Tex. Evid. R. Order 15-001

Tex. Evid. R. Order 15-001

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Misc. Docket No. 15-001

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

ORDERED that

1.By order dated November 19, 2014, in Misc. Docket No. 14-9232, the Supreme Court of Texas approved amendments to the Texas Rules of Evidence and invited public comment. After receiving public comments, the Supreme Court made revisions to the rules. This order incorporates those revisions and contains the final version of the rules. The amendments are effective April 1, 2015.

2.Except for the amendments to Rules 511 and 613, which include substantive amendments, these amendments comprise a general restyling of the Texas Rules of Evidence. They seek to make the rules more easily understood and to make style and terminology consistent throughout. The restyling changes are intended to be stylistic only.

The Restyling Project

Following a lengthy restyling process, the Federal Rules of Evidence were amended effective December 1, 2011. The Texas Rules of Evidence restyling project was initiated with the aim of keeping the Texas Rules as consistent as possible with Federal Rules, but without effecting any substantive change in Texas evidence law.

General Guidelines

Following the lead of the drafters of the restyled Federal Rules, the drafters of the restyled Texas Rules were guided in their drafting, usage, and style by Bryan Garner, Guidelines for Drafting and Editing Court Rules, Administrative Office of the United States Courts (1996) and Bryan Garner, Dictionary of Modern Legal Usage (2d ed. 1995).

Formatting Changes

Many of the changes in the restyled rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists.

"Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, inconsistent usage can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. See, e.g., Rule 602 (omitting "but need not").

The restyled rules also remove words and concepts that are outdated or redundant.

Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

3.The amendments to Rule 511 align Texas law on waiver of privilege by voluntary disclosure with Federal Rule of Evidence 502.

4.In response to public comments, the Court made the following changes to the version of the restyled rules proposed by Misc. Docket No. 14-9232.

a.The comment to Rule 509 has been revised to add the following sentence to the end of the comment: "Finally, reconciling the provisions of Rule 509 with the parts of Tex. Occ. Code ch. 159 that address a physician-patient privilege applicable to court proceedings is beyond the scope of the restyling project."

b.The comment to Rule 510 has been revised to add the following paragraph: "Tex. Health & Safety Code ch. 611 addresses confidentiality rules for communications between a patient and a mental-health professional and for the professional's treatment records. Many of these provisions apply in contexts other than court proceedings. Reconciling the provisions of Rule 510 with the parts of chapter 611 that address a mental-health-information privilege applicable to court proceedings is beyond the scope of the restyling project."

c.The comment to Rule 613 has been revised. The comment now reads: "The amended rule retains the requirement that a witness be given an opportunity to explain or deny (a) a prior inconsistent statement or (b) the circumstances or a statement showing the witness's bias or interest, but this requirement is not imposed on the examining attorney. A witness may have to wait until redirect examination to explain a prior inconsistent statement or the circumstances or a statement that shows bias. But the impeaching attorney still is not permitted to introduce extrinsic evidence of the witness's prior inconsistent statement or bias unless the witness has first been examined about the statement or bias and has failed to unequivocally admit it. All other changes to the rule are intended to be stylistic only."

d.The Court revised Rule 804(b)(1)(A)(i) to remove redundant language. The change is stylistic only.

e.The Court revised Rule 902(10)(B) to add the following sentence to the text of the rule: "The proponent may use an unsworn declaration made under penalty of perjury in place of an affidavit."

5.The Clerk is directed to:

a.file a copy of this order with the Secretary of State;

b.cause a copy of this order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

c.send a copy of this order to each elected member of the Legislature; and

d.submit a copy of the order for publication in the *Texas Register*.

Dated: March 10, 2015.

Nathan L. Hecht, Chief Justice

Paul W. Green, Justice

Phil Johnson, Justice

Don R. Willett, Justice

Eva M. Guzman, Justice

Debra H. Lehrmann, Justice

Jeffrey S. Boyd, Justice

John P. Devine, Justice

Jeffrey V. Brown, Justice

End of Document

Tex. Evid. R. 101

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS RULES OF EVIDENCE > ARTICLE I. GENERAL PROVISIONS

Rule 101 Title, Scope, and Applicability of the Rules; Definitions

(a) ***Title.***--These rules may be cited as the Texas Rules of Evidence.

(b) ***Scope.***--These rules apply to proceedings in Texas courts except as otherwise provided in subdivisions (d)-(f).

(c) ***Rules on Privilege.***--The rules on privilege apply to all stages of a case or proceeding.

(d) ***Exception for Constitutional or Statutory Provisions or Other Rules.***--Despite these rules, a court must admit or exclude evidence if required to do so by the United States or Texas Constitution, a federal or Texas statute, or a rule prescribed by the United States or Texas Supreme Court or the Texas Court of Criminal Appeals. If possible, a court should resolve by reasonable construction any inconsistency between these rules and applicable constitutional or statutory provisions or other rules.

(e) ***Exceptions.***--These rules - except for those on privilege - do not apply to:

(1)the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2)grand jury proceedings; and

(3)the following miscellaneous proceedings:

(A)an application for habeas corpus in extradition, rendition, or interstate detainer proceedings;

(B)an inquiry by the court under Code of Criminal Procedure article 46B.004 to determine whether evidence exists that would support a finding that the defendant may be incompetent to stand trial;

(C)bail proceedings other than hearings to deny, revoke, or increase bail;

(D)hearings on justification for pretrial detention not involving bail;

(E)proceedings to issue a search or arrest warrant; and

(F)direct contempt determination proceedings.

(f) ***Exception for Justice Court Cases.***--These rules do not apply to justice court cases except as authorized by Texas Rule of Civil Procedure 500.3.

(g) ***Exception for Military Justice Hearings.***--The Texas Code of Military Justice, Tex. Gov't Code §§ 432.001-432.195, governs the admissibility of evidence in hearings held under that Code.

(h) ***Definitions.***--In these rules:

(1)"civil case" means a civil action or proceeding;

(2)"criminal case" means a criminal action or proceeding, including an examining trial;

(3)"public office" includes a public agency;

(4)"record" includes a memorandum, report, or data compilation;

(5)a "rule prescribed by the United States or Texas Supreme Court or the Texas Court of Criminal Appeals" means a rule adopted by any of those courts under statutory authority;

(6)"unsworn declaration" means an unsworn declaration made in accordance with Tex. Civ. Prac. & Rem. Code § 132.001; and

(7)a reference to any kind of written material or any other medium includes electronically stored information.

History

EDITOR'S NOTE. --

The Federal Rules of Evidence were amended effective December 1, 2011. In response to these amendments, the Texas Rules of Evidence restyling project was initiated with the aim of keeping the Texas Rules as consistent as possible with Federal Rules, but without effecting any substantive change in Texas evidence law. The Texas restyling project was designed to achieve clearer presentations, and reduce inconsistent, ambiguous, redundant, repetitive, or archaic words. By order dated November 19, 2014, in Misc. Docket No. 14-9232, the Supreme Court of Texas approved amendments to the Texas Rules of Evidence and invited public comment. On March 12, 2015, the Supreme Court issued an order in Misc. Docket No. 15-9048, with the final version of the restyled rules, effective April 1, 2015.

Comment to 2015 Restyling: The reference to "hierarchical governance" in former Rule 101(c) has been deleted as unnecessary. The textual limitation of former Rule 101(c) to criminal cases has been eliminated. Courts in civil cases must also admit or exclude evidence when required to do so by constitutional or statutory provisions or other rules that take precedence over these rules. Likewise, the title to former Rule 101(d) has been changed to more accurately indicate the purpose and scope of the subdivision.

Annotations

Case Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : General Overview
Criminal Law & Procedure : Bail : Forfeitures
Criminal Law & Procedure : Bail : Hearings
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Sentencing : Presentence Reports
Criminal Law & Procedure : Appeals : Standards of Review : De Novo Review : Motions to Suppress
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Judicial Notice
Evidence : Judicial Notice : Adjudicative Facts : General Overview
Evidence : Privileges : Clergy Communications
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Witness Qualifications
Evidence : Procedural Considerations : Rule Application & Interpretation
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Testimony : Experts : Admissibility

LexisNexis (R) Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : General Overview

1. At defendant's trial for the aggravated sexual assault of a child, the trial court erred because it refused to allow defendant to cross-examine the State's witnesses in violation of the Sixth Amendment and the Fourteenth Amendment regarding the complainant's sexual assault of his younger sister. The Texas Rules of Evidence and the Texas Family Code did not prevent impeachment by a juvenile adjudication, because Tex. R. Evid. 101(c) established that the Constitution of the United States controlled over a conflicting evidentiary rule or civil statute. Johnson v. State, 2013 Tex. App. LEXIS 1515, 2013 WL 531079 (Tex. App. Fort Worth Feb. 14 2013).

Criminal Law & Procedure : Bail : Forfeitures

2. In proceedings to finalize a forfeiture of two bail bonds, judicial notice could be taken, under the common law, of both the judgments nisi and the bonds; because Tex. R. Evid. 101 indicates that proceedings regarding bail are not covered by the rules of evidence, judicial notice in such cases does not have to comply with Tex. R. Evid. 201, although Tex. Code Crim. Proc. Ann. art. 22.10 provides that civil rules govern all proceedings in the trial court in a bond-forfeiture case following a judgment nisi. Kubosh v. State, 241 S.W.3d 60, 2007 Tex. Crim. App. LEXIS 1563 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Bail : Hearings

3. In a bond reduction hearing where defendant was charged with with two aggravated sexual assault of a child offenses, the trial judge was permitted to take judicial notice of the evidence presented in defendant's previous sexual assault trial involving the same victim; the same judge presided over both cases. The Texas Rules of Evidence do not apply to bond reduction hearings. Ex parte Bratcher, 2005 Tex. App. LEXIS 5418 (Tex. App. Dallas July 13 2005).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

4. In a driving while intoxicated case, because Tex. R. Evid. 702 did not apply to suppression hearings, a trial judge, in ruling on the admissibility of Light Detection and Ranging technology, was not required to hold a Rule 702 Kelly gatekeeping hearing to determine the reliability of that technology. Hall v. State, 297 S.W.3d 294, 2009 Tex. Crim. App. LEXIS 1205 (Tex. Crim. App. 2009).

5. Rules of evidence did not apply in suppression hearings, Tex. R. Evid. 101(d)(1)(A); therefore, the failure to object to statements introduced at a suppression hearing did not operate to bar the issue from being argued on appeal. Gonzalez v. State, 2005 Tex. App. LEXIS 6127 (Tex. App. Waco Aug. 3 2005).

6. Assistance of counsel was not rendered ineffective by a failure to object to hearsay and leading questions at a suppression hearing. The Texas Rules of Evidence, with the exception of privileges, did not apply to suppression hearings. Piper v. State, 2004 Tex. App. LEXIS 7601 (Tex. App. Texarkana Aug. 25 2004).

7. At the hearing on a motion to suppress, there was no error in admitting a police report that was unsigned and had no reliable indicia of authenticity or accuracy, into evidence where the rules of evidence, except as to privileges, did not apply. Mullins v. State, 2004 Tex. App. LEXIS 6970 (Tex. App. Tyler July 30 2004).

Criminal Law & Procedure : Sentencing : Presentence Reports

8. Texas Code of Criminal Procedure's express statutory provision for presentence investigation reports in Tex. Code Crim. Proc. Ann. art. 42.12, § 9 governs over the Texas Rules of Evidence, as provided in Tex. R. Evid. 101(c). Pierce v. State, 2002 Tex. App. LEXIS 4683 (Tex. App. Houston 14th Dist. June 27 2002).

Criminal Law & Procedure : Appeals : Standards of Review : De Novo Review : Motions to Suppress

9. In a hearing on a motion to suppress, an officer's purported lack of independent knowledge of events surrounding an investigative stop did not make the officer incompetent as a witness under Tex. R. Evid. 601 in part because the rules of evidence (except for those rules concerning privileges) did not apply to suppression hearings. Belcher v. State, 244 S.W.3d 531, 2007 Tex. App. LEXIS 9883 (Tex. App. Fort Worth 2007).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

10. Texas Code of Criminal Procedure has no provision for a clergyman privilege; thus, Tex. Fam. Code Ann. § 261.202 takes precedence over Tex. R. Evid. 505 in criminal prosecutions concerning child abuse. Almendarez v. State, 153 S.W.3d 727, 2005 Tex. App. LEXIS 449 (Tex. App. Dallas 2005).

Evidence : Judicial Notice

11. In a bond reduction hearing where defendant was charged with with two aggravated sexual assault of a child offenses, the trial judge was permitted to take judicial notice of the evidence presented in defendant's previous sexual assault trial involving the same victim; the same judge presided over both cases. The Texas Rules of Evidence do not apply to bond reduction hearings. Ex parte Bratcher, 2005 Tex. App. LEXIS 5418 (Tex. App. Dallas July 13 2005).

Evidence : Judicial Notice : Adjudicative Facts : General Overview

12. In proceedings to finalize a forfeiture of two bail bonds, judicial notice could be taken, under the common law, of both the judgments nisi and the bonds; because Tex. R. Evid. 101 indicates that proceedings regarding bail are not covered by the rules of evidence, judicial notice in such cases does not have to comply with Tex. R. Evid. 201, although Tex. Code Crim. Proc. Ann. art. 22.10 provides that civil rules govern all proceedings in the trial court in a bond-forfeiture case following a judgment nisi. Kubosh v. State, 241 S.W.3d 60, 2007 Tex. Crim. App. LEXIS 1563 (Tex. Crim. App. 2007).

Evidence : Privileges : Clergy Communications

13. Texas Code of Criminal Procedure has no provision for a clergyman privilege; thus, Tex. Fam. Code Ann. § 261.202 takes precedence over Tex. R. Evid. 505 in criminal prosecutions concerning child abuse. Almendarez v. State, 153 S.W.3d 727, 2005 Tex. App. LEXIS 449 (Tex. App. Dallas 2005).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

14. Texas Code of Criminal Procedure's express statutory provision for presentence investigation reports in Tex. Code Crim. Proc. Ann. art. 42.12, § 9 governs over the Texas Rules of Evidence, as provided in Tex. R. Evid. 101(c). Pierce v. State, 2002 Tex. App. LEXIS 4683 (Tex. App. Houston 14th Dist. June 27 2002).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Witness Qualifications

15. In a hearing on a motion to suppress, an officer's purported lack of independent knowledge of events surrounding an investigative stop did not make the officer incompetent as a witness under Tex. R. Evid. 601 in part because the rules of evidence (except for those rules concerning privileges) did not apply to suppression hearings. Belcher v. State, 244 S.W.3d 531, 2007 Tex. App. LEXIS 9883 (Tex. App. Fort Worth 2007).

Evidence : Procedural Considerations : Rule Application & Interpretation

16. Error in excluding a prior inconsistent statement lacked the magnitude necessary to arise to constitutional error. The Texas Rules of Evidence did not categorically and arbitrarily prohibit defendant from offering otherwise relevant, reliable evidence necessary for his defense; the evidence did not form a vital core of defendant's defensive theory. Flowers v. State, 438 S.W.3d 96, 2014 Tex. App. LEXIS 5899, 2014 WL 3953988 (Tex. App. Texarkana June 3 2014).

17. Texas Rules of Evidence did not compel the exclusion of the audio recording even if it was obtained in violation of attorney disciplinary rules. Tierone Converged Networks, Inc. v. Parman, 2013 Tex. App. LEXIS 8380 (Tex. App. Dallas July 9 2013).

18. At defendant's trial for the aggravated sexual assault of a child, the trial court erred because it refused to allow defendant to cross-examine the State's witnesses in violation of the Sixth Amendment and the Fourteenth Amendment regarding the complainant's sexual assault of his younger sister. The Texas Rules of Evidence and the Texas Family Code did not prevent impeachment by a juvenile adjudication, because Tex. R. Evid. 101(c) established that the Constitution of the United States controlled over a conflicting evidentiary rule or civil statute. Johnson v. State, 2013 Tex. App. LEXIS 1515, 2013 WL 531079 (Tex. App. Fort Worth Feb. 14 2013).

19. Rules of evidence did not apply in suppression hearings, Tex. R. Evid. 101(d)(1)(A); therefore, the failure to object to statements introduced at a suppression hearing did not operate to bar the issue from being argued on appeal. Gonzalez v. State, 2005 Tex. App. LEXIS 6127 (Tex. App. Waco Aug. 3 2005).

20. In a bond reduction hearing where defendant was charged with with two aggravated sexual assault of a child offenses, the trial judge was permitted to take judicial notice of the evidence presented in defendant's previous sexual assault trial involving the same victim; the same judge presided over both cases. The Texas Rules of Evidence do not apply to bond reduction hearings. Ex parte Bratcher, 2005 Tex. App. LEXIS 5418 (Tex. App. Dallas July 13 2005).

21. Texas Code of Criminal Procedure has no provision for a clergyman privilege; thus, Tex. Fam. Code Ann. § 261.202 takes precedence over Tex. R. Evid. 505 in criminal prosecutions concerning child abuse. Almendarez v. State, 153 S.W.3d 727, 2005 Tex. App. LEXIS 449 (Tex. App. Dallas 2005).

22. There was no abuse of discretion in excluding evidence that the victim threatened to falsely accuse her uncle because, given the corroborating evidence, the instant case did not involve a "heightened need" to impeach the victim's credibility with her threat to falsely accuse the uncle, and it was not entirely clear from the uncle's testimony that the victim threatened to accuse him of sexual assault as opposed to some other allegation; even if the trial court erred by not admitting the evidence, any error was harmless beyond a reasonable doubt because the uncle's testimony would have been cumulative of the evidence rejected by the jury, as its exclusion did not move the jury from a state of non-persuasion to one of persuasion on the issue of the victim's credibility. Hamrick v. State, 2004 Tex. App. LEXIS 4418 (Tex. App. El Paso May 13 2004).

23. Texas Code of Criminal Procedure's express statutory provision for presentence investigation reports in Tex. Code Crim. Proc. Ann. art. 42.12, § 9 governs over the Texas Rules of Evidence, as provided in Tex. R. Evid. 101(c). Pierce v. State, 2002 Tex. App. LEXIS 4683 (Tex. App. Houston 14th Dist. June 27 2002).

Evidence : Procedural Considerations : Rulings on Evidence

24. Error in excluding a prior inconsistent statement lacked the magnitude necessary to arise to constitutional error. The Texas Rules of Evidence did not categorically and arbitrarily prohibit defendant from offering otherwise relevant, reliable evidence necessary for his defense; the evidence did not form a vital core of defendant's defensive theory. Flowers v. State, 438 S.W.3d 96, 2014 Tex. App. LEXIS 5899, 2014 WL 3953988 (Tex. App. Texarkana June 3 2014).

Evidence : Testimony : Experts : Admissibility

25. In a driving while intoxicated case, because Tex. R. Evid. 702 did not apply to suppression hearings, a trial judge, in ruling on the admissibility of Light Detection and Ranging technology, was not required to hold a Rule 702 Kelly gatekeeping hearing to determine the reliability of that technology. Hall v. State, 297 S.W.3d 294, 2009 Tex. Crim. App. LEXIS 1205 (Tex. Crim. App. 2009).

End of Document

Tex. Evid. R. 102

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 102 Purpose

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Annotations

Case Notes

Administrative Law : Agency Adjudication : Hearings : Right to Hearing : Due Process
Evidence : Procedural Considerations : Rule Application & Interpretation

LexisNexis (R) Notes

Administrative Law : Agency Adjudication : Hearings : Right to Hearing : Due Process

1. Where a sexually oriented business operator's request for a location exemption was denied, the operator was deprived of procedural due process during a hearing because an administrative law judge refused to allow the operator to re-examine witnesses after the board members had asked questions of those witnesses. City of Arlington v. Centerfolds, Inc., 232 S.W.3d 238, 2007 Tex. App. LEXIS 4705 (Tex. App. Fort Worth 2007).

Evidence : Procedural Considerations : Rule Application & Interpretation

2. Where a sexually oriented business operator's request for a location exemption was denied, the operator was deprived of procedural due process during a hearing because an administrative law judge refused to allow the operator to re-examine witnesses after the board members had asked questions of those witnesses. City of Arlington v. Centerfolds, Inc., 232 S.W.3d 238, 2007 Tex. App. LEXIS 4705 (Tex. App. Fort Worth 2007).

Tex. Evid. R. 103

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 103 Rulings on Evidence

(a) ***Preserving a Claim of Error.***--A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1)if the ruling admits evidence, a party, on the record:

(A)timely objects or moves to strike; and

(B)states the specific ground, unless it was apparent from the context; or

(2)if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) ***Not Needing to Renew an Objection.***--When the court hears a party's objections outside the presence of the jury and rules that evidence is admissible, a party need not renew an objection to preserve a claim of error for appeal.

(c) ***Court's Statement About the Ruling; Directing an Offer of Proof.***--The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court must allow a party to make an offer of proof as soon as practicable. In a jury trial, the court must allow a party to make the offer outside the jury's presence and before the court reads its charge to the jury. At a party's request, the court must direct that an offer of proof be made in question-and-answer form. Or the court may do so on its own.

(d) ***Preventing the Jury from Hearing Inadmissible Evidence.***--To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) ***Taking Notice of Fundamental Error in Criminal Cases.***--In criminal cases, a court may take notice of a fundamental error affecting a substantial right, even if the claim of error was not properly preserved.

History

Amended by Texas Supreme Court, Misc. Docket No. 20-9011, effective June 1, 2020; Amended Texas Supreme Court Misc. Docket No. 20-9075, effective June 1, 2020.

Annotations

Commentary

COMMENT

Change by amendment effective November 1, 1984: The words "a party" have been substituted for "counsel" in the last sentence of subdivision (b).

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 21, *Determining Admissibility: Procedure*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Comment to 1997 change The exception to the requirement of an offer of proof for matters that were apparent from the context within which questions were asked, found in paragraph (a)(2), is now applicable to civil as well as criminal cases.

Case Notes

Civil Procedure : Justiciability : Standing : General Overview
Civil Procedure : Pleading & Practice : Service of Process : Methods : General Overview
Civil Procedure : Judicial Officers : Judges : Discretion
Civil Procedure : Discovery : Disclosures : Mandatory Disclosures
Civil Procedure : Discovery : Motions to Compel
Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Pretrial Matters : Motions in Limine : Appeals
Civil Procedure : Trials : Jury Trials : Jurors : Selection : Voir Dire
Civil Procedure : Trials : Jury Trials : Jury Instructions : Requests for Instructions
Civil Procedure : Remedies : Costs & Attorney Fees : General Overview
Civil Procedure : Remedies : Damages : Punitive Damages
Civil Procedure : Appeals : Remands
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : General Overview
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Civil Procedure : Appeals : Standards of Review : Reversible Errors
Civil Procedure : Eminent Domain Proceedings : Experts
Computer & Internet Law : Criminal Offenses : Sex Crimes
Constitutional Law : Bill of Rights : Fundamental Rights : Search & Seizure : Scope of Protection
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Assistance of Counsel
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : Penalties
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy : Elements
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : General Overview
Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : Statements
Criminal Law & Procedure : Search & Seizure : Exclusionary Rule : Rule Application & Interpretation
Criminal Law & Procedure : Search & Seizure : Seizures of Persons
Criminal Law & Procedure : Interrogation : Miranda Rights : Notice & Warning
Criminal Law & Procedure : Interrogation : Miranda Rights : Right to Counsel During Questioning
Criminal Law & Procedure : Interrogation : Miranda Rights : Self-Incrimination Privilege
Criminal Law & Procedure : Interrogation : Voluntariness
Criminal Law & Procedure : Preliminary Proceedings : Preliminary Hearings : Evidence
Criminal Law & Procedure : Pretrial Motions & Procedures : Motions in Limine
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Guilty Pleas : Admissibility at Trial
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Counsel : Right to Counsel : General Overview
Criminal Law & Procedure : Juries & Jurors : Jury Questions to the Court : Procedures
Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury : Weight of the Evidence
Criminal Law & Procedure : Juries & Jurors : Voir Dire : General Overview
Criminal Law & Procedure : Juries & Jurors : Voir Dire : Appellate Review
Criminal Law & Procedure : Juries & Jurors : Voir Dire : Individual Voir Dire
Criminal Law & Procedure : Juries & Jurors : Voir Dire : Judicial Discretion
Criminal Law & Procedure : Trials : Closing Arguments : General Overview
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : General Overview
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Fair Trial
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Remain Silent : General Overview
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Remain Silent
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Remain Silent : Self-Incrimination Privilege
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Judicial Discretion
Criminal Law & Procedure : Trials : Motions for Mistrial
Criminal Law & Procedure : Witnesses : General Overview
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Defenses : Self-Defense
Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence
Criminal Law & Procedure : Sentencing : Appeals : Appealability
Criminal Law & Procedure : Sentencing : Appeals : Proportionality & Reasonableness Review
Criminal Law & Procedure : Sentencing : Corrections, Modifications & Reductions : Illegal Sentences
Criminal Law & Procedure : Sentencing : Cruel & Unusual Punishment
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History : Prior Felonies
Criminal Law & Procedure : Sentencing : Imposition : General Overview
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Sentencing : Presentence Reports
Criminal Law & Procedure : Sentencing : Restitution
Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Appeals : Procedures : Briefs
Criminal Law & Procedure : Appeals : Procedures : Records on Appeal
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

Criminal Law & Procedure : Appeals : Reversible Errors : Prosecutorial Misconduct
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Constitutional Issues
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Exceptions to Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Prosecutorial Misconduct
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Waiver Triggers Generally
Criminal Law & Procedure : Appeals : Right to Appeal : Government
Criminal Law & Procedure : Appeals : Standards of Review : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Plain Error : General Overview
Evidence : Authentication : General Overview
Evidence : Authentication : Self-Authentication
Evidence : Competency : Dead Man's Acts : Waiver
Evidence : Competency : Disability : Children
Evidence : Competency : Judges
Evidence : Demonstrative Evidence : Photographs
Evidence : Demonstrative Evidence : Recordings
Evidence : Documentary Evidence : Completeness
Evidence : Hearsay : General Overview
Evidence : Hearsay : Exceptions : General Overview
Evidence : Hearsay : Exceptions : Business Records : General Overview
Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials
Evidence : Hearsay : Exceptions : Former Testimony of Unavailable Declarants
Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment
Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports
Evidence : Hearsay : Exceptions : Reputation : General Overview
Evidence : Hearsay : Exceptions : State of Mind : Proof of Earlier Acts
Evidence : Hearsay : Exceptions : Statements Against Interest
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Exemptions : Confessions : General Overview
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview
Evidence : Hearsay : Hearsay Within Hearsay
Evidence : Inferences & Presumptions : Presumptions : General Overview
Evidence : Judicial Notice
Evidence : Judicial Notice : General Overview
Evidence : Privileges : Attorney-Client Privilege : Waiver
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : General Overview
Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof
Evidence : Procedural Considerations : Objections & Offers of Proof : Timeliness
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview

Evidence : Procedural Considerations : Preliminary Questions : Hearings Out of Jury's Presence
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : Character Evidence
Evidence : Relevance : Compromise & Settlement Negotiations
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : General Overview
Evidence : Relevance : Sex Offenses : Rape Shield Laws
Evidence : Relevance : Sex Offenses : Similar Acts
Evidence : Scientific Evidence : Autopsies
Evidence : Scientific Evidence : Blood Alcohol
Evidence : Scientific Evidence : DNA
Evidence : Scientific Evidence : Hairs & Fibers
Evidence : Scientific Evidence : Polygraphs
Evidence : Scientific Evidence : Sobriety Tests
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice
Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview
Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility
Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility
Evidence : Testimony : Credibility : Impeachment : Prior Conduct
Evidence : Testimony : Examination : General Overview
Evidence : Testimony : Examination : Cross-Examination : General Overview
Evidence : Testimony : Examination : Judicial Interrogation
Evidence : Testimony : Examination : Leading Questions
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility
Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Experts : Qualifications
Evidence : Testimony : Presentation of Evidence
Family Law : Child Custody : Modification : General Overview
Family Law : Child Support : Obligations : Computation : Guidelines
Family Law : Child Support : Obligations : Enforcement : Contempt
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview
Governments : Courts : Authority to Adjudicate
Real Property Law : Eminent Domain Proceedings : General Overview
Real Property Law : Landlord & Tenant : Lease Agreements : Commercial Leases : General Overview
Real Property Law : Nonmortgage Liens : Tax Liens
Torts : Intentional Torts : Conversion : General Overview
Torts : Malpractice & Professional Liability : Healthcare Providers
Torts : Negligence : General Overview
Transportation Law : Private Vehicles : Operator Licenses : General Overview
Workers' Compensation & SSDI : Administrative Proceedings : Evidence : General Overview

LexisNexis (R) Notes

Civil Procedure : Justiciability : Standing : General Overview

1. Pursuant to Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1), the lessor in a commercial lease did not preserve by a proper objection any error regarding the lessee's alleged lack of standing to bring the suit; thus, any

error as to lack of standing was waived. Parts Indus. Corp. v. A.V.A. Servs., 104 S.W.3d 671, 2003 Tex. App. LEXIS 2244 (Tex. App. Corpus Christi 2003).

Civil Procedure : Pleading & Practice : Service of Process : Methods : General Overview

2. Bill of review was denied in a paternity case because a purported father waived his argument regarding substituted service under Tex. R. Civ. P. 106 based on statements that his attorney made to the trial court; further, due to the waiver, the issue relating to substituted service was not preserved for appellate review. Moreover, since actual notice was not required for substituted service to be effective, evidence regarding actual notice was not heard as it was not relevant and did not affect the substantial rights of the parties. Thomas v. Wheeler, 2008 Tex. App. LEXIS 5617 (Tex. App. Texarkana July 29 2008).

Civil Procedure : Judicial Officers : Judges : Discretion

3. Where appellants urged that the district court violated their procedural and substantive due process rights by limiting them to one hour to present their case, where, at no point in the trial did appellants make an offer of proof concerning evidence excluded because of time constraints, the appellate court had nothing to review. Health Enrichment & Longevity Inst., Inc. v. State, 2004 Tex. App. LEXIS 5094 (Tex. App. Austin June 10 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 6246 (Tex. App. Austin July 15, 2004).

Civil Procedure : Discovery : Disclosures : Mandatory Disclosures

4. In a case involving the civil commitment of a sexually violent predator, a trial court did not abuse its discretion by excluding the testimony of one expert because the subject matter of the testimony was not revealed under Tex. R. Civ. P. 194; the fact that the expert would have been offered for rebuttal was irrelevant, and there was no showing that the testimony of a State's witness was unanticipated; moreover, the patient did not raise the issue of good cause or seek a finding that there was no unfair surprise until a motion for a new trial, so it was untimely. In re Commitment of Marks, 230 S.W.3d 241, 2007 Tex. App. LEXIS 5424 (Tex. App. Beaumont 2007).

Civil Procedure : Discovery : Motions to Compel

5. Pursuant to Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1), the lessor in a commercial lease failed to make an objection in the trial court as to the alleged date defect and discovery rule violation that one of lessee's exhibits was not created more than 30 days prior to trial as required by Tex. R. Civ. P. 215.5 and waived error, and even if the lessor had made the proper objection, the trial court could have properly overruled it, because no discovery request was made for the exhibit as required by Tex. R. Civ. P. 93. Parts Indus. Corp. v. A.V.A. Servs., 104 S.W.3d 671, 2003 Tex. App. LEXIS 2244 (Tex. App. Corpus Christi 2003).

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

6. In a tenant's case alleging that her landlord refused to return her personal property, the landlord's objections to the tenant's summary judgment affidavit were sufficiently specific. The objections identified each sentence that was being objected to, stated the nature of the objection, and included citations to rules of civil procedure and evidence and to case law. Koch v. Griffith-Stroud Constr. & Leasing Co., 2004 Tex. App. LEXIS 2549 (Tex. App. Houston 14th Dist. Mar. 23 2004).

Civil Procedure : Pretrial Matters : Motions in Limine : Appeals

7. Attorney's motion in limine was heard on the record and reargued when the successor-in-interest actually offered the exhibits for admission into evidence, which occurred after jury selection but before opening statements;

when the successor offered the exhibits and the trial judge asked for objections, at that point, the hearing became a hearing on the admissibility of the exhibits, and the attorney's objections to the exhibits were preserved. Thus, the attorney's complaints were not unreviewable. Houston v. Ludwick, 2010 Tex. App. LEXIS 8415, 2010 WL 4132215 (Tex. App. Houston 14th Dist. Oct. 21 2010).

Civil Procedure : Trials : Jury Trials : Jurors : Selection : Voir Dire

8. During voir dire in a termination of parental rights case, a trial court's alleged limitation on questioning was not preserved for appellate review under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103 because an attorney did not give an explanation after the State's objection, but reworded the question and proceeded without further objection. In re C.S., 2007 Tex. App. LEXIS 5481 (Tex. App. Fort Worth July 12 2007).

Civil Procedure : Trials : Jury Trials : Jury Instructions : Requests for Instructions

9. Employer's contention that the trial court erred by failing to instruct the jury that damages in a negligence action could not arise from conduct that amounted to statutory sexual harassment was waived for appellate review because during the charge conference, the employer did not plainly make the trial court aware of its complaint. Waffle House, Inc. v. Williams, 314 S.W.3d 1, 2007 Tex. App. LEXIS 843, 100 Fair Empl. Prac. Cas. (BNA) 451 (Tex. App. Fort Worth 2007).

Civil Procedure : Remedies : Costs & Attorney Fees : General Overview

10. In a tax lien foreclosure suit, the tax lien holder was not estopped from recovering attorney fees at the rate of 15 percent under Tex. Tax Code Ann. § 33.48; although the tax lien holder requested attorney fees as authorized by Tex. Tax Code Ann. § 32.06 et seq., that citation reasonably included Tex. Tax Code Ann. § 32.065(c), which provided that an assignee of a taxing authority was subrogated to all rights of the taxing authority, and the issue was not properly preserved under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1) because an estoppel argument was not made to the trial court. JB Joyce, Ltd. v. Regions Fin. Corp., 2005 Tex. App. LEXIS 7246 (Tex. App. Texarkana Sept. 1 2005).

Civil Procedure : Remedies : Damages : Punitive Damages

11. Where the reviewing court could not determine whether the objection made to the trial court was the same objection as on appeal, a civil defendant failed under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1), to preserve a claim as to the trial court's definition of "malice," in a case involving punitive damages. Morrison v. Standerfer, 2010 Tex. App. LEXIS 2152 (Tex. App. Fort Worth Mar. 25 2010).

Civil Procedure : Appeals : Remands

12. Although a mother in a parental rights proceeding failed to preserve error on her objections to the reliability of the expert testimony presented during the proceeding because she did not file a written objection to the expert's testimony or object or ask any questions of the expert during the pretrial hearing, an appellate court held that it had broad discretion to remand in the interest of justice because the trial court had erred in overruling the father's objection to the expert opinion and that error was harmful, which made a new trial necessary. In re S.E.W., 168 S.W.3d 875, 2005 Tex. App. LEXIS 3809 (Tex. App. Dallas 2005).

Civil Procedure : Appeals : Reviewability : Preservation for Review

13. Issues were waived on review, because the dentist failed to appear and raise objection to the testimony of the board's expert witness, and the error concerning the dentist's employer could easily have been corrected had the

dentist brought it to the board's attention but his motion for rehearing of the board's order raised no issue regarding the sufficiency of the evidence supporting the finding. Mcintosh v. Tex. State Bd. of Dental Examiners, 2014 Tex. App. LEXIS 2751, 2014 WL 931260 (Tex. App. Amarillo Mar. 10 2014).

14. Patient's counsel made an offer of proof covering other areas of the doctor's testimony, but did not ask questions regarding the doctor's rate of error, and because the patient failed to include questions and elicit answers regarding the doctor's rates of error during his offers of proof, it could not be determined whether the exclusion of the evidence was harmful, and the patient's claim was not preserved. In re Commitment Lovings, 2013 Tex. App. LEXIS 12927, 2013 WL 5658426 (Tex. App. Beaumont Oct. 17 2013).

15. Husband did not assert that his constitutional complaint could be raised for the first time on appeal and he waived the issue for review and he failed to preserve the issue that he was not permitted to present specific evidence and ask specific questions of witnesses with an offer of proof or formal bill of exception, Tex. R. Evid. 103(a)(2); if the parties or the trial court did not agree with the contents of the bill, the rules provided a procedure for presenting the bill, Tex. R. Civ. P. 33.2(c)(2)(A)-(C). Lancaster v. Lancaster, 2013 Tex. App. LEXIS 7708 (Tex. App. Houston 1st Dist. June 25 2013).

16. Mother failed to preserve for review her contention that the trial court abused its discretion by excluding a psychologist's report from evidence because she never offered the report into evidence and there was nothing in the record showing that she made an offer of proof or a bill of exception. In the Interest of L.D.W., 2013 Tex. App. LEXIS 6195 (Tex. App. Houston 14th Dist. May 21 2013).

17. Objection on relevance grounds did not preserve error under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1) as to an asserted Tex. R. Evid. 404(b) error. Helping Hands Home Care, Inc. v. Home Health of Tarrant County, Inc., 393 S.W.3d 492, 2013 Tex. App. LEXIS 820, 2013 WL 326319 (Tex. App. Dallas Jan. 29 2013).

18. Defendant failed to preserve for appellate review her claims that the trial court improperly admitted evidence, including expert testimony, because she failed to object to the evidence when it was presented during the trial as required by Tex. R. App. P. 33.1. In re A.B.G., 2013 Tex. App. LEXIS 601, 2013 WL 257311 (Tex. App. Beaumont Jan. 24 2013).

19. Mother waived on appeal her claim that the expert's testimony was not relevant, because she made no such objection at trial, nor did she move to strike any of the testimony. Mueller v. Bran, 2013 Tex. App. LEXIS 176, 2013 WL 123693 (Tex. App. Houston 1st Dist. Jan. 10 2013).

20. In a partition action, the appellant property owner's complain of the relevancy of the evidence was not preserved for review because the exhibit had already been admitted when the appellee property owner testified and appellant did not object to appellee's expert's testimony; the same or similar evidence that appellant complained of on appeal was admitted elsewhere in the trial without a relevance objection, Tex. R. App. P. 33.1(a), Tex. R. Evid. 103(a)(1). Williams v. Mai, 2012 Tex. App. LEXIS 10513, 2012 WL 6644704 (Tex. App. Houston 1st Dist. Dec. 20 2012).

21. Hearsay objection was not preserved for review, because appellants' counsel made only a general hearsay objection to the admission of the witness's testimony and did not object with specificity, despite the trial court's invitation to him to do so; nor did he obtain a definitive adverse ruling while the trial court was in a proper position to change its conditional ruling of admissibility and the claimant was in a position to offer other testimony or to subpoena the witness to testify. Tryco Enters. v. Robinson, 390 S.W.3d 497, 2012 Tex. App. LEXIS 7810, 2012 WL 4021126 (Tex. App. Houston 1st Dist. Sept. 13 2012).

22. In a case involving a forum selection clause, although two guarantors made a number of objections to an affidavit in an appellate brief, none of the objections were made at a hearing. Therefore, the issues were overruled. Chaseekhalili v. Cinemacar Leasing, Inc., 2012 Tex. App. LEXIS 6617 (Tex. App. Fort Worth Aug. 9 2012).

23. At the hearing on a motion for closure of the estate and approval of the inventory, the trial court did not abuse its discretion by refusing to hear testimony from appellee estate administrator and his counsel. Because appellant estate beneficiary did not make an offer of proof of the substance of the evidence he hoped to elicit, he did not preserve the error for review under Tex. R. Evid. 103(a), (b). In re Estate of Denton, 2012 Tex. App. LEXIS 6212, 2012 WL 3063845 (Tex. App. Eastland July 26 2012).

24. Patient failed to object when the State read his admissions into evidence and when it explained the requests for admissions; the patient failed to preserve his complaints for appeal, Tex. E. Evid. 103(a)(1), Tex. R. App. P. 33.1. In re Kilpatrick, 2011 Tex. App. LEXIS 6997, 2011 WL 3925665 (Tex. App. Beaumont Aug. 25 2011).

25. Daughter did not claim that she intended to demonstrate that the signature on the deed was not her mother's, and there was no dispute that the signature on the notarized deed belonged to the decedent; instead, the only issue at trial was whether the decedent had the mental capacity to sign the deed. In re Estate of Johnson, 2011 Tex. App. LEXIS 6243, 2011 WL 3503188 (Tex. App. Texarkana Aug. 11 2011).

26. Error was preserved for review, because objections to evidence offered out of the jury's presence would be deemed to apply to such evidence when admitted without the necessity of repeating the objection. Schultz v. Lester, 2011 Tex. App. LEXIS 5866, 2011 WL 3211271 (Tex. App. Dallas July 29 2011).

27. Trial court's explanation did not indicate approval of the State's argument, indicate disbelief in the defense's position, or diminish the credibility of the defense's approach; because the inmate did not object to the trial court's explanation, he waived his complaint. In re Frazier, 2011 Tex. App. LEXIS 4896 (Tex. App. Beaumont June 30 2011).

28. Husband's complaint was not preserved for review where although he contended the trial court prevented him from presenting evidence of the wife's alleged adultery, the husband did not identify what additional evidence he was prevented from presenting, and he made no offer of proof or bill of exception for the appellate court to review. Ismik v. Ibrahimbas, 2011 Tex. App. LEXIS 4540 (Tex. App. Houston 14th Dist. June 16 2011).

29. Insurer failed to preserve error with regard to its appellate issues, Tex. R. App. P. 33.1(a), as it made its arguments against setting a hearing on attorney's fees, not against actually awarding the employee attorney's fees; the insurer did not inform the court that it had additional evidence to put on and objections to make. Am. Cas. Co. v. Neuwirth, 2011 Tex. App. LEXIS 4069, 2011 WL 2139121 (Tex. App. Austin May 26 2011).

30. Because appellant did not make an offer of proof under Tex. R. Evid. 103(a)(2), obtain an adverse ruling on the admissibility of evidence, or otherwise make a record of the proposed evidence by a bill of exception, he failed to preserve his complaint under Tex. R. App. P. 33.1 that the trial court erred in excluding his testimony concerning a request to change his child's surname. In re Interest of R.F., 2011 Tex. App. LEXIS 2373 (Tex. App. Beaumont Mar. 31 2011).

31. In a commercial dispute, the seller waived his challenge to the trial court's ruling on deposition testimony in which he asserted his Fifth Amendment privilege against self-incrimination by withdrawing the proffered testimony. The issue was not preserved for review under Tex. R. App. P. 33.1(a)(1)(A); Tex.R. Evid. 103(a)(1). Ferro v.

Dinicolantonio, 2011 Tex. App. LEXIS 955, 2011 WL 494741 (Tex. App. Houston 1st Dist. Feb. 10 2011).

32. In a dispute between a condominium association and a unit owner, because the owner failed to object or make an offer of proof, evidentiary issues were waived under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(2). Bosch v. Cedar Vill. Townhomes Homeowners Ass'n, 2011 Tex. App. LEXIS 804, 2011 WL 346317 (Tex. App. Houston 1st Dist. Feb. 3 2011).

33. In the insureds' appeal of a judgment entered in favor of the insurer, the court held that: (1) the insurer's expert did not admit that his testimony was speculative; (2) to the extent that the insureds challenged the expert's qualifications to testify regarding roof damage or that his opinion was not reliable, the complaint was waived because there was no timely objection to his qualifications or the reliability of his testimony; and (3) the expert's testimony was based on his training and 28 years of experience. Patel v. Nautilus Ins. Co., 2011 Tex. App. LEXIS 724, 2011 WL 345967 (Tex. App. Corpus Christi Jan. 28 2011).

34. Claimant failed to show that the trial court erred by admitting irrelevant evidence, because the issue was not preserved for review, when the claimant did not object at trial to the dealership's first exhibit, the claimant objected to the dealership's second exhibit, but the objection was based on hearsay rather than relevance, and the claimant did not identify on appeal any other specific evidence that should not have been admitted. Opuiyo v. Houston Auto M. Imps., Ltd., 2011 Tex. App. LEXIS 58, 2011 WL 61853 (Tex. App. Houston 14th Dist. Jan. 6 2011).

35. Because the detective failed to address each document he objected to, identify which parts of the document contained hearsay and hearsay within hearsay, and explain why the documents were not admissible as a statement by a party opponent, his claim was rejected on appeal. Both at trial and on appeal, the detective made a blanket objection without identifying each part of each statement that contained hearsay with hearsay, and as such, his objection was not sufficiently specific to preserve error. Flores v. City of Liberty, 318 S.W.3d 551, 2010 Tex. App. LEXIS 6298 (Tex. App. Beaumont Aug. 5 2010).

36. In a child custody case, because a father failed to make an offer of proof under Tex. R. Evid. 103(a)(2) concerning the proposed testimony from his daughter, an issue relating to the exclusion of her testimony was not properly preserved for appellate review. Further, the father's comment to the trial court was not a sufficient burden of proof. Conn v. Rhodes, 2009 Tex. App. LEXIS 6587, 2009 WL 2579577 (Tex. App. Fort Worth Aug. 20 2009).

37. In a civil commitment case involving a sexually violent predator, an alleged error relating to a decision to allow experts to testify regarding a patient's truthfulness was not preserved for appellate review because it did not appear that he made an objection at trial. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

38. In a trust dispute, a grandson did not preserve his complaint regarding the exclusion of the testimony of a witness because he did not file an offer of proof or follow the procedures relating to a formal bill of exceptions. Cooper v. Cochran, 288 S.W.3d 522, 2009 Tex. App. LEXIS 2522 (Tex. App. Dallas Apr. 9 2009).

39. In a divorce case, a former husband failed to preserve an alleged error relating to child support because he did not bring to a trial court's attention a discrepancy between the oral pronouncement of child support and the amount that he was ordered to pay in both the original and corrected decrees. Further, he did not challenge the finding that his net monthly income was $ 6,000, and the $ 1,500 child support amount awarded in the original and corrected decrees was consistent with the guidelines for that income amount. Beckner v. Beckner, 2009 Tex. App. LEXIS 759, 2009 WL 279485 (Tex. App. Fort Worth Feb. 5 2009).

40. Trial judges are not required to adopt the methods of Sherlock Holmes and divine without written or oral guidance as to where, when, why, and how an expert's report is conclusory. Therefore, in a health care liability case, an alleged error was not preserved for review under Tex. R. App. P. 33.1(a) because a doctor's objection before a trial court was that an expert report was factually inaccurate; however, on appeal, he acknowledged that he was not raising a factual inaccuracy argument. Plemons v. Harris, 2009 Tex. App. LEXIS 145, 2009 WL 51290 (Tex. App. Fort Worth Jan. 8 2009).

41. In a negligence suit, the intervenors second objection to a doctor's expert testimony referred to the general violation of a motion in limine and was non-specific as to the basis of their objection under Tex. R. Evid. 103. Because intervenors did not identify the basis of their objection and there was no record of the trial court's placing any limitations on the expert's testimony, the intervenor's objection was insufficient and waived under Tex. R. App. P. 33.1. Sinegaure v. Bally Total Fitness Corp., 2008 Tex. App. LEXIS 9435 (Tex. App. Houston 1st Dist. Dec. 18 2008).

42. In a trust dispute, a grandson did not preserve his complaint regarding the exclusion of the testimony of a witness because he did not file an offer of proof or follow the procedures relating to a formal bill of exceptions.

43. In a termination of parental rights case, the father failed to preserve for appellate review his arguments that the continuation of the trial in his absence infringed upon his constitutional rights because the record did not demonstrate that the father lodged his own objection based on constitutional grounds challenging the trial court's decision to proceed with the trial. Although the mother's counsel stated that "we" believe that the father had a constitutional right to be at trial, the mother's counsel did not represent the father at trial, nor did the father's counsel join in the objection. In re T.H., 2008 Tex. App. LEXIS 8413 (Tex. App. Fort Worth Nov. 6, 2008).

44. Bill of review was denied in a paternity case because a purported father waived his argument regarding substituted service under Tex. R. Civ. P. 106 based on statements that his attorney made to the trial court; further, due to the waiver, the issue relating to substituted service was not preserved for appellate review. Moreover, since actual notice was not required for substituted service to be effective, evidence regarding actual notice was not heard as it was not relevant and did not affect the substantial rights of the parties. Thomas v. Wheeler, 2008 Tex. App. LEXIS 5617 (Tex. App. Texarkana July 29 2008).

45. Where an ex-wife failed to make an offer of proof or file a formal bill of exceptions at the trial stage, she had failed to preserve for appeal her claim that the trial court erred in failing to admit her documents into evidence because although she stated in her brief that copies of the documents were in the appellate record, she did not state where in the record the documents could be found, and the appellate court was unable to locate them in its review of the record; in any event, simply filing the excluded evidence was not sufficient to make a proper bill of exceptions. Darby v. Darby, 2008 Tex. App. LEXIS 3452 (Tex. App. Tyler May 14 2008).

46. Because the record did show any objections to the evidence, the court rejected the parents' claim that hearsay evidence constituted the majority of the evidence presented in a proceeding concerning the conservatorship of their daughter, and therefore no error was shown by the district court's consideration of unobjected-to evidence. Rodriguez v. Tex. Dep't of Family & Protective Servs., 2008 Tex. App. LEXIS 3387 (Tex. App. Austin May 8 2008).

47. In a personal injury suit, appellants properly preserved the error, if any, regarding excluded evidence of appellee's consumption of alcohol because, although single offers of proof from a witness might have elicited testimony concerning multiple classifications of excluded evidence, i.e., evidence concerning both the consumption of alcohol and speeding, the trial court was not prevented from differentiating between such testimony and making separate rulings on the same. PPC Transp. v. Metcalf, 254 S.W.3d 636, 2008 Tex. App. LEXIS 3291 (Tex. App.

Tyler 2008).

48. Driver in a car accident negligence case failed to preserve alleged trial court errors for review because he failed to object, request curative instructions, or move for a mistrial; further, any error in the admission of testimony regarding a prior accident and an undisclosed witness to the accident was harmless. Gallaher v. Brown, 2008 Tex. App. LEXIS 2851 (Tex. App. Fort Worth Apr. 17 2008).

49. Appellants, the children of a decedent, failed to preserve certain issues for appeal because they did not object to the issue as required by Tex. R. App. P. 33 and Tex. R. Evid. 103; the only exception was an issue involving a legal sufficiency challenge following a bench trial, which could be challenged for the first time on appeal pursuant to Tex. R. App. P. 33 and Tex. R. Civ. P. 324. Hulen v. Hamilton, 2008 Tex. App. LEXIS 1672 (Tex. App. Fort Worth Feb. 28 2008).

50. In a personal injury case, failure to object waived a claim that statements made in compromise negotiations were inadmissible and were improperly admitted at a hearing on a motion to dismiss; an objection was required to preserve error, as provided in Tex. R. Evid. 103. Hamrick v. Lopez, 2007 Tex. App. LEXIS 8113 (Tex. App. Beaumont Oct. 11 2007).

51. In a civil commitment proceeding for appellant, who was found to be a sexually violent predator, where appellant argued that the trial court erred in allowing the State's expert witness, a board-certified psychiatrist, to testify, challenging the standard that she employed in reaching her opinion that he was likely to reoffend, he had not preserved the issue for review; an expert-reliability challenge asking the reviewing court to examine the expert's underlying methodology, technique, or foundational data, required a timely objection so that the trial court had the opportunity to conduct such analysis. In re Commitment of Gollihar, 224 S.W.3d 843, 2007 Tex. App. LEXIS 3786 (Tex. App. Beaumont 2007).

52. Helicopter service facility did not preserve for appeal objections to an affidavit proffered by a helicopter manufacturer in support of the manufacturer's motion for summary judgment; each of the service facility's objections--to a lack of verification and authentication and to the affidavit of an interested witness--presented defects of form; because the trial court did not rule on these objections, they were not preserved for appellate review. Cent. Am. Aviation Servs., S. A. v. Bell Helicopter Textron, Inc., 2007 Tex. App. LEXIS 1469 (Tex. App. Fort Worth Mar. 1 2007).

53. Record did not reveal that the track owner ever specifically brought the couple's expert's qualifications or the reliability of his testimony to the trial court's attention and obtained a ruling from the court; consequently, the owner failed to preserve for appellate review any challenge relating to the expert's qualifications or the reliability of his testimony. S.E.A. Leasing, Inc. v. Steele, 2007 Tex. App. LEXIS 1337 (Tex. App. Houston 1st Dist. Feb. 22 2007).

54. Employer's contention that the trial court erred by failing to instruct the jury that damages in a negligence action could not arise from conduct that amounted to statutory sexual harassment was waived for appellate review because during the charge conference, the employer did not plainly make the trial court aware of its complaint. Waffle House, Inc. v. Williams, 314 S.W.3d 1, 2007 Tex. App. LEXIS 843, 100 Fair Empl. Prac. Cas. (BNA) 451 (Tex. App. Fort Worth 2007).

55. Husband did not properly preserve for review his assertion that the trial court abused its discretion when it appointed the mediator as arbitrator because there was no record of an objection being made to the trial court or of a ruling on the objection as required by Tex. R. Evid. 103. Gaskin v. Gaskin, 2006 Tex. App. LEXIS 7689 (Tex. App. Fort Worth Aug. 31 2006).

56. In a negligence action arising from a motor vehicle accident, failure to object waived, under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103, claims of falsified or spoliated evidence. Kadyebo v. Chako, 2006 Tex. App. LEXIS 416 (Tex. App. Fort Worth Jan. 19 2006).

57. In a civil forfeiture proceeding, defendant waived his complaint concerning evidence seized from his wallet during a pat down search incident to his arrest for possession of a controlled substance; defendant made no objection when the state presented testimony concerning the evidence. $ 1,590.00 United States Currency v. Tex., 2005 Tex. App. LEXIS 10423 (Tex. App. Fort Worth Dec. 15 2005).

58. In child custody and support enforcement proceedings, the mother's failure to object to the trial court's questioning waived the issue under Tex. R. App. P. 33.1 and Tex. R. Evid. 103; also, the questioning did not deny the mother her federal or state constitutional rights to a fair trial or violate Tex. R. Evid. 605 because the judge did not testify as a witness at the trial and the questions were reasonable and fact-based. Kogel v. Robertson, 2005 Tex. App. LEXIS 10028 (Tex. App. Austin Dec. 2 2005).

59. Trial court did not prevent appellant from presenting error to the reviewing court through an offer of proof because, while the trial court denied appellant an opportunity to develop the excluded testimony in a question-and-answer form, her attorney informed the court of the substance of the testimony in an offer of proof. In reaching that conclusion, the court compared Tex. R. Evid. 103(a)(2), providing that an offer of proof was a trial-time offer of evidence excluded by court, and Tex. R. App. P. 33.2, setting out that a formal bill of exception was a post-trial offer of evidence in written form. In re A A.E., 2005 Tex. App. LEXIS 4419 (Tex. App. Corpus Christi June 9 2005).

60. Although a mother in a parental rights proceeding failed to preserve error on her objections to the reliability of the expert testimony presented during the proceeding because she did not file a written objection to the expert's testimony or object or ask any questions of the expert during the pretrial hearing, an appellate court held that it had broad discretion to remand in the interest of justice because the trial court had erred in overruling the father's objection to the expert opinion and that error was harmful, which made a new trial necessary. In re S.E.W., 168 S.W.3d 875, 2005 Tex. App. LEXIS 3809 (Tex. App. Dallas 2005).

61. In a termination of parental rights case, the mother did not preserve her complaint for review because the complaint did not comport with the mother's objection made at the time certain testimony was being offered. At trial, the mother complained that a social worker had not followed statutory procedures under the Texas Health and Safety Code, but, on review, the mother complained that the social worker's testimony violated Tex. R. Evid. 510. Additionally, the mother's second objection at trial, which was based on Rule 510, was not made until after the social worker left the witness stand; therefore, this objection was not timely made. In re Smith, 2005 Tex. App. LEXIS 990 (Tex. App. Dallas Feb. 8 2005).

62. Customer argued that the trial court erred in denying her motion to compel discovery, but her counsel conceded at oral argument that she did not obtain a ruling from the trial court on the motion to compel; to preserve a complaint for the appellate court's review, a party had to have presented to the trial court a timely request, objection, or motion that stated the specific grounds for the desired ruling, Tex. R. Evid. 103(a)(1), and the objecting party had to also get an express or implied ruling from the trial court, and because the customer failed to present her objection to the trial court and obtain a ruling, she waived this complaint on appeal. Banks v. River Oaks Steak House, 2004 Tex. App. LEXIS 7517 (Tex. App. Fort Worth Aug. 19 2004).

63. Where a trial court did not exclude testimony regarding a patient's motive in bringing a negligence action based on medical malpractice against his doctor, but rather, indicated that the questioning was to be disallowed at one point and could be raised again later, but the patient failed to introduce the evidence again, there was no ruling excluding the evidence for purposes of appellate review and accordingly, the patient failed to preserve the error

pursuant to Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(2). Ramsey v. Cravey, 2004 Tex. App. LEXIS 5724 (Tex. App. San Antonio June 30 2004).

64. Where a wife in a divorce proceeding failed to make an offer of proof pursuant to Tex. R. Evid. 103 or file a formal bill of exception pursuant to Tex. R. App. P. 33.2, and the substance of the evidence she sought to present was not apparent from the record, her complaint that the trial court erred by not allowing her to prove that she had separate property and by finding that she had none was not preserved for appellate review under Tex. R. App. P. 33.1(a). Furthermore, because the wife did not present evidence of her ownership of separate property, the correctness of the trial court's finding that she had none had to be presumed under Tex. Fam. Code Ann. § 3.003. Smith v. Smith, 143 S.W.3d 206, 2004 Tex. App. LEXIS 5670 (Tex. App. Waco 2004).

65. Pursuant to Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1), the lessor in a commercial lease failed to make an objection in the trial court as to the alleged date defect and discovery rule violation that one of lessee's exhibits was not created more than 30 days prior to trial as required by Tex. R. Civ. P. 215.5 and waived error, and even if the lessor had made the proper objection, the trial court could have properly overruled it, because no discovery request was made for the exhibit as required by Tex. R. Civ. P. 93. Parts Indus. Corp. v. A.V.A. Servs., 104 S.W.3d 671, 2003 Tex. App. LEXIS 2244 (Tex. App. Corpus Christi 2003).

66. Pursuant to Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1), the lessor in a commercial lease did not preserve by a proper objection any error regarding the lessee's alleged lack of standing to bring the suit; thus, any error as to lack of standing was waived. Parts Indus. Corp. v. A.V.A. Servs., 104 S.W.3d 671, 2003 Tex. App. LEXIS 2244 (Tex. App. Corpus Christi 2003).

Civil Procedure : Appeals : Standards of Review : General Overview

67. Pursuant to Tex. R. Evid 103(a)(2), error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and the substance of the objection is made known to the trial court by offer of proof; however, in this termination of parental rights case, the mother's attorney adequately described the substance of the proposed testimony, introduced the witness's letter, and referenced the best interest of the children, and the appeals court found this showing sufficient under the circumstances. In re N.R.C., 94 S.W.3d 799, 2002 Tex. App. LEXIS 8566 (Tex. App. Houston 14th Dist. 2002).

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

68. Mother failed to preserve for review her assertion that the court abused its discretion by excluding evidence that the Texas Department of Family and Protective Services moved to strike her divorce petition, because the excluded evidence was subject to a motion in limine, and at no other time before or during trial did the mother ever object to the exclusion of the evidence. Casillas v. Tex. Dep't of Family & Protective Servs., 2010 Tex. App. LEXIS 2210, 2010 WL 1173074 (Tex. App. Austin Mar. 24 2010).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

69. Despite sustaining defedant's hearsay objection in an action to quiet title, the trial court later allowed plaintiff to testify to many of the facts surrounding decedent's alleged parol gift; because the trial court allowed evidence of the substantial improvements plaintiff made to the land during decedent's lifetime and plaintiff's continuous possession of the land, the appellate court could not say that the trial court's ruling on decedent's hearsay statement to plaintiff regarding her donative intnet caused the rendition of an improper judgment. Conner v. Johnson, 2004 Tex. App. LEXIS 9633 (Tex. App. Fort Worth Oct. 28 2004).

70. In an inverse condemnation case, a trial court's refusal to allow the State to give an offer of proof was harmless because the substance of the evidence was apparent from the context within which the questions were asked; moreover, the testimony the State sought to offer concerning the impairment of access and the viability of driveway proposals was immaterial to the issue of damages. State v. Delany, 149 S.W.3d 655, 2004 Tex. App. LEXIS 2385 (Tex. App. Houston 14th Dist. 2004), reversed by 2006 Tex. LEXIS 416, 49 Tex. Sup. Ct. J. 557 (Tex. 2006).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

71. Any error by determining the drug test results were admissible was harmless, because the father's testimony was admitted without objection, when the content of the testimony was cumulative of the drug test results the father argued were inappropriately admitted. D.O.H. v. Tex. Dep't of Family & Protective Servs., 2011 Tex. App. LEXIS 6685, 2011 WL 3684568 (Tex. App. Houston 14th Dist. Aug. 23 2011).

Civil Procedure : Appeals : Standards of Review : Reversible Errors

72. Any error in the admission of the expert's testimony did not affect the patient's substantial rights, because the trial court gave the jury a limiting instruction regarding the use of hearsay evidence. In re Commitment of Villegas, 2013 Tex. App. LEXIS 1596, 2013 WL 645239 (Tex. App. Beaumont Feb. 21 2013).

Civil Procedure : Eminent Domain Proceedings : Experts

73. In an action arising from the State's partial taking of owners' property for use in a highway project, the trial court did not abuse its discretion in overruling the State's pretrial motion to exclude the testimony of the owners' designated real estate appraiser without conducting an evidentiary hearing where the appraiser's qualifications were not challenged, and where he generally utilized the long favored comparable sales approach for appraising real property. The State failed to show that the denial of its motion affected a substantial right of the State pursuant to Tex. R. Evid. 103(a). State v. Petropoulos, 346 S.W.3d 619, 2009 Tex. App. LEXIS 3021 (Tex. App. Austin Apr. 28 2009).

Computer & Internet Law : Criminal Offenses : Sex Crimes

74. In a case where defendant was convicted under Tex. Penal Code Ann. § 33.021(b), there was no ineffective assistance of counsel because a trial court would not have erred by admitting an exhibit showing pictures of scantily clad children that defendant was purportedly viewing at a library over a proper specific objection made by defense counsel; defense counsel had merely objected based on an improper predicate. It was evident from a librarian's testimony that the photographs were the product of a reliable system, pursuant to Tex. R. Evid. 901(b)(9), and the proof was sufficient to demonstrate that the challenged exhibit was what its proponent claimed it to be under Tex. R. Evid. 901(a). Brier v. State, 2009 Tex. App. LEXIS 3749, 2009 WL 998638 (Tex. App. Tyler Apr. 15 2009).

Constitutional Law : Bill of Rights : Fundamental Rights : Search & Seizure : Scope of Protection

75. In a civil forfeiture proceeding, defendant waived his complaint concerning evidence seized from his wallet during a pat down search incident to his arrest for possession of a controlled substance; defendant made no objection when the state presented testimony concerning the evidence. $ 1,590.00 United States Currency v. Tex., 2005 Tex. App. LEXIS 10423 (Tex. App. Fort Worth Dec. 15 2005).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Assistance of Counsel

76. Prosecutors should avoid using an evidentiary objection to inject new facts into the record when such assertions are otherwise unsupported by properly admitted evidence. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

77. In a delinquency proceeding, a Confrontation Clause issue was preserved for review, even though the juvenile failed to identify for the trial court the particular portions of a contested report that he considered to be inadmissible, because the comments of the prosecutor, defense counsel, and the trial court all indicated that the basis for the objection was apparent from the context. In re M.P., 220 S.W.3d 99, 2007 Tex. App. LEXIS 921 (Tex. App. Waco 2007).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview

78. In an appeal from a marijuana conviction, the court reviewed the admission of the marijuana, even though defendant failed to object at the time that the evidence was admitted; under Tex. R. Evid. 103, defendant was not required to object to the admission of the marijuana in order to preserve error because the trial court heard the objection to the admission of the marijuana outside of the presence of the jury and admitted the evidence. Skinner v. State, 2006 Tex. App. LEXIS 5498 (Tex. App. Dallas June 28 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

79. Probative value of evidence regarding whether defendant and the complainant continued their relationship after the aggravated assault with a deadly weapon was slight for the purpose of showing whether the alleged assault occurred; in addition, because of the graphically sexual nature of the photos that defendant sought to introduce into evidence, there was a danger that the jury would unfairly consider them for purposes other than that for which they were offered; in any event, because the record contained no offer of proof or bill of exceptions containing the substance of the testimony that defendant sought to elicit, pursuant to Tex. R. Evid. 103, defendant's complaint presented nothing for the appellate court's review. Carranza v. State, 2006 Tex. App. LEXIS 10137 (Tex. App. Houston 14th Dist. Nov. 28 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

80. Defendant's convictions of indecency with a child by contact and exposure pursuant to Tex. Penal Code Ann. § 21.11 were affirmed, even though two witness were erroneously permitted to testify as outcry witnesses under Tex. Code Crim. Proc. Ann. art. 38.072, and the counselor was erroneously allowed to testify under Tex. R. Evid. 803(4) regarding the victim's statements during counseling, and where the testimony did not affect defendant's substantial rights under Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b), as defendant admitted that he engaged in the conduct described in the victim's statements to the three witnesses. Jones v. State, 92 S.W.3d 619, 2002 Tex. App. LEXIS 8545 (Tex. App. Austin 2002).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview

81. In a murder trial involving a claim of self-defense, there was no error in excluding evidence that the victim's child had been physically abused; to the extent that defendant sought to admit evidence that the victim was responsible for the child's injuries, defendant made no offer of proof or bill of exception, as required by Tex. R. Evid.103. Bina v. State, 2008 Tex. App. LEXIS 667 (Tex. App. Houston 1st Dist. Jan. 31 2008).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : Penalties

82. At the punishment phase of a trial for aggravated robbery, any error in admitting a prior conviction for unlawfully carrying a weapon was harmless under Tex. R. App. P. 44.2(b) and Tex. R. Evid. 103(a). The conviction was not reiterated or emphasized, the jury also received evidence of three other misdemeanor convictions, and defendant was sentenced to 40 years, the middle of the sentencing range under Tex. Penal Code Ann. §§ 12.32(a), 29.03. Abdolahi-Damaneh v. State, 2007 Tex. App. LEXIS 2003 (Tex. App. Dallas Mar. 15 2007).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

83. In a murder trial, any error in refusing to admit letters written by the victim was harmless under Tex. R. App. P. 44.3 and Tex. R. Evid. 103(a) because there was other evidence of the victim's behavior and demeanor that defendant sought to admit through the letters. Cantu v. State, 2012 Tex. App. LEXIS 1639, 2012 WL 664939 (Tex. App. Corpus Christi Mar. 1 2012).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

84. In defendant's capital murder case, a court did not err by informing the jury that it had overruled defendant's objection to the State's attempt to offer defendant's grand jury testimony, which had occurred outside the jury's presence where the trial judge's explanation was not a comment on the weight of the evidence, and it did not rise to the level of fundamental error because the judge did not express an opinion on the weight of evidence. Martinez v. State, 147 S.W.3d 412, 2004 Tex. App. LEXIS 2897 (Tex. App. Tyler 2004), *cert. denied*, 131 S. Ct. 3073, 180 L. Ed. 2d 896, 2011 U.S. LEXIS 4930 (2011).

Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy : Elements

85. In a trial for conspiracy to commit murder, defendant waived the argument that it was error under Tex. R. Evid. 403 to exclude expert and lay testimony of defendant's mental retardation, through which she sought to contest that she had the requisite mens rea. Defendant did not call the witnesses and have their excluded testimony entered into the record, provided a general and cursory summary statement of the excluded evidence, and failed to meet the requirements of Tex. R. Evid. 103, in that there was no evidence in the record of defendant's specific mental impairments or their impact on her mental state at the time of the offense. Rhoten v. State, 299 S.W.3d 349, 2009 Tex. App. LEXIS 8058 (Tex. App. Texarkana Oct. 16 2009).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly

86. Under Tex. R. Evid. 103 and Tex. R. App. P. 33, defendant failed to preserve an argument that the State improperly elicited testimony concerning alleged gang membership because defendant failed to identify the objectionable testimony in the record and did not even assert that defense counsel raised such an objection to the testimony. Marshal v. State, 2008 Tex. App. LEXIS 1411 (Tex. App. Houston 14th Dist. Feb. 28 2008).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview

87. In a case involving theft, defendant's objections regarding hearsay and lack of predicate were insufficient to inform a trial court that an objection to the State's method of proving value was being asserted; however, the failure to object did not deprive defendant of the constitutional right to insist upon proof beyond a reasonable doubt on the issue of value. Moff v. State, 131 S.W.3d 485, 2004 Tex. Crim. App. LEXIS 641 (Tex. Crim. App. 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : General Overview

88. Admission of extraneous-offense evidence, regarding defendant's two encounters with children in public restrooms, did not affect defendant's substantial rights because testimony regarding the encounters did not consume an inordinate amount of time during trial, the State focused the majority of its closing argument on the evidence establishing the charged offenses, and the trial court gave a limiting instruction. Hoard v. State, 2013 Tex. App. LEXIS 11760 (Tex. App. Beaumont Sept. 18 2013).

89. Admission of expert testimony regarding the connection between a photograph of a child and sexual arousal did not affect defendant's substantial rights because there was evidence of images of children on various devices owned by defendant, one of the devices contained a video of defendant with the victim, and the images were purposefully placed on defendant's devices. Hoard v. State, 2013 Tex. App. LEXIS 11760 (Tex. App. Beaumont Sept. 18 2013).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

90. In a sexual assault trial, there was no error in limiting defense questioning of a witness regarding sexually explicit photographs of a woman who appeared to be asleep or unconscious; the witness was permitted to testify in support of the defensive theory that drug use and sexual conduct of the sort shown in the photographs were common among persons employed by topless clubs and that the woman in the photographs may have consented to the acts shown; defendant did not make an offer of proof regarding other questions, as required by Tex. R. Evid. 103. Casey v. State, 2007 Tex. App. LEXIS 7940 (Tex. App. Austin Oct. 5 2007).

91. In a trial for a mother's sexual abuse of her son, it was error under Tex. R. Evid. 404 to admit evidence that defendant had been a victim of sexual assault as a child to show that she was more likely to commit the offense; the error was harmful under Tex. R. App. P. 44.2 and Tex. R. Evid. 103 because it was a close case resolved by a credibility determination between the child and defendant. Kirby v. State, 208 S.W.3d 568, 2006 Tex. App. LEXIS 2785 (Tex. App. Austin 2006).

92. Defendant's objections at an evidentiary hearing outside the jury's presence to determine the admissibility of a minor's testimony were deemed to apply when the evidence was admitted at his trial for indecency with a child. Pettigrew v. State, 2006 Tex. App. LEXIS 1898 (Tex. App. Fort Worth Mar. 9 2006).

93. In defendant's aggravated sexual assault of a child case, a court did not err in the sentencing phase, by admitting a videotape depicting him engaging in sexual activity with an unidentified adult female where the State's attempt to establish defendant's character for sexual depravity was a legitimate purpose for permitting the videotape to be shown. Moreover, even if the trial court committed error in permitting the videotape to be played to the jury, the record did not necessarily establish that defendant suffered harm from its admission; as a result of a prior felony conviction, the applicable punishment range for the conviction for indecency with a child was enhanced to the range of 5 to 99 years or life. Chambers v. State, 2004 Tex. App. LEXIS 2693 (Tex. App. Eastland Mar. 25 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

94. In a trial for sexual assault and indecency with a child, defendant failed to preserve for review an argument that he was erroneously prevented from presenting or eliciting evidence of the complainant's sexual history and sexual sophistication in part because defendant's offer of proof failed to establish that he was seeking to cross-examine or elicit testimony regarding the complainant's sexual history or sexual sophistication. Martinez v. State, 2014 Tex.

App. LEXIS 3827, 2014 WL 1396705 (Tex. App. El Paso Apr. 9 2014).

95. Defendant's conviction for aggravated sexual assault of a child under six years of age at the time of the offense was appropriate because there was no error in the admission of the child's statement to the forensic interviewer. However, even there was error, it was harmless because evidence regarding the victim's statements that defendant sexually assaulted her on two occasions came into evidence without objection through the testimony of a nurse and the SAFE Form, Tex. R. Evid. 103(a)(1). Loya v. State, 2012 Tex. App. LEXIS 8640, 2012 WL 4875499 (Tex. App. Dallas Oct. 16 2012).

96. In defendant's trial for indecency with a child, defendant failed to preserve his objection to an expert's testimony that false accusations had occurred in about 2 percent of the cases he had been involved in because, after he objected to the initial question posed to the expert, the State rephrased its question and defendant did not object to the rephrased question. Smikal v. State, 2012 Tex. App. LEXIS 2904, 2012 WL 1259127 (Tex. App. Corpus Christi Apr. 12 2012).

97. In a trial for sexual assault of a child, defendant failed to preserve the argument that it was improper to exclude evidence of the complainant's sexual history because the record did not contain an offer of proof from which the reviewing court could analyze the excluded testimony, as required by Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1(a). Cordero v. State, 2012 Tex. App. LEXIS 2834, 2012 WL 1248064 (Tex. App. El Paso Apr. 11 2012).

98. In a trial for child sexual assault, defendant's complaint on appeal regarding a nurse's testimony (that the complainant's scarred hymen could have been caused by an adult's fingers) did not comport, as required by Tex. R. Evid. 103(a)(1); Tex. R. App. P. 33.1(a)(1), with a pretrial objection to causation testimony; it was doubtful the trial court considered the nurse's testimony that it was possible for human fingers to cause such injuries. Moore v. State, 2011 Tex. App. LEXIS 6826, 2011 WL 3717058 (Tex. App. Amarillo Aug. 23 2011).

99. In defendant's prosecution for sexual assault of a child under Tex. Penal Code Ann. § 22.011, defendant did not preserve error for review regarding the exclusion of the testimony of the victim's minor son, who was allegedly present during all her encounters with defendant, as he did not submit an offer of proof under Tex. R. Evid. 103(a)(2) setting forth the substance of the son's testimony. Daniel v. State, 2011 Tex. App. LEXIS 1996, 2011 WL 941301 (Tex. App. Waco Mar. 16 2011).

100. Court affirmed a judgment convicting defendant of aggravated sexual assault of a child because defendant did not preserve error for review when he failed to make an offer of proof, and the court could not determine on what general subject defendant wished to cross-examine the prosecutor had he been allowed to do so. Balderas v. State, 2006 Tex. App. LEXIS 7801 (Tex. App. Houston 14th Dist. Aug. 31 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

101. In a negligence suit by a driver against a trucker, the trial court's exclusion of the evidence concerning the driver's consumption of alcohol required reversal because the jury, believing the driver to be sober, declined to find the driver negligent; the judgment turned on evidence of the driver's consumption of alcohol, and therefore, the judgment rendered in favor of the driver was improper. PPC Transp. v. Metcalf, 254 S.W.3d 636, 2008 Tex. App. LEXIS 3291 (Tex. App. Tyler 2008).

102. In defendant's driving while intoxicated case, defendant's "amended" motion to suppress was not brought to the trial court's attention until after the State had rested its case during the guilt-innocence stage of the trial. By that time, the intoxilyzer operator had testified extensively about defendant's refusal, and because her motion to

suppress on the additional ground was not timely, defendant did not preserve error on that issue. Boles v. State, 2004 Tex. App. LEXIS 3193 (Tex. App. Fort Worth Apr. 8 2004).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

103. Complaint on appeal as to the reliability of retrograde extrapolation did not comport with his complaint below that the trial court was not permitting him to take the chemist on voir dire. Therefore, the reliability issue was not preserved for review under Tex. R. Evid. 103. Garner v. State, 2011 Tex. App. LEXIS 5991, 2011 WL 3278533 (Tex. App. Dallas Aug. 2 2011).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

104. In a driving while intoxicated case, because defendant did not present evidentiary complaints relating to the admission of a police officer's testimony and the results of a breath test to a trial court, they were not preserved for appellate review under Tex. R. App. P. 33.1(a)(1). Egerton v. State, 2009 Tex. App. LEXIS 4848, 2009 WL 1815772 (Tex. App. Fort Worth June 25 2009).

Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : General Overview

105. In a delinquency proceeding, a Confrontation Clause issue was preserved for review, even though the juvenile failed to identify for the trial court the particular portions of a contested report that he considered to be inadmissible, because the comments of the prosecutor, defense counsel, and the trial court all indicated that the basis for the objection was apparent from the context. In re M.P., 220 S.W.3d 99, 2007 Tex. App. LEXIS 921 (Tex. App. Waco 2007).

Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : Statements

106. Defendant juvenile's complaint regarding the admissibility of his statment was preserved because the record as a whole indicated an understanding by the judge and counsel that the juvenile's counsel did not intend to forfeit the issue of admissibility of the statement by stating, "no objection," when it was offered at trial. In re X.J.T., 2014 Tex. App. LEXIS 2312, 2014 WL 787832 (Tex. App. Fort Worth Feb. 27 2014).

Criminal Law & Procedure : Search & Seizure : Exclusionary Rule : Rule Application & Interpretation

107. Objection to the admissibility of evidence under the first sentence of Tex. Code Crim. Proc. Ann. art. 38.23 is not a prerequisite to the right to a jury instruction regarding a disputed factual issue under the second sentence of Tex. Code Crim. Proc. Ann. art. 38.23 because a defendant may, but is not required to, object to the admission of evidence as well as make a request for a Tex. Code Crim. Proc. Ann. art. 38.23 jury instruction; even when the defendant affirmatively states that he has no objection to the admission of certain evidence, he may still be entitled to a Tex. Code Crim. Proc. Ann. art. 38.23 jury instruction because the admissibility of evidence and the jury's consideration of that evidence are not necessarily linked together. Holmes v. State, 248 S.W.3d 194, 2008 Tex. Crim. App. LEXIS 327 (Tex. Crim. App. 2008).

Criminal Law & Procedure : Search & Seizure : Seizures of Persons

108. Defendant's suppression argument on appeal from a drug conviction--that he was detained without reasonable suspicion--did not comport with the argument raised in a motion to suppress--that there was no consent for a search of his vehicle. Therefore, defendant waived the detention issue under Tex. R. App. P. 33.1; Tex. R. Evid. 103(a). Franklin v. State, 2010 Tex. App. LEXIS 3686, 2010 WL 1957024 (Tex. App. Houston 14th Dist. May 18 2010).

Criminal Law & Procedure : Interrogation : Miranda Rights : Notice & Warning

109. Defendant failed to preserve for review his complaint under Tex. Code Crim. Proc. Ann. art. 38.22, § 3(a)(2) because, in light of defendant's clearly and persistently articulated constitutional argument, and the lack of a statutory reference in his second motion to suppress, defendant's reference to the videotape was most likely part of his argument that the police had violated his rights under the United States and Texas Constitutions by failing to Mirandize him. Resendez v. State, 306 S.W.3d 308, 2009 Tex. Crim. App. LEXIS 1439 (Tex. Crim. App. 2009).

Criminal Law & Procedure : Interrogation : Miranda Rights : Right to Counsel During Questioning

110. Because defendant did not object to an officer's testimony that defendant would not provide a statement at the scene of an aggravated assault without an attorney being present, he did not preserve this issue for review under Tex. R. Evid. 103(a)(1). Testimonial references to a defendant's pre-arrest silence and his pre-arrest invocation of the right to counsel do not constitute fundamental error. McCullough v. State, 2005 Tex. App. LEXIS 2253 (Tex. App. Waco Mar. 23 2005).

Criminal Law & Procedure : Interrogation : Miranda Rights : Self-Incrimination Privilege

111. State's questions specifically referenced only one period of time -- when defendant was in police custody and before Miranda rights were read to him; the context of the questions, therefore, could only implicate defendant's post-arrest, pre-Miranda right to remain silent, which was protected only by Tex. Const. art. I, § 10; thus, despite the failure of the objection to specifically reference the Texas Constitution, given the context of the State's question, the objection was specific enough to have put the trial court on notice of defendant's objection; therefore, defendant's objection was sufficient to preserve for appellate review his claim that his right against self-incrimination was violated. Wyborny v. State, 209 S.W.3d 285, 2006 Tex. App. LEXIS 10109 (Tex. App. Houston 1st Dist. 2006).

112. Because defendant complained only generally at trial of his "right to remain silent," without any further assertions concerning his rights to post-arrest silence under either Tex. Const. art. I, § 10 or the Sanchez case, defendant's trial objection was not sufficient to make the trial court aware of his complaint, as required by Tex. R. Evid. 103(a)(1). Moreover, the specific grounds of defendant's complaint were not apparent from the context under Tex. R. App. P. 33.1(a)(1)(A). Cleveland v. State, 177 S.W.3d 374, 2005 Tex. App. LEXIS 2726 (Tex. App. Houston 1st Dist. 2005), cert. denied 126 S. Ct. 1774, 164 L. Ed. 2d 523, 2006 U.S. LEXIS 3222, 74 U.S.L.W. 3585 (U.S. 2006).

Criminal Law & Procedure : Interrogation : Voluntariness

113. Defendant's contention that the trial court erred when it admitted his statement to detectives on the ground that it was not voluntary due to his intoxication was not preserved for appellate review because his objections at trial were not sufficiently specific to inform the trial court that the basis of his objections was involuntariness due to intoxication. Maden v. State, 2013 Tex. App. LEXIS 2619, 2013 WL 1049040 (Tex. App. Amarillo Mar. 13 2013).

114. Defendant's contention that the trial court erred when it admitted his telephone conversation with his wife recorded while he was detained a a police department holding facility on the ground that it violated the Texas wiretapping statute, Tex. Penal Code Ann. § 16.02(b)(1), was not preserved for appellate review because he made no mention of the wiretapping statute or any other Texas statutory provision in his objection to the admission of the recording. Maden v. State, 2013 Tex. App. LEXIS 2619, 2013 WL 1049040 (Tex. App. Amarillo Mar. 13 2013).

Criminal Law & Procedure : Preliminary Proceedings : Preliminary Hearings : Evidence

115. Tex. R. Evid. 609(a) requires that the trial court determine whether the probative value of admitting evidence of prior convictions outweighs its prejudicial effect to a party, and Tex. R. Evid. 609(f) requires timely notice of the State's intended use of evidence of prior convictions to provide the defendant a fair opportunity to contest the use of such evidence, but the phrase "fair opportunity" does not specify at what point in the proceedings the decision as to admissibility is to be made; there is not authority holding that a "fair opportunity" means an opportunity exclusively during a pretrial hearing and not during a hearing outside the presence of the jury during a trial on the merits; thus, the trial court's denial of defendant's motion for a pretrial hearing on his Tex. R. Evid. 609 motion was neither an abuse of discretion nor reversible error. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

Criminal Law & Procedure : Pretrial Motions & Procedures : Motions in Limine

116. Defendant's objection that the complainant's testimony was in violation of a motion in limine was not a specific objection sufficient to preserve error, pursuant to Tex. R. App. P. P. 33.1(a)(1), Tex. R. Evid. 103(a)(1). A motion in limine did not preserve error. Bennett v. State, 2010 Tex. App. LEXIS 4436, 2010 WL 2347066 (Tex. App. Beaumont June 9 2010).

117. In defendant's burglary case, he failed to preserve for review an issue of the admission of extraneous offenses because trial counsel made no objection to the State's alleged violation of the motion in limine, and the record reflected that the district court, if anything, ruled in defendant's favor and excluded evidence related to the offenses. Thus, the exception provided by Tex. R. Evid. 103 did not apply. Perez v. State, 2009 Tex. App. LEXIS 6521, 2009 WL 2567908 (Tex. App. Austin Aug. 21 2009).

118. In a robbery case, because defendant failed to offer evidence of the victim's voluntary manslaughter conviction at trial after the trial court granted the State's pretrial motion in limine to exclude evidence of the victim's voluntary manslaughter conviction, no error was preserved for appeal, as provided in Tex. R. Evid. 103. Windham v. State, 2008 Tex. App. LEXIS 2440 (Tex. App. Dallas Apr. 7 2008).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

119. Appellate court was not required to ignore defendant's point of error based on the trial court's denial of his pretrial motion to suppress because this rule does not dispense with appellate review of pretrial suppression motions; instead, it merely serves to protect against waiver of such objections offered outside the presence of the jury when the same evidence is offered at trial. Jackson v. State, 424 S.W.3d 140, 2014 Tex. App. LEXIS 1170, 2014 WL 409946 (Tex. App. Texarkana Feb. 4 2014).

120. Defendant failed to preserve for appellate review his contention that the trial court erred by denying his motion to suppress on the ground that the officer lacked reasonable suspicion to justify the traffic stop because he did not file a pretrial motion to suppress and he did not object before or during the State's case-in-chief to the admissibility of any evidence the officers obtained after the stop. Sample v. State, 405 S.W.3d 295, 2013 Tex. App. LEXIS 7288 (Tex. App. Fort Worth June 13 2013).

121. Defendant failed to preserve for appellate review his contention that the trial court erred by denying his motion to suppress because when the State presented the testimony of the officers who had entered defendant's apartment, defense counsel did not object or re-urge his motion to suppress. Clark v. State, 2011 Tex. App. LEXIS 5160, 2011 WL 2651902 (Tex. App. Austin July 8 2011).

122. Admission of post-arrest statements by defendant, who was arrested for driving while intoxicated, that he was sorry and that he would not do it anymore could not be challenged as violating a suppression order because

defendant failed to object to the evidence during trial as required by Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1). Jimenez v. State, 2011 Tex. App. LEXIS 194, 2011 WL 192701 (Tex. App. El Paso Jan. 12 2011).

123. Defendant's contention that the trial court erred by denying his motion to suppress evidence seized following the traffic stop and his arrest was not preserved for appellate review because his argument, that the officer could not have had the requisite probable cause to believe that a traffic violation had occurred as the evidence showed that the action taken by defendant did not violate any Transportation Code requirements, was not raised until the hearing on defendant's motion for a new trial. Butler v. State, 2010 Tex. App. LEXIS 5646, 2010 WL 2836310 (Tex. App. Texarkana July 20 2010).

124. Defendant did not address a suppression issue pretrial or object at trial, as required to preserve the issue under Tex. R. App. P. 33.1(a); Tex. R. Evid. 103(a)(1), until the State offered the seized contraband. Any error in the admission of the evidence was harmless because substantial testimony describing the contraband was admitted without objection. Griggs v. State, 2010 Tex. App. LEXIS 3433, 2010 WL 1840219 (Tex. App. Houston 1st Dist. May 6 2010).

125. Where defendant was convicted of possession of cocaine, he did not urge his motion to suppress until the close of the evidence and failed to object to the evidence at the first opportunity; he failed to preserve review of the trial court's denial of his motion to suppress. Alex v. State, 2006 Tex. App. LEXIS 4031 (Tex. App. Beaumont May 10 2006).

126. In a capital murder case, although Tex. R. Evid. 103(a)(1) did not require a trial objection to the same evidence after the denial of a motion to suppress, defendant's challenge to the admissibility of oral statements was not preserved for review because defendant's arguments at the suppression hearing dealt only with written statements. Higginbotham v. State, 2005 Tex. App. LEXIS 8184 (Tex. App. Texarkana Oct. 4 2005).

127. In defendant's driving while intoxicated case, defendant's "amended" motion to suppress was not brought to the trial court's attention until after the State had rested its case during the guilt-innocence stage of the trial. By that time, the intoxilyzer operator had testified extensively about defendant's refusal, and because her motion to suppress on the additional ground was not timely, defendant did not preserve error on that issue. Boles v. State, 2004 Tex. App. LEXIS 3193 (Tex. App. Fort Worth Apr. 8 2004).

Criminal Law & Procedure : Guilty Pleas : Admissibility at Trial

128. In a murder trial, no harm occurred, within the meaning of Tex. R. App. P. 44 and Tex. R. Evid. 103, when the trial court admitted tape-recorded phone conversations that included defendant's statement about a plea offer on an unrelated offense; defendant's remark was in the middle of the State's first tape-recorded conversation, it was not singled out at trial, and the State did not attempt to introduce other evidence regarding the previous offense. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

129. Given the brief description of the proffered evidence with concise facts, as reflected by the record and stated by trial counsel regarding the civil suit, defendant's trial counsel did not render ineffective assistance. West v. State, 2012 Tex. App. LEXIS 3612, 2012 WL 1606239 (Tex. App. Houston 14th Dist. May 8 2012).

130. In a driving while intoxicated case, defendant failed to show that she received ineffective assistance of counsel based on a failure to make certain evidentiary objections; defendant did not file a motion for a new trial or otherwise develop a record concerning the motives behind trial counsel's decision not to make objections. Because

speculation would have been required, counsel's actions were presumed to be within the wide range of reasonable and professional assistance. Egerton v. State, 2009 Tex. App. LEXIS 4848, 2009 WL 1815772 (Tex. App. Fort Worth June 25 2009).

131. In a case where defendant was convicted under Tex. Penal Code Ann. § 33.021(b), there was no ineffective assistance of counsel because a trial court would not have erred by admitting an exhibit showing pictures of scantily clad children that defendant was purportedly viewing at a library over a proper specific objection made by defense counsel; defense counsel had merely objected based on an improper predicate. It was evident from a librarian's testimony that the photographs were the product of a reliable system, pursuant to Tex. R. Evid. 901(b)(9), and the proof was sufficient to demonstrate that the challenged exhibit was what its proponent claimed it to be under Tex. R. Evid. 901(a). Brier v. State, 2009 Tex. App. LEXIS 3749, 2009 WL 998638 (Tex. App. Tyler Apr. 15 2009).

132. In an aggravated assault case, defendant failed to show that she received ineffective assistance of counsel based on a failure to make certain objections; the record was silent as to trial counsel's reasoning or strategy, and an appellate court was unable to speculate on such. Even if an objection would have been proper during voir dire based on comments made about the burden of proof, defendant failed to rebut the strong presumption that the failure to object was strategic; moreover, she did not show that the trial court would have committed error in failing to sustain an objection to cross-examination conducted during the punishment phase of the trial. Zachery v. State, 2009 Tex. App. LEXIS 356, 2009 WL 136915 (Tex. App. Houston 14th Dist. Jan. 20 2009).

133. In the punishment phase of a murder trial, counsel was not rendered ineffective by failing to preserve an expert witness's testimony under Tex. R. Evid. 103 once the trial court prohibited the expert witness from testifying; counsel's brief description complied with the requirements to preserve the testimony for appellate review. Johnson v. State, 233 S.W.3d 109, 2007 Tex. App. LEXIS 6010 (Tex. App. Houston 14th Dist. 2007).

Criminal Law & Procedure : Counsel : Right to Counsel : General Overview

134. Defendant failed to preserve an argument that it was error, at the punishment phase of a trial for intoxication manslaughter, to admit evidence of gang affiliation. Defendant's argument on appeal that it violated the Sixth Amendment to admit photographs of his tattoos did not comport with his argument at trial, as required under Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(a)(1), that it violated the Sixth Amendment to admit statements resulting from a police interview. Ruiz v. State, 2010 Tex. App. LEXIS 3666 (Tex. App. Houston 1st Dist. May 13 2010).

Criminal Law & Procedure : Juries & Jurors : Jury Questions to the Court : Procedures

135. Because the record was silent as to whether appellant objected to the trial court's response to the jury's second note regarding deadlock to "keep deliberating", it was presumed that the trial court complied with Tex. Code Crim. Proc. art. 36.27 regarding communications with the jury; by failing to timely object to the trial court's written response to the jury to "keep deliberating" as required by Tex. R. App. P. 33.1(a)(1), appellant failed to preserve his claim that the response was unduly coercive. Hartman v. State, 2010 Tex. App. LEXIS 6569, 2010 WL 3193565 (Tex. App. Fort Worth Aug. 12 2010).

Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury : Weight of the Evidence

136. Defendant failed to preserve for review her claim that the trial court made two improper comments on the weight of the evidence because she failed to object to either comment during the trial. The alleged error was not fundamental because the trial court's comments suggested only that defense counsel was attempting to broach a subject that the court had previously and repeatedly instructed the parties to avoid and the trial court believed a

defense witness's testimony was a "diatribe." Wyatt v. State, 2012 Tex. App. LEXIS 1308, 2012 WL 512654 (Tex. App. Austin Feb. 16 2012).

Criminal Law & Procedure : Juries & Jurors : Voir Dire : General Overview

137. In an aggravated assault case, defendant waived an error relating to a trial court's comments during voir dire because no objection was made, as required by Tex. R. App. P. 33.1; there was no fundamental error allowing review because the burden of proof discussed in voir dire did not differ from the jury-charge instructions. Moreover, the comments in this case did not rise to the level set forth by the plurality in Blue v. State, 41 S.W.3d 129 (Tex. Crim. App. 2000), because they did not taint defendant's presumption of innocence in front of the venire or vitiate the impartiality of the jury. Zachery v. State, 2009 Tex. App. LEXIS 356, 2009 WL 136915 (Tex. App. Houston 14th Dist. Jan. 20 2009).

138. Defendant failed to preserve for appellate review his claim that that the State's introduction of photographs depicting defendant with his hands shackled and bagged behind him because the record showed that the photographs were admitted without objection. Diaz v. State, 2007 Tex. App. LEXIS 8904 (Tex. App. Houston 1st Dist. Nov. 8 2007).

139. Because a trial judge's qualification of a venire panel in a case involving capital murder and serious bodily injury to a child did not vitiate the presumption of innocence, a failure to object at trial meant nothing was preserved for appellate review under Tex. R. App. P. 33.1; there was no fundamental error affecting substantial rights under Tex. R. Evid. 103. Mason v. State, 237 S.W.3d 800, 2007 Tex. App. LEXIS 7451 (Tex. App. Waco 2007).

140. Under Tex. R. App. P. 33.1, defendant waived his argument that the trial court's comment during voir dire was so prejudicial that he was deprived of a fair and impartial trial. There was no fundamental error under Tex. R. Evid. 103(d) that would excuse the waiver because the trial court properly instructed the jury that it could not consider a defendant's refusal to testify for any purpose. Vargas v. State, 2005 Tex. App. LEXIS 4626 (Tex. App. Eastland June 16 2005).

Criminal Law & Procedure : Juries & Jurors : Voir Dire : Appellate Review

141. Where defendant failed to object during voir dire that the trial court incorrectly described the State's burden of proof, he waived his complaints on appeal under Tex. R. App. P. 33.1(a)(1) and Tex. R. Evid. 103(d), unless there was fundamental error. There was no fundamental error when the trial court commented that jurors would know reasonable doubt when they saw it or that proof necessary to satisfy a juror beyond a reasonable doubt was "whatever it means to you." Meadows v. State, 2010 Tex. App. LEXIS 5874, 2010 WL 2874199 (Tex. App. Houston 1st Dist. July 22 2010).

142. Judge's comments in a trial for prostitution under Tex. Penal Code Ann. § 43.02 did not rise to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury, as required for review under Tex. R. Evid. 103(d). The comments--that the judge had about 7,000 prostitutions cases in 22 years and that prostitution was not a victimless offense--were made while qualifying jurors during voir dire and in the context of explaining that regardless of their personal feelings, jurors had to follow the law. Mclean v. State, 312 S.W.3d 912, 2010 Tex. App. LEXIS 537 (Tex. App. Houston 1st Dist. Jan. 28 2010).

Criminal Law & Procedure : Juries & Jurors : Voir Dire : Individual Voir Dire

143. Defendant failed to preserve for appellate review his contention that the trial court abused its discretion by limiting his voir dire examination of a veniremember because he did not object to the trial court's ruling. Samaripas v. State, 446 S.W.3d 1, 2013 Tex. App. LEXIS 430, 2013 WL 178137 (Tex. App. Corpus Christi Jan. 17 2013).

Criminal Law & Procedure : Juries & Jurors : Voir Dire : Judicial Discretion

144. Although defendant failed to make a timely objection to comments by the court during voir dire, as required by Tex. R. App. P. 33.1(a)(1), the court reviewed the comments for fundamental error under Tex. R. Evid. 103 and found none. Brown v. State, 2011 Tex. App. LEXIS 5300, 2011 WL 2714117 (Tex. App. El Paso July 13 2011).

Criminal Law & Procedure : Trials : Closing Arguments : General Overview

145. Defendant's objections at trial--that the prosecutor's remarks constituted "argument" and "interpretation of evidence"--did not preserve a complaint on appeal focused on whether the argument shifted the burden of proof and violated defendant's right to the presumption of innocence. Under Tex. R. Evid. 103(d), defendant was required to object unless the rights were either waivable only or an absolute systemic requirement. Reyes v. State, 2010 Tex. App. LEXIS 2359, 2010 WL 1254543 (Tex. App. Corpus Christi Apr. 1 2010).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

146. In a stalking case, defendant's bill of exception arguing that testimony about the complainant's conduct should have been admitted because it would have gone to the weight, reliability, and credibility of the complainant was not specific enough to preserve a confrontation argument under Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(1), (2). Armelin v. State, 2006 Tex. App. LEXIS 8680 (Tex. App. Houston 14th Dist. Oct. 3 2006).

147. In a kidnapping case, defendant waived a confrontation issue under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a) by failing to raise the issue below. Wright v. State, 2005 Tex. App. LEXIS 5261 (Tex. App. Austin July 8 2005).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : General Overview

148. Because defendant failed to object before or during trial, as required by Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(d), he did not preserve his argument that it was error to admit his recorded statement because he invoked his right to counsel twice near the beginning of the statement. Welch v. State, 2011 Tex. App. LEXIS 2692, 2011 WL 1364970 (Tex. App. Texarkana Apr. 12 2011).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Fair Trial

149. Defendant failed to preserve for review, as required under Tex. R. App. P. 33, his claims that the trial court abandoned its role as a neutral arbiter and thereby denied defendant his right to a fair trial, as he failed to show that he was prejudiced and that the fundamental error doctrine applied under Tex. R. Evid. 103; the trial court was permitted to question a witness to clarify defendant's misstatement of the witness's testimony, it was permitted to intervene under Tex. R. Evid. 611 by asking the State for objections to defendant's questioning; the trial court's insistence that defendant ask a witness relevant questions did not translate into an indication of the judge's views about defendant's guilt or innocence. Bogany v. State, 2007 Tex. App. LEXIS 10074 (Tex. App. Houston 1st Dist. Dec. 20 2007).

150. Even though defense counsel did not object when the trial court told the jury at the outset of the trial that defendant seriously considered entering into a plea agreement and that he would have preferred that the defendant

plead guilty, under Tex. R. Evid. 103(d) the appellate court was authorized to take notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court, and the trial court's statements were plain error warranting reversal of defendant's conviction and remand. Blue v. State, 41 S.W.3d 129, 2000 Tex. Crim. App. LEXIS 113 (Tex. Crim. App. 2000), criticized by Rabago v. State, 75 S.W.3d 561, 2002 Tex. App. LEXIS 1828 (Tex. App. San Antonio 2002).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Remain Silent : General Overview

151. In an aggravated robbery case, defendant's failure to object waived error under Tex. R. App. P. 33.1(a), Tex. R. Evid. 103 as to the admission of testimony that defendant, after he was advised of his rights, chose not to give a statement and invoked his right to counsel; although the use of defendant's silence and invocation of his right to counsel as evidence of guilt was constitutionally impermissible and was prohibited by Tex. Code Crim. Proc. Ann. art. 38.38, the error was not fundamental error under Tex. R. Evid. 103(d). Morales v. State, 2005 Tex. App. LEXIS 3359 (Tex. App. San Antonio May 4 2005).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Remain Silent

152. Although defendant argued that the prosecutor should not have been allowed to instruct the jury panel to consider her body language, if defendant chose not to testify at trial, defendant did not make any of her complaints on appeal in the trial court, and the prosecutor's comments did not amount to fundamental error. Nothing in the record suggested the prosecutor manifestly intended to comment on defendant's failure to testify, and the typical jury would not have naturally and necessarily understood the prosecutor's comment to refer to defendant's failure to testify. Floyd v. State, 2011 Tex. App. LEXIS 6656, 2011 WL 3667746 (Tex. App. Corpus Christi Aug. 22 2011).

153. In the absence of a timely and specific objection, defendant's claim that trial court erred in allowing testimony to be presented that may have amounted to a comment on his right to remain silent was not preserved for review. Perales v. State, 2006 Tex. App. LEXIS 5829 (Tex. App. Corpus Christi July 6 2006).

154. Defendant waived any error in the prosecutor's comments on the invocation of his right to counsel and right to remain silent by failing to object to this line of questioning. The error was not preversed for review. Rivera v. State, 2005 Tex. App. LEXIS 5459 (Tex. App. Corpus Christi July 14 2005).

155. Because defendant did not object to an officer's testimony that defendant would not provide a statement at the scene of an aggravated assault without an attorney being present, he did not preserve this issue for review under Tex. R. Evid. 103(a)(1). Testimonial references to a defendant's pre-arrest silence and his pre-arrest invocation of the right to counsel do not constitute fundamental error. McCullough v. State, 2005 Tex. App. LEXIS 2253 (Tex. App. Waco Mar. 23 2005).

156. Pursuant to Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(a)(1), defendant did not preserve error on his claims that the trial court erred in allowing the State to refer to his post-arrest silence in violation of Tex. Const. art. I, § 10 due to: (1) the lack of time-specific questions by the State; (2) counsel's failure to cite to the state constitution, or even specify that he was objecting to post-arrest silence; and (3) the lack of commentary by the trial court in making its rulings on the objections. There was no indication in the record that the trial court understood that defendant was trying to invoke a protection different from the U.S. Const. amend. V protection which he was citing. Heidelberg v. State, 144 S.W.3d 535, 2004 Tex. Crim. App. LEXIS 1479 (Tex. Crim. App. 2004).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Remain Silent : Self-Incrimination Privilege

157. Defendant waived an argument that the complainant commented on defendant's state of mind, allegedly violating defendant's right not to testify, because defendant's argument at trial--that the complainant was not a credible witness--did not comport with the argument on appeal, as required by Tex. R. Evid. 103 and Tex. R. App. P. 33.1. Blue v. State, 2010 Tex. App. LEXIS 3056 (Tex. App. Houston 14th Dist. Apr. 27 2010).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

158. In a driving while intoxicated case, defendant failed to preserve error as to cross-examining the arresting officer about his own driving record because defendant failed to make an offer of proof. Because the court did not know what the officer's response to the question would have been, it could not review the complaint. Bridges v. State, 2011 Tex. App. LEXIS 9104, 2011 WL 5557534 (Tex. App. Dallas Nov. 16 2011).

159. Defendant failed to preserve an argument that evidence was improperly excluded by imposing an arbitrary time limit on his cross-examination; counsel failed to make an offer of proof in the form of a concise and specific summary of testimony to be elicited, as required by Tex. R. Evid. 103. Garner v. State, 2011 Tex. App. LEXIS 5991, 2011 WL 3278533 (Tex. App. Dallas Aug. 2 2011).

160. Defendant did not preserve an argument that cross-examination should have been allowed as to a witness's intoxication role in the charged offense because the substance of the evidence was not made known to the trial court by offer of proof, as required by Tex. R. Evid. 103. Reyes v. State, 2010 Tex. App. LEXIS 2359, 2010 WL 1254543 (Tex. App. Corpus Christi Apr. 1 2010).

161. Trial court properly sustained the State's objection that defendant was presenting jury argument during his cross-examination of a police officer because defendant's statement, "I'd like for the jury to note that," was not the equivalent of a "let the record reflect" statement, and there was simply no indication, as defendant argued, that he was attempting, during his cross-examination of the officer, to have the record reflect some observable, but non-verbal, incident that was occurring in the courtroom; even if defendant had been trying to have the record reflect a non-verbal event, he did not properly preserve his complaint for appeal pursuant to Tex. R. Evid. 103 because at no time did he object or indicate to the trial court that he wanted to preserve a complaint for appeal regarding some non-verbal event occurring in the courtroom, and there was no indication in the record or in defendant's arguments contained in his brief what evidence he claimed was improperly excluded, and it also was not apparent from the context within which defendant asked questions what evidence was improperly excluded. Cordova v. State, 2007 Tex. App. LEXIS 9457 (Tex. App. San Antonio Dec. 5 2007).

162. In a trial for driving while intoxicated, defendant preserved the argument that it was a deprivation of the right to present a defense when the trial court denied the right to cross-examine experts on the underlying science that supported a particular breath-testing machine; counsel adequately showed, as required by Tex. R. Evid. 103, that evidence sought through cross-examination related to the contention that the machine did not adequately control or correlate the actual (as opposed to presumed) temperature of the breath of the person tested in calculating breath-alcohol content; it was apparent from the record that counsel and the court both understood the broad picture of the questions counsel sought to propound and the line of questioning upon which the arguments were based. Woodall v. State, 216 S.W.3d 530, 2007 Tex. App. LEXIS 1304 (Tex. App. Texarkana 2007).

163. Defendant challenged the trial court's refusal to allow cross-examination of the complainant concerning withdrawals she made from defendant's bank account after his arrest and her history of mental health problems; defendant argued that the cross-examination was relevant to show the complainant's motive to have him arrested, credibility, and ability to process information; however, because the record contained no offer of proof or bill of exceptions containing the substance of the excluded cross-examination testimony, pursuant to Tex. R. Evid. 103, defendant's complaint presented nothing for the appellate court's review. Carranza v. State, 2006 Tex. App. LEXIS

10137 (Tex. App. Houston 14th Dist. Nov. 28 2006).

164. Murder defendant failed to make an offer of proof showing the substance of cross-examination evidence that he alleged was improperly excluded; he therefore waived his arguments that he should have been given greater latitude in conducting a cross-examination to develop the witness's bias from her prolonged detention at the hands of the State and that he should have been allowed to cross-examine the witness about her drug use. Headley v. State, 2004 Tex. App. LEXIS 5104 (Tex. App. Houston 1st Dist. June 10 2004).

Criminal Law & Procedure : Trials : Judicial Discretion

165. Under the principles of Tex. R. Evid. 103(d), the court of appeals reviewed a murder defendant's argument that the trial court's comments created a hostile environment, even though the prosecution argued that the issue was inadequately briefed and that defendant did not preserve error. Lozano v. State, 2006 Tex. App. LEXIS 9439 (Tex. App. Corpus Christi Oct. 26 2006).

Criminal Law & Procedure : Trials : Motions for Mistrial

166. It was not error to deny defendant's mistrial motion based on a prosecutor allegedly eliciting testimony that defendant was in jail before trial because (1) the testimony was not objected to in a timely manner, as no objection was lodged until after defense counsel asked the witness several follow-up questions, rather than when the witness gave the testimony at issue, (2) the testimony did not create fundamental error, and (3) it was presumed that the jury followed an instruction not to infer defendant's guilt from the testimony. Johnson v. State, 2013 Tex. App. LEXIS 4524 (Tex. App. Beaumont Apr. 10 2013).

167. Court rejected defendant's contention that the trial court abused its discretion in denying his motion for a mistrial based on jury misconduct, specifically, a juror sleeping during the trial. Defendant's argument was not properly preserved for appellate review because the only item before the trial court on the motion for mistrial was the statement of defendant's trial counsel. Trial counsel's statement that a juror was sleeping presented no evidence of the matter. It was incumbent upon defendant's trial counsel to develop the record for the trial court in order to clarify which specific juror counsel was referencing and to determine if that juror was sleeping. Thieleman v. State, 2004 Tex. App. LEXIS 8833 (Tex. App. Fort Worth Sept. 30 2004).

Criminal Law & Procedure : Witnesses : General Overview

168. Motion to cross-examine the State's breath-test expert about the operation of the Intoxilyzer 5000 was not preserved for review because defendant failed to establish that the general subject matter of his proffered evidence would be used to impeach the expert, and not the substance of the expert's testimony as required by Tex. R. Evid. 103(a)(2). When the defense attorney failed to "perfect a bill" or to make a statement of what he would prove, as he told the trial court he would do, he failed to satisfy Rule 103(a)(2); counsel's statements were not a reasonably specific summary of the evidence offered. Holmes v. State, 323 S.W.3d 163, 2009 Tex. Crim. App. LEXIS 522 (Tex. Crim. App. 2009).

Criminal Law & Procedure : Witnesses : Impeachment

169. Any error in the exclusion of evidence of a complainant's mental health for impeachment purposes was not preserved for review because defendant did not make an offer of proof or a bill of exception or otherwise indicate what the excluded evidence would have shown, as required by Tex. R. Evid. 103. Campbell v. State, 2008 Tex. App. LEXIS 1707 (Tex. App. Eastland Mar. 6 2008).

Criminal Law & Procedure : Defenses : Self-Defense

170. In an assault trial arising from a bar fight, it was error under Tex. R. Evid. 404(b) to exclude evidence of a prior violent act by the victim because there was evidence that the victim was the first aggressor. The error did not require reversal under Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b) because the excluded testimony did not have a substantial effect on the rejection of defendant's self-defense claim, given that defendant did not attempt to retreat but pulled a knife during a physical altercation and stabbed the unarmed victim, who did not not use deadly force. Dudzik v. State, 276 S.W.3d 554, 2008 Tex. App. LEXIS 9073 (Tex. App. Waco 2008).

171. Where appellant and the victim shot each other, the victim died, appellant asserted self-defense, and the witnesses disagreed as to whether the victim or appellant shot first, appellant's conviction of murder in violation of Tex. Penal Code Ann. § 19.02 was affirmed because (1) the evidence as to why appellant was afraid of the victim was irrelevant under the provisions of Tex. R. Evid. 404(a), (b) because the victim's conduct of flashing his gun and shooting first were unambiguous acts of aggression and violence, (2) appellant failed to properly preserve error under Tex. R. Evid. 103(a)(1), Tex. R. App. P. 33.1(a)(1)(A), to the admission of evidence of his gang membership under Tex. R. Evid. 403, and (3) impeachment of the witness under Tex. R. Evid. 609(a) was proper because the witness created a false impression with the jury as to the extent of his arrests and convictions. Reyna v. State, 99 S.W.3d 344, 2003 Tex. App. LEXIS 1391 (Tex. App. Fort Worth 2003).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence

172. Objection to the admissibility of evidence under the first sentence of Tex. Code Crim. Proc. Ann. art. 38.23 is not a prerequisite to the right to a jury instruction regarding a disputed factual issue under the second sentence of Tex. Code Crim. Proc. Ann. art. 38.23 because a defendant may, but is not required to, object to the admission of evidence as well as make a request for a Tex. Code Crim. Proc. Ann. art. 38.23 jury instruction; even when the defendant affirmatively states that he has no objection to the admission of certain evidence, he may still be entitled to a Tex. Code Crim. Proc. Ann. art. 38.23 jury instruction because the admissibility of evidence and the jury's consideration of that evidence are not necessarily linked together. Holmes v. State, 248 S.W.3d 194, 2008 Tex. Crim. App. LEXIS 327 (Tex. Crim. App. 2008).

Criminal Law & Procedure : Sentencing : Appeals : Appealability

173. To the extent a victim testified at the punishment phase about defendant's "actual" intentions, as opposed to what she thought his intentions were, objection to the testimony was waived by failure to object. Rustin v. State, 2013 Tex. App. LEXIS 6523 (Tex. App. Dallas May 29 2013).

Criminal Law & Procedure : Sentencing : Appeals : Proportionality & Reasonableness Review

174. Disproportionate sentencing issue was not fundamental error; therefore the issue was waived by failing to object. Walton v. State, 2013 Tex. App. LEXIS 14759, 2013 WL 6405478 (Tex. App. Houston 14th Dist. Dec. 5 2013).

Criminal Law & Procedure : Sentencing : Corrections, Modifications & Reductions : Illegal Sentences

175. In defendant's drug and robbery case, given that defendant's sentence was not illegal, the complaints that defendant asserted for the first time on appeal were not so fundamental as to have relieved him of the necessity of a timely, specific trial objection. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

Criminal Law & Procedure : Sentencing : Cruel & Unusual Punishment

176. Where defendant pleaded guilty to two indictments for aggravated sexual assault of a child, he contended that his 50-year sentences constituted cruel and unusual punishment. Defendant never objected to the alleged disproportionality of his sentences either in the trial court or in a post-trial motion; in the absence of plain error, his argument was not preserved for review. Chevis v. State, 2007 Tex. App. LEXIS 1573 (Tex. App. Houston 1st Dist. Mar. 1 2007).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History : Prior Felonies

177. Defendant failed to preserve for review his argument that a judgment offered to prove a sentencing enhancement was void. Trial counsel specifically stated that he had no objection to the admission of the judgment. Pool v. State, 2005 Tex. App. LEXIS 7235 (Tex. App. Fort Worth Aug. 31 2005).

Criminal Law & Procedure : Sentencing : Imposition : General Overview

178. Appellant was not denied due process at sentencing because he failed to object to the judge's statement that he would not consider probation under the provisions of Tex. R. Evid. 103(a). Teixeira v. State, 89 S.W.3d 190, 2002 Tex. App. LEXIS 6980 (Tex. App. Texarkana 2002).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

179. Where defendant was convicted of aggravated assault with a deadly weapon, he was not harmed by the admission of evidence of a prior sexual assault during the punishment phase even though he had been acquitted of the offense. The jury was presented with defendant's lengthy and varied criminal history and threats against the victim; the admission of the prior sexual assault evidence did not influence the jury verdict. Benner v. State, 2006 Tex. App. LEXIS 2977 (Tex. App. Waco Apr. 12 2006).

180. In defendant's aggravated sexual assault of a child case, a court did not err in the sentencing phase, by admitting a videotape depicting him engaging in sexual activity with an unidentified adult female where the State's attempt to establish defendant's character for sexual depravity was a legitimate purpose for permitting the videotape to be shown. Moreover, even if the trial court committed error in permitting the videotape to be played to the jury, the record did not necessarily establish that defendant suffered harm from its admission; as a result of a prior felony conviction, the applicable punishment range for the conviction for indecency with a child was enhanced to the range of 5 to 99 years or life. Chambers v. State, 2004 Tex. App. LEXIS 2693 (Tex. App. Eastland Mar. 25 2004).

Criminal Law & Procedure : Sentencing : Presentence Reports

181. Defendant forfeited his complaint for review regarding his right to have counsel present when a probation officer questioned him during preparation of the presentence report (PSI) because the rights he complained of were not systemic or absolute rights, and he failed to object to the PSI when it was considered by the trial court. Reyes v. State, 361 S.W.3d 222, 2012 Tex. App. LEXIS 1085, 2012 WL 407439 (Tex. App. Fort Worth Feb. 9 2012).

182. In order to procedurally perfect for an appellate court's review a trial court's consideration of a presentence report (PSI) that is obtained in alleged violation of a defendant's Fifth Amendment, U.S. Const. amend. V, right against self-incrimination; his Tex. Const. art. I, § 10 right to counsel; and his Sixth Amendment, U.S. Const. amend. VI, right to have counsel present when a probation officer questions him during preparation of the PSI, the defendant must object to the trial court's consideration of the PSI when it is considered by the trial court. Reyes v. State, 361 S.W.3d 222, 2012 Tex. App. LEXIS 1085, 2012 WL 407439 (Tex. App. Fort Worth Feb. 9 2012).

Criminal Law & Procedure : Sentencing : Restitution

183. In a criminal prosecution for arson where defendant did not specifically object to the admissibility of the State's evidence on the issue of restitution, the evidentiary question was not preserved for appellate review. However, defendant's claim that the restitution order lacked a sufficient factual basis was perserved without objection. Drilling v. State, 2005 Tex. App. LEXIS 1509 (Tex. App. Waco Feb. 23 2005).

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

184. Defendant failed to preserve error on his complaint regarding failure to hold an evidentiary hearing on his motion for new trial because, at no point during the hearing did counsel inform the court that defendant had additional information to provide to the court, defendant never attempted to introduce the affidavits into evidence and never indicated to the trial court that he desired to examine the prosecutor or have co-counsel from the trial testify. When the trial court ruled on the motion for new trial, counsel thanked the trial court without notifying the court that defendant had additional evidence to present. Boyce v. State, 2010 Tex. App. LEXIS 504, 2009 WL 5549302 (Tex. App. Beaumont Jan. 27 2010).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview

185. In a civil commitment case involving a sexually violent predator, an alleged error relating to a decision to allow experts to testify regarding a patient's truthfulness was not preserved for appellate review because it did not appear that he made an objection at trial. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

186. In a case involving the civil commitment of a sexually violent predator, because a patient did not object or request an instruction to disregard with respect to his complaints on appeal about hearsay or undue prejudice in relation to expert testimony, the error was not preserved for appellate review. The patient argued that the testimony from one expert exceeded the scope of a limiting instruction, and that another expert's testimony about the effect of his offenses on the victims had no probative value regarding the diagnosis of the patient's mental condition and was not related to a prediction of future dangerousness. In re Bocanegra, 2013 Tex. App. LEXIS 844 (Tex. App. Beaumont Jan. 31 2013).

187. In a case involving the civil commitment of a sexual predator, a patient failed to preserve an error under Tex. R. Evid. 403 relating to the details of his offenses because he did not object and obtain an adverse ruling each time the complained-of evidence was presented or obtain a running objection to the evidence; the patient did not waive error by waiting until the evidence was repeated to complain that it was prejudicial because it was needlessly cumulative. Even if the patient had preserved error regarding the experts' discussion of the details of the offenses, there was no unfair prejudice under Rule 403; the evidence assisted the jury in weighing each expert's testimony and opinion that each expert offered regarding the ultimate issue in the case. In re Ford, 2012 Tex. App. LEXIS 2221, 2012 WL 983323 (Tex. App. Beaumont Mar. 22 2012).

Criminal Law & Procedure : Appeals : Procedures : Briefs

188. In a murder trial, defendant failed to preserve error, under Tex. R. App. P. 33, to the expert testimony of a medical examiner and the forensic firearms and tool marks examiner; the court declined to review the issue under Tex. R. Evid. 103, in part because defendant made no attempt to comply wit Tex. R. App. P. 38 by providing authority wherein courts had found the same or similar testimony to have been fundamentally erroneous, or to have caused egregious harm to a defendant. Mendoza v. State, 2007 Tex. App. LEXIS 10011 (Tex. App. San Antonio

Dec. 28 2007).

189. In a murder case, defendant's brief, which lacked citation to authority and argument, was inadequate under Tex. R. App. P. 38.1(h) to support a claim of fundamental error under Tex. R. Evid. 103(d). Boler v. State, 177 S.W.3d 366, 2005 Tex. App. LEXIS 2719 (Tex. App. Houston 1st Dist. 2005).

190. In a drunk driving case, under Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a), defendant waived his objection to the admission of allegedly uncertified copies of judgments because his point of error on appeal did not comport with his trial court objection. Singer v. State, 2004 Tex. App. LEXIS 11712 (Tex. App. Houston 1st Dist. Dec. 23 2004).

Criminal Law & Procedure : Appeals : Procedures : Records on Appeal

191. Appellate court could not determine whether the trial court abused its discretion by excluding documents published by the United States government relating to immigration because the publication was marked for appellate purposes and was not in the record and defense counsel did not explain what the benefits were or how they were relevant to show any bias or motive to testify on the part of the witness. Guerrero v. State, 2011 Tex. App. LEXIS 4219, 2011 WL 2176825 (Tex. App. Austin June 3 2011).

192. Appellate court was unable to review the transcript of an alleged telephone conversation between defendant and his wife because it was never marked for appellate review and was not in the record, and defense counsel did not explain what was said during the conversation or how it was relevant to the case. Guerrero v. State, 2011 Tex. App. LEXIS 4219, 2011 WL 2176825 (Tex. App. Austin June 3 2011).

193. In a prosecution of defendant juvenile for felony murder, the court of appeals had no basis for reviewing defendant's contention that the trial court erred in excluding a defense exhibit in the absence of a bill of exception or offer of proof. In re E.B.M., 2005 Tex. App. LEXIS 7255 (Tex. App. Fort Worth Aug. 31 2005).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

194. Because defendant did not object to an officer's testimony that defendant would not provide a statement at the scene of an aggravated assault without an attorney being present, he did not preserve this issue for review under Tex. R. Evid. 103(a)(1). Testimonial references to a defendant's pre-arrest silence and his pre-arrest invocation of the right to counsel do not constitute fundamental error. McCullough v. State, 2005 Tex. App. LEXIS 2253 (Tex. App. Waco Mar. 23 2005).

195. In defendant's capital murder case, a court did not err by informing the jury that it had overruled defendant's objection to the State's attempt to offer defendant's grand jury testimony, which had occurred outside the jury's presence where the trial judge's explanation was not a comment on the weight of the evidence, and it did not rise to the level of fundamental error because the judge did not express an opinion on the weight of evidence. Martinez v. State, 147 S.W.3d 412, 2004 Tex. App. LEXIS 2897 (Tex. App. Tyler 2004), *cert. denied*, 131 S. Ct. 3073, 180 L. Ed. 2d 896, 2011 U.S. LEXIS 4930 (2011).

196. In defendant's aggravated sexual assault of a child case, a court did not err in the sentencing phase, by admitting a videotape depicting him engaging in sexual activity with an unidentified adult female where the State's attempt to establish defendant's character for sexual depravity was a legitimate purpose for permitting the videotape to be shown. Moreover, even if the trial court committed error in permitting the videotape to be played to the jury, the record did not necessarily establish that defendant suffered harm from its admission; as a result of a prior felony conviction, the applicable punishment range for the conviction for indecency with a child was enhanced

to the range of 5 to 99 years or life. Chambers v. State, 2004 Tex. App. LEXIS 2693 (Tex. App. Eastland Mar. 25 2004).

Criminal Law & Procedure : Appeals : Reversible Errors : Prosecutorial Misconduct

197. Defendant failed to preserve error on his contention that the State committed prosecutorial misconduct by eliciting testimony suggesting that defendant stole the gun because defendant objected only at the beginning of the witness's testimony but did not object to the remainder. Defendant objected to admission of the testimony on relevancy grounds, but did not assert that introduction of the allegedly irrelevant testimony constituted prosecutorial misconduct warranting a mistrial. Thibodeaux v. State, 2009 Tex. App. LEXIS 4964, 2009 WL 1748747 (Tex. App. Houston 14th Dist. June 23 2009).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

198. Defendant failed to preserve for appellate review his claim that that the State's introduction of photographs depicting defendant with his hands shackled and bagged behind him because the record showed that the photographs were admitted without objection. Diaz v. State, 2007 Tex. App. LEXIS 8904 (Tex. App. Houston 1st Dist. Nov. 8 2007).

199. Because a trial judge's qualification of a venire panel in a case involving capital murder and serious bodily injury to a child did not vitiate the presumption of innocence, a failure to object at trial meant nothing was preserved for appellate review under Tex. R. App. P. 33.1; there was no fundamental error affecting substantial rights under Tex. R. Evid. 103. Mason v. State, 237 S.W.3d 800, 2007 Tex. App. LEXIS 7451 (Tex. App. Waco 2007).

200. When the trial court granted defendant's motion to suppress evidence and excluded evidence of a second blood sample taken from defendant after an automobile accident, the State could not rely on Tex. R. Evid. 103 and merely make the substance of the evidence known to the trial court in order to preserve all issues for appeal, pursuant to Tex. R. App. P. 33; just as a defendant would be required to do, the State was required to raise all issues with the trial court or they would be forfeited on appeal. State v. Neesley, 196 S.W.3d 356, 2006 Tex. App. LEXIS 4873 (Tex. App. Houston 1st Dist. 2006).

201. Defendant failed to properly object to evidence that was admitted at trial concerning unindicted aggravated robberies, even though he filed a motion in limine, because he failed to make objections under Tex. R. Evid. 404(b) when the evidence was admitted at trial. Ashford v. State, 2006 Tex. App. LEXIS 2770 (Tex. App. Fort Worth Apr. 6 2006).

202. Defendant preserved his complaint that a witness's outcry statement was insufficient for failure to describe an act for which he was indicted because defendant objected that the summary of the witness's testimony was insufficient and that the witness had indicated that she was going to testify to substantially more than the summary provided. Klein v. State, 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

203. In a child sexual abuse case, because there was no offer of proof, defendant did not preserve, under Tex. R. App. P. 33 and Tex. R. Evid. 103(a)(2), a complaint that the trial court erroneously excluded evidence of the bias of a witness. Vega v. State, 2006 Tex. App. LEXIS 1513 (Tex. App. Houston 1st Dist. Feb. 23 2006).

204. By not objecting, defendant failed to preserve error regarding admission of a 911 call tape. Bailey v. State, 2006 Tex. App. LEXIS 1267 (Tex. App. Houston 14th Dist. Feb. 16 2006).

205. In a trial for driving while intoxicated, defendant forfeited his arguments that his blood test results were improperly admitted under Tex. R. Evid. 403 and that he was entitled to an instruction under Tex. R. Evid. 105(a). Although defendant objected when a blood-draw kit was offered into evidence, he failed to object when the report with the blood-test results was offered. Walker v. State, 2006 Tex. App. LEXIS 1328 (Tex. App. Fort Worth Feb. 16 2006).

206. In a capital murder case, although Tex. R. Evid. 103(a)(1) did not require a trial objection to the same evidence after the denial of a motion to suppress, defendant's challenge to the admissibility of oral statements was not preserved for review because defendant's arguments at the suppression hearing dealt only with written statements. Higginbotham v. State, 2005 Tex. App. LEXIS 8184 (Tex. App. Texarkana Oct. 4 2005).

207. In a criminal trespass trial, defendant's complaint that an officer's testimony regarding his intoxication was inadmissible extraneous offense testimony was not preserved for review under Tex. R. App. P. 33.1(a)(1) and Tex. R. Evid. 103(a)(1) because defendant failed to object to the admission of other evidence relating to his intoxication. Jones v. State, 2005 Tex. App. LEXIS 8126 (Tex. App. Fort Worth Sept. 29 2005).

208. In a DWI trial, defendant forfeited his objection to laser radar gun evidence under Tex. R. App. P. 33.1(a)(1) and Tex. R. Evid. 103(a)(1) because he did not voice an objection to the officer's testimony regarding his use of the laser radar gun on defendant's vehicle until after the testimony was already in evidence and the officer was questioned on voir dire. Miley v. State, 2005 Tex. App. LEXIS 8132 (Tex. App. Fort Worth Sept. 29 2005).

209. In a criminal trial for aggravated sexual assault, the State gave notice of its intention to use evidence of extraneous offenses committed by defendant and the trial court admitted the evidence. Because defendant did not object on the ground that the State's notice was untimely, the issue was not preserved for review. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

210. Defendant failed to preserve error as to testimony that he had been imprisoned for eight years where he objected after the State's initial question but not to subsequent questioning, and never asked for a running objection or a hearing outside of the jury's presence. Wilson v. State, 2005 Tex. App. LEXIS 7663 (Tex. App. Fort Worth Sept. 15 2005).

211. Defendant failed to preserve for review his argument that a judgment offered to prove a sentencing enhancement was void. Trial counsel specifically stated that he had no objection to the admission of the judgment. Pool v. State, 2005 Tex. App. LEXIS 7235 (Tex. App. Fort Worth Aug. 31 2005).

212. Defense counsel's objection that a police officer was speaking of someone else's knowledge was sufficiently specific to preserve defendant's hearsay objection under Tex. R. App. P. 103(a)(1); however, where defense counsel cited a field manual entitled "Standardized Field and Sobriety Testing," and had the officer read aloud a portion of it that said a person whose eyes did not track together could be indicative of an injury, serious medical condition, or neurological disorder, the effect of the countervailing evidence introduced was negligible; therefore, error, if any, in the admission of the complained-of hearsay testimony was harmless. Werdlow v. State, 2005 Tex. App. LEXIS 6788 (Tex. App. Corpus Christi Aug. 22 2005).

213. Where defendant did not object to the admission of the officers' testimony regarding their knowledge of defendant's reputation in the community, the issue was not preserved for appeal. Smith v. State, 2005 Tex. App. LEXIS 6567 (Tex. App. Texarkana Aug. 18 2005).

214. In a drug and weapons possession case, defendant's objection to an officer's testimony regarding reported drug activities at his residence, made almost immediately thereafter, was timely and was sufficient to preserve error under Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a)(1). Summerville v. State, 2005 Tex. App. LEXIS 6773 (Tex. App. Fort Worth Aug. 18 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 9715 (Tex. App. Fort Worth Nov. 15, 2005).

215. Any error in excluding an audiotaped interview between a private investigator and a robbery complainant was preserved under Tex. R. Evid. 103(a)(2), even though the substance of the evidence was not made known to the court by offer of proof, because the substance of the evidence was apparent from the context within which questions were asked. Guerrero v. State, 2005 Tex. App. LEXIS 5734 (Tex. App. Houston 1st Dist. July 21 2005).

216. Defendant waived any error in the prosecutor's comments on the invocation of his right to counsel and right to remain silent by failing to object to this line of questioning. The error was not preversed for review. Rivera v. State, 2005 Tex. App. LEXIS 5459 (Tex. App. Corpus Christi July 14 2005).

217. In a kidnapping case, defendant waived a confrontation issue under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a) by failing to raise the issue below. Wright v. State, 2005 Tex. App. LEXIS 5261 (Tex. App. Austin July 8 2005).

218. Under Tex. R. App. P. 33.1, defendant waived his argument that the trial court's comment during voir dire was so prejudicial that he was deprived of a fair and impartial trial. There was no fundamental error under Tex. R. Evid. 103(d) that would excuse the waiver because the trial court properly instructed the jury that it could not consider a defendant's refusal to testify for any purpose. Vargas v. State, 2005 Tex. App. LEXIS 4626 (Tex. App. Eastland June 16 2005).

219. Defendant failed to preserve error concerning the admission of extraneous-offense evidence or an identification of defendant as the person who committed a robbery because he failed to object. The record did not contain a running objection or a ruling made outside the presence of the jury under Tex. R. Evid. 103(a)(1). Russell v. State, 2005 Tex. App. LEXIS 3703 (Tex. App. Texarkana May 13 2005).

220. In an aggravated robbery case, defendant's failure to object waived error under Tex. R. App. P. 33.1(a), Tex. R. Evid. 103 as to the admission of testimony that defendant, after he was advised of his rights, chose not to give a statement and invoked his right to counsel; although the use of defendant's silence and invocation of his right to counsel as evidence of guilt was constitutionally impermissible and was prohibited by Tex. Code Crim. Proc. Ann. art. 38.38, the error was not fundamental error under Tex. R. Evid. 103(d). Morales v. State, 2005 Tex. App. LEXIS 3359 (Tex. App. San Antonio May 4 2005).

221. In an aggravated robbery case, defendant's objection to his girlfriend's testimony that defendant had threatened to kill her by cutting her throat did not assert that it was inadmissible extraneous offense evidence because the threat was not sufficiently similar to the charged offense; hence, defendant could not raise that argument on appeal. Morales v. State, 2005 Tex. App. LEXIS 3359 (Tex. App. San Antonio May 4 2005).

222. Defendant's claim that her fundamental right to confrontation was violated by a trial court's sustaining of the State's objections during a witness's cross-examination was not preserved for appellate review pursuant to Tex. R. Evid. 103(a)(2) because defendant had failed to make an offer of proof and had failed to demonstrate how the substance of the excluded evidence was apparent from the context within which questions were asked. Furthermore, defendant never asserted to the trial court that any of the constitutional rights she complained of in the appeal were violated by the trial court's ruling that sustained the State's objections. Bergman v. State, 2005 Tex.

App. LEXIS 3046 (Tex. App. Houston 1st Dist. Apr. 21 2005).

223. Because defendant complained only generally at trial of his "right to remain silent," without any further assertions concerning his rights to post-arrest silence under either Tex. Const. art. I, § 10 or the Sanchez case, defendant's trial objection was not sufficient to make the trial court aware of his complaint, as required by Tex. R. Evid. 103(a)(1). Moreover, the specific grounds of defendant's complaint were not apparent from the context under Tex. R. App. P. 33.1(a)(1)(A). Cleveland v. State, 177 S.W.3d 374, 2005 Tex. App. LEXIS 2726 (Tex. App. Houston 1st Dist. 2005), cert. denied 126 S. Ct. 1774, 164 L. Ed. 2d 523, 2006 U.S. LEXIS 3222, 74 U.S.L.W. 3585 (U.S. 2006).

224. In a criminal prosecution for arson where defendant did not specifically object to the admissibility of the State's evidence on the issue of restitution, the evidentiary question was not preserved for appellate review. However, defendant's claim that the restitution order lacked a sufficient factual basis was perserved without objection. Drilling v. State, 2005 Tex. App. LEXIS 1509 (Tex. App. Waco Feb. 23 2005).

225. In a murder case, defendant did not preserve his complaint about excluded evidence because he did not make an offer of proof as to the purported meaning of the victim's tattoos, nor demonstrate that the medical examiner had knowledge on the subject. Moore v. State, 2005 Tex. App. LEXIS 1130 (Tex. App. Houston 1st Dist. Feb. 10 2005).

226. Murder defendant did not preserve for review an argument that his witness should have been allowed to testify that the deceased had attacked the witness with a knife. Defendant did not offer the evidence or obtain a ruling on his offer of proof, and the record did not show the substance of the testimony from the context within which the questions were asked. Denoso v. State, 156 S.W.3d 166, 2005 Tex. App. LEXIS 878 (Tex. App. Corpus Christi 2005).

227. In defendant's murder trial, photos were excluded from evidence showing a large pool of blood outside of the victim's motel room; defendant attempted to argue on appeal that these photos were relevant to show that defendant acted in self-defense. Nevertheless, defendant failed to make this argument to the trial court, and he failed to make an offer of of proof; therefore, he failed to preserve the alleged error. Kennedy v. State, 2005 Tex. App. LEXIS 897 (Tex. App. Fort Worth Feb. 3 2005), opinion withdrawn by 2005 Tex. App. LEXIS 10469 (Tex. App. Fort Worth Dec. 16, 2005).

228. Where excluded evidence was not apparent from the record and since defendant failed to make an offer of proof, the appellate court could not determine whether the evidence was relevant to a defensive issue, nor could it ascertain whether the error, if any, was harmful. Gallardo v. State, 2005 Tex. App. LEXIS 913 (Tex. App. El Paso Feb. 3 2005).

229. In a trial for defendant's murder of her child, defendant failed to preserve her argument that the trial court improperly excluded evidence regarding her relationships, which she failed to pursue after being overruled as to the admissibility of her placement in a drug treatment program. She also did not make the required offer of proof regarding that testimony, as well as regarding excluded character evidence, and defendant's testimony regarding her relationship with her other children. Burke v. State, 2005 Tex. App. LEXIS 198 (Tex. App. Houston 14th Dist. Jan. 11 2005).

230. In a drunk driving case, under Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a), defendant waived his objection to the admission of allegedly uncertified copies of judgments because his point of error on appeal did not comport with his trial court objection. Singer v. State, 2004 Tex. App. LEXIS 11712 (Tex. App. Houston 1st Dist.

Dec. 23 2004).

231. Defendant failed to preserve error in allowing witnesses to refer to him by his street nickname, "Thug." Although he objected outside the presence of the jury to the admission of his nickname through one witness's testimony, this objection only relieved him of having to reassert his objection while that particular witness testified. The objection did not preserve error as to other witnesses. Ross v. State, 154 S.W.3d 804, 2004 Tex. App. LEXIS 11407 (Tex. App. Houston 14th Dist. 2004).

232. Defendant on a charge of child sexual assault preserved error with regard to the admission of the victim's medical records during a hearing outside the presence of the jury in which the trial judge admitted the record and overruled the objections. Pursuant to Tex. R. Evid. 103(a)(1), defendant did not have to object again when the State asked a testifying witness to read the objectionable portion of the record. Perez v. State, 2004 Tex. App. LEXIS 11395 (Tex. App. Fort Worth Dec. 16 2004).

233. Defendant waived his complaint regarding an officer's testimony that she had known defendant since she first went to work for the police department because he did not object at trial. Dennis v. State, 151 S.W.3d 745, 2004 Tex. App. LEXIS 11296 (Tex. App. Amarillo 2004).

234. Defendant argued that the trial court improperly restricted his attempts to impeach a witness's testimony with a prior statement in which he said he saw the victim in the hallway with a shotgun just before he heard the fatal shot. The State properly responded that the witness's prior written statement was not in the record, and thus defendant had failed to preserve his complaint by making an offer of proof pursuant to Tex. R. Evid. 103. Lindsey v. State, 2004 Tex. App. LEXIS 11139 (Tex. App. Waco Dec. 8 2004).

235. In an aggravated kidnapping case, because no offers of proof were made, defendant failed to preserve error under Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(2) regarding the trial court's refusal to admit prior inconsistent videotaped statements and the exclusion of a defense witness' testimony. Kelly v. State, 2004 Tex. App. LEXIS 10492 (Tex. App. Beaumont Nov. 24 2004).

236. Although defendant did not raise the issue on appeal of whether a successfully completed community supervision sentence under Tex. Code Crim. Proc. Ann. art. 42.12, § 20(a) could be used to enhance a subsequent domestic assualt conviction, the appellate court had the authority to review the issue sus sponte. Comeaux v. State, 151 S.W.3d 710, 2004 Tex. App. LEXIS 10344 (Tex. App. Beaumont 2004).

237. Court rejected defendant's contention that the trial court abused its discretion in denying his motion for a mistrial based on jury misconduct, specifically, a juror sleeping during the trial. Defendant's argument was not properly preserved for appellate review because the only item before the trial court on the motion for mistrial was the statement of defendant's trial counsel. Trial counsel's statement that a juror was sleeping presented no evidence of the matter. It was incumbent upon defendant's trial counsel to develop the record for the trial court in order to clarify which specific juror counsel was referencing and to determine if that juror was sleeping. Thieleman v. State, 2004 Tex. App. LEXIS 8833 (Tex. App. Fort Worth Sept. 30 2004).

238. Pursuant to Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(a)(1), defendant did not preserve error on his claims that the trial court erred in allowing the State to refer to his post-arrest silence in violation of Tex. Const. art. I, § 10 due to: (1) the lack of time-specific questions by the State; (2) counsel's failure to cite to the state constitution, or even specify that he was objecting to post-arrest silence; and (3) the lack of commentary by the trial court in making its rulings on the objections. There was no indication in the record that the trial court understood that defendant was trying to invoke a protection different from the U.S. Const. amend. V protection which he was

citing. Heidelberg v. State, 144 S.W.3d 535, 2004 Tex. Crim. App. LEXIS 1479 (Tex. Crim. App. 2004).

239. In a criminal prosecution for aggravated sexual assault, defendant failed to preserve error in the trial court's decision to sustain the State's hearsay objections when he attempted to testify regarding statements the victim made to him, and defendant did not make a formal offer of proof concerning this proposed evidence. Butler v. State, 2004 Tex. App. LEXIS 6800 (Tex. App. Texarkana July 28 2004).

240. Trial court's exclusion of evidence concerning the lifestyle and the violent nature of the nephew, who was shot to death by defendant, could not be considered error on appeal, as defendant, who was charged with murder did not preserve the issue for review because defendant did not make an offer of proof of what the excluded evidence was and, thus, the appellate court was not left with anything to review in that regard. Goodwin v. State, 2004 Tex. App. LEXIS 6692 (Tex. App. Texarkana July 23 2004).

241. Where defendant failed to object to the admission of his statement to authorities regarding the credibility of his victim, he failed to preserve the issue for appellate review because none of the fundamental error categories included the admission or exclusion of evidence. Apolinar v. State, 2004 Tex. App. LEXIS 6025 (Tex. App. San Antonio July 7 2004).

242. Complaining party, to preserve a complaint that the trial court erroneously excluded evidence, had to bring forward a record indicating the nature of the evidence and if the excluded evidence was not apparent from the context of the record, it had to be brought forward either through a timely offer of proof or a formal bill of exception; absent a showing of what such testimony would have been, nothing was presented for review, such that although defendant sought to introduce the evidence three times, he did not make an offer of proof regarding what the witnesses would say about the couple's relationship, how that would affect his defense, or how it would assist the jury in its deliberations. Because he made no offer of proof at the time of his objections, defendant waived his right to appeal this issue. Novillo v. State, 2004 Tex. App. LEXIS 5086 (Tex. App. Austin June 10 2004).

243. In a criminal prosecution for aggravated sexual assault, where the State offered defendant's statement into evidence without objection, no error was preserved for appellate review. Carter v. State, 2004 Tex. App. LEXIS 4901 (Tex. App. Amarillo May 28 2004).

244. In a child sexual abuse case, defendant waived an objection to the participation of co-counsel for the State because the objection was not made as soon as the basis for it became apparent, as required by Tex. R. Evid. 103(a)(1). Gardner v. State, 2004 Tex. App. LEXIS 4822 (Tex. App. Fort Worth May 27 2004), affirmed by 164 S.W.3d 393, 2005 Tex. Crim. App. LEXIS 703 (Tex. Crim. App. 2005).

245. In defendant's driving while intoxicated case, defendant's "amended" motion to suppress was not brought to the trial court's attention until after the State had rested its case during the guilt-innocence stage of the trial. By that time, the intoxilyzer operator had testified extensively about defendant's refusal, and because her motion to suppress on the additional ground was not timely, defendant did not preserve error on that issue. Boles v. State, 2004 Tex. App. LEXIS 3193 (Tex. App. Fort Worth Apr. 8 2004).

246. In defendant's drug and robbery case, given that defendant's sentence was not illegal, the complaints that defendant asserted for the first time on appeal were not so fundamental as to have relieved him of the necessity of a timely, specific trial objection. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

247. Where appellant and the victim shot each other, the victim died, appellant asserted self-defense, and the witnesses disagreed as to whether the victim or appellant shot first, appellant's conviction of murder in violation of Tex. Penal Code Ann. § 19.02 was affirmed because (1) the evidence as to why appellant was afraid of the victim was irrelevant under the provisions of Tex. R. Evid. 404(a), (b) because the victim's conduct of flashing his gun and shooting first were unambiguous acts of aggression and violence, (2) appellant failed to properly preserve error under Tex. R. Evid. 103(a)(1), Tex. R. App. P. 33.1(a)(1)(A), to the admission of evidence of his gang membership under Tex. R. Evid. 403, and (3) impeachment of the witness under Tex. R. Evid. 609(a) was proper because the witness created a false impression with the jury as to the extent of his arrests and convictions. Reyna v. State, 99 S.W.3d 344, 2003 Tex. App. LEXIS 1391 (Tex. App. Fort Worth 2003).

248. Under Tex. R. Evid. 103(a)(2), an offer of proof was required to preserve error in the trial court's exclusion of part of a defense witness's testimony where the relevant matters the defense was attempting to prove by the testimony were not apparent from the context of the questioning. Railsback v. State, 95 S.W.3d 473, 2002 Tex. App. LEXIS 8492 (Tex. App. Houston 1st Dist. 2002).

249. Defendant failed to preserve his claim that a trial court violated Tex. Code Crim. Proc. Ann. art. 38.22 by admitting into evidence, in defendant's trial for aggravated assault under Tex. Penal Code Ann. § 22.02, an incriminating statement made by defendant to a police officer after defendant was arrested and before he was given any Miranda warnings; because defendant did not raise his objections before the officer testified as to the statement or obtain an adverse ruling thereon as required by Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(1), the officer thereafter repeated the statement without objection, and defendant's trial objection was made under Tex. Code Crim. Proc. Ann. art. 38.21 rather than Tex. Code Crim. Proc. Ann. art. 38.22. Camarillo v. State, 82 S.W.3d 529, 2002 Tex. App. LEXIS 3228 (Tex. App. Austin 2002).

250. Even though defense counsel did not object when the trial court told the jury at the outset of the trial that defendant seriously considered entering into a plea agreement and that he would have preferred that the defendant plead guilty, under Tex. R. Evid. 103(d) the appellate court was authorized to take notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court, and the trial court's statements were plain error warranting reversal of defendant's conviction and remand. Blue v. State, 41 S.W.3d 129, 2000 Tex. Crim. App. LEXIS 113 (Tex. Crim. App. 2000), criticized by Rabago v. State, 75 S.W.3d 561, 2002 Tex. App. LEXIS 1828 (Tex. App. San Antonio 2002).

251. Under Tex. R. Evid. 103(a)(2), defendant failed to preserve for review her claim that the trial court erred by refusing her request to take the stand under the limited use doctrine to testify about the voluntariness of her confession, where the record was devoid of any reference to what, if anything, defendant would have testified to. Greenwood v. State, 948 S.W.2d 542, 1997 Tex. App. LEXIS 3616 (Tex. App. Fort Worth 1997).

252. Defendant's claim that the trial court improperly communicated his opinion on the merits of the case to the jury in which he pointed to seven specific comments made by the trial court was waived because defendant lodged no objection to any comment, either during the trial or in his motion for a new trial, and without an objection pointing out the error to the trial court, noting was preserved for review under former Tex. R. App. P. 52(a). Mireles v. State, 1997 Tex. App. LEXIS 2179 (Tex. App. Corpus Christi Apr. 24 1997).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Constitutional Issues

253. Defendant failed to preserve a complaint regarding the trial court's limitation of cross-examination and consequential exclusion of evidence because counsel did not lodge any complaint in the trial court concerning the denial of the right of confrontation or the exclusion of evidence. Gerik v. State, 2014 Tex. App. LEXIS 1446, 2014 WL 546033 (Tex. App. Amarillo Feb. 10 2014).

254. Defendant failed to preserve an argument that evidentiary rulings would violate his federal constitutional rights because he failed to alert the trial court to the argument; he did not argue that the constitutional rights relied on were immune from procedural default. Rodriguez v. State, 368 S.W.3d 821, 2012 Tex. App. LEXIS 3913, 2012 WL 1744248 (Tex. App. Houston 14th Dist. May 17 2012).

255. When defendant was convicted for cruelty to an animal under Tex. Penal Code Ann. § 42.092(b)(3), he urged the jury to consider his religious beliefs but he never argued to the court or requested a ruling on the constitutionality of the statute; his claim that the animal cruelty statute violated the First Amendment was not preserved for review under Tex. R. Evid. 103(a)(1). Myers v. State, 2011 Tex. App. LEXIS 5665, 2011 WL 2989944 (Tex. App. Fort Worth July 21 2011).

256. During defendant's trial for several counts of aggravated robbery, he failed to make a Confrontation-Clause objection to portions of the detective's testimony relating what a declarant told him about defendant's involvement in the crimes; while defendant was not given an opportunity to cross-examine the declarant, he waived his right to challenge the admission of the testimony by failing to object as required by Tex. R. Evid. 103. Vidal v. State, 2007 Tex. App. LEXIS 6339 (Tex. App. Austin Aug. 10 2007).

257. Under the principles of Tex. R. Evid. 103(d), the court of appeals reviewed a murder defendant's argument that the trial court's comments created a hostile environment, even though the prosecution argued that the issue was inadequately briefed and that defendant did not preserve error. Lozano v. State, 2006 Tex. App. LEXIS 9439 (Tex. App. Corpus Christi Oct. 26 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

258. Defendant failed to preserve a complaint regarding the trial court's limitation of cross-examination and consequential exclusion of evidence because counsel did not lodge any complaint in the trial court concerning the denial of the right of confrontation or the exclusion of evidence. Gerik v. State, 2014 Tex. App. LEXIS 1446, 2014 WL 546033 (Tex. App. Amarillo Feb. 10 2014).

259. Defendant did not preserve error as to the exclusion of the police report he offered during his cross-examination of an officer because defendant objected to the admission of the report unless he was allowed to examine the witness about the report before the State questioned him. Tesi v. State, 2014 Tex. App. LEXIS 294, 2014 WL 70084 (Tex. App. Fort Worth Jan. 9 2014).

260. At defendant's DWI trial, the court did not deny his rights under the Sixth Amendment by limiting his cross-examination of the State's witness who was a former breath test technical advisor; without the substance of the proffered evidence, defendant's bill of exception failed to preserve his complaint for appellate review. Balderama v. State, 421 S.W.3d 247, 2013 Tex. App. LEXIS 15133, 2013 WL 6637703 (Tex. App. San Antonio Dec. 18 2013).

261. Any error associated with the admission of testimony of an informant and a sheriff's investigator establishing that defendant purchased methamphetamine from a dealer and then re-sold the methamphetamine to others, including the informant, was cured because the complained-of evidence was admitted elsewhere without objection. Alexander v. State, 2013 Tex. App. LEXIS 13562, 2013 WL 5888695 (Tex. App. Waco Oct. 31 2013).

262. Defendant failed to preserve for appellate review his contention that the trial court erred by denying his motion to suppress on the ground that the officer lacked reasonable suspicion to justify the traffic stop because he did not file a pretrial motion to suppress and he did not object before or during the State's case-in-chief to the admissibility of any evidence the officers obtained after the stop. Sample v. State, 405 S.W.3d 295, 2013 Tex. App.

LEXIS 7288 (Tex. App. Fort Worth June 13 2013).

263. At defendant's trial for failure to comply with sex offender registration requirements, the trial court did not abuse its discretion by overruling his objections to the admission of evidence of an extraneous bad act under Tex. R. Evid. 404(b); because his objection in the trial court pertained to lack of adequate notice, his complaint that the evidence in question constituted improper pattern evidence was not preserved for appellate review under Tex. R. App. P. 33.1(a); Tex. R. Evid. 103(a). Hogan v. State, 2013 Tex. App. LEXIS 6706 (Tex. App. Dallas May 30 2013).

264. Even if the trial court erred by admitting testimony from defendant's husband regarding the victim's violent history, the error was harmless because other testimony in the record showed the victim's past violent behavior. To the extent that defendant's argument on appeal was that she should have been allowed to present additional evidence of defendant's violent past, defendant did not preserve error to make that showing. Lopez v. State, 2013 Tex. App. LEXIS 4661 (Tex. App. Fort Worth Apr. 11 2013).

265. Defendant's contention that the trial court erred when it admitted his statement to detectives on the ground that it was not voluntary due to his intoxication was not preserved for appellate review because his objections at trial were not sufficiently specific to inform the trial court that the basis of his objections was involuntariness due to intoxication. Maden v. State, 2013 Tex. App. LEXIS 2619, 2013 WL 1049040 (Tex. App. Amarillo Mar. 13 2013).

266. Defendant's contention that the trial court erred when it admitted his telephone conversation with his wife recorded while he was detained a a police department holding facility on the ground that it violated the Texas wiretapping statute, Tex. Penal Code Ann. § 16.02(b)(1), was not preserved for appellate review because he made no mention of the wiretapping statute or any other Texas statutory provision in his objection to the admission of the recording. Maden v. State, 2013 Tex. App. LEXIS 2619, 2013 WL 1049040 (Tex. App. Amarillo Mar. 13 2013).

267. Even if the trial court erred by admitting into evidence a witness's testimony that defendant had been trying to send someone to harm him and his family, any error was cured when the same type of evidence concerning witnesses' fear of defendant was admitted elsewhere without objection, both before and after the complained-of testimony. Prior to the complained-of testimony, a co-defendant testified that he did not want to tell authorities about defendant's involvement in the offense because "snitches get stitches," and a second co-defendant testified that he gave three different statements to the police because he feared that defendant would harm his family in retaliation; after the complained-of testimony, defendant's ex-wife testified without objection that she came forward with what she knew about defendant's involvement because she feared that defendant would harm her because she no longer wanted to be involved with him. Brown v. State, 2013 Tex. App. LEXIS 1058, 2013 WL 476764 (Tex. App. Beaumont Feb. 6 2013).

268. On appeal of defendant's conviction for aggravated robbery, he claimed the trial court abused its discretion when it refused to allow the defense to cross-examine a witness regarding his criminal history; because defendant made no offer of proof regarding the underlying facts of the witness's conviction that he wanted to explore, the issue was not preserved for review under Tex. R. Evid. 103; Tex. R. App. P. 33.1. Henson v. State, 2013 Tex. App. LEXIS 974, 2013 WL 396015 (Tex. App. Houston 14th Dist. Jan. 31 2013).

269. Defendant preserved for review her argument that the trial court erred in admitting into evidence her fourth recorded interview with the officer, because in her motion to suppress, defendant expressly argued that she was either under arrest or substantially deprived of freedom by the attendant conduct of said law enforcement officers and the surrounding circumstances. Nelson v. State, 405 S.W.3d 113, 2013 Tex. App. LEXIS 377, 2013 WL 174502 (Tex. App. Houston 1st Dist. Jan. 17 2013).

270. Because defendant failed to make an offer of proof under Tex. R. Evid. 103 detailing what the excluded evidence would have been, the appellate court had no basis for reviewing his contention that the trial court erred in excluding the testimony of defendant's wife about the relationship between defendant and his children. Smith v. State, 2012 Tex. App. LEXIS 9037 (Tex. App. El Paso Oct. 31 2012).

271. Defendant failed to preserve for review her claim that the trial court erred by excluding the testimony of her expert about approximate vehicle speeds based on "crush analysis" because the expert never stated what speeds she estimated the vehicles to be traveling, which would be crucial to understanding what testimony was excluded and whether the exclusion was harmful. Montgomery v. State, 383 S.W.3d 722, 2012 Tex. App. LEXIS 8491, 2012 WL 4829800 (Tex. App. Houston 14th Dist. Oct. 11 2012).

272. Defendant failed to preserve for review her claim that the trial court erred by excluding the expert's testimony about the angle of defendant's lane change because the court was unable to determine from the context what the expert would have said about the angle of defendant's vehicle. Montgomery v. State, 383 S.W.3d 722, 2012 Tex. App. LEXIS 8491, 2012 WL 4829800 (Tex. App. Houston 14th Dist. Oct. 11 2012).

273. Sex offender failed to preserve error regarding the exclusion of his designated expert as an expert witness because he had not shown that he made an offer of proof in the trial court that made the substance of the purported testimony by his designated expert known or that he perfected a bill of exception. In re Brown, 2012 Tex. App. LEXIS 8136, 2012 WL 4466348 (Tex. App. Beaumont Sept. 27 2012).

274. Defendant failed to preserve for appellate review his claim that the trial court erred by excluding an officer's opinion about whether an interviewer used leading questions in a recorded interview because defendant made no offer of proof or bill of exception containing the substance of the officer's excluded testimony. Myles v. State, 2012 Tex. App. LEXIS 4911, 2012 WL 2357426 (Tex. App. Houston 1st Dist. June 21 2012).

275. Defendant failed to make an offer of proof regarding any other mental afflictions suffered by the informant, and therefore he failed to preserve them for review. Dowden v. State, 2012 Tex. App. LEXIS 3584, 2012 WL 1605234 (Tex. App. Texarkana May 8 2012).

276. Defendant's motion in limine and argument on the issue outside the presence of the jury adequately preserved for review his objections to evidence regarding his membership in the Aryan Brotherhood gang without the need to object to testimony as it came in or to obtain a continuing objection. Guffey v. State, 2012 Tex. App. LEXIS 3293, 2012 WL 1470185 (Tex. App. Eastland Apr. 26 2012).

277. In defendant's trial for indecency with a child, defendant failed to preserve his objection to an expert's testimony that false accusations had occurred in about 2 percent of the cases he had been involved in because, after he objected to the initial question posed to the expert, the State rephrased its question and defendant did not object to the rephrased question. Smikal v. State, 2012 Tex. App. LEXIS 2904, 2012 WL 1259127 (Tex. App. Corpus Christi Apr. 12 2012).

278. Defendant's contention that the trial court erred by limiting the scope of cross-examination of the child victim and refusing to admit into evidence two affidavits signed by the victim was not preserved for appellate review because defendant failed to make either a formal bill of exceptions or request permission to make an informal offer of proof and therefore the court had no idea what the victim would have testified to and whether she would have denied making the statements in the affidavits. Duke v. State, 365 S.W.3d 722, 2012 Tex. App. LEXIS 2376, 2012 WL 1005069 (Tex. App. Texarkana Mar. 27 2012).

279. Defendant's claim that her right of confrontation was violated by the trial court limiting her cross-examination during her theft trial presented nothing for review, because the record contained no offer of proof under Tex. R. Evid. 103(a) identifying the substance of the excluded testimony. Huff v. State, 2012 Tex. App. LEXIS 1079, 2012 WL 401047 (Tex. App. Dallas Feb. 9 2012).

280. Blood-test evidence concerning defendant's accident did not affect his substantial rights during the punishment phase of trial and even if the admission of the evidence in the absence of objection was fundamental error that survived the lack of preservation, its admission was harmless, because defendant pled guilty to four counts of intoxication manslaughter and two counts of intoxication assault, so the only issue was the length of the sentence, and the testimonial and photographic evidence admitted at the punishment phase, combined with the tragic loss of four lives and severe injuries to others, was compelling regarding the nature of the accident and the crimes. Looschen v. State, 2011 Tex. App. LEXIS 10257, 2011 WL 6938516 (Tex. App. Austin Dec. 29 2011).

281. Defendant failed to preserve the trial court's alleged error in excluding her proposed testimony about prior acts of abuse by the boyfriend, because the substance of the excluded testimony was not apparent from the context and defendant made no offer of proof. Ellis v. State, 2011 Tex. App. LEXIS 9821 (Tex. App. Houston 14th Dist. Dec. 15 2011).

282. Defendant failed to preserve an argument that the trial court erred not allowing him to make a formal bill of exception in question and answer form because defendant first stated he wanted to make a "lawyer's offer of proof" and then requested to make an offer in question and answer format at "the Court's discretion." Armstrong v. State, 2011 Tex. App. LEXIS 9760, 2011 WL 6188608 (Tex. App. Dallas Dec. 14 2011).

283. Defendant convicted of capital murder following the death of a restaurant employee during a robbery failed to preserve his claim that the trial court erred by excluding a co-conspirator's opinion that defendant could not have anticipated the murder. Defendant did not make an offer of proof as required by Tex. R. Evid. 103(a)(2). Barton v. State, 2011 Tex. App. LEXIS 9229, 2011 WL 5846300 (Tex. App. Houston 14th Dist. Nov. 22 2011).

284. Defendant failed to preserve for review his assertion that the trial court erred by admitting an audio-video recording containing portions of his grand jury testimony, because defendant never lodged any complaints regarding self-incrimination, and when the State offered the redacted recording of defendant's grand jury testimony, defendant objected solely on grounds of optional completeness. Lewis v. State, 2011 Tex. App. LEXIS 6987, 2011 WL 3925633 (Tex. App. Beaumont Aug. 24 2011).

285. Objection under Tex. R. Evid. 404, 405 did not preserve defendant's complaints under Tex. R. Evid. 401, 403 regarding evidence of his gang affiliation, as required by Tex. R. App. P. 33.1(a); Tex. R. Evid. 103(a)(1). Martin v. State, 2011 Tex. App. LEXIS 5624, 2011 WL 2937423 (Tex. App. Corpus Christi July 21 2011).

286. Defendant failed to preserve for appellate review his contention that the trial court erred by denying his motion to suppress because when the State presented the testimony of the officers who had entered defendant's apartment, defense counsel did not object or re-urge his motion to suppress. Clark v. State, 2011 Tex. App. LEXIS 5160, 2011 WL 2651902 (Tex. App. Austin July 8 2011).

287. Defendant convicted of owning an adult arcade without a permit did not offer evidence on the primary-business defense or the effect of the 50/50 rule during trial and made an untimely offer of proof after the jury charge was read; therefore, any error in excluding the evidence was not preserved for review under Tex. R. Evid. 103. Ethridge v. State, 2011 Tex. App. LEXIS 4780, 2011 WL 2502542 (Tex. App. Houston 1st Dist. June 23 2011).

288. Appellate court could not determine whether the trial court abused its discretion by excluding documents published by the United States government relating to immigration because the publication was marked for appellate purposes and was not in the record and defense counsel did not explain what the benefits were or how they were relevant to show any bias or motive to testify on the part of the witness. Guerrero v. State, 2011 Tex. App. LEXIS 4219, 2011 WL 2176825 (Tex. App. Austin June 3 2011).

289. Appellate court was unable to review the transcript of an alleged telephone conversation between defendant and his wife because it was never marked for appellate review and was not in the record, and defense counsel did not explain what was said during the conversation or how it was relevant to the case. Guerrero v. State, 2011 Tex. App. LEXIS 4219, 2011 WL 2176825 (Tex. App. Austin June 3 2011).

290. Appellate counsel's conclusion that an "optional completeness" argument had not been properly preserved for state appellate review was an objectively reasonable deduction because the specificity required by Tex. R. Evid. 103 and Tex. R. App. P. 33.1(a) was lacking; nothing in the exchanges between petitioner inmate's trial counsel and the state trial court reasonably alerted the state trial court that the inmate was suggesting a detective should be permitted to testify to the clearly hearsay within hearsay details of a witness's written statement based upon the Texas Rule of Optional Completeness found in Tex. R. Evid. 107. Hernandez v. Thaler, 787 F. Supp. 2d 504, 2011 U.S. Dist. LEXIS 123538 (W.D. Tex. May 12 2011).

291. Pursuant to Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1, defendant convicted of driving while intoxicated (DWI), second offense, failed to preserve for appellate review his claim that the trial court erred in denying his motion for mistrial following publication to the jury of portions of an audio-video recording of the traffic stop that led to his arrest because the recording was admitted and played to the jury without timely objection. Even if defendant had not waived his objection, any error in the admission of the audio recording was harmless because: (1) the recording made only vague reference to an intoxication offense, rather than direct mention of any prior DWI conviction; (2) the audio that was the subject of defense counsel's objection was played only once in open court to the jury, an instruction to disregard was given by the trial court, and only a redacted version excluding the three complained-of references was sent back with the jury to watch during deliberations; (3) the record contained ample evidence to support the jury's finding that defendant was driving while intoxicated; and (4) the jury had the opportunity to view the recording of the traffic stop and defendant's behavior. Doucette v. State, 2011 Tex. App. LEXIS 1750, 2011 WL 832129 (Tex. App. Austin Mar. 9 2011).

292. When police officers responded to a domestic disturbance call at the residence of defendant and his wife, she told the officers that defendant had repeatedly struck her with a cane and held a gun to her head during an argument. At defendant's trial for assault, he did not object to the officers' testimony describing the discovery and seizure of the weapon as required by Tex. R. Evid. 103(a)(1) to preserve the issue; thus, under Tex. R. App. P. 33.1 he could not complain on appeal that the fact of his being armed was irrelevant or unfairly prejudicial. Smith v. State, 2011 Tex. App. LEXIS 859, 2011 WL 350434 (Tex. App. Austin Feb. 2 2011).

293. Admission of post-arrest statements by defendant, who was arrested for driving while intoxicated, that he was sorry and that he would not do it anymore could not be challenged as violating a suppression order because defendant failed to object to the evidence during trial as required by Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1). Jimenez v. State, 2011 Tex. App. LEXIS 194, 2011 WL 192701 (Tex. App. El Paso Jan. 12 2011).

294. On appeal of defendant's conviction for causing serious bodily injury to a child, he claimed the trial court erred by excluding defensive testimony relevant to his culpable mental state. Defendant failed to preserve this contention for review, because he did not make an offer of proof under Tex. R. Evid. 103(a)(2). Ord v. State, 2010 Tex. App. LEXIS 9538, 2010 WL 4909951 (Tex. App. Austin Dec. 1 2010).

295. Defendant's contention that the trial court erred by denying his motion to suppress evidence seized following the traffic stop and his arrest was not preserved for appellate review because his argument, that the officer could not have had the requisite probable cause to believe that a traffic violation had occurred as the evidence showed that the action taken by defendant did not violate any Transportation Code requirements, was not raised until the hearing on defendant's motion for a new trial. Butler v. State, 2010 Tex. App. LEXIS 5646, 2010 WL 2836310 (Tex. App. Texarkana July 20 2010).

296. Defendant forfeited his complaints about the admission of evidence that was obtained from his car because he failed to obtain a pretrial hearing or ruling on his motion to suppress and because he allowed the detective to testify about the evidence extensively before objecting to the admission of the State's physical evidence. Ratliff v. State, 320 S.W.3d 857, 2010 Tex. App. LEXIS 5629 (Tex. App. Fort Worth July 15 2010).

297. Defendant failed to preserve for review his assertion that the trial court abused its discretion by overruling his objection to the marihuana exhibit, because defendant did not obtain a running objection, and when the State offered the report stating that the exhibit to which defendant had previously objected was marihuana, defendant affirmatively stated that he had no objection. Lara v. State, 2010 Tex. App. LEXIS 5640, 2010 WL 2813522 (Tex. App. Fort Worth July 15 2010).

298. On appeal of the judgment revoking defendant's community supervision, he argued that the trial court erred by excluding an affidavit from a witness who was unavailable to testify at trial. Because defendant did not offer the affidavit for record purposes or describe the substance of the affidavit to the trial court as required by Tex. R. Evid. 103(a)(2), the error was not preserved for appellate review. White v. State, 2010 Tex. App. LEXIS 4773 (Tex. App. Dallas June 24 2010).

299. Defendant failed to preserve error in the admission of evidence because he did not object in the trial court, as required by Tex. R. App. P. 33.1(a). The trial court's ruling on the admissibility of evidence did not constitute "fundamental error" under Tex. R. Evid. 103(d). Roberts v. State, 2010 Tex. App. LEXIS 2374, 2010 WL 1253564 (Tex. App. Austin Apr. 1 2010).

300. Counsel properly objected to the State's effort to call a witness in a murder case, and because that objection was addressed before trial, it did not have to be uttered during trial to remain preserved under Tex. R. Evid. 103(a)(1). Comparan v. State, 2010 Tex. App. LEXIS 1173, 2010 WL 597158 (Tex. App. Amarillo Feb. 18 2010).

301. Defendant failed to preserve for review his assertion that the trial court erred in excluding testimony from the clinical psychologist, because defendant waived the complaint when he failed to make an offer of proof. Hatcher v. State, 2010 Tex. App. LEXIS 362, 2010 WL 183521 (Tex. App. Houston 14th Dist. Jan. 21 2010).

302. Defendant failed to preserve his argument regarding unadjudicated offenses because, although defendant timely objected to the State's first line of questions pertaining to his unadjudicated offenses, defendant did not continue to object to the State's subsequent questions regarding the same unadjudicated offenses. Mccabe v. State, 2009 Tex. App. LEXIS 8828, 2009 WL 3823203 (Tex. App. Fort Worth Nov. 12 2009).

303. In a case involving unlawful possession of a firearm by a felon, defendant failed to preserve an error relating to the exclusion of evidence of his mental health treatment during the punishment phase of the trial. The trial court's indication that it was not going to allow testimony relating to competency proceedings did not relieve defendant of the responsibility of at least making an offer of proof and obtaining a ruling. Jackson v. State, 2009 Tex. App. LEXIS 7251, 2009 WL 3365880 (Tex. App. Houston 14th Dist. Sept. 10 2009).

304. Defendant's objection to extraneous offense evidence that four truckloads of stolen car parts were found at his house, along with evidence that he had purchased stolen car parts in the past, was preserved for appellate review because a bench conference conducted outside of the jury's presence provided the trial court the opportunity to consider the necessary factors and rule on the objection. Marban v. State, 2009 Tex. App. LEXIS 6760, 2009 WL 2618343 (Tex. App. Beaumont Aug. 26 2009).

305. In a driving while intoxicated case, because defendant did not present evidentiary complaints relating to the admission of a police officer's testimony and the results of a breath test to a trial court, they were not preserved for appellate review under Tex. R. App. P. 33.1(a)(1). Egerton v. State, 2009 Tex. App. LEXIS 4848, 2009 WL 1815772 (Tex. App. Fort Worth June 25 2009).

306. Defendant failed to preserve an argument regarding the omission of testimony because, although defense counsel explained to the trial court that defendant could testify as to an alleged prior stabbing or shooting, there was no offer of proof made as to defendant's testimony. Because the substance of the evidence sought to be admitted was not made known to the trial court, and was not apparent from the context, defendant failed to preserve the issue for appellate review. Martinez v. Texas, 2009 Tex. App. LEXIS 4837 (Tex. App. Corpus Christi June 25 2009).

307. In a driving while intoxicated case, defendant did not preserve an issue relating to extraneous offense evidence for appellate review under Tex. R. App. P. 33.1 because no objection was lodged; the record was replete with evidence of a homicide, its investigation, and a grand jury's return of a "no-bill" in favor of defendant. Vanderburgh v. State, 2009 Tex. App. LEXIS 4643, 2009 WL 1740053 (Tex. App. Fort Worth June 18 2009).

308. In defendant's murder case, defendant failed to preserve for review the exclusion of testimony regarding his state of mind because defense counsel did not provide the trial judge with a concise statement regarding the content of the testimony he proposed to elicit from defendant; instead, he merely informed the trial judge of his reason for asking the questions. Gobert v. State, 2009 Tex. App. LEXIS 4341, 2009 WL 1493036 (Tex. App. Houston 14th Dist. May 28 2009).

309. In a case involving aggravated sexual assault of a child under 14, defendant failed to preserve an alleged error relating to the granting of the State's motion in limine regarding the admission of a videotape because no offer of proof was made under Tex. R. Evid. 103(a)(2). Defendant wanted to offer the tape to rebut the alleged victim's claim that she was afraid of him. Luna v. State, 2009 Tex. App. LEXIS 1146, 2009 WL 400629 (Tex. App. Dallas Feb. 19 2009).

310. By failing to timely object, defendant waived, under Tex. R. Evid. 103 and Tex. R. App. P. 33.1, an argument that the right to the presumption of innocence was violated by a detective's testimony the detective would have taken a polygraph exam. Whatley v. State, 2009 Tex. App. LEXIS 556, 2009 WL 1607813 (Tex. App. Corpus Christi Jan. 29 2009).

311. In a robbery case, because defendant failed to offer evidence of the victim's voluntary manslaughter conviction at trial after the trial court granted the State's pretrial motion in limine to exclude evidence of the victim's voluntary manslaughter conviction, no error was preserved for appeal, as provided in Tex. R. Evid. 103. Windham v. State, 2008 Tex. App. LEXIS 2440 (Tex. App. Dallas Apr. 7 2008).

312. In the penalty phase following a guilty plea to manslaughter, defendant failed to preserve challenges to the State's use of the term "murder" because defendant failed to object, as required by Tex. R. App. P. 33, and the error was not fundamental under Tex. R. Evid. 103, given that the references were inadvertent. Stevens v. State, 2008 Tex. App. LEXIS 2331 (Tex. App. Dallas Apr. 3 2008).

313. Under Tex. R. Evid. 103 and Tex. R. App. P. 33, defendant failed to preserve an argument that the State improperly elicited testimony concerning alleged gang membership because defendant failed to identify the objectionable testimony in the record and did not even assert that defense counsel raised such an objection to the testimony. Marshal v. State, 2008 Tex. App. LEXIS 1411 (Tex. App. Houston 14th Dist. Feb. 28 2008).

314. During defendant's murder trial, he objected to a police officer's videotaped interview with a witness on Confrontation Clause grounds; on appeal, he claimed the trial court violated Tex. R. Evid. 613 by admitting the recording; because the objection at trial did not comport with the complaint on appeal, the error was not preserved for review under Tex. R. App. P. 33. Brandon v. State, 2007 Tex. App. LEXIS 8903 (Tex. App. Houston 1st Dist. Nov. 8 2007).

315. Defendant asserted that the trial court erred in admitting an expert's testimony because he was not qualified to testify as an expert and because his "backdoor opinion" that sex offenders were not capable of being cured violated Tex. R. Evid. 702; that argument was rejected, however, because defendant did not properly object and, therefore, failed to preserve the alleged error as required by Tex. R. Evid. 103 and Tex. R. App. P. 33. Ghahremani v. State, 2007 Tex. App. LEXIS 8584 (Tex. App. Houston 14th Dist. Oct. 30 2007).

316. Defendant did not preserve error under Tex. R. App. P. 33 and Tex. R. Evid. 103 as to the timeliness of the State's notice under Tex. R. Evid. 404 of its intent to introduce extraneous offense evidence in a child sexual abuse case because, although he raised the issue, he did not object to any specific testimony or obtain a ruling. Jared v. State, 2007 Tex. App. LEXIS 8448 (Tex. App. Fort Worth Oct. 25 2007).

317. Defendant's failure to make specific objections waived, under Tex. R. App. P. 33.1 and Tex. R. Evid. 103, the issues of hearsay in a police officer's testimony concerning an unsafe lane change and the lack of closing arguments; to the extent defendant's general objection to the officer's testimony could be construed as a more general contention that a conviction could not be based on hearsay evidence, Tex. R. Evid. 802 allows consideration of inadmissible hearsay admitted without objection. James v. State, 2007 Tex. App. LEXIS 7608 (Tex. App. Waco Sept. 19 2007).

318. Defendant was accused of severing a complainant's penis with a knife; defendant argued that her actions were in self-defense, and the trial court should have admitted certain evidence in that regard; defendant, however, failed to cite the rules and the statutes to the trial court under which she objected; therefore, defendant's argument was waived on appeal. Ruiz v. State, 2007 Tex. App. LEXIS 6208 (Tex. App. Houston 14th Dist. Aug. 7 2007).

319. In the punishment phase of a murder trial, counsel was not rendered ineffective by failing to preserve an expert witness's testimony under Tex. R. Evid. 103 once the trial court prohibited the expert witness from testifying; counsel's brief description complied with the requirements to preserve the testimony for appellate review. Johnson v. State, 233 S.W.3d 109, 2007 Tex. App. LEXIS 6010 (Tex. App. Houston 14th Dist. 2007).

320. Where defendant was convicted of murder, he failed to object to the trial court's admission of his written statement and opinion testimony from two police officers; because the admission of the evidence did not constitute fundamental error, the claims were not preserved for review. Stearns v. State, 2007 Tex. App. LEXIS 5910 (Tex. App. Corpus Christi July 26 2007).

321. Defendant preserved for appellate review his claim that the trial court erred in admitting impeachment evidence because the hearing outside the jury's presence preserved defendant's complaint. Lopez v. State, 230 S.W.3d 875, 2007 Tex. App. LEXIS 5695 (Tex. App. Eastland 2007).

322. The trial court correctly admitted statements made by the defendant to his polygraph examiner, finding that the statements were made voluntarily. Defendant never asserted his right to remain silent, and he was not the victim of such deception that his will was overborne; further, promises that the statements would only be heard by the examiner were unlikely to elicit false statements. Harty v. State, 229 S.W.3d 849, 2007 Tex. App. LEXIS 5404 (Tex. App. Texarkana 2007).

323. By failing to object, appellant juvenile failed to preserve his claim that he was not allowed a full cross-examination of the assault victim at the disposition hearing. In re J.L.C., 2007 Tex. App. LEXIS 3063 (Tex. App. Fort Worth Apr. 19 2007).

324. Trial court did not abuse its discretion in disallowing execution-impact testimony from members of appellant's family because appellant did not make an offer of proof conveying the substance of the proffered evidence and therefore failed to preserve the error. Roberts v. State, 220 S.W.3d 521, 2007 Tex. Crim. App. LEXIS 429 (Tex. Crim. App. 2007).

325. Because no offer of proof was made regarding testimony about previous problems in the police department crime laboratory and issues surrounding its re-certification and the record did not indicate what the excluded testimony would have been, defendant waived any error regarding the exclusion of that testimony, and nothing was presented for appellate review. Ruiz v. State, 2006 Tex. App. LEXIS 10318 (Tex. App. Houston 1st Dist. Nov. 30 2006).

326. Defendant did not preserve error under Tex. R. Evid. 103(a)(2), (b) and Tex. R. App. P. 33.2 as to the exclusion of evidence regarding other occupants of a house where drugs were found in her bedroom because she did not make an offer of proof. Smith v. State, 2006 Tex. App. LEXIS 8685 (Tex. App. Fort Worth Oct. 5 2006).

327. Defendant did not preserve error under Tex. R. Evid. 103 as to the testimony of a police officer who stated that the victims identified a witness as being present during an armed robbery; although defendant previously had objected to similar testimony from another officer, he did not obtain a running objection or object outside the jury's presence to all testimony regarding the victims' identification of the witness. Brown v. State, 2006 Tex. App. LEXIS 6859 (Tex. App. Houston 14th Dist. Aug. 1 2006).

328. Where defendant was convicted of possession of cocaine, he did not urge his motion to suppress until the close of the evidence and failed to object to the evidence at the first opportunity; he failed to preserve review of the trial court's denial of his motion to suppress. Alex v. State, 2006 Tex. App. LEXIS 4031 (Tex. App. Beaumont May 10 2006).

329. Defendant juvenile's complaint regarding the admissibility of his statment was preserved because the record as a whole indicated an understanding by the judge and counsel that the juvenile's counsel did not intend to forfeit the issue of admissibility of the statement by stating, "no objection," when it was offered at trial. In re X.J.T., 2014 Tex. App. LEXIS 2312, 2014 WL 787832 (Tex. App. Fort Worth Feb. 27 2014).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Exceptions to Failure to Object

330. It was not error to deny defendant's mistrial motion based on a prosecutor allegedly eliciting testimony that defendant was in jail before trial because (1) the testimony was not objected to in a timely manner, as no objection was lodged until after defense counsel asked the witness several follow-up questions, rather than when the witness gave the testimony at issue, (2) the testimony did not create fundamental error, and (3) it was presumed that the jury followed an instruction not to infer defendant's guilt from the testimony. Johnson v. State, 2013 Tex. App.

LEXIS 4524 (Tex. App. Beaumont Apr. 10 2013).

331. Under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(d), defendant did not show fundamental error where nothing in the record demonstrated that the witness's testimony was false; defendant's sentence was within the range of punishment and the witness testimony did not affect his sentence. Olivarez v. State, 2012 Tex. App. LEXIS 9253, 2012 WL 5458422 (Tex. App. Houston 1st Dist. Nov. 8 2012).

332. Where defendant entered a plea of true to intoxication manslaughter, defendant waived his claim that the presentation of evidence to the jury during sentencing violated his right to due process of law and equal protection of law. The fundamental error concept set forth in Tex. R. Evid. 103(d) did not apply. In re A.D., 2009 Tex. App. LEXIS 3985 (Tex. App. Texarkana May 15 2009).

333. In an aggravated assault case, defendant waived an error relating to a trial court's comments during voir dire because no objection was made, as required by Tex. R. App. P. 33.1; there was no fundamental error allowing review because the burden of proof discussed in voir dire did not differ from the jury-charge instructions. Moreover, the comments in this case did not rise to the level set forth by the plurality in Blue v. State, 41 S.W.3d 129 (Tex. Crim. App. 2000), because they did not taint defendant's presumption of innocence in front of the venire or vitiate the impartiality of the jury. Zachery v. State, 2009 Tex. App. LEXIS 356, 2009 WL 136915 (Tex. App. Houston 14th Dist. Jan. 20 2009).

334. Although defendant convicted of the felony offense of resisting arrest, for which he was sentenced to six years in prison pursuant to Tex. Penal Code Ann. § 38.03, claimed that the trial court erred by making an erroneous statement regarding the law of juror disqualification to the venire in violation of Tex. Code Crim. Proc. Ann. art. 35.16(a), Tex. Code Crim. Proc. Ann. art. 35.19 and Tex. Gov't Code Ann. § 62.102, the error, if any, was waived because defendant failed to assert any objection to the statement at trial; defendant did not argue that the trial court's alleged error was fundamental, that it bore upon the presumption of his innocence, that it vitiated the jury's impartiality, or that there was any other basis by which he might have been excused from preserving error pursuant to Tex. R. Evid. 103. Uribe v. State, 2008 Tex. App. LEXIS 1071 (Tex. App. Houston 1st Dist. Feb. 14 2008).

335. In an appeal from a marijuana conviction, the court reviewed the admission of the marijuana, even though defendant failed to object at the time that the evidence was admitted; under Tex. R. Evid. 103, defendant was not required to object to the admission of the marijuana in order to preserve error because the trial court heard the objection to the admission of the marijuana outside of the presence of the jury and admitted the evidence. Skinner v. State, 2006 Tex. App. LEXIS 5498 (Tex. App. Dallas June 28 2006).

336. Aggravated robbery conviction was affirmed because defendant did not object to the admission of the victim sympathy evidence, and the error, if any, in allowing the introduction of victim sympathy evidence was not fundamental error, when error in admitting evidence, even if constitutional rights were implicated, was neither systemic nor waivable-only, and thus was not fundamental. Connor v. State, 2006 Tex. App. LEXIS 4896 (Tex. App. Houston 1st Dist. June 8 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

337. Defendant convicted for possession of a controlled substance waived his challenge to the admission of evidence of methamphetamine discovered after a warrantless patdown search because he stated that he had no objection and did not raise his motion to suppress during trial. Jones v. State, 2014 Tex. App. LEXIS 9001 (Tex. App. Fort Worth Aug. 14 2014).

338. Defendant's objection, when it finally arrived, was too late to preserve the complaint; the prosecutor asked defendant a number of times if he thought the victim had lied, and defendant answered a number of times before he finally objected. Donato v. State, 2014 Tex. App. LEXIS 4698 (Tex. App. Fort Worth Apr. 30 2014).

339. Where defendant was convicted for failure to comply with sexual offender registration requirements, he failed to preserve review of the prosecutor's comment that he had previously been convicted of aggravated sexual assault of a child because he did not object each time the State presented evidence of, or commented on, his previous sexual assault conviction. Hargiss v. State, 2014 Tex. App. LEXIS 3103, 2014 WL 1087924 (Tex. App. Fort Worth Mar. 20 2014).

340. In a case involving the civil commitment of a sexually violent predator, because a patient did not object or request an instruction to disregard with respect to his complaints on appeal about hearsay or undue prejudice in relation to expert testimony, the error was not preserved for appellate review. The patient argued that the testimony from one expert exceeded the scope of a limiting instruction, and that another expert's testimony about the effect of his offenses on the victims had no probative value regarding the diagnosis of the patient's mental condition and was not related to a prediction of future dangerousness. In re Bocanegra, 2013 Tex. App. LEXIS 844 (Tex. App. Beaumont Jan. 31 2013).

341. Defendant failed to preserve for appellate review his contention that the trial court abused its discretion by limiting his voir dire examination of a veniremember because he did not object to the trial court's ruling. Samaripas v. State, 446 S.W.3d 1, 2013 Tex. App. LEXIS 430, 2013 WL 178137 (Tex. App. Corpus Christi Jan. 17 2013).

342. As to defendant's argument regarding the various, unspecified complaints about the confidential informant from people connected to the apartment building, the issue was not preserved for appellate review. Bolton v. State, 2012 Tex. App. LEXIS 9402, 2012 WL 5507404 (Tex. App. Texarkana Nov. 14 2012).

343. Under Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(a)(1), defendant did not renew his objection during the detective's testimony, nor did he make a new objection, or seek to renew the objection, during the testimony of the witnesses, or the State's closing argument; defendant preserved nothing for appellate review. Suiters v. State, 2012 Tex. App. LEXIS 8098, 2012 WL 4393391 (Tex. App. El Paso Sept. 26 2012).

344. Pursuant to Tex. R. App. P. 33.1(1)(1)(A) and Tex. R. Evid. 103(a)(1), defendant did not preserve for appellate review his arguments concerning his complaints regarding witness testimony, and he did not object when the witness testified to essentially the same facts as the detective's testimony. Suiters v. State, 2012 Tex. App. LEXIS 8099 (Tex. App. El Paso Sept. 26 2012).

345. Defendant failed to preserve his bolstering argument for appeal because his only objections to the admission of the sexual assault nurse examiner's testimony about the victim's statements were that it was hearsay and violated his rights to confront the complainant; defendant never complained to the trial court about the alleged bolstering effect of the testimony and therefore he failed to preserve error on that ground. Bowman v. State, 2012 Tex. App. LEXIS 5210, 2012 WL 2444908 (Tex. App. Dallas June 28 2012).

346. Defendant failed to preserve for review her claim that the trial court made two improper comments on the weight of the evidence because she failed to object to either comment during the trial. The alleged error was not fundamental because the trial court's comments suggested only that defense counsel was attempting to broach a subject that the court had previously and repeatedly instructed the parties to avoid and the trial court believed a defense witness's testimony was a "diatribe." Wyatt v. State, 2012 Tex. App. LEXIS 1308, 2012 WL 512654 (Tex. App. Austin Feb. 16 2012).

347. Defendant forfeited his complaint for review regarding his right to have counsel present when a probation officer questioned him during preparation of the presentence report (PSI) because the rights he complained of were not systemic or absolute rights, and he failed to object to the PSI when it was considered by the trial court. Reyes v. State, 361 S.W.3d 222, 2012 Tex. App. LEXIS 1085, 2012 WL 407439 (Tex. App. Fort Worth Feb. 9 2012).

348. In order to procedurally perfect for an appellate court's review a trial court's consideration of a presentence report (PSI) that is obtained in alleged violation of a defendant's Fifth Amendment, U.S. Const. amend. V, right against self-incrimination; his Tex. Const. art. I, § 10 right to counsel; and his Sixth Amendment, U.S. Const. amend. VI, right to have counsel present when a probation officer questions him during preparation of the PSI, the defendant must object to the trial court's consideration of the PSI when it is considered by the trial court. Reyes v. State, 361 S.W.3d 222, 2012 Tex. App. LEXIS 1085, 2012 WL 407439 (Tex. App. Fort Worth Feb. 9 2012).

349. Defendant waived error by failing to object to the trial court's comments on reasonable doubt during voir dire, because the comments did not rise to the level of fundamental error, when the comments did not taint the presumption of innocence. Haro v. State, 371 S.W.3d 262, 2011 Tex. App. LEXIS 10218, 2011 WL 6938530 (Tex. App. Houston 1st Dist. Dec. 29 2011).

350. Defendant forfeited her complaint about the evidence under Tex. R. App. P. 33.1(a) and the evidentiary complaints made by her were not fundamental under Tex. R. Evid. 103(d). Osborne v. State, 2011 Tex. App. LEXIS 9299, 2011 WL 5903651 (Tex. App. Fort Worth Nov. 23 2011).

351. Defendant neither filed a motion to suppress any evidence nor asserted an objection when the State offered the handgun into evidence; consequently, defendant failed to preserve this point for appellate review. Nero v. State, 2011 Tex. App. LEXIS 9039, 2011 WL 5515495 (Tex. App. Fort Worth Nov. 10 2011).

352. Any statements addressed to defendant were for the purpose of clarifying an issue before the court, that being rehabilitation, and the trial court maintained a neutral and detached role; thus, an objection was required. Williams v. State, 2011 Tex. App. LEXIS 8750, 2011 WL 5221263 (Tex. App. Waco Oct. 26 2011).

353. Defendant's "invading the province of the jury" amounted to no objection and did not preserve anything for appellate review, Tex. R. Evid. 103, Tex. R. App. P. 33.1. Contreras v. State, 2011 Tex. App. LEXIS 5891, 2011 WL 3273966 (Tex. App. Tyler July 29 2011).

354. Defendant did not preserve his claim that the court improperly permitted the officer to state his expert opinion that defendant was intoxicated for review because he did not object to this testimony at trial, and defendant did not argue that the admission of the evidence was fundamental error; the officer explained the basis of his opinion, permitting the jury to evaluate whether it agreed with the officer's conclusion. Reyna v. State, 2011 Tex. App. LEXIS 5038, 2011 WL 2621314 (Tex. App. Austin July 1 2011).

355. Defendant failed to preserve his claim for review, Tex. R. Evid. 103(b), Tex. R. App. P. 33.2, as he did not make a record showing what other evidence he wanted to elicit. The appellate court could not tell what other evidence besides the witness's opinion testimony about the informant's credibility defendant sought to admit. Hicks v. State, 2011 Tex. App. LEXIS 4623, 2011 WL 2436818 (Tex. App. Fort Worth June 16 2011).

356. Viewed in its proper context, the jury instruction neither tainted defendant's presumption of innocence or prevented him from receiving a fair trial, and no fundamental error was committed; therefore, defendant waived the issue by failing to object at trial. Gonzales v. State, 2011 Tex. App. LEXIS 4376, 2011 WL 2404272 (Tex. App.

Corpus Christi June 9 2011).

357. At the revocation hearing, defendant objected to an officer's testimony concerning text messages that he found on a cell phone that was in defendant's possession at the time of her arrest for driving while intoxicated on the grounds that the officer lacked a warrant, probable cause, or reasonable suspicion to justify searching the cell phone. Because defendant did not object that the testimony was hearsay or that it violated the Confrontation Clause, these issues were not preserved for review under Tex. R. Evid. 103 (a)(1) and Tex. R. App. P. 33.1. Bird v. State, 2011 Tex. App. LEXIS 4211, 2011 WL 2203925 (Tex. App. Eastland June 2 2011).

358. After the trial court denied defendant's motion in limine, he waived his complaint regarding the officer's testimony about the horizontal gaze nystagmus field sobriety test during his trial for driving while intoxicated. Defendant made no objection as required by Tex. R. Evid. 103(a)(1) and his motion in limine was not sufficient to preserve the error for review. Garcia v. State, 2011 Tex. App. LEXIS 2352, 2011 WL 1198922 (Tex. App. Tyler Mar. 31 2011).

359. Denial of defendant's motion in limine was not sufficient to preserve error in admitting evidence of defendant's extraneous offenses. By not objecting in accordance with Tex. R. Evid. 103 to the admission of his guilty pleas at trial, defendant failed to preserve the issue for appellate review. Kuykendall v. State, 335 S.W.3d 429, 2011 Tex. App. LEXIS 1722 (Tex. App. Beaumont Mar. 9 2011).

360. Any error in admitting testimony regarding an extraneous offense was cured by defendant's failure to object, as required under Tex. R. Evid. 103(a); Tex. R. App. P. 33.1(a), when the same evidence was introduced through later testimony. Griffin v. State, 2011 Tex. App. LEXIS 1039, 2011 WL 531558 (Tex. App. Houston 14th Dist. Feb. 15 2011).

361. On appeal of defendant's conviction for aggravated assault with a deadly weapon, he claimed the trial court abused its discretion by admitting evidence that two of the guns found in his apartment were stolen. Because the jury had already heard evidence from two different witnesses that the guns were stolen without any objection from defendant, the error was not properly preserved for review under Tex. R. Evid. 103(a)(1). Chenier v. State, 2011 Tex. App. LEXIS 678, 2011 WL 286156 (Tex. App. Houston 1st Dist. Jan. 27 2011).

362. Because the record was silent as to whether appellant objected to the trial court's response to the jury's second note regarding deadlock to "keep deliberating", it was presumed that the trial court complied with Tex. Code Crim. Proc. art. 36.27 regarding communications with the jury; by failing to timely object to the trial court's written response to the jury to "keep deliberating" as required by Tex. R. App. P. 33.1(a)(1), appellant failed to preserve his claim that the response was unduly coercive. Hartman v. State, 2010 Tex. App. LEXIS 6569, 2010 WL 3193565 (Tex. App. Fort Worth Aug. 12 2010).

363. Defendant forfeited his complaints about the admission of evidence that was obtained from his car because he failed to obtain a pretrial hearing or ruling on his motion to suppress and because he allowed the detective to testify about the evidence extensively before objecting to the admission of the State's physical evidence. Ratliff v. State, 320 S.W.3d 857, 2010 Tex. App. LEXIS 5629 (Tex. App. Fort Worth July 15 2010).

364. Defendant was properly sentenced to five years' community supervision for sexual assault of a child, because the jury initially returned a verdict sentencing defendant to two years and recommending community supervision, which was illegal under Tex. Code Crim. Proc. Ann. art. 42.12, and the trial court properly declared the verdict illegal and sent the jury back to continue its deliberations under the charge, and the jury returned with a proper verdict sentencing defendant to the minimum sentence available under Tex. Code Crim. Proc. Ann. art. 42.12 for a recommendation of community supervision for an offense under Tex. Penal Code Ann. § 22.011;

defendant did not object to the instruction that the jury follow the law, and there was no indication that the instruction constituted fundamental error, but rather the instruction was correct on the law. Mayes v. State, 2010 Tex. App. LEXIS 5393, 2010 WL 2723161 (Tex. App. Houston 1st Dist. July 8 2010).

365. Defendant failed to preserve his points for appellate review in a driving while intoxicated trial as required by Tex. R. App. P. 33.1(a) because, although defendant objected to the expert's qualifications to testify on the subject of retrograde extrapolation, he did not object to the expert's specific testimony that related to the points he brought on appeal. Roe v. State, 2010 Tex. App. LEXIS 4904, 2010 WL 2555189 (Tex. App. Fort Worth June 24 2010).

366. Defendant failed to preserve for review his assertion that the State commented on his failure to call defense witnesses, because defendant should have objected to the State's statements when it first became apparent that the State was referencing defendant's failure to call family members to testify. Charles v. State, 2010 Tex. App. LEXIS 4644, 2010 WL 2432048 (Tex. App. Fort Worth June 17 2010).

367. Because defendant failed to object during trial to the constitutionality of the prosecutor's opening statement and the introduction of evidence that defendant refused to cooperate with the police investigation, defendant failed to preserve the issue for appeal under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1). Saldivar v. State, 2010 Tex. App. LEXIS 3445, 2010 WL 1840240 (Tex. App. Houston 1st Dist. May 6 2010).

368. Defendant forfeited his appellate complaint that Tex. Code Crim. Proc. Ann. art. 42.07 was unconstitutional because, at the revocation hearing, defense counsel did not state that any of art. 42.07's three reasons for withholding pronouncement of sentence applied and voiced no objection or complaint with respect to assessment of punishment and there were no post-judgment motions that included argument or authority challenging the constitutionality of art. 42.07; defendant referred to no authority holding that his complaint constituted either a waivable-only right or an absolute, systemic requirement, and thus failed to establish fundamental error. Arguellez v. State, 2009 Tex. App. LEXIS 7832, 2009 WL 3210934 (Tex. App. Corpus Christi Oct. 8 2009).

369. Trial court's statements to the jury venire during voir dire were not improper comments on the weight of the evidence in violation of Tex. Code Crim. Proc. Ann. art. 38.05 and did not rise to fundamental error because the trial court properly laid out the manner in which a misdemeanor theft offense was enhanced to a felony third-offender offense and described the State's burden, and, taken in context, the trial court explained to the venire that there had to have been an allegation of two prior theft convictions to charge a defendant with felony third-offender theft; the trial court explained that defendant was guilty only if the State proved beyond a reasonable doubt that he had been previously convicted of the two prior felony thefts alleged and that he had committed the underlying theft offense. The statements neither tainted defendant's presumption of innocence nor compromised the impartiality of the jury. Jackson v. State, 2009 Tex. App. LEXIS 7232, 2009 WL 3050588 (Tex. App. Houston 14th Dist. Sept. 10 2009).

370. In an aggravated assault case, an alleged error based on a prosecutor's cross-examination of defendant during the punishment phase of the trial was not preserved for review because the objection before the trial court did not comport with the issue raised on appeal; instead of bringing forth an objection based on DeGarmo v. State, 691 S.W.2d 657 (Tex. Crim. App. 1985), during trial, an objection was made that a question had been "asked and answered." Zachery v. State, 2009 Tex. App. LEXIS 356, 2009 WL 136915 (Tex. App. Houston 14th Dist. Jan. 20 2009).

371. In an aggravated assault case, because defendant cited no binding authority for an argument that an appellate court should have waived a contemporaneous objection requirement and applied the principles associated with jury-charge error, as set out in Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984), to commentary made during voir dire as a way of determining that egregious harm resulted, the argument was rejected. Zachery v. State, 2009 Tex. App. LEXIS 356, 2009 WL 136915 (Tex. App. Houston 14th Dist. Jan. 20

2009).

372. In a case involving the civil commitment of a patient found to be a sexually violent predator, the patient failed to object at the first opportunity to an expert's opinion regarding truthfulness; therefore, the alleged error was not preserved for appellate review. In re Commitment of Eeds, 254 S.W.3d 555, 2008 Tex. App. LEXIS 3337 (Tex. App. Beaumont 2008).

373. Defendant failed to preserve his claim that a trial court violated his Sixth Amendment right to confrontation by excluding certain testimony aimed at impeaching the key witness against him because although defendant argued that the testimony should be admitted because it would impeach the witness's credibility, he did not specifically assert his right of confrontation. Johnson v. State, 2008 Tex. App. LEXIS 2644 (Tex. App. Houston 14th Dist. Apr. 15 2008).

374. Although defendant convicted of the felony offense of resisting arrest, for which he was sentenced to six years in prison pursuant to Tex. Penal Code Ann. § 38.03, claimed that the trial court erred by making an erroneous statement regarding the law of juror disqualification to the venire in violation of Tex. Code Crim. Proc. Ann. art. 35.16(a), Tex. Code Crim. Proc. Ann. art. 35.19 and Tex. Gov't Code Ann. § 62.102, the error, if any, was waived because defendant failed to assert any objection to the statement at trial; defendant did not argue that the trial court's alleged error was fundamental, that it bore upon the presumption of his innocence, that it vitiated the jury's impartiality, or that there was any other basis by which he might have been excused from preserving error pursuant to Tex. R. Evid. 103. Uribe v. State, 2008 Tex. App. LEXIS 1071 (Tex. App. Houston 1st Dist. Feb. 14 2008).

375. Defendant failed to preserve for review, as required under Tex. R. App. P. 33, his claims that the trial court abandoned its role as a neutral arbiter and thereby denied defendant his right to a fair trial, as he failed to show that he was prejudiced and that the fundamental error doctrine applied under Tex. R. Evid. 103; the trial court was permitted to question a witness to clarify defendant's misstatement of the witness's testimony, it was permitted to intervene under Tex. R. Evid. 611 by asking the State for objections to defendant's questioning; the trial court's insistence that defendant ask a witness relevant questions did not translate into an indication of the judge's views about defendant's guilt or innocence. Bogany v. State, 2007 Tex. App. LEXIS 10074 (Tex. App. Houston 1st Dist. Dec. 20 2007).

376. Defendant's convictions for multiple counts of aggravated sexual assault of a child, indecency with a child, and sexual assault were appropriate pursuant to Tex. R. Evid. 103 because defendant's claim that the trial court erred in admitting testimony that pornography was recovered from a computer seized during the search of his home was not preserved for appellate review; defendant failed to object at trial when an investigator testified that images of pornography involving animals were found on the computer. Patterson v. State, 2007 Tex. App. LEXIS 9264 (Tex. App. Dallas Nov. 29 2007).

377. On appeal of his conviction for theft, defendant argued that the trial court erred in admitting evidence concerning various instances of prior bad acts in violation of Tex. R. Evid. 404(b); because defendant did not object to the testimony when it was first elicted, he waived any error concerning the admissibility of such testimony according to Tex. R. App. P. 33.1. Craig v. State, 2007 Tex. App. LEXIS 6027 (Tex. App. Tyler July 31 2007).

378. Where defendant was convicted of murder, he failed to object to the trial court's admission of his written statement and opinion testimony from two police officers; because the admission of the evidence did not constitute fundamental error, the claims were not preserved for review. Stearns v. State, 2007 Tex. App. LEXIS 5910 (Tex. App. Corpus Christi July 26 2007).

379. In defendant's aggravated sexual assault on a child case, defendant failed to preserve for review his complaint regarding admission of a statement he made to a witness because defendant objected on various grounds, including relevance, when the State asked the witness whether defendant made any comments of a sexual nature about young women, but defendant did not object when the State subsequently asked the witness to relay the substance of the comment at issue. Silva v. State, 2007 Tex. App. LEXIS 4720 (Tex. App. Houston 14th Dist. June 19 2007).

380. Alleged sexually violent predator (SVP) failed to timely object to foundational basis for experts' opinion that he was likely a repeat offender; therefore, the alleged SVP waived his sole issue on appeal. In re Commitment of Sanchez, 2007 Tex. App. LEXIS 3787 (Tex. App. Beaumont May 17 2007).

381. Where defendant pleaded guilty to two indictments for aggravated sexual assault of a child, he contended that his 50-year sentences constituted cruel and unusual punishment. Defendant never objected to the alleged disproportionality of his sentences either in the trial court or in a post-trial motion; in the absence of plain error, his argument was not preserved for review. Chevis v. State, 2007 Tex. App. LEXIS 1573 (Tex. App. Houston 1st Dist. Mar. 1 2007).

382. Given defendant's attorney's concession that defendant's comment that she had not had too much to drink in "many, many, many years" opened the door to questioning about prior driving while intoxicated (DWI) arrests and convictions, as well as his failure to object, the trial court did not abuse its discretion in denying defendant's motion for new trial on her DWI conviction. Richardson v. State, 2007 Tex. App. LEXIS 1052 (Tex. App. San Antonio Feb. 14 2007).

383. Although the State asked a six-year-old sexual assault complainant numerous leading questions, defendant's trial counsel had objected only once, and because the one question objected to was not a leading question, the trial court did not err in overruling the objection; by not objecting to each leading question, defendant had not preserved his complaint for appellate review in accordance with Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a). Embree v. State, 2006 Tex. App. LEXIS 7772 (Tex. App. Waco Aug. 30 2006).

384. Because defendant did not make an offer of proof and the substance of the testimony regarding the victim's reputation for truthfulness at issue was not apparent from the context, his fourth point presented nothing for review. Jagneaux v. State, 2006 Tex. App. LEXIS 7871 (Tex. App. Waco Aug. 30 2006).

385. Victim's counselor testified three times about the victim's statements about what defendant had done before defendant objected, and the need for an objection was apparent from the moment the prosecutor asked the counsel to use the victim's words; thus, defendant's objection was untimely, and this point was not preserved for appellate review. Jagneaux v. State, 2006 Tex. App. LEXIS 7871 (Tex. App. Waco Aug. 30 2006).

386. Where defendant was convicted of possession of cocaine, he did not urge his motion to suppress until the close of the evidence and failed to object to the evidence at the first opportunity; he failed to preserve review of the trial court's denial of his motion to suppress. Alex v. State, 2006 Tex. App. LEXIS 4031 (Tex. App. Beaumont May 10 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Prosecutorial Misconduct

387. Appellant did not set forth and the court found no authority characterizing the State's discussion of plea negotiations or of the defendant's criminal history during closing argument as systemic, waivable-only, or fundamental or plain error; courts repeatedly had emphasized that a defendant had to preserve a complaint that the

State's closing argument was improper. Parker v. State, 2011 Tex. App. LEXIS 9419, 2011 WL 5984539 (Tex. App. Fort Worth Dec. 1 2011).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

388. Where defendant was convicted for failure to comply with sexual offender registration requirements, his claim that the trial court erred by overruling his objection to the prosecutor's closing argument was not preserved for review because it was not clear from his objection what he was objecting to at trial. Hargiss v. State, 2014 Tex. App. LEXIS 3103, 2014 WL 1087924 (Tex. App. Fort Worth Mar. 20 2014).

389. Defendant preserved the hearsay issue for appellate review, because the record clearly indicated that defendant objected to two portions of the medical record that were purportedly hearsay, even going so far as to read them aloud to the court, and counsel requested specific rulings on the hearsay and Crawford objections, which the trial court provided and from which defendant asked for reconsideration. Trevizo v. State, 2014 Tex. App. LEXIS 652, 2014 WL 260591 (Tex. App. El Paso Jan. 22 2014).

390. Defendant preserved the hearsay issue for appellate review, because the record clearly indicated that defendant objected to two portions of the medical record that were purportedly hearsay, even going so far as to read them aloud to the court, and counsel requested specific rulings on the hearsay and Crawford objections, which the trial court provided and from which defendant asked for reconsideration. Trevizo v. State, 2014 Tex. App. LEXIS 652, 2014 WL 260591 (Tex. App. El Paso Jan. 22 2014).

391. Prosecutor did not make a proper objection by remarking that he did not want that done after the trial court suggested to defense counsel that he could respond in closing to the prosecutor's closing argument that defendant's refusal to take a breath test was evidence of his intoxication. Montoya v. State, 2014 Tex. App. LEXIS 473, 2014 WL 223228 (Tex. App. Corpus Christi Jan. 16 2014).

392. Defendant convicted of aggravated assault with a deadly weapon failed to preserve error on his claim that the trial court abused its discretion by limiting his cross-examination of the victim to exclude questions regarding the victim's drug use after the assault because defendant failed to make an offer of proof for the excluded testimony. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

393. Finding that respondent was a sexually violent predator was proper because his counsel did not make an offer of proof with the psychiatrist regarding the issue of behavioral abnormality, nor did he identify the answers he expected to receive from the psychiatrist. Without an offer of proof, the appellate court was unable to determine whether the trial court excluded relevant examination or whether the exclusion of the evidence was harmful, Tex. R. Evid. 103(a)(2); Tex. R. App. P. 33.1(a)(1). In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

394. Merely stating a desire to ask questions about an officer's basis for reasonable suspicion, as defense counsel did, did not apprise the trial court of the basis for the objection or the testimony desired; because defendant failed to make an offer of proof under Tex. R. Evid. 103, he preserved nothing for appellate review. Emale v. State, 2012 Tex. App. LEXIS 9913 (Tex. App. Dallas Nov. 30 2012).

395. Without an offer of proof as required by Tex. R. Evid. 103, the court declined to speculate about the nature of a trooper's excluded testimony. Watts v. State, 371 S.W.3d 448, 2012 Tex. App. LEXIS 3607, 2012 WL 1601886 (Tex. App. Houston 14th Dist. May 8 2012).

396. Defendant's contention that the trial court erred by limiting the scope of cross-examination of the child victim and refusing to admit into evidence two affidavits signed by the victim was not preserved for appellate review because defendant failed to make either a formal bill of exceptions or request permission to make an informal offer of proof and therefore the court had no idea what the victim would have testified to and whether she would have denied making the statements in the affidavits. Duke v. State, 365 S.W.3d 722, 2012 Tex. App. LEXIS 2376, 2012 WL 1005069 (Tex. App. Texarkana Mar. 27 2012).

397. Appellant did not set forth and the court found no authority characterizing the State's discussion of plea negotiations or of the defendant's criminal history during closing argument as systemic, waivable-only, or fundamental or plain error; courts repeatedly had emphasized that a defendant had to preserve a complaint that the State's closing argument was improper. Parker v. State, 2011 Tex. App. LEXIS 9419, 2011 WL 5984539 (Tex. App. Fort Worth Dec. 1 2011).

398. Defendant waived any error regarding the admission of the officer's testimony concerning the recording device in the patrol car, because defendant failed to object to the testimony in the trial court on the ground that he raised on appeal; the record did not reflect that defendant made or obtained a running objection to the admission of the evidence of which he now complained. Norfleet v. State, 2011 Tex. App. LEXIS 4567, 2011 WL 2436494 (Tex. App. Houston 1st Dist. June 16 2011).

399. Instruction to the jury that two defense witnesses violated the witness rule in Tex. R. Evid. 614 was not fundamental error under Tex. R. Evid. 103(d) because the comment on the evidence under Tex. Code Crim. Proc. Ann. art. 38.05 only suggested that the witnesses might be untrustworthy rather than that defendant might be guilty. Powell v. State, 2011 Tex. App. LEXIS 2888, 2011 WL 1466876 (Tex. App. Austin Apr. 15 2011).

400. Petitioner forfeited his complaint about the admission of the polygraph results, because although the petitioner objected to the first portion of the community supervision officer's testimony that mentioned the results of his polygraph tests and objected to a question in the middle of his own testimony, the petitioner did not object to every question or answer that disclosed the results, and he did not obtain a running objection to the polygraph evidence. Gardner v. State, 2010 Tex. App. LEXIS 8991, 2010 WL 4569899 (Tex. App. Fort Worth Nov. 4 2010).

401. Defendant failed to preserve his points for appellate review in a driving while intoxicated trial as required by Tex. R. App. P. 33.1(a) because, although defendant objected to the expert's qualifications to testify on the subject of retrograde extrapolation, he did not object to the expert's specific testimony that related to the points he brought on appeal. Roe v. State, 2010 Tex. App. LEXIS 4904, 2010 WL 2555189 (Tex. App. Fort Worth June 24 2010).

402. Defendant's objection that the complainant's testimony was in violation of a motion in limine was not a specific objection sufficient to preserve error, pursuant to Tex. R. App. P. P. 33.1(a)(1), Tex. R. Evid. 103(a)(1). A motion in limine did not preserve error. Bennett v. State, 2010 Tex. App. LEXIS 4436, 2010 WL 2347066 (Tex. App. Beaumont June 9 2010).

403. Defendant failed to preserve error on his complaint regarding failure to hold an evidentiary hearing on his motion for new trial because, at no point during the hearing did counsel inform the court that defendant had additional information to provide to the court, defendant never attempted to introduce the affidavits into evidence and never indicated to the trial court that he desired to examine the prosecutor or have co-counsel from the trial testify. When the trial court ruled on the motion for new trial, counsel thanked the trial court without notifying the court that defendant had additional evidence to present. Boyce v. State, 2010 Tex. App. LEXIS 504, 2009 WL 5549302 (Tex. App. Beaumont Jan. 27 2010).

404. Defendant's claim of error with respect to the admission of the recorded interview with an officer was not preserved for appellate review because, after the trial court concluded that the recording indicated that defendant was advised of his rights, defense counsel stated, "I have nothing else." The opportunity presented itself for defendant to clarify the objection and to specifically state the basis of it to have involved the mention of extraneous offenses. Crews v. State, 2009 Tex. App. LEXIS 9677, 2009 WL 4907423 (Tex. App. Texarkana Dec. 22 2009).

405. Defendant failed to preserve his argument regarding unadjudicated offenses because, although defendant timely objected to the State's first line of questions pertaining to his unadjudicated offenses, defendant did not continue to object to the State's subsequent questions regarding the same unadjudicated offenses. Mccabe v. State, 2009 Tex. App. LEXIS 8828, 2009 WL 3823203 (Tex. App. Fort Worth Nov. 12 2009).

406. Defendant failed to preserve for review his complaint under Tex. Code Crim. Proc. Ann. art. 38.22, § 3(a)(2) because, in light of defendant's clearly and persistently articulated constitutional argument, and the lack of a statutory reference in his second motion to suppress, defendant's reference to the videotape was most likely part of his argument that the police had violated his rights under the United States and Texas Constitutions by failing to Mirandize him. Resendez v. State, 306 S.W.3d 308, 2009 Tex. Crim. App. LEXIS 1439 (Tex. Crim. App. 2009).

407. Defendant preserved an issue relating to the admission of autopsy photographs, even though he did not specifically invoke Tex. R. Evid. 403, because he objected on the basis that they were unfairly prejudicial and needlessly cumulative and the trial court granted him a running objection to the admission of each of the photographs, as permitted Tex. R. Evid. 103(a)(1). Kilgore v. State, 2009 Tex. App. LEXIS 6904, 2009 WL 2707175 (Tex. App. Tyler Aug. 28 2009).

408. In defendant's burglary case, he failed to preserve for review an issue of the admission of extraneous offenses because trial counsel made no objection to the State's alleged violation of the motion in limine, and the record reflected that the district court, if anything, ruled in defendant's favor and excluded evidence related to the offenses. Thus, the exception provided by Tex. R. Evid. 103 did not apply. Perez v. State, 2009 Tex. App. LEXIS 6521, 2009 WL 2567908 (Tex. App. Austin Aug. 21 2009).

409. Defendant failed to preserve error relating to a trial court's ruling that evidence of diminished capacity was not admissible during the guilt phase of a capital murder trial because he did not make an offer of proof, as required by Tex. R. Evid. 103; because the trial court intended for the exclusion of diminished capacity evidence to apply to the entire guilt phase of the trial, defendant was obligated to make an offer of proof that extended beyond the anticipated questions to, and topics of discussion with, potential jurors during voir dire. The fact that a trial judge was mistaken about the need for an offer of proof did not relieve defendant of his burden. Mays v. State, 285 S.W.3d 884, 2009 Tex. Crim. App. LEXIS 981 (Tex. Crim. App. 2009).

410. In a driving while intoxicated case, defendant's objection was specific enough to put the trial judge and opposing counsel on notice of the issue and to afford them the opportunity to remedy the defect by calling an expert witness. The trial judge specifically stated that defendant made his record for the objection, and that indicated that the trial judge was aware of the basis for objection, but found it did not have any merit. Layton v. State, 280 S.W.3d 235, 2009 Tex. Crim. App. LEXIS 149 (Tex. Crim. App. 2009).

411. In a sexual assault of a child case, defendant failed to preserve his complaint of the child's competency to testify because the trial court found the child competent to testify, and defendant did not object, nor did he object when the trial court made its finding of competency. Furthermore, defendant did not make any objections when the child testified in the presence of the jury. Martin v. State, 2008 Tex. App. LEXIS 8437 (Tex. App. Fort Worth Nov. 6, 2008).

412. Defendant's contention that a DVD recording of his statement to a detective violated Tex. Code Crim. Proc. Ann. art. 38.22 was not properly preserved for appellate review because defendant complained to the trial court that there were omissions on the tape, but he did not argue that the device used to make the recording was incapable of making an accurate recording. Ellison v. State, 2008 Tex. App. LEXIS 6901 (Tex. App. San Antonio Sept. 10 2008).

413. Defendant failed to preserve for review his claim that the trial court erred by denying him the opportunity to cross-examine one victim about her alleged sexual relationship with someone else because defendant made no offer of proof indicating the victim's answers to the questions and the substance of the evidence was not apparent from the context within which the questions were asked. Franklin v. State, 2008 Tex. App. LEXIS 1171 (Tex. App. Texarkana Feb. 20 2008).

414. Under Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1(a), a murder defendant waived the argument that autopsy photos were not relevant because an objection under Tex. R. Evid. 403 did not preserve error under Tex. R. Evid. 401. Williams v. State, 2007 Tex. App. LEXIS 6397 (Tex. App. Fort Worth Aug. 9 2007).

415. Defendant alleged that the in-court identification of defendant was improperly suggestive in violation of his due process rights under the Fifth and Fourteenth Amendments because the arresting officer reviewed a photograph of defendant about one month prior to the trial; however, the issue was not preserved for appellate review because the objection was not timely under Tex. R. App. P. 33 and Tex. R. Evid. 103 since (1) defendant failed to object when the officer's testimony about her review of the photograph was first elicited; and (2) counsel waited until the State rested before asserting any objections to the testimony. Abraham v. State, 2007 Tex. App. LEXIS 2109 (Tex. App. Dallas Mar. 20 2007).

416. State's questions specifically referenced only one period of time -- when defendant was in police custody and before Miranda rights were read to him; the context of the questions, therefore, could only implicate defendant's post-arrest, pre-Miranda right to remain silent, which was protected only by Tex. Const. art. I, § 10; thus, despite the failure of the objection to specifically reference the Texas Constitution, given the context of the State's question, the objection was specific enough to have put the trial court on notice of defendant's objection; therefore, defendant's objection was sufficient to preserve for appellate review his claim that his right against self-incrimination was violated. Wyborny v. State, 209 S.W.3d 285, 2006 Tex. App. LEXIS 10109 (Tex. App. Houston 1st Dist. 2006).

417. In an aggravated robbery and burglary case, because defendant failed to lodge a timely objection pursuant to Tex. R. Evid. 103 during the State's enhancement presentation, he forfeited appellate review under Tex. R. App. P. 33.1(a) of his complaint regarding issues raised before the jury panel regarding his criminal history; the motion in limine indicated that defendant understood that measures were necessary to prevent the jury panel from being informed of his prior criminal history, and he failed to show any legitimate reason for waiting until the conclusion of the State's voir dire presentation to lodge his complaint. Lowe v. State, 2006 Tex. App. LEXIS 9487 (Tex. App. Beaumont Nov. 1 2006).

418. Although defendant complained about a Power Point presentation that the State displayed for the venire panel, which set out the range of punishment for driving while intoxicated in a variety of scenarios, his objection was untimely and thus failed to preserve his complaint for appellate review where it appeared that he had the opportunity to review the Power Point slides before voir dire and affirmatively stated that he had no objection to the slides. Thrower v. State, 2006 Tex. App. LEXIS 6884 (Tex. App. Fort Worth Aug. 3 2006).

419. Defendant failed to preserve his complaint regarding prior acts evidence for review because the sister of a prior assault victim testified to the same or similar incidents and defendant did not object to her testimony, his earlier general objections to the testimony of that victim's children did not preserve error when the same evidence regarding the incidents of assault against the victim was admitted. Brown v. State, 2006 Tex. App. LEXIS 5163

(Tex. App. Austin June 16 2006).

420. Where defendant was convicted of two counts of aggravated sexual assault of a child, he failed to preserve error in the trial court's admission of extraneous-offense evidence of defendant's sexual assault of the victim's younger sister; the same evidence was admitted through the testimony of several witnesses, and counsel did not timely object as required by Tex. R. Evid. 103. Sinclair v. State, 2006 Tex. App. LEXIS 4277 (Tex. App. Waco May 17 2006).

421. Defendant failed to preserve a point of error for review because he did not point to any offer of proof in the record; in order to preserve error, defendant would have had to engage in a question and answer with the witness outside of the jury's presence, or summarize what he believed the evidence would be. Ford v. State, 2014 Tex. App. LEXIS 2379, 2014 WL 823409 (Tex. App. El Paso Feb. 28 2014).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

422. Counsel did not object when defendant was forced to take a breath test before his DWI trial to determine if he was intoxicated in the courtroom; defendant forfeited his right to complain about the admission of any evidence relating to the breath test or his alleged intoxication in the courtroom. Phillips v. State, 2006 Tex. App. LEXIS 2771 (Tex. App. Fort Worth Apr. 6 2006).

423. In a revocation of community supervision proceeding, because defendant's complained-of error regarding the neutrality of the trial court did not rise to the level of fundamental error, and because there was no reason to believe that an objection would have been futile, defendant waived her appellate challenges by failing to object at trial. Perez v. State, 2006 Tex. App. LEXIS 1440 (Tex. App. Houston 1st Dist. Feb. 23 2006).

424. Where the record showed that during the punishment phase of the trial, defendant's stepfather testified that defendant had previously taken his car without permission, defendant's conviction of aggravated assault with a deadly weapon was affirmed; defendant waived his objection as to the admission of his stepfather's testimony where he failed to object when subsequent witnesses testified about the same subject under the provisions of Tex. R. Evid. 103(a)(1). Childs v. State, 2003 Tex. App. LEXIS 9825 (Tex. App. Austin Nov. 20 2003).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

425. Defendant convicted for possession of a controlled substance waived his challenge to the admission of evidence of methamphetamine discovered after a warrantless patdown search because he stated that he had no objection and did not raise his motion to suppress during trial. Jones v. State, 2014 Tex. App. LEXIS 9001 (Tex. App. Fort Worth Aug. 14 2014).

426. Trial court did not err by revoking defendant's community supervision because the victim's positive identification of him as the individual who exposed himself to her on a college campus was sufficient to show that he committed the offense of indecent exposure. Because defendant did not make any objections to the admissibility of the in-court identification, he waived any error in the trial court's admission of the testimony. Samuel v. State, 2013 Tex. App. LEXIS 14665 (Tex. App. Corpus Christi Dec. 5 2013).

427. Defendant waived any error in the admission of extraneous bad acts allegedly committed by defendant because he never obtained an adverse ruling as to the prior victim's testimony, and he did not object when the prior victim testified that defendant had spanked him. Reckart v. State, 323 S.W.3d 588, 2010 Tex. App. LEXIS 7002 (Tex. App. Corpus Christi Aug. 26 2010).

428. In the absence of a timely and specific objection, defendant's claim that trial court erred in allowing testimony to be presented that may have amounted to a comment on his right to remain silent was not preserved for review. Perales v. State, 2006 Tex. App. LEXIS 5829 (Tex. App. Corpus Christi July 6 2006).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Waiver Triggers Generally

429. Finding that respondent was a sexually violent predator was proper because, without an offer of proof, the appellate court was unable to determine whether the trial court's exclusion of the doctor's testimony regarding his rate of error was erroneous and harmful, Tex. R. App. P. 33.1(a); Tex. R. Evid. 103(a)(2); Tex. R. App. P. 44.1(a). Thus, respondent's claim was waived. In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

430. Because defendant did not make a Tex. R. Evid. 403 objection at any point during the testimony of a witness or when the State actually introduced the exhibit, the Rule 403 complaint was waived; defendant did not obtain a running objection based on Tex. R. Evid. 404(b) after he first objected to the witness's testimony on the subject of the altercation at the hospital, and he did not raise a Rule 404(b) or 403 objection when the State offered the video, and as such, he waived error. White v. State, 2011 Tex. App. LEXIS 8118, 2011 WL 4825650 (Tex. App. El Paso Oct. 12 2011).

431. Defendant's trial counsel did not lodge any objections or obtain a running objection pertaining to the complained-of testimony regarding defendant's alleged misdeeds in his real estate dealings; thus, under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103, the issue was waived on appeal. Whitley v. State, 2010 Tex. App. LEXIS 8651, 2010 WL 4264661 (Tex. App. Corpus Christi Oct. 28 2010).

Criminal Law & Procedure : Appeals : Right to Appeal : Government

432. When the trial court granted defendant's motion to suppress evidence and excluded evidence of a second blood sample taken from defendant after an automobile accident, the State could not rely on Tex. R. Evid. 103 and merely make the substance of the evidence known to the trial court in order to preserve all issues for appeal, pursuant to Tex. R. App. P. 33; just as a defendant would be required to do, the State was required to raise all issues with the trial court or they would be forfeited on appeal. State v. Neesley, 196 S.W.3d 356, 2006 Tex. App. LEXIS 4873 (Tex. App. Houston 1st Dist. 2006).

Criminal Law & Procedure : Appeals : Standards of Review : General Overview

433. Defendant forfeited his appellate complaint that Tex. Code Crim. Proc. Ann. art. 42.07 was unconstitutional because, at the revocation hearing, defense counsel did not state that any of art. 42.07's three reasons for withholding pronouncement of sentence applied and voiced no objection or complaint with respect to assessment of punishment and there were no post-judgment motions that included argument or authority challenging the constitutionality of art. 42.07; defendant referred to no authority holding that his complaint constituted either a waivable-only right or an absolute, systemic requirement, and thus failed to establish fundamental error. Arguellez v. State, 2009 Tex. App. LEXIS 7832, 2009 WL 3210934 (Tex. App. Corpus Christi Oct. 8 2009).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

434. It could not be determined on appeal that the trial court abused its discretion by precluding defendant from questioning an officer about an allegedly inconsistent statement she gave to the police department's Internal Affairs Division to demonstrate bias because defendant did not make an offer of proof by presenting the entire statement. Foster v. State, 2013 Tex. App. LEXIS 1139, 2013 WL 476817 (Tex. App. Houston 14th Dist. Feb. 7 2013).

435. Trial court did not abuse its discretion in disallowing execution-impact testimony from members of appellant's family because appellant did not make an offer of proof conveying the substance of the proffered evidence and therefore failed to preserve the error. Roberts v. State, 220 S.W.3d 521, 2007 Tex. Crim. App. LEXIS 429 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial

436. Trial court did not abuse its discretion by denying defendant's motion for a new trial based on a sworn statement by another individual confessing to the crime because the letter was in the record before the court and defendant failed to make an offer of proof at trial regarding the excluded letter and its contents. Henry v. State, 2012 Tex. App. LEXIS 7590 (Tex. App. Beaumont Sept. 5 2012).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

437. Record did not establish harm under Tex. R. App. P. 44.2 and Tex. R. Evid. 103(d) from the trial court's failure to conduct a pretrial hearing to determine the admissibility of impeachment evidence because defendant elected not to testify; the jury, therefore, was not exposed to the allegedly prejudicial evidence; any possible harm flowing from the refusal to conduct a hearing was wholly speculative. Yanez v. State, 187 S.W.3d 724, 2006 Tex. App. LEXIS 1289 (Tex. App. Corpus Christi 2006).

438. Testimony by the officer that defendant could have been destroying evidence prior to his arrest was properly before the jury where the same evidence came in elsewhere without objection along with defendant's admission of two prior possession convictions of cocaine; thus, even without the officer's testimony, there was ample evidence that defendant was in possession of cocaine on the occasion in question and the officer's testimony did not have a substantial influence on the jury's verdict. Gardner v. State, 2005 Tex. App. LEXIS 2268 (Tex. App. Waco Mar. 23 2005).

439. Appellant failed to show harm from a trial court's exclusion of extrinsic evidence of out-of-court statements made by State's witness where appellant's counsel made no offer of proof detailing the questions counsel wanted to ask or the specific inconsistent statements to be used for impeachment under Tex. R. Evid. 103 and Tex. R. App. P. 33.2. Ferguson v. State, 97 S.W.3d 293, 2003 Tex. App. LEXIS 148 (Tex. App. Houston 14th Dist. 2003).

440. Where defendant was a passenger in a vehicle she had rented when it was pulled over by a sheriff's deputy, a consensual search led to the seizure of illegal drugs and the arrest of defendant and the driver, defendant was charged with unlawful possession, which required proof of intentional or knowing possession of the drugs, defendant consistently denied knowledge of the drugs, and the State relied upon circumstantial evidence to establish knowledge where the driver's statement to law enforcement, in which she claimed responsibility for the situation and asserted that she "used" defendant to obtain the rental vehicle and that defendant knew nothing about the drugs, was a statement against penal interest supported by corroborating evidence indicating its trustworthiness and should have been admitted under Tex. R. Evid. 803(24) and its exclusion prevented defendant from adequately supporting her defense and substantially and injuriously affected the jury's verdict, thereby affecting a substantial right of the defendant under Tex. R. Evid. 103(a). James v. State, 102 S.W.3d 162, 2003 Tex. App. LEXIS 181 (Tex. App. Fort Worth 2003).

441. There was no reversible error under Tex. R. App. P. 44.2(b) because admitting the outcry witness's testimony without first conducting a hearing pursuant to Tex. Code Crim. Proc. Ann. art. 38.072 was harmless, where the testimony included the same facts that were admitted into evidence without objection under Tex. R. Evid. 103(a)(1). Duncan v. State, 95 S.W.3d 669, 2002 Tex. App. LEXIS 9309 (Tex. App. Houston 1st Dist. 2002).

442. Where exclusion of evidence relevant to the defense of self-defense did not preclude presentation of the defense altogether, the exclusion did not impinge upon constitutional rights. Because the exclusion did not affect a substantial right, there was no error under this rule. Potier v. State, 68 S.W.3d 657, 2002 Tex. Crim. App. LEXIS 33 (Tex. Crim. App. 2002).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

443. Exclusion of character evidence that a murder victim occasionally drank to excess and was violent when he drank was harmless error, given that defendant was able to present his defense that the victim was drunk and pulled a shotgun on defendant, which defendant then used to kill the victim. Milliff v. State, 2014 Tex. App. LEXIS 4589, 2014 WL 1713897 (Tex. App. Houston 14th Dist. Apr. 29 2014).

444. Even if the trial court erred by admitting testimony from defendant's husband regarding the victim's violent history, the error was harmless because other testimony in the record showed the victim's past violent behavior. To the extent that defendant's argument on appeal was that she should have been allowed to present additional evidence of defendant's violent past, defendant did not preserve error to make that showing. Lopez v. State, 2013 Tex. App. LEXIS 4661 (Tex. App. Fort Worth Apr. 11 2013).

445. At defendant's trial for DWI, the admission of medical records containing extraneous offense evidence did not have a substantial effect on the verdict under Tex. R. Evid. 103(a), because the jury heard evidence that defendant was passed out in his vehicle with a bottle of alcohol between his legs; the officer noticed defendant's glassy and bloodshot eyes, defendant admitted he consumed alcohol and prescription medications, and field sobriety test results suggested intoxication. The record contained sufficient evidence from which the jury could find defendant guilty of DWI beyond a reasonable doubt. Lorenz v. State, 2012 Tex. App. LEXIS 7777, 2012 WL 4017766 (Tex. App. Beaumont Sept. 12 2012).

446. Even if the trial court erred by admitting extraneous offense evidence, the error did not affect defendant's substantial rights because: (1) the record did not indicate that the State specifically mentioned the agent's testimony regarding the 20 instances when similar counterfeit bills were passed; (2) the trial court instructed the jury that it could not consider extraneous offenses unless it found beyond a reasonable doubt that defendant committed the offenses; and (3) the record contained sufficient other evidence to support defendant's forgery conviction. Mookdasnit v. State, 2012 Tex. App. LEXIS 2220, 2012 WL 983333 (Tex. App. Beaumont Mar. 21 2012).

447. Although the appellate court assumed without deciding that defendant's complaints about the admission of three 1981 convictions were preserved and that the trial court erred in admitting the evidence, the appellate court overruled the issue because it had a fair assurance that the admission of the convictions did not influence the jury or had but a slight effect. Blount v. State, 2012 Tex. App. LEXIS 1648, 2012 WL 662306 (Tex. App. Waco Feb. 29 2012).

448. During the punishment phase of defendant's trial for bribery, defendant was not harmed by the trial court's ruling on evidence under Tex. R. Evid. 103(a) allowing testimony from a witness urging the jury not to sentence defendant to probation. The testimony did not influence the jury, because its imposition of a 19-year sentence showed that the jury did not consider probation to be an appropriate option. Watts v. State, 2012 Tex. App. LEXIS 1044, 2012 WL 403859 (Tex. App. Beaumont Feb. 8 2012).

449. Blood-test evidence concerning defendant's accident did not affect his substantial rights during the punishment phase of trial and even if the admission of the evidence in the absence of objection was fundamental error that survived the lack of preservation, its admission was harmless, because defendant pled guilty to four counts of intoxication manslaughter and two counts of intoxication assault, so the only issue was the length of the

sentence, and the testimonial and photographic evidence admitted at the punishment phase, combined with the tragic loss of four lives and severe injuries to others, was compelling regarding the nature of the accident and the crimes. Looschen v. State, 2011 Tex. App. LEXIS 10257, 2011 WL 6938516 (Tex. App. Austin Dec. 29 2011).

450. Pursuant to Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1, defendant convicted of driving while intoxicated (DWI), second offense, failed to preserve for appellate review his claim that the trial court erred in denying his motion for mistrial following publication to the jury of portions of an audio-video recording of the traffic stop that led to his arrest because the recording was admitted and played to the jury without timely objection. Even if defendant had not waived his objection, any error in the admission of the audio recording was harmless because: (1) the recording made only vague reference to an intoxication offense, rather than direct mention of any prior DWI conviction; (2) the audio that was the subject of defense counsel's objection was played only once in open court to the jury, an instruction to disregard was given by the trial court, and only a redacted version excluding the three complained-of references was sent back with the jury to watch during deliberations; (3) the record contained ample evidence to support the jury's finding that defendant was driving while intoxicated; and (4) the jury had the opportunity to view the recording of the traffic stop and defendant's behavior. Doucette v. State, 2011 Tex. App. LEXIS 1750, 2011 WL 832129 (Tex. App. Austin Mar. 9 2011).

451. Believing that defendant had drugs in the car that he was driving, an undercover officer directed uniformed police officers to stop defendant after he observed defendant commit a traffic violation; based on prior encounters with defendant, the undercover officer called for a narcotics dog which lead to the discovery of drugs in defendant's car. At the hearing on defendant's motion to suppress, he raised objections under Tex. R. Evid. 103 that prevented the officer from testifying as to the articulable facts that led the officer to believe there was contraband in defendant's car; therefore, the invited error doctrine prevented defendant from challenging the State's failure to prove the articulable facts that led to the search of his car. Vennus v. State, 282 S.W.3d 70, 2009 Tex. Crim. App. LEXIS 977 (Tex. Crim. App. 2009).

452. In an aggravated sexual assault case, defendant was not harmed by the hearsay search warrant affidavit because the witnesses who provided the information that was in the affidavit provided the same or substantially the same testimony at trial. Rangel v. State, 2009 Tex. App. LEXIS 1555, 2009 WL 540780 (Tex. App. Waco Mar. 4 2009).

453. Court's exclusion of a witness's statement did not have a substantial or injurious effect on the jury's verdict in defendant's drug case because the statement concerning his assumption of responsibility did not absolve defendant from potential liability; the witness's responsibility was neither mutually exclusive of or inconsistent with defendant's possession. Therefore, the witness's gratuitous statement was of no legal consequence. Blum v. State, 2009 Tex. App. LEXIS 466, 2009 WL 161980 (Tex. App. Dallas Jan. 26 2009).

454. Appellant was entitled to a new trial based on the erroneous admission of improper character evidence that appellant failed a drug test, contrary to Tex. R. Evid. 404(b); the evidence of the drug-test results, which occurred after the assault for which appellant was on trial, came in unexpectedly and was later explained by appellant, yet it was embraced by the State and emphasized throughout trial in an effort to tie the drug-test results to the assault; consequently, the error in admitting the evidence was not harmless under Tex. R. App. P. 44 and Tex. R. Evid. 103. Simmons v. State, 2007 Tex. App. LEXIS 9732 (Tex. App. Texarkana Dec. 14 2007).

455. At the punishment phase of a trial for aggravated robbery, any error in admitting a prior conviction for unlawfully carrying a weapon was harmless under Tex. R. App. P. 44.2(b) and Tex. R. Evid. 103(a). The conviction was not reiterated or emphasized, the jury also received evidence of three other misdemeanor convictions, and defendant was sentenced to 40 years, the middle of the sentencing range under Tex. Penal Code Ann. §§ 12.32(a), 29.03. Abdolahi-Damaneh v. State, 2007 Tex. App. LEXIS 2003 (Tex. App. Dallas Mar. 15 2007).

456. Where defendant was convicted of aggravated assault with a deadly weapon, he was not harmed by the admission of evidence of a prior sexual assault during the punishment phase even though he had been acquitted of the offense. The jury was presented with defendant's lengthy and varied criminal history and threats against the victim; the admission of the prior sexual assault evidence did not influence the jury verdict. Benner v. State, 2006 Tex. App. LEXIS 2977 (Tex. App. Waco Apr. 12 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Plain Error : General Overview

457. Trial judge was disqualified because of the stated inability to rule based solely on the evidence adduced, and this error required disqualification and made the actions taken by the judge, including a denial of a motion to suppress, void; the court determined it had to address this unassigned error given that a defendant, as in this case, did not waive appellate review of the structural defect of the right to an impartial judge by failing to object, and court noted that even if review for harm was appropriate, a denial of one's right to an impartial judge was not subject to harmless error analysis. Gentry v. State, 2006 Tex. App. LEXIS 2923 (Tex. App. Texarkana Apr. 12 2006).

458. Under Tex. R. App. P. 33.1, defendant waived his argument that the trial court's comment during voir dire was so prejudicial that he was deprived of a fair and impartial trial. There was no fundamental error under Tex. R. Evid. 103(d) that would excuse the waiver because the trial court properly instructed the jury that it could not consider a defendant's refusal to testify for any purpose. Vargas v. State, 2005 Tex. App. LEXIS 4626 (Tex. App. Eastland June 16 2005).

459. In a murder case, defendant's brief, which lacked citation to authority and argument, was inadequate under Tex. R. App. P. 38.1(h) to support a claim of fundamental error under Tex. R. Evid. 103(d). Boler v. State, 177 S.W.3d 366, 2005 Tex. App. LEXIS 2719 (Tex. App. Houston 1st Dist. 2005).

460. Admission of testimony from the victim's sister during the penalty phase of defendant's trial about sexual abuse he committed against her was properly admitted, as defendant failed to object to the admission of the challenged testimony; further, said failure to object also precluded review for fundamental error under Tex. R. Evid. 103(d). Martinez v. State, 2003 Tex. App. LEXIS 10811 (Tex. App. San Antonio Dec. 31 2003).

461. Under Tex. R. Evid. 103(a)(2), a defendant's substantial rights were not affected by the trial court's ruling that defense counsel could not question a witness, for impeachment purposes, regarding his being a drug dealer where the trial court offered defense counsel 20 minutes to question the witness outside of the jury's presence in order to establish whether the witness was indeed a drug dealer, and defense counsel declined the trial court's generous offer. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App. LEXIS 7512 (Tex. App. Beaumont 2003).

462. Even though defense counsel did not object when the trial court told the jury at the outset of the trial that defendant seriously considered entering into a plea agreement and that he would have preferred that the defendant plead guilty, under Tex. R. Evid. 103(d) the appellate court was authorized to take notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court, and the trial court's statements were plain error warranting reversal of defendant's conviction and remand. Blue v. State, 41 S.W.3d 129, 2000 Tex. Crim. App. LEXIS 113 (Tex. Crim. App. 2000), criticized by Rabago v. State, 75 S.W.3d 561, 2002 Tex. App. LEXIS 1828 (Tex. App. San Antonio 2002).

Evidence : Authentication : General Overview

463. Error based on improper authentication of exhibits during a summary judgment hearing was not preserved for appellate review because an attorney had "no objection" when the evidence was admitted at a prior hearing. Kent v. Holmes, 139 S.W.3d 120, 2004 Tex. App. LEXIS 5844 (Tex. App. Texarkana 2004).

Evidence : Authentication : Self-Authentication

464. In a case involving unpaid credit card debt, business records showing a debtor's liability were properly admitted under Tex. R. Evid. 803(6) because an authenticating affiant did not have to be a custodian of records to qualify under Tex. R. Evid. 902(10); therefore, a designated agent was able to satisfy this standard. Moreover, the agent's affidavit tracked the model language of a self-authenticating affidavit, the affidavit was not conclusory, and an objection regarding personal knowledge was not raised at trial. McElroy v. Unifund CCR Partners, 2008 Tex. App. LEXIS 7170 (Tex. App. Houston 14th Dist. Aug. 26, 2008).

Evidence : Competency : Dead Man's Acts : Waiver

465. Where decedent's wife testified as to their agreement to be married, the trial court construed decedent's will as if a common law marriage existed; on appeal, decedent's children argued that the wife's testimony did not meet the requirements of the Dead Man's Statute under Tex. R. Evid. 601 because it was not corroborated by other evidence. The Court of Appeals of Texas would not address the argument, because no objection was made at trial as required by Tex. R. Evid. 103(a)(1). In the Estate of Landers, 2010 Tex. App. LEXIS 7196, 2010 WL 3420905 (Tex. App. Texarkana Sept. 1 2010).

Evidence : Competency : Disability : Children

466. In a sexual assault of a child case, defendant failed to preserve his complaint of the child's competency to testify because the trial court found the child competent to testify, and defendant did not object, nor did he object when the trial court made its finding of competency. Furthermore, defendant did not make any objections when the child testified in the presence of the jury. Martin v. State, 2008 Tex. App. LEXIS 8437 (Tex. App. Fort Worth Nov. 6, 2008).

Evidence : Competency : Judges

467. Defendant failed to preserve an argument that he should have been permitted to call the judge in his case as a witness, based on the judge's prior representation of a defendant in a case involving the same victim. Defendant failed to make an offer of proof, as require by Tex. R. Evid. 103, as to what the judge's testimony would have been with respect to an prior consistent statements made by the former client. Teczar v. State, 2011 Tex. App. LEXIS 2919, 2011 WL 1743756 (Tex. App. Eastland Apr. 15 2011).

Evidence : Demonstrative Evidence : Photographs

468. Defendant failed to preserve error with regard to the admission of photographs because he did not make the proper offer of proof with the photos he wished to admit. Stewart v. State, 2012 Tex. App. LEXIS 4511, 2012 WL 2052148 (Tex. App. Corpus Christi June 7 2012).

469. Defendant preserved an issue relating to the admission of autopsy photographs, even though he did not specifically invoke Tex. R. Evid. 403, because he objected on the basis that they were unfairly prejudicial and needlessly cumulative and the trial court granted him a running objection to the admission of each of the photographs, as permitted Tex. R. Evid. 103(a)(1). Kilgore v. State, 2009 Tex. App. LEXIS 6904, 2009 WL 2707175 (Tex. App. Tyler Aug. 28 2009).

470. In a sexual assault trial, there was no error in limiting defense questioning of a witness regarding sexually explicit photographs of a woman who appeared to be asleep or unconscious; the witness was permitted to testify in

support of the defensive theory that drug use and sexual conduct of the sort shown in the photographs were common among persons employed by topless clubs and that the woman in the photographs may have consented to the acts shown; defendant did not make an offer of proof regarding other questions, as required by Tex. R. Evid. 103. Casey v. State, 2007 Tex. App. LEXIS 7940 (Tex. App. Austin Oct. 5 2007).

471. Under Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1(a), defendant failed to preserve an issue regarding admission of a purportedly gruesome photograph because defendant stated that there was no objections to that exhibit. Pecina v. State, 2007 Tex. App. LEXIS 3424 (Tex. App. Fort Worth May 3 2007).

Evidence : Demonstrative Evidence : Recordings

472. Defendant failed to preserve error as to the admission of those portions of a recording that he did not specifically point to the trial court. Basinger v. State, 2012 Tex. App. LEXIS 3847, 2012 WL 1704322 (Tex. App. Dallas May 16 2012).

Evidence : Documentary Evidence : Completeness

473. During defendant's criminal trial for murder, the trial judge violated the rule of optional completeness under Tex. R. Evid. 107 when he allowed a 911 operator to testify that he asked defendant if he wanted to talk about what had happened, but excluded defendant's response indicating that he shot the victim in self-defense; the error was nonconstitutional under Tex. R. Evid. 103, because defendant testified about his longstanding strife with the victim; the trial court's erroneous exclusion of his 911 statements did not prevent him from fully presenting his self-defense theory. Walters v. State, 247 S.W.3d 204, 2007 Tex. Crim. App. LEXIS 1701 (Tex. Crim. App. 2007).

Evidence : Hearsay : General Overview

474. In an aggravated sexual assault case, defendant was not harmed by the hearsay search warrant affidavit because the witnesses who provided the information that was in the affidavit provided the same or substantially the same testimony at trial. Rangel v. State, 2009 Tex. App. LEXIS 1555, 2009 WL 540780 (Tex. App. Waco Mar. 4 2009).

475. Because the record did show any objections to the evidence, the court rejected the parents' claim that hearsay evidence constituted the majority of the evidence presented in a proceeding concerning the conservatorship of their daughter, and therefore no error was shown by the district court's consideration of unobjected-to evidence. Rodriguez v. Tex. Dep't of Family & Protective Servs., 2008 Tex. App. LEXIS 3387 (Tex. App. Austin May 8 2008).

476. Hearsay objection under Tex. R. Evid. 801 was inadequate under Tex. R. App. P. 33 and Tex. R. Evid. 103 where counsel asserted a reiteration of a previous objection but had not previously objected on hearsay grounds, where counsel failed to obtain a ruling, and where the evidence was admitted without objection elsewhere. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

477. In a murder trial, defendant failed to preserve hearsay error with regard to a statement that the complainant made to a witness because defendant permitted the contents of the complainant's statement to come in without objection and therefore failed to comply with Tex. R. App. P. 33.1 and Tex. R. Evid. 103. Gay v. State, 2007 Tex. App. LEXIS 8753 (Tex. App. Houston 1st Dist. Nov. 1 2007).

478. Defendant's failure to make specific objections waived, under Tex. R. App. P. 33.1 and Tex. R. Evid. 103, the issues of hearsay in a police officer's testimony concerning an unsafe lane change and the lack of closing

arguments; to the extent defendant's general objection to the officer's testimony could be construed as a more general contention that a conviction could not be based on hearsay evidence, Tex. R. Evid. 802 allows consideration of inadmissible hearsay admitted without objection. James v. State, 2007 Tex. App. LEXIS 7608 (Tex. App. Waco Sept. 19 2007).

Evidence : Hearsay : Exceptions : General Overview

479. In a case of fleeing from arrest, hearsay testimony was cumulative of other properly admitted testimony; thus, in accordance with Tex. R. App. P. 44.2(b) and Tex. R. Evid. 103(a), its admission was not reversible error. Gant v. State, 153 S.W.3d 294, 2004 Tex. App. LEXIS 11841 (Tex. App. Beaumont 2004), writ of certiorari denied by 126 S. Ct. 1574, 164 L. Ed. 2d 307, 2006 U.S. LEXIS 2315, 74 U.S.L.W. 3530 (U.S. 2006).

480. Trial court erred in admitting videotaped testimony of sexual assault victims under Tex. Code Crim. Proc. Ann. art. 38.072, however, such error was harmless under Tex. R. Evid. 103(a) and to be disregarded on appeal under Tex. R. App. P. 44.2, because it did not affect a substantial right of defendant where the in-court testimony of the victims mirrored their videotape testimony, and the State made no specific reference attributable solely to the videotapes. Dunn v. State, 125 S.W.3d 610, 2003 Tex. App. LEXIS 9290 (Tex. App. Texarkana 2003).

Evidence : Hearsay : Exceptions : Business Records : General Overview

481. In a case involving unpaid credit card debt, business records showing a debtor's liability were properly admitted under Tex. R. Evid. 803(6) because an authenticating affiant did not have to be a custodian of records to qualify under Tex. R. Evid. 902(10); therefore, a designated agent was able to satisfy this standard. Moreover, the agent's affidavit tracked the model language of a self-authenticating affidavit, the affidavit was not conclusory, and an objection regarding personal knowledge was not raised at trial. McElroy v. Unifund CCR Partners, 2008 Tex. App. LEXIS 7170 (Tex. App. Houston 14th Dist. Aug. 26, 2008).

Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

482. Hearsay argument was preserved for review where it was clear from the record that both the prosecutor and the trial court understood defendant to be making a hearsay objection to the admission of a booking record. Martin v. State, 2004 Tex. App. LEXIS 8903 (Tex. App. Austin Oct. 7 2004).

Evidence : Hearsay : Exceptions : Former Testimony of Unavailable Declarants

483. In defendant's capital murder trial, the trial court did not err in excluding the former testimony of a witness from a co-defendant's trial because the requested excerpt of testimony contained both admissible and inadmissible evidence, and it was defendant's burden to segregate and specifically offer the portions that were admissible under Tex. R. Evid. 804(b)(1), pursuant to Tex. R. Evid. 103(a)(2). Brown v. State, 2013 Tex. App. LEXIS 10655 (Tex. App. Houston 14th Dist. Aug. 22 2013).

Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment

484. In a termination of parental rights case, a parent failed to preserve objections to the admission of the child's medical records because the trial court was not directed to specific parts of the records that were not relevant. In re K.L., 442 S.W.3d 396, 2012 Tex. App. LEXIS 4294 (Tex. App. Beaumont May 31 2012).

485. Defendant's convictions of indecency with a child by contact and exposure pursuant to Tex. Penal Code Ann. § 21.11 were affirmed, even though two witness were erroneously permitted to testify as outcry witnesses under

Tex. Code Crim. Proc. Ann. art. 38.072, and the counselor was erroneously allowed to testify under Tex. R. Evid. 803(4) regarding the victim's statements during counseling, and where the testimony did not affect defendant's substantial rights under Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b), as defendant admitted that he engaged in the conduct described in the victim's statements to the three witnesses. Jones v. State, 92 S.W.3d 619, 2002 Tex. App. LEXIS 8545 (Tex. App. Austin 2002).

Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports

486. In a subrogation action, a trial court did not err by admitting a police report into evidence under Tex. R. Evid. 803(8) because there was nothing to indicate that the report lacked trustworthiness. Moreover, because a large part of the report was admissible non-opinion evidence and a driver did not specifically object to the opinion statements, the trial court properly overruled an alleged driver's objection regarding expert opinion. Lawrence v. Geico Gen. Ins. Co., 2009 Tex. App. LEXIS 5082, 2009 WL 1886177 (Tex. App. Houston 1st Dist. July 2 2009).

Evidence : Hearsay : Exceptions : Reputation : General Overview

487. Where defendant did not object to the admission of the officers' testimony regarding their knowledge of defendant's reputation in the community, the issue was not preserved for appeal. Smith v. State, 2005 Tex. App. LEXIS 6567 (Tex. App. Texarkana Aug. 18 2005).

Evidence : Hearsay : Exceptions : State of Mind : Proof of Earlier Acts

488. In a negligence suit, the trial court properly sustained Tex. R. Evid. 801(d) hearsay objections to testimony from a police officer and to e-mails written in anticipation of litigation; the officer's testimony was not admissible under the Tex. R. Evid. 803(3) state of mind hearsay exception because the Tex. R. Evid. 103(a)(2) offer of proof did not make clear when the declarant spoke with the officer, and the e-mails also were not spontaneous statements and did not qualify as business records under Rule 803(6). Estate of Ronnie Wren v. Bastinelli, 2010 Tex. App. LEXIS 330 (Tex. App. Texarkana Jan. 20 2010).

Evidence : Hearsay : Exceptions : Statements Against Interest

489. Despite sustaining defedant's hearsay objection in an action to quiet title, the trial court later allowed plaintiff to testify to many of the facts surrounding decedent's alleged parol gift; because the trial court allowed evidence of the substantial improvements plaintiff made to the land during decedent's lifetime and plaintiff's continuous possession of the land, the appellate court could not say that the trial court's ruling on decedent's hearsay statement to plaintiff regarding her donative intnet caused the rendition of an improper judgment. Conner v. Johnson, 2004 Tex. App. LEXIS 9633 (Tex. App. Fort Worth Oct. 28 2004).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

490. Defendant preserved his complaint that a witness's outcry statement was insufficient for failure to describe an act for which he was indicted because defendant objected that the summary of the witness's testimony was insufficient and that the witness had indicated that she was going to testify to substantially more than the summary provided. Klein v. State, 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

491. Appellant preserved error as to outcry testimony, even though he did not object when the witness testified in front of the jury, because he objected to the testimony at a hearing outside the jury's presence. He sufficiently objected on the same grounds raised on appeal; in addition to his hearsay objection, he objected that the testimony was not proper outcry because the witness could not get any meaningful information from the victim about exactly what happened. Chapman v. State, 150 S.W.3d 809, 2004 Tex. App. LEXIS 9305 (Tex. App. Houston 14th Dist.

2004).

492. Trial court abused its discretion by admitting outcry testimony as to an extraneous child sexual assault because by its own terms, Tex. Code Crim. Proc. Ann. art. 38.072 applied only to statements that described the alleged offense. Defendant objected to the testimony at a hearing outside the jury's presence and, in order to preserve error, was not required to object again when the witness testified before the jury. Chapman v. State, 2004 Tex. App. LEXIS 7364 (Tex. App. Houston 14th Dist. Aug. 17 2004), opinion withdrawn by, substituted opinion at 150 S.W.3d 809, 2004 Tex. App. LEXIS 9305 (Tex. App. Houston 14th Dist. 2004).

493. Trial court erred in admitting videotaped testimony of sexual assault victims under Tex. Code Crim. Proc. Ann. art. 38.072, however, such error was harmless under Tex. R. Evid. 103(a) and to be disregarded on appeal under Tex. R. App. P. 44.2, because it did not affect a substantial right of defendant where the in-court testimony of the victims mirrored their videotape testimony, and the State made no specific reference attributable solely to the videotapes. Dunn v. State, 125 S.W.3d 610, 2003 Tex. App. LEXIS 9290 (Tex. App. Texarkana 2003).

494. There was no reversible error under Tex. R. App. P. 44.2(b) because admitting the outcry witness's testimony without first conducting a hearing pursuant to Tex. Code Crim. Proc. Ann. art. 38.072 was harmless, where the testimony included the same facts that were admitted into evidence without objection under Tex. R. Evid. 103(a)(1). Duncan v. State, 95 S.W.3d 669, 2002 Tex. App. LEXIS 9309 (Tex. App. Houston 1st Dist. 2002).

495. Defendant's convictions of indecency with a child by contact and exposure pursuant to Tex. Penal Code Ann. § 21.11 were affirmed, even though two witness were erroneously permitted to testify as outcry witnesses under Tex. Code Crim. Proc. Ann. art. 38.072, and the counselor was erroneously allowed to testify under Tex. R. Evid. 803(4) regarding the victim's statements during counseling, and where the testimony did not affect defendant's substantial rights under Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b), as defendant admitted that he engaged in the conduct described in the victim's statements to the three witnesses. Jones v. State, 92 S.W.3d 619, 2002 Tex. App. LEXIS 8545 (Tex. App. Austin 2002).

Evidence : Hearsay : Exemptions : Confessions : General Overview

496. Defendant failed to preserve his claim that a trial court violated Tex. Code Crim. Proc. Ann. art. 38.22 by admitting into evidence, in defendant's trial for aggravated assault under Tex. Penal Code Ann. § 22.02, an incriminating statement made by defendant to a police officer after defendant was arrested and before he was given any Miranda warnings; because defendant did not raise his objections before the officer testified as to the statement or obtain an adverse ruling thereon as required by Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(1), the officer thereafter repeated the statement without objection, and defendant's trial objection was made under Tex. Code Crim. Proc. Ann. art. 38.21 rather than Tex. Code Crim. Proc. Ann. art. 38.22. Camarillo v. State, 82 S.W.3d 529, 2002 Tex. App. LEXIS 3228 (Tex. App. Austin 2002).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview

497. Appellant failed to show harm from a trial court's exclusion of extrinsic evidence of out-of-court statements made by State's witness where appellant's counsel made no offer of proof detailing the questions counsel wanted to ask or the specific inconsistent statements to be used for impeachment under Tex. R. Evid. 103 and Tex. R. App. P. 33.2. Ferguson v. State, 97 S.W.3d 293, 2003 Tex. App. LEXIS 148 (Tex. App. Houston 14th Dist. 2003).

Evidence : Hearsay : Hearsay Within Hearsay

498. Because the detective failed to address each document he objected to, identify which parts of the document contained hearsay and hearsay within hearsay, and explain why the documents were not admissible as a statement by a party opponent, his claim was rejected on appeal. Both at trial and on appeal, the detective made a blanket objection without identifying each part of each statement that contained hearsay with hearsay, and as such, his objection was not sufficiently specific to preserve error. Flores v. City of Liberty, 318 S.W.3d 551, 2010 Tex. App. LEXIS 6298 (Tex. App. Beaumont Aug. 5 2010).

Evidence : Inferences & Presumptions : Presumptions : General Overview

499. In a driving while intoxicated case, defendant failed to show that she received ineffective assistance of counsel based on a failure to make certain evidentiary objections; defendant did not file a motion for a new trial or otherwise develop a record concerning the motives behind trial counsel's decision not to make objections. Because speculation would have been required, counsel's actions were presumed to be within the wide range of reasonable and professional assistance. Egerton v. State, 2009 Tex. App. LEXIS 4848, 2009 WL 1815772 (Tex. App. Fort Worth June 25 2009).

Evidence : Judicial Notice

500. Defendant did not object to trial court's comments about his decision to proceed pro se in his trial for forgery; however, the appellate court took judicial notice of the comments. Nevertheless, the comments did not impinge on defendant's fundamental rights as they were not directed toward his possible guilt or innocence. Watson v. State, 176 S.W.3d 413, 2004 Tex. App. LEXIS 9098 (Tex. App. Houston 1st Dist. 2004).

Evidence : Judicial Notice : General Overview

501. Defendant did not object to trial court's comments about his decision to proceed pro se in his trial for forgery; however, the appellate court took judicial notice of the comments. Nevertheless, the comments did not impinge on defendant's fundamental rights as they were not directed toward his possible guilt or innocence. Watson v. State, 176 S.W.3d 413, 2004 Tex. App. LEXIS 9098 (Tex. App. Houston 1st Dist. 2004).

Evidence : Privileges : Attorney-Client Privilege : Waiver

502. In a drug case, defendant did not have to waive his attorney-client privilege to obtain testimony from a former attorney regarding the attorney's notes on conflicting information in the police report; no waiver was required under the work product privilege of Tex. R. Evid. 503, and a discussion regarding the admissibility of the evidence, combined with defendant's offer of proof, sufficed to preserve error under Tex. R. App. P. 33.1 and Tex. R. Evid. 103 as to the exclusion of the evidence. Cameron v. State, 241 S.W.3d 15, 2007 Tex. Crim. App. LEXIS 1120 (Tex. Crim. App. 2007).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

503. In a child sexual abuse case, defendant's objections at the conclusion of an admissibility hearing preserved his complaint that the outcry statement was insufficient because it failed to describe an act for which he was indicted; pursuant to Tex. R. Evid. 103(a)(1), the objections were deemed to apply to the evidence when it was admitted before the jury without the necessity of repeating the objections. Klein v. State, 2006 Tex. App. LEXIS 950 (Tex. App. Fort Worth Feb. 2 2006), opinion withdrawn by, substituted opinion at, modified by 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

504. By failing to object to the admission of a hair sample at trial, defendant waived his complaint. Ocanas v. State, 2005 Tex. App. LEXIS 7726 (Tex. App. Amarillo Sept. 20 2005).

505. Where defendant did not object to the admission of the officers' testimony regarding their knowledge of defendant's reputation in the community, the issue was not preserved for appeal. Smith v. State, 2005 Tex. App. LEXIS 6567 (Tex. App. Texarkana Aug. 18 2005).

506. State was correct that defendant failed to preserve the issue of whether the testimony was inadmissible hearsay because he failed to object. Shook v. State, 172 S.W.3d 36, 2005 Tex. App. LEXIS 6167 (Tex. App. Waco 2005).

507. In an aggravated robbery case, defendant's failure to object waived error under Tex. R. App. P. 33.1(a), Tex. R. Evid. 103 as to the admission of testimony that defendant, after he was advised of his rights, chose not to give a statement and invoked his right to counsel; although the use of defendant's silence and invocation of his right to counsel as evidence of guilt was constitutionally impermissible and was prohibited by Tex. Code Crim. Proc. Ann. art. 38.38, the error was not fundamental error under Tex. R. Evid. 103(d). Morales v. State, 2005 Tex. App. LEXIS 3359 (Tex. App. San Antonio May 4 2005).

508. In an aggravated robbery case, defendant's objection to his girlfriend's testimony that defendant had threatened to kill her by cutting her throat did not assert that it was inadmissible extraneous offense evidence because the threat was not sufficiently similar to the charged offense; hence, defendant could not raise that argument on appeal. Morales v. State, 2005 Tex. App. LEXIS 3359 (Tex. App. San Antonio May 4 2005).

509. Testimony by the officer that defendant could have been destroying evidence prior to his arrest was properly before the jury where the same evidence came in elsewhere without objection along with defendant's admission of two prior possession convictions of cocaine; thus, even without the officer's testimony, there was ample evidence that defendant was in possession of cocaine on the occasion in question and the officer's testimony did not have a substantial influence on the jury's verdict. Gardner v. State, 2005 Tex. App. LEXIS 2268 (Tex. App. Waco Mar. 23 2005).

510. In a criminal prosecution for arson where defendant did not specifically object to the admissibility of the State's evidence on the issue of restitution, the evidentiary question was not preserved for appellate review. However, defendant's claim that the restitution order lacked a sufficient factual basis was perserved without objection. Drilling v. State, 2005 Tex. App. LEXIS 1509 (Tex. App. Waco Feb. 23 2005).

511. Where excluded evidence was not apparent from the record and since defendant failed to make an offer of proof, the appellate court could not determine whether the evidence was relevant to a defensive issue, nor could it ascertain whether the error, if any, was harmful. Gallardo v. State, 2005 Tex. App. LEXIS 913 (Tex. App. El Paso Feb. 3 2005).

512. In a trial for defendant's murder of her child, defendant failed to preserve her argument that the trial court improperly excluded evidence regarding her relationships, which she failed to pursue after being overruled as to the admissibility of her placement in a drug treatment program. She also did not make the required offer of proof regarding that testimony, as well as regarding excluded character evidence, and defendant's testimony regarding her relationship with her other children. Burke v. State, 2005 Tex. App. LEXIS 198 (Tex. App. Houston 14th Dist. Jan. 11 2005).

513. In a case of fleeing from arrest, hearsay testimony was cumulative of other properly admitted testimony; thus, in accordance with Tex. R. App. P. 44.2(b) and Tex. R. Evid. 103(a), its admission was not reversible error. Gant v. State, 153 S.W.3d 294, 2004 Tex. App. LEXIS 11841 (Tex. App. Beaumont 2004), writ of certiorari denied by 126 S. Ct. 1574, 164 L. Ed. 2d 307, 2006 U.S. LEXIS 2315, 74 U.S.L.W. 3530 (U.S. 2006).

514. Where defendant failed to object to the admission of his statement to authorities regarding the credibility of his victim, he failed to preserve the issue for appellate review because none of the fundamental error categories included the admission or exclusion of evidence. Apolinar v. State, 2004 Tex. App. LEXIS 6025 (Tex. App. San Antonio July 7 2004).

515. Complaining party, to preserve a complaint that the trial court erroneously excluded evidence, had to bring forward a record indicating the nature of the evidence and if the excluded evidence was not apparent from the context of the record, it had to be brought forward either through a timely offer of proof or a formal bill of exception; absent a showing of what such testimony would have been, nothing was presented for review, such that although defendant sought to introduce the evidence three times, he did not make an offer of proof regarding what the witnesses would say about the couple's relationship, how that would affect his defense, or how it would assist the jury in its deliberations. Because he made no offer of proof at the time of his objections, defendant waived his right to appeal this issue. Novillo v. State, 2004 Tex. App. LEXIS 5086 (Tex. App. Austin June 10 2004).

516. In a criminal prosecution for aggravated sexual assault, where the State offered defendant's statement into evidence without objection, no error was preserved for appellate review. Carter v. State, 2004 Tex. App. LEXIS 4901 (Tex. App. Amarillo May 28 2004).

517. Defendant, on a charge of driving while intoxicated, waived his argument that the trial court incorrectly refused to allow him to testify about his medical condition where he made no offer of proof. Hough v. State, 2004 Tex. App. LEXIS 101 (Tex. App. Austin Jan. 8 2004).

518. Under Tex. R. Evid. 103(a)(2), a defendant's substantial rights were not affected by the trial court's ruling that defense counsel could not question a witness, for impeachment purposes, regarding his being a drug dealer where the trial court offered defense counsel 20 minutes to question the witness outside of the jury's presence in order to establish whether the witness was indeed a drug dealer, and defense counsel declined the trial court's generous offer. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App. LEXIS 7512 (Tex. App. Beaumont 2003).

519. Where defendant was a passenger in a vehicle she had rented when it was pulled over by a sheriff's deputy, a consensual search led to the seizure of illegal drugs and the arrest of defendant and the driver, defendant was charged with unlawful possession, which required proof of intentional or knowing possession of the drugs, defendant consistently denied knowledge of the drugs, and the State relied upon circumstantial evidence to establish knowledge where the driver's statement to law enforcement, in which she claimed responsibility for the situation and asserted that she "used" defendant to obtain the rental vehicle and that defendant knew nothing about the drugs, was a statement against penal interest supported by corroborating evidence indicating its trustworthiness and should have been admitted under Tex. R. Evid. 803(24) and its exclusion prevented defendant from adequately supporting her defense and substantially and injuriously affected the jury's verdict, thereby affecting a substantial right of the defendant under Tex. R. Evid. 103(a). James v. State, 102 S.W.3d 162, 2003 Tex. App. LEXIS 181 (Tex. App. Fort Worth 2003).

520. Any error in the trial court's ruling was preserved for appellate review because defendant timely requested the victim impact statement, when his request was denied, he asked that a copy of the statement be placed in the record for purposes of appeal, and the trial court granted this latter request. Gozdowski v. State, 2002 Tex. App. LEXIS 9363 (Tex. App. Fort Worth May 2 2002).

Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : General Overview

521. In defendant's capital murder case, a court did not err by informing the jury that it had overruled defendant's objection to the State's attempt to offer defendant's grand jury testimony, which had occurred outside the jury's presence where the trial judge's explanation was not a comment on the weight of the evidence, and it did not rise to the level of fundamental error because the judge did not express an opinion on the weight of evidence. Martinez v. State, 147 S.W.3d 412, 2004 Tex. App. LEXIS 2897 (Tex. App. Tyler 2004), *cert. denied*, 131 S. Ct. 3073, 180 L. Ed. 2d 896, 2011 U.S. LEXIS 4930 (2011).

Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges

522. Trial court's statements to the jury venire during voir dire were not improper comments on the weight of the evidence in violation of Tex. Code Crim. Proc. Ann. art. 38.05 and did not rise to fundamental error because the trial court properly laid out the manner in which a misdemeanor theft offense was enhanced to a felony third-offender offense and described the State's burden, and, taken in context, the trial court explained to the venire that there had to have been an allegation of two prior theft convictions to charge a defendant with felony third-offender theft; the trial court explained that defendant was guilty only if the State proved beyond a reasonable doubt that he had been previously convicted of the two prior felony thefts alleged and that he had committed the underlying theft offense. The statements neither tainted defendant's presumption of innocence nor compromised the impartiality of the jury. Jackson v. State, 2009 Tex. App. LEXIS 7232, 2009 WL 3050588 (Tex. App. Houston 14th Dist. Sept. 10 2009).

Evidence : Procedural Considerations : Limited Admissibility

523. In defendant's sexual assault and indecency with a child case, any error in failing to give limiting instructions was harmless; defendant's first request was untimely and the trial court did not err by denying it, and within the context of the entire case, defendant's failure to request a limiting instruction during any other testimony covering the same extraneous offense evidence did not affect defendant's substantial rights. Neathery v. State, 2007 Tex. App. LEXIS 6625 (Tex. App. Fort Worth Aug. 16 2007).

524. Under Tex. R. Evid. 103(a)(2), defendant failed to preserve for review her claim that the trial court erred by refusing her request to take the stand under the limited use doctrine to testify about the voluntariness of her confession, where the record was devoid of any reference to what, if anything, defendant would have testified to. Greenwood v. State, 948 S.W.2d 542, 1997 Tex. App. LEXIS 3616 (Tex. App. Fort Worth 1997).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

525. At defendant's DWI trial, the court did not deny his rights under the Sixth Amendment by limiting his cross-examination of the State's witness who was a former breath test technical advisor; without the substance of the proffered evidence, defendant's bill of exception failed to preserve his complaint for appellate review. Balderama v. State, 421 S.W.3d 247, 2013 Tex. App. LEXIS 15133, 2013 WL 6637703 (Tex. App. San Antonio Dec. 18 2013).

526. In a murder case, the trial court did not err when it denied defendant the opportunity to question an eyewitness about her experience with burning people to establish her as an alternate perpetrator. With little details regarding the alleged past conduct, the trial court did not err in sustaining the State's relevancy objection because defendant failed to make an offer of proof under Tex. R. Evid. 103(a)(2) describing the circumstances surrounding the alleged incidences, including who was involved and how long ago they occurred. Dayne Adenauer White v. State, 2012 Tex. App. LEXIS 8107 (Tex. App. Houston 1st Dist. Sept. 27 2012).

527. Motion to cross-examine the State's breath-test expert about the operation of the Intoxilyzer 5000 was not preserved for review because defendant failed to establish that the general subject matter of his proffered evidence would be used to impeach the expert, and not the substance of the expert's testimony as required by Tex. R. Evid. 103(a)(2). When the defense attorney failed to "perfect a bill" or to make a statement of what he would prove, as he told the trial court he would do, he failed to satisfy Rule 103(a)(2); counsel's statements were not a reasonably specific summary of the evidence offered. Holmes v. State, 323 S.W.3d 163, 2009 Tex. Crim. App. LEXIS 522 (Tex. Crim. App. 2009).

528. Defendant contended that the trial court erred in not granting a mistrial because the State was allowed to allude to inadmissible evidence, which violated due process, but the court disagreed; in keeping in line with Tex. R. Evid. 103(c), the trial court refused to allow the contents of a letter to be presented to the jury, the contents of the letter were never discussed, such that no error occurred, and even if error occurred, the trial court could have concluded that its instruction to disregard effectively removed any prejudice. Randle v. State, 2008 Tex. App. LEXIS 6154 (Tex. App. Houston 1st Dist. Aug. 14 2008).

529. Case was not one in which defendant had been denied the opportunity to present evidence or preserve the record, but rather defendant complained that the trial court denied his request to recall certain members of the venire for questioning, and thus, Tex. R. Evid. 103 did not apply; counsel had the chance to ask the venire questions related to certain photographs displayed during voir dire, but did not. Salazar v. State, 2008 Tex. App. LEXIS 1151 (Tex. App. Amarillo Feb. 15 2008).

530. Terms bill of review and bill of exceptions were often confused; although defense counsel requested a bill of review when the appropriate request should have been a request for a bill of exception or an offer of proof, the court believed that the trial court was not confused. Salazar v. State, 2008 Tex. App. LEXIS 1151 (Tex. App. Amarillo Feb. 15 2008).

531. Executor's failure to make a formal bill of exceptions pursuant to Tex. R. App. P. 33 after making no offer of proof waived his challenge to the exclusion of evidence in an action to remove him for cause; simply filing the excluded evidence with the probate court was insufficient. In the Estate of Miller, 243 S.W.3d 831, 2008 Tex. App. LEXIS 110 (Tex. App. Dallas 2008).

532. Counsel did not object when defendant was forced to take a breath test before his DWI trial to determine if he was intoxicated in the courtroom; defendant forfeited his right to complain about the admission of any evidence relating to the breath test or his alleged intoxication in the courtroom. Phillips v. State, 2006 Tex. App. LEXIS 2771 (Tex. App. Fort Worth Apr. 6 2006).

533. Defendant's convictions for aggravated assault with a deadly weapon, possession of cocaine in an amount of less than one gram, and robbery, were appropriate where defendant's argument on appeal that a statement was an improper comment on the evidence was not objected to at trial and there was no fundamental error under Tex. R. Evid. 103. Williams v. State, 191 S.W.3d 242, 2006 Tex. App. LEXIS 1687 (Tex. App. Austin 2006).

534. In a child sexual abuse case, because there was no offer of proof, defendant did not preserve, under Tex. R. App. P. 33 and Tex. R. Evid. 103(a)(2), a complaint that the trial court erroneously excluded evidence of the bias of a witness. Vega v. State, 2006 Tex. App. LEXIS 1513 (Tex. App. Houston 1st Dist. Feb. 23 2006).

535. Defendant failed to preserve error with an untimely objection that was not repeated each time as required, for purposes of Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a)(1). Mai v. State, 189 S.W.3d 316, 2006 Tex. App. LEXIS 1065 (Tex. App. Fort Worth 2006).

536. Without a witness's responses to the questions defendant wanted to ask, the court was unable to determine the impact the testimony might have had, and thus, for purposes of Tex. R. App. P. 33.1, 33.2 and Tex. R. Evid. 103(a)(2), defendant did not preserve the issue for review and the court overruled it. Bird v. State, 2006 Tex. App. LEXIS 1091 (Tex. App. El Paso Feb. 9 2006).

537. In a child sexual abuse case, defendant's objections at the conclusion of an admissibility hearing preserved his complaint that the outcry statement was insufficient because it failed to describe an act for which he was indicted; pursuant to Tex. R. Evid. 103(a)(1), the objections were deemed to apply to the evidence when it was admitted before the jury without the necessity of repeating the objections. Klein v. State, 2006 Tex. App. LEXIS 950 (Tex. App. Fort Worth Feb. 2 2006), opinion withdrawn by, substituted opinion at, modified by 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

538. In a negligence action arising from a motor vehicle accident, failure to object waived, under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103, claims of falsified or spoliated evidence. Kadyebo v. Chako, 2006 Tex. App. LEXIS 416 (Tex. App. Fort Worth Jan. 19 2006).

539. In a civil forfeiture proceeding, defendant waived his complaint concerning evidence seized from his wallet during a pat down search incident to his arrest for possession of a controlled substance; defendant made no objection when the state presented testimony concerning the evidence. $ 1,590.00 United States Currency v. Tex., 2005 Tex. App. LEXIS 10423 (Tex. App. Fort Worth Dec. 15 2005).

540. Because a witness' testimony was not offered for the truth of the matter asserted, it did not constitute hearsay; even if the testimony was hearsay, because the testimony was cumulative, if there was error, it was harmless under Tex. R. App. P. 44.2(b), given that defendant did not demonstrate that the admission of the testimony affected defendant's substantial rights under Tex. R. App. P. 44.2(b) and Tex. R. Evid. 103(a). Alexander v. State, 2005 Tex. App. LEXIS 10298 (Tex. App. Beaumont Dec. 7, 2005).

541. Because there was no proof as to what defendant's testimony would have been, for purposes of Tex. R. Evid. 103(a) or Tex. R. App. P. 33.1(a), and the precise content of the excluded testimony was not apparent, the issue was not preserved for review. Kennedy v. State, 184 S.W.3d 309, 2005 Tex. App. LEXIS 10126 (Tex. App. Texarkana 2005).

542. In child custody and support enforcement proceedings, the mother's failure to object to the trial court's questioning waived the issue under Tex. R. App. P. 33.1 and Tex. R. Evid. 103; also, the questioning did not deny the mother her federal or state constitutional rights to a fair trial or violate Tex. R. Evid. 605 because the judge did not testify as a witness at the trial and the questions were reasonable and fact-based. Kogel v. Robertson, 2005 Tex. App. LEXIS 10028 (Tex. App. Austin Dec. 2 2005).

543. For purposes of Tex. R. Evid. 103(a)(2) and Tex. R. App. P. 33.1(a)(1)(A), preservation of error with regard to the exclusion of evidence involves a two-step process: informing the trial court of the substance of the evidence sought to be admitted and informing the trial court of the legal grounds for the admission of the evidence. Johnson v. State, 181 S.W.3d 760, 2005 Tex. App. LEXIS 9441 (Tex. App. Waco 2005).

544. Defendant sufficiently advised the trial court of the substance of the evidence defendant sought to admit, for purposes of Tex. R. Evid. 103(a)(2); however, because defendant's theory for admissibility on appeal was different than the theory of admissibility pursued in the trial court, defendant failed to preserve the issue for review, pursuant to Tex. R. App. P. 33.1(a)(1)(A). Johnson v. State, 181 S.W.3d 760, 2005 Tex. App. LEXIS 9441 (Tex. App. Waco 2005).

545. While it was clear that defendant's attorney did not obtain a running objection, the bench conference was a hearing outside the presence of the jury and satisfied Tex. R. Evid. 103(a), and thus, for purposes of Tex. R. App. 33.1(a), defendant properly preserved error and the appellate court was correct in addressing the issue. Haley v. State, 173 S.W.3d 510, 2005 Tex. Crim. App. LEXIS 1621 (Tex. Crim. App. 2005).

546. In a criminal trespass trial, defendant's complaint that an officer's testimony regarding his intoxication was inadmissible extraneous offense testimony was not preserved for review under Tex. R. App. P. 33.1(a)(1) and Tex. R. Evid. 103(a)(1) because defendant failed to object to the admission of other evidence relating to his intoxication. Jones v. State, 2005 Tex. App. LEXIS 8126 (Tex. App. Fort Worth Sept. 29 2005).

547. In a DWI trial, defendant forfeited his objection to laser radar gun evidence under Tex. R. App. P. 33.1(a)(1) and Tex. R. Evid. 103(a)(1) because he did not voice an objection to the officer's testimony regarding his use of the laser radar gun on defendant's vehicle until after the testimony was already in evidence and the officer was questioned on voir dire. Miley v. State, 2005 Tex. App. LEXIS 8132 (Tex. App. Fort Worth Sept. 29 2005).

548. Defendant preserved no error regarding the trial court's handling of his request to present testimony to support his motion to disqualify the district attorney's office because defendant failed to present to the trial court any offer of proof of any evidence he anticipated providing on the subject. Green v. State, 2005 Tex. App. LEXIS 7841 (Tex. App. Texarkana Sept. 27 2005).

549. By failing to object in the trial court on a particular basis under Tex. R. Evid. 103(a)(1), defendant failed to preserve the issue for review under Tex. R. App. P. 33.1(a). Butler v. State, 2005 Tex. App. LEXIS 7709 (Tex. App. San Antonio Sept. 21 2005).

550. In a criminal trial for aggravated sexual assault, the State gave notice of its intention to use evidence of extraneous offenses committed by defendant and the trial court admitted the evidence. Because defendant did not object on the ground that the State's notice was untimely, the issue was not preserved for review. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

551. By failing to object to the admission of a hair sample at trial, defendant waived his complaint. Ocanas v. State, 2005 Tex. App. LEXIS 7726 (Tex. App. Amarillo Sept. 20 2005).

552. Defendant failed to preserve error as to testimony that he had been imprisoned for eight years where he objected after the State's initial question but not to subsequent questioning, and never asked for a running objection or a hearing outside of the jury's presence. Wilson v. State, 2005 Tex. App. LEXIS 7663 (Tex. App. Fort Worth Sept. 15 2005).

553. Because defendant's request to impeach the officer if the officer changed the officer's story on the stand was premature and not made with sufficient specificity, and because the substance of the evidence was not apparent from the context of the request, for purposes of Tex. R. Evid. 103(a), defendant waived any error under Tex. R. App. P. 33.1. Ahmed v. State, 2005 Tex. App. LEXIS 7148 (Tex. App. Corpus Christi Aug. 31 2005).

554. Pursuant to Tex. R. App. P. 33.1, defendant did not preserve certain issues for review because defendant initially objected to the testimony, but then did not ask for a running objection, nor did defendant get a court ruling to offered testimony outside of the jury's presence, pursuant to Tex. R. Evid. 103(a)(1). Miramontes v. State, 225 S.W.3d 132, 2005 Tex. App. LEXIS 7160 (Tex. App. El Paso 2005).

555. In a prosecution of defendant juvenile for felony murder, the court of appeals had no basis for reviewing defendant's contention that the trial court erred in excluding a defense exhibit in the absence of a bill of exception or offer of proof. In re E.B.M., 2005 Tex. App. LEXIS 7255 (Tex. App. Fort Worth Aug. 31 2005).

556. Defendant did not make an offer of proof, under Tex. R. Evid. 103, to demonstrate what testimony would have been if allowed, and thus defendant did not preserve error; however, to the extent the court was able to glean the substance of the evidence that was excluded, the questions called for hearsay responses, as defined in Tex. R. Evid. 801(d), because a witness was asked to testify about a statement made by a third person, and the testimony defendant claimed was erroneously excluded was actually admitted elsewhere and defendant failed to show harm. Jones v. State, 2005 Tex. App. LEXIS 7049 (Tex. App. Dallas Aug. 29 2005).

557. Party only partially preserved, under Tex. R. App. P. 33.1(a)(1), its challenge to the exclusion of certain testimony and questioning related to deposition changes because counsel made an offer of proof concerning only three of the deposition changes. Chavez Constr., Inc. v. McNeely, 177 S.W.3d 593, 2005 Tex. App. LEXIS 6930 (Tex. App. Houston 1st Dist. 2005).

558. Defense counsel's objection that a police officer was speaking of someone else's knowledge was sufficiently specific to preserve defendant's hearsay objection under Tex. R. App. P. 103(a)(1); however, where defense counsel cited a field manual entitled "Standardized Field and Sobriety Testing," and had the officer read aloud a portion of it that said a person whose eyes did not track together could be indicative of an injury, serious medical condition, or neurological disorder, the effect of the countervailing evidence introduced was negligible; therefore, error, if any, in the admission of the complained-of hearsay testimony was harmless. Werdlow v. State, 2005 Tex. App. LEXIS 6788 (Tex. App. Corpus Christi Aug. 22 2005).

559. Will contestants' objection to an expert's testimony was untimely under Tex. R. Evid. 103(a)(1), and hence, the issue was waived under Tex. R. App. P. 33.1(a); however, the court noted that the contestants' request to voir dire the witness to delve into the expert's qualifications did not invoke Tex. R. Evid. 705(b), which pertained to inquiry into the underlying facts or data and was discretionary in any event. In re Estate of Trawick, 170 S.W.3d 871, 2005 Tex. App. LEXIS 6568 (Tex. App. Texarkana 2005).

560. By making a vague objection to the admission of certain reports under Tex. R. Evid. 103(a), defendant failed to preserve the issue for review pursuant to Tex. R. App. P. 33.1(a)(1)(A). Franklin v. State, 2005 Tex. App. LEXIS 6620 (Tex. App. Corpus Christi Aug. 18 2005).

561. County court erred in impliedly holding that error had been preserved because the testimony of two witnesses would have been repetitious and was properly excluded by the administrative law judge (ALJ), and as to the witnesses who were with the driver prior to the accident, the driver failed to make an offer of proof at the ALJ hearing regarding the excluded testimony of these witnesses and by failing to make an offer of proof or a bill of exceptions, the driver presented nothing for review. Tex. Dep't of Pub. Safety v. Delaney, 2005 Tex. App. LEXIS 6647 (Tex. App. Corpus Christi Aug. 18 2005).

562. In a drug and weapons possession case, defendant's objection to an officer's testimony regarding reported drug activities at his residence, made almost immediately thereafter, was timely and was sufficient to preserve error under Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a)(1). Summerville v. State, 2005 Tex. App. LEXIS 6773 (Tex. App. Fort Worth Aug. 18 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 9715 (Tex. App. Fort Worth Nov. 15, 2005).

563. Party's response to a question was specific enough to show the nature of the testimony the party would have offered, and thus error was preserved pursuant to Tex. R. Evid. 103(a)(2). Coleman v. Coleman, 170 S.W.3d 231,

2005 Tex. App. LEXIS 6557 (Tex. App. Dallas 2005).

564. In a tax lien foreclosure suit, the tax lien holder was not estopped from recovering attorney fees at the rate of 15 percent under Tex. Tax Code Ann. § 33.48; although the tax lien holder requested attorney fees as authorized by Tex. Tax Code Ann. § 32.06 et seq., that citation reasonably included Tex. Tax Code Ann. § 32.065(c), which provided that an assignee of a taxing authority was subrogated to all rights of the taxing authority, and the issue was not properly preserved under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1) because an estoppel argument was not made to the trial court. JB Joyce, Ltd. v. Regions Fin. Corp., 2005 Tex. App. LEXIS 7246 (Tex. App. Texarkana Sept. 1 2005).

565. Defendant failed to preserve for review an issue related to the exclusion of evidence because no offer of proof was made under Tex. R. Evid. 103(a). LaHood v. State, 171 S.W.3d 613, 2005 Tex. App. LEXIS 6258 (Tex. App. Houston 14th Dist. 2005).

566. Although defendant did not object to an extraneous offense each time it was offered, nor did he obtain a running objection from the trial court, because the trial court heard objections to the extraneous offense out of the presence of the jury and ruled that such evidence be admitted, it was unnecessary for defendant to repeat his objections when the evidence was presented to the jury. Consequently, defendant did not waive the issue by failing to object each time the evidence was presented or by extensively cross-examining witnesses and producing one witness in order to meet, rebut, destroy, deny, or explain the extraneous offense. Simoneaux v. State, 2005 Tex. App. LEXIS 5628 (Tex. App. Tyler July 20 2005).

567. Defendant waived any error in the prosecutor's comments on the invocation of his right to counsel and right to remain silent by failing to object to this line of questioning. The error was not preversed for review. Rivera v. State, 2005 Tex. App. LEXIS 5459 (Tex. App. Corpus Christi July 14 2005).

568. Defendant's conviction for one count of sexual assault was proper where the trial court did not err in not permitting his entire confession into evidence allegedly in violation of Tex. R. Evid. 106 because defendant failed to preserve the issue for review as required by Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a). Salazar v. State, 2005 Tex. App. LEXIS 5487 (Tex. App. El Paso July 14 2005).

569. Defendant answered trial counsel's question regarding a witness's alleged drug use on the record, and thus counsel preserved the issue for appeal pursuant to Tex. R. Evid. 103(a)(2); however, the trial court's decision to exclude defendant's testimony was not unreasonable, and counsel did not demonstrate how the purported evidence about the witness's drug use was relevant to the defense under Tex. R. Evid. 401. Edwards v. State, 178 S.W.3d 139, 2005 Tex. App. LEXIS 5132 (Tex. App. Houston 1st Dist. 2005).

570. Defendant failed to preserve his claim for appeal that his punishment violated U.S. Const. amend. VIII, because defendant waived the court reporter for purposes of recording the pre-sentence investigation hearing, and defendant had no record of any objection that would have preserved a claim of error on Eighth Amendment grounds. Fletcher v. State, 2005 Tex. App. LEXIS 4710 (Tex. App. Houston 1st Dist. June 16 2005).

571. Trial court did not prevent appellant from presenting error to the reviewing court through an offer of proof because, while the trial court denied appellant an opportunity to develop the excluded testimony in a question-and-answer form, her attorney informed the court of the substance of the testimony in an offer of proof. In reaching that conclusion, the court compared Tex. R. Evid. 103(a)(2), providing that an offer of proof was a trial-time offer of evidence excluded by court, and Tex. R. App. P. 33.2, setting out that a formal bill of exception was a post-trial offer of evidence in written form. In re A A.E., 2005 Tex. App. LEXIS 4419 (Tex. App. Corpus Christi June 9 2005).

572. Although a driver complained of not being allowed to cross-examine a motorist about certain issues, the record revealed that the trial court did permit such cross-examination; the trial court allowed the driver to present an offer of proof, but the driver did not request that the jury be allowed to hear the evidence. Presswood v. Goehring, 2005 Tex. App. LEXIS 4467 (Tex. App. Houston 1st Dist. June 9 2005).

573. Because defendant did not make an offer of proof under Tex. R. Evid. 103(a)(2) concerning the testimony defendant wanted to elicit from a witness, defendant did not preserve this issue for review. Bronaugh v. State, 2005 Tex. App. LEXIS 4455 (Tex. App. Waco June 8 2005).

574. Defendant's conviction for burglary of a habitation was proper where he failed to preserve error regarding the exclusion of testimony because he did not make an offer of proof or bill of exceptions establishing how witnesses would have answered particular questions. Love v. State, 2005 Tex. App. LEXIS 4236 (Tex. App. Fort Worth June 2 2005).

575. Defendant forfeited one complaint by not preserving error under Tex. R. App. P. 33.2 in the exclusion of certain testimony; no offer of proof had been made under Tex. R. Evid. 103(a)(2). Richards v. State, 2005 Tex. App. LEXIS 3468 (Tex. App. Fort Worth May 5 2005).

576. In an adverse possession case, because the claimants failed to make an offer of proof under Tex. R. Evid. 103(a)(2) regarding the exclusion of documentary evidence, the issue was not preserved for appeal. Melendez v. De Leon, 2005 Tex. App. LEXIS 3360 (Tex. App. San Antonio May 4 2005).

577. Defendant's claim that her fundamental right to confrontation was violated by a trial court's sustaining of the State's objections during a witness's cross-examination was not preserved for appellate review pursuant to Tex. R. Evid. 103(a)(2) because defendant had failed to make an offer of proof and had failed to demonstrate how the substance of the excluded evidence was apparent from the context within which questions were asked. Furthermore, defendant never asserted to the trial court that any of the constitutional rights she complained of in the appeal were violated by the trial court's ruling that sustained the State's objections. Bergman v. State, 2005 Tex. App. LEXIS 3046 (Tex. App. Houston 1st Dist. Apr. 21 2005).

578. Because defendant complained only generally at trial of his "right to remain silent," without any further assertions concerning his rights to post-arrest silence under either Tex. Const. art. I, § 10 or the Sanchez case, defendant's trial objection was not sufficient to make the trial court aware of his complaint, as required by Tex. R. Evid. 103(a)(1). Moreover, the specific grounds of defendant's complaint were not apparent from the context under Tex. R. App. P. 33.1(a)(1)(A). Cleveland v. State, 177 S.W.3d 374, 2005 Tex. App. LEXIS 2726 (Tex. App. Houston 1st Dist. 2005), cert. denied 126 S. Ct. 1774, 164 L. Ed. 2d 523, 2006 U.S. LEXIS 3222, 74 U.S.L.W. 3585 (U.S. 2006).

579. Because the ex-husband did not make an offer of proof on certain proposed testimony, he waived on appeal the issue regarding the testimony. Smith v. Smith, 2005 Tex. App. LEXIS 1983 (Tex. App. Eastland Mar. 17 2005).

580. Because counsel did not make an offer of proof under Tex. R. Evid. 103(a)(2), nor did counsel argue certain grounds for the admission of testimony as required by Tex. R. App. P. 33.1(a), any error regarding the exclusion of the testimony was waived and nothing was presented for review. Ortega v. LPP Mortg., Ltd., 160 S.W.3d 596, 2005 Tex. App. LEXIS 1037 (Tex. App. Corpus Christi 2005).

581. In a murder case, defendant did not preserve his complaint about excluded evidence because he did not make an offer of proof as to the purported meaning of the victim's tattoos, nor demonstrate that the medical

examiner had knowledge on the subject. Moore v. State, 2005 Tex. App. LEXIS 1130 (Tex. App. Houston 1st Dist. Feb. 10 2005).

582. In a termination of parental rights case, the mother did not preserve her complaint for review because the complaint did not comport with the mother's objection made at the time certain testimony was being offered. At trial, the mother complained that a social worker had not followed statutory procedures under the Texas Health and Safety Code, but, on review, the mother complained that the social worker's testimony violated Tex. R. Evid. 510. Additionally, the mother's second objection at trial, which was based on Rule 510, was not made until after the social worker left the witness stand; therefore, this objection was not timely made. In re Smith, 2005 Tex. App. LEXIS 990 (Tex. App. Dallas Feb. 8 2005).

583. In defendant's murder trial, photos were excluded from evidence showing a large pool of blood outside of the victim's motel room; defendant attempted to argue on appeal that these photos were relevant to show that defendant acted in self-defense. Nevertheless, defendant failed to make this argument to the trial court, and he failed to make an offer of of proof; therefore, he failed to preserve the alleged error. Kennedy v. State, 2005 Tex. App. LEXIS 897 (Tex. App. Fort Worth Feb. 3 2005), opinion withdrawn by 2005 Tex. App. LEXIS 10469 (Tex. App. Fort Worth Dec. 16, 2005).

584. In an assault case, evidence of a reconciliation between defendant and the victim was not properly preserved for review because an offer of proof was required; the evidence was designed to elicit certain specific responses which had no bearing on the victim's bias, interest, prejudice, inconsistent statements, traits of character affecting credibility, or evidence that might go to any impairment or disability affecting credibility Mumphrey v. State, 155 S.W.3d 651, 2005 Tex. App. LEXIS 370 (Tex. App. Texarkana 2005).

585. Because defendant did not contend at trial that the admission of the judgment violated Tex. Code Crim. Proc. Ann. art. 38.05, he had not preserved the issue for appellate review. Roberts v. State, 2005 Tex. App. LEXIS 107 (Tex. App. Waco Jan. 5 2005).

586. Pursuant to Tex. R. Evid. 103, defendant's contention concerning the denial of the cross-examination of a witness regarding a prior offense was waived because he failed to make an offer of proof at trial in the form of records of the witness's prior convictions, or by any other method. Mason v. State, 2004 Tex. App. LEXIS 11481 (Tex. App. Texarkana Dec. 22 2004).

587. Because the record did not contain a sufficient offer of proof, the court overruled defendant's claim that the trial court erred in not allowing defendant to recall a witness on rebuttal to impeach the witness with inconsistent statements and to recall another witness to prove those inconsistencies. De Leon v. State, 2004 Tex. App. LEXIS 11197 (Tex. App. San Antonio Dec. 15 2004).

588. Defendant argued that the trial court improperly restricted his attempts to impeach a witness's testimony with a prior statement in which he said he saw the victim in the hallway with a shotgun just before he heard the fatal shot. The State properly responded that the witness's prior written statement was not in the record, and thus defendant had failed to preserve his complaint by making an offer of proof pursuant to Tex. R. Evid. 103. Lindsey v. State, 2004 Tex. App. LEXIS 11139 (Tex. App. Waco Dec. 8 2004).

589. In an aggravated kidnapping case, because no offers of proof were made, defendant failed to preserve error under Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(2) regarding the trial court's refusal to admit prior inconsistent videotaped statements and the exclusion of a defense witness' testimony. Kelly v. State, 2004 Tex. App. LEXIS 10492 (Tex. App. Beaumont Nov. 24 2004).

590. Father argued that the trial court erred by denying him the opportunity to present evidence of his net resources, but his attempted offer, however, came after both he and the State had rested, and the record did not reveal what evidence the father was attempting to offer, nor did it indicate that the father made an offer of proof or a formal bill of exceptions to preserve error, pursuant to Tex. R. Evid. 103(a)(2). Appellate review of alleged improperly excluded evidence was not possible without a showing of what evidence would have been presented, such that the issue of whether the trial court erred by refusing to let the father reopen to put on evidence of his net resources was not preserved for the appellate court's review, Tex. R. App. P. 33.1(a). Hilliard v. Holland, 2004 Tex. App. LEXIS 10515 (Tex. App. Fort Worth Nov. 24 2004).

591. In a personal injury case, because no objection or offer of proof was made under Tex. R. Evid. 103(a)(1), (b) regarding an alleged voir dire error, the issue was unpreserved for review under Tex. R. App. P. 33.1(a). Lewis v. UPS, 175 S.W.3d 811, 2004 Tex. App. LEXIS 9813 (Tex. App. Houston 1st Dist. 2004).

592. At an administrative license suspension hearing, the driver waived any error in the denial of his right to fully cross-examine the arresting officer. The driver did not offer a bill of exceptions containing potential questions for the arresting officer, nor answers he expected to receive. Parks v. Tex. Dep't of Pub. Safety, 2004 Tex. App. LEXIS 9365 (Tex. App. Houston 1st Dist. Oct. 21 2004).

593. Pursuant to Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(a)(1), defendant did not preserve error on his claims that the trial court erred in allowing the State to refer to his post-arrest silence in violation of Tex. Const. art. I, § 10 due to: (1) the lack of time-specific questions by the State; (2) counsel's failure to cite to the state constitution, or even specify that he was objecting to post-arrest silence; and (3) the lack of commentary by the trial court in making its rulings on the objections. There was no indication in the record that the trial court understood that defendant was trying to invoke a protection different from the U.S. Const. amend. V protection which he was citing. Heidelberg v. State, 144 S.W.3d 535, 2004 Tex. Crim. App. LEXIS 1479 (Tex. Crim. App. 2004).

594. Patient's spoliation argument was sufficiently specific to make the trial court aware of her complaint under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1); the patient alleged that the hospital's failure to identify, isolate, or test an allegedly defective infusion pump destroyed the ability to determine what occurred on the occasion in question. Martinez v. Abbott Labs., 146 S.W.3d 260, 2004 Tex. App. LEXIS 8064, CCH Prod. Liab. Rep. P17113 (Tex. App. Fort Worth 2004).

595. Customer argued that the trial court erred in denying her motion to compel discovery, but her counsel conceded at oral argument that she did not obtain a ruling from the trial court on the motion to compel; to preserve a complaint for the appellate court's review, a party had to have presented to the trial court a timely request, objection, or motion that stated the specific grounds for the desired ruling, Tex. R. Evid. 103(a)(1), and the objecting party had to also get an express or implied ruling from the trial court, and because the customer failed to present her objection to the trial court and obtain a ruling, she waived this complaint on appeal. Banks v. River Oaks Steak House, 2004 Tex. App. LEXIS 7517 (Tex. App. Fort Worth Aug. 19 2004).

596. Defendant waived the issue that the trial court abused its discretion by admitting evidence of the complainant's injuries, because he failed to object each time the challenged evidence was offered. Defendant did not request a Tex. R. Evid. 103(a)(1) hearing but he did make a running objection to the testimony of the State's first witness, and defendant never renewed his request for a running objection when other witnesses testified on the same subject. Rodriguez v. State, 2004 Tex. App. LEXIS 6910 (Tex. App. El Paso July 29 2004).

597. In a criminal prosecution for aggravated sexual assault, defendant failed to preserve error in the trial court's decision to sustain the State's hearsay objections when he attempted to testify regarding statements the victim made to him, and defendant did not make a formal offer of proof concerning this proposed evidence. Butler v. State,

2004 Tex. App. LEXIS 6800 (Tex. App. Texarkana July 28 2004).

598. Trial court's exclusion of evidence concerning the lifestyle and the violent nature of the nephew, who was shot to death by defendant, could not be considered error on appeal, as defendant, who was charged with murder did not preserve the issue for review because defendant did not make an offer of proof of what the excluded evidence was and, thus, the appellate court was not left with anything to review in that regard. Goodwin v. State, 2004 Tex. App. LEXIS 6692 (Tex. App. Texarkana July 23 2004).

599. Error based on improper authentication of exhibits during a summary judgment hearing was not preserved for appellate review because an attorney had "no objection" when the evidence was admitted at a prior hearing. Kent v. Holmes, 139 S.W.3d 120, 2004 Tex. App. LEXIS 5844 (Tex. App. Texarkana 2004).

600. Where a trial court did not exclude testimony regarding a patient's motive in bringing a negligence action based on medical malpractice against his doctor, but rather, indicated that the questioning was to be disallowed at one point and could be raised again later, but the patient failed to introduce the evidence again, there was no ruling excluding the evidence for purposes of appellate review and accordingly, the patient failed to preserve the error pursuant to Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(2). Ramsey v. Cravey, 2004 Tex. App. LEXIS 5724 (Tex. App. San Antonio June 30 2004).

601. Where a wife in a divorce proceeding failed to make an offer of proof pursuant to Tex. R. Evid. 103 or file a formal bill of exception pursuant to Tex. R. App. P. 33.2, and the substance of the evidence she sought to present was not apparent from the record, her complaint that the trial court erred by not allowing her to prove that she had separate property and by finding that she had none was not preserved for appellate review under Tex. R. App. P. 33.1(a). Furthermore, because the wife did not present evidence of her ownership of separate property, the correctness of the trial court's finding that she had none had to be presumed under Tex. Fam. Code Ann. § 3.003. Smith v. Smith, 143 S.W.3d 206, 2004 Tex. App. LEXIS 5670 (Tex. App. Waco 2004).

602. Complaining party, to preserve a complaint that the trial court erroneously excluded evidence, had to bring forward a record indicating the nature of the evidence and if the excluded evidence was not apparent from the context of the record, it had to be brought forward either through a timely offer of proof or a formal bill of exception; absent a showing of what such testimony would have been, nothing was presented for review, such that although defendant sought to introduce the evidence three times, he did not make an offer of proof regarding what the witnesses would say about the couple's relationship, how that would affect his defense, or how it would assist the jury in its deliberations. Because he made no offer of proof at the time of his objections, defendant waived his right to appeal this issue. Novillo v. State, 2004 Tex. App. LEXIS 5086 (Tex. App. Austin June 10 2004).

603. Where appellants urged that the district court violated their procedural and substantive due process rights by limiting them to one hour to present their case, where, at no point in the trial did appellants make an offer of proof concerning evidence excluded because of time constraints, the appellate court had nothing to review. Health Enrichment & Longevity Inst., Inc. v. State, 2004 Tex. App. LEXIS 5094 (Tex. App. Austin June 10 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 6246 (Tex. App. Austin July 15, 2004).

604. In a criminal prosecution for aggravated sexual assault, where the State offered defendant's statement into evidence without objection, no error was preserved for appellate review. Carter v. State, 2004 Tex. App. LEXIS 4901 (Tex. App. Amarillo May 28 2004).

605. In a child sexual abuse case, defendant waived an objection to the participation of co-counsel for the State because the objection was not made as soon as the basis for it became apparent, as required by Tex. R. Evid. 103(a)(1). Gardner v. State, 2004 Tex. App. LEXIS 4822 (Tex. App. Fort Worth May 27 2004), affirmed by 164

S.W.3d 393, 2005 Tex. Crim. App. LEXIS 703 (Tex. Crim. App. 2005).

606. To the extent defendant argued that the victim's uncle should have been allowed to testify that the victim had accused others of sexual contact, his contention was waived, because defendant's counsel did not suggest that the testimony should be admitted, and in fact specifically agreed with the trial court that it was inadmissible, and having failed to offer the evidence for admission, defendant could not complain on appeal that the trial court erred by excluding it. Hamrick v. State, 2004 Tex. App. LEXIS 4418 (Tex. App. El Paso May 13 2004).

607. In an inverse condemnation case, a trial court's refusal to allow the State to give an offer of proof was harmless because the substance of the evidence was apparent from the context within which the questions were asked; moreover, the testimony the State sought to offer concerning the impairment of access and the viability of driveway proposals was immaterial to the issue of damages. State v. Delany, 149 S.W.3d 655, 2004 Tex. App. LEXIS 2385 (Tex. App. Houston 14th Dist. 2004), reversed by 2006 Tex. LEXIS 416, 49 Tex. Sup. Ct. J. 557 (Tex. 2006).

608. In a conversion case, following the trial court's ruling excluding the affidavit evidence, the mechanic made no offer of proof showing the substance of any of the affidavits pursuant to Tex. R. Evid. 103; thus, the mechanic failed to preserve error as to the affidavits. Berry v. Covarrubias, 2004 Tex. App. LEXIS 236 (Tex. App. Houston 1st Dist. Jan. 8 2004).

609. In a conversion case, the mechanic failed to make an offer of proof following the trial court's ruling excluding the vehicle inquiry receipt and a police incident report regarding a different car pursuant to Tex. R. Evid. 103; thus, the receipt or the incident report could not be considered on appeal. Berry v. Covarrubias, 2004 Tex. App. LEXIS 236 (Tex. App. Houston 1st Dist. Jan. 8 2004).

610. Admission of testimony from the victim's sister during the penalty phase of defendant's trial about sexual abuse he committed against her was properly admitted, as defendant failed to object to the admission of the challenged testimony; further, said failure to object also precluded review for fundamental error under Tex. R. Evid. 103(d). Martinez v. State, 2003 Tex. App. LEXIS 10811 (Tex. App. San Antonio Dec. 31 2003).

611. Where the record showed that during the punishment phase of the trial, defendant's stepfather testified that defendant had previously taken his car without permission, defendant's conviction of aggravated assault with a deadly weapon was affirmed; defendant waived his objection as to the admission of his stepfather's testimony where he failed to object when subsequent witnesses testified about the same subject under the provisions of Tex. R. Evid. 103(a)(1). Childs v. State, 2003 Tex. App. LEXIS 9825 (Tex. App. Austin Nov. 20 2003).

612. Where appellant and the victim shot each other, the victim died, appellant asserted self-defense, and the witnesses disagreed as to whether the victim or appellant shot first, appellant's conviction of murder in violation of Tex. Penal Code Ann. § 19.02 was affirmed because (1) the evidence as to why appellant was afraid of the victim was irrelevant under the provisions of Tex. R. Evid. 404(a), (b) because the victim's conduct of flashing his gun and shooting first were unambiguous acts of aggression and violence, (2) appellant failed to properly preserve error under Tex. R. Evid. 103(a)(1), Tex. R. App. P. 33.1(a)(1)(A), to the admission of evidence of his gang membership under Tex. R. Evid. 403, and (3) impeachment of the witness under Tex. R. Evid. 609(a) was proper because the witness created a false impression with the jury as to the extent of his arrests and convictions. Reyna v. State, 99 S.W.3d 344, 2003 Tex. App. LEXIS 1391 (Tex. App. Fort Worth 2003).

613. Tex. R. Evid. 103(a)(1) excuses the requirement to repeat objections in front of the jury if a proper objection has been made outside the jury's hearing; where defense counsel objected to two gang related photos at a bench conference, under Rule 103(a)(1) it was not necessary to repeat the objection to the photos but defense counsel

was obligated to object to other gang related evidence. Martinez v. State, 98 S.W.3d 189, 2003 Tex. Crim. App. LEXIS 33 (Tex. Crim. App. 2003), *cert. denied*, 131 S. Ct. 3073, 180 L. Ed. 2d 896, 2011 U.S. LEXIS 4930 (U.S. 2011).

614. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground is not apparent from the context. Martinez v. State, 91 S.W.3d 331, 2002 Tex. Crim. App. LEXIS 233 (Tex. Crim. App. 2002).

615. Under Tex. R. Evid. 103(a)(2), an offer of proof was required to preserve error in the trial court's exclusion of part of a defense witness's testimony where the relevant matters the defense was attempting to prove by the testimony were not apparent from the context of the questioning. Railsback v. State, 95 S.W.3d 473, 2002 Tex. App. LEXIS 8492 (Tex. App. Houston 1st Dist. 2002).

616. A trial court did not err in excluding the testimony of a defendant's expert under Tex. R. Evid. 103(a)(2), where the defendant did not offer a bill of exception of offer of proof to show the substance of his expert's proposed testimony. Martinez v. State, 2002 Tex. App. LEXIS 7708 (Tex. App. San Antonio Oct. 30 2002).

617. Absent a showing of proof regarding the testimony of defendant's witness as required by Tex. R. Evid. 103, a trial court properly excluded the witness's testimony that appeared to have been based on facts not in evidence. Ricketts v. State, 89 S.W.3d 312, 2002 Tex. App. LEXIS 7838 (Tex. App. Fort Worth 2002).

618. Appellant was not denied due process at sentencing because he failed to object to the judge's statement that he would not consider probation under the provisions of Tex. R. Evid. 103(a). Teixeira v. State, 89 S.W.3d 190, 2002 Tex. App. LEXIS 6980 (Tex. App. Texarkana 2002).

619. Appellant's conviction was affirmed because the issue of the expert's testimony on sexual assault had been waived in that appellant failed to make a specific objection as to any aspect of her expertise under the provisions of Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1. Teixeira v. State, 89 S.W.3d 190, 2002 Tex. App. LEXIS 6980 (Tex. App. Texarkana 2002).

620. Objection that extraneous act evidence was prior to the act at issue and not part of the transaction at issue was not sufficient to preserve appeal based on lack of notice of extraneous act evidence. Hartson v. State, 59 S.W.3d 780, 2001 Tex. App. LEXIS 6810 (Tex. App. Texarkana 2001).

621. Stockbroker's testimony in a bill of exception was insufficient to satisfy the burden born by a trial court when it excluded evidence because the substance of the evidence had to by known to the trial court by an offer pursuant to Tex. R. Evid. 103(a)(2). Texas Capital Secs., Inc. v. Sandefer, 58 S.W.3d 760, 2001 Tex. App. LEXIS 3223, Blue Sky L. Rep. (CCH) P74233 (Tex. App. Houston 1st Dist. 2001), opinion withdrawn in part by 2001 Tex. App. LEXIS 5004 (Tex. App. Houston 1st Dist. July 26, 2001).

622. Under Tex. R. Evid. 103(a)(2), defendant failed to preserve for review her claim that the trial court erred by refusing her request to take the stand under the limited use doctrine to testify about the voluntariness of her confession, where the record was devoid of any reference to what, if anything, defendant would have testified to. Greenwood v. State, 948 S.W.2d 542, 1997 Tex. App. LEXIS 3616 (Tex. App. Fort Worth 1997).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

623. Defendant's objection, when it finally arrived, was too late to preserve the complaint; the prosecutor asked defendant a number of times if he thought the victim had lied, and defendant answered a number of times before he finally objected. Donato v. State, 2014 Tex. App. LEXIS 4698 (Tex. App. Fort Worth Apr. 30 2014).

624. Where defendant was convicted for failure to comply with sexual offender registration requirements, his claim that the trial court erred by overruling his objection to the prosecutor's closing argument was not preserved for review because it was not clear from his objection what he was objecting to at trial. Hargiss v. State, 2014 Tex. App. LEXIS 3103, 2014 WL 1087924 (Tex. App. Fort Worth Mar. 20 2014).

625. Where defendant was convicted for failure to comply with sexual offender registration requirements, he failed to preserve review of the prosecutor's comment that he had previously been convicted of aggravated sexual assault of a child because he did not object each time the State presented evidence of, or commented on, his previous sexual assault conviction. Hargiss v. State, 2014 Tex. App. LEXIS 3103, 2014 WL 1087924 (Tex. App. Fort Worth Mar. 20 2014).

626. Prosecutor did not make a proper objection by remarking that he did not want that done after the trial court suggested to defense counsel that he could respond in closing to the prosecutor's closing argument that defendant's refusal to take a breath test was evidence of his intoxication. Montoya v. State, 2014 Tex. App. LEXIS 473, 2014 WL 223228 (Tex. App. Corpus Christi Jan. 16 2014).

627. Trial court did not err by revoking defendant's community supervision because the victim's positive identification of him as the individual who exposed himself to her on a college campus was sufficient to show that he committed the offense of indecent exposure. Because defendant did not make any objections to the admissibility of the in-court identification, he waived any error in the trial court's admission of the testimony. Samuel v. State, 2013 Tex. App. LEXIS 14665 (Tex. App. Corpus Christi Dec. 5 2013).

628. At defendant's trial for failure to comply with sex offender registration requirements, the trial court did not abuse its discretion by overruling his objections to the admission of evidence of an extraneous bad act under Tex. R. Evid. 404(b); because his objection in the trial court pertained to lack of adequate notice, his complaint that the evidence in question constituted improper pattern evidence was not preserved for appellate review under Tex. R. App. P. 33.1(a); Tex. R. Evid. 103(a). Hogan v. State, 2013 Tex. App. LEXIS 6706 (Tex. App. Dallas May 30 2013).

629. Even if a trial court erred in denying defendant's motion for a mistrial, defendant waived error under Tex. R. Evid. 103(a)(1) by failing to timely object; although there was extensive discussion among the prosecution, defense counsel, and the trial court regarding defendant's invoking his right against self-incrimination, defendant did not object when the State asked him the question of which he complained on appeal. Kalka v. State, 2013 Tex. App. LEXIS 6257 (Tex. App. San Antonio May 22 2013).

630. Trial court granted defendant a running objection as to hearsay and he did not specifically object on the basis that the repeated details of the offenses were cumulative of other evidence, or unduly repetitive, and he has waived that objection, Tex. R. Evid. 103(a)(1); Tex. R. App. P. 33.1(a); there was no abuse of discretion under the circumstances in the trial court's exercise of control over the manner in which the trial was conducted, Tex. R. Evid. 611(a). In re Adame, 2013 Tex. App. LEXIS 4847, 2013 WL 3853386 (Tex. App. Beaumont Apr. 18 2013).

631. Even if the court found that appellant's objections fit within the confines of Tex. R. Evid. 404(b), appellant did not object each time the State sought to introduce evidence of the incident, nor did appellant obtain a running objection or set forth a proper objection outside the jury's presence, for purposes of Tex. R. Evid. 103(a)(1); because the evidence in question was admitted elsewhere without objection, any error in admitting the evidence

was cured. Rudzavice v. State, 2013 Tex. App. LEXIS 3140, 2013 WL 1188924 (Tex. App. Waco Mar. 21 2013).

632. Objection on relevance grounds did not preserve error under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1) as to an asserted Tex. R. Evid. 404(b) error. Helping Hands Home Care, Inc. v. Home Health of Tarrant County, Inc., 393 S.W.3d 492, 2013 Tex. App. LEXIS 820, 2013 WL 326319 (Tex. App. Dallas Jan. 29 2013).

633. In a partition action, the appellant property owner's complain of the relevancy of the evidence was not preserved for review because the exhibit had already been admitted when the appellee property owner testified and appellant did not object to appellee's expert's testimony; the same or similar evidence that appellant complained of on appeal was admitted elsewhere in the trial without a relevance objection, Tex. R. App. P. 33.1(a), Tex. R. Evid. 103(a)(1). Williams v. Mai, 2012 Tex. App. LEXIS 10513, 2012 WL 6644704 (Tex. App. Houston 1st Dist. Dec. 20 2012).

634. Under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(d), defendant did not show fundamental error where nothing in the record demonstrated that the witness's testimony was false; defendant's sentence was within the range of punishment and the witness testimony did not affect his sentence. Olivarez v. State, 2012 Tex. App. LEXIS 9253, 2012 WL 5458422 (Tex. App. Houston 1st Dist. Nov. 8 2012).

635. Defendant's conviction for aggravated sexual assault of a child under six years of age at the time of the offense was appropriate because there was no error in the admission of the child's statement to the forensic interviewer. However, even there was error, it was harmless because evidence regarding the victim's statements that defendant sexually assaulted her on two occasions came into evidence without objection through the testimony of a nurse and the SAFE Form, Tex. R. Evid. 103(a)(1). Loya v. State, 2012 Tex. App. LEXIS 8640, 2012 WL 4875499 (Tex. App. Dallas Oct. 16 2012).

636. Under Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(a)(1), defendant did not renew his objection during the detective's testimony, nor did he make a new objection, or seek to renew the objection, during the testimony of the witnesses, or the State's closing argument; defendant preserved nothing for appellate review. Suiters v. State, 2012 Tex. App. LEXIS 8098, 2012 WL 4393391 (Tex. App. El Paso Sept. 26 2012).

637. Pursuant to Tex. R. App. P. 33.1(1)(1)(A) and Tex. R. Evid. 103(a)(1), defendant did not preserve for appellate review his arguments concerning his complaints regarding witness testimony, and he did not object when the witness testified to essentially the same facts as the detective's testimony. Suiters v. State, 2012 Tex. App. LEXIS 8099 (Tex. App. El Paso Sept. 26 2012).

638. In a case involving a forum selection clause, although two guarantors made a number of objections to an affidavit in an appellate brief, none of the objections were made at a hearing. Therefore, the issues were overruled. Chaseekhalili v. Cinemacar Leasing, Inc., 2012 Tex. App. LEXIS 6617 (Tex. App. Fort Worth Aug. 9 2012).

639. Defendant failed to preserve his bolstering argument for appeal because his only objections to the admission of the sexual assault nurse examiner's testimony about the victim's statements were that it was hearsay and violated his rights to confront the complainant; defendant never complained to the trial court about the alleged bolstering effect of the testimony and therefore he failed to preserve error on that ground. Bowman v. State, 2012 Tex. App. LEXIS 5210, 2012 WL 2444908 (Tex. App. Dallas June 28 2012).

640. Defendant's motion in limine and argument on the issue outside the presence of the jury adequately preserved for review his objections to evidence regarding his membership in the Aryan Brotherhood gang without the need to object to testimony as it came in or to obtain a continuing objection. Guffey v. State, 2012 Tex. App.

LEXIS 3293, 2012 WL 1470185 (Tex. App. Eastland Apr. 26 2012).

641. Defendant forfeited her complaint about the evidence under Tex. R. App. P. 33.1(a) and the evidentiary complaints made by her were not fundamental under Tex. R. Evid. 103(d). Osborne v. State, 2011 Tex. App. LEXIS 9299, 2011 WL 5903651 (Tex. App. Fort Worth Nov. 23 2011).

642. Defendant neither filed a motion to suppress any evidence nor asserted an objection when the State offered the handgun into evidence; consequently, defendant failed to preserve this point for appellate review. Nero v. State, 2011 Tex. App. LEXIS 9039, 2011 WL 5515495 (Tex. App. Fort Worth Nov. 10 2011).

643. Any statements addressed to defendant were for the purpose of clarifying an issue before the court, that being rehabilitation, and the trial court maintained a neutral and detached role; thus, an objection was required. Williams v. State, 2011 Tex. App. LEXIS 8750, 2011 WL 5221263 (Tex. App. Waco Oct. 26 2011).

644. Because defendant did not make a Tex. R. Evid. 403 objection at any point during the testimony of a witness or when the State actually introduced the exhibit, the Rule 403 complaint was waived; defendant did not obtain a running objection based on Tex. R. Evid. 404(b) after he first objected to the witness's testimony on the subject of the altercation at the hospital, and he did not raise a Rule 404(b) or 403 objection when the State offered the video, and as such, he waived error. White v. State, 2011 Tex. App. LEXIS 8118, 2011 WL 4825650 (Tex. App. El Paso Oct. 12 2011).

645. Patient failed to object when the State read his admissions into evidence and when it explained the requests for admissions; the patient failed to preserve his complaints for appeal, Tex. E. Evid. 103(a)(1), Tex. R. App. P. 33.1. In re Kilpatrick, 2011 Tex. App. LEXIS 6997, 2011 WL 3925665 (Tex. App. Beaumont Aug. 25 2011).

646. Defendant's "invading the province of the jury" amounted to no objection and did not preserve anything for appellate review, Tex. R. Evid. 103, Tex. R. App. P. 33.1. Contreras v. State, 2011 Tex. App. LEXIS 5891, 2011 WL 3273966 (Tex. App. Tyler July 29 2011).

647. Defendant did not preserve his claim that the court improperly permitted the officer to state his expert opinion that defendant was intoxicated for review because he did not object to this testimony at trial, and defendant did not argue that the admission of the evidence was fundamental error; the officer explained the basis of his opinion, permitting the jury to evaluate whether it agreed with the officer's conclusion. Reyna v. State, 2011 Tex. App. LEXIS 5038, 2011 WL 2621314 (Tex. App. Austin July 1 2011).

648. Trial court's explanation did not indicate approval of the State's argument, indicate disbelief in the defense's position, or diminish the credibility of the defense's approach; because the inmate did not object to the trial court's explanation, he waived his complaint. In re Frazier, 2011 Tex. App. LEXIS 4896 (Tex. App. Beaumont June 30 2011).

649. Viewed in its proper context, the jury instruction neither tainted defendant's presumption of innocence or prevented him from receiving a fair trial, and no fundamental error was committed; therefore, defendant waived the issue by failing to object at trial. Gonzales v. State, 2011 Tex. App. LEXIS 4376, 2011 WL 2404272 (Tex. App. Corpus Christi June 9 2011).

650. At the revocation hearing, defendant objected to an officer's testimony concerning text messages that he found on a cell phone that was in defendant's possession at the time of her arrest for driving while intoxicated on the grounds that the officer lacked a warrant, probable cause, or reasonable suspicion to justify searching the cell

phone. Because defendant did not object that the testimony was hearsay or that it violated the Confrontation Clause, these issues were not preserved for review under Tex. R. Evid. 103 (a)(1) and Tex. R. App. P. 33.1. Bird v. State, 2011 Tex. App. LEXIS 4211, 2011 WL 2203925 (Tex. App. Eastland June 2 2011).

651. After the trial court denied defendant's motion in limine, he waived his complaint regarding the officer's testimony about the horizontal gaze nystagmus field sobriety test during his trial for driving while intoxicated. Defendant made no objection as required by Tex. R. Evid. 103(a)(1) and his motion in limine was not sufficient to preserve the error for review. Garcia v. State, 2011 Tex. App. LEXIS 2352, 2011 WL 1198922 (Tex. App. Tyler Mar. 31 2011).

652. Denial of defendant's motion in limine was not sufficient to preserve error in admitting evidence of defendant's extraneous offenses. By not objecting in accordance with Tex. R. Evid. 103 to the admission of his guilty pleas at trial, defendant failed to preserve the issue for appellate review. Kuykendall v. State, 335 S.W.3d 429, 2011 Tex. App. LEXIS 1722 (Tex. App. Beaumont Mar. 9 2011).

653. In a case in which defendant's issue on appeal related not to the admission of certain photographs of the victim, to which defendant objected, but to the trial court's asking of a predicate question, which defendant suggested indicated the judge's bias towards the State, the appellate court agreed that the trial court should have allowed the State to lay the predicate for its evidence, but it did not agree the trial court's conduct rose to the level of a fundamental error under Tex. R. Evidence 103(d) or a right that could not be forfeited. To the extent the trial court did err, its action was not incurable if defendant had objected. Vestal v. State, 2011 Tex. App. LEXIS 802, 2011 WL 345943 (Tex. App. Houston 1st Dist. Feb. 3 2011).

654. On appeal of defendant's conviction for aggravated assault with a deadly weapon, he claimed the trial court abused its discretion by admitting evidence that two of the guns found in his apartment were stolen. Because the jury had already heard evidence from two different witnesses that the guns were stolen without any objection from defendant, the error was not properly preserved for review under Tex. R. Evid. 103(a)(1). Chenier v. State, 2011 Tex. App. LEXIS 678, 2011 WL 286156 (Tex. App. Houston 1st Dist. Jan. 27 2011).

655. Defendant's trial counsel did not lodge any objections or obtain a running objection pertaining to the complained-of testimony regarding defendant's alleged misdeeds in his real estate dealings; thus, under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103, the issue was waived on appeal. Whitley v. State, 2010 Tex. App. LEXIS 8651, 2010 WL 4264661 (Tex. App. Corpus Christi Oct. 28 2010).

656. Where decedent's wife testified as to their agreement to be married, the trial court construed decedent's will as if a common law marriage existed; on appeal, decedent's children argued that the wife's testimony did not meet the requirements of the Dead Man's Statute under Tex. R. Evid. 601 because it was not corroborated by other evidence. The Court of Appeals of Texas would not address the argument, because no objection was made at trial as required by Tex. R. Evid. 103(a)(1). In the Estate of Landers, 2010 Tex. App. LEXIS 7196, 2010 WL 3420905 (Tex. App. Texarkana Sept. 1 2010).

657. In a criminal case involving sexual abuse of a child, while defendant claimed that a speculation objection to a nurse practitioner's testimony on statistics of confirmed cases of sexual abuse where there were no physical findings was a challenge to the nurse practitioner's expert qualifications, that ground was not apparent from the context under Tex. R. Evid. 103(a)(1). Cortez v. State, 2010 Tex. App. LEXIS 5854, 2010 WL 2889670 (Tex. App. Fort Worth July 22 2010).

658. Defendant's objection outside of a jury's presence to the State being allowed to question a codefendant when the State knew the codefendant would invoke the privilege against self-incrimination was sufficient to preserve the

matter on appeal under Tex. R. Evid. 103(a)(1). Gober v. State, 2010 Tex. App. LEXIS 3065, 2010 WL 1657164 (Tex. App. Amarillo Apr. 26 2010).

659. State correctly recognized that under Tex. R. Evid. 103(b), no objection was required to be made before the jury where the court heard objections to offered evidence outside the presence of the jury; Rule 103(b) applies only where the court rules that the evidence be admitted. Downey v. State, 2010 Tex. App. LEXIS 2722 (Tex. App. Dallas Apr. 6 2010).

660. Defendant's claim of error with respect to the admission of the recorded interview with an officer was not preserved for appellate review because, after the trial court concluded that the recording indicated that defendant was advised of his rights, defense counsel stated, "I have nothing else." The opportunity presented itself for defendant to clarify the objection and to specifically state the basis of it to have involved the mention of extraneous offenses. Crews v. State, 2009 Tex. App. LEXIS 9677, 2009 WL 4907423 (Tex. App. Texarkana Dec. 22 2009).

661. In a subrogation action, a trial court did not err by admitting a police report into evidence under Tex. R. Evid. 803(8) because there was nothing to indicate that the report lacked trustworthiness. Moreover, because a large part of the report was admissible non-opinion evidence and a driver did not specifically object to the opinion statements, the trial court properly overruled an alleged driver's objection regarding expert opinion. Lawrence v. Geico Gen. Ins. Co., 2009 Tex. App. LEXIS 5082, 2009 WL 1886177 (Tex. App. Houston 1st Dist. July 2 2009).

662. In defendant's murder case, defendant failed to preserve for review the exclusion of testimony regarding his state of mind because defense counsel did not provide the trial judge with a concise statement regarding the content of the testimony he proposed to elicit from defendant; instead, he merely informed the trial judge of his reason for asking the questions. Gobert v. State, 2009 Tex. App. LEXIS 4341, 2009 WL 1493036 (Tex. App. Houston 14th Dist. May 28 2009).

663. Where defendant entered a plea of true to intoxication manslaughter, defendant waived his claim that the presentation of evidence to the jury during sentencing violated his right to due process of law and equal protection of law. The fundamental error concept set forth in Tex. R. Evid. 103(d) did not apply. In re A.D., 2009 Tex. App. LEXIS 3985 (Tex. App. Texarkana May 15 2009).

664. Believing that defendant had drugs in the car that he was driving, an undercover officer directed uniformed police officers to stop defendant after he observed defendant commit a traffic violation; based on prior encounters with defendant, the undercover officer called for a narcotics dog which lead to the discovery of drugs in defendant's car. At the hearing on defendant's motion to suppress, he raised objections under Tex. R. Evid. 103 that prevented the officer from testifying as to the articulable facts that led the officer to believe there was contraband in defendant's car; therefore, the invited error doctrine prevented defendant from challenging the State's failure to prove the articulable facts that led to the search of his car. Vennus v. State, 282 S.W.3d 70, 2009 Tex. Crim. App. LEXIS 977 (Tex. Crim. App. 2009).

665. In a driving while intoxicated case, defendant's objection was specific enough to put the trial judge and opposing counsel on notice of the issue and to afford them the opportunity to remedy the defect by calling an expert witness. The trial judge specifically stated that defendant made his record for the objection, and that indicated that the trial judge was aware of the basis for objection, but found it did not have any merit. Layton v. State, 280 S.W.3d 235, 2009 Tex. Crim. App. LEXIS 149 (Tex. Crim. App. 2009).

666. In an aggravated assault case, defendant failed to show that she received ineffective assistance of counsel based on a failure to make certain objections; the record was silent as to trial counsel's reasoning or strategy, and an appellate court was unable to speculate on such. Even if an objection would have been proper during voir dire

based on comments made about the burden of proof, defendant failed to rebut the strong presumption that the failure to object was strategic; moreover, she did not show that the trial court would have committed error in failing to sustain an objection to cross-examination conducted during the punishment phase of the trial. Zachery v. State, 2009 Tex. App. LEXIS 356, 2009 WL 136915 (Tex. App. Houston 14th Dist. Jan. 20 2009).

667. In an aggravated assault case, an alleged error based on a prosecutor's cross-examination of defendant during the punishment phase of the trial was not preserved for review because the objection before the trial court did not comport with the issue raised on appeal; instead of bringing forth an objection based on DeGarmo v. State, 691 S.W.2d 657 (Tex. Crim. App. 1985), during trial, an objection was made that a question had been "asked and answered." Zachery v. State, 2009 Tex. App. LEXIS 356, 2009 WL 136915 (Tex. App. Houston 14th Dist. Jan. 20 2009).

668. In a negligence suit, the intervenors second objection to a doctor's expert testimony referred to the general violation of a motion in limine and was non-specific as to the basis of their objection under Tex. R. Evid. 103. Because intervenors did not identify the basis of their objection and there was no record of the trial court's placing any limitations on the expert's testimony, the intervenor's objection was insufficient and waived under Tex. R. App. P. 33.1. Sinegaure v. Bally Total Fitness Corp., 2008 Tex. App. LEXIS 9435 (Tex. App. Houston 1st Dist. Dec. 18 2008).

669. In a case involving the civil commitment of a patient found to be a sexually violent predator, the patient failed to object at the first opportunity to an expert's opinion regarding truthfulness; therefore, the alleged error was not preserved for appellate review. In re Commitment of Eeds, 254 S.W.3d 555, 2008 Tex. App. LEXIS 3337 (Tex. App. Beaumont 2008).

670. Defendant failed to preserve his claim that a trial court violated his Sixth Amendment right to confrontation by excluding certain testimony aimed at impeaching the key witness against him because although defendant argued that the testimony should be admitted because it would impeach the witness's credibility, he did not specifically assert his right of confrontation. Johnson v. State, 2008 Tex. App. LEXIS 2644 (Tex. App. Houston 14th Dist. Apr. 15 2008).

671. Defendant failed, under Tex. R. Evid. 103, to make an objection under Tex. R. Evid. 403, Tex. R. Evid. 404 to the complained-of testimony, plus defendant failed to object to the introduction of two letters, and thus defendant forfeited his complaint under Tex. R. App. P. 33. Guerrero v. State, 2008 Tex. App. LEXIS 1837 (Tex. App. Corpus Christi Mar. 13 2008).

672. Appellants, the children of a decedent, failed to preserve certain issues for appeal because they did not object to the issue as required by Tex. R. App. P. 33 and Tex. R. Evid. 103; the only exception was an issue involving a legal sufficiency challenge following a bench trial, which could be challenged for the first time on appeal pursuant to Tex. R. App. P. 33 and Tex. R. Civ. P. 324. Hulen v. Hamilton, 2008 Tex. App. LEXIS 1672 (Tex. App. Fort Worth Feb. 28 2008).

673. Admission of extraneous offense evidence in a murder case was not error because defendant objected only to the admission of physical evidence related to the extraneous offense, not to testimony about it; defendant did not make a timely objection under Tex. R. Evid. 103 as soon as the basis for it became apparent. Stephens v. State, 2008 Tex. App. LEXIS 1301 (Tex. App. Fort Worth Feb. 21 2008).

674. Defendant's convictions for multiple counts of aggravated sexual assault of a child, indecency with a child, and sexual assault were appropriate pursuant to Tex. R. Evid. 103 because defendant's claim that the trial court erred in admitting testimony that pornography was recovered from a computer seized during the search of his home

was not preserved for appellate review; defendant failed to object at trial when an investigator testified that images of pornography involving animals were found on the computer. Patterson v. State, 2007 Tex. App. LEXIS 9264 (Tex. App. Dallas Nov. 29 2007).

675. During defendant's murder trial, he objected to a police officer's videotaped interview with a witness on Confrontation Clause grounds; on appeal, he claimed the trial court violated Tex. R. Evid. 613 by admitting the recording; because the objection at trial did not comport with the complaint on appeal, the error was not preserved for review under Tex. R. App. P. 33. Brandon v. State, 2007 Tex. App. LEXIS 8903 (Tex. App. Houston 1st Dist. Nov. 8 2007).

676. Defendant asserted that the trial court erred in admitting an expert's testimony because he was not qualified to testify as an expert and because his "backdoor opinion" that sex offenders were not capable of being cured violated Tex. R. Evid. 702; that argument was rejected, however, because defendant did not properly object and, therefore, failed to preserve the alleged error as required by Tex. R. Evid. 103 and Tex. R. App. P. 33. Ghahremani v. State, 2007 Tex. App. LEXIS 8584 (Tex. App. Houston 14th Dist. Oct. 30 2007).

677. Defendant did not preserve error under Tex. R. App. P. 33 and Tex. R. Evid. 103 as to the timeliness of the State's notice under Tex. R. Evid. 404 of its intent to introduce extraneous offense evidence in a child sexual abuse case because, although he raised the issue, he did not object to any specific testimony or obtain a ruling. Jared v. State, 2007 Tex. App. LEXIS 8448 (Tex. App. Fort Worth Oct. 25 2007).

678. In defendant's sexual assault and indecency with a child case, any error in failing to give limiting instructions was harmless; defendant's first request was untimely and the trial court did not err by denying it, and within the context of the entire case, defendant's failure to request a limiting instruction during any other testimony covering the same extraneous offense evidence did not affect defendant's substantial rights. Neathery v. State, 2007 Tex. App. LEXIS 6625 (Tex. App. Fort Worth Aug. 16 2007).

679. During defendant's trial for several counts of aggravated robbery, he failed to make a Confrontation-Clause objection to portions of the detective's testimony relating what a declarant told him about defendant's involvement in the crimes; while defendant was not given an opportunity to cross-examine the declarant, he waived his right to challenge the admission of the testimony by failing to object as required by Tex. R. Evid. 103. Vidal v. State, 2007 Tex. App. LEXIS 6339 (Tex. App. Austin Aug. 10 2007).

680. Where defendant was charged with aggravated sexual assault of the thirteen-year-old victim, the State informed the defense of its intent to offer evidence of the three extraneous acts of sexual intercourse; outside the presence of the jury, defendant objected to the evidence on grounds of relevance and prejudice; he was not required to reassert the objections before the jury under Tex. R. Evid. 103. Smith v. State, 2007 Tex. App. LEXIS 6004 (Tex. App. Amarillo July 30 2007).

681. In defendant's aggravated sexual assault on a child case, defendant failed to preserve for review his complaint regarding admission of a statement he made to a witness because defendant objected on various grounds, including relevance, when the State asked the witness whether defendant made any comments of a sexual nature about young women, but defendant did not object when the State subsequently asked the witness to relay the substance of the comment at issue. Silva v. State, 2007 Tex. App. LEXIS 4720 (Tex. App. Houston 14th Dist. June 19 2007).

682. By failing to object, appellant juvenile failed to preserve his claim that he was not allowed a full cross-examination of the assault victim at the disposition hearing. In re J.L.C., 2007 Tex. App. LEXIS 3063 (Tex. App. Fort

Worth Apr. 19 2007).

683. In defendant's aggravated sexual assault case, because evidence about defendant's drinking and arguments with the victims' mother was admitted without objection before the complained-of ruling, defendant failed to preserve any error associated with testimony regarding those issues. Mayfield v. State, 2007 Tex. App. LEXIS 2545 (Tex. App. Fort Worth Mar. 29 2007).

684. Because defendant failed, under Tex. R. Evid. 103, to object to testimony on the grounds asserted on appeal, the arguments were waived under Tex. R. App. P. 33.1(a); even if error was preserved, the testimony in question was cumulative of other properly admitted evidence from the victim herself, and thus the court overruled defendant's claim that the trial court erred in admitting the testimony of the witness under Tex. Code Crim. Proc. Ann. art. 38.072. Stepp v. State, 2007 Tex. App. LEXIS 1439 (Tex. App. Houston 14th Dist. Mar. 1 2007).

685. Record did not reveal that the track owner ever specifically brought the couple's expert's qualifications or the reliability of his testimony to the trial court's attention and obtained a ruling from the court; consequently, the owner failed to preserve for appellate review any challenge relating to the expert's qualifications or the reliability of his testimony. S.E.A. Leasing, Inc. v. Steele, 2007 Tex. App. LEXIS 1337 (Tex. App. Houston 1st Dist. Feb. 22 2007).

686. Husband did not properly preserve for review his assertion that the trial court abused its discretion when it appointed the mediator as arbitrator because there was no record of an objection being made to the trial court or of a ruling on the objection as required by Tex. R. Evid. 103. Gaskin v. Gaskin, 2006 Tex. App. LEXIS 7689 (Tex. App. Fort Worth Aug. 31 2006).

687. Defendant did not preserve error under Tex. R. Evid. 103 as to the testimony of a police officer who stated that the victims identified a witness as being present during an armed robbery; although defendant previously had objected to similar testimony from another officer, he did not obtain a running objection or object outside the jury's presence to all testimony regarding the victims' identification of the witness. Brown v. State, 2006 Tex. App. LEXIS 6859 (Tex. App. Houston 14th Dist. Aug. 1 2006).

688. In the absence of a timely and specific objection, defendant's claim that trial court erred in allowing testimony to be presented that may have amounted to a comment on his right to remain silent was not preserved for review. Perales v. State, 2006 Tex. App. LEXIS 5829 (Tex. App. Corpus Christi July 6 2006).

689. Where defendant was convicted of two counts of aggravated sexual assault of a child, he failed to preserve error in the trial court's admission of extraneous-offense evidence of defendant's sexual assault of the victim's younger sister; the same evidence was admitted through the testimony of several witnesses, and counsel did not timely object as required by Tex. R. Evid. 103. Sinclair v. State, 2006 Tex. App. LEXIS 4277 (Tex. App. Waco May 17 2006).

Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof

690. Where the expert could have presented or intended to present testimony which was not reflected in her report, any error relating to the exclusion of that testimony was not preserved for appeal; the mother failed to make an offer of proof and could not now complain of excluded testimony not reflected in the expert's report. In the Interest of D.W.C., 2014 Tex. App. LEXIS 5166 (Tex. App. Texarkana May 15 2014).

691. Trial court was within its discretion in naming a grandparent as a joint managing conservator to protect the children's physical health and emotional development, in part because the decision to exclude testimony related to

conservatorship of another of her child was not preserved for appellate review. The mother did not demonstrate the substance of the excluded testimony and the limited record regarding the stricken testimony belied the assertion that the grandmother would have testified that the mother was a fit mother. Compton v. Pfannenstiel, 428 S.W.3d 881, 2014 Tex. App. LEXIS 1680, 2014 WL 576175 (Tex. App. Houston 1st Dist. Feb. 13 2014).

692. In a trial for aggravated assault on an officer arising from an exchange of gunfire between defendant and the officer, the Sixth Amendment did not require that defendant be allowed to question the officer's attorney, who had met with the officer at the scene, because it was not a sufficient offer of proof to argue that no one seeks the advice of an attorney unless they think they need one and that the attorney "may have" affected the officer's willingness to discuss the events with an investigator. Tesi v. State, 2014 Tex. App. LEXIS 294, 2014 WL 70084 (Tex. App. Fort Worth Jan. 9 2014).

693. Patient's counsel made an offer of proof covering other areas of the doctor's testimony, but did not ask questions regarding the doctor's rate of error, and because the patient failed to include questions and elicit answers regarding the doctor's rates of error during his offers of proof, it could not be determined whether the exclusion of the evidence was harmful, and the patient's claim was not preserved. In re Commitment Lovings, 2013 Tex. App. LEXIS 12927, 2013 WL 5658426 (Tex. App. Beaumont Oct. 17 2013).

694. Defendant did not point to a place in the record, via an offer of proof or otherwise, that established the victim consented to sexual activity after age 18, and thus evidence supporting defendant's position on consent was not submitted for consideration of admissibility and defendant failed to preserve error on the point. Green v. State, 2013 Tex. App. LEXIS 10890 (Tex. App. Texarkana Aug. 28 2013).

695. In defendant's capital murder trial, the trial court did not err in excluding the former testimony of a witness from a co-defendant's trial because the requested excerpt of testimony contained both admissible and inadmissible evidence, and it was defendant's burden to segregate and specifically offer the portions that were admissible under Tex. R. Evid. 804(b)(1), pursuant to Tex. R. Evid. 103(a)(2). Brown v. State, 2013 Tex. App. LEXIS 10655 (Tex. App. Houston 14th Dist. Aug. 22 2013).

696. Defendant's claim that a trial court erred in excluding evidence of a murder victim's criminal history was not preserved for review under Tex. R. Evid. 103(a)(2) because defendant never received an adverse ruling from the trial court and never made an offer of proof. Leyba v. State, 416 S.W.3d 563, 2013 Tex. App. LEXIS 10067, 2013 WL 4070770 (Tex. App. Houston 14th Dist. Aug. 13 2013).

697. At defendant's trial for aggravated assault on a public servant, the trial court did not reversibly err by sustaining the State's objection to expert testimony concerning the nature of the wounds defendant sustained when he was shot. Because defendant did not make an offer of proof, it was unclear from the record what he wished to ask the expert. Bowen v. State, 2013 Tex. App. LEXIS 9197 (Tex. App. Fort Worth July 25 2013).

698. Appellate court had nothing to review on a father's claim that his due process rights were violated when the trial court refused to allow him to meaningfully cross-examine a mother; the father did not object to the two-and-a-half-hour time limit to present his case or make an offer of proof under Tex. R. Evid. 103(a)(2) concerning evidence that was excluded. In the Interest of A.E.A., 406 S.W.3d 404, 2013 Tex. App. LEXIS 8935 (Tex. App. Fort Worth July 18 2013).

699. Husband did not assert that his constitutional complaint could be raised for the first time on appeal and he waived the issue for review and he failed to preserve the issue that he was not permitted to present specific evidence and ask specific questions of witnesses with an offer of proof or formal bill of exception, Tex. R. Evid. 103(a)(2); if the parties or the trial court did not agree with the contents of the bill, the rules provided a procedure for

presenting the bill, Tex. R. Civ. P. 33.2(c)(2)(A)-(C). Lancaster v. Lancaster, 2013 Tex. App. LEXIS 7708 (Tex. App. Houston 1st Dist. June 25 2013).

700. Trial court did not abuse its discretion in excluding details of certain complaints under Tex. R. Evid. 403, given that prolonged proof of what happened in other accidents could not be used to distract the jury's attention from what happened in the instant case, plus appellants did not make an offer of proof as to the contents of the complaints until filing a statutory offer of proof, while Tex. R. Evid. 103(b) required an offer to be made before the charge was read to the jury, and the record did not show that the procedure required in filing a formal bill of exception under Tex. R. App. P. 33.2 was followed. Estate of Muniz v. Ford Motor Co., 2013 Tex. App. LEXIS 7158 (Tex. App. San Antonio June 12 2013).

701. It was clear from the record that the trial court's ruling on the motion in limine permitted testimony that the victim suffered from post-traumatic stress disorder (PTSD), but the trial court intended to exclude evidence that his actions were a result of his PTSD diagnosis without expert testimony; the court found no waiver of appellant's complaint on appeal, and although appellant might have made an offer of proof concerning how the victim's PTSD diagnosis related to her belief of his actions on the day in question, such an offer was not necessary because counsel made the trial court aware of the content of the testimony. Strache v. State, 2013 Tex. App. LEXIS 6494 (Tex. App. San Antonio May 29 2013).

702. Mother failed to preserve for review her contention that the trial court abused its discretion by excluding a psychologist's report from evidence because she never offered the report into evidence and there was nothing in the record showing that she made an offer of proof or a bill of exception. In the Interest of L.D.W., 2013 Tex. App. LEXIS 6195 (Tex. App. Houston 14th Dist. May 21 2013).

703. For purposes of seeking relief from a default judgment, it was not disputed that the original new trial motion and affidavits of the roofer and company did not assert facts that would established the existence of a meritorious defense, plus the trial court prohibited the roofer from testifying, and for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(2), counsel did not object to this or make an offer of proof. Kyle v. Zepeda, 2013 Tex. App. LEXIS 6229, 2013 WL 2246030 (Tex. App. Houston 1st Dist. May 21 2013).

704. Without knowing what facts the roofer would have testified to, the court was unable to determine whether the company would have established a meritorious defense for relief from default judgment purposes, and whether the exclusion of the testimony was harmful. Kyle v. Zepeda, 2013 Tex. App. LEXIS 6229, 2013 WL 2246030 (Tex. App. Houston 1st Dist. May 21 2013).

705. Nothing supported the claim that the statements qualified under Tex. R. Evid. 801(e)(1)(B), and appellant did not assert this at trial or make an offer of proof. Carrion v. State, 2013 Tex. App. LEXIS 5673 (Tex. App. Eastland May 9 2013).

706. On appeal of the decision denying appellant property owner's request for a temporary injunction to prevent a foreclosure, appellant claimed the trial court abused its discretion by refusing to permit her to admit into evidence a tape recording of a conversation between her and the bank's president. The appellate court was unable to evaluate the merits of her claim, because appellant did not make an offer of proof or otherwise make the tape recording part of the appellate record under Tex. R. Evid. 103(a)(2). Wright v. First Nat'l Bank of Bastrop, 2013 Tex. App. LEXIS 4911 (Tex. App. Austin Apr. 19 2013).

707. Grandmother had waived the issue of whether the trial court improperly excluded evidence of the her grandchildren's heritage where she did not offer the evidence she contended should have been admitted, and consequently did not obtain a ruling excluding that evidence, nor did she make an offer of proof or a bill of

exception. B. O. v. Tex. Dep't of Family & Protective Servs., 2013 Tex. App. LEXIS 4712, 2013 WL 1567452 (Tex. App. Austin Apr. 12 2013).

708. Defendant convicted of aggravated assault with a deadly weapon failed to preserve error on his claim that the trial court abused its discretion by limiting his cross-examination of the victim to exclude questions regarding the victim's drug use after the assault because defendant failed to make an offer of proof for the excluded testimony. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

709. Finding that respondent was a sexually violent predator was proper because, without an offer of proof, the appellate court was unable to determine whether the trial court's exclusion of the doctor's testimony regarding his rate of error was erroneous and harmful, Tex. R. App. P. 33.1(a); Tex. R. Evid. 103(a)(2); Tex. R. App. P. 44.1(a). Thus, respondent's claim was waived. In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

710. Finding that respondent was a sexually violent predator was proper because his counsel did not make an offer of proof with the psychiatrist regarding the issue of behavioral abnormality, nor did he identify the answers he expected to receive from the psychiatrist. Without an offer of proof, the appellate court was unable to determine whether the trial court excluded relevant examination or whether the exclusion of the evidence was harmful, Tex. R. Evid. 103(a)(2); Tex. R. App. P. 33.1(a)(1). In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

711. Court did not abuse its discretion by excluding additional evidence regarding the receipt of text messages, because the record indicated that the evidence defendant wanted the jury to hear, the jury did in fact hear; the jury heard the evidence, though perhaps from fewer witnesses and in less detail than defendant would have preferred. Wooten v. State, 2013 Tex. App. LEXIS 1658, 2013 WL 625734 (Tex. App. Amarillo Feb. 20 2013).

712. Appellant did not preserve for review his claim regarding the limitation on an expert's testimony and the cross-examination of the victim, given that he did not make an offer of proof as to what questions he would have asked and the testimony he would have elicited, he did not summarize what the evidence would have shown, and counsel's comments of inconsistencies indicating the victim was not able to hold a memory did not amount to a formal offer of proof or an informal bill, as they did not reveal the substance of the evidence; the court could not conduct a proper harm analysis. Covarrubias v. State, 2013 Tex. App. LEXIS 1434, 2013 WL 557177 (Tex. App. El Paso Feb. 13 2013).

713. It could not be determined on appeal that the trial court abused its discretion by precluding defendant from questioning an officer about an allegedly inconsistent statement she gave to the police department's Internal Affairs Division to demonstrate bias because defendant did not make an offer of proof by presenting the entire statement. Foster v. State, 2013 Tex. App. LEXIS 1139, 2013 WL 476817 (Tex. App. Houston 14th Dist. Feb. 7 2013).

714. On appeal of defendant's conviction for aggravated robbery, he claimed the trial court abused its discretion when it refused to allow the defense to cross-examine a witness regarding his criminal history; because defendant made no offer of proof regarding the underlying facts of the witness's conviction that he wanted to explore, the issue was not preserved for review under Tex. R. Evid. 103; Tex. R. App. P. 33.1. Henson v. State, 2013 Tex. App. LEXIS 974, 2013 WL 396015 (Tex. App. Houston 14th Dist. Jan. 31 2013).

715. Counsel's description of a doctor's anticipated testimony at trial did not describe the context of the testimony, but only made a general comment on the nature of the evidence, and this was insufficient to preserve the issue for appeal, as it was not specific enough for the court to determine admissibility, and moreover, counsel's description did not reference the best interests of the child in this suit to modify the parent-child relationship; even if the court held that a sufficient offer of proof had been made, the court would have found no abuse of discretion by the trial

court in limiting the doctor's testimony, as the offer only referred to generalized categories of testimony, the father did not show that the evidence would have been material to the ruling, and absent a complaint about the substantive ruling, it was hard to see how the exclusion of the evidence probably caused the rendition of an improper judgment, plus the doctor could not have testified to any personal knowledge of harm to the child because he did not treat him. Watts v. Oliver, 396 S.W.3d 124, 2013 Tex. App. LEXIS 716, 2013 WL 266050 (Tex. App. Houston 14th Dist. Jan. 24 2013).

716. Mother claimed the trial court erred in excluding evidence when the trial court denied her the right to make a timely proffer, for purposes of Tex. R. Evid. 103(b), but the trial court expressly told the mother before the charge was read that she could make her offer of proof whenever she wanted to do so, and she did not timely act on this and instead offered her proof after the charge was read, and thus the court had no basis to review the issue and the mother waived any error in this regard. In the Interest of A.C., 394 S.W.3d 633, 2012 Tex. App. LEXIS 10299, 2012 WL 6204285 (Tex. App. Houston 1st Dist. Dec. 13 2012).

717. Merely stating a desire to ask questions about an officer's basis for reasonable suspicion, as defense counsel did, did not apprise the trial court of the basis for the objection or the testimony desired; because defendant failed to make an offer of proof under Tex. R. Evid. 103, he preserved nothing for appellate review. Emale v. State, 2012 Tex. App. LEXIS 9913 (Tex. App. Dallas Nov. 30 2012).

718. As to defendant's argument regarding the various, unspecified complaints about the confidential informant from people connected to the apartment building, the issue was not preserved for appellate review. Bolton v. State, 2012 Tex. App. LEXIS 9402, 2012 WL 5507404 (Tex. App. Texarkana Nov. 14 2012).

719. Because defendant failed to make an offer of proof under Tex. R. Evid. 103 detailing what the excluded evidence would have been, the appellate court had no basis for reviewing his contention that the trial court erred in excluding the testimony of defendant's wife about the relationship between defendant and his children. Smith v. State, 2012 Tex. App. LEXIS 9037 (Tex. App. El Paso Oct. 31 2012).

720. Defendant failed to preserve for review her claim that the trial court erred by excluding the testimony of her expert about approximate vehicle speeds based on "crush analysis" because the expert never stated what speeds she estimated the vehicles to be traveling, which would be crucial to understanding what testimony was excluded and whether the exclusion was harmful. Montgomery v. State, 383 S.W.3d 722, 2012 Tex. App. LEXIS 8491, 2012 WL 4829800 (Tex. App. Houston 14th Dist. Oct. 11 2012).

721. Defendant failed to preserve for review her claim that the trial court erred by excluding the expert's testimony about the angle of defendant's lane change because the court was unable to determine from the context what the expert would have said about the angle of defendant's vehicle. Montgomery v. State, 383 S.W.3d 722, 2012 Tex. App. LEXIS 8491, 2012 WL 4829800 (Tex. App. Houston 14th Dist. Oct. 11 2012).

722. Sex offender failed to preserve error regarding the exclusion of his designated expert as an expert witness because he had not shown that he made an offer of proof in the trial court that made the substance of the purported testimony by his designated expert known or that he perfected a bill of exception. In re Brown, 2012 Tex. App. LEXIS 8136, 2012 WL 4466348 (Tex. App. Beaumont Sept. 27 2012).

723. Trial court did not abuse its discretion by denying defendant's motion for a new trial based on a sworn statement by another individual confessing to the crime because the letter was in the record before the court and defendant failed to make an offer of proof at trial regarding the excluded letter and its contents. Henry v. State, 2012 Tex. App. LEXIS 7590 (Tex. App. Beaumont Sept. 5 2012).

724. Because the claimants' counsel in a products liability case did not make a bill of exception under Tex. R. App. P. 33.2 and did not make an offer of proof under Tex. R. Evid. 103(a), (b) regarding the exclusion of an exhibit, the claimants waived review of the trial court's exclusion of the exhibit. Tidwell v. Terex Corp., 2012 Tex. App. LEXIS 7724 (Tex. App. Houston 1st Dist. Aug. 30 2012).

725. At the hearing on a motion for closure of the estate and approval of the inventory, the trial court did not abuse its discretion by refusing to hear testimony from appellee estate administrator and his counsel. Because appellant estate beneficiary did not make an offer of proof of the substance of the evidence he hoped to elicit, he did not preserve the error for review under Tex. R. Evid. 103(a), (b). In re Estate of Denton, 2012 Tex. App. LEXIS 6212, 2012 WL 3063845 (Tex. App. Eastland July 26 2012).

726. Counsel did not claim to want to cross-examine a witness about a potential bias, no offer of proof was made, plus counsel's complaint was different than the one made on appeal, as counsel asked to visit the witness's criminal matters, and the trial court denied the request because convictions were not involved, for purposes of Tex. R. Evid. 609(a), and thus appellant waived complaints under Tex. R. Evid. 611 and the Sixth Amendment concerning the limitations on the cross-examination of the witness, for purposes of Tex. R. App. P. 33.1(a)(1)(A); even absent waiver, the court would have overruled the claims, given that (1) there was no causal connection between the witness's deferred adjudication and his testimony, and (2) nothing showed the existence or expectation of a deal in the deferred adjudication case. Mcburnett v. State, 2012 Tex. App. LEXIS 5300, 2012 WL 2583407 (Tex. App. San Antonio July 5 2012).

727. Defendant failed to preserve for appellate review his claim that the trial court erred by excluding an officer's opinion about whether an interviewer used leading questions in a recorded interview because defendant made no offer of proof or bill of exception containing the substance of the officer's excluded testimony. Myles v. State, 2012 Tex. App. LEXIS 4911, 2012 WL 2357426 (Tex. App. Houston 1st Dist. June 21 2012).

728. Husband failed to preserve his complaint on appeal that a trial court erred in a divorce action in refusing to hear evidence of an inheritance by the wife; the husband failed to comply with Tex. R. Evid. 103(a)(2) by making the substance of the evidence known to the trial court by an offer of proof. Ashraf v. Ashraf, 2012 Tex. App. LEXIS 4345, 2012 WL 1948347 (Tex. App. Austin May 24 2012).

729. Father failed to demonstrate the witness's unavailability, and he did not make an offer of proof regarding the evidence the witness would have provided, Tex. R. Evid. 103. In the Interest of S.G.E., 2012 Tex. App. LEXIS 3944, 2012 WL 1795132 (Tex. App. Beaumont May 17 2012).

730. In a habeas corpus case in which an inmate had been convicted of capital murder and sentenced to death, his claim that the trial court violated his right to be free from cruel and unusual punishment when it denied his niece the opportunity to testify about how his execution would impact her was procedurally barred. At trial, defendant did not make an offer of proof, the Texas Court of Criminal Appeals (TCCA) expressly relied on Tex. R. Evid. 103(a)(2) in adjudicating the inmate's claim, and the TCCA had applied that procedural requirement strictly or regularly in the majority of similar claims in the capital context. Roberts v. Thaler, 681 F.3d 597, 2012 U.S. App. LEXIS 9790 (5th Cir. Tex. May 15 2012).

731. Defendant failed to make an offer of proof regarding any other mental afflictions suffered by the informant, and therefore he failed to preserve them for review. Dowden v. State, 2012 Tex. App. LEXIS 3584, 2012 WL 1605234 (Tex. App. Texarkana May 8 2012).

732. Given the brief description of the proffered evidence with concise facts, as reflected by the record and stated by trial counsel regarding the civil suit, defendant's trial counsel did not render ineffective assistance. West v. State,

2012 Tex. App. LEXIS 3612, 2012 WL 1606239 (Tex. App. Houston 14th Dist. May 8 2012).

733. Nothing showed that appellant attempted to comply with Tex. R. Evid. 103 or that the trial court denied appellant the chance to make an offer of proof as to evidence of his mother's mental health; as appellant did not present evidence and made no bill on the issue, the court was left to speculate, and the court overruled his claim of ineffective assistance in this regard. Arroyos v. State, 2012 Tex. App. LEXIS 3574, 2012 WL 1555900 (Tex. App. Fort Worth May 3 2012).

734. Defendant's conviction for retaliation against a public servant was proper because, although defendant contended that the trial court erred by limiting his cross-examination of a corporal, counsel failed to make it known to the court, and it was not apparent from the context, what evidence defendant intended to elicit from the witness to further show that the assault charge had no basis in fact; the appellate court was unable to determine whether error occurred or defendant was harmed, Tex. R. Evid. 103(a)(2). Creeks v. State, 2012 Tex. App. LEXIS 2933 (Tex. App. Houston 14th Dist. Apr. 17 2012).

735. In a case in which a trial court denied a mother's motion to modify the conservatorship provisions of the parties' divorce decree, if the mother thought evidence with respect to her claim that the father had received an alleged diagnosis of antisocial personality disorder was relevant and important to the issues raised in the modification hearing, she should have made an offer of proof so that the excluded evidence could be assessed on appeal; without it, a reviewing court could not determine if the trial court actually erred. In the Interest of I.J.M., 2012 Tex. App. LEXIS 2710 (Tex. App. Corpus Christi Apr. 5 2012).

736. Because there was no offer of proof or bill of exceptions that identified the substance of the allegedly erroneously-excluded testimony, nothing was presented for review. Beckett v. State, 2012 Tex. App. LEXIS 2293, 2012 WL 955358 (Tex. App. Dallas Mar. 22 2012).

737. For purposes of Tex. R. App. P. 33.1(a)(1)(B) and Tex. R. Evid. 103(a)(2), (b), appellant did not perfect an offer of proof or a bill of exceptions, and absent a showing of what the testimony would have been or an offer of a statement in this regard, and because the substance of what a witness's answers would have been was not apparent, appellant did not present anything for review and the issue was waived. Beckett v. State, 2012 Tex. App. LEXIS 2293, 2012 WL 955358 (Tex. App. Dallas Mar. 22 2012).

738. Husband failed to preserve the issue for appeal concerning the exclusion his expert witness, because the husband did not make a timely offer of proof before the trial court and did not file a formal bill of exception. Sink v. Sink, 364 S.W.3d 340, 2012 Tex. App. LEXIS 2006, 2012 WL 840340 (Tex. App. Dallas Mar. 14 2012).

739. Defendant's claim that her right of confrontation was violated by the trial court limiting her cross-examination during her theft trial presented nothing for review, because the record contained no offer of proof under Tex. R. Evid. 103(a) identifying the substance of the excluded testimony. Huff v. State, 2012 Tex. App. LEXIS 1079, 2012 WL 401047 (Tex. App. Dallas Feb. 9 2012).

740. No questions concerning certain sobriety tests were asked of appellant's father, either before the jury or in the offer of proof, and thus the issue was not preserved for review. Bradley v. State, 2012 Tex. App. LEXIS 410, 2012 WL 150969 (Tex. App. Beaumont Jan. 18 2012).

741. Trial court did not err in excluding the testimony of a tenant's general partner; the tenant's counsel, in his offer of proof, gave no explanation for the basis of the partner's opinions and whether he had personal knowledge on the cost of damages or repairs, nothing in the bill of exception indicated such personal knowledge, and the partner

agreed several times that he lacked personal knowledge about the work done at the leased property. Lone Starr Multi-Theatres, Ltd. v. Max Interests, Ltd., 365 S.W.3d 688, 2011 Tex. App. LEXIS 10210, 2011 WL 6938527 (Tex. App. Houston 1st Dist. Dec. 29 2011).

742. In the proceeding to commit respondent as a sexually violent predator, the trial court did not abuse its discretion by restricting respondent's cross-examination of one of the State's experts. Even if respondent's proposed questions were relevant to an issue in dispute, his failure to make an offer of proof under Tex. R. Evid. 103(a) preserved nothing for appellate review. In re Dees, 2011 Tex. App. LEXIS 9807 (Tex. App. Beaumont Dec. 15 2011).

743. Defendant convicted of capital murder following the death of a restaurant employee during a robbery failed to preserve his claim that the trial court erred by excluding a co-conspirator's opinion that defendant could not have anticipated the murder. Defendant did not make an offer of proof as required by Tex. R. Evid. 103(a)(2). Barton v. State, 2011 Tex. App. LEXIS 9229, 2011 WL 5846300 (Tex. App. Houston 14th Dist. Nov. 22 2011).

744. Appellant made an offer of proof in which he described the testimony he expected witnesses would have provided, and thus appellant preserved the non-constitutional evidentiary arguments he raised. Jackson v. State, 352 S.W.3d 288, 2011 Tex. App. LEXIS 8455 (Tex. App. Houston 14th Dist. Oct. 25 2011).

745. Appellant did not preserve a constitutional argument because he never argued that exclusion of proffered evidence prevented him from asserting a defense or violated his right to confrontation or due process. Jackson v. State, 352 S.W.3d 288, 2011 Tex. App. LEXIS 8455 (Tex. App. Houston 14th Dist. Oct. 25 2011).

746. Excluded photographs were not included in the record, and although the court could not review the actual photographs, the court assumed appellant preserved the issue because the subject matter of the photographs was apparent from context, for purposes of Tex. R. Evid. 103(a)(2). Jackson v. State, 352 S.W.3d 288, 2011 Tex. App. LEXIS 8455 (Tex. App. Houston 14th Dist. Oct. 25 2011).

747. Trial court did not abuse its discretion in finding that a company and a business failed to establish the absence of unfair surprise or unfair prejudice regarding a motion for leave to supplement its expert disclosure; the corporation incurred over $ 400,000 in attorney and expert fees already, the corporation's attorney testified that three months would not be enough time to analyze and oppose new opinions, and there was no offer of proof to show what the late-designated expert would have testified at trial. Popcap Games, Inc. v. MumboJumbo, LLC, 350 S.W.3d 699, 2011 Tex. App. LEXIS 7122 (Tex. App. Dallas Aug. 31 2011).

748. Company and business argued that the denial of its motion for leave under Tex. R. Civ. P. 193.6 was harmful because it left them without expert testimony to support its damages model, but any error was harmless unless the new testifying expert could have provided reliable, admissible testimony, and without an offer of proof, the court would be speculating to assume such. Popcap Games, Inc. v. MumboJumbo, LLC, 350 S.W.3d 699, 2011 Tex. App. LEXIS 7122 (Tex. App. Dallas Aug. 31 2011).

749. Daughter did not claim that she intended to demonstrate that the signature on the deed was not her mother's, and there was no dispute that the signature on the notarized deed belonged to the decedent; instead, the only issue at trial was whether the decedent had the mental capacity to sign the deed. In re Estate of Johnson, 2011 Tex. App. LEXIS 6243, 2011 WL 3503188 (Tex. App. Texarkana Aug. 11 2011).

750. As to credibility of an officer's testimony, a traditional offer of proof was unnecessary under Tex. R. Evid. 103(a)(2), but appellant made no showing sufficient to satisfy even a relaxed standard for preserving error.

Villasenor v. State, 2011 Tex. App. LEXIS 6172, 2011 WL 3435376 (Tex. App. Dallas Aug. 8 2011).

751. Seller failed to preserve error regarding admission of certain documents, because the seller failed to make an offer of proof; error could not be predicated upon a ruling which excluded evidence unless a substantial right of the party was affected and the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked. Brookins v. Coppa, 2011 Tex. App. LEXIS 5931, 2011 WL 3242629 (Tex. App. Texarkana July 29 2011).

752. Defendant's complaint on appeal regarding a trial court's decision in defendant's criminal trial to exclude evidence addressing defendant's civil suit against the police was not waived by defendant's failure to make an offer of proof under Tex. R. Evid. 103(a)(2). Van Goffney v. State, 2011 Tex. App. LEXIS 5334, 2011 WL 2731850 (Tex. App. Beaumont July 13 2011).

753. Because the substance of the excluded testimony was not apparent from the circumstances, defendant needed to provide an offer of proof to preserve the error, and he failed to do so; defendant's counsel offered no response to the trial court's ruling and passed the witness without further discussion, and any potential error was not preserved. Lewis v. State, 2011 Tex. App. LEXIS 4861, 2011 WL 2536161 (Tex. App. Houston 14th Dist. June 28 2011).

754. Party made no offer of proof and did not offer the excluded evidence into the record by filing a bill of exception; the court could not consider the records, and because the substance of those records was not apparent, the party failed to preserve error in this regard. In re Estate of Brooks, 2011 Tex. App. LEXIS 4755, 2011 WL 2475846 (Tex. App. Corpus Christi June 23 2011).

755. Husband's complaint was not preserved for review where although he contended the trial court prevented him from presenting evidence of the wife's alleged adultery, the husband did not identify what additional evidence he was prevented from presenting, and he made no offer of proof or bill of exception for the appellate court to review. Ismik v. Ibrahimbas, 2011 Tex. App. LEXIS 4540 (Tex. App. Houston 14th Dist. June 16 2011).

756. Defendant failed to preserve his claim for review, Tex. R. Evid. 103(b), Tex. R. App. P. 33.2, as he did not make a record showing what other evidence he wanted to elicit. The appellate court could not tell what other evidence besides the witness's opinion testimony about the informant's credibility defendant sought to admit. Hicks v. State, 2011 Tex. App. LEXIS 4623, 2011 WL 2436818 (Tex. App. Fort Worth June 16 2011).

757. Insurer failed to preserve error with regard to its appellate issues, Tex. R. App. P. 33.1(a), as it made its arguments against setting a hearing on attorney's fees, not against actually awarding the employee attorney's fees; the insurer did not inform the court that it had additional evidence to put on and objections to make. Am. Cas. Co. v. Neuwirth, 2011 Tex. App. LEXIS 4069, 2011 WL 2139121 (Tex. App. Austin May 26 2011).

758. Appellant never submitted a formal offer of proof indicating what he intended to testify to; thus, the substance of the excluded testimony could not be determined and appellant failed to preserve error under Tex. R. App. P. 33.2. Hardeman v. State, 2011 Tex. App. LEXIS 3858, 2011 WL 1901978 (Tex. App. Fort Worth May 19 2011).

759. Because appellant did not file a motion for new trial arguing ineffective assistance, there was no record to affirmatively show that counsel was deficient, and even assuming that counsel was deficient in not preserving error through an offer of proof regarding introducing a driver's handbook, prejudice was not shown; the purpose of introducing the handbook was to prove that a detective was at fault for making a left turn in front of appellant, but the handbook only made recommendations, and even without it, appellant was able to argue the Texas Penal Code

to show fault. Toney v. State, 2011 Tex. App. LEXIS 3725, 2011 WL 1991031 (Tex. App. San Antonio May 18 2011).

760. Father properly preserved his complaint for appellate review where the trial court understood the substance of the evidence related to the father's defenses against the alleged arrearage; it was apparent that the father and his wife intended to testify that the child support had been paid in full. In re R.G., 362 S.W.3d 118, 2011 Tex. App. LEXIS 3493 (Tex. App. San Antonio May 11 2011).

761. During the punishment phase of defendant's manslaughter prosecution, exclusion of evidence about the stepfather's religious principles and their influence on defendant was not improper because defendant failed to make an offer of proof under Tex. R. Evid. 103(a)(2) to show the relevance of that evidence. Fruge v. State, 2011 Tex. App. LEXIS 2829, 2011 WL 1441891 (Tex. App. Corpus Christi Apr. 14 2011).

762. Appellant did not make an offer of proof or bill of exception to show what excluded testimony would have been, and counsel's statements did not constitute a summary of the evidence offered; even assuming that counsel's statements were sufficient and the trial court erred by excluding the proffered testimony, exclusion of the testimony did not affect appellant's substantial rights under Tex. R. App. P. 44.2(b), given that the record contained evidence from which the jury could have found that appellant committed the offenses in question. Fisher v. State, 2011 Tex. App. LEXIS 2746, 2011 WL 1416585 (Tex. App. Beaumont Apr. 13 2011).

763. Because appellant did not make an offer of proof under Tex. R. Evid. 103(a)(2), obtain an adverse ruling on the admissibility of evidence, or otherwise make a record of the proposed evidence by a bill of exception, he failed to preserve his complaint under Tex. R. App. P. 33.1 that the trial court erred in excluding his testimony concerning a request to change his child's surname. In re Interest of R.F., 2011 Tex. App. LEXIS 2373 (Tex. App. Beaumont Mar. 31 2011).

764. In defendant's prosecution for sexual assault of a child under Tex. Penal Code Ann. § 22.011, defendant did not preserve error for review regarding the exclusion of the testimony of the victim's minor son, who was allegedly present during all her encounters with defendant, as he did not submit an offer of proof under Tex. R. Evid. 103(a)(2) setting forth the substance of the son's testimony. Daniel v. State, 2011 Tex. App. LEXIS 1996, 2011 WL 941301 (Tex. App. Waco Mar. 16 2011).

765. In a dispute between a condominium association and a unit owner, because the owner failed to object or make an offer of proof, evidentiary issues were waived under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(2). Bosch v. Cedar Vill. Townhomes Homeowners Ass'n, 2011 Tex. App. LEXIS 804, 2011 WL 346317 (Tex. App. Houston 1st Dist. Feb. 3 2011).

766. Defendant failed to preserve for review his claim that a child sexual assault victim had bias or motive to lie because he did not introduce at a hearing that occurred outside the presence of the jury the victim's prior outcry statement that she had made against another man; he provided no offer of proof as required by Tex. R. App. P. 33.2 and Tex. R. Evid. 103(a)(2). Littlepage v. State, 2010 Tex. App. LEXIS 9968 (Tex. App. Fort Worth Dec. 16 2010).

767. On appeal of defendant's conviction for causing serious bodily injury to a child, he claimed the trial court erred by excluding defensive testimony relevant to his culpable mental state. Defendant failed to preserve this contention for review, because he did not make an offer of proof under Tex. R. Evid. 103(a)(2). Ord v. State, 2010 Tex. App. LEXIS 9538, 2010 WL 4909951 (Tex. App. Austin Dec. 1 2010).

768. Before a witness took the stand, counsel stated what his first-aggressor witnesses would testify to, and based on these representations, the substance of the witness's testimony was made known to the trial court for purposes of Tex. R. Evid. 103(a)(2), and the complaint was therefore preserved under Tex. R. App. P. 33.1(a). Garcia v. State, 2010 Tex. App. LEXIS 8834, 2010 WL 4361885 (Tex. App. Corpus Christi Nov. 4 2010).

769. Although defendant complained that he was denied his constitutional right to confront and cross-examine one of the complainants about his credibility, specifically by asking the complainant about his prior felony and misdemeanor convictions, defendant never made an offer of proof of the evidence that he sought to have admitted; without an offer of proof, an appellate court could not evaluate the complaint, and error could not be predicated on the ruling, pursuant to Tex. R. Evid. 103(a)(2), (b). Douglas v. State, 2010 Tex. App. LEXIS 8659, 2010 WL 4264541 (Tex. App. Houston 1st Dist. Oct. 28 2010).

770. Under Tex. R. Evid. 103(a), respondent failed to preserve for review a challenge to a trial court's sustaining of the State's objection to questions concerning what age respondent would be upon release from prison; respondent did not make an offer of proof concerning how the witness would have answered the questions had the trial court permitted the witness to do so. In re Commitment of Robertson, 2010 Tex. App. LEXIS 7421 (Tex. App. Beaumont Sept. 9 2010).

771. Under Tex. R. Evid. 103(a)(2), a party had to make an offer of proof to preserve error with regard to the exclusion of evidence unless the substance of the evidence was apparent from the context; however, an offer of proof was not required when a defendant was cross-examining a State's witness about matters that might affect the witness's credibility. Because the witness's cross-examination did not focus on the witness's personal characteristics, an offer of proof was required to preserve the issue for appellate review, and because defendant failed to make an offer of proof, he failed to preserve this issue for review. Bonner v. State, 2010 Tex. App. LEXIS 7440, 2010 WL 3503858 (Tex. App. Waco Sept. 8 2010).

772. Defendant's contention that the trial court erred by denying his request to make an offer of proof was rejected because it was unclear from the record that defendant intended to make such an offer, as it was not apparent from the plain language or the context of the record what defendant hoped to elicit from the witness and defendant did not make the trial court aware of what he expected to elicit. Lewis v. State, 2010 Tex. App. LEXIS 6870, 2010 WL 3304205 (Tex. App. Fort Worth Aug. 19 2010).

773. Although a daughter sent many documents to the court that were not included in the record, the documents were not a part of the appellate record and the court was unable to review the complaint under Tex. R. App. P. 33.1, and the trial court did not abuse its discretion in excluding the evidence in question; even if an offer of proof had been made for purposes of Tex. R. Evid. 103(a)(2), without the documents the court could not ascertain the error. Thornton v. State, 2010 Tex. App. LEXIS 6462, 2010 WL 3160040 (Tex. App. San Antonio Aug. 11 2010).

774. On appeal of the judgment revoking defendant's community supervision, he argued that the trial court erred by excluding an affidavit from a witness who was unavailable to testify at trial. Because defendant did not offer the affidavit for record purposes or describe the substance of the affidavit to the trial court as required by Tex. R. Evid. 103(a)(2), the error was not preserved for appellate review. White v. State, 2010 Tex. App. LEXIS 4773 (Tex. App. Dallas June 24 2010).

775. Appellant did not make an offer of proof in order to preserve error and thus error was not preserved. Shrenyee Cheng v. Zhaoya Wang, 315 S.W.3d 668, 2010 Tex. App. LEXIS 4669 (Tex. App. Dallas June 22 2010).

776. Defendant's conviction for indecency with a child by contact was proper because, although the record indicated that defendant sought to question the State's expert on two Child Protective Services' reports involving

physical abuse of the complainant, a prior report of physical abuse was not sufficiently similar to an allegation of sexual abuse to have any probative value, particularly given the risk that such evidence would unduly prejudice and confuse the jury. Furthermore, the record contained no evidence of the circumstances surrounding the making of the reports, including whether they were made by the complainant or someone else; because defendant made no offer of proof regarding the reports, there was nothing for the appellate court to review, Tex. R. Evid. 103(a)(2) Sosa v. State, 2010 Tex. App. LEXIS 4428, 2010 WL 2330304 (Tex. App. Austin June 10 2010).

777. Defendant's conviction for indecency with a child by contact was proper because he presented nothing for review regarding the testimony he sought to elicit on cross-examination and because he failed to establish that any prior allegations of abuse were both false and similar in nature to the allegations at issue in the current case. Thus, the trial court did not abuse its discretion in excluding such evidence under Tex. R. Evid. 103(a)(2). Sosa v. State, 2010 Tex. App. LEXIS 4428, 2010 WL 2330304 (Tex. App. Austin June 10 2010).

778. In an attorney fee dispute, the client failed to preserve his issues for review under Tex. R. Evid. 103(a)(2) and Tex. R. App. P. 33.1, 33.2 because he did not object, make an offer of proof, or file a bill of exceptions after the trial court sanctioned him for refusing to answer a discovery request by not allowing him to present evidence at trial; thus, no harmful error could be found under Tex. R. App. P. 44.1(a). Nelson v. Duesler, 2010 Tex. App. LEXIS 3390, 2010 WL 1796098 (Tex. App. Beaumont May 6 2010).

779. Defendant made no offer of proof or bill of exception showing what a witness's excluded testimony would have been; because defendant did not show what the witness's testimony would have been, he has not preserved this issue for appellate review. Thompson v. State, 2010 Tex. App. LEXIS 994 (Tex. App. Houston 1st Dist. Feb. 11, 2010).

780. In a negligence suit, the trial court properly sustained Tex. R. Evid. 801(d) hearsay objections to testimony from a police officer and to e-mails written in anticipation of litigation; the officer's testimony was not admissible under the Tex. R. Evid. 803(3) state of mind hearsay exception because the Tex. R. Evid. 103(a)(2) offer of proof did not make clear when the declarant spoke with the officer, and the e-mails also were not spontaneous statements and did not qualify as business records under Rule 803(6). Estate of Ronnie Wren v. Bastinelli, 2010 Tex. App. LEXIS 330 (Tex. App. Texarkana Jan. 20 2010).

781. Although defendant's argument based on Tex. R. Evid. 612 ultimately failed because defendant never established that a witness used the document to refresh her memory, defendant also failed to make an offer of proof concerning the document, and without the inclusion of the document in the record, the court could not determine whether the trial court committed harmful error by refusing to allow the defense to review the document. Love v. State, 2009 Tex. App. LEXIS 8952, 2009 WL 3930900 (Tex. App. Houston 1st Dist. Nov. 19 2009).

782. Relatives who sought custody of a child preserved their objection to the exclusion of testimony regarding the mother's competence to sign the statement of consent because they made an offer of proof in accordance with Tex. R. Evid. 103(a)(2). In re Cervantes, 300 S.W.3d 865, 2009 Tex. App. LEXIS 8743 (Tex. App. Waco Nov. 10 2009).

783. In a case involving unlawful possession of a firearm by a felon, defendant failed to preserve an error relating to the exclusion of evidence of his mental health treatment during the punishment phase of the trial. The trial court's indication that it was not going to allow testimony relating to competency proceedings did not relieve defendant of the responsibility of at least making an offer of proof and obtaining a ruling. Jackson v. State, 2009 Tex. App. LEXIS 7251, 2009 WL 3365880 (Tex. App. Houston 14th Dist. Sept. 10 2009).

784. In a child custody case, because a father failed to make an offer of proof under Tex. R. Evid. 103(a)(2) concerning the proposed testimony from his daughter, an issue relating to the exclusion of her testimony was not

properly preserved for appellate review. Further, the father's comment to the trial court was not a sufficient burden of proof. Conn v. Rhodes, 2009 Tex. App. LEXIS 6587, 2009 WL 2579577 (Tex. App. Fort Worth Aug. 20 2009).

785. Individual had not waived error by failing to make an offer of proof, as required by Tex. R. Evid. 103(a)(2), where the individual complained of the entire procedure employed by the trial court in rendering judgment enforcing the settlement agreement without supporting pleadings, evidence, or an appropriate proceeding such as a trial or summary judgment, and the individual had made this complaint clear at the hearing on his motion to vacate the settlement agreement. Gunter v. Empire Pipeline Corp., 310 S.W.3d 19, 2009 Tex. App. LEXIS 5685 (Tex. App. Dallas July 24 2009).

786. Defendant failed to preserve an argument regarding the omission of testimony because, although defense counsel explained to the trial court that defendant could testify as to an alleged prior stabbing or shooting, there was no offer of proof made as to defendant's testimony. Because the substance of the evidence sought to be admitted was not made known to the trial court, and was not apparent from the context, defendant failed to preserve the issue for appellate review. Martinez v. Texas, 2009 Tex. App. LEXIS 4837 (Tex. App. Corpus Christi June 25 2009).

787. Defendant failed to preserve error relating to a trial court's ruling that evidence of diminished capacity was not admissible during the guilt phase of a capital murder trial because he did not make an offer of proof, as required by Tex. R. Evid. 103; because the trial court intended for the exclusion of diminished capacity evidence to apply to the entire guilt phase of the trial, defendant was obligated to make an offer of proof that extended beyond the anticipated questions to, and topics of discussion with, potential jurors during voir dire. The fact that a trial judge was mistaken about the need for an offer of proof did not relieve defendant of his burden. Mays v. State, 285 S.W.3d 884, 2009 Tex. Crim. App. LEXIS 981 (Tex. Crim. App. 2009).

788. Habeas corpus relief was denied in a child support case where there was a finding of contempt because a father waived his argument that a trial court erred by not allowing him to offer evidence about certain offsets because the father did not make an offer of proof under Tex. R. Evid. 103(a)(2). In re Corder, 332 S.W.3d 498, 2009 Tex. App. LEXIS 2652 (Tex. App. Houston 1st Dist. Apr. 10 2009).

789. In a trust dispute, a grandson did not preserve his complaint regarding the exclusion of the testimony of a witness because he did not file an offer of proof or follow the procedures relating to a formal bill of exceptions. Cooper v. Cochran, 288 S.W.3d 522, 2009 Tex. App. LEXIS 2522 (Tex. App. Dallas Apr. 9 2009).

790. Appellants did not cite any authority or outline their argument on appeal regarding tort claims and thus under Tex. R. App. P. 33.1(a), they waived a challenge to the trial court's grant of the landowners no-evidence summary judgment; the trial court denied a motion to sever the claims, no bill of exception or offer of proof was sought under Tex. R. Evid. 103(a)(b), and counsel did not object to the charge or provide a proposed charge including the claims, for purposes of Tex. R. Cciv. P. 279. Estate of Jose Ernesto Trevino v. Melton, 2009 Tex. App. LEXIS 4084, 2009 WL 891881 (Tex. App. San Antonio Apr. 3 2009).

791. Court did not need to address defendant's argument regarding exclusion of his expert's testimony because error was not properly preserved for review under Tex. R. App. P. 33.1, 33.2, Tex. R. Evid. 103(a)(2), given that (1) counsel's identification of the mere topics of the expert's likely testimony did not qualify as a reasonably specific summary of the evidence, (2) in the absence of a bill of exception or offer of proof, the record did not indicate what the excluded testimony would have been at the guilt/innocence phase, and (3) although the trial court allowed defendant's expert to testify about defendant's relationship with his father, because the evidence was offered after the court's charge was read to the jury, it could not qualify as an offer of proof under Rule 103(b) that would otherwise have preserved error during the guilt/innocence phase. Solley v. State, 2009 Tex. App. LEXIS 1118, 2009

WL 396268 (Tex. App. Houston 14th Dist. Feb. 19 2009).

792. In a case involving aggravated sexual assault of a child under 14, defendant failed to preserve an alleged error relating to the granting of the State's motion in limine regarding the admission of a videotape because no offer of proof was made under Tex. R. Evid. 103(a)(2). Defendant wanted to offer the tape to rebut the alleged victim's claim that she was afraid of him. Luna v. State, 2009 Tex. App. LEXIS 1146, 2009 WL 400629 (Tex. App. Dallas Feb. 19 2009).

793. Defendant made no attempt to introduce the evidence that he claimed that the trial court improperly excluded, and absent an offer of proof or a bill of exception setting forth the evidence he sought to introduce, for purposes of Tex. R. Evid. 103(a)(2) and Tex. R. App. P. 33.2, nothing on this issue was presented for review on appeal. Moore v. State, 275 S.W.3d 633, 2009 Tex. App. LEXIS 48 (Tex. App. Beaumont Jan. 7 2009).

794. In a trust dispute, a grandson did not preserve his complaint regarding the exclusion of the testimony of a witness because he did not file an offer of proof or follow the procedures relating to a formal bill of exceptions.

795. Because the court found that the trial court's ruling was based solely on its conclusion that damages were no longer available to a purchaser and predecessor after they had already elected to seek, and had obtained, specific performance as a remedy, the court confined its analysis to the trial court's specific ruling, and the purchaser and predecessor were not required to make an offer of proof to preserve this argument, as the seller contended. Paciwest, Inc. v. Warner Alan Props., LLC, 266 S.W.3d 559, 2008 Tex. App. LEXIS 6812 (Tex. App. Fort Worth 2008).

796. In a family violence protective order hearing, the trial court excluded evidence of the victim's violation of her alcohol probation terms which was offered to impeach the victim's credibility. The issue was preserved for review, because defense counsel said that he was seeking to impeach the victim's credibility; an explicit offer of proof was not necessary under Tex. R. Evid. 103(a)(2). Mercer v. State, 2008 Tex. App. LEXIS 5794 (Tex. App. Corpus Christi July 31 2008).

797. Although defendant claimed that the exclusion of testimony violated defendant's federal constitutional rights, defendant did not object to the exclusion on such grounds nor did he raise such grounds in his offer of proof; he was not free to raise this for the first time on appeal and the issue was waived. Poplin v. State, 2008 Tex. App. LEXIS 5451 (Tex. App. Dallas July 24 2008).

798. To the extent that defendant's proffer of testimony could have been construed as an offer of a prior inconsistent statement by the victim under Tex. R. Evid. 613, defendant did not lay the proper predicate to the admission of the testimony under Rule 613(a); by not confronting the victim first with her prior inconsistent statement, defendant did not give her an opportunity to explain the prior inconsistency and the vague and broad questions that defendant asked did not give the victim enough information to explain, deny, or admit her prior statement Poplin v. State, 2008 Tex. App. LEXIS 5451 (Tex. App. Dallas July 24 2008).

799. Where an ex-wife failed to make an offer of proof or file a formal bill of exceptions at the trial stage, she had failed to preserve for appeal her claim that the trial court erred in failing to admit her documents into evidence because although she stated in her brief that copies of the documents were in the appellate record, she did not state where in the record the documents could be found, and the appellate court was unable to locate them in its review of the record; in any event, simply filing the excluded evidence was not sufficient to make a proper bill of exceptions. Darby v. Darby, 2008 Tex. App. LEXIS 3452 (Tex. App. Tyler May 14 2008).

800. In a personal injury suit, appellants properly preserved the error, if any, regarding excluded evidence of appellee's consumption of alcohol because, although single offers of proof from a witness might have elicited testimony concerning multiple classifications of excluded evidence, i.e., evidence concerning both the consumption of alcohol and speeding, the trial court was not prevented from differentiating between such testimony and making separate rulings on the same. PPC Transp. v. Metcalf, 254 S.W.3d 636, 2008 Tex. App. LEXIS 3291 (Tex. App. Tyler 2008).

801. Defendant failed to articulate a basis for his objection to the trial court's failure to admit evidence concerning the purported meaning of a victim's tattoo and defendant failed to make his intended proffer, such that defendant waived this claim's review. Lopez v. State, 2008 Tex. App. LEXIS 3167 (Tex. App. Houston 1st Dist. May 1 2008).

802. Individual argued that the trial court erred in striking the individual's expert witness; however, there was nothing in the record showing an offer of proof, a bill of exception, or that the expert report was brought to the trial court's attention, and without an offer of proof, the individual failed to preserve the complaint for review. Bobbora v. Unitrin Ins. Servs., 255 S.W.3d 331, 2008 Tex. App. LEXIS 2928 (Tex. App. Dallas 2008).

803. Because defendant did not make an offer of proof under Tex. R. Evid. 103, defendant did not preserve error for review. Nixon v. State, 2008 Tex. App. LEXIS 2266 (Tex. App. Tyler Mar. 31 2008).

804. Water district board member failed to preserve for review his assertion that the trial court improperly excluded evidence from various reliable news articles and campaign materials and from several prominent citizens, because even though the board member attached an offer of proof to his motion for new trial, the record did not reflect that he made a timely offer, thus, there was no record of the precise testimony or evidence which the board member sought to include. Scott v. King, 2008 Tex. App. LEXIS 2215 (Tex. App. Houston 1st Dist. Mar. 27 2008).

805. Defendant failed to preserve for review his claim that the trial court erred by denying him the opportunity to cross-examine one victim about her alleged sexual relationship with someone else because defendant made no offer of proof indicating the victim's answers to the questions and the substance of the evidence was not apparent from the context within which the questions were asked. Franklin v. State, 2008 Tex. App. LEXIS 1171 (Tex. App. Texarkana Feb. 20 2008).

806. By failing to make an offer of proof or bill of exception, a mortgagor failed to preserve a complaint regarding excluded testimony for appellate review in a dispute regarding a mortgage contract. Wakeland v. Wakeland, 2008 Tex. App. LEXIS 1024 (Tex. App. San Antonio Feb. 13 2008).

807. Trial court properly sustained the State's objection that defendant was presenting jury argument during his cross-examination of a police officer because defendant's statement, "I'd like for the jury to note that," was not the equivalent of a "let the record reflect" statement, and there was simply no indication, as defendant argued, that he was attempting, during his cross-examination of the officer, to have the record reflect some observable, but non-verbal, incident that was occurring in the courtroom; even if defendant had been trying to have the record reflect a non-verbal event, he did not properly preserve his complaint for appeal pursuant to Tex. R. Evid. 103 because at no time did he object or indicate to the trial court that he wanted to preserve a complaint for appeal regarding some non-verbal event occurring in the courtroom, and there was no indication in the record or in defendant's arguments contained in his brief what evidence he claimed was improperly excluded, and it also was not apparent from the context within which defendant asked questions what evidence was improperly excluded. Cordova v. State, 2007 Tex. App. LEXIS 9457 (Tex. App. San Antonio Dec. 5 2007).

808. Normally, the remedy for an error regarding offers of proof under Tex. R. Evid. 103 is not a new trial as defendant contended, but is to abate the appeal to permit counsel to develop the appellate record. Andrade v.

State, 246 S.W.3d 217, 2007 Tex. App. LEXIS 9288 (Tex. App. Houston 14th Dist. 2007).

809. Trial court's handling of defendant's requests to make offers of proof under Tex. R. Evid. 103 was harmless error; while the trial court erred when it prevented defendant from making an offer of proof prior to the charge being read to the jury, the error was harmless because defendant was ultimately allowed to make his offer of proof. Andrade v. State, 246 S.W.3d 217, 2007 Tex. App. LEXIS 9288 (Tex. App. Houston 14th Dist. 2007).

810. Defendant did not object to the trial court stopping his offer of proof and defendant did not seek to resume his offer at any later point, and thus he failed to preserve this issue for review under Tex. R. App. P. 33. Andrade v. State, 246 S.W.3d 217, 2007 Tex. App. LEXIS 9288 (Tex. App. Houston 14th Dist. 2007).

811. As defendant had an absolute right to make an offer of proof under Tex. R. Evid. 103 as to excluded testimony, the trial court erred when it prohibited defendant from making his offer, but because defendant did not raise an issue arguing error in this regard, an abatement to permit counsel to develop the appellate record would have served no purpose as it would not have resulted in the development of any information relevant to the appeal, and thus the error was harmless. Andrade v. State, 246 S.W.3d 217, 2007 Tex. App. LEXIS 9288 (Tex. App. Houston 14th Dist. 2007).

812. No offer of proof was made to documents excluded by the trial court, such that the contents of the documents and relevance could not be determined on appeal, and the alleged error was therefore not preserved. Roberts v. Davis, 2007 Tex. App. LEXIS 8672 (Tex. App. Texarkana Nov. 1 2007).

813. In a child support modification proceeding, the father's failure to make an offer of proof waived, under Tex. R. Evid. 103, the trial court's exclusion of certain documents. In re G.L.S., 2007 Tex. App. LEXIS 8397 (Tex. App. Tyler Oct. 24 2007).

814. In a drug case, defendant did not have to waive his attorney-client privilege to obtain testimony from a former attorney regarding the attorney's notes on conflicting information in the police report; no waiver was required under the work product privilege of Tex. R. Evid. 503, and a discussion regarding the admissibility of the evidence, combined with defendant's offer of proof, sufficed to preserve error under Tex. R. App. P. 33.1 and Tex. R. Evid. 103 as to the exclusion of the evidence. Cameron v. State, 241 S.W.3d 15, 2007 Tex. Crim. App. LEXIS 1120 (Tex. Crim. App. 2007).

815. On appeal of a conviction of misdemeanor theft, the trial court did not err in sustaining the State's objection to the offender's question concerning profit margin in her inquiry as to the value of stolen retail property because the offender did not point to any offer of proof as required by Tex. R. Evid. 103, and the substance of the evidence she sought to offer was not apparent; thus, she forfeited her issue pursuant to Tex. R. App. P. 33; moreover, had she preserved her complaint, the trial court did not err; the offender complained that the trial court should not have sustained the State's relevance objection, but evidence that the victim had a profit margin did not tend to rebut the fact that the victim's sales price was at a fair market value. Smith v. State, 2007 Tex. App. LEXIS 5880 (Tex. App. Waco July 25 2007).

816. The trial court correctly admitted statements made by the defendant to his polygraph examiner, finding that the statements were made voluntarily. Defendant never asserted his right to remain silent, and he was not the victim of such deception that his will was overborne; further, promises that the statements would only be heard by the examiner were unlikely to elicit false statements. Harty v. State, 229 S.W.3d 849, 2007 Tex. App. LEXIS 5404 (Tex. App. Texarkana 2007).

817. Defendant's trial counsel did not make an offer of proof or present a bill of exception to the trial court to reveal the anticipated substance of the excluded testimony, for purposes of Tex. R. Evid. 103(a)(2), and the substance of the testimony was not apparent from the context, and because no offer of proof was made and the record did not indicate what the excluded testimony would have been, defendant waived any error, and nothing was presented for review, for purposes of Tex. R. App. P. 33.1(a)(1)(A). Velez v. State, 2007 Tex. App. LEXIS 4677 (Tex. App. Houston 1st Dist. June 14 2007).

818. Only the last of three inconsistencies about which defendant complained on appeal appeared in an exhibit and thus, under Tex. R. Evid. 103(a)(2), but defense counsel plainly informed the trial court of the substance of the evidence that was excluded, and thus the court agreed to address the complaints. Mooring v. State, 2007 Tex. App. LEXIS 3601 (Tex. App. Waco May 9 2007).

819. Defendant did not preserve error on the issue of the admissibility of mental status evidence, given that defendant failed to offer any evidence of this status at the guilt-innocence phase of the trial, and thus the trial court never made an admissibility ruling on which error could have been based. While defendant's mental status was discussed, that reflected only an intent or desire to introduce evidence of mental condition, which did not support the claim that defendant actually offered any evidence of mental status. Buentello v. State, 2007 Tex. App. LEXIS 3344 (Tex. App. Houston 14th Dist. May 1 2007).

820. Nothing showed that the trial court ruled or refused to rule on the admissibility of certain testimony and defendant did not show that he obtained a ruling on whether the evidence was admissible under the Confrontation Clause; the offer of proof defendant made did not include any proffered testimony, and thus defendant failed to preserve the complaint for review under Tex. R. App. P. 33.1. Dowdell v. State, 2007 Tex. App. LEXIS 2738 (Tex. App. Houston 14th Dist. Apr. 10 2007).

821. While defendant included proposed testimony regarding the alleged evening assault by the victim, defendant's wife, in his offer of proof, there was no evidence the trial court actually denied defendant the opportunity to cross-examine the victim regarding this alleged assault, and there was nothing showing that defendant attempted to do so; because defendant failed to show that the trial court excluded the testimony and defendant failed to show he obtained a ruling on whether the evidence was admissible under the Confrontation Clause, defendant failed to preserve this complaint for appellate review. Dowdell v. State, 2007 Tex. App. LEXIS 2738 (Tex. App. Houston 14th Dist. Apr. 10 2007).

822. Patient's claim that an expert's testimony concerning a radiologist's alleged mistreatment and misdiagnosis of patients other than the patient was not properly preserved for review, because although the patient included some evidence in this regard in an offer of proof, the patient failed to state why the evidence was improperly excluded or why it should have been admitted, and the patient failed to specify the purpose for which the evidence was offered; in any event, the trial court did not abuse its discretion in excluding this evidence given that the expert's testimony in one aspect amounted to pure speculation and the patient did not establish how the testimony was material to the radiologist's interpretation of certain scans, such that the trial court did not abuse its discretion in finding the testimony was not relevant under Tex. R. Evid. 401, or that even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Montgomery v. Varon, 2007 Tex. App. LEXIS 2582 (Tex. App. Houston 14th Dist. Apr. 3 2007).

823. Although a patient made an offer of proof, the patient failed to make any argument as to why evidence of a surgeon's reputation in the medical community and alleged mistreatment of other patients was improperly excluded or why it should have been admitted, and the patient failed to specify the purpose for which the evidence was offered; because both steps were required to avoid waiver, the patient failed to preserve certain issues for review. Montgomery v. Varon, 2007 Tex. App. LEXIS 2582 (Tex. App. Houston 14th Dist. Apr. 3 2007).

824. For purposes of Tex. R. Evid. 103, the record did not show that defendant attempted to offer evidence at a hearing, that defendant was prevented from doing so, that defendant objected, or that an offer of proof was made, such that the alleged error concerning compulsory process was arguably not properly preserved for review; assuming that error was preserved, the court consistently followed precedent and noted that (1) Tex. Code Crim. Proc. Ann. art. 1.15 was an additional procedural safeguard, not required under federal constitutional law, that a defendant was not to be convicted on insufficient evidence even if the defendant pleaded guilty, (2) nothing in the article prohibited the trial court from considering evidence offered by defendant or required the trial court to accept the State's evidence, and (3) a defendant was not required to expressly waive the right to compulsory process before the trial court was able to proceed to judgment on a plea of guilty. Jackson v. State, 2007 Tex. App. LEXIS 1434 (Tex. App. Houston 14th Dist. Mar. 1 2007).

825. Allowing evidence of defendant's flight was not error; defendant made no affirmative showing that his flight was not connected with the offense at trial and evidence, through counsel's statements to the trial court, that defendant did not know of the warrant for his arrest was not affirmative evidence that defendant was fleeing for a reason other than guilt for aggravated robbery; the court noted that case law suggested that an attorney's statements were not enough to make the affirmative showing and that an offer of proof seemed to be the appropriate vehicle. Gore v. State, 2007 Tex. App. LEXIS 1124 (Tex. App. Houston 14th Dist. Feb. 15 2007).

826. Although the State argued that defendant failed to preserve a complaint for review by not making an offer of proof, for purposes of Tex. R. Evid. 103, of defendant's testimony until after the jury was charged, the court understood the trial court's ruling as one admitting, at least in limine, evidence of defendant's prior conviction and not a ruling excluding defendant's testimony, such that defendant preserved the complaint without regard to an offer of proof; although defendant did not testify before the jury, and thus the State did not attempt to offer evidence of defendant's conviction in the guilt-or-innocence stage of trial, the court assumed without deciding that defendant preserved the complaint. Herrera v. State, 2007 Tex. App. LEXIS 910 (Tex. App. Waco Feb. 7 2007).

827. Defendant had already established a fact, and thus the trial court did not abuse its discretion by sustaining the prosecutor's objection when defendant asked the question again; while defendant argued that the trial court should have allowed the line of questioning so defendant was able to demonstrate a claim of police brutality, defendant made no offer of proof under Tex. R. Evid. 103, and thus defendant failed to preserve any complaint regarding the trial court's exclusion of this line of questioning. Oduol v. State, 2007 Tex. App. LEXIS 182 (Tex. App. Waco Jan. 10 2007).

828. Because no offer of proof was made regarding testimony about previous problems in the police department crime laboratory and issues surrounding its re-certification and the record did not indicate what the excluded testimony would have been, defendant waived any error regarding the exclusion of that testimony, and nothing was presented for appellate review. Ruiz v. State, 2006 Tex. App. LEXIS 10318 (Tex. App. Houston 1st Dist. Nov. 30 2006).

829. Defendant challenged the trial court's refusal to allow cross-examination of the complainant concerning withdrawals she made from defendant's bank account after his arrest and her history of mental health problems; defendant argued that the cross-examination was relevant to show the complainant's motive to have him arrested, credibility, and ability to process information; however, because the record contained no offer of proof or bill of exceptions containing the substance of the excluded cross-examination testimony, pursuant to Tex. R. Evid. 103, defendant's complaint presented nothing for the appellate court's review. Carranza v. State, 2006 Tex. App. LEXIS 10137 (Tex. App. Houston 14th Dist. Nov. 28 2006).

830. Probative value of evidence regarding whether defendant and the complainant continued their relationship after the aggravated assault with a deadly weapon was slight for the purpose of showing whether the alleged assault occurred; in addition, because of the graphically sexual nature of the photos that defendant sought to

introduce into evidence, there was a danger that the jury would unfairly consider them for purposes other than that for which they were offered; in any event, because the record contained no offer of proof or bill of exceptions containing the substance of the testimony that defendant sought to elicit, pursuant to Tex. R. Evid. 103, defendant's complaint presented nothing for the appellate court's review. Carranza v. State, 2006 Tex. App. LEXIS 10137 (Tex. App. Houston 14th Dist. Nov. 28 2006).

831. Appellate court could not consider an expert's testimony from the bill of exceptions in determining whether the trial court erred in excluding his causation testimony because it did not first determine, pursuant to properly assigned error, that the trial court erred in refusing to admit the testimony. Mack Trucks v. Tamez, 206 S.W.3d 572, 2006 Tex. LEXIS 1074, 50 Tex. Sup. Ct. J. 80 (Tex. 2006).

832. In a trial for driving while intoxicated, defendant failed, under Tex. R. Evid. 103 and Tex. R. App. P. 33, to preserve error regarding the exclusion of expert testimony that defendant's diabetic condition could have produced symptoms of alcohol intoxication; defendant's offer of proof consisted of a review of the expert's purported qualifications and potential helpfulness but failed to show the specific substance of the excluded evidence. Salam v. State, 2006 Tex. App. LEXIS 8856 (Tex. App. Fort Worth Oct. 12 2006).

833. Trial court did not err by excluding medical expense affidavits in a negligence case because the record did not reflect compliance with Tex. R. Evid. 103, which requires that the substance of the evidence must be made known to the trial judge at trial; the records were not offered at trial, and no questions relating to them were asked. Morris v. Marin, 2006 Tex. App. LEXIS 8613 (Tex. App. Dallas Oct. 5 2006).

834. Defendant did not preserve error under Tex. R. Evid. 103(a)(2), (b) and Tex. R. App. P. 33.2 as to the exclusion of evidence regarding other occupants of a house where drugs were found in her bedroom because she did not make an offer of proof. Smith v. State, 2006 Tex. App. LEXIS 8685 (Tex. App. Fort Worth Oct. 5 2006).

835. In a stalking case, defendant's bill of exception arguing that testimony about the complainant's conduct should have been admitted because it would have gone to the weight, reliability, and credibility of the complainant was not specific enough to preserve a confrontation argument under Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(1), (2). Armelin v. State, 2006 Tex. App. LEXIS 8680 (Tex. App. Houston 14th Dist. Oct. 3 2006).

836. Although, for purposes of Tex. R. Evid. 103, defendant made an offer of proof and obtained a ruling, the objection was not specific enough to put the trial court on notice that defendant was making a Confrontation Clause argument, and thus error was not preserved; defendant waived those contentions on appeal. Johnson v. State, 2006 Tex. App. LEXIS 8147 (Tex. App. El Paso Sept. 14 2006).

837. Trial court did not exclude testimony offered by defendant and defendant did not make an offer of proof regarding any additional testimony that was purportedly excluded, and therefore, to the extent that defendant claimed to have been precluded from offering such, defendant waived the complaint, for purposes of Tex. R. Evid. 103(a)(2) and Tex. R. App. P. 33.2. Dixon v. State, 2006 Tex. App. LEXIS 7953 (Tex. App. Houston 14th Dist. Sept. 5 2006).

838. Because defendant obtained a ruling on an offer of proof and it appeared that the substance of the offer was made known to the court, the court rejected the State's claim that defendant failed to preserve error because the offer of proof was made outside the trial court's presence. Freeman v. State, 2006 Tex. App. LEXIS 7675 (Tex. App. Houston 14th Dist. Aug. 31 2006).

839. Revocation of community supervision was affirmed because without speculating, the appellate court had no idea what the disqualified witnesses' testimony would have been and no way to determine whether it was crucial to the defense, since defendant never made an offer of proof or bill of exception. Duncan v. State, 2006 Tex. App. LEXIS 7816 (Tex. App. Fort Worth Aug. 31 2006).

840. Because defendant did not make an offer of proof and the substance of the testimony regarding the victim's reputation for truthfulness at issue was not apparent from the context, his fourth point presented nothing for review. Jagneaux v. State, 2006 Tex. App. LEXIS 7871 (Tex. App. Waco Aug. 30 2006).

841. Because defendant did not raise certain arguments under Tex. R. Evid. 412 before the trial court, nor were the complaints apparent from the context in which they occurred, for purposes of Tex. R. App. P. 33.1, defendant did not preserve error for review; the trial court indicated that the testimony sought was inadmissible under Tex. R. Evid. 412 and defendant made an offer of proof, but defendant did not offer any other grounds for admitting the excluded testimony when the offer of proof was made. Denton v. State, 2006 Tex. App. LEXIS 6662 (Tex. App. Fort Worth July 27 2006).

842. Trial court did not err in excluding the testimony of defendant's expert witness because where was no adequate offer of proof following the very general responses given by the expert during questioning by the State; trial counsel's response was merely an attempt to reply to the State's objection, and did not provide a reasonably specific summary of what the expert testimony would contain. Fergerson v. State, 2006 Tex. App. LEXIS 6589 (Tex. App. Beaumont July 26 2006).

843. Court rejected a cardiologist's claim that appellants' offer of proof was inadequate for purposes of Tex. R. Evid. 103 because (1) this was not a case in which testimony on an isolated issue was buried in a long deposition, but instead, appellants' counsel included the entire deposition as a convenience, given that in attempting to identify a portion by page and line, counsel had included over 90 percent of the deposition, and (2) the nature of the disputed evidence was apparent and the offer was sufficiently specific; furthermore, neither the cardiologist nor the internist objected to the testimony as cumulative and appellants had no obligation to explain why it was not, such that the court found that appellants' offer of proof was sufficient to preserve error. Hooper v. Chittaluru, 222 S.W.3d 103, 2006 Tex. App. LEXIS 5532 (Tex. App. Houston 14th Dist. 2006).

844. When the trial court granted defendant's motion to suppress evidence and excluded evidence of a second blood sample taken from defendant after an automobile accident, the State could not rely on Tex. R. Evid. 103 and merely make the substance of the evidence known to the trial court in order to preserve all issues for appeal, pursuant to Tex. R. App. P. 33; just as a defendant would be required to do, the State was required to raise all issues with the trial court or they would be forfeited on appeal. State v. Neesley, 196 S.W.3d 356, 2006 Tex. App. LEXIS 4873 (Tex. App. Houston 1st Dist. 2006).

845. Because defendant failed to make an offer of proof under Tex. R. Evid. 103, nothing was preserved for review on defendant's claim of error related to certain testimony. Garst v. State, 2006 Tex. App. LEXIS 3841 (Tex. App. Austin May 3 2006).

846. Defendant failed to preserve a point of error for review because he did not point to any offer of proof in the record; in order to preserve error, defendant would have had to engage in a question and answer with the witness outside of the jury's presence, or summarize what he believed the evidence would be. Ford v. State, 2014 Tex. App. LEXIS 2379, 2014 WL 823409 (Tex. App. El Paso Feb. 28 2014).

Evidence : Procedural Considerations : Objections & Offers of Proof : Timeliness

847. No error was preserved regarding the exclusion of four photographs because the record contained nothing by way of an offer of photographs or an offer of proof until after the charge was read to the jury and it was deliberating. Riley v. State, 2012 Tex. App. LEXIS 9580, 2012 WL 5866651 (Tex. App. Texarkana Nov. 20 2012).

848. Defendant convicted of owning an adult arcade without a permit did not offer evidence on the primary-business defense or the effect of the 50/50 rule during trial and made an untimely offer of proof after the jury charge was read; therefore, any error in excluding the evidence was not preserved for review under Tex. R. Evid. 103. Ethridge v. State, 2011 Tex. App. LEXIS 4780, 2011 WL 2502542 (Tex. App. Houston 1st Dist. June 23 2011).

849. In a termination of parental rights proceeding, the mother failed to timely object to the admission of drug test results under Tex. R. App. P. 33.1(a), and error was waived under Tex. R. Evid. 103(a)(1) by the subsequent admission of drug test evidence without objection. Moreover, any error was harmless under Tex. R. App. P. 44.1 because the jury heard considerable evidence of the mother's drug use and her drug-related arrests. In the Interest of M.F., 2010 Tex. App. LEXIS 3676 (Tex. App. Eastland May 13 2010).

850. Counsel properly objected to the State's effort to call a witness in a murder case, and because that objection was addressed before trial, it did not have to be uttered during trial to remain preserved under Tex. R. Evid. 103(a)(1). Comparan v. State, 2010 Tex. App. LEXIS 1173, 2010 WL 597158 (Tex. App. Amarillo Feb. 18 2010).

851. In an aggravated assault case, because defendant cited no binding authority for an argument that an appellate court should have waived a contemporaneous objection requirement and applied the principles associated with jury-charge error, as set out in Almanza v. State, 686 S.W.2d 157 (Tex. Crim. App. 1984), to commentary made during voir dire as a way of determining that egregious harm resulted, the argument was rejected. Zachery v. State, 2009 Tex. App. LEXIS 356, 2009 WL 136915 (Tex. App. Houston 14th Dist. Jan. 20 2009).

852. In a case involving the civil commitment of a sexually violent predator, a trial court did not abuse its discretion by excluding the testimony of one expert because the subject matter of the testimony was not revealed under Tex. R. Civ. P. 194; the fact that the expert would have been offered for rebuttal was irrelevant, and there was no showing that the testimony of a State's witness was unanticipated; moreover, the patient did not raise the issue of good cause or seek a finding that there was no unfair surprise until a motion for a new trial, so it was untimely. In re Commitment of Marks, 230 S.W.3d 241, 2007 Tex. App. LEXIS 5424 (Tex. App. Beaumont 2007).

853. Defendant alleged that the in-court identification of defendant was improperly suggestive in violation of his due process rights under the Fifth and Fourteenth Amendments because the arresting officer reviewed a photograph of defendant about one month prior to the trial; however, the issue was not preserved for appellate review because the objection was not timely under Tex. R. App. P. 33 and Tex. R. Evid. 103 since (1) defendant failed to object when the officer's testimony about her review of the photograph was first elicited; and (2) counsel waited until the State rested before asserting any objections to the testimony. Abraham v. State, 2007 Tex. App. LEXIS 2109 (Tex. App. Dallas Mar. 20 2007).

854. In an aggravated robbery and burglary case, because defendant failed to lodge a timely objection pursuant to Tex. R. Evid. 103 during the State's enhancement presentation, he forfeited appellate review under Tex. R. App. P. 33.1(a) of his complaint regarding issues raised before the jury panel regarding his criminal history; the motion in limine indicated that defendant understood that measures were necessary to prevent the jury panel from being informed of his prior criminal history, and he failed to show any legitimate reason for waiting until the conclusion of the State's voir dire presentation to lodge his complaint. Lowe v. State, 2006 Tex. App. LEXIS 9487 (Tex. App. Beaumont Nov. 1 2006).

855. Victim's counselor testified three times about the victim's statements about what defendant had done before defendant objected, and the need for an objection was apparent from the moment the prosecutor asked the counsel to use the victim's words; thus, defendant's objection was untimely, and this point was not preserved for appellate review. Jagneaux v. State, 2006 Tex. App. LEXIS 7871 (Tex. App. Waco Aug. 30 2006).

856. Although defendant complained about a Power Point presentation that the State displayed for the venire panel, which set out the range of punishment for driving while intoxicated in a variety of scenarios, his objection was untimely and thus failed to preserve his complaint for appellate review where it appeared that he had the opportunity to review the Power Point slides before voir dire and affirmatively stated that he had no objection to the slides. Thrower v. State, 2006 Tex. App. LEXIS 6884 (Tex. App. Fort Worth Aug. 3 2006).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview

857. Attorney's motion in limine was heard on the record and reargued when the successor-in-interest actually offered the exhibits for admission into evidence, which occurred after jury selection but before opening statements; when the successor offered the exhibits and the trial judge asked for objections, at that point, the hearing became a hearing on the admissibility of the exhibits, and the attorney's objections to the exhibits were preserved. Thus, the attorney's complaints were not unreviewable. Houston v. Ludwick, 2010 Tex. App. LEXIS 8415, 2010 WL 4132215 (Tex. App. Houston 14th Dist. Oct. 21 2010).

Evidence : Procedural Considerations : Preliminary Questions : Hearings Out of Jury's Presence

858. Defendant's objection outside of a jury's presence to the State being allowed to question a codefendant when the State knew the codefendant would invoke the privilege against self-incrimination was sufficient to preserve the matter on appeal under Tex. R. Evid. 103(a)(1). Gober v. State, 2010 Tex. App. LEXIS 3065, 2010 WL 1657164 (Tex. App. Amarillo Apr. 26 2010).

Evidence : Procedural Considerations : Rulings on Evidence

859. Issues were waived on review, because the dentist failed to appear and raise objection to the testimony of the board's expert witness, and the error concerning the dentist's employer could easily have been corrected had the dentist brought it to the board's attention but his motion for rehearing of the board's order raised no issue regarding the sufficiency of the evidence supporting the finding. Mcintosh v. Tex. State Bd. of Dental Examiners, 2014 Tex. App. LEXIS 2751, 2014 WL 931260 (Tex. App. Amarillo Mar. 10 2014).

860. Appellate court was not required to ignore defendant's point of error based on the trial court's denial of his pretrial motion to suppress because this rule does not dispense with appellate review of pretrial suppression motions; instead, it merely serves to protect against waiver of such objections offered outside the presence of the jury when the same evidence is offered at trial. Jackson v. State, 424 S.W.3d 140, 2014 Tex. App. LEXIS 1170, 2014 WL 409946 (Tex. App. Texarkana Feb. 4 2014).

861. Defendant was convicted for organized criminal activity based on gambling promotion, because he organized a raffle drawing to benefit his political campaign, his employees distributed and sold raffle tickets, and defendant deposited the ticket sales proceeds into his bank account. The trial court did not err by excluding evidence attacking the credibility of the State's witnesses who were defendant's former employees, because the jury was aware that all three witnesses had possible motives to make false accusations; the evidence tended to be needlessly cumulative, risked confusion of the issues, or misleading the jury. Evans v. State, 2014 Tex. App. LEXIS 1430, 2014 WL 425613 (Tex. App. Dallas Jan. 31 2014).

862. In a civil proceeding to commit a sexually violent predator, the trial court did not err by allowing the State's experts to disclose various facts and data on which their respective opinions were based. The evidence was admissible under Tex. R. Evid. 705 and the jury was given a limiting instruction about the appropriate use of the information. In re Tesson, 413 S.W.3d 514, 2013 Tex. App. LEXIS 12919, 2013 WL 5651804 (Tex. App. Beaumont Oct. 17 2013).

863. Defendant did not point to a place in the record, via an offer of proof or otherwise, that established the victim consented to sexual activity after age 18, and thus evidence supporting defendant's position on consent was not submitted for consideration of admissibility and defendant failed to preserve error on the point. Green v. State, 2013 Tex. App. LEXIS 10890 (Tex. App. Texarkana Aug. 28 2013).

864. Defendant's claim that a trial court erred in excluding evidence of a murder victim's criminal history was not preserved for review under Tex. R. Evid. 103(a)(2) because defendant never received an adverse ruling from the trial court and never made an offer of proof. Leyba v. State, 416 S.W.3d 563, 2013 Tex. App. LEXIS 10067, 2013 WL 4070770 (Tex. App. Houston 14th Dist. Aug. 13 2013).

865. At defendant's trial for aggravated assault on a public servant, the trial court did not reversibly err by sustaining the State's objection to expert testimony concerning the nature of the wounds defendant sustained when he was shot. Because defendant did not make an offer of proof, it was unclear from the record what he wished to ask the expert. Bowen v. State, 2013 Tex. App. LEXIS 9197 (Tex. App. Fort Worth July 25 2013).

866. Appellate court had nothing to review on a father's claim that his due process rights were violated when the trial court refused to allow him to meaningfully cross-examine a mother; the father did not object to the two-and-a-half-hour time limit to present his case or make an offer of proof under Tex. R. Evid. 103(a)(2) concerning evidence that was excluded. In the Interest of A.E.A., 406 S.W.3d 404, 2013 Tex. App. LEXIS 8935 (Tex. App. Fort Worth July 18 2013).

867. Specific objection to an exhibit was not recorded in the record and thus was not preserved for appeal, for purposes of Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1). Hht Ltd. v. Nationwide Recovery Sys., 2013 Tex. App. LEXIS 6717 (Tex. App. Dallas May 31 2013).

868. Even if a trial court erred in denying defendant's motion for a mistrial, defendant waived error under Tex. R. Evid. 103(a)(1) by failing to timely object; although there was extensive discussion among the prosecution, defense counsel, and the trial court regarding defendant's invoking his right against self-incrimination, defendant did not object when the State asked him the question of which he complained on appeal. Kalka v. State, 2013 Tex. App. LEXIS 6257 (Tex. App. San Antonio May 22 2013).

869. Appellant failed to preserve his second point for review, given that (1) at a pretrial hearing, for purposes of Tex. R. Evid. 103(a)(1), appellant objected when the State offered an exhibit regarding a judgment and sentence for a prior conviction, but when the State offered the exhibit at trial, appellant stated that he had no objection, and (2) as to appellant's argument about the admission of facts of the prior conviction, he asserted an objection as to testimony from one witness, but the State had already elicited similar testimony from another witness without objection. Mccowan v. State, 2013 Tex. App. LEXIS 6138 (Tex. App. Fort Worth May 16 2013).

870. On appeal of the decision denying appellant property owner's request for a temporary injunction to prevent a foreclosure, appellant claimed the trial court abused its discretion by refusing to permit her to admit into evidence a tape recording of a conversation between her and the bank's president. The appellate court was unable to evaluate the merits of her claim, because appellant did not make an offer of proof or otherwise make the tape recording part of the appellate record under Tex. R. Evid. 103(a)(2). Wright v. First Nat'l Bank of Bastrop, 2013 Tex. App. LEXIS

4911 (Tex. App. Austin Apr. 19 2013).

871. Appellant claimed that the notice provided by the State, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) and Tex. R. Evid. 404(b), was incomplete and too late, and while the trial court overruled these objections at the time, the trial court invited defense counsel to revisit the issues and then a hearing would be conducted and a final ruling made, but appellant did not cite where he made a follow-up objection based on improper notice, and the court did not find any such objection; defense counsel did not ask for a hearing, renew any objection, or request a running objection, for purposes of Tex. R. Evid. 103(a)(1), and thus appellant did not preserve for review any error that might have taken place when the evidence was admitted without objection. Asael Furquim Dearruda v. State, 2013 Tex. App. LEXIS 4657 (Tex. App. Fort Worth Apr. 11 2013).

872. Even if the court found that appellant's objections fit within the confines of Tex. R. Evid. 404(b), appellant did not object each time the State sought to introduce evidence of the incident, nor did appellant obtain a running objection or set forth a proper objection outside the jury's presence, for purposes of Tex. R. Evid. 103(a)(1); because the evidence in question was admitted elsewhere without objection, any error in admitting the evidence was cured. Rudzavice v. State, 2013 Tex. App. LEXIS 3140, 2013 WL 1188924 (Tex. App. Waco Mar. 21 2013).

873. Any error in the admission of the expert's testimony did not affect the patient's substantial rights, because the trial court gave the jury a limiting instruction regarding the use of hearsay evidence. In re Commitment of Villegas, 2013 Tex. App. LEXIS 1596, 2013 WL 645239 (Tex. App. Beaumont Feb. 21 2013).

874. Court did not abuse its discretion by excluding additional evidence regarding the receipt of text messages, because the record indicated that the evidence defendant wanted the jury to hear, the jury did in fact hear; the jury heard the evidence, though perhaps from fewer witnesses and in less detail than defendant would have preferred. Wooten v. State, 2013 Tex. App. LEXIS 1658, 2013 WL 625734 (Tex. App. Amarillo Feb. 20 2013).

875. Mother complained of the exclusion of certain testimony, but her objection was not preserved; to preserve error, the substance of the evidence had to be shown via an offer of proof unless it was apparent from context, for purposes of Tex. R. Evid. 103(a)(2), Tex. R. App. P. 33.2. In the Interest of D.J.E., 2013 Tex. App. LEXIS 1505, 2013 WL 594021 (Tex. App. Waco Feb. 14 2013).

876. Appellant did not preserve for review his claim regarding the limitation on an expert's testimony and the cross-examination of the victim, given that he did not make an offer of proof as to what questions he would have asked and the testimony he would have elicited, he did not summarize what the evidence would have shown, and counsel's comments of inconsistencies indicating the victim was not able to hold a memory did not amount to a formal offer of proof or an informal bill, as they did not reveal the substance of the evidence; the court could not conduct a proper harm analysis. Covarrubias v. State, 2013 Tex. App. LEXIS 1434, 2013 WL 557177 (Tex. App. El Paso Feb. 13 2013).

877. Counsel's description of a doctor's anticipated testimony at trial did not describe the context of the testimony, but only made a general comment on the nature of the evidence, and this was insufficient to preserve the issue for appeal, as it was not specific enough for the court to determine admissibility, and moreover, counsel's description did not reference the best interests of the child in this suit to modify the parent-child relationship; even if the court held that a sufficient offer of proof had been made, the court would have found no abuse of discretion by the trial court in limiting the doctor's testimony, as the offer only referred to generalized categories of testimony, the father did not show that the evidence would have been material to the ruling, and absent a complaint about the substantive ruling, it was hard to see how the exclusion of the evidence probably caused the rendition of an improper judgment, plus the doctor could not have testified to any personal knowledge of harm to the child because he did not treat him. Watts v. Oliver, 396 S.W.3d 124, 2013 Tex. App. LEXIS 716, 2013 WL 266050 (Tex. App.

Houston 14th Dist. Jan. 24 2013).

878. Appellant did not make an offer of proof concerning the testimony she wanted to elicit from a witness, and thus she failed to preserve this issue for review. St. Amand v. State, 2013 Tex. App. LEXIS 374 (Tex. App. Houston 1st Dist. Jan. 17 2013).

879. Defendant preserved for review her argument that the trial court erred in admitting into evidence her fourth recorded interview with the officer, because in her motion to suppress, defendant expressly argued that she was either under arrest or substantially deprived of freedom by the attendant conduct of said law enforcement officers and the surrounding circumstances. Nelson v. State, 405 S.W.3d 113, 2013 Tex. App. LEXIS 377, 2013 WL 174502 (Tex. App. Houston 1st Dist. Jan. 17 2013).

880. Mother waived on appeal her claim that the expert's testimony was not relevant, because she made no such objection at trial, nor did she move to strike any of the testimony. Mueller v. Bran, 2013 Tex. App. LEXIS 176, 2013 WL 123693 (Tex. App. Houston 1st Dist. Jan. 10 2013).

881. Assuming without deciding that the trial court abused its discretion in permitting expert witness testimony, the court could not find that appellant's substantial rights were affected, for purposes of Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b), given in part that (1) the jury heard evidence that appellant, while driving, weaved, struck a guardrail, failed to signal, and almost hit another car, (2) the jury saw a video recording showing appellant crossing into another lane and failing to signal, (3) the jury heard officer testimony that appellant smelled of alcohol, was wobbly and had slow speech and a cold beer can in his vehicle, and (4) appellant admitted to drinking and taking prescription medication; the defense reminded the jury that the expert was not a doctor, and the jury was advised that it could only find appellant guilty if it found so beyond a reasonable doubt, and thus even without the expert's testimony, there was sufficient evidence from which the jury could have found appellant guilty of driving with a child passenger while intoxicated. Miller v. State, 2012 Tex. App. LEXIS 10264, 2012 WL 6213735 (Tex. App. Beaumont Dec. 12 2012).

882. Because a builder failed to object and make an offer of proof and instead affirmatively represented that the builder had no further questions to ask homeowners' construction expert, the builder failed to preserve under Tex. R. Evid. 103(a)(1) a claim that the trial court erred in limiting cross-examination of the expert. Kramer v. Hollmann, 2012 Tex. App. LEXIS 9655, 2012 WL 5869423 (Tex. App. Fort Worth Nov. 21 2012).

883. Appellant did not show what other evidence he wanted to be considered, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a), and he did not file a new trial motion; because the substance of the evidence was not in the record, for purposes of Tex. R. Evid. 103(a)(2), Tex. R. App. P. 33.2, the court could not examine it to determine if the exclusion was harmful, and the issue was not preserved for review. Schulte v. State, 2012 Tex. App. LEXIS 9320 (Tex. App. Houston 1st Dist. Nov. 1 2012).

884. Appellant, in claiming the victim, a 19-year-old mentally disabled woman, was incompetent, requested a hearing under Tex. R. Evid. 601(a)(2), and the trial court found the victim competent, and during cross-examination, defense counsel re-urged the competency objection; appellant's motion did not only seek a hearing, but exclusion of the victim's testimony, and this was a timely request stating grounds for exclusion, which was pursued to an adverse ruling for purposes of Tex. R. App. P. 33.1(a), and thus appellant preserved this issue for review by obtaining an adverse ruling on the evidence's admissibility outside of the jury's presence, for purposes of Tex. R. Evid. 103(a)(1). Luria v. State, 2012 Tex. App. LEXIS 8646, 2012 WL 4900908 (Tex. App. San Antonio Oct. 17 2012).

885. Appellant's brief did not contain one statement that comported with his trial objection, and although appellant objected to the introduction of certain exhibits and testimony concerning those exhibits, he did not object when the victim testified to essentially the same facts; a party wishing to complain about evidence had to object each time the evidence was offered, or the objection was waived. Suiters v. State, 2012 Tex. App. LEXIS 8097 (Tex. App. El Paso Sept. 26 2012).

886. Appellant's counsel objected to certain exhibits, but appellant did not renew the objection during a detective's testimony or make a new objection or renew the objection during other testimony or the State's closing argument, and he cited no authority that supported such a broad application of one objection, nor did the court find any; the court reviewed the record to see if a sufficient objection was made elsewhere for preservation purposes, but the court found none. Suiters v. State, 2012 Tex. App. LEXIS 8097 (Tex. App. El Paso Sept. 26 2012).

887. Because no objection or motion was made before the trial court regarding appellant's complaints on appeal, nothing was preserved for review as to these complaints, for purposes of Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(a)(1). Suiters v. State, 2012 Tex. App. LEXIS 8097 (Tex. App. El Paso Sept. 26 2012).

888. Appellant did not make a timely request or objection during certain testimony and counsel instead stated he had no objection to the testimony or certain exhibits, such that nothing was presented for review in this regard. Suiters v. State, 2012 Tex. App. LEXIS 8097 (Tex. App. El Paso Sept. 26 2012).

889. Complaints about the State's closing argument were unpreserved because appellant did not object, and the trial objections did not comport with the ones on appeal; error was waived. Suiters v. State, 2012 Tex. App. LEXIS 8097 (Tex. App. El Paso Sept. 26 2012).

890. Hearsay objection was not preserved for review, because appellants' counsel made only a general hearsay objection to the admission of the witness's testimony and did not object with specificity, despite the trial court's invitation to him to do so; nor did he obtain a definitive adverse ruling while the trial court was in a proper position to change its conditional ruling of admissibility and the claimant was in a position to offer other testimony or to subpoena the witness to testify. Tryco Enters. v. Robinson, 390 S.W.3d 497, 2012 Tex. App. LEXIS 7810, 2012 WL 4021126 (Tex. App. Houston 1st Dist. Sept. 13 2012).

891. At defendant's trial for DWI, the admission of medical records containing extraneous offense evidence did not have a substantial effect on the verdict under Tex. R. Evid. 103(a), because the jury heard evidence that defendant was passed out in his vehicle with a bottle of alcohol between his legs; the officer noticed defendant's glassy and bloodshot eyes, defendant admitted he consumed alcohol and prescription medications, and field sobriety test results suggested intoxication. The record contained sufficient evidence from which the jury could find defendant guilty of DWI beyond a reasonable doubt. Lorenz v. State, 2012 Tex. App. LEXIS 7777, 2012 WL 4017766 (Tex. App. Beaumont Sept. 12 2012).

892. At a bench conference, counsel made an argument under Tex. R. Evid. 403 regarding a videotape, and although counsel failed to reassert her objection during the sentencing part of the trial, because the bench conference discussing the videotape was done outside of the jury's presence, the issue was preserved for review, for purposes of Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1). Garza v. State, 2012 Tex. App. LEXIS 6865, 2012 WL 3525634 (Tex. App. Corpus Christi Aug. 16 2012).

893. Extent to which defendant argued that the trial court prevented him from asking the witness a question regarding defendant's ability to follow the law, the complaint was without merit, because defense counsel did not ask the witness any questions regarding defendant's ability to follow the law and the trial court did not prevent defense counsel from asking such a question, and defendant had not shown that the exclusion of the witness's

testimony regarding defendant's faith affected a substantial right. Villarreal v. State, 2012 Tex. App. LEXIS 5862, 2012 WL 2929390 (Tex. App. Corpus Christi July 19 2012).

894. Appellant did not object to a trooper's testimony concerning appellant's failure to answer questions on a form, and thus he failed to preserve error concerning admission of the form. Stovall v. State, 2012 Tex. App. LEXIS 5571, 2012 WL 2862369 (Tex. App. Eastland July 12 2012).

895. Trial court accepted the jury's second punishment for sexual assault of a child of five years' confinement, and because the sentence ultimately imposed was within the statutory range under Tex. Penal Code Ann. §§ 22.011(f), 12.33(a), the sentence was not illegal and the trial court did not violate appellant's fundamental rights in imposing a sentence according to the second punishment verdict, for purposes of Tex. R. Evid. 103(d). Mayes v. State, 2012 Tex. App. LEXIS 5157, 2012 WL 2453724 (Tex. App. Houston 1st Dist. June 28 2012).

896. Error about which appellant complained, regarding the jury verdict and the sentence imposed, was not so fundamental as to have relieved him of the requirement to object, and the court found that (1) he did not object to the deliberations procedures and counsel agreed with the trial court's finding that the initial verdict was illegal and deliberations were to continue, and (2) the motion for a new trial did not preserve the issue; as the sentence imposed for sexual assault of a child was not illegal, and appellant failed to object and the motion for a new trial was not shown to have been presented, he failed to preserve for review his claims concerning the trial court's rejection of the original verdict and misstatement of the law. Mayes v. State, 2012 Tex. App. LEXIS 5157, 2012 WL 2453724 (Tex. App. Houston 1st Dist. June 28 2012).

897. Appellant did not object to evidence of narcotics use when the State posed a question or when the witness answered, but at a bench conference, he argued that the evidence was not relevant, and this was sufficient to preserve the relevance objection given that the objection was deemed to apply when the evidence was subsequently admitted, for purposes of Tex. R. Evid. 103(a)(1); at the bench conference, appellant did not object on prejudicial effect grounds, the objection at trial did not comport with the one on appeal, and he failed to preserve error on the claim that the testimony was prejudicial. Miles v. State, 2012 Tex. App. LEXIS 4929, 2012 WL 2356478 (Tex. App. Houston 14th Dist. June 21 2012).

898. Husband failed to preserve his complaint on appeal that a trial court erred in a divorce action in refusing to hear evidence of an inheritance by the wife; the husband failed to comply with Tex. R. Evid. 103(a)(2) by making the substance of the evidence known to the trial court by an offer of proof. Ashraf v. Ashraf, 2012 Tex. App. LEXIS 4345, 2012 WL 1948347 (Tex. App. Austin May 24 2012).

899. Nothing showed that appellant attempted to comply with Tex. R. Evid. 103 or that the trial court denied appellant the chance to make an offer of proof as to evidence of his mother's mental health; as appellant did not present evidence and made no bill on the issue, the court was left to speculate, and the court overruled his claim of ineffective assistance in this regard. Arroyos v. State, 2012 Tex. App. LEXIS 3574, 2012 WL 1555900 (Tex. App. Fort Worth May 3 2012).

900. Debtor testified without objection that statements shown to him were his statements, and he answered questions about the documents before his counsel objected; the objection was not timely for purposes of Tex. R. Evid. 103 and Tex. R. App. P. 33.1(a), plus the records were offered to refresh the debtor's recollection and impeach his credibility for purposes of Tex. R. Evid. 612, credibility could be attacked by any party under Tex. R. Evid. 607, and the trial court did not abuse its discretion in admitting the debtor's testimony in this regard. Ainsworth v. Cach, Llc, 2012 Tex. App. LEXIS 2798 (Tex. App. Houston 14th Dist. Apr. 10 2012).

901. Ex-husband could not show that the trial court abused its discretion in refusing to allow questions to the ex-wife about an excluded exhibit, given that (1) the exhibit was not offered into evidence and was not part of the record, (2) the ex-husband did not make an offer of proof or otherwise make the exhibit or testimony part of the record, for purposes of Tex. R. Evid. 103 and Tex. R. App. P. 33.2, and (3) the trial court already admitted evidence of emails between the ex-wife and her alleged paramour, and thus the trial court already admitted evidence of the ex-wife's affair. Prentiss v. Prentiss, 2012 Tex. App. LEXIS 2070, 2012 WL 858592 (Tex. App. Fort Worth Mar. 15 2012).

902. At trial, appellant only requested that it call a rebuttal witness without identifying the witness or the questioning, and thus appellant did not make the substance of its proposed testimony known, for purposes of Tex. R. Evid. 103(a)(2), and appellant did not preserve the issue for review under Tex. R. App. P. 33.1(a). 1.9 Little York, Ltd. v. Allice Trading Inc., 2012 Tex. App. LEXIS 2112, 2012 WL 897776 (Tex. App. Houston 1st Dist. Mar. 15 2012).

903. Husband failed to preserve the issue for appeal concerning the exclusion his expert witness, because the husband did not make a timely offer of proof before the trial court and did not file a formal bill of exception. Sink v. Sink, 364 S.W.3d 340, 2012 Tex. App. LEXIS 2006, 2012 WL 840340 (Tex. App. Dallas Mar. 14 2012).

904. On appeal of defendant's conviction for indecency with a child by contact, defendant argued that the trial court erred under Tex. R. Evid. 103(a)(2) by disallowing the cross-examination of the complainant regarding her motive and state of mind in telling her friend that defendant fondled her. Because the evidence came in during the testimony of the friend, any error was harmless. Taylor v. State, 2012 Tex. App. LEXIS 1663, 2012 WL 662373 (Tex. App. Fort Worth Mar. 1 2012).

905. Appellant based her objection at trial upon an exhibit's alleged hearsay status because of the exhibit's purported failure to qualify as a business record, but she did not object on constitutional grounds, and an objection concerning hearsay rules did not preserve an argument concerning one's right of confrontation; because appellant failed to urge an objection regarding her right of confrontation under U.S. Const. amend. VI, XIV at trial, she forfeited her issue on appeal, under Tex. R. App. P. 33.1(a). Buckner v. State, 2012 Tex. App. LEXIS 1258, 2012 WL 503522 (Tex. App. Fort Worth Feb. 16 2012).

906. During the punishment phase of defendant's trial for bribery, defendant was not harmed by the trial court's ruling on evidence under Tex. R. Evid. 103(a) allowing testimony from a witness urging the jury not to sentence defendant to probation. The testimony did not influence the jury, because its imposition of a 19-year sentence showed that the jury did not consider probation to be an appropriate option. Watts v. State, 2012 Tex. App. LEXIS 1044, 2012 WL 403859 (Tex. App. Beaumont Feb. 8 2012).

907. Client argued that he preserved his complaint for review because his objection grounds were apparent from context, for purposes of Tex. R. Evid. 103(a)(1), but it was not clear what his objection was and whether he argued that a question was prejudicial or objectionable on some other ground, and the client did not object when conspiracy theories were mentioned, plus an objection with no basis was overruled; although the client claimed he did not have to renew his objections, there was no ruling on the record, and thus the matter was not preserved for review. Parsons v. Greenberg, 2012 Tex. App. LEXIS 888, 2012 WL 310505 (Tex. App. Fort Worth Feb. 2 2012).

908. No adverse ruling regarding appellant's father's testimony about appellant's medical records apepared, his offer of proof had no testimony from the father, and the record contained no explanation of how a diagnosis of neurofibromatosis was relevant to any contested issue in this driving while intoxicated case, such that the issue was not preserved for review, for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(2), (b). Bradley v. State,

2012 Tex. App. LEXIS 410, 2012 WL 150969 (Tex. App. Beaumont Jan. 18 2012).

909. No questions concerning certain sobriety tests were asked of appellant's father, either before the jury or in the offer of proof, and thus the issue was not preserved for review. Bradley v. State, 2012 Tex. App. LEXIS 410, 2012 WL 150969 (Tex. App. Beaumont Jan. 18 2012).

910. Appellant did not make an offer of proof regarding the contents of a letter and the relevance thereof, and therefore he failed to preserve this issue for review. Lewis v. State, 2012 Tex. App. LEXIS 100, 2012 WL 29326 (Tex. App. Corpus Christi Jan. 5 2012).

911. Under Tex. R. Evid. 103(a)(2), appellant had to proffer with some degree of specificity the substantive evidence he intended to present with regard to the victim's anger and the relevance thereof, but he failed to do so, and thus he did not preserve this argument for review. Lewis v. State, 2012 Tex. App. LEXIS 100, 2012 WL 29326 (Tex. App. Corpus Christi Jan. 5 2012).

912. Trial court did not err in excluding the testimony of a tenant's general partner; the tenant's counsel, in his offer of proof, gave no explanation for the basis of the partner's opinions and whether he had personal knowledge on the cost of damages or repairs, nothing in the bill of exception indicated such personal knowledge, and the partner agreed several times that he lacked personal knowledge about the work done at the leased property. Lone Starr Multi-Theatres, Ltd. v. Max Interests, Ltd., 365 S.W.3d 688, 2011 Tex. App. LEXIS 10210, 2011 WL 6938527 (Tex. App. Houston 1st Dist. Dec. 29 2011).

913. Defendant failed to preserve the trial court's alleged error in excluding her proposed testimony about prior acts of abuse by the boyfriend, because the substance of the excluded testimony was not apparent from the context and defendant made no offer of proof. Ellis v. State, 2011 Tex. App. LEXIS 9821 (Tex. App. Houston 14th Dist. Dec. 15 2011).

914. Appellant failed to preserve complaints for appeal under Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1; appellant failed to object during a hearing to commit appellant as a sexually violent predator when the State read appellant's admissions into evidence and when the trial court gave appellant's explanation of requests for admissions. In re Hitt, 2011 Tex. App. LEXIS 9377 (Tex. App. Beaumont Dec. 1 2011).

915. Because a party failed to raise constitutional complaints below, she failed to preserve them for appeal, for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(1). In the Interest of A.S.D., 2011 Tex. App. LEXIS 9205, 2011 WL 5607608 (Tex. App. Fort Worth Nov. 17 2011).

916. Where a decedent's husband made a blanket hearsay objection without identifying each part of each nurse's report that was problematic and because he did not specifically assert that the reports contained hearsay within hearsay, his blanket objection was not sufficiently specific to preserve error under Tex. R. Evid. 103(a)(1). In the Estate of Ward, 2011 Tex. App. LEXIS 6811, 2011 WL 3720829 (Tex. App. Waco Aug. 24 2011).

917. Defendant failed to preserve for review his assertion that the trial court erred by admitting an audio-video recording containing portions of his grand jury testimony, because defendant never lodged any complaints regarding self-incrimination, and when the State offered the redacted recording of defendant's grand jury testimony, defendant objected solely on grounds of optional completeness. Lewis v. State, 2011 Tex. App. LEXIS 6987, 2011 WL 3925633 (Tex. App. Beaumont Aug. 24 2011).

918. Any error by determining the drug test results were admissible was harmless, because the father's testimony was admitted without objection, when the content of the testimony was cumulative of the drug test results the father argued were inappropriately admitted. D.O.H. v. Tex. Dep't of Family & Protective Servs., 2011 Tex. App. LEXIS 6685, 2011 WL 3684568 (Tex. App. Houston 14th Dist. Aug. 23 2011).

919. Substance of certain evidence was not made known to the trial court by offer, plus the substance was not apparent from the context within which the questions were asked; thus, appellant failed to comply with Tex. R. Evid. 103(a)(2) and waived any error regarding this evidence. Sanford v. State, 2011 Tex. App. LEXIS 6615 (Tex. App. Corpus Christi Aug. 18 2011).

920. Because defendant made no specific objection during a revocation hearing to testimony by defendant's probation officer as improper polygraph evidence, defendant failed to preserve the complaint for appellate review under Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(a)(1). Williams v. State, 2011 Tex. App. LEXIS 6580, 2011 WL 3621333 (Tex. App. Waco Aug. 17 2011).

921. Because counsel for appellant did not argue that the exclusion of evidence would violate appellant's constitutional right to present a defense under the Fourteenth and Sixth Amendments, he failed to preserve his complaint for appellate review, for purposes of Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(a)(1). Villasenor v. State, 2011 Tex. App. LEXIS 6172, 2011 WL 3435376 (Tex. App. Dallas Aug. 8 2011).

922. Error was preserved for review, because objections to evidence offered out of the jury's presence would be deemed to apply to such evidence when admitted without the necessity of repeating the objection. Schultz v. Lester, 2011 Tex. App. LEXIS 5866, 2011 WL 3211271 (Tex. App. Dallas July 29 2011).

923. Seller failed to preserve error regarding admission of certain documents, because the seller failed to make an offer of proof; error could not be predicated upon a ruling which excluded evidence unless a substantial right of the party was affected and the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked. Brookins v. Coppa, 2011 Tex. App. LEXIS 5931, 2011 WL 3242629 (Tex. App. Texarkana July 29 2011).

924. Defendant's complaint on appeal regarding a trial court's decision in defendant's criminal trial to exclude evidence addressing defendant's civil suit against the police was not waived by defendant's failure to make an offer of proof under Tex. R. Evid. 103(a)(2). Van Goffney v. State, 2011 Tex. App. LEXIS 5334, 2011 WL 2731850 (Tex. App. Beaumont July 13 2011).

925. Pursuant to Tex. R. Evid. 103(a)(1), a trucking company preserved its issue regarding the admission of drug tests into evidence because it objected to the complained-of evidence outside the presence of the jury and pursued the objection to an adverse ruling. Tornado Trucking, Inc. v. Dodd, 2011 Tex. App. LEXIS 5123, 2011 WL 2641272 (Tex. App. Waco July 6 2011).

926. When evidence was offered, a party made no complaint, and thus under Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a), he failed to preserve any error on this matter. Baxley v. Baxley, 2011 Tex. App. LEXIS 4777, 2011 WL 2504216 (Tex. App. Houston 1st Dist. June 23 2011).

927. Appellant objected immediately after witnesses answered questions, and this was when alleged grounds for an objection became apparent because neither question was phrased so as to have elicited a hearsay response, and the objections were timely for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(1). Briscoe v. State,

2011 Tex. App. LEXIS 4632, 2011 WL 2420367 (Tex. App. Dallas June 17 2011).

928. Defendant waived any error regarding the admission of the officer's testimony concerning the recording device in the patrol car, because defendant failed to object to the testimony in the trial court on the ground that he raised on appeal; the record did not reflect that defendant made or obtained a running objection to the admission of the evidence of which he now complained. Norfleet v. State, 2011 Tex. App. LEXIS 4567, 2011 WL 2436494 (Tex. App. Houston 1st Dist. June 16 2011).

929. Defendant failed to present anything for appellate review as to two photographs that were admitted during trial because defense counsel had affirmatively stated at trial that defense counsel had no objection to admission of the photographs; hence, any error was waived under Tex. R. Evid. 103(a). Johnson v. State, 2011 Tex. App. LEXIS 3754, 2011 WL 2083969 (Tex. App. Houston 14th Dist. May 19 2011).

930. Appellant specifically stated she had no objection to the introduction of the presentence investigation report, for purposes of Tex. Code Crim. Proc. Ann. art. 42.12, § 9(e), into evidence, and it was not until closing arguments that appellant identified any complaints, but counsel's argument was not evidence and appellant never tried to obtain a ruling on any objection, for purposes of Tex. R. App. P. 33.1(a), Tex. R. Evid. 103(a); thus, the issue was not preserved for review. Davis v. State, 2011 Tex. App. LEXIS 3591, 2011 WL 1900569 (Tex. App. Houston 1st Dist. May 12 2011).

931. Appellate counsel's conclusion that an "optional completeness" argument had not been properly preserved for state appellate review was an objectively reasonable deduction because the specificity required by Tex. R. Evid. 103 and Tex. R. App. P. 33.1(a) was lacking; nothing in the exchanges between petitioner inmate's trial counsel and the state trial court reasonably alerted the state trial court that the inmate was suggesting a detective should be permitted to testify to the clearly hearsay within hearsay details of a witness's written statement based upon the Texas Rule of Optional Completeness found in Tex. R. Evid. 107. Hernandez v. Thaler, 787 F. Supp. 2d 504, 2011 U.S. Dist. LEXIS 123538 (W.D. Tex. May 12 2011).

932. Instruction to the jury that two defense witnesses violated the witness rule in Tex. R. Evid. 614 was not fundamental error under Tex. R. Evid. 103(d) because the comment on the evidence under Tex. Code Crim. Proc. Ann. art. 38.05 only suggested that the witnesses might be untrustworthy rather than that defendant might be guilty. Powell v. State, 2011 Tex. App. LEXIS 2888, 2011 WL 1466876 (Tex. App. Austin Apr. 15 2011).

933. Appellant did not object to an officer's trial testimony and his motion in limine did not preserve error for appeal. Shipp v. State, 2011 Tex. App. LEXIS 1976, 2011 WL 1005459 (Tex. App. Houston 1st Dist. Mar. 17 2011).

934. Appellant failed to make a timely and specific objection, for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103(d), and thus his issue survived only if the trial judge's comment constituted fundamental error. Basey v. State, 2011 Tex. App. LEXIS 1695, 2011 WL 825014 (Tex. App. Houston 14th Dist. Mar. 10 2011).

935. Because a party gave the trial court no indication that he found certain evidence objectionable during trial, he failed to preserve the issue for review under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103. Catalanotto v. Meador Oldsmobile Llc, 2011 Tex. App. LEXIS 1590, 2011 WL 754413 (Tex. App. Fort Worth Mar. 3 2011).

936. In a commercial dispute, the seller waived his challenge to the trial court's ruling on deposition testimony in which he asserted his Fifth Amendment privilege against self-incrimination by withdrawing the proffered testimony. The issue was not preserved for review under Tex. R. App. P. 33.1(a)(1)(A); Tex.R. Evid. 103(a)(1). Ferro v.

Dinicolantonio, 2011 Tex. App. LEXIS 955, 2011 WL 494741 (Tex. App. Houston 1st Dist. Feb. 10 2011).

937. When police officers responded to a domestic disturbance call at the residence of defendant and his wife, she told the officers that defendant had repeatedly struck her with a cane and held a gun to her head during an argument. At defendant's trial for assault, he did not object to the officers' testimony describing the discovery and seizure of the weapon as required by Tex. R. Evid. 103(a)(1) to preserve the issue; thus, under Tex. R. App. P. 33.1 he could not complain on appeal that the fact of his being armed was irrelevant or unfairly prejudicial. Smith v. State, 2011 Tex. App. LEXIS 859, 2011 WL 350434 (Tex. App. Austin Feb. 2 2011).

938. Claimant failed to show that the trial court erred by admitting irrelevant evidence, because the issue was not preserved for review, when the claimant did not object at trial to the dealership's first exhibit, the claimant objected to the dealership's second exhibit, but the objection was based on hearsay rather than relevance, and the claimant did not identify on appeal any other specific evidence that should not have been admitted. Opuiyo v. Houston Auto M. Imps., Ltd., 2011 Tex. App. LEXIS 58, 2011 WL 61853 (Tex. App. Houston 14th Dist. Jan. 6 2011).

939. Court did not abuse its discretion by excluding the expert's testimony with regard to the cause of the claimant's right-side pain, because the expert asserted that the doctor performed the third set of injections without fluoroscopy and that this conduct constituted gross negligence, and the claimant raised the fluoroscopy issue before the trial court in terms of standard of care, not causation; the expert did not link this standard of care opinion to his causation conclusion that the third set of injections caused the claimant's right leg pain. Wilson v. Shanti, 333 S.W.3d 909, 2011 Tex. App. LEXIS 116 (Tex. App. Houston 1st Dist. Jan. 6 2011).

940. Because appellant did not object to the trial court's rulings on any Sixth Amendment basis, he waived this argument on appeal, under Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1(a). Costilla v. State, 2010 Tex. App. LEXIS 10321, 2010 WL 5463853 (Tex. App. Austin Dec. 23 2010).

941. Record did not show a ruling by the trial court concerning appellant's alleged Fifth Amendment objection, plus a defendant had no right to hybrid representation, such that appellant's answer to the State's questioning did not adequately preserve his Fifth Amendment challenge, under Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a). Costilla v. State, 2010 Tex. App. LEXIS 10321, 2010 WL 5463853 (Tex. App. Austin Dec. 23 2010).

942. Defendant failed to preserve for review his claim that a child sexual assault victim had bias or motive to lie because he did not introduce at a hearing that occurred outside the presence of the jury the victim's prior outcry statement that she had made against another man; he provided no offer of proof as required by Tex. R. App. P. 33.2 and Tex. R. Evid. 103(a)(2). Littlepage v. State, 2010 Tex. App. LEXIS 9968 (Tex. App. Fort Worth Dec. 16 2010).

943. Appellant did not object to testimony on a competency basis at trial, so it would not serve as grounds for reversal unless it constituted fundamental error under Tex. R. Evid. 103(d). Ates v. State, 2010 Tex. App. LEXIS 9777 (Tex. App. Austin Dec. 10 2010).

944. Admitting a child's testimony was not fundamental error under Tex. R. Evid. 103(d), given that (1) the child successfully answered a series of questions about his age and interests, and nothing suggested that he was unable to intelligently observe what he witnessed, for purposes of Tex. R. Evid. 601(a)(2), (2) his testimony was not essential to appellant's conviction under Tex. Penal Code Ann. §§ 21.11, 22.021, as the victim's testimony did not require corroboration under Tex. Code Crim. Proc. Ann. art. 38.07(a), (b)(1), and (3) the State did not elect to seek a conviction on the basis of the episode about which the witness testified. Ates v. State, 2010 Tex. App. LEXIS 9777 (Tex. App. Austin Dec. 10 2010).

945. Even though the substance of the proposed testimony regarding prior violent acts by the decedent appeared in the record through affidavits attached to appellant's motion for a new trial, the court was faced with the issue, for purposes of Tex. R. Evid. 103(b), that the evidence was not offered at trial, and the trial court did not have the opportunity to rule on the admissibility of the testimony, under Tex. R. App. P. 33.1(a); absent a ruling by the trial court on the portion of the evidence of which appellant complained, the court had no cognizable complaint on which to pass judgment, and appellant waived this issue. Garcia v. State, 2010 Tex. App. LEXIS 8834, 2010 WL 4361885 (Tex. App. Corpus Christi Nov. 4 2010).

946. Defense failed to preserve any challenge to the reliability of the State's DNA-testing procedures by failing to object on that basis, for purposes of Tex. R. App. P. 33.1, Tex. R. Evid. 103. Vasquez v. State, 2010 Tex. App. LEXIS 8839, 2010 WL 4361877 (Tex. App. Corpus Christi Nov. 4 2010).

947. Petitioner forfeited his complaint about the admission of the polygraph results, because although the petitioner objected to the first portion of the community supervision officer's testimony that mentioned the results of his polygraph tests and objected to a question in the middle of his own testimony, the petitioner did not object to every question or answer that disclosed the results, and he did not obtain a running objection to the polygraph evidence. Gardner v. State, 2010 Tex. App. LEXIS 8991, 2010 WL 4569899 (Tex. App. Fort Worth Nov. 4 2010).

948. Because a party's public policy arguments were unpreserved for purposes of Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1), the court did not address them. Montoya v. Bluebonnet Fin. Assets, 2010 Tex. App. LEXIS 8691, 2010 WL 4261481 (Tex. App. Fort Worth Oct. 28 2010).

949. Appellants did not object at trial to all of the arguments of which they complained on appeal, and for those they did object to, discussion was off the record, such that the record failed to show the statements of grounds, trial court's rulings, and a request for an instruction to disregard, but some of the statements were preserved in appellants' motion for a new trial; because appellants sponsored certain evidence, error could not be assigned for commenting on that in argument. Atwood v. Pietrowicz, 2010 Tex. App. LEXIS 8689, 2010 WL 4261600 (Tex. App. Fort Worth Oct. 28 2010).

950. Under Tex. R. Evid. 103(a), respondent failed to preserve for review a challenge to a trial court's sustaining of the State's objection to questions concerning what age respondent would be upon release from prison; respondent did not make an offer of proof concerning how the witness would have answered the questions had the trial court permitted the witness to do so. In re Commitment of Robertson, 2010 Tex. App. LEXIS 7421 (Tex. App. Beaumont Sept. 9 2010).

951. Appellant's objection that another witness's testimony was in violation of a motion in limine was not a specific objection sufficient to preserve error, for purposes of Tex. R. Evid. 103(a)(1). Bennett v. State, 2010 Tex. App. LEXIS 6684, 2010 WL 3292941 (Tex. App. Beaumont Aug. 18 2010).

952. During a pretrial conference, the trial court overruled appellant's objection to evidence; under Tex. R. Evid. 103, when the court ruled on the admissibility of evidence outside the presence of the jury, repeating the objections when the evidence was later introduced was unnecessary to preserve the issue for review. Espinosa v. State, 328 S.W.3d 32, 2010 Tex. App. LEXIS 6341 (Tex. App. Corpus Christi Aug. 5 2010).

953. Defendant failed to preserve for review his assertion that the trial court abused its discretion by overruling his objection to the marihuana exhibit, because defendant did not obtain a running objection, and when the State offered the report stating that the exhibit to which defendant had previously objected was marihuana, defendant affirmatively stated that he had no objection. Lara v. State, 2010 Tex. App. LEXIS 5640, 2010 WL 2813522 (Tex.

App. Fort Worth July 15 2010).

954. Individual did not advance any specific objection to an injunction's constitutionality or otherwise reference her right to free speech, and thus the court found that the individual's complaint that the injunction was overbroad, vague and ambiguous was not a sufficiently specific objection to preserve this error for appellate review for purposes of Tex. R. App. P. 33.1(a)(1)(A), Tex. R. Evid. 103(a)(1). Townson v. Liming, 2010 Tex. App. LEXIS 5459, 2010 WL 2767984 (Tex. App. Texarkana July 14 2010).

955. When counsel tendered the exhibits appellant argued were erroneously admitted, appellant complained that they were not put in the same order, but this was not a valid objection to the evidence at trial, such that appellant failed to preserve error under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1). Shren-yee Cheng v. Zhaoya Wang, 315 S.W.3d 668, 2010 Tex. App. LEXIS 4669 (Tex. App. Dallas June 22 2010).

956. Appellant failed to make timely and specific objections at trial and failed to preserve error for appellate review under Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a); even if error was preserved, appellant failed to explain or cite any authority that any error in the admission or exclusion of evidence affected a substantial right and thus the court overruled the issue. Shren-yee Cheng v. Zhaoya Wang, 315 S.W.3d 668, 2010 Tex. App. LEXIS 4669 (Tex. App. Dallas June 22 2010).

957. Record did not show any time when appellant raised the specific issue that he complained of on appeal, that his sentences were abuses of discretion; although appellant contended that any specific objection would not have served a useful purpose because the objection was apparent from the context, for purposes of Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1(a)(1)(A), the court disagreed, because his argument assumed that no complaint was required under Rule 33.1. Hefley v. State, 2010 Tex. App. LEXIS 4659 (Tex. App. Dallas June 21 2010).

958. Rather than narrowly reading a sentence of appellant's brief to invoke a waiver of rights, as the dissent did, the court read the brief as a whole and construed a statement to refer to the brief's prior discussion of the warrantless search of the residence; appellant did not waive his argument at trial because he obtained a ruling outside the presence of the jury, under Tex. R. Evid. 103, and he did reassert his objection to the admission of the statement based on the prior warrantless search of the residence. Limon v. State, 314 S.W.3d 694, 2010 Tex. App. LEXIS 4565 (Tex. App. Corpus Christi June 17 2010).

959. Because defendant failed to object during trial to the constitutionality of the prosecutor's opening statement and the introduction of evidence that defendant refused to cooperate with the police investigation, defendant failed to preserve the issue for appeal under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1). Saldivar v. State, 2010 Tex. App. LEXIS 3445, 2010 WL 1840240 (Tex. App. Houston 1st Dist. May 6 2010).

960. Any error in the exclusion of the evidence was not preserved because defendant did not make an offer of proof or a bill of exception or otherwise make a reasonably summary of the evidence offered; to the extent defendant argued he made an offer of proof in his attachments to his motion for new trial, the court rejected this contention because he was required to develop the record before the charge on guilt was read to the jury, for purposes of Tex. R. Evid. 103(b). Hiatt v. State, 319 S.W.3d 115, 2010 Tex. App. LEXIS 3076 (Tex. App. San Antonio Apr. 28 2010).

961. Defendant's objections during trial were sufficient under Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(a)(1) to preserve a complaint about the admissibility of evidence regarding two offenses that did not involve defendant; the trial court, outside of the jury's presence, heard and overruled defendant's objections to the evidence, and therefore, defendant was not required to continue to object when the evidence was actually presented to the jury. Jackson v. State, 314 S.W.3d 118, 2010 Tex. App. LEXIS 2730 (Tex. App. Houston 1st Dist.

Apr. 15 2010).

962. State correctly recognized that under Tex. R. Evid. 103(b), no objection was required to be made before the jury where the court heard objections to offered evidence outside the presence of the jury; Rule 103(b) applies only where the court rules that the evidence be admitted. Downey v. State, 2010 Tex. App. LEXIS 2722 (Tex. App. Dallas Apr. 6 2010).

963. Mother failed to preserve for review her assertion that the court abused its discretion by excluding evidence that the Texas Department of Family and Protective Services moved to strike her divorce petition, because the excluded evidence was subject to a motion in limine, and at no other time before or during trial did the mother ever object to the exclusion of the evidence. Casillas v. Tex. Dep't of Family & Protective Servs., 2010 Tex. App. LEXIS 2210, 2010 WL 1173074 (Tex. App. Austin Mar. 24 2010).

964. Even if due process allowed the court to consider the mother's new points on appeal, they were not preserved in the trial record under Tex. R. App. P. 33.1(a)(1) and for purposes of Tex. R. Evid. 103(a)(2), given that she did not object to certain evidence, she did not request, for purposes of Tex. R. Civ. P. 278, that the charge include a certain instruction, and she did not identify what evidence was excluded and why it was admissible; the court saw nothing that supported the mother's position that issues of race could be raised for the first time on appeal when they have never been raised in the trial court, plus it was not argued that race was a deciding issue. Carlson v. Tex. Dep't of Family & Protective Servs., 2010 Tex. App. LEXIS 1897 (Tex. App. Houston 14th Dist. Mar. 18 2010).

965. Defendant failed to preserve for appellate review under Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a)(1)(A), a claim that the State coerced sexual assault victims' mother into testifying against defendant at trial because defendant did not object to the mother's testimony on the basis that she was coerced. By allowing her to testify without objection, defendant failed to preserve error. Werner v. State, 2010 Tex. App. LEXIS 1657, 2010 WL 779336 (Tex. App. Dallas Mar. 9 2010).

966. Record did not show that defendant objected to certain evidence, for purposes of Tex. R. Evid. 103(a)(1), and his motion in limine did not preserve the issue for review. Saenz v. State, 2010 Tex. App. LEXIS 1519 (Tex. App. San Antonio Mar. 3 2010).

967. Defendant did not preserve his claim that the trial court violated his Fifth Amendment right against self-incrimination by commenting on his failure to testify, for purposes of Tex. R. App. P. 33.1(a)(1)(A) and Tex. R. Evid. 103(d); the error of which defendant complained was not fundamental and the court refused to extend case law to make the claimed error fundamental, and even if case law identified a fundamental error not previously recognized, the lack of a majority in that case law meant it was not binding precedent. Bell v. State, 2010 Tex. App. LEXIS 1464, 2010 WL 695809 (Tex. App. Houston 14th Dist. Mar. 2 2010).

968. Defendant's bolstering objection was untimely as not made until after the question had been answered and defendant offered no explanation for his delay in objecting, for purposes of Tex. R. Evid. 103(a)(1). Thompson v. State, 2010 Tex. App. LEXIS 994 (Tex. App. Houston 1st Dist. Feb. 11, 2010).

969. Defendant made no offer of proof or bill of exception showing what a witness's excluded testimony would have been; because defendant did not show what the witness's testimony would have been, he has not preserved this issue for appellate review. Thompson v. State, 2010 Tex. App. LEXIS 994 (Tex. App. Houston 1st Dist. Feb. 11, 2010).

970. Because defendant failed to object to the indictment, he waived his right to complain on appeal of any nonfundamental defect, for purposes of Tex. R. App. P. 33.1, Tex. R. Evid. 103, and Tex. Code Crim. Proc. Ann. art. 1.14(b). Cross v. State, 2010 Tex. App. LEXIS 877, 2010 WL 438193 (Tex. App. Texarkana Feb. 9 2010).

971. Defendant claimed the trial court erred in admitting testimony over his Tex. R. Evid. 403 objection, but this same evidence was introduced without objection, for purposes of Tex. R. Evid. 103 and Tex. R. App. P. 33.1(a), through defendant's own testimony, and thus any error the trial court might have made in admitting the challenged testimony was cured. Philip v. State, 2010 Tex. App. LEXIS 353, 2010 WL 183524 (Tex. App. Houston 14th Dist. Jan. 21 2010).

972. Defendant failed to preserve for review his assertion that the trial court erred in excluding testimony from the clinical psychologist, because defendant waived the complaint when he failed to make an offer of proof. Hatcher v. State, 2010 Tex. App. LEXIS 362, 2010 WL 183521 (Tex. App. Houston 14th Dist. Jan. 21 2010).

973. Even if outcry testimony was inadmissible because the summary was no more than a general allusion that something in the area of child abuse was going on, the admission of such evidence under Tex. Code Crim. Proc. Ann. art. 38.072 was nonconstitutional error and the court had to disregard it unless it affected defendant's substantial rights under Tex. R. Evid. 103(a), Tex. R. App. P. 44.2(b). Wingard v. State, 2009 Tex. App. LEXIS 9880 (Tex. App. Tyler Dec. 31 2009).

974. Because defendant failed to procedurally perfect his objection to an officer's testimony at trial, the court was prohibited from considering his assignment of error, unless the admission of that testimony violated an absolute or systemic requirement or defendant did not forfeit a right that was waivable-only. Hall v. State, 303 S.W.3d 336, 2009 Tex. App. LEXIS 9542 (Tex. App. Amarillo Dec. 16 2009).

975. Court finds that the right to have counsel present during post-indictment defendant-initiated interrogations is not a systemic or absolute right and is not a waivable-only right; thus, because defendant failed to make a timely objection to the admission of his inculpatory statements, he failed to preserve the argument on appeal. Hall v. State, 303 S.W.3d 336, 2009 Tex. App. LEXIS 9542 (Tex. App. Amarillo Dec. 16 2009).

976. Defendant's argument on appeal did not comport with his objection at trial, such that the claimed error based on the trial court's failure to issue a limiting instruction was waived under Tex. R. App. P. 33.1, Tex. R. Evid. 103(a); in any event, the complaint provided no basis for reversal because statements admitted as present sense impressions or excited utterances under Tex. R. Evid. 803(1), (2) were admissible for all purposes and were not subject to a limiting instruction. Green v. State, 2009 Tex. App. LEXIS 9300, 2009 WL 4575146 (Tex. App. Houston 14th Dist. Dec. 8 2009).

977. Because defendant did not raise one objection at trial, he presented nothing for appellate review, for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a). Green v. State, 2009 Tex. App. LEXIS 9300, 2009 WL 4575146 (Tex. App. Houston 14th Dist. Dec. 8 2009).

978. On appeal, defendant argued that testimony was inadmissible under extraneous evidence grounds, but defendant's hearsay objection did not preserve the issue for appellate review on a different theory. Norman v. State, 2009 Tex. App. LEXIS 8796, 2009 WL 3805830 (Tex. App. Houston 1st Dist. Nov. 12 2009).

979. Even if testimony was unexpected, the proper time for the objection was directly after the statement was made, and an objection made later was untimely and did not preserve error for review. Norman v. State, 2009 Tex.

App. LEXIS 8796, 2009 WL 3805830 (Tex. App. Houston 1st Dist. Nov. 12 2009).

980. No objection was made to the admission of evidence regarding a sexual assault when the evidence was offered through a victim's testimony, such that nothing was preserved for review, whether through the motion in limine or through objection to the admission of the evidence, for purposes of Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a)(1)(A). Cherry v. State, 2009 Tex. App. LEXIS 7755, 2009 WL 3153276 (Tex. App. Fort Worth Oct. 1 2009).

981. For purposes of Tex. R. Evid. 103(a)(1), defense counsel did not object to victim-impact testimony, use the words "victim impact," refer to objectionable victim-impact testimony, or identify any testimony that he sought to exclude, plus he did not raise the objection to the testimony that he attempted to raise here, and thus the appellate complaint about the testimony was not preserved by any objections made during the bench conference, for purposes of Tex. R. App. P. 33.1. Ashire v. State, 296 S.W.3d 331, 2009 Tex. App. LEXIS 7316 (Tex. App. Houston 1st Dist. Sept. 17 2009).

982. Defendant's objections were sustained and he did not seek an instruction to disregard or move for a mistrial; because he received all of the relief that he sought from the trial court, there was nothing for him to complain of on appeal, and in any event, counsel's non-specific objection would not have preserved error as to the victim-impact evidence because counsel did not differentiate between any admissible testimony and non-admissible testimony. Ashire v. State, 296 S.W.3d 331, 2009 Tex. App. LEXIS 7316 (Tex. App. Houston 1st Dist. Sept. 17 2009).

983. Defendant answered the State's question that was substantially identical to the question complained-of on appeal, the prosecutor asked another one and defendant answered it, and the State repeated the complained-of question before there was an objection; the objection was untimely, for purposes of Tex. R. Evid. 103(a)(2), because it was made after a substantially identical question was asked and answered and defendant failed to preserve his complaint for review under Tex. R. App. P. 33.1. Williams v. State, 2009 Tex. App. LEXIS 6950, 2009 WL 2750990 (Tex. App. Fort Worth Aug. 27 2009).

984. Defendant conceded that he failed to object to the use of a pseudonym or assert the unconstitutionality of Tex. Code Crim. Proc. Ann. art. 57.02, and thus had to show fundamental error. Flint v. State, 2009 Tex. App. LEXIS 6131, 2009 WL 2408336 (Tex. App. Texarkana Aug. 7 2009).

985. Alleged errors under Tex. Code Crim. Proc. Ann. art. 57.02 and the Sixth Amendment were not fundamental in nature, for purposes of Tex. R. Evid. 103(d), as there was no indication that defendant did not know the identity of the child claiming to be the victim, and by failing to object at trial, defendant waived these claims, which were not preserved for review under Tex. R. App. P. 33.1(a). Flint v. State, 2009 Tex. App. LEXIS 6131, 2009 WL 2408336 (Tex. App. Texarkana Aug. 7 2009).

986. Given that defendant did not object at trial that photographs were unduly prejudicial, he failed to preserve that issue for appeal, for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(1). Wallace v. State, 2009 Tex. App. LEXIS 5794, 2009 WL 2265023 (Tex. App. San Antonio July 29 2009).

987. Defendant failed to preserve for appellate review his assertion that the trial court erred when it refused to admit his voluntary videotaped confession to six extraneous offenses into evidence at punishment, because defendant initially contended in the trial court at he was not interested in admitting the confession itself, but wanted to question the officer about the circumstances surrounding his voluntary confession, and this was not defendant's complaint on appeal; the only time defendant appeared to ask the trial court to admit the confession itself was when he was objecting to the State's offering evidence of the other six drive-bys, and defendant never obtained a ruling, thus, the complaint was not preserved for appellate review. Hernandez v. State, 2009 Tex. App. LEXIS 5726, 2009

WL 2196130 (Tex. App. Fort Worth July 23 2009).

988. Defendant argued that the trial court erred in admitting evidence of his unlawful entry into the victims' house months earlier, but he did not object to this evidence; the rules of evidence, including Tex. R. Evid. 103(d), do not preclude taking notice of fundamental errors affecting substantial rights that were not brought to the attention of the trial court, but defendant's reliance on case law was misplaced because it applied only to charge error, and thus defendant failed to preserve his complaint regarding extraneous offense evidence. Santos v. State, 2009 Tex. App. LEXIS 3876, 2009 WL 1563571 (Tex. App. Austin June 3 2009).

989. Any error in overruling defendant's hearsay objection was harmless under Tex. R. App. P. 44.2(d), Tex. R. Evid. 103(a); other evidence was admitted of defendant's improper jail conduct and prior criminal history and the error did not affect defendant's substantial rights. Henley v. State, 2009 Tex. App. LEXIS 3653, 2009 WL 1464247 (Tex. App. Dallas May 27 2009).

990. Under Tex. R. App. P. 33.1(a) and for purposes of Tex. R. Evid. 103(a)(1), an individual waived error on her claim that the trial court erred in refusing to allow her to comment on a negative presumption; the objection made was not specific enough and thus did not inform the trial court of the basis of the argument and the trial court did not have an opportunity to rule on it. Arabie v. Crete Carrier Corp., 2009 Tex. App. LEXIS 3390, 2009 WL 1372962 (Tex. App. Fort Worth May 14 2009).

991. Appellants did not cite any authority or outline their argument on appeal regarding tort claims and thus under Tex. R. App. P. 33.1(a), they waived a challenge to the trial court's grant of the landowners no-evidence summary judgment; the trial court denied a motion to sever the claims, no bill of exception or offer of proof was sought under Tex. R. Evid. 103(a)(b), and counsel did not object to the charge or provide a proposed charge including the claims, for purposes of Tex. R. Cciv. P. 279. Estate of Jose Ernesto Trevino v. Melton, 2009 Tex. App. LEXIS 4084, 2009 WL 891881 (Tex. App. San Antonio Apr. 3 2009).

992. Defendant objected to the admission of a recording, but not on the ground he now urged on appeal, for purposes of Tex. R. App. P. 33.1(a), plus defendant did not object to the admission of the victim's photograph, but argued that the admission was plain error for purposes of Tex. R. Evid. 103(d); however, defendant referred the court to no case authority holding that the admission of similar evidence under similar circumstances was fundamental error and the court found no basis for finding that the admission of either the recording or the photograph was so manifestly improper so as to have constituted fundamental error. Barrientes v. State, 2009 Tex. App. LEXIS 1915, 2009 WL 722258 (Tex. App. Austin Mar. 18 2009).

993. For purposes of Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a)(1)(A), an insurance agency waived any argument as to an affidavit by failing to specifically identify objectionable statements within an affidavit; regarding the one statement specifically identified, another affidavit that was not objected to stated the same information and the trial court did not abuse its discretion in admitting the affidavit. Haye v. Elton Porter Marine Ins., 2009 Tex. App. LEXIS 1704, 2009 WL 542486 (Tex. App. Corpus Christi Mar. 5 2009).

994. Court did not need to address defendant's argument regarding exclusion of his expert's testimony because error was not properly preserved for review under Tex. R. App. P. 33.1, 33.2, Tex. R. Evid. 103(a)(2), given that (1) counsel's identification of the mere topics of the expert's likely testimony did not qualify as a reasonably specific summary of the evidence, (2) in the absence of a bill of exception or offer of proof, the record did not indicate what the excluded testimony would have been at the guilt/innocence phase, and (3) although the trial court allowed defendant's expert to testify about defendant's relationship with his father, because the evidence was offered after the court's charge was read to the jury, it could not qualify as an offer of proof under Rule 103(b) that would otherwise have preserved error during the guilt/innocence phase. Solley v. State, 2009 Tex. App. LEXIS 1118, 2009

WL 396268 (Tex. App. Houston 14th Dist. Feb. 19 2009).

995. Defendant did not object or obtain a running objection to a witness's testimony that defendant had sold him cocaine on past occasions, and although a bench conference might have satisfied the requirement that a hearing be conducted outside the presence of the jury, defendant failed to offer a specific objection to the proffered evidence and defendant's objection that the witness's testimony was inadmissible was too vague and imprecise to have preserved error under Tex. R. App. P. 33.1; the objection did not properly advise the trial court of the specific basis for the objection. Roundtree v. State, 2009 Tex. App. LEXIS 1122, 2009 WL 433218 (Tex. App. Houston 14th Dist. Feb. 19 2009).

996. Trial court gave a defense witness a brief contempt warning, but only after the witness had testified at length for the defense, and because the court found no fundamental error, defendant's lack of objection and offer of proof waived the argument for appeal. Henderson v. State, 2009 Tex. App. LEXIS 677, 2009 WL 237473 (Tex. App. Houston 14th Dist. Feb. 3 2009).

997. Because defendant failed to object at trial, the trial court's comments must have risen to the level of fundamental error to be preserved for appeal. Henderson v. State, 2009 Tex. App. LEXIS 677, 2009 WL 237473 (Tex. App. Houston 14th Dist. Feb. 3 2009).

998. Defendant relied on certain case law as the primary basis for his argument that the trial court's comments constituted fundamental error, therefore not requiring objection during trial to preserve error, but that case did not apply to these facts in any event, and even if the case in question was not a plurality opinion and was binding on the court, the trial court's comments did not rise to such a level as to bear on the presumption of innocence or vitiate the impartiality of the judge; the majority of the comments appellant complains of fell within the trial court's broad discretion to expedite and maintain control over the trial, and thus defendant failed to show fundamental error in this regard and the matter was waived. Henderson v. State, 2009 Tex. App. LEXIS 677, 2009 WL 237473 (Tex. App. Houston 14th Dist. Feb. 3 2009).

999. For purposes of Tex. R. Evid. 103(d), occasions in taking notice of fundamental errors not brought to the attention of the trial court were rare and defendant simply stated that fundamental error existed while failing to point to any reason or authority to support that conclusion; moreover, Tex. R. Evid. 404(b), cited by defendant, was inapplicable in this context because it referred to extraneous offenses, and the prosecutor's use of the term "home invasion" was in reference to the offense for which defendant was on trial, burglary, not to any extraneous offense, and thus fundamental error was not shown. Anderson v. State, 2009 Tex. App. LEXIS 406 (Tex. App. Houston 1st Dist. Jan. 22 2009).

1000. Defendant made no attempt to introduce the evidence that he claimed that the trial court improperly excluded, and absent an offer of proof or a bill of exception setting forth the evidence he sought to introduce, for purposes of Tex. R. Evid. 103(a)(2) and Tex. R. App. P. 33.2, nothing on this issue was presented for review on appeal. Moore v. State, 275 S.W.3d 633, 2009 Tex. App. LEXIS 48 (Tex. App. Beaumont Jan. 7 2009).

1001. Error of admitting expert testimony relating to the truthfulness of a witness, as the parties agreed in this case, is nonconstitutional error, and the appellate court reviews the entire record to see if the appellant's substantial rights were harmed, for purposes of Tex. R. App. P. 44.2(b), Tex. R. Evid. 103(a). Long v. State, 2008 Tex. App. LEXIS 8885 (Tex. App. Tyler Nov. 26 2008).

1002. While there was evidence of defendant's guilt of sexual assault of a child in violation of Tex. Penal Code Ann. § 22.011(a)(2)(A), this was not a case where a guilty verdict was the only likely outcome, and while the evidence was substantial, it was not overwhelming, and the court held that the error of admitting expert testimony

related to the truthfulness of the victim harmed defendant's substantial rights under Tex. R. App. P. 44.2(b); whether the victim was telling the truth was the singular issue in the trial, the expert testified that the victim testified truthfully, it was likely that this testimony was powerful, there were no instructions sought or given to explain how the jury was to use the expert's testimony, the State emphasized the expert's opinion in closing arguments, and the expert's testimony invaded the province of the jury in a fundamental way by putting the weight of expert opinion behind the conclusion that the complaining witness was telling the truth, and the court was not convinced that defendant's substantial rights were not harmed. Long v. State, 2008 Tex. App. LEXIS 8885 (Tex. App. Tyler Nov. 26 2008).

1003. In a civil case adopted daughters brought against their adoptive father and mother for damages related to sexual abuse, the father and mother argued that the trial court should not have admitted evidence of the father's conviction, but the court did not address this argument because error has not been properly preserved for review, given that (1) the trial court's ruling on their motion in limine did not preserve the error for review, (2) the mother and father's failure to object on the record, for purposes of Tex. R. Evid. 103(a), and obtain an adverse ruling waived the error, and (3) although they moved for a mistrial, because there was no timely objection made on the record and no request for the jury to disregard, error was not preserved for appeal; when the father and mother objected to the use of the conviction to impeach the father's testimony, it had already been admitted into evidence without objection, and because they failed to pursue an adverse ruling after evidence of the conviction was initially admitted, they waived any complaint regarding the admission of the evidence and preserved nothing for appellate review. K.H. v. Doe, 2008 Tex. App. LEXIS 8636 (Tex. App. Houston 14th Dist. Nov. 18 2008).

1004. Defendant argued that a deputy's employment of the horizontal gaze nystagmus test was not reliable for purposes of Tex. R. Evid. 705(c), and the testimony was not only not helpful to the jury, but was misleading and unfairly prejudicial, for purposes of Tex. R. Evid. 402, 403, 702, but defendant's objection, which referred broadly to the deputy's administration of the test, was not specific enough to have informed the trial court of the basis of the argument defendant now raised on appeal so as to have afforded the trial court the opportunity to rule on it, for purposes of Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103; thus, defendant waived error, if any. Gowin v. State, 2008 Tex. App. LEXIS 6873 (Tex. App. Tyler Sept. 17 2008).

1005. For purposes of Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103, defendant's objection to evidence was incomplete and lacked specificity, plus his request for voir dire was granted, and he neither made a more specific objection to testimony, nor did he request a ruling from the trial court regarding his first incomplete objection, and thus defendant failed to preserve error, if any. Gowin v. State, 2008 Tex. App. LEXIS 6873 (Tex. App. Tyler Sept. 17 2008).

1006. In defendant's delivery of a controlled substance trial, before the State offered an exhibit, officers testified without objection that police found a stash of cocaine when they searched a dumpster; because defendant failed to urge his objection at the earliest opportunity for purposes of Tex. R. Evid. 103(a)(1), that is, when the officers testified, defendant waived his subsequent objection to the admission of the drugs themselves, and nothing was presented for review. King v. State, 2008 Tex. App. LEXIS 6564 (Tex. App. Fort Worth Aug. 26, 2008).

1007. Because evidence was not objected to on Tex. R. Evid. 403 grounds, the complaint was waived, for purposes of Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a). South Plains Lamesa R.R. v. Heinrich, 280 S.W.3d 357, 2008 Tex. App. LEXIS 6038 (Tex. App. Amarillo 2008).

1008. Defendant did not object to the sentence at trial and thus any error was waived; although defendant relied on case law that held that the lack of an objection did not waive a similar error, for purposes of Tex. R. Evid. 103, unlike in that case, the trial court's comments did not taint defendant's presumption of innocence in front of the jury, as the comments were made during the punishment stage after the jury found defendant guilty and after the trial court had assessed punishment and the jury had already been dismissed, and thus the alleged error was not

fundamental and the matter was not preserved for review; furthermore, the trial court's comments showed that it was considering statements made by defendant to the presentence investigation officer, not defendant's failure to testify at punishment, and those statements related to whether defendant could be rehabilitated or whether he was a good candidate for probation, which defendant requested, and thus the trial court's comments did not bear on defendant's failure to testify at the punishment hearing or show that he was denied an impartial tribunal. Phelps v. State, 2008 Tex. App. LEXIS 3090 (Tex. App. Fort Worth Apr. 24 2008).

1009. Driver in a car accident negligence case failed to preserve alleged trial court errors for review because he failed to object, request curative instructions, or move for a mistrial; further, any error in the admission of testimony regarding a prior accident and an undisclosed witness to the accident was harmless. Gallaher v. Brown, 2008 Tex. App. LEXIS 2851 (Tex. App. Fort Worth Apr. 17 2008).

1010. Appellate court overruled the point of error that the probate court erroneously excluded testimony regarding the testatrix's testamentary intent, because this point of error was not properly preserved for appellate review, when there was no indication of what the witness would have said about the testatrix's intent. Hahn v. Estate of Stange, 2008 Tex. App. LEXIS 1027 (Tex. App. San Antonio Feb. 13 2008).

1011. Where a juvenile failed to ask a trial court to conduct a "gatekeeper hearing," the juvenile failed under Tex. R. Evid. 103 and Tex. R. App. P. 33 to preserve a claim regarding an expert's qualifications for appellate review. In re C.D.S., 2008 Tex. App. LEXIS 706 (Tex. App. Waco Jan. 30 2008).

1012. During defendant's criminal trial for murder, the trial judge violated the rule of optional completeness under Tex. R. Evid. 107 when he allowed a 911 operator to testify that he asked defendant if he wanted to talk about what had happened, but excluded defendant's response indicating that he shot the victim in self-defense; the error was nonconstitutional under Tex. R. Evid. 103, because defendant testified about his longstanding strife with the victim; the trial court's erroneous exclusion of his 911 statements did not prevent him from fully presenting his self-defense theory. Walters v. State, 247 S.W.3d 204, 2007 Tex. Crim. App. LEXIS 1701 (Tex. Crim. App. 2007).

1013. Appellate court found no merit to a wife's claim that a trial court improperly prevented her from offering evidence and testimony in a divorce action regarding the husband's business interests where the wife made no offer of proof showing the substance of any of the reports following the trial court's ruling, as required by Tex. R. Evid. 103; the wife failed to preserve any error under Tex. R. App. P. 33. Dean-Groff v. Groff, 2007 Tex. App. LEXIS 8881 (Tex. App. Corpus Christi Nov. 8 2007).

1014. No offer of proof was made to documents excluded by the trial court, such that the contents of the documents and relevance could not be determined on appeal, and the alleged error was therefore not preserved. Roberts v. Davis, 2007 Tex. App. LEXIS 8672 (Tex. App. Texarkana Nov. 1 2007).

1015. Defense counsel's concise statement and examination of the victim's father was reasonably specific to have shown the trial court the substance of the excluded evidence and to preserve error for review, for purposes of Tex. R. App. P. 33, Tex. R. Evid. 103; counsel made a reasonably specific summary of the evidence and argued the relevancy thereof, it was apparent by the State's Tex. R. Evid. 412 objection that it knew the precise nature of the excluded evidence, and the trial court was aware of the testimony defendant was trying to illicit by the nature of the trial court's ruling. Ladesic v. State, 2007 Tex. App. LEXIS 8106 (Tex. App. Fort Worth Oct. 11 2007).

1016. Defendant's objection did not make reference to Tex. R. Evid. 613; the court was unable to say that the ground objection asserted on appeal was apparent from context, for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103, and thus the court overruled the issue and noted that it was uncertain that the exhibit was viewed by either counsel purely as impeachment evidence, and no mention was made of an instruction limiting its use by the

jury to that purpose. Mendoza v. State, 2007 Tex. App. LEXIS 7679 (Tex. App. Amarillo Sept. 24 2007).

1017. Under Tex. R. App. P. 33.1(a), defendant did not properly preserve error because he did not renew his objection when the State resumed questioning and explicitly asked about the issue in question; there were two exceptions to the contemporaneous objection requirement, including that defendant object outside the jury's presence pursuant to Tex. R. Evid. 103, but defendant did not meet either exception. Pena v. State, 2007 Tex. App. LEXIS 6309 (Tex. App. Corpus Christi Aug. 9 2007).

1018. Because a party never obtained a ruling from the trial court regarding the exclusion of certain evidence, for purposes of Tex. R. App. P. 33, Tex. R. Evid. 103, the issue was not preserved for review. Morris v. Morris, 2007 Tex. App. LEXIS 5878 (Tex. App. Corpus Christi July 26 2007).

1019. On appeal of a conviction of misdemeanor theft, the trial court did not err in sustaining the State's objection to the offender's question concerning profit margin in her inquiry as to the value of stolen retail property because the offender did not point to any offer of proof as required by Tex. R. Evid. 103, and the substance of the evidence she sought to offer was not apparent; thus, she forfeited her issue pursuant to Tex. R. App. P. 33; moreover, had she preserved her complaint, the trial court did not err; the offender complained that the trial court should not have sustained the State's relevance objection, but evidence that the victim had a profit margin did not tend to rebut the fact that the victim's sales price was at a fair market value. Smith v. State, 2007 Tex. App. LEXIS 5880 (Tex. App. Waco July 25 2007).

1020. Driver could not complain on appeal about admission of the evidence of his arrest and subsequent refusal to provide the specimen because the driver's counsel affirmatively stated he had no objection to the exhibits presented by the Texas Department of Public Safety. Morgan v. Tex. Dep't of Pub. Safety, 2007 Tex. App. LEXIS 5208 (Tex. App. Amarillo July 3 2007).

1021. Order allowing the State, at the punishment phase, to cross-examine defendant's mother about an unadjudicated theft was upheld where, by failing to object, defendant did not preserve the error under Tex. R. Evid. 103; hence, defendant left the appellate court nothing to review. Bradley v. State, 2007 Tex. App. LEXIS 3748 (Tex. App. Texarkana May 16 2007).

1022. Penitentiary packet was admitted in evidence without objection and by failing to object to the offer of the packet that detailed extraneous offenses for purposes of Tex. R. Evid. 404(b), defendant failed to preserve the issue for review. Daniels v. State, 2007 Tex. App. LEXIS 3421 (Tex. App. Texarkana May 4 2007).

1023. Court rejected an inmate's claim in a petition for writ of habeas corpus that trial counsel was ineffective for failing to preserve testimony of a corroborating witness who was precluded from testifying after violating Tex. R. Evid. 614; the court found that (1) counsel failed to preserve the witness's testimony and thus, for purposes of Tex. R. Evid. 103, the failure to make an offer of proof prevented the inmate from arguing on direct appeal that the trial court erred in precluding the witness from testifying, but (2) regardless of whether the failure resulted in deficient representation, the failure was not prejudicial because the trial court acted within its discretion in precluding the witness from testifying; although certain actions of the witness did not justify exclusion, the witness violated Tex. R. Evid. 614 when she spoke to the inmate on two separate occasions and the inmate necessarily had knowledge of the violations, and thus the inmate failed to prove prejudice in the ineffective assistance claim. David v. State, 2007 Tex. App. LEXIS 3440 (Tex. App. Houston 1st Dist. May 3 2007).

1024. For purposes of Tex. R. Evid. 103(a)(2), the court overruled a party's claim that the trial court erred in excluding a certain exhibit; it was not in the appellate record and thus the court had no way of reviewing it and the court was unable to say the trial court abused its discretion in excluding the exhibit. Tejas Toyota, Inc. v. Coffman,

2007 Tex. App. LEXIS 3448 (Tex. App. Houston 1st Dist. May 3 2007).

1025. For purposes of Tex. R. Evid. 103, defendant waited until after the jury had decided guilt and punishment before making a bill of exception regarding the exclusion of evidence that defendant claimed on appeal was admissible under an exception to the hearsay rule under Tex. R. Evid. 803; defendant never argued this claim to the trial court and thus defendant failed to preserve this issue for review. Chapman v. State, 2007 Tex. App. LEXIS 3184 (Tex. App. Waco Apr. 25 2007).

1026. Trial court reviewed the presentence investigation report after defendant pleaded guilty, signed a judicial confession, and stipulated to the evidence of guilt, and thus the trial court could not have used the report to influence a decision on guilt, but only for punishment purposes, and thus defendant's constitutional rights were not violated under Tex. Const. art. I, § 19; furthermore, Tex. Code Crim. Proc. Ann. art. 42.12, § 9(c) permitted a judge to inspect a report once defendant pleaded guilty or was convicted, and the trial court did not violate any of defendant's state statutory rights, and because defendant failed to object to the review of the report under Tex. R. App. P. 33.1(a) and there was no fundamental error, the court overruled defendant's arguments. Torres v. State, 2007 Tex. App. LEXIS 2874 (Tex. App. Houston 14th Dist. Apr. 17 2007).

1027. Court overruled defendant's claim that the trial court erred in failing to sua sponte declare a mistrial when the trial court and later a jury member brought attention to the presence of armed security personnel in the courtroom; the trial court's initial comment was simply to introduce the court staff, nothing was said to suggest that the bailiff was needed to protect jurors from defendant, and the trial court said the bailiff was there for everyone's protection, and as for the juror, the prosecutor sought to allay any concerns and specifically explained that defendant was entitled to a presumption of innocence, such that fundamental error, given that defendant did not object, was not shown. Sneed v. State, 2007 Tex. App. LEXIS 2910 (Tex. App. Dallas Apr. 17 2007).

1028. No fundamental error was shown and thus the court overruled defendant's claim that the trial court erred by not declaring a mistrial after the State elicited victim impact testimony during its case-in-chief; defendant made no objection to the testimony and defendant cited no cases discussing situations in which courts had found the same or similar testimony to have been fundamentally erroneous. Sneed v. State, 2007 Tex. App. LEXIS 2910 (Tex. App. Dallas Apr. 17 2007).

1029. Because a party did not object, for purposes of Tex. R. Evid. 103, to the admission of an exhibit, the trial court did not err by admitting that exhibit. In re G.C.F., 2007 Tex. App. LEXIS 2680 (Tex. App. Fort Worth Apr. 5 2007).

1030. Conviction for solicitation of capital murder was affirmed because defendant had preserved nothing for review, when defendant never informed the trial court that the excluded evidence as to the number of times the informant had worked for the investigator was relevant to the defense of entrapment, defendant offered no response to the State's relevancy objection, and defendant did not mention his entrapment defense to the trial court until the charge conference. Wormington v. State, 2007 Tex. App. LEXIS 2205 (Tex. App. Houston 1st Dist. Mar. 22 2007).

1031. Helicopter service facility did not preserve for appeal objections to an affidavit proffered by a helicopter manufacturer in support of the manufacturer's motion for summary judgment; each of the service facility's objections--to a lack of verification and authentication and to the affidavit of an interested witness--presented defects of form; because the trial court did not rule on these objections, they were not preserved for appellate review. Cent. Am. Aviation Servs., S. A. v. Bell Helicopter Textron, Inc., 2007 Tex. App. LEXIS 1469 (Tex. App. Fort Worth Mar. 1 2007).

1032. Trial court did not abuse its discretion in excluding the results of the out-of-court blood alcohol experiment conducted on defendant, because defendant failed to affirmatively show the proposed experiment was substantially similar to the incident, when the experiment did not attempt to replicate the drinking pattern defendant testified he followed the night in question, and differing absorption rates based on differing factors logically could cause differing results. Noyes v. State, 2007 Tex. App. LEXIS 1133 (Tex. App. Houston 14th Dist. Feb. 15 2007).

1033. Although the State argued that defendant failed to preserve a complaint for review by not making an offer of proof, for purposes of Tex. R. Evid. 103, of defendant's testimony until after the jury was charged, the court understood the trial court's ruling as one admitting, at least in limine, evidence of defendant's prior conviction and not a ruling excluding defendant's testimony, such that defendant preserved the complaint without regard to an offer of proof; although defendant did not testify before the jury, and thus the State did not attempt to offer evidence of defendant's conviction in the guilt-or-innocence stage of trial, the court assumed without deciding that defendant preserved the complaint. Herrera v. State, 2007 Tex. App. LEXIS 910 (Tex. App. Waco Feb. 7 2007).

1034. Defendant's motion to suppress argued only that a search was illegal based on lack of consent and a valid warrant or probable cause; however, a search incident to arrest did not require these things and at no time did defendant contest the validity of the search, such that nothing was presented for review, and even if the error was preserved, the argument still lacked merit because the trial court could have found that (1) an officer stopped defendant, (2) defendant attempted to evade and then flee on foot, and (3) defendant attempted to have the vehicle removed, such that the trial court could have found that defendant was a recent occupant of the vehicle whose arrest justified a search thereof. Mares v. State, 2006 Tex. App. LEXIS 8370 (Tex. App. Houston 14th Dist. Sept. 26 2006).

1035. Defendant waived a complaint under Tex. R. App. p. 33.1(a) by failing to object to the trial court's statements, defendant did not make any argument or cite any authority to show the trial court's statements were incorrect or that defendant was harmed by the statements, for purposes of Tex. R. App. P. 38.1(h), and defendant's argument failed to inform the court how the trial court allegedly misstated the law regarding Tex. Code Crim. Proc. Ann. art. 38.23; the record showed that the statements, even if incorrect, caused no harm for purposes of Tex. R. Evid. 103, given that two statements were general explanations of the statute, one statement concerned a hypothetical illustration of the statute, and another statement was more of a comment than an explanation. Dixon v. State, 2006 Tex. App. LEXIS 7953 (Tex. App. Houston 14th Dist. Sept. 5 2006).

1036. For purposes of Tex. R. App. P. 33.1(a), Tex. R. Evid. 103(a)(1), the record showed no objection, request, or motion in which the individual, an inmate, requested the trial court to issue a bench warrant for the individual's attendance at trial; thus, the individual waived this complaint. Guy M. v. Marie M., 2006 Tex. App. LEXIS 6049 (Tex. App. Fort Worth July 13 2006).

1037. Aggravated robbery conviction was affirmed because defendant did not object to the admission of the victim sympathy evidence, and the error, if any, in allowing the introduction of victim sympathy evidence was not fundamental error, when error in admitting evidence, even if constitutional rights were implicated, was neither systemic nor waivable-only, and thus was not fundamental. Connor v. State, 2006 Tex. App. LEXIS 4896 (Tex. App. Houston 1st Dist. June 8 2006).

1038. Defendant's claim that the trial court violated defendant's right to confrontation by admitting testimony from a witness regarding a statement by defendant's former girlfriend was not preserved for review, given that defendant did not timely object each time the witness was asked the question; even if an earlier objection could have been construed as timely, defendant still failed to preserve error because the hearsay objection did not comport with the complaint on appeal, and defendant's hearsay objection did not preserve error on defendant's Confrontation Clause complaint. Reyes v. State, 2006 Tex. App. LEXIS 3649 (Tex. App. Houston 14th Dist. Apr. 27 2006), opinion

withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 4160 (Tex. App. Houston 14th Dist. May 16, 2006).

1039. Trial judge was disqualified because of the stated inability to rule based solely on the evidence adduced, and this error required disqualification and made the actions taken by the judge, including a denial of a motion to suppress, void; the court determined it had to address this unassigned error given that a defendant, as in this case, did not waive appellate review of the structural defect of the right to an impartial judge by failing to object, and court noted that even if review for harm was appropriate, a denial of one's right to an impartial judge was not subject to harmless error analysis. Gentry v. State, 2006 Tex. App. LEXIS 2923 (Tex. App. Texarkana Apr. 12 2006).

1040. Defendant failed to preserve his issues for appellate review because defendant withdrew his hearsay objection to the alleged burglary thereby failing to preserve error, defendant failed to raise his confrontation clause complaint regarding the alleged burglary, and defendant did not adequately brief his right to counsel complaint. Badger v. State, 2006 Tex. App. LEXIS 1486 (Tex. App. Fort Worth Feb. 23 2006).

1041. Pursuant to Tex. R. App. P. 33.1(a), Tex. R. Evid. 103(a)(1), appellant preserved an issue regarding attorney fees; appellant raised the issue before the trial court and received an adverse ruling from the trial court each time. Mount Calvary Missionary Baptist Church v. Morse St. Baptist Church, 2005 Tex. App. LEXIS 5546 (Tex. App. Fort Worth July 14 2005).

1042. Defendant did not object to the lack of notice or adequacy of notice, pursuant to Tex. R. Evid. 404(b), Tex. R. Evid. 609(f), Tex. Code Crim. Proc. art. 38.37, § 3, and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g), when the evidence in question was offered, pursuant to Tex. R. Evid. 103(a)(1); thus, defendant did not preserve this aspect of defendant's first issue for appellate review. Bronaugh v. State, 2005 Tex. App. LEXIS 4455 (Tex. App. Waco June 8 2005).

1043. Under Tex. R. Evid. 103(a)(2), (b), the court did not consider the portion of defendant's offer of proof made after the charge was read to the jury. Alvarez v. State, 2005 Tex. App. LEXIS 4075 (Tex. App. Dallas May 26 2005).

1044. Although a mother in a parental rights proceeding failed to preserve error on her objections to the reliability of the expert testimony presented during the proceeding because she did not file a written objection to the expert's testimony or object or ask any questions of the expert during the pretrial hearing, an appellate court held that it had broad discretion to remand in the interest of justice because the trial court had erred in overruling the father's objection to the expert opinion and that error was harmful, which made a new trial necessary. In re S.E.W., 168 S.W.3d 875, 2005 Tex. App. LEXIS 3809 (Tex. App. Dallas 2005).

1045. Because defendant failed to object to the trial court's comments at the time, the court had to determine if error existed, and if error was shown, whether such error constituted fundamental error affecting substantial rights, pursuant to Tex. R. Evid. 103(d). Flores v. State, 2005 Tex. App. LEXIS 2353 (Tex. App. San Antonio Mar. 30, 2005).

1046. Defendant's objection to evidence seized was not timely made under Tex. R. Evid. 103(a)(1) because the State referred to the evidence in its opening statement, called a witness who testified about the evidence, and introduced the evidence, and defendant waited to object until after the State introduced the form on which defendant gave consent to the search. Because defendant did not object before substantial testimony was given regarding the evidence, defendant failed to preserve error for appellate review under Tex. R. App. P. 33.1(a)(1). Ralston v. State, 2005 Tex. App. LEXIS 885 (Tex. App. Fort Worth Feb. 3 2005).

1047. Even though the complaint to the introduction of a photographic array itself was waived by counsel's "no objection" comment, the complaint about the taint arising from that array was not; that objection had been properly presented during the suppression hearing and was not affirmatively waived during trial and remained viable under Tex. R. Evid. 103(a)(1). Mayfield v. State, 152 S.W.3d 829, 2005 Tex. App. LEXIS 6 (Tex. App. Texarkana 2005).

1048. Although defendant initially preserved error pursuant to Tex. R. App. P. 33.1(a), Tex. R. Evid. 103(a)(1) by filing a motion to suppress, defendant's counsel affirmatively waived it at trial by affirmatively stating that there was no objection to the evidence. Jones v. State, 2004 Tex. App. LEXIS 11342 (Tex. App. El Paso Dec. 16 2004).

1049. Father argued that the trial court erred by denying him the opportunity to present evidence of his net resources, but his attempted offer, however, came after both he and the State had rested, and the record did not reveal what evidence the father was attempting to offer, nor did it indicate that the father made an offer of proof or a formal bill of exceptions to preserve error, pursuant to Tex. R. Evid. 103(a)(2). Appellate review of alleged improperly excluded evidence was not possible without a showing of what evidence would have been presented, such that the issue of whether the trial court erred by refusing to let the father reopen to put on evidence of his net resources was not preserved for the appellate court's review, Tex. R. App. P. 33.1(a). Hilliard v. Holland, 2004 Tex. App. LEXIS 10515 (Tex. App. Fort Worth Nov. 24 2004).

1050. Defendant did not preserve for review under Tex. R. App. P. 33.1 an alleged error regarding the exclusion of testimony because defendant did not sure that the record reflected what the excluded testimony would have been pursuant to Tex. R. Evid. 103. Ybarra v. State, 2004 Tex. App. LEXIS 9488 (Tex. App. Houston 14th Dist. Oct. 28 2004).

1051. Court rejected defendant's contention that the trial court abused its discretion in denying his motion for a mistrial based on jury misconduct, specifically, a juror sleeping during the trial. Defendant's argument was not properly preserved for appellate review because the only item before the trial court on the motion for mistrial was the statement of defendant's trial counsel. Trial counsel's statement that a juror was sleeping presented no evidence of the matter. It was incumbent upon defendant's trial counsel to develop the record for the trial court in order to clarify which specific juror counsel was referencing and to determine if that juror was sleeping. Thieleman v. State, 2004 Tex. App. LEXIS 8833 (Tex. App. Fort Worth Sept. 30 2004).

1052. Without a showing of what testimony would have been or an offer of proof pursuant to Tex. R. Evid. 103(a)(1), there was nothing presented for review pursuant to Tex. R. App. P. 33.2. Rivera v. State, 2004 Tex. App. LEXIS 8400 (Tex. App. San Antonio Sept. 22 2004).

1053. Even assuming that the trial court erred in allowing the State to use evidence of allegations of extraneous acts in connection with defendant's forgery trial, which defendant did not object to pursuant to Tex. R. App. P. 33.1(a)(1)(A) as required, the improper admission of extraneous offenses did not constitute fundamental error subject to review under Tex. R. Evid. 103(d); defendant could also not claim fundamental error to excuse the failure to preserve the alleged error in the State's arguments to the jury. Lamkin v. State, 2004 Tex. App. LEXIS 7826 (Tex. App. Fort Worth Aug. 26 2004), writ of certiorari denied by 126 S. Ct. 79, 163 L. Ed. 2d 100, 2005 U.S. LEXIS 6301, 74 U.S.L.W. 3204 (U.S. 2005).

1054. With respect to the victim's probation officer's testimony, defendant objected on the grounds that the officer was not properly identified as an outcry witness under Tex. Code Crim. Proc. Ann. art. 38.072, but the State did not offer the officer's testimony as such, and the court found no error in the admission of the officer's testimony in connection with defendant's trial for aggravated sexual assault of a child because where there were attempts to impeach the credibility of the victim, testimony from the officer would not have constituted hearsay because, pursuant to Tex. R. Evid. 801(e)(1)(B), it related a prior consistent statement made by the victim, who was subject

to cross-examination and whose prior statement rebutted a charge of motive or recent fabrication; moreover, the content of the officer's testimony was admitted elsewhere through direct testimony from the victim, and even if the trial court erred in admitting the testimony, the error did not affect defendant's substantial rights, and, pursuant to Tex. R. Evid. 103(a), Tex. R. App. P. 44.2(b), error could not have been predicated on a ruling admitting evidence unless a substantial right of the party was affected. Sanchez v. State, 2004 Tex. App. LEXIS 7043 (Tex. App. Corpus Christi Aug. 5 2004).

1055. Court rejected defendant's claim of the denial of due process of law when the prosecution twice elicited testimony from the arresting officer that defendant refused to answer questions after an arrest for driving while intoxicated since an objection was required to preserve issues related to the right to remain silent, and the court found that (1) the officer's first answer was given before defense counsel objected, defendant did not preserve, pursuant to Tex. R. App. P. 33.1(a), an objection to the officer's testimony on direct examination regarding defendant's post-arrest silence, and the court presumed that the instruction to disregard given to the jury was effective, and (2) because defense counsel did not request a second instruction to disregard or move for a mistrial after the officer's nonresponsive answer on redirect, defendant also waived error concerning the officer's second answer. Thompson v. State, 2004 Tex. App. LEXIS 6860 (Tex. App. Corpus Christi July 29 2004).

1056. Where defendant did not articulate the legal basis for an objection, the basis was not apparent to the trial court from the context of the objection, and without knowing the legal basis of defendant's objection regarding the admission of a presentence investigation report at which defendant's counsel was not present, the trial court did not know which constitutional analysis to apply, and thus, the court could not hold that the trial court abused its discretion in admitting the report and the court held that defendant failed to preserve error pursuant to Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a)(1). Alegria v. State, 2004 Tex. App. LEXIS 5405 (Tex. App. Houston 1st Dist. June 17 2004).

1057. In a case involving theft, defendant's objections regarding hearsay and lack of predicate were insufficient to inform a trial court that an objection to the State's method of proving value was being asserted; however, the failure to object did not deprive defendant of the constitutional right to insist upon proof beyond a reasonable doubt on the issue of value. Moff v. State, 131 S.W.3d 485, 2004 Tex. Crim. App. LEXIS 641 (Tex. Crim. App. 2004).

1058. In a conversion case, following the trial court's ruling excluding the affidavit evidence, the mechanic made no offer of proof showing the substance of any of the affidavits pursuant to Tex. R. Evid. 103; thus, the mechanic failed to preserve error as to the affidavits. Berry v. Covarrubias, 2004 Tex. App. LEXIS 236 (Tex. App. Houston 1st Dist. Jan. 8 2004).

1059. In a conversion case, the mechanic failed to make an offer of proof following the trial court's ruling excluding the vehicle inquiry receipt and a police incident report regarding a different car pursuant to Tex. R. Evid. 103; thus, the receipt or the incident report could not be considered on appeal. Berry v. Covarrubias, 2004 Tex. App. LEXIS 236 (Tex. App. Houston 1st Dist. Jan. 8 2004).

1060. There was no reversible error under Tex. R. App. P. 44.2(b) because admitting the outcry witness's testimony without first conducting a hearing pursuant to Tex. Code Crim. Proc. Ann. art. 38.072 was harmless, where the testimony included the same facts that were admitted into evidence without objection under Tex. R. Evid. 103(a)(1). Duncan v. State, 95 S.W.3d 669, 2002 Tex. App. LEXIS 9309 (Tex. App. Houston 1st Dist. 2002).

1061. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground is not apparent from the context. Martinez v.

State, 91 S.W.3d 331, 2002 Tex. Crim. App. LEXIS 233 (Tex. Crim. App. 2002).

1062. Defendant failed to preserve his claim that a trial court violated Tex. Code Crim. Proc. Ann. art. 38.22 by admitting into evidence, in defendant's trial for aggravated assault under Tex. Penal Code Ann. § 22.02, an incriminating statement made by defendant to a police officer after defendant was arrested and before he was given any Miranda warnings; because defendant did not raise his objections before the officer testified as to the statement or obtain an adverse ruling thereon as required by Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(1), the officer thereafter repeated the statement without objection, and defendant's trial objection was made under Tex. Code Crim. Proc. Ann. art. 38.21 rather than Tex. Code Crim. Proc. Ann. art. 38.22. Camarillo v. State, 82 S.W.3d 529, 2002 Tex. App. LEXIS 3228 (Tex. App. Austin 2002).

Evidence : Relevance : Character Evidence

1063. Exclusion of character evidence that a murder victim occasionally drank to excess and was violent when he drank was harmless error, given that defendant was able to present his defense that the victim was drunk and pulled a shotgun on defendant, which defendant then used to kill the victim. Milliff v. State, 2014 Tex. App. LEXIS 4589, 2014 WL 1713897 (Tex. App. Houston 14th Dist. Apr. 29 2014).

1064. In a trial for interfering with the lawful custody of a child, proffered character testimony was irrelevant on its face because whether defendants had ever helped other children in the past was not evidence having any tendency to make the existence of any fact that was of consequence more or less probable. Little v. State, 246 S.W.3d 391, 2008 Tex. App. LEXIS 1126 (Tex. App. Amarillo 2008).

1065. Defendant adequately preserved error under Tex. R. App. P. 33.1 as to the exclusion of character evidence under Tex. R. Evid. 404 and satisfied Tex. R. Evid. 103(a)(2), even though he did not make an offer of proof, because counsel told the trial court that he wanted to elicit evidence of defendant's reputation for the ethical treatment of children; accordingly, the nature of the disputed evidence was apparent to all. Moody v. State, 2006 Tex. App. LEXIS 9788 (Tex. App. Houston 1st Dist. Nov. 9 2006).

1066. In a trial for a mother's sexual abuse of her son, it was error under Tex. R. Evid. 404 to admit evidence that defendant had been a victim of sexual assault as a child to show that she was more likely to commit the offense; the error was harmful under Tex. R. App. P. 44.2 and Tex. R. Evid. 103 because it was a close case resolved by a credibility determination between the child and defendant. Kirby v. State, 208 S.W.3d 568, 2006 Tex. App. LEXIS 2785 (Tex. App. Austin 2006).

1067. Where appellant and the victim shot each other, the victim died, appellant asserted self-defense, and the witnesses disagreed as to whether the victim or appellant shot first, appellant's conviction of murder in violation of Tex. Penal Code Ann. § 19.02 was affirmed because (1) the evidence as to why appellant was afraid of the victim was irrelevant under the provisions of Tex. R. Evid. 404(a), (b) because the victim's conduct of flashing his gun and shooting first were unambiguous acts of aggression and violence, (2) appellant failed to properly preserve error under Tex. R. Evid. 103(a)(1), Tex. R. App. P. 33.1(a)(1)(A), to the admission of evidence of his gang membership under Tex. R. Evid. 403, and (3) impeachment of the witness under Tex. R. Evid. 609(a) was proper because the witness created a false impression with the jury as to the extent of his arrests and convictions. Reyna v. State, 99 S.W.3d 344, 2003 Tex. App. LEXIS 1391 (Tex. App. Fort Worth 2003).

Evidence : Relevance : Compromise & Settlement Negotiations

1068. In a personal injury case, failure to object waived a claim that statements made in compromise negotiations were inadmissible and were improperly admitted at a hearing on a motion to dismiss; an objection was required to

preserve error, as provided in Tex. R. Evid. 103. Hamrick v. Lopez, 2007 Tex. App. LEXIS 8113 (Tex. App. Beaumont Oct. 11 2007).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

1069. Defendant was convicted for organized criminal activity based on gambling promotion, because he organized a raffle drawing to benefit his political campaign, his employees distributed and sold raffle tickets, and defendant deposited the ticket sales proceeds into his bank account. The trial court did not err by excluding evidence attacking the credibility of the State's witnesses who were defendant's former employees, because the jury was aware that all three witnesses had possible motives to make false accusations; the evidence tended to be needlessly cumulative, risked confusion of the issues, or misleading the jury. Evans v. State, 2014 Tex. App. LEXIS 1430, 2014 WL 425613 (Tex. App. Dallas Jan. 31 2014).

1070. Defendant was convicted for organized criminal activity and gambling promotion, because he organized a raffle drawing to benefit his political campaign, his employees distributed and sold raffle tickets, and defendant deposited the ticket sales proceeds into his bank account for his campaign. The trial court did not err by excluding evidence attacking the credibility of the State's witnesses who were defendant's former employees, because the jury was aware that all three witnesses had possible motives to make false accusations; additional evidence tended to be needlessly cumulative, risked confusion of the issues, or misleading the jury. Evans v. State, 2014 Tex. App. LEXIS 823, 2014 WL 261063 (Tex. App. Dallas Jan. 23 2014).

1071. Defendant was convicted for organized criminal activity and gambling promotion, because he organized a raffle drawing to benefit his political campaign, his employees distributed and sold raffle tickets, and defendant deposited the ticket sales proceeds into his bank account for his campaign. The trial court did not err by excluding evidence attacking the credibility of the State's witnesses who were defendant's former employees, because the jury was aware that all three witnesses had possible motives to make false accusations; additional evidence tended to be needlessly cumulative, risked confusion of the issues, or misleading the jury. Evans v. State, 2014 Tex. App. LEXIS 823, 2014 WL 261063 (Tex. App. Dallas Jan. 23 2014).

1072. Objection under Tex. R. Evid. 403 was not preserved by an argument that photographs had no probative value. Smith v. East, 411 S.W.3d 519, 2013 Tex. App. LEXIS 1753, 2013 WL 692456 (Tex. App. Austin Feb. 22 2013).

1073. In a case involving the civil commitment of a sexual predator, a patient failed to preserve an error under Tex. R. Evid. 403 relating to the details of his offenses because he did not object and obtain an adverse ruling each time the complained-of evidence was presented or obtain a running objection to the evidence; the patient did not waive error by waiting until the evidence was repeated to complain that it was prejudicial because it was needlessly cumulative. Even if the patient had preserved error regarding the experts' discussion of the details of the offenses, there was no unfair prejudice under Rule 403; the evidence assisted the jury in weighing each expert's testimony and opinion that each expert offered regarding the ultimate issue in the case. In re Ford, 2012 Tex. App. LEXIS 2221, 2012 WL 983323 (Tex. App. Beaumont Mar. 22 2012).

1074. Defendant failed to properly object to evidence that was admitted at trial concerning unindicted aggravated robberies, even though he filed a motion in limine, because he failed to make objections under Tex. R. Evid. 404(b) when the evidence was admitted at trial. Ashford v. State, 2006 Tex. App. LEXIS 2770 (Tex. App. Fort Worth Apr. 6 2006).

1075. Eventhough Texas has long discouraged needless presentation of cumulative evidence, pursuant to Tex. R. Evid. 403, the mere fact that another witness may have given the same or substantially the same testimony is not

the decisive factor, as recognized pursuant to Tex. R. Evid 103(a)(2), as error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and the substance of the objection was made known to the trial court by offer of proof; however, in this termination of parental rights case, the mother's attorney adequately described the substance of the proposed testimony, introduced the witness's letter and referenced the best interest of the children, and the appeals court found this showing sufficient under the circumstances, by considering whether the excluded testimony would have added substantial weight to the mother's case. In re N.R.C., 94 S.W.3d 799, 2002 Tex. App. LEXIS 8566 (Tex. App. Houston 14th Dist. 2002).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

1076. Admission of extraneous-offense evidence, regarding defendant's two encounters with children in public restrooms, did not affect defendant's substantial rights because testimony regarding the encounters did not consume an inordinate amount of time during trial, the State focused the majority of its closing argument on the evidence establishing the charged offenses, and the trial court gave a limiting instruction. Hoard v. State, 2013 Tex. App. LEXIS 11760 (Tex. App. Beaumont Sept. 18 2013).

1077. Even if the trial court erred by admitting into evidence a witness's testimony that defendant had been trying to send someone to harm him and his family, any error was cured when the same type of evidence concerning witnesses' fear of defendant was admitted elsewhere without objection, both before and after the complained-of testimony. Prior to the complained-of testimony, a co-defendant testified that he did not want to tell authorities about defendant's involvement in the offense because "snitches get stitches," and a second co-defendant testified that he gave three different statements to the police because he feared that defendant would harm his family in retaliation; after the complained-of testimony, defendant's ex-wife testified without objection that she came forward with what she knew about defendant's involvement because she feared that defendant would harm her because she no longer wanted to be involved with him. Brown v. State, 2013 Tex. App. LEXIS 1058, 2013 WL 476764 (Tex. App. Beaumont Feb. 6 2013).

1078. Even if the trial court erred by admitting extraneous offense evidence, the error did not affect defendant's substantial rights because: (1) the record did not indicate that the State specifically mentioned the agent's testimony regarding the 20 instances when similar counterfeit bills were passed; (2) the trial court instructed the jury that it could not consider extraneous offenses unless it found beyond a reasonable doubt that defendant committed the offenses; and (3) the record contained sufficient other evidence to support defendant's forgery conviction. Mookdasnit v. State, 2012 Tex. App. LEXIS 2220, 2012 WL 983333 (Tex. App. Beaumont Mar. 21 2012).

1079. Defendant failed to preserve error regarding extraneous offense evidence because defendant failed to object when the State questioned him about the incident, after the court had sustained an objection outside the jury's presence. Mcnatt v. State, 2011 Tex. App. LEXIS 8037, 2011 WL 4712002 (Tex. App. Fort Worth Oct. 6 2011).

1080. Defendant's objection to extraneous offense evidence that four truckloads of stolen car parts were found at his house, along with evidence that he had purchased stolen car parts in the past, was preserved for appellate review because a bench conference conducted outside of the jury's presence provided the trial court the opportunity to consider the necessary factors and rule on the objection. Marban v. State, 2009 Tex. App. LEXIS 6760, 2009 WL 2618343 (Tex. App. Beaumont Aug. 26 2009).

1081. Defendant failed to preserve error on his contention that the State committed prosecutorial misconduct by eliciting testimony suggesting that defendant stole the gun because defendant objected only at the beginning of the witness's testimony but did not object to the remainder. Defendant objected to admission of the testimony on relevancy grounds, but did not assert that introduction of the allegedly irrelevant testimony constituted prosecutorial misconduct warranting a mistrial. Thibodeaux v. State, 2009 Tex. App. LEXIS 4964, 2009 WL 1748747 (Tex. App.

Houston 14th Dist. June 23 2009).

1082. In a driving while intoxicated case, defendant did not preserve an issue relating to extraneous offense evidence for appellate review under Tex. R. App. P. 33.1 because no objection was lodged; the record was replete with evidence of a homicide, its investigation, and a grand jury's return of a "no-bill" in favor of defendant. Vanderburgh v. State, 2009 Tex. App. LEXIS 4643, 2009 WL 1740053 (Tex. App. Fort Worth June 18 2009).

1083. Despite a mother's argument that it was inadmissible under Tex. R. Evid. 404(b), a trial court did not err by admitting evidence concerning an oldest daughter, who was not part of a termination of parental rights proceeding, because such evidence was probative of whether the termination was in the best interest of four other children under the factors set forth in Tex. Fam. Code Ann. § 263.307; the State had to prove, by clear and convincing evidence, both the grounds for termination and that termination was in the best interest of the children. It was not necessary for the appellate court to decide whether this issue was preserved by a nonparticularized objection because, even if error was preserved, the trial court did not abuse its discretion in admitting the evidence, which related to a history of abusive or assaultive conduct by the children's family. In re J.A.P., 2009 Tex. App. LEXIS 2422, 2009 WL 839953 (Tex. App. Texarkana Apr. 1 2009).

1084. Defendant failed to preserve an argument as to the admissibility of a murder victim's violent nature because nothing in the record indicated what knowledge the witness had as to the victim's previous acts, as required by Tex. R. Evid. 103(a)(2); Tex. R. App. P. 33.2. Bundy v. State, 280 S.W.3d 425, 2009 Tex. App. LEXIS 326 (Tex. App. Fort Worth Jan. 15 2009).

1085. In an assault trial arising from a bar fight, it was error under Tex. R. Evid. 404(b) to exclude evidence of a prior violent act by the victim because there was evidence that the victim was the first aggressor. The error did not require reversal under Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b) because the excluded testimony did not have a substantial effect on the rejection of defendant's self-defense claim, given that defendant did not attempt to retreat but pulled a knife during a physical altercation and stabbed the unarmed victim, who did not not use deadly force. Dudzik v. State, 276 S.W.3d 554, 2008 Tex. App. LEXIS 9073 (Tex. App. Waco 2008).

1086. Appellant was entitled to a new trial based on the erroneous admission of improper character evidence that appellant failed a drug test, contrary to Tex. R. Evid. 404(b); the evidence of the drug-test results, which occurred after the assault for which appellant was on trial, came in unexpectedly and was later explained by appellant, yet it was embraced by the State and emphasized throughout trial in an effort to tie the drug-test results to the assault; consequently, the error in admitting the evidence was not harmless under Tex. R. App. P. 44 and Tex. R. Evid. 103. Simmons v. State, 2007 Tex. App. LEXIS 9732 (Tex. App. Texarkana Dec. 14 2007).

1087. On appeal of his conviction for theft, defendant argued that the trial court erred in admitting evidence concerning various instances of prior bad acts in violation of Tex. R. Evid. 404(b); because defendant did not object to the testimony when it was first elicted, he waived any error concerning the admissibility of such testimony according to Tex. R. App. P. 33.1. Craig v. State, 2007 Tex. App. LEXIS 6027 (Tex. App. Tyler July 31 2007).

1088. In a trial for aggravated sexual assault of a child under Tex. Penal Code Ann. § 22.021, defendant waived error, under Tex. R. App. P. 33, regarding the admission of extraneous offense evidence and outcry testimony; although counsel objected to some extraneous offense evidence under Tex. R. Evid. 404, counsel did not ask for a running objection and did not request that the objection be applied to all similar testimony, as permitted by Tex. R. Evid 103. Ivey v. State, 2007 Tex. App. LEXIS 3186 (Tex. App. Corpus Christi Apr. 26 2007).

1089. In defendant's aggravated sexual assault case, because evidence about defendant's drinking and arguments with the victims' mother was admitted without objection before the complained-of ruling, defendant failed

to preserve any error associated with testimony regarding those issues. Mayfield v. State, 2007 Tex. App. LEXIS 2545 (Tex. App. Fort Worth Mar. 29 2007).

1090. Defendant failed to preserve his complaint regarding prior acts evidence for review because the sister of a prior assault victim testified to the same or similar incidents and defendant did not object to her testimony, his earlier general objections to the testimony of that victim's children did not preserve error when the same evidence regarding the incidents of assault against the victim was admitted. Brown v. State, 2006 Tex. App. LEXIS 5163 (Tex. App. Austin June 16 2006).

1091. Where defendant was convicted of two counts of aggravated sexual assault of a child, he failed to preserve error in the trial court's admission of extraneous-offense evidence of defendant's sexual assault of the victim's younger sister; the same evidence was admitted through the testimony of several witnesses, and counsel did not timely object as required by Tex. R. Evid. 103. Sinclair v. State, 2006 Tex. App. LEXIS 4277 (Tex. App. Waco May 17 2006).

1092. Where defendant was convicted of aggravated assault with a deadly weapon, he was not harmed by the admission of evidence of a prior sexual assault during the punishment phase even though he had been acquitted of the offense. The jury was presented with defendant's lengthy and varied criminal history and threats against the victim; the admission of the prior sexual assault evidence did not influence the jury verdict. Benner v. State, 2006 Tex. App. LEXIS 2977 (Tex. App. Waco Apr. 12 2006).

1093. Defendant failed to properly object to evidence that was admitted at trial concerning unindicted aggravated robberies, even though he filed a motion in limine, because he failed to make objections under Tex. R. Evid. 404(b) when the evidence was admitted at trial. Ashford v. State, 2006 Tex. App. LEXIS 2770 (Tex. App. Fort Worth Apr. 6 2006).

1094. In a criminal trial for aggravated sexual assault, the State gave notice of its intention to use evidence of extraneous offenses committed by defendant and the trial court admitted the evidence. Because defendant did not object on the ground that the State's notice was untimely, the issue was not preserved for review. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

1095. Defendant failed to preserve error concerning the admission of extraneous-offense evidence or an identification of defendant as the person who committed a robbery because he failed to object. The record did not contain a running objection or a ruling made outside the presence of the jury under Tex. R. Evid. 103(a)(1). Russell v. State, 2005 Tex. App. LEXIS 3703 (Tex. App. Texarkana May 13 2005).

1096. Defendant contended that testimony that he pressured his girlfriend to have sex with him should not have been admitted in his trial for sexual assault on a child; however, defendant failed to promptly object to this line of questioning. Barnes v. State, 165 S.W.3d 75, 2005 Tex. App. LEXIS 2603 (Tex. App. Austin 2005).

1097. Where appellant and the victim shot each other, the victim died, appellant asserted self-defense, and the witnesses disagreed as to whether the victim or appellant shot first, appellant's conviction of murder in violation of Tex. Penal Code Ann. § 19.02 was affirmed because (1) the evidence as to why appellant was afraid of the victim was irrelevant under the provisions of Tex. R. Evid. 404(a), (b) because the victim's conduct of flashing his gun and shooting first were unambiguous acts of aggression and violence, (2) appellant failed to properly preserve error under Tex. R. Evid. 103(a)(1), Tex. R. App. P. 33.1(a)(1)(A), to the admission of evidence of his gang membership under Tex. R. Evid. 403, and (3) impeachment of the witness under Tex. R. Evid. 609(a) was proper because the witness created a false impression with the jury as to the extent of his arrests and convictions. Reyna v. State, 99

S.W.3d 344, 2003 Tex. App. LEXIS 1391 (Tex. App. Fort Worth 2003).

1098. Counsel's objection to the admissibility of defendant's prior unadjudicated offenses made at a bench conference--a hearing outside the presence of the jury--satisfied Tex. R. Evid. 103(a). The point was preserved for review under Tex. R. App. P. 33.1. Aguilar v. State, 2001 Tex. App. LEXIS 8656 (Tex. App. Corpus Christi July 14 2001).

1099. In a murder trial, an argument on appeal that photographs, which showed bruising from a prior assault, were inflammatory did not comport with the argument below, as required by Tex. R. Evid. 103 and Tex. R. App. P. 33.1, that the bruising was from an unadjudicated offense. Aguilar v. State, 2001 Tex. App. LEXIS 8656 (Tex. App. Corpus Christi July 14 2001).

Evidence : Relevance : Relevant Evidence

1100. Because defendant presented no evidence showing the relevance of the witness's prior misdemeanor conviction or the circumstances surrounding his alleged dismissal from the sheriff's department, the trial court did not err by limiting her cross-examination of him. Sheffield v. State, 2013 Tex. App. LEXIS 12789, 2013 WL 5638878 (Tex. App. Houston 1st Dist. Oct. 15 2013).

1101. In a murder case, the trial court did not err when it denied defendant the opportunity to question an eyewitness about her experience with burning people to establish her as an alternate perpetrator. With little details regarding the alleged past conduct, the trial court did not err in sustaining the State's relevancy objection because defendant failed to make an offer of proof under Tex. R. Evid. 103(a)(2) describing the circumstances surrounding the alleged incidences, including who was involved and how long ago they occurred. Dayne Adenauer White v. State, 2012 Tex. App. LEXIS 8107 (Tex. App. Houston 1st Dist. Sept. 27 2012).

1102. In a murder trial, the trial court did not err when it excluded testimony regarding defendant's prior emotional and behavioral examinations because neither witness knew about defendant's emotional or behavioral condition at the time of his admitted action, and neither could testify about whether defendant continued to suffer from an anxiety disorder or the trauma of his childhood abuse at the time of the offense. Lewis v. State, 2006 Tex. App. LEXIS 10449 (Tex. App. Dallas Dec. 7 2006).

1103. Court, in defendant's driving while intoxicated case, did not err in preventing defendant from offering evidence about the lack of specialized training of a police officer, where the jury was able to infer from the officer's testimony that the officer was not a medical doctor and did not have any training in toxicology. Railsback v. State, 95 S.W.3d 473, 2002 Tex. App. LEXIS 8492 (Tex. App. Houston 1st Dist. 2002).

Evidence : Relevance : Sex Offenses : General Overview

1104. In a trial for child sexual assault, there was no error under Tex. R. Evid. 103 in determining that defendant could not cross-examine the mother of the victims as to the details of a prior sexual assault she allegedly suffered as a child. Garcia v. State, 2010 Tex. App. LEXIS 9524, 2010 WL 4901389 (Tex. App. Corpus Christi Nov. 30 2010).

Evidence : Relevance : Sex Offenses : Rape Shield Laws

1105. In a trial for sexual assault and indecency with a child, defendant failed to preserve for review an argument that he was erroneously prevented from presenting or eliciting evidence of the complainant's sexual history and sexual sophistication in part because defendant's offer of proof failed to establish that he was seeking to cross-

examine or elicit testimony regarding the complainant's sexual history or sexual sophistication. Martinez v. State, 2014 Tex. App. LEXIS 3827, 2014 WL 1396705 (Tex. App. El Paso Apr. 9 2014).

1106. At a hearing under Tex. R. Evid. 412, defendant failed to preserve error with regard to a request for continuance and the request to recall a particular witness because defendant failed to submit his proposed questions under Tex. R. App. P. 33 and Tex. R. Evid. 103(a)(2). LaPointe v. State, 225 S.W.3d 513, 2007 Tex. Crim. App. LEXIS 505 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1015, 128 S. Ct. 544, 169 L. Ed. 2d 381 (2007).

1107. In a trial for aggravated sexual assault of a child, defendant failed to preserve error regarding his inquiry into complainant's sexual experience by not making an offer of proof, as required by Tex. R. Evid. 103. Alfaro v. State, 224 S.W.3d 426, 2006 Tex. App. LEXIS 10463 (Tex. App. Houston 1st Dist. 2006).

Evidence : Relevance : Sex Offenses : Similar Acts

1108. In a trial for indecency with a child, it was error to admit extraneous offense evidence regarding incidents that involved defendant and two other children in order to rebut defendant's fabrication defense; the reviewing court noted that prior to the testimony defendant received a running objection under Tex. R. Evid. 103 as to the extraneous offenses. Bass v. State, 222 S.W.3d 571, 2007 Tex. App. LEXIS 1856 (Tex. App. Houston 14th Dist. 2007).

Evidence : Scientific Evidence : Autopsies

1109. Under Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1(a), a murder defendant waived the argument that autopsy photos were not relevant because an objection under Tex. R. Evid. 403 did not preserve error under Tex. R. Evid. 401. Williams v. State, 2007 Tex. App. LEXIS 6397 (Tex. App. Fort Worth Aug. 9 2007).

Evidence : Scientific Evidence : Blood Alcohol

1110. Counsel did not object when defendant was forced to take a breath test before his DWI trial to determine if he was intoxicated in the courtroom; defendant forfeited his right to complain about the admission of any evidence relating to the breath test or his alleged intoxication in the courtroom. Phillips v. State, 2006 Tex. App. LEXIS 2771 (Tex. App. Fort Worth Apr. 6 2006).

1111. In a trial for driving while intoxicated, defendant forfeited his arguments that his blood test results were improperly admitted under Tex. R. Evid. 403 and that he was entitled to an instruction under Tex. R. Evid. 105(a). Although defendant objected when a blood-draw kit was offered into evidence, he failed to object when the report with the blood-test results was offered. Walker v. State, 2006 Tex. App. LEXIS 1328 (Tex. App. Fort Worth Feb. 16 2006).

Evidence : Scientific Evidence : DNA

1112. Defendant failed to preserve an argument that it was necessary to suppress a DNA sample in CODIS because his Fourth Amendment argument at trial did not comport with his statutory argument on appeal. Hardge v. State, 2013 Tex. App. LEXIS 11102 (Tex. App. Houston 1st Dist. Aug. 29 2013).

Evidence : Scientific Evidence : Hairs & Fibers

1113. By failing to object to the admission of a hair sample at trial, defendant waived his complaint. Ocanas v. State, 2005 Tex. App. LEXIS 7726 (Tex. App. Amarillo Sept. 20 2005).

Evidence : Scientific Evidence : Polygraphs

1114. By failing to timely object, defendant waived, under Tex. R. Evid. 103 and Tex. R. App. P. 33.1, an argument that the right to the presumption of innocence was violated by a detective's testimony the detective would have taken a polygraph exam. Whatley v. State, 2009 Tex. App. LEXIS 556, 2009 WL 1607813 (Tex. App. Corpus Christi Jan. 29 2009).

Evidence : Scientific Evidence : Sobriety Tests

1115. In a trial for driving with a child passenger while intoxicated, there was no reversible error from the admission of a trooper's testimony on the issue of intoxication, even if the trooper's method and technique used to administer and interpret field sobriety tests was flawed. Even without the trooper's testimony regarding the horizontal gaze nystagmus test, the record contained sufficient evidence that defendant was intoxicated. Pointe v. State, 371 S.W.3d 527, 2012 Tex. App. LEXIS 4295, 2012 WL 1948880 (Tex. App. Beaumont May 30 2012).

1116. In a trial for driving while intoxicated, defendant preserved the argument that it was a deprivation of the right to present a defense when the trial court denied the right to cross-examine experts on the underlying science that supported a particular breath-testing machine; counsel adequately showed, as required by Tex. R. Evid. 103, that evidence sought through cross-examination related to the contention that the machine did not adequately control or correlate the actual (as opposed to presumed) temperature of the breath of the person tested in calculating breath-alcohol content; it was apparent from the record that counsel and the court both understood the broad picture of the questions counsel sought to propound and the line of questioning upon which the arguments were based. Woodall v. State, 216 S.W.3d 530, 2007 Tex. App. LEXIS 1304 (Tex. App. Texarkana 2007).

1117. Even if an officer's testimony regarding defendant's horizontal gaze nystagmus (HGN) test, was improperly admitted at a trial for driving while intoxicated, the alleged error did not affect defendant's substantial rights within the meaning of Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b), given the presence of other evidence of defendant's intoxication properly presented to the jury. Bordelon v. State, 2007 Tex. App. LEXIS 275 (Tex. App. Beaumont Jan. 17 2007).

Evidence : Testimony : Credibility : General Overview

1118. In an assault case, evidence of a reconciliation between defendant and the victim was not properly preserved for review because an offer of proof was required; the evidence was designed to elicit certain specific responses which had no bearing on the victim's bias, interest, prejudice, inconsistent statements, traits of character affecting credibility, or evidence that might go to any impairment or disability affecting credibility Mumphrey v. State, 155 S.W.3d 651, 2005 Tex. App. LEXIS 370 (Tex. App. Texarkana 2005).

1119. Appellant failed to show harm from a trial court's exclusion of extrinsic evidence of out-of-court statements made by State's witness where appellant's counsel made no offer of proof detailing the questions counsel wanted to ask or the specific inconsistent statements to be used for impeachment under Tex. R. Evid. 103 and Tex. R. App. P. 33.2. Ferguson v. State, 97 S.W.3d 293, 2003 Tex. App. LEXIS 148 (Tex. App. Houston 14th Dist. 2003).

Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice

1120. Defendant was convicted for organized criminal activity and gambling promotion, because he organized a raffle drawing to benefit his political campaign, his employees distributed and sold raffle tickets, and defendant deposited the ticket sales proceeds into his bank account for his campaign. The trial court did not err by excluding evidence attacking the credibility of the State's witnesses who were defendant's former employees, because the jury was aware that all three witnesses had possible motives to make false accusations; additional evidence tended to be needlessly cumulative, risked confusion of the issues, or misleading the jury. Evans v. State, 2014 Tex. App. LEXIS 823, 2014 WL 261063 (Tex. App. Dallas Jan. 23 2014).

1121. Defendant was convicted for organized criminal activity and gambling promotion, because he organized a raffle drawing to benefit his political campaign, his employees distributed and sold raffle tickets, and defendant deposited the ticket sales proceeds into his bank account for his campaign. The trial court did not err by excluding evidence attacking the credibility of the State's witnesses who were defendant's former employees, because the jury was aware that all three witnesses had possible motives to make false accusations; additional evidence tended to be needlessly cumulative, risked confusion of the issues, or misleading the jury. Evans v. State, 2014 Tex. App. LEXIS 823, 2014 WL 261063 (Tex. App. Dallas Jan. 23 2014).

Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview

1122. Pursuant to Tex. R. Evid. 103, defendant's contention concerning the denial of the cross-examination of a witness regarding a prior offense was waived because he failed to make an offer of proof at trial in the form of records of the witness's prior convictions, or by any other method. Mason v. State, 2004 Tex. App. LEXIS 11481 (Tex. App. Texarkana Dec. 22 2004).

Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility

1123. Defendant's objection to the admissibility of a remote conviction under Tex. R. Evid. 609 was properly preserved for review under Tex. R. App. P. 33 because defendant's objection was timely and stated the specific ground of objection; under Tex. R. Evid 103 defendant was not required to object to the admission of the evidence at the time that evidence was offered before the jury during cross-examination because the trial court ruled on the objection outside the presence of the jury. Grant v. State, 247 S.W.3d 360, 2008 Tex. App. LEXIS 1135 (Tex. App. Austin 2008).

1124. Tex. R. Evid. 609(a) requires that the trial court determine whether the probative value of admitting evidence of prior convictions outweighs its prejudicial effect to a party, and Tex. R. Evid. 609(f) requires timely notice of the State's intended use of evidence of prior convictions to provide the defendant a fair opportunity to contest the use of such evidence, but the phrase "fair opportunity" does not specify at what point in the proceedings the decision as to admissibility is to be made; there is not authority holding that a "fair opportunity" means an opportunity exclusively during a pretrial hearing and not during a hearing outside the presence of the jury during a trial on the merits; thus, the trial court's denial of defendant's motion for a pretrial hearing on his Tex. R. Evid. 609 motion was neither an abuse of discretion nor reversible error. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility

1125. Because defendant presented no evidence showing the relevance of the witness's prior misdemeanor conviction or the circumstances surrounding his alleged dismissal from the sheriff's department, the trial court did not err by limiting her cross-examination of him. Sheffield v. State, 2013 Tex. App. LEXIS 12789, 2013 WL 5638878 (Tex. App. Houston 1st Dist. Oct. 15 2013).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

1126. Record did not establish harm under Tex. R. App. P. 44.2 and Tex. R. Evid. 103(d) from the trial court's failure to conduct a pretrial hearing to determine the admissibility of impeachment evidence because defendant elected not to testify; the jury, therefore, was not exposed to the allegedly prejudicial evidence; any possible harm flowing from the refusal to conduct a hearing was wholly speculative. Yanez v. State, 187 S.W.3d 724, 2006 Tex. App. LEXIS 1289 (Tex. App. Corpus Christi 2006).

1127. Under Tex. R. Evid. 103(a)(2), a defendant's substantial rights were not affected by the trial court's ruling that defense counsel could not question a witness, for impeachment purposes, regarding his being a drug dealer where the trial court offered defense counsel 20 minutes to question the witness outside of the jury's presence in order to establish whether the witness was indeed a drug dealer, and defense counsel declined the trial court's generous offer. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App. LEXIS 7512 (Tex. App. Beaumont 2003).

Evidence : Testimony : Examination : General Overview

1128. At an administrative license suspension hearing, the driver waived any error in the denial of his right to fully cross-examine the arresting officer. The driver did not offer a bill of exceptions containing potential questions for the arresting officer, nor answers he expected to receive. Parks v. Tex. Dep't of Pub. Safety, 2004 Tex. App. LEXIS 9365 (Tex. App. Houston 1st Dist. Oct. 21 2004).

Evidence : Testimony : Examination : Cross-Examination : General Overview

1129. On appeal of defendant's conviction for indecency with a child by contact, defendant argued that the trial court erred under Tex. R. Evid. 103(a)(2) by disallowing the cross-examination of the complainant regarding her motive and state of mind in telling her friend that defendant fondled her. Because the evidence came in during the testimony of the friend, any error was harmless. Taylor v. State, 2012 Tex. App. LEXIS 1663, 2012 WL 662373 (Tex. App. Fort Worth Mar. 1 2012).

Evidence : Testimony : Examination : Judicial Interrogation

1130. In child custody and support enforcement proceedings, the mother's failure to object to the trial court's questioning waived the issue under Tex. R. App. P. 33.1 and Tex. R. Evid. 103; also, the questioning did not deny the mother her federal or state constitutional rights to a fair trial or violate Tex. R. Evid. 605 because the judge did not testify as a witness at the trial and the questions were reasonable and fact-based. Kogel v. Robertson, 2005 Tex. App. LEXIS 10028 (Tex. App. Austin Dec. 2 2005).

Evidence : Testimony : Examination : Leading Questions

1131. Defendant failed to preserve an objection to leading questions because when the prosecutor rephrased a withdrawn question in essentially the same terms, defendant did not object to the newly posed question. Franklin v. State, 2012 Tex. App. LEXIS 7626, 2012 WL 3861970 (Tex. App. Houston 14th Dist. Sept. 6 2012).

1132. Although the State asked a six-year-old sexual assault complainant numerous leading questions, defendant's trial counsel had objected only once, and because the one question objected to was not a leading question, the trial court did not err in overruling the objection; by not objecting to each leading question, defendant had not preserved his complaint for appellate review in accordance with Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a). Embree v. State, 2006 Tex. App. LEXIS 7772 (Tex. App. Waco Aug. 30 2006).

Evidence : Testimony : Experts : General Overview

1133. Appellant's conviction was affirmed because the issue of the expert's testimony on sexual assault had been waived in that appellant failed to make a specific objection as to any aspect of her expertise under the provisions of Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1. Teixeira v. State, 89 S.W.3d 190, 2002 Tex. App. LEXIS 6980 (Tex. App. Texarkana 2002).

Evidence : Testimony : Experts : Admissibility

1134. In a civil proceeding to commit a sexually violent predator, the trial court did not err by allowing the State's experts to disclose various facts and data on which their respective opinions were based. The evidence was admissible under Tex. R. Evid. 705 and the jury was given a limiting instruction about the appropriate use of the information. In re Tesson, 413 S.W.3d 514, 2013 Tex. App. LEXIS 12919, 2013 WL 5651804 (Tex. App. Beaumont Oct. 17 2013).

1135. Defendant failed to preserve for appellate review her claims that the trial court improperly admitted evidence, including expert testimony, because she failed to object to the evidence when it was presented during the trial as required by Tex. R. App. P. 33.1. In re A.B.G., 2013 Tex. App. LEXIS 601, 2013 WL 257311 (Tex. App. Beaumont Jan. 24 2013).

1136. In the proceeding to commit respondent as a sexually violent predator, the trial court did not abuse its discretion by restricting respondent's cross-examination of one of the State's experts. Even if respondent's proposed questions were relevant to an issue in dispute, his failure to make an offer of proof under Tex. R. Evid. 103(a) preserved nothing for appellate review. In re Dees, 2011 Tex. App. LEXIS 9807 (Tex. App. Beaumont Dec. 15 2011).

1137. In the insureds' appeal of a judgment entered in favor of the insurer, the court held that: (1) the insurer's expert did not admit that his testimony was speculative; (2) to the extent that the insureds challenged the expert's qualifications to testify regarding roof damage or that his opinion was not reliable, the complaint was waived because there was no timely objection to his qualifications or the reliability of his testimony; and (3) the expert's testimony was based on his training and 28 years of experience. Patel v. Nautilus Ins. Co., 2011 Tex. App. LEXIS 724, 2011 WL 345967 (Tex. App. Corpus Christi Jan. 28 2011).

1138. Court did not abuse its discretion by excluding the expert's testimony with regard to the cause of the claimant's right-side pain, because the expert asserted that the doctor performed the third set of injections without fluoroscopy and that this conduct constituted gross negligence, and the claimant raised the fluoroscopy issue before the trial court in terms of standard of care, not causation; the expert did not link this standard of care opinion to his causation conclusion that the third set of injections caused the claimant's right leg pain. Wilson v. Shanti, 333 S.W.3d 909, 2011 Tex. App. LEXIS 116 (Tex. App. Houston 1st Dist. Jan. 6 2011).

1139. In a civil commitment proceeding for appellant, who was found to be a sexually violent predator, where appellant argued that the trial court erred in allowing the State's expert witness, a board-certified psychiatrist, to testify, challenging the standard that she employed in reaching her opinion that he was likely to reoffend, he had not preserved the issue for review; an expert-reliability challenge asking the reviewing court to examine the expert's underlying methodology, technique, or foundational data, required a timely objection so that the trial court had the opportunity to conduct such analysis. In re Commitment of Gollihar, 224 S.W.3d 843, 2007 Tex. App. LEXIS 3786 (Tex. App. Beaumont 2007).

1140. Appellate court could not consider an expert's testimony from the bill of exceptions in determining whether the trial court erred in excluding his causation testimony because it did not first determine, pursuant to properly

assigned error, that the trial court erred in refusing to admit the testimony. Mack Trucks v. Tamez, 206 S.W.3d 572, 2006 Tex. LEXIS 1074, 50 Tex. Sup. Ct. J. 80 (Tex. 2006).

1141. Trial court did not err in excluding the testimony of defendant's expert witness because where was no adequate offer of proof following the very general responses given by the expert during questioning by the State; trial counsel's response was merely an attempt to reply to the State's objection, and did not provide a reasonably specific summary of what the expert testimony would contain. Fergerson v. State, 2006 Tex. App. LEXIS 6589 (Tex. App. Beaumont July 26 2006).

Evidence : Testimony : Experts : Criminal Trials

1142. Admission of expert testimony regarding the connection between a photograph of a child and sexual arousal did not affect defendant's substantial rights because there was evidence of images of children on various devices owned by defendant, one of the devices contained a video of defendant with the victim, and the images were purposefully placed on defendant's devices. Hoard v. State, 2013 Tex. App. LEXIS 11760 (Tex. App. Beaumont Sept. 18 2013).

Evidence : Testimony : Experts : Qualifications

1143. In a criminal case involving sexual abuse of a child, while defendant claimed that a speculation objection to a nurse practitioner's testimony on statistics of confirmed cases of sexual abuse where there were no physical findings was a challenge to the nurse practitioner's expert qualifications, that ground was not apparent from the context under Tex. R. Evid. 103(a)(1). Cortez v. State, 2010 Tex. App. LEXIS 5854, 2010 WL 2889670 (Tex. App. Fort Worth July 22 2010).

Evidence : Testimony : Presentation of Evidence

1144. Trial court granted defendant a running objection as to hearsay and he did not specifically object on the basis that the repeated details of the offenses were cumulative of other evidence, or unduly repetitive, and he has waived that objection, Tex. R. Evid. 103(a)(1); Tex. R. App. P. 33.1(a); there was no abuse of discretion under the circumstances in the trial court's exercise of control over the manner in which the trial was conducted, Tex. R. Evid. 611(a). In re Adame, 2013 Tex. App. LEXIS 4847, 2013 WL 3853386 (Tex. App. Beaumont Apr. 18 2013).

Family Law : Child Custody : Modification : General Overview

1145. In a case in which a trial court denied a mother's motion to modify the conservatorship provisions of the parties' divorce decree, if the mother thought evidence with respect to her claim that the father had received an alleged diagnosis of antisocial personality disorder was relevant and important to the issues raised in the modification hearing, she should have made an offer of proof so that the excluded evidence could be assessed on appeal; without it, a reviewing court could not determine if the trial court actually erred. In the Interest of I.J.M., 2012 Tex. App. LEXIS 2710 (Tex. App. Corpus Christi Apr. 5 2012).

Family Law : Child Support : Obligations : Computation : Guidelines

1146. In a divorce case, a former husband failed to preserve an alleged error relating to child support because he did not bring to a trial court's attention a discrepancy between the oral pronouncement of child support and the amount that he was ordered to pay in both the original and corrected decrees. Further, he did not challenge the finding that his net monthly income was $ 6,000, and the $ 1,500 child support amount awarded in the original and corrected decrees was consistent with the guidelines for that income amount. Beckner v. Beckner, 2009 Tex. App. LEXIS 759, 2009 WL 279485 (Tex. App. Fort Worth Feb. 5 2009).

Family Law : Child Support : Obligations : Enforcement : Contempt

1147. Habeas corpus relief was denied in a child support case where there was a finding of contempt because a father waived his argument that a trial court erred by not allowing him to offer evidence about certain offsets because the father did not make an offer of proof under Tex. R. Evid. 103(a)(2). In re Corder, 332 S.W.3d 498, 2009 Tex. App. LEXIS 2652 (Tex. App. Houston 1st Dist. Apr. 10 2009).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview

1148. Despite a mother's argument that it was inadmissible under Tex. R. Evid. 404(b), a trial court did not err by admitting evidence concerning an oldest daughter, who was not part of a termination of parental rights proceeding, because such evidence was probative of whether the termination was in the best interest of four other children under the factors set forth in Tex. Fam. Code Ann. § 263.307; the State had to prove, by clear and convincing evidence, both the grounds for termination and that termination was in the best interest of the children. It was not necessary for the appellate court to decide whether this issue was preserved by a nonparticularized objection because, even if error was preserved, the trial court did not abuse its discretion in admitting the evidence, which related to a history of abusive or assaultive conduct by the children's family. In re J.A.P., 2009 Tex. App. LEXIS 2422, 2009 WL 839953 (Tex. App. Texarkana Apr. 1 2009).

1149. In a termination of parental rights case, the father failed to preserve for appellate review his arguments that the continuation of the trial in his absence infringed upon his constitutional rights because the record did not demonstrate that the father lodged his own objection based on constitutional grounds challenging the trial court's decision to proceed with the trial. Although the mother's counsel stated that "we" believe that the father had a constitutional right to be at trial, the mother's counsel did not represent the father at trial, nor did the father's counsel join in the objection. In re T.H., 2008 Tex. App. LEXIS 8413 (Tex. App. Fort Worth Nov. 6, 2008).

1150. During voir dire in a termination of parental rights case, a trial court's alleged limitation on questioning was not preserved for appellate review under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103 because an attorney did not give an explanation after the State's objection, but reworded the question and proceeded without further objection. In re C.S., 2007 Tex. App. LEXIS 5481 (Tex. App. Fort Worth July 12 2007).

Governments : Courts : Authority to Adjudicate

1151. Where appellants urged that the district court violated their procedural and substantive due process rights by limiting them to one hour to present their case, where, at no point in the trial did appellants make an offer of proof concerning evidence excluded because of time constraints, the appellate court had nothing to review. Health Enrichment & Longevity Inst., Inc. v. State, 2004 Tex. App. LEXIS 5094 (Tex. App. Austin June 10 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 6246 (Tex. App. Austin July 15, 2004).

Real Property Law : Eminent Domain Proceedings : General Overview

1152. In an inverse condemnation case, a trial court's refusal to allow the State to give an offer of proof was harmless because the substance of the evidence was apparent from the context within which the questions were asked; moreover, the testimony the State sought to offer concerning the impairment of access and the viability of driveway proposals was immaterial to the issue of damages. State v. Delany, 149 S.W.3d 655, 2004 Tex. App. LEXIS 2385 (Tex. App. Houston 14th Dist. 2004), reversed by 2006 Tex. LEXIS 416, 49 Tex. Sup. Ct. J. 557 (Tex. 2006).

Real Property Law : Landlord & Tenant : Lease Agreements : Commercial Leases : General Overview

1153. Pursuant to Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1), the lessor in a commercial lease failed to make an objection in the trial court as to the alleged date defect and discovery rule violation that one of lessee's exhibits was not created more than 30 days prior to trial as required by Tex. R. Civ. P. 215.5 and waived error, and even if the lessor had made the proper objection, the trial court could have properly overruled it, because no discovery request was made for the exhibit as required by Tex. R. Civ. P. 93. Parts Indus. Corp. v. A.V.A. Servs., 104 S.W.3d 671, 2003 Tex. App. LEXIS 2244 (Tex. App. Corpus Christi 2003).

1154. Pursuant to Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1), the lessor in a commercial lease did not preserve by a proper objection any error regarding the lessee's alleged lack of standing to bring the suit; thus, any error as to lack of standing was waived. Parts Indus. Corp. v. A.V.A. Servs., 104 S.W.3d 671, 2003 Tex. App. LEXIS 2244 (Tex. App. Corpus Christi 2003).

Real Property Law : Nonmortgage Liens : Tax Liens

1155. In a tax lien foreclosure suit, the tax lien holder was not estopped from recovering attorney fees at the rate of 15 percent under Tex. Tax Code Ann. § 33.48; although the tax lien holder requested attorney fees as authorized by Tex. Tax Code Ann. § 32.06 et seq., that citation reasonably included Tex. Tax Code Ann. § 32.065(c), which provided that an assignee of a taxing authority was subrogated to all rights of the taxing authority, and the issue was not properly preserved under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1) because an estoppel argument was not made to the trial court. JB Joyce, Ltd. v. Regions Fin. Corp., 2005 Tex. App. LEXIS 7246 (Tex. App. Texarkana Sept. 1 2005).

Torts : Intentional Torts : Conversion : General Overview

1156. In a conversion case, following the trial court's ruling excluding the affidavit evidence, the mechanic made no offer of proof showing the substance of any of the affidavits pursuant to Tex. R. Evid. 103; thus, the mechanic failed to preserve error as to the affidavits. Berry v. Covarrubias, 2004 Tex. App. LEXIS 236 (Tex. App. Houston 1st Dist. Jan. 8 2004).

1157. In a conversion case, the mechanic failed to make an offer of proof following the trial court's ruling excluding the vehicle inquiry receipt and a police incident report regarding a different car pursuant to Tex. R. Evid. 103; thus, the receipt or the incident report could not be considered on appeal. Berry v. Covarrubias, 2004 Tex. App. LEXIS 236 (Tex. App. Houston 1st Dist. Jan. 8 2004).

Torts : Malpractice & Professional Liability : Healthcare Providers

1158. Trial judges are not required to adopt the methods of Sherlock Holmes and divine without written or oral guidance as to where, when, why, and how an expert's report is conclusory. Therefore, in a health care liability case, an alleged error was not preserved for review under Tex. R. App. P. 33.1(a) because a doctor's objection before a trial court was that an expert report was factually inaccurate; however, on appeal, he acknowledged that he was not raising a factual inaccuracy argument. Plemons v. Harris, 2009 Tex. App. LEXIS 145, 2009 WL 51290 (Tex. App. Fort Worth Jan. 8 2009).

Torts : Negligence : General Overview

1159. In a negligence suit by a driver against a trucker, the trial court's exclusion of the evidence concerning the driver's consumption of alcohol required reversal because the jury, believing the driver to be sober, declined to find the driver negligent; the judgment turned on evidence of the driver's consumption of alcohol, and therefore, the

judgment rendered in favor of the driver was improper. PPC Transp. v. Metcalf, 254 S.W.3d 636, 2008 Tex. App. LEXIS 3291 (Tex. App. Tyler 2008).

Transportation Law : Private Vehicles : Operator Licenses : General Overview

1160. At an administrative license suspension hearing, the driver waived any error in the denial of his right to fully cross-examine the arresting officer. The driver did not offer a bill of exceptions containing potential questions for the arresting officer, nor answers he expected to receive. Parks v. Tex. Dep't of Pub. Safety, 2004 Tex. App. LEXIS 9365 (Tex. App. Houston 1st Dist. Oct. 21 2004).

Workers' Compensation & SSDI : Administrative Proceedings : Evidence : General Overview

1161. Insurer waived any objection that the decision of the Appeals Panel of the Texas Department of Insurance, Division of Workers' Compensation, was not based on competent medical evidence, because the insurer did not object before the trial court took judicial notice of the decision. Liberty Mut. Ins. Co. v. Burk, 295 S.W.3d 771, 2009 Tex. App. LEXIS 6956 (Tex. App. Fort Worth Aug. 31 2009).

End of Document

Tex. Evid. R. 104

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 104 Preliminary Questions

(a) ***In General.***--The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) ***Relevance That Depends on a Fact.***--When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) ***Conducting a Hearing So That the Jury Cannot Hear It.***--The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1)the hearing involves the admissibility of a confession in a criminal case;

(2)a defendant in a criminal case is a witness and so requests; or

(3)justice so requires.

(d) ***Cross-Examining a Defendant in a Criminal Case.***--By testifying outside the jury's hearing on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) ***Evidence Relevant to Weight and Credibility.***--This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 21, *Determining Admissibility: Procedure*.

Case Notes

Civil Procedure : Eminent Domain Proceedings : Experts
Computer & Internet Law : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Search & Seizure : Exclusionary Rule : Rule Application & Interpretation
Criminal Law & Procedure : Search & Seizure : Search Warrants : Affirmations & Oaths : Sufficiency Challenges
Criminal Law & Procedure : Search & Seizure : Search Warrants : Probable Cause : General Overview
Criminal Law & Procedure : Interrogation : Miranda Rights : Notice & Warning
Criminal Law & Procedure : Pretrial Motions & Procedures : Competency to Stand Trial
Criminal Law & Procedure : Pretrial Motions & Procedures : Joinder & Severance : Severance of Defendants
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Judicial Discretion
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Scienter : General Intent
Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence
Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances
Criminal Law & Procedure : Appeals : Reversible Errors : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : De Novo Review : Motions to Suppress
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Estate, Gift & Trust Law : Will Contests : Testamentary Capacity : Evidence
Evidence : Authentication : General Overview
Evidence : Competency : General Overview
Evidence : Competency : Affirmations & Oaths
Evidence : Documentary Evidence : Writings : General Overview
Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Unavailability : General Overview
Evidence : Privileges : Attorney-Client Privilege
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Preliminary Questions : General Overview
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Existence of Privileges
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Witness Qualifications
Evidence : Procedural Considerations : Preliminary Questions : Conditional Admissions
Evidence : Procedural Considerations : Preliminary Questions : Hearings Out of Jury's Presence
Evidence : Procedural Considerations : Preliminary Questions : Testimony by Accused
Evidence : Procedural Considerations : Preliminary Questions : Weight & Credibility of Evidence
Evidence : Procedural Considerations : Rule Application & Interpretation
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Testimony : Credibility : Impeachment : General Overview
Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility

Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Experts : Daubert Standard
Evidence : Testimony : Experts : Helpfulness
Evidence : Testimony : Experts : Qualifications
Family Law : Parental Duties & Rights : Termination of Rights : General Overview
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview
Public Health & Welfare Law : Healthcare : Mental Health Services : Commitment : Involuntary Commitment of Adults
Tax Law : State & Local Taxes : Real Property Tax : Assessment & Valuation : General Overview
Workers' Compensation & SSDI : Benefit Determinations : Permanent Partial Disabilities

LexisNexis (R) Notes

Civil Procedure : Eminent Domain Proceedings : Experts

1. In an action arising from the State's partial taking of owners' property for use in a highway project, the trial court did not abuse its discretion in overruling the State's pretrial motion to exclude the testimony of the owners' designated real estate appraiser without conducting an evidentiary hearing where the appraiser's qualifications were not challenged, and where he generally utilized the long favored comparable sales approach for appraising real property. The State failed to show that the denial of its motion affected a substantial right of the State pursuant to Tex. R. Evid. 103(a). State v. Petropoulos, 346 S.W.3d 619, 2009 Tex. App. LEXIS 3021 (Tex. App. Austin Apr. 28 2009).

Computer & Internet Law : General Overview

2. Court properly admitted the contents of social networking web pages because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be -- web pages the contents of which defendant was responsible for. There were numerous photographs of defendant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring, and there was a reference to the victim's death and the music from his funeral. Tienda v. State, 358 S.W.3d 633, 2012 Tex. Crim. App. LEXIS 244 (Tex. Crim. App. 2012).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children

3. Evidence was sufficient to support a finding that an extraneous offense occurred, specifically that defendant parent failed to report that there might have been abuse of the child years before the charged offense, because the child testified that she told defendant about the prior inappropriate sexual activity by the same abuser and that nothing happened because defendant did not tell authorities. Cannell v. State, 2013 Tex. App. LEXIS 15299, 2013 WL 6729857 (Tex. App. Houston 1st Dist. Dec. 19 2013).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

4. In a case involving sexual assault of a child, a trial court did not err by admitting expert testimony; even though there was no explicit ruling made on a doctor's qualifications, an implicit ruling was made since defendant's predicate objection was overruled. The trial court did not err by finding that the doctor was qualified based on her knowledge, training, skill, experience, and education; inter alia, the doctor testified that she had performed about 8,500 sexual abuse examinations. Little v. State, 2009 Tex. App. LEXIS 7091, 2009 WL 2882932 (Tex. App. San Antonio Sept. 9 2009).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

5. In a driving while intoxicated (DWI) case, defendant was unable to object to testimony regarding the abilities of other individuals arrested for DWI on the basis of the Sixth Amendment, Tex. Const. art. I, § 10, Tex. R. Evid. 801, and Tex. Code Crim. Proc. Ann. art. 1.25 because the issues were not raised to the trial court; moreover, his preserved complaints relating to comparative evidence and relevance were waived because the evidence came in without objection during other parts of the trial. Taylor v. State, 264 S.W.3d 914, 2008 Tex. App. LEXIS 6255 (Tex. App. Fort Worth 2008).

Criminal Law & Procedure : Search & Seizure : Exclusionary Rule : Rule Application & Interpretation

6. Objection to the admissibility of evidence under the first sentence of Tex. Code Crim. Proc. Ann. art. 38.23 is not a prerequisite to the right to a jury instruction regarding a disputed factual issue under the second sentence of Tex. Code Crim. Proc. Ann. art. 38.23 because a defendant may, but is not required to, object to the admission of evidence as well as make a request for a Tex. Code Crim. Proc. Ann. art. 38.23 jury instruction; even when the defendant affirmatively states that he has no objection to the admission of certain evidence, he may still be entitled to a Tex. Code Crim. Proc. Ann. art. 38.23 jury instruction because the admissibility of evidence and the jury's consideration of that evidence are not necessarily linked together. Holmes v. State, 248 S.W.3d 194, 2008 Tex. Crim. App. LEXIS 327 (Tex. Crim. App. 2008).

Criminal Law & Procedure : Search & Seizure : Search Warrants : Affirmations & Oaths : Sufficiency Challenges

7. Trial court acted within its discretion in allowing and considering the officer's testimony that the May 18, 2009 date in the search warrant affidavit was a typographical error. Because the May 18, 2009 date was a typographical error, the court rejected defendant's contention that the information in the affidavit was stale; the controlled buy actually occurred on May 18, 2010 and the warrant was issued on May 19, 2010. Reyes v. State, 2013 Tex. App. LEXIS 4367 (Tex. App. Fort Worth Apr. 4 2013).

Criminal Law & Procedure : Search & Seizure : Search Warrants : Probable Cause : General Overview

8. Trial court acted within its discretion in allowing and considering the officer's testimony that the May 18, 2009 date in the search warrant affidavit was a typographical error. Because the May 18, 2009 date was a typographical error, the court rejected defendant's contention that the information in the affidavit was stale; the controlled buy actually occurred on May 18, 2010 and the warrant was issued on May 19, 2010. Reyes v. State, 2013 Tex. App. LEXIS 4367 (Tex. App. Fort Worth Apr. 4 2013).

Criminal Law & Procedure : Interrogation : Miranda Rights : Notice & Warning

9. State did not meet its burden to show under Tex. R. Evid. 104(a) that defendant's video-taped confession was admissible because it did not present evidence that officers read defendant his Miranda warnings before he made initial off-camera incriminating statements and there was evidence that a two-step interrogation technique was deliberately employed to undermine the later warnings. Vasquez v. State, 397 S.W.3d 850, 2013 Tex. App. LEXIS 4039, 2013 WL 1248304 (Tex. App. Houston 14th Dist. Mar. 28 2013).

Criminal Law & Procedure : Pretrial Motions & Procedures : Competency to Stand Trial

10. Evidence of incompetency need not be in admissible form; reliable information that meets the standards of Tex. R. Evid. 104(a) suffices. McDaniel v. State, 98 S.W.3d 704, 2003 Tex. Crim. App. LEXIS 45 (Tex. Crim. App.

2003).

11. Evidence of incompetency need not be in admissible form where reliable information that meets the standards of Tex. R. Evid. 104(a) suffices, and the defendant's attorney might orally recite the specific problems he has had in communicating with his client, and the trial judge might consider the defendant's conduct or statements in court; in addition, hearsay letters or reports may be appropriately reliable evidence to consider at this stage. McDaniel v. State, 98 S.W.3d 704, 2003 Tex. Crim. App. LEXIS 45 (Tex. Crim. App. 2003).

Criminal Law & Procedure : Pretrial Motions & Procedures : Joinder & Severance : Severance of Defendants

12. In a case of solicitation of capital murder, Tex. R. Evid. 104 did not bar the State from inquiring into defendant's theories of defense at a severance hearing. Benavides v. State, 2007 Tex. App. LEXIS 2691 (Tex. App. Austin Apr. 5 2007).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

13. In a driving while intoxicated case, a trial court did not err by amending a pretrial suppression order that suppressed all evidence because a pretrial ruling on such was interlocutory and subject to reconsideration and revision during trial, just as any other ruling on the admissibility of evidence. The trial court was able to reconsider and change the pretrial order at any time during the course of the trial. Mince v. State, 2013 Tex. App. LEXIS 8771 (Tex. App. San Antonio July 17 2013).

14. Court properly relied upon an officer's unsworn hearsay document at defendant's suppression hearing because, although it was better practice to produce the witness or attach the documentary evidence to an affidavit, Tex. Code Crim. Proc. Ann. art. 28.01, § 1(6) did not create a "best evidence" rule that mandated such a procedure in a motion to suppress hearing. The offense report included defendant's name, correct offense date, and specific information that coincided with the same basic information to which defendant testified at the hearing, and defendant did not argue that the offense report was, in any way, unauthentic, inaccurate, unreliable, or lacking in credibility. Ford v. State, 305 S.W.3d 530, 2009 Tex. Crim. App. LEXIS 1440 (Tex. Crim. App. 2009).

15. At the hearing on defendant's motion to suppress intoxilyzer results, the trial court was not prohibited from admitting unsworn police reports offered by the State detailing defendant's arrest for driving while intoxicated. The rules of evidence do not apply in suppression hearings. Caballero v. State, 2005 Tex. App. LEXIS 1865 (Tex. App. El Paso Mar. 10 2005).

16. Assistance of counsel was not rendered ineffective by a failure to object to hearsay and leading questions at a suppression hearing. The Texas Rules of Evidence, with the exception of privileges, did not apply to suppression hearings. Piper v. State, 2004 Tex. App. LEXIS 7601 (Tex. App. Texarkana Aug. 25 2004).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

17. Defendant forfeited, by his own misconduct of fatally shooting the victim during a robbery or the burglary of her home, his right to confront the victim in court under the Sixth Amendment about hearsay statements she made to police officers before she died, and therefore her statements were properly admitted into evidence. Gonzalez v. State, 195 S.W.3d 114, 2006 Tex. Crim. App. LEXIS 1129 (Tex. Crim. App. 2006).

Criminal Law & Procedure : Trials : Judicial Discretion

18. Sufficiency of a witness's oath or affirmation is a preliminary question to be decided by a court pursuant to Tex. Evid. R. 104(a). The rules of evidence afford the court broad discretion in the determination of such questions. Scott v. State, 80 S.W.3d 184, 2002 Tex. App. LEXIS 4349 (Tex. App. Waco 2002).

19. Preliminary questions concerning the admissibility of evidence are to be determined by the trial court, and such determinations are committed to the trial court's discretion; the trial court's ruling on the admission or exclusion of evidence will not be disturbed unless the record clearly demonstrates an abuse of such discretion. To demonstrate an abuse of discretion, the appellant must show that the trial court acted arbitrarily and without reference to guiding principles. Pina v. State, 38 S.W.3d 730, 2001 Tex. App. LEXIS 307 (Tex. App. Texarkana 2001).

20. In defendant's capital murder trial, the testimony of a relative whom defendant referred to as his "sister" was properly admitted where she testified through an interpreter that defendant arrived at his mother's house early in the morning wearing bloody clothing and that he told his mother that he was in trouble and that he had killed the victim. The trial court did not abuse its discretion in admitting this evidence even though the witness understood little English, her testimony had to be elicited through an interpreter, she was testifying against her own relative, and her testimony was contradictory at times because the witness provided significant evidence pertaining to the facts of the case; her credibility was for the jury to determine, and defense counsel had ample opportunity to cross-examine her. Pina v. State, 38 S.W.3d 730, 2001 Tex. App. LEXIS 307 (Tex. App. Texarkana 2001).

Criminal Law & Procedure : Witnesses : Credibility

21. Nothing in the record reflected an abuse of discretion by a trial court in permitting a witness who defendant claimed was intoxicated to testify because the possibility that the witness was intoxicated at the time of trial was a factor that the jury could have considered in evaluating her credibility. Therefore, the trial court did not abuse its discretion by denying defendant's motion to strike her testimony. Horace v. State, 2012 Tex. App. LEXIS 2208, 2012 WL 983337 (Tex. App. Beaumont Mar. 21 2012).

Criminal Law & Procedure : Scienter : General Intent

22. Where a detective administered a lie detector test but testified that he was not trying to determine whether defendant was being truthful, the detective had the intent to deceive if the testimony was false, even if his motive was to avoid the jury being tainted by hearing improper testimony; the reviewing court noted that questions concerning the admissibility of evidence were to be decided by the court, not by the witnesses. Nelson v. State, 2006 Tex. App. LEXIS 8059 (Tex. App. Austin Sept. 8 2006).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence

23. Objection to the admissibility of evidence under the first sentence of Tex. Code Crim. Proc. Ann. art. 38.23 is not a prerequisite to the right to a jury instruction regarding a disputed factual issue under the second sentence of Tex. Code Crim. Proc. Ann. art. 38.23 because a defendant may, but is not required to, object to the admission of evidence as well as make a request for a Tex. Code Crim. Proc. Ann. art. 38.23 jury instruction; even when the defendant affirmatively states that he has no objection to the admission of certain evidence, he may still be entitled to a Tex. Code Crim. Proc. Ann. art. 38.23 jury instruction because the admissibility of evidence and the jury's consideration of that evidence are not necessarily linked together. Holmes v. State, 248 S.W.3d 194, 2008 Tex. Crim. App. LEXIS 327 (Tex. Crim. App. 2008).

Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances

24. If the jury believed from the evidence presented that petitioner state death row inmate was a sexual sadist, and if it understood that non-consensual anal intercourse was an act of criminal violence, then the expert's testimony --

that sexual sadists prefer to commit anal rape, have high recidivism rates, and do not respond well to treatment -- made more likely the proposition that there was a probability that the inmate would commit acts of criminal violence that would constitute a continuing threat to society, and because the testimony was highly relevant under Tex. R. Evid. 104(b), its relevance was not substantially outweighed by its prejudicial effect. Wyatt v. Dretke, 2003 U.S. Dist. LEXIS 26997 (E.D. Tex. Dec. 3 2003).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

25. Trial court abused its discretion by allowing the arresting officer to testify regarding his opinion on defendant's prescription medications in conjunction with his ultimate opinion on defendant's intoxication because the officer's testimony was neither relevant nor reliable and the officer was not qualified to offer such detailed testimony as required by Tex. R. Evid. 702;.the officer conceded that he was not certified by the police department as a drug-recognition expert, he did not conduct the standard 12-step examination that would have been conducted by a drug-recognition expert, he did not contact such an expert after defendant refused a breath test, and the officer's testimony did not reveal that he had expert knowledge about the medications that defendant had taken or their effects. The error was not harmless because the officer's extensive testimony about defendant's prescription medications was unreliable and the testimony was constituted a substantial part of the State's case. Delane v. State, 369 S.W.3d 412, 2012 Tex. App. LEXIS 905, 2012 WL 340234 (Tex. App. Houston 1st Dist. Feb. 2 2012).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

26. In a driving while intoxicated (DWI) case, defendant was unable to object to testimony regarding the abilities of other individuals arrested for DWI on the basis of the Sixth Amendment, Tex. Const. art. I, § 10, Tex. R. Evid. 801, and Tex. Code Crim. Proc. Ann. art. 1.25 because the issues were not raised to the trial court; moreover, his preserved complaints relating to comparative evidence and relevance were waived because the evidence came in without objection during other parts of the trial. Taylor v. State, 264 S.W.3d 914, 2008 Tex. App. LEXIS 6255 (Tex. App. Fort Worth 2008).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

27. Preliminary questions concerning the admissibility of evidence are to be determined by the trial court, and such determinations are committed to the trial court's discretion; the trial court's ruling on the admission or exclusion of evidence will not be disturbed unless the record clearly demonstrates an abuse of such discretion. To demonstrate an abuse of discretion, the appellant must show that the trial court acted arbitrarily and without reference to guiding principles. Pina v. State, 38 S.W.3d 730, 2001 Tex. App. LEXIS 307 (Tex. App. Texarkana 2001).

28. In defendant's capital murder trial, the testimony of a relative whom defendant referred to as his "sister" was properly admitted where she testified through an interpreter that defendant arrived at his mother's house early in the morning wearing bloody clothing and that he told his mother that he was in trouble and that he had killed the victim. The trial court did not abuse its discretion in admitting this evidence even though the witness understood little English, her testimony had to be elicited through an interpreter, she was testifying against her own relative, and her testimony was contradictory at times because the witness provided significant evidence pertaining to the facts of the case; her credibility was for the jury to determine, and defense counsel had ample opportunity to cross-examine her. Pina v. State, 38 S.W.3d 730, 2001 Tex. App. LEXIS 307 (Tex. App. Texarkana 2001).

Criminal Law & Procedure : Appeals : Standards of Review : De Novo Review : Motions to Suppress

29. In a suppression hearing, an officer was properly allowed to testify as to his personal knowledge of the existence of an ordinance, even though the ordinance was not admitted into evidence or judicially noticed. Olguin v.

State, 2011 Tex. App. LEXIS 8401, 2011 WL 5009793 (Tex. App. Dallas Oct. 21 2011).

30. In a hearing on a motion to suppress, an officer's purported lack of independent knowledge of events surrounding an investigative stop did not make the officer incompetent as a witness under Tex. R. Evid. 601 in part because the rules of evidence (except for those rules concerning privileges) did not apply to suppression hearings. Belcher v. State, 244 S.W.3d 531, 2007 Tex. App. LEXIS 9883 (Tex. App. Fort Worth 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

31. During the guilt-innocence phase of defendant's murder trial, the trial court erred under Tex. R. Evid. 104 in admitting evidence regarding the theft of a rifle from the store where defendant worked based on the State's proffer where although the proffer might well have identified defendant as one of several possible suspects in the theft, it fell short of providing legally sufficient evidence to allow the trier of fact to reasonably find that defendant committed the offense because, based on the proffer, the only link between defendant and the theft was that he was one of possibly 14 managers with a key to the gun locker and that he "mentioned" that the store was selling a small child's rifle; furthermore, the erroneous admission of the extraneous offense evidence had a substantial and injurious effect or influence on the jury's verdict, thereby affecting defendant's substantial rights pursuant to Tex. R. App. P. 44. Fischer v. State, 235 S.W.3d 470, 2007 Tex. App. LEXIS 8378 (Tex. App. San Antonio 2007).

Estate, Gift & Trust Law : Will Contests : Testamentary Capacity : Evidence

32. In a will contest alleging lack of testamentary capacity and undue influence, a probate court did not err in excluding the affidavits or exhibits from summary judgment evidence; a review of the record indicated the excluded items were irrelevant to the will contest or were unsworn copies of what they purported to be. In re Estate of Mask, 2008 Tex. App. LEXIS 5439 (Tex. App. San Antonio July 23 2008).

Evidence : Authentication : General Overview

33. Admission of a surveillance video recording depicting the capital murder of a cab company employee was proper because the evidence was sufficient for the trial court to determine that the testimony concerning the recording was sufficient for a reasonable jury to determine that the recording was in fact an accurate video recording of the events that occurred that morning at the cab company; two witnesses familiar with the video surveillance system testified regarding the video evidence, and the cab driver who discovered the victim also testified about the recording. Turnbull v. State, 2013 Tex. App. LEXIS 13167 (Tex. App. Austin Oct. 24 2013).

34. Trial court did not abuse it discretion when it authenticated and admitted the e-mails under Tex. R. Evid. 104 and 901 because the alleged victim's mother testified that about personally knowing defendant's e-mail address and the content of the e-mails referred to matters that only defendant and the alleged victim would know. Sennett v. State, 406 S.W.3d 661, 2013 Tex. App. LEXIS 5148 (Tex. App. Eastland Apr. 25 2013).

35. In defendant's criminal prosecution for bribery, the trial court did not abuse its discretion by admitting a letter into evidence because it contained sufficient distinctive characteristics to support a finding that defendant was the intended recipient. The authentication requirement was met because the evidence supported a finding that the letter was what its proponent claimed it to be under Tex. R. Evid. 104(b), 901(a). Watts v. State, 2012 Tex. App. LEXIS 1044, 2012 WL 403859 (Tex. App. Beaumont Feb. 8 2012).

36. In defendant's murder case, the conditional admission of handwritten letters of the victim was proper because the State did indeed authenticate the letters through the victim's daughter, who recognized the handwriting on all

three letters as being that of her mother. Stafford v. State, 248 S.W.3d 400, 2008 Tex. App. LEXIS 1280 (Tex. App. Beaumont 2008).

Evidence : Competency : General Overview

37. Nothing in the record reflected an abuse of discretion by a trial court in permitting a witness who defendant claimed was intoxicated to testify because the possibility that the witness was intoxicated at the time of trial was a factor that the jury could have considered in evaluating her credibility. Therefore, the trial court did not abuse its discretion by denying defendant's motion to strike her testimony. Horace v. State, 2012 Tex. App. LEXIS 2208, 2012 WL 983337 (Tex. App. Beaumont Mar. 21 2012).

Evidence : Competency : Affirmations & Oaths

38. Sufficiency of a witness's oath or affirmation is a preliminary question to be decided by a court pursuant to Tex. Evid. R. 104(a). The rules of evidence afford the court broad discretion in the determination of such questions. Scott v. State, 80 S.W.3d 184, 2002 Tex. App. LEXIS 4349 (Tex. App. Waco 2002).

Evidence : Documentary Evidence : Writings : General Overview

39. Trial court did not abuse it discretion when it authenticated and admitted the e-mails under Tex. R. Evid. 104 and 901 because the alleged victim's mother testified that about personally knowing defendant's e-mail address and the content of the e-mails referred to matters that only defendant and the alleged victim would know. Sennett v. State, 406 S.W.3d 661, 2013 Tex. App. LEXIS 5148 (Tex. App. Eastland Apr. 25 2013).

Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment

40. Although defendant claimed that a trial court erred in admitting the child sexual assault complainant's hearsay statements to her counselor through the medical records exception to the hearsay rule, before permitting the counselor to testify, the trial court had held a hearing under rule of Tex. R. Evid. 104 at which the State elicited testimony concerning the counselor's treatment of the complainant; the counselor testified that his eliciting of facts concerning the complainant's sexual abuse was an important part of her diagnosis and treatment, he provided a treatment-related reason for the timing of her statements, and he also testified that an important part of his work was ensuring that the complainant made truthful statements, and similar testimony had been held in other cases to support admission of child sexual abuse victim statements. Graham v. State, 2006 Tex. App. LEXIS 8063 (Tex. App. Austin Sept. 8 2006).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

41. Defendant's convictions for multiple counts of felony aggravated sexual assault were proper where the trial court did not err by denying defendant's motion to prevent the victim from testifying because the admissibility of the victim's testimony and qualification to be a witness was within the discretion of the trial court pursuant to Tex. R. Evid. 104(a). Although the identification procedure was unduly suggestive, the trial court had found that the victim's testimony was still reliable. Johnson v. State, 2004 Tex. App. LEXIS 10133 (Tex. App. Waco Nov. 10 2004).

Evidence : Hearsay : Unavailability : General Overview

42. Defendant forfeited, by his own misconduct of fatally shooting the victim during a robbery or the burglary of her home, his right to confront the victim in court under the Sixth Amendment about hearsay statements she made to police officers before she died, and therefore her statements were properly admitted into evidence. Gonzalez v. State, 195 S.W.3d 114, 2006 Tex. Crim. App. LEXIS 1129 (Tex. Crim. App. 2006).

Evidence : Privileges : Attorney-Client Privilege

43. Where defendant's cell mate was a former attorney who surrendered his license to practice law in lieu of disciplinary proceedings, he was not a "lawyer" as defined in Tex. R. Evid. 503(a)(1). The cell mate was permitted to testify that defendant had confessed to him; the trial court did not abuse its discretion under Tex. R. Evid. 104(a) by ruling that the attorney-client privilege did not apply. Salatini v. State, 2005 Tex. App. LEXIS 10664 (Tex. App. Dallas Dec. 28, 2005).

Evidence : Procedural Considerations : Curative Admissibility

44. In an aggravated assault case, extraneous conduct of theft of a firearm was properly admitted because the victim testified that defendant had showed him a pistol that defendant had stolen, and it was clear that the evidence was offered to negate defendant's theory that the victim was the first aggressor and establish that defendant intentionally attacked the victim because defendant believed that the victim had "snitched" on him. While the evidence was prejudicial, such prejudice was not unfair. White v. State, 2009 Tex. App. LEXIS 6875, 2009 WL 2914480 (Tex. App. Corpus Christi Aug. 28 2009).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

45. Defendant's convictions for multiple counts of felony aggravated sexual assault were proper where the trial court did not err by denying defendant's motion to prevent the victim from testifying because the admissibility of the victim's testimony and qualification to be a witness was within the discretion of the trial court pursuant to Tex. R. Evid. 104(a). Although the identification procedure was unduly suggestive, the trial court had found that the victim's testimony was still reliable. Johnson v. State, 2004 Tex. App. LEXIS 10133 (Tex. App. Waco Nov. 10 2004).

46. Evidence of incompetency need not be in admissible form where reliable information that meets the standards of Tex. R. Evid. 104(a) suffices, and the defendant's attorney might orally recite the specific problems he has had in communicating with his client, and the trial judge might consider the defendant's conduct or statements in court; in addition, hearsay letters or reports may be appropriately reliable evidence to consider at this stage. McDaniel v. State, 98 S.W.3d 704, 2003 Tex. Crim. App. LEXIS 45 (Tex. Crim. App. 2003).

47. Preliminary questions concerning the admissibility of evidence are to be determined by the trial court, and such determinations are committed to the trial court's discretion; the trial court's ruling on the admission or exclusion of evidence will not be disturbed unless the record clearly demonstrates an abuse of such discretion. To demonstrate an abuse of discretion, the appellant must show that the trial court acted arbitrarily and without reference to guiding principles. Pina v. State, 38 S.W.3d 730, 2001 Tex. App. LEXIS 307 (Tex. App. Texarkana 2001).

48. In defendant's capital murder trial, the testimony of a relative whom defendant referred to as his "sister" was properly admitted where she testified through an interpreter that defendant arrived at his mother's house early in the morning wearing bloody clothing and that he told his mother that he was in trouble and that he had killed the victim. The trial court did not abuse its discretion in admitting this evidence even though the witness understood little English, her testimony had to be elicited through an interpreter, she was testifying against her own relative, and her testimony was contradictory at times because the witness provided significant evidence pertaining to the facts of the case; her credibility was for the jury to determine, and defense counsel had ample opportunity to cross-examine her. Pina v. State, 38 S.W.3d 730, 2001 Tex. App. LEXIS 307 (Tex. App. Texarkana 2001).

Evidence : Procedural Considerations : Limited Admissibility

49. Trial court admitted the evidence conditionally under Tex. R. Evid. 104(b), and appellant did not renew a hearsay objection under Tex. R. Evid. 801and Tex. R. Evid. 802, and thus this issue was waived under Tex. R. App. P. 33.1(a). Watson v. Michael Haskins Photography, Inc., 2005 Tex. App. LEXIS 9838 (Tex. App. Waco Nov. 23 2005).

Evidence : Procedural Considerations : Preliminary Questions : General Overview

50. Trial court did not abuse its discretion when it excluded defendant's cross-examination question to the victim, asking whether the victim made an allegation that defendant did the same thing to his daughter, as impermissible, as defendant made an inadequate showing that the complaining witness made such an allegation and that it was false. Pierson v. State, 426 S.W.3d 763, 2014 Tex. Crim. App. LEXIS 539 (Tex. Crim. App. Apr. 9 2014).

51. Trial court admitted the evidence conditionally under Tex. R. Evid. 104(b), and appellant did not renew a hearsay objection under Tex. R. Evid. 801and Tex. R. Evid. 802, and thus this issue was waived under Tex. R. App. P. 33.1(a). Watson v. Michael Haskins Photography, Inc., 2005 Tex. App. LEXIS 9838 (Tex. App. Waco Nov. 23 2005).

52. In a dispute regarding open-space valuation of real property, there was no error in the trial court's decision to qualify the taxpayers' expert witness pursuant to Tex. R. Evid. 104(a), 702; although the expert did not have training specific to ad valorem taxation, he had substantial experience and expertise in agricultural use of land and prudent land management. Calhoun County Appraisal Review Bd. v. Stofer L.P., 2005 Tex. App. LEXIS 6629 (Tex. App. Corpus Christi Aug. 18 2005).

53. Given that under Tex. R. Evid. 104(b), before the admission of extraneous offense evidence under Tex. R. Evid. 404(b), the trial court had to be satisfied that a jury could have found that defendant committed the offense, and assuming that defendant, pursuant to Tex. R. App. P. 33.1, preserved this complaint for review by objecting below, the court rejected defendant's argument that the extraneous offenses were not proven, given the State's uncontradicted evidence. Thompson v. State, 2005 Tex. App. LEXIS 5817 (Tex. App. Dallas July 27 2005).

54. Evidence of incompetency need not be in admissible form; reliable information that meets the standards of Tex. R. Evid. 104(a) suffices. McDaniel v. State, 98 S.W.3d 704, 2003 Tex. Crim. App. LEXIS 45 (Tex. Crim. App. 2003).

55. Evidence of incompetency need not be in admissible form where reliable information that meets the standards of Tex. R. Evid. 104(a) suffices, and the defendant's attorney might orally recite the specific problems he has had in communicating with his client, and the trial judge might consider the defendant's conduct or statements in court; in addition, hearsay letters or reports may be appropriately reliable evidence to consider at this stage. McDaniel v. State, 98 S.W.3d 704, 2003 Tex. Crim. App. LEXIS 45 (Tex. Crim. App. 2003).

56. Court erred, in parental rights termination case, by admitting expert testimony regarding the mother's ability to parent, where the State proffered only the testimony of the expert to establish the reliability of his methodology, and the expert offered no specific, independent sources to support the reliability of his methodology. In re J.B., 93 S.W.3d 609, 2002 Tex. App. LEXIS 8505 (Tex. App. Waco 2002).

57. Suppression hearings involve determination of preliminary matters of admissibility, so the rules of evidence, except those governing privilege, do not apply. This interpretation is consistent with the reading of the federal counterpart to Tex. R. Evid. 104(a). Granados v. State, 85 S.W.3d 217, 2002 Tex. Crim. App. LEXIS 99 (Tex. Crim. App. 2002), *cert. denied*, 549 U.S. 1081, 127 S. Ct. 732, 166 L. Ed. 2d 568, 2006 U.S. LEXIS 9310 (2006).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview

58. Although a picture of a text message sent to a sexual assault victim might have been insufficient for authentication purposes, the evidence was proffered in such a way that, in combination with other evidence, it was sufficient for a jury to reasonably believe the text message was sent by defendant; hence, the trial court properly admitted the evidence. Aekins v. State, 2013 Tex. App. LEXIS 13694, 2013 WL 5948188 (Tex. App. San Antonio Nov. 6 2013).

59. In a driving while intoxicated case, a trial court did not err by amending a pretrial suppression order that suppressed all evidence because a pretrial ruling on such was interlocutory and subject to reconsideration and revision during trial, just as any other ruling on the admissibility of evidence. The trial court was able to reconsider and change the pretrial order at any time during the course of the trial. Mince v. State, 2013 Tex. App. LEXIS 8771 (Tex. App. San Antonio July 17 2013).

60. For purposes of Tex. R. Evid. 901, the content of Facebook messages purported to be messages that were sent from an account with appellant's name to an account with the victim's name, and although this alone was insufficient to authenticate that appellant was the author of the messages, when combined with other evidence that was circumstantial, the record might support a finding that appellant authored and sent the messages, and thus the court examined whether the other evidence supported the ruling that admitted the Facebook messages. Campbell v. State, 382 S.W.3d 545, 2012 Tex. App. LEXIS 7684 (Tex. App. Austin Aug. 31 2012).

61. Trial court "may," but is not required to, resolve a motion to suppress evidence in a pretrial hearing under Tex. Code Crim. Proc. Ann. art. 28.01, and a pretrial ruling on such a motion is interlocutory in nature, and as such, it should be regarded as just as much the subject of reconsideration and revision as any other ruling on the admissibility of evidence under Tex. R. Evid. 104, which a trial court may revisit at its discretion at any time during the course of a trial; to the extent that Tex. Code Crim. Proc. Ann. art. 36.02 may be said to circumscribe a trial court's authority to reopen a hearing on a motion suppress, it should be construed according to its terms, and Article 36.02 restricts the trial court's discretion to reopen a hearing on a motion to suppress only to the extent that it prohibits further evidence of any kind once the parties have concluded their arguments of the cause, that is to say, the trial itself. This conclusion is bolstered by case law from other jurisdictions that have concluded that a trial court retains the authority to reopen a suppression hearing and revisit its pretrial ruling thereon during the course of trial. Black v. State, 362 S.W.3d 626, 2012 Tex. Crim. App. LEXIS 357 (Tex. Crim. App. 2012).

62. Tex. R. Evid. 104(b) clearly contemplates that the trial court may be required to revisit the question of the admissibility of certain evidence long after it has declared that evidence at least contingently admissible; the court sees no reason why a trial court should lack the authority likewise to revisit a preliminary determination with respect to the admissibility of evidence under Rule 104(a), if requested to do so for sufficient cause by one of the parties, at its discretion, of course, and subject to Tex. Code Crim. Proc. Ann. art. 36.02. Black v. State, 362 S.W.3d 626, 2012 Tex. Crim. App. LEXIS 357 (Tex. Crim. App. 2012).

63. Court properly admitted the contents of social networking web pages because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be -- web pages the contents of which defendant was responsible for. There were numerous photographs of defendant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring, and there was a reference to the victim's death and the music from his funeral. Tienda v. State, 358 S.W.3d 633, 2012 Tex. Crim. App. LEXIS 244 (Tex. Crim. App. 2012).

64. In defendant's criminal prosecution for bribery, the trial court did not abuse its discretion by admitting a letter into evidence because it contained sufficient distinctive characteristics to support a finding that defendant was the

intended recipient. The authentication requirement was met because the evidence supported a finding that the letter was what its proponent claimed it to be under Tex. R. Evid. 104(b), 901(a). Watts v. State, 2012 Tex. App. LEXIS 1044, 2012 WL 403859 (Tex. App. Beaumont Feb. 8 2012).

65. In a murder case, the court did not err by refusing to allow defendant to make his objections regarding an extraneous firebombing outside of the presence of the jury because, in his objection on the record, defendant did not refer to a firebomb or what specific testimony he believed to be forthcoming to which he objected. Additionally, the jury was instructed in the charge that they were only to consider any extraneous offenses if the State had proved them beyond a reasonable doubt. Asberry v. State, 2009 Tex. App. LEXIS 8512 (Tex. App. Waco Nov. 4 2009).

66. Court properly relied upon an officer's unsworn hearsay document at defendant's suppression hearing because, although it was better practice to produce the witness or attach the documentary evidence to an affidavit, Tex. Code Crim. Proc. Ann. art. 28.01, § 1(6) did not create a "best evidence" rule that mandated such a procedure in a motion to suppress hearing. The offense report included defendant's name, correct offense date, and specific information that coincided with the same basic information to which defendant testified at the hearing, and defendant did not argue that the offense report was, in any way, unauthentic, inaccurate, unreliable, or lacking in credibility. Ford v. State, 305 S.W.3d 530, 2009 Tex. Crim. App. LEXIS 1440 (Tex. Crim. App. 2009).

67. In defendant's capital murder case, the court properly denied defendant's witness's testimony relating to the field of false confessions because the witness's testimony could not have assisted the jury in understanding the evidence or in making a determination of a fact issue. He did not intend to offer an opinion as to the truth or falsity of defendant's confession, and during cross-examination defendant admitted the truth of the portions of his confession that he earlier claimed were inaccurate. Munoz v. State, 2009 Tex. App. LEXIS 6475, 2009 WL 2517664 (Tex. App. El Paso Aug. 19 2009).

68. Decision of the trial court to admit the extraneous-offense evidence regarding defendant's drug sales was within the zone of reasonable disagreement and the trial court did not abuse its discretion in admitting same, and it was noted that extraneous offense evidence could not be considered by the jury unless there was sufficient evidence to support a finding that defendant committed the offense beyond a reasonable doubt, for purposes of Tex. R. Evid. 104(b); the State claimed that evidence of defendant's sale of drugs was admissible as his motive to conspire to have the victim killed and motive was one of the possible bases for admission of extraneous offense evidence under Tex. R. Evid. 404(b). Toliver v. State, 279 S.W.3d 391, 2009 Tex. App. LEXIS 345 (Tex. App. Texarkana Jan. 21 2009).

69. In defendant's murder case, the conditional admission of handwritten letters of the victim was proper because the State did indeed authenticate the letters through the victim's daughter, who recognized the handwriting on all three letters as being that of her mother. Stafford v. State, 248 S.W.3d 400, 2008 Tex. App. LEXIS 1280 (Tex. App. Beaumont 2008).

70. In defendant's trial for capital murder, a trial court did not err in admitting evidence; there was sufficient evidence to support the jury's finding that defendant wrote a letter and an envelope that was sent from the jail and returned to defendant for insufficient postage; the documents had sufficient internal characteristics to authenticate the evidence. Druery v. State, 225 S.W.3d 491, 2007 Tex. Crim. App. LEXIS 392 (Tex. Crim. App. 2007), *cert. denied*, 132 S. Ct. 1550, 182 L. Ed. 2d 180, 2012 U.S. LEXIS 1267 (U.S. 2012).

71. Where defendant was charged with aggravated robbery based on his involvement in a gang-style offense with two other men, the trial court did not err in admitting into evidence an extraneous robbery that was committed by two or three Hispanic men; the facts of the robberies were similar, and personal documents taken during the

extraneous robbery were found in defendant's apartment; as required by Tex. R. Evid. 104, the trial court made the requisite threshold determination that a jury could reasonably find beyond a reasonable doubt that defendant committed the extraneous robbery. Gonzalez v. State, 2007 Tex. App. LEXIS 2318 (Tex. App. Dallas Mar. 26 2007).

72. Pursuant to Tex. R. Evid. 104(a), the trial court was entitled to admit a witness's lay opinion testimony at the preliminary hearing without the predicate of Tex. R. Evid. 701 being met. Denton v. State, 2007 Tex. App. LEXIS 1706 (Tex. App. Tyler Mar. 7 2007).

73. Although defendant claimed that a trial court erred in admitting the child sexual assault complainant's hearsay statements to her counselor through the medical records exception to the hearsay rule, before permitting the counselor to testify, the trial court had held a hearing under rule of Tex. R. Evid. 104 at which the State elicited testimony concerning the counselor's treatment of the complainant; the counselor testified that his eliciting of facts concerning the complainant's sexual abuse was an important part of her diagnosis and treatment, he provided a treatment-related reason for the timing of her statements, and he also testified that an important part of his work was ensuring that the complainant made truthful statements, and similar testimony had been held in other cases to support admission of child sexual abuse victim statements. Graham v. State, 2006 Tex. App. LEXIS 8063 (Tex. App. Austin Sept. 8 2006).

74. To the extent that defendant contended that the trial court erred by failing to conduct a preliminary hearing outside the jury's presence concerning extraneous offense evidence the State intended to offer, the court overruled the complaint; there was no requirement that the initial determination -- that a jury could reasonably find beyond a reasonable doubt that a defendant committed extraneous offenses -- be made following a hearing as opposed to some other form of preliminary review. Hernandez v. State, 2006 Tex. App. LEXIS 4834 (Tex. App. San Antonio June 7 2006).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Existence of Privileges

75. Testimony was insufficient to show that the woman was defendant's common law wife, because the couple did not have a joint bank account, and the woman had last filed her income tax return as a single person. Ward v. State, 2010 Tex. App. LEXIS 2405, 2010 WL 1266777 (Tex. App. Amarillo Mar. 31 2010).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Witness Qualifications

76. There was no abuse of discretion by excluding the expert's testimony regarding alleged marketing or design defects in the automatic external defibrillator or its battery, because the expert did not test the actual device or battery involved and did not express specific expertise regarding automatic external defibrillators and batteries. Schronk v. Laerdal Med. Corp., 2013 Tex. App. LEXIS 9916 (Tex. App. Waco Aug. 8 2013).

77. Evidence was insufficient to defeat no-evidence motion for summary judgment, because the expert's opinions were not reliable, were conclusory and speculative, and the expert was not qualified to render such opinions; the expert's opinions relied extensively on one published article, which did nothing more than conclude that darker shoes would become hotter than lighter shoes when exposed to sun light, and the expert failed to provide testimony regarding the temperature at which to expect blisters to form on the claimant's feet. Davis v. Aetrex Worldwide, Inc., 392 S.W.3d 213, 2012 Tex. App. LEXIS 9845, CCH Prod. Liab. Rep. P18967, 2012 WL 5969621 (Tex. App. Amarillo Nov. 29 2012).

78. In a child sexual abuse case, the trial court did not abuse its discretion under Tex. R. Evid. 104(a) in finding that a forensic interviewer who videotaped an interview with the victim testified as a lay witness under Tex. R. Evid. 701 by describing the events she personally observed. Because the witness did not testify as an expert under Tex. R. Evid. 702, notice was not required under Tex. Code Crim. Proc. Ann. art. 39.14(b), and there was no need to lay an expert predicate. Flood v. State, 2011 Tex. App. LEXIS 5409, 2011 WL 2732608 (Tex. App. Corpus Christi July 14 2011).

79. In a proceeding to civilly commit appellant as a sexually violent predator, the court did not err under Tex. R. Evid. 104(a) in admitting testimony from the State's experts, a psychologist and a psychiatrist, because their opinions were reliable and adequately tied to relevant facts; they diagnosed appellant with paraphilia, polysubstance dependence, and personality disorder with antisocial features. In re Polk, 2011 Tex. App. LEXIS 1323, 2011 WL 662928 (Tex. App. Beaumont Feb. 24 2011).

80. Under the court's standard of review, the court assumed that the trial court was operating from the best vantage point to interpret the situation as to whether a witness was confused by the phrasing of a question, for purposes of Tex. R. Evid. 104(a). Garcia v. State, 2010 Tex. App. LEXIS 8834, 2010 WL 4361885 (Tex. App. Corpus Christi Nov. 4 2010).

81. In defendant's trial for injury to a child, the court did not err under Tex. R. Evid. 104(a) in excluding the testimony of defendant's expert witness regarding the mother's interaction and bonding with the child because defendant wholly failed to establish that the witness was an expert on the subject matter upon which the witness was called to testify. Esch v. State, 2010 Tex. App. LEXIS 8220, 2010 WL 3981924 (Tex. App. Amarillo Oct. 12 2010).

82. Express ruling on a company's expert objections to the methodology, technique, or foundational data was required to exclude as unreliable the treating oncologist's causation opinion; considered with notice and opportunity-to-be-heard principles, the two proceedings, a challenge under Tex. R. Evid. 104(a) and a no-evidence motion for summary judgment, had to be separate under the circumstances of this case, and the court was not to consider the company's reliability objections as implicitly sustained by the trial court. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

83. By conducting a separate E.I. du Pont de Nemours & Co. v. Robinson hearing before considering a no-evidence motion for summary judgment, the trial court applies the process applicable to each hearing, provides the parties notice and an opportunity to present the best available evidence, and provides the appellate court with a full record for review, and that process was required in this case. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

84. Process missing from the record and necessary in this case was a hearing under Tex. R. Evid. 104(a), and without an express ruling that the treating oncologist's causation opinion was unreliable, however, the treating oncologist's affidavit remained part of the summary judgment proof and provided some evidence to defeat the no-evidence motion on causation; if the trial court decided the affidavit had to be stricken because of unreliable data or for some other reason, the trial court might then decide whether to grant the no-evidence summary judgment, or order a continuance, and the court reversed the judgment against the company. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

85. Ruling sustaining a company's objections to the oncologist's causation opinion was not implicit in the trial court's ruling on the motion for summary judgment; a contrary conclusion, that the trial court implicitly sustained the company's objections and found the causation affidavit unreliable and inadmissible, would arguably require that two standards of review be applied, but without a record of the Tex. R. Evid. 104(a) determination, and the court applied

the summary judgment standard in this appeal. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

86. If the trial court did not abuse its discretion in implicitly sustaining the expert evidence challenge, there would be no affidavit by the treating oncologist to consider and no causation evidence in response to the no-evidence motion, and practically this approach would reduce the summary judgment appellate review standard to an abuse of discretion standard whenever case-determinative objections, coupled with a no-evidence motion, were considered implicitly sustained by the granting of summary judgment; whether or not the trial court abused its discretion in sustaining the objections would be determinative on appeal of whether the summary judgment had to be reversed or affirmed. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

87. Fusion of review standards cannot be avoided simply by requiring an express ruling on the E.I. du Pont de Nemours & Co. v. Robinson challenge, along with a ruling on the no-evidence summary judgment motion, but an express Tex. R. Evid. 104(a) determination does clarify the process followed in the trial court, and notifies the nonmovant that the expert's opinion is ruled inadmissible before summary judgment is granted; because Tex. R. Evid. 705(a) allows the expert to express an opinion without first introducing the underlying facts or data, unless the court requires the disclosure, an express ruling notifies the nonmovant of that ruling as well and permits an opportunity to comply with the ruling. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

88. In a hearing on a motion to suppress, an officer's purported lack of independent knowledge of events surrounding an investigative stop did not make the officer incompetent as a witness under Tex. R. Evid. 601 in part because the rules of evidence (except for those rules concerning privileges) did not apply to suppression hearings. Belcher v. State, 244 S.W.3d 531, 2007 Tex. App. LEXIS 9883 (Tex. App. Fort Worth 2007).

89. In a criminal prosecution for aggravated sexual assault, the trial court did not abuse its discretion by admitting opinion testimony from a pediatrician; the testimony the witness gave regarding her qualifications, experience, and education all went to her status as an expert for purposes of Tex. R. Evid. 104; no express words were required to offer the expert; the defense never objected that she was unqualified or that the subject matter of her testimony was inappropriate for expert testimony. Degollado v. State, 2007 Tex. App. LEXIS 6032 (Tex. App. San Antonio Aug. 1 2007).

Evidence : Procedural Considerations : Preliminary Questions : Conditional Admissions

90. Trial court did not err under Tex. R. Evid. 104(b) in admitting letters that defendant purportedly wrote to a district attorney and an assistant district attorney because the trial court recalled a detective who interviewed defendant to testify; the detective testified that the two letters appeared to be in the same handwriting as on a warning form that defendant signed. Woodall v. State, 376 S.W.3d 122, 2012 Tex. App. LEXIS 6245 (Tex. App. Texarkana July 31 2012).

91. Although the State had not elicited testimony connecting appellant to another armed robbery when the State offered certain evidence, the State later offered evidence through other testimony, from which the jury could have found that appellant committed that robbery; evidence was not to be excluded merely because its relevance might depend on other evidence being produced later in the trial, for purposes of Tex. R. Evid. 104(b), and the court saw no reason why this standard should not have applied when the trial court made its admissibility finding of the extraneous evidence at punishment, especially given that the trial court had the chance to reconsider the same evidence when appellant objected. To the extent appellant argued that the extraneous evidence was irrelevant, the court found no abuse of discretion. Bryant v. State, 2012 Tex. App. LEXIS 479, 2012 WL 171243 (Tex. App. Fort

Worth Jan. 19 2012).

92. In a driving while intoxicated case, evidence of defendant's use of prescription medications was not relevant because there was no evidence as to the dosage, the exact times of ingestion, or the half-life of the drug; a lay juror was not in a position to determine whether the drugs, taken more than 12 hours before arrest, would have any effect on defendant's intoxication. Without expert testimony to provide the foundation required to admit scientific evidence, the testimony regarding defendant's use of prescription medications was not relevant. Layton v. State, 280 S.W.3d 235, 2009 Tex. Crim. App. LEXIS 149 (Tex. Crim. App. 2009).

93. Defendant's conviction for the murder of defendant's aunt was overturned and a new trial was ordered where the trial court erred under Tex. R. Evid. 104 in admitting extraneous offense evidence relating to the theft of a rifle from a store where defendant worked; the erroneous admission of the extraneous offense evidence had a substantial and injurious effect on the jury's verdict and was reversible error under Tex. R. App. P. 44. Fischer v. State, 2007 Tex. App. LEXIS 7220 (Tex. App. San Antonio Sept. 5 2007).

Evidence : Procedural Considerations : Preliminary Questions : Hearings Out of Jury's Presence

94. Court did not err by not allowing defendant to question two witnesses outside the presence of the jury to demonstrate that a witness knowingly violated the motion in limine, because the court reviewed the records relating to defendant's registration as a sex offender and knew that even with this evidence it would not grant a mistrial. Brownlee v. State, 2010 Tex. App. LEXIS 3679 (Tex. App. Eastland May 13 2010).

Evidence : Procedural Considerations : Preliminary Questions : Testimony by Accused

95. In a case of solicitation of capital murder, Tex. R. Evid. 104 did not bar the State from inquiring into defendant's theories of defense at a severance hearing. Benavides v. State, 2007 Tex. App. LEXIS 2691 (Tex. App. Austin Apr. 5 2007).

Evidence : Procedural Considerations : Preliminary Questions : Weight & Credibility of Evidence

96. During the guilt-innocence phase of defendant's murder trial, the trial court erred under Tex. R. Evid. 104 in admitting evidence regarding the theft of a rifle from the store where defendant worked based on the State's proffer where although the proffer might well have identified defendant as one of several possible suspects in the theft, it fell short of providing legally sufficient evidence to allow the trier of fact to reasonably find that defendant committed the offense because, based on the proffer, the only link between defendant and the theft was that he was one of possibly 14 managers with a key to the gun locker and that he "mentioned" that the store was selling a small child's rifle; furthermore, the erroneous admission of the extraneous offense evidence had a substantial and injurious effect or influence on the jury's verdict, thereby affecting defendant's substantial rights pursuant to Tex. R. App. P. 44. Fischer v. State, 235 S.W.3d 470, 2007 Tex. App. LEXIS 8378 (Tex. App. San Antonio 2007).

Evidence : Procedural Considerations : Rule Application & Interpretation

97. At the hearing on defendant's motion to suppress intoxilyzer results, the trial court was not prohibited from admitting unsworn police reports offered by the State detailing defendant's arrest for driving while intoxicated. The rules of evidence do not apply in suppression hearings. Caballero v. State, 2005 Tex. App. LEXIS 1865 (Tex. App. El Paso Mar. 10 2005).

Evidence : Procedural Considerations : Rulings on Evidence

98. Although the power to disregard the rules of evidence exists, nothing in the language of the rule compels the trial to exercise that power; appellant did not show that an application of the rules of evidence during the pre-trial hearing in his case constituted an abuse of discretion. Baldree v. State, 248 S.W.3d 224, 2007 Tex. App. LEXIS 5057 (Tex. App. Houston 1st Dist. 2007).

99. Defendant forfeited, by his own misconduct of fatally shooting the victim during a robbery or the burglary of her home, his right to confront the victim in court under the Sixth Amendment about hearsay statements she made to police officers before she died, and therefore her statements were properly admitted into evidence. Gonzalez v. State, 195 S.W.3d 114, 2006 Tex. Crim. App. LEXIS 1129 (Tex. Crim. App. 2006).

100. Where defendant's cell mate was a former attorney who surrendered his license to practice law in lieu of disciplinary proceedings, he was not a "lawyer" as defined in Tex. R. Evid. 503(a)(1). The cell mate was permitted to testify that defendant had confessed to him; the trial court did not abuse its discretion under Tex. R. Evid. 104(a) by ruling that the attorney-client privilege did not apply. Salatini v. State, 2005 Tex. App. LEXIS 10664 (Tex. App. Dallas Dec. 28, 2005).

101. At the hearing on defendant's motion to suppress intoxilyzer results, the trial court was not prohibited from admitting unsworn police reports offered by the State detailing defendant's arrest for driving while intoxicated. The rules of evidence do not apply in suppression hearings. Caballero v. State, 2005 Tex. App. LEXIS 1865 (Tex. App. El Paso Mar. 10 2005).

Evidence : Procedural Considerations : Weight & Sufficiency

102. Admission of a surveillance video recording depicting the capital murder of a cab company employee was proper because the evidence was sufficient for the trial court to determine that the testimony concerning the recording was sufficient for a reasonable jury to determine that the recording was in fact an accurate video recording of the events that occurred that morning at the cab company; two witnesses familiar with the video surveillance system testified regarding the video evidence, and the cab driver who discovered the victim also testified about the recording. Turnbull v. State, 2013 Tex. App. LEXIS 13167 (Tex. App. Austin Oct. 24 2013).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

103. Evidence was sufficient to support a finding that an extraneous offense occurred, specifically that defendant parent failed to report that there might have been abuse of the child years before the charged offense, because the child testified that she told defendant about the prior inappropriate sexual activity by the same abuser and that nothing happened because defendant did not tell authorities. Cannell v. State, 2013 Tex. App. LEXIS 15299, 2013 WL 6729857 (Tex. App. Houston 1st Dist. Dec. 19 2013).

104. In an aggravated assault case, extraneous conduct of theft of a firearm was properly admitted because the victim testified that defendant had showed him a pistol that defendant had stolen, and it was clear that the evidence was offered to negate defendant's theory that the victim was the first aggressor and establish that defendant intentionally attacked the victim because defendant believed that the victim had "snitched" on him. While the evidence was prejudicial, such prejudice was not unfair. White v. State, 2009 Tex. App. LEXIS 6875, 2009 WL 2914480 (Tex. App. Corpus Christi Aug. 28 2009).

105. Where defendant was charged with aggravated robbery based on his involvement in a gang-style offense with two other men, the trial court did not err in admitting into evidence an extraneous robbery that was committed by two or three Hispanic men; the facts of the robberies were similar, and personal documents taken during the extraneous robbery were found in defendant's apartment; as required by Tex. R. Evid. 104, the trial court made the

requisite threshold determination that a jury could reasonably find beyond a reasonable doubt that defendant committed the extraneous robbery. Gonzalez v. State, 2007 Tex. App. LEXIS 2318 (Tex. App. Dallas Mar. 26 2007).

Evidence : Relevance : Relevant Evidence

106. In defendant's murder case, the court did not err in admitting evidence that she stole insulin from a hospital because the issue was whether a reasonable jury could have found that she had knowledge of insulin and access to it within a reasonable time before the victim's death. Defendant had a key to a locked medication room, defendant had "working knowledge" of insulin and its effects, and defendant worked in an area where over seventy percent of the patients were in need of regular insulin injections. Hannah v. State, 2008 Tex. App. LEXIS 6361 (Tex. App. Corpus Christi Aug. 21, 2008).

107. In defendant's murder case, the court did not err in admitting evidence of defendant's link to another person's death and the theft of her ring because a reasonable jury could have found that defendant was culpable in the death. A jury could have inferred that defendant most likely killed the other victim by injecting her with an overdose of insulin and then expedited her plan by forging the victim's signature on a do not resuscitate order and urging other nurses to stay away. Hannah v. State, 2008 Tex. App. LEXIS 6361 (Tex. App. Corpus Christi Aug. 21, 2008).

108. In a will contest alleging lack of testamentary capacity and undue influence, a probate court did not err in excluding the affidavits or exhibits from summary judgment evidence; a review of the record indicated the excluded items were irrelevant to the will contest or were unsworn copies of what they purported to be. In re Estate of Mask, 2008 Tex. App. LEXIS 5439 (Tex. App. San Antonio July 23 2008).

109. If the jury believed from the evidence presented that petitioner state death row inmate was a sexual sadist, and if it understood that non-consensual anal intercourse was an act of criminal violence, then the expert's testimony -- that sexual sadists prefer to commit anal rape, have high recidivism rates, and do not respond well to treatment -- made more likely the proposition that there was a probability that the inmate would commit acts of criminal violence that would constitute a continuing threat to society, and because the testimony was highly relevant under Tex. R. Evid. 104(b), its relevance was not substantially outweighed by its prejudicial effect. Wyatt v. Dretke, 2003 U.S. Dist. LEXIS 26997 (E.D. Tex. Dec. 3 2003).

Evidence : Testimony : Credibility : Impeachment : General Overview

110. Trial court did not abuse its discretion by excluding evidence concerning the victim's alleged recantation because due to the dissimilarity of the sexual abuse and the physical abuse that she allegedly recanted, the evidence could be deemed a collateral matter which was not permitted to be used to impeach and defendant failed to show an exception to that rule. Hosey v. State, 2014 Tex. App. LEXIS 7876, 2014 WL 3621796 (Tex. App. Texarkana July 23 2014).

Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview

111. Tex. R. Evid. 104(a) afforded the trial court broad discretion in determining admissibility; thus, under Rule 104(a) the trial court could consider the NCIC report in determining the admissibility of defendant's prior conviction, and the trial court did not abuse its discretion in considering the NCIC report to determine whether defendant's prior conviction was admissible under Tex. R. Evid. 609. Gay v. State, 2004 Tex. App. LEXIS 5448 (Tex. App. Dallas June 18 2004).

Evidence : Testimony : Experts : General Overview

112. In a driving while intoxicated case, evidence of defendant's use of prescription medications was not relevant because there was no evidence as to the dosage, the exact times of ingestion, or the half-life of the drug; a lay juror was not in a position to determine whether the drugs, taken more than 12 hours before arrest, would have any effect on defendant's intoxication. Without expert testimony to provide the foundation required to admit scientific evidence, the testimony regarding defendant's use of prescription medications was not relevant. Layton v. State, 280 S.W.3d 235, 2009 Tex. Crim. App. LEXIS 149 (Tex. Crim. App. 2009).

113. In a dispute regarding open-space valuation of real property, there was no error in the trial court's decision to qualify the taxpayers' expert witness pursuant to Tex. R. Evid. 104(a), 702; although the expert did not have training specific to ad valorem taxation, he had substantial experience and expertise in agricultural use of land and prudent land management. Calhoun County Appraisal Review Bd. v. Stofer L.P., 2005 Tex. App. LEXIS 6629 (Tex. App. Corpus Christi Aug. 18 2005).

114. Appellate court overruled defendant's argument that the trial court erred in allowing the witness to answer because she did not have the expertise to testify as to whether the victim's condition would improve because the witness did not testify to her opinion about the victim's prospects for improvement, but rather she testified to what the doctors had told her. Cushing v. State, 2005 Tex. App. LEXIS 5699 (Tex. App. Waco July 20 2005).

115. Appellate court overruled defendant's complaint that the State asked the officer whether an appearance of confusion, not knowing the time, and having time lapses could be an indication of someone trying to be deceptive, because defendant failed to demonstrate that he was harmed by the testimony about which he complained. Cushing v. State, 2005 Tex. App. LEXIS 5699 (Tex. App. Waco July 20 2005).

116. If the jury believed from the evidence presented that petitioner state death row inmate was a sexual sadist, and if it understood that non-consensual anal intercourse was an act of criminal violence, then the expert's testimony -- that sexual sadists prefer to commit anal rape, have high recidivism rates, and do not respond well to treatment -- made more likely the proposition that there was a probability that the inmate would commit acts of criminal violence that would constitute a continuing threat to society, and because the testimony was highly relevant under Tex. R. Evid. 104(b), its relevance was not substantially outweighed by its prejudicial effect. Wyatt v. Dretke, 2003 U.S. Dist. LEXIS 26997 (E.D. Tex. Dec. 3 2003).

117. Court erred, in parental rights termination case, by admitting expert testimony regarding the mother's ability to parent where the State proffered only the testimony of the expert to establish the reliability of his methodology, and the expert offered no specific, independent sources to support the reliability of his methodology. In re J.B., 93 S.W.3d 609, 2002 Tex. App. LEXIS 8505 (Tex. App. Waco 2002).

118. Court erred, in parental rights termination case, by admitting expert testimony regarding the mother's ability to parent, where the State proffered only the testimony of the expert to establish the reliability of his methodology, and the expert offered no specific, independent sources to support the reliability of his methodology. In re J.B., 93 S.W.3d 609, 2002 Tex. App. LEXIS 8505 (Tex. App. Waco 2002).

Evidence : Testimony : Experts : Admissibility

119. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

120. Trial court did not abuse its discretion during defendant's trial for aggravated assault and endangering a child in permitting a State witness to testify as an expert witness where the witness's expertise fit with the subject matter at issue, which was whether the damages to the victims' vehicles were consistent with their accounts of how the damage occurred. The witness had seventeen years of experience in the automotive industry and thirteen years of experience as an estimator for damaged vehicles, and his testimony did not involve a complex subject, but rather consisted of matching up paint transfer and damages to the victims' vehicles with damages to defendant's truck. Ibarra v. State, 2013 Tex. App. LEXIS 169, 2013 WL 123705 (Tex. App. Corpus Christi Jan. 10 2013).

121. Trial court abused its discretion by allowing the arresting officer to testify regarding his opinion on defendant's prescription medications in conjunction with his ultimate opinion on defendant's intoxication because the officer's testimony was neither relevant nor reliable and the officer was not qualified to offer such detailed testimony as required by Tex. R. Evid. 702;.the officer conceded that he was not certified by the police department as a drug-recognition expert, he did not conduct the standard 12-step examination that would have been conducted by a drug-recognition expert, he did not contact such an expert after defendant refused a breath test, and the officer's testimony did not reveal that he had expert knowledge about the medications that defendant had taken or their effects. The error was not harmless because the officer's extensive testimony about defendant's prescription medications was unreliable and the testimony was constituted a substantial part of the State's case. Delane v. State, 369 S.W.3d 412, 2012 Tex. App. LEXIS 905, 2012 WL 340234 (Tex. App. Houston 1st Dist. Feb. 2 2012).

122. In defendant's capital murder case, the court properly denied defendant's witness's testimony relating to the field of false confessions because the witness's testimony could not have assisted the jury in understanding the evidence or in making a determination of a fact issue. He did not intend to offer an opinion as to the truth or falsity of defendant's confession, and during cross-examination defendant admitted the truth of the portions of his confession that he earlier claimed were inaccurate. Munoz v. State, 2009 Tex. App. LEXIS 6475, 2009 WL 2517664 (Tex. App. El Paso Aug. 19 2009).

123. In a criminal prosecution for aggravated sexual assault, the trial court did not abuse its discretion by admitting opinion testimony from a pediatrician; the testimony the witness gave regarding her qualifications, experience, and education all went to her status as an expert for purposes of Tex. R. Evid. 104; no express words were required to offer the expert; the defense never objected that she was unqualified or that the subject matter of her testimony was inappropriate for expert testimony. Degollado v. State, 2007 Tex. App. LEXIS 6032 (Tex. App. San Antonio Aug. 1 2007).

124. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

Evidence : Testimony : Experts : Criminal Trials

125. Trial court did not abuse its discretion during defendant's trial for aggravated assault and endangering a child in permitting a State witness to testify as an expert witness where the witness's expertise fit with the subject matter at issue, which was whether the damages to the victims' vehicles were consistent with their accounts of how the damage occurred. The witness had seventeen years of experience in the automotive industry and thirteen years of experience as an estimator for damaged vehicles, and his testimony did not involve a complex subject, but rather consisted of matching up paint transfer and damages to the victims' vehicles with damages to defendant's truck. Ibarra v. State, 2013 Tex. App. LEXIS 169, 2013 WL 123705 (Tex. App. Corpus Christi Jan. 10 2013).

126. In a case in which defendant was convicted of aggravated sexual assault of a child, the trial court did not err by admitting a pediatrician's testimony where: (1) the pediatrician, a specialist in child maltreatment, had published research in the area of maltreatment, particularly in the area of child abuse; (2) the pediatrician had personally examined over one thousand children and was considered an expert in the area of sexual abuse; and (3) the pediatrician's ten-page curriculum vitae, which was admitted into evidence without objection, reflected her extensive training, skills, education, experience, and publications in the area of child sexual abuse. The prosecutor specifically requested the pediatrician's opinion based on her training and experience, as well as her examinations of children who had made a delayed outcry, for an opinion on why sexually abused children might delay outcry, which did not require a greater or more specific degree of expertise in the psychology or sociology of sexually abused children than possessed by the pediatrician, and the pediatrician's testimony would assist the jury in understanding why children might delay reporting sexual abuse. Salinas v. State, 2009 Tex. App. LEXIS 7828, 2009 WL 3210941 (Tex. App. Houston 14th Dist. Oct. 8 2009).

127. In a case in which defendant was convicted of intentionally causing serious bodily injury to his stepson, causing his death, and intentionally or knowingly concealing the body, the trial court did not err by completely excluding the testimony of a defense expert pathologist who was board certified in both clinical and anatomical pathology, but was not a forensic pathologist, where the trial court could have reasonably concluded that the defense did not demonstrate that the pathologist was sufficiently qualified in the sub-speciality of forensic pathology and that his methodology, without accessing or viewing the corpse, was not scientifically reliable; defendant did not demonstrate to the trial court that the pathologist had any experience with strangulations or decomposed bodies. Crunk v. State, 2009 Tex. App. LEXIS 7329, 2009 WL 2973474 (Tex. App. Corpus Christi Sept. 17 2009).

Evidence : Testimony : Experts : Daubert Standard

128. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

Evidence : Testimony : Experts : Helpfulness

129. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

Evidence : Testimony : Experts : Qualifications

130. Evidence was insufficient to defeat no-evidence motion for summary judgment, because the expert's opinions were not reliable, were conclusory and speculative, and the expert was not qualified to render such opinions; the expert's opinions relied extensively on one published article, which did nothing more than conclude that darker shoes would become hotter than lighter shoes when exposed to sun light, and the expert failed to provide testimony regarding the temperature at which to expect blisters to form on the claimant's feet. Davis v. Aetrex Worldwide, Inc., 392 S.W.3d 213, 2012 Tex. App. LEXIS 9845, CCH Prod. Liab. Rep. P18967, 2012 WL 5969621 (Tex. App. Amarillo Nov. 29 2012).

131. In a case involving sexual assault of a child, a trial court did not err by admitting expert testimony; even though there was no explicit ruling made on a doctor's qualifications, an implicit ruling was made since defendant's

predicate objection was overruled. The trial court did not err by finding that the doctor was qualified based on her knowledge, training, skill, experience, and education; inter alia, the doctor testified that she had performed about 8,500 sexual abuse examinations. Little v. State, 2009 Tex. App. LEXIS 7091, 2009 WL 2882932 (Tex. App. San Antonio Sept. 9 2009).

132. In a workers' compensation action regarding an employee's impairment rating, the trial court properly admitted testimony from the physician appointed to evaluate the employee on behalf of the employer under Tex. R. Evid. 104(a); although the doctor's orthopedic training was in Canada, the doctor was licensed and practiced in Texas, and had been approved as a designated doctor by the Texas Workers' Compensation Commission. Barrigan v. MHMR Servs., 2007 Tex. App. LEXIS 43 (Tex. App. Austin Jan. 4 2007).

133. As a pathologist, a doctor, who was an expert witness for the State, could reliably base her opinion concerning bone fractures upon her examination, background, studies, and experience with the tensile strength of pediatric bones, particularly ribs, and the amount of force necessary to break a two and a half year old child's ribs; thus, there was no merit to the argument that a forensic pathologist needed to have a sub speciality in merry-go-round accidents or stair falls in order to testify to the pathological consequences of that type of a fall; accordingly, in a termination of parental rights case, the doctor's testimony regarding the deceased daughter's injuries was admissible. In re J.L., 2006 Tex. App. LEXIS 11102 (Tex. App. Corpus Christi Dec. 28 2006), (citation omitted).

134. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

135. It was not an abuse of discretion for the trial court to find that a forensic psychiatrist was qualified as an expert in the field of psychiatry and was qualified to testify to the opinions she expressed in a civil commitment case because: (1) the psychiatrist received her bachelor's degree in psychology from the University of Oklahoma; (2) she was a graduate of Emory Medical School; (3) she also completed a one-year internship at Emory Medical School; (4) she completed psychology and psychiatry residency training; (5) after receiving specialized training during her fellowship in forensic psychiatry, she was in private practice; (6) as part of her outpatient practice, she had treated inmates for about eight hours a week for eight years at a county Jail; (7) the psychiatrist had evaluated and treated juveniles, including sex offenders, committed to the Texas Youth Commission and at the state school in Gainesville; (8) at the time of her deposition she still evaluated defendants for the criminal courts in several counties. In re Martinez, 2006 Tex. App. LEXIS 7459 (Tex. App. Beaumont Aug. 24 2006).

Family Law : Parental Duties & Rights : Termination of Rights : General Overview

136. Court erred, in parental rights termination case, by admitting expert testimony regarding the mother's ability to parent where the State proffered only the testimony of the expert to establish the reliability of his methodology, and the expert offered no specific, independent sources to support the reliability of his methodology. In re J.B., 93 S.W.3d 609, 2002 Tex. App. LEXIS 8505 (Tex. App. Waco 2002).

137. Court erred, in parental rights termination case, by admitting expert testimony regarding the mother's ability to parent, where the State proffered only the testimony of the expert to establish the reliability of his methodology, and the expert offered no specific, independent sources to support the reliability of his methodology. In re J.B., 93 S.W.3d 609, 2002 Tex. App. LEXIS 8505 (Tex. App. Waco 2002).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview

138. As a pathologist, a doctor, who was an expert witness for the State, could reliably base her opinion concerning bone fractures upon her examination, background, studies, and experience with the tensile strength of pediatric bones, particularly ribs, and the amount of force necessary to break a two and a half year old child's ribs; thus, there was no merit to the argument that a forensic pathologist needed to have a sub speciality in merry-go-round accidents or stair falls in order to testify to the pathological consequences of that type of a fall; accordingly, in a termination of parental rights case, the doctor's testimony regarding the deceased daughter's injuries was admissible. In re J.L., 2006 Tex. App. LEXIS 11102 (Tex. App. Corpus Christi Dec. 28 2006), (citation omitted).

Public Health & Welfare Law : Healthcare : Mental Health Services : Commitment : Involuntary Commitment of Adults

139. It was not an abuse of discretion for the trial court to find that a forensic psychiatrist was qualified as an expert in the field of psychiatry and was qualified to testify to the opinions she expressed in a civil commitment case because: (1) the psychiatrist received her bachelor's degree in psychology from the University of Oklahoma; (2) she was a graduate of Emory Medical School; (3) she also completed a one-year internship at Emory Medical School; (4) she completed psychology and psychiatry residency training; (5) after receiving specialized training during her fellowship in forensic psychiatry, she was in private practice; (6) as part of her outpatient practice, she had treated inmates for about eight hours a week for eight years at a county Jail; (7) the psychiatrist had evaluated and treated juveniles, including sex offenders, committed to the Texas Youth Commission and at the state school in Gainesville; (8) at the time of her deposition she still evaluated defendants for the criminal courts in several counties. In re Martinez, 2006 Tex. App. LEXIS 7459 (Tex. App. Beaumont Aug. 24 2006).

Tax Law : State & Local Taxes : Real Property Tax : Assessment & Valuation : General Overview

140. In a dispute regarding open-space valuation of real property, there was no error in the trial court's decision to qualify the taxpayers' expert witness pursuant to Tex. R. Evid. 104(a), 702; although the expert did not have training specific to ad valorem taxation, he had substantial experience and expertise in agricultural use of land and prudent land management. Calhoun County Appraisal Review Bd. v. Stofer L.P., 2005 Tex. App. LEXIS 6629 (Tex. App. Corpus Christi Aug. 18 2005).

Workers' Compensation & SSDI : Benefit Determinations : Permanent Partial Disabilities

141. In a workers' compensation action regarding an employee's impairment rating, the trial court properly admitted testimony from the physician appointed to evaluate the employee on behalf of the employer under Tex. R. Evid. 104(a); although the doctor's orthopedic training was in Canada, the doctor was licensed and practiced in Texas, and had been approved as a designated doctor by the Texas Workers' Compensation Commission. Barrigan v. MHMR Servs., 2007 Tex. App. LEXIS 43 (Tex. App. Austin Jan. 4 2007).

Tex. Evid. R. 105

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 105 Evidence That is Not Admissible Against Other Parties or for Other Purposes

(a) ***Limiting Admitted Evidence.***--If the court admits evidence that is admissible against a party or for a purpose - but not against another party or for another purpose - the court, on request, must restrict the evidence to its proper scope and instruct the jury accordingly.

(b) ***Preserving a Claim of Error.***

(1) ***Court Admits the Evidence Without Restriction.***--A party may claim error in a ruling to admit evidence that is admissible against a party or for a purpose - but not against another party or for another purpose - only if the party requests the court to restrict the evidence to its proper scope and instruct the jury accordingly.

(2) ***Court Excludes the Evidence.***--A party may claim error in a ruling to exclude evidence that is admissible against a party or for a purpose - but not against another party or for another purpose - only if the party limits its offer to the party against whom or the purpose for which the evidence is admissible.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 21, *Determining Admissibility: Procedure*.

Case Notes

Civil Procedure : Trials : Bench Trials
Civil Procedure : Trials : Jury Trials : Jury Instructions : General Overview
Civil Procedure : Trials : Jury Trials : Jury Instructions : Requests for Instructions
Civil Procedure : Appeals : Reviewability : General Overview
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Rights Law : Protection of Disabled Persons : General Overview
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Hit & Run Accidents : General Overview
Criminal Law & Procedure : Accusatory Instruments : Indictments : General Overview
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Closing Arguments : Fair Comment & Fair Response
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Witnesses : Presentation
Criminal Law & Procedure : Defenses : Self-Defense
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Jury Instructions : Objections
Criminal Law & Procedure : Jury Instructions : Particular Instructions : General Overview
Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence
Criminal Law & Procedure : Verdicts : Unanimity
Criminal Law & Procedure : Appeals : Procedures : Records on Appeal
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Constitutional Issues
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Jury Instructions
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Jury Instructions
Evidence : Hearsay : Exceptions : General Overview
Evidence : Hearsay : Exceptions : Business Records : General Overview
Evidence : Hearsay : Exceptions : Business Records : Absence of Records
Evidence : Hearsay : Exemptions : Statements by Party Opponents : Adopted Statements
Evidence : Hearsay : Rule Components : Truth of Matter Asserted
Evidence : Privileges : Self-Incrimination Privilege : Scope
Evidence : Procedural Considerations : General Overview
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : Character Evidence
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : Similar Acts
Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview
Evidence : Relevance : Sex Offenses : Similar Crimes : Child Molestation Cases
Evidence : Scientific Evidence : Blood Alcohol
Evidence : Testimony : General Overview
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility

Evidence : Testimony : Experts : Admissibility
Family Law : Marital Termination & Spousal Support : Dissolution & Divorce : Procedures
Family Law : Paternity & Surrogacy : Establishing Paternity : Father's Acknowledgment
Governments : State & Territorial Governments : Licenses
Torts : Wrongful Death & Survival Actions : Potential Plaintiffs

LexisNexis (R) Notes

Civil Procedure : Trials : Bench Trials

1. Where a trial court, in a bench trial, found for a creditor on contract and fraud claims but did not make specific findings allocating the damages, although there was no evidence to support the fraud finding, the judgment was affirmed; under Tex. R. Evid. 105(a), the evidence on damages, which consisted of testimony admitted without objection, could be considered for all purposes. Advanced Messaging Wireless, Inc. v. Campus Design, Inc., 190 S.W.3d 66, 2005 Tex. App. LEXIS 8991 (Tex. App. Amarillo 2005).

Civil Procedure : Trials : Jury Trials : Jury Instructions : General Overview

2. Trial court did not err in not giving a jury a limiting instruction pursuant to Tex. R. Evid. 105 regarding the legal ability of an employee of a contractor to hold himself out as an engineer where there was no testimony or evidence requiring such an instruction because, at trial, the employee was clear in stating that while he held an engineering degree from a preeminent educational institution, he was not a licensed engineer, and he testified that he had merely provided AutoCAD drafting services, which did not require an engineering license; finally, the employee had not been held out to the contractor's customer as a licensed engineer. Purnell Furniture Servs. v. Warehouse Rack Co., 2006 Tex. App. LEXIS 6858 (Tex. App. Houston 14th Dist. Aug. 1 2006).

3. Because the horse farm owners did not request a limiting instruction regarding the horse owner's hearsay testimony impeaching a veterinarian's earlier testimony, and the trial court did not give a limiting instruction, the jury was able to consider the evidence for any and all purposes. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

Civil Procedure : Trials : Jury Trials : Jury Instructions : Requests for Instructions

4. Portion of the automobile manufacturer's spreadsheet reflecting the 67 code 56 claims concerning airbags was admissible as an admission by a party opponent under Tex. R. Evid. 801 because the spreadsheet was created by the manufacturer and produced in discovery, and a witness testified that the 67 open circuits reflected on the spreadsheet were all claims submitted to the manufacturer and paid because technicians confirmed the claims all involved defects. Because the manufacturer did not request a limiting instruction as to the statements from customers listed on the spreadsheet or the remainder of the warranty claims, the inclusion of the items was not ground for complaint on appeal. Kia Motors Corp. v. Ruiz, 348 S.W.3d 465, 2011 Tex. App. LEXIS 6144, CCH Prod. Liab. Rep. P18719 (Tex. App. Dallas Aug. 5 2011).

Civil Procedure : Appeals : Reviewability : General Overview

5. In an action involving a fire and who was the cause of it, the condominium's contention that the trial court erred by forcing it to present evidence of insurance to the jury was without merit since the condominium apparently did not enter the proof of loss into evidence and the proof of loss was admitted without limitation, Tex. R. Evid. 105. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 245 S.W.3d 646, 2008 Tex. App. LEXIS 963 (Tex. App. Fort Worth 2008).

Civil Procedure : Appeals : Reviewability : Preservation for Review

6. In a negligence case arising from a fire at a condominium complex, absent a request for a limiting instruction on evidence of insurance, that issue was waived on appeal under Tex. R. Evid. 105. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 2007 Tex. App. LEXIS 5977 (Tex. App. Fort Worth July 26 2007).

Civil Rights Law : Protection of Disabled Persons : General Overview

7. No abuse of discretion in excluding evidence regarding the Americans With disabilities Act and the Texas Accessibility Standards, because the evidence was not crucial to whether the clinic had actual or constructive knowledge of a dangerous condition on the premises that presented an unreasonable risk of harm and that the condition proximately caused the claimant's injuries. Craig v. Beeville Family Practice, L.L.P., 2012 Tex. App. LEXIS 4422, 2012 WL 1656492 (Tex. App. Corpus Christi May 10 2012).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

8. Defendant's objection to the whole community-supervision document did not preserve the error complained of on appeal that admission of the document violated his confrontation rights because his objection was to testimony from any portion of the community-supervision records, and by his own argument, portions of the records were admissible. Blackman v. State, 2014 Tex. App. LEXIS 115, 2014 WL 50804 (Tex. App. Houston 1st Dist. Jan. 7 2014).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

9. In a trial for child sexual assault, a limiting instruction was not required under Tex. R. Evid. 105 as to testimony about extraneous acts because defendant failed to timely request an instruction. The court noted that although the trial court placed a limiting instruction in the jury charge, limiting instructions given for the first time during the jury charge did not constitute an efficacious application of Tex. R. Evid. 105(a) because limiting instructions, when properly requested, were most effective when given simultaneously with the relevant evidence. Miller v. State, 2005 Tex. App. LEXIS 6227 (Tex. App. El Paso Aug. 4 2005).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary

10. In a trial for two counts of burglary, defendant was not egregiously harmed by the trial court's failure to instruct the jury to use the evidence concerning each cause separately and not to use evidence in one case in the other. Under Tex. R. Evid. 105(a), the trial court did not have a duty to sua sponte include such a limiting instruction in the jury charge, and there was nothing indicating improper use of the evidence. Owen v. State, 2011 Tex. App. LEXIS 9016, 2011 WL 5515548 (Tex. App. Corpus Christi Nov. 10 2011).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements

11. Trial court did not violate Tex. R. Evid. 105 by refusing to give a limiting instruction when it admitted testimony related to defendant's prior conviction because defendant's request was untimely and the State solicited the victim's testimony about defendant's criminal history as part of its efforts to rebut the impression created by defense counsel's questioning that defendant lived at the apartment at the time of the burglary. Ruth v. State, 2011 Tex. App. LEXIS 7006, 2011 WL 3840503 (Tex. App. Corpus Christi Aug. 29 2011).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

12. In a trial for sexual assault and indecency with a child, the trial court erred by failing to give a contemporaneous limiting instruction, but the error was harmless because there was ample evidence of guilt, and the trial court included a limiting instruction in the jury charge. Martin v. State, 176 S.W.3d 887, 2005 Tex. App. LEXIS 8514 (Tex. App. Fort Worth 2005).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

13. In a trial for child sexual assault, the trial court erred under Tex. R. Evid. 105 by denying defendant's request for an oral limiting instruction as to extraneous offense; the error in not giving the instruction warranted reversal, considering that extraneous-offense evidence was admitted at the very earliest stages of the trial on guilt/innocence, that 35 percent of the record was devoted to the extraneous offense, and that the jury had unfettered discretion to compare the extraneous offense evidence to the victim's accusations of molestation before receiving the trial court's written jury charge. Pedersen v. State, 237 S.W.3d 882, 2007 Tex. App. LEXIS 8383 (Tex. App. Texarkana 2007).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

14. In a driving while intoxicated (DWI) case, defendant was unable to object to testimony regarding the abilities of other individuals arrested for DWI on the basis of the Sixth Amendment, Tex. Const. art. I, § 10, Tex. R. Evid. 801, and Tex. Code Crim. Proc. Ann. art. 1.25 because the issues were not raised to the trial court; moreover, his preserved complaints relating to comparative evidence and relevance were waived because the evidence came in without objection during other parts of the trial. Taylor v. State, 264 S.W.3d 914, 2008 Tex. App. LEXIS 6255 (Tex. App. Fort Worth 2008).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

15. In defendant's driving while intoxicated case, although the trial judge erred in giving a limiting instruction informing the jury that, by itself, the test result did not prove more than that defendant ingested alcohol (and became intoxicated) "only at some time before the time of the test" because it was improper and misleading, it did not prohibit the jury from using the blood alcohol test result, along with the rest of the evidence, to conclude that defendant was per se intoxicated at the time he was driving. Kirsch v. State, 306 S.W.3d 738, 2010 Tex. Crim. App. LEXIS 11 (Tex. Crim. App. 2010).

16. In a driving while intoxicated case, defendant was not harmed by the court's limiting instruction regarding blood alcohol because the jury could have considered the blood alcohol content to decide whether defendant's blood alcohol content was above the legal limit. Therefore, the court's jury instruction allowing the jury to convict under the per se definition was not erroneous because there was evidence from which the jury could have found defendant guilty under the per se impairment definition of intoxication. Kirsch v. State, 276 S.W.3d 579, 2008 Tex. App. LEXIS 9069 (Tex. App. Houston 1st Dist. 2008).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Hit & Run Accidents : General Overview

17. In a trial for failing to stop and give information after a motor vehicle accident, defendant did not object to limited testimony about a driving while intoxicated investigation or request a limiting instruction; therefore, those complaints were waived. Dudley v. State, 205 S.W.3d 82, 2006 Tex. App. LEXIS 8564 (Tex. App. Tyler 2006).

Criminal Law & Procedure : Accusatory Instruments : Indictments : General Overview

18. In an aggravated sexual assault case where the victim testified regarding multiple acts of sexual abuse, a limiting instruction under Tex. R. Evid. 105(a) was not required because the indictment contained "on or about" language; each of the purported extraneous acts could have been prosecuted under the indictment, so they were not extraneous. Pittillo v. State, 2006 Tex. App. LEXIS 1646 (Tex. App. Waco Mar. 1 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

19. Defendant did not show that counsel was ineffective in failing request a limiting instruction at the time of defendant's testimony about his criminal history because the jury charge contained a limiting instruction. Mars v. State, 2014 Tex. App. LEXIS 7342 (Tex. App. San Antonio July 9 2014).

20. Counsel was not ineffective for failing to request a limiting instruction concerning defendant's girlfriend's testimony concerning an altercation between defendant and a former business partner because it was reasonable to conclude that after the trial court sustained the objection, counsel decided that seeking an instruction to disregard the testimony would only bring further attention to it. Agbogwe v. State, 414 S.W.3d 820, 2013 Tex. App. LEXIS 11103 (Tex. App. Houston 1st Dist. Aug. 29 2013).

21. In a case involving aggravated sexual assault of a child, trial counsel did not perform ineffectively, even though no limiting instruction was requested concerning evidence of prior acts, crimes, or wrongs, because the decision might have been strategic. The record was silent regarding the reasons for the failure to request the instruction, and an argument was made that certain activities brought up by the State were normal family interactions. Arcement v. State, 2009 Tex. App. LEXIS 1096, 2009 WL 383398 (Tex. App. Texarkana Feb. 18 2009).

22. Because the record contained no evidence regarding why defense counsel chose not to request a limiting instruction or object to written jury instructions regarding extraneous offense evidence, the court held that counsel's conduct in failing to do so was not so outrageous that no competent attorney would have done so. Hassenplug v. State, 2007 Tex. App. LEXIS 4998 (Tex. App. Houston 14th Dist. June 28 2007).

23. In a theft case, counsel was not ineffective for failing to request a limiting instruction under Tex. R. Evid. 105(a); absent evidence as to why counsel made the decision, counsel was presumed to have rendered adequate assistance and exercised reasonable professional judgment. Jackson v. State, 2005 Tex. App. LEXIS 36 (Tex. App. Texarkana Jan. 5 2005).

Criminal Law & Procedure : Trials : Closing Arguments : Fair Comment & Fair Response

24. During closing arguments in defendant's aggravated assault trial, the prosecutor was permitted to remark during closing argument that defendant buried the gun after he shot the victim; the prosecutor's statement that defendant tampered with evidence was a reasonable deduction; defendant was not harmed by the trial court's failure to give the jury an instruction to disregard under Tex. R. Evid. 105. Johnson v. State, 2007 Tex. App. LEXIS 7033 (Tex. App. Tyler Aug. 30 2007).

Criminal Law & Procedure : Witnesses : Impeachment

25. Because a witness's testimony was admissible only to rebut defendant's statement of good conduct with minors, a court should have given an instruction to use the testimony only in assessing defendant's credibility, not as proof that he committed the offense or as proof of a plan to have a sexual relationship with the victim. Daggett v. State, 187 S.W.3d 444, 2005 Tex. Crim. App. LEXIS 2127 (Tex. Crim. App. 2005).

Criminal Law & Procedure : Witnesses : Presentation

26. Not timely requesting a limiting instruction as to the evidence of the accomplice's conviction, which the jury was told was admitted for the limited purpose of showing criminal conduct by the accomplice, when the evidence of the conviction was introduced or prior to charging the jury waived, under Tex. R. Evid. 105 and Tex. R. App. P. 33.1, the right to appeal the instruction as to the evidence of the accomplice's conviction, and the fact that the accomplice was not a live witness who was speaking under oath at defendant's trial meant that the requirement under Tex. Code Crim. Proc. Ann. art. 36.14 that a conviction could not be based on an accomplice's testimony unless that testimony was corroborated by evidence other than evidence of an offense's commission did not apply. Evans v. State, 2002 Tex. App. LEXIS 2705 (Tex. App. Amarillo Apr. 15 2002).

Criminal Law & Procedure : Defenses : Self-Defense

27. In a murder case, the trial court's failure to give a limiting instruction pursuant to Tex. R. Evid. 105(a) regarding evidence of extraneous offenses was harmless error under Tex. R. App. P. 44.2 because the evidence of self-defense, as limited by Tex. Penal Code Ann. §§ 9.31(b)(4), 9.32(a) was very weak. Taylor v. State, 2004 Tex. App. LEXIS 2338 (Tex. App. Waco Mar. 10, 2004).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

28. In his trial for aggravated sexual assault of his adopted sister, defendant failed to preserve for review his contention that he was entitled to a limiting instruction regarding other acts evidence because he did not specify what limitations should be placed on the testimony and only objected to one question. Washburn v. State, 2014 Tex. App. LEXIS 8351, 2014 WL 3756486 (Tex. App. Dallas July 30 2014).

29. Because defendant failed to request a limiting instruction when the State used his previously-suppressed custodial statement to impeach his testimony regarding his intent in going to the victim's home, the evidence that he told police that he intended to steal from the victim was rendered admissible for all purposes and was properly considered in a review of the legal sufficiency of the evidence. Sanchez v. State, 428 S.W.3d 240, 2014 Tex. App. LEXIS 1054, 2014 WL 346444 (Tex. App. Houston 1st Dist. Jan. 30 2014).

30. At defendant's trial for burglary of a habitation, the trial court was not required to give an instruction in the jury charge limiting the use of defendant's prior convictions for impeachment purposes only because defendant never requested a limiting instruction at the time the evidence was introduced. Reyes v. State, 422 S.W.3d 18, 2013 Tex. App. LEXIS 13573, 2013 WL 5872738 (Tex. App. Waco Oct. 31 2013).

31. Court's failure to give the jury a contemporaneous instruction when admitting evidence of defendant's extraneous sexual acts, as defendant requested, was harmless, because the error did not deprive defendant of a substantial right; failure to give the jury timely limiting instructions did not influence the jury or had only slight effect with respect to the jury's evaluating the victim's credibility. Hunter v. State, 2013 Tex. App. LEXIS 11992, 2013 WL 5425707 (Tex. App. Beaumont Sept. 25 2013).

32. Because defendant convicted of aggravated sexual assault of a child failed to request a limiting instruction at the moment the complainant started testifying regarding vaginal penetration, the evidence was admitted for all purposes; his untimely request for a limiting instruction was properly overruled. Edwards v. State, 2013 Tex. App. LEXIS 11918 (Tex. App. Dallas Sept. 20 2013).

33. Counsel was not ineffective for failing to request a limiting instruction concerning defendant's girlfriend's testimony concerning an altercation between defendant and a former business partner because it was reasonable to conclude that after the trial court sustained the objection, counsel decided that seeking an instruction to disregard

the testimony would only bring further attention to it. Agbogwe v. State, 414 S.W.3d 820, 2013 Tex. App. LEXIS 11103 (Tex. App. Houston 1st Dist. Aug. 29 2013).

34. Defendant did not request a limiting instruction when the evidence was admitted; thus, the trial court did not err by failing to include a limiting instruction in the jury charge. Grubbs v. State, 440 S.W.3d 130, 2013 Tex. App. LEXIS 10657 (Tex. App. Houston 14th Dist. Aug. 22 2013).

35. Trial court was not obligated to issue an instruction limiting the usage of evidence pertaining to a pornographic video that defendant showed to his child sexual assault victim (his teenaged daughter) because the complained-of evidence constituted same-transaction contextual evidence; the evidence was properly received as general evidence. Freeman v. State, 2013 Tex. App. LEXIS 8566 (Tex. App. Waco July 11 2013).

36. In defendant's aggravated sexual assault of a child trial, at which evidence of his conduct with the child when he was younger than 17 was admitted, the trial court erred when it omitted an instruction under Tex. Penal Code Ann. § 8.07(b); however, defendant did not suffer egregious harm. Limiting instructions pursuant to Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37 were given. Mendoza v. State, 2013 Tex. App. LEXIS 6914 (Tex. App. Eastland June 6 2013).

37. Trial court did not abuse its discretion in failing to give a jury a limiting instruction where defendant had failed to request a limiting instruction at the time that the evidence at issue was admitted at trial. Iglesias v. State, 2013 Tex. App. LEXIS 433 (Tex. App. Corpus Christi Jan. 17 2013).

38. Even though the trial court gave an improper limiting instruction under Tex. R. Evid. 105(a) concerning the extraneous offense evidence, the instruction helped defendant because it prohibited the jury from using the evidence to rebut defendant's implication that the charges had been fabricated to form the basis of a civil lawsuit. Hetherington v. State, 2013 Tex. App. LEXIS 437, 2013 WL 173760 (Tex. App. Fort Worth Jan. 17 2013).

39. Assuming with deciding that the trial court erred by refusing defendant's request for a contemporaneous limiting instruction under Tex. R. Evid. 105(a) regarding evidence of his recent history of writing hot checks, the error was harmless under Tex. R. App. P. 44.2(b) because defendant admitted that he knew he could not afford to pay the checks he had written. Tausch v. State, 2012 Tex. App. LEXIS 7081, 2012 WL 3601095 (Tex. App. Austin Aug. 15 2012).

40. Trial court did not err by refusing to give a limiting instruction with regard to hearsay statements contained in the video of defendant's son's second forensic interview because the video was admitted without limitation and defendant did not timely request a limiting instruction. Brown v. State, 381 S.W.3d 565, 2012 Tex. App. LEXIS 5164 (Tex. App. Eastland June 28 2012).

41. Defendant was not entitled to a limiting instruction because he failed to request one at the time of the testimony at issue, as required by Tex. R. Evid. 105(a). Cantu v. State, 2012 Tex. App. LEXIS 1639, 2012 WL 664939 (Tex. App. Corpus Christi Mar. 1 2012).

42. Trial court did not err, under Tex. R. Evid. 404(b), by allowing the jury to hear evidence of defendant's extraneous offenses during the guilt/innocence stage of the trial because the evidence was not admitted to show that defendant had actually committed the prior offense, but to show that he had lied to the officer about whether he had been previously arrested. The trial court properly instructed the jury to use the evidence solely for the purpose of showing the existence of defendant's untruth about a prior arrest, providing some support for the officer to have a reasonable suspicion about the nature of defendant's activities. Davila v. State, 2012 Tex. App. LEXIS 959, 2012

WL 376634 (Tex. App. Texarkana Feb. 7 2012).

43. Trial court did not violate Tex. R. Evid. 105 by refusing to give a limiting instruction when it admitted testimony related to defendant's prior conviction because defendant's request was untimely and the State solicited the victim's testimony about defendant's criminal history as part of its efforts to rebut the impression created by defense counsel's questioning that defendant lived at the apartment at the time of the burglary. Ruth v. State, 2011 Tex. App. LEXIS 7006, 2011 WL 3840503 (Tex. App. Corpus Christi Aug. 29 2011).

44. Trial court did not abuse its discretion by admitting evidence of guns and cash during his capital murder trial because, to put the conspiracy offense in context, evidence that defendant and his sons were drug dealers who dealt in large amounts of cash and guns to protect their drugs and case was necessary, and therefore the evidence was same-transaction contextual evidence and background contextual evidence excepted from Tex. R. Evid. 404(b). Because the evidence was same-transaction contextual evidence, the trial court did not abuse its discretion by refusing to give limiting instructions. Davis v. State, 2011 Tex. App. LEXIS 835, 2011 WL 322877 (Tex. App. Waco Feb. 2 2011).

45. Trial court did not err by failing to sua sponte give a limiting instruction to the jury regarding the dog's prior bad acts because defendant did not request such a limiting instruction, and therefore the evidence was admissible for all purposes. Watson v. State, 337 S.W.3d 347, 2011 Tex. App. LEXIS 592 (Tex. App. Eastland Jan. 27 2011).

46. Trial court did not err by failing to sua sponte give a limiting instruction to the jury regarding the dog's prior bad acts because defendant did not request such a limiting instruction, and therefore the evidence was admissible for all purposes. Smith v. State, 337 S.W.3d 354, 2011 Tex. App. LEXIS 594 (Tex. App. Eastland Jan. 27 2011).

47. During defendant's punishment hearing for three counts of aggravated sexual assault of a child, his daughter, the trial court did not err in admitting evidence of unadjudicated extraneous offenses under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) as to a 1992 offense because the evidence was admissible with respect to the other two counts; defendant did not request a limiting instruction pursuant to Tex. R. Evid. 105(a). Watson v. State, 2010 Tex. App. LEXIS 3402, 2010 WL 1814680 (Tex. App. Austin May 5 2010).

48. Defendant juvenile waived his right to complain of a trial court's denial of his request for a limiting instruction where defendant failed to request a limiting instruction at the time the evidence was admitted, pursuant to Tex. R. Evid. 105(a). In re J.R.N., 2010 Tex. App. LEXIS 2280, 2009 WL 6312273 (Tex. App. Beaumont Apr. 1 2010).

49. In defendant's driving while intoxicated case, although the trial judge erred in giving a limiting instruction informing the jury that, by itself, the test result did not prove more than that defendant ingested alcohol (and became intoxicated) "only at some time before the time of the test" because it was improper and misleading, it did not prohibit the jury from using the blood alcohol test result, along with the rest of the evidence, to conclude that defendant was per se intoxicated at the time he was driving. Kirsch v. State, 306 S.W.3d 738, 2010 Tex. Crim. App. LEXIS 11 (Tex. Crim. App. 2010).

50. In defendant's aggravated robbery case, the trial court did not err in declining to strike the previously admitted evidence of the knife and a witness's testimony about the knife because the knife was relevant, it was admitted into evidence before the witness testified, and a photograph showed the exact location where the knife was found. Because the evidence was properly admitted, the trial court did not err by refusing defendant's request for a limiting instruction. Jones v. State, 2009 Tex. App. LEXIS 9570, 2009 WL 4856420 (Tex. App. Houston 1st Dist. Dec. 17 2009).

51. In an attempted capital murder case, there was no error in the limiting instruction provided in the jury charge because the trial court was not required to further instruct the jury that it could not consider the impeachment testimony for purposes of determining guilt-innocence because that idea was implicit in the court's instruction that the impeachment testimony was to be used to determine credibility and "for no other reason." Walker v. State, 300 S.W.3d 836, 2009 Tex. App. LEXIS 7763 (Tex. App. Fort Worth Oct. 1 2009).

52. In defendant's attempted capital murder case, a court's error in a limiting instruction was harmless because the trial court clarified and corrected the instruction in the jury charge, and also, because the trial court provided the correct instruction to the jury immediately before it began deliberating, it would have been more influential in the jury's deliberations. Walker v. State, 300 S.W.3d 836, 2009 Tex. App. LEXIS 7763 (Tex. App. Fort Worth Oct. 1 2009).

53. In a case involving aggravated sexual assault of a child, trial counsel did not perform ineffectively, even though no limiting instruction was requested concerning evidence of prior acts, crimes, or wrongs, because the decision might have been strategic. The record was silent regarding the reasons for the failure to request the instruction, and an argument was made that certain activities brought up by the State were normal family interactions. Arcement v. State, 2009 Tex. App. LEXIS 1096, 2009 WL 383398 (Tex. App. Texarkana Feb. 18 2009).

54. Although the trial court erred by denying a limiting instruction because the witnesses' prior statements did not fall within any hearsay exception and so were admissible for impeachment purposes only, the error was harmless. Absent from the inconsistent statements, the record contained other evidence from which the jury could have inferred that defendant did not act in self-defense, and the trial court's charge instructed the jury that a witness's prior inconsistent statement could only be considered for impeachment purposes to asses the witness's credibility. Arnold v. State, 2008 Tex. App. LEXIS 9768 (Tex. App. Waco Dec. 31 2008).

55. Although the trial court erred by denying defendant's request for a contemporaneous limiting instruction regarding the terroristic threat conviction, the error was harmless. The trial court's charge instructed the jury that extraneous offenses could not be considered as evidence of defendant's guilt, but solely to rebut the defensive claim of self-defense, the evidence was presented toward the end of trial, and the conviction was not "more heinous or inflammatory than the charged offense." Arnold v. State, 2008 Tex. App. LEXIS 9768 (Tex. App. Waco Dec. 31 2008).

56. In a driving while intoxicated case, defendant was not harmed by the court's limiting instruction regarding blood alcohol because the jury could have considered the blood alcohol content to decide whether defendant's blood alcohol content was above the legal limit. Therefore, the court's jury instruction allowing the jury to convict under the per se definition was not erroneous because there was evidence from which the jury could have found defendant guilty under the per se impairment definition of intoxication. Kirsch v. State, 276 S.W.3d 579, 2008 Tex. App. LEXIS 9069 (Tex. App. Houston 1st Dist. 2008).

57. In defendant's trial for the offense of injury to a child, a trial court did not err in not giving a limiting instruction, pursuant to Tex. R. Evid. 105(a). with respect to testimony about defendant's confrontation with the child's mother because the evidence was res gestae as the incident occurred immediately prior to defendant hitting the child. Barbera v. State, 2008 Tex. App. LEXIS 6849 (Tex. App. Corpus Christi Aug. 28 2008).

58. In a child sexual assault case, the trial court did not err by denying defendant's request for a contemporaneous limiting instruction in connection with the admission of a different extraneous offense because, when the same evidence was later introduced through the matching testimony of a witness, defendant did not object or request a limiting instruction; consequently, the issue was moot. Sanders v. State, 255 S.W.3d 754, 2008 Tex. App. LEXIS

3413 (Tex. App. Fort Worth 2008).

59. Trial court did not err in admitting a letter the district attorney issued to defendant before her arrest because: (1) the letter was not hearsay under Tex. R. Evid. 801, as it was admitted to show that defendant had notice that her activities might have been illegal, rather than to prove that the letter's contents were true; (2) defendant failed to request a limiting instruction, and therefore she could not complain on appeal about the letter's admission for all purposes; and (3) defendant's due process rights were not violated, as the State did not expressly represent the letter as a correct statement of the law until its closing argument, after the trial court had instructed the jury as to the applicable law. Pardue v. State, 252 S.W.3d 690, 2008 Tex. App. LEXIS 2421 (Tex. App. Texarkana 2008).

60. In a drug case, the trial court was not required under Tex. Code Crim. Proc. Ann. art. 36.14 to instruct the jury sua sponte on the burden of proof when considering evidence of an extraneous offense during the guilt phase; even if a limiting instruction under Tex. R. Evid. 404(b) would have been appropriate, defendant failed to request a limiting instruction under Tex. R. Evid. 105 when the evidence was offered. Delgado v. State, 235 S.W.3d 244, 2007 Tex. Crim. App. LEXIS 1235 (Tex. Crim. App. 2007).

61. During closing arguments in defendant's aggravated assault trial, the prosecutor was permitted to remark during closing argument that defendant buried the gun after he shot the victim; the prosecutor's statement that defendant tampered with evidence was a reasonable deduction; defendant was not harmed by the trial court's failure to give the jury an instruction to disregard under Tex. R. Evid. 105. Johnson v. State, 2007 Tex. App. LEXIS 7033 (Tex. App. Tyler Aug. 30 2007).

62. Defendant's challenge to a jury instruction that was given regarding the use of that evidence was rejected because defendant did not request a limiting instruction at the time the evidence was first admitted, and therefore it was admitted for all purposes, and the trial court was not required to give a limiting instruction at all. Vargas v. State, 2007 Tex. App. LEXIS 4209 (Tex. App. San Antonio May 30 2007).

63. In a criminal trial where defendant was charged with several offenses, the State was not required to elect among the various offenses it sought to prove; in accordance with Tex. R. Evid. 105, the trial court's general limiting instruction to the jury on extraneous offenses was sufficient to protect the defendant from an unfair trial. Pittillo v. State, 2006 Tex. App. LEXIS 6534 (Tex. App. Waco July 26 2006).

64. Two defendants' sexual assault convictions were inappropriate because the trial court erred by failing to have the State elect, at the close of its evidence, which occurrence it would use to convict as requested by the defense; the requirement of an election was distinct from a limiting instruction, Tex. R. Evid. 105, because the election requirement provided explicit notice to a defendant and prompted unanimous jury verdicts; a limiting instruction alone did not adequately serve all of those purposes. Phillips v. State, 193 S.W.3d 904, 2006 Tex. Crim. App. LEXIS 1069 (Tex. Crim. App. 2006).

65. Where defendant was charged with criminal mischief for causing damage to his neighbor's motorcycle, the trial court admitted evidence that on one prior occasion defendant had knocked down the mailbox with his truck; the trial court's failure to instruct the jury that evidence of extraneous bad acts or offenses could only be considered if the jury found beyond a reasonable doubt that the defendant committed them was harmless; defendant made no objection at trial and did not request any kind of limiting instruction under Tex. R. Evid. 105. Giddens v. State, 2006 Tex. App. LEXIS 1957 (Tex. App. Texarkana Mar. 15 2006).

66. In an aggravated sexual assault of a child and indecency with a child case, defendant did not request a limiting instruction when the evidence of extraneous acts was admitted; thus, the evidence became admissible for all purposes and a limiting instruction was not required. Therefore, the trial court committed no error in failing to

instruct the jury that extraneous acts admitted under Tex. Code Crim. Proc. Ann. art. 38.37, § 2 could only be considered to show defendant's state of mind or the relationship between him and the complainants. Garza v. State, 2006 Tex. App. LEXIS 2092 (Tex. App. Beaumont Mar. 15 2006).

67. In an aggravated sexual assault case where the victim testified regarding multiple acts of sexual abuse, a limiting instruction under Tex. R. Evid. 105(a) was not required because the indictment contained "on or about" language; each of the purported extraneous acts could have been prosecuted under the indictment, so they were not extraneous. Pittillo v. State, 2006 Tex. App. LEXIS 1646 (Tex. App. Waco Mar. 1 2006).

68. Because a witness's testimony was admissible only to rebut defendant's statement of good conduct with minors, a court should have given an instruction to use the testimony only in assessing defendant's credibility, not as proof that he committed the offense or as proof of a plan to have a sexual relationship with the victim. Daggett v. State, 187 S.W.3d 444, 2005 Tex. Crim. App. LEXIS 2127 (Tex. Crim. App. 2005).

69. In a trial for sexual assault and indecency with a child, the trial court erred by failing to give a contemporaneous limiting instruction, but the error was harmless because there was ample evidence of guilt, and the trial court included a limiting instruction in the jury charge. Martin v. State, 176 S.W.3d 887, 2005 Tex. App. LEXIS 8514 (Tex. App. Fort Worth 2005).

70. In a trial for sexual assault and indecency with a child based on oral sex and breast touching, defendant forfeited error regarding the trial court's failure to give a contemporaneous limiting instruction when it admitted testimony that defendant penetrated the victim's sexual organ with his penis. Defendant objected to the extraneous evidence rather than requesting a limiting instruction under Tex. R. Evid. 105, and his request for a limiting instruction after two additional witnesses testified was untimely. Martin v. State, 176 S.W.3d 887, 2005 Tex. App. LEXIS 8514 (Tex. App. Fort Worth 2005).

71. In a trial for child sexual assault, a limiting instruction was not required under Tex. R. Evid. 105 as to testimony about extraneous acts because defendant failed to timely request an instruction. The court noted that although the trial court placed a limiting instruction in the jury charge, limiting instructions given for the first time during the jury charge did not constitute an efficacious application of Tex. R. Evid. 105(a) because limiting instructions, when properly requested, were most effective when given simultaneously with the relevant evidence. Miller v. State, 2005 Tex. App. LEXIS 6227 (Tex. App. El Paso Aug. 4 2005).

72. While the trial court should have instructed the jurors under Tex. R. Evid. 105(a) that a chart admitted as demonstrative evidence had a purpose limited to assisting them in understanding the officer's testimony as he testified in court, the error did not effect a substantial right of defendant pursuant to Tex. R. App. P. 44 because the officer attested, through his oral testimony, to all of the information on the chart. Baker v. State, 177 S.W.3d 113, 2005 Tex. App. LEXIS 662 (Tex. App. Houston 1st Dist. 2005).

73. In a theft case, counsel was not ineffective for failing to request a limiting instruction under Tex. R. Evid. 105(a); absent evidence as to why counsel made the decision, counsel was presumed to have rendered adequate assistance and exercised reasonable professional judgment. Jackson v. State, 2005 Tex. App. LEXIS 36 (Tex. App. Texarkana Jan. 5 2005).

74. Request for a limiting instruction must be made at the admission of the evidence. Revill v. State, 2004 Tex. App. LEXIS 5654 (Tex. App. Tyler June 23 2004).

75. Where evidence is admissible for a limited purpose and the court admits it without limitation, the party opposing the evidence has the burden of requesting a limiting instruction. Revill v. State, 2004 Tex. App. LEXIS 5654 (Tex. App. Tyler June 23 2004).

76. Under Tex. R. Evid. 105(a), because defendant did not request a limiting instruction when the police officer testified regarding the extraneous offense, the evidence was admitted for all purposes and did not warrant a limiting instruction. Davis v. State, 2004 Tex. App. LEXIS 4748 (Tex. App. Houston 1st Dist. May 27 2004).

77. Pursuant to Tex. R. Evid. 105(a), a request for a limiting instruction must be made as soon as evidence is admitted; accordingly, court did not err in denying a limiting instruction on the victim's police statement during the punishment stage of defendant's trial for sexual assault and indecency with a child where defendant requested the limiting instruction during the punishment phase after the jury had considered the statement without restriction. Zavala v. State, 2004 Tex. App. LEXIS 2986 (Tex. App. Corpus Christi Apr. 1 2004).

78. In drug and robbery case, although defendant's relevancy objection to evidence of other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

79. In a murder case, the trial court's failure to give a limiting instruction pursuant to Tex. R. Evid. 105(a) regarding evidence of extraneous offenses was harmless error under Tex. R. App. P. 44.2 because the evidence of self-defense, as limited by Tex. Penal Code Ann. §§ 9.31(b)(4), 9.32(a) was very weak. Taylor v. State, 2004 Tex. App. LEXIS 2338 (Tex. App. Waco Mar. 10, 2004).

80. Not timely requesting a limiting instruction as to the evidence of the accomplice's conviction, which the jury was told was admitted for the limited purpose of showing criminal conduct by the accomplice, when the evidence of the conviction was introduced or prior to charging the jury waived, under Tex. R. Evid. 105 and Tex. R. App. P. 33.1, the right to appeal the instruction as to the evidence of the accomplice's conviction, and the fact that the accomplice was not a live witness who was speaking under oath at defendant's trial meant that the requirement under Tex. Code Crim. Proc. Ann. art. 36.14 that a conviction could not be based on an accomplice's testimony unless that testimony was corroborated by evidence other than evidence of an offense's commission did not apply. Evans v. State, 2002 Tex. App. LEXIS 2705 (Tex. App. Amarillo Apr. 15 2002).

81. Party opposing evidence under Tex. R. Evid. 105 has the burden of requesting the limiting instruction at the introduction of the evidence. Once evidence is received without a limiting instruction, it becomes part of the general evidence and may be used for all purposes, and a limiting instruction in the jury charge is no longer appropriate. Hammock v. State, 46 S.W.3d 889, 2001 Tex. Crim. App. LEXIS 39 (Tex. Crim. App. 2001).

82. It is not required to object to evidence prior to requesting a limiting instruction for that evidence. Hammock v. State, 46 S.W.3d 889, 2001 Tex. Crim. App. LEXIS 39 (Tex. Crim. App. 2001).

Criminal Law & Procedure : Jury Instructions : Objections

83. In a trial for sexual assault of a child, the trial court was not required to instruct the jury, sua sponte, not to consider evidence of extraneous offenses, in part because defendant failed to request a limiting instruction at the time the extraneous offense evidence was admitted, thereby allowing it to be admitted for all purposes. Allen v. State, 180 S.W.3d 260, 2005 Tex. App. LEXIS 9709 (Tex. App. Fort Worth 2005).

84. In a trial for child sexual assault, a limiting instruction was not required under Tex. R. Evid. 105 as to testimony about extraneous acts because defendant failed to timely request an instruction. The court noted that although the trial court placed a limiting instruction in the jury charge, limiting instructions given for the first time during the jury charge did not constitute an efficacious application of Tex. R. Evid. 105(a) because limiting instructions, when properly requested, were most effective when given simultaneously with the relevant evidence. Miller v. State, 2005 Tex. App. LEXIS 6227 (Tex. App. El Paso Aug. 4 2005).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : General Overview

85. Defendant's assertion that a trial court erred in refusing to instruct a jury, at the time evidence was offered, on the burden of proof for unadjudicated offenses and bad acts that were introduced at the punishment phase of the trial failed because Tex. R. Evid. 105 addressed parties and purpose; the rule did not address burdens of proof. Jackson v. State, 992 S.W.2d 469, 1999 Tex. Crim. App. LEXIS 42 (Tex. Crim. App. 1999).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence

86. Although a trial court cannot delay in giving a limiting jury instruction, timely requested, until the end of the trial, the burden of timely requesting a limiting instruction is on the party opposing the general admission of the evidence and there is nothing in the plain language of Tex. R. Evid. 105 or the case law that requires the trial court, upon a pre-trial request, to recognize each instance of extraneous offense evidence and deliver a limiting instruction at each instance; thus, the trial court did not err in not giving a limiting instruction pursuant to Tex. R. Evid. 105(a) each time extraneous offense evidence was admitted without a timely request by defendant. Reeves v. State, 99 S.W.3d 657, 2003 Tex. App. LEXIS 909 (Tex. App. Waco 2003).

Criminal Law & Procedure : Verdicts : Unanimity

87. Two defendants' sexual assault convictions were inappropriate because the trial court erred by failing to have the State elect, at the close of its evidence, which occurrence it would use to convict as requested by the defense; the requirement of an election was distinct from a limiting instruction, Tex. R. Evid. 105, because the election requirement provided explicit notice to a defendant and prompted unanimous jury verdicts; a limiting instruction alone did not adequately serve all of those purposes. Phillips v. State, 193 S.W.3d 904, 2006 Tex. Crim. App. LEXIS 1069 (Tex. Crim. App. 2006).

Criminal Law & Procedure : Appeals : Procedures : Records on Appeal

88. Trial court had no obligation under Tex. R. Evid. 105 to limit the use of evidence in the jury charge because defendant provided no record cites to show a request for a limiting instruction each time the complained-of evidence was admitted or where the trial court denied his requests. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

89. In a trial for driving while intoxicated, defendant forfeited his arguments that his blood test results were improperly admitted under Tex. R. Evid. 403 and that he was entitled to an instruction under Tex. R. Evid. 105(a). Although defendant objected when a blood-draw kit was offered into evidence, he failed to object when the report with the blood-test results was offered. Walker v. State, 2006 Tex. App. LEXIS 1328 (Tex. App. Fort Worth Feb. 16 2006).

90. In a trial for sexual assault and indecency with a child based on oral sex and breast touching, defendant forfeited error regarding the trial court's failure to give a contemporaneous limiting instruction when it admitted

testimony that defendant penetrated the victim's sexual organ with his penis. Defendant objected to the extraneous evidence rather than requesting a limiting instruction under Tex. R. Evid. 105, and his request for a limiting instruction after two additional witnesses testified was untimely. Martin v. State, 176 S.W.3d 887, 2005 Tex. App. LEXIS 8514 (Tex. App. Fort Worth 2005).

91. Appeals court would not consider the lack of an instruction on extraneous offense evidence because defendant had not requested an instruction. Adams v. State, 2004 Tex. App. LEXIS 8999 (Tex. App. Houston 14th Dist. Oct. 12 2004).

92. Not timely requesting a limiting instruction as to the evidence of the accomplice's conviction, which the jury was told was admitted for the limited purpose of showing criminal conduct by the accomplice, when the evidence of the conviction was introduced or prior to charging the jury waived, under Tex. R. Evid. 105 and Tex. R. App. P. 33.1, the right to appeal the instruction as to the evidence of the accomplice's conviction, and the fact that the accomplice was not a live witness who was speaking under oath at defendant's trial meant that the requirement under Tex. Code Crim. Proc. Ann. art. 36.14 that a conviction could not be based on an accomplice's testimony unless that testimony was corroborated by evidence other than evidence of an offense's commission did not apply. Evans v. State, 2002 Tex. App. LEXIS 2705 (Tex. App. Amarillo Apr. 15 2002).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Constitutional Issues

93. Where defendant was convicted for DWI based in part on officer's testimony that he believed defendant was intoxicated because he slurred his speech, he wanted to provide a voice exemplar for the limited purpose of showing the jury that he always slurred his speech. Because the trial court sustained the State's objection on the ground that defendant could easily manipulate his voice to sound slurred and defendant did not claim constitutional error, the issue was not preserved for review. Tollett v. State, 422 S.W.3d 886, 2014 Tex. App. LEXIS 1216, 2014 WL 462275 (Tex. App. Houston 14th Dist. Feb. 4 2014).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

94. Trial court did not err by refusing to give a limiting instruction with regard to hearsay statements contained in the video of defendant's son's second forensic interview because the video was admitted without limitation and defendant did not timely request a limiting instruction. Brown v. State, 381 S.W.3d 565, 2012 Tex. App. LEXIS 5164 (Tex. App. Eastland June 28 2012).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

95. Defendant's objection to the whole community-supervision document did not preserve the error complained of on appeal that admission of the document violated his confrontation rights because his objection was to testimony from any portion of the community-supervision records, and by his own argument, portions of the records were admissible. Blackman v. State, 2014 Tex. App. LEXIS 115, 2014 WL 50804 (Tex. App. Houston 1st Dist. Jan. 7 2014).

96. Reviewing court did not address defendant's arguments that it was error under Tex. R. Evid. 403 to allow the State to introduce an out-of-court statement of its own witness in the guise of impeachment and that the error was compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds, as required by Tex. R. App. P. 33.1(a), and did not request a limiting instruction, as required by Tex. R. Evid. 105(a). Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Jury Instructions

97. Defendant juvenile waived his right to complain of a trial court's denial of his request for a limiting instruction where defendant failed to request a limiting instruction at the time the evidence was admitted, pursuant to Tex. R. Evid. 105(a). In re J.R.N., 2010 Tex. App. LEXIS 2280, 2009 WL 6312273 (Tex. App. Beaumont Apr. 1 2010).

98. Drug defendant had no ground for complaint on appeal based on the admission of extraneous offense evidence pertaining to other controlled substances and illegal narcotics because defendant failed to request a limiting instruction under Tex. R. Evid. 105. Johnson v. State, 2007 Tex. App. LEXIS 7773 (Tex. App. Fort Worth Sept. 27 2007).

99. Because defendant did not request a limiting instruction concerning a deputy's testimony about her co-defendant's confronting the deputy when he seized a vehicle, she forfeited the alleged error. Chase v. State, 2007 Tex. App. LEXIS 2270 (Tex. App. Fort Worth Mar. 22 2007).

100. Reviewing court did not address defendant's arguments that it was error under Tex. R. Evid. 403 to allow the State to introduce an out-of-court statement of its own witness in the guise of impeachment and that the error was compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds, as required by Tex. R. App. P. 33.1(a), and did not request a limiting instruction, as required by Tex. R. Evid. 105(a). Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

101. By failing to request a limiting instruction at the time evidence was offered and by failing to object to the court's failure to give a limiting instruction, defendant waived this complaint for appellate purposes under Tex. R. Evid. 105 and Tex. R. App. P. 33.1(a). Hernandez v. State, 2010 Tex. App. LEXIS 851, 2010 WL 391850 (Tex. App. Austin Feb. 5 2010).

102. In a driving while intoxicated (DWI) case, defendant was unable to object to testimony regarding the abilities of other individuals arrested for DWI on the basis of the Sixth Amendment, Tex. Const. art. I, § 10, Tex. R. Evid. 801, and Tex. Code Crim. Proc. Ann. art. 1.25 because the issues were not raised to the trial court; moreover, his preserved complaints relating to comparative evidence and relevance were waived because the evidence came in without objection during other parts of the trial. Taylor v. State, 264 S.W.3d 914, 2008 Tex. App. LEXIS 6255 (Tex. App. Fort Worth 2008).

103. In a trial for child sexual assault, defendant failed to preserve an argument under Tex. R. Evid. 105 that the trial court erred by failing to give the jury a limiting instruction regarding extraneous offenses at the time the evidence was admitted into evidence; defendant did not specify what limiting instruction was sought, and, when the court stated that the limiting instruction would be included in the charge rather than given contemporaneously, defendant did not object. Wells v. State, 241 S.W.3d 172, 2007 Tex. App. LEXIS 8413 (Tex. App. Eastland 2007).

104. In a trial for failing to stop and give information after a motor vehicle accident, defendant did not object to limited testimony about a driving while intoxicated investigation or request a limiting instruction; therefore, those complaints were waived. Dudley v. State, 205 S.W.3d 82, 2006 Tex. App. LEXIS 8564 (Tex. App. Tyler 2006).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

105. In drug and robbery case, although defendant's relevancy objection to evidence of other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial

effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

106. Where defendant was charged with criminal mischief for causing damage to his neighbor's motorcycle, the trial court admitted evidence that on one prior occasion defendant had knocked down the mailbox with his truck; the trial court's failure to instruct the jury that evidence of extraneous bad acts or offenses could only be considered if the jury found beyond a reasonable doubt that the defendant committed them was harmless; defendant made no objection at trial and did not request any kind of limiting instruction under Tex. R. Evid. 105. Giddens v. State, 2006 Tex. App. LEXIS 1957 (Tex. App. Texarkana Mar. 15 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Jury Instructions

107. In defendant's attempted capital murder case, a court's error in a limiting instruction was harmless because the trial court clarified and corrected the instruction in the jury charge, and also, because the trial court provided the correct instruction to the jury immediately before it began deliberating, it would have been more influential in the jury's deliberations. Walker v. State, 300 S.W.3d 836, 2009 Tex. App. LEXIS 7763 (Tex. App. Fort Worth Oct. 1 2009).

108. Although the trial court erred by denying a limiting instruction because the witnesses' prior statements did not fall within any hearsay exception and so were admissible for impeachment purposes only, the error was harmless. Absent from the inconsistent statements, the record contained other evidence from which the jury could have inferred that defendant did not act in self-defense, and the trial court's charge instructed the jury that a witness's prior inconsistent statement could only be considered for impeachment purposes to asses the witness's credibility. Arnold v. State, 2008 Tex. App. LEXIS 9768 (Tex. App. Waco Dec. 31 2008).

109. Although the trial court erred by denying defendant's request for a contemporaneous limiting instruction regarding the terroristic threat conviction, the error was harmless. The trial court's charge instructed the jury that extraneous offenses could not be considered as evidence of defendant's guilt, but solely to rebut the defensive claim of self-defense, the evidence was presented toward the end of trial, and the conviction was not "more heinous or inflammatory than the charged offense." Arnold v. State, 2008 Tex. App. LEXIS 9768 (Tex. App. Waco Dec. 31 2008).

Evidence : Hearsay : Exceptions : General Overview

110. In an insurance fraud case, the trial court did not err in admitting the insurance claim file as it was not admitted to prove the truth of the matter asserted, as defendant argued, and its contents about the detective's investigation were not inadmissible on hearsay grounds. Wycough v. State, 2004 Tex. App. LEXIS 4608 (Tex. App. El Paso May 20 2004).

Evidence : Hearsay : Exceptions : Business Records : General Overview

111. In a defamation action, a trial court did not err by admitting daily logs as business records for the limited purpose of whether a prudent investigation of complaints was conducted by an executive director of an independent living facility prior to banning a service provider; the trial court gave a limiting instruction to the jury, and the logs were relevant because the bore on the directors motivation and state of mine and a substantial truth defense. Collins v. Sunrise Senior Living Mgmt., 2012 Tex. App. LEXIS 2457, 2012 WL 1067953 (Tex. App. Houston 1st Dist. Mar. 29 2012).

112. In a breach of contract and fraudulent inducement case, a trial court properly refused to admit an exhibit because it was irrelevant to either claim; moreover, it did not fit within the business records exception to the hearsay rule. Further, no attempt was made to segregate the admissible from the inadmissible. Case Corp. v. Hi-Class Bus. Sys. of Am., Inc., 184 S.W.3d 760, 2005 Tex. App. LEXIS 10549 (Tex. App. Dallas 2005).

Evidence : Hearsay : Exceptions : Business Records : Absence of Records

113. In revocation of community supervision proceedings, while defendant conceded that his probation file was admissible as a business record under Tex. R. Evid. 803(6), defendant failed to object on the basis that the State never established the necessary predicate for admitting the negative evidence in the business record under Tex. R. Evid. 803(7). The trial court, therefore, could properly admit the entire proffer under Tex. R. Evid. 105(a). Ferris v. State, 2011 Tex. App. LEXIS 1232, 2011 WL 664016 (Tex. App. Houston 1st Dist. Feb. 17 2011).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : Adopted Statements

114. Portion of the automobile manufacturer's spreadsheet reflecting the 67 code 56 claims concerning airbags was admissible as an admission by a party opponent under Tex. R. Evid. 801 because the spreadsheet was created by the manufacturer and produced in discovery, and a witness testified that the 67 open circuits reflected on the spreadsheet were all claims submitted to the manufacturer and paid because technicians confirmed the claims all involved defects. Because the manufacturer did not request a limiting instruction as to the statements from customers listed on the spreadsheet or the remainder of the warranty claims, the inclusion of the items was not ground for complaint on appeal. Kia Motors Corp. v. Ruiz, 348 S.W.3d 465, 2011 Tex. App. LEXIS 6144, CCH Prod. Liab. Rep. P18719 (Tex. App. Dallas Aug. 5 2011).

Evidence : Hearsay : Rule Components : Truth of Matter Asserted

115. Trial court did not err in admitting a letter the district attorney issued to defendant before her arrest because: (1) the letter was not hearsay under Tex. R. Evid. 801, as it was admitted to show that defendant had notice that her activities might have been illegal, rather than to prove that the letter's contents were true; (2) defendant failed to request a limiting instruction, and therefore she could not complain on appeal about the letter's admission for all purposes; and (3) defendant's due process rights were not violated, as the State did not expressly represent the letter as a correct statement of the law until its closing argument, after the trial court had instructed the jury as to the applicable law. Pardue v. State, 252 S.W.3d 690, 2008 Tex. App. LEXIS 2421 (Tex. App. Texarkana 2008).

Evidence : Privileges : Self-Incrimination Privilege : Scope

116. Under Tex. R. Evid. 105(a) and 513(d), it was error to deny defendant a limiting instruction that the jury draw no inference against defendant from a co-defendant's invocation of the Fifth Amendment privilege against self-incrimination. Hudnall v. State, 2008 Tex. App. LEXIS 5877 (Tex. App. Houston 1st Dist. July 31, 2008).

Evidence : Procedural Considerations : General Overview

117. In revocation of community supervision proceedings, while defendant conceded that his probation file was admissible as a business record under Tex. R. Evid. 803(6), defendant failed to object on the basis that the State never established the necessary predicate for admitting the negative evidence in the business record under Tex. R. Evid. 803(7). The trial court, therefore, could properly admit the entire proffer under Tex. R. Evid. 105(a). Ferris v. State, 2011 Tex. App. LEXIS 1232, 2011 WL 664016 (Tex. App. Houston 1st Dist. Feb. 17 2011).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

118. In a murder case, the prosecutor's affidavit regarding trial strategy was relevant and admissible under Tex. R. Evid. 401and Tex. R. Evid. 602 at a new trial hearing because it addressed the issue of effective assistance and included some statements made from personal knowledge; defendant did not seek to limit the scope of the affidavit pursuant to Tex. R. Evid. 105(a). Shanklin v. State, 190 S.W.3d 154, 2005 Tex. App. LEXIS 10675 (Tex. App. Houston 1st Dist. 2005).

119. Request for a limiting instruction must be made at the admission of the evidence. Revill v. State, 2004 Tex. App. LEXIS 5654 (Tex. App. Tyler June 23 2004).

Evidence : Procedural Considerations : Limited Admissibility

120. Because defendant did not request a limiting instruction when a sexual assault victim testified about alleged other wrongs or acts, Tex. R. Evid. 404(b) never became law applicable to the case, the evidence was admissible for all purposes, and the trial court had no duty to include a limiting instruction under Tex. R. Evid. 105(a). Irielle v. State, 441 S.W.3d 868, 2014 Tex. App. LEXIS 8771 (Tex. App. Houston 14th Dist. Aug. 12 2014).

121. Trial court did not err under Tex. R. Evid. 105(a) in failing to include a limiting instruction in a jury charge on an extraneous offense because defendant did not request a limiting instruction when the extraneous offense evidence was admitted. Ivy v. State, 2014 Tex. App. LEXIS 7501 (Tex. App. Houston 1st Dist. July 10 2014).

122. At defendant's trial for three counts of aggravated sexual assault of a child and two counts of indecency with a child by contact based on conduct occurring over a two-year period, the trial court did not err by admitting evidence about the details of defendant's ongoing sexual misconduct with the victim. Because it was same-transaction contextual evidence, the trial court was not obligated to issue a contemporaneous-limiting instruction. Ramirez v. State, 2014 Tex. App. LEXIS 3955, 2014 WL 1410344 (Tex. App. Waco Apr. 10 2014).

123. Where defendant was convicted for DWI based in part on officer's testimony that he believed defendant was intoxicated because he slurred his speech, he wanted to provide a voice exemplar for the limited purpose of showing the jury that he always slurred his speech. Because the trial court sustained the State's objection on the ground that defendant could easily manipulate his voice to sound slurred and defendant did not claim constitutional error, the issue was not preserved for review. Tollett v. State, 422 S.W.3d 886, 2014 Tex. App. LEXIS 1216, 2014 WL 462275 (Tex. App. Houston 14th Dist. Feb. 4 2014).

124. Court's failure to give the jury a contemporaneous instruction when admitting evidence of defendant's extraneous sexual acts, as defendant requested, was harmless, because the error did not deprive defendant of a substantial right; failure to give the jury timely limiting instructions did not influence the jury or had only slight effect with respect to the jury's evaluating the victim's credibility. Hunter v. State, 2013 Tex. App. LEXIS 11992, 2013 WL 5425707 (Tex. App. Beaumont Sept. 25 2013).

125. Because defendant convicted of aggravated sexual assault of a child failed to request a limiting instruction at the moment the complainant started testifying regarding vaginal penetration, the evidence was admitted for all purposes; his untimely request for a limiting instruction was properly overruled. Edwards v. State, 2013 Tex. App. LEXIS 11918 (Tex. App. Dallas Sept. 20 2013).

126. Defendant did not request a limiting instruction when the evidence was admitted; thus, the trial court did not err by failing to include a limiting instruction in the jury charge. Grubbs v. State, 440 S.W.3d 130, 2013 Tex. App. LEXIS 10657 (Tex. App. Houston 14th Dist. Aug. 22 2013).

127. Defendant claimed the trial court erred in admitting an exhibit into evidence and not sua sponte giving the jury a limiting instruction, but he did not request one and the court found the complaint waived. Moore v. State, 2013 Tex. App. LEXIS 7436 (Tex. App. San Antonio June 19 2013).

128. Any error in admitting a witness's testimony that defendant was locked up was harmless because the same evidence came before the jury at different points during his testimony without an objection, plus the trial court issued a limiting instruction to disregard such statements. Mendoza v. State, 2013 Tex. App. LEXIS 7157 (Tex. App. San Antonio June 12 2013).

129. Court noted that absent an election, the trial court was required to render a judgment framed to give a party all the relief to which he might be entitled, for purposes of Tex. R. Civ. P. 301, but under the one-satisfaction rule, one was only entitled to one recovery for any damages; a borrower claimed he was entitled to recover the sum of all damages found for each injury under the various theories submitted because the bank and servicer did not plead the one-satisfaction rule as an affirmative defense, did not object to the submission of more than one measure of damages, and did not ask for a limiting instruction to prevent a double recovery, but these actions were not required. Nat'l City Bank of Ind. v. Ortiz, 401 S.W.3d 867, 2013 Tex. App. LEXIS 6117 (Tex. App. Houston 14th Dist. May 16 2013).

130. To prevail on his ineffective assistance claims, the father had to show that counsel's performance fell below an objective standard of reasonableness based on the failure to make hearsay objections and seek limiting instructions, and then the father had to show that but for these errors, the results of the proceedings would have been different; as the father failed to meet the second prong, given that his conclusory allegation did not meet the prejudice requirement, the court did not need to address the first prong, and the court overruled this issue. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

131. Failure to include a limiting instruction as to extraneous offense evidence admitted during the punishment phase did not cause appellant egregious harm, given that (1) the State did not mention the extraneous offense during voir dire or opening statements, (2) the State put on strong evidence of appellant's guilt of indecency, (3) the jury did not punish appellant's inappropriate touching of one victim more harshly based on the extraneous offense, and (4) the sentence fell within the lower half of the available range. Davis v. State, 2013 Tex. App. LEXIS 1452, 2013 WL 593484 (Tex. App. Houston 1st Dist. Feb. 14 2013).

132. Appellant claimed counsel failed to request a certain limiting instruction, but the record was silent as to counsel's inaction, and thus the court could not speculate in order to find counsel's performance ineffective; even if the court assumed the failure to request the instruction fell below an objective standard of reasonableness, appellant could still not prevail because he did not show that there was a reasonable probability that the outcome of the trial would have been different if counsel had succeeded in obtaining the instruction. Davis v. State, 2013 Tex. App. LEXIS 1452, 2013 WL 593484 (Tex. App. Houston 1st Dist. Feb. 14 2013).

133. Appellant did not request a limiting instruction regarding extraneous offenses offered during the punishment phase, but a trial court had a duty to provide such even without objection. Davis v. State, 2013 Tex. App. LEXIS 1452, 2013 WL 593484 (Tex. App. Houston 1st Dist. Feb. 14 2013).

134. During closing argument, appellant did not object or ask for a limiting instruction, and her motion for a new trial was based just on the denial of a mistrial, which was based on an alleged violation of a motion in limine; thus, appellant failed to preserve her incurable jury argument issue for review. Nguyen v. Myers, 442 S.W.3d 434, 2013 Tex. App. LEXIS 2085, 2013 WL 1277838 (Tex. App. Dallas Feb. 14 2013).

135. Utterance could have been seen as indicative of the mother's state of mind in response to her frustration that arose from being told that police were interested in talking to appellant, her son; construing the declaration this way would have fallen within the zone of reasonable disagreement, and no limiting instruction was sought by appellant, such that the jury was free to use the evidence as it cared to. Williams v. State, 2013 Tex. App. LEXIS 695 (Tex. App. Amarillo Jan. 24 2013).

136. Appellant's testimony concerning a prior incident was admissible for more than one reason, and because the testimony touched on several other relevant issues at trial, a limiting instruction to determining appellant's credibility was not required. Moten v. State, 2012 Tex. App. LEXIS 9541, 2012 WL 5696200 (Tex. App. Waco Nov. 15 2012).

137. In undermining appellant's theory of self-defense, the evidence complained-of was also admissible to prove appellant's state of mind at the time of the shooting, and the trial court did not err in refusing to give a limiting instruction regarding appellant's testimony about a prior incident, in connection with his conviction of aggravated assault on a peace officer. Moten v. State, 2012 Tex. App. LEXIS 9541, 2012 WL 5696200 (Tex. App. Waco Nov. 15 2012).

138. Absent a request that the trial court admit evidence of a subsequent remedial measure with a limiting instruction under Tex. R. Evid. 105(b) that the jury could consider it only for the products liability claims, the trial court did not err in not admitting the evidence under Tex. R. Evid. 407(a). Moreover, because the claimants did not argue at trial that the evidence was admissible to show control, they failed to preserve this argument for review under Tex. R. App. P. 33.1. Tidwell v. Terex Corp., 2012 Tex. App. LEXIS 7724 (Tex. App. Houston 1st Dist. Aug. 30 2012).

139. Appellant failed to meet his burden of proof as to ineffective assistance of counsel, given that (1) there was not testimony from counsel concerning his strategy, (2) had a limiting instruction been given, it would have kept the jury from considering previous offenses for non-credibility issues, but the lack of a statement from counsel lessened the effectiveness of the State's theory in this regard, (3) while an error affecting a single aspect of a trial might undermine the entire result, it was not clear that was what happened here, (4) counsel filed relevant motions and examined witnesses, and (5) appellant did not show that counsel's failure to permit or obtain a limiting instruction rendered his representation ineffective. Simmons v. State, 2012 Tex. App. LEXIS 7178, 2012 WL 3629864 (Tex. App. Austin Aug. 22 2012).

140. Even if appellant met the first prong of the ineffective assistance test, appellant did not show the absence of a limiting instruction affected the trial's outcome, given that (1) the key to the trial was witness credibility, (2) the jury still could have considered appellant's prior offenses to impeach his credibility, even had a limiting instruction been given, (3) the absence of the instruction permitted the jury to consider those offenses for any purpose, but the court did not see how that changed the outcome in any harmful way, and (4) the prior offenses did not show character conformity, and thus the absence of the limiting instruction did not have a discernible effect on the trial's outcome. Simmons v. State, 2012 Tex. App. LEXIS 7178, 2012 WL 3629864 (Tex. App. Austin Aug. 22 2012).

141. Although appellant filed a motion for a new trial, he did not allege ineffective assistance and there was no hearing, and thus the record did not show why counsel did not request a limiting instruction or object to a purportedly erroneous instruction given, and all explanations were conjecture only; the court noted that counsel's question was not designed to elicit a response that appellant had been incarcerated, the court could not speculate as to counsel's strategy, appellant was unable to rebut the presumption of reasonable assistance, and counsel's actions, without explanation, did not compel a finding that counsel's performance was deficient, nor could the court say that no strategy could have justified the decisions or that counsel's conduct was so outrageous that no attorney would have done so. Parker v. State, 2012 Tex. App. LEXIS 7179, 2012 WL 3630163 (Tex. App. Austin Aug. 22 2012).

142. Potential of the extraneous offense evidence to impress the jury in an irrational but indelible way was not high, given that the evidence did not involve a crime of violence and the trial court gave a limiting instruction, and this factor weighed in favor of admitting the evidence. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

143. Mother did not preserve for appellate review under Tex. R. Evid. 105(a) her complaint about evidence of her predicate violations being used in a termination of parental rights proceeding; when evidence of her predicate violations was offered during trial, she made no request for the jury to be instructed that the evidence be admitted for the limited purpose of the predicate violations. In the Interest of A.M., 385 S.W.3d 74, 2012 Tex. App. LEXIS 6705 (Tex. App. Waco Aug. 9 2012).

144. Appellant's claim that the admission of a hearsay document was error had to be looked at within the confines of the limiting instruction given that precluded use of the affidavit to prove the truth of the matter asserted, and appellant did not object to the limiting instruction; the contents of the affidavit were not inadmissible on hearsay grounds and appellant's claim could not be sustained. Richard v. State, 2012 Tex. App. LEXIS 5872, 2012 WL 2945970 (Tex. App. Texarkana July 20 2012).

145. Counselor's inability to cite studies did not make her testimony unreliable, given the nature of her expertise field; the trial court properly limited the testimony to comport with the counsel's expertise, and the court found no abuse of discretion in admitting her testimony in order to help the jury understand why the victim delayed in calling the police in this aggravated assault case involving appellant, the victim's fiance. Brewer v. State, 370 S.W.3d 471, 2012 Tex. App. LEXIS 4519, 2012 WL 2290871 (Tex. App. Amarillo June 7 2012).

146. State did not meet the predicate for admissibility as a recorded recollection because the victim did not vouch for the statement's accuracy and did not remember much of what was in the statement, plus parts were not in her handwriting, and thus a limiting instruction, advising the jury to consider the statement for testing the victim's credibility only for purposes of Tex. R. Evid. 613(a), should have been granted. Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

147. In a defamation action, a trial court did not err by admitting daily logs as business records for the limited purpose of whether a prudent investigation of complaints was conducted by an executive director of an independent living facility prior to banning a service provider; the trial court gave a limiting instruction to the jury, and the logs were relevant because the bore on the directors motivation and state of mine and a substantial truth defense. Collins v. Sunrise Senior Living Mgmt., 2012 Tex. App. LEXIS 2457, 2012 WL 1067953 (Tex. App. Houston 1st Dist. Mar. 29 2012).

148. Court has located no authority to support an argument that the trial court had a duty to give the jury a limiting instruction in the absence of a request for the instruction the first time the evidence was admitted at trial. Beckett v. State, 2012 Tex. App. LEXIS 2293, 2012 WL 955358 (Tex. App. Dallas Mar. 22 2012).

149. Trial court stated that the denial of a limiting instruction did not mean the jury could consider certain evidence as evidence of appellant's guilt, and the instruction nullified the tendency of the jury to infer appellant's pre-trial detention was evidence of guilt; error, if any, was rendered harmless by the instruction given. Beckett v. State, 2012 Tex. App. LEXIS 2293, 2012 WL 955358 (Tex. App. Dallas Mar. 22 2012).

150. Although the trial court erred by failing to give a limiting instruction pursuant to Tex. R. Evid. 105 with regard to extraneous acts contained in a prosecution's exhibit when the exhibit was first admitted into evidence, this error had no more than a slight effect on the jury's verdict and, thus, was harmless. Mccormick v. State, 2012 Tex. App.

LEXIS 2026, 2012 WL 851696 (Tex. App. Waco Mar. 14 2012).

151. Where there was no limiting instruction and no request for a limiting instruction under Tex. R. Evid. 105(a) during defendant's trial for burglary and theft, a detective's testimony was admitted for all purposes and could be considered in a sufficiency review. Harralson v. State, 2012 Tex. App. LEXIS 1583, 2012 WL 682345 (Tex. App. Houston 1st Dist. Mar. 1 2012).

152. Having failed to request a limiting instruction, parties could not argue on appeal about any harm allegedly caused by the introduction of evidence in this regard; also, the court could not say that the evidence influenced the jury to the extent that it probably caused the rendition of an improper judgment. Carlton Energy Group, LLC v. Phillips, 369 S.W.3d 433, 2012 Tex. App. LEXIS 1299, 2012 WL 555980 (Tex. App. Houston 1st Dist. Feb. 14 2012).

153. Trial court's failure to instruct the jury during the witness's testimony did not affect appellant's substantial rights under Tex. R. App. P. 44.2(b) and did not influence the jury or had but a slight effect; the trial court gave a limiting instruction in the charge of each offense, and nothing showed that the jury failed to comply with the limiting instruction. Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

154. State's theory was that appellant killed his ex-wife in a rage when confronted about sexual conduct with her daughter, and appellant admitted being accused of molestation before he stabbed the ex-wife; the evidence concerning appellant's sexually-oriented emails and alleged fantasizing about his stepdaughter was probative of motive and intent under Tex. R. Evid. 404(b), plus the trial court gave limiting instructions, and the court found no abuse of discretion on the trial court's part. Zavala v. State, 401 S.W.3d 171, 2011 Tex. App. LEXIS 8671, 2011 WL 5156843 (Tex. App. Houston 14th Dist. Nov. 1 2011).

155. Supervisor's statements telling an employee the purpose of a per diem payment were within his apparent authority and were not hearsay because they addressed terms of employment; thus, the absence of a limiting instruction under Tex. R. Evid. 105(a) could not be harmful error. Tex. Prop. & Cas. Ins. Guar. Ass'n v. Brooks, 2011 Tex. App. LEXIS 7269, 2011 WL 3890405 (Tex. App. Austin Aug. 31 2011).

156. Because neither side requested an instruction limiting the jury's consideration of certain evidence, it was admitted for all purposes. Penaloza v. State, 349 S.W.3d 709, 2011 Tex. App. LEXIS 6463 (Tex. App. Houston 14th Dist. Aug. 16 2011).

157. Given that (1) appellant requested a limiting instruction and the trial court said it had to hear the evidence first and would be receptive to such an instruction, (2) the State elicited testimony concerning extraneous offenses, and (3) appellant did not renew his request or later ask for another one, the court could not find that the trial court's comment that it would "certainly be receptive" to a limiting instruction constituted an adverse ruling, for purposes of Tex. R. App. P. 33.1(a), and the issue was not preserved for review. Reyes v. State, 2011 Tex. App. LEXIS 4811, 2011 WL 2507002 (Tex. App. Austin June 24 2011).

158. Limiting instruction was given in the charge; without a specific request for a contemporaneous limiting instruction at the time the evidence was admitted and the denial of such a request, there was nothing for the trial court to review. Reyes v. State, 2011 Tex. App. LEXIS 4811, 2011 WL 2507002 (Tex. App. Austin June 24 2011).

159. Even assuming counsel was deficient for failing to object to testimony or request a limiting instruction, the record did not support the conclusion that appellant met the second prong of the test for ineffective assistance.

Garcia v. State, 2011 Tex. App. LEXIS 4663, 2011 WL 2463049 (Tex. App. Corpus Christi June 16 2011).

160. Under Tex. R. App. P. 33.1(a), it appeared that appellant waived any objection to testimony, given that he failed to object to the evidence when it was offered, and there was no request for any instruction in the charge on punishment; even if the court assumed appellant could raise some appellate objection, appellant did not request a limiting instruction and the failure of the trial court to give one was not error. Moore v. State, 339 S.W.3d 365, 2011 Tex. App. LEXIS 2602 (Tex. App. Amarillo Apr. 6 2011).

161. Assuming the court was able to consider the issue, appellant failed to demonstrate that the failure to give the instruction limiting the jury's use of gang membership was egregious error, given that (1) appellant received a mid-range sentence, and (2) the State concentrated its argument on the fact that this was appellant's third conviction. Moore v. State, 339 S.W.3d 365, 2011 Tex. App. LEXIS 2602 (Tex. App. Amarillo Apr. 6 2011).

162. In an action for breach of a gas purchase agreement, evidence of early pays and appellant's relationship with a third party was properly admitted to show they had oral agreements and the third party's authority was not encompassed by the sole written contract between them; this evidence was relevant under Tex. R. Evid. 401 for purposes of establishing apparent agency. Because appellant did not request a limiting instruction under Tex. R. Evid. 105(a), the evidence was admissible for any purpose. Reliant Energy Servs. v. Cotton Valley Compression, Llc, 336 S.W.3d 764, 2011 Tex. App. LEXIS 959, 173 Oil & Gas Rep. 732 (Tex. App. Houston 1st Dist. Feb. 10 2011).

163. Trial court did not err in refusing the limiting instruction regarding testimony about drugs; examining the home environment and evidence of illegal drug-use and related criminal activity was necessary in determining endangerment. In the Interest of S.R., 2010 Tex. App. LEXIS 9681, 2010 WL 4983484 (Tex. App. Waco Dec. 8 2010).

164. Trial court could have reasonably concluded that an accomplice's testimony was not offered for character conformity purposes under Tex. R. Evid. 404(b), but instead was offered to rebut appellant's defensive theory in his trial under Tex. Penal Code Ann. § 32.51(b) that the identifying information was in his car by mistake and that he had no knowledge of the information; the trial court's limiting instruction showed that the trial court admitted the testimony for noncharacter conformity purposes and the trial court did not err in admitting the testimony as rebuttal evidence. Richardson v. State, 328 S.W.3d 61, 2010 Tex. App. LEXIS 6564 (Tex. App. Fort Worth Aug. 12 2010).

165. Second and third factors of a Tex. R. Evid. 403 analysis weighed in favor of the trial court's decision to admit extraneous offense evidence; the trial court gave a limiting instruction and the State did not spend an unduly lengthy amount of time to develop the evidence. Fletcher v. State, 2010 Tex. App. LEXIS 5084, 2010 WL 2650008 (Tex. App. Houston 14th Dist. July 6 2010).

166. Witness's testimony was not admitted for all purposes, because the court's statement adequately informed the jury that the testimony should be considered for impeachment only and not for the truth of the matter asserted. Saavedra v. State, 2010 Tex. App. LEXIS 3878 (Tex. App. Dallas May 24 2010).

167. Trial court's decision to admit a videotape under Tex. R. Evid. 404(b) fell within the zone of reasonable disagreement, given that (1) the charge contained a limiting instruction of how the evidence of another wrong was to be considered, and (2) the videotape, which showed defendant struggling with police, was probative of the issue of whether defendant intentionally kicked an officer or did so by accident; the actions depicted on the videotape did not warrant the conclusion that the probative value was substantially outweighed by its prejudicial effect under Tex. R. Evid. 403 and the trial court did not abuse its discretion in admitting the videotape into evidence on substantive

grounds. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

168. During defendant's punishment hearing for three counts of aggravated sexual assault of a child, his daughter, the trial court did not err in admitting evidence of unadjudicated extraneous offenses under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) as to a 1992 offense because the evidence was admissible with respect to the other two counts; defendant did not request a limiting instruction pursuant to Tex. R. Evid. 105(a). Watson v. State, 2010 Tex. App. LEXIS 3402, 2010 WL 1814680 (Tex. App. Austin May 5 2010).

169. Court could assume without deciding that defendant was correct that a videotape was not admissible as a prior consistent statement or prior inconsistent statement, for purposes of Tex. R. Evid. 613(a), 801(e)(1)(B), even though he failed to raise the latter objection at trial and raised the former with insufficient specificity because the videotape was still admissible (1) to rebut the suggestion that the police fed the witness his answers to their questions, and (2) to show that the witness was not parroting what the police told him; defendant did not object or seek a limiting instruction under Tex. R. Evid. 105(a), such that the jury was free to consider the tape's contents for any purposes, plus the videotape was admissible to clarify what the witness actually said, for purposes of Tex. R. Evid. 107. Franks v. State, 2010 Tex. App. LEXIS 3224, 2010 WL 1730032 (Tex. App. Austin Apr. 28 2010).

170. Cases do not prohibit the trial court from including a limiting instruction in the charge even when the evidence is admissible for all purposes and even though the defendant does not request such an instruction. Gilmore v. State, 2010 Tex. App. LEXIS 1944 (Tex. App. Houston 1st Dist. Mar. 18 2010).

171. Because defendant did not request a limiting instruction under Tex. R. Evid. 105(a) on certain evidence regarding pictures of a house, the jury could consider the pictures of the house for all purposes, and thus the trial court's oral and written limiting instructions were not necessary; although the trial court was not required to give a limiting instruction, the trial court did not commit egregious error by instructing the jury that they could consider the evidence only for background contextual purposes. Gilmore v. State, 2010 Tex. App. LEXIS 1944 (Tex. App. Houston 1st Dist. Mar. 18 2010).

172. Defendant did not object to certain extraneous evidence by the victim and related evidence was admitted without objection as to other witnesses, plus the jury was given a limiting instruction, such that any error that might have occurred was harmless. Dempsey v. State, 2009 Tex. App. LEXIS 9537, 2009 WL 4840158 (Tex. App. Houston 14th Dist. Dec. 17 2009).

173. Pursuant to Tex. R. App. P. 33.1(a), defendant waived his complaint about the admission of a prior fight because he failed to continuously object to the evidence and he allowed the same evidence to come in through another witness without objection, which cured the error, plus the trial court instructed the jury about the limited purpose of the evidence, such that any error that might have occurred was harmless. Dempsey v. State, 2009 Tex. App. LEXIS 9537, 2009 WL 4840158 (Tex. App. Houston 14th Dist. Dec. 17 2009).

174. Defendant's argument on appeal did not comport with his objection at trial, such that the claimed error based on the trial court's failure to issue a limiting instruction was waived under Tex. R. App. P. 33.1, Tex. R. Evid. 103(a); in any event, the complaint provided no basis for reversal because statements admitted as present sense impressions or excited utterances under Tex. R. Evid. 803(1), (2) were admissible for all purposes and were not subject to a limiting instruction. Green v. State, 2009 Tex. App. LEXIS 9300, 2009 WL 4575146 (Tex. App. Houston 14th Dist. Dec. 8 2009).

175. Defendant objected to certain testimony and asked for an instruction telling the jury to disregard the testimony, but defendant did not seek a limiting instruction under Tex. R. Evid. 105(a), and in the absence of a request, defendant could not complain on appeal that such an instruction was not given. Perez v. State, 2009 Tex.

App. LEXIS 8963 (Tex. App. Austin Nov. 20 2009).

176. State did not request a limiting instruction after its objection to certain testimony under Tex. R. Evid. 608(b) and the trial court sustained no objection to another's testimony about the victim's truthfulness, such that defendant failed to present any error for the court's review as to certain witnesses. Love v. State, 2009 Tex. App. LEXIS 8952, 2009 WL 3930900 (Tex. App. Houston 1st Dist. Nov. 19 2009).

177. In an attempted capital murder case, there was no error in the limiting instruction provided in the jury charge because the trial court was not required to further instruct the jury that it could not consider the impeachment testimony for purposes of determining guilt-innocence because that idea was implicit in the court's instruction that the impeachment testimony was to be used to determine credibility and "for no other reason." Walker v. State, 300 S.W.3d 836, 2009 Tex. App. LEXIS 7763 (Tex. App. Fort Worth Oct. 1 2009).

178. Trial court ruled that testimony was admissible under Tex. R. Evid. 404(b), and when the trial court gave a limiting instruction, defendant did not object; defendant's contention that the trial court failed to correctly instruct the jury had not been preserved. Villarreal v. State, 2009 Tex. App. LEXIS 7305, 2009 WL 2965281 (Tex. App. Eastland Sept. 17 2009).

179. Extraneous offense was highly probative on the issue of identity because of its similarity to the charged offense, the evidence was only introduced after defendant asserted an alibi, thus making the evidence probative to disprove that defense, and all the evidence bearing on identity was disputed, thus elevating the State's need for extraneous offense testimony; given that (1) the testimony was not so graphic or appalling that it would impress the jury in some irrational, but indelible way, (2) the trial court gave a limiting instruction, (3) the extraneous offense testimony was presented after all the evidence of the charged crime was presented and it did not consume an inordinate amount of time, (4) there was nothing about the witness's testimony that would cause jurors to improperly rely on her statements, and (5) her testimony was not repetitive of other evidence already admitted, the danger of unfair prejudice did not substantially outweigh the probative value of the extraneous offense evidence and the trial court did not err in admitting it. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

180. While the offenses were no doubt prejudicial, they were not unfairly so in proportion to their probative value; moreover, the jury received an instruction limiting their consideration of the offenses to the issue of fabrication, and this factor favored admissibility under Tex. R. Evid. 403. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

181. For purposes of Tex. R. Evid. 404(b), a witness's testimony was admissible as proper rebuttal evidence to show that defendant had the requisite intent to rob or violate or abuse the victim sexually, which was necessary to establish the offense of aggravated kidnapping; given that the witness's testimony showed that defendant was involved in a similar crime, it was at least subject to reasonable disagreement that the witness's testimony made defendant's defensive theory of lack of intent more or less probable, plus under Tex. R. Evid. 105(a), the trial court admitted the evidence for its noncharacter conformity purpose of determining defendant's intent, and the trial court did not abuse its discretion in admitting this evidence. Dale v. State, 2009 Tex. App. LEXIS 5784, 2009 WL 2264230 (Tex. App. San Antonio July 29 2009).

182. Under the Tex. R. Evid. 403 balancing test, the probative value of a witness's testimony under Tex. R. Evid. 404(b) was not substantially outweighed by the danger of unfair prejudice, given that (1) the testimony was probative to rebut defendant's defensive theory of a lack of intent, which was an issue in the aggravated kidnapping case, (2) the evidence was presented in a short and concise manner, (3) the testimony was preceded by a limiting instruction, plus the jury charge clarified that the evidence was offered only for its noncharacter conformity purpose

of determining defendant's intent, and (4) while the witness's testimony injured defendant's case, it did not adversely affect defendant beyond its purpose of tending to prove his intent to commit the offense, and the trial court did not err in admitting the testimony. Dale v. State, 2009 Tex. App. LEXIS 5784, 2009 WL 2264230 (Tex. App. San Antonio July 29 2009).

183. Trial court could have found that evidence of defendant's drug dealing, for purposes of Tex. R. Evid. 404(b), had some logical relevance aside from character conformity, plus the evidence was not outweighed by the danger of unfair prejudice, given the other evidence admitted at trial, including evidence of defendant's gang membership; assuming it was error to admit the extraneous offense evidence, defendant's substantial rights were not affected under Tex. R. App. P. 44.2(b), given that the jury was instructed to use the evidence for the limited purpose of determining a relationship between defendant and another and the drug dealing was not mentioned by the State in closing arguments and thus was not emphasized. Mata v. State, 2009 Tex. App. LEXIS 5410, 2009 WL 2045250 (Tex. App. San Antonio July 15 2009).

184. Regarding an apparent charge error complaint, defendant, contrary to Tex. R. App. P. 38.1(i), cited to no authority in support of his statement that the trial court's failure to include a limiting instruction in the jury charge constituted charge error and the court did not consider it as a separate complaint among those raised under his second point but instead as part of the harm discussion; the court noted that where no limiting instruction was requested when evidence was first admitted, it was admitted for all purposes, and no subsequent limitation on the evidence by means of a jury charge instruction was appropriate. John v. State, 2009 Tex. App. LEXIS 4853, 2009 WL 1815650 (Tex. App. Fort Worth June 25 2009).

185. Any error in admitting extraneous offense evidence was harmless under Tex. R. App. P. 44.2(b), given that (1) the State presented ample evidence of defendant's guilt of murder, (2) the disputed evidence did not serve to improperly bolster other evidence against defendant, but was proffered to help the factfinder in understanding the circumstances under which defendant obtained a murder weapon, (3) the State spent little time eliciting the disputed testimony and made no reference to it in closing argument, and (4) the trial court gave a limiting instruction regarding extraneous offense testimony, which instruction the jury was presumed to have followed, and this presumption was not rebutted by defendant. Lewis v. State, 2009 Tex. App. LEXIS 4889, 2009 WL 1813132 (Tex. App. Houston 1st Dist. June 25 2009).

186. Although defendant complained about the State's reference to defendant's prior conviction and argued that the State was attempting to show the jury that defense counsel did not know the law, it appeared that the State was referring to the law applicable to the use of evidence admitted in the absence of a limiting instruction; when the State asked defendant about the prior conviction, counsel did not request a limiting instruction, nor did the jury charge contain any such instruction, and thus the conviction was before the jury for all purposes and the State's reference to the conviction was not improper argument, plus the State's remarks appeared to have been in response to defense counsel's argument. Vega v. State, 2009 Tex. App. LEXIS 4102, 2009 WL 1617670 (Tex. App. San Antonio June 10 2009).

187. Although defendant referred to much of the State's evidence as extraneous or under Tex. R. Evid. 404(b), it was incumbent upon defendant to argue that objections to this evidence properly would have been sustained or a limiting instruction properly given; he made no attempt to show that any of the purported Rule 404(b) evidence was inadmissible or that a limiting instruction was appropriate, and because he failed to discuss the facts in light of the relevant authority, he inadequately briefed this complaint; nevertheless, the record established much of the purported extraneous offense evidence was admissible as same transaction contextual evidence or was admitted without objection as part of trial counsel's strategy that was not so outrageous that no attorney would have engaged in it and defendant would not have been entitled to a limiting instruction. The court thus rejected defendant's ineffective assistance claim in this regard. Ruiz v. State, 293 S.W.3d 685, 2009 Tex. App. LEXIS 3632 (Tex. App.

San Antonio May 27 2009).

188. Any error in admitting extraneous offense evidence did not have a substantial effect on the verdict and did not affect defendant's substantial rights, such that any error was harmless under Tex. R. App. P. 44.2(b), given that (1) the State presented ample evidence of defendant's guilt of aggravated robbery, (2) the only evidence directly supporting one defense theory was a single affirmative response by defendant's former girlfriend, who admitted to having prior felony convictions, and the only evidence of defendant's alibi defense was defendant's father's testimony, (3) although the State referenced the extraneous offense in its closing argument, the State did so to rebut defendant's fabrication and alibi defenses, plus the State told the jury to consider the extraneous offense evidence for rebuttal only, and (4) the trial court also provided a limiting instruction and defendant did not rebut the presumption that the jury followed the instructions given. Burton v. State, 2009 Tex. App. LEXIS 2781, 2009 WL 1086934 (Tex. App. Houston 1st Dist. Apr. 23 2009).

189. Trial court impliedly sustained defendant's vague hearsay objection by ordering the State to rephrase the question and defendant's limiting instruction request went only to the issue of nonresponsiveness; the record did not support the view that the trial court was given an opportunity to address the issue being raised on appeal, that the trial court failed to instruct the jury to disregard. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

190. Defendant did not meet the first prong of the test for ineffective assistance of counsel because the record was undeveloped, defendant failed to rebut the presumption that trial counsel's decisions were reasonable, and the court was not required to speculate on counsel's actions when confronted with a silent record; although the record contained no explanation as to why defense counsel (1) allowed the introduction of allegations of extraneous offenses and another statement, and (2) did not object to certain testimony, reasonable trial strategy might have justified counsel's conduct, as counsel might not have pursued a limiting instruction on the extraneous offenses because of concern that such would lend more credibility to the offenses. Rivas v. State, 2009 Tex. App. LEXIS 983, 2009 WL 335274 (Tex. App. Houston 14th Dist. Feb. 12 2009).

191. Admission of the extraneous offenses carried a risk of irrationally impressing the jury of defendant's character conformity, which the law seeks to avoid, but the trial court gave a limiting instruction and the testimony in question did not take up a significant portion of the trial for aggravated sexual assault, and the trial court did not err in admitting the evidence. Jabari v. State, 273 S.W.3d 745, 2008 Tex. App. LEXIS 8814 (Tex. App. Houston 1st Dist. 2008).

192. In defendant's trial under Tex. Penal Code Ann. § 22.11(a)(1), extraneous evidence under Tex. R. Evid. 404(b) was not inadmissible under Tex. R. Evid. 403, given that (1) the extraneous evidence did tend to show a scheme or plan and a motive on the part of defendant to throw bodily fluids on people in order to stay in administrative segregation, (2) the State demonstrated a need to use this evidence, (3) the trial court limited the number of incidents that the State could use and testimony was admitted accordingly, and (4) the trial court gave the jury a limiting instruction. Cantu v. State, 2008 Tex. App. LEXIS 8560 (Tex. App. Houston 1st Dist. Nov. 13 2008).

193. Neither of two witnesses testified that a jail identification card belonged to defendant, defendant did not seek a limiting instruction or an instruction to disregard, and even if there had been an error in one witness's statement, an instruction to disregard could have been requested to cure any possible error and defendant's failure to request a cure short of a mistrial waived any error; defendant also did not object when the other witness testified about the card, and thus defendant waived any error related to the testimony, for purposes of Tex. R. App. P. 33.1. Garza v. State, 2008 Tex. App. LEXIS 7004 (Tex. App. Austin Sept. 19, 2008).

194. In an ex-husband's appeal of a divorce judgment, the appellate court excluded the husband's submission notebook from its review of the evidence and excluded the husband's arguments based on the notebook from its analysis because the trial court had admitted the notebook only as a summary of a witness's testimony, and the husband had not testified at trial. To the extent that any specific portion of the notebook was admitted into evidence without limitation elsewhere during the trial, the court concluded that it would consider such portion pursuant to Tex. R. Evid. 105(a). Hancock v. Hancock, 2008 Tex. App. LEXIS 5737 (Tex. App. Fort Worth July 31 2008).

195. In a child sexual assault case, the trial court did not err by denying defendant's request for a contemporaneous limiting instruction in connection with the admission of a different extraneous offense because, when the same evidence was later introduced through the matching testimony of a witness, defendant did not object or request a limiting instruction; consequently, the issue was moot. Sanders v. State, 255 S.W.3d 754, 2008 Tex. App. LEXIS 3413 (Tex. App. Fort Worth 2008).

196. In connection with defendant's conviction under Tex. Penal Code Ann. § 22.021, defendant did not assert in his new trial motion that counsel was ineffective for the reasons defendant asserted on appeal and the record did not indicate why counsel asked the victim whether the sexual abuse occurred only once or why counsel did not ask for a limiting instruction, and on this record, the court was unable to conclude that the challenged conduct was not sound trial strategy or was so outrageous that no competent attorney could have engaged in it; it was plausible that counsel was attempting to cast doubt on the victim's credibility, which was a proper trial strategy, and if counsel engaged in such strategy without success, the court was unable to conclude in hindsight that he was ineffective for attempting it, and thus defendant failed to overcome the strong presumption that counsel might have acted pursuant to a sound trial strategy. Marine v. State, 2008 Tex. App. LEXIS 3161 (Tex. App. Houston 1st Dist. May 1 2008).

197. In an action involving a fire and who was the cause of it, the condominium's contention that the trial court erred by forcing it to present evidence of insurance to the jury was without merit since the condominium apparently did not enter the proof of loss into evidence and the proof of loss was admitted without limitation, Tex. R. Evid. 105. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 245 S.W.3d 646, 2008 Tex. App. LEXIS 963 (Tex. App. Fort Worth 2008).

198. During a trial for assault, defendant's failure to redact the machine-generated numbers on the back of a photograph before offering it into evidence or to request a limiting instruction that the jury consider only the front of the photograph resulted in the admission of the photograph for all purposes under Tex. R. Evid. 105 and allowed the jury to consider the entire photograph, including the back. Kuhn v. State, 2008 Tex. App. LEXIS 960 (Tex. App. Fort Worth Feb. 7 2008).

199. Defendant was not required to request a further limiting instruction where the trial court, in overruling his objection to a witness's testimony that he told her that he had abused his stepdaughter, had stated that the testimony was for impeachment purposes only and thus, the statement adequately informed the jury the testimony should be considered for impeachment only and not for the truth of the matter asserted. Saavedra v. State, 2008 Tex. App. LEXIS 25 (Tex. App. Dallas Jan. 3 2008).

200. To the extent that defendant's issue could have been construed as the trial court erring in not giving a limiting instruction that the ejection of counsel was not to be held against defendant, that issue was not preserved under Tex. R. App. P. 33 because defendant failed to make a request for such an instruction at that time. Andrade v. State, 246 S.W.3d 217, 2007 Tex. App. LEXIS 9288 (Tex. App. Houston 14th Dist. 2007).

201. One victim's testimony was sufficient to establish by a preponderance of the evidence that the charged offenses occurred in a particular county, for purposes of Tex. Code Crim. Proc. Ann. art. 13.17; the jury reasonably

inferred that the victim meant that defendant lived in two counties and defendant did not request a limiting instruction under Tex. R. Evid. 105 as to the victim's testimony, and thus it was admissible for all purposes. Bryant v. State, 2007 Tex. App. LEXIS 9425 (Tex. App. Fort Worth Nov. 29 2007).

202. Defendant's requested jury instruction was not warranted because he failed to object and request a limiting instruction when he first had the opportunity to do so; although the evidence of extraneous wrongdoing would likely have merited a limiting instruction, defendant did not object when the comment was made, but instead requested an instruction in the jury charge. Chuber v. State, 2007 Tex. App. LEXIS 9227 (Tex. App. San Antonio Nov. 28 2007).

203. Court was bound by the Texas Criminal Court of Appeals' holdings, wherein the Court found that a "car dumping" incident was not probative of defendant's intent or motive for purposes of Tex. R. Evid. 404(b), and thus the court held that the trial court should not have instructed the jury to consider the incident for intent and motive; by giving the instruction, the trial court exacerbated the prejudicial impact of the evidence and the court found that defendant was harmed as a result, but the Court had previously found that a limiting instruction was a reason why any potential prejudice was diminished, and the court was bound by this holding and overruled defendant's issues in this regard; because the Court had previously found that the car dumping incident was not erroneously admitted, there was no evidentiary error that denied defendant a fundamentally fair trial. Garcia v. State, 246 S.W.3d 121, 2007 Tex. App. LEXIS 8051 (Tex. App. San Antonio 2007), *cert. denied*, 555 U.S. 949, 129 S. Ct. 404, 172 L. Ed. 2d 295, 2008 U.S. LEXIS 7457 (2008).

204. Defendant's objection did not make reference to Tex. R. Evid. 613; the court was unable to say that the ground objection asserted on appeal was apparent from context, for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103, and thus the court overruled the issue and noted that it was uncertain that the exhibit was viewed by either counsel purely as impeachment evidence, and no mention was made of an instruction limiting its use by the jury to that purpose. Mendoza v. State, 2007 Tex. App. LEXIS 7679 (Tex. App. Amarillo Sept. 24 2007).

205. Videotape showing the route taken by defendant during a chase was not an experiment or a reconstruction that required expert explanation, but instead it was a videotape version of a print map showing defendant's efforts to avoid officers and was used to show the jury the route followed, and the jury was instructed that its consideration of the evidence was limited to that purpose; relevant to the issue of intent in defendant's trial for aggravated assault on a public servant with a deadly weapon finding, under Tex. Penal Code Ann. § 22.02, was the preceding flight and the court did not find that the admission of the evidence in question was error. Timmons v. State, 2007 Tex. App. LEXIS 7519 (Tex. App. Texarkana Sept. 17 2007).

206. Complained-of testimony was not extraneous offense evidence, but was multiple occurrences of acts alleged in the indictment, such that defendant was not entitled to a limiting instruction or an instruction during either the guilt/innocence phase or the punishment phase of the trial indicating that the State needed to prove the extraneous offenses beyond a reasonable doubt; because the court found that the trial court did not err in refusing to submit the requested instructions, the court did not address harm. Aportela v. State, 2007 Tex. App. LEXIS 7580 (Tex. App. El Paso Sept. 6 2007).

207. In defendant's sexual assault and indecency with a child case, any error in failing to give limiting instructions was harmless; defendant's first request was untimely and the trial court did not err by denying it, and within the context of the entire case, defendant's failure to request a limiting instruction during any other testimony covering the same extraneous offense evidence did not affect defendant's substantial rights. Neathery v. State, 2007 Tex. App. LEXIS 6625 (Tex. App. Fort Worth Aug. 16 2007).

208. In a negligence case arising from a fire at a condominium complex, absent a request for a limiting instruction on evidence of insurance, that issue was waived on appeal under Tex. R. Evid. 105. Richmond Condos. v.

Skipworth Commer. Plumbing, Inc., 2007 Tex. App. LEXIS 5977 (Tex. App. Fort Worth July 26 2007).

209. Trial court properly sustained the objection to the admission of a chemist report prepared by the expert's employee and relied upon by the expert, but the trial court properly admitted the expert's testimony because it was not hearsay and was not required to be based on personal knowledge; even if the expert's testimony did improperly reveal underlying facts or data that were inadmissible, for which Tex. R. Evid. 705 would have required the trial court to give a limiting instruction upon request, no such instruction was requested and thus the trial court did not err in admitting the expert's testimony. Collins v. State, 2007 Tex. App. LEXIS 6116 (Tex. App. Fort Worth July 26 2007).

210. It could have been strategic that defense counsel did not object to certain evidence, and defendant failed to show that counsel's failure to object to the admission of the evidence or to request a limiting instruction fell below an objective standard of reasonableness as required to show ineffective assistance of counsel. Smith v. State, 2007 Tex. App. LEXIS 5693 (Tex. App. Austin July 18 2007).

211. Because the record did not reflect counsel's reason for not requesting a limiting instruction, the court found no basis for concluding that counsel did not exercise reasonable professional judgment, and defendant failed to rebut the presumption that counsel's actions or inactions were reasonable. Mathews v. State, 2007 Tex. App. LEXIS 5349 (Tex. App. Corpus Christi July 5 2007).

212. In a case where two people were being tried for aggravated sexual abuse of a child, "have you heard" questions under Tex. R. Evid. 405 were properly asked when witnesses testified about the character of the co-defendant; defendant failed to request a limiting instruction under Tex. R. Evid. 105, so she could not challenge the issue on appeal; the evidence was not offered to prove the extraneous offense, but to test the qualification of the witnesses to testify regarding character. Little v. State, 2007 Tex. App. LEXIS 4194 (Tex. App. Texarkana May 30 2007).

213. Trial court properly overruled defendant's motion to sever under Tex. Code Crim. Proc. Ann. art. 36.09 because defendant failed to establish that a joint trial would have been prejudicial to him; defendant did not show a serious risk that a specific trial right would be compromised by a joint trial or that a joint trial would have prevented the jury from making a reliable judgment and that the problem could not have been adequately addressed by other curative measures such as a limiting instruction. Hernandez v. State, 2007 Tex. App. LEXIS 4088 (Tex. App. Corpus Christi May 24 2007).

214. Court rejected defendant's claim of ineffective assistance of counsel; although defendant argued that counsel was ineffective for not asking for a limited instruction regarding the admissibility of DNA evidence, nothing in the record supported defendant's claims, defendant did not assert this issue in a motion for a new trial, counsel did not have the chance to explain himself, the trial court's handwritten note to the jury was not determinative evidence, and defendant failed to show that but for counsel's performance, the result would have been different. Reese v. State, 2007 Tex. App. LEXIS 3137 (Tex. App. Dallas Apr. 25 2007).

215. For purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 4, the prosecutor only restated the parole law rather than actually calculating the issue with regard to defendant, and regardless of whether the argument was error, the record did not show that but for counsel's failure to object or seek a limiting instruction, the outcome would have been different; for robbery, the jury was allowed to assess between two and 20 years in prison, the jury assessed punishment at eight years, less than the State requested, and defendant did not show prejudice. Hagos v. State, 2007 Tex. App. LEXIS 2928 (Tex. App. San Antonio Apr. 18 2007).

216. Even assuming an officer's testimony of events occurring after the arrest was irrelevant, the failure to object to its admission could not have formed the basis of an ineffective assistance claim, and the court was hesitant to speculate as to why counsel failed to seek a limiting instruction regarding the extraneous acts, and thus defendant failed to show that counsel's lack of objection was not part of strategy. Hagos v. State, 2007 Tex. App. LEXIS 2928 (Tex. App. San Antonio Apr. 18 2007).

217. Trial court erred in admitting a document because it contained several instances of hearsay under Tex. R. Evid. 801, and thus it should not have been admitted for all purposes, and because the offer was not limited, it was an offer for all purposes, including the truth of the matter asserted; the State's claim that the hearsay objection was forfeited by wrongdoing had no basis in Texas evidence law; however, error was not harmful under Tex. R. App. P. 44.2 because the jury never heard the hearsay contained in the document. Sapp v. State, 2007 Tex. App. LEXIS 2875 (Tex. App. Houston 14th Dist. Apr. 17 2007).

218. Court rejected defendant's claim of ineffective assistance of counsel, given that (1) defendant failed to provide an adequate record explaining counsel's reasons for conducting a cross-examination of a detective as counsel did, (2) counsel might have had a strategy in doing so, and even if the strategy was not as effective as counsel intended, the effectiveness of counsel was not to be evaluated based on hindsight, (3) counsel might have decided not to request a limiting instruction to avoid drawing attention to the extraneous offenses, and (4) nothing showed that counsel's actions were not of sound legal strategy; the court also did not find that counsel's performance was so outrageous that no competent attorney would have engaged in it. Scott v. State, 2007 Tex. App. LEXIS 2855 (Tex. App. Houston 14th Dist. Apr. 12 2007).

219. Witness's prior out of court statement to police, if offered to prove the truth of the matters asserted, likely constituted inadmissible hearsay, and thus the statements were subject to a limiting instruction under Tex. R. Evid. 105, and because counsel did not request the instruction at the first opportunity, the evidence was admitted for all purposes; the record was undeveloped as to counsel's reasons for not requesting the instruction, no new trial motion was filed to create such a record, and thus defendant did not overcome the presumption of reasonable assistance; even if the court found counsel's performance was not within the range of professional assistance, defendant failed to show that there was a reasonable probability that the result of the proceeding would have been different had counsel sought to limit the use of the witness's statements sooner than in the jury charge, as this testimony was not the only evidence that could have defeated defendant's self-defense theory in the murder trial. Scott v. State, 2007 Tex. App. LEXIS 2896 (Tex. App. Houston 1st Dist. Apr. 12 2007).

220. Admission of an extraneous conviction amounted to harm under Tex. R. App. P. 44.2(b); while there was enough evidence to convict defendant of attempted sexual assault without the conviction, there was some contradictory evidence and the error involved the introduction of evidence, a prior conviction for indecency with a child, that was inherently inflammatory; although the trial court gave a limiting instruction, the relevance of the evidence was suspect and the court had little choice but to recognize the high likelihood that the prior conviction influenced one or more of the jurors. Bjorgaard v. State, 220 S.W.3d 555, 2007 Tex. App. LEXIS 2514 (Tex. App. Amarillo 2007).

221. Because defendant did not request a limiting instruction concerning a deputy's testimony about her co-defendant's confronting the deputy when he seized a vehicle, she forfeited the alleged error. Chase v. State, 2007 Tex. App. LEXIS 2270 (Tex. App. Fort Worth Mar. 22 2007).

222. Although defendant argued that the trial court gave an improper limiting instruction, defendant failed to object and thus forfeited the complaint on appeal pursuant to Tex. R. App. P. 33.1(a). Maldonado v. State, 2007 Tex. App. LEXIS 2276 (Tex. App. Fort Worth Mar. 22 2007).

223. The inclusion of certain documents was not permitted under Tex. Gov't Code Ann. § 2001.173(a), and the taxpayer made no attempt to offer the evidence for the limited purpose of consideration and thus it was not free to complain on appeal, pursuant to Tex. R. Evid. 105, Tex. R. App. P. 33.1; moreover, the taxpayer did not show reversible error for purposes of Tex. R. App. P. 44.1 because the exclusion of the documents did not prevent the taxpayer from making its case or lead to an improper verdict. DuPont Photomasks, Inc. v. Strayhorn, 219 S.W.3d 414, 2006 Tex. App. LEXIS 10986 (Tex. App. Austin 2006).

224. Defendant failed to show that, but for counsel's failure to ask for limiting instructions, the outcome of the trial would have been different; testimony had already been admitted and thus defendant was not harmed by counsel's failure, and although counsel did not request a limiting instruction regarding certain evidence, one was provided in the jury charge. Romero v. State, 2006 Tex. App. LEXIS 10723 (Tex. App. Austin Dec. 15 2006).

225. Defendant did not object to the State's failure to give defendant notice of alleged extraneous offenses and defendant did not request a limiting instruction when the evidence was admitted, such that these complaints were not preserved for appellate review. Najar v. State, 2006 Tex. App. LEXIS 8499 (Tex. App. El Paso Sept. 28 2006).

226. Defendant did not request a limiting instruction when alleged extraneous offense evidence was admitted, and because it was admitted for all purposes, the trial court did not err by not issuing a limiting instruction in the jury charge regarding the evidence. Najar v. State, 2006 Tex. App. LEXIS 8499 (Tex. App. El Paso Sept. 28 2006).

227. Defendant claimed that the admission of extraneous offense evidence under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) was error; because the trial court instructed the jury to disregard an officer's testimony about defendant's prior arrest in 2003, the court assumed without deciding that the introduction of the officer's testimony was erroneous, and because the officer's testimony was not so inflammatory that its effect could not have been cured by an instruction to disregard, the court presumed that the jury followed the instructions; defendant failed to rebut the presumption that the jury followed the limiting instructions, and given the amount of drugs possessed by defendant, as well as a 1998 drug conviction, the court was unable to find that defendant's 18-year sentence for possession of more than four grams, but less than 200 grams, of methamphetamine was excessive. Elliott v. State, 2006 Tex. App. LEXIS 6220 (Tex. App. Corpus Christi July 20 2006).

228. Defendant conceded to being present at the drug buy and knowing that a drug transaction was going to occur, and because the evidence made defendant's intent to participate in the offense more probable, the trial court did not err in admitting the evidence under Tex. R. Evid. 404(b); furthermore, there was no error in the admission of the evidence under Tex. R. Evid. 403 because (1) evidence that defendant had sold drugs in the past was probative of the fact that defendant intended to participate in the drug transaction at issue, (2) the testimony helped rebut the defensive theory that defendant was merely present at the time, (3) the evidence was not more heinous than the crime charged and thus the potential for irrationally impressing the jury was slight, (4) the State did not spend much time introducing the evidence in question, (5) there was a need for the evidence given defendant's questioning of the link between defendant and the offense under violation of Tex. Health & Safety Code Ann. § 481.112(a), and (6) the trial court gave the jury a limiting instruction. Malone v. State, 2006 Tex. App. LEXIS 6088 (Tex. App. Fort Worth July 13 2006).

229. Because it was one instance involving several acts of sexual contact that were committed in one continuous act of force and threats and part of the same criminal transaction, election was not required for purposes of defendant's charge of indecency under Tex. Penal Code Ann. § 21.11(a)(1) and Tex. Const. art. V, § 13 and Tex. Code Crim. Proc. Ann. art. 36.29(a), which required unanimity in verdicts; although defendant asserted that one incident was a fourth incident of sexual contact, the instance was an extraneous offense under Tex. R. Evid. 404(b) to which defendant's objection was overruled, defendant's failure to request a limiting instruction on the extraneous offense waived error on appeal, and the failure to include such an instruction was not fundamental error. Alvarez v.

State, 2006 Tex. App. LEXIS 4904 (Tex. App. Corpus Christi June 8 2006).

230. Two defendants' sexual assault convictions were inappropriate because the trial court erred by failing to have the State elect, at the close of its evidence, which occurrence it would use to convict as requested by the defense; the requirement of an election was distinct from a limiting instruction, Tex. R. Evid. 105, because the election requirement provided explicit notice to a defendant and prompted unanimous jury verdicts; a limiting instruction alone did not adequately serve all of those purposes. Phillips v. State, 193 S.W.3d 904, 2006 Tex. Crim. App. LEXIS 1069 (Tex. Crim. App. 2006).

231. Portions of an offense report contained factual findings resulting from an officer's investigation of one of the State's witnesses, and the factual findings were admissible even though the report in its entirety was not admissible; under Tex. R. Evid. 803, defendant could have properly offered those factual findings into evidence to show bias or motive, but defendant offered the entire report, including the part that was inadmissible, and because defendant did not limit the offer to the admissible portions of the report, the trial court did not err in excluding the entire report. August v. State, 2006 Tex. App. LEXIS 3829 (Tex. App. Fort Worth May 4 2006).

232. In an aggravated sexual assault of a child and indecency with a child case, defendant did not request a limiting instruction when the evidence of extraneous acts was admitted; thus, the evidence became admissible for all purposes and a limiting instruction was not required. Therefore, the trial court committed no error in failing to instruct the jury that extraneous acts admitted under Tex. Code Crim. Proc. Ann. art. 38.37, § 2 could only be considered to show defendant's state of mind or the relationship between him and the complainants. Garza v. State, 2006 Tex. App. LEXIS 2092 (Tex. App. Beaumont Mar. 15 2006).

233. Even if the consumer was right that portions of a report were inadmissible, the consumer waived any complaint to the general admission thereof by failing to request redaction and by failing to ask for a limiting instruction, under Tex. R. Evid. 105(a), as well as by failing to object to the admission of the witness's videotaped deposition, during which the witness described the contents of the report. Benavides v. Cushman, Inc., 189 S.W.3d 875, 2006 Tex. App. LEXIS 716 (Tex. App. Houston 1st Dist. 2006).

234. Individual's testimony regarding diminished income in the year following the accident in question was admitted without any objection, and appellants' failure to request an instruction to limit the evidence under Tex. R. Evid. 105(a) to specific issues allowed the jury to consider the evidence for any and all purposes; thus, any error was waived under Tex. R. Civ. P. 274. Smith v. Scott, 2006 Tex. App. LEXIS 509 (Tex. App. Amarillo Jan. 20 2006).

235. In a murder case, the prosecutor's affidavit regarding trial strategy was relevant and admissible under Tex. R. Evid. 401and Tex. R. Evid. 602 at a new trial hearing because it addressed the issue of effective assistance and included some statements made from personal knowledge; defendant did not seek to limit the scope of the affidavit pursuant to Tex. R. Evid. 105(a). Shanklin v. State, 190 S.W.3d 154, 2005 Tex. App. LEXIS 10675 (Tex. App. Houston 1st Dist. 2005).

236. By failing to request a limiting instruction regarding the causation opinion of a witness pursuant to Tex. R. Evid. 105(a), the party waived its complaint to the general admission of the evidence. Duke Energy Field Servs., L.P. v. Meyer, 190 S.W.3d 149, 2005 Tex. App. LEXIS 10658 (Tex. App. Amarillo 2005).

237. Because defendant did not ask the trial court to give a limiting instruction, defendant waived the complaint on appeal pursuant to Tex. R. Evid. 105(a). Onwukwe v. State, 186 S.W.3d 81, 2005 Tex. App. LEXIS 9603 (Tex. App. Houston 1st Dist. 2005).

238. Where a trial court, in a bench trial, found for a creditor on contract and fraud claims but did not make specific findings allocating the damages, although there was no evidence to support the fraud finding, the judgment was affirmed; under Tex. R. Evid. 105(a), the evidence on damages, which consisted of testimony admitted without objection, could be considered for all purposes. Advanced Messaging Wireless, Inc. v. Campus Design, Inc., 190 S.W.3d 66, 2005 Tex. App. LEXIS 8991 (Tex. App. Amarillo 2005).

239. While the complainant could not testify that the knife offered by the State was an exact replica of the knife used during the assault, nothing in the record indicated that the probative value of the knife was substantially outweighed by unfair prejudice or any possible inflammatory effect, and the trial court did not abuse its discretion in admitting the knife for demonstrative purposes Risley v. State, 2005 Tex. App. LEXIS 4468 (Tex. App. Houston 1st Dist. June 9 2005).

240. Because the horse farm owners did not request a limiting instruction regarding the horse owner's hearsay testimony impeaching a veterinarian's earlier testimony, and the trial court did not give a limiting instruction, the jury was able to consider the evidence for any and all purposes. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

241. When the trial court sustained the State's objection that certain punishment evidence was inadmissible under Tex. R. Evid. 608(b), defendant did not inform the trial court of any alternative theories of admissibility; because defendant did not expressly offer the evidence for its limited admissible purpose pursuant to Tex. R. Evid. 105(b), defendant was not free to complain of its exclusion on appeal and defendant failed to preserve error. Hatcher v. State, 2005 Tex. App. LEXIS 884 (Tex. App. Fort Worth Feb. 3 2005).

242. In the absence of any request to limit the scope of a prosecutor's affidavit, the court upheld the trial court's ruling under Tex. R. Evid. 105(a) because parts of the material in the affidavit were relevant under Tex. R. Evid. 401 as they recounted the prosecutors' recollection regarding voir dire in defendant's theft trial under Tex. Penal Code Ann. § 31.03(a), and the affidavit was not inadmissible under Tex. R. Evid. 403; the trial court was the fact finder and there was less danger that it was influenced by improper suggestion. Biagas v. State, 177 S.W.3d 161, 2005 Tex. App. LEXIS 947 (Tex. App. Houston 1st Dist. 2005).

243. Although a manufacturer filed a request for a limiting instruction, no ruling appeared in the record on appeal; the evidence was thus properly admitted for all purposes under Tex. R. Evid. 105(a). Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 2004 Tex. LEXIS 737, 47 Tex. Sup. Ct. J. 955, CCH Prod. Liab. Rep. P17123 (Tex. 2004).

244. In an insurance fraud case, the trial court did not err in admitting the insurance claim file as it was not admitted to prove the truth of the matter asserted, as defendant argued, and its contents about the detective's investigation were not inadmissible on hearsay grounds. Wycough v. State, 2004 Tex. App. LEXIS 4608 (Tex. App. El Paso May 20 2004).

245. In a motor vehicle accident case, a summary of medical expenses, admitted into evidence without any limiting instruction, could be considered by the jury for all purposes, in accordance with Tex. R. Evid. 105(a). Huddleston v. Lovvorn, 2004 Tex. App. LEXIS 4536 (Tex. App. Amarillo May 19 2004).

246. In a motor vehicle accident case, a summary of medical expenses, admitted into evidence without any limiting instruction, could be considered by the jury for all purposes, in accordance with Tex. R. Evid. 105(a). Huddleston v. Lovvorn, 2004 Tex. App. LEXIS 4536 (Tex. App. Amarillo May 19 2004).

247. Pursuant to Tex. R. Evid. 105(a), a request for a limiting instruction must be made as soon as evidence is admitted; accordingly, court did not err in denying a limiting instruction on the victim's police statement during the punishment stage of defendant's trial for sexual assault and indecency with a child where defendant requested the limiting instruction during the punishment phase after the jury had considered the statement without restriction. Zavala v. State, 2004 Tex. App. LEXIS 2986 (Tex. App. Corpus Christi Apr. 1 2004).

248. Although a trial court cannot delay in giving a limiting jury instruction, timely requested, until the end of the trial, the burden of timely requesting a limiting instruction is on the party opposing the general admission of the evidence and there is nothing in the plain language of Tex. R. Evid. 105 or the case law that requires the trial court, upon a pre-trial request, to recognize each instance of extraneous offense evidence and deliver a limiting instruction at each instance; thus, the trial court did not err in not giving a limiting instruction pursuant to Tex. R. Evid. 105(a) each time extraneous offense evidence was admitted without a timely request by defendant. Reeves v. State, 99 S.W.3d 657, 2003 Tex. App. LEXIS 909 (Tex. App. Waco 2003).

249. Defendant's assertion that a trial court erred in refusing to instruct a jury, at the time evidence was offered, on the burden of proof for unadjudicated offenses and bad acts that were introduced at the punishment phase of the trial failed because Tex. R. Evid. 105 addressed parties and purpose; the rule did not address burdens of proof. Jackson v. State, 992 S.W.2d 469, 1999 Tex. Crim. App. LEXIS 42 (Tex. Crim. App. 1999).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

250. Under Tex. R. Evid. 105(a), because defendant did not request a limiting instruction when the police officer testified regarding the extraneous offense, the evidence was admitted for all purposes and did not warrant a limiting instruction. Davis v. State, 2004 Tex. App. LEXIS 4748 (Tex. App. Houston 1st Dist. May 27 2004).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

251. In defendant's sexual assault and indecency with a child case, any error in failing to give limiting instructions was harmless; defendant's first request was untimely and the trial court did not err by denying it, and within the context of the entire case, defendant's failure to request a limiting instruction during any other testimony covering the same extraneous offense evidence did not affect defendant's substantial rights. Neathery v. State, 2007 Tex. App. LEXIS 6625 (Tex. App. Fort Worth Aug. 16 2007).

Evidence : Procedural Considerations : Rulings on Evidence

252. Because defendant failed to request a limiting instruction when the State used his previously-suppressed custodial statement to impeach his testimony regarding his intent in going to the victim's home, the evidence that he told police that he intended to steal from the victim was rendered admissible for all purposes and was properly considered in a review of the legal sufficiency of the evidence. Sanchez v. State, 428 S.W.3d 240, 2014 Tex. App. LEXIS 1054, 2014 WL 346444 (Tex. App. Houston 1st Dist. Jan. 30 2014).

253. In an action for breach of a gas purchase agreement, evidence of early pays and appellant's relationship with a third party was properly admitted to show they had oral agreements and the third party's authority was not encompassed by the sole written contract between them; this evidence was relevant under Tex. R. Evid. 401 for purposes of establishing apparent agency. Because appellant did not request a limiting instruction under Tex. R. Evid. 105(a), the evidence was admissible for any purpose. Reliant Energy Servs. v. Cotton Valley Compression, Llc, 336 S.W.3d 764, 2011 Tex. App. LEXIS 959, 173 Oil & Gas Rep. 732 (Tex. App. Houston 1st Dist. Feb. 10 2011).

Evidence : Relevance : Character Evidence

254. In a case where two people were being tried for aggravated sexual abuse of a child, "have you heard" questions under Tex. R. Evid. 405 were properly asked when witnesses testified about the character of the co-defendant; defendant failed to request a limiting instruction under Tex. R. Evid. 105, so she could not challenge the issue on appeal; the evidence was not offered to prove the extraneous offense, but to test the qualification of the witnesses to testify regarding character. Little v. State, 2007 Tex. App. LEXIS 4194 (Tex. App. Texarkana May 30 2007).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

255. It was error not to give a limiting instruction when evidence of extraneous offense was admitted, but the error was harmless because fewer than 24 hours passed between the erroneous admission and the jury charge, which included the limiting instruction; the issues were not confusing; and there was no evidence the error affected the jury. Cannell v. State, 2013 Tex. App. LEXIS 15299, 2013 WL 6729857 (Tex. App. Houston 1st Dist. Dec. 19 2013).

256. Trial court was not obligated to issue an instruction limiting the usage of evidence pertaining to a pornographic video that defendant showed to his child sexual assault victim (his teenaged daughter) because the complained-of evidence constituted same-transaction contextual evidence; the evidence was properly received as general evidence. Freeman v. State, 2013 Tex. App. LEXIS 8566 (Tex. App. Waco July 11 2013).

257. Even though the trial court gave an improper limiting instruction under Tex. R. Evid. 105(a) concerning the extraneous offense evidence, the instruction helped defendant because it prohibited the jury from using the evidence to rebut defendant's implication that the charges had been fabricated to form the basis of a civil lawsuit. Hetherington v. State, 2013 Tex. App. LEXIS 437, 2013 WL 173760 (Tex. App. Fort Worth Jan. 17 2013).

258. Assuming with deciding that the trial court erred by refusing defendant's request for a contemporaneous limiting instruction under Tex. R. Evid. 105(a) regarding evidence of his recent history of writing hot checks, the error was harmless under Tex. R. App. P. 44.2(b) because defendant admitted that he knew he could not afford to pay the checks he had written. Tausch v. State, 2012 Tex. App. LEXIS 7081, 2012 WL 3601095 (Tex. App. Austin Aug. 15 2012).

259. Defendant was not entitled under Tex. R. Evid. 105(a) to a limiting instruction on extraneous offense evidence because the instruction was not timely requested. Taylor v. State, 2012 Tex. App. LEXIS 2279, 2012 WL 955383 (Tex. App. Fort Worth Mar. 22 2012).

260. Trial court did not err, under Tex. R. Evid. 404(b), by allowing the jury to hear evidence of defendant's extraneous offenses during the guilt/innocence stage of the trial because the evidence was not admitted to show that defendant had actually committed the prior offense, but to show that he had lied to the officer about whether he had been previously arrested. The trial court properly instructed the jury to use the evidence solely for the purpose of showing the existence of defendant's untruth about a prior arrest, providing some support for the officer to have a reasonable suspicion about the nature of defendant's activities. Davila v. State, 2012 Tex. App. LEXIS 959, 2012 WL 376634 (Tex. App. Texarkana Feb. 7 2012).

261. Trial court did not abuse its discretion by admitting evidence of guns and cash during his capital murder trial because, to put the conspiracy offense in context, evidence that defendant and his sons were drug dealers who dealt in large amounts of cash and guns to protect their drugs and case was necessary, and therefore the evidence was same-transaction contextual evidence and background contextual evidence excepted from Tex. R. Evid. 404(b). Because the evidence was same-transaction contextual evidence, the trial court did not abuse its discretion by refusing to give limiting instructions. Davis v. State, 2011 Tex. App. LEXIS 835, 2011 WL 322877 (Tex. App.

Waco Feb. 2 2011).

262. Trial court did not err by failing to sua sponte give a limiting instruction to the jury regarding the dog's prior bad acts because defendant did not request such a limiting instruction, and therefore the evidence was admissible for all purposes. Watson v. State, 337 S.W.3d 347, 2011 Tex. App. LEXIS 592 (Tex. App. Eastland Jan. 27 2011).

263. Trial court did not err by failing to sua sponte give a limiting instruction to the jury regarding the dog's prior bad acts because defendant did not request such a limiting instruction, and therefore the evidence was admissible for all purposes. Smith v. State, 337 S.W.3d 354, 2011 Tex. App. LEXIS 594 (Tex. App. Eastland Jan. 27 2011).

264. In a trial for child sexual assault, the trial court erred under Tex. R. Evid. 105 by denying defendant's request for an oral limiting instruction as to extraneous offense; the error in not giving the instruction warranted reversal, considering that extraneous-offense evidence was admitted at the very earliest stages of the trial on guilt/innocence, that 35 percent of the record was devoted to the extraneous offense, and that the jury had unfettered discretion to compare the extraneous offense evidence to the victim's accusations of molestation before receiving the trial court's written jury charge. Pedersen v. State, 237 S.W.3d 882, 2007 Tex. App. LEXIS 8383 (Tex. App. Texarkana 2007).

265. In a murder trial, defendant was entitled under Tex. R. Evid. 105 to receive a limiting instruction when extraneous evidence was admitted to show motive; however, defendant's complaint to the trial court did not comport with the complaint on appeal because counsel requested a limiting instruction stating that the extraneous offense evidence would only be relevant if it was connected up later; that request could not be read as a request that the extraneous offense evidence be considered only for the purpose of motive. Bullard v. State, 2007 Tex. App. LEXIS 7943 (Tex. App. Fort Worth Oct. 4 2007).

266. Because the record contained no evidence regarding why defense counsel chose not to request a limiting instruction or object to written jury instructions regarding extraneous offense evidence, the court held that counsel's conduct in failing to do so was not so outrageous that no competent attorney would have done so. Hassenplug v. State, 2007 Tex. App. LEXIS 4998 (Tex. App. Houston 14th Dist. June 28 2007).

267. Defendant's objection to testimony addressed only the fact that the defendant made no comment during the relevant part of his interrogation, not extraneous offenses. Defendant did not request a limiting instruction under Tex. R. Evid. 105, no objection or request was made for the charge to instruct the jury regarding the extraneous acts, and thus the issue was not preserved for appeal pursuant to Tex. R. App. P. 33.1. Zelaya v. State, 2006 Tex. App. LEXIS 8233 (Tex. App. Texarkana Sept. 21 2006).

268. In a criminal trial where defendant was charged with several offenses, the State was not required to elect among the various offenses it sought to prove; in accordance with Tex. R. Evid. 105, the trial court's general limiting instruction to the jury on extraneous offenses was sufficient to protect the defendant from an unfair trial. Pittillo v. State, 2006 Tex. App. LEXIS 6534 (Tex. App. Waco July 26 2006).

269. Where defendant was charged with criminal mischief for causing damage to his neighbor's motorcycle, the trial court admitted evidence that on one prior occasion defendant had knocked down the mailbox with his truck; the trial court's failure to instruct the jury that evidence of extraneous bad acts or offenses could only be considered if the jury found beyond a reasonable doubt that the defendant committed them was harmless; defendant made no objection at trial and did not request any kind of limiting instruction under Tex. R. Evid. 105. Giddens v. State, 2006 Tex. App. LEXIS 1957 (Tex. App. Texarkana Mar. 15 2006).

270. In an aggravated sexual assault of a child and indecency with a child case, defendant did not request a limiting instruction when the evidence of extraneous acts was admitted; thus, the evidence became admissible for all purposes and a limiting instruction was not required. Therefore, the trial court committed no error in failing to instruct the jury that extraneous acts admitted under Tex. Code Crim. Proc. Ann. art. 38.37, § 2 could only be considered to show defendant's state of mind or the relationship between him and the complainants. Garza v. State, 2006 Tex. App. LEXIS 2092 (Tex. App. Beaumont Mar. 15 2006).

271. Because a witness's testimony was admissible only to rebut defendant's statement of good conduct with minors, a court should have given an instruction to use the testimony only in assessing defendant's credibility, not as proof that he committed the offense or as proof of a plan to have a sexual relationship with the victim. Daggett v. State, 187 S.W.3d 444, 2005 Tex. Crim. App. LEXIS 2127 (Tex. Crim. App. 2005).

272. In a trial for sexual assault of a child, the trial court was not required to instruct the jury, sua sponte, not to consider evidence of extraneous offenses, in part because defendant failed to request a limiting instruction at the time the extraneous offense evidence was admitted, thereby allowing it to be admitted for all purposes. Allen v. State, 180 S.W.3d 260, 2005 Tex. App. LEXIS 9709 (Tex. App. Fort Worth 2005).

273. In drug and robbery case, although defendant's relevancy objection to evidence of other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

274. Party opposing evidence under Tex. R. Evid. 105 has the burden of requesting the limiting instruction at the introduction of the evidence. Once evidence is received without a limiting instruction, it becomes part of the general evidence and may be used for all purposes, and a limiting instruction in the jury charge is no longer appropriate. Hammock v. State, 46 S.W.3d 889, 2001 Tex. Crim. App. LEXIS 39 (Tex. Crim. App. 2001).

275. It is not required to object to evidence prior to requesting a limiting instruction for that evidence. Hammock v. State, 46 S.W.3d 889, 2001 Tex. Crim. App. LEXIS 39 (Tex. Crim. App. 2001).

Evidence : Relevance : Relevant Evidence

276. In defendant's aggravated robbery case, the trial court did not err in declining to strike the previously admitted evidence of the knife and a witness's testimony about the knife because the knife was relevant, it was admitted into evidence before the witness testified, and a photograph showed the exact location where the knife was found. Because the evidence was properly admitted, the trial court did not err by refusing defendant's request for a limiting instruction. Jones v. State, 2009 Tex. App. LEXIS 9570, 2009 WL 4856420 (Tex. App. Houston 1st Dist. Dec. 17 2009).

277. In a murder case, the prosecutor's affidavit regarding trial strategy was relevant and admissible under Tex. R. Evid. 401and Tex. R. Evid. 602 at a new trial hearing because it addressed the issue of effective assistance and included some statements made from personal knowledge; defendant did not seek to limit the scope of the affidavit pursuant to Tex. R. Evid. 105(a). Shanklin v. State, 190 S.W.3d 154, 2005 Tex. App. LEXIS 10675 (Tex. App. Houston 1st Dist. 2005).

Evidence : Relevance : Sex Offenses : Similar Acts

278. At defendant's trial for three counts of aggravated sexual assault of a child and two counts of indecency with a child by contact based on conduct occurring over a two-year period, the trial court did not err by admitting evidence about the details of defendant's ongoing sexual misconduct with the victim. Because it was same-transaction contextual evidence, the trial court was not obligated to issue a contemporaneous-limiting instruction. Ramirez v. State, 2014 Tex. App. LEXIS 3955, 2014 WL 1410344 (Tex. App. Waco Apr. 10 2014).

Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview

279. In a trial for sexual assault and indecency with a child based on oral sex and breast touching, defendant forfeited error regarding the trial court's failure to give a contemporaneous limiting instruction when it admitted testimony that defendant penetrated the victim's sexual organ with his penis. Defendant objected to the extraneous evidence rather than requesting a limiting instruction under Tex. R. Evid. 105, and his request for a limiting instruction after two additional witnesses testified was untimely. Martin v. State, 176 S.W.3d 887, 2005 Tex. App. LEXIS 8514 (Tex. App. Fort Worth 2005).

Evidence : Relevance : Sex Offenses : Similar Crimes : Child Molestation Cases

280. In his trial for aggravated sexual assault of his adopted sister, defendant failed to preserve for review his contention that he was entitled to a limiting instruction regarding other acts evidence because he did not specify what limitations should be placed on the testimony and only objected to one question. Washburn v. State, 2014 Tex. App. LEXIS 8351, 2014 WL 3756486 (Tex. App. Dallas July 30 2014).

281. In defendant's aggravated sexual assault of a child trial, at which evidence of his conduct with the child when he was younger than 17 was admitted, the trial court erred when it omitted an instruction under Tex. Penal Code Ann. § 8.07(b); however, defendant did not suffer egregious harm. Limiting instructions pursuant to Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37 were given. Mendoza v. State, 2013 Tex. App. LEXIS 6914 (Tex. App. Eastland June 6 2013).

Evidence : Scientific Evidence : Blood Alcohol

282. In a trial for driving while intoxicated, defendant forfeited his arguments that his blood test results were improperly admitted under Tex. R. Evid. 403 and that he was entitled to an instruction under Tex. R. Evid. 105(a). Although defendant objected when a blood-draw kit was offered into evidence, he failed to object when the report with the blood-test results was offered. Walker v. State, 2006 Tex. App. LEXIS 1328 (Tex. App. Fort Worth Feb. 16 2006).

Evidence : Testimony : General Overview

283. Trial court did not err in not giving a jury a limiting instruction pursuant to Tex. R. Evid. 105 regarding the legal ability of an employee of a contractor to hold himself out as an engineer where there was no testimony or evidence requiring such an instruction because, at trial, the employee was clear in stating that while he held an engineering degree from a preeminent educational institution, he was not a licensed engineer, and he testified that he had merely provided AutoCAD drafting services, which did not require an engineering license; finally, the employee had not been held out to the contractor's customer as a licensed engineer. Purnell Furniture Servs. v. Warehouse Rack Co., 2006 Tex. App. LEXIS 6858 (Tex. App. Houston 14th Dist. Aug. 1 2006).

Evidence : Testimony : Credibility : General Overview

284. Because the horse farm owners did not request a limiting instruction regarding the horse owner's hearsay testimony impeaching a veterinarian's earlier testimony, and the trial court did not give a limiting instruction, the jury

was able to consider the evidence for any and all purposes. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility

285. At defendant's trial for burglary of a habitation, the trial court was not required to give an instruction in the jury charge limiting the use of defendant's prior convictions for impeachment purposes only because defendant never requested a limiting instruction at the time the evidence was introduced. Reyes v. State, 422 S.W.3d 18, 2013 Tex. App. LEXIS 13573, 2013 WL 5872738 (Tex. App. Waco Oct. 31 2013).

Evidence : Testimony : Experts : Admissibility

286. No abuse of discretion in excluding evidence regarding the Americans With disabilities Act and the Texas Accessibility Standards, because the evidence was not crucial to whether the clinic had actual or constructive knowledge of a dangerous condition on the premises that presented an unreasonable risk of harm and that the condition proximately caused the claimant's injuries. Craig v. Beeville Family Practice, L.L.P., 2012 Tex. App. LEXIS 4422, 2012 WL 1656492 (Tex. App. Corpus Christi May 10 2012).

Family Law : Marital Termination & Spousal Support : Dissolution & Divorce : Procedures

287. In an ex-husband's appeal of a divorce judgment, the appellate court excluded the husband's submission notebook from its review of the evidence and excluded the husband's arguments based on the notebook from its analysis because the trial court had admitted the notebook only as a summary of a witness's testimony, and the husband had not testified at trial. To the extent that any specific portion of the notebook was admitted into evidence without limitation elsewhere during the trial, the court concluded that it would consider such portion pursuant to Tex. R. Evid. 105(a). Hancock v. Hancock, 2008 Tex. App. LEXIS 5737 (Tex. App. Fort Worth July 31 2008).

Family Law : Paternity & Surrogacy : Establishing Paternity : Father's Acknowledgment

288. Trial court did not abuse its discretion by admitting into evidence during a wrongful death action a prior order from a family law court regarding parental rights to the decedent because the order was not offered as a determination of parentage but was offered only for the limited purpose of showing that appellee had accepted his parentage of the decedent in the family court proceeding. Gurka v. Gurka, 402 S.W.3d 341, 2013 Tex. App. LEXIS 6363, 2013 WL 2253587 (Tex. App. Houston 14th Dist. May 23 2013).

Governments : State & Territorial Governments : Licenses

289. Trial court did not err in not giving a jury a limiting instruction pursuant to Tex. R. Evid. 105 regarding the legal ability of an employee of a contractor to hold himself out as an engineer where there was no testimony or evidence requiring such an instruction because, at trial, the employee was clear in stating that while he held an engineering degree from a preeminent educational institution, he was not a licensed engineer, and he testified that he had merely provided AutoCAD drafting services, which did not require an engineering license; finally, the employee had not been held out to the contractor's customer as a licensed engineer. Purnell Furniture Servs. v. Warehouse Rack Co., 2006 Tex. App. LEXIS 6858 (Tex. App. Houston 14th Dist. Aug. 1 2006).

Torts : Wrongful Death & Survival Actions : Potential Plaintiffs

290. Trial court did not abuse its discretion by admitting into evidence during a wrongful death action a prior order from a family law court regarding parental rights to the decedent because the order was not offered as a determination of parentage but was offered only for the limited purpose of showing that appellee had accepted his

parentage of the decedent in the family court proceeding. Gurka v. Gurka, 402 S.W.3d 341, 2013 Tex. App. LEXIS 6363, 2013 WL 2253587 (Tex. App. Houston 14th Dist. May 23 2013).

Tex. Evid. R. 106

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 106 Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may introduce, at that time, any other part - or any other writing or recorded statement - that in fairness ought to be considered at the same time. "Writing or recorded statement" includes depositions.

Annotations

Commentary

COMMENT

Pre-March 1, 1998 Comment This rule is the federal rule with one modification. Under the federal rule, a party may require his opponent to introduce evidence contrary to the latter's own case. The Committee believes the better practice is to permit the party himself to introduce such evidence contemporaneously with the introduction of the incomplete evidence. This rule does not in any way circumscribe the right of a party to develop fully the matter on cross-examination or as part of his own case. Cf. Tex. C. Crim. P. , art. 38.24. Nor does it alter the common law doctrine that the rule of optional completeness, as to writings, oral conversations, or other matters, may take precedence over exclusionary doctrines such as the hearsay or best evidence rule or the first-hand knowledge requirement. See also Tex. R. Evid. 610(a).

PUBLICATION REFERENCES. --See Texas Civil Trial Guide, Unit 21, Determining Admissibility: Procedure.

Case Notes

Criminal Law & Procedure : Interrogation : Miranda Rights : Custodial Interrogation
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Demonstrative Evidence : Recordings
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Documentary Evidence : Completeness
Evidence : Documentary Evidence : Writings : General Overview

Evidence : Documentary Evidence : Writings : Transcripts & Translations : General Overview
Evidence : Privileges : Attorney-Client Privilege : Exceptions
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview

LexisNexis (R) Notes

Criminal Law & Procedure : Interrogation : Miranda Rights : Custodial Interrogation

1. In a murder case, the trial court did not err by overruling defendant's motion to suppress voluntary statements she gave to the police because, after saying that he had no objection to the written statement, defense counsel requested that the entire videotape statement be introduced pursuant to Tex. R. Evid. 106, 107, and the videotapes of the full three-and-a-half hour interview were introduced in evidence as defense exhibits and played for the jury. As such, defendant could not assert that it was error to admit the videotaped interview at trial because it was she who offered it in evidence. Herron v. State, 2008 Tex. App. LEXIS 7231 (Tex. App. Austin Sept. 26, 2008).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

2. Defendant's claim that the trial court abused its discretion in excluding a letter she wrote in response to a letter written to her by the police chief when the chief's letter was admitted into evidence was upheld as a violation of Tex. R. Evid. 106 and Tex. R. Evid. 107, which comprised the rule of optional completeness as excluding the letter and failing to include a limiting instruction under Tex. Code Crim. Proc. Ann. art. 36.14, and gave rise to a strong possibility that the jury could have formed a false impression regarding defendant's intent such that defendant's substantial rights were affected and she was prevented from adequately presenting her defense. Elmore v. State, 116 S.W.3d 801, 2003 Tex. App. LEXIS 7163 (Tex. App. Fort Worth 2003).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

3. In a trial for assault of a family member, it was error under Tex. R. Evid. 106 for the complainant's written statement to be read into evidence; the error was harmless under Tex. R. App. P. 44. because there was other evidence of the fight and the complainant's injuries. Long Xuan Thai v. State, 2007 Tex. App. LEXIS 6056 (Tex. App. Dallas Aug. 1 2007).

4. In the trial of an officer for lying in a warrant affidavit about the reliability of an informant, any error under Tex. R. Evid. 106, 107 was harmless under Tex. R. App. P. 44.2(b) when the trial court refused to allow the jury to hear that guns and money were seized under the tainted warrant. Although the excluded evidence was relevant to a defensive theory relating to the identity of the informant, the exclusion did not prevent defendant from presenting the substance of that defense to the jury. Delapaz v. State, 228 S.W.3d 183, 2007 Tex. App. LEXIS 2377 (Tex. App. Dallas 2007).

Evidence : Demonstrative Evidence : Recordings

5. In a murder case, the trial court did not err by overruling defendant's motion to suppress voluntary statements she gave to the police because, after saying that he had no objection to the written statement, defense counsel requested that the entire videotape statement be introduced pursuant to Tex. R. Evid. 106, 107, and the videotapes of the full three-and-a-half hour interview were introduced in evidence as defense exhibits and played for the jury. As such, defendant could not assert that it was error to admit the videotaped interview at trial because it was she who offered it in evidence. Herron v. State, 2008 Tex. App. LEXIS 7231 (Tex. App. Austin Sept. 26, 2008).

Evidence : Demonstrative Evidence : Visual Formats

6. In a theft trial, there was no error under Tex. R. Evid. 106 in admitting a videotape put together by a store's loss prevention officer from numerous surveillance cameras. The record did not show that defendant made any effort to obtain the original recording from the store. Massey v. State, 2011 Tex. App. LEXIS 5284, 2011 WL 2698608 (Tex. App. Dallas July 13 2011).

Evidence : Documentary Evidence : Completeness

7. Trial court did not abuse its discretion by allowing the officer's testimony because defendant opened the door to it, where the trial court could allow the State to present evidence to clear up the erroneous impression by admitting evidence that the manual did have something to say about the other definition of intoxication; the trial court's ruling admitting the officer's testimony regarding the correlation between the HGN and alcohol concentration was within the zone of reasonable disagreement. Jordy v. State, 413 S.W.3d 227, 2013 Tex. App. LEXIS 12409, 2013 WL 5493408 (Tex. App. Fort Worth Oct. 3 2013).

8. Probate court did not abuse its discretion by admitting redacted billing statements and excluding unredacted statements in a dispute over attorney's fees and expenses because the rule of optional completeness under Tex. R. Evid. 106, 107 was not an exception to the attorney-client privilege, and it did not mandate a waiver of the privilege. Even if the rule of optional completeness was found to apply, an administrator did not show that unredacted statements were necessary for the probate court to understand the attorney's fees recoverable from an estate; significant information was provided to the court in the redacted billing statements, and, when combined with the testimony of the guardian's attorneys, further information was not necessary for the court to understand the matter. In the Estate of Johnston, 2012 Tex. App. LEXIS 4255, 2012 WL 1940656 (Tex. App. San Antonio May 30 2012).

9. In an assault on a correctional officer case, a court erred by admitting a portion of the State's document regarding the incident because, under the plain language of Tex. R. Evid. 107 it was error to admit the exhibit into evidence when a portion thereof had only been read into evidence; however, the error was harmless because the evidence had already been admitted without objection through another witness. Stewart v. State, 221 S.W.3d 306, 2007 Tex. App. LEXIS 2533 (Tex. App. Fort Worth 2007).

10. Defendant's conviction for one count of sexual assault was proper where the trial court did not err in not permitting his entire confession into evidence allegedly in violation of Tex. R. Evid. 106 because defendant failed to preserve the issue for review as required by Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a). Salazar v. State, 2005 Tex. App. LEXIS 5487 (Tex. App. El Paso July 14 2005).

11. Defendant's claim that the trial court abused its discretion in excluding a letter she wrote in response to a letter written to her by the police chief when the chief's letter was admitted into evidence was upheld as a violation of Tex. R. Evid. 106 and Tex. R. Evid. 107, which comprised the rule of optional completeness as excluding the letter and failing to include a limiting instruction under Tex. Code Crim. Proc. Ann. art. 36.14, and gave rise to a strong possibility that the jury could have formed a false impression regarding defendant's intent such that defendant's substantial rights were affected and she was prevented from adequately presenting her defense. Elmore v. State, 116 S.W.3d 801, 2003 Tex. App. LEXIS 7163 (Tex. App. Fort Worth 2003).

Evidence : Documentary Evidence : Writings : General Overview

12. Trial court did not abuse its discretion by allowing the officer's testimony because defendant opened the door to it, where the trial court could allow the State to present evidence to clear up the erroneous impression by admitting evidence that the manual did have something to say about the other definition of intoxication; the trial court's ruling admitting the officer's testimony regarding the correlation between the HGN and alcohol concentration was within the zone of reasonable disagreement. Jordy v. State, 413 S.W.3d 227, 2013 Tex. App. LEXIS 12409, 2013 WL 5493408 (Tex. App. Fort Worth Oct. 3 2013).

Evidence : Documentary Evidence : Writings : Transcripts & Translations : General Overview

13. In an assault on a correctional officer case, a court erred by admitting a portion of the State's document regarding the incident because, under the plain language of Tex. R. Evid. 107 it was error to admit the exhibit into evidence when a portion thereof had only been read into evidence; however, the error was harmless because the evidence had already been admitted without objection through another witness. Stewart v. State, 221 S.W.3d 306, 2007 Tex. App. LEXIS 2533 (Tex. App. Fort Worth 2007).

Evidence : Privileges : Attorney-Client Privilege : Exceptions

14. Probate court did not abuse its discretion by admitting redacted billing statements and excluding unredacted statements in a dispute over attorney's fees and expenses because the rule of optional completeness under Tex. R. Evid. 106, 107 was not an exception to the attorney-client privilege, and it did not mandate a waiver of the privilege. Even if the rule of optional completeness was found to apply, an administrator did not show that unredacted statements were necessary for the probate court to understand the attorney's fees recoverable from an estate; significant information was provided to the court in the redacted billing statements, and, when combined with the testimony of the guardian's attorneys, further information was not necessary for the court to understand the matter. In the Estate of Johnston, 2012 Tex. App. LEXIS 4255, 2012 WL 1940656 (Tex. App. San Antonio May 30 2012).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

15. Defendant's claim that the trial court abused its discretion in excluding a letter she wrote in response to a letter written to her by the police chief when the chief's letter was admitted into evidence was upheld as a violation of Tex. R. Evid. 106 and Tex. R. Evid. 107, which comprised the rule of optional completeness as excluding the letter and failing to include a limiting instruction under Tex. Code Crim. Proc. Ann. art. 36.14, and gave rise to a strong possibility that the jury could have formed a false impression regarding defendant's intent such that defendant's substantial rights were affected and she was prevented from adequately presenting her defense. Elmore v. State, 116 S.W.3d 801, 2003 Tex. App. LEXIS 7163 (Tex. App. Fort Worth 2003).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview

16. Where an issue related to admissibility of evidence, the reviewing court applied Tex. R. Evid. 107 rather than Tex. R. Evid. 106, which was merely a rule of timing. Ziolkowski v. State, 223 S.W.3d 640, 2007 Tex. App. LEXIS 2580 (Tex. App. Texarkana 2007).

End of Document

Tex. Evid. R. 107

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 107 Rule of Optional Completeness

If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject. An adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. "Writing or recorded statement" includes a deposition.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Comment to 1998 change This rule is the former Criminal Rule 107 except that the example regarding "when a letter is read" has been relocated in the rule so as to more accurately indicate the provision it explains. While this rule appeared only in the prior criminal rules, it is made applicable to civil cases because it accurately reflects the common law rule of optional completeness in civil cases.

Case Notes

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Money Laundering : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements
Criminal Law & Procedure : Interrogation : Miranda Rights : Custodial Interrogation
Criminal Law & Procedure : Counsel : Effective Assistance : Appeals
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Examination of Witnesses : General Overview
Criminal Law & Procedure : Jury Instructions : Limiting Instructions

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Theory of Defense
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Appeals : Reversible Errors : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Habeas Corpus : Appeals : Certificate of Appealability
Evidence : Demonstrative Evidence : Recordings
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Documentary Evidence : Best Evidence Rule
Evidence : Documentary Evidence : Completeness
Evidence : Documentary Evidence : Writings : General Overview
Evidence : Documentary Evidence : Writings : Transcripts & Translations : General Overview
Evidence : Documentary Evidence : Writings : Transcripts & Translations : Deposition Transcripts
Evidence : Hearsay : General Overview
Evidence : Hearsay : Credibility of Declarants : General Overview
Evidence : Hearsay : Exceptions : General Overview
Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials
Evidence : Hearsay : Exceptions : Residual Exceptions : General Overview
Evidence : Hearsay : Exceptions : Residual Exceptions : Necessity
Evidence : Hearsay : Exceptions : Spontaneous Statements : General Overview
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Exemptions : General Overview
Evidence : Hearsay : Exemptions : Statements by Coconspirators : General Overview
Evidence : Privileges : Attorney-Client Privilege : Exceptions
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Preliminary Questions : General Overview
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview
Evidence : Procedural Considerations : Preliminary Questions : Conditional Admissions
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : Character Evidence
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : General Overview
Evidence : Relevance : Sex Offenses : Rape Shield Laws
Evidence : Testimony : General Overview
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements
Evidence : Testimony : Examination : General Overview
Evidence : Testimony : Examination : Cross-Examination : Scope
Evidence : Testimony : Presentation of Evidence
Family Law : Child Support : Procedures
Tax Law : State & Local Taxes : Real Property Tax : Exemptions
Torts : Business Torts : Fraud & Misrepresentation : Negligent Misrepresentation : General Overview
Torts : Transportation Torts : General Overview

LexisNexis (R) Notes

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

1. In a personal injury case arising from an auto-pedestrian accident, any error under Tex. R. Evid. 608(b), 107 in excluding evidence of a driver's subsequent automobile accidents was harmless because it was unlikely that, if the jury heard that evidence, it would apportioned more fault to the driver, given the admitted evidence that he consumed a pint of vodka on the day in question, was arrested for driving while intoxicated at the scene of the accident, and failed a breathalyzer test with a blood alcohol content that was nearly twice the legal limit. Muhs v. Whataburger, Inc., 2010 Tex. App. LEXIS 9229, 2010 WL 4657955 (Tex. App. Corpus Christi Nov. 18 2010).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

2. When defendant asked about a statement his wife made concerning ownership of the cocaine, the prosecution could follow up that question, under Tex. R. Evid. 107, to explain the statement and make it more understandable. Broussard v. State, 68 S.W.3d 197, 2002 Tex. App. LEXIS 250 (Tex. App. Houston 1st Dist. 2002).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

3. Defense counsel was not rendered ineffective by failing to object when the prosecutor elicited testimony showing that defendant had assaulted a murder victim because the hearsay evidence was admissible under the rule of optional completeness, given that the portion of the statement admitted by the defense gave the false impression that defendant was not present when the victim was murdered. Salazar v. State, 2012 Tex. App. LEXIS 4983, 2012 WL 2357744 (Tex. App. Corpus Christi June 21 2012).

4. In a murder trial, the rule of optional completeness, Tex. R. Evid. 107 did not require the admission of a redacted portion of the DVD video recording of defendant's statement because there has been no showing either that the redacted portion of the video recording was on the same subject or that it was necessary to correct a false or incorrect impression of the evidence. Johnson v. State, 2010 Tex. App. LEXIS 10051, 2010 WL 5142392 (Tex. App. Dallas Dec. 20 2010).

5. In a murder trial, there was no error under Tex. R. Evid. 107 in not admitting the complete text of defendant's statements after the State introduced portions relating to defendant's possession of the murder weapon because there was no showing that defendant's self-serving statements that another person acted alone were on the same subject or corrected a false impression. Ziolkowski v. State, 223 S.W.3d 640, 2007 Tex. App. LEXIS 2580 (Tex. App. Texarkana 2007).

6. In a murder trial, the court did not abuse its discretion by admitting a witness's written statement under the rule of optional completeness because defendant had questioned the witness about inconsistencies between her written statement and her trial testimony, creating the impression that the statement contained more than it actually did. Moreover, the written statement and the portion introduced by defendant during his cross-examination were on the "same subject," specifically, what happened at the apartment. Wilson v. State, 2005 Tex. App. LEXIS 7663 (Tex. App. Fort Worth Sept. 15 2005).

7. In a trial for a "shaken-baby" murder, the report of a Child Protective Services investigator was properly admitted under Tex. R. Evid. 107 because the matter was "opened up" when defense counsel questioned the investigator about how she reached the conclusions stated in her report, and then attempted to impeach her by raising questions about the affidavits which were attached. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Money Laundering : General Overview

8. In a money laundering case, a court did not err in failing to admit a videotape under Tex. R. Evid. 107 where the State introduced the entire conversation between the officer and defendant, and to the extent defendant argued that the videotape showed his ability to speak and understand the English language, Rule 107 was not intended for that purpose. Pham v. State, 2004 Tex. App. LEXIS 9439 (Tex. App. Dallas Oct. 27 2004).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements

9. Under Tex. R. Evid. 107, the State was properly allowed to present testimony of a driving while intoxicated defendant's videotaped statements about his drinking, even though the trial court had previously suppressed the audio portion of the tape because of its poor quality, because defendant attempted to impeach the officer's credibility as to the basis for his opinion that defendant had been drinking, as permitted by Tex. R. Evid 607. Cadena v. State, 2006 Tex. App. LEXIS 8622 (Tex. App. El Paso Oct. 5 2006).

Criminal Law & Procedure : Interrogation : Miranda Rights : Custodial Interrogation

10. In defendant's drug case, error in the admission of defendant statements that did not comply with Tex. Code Crim. Proc. Ann. art. 38.22 was harmless because the evidence was subsequently admitted through admission of a portion of an officer's report, admitted on the basis of the rule of optional completeness. Rascon v. State, 2010 Tex. App. LEXIS 593, 2010 WL 337044 (Tex. App. Eastland Jan. 29 2010).

11. In a murder case, the trial court did not err by overruling defendant's motion to suppress voluntary statements she gave to the police because, after saying that he had no objection to the written statement, defense counsel requested that the entire videotape statement be introduced pursuant to Tex. R. Evid. 106, 107, and the videotapes of the full three-and-a-half hour interview were introduced in evidence as defense exhibits and played for the jury. As such, defendant could not assert that it was error to admit the videotaped interview at trial because it was she who offered it in evidence. Herron v. State, 2008 Tex. App. LEXIS 7231 (Tex. App. Austin Sept. 26, 2008).

Criminal Law & Procedure : Counsel : Effective Assistance : Appeals

12. Appellate counsel for a prisoner, who was convicted of capital murder and sentenced to death, was not ineffective for habeas corpus relief for not complaining on appeal that the trial court should have admitted the rest of a witness's statement under the doctrine of optional completeness under Tex. R. Evid. 107, even though the complaint was preserved for appellate review under Tex. R. App. P. 33.1(a), because counsel was justified in believing that any error was harmless since the rest of the statement would not have helped exonerate the prisoner; the Texas law of parties under Tex. Penal Code Ann. § 7.02 (2003) further supported the harmlessness of refusing to admit the full statement because the prisoner also could have been convicted if the prisoner aided in the ways described in § 7.02, and the evidence of the prisoner's extensive participation was strong enough that admitting the statement would not have changed the result. Hernandez v. Thaler, 463 Fed. Appx. 349, 2012 U.S. App. LEXIS 4256 (5th Cir. Tex. Mar. 1 2012).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

13. Trial counsel did not provide ineffective assistance by not introducing evidence that his client's codefendant had judicially confessed to the murder that resulted in his client's conviction for capital murder and death sentence because, if counsel had introduced codefendant's testimony from the punishment phase of his own trial, the prosecution would have introduced codefendant's testimony from the guilt determination phase of his trial under the Rule of Optional Completeness, Tex. R. Evid. 107, and this testimony would have contradicted the contention

counsel's client did not direct both the kidnapping and the shooting. Adams v. Thaler, 2010 U.S. Dist. LEXIS 74807 (E.D. Tex. July 26 2010).

Criminal Law & Procedure : Trials : Examination of Witnesses : General Overview

14. When defendant asked about a statement his wife made concerning ownership of the cocaine, the prosecution could follow up that question, under Tex. R. Evid. 107, to explain the statement and make it more understandable. Broussard v. State, 68 S.W.3d 197, 2002 Tex. App. LEXIS 250 (Tex. App. Houston 1st Dist. 2002).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

15. Defendant's claim that the trial court abused its discretion in excluding a letter she wrote in response to a letter written to her by the police chief when the chief's letter was admitted into evidence was upheld as a violation of Tex. R. Evid. 106 and Tex. R. Evid. 107, which comprised the rule of optional completeness as excluding the letter and failing to include a limiting instruction under Tex. Code Crim. Proc. Ann. art. 36.14, and gave rise to a strong possibility that the jury could have formed a false impression regarding defendant's intent such that defendant's substantial rights were affected and she was prevented from adequately presenting her defense. Elmore v. State, 116 S.W.3d 801, 2003 Tex. App. LEXIS 7163 (Tex. App. Fort Worth 2003).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Theory of Defense

16. In a murder trial, the court did not abuse its discretion by admitting a witness's written statement under the rule of optional completeness because defendant had questioned the witness about inconsistencies between her written statement and her trial testimony, creating the impression that the statement contained more than it actually did. Moreover, the written statement and the portion introduced by defendant during his cross-examination were on the "same subject," specifically, what happened at the apartment. Wilson v. State, 2005 Tex. App. LEXIS 7663 (Tex. App. Fort Worth Sept. 15 2005).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

17. In a trial for defendant's sexual assault of his 12-year-old daughter, evidence that the victim had been previously assaulted by another relative was properly excluded in the punishment phase after the victim described the impact of the assault, including three attempted suicides. The rule of optional completeness under Tex. R. Evid. 107 was inapplicable because a prior act, conversation, declaration, or written or recorded statement was not at issue. Delapaz v. State, 297 S.W.3d 824, 2009 Tex. App. LEXIS 7510 (Tex. App. Eastland Sept. 24 2009).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

18. Trial court's admission into evidence-over a hearsay objection-of three of four related telephone conversations, and subsequent exclusion of the fourth conversation by sustaining a hearsay objection, was an abuse of discretion under the rule of optional completeness, Tex. R. Evid. 107, and the error could not be said not to have contributed to defendant's conviction or punishment; defendant sought to introduce a recording of the entirety of the conversations, which would have included the remainder of the content, and allowed the jury to determine for itself his demeanor without filtration through a third party, which was the very purpose of the rule of optional completeness. Walters v. State, 206 S.W.3d 780, 2006 Tex. App. LEXIS 9555 (Tex. App. Texarkana 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

19. In a trial for aggravated sexual assault of a child, defendant's objection that he had not "opened the door" to the admission of a videotaped interview of complainant was insufficient to alert the trial court that he was asserting

an objection under Tex. R. Evid. 107. Tovar v. State, 221 S.W.3d 185, 2006 Tex. App. LEXIS 6440 (Tex. App. Houston 1st Dist. 2006).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

20. In a murder case, videotapes were not hearsay under Tex. R. Evid. 801(d) because they were offered to prove that conversations had taken place, and in addition, the tapes were admissible under Tex. R. Evid. 107 because defendant opened the door by suggesting that the conversations had not occurred. Williams v. State, 2005 Tex. App. LEXIS 5351 (Tex. App. Houston 14th Dist. July 12 2005).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

21. Trial court did not err by refusing to admit text messages between the victim and third parties under this rule because the fact that the victim used profanity with others or communicated with other men was not necessary to explain the context of the text messages between defendant and the victim and defendant failed to point to any other text message relevant to the relationship and communications between defendant and the victim. Davis v. State, 2013 Tex. App. LEXIS 13242, 2013 WL 5781489 (Tex. App. Fort Worth Oct. 24 2013).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

22. Even if the trial court erred by admitting the video recording of the victim's sexual assault interview under Tex. R. Evid. 107, the error was harmless because the victim provided the same account in her trial testimony that defendant touched her "both" on the inside and outside of her vaginal area. Cline v. State, 2013 Tex. App. LEXIS 872 (Tex. App. Corpus Christi Jan. 31 2013).

23. Court did not violate the rule of optional completeness by excluding a portion of defendant's statement because it did not concern the same subject matter as the portion offered by the prosecution (i.e., defendant's statement of guilt), and the redacted portion would have been cumulative of admitted evidence. Campa v. State, 2009 Tex. App. LEXIS 5065 (Tex. App. Dallas July 2 2009).

24. During defendant's criminal trial for murder, the trial judge violated the rule of optional completeness under Tex. R. Evid. 107 when he allowed a 911 operator to testify that he asked defendant if he wanted to talk about what had happened, but excluded defendant's response indicating that he shot the victim in self-defense; the error was nonconstitutional, because defendant testified about his longstanding strife with the victim; the trial court's erroneous exclusion of his 911 statements did not prevent him from fully presenting his self-defense theory. Walters v. State, 247 S.W.3d 204, 2007 Tex. Crim. App. LEXIS 1701 (Tex. Crim. App. 2007).

25. In a trial for assault of a family member, it was error under Tex. R. Evid. 107 for the complainant's written statement to be read into evidence; the error was harmless under Tex. R. App. P. 44. because there was other evidence of the fight and the complainant's injuries. Long Xuan Thai v. State, 2007 Tex. App. LEXIS 6056 (Tex. App. Dallas Aug. 1 2007).

26. In the trial of an officer for lying in a warrant affidavit about the reliability of an informant, any error under Tex. R. Evid. 106, 107 was harmless under Tex. R. App. P. 44.2(b) when the trial court refused to allow the jury to hear that guns and money were seized under the tainted warrant. Although the excluded evidence was relevant to a defensive theory relating to the identity of the informant, the exclusion did not prevent defendant from presenting the substance of that defense to the jury. Delapaz v. State, 228 S.W.3d 183, 2007 Tex. App. LEXIS 2377 (Tex. App. Dallas 2007).

27. Defendant's conviction of theft under Tex. Penal Code Ann. § 31.03 was affirmed because any error in the admission of her manager's testimony that the cleaning crew owner stated he saw defendant at the restaurant before the bank deposits were reported missing was harmless, as provided in Tex. R. App. P. 44.2(b), where the testimony was cumulative of other evidence of defendant's guilt; further, the testimony was admissible under the rule of optional completeness provided in Tex. R. Evid. 107 because defense counsel had invited a response from the State by suggesting that the manager did not know of anyone on the cleaning crew who saw defendant at the store. Sheridan v. State, 2006 Tex. App. LEXIS 6942 (Tex. App. Austin Aug. 4 2006).

Criminal Law & Procedure : Habeas Corpus : Appeals : Certificate of Appealability

28. Defendant was not entitled to a certificate of appealability as to defendant's claim that his U.S. Const. amend. VI right to confront witnesses was violated when the trial court admitted into evidence, pursuant to Tex. R. Evid. 107, testimony from a detective who described a conversation in which an accomplice stated that defendant had used the accomplice's knife to commit a murder; such claim was procedurally defaulted because defendant only asserted a hearsay objection at trial, which did not meet the specificity requirements of Tex. R. App. P. 33.1. Wright v. Quarterman, 470 F.3d 581, 2006 U.S. App. LEXIS 28509 (5th Cir. Tex. 2006), *cert. denied*, 551 U.S. 1134, 127 S. Ct. 2996, 168 L. Ed. 2d 707, 2007 U.S. LEXIS 7775 (2007).

Evidence : Demonstrative Evidence : Recordings

29. In a murder case, the trial court did not err by overruling defendant's motion to suppress voluntary statements she gave to the police because, after saying that he had no objection to the written statement, defense counsel requested that the entire videotape statement be introduced pursuant to Tex. R. Evid. 106, 107, and the videotapes of the full three-and-a-half hour interview were introduced in evidence as defense exhibits and played for the jury. As such, defendant could not assert that it was error to admit the videotaped interview at trial because it was she who offered it in evidence. Herron v. State, 2008 Tex. App. LEXIS 7231 (Tex. App. Austin Sept. 26, 2008).

Evidence : Demonstrative Evidence : Visual Formats

30. In a trial for aggravated sexual assault of a child, defense counsel's cross-examination opened the door under Tex. R. Evid. 107 to a videotaped interview of complainant because counsel asked whether the complainant "remembered" telling the interviewer that another person was in the room during the assault, even though she actually said she was alone with defendant; thus the question falsely suggested that the complainant had given inconsistent statements about the presence of another person during the assault and the admission was necessary to fully and fairly to explain the contents of the complainant's videotaped statement. Tovar v. State, 221 S.W.3d 185, 2006 Tex. App. LEXIS 6440 (Tex. App. Houston 1st Dist. 2006).

Evidence : Documentary Evidence : Best Evidence Rule

31. Because appellant did not object to the admission of a CD under Tex. R. Evid. 107, the issue was not preserved for appeal. Parr v. State, 2012 Tex. App. LEXIS 3144, 2012 WL 1392614 (Tex. App. Amarillo Apr. 23 2012).

Evidence : Documentary Evidence : Completeness

32. Defendant failed to show the court erred by admitting the exhibit since its admission violated the rule of optional completeness, because the rule did not provide for excluding the original exhibit. Adams v. State, 2014 Tex. App. LEXIS 6619, 2014 WL 2807978 (Tex. App. Dallas June 18 2014).

33. At defendant's trial for three counts of aggravated sexual assault of a child and two counts of indecency with a child by contact, the trial court did not err by admitting the entire statement of the victim into evidence under the rule of completeness. The State was allowed to question a detective about the victim's statements and the differences between the two police reports, because defense counsel opened the door by asking questions based on the discrepancies between the reports. Ramirez v. State, 2014 Tex. App. LEXIS 3955, 2014 WL 1410344 (Tex. App. Waco Apr. 10 2014).

34. In a child support dispute, the trial court did not err when it admitted, over the mother's "completeness" objection, the father's bank statements from 2003 to 2005 that did not include copies of the canceled checks referenced in each statement because the mother never offered any other document to complete the statements offered by the father, nor did it appear that such documents were available to offer. In the Interest of C.S., 2014 Tex. App. LEXIS 2593, 2014 WL 972310 (Tex. App. Eastland Mar. 6 2014).

35. Admission of a police officer's report based on the rule of optional completeness was not an option because defendant's questions on cross-examination regarding the report were general, no reference was made with regard to specific statements in the report, and no portion of the report was read to the jury. Maxwell v. State, 2014 Tex. App. LEXIS 1514, 2014 WL 556377 (Tex. App. Texarkana Feb. 12 2014).

36. Court did not abuse its discretion in concluding that Tex. R. Evid. 107 did not require admission of a portion of the officer's video and audio recording that the State redacted because the excluded portion of the video would not have countered or helped explain any impression created by the officer's direct testimony or the unredacted portion of the video. Godfrey v. State, 2014 Tex. App. LEXIS 879, 2014 WL 309381 (Tex. App. Houston 14th Dist. Jan. 28 2014).

37. Court did not abuse its discretion in concluding that Tex. R. Evid. 107 did not require admission of a portion of the officer's video and audio recording that the State redacted because the excluded portion of the video would not have countered or helped explain any impression created by the officer's direct testimony or the unredacted portion of the video. Godfrey v. State, 2014 Tex. App. LEXIS 879, 2014 WL 309381 (Tex. App. Houston 14th Dist. Jan. 28 2014).

38. In a case in which a jury convicted defendant of solicitation to commit capital murder, the trial court did not abuse its discretion in excluding a recording of defendant's statement to police following her arrest. Although defendant claimed that her post-arrest statement was admissible under the rule of optional completeness, there was nothing in the record to indicate that the post-arrest statement was necessary to explain her earlier statement or to make it fully understood. Gelber v. State, 2014 Tex. App. LEXIS 257, 2014 WL 98802 (Tex. App. Waco Jan. 9 2014).

39. Employee did not meet the first requirement for the application of Tex. R. Evid. 107 as the employer did not introduce the disciplinary records into evidence, and the trial court did not err in excluding them from evidence. Moreno v. Tex. DOT, 440 S.W.3d 889, 2013 Tex. App. LEXIS 15180, 2013 WL 6668714 (Tex. App. El Paso Dec. 18 2013).

40. Trial court did not err by refusing to admit text messages between the victim and third parties under this rule because the fact that the victim used profanity with others or communicated with other men was not necessary to explain the context of the text messages between defendant and the victim and defendant failed to point to any other text message relevant to the relationship and communications between defendant and the victim. Davis v. State, 2013 Tex. App. LEXIS 13242, 2013 WL 5781489 (Tex. App. Fort Worth Oct. 24 2013).

41. Trial court did not abuse its discretion by allowing the officer's testimony because defendant opened the door to it, where the trial court could allow the State to present evidence to clear up the erroneous impression by admitting evidence that the manual did have something to say about the other definition of intoxication; the trial court's ruling admitting the officer's testimony regarding the correlation between the HGN and alcohol concentration was within the zone of reasonable disagreement. Jordy v. State, 413 S.W.3d 227, 2013 Tex. App. LEXIS 12409, 2013 WL 5493408 (Tex. App. Fort Worth Oct. 3 2013).

42. Trial court did not err in allowing the tax appraisal district to introduce the taxpayer's complete applications for exemptions after the taxpayer sought to broaden the scope of its claim for an exemption and introduced only a portion of its applications. Harvest Life Found. v. Harris County Appraisal Dist., 2013 Tex. App. LEXIS 6906 (Tex. App. Houston 14th Dist. June 6 2013).

43. Although Tex. R. Evid. 107 is limited by Tex. R. Evid. 403, appellant failed to object that the evidence was substantially more prejudicial than probative, and to the extent he tried to raise a Rule 403 complaint on appeal, he did not preserve this issue for review under Tex. R. App. P. 33.1(a)(1). Hailey v. State, 413 S.W.3d 457, 2012 Tex. App. LEXIS 8717, 2012 WL 4936655 (Tex. App. Fort Worth Oct. 18 2012).

44. Court did not need to decide if the entire interview was on the same subject, for purposes of Tex. R. Evid. 107, because even assuming the trial court committed error in permitting the taped interview to be played in its entirety, this nonconstitutional error was harmless under Tex. R. App. P. 44.2(b), given that (1) any extraneous information on the tape was cumulative of other evidence, and (2) any error in admitting the entire interview did not have a substantial influence on the verdict; witnesses described appellant's incriminating statements, appellant testified, which gave the jury a chance to assess his credibility, appellant still challenged the mother's credibility despite the introduction of the interview, other evidence was introduced that implicated appellant that was more damaging than the interview, and ample evidence supported the capital murder guilty verdict, and although there was no confession, appellant did not challenge the sufficiency of the evidence. Hailey v. State, 413 S.W.3d 457, 2012 Tex. App. LEXIS 8717, 2012 WL 4936655 (Tex. App. Fort Worth Oct. 18 2012).

45. Probate court did not abuse its discretion by admitting redacted billing statements and excluding unredacted statements in a dispute over attorney's fees and expenses because the rule of optional completeness under Tex. R. Evid. 106, 107 was not an exception to the attorney-client privilege, and it did not mandate a waiver of the privilege. Even if the rule of optional completeness was found to apply, an administrator did not show that unredacted statements were necessary for the probate court to understand the attorney's fees recoverable from an estate; significant information was provided to the court in the redacted billing statements, and, when combined with the testimony of the guardian's attorneys, further information was not necessary for the court to understand the matter. In the Estate of Johnston, 2012 Tex. App. LEXIS 4255, 2012 WL 1940656 (Tex. App. San Antonio May 30 2012).

46. At defendant's trial for indecency with a child, defense counsel's questioning of a caseworker created the false impression that the victim did not make an allegation of sexual abuse during the interview. The trial court did not err in admitting additional testimony from the caseworker under the rule of optional completeness, Tex. R. Evid. 107, to correct that false impression. Smith v. State, 2012 Tex. App. LEXIS 2510, 2012 WL 1067946 (Tex. App. Houston 1st Dist. Mar. 29 2012).

47. Appellate counsel for a prisoner, who was convicted of capital murder and sentenced to death, was not ineffective for habeas corpus relief for not complaining on appeal that the trial court should have admitted the rest of a witness's statement under the doctrine of optional completeness under Tex. R. Evid. 107, even though the complaint was preserved for appellate review under Tex. R. App. P. 33.1(a), because counsel was justified in believing that any error was harmless since the rest of the statement would not have helped exonerate the prisoner; the Texas law of parties under Tex. Penal Code Ann. § 7.02 (2003) further supported the harmlessness of refusing to admit the full statement because the prisoner also could have been convicted if the prisoner aided in the ways

described in § 7.02, and the evidence of the prisoner's extensive participation was strong enough that admitting the statement would not have changed the result. Hernandez v. Thaler, 463 Fed. Appx. 349, 2012 U.S. App. LEXIS 4256 (5th Cir. Tex. Mar. 1 2012).

48. Statements in a letter relating to defendant's abusive conduct causing the victim's suicidal thoughts were admissible under the rule of optional completeness because those statements were from the same document and on the same subject as the statements used by defendant, and defendant's cross-examination of the victim could have left a false impression with the jury that the victim's suicidal thoughts were due to issues other than defendant's conduct. Lofton v. State, 2011 Tex. App. LEXIS 9666 (Tex. App.--Dallas Dec. 9, 2011).

49. Statements in a letter relating to defendant's abusive conduct causing the victim's suicidal thoughts were admissible because defendant's cross-examination of the victim could have left a false impression with the jury that the victim's suicidal thoughts were due to issues other than defendant's conduct. Lofton v. State, 2011 Tex. App. LEXIS 9664, 2011 WL 6225415 (Tex. App. Dallas Dec. 9 2011).

50. During defendant's trial for sexual assault of a child, the court did not err in admitting a videotape of an interview by a forensic interviewer of the victim because defendant's cross-examination of the victim about her specific statements in the forensic interview created the possibility of confusion and false impressions had the jury not been permitted to see and hear the conversation in context. Bailey v. State, 2011 Tex. App. LEXIS 5085, 2011 WL 2732596 (Tex. App. Eastland June 30 2011).

51. Appellate counsel's conclusion that an "optional completeness" argument had not been properly preserved for state appellate review was an objectively reasonable deduction because the specificity required by Tex. R. Evid. 103 and Tex. R. App. P. 33.1(a) was lacking; nothing in the exchanges between petitioner inmate's trial counsel and the state trial court reasonably alerted the state trial court that the inmate was suggesting a detective should be permitted to testify to the clearly hearsay within hearsay details of a witness's written statement based upon the Texas Rule of Optional Completeness found in Tex. R. Evid. 107. Hernandez v. Thaler, 787 F. Supp. 2d 504, 2011 U.S. Dist. LEXIS 123538 (W.D. Tex. May 12 2011).

52. Because the prosecution made no effort whatsoever to introduce any of the contents of a witness's written statement, under the plain language of Tex. R. Evid. 107 the Texas Rule of Optional Completeness had no application to a detective's testimony regarding the contents of that written statement; the rule would not be implicated until such time as a party attempted to have a portion of an act, declaration, conversation, writing or recorded statement given in evidence. Hernandez v. Thaler, 787 F. Supp. 2d 504, 2011 U.S. Dist. LEXIS 123538 (W.D. Tex. May 12 2011).

53. In a commercial dispute, the seller invoked his Fifth Amendment privilege against self-incrimination in response to a series of deposition questions; he later reversed his position and provided substantive answers to those questions. Under the rule of completeness set forth in Tex. R. Evid. 107, the trial court granted his motion to add allow testimony showing that the seller decided not to invoke the privilege and answered the questions. Ferro v. Dinicolantonio, 2011 Tex. App. LEXIS 955, 2011 WL 494741 (Tex. App. Houston 1st Dist. Feb. 10 2011).

54. By suggesting the victim's statement and testimony were inconsistent, appellant's counsel gave the State the right correct the false impressions, and because counsel used specific statements from an interview to challenge the victim's credibility, the entire recording was admissible; thus, the trial court did not abuse its discretion in admitting the recording under Tex. R. Evid. 107 to clarify the contents of the victim's statement. Castillo v. State, 2010 Tex. App. LEXIS 8392, 2010 WL 4117674 (Tex. App. El Paso Oct. 20 2010).

55. Trial court did not err by admitting defendant's husband's statement because defendant presented a portion of the statement to the jury through a detective, and therefore the State was entitled to offer the remainder of the statement under Tex. R. Evid. 107. Roberson v. State, 2010 Tex. App. LEXIS 6421, 2010 WL 3075612 (Tex. App. Fort Worth Aug. 5 2010).

56. Court could assume without deciding that defendant was correct that a videotape was not admissible as a prior consistent statement or prior inconsistent statement, for purposes of Tex. R. Evid. 613(a), 801(e)(1)(B), even though he failed to raise the latter objection at trial and raised the former with insufficient specificity because the videotape was still admissible (1) to rebut the suggestion that the police fed the witness his answers to their questions, and (2) to show that the witness was not parroting what the police told him; defendant did not object or seek a limiting instruction under Tex. R. Evid. 105(a), such that the jury was free to consider the tape's contents for any purposes, plus the videotape was admissible to clarify what the witness actually said, for purposes of Tex. R. Evid. 107. Franks v. State, 2010 Tex. App. LEXIS 3224, 2010 WL 1730032 (Tex. App. Austin Apr. 28 2010).

57. Trial court properly admitted challenged testimony under the rule of optional completeness; after the defense adduced defendant's wife's testimony that she believed her daughters' accusations because of other things that had happened in her marriage, the State was entitled to ask the wife what those things were, and by adducing testimony regarding defendant's unwelcome sexual advances and touching, the defense opened the door for the State to more fully develop the circumstances under which he would touch his wife. Schoff v. State, 2010 Tex. App. LEXIS 1350, 2010 WL 668904 (Tex. App. Austin Feb. 23 2010).

58. In defendant's drug case, error in the admission of defendant statements that did not comply with Tex. Code Crim. Proc. Ann. art. 38.22 was harmless because the evidence was subsequently admitted through admission of a portion of an officer's report, admitted on the basis of the rule of optional completeness. Rascon v. State, 2010 Tex. App. LEXIS 593, 2010 WL 337044 (Tex. App. Eastland Jan. 29 2010).

59. In defendant's murder case, the trial court could have found that it was appropriate to admit hearsay evidence under the rule of optional completeness because the written statements by the deaf victim and testimony by the deputy were brought in during the State's rebuttal in the punishment phase after defendant opened the door to the issue during his direct examination. Defendant told only part of the story, leaving the jury with a false impression of the situation. Fuentes v. State, 2009 Tex. App. LEXIS 9779 (Tex. App. Houston 1st Dist. Dec. 3 2009).

60. Court did not violate the rule of optional completeness by excluding a portion of defendant's statement because it did not concern the same subject matter as the portion offered by the prosecution (i.e., defendant's statement of guilt), and the redacted portion would have been cumulative of admitted evidence. Campa v. State, 2009 Tex. App. LEXIS 5065 (Tex. App. Dallas July 2 2009).

61. Defendant objected to the admission of recordings only on the ground that the recordings were not accurate and complete, and in his motion for new trial, he contended that this trial objection was based on the doctrine of optional completeness under Tex. R. Evid. 107, but that was not a rule of exclusion; his objection at trial was too general to alert the trial court that he was actually objecting on the grounds that the recording equipment malfunctioned or that the recordings were manipulated and he did not argue in his new trial motion that he had a legitimate reason for not asserting these objections when the recordings were offered, such that the objections made for the first time in the new trial motion were not preserved for review under Tex. R. App. P. 33.1(a)(1). Even if the matter was preserved, a witness's testimony was sufficient to meet the requirement that the evidence be authenticated under Tex. R. Evid. 901, plus defendant's complaint that the recordings were not accurate went to the weight of the evidence only and not to its admissibility. Manis v. State, 2009 Tex. App. LEXIS 4909 (Tex. App. Dallas June 26 2009).

62. Defense counsel's cross-examination "opened the door" when he inquired about DNA results, and therefore, the trial court properly overruled defendant's hearsay objection and allowed the State to question a detective on re-direct about the actual DNA results of the vulvar swabs, which she had misstated during defendant's cross-examination. Because defendant opened the door to the detective's testimony regarding the DNA results, the trial court did not abuse its discretion by overruling defendant's hearsay objection. Alvarez v. State, 2009 Tex. App. LEXIS 3039, 2009 WL 1176440 (Tex. App. Fort Worth Apr. 30 2009).

63. In an intoxication manslaughter case, the trial court's decision to exclude the statements at issue did not violate the doctrine of optional completeness because the officer's testimony that people at the scene said they saw what happened did not leave a false impression with the jury, and the excluded statements were not necessary to fully understand the officer's testimony; he further testified that people were approaching him while he was laying the flare line on the scene and that he gave one person a stack of affidavits so that witnesses could begin writing down what they saw. The officer testified that he did not talk to every witness on the scene, thus informing the jury that not all witnesses testified at trial. Mole v. State, 2009 Tex. App. LEXIS 2838, 2009 WL 1099433 (Tex. App. Fort Worth Apr. 23 2009).

64. In response to a question seeking a yes-or-no answer, defendant volunteered information that suggested police brutality in his arrest, and thus defendant "opened up" the matter of the circumstances of his arrest, permitting the State to elicit additional evidence to explain fully and fairly those circumstances, for purposes of Tex. R. Evid. 107. Penney v. State, 2009 Tex. App. LEXIS 2824, 2009 WL 1058742 (Tex. App. Dallas Apr. 21 2009).

65. Trial court acted within its discretion when it excluded the redacted portion of defendant's statement and thus the court overruled defendant's claim that the rule of optional completeness under Tex. R. Evid. 107 was violated; because the excluded portion did not concern the same subject matter as the part offered by the prosecution, the rule did not apply, plus the trial court's refusal to admit the redacted portion did not create reversible harm under Tex. R. App. P. 44.2(a), as the redacted portion would have been cumulative of admitted evidence. Campa v. State, 2009 Tex. App. LEXIS 2682 (Tex. App. Dallas Apr. 20 2009).

66. Trial court could have reasonably concluded that (1) defendant's half-brother's testimony did not substantially outweigh its prejudicial value. (2) the State's need for the evidence was considerable since it suggested that defendant misled the jury about the reason for his expulsion from the family home, and (3) the half-brother's testimony did not tend to suggest that the jury decide the case on an improper basis; the conduct in which the half-brother testified that appellant engaged with him, inappropriate touching and oral genital contact, was no more serious and potentially inflammatory than the offense defendant was charged with committing against the victim in this aggravated sexual assault trial and the testimony did not confuse or distract the or take an inordinate amount of time, and thus the trial court did not abuse its discretion by determining that the probative value of testimony outweighed any unfairly prejudicial impact and the testimony was admissible under the rule of optional completeness. Goodwin v. State, 2009 Tex. App. LEXIS 875, 2009 WL 311457 (Tex. App. Dallas Feb. 10 2009).

67. Even if the trial court abused its discretion by allowing defendant's half-brother to testify under the rule of optional completeness, the error was harmless because defendant admitted on cross-examination that he sexually assaulted him and defendant did not object to the questioning on this subject, and improper admission of evidence was not reversible error if the same facts are shown by other evidence that was unchallenged. Goodwin v. State, 2009 Tex. App. LEXIS 875, 2009 WL 311457 (Tex. App. Dallas Feb. 10 2009).

68. Defendant suggested on direct examination that he was kicked out of a home because of his alcoholic step-father's abusiveness, but according to his half-brother, defendant was actually kicked out of the house, at least in part, because he molested the half-brother, and pursuant to the rule of optional completeness under Tex. R. Evid. 107, the State was entitled to cull details to paint a broader picture of the event referred to by defendant, provided those details were on the same subject and the prejudicial value of such testimony did not substantially outweigh its

probative value; the half-brother's testimony was on the same subject and thus completed the picture painted by defendant about his life. Goodwin v. State, 2009 Tex. App. LEXIS 875, 2009 WL 311457 (Tex. App. Dallas Feb. 10 2009).

69. In defendant's murder case, the trial court properly excluded a psychiatrist's memo because the entirety of it was not on the same subject as the portion read aloud by the doctor during direct examination. The memo covered her entire conversation with defendant which took place over more than six hours, and much of the memo was not on the same subject as the portion read into evidence by the prosecutor. Whipple v. State, 281 S.W.3d 482, 2008 Tex. App. LEXIS 6344 (Tex. App. El Paso 2008).

70. Witness statement was properly admitted because the statement was not merely referred to during the testimony, but portions of the statement were actually read aloud on the record by defendant's attorney, and therefore, the rest of the statement was properly offered into evidence under the rule of optional completeness because it related to the same subject -- the shooting that the witness observed. Jones v. State, 2008 Tex. App. LEXIS 3797 (Tex. App. Dallas May 27 2008).

71. Defendant did not explain how Tex. R. Evid. 107 operated in furtherance of the admission of autopsy photographs, such that the point was inadequately briefed under Tex. R. App. P. 38 and presented nothing for review. Lopez v. State, 2008 Tex. App. LEXIS 3167 (Tex. App. Houston 1st Dist. May 1 2008).

72. In defendant's drug case, the court properly precluded defendant from offering the informant's criminal record under the rule of completeness because a deputy did not offer details about the background check of the informant, he did not testify that he had obtained a criminal history as part of the background check, and therefore, because the State did not introduce any portion of the informant's background check or criminal history into evidence, there was nothing for defendant to offer for purposes of "completeness." Kuecker v. State, 2008 Tex. App. LEXIS 2778 (Tex. App. Houston 1st Dist. Apr. 17 2008).

73. During defendant's criminal trial for murder, the trial judge violated the rule of optional completeness under Tex. R. Evid. 107 when he allowed a 911 operator to testify that he asked defendant if he wanted to talk about what had happened, but excluded defendant's response indicating that he shot the victim in self-defense; the error was nonconstitutional, because defendant testified about his longstanding strife with the victim; the trial court's erroneous exclusion of his 911 statements did not prevent him from fully presenting his self-defense theory. Walters v. State, 247 S.W.3d 204, 2007 Tex. Crim. App. LEXIS 1701 (Tex. Crim. App. 2007).

74. In order to invoke the rule of optional completeness under Tex. R. Evid. 107, defendant had to show that the portion of the statement he sought to admit was part of the same statement previously admitted by the opposing party, but his statement to a detective was not part of his statement to a nurse, as the statement given to the nurse was for medical assessment and the statement given to the detective was for criminal investigation purposes. Ramirez v. State, 2007 Tex. App. LEXIS 8349 (Tex. App. Houston 14th Dist. Oct. 23 2007).

75. Defendant failed to object to evidence on the basis of Tex. R. Evid. 107 and thus defendant failed to preserve for review this complaint, as his trial objection did not comport with his complaint on appeal. Martinez v. State, 2007 Tex. App. LEXIS 7482 (Tex. App. Houston 14th Dist. Sept. 13 2007).

76. During defendant's trial for aggravated sexual assault of a child, the trial court did not err in violation of Tex. R. Evid. 107 by excluding evidence that the complainant had falsely accused defendant of sexually assaulting another child where the State did not present any evidence at trial concerning the complainant's accusation that defendant molested the other child and where defendant himself, on cross-examination of the complainant, elicited testimony that the complainant had falsely reported to police that defendant molested the other child; with regard to the

testimony of the other child's mother, defendant did not state what specific evidence was omitted and had not demonstrated that the trial court abused its discretion in determining that her vague recollections that defendant might have called her house one to four times created an incomplete or misleading impression that defendant molested her son, or that such evidence was necessary to make her testimony fully understood. Billodeau v. State, 263 S.W.3d 318, 2007 Tex. App. LEXIS 6404 (Tex. App. Houston 1st Dist. 2007).

77. Defendant raised the subject of the victim's letters and inquired into specific portions of their content, which entitled the State to introduce, under Tex. R. Evid. 107, those portions of the letters addressing the same subject, but the State was not entitled to introduce the letters in their entirety, and the letters were thus reviewed by both sides to determine what portions to redact; by creating false impressions of the relationship between defendant and the victim, defendant invited a reply from the State to fully explain the content of the letters, and hearsay was admissible when it went to clarify other hearsay evidence elicited by the opposition, such that the court found no error in the admission of the letters. Rios v. State, 230 S.W.3d 252, 2007 Tex. App. LEXIS 5123 (Tex. App. Waco 2007).

78. Trial court did not abuse its discretion by excluding evidence that the victim had falsely accused defendant of sexually assaulting another child because the State did not present any evidence at trial concerning that accusation as required by Tex. R. Evid. 107. Billodeau v. State, 2007 Tex. App. LEXIS 4462 (Tex. App. Houston 1st Dist. June 7 2007).

79. On direct examination by the State, a nurse orally recounted selected portions of her report, leaving out any reference to abuse by the victim's natural father; defendant argued that the trial court erred by refusing his request to introduce the nurse's full report into evidence; however, the unadmitted statements to which counsel directed the appellate court's attention were not directly related to the assault case, and there was nothing about that assault that the unadmitted statements would illuminate; thus, the trial court did not abuse its discretion by overruling the motion to present the remainder of the report to the jury for its consideration pursuant to Tex. R. Evid. 107. Bryant v. State, 2007 Tex. App. LEXIS 3054 (Tex. App. Texarkana Apr. 20 2007).

80. In an assault on a correctional officer case, a court erred by admitting a portion of the State's document regarding the incident because, under the plain language of Tex. R. Evid. 107 it was error to admit the exhibit into evidence when a portion thereof had only been read into evidence; however, the error was harmless because the evidence had already been admitted without objection through another witness. Stewart v. State, 221 S.W.3d 306, 2007 Tex. App. LEXIS 2533 (Tex. App. Fort Worth 2007).

81. Defendant immediately objected when the State offered a prosecution report into evidence pursuant to the rule of optional completeness under Tex. R. Evid. 107, and thus the court found that defendant adequately apprised the trial court of the basis for the complaint on appeal, such that it was properly preserved for review. Mata v. State, 2007 Tex. App. LEXIS 2319 (Tex. App. Dallas Mar. 26 2007).

82. Defense counsel's use of a prosecution report to cross-examine a witness did not invoke Tex. R. Evid. 107, as other than questioning the witness about the time of the offense, the report was not read to the jury, such that the trial court erred in admitting the narrative portion of the report into evidence; however, it was harmless error under Tex. R. App. P. 44.2(b) given that the State presented overwhelming evidence supporting the jury's guilty verdict and much of the contents of the report were proven by other evidence introduced at trial, and the contents not proven by other evidence were not emphasized by the State. Mata v. State, 2007 Tex. App. LEXIS 2319 (Tex. App. Dallas Mar. 26 2007).

83. In a second trial for sexual abuse, it was error under Tex. R. Evid. 107 to admit the entirety of the complainant's testimony from the first trial, even though the defense used part of the testimony for impeachment,

because there was no showing that the entire prior testimony was either on the same subject or was necessary to correct a false or incorrect impression of the witness' testimony. Sneed v. State, 209 S.W.3d 782, 2006 Tex. App. LEXIS 10067 (Tex. App. Texarkana 2006).

84. Defendant was not entitled to a certificate of appealability as to defendant's claim that his U.S. Const. amend. VI right to confront witnesses was violated when the trial court admitted into evidence, pursuant to Tex. R. Evid. 107, testimony from a detective who described a conversation in which an accomplice stated that defendant had used the accomplice's knife to commit a murder; such claim was procedurally defaulted because defendant only asserted a hearsay objection at trial, which did not meet the specificity requirements of Tex. R. App. P. 33.1. Wright v. Quarterman, 470 F.3d 581, 2006 U.S. App. LEXIS 28509 (5th Cir. Tex. 2006), *cert. denied*, 551 U.S. 1134, 127 S. Ct. 2996, 168 L. Ed. 2d 707, 2007 U.S. LEXIS 7775 (2007).

85. Trial court did not err, pursuant to Tex. R. Evid. 107, the rule of optional completeness, in redacting the last sentence of defendant's statement that stated he was willing to take a polygraph because, inter alia, the evidence he sought to introduce was inadmissible, defendant made no attempt to introduce the remainder of the statement and he failed to show why it was necessary to admit the entire statement to explain the portion read by the State. Weaver v. State, 2006 Tex. App. LEXIS 9996 (Tex. App. Waco Nov. 15 2006).

86. Defendant's arguments under Tex. R. Evid. 107 were inadequately briefed under Tex. R. App. P. 38.1(h) and defendant waived appellate review of the issue. Dixon v. State, 2006 Tex. App. LEXIS 7953 (Tex. App. Houston 14th Dist. Sept. 5 2006).

87. Trial court did not abuse its discretion in granting the State's request under Tex. R. Evid. 107 to introduce a videotape of the forensic interview of the victim; while the State referred to the existence of the tape, the State did not inquire into the substance of what was contained on the tape, and on redirect by defendant, substantive matters contained on the tape were raised; by doing so, defendant opened the door and thus the trial court did not abuse its discretion in admitting the videotape, and by challenging the credibility of the victim using specific statements on the videotape, the entire tape was admissible. Rodarte v. State, 2006 Tex. App. LEXIS 6938 (Tex. App. El Paso Aug. 4 2006).

88. In a trial for a "shaken-baby" murder, the report of a Child Protective Services investigator was properly admitted under Tex. R. Evid. 107 because the matter was "opened up" when defense counsel questioned the investigator about how she reached the conclusions stated in her report, and then attempted to impeach her by raising questions about the affidavits which were attached. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

89. When a letter was used to show that a bank had said that it was a lender to a developer, both paragraphs of the letter, read together, indicated that the bank had not made a false statement about the loan, and the loan was conditional; on that basis, a corporation's suit for negligent misrepresentation failed. C. E. Barker, Inc. v. Firstcapital Bank, 2005 Tex. App. LEXIS 3814 (Tex. App. Corpus Christi May 19 2005).

90. Trial court did not err in ruling that the entire videotape containing an interview with the child sexual assault victim was admissible on the State's motion, under the rule of optional completeness, if defendant introduced specific segments to impeach the victim's testimony, as that ruling was necessary to keep statements made in the interview from being taken out of context. Miles v. State, 2005 Tex. App. LEXIS 2919 (Tex. App. Houston 1st Dist. Apr. 14 2005).

91. Defendant opened the door to the question of why the child victim did not testify, and a detective's testimony regarding the competency of child witnesses was appropriate to clarify the issue pursuant to Tex. R. Evid. 107; in

addition, the testimony was admissible under Tex. R. Evid. 701 because (1) the detective had personal experience with child witnesses and their ability or inability to testify, (2) the detective's testimony was based on inferences made as a result of the detective's personal experience and observations, and (3) common sense also dictated that a three-year-old child might not be fit to testify. Martinez v. State, 2005 Tex. App. LEXIS 1822 (Tex. App. Austin Mar. 10 2005).

92. Under the rule of optional completeness, the trial court did not err in excluding a tape-recorded oral statement that defendant made to police following his arrest. The record did not establish that any portion of the statement was read or played for the jury; further, defendant did not show that it was necessary to admit the entire audio-taped statement to explain or understand the portions referred to by the State, nor had he contended that the State misrepresented the statements in any way. Smith v. State, 2005 Tex. App. LEXIS 1087 (Tex. App. San Antonio Feb. 9 2005).

93. Trial court did not violate Tex. R. Evid. 107 by excluding portions of a business record that consisted of a report regarding defendant's speak to a counselor while in jail because the report was not admitted for the truth of the matter but was admitted to impeach defendant's testimony that he could not read and write. Ponce-Duron v. State, 2004 Tex. App. LEXIS 10149 (Tex. App. Fort Worth Nov. 12 2004).

94. In a money laundering case, a court did not err in failing to admit a videotape under Tex. R. Evid. 107 where the State introduced the entire conversation between the officer and defendant, and to the extent defendant argued that the videotape showed his ability to speak and understand the English language, Rule 107 was not intended for that purpose. Pham v. State, 2004 Tex. App. LEXIS 9439 (Tex. App. Dallas Oct. 27 2004).

95. Record confirmed that the State used the victim's autopsy report solely to establish the victim's cause of death. Because the various tattoos were not germane to the same subject, the trial court did not abuse its discretion in admitting the redacted autopsy report. Wortham v. State, 2004 Tex. App. LEXIS 8810 (Tex. App. Tyler Sept. 30 2004).

96. In an aggravated assault case, although pursuant to the rule of optional completeness the State was entitled to cull details to paint a broader picture of the event referred to by defendant, provided the details were on the same subject as the shooting referred to by defendant and the prejudicial value of such testimony did not substantially outweigh its probative value, the State went beyond clarifying any possible misconception defendant created by delving into his defensive strategy in the prior conviction (self-defense), whether he accepted a plea bargain, and whether such defensive strategy worked. Arebalo v. State, 143 S.W.3d 402, 2004 Tex. App. LEXIS 7157 (Tex. App. Austin 2004).

97. Defendant contended that the letters he wrote to the victim's mother should have been admitted to show his continued remorsefulness, but at the same time, he conceded that the substance of the letters was basically identical to the letter already in evidence; given those arguments, the trial court did not abuse its discretion by excluding the letters, and defendant's argument that the letters should have been admitted to show his continued remorsefulness did not amount to an argument for admission under the rule of optional completeness. Miller v. State, 2004 Tex. App. LEXIS 7273 (Tex. App. Corpus Christi Aug. 12 2004).

98. Defendant's claim that the trial court abused its discretion in excluding a letter she wrote in response to a letter written to her by the police chief when the chief's letter was admitted into evidence was upheld as a violation of Tex. R. Evid. 106 and Tex. R. Evid. 107, which comprised the rule of optional completeness as excluding the letter and failing to include a limiting instruction under Tex. Code Crim. Proc. Ann. art. 36.14, and gave rise to a strong possibility that the jury could have formed a false impression regarding defendant's intent such that defendant's substantial rights were affected and she was prevented from adequately presenting her defense. Elmore v. State,

116 S.W.3d 801, 2003 Tex. App. LEXIS 7163 (Tex. App. Fort Worth 2003).

99. Tex. R. Evid. 107 is properly invoked when an opposing party reads part, but not all of a statement into evidence. Merely referring to a statement or to a quotation from it does not invoke Tex. R. Evid. 107. Goldberg v. State, 95 S.W.3d 345, 2002 Tex. App. LEXIS 6114 (Tex. App. Houston 1st Dist. 2002), *cert. denied*, 540 U.S. 1190, 124 S. Ct. 1436, 158 L. Ed. 2d 99, 2004 U.S. LEXIS 1219 (2004).

100. Tex. R. Evid. 107 did not permit defendant to get everything that he told a police officer about his activities of the day of the murder into evidence because it would have been self-serving hearsay and it was not necessary to correct a false or incorrect impression created by the officer's testimony. Goldberg v. State, 95 S.W.3d 345, 2002 Tex. App. LEXIS 6114 (Tex. App. Houston 1st Dist. 2002), *cert. denied*, 540 U.S. 1190, 124 S. Ct. 1436, 158 L. Ed. 2d 99, 2004 U.S. LEXIS 1219 (2004).

Evidence : Documentary Evidence : Writings : General Overview

101. Trial court did not abuse its discretion by allowing the officer's testimony because defendant opened the door to it, where the trial court could allow the State to present evidence to clear up the erroneous impression by admitting evidence that the manual did have something to say about the other definition of intoxication; the trial court's ruling admitting the officer's testimony regarding the correlation between the HGN and alcohol concentration was within the zone of reasonable disagreement. Jordy v. State, 413 S.W.3d 227, 2013 Tex. App. LEXIS 12409, 2013 WL 5493408 (Tex. App. Fort Worth Oct. 3 2013).

Evidence : Documentary Evidence : Writings : Transcripts & Translations : General Overview

102. In an assault on a correctional officer case, a court erred by admitting a portion of the State's document regarding the incident because, under the plain language of Tex. R. Evid. 107 it was error to admit the exhibit into evidence when a portion thereof had only been read into evidence; however, the error was harmless because the evidence had already been admitted without objection through another witness. Stewart v. State, 221 S.W.3d 306, 2007 Tex. App. LEXIS 2533 (Tex. App. Fort Worth 2007).

Evidence : Documentary Evidence : Writings : Transcripts & Translations : Deposition Transcripts

103. In a commercial dispute, the seller invoked his Fifth Amendment privilege against self-incrimination in response to a series of deposition questions; he later reversed his position and provided substantive answers to those questions. Under the rule of completeness set forth in Tex. R. Evid. 107, the trial court granted his motion to add allow testimony showing that the seller decided not to invoke the privilege and answered the questions. Ferro v. Dinicolantonio, 2011 Tex. App. LEXIS 955, 2011 WL 494741 (Tex. App. Houston 1st Dist. Feb. 10 2011).

Evidence : Hearsay : General Overview

104. Statements in a letter relating to defendant's abusive conduct causing the victim's suicidal thoughts were admissible under the rule of optional completeness because those statements were from the same document and on the same subject as the statements used by defendant, and defendant's cross-examination of the victim could have left a false impression with the jury that the victim's suicidal thoughts were due to issues other than defendant's conduct. Lofton v. State, 2011 Tex. App. LEXIS 9666 (Tex. App.--Dallas Dec. 9, 2011).

Evidence : Hearsay : Credibility of Declarants : General Overview

105. Horse owner was properly permitted to testify in rebuttal that a veterinarian who testified that the horse owner's filly did not die because of any actions taken by the horse farm owners, with whom the horse owner left his filly, had told the horse owner that the filly died because the horse farm owners failed to get the filly to the veterinary clinic sooner. The testimony pertained to the same subject matter as did veterinarian's testimony and was directly contrary to veterinarian's testimony. Therefore, the evidence was clearly admissible for the limited purpose of impeaching the veterinarian's earlier testimony, and the trial court properly admitted it over the horse farm owners' hearsay objection. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

Evidence : Hearsay : Exceptions : General Overview

106. During defendant's criminal trial for two counts of aggravated sexual assault of a child, the investigating detective was permitted to testify as to hearsay evidence relating the child's grandmother's concern that another illicit sexual contact had occurred; the testimony was admissible as "the whole on the same subject" inquired into by the State and thus allowed by Tex. R. Evid. 107. Phillips v. State, 2006 Tex. App. LEXIS 9509 (Tex. App. Dallas Nov. 2 2006).

107. In a murder case, videotapes were not hearsay under Tex. R. Evid. 801(d) because they were offered to prove that conversations had taken place, and in addition, the tapes were admissible under Tex. R. Evid. 107 because defendant opened the door by suggesting that the conversations had not occurred. Williams v. State, 2005 Tex. App. LEXIS 5351 (Tex. App. Houston 14th Dist. July 12 2005).

Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

108. Trial court did not violate Tex. R. Evid. 107 by excluding portions of a business record that consisted of a report regarding defendant's speak to a counselor while in jail because the report was not admitted for the truth of the matter but was admitted to impeach defendant's testimony that he could not read and write. Ponce-Duron v. State, 2004 Tex. App. LEXIS 10149 (Tex. App. Fort Worth Nov. 12 2004).

Evidence : Hearsay : Exceptions : Residual Exceptions : General Overview

109. Defendant's conviction of theft under Tex. Penal Code Ann. § 31.03 was affirmed because any error in the admission of her manager's testimony that the cleaning crew owner stated he saw defendant at the restaurant before the bank deposits were reported missing was harmless, as provided in Tex. R. App. P. 44.2(b), where the testimony was cumulative of other evidence of defendant's guilt; further, the testimony was admissible under the rule of optional completeness provided in Tex. R. Evid. 107 because defense counsel had invited a response from the State by suggesting that the manager did not know of anyone on the cleaning crew who saw defendant at the store. Sheridan v. State, 2006 Tex. App. LEXIS 6942 (Tex. App. Austin Aug. 4 2006).

Evidence : Hearsay : Exceptions : Residual Exceptions : Necessity

110. Trial court did not abuse its discretion on excluding appellant's recorded interview with the police where the trial court could have reasonably concluded the statement was not res gestae of the offense or arrest given that appellant made the statement sometime after the burglaries and well before his arrest. Lee v. State, 2013 Tex. App. LEXIS 8481 (Tex. App. Dallas July 10 2013).

111. Trial court did not abuse its discretion on excluding appellant's recorded interview with the police where the State did not introduce any part of the recorded statement into evidence, and Tex. R. Evid. 107 was not invoked by a mere reference to a document, statement, or act. Lee v. State, 2013 Tex. App. LEXIS 8481 (Tex. App. Dallas July 10 2013).

112. Trial court did not abuse its discretion on excluding appellant's recorded interview with the police where nothing in a witness' brief statement that appellant sold some property at a drug house because he needed money created a false impression or misled the jury, and thus, the statement was not necessary to contradict or explain any acts or declarations offered by the State. Lee v. State, 2013 Tex. App. LEXIS 8481 (Tex. App. Dallas July 10 2013).

Evidence : Hearsay : Exceptions : Spontaneous Statements : General Overview

113. In defendant's murder case, the trial court could have found that it was appropriate to admit hearsay evidence under the rule of optional completeness because the written statements by the deaf victim and testimony by the deputy were brought in during the State's rebuttal in the punishment phase after defendant opened the door to the issue during his direct examination. Defendant told only part of the story, leaving the jury with a false impression of the situation. Fuentes v. State, 2009 Tex. App. LEXIS 9779 (Tex. App. Houston 1st Dist. Dec. 3 2009).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

114. Complainant initially told her school counselor that defendant had touched her inappropriately; however, the complainant testified at trial that she had made up the scenario; a videotape of complainant was admissible because defendant's attorney opened the door by insinuating that if a person were to watch the video, he could "see what happened." Roberts v. State, 2007 Tex. App. LEXIS 6214 (Tex. App. Houston 14th Dist. Aug. 7 2007).

Evidence : Hearsay : Exemptions : General Overview

115. Defendant's claim that a trial court erred by admitting hearsay evidence from a police officer about what transpired behind a restaurant before the officer's arrival was overruled on appeal because even if the testimony concerning what a store's employees told the officer related to defendant's stated issue, the testimony was admissible because it explained how defendant became a suspect in the investigation; generally, when evidence was necessary to explain a matter opened up by the other party, a trial court could decide to admit evidence which would otherwise be inadmissible pursuant to Tex. R. Evid. 107. Godwin v. State, 2007 Tex. App. LEXIS 6458 (Tex. App. Beaumont Aug. 15 2007).

Evidence : Hearsay : Exemptions : Statements by Coconspirators : General Overview

116. Where defendant pled guilty to aggravated robbery with a deadly weapon, the trial court did not err in refusing to admit his co-conspirator's out-of-court statement in which he said that he was involved in the crime but that a third co-conspirator fired the shot that struck the victim. The statement was not admissible under the rule of optional completeness, because defendant was not trying to complete the jury's picture of the assault but to rebut the complainant's testimony that defendant was the last person he saw holding the gun before he was shot. Perkins v. State, 2013 Tex. App. LEXIS 14372, 2013 WL 6459390 (Tex. App. Austin Nov. 26 2013).

Evidence : Privileges : Attorney-Client Privilege : Exceptions

117. Probate court did not abuse its discretion by admitting redacted billing statements and excluding unredacted statements in a dispute over attorney's fees and expenses because the rule of optional completeness under Tex. R. Evid. 106, 107 was not an exception to the attorney-client privilege, and it did not mandate a waiver of the privilege. Even if the rule of optional completeness was found to apply, an administrator did not show that unredacted statements were necessary for the probate court to understand the attorney's fees recoverable from an estate; significant information was provided to the court in the redacted billing statements, and, when combined with the testimony of the guardian's attorneys, further information was not necessary for the court to understand the matter. In the Estate of Johnston, 2012 Tex. App. LEXIS 4255, 2012 WL 1940656 (Tex. App. San Antonio May 30 2012).

Evidence : Procedural Considerations : Curative Admissibility

118. At defendant's trial for three counts of aggravated sexual assault of a child and two counts of indecency with a child by contact, the trial court did not err by admitting the entire statement of the victim into evidence under the rule of completeness. The State was allowed to question a detective about the victim's statements and the differences between the two police reports, because defense counsel opened the door by asking questions based on the discrepancies between the reports. Ramirez v. State, 2014 Tex. App. LEXIS 3955, 2014 WL 1410344 (Tex. App. Waco Apr. 10 2014).

119. Where defendant pled guilty to aggravated robbery with a deadly weapon, the trial court did not err in refusing to admit his co-conspirator's out-of-court statement in which he said that he was involved in the crime but that a third co-conspirator fired the shot that struck the victim. The statement was not admissible under the rule of optional completeness, because defendant was not trying to complete the jury's picture of the assault but to rebut the complainant's testimony that defendant was the last person he saw holding the gun before he was shot. Perkins v. State, 2013 Tex. App. LEXIS 14372, 2013 WL 6459390 (Tex. App. Austin Nov. 26 2013).

120. Trial court did not err by admitting only a portion of defendant's videotaped interview without showing jurors the entire interview did not violate Tex. R. Evid. 107 because it could have concluded that references in the full interview to extraneous offenses would likely create confusion and the record did not show that the entire interview was necessary to reduce the possibility of the jury receiving a false impression. Taylor v. State, 2013 Tex. App. LEXIS 10129 (Tex. App. Dallas Aug. 13 2013).

121. Trial court did not err by not admitting his accomplice's written statement in its entirety and the written agreement the accomplice made with the State in exchange for his testimony pursuant to the rule of optional completeness because the evidence was not necessary to explain the evidence of the offense itself, the accomplice admitting to participating in the robbery, and an officer testified that the accomplice was believed to be a member of the same gang as defendant and the co-defendant. Hernandez v. State, 2013 Tex. App. LEXIS 9291 (Tex. App. Waco July 25 2013).

122. Defendant's statement to police that he had, 20 years earlier, been accused of improper conduct with his former stepdaughter, was not relevant to prove defendant's intent under Tex. R. Evid. 401 and Tex. R. Evid. 404(b), and it was unduly prejudicial under Tex. R. Evid. 403. Defendant did not "open the door" to admission of the statement, Tex. R. Evid. 107, by responding to a question by the State. However, given the evidence of guilt, the error was harmless. Cressman v. State, 2012 Tex. App. LEXIS 9849, 2012 WL 5974013 (Tex. App. Waco Nov. 29 2012).

123. Trial court did not abuse its discretion by admitting the entire written statement of the complaining witness under Tex. R. Evid. 107 because defense counsel chose to give the jury special information found in the statement, and admitting the entire statement allowed the jury to place the portions injected into the case in context and minimize the chance that the jury might have believed that the witness gave the officer an inconsistent account of her encounter with defendant. Kelly v. State, 2012 Tex. App. LEXIS 906 (Tex. App. Beaumont Feb. 1 2012).

124. There was no abuse of discretion by admitting the child's interview under Tex. R. Evid. 107 and over defendant's Tex. R. Evid. 403 objection, because the interview was inherently probative and necessary for the Tex. R. Evid. 107 purpose for which it was admitted, and it was unlikely to distract the jury from the issues in the case; although the defense argued that the State should just be allowed to ask follow-up questions, the jury would not have had any yardstick by which to measure the effect of the interviewer's questions and techniques on the child, which occurred before the child testified at trial, other than by seeing the actual interview. Ibenyenwa v. State, 2011

Tex. App. LEXIS 9908, 2011 WL 6260874 (Tex. App. Fort Worth Dec. 15 2011).

125. There was no err in denying defendant's request to present testimony during the guilt/innocence phase from a physician that performed a pelvic examination of the complainant during the previous year based upon an allegation that defendant had sexually assaulted her at that time, because Tex. R. Evid. 412 contained five exceptions, and the rule of optional completeness under Tex. R. Evid. 107 was not listed as one of the exceptions. Williams v. State, 2010 Tex. App. LEXIS 8754, 2010 WL 4324430 (Tex. App. Eastland Oct. 28 2010).

126. Trial court did not abuse its discretion by permitting the admission of the witness's written statement because defense counsel misquoted the handwritten portion of the statement and actually created a visual of the misquoted statement for the jury to view, and therefore the rule of completeness under Tex. R. Evid. 107 was properly invoked. Bell v. State, 2008 Tex. App. LEXIS 6635 (Tex. App. Fort Worth Aug. 29, 2008).

127. Trial court did not err in admitting evidence concerning defendant juvenile's disciplinary problems in high school and his obsession with a girlfriend where the juvenile's counsel had opened the door to the juvenile's past behavioral problems. Such testimony was in direct relation to counsel's questions relating to the juvenile's stepmother not wanting him back. In re D. A. H., 2008 Tex. App. LEXIS 6537 (Tex. App. Corpus Christi Aug. 27, 2008).

128. Trial court reasonably concluded that defendant opened the door to allowing into evidence the results of a portable breath test, under Tex. R. Evid. 107, and correctly overruled defendant's objection to the lack of reliability evidence because defendant's questions at trial necessarily implicated what a trooper saw on a portable breath testing machine following defendant's test because (1) defendant's questions went beyond merely asking if the machine worked correctly; (2) defendant asked whether the machine gave a result and if that result was saved; and (3) in the context of whether a portable breath tester worked when used on defendant, the only way the trooper would know this was by reading the digital readout. Baley v. State, 2007 Tex. App. LEXIS 9582 (Tex. App. Eastland Dec. 6 2007).

129. Trial court did not err in overruling defendant's objection to the admission of extraneous bad acts that defendant allegedly committed where defendant invited the inquiry by suggesting to the jury that there was some relationship between defendant and a police officer; even if the evidence was admitted erroneously, the error was harmless under Tex. R. App. P. 44 because the complainants had already testified in front of the jury about defendant's prior disturbances. Johnson v. State, 2007 Tex. App. LEXIS 9176 (Tex. App. Dallas Nov. 26 2007).

130. In a case alleging aggravated assault with a deadly weapon, defendant was not allowed to question witnesses regarding a previous child abuse complaint against the same child since it was not relevant or material to the offense, and a mother could not have been questioned about specific instances of conduct; moreover, the mother's testimony during direct examination did not leave a misleading impression with the jury which needed clarification under Tex. R. Evid. 107; the focus of the prior investigation was a grandmother, who was not a witness in the case. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

131. Trial court's admission into evidence-over a hearsay objection-of three of four related telephone conversations, and subsequent exclusion of the fourth conversation by sustaining a hearsay objection, was an abuse of discretion under the rule of optional completeness, Tex. R. Evid. 107, and the error could not be said not to have contributed to defendant's conviction or punishment; defendant sought to introduce a recording of the entirety of the conversations, which would have included the remainder of the content, and allowed the jury to determine for itself his demeanor without filtration through a third party, which was the very purpose of the rule of optional completeness. Walters v. State, 206 S.W.3d 780, 2006 Tex. App. LEXIS 9555 (Tex. App. Texarkana

2006).

132. Under Tex. R. Evid. 107, the State was properly allowed to present testimony of a driving while intoxicated defendant's videotaped statements about his drinking, even though the trial court had previously suppressed the audio portion of the tape because of its poor quality, because defendant attempted to impeach the officer's credibility as to the basis for his opinion that defendant had been drinking, as permitted by Tex. R. Evid 607. Cadena v. State, 2006 Tex. App. LEXIS 8622 (Tex. App. El Paso Oct. 5 2006).

133. It was not an abuse of discretion for the trial court to exclude the victim's statement that she was fearful of the police because of her DWI probation because the two statements at issue were not on the same subject as required for the rule of optional completeness; the State offered the victim's statements to identify defendant. Sabillon v. State, 2006 Tex. App. LEXIS 7822 (Tex. App. Fort Worth Aug. 31 2006).

134. In a trial for aggravated sexual assault of a child, defense counsel's cross-examination opened the door under Tex. R. Evid. 107 to a videotaped interview of complainant because counsel asked whether the complainant "remembered" telling the interviewer that another person was in the room during the assault, even though she actually said she was alone with defendant; thus the question falsely suggested that the complainant had given inconsistent statements about the presence of another person during the assault and the admission was necessary to fully and fairly to explain the contents of the complainant's videotaped statement. Tovar v. State, 221 S.W.3d 185, 2006 Tex. App. LEXIS 6440 (Tex. App. Houston 1st Dist. 2006).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

135. It was not error to refuse to allow defendant to put on evidence of the sentences that his codefendants received after they testified in his capital murder trial; there was no evidence that a false impression was created with regard to two of the codefendants, because the record did not show the outcomes of their cases, and evidence regarding the third codefendant's sentence would not have benefitted defendant. Johnson v. State, 2006 Tex. App. LEXIS 1897 (Tex. App. Fort Worth Mar. 9 2006).

136. Trial court did not err in ruling that the entire videotape containing an interview with the child sexual assault victim was admissible on the State's motion, under the rule of optional completeness, if defendant introduced specific segments to impeach the victim's testimony, as that ruling was necessary to keep statements made in the interview from being taken out of context. Miles v. State, 2005 Tex. App. LEXIS 2919 (Tex. App. Houston 1st Dist. Apr. 14 2005).

137. In an aggravated sexual assault case, the admission of the complainant's redacted medical records did not violate Tex. R. Evid. 107 because the omission of chlamydia test results did not create a misleading impression. Scott v. State, 2005 Tex. App. LEXIS 1872 (Tex. App. Fort Worth Mar. 10 2005).

138. Defendant was not entitled to introduce the entirety of a witness's prior statement where the State briefly questioned the witness on cross-examination about the statement. Tex. R. Evid. 107 was not properly invoked because the State never sought to introduce the statement into evidence nor did the State directly read any portion of it to the jury. Burke v. State, 2005 Tex. App. LEXIS 198 (Tex. App. Houston 14th Dist. Jan. 11 2005).

139. Defendant's claim that the trial court abused its discretion in excluding a letter she wrote in response to a letter written to her by the police chief when the chief's letter was admitted into evidence was upheld as a violation of Tex. R. Evid. 106 and Tex. R. Evid. 107, which comprised the rule of optional completeness as excluding the letter and failing to include a limiting instruction under Tex. Code Crim. Proc. Ann. art. 36.14, and gave rise to a strong possibility that the jury could have formed a false impression regarding defendant's intent such that

defendant's substantial rights were affected and she was prevented from adequately presenting her defense. Elmore v. State, 116 S.W.3d 801, 2003 Tex. App. LEXIS 7163 (Tex. App. Fort Worth 2003).

Evidence : Procedural Considerations : Limited Admissibility

140. During defendant's trial for capital murder, the court did not err in excluding a video recording containing a redacted portion of defendant's statement to the police, during which defendant admitted participation in the burglary, but denied direct responsibility for killing the victim; there was no evidence that the exhibit was necessary to make an earlier "I'm sorry" statement fully understood. Estrada v. State, 352 S.W.3d 762, 2011 Tex. App. LEXIS 6739 (Tex. App. San Antonio Aug. 24 2011).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

141. Although defendant argued that the trial court erred in limiting his cross-examination of two witnesses in violation of Tex. R. Evid. 107, he did not point the appellate court to any place in the record where he lodged an objection under Rule 107; where defendant's complaint was different than that presented below, the appellate court did not address it. Roth v. State, 2004 Tex. App. LEXIS 180 (Tex. App. Dallas Jan. 8 2004).

Evidence : Procedural Considerations : Preliminary Questions : General Overview

142. Horse owner was properly permitted to testify in rebuttal that a veterinarian who testified that the horse owner's filly did not die because of any actions taken by the horse farm owners, with whom the horse owner left his filly, had told the horse owner that the filly died because the horse farm owners failed to get the filly to the veterinary clinic sooner. The testimony pertained to the same subject matter as did veterinarian's testimony and was directly contrary to veterinarian's testimony. Therefore, the evidence was clearly admissible for the limited purpose of impeaching the veterinarian's earlier testimony, and the trial court properly admitted it over the horse farm owners' hearsay objection. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview

143. Complainant initially told her school counselor that defendant had touched her inappropriately; however, the complainant testified at trial that she had made up the scenario; a videotape of complainant was admissible because defendant's attorney opened the door by insinuating that if a person were to watch the video, he could "see what happened." Roberts v. State, 2007 Tex. App. LEXIS 6214 (Tex. App. Houston 14th Dist. Aug. 7 2007).

144. Trial court did not err, pursuant to Tex. R. Evid. 107, the rule of optional completeness, in redacting the last sentence of defendant's statement that stated he was willing to take a polygraph because, inter alia, the evidence he sought to introduce was inadmissible, defendant made no attempt to introduce the remainder of the statement and he failed to show why it was necessary to admit the entire statement to explain the portion read by the State. Weaver v. State, 2006 Tex. App. LEXIS 9996 (Tex. App. Waco Nov. 15 2006).

Evidence : Procedural Considerations : Preliminary Questions : Conditional Admissions

145. During defendant's trial for capital murder, the court did not err in excluding a video recording containing a redacted portion of defendant's statement to the police, during which defendant admitted participation in the burglary, but denied direct responsibility for killing the victim; there was no evidence that the exhibit was necessary to make an earlier "I'm sorry" statement fully understood. Estrada v. State, 352 S.W.3d 762, 2011 Tex. App. LEXIS 6739 (Tex. App. San Antonio Aug. 24 2011).

Evidence : Procedural Considerations : Rulings on Evidence

146. Rule of optional completeness was not invoked where the State did not admit any part of either video-recorded statement, and the detective did not testify to any particular statements that defendant made during either interview. Trejo v. State, 2011 Tex. App. LEXIS 5046, 2011 WL 2637458 (Tex. App. San Antonio July 6 2011).

147. Defendant's claim that a trial court erred by admitting hearsay evidence from a police officer about what transpired behind a restaurant before the officer's arrival was overruled on appeal because even if the testimony concerning what a store's employees told the officer related to defendant's stated issue, the testimony was admissible because it explained how defendant became a suspect in the investigation; generally, when evidence was necessary to explain a matter opened up by the other party, a trial court could decide to admit evidence which would otherwise be inadmissible pursuant to Tex. R. Evid. 107. Godwin v. State, 2007 Tex. App. LEXIS 6458 (Tex. App. Beaumont Aug. 15 2007).

148. During defendant's trial for aggravated sexual assault of a child, the trial court did not err in violation of Tex. R. Evid. 107 by excluding evidence that the complainant had falsely accused defendant of sexually assaulting another child where the State did not present any evidence at trial concerning the complainant's accusation that defendant molested the other child and where defendant himself, on cross-examination of the complainant, elicited testimony that the complainant had falsely reported to police that defendant molested the other child; with regard to the testimony of the other child's mother, defendant did not state what specific evidence was omitted and had not demonstrated that the trial court abused its discretion in determining that her vague recollections that defendant might have called her house one to four times created an incomplete or misleading impression that defendant molested her son, or that such evidence was necessary to make her testimony fully understood. Billodeau v. State, 263 S.W.3d 318, 2007 Tex. App. LEXIS 6404 (Tex. App. Houston 1st Dist. 2007).

149. For purposes of Tex. R. Evid. 107, the trial court did not abuse its discretion in admitting a videotape of the child victim's interview with a forensic interviewer about defendant's sexual assault of the victim; counsel's examination of the interviewer created potential confusion and false impressions that made the admission of the videotape necessary. Aguirre v. State, 2006 Tex. App. LEXIS 1089 (Tex. App. El Paso Feb. 9 2006).

150. Defendant opened the door to the question of why the child victim did not testify, and a detective's testimony regarding the competency of child witnesses was appropriate to clarify the issue pursuant to Tex. R. Evid. 107; in addition, the testimony was admissible under Tex. R. Evid. 701 because (1) the detective had personal experience with child witnesses and their ability or inability to testify, (2) the detective's testimony was based on inferences made as a result of the detective's personal experience and observations, and (3) common sense also dictated that a three-year-old child might not be fit to testify. Martinez v. State, 2005 Tex. App. LEXIS 1822 (Tex. App. Austin Mar. 10 2005).

Evidence : Relevance : Character Evidence

151. In a murder trial, there was no error, after allowing testimony about a conversation in which defendant expressed a desire to get rid of the victim, in excluding further evidence offered under Tex. R. Evid. 107, the rule of optional completeness; the evidence that defendant sought--allegations that the victim had sexually abused their child and was involved with child pornography--was properly found to be more prejudicial than probative under Tex. R. Evid. 403 because the evidence did not tend to show that defendant's desire to get rid of the victim was any less serious. Glover v. State, 2007 Tex. App. LEXIS 8852 (Tex. App. Austin Nov. 8 2007).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

152. On appeal from his convictions for continuous sexual abuse, aggravated sexual assault, and indecency with a child, the trial court did not abuse its discretion by admitting the child's interview under Tex. R. Evid. 107 and did not abuse its discretion by admitting the evidence over defendant's Tex. R. Evid. 403 objection. The interview was inherently probative to the issue of whether the interviewer's technique amounted to "coaching" the child and was the only evidence of whether the child equivocated in the interview; moreover, it was unlikely to distract the jury from the issues in the case. Ibenyenwa v. State, 367 S.W.3d 420, 2012 Tex. App. LEXIS 2333, 2012 WL 955401 (Tex. App. Fort Worth Mar. 22 2012).

153. In defendant's murder case, the trial court properly excluded a psychiatrist's memo because the entirety of it was not on the same subject as the portion read aloud by the doctor during direct examination. The memo covered her entire conversation with defendant which took place over more than six hours, and much of the memo was not on the same subject as the portion read into evidence by the prosecutor. Whipple v. State, 281 S.W.3d 482, 2008 Tex. App. LEXIS 6344 (Tex. App. El Paso 2008).

154. In an aggravated assault case, although pursuant to the rule of optional completeness the State was entitled to cull details to paint a broader picture of the event referred to by defendant, provided the details were on the same subject as the shooting referred to by defendant and the prejudicial value of such testimony did not substantially outweigh its probative value, the State went beyond clarifying any possible misconception defendant created by delving into his defensive strategy in the prior conviction (self-defense), whether he accepted a plea bargain, and whether such defensive strategy worked. Arebalo v. State, 143 S.W.3d 402, 2004 Tex. App. LEXIS 7157 (Tex. App. Austin 2004).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

155. Defendant's statement to police that he had, 20 years earlier, been accused of improper conduct with his former stepdaughter, was not relevant to prove defendant's intent under Tex. R. Evid. 401 and Tex. R. Evid. 404(b), and it was unduly prejudicial under Tex. R. Evid. 403. Defendant did not "open the door" to admission of the statement, Tex. R. Evid. 107, by responding to a question by the State. However, given the evidence of guilt, the error was harmless. Cressman v. State, 2012 Tex. App. LEXIS 9849, 2012 WL 5974013 (Tex. App. Waco Nov. 29 2012).

Evidence : Relevance : Relevant Evidence

156. On appeal from his convictions for continuous sexual abuse, aggravated sexual assault, and indecency with a child, the trial court did not abuse its discretion by admitting the child's interview under Tex. R. Evid. 107 and did not abuse its discretion by admitting the evidence over defendant's Tex. R. Evid. 403 objection. The interview was inherently probative to the issue of whether the interviewer's technique amounted to "coaching" the child and was the only evidence of whether the child equivocated in the interview; moreover, it was unlikely to distract the jury from the issues in the case. Ibenyenwa v. State, 367 S.W.3d 420, 2012 Tex. App. LEXIS 2333, 2012 WL 955401 (Tex. App. Fort Worth Mar. 22 2012).

157. In a case alleging aggravated assault with a deadly weapon, defendant was not allowed to question witnesses regarding a previous child abuse complaint against the same child since it was not relevant or material to the offense, and a mother could not have been questioned about specific instances of conduct; moreover, the mother's testimony during direct examination did not leave a misleading impression with the jury which needed clarification under Tex. R. Evid. 107; the focus of the prior investigation was a grandmother, who was not a witness in the case. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

Evidence : Relevance : Sex Offenses : General Overview

158. There was no err in denying defendant's request to present testimony during the guilt/innocence phase from a physician that performed a pelvic examination of the complainant during the previous year based upon an allegation that defendant had sexually assaulted her at that time, because Tex. R. Evid. 412 contained five exceptions, and the rule of optional completeness under Tex. R. Evid. 107 was not listed as one of the exceptions. Williams v. State, 2010 Tex. App. LEXIS 8754, 2010 WL 4324430 (Tex. App. Eastland Oct. 28 2010).

Evidence : Relevance : Sex Offenses : Rape Shield Laws

159. In a trial for defendant's sexual assault of his 12-year-old daughter, evidence that the victim had been previously assaulted by another relative was properly excluded in the punishment phase after the victim described the impact of the assault, including three attempted suicides. The rule of optional completeness under Tex. R. Evid. 107 was inapplicable because a prior act, conversation, declaration, or written or recorded statement was not at issue. Delapaz v. State, 297 S.W.3d 824, 2009 Tex. App. LEXIS 7510 (Tex. App. Eastland Sept. 24 2009).

Evidence : Testimony : General Overview

160. Trial court abused its discretion in designating the child's mother as the outcry witness, for purposes of Tex. Code Crim. Proc. Ann. art. 38.072, because her testimony was that the child only made a general allusion to something that happened to him, the mother's lack of knowledge was confirmed at trial, and the child first described the alleged offense to the child's psychotherapist, who was the proper outcry witness; even assuming that the mother was the proper outcry witness, the trial court properly admitted the psychotherapist's statement under the rule of optional completeness, because defense counsel's questioning left the jury with the impression that the child was not to be believed and that he had not accused defendant during the therapy session, and the State was entitled to correct that impression under the rule, and there was no harm because the psychotherapist was the proper outcry witness. Hatcher v. State, 2006 Tex. App. LEXIS 3734 (Tex. App. Eastland May 4 2006).

161. Defendant's objection, to a psychotherapist's testimony that a child abuse report was made after interviewing the victim, differed at trial from that on appeal, and nothing was presented for review; however, the court noted that the victim's statement to the psychotherapist was properly allowed either as the proper outcry statement under Tex. Code Crim. Proc. Ann. art. 38.072 or as a statement under the doctrine of optional completeness. Hatcher v. State, 2006 Tex. App. LEXIS 3734 (Tex. App. Eastland May 4 2006).

Evidence : Testimony : Credibility : General Overview

162. Horse owner was properly permitted to testify in rebuttal that a veterinarian who testified that the horse owner's filly did not die because of any actions taken by the horse farm owners, with whom the horse owner left his filly, had told the horse owner that the filly died because the horse farm owners failed to get the filly to the veterinary clinic sooner. The testimony pertained to the same subject matter as did veterinarian's testimony and was directly contrary to veterinarian's testimony. Therefore, the evidence was clearly admissible for the limited purpose of impeaching the veterinarian's earlier testimony, and the trial court properly admitted it over the horse farm owners' hearsay objection. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

163. There was no error under Tex. R. Evid. 613 when the trial court admitted the transcript of a witness's grand jury testimony under the rule of optional completeness, Tex. R. Evid. 107, even though the witness unequivocally admitted to making the prior inconsistent statements raised by defendant during cross-examination. The witness's illiteracy necessitated that both attorneys read the prior testimony aloud to the witness, which could have caused confusion for the jury concerning the substance of the prior testimony. Green v. State, 2009 Tex. App. LEXIS 651, 2009 WL 223366 (Tex. App. Tyler Jan. 30 2009).

Evidence : Testimony : Examination : General Overview

164. When defendant asked about a statement his wife made concerning ownership of the cocaine, the prosecution could follow up that question, under Tex. R. Evid. 107, to explain the statement and make it more understandable. Broussard v. State, 68 S.W.3d 197, 2002 Tex. App. LEXIS 250 (Tex. App. Houston 1st Dist. 2002).

Evidence : Testimony : Examination : Cross-Examination : Scope

165. Defendant's conviction of theft under Tex. Penal Code Ann. § 31.03 was affirmed because any error in the admission of her manager's testimony that the cleaning crew owner stated he saw defendant at the restaurant before the bank deposits were reported missing was harmless, as provided in Tex. R. App. P. 44.2(b), where the testimony was cumulative of other evidence of defendant's guilt; further, the testimony was admissible under the rule of optional completeness provided in Tex. R. Evid. 107 because defense counsel had invited a response from the State by suggesting that the manager did not know of anyone on the cleaning crew who saw defendant at the store. Sheridan v. State, 2006 Tex. App. LEXIS 6942 (Tex. App. Austin Aug. 4 2006).

Evidence : Testimony : Presentation of Evidence

166. Trial counsel did not provide ineffective assistance by not introducing evidence that his client's codefendant had judicially confessed to the murder that resulted in his client's conviction for capital murder and death sentence because, if counsel had introduced codefendant's testimony from the punishment phase of his own trial, the prosecution would have introduced codefendant's testimony from the guilt determination phase of his trial under the Rule of Optional Completeness, Tex. R. Evid. 107, and this testimony would have contradicted the contention counsel's client did not direct both the kidnapping and the shooting. Adams v. Thaler, 2010 U.S. Dist. LEXIS 74807 (E.D. Tex. July 26 2010).

Family Law : Child Support : Procedures

167. In a child support dispute, the trial court did not err when it admitted, over the mother's "completeness" objection, the father's bank statements from 2003 to 2005 that did not include copies of the canceled checks referenced in each statement because the mother never offered any other document to complete the statements offered by the father, nor did it appear that such documents were available to offer. In the Interest of C.S., 2014 Tex. App. LEXIS 2593, 2014 WL 972310 (Tex. App. Eastland Mar. 6 2014).

Tax Law : State & Local Taxes : Real Property Tax : Exemptions

168. Trial court did not err in allowing the tax appraisal district to introduce the taxpayer's complete applications for exemptions after the taxpayer sought to broaden the scope of its claim for an exemption and introduced only a portion of its applications. Harvest Life Found. v. Harris County Appraisal Dist., 2013 Tex. App. LEXIS 6906 (Tex. App. Houston 14th Dist. June 6 2013).

Torts : Business Torts : Fraud & Misrepresentation : Negligent Misrepresentation : General Overview

169. When a letter was used to show that a bank had said that it was a lender to a developer, both paragraphs of the letter, read together, indicated that the bank had not made a false statement about the loan, and the loan was conditional; on that basis, a corporation's suit for negligent misrepresentation failed. C. E. Barker, Inc. v. Firstcapital Bank, 2005 Tex. App. LEXIS 3814 (Tex. App. Corpus Christi May 19 2005).

Torts : Transportation Torts : General Overview

170. In a personal injury case arising from an auto-pedestrian accident, any error under Tex. R. Evid. 608(b), 107 in excluding evidence of a driver's subsequent automobile accidents was harmless because it was unlikely that, if the jury heard that evidence, it would apportioned more fault to the driver, given the admitted evidence that he consumed a pint of vodka on the day in question, was arrested for driving while intoxicated at the scene of the accident, and failed a breathalyzer test with a blood alcohol content that was nearly twice the legal limit. Muhs v. Whataburger, Inc., 2010 Tex. App. LEXIS 9229, 2010 WL 4657955 (Tex. App. Corpus Christi Nov. 18 2010).

End of Document

Tex. Evid. R. 201

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS RULES OF EVIDENCE > ARTICLE II. JUDICIAL NOTICE

Rule 201 Judicial Notice of Adjudicative Facts

(a) ***Scope.***--This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) ***Kinds of Facts That May Be Judicially Noticed.***--The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1)is generally known within the trial court's territorial jurisdiction; or

(2)can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) ***Taking Notice.***--The court:

(1)may take judicial notice on its own; or

(2)must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) ***Timing.***--The court may take judicial notice at any stage of the proceeding.

(e) ***Opportunity to Be Heard.***--On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) ***Instructing the Jury.***--In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 20, *Presentation of Evidence*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Case Notes

Business & Corporate Law : General Partnerships : Management Duties & Liabilities : General Overview
Civil Procedure : Pleading & Practice : Pleadings : Time Limitations : Computation
Civil Procedure : Pleading & Practice : Service of Process : Proof : General Overview
Civil Procedure : Judicial Officers : Judges : Disqualifications & Recusals : Grounds : Financial Interests
Civil Procedure : Judicial Officers : Judges : Successors
Civil Procedure : Pretrial Judgments : Default : Default Judgments
Civil Procedure : Pretrial Judgments : Default : Entry of Default Judgments
Civil Procedure : Summary Judgment : Standards : General Overview
Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Alternative Dispute Resolution : Judicial Review
Civil Procedure : Trials : Jury Trials : Jury Instructions : General Overview
Civil Procedure : Judgments : Preclusion & Effect of Judgments : Estoppel : Judicial Estoppel
Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials
Civil Procedure : Judgments : Relief From Judgment : Void Judgments
Civil Procedure : Remedies : Bonds : Sureties : Liability
Civil Procedure : Remedies : Costs & Attorney Fees : General Overview
Civil Procedure : Remedies : Costs & Attorney Fees : Attorney Expenses & Fees : Statutory Awards
Civil Procedure : Remedies : Judgment Interest : Postjudgment Interest
Civil Procedure : Appeals : Reviewability : Preservation for Review
Constitutional Law : Bill of Rights : Fundamental Freedoms : Freedom of Religion : Free Exercise of Religion
Constitutional Law : Bill of Rights : Fundamental Freedoms : Judicial & Legislative Restraints : Prior Restraint
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Obstruction of Justice : Elements
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson : Simple Arson : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : License Violations : General Overview
Criminal Law & Procedure : Interrogation : Miranda Rights : Custodial Interrogation
Criminal Law & Procedure : Preliminary Proceedings
Criminal Law & Procedure : Bail : Forfeitures
Criminal Law & Procedure : Bail : Hearings
Criminal Law & Procedure : Pretrial Motions & Procedures : Gag Orders
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Juries & Jurors : Peremptory Challenges : Proving Discriminatory Use
Criminal Law & Procedure : Jurisdiction & Venue : Venue
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Self-Representation
Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Proceedings
Criminal Law & Procedure : Sentencing : Fines
Criminal Law & Procedure : Sentencing : Forfeitures : Proceedings
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Sentencing : Presentence Reports
Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial
Criminal Law & Procedure : Appeals : Appellate Jurisdiction : Extraordinary Writs
Criminal Law & Procedure : Appeals : Procedures : General Overview
Criminal Law & Procedure : Appeals : Prosecutorial Misconduct : Use of False Testimony
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Standards of Review : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : Sufficiency of Evidence

Estate, Gift & Trust Law : Will Contests : General Overview
Evidence : Authentication : General Overview
Evidence : Judicial Notice
Evidence : Judicial Notice : General Overview
Evidence : Judicial Notice : Adjudicative Facts : General Overview
Evidence : Judicial Notice : Adjudicative Facts : Facts Generally Known
Evidence : Judicial Notice : Adjudicative Facts : Proceedings in Other Courts
Evidence : Judicial Notice : Adjudicative Facts : Public Records
Evidence : Judicial Notice : Adjudicative Facts : Verifiable Facts
Evidence : Judicial Notice : Domestic Laws
Evidence : Judicial Notice : Laws of Foreign States
Evidence : Judicial Notice : Scientific & Technical Facts
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Rule Application & Interpretation
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Relevance : Relevant Evidence
Evidence : Scientific Evidence : Blood & Bodily Fluids
Evidence : Scientific Evidence : Sobriety Tests
Evidence : Testimony : Experts : Criminal Trials
Family Law : Parental Duties & Rights : Termination of Rights : General Overview
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Reunification Plans
Healthcare Law : Treatment : Incompetent, Minor & Mentally Disabled Patients : General Overview
Real Property Law : Landlord & Tenant : Tenant's Remedies & Rights : General Overview
Real Property Law : Restrictive Covenants : General Overview
Transportation Law : Private Vehicles : Traffic Regulation : General Overview
Workers' Compensation & SSDI : Third Party Actions : Third Party Liability

LexisNexis (R) Notes

Business & Corporate Law : General Partnerships : Management Duties & Liabilities : General Overview

1. Where a purported partner's failure to file a Tex. R. Civ. P. 93 verified denial of partnership was not brought to the trial court's attention, the trial court was not required to take judicial notice of it under Tex. R. Evid. 201(d) as an admission of partnership. Ball v. Smith, 150 S.W.3d 889, 2004 Tex. App. LEXIS 11025 (Tex. App. Dallas 2004).

Civil Procedure : Pleading & Practice : Pleadings : Time Limitations : Computation

2. In a paternity case, a motion for new trial, although filed more than 30 calendar days after entry of a default judgment, was timely; taking judicial notice under Tex. R. Evid. 201(b) of the fact that the courthouse was closed for a hurricane evacuation, which was the equivalent of a legal holiday under Tex. R. Civ. P. 4, meant that the motion was timely filed within the 30-day period of Tex. R. Civ. P. 329b(a). Garcia v. Vera, 2006 Tex. App. LEXIS 8701 (Tex. App. Houston 1st Dist. Oct. 5 2006).

Civil Procedure : Pleading & Practice : Service of Process : Proof : General Overview

3. Trial court erred in granting summary judgment pursuant to Tex. R. Civ. P. 166a(c) to appellee in appellant's personal injury action arising from a car accident, based on the trial court's determination that the action was barred by the limitations period of Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) because appellant had not exercised due diligence in serving appellee; the record indicated that appellant had met his burden of showing that he exercised

due diligence in his continual efforts to have appellee served, and that appellee's attempt to have the court take judicial notice of a phone book page that listed her and her address, pursuant to Tex. R. Evid. 201, was insufficient to conclusively establish appellee's address and to show appellant's lack of diligence. Tranter v. Duemling, 129 S.W.3d 257, 2004 Tex. App. LEXIS 1912 (Tex. App. El Paso 2004).

Civil Procedure : Judicial Officers : Judges : Disqualifications & Recusals : Grounds : Financial Interests

4. Supreme Court of Texas held that neither it nor the appellate court had jurisdiction to consider the merits of the parties' arguments because the trial court judge accepted a bribe for ruling on the newspapers' summary judgment motion, disqualifying him from the case under Tex. Const. art. V, § 11 and making his order void. The facts in the trial judge's plea agreement in another case, which the court took judicial notice of under Tex. R. Evid. 201(b), showed that he had an illegal interest in the instant case because he obtained a pecuniary gain as a direct result of his rulings. Freedom Communs., Inc. v. Coronado, 372 S.W.3d 621, 2012 Tex. LEXIS 503 (Tex. 2012).

Civil Procedure : Judicial Officers : Judges : Successors

5. It was appropriate to take judicial notice under Tex. R. Evid. 201 that a judge named as respondent in a mandamus proceeding had resigned, and consequently Tex. R. App. P. 7 required the substitution of his successor as respondent and the abatement of the mandamus proceeding to allow the newly appointed judge to consider the pleadings. In re Newby, 280 S.W.3d 298, 2008 Tex. App. LEXIS 2685 (Tex. App. Amarillo 2008).

Civil Procedure : Pretrial Judgments : Default : Default Judgments

6. Record supported the trial court's finding that a defaulting party's location was unknown, and the court took judicial notice of the party's correspondence, which showed that none of her envelopes or letters had included a return mailing address. Raines v. Gomez, 2004 Tex. App. LEXIS 6924 (Tex. App. Texarkana July 30 2004), opinion withdrawn by, substituted opinion at 143 S.W.3d 867, 2004 Tex. App. LEXIS 7605 (Tex. App. Texarkana 2004).

Civil Procedure : Pretrial Judgments : Default : Entry of Default Judgments

7. Post-answer default judgment was properly entered against appellant and in favor of appellee when appellant and her attorney failed to appear for trial because there was no evidence that the attorney was not a licensed attorney or not the attorney of record for appellant at the time the attorney received notice of the trial setting under Tex. R. Civ. P. 21a and the court could not take judicial notice of the attorney's suspensions, which did not fall within the scope of Tex. R. Evid. 201. Gutierrez v. Draheim, 2007 Tex. App. LEXIS 7415 (Tex. App. San Antonio Sept. 12 2007).

Civil Procedure : Summary Judgment : Standards : General Overview

8. Trial court erred in granting summary judgment pursuant to Tex. R. Civ. P. 166a(c) to appellee in appellant's personal injury action arising from a car accident, based on the trial court's determination that the action was barred by the limitations period of Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) because appellant had not exercised due diligence in serving appellee; the record indicated that appellant had met his burden of showing that he exercised due diligence in his continual efforts to have appellee served, and that appellee's attempt to have the court take judicial notice of a phone book page that listed her and her address, pursuant to Tex. R. Evid. 201, was insufficient to conclusively establish appellee's address and to show appellant's lack of diligence. Tranter v. Duemling, 129 S.W.3d 257, 2004 Tex. App. LEXIS 1912 (Tex. App. El Paso 2004).

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

9. In a dispute involving a road, a trial court erred by taking judicial notice of prior court records since they were not attached to a motion for summary judgment; moreover, judicial notice could not have been taken of documents that were no longer in existence. Graff v. Berry, 2008 Tex. App. LEXIS 2069 (Tex. App. Texarkana Mar. 18 2008).

10. Trial court erred in taking judicial notice of documents pursuant to Tex. R. Evid. 201 when some of the judicially noticed documents no longer existed and when others were not attached to to the motion of a party seeking summary judgment as required by Tex. R. Civ. P. 166a. Graff v. Berry, 2008 Tex. App. LEXIS 1163 (Tex. App. Texarkana Feb. 20 2008).

Civil Procedure : Alternative Dispute Resolution : Judicial Review

11. Arbitration award could not be confirmed as provided in Tex. Civ. Prac. & Rem. Code Ann. § 171.087 because there was no evidence establishing the award; attaching the award documents to the petition did not make them admissible evidence, and the trial court's taking judicial notice of the contents of its file under Tex. R. Evid. 201 did not elevate averments to proof. Gruber v. CACV of Colo., LLC, 2008 Tex. App. LEXIS 2314 (Tex. App. Dallas Apr. 2 2008).

Civil Procedure : Trials : Jury Trials : Jury Instructions : General Overview

12. In a tort suit following a motor vehicle collision that occurred on the shoulder of the highway, Tex. R. Evid. 201 did not require the trial court to instruct the jury on judicial notice. Tex. Transp. Code Ann. § 545.058 and its terms are legislative facts, rather than judicial facts. Perkins v. Delaney, 170 S.W.3d 136, 2005 Tex. App. LEXIS 4027 (Tex. App. Eastland 2005).

Civil Procedure : Judgments : Preclusion & Effect of Judgments : Estoppel : Judicial Estoppel

13. Church and pastors were estopped from asserting that they were entitled to First Amendment protections, in the form of a malice requirement, with regard to a church member's assault and false imprisonment claims because the church and pastors had obtained the dismissal of all but those claims in a prior mandamus proceeding. The court took judicial notice, under Tex. R. Evid. 201(d), of the records of that proceeding and found that defendants swore under oath that the assault and battery and false imprisonment claims should go forward because those claims were purely secular and entitled to no First Amendment protections. Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388, 2005 Tex. App. LEXIS 7660 (Tex. App. Fort Worth 2005).

Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials

14. In a breach of contract case, a trial court did not err by refusing to grant a new trial based on newly discovered evidence; Tex. R. Evid. 901(b)(7) did not require the admission of the evidence since appellant offered no evidence about an Internal Revenue Service document other than his unsworn statement that he received the document in the mail, and it was not authenticated by either certification or any extrinsic evidence. Moreover, the trial court did not err by failing to take judicial notice of the document. Nixon v. GMAC Mortg. Corp., 2009 Tex. App. LEXIS 7350, 2009 WL 2973660 (Tex. App. Dallas Sept. 18 2009).

15. In a will contest, an objector was not entitled to a new trial under Tex. R. App. P. 34.6(f) because he failed to show that a missing portion of a reporter's record was necessary to the resolution of an appeal; the trial court had not taken judicial notice of a common law marriage because it was a fact issue in dispute during the proceedings, and the fact that other parties referred to the objector and a decedent as married did not mean that the trial court had made a determination on that issue. In re Estate of Rabke, 2009 Tex. App. LEXIS 481, 2009 WL 196328 (Tex. App. San Antonio Jan. 28 2009).

Civil Procedure : Judgments : Relief From Judgment : Void Judgments

16. Supreme Court of Texas held that neither it nor the appellate court had jurisdiction to consider the merits of the parties' arguments because the trial court judge accepted a bribe for ruling on the newspapers' summary judgment motion, disqualifying him from the case under Tex. Const. art. V, § 11 and making his order void. The facts in the trial judge's plea agreement in another case, which the court took judicial notice of under Tex. R. Evid. 201(b), showed that he had an illegal interest in the instant case because he obtained a pecuniary gain as a direct result of his rulings. Freedom Communs., Inc. v. Coronado, 372 S.W.3d 621, 2012 Tex. LEXIS 503 (Tex. 2012).

Civil Procedure : Remedies : Bonds : Sureties : Liability

17. Where a creditor obtained a judgment against a constable and an insurance company regarding the constable's duty with respect to a writ of execution and the insurance company filed a resticted appeal, even if the constable's bond was a public record and an appropriate subject for judicial notice, there was no evidence in the record that the insurance company was the surety on the constable's bond since, inter alia, the record did not contain the bond. Dupree v. KingVision Pay-Per-View, Ltd., 219 S.W.3d 602, 2007 Tex. App. LEXIS 2676 (Tex. App. Dallas 2007).

Civil Procedure : Remedies : Costs & Attorney Fees : General Overview

18. Texas Court of Appeals was uncertain that the fact sheet should have been given judicial notice under either Tex. R. Evid. 201 or Rule 202 because there was no indication in the fact sheet that the FCC intended for the 47 C.F.R. § 1.4000(a)(3)'s limitation on the availability of attorney's fees to apply only when a restriction is held invalid. The fact sheet does not discuss the attorney's fees provision in any respect. River Oaks Place Council of Co-Owners v. Daly, 172 S.W.3d 314, 2005 Tex. App. LEXIS 7154 (Tex. App. Corpus Christi 2005).

Civil Procedure : Remedies : Costs & Attorney Fees : Attorney Expenses & Fees : Statutory Awards

19. In a breach of contract case, trial attorney's fees should have been awarded because a manufacturer failed to request that the trial court take judicial notice of Michigan law until it was too late, the fees were not precluded by a limitation-of-damages provision in a contract, and a failure to segregate attorney's fees did not preclude recovery of all attorney's fees. There was no argument that the requirements of Tex. Civ. Prac. & Rem. Code Ann. §§ 38.001, 38.002 were not met. Daimlerchrysler Motors Co., Llc v. Manuel, 362 S.W.3d 160, 2012 Tex. App. LEXIS 1489 (Tex. App. Fort Worth Feb. 24 2012).

Civil Procedure : Remedies : Judgment Interest : Postjudgment Interest

20. In a dispute regarding interests in gas wells, judicial notice could be taken pursuant to Tex. R. Evid. 201 of the postjudgment interest rate under former Tex. Fin. Code Ann. § 304.003, resulting in a determination that the trial court correctly set the postjudgment interest rate. Griffin v. Long, 442 S.W.3d 380, 2011 Tex. App. LEXIS 8910, 2011 WL 5545942 (Tex. App. Tyler Nov. 9 2011).

Civil Procedure : Appeals : Reviewability : Preservation for Review

21. Mother failed to preserve for review her contention that the trial court abused its discretion by excluding a psychologist's report from evidence because she never offered the report into evidence and there was nothing in the record showing that she made an offer of proof or a bill of exception. The trial court did not err failing to sua sponte taking judicial notice of the report because the record was not part of the appellate record and therefore the court could not determine whether it would have met the requirements for an adjudicative fact. In the Interest of L.D.W., 2013 Tex. App. LEXIS 6195 (Tex. App. Houston 14th Dist. May 21 2013).

22. Because a surety's motion for new trial did not argue that the terms of the judgments nisi were in any respect at variance with the tenor of the bail bonds that were forfeited, the surety did not preserve for review any claim that the particular bonds were not properly the subject of judicial notice. Kubosh v. State, 241 S.W.3d 60, 2007 Tex. Crim. App. LEXIS 1563 (Tex. Crim. App. 2007).

Constitutional Law : Bill of Rights : Fundamental Freedoms : Freedom of Religion : Free Exercise of Religion

23. Church and pastors were estopped from asserting that they were entitled to First Amendment protections, in the form of a malice requirement, with regard to a church member's assault and false imprisonment claims because the church and pastors had obtained the dismissal of all but those claims in a prior mandamus proceeding. The court took judicial notice, under Tex. R. Evid. 201(d), of the records of that proceeding and found that defendants swore under oath that the assault and battery and false imprisonment claims should go forward because those claims were purely secular and entitled to no First Amendment protections. Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388, 2005 Tex. App. LEXIS 7660 (Tex. App. Fort Worth 2005).

Constitutional Law : Bill of Rights : Fundamental Freedoms : Judicial & Legislative Restraints : Prior Restraint

24. When entering a gag order in the retrial of a murder charge, the trial judge's decision to take judicial notice of pretrial publicity did not satisfy Tex. R. Evid. 201 because the judge never gave defendant an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. Had defendant been given such opportunity, a record could have been made documenting the nature and extent of the pretrial publicity in the case and the impact such publicity would have on the right to a fair trial by an impartial jury. In re Graves, 217 S.W.3d 744, 2007 Tex. App. LEXIS 2341 (Tex. App. Waco 2007).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Obstruction of Justice : Elements

25. Evidence was sufficient to support a conviction under Tex. Penal Code Ann. § 38.02(b) when defendant gave a police officer a fictitious name because there was nothing to suggest the officer was not wearing a uniform or driving a marked vehicle during a traffic stop, the State was able to prove that the crime was committed in Texas through circumstantial evidence after judicial notice was taken that Jasper County was located in Texas, and the element of lawful detention was satisfied because defendant was detained under U.S. Const. amend. IV as a passenger in a car that was stopped for a minor traffic violation. Defendant asserted no constitutional argument on the grounds of U.S. Const. amend. IV or Tex. Const. art. I, § 9 with respect to an unlawful arrest or unreasonable search or seizure. Waalee v. State, 2009 Tex. App. LEXIS 1012, 2008 WL 5622656 (Tex. App. Beaumont Feb. 11 2009).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson : Simple Arson : General Overview

26. Evidence was sufficient so sustain defendant's arson conviction because it was not necessary that the State present evidence to prove that Corpus Christi was incorporated. The court of appeals took judicial notice that Corpus Christi was an incorporated city. Rios v. State, 2008 Tex. App. LEXIS 6524 (Tex. App. Corpus Christi Aug. 26, 2008).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : General Overview

27. In a trial for aggravated sexual assault of a child, the evidence was sufficient to prove venue in Galveston County; citing Tex. R. Evid. 201, the court noted that the victim testified that she had been sexually assaulted by

defendant on two separate occasions, once in Houston (Harris County) and once in Texas City (Galveston County). Clark v. State, 2006 Tex. App. LEXIS 5837 (Tex. App. Corpus Christi July 6 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

28. In defendant's sexual assault case, a court did not err by taking judicial notice of defendant's birth date where the alleged discrepancy regarding defendant's date of birth was not reflected in the appellate record, and as to the age difference, the victim testified without objection that she was 14 years old and that defendant told her he was 35 years old. The jury could also draw its own conclusions from the appearance of the victim and defendant in the courtroom. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : License Violations : General Overview

29. Where defendant was tried for driving with license suspended in Texas, the trial court did not abuse its discretion by failing to take judicial notice of the that fact defendant had a valid New Mexico driver's license; this was a question of fact for the jury. McGrew v. State, 2006 Tex. App. LEXIS 2752 (Tex. App. El Paso Apr. 6 2006).

Criminal Law & Procedure : Interrogation : Miranda Rights : Custodial Interrogation

30. Rules pertaining to custodial interrogations are not extended to information not received from investigative questioning and information that is not incriminating; therefore, a trial court did not err when it took judicial notice of the fact that defendant was married to a particular person in a burglary case because this information was merely provided in an indigency affidavit. Britt v. State, 2006 Tex. App. LEXIS 4982 (Tex. App. Fort Worth June 8 2006).

31. Trial court's decision to take judicial notice of defendant's date of birth was not an error preserved for review because the complaint made on appeal did not comport with the complaint made in the trial court; defendant contended for the first time on appeal that the admission of such evidence violated his right against self-incrimination. Britt v. State, 2006 Tex. App. LEXIS 4982 (Tex. App. Fort Worth June 8 2006).

Criminal Law & Procedure : Preliminary Proceedings

32. In a termination of parental rights case, it was improper to take judicial notice of prior testimony, evidence, and factual assertions from earlier hearings and from the court's files because the evidence was not notorious or verifiable and was not admitted into evidence at the termination trial. B. L. M. v. J. H. M., 2014 Tex. App. LEXIS 7707 (Tex. App. Austin July 17 2014).

Criminal Law & Procedure : Bail : Forfeitures

33. In proceedings to finalize a forfeiture of two bail bonds, judicial notice could be taken, under the common law, of both the judgments nisi and the bonds; because Tex. R. Evid. 101 indicates that proceedings regarding bail are not covered by the rules of evidence, judicial notice in such cases does not have to comply with Tex. R. Evid. 201, although Tex. Code Crim. Proc. Ann. art. 22.10 provides that civil rules govern all proceedings in the trial court in a bond-forfeiture case following a judgment nisi. Kubosh v. State, 241 S.W.3d 60, 2007 Tex. Crim. App. LEXIS 1563 (Tex. Crim. App. 2007).

34. Because a surety's motion for new trial did not argue that the terms of the judgments nisi were in any respect at variance with the tenor of the bail bonds that were forfeited, the surety did not preserve for review any claim that

the particular bonds were not properly the subject of judicial notice. Kubosh v. State, 241 S.W.3d 60, 2007 Tex. Crim. App. LEXIS 1563 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Bail : Hearings

35. In a bond reduction hearing where defendant was charged with two aggravated sexual assault of a child offenses, the trial judge was permitted to take judicial notice of the evidence presented in defendant's previous sexual assault trial involving the same victim; the same judge presided over both cases. The Texas Rules of Evidence do not apply to bond reduction hearings. Ex parte Bratcher, 2005 Tex. App. LEXIS 5418 (Tex. App. Dallas July 13 2005).

Criminal Law & Procedure : Pretrial Motions & Procedures : Gag Orders

36. When entering a gag order in the retrial of a murder charge, the trial judge's decision to take judicial notice of pretrial publicity did not satisfy Tex. R. Evid. 201 because the judge never gave defendant an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. Had defendant been given such opportunity, a record could have been made documenting the nature and extent of the pretrial publicity in the case and the impact such publicity would have on the right to a fair trial by an impartial jury. In re Graves, 217 S.W.3d 744, 2007 Tex. App. LEXIS 2341 (Tex. App. Waco 2007).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

37. In a murder trial, the trial court erred in taking judicial notice of defendant's testimony at another defendant's trial for the purpose of ruling on defendant's motion to suppress a confession; the facts the trial court utilized were disputed, and contrary to the State's assertion, defendant did not treat the prior testimony as if it had been admitted into evidence; further, the testimony the trial court judicially noticed was inherently swayed towards the viewpoint of opposing parties at the prior trial, and defendant did not have an opportunity to present the facts in the most favorable light. Resendez v. State, 256 S.W.3d 315, 2007 Tex. App. LEXIS 7052 (Tex. App. Houston 14th Dist. 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

38. In a drug case, counsel was not ineffective for not making objections to an officer's testimony regarding the GPS measurement to the school because counsel testified that there had been a measurement done with a roller measurer that was evidence at trial showing that the distance was less than a 1,000 feet. Additionally, the court of appeals took judicial notice of the fact that the school was less than 1,000 feet from the location of the drug transaction. Jackson v. State, 2009 Tex. App. LEXIS 5997, 2009 WL 2372973 (Tex. App. Eastland July 30 2009).

Criminal Law & Procedure : Juries & Jurors : Peremptory Challenges : Proving Discriminatory Use

39. In the context of a Batson challenge, the appellate court did not abuse its discretion under Tex. R. Evid. 201 when it declined to take judicial notice of a study commissioned by a newspaper that purportedly showed the county's continuing pattern of exercising peremptory challenges in a racially discriminatory manner. Watkins v. State, 245 S.W.3d 444, 2008 Tex. Crim. App. LEXIS 215 (Tex. Crim. App. 2008), *cert. denied,* 555 U.S. 846, 129 S. Ct. 92, 172 L. Ed. 2d 78, 2008 U.S. LEXIS 7139 (2008).

Criminal Law & Procedure : Jurisdiction & Venue : Venue

40. In a trial for aggravated sexual assault of a child, the evidence was sufficient to prove venue in Galveston County; citing Tex. R. Evid. 201, the court noted that the victim testified that she had been sexually assaulted by

defendant on two separate occasions, once in Houston (Harris County) and once in Texas City (Galveston County). Clark v. State, 2006 Tex. App. LEXIS 5837 (Tex. App. Corpus Christi July 6 2006).

41. In delinquency proceedings, an employee of the juvenile detention facility in Post, Texas, testified that while he was working he saw appellant strike another resident on the head; Tex. R. Evid. 201 permitted the court may take judicial notice that Post was the county seat of Garza County, Texas; the evidence was sufficient to prove venue in Garza County. In re E.H., 2006 Tex. App. LEXIS 4310 (Tex. App. Fort Worth May 18 2006).

42. In a criminal prosecution for evading arrest, the deputy testified that he located defendant's vehicle near the intersection of Westfield Place Drive and Hollow Tree Lane in Houston, Texas; Tex. R. Evid. 201 permitted the court to take judicial notice that this location was within Harris County, Texas; the evidence was sufficient to establish venue. Crawford v. State, 2006 Tex. App. LEXIS 2722 (Tex. App. Houston 1st Dist. Apr. 6 2006).

43. Although defendant attempted to argue on appeal that Harris County was not the proper venue for his trial on a charge of aggravated assault, the appellate court could take judicial notice of a photograph of the crime scene, which had been admitted to evidence and showed the location's address, which was in Harris County. Campos v. State, 2004 Tex. App. LEXIS 3259 (Tex. App. Houston 14th Dist. Apr. 6 2004).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Self-Representation

44. In an appeal relating to the right to self-representation, the reviewing court took judicial notice of a hearing in which defendant discussed invocation of his right to self-representation with the same trial court judge on a different criminal case. The discussion was not subject to reasonable dispute, was capable of accurate determination by referring to the reporter's record, and provided the basis for the trial court's finding that defendant was aware of the dangers and disadvantages of self-representation. Curry v. State, 2013 Tex. App. LEXIS 14286, 2013 WL 6157573 (Tex. App. Tyler Nov. 21 2013).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Proceedings

45. Trial court did not abuse its discretion when it revoked defendant's community supervision because the evidence was sufficient to prove that he committed the offense of possession of a controlled substance. Although the State asked the trial court to take judicial notice of the judgment of conviction, the judge inferentially took judicial notice of the evidence in the possession case over which she presided and found defendant committed the offense of possession of a controlled substance. Adams v. State, 2012 Tex. App. LEXIS 6022, 2012 WL 3025917 (Tex. App. El Paso July 25 2012).

46. In a community supervision revocation proceeding, the trial court did not err in finding that defendant committed the offense of possession of a controlled substance because the trial court took judicial notice of the evidence in the possession case over which she had presided. Adams v. State, 2012 Tex. App. LEXIS 6021, 2012 WL 3025921 (Tex. App. El Paso July 25 2012).

Criminal Law & Procedure : Sentencing : Fines

47. Where defendant was convicted of aggravated assault with a deadly weapon, he filed an affidavit of indigence and a motion requesting a free copy of the reporter's record on appeal; the trial court took judicial notice of the fact that defendant was assessed a $ 5,000 fine in the underlying criminal conviction with the understanding that he had the means to pay the fine. Howard v. State, 2006 Tex. App. LEXIS 3900 (Tex. App. San Antonio May 10 2006).

Criminal Law & Procedure : Sentencing : Forfeitures : Proceedings

48. From defendant's murder conviction, the trial court's granting of the forfeiture of defendant's vehicle as contraband under Tex. Code Crim. Proc. Ann. art. 59.01(2) was reversed as the trial court erred when it took judicial notice of prior testimony without admitting a transcript of it into evidence in the forfeiture proceeding as required by Tex. R. Evid. 201; there was no evidence that created even a mere surmise or suspicion of a nexus between the illegal activity and the seized vehicle. Davis v. State, 293 S.W.3d 794, 2009 Tex. App. LEXIS 5493 (Tex. App. Waco July 15 2009).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

49. In a case of aggravated robbery with a deadly weapon, although the written plea admonishments were not offered into evidence, they were filed with the trial court and were properly before the trial court at the punishment hearing because the trial court could take judicial notice of its own records. Gaffney v. State, 2005 Tex. App. LEXIS 2738 (Tex. App. Fort Worth Apr. 7 2005).

Criminal Law & Procedure : Sentencing : Presentence Reports

50. Upon sentencing defendant for aggravated sexual assault, the trial court was permitted to take judicial notice of and consider unobjected to facts contained in the presentence investigation report (PSI). Defendant made no challenge to the facts of the PSI. Guerra v. State, 2005 Tex. App. LEXIS 850 (Tex. App. Amarillo Feb. 1 2005).

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

51. Court could not take judicial notice of the facts in an affidavit that a criminal appellant attached to her motion for new trial but did not introduce into evidence. Jackson v. State, 139 S.W.3d 7, 2004 Tex. App. LEXIS 4983 (Tex. App. Fort Worth 2004).

Criminal Law & Procedure : Appeals : Appellate Jurisdiction : Extraordinary Writs

52. Where the trial court failed to rule on relator's motion for judicial notice for three months, the appellate court declined to hold that that period of time constituted an unreasonable delay; the relator was not entitled to mandamus relief to compel the trial judge to hold an evidentiary hearing on his motion for judicial notice; relator failed to show that he demanded performance, or that he had no other adequate remedy at law. In re Gonzales, 2006 Tex. App. LEXIS 8057 (Tex. App. Amarillo Sept. 6 2006).

Criminal Law & Procedure : Appeals : Procedures : General Overview

53. On appeal of defendant's conviction for evading arrest or detention using a vehicle, Tex. R. Evid. 201(b), (c), (f) authorized the Court of Appeals of Texas to take judicial notice for the first time on appeal of the location, direction, and trajectories of the streets described during the encounter. Griego v. State, 331 S.W.3d 815, 2011 Tex. App. LEXIS 204 (Tex. App. Amarillo Jan. 11 2011).

Criminal Law & Procedure : Appeals : Prosecutorial Misconduct : Use of False Testimony

54. New trial on punishment was necessary in a Tex. Penal Code Ann. § 19.03 capital murder case because a prosecution witness incorrectly testified that an inmate sentenced to life without parole might become eligible for a less restrictive prison classification status. The State conceded federal constitutional error, and the court, taking judicial notice pursuant to Tex. R. Evid. 201(b)-(d) of a regulation that prohibited such reclassification, found it probable that the death sentence was based upon the incorrect testimony. Estrada v. State, 313 S.W.3d 274, 2010 Tex. Crim. App. LEXIS 722 (Tex. Crim. App. 2010).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

55. Because the surety never objected to the trial court taking judicial notice of its file and the prior proceedings, he failed to preserve his contention for review; the State introduced both the bond and judgment nisi into evidence without any objection from the surety and took judicial notice as requested. Baeza v. State, 2004 Tex. App. LEXIS 3426 (Tex. App. El Paso Apr. 15 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

56. Defendant failed to preserve the right to question a prosecutor's qualifications under Tex. Const. art. XVI, § 1 on direct appeal where there was no evidence in the appellate record to support defendant's allegations until defendant tendered four exhibits to the court of appeals and asked that court to take judicial notice of those documents as proof of allegations that he raised for the first time on direct appeal. Davis v. State, 227 S.W.3d 733, 2007 Tex. Crim. App. LEXIS 864 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

57. Trial court's decision to take judicial notice of defendant's date of birth was not an error preserved for review because the complaint made on appeal did not comport with the complaint made in the trial court; defendant contended for the first time on appeal that the admission of such evidence violated his right against self-incrimination. Britt v. State, 2006 Tex. App. LEXIS 4982 (Tex. App. Fort Worth June 8 2006).

Criminal Law & Procedure : Appeals : Standards of Review : General Overview

58. In a case of organized criminal activity and burglary, the appellate court declined defendant's request to take judicial notice of documents purporting to show that the prosecutor lacked authority to act; judicial notice cannot be taken for the first time on appeal of facts that do not uphold the integrity of the judgment. Davis v. State, 227 S.W.3d 766, 2005 Tex. App. LEXIS 6589 (Tex. App. Tyler 2005).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

59. Violation of an evidentiary rule, such as Tex. R. Evid. 201, that results in the erroneous admission of evidence is not constitutional error. Assuming arguendo that the trial court erred in a probation revocation proceeding by judicially noticing defendant's federal judgment and accompanying unsworn statements, the error was harmless. Deshone v. State, 2004 Tex. App. LEXIS 7409 (Tex. App. Amarillo Aug. 17 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : Sufficiency of Evidence

60. Evidence was sufficient to support a conviction under Tex. Penal Code Ann. § 38.02(b) when defendant gave a police officer a fictitious name because there was nothing to suggest the officer was not wearing a uniform or driving a marked vehicle during a traffic stop, the State was able to prove that the crime was committed in Texas through circumstantial evidence after judicial notice was taken that Jasper County was located in Texas, and the element of lawful detention was satisfied because defendant was detained under U.S. Const. amend. IV as a passenger in a car that was stopped for a minor traffic violation. Defendant asserted no constitutional argument on the grounds of U.S. Const. amend. IV or Tex. Const. art. I, § 9 with respect to an unlawful arrest or unreasonable search or seizure. Waalee v. State, 2009 Tex. App. LEXIS 1012, 2008 WL 5622656 (Tex. App. Beaumont Feb. 11 2009).

Estate, Gift & Trust Law : Will Contests : General Overview

61. Appellate court refused to take judicial notice that a purported signature on a will was not genuine or could not have been procured in the absence of undue influence because this fact was not generally known in the community or capable of accurate and ready determination by resort to sources whose accuracy could not have been reasonably questioned. Fletcher v. Harris, 2007 Tex. App. LEXIS 2961 (Tex. App. Houston 14th Dist. Apr. 19 2007).

Evidence : Authentication : General Overview

62. In a breach of contract case, a trial court did not err by refusing to grant a new trial based on newly discovered evidence; Tex. R. Evid. 901(b)(7) did not require the admission of the evidence since appellant offered no evidence about an Internal Revenue Service document other than his unsworn statement that he received the document in the mail, and it was not authenticated by either certification or any extrinsic evidence. Moreover, the trial court did not err by failing to take judicial notice of the document. Nixon v. GMAC Mortg. Corp., 2009 Tex. App. LEXIS 7350, 2009 WL 2973660 (Tex. App. Dallas Sept. 18 2009).

Evidence : Judicial Notice

63. In a criminal prosecution for evading arrest, the deputy testified that he located defendant's vehicle near the intersection of Westfield Place Drive and Hollow Tree Lane in Houston, Texas; Tex. R. Evid. 201 permitted the court to take judicial notice that this location was within Harris County, Texas; the evidence was sufficient to establish venue. Crawford v. State, 2006 Tex. App. LEXIS 2722 (Tex. App. Houston 1st Dist. Apr. 6 2006).

64. Where defendant was tried for driving with license suspended in Texas, the trial court did not abuse its discretion by failing to take judicial notice of the that fact defendant had a valid New Mexico driver's license; this was a question of fact for the jury. McGrew v. State, 2006 Tex. App. LEXIS 2752 (Tex. App. El Paso Apr. 6 2006).

65. In a bond reduction hearing where defendant was charged with two aggravated sexual assault of a child offenses, the trial judge was permitted to take judicial notice of the evidence presented in defendant's previous sexual assault trial involving the same victim; the same judge presided over both cases. The Texas Rules of Evidence do not apply to bond reduction hearings. Ex parte Bratcher, 2005 Tex. App. LEXIS 5418 (Tex. App. Dallas July 13 2005).

66. Upon sentencing defendant for aggravated sexual assault, the trial court was permitted to take judicial notice of and consider unobjected to facts contained in the presentence investigation report (PSI). Defendant made no challenge to the facts of the PSI. Guerra v. State, 2005 Tex. App. LEXIS 850 (Tex. App. Amarillo Feb. 1 2005).

67. Violation of an evidentiary rule, such as Tex. R. Evid. 201, that results in the erroneous admission of evidence is not constitutional error. Assuming arguendo that the trial court erred in a probation revocation proceeding by judicially noticing defendant's federal judgment and accompanying unsworn statements, the error was harmless. Deshone v. State, 2004 Tex. App. LEXIS 7409 (Tex. App. Amarillo Aug. 17 2004).

68. In defendant's sexual assault case, a court did not err by taking judicial notice of defendant's birth date where the alleged discrepancy regarding defendant's date of birth was not reflected in the appellate record, and as to the age difference, the victim testified without objection that she was 14 years old and that defendant told her he was 35 years old. The jury could also draw its own conclusions from the appearance of the victim and defendant in the courtroom. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

69. The trial court granted the parties' divorce on grounds of cruelty; because the protective order finding that the husband committed family violence against the wife and affidavit in support thereof were filed with the trial court in the same cause as the divorce, the appellate court presumed that the trial court took judicial notice of the contents of the file. Barnard v. Barnard, 133 S.W.3d 782, 2004 Tex. App. LEXIS 3009 (Tex. App. Fort Worth 2004).

70. In an aggravated assault case, because blood spatter analysis was subject to judicial notice and the State proved the proper application of blood spatter analysis, the trial court did not err in admitting the State's testimony on the issue of blood spatter analysis. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

71. Texas takes judicial notice of the validity of blood spatter analysis; the State is not required to produce evidence on the first two criteria of Kelly. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

72. Under Tex. R. Evid. 201(b) and (d), the appellate court properly denied a defendant's motion asking the court to take judicial notice of the complainant's age at the time of the offense based upon a computer print-out of the defendant's sex offender registration record because the victim's age was not generally known in the county and the accuracy of the online record could reasonably be questioned. Ex parte Alakayi, 102 S.W.3d 426, 2003 Tex. App. LEXIS 3135 (Tex. App. Houston 14th Dist. 2003).

Evidence : Judicial Notice : General Overview

73. Rational trier of fact could have found beyond a reasonable doubt that sufficient evidence linked defendant to the previous judgment of conviction for burglary of a building; previous judgment was rendered in the Houston and the court took judicial notice that Houston was approximately seventy-three miles from where the case took place. Farrell v. State, 2014 Tex. App. LEXIS 9213 (Tex. App. Corpus Christi Aug. 21 2014).

74. Trial judge said he took judicial notice of the public nature of a street and the jury had to take that as a true fact, which directly contradicted the permissive instruction required by the rule, and thus the trial judge essentially told the jury to find satisfied the public place element of the offense; however, the charge was proper as to the public place element and defendant did not suffer egregious harm from the trial court's failure to include an instruction, as the public place element was supported by the evidence and not seriously contested. Lyle v. State, 418 S.W.3d 901, 2013 Tex. App. LEXIS 15243, 2013 WL 6689387 (Tex. App. Houston 14th Dist. Dec. 19 2013).

75. Appellant claimed the trial court erred in taking judicial notice of a disputed fact, but he made no objection when the trial court said it was taking judicial notice of the gestures observed as to certain witnesses, and thus appellant did not preserve this complaint for review, for purposes of Tex. R. App. P. 33.1; also, although the trial court used the term judicial notice, the trial court was simply articulating the observations made of the witnesses' gestures for the record. Gutierrez v. State, 2013 Tex. App. LEXIS 2159, 2013 WL 820489 (Tex. App. San Antonio Mar. 6 2013).

76. Although the panel expresses its concern with the practice of relying on judicially-noticed affidavits, not formally introduced into evidence at trial, as evidence supporting the trial court's findings in termination cases, the court is nevertheless obligated to follow the court's precedent in relying on such affidavits when they are judicially noticed without objection. T.L.S., 2012 Tex. App. LEXIS 10297, 2012 WL 6213515 (Tex. App. Houston 1st Dist. Dec. 13 2012).

77. Court could not review alleged testimony because a transcript of the hearing for the bail reduction motion was not admitted and nothing indicated that the trial court took judicial notice of the evidence or was aware of the

evidence admitted at a prior hearing before a different judge. Ex Parte Moore, 2012 Tex. App. LEXIS 4556, 2012 WL 2078257 (Tex. App. Austin June 8 2012).

78. Trial court never formally took judicial notice of the documents produced at a temporary injunction hearing, and while the court could take judicial notice of court documents on appeal, no such request was made; thus, the documents themselves could not be considered competent evidence supporting the injunction order.

79. Although the widow asked the court to take judicial notice that oil, gas, and minerals were subject to the Relinquishment Act and were owned by the State, the court declined; the facts that the court was asked to take judicial notice of were found in a letter from someone who purportedly worked at the state general land office, and the issue of whether the State owned the minerals was an issue best resolved by the trial court. Burchard v. Burchard, 2012 Tex. App. LEXIS 80, 2012 WL 28831 (Tex. App. Eastland Jan. 5 2012).

80. It would be illogical to hold that the landowners did not present sufficient evidence to exclude the neighbor as a possible source of contamination after the trial court took judicial notice, and instructed the jury, that the neighbor was not responsible for the contamination. E-z Mart Stores, Inc. v. Ronald Holland's A Plus Transmission & Auto., Inc., 358 S.W.3d 665, 2011 Tex. App. LEXIS 6000, 41 Envtl. L. Rep. 20273 (Tex. App. San Antonio Aug. 3 2011).

81. Court exercised its discretion to take judicial notice of the correct postjudgment interest rate under Tex. Fin. Code Ann. § 304.003. Griffin v. Long, 2011 Tex. App. LEXIS 3521, 2011 WL 1849271 (Tex. App. Tyler May 11 2011).

82. While the rules no longer treat as harmless all errors made in a non-jury trial, that does not mean the appellate court cannot consider the fact that the judge was the factfinder, and the trial court was aware of the difference between argument based on evidence and that without support; the prosecutor's statement that recidivism rates in sex offender programs were horrendous and the programs did not work was made in a request that the trial court take judicial notice, which was not done, and by making the request, the State implicitly conceded that this argument was not supported by the evidence. Stroble v. State, 2011 Tex. App. LEXIS 3205 (Tex. App. Houston 1st Dist. Apr. 28 2011).

83. Party could not ask the trial court to take judicial notice, and then on appeal complain that the trial court did as he asked. Smale v. Torchmark Corp., 2011 Tex. App. LEXIS 2333, 2011 WL 1238386 (Tex. App. Dallas Mar. 31 2011).

84. Because a mother did not object at the time that the trial court took judicial notice, she waived this complaint under Tex. R. App. P. 33.1. In the Interest of T.C., 2010 Tex. App. LEXIS 9685, 2010 WL 4983512 (Tex. App. Waco Dec. 1 2010).

85. To the extent certain matters were relevant to the court's analysis, the court took judicial notice of those matters. Vista Healthcare, Inc. v. Tex. Mut. Ins. Co., 324 S.W.3d 264, 2010 Tex. App. LEXIS 7046 (Tex. App. Austin Aug. 26 2010).

86. Court did not abuse its discretion by revoking defendant's community supervision, because it should have been apparent to defendant that the trial court took judicial notice of the evidence, as opposed to the conviction, when the trial court announced that the evidence supported the State's motion, yet defendant did not object or seek to be heard on the issue of sufficient evidence. Lighteard v. State, 2010 Tex. App. LEXIS 3854, 2010 WL 1997723 (Tex. App. San Antonio May 19 2010).

87. Court did not abuse its discretion in entering the turnover order, because the evidence supported the order, when the tenants had not established that, by the trial court's turnover order, the company had obtained a suit against itself or that the order restricted the tenant's common law cause of action; applying Tex. Civ. Prac. & Rem. Code Ann. § 31.002 that the tenants owned its cause of action (the lease dispute it filed), that its cause of action could not be readily attached or levied on by ordinary legal process, and that its cause of action was not exempt from attachment, execution, or seizure for the satisfaction of liabilities were facts readily susceptible to judicial notice. E. Bloc Entm't, Ltd. v. Abco Props., 2010 Tex. App. LEXIS 2179 (Tex. App. Houston 1st Dist. Mar. 11 2010).

88. State offered Louisiana documents to prove defendant's out-of-state convictions without offering proof of Louisiana's evidentiary requirements for proof of a final conviction, and the State did not ask the trial court to take judicial notice of those evidentiary requirements; therefore, Texas law applied. Andrus v. State, 2010 Tex. App. LEXIS 1665, 2010 WL 797196 (Tex. App. Dallas Mar. 10 2010).

89. Trial court erred in taking judicial notice of documents pursuant to Tex. R. Evid. 201 when some of the judicially noticed documents no longer existed and when others were not attached to to the motion of a party seeking summary judgment as required by Tex. R. Civ. P. 166a. Graff v. Berry, 2008 Tex. App. LEXIS 1163 (Tex. App. Texarkana Feb. 20 2008).

90. Trial court did not abuse its discretion in denying a guarantor's motion to appear by telephone, given that (1) Tex. R. Jud. Admin. 7 did not require courts to allow parties to attend pretrial hearings via telephone, (2) the guarantor failed to cite any authority, nor was the court aware of any, for the proposition that a violation of the Americans with Disabilities Act voided an otherwise valid judgment, and (3) it was not necessary for the court to decide whether the guarantor's due process rights were violated by an alleged violation of the Act because (a) assuming that a violation could void a judgment, the claim was an affirmative defense that had to be pleaded and proven, (b) the guarantor failed to plead an affirmative defense based on a violation of the Act, and (c) even if the guarantor's motion to transfer venue pleaded an affirmative defense based on an Act violation and assuming a violation of the Act voided a judgment, the guarantor failed to prove that the trial court's action violated the Act, as the trial court took judicial notice that the courthouse was wheelchair accessible and the guarantor failed to prove that he could not access the courtroom. Corona v. Pilgrim's Pride Corp., 245 S.W.3d 75, 2008 Tex. App. LEXIS 492 (Tex. App. Texarkana 2008).

91. Post-answer default judgment was properly entered against appellant and in favor of appellee when appellant and her attorney failed to appear for trial because there was no evidence that the attorney was not a licensed attorney or not the attorney of record for appellant at the time the attorney received notice of the trial setting under Tex. R. Civ. P. 21a and the court could not take judicial notice of the attorney's suspensions, which did not fall within the scope of Tex. R. Evid. 201. Gutierrez v. Draheim, 2007 Tex. App. LEXIS 7415 (Tex. App. San Antonio Sept. 12 2007).

92. Appellate court denied an appellant's motion to take judicial notice of various rules, statutes, cases, and alleged facts because: (1) many of the items were not the proper subject of judicial notice; (2) other items contained either incomplete or inaccurate information; and (3) none of the items affected the resolution of the specific issues that the appellant raised on appeal. Hunt v. Rodriguez-Mendoza, 2007 Tex. App. LEXIS 7250 (Tex. App. Austin Aug. 29 2007).

93. Whether a judge was constitutionally qualified to serve as a visiting judge was a legal conclusion and not a fact that could be judicially noticed. In re Caraway, 2007 Tex. App. LEXIS 5131 (Tex. App. Fort Worth June 28 2007).

94. Evidence was sufficient to support a finding that the offense took place in Palo Pinto County (Texas), as the detective testified that all four offenses took place in the county, defendant did not contest this testimony, and

defendant's guilty plea constituted an admission of all elements of the offense charged; the court declined to take judicial notice under Tex. R. Evid. 201 that the offenses took place in another county based on a deed and maps because the documents were not in a form that would have been admissible at trial and a judicially noticed fact had to be one that was not subject to reasonable dispute. Pollone v. State, 2007 Tex. App. LEXIS 174 (Tex. App. Eastland Jan. 11 2007).

95. Where the trial court failed to rule on relator's motion for judicial notice for three months, the appellate court declined to hold that that period of time constituted an unreasonable delay; the relator was not entitled to mandamus relief to compel the trial judge to hold an evidentiary hearing on his motion for judicial notice; relator failed to show that he demanded performance, or that he had no other adequate remedy at law. In re Gonzales, 2006 Tex. App. LEXIS 8057 (Tex. App. Amarillo Sept. 6 2006).

96. Even though the trial court incorrectly took judicial notice of the arrest warrant and clerk's certificate of defendant's failure to appear at trial for his speeding citation, defendant was not harmed by the error, because the jury was not told by the trial court or anyone else that the trial court had taken judicial notice of the exhibits, and the jury did not know that by taking judicial notice of the documents the trial court was telling them they could consider them as conclusive proof of facts contained therein. Azeez v. State, 203 S.W.3d 456, 2006 Tex. App. LEXIS 7821 (Tex. App. Houston 14th Dist. 2006).

97. Trial court was free to take judicial notice of its own records and prior pleadings in the case with or without a request of a party, and thus the court rejected appellant's claim that the trial court was limited to considering only the evidence presented at the hearing in making its determination regarding removal under Tex. Prob. Code Ann. § 222. In re Estate of Clark, 198 S.W.3d 273, 2006 Tex. App. LEXIS 3234 (Tex. App. Dallas 2006).

98. Trial court was free to take judicial notice of its own records and prior pleadings in the case with or without a request of a party, and thus the court rejected appellant's claim that the trial court was limited to considering only the evidence presented at the hearing in making its determination regarding removal under Tex. Prob. Code Ann. § 222. In re Estate of Clark, 198 S.W.3d 273, 2006 Tex. App. LEXIS 3234 (Tex. App. Dallas 2006).

99. Defense counsel had a duty to investigate defendant's prior convictions and present evidence that the judgment for a prior conviction was void, and counsel's performance was deficient because there was no reasonable trial strategy in failing to present evidence that might have proven the indictment relied on a void prior conviction to enhance defendant's punishment for unlawful possession with the intent to deliver heroin; the court declined to take judicial notice of facts that went to the merits of the dispute. Rodgers v. State, 2006 Tex. App. LEXIS 2858 (Tex. App. Dallas Apr. 10 2006).

100. Because Tex. Civ. Prac. & Rem. Code Ann. § 38.004 is more specific than Tex. R. Evid. 201, it controls in claims for attorney's fees. Cox v. Wilkins, 2006 Tex. App. LEXIS 2598 (Tex. App. Austin Mar. 31 2006).

101. The victim testified that the assault occurred in Cass County, and under Tex. R. Evid. 201(b), the court took judicial notice that Cass County was located in the State of Texas, and the court found the evidence sufficient to prove venue. Van Schoyck v. State, 189 S.W.3d 333, 2006 Tex. App. LEXIS 1936 (Tex. App. Texarkana 2006).

102. Trial court properly refused to take judicial notice under Tex. R. Evid. 201 of public record documents that were not certified and were for informational purposes only, given that Tex. R. Evid. 1005 provided that the contents of official public records could be proven by a certified copy. Verizon California, Inc. v. Douglas, 2006 Tex. App. LEXIS 1622 (Tex. App. Houston 1st Dist. Mar. 2, 2006).

103. The trial court was free to take judicial notice of usual and customary attorney fees and the company did not show an abuse of discretion on the trial court's part. First Nat'l Acceptance Co. v. Bishop, 187 S.W.3d 710, 2006 Tex. App. LEXIS 1159 (Tex. App. Corpus Christi 2006).

104. Trial court was not able to take judicial notice of testimony from a prior hearing unless a transcription of the testimony was offered in evidence; nevertheless, this requirement may be waived if no objection is made to a proponent's failure to offer the transcription in evidence, for purposes of Tex. R. App. P. 33.1(a)(1). Roberts v. Roberts, 2006 Tex. App. LEXIS 1090 (Tex. App. Waco Feb. 8 2006).

105. Defendant's complaints, that the trial court erred in failing to take judicial notice of the reliability of a horizontal gaze nystagmus (HGN) test and in failing to make other inquiry under Tex. R. Evid. 702, were not raised in the trial court, for purposes of Tex. R. App. P. 33.1; however, HGN tests had previously been found to be scientifically reliable, and thus the State was not required to present evidence on the issue and the appellate court was free to take judicial notice of the reliability on appeal, and thus, even if preserved, no abuse of discretion existed on these grounds. Cooper v. State, 2006 Tex. App. LEXIS 942 (Tex. App. El Paso Feb. 2 2006).

106. Court took judicial notice under Tex. R. Evid. 201(d) of a trustee's deed, and the court noted that the foreclosed deed of trust lien was dated in 2000, but the inception of the materialmen's lien related back to when work started, which was in 1998, for purposes of Tex. Prop. Code Ann. § 53.021(a), Tex. Prop. Code Ann. § 53.123, and Tex. Prop. Code Ann. § 53.124; because the materialmen's lien was not a junior lien but was superior to the deed of trust, the court declined to hold that the issue of the removal of the lien was moot based on foreclosure. Northside Marketplace W.D. '97, Ltd. v. David Christopher, Inc., 2005 Tex. App. LEXIS 9830 (Tex. App. Fort Worth Nov. 23 2005).

107. Church and pastors were estopped from asserting that they were entitled to First Amendment protections, in the form of a malice requirement, with regard to a church member's assault and false imprisonment claims because the church and pastors had obtained the dismissal of all but those claims in a prior mandamus proceeding. The court took judicial notice, under Tex. R. Evid. 201(d), of the records of that proceeding and found that defendants swore under oath that the assault and battery and false imprisonment claims should go forward because those claims were purely secular and entitled to no First Amendment protections. Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388, 2005 Tex. App. LEXIS 7660 (Tex. App. Fort Worth 2005).

108. Texas Court of Appeals was uncertain that the fact sheet should have been given judicial notice under either Tex. R. Evid. 201 or Rule 202 because there was no indication in the fact sheet that the FCC intended for the 47 C.F.R. § 1.4000(a)(3)'s limitation on the availability of attorney's fees to apply only when a restriction is held invalid. The fact sheet does not discuss the attorney's fees provision in any respect. River Oaks Place Council of Co-Owners v. Daly, 172 S.W.3d 314, 2005 Tex. App. LEXIS 7154 (Tex. App. Corpus Christi 2005).

109. Trial court was entitled to take judicial notice of its own prior order entered in a related case between substantially the same parties. In re Shell E&P, Inc., 179 S.W.3d 125, 2005 Tex. App. LEXIS 7313 (Tex. App. San Antonio 2005).

110. Defendant did not challenge venue in the trial court, and thus under Tex. R. App. P. 44.2(c)(1), the issue was presumed proven, given that the record did not affirmatively show otherwise; the evidence report identified the location as in a particular city, and courts were free to take judicial notice that the city was the county seat, which was sufficient to establish venue in the county, and there was no evidence to rebut that the offense took place in the county. Ramirez v. State, 2005 Tex. App. LEXIS 6705 (Tex. App. El Paso Aug. 18 2005).

111. Courts can take judicial notice that El Paso, Texas is the county seat of El Paso County. Ramirez v. State, 2005 Tex. App. LEXIS 6705 (Tex. App. El Paso Aug. 18 2005).

112. In a case of organized criminal activity and burglary, the appellate court declined defendant's request to take judicial notice of documents purporting to show that the prosecutor lacked authority to act; judicial notice cannot be taken for the first time on appeal of facts that do not uphold the integrity of the judgment. Davis v. State, 227 S.W.3d 766, 2005 Tex. App. LEXIS 6589 (Tex. App. Tyler 2005).

113. Trial court did not err in not taking judicial notice of case law because the case was not an adjudicative fact as required by Tex. R. Evid. 201(a). Crook v. State, 2005 Tex. App. LEXIS 5075 (Tex. App. El Paso June 30 2005).

114. Trial court did not err in taking judicial notice under Tex. R. Evid. 201(a) of Tex. Disciplinary R. Prof. Conduct 7.03(a), 8.04(a)(1), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (2005) (Tex. State Bar R. art. X, sec. 9) because the rules were applicable in defendant's charge in a trial under Tex. Penal Code Ann. § 38.12. Crook v. State, 2005 Tex. App. LEXIS 5075 (Tex. App. El Paso June 30 2005).

115. Under Tex. R. Evid. 201(b), the trial court was permitted to take judicial notice of the fact that a doctor's report was filed on a particular date, but the mother did not request that the report be admitted, and thus the substance of the report could not have been considered as evidence on the issue of best interest of the child in a motion to modify an order appointing the mother and father as joint managing conservators; in any event, the doctor's expert opinions of what might have been in the child's best interests were not facts and therefore not a proper subject for judicial notice, and the trial court did not abuse its discretion by refusing to consider the report at a later hearing. In re C.A.N.M., 2005 Tex. App. LEXIS 4372 (Tex. App. Fort Worth June 9 2005).

116. Property an officer saw in plain view during an investigation appeared to be packaged in the same manner that illegal drugs were packaged, and the officer believed the bag contained cocaine; athough this belief was not required to be correct or more likely true than false in order to support probable cause under U.S. Const. amend. IV and Tex. Const. art. I, § 9, for purposes of the suppression hearing under Tex. Code Crim. Proc. Ann. art. 38.23, the trial court could have taken judicial notice that the property seized was cocaine based on the indictment before it, under Tex. R. Evid. 201. Cruz v. State, 2005 Tex. App. LEXIS 4250 (Tex. App. Corpus Christi June 2 2005).

117. In a tort suit following a motor vehicle collision that occurred on the shoulder of the highway, Tex. R. Evid. 201 did not require the trial court to instruct the jury on judicial notice. Tex. Transp. Code Ann. § 545.058 and its terms are legislative facts, rather than judicial facts. Perkins v. Delaney, 170 S.W.3d 136, 2005 Tex. App. LEXIS 4027 (Tex. App. Eastland 2005).

118. In a mother's appeal of the termination of her parental rights to one of her children, the court of appeals should not have taken judicial notice pursuant to Tex. R. Evid. 201(b) of expert testimony given by an expert of the State in criminal proceedings against the mother and her boyfriend for the death of another of her children that appeared to contradict the child's autopsy because the testimony concerned disputed facts and opinions. In re J.L., 163 S.W.3d 79, 2005 Tex. LEXIS 299, 48 Tex. Sup. Ct. J. 559 (Tex. 2005).

119. In a case of aggravated robbery with a deadly weapon, although the written plea admonishments were not offered into evidence, they were filed with the trial court and were properly before the trial court at the punishment hearing because the trial court could take judicial notice of its own records. Gaffney v. State, 2005 Tex. App. LEXIS 2738 (Tex. App. Fort Worth Apr. 7 2005).

120. Court agreed that an individual's action against a state workforce commission was timely filed under Tex. Lab. Code Ann. § 212.201(a), pursuant to Tex. R. Civ. P. 5; on the record before the court, it was established that the individual's petition was mailed on December 23, a holiday as the court noticed under Tex. R. Evid. 201(b), (c), and was received on December 26, and thus, the petition was timely filed under the mailbox rule. Jackson v. Tex. Workforce Comm'n, 2005 Tex. App. LEXIS 891 (Tex. App. Fort Worth Feb. 3 2005).

121. Because a company did not offer a record of a previous hearing into evidence, the trial court, which took judicial notice of the evidence, erred, and thus the resulting damage award was unsupported by the evidence. Paradigm Oil, Inc. v. Retamco Operating, Inc., 161 S.W.3d 531, 2004 Tex. App. LEXIS 11196, 167 Oil & Gas Rep. 227 (Tex. App. San Antonio 2004).

122. Trial judge's personal knowledge about flight prices and flight times within Texas was knowledge of facts of which the judge could not take judicial knowledge. In re A.C.S., 157 S.W.3d 9, 2004 Tex. App. LEXIS 11315 (Tex. App. Waco 2004).

123. Where a purported partner's failure to file a Tex. R. Civ. P. 93 verified denial of partnership was not brought to the trial court's attention, the trial court was not required to take judicial notice of it under Tex. R. Evid. 201(d) as an admission of partnership. Ball v. Smith, 150 S.W.3d 889, 2004 Tex. App. LEXIS 11025 (Tex. App. Dallas 2004).

124. Client failed to show that the trial court erred in not taking judicial notice of the records of his divorce because judicial notice of the client's divorce records could not be taken through reference to a publication containing the information, and for the client to have supplied the trial court with the necessary information to take judicial notice of the divorce records, the client must have presented those records to the trial court, which he did not do. Brown v. Brown, 145 S.W.3d 745, 2004 Tex. App. LEXIS 7892 (Tex. App. Dallas 2004).

125. Because the record in this case on its first appeal was relevant to the issues in the second appeal, the court took judicial notice of the record from the first appeal pursuant to Tex. R. Evid. 201. Raines v. Gomez, 143 S.W.3d 867, 2004 Tex. App. LEXIS 7605 (Tex. App. Texarkana 2004).

126. Court declined to take judicial notice of a particular fire guide because there were no Texas cases that recognized the methodology prescribed in the guide for arson investigations as a reliable methodology. Davis v. State, 147 S.W.3d 554, 2004 Tex. App. LEXIS 7756 (Tex. App. Waco 2004).

127. Trial court had the discretion to take judicial notice of a judgment in a different case pursuant to Tex. R. Evid. 201(c), (f); although the bank argued that the judgment was not offered in proper form, any error was waived pursuant to Tex. R. App. P. 33.1(a) because the bank failed to make the proper objection, and even if the trial court erred, the error probably did not cause an improper judgment or prevent the bank from properly presenting the case on appeal, pursuant to Tex. R. App. P. 44.1(a)(1), (2). First Commerce Bank v. J.V.3, Inc., 165 S.W.3d 366, 2004 Tex. App. LEXIS 7423 (Tex. App. Corpus Christi 2004).

128. Copy of the email correspondence appellant claimed was from appellees to the trial court that appellees intended for the judgment to be final as to their counterclaims was not accompanied by an affidavit, nor was it authenticated; appellees did not concede that the copy of the email was accurate, nor did they concede that it was ever sent, nor did the copy appear to fall within the category of facts that may be judicially noticed, such that the appellate court could not consider it for purposes of determining whether appellees intended for the judgment to be final as to their counterclaims. Lindsey v. Kline, 2004 Tex. App. LEXIS 6941 (Tex. App. Fort Worth July 29 2004).

129. Trial court erred in granting summary judgment pursuant to Tex. R. Civ. P. 166a(c) to appellee in appellant's personal injury action arising from a car accident, based on the trial court's determination that the action was barred by the limitations period of Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) because appellant had not exercised due diligence in serving appellee; the record indicated that appellant had met his burden of showing that he exercised due diligence in his continual efforts to have appellee served, and that appellee's attempt to have the court take judicial notice of a phone book page that listed her and her address, pursuant to Tex. R. Evid. 201, was insufficient to conclusively establish appellee's address and to show appellant's lack of diligence. Tranter v. Duemling, 129 S.W.3d 257, 2004 Tex. App. LEXIS 1912 (Tex. App. El Paso 2004).

130. Under Tex. R. Evid. 201(b) and (d), the appellate court properly denied a defendant's motion asking the court to take judicial notice of the complainant's age at the time of the offense based upon a computer print-out of the defendant's sex offender registration record because the victim's age was not generally known in the county and the accuracy of the online record could reasonably be questioned. Ex parte Alakayi, 102 S.W.3d 426, 2003 Tex. App. LEXIS 3135 (Tex. App. Houston 14th Dist. 2003).

131. Tex. R. Evid. 201 governs judicial notice of adjudicative facts. Watts v. State, 99 S.W.3d 604, 2003 Tex. Crim. App. LEXIS 58 (Tex. Crim. App. 2003).

132. Court order restricting media access to trial was proper when it took judicial notice not only of the emotional nature of issues in the case, but also the extensive media coverage, including numerous interviews with counsel for both sides in the media. In re Houston Chronicle Publ. Co., 64 S.W.3d 103, 2001 Tex. App. LEXIS 5300 (Tex. App. Houston 14th Dist. 2001).

133. Judicial notice is mandatory if requested by a party and the court is supplied with the necessary information; however, Tex. R. Evid. 201 governs only judicial notice of adjudicative facts. Adjudicative facts are those facts concerning the immediate parties; who did what, where, when, how, and with what motive or intent. Occidental Permian, Ltd. v. R.R. Comm'n, 47 S.W.3d 801, 2001 Tex. App. LEXIS 3583, 149 Oil & Gas Rep. 321 (Tex. App. Austin 2001).

134. Judicial notice is an exception to the normal requirements of proof, and a trial court may take judicial notice of an adjudicative fact if it is not subject to reasonable dispute. Althoff v. State, 2000 Tex. App. LEXIS 2679 (Tex. App. Dallas Apr. 25 2000).

Evidence : Judicial Notice : Adjudicative Facts : General Overview

135. Facts in the certificates of account status were relevant, in connection with a claim that a company could not affirmatively seek to enforce an arbitration clause by not meeting all franchise tax requirements under Tex. Tax Code Ann. § 171.253, and thus it was appropriate for the court to take judicial notice of the certificates from the Texas Comptroller. Dish Network L.L.C. v. Brenner, 2013 Tex. App. LEXIS 7838, 163 Lab. Cas. (CCH) P61367 (Tex. App. Corpus Christi June 27 2013).

136. In this termination case, the court presumed the trial court took judicial notice of its record without any request being made and without any announcement that it had done so, and certain case law was not inconsistent. In the Interest K.F., 402 S.W.3d 497, 2013 Tex. App. LEXIS 7461 (Tex. App. Houston 14th Dist. June 20 2013).

137. In this termination case, the mother claimed certain case law and Tex. R. Evid. 201(e) required the trial court to notify the parties that it was taking judicial notice of an order and give the parties the chance to challenge the decision, but the court found that neither case law nor the rule applied in this case; case law and Tex. R. Evid. 201(e) pertain to adjudicative facts rather than the mere existence of a document in a court's record, the trial court

here was not required to ascertain adjudicative facts, and the court presumed the trial court merely took judicial notice of the existence of the order. In the Interest K.F., 402 S.W.3d 497, 2013 Tex. App. LEXIS 7461 (Tex. App. Houston 14th Dist. June 20 2013).

138. Because the court could presume that the trial court took judicial notice of its own records, the evidence was sufficient to support a finding that the Texas Department of Family and Protective Services proved there was an order that established the actions the mother had to take to obtain the return of her children. In the Interest K.F., 402 S.W.3d 497, 2013 Tex. App. LEXIS 7461 (Tex. App. Houston 14th Dist. June 20 2013).

139. Mother failed to preserve for review her contention that the trial court abused its discretion by excluding a psychologist's report from evidence because she never offered the report into evidence and there was nothing in the record showing that she made an offer of proof or a bill of exception. The trial court did not err failing to sua sponte taking judicial notice of the report because the record was not part of the appellate record and therefore the court could not determine whether it would have met the requirements for an adjudicative fact. In the Interest of L.D.W., 2013 Tex. App. LEXIS 6195 (Tex. App. Houston 14th Dist. May 21 2013).

140. Trial court was free to examine its own prior orders that found that the child had been removed from the home for neglect or abuse, plus those findings were part of the record and the trial court was free to take judicial notice thereof; the findings that the child was removed for abuse or neglect were clear and convincing evidence of those points, a fact finder could have found that the mother did not comply with her service plan after the child was removed, and as the mother did not challenge any of the other elements to support termination under Tex. Fam. Code Ann. § 161.001(1)(O), the evidence was sufficient to support termination under this subsection. In re A.O., 2012 Tex. App. LEXIS 9373, 2012 WL 5507107 (Tex. App. San Antonio Nov. 14 2012).

141. Taking judicial notice of the court's records, the reporter's record and the clerk's record were filed on certain dates, and to the extent the petition for mandamus relief might be seeking an order requiring preparation of the record on appeal, the petition was moot. In re Garcia, 2012 Tex. App. LEXIS 8740, 2012 WL 5188050 (Tex. App. Corpus Christi Oct. 12 2012).

142. Appellee could not amend his first amended new trial motion because a witness's testimony was not available until one day after the deadline, and the State would not agree to a further amendment, but the trial court had judicial notice of the witness's testimony and found that the State's primary witness was not credible, plus the trial court had already found he had perjured himself; the court found no abuse of discretion on the trial court's part in granting appellee's first amended new trial motion in his capital murder case. State v. Matthews, 2012 Tex. App. LEXIS 7253 (Tex. App. Dallas Aug. 28 2012).

143. Appellate court presumed that the trial court took notice of its contempt order and considered it as evidence when deciding whether the employee had engaged in sanctionable conduct; accordingly, the appellate court rejected the employee's complaint that there was no evidence for the trial court to consider when deciding whether sanctions were warranted. Cognata v. Down Hole Injection, Inc., 375 S.W.3d 370, 2012 Tex. App. LEXIS 4827 (Tex. App. Houston 14th Dist. June 19 2012).

144. Trial court properly admitted its prior order incorporating a family service plan by judicial notice during closing argument in a parental rights termination case because the family service plan was incorporated in this order. Also, the plan was admitted at trial without objection. In the Interest of D.J.H., 2012 Tex. App. LEXIS 3638 (Tex. App. San Antonio May 9 2012).

145. Same judge who signed the order following a Tex. Fam. Code Ann. ch. 262 hearing also signed the termination decree, and while the judge did not state he was taking judicial notice of the order, which order was in

the record and ordered the mother to comply, the court presumed the judge took judicial notice in following the court's precedent. In the Interest of A.W.B., 2012 Tex. App. LEXIS 2362, 2012 WL 1048640 (Tex. App. Houston 14th Dist. Mar. 27 2012).

146. Regardless of whether the court presumed judicial notice of an order for purposes of Tex. Fam. Code Ann. § 262.201, there was sufficient evidence that the mother knew what was required by the plan and that her failure to comply was a ground for termination of her rights; thus, the evidence supported the finding that the mother failed to comply with the provisions of the order. In the Interest of A.W.B., 2012 Tex. App. LEXIS 2362, 2012 WL 1048640 (Tex. App. Houston 14th Dist. Mar. 27 2012).

147. Ex-husband filed an amended proposed property division, the trial court could take judicial notice of matters in its files, the division constituted sufficient evidence of the existence and value of an account, and there was no abuse of discretion by the trial court in relying on that unchallenged amount in making a valuation; furthermore, a valuation error would have reduced the ex-wife's share by less than one percentage point, and thus no error was shown that resulted in a manifestly unjust property division. Sias-Chinn v. Chinn, 2012 Tex. App. LEXIS 1687, 2012 WL 677496 (Tex. App. Austin Feb. 29 2012).

148. On the first day of the termination trial, the court took judicial notice of its prior orders in the case; in this circumstance, the trial court was entitled to take judicial notice of its own orders. In re J.T.G., 2012 Tex. App. LEXIS 430, 2012 WL 171012 (Tex. App. Houston 14th Dist. Jan. 19 2012).

149. Mother argued it was inappropriate for the court to take judicial notice of the affidavit supporting the original termination petition, but the court did not need to decide the issue because the substance of the affidavit that supported the original action was included in a report admitted at trial, and the mother did not claim that the trial court erred in admitting that report. In re J.T.G., 2012 Tex. App. LEXIS 430, 2012 WL 171012 (Tex. App. Houston 14th Dist. Jan. 19 2012).

150. In connection with appellant's conviction of possession with intent to deliver a controlled substance, the jury was not required to rely solely on the testimony of a scientist's about the aggregate weight of the bags in determining whether appellant was guilty of possessing four or more grams of methamphetamine, and the jury could have also considered the testimony of an informant that an officer asked to buy two ounces and the informant had conversations to arrange a meeting with appellant for that reason; the court took judicial notice for purposes of this appeal that one ounce equaled 28.349 grams, and the evidence showed that appellant contemplated a sale of methamphetamine that weighed more than 56 grams. Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

151. In this commitment proceeding, although the trial court could not properly take judicial notice of the truth of allegations contained within physician certificates, it was proper for the trial court to take notice of the file to show the certificates were part of the court's files, that the certificates were filed on a certain date, and that they were before the trial court at the hearing. State Ex Rel. S.W., 356 S.W.3d 576, 2011 Tex. App. LEXIS 9631 (Tex. App. Texarkana Dec. 9 2011).

152. For contempt purposes, the trial court might have had direct knowledge that a litigant failed to seek permission of the local administrative judge to file his petition if the trial court judge was the local administrative judge, but the county was served by two district courts, under Tex. Gov't Code Ann. §§ 24.166, 24.419, and the record did not show which judge was serving, and the court had no basis for which to take judicial notice. Johnson v. Clark, 2011 Tex. App. LEXIS 8593 (Tex. App. Amarillo Oct. 28 2011).

153. Appellant argued that the trial court improperly took judicial notice of the impact of geographical features on the value of real property, but he did not challenge the trial court's related findings. Wheeler v. Phillips, 2011 Tex. App. LEXIS 7402 (Tex. App. Austin Sept. 7 2011).

154. Evidence was sufficient to support the finding that the property was not susceptible to an equitable partition in kind under Tex. R. Civ. P. 761 and the trial court did not err in ordering the property partitioned by sale under Tex. R. Civ. P. 770, given that (1) the trial court found that there were multiple joint owners with various interests, (2) to the extent appellant challenged the trial court's judicial notice of the impact of geographical features on the value of the property, appellant's counsel agreed that frontage property was more valuable, (3) the value of the property was uncertain, and (4) although appellant claimed that the property was easily divisible and that he did not want to sell the property, the trial court's finding was not clearly wrong. Wheeler v. Phillips, 2011 Tex. App. LEXIS 7402 (Tex. App. Austin Sept. 7 2011).

155. Because an inmate's pleadings and an excerpt from his trial showed that the inmate and his counsel knew about the photographs in question, his Brady claim had no arguable basis in law; the court took judicial notice of a portion of counsel's closing argument in which he stated that it was true he did not subpoena the photographs in question. Reger v. Crim. Da, 2011 Tex. App. LEXIS 6413 (Tex. App. Fort Worth Aug. 11 2011).

156. There was no err by refusing initially to take judicial notice of the safety regulations and handbook, because they were not adjudicative facts, and when a fact was classified as legislative rather than adjudicative, judicial notice was discretionary. Schultz v. Lester, 2011 Tex. App. LEXIS 5866, 2011 WL 3211271 (Tex. App. Dallas July 29 2011).

157. In a termination of parental rights proceeding, the record contained the order that established the actions necessary for the mother to obtain return of her children because the trial court had taken judicial notice of the order requiring the mother to comply with the family service plan. In re R.W., 2011 Tex. App. LEXIS 4556 (Tex. App. Houston 1st Dist. June 16 2011).

158. Court in prior case noted that an inmate was a vexatious litigant, of which the court could take judicial notice. Douglas v. Porter, 2011 Tex. App. LEXIS 3068, 2011 WL 1601292 (Tex. App. Houston 14th Dist. Apr. 26 2011).

159. Evidence was legally insufficient to support a finding that a decedent's daughter, who had priority under Tex. Prob. Code Ann. § 77(d), (e), was unsuitable under Tex. Prob. Code Ann. § 78 to serve as successor administratrix based on reasons that had not been asserted by any interested party. Because Tex. R. Evid. 201(b) did not allow the trial court to take judicial notice of the entire case file, there was no evidence to support its conclusion that there was family discord, and appointing an attorney instead of the daughter did not reduce the estate's expenses under Tex. Prob. Code Ann. §§ 241, 242. Guyton v. Monteau, 332 S.W.3d 687, 2011 Tex. App. LEXIS 219 (Tex. App. Houston 14th Dist. Jan. 13 2011).

160. On appeal of defendant's conviction for evading arrest or detention using a vehicle, Tex. R. Evid. 201(b), (c), (f) authorized the Court of Appeals of Texas to take judicial notice for the first time on appeal of the location, direction, and trajectories of the streets described during the encounter. Griego v. State, 331 S.W.3d 815, 2011 Tex. App. LEXIS 204 (Tex. App. Amarillo Jan. 11 2011).

161. Copy of that 2008 turnover order was included in the record of a related appeal from the same trial-court cause involving the same parties; the court took judicial notice of that order. Bahar v. Lyon Fin. Servs., 330 S.W.3d 379, 2010 Tex. App. LEXIS 8872 (Tex. App. Austin Nov. 5 2010).

162. Letter was filed in the trial court during trial, it was part of the clerk's record, it was presented to the trial court, and a trial court could take judicial notice of its own documents even though no request was made, such that the trial court did not err in considering the letter. Dominion Okla. Tex. Exploration & Prod. v. Faulconer Energy Corp., 2010 Tex. App. LEXIS 7150, 2010 WL 3422454 (Tex. App. Corpus Christi Aug. 31 2010).

163. Defendant challenged as ineffective his counsel's request that the trial court to take judicial notice of its own file, but such was proper, and all of the information that the trial court noted from its files was duplicative of testimony, such that defendant could not show that but for counsel's request, the result of the proceeding would have been different. Gavin v. State, 404 S.W.3d 597, 2010 Tex. App. LEXIS 3862, 2010 WL 2025759 (Tex. App. Houston 1st Dist. May 20 2010).

164. Mother claimed there was no evidence of a court-ordered service plan because none was admitted in evidence, but the plan and order adopting the plan was filed in the trial court and found in the clerk's record and the court presumed that the trial court took judicial notice of its own files. In the Interest of A.X.A., 2009 Tex. App. LEXIS 9788, 2009 WL 5150068 (Tex. App. San Antonio Dec. 30 2009).

165. As a trial court did not take judicial notice pursuant to Tex. R. Evid. 201(c) of prior proceedings involving a mother and her children, and the Department of Family and Protective Services offered insufficient evidence to support the elements for termination of a mother's parental rights under Tex. Fam. Code Ann. § 161.001(1)(O), the decision could not stand; judicial notice could not be taken without affording the parties notice thereof and an opportunity to be heard pursuant to Rule 201(e). In re C.L., 304 S.W.3d 512, 2009 Tex. App. LEXIS 7994 (Tex. App. Waco Oct. 14 2009).

166. Court granted a motion for judicial notice in part as to a city charter because the citizen presented the same request to the trial court. Brock v. Tandy, 2009 Tex. App. LEXIS 3411 (Tex. App. Fort Worth May 14 2009).

167. Even if the court was to grant a citizen's motion for judicial notice as to a development code, which was not presented to the trial court, in light of the court's resolution with regard to the imputation of official dishonesty for libel purposes, the court did not need to address the argument that, although the mayor violated the code, she failed to show that backdating was a basis to remove her from her office as mayor. Brock v. Tandy, 2009 Tex. App. LEXIS 3411 (Tex. App. Fort Worth May 14 2009).

168. Trial court did not err in denying an ex-husband's motion for enforcement; the ex-husband had the burden of proof, the ex-wife generally denied the allegations, and the ex-husband generally complained that she did not let him see the children, but he did not offer any specifics, plus the trial court was free to accept the ex-wife's testimony and disregard that of the ex-husband and the items the ex-husband cited to in the clerk's record did not constitute evidence because they were not admitted as exhibits at trial or judicially noticed by the court. Siddiqui v. Siddiqui, 2009 Tex. App. LEXIS 1443, 2009 WL 508260 (Tex. App. Houston 14th Dist. Mar. 3 2009).

169. Ex-husband cited to the clerk's record in support of an argument regarding a legal fee award, but nothing in that record constituted evidence unless admitted at trial or judicially noticed, plus he did not assert any particular legal argument as a basis for overturning the award, and thus the court overruled this issue. Siddiqui v. Siddiqui, 2009 Tex. App. LEXIS 1443, 2009 WL 508260 (Tex. App. Houston 14th Dist. Mar. 3 2009).

170. Court agrees with those courts that hold that, unless the claim is one set forth in Tex. Civ. Prac. & Rem. Code Ann. § 38.001, the court may not take judicial notice that the usual and customary fees are reasonable but, rather, the party must offer legally and factually sufficient evidence on the issue, and because the judgment was based upon violations of the Texas Deceptive Trade Practices Act, this case was not a claim described in § 38.001 and the trial court abused its discretion when it awarded attorney's fees based only on judicial notice under Tex. Civ.

Prac. & Rem. Code Ann. §§ 38.003, 38.004; because an award of attorney fees was mandated under Tex. Bus. & Com. Code Ann. § 17.50(d), the proper action was to remand the issue of attorney fees to the trial court. Scott v. Spalding, 2009 Tex. App. LEXIS 628, 2009 WL 223459 (Tex. App. Eastland Jan. 30 2009).

171. In a will contest, an objector was not entitled to a new trial under Tex. R. App. P. 34.6(f) because he failed to show that a missing portion of a reporter's record was necessary to the resolution of an appeal; the trial court had not taken judicial notice of a common law marriage because it was a fact issue in dispute during the proceedings, and the fact that other parties referred to the objector and a decedent as married did not mean that the trial court had made a determination on that issue. In re Estate of Rabke, 2009 Tex. App. LEXIS 481, 2009 WL 196328 (Tex. App. San Antonio Jan. 28 2009).

172. Arbitration award could not be confirmed as provided in Tex. Civ. Prac. & Rem. Code Ann. § 171.087 because there was no evidence establishing the award; attaching the award documents to the petition did not make them admissible evidence, and the trial court's taking judicial notice of the contents of its file under Tex. R. Evid. 201 did not elevate averments to proof. Gruber v. CACV of Colo., LLC, 2008 Tex. App. LEXIS 2314 (Tex. App. Dallas Apr. 2 2008).

173. In a dispute involving a road, a trial court erred by taking judicial notice of prior court records since they were not attached to a motion for summary judgment; moreover, judicial notice could not have been taken of documents that were no longer in existence. Graff v. Berry, 2008 Tex. App. LEXIS 2069 (Tex. App. Texarkana Mar. 18 2008).

174. In a construction dispute, the trial court's review of the contract documents at a hearing on a motion to compel arbitration was proper and established the existence of a valid arbitration agreement. Northwest Constr. Co. v. Oak Partners, L.P., 248 S.W.3d 837, 2008 Tex. App. LEXIS 1734 (Tex. App. Fort Worth 2008).

175. Debtors and relatives did not request the trial court to take judicial notice of the evidence presented in the answer to the previous motion for summary judgment, nor did they incorporate that response or even refer to it, and even if the court found that it should review the entirety of depositions, which was questionable, they were not filed in response to the no-evidence motion and were not otherwise presented to the trial court, and thus summary judgment on those issues was properly rendered. Fears v. Texas Bank, 247 S.W.3d 729, 2008 Tex. App. LEXIS 851 (Tex. App. Texarkana 2008).

176. In proceedings to finalize a forfeiture of two bail bonds, judicial notice could be taken, under the common law, of both the judgments nisi and the bonds; because Tex. R. Evid. 101 indicates that proceedings regarding bail are not covered by the rules of evidence, judicial notice in such cases does not have to comply with Tex. R. Evid. 201, although Tex. Code Crim. Proc. Ann. art. 22.10 provides that civil rules govern all proceedings in the trial court in a bond-forfeiture case following a judgment nisi. Kubosh v. State, 241 S.W.3d 60, 2007 Tex. Crim. App. LEXIS 1563 (Tex. Crim. App. 2007).

177. Defendant failed to preserve the right to question a prosecutor's qualifications under Tex. Const. art. XVI, § 1 on direct appeal where there was no evidence in the appellate record to support defendant's allegations until defendant tendered four exhibits to the court of appeals and asked that court to take judicial notice of those documents as proof of allegations that he raised for the first time on direct appeal. Davis v. State, 227 S.W.3d 733, 2007 Tex. Crim. App. LEXIS 864 (Tex. Crim. App. 2007).

178. For purposes of Tex. Civ. Prac. & Rem. Code Ann. § 38.003, the proceeding was before the trial court, and although it did not state that it was taking judicial notice of customary fees, the court presumed that it did, and the customers' counsel testified to his attorney fees; the company did not present any contrary evidence indicating that the fees charged were excessive or unreasonable and thus the evidence was sufficient to support the award of

attorney fees. D'Lux Movers & Storage v. Fulton, 2007 Tex. App. LEXIS 3430 (Tex. App. Fort Worth May 3 2007).

179. Appellate court refused to take judicial notice that a purported signature on a will was not genuine or could not have been procured in the absence of undue influence because this fact was not generally known in the community or capable of accurate and ready determination by resort to sources whose accuracy could not have been reasonably questioned. Fletcher v. Harris, 2007 Tex. App. LEXIS 2961 (Tex. App. Houston 14th Dist. Apr. 19 2007).

180. Evidence was factually insufficient to support an order authorizing the administration of psychoactive medication because the State failed to prove that the patient was under a court order to receive inpatient mental health services; although judicial notice could be taken pursuant to Tex. R. Evid. 201(b), Tex. Health & Safety Code Ann. § 574.031(e) of the fact that the application was made, the application did not contain facts showing that the patient was under a court order. In re C.S., 208 S.W.3d 77, 2006 Tex. App. LEXIS 8873 (Tex. App. Fort Worth 2006).

181. Rules pertaining to custodial interrogations are not extended to information not received from investigative questioning and information that is not incriminating; therefore, a trial court did not err when it took judicial notice of the fact that defendant was married to a particular person in a burglary case because this information was merely provided in an indigency affidavit. Britt v. State, 2006 Tex. App. LEXIS 4982 (Tex. App. Fort Worth June 8 2006).

182. Trial court's decision to take judicial notice of defendant's date of birth was not an error preserved for review because the complaint made on appeal did not comport with the complaint made in the trial court; defendant contended for the first time on appeal that the admission of such evidence violated his right against self-incrimination. Britt v. State, 2006 Tex. App. LEXIS 4982 (Tex. App. Fort Worth June 8 2006).

Evidence : Judicial Notice : Adjudicative Facts : Facts Generally Known

183. Evidence illustrated that defendant's blood was drawn by a registered nurse at a medical center and the court could take judicial notice that the medical center was a hospital, which was a sanitary place within the contemplation of Tex. Transp. Code Ann. § 724.017(a), and thus the record supported the trial court's decision to overrule defendant's motion to suppress filed in his felony driving while intoxicated trial. Jimenez v. State, 2008 Tex. App. LEXIS 3376 (Tex. App. Amarillo May 8 2008).

184. It was appropriate to take judicial notice under Tex. R. Evid. 201 that a judge named as respondent in a mandamus proceeding had resigned, and consequently Tex. R. App. P. 7 required the substitution of his successor as respondent and the abatement of the mandamus proceeding to allow the newly appointed judge to consider the pleadings. In re Newby, 280 S.W.3d 298, 2008 Tex. App. LEXIS 2685 (Tex. App. Amarillo 2008).

Evidence : Judicial Notice : Adjudicative Facts : Proceedings in Other Courts

185. In a termination of parental rights case, it was improper to take judicial notice of prior testimony, evidence, and factual assertions from earlier hearings and from the court's files because the evidence was not notorious or verifiable and was not admitted into evidence at the termination trial. B. L. M. v. J. H. M., 2014 Tex. App. LEXIS 7707 (Tex. App. Austin July 17 2014).

186. Judicial notice of a federal trial court's orders, which constituted adjudicative facts, was permissible in an appeal from a turnover order. D&m Marine v. Turner, 409 S.W.3d 853, 2013 Tex. App. LEXIS 10374 (Tex. App. Fort Worth Aug. 15 2013).

187. In a tenant's suit against her landlord for repairs and judicial remedies, the trial court erred by sua sponte dismissing the case on grounds of res judicata and collateral estoppel; it could not take judicial notice of the evidence from the prior proceedings without admitting it into evidence at the hearing. Holmes v. Jaafreh, 2013 Tex. App. LEXIS 6648 (Tex. App. Waco May 30 2013).

188. Trial court could have found that (1) the inmate did not have a reasonable probability of prevailing on his professional negligence claim against his attorney, as he did not offer evidence of a duty and recovery was barred in the absence of exoneration from his conviction, and (2) the inmate had a long history of starting baseless litigation, and the trial court was free to take judicial notice of other cases decided adversely to appellant, as well as cases that had been issued since the earlier order was entered; the record supported a finding that in seven years, the inmate maintained at least five lawsuits that were finally determined adverse to him, and he repeatedly relitigated the same case against others in cases that had finally been determined, and thus there was sufficient evidence to support a finding under Tex. Civ. Prac. & Rem. Code Ann. § 11.054. Douglas v. Redmond, 2012 Tex. App. LEXIS 9712, 2012 WL 5921200 (Tex. App. Houston 14th Dist. Nov. 27 2012).

189. Neither oral nor written admonishments were given to appellant concerning the deportation possibility, and notwithstanding that the record did not address citizenship, the court took judicial notice of the record in his prior appeal, where his mother testified he was a United States citizen, to establish such; the court had a fair assurance that appellant's substantial rights were not affected by the trial court's error in failing admonish him under Tex. Code Crim. Proc. Ann. art. 26.13(a)(4). Hernandez v. State, 2012 Tex. App. LEXIS 7020, 2012 WL 3600192 (Tex. App. Amarillo Aug. 22 2012).

190. Trial court did not abuse its discretion when it revoked defendant's community supervision because the evidence was sufficient to prove that he committed the offense of possession of a controlled substance. Although the State asked the trial court to take judicial notice of the judgment of conviction, the judge inferentially took judicial notice of the evidence in the possession case over which she presided and found defendant committed the offense of possession of a controlled substance. Adams v. State, 2012 Tex. App. LEXIS 6022, 2012 WL 3025917 (Tex. App. El Paso July 25 2012).

191. In a community supervision revocation proceeding, the trial court did not err in finding that defendant committed the offense of possession of a controlled substance because the trial court took judicial notice of the evidence in the possession case over which she had presided. Adams v. State, 2012 Tex. App. LEXIS 6021, 2012 WL 3025921 (Tex. App. El Paso July 25 2012).

192. Although the trial court took judicial notice of appellant's acquittal on the possession charge, she did not produce evidence that her charges stemmed from the same cocaine, and thus no juror could have found that the State was prosecuting appellant for having the same cocaine she was previously found not guilty as to possession; as there was no evidence in support of her plea, the trial court did not err in failing to submit it to the jury. Bussey v. State, 2012 Tex. App. LEXIS 1505, 2012 WL 626316 (Tex. App. Houston 14th Dist. Jan. 3 2012).

193. In a mandamus petition, relator asked the appellate court to order the trial court to grant his motion for judgment nunc pro tunc to correctly credit relator with actual time served for which no credit was given. Because a previous petition was filed by relator based on the same facts giving rise to this petition, the appellate court was permitted to take judicial notice of the exhibits previously provided to the court. In re Bledsoe, 2011 Tex. App. LEXIS 2599 (Tex. App. Texarkana Apr. 8 2011).

194. Because prior adjudications were from the same court and involved appellant, counsel's continued objection to the judicial notice under Tex. R. Evid. 201(b) would most likely have been futile, and counsel was not ineffective for failing to make futile objections. Morales v. State, 2010 Tex. App. LEXIS 10049, 2010 WL 5141838 (Tex. App.

Dallas Dec. 20 2010).

195. Appellant did not cite authority indicating that the State failed to establish a proper foundation for judicial notice under Tex. R. Evid. 201(b) of his prior adjudications and error was not shown. Morales v. State, 2010 Tex. App. LEXIS 10049, 2010 WL 5141838 (Tex. App. Dallas Dec. 20 2010).

196. Court assumed without deciding that a deficiency in the record could make the factual basis of a claim unavailable for purposes of Tex. Code Crim. Proc. Ann. art. 11.072, § 9(c), and even assuming that the trial court was authorized to grant relief under appellant's attempted actual innocence claim, the trial court did not abuse its discretion by denying relief because the evidence at the plea hearing met the requirements of Tex. Code Crim. Proc. Ann. art. 42.12, § 5 to substantiate guilt, and the habeas record in no way established appellant's actual innocence; the court took judicial notice of the clerk's record on direct appeal, and noted that appellant's written judicial confession, for purposes of Tex. Code Crim. Proc. Ann. art. 1.15, included his statements that he committed the allegation in the indictment. Ex Parte Jessep, 2010 Tex. App. LEXIS 8845 (Tex. App. Amarillo Nov. 4 2010).

197. Entered under Tex. R. Evid. 201, a certified copy of a 2006 decree terminating the mother's rights to another child based on the finding that she endangered the child was admitted into evidence, for purposes of Tex. Fam. Code Ann. § 161.001(1)(M); this evidence was legally and factually sufficient to support the trial court's finding of termination based on this section. In the Interest of R.S., 2009 Tex. App. LEXIS 7632, 2009 WL 3191515 (Tex. App. Houston 14th Dist. Oct. 1 2009).

198. In connection with an inmate's previous motion for DNA testing, a laboratory letter and a record of the trial court's reliance on it were contained within the court's records; the court presumed that the trial court relied on the evidence of the nonexistence of testable materials in denying the inmate's motion for further DNA testing and the court took judicial notice of the content of the letter and record in the court's determination. Jacobs v. State, 294 S.W.3d 192, 2009 Tex. App. LEXIS 6145 (Tex. App. Texarkana Aug. 7 2009).

199. From defendant's murder conviction, the trial court's granting of the forfeiture of defendant's vehicle as contraband under Tex. Code Crim. Proc. Ann. art. 59.01(2) was reversed as the trial court erred when it took judicial notice of prior testimony without admitting a transcript of it into evidence in the forfeiture proceeding as required by Tex. R. Evid. 201; there was no evidence that created even a mere surmise or suspicion of a nexus between the illegal activity and the seized vehicle. Davis v. State, 293 S.W.3d 794, 2009 Tex. App. LEXIS 5493 (Tex. App. Waco July 15 2009).

200. In resolving a dispute, the court took judicial notice of two of its prior opinions stemming from different phases of the same litigation. Kachar v. Harris County Attys., 2009 Tex. App. LEXIS 3161, 2009 WL 1270288 (Tex. App. Houston 1st Dist. May 7 2009).

201. Trial court was not free to take judicial notice from a previous proceeding at a subsequent proceeding unless the testimony was admitted into evidence at the subsequent proceeding. Augillard v. Madura, 257 S.W.3d 494, 2008 Tex. App. LEXIS 4552 (Tex. App. Austin 2008).

202. Because the same trial judge presided over both the trial of the subsequent cause and defendant's revocation hearing, the trial court acted within its discretion in taking judicial notice of the record in the subsequent cause and considering it in deciding whether to adjudicate defendant's guilt, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). Rivera v. State, 2008 Tex. App. LEXIS 4389 (Tex. App. Houston 1st Dist. June 5 2008).

203. It was not an abuse of discretion for the district court to take judicial notice of the finality of defendant's 1982 conviction for aggravated robbery because the State presented the district court with evidence of a conviction that had occurred 23 years earlier, there was nothing in the evidence presented to indicate that the conviction was not final, and defendant presented no evidence to overcome the presumption of finality. Figueroa v. State, 250 S.W.3d 490, 2008 Tex. App. LEXIS 2028 (Tex. App. Austin 2008).

204. Trial court did not conduct a hearing outside the presence of the jury, for purposes of Tex. R. Evid. 702, to determine whether the State had established that an ignition interlock device met the requirements of case law, and the court did not find any authority establishing that any court had found the reliability of the ignition interlock device, and thus the trial court was not able to take judicial notice of the evidence; had the trial court previously conducted numerous gatekeeping hearings on this issue and repeatedly found evidence of the use of ignition interlock device scientifically reliable, then the trial court or the State could have put that in the record along with materials from those previous hearings. Brock v. State, 2007 Tex. App. LEXIS 8689 (Tex. App. Fort Worth Nov. 1 2007).

205. Trial court erred in failing to hold a gatekeeper hearing because the ignition interlock evidence was scientific in nature, however, the error did not require reversal under Tex. R. App. P. 44.2(b) because (1) the evidence was merely cumulative, and (2) even without the evidence, defendant was still not a suitable candidate for community supervision as there was sufficient evidence to support her felony driving while intoxicated conviction and her eight-year prison term rather than community supervision, given that (1) she narrowly missed hitting someone, (2) her blood alcohol content was four times the legal limit, and (3) she refused to take responsibility for her repeated offenses. Brock v. State, 2007 Tex. App. LEXIS 8689 (Tex. App. Fort Worth Nov. 1 2007).

206. Court found that identity was not an issue in the inmate's case, for purposes of Tex. Code Crim. Proc. Ann. art. 64.03(a)(1)(B), and in the absence of factual allegations that, if true, would have supported the finding required by the statute, the court was unable to say that the trial court erred in denying the inmate's motion; furthermore, assuming the trial court took judicial notice of the underlying aggravated sexual assault trial, the evidence supported the conclusion that identity was not an issue, although the victim did not directly identify the inmate, given that (1) the victim said her attacker fell asleep on her couch after the assault, (2) officers found the inmate sleeping there a short time later, (3) the inmate had blood on him and the victim was bleeding after the attack, and (4) the inmate had a knife and the victim said her attacker had a knife. McAfee v. State, 2007 Tex. App. LEXIS 940 (Tex. App. Eastland Feb. 8 2007).

207. Where defendant was convicted of aggravated assault with a deadly weapon, he filed an affidavit of indigence and a motion requesting a free copy of the reporter's record on appeal; the trial court took judicial notice of the fact that defendant was assessed a $ 5,000 fine in the underlying criminal conviction with the understanding that he had the means to pay the fine. Howard v. State, 2006 Tex. App. LEXIS 3900 (Tex. App. San Antonio May 10 2006).

Evidence : Judicial Notice : Adjudicative Facts : Public Records

208. Where a creditor obtained a judgment against a constable and an insurance company regarding the constable's duty with respect to a writ of execution and the insurance company filed a resticted appeal, even if the constable's bond was a public record and an appropriate subject for judicial notice, there was no evidence in the record that the insurance company was the surety on the constable's bond since, inter alia, the record did not contain the bond. Dupree v. KingVision Pay-Per-View, Ltd., 219 S.W.3d 602, 2007 Tex. App. LEXIS 2676 (Tex. App. Dallas 2007).

Evidence : Judicial Notice : Adjudicative Facts : Verifiable Facts

209. Court takes judicial notice that Lamar County has a population of 49,793 according to the 2010 census; however, Tex. Transp. Code Ann. § 281.003 did not affect roads impliedly dedicated to public use before the effective date of the statute, and thus appellees had to show that the road in question had been impliedly dedicated by appellants as a county road of the county prior to August 31, 1981. Mitchell v. Ballard, 420 S.W.3d 122, 2012 Tex. App. LEXIS 8585, 2012 WL 4840812 (Tex. App. Texarkana Oct. 12 2012).

210. In a dispute regarding interests in gas wells, judicial notice could be taken pursuant to Tex. R. Evid. 201 of the postjudgment interest rate under former Tex. Fin. Code Ann. § 304.003, resulting in a determination that the trial court correctly set the postjudgment interest rate. Griffin v. Long, 442 S.W.3d 380, 2011 Tex. App. LEXIS 8910, 2011 WL 5545942 (Tex. App. Tyler Nov. 9 2011).

211. Of facts concerning a pro bono pilot program, the court took judicial notice on its own initiative. Eggers v. Van Zandt, 2011 Tex. App. LEXIS 6479, 2011 WL 3568943 (Tex. App. Amarillo Aug. 15 2011).

212. If one believed the State's version of events, appellant possessed cocaine at the Williamson County jail, and there was no evidence that this jail was anywhere other than Williamson County, such that venue was established; to the extent necessary, the court took judicial notice of the fact that the Williamson County jail was in Williamson County. Perez v. State, 2011 Tex. App. LEXIS 6368, 2011 WL 3518047 (Tex. App. Austin Aug. 12 2011).

213. In a forcible detainer action, taking judicial notice pursuant to Tex. R. Evid. 201(b)(2) of a bankruptcy court's order that annulled its stay to validate a foreclosure sale led to the conclusion that the foreclosure sale was not invalid because of the bankruptcy stay. Ramey v. Bank of N.Y., 2010 Tex. App. LEXIS 5727 (Tex. App. Houston 14th Dist. July 22 2010).

214. New trial on punishment was necessary in a Tex. Penal Code Ann. § 19.03 capital murder case because a prosecution witness incorrectly testified that an inmate sentenced to life without parole might become eligible for a less restrictive prison classification status. The State conceded federal constitutional error, and the court, taking judicial notice pursuant to Tex. R. Evid. 201(b)-(d) of a regulation that prohibited such reclassification, found it probable that the death sentence was based upon the incorrect testimony. Estrada v. State, 313 S.W.3d 274, 2010 Tex. Crim. App. LEXIS 722 (Tex. Crim. App. 2010).

215. Political party affiliation of a candidate for local office was a proper subject for judicial notice under Tex. R. Evid. 201(b)(2). In re Baker, 404 S.W.3d 575, 2010 Tex. App. LEXIS 1426 (Tex. App. Houston 1st Dist. Feb. 25 2010).

216. In a drug case, counsel was not ineffective for not making objections to an officer's testimony regarding the GPS measurement to the school because counsel testified that there had been a measurement done with a roller measurer that was evidence at trial showing that the distance was less than a 1,000 feet. Additionally, the court of appeals took judicial notice of the fact that the school was less than 1,000 feet from the location of the drug transaction. Jackson v. State, 2009 Tex. App. LEXIS 5997, 2009 WL 2372973 (Tex. App. Eastland July 30 2009).

217. Evidence was sufficient so sustain defendant's arson conviction because it was not necessary that the State present evidence to prove that Corpus Christi was incorporated. The court of appeals took judicial notice that Corpus Christi was an incorporated city Rios v. State, 2008 Tex. App. LEXIS 6524 (Tex. App. Corpus Christi Aug. 26, 2008).

218. Under Tex. R. Evid. 201, the trial court was not required to take judicial notice of the location of Hurricane Emily on July 18, 2005 and related evacuations, even though those facts could be facts subject to judicial notice,

because defendant provided nothing that could serve as a reliable source to support an accurate and ready determination. Tidwell v. State, 2007 Tex. App. LEXIS 3507 (Tex. App. Texarkana May 9 2007).

219. In a paternity case, a motion for new trial, although filed more than 30 calendar days after entry of a default judgment, was timely; taking judicial notice under Tex. R. Evid. 201(b) of the fact that the courthouse was closed for a hurricane evacuation, which was the equivalent of a legal holiday under Tex. R. Civ. P. 4, meant that the motion was timely filed within the 30-day period of Tex. R. Civ. P. 329b(a). Garcia v. Vera, 2006 Tex. App. LEXIS 8701 (Tex. App. Houston 1st Dist. Oct. 5 2006).

220. In delinquency proceedings, an employee of the juvenile detention facility in Post, Texas, testified that while he was working he saw appellant strike another resident on the head; Tex. R. Evid. 201 permitted the court may take judicial notice that Post was the county seat of Garza County, Texas; the evidence was sufficient to prove venue in Garza County. In re E.H., 2006 Tex. App. LEXIS 4310 (Tex. App. Fort Worth May 18 2006).

Evidence : Judicial Notice : Domestic Laws

221. Court granted a citizen's motion to take judicial notice of a city charter because he presented some this same request to the trial court, but the court denied the motion otherwise; even if the court were to grant the motion as to the development code, which was not presented to the trial court, given the court's finding that the citizen's advertisement appeared to impeach a mayor's honesty or reputation for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 73.001, the court did not need to address the argument that, although the mayor allegedly violated the code, she failed to show that backdating was a basis to remove her from office, for purposes of Tex. Penal Code Ann. § 37.10(a)(1)-(3), (c)(1). Brock v. Tandy, 2009 Tex. App. LEXIS 5171, 2009 WL 1905130 (Tex. App. Fort Worth July 2 2009).

Evidence : Judicial Notice : Laws of Foreign States

222. In a breach of contract case, trial attorney's fees should have been awarded because a manufacturer failed to request that the trial court take judicial notice of Michigan law until it was too late, the fees were not precluded by a limitation-of-damages provision in a contract, and a failure to segregate attorney's fees did not preclude recovery of all attorney's fees. There was no argument that the requirements of Tex. Civ. Prac. & Rem. Code Ann. §§ 38.001, 38.002 were not met. Daimlerchrysler Motors Co., Llc v. Manuel, 362 S.W.3d 160, 2012 Tex. App. LEXIS 1489 (Tex. App. Fort Worth Feb. 24 2012).

223. Under Tex. R. Evid. 202, the court took judicial notice of the laws of various other jurisdictions as per a party's request, but such was immaterial because the court disposed of the party's complaints under Texas law. In re B.G., 2006 Tex. App. LEXIS 5026 (Tex. App. Houston 14th Dist. June 13 2006).

Evidence : Judicial Notice : Scientific & Technical Facts

224. Although defendant originally objected to the trial court taking judicial notice of evidence including a certificate of a drug analysis laboratory report, defendant conceded that the legislature had authorized this method of admitting laboratory analysis of physical evidence. Ray v. State, 2008 Tex. App. LEXIS 3295 (Tex. App. Dallas May 8 2008).

225. On appeal of the trial court's decision granting the defendant's motion in limine to prohibit expert testimony relating to the Horizontal Gaze Nystagmus (HGN) test, the appellate court could not take judicial notice of scientific articles offered by the State concerning reliability of the HGN test results; judicial notice on appeal cannot serve as the sole source of support for a bare trial court record concerning scientific reliability. State v. Trinidad, 2006 Tex.

App. LEXIS 8180 (Tex. App. San Antonio Sept. 13 2006).

226. It could not be concluded on appeal that the trial court abused its discretion by refusing to take judicial notice of the National Highway Transportation and Safety Administration instructor's manual because the manual was not part of the record from the trial court. Hartman v. State, 198 S.W.3d 829, 2006 Tex. App. LEXIS 6869 (Tex. App. Corpus Christi 2006).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

227. Because the surety never objected to the trial court taking judicial notice of its file and the prior proceedings, he failed to preserve his contention for review; the State introduced both the bond and judgment nisi into evidence without any objection from the surety and took judicial notice as requested. Baeza v. State, 2004 Tex. App. LEXIS 3426 (Tex. App. El Paso Apr. 15 2004).

Evidence : Procedural Considerations : Rule Application & Interpretation

228. In a bond reduction hearing where defendant was charged with two aggravated sexual assault of a child offenses, the trial judge was permitted to take judicial notice of the evidence presented in defendant's previous sexual assault trial involving the same victim; the same judge presided over both cases. The Texas Rules of Evidence do not apply to bond reduction hearings. Ex parte Bratcher, 2005 Tex. App. LEXIS 5418 (Tex. App. Dallas July 13 2005).

Evidence : Procedural Considerations : Weight & Sufficiency

229. Evidence was legally insufficient to support a finding that a decedent's daughter, who had priority under Tex. Prob. Code Ann. § 77(d), (e), was unsuitable under Tex. Prob. Code Ann. § 78 to serve as successor administratrix based on reasons that had not been asserted by any interested party. Because Tex. R. Evid. 201(b) did not allow the trial court to take judicial notice of the entire case file, there was no evidence to support its conclusion that there was family discord, and appointing an attorney instead of the daughter did not reduce the estate's expenses under Tex. Prob. Code Ann. §§ 241, 242. Guyton v. Monteau, 332 S.W.3d 687, 2011 Tex. App. LEXIS 219 (Tex. App. Houston 14th Dist. Jan. 13 2011).

230. In delinquency proceedings, an employee of the juvenile detention facility in Post, Texas, testified that while he was working he saw appellant strike another resident on the head; Tex. R. Evid. 201 permitted the court may take judicial notice that Post was the county seat of Garza County, Texas; the evidence was sufficient to prove venue in Garza County. In re E.H., 2006 Tex. App. LEXIS 4310 (Tex. App. Fort Worth May 18 2006).

Evidence : Relevance : Relevant Evidence

231. In defendant's sexual assault case, a court did not err by taking judicial notice of defendant's birth date where the alleged discrepancy regarding defendant's date of birth was not reflected in the appellate record, and as to the age difference, the victim testified without objection that she was 14 years old and that defendant told her he was 35 years old. The jury could also draw its own conclusions from the appearance of the victim and defendant in the courtroom. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

Evidence : Scientific Evidence : Blood & Bodily Fluids

232. In an aggravated assault case, because blood spatter analysis was subject to judicial notice and the State proved the proper application of blood spatter analysis, the trial court did not err in admitting the State's testimony on the issue of blood spatter analysis. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

233. Texas takes judicial notice of the validity of blood spatter analysis; the State is not required to produce evidence on the first two criteria of Kelly. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

Evidence : Scientific Evidence : Sobriety Tests

234. On appeal of the trial court's decision granting the defendant's motion in limine to prohibit expert testimony relating to the Horizontal Gaze Nystagmus (HGN) test, the appellate court could not take judicial notice of scientific articles offered by the State concerning reliability of the HGN test results; judicial notice on appeal cannot serve as the sole source of support for a bare trial court record concerning scientific reliability. State v. Trinidad, 2006 Tex. App. LEXIS 8180 (Tex. App. San Antonio Sept. 13 2006).

Evidence : Testimony : Experts : Criminal Trials

235. In an aggravated assault case, because blood spatter analysis was subject to judicial notice and the State proved the proper application of blood spatter analysis, the trial court did not err in admitting the State's testimony on the issue of blood spatter analysis. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

236. Texas takes judicial notice of the validity of blood spatter analysis; the State is not required to produce evidence on the first two criteria of Kelly. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

Family Law : Parental Duties & Rights : Termination of Rights : General Overview

237. In a mother's appeal of the termination of her parental rights to one of her children, the court of appeals should not have taken judicial notice pursuant to Tex. R. Evid. 201(b) of expert testimony given by an expert of the State in criminal proceedings against the mother and her boyfriend for the death of another of her children that appeared to contradict the child's autopsy because the testimony concerned disputed facts and opinions. In re J.L., 163 S.W.3d 79, 2005 Tex. LEXIS 299, 48 Tex. Sup. Ct. J. 559 (Tex. 2005).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview

238. As a trial court did not take judicial notice pursuant to Tex. R. Evid. 201(c) of prior proceedings involving a mother and her children, and the Department of Family and Protective Services offered insufficient evidence to support the elements for termination of a mother's parental rights under Tex. Fam. Code Ann. § 161.001(1)(O), the decision could not stand; judicial notice could not be taken without affording the parties notice thereof and an opportunity to be heard pursuant to Rule 201(e). In re C.L., 304 S.W.3d 512, 2009 Tex. App. LEXIS 7994 (Tex. App. Waco Oct. 14 2009).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

239. In determining the evidentiary sufficiency for a termination of parental rights, the court of appeals declined to consider documents filed in the clerk's record, which included statements about the children's living conditions with

their aunt and details about the aunt's intellect. Although the trial court had taken judicial notice of its file, a court could not take judicial notice of the truth of allegations in the record. Rios v. Tex. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 5724, 2012 WL 2989237 (Tex. App. Austin July 11 2012).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Reunification Plans

240. Trial court properly admitted its prior order incorporating a family service plan by judicial notice during closing argument in a parental rights termination case because the family service plan was incorporated in this order. Also, the plan was admitted at trial without objection. In the Interest of D.J.H., 2012 Tex. App. LEXIS 3638 (Tex. App. San Antonio May 9 2012).

Healthcare Law : Treatment : Incompetent, Minor & Mentally Disabled Patients : General Overview

241. Evidence was factually insufficient to support an order authorizing the administration of psychoactive medication because the State failed to prove that the patient was under a court order to receive inpatient mental health services; although judicial notice could be taken pursuant to Tex. R. Evid. 201(b), Tex. Health & Safety Code Ann. § 574.031(e) of the fact that the application was made, the application did not contain facts showing that the patient was under a court order. In re C.S., 208 S.W.3d 77, 2006 Tex. App. LEXIS 8873 (Tex. App. Fort Worth 2006).

Real Property Law : Landlord & Tenant : Tenant's Remedies & Rights : General Overview

242. In a tenant's suit against her landlord for repairs and judicial remedies, the trial court erred by sua sponte dismissing the case on grounds of res judicata and collateral estoppel; it could not take judicial notice of the evidence from the prior proceedings without admitting it into evidence at the hearing. Holmes v. Jaafreh, 2013 Tex. App. LEXIS 6648 (Tex. App. Waco May 30 2013).

Real Property Law : Restrictive Covenants : General Overview

243. Texas Court of Appeals was uncertain that the fact sheet should have been given judicial notice under either Tex. R. Evid. 201 or Rule 202 because there was no indication in the fact sheet that the FCC intended for the 47 C.F.R. § 1.4000(a)(3)'s limitation on the availability of attorney's fees to apply only when a restriction is held invalid. The fact sheet does not discuss the attorney's fees provision in any respect. River Oaks Place Council of Co-Owners v. Daly, 172 S.W.3d 314, 2005 Tex. App. LEXIS 7154 (Tex. App. Corpus Christi 2005).

Transportation Law : Private Vehicles : Traffic Regulation : General Overview

244. In a tort suit following a motor vehicle collision that occurred on the shoulder of the highway, Tex. R. Evid. 201 did not require the trial court to instruct the jury on judicial notice. Tex. Transp. Code Ann. § 545.058 and its terms are legislative facts, rather than judicial facts. Perkins v. Delaney, 170 S.W.3d 136, 2005 Tex. App. LEXIS 4027 (Tex. App. Eastland 2005).

Workers' Compensation & SSDI : Third Party Actions : Third Party Liability

245. Reviewing court took judicial notice of administrative decisions regarding the sufficiency of insurers' explanation of benefits to hospitals in workers' compensation medical-fee disputes. Vista Med. Ctr. Hosp. v. Tex. Mut. INS. Co., 2013 Tex. App. LEXIS 6853 (Tex. App. Austin June 6 2013).

End of Document

Tex. Evid. R. 202

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 202 Judicial Notice of Other States' Law

(a) ***Scope.***--This rule governs judicial notice of another state's, territory's, or federal jurisdiction's:

-- Constitution;

-- public statutes;

-- rules;

-- regulations;

-- ordinances;

-- court decisions; and

-- common law.

(b) ***Taking Notice.***--The court:

(1)may take judicial notice on its own; or

(2)must take judicial notice if a party requests it and the court is supplied with the necessary information.

(c) ***Notice and Opportunity to Be Heard.***

(1) ***Notice.***--The court may require a party requesting judicial notice to notify all other parties of the request so they may respond to it.

(2) ***Opportunity to Be Heard.***--On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the matter to be noticed. If the court takes judicial notice before a party has been notified, the party, on request, is still entitled to be heard.

(d) ***Timing.***--The court may take judicial notice at any stage of the proceeding.

(e) ***Determination and Review.***--The court - not the jury - must determine the law of another state, territory, or federal jurisdiction. The court's determination must be treated as a ruling on a question of law.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 20, *Presentation of Evidence*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Case Notes

Civil Procedure : Federal & State Interrelationships : Choice of Law : General Overview
Civil Procedure : Alternative Dispute Resolution : Arbitrations : General Overview
Civil Procedure : Pretrial Matters : Continuances
Civil Procedure : Remedies : Costs & Attorney Fees : General Overview
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview
Evidence : Judicial Notice : General Overview
Evidence : Judicial Notice : Domestic Laws
Evidence : Judicial Notice : Laws of Foreign States
Real Property Law : Restrictive Covenants : General Overview

LexisNexis (R) Notes

Civil Procedure : Federal & State Interrelationships : Choice of Law : General Overview

1. In an action for breach of contract, breach of fiduciary duty, fraud and related claims, the underlying agreement provided that all legal proceedings would be governed by the laws of the State of Delaware. Because neither party argued that Delaware law differed substantially from Texas law, the Court of Appeals of Texas presumed according to Tex. R. Evid. 202 that the law of Delaware was identical to Texas law for purposes of resolving an arbitration dispute. Continuum Health Servs., Llc v. Cross, 2012 Tex. App. LEXIS 9566, 2012 WL 5845367 (Tex. App. Dallas Nov. 19 2012).

2. Appellant filed a Tex. R. Evid. 202 motion that identified the conflict between Texas and Wisconsin, plus appellant submitted an affidavit from a Wisconsin attorney stated that Wisconsin did not have a statute requiring manufacturers to indemnify an innocent retailer; thus, the court rejected appellee's claim that appellant did not provide the trial court with enough information to determine the issue of choice of law. Engine Components, Inc. v. A.E.R.O. Aviation Co., 2012 Tex. App. LEXIS 1528, 2012 WL 666648 (Tex. App. San Antonio Feb. 29 2012).

3. Nothing in Tex. R. Evid. 202 requires a definitive choice-of-law analysis; the rule simply provides a mechanism by which a party may compel the trial court to judicially notice the law of another state; it does not force a party to make a definitive declaration as to which state's law applies. Burlington N. & Santa Fe Ry. v. Gunderson, Inc., 235 S.W.3d 287, 2007 Tex. App. LEXIS 6832 (Tex. App. Fort Worth 2007).

4. Assignor's argument that the laws of the Commonwealth of Pennsylvania were to be applied to his agreement with an assignee failed because no preliminary motion was filed pursuant to Tex. R. Evid. 202 asking the trial court to apply another state's laws. Furthermore, there was nothing in the record showing that either party advised the trial court that there was a choice of law issue or pointed out the distinctions between the laws of Pennsylvania and Texas regarding the matter in controversy. Johnson v. Structured Asset Servs., LLC, 148 S.W.3d 711, 2004 Tex. App. LEXIS 9622 (Tex. App. Dallas 2004).

Civil Procedure : Alternative Dispute Resolution : Arbitrations : General Overview

5. In a dispute over a mall, because there was no request for a trial court to take judicial notice under Tex. R. Evid. 202 of the relevant provisions of the California Arbitration Act, Cal. Code Civ. Proc. §§ 1280-1294.2, it was presumed that California law was the same as Texas law with regard to judicial review and enforcement of arbitration awards. The Texas General Arbitration Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001-.098, was applied to the appeal. Collins v. Tex Mall, L.P., 297 S.W.3d 409, 2009 Tex. App. LEXIS 6602 (Tex. App. Fort Worth Aug. 20 2009).

Civil Procedure : Pretrial Matters : Continuances

6. In a case alleging product liability and other causes of action, a trial court did not err by failing to conduct a conflict of law analysis because a purchaser never filed a motion under Tex. R. Evid. 202; therefore, the trial court presumed that the law of the foreign state was identical to that in Texas. Burlington N. & Santa Fe Ry. v. Gunderson, Inc., 235 S.W.3d 287, 2007 Tex. App. LEXIS 6832 (Tex. App. Fort Worth 2007).

Civil Procedure : Remedies : Costs & Attorney Fees : General Overview

7. Texas Court of Appeals was uncertain that the fact sheet should have been given judicial notice under either Tex. R. Evid. 201 or Rule 202 because there was no indication in the fact sheet that the FCC intended for the 47 C.F.R. § 1.4000(a)(3)'s limitation on the availability of attorney's fees to apply only when a restriction is held invalid. The fact sheet does not discuss the attorney's fees provision in any respect. River Oaks Place Council of Co-Owners v. Daly, 172 S.W.3d 314, 2005 Tex. App. LEXIS 7154 (Tex. App. Corpus Christi 2005).

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

8. In a case arising from a car accident, a trial court did not abuse its discretion by failing to take judicial notice of Louisiana law regarding spousal immunity, pursuant to Tex. R. Evid. 202, because there was an untimely motion providing inadequate proof of the content of the law in Louisiana. Colvin v. Colvin, 291 S.W.3d 508, 2009 Tex. App. LEXIS 5329 (Tex. App. Tyler July 8 2009).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview

9. In a sex offender registration case, the evidence was legally and factually sufficient to support a finding of "true" that defendant had a prior felony sex offense conviction in Colorado for the offense of criminal attempt to commit third degree sexual assault where a four-year sentence was imposed, and a reference was made to "F-5;" judicial notice was properly taken of Colorado law. Laningham v. State, 2007 Tex. App. LEXIS 5511 (Tex. App. Waco July 11 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview

10. In a sex offender registration case, the evidence was legally and factually sufficient to support a finding of "true" that defendant had a prior felony sex offense conviction in Colorado for the offense of criminal attempt to commit third degree sexual assault where a four-year sentence was imposed, and a reference was made to "F-5;" judicial notice was properly taken of Colorado law. Laningham v. State, 2007 Tex. App. LEXIS 5511 (Tex. App. Waco July 11 2007).

Evidence : Judicial Notice : General Overview

11. There was no indication in the record that a condominium association failed to comply with the requirements of Tex. R. Evid. 202 when it asked the trial court to take judicial notice of 47 C.F.R. § 1.4000. The Texas Court of Appeals therefore found that the trial court erred in failing to take judicial notice of the regulation, and took judicial

notice of it then, recognizing that the First Court of Appeals also did so during the first appeal of this case. River Oaks Place Council of Co-Owners v. Daly, 172 S.W.3d 314, 2005 Tex. App. LEXIS 7154 (Tex. App. Corpus Christi 2005).

12. Texas Court of Appeals was uncertain that the fact sheet should have been given judicial notice under either Tex. R. Evid. 201 or Rule 202 because there was no indication in the fact sheet that the FCC intended for the 47 C.F.R. § 1.4000(a)(3)'s limitation on the availability of attorney's fees to apply only when a restriction is held invalid. The fact sheet does not discuss the attorney's fees provision in any respect. River Oaks Place Council of Co-Owners v. Daly, 172 S.W.3d 314, 2005 Tex. App. LEXIS 7154 (Tex. App. Corpus Christi 2005).

13. In a fraudulent transfer case, although the trial court was asked to take judicial notice of California trust law, no argument was made in support of that request; hence, applying Texas law was not error. Schaefer v. Bellfort Chateau L.P., 2005 Tex. App. LEXIS 6564 (Tex. App. Houston 14th Dist. Aug. 18 2005).

Evidence : Judicial Notice : Domestic Laws

14. Kansas default judgment was entitled to full faith and credit and was enforceable because the Kansas court had personal jurisdiction over nonresidents performing services in Kansas. Jurisdictional facts alleged in the Kansas petition were deemed admitted in the Texas enforcement proceeding, and Texas law was properly applied absent a request to apply or take judicial notice of Kansas law. Ward v. Hawkins, 418 S.W.3d 815, 2013 Tex. App. LEXIS 15125, 2013 WL 6578766 (Tex. App. Dallas Dec. 16 2013).

15. In a case arising from a car accident, a trial court did not abuse its discretion by failing to take judicial notice of Louisiana law regarding spousal immunity, pursuant to Tex. R. Evid. 202, because there was an untimely motion providing inadequate proof of the content of the law in Louisiana. Colvin v. Colvin, 291 S.W.3d 508, 2009 Tex. App. LEXIS 5329 (Tex. App. Tyler July 8 2009).

Evidence : Judicial Notice : Laws of Foreign States

16. Before the trial court was required to determine if Connecticut or Texas law applied, the company had the initial burden to show that a conflict existed between the two and provide the trial court with sufficient information to make its choice of law determination. Grizzly Mt. Aviation, Inc. v. Honeywell Int'l, Inc., 2013 Tex. App. LEXIS 12869, CCH Prod. Liab. Rep. P19252, 2013 WL 5676069 (Tex. App. Corpus Christi Oct. 17 2013).

17. Company's arguments failed to meet its burden to show that a conflict existed between Texas and Connecticut law, and absent proof or argument to the contrary, the trial court could have presumed that the laws were the same, and the trial court was under no obligation to find that Connecticut law differed from Texas law. Grizzly Mt. Aviation, Inc. v. Honeywell Int'l, Inc., 2013 Tex. App. LEXIS 12869, CCH Prod. Liab. Rep. P19252, 2013 WL 5676069 (Tex. App. Corpus Christi Oct. 17 2013).

18. In an action for breach of contract, breach of fiduciary duty, fraud and related claims, the underlying agreement provided that all legal proceedings would be governed by the laws of the State of Delaware. Because neither party argued that Delaware law differed substantially from Texas law, the Court of Appeals of Texas presumed according to Tex. R. Evid. 202 that the law of Delaware was identical to Texas law for purposes of resolving an arbitration dispute. Continuum Health Servs., Llc v. Cross, 2012 Tex. App. LEXIS 9566, 2012 WL 5845367 (Tex. App. Dallas Nov. 19 2012).

19. Trial court properly held that an oil company was entitled to recover attorney fees based on a sanctions award and the presumption that California law was identical to Texas law; appellants neither requested that the trial court

take judicial notice of California law nor alerted it to any discrepancies between California and Texas law. Paradigm Oil, Inc. v. Retamco Operating, Inc., 330 S.W.3d 342, 2010 Tex. App. LEXIS 7087, 178 Oil & Gas Rep. 162 (Tex. App. San Antonio Aug. 31 2010).

20. In a dispute over a mall, because there was no request for a trial court to take judicial notice under Tex. R. Evid. 202 of the relevant provisions of the California Arbitration Act, Cal. Code Civ. Proc. §§ 1280-1294.2, it was presumed that California law was the same as Texas law with regard to judicial review and enforcement of arbitration awards. The Texas General Arbitration Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 171.001-.098, was applied to the appeal. Collins v. Tex Mall, L.P., 297 S.W.3d 409, 2009 Tex. App. LEXIS 6602 (Tex. App. Fort Worth Aug. 20 2009).

21. In a dispute concerning title to mineral interests, no party asked the trial court to take judicial notice of the applicable laws of Alabama with respect to a will that had been probated in Alabama, and there was no indication that the trial court undertook to do so on its own motion; therefore, the pertinent law of Alabama was presumed on appeal to be identical to Texas law. McCuen v. Huey, 255 S.W.3d 716, 2008 Tex. App. LEXIS 3615 (Tex. App. Waco 2008).

22. Nothing in Tex. R. Evid. 202 requires a definitive choice-of-law analysis; the rule simply provides a mechanism by which a party may compel the trial court to judicially notice the law of another state; it does not force a party to make a definitive declaration as to which state's law applies. Burlington N. & Santa Fe Ry. v. Gunderson, Inc., 235 S.W.3d 287, 2007 Tex. App. LEXIS 6832 (Tex. App. Fort Worth 2007).

23. In a case alleging product liability and other causes of action, a trial court did not err by failing to conduct a conflict of law analysis because a purchaser never filed a motion under Tex. R. Evid. 202; therefore, the trial court presumed that the law of the foreign state was identical to that in Texas. Burlington N. & Santa Fe Ry. v. Gunderson, Inc., 235 S.W.3d 287, 2007 Tex. App. LEXIS 6832 (Tex. App. Fort Worth 2007).

Real Property Law : Restrictive Covenants : General Overview

24. Texas Court of Appeals was uncertain that the fact sheet should have been given judicial notice under either Tex. R. Evid. 201 or Rule 202 because there was no indication in the fact sheet that the FCC intended for the 47 C.F.R. § 1.4000(a)(3)'s limitation on the availability of attorney's fees to apply only when a restriction is held invalid. The fact sheet does not discuss the attorney's fees provision in any respect. River Oaks Place Council of Co-Owners v. Daly, 172 S.W.3d 314, 2005 Tex. App. LEXIS 7154 (Tex. App. Corpus Christi 2005).

Tex. Evid. R. 203

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 203 Determining Foreign Law

(a) ***Raising a Foreign Law Issue.***--A party who intends to raise an issue about a foreign country's law must:

(1)give reasonable notice by a pleading or other writing; and

(2)at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.

(b) ***Translations.***--If the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 30 days before trial, supply all parties both a copy of the foreign language text and an English translation.

(c) ***Materials the Court May Consider; Notice.***--In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.

(d) ***Determination and Review.***--The court - not the jury - must determine foreign law. The court's determination must be treated as a ruling on a question of law.

(e) ***Suits Brought Under the Family Code Involving a Marriage Relationship or Parent-Child Relationship.***--Subsections (a) and (b) of this rule do not apply to an action to which Rule 308b, Texas Rules of Civil Procedure, applies.

History

Amended by Texas Supreme Court, Misc. Docket No. 17-9163, effective January 1, 2018.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 20, *Presentation of Evidence*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Case Notes

Civil Procedure : Federal & State Interrelationships : Choice of Law : General Overview
Civil Procedure : Judgments : Entry of Judgments : Enforcement & Execution : Foreign Judgments
Civil Procedure : Appeals : Reviewability : Preservation for Review
Evidence : Judicial Notice : General Overview
Evidence : Judicial Notice : Laws of Foreign States
Evidence : Procedural Considerations : Preliminary Questions : General Overview
Family Law : Child Support : Obligations : Enforcement : Interstate Enforcement : General Overview

LexisNexis (R) Notes

Civil Procedure : Federal & State Interrelationships : Choice of Law : General Overview

1. In a case in which a Canadian petroleum company and related entities brought claims against an engineering company headquartered in Texas for engineering work that the engineering company had done in Yemen on a pipeline for the petroleum company's corporate predecessor, the trial court was deemed to have made the proper choice of law when it was presented with the choice-of-law issue and the evidence in support of it; furthermore, the Alberta case law, the Alberta Limitations Act, and an Alberta Law Reform Institute report on limitations that, together, both parties presented below, were the type of materials contemplated under Tex. R. Evid. 203 to prove foreign jurisdictions' laws. Nexen Inc. v. Gulf Interstate Eng'g Co., 224 S.W.3d 412, 2006 Tex. App. LEXIS 10289, 166 Oil & Gas Rep. 629 (Tex. App. Houston 1st Dist. 2006).

Civil Procedure : Judgments : Entry of Judgments : Enforcement & Execution : Foreign Judgments

2. Where the parties had a loan agreement that provided Belgium law would apply to any dispute, appellee company A did not waive any argument regarding the application of Belgium law under Tex. R. Evid. 203 by failing to provide notice that it intended to raise an issue concerning the law of Belgium in an action to enforce the Belgium court's judgment in Texas in a dispute concerning loan payments. Appellee provided appellant company B with notice that it was relying on the judgments issued by the Belgium courts, and furnished the Texas court with complete copies of the Belgium judgments with English translations. Presley v. Veredeling, 370 S.W.3d 425, 2012 Tex. App. LEXIS 3282, 2012 WL 1441399 (Tex. App. Houston 1st Dist. Apr. 26 2012).

Civil Procedure : Appeals : Reviewability : Preservation for Review

3. Party who intends to raise an issue about foreign law is required to give notice and, at 30 days before trial, furnish all parties copies of any written materials or sources the party intends to use as proof of foreign law; if a party fails to give notice and prove foreign law as provided by the rule, the foreign law may not be applied. Exxon Corp. v. Breezevale, Ltd., 82 S.W.3d 429, 2002 Tex. App. LEXIS 2407, 157 Oil & Gas Rep. 785 (Tex. App. Dallas 2002).

Evidence : Judicial Notice : General Overview

4. Judgment debtor and his wife, who owned a Mexican entity that the court assumed was a corporation, submitted no proof of any Mexican laws or relevant expert testimony to interpret the documents at issue, nor did the trial court take judicial notice of Mexican law pursuant to Tex. R. Evid. 203, and thus the court applied Texas law to the turnover order issued under Tex. Civ. Prac. & Rem. Code Ann. § 31.002. The documents ordered turned over were specific corporate resolutions that effected a transfer of the interest in the entity, and accordingly, consents in writing would be signed by the holders of all the shares, which made Tex. Bus. Corp. Act Ann. art. 9.10 applicable and dispensed with the requirement of a meeting in the entity's domicile, and the "action so taken" did not need to

be taken in a formal manner, and therefore the order did not require the violation of the entity's articles of incorporation. Gerdes v. Kennamer, 155 S.W.3d 541, 2004 Tex. App. LEXIS 10945 (Tex. App. Corpus Christi 2004).

5. Corporation's motion for judicial notice did not adequately apprise the trial court of any distinction in the laws of Texas and Japan regarding judgment interest because: (1) the corporation failed to direct the trial court's attention to any distinctions regarding judgment interest in its motion, and (2) although the corporation argued that judgment interest differed under Japanese law in response to the representative's summary judgment motion under Tex. R. Civ. P. 166a, which was a pleading under Tex. R. Evid. 203, the corporation merely referenced two pages in a treatise, which was a conclusory statement; thus, the trial court was left to presume that Japan law was the same as Texas law on the issue. PennWell Corp. v. Ken Assocs., 123 S.W.3d 756, 2003 Tex. App. LEXIS 10401 (Tex. App. Houston 14th Dist. 2003).

6. Tex. R. Evid. art. 203 governs judicial notice of adjudicative facts and foreign law, but does not apply to judicial notice of the laws of the forum where individual statutes, rules, and judicial decisions govern. Watts v. State, 99 S.W.3d 604, 2003 Tex. Crim. App. LEXIS 58 (Tex. Crim. App. 2003).

7. Tex. R. Evid. art. 203 governs judicial notice of adjudicative facts and foreign law, but does not apply to judicial notice of the laws of the forum where individual statutes, rules, and judicial decisions govern. Watts v. State, 99 S.W.3d 604, 2003 Tex. Crim. App. LEXIS 58 (Tex. Crim. App. 2003).

8. Tex. R. Evid. art. 203 governs judicial notice of adjudicative facts and foreign law, but does not apply to judicial notice of the laws of the forum where individual statutes, rules, and judicial decisions govern. Watts v. State, 99 S.W.3d 604, 2003 Tex. Crim. App. LEXIS 58 (Tex. Crim. App. 2003).

9. Party who intends to raise an issue about foreign law is required to give notice and, at 30 days before trial, furnish all parties copies of any written materials or sources the party intends to use as proof of foreign law; if a party fails to give notice and prove foreign law as provided by the rule, the foreign law may not be applied. Exxon Corp. v. Breezevale, Ltd., 82 S.W.3d 429, 2002 Tex. App. LEXIS 2407, 157 Oil & Gas Rep. 785 (Tex. App. Dallas 2002).

Evidence : Judicial Notice : Laws of Foreign States

10. Where the parties had a loan agreement that provided Belgium law would apply to any dispute, appellee company A did not waive any argument regarding the application of Belgium law under Tex. R. Evid. 203 by failing to provide notice that it intended to raise an issue concerning the law of Belgium in an action to enforce the Belgium court's judgment in Texas in a dispute concerning loan payments. Appellee provided appellant company B with notice that it was relying on the judgments issued by the Belgium courts, and furnished the Texas court with complete copies of the Belgium judgments with English translations. Presley v. Veredeling, 370 S.W.3d 425, 2012 Tex. App. LEXIS 3282, 2012 WL 1441399 (Tex. App. Houston 1st Dist. Apr. 26 2012).

11. Although under Tex. Fam. Code Ann. § 159.604(a)(2), Canadian law governed a dispute over child support arising out a child support order issued by a Canadian court, the father failed to notify the parties and the court of his intent to invoke Canadian law or to provide notice of the sources he relied on, as required by Tex. R. Evid. 203, thereby waiving his right to invoke Canadian law. In re S.N.A., 2008 Tex. App. LEXIS 8721 (Tex. App. Fort Worth Nov. 20 2008).

12. Pursuant to Tex. Bus. & Com. Code Ann. § 2A.505, the cancellation of the parties' agreement could not be construed as a discharge of any right belonging to the other party based on an antecedent breach by the other

unless such intention clearly appeared in the parties' second agreement, and that agreement was silent regarding the discharge of any claims that arose prior to the cancellation of the first agreement; appellant failed to meet its burden to show that any rights appellee had to recover for a breach that occurred prior to the cancellation of the first agreement were extinguished by the cancellation. Frank's Int'l, Inc. v. Smith Int'l, Inc., 249 S.W.3d 557, 2008 Tex. App. LEXIS 248, 66 U.C.C. Rep. Serv. 2d (CBC) 301 (Tex. App. Houston 1st Dist. 2008).

13. In a case in which a Canadian petroleum company and related entities brought claims against an engineering company headquartered in Texas for engineering work that the engineering company had done in Yemen on a pipeline for the petroleum company's corporate predecessor, the trial court was deemed to have made the proper choice of law when it was presented with the choice-of-law issue and the evidence in support of it; furthermore, the Alberta case law, the Alberta Limitations Act, and an Alberta Law Reform Institute report on limitations that, together, both parties presented below, were the type of materials contemplated under Tex. R. Evid. 203 to prove foreign jurisdictions' laws. Nexen Inc. v. Gulf Interstate Eng'g Co., 224 S.W.3d 412, 2006 Tex. App. LEXIS 10289, 166 Oil & Gas Rep. 629 (Tex. App. Houston 1st Dist. 2006).

Evidence : Procedural Considerations : Preliminary Questions : General Overview

14. As the lessees failed to show how the lessor's failure to submit the English translations of foreign laws on which it intended to rely caused the trial court to render an improper judgment, the trial court's judgment in favor of the lessor was affirmed. Thomas v. Arrendadora Internacional, S.A. de C.V., 2004 Tex. App. LEXIS 7715 (Tex. App. Corpus Christi Aug. 26 2004).

Family Law : Child Support : Obligations : Enforcement : Interstate Enforcement : General Overview

15. Although under Tex. Fam. Code Ann. § 159.604(a)(2), Canadian law governed a dispute over child support arising out a child support order issued by a Canadian court, the father failed to notify the parties and the court of his intent to invoke Canadian law or to provide notice of the sources he relied on, as required by Tex. R. Evid. 203, thereby waiving his right to invoke Canadian law. In re S.N.A., 2008 Tex. App. LEXIS 8721 (Tex. App. Fort Worth Nov. 20 2008).

End of Document

Tex. Evid. R. 204

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 204 Judicial Notice of Texas Municipal and County Ordinances, Texas Register Contents, and Published Agency Rules

(a) ***Scope.***--This rule governs judicial notice of Texas municipal and county ordinances, the contents of the Texas Register, and agency rules published in the Texas Administrative Code.

(b) ***Taking Notice.***--The court:

(1)may take judicial notice on its own; or

(2)must take judicial notice if a party requests it and the court is supplied with the necessary information.

(c) ***Notice and Opportunity to Be Heard.***

(1) ***Notice.***--The court may require a party requesting judicial notice to notify all other parties of the request so they may respond to it.

(2) ***Opportunity to Be Heard.***--On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the matter to be noticed. If the court takes judicial notice before a party has been notified, the party, on request, is still entitled to be heard.

(d) ***Determination and Review.***--The court - not the jury - must determine municipal and county ordinances, the contents of the Texas Register, and published agency rules. The court's determination must be treated as a ruling on a question of law.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 20, *Presentation of Evidence*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Pre-March 1, 1998 Comment Judicial notice upon motion of a party is made mandatory rather than discretionary.

Case Notes

Evidence : Judicial Notice : General Overview
Evidence : Judicial Notice : Domestic Laws
Evidence : Judicial Notice : Scientific & Technical Facts
Governments : Local Governments : Ordinances & Regulations

LexisNexis (R) Notes

Evidence : Judicial Notice : General Overview

1. Pursuant to Tex. R. App. P. 33.1, defendant failed to preserve an issue on appeal related to the jury charge in defendant's trial under Tex. Health & Safety Code Ann. § 481.124(a)(2) because the complaint on appeal did not comport with the objection made at trial, and the court reviewed only for egregious error, but none was found. The instruction complained of was an instruction in accordance with the Texas Register, the extra sentence declaring red phosphorous and iodine as immediate precursors was an extension of the definition of immediate precursors under Tex. Health & Safety Code Ann. § 481.002(22), and the court noted that whether such items were immediate precursors was a question of law and subject to judicial notice under Tex. R. Evid. 204, and defendant failed to show any error in the charge for purposes of Tex. Code Crim. Proc. Ann. art. 36.19. Miramontes v. State, 225 S.W.3d 132, 2005 Tex. App. LEXIS 7160 (Tex. App. El Paso 2005).

2. Under Tex. R. Evid. 204, the court judicially notes that red phosphorous and iodine are immediate precursors, as defined in Tex. Health & Safety Code Ann. § 481.002(22), as prescribed by the Texas Commissioner of Health in 27 Tex. Reg. 8327-28. Miramontes v. State, 225 S.W.3d 132, 2005 Tex. App. LEXIS 7160 (Tex. App. El Paso 2005).

3. Judicial notice of the existence and content of local laws and ordinances, as well as the contents of the Texas Register and Administrative Code, is governed by Tex. R. Evid. 204. Watts v. State, 99 S.W.3d 604, 2003 Tex. Crim. App. LEXIS 58 (Tex. Crim. App. 2003).

Evidence : Judicial Notice : Domestic Laws

4. During defendant's felony DWI trial, the court did not err in denying defendant's request to take judicial notice of the contents of 37 Tex. Admin. Code § 221.9 as that section existed on the date of defendant's arrest because an officer's testimony about defendant's performance on standardized field sobriety tests was properly admitted even if the officer was not certified as a practitioner at the time of the tests. Henderson v. State, 2012 Tex. App. LEXIS 9653, 2012 WL 5869585 (Tex. App. Fort Worth Nov. 21 2012).

5. In a condemnation case, although the court took judicial notice of regulations that the county had not presented to the trial court, the county failed to show that the regulations were material to the resolution of any issue presented in the appeal. Dallas County v. Crestview Corners Car Wash, 370 S.W.3d 25, 2012 Tex. App. LEXIS 5945 (Tex. App. Dallas July 24 2012).

6. Pursuant to Tex. R. Evid. 204, the court took judicial notice of the ordinances of a city. City of Paris v. Abbott, 360 S.W.3d 567, 2011 Tex. App. LEXIS 8440 (Tex. App. Texarkana Oct. 21 2011).

7. Court erred in overturning defendant's cruelty to animals conviction because defendant never demonstrated that the statute had been adopted by the county voters; the reviewing court could not determine the content of local law with sufficient certainty to take judicial notice of whether or not the statute applied to the location in which the

incident occurred. Volosen v. State, 227 S.W.3d 77, 2007 Tex. Crim. App. LEXIS 810 (Tex. Crim. App. 2007).

8. Rule requires a court to take judicial notice of a county or municipal ordinance upon request, so long as the requesting party furnishes sufficient information to enable the court properly to comply with the request; the rule also permits a court to take judicial notice upon its own motion. Volosen v. State, 227 S.W.3d 77, 2007 Tex. Crim. App. LEXIS 810 (Tex. Crim. App. 2007).

Evidence : Judicial Notice : Scientific & Technical Facts

9. In a felony driving while intoxicated case, the trial court did not err in taking judicial notice of the reliability of the theory underlying the horizontal gaze nystagmus test and its technique without conducting a gatekeeper hearing. Goains v. State, 2011 Tex. App. LEXIS 7875, 2011 WL 4537892 (Tex. App. Beaumont Sept. 28 2011).

Governments : Local Governments : Ordinances & Regulations

10. Judicial notice of the existence and content of local laws and ordinances, as well as the contents of the Texas Register and Administrative Code, is governed by Tex. R. Evid. 204. Watts v. State, 99 S.W.3d 604, 2003 Tex. Crim. App. LEXIS 58 (Tex. Crim. App. 2003).

Tex. Evid. R.

THIS DOCUMENT IS CURRENT THROUGH AUGUST 3, 2020

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS RULES OF EVIDENCE > ARTICLE III. PRESUMPTIONS

ARTICLE III. PRESUMPTIONS

[No rules adopted at this time.]

End of Document

Tex. Evid. R. Article III

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS RULES OF EVIDENCE > ARTICLE III. PRESUMPTIONS

ARTICLE III. PRESUMPTIONS

[No rules adopted at this time.]

End of Document

Tex. Evid. R. 401

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 401 Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 22, *Rules Affecting Admissibility* .

Case Notes

Business & Corporate Law : Agency Relationships : Authority to Act : Apparent Authority : Proof
Business & Corporate Law : Corporations : Shareholders : Disregard of Corporate Entity : General Overview
Civil Procedure : Jurisdiction : Personal Jurisdiction & In Rem Actions : In Personam Actions : General Overview
Civil Procedure : Counsel : Disqualifications
Civil Procedure : Discovery : Disclosures : Mandatory Disclosures
Civil Procedure : Discovery : Methods : Admissions : Objections
Civil Procedure : Discovery : Methods : Oral Depositions
Civil Procedure : Discovery : Relevance
Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials
Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Civil Procedure : Eminent Domain Proceedings : Experts
Computer & Internet Law : General Overview
Computer & Internet Law : Criminal Offenses : General Overview
Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Self-Incrimination Privilege

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Assistance of Counsel
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Contracts Law : Contract Interpretation : Intent
Contracts Law : Remedies : Equitable Relief : General Overview
Contracts Law : Remedies : Specific Performance
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Simple Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Coercion : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : Elements
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Custodial Interference
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Custodial Interference
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Endangerment : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Violation of Protective Orders
Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : Elements
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : Elements
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : First-Degree Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Consciousness of Guilt
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Witness Tampering
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Prostitution : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Vehicular Homicide : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Vehicular Homicide : Penalties
Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Weapons : Use : Commission of Another Crime : Elements
Criminal Law & Procedure : Accessories : Aiding & Abetting
Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : General Overview
Criminal Law & Procedure : Arrests : Probable Cause
Criminal Law & Procedure : Search & Seizure : Warrantless Searches : Investigative Stops
Criminal Law & Procedure : Accusatory Instruments : Indictments : General Overview
Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims
Criminal Law & Procedure : Eyewitness Identification : Photo Identifications
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Burdens of Proof : Defense
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Due Process
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Fair Trial
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Remain Silent : Self-Incrimination Privilege
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Prison Attire & Restraints
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Defenses : General Overview
Criminal Law & Procedure : Defenses : Alibi
Criminal Law & Procedure : Defenses : Coercion & Duress
Criminal Law & Procedure : Defenses : Insanity : General Overview
Criminal Law & Procedure : Defenses : Insanity : Insanity Defense
Criminal Law & Procedure : Defenses : Necessity
Criminal Law & Procedure : Defenses : Right to Present
Criminal Law & Procedure : Defenses : Self-Defense
Criminal Law & Procedure : Scienter : Specific Intent
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence
Criminal Law & Procedure : Sentencing : Alternatives : Community Confinement
Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview
Criminal Law & Procedure : Sentencing : Alternatives : Probation : Eligibility
Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances
Criminal Law & Procedure : Sentencing : Capital Punishment : Mitigating Circumstances
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Sentencing : Imposition : Victim Statements
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Classification

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Registration
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview
Criminal Law & Procedure : Appeals : Reversible Errors : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Constitutional Issues
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Constitutional Errors
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Energy & Utilities Law : Administrative Proceedings : Public Utility Commissions : General Overview
Environmental Law : Air Quality : Emission Standards : Stationary Sources : New Sources
Environmental Law : Air Quality : Enforcement : Administrative Proceedings
Environmental Law : Air Quality : Preconstruction Permits
Environmental Law : Air Quality : Prevention of Significant Deterioration
Environmental Law : Solid Wastes : Municipal Landfills
Estate, Gift & Trust Law : Probate : Procedures in Probate : General Overview
Evidence : Authentication : General Overview
Evidence : Authentication : Chain of Custody
Evidence : Demonstrative Evidence : General Overview
Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Photographs
Evidence : Demonstrative Evidence : Recordings
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Hearsay : Exceptions : Business Records : General Overview
Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business
Evidence : Hearsay : Exceptions : State of Mind : General Overview
Evidence : Hearsay : Exemptions : Confessions : General Overview
Evidence : Hearsay : Exemptions : Confessions : Corpus Delicti Doctrine
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Hearsay : Rule Components : General Overview
Evidence : Hearsay : Rule Components : Truth of Matter Asserted
Evidence : Inferences & Presumptions : Inferences
Evidence : Judicial Notice : Adjudicative Facts : Facts Generally Known
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : Limitations
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof
Evidence : Procedural Considerations : Preliminary Questions : General Overview
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : General Overview
Evidence : Relevance : Character Evidence
Evidence : Relevance : Circumstantial & Direct Evidence
Evidence : Relevance : Compromise & Settlement Negotiations
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Liability Insurance
Evidence : Relevance : Prior Acts, Crimes & Wrongs

Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Routine Practices
Evidence : Relevance : Sex Offenses : General Overview
Evidence : Relevance : Sex Offenses : Rape Shield Laws
Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview
Evidence : Relevance : Sex Offenses : Similar Crimes : Child Molestation Cases
Evidence : Relevance : Spoliation
Evidence : Scientific Evidence : General Overview
Evidence : Scientific Evidence : Autopsies
Evidence : Scientific Evidence : Blood Alcohol
Evidence : Scientific Evidence : Blood & Bodily Fluids
Evidence : Scientific Evidence : Daubert Standard
Evidence : Scientific Evidence : DNA
Evidence : Scientific Evidence : Sobriety Tests
Evidence : Scientific Evidence : Toxicology
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances
Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice
Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview
Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility
Evidence : Testimony : Credibility : Impeachment : Mental Incapacity
Evidence : Testimony : Credibility : Impeachment : Prior Conduct
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements
Evidence : Testimony : Examination : General Overview
Evidence : Testimony : Examination : Cross-Examination : General Overview
Evidence : Testimony : Examination : Cross-Examination : Scope
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility
Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Experts : Daubert Standard
Evidence : Testimony : Experts : Helpfulness
Evidence : Testimony : Experts : Qualifications
Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview
Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions
Evidence : Testimony : Lay Witnesses : Personal Knowledge
Evidence : Testimony : Presentation of Evidence
Family Law : Child Custody : Awards : General Overview
Family Law : Child Custody : Procedures
Family Law : Family Protection & Welfare : Elderly Persons : Abuse, Endangerment & Neglect
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Child Abuse
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure
Governments : Legislation : Sunday Closing Laws
Governments : Local Governments : Employees & Officials
Governments : Local Governments : Ordinances & Regulations
Immigration Law : Duties & Rights of Aliens : Discrimination
Immigration Law : Immigrants : General Overview
Labor & Employment Law : Discrimination : Age Discrimination : Proof : Circumstantial Evidence
Labor & Employment Law : Discrimination : Harassment : Sexual Harassment : Burdens of Proof : Employee Burdens
Labor & Employment Law : Discrimination : Retaliation : General Overview
Labor & Employment Law : Occupational Safety & Health : General Overview
Legal Ethics : Client Relations : General Overview

Legal Ethics : Client Relations : Confidentiality of Information
Real Property Law : Adverse Possession : General Overview
Real Property Law : Eminent Domain Proceedings : Procedure
Real Property Law : Eminent Domain Proceedings : Valuation
Real Property Law : Property Valuation
Tax Law : State & Local Taxes : Personal Property Tax : Tangible Property : General Overview
Tax Law : State & Local Taxes : Real Property Tax : General Overview
Torts : Business Torts : Negligent Hiring & Supervision : General Overview
Torts : Damages : Compensatory Damages : Lost Income : Award Calculations
Torts : Damages : Punitive Damages : Conduct Supporting Awards
Torts : Malpractice & Professional Liability : Healthcare Providers
Torts : Negligence : Causation : General Overview
Torts : Products Liability : Design Defects
Torts : Products Liability : Negligence
Torts : Transportation Torts : Rail Transportation : Federal Employers' Liability Act
Transportation Law : Private Vehicles : Traffic Regulation : Speed Limits : Drag Racing
Workers' Compensation & SSDI : Administrative Proceedings : Evidence : Medical Evidence
Workers' Compensation & SSDI : Administrative Proceedings : Judicial Review : General Overview

LexisNexis (R) Notes

Business & Corporate Law : Agency Relationships : Authority to Act : Apparent Authority : Proof

1. In an action for breach of a gas purchase agreement, evidence of early pays and appellant's relationship with a third party was properly admitted to show they had oral agreements and the third party's authority was not encompassed by the sole written contract between them. This evidence was relevant under Tex. R. Evid. 401 for purposes of establishing apparent agency. Reliant Energy Servs. v. Cotton Valley Compression, Llc, 336 S.W.3d 764, 2011 Tex. App. LEXIS 959, 173 Oil & Gas Rep. 732 (Tex. App. Houston 1st Dist. Feb. 10 2011).

Business & Corporate Law : Corporations : Shareholders : Disregard of Corporate Entity : General Overview

2. In an action alleging an alter ego theory, letters and asset purchase agreement of an individual defendant showed the nature of the actions taken by him in regard to the corporate defendants. Accordingly, the letters and agreement were relevant as to whether the individual was the alter ego of the corporation. Carone v. Retamco Operating, Inc., 138 S.W.3d 1, 2004 Tex. App. LEXIS 2557 (Tex. App. San Antonio 2004).

3. In an action alleging an alter ego theory, letters and asset purchase agreement of an individual defendant showed the nature of the actions taken by him in regard to the corporate defendants. Accordingly, the letters and agreement were relevant as to whether the individual was the alter ego of the corporation. Carone v. Retamco Operating, Inc., 138 S.W.3d 1, 2004 Tex. App. LEXIS 2557 (Tex. App. San Antonio 2004).

Civil Procedure : Jurisdiction : Personal Jurisdiction & In Rem Actions : In Personam Actions : General Overview

4. In an appeal from the denial of a special appearance, the court rejected a foreign manufacturer's argument that some exhibits were irrelevant in that they related to other companies, which the opposing party asserted were predecessors. The court determined that the opposing party met its initial burden of pleading sufficient allegations to bring the manufacturer within the provisions of the Texas long-arm statute and therefore that the relevancy argument was without merit. Ho Wah Genting Kintron Sdn Bhd v. Leviton Mfg. Co., 163 S.W.3d 120, 2005 Tex. App. LEXIS 1414, CCH Prod. Liab. Rep. P17391 (Tex. App. San Antonio 2005).

Civil Procedure : Counsel : Disqualifications

5. Disqualification of opposing counsel in a suit affecting the parent-child relationship was proper because the product of the risk and the consequences was great enough that the representation was adverse, and there was a reasonable probability that the representation would have violated the rule pertaining to confidential information where opposing counsel had represented a family member of a father's fiancee in a previous custody case, and her medical history was relevant to a child's best interest. In re C.G.H., 2013 Tex. App. LEXIS 8202, 2013 WL 3377421 (Tex. App. Tyler July 3 2013).

Civil Procedure : Discovery : Disclosures : Mandatory Disclosures

6. In a gross negligence case arising from a fatal vehicle accident, a petition for a writ of mandamus was denied in relation to the discovery of relevant tax returns, even though the returns were not duplicative of balance sheets that were not audited or certified, because a widower failed to show that the returns were not duplicative other financial information already supplied; the privacy standards for tax returns applied to the returns of corporations as well. In re Brewer Leasing, Inc., 255 S.W.3d 708, 2008 Tex. App. LEXIS 3021 (Tex. App. Houston 1st Dist. 2008).

Civil Procedure : Discovery : Methods : Admissions : Objections

7. Trial court did not abuse its discretion by excluding quality control documents the automobile manufacturer produced the day before trial because they were untimely produced. The documents should have been produced at the time the manufacturer made its objections concerning relevance because the documents were outside the scope of the manufacturer's objections and they directly related to the estate representative's claim that the manufacturer had negligent quality control; in addition, the manufacturer did not assert a lack of possession, custody or control of the documents. Kia Motors Corp. v. Ruiz, 348 S.W.3d 465, 2011 Tex. App. LEXIS 6144, CCH Prod. Liab. Rep. P18719 (Tex. App. Dallas Aug. 5 2011).

Civil Procedure : Discovery : Methods : Oral Depositions

8. Trial court did not err by failing to quash the property owner's accountant's deposition based on the accountant-client privilege because: (1) the property owner produced no evidence to substantiate any claim of an alleged privilege, as the existence of such a privilege based on Tex. Occ. Code Ann. § 901.457 (2004) was doubtful; (2) even assuming that § 901.457 created a privilege, the accountant's deposition fell within the statutory exception to the privilege as a court order directed to the accountant, mentioning the property owner by name, and requesting specific information concerning the property owner; (3) the accountant's actions and knowledge regarding the ownership of the property were relevant to the employee's premises liability issues and rendered the accountant a fact witness subject to deposition; and (4) the property owner did not file a motion for a protective order as required by Tex. R. Civ. P. 192.6. In re Arnold, 2012 Tex. App. LEXIS 9957, 2012 WL 6085320 (Tex. App. Corpus Christi Nov. 30 2012).

Civil Procedure : Discovery : Relevance

9. In a premises liability lawsuit, a trial court did not abuse its discretion in compelling discovery of two incident reports where its order was narrowly tailored to limit discovery to a period of three years, to the particular store where the underlying injury occurred, to the parking lot of that store, and to trip and falls. Although those incidents did not involve cart corrals, plaintiff broadly alleged that the store was negligent and failed to use ordinary care in maintaining the premises in a reasonably safe condition and free of hazards and thus, the reports were relevant and reasonably calculated to lead to the discovery of admissible evidence. In re H.E.B. Grocery Co., L.P., 2014 Tex.

App. LEXIS 1777, 2014 WL 700749 (Tex. App. Corpus Christi Feb. 18 2014).

10. City was entitled to mandamus relief, because the owner failed to object to the city's discovery requests, and the discovery information the city sought went to the heart of the owner's lost profits claim for inverse condemnation through a regulatory taking; the owner had a duty to supplement its answers to the city's requests for production and failed to do so, and the requested documents were relevant. In re City of Houston, 2013 Tex. App. LEXIS 21 (Tex. App. Houston 14th Dist. Jan. 4 2013).

11. Trial court did not err by failing to quash the property owner's accountant's deposition based on the accountant-client privilege because: (1) the property owner produced no evidence to substantiate any claim of an alleged privilege, as the existence of such a privilege based on Tex. Occ. Code Ann. § 901.457 (2004) was doubtful; (2) even assuming that § 901.457 created a privilege, the accountant's deposition fell within the statutory exception to the privilege as a court order directed to the accountant, mentioning the property owner by name, and requesting specific information concerning the property owner; (3) the accountant's actions and knowledge regarding the ownership of the property were relevant to the employee's premises liability issues and rendered the accountant a fact witness subject to deposition; and (4) the property owner did not file a motion for a protective order as required by Tex. R. Civ. P. 192.6. In re Arnold, 2012 Tex. App. LEXIS 9957, 2012 WL 6085320 (Tex. App. Corpus Christi Nov. 30 2012).

12. In a case stemming from a house fire and the resulting product liability lawsuit filed by real parties in interest against the manufacturer of a computer power supply/surge protector and others, the trial court abused its discretion in ordering the manufacturer to produce certain of its back up power supply products, discovery produced in relation to another lawsuit, and other documents because real parties failed to establish a correlation between the specific model they had purchased and another of the manufacturer's product lines, failed to show that their request was not narrowly tailored to include only relevant materials, and failed to show that the litigation information they sought was relevant. In re Am. Power Conversion Corp., 2012 Tex. App. LEXIS 9369, 2012 WL 5507111 (Tex. App. San Antonio Nov. 14 2012).

13. Trial court could have reasonably concluded that the phone records from the two and one-half hour window immediately before and after the accident were reasonably calculated to lead to the discovery of admissible evidence to support the pleadings, and the trial court did not abuse its discretion in ordering production of the phone records from 4:30 p.m. to 7:00 p.m. on the date of the accident; whether the mother made threats to the driver did not make it more or less probable that she negligently entrusted the go-cart to her son, or that her son was negligent in driving the go-cart, Tex. R. Civ. P. 192.3, Tex. R. Evid. 401, and the trial court abused its discretion in ordering those records to be produced. In re Moor, 2012 Tex. App. LEXIS 9232, 2012 WL 5463193 (Tex. App. Houston 14th Dist. Nov. 8 2012).

14. Store was entitled to partial conditional writ of mandamus, because the claimant's discovery requests for information relating to incidents at all 23 grocery stores in the slip and fall case was overbroad, the claimant's discovery request for accident and/or incident reports regarding other incidents was overbroad, and the trial court could have reasonably concluded that floor safety training records of managers, maintenance partners, and partners who were working in the area where the claimant fell could lead to relevant, admissible evidence to support the pleading. In re Heb Grocery Co., L.P., 375 S.W.3d 497, 2012 Tex. App. LEXIS 5409 (Tex. App. Houston 14th Dist. July 10 2012).

15. In a product liability case involving an allegedly defective surge protector, the trial court properly ordered discovery relating to a recall of a predecessor product that caused overheating and fires, but erred in allowing discovery of complaints regarding models that were not similar to the model in question and in failing to limit the scope of the requests as to time and locale. In re Am. Power Conversion Corp., 2012 Tex. App. LEXIS 5310, 2012

WL 2584290 (Tex. App. San Antonio July 5 2012).

16. Information sought by an injured person in the request for production was relevant and discoverable because, whether or not the accident was caused because the waste management company did not properly train its drivers in safety matters, or improperly scheduled them, or because it did not employ a safety director when other locations did, was relevant to the claim that the office was deficient in its safety training and management. In re Waste Mgmt. of Tex., Inc., 2011 Tex. App. LEXIS 7192, 2011 WL 3855745 (Tex. App. Corpus Christi Aug. 31 2011).

17. Trial court did not abuse its discretion by excluding quality control documents the automobile manufacturer produced the day before trial because they were untimely produced. The documents should have been produced at the time the manufacturer made its objections concerning relevance because the documents were outside the scope of the manufacturer's objections and they directly related to the estate representative's claim that the manufacturer had negligent quality control; in addition, the manufacturer did not assert a lack of possession, custody or control of the documents. Kia Motors Corp. v. Ruiz, 348 S.W.3d 465, 2011 Tex. App. LEXIS 6144, CCH Prod. Liab. Rep. P18719 (Tex. App. Dallas Aug. 5 2011).

18. Private club was entitled to mandamus relief from a discovery order requiring it to produce documents containing members' names in a defamation suit; although the names of members who allegedly made defamatory statements might be relevant under Tex. R. Evid. 401 and subject to discovery under Tex. R. Civ. P. 192.3(b), other members' names were not, and the order was thus overbroad. In re Houstonian Campus, Llc, 312 S.W.3d 178, 2010 Tex. App. LEXIS 2805 (Tex. App. Houston 14th Dist. Apr. 16 2010).

19. Discovery order in a product liability case requiring the manufacturer to produce documents about protective systems on several model years was not overbroad; evidence about similar products was relevant under Tex. R. Civ. P. 192.3(a), Tex. R. Evid. 401 to a safer alternative design as contemplated by Tex. Civ. Prac. & Rem. Code Ann. § 82.005, and the manufacturer did not meet its burden under Tex. R. Civ. P. 193.4(a), 199.6 of showing that the time parameters were burdensome or otherwise presenting proof to support its objections. In re Exmark Mfg. Co., 299 S.W.3d 519, 2009 Tex. App. LEXIS 8469 (Tex. App. Corpus Christi Oct. 30 2009).

20. District court judge did not err in ordering disclosure of the names and addresses of other insured property owners whose claims were handled by the investigator that denied the insured homeowner's water damage claim because Tex. R. Civ. P. 192.3(e)(5) specifically provided that a party could discover any bias of the witness and did not contain any requirement that an expert's credibility must be an issue for evidence of the expert's potential bias to be discoverable; further, the insurer failed to show the names and addresses were not relevant as provided in Tex. R. Evid. 401 or that they were within any constitutionally protected zone of privacy. In re Kemper Lloyds Ins. Co., 2006 Tex. App. LEXIS 1602 (Tex. App. Tyler Feb. 28 2006).

21. In a breach of contract case, the trial court did not abuse its discretion in denying a motion to compel discovery; the documents sought, which were tax returns, did not constitute relevant information because the terms of the parties' contract did not give rise to the duties alleged. Wakeland v. Wakeland, 2006 Tex. App. LEXIS 6 (Tex. App. San Antonio Jan. 4 2006).

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

22. Affidavits of expert witnesses offered in support of homeowners' motion against summary judgment in an action seeking losses for a house fire failed to meet the requirements of Tex. R. Evid. 401, 403, 702, and 703, as the testimony was a pyramid of inferences lacking probative force because it was based on assumed facts that varied from the actual undisputed facts. Rayon v. Energy Specialties, Inc., 121 S.W.3d 7, 2002 Tex. App. LEXIS 9160 (Tex. App. Fort Worth 2002).

Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials

23. Fact that a witness might have suffered a shoulder injury as a result of the accident did not tend to make the parents' allegation that their son suffered a shoulder injury as a result of the accident more or less probable than it would be without the evidence; thus, the witness's testimony was irrelevant under Tex. Evid. R. 401 and was properly excluded. Therefore, the trial court did not err in denying the parents' motion for a new trial. McGaffigan v. Mora, 2004 Tex. App. LEXIS 4697 (Tex. App. San Antonio May 26 2004).

Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus

24. In a case arising from a fatal vehicle accident, a petition for a writ of mandamus was granted in relation to the discovery of financial records in a gross negligence case because the records sought were not duplicative of balance sheets produced; the balance sheets were not audited or certified, and they did not contain an affidavit or statement that they represented the net worth of a truck owner and an employer; evidence of net worth was relevant to this lawsuit and discoverable because punitive damages were sought under Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a). In re Brewer Leasing, Inc., 255 S.W.3d 708, 2008 Tex. App. LEXIS 3021 (Tex. App. Houston 1st Dist. 2008).

25. In a gross negligence case arising from a fatal vehicle accident, a petition for a writ of mandamus was denied in relation to the discovery of relevant tax returns, even though the returns were not duplicative of balance sheets that were not audited or certified, because a widower failed to show that the returns were not duplicative other financial information already supplied; the privacy standards for tax returns applied to the returns of corporations as well. In re Brewer Leasing, Inc., 255 S.W.3d 708, 2008 Tex. App. LEXIS 3021 (Tex. App. Houston 1st Dist. 2008).

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

26. In an action under the the Federal Employers Liability Act, in the absence of any evidence that a railroad employee had a genetic predisposition to such injuries, the trial court did not abuse its discretion by excluding testimony that genetics was a cause of degenerative disc disease. BNSF Ry. Co. v. Phillips, 434 S.W.3d 675, 2014 Tex. App. LEXIS 5533 (Tex. App. Fort Worth May 22 2014).

27. Trial court did not abuse its discretion by admitting evidence concerning sexual abuse allegations made against the father because the Texas Department of Family and Protective Services did not seek to terminate the father's parental rights based on those allegations, the Department did not contend that the allegations were true, and the trial court gave the jury a limiting instruction concerning the evidence. J.H. v. Tex. Dep't of Family & Protective Servs., 2011 Tex. App. LEXIS 4434, 2011 WL 2297723 (Tex. App. Austin June 9 2011).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

28. Where a former employee alleged that a former employer terminated the employee because the employee refused to drive a truck without a required permit and a jury found in favor of the employer, any error in excluding seven overweight permits as irrelevant was harmless because the excluded permits were not relevant to the first jury question since whether the truck was overweight on the day in question was not relevant to whether the employee was discharged, and the jury did not reach the remaining questions. Nezat v. Tucker Energy Servs., 437 S.W.3d 541, 2014 Tex. App. LEXIS 6518, 38 I.E.R. Cas. (BNA) 1033 (Tex. App. Houston 14th Dist. June 17 2014).

29. In a negligence case arising from a fire at a condominium complex, speculative testimony regarding the adequacy of plumbing work was irrelevant and inadmissible and no showing of expert qualifications was made

under Tex. R. Evid. 702; however, the trial court's error in admitting the testimony was harmless under Tex. R. App. P. 44. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 2007 Tex. App. LEXIS 5977 (Tex. App. Fort Worth July 26 2007).

Civil Procedure : Eminent Domain Proceedings : Experts

30. In an eminent domain proceeding in which a land planner designated as an expert by the owner testified that the owner could not achieve full compliance with the town's zoning ordinances after the State's condemnation and that the owner would be required to demolish all of its buildings, the trial court abused its discretion by admitting the land planner's opinion about the allegedly required demolition of the owner's buildings because his opinion was impermissibly speculative and conjectural. Reversal was required because there was a reasonable probability that the inadmissible evidence that characterized the demolition of the owner's buildings as a certainty, rather than a market-affecting factor, improperly influenced the jury's verdict on remainder damages. State v. Little Elm Plaza, Ltd., 2012 Tex. App. LEXIS 8880 (Tex. App. Fort Worth Oct. 25 2012).

31. In an action arising from the State's partial taking of owners' property for use in a highway project, the trial court did not abuse its discretion in denying the State's pretrial motion to exclude the expert testimony of the owners' designated real estate appraiser where his testimony was relevant because the market value of the whole property prior to the taking was a fact of consequence to the determination of the disputed element of the measure of damages. Moreover, the owners met their burden to show that the appraiser's expert testimony was reliable because he provided data of comparable sales with a variety of possible uses for the property and also testified that he performed a feasibility study on the possible uses for the property considering such factors as the impervious cover limitations, and although the State's experts provided conflicting testimony of the property's highest and best use as an office building and the property's market value based on four different land sales with a different unit of comparison, it was for the jury to resolve the conflicting evidence of the experts to determine the market value of the whole property prior to the taking. State v. Petropoulos, 346 S.W.3d 619, 2009 Tex. App. LEXIS 3021 (Tex. App. Austin Apr. 28 2009).

Computer & Internet Law : General Overview

32. Court properly admitted the contents of social networking web pages because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be -- web pages the contents of which defendant was responsible for. There were numerous photographs of defendant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring, and there was a reference to the victim's death and the music from his funeral. Tienda v. State, 358 S.W.3d 633, 2012 Tex. Crim. App. LEXIS 244 (Tex. Crim. App. 2012).

Computer & Internet Law : Criminal Offenses : General Overview

33. In a murder trial, there was no error under Tex. R. Evid. 401, 402, 403, 404 in admitting a video of a social networking page, on which defendant was depicted holding a gun. The evidence was relevant because a witness testified that the gun in the video was the same gun the witness saw defendant use in the murder; it wass unlikely that the jury would have felt compelled to convict defendant of murder simply because he acted like a "bad boy" and brandished a weapon on camera. Brumfield v. State, 2010 Tex. App. LEXIS 10137, 2010 WL 5187690 (Tex. App. Houston 1st Dist. Dec. 23 2010).

34. In a trial for a murder by ligature strangulation, there was no error in admitting exhibits relating to defendant's use of an erotic asphyxiation Web site, in part because images of unrelated sexual activity and nudity were eliminated, leaving only those images showing ligature and manual strangulation that defendant had viewed in the five weeks before the murder; the State was able to tie some of the viewings to the dates that defendant visited

other female homeowners and realtors, in order to show intent and motive in the murder of the female victim during an ostensible viewing of her home. Russo v. State, 228 S.W.3d 779, 2007 Tex. App. LEXIS 4499 (Tex. App. Austin 2007).

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Self-Incrimination Privilege

35. Trial court did not abuse its discretion by requiring appellant, who was on trial for capital murder, to display his gang-related tattoo to the jury because the tattoos were admissible to prove the "criminal street gang" element of the offense, and their probative value was not outweighed by the danger of unfair prejudice. Garza v. State, 213 S.W.3d 338, 2007 Tex. Crim. App. LEXIS 98 (Tex. Crim. App. 2007).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Assistance of Counsel

36. Ineffective assistance of counsel in violation of U.S. Const. amend. VI was shown where defendant's counsel failed to object to evidence that one of two women who died after being run over by defendant's truck was pregnant; evidence of her pregnancy was irrelevant under Tex. R. Evid. 401 and Tex. R. Evid. 402 because the fact that the woman was pregnant did not tend to make it more or less probable that defendant had the requisite intent to injure her and there was no evidence that defendant in fact even was aware of the woman's pregnancy. White v. Thaler, 610 F.3d 890, 2010 U.S. App. LEXIS 13329 (5th Cir. Tex. 2010).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

37. Although a driver had the right under U.S. Const. amend. XIV, § 1 and Tex. Const. art. I, § 19 to cross-examine the officer who arrested him for driving while intoxicated after he was involved in an auto accident, the administrative law judge (ALJ) who suspended his driver's license was within her discretion to limit questioning on relevancy grounds pursuant to Tex. R. Evid. 401 because the record showed that when the officer was asked by the ALJ if he had taken the driver's driving and possible culpability in causing the accident into consideration for probable cause to arrest him, the officer responded negatively. Because the officer did not take the fault of the accident into consideration in determining probable cause for intoxication, the issue was irrelevant. Tex. Dep't of Pub. Safety v. Burrer, 2005 Tex. App. LEXIS 3534 (Tex. App. San Antonio May 11 2005).

Contracts Law : Contract Interpretation : Intent

38. Trial court abused its discretion in denying the deletions and revisions in the lease drafts on hearsay and relevancy grounds in parties' dispute over the terms of an oil and gas lease because they were offered to show what was said, such that they were not hearsay, and they were clearly relevant to the parties' intentions. PNP Petroleum I, LP v. Taylor, 438 S.W.3d 723, 2014 Tex. App. LEXIS 5402, 180 Oil & Gas Rep. 1049 (Tex. App. San Antonio May 21 2014).

Contracts Law : Remedies : Equitable Relief : General Overview

39. Trial court's evidentiary rulings were not an abuse of discretion, as the evidence admitted in a dialysis service provider's action against a self-insurer, seeking recovery for services rendered, was relevant to the claims made by each party pursuant to Tex. R. Evid. 401; other payment plans, other providers' acceptance of the rates provided by Blue Cross, and other lawsuits filed by the provider were relevant to the reasonable value of the services rendered under the provider's quantum meruit claim. H.E. Butt Grocery Co. v. Rencare, Ltd., 2004 Tex. App. LEXIS 1005 (Tex. App. San Antonio Feb. 4 2004).

Contracts Law : Remedies : Specific Performance

40. In a collection suit by a creditor that purchased the debt from a credit card company, the trial court did not abuse its discretion in excluding the deposition of the creditor's employee concerning a different case because that deposition did not pertain to the credit card company. The deposition was not relevant under Tex. R. Evid. 401, 406. Simien v. Unifund Ccr Partners, 2010 Tex. App. LEXIS 2687, 2010 WL 1492267 (Tex. App. Houston 1st Dist. Apr. 15 2010).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview

41. In a trial for manufactured methamphetamine, there was no error in the admission of evidence concerning a subsequent arrest, seven months later, for possession of chemicals with intent to manufacture methamphetamine. That evidence tended to make less probable defendant's argument that he possessed items used to manufacture methamphetamine solely for use in bartering for drugs; thus, the evidence was relevant under Tex. R. Evid 401 and 402. Tarpley v. State, 2005 Tex. App. LEXIS 6289 (Tex. App. Dallas Aug. 10 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 8782 (Tex. App. Dallas Oct. 24, 2005).

42. Trial court did not err in admitting evidence of two prior extraneous acts in defendant's trial on charges of possession of pseudoephedrine with the intent to manufacture methamphetamine because there was no direct evidence of defendant's intent, and intent could not necessarily be inferred from the act itself. The evidence of the prior extraneous act in which defendant was found with fresh track marks in his arm was relevant under Tex. R. Evid. 401 because methamphetamine use and addiction was highly probative regarding commission of the charged offense, and the evidence was admissible under Tex. R. Evid. 404(b) to show intent, plan, and absence of mistake. Fulfer v. State, 2005 Tex. App. LEXIS 2449 (Tex. App. El Paso Mar. 31 2005).

43. In a possession and manufacture of methamphetamine case, admission of evidence regarding defendant's arrest in another county was proper as issues of who was in care, custody, or control of the clandestine laboratory equipment and the methamphetamine, and of defendant's intent and knowledge, were in dispute, and that he had the same type of equipment used in the manufacture on his own property in the other county was therefore relevant to those issues. Tullos v. State, 2004 Tex. App. LEXIS 5186 (Tex. App. Beaumont June 9 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

44. Evidence of trace quantities of controlled substances that were found in defendant's car during the same search in which the methadone was found was relevant and admissible because it was visible in a baggie and on a scale, and the baggie was found in the location where the trooper had seen defendant secret something. Lamkin v. State, 2010 Tex. App. LEXIS 6484, 2010 WL 3170647 (Tex. App. Eastland Aug. 12 2010).

45. Documents relating to purchases of a vehicle were properly admitted in a trial for possession of marihuana that was found in a false compartment in the vehicle because the documents were relevant under Tex. R. Evid. 401 to prove the chain of custody, possession, or ownership of the vehicle from two prior owners to defendant. Trevino v. State, 2005 Tex. App. LEXIS 6139 (Tex. App. Corpus Christi Aug. 4 2005).

46. Defendant forfeited consideration of his argument that the monetary value of cocaine was not an element of his possession offense and was, therefore, irrelevant because the street value of rock-cocaine was admitted before the jury without objection earlier in the trial. Broussard v. State, 163 S.W.3d 312, 2005 Tex. App. LEXIS 3382 (Tex. App. Beaumont 2005).

47. Trial court did not abuse its discretion in admitting evidence of drug paraphernalia found in a vehicle outside a residence in which police arrested defendant because the State demonstrated that the evidence was relevant under Tex. R. Evid. 401 to the issue of defendant's intent to deliver crack cocaine by connecting a woman in the residence

to the vehicle in which the contraband was found. With the connection between the contraband in the vehicle and the residence, along with scales, razor blades, and testimony that defendant was seen directing traffic in front of the location, the evidence had a tendency to prove that defendant possessed crack cocaine with intent to deliver. Guy v. State, 160 S.W.3d 606, 2005 Tex. App. LEXIS 1289 (Tex. App. Fort Worth 2005).

48. In a trial for heroin possession, gang-membership evidence was relevant because it was specifically linked to the case and was not used as character conformity evidence. The expert testified about defendant's affiliation with a gang and about the gang's trade being the trafficking of heroin, primarily by using a female's body cavity to transport the contraband, and having that female accompanied by a gang member; that evidence was relevant to the offense, which was charged after defendant entered the country with a woman who was carrying heroin in her vaginal cavity. Ojeda v. State, 2004 Tex. App. LEXIS 8557 (Tex. App. El Paso Sept. 24 2004).

49. In a possession and manufacture of methamphetamine case, admission of evidence regarding defendant's arrest in another county was proper as issues of who was in care, custody, or control of the clandestine laboratory equipment and the methamphetamine, and of defendant's intent and knowledge, were in dispute, and that he had the same type of equipment used in the manufacture on his own property in the other county was therefore relevant to those issues. Tullos v. State, 2004 Tex. App. LEXIS 5186 (Tex. App. Beaumont June 9 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute

50. Trial court did not err by prohibiting defendant from eliciting testimony at trial that pertained to the drug seller's identity because the trial court could have reasonably determined that even if defendant and the seller were not the same person, it was not logically less probable that defendant possessed cocaine with intent to deliver it on the date of his arrest merely because someone else did so at the apartment on other occasions. Harris v. State, 2012 Tex. App. LEXIS 732, 2012 WL 254086 (Tex. App. Fort Worth Jan. 26 2012).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements

51. In a drug trial, video excerpts from a seized camera were properly admitted under Tex. R. Evid. 401, 403, because they were material to the issues of possession-with-intent-to-deliver a controlled substance and a deadly weapon finding, in that they placed defendant in a drug house around the money and guns. They were not unduly prejudicial because they did not show actual drug dealing. Mincey v. State, 2009 Tex. App. LEXIS 2825, 2009 WL 1058734 (Tex. App. Dallas Apr. 21 2009).

52. Trial court did not abuse its discretion in admitting evidence of defendant's statement, which contained a list of persons to whom defendant admitted he had sold methamphetamine as well as his admissions that he had bought approximately a half-ounce of methamphetamine every week for the last three years, that he used about a quarter-ounce every week, that he sold the rest, and that he sold enough methamphetamine to support his habit, because those portions of the statement that related to defendant's selling methamphetamine were relevant to proving intent to deliver, which was an essential element of defendant's offense, possession of a controlled substance with intent to deliver. Furthermore, the probative force and the State's need to admit the statement outweighed the factors that favored exclusion because defendant's admission that he regularly sold methamphetamine was compelling evidence that he intended to sell methamphetamine, and his admission further served to rebut his theories that the drugs were planted on him and that the money that he carried when he was arrested had come, not from selling drugs, but from payments from his rental properties. Bridges v. State, 2008 Tex. App. LEXIS 6634 (Tex. App. Fort Worth Aug. 29, 2008).

53. In a trial for possession of cocaine with intent to distribute a narcotics officer was properly allowed to describe the cocaine, its packaging, amounts and prices, and to testify that a person in possession of a 100 grams of

cocaine would be in possession with intent to distribute. Brooks v. State, 2006 Tex. App. LEXIS 6973 (Tex. App. Dallas Aug. 8 2006).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview

54. In a driving while intoxicated trial, evidence that cocaine was located in plain view next to the driver's seat in the vehicle defendant was driving was relevant to prove the State's allegation in the indictment that defendant was intoxicated, and, because the possession of cocaine evidence went to a material element of the State's case, it was not an extraneous offense. Lopez v. State, 2013 Tex. App. LEXIS 2064, 2013 WL 765711 (Tex. App. Waco Feb. 28 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

55. In an assault trial arising from an incident in which defendant was bounced from a bar, there was no error under Tex. R. Evid. 401, 403 in admitting evidence that defendant was taking prescription medication to control temper. Dudzik v. State, 276 S.W.3d 554, 2008 Tex. App. LEXIS 9073 (Tex. App. Waco 2008).

56. In an aggravated assault case, a court properly admitted evidence of a witness that she miscarried after jumping out a window because it was relevant to show the witness's physical and emotional state during and following the assault. Smith v. State, 2004 Tex. App. LEXIS 9172 (Tex. App. Dallas Oct. 19 2004).

57. Defendant argued that the trial court erred by excluding evidence relating to his strained marital relationship with the victim because that evidence was probative of his state of mind and motivation at the time of his actions; however, because the only conduct elements potentially implicated for the crime of aggravated assault were the nature of the conduct and the result of the conduct, the circumstances surrounding the conduct were not relevant and were properly excluded. Novillo v. State, 2004 Tex. App. LEXIS 5086 (Tex. App. Austin June 10 2004).

58. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

59. In a prosecution for intentionally and knowingly causing serious bodily injury to a child in violation of Tex. Penal Code Ann. § 22.04, evidence that defendant had personal knowledge that his girlfriend, the child's mother, had a fight with her sister and that anger management classes resulted did not appear to meet the relevance test of Tex. R. Evid. 401; further, defendant failed to reveal the "meaningful" defense that he was deprived of presenting by virtue of the excluded evidence. Ortiz v. State, 2004 Tex. App. LEXIS 2246 (Tex. App. Austin Mar. 11 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

60. In a shooting case, it was proper to admit extraneous offenses as same transaction contextual evidence because shooting two other victims at the same place and time as the victim of the charged shooting, flight, and assault on a deputy were relevant to the issues of identity and rebutting defendant's other-shooter theory. Hignojos v. State, 2013 Tex. App. LEXIS 8929 (Tex. App. Eastland July 18 2013).

61. In a trial for aggravated assault on a public servant, it was proper to admit a rifle and associated photographs to show that defendant had access to the rifle, which was located in the same room. Airheart v. State, 2012 Tex. App. LEXIS 3235, 2012 WL 1431762 (Tex. App. El Paso Apr. 25 2012).

62. In a trial for aggravated assault on a public servant, evidence of defendant's assault on his wife earlier the same evening was admissible under Tex. R. Evid. 401, 404 as same transaction contextual evidence or as background contextual evidence. The series of events that took place that night was an uninterrupted continuum of conduct that was, in essence, a single event. Hester v. State, 2009 Tex. App. LEXIS 9311, 2009 WL 4597948 (Tex. App. Texarkana Dec. 8 2009).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Simple Offenses

63. Trial court did not abuse its discretion by excluding expert psychological testimony who allegedly would have testified that as a result of his mental defects defendant was incapable of forming the necessary mens rea to commit an assault because defendant's amnesia was caused by his head injury, which occurred after the assault, and therefore could not be relevant to his intent at the time of the assault. In addition, the expert's report only noted that defendant told the expert that he had post-traumatic stress disorder, and nothing suggested that the expert himself confirmed the diagnosis. Iniquez v. State, 374 S.W.3d 611, 2012 Tex. App. LEXIS 5436, 2012 WL 2742632 (Tex. App. Austin July 6 2012).

64. In a trial for assault on a public servant, testimony that defendant was a convicted felon and in possession of drugs and a handgun was properly admitted under Tex. R. Evid. 401, because it was relevant to motive. Thurman v. State, 2007 Tex. App. LEXIS 135 (Tex. App. Tyler Jan. 10 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Coercion : General Overview

65. When an inmate was charged with harassment by persons in certain correctional facilities for throwing urine and feces at two correctional officers, the officers' testimony about how they felt when defendant engaged in this conduct was circumstantial evidence relevant to the element of whether defendant had the intent to harass and alarm and annoy another person, so it could not be said that it was not relevant, under Tex. R. Evid. 401, or admissible, under Tex. R. Evid. 402. Wheatly v. State, 2004 Tex. App. LEXIS 5671 (Tex. App. Waco June 23 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

66. Defendant's allegation that the complainant's unlawful sexual contact with her thirteen years prior to the assault was irrelevant to disproving the allegation of a dating relationship was rebutted by the State because the complainant testified he and defendant were dating at the time he was injured, and defendant testified that during a phone call she made to the victim after he was injured, she told him "I love you" several times. Smith v. State, 2012 Tex. App. LEXIS 8848, 2012 WL 5238280 (Tex. App. Dallas Oct. 24 2012).

67. In a trial for child sexual assault, testimony about extraneous acts was properly admitted from a complainant, defendant's stepdaughter, because the testimony concerning two sexual encounters was relevant, under Tex. R. Evid. 401, as to defendant's intent to engage in the charged offenses and the states of mind of defendant and the stepdaughter. Miller v. State, 2005 Tex. App. LEXIS 6227 (Tex. App. El Paso Aug. 4 2005).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview

68. In a trial for injury to a child, defendant's letters to his girlfriend while awaiting trial were relevant because they contained apologies, some specific and bordering on admissions, and also contained attempts to persuade the girlfriend to recant, both circumstances indicating consciousness of guilt. Pizano v. State, 2013 Tex. App. LEXIS 7459, 2013 WL 3155954 (Tex. App. Houston 1st Dist. June 20 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : Elements

69. In a murder trial involving a child victim, there was no error under Tex. R. Evid. 401, 402, 403 in admitting an autopsy photograph because it demonstrated the scope and extent of the child's injuries and the cause of death. It was not cumulative because it showed injuries to the victim's neck and head from a side view, whereas two other photographs showed injuries from a frontal view. Williams v. State, 2009 Tex. App. LEXIS 1045 (Tex. App. Houston 1st Dist. Feb. 12 2009).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Custodial Interference

70. In defendant's prosecution for interference with child custody under Tex. Penal Code Ann. § 25.03(a)(1), evidence that he continued to pay child support after July 2006 was relevant and not unfairly prejudicial as it tended to rebut his claim that he and the complainant had reconciled and that he believed that the divorce decree was void. Long v. State, 2010 Tex. App. LEXIS 9804 (Tex. App. Houston 1st Dist. Dec. 9 2010).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Custodial Interference

71. In a prosecution for interference with child custody in violation of Tex. Penal Code Ann. § 25.03(a)(1), as there was no mutual agreement between defendant and the children's mother to vary from the divorce decree's terms of possession, evidence of their past dealings regarding possession of the children was properly excluded as irrelevant. Gallegos v. State, 2013 Tex. App. LEXIS 12149, 2013 WL 5460044 (Tex. App. Amarillo Sept. 26 2013).

72. In a prosecution for interference with child custody, the trial court properly excluded evidence that defendant sought to present to show that the mother was not a fit custodial parent, as it was not relevant to any issue in the case. Gallegos v. State, 2013 Tex. App. LEXIS 12149, 2013 WL 5460044 (Tex. App. Amarillo Sept. 26 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault

73. In a trial under Tex. Penal Code Ann. § 22.02 for assault with a deadly weapon on a family member, evidence that the complainant's parent had a gun was properly excluded as irrelevant because the fact had no bearing on who had access to the gun and did not make it less likely that defendant assaulted the complainant with a gun; therefore, limiting defendant's cross-examination of the complainant on that issue did not violate Tex. Const. art. I, § 10. Dancy v. State, 2007 Tex. App. LEXIS 9806 (Tex. App. Houston 1st Dist. Dec. 13 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Endangerment : General Overview

74. During the punishment phase of a criminal trial where defendant was charged with endangering a child, the trial court did not abuse its discretion by admitting evidence from defendant's ex-boyfriend who was convicted of sexually assaulting defendant's daughter since the probative value of the confession was not substantially outweighed by its prejudice. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview

75. In trial for the aggravated kidnapping of a two-year-old girl, the trial court's decision to admit the evidence about defendant purchasing a condom the night before the kidnapping was within the zone of reasonable disagreement. The evidence about defendant's condom purchase tended to make the existence of a material fact, that defendant had planned to sexually assault the victim during the kidnapping, more probable than it would have been without the evidence; thus, the evidence was relevant and admissible. Howe v. State, 2004 Tex. App. LEXIS 2417 (Tex. App. Texarkana Mar. 16 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

76. Court did not err by admitting into evidence the photographic lineup viewed by the officer; the lineup was relevant because the lineup and the officer's identification of defendant in the lineup had a tendency to make defendant's identity as the third robber more probable than it would be without the evidence. Caine v. State, 2013 Tex. App. LEXIS 13601, 2013 WL 5918402 (Tex. App. Dallas Nov. 1 2013).

77. Because the robberies occurred in the same geographic area within a relatively brief time frame, and all were committed by an assailant who covered his hands with socks or gloves, and whose face was completely covered by a similar covering, leaving only the eyes exposed, there are sufficient common characteristics between each of the robberies, that the extraneous offenses were relevant to prove identity and admissible under Tex. R. Evid. 401, 402, 404(b). Heigelmann v. State, 362 S.W.3d 763, 2012 Tex. App. LEXIS 1670, 2012 WL 688427 (Tex. App. Texarkana Mar. 2 2012).

78. In a robbery trial, there was no error in the trial court's refusal to admit testimony regarding a scalp condition from a registered nurse who had examined defendant. Defendant did not explain how the nurse's testimony about his scalp condition on February 1, 2010 was relevant under Tex. R. Evid. 401 to his appearance--whether he was going bald--at the time of the crime, August 2007. Griffin v. State, 2011 Tex. App. LEXIS 1039, 2011 WL 531558 (Tex. App. Houston 14th Dist. Feb. 15 2011).

79. In a robbery trial, evidence that defendant committed a similar robbery in a nearby location a few days after he was alleged to have committed the charged offense was relevant under Tex. R. Evid. 401 to rebut alibi testimony that he was not in Houston at the time of the charged offense. Griffin v. State, 2011 Tex. App. LEXIS 1039, 2011 WL 531558 (Tex. App. Houston 14th Dist. Feb. 15 2011).

80. In a trial for capital murder arising from a robbery and shooting, it was reversible error to admit evidence that defendant committed an armed robbery of a grocery store a month after the charged murder because any probative value as to intent under Tex. R. Evid. 401, 402 was outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Jackson v. State, 320 S.W.3d 873, 2010 Tex. App. LEXIS 6572 (Tex. App. Texarkana Aug. 12 2010).

81. In a robbery trial, there was no error under Tex. R. Evid. 401 in admitting the complainant's demonstration before the jury of the degree of movement he had in his legs because the evidence was relevant to whether he had suffered bodily injury. Onyeche v. State, 2010 Tex. App. LEXIS 3659, 2010 WL 1946772 (Tex. App. Fort Worth May 13 2010).

82. In an aggravated robbery case, defendant was properly denied the opportunity to impeach a victim regarding the amount of her paycheck because it was not relevant to the offense charged. Moore v. State, 2009 Tex. App. LEXIS 4982, 2009 WL 1886450 (Tex. App. Waco July 1 2009).

83. During the punishment of defendant's trial, the trial court did not abuse its discretion by allowing testimony and photographs of the victim's injuries to show defendant committed the enhancement offense of a prior aggravated robbery under Tex. Penal Code Ann. § 29.03; evidence establishing that defendant inflicted "serious bodily injury" upon his victim was an essential part of the State's proof of the enhancement offense; the photographs were relevant and highly probative. Thompson v. State, 2007 Tex. App. LEXIS 57 (Tex. App. Dallas Jan. 5 2007).

84. In a trial for the robbery of a pickup truck, the trial court properly admitted a police chase video of the robbers' pickup along with testimony about the chase, even though defendant was not in the truck, as well as evidence of three handguns found in the pickup; the evidence was relevant under Tex. R. Evid. 401 because it substantiated defendant's confession and rebutted his claim that he was not armed when robbing the complainant. Hawkins v. State, 2006 Tex. App. LEXIS 6439 (Tex. App. Houston 1st Dist. July 20 2006).

85. In a robbery trial, the court did not have to admit evidence of the complainant's prior conviction for misdemeanor assault against defendant's nephew. Contrary to defendant's argument, the two-year-old conviction was not relevant to show that the complainant ran from his apartment because he feared a physical confrontation. Allison v. State, 2005 Tex. App. LEXIS 4055 (Tex. App. Houston 14th Dist. May 24 2005).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview

86. In a robbery trial, there was no error under Tex. R. Evid. 401, 403 in admitting evidence that after the robbery, someone stole the complainant's tools from the complainant's vehicle and set the vehicle on fire. The extraneous offenses were contextual evidence that helped to explain why the police became involved in the case that led to the investigation of the underlying facts and how the police ultimately arrested defendant for robbery. Flores v. State, 2007 Tex. App. LEXIS 6539 (Tex. App. Houston 1st Dist. Aug. 16 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview

87. In a stalking case, the trial court did not err by allowing the cross-examination of a defense witness regarding whether she was aware that defendant had been charged with a crime following an alleged domestic violence incident with the victim and whether she was aware that he had violated a protective order and assaulted his former wife; this evidence was relevant to defendant's good character after the witness testified that she had called the victim and asked her to give defendant another chance. Allen v. State, 218 S.W.3d 905, 2007 Tex. App. LEXIS 2527 (Tex. App. Beaumont 2007).

88. Trial court did not err in admitting the victim's testimony about incidents of property damage that were not included in the stalking indictment, which included testimony that someone piled her trash in front of her door, flipped her breaker box, flooded her yard, damaged her yard decorations, pulled down an outside light fixture, cut her satellite cable, and spray-painted her gate, because (1) the evidence was not improper character evidence under Tex. Evid. R. 404(a) as the victim never claimed that defendant committed the acts; and (2) the victim's

testimony that the offenses against her property had occurred was relevant to establishing her state of mind at the time of the events in the stalking indictment. Marsh v. State, 2004 Tex. App. LEXIS 3620 (Tex. App. Fort Worth Apr. 22 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Violation of Protective Orders

89. In a trial for violating a protective order under Tex. Penal Code Ann. § 25.07, the underlying protective order and findings of family violence under Tex. Fam. Code Ann. § 85.001 were relevant within the meaning of Tex. R. Evid. 401; the issuing court's findings were relevant to a determination of defendant's intent in violating the protective order, the complainant's fear of bodily injury or death, and a reasonable person's fear of bodily injury or death. Marston v. State, 2007 Tex. App. LEXIS 8671 (Tex. App. Eastland Nov. 1 2007).

Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : General Overview

90. In a homicide trial, there was no error in admitting evidence of defendant's gang membership. Under Tex. R. Evid. 401, 403, the evidence was admissible to explain defendant's anger at the victim's alleged false claim regarding prison time and gang affiliation. McCallum v. State, 311 S.W.3d 9, 2010 Tex. App. LEXIS 440 (Tex. App. San Antonio Jan. 27 2010).

91. In defendant's manslaughter case, the trial judge did not err in excluding evidence that a toxicology report revealed that a passenger had cocaine in her system at the time of her death where the evidence was not relevant because defendant presented no evidence that the driver used drugs on the day of the accident, and the fact that the passenger had cocaine in her system did not mean that the driver in the same car likewise had used cocaine. Tijerina v. State, 2004 Tex. App. LEXIS 9539 (Tex. App. Dallas Oct. 28 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : Elements

92. Pursuant to Tex. R. Evid. 401 and 403, the testimony of a claims representative for defendant's insurer that the insurer was liable was not barred by Tex. R. Evid. 411 because it allowed for an inference of fault on the part of defendant, which was a fact of consequence in the manslaughter prosecution under Tex. Penal Code Ann. § 19.04. Mitchell v. State, 377 S.W.3d 21, 2011 Tex. App. LEXIS 8970, 2011 WL 5994154 (Tex. App. Waco Nov. 9 2011).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

93. In a trial for defendant's murder of his wife, evidence that he remarried a month after being released on bond was relevant to motive. Davis v. State, 2011 Tex. App. LEXIS 8372, 2011 WL 5026403 (Tex. App. Houston 1st Dist. Oct. 20 2011).

94. In a murder trial, there was no error under Tex. R. Evid. 401, 402, 403, 404 in admitting a video of a social networking page, on which defendant was depicted holding a gun. The evidence was relevant because a witness testified that the gun in the video was the same gun the witness saw defendant use in the murder; it wass unlikely that the jury would have felt compelled to convict defendant of murder simply because he acted like a "bad boy" and brandished a weapon on camera. Brumfield v. State, 2010 Tex. App. LEXIS 10137, 2010 WL 5187690 (Tex. App. Houston 1st Dist. Dec. 23 2010).

95. In a murder trial, there was no error under Tex. R. Evid. 401 in admitting pawn shop tickets showing that defendant was in Houston on two of the days when an alibi witness testified he was in New Orleans. The pawn shop tickets were relevant because they were helpful in determining the truth or falsity of the witness's testimony.

Brumfield v. State, 2010 Tex. App. LEXIS 10137, 2010 WL 5187690 (Tex. App. Houston 1st Dist. Dec. 23 2010).

96. There was no error under Tex. R. Evid. 401, 403 when the trial court admitted, at the punishment phase of a murder trial, a video of sexual acts involving defendant and the victim, his wife, who was unconscious due to alleged intoxication, because the video countered defendant's assertions of sudden passion and that he was law abiding until the murder. Skolnik v. State, 2010 Tex. App. LEXIS 5509, 2010 WL 2783872 (Tex. App. Corpus Christi July 15 2010).

97. In a murder trial, shell casings that were retrieved from defendant's residence prior to the charged offense were relevant under Tex. R. Evid. 401 because they were circumstantial evidence of a connection between defendant and the murder weapon. Quesada v. State, 2006 Tex. App. LEXIS 1011 (Tex. App. San Antonio Feb. 8 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 6181 (Tex. App. San Antonio July 19, 2006).

98. Where defendant was charged with the murder of her ex-boyfriend's new girlfriend, the trial court did not err in admitting into evidence a letter written by defendant to her ex-boyfriend. In the letter, defendant described the intensity of her feelings for him and her concern about the possibility of his philandering. Defendant's statements proved that she had a motive to kill the complainant. Harris v. State, 2005 Tex. App. LEXIS 346 (Tex. App. Houston 1st Dist. Jan. 13 2005).

99. In a trial for murder and robbery, evidence that a gun was taken in a prior robbery was same transaction contextual evidence and was relevant to show preparation for the planned robbery and murder at issue. The evidence was not unduly prejudicial, given the other evidence that the stolen gun was the murder weapon. Hill v. State, 2004 Tex. App. LEXIS 8474 (Tex. App. Tyler Sept. 22 2004).

100. In a prosecution for murder, the medical records of defendant's shooting victims were properly admitted at the sentencing phase; the medical records were relevant to the circumstances of the murder and provided evidence of bad acts for which defendant could be held criminally responsible. Mendoza v. State, 2004 Tex. App. LEXIS 2486 (Tex. App. Houston 1st Dist. Mar. 18 2004).

101. Trial court did not abuse its discretion in admitting testimony, in defendant's trial under Tex. Penal Code Ann. § 7.01(a) and Tex. Penal Code Ann. § 7.02(a)(2) for being a party to his wife's murder, as to defendant's statement regarding researching how to make a silencer for a gun on the ground that it was relevant to a fact of consequence as set forth in Tex. R. Evid. 401. Guevara v. State, 2001 Tex. App. LEXIS 8520 (Tex. App. San Antonio Dec. 26 2001), opinion withdrawn by, substituted opinion at 103 S.W.3d 549, 2003 Tex. App. LEXIS 960 (Tex. App. San Antonio 2003).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

102. In a murder trial, there was no error in admitting extraneous offense evidence regarding a robbery/shooting that occurred ten minutes before the murder or regarding an assault that occurred as the suspects drove away from the robbery victim's apartment. The other offenses bore bear striking similarities to the offense for which defendant was convicted and were relevant to the hotly contested issue of identity. Mason v. State, 416 S.W.3d 720, 2013 Tex. App. LEXIS 13527, 2013 WL 5861492 (Tex. App. Houston 14th Dist. Oct. 31 2013).

103. In a murder trial, there was no error under Tex. R. Evid. 401, 403, 404(b) in admitting the extraneous offense evidence of an aggravated robbery that defendant and an accomplice allegedly committed six days prior to the murder because it was reasonable to conclude that the evidence went directly to the issue of intent, given that the extraneous robbery occurred less than a week prior to the shooting and had several similarities to the charged

offense. Maxwell v. State, 2010 Tex. App. LEXIS 9036, 2010 WL 4595702 (Tex. App. Austin Nov. 12 2010).

104. In a trial for capital murder arising from a robbery and shooting, it was reversible error to admit evidence that defendant committed an armed robbery of a grocery store a month after the charged murder because any probative value as to intent under Tex. R. Evid. 401, 402 was outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Jackson v. State, 320 S.W.3d 873, 2010 Tex. App. LEXIS 6572 (Tex. App. Texarkana Aug. 12 2010).

105. In a capital murder trial, there was no error under Tex. R. Evid. 401 in admitting testimony from witnesses who had encounters with defendant either six months or three months before the offense; the evidence was not too remote to be relevant. Russo v. State, 228 S.W.3d 779, 2007 Tex. App. LEXIS 4499 (Tex. App. Austin 2007).

106. In a murder trial, photographs of the deceased were properly introduced into evidence under Tex. R. Evid. 401, even though they showed the gruesome appearance of the body, which was badly burned in arson, because the photographs showed the position of stab wounds that caused death; although graphic, the photographs did not inject any additional, intangible, or inappropriate emotional element into the case such that the trial court should have necessarily excluded these photographs. Ledbetter v. State, 208 S.W.3d 723, 2006 Tex. App. LEXIS 10040 (Tex. App. Texarkana 2006).

107. In a capital murder case, a court did not err by admitting bullet fragments where there was a weapon already connected to the crime, there was no dispute that the accomplice had the gun that evening, the fragments recovered from the apartment were similar both in appearance and in chemical composition to those recovered from the victim's body, defendant was admittedly at the apartment once that evening and at the complex a second time, he did not accounted for a sizeable portion of his own time line, and all the jury had to infer was that he and the accomplice test-fired the weapon in contemplation of using it in the robbery. Jacques v. State, 2004 Tex. App. LEXIS 7264 (Tex. App. El Paso Aug. 12 2004).

108. In a capital murder trial under Tex. Penal Code Ann. § 19.03(a), the trial court did not err in admitting the expert testimony of an FBI agent because the agent's testimony was relevant under Tex. R. Evid. 401 to rebut defendant's defensive theory of insanity. Resendiz v. State, 112 S.W.3d 541, 2003 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 2003), *cert. denied*, Resendiz v. Texas, 541 U.S. 1032, 124 S. Ct. 2098, 158 L. Ed. 2d 713, 2004 U.S. LEXIS 3274 (2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : Elements

109. Trial court did not abuse its discretion by finding that the knives recovered from defendant's vehicle to be relevant because defendant admitted in his statement made in 2005 that he had collected knives since he was a child and he carried a knife in his vehicle 1989 for protection. This evidence was relevant to show defendant's considerable familiarity with knives and to provide a "small nudge" toward demonstrating his opportunity, means, and capacity to have committed the murder of the victim, who was stabbed to death. Tilford v. State, 2011 Tex. App. LEXIS 5933, 2011 WL 3273543 (Tex. App. El Paso July 29 2011).

110. Trial court did not abuse its discretion by admitting defendant's admission that he was paid after the crime because the State had the burden to prove that defendant received renumeration for the killing in order to prove its capital murder charge, and therefore defendant's statement about receiving money was relevant. Quintanilla v. State, 2011 Tex. App. LEXIS 1353, 2011 WL 665328 (Tex. App. Houston 14th Dist. Feb. 24 2011).

111. Evidence of a judgment that terminated defendant's parental rights to three of her children after the date that she allegedly murdered her newborn infant was relevant at her capital murder trial under Tex. R. Evid. 401, and had relevance apart from mere proof of character conformity in compliance with Tex. R. Evid. 404(b), because an

extraneous offense/bad act that took place subsequent to the offense for which a defendant was on trial did not make the extraneous offense/bad act inadmissible per se; furthermore, the judgment was introduced by the State after defendant had testified that the infant's death on the night in question was not the result of any intentional or knowing conduct on defendant's part, and the termination judgment contained findings by the trial judge that defendant "knowingly" placed or allowed her other children to remain in conditions dangerous to their physical or emotional well-being, which at least arguably made it more probable that defendant's acts or omissions on the night in question were done either intentionally or knowingly. Fergerson v. State, 2006 Tex. App. LEXIS 6589 (Tex. App. Beaumont July 26 2006).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : First-Degree Murder : General Overview

112. In defendant's murder case, the court properly admitted testimony regarding the victim having worked for defendant as a prostitute because the witness testified that the cycle of violence evolved from "slapping" to the point of "pretty brutal beatings." That testimony tended to show that defendant was violent toward the victim in the past and that his violence toward her was escalating; therefore, the testimony was relevant to the charge of murder. Wilson v. State, 2010 Tex. App. LEXIS 604, 2010 WL 323537 (Tex. App. Fort Worth Jan. 28 2010).

113. In defendant's murder case, the trial court properly excluded defendant's testimony about the victim's alleged indifference to her pregnancy and the problems she encountered just before her son's birth because the proffered evidence was not probative of the alleged reasonableness of defendant's belief that the victim had used, was using, or even might use deadly force at the time that she shot and killed him. Eisenman v. State, 2008 Tex. App. LEXIS 282 (Tex. App. Corpus Christi Jan. 10 2008).

114. In defendant's murder case, the court did not err by omitting evidence of pornography found on the victim's computer because there was no showing by defendant that the pornographic images were related to the shooting, that the images were the subject of the argument that preceded the shooting, or that the images played any part whatsoever during the events leading up to the shooting. Eisenman v. State, 2008 Tex. App. LEXIS 282 (Tex. App. Corpus Christi Jan. 10 2008).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : General Overview

115. During defendant's trial for illegal dumping, the trial court did not err in excluding documentary evidence consisting of numerous receipts indicating that defendant had sold or recycled metals and other materials in 2002 and 2003, which defendant claimed was offered to prove he was recycling, rather than dumping, solid waste on his property, because the fact that defendant might not have been operating a solid waste site in 2002 and 2003 had little or no logical relevance to whether he began operating such a site in 2004, which was when the activity for which he was prosecuted occurred. Gandy v. State, 222 S.W.3d 525, 2007 Tex. App. LEXIS 1441 (Tex. App. Houston 14th Dist. 2007).

116. Defendant's conviction of fraudulent use or possession of identifying information, arising out of the creation of a fake warehouse store shopper's card, was affirmed because the trial court did not err in sustaining the State's relevancy objection to fake drivers' licenses seized from the home of defendant's relative. Bell v. State, 2006 Tex. App. LEXIS 3830 (Tex. App. Fort Worth May 4 2006).

117. Trial court erred in excluding from jury consideration evidence of discriminatory enforcement of the Blue Law, former Tex. Rev. Civ. Stat. Ann. art. 9001; however, the error was harmless in that there was no hint of any reason that constituted the kind of invidious enforcement that gave rise to constitutional protection. Wolf v. State, 661 S.W.2d 765, 1983 Tex. App. LEXIS 5456 (Tex. App. Fort Worth 1983).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : General Overview

118. In defendant's evading arrest case, the court properly allowed testimony concerning typical behavior during a traffic stop because the testimony that very few people fled when a squad car initiated a stop by activating its lights was relevant to the offense of evading arrest, and went to defendant's intent. The fact that most people pulled over after the police initiated a stop made it more probable that defendant intentionally disregarded the officer's attempt to pull him over. Spencer v. State, 2013 Tex. App. LEXIS 2227, 2013 WL 1282307 (Tex. App. Dallas Mar. 6 2013).

119. In a trial for evading arrest, there was no error under Tex. R. Evid. 401, 403, or 404 in the admission of evidence that defendant placed a marijuana cigar on the pavement outside his motor vehicle while fleeing from a deputy sheriff. The evidence was relevant because it helped to prove that defendant intentionally fled; it was not submitted to show that defendant acted in conformity with his character because it indicated a motive; and it was highly probative in establishing intent, an essential element of the charge. Slaughter v. State, 2006 Tex. App. LEXIS 8694 (Tex. App. Houston 14th Dist. Oct. 3 2006).

120. In a criminal prosecution for indecency with a child by sexual contact, evidence of defendant's flight was relevant to show guilt. Howard v. State, 2006 Tex. App. LEXIS 1083 (Tex. App. Waco Feb. 8 2006).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Consciousness of Guilt

121. At defendant's trial for robbery, the trial court did not err in admitting testimony regarding his efforts to resist arrest because evidence relevant to his flight from the scene was a circumstance indicative of guilt. Johnson v. State, 2014 Tex. App. LEXIS 471, 2014 WL 222929 (Tex. App. Corpus Christi Jan. 16 2014).

122. In a trial for aggravated sexual assault, there was no error in admitting evidence that defendant, after being confronted by the victim's mother and fleeing to a nearby apartment complex, was seen fleeing from the complex, in which a fire had been started. A reasonable inference from the evidence was that defendant started the fire to aid his flight from the apartment complex; thus, the evidence was of value in establishing consciousness of guilt. Craft v. State, 2012 Tex. App. LEXIS 199, 2012 WL 112527 (Tex. App. El Paso Jan. 11 2012).

123. In a criminal prosecution for aggravated assault with a deadly weapon, evidence that defendant was driving a vehicle that matched the description of the vehicle involved in the shooting and that he attempted to flee from officers when one of them tried to pull him over was probative of his consciousness of guilt. Therefore, defendant's flight was relevant evidence under Tex. R. Evid. 401; the probative value of the evidence was not outweighed by its prejudicial effect under Tex. R. Evid. 403. Owens v. State, 2011 Tex. App. LEXIS 2871, 2011 WL 1435499 (Tex. App. Fort Worth Apr. 14 2011).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly

124. Court properly admitted evidence of defendant's gang affiliation during the punishment phase of his trial because, after admitting, the evidence the court properly instructed the jury it could not consider any evidence of an alleged extraneous crime or bad act unless the State had proved beyond a reasonable doubt that the defendant had committed the act, or it was one for which defendant could be held criminally responsible. By issuing that instruction, the trial court limited the jury's review of evidence in the punishment phase to those bad acts that had been proven beyond a reasonable doubt. Sierra v. State, 266 S.W.3d 72, 2008 Tex. App. LEXIS 6417 (Tex. App. Houston 1st Dist. 2008).

125. Defendant did not object to testimony about gang affiliation during the guilt-innocence phase of a murder trial and therefore failed to preserved error under Tex. R. Evid. 401. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

126. In a trial for heroin possession, gang-membership evidence was relevant because it was specifically linked to the case and was not used as character conformity evidence. The expert testified about defendant's affiliation with a gang and about the gang's trade being the trafficking of heroin, primarily by using a female's body cavity to transport the contraband, and having that female accompanied by a gang member; that evidence was relevant to the offense, which was charged after defendant entered the country with a woman who was carrying heroin in her vaginal cavity. Ojeda v. State, 2004 Tex. App. LEXIS 8557 (Tex. App. El Paso Sept. 24 2004).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Witness Tampering

127. Assault defendant failed to request notice of other crimes and acts evidence under Tex. R. Evid. 404(b) and therefore could not complain of the adequacy of the State's notice; moreover, the notice gave her reasonable notice of a neighbor's expected testimony that defendant sought to bribe her to say that the victim struck defendant first. Additionally, this bribery evidence was relevant as consciousness of guilt and was not unfairly prejudicial. Cavazos v. State, 2014 Tex. App. LEXIS 5045, 2014 WL 1881691 (Tex. App. Amarillo May 8 2014).

128. In a trial for child sexual assault, the complainant's parent was properly allowed to testify that, after the parent discovered defendant, a pastor, watching an R-rated movie with the complainant, defendant threatened to take away the parent's children, house, business, and car if the parent did not sign some papers and that when the parent refused, defendant told the parent to commit suicide; the disputed statement was probative of defendant's state of mind and consciousness of guilt and was properly admitted under Tex. R. Evid. 401, Tex. R. Evid. 403. Hinson v. State, 2008 Tex. App. LEXIS 554 (Tex. App. Fort Worth Jan. 24 2008).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : General Overview

129. In defendant's burglary case, although the testimony of the victims regarding illegal drugs taken during the robbery was of only slight probative value, it was relevant for purposes of sentencing because it pertained to the circumstances of the offense, and therefore, the trial court erred by excluding it. In addition, although the victims denied any involvement in drug-related activities, the jury should have been allowed to assess their credibility and demeanor and the jury may have considered those circumstances in assessing defendant's sentence; therefore, the error was harmful. McKaine v. State, 2004 Tex. App. LEXIS 3777 (Tex. App. Corpus Christi Apr. 29 2004), substituted opinion at, opinion withdrawn by 170 S.W.3d 285, 2005 Tex. App. LEXIS 7147 (Tex. App. Corpus Christi 2005).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary

130. In a burglary trial, there was no error under Tex. R. Evid. 401, 404(b), 403 in admitting evidence of an extraneous burglary in order to show intent. The prior burglary was near in time and location to the charged burglary. Martinez v. State, 304 S.W.3d 642, 2010 Tex. App. LEXIS 413 (Tex. App. Amarillo Jan. 21 2010).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements

131. Trial court did not abuse its discretion by admitting the utility knife, the pocket knife, and wire cutters that were found on defendant's person after his arrest into evidence because they were relevant, as the officer testified that such items were commonly used for burglaries and the State's purpose for introducing the items was to show

defendant's intent; defendant's possession of the items tended to show his intent to commit the offense of burglary and assisted the jury in drawing an inference that he entered the garage with the intent to commit theft. Enloe v. State, 2009 Tex. App. LEXIS 1866 (Tex. App. Corpus Christi Mar. 19 2009).

132. In a burglary trial, there was no error in the admission of evidence that defendant had, in his possession when he was arrested, items taken in a subsequent burglary from the same victim; the evidence was admissible to rebut a line of questioning directed at burglaries that occurred after defendant was in custody. Ellis v. State, 2007 Tex. App. LEXIS 414 (Tex. App. Tyler Jan. 24 2007).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : Elements

133. Witness acknowledged in a recorded statement that he committed the theft, that he did not have the owner's authority to use the vehicle, and that he misled defendant in that regard, and thus the witness's statement exposed him to criminal liability, for analysis purposes under Tex. R. Evid. 803; the trial court could properly consider the witness's changing versions in finding whether his version of events in the recorded statement was credible, but the court ultimately found the evidence credible, given that (1) the witness was in a position to commit the crimes with which defendant had been tried, including theft and unauthorized use of a motor vehicle, (2) the witness's admissions were made at a time when they were relevant to then-existing charges, and (3) independent corroborative facts supported the credibility of the account, such that defendant met the burden of corroborating the witness's statement against interest and the corroborating circumstances indicated the trustworthiness of the statement. Watkins v. State, 2008 Tex. App. LEXIS 2539 (Tex. App. Beaumont Apr. 9 2008).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : General Overview

134. At defendant's trial for indecency with a child by contact, the trial court did not err by admitting his recorded interview with an investigator from the district attorney's office. Defendant's description of his sexual urges toward children was relevant to the elements of the offense. Mattingly v. State, 382 S.W.3d 611, 2012 Tex. App. LEXIS 8126, 2012 WL 4457713 (Tex. App. Amarillo Sept. 26 2012).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Prostitution : General Overview

135. Video recordings showing sex acts between dancers and patrons of the adult establishment were relevant, and therefore the trial court did not abuse its discretion by admitting them during defendant's trial, because they tended to show that the establishment was a prostitution enterprise and was relevant to the charged offense of aggravated promotion of prostitution. Coutta v. State, 385 S.W.3d 641, 2012 Tex. App. LEXIS 8692 (Tex. App. El Paso Oct. 17 2012).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

136. In an aggravated assault and aggravated sexual assault case, pursuant to Tex. R. Evid. 401, the trial court did not abuse its discretion by admitting testimony of a victim's former sexual partner that the victim had not engaged in sadomasochistic activities with her former partner prior to or after defendant's assault as it was relevant to determine whether she consented to sexual encounter and to having defendant brand his initials on her buttocks. Reed v. State, 2006 Tex. App. LEXIS 10107 (Tex. App. Houston 1st Dist. Nov. 22 2006).

137. In a case of aggravated sexual assault of a child, the trial court did not err in admitting testimony of the complaining witness and two other children about extraneous acts by defendant; although defendant argued that the testimony was irrelevant under Tex. R. Evid. 401 and was not admissible under Tex. R. Evid. 404(b) because it was not necessary to prove elements of the offense that were essentially uncontested, such as identity, intent, plan, preparation, and opportunity, the evidence was relevant under Tex. Code Crim. Proc. Ann. art. 38.37, § 2 to show

defendant's intentions toward the complaining witness. Nesby v. State, 2005 Tex. App. LEXIS 3379 (Tex. App. Austin May 5 2005).

138. In an aggravated sexual assault of a child case, the trial court did not err in admitting testimony of the complainant and other children about defendant's extraneous acts as the evidence was relevant to show the relationship between defendant and the complainant and their respective states of mind. Nesby v. State, 2005 Tex. App. LEXIS 2182 (Tex. App. Austin Mar. 24 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 3379 (Tex. App. Austin May 5, 2005).

139. In a child sexual assault trial, testimony that there would not necessarily be bleeding during a female's first sexual intercourse was properly admitted. Although there was no evidence that the victim bled the day of the incident, the testimony was relevant to explain the lack of medical findings of trauma or physical injury and to determine whether defendant and the victim engaged in sexual intercourse. Croft v. State, 148 S.W.3d 533, 2004 Tex. App. LEXIS 8398 (Tex. App. Houston 14th Dist. 2004).

140. Trial court did not err in admitting evidence that defendant had sexually assaulted another woman approximately three months prior to the instant assault where the state was not allowed to use the extraneous sexual assault evidence until defendant had presented his defensive theory of consent in his testimony. Martin v. State, 144 S.W.3d 29, 2004 Tex. App. LEXIS 7755 (Tex. App. Beaumont 2004), affirmed by 173 S.W.3d 463, 2005 Tex. Crim. App. LEXIS 1618 (Tex. Crim. App. 2005).

141. In the sentencing phase of defendant's sexual assault case, a court properly excluded testimony regarding prison conditions and defendant's potential status of being "fresh meat" in prison where the witness's testimony was elicited specifically to educate the jury on what defendant's prison experiences would be, and the testimony would not have been helpful to the jury in determining the appropriate sentence. Zunker v. State, 2004 Tex. App. LEXIS 4376 (Tex. App. Houston 1st Dist. May 13 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 72, 2005 Tex. App. LEXIS 320 (Tex. App. Houston 1st Dist. 2005).

142. In a sexual assault case, a court properly allowed an expert to testify regarding sexual abuse where, although the State did not tie the testimony to the facts of the case, the testimony was relevant, it had a relatively close association with the evidence, and it was better for the expert not to tie his or her testimony too tightly to the particular child victim, but instead, to limit the import of such testimony to general characteristics and empirically obtained data, so that the jury could draw its own conclusions. Carey v. State, 2004 Tex. App. LEXIS 3188 (Tex. App. Texarkana Apr. 8, 2004).

143. In defendant's sexual assault case, a court did not err permitting the victim's stepfather to testify that he saw defendant in the parking lot of the family's apartment complex a few weeks after the victim made her outcry where that evidence tended to corroborate the victim's testimony and was not, in itself, evidence of misconduct or bad character. The prosecutors' description of defendant as a "sexual predator" was a logical inference from his overall behavior as shown by the victim's testimony. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

144. Evidence of defendant's prior history of sexual assault against a child victim was relevant under Tex. R. Evid. 401 as "other crimes, wrongs, or acts" pursuant to Tex. Code Crim. Proc. Ann. art. 38.37. McCulloch v. State, 39 S.W.3d 678, 2001 Tex. App. LEXIS 1327 (Tex. App. Beaumont 2001).

145. In defendant's trial on two counts of indecency with a child, testimony from defendant's ex-wife that defendant occasionally paraded around in front of his minor daughters, the complainants, in the nude with an erection was

relevant under Tex. R. Evid. 401 and, thus, admissible under Tex. R. Evid. 402, and its prejudicial effect did not substantially outweigh its probative value under Tex. R. Evid. 403 because the State had to prove, beyond a reasonable doubt, that defendant had contact with the complainants and the contact was done for his sexual gratification, and because the evidence was relevant to prove sexual motive in as much as the manner that defendant acted around his own children was the only proof of defendant's possible sexual motive if the touching did in fact occur. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

146. Testimony of a sexual assault nurse examiner was relevant, even thought the examination took place two years after the last alleged act of child sexual abuse, because it refuted defense questioning of other witnesses about the absence of trauma or physical evidence to establish that the alleged acts occurred. Kaizer v. State, 2013 Tex. App. LEXIS 7271 (Tex. App. Corpus Christi June 13 2013).

147. Trial court did not abuse its discretion in a case in which defendant was convicted of continuous sexual abuse of a child, his two daughters, by allowing evidence of computer searches for child pornography on defendant's laptop because the complained-of testimony showed that defendant viewed the father-daughter relationship as a sexual one; his viewing of child pornography, particularly father-daughter pornography, was relevant circumstantial evidence of his intent to arouse or gratify his sexual desire. Watkins v. State, 2013 Tex. App. LEXIS 1512, 2013 WL 531062 (Tex. App. Fort Worth Feb. 14 2013).

148. Trial court did not abuse its discretion by admitting into evidence a portion of defendant's statement to the police about manipulating and threatening other children into proposed sexual activity because the evidence made it more likely that he threatened the victim and it rebutted the defensive theory that defendant was guilty of only sexual assault, not aggravated sexual assault. Sandles v. State, 2012 Tex. App. LEXIS 5518, 2012 WL 3104377 (Tex. App. Dallas July 11 2012).

149. Trial court did not abuse its discretion when it found that sex toys, lubricant, and a camcorder found in defendant's home were relevant during his trial for continuous sexual abuse of a young child or children in violation of Tex. Penal Code Ann. § 21.02(b) because they were relevant to the daughter's claims of the abuse she suffered from defendant and her stepmother and defendant told a coworker that his daughter might have hurt herself on sex toys she had been caught using. The trial court did not err by admitting the evidence under Tex. R. Evid. 403 because it made facts of consequence more probable, each of the items went directly to the series of events described by the daughter, the jury was entitled to know the context in which the events took place, and the evidence took up only 47 pages of the 800 pages in the reporter's record. Brown v. State, 381 S.W.3d 565, 2012 Tex. App. LEXIS 5164 (Tex. App. Eastland June 28 2012).

150. Trial court did not abuse its discretion by admitting nude photographs of the daughter's stepmother during defendant's trial for continuous sexual abuse of a young child or children in violation of Tex. Penal Code Ann. § 21.02(b) because they were relevant to the daughter's claims of sexual abuse and her physical description of her stepmother's genitals. The photographs were probative because they contained compelling evidence that made the fact that the sexual abuse occurred as claimed more probable. Brown v. State, 381 S.W.3d 565, 2012 Tex. App. LEXIS 5164 (Tex. App. Eastland June 28 2012).

151. Trial court did not abuse its discretion by admitting pornography that was found at defendant's home during his trial for continuous sexual abuse of a young child or children in violation of Tex. Penal Code Ann. § 21.02(b) because they depicted events similar to some of the instances of sexual abuse described by the daughter and thus had a tendency to make the daughter's claims more plausible, and defendant did not overcome the presumption that the evidence was more probative than prejudicial. Brown v. State, 381 S.W.3d 565, 2012 Tex. App. LEXIS

5164 (Tex. App. Eastland June 28 2012).

152. Under Tex. R. Evid. 401, the trial court found that defendant's acquittal in the assault charge on police officers had no tendency to make the existence of any fact of consequence to the determination of the aggravated sexual assault charge more or less probable. Lopez v. State, 2012 Tex. App. LEXIS 676, 2012 WL 256103 (Tex. App. Corpus Christi Jan. 26 2012).

153. In a trial for child sexual assault, there was no error under Tex. R. Evid. 401, 702 in admitting testimony from a pediatrician with expertise in child abuse cases, who examined the complainant after she made her outcry, (nine years after the offense occurred) and who was unable to medically confirm or refute the allegations of abuse. Alejo v. State, 2011 Tex. App. LEXIS 6652, 2011 WL 3659309 (Tex. App. Austin Aug. 19 2011).

154. In a trial for indecency with a child, there was no error under Tex. R. Evid. 401, 402 in admitting testimony about the complainant's delayed outcry. The trial court was within its discretion to find that fear of defendant by his son was relevant because it explained the complainant's fear of defendant, which was the proffered reason for her prior denial when the son reported the abuse and for the complainant's delayed outcry. Welch v. State, 2011 Tex. App. LEXIS 2692, 2011 WL 1364970 (Tex. App. Texarkana Apr. 12 2011).

155. In a trial for child sexual assault, statements about a phone conversation between defendant and his priest and testimony from a forensic examiner who interviewed the complainant were relevant under Tex. R. Evid. 401, 402 to rebut defendant's claim that the complainant fabricated the allegation. Gutierrez v. State, 2010 Tex. App. LEXIS 8952, 2010 WL 4484350 (Tex. App. Houston 1st Dist. Nov. 10 2010).

156. In an aggravated sexual assault of a child younger than 14 years old case, where a doctor's testimony and opinions were based on his experience and training as a physician at the child advocacy center, his educational and professional background was relevant to prove his expertise in the evaluation and treatment of child victims and to lay the predicate for his testimony; thus, without a showing of harm, evidence, like the doctor's curriculum vitae, was properly admitted to assist the jury in making its determination as it served a relevant purpose beyond solely bolstering the witness and any extraneous information included on the curriculum vitae had only slight effect. Walker v. State, 2010 Tex. App. LEXIS 8452 (Tex. App. Houston 1st Dist. Oct. 21 2010).

157. In a trial for child sexual assault, there was no error under Tex. R. Evid. 401 in excluding questioning of a case worker regarding the complainant's credibility because the complainant had already admitted before the jury that she initially denied the sexual abuse but that she was lying when she did so. Smith v. State, 2010 Tex. App. LEXIS 7021 (Tex. App. Fort Worth Aug. 27 2010).

158. In a trial for child sexual assault, defendant was not entitled to question the complaint about her having been hospitalized for "cutting" behavior. The evidence was of only minimal relevance and could only lead to speculation and therefore was properly excluded under Tex. R. Evid. 401. Smith v. State, 2010 Tex. App. LEXIS 7021 (Tex. App. Fort Worth Aug. 27 2010).

159. In defendant's aggravated sexual assault case, the trial court did not abuse its discretion in overruling defendant's relevancy objection to the testimony of the victim's mother that defendant owned pornography because the mother's testimony corroborated the fact that defendant owned pornography he could have shown to the victim. Defendant's ownership of pornography was relevant to the allegation of sexual assault and relevant on the issue of intent. Garrett v. State, 2010 Tex. App. LEXIS 685, 2010 WL 338202 (Tex. App. Dallas Feb. 1 2010).

160. In a trial for indecency with a child, in violation of Tex. Penal Code Ann. § 21.11(b), there was no error under Tex. R. Evid. 401, 403, 404, in admitting extraneous offense evidence. Evidence of possession of child pornography was relevant to defendant's intent to arouse or gratify his sexual desire; evidence of methamphetamine use was relevant to show defendant's state of mind at the time of the charged offense and tended to show how the offense unfolded and progressed; and evidence that defendant physically abused the victim and two other children, in addition to providing context about the relationship between the victim and defendant, was admissible to show the victim's state of mind and explain why the victim did not speak up earlier about the abuse. Stinson v. State, 2009 Tex. App. LEXIS 3186, 2009 WL 1267348 (Tex. App. Dallas May 8 2009).

161. In a trial for child sexual assault, a State medical expert did not testify that the victim was truthful or that sexual abuse victims, as a class, were truthful. To the contrary, the expert properly testified, under Tex. R. Evid. 401, 702, that, although not definitive, the complainant's physical condition was consistent with the abuse later described. Reyes v. State, 274 S.W.3d 724, 2008 Tex. App. LEXIS 5921 (Tex. App. San Antonio 2008).

162. In a case involving the sexual abuse of a child, a trial court did not err by allowing the introduction of evidence that a young victim saw defendant having sexual relations with his own sister around the time of an alleged abuse incident because this was relevant since it was similar to the charged offense; moreover, it rebutted a defensive theory that family members had conspired to frame defendant. Belt v. State, 227 S.W.3d 339, 2007 Tex. App. LEXIS 3749 (Tex. App. Texarkana 2007).

163. In defendant's aggravated sexual assault case, the mere fact the complainant might have had intercourse with defendant's nephew did not rebut the scientific proof provided by the State showing a probability of greater than 99.99 percent that defendant fathered the complainant's child. More importantly, paternity of the child did not bear on defendant's guilt. Reagan v. State, 2007 Tex. App. LEXIS 3589 (Tex. App. El Paso May 10 2007).

164. In a trial for indecency with a child, it was proper to exclude evidence of conduct by the complainant's mother, such as extramarital affairs and involvement in pornography and drug abuse, because the probative value in establishing a motive for the complainant to make false accusations against defendant was low. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements

165. In defendant's trial for indecency with a child in violation of Tex. Penal Code Ann. § 21.11, the trial court properly excluded as speculative and irrelevant defendant's evidence that the victims' mother's friend, with whom the mother was drinking at the time of the incidents, was a convicted child molester whose probation was revoked due to his proximity to the two boys. Smikal v. State, 2012 Tex. App. LEXIS 2904, 2012 WL 1259127 (Tex. App. Corpus Christi Apr. 12 2012).

166. Trial court did not abuse its discretion by allowing the victim's mother to testify that the victim had experienced approximately 12 episodes of urinary incontinence at school because it tended to corroborate the victim's accusations and made the existence of the alleged penetration more probable. Arredondo v. State, 2010 Tex. App. LEXIS 8465, 2010 WL 4137425 (Tex. App. Austin Oct. 19 2010).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : General Overview

167. In a trial for unauthorized use of a motor vehicle, testimony that defendant removed a bumper sticker on the missing truck was relevant under Tex. R. Evid. 401 because tended to make more probable the notion that

defendant did not want the truck to be recognized because he had taken it. Seat v. State, 2011 Tex. App. LEXIS 4322, 2011 WL 2306249 (Tex. App. Texarkana June 8 2011).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

168. Trial court did not abuse its discretion in excluding part of defendant's employer's testimony concerning the employer's son's prescription medication and a videotape of defendant's 2000 arrest for driving while intoxicated because the evidence was not relevant under Tex. R. Evid. 401 to whether defendant was guilty of the charged crimes of driving while intoxicated and evading arrest. Peavey v. State, 248 S.W.3d 455, 2008 Tex. App. LEXIS 1818 (Tex. App. Austin 2008).

169. In a trial for driving while intoxicated, evidence of defendant's medical condition, including that she had lupus and allergies, was properly excluded on the basis that there was no expert medical testimony as to what effect the medicines that she was taking would have on a person's conduct or condition, or on a person's normal use of mental and physical faculties; the proffered evidence was properly subject to a relevancy objection because it was a self-serving, sympathy-provoking recitation of her health and current medication without any showing of a link or nexus to any fact that is of consequence. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

170. Photographs used by defendant's opponent in a mayoral election referring to defendant's automobile accident were properly excluded from his trial on an intoxication assault charge because the tactics used by defendant's opponent were irrelevant to the issue of defendant's guilt. Rodriguez v. State, 191 S.W.3d 428, 2006 Tex. App. LEXIS 2841 (Tex. App. Corpus Christi 2006).

171. Trial court did not err in admitting defendant's intoxilyzer test results into evidence in the absence of retrograde extrapolation evidence on defendant's claim that the results were irrelevant under Rule 401 because the results of breath tests were relevant without retrograde extrapolation evidence. Trillo v. State, 165 S.W.3d 763, 2005 Tex. App. LEXIS 2792 (Tex. App. San Antonio 2005).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

172. In defendant's DWI case, he objected to the State's introduction of his blood-test results and extrapolation testimony because the blood draw occurred two hours after he was arrested and therefore was not relevant under Tex. R. Evid. 401 to whether he had the normal use of his faculties at the time of the alleged offense. The trial court overruled the objection. Crenshaw v. State, 378 S.W.3d 460, 2012 Tex. Crim. App. LEXIS 1254, 2012 WL 4372284 (Tex. Crim. App. Sept. 26 2012).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

173. Because the DIC-24 Statutory Warning Form was relevant to prove that defendant refused to submit to the taking of a specimen of breath and was provided with the required information before her specimen was requested, a trial court did not err in admitting the DIC-24 Form during defendant's driving while intoxicated trial. The DIC-24 Form contained the information that Tex. Transp. Code Ann. § 724.015 required to be given in writing. Zamora v. State, 2010 Tex. App. LEXIS 943, 2010 WL 456941 (Tex. App. Houston 14th Dist. Feb. 11 2010).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

174. In a driving while intoxicated case, a trial court did not err by admitting a DIC-24 form into evidence because it was relevant to prove that defendant refused to submit to the taking of a specimen of his breath and that defendant was provided with the required information under Tex. Transp. Code Ann. § 724.015 before his specimen was requested. Frnka v. State, 2009 Tex. App. LEXIS 7095, 2009 WL 2882939 (Tex. App. San Antonio Sept. 9 2009).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements

175. In a driving while intoxicated trial, evidence that cocaine was located in plain view next to the driver's seat in the vehicle defendant was driving was relevant to prove the State's allegation in the indictment that defendant was intoxicated, and, because the possession of cocaine evidence went to a material element of the State's case, it was not an extraneous offense. Lopez v. State, 2013 Tex. App. LEXIS 2064, 2013 WL 765711 (Tex. App. Waco Feb. 28 2013).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Vehicular Homicide : Elements

176. Trial court did not err by refusing to exclude the blood alcohol test under Tex. R. Evid. 401 because the test result was circumstantial evidence that, coupled with other evidence, tended to show that defendant was intoxicated at the time she drove. Damon v. State, 2011 Tex. App. LEXIS 4017, 2011 WL 2112807 (Tex. App. Houston 1st Dist. May 26 2011).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Vehicular Homicide : Penalties

177. During defendant's trial for intoxication manslaughter, testimony about the difference between punishment for murder and intoxication manslaughter was relevant because it gave the jury complete information about how the punishment range for a particular criminal offense varies when a mental state is proven; defendant claimed that the collision was an accident or a mistake. Hackler v. State, 2006 Tex. App. LEXIS 4995 (Tex. App. Fort Worth June 8 2006).

Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview

178. Trial court did not err when it admitted evidence that defendant had been seen selling drugs a month before her indicted offense of being a felon in possession of a firearm because the testimony, elicited from a witness present when the indicted offense was committed, was relevant and tended to make the existence of defendant's intent to possess a firearm more likely than not, as the witness testified that he knew of five prior occasions on which defendant sold crack cocaine and also commented that drug dealers were often armed to protect themselves from being robbed. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

Criminal Law & Procedure : Criminal Offenses : Weapons : Use : Commission of Another Crime : Elements

179. In a trial for failing to stop and render aid, evidence of the complainant's intoxication was properly excluded because the complainant's intoxication or sobriety when he was struck or his degree of fault in the accident was not relevant. Soto v. State, 2012 Tex. App. LEXIS 10071, 2012 WL 6049112 (Tex. App. Fort Worth Dec. 6 2012).

Criminal Law & Procedure : Accessories : Aiding & Abetting

180. Trial court did not abuse its discretion in admitting testimony, in defendant's trial under Tex. Penal Code Ann. § 7.01(a) and Tex. Penal Code Ann. § 7.02(a)(2) for being a party to his wife's murder, as to defendant's statement regarding researching how to make a silencer for a gun on the ground that it was relevant to a fact of consequence as set forth in Tex. R. Evid. 401. Guevara v. State, 2001 Tex. App. LEXIS 8520 (Tex. App. San Antonio Dec. 26

2001), opinion withdrawn by, substituted opinion at 103 S.W.3d 549, 2003 Tex. App. LEXIS 960 (Tex. App. San Antonio 2003).

Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : General Overview

181. In a proceeding to modify a juvenile's disposition, there was no error in the exclusion of evidence that was purportedly relevant to whether the juvenile was fearful for his safety when he evaded an officer because his defense of necessity would have related only to fleeing from one officer, not from the other, and he did not admit that he fled from the first officer. In re S.G.V., 2006 Tex. App. LEXIS 2688 (Tex. App. San Antonio Apr. 5 2006).

Criminal Law & Procedure : Arrests : Probable Cause

182. Videotape of a driver's performance on field sobriety tests can be sufficient evidence to support probable cause to proceed with an arrest for driving while intoxicated. The reviewing court assumed that such a video, which was introduced in the trial court as permitted by Tex. R. Evid. 401, 1001, supported a probable cause finding where defendant failed to include the video in the record and the trial court did not file findings of fact. Amador v. State, 187 S.W.3d 543, 2006 Tex. App. LEXIS 2090 (Tex. App. Beaumont 2006).

Criminal Law & Procedure : Search & Seizure : Warrantless Searches : Investigative Stops

183. Even if questions regarding the scent of herbal incense were relevant to defendant's claim that he was not smoking marijuana when officers approached his vehicle, any error in limiting the questions was harmless; even if defendant conclusively proved that the substance he was smoking did not smell like marijuana, that would not have raised a fact issue regarding whether the officers smelled marijuana emanating from his vehicle. Broussard v. State, 434 S.W.3d 828, 2014 Tex. App. LEXIS 6142, 2014 WL 2535273 (Tex. App. Houston 14th Dist. June 5 2014).

184. As a police officer had reasonable suspicion to detain defendant based upon the information in the NCIC system, such that ownership of the vehicle was not relevant to the detention, the trial court did not err in excluding evidence regarding the actual ownership of the vehicle that defendant was in when he was stopped. Thornton v. State, 2014 Tex. App. LEXIS 2273, 2014 WL 813745 (Tex. App. Waco Feb. 27 2014).

Criminal Law & Procedure : Accusatory Instruments : Indictments : General Overview

185. Testimony of a witness not named in an indictment did not constitute irrelevant victim impact testimony because her reaction to witnessing the shooting of a police officer was admissible as circumstances of the crime under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a). Espinosa v. State, 194 S.W.3d 703, 2006 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. 2006).

Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims

186. It was not reversible Brady error to exclude evidence that one of the officers involved in a search was later convicted of theft of property from crime scenes because the State disclosed the fact of the conviction and there was no evidence that the officer had anything to do with the money in the current case. Ramirez v. State, 2014 Tex. App. LEXIS 8144, 2014 WL 3735290 (Tex. App. Dallas July 28 2014).

Criminal Law & Procedure : Eyewitness Identification : Photo Identifications

187. Court did not err by admitting into evidence the photographic lineup viewed by the officer; the lineup was relevant because the lineup and the officer's identification of defendant in the lineup had a tendency to make defendant's identity as the third robber more probable than it would be without the evidence. Caine v. State, 2013

Tex. App. LEXIS 13601, 2013 WL 5918402 (Tex. App. Dallas Nov. 1 2013).

188. Under Tex. R. Evid. 401, 402, the statement by the witness that she was afraid to select the photo of defendant in the photo lineup was relevant and admissible because it showed that she identified defendant as the person that perpetrated the victim's murder. Benavides v. State, 2012 Tex. App. LEXIS 4971, 2012 WL 2353731 (Tex. App. Dallas June 21 2012).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

189. Defendant complained that the State did not produce a chain of custody for the videotape and the baseball bat; however, those exhibits were properly authenticated and there was no evidence that they had been tampered with; defendant also contended that her statements on the videotape and the testimony regarding the bat were irrelevant under Tex. R. Evid. 401, but the evidence was relevant if it had any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence; thus, the evidence was relevant, and the trial court properly denied defendant's motion to suppress that evidence. Barnes v. State, 2007 Tex. App. LEXIS 4502 (Tex. App. Austin June 7 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

190. In a case in which a jury had convicted a habeas corpus applicant of possession of a controlled substance, methamphetamine, in the amount of 200 grams or more, but less than 400 grams, applicant demonstrated that trial counsel was deficient at the punishment stage of trial because counsel failed to: (1) object to a DEA agent's testimony on the dangers and societal costs caused by methamphetamine constituted deficient performance; (2) request pre-trial notice of the State's experts; (3) determine that a DEA agent would testify about methamphetamine addiction; (4) properly object to the agent's testimony about addiction and the number of people who could get high from the methamphetamine that applicant possessed; and (5) call an expert in rebuttal. During the punishment stage of trial, the prosecutors asked for a life sentence, relying heavily on the objectionable testimony that was introduced during both phases of trial, and because applicant had received a life sentence, the maximum sentence available for her offense, she had shown that there was a reasonable probability--one sufficient to undermine confidence in the result--that the outcome at the punishment stage would have been different but for her counsel's deficient performance. Ex Parte Lane, 303 S.W.3d 702, 2009 Tex. Crim. App. LEXIS 1750 (Tex. Crim. App. 2009).

191. Habeas petitioner's counsel's failure to object to the admission of evidence that the petitioner had used and sold illegal drugs roughly 10 years before his arrest for sex crimes was not relevant to the jury's sentencing determination. The petitioner's involvement with illegal drugs was separate and unrelated to his sex crimes, and was therefore not helpful to the jury in making its sentencing determination. Ward v. Dretke, 420 F.3d 479, 2005 U.S. App. LEXIS 16596 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1621, 164 L. Ed. 2d 334, 2006 U.S. LEXIS 2520, 74 U.S.L.W. 3543 (U.S. 2006).

192. Habeas petitioner's counsel's failure to object to the admission during the jury's sentencing determination of images of adult bestiality taken from the petitioner's computer. The images did not form part of the factual basis for the charges to which the petitioner had plead guilty, and had no relevance to the jury's sentencing determination apart from demonstrating the depths of depravity to which the petitioner had sunk; even if the evidence were relevant in some tangential way to the determination of his sentence, it was highly probable that considerations of unfair prejudice would have sufficed to keep this evidence from the jury. Ward v. Dretke, 420 F.3d 479, 2005 U.S. App. LEXIS 16596 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1621, 164 L. Ed. 2d 334, 2006 U.S. LEXIS 2520, 74 U.S.L.W. 3543 (U.S. 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

193. In a case in which a jury had convicted a habeas corpus applicant of possession of a controlled substance, methamphetamine, in the amount of 200 grams or more, but less than 400 grams, applicant demonstrated that trial counsel was deficient for failing to object to: (1) an officer's testimony regarding the extent of the methamphetamine problem; and (2) the prosecutor's argument, that "people" were bringing methamphetamine into the county to poison the children and turn them into addicts and that children were in fact shooting up and smoking methamphetamine. However, applicant's claim of ineffective assistance of counsel failed because she was unable to show that there was a reasonable probability, sufficient to undermine confidence in the outcome that, but for counsel's deficient performance, the result of the trial would have been different. Ex Parte Lane, 303 S.W.3d 702, 2009 Tex. Crim. App. LEXIS 1750 (Tex. Crim. App. 2009).

194. In a child pornography case, habeas relief was denied to an accused on the basis of ineffectiveness of trial counsel relating to a failure to object on the basis of relevance because, since the gravamen of the offense was the accused's intentional or knowing possession of images of child pornography, the images themselves and how the accused intentionally or knowingly possessed them (via his home computers) were highly relevant to the prosecution. Ex Parte Yusafi, 2009 Tex. App. LEXIS 6715, 2008 WL 6740798 (Tex. App. Beaumont Aug. 26 2009).

195. Even if trial counsel should have objected to testimony from a murder victim's parent, defendant admitted shooting the victim three times; therefore, it was unlikely that the outcome of the trial would have been different if trial counsel had objected to the relevance of the evidence; defendant therefore failed to show that counsel was ineffective in failing to object. Kearse v. State, 2007 Tex. App. LEXIS 9828 (Tex. App. San Antonio Dec. 19 2007).

196. In a resisting arrest case, counsel was ineffective where, inter alia, counsel failed to investigate or interview defendant in detail about his criminal history or his prior contacts with the arresting officer; failed to seek discovery from the State; failed to file and obtain rulings on a motion in limine to require the State to raise extraneous matters outside the presence of the jury; failed to prepare defendant to testify; failed to object to evidence of inadmissible extraneous matters during the guilt phase; invited evidence of unadjudicated arrests during the punishment phase; and failed to object to failure of the punishment-phase charge to include a reasonable doubt instruction. Walker v. State, 195 S.W.3d 250, 2006 Tex. App. LEXIS 1381 (Tex. App. San Antonio 2006).

197. Because a police officer's testimony concerning the environment and activities in and around the club at which defendant was arrested explained why the police officers were there and how defendant became a suspect, defense counsel's failure to object to that evidence was not sufficient to establish ineffective assistance of counsel; subject to certain exceptions not applicable to defendant's case, an officer's testimony explaining how he happened to be at the scene of a crime or accident would almost always be relevant. LeBleu v. State, 2006 Tex. App. LEXIS 887 (Tex. App. Beaumont Feb. 1 2006).

198. In a trial for aggravated robbery, counsel was not rendered ineffective by failing to object to evidence that showed the complainant suffered actual serious bodily injury rather than that he was threatened and placed in fear of imminent bodily injury or death. The contextual evidence admitted to prove the crime was clearly admissible because it placed the offense in its proper setting so that the jury could evaluate it. Washington v. State, 2004 Tex. App. LEXIS 11809 (Tex. App. Houston 1st Dist. Dec. 30 2004).

199. Defendant was not entitled to have his murder conviction overturned based on his claim that he received ineffective assistance of counsel because counsel did not object to the introduction of the photographs of the shooting victim, defendant's nephew where such evidence was relevant and defendant did not show that the probative value of such evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Goodwin v. State, 2004 Tex. App. LEXIS 6692 (Tex. App. Texarkana July 23 2004).

200. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

Criminal Law & Procedure : Trials : Burdens of Proof : Defense

201. Trial court did not err in admitting evidence of prior statements made to police by two individuals whom the State contended were with defendant at the time of a shooting where evidence that both individuals made statements that defendant admitted to being involved in a freeway shooting and later recanted them was relevant because the statements, even if recanted, indicated that the witnesses had knowledge that a freeway shooting had occurred and showed the witnesses' willingness to implicate defendant in order to exonerate themselves, thus making the State's theory that all three men were involved more probable than the theory would have been without the evidence. Furthermore, defendant had not demonstrated that the negative attributes of the statements substantially outweighed their probative value because the State had made clear that the statements had been recanted so that the jury was not given the impression that the witnesses still maintained that defendant had admitted the shooting to them. Dinh Tan Ho v. State, 171 S.W.3d 295, 2005 Tex. App. LEXIS 4405 (Tex. App. Houston 14th Dist. 2005).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

202. In an aggravated assault case, the trial court did not abuse its discretion in refusing to allow defendant to cross-examine the complainant and her mother because his allegations suggesting that the complainant and her mother lied about the assault because they took his personal belongings from the house while he was jailed did not fairly tend to raise an inference that the complainant and her mother had motive to testify falsely. McClendon v. State, 2007 Tex. App. LEXIS 9300 (Tex. App. Houston 14th Dist. Nov. 29 2007).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Due Process

203. Trial court did not violate defendant's due process rights during his trial for aggravated sexual assault of a child by excluding testimony of the complainant's neighbor and her adult son that concerned the complainant's threats to falsely accuse them of molestation where, in light of the remoteness in time and the dissimilarity between the alleged threats toward the neighbor and her son and the accusation in the charged offense, their testimony was not relevant because it was not probative regarding the complainant's credibility at the time of the instant offense. Billodeau v. State, 263 S.W.3d 318, 2007 Tex. App. LEXIS 6404 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Fair Trial

204. Trial court did not commit constitutional error by denying defendant's right to present a defensive theory that someone else could have murdered a security guard because it was not relevant that unknown persons three months before the murder asked another security guard about a minor theft. Peace v. State, 2005 Tex. App. LEXIS 7700 (Tex. App. Houston 14th Dist. Sept. 20 2005).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Remain Silent : Self-Incrimination Privilege

205. In a case involving aggravated sexual abuse of a child, defendant was unable to invoke her Fifth Amendment rights while testifying on her own behalf during sentencing when asked about an extraneous offense; moreover, cross-examination of defendant was proper since this evidence was relevant to sentencing considerations based on the fact that it concerned a prior, similar offense against a child. Little v. State, 2007 Tex. App. LEXIS 4194 (Tex. App. Texarkana May 30 2007).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

206. Trial court did not abuse its discretion by not allowing defendant to cross-examine the CPS supervisor about an investigation into the victims' adoptive grandfather because testimony was irrelevant, as the supervisor testified that the grandfather sexually abused his sons not his daughters and there was no evidence that any victims identified the grandfather as the perpetrator of the sexual abuse. Oliver v. State, 2014 Tex. App. LEXIS 2836, 2014 WL 1016244 (Tex. App. Waco Mar. 13 2014).

207. Trial court did not abuse its discretion by not allowing defendant to cross-examine the foster mother because the evidence was not relevant, as none of the victims made outcries of sexual abuse against their adopted grandfather, the foster mother's adult son, or the foster mother's ex-husband, and the foster mother's testimony was that none of the victims were left alone with any of those men. The foster's mother's encounters with CPS and her own past experience as a victim of sexual abuse was also irrelevant. Oliver v. State, 2014 Tex. App. LEXIS 2836, 2014 WL 1016244 (Tex. App. Waco Mar. 13 2014).

208. Trial court did not err by refusing to allow defendant to cross-examine an officer about the confidential informant because the disallowed questions were not relevant to the issue of defendant's guilt or innocence, as the State did not rely on events related to obtaining the search warrant in proving defendant's guilt. Nwaogu v. State, 2013 Tex. App. LEXIS 4588, 2013 WL 1490489 (Tex. App. Houston 1st Dist. Apr. 11 2013).

209. Defendant failed to show an abuse by the trial court in excluding evidence where he did not show the exclusion of relevant and reliable evidence, Tex. R. Evid. 401, 402, that formed such a vital part of his case that its exclusion effectively precluded him from presenting a defense, U.S. Const. amends. VI, XIV. Houston v. State, 2012 Tex. App. LEXIS 5276, 2012 WL 2511588 (Tex. App. Dallas July 2 2012).

210. In a stalking case, the trial court did not err by allowing the cross-examination of a defense witness regarding whether she was aware that defendant had been charged with a crime following an alleged domestic violence incident with the victim and whether she was aware that he had violated a protective order and assaulted his former wife; this evidence was relevant to defendant's good character after the witness testified that she had called the victim and asked her to give defendant another chance. Allen v. State, 218 S.W.3d 905, 2007 Tex. App. LEXIS 2527 (Tex. App. Beaumont 2007).

211. Court did not err by limiting defendant's cross-examination of the medical examiner concerning the lapse of her medical license because defendant adduced no evidence that the status of the medical examiner's license in 2004 had any relevance to the facts or validity of her testimony, the State had a strong case, and the testimony as to the cause of the child's death was corroborated by a large amount of other forensic evidence; defendant cross-examined the medical examiner fully regarding the autopsy, and the record showed that the medical examiner was licensed when she performed the autopsy and compiled the autopsy report; thus, even if the trial court abused its discretion in limiting and denying cross-examination, defendant did not demonstrate harm. Valdez v. State, 2006 Tex. App. LEXIS 10295 (Tex. App. Corpus Christi Nov. 30 2006).

212. Although defendant claimed that a trial court erred in not allowing him to cross-examine his arresting officer concerning another officer's relationship with a former girlfriend of defendant, there was no evidence presented of

any bias or prejudice on the part of the arresting officer, only that six months after the incident he became aware that a fellow officer was dating a woman who had a relationship with defendant; having established no possible bias or prejudice, defendant had not shown that the evidence was relevant or that the trial judge abused his discretion by failing to allow testimony of the post-arrest knowledge obtained by the arresting officer. Waldrop v. State, 2006 Tex. App. LEXIS 8017 (Tex. App. Fort Worth Sept. 7 2006).

213. Court properly limited defense counsel's cross-examination of a State's witness where his question regarding whether the prosecutor told the witness she needed a different attorney was not relevant and did not reveal evidence having any tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would be without the evidence. Roda v. State, 2006 Tex. App. LEXIS 4475 (Tex. App. Corpus Christi May 25 2006).

214. During defendant's trial for indecent exposure, the trial court properly excluded evidence that the victim called the police regarding various disturbances at her residence on several occasions following the report of exposure because the decision was within the zone of reasonable disagreement; the trial court maintained broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative and collateral evidence, and, under Tex. R. Evid. 608(b), specific instances of conduct, other than conviction of a crime, when offered to attack the witness's credibility could not be explored on cross-examination. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

Criminal Law & Procedure : Trials : Prison Attire & Restraints

215. Video (but not audio) of defendant's interview with a detective was properly excluded because the jury could discern that defendant was in custody, given the venue; his ill-fitting, monochrome jail uniform with the name of a county jail stenciled on the back; and a plastic identification bracelet. The court deferred to the trial court's finding that the probative value was diminished by the State's ability to recreate defendant's pantomime of the events in question through its witness. State v. Pringle, 2013 Tex. App. LEXIS 7671 (Tex. App. Tyler June 25 2013).

Criminal Law & Procedure : Witnesses : Credibility

216. Because the testimony contained in the record addressing the victim's pending driving while intoxicated (DWI) charge reflected that he had no agreement with the State regarding a dismissal of the charge, and he had no expectation of leniency in return for his testimony against defendant, the trial court was entitled to conclude that the victim's pending DWI charge was not relevant on the question of the victim's motivations in testifying. Smith v. State, 2011 Tex. App. LEXIS 5338, 2011 WL 2732270 (Tex. App. Beaumont July 13 2011).

217. Even though evidence was admissible during sentencing if it was relevant, pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), a trial court did not err by excluding a psychologist's testimony in a sexual assault case because a report and evaluation of a child held little probative value with respect to the truthfulness of her version of events. The evaluation and report concerning the child simply listed the textbook symptoms associated with the conditions that the psychologist diagnosed, and the tendency to lie was merely one of the traits of a condition that the child had been diagnosed with. Canales v. State, 2009 Tex. App. LEXIS 2716, 2009 WL 1034933 (Tex. App. Amarillo Apr. 17 2009).

218. Where defendant was charged with aggravated sexual assault of a child, the State's expert to give expert opinion testimony as to the truthfulness of the complaining witness. The defense opened the door to the testimony by questioning the expert about the manipulation of children who make allegations of sexual abuse. Johnson v. State, 2005 Tex. App. LEXIS 7412 (Tex. App. Tyler Sept. 7 2005).

219. Trial court properly excluded evidence of a witness's mental health problems under Tex. R. Evid. 401 where there was no reasonable logical nexus connecting the ability of the witness to observe the details of an assault and communicate those details to the police and the witness's mental health problems. The evidence concerning the mental health problems of the witness was therefore not relevant. Goodwin v. State, 91 S.W.3d 912, 2002 Tex. App. LEXIS 8455 (Tex. App. Fort Worth 2002).

Criminal Law & Procedure : Witnesses : Impeachment

220. During a capital murder trial, the State admitted an unauthenticated letter, written by a third party and sent to defendant at the county jail for the purpose of impeaching defendant's trial court testimony that she never had sex with another woman; the letter was not relevant to anything at issue, was not proper impeachment, and the trial court erred in admitting the letter. Abdygapparova v. State, 243 S.W.3d 191, 2007 Tex. App. LEXIS 8205 (Tex. App. San Antonio 2007).

221. Where the State had already established on direct examination that the complainant was serving a deferred adjudication probation during one point in her relationship with defendant, any further inquiry would not have made the existence of any fact of consequence to the determination of defendant's alleged offense more or less probable than it was without the evidence, and such testimony was not relevant to any bias, motive, or interest to help the State, making it an impermissible method of impeachment; accordingly, the trial court was within its discretion to limit the question posed by defendant's counsel on cross-examination. Crook v. State, 2005 Tex. App. LEXIS 3485 (Tex. App. Dallas May 6 2005).

222. Where defendant was tried for murdering the victim in exchange for his wife's promise for a share of the insurance proceeds, the State's failure to charge the wife was irrelevant to the credibility of the State's key witness, defendant's girlfriend. The trial court did not abuse its discretion in excluding the proffered impeachment evidence. Day v. State, 2004 Tex. App. LEXIS 6238 (Tex. App. Austin July 15 2004).

Criminal Law & Procedure : Defenses : General Overview

223. Although defendant's proffered alternative perpetrator evidence was relevant under Tex. R. Evid. 401 because identity was a material issue in the case and vigorously contested at defendant's aggravated robbery trial, and although there was no danger that the evidence would create a side issue that would unduly distract the jury from the main issues under Tex. R. Evid. 403 because the evidence addressed a material issue in the case, the trial court's exclusion of the evidence was not error because defendant failed to show the required nexus between the alleged alternative perpetrator and the offense-at-issue; although the alleged alternative perpetrator's indictments and convictions indicated that he engaged in a spree of robberies overlapping the offense-at-issue, that evidence supported no conclusions other than that he was committing robberies around the time of the offense-at-issue, and defendant did not present evidence that the alleged alternative perpetrator's offenses were committed at or near the location of the offense-at-issue or present testimony from any of the witnesses identifying that individual as the robber. Dickson v. State, 246 S.W.3d 733, 2007 Tex. App. LEXIS 9859 (Tex. App. Houston 14th Dist. 2007).

Criminal Law & Procedure : Defenses : Alibi

224. In an aggravated robbery case, the court properly allowed the State to present a witness's testimony that defendant had robbed her at gunpoint at a time when defendant's witness testified that he was working for her because the testimony had significant potential value to prove that defendant's alibi witness was not truthful; in light of the instructions given, the evidence did not have the potential to impress the jury in an irrational way, and no other evidence except the witness's significantly assisted the State in contradicting the account of defendant's whereabouts. Davis v. State, 214 S.W.3d 101, 2006 Tex. App. LEXIS 10866 (Tex. App. Beaumont 2006).

Criminal Law & Procedure : Defenses : Coercion & Duress

225. In a trial for writing threatening letters to the appellate court in violation of Tex. Penal Code Ann. § 36.06, evidence that defendant was mistreated in prison was not relevant, under Tex. R. Evid. 401, to defenses of duress or necessity; the evidence was properly excluded, and defendant was not entitled to instructions on those defenses. Trove v. State, 2007 Tex. App. LEXIS 9028 (Tex. App. Austin Nov. 14 2007).

Criminal Law & Procedure : Defenses : Insanity : General Overview

226. Although defendant argued that the trial court abused its discretion by excluding a psychologist's testimony during the guilt-innocence phase of trial because it would have assisted the jury in determining whether defendant was insane, the trial court properly excluded the testimony, where the psychologist did not testify about defendant's past mental health during a proffer, and he specifically testified that he was unaware of defendant's mental health status on the date of the incident at issue. Teel v. State, 2010 Tex. App. LEXIS 9391, 2010 WL 4812994 (Tex. App. Fort Worth Nov. 24 2010).

Criminal Law & Procedure : Defenses : Insanity : Insanity Defense

227. In a capital murder trial under Tex. Penal Code Ann. § 19.03(a), the trial court did not err in admitting the expert testimony of an FBI agent because the agent's testimony was relevant under Tex. R. Evid. 401 to rebut defendant's defensive theory of insanity. Resendiz v. State, 112 S.W.3d 541, 2003 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 2003), *cert. denied*, Resendiz v. Texas, 541 U.S. 1032, 124 S. Ct. 2098, 158 L. Ed. 2d 713, 2004 U.S. LEXIS 3274 (2004).

Criminal Law & Procedure : Defenses : Necessity

228. In a trial for writing threatening letters to the appellate court in violation of Tex. Penal Code Ann. § 36.06, evidence that defendant was mistreated in prison was not relevant, under Tex. R. Evid. 401, to defenses of duress or necessity; the evidence was properly excluded, and defendant was not entitled to instructions on those defenses. Trove v. State, 2007 Tex. App. LEXIS 9028 (Tex. App. Austin Nov. 14 2007).

Criminal Law & Procedure : Defenses : Right to Present

229. In a child sexual assault case, testimony that a victim's mother sent inappropriate text messages to her underage step-daughter was not relevant under Tex. R. Evid. 401; this did not show that the mother manipulated the victim into making a false accusation. Because the trial court did not err in excluding the evidence in question, the appellate court did not need to determine if the exclusion of that evidence prevented appellant from presenting a meaningful defense. Garcia v. State, 397 S.W.3d 860, 2013 Tex. App. LEXIS 4035, 2013 WL 1248305 (Tex. App. Houston 14th Dist. Mar. 28 2013).

Criminal Law & Procedure : Defenses : Self-Defense

230. Witness's testimony was relevant because the fact that defendant was angry and agitated earlier the same evening of the stabbing tended to prove his intent to commit an act clearly dangerous to human life against the victim without a reasonable belief that deadly force was necessary to protect himself. Allen v. State, 2014 Tex. App. LEXIS 7895 (Tex. App. Houston 14th Dist. July 22 2014).

231. In a case in which a jury found defendant guilty of the offense of murder, the trial court did not err in excluding defendant's testimony regarding the specifics about the "immoral teachings" that he believed his children's grandmother and the complainant had been exposing the children to because defendant did not explain, nor was a reviewing court able to discern, how any testimony about the contents of any "immoral teachings" would have had

any tendency to make his self-defense claim more or less probable. Washington v. State, 2009 Tex. App. LEXIS 4434, 2009 WL 40168 (Tex. App. Houston 1st Dist. Jan. 8 2009).

232. In the assault trial of a father who shot his son, the trial court properly excluded a post-shooting psychological evaluation of the son, and any evidence of the son's violent nature that surfaced after the shooting was at best only minimally relevant and was outweighed by the danger of unfair prejudice or confusion of the issues concerning the father's assertion of self-defense. Iverson v. State, 2004 Tex. App. LEXIS 7007 (Tex. App. Texarkana Aug. 2 2004).

Criminal Law & Procedure : Scienter : Specific Intent

233. Evidence of an extraneous assault offense that defendant allegedly committed against his wife after her aggravated kidnapping and six days before his trial on that charge was admissible under Tex. R. Evid. 404(b) for the purpose of showing his intent to inflict bodily injury on his wife where defendant's intent was a fact of consequence because the indictment included an allegation that he intended to commit murder or to inflict bodily injury when he abducted his wife. Furthermore, evidence of defendant's subsequent alleged assault of his wife was relevant because his subsequent conduct made it more probable that he intended to inflict bodily injury on his wife during the charged offense. Simoneaux v. State, 2005 Tex. App. LEXIS 5628 (Tex. App. Tyler July 20 2005).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

234. In drug and robbery case, although defendant's relevancy objection to evidence of the other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence

235. Where defendant convicted of driving while intoxicated after a traffic stop challenged the officer's basis for stopping him, the trial court erred by not including an Tex. Crim. Proc. Code Ann. art. 38.23(a) instruction in the jury charge. The videotape of the stop and the officers' testimony about the videotape was relevant for purposes of Tex. R. Evid. 401, because it created some affirmative evidence to show that the stop was not justified. Dyer v. State, 2010 Tex. App. LEXIS 9964 (Tex. App. Fort Worth Dec. 16 2010).

Criminal Law & Procedure : Sentencing : Alternatives : Community Confinement

236. Question to appellant's aunt in the punishment phase regarding the criminal history of appellant's brother and sister was relevant under Tex. R. Evid. 401 because one of the issues was whether appellant was a suitable candidate for community supervision and, in determining that issue, the character and criminal background of family members with whom appellant would associate was relevant under Tex. Code Crim. Proc. Ann. art. 42.12, § 11(a)(3); any error was harmless under Tex. R. App. P. 44.2(b) because the aunt never responded and appellant had, inter alia, tested positive for alcohol on two separate occasions during urinalysis tests while out on bond. Jones v. State, 2010 Tex. App. LEXIS 5860, 2010 WL 2889690 (Tex. App. Fort Worth July 22 2010).

237. In revoking community supervision, the trial court did not abuse its discretion in overruling defendant's objection to a police officer's testimony regarding his conduct in evading arrest by using a vehicle, as the evidence was relevant to sentencing. Cooper v. State, 2004 Tex. App. LEXIS 4334 (Tex. App. Fort Worth May 13 2004).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview

238. In a hearing to revoke defendant's community supervision, the State was permitted to introduce evidence of the underlying offense of cruelty to animals; the evidence was relevant to whether defendant was entitled to a reduced sentence. Davis v. State, 181 S.W.3d 426, 2005 Tex. App. LEXIS 9093 (Tex. App. Waco 2005).

239. In a hearing to revoke defendant's community supervision, the State was permitted to introduce evidence of the underlying offense of cruelty to animals; the evidence was relevant to whether defendant was entitled to a reduced sentence. Davis v. State, 181 S.W.3d 426, 2005 Tex. App. LEXIS 9093 (Tex. App. Waco 2005).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : Eligibility

240. Trial court's decision to overrule a relevancy objection based on Tex. R. Evid. 401 regarding questions about the criminal history of defendant's family members was not beyond the zone of reasonable disagreement because the character of the people he would have worked and associated with was relevant to his suitability for community supervision. Williams v. State, 2009 Tex. App. LEXIS 1810 (Tex. App. Fort Worth Mar. 12 2009).

Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances

241. Trial court did not err by admitting testimony regarding an alleged threat defendant made against the unborn child of a witness because the testimony was relevant to the jury's determination of defendant's future dangerousness because it had a tendency to make the existence of defendant's future dangerousness more probable than it would be without the evidence. The statement had probative value, as the fact that he would make such a statement to a pregnant woman regarding an unborn child was some evidence of defendant's character, and it was not unfairly prejudicial, as it was not mentioned again after the witness testified. Martinez v. State, 327 S.W.3d 727, 2010 Tex. Crim. App. LEXIS 1653 (Tex. Crim. App. 2010), *cert. denied*, No. 10-9833, --U.S. --, 131 S. Ct. 2966, 180 L. Ed.2d 253, 2011 U.S. LEXIS 4238 (2011).

242. Trial court did not err by admitting during sentencing an audio recording of jokes defendant told his brother on the telephone while in jail over his First Amendment objection because it was within the zone of reasonable disagreement that the evidence was indicative of defendant's character and thus relevant to the issue of future dangerousness; the jocks, which defendant told after raping, beating, and murdering a 15-year-old girl showed that he found the topics of violence and disrespect towards women to be humorous. The evidence was relevant under Tex. R. Evid. 401 because it had a tendency to make the existence of defendant's future dangerousness more probable, and it was not so prejudicial that there was a clear disparity between the degree of prejudice and its probative value. Davis v. State, 329 S.W.3d 798, 2010 Tex. Crim. App. LEXIS 1207 (Tex. Crim. App. 2010).

243. Trial court did not err when it allowed the State to present evidence that defendant had become a Satanist while imprisoned on death row because the evidence was relevant to the issue of defendant's future dangerousness and outside the protection of the First Amendment, as an expert testified that some members of the religion advocated violence, that Satanic religious publications like the ones found in defendant's cell discussed rituals of destruction and human sacrifice, and that various people had committed murder and mutilation in the name of Satan. Davis v. State, 329 S.W.3d 798, 2010 Tex. Crim. App. LEXIS 1207 (Tex. Crim. App. 2010).

244. In the penalty phase of a capital murder trial, there was no error in allowing testimony about Texas prison conditions in general and that violence could occur within the Texas prison system; an issue for the jury's determination was future dangerousness; therefore, the testimony was relevant to whether defendant would have opportunities to commit violent acts in prison. Lucero v. State, 246 S.W.3d 86, 2008 Tex. Crim. App. LEXIS 219 (Tex. Crim. App. 2008).

Criminal Law & Procedure : Sentencing : Capital Punishment : Mitigating Circumstances

245. In a capital sentencing proceeding, mitigating evidence of life in poverty and a crime-ridden neighborhood was relevant, within the language of Tex. R. Evid. 401, because it had a tendency to make a deprived and troubled childhood more probable than it would be without the evidence. Ex Parte Smith, 309 S.W.3d 53, 2010 Tex. Crim. App. LEXIS 534 (Tex. Crim. App. 2010).

246. In a capital murder case, a court did not err by excluding testimony in mitigation of punishment regarding a history of family sexual abuse of multiple generations of children in defendant's family because the fact that others in defendant's family were abused did not by itself make him more or less morally culpable for the crime for which he was on trial, nor did it, by itself, make a jury's finding of mitigation any more or less probable than it would have been without the evidence. Shuffield v. State, 189 S.W.3d 782, 2006 Tex. Crim. App. LEXIS 365 (Tex. Crim. App. 2006).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

247. At the punishment phase of defendant's trial for robbery, the trial court did not abuse its discretion by admitting into evidence photographs of his wife after a domestic violence incident because the photographs were "relevant" for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) to a police officer's testimony that defendant might have a propensity toward intoxication and violence; the photographs were also helpful to the jury in assessing a proper sentence. The definition of "relevant," as stated in Tex. R. Evid. 401, did not readily apply. Cordova v. State, 2013 Tex. App. LEXIS 9947 (Tex. App. Corpus Christi Aug. 8 2013).

248. Trial court did not abuse its discretion by admitting a photograph of a tattoo on defendant's chest which read "murder is my motive" during sentencing because the tattoo was relevant to his character. Gossett v. State, 2013 Tex. App. LEXIS 9477 (Tex. App. El Paso July 31 2013).

249. In defendant's unauthorized use of a motor vehicle case, a court did not err during punishment the phase by admitting a photograph of defendant's chest tattoo that read "murder is my motive" because a defendant's choice of tattoos was some evidence of his character, and therefore, the photograph was relevant to defendant's character. Gossett v. State, 2013 Tex. App. LEXIS 9474, 2013 WL 3943108 (Tex. App. El Paso July 31 2013).

250. In defendant's evading arrest case, the court did not err during the punishment phase by admitting a photograph of defendant's chest tattoo that read "murder is my motive" because a defendant's choice of tattoos was some evidence of his character, and therefore, the photograph was relevant to defendant's character. Gossett v. State, 2013 Tex. App. LEXIS 9473, 2013 WL 3943120 (Tex. App. El Paso July 31 2013).

251. Trial court did not abuse its discretion by admitting a photograph of a tattoo on defendant's chest which read "murder is my motive" during sentencing because the tattoo was relevant to his character. Gossett v. State, 2013 Tex. App. LEXIS 9479 (Tex. App. El Paso July 31 2013).

252. During the punishment phase of defendant's trial for intoxication assault, the trial court did not err by admitting a statement probative of defendant's general attitude of selfishness because the statement was relevant under Tex. R. Evid. 401 to show defendant's character and helpful to the jury in determining whether she was a good candidate for community supervision. Ford v. State, 2012 Tex. App. LEXIS 8034, 2012 WL 4243715 (Tex. App. Waco Sept. 20 2012).

253. Where defendant entered a plea of guilty to four aggravated robberies, the trial court did not abuse its discretion in admitting evidence of defendant's tattoos as it was relevant under Tex. R. Evid. 401 to the jury's determination of his suitability for community supervision. Jackson v. State, 2012 Tex. App. LEXIS 5221, 2012 WL

2445052 (Tex. App. Dallas June 28 2012).

254. When defendant pleaded guilty to intoxication manslaughter in violation of Tex. Penal Code Ann. § 49.08(a), the doctrines of double jeopardy and collateral estoppel did not preclude the trial court at sentencing from determining that defendant's prior offense involved alcohol even though the State had reduced the charge in the prior case from driving while intoxicated (DWI) to obstruction of a highway or other passageway; double jeopardy did not attach, because there were no common factual elements between DWI and obstruction of a highway or other passageway. Under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and Tex. R. Evid. 401-402, the trial court was permitted to consider all relevant evidence at sentencing. Cherian v. State, 2010 Tex. App. LEXIS 8646, 2010 WL 4244002 (Tex. App. Houston 1st Dist. Oct. 28 2010).

255. There was no error under Tex. R. Evid. 401, 403 when the trial court admitted, at the punishment phase of a murder trial, a video of sexual acts involving defendant and the victim, his wife, who was unconscious due to alleged intoxication, because the video countered defendant's assertions of sudden passion and that he was law abiding until the murder. Skolnik v. State, 2010 Tex. App. LEXIS 5509, 2010 WL 2783872 (Tex. App. Corpus Christi July 15 2010).

256. Even without medical evidence to verify it, defendant's volunteered statement to a police officer that he was HIV positive had probative value to show he was infected by the HIV virus when he sexually assaulted a child victim and was relevant as a circumstance of the offense that the jury could consider in assessing punishment under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). Lewis v. State, 2010 Tex. App. LEXIS 4545 (Tex. App. Amarillo June 16 2010).

257. Evidence pertaining to defendant's flight from justice and efforts to arrest him for assault on a public servant was relevant and admissible at sentencing under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), which governed the ruling on relevance instead of the general Tex. R. Evid. 401 definition, because defendant's flight was an extension of his conduct during the offense and showed his lack of respect for lawful authority. Campbell v. State, 2009 Tex. App. LEXIS 8643, 2009 WL 3593481 (Tex. App. Texarkana Oct. 28 2009).

258. In a sentencing trial for felony assault to a family member, there was no error under Tex. R. Evid. 401, 402 when the trial court admitted testimony from defendant's wife about the circumstances of a prior assault and guilty plea. The testimony was relevant punishment evidence because it illustrated defendant's propensity for family violence and that he was not deterred by his earlier conviction. Murchison v. State, 2009 Tex. App. LEXIS 7481, 2009 WL 3050823 (Tex. App. Houston 1st Dist. Sept. 24 2009).

259. Even though evidence was admissible during sentencing if it was relevant, pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), a trial court did not err by excluding a psychologist's testimony in a sexual assault case because a report and evaluation of a child held little probative value with respect to the truthfulness of her version of events. The evaluation and report concerning the child simply listed the textbook symptoms associated with the conditions that the psychologist diagnosed, and the tendency to lie was merely one of the traits of a condition that the child had been diagnosed with. Canales v. State, 2009 Tex. App. LEXIS 2716, 2009 WL 1034933 (Tex. App. Amarillo Apr. 17 2009).

260. In a case involving indecency with a child, testimony from defendant's former wife regarding defendant's sexual behavior with neighborhood boys and with his niece was relevant under Tex. R. Evid. 401 because it was helpful to the jury in determining an appropriate sentence, and any issues relating to truthfulness or a lack of specificity went to the weight, not the admissibility, of the evidence and was for the jury to determine; moreover, the extraneous offense testimony was not inadmissible under Tex. R. Evid. 403 because it was probative, it would not have irrationally impressed the jury, the time needed to develop the evidence was minimal, and the State needed

the evidence. To the extent the evidence showed defendant's sexual conduct with children, it was not unfairly prejudicial. Orr v. State, 2009 Tex. App. LEXIS 4152, 2009 WL 485502 (Tex. App. Dallas Feb. 27 2009).

261. In defendant's aggravated robbery case, evidence during the punishment phase of defendant's gang affiliation was relevant to defendant's punishment and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. An officer testified that defendant's gang was involved in narcotics trafficking, theft, kick burglaries, and other similar offenses. Sutton v. State, 2008 Tex. App. LEXIS 9068 (Tex. App. Houston 1st Dist. Dec. 4 2008).

262. Court properly admitted evidence of defendant's gang affiliation during the punishment phase of his trial because, after admitting, the evidence the court properly instructed the jury it could not consider any evidence of an alleged extraneous crime or bad act unless the State had proved beyond a reasonable doubt that the defendant had committed the act, or it was one for which defendant could be held criminally responsible. By issuing that instruction, the trial court limited the jury's review of evidence in the punishment phase to those bad acts that had been proven beyond a reasonable doubt. Sierra v. State, 266 S.W.3d 72, 2008 Tex. App. LEXIS 6417 (Tex. App. Houston 1st Dist. 2008).

263. In a sexual assault case, the court properly allowed the victim to read her poem to the jury during punishment because it was relevant to show that the consequences of defendant's act included the victim's sadness at having lost the sense of safety she once knew with defendant, her mixed feelings, her anger, her need to apologize for her promise not to tell, and implicitly, for breaking that promise. Mansfield v. State, 2008 Tex. App. LEXIS 5615 (Tex. App. Houston 14th Dist. July 29 2008).

264. In the punishment phase of a kidnapping trial, there was no error in the admission of extraneous evidence of the victim's murder because the murder was relevant and attributable to defendant. Leffew v. State, 2008 Tex. App. LEXIS 389 (Tex. App. El Paso Jan. 17 2008).

265. In an assault trial, there was no error in admitting opinion evidence at the sentencing phase relating to defendant's gang membership; the expert opinion testimony that certain of defendant's tattoos had distinctive meanings and were common in certain gangs supplied sound evidence of gang membership, which was relevant to defendant's character. Garcia v. State, 239 S.W.3d 862, 2007 Tex. App. LEXIS 8307 (Tex. App. Houston 1st Dist. 2007).

266. In a case involving aggravated sexual abuse of a child, defendant was unable to invoke her Fifth Amendment rights while testifying on her own behalf during sentencing when asked about an extraneous offense; moreover, cross-examination of defendant was proper since this evidence was relevant to sentencing considerations based on the fact that it concerned a prior, similar offense against a child. Little v. State, 2007 Tex. App. LEXIS 4194 (Tex. App. Texarkana May 30 2007).

267. Under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and Tex. R. Evid. 401, evidence of defendant's commission of an offense similar to the ones for which she pleaded guilty, allegedly committed during the pendency of the indictment, was clearly relevant to the issue of whether community supervision was appropriate. Terrell v. State, 2006 Tex. App. LEXIS 9780 (Tex. App. Austin Nov. 10 2006).

268. Probation officer was properly allowed to testify that defendant was not a suitable candidate for community supervision because suitability is a matter relevant to sentencing under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) when a defendant seeks placement on community supervision; the court noted that the trial judge still had operate within the bounds of Tex. R. Evid. 401. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689

(Tex. Crim. App. 2006).

269. During defendant's trial for intoxication manslaughter, testimony about the difference between punishment for murder and intoxication manslaughter was relevant because it gave the jury complete information about how the punishment range for a particular criminal offense varies when a mental state is proven; defendant claimed that the collision was an accident or a mistake. Hackler v. State, 2006 Tex. App. LEXIS 4995 (Tex. App. Fort Worth June 8 2006).

270. Trial court did not err when it allowed the introduction of defendant's threatening statement to a jailor relating to his release from prison under Tex. Code Crim. Proc. Ann. art. 37.07. § 3(a); this statement was highly relevant in assessing punishment for the attempted murder of police officers, and it was not unfairly prejudicial under Tex. R. Evid. 403. Espinosa v. State, 194 S.W.3d 703, 2006 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. 2006).

271. Where defendant, a large Caucasian man, was accused of burglarizing the homes of two Hispanic families, photographs of defendant's tattoos were admissible as evidence of defendant's selfishness and his impact on the victims. The photographs were not admissible to establish that defendant's race would make him more likely to engage in future criminal conduct. Hicks v. State, 2005 Tex. App. LEXIS 10663 (Tex. App. Dallas Dec. 28 2005).

272. In a hearing to revoke defendant's community supervision, the State was permitted to introduce evidence of the underlying offense of cruelty to animals; the evidence was relevant to whether defendant was entitled to a reduced sentence. Davis v. State, 181 S.W.3d 426, 2005 Tex. App. LEXIS 9093 (Tex. App. Waco 2005).

273. In a hearing to revoke defendant's community supervision, the State was permitted to introduce evidence of the underlying offense of cruelty to animals; the evidence was relevant to whether defendant was entitled to a reduced sentence. Davis v. State, 181 S.W.3d 426, 2005 Tex. App. LEXIS 9093 (Tex. App. Waco 2005).

274. In a case of indecency with a child, the admission of irrelevant evidence at punishment that the victim's brother also abused the victim was harmless error under Tex. R. App. P. 44.2(b) because the victim testified that defendant did not know of the brother's abuse and because proper evidence of defendant's conduct warranted the sentence imposed. Dustman v. State, 2005 Tex. App. LEXIS 6588 (Tex. App. Tyler Aug. 17 2005).

275. Habeas petitioner's counsel's failure to object to the admission of evidence that the petitioner had used and sold illegal drugs roughly 10 years before his arrest for sex crimes was not relevant to the jury's sentencing determination. The petitioner's involvement with illegal drugs was separate and unrelated to his sex crimes, and was therefore not helpful to the jury in making its sentencing determination. Ward v. Dretke, 420 F.3d 479, 2005 U.S. App. LEXIS 16596 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1621, 164 L. Ed. 2d 334, 2006 U.S. LEXIS 2520, 74 U.S.L.W. 3543 (U.S. 2006).

276. Habeas petitioner's counsel's failure to object to the admission during the jury's sentencing determination of images of adult bestiality taken from the petitioner's computer. The images did not form part of the factual basis for the charges to which the petitioner had plead guilty, and had no relevance to the jury's sentencing determination apart from demonstrating the depths of depravity to which the petitioner had sunk; even if the evidence were relevant in some tangential way to the determination of his sentence, it was highly probable that considerations of unfair prejudice would have sufficed to keep this evidence from the jury. Ward v. Dretke, 420 F.3d 479, 2005 U.S. App. LEXIS 16596 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1621, 164 L. Ed. 2d 334, 2006 U.S. LEXIS 2520, 74 U.S.L.W. 3543 (U.S. 2006).

277. Trial court did not abuse its discretion in admitting evidence during the sentencing phase that a gun used in the commission of the assault on the victim was operable even though the jury had not found that defendant had possessed a deadly weapon during the guilt phase of the trial as the trial court could have reasonably believed that it was relevant and would be helpful for the jury to know whether the pistol was capable of being fired since it was available for defendant's use in the midst of a volatile situation. Kerr v. State, 2005 Tex. App. LEXIS 1081 (Tex. App. Tyler Feb. 10 2005).

278. Where defendant was tried for aiding seven men escape from prison, evidence of the post-escape crimes committed by the seven men bore heavily upon defendant's character and moral blameworthiness; the evidence was admissible to help the jury determine an appropriate sentence for defendant's crimes. Rodriguez v. State, 163 S.W.3d 115, 2005 Tex. App. LEXIS 1084 (Tex. App. San Antonio 2005).

279. Trial court did not err by excluding proffered evidence under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) to show that defendant was in psychiatric hospital at the time of his arrest for sexual assault in order to show his state of mind following the commission of the offense because even though defendant's mental state during and after the offense might have been relevant under Tex. R. Evid. 401 to the jury's determination of an appropriate punishment, his location at the time of his arrest and his mental state were not one and the same. Furthermore, defendant was not prohibited from introducing direct evidence of his mental condition because he could have offered significantly more relevant testimony to establish a diminished mental capacity by testifying as to whether he had ever been treated for drug addiction or mental illness and by calling the doctor who certified him competent to stand trial to testify to the significant mental deficits noted in his competency evaluation of defendant. Lamb v. State, 2005 Tex. App. LEXIS 879 (Tex. App. Corpus Christi Feb. 3 2005).

280. In a joint trial on the offense of sexual assault, a trial court's decision to admit a portion of a videotape showing one co-defendant's presence during the accidental overdose of a friend was not erroneous because the trial court repeatedly instructed the jury that defendant was not there. Klock v. State, 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

281. Trial court's decision to exclude testimony from a former prisoner regarding confinement conditions during sentencing was not erroneous because the trial court could have reasonably concluded that the testimony would not have been helpful to the jury in determining the appropriate sentence in a sexual assault case; moreover, the trial court could have reasonably concluded that the testimony went beyond the scope of any door opened by the State. Klock v. State, 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

282. In an aggravated sexual assault case, a court properly excluded a defense witness's testimony where it described prison life as he had observed it several years before, rather than present prison life, and the court could have reasonably concluded that the testimony was not helpful to determining an appropriate sentence. Zunker v. State, 177 S.W.3d 72, 2005 Tex. App. LEXIS 320 (Tex. App. Houston 1st Dist. 2005).

283. In the punishment phase of defendant's murder case, autopsy photographs were properly admitted because they supplied complete information regarding the nature of the wounds, that information was helpful to the court in devising an appropriate sentence, and they were probative as to the extent and nature of the injuries. Therefore, the autopsy photographs were relevant and were not unduly prejudicial. Williams v. State, 176 S.W.3d 476, 2004 Tex. App. LEXIS 10561 (Tex. App. Houston 1st Dist. 2004).

284. In the sentencing phase of defendant's sexual assault case, a court properly excluded testimony regarding prison conditions and defendant's potential status of being "fresh meat" in prison where the witness's testimony was elicited specifically to educate the jury on what defendant's prison experiences would be, and the testimony would not have been helpful to the jury in determining the appropriate sentence. Zunker v. State, 2004 Tex. App. LEXIS

4376 (Tex. App. Houston 1st Dist. May 13 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 72, 2005 Tex. App. LEXIS 320 (Tex. App. Houston 1st Dist. 2005).

285. In revoking community supervision, the trial court did not abuse its discretion in overruling defendant's objection to a police officer's testimony regarding his conduct in evading arrest by using a vehicle, as the evidence was relevant to sentencing. Cooper v. State, 2004 Tex. App. LEXIS 4334 (Tex. App. Fort Worth May 13 2004).

286. Tex. R. Evid. 401 definition of relevant evidence is not a perfect fit in the punishment context. Mendoza v. State, 2004 Tex. App. LEXIS 2486 (Tex. App. Houston 1st Dist. Mar. 18 2004).

287. In a prosecution for murder, the medical records of defendant's shooting victims were properly admitted at the sentencing phase; the medical records were relevant to the circumstances of the murder and provided evidence of bad acts for which defendant could be held criminally responsible. Mendoza v. State, 2004 Tex. App. LEXIS 2486 (Tex. App. Houston 1st Dist. Mar. 18 2004).

288. Trial court did not err under Texas Rule of Evidence 403 when it held inadmissible at the punishment stage of trial defendant's exhibit, a videotape depicting the administrative segregation facilities of a Texas prison unit as the videotape portrayed only one aspect of an entire system and offered only general information about some procedures used in that system, and the fact that other inmates had been controlled in the prison system or that certain procedures were in place, was not evidence of consequence to the jury's factual determination of whether defendant would pose a continuing threat to society where no evidence was offered that the circumstances portrayed in the videotape would specifically apply to defendant. Sells v. State, 121 S.W.3d 748, 2003 Tex. Crim. App. LEXIS 63 (Tex. Crim. App. 2003), *cert. denied*, 540 U.S. 986, 124 S. Ct. 511, 2003 U.S. LEXIS 8067 (2003).

Criminal Law & Procedure : Sentencing : Imposition : Victim Statements

289. Testimony of defendant's former girlfriend during the punishment phase as to the impact of an extraneous offense on her was not victim impact evidence because she was the victim of that extraneous offense, and the testimony was admissible in a case of evading arrest or detention using a motor vehicle. Guerra v. State, 2010 Tex. App. LEXIS 5655, 2010 WL 2816215 (Tex. App. Amarillo July 19 2010).

290. In the punishment phase of a kidnapping trial, it was error to admit testimony from the victim's parent regarding the impact of the victim's murder because defendant was not charged with the murder; therefore, the victim impact testimony was not relevant under Tex. R. Evid. 401, Tex. Code Crim. Proc. Ann. art. 37.07; the error was not harmless under Tex. R. App. P. 44; the State emphasized during closing arguments that the victim would not be coming back and that if the punishment were enhanced, it would be of some comfort to the family. Leffew v. State, 2008 Tex. App. LEXIS 389 (Tex. App. El Paso Jan. 17 2008).

291. Even if trial counsel should have objected to testimony from a murder victim's parent, defendant admitted shooting the victim three times; therefore, it was unlikely that the outcome of the trial would have been different if trial counsel had objected to the relevance of the evidence; defendant therefore failed to show that counsel was ineffective in failing to object. Kearse v. State, 2007 Tex. App. LEXIS 9828 (Tex. App. San Antonio Dec. 19 2007).

292. Testimony of a witness not named in an indictment did not constitute irrelevant victim impact testimony because her reaction to witnessing the shooting of a police officer was admissible as circumstances of the crime under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a). Espinosa v. State, 194 S.W.3d 703, 2006 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. 2006).

293. Where defendant was convicted of sexual assault, trial court did not err under Tex. R. Evid. 401, 402, 403 in admitting testimony from the victim and his sister of the effect of the assault on the victim; testimony of an inflammatory or sympathetic nature will not bar its admissibility if it is relevant to the issue at trial, and the issue need not be contested. Ranels v. State, 1996 Tex. App. LEXIS 2867 (Tex. App. Beaumont Mar. 20 1996).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview

294. In defendant's indecency with a child case, the court properly excluded evidence that a boyfriend of the victims' mother was a registered sex offender because evidence of the boyfriend's registered-sex-offender status would only have been relevant if the identity of the alleged perpetrator of the offenses was an issue in the case. However, evidence of an alternative perpetrator was not relevant to the determination of whether the alleged offenses occurred. Shaw v. State, 2008 Tex. App. LEXIS 9038 (Tex. App. Waco Dec. 3 2008).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

295. Admission of evidence of a sex offender's 1975 murder conviction during a proceeding to commit him as a sexually violent predator was not error because the conviction and the facts surrounding his nonsexual criminal history were relevant to the issue of whether he suffered from a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

296. In a civil commitment proceeding, defense counsel's cross-examination of an expert was not improperly limited because counsel sought to elicit information that did not make the existence of any fact of consequence to the determination of whether an inmate was a sexually violent predator more or less probable. In re Ramirez, 2013 Tex. App. LEXIS 12917, 2013 WL 5658597 (Tex. App. Beaumont Oct. 17 2013).

297. In a sexually violent predator civil commitment case brought under Tex. Health & Safety Code Ann. § 841.003(a)(2), the trial court did not err in admitting a videotape appellant had made of a comatose woman that demonstrated the extent of his voyeurism and the escalation of his voyeurism to sexual assault, pursuant to Tex. R. Evid. 401. In re Chapman, 2013 Tex. App. LEXIS 11404, 2013 WL 4773231 (Tex. App. Beaumont Sept. 5 2013).

298. In a trial of inmate's civil commitment as a sexually violent predator under Tex. Health & Safety Code Ann. § 841.062, the trial court properly excluded the inmate's expert's testimony that one of the victims had recanted pursuant to Tex. R. Evid. 401, 402, and 702, because such evidence represented a collateral attack on the underlying convictions, which had not been set aside. In re Barron, 2013 Tex. App. LEXIS 8495, 2013 WL 3487385 (Tex. App. Beaumont July 11 2013).

299. In proceedings on a petition to civilly commit an inmate as a sexually violent predator, it was not error to exclude evidence on the inmate's super intensive supervision parole plan because the issue was whether the inmate was a repeat sexually violent offender with a behavioral abnormality making the inmate likely to commit a predatory act of sexual violence, under Tex. Health & Safety Code Ann. § 841.003(a), so the inmate's parole supervision level was irrelevant. In re Smith, 2013 Tex. App. LEXIS 1095, 2013 WL 476771 (Tex. App. Beaumont Feb. 7 2013).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Classification

300. Admission of evidence of a sex offender's 1975 murder conviction during a proceeding to commit him as a sexually violent predator was not error because the conviction and the facts surrounding his nonsexual criminal history were relevant to the issue of whether he suffered from a behavioral abnormality that predisposed him to

engage in a predatory act of sexual violence. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

301. Finding that respondent was a sexually violent predator (SVP) was proper under Tex. Health & Safety Code Ann. § 841.002(5) because there was no error in failing to allow respondent's counsel to question a witness on the interpretation of the SVP statute, Tex. Health & Safety Code Ann. § 841.001-851.151. The questions respondent was not allowed to ask did not address a fact of consequence that would have made the doctor's prognosis more or less probable. In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Registration

302. Based on his conviction for first-degree felony offense burglary of a habitation with intent to commit sexual assault, defendant did not show why it was reasonable for him to believe that the findings of fact and conclusions of law established he was not required to comply with sex-offender registration, Tex. Code Crim. Proc. Ann. art. 62.001(5)(D); it was within the trial court's discretion to determine that the findings of fact and conclusions of law were not relevant evidence. Durham v. State, 2013 Tex. App. LEXIS 7301 (Tex. App. Houston 1st Dist. June 13 2013).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

303. During defendant's trial for indecent exposure, the danger of unfair prejudice did not substantially outweigh the probative value of evidence that defendant walked around nude in front of his stepdaughters, masturbated in the presence of his stepdaughter, and inappropriately touched his stepdaughter because the evidence was probative to show defendant's intent and motive to sexually gratify himself in the presence of others and to rebut his defensive theory of mistake. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

304. In an indecency with a child case, the court committed reversible error in the admission of sex toys because there was no suggestion that sex toys were used in any way related to the complainant, and the State emphasized those items in providing a detailed description of each item, making certain to emphasize their graphic nature by carrying them in a single plastic tub, pointing out the testifying officer's wearing of gloves, and repeatedly apologizing to the jury for the graphic nature of those items. Warr v. State, 418 S.W.3d 617, 2009 Tex. App. LEXIS 2538 (Tex. App. Texarkana Apr. 15 2009).

305. In a trial for child sexual assault, there was no reversible error under Tex. R. Evid. 401, from the admission of evidence that defendant was a former police officer. Nino v. State, 223 S.W.3d 749, 2007 Tex. App. LEXIS 3519 (Tex. App. Houston 14th Dist. 2007).

306. During defendant's trial for illegal dumping, the trial court did not err in excluding documentary evidence consisting of numerous receipts indicating that defendant had sold or recycled metals and other materials in 2002 and 2003, which defendant claimed was offered to prove he was recycling, rather than dumping, solid waste on his property, because the fact that defendant might not have been operating a solid waste site in 2002 and 2003 had little or no logical relevance to whether he began operating such a site in 2004, which was when the activity for which he was prosecuted occurred. Gandy v. State, 222 S.W.3d 525, 2007 Tex. App. LEXIS 1441 (Tex. App. Houston 14th Dist. 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

307. In a trial for arson based on defendant's setting fire to a piece of cloth in the gas tank of his ex-girlfriend's car, it was not error to exclude the ex-girlfriend's testimony concerning her new boyfriend. The relevancy was not readily apparent, given that neither the girlfriend nor her new boyfriend was present when the arson was committed. Flores v. State, 2005 Tex. App. LEXIS 6255 (Tex. App. Amarillo Aug. 8 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Constitutional Issues

308. On appeal of defendant's conviction for continuous sexual abuse of a child, his complaint that the trial court erred by refusing to allow him to confront a witness was not preserved for appellate review because defense counsel did not articulate that either U.S. Const. amend. VI or Tex. Const. art. I, § 10 demanded admission of testimony about the victim's sexual relations with her boyfriend. Defense counsel's argument that the testimony was admissible as relevant evidence under Tex. R. Evid. 401 was not sufficient to preserve the Confrontation Clause claim for review. Dukes v. State, 2012 Tex. App. LEXIS 6151 (Tex. App. Corpus Christi July 26 2012).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

309. Defendant also failed to preserve for appellate review any claim that exclusion of the evidence violated the Texas Rules of Evidence because the rules were not argued or cited in defendant's brief. Even if the issue had been preserved, the court held that any error was harmless because the record contained ample evidence that defendant's wife harbored ill will towards him, and therefore the excluded evidence was merely cumulative. Rhodes v. State, 2013 Tex. App. LEXIS 5218 (Tex. App. Texarkana Apr. 30 2013).

310. Defendant's relevancy objections did not preserve his argument that admission of extraneous offense evidence of uncharged sexual conduct violated Tex. R. Evid. 404; in any event, because the same evidence came in through other testimony without objection, any error was cured. Goodwin v. State, 2012 Tex. App. LEXIS 6918, 2012 WL 3590723 (Tex. App. Corpus Christi Aug. 20 2012).

311. Objection under Tex. R. Evid. 404, 405 did not preserve defendant's complaints under Tex. R. Evid. 401, 403 regarding evidence of his gang affiliation. Martin v. State, 2011 Tex. App. LEXIS 5624, 2011 WL 2937423 (Tex. App. Corpus Christi July 21 2011).

312. While defendant claimed evidence of the nature of an arrest warrant was irrelevant under Tex. R. Evid. 401 in his prosecution for, inter alia, evading arrest, defendant waived his argument because he failed to object every time the nature of his arrest warrant came into evidence or obtain a running objection. Even if the argument had not been waived, an error would have been harmless under Tex. R. App. P. 44.2(b) because strong evidence of defendant's guilt was presented, including video recordings of the police pursuit and the testimony of the police officers regarding the fact that defendant drove his car toward the first police officer. Williams v. State, 2011 Tex. App. LEXIS 1426, 2011 WL 677390 (Tex. App. Austin Feb. 25 2011).

313. Defendant failed to show that the trial court abused its discretion during the punishment phase of the trial by admitting extraneous offense evidence to which jeopardy had attached, because none of the objections were based on a double-jeopardy violation, and the undisputed facts showed that defendant's claim of a double jeopardy violation was not clearly apparent on the face of the record, when the facts establishing double jeopardy were disputed. Williams v. State, 2010 Tex. App. LEXIS 9561, 2010 WL 4910243 (Tex. App. Houston 1st Dist. Dec. 2 2010).

314. Trial court did not abuse its discretion by refusing to admit evidence of a fight between the victim and his older brother because defendant failed to show the victim's propensity to fight when challenged was a pertinent character trait that had any relevance in a sexual assault on a child case. Soto v. State, 2010 Tex. App. LEXIS

8709, 2010 WL 4273173 (Tex. App. San Antonio Oct. 29 2010).

315. Defendant failed to preserve for appellate review his claim that the district court erred by excluding evidence regarding the motivation of the authorities to prosecute the case against him because he failed to objected on the basis of Tex. R. Evid. 404(b) during the trial. Even assuming that defendant had preserved error, the trial court did not abuse its discretion because: (1) the proffered evidence had no relevance to the issue of whether defendant had committed the offense of unauthorized use of a motor vehicle; (2) the trial court could have found that the evidence would have put the officers and the police department on trial, confused the issues, and caused undue delay; and (3) there was considerable evidence showing that defendant committed the offense, particularly the videotape showing defendant entering the bait vehicle on three separate dates. Bishop v. State, 2010 Tex. App. LEXIS 7056, 2010 WL 3369845 (Tex. App. Austin Aug. 26 2010).

316. Defendant failed to preserve for appellate review his claim that the trial court erred by allowing the State to question him about testimony he gave in a prior trial because at trial defendant specifically objected to the testimony under Tex. R. Evid. 403, but on appeal he argued that the testimony was not relevant under Tex. R. Evid. 401. Garcia v. State, 2010 Tex. App. LEXIS 6738, 2010 WL 3279386 (Tex. App. Corpus Christi Aug. 19 2010).

317. It could be argued that defendant waived an objection under Tex. R. App. P. 33.1 to evidence under Tex. R. Evid. 401, 403 because objections that the evidence was not fair and cumulative did not comport with the objection on appeal. McCallum v. State, 311 S.W.3d 9, 2010 Tex. App. LEXIS 440 (Tex. App. San Antonio Jan. 27 2010).

318. In a driving while intoxicated case, even though defendant made several challenges to the trial court's admission of a DC-24 form into evidence, because the only objection made at trial was for relevance, that was the only issue preserved for appellate review. Frnka v. State, 2009 Tex. App. LEXIS 7095, 2009 WL 2882939 (Tex. App. San Antonio Sept. 9 2009).

319. Defendant did not object to testimony about gang affiliation during the guilt-innocence phase of a murder trial and therefore failed to preserved error under Tex. R. Evid. 401. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

320. Because defendant failed to object to the relevance of his jailhouse tattoos, as opposed to an alleged gang affiliation, and failed to object to the State's continued questioning about his tattoos, testimony concerning his tattoos was admitted into evidence without objection. While defendant failed to obtain an adverse ruling in the first place, even if he had, he would have waived the objection by failing to either interpose it each time the evidence in question was offered or seek a running objection. Shipley v. State, 2014 Tex. App. LEXIS 2868, 2014 WL 1004498 (Tex. App. Texarkana Mar. 14 2014).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

321. Defense counsel preserved for review the issue of whether the trial court erred in admitting an extraneous offense because defense counsel emphasized what rules his request for a running objection was based on, and the trial court stated that the evidence was admitted as inextricably intertwined with the offense. Finney v. State, 2013 Tex. App. LEXIS 8317 (Tex. App. Dallas July 8 2013).

322. In an appeal from a kidnapping conviction, the court reviewed arguments relating to the admission of evidence, even though defendant failed to object, because defendant's complaints were apparent from the context of defendant's objections; therefore, Tex. R. App. P. 33.1 was satisfied. Leffew v. State, 2008 Tex. App. LEXIS 389

(Tex. App. El Paso Jan. 17 2008).

323. Under Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1(a), a murder defendant waived the argument that autopsy photos were not relevant because an objection under Tex. R. Evid. 403 did not preserve error under Tex. R. Evid. 401. Williams v. State, 2007 Tex. App. LEXIS 6397 (Tex. App. Fort Worth Aug. 9 2007).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

324. In a murder trial, defendant waived his Tex. R. Evid. 401 and 403 objections to the portion of a surveillance videotape that depicted the victim's wife kneeling and crying over the victim's body after defendant had fled the store. Two witnesses testified, without objection, regarding actions depicted on the videotape and verbally conveyed the same imagery. Fernandez v. State, 2005 Tex. App. LEXIS 7068 (Tex. App. Houston 14th Dist. Aug. 30 2005).

325. In drug and robbery case, although defendant's relevancy objection to evidence of the other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

326. Where defendant was charged with possession with intent to deliver cocaine after police searched him as a suspect in a nearby shooting, the trial court did not abuse its discretion by excluding the spent bullet from evidence. A defense theory that the shots were fired by men who placed the cocaine in defendant's pockets while he was unconscious was mere speculation. Seay v. State, 2005 Tex. App. LEXIS 2048 (Tex. App. Houston 1st Dist. Mar. 17 2005).

327. Questions of relevance should be left largely to the trial court, relying on its own observations and experience, and will not be reversed absent an abuse of discretion. Day v. State, 2004 Tex. App. LEXIS 6238 (Tex. App. Austin July 15 2004).

328. Relevance of an allegation of sexual assault on a minor made over two years after the one at bar, without more, was extremely minimal, and under those circumstances, the trial court did not err in excluding the evidence. Keith v. State, 2004 Tex. App. LEXIS 4450 (Tex. App. Texarkana May 18 2004).

329. Relevance of an allegation of sexual assault on a minor made over two years after the one at bar, without more, was extremely minimal, and under those circumstances, the trial court did not err in excluding the evidence. Keith v. State, 2004 Tex. App. LEXIS 4450 (Tex. App. Texarkana May 18 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

330. Trial court did not abuse its discretion by admitting evidence regarding defendant's membership in a gang because it was relevant to show defendant's motive for shooting the two victims and to rebut defendant's theory that he shot at the vehicle in self-defense. Johnson v. State, 2014 Tex. App. LEXIS 3618 (Tex. App. Houston 14th Dist. Apr. 3 2014).

331. Court did not abuse its discretion in admitting the evidence because the trial court's decision to admit evidence of defendant's knowledge that he was prohibited from owning a firearm fell within the zone of reasonable disagreement. Tran v. State, 2014 Tex. App. LEXIS 2387, 2014 WL 859674 (Tex. App. Texarkana Mar. 4 2014).

332. Court did not abuse its discretion in the exclusion of the proffered evidence because the excluded testimony failed to establish the existence of "bad blood" between defendant and the alleged victim. Tran v. State, 2014 Tex. App. LEXIS 2387, 2014 WL 859674 (Tex. App. Texarkana Mar. 4 2014).

333. Trial court did not abuse its discretion by admitting a shovel into evidence because the State's theory was that defendant dumped the victim's body in a wooded area and covered the body with grass clippings, rocks, leaves, and bamboo, and the fact he had a shovel readily available to assist him was relevant. Briscoe v. State, 2013 Tex. App. LEXIS 10859 (Tex. App. Austin Aug. 29 2013).

334. Trial court did not abuse its discretion by admitting an extraneous offense regarding marijuana found on defendant's person and in his car because it was admissible same transaction contextual evidence; defendant's possession of an illegal substance explained his possible motive for hitting a detective and fleeing the scene before the drugs could be found, and he was not acting suspiciously until the detective moved closer. Finney v. State, 2013 Tex. App. LEXIS 8317 (Tex. App. Dallas July 8 2013).

335. Trial court did not abuse its discretion by excluding evidence of another potential suspect because defendant made an offer of proof but did not tender any other evidence connecting his brother's alleged drug use or dealing to his murder. Honish v. State, 2013 Tex. App. LEXIS 5139 (Tex. App. Fort Worth Apr. 25 2013).

336. Trial court did not abuse its discretion by preventing defense counsel from asking the medical examiner about the percentage of people who died from violent deaths while having narcotics in their bodies because the question would not have elicited any relevant testimony, as the percentage did not make defendant more of less culpable of the victim's murder and did not make a jury's finding of mitigation any more or less probable than it would be without the evidence. Herrera v. State, 2012 Tex. App. LEXIS 5594, 2012 WL 2861673 (Tex. App. Corpus Christi July 12 2012).

337. Trial court did not abuse its discretion by admitting evidence of a tattoo of "187" on defendant's hand as a statement that defendant committed murder pursuant to Tex. R. Evid. 801(e)(2)(A) because the record showed that defendant did not have the tattoo on the night of the shooting, it was placed on him after he was in jail in connection with the underlying murder charge, and went to his state of mind at the time of the shooting and clarified the circumstances surrounding the shooting. It was clear from the placement of the tattoo on his hand that it was an open and obvious statement he wanted everyone to see and it directly contradicted his defensive theory that he acted in self defense. Salazar v. State, 2011 Tex. App. LEXIS 6835, 2011 WL 3770297 (Tex. App. Dallas Aug. 26 2011).

338. In a criminal solicitation of a minor for sexual assault case, under Tex. R. Evid. 401, 402, the trial court did not abuse its discretion in excluding the defense witness's testimony about the veracity of the chat room logs because it was irrelevant as he could not say whether the State's or defendant's version of the chat logs was an accurate version of the actual chat sessions. Pudasaini v. State, 2011 Tex. App. LEXIS 5582, 2011 WL 2905592 (Tex. App. Dallas July 21 2011).

339. Trial court did not abuse its discretion by prohibiting defendant from questioning his daughter about the victim's use of marijuana because whether the victim used drugs over a month earlier would not rebut the toxicology report showing no drugs in her system at the time she was killed. Mcghee v. State, 2010 Tex. App.

LEXIS 5561 (Tex. App. Houston 1st Dist. July 15 2010).

340. Trial court did not abuse its discretion in finding that the evidence was relevant because (1) a police officer testified that track marks on a person's arms were the result of heroin use; (2) during a raid on defendant's residence, police officers discovered 19.34 grams of heroin on the premises, along with numerous syringes that a police officer testified were commonly used to shoot heroin; and (3) evidence of track marks on defendant's arms made his alleged involvement with the criminal activity at the residence more probable than it would be without the evidence. Gomez v. State, 2007 Tex. App. LEXIS 8853 (Tex. App. Austin Nov. 9 2007).

341. Trial court did not err by admitting into evidence defendant's book-in photograph because defendant did not object at trial or complain of an improperly suggestive photographic identification procedure by the State; the photograph was not prejudicial merely because defendant had an "angry look;" the photograph, which was used by a witness during her deposition to identify defendant as the perpetrator, was relevant as identity was an essential element of any criminal offense. King v. State, 2007 Tex. App. LEXIS 8766 (Tex. App. Beaumont Oct. 31 2007).

342. Photograph of the complainant's children was relevant to the case where, at trial, the complainant and her sister testified the complainant's two young daughters were in the car at the time of the shooting, while other witnesses claimed they did not see the girls in the car. The photograph showed the girls' size at the time of the offense and allowed the jury to evaluate whether the children would be visible in the car, particularly if they had ducked down when the shooting began. Brown v. State, 2007 Tex. App. LEXIS 237 (Tex. App. Dallas Jan. 12 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

343. Defendant's claim that a trial court erred in excluding evidence in the guilt/innocence phase of his murder trial that his co-offender died in an unrelated armed confrontation with police, on the ground that how he died was not relevant, was resolved against him because, even assuming that the trial court erred in excluding the evidence that the roommate died in an armed confrontation with police, any error was harmless, as similar evidence was introduced by defendant when he testified. Perez v. State, 2005 Tex. App. LEXIS 6814 (Tex. App. Dallas Aug. 23 2005), writ of certiorari denied by 126 S. Ct. 2897, 165 L. Ed. 2d 924, 2006 U.S. LEXIS 4763, 74 U.S.L.W. 3703 (U.S. 2006).

344. In a case of indecency with a child, the admission of irrelevant evidence at punishment that the victim's brother also abused the victim was harmless error under Tex. R. App. P. 44.2(b) because the victim testified that defendant did not know of the brother's abuse and because proper evidence of defendant's conduct warranted the sentence imposed. Dustman v. State, 2005 Tex. App. LEXIS 6588 (Tex. App. Tyler Aug. 17 2005).

345. Trial court should have excluded as irrelevant and prejudicial a BB gun that was found in a defendant's truck and that was not used during the charged burglary. The error was harmless, however, because the court did not have fair assurances that the mind of an average juror would have found the State's case less persuasive had the BB gun not been admitted. Moreno v. State, 2005 Tex. App. LEXIS 4487 (Tex. App. Houston 1st Dist. June 9 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 6371 (Tex. App. Houston 1st Dist. Aug. 11, 2005).

346. In a trial for a violent sexual assault of a child, it was error to admit a letter that defendant wrote from prison in which he asserted that the victim lied about her age and that he defended himself when she attacked him, and because his testimony, prior to admission of the letter, was consistent with those claims, the letter was not relevant to guilt and was only relevant to defendant's promiscuous sexual conduct, which he also discussed in the letter; however, the error was harmless because the letter was largely exculpatory and the evidence of guilt was

overwhelming. Reed v. State, 2004 Tex. App. LEXIS 5389 (Tex. App. Fort Worth June 17 2004).

347. In defendant's burglary case, although the testimony of the victims regarding illegal drugs taken during the robbery was of only slight probative value, it was relevant for purposes of sentencing because it pertained to the circumstances of the offense, and therefore, the trial court erred by excluding it. In addition, although the victims denied any involvement in drug-related activities, the jury should have been allowed to assess their credibility and demeanor and the jury may have considered those circumstances in assessing defendant's sentence; therefore, the error was harmful. McKaine v. State, 2004 Tex. App. LEXIS 3777 (Tex. App. Corpus Christi Apr. 29 2004), substituted opinion at, opinion withdrawn by 170 S.W.3d 285, 2005 Tex. App. LEXIS 7147 (Tex. App. Corpus Christi 2005).

348. Trial court erred in excluding from jury consideration evidence of discriminatory enforcement of the Blue Law, former Tex. Rev. Civ. Stat. Ann. art. 9001; however, the error was harmless in that there was no hint of any reason that constituted the kind of invidious enforcement that gave rise to constitutional protection. Wolf v. State, 661 S.W.2d 765, 1983 Tex. App. LEXIS 5456 (Tex. App. Fort Worth 1983).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Constitutional Errors

349. Court did not err by limiting defendant's cross-examination of the medical examiner concerning the lapse of her medical license because defendant adduced no evidence that the status of the medical examiner's license in 2004 had any relevance to the facts or validity of her testimony, the State had a strong case, and the testimony as to the cause of the child's death was corroborated by a large amount of other forensic evidence; defendant cross-examined the medical examiner fully regarding the autopsy, and the record showed that the medical examiner was licensed when she performed the autopsy and compiled the autopsy report; thus, even if the trial court abused its discretion in limiting and denying cross-examination, defendant did not demonstrate harm. Valdez v. State, 2006 Tex. App. LEXIS 10295 (Tex. App. Corpus Christi Nov. 30 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

350. Because the evidence of defendant's extraneous rule violations at the treatment center was irrelevant to prove that she consumed alcohol on a specific date, any error in the admission of that evidence was harmless. Strother v. State, 2013 Tex. App. LEXIS 10606 (Tex. App. Houston 14th Dist. Aug. 22 2013).

351. Defendant also failed to preserve for appellate review any claim that exclusion of the evidence violated the Texas Rules of Evidence because the rules were not argued or cited in defendant's brief. Even if the issue had been preserved, the court held that any error was harmless because the record contained ample evidence that defendant's wife harbored ill will towards him, and therefore the excluded evidence was merely cumulative. Rhodes v. State, 2013 Tex. App. LEXIS 5218 (Tex. App. Texarkana Apr. 30 2013).

352. Even though the trial court abused its discretion by admitting defendant's military record into evidence, as the fact that defendant was charged with escape and had been discharged for misconduct did not make it more or less likely that he had committed the sexual assault offenses, the error was harmless because there was evidence supporting defendant's conviction, other evidence showed that he was untruthful about his military service, and the State never mentioned the extraneous offenses contained in defendant's military record. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

353. In a robbery trial, any error was harmless when the trial court allowed evidence of defendant's tattoos because an accomplice admitted he robbed the shoe store and testified that defendant was also involved in the

robbery. Further, defendant's fingerprint was found on one of the shoe boxes handled by the robbers. Jefferson v. State, 2012 Tex. App. LEXIS 663, 2012 WL 234116 (Tex. App. Dallas Jan. 26 2012).

354. Because a crayon drawing found in the victim's clothes during the autopsy did not provide a small nudge toward proving or disproving some fact of consequence, the drawing was irrelevant and inadmissible under Tex. R. Evid. 401 and 402; however, under Tex. R. App. P. 44.2(b), admission of the drawing was harmless error as the evidence against defendant was substantial and the drawing was not so emotionally charged that it prevented the jury from rationally considering the evidence before it. Soto v. State, 2011 Tex. App. LEXIS 8360, 2011 WL 5000393 (Tex. App. Corpus Christi Oct. 20 2011).

355. In a capital murder trial, any error under Tex. R. Evid. 401, 402 in admitting a drawing by a witness to the shooting that showed both the shooting and the immediate aftermath was harmless under Tex. R. App. P. 44.2(b) because the events depicted in the drawing were testified to by several other witnesses, surveillance videos showed defendant's actions, and defendant confessed. Petty v. State, 346 S.W.3d 200, 2011 Tex. App. LEXIS 5494 (Tex. App. Amarillo July 19 2011).

356. Court abused its discretion when it allowed the State to introduce evidence that defendant failed to appear for two drug tests, however, the error did not affect defendant's substantial rights, because the evidence was brief and was not emphasized by the State, defendant had a prior criminal record, and there was direct evidence connecting defendant with the syringe that contained a trace amount of methamphetamine. Hood v. State, 2010 Tex. App. LEXIS 6301, 2010 WL 3049030 (Tex. App. Eastland Aug. 5 2010).

357. In an aggravated assault case, even if photographs of dead cattle were irrelevant, their admission was harmless error because testimony describing the dead cattle was admitted without objection. Walls v. State, 2009 Tex. App. LEXIS 9783, 2009 WL 5150073 (Tex. App. San Antonio Dec. 30 2009).

358. In an indecency with a child case, the court erred by admitting extraneous offense evidence due to the lack of similarity between the extraneous offenses and the charged offenses, the duration in time of twenty years between the offenses, and the lack of evidence concerning a continuing course of conduct by defendant. The extraneous acts did not take place in defendant's home and defendant did not ask the witness to touch himself or defendant. Crocker v. State, 2009 Tex. App. LEXIS 9432, 2009 WL 4725299 (Tex. App. Dallas Dec. 11 2009).

359. In a felony murder case, defendant was not harmed by the trial court's exclusion of expert testimony of two of her witnesses on her affirmative defense of insanity because, although relevant and probative of her defense, the excluded testimony was repetitive of the evidence of the history of mental illness, as described by defendant's husband. More importantly, the excluded evidence did not directly pertain to the question of whether defendant was sane at the time of the collision because neither witness ever evaluated defendant for sanity. Fisher-Riza v. State, 2009 Tex. App. LEXIS 9769, 2009 WL 4358622 (Tex. App. Houston 1st Dist. Dec. 3 2009).

360. In defendant's drug case, error occasioned by the admission of improper testimony was harmless because the evidence of credibility was cumulative of testimony provided by the witness and was unrelated to the evidence upon which defendant was convicted. The admission of the testimony in question was not error of such magnitude that the jury's proper evaluation of the evidence was disrupted. Perkins v. State, 2009 Tex. App. LEXIS 8862, 2009 WL 3834119 (Tex. App. Texarkana Nov. 18 2009).

361. Trial court abused its discretion by admitting evidence of defendant's prior burglary arrest pursuant to Tex. R. Evid. 404(b) where the tendency of the evidence was to show defendant was a bad person or that his character conformed to that of a person from whom criminal conduct might be expected. However, the error did not influence the jury, or had but a slight effect on its verdict of guilt, because the State's presentation of the alleged burglary,

although factually detailed, was brief and received only passing mention in closing argument, and because the propensity and potency of the evidence to characterize defendant as a criminal was blunted by the previous, unopposed, admission of evidence of his prior conviction for manslaughter. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

362. In a sexual assault of a child case, the court reversibly erred by admitting extraneous acts evidence because defendant's practice of not using a condom while engaged in consensual sex with an adult companion, or informing the companion of his HIV positive status, had the practical effect of prejudicing any defense raised by defendant regarding the complainant's credibility. Such an effect would have been detrimental to defendant, who sought to discredit the complainant by pointing out factual variances in his outcries, and by suggesting that the complainant was motivated to fabricate the assault to avoid being schooled in an alternative education program. Lopez v. State, 288 S.W.3d 148, 2009 Tex. App. LEXIS 2050 (Tex. App. Corpus Christi Mar. 26 2009).

363. In a theft case, a court reversibly erred by excluding evidence that the complainant was a prostitute because the jury could not properly evaluate a witness's story that he was the complainant's bodyguard and would have intervened to protect her, and his business interest, if she had been in danger. Thomas v. State, 2008 Tex. App. LEXIS 6498 (Tex. App. Dallas Aug. 26, 2008).

364. Exclusion of a witness's testimony under Tex. R. Evid. 803(24) was not harmless under Tex. R. App. P. 44 because, for purposes of the offense of unauthorized use of a motor vehicle under Tex. Penal Code Ann. § 31.07, the witness's statement was relevant to the issue of defendant's state of mind and it was an issue on which the State had the burden of proof; because the witness's statement would have given credibility to defendant's otherwise self-serving testimony that he was misled by the witness about the source of the witness's permission to use the truck, the trial court's exclusion of the witness's statement was prejudicial, which necessitated reversal of defendant's conviction. Watkins v. State, 2008 Tex. App. LEXIS 2539 (Tex. App. Beaumont Apr. 9 2008).

365. In a trial for aggravated robbery, it was error to admit testimony from an officer that people in the area commonly did not call police when they found a gun; however, the error in admitting the irrelevant evidence was harmless under Tex. R. App. P. 44 because the evidence of guilt, while not overwhelming, was substantial; defendant admitted to involvement, and the complainant's testimony placed the gun squarely in defendant's hands during a robbery. Brown v. State, 2008 Tex. App. LEXIS 1406 (Tex. App. Houston 14th Dist. Feb. 28 2008).

366. In defendant's capital murder case, evidence in the guilt-innocence phase that painted a picture of the victim as a young man with a promising future whose life defendant had ended prematurely was irrelevant and appealed to the jury's sympathies. However, the error was harmless; defendant admitted to participating in the shooting, and a witness testified that defendant shot the victim and grabbed the bag of codeine. Durand v. State, 2007 Tex. App. LEXIS 6535 (Tex. App. Houston 1st Dist. Aug. 16 2007).

367. Even though the trial court erred by admitting photographs of the corpse of defendant's murdered wife, because it had no tendency to make more or less probable any fact of consequence to the determination of defendant's guilt, the error was harmless given other devastating evidence against defendant; this evidence included the fact that defendant's prior conviction was for murder and that he appeared calm and unemotional after his wife's murder. Smith v. State, 2007 Tex. App. LEXIS 6023 (Tex. App. Tyler July 31 2007).

368. In defendant's aggravated sexual assault on a child case, even if the trial court erred by admitting a statement defendant made to a witness regarding young women, the error was harmless; by the time the comment was admitted, the jury had already heard the victim's detailed testimony describing the sexual assault and defendant's wife's testimony regarding defendant's admission that he engaged in, at least, some sexual contact

with the victim. Silva v. State, 2007 Tex. App. LEXIS 4720 (Tex. App. Houston 14th Dist. June 19 2007).

369. Even though the trial court erred by admitting into evidence during defendant's aggravated sexual assault trial photographs of defendant, his co-defendant, and his roommate having sex, appearing to be intoxicated, and flashing a gang sign, the error was harmless because: (1) the photographs of defendant and the two others partying were not scandalous or shocking, but were innocuous in comparison to the photographs of the complainant and other women, who were naked and unconscious; (2) except for one comment during closing arguments, the State did not emphasize the evidence; (3) there was very little contemporaneous testimony concerning the photographs when they were admitted into evidence; and (4) the jury was manifestly able to consider the probative evidence and separate it from marginally relevant evidence because it acquitted the co-defendant and convicted defendant of the lesser-included offense of sexual assault. Casey v. State, 215 S.W.3d 870, 2007 Tex. Crim. App. LEXIS 230 (Tex. Crim. App. 2007).

370. In a case involving indecency with a child, a trial court erred by admitting photographs of the victim showing weight gain; however, the error was harmless considering the amount of inculpatory evidence against defendant. Dehart v. State, 2006 Tex. App. LEXIS 5111 (Tex. App. Amarillo June 14 2006).

Energy & Utilities Law : Administrative Proceedings : Public Utility Commissions : General Overview

371. Substantial evidence pursuant to Tex. Gov't Code Ann. § 2001.174 supported an order of the Public Utility Commission of Texas that raised the fuel factor component of the price-to-beat for an affiliated retail electric provider (AREP) because the Commission linked the measurement of the adequacy of the fuel factor to reflect significant changes in market price and the mechanism to correct inadequacies, and concluded that the New York Mercantile Exchange (NYMEX) was sufficient for both tasks, and because the Commission did not err in barring the order's opponents from presenting relevant evidence under Tex. R. Evid. 401 where evidence regarding the AREP's purchase price and any windfall profits resulting from the fuel-factor adjustment did not bear on whether the NYMEX index had changed the requisite amount. Furthermore, the fuel-factor increase did not violate a set limit on the price-to-beat under Tex. Util. Code Ann. § 39.202 because the adjustments under § 39.202(l) were not limited by § 39.202(p). City of Alvin v. PUC of Tex., 143 S.W.3d 872, 2004 Tex. App. LEXIS 7685 (Tex. App. Austin 2004).

Environmental Law : Air Quality : Emission Standards : Stationary Sources : New Sources

372. In approving an application for an air quality permit necessary for an applicant to build a pulverized coal power plant, the Texas Commission on Environmental Quality did not err in excluding evidence that the best available control technology (BACT) analysis pursuant to Tex. Health & Safety Code Ann. § 382.0518(b)(1) for a coal-fueled power plant should have included consideration of integrated gasification combined cycle (IGCC) or other coal-conversion processes where the IGCC evidence offered by an opponent of the application was not relevant because the opponent offered no evidence that IGCC was a process that could be applied to the pulverized coal power plant proposed by the applicant. An IGCC process, by which electricity is produced by the burning of gasses extracted from coal to drive turbines that turn electric power generators, is significantly different from the pulverized coal power plant, which produces electricity by burning coal to generate steam that drives a conventional steam-powered turbine, as proposed by the applicant. Blue Skies Alliance v. Tex. Comm'n on Envtl. Quality, 283 S.W.3d 525, 2009 Tex. App. LEXIS 2534 (Tex. App. Amarillo Apr. 14 2009).

Environmental Law : Air Quality : Enforcement : Administrative Proceedings

373. Texas Commission on Environmental Quality did not err under Tex. Health & Safety Code Ann. § 382.0518(b)(1) in excluding as not relevant evidence that the best available control technology (BACT) analysis for an air quality permit applicant's coal-fueled power plant should have included consideration of integrated gasification combined cycle (IGCC) where the Commission had appropriately drawn the line between what

constituted a control technology that could be applied to the applicant's proposed plant and what constituted a redesign of the proposed plant. An IGCC process was significantly different from the pulverized coal power plant proposed by the applicant, and because an opponent of the application had offered no evidence that IGCC was a process that could be applied to the proposed pulverized coal power plant, it had failed to meet its burden. Blue Skies Alliance v. Tex. Comm'n on Envtl. Quality, 2009 Tex. App. LEXIS 596, 2009 WL 214340 (Tex. App. Amarillo Jan. 29 2009).

Environmental Law : Air Quality : Preconstruction Permits

374. In approving an application for an air quality permit necessary for an applicant to build a pulverized coal power plant, the Texas Commission on Environmental Quality did not err in excluding evidence that the best available control technology (BACT) analysis pursuant to Tex. Health & Safety Code Ann. § 382.0518(b)(1) for a coal-fueled power plant should have included consideration of integrated gasification combined cycle (IGCC) or other coal-conversion processes where the IGCC evidence offered by an opponent of the application was not relevant because the opponent offered no evidence that IGCC was a process that could be applied to the pulverized coal power plant proposed by the applicant. An IGCC process, by which electricity is produced by the burning of gasses extracted from coal to drive turbines that turn electric power generators, is significantly different from the pulverized coal power plant, which produces electricity by burning coal to generate steam that drives a conventional steam-powered turbine, as proposed by the applicant. Blue Skies Alliance v. Tex. Comm'n on Envtl. Quality, 283 S.W.3d 525, 2009 Tex. App. LEXIS 2534 (Tex. App. Amarillo Apr. 14 2009).

Environmental Law : Air Quality : Prevention of Significant Deterioration

375. Texas Commission on Environmental Quality did not err under Tex. Health & Safety Code Ann. § 382.0518(b)(1) in excluding as not relevant evidence that the best available control technology (BACT) analysis for an air quality permit applicant's coal-fueled power plant should have included consideration of integrated gasification combined cycle (IGCC) where the Commission had appropriately drawn the line between what constituted a control technology that could be applied to the applicant's proposed plant and what constituted a redesign of the proposed plant. An IGCC process was significantly different from the pulverized coal power plant proposed by the applicant, and because an opponent of the application had offered no evidence that IGCC was a process that could be applied to the proposed pulverized coal power plant, it had failed to meet its burden. Blue Skies Alliance v. Tex. Comm'n on Envtl. Quality, 2009 Tex. App. LEXIS 596, 2009 WL 214340 (Tex. App. Amarillo Jan. 29 2009).

Environmental Law : Solid Wastes : Municipal Landfills

376. Experts' conclusory opinions provided no evidence that a child's leukemia was caused by the mother's exposure during pregnancy to benzene from a landfill. Therefore, the testimony was not relevant under Tex. R. Evid. 401. City of San Antonio v. Pollock, 284 S.W.3d 809, 2009 Tex. LEXIS 292, 52 Tex. Sup. Ct. J. 665 (Tex. 2009).

Estate, Gift & Trust Law : Probate : Procedures in Probate : General Overview

377. In a probate proceeding where the testator's wife contested the testator's daughter inventory of property, the first exhibit the daughters sought to admit into evidence was relevant under Tex. R. Evid. 401; without either that exhibit or the second exhibit in evidence before the trial court, the trial court could not determine the community property agreement's validity and whether the agreement was enforceable, which were both issues of consequence to the determination of the declaratory judgment action. Haugen v. Olson, 2003 Tex. App. LEXIS 10495 (Tex. App. Dallas Dec. 15 2003).

Evidence : Authentication : General Overview

378. In defendant's stalking case, a reasonable fact finder could have found that the telephone number the victim attributed to defendant was his telephone number, and that defendant sent the electronic communications attributed to him by the State and depicted in the challenged exhibits. Accordingly, the challenged exhibits were relevant, and the trial court did not abuse its discretion by admitting them. Manuel v. State, 357 S.W.3d 66, 2011 Tex. App. LEXIS 7152 (Tex. App. Tyler Aug. 31 2011).

379. Defendant's taped statements were properly authenticated under Tex. R. Evid. 901 because the detective participating in the taped conversation testified he was the operator of the recording equipment, it was functioning properly, and that the recording accurately reflected the conversation. Additionally, the tape statements were relevant because they contained defendant's version of the events. Thus, the trial court did not abuse its discretion in admitting the statements at his trial. Raveiro v. State, 2005 Tex. App. LEXIS 218 (Tex. App. Houston 14th Dist. Jan. 13 2005).

Evidence : Authentication : Chain of Custody

380. There was no error under Tex. R. Evid. 401 in admitting a methamphetamine exhibit in a possession trial, even though there was no identification of the exhibit by the store employee who say it fall from defendant, because the uncontroverted evidence established an unbroken chain of custody from the employee who first saw the item, to a manager, to the police officer who identified the item in court. Minze v. State, 2010 Tex. App. LEXIS 1978, 2010 WL 1006394 (Tex. App. Fort Worth Mar. 18 2010).

Evidence : Demonstrative Evidence : General Overview

381. In an action in which a trial court awarded more than $ 2 million to a pedestrian for injuries she sustained when she was struck by a city transit bus driven by an employee of a transit authority contractor, the trial court did not err when it admitted into evidence the graphic photographs of the pedestrian's injuries; even though the driver objected to the admission of the photographs, any error was waived by the failure to object to testimony of the conditions depicted in those photographs; at trial, witnesses testified they saw the pedestrian in the crosswalk when she was struck and dragged by the bus, and the orthopedic trauma surgeon who treated the pedestrian when she arrived at the hospital and amputated her leg testified, without objection, about the nature and extent of her injuries. Castro v. Cammerino, 186 S.W.3d 671, 2006 Tex. App. LEXIS 1765 (Tex. App. Dallas 2006).

Evidence : Demonstrative Evidence : Admissibility

382. At defendant's murder trial, the court did not err by admitting an autopsy photograph depicting the bullet lodged in the tissue at the back of the victim's neck; the photograph was relevant to the cause of death--a gunshot wound to the head, and manner of death--homicide. Barr v. State, 2014 Tex. App. LEXIS 1714, 2014 WL 641351 (Tex. App. Austin Feb. 14 2014).

383. Demonstration in which the prosecutor instructed defendant to stab the air 20 times while the prosecutor positioned himself in the place of the murder victim was relevant because it raised an inference that defendant had a motive to murder his wife. Davis v. State, 2011 Tex. App. LEXIS 8372, 2011 WL 5026403 (Tex. App. Houston 1st Dist. Oct. 20 2011).

384. In a case involving injury to a child, there was no error in the State's admission of a golf club, similar to one found in defendant's apartment, to show that it could have been the type of weapon used to inflict injuries to a victim; the club had some probative value as demonstrative evidence. Lynch v. State, 2007 Tex. App. LEXIS 4107

(Tex. App. Amarillo May 23 2007).

385. In defendant's capital murder case, the court properly admitted autopsy photographs of the victim where the photographs were taken before the autopsy procedure began and showed the condition of the body as it was received from the hospital; the photographs showed the bullet wound that testimony indicated was the cause of death, they illustrated that the victim was not otherwise bruised or injured as he would have been if there had been a fight before he was shot, and they showed no more than the nature of the victim's injury. Gray v. State, 2006 Tex. App. LEXIS 2363 (Tex. App. Dallas Mar. 29 2006).

386. In a capital murder case, a court properly admitted photographs of the victim's corpse where the photographs were probative of the crime scene and the injuries received by the victim, they were necessary for the State in developing its case, and, because they were not overly gruesome, the photographs did not pose the potential of impressing the jury in some irrational way. Shuffield v. State, 189 S.W.3d 782, 2006 Tex. Crim. App. LEXIS 365 (Tex. Crim. App. 2006).

387. Admission of photos of a sexual assault victim, depicting her at the age she was when the assults allegedly occurred, was relevant to give a perspective on the victim's credibility. Baker v. State, 2005 Tex. App. LEXIS 5842 (Tex. App. Houston 14th Dist. July 26 2005).

388. Court did not err by admitting an investigation videotape into evidence because, although the content of the video might have been unpleasant to view, it depicted the reality of the brutal crime committed, it contained material that was the subject of testimony presented during the State's case in chief, and it was probative of the fact and manner of the victim's death and defendant's culpable mental state. Ramirez v. State, 2005 Tex. App. LEXIS 4185 (Tex. App. San Antonio June 1 2005).

389. Videotape that was offered as evidence about "the system" and was not offered as information about the capital defendant, or about how the capital defendant might be handled, was not relevant evidence that was admissible during the proceedings against the capital defendant; Tex. R. Evid. 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Sells v. State, 121 S.W.3d 748, 2003 Tex. Crim. App. LEXIS 63 (Tex. Crim. App. 2003), *cert. denied*, 540 U.S. 986, 124 S. Ct. 511, 2003 U.S. LEXIS 8067 (2003).

Evidence : Demonstrative Evidence : Photographs

390. At defendant's murder trial, the court did not err by admitting an autopsy photograph depicting the bullet lodged in the tissue at the back of the victim's neck; the photograph was relevant to the cause of death--a gunshot wound to the head, and manner of death--homicide. Barr v. State, 2014 Tex. App. LEXIS 1714, 2014 WL 641351 (Tex. App. Austin Feb. 14 2014).

391. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

392. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014

WL 310117 (Tex. App. Dallas Jan. 28 2014).

393. In a murder trial, any error was harmless from the admission of photographs showing unusual items found during a search of defendant's home, including a plastic manikin torso and head suspended by a noose around its neck and replica human skulls; the jury had the means to discern whether the items in the photographs represented an obsession with violence or merely poor taste and a penchant for collecting strange things. Kirk v. State, 421 S.W.3d 772, 2014 Tex. App. LEXIS 788, 2014 WL 252086 (Tex. App. Fort Worth Jan. 23 2014).

394. In a murder trial, any error was harmless from the admission of photographs showing unusual items found during a search of defendant's home, including a plastic manikin torso and head suspended by a noose around its neck and replica human skulls; the jury had the means to discern whether the items in the photographs represented an obsession with violence or merely poor taste and a penchant for collecting strange things. Kirk v. State, 421 S.W.3d 772, 2014 Tex. App. LEXIS 788, 2014 WL 252086 (Tex. App. Fort Worth Jan. 23 2014).

395. Trial court did not abuse its discretion in admitting a photograph of defendant's back yard taken in 2006 because it showed defendant's knowledge and intent, as some lumber and a yellow chair were in defendant's backyard three years before similar items were added to the waste pile after defendant's encounter with an officer. Mellen v. State, 2013 Tex. App. LEXIS 12091, 2013 WL 5520369 (Tex. App. Eastland Sept. 26 2013).

396. In a prosecution for evading arrest, the trial court did not err by admitting the State's photographs over defendant's objection under Tex. R. Evid 403 because defendant challenged the officer's version of the events, there was no other evidence except the officers' testimony to establish that defendant refused to comply, and the pictures were not gruesome. King v. State, 2013 Tex. App. LEXIS 11185 (Tex. App. Corpus Christi Aug. 30 2013).

397. Trial court did not abuse its discretion by admitting into evidence photographs of the Sifuentes v. State, 2013 Tex. App. LEXIS 8105 (Tex. App. San Antonio July 3 2013).

398. Trial court did not abuse its discretion by admitting graphic photographs depicting the murder victim's injuries into evidence because they were probative of the manner of death and could be interpreted to indicate that the victim was shot twice in the back and that defendant planted the knife in the victim's hand, which was relevant to defendant's claim of self-defense. The court could not say that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice because while the photographic depiction of the entrance wound was no doubt made more gruesome due to postmortem changes, that information was submitted to the jury solely by way of the autopsy report and the State did not focus on the condition of the wound. Rider v. State, 2013 Tex. App. LEXIS 5050 (Tex. App. Texarkana Apr. 25 2013).

399. In a murder trial, there was no error in admitting autopsy photographs because they were highly probative to show the full extent of the victim's injuries and portrayed no more than the gruesomeness of the injuries inflicted. Salazar v. State, 2012 Tex. App. LEXIS 4983, 2012 WL 2357744 (Tex. App. Corpus Christi June 21 2012).

400. Photograph of a murder victim taken at the crime scene after she had been shot by defendant was properly admitted where: (1) witnesses identified the picture as that of the victim; (2) the photo was not gruesome and showed no indication that the body had been posed or otherwise disturbed; and (3) the jury saw a video that showed the entire episode without objection. The photo simply depicted the result of a violent assault by one person, defendant, on another person, the victim, and the photo's probative value was not substantially outweighed by danger of unfair prejudice. Bibbs v. State, 371 S.W.3d 564, 2012 Tex. App. LEXIS 4677, 2012 WL 2135561 (Tex. App. Amarillo June 13 2012).

401. Seven autopsy photographs were properly admitted in a murder trial, even though defendant did not contest the cause of death, because they showed the severely decomposed state of the corpse, which the jury could have concluded contradicted defendant's claim that he cared deeply about her and killed her in sudden passion. Cantu v. State, 2012 Tex. App. LEXIS 1639, 2012 WL 664939 (Tex. App. Corpus Christi Mar. 1 2012).

402. In defendant's capital murder case, the trial court properly admitted autopsy photographs because they were not any more gruesome than what would be expected, the photographs tracked the doctor's testimony, and the photographs depicted the victim's bloody and bruised face and were vital to the State's case to the jury with regard to the manner and method of the victim's death. Gonzalez v. State, 2012 Tex. App. LEXIS 927, 2012 WL 361733 (Tex. App. Corpus Christi Feb. 2 2012).

403. Trial court did not abuse its discretion by admitting four photographs from the victim's autopsy because they helped the jury understand the extent of the victim's injuries, were demonstrative of defendant's intent, and did not constitute a large part of the pathologist's testimony and the State's case. The photographs were highly relevant and probative and not unfairly prejudicial. Ramirez v. State, 2012 Tex. App. LEXIS 455, 2012 WL 170996 (Tex. App. Corpus Christi Jan. 19 2012).

404. Pursuant to Tex. R. Evid. 401 and 402, the exclusion of the photographs of a witness based on irrelevance was within the trial court's discretion because defense counsel did not establish that the photographs depicted gang activity and only stated that it could show gang signs. Oliva v. State, 2011 Tex. App. LEXIS 8940, 2011 WL 5428965 (Tex. App. Houston 1st Dist. Nov. 10 2011).

405. In defendant's felony murder case, a court properly admitted a photo of the victim prior to death because it demonstrated the victim's health and physical characteristics, the photo of the victim while alive furnished a basis of contrast and comparison with other photos showing the wounds inflicted by the assault, and the fact that several witnesses identified the victim did not necessarily reduce the probative value of the photo. Flores v. State, 2010 Tex. App. LEXIS 822, 2010 WL 411747 (Tex. App. Corpus Christi Feb. 4 2010).

406. In a murder trial, there was no error under Tex. R. Evid. 401, 403 in admitting photographs showing the victim's body and injuries from different angles and showing various views of the wounds because the photographs did nothing more than portray the consequences of defendant's actions. Tolopka v. State, 2010 Tex. App. LEXIS 714 (Tex. App. Amarillo Jan. 31 2010).

407. Picture of spinner rims was properly admitted because it aided the jury in understanding the police officers' testimony about the improvements that defendant made to the rental car he drove for approximately one week; that was helpful to the jury by enabling them to determine if the installation of spinner rims tended to demonstrate defendant's control over the rental car. In addition, a photograph of the spinner rims that were actually installed on the rental car would have been relevant for the same reason and admissible at trial. Rollins v. State, 2009 Tex. App. LEXIS 9891 (Tex. App. Houston 1st Dist. Dec. 31, 2009).

408. Trial court did not abuse its discretion during defendant's trial for racing on a highway in admitting photographs that showed images of high performance additions to defendant's car, including the type of engine and several after-market additions, where the arresting officer testified the additions were commonly added to high-performance vehicles owned by racers to enhance a vehicle's overall performance. Based on the arresting officer's testimony, the photographs were relevant under Tex. R. Evid. 401 to the alleged racing charge because the photographs had a tendency to make the determination that defendant was racing more or less probable by showing his car had high performance additions commonly used by racing vehicles. Sony v. State, 307 S.W.3d 348, 2009 Tex. App. LEXIS 8688 (Tex. App. San Antonio Nov. 11 2009).

409. In a murder case, autopsy photographs were properly admitted because the State had to prove that defendant caused the victim's death by shooting him with a deadly weapon, and a doctor's testimony described the type of injuries the victim received, the extent of those injuries, and the cause of his death. Additionally, although the photographs were somewhat gruesome, they were not enlarged. Ramirez v. State, 2009 Tex. App. LEXIS 6640, 2009 WL 4377427 (Tex. App. Corpus Christi Aug. 25 2009).

410. In defendant's capital murder case, the court properly allowed photographs of the victim to be admitted because the medical examiner who performed the autopsy stated that photographs of the child's body before and during the autopsy would assist him in describing his findings to the jury, the testimony was probative of the child's condition at the time defendant brought the child to a witness's house, and the testimony demonstrated the scope and extent of the child's injuries and the cause of death. Williams v. State, 294 S.W.3d 674, 2009 Tex. App. LEXIS 4201 (Tex. App. Houston 1st Dist. June 11 2009).

411. In defendant's injury to a child case, the court did not err in admitting photographs of the child because a deputy testified to his initial observations of the child before being life-flighted to the burn center; the boy had a large knot on the left side of his head and blood coming out of his nose. The photos were clearly relevant and needed by the State to rebut defendant's statements denying causing any other injuries to the child and defendant's claim of accidental injury. Smith v. State, 2009 Tex. App. LEXIS 401, 2009 WL 1941999 (Tex. App. Corpus Christi Jan. 22 2009).

412. In defendant's capital murder case, the court properly admitted photographs because the exhibits constituted only two photographs and depicted nothing more than the reality of the brutal crime committed. The victim's body was clothed, and they were not extreme close-up shots. Badgett v. State, 2009 Tex. App. LEXIS 342, 2009 WL 142324 (Tex. App. San Antonio Jan. 21 2009).

413. Trial court did not abuse its discretion by admitting a photograph of defendant holding a pistol during his trial for possessing more than four grams of cocaine with intent to deliver and for possessing more than four ounces of marihuana where the photograph was relevant because it made it more probable that defendant knowingly possessed both the contraband and the pistol, and where that relevance was not outweighed by the risk of unfair prejudice because no significant amount of time was required to introduce the photograph. Furthermore, even though the photograph had the potential for impressing the jury in an improper way pursuant to Tex. R. Evid. 404(b) by suggesting that defendant was the sort of person who brandished a pistol during a telephone conversation, by linking defendant to the pistol found in the night stand of his motel room, albeit indirectly, the photograph was some evidence that defendant used the pistol to protect his drugs and money, and the State's only other evidence of such use, beyond defendant's simple possession of the weapon, was a police officer's testimony describing defendant's ambiguous movements when the officers entered his motel room. Rangel v. State, 2008 Tex. App. LEXIS 9008 (Tex. App. Austin Dec. 5 2008).

414. In a capital murder case, the court properly admitted two photographs because the photographs bolstered a State witness's testimony that testifying as a "snitch" had detrimental consequences -- injury to his sister, the photographs presented little, if any, prejudice to defendant because no party suggested to the jury that defendant was connected to the stabbing of the witness's sister, and the time involved in the introduction of the two photographs was minimal and unlikely to distract the jury from considering the charged offense when compared to having the witness's sister testify before the jury. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

415. Defendant's arrest photo was properly admitted as relevant on the question of identification because defendant looked very different from how he looked in the courtroom. Defendant raised only a relevancy objection at trial and did not preserve his argument based on Tex. R. Evid. 403. Avendano v. State, 2008 Tex. App. LEXIS

5832 (Tex. App. El Paso July 31, 2008).

416. In a murder case, the trial court did not abuse its discretion in admitting photographs of the victim at the crime scene because some of the photographs were used by the experts to explain the manner of the death and the amount of force used by defendant when hitting the victim with the baseball bat, tending to disprove his self-defense claim; other photographs, along with the testimony of the blood-spatter expert, addressed the absence of any struggle between the victim and defendant and that the victim was either on his knees or on the ground while being beaten, while some photographs depicted the brutality of the crime and the severity of the injuries and were probative of the manner of the victim's death. Grayson v. State, 2008 Tex. App. LEXIS 2210 (Tex. App. Houston 1st Dist. Mar. 27 2008).

417. In a murder trial, there was no error in admitting an eighth grade photograph of the 17-year-old victim, shown with several school friends, as proof of identity; the victim's parent testified that the picture depicted what the victim looked like just prior to death. Hornsby v. State, 2008 Tex. App. LEXIS 345 (Tex. App. Beaumont Jan. 16 2008).

418. Trial court did not err by admitting into evidence defendant's book-in photograph because defendant did not object at trial or complain of an improperly suggestive photographic identification procedure by the State; the photograph was not prejudicial merely because defendant had an "angry look;" the photograph, which was used by a witness during her deposition to identify defendant as the perpetrator, was relevant as identity was an essential element of any criminal offense. King v. State, 2007 Tex. App. LEXIS 8766 (Tex. App. Beaumont Oct. 31 2007).

419. Trial court did not abuse its discretion under Tex. R. Evid. 403 in admitting photographs of the victim's body in a capital murder case because they were relevant under Tex. R. Evid. 401 and were highly probative to show the victim's injuries and the specific circumstances of the murder. Gallo v. State, 239 S.W.3d 757, 2007 Tex. Crim. App. LEXIS 1234 (Tex. Crim. App. 2007).

420. In a trial for intoxication assault arising from a car crash caused by defendant, there was no error in admitting photographs that showed, in graphic detail, the complainant's injuries, which included damage such that the complainant's liver was extruding from the complainant's body; the photographs were relevant to explain the nature of the injuries and the procedures used to treat the complainant, and, while undoubtedly explicit, they were not more emotionally loaded than any usual clinical photograph of a patient who sustained serious wounds. Strickland v. State, 2007 Tex. App. LEXIS 7383 (Tex. App. Texarkana Sept. 11 2007).

421. Trial court properly admitted a photograph of a murder victim and his family because it was relevant to show a true appearance of the victim before his death, and its probative value was not substantially outweighed by its prejudicial effect. While it showed the family smiling, the photograph was not the type that would impress the jury in an irrational but indelible way, no mention was made of the photograph during closing argument, and only one mention was made of the victim's children. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

422. Defendant objected that certain photographs and his wallet were irrelevant and should not have been admitted into evidence; however, defendant did not attempt to explain how the wallet and pictures harmed him, other than to generally say that harm was evidenced by his lengthy punishment. That explanation is insufficient; thus, defendant's complaints with regard to those exhibits were overruled. Arnold v. State, 2007 Tex. App. LEXIS 2187 (Tex. App. Corpus Christi Mar. 22 2007).

423. During the punishment of defendant's trial, the trial court did not abuse its discretion by allowing testimony and photographs of the victim's injuries to show defendant committed the enhancement offense of a prior aggravated robbery under Tex. Penal Code Ann. § 29.03; evidence establishing that defendant inflicted "serious

bodily injury" upon his victim was an essential part of the State's proof of the enhancement offense; the photographs were relevant and highly probative. Thompson v. State, 2007 Tex. App. LEXIS 57 (Tex. App. Dallas Jan. 5 2007).

424. In a murder trial, photographs of the deceased were properly introduced into evidence under Tex. R. Evid. 401, even though they showed the gruesome appearance of the body, which was badly burned in arson, because the photographs showed the position of stab wounds that caused death; although graphic, the photographs did not inject any additional, intangible, or inappropriate emotional element into the case such that the trial court should have necessarily excluded these photographs. Ledbetter v. State, 208 S.W.3d 723, 2006 Tex. App. LEXIS 10040 (Tex. App. Texarkana 2006).

425. During a murder trial, the victim's mother identified a photograph of her son taken before the murder; the trial court did not abuse its discretion in admitting the photograph; the mother's identification had probative value in identifying the son as the victim. Brown v. State, 2006 Tex. App. LEXIS 7556 (Tex. App. Austin Aug. 25 2006).

426. Where defendant was on trial for possessing or transporting chemicals with the intent to manufacture methamphetamine, the trial court did not err in admitting photographs which showed a vapor cloud spraying from canisters found in defendant's car over defendant's Tex. R. Evid. 403 objection as they were not so alarming in nature that they would have clouded the jury's mind with fear; instead, they provided a visual depiction of the disposal methods described through police testimony, and were relevant to police officers' belief that the canisters contained anhydrous ammonia. Daigger v. State, 2006 Tex. App. LEXIS 5846 (Tex. App. Austin July 7 2006).

427. In a case involving indecency with a child, a trial court erred by admitting photographs of the victim showing weight gain; however, the error was harmless considering the amount of inculpatory evidence against defendant. Dehart v. State, 2006 Tex. App. LEXIS 5111 (Tex. App. Amarillo June 14 2006).

428. In an aggravated assault of a peace officer case, the trial court did not err in admitting the photographs of the officer, whose injuries were the basis for the arrest warrant, as the State did not wilfully withhold the photographs, defendant did not contend that he was surprised or otherwise disadvantaged by the introduction of the photographs, and whether defendant assaulted the officer was not at issue. Dunklin v. State, 194 S.W.3d 14, 2006 Tex. App. LEXIS 3596 (Tex. App. Tyler 2006).

429. Videotape of a driver's performance on field sobriety tests can be sufficient evidence to support probable cause to proceed with an arrest for driving while intoxicated. The reviewing court assumed that such a video, which was introduced in the trial court as permitted by Tex. R. Evid. 401, 1001, supported a probable cause finding where defendant failed to include the video in the record and the trial court did not file findings of fact. Amador v. State, 187 S.W.3d 543, 2006 Tex. App. LEXIS 2090 (Tex. App. Beaumont 2006).

430. Where defendant, a large Caucasian man, was accused of burglarizing the homes of two Hispanic families, photographs of defendant's tattoos were admissible as evidence of defendant's selfishness and his impact on the victims. The photographs were not admissible to establish that defendant's race would make him more likely to engage in future criminal conduct. Hicks v. State, 2005 Tex. App. LEXIS 10663 (Tex. App. Dallas Dec. 28 2005).

431. Admission of photos of a sexual assault victim, depicting her at the age she was when the assults allegedly occurred, was relevant to give a perspective on the victim's credibility. Baker v. State, 2005 Tex. App. LEXIS 5842 (Tex. App. Houston 14th Dist. July 26 2005).

432. In a trial for burglary, a photograph of the victim's daughter was properly admitted under Tex. R. Evid. 403, even though the daughter was not present. The small, studio-quality photograph was not unduly prejudicial, and it was relevant because the victim, defendant's former girlfriend, testified that her conduct toward defendant was motivated by the desire to protect her young daughter from confrontation. Wight v. State, 2005 Tex. App. LEXIS 4334 (Tex. App. Amarillo June 7 2005).

433. Photographs of a murder victim were relevant under Tex. R. Evid. 401 and were not unduly prejudicial to defendant under Tex. R. Evid. 403 because a photograph of the victim lying in an ambulance immediately after firefighters removed her body from a burning house was both material and probative, as it established her condition at the crime scene, and because a photograph of her face taken during autopsy was also material and probative of the fact that the autopsy was performed on the same person removed from the crime scene by ambulance. The numerous autopsy photographs were also probative of the victim's cause of death, a material element in the offense of capital murder, and although the detail in the photographs was graphic, each served the purpose of illustrating the nature and extent of the victim's injuries. Vargas v. State, 2005 Tex. App. LEXIS 2417 (Tex. App. Houston 1st Dist. Mar. 31 2005).

434. Court properly admitted autopsy photos because, although they were gruesome, they were no more gruesome than the injuries that defendant inflicted upon the victim when he committed the offense of intoxication manslaughter. Each of the six photographs depicted a different view of the victim and showed the different injuries that she suffered, and the State did not offer a large number of photographs, nor were the photographs it offered cumulative of the victim's injuries. Booth v. State, 2014 Tex. App. LEXIS 2351, 2014 WL 887286 (Tex. App. Eastland Feb. 28 2014).

Evidence : Demonstrative Evidence : Recordings

435. In a capital murder case, a trial court did not violate defendant's right to due process or right to present a defense by excluding a digital video disk (DVD) from evidence because defendant was able to present an effective defense and place the credibility of the witness into question without the admission of the DVD recording. Moreover, the only showing made by defendant concerning the DVD's relevance was that the DVD contained additional statements made by the witness that were similar to those made at trial; therefore, the DVD added nothing to the defense, and its exclusion was within the zone of reasonable disagreement. Gonzalez v. State, 2008 Tex. App. LEXIS 8954 (Tex. App. San Antonio Dec. 3 2008).

436. In a capital-murder trial, the perpetrator's videotaped statement, which was relevant and probative to the State's case, was not improperly admitted over the perpetrator's Tex. R. Evid. 403 objection, since the perpetrator did not overcome the presumption that the evidence was more probative than prejudicial since he admitted his direct involvement in causing at least one of the victim's stab wounds and starting the fire in her bedroom. Mata v. State, 2007 Tex. App. LEXIS 4505 (Tex. App. Fort Worth June 7 2007).

Evidence : Demonstrative Evidence : Visual Formats

437. In a drug trial, video excerpts from a seized camera were properly admitted under Tex. R. Evid. 401, 403, because they were material to the issues of possession-with-intent-to-deliver a controlled substance and a deadly weapon finding, in that they placed defendant in a drug house around the money and guns. They were not unduly prejudicial because they did not show actual drug dealing. Mincey v. State, 2009 Tex. App. LEXIS 2825, 2009 WL 1058734 (Tex. App. Dallas Apr. 21 2009).

Evidence : Hearsay : Exceptions : Business Records : General Overview

438. In a defamation action, a trial court did not err by admitting daily logs as business records for the limited purpose of whether a prudent investigation of complaints was conducted by an executive director of an independent living facility prior to banning a service provider; the trial court gave a limiting instruction to the jury, and the logs were relevant because the bore on the directors motivation and state of mine and a substantial truth defense. Collins v. Sunrise Senior Living Mgmt., 2012 Tex. App. LEXIS 2457, 2012 WL 1067953 (Tex. App. Houston 1st Dist. Mar. 29 2012).

Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business

439. In the State's action under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) that alleged that appellants, a husband and wife who operated a business assisting Spanish speaking individuals with immigration matters, had counseled consumers without legal authorization or qualification, appellants raised no valid complaints regarding the admissibility of the evidence and the trial court's rulings thereon where an exhibit consisting of a summary of the more than 2,180 G-28 forms filed by the husband was itself a business record entitled to be treated as other business records, making Tex. R. Evid. 1006 inapplicable, and where the testimony of an intelligence research specialist with the Citizenship and Immigration Services Branch of the United States Department of Homeland Security established the necessary predicate required by Tex. R. Evid. 803(6) because the specialist testified that the exhibit was a business record made in the ordinary course of business at Citizenship and Immigration Services, made at or near the time his department received the G-28 forms, by a person with knowledge of the events being recorded; furthermore, the trial court did not err in refusing to allow a previous client of appellants who was testifying for the State to answer when asked if she obtained her residency status because any testimony going to the gravity of the harm done by engaging in the prohibited act was irrelevant and inadmissible. Avila v. State, 252 S.W.3d 632, 2008 Tex. App. LEXIS 2270 (Tex. App. Tyler 2008).

Evidence : Hearsay : Exceptions : State of Mind : General Overview

440. Daughter's statements in her affidavit signed two days after the night her mother came to pick her up were not statements of her then existing state of mind or spontaneous remarks made while a sensation was being experienced such that they were admissible; the affidavit containing the daughter's statements in a conservatorship proceeding nearly two years prior to her death were not relevant to the damages suffered by the father due to the loss of his daughter's companionship and society. In re Estate of Macdonald, 2013 Tex. App. LEXIS 10135, 2013 WL 4081419 (Tex. App. Dallas Aug. 13 2013).

Evidence : Hearsay : Exemptions : Confessions : General Overview

441. During the punishment phase of a criminal trial where defendant was charged with endangering a child, the trial court did not abuse its discretion by admitting evidence from defendant's ex-boyfriend who was convicted of sexually assaulting defendant's daughter since the probative value of the confession was not substantially outweighed by its prejudice. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

Evidence : Hearsay : Exemptions : Confessions : Corpus Delicti Doctrine

442. Trial court did not err during defendant's murder trial in admitting extraneous offense evidence of defendant's theft of a truck because the evidence was not relevant just to show character conformity, but was relevant under Tex. R. Evid. 401 and admissible under Tex. R. Evid. 404(b) to corroborate defendant's confession to police, in which he stated that he stole a green truck from a certain location and then drove that truck to the victim's home, where he then committed the murder. At trial, the State was able to corroborate that portion of defendant's confession by introducing evidence from a witness that his green truck had been stolen on the same day and from the same location as defendant indicated in his confession, and a police officer confirmed that he wrote a report for a stolen truck by the witness at the same time and location as described by defendant in his confession. Shuff v. State, 2013 Tex. App. LEXIS 5469 (Tex. App. Houston 1st Dist. May 2 2013).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

443. Trial court did not err by admitting into evidence statements defendant made in a letter concerning the murder because the statements were not hearsay under Tex. R. Evid. 801, as they were admissible as admissions of a party opponent. The statements were relevant because in the letter defendant did not claim, as he did at trial, that the shooting was accidental, and they were not inadmissible under Tex. R. Evid. 403, as the statements supported the State's contention that defendant intentionally shot the victim, it related to defendant's state of mind which was a central issue at trial, and the letter was brief and not cumulative of other evidence. Benitez v. State, 2011 Tex. App. LEXIS 9871, 2011 WL 6306643 (Tex. App. Houston 1st Dist. Dec. 15 2011).

444. Trial court did not abuse its discretion by admitting evidence of a tattoo of "187" on defendant's hand as a statement that defendant committed murder pursuant to Tex. R. Evid. 801(e)(2)(A) because the record showed that defendant did not have the tattoo on the night of the shooting, it was placed on him after he was in jail in connection with the underlying murder charge, and went to his state of mind at the time of the shooting and clarified the circumstances surrounding the shooting. It was clear from the placement of the tattoo on his hand that it was an open and obvious statement he wanted everyone to see and it directly contradicted his defensive theory that he acted in self defense. Salazar v. State, 2011 Tex. App. LEXIS 6835, 2011 WL 3770297 (Tex. App. Dallas Aug. 26 2011).

Evidence : Hearsay : Rule Components : General Overview

445. Messages retrieved from a murder victim's voicemail were not hearsay under Tex. R. Evid. 801 and were relevant under Tex. R. Evid. 401 because they were not offered to prove the truth of the matters asserted therein and they assisted the jury in establishing the time of the victim's death. White v. State, 2006 Tex. App. LEXIS 2224 (Tex. App. Houston 1st Dist. Mar. 23 2006).

Evidence : Hearsay : Rule Components : Truth of Matter Asserted

446. Trial court did not abuse its discretion by not permitting defendant to cross-examine a detective about statements allegedly made by a third party during the murder investigation because the statements could not provide defendant with a defense to the capital murder charge unless the jury believed the statements, as they were offered to prove that the third party, not defendant, was the last person to see the victim alive. Therefore, the statements were hearsay, and because defendant did not argue that they were admissible under a hearsay exception, they were inadmissible. Tilford v. State, 2011 Tex. App. LEXIS 5933, 2011 WL 3273543 (Tex. App. El Paso July 29 2011).

Evidence : Inferences & Presumptions : Inferences

447. In a trial for possession hydromorphone, it was proper to admit unsealed and opened vials of medicine to support an inference that defendant's possession was not a one-time mistake. Moore v. State, 2014 Tex. App. LEXIS 5823, 2014 WL 2521537 (Tex. App. Tyler May 30 2014).

Evidence : Judicial Notice : Adjudicative Facts : Facts Generally Known

448. There was substantial evidence that the driver's violation of the ordinance occurred within the city limits because the administrative law judge could have reasonably inferred from the evidence that the sergeant witnessed the driver peel out inside the city limits or it could have taken judicial notice of the fact that the incident took place in the city. Tex. Dep't of Pub. Safety v. Botsford, 2014 Tex. App. LEXIS 2649, 2014 WL 902567 (Tex. App. Austin Mar. 7 2014).

Evidence : Procedural Considerations : Curative Admissibility

449. Defendant's statement to police that he had, 20 years earlier, been accused of improper conduct with his former stepdaughter, was not relevant to prove defendant's intent under Tex. R. Evid. 401 and Tex. R. Evid. 404(b), and it was unduly prejudicial under Tex. R. Evid. 403. Defendant did not "open the door" to admission of the statement, Tex. R. Evid. 107, by responding to a question by the State. However, given the evidence of guilt, the error was harmless. Cressman v. State, 2012 Tex. App. LEXIS 9849, 2012 WL 5974013 (Tex. App. Waco Nov. 29 2012).

450. Evidence of defendant's prior conviction for delivering drugs was admissible where, through his questioning of a defense witness, defense counsel had sought to paint defendant as a "white knight" not involved with drugs, thereby creating a false impression before the jury; by doing so, defendant opened the door to testimony to correct that false impression, and the prosecutor could only correct that false impression by cross-examination of the witness who created it. Jones v. State, 2006 Tex. App. LEXIS 7917 (Tex. App. Dallas Sept. 5 2006).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

451. In a criminal prosecution for capital murder, the trial court did not err by allowing the prosecutor's questions regarding the possible exchange of sexual favors for forgiveness of a drug debt; the evidence was admissible to show the relationship between defendant and the victim. Whitmire v. State, 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

452. In a murder case, the prosecutor's affidavit regarding trial strategy was relevant and admissible under Tex. R. Evid. 401and Tex. R. Evid. 602 at a new trial hearing because it addressed the issue of effective assistance and included some statements made from personal knowledge; defendant did not seek to limit the scope of the affidavit pursuant to Tex. R. Evid. 105(a). Shanklin v. State, 190 S.W.3d 154, 2005 Tex. App. LEXIS 10675 (Tex. App. Houston 1st Dist. 2005).

453. Where defendant was charged with aggravated sexual assault of a child, the State's expert to give expert opinion testimony as to the truthfulness of the complaining witness. The defense opened the door to the testimony by questioning the expert about the manipulation of children who make allegations of sexual abuse. Johnson v. State, 2005 Tex. App. LEXIS 7412 (Tex. App. Tyler Sept. 7 2005).

454. Trial court did not err in admitting into evidence extraneous offense evidence, specifically, nine other images of children engaged in types of sexual conduct, because (1) a jury could find beyond a reasonable doubt that defendant knowingly and intentionally possessed the additional nine images of child pornography; (2) the extraneous offenses made it more probable that defendant intentionally possessed the one image for which he was indicted; (3) the extraneous offenses were relevant to rebut the defensive theory of mistake; and (4) the probative value of the evidence outweighed the possibility of unfair prejudice. Boyd v. State, 2005 Tex. App. LEXIS 6907 (Tex. App. Eastland Aug. 25 2005).

455. In a murder case in which defendant shot and killed one of the occupants of a car that approached his house, the trial court did not err in excluding evidence of marijuana blunts in the victim's car because that evidence was irrelevant. Richardson v. State, 2005 Tex. App. LEXIS 4342 (Tex. App. San Antonio June 8 2005).

456. In a murder case in which defendant shot and killed one of the occupants of a car that approached his house, a rifle belonging to defendant's brother was relevant evidence because the trial court's charge authorized the jury to convict defendant under the law of parties and the rifle showed the context in which the shooting occurred.

Richardson v. State, 2005 Tex. App. LEXIS 4342 (Tex. App. San Antonio June 8 2005).

457. In a case of aggravated sexual assault of a child, the trial court did not err in admitting testimony of the complaining witness and two other children about extraneous acts by defendant; although defendant argued that the testimony was irrelevant under Tex. R. Evid. 401 and was not admissible under Tex. R. Evid. 404(b) because it was not necessary to prove elements of the offense that were essentially uncontested, such as identity, intent, plan, preparation, and opportunity, the evidence was relevant under Tex. Code Crim. Proc. Ann. art. 38.37, § 2 to show defendant's intentions toward the complaining witness. Nesby v. State, 2005 Tex. App. LEXIS 3379 (Tex. App. Austin May 5 2005).

458. Defendant forfeited consideration of his argument that the monetary value of cocaine was not an element of his possession offense and was, therefore, irrelevant because the street value of rock-cocaine was admitted before the jury without objection earlier in the trial. Broussard v. State, 163 S.W.3d 312, 2005 Tex. App. LEXIS 3382 (Tex. App. Beaumont 2005).

459. Where defendant was charged with possession with intent to deliver cocaine after police searched him as a suspect in a nearby shooting, the trial court did not abuse its discretion by excluding the spent bullet from evidence. A defense theory that the shots were fired by men who placed the cocaine in defendant's pockets while he was unconscious was mere speculation. Seay v. State, 2005 Tex. App. LEXIS 2048 (Tex. App. Houston 1st Dist. Mar. 17 2005).

460. In a criminal trial for aggravated sexual assault, defendant's statement about robbing someone was part of a continuum of activity beginning with his presence in the victim's apartment. The statement was offered to assist the jury in identifying defendant as the perpetrator; the trial court properly admitted the statement. Williams v. State, 161 S.W.3d 680, 2005 Tex. App. LEXIS 2014 (Tex. App. Beaumont 2005).

461. Defendant's taped statements were properly authenticated under Tex. R. Evid. 901 because the detective participating in the taped conversation testified he was the operator of the recording equipment, it was functioning properly, and that the recording accurately reflected the conversation. Additionally, the tape statements were relevant because they contained defendant's version of the events. Thus, the trial court did not abuse its discretion in admitting the statements at his trial. Raveiro v. State, 2005 Tex. App. LEXIS 218 (Tex. App. Houston 14th Dist. Jan. 13 2005).

462. Where defendant was charged with the murder of her ex-boyfriend's new girlfriend, the trial court did not err in admitting into evidence a letter written by defendant to her ex-boyfriend. In the letter, defendant described the intensity of her feelings for him and her concern about the possibility of his philandering. Defendant's statements proved that she had a motive to kill the complainant. Harris v. State, 2005 Tex. App. LEXIS 346 (Tex. App. Houston 1st Dist. Jan. 13 2005).

463. Where defendant was tried for murdering the victim in exchange for his wife's promise for a share of the insurance proceeds, the State's failure to charge the wife was irrelevant to the credibility of the State's key witness, defendant's girlfriend. The trial court did not abuse its discretion in excluding the proffered impeachment evidence. Day v. State, 2004 Tex. App. LEXIS 6238 (Tex. App. Austin July 15 2004).

464. In a child sexual abuse case, where defendant sought to introduce evidence of letters written by one of the victims, which allegedly discussed sexual topics, to show that the victim was not innocent, a trial court did not abuse its discretion by refusing to admit the letters since the letters were written after the abuse had occurred. Whitehorn v. State, 2004 Tex. App. LEXIS 6373 (Tex. App. Waco July 14 2004), writ of certiorari denied by 126 S. Ct. 67, 163

L. Ed. 2d 92, 2005 U.S. LEXIS 6247, 74 U.S.L.W. 3203 (U.S. 2005).

465. Defendant argued that the trial court erred by excluding evidence relating to his strained marital relationship with the victim because that evidence was probative of his state of mind and motivation at the time of his actions; however, because the only conduct elements potentially implicated for the crime of aggravated assault were the nature of the conduct and the result of the conduct, the circumstances surrounding the conduct were not relevant and were properly excluded. Novillo v. State, 2004 Tex. App. LEXIS 5086 (Tex. App. Austin June 10 2004).

466. Relevance of an allegation of sexual assault on a minor made over two years after the one at bar, without more, was extremely minimal, and under those circumstances, the trial court did not err in excluding the evidence. Keith v. State, 2004 Tex. App. LEXIS 4450 (Tex. App. Texarkana May 18 2004).

467. Relevance of an allegation of sexual assault on a minor made over two years after the one at bar, without more, was extremely minimal, and under those circumstances, the trial court did not err in excluding the evidence. Keith v. State, 2004 Tex. App. LEXIS 4450 (Tex. App. Texarkana May 18 2004).

468. In an aggravated assault case, the trial court did not err by admitting the kitchen knife used in the assault into evidence because the knife was relevant under Tex. R. Evid. 401 to prove the allegation that defendant used or exhibited a deadly weapon, and was not unfairly prejudicial under Tex. R. Evid. 403 because it did not have an undue tendency to suggest that a decision be made on an improper basis. Hardy v. State, 2004 Tex. App. LEXIS 3214 (Tex. App. Fort Worth Apr. 8 2004).

469. In trial for the aggravated kidnapping of a two-year-old girl, the trial court's decision to admit the evidence about defendant purchasing a condom the night before the kidnapping was within the zone of reasonable disagreement. The evidence about defendant's condom purchase tended to make the existence of a material fact, that defendant had planned to sexually assault the victim during the kidnapping, more probable than it would have been without the evidence; thus, the evidence was relevant and admissible. Howe v. State, 2004 Tex. App. LEXIS 2417 (Tex. App. Texarkana Mar. 16 2004).

470. Videotape that was offered as evidence about "the system" and was not offered as information about the capital defendant, or about how the capital defendant might be handled, was not relevant evidence that was admissible during the proceedings against the capital defendant; Tex. R. Evid. 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Sells v. State, 121 S.W.3d 748, 2003 Tex. Crim. App. LEXIS 63 (Tex. Crim. App. 2003), *cert. denied*, 540 U.S. 986, 124 S. Ct. 511, 2003 U.S. LEXIS 8067 (2003).

471. Subject to certain exceptions, all relevant evidence is admissible in a criminal prosecution under Tex. R. Evid. 402, and 401; "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Haliburton v. State, 80 S.W.3d 309, 2002 Tex. App. LEXIS 4822 (Tex. App. Fort Worth 2002).

472. Trial court did not abuse its discretion in admitting evidence that the two men, who defendant was with when he was arrested, were involved in a robbery a short time before the arrest, because it was within the zone of reasonable disagreement whether the robbery was so intertwined with the stop and arrest that the jury's understanding of the offense would have been obscured without it. Haliburton v. State, 80 S.W.3d 309, 2002 Tex. App. LEXIS 4822 (Tex. App. Fort Worth 2002).

473. Officer's testimony that the quantity of marijuana recovered from the defendant's vehicle indicated that it was possessed for resale rather than for personal use was relevant under Tex. R. Evid. 403 and Tex. R. Evid. 401. Gallegos v. State, 1999 Tex. App. LEXIS 5042 (Tex. App. Dallas July 9 1999).

474. Under Tex. R. Evid. 401 and Tex. R. Evid. 402, finding a piece of evidence to be relevant is the first step in a trial court's determination of whether the evidence should be admitted before the jury. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

475. Relevancy is defined to be that which conduces to the proof of a pertinent hypothesis--a pertinent hypothesis being one which, if sustained would logically influence the issue. Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue more or less probable. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : Limitations

476. In a suit on a sworn account brought by a law firm to recover its legal fees, the trial court questioned the law firm's principal witness to establish that the underlying legal matter was settled. The trial court acted within its discretion in attempting to limit the jury's exposure to needless and possibly confusing or misleading evidence under Tex. R. Evid. 401 and 403; the trial court did not impermissibly comment on the weight of the evidence. Alam v. Wilshire & Scott, P.C., 2007 Tex. App. LEXIS 5501 (Tex. App. Houston 1st Dist. July 12 2007).

Evidence : Procedural Considerations : Limited Admissibility

477. In a defamation action, a trial court did not err by admitting daily logs as business records for the limited purpose of whether a prudent investigation of complaints was conducted by an executive director of an independent living facility prior to banning a service provider; the trial court gave a limiting instruction to the jury, and the logs were relevant because the bore on the directors motivation and state of mine and a substantial truth defense. Collins v. Sunrise Senior Living Mgmt., 2012 Tex. App. LEXIS 2457, 2012 WL 1067953 (Tex. App. Houston 1st Dist. Mar. 29 2012).

478. In a murder case, the prosecutor's affidavit regarding trial strategy was relevant and admissible under Tex. R. Evid. 401and Tex. R. Evid. 602 at a new trial hearing because it addressed the issue of effective assistance and included some statements made from personal knowledge; defendant did not seek to limit the scope of the affidavit pursuant to Tex. R. Evid. 105(a). Shanklin v. State, 190 S.W.3d 154, 2005 Tex. App. LEXIS 10675 (Tex. App. Houston 1st Dist. 2005).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

479. On appeal of defendant's murder conviction, his complaint that the trial court abused its discretion by overruling his Rule 401 relevancy objection to three of the State's exhibits was not preserved for review. His appellate brief lacked a legal argument supported by authority asserting how the trial court abused its discretion or how the evidence to which he objected was irrelevant. Green v. State, 2013 Tex. App. LEXIS 14355 (Tex. App. El Paso Nov. 22 2013).

480. Buyer of imported vehicles failed to preserve its objection to a composite exhibit consisting of sales contracts and an invoice, although one contract showed a seller other than the plaintiff seller, by failing to specify which parts were inadmissible as irrelevant under Tex. R. Evid. 401. Sunl Group, Inc. v. Zhejiang Yongkang Top Imp. & Exp. Co., 394 S.W.3d 812, 2013 Tex. App. LEXIS 832, 2013 WL 326324 (Tex. App. Dallas Jan. 29 2013).

481. In a murder case, the trial court did not err when it denied defendant the opportunity to question an eyewitness about her experience with burning people to establish her as an alternate perpetrator. With little details regarding the alleged past conduct, the trial court did not err in sustaining the State's relevancy objection under Tex. R. Evid. 401. Dayne Adenauer White v. State, 2012 Tex. App. LEXIS 8107 (Tex. App. Houston 1st Dist. Sept. 27 2012).

482. Victim's brother testified that he was riding in the car with defendant when they saw a police car turn onto the street going the same direction they were driving; defendant became very nervous and when the police attempted to stop them, defendant sped away; when the victim's brother asked defendant why he did not stop, defendant told him there was a warrant for his arrest for touching the victim; thus, defendant did not show that his flight from the police was connected to some other transaction, and not with the indecency with a child offense, and, therefore, the trial court properly overruled defendant's objection that his flight from the police was not relevant to his indecency with a child offense. Mestas v. State, 2007 Tex. App. LEXIS 6947 (Tex. App. Dallas Aug. 29 2007).

Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof

483. In defendant's sexual assault of a child case, the trial court did not err in excluding his offer of proof at trial concerning an earlier outcry of sexual abuse by the victim regarding another individual because the testimony of the victim's mother in defendant's offer of proof provided only indirect evidence of any statement by the child. Although it was clear from the mother's testimony that she believed defendant's sister was coaching the child in the 2001 incident, no evidence showed that the specific statement attributed to the victim, then five years old, was false. Gonzales v. State, 2009 Tex. App. LEXIS 1435, 2009 WL 498032 (Tex. App. Amarillo Feb. 27 2009).

Evidence : Procedural Considerations : Preliminary Questions : General Overview

484. In making the initial determination of admissibility of evidence, Texas courts must apply the principles set forth in the evidentiary rules governing relevancy under Tex. R. Evid. 401- 403; to meet the relevancy test, the proffered evidence must, first, have probative value, and second, be of consequence to some issue in the trial under Tex. R. Evid. 401. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

Evidence : Procedural Considerations : Rulings on Evidence

485. Trial court had not erred by excluding defendant's testimony regarding his attorney's advice and why defendant had left the country where the proffered testimony was immaterial, and therefore inadmissible, because it was not shown to be addressed to the proof of a material proposition. Claudio v. State, 2012 Tex. App. LEXIS 3818, 2012 WL 1656328 (Tex. App. Corpus Christi May 10 2012).

486. Court did not err in excluding all of defendant's proffered evidence at sentencing, because defendant did not separate the admissible evidence from the inadmissible evidence. Fegans v. State, 2010 Tex. App. LEXIS 2588, 2010 WL 1571217 (Tex. App. Houston 1st Dist. Apr. 8 2010).

487. Trial court did not err in denying defendant's motions to continue his indecency with a child trial so that he could flesh out allegations in a report to child protective services (CPS) that the victim (who was four years old at the time) was "purging" at home and in school and was caught by her uncle in bed with her four-year-old cousin's head between her legs, which allegations defendant believed were exculpatory where defendant's argument was founded on a defective factual basis because nothing in the CPS report exculpated him; nothing in the report suggested that defendant did not molest the child as alleged in the indictment, even if the circumstances mentioned in the report were deemed true, but, rather, the circumstances described (when intertwined with imagination) suggested that the child could have been the victim of other molestation at the hands of unknown parties, or so a reasonable jurist could have interpreted the circumstances. Reder v. State, 2008 Tex. App. LEXIS 2624 (Tex. App.

Amarillo Apr. 10 2008).

488. On appeal of a conviction of misdemeanor theft, the trial court did not err in sustaining the State's objection to the offender's question concerning profit margin in her inquiry as to the value of stolen retail property because the offender did not point to any offer of proof as required by Tex. R. Evid. 103, and the substance of the evidence she sought to offer was not apparent; thus, she forfeited her issue pursuant to Tex. R. App. P. 33; moreover, had she preserved her complaint, the trial court did not err; the offender complained that the trial court should not have sustained the State's relevance objection, but evidence that the victim had a profit margin did not tend to rebut the fact that the victim's sales price was at a fair market value. Smith v. State, 2007 Tex. App. LEXIS 5880 (Tex. App. Waco July 25 2007).

489. Where defendant used a car jack to strike the hood of the complainant's SUV, the arresting officer was permitted to testify that $1500 was the estimated cost of repairing the damage based on his years of experience with criminal mischief cases; the officer also testified that the body shop's repair estimate was $ 1,530.01. Barnes v. State, 248 S.W.3d 217, 2007 Tex. App. LEXIS 4261 (Tex. App. Houston 1st Dist. 2007).

490. Trial court did not err in not admitting an entire tape that included threatening phone calls from the victim, defendant's former wife, because defendant sought to admit the entire tape, and the messages on the tape that were unidentified had no relevance as to the victim and her alleged motives, and lacked a proper predicate for admission under Tex. R. Evid. 401, 402, and 404(b). Davis v. State, 2005 Tex. App. LEXIS 3649 (Tex. App. Fort Worth May 12 2005).

491. Fact that a witness might have suffered a shoulder injury as a result of the accident did not tend to make the parents' allegation that their son suffered a shoulder injury as a result of the accident more or less probable than it would be without the evidence; thus, the witness's testimony was irrelevant under Tex. Evid. R. 401 and was properly excluded. Therefore, the trial court did not err in denying the parents' motion for a new trial. McGaffigan v. Mora, 2004 Tex. App. LEXIS 4697 (Tex. App. San Antonio May 26 2004).

492. Trial court properly excluded evidence of a witness's mental health problems under Tex. R. Evid. 401 where there was no reasonable logical nexus connecting the ability of the witness to observe the details of an assault and communicate those details to the police and the witness's mental health problems. The evidence concerning the mental health problems of the witness was therefore not relevant. Goodwin v. State, 91 S.W.3d 912, 2002 Tex. App. LEXIS 8455 (Tex. App. Fort Worth 2002).

Evidence : Relevance : General Overview

493. In a premises liability lawsuit, a trial court did not abuse its discretion in compelling discovery of two incident reports where its order was narrowly tailored to limit discovery to a period of three years, to the particular store where the underlying injury occurred, to the parking lot of that store, and to trip and falls. Although those incidents did not involve cart corrals, plaintiff broadly alleged that the store was negligent and failed to use ordinary care in maintaining the premises in a reasonably safe condition and free of hazards and thus, the reports were relevant and reasonably calculated to lead to the discovery of admissible evidence. In re H.E.B. Grocery Co., L.P., 2014 Tex. App. LEXIS 1777, 2014 WL 700749 (Tex. App. Corpus Christi Feb. 18 2014).

494. In a case in which defendant was convicted of indecency with a child, the trial court did not abuse its discretion by limiting defendant's cross-examination of the victim's mother. Evidence that a male friend died of a drug overdose while in the mother's home was irrelevant to whether the mother had any ill feeling, bias, motive, interest, or animus that would lead her to fabricate allegations against defendant. Utkov v. State, 2012 Tex. App.

LEXIS 8147, 2012 WL 4470910 (Tex. App. Beaumont Sept. 26 2012).

495. In a possession of a controlled substance with intent to deliver case, as the additional evidence regarding the procedures that officers should employ in their task force manual when dealing with a confidential informant would have been a collateral matter, the trial court properly denied defendant's motion for new trial; because the evidence related to an issue regarding the identity of an informant, it was irrelevant in that it did not address defendant's guilt. Cortez v. State, 2006 Tex. App. LEXIS 4998 (Tex. App. Fort Worth June 8 2006).

Evidence : Relevance : Character Evidence

496. Trial court did not abuse its discretion by admitting a photograph of a tattoo on defendant's chest which read "murder is my motive" during sentencing because the tattoo was relevant to his character. Gossett v. State, 2013 Tex. App. LEXIS 9477 (Tex. App. El Paso July 31 2013).

497. Trial court did not abuse its discretion by admitting a photograph of a tattoo on defendant's chest which read "murder is my motive" during sentencing because the tattoo was relevant to his character. Gossett v. State, 2013 Tex. App. LEXIS 9479 (Tex. App. El Paso July 31 2013).

498. At the punishment phase of a criminal trial, evidence of defendant's tattoos could be presented as character evidence. Likewise, his choice of tattoos could demonstrate a motive for his crime. Albarado v. State, 2009 Tex. App. LEXIS 5471, 2009 WL 2055947 (Tex. App. Eastland July 16 2009).

499. Court did not err by refusing to allow defense counsel to cross-examine a police officer about prior incidents in which the officer allegedly used excessive force because the officer's character was not an essential element of the charge, claim, or defense to attempting to take a weapon from a peace officer, and the proffered testimony was not material because it did not address any fact of importance to the outcome of the action. Rico v. State, 2009 Tex. App. LEXIS 4141, 2009 WL 1623343 (Tex. App. Corpus Christi June 11 2009).

500. In a trial for interfering with the lawful custody of a child, proffered character testimony was irrelevant on its face because whether defendants had ever helped other children in the past was not evidence having any tendency to make the existence of any fact that was of consequence more or less probable. Little v. State, 246 S.W.3d 391, 2008 Tex. App. LEXIS 1126 (Tex. App. Amarillo 2008).

501. Trial court did not err in admitting the victim's testimony about incidents of property damage that were not included in the stalking indictment, which included testimony that someone piled her trash in front of her door, flipped her breaker box, flooded her yard, damaged her yard decorations, pulled down an outside light fixture, cut her satellite cable, and spray-painted her gate, because (1) the evidence was not improper character evidence under Tex. Evid. R. 404(a) as the victim never claimed that defendant committed the acts; and (2) the victim's testimony that the offenses against her property had occurred was relevant to establishing her state of mind at the time of the events in the stalking indictment. Marsh v. State, 2004 Tex. App. LEXIS 3620 (Tex. App. Fort Worth Apr. 22 2004).

Evidence : Relevance : Circumstantial & Direct Evidence

502. In a firefighter's action alleging intentional failure to implement relief granted to him by a grievance examiner, the trial court did not err in excluding evidence of a demand letter because it was irrelevant. City of Houston v. Jackson, 135 S.W.3d 891, 2004 Tex. App. LEXIS 2942 (Tex. App. Houston 1st Dist. 2004), reversed by 192 S.W.3d 764, 2006 Tex. LEXIS 258, 49 Tex. Sup. Ct. J. 492, 152 Lab. Cas. (CCH) P60178 (Tex. 2006).

Evidence : Relevance : Compromise & Settlement Negotiations

503. With respect to breach of contract and promissory estoppel claims, a letter written in connection with the settlement of an unrelated lawsuit was relevant and admissible under Tex. R. Evid. 401, 402 as proof of an agreement to pay a claimed sum; hence, it was not barred by Tex. R. Evid. 408. MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc., 179 S.W.3d 51, 2005 Tex. App. LEXIS 5796 (Tex. App. San Antonio 2005).

504. In a drug case, in light of the offense charged and the evidence adduced at trial, the evidence that defendant possessed a bogus license did not unfairly prejudice the jury or confuse the issues. Accordingly, the trial court did not abuse its discretion in admitting the evidence. Gregory v. State, 159 S.W.3d 254, 2005 Tex. App. LEXIS 1660 (Tex. App. Beaumont 2005).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

505. Appellant's conviction for felony theft was affirmed because the trial court did not abuse its discretion in excluding evidence where nothing about the other individual's arrest for the January 30 break-in made any facts of consequence to the determination of appellant's guilt or innocence in the January 25 theft any more or less probable. Graves v. State, 2014 Tex. App. LEXIS 6522 (Tex. App. Houston 1st Dist. June 17 2014).

506. Trial court did not abuse its discretion by admitting defendant's shirts with gun shot residue particles on them because the evidence was relevant, as the shirts were collected from defendant's vehicle two days after the murder. The evidence was not prejudicial because it showed defendant's connection to a discharged weapon, directly or indirectly, at some point in time. Burks v. State, 2014 Tex. App. LEXIS 3243, 2014 WL 1285731 (Tex. App. Austin Mar. 26 2014).

507. Exclusion of testimony by defendant's wife, who was also the complainant's older sister, regarding alleged prior sexual abuse by the complainant's father was proper because it would have confused or distracted the jury from the main issue-whether defendant perpetrated the crimes against the complainant-and would have been more prejudicial than probative. The complainant, who was twenty-three at the time of trial, positively identified defendant, and no one else, as the perpetrator of the charged offenses, and when questioned outside the presence of the jury, the complainant denied any sexual abuse at the hands of her father. Johnson v. State, 2014 Tex. App. LEXIS 1369, 2014 WL 505332 (Tex. App. Waco Feb. 6 2014).

508. Evidence that defendant on trial for reckless injury to his five-week-old daughter previously put a blanket tip into the victim's mouth to quiet her cries was properly admitted as a prior bad act because it was relevant to the issue of his intent to harm the victim and to demonstrate the character of his relationship with her; the evidence's probative value outweighed its unfair prejudice because there was little danger it would impress on the jury in some irrational way, it took little time to develop, and the State needed it to prove defendant's mental state. Sanchez v. State, 2014 Tex. App. LEXIS 896, 2014 WL 298322 (Tex. App. Houston 1st Dist. Jan. 28 2014).

509. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

510. Evidence that defendant on trial for reckless injury to his five-week-old daughter previously put a blanket tip into the victim's mouth to quiet her cries was properly admitted as a prior bad act because it was relevant to the issue of his intent to harm the victim and to demonstrate the character of his relationship with her; the evidence's probative value outweighed its unfair prejudice because there was little danger it would impress on the jury in some irrational way, it took little time to develop, and the State needed it to prove defendant's mental state. Sanchez v.

State, 2014 Tex. App. LEXIS 896, 2014 WL 298322 (Tex. App. Houston 1st Dist. Jan. 28 2014).

511. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

512. Defendant suffered no harm from the admission of evidence of a prior offense of aggravated assault/family violence against the same victim because, by his plea, defendant admitted he had a dating relationship with the victim, and the State only referenced the exhibit in its final argument to show a dating relationship between defendant and the victim. Pickett v. State, 2013 Tex. App. LEXIS 15410, 2013 WL 6923977 (Tex. App. Waco Dec. 27 2013).

513. Trial court did not err in admitting testimony showing that defendant was the driver of a vehicle involved in a drive-by shooting four days before the alleged victim was shot because the evidence was probative to show opportunity and identity and to rebut defendant's defensive theory that he was not the perpetrator, and there was nothing confusing or misleading about the evidence. Williams v. State, 2013 Tex. App. LEXIS 14602, 2013 WL 6253764 (Tex. App. San Antonio Dec. 4 2013).

514. State was properly permitted to use a demonstrative exhibit of a photograph of two capsules of a prescription drug because it had unmistakable relevance, as it corroborated the victim's testimony, and it had little to no inflammatory effect unrelated to its probative value; the evidence tended to solve an issue in the case by shedding some light on the subject at hand-the drug that was given to the victim and her half-brothers to make them sleepy so that defendant could commit the child sexual assualt offenses against the victim. Ruiz v. State, 2013 Tex. App. LEXIS 14013, 2013 WL 6047030 (Tex. App. Houston 14th Dist. Nov. 14 2013).

515. Trial court did not abuse its discretion by admitting evidence because in light of the defensive theory to attack State's evidence, evidence that defendant chewed and destroyed crack cocaine during a prior traffic stop increased the likelihood that defendant did the same during the instant traffic stop. The court could not hold that the probative value of showing a lack of accident or mistake was substantially outweighed by the danger of unfair prejudice or the misleading nature of the evidence. Williams v. State, 2013 Tex. App. LEXIS 12925, 2013 WL 5676226 (Tex. App. Eastland Oct. 17 2013).

516. Court did not abuse its discretion in admitting evidence of defendant's apology to the alleged victim because the apology was indicative of a consciousness of guilt and, thus, was highly probative and not outweighed by any danger of unfair prejudice. Smith v. State, 2013 Tex. App. LEXIS 11678 (Tex. App. Austin Sept. 17 2013).

517. In a prosecution for evading arrest, the trial court did not err by admitting the State's photographs over defendant's objection under Tex. R. Evid 403 because defendant challenged the officer's version of the events, there was no other evidence except the officers' testimony to establish that defendant refused to comply, and the pictures were not gruesome. King v. State, 2013 Tex. App. LEXIS 11185 (Tex. App. Corpus Christi Aug. 30 2013).

518. At issue in the case was the father's mental anguish following the death of his daughter; the single picture of the daughter's body was relevant to that issue and was properly admitted. In re Estate of Macdonald, 2013 Tex. App. LEXIS 10135, 2013 WL 4081419 (Tex. App. Dallas Aug. 13 2013).

519. Probative value of the two autopsy photographs substantially outweighed the danger of unfair prejudice because defendant stated that he did not intentionally hurt the six-year-old child, but the medical examiner testified

that neither of the two fatal injuries that the child sustained could have been caused accidentally or unintentionally; and the extent of the child's brain injury could not be determined from looking at the outside of his head. West v. State, 2013 Tex. App. LEXIS 9612 (Tex. App. Houston 1st Dist. Aug. 1 2013).

520. Trial court did not abuse its discretion by admitting into evidence photographs of the Sifuentes v. State, 2013 Tex. App. LEXIS 8105 (Tex. App. San Antonio July 3 2013).

521. Trial court did not abuse its discretion by admitting graphic photographs depicting the murder victim's injuries into evidence because they were probative of the manner of death and could be interpreted to indicate that the victim was shot twice in the back and that defendant planted the knife in the victim's hand, which was relevant to defendant's claim of self-defense. The court could not say that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice because while the photographic depiction of the entrance wound was no doubt made more gruesome due to postmortem changes, that information was submitted to the jury solely by way of the autopsy report and the State did not focus on the condition of the wound. Rider v. State, 2013 Tex. App. LEXIS 5050 (Tex. App. Texarkana Apr. 25 2013).

522. Trial court did not err by excluding a defense witness's testimony as it related to defendant's neighbor's arrests and drug-related involvement with police because while there was evidence indicating that the neighbor might have been the anonymous tipster, there was no evidence that he planted the drugs, and therefore the fact that he may have been tipster was not relevant to the jury's determination of whether defendant possessed drugs. Even if the evidence was relevant, the trial court could have reasonably concluded that the relevance was substantially outweighed by the danger of confusing the jury or causing undue delay. Ivie v. State, 407 S.W.3d 305, 2013 Tex. App. LEXIS 4876 (Tex. App. Eastland Apr. 18 2013).

523. Trial court did not abuse its discretion by concluding that evidence that two co-defendants had committed a nearly identical robbery just a few days before the instant robbery and that defendant knew about that robbery was relevant to show defendant's intent to participate in the instant robbery and was relevant to the State's theory that defendant had conspired with the two co-defendants to commit the instant robbery. The trial court did not abuse its discretion by concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence because the evidence tended to rebut defendant's theory that she had nothing to do with the instant robbery and capital murder. Ohlfs v. State, 2013 Tex. App. LEXIS 4660 (Tex. App. Fort Worth Apr. 11 2013).

524. Trial court did not err by admitting into evidence a letter defendant wrote to the woman who leased the apartment where the drugs were found because it was relevant, as defendant's statement in the letter that he had the "best dope around" could be seen as indicative of a willingness to provide the woman and perhaps others with dope, further connecting him to the woman and suggesting an intent to deliver. In addition, the letter was strongly probative to rebut any contention that his presence in the apartment was merely fortuitous and assisted the State with its proof that defendant's possession of the drugs was knowing. Bible v. State, 2013 Tex. App. LEXIS 4455, 2013 WL 1411849 (Tex. App. Amarillo Apr. 8 2013).

525. Court properly admitted evidence that defendant's girlfriend purchased a silver .38 caliber revolver shortly before the victim's death because a codefendant testified that defendant had used a silver gun, and another witness testified that defendant was carrying a "chrome .38, snub-nose revolver" on the day the victim was killed. The inherent probative force of the evidence concerning the guns was its tendency to show that defendant was the shooter, and although the evidence was prejudicial, it was not unfairly prejudicial. Buckley v. State, 2013 Tex. App. LEXIS 2246 (Tex. App. Houston 14th Dist. Mar. 7 2013).

526. Defendant made no showing that the complainant's immigration status was relevant to proving a material issue in the case and the trial court did not abuse its discretion by sustaining the State's relevance objection, Tex.

R. Evid. 401; the trial court could have concluded that the prejudice from defense counsel's deportation and immigration-based questions far outweighed any probative value, Tex. R. Evid. 403. Lopez v. State, 2013 Tex. App. LEXIS 2042, 2013 WL 1277883 (Tex. App. Dallas Feb. 28 2013).

527. Trial court did not err in admitting evidence that defendant had previously, knowingly disregarded the lawful commands of a police officer because the State was entitled to rebut defendant's assertion that had he known they were police officers, he would not have pointed his firearm at them. Flores v. State, 2013 Tex. App. LEXIS 1809 (Tex. App. Dallas Feb. 26 2013).

528. Trial court did not abuse its discretion by admitting into evidence defendant's jail telephone call recordings and summaries because they aided the State in its rebuttal of defendant's defense that he had no involvement or knowledge of the dealership's transactions. The trial court was within the zone of reasonable disagreement to find that the probative value of the recordings and summaries were not substantially outweighed by the danger of unfair prejudice. Wood v. State, 2013 Tex. App. LEXIS 866 (Tex. App. Corpus Christi Jan. 31 2013).

529. Trial court did not abuse its discretion by admitting evidence that he held the child victim's mother at gunpoint several days after the alleged assault occurred under Tex. R. Evid. 404(b) because it constituted same transaction contextual evidence and was relevant, as the evidence showed that defendant confronted the victim's mother because he wanted to interrogate the victim about the assault and showed the jury how defendant reacted violently to the victim's outcry; the evidence was also necessary to show how defendant gained access to the victim's house to leave a letter in which he admitted to touching the victim. The admission of the evidence did not violate Tex. R. Evid. 403 because it made a fact of consequence, defendant's touching of the victim's genitals, more probable. Rodriguez v. State, 2013 Tex. App. LEXIS 213, 2013 WL 135723 (Tex. App. Waco Jan. 10 2013).

530. Trial court properly admitted a sex offender's prior written statements in his sexually violent predator commitment proceeding because the statements were relevant apart from their tendency to prove the sex offender's stipulated convictions. The prior inconsistent statements were neither unduly prejudicial nor cumulative of the matters that the sex offender admitted in his requests for admissions. In re Commitment of Bath, 2012 Tex. App. LEXIS 7586, 2012 WL 3860631 (Tex. App. Beaumont Sept. 6 2012).

531. Court did not abuse its discretion in admitting evidence regarding the underlying offense for which defendant was required to register as a sex offender because the State introduced statements made by defendant to officers that he did not think he should have to register as a sex offender because the sex with his thirteen-year-old stepdaughter was consensual. The State argued such evidence was relevant to show defendant's casual attitude regarding sex offender registration requirements and defendant's intent to ignore them; presentation of the disputed evidence did not consume an inordinate amount of time. Toliver v. State, 2012 Tex. App. LEXIS 6902, 2012 WL 3553380 (Tex. App. Dallas Aug. 17 2012).

532. In a murder case, the court properly admitted photographs of defendant's tattoos because the "REDRUM" and revolver tattoos were especially probative of defendant's intent and attitude relevant to his defense and testimony that he would never point a gun at someone else first. Given defendant's own counsel's indication that everyone had tattoos and criminal records, on both sides, there was no indication the evidence unfairly aroused the jury's hostility or sympathy. Luckett v. State, 2012 Tex. App. LEXIS 6686, 2012 WL 3241802 (Tex. App. Dallas Aug. 10 2012).

533. Passenger's evidence concerning her physical, emotional, and economic limitations was properly excluded by the trial court because even if it was relevant, it was merely the presentation of cumulative evidence; the passenger's 2008 motion for reinstatement did not raise the issue of how her health and finances may have limited her ability to pursue her claim. Welborn v. Ferrell Enters., 376 S.W.3d 902, 2012 Tex. App. LEXIS 6378 (Tex. App.

Dallas Aug. 2 2012).

534. Trial court did not abuse its discretion by admitting portions of the victim's police interview during which he claimed defendant threatened to kill him like he had other boys because the statements were necessary to understand how defendant overcame the victim's resistance to the sexual assault and the evidence was relevant to rebut defendant's claim that he did not threaten the victim. The evidence was probative of whether defendant used or exhibited a deadly weapon to accomplish the assault, presentation of the evidence took little time, and the statements did not suggest an improper basis for deciding the case. Sandles v. State, 2012 Tex. App. LEXIS 5518, 2012 WL 3104377 (Tex. App. Dallas July 11 2012).

535. Trial court did not abuse its discretion by allowing two witnesses to testify about extraneous offenses because it could have concluded that the evidence was relevant, probative, and necessary to rebut defendant's theory that the victim fabricated her allegation against defendant. The State's presentation of the evidence consumed very little time, and it was presented in a fashion to prove defendant's intent or knowledge of the offenses charged in the indictment. Guardado v. State, 2012 Tex. App. LEXIS 5514, 2012 WL 2832561 (Tex. App. El Paso July 11 2012).

536. Determination of the identity of the person fleeing from the police officer was a fact of significant consequence to the determination of the action, and an extraneous offense may be admissible, to show the identity of the accused, Tex. R. Evid. 403(b); therefore, evidence pertaining to identity was relevant and the trial court's decision to deny defendant's objection on the basis of Tex. R. Evid. 401 was within the zone of reasonable disagreement. White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

537. Determination of the identity of the person fleeing from the police officer was a fact of significant consequence to the determination of the action, and an extraneous offense may be admissible, to show the identity of the accused, Tex. R. Evid. 403(b); therefore, evidence pertaining to identity was relevant and the trial court's decision to deny defendant's objection on the basis of Tex. R. Evid. 401 was within the zone of reasonable disagreement. White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

538. Trial court did not abuse its discretion when it found that sex toys, lubricant, and a camcorder found in defendant's home were relevant during his trial for continuous sexual abuse of a young child or children in violation of Tex. Penal Code Ann. § 21.02(b) because they were relevant to the daughter's claims of the abuse she suffered from defendant and her stepmother and defendant told a coworker that his daughter might have hurt herself on sex toys she had been caught using. The trial court did not err by admitting the evidence under Tex. R. Evid. 403 because it made facts of consequence more probable, each of the items went directly to the series of events described by the daughter, the jury was entitled to know the context in which the events took place, and the evidence took up only 47 pages of the 800 pages in the reporter's record. Brown v. State, 381 S.W.3d 565, 2012 Tex. App. LEXIS 5164 (Tex. App. Eastland June 28 2012).

539. Trial court did not abuse its discretion by admitting nude photographs of the daughter's stepmother during defendant's trial for continuous sexual abuse of a young child or children in violation of Tex. Penal Code Ann. § 21.02(b) because they were relevant to the daughter's claims of sexual abuse and her physical description of her stepmother's genitals. The photographs were probative because they contained compelling evidence that made the fact that the sexual abuse occurred as claimed more probable. Brown v. State, 381 S.W.3d 565, 2012 Tex. App. LEXIS 5164 (Tex. App. Eastland June 28 2012).

540. Exclusion of the photographic evidence, of marginal relevance at best, was not calculated to cause, nor did it probably cause, the rendition of an improper judgment; because the photographs in question did not purport to show the condition of the property at the time of the annexation, but later, the trial court did not abuse its discretion in excluding them. City of Lufkin v. Akj Props., Inc., 2012 Tex. App. LEXIS 5057, 2012 WL 2393087 (Tex. App.

Texarkana June 26 2012).

541. Trial court did not err in admitting a color photograph of a murder victim taken at her autopsy, which depicted a side shot of her from the neck up and showed a placard placed beside her body bearing a unique autopsy number, because the photo was not gruesome, and because the State needed to identify the person in the photo as that of the victim. The probative value of the photo was not substantially outweighed by the danger of unfair prejudice. Bibbs v. State, 371 S.W.3d 564, 2012 Tex. App. LEXIS 4677, 2012 WL 2135561 (Tex. App. Amarillo June 13 2012).

542. Photograph of a murder victim taken at the crime scene after she had been shot by defendant was properly admitted where: (1) witnesses identified the picture as that of the victim; (2) the photo was not gruesome and showed no indication that the body had been posed or otherwise disturbed; and (3) the jury saw a video that showed the entire episode without objection. The photo simply depicted the result of a violent assault by one person, defendant, on another person, the victim, and the photo's probative value was not substantially outweighed by danger of unfair prejudice. Bibbs v. State, 371 S.W.3d 564, 2012 Tex. App. LEXIS 4677, 2012 WL 2135561 (Tex. App. Amarillo June 13 2012).

543. Trial court did not err by admitting into evidence a picture of a pornographic videotape that contained adult pornography during defendant's trial on charges of indecency with a child and sexual assault of a child because it had some probative value, as a complainant testified that defendant used pornography in his bedroom immediately before sexually assaulting her and an officer testified about the use of pornography in grooming sexual assault victims. Admission of the picture was not unfairly prejudicial because defendant called the complainant's credibility into question, the officer provided unobjected-to testimony about similar materials found on defendant's computer, and the State focused on the evidence for a relatively short amount of time. Allen v. State, 2012 Tex. App. LEXIS 4598, 2012 WL 2106550 (Tex. App. Houston 1st Dist. June 7 2012).

544. Trial court did not err by admitting into evidence a school principal's testimony about one of the complainant's bad hygiene during defendant's trial on charges of indecency with a child and sexual assault of a child because the State represented that its relevance would be demonstrated through later testimony and defendant did not argue that the relevance of the testimony was not demonstrated with later evidence. Allen v. State, 2012 Tex. App. LEXIS 4598, 2012 WL 2106550 (Tex. App. Houston 1st Dist. June 7 2012).

545. In a murder case, a text message sent by appellant to his girlfriend after a shooting was relevant under Tex. R. Evid. 401 to show state of mind and that appellant did not act in self-defense; it was not subject to exclusion under Tex. R. Evid. 403 because it was the only evidence of state of mind following the shooting, despite the fact that it contained a derogatory term. Guerra v. State, 2012 Tex. App. LEXIS 2973, 2012 WL 1297718 (Tex. App. Dallas Apr. 17 2012).

546. In a capital murder case, a trial court did not abuse its discretion by admitting a video recording and a photograph because their probative value was not substantially outweighed by the potential for undue prejudice. The evidence was probative to show appellant's presence at the scene of the crime and the degree of cooperation between appellant and his brother, the prejudice to appellant was not unfair, the challenged evidence did not create or add to any confusion regarding the events, there was little danger of misleading the jury, and, given the highly probative nature of the recording and photographs, the trial court could have concluded that there was no undue delay and that their presentation was necessary. Mccuin v. State, 2012 Tex. App. LEXIS 1363, 2012 WL 566796 (Tex. App. El Paso Feb. 22 2012).

547. Trial court did not abuse its discretion in admitting evidence of a pending assault charge against the father because it was relevant in determining whether termination of the father's rights was in the best interest of the

child.. Defendant failed to show that its admission confused or misled the jury, was cumulative of other evidence, or unfairly prejudiced the jury under Tex. R. Evid. 403; a key issue in the trial was defendant's criminal history, and the pending charge was only a small fraction of that history. Davis v. Tex. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 1315, 2012 WL 512674 (Tex. App. Austin Feb. 15 2012).

548. In defendant's capital murder case, the trial court properly barred evidence of the victim's possible HIV condition because it found it irrelevant and too speculative; the proffered evidence showed only that the victim bit an accomplice, as the victim attempted to defend himself, and that the accomplice knew of the victim's possible HIV infection. The evidence was not enough to support defendant's defense of independent impulse and it lacked probative value. Gonzalez v. State, 2012 Tex. App. LEXIS 927, 2012 WL 361733 (Tex. App. Corpus Christi Feb. 2 2012).

549. Trial court did not abuse its discretion by admitting four photographs from the victim's autopsy because they helped the jury understand the extent of the victim's injuries, were demonstrative of defendant's intent, and did not constitute a large part of the pathologist's testimony and the State's case. The photographs were highly relevant and probative and not unfairly prejudicial. Ramirez v. State, 2012 Tex. App. LEXIS 455, 2012 WL 170996 (Tex. App. Corpus Christi Jan. 19 2012).

550. Trial court did not err by admitting into evidence statements defendant made in a letter concerning the murder because the statements were not hearsay under Tex. R. Evid. 801, as they were admissible as admissions of a party opponent. The statements were relevant because in the letter defendant did not claim, as he did at trial, that the shooting was accidental, and they were not inadmissible under Tex. R. Evid. 403, as the statements supported the State's contention that defendant intentionally shot the victim, it related to defendant's state of mind which was a central issue at trial, and the letter was brief and not cumulative of other evidence. Benitez v. State, 2011 Tex. App. LEXIS 9871, 2011 WL 6306643 (Tex. App. Houston 1st Dist. Dec. 15 2011).

551. Trial court did not abuse its discretion in admitting an autopsy photograph depicting a murder victim's brain after it was removed from his body where the photograph had probative value because it showed the extent of the victim's injury and helped the jury understand how blunt force trauma-which other evidence showed came in the form of defendant's having kicked the victim in the head-caused the victim's death. Because the photograph had probative value and was not unnecessarily gruesome, the danger of unfair prejudice does did outweigh its probative value. Malone v. State, 2011 Tex. App. LEXIS 8602, 2011 WL 5118820 (Tex. App. Fort Worth Oct. 27 2011).

552. State did not refer to defendant as a drug dealer or elicit testimony that he was known as a drug dealer, and there was no dispute that defendant possessed marijuana; the State presented evidence that the marijuana was packaged for sale and that no one would purchase marijuana that had been in a person's underwear, and the trial court did not abuse its discretion in admitting the testimony. Eastland v. State, 2011 Tex. App. LEXIS 8748, 2011 WL 5221252 (Tex. App. Waco Oct. 26 2011).

553. In a case in which defendant was convicted of harassment in violation of Tex. Penal Code Ann. § 42.07(a)(2), the trial court did not err by admitting evidence of defendant's prior bad acts toward the complainant, his estranged wife, because the evidence was relevant to show both defendant's intent and the reasonable likelihood that the complainant was alarmed by defendant's threats, and because the evidence was relevant to rebut the defense's theory of the case. The trial court properly and adequately weighed the probative value of the evidence, which was not needlessly cumulative, against its potentially prejudicial effect, and the danger of undue prejudice to defendant was not so great that the trial court's decision to allow it should be disturbed. Sapp v. State, 2011 Tex. App. LEXIS 5331, 2011 WL 2732229 (Tex. App. Beaumont July 13 2011).

554. Trial court did not abuse its discretion by determining that defendant's statement was relevant because the discussion of "I'll find a way out" without "snitching" and his reference to the "footage" made it more probable that defendant had some involvement in the crime. The trial court did not abuse its discretion by determining that there was not unfair prejudice requiring exclusion of the statement because if the jury chose to credit it, it would not have been on an improper basis; rather, it would have been on the basis that defendant was part of the crime. Quintanilla v. State, 2011 Tex. App. LEXIS 1353, 2011 WL 665328 (Tex. App. Houston 14th Dist. Feb. 24 2011).

555. Trial court did not abuse its discretion by admitting evidence concerning a syringe found in defendant's sock in jail following his arrest because the evidence was relevant to establish defendant's knowledge of the methamphetamine and to rebut the defensive theory that defendant had no knowledge of the methamphetamine in either the van or in the vehicle defendant was riding in. Defendant failed to establish that the probative value of the evidence was significantly or substantially outweighed by its prejudicial effect, defendant's knowledge of the methamphetamine was seriously contested, the time necessary to present the evidence represented a negligible portion of the State's case, and limiting instructions were given. Phillips v. State, 2011 Tex. App. LEXIS 1383, 2011 WL 652846 (Tex. App. Amarillo Feb. 23 2011).

556. Trial court did not abuse its discretion by admitting evidence of the circumstances of defendant' arrest in July 2004 because evidence that defendant possessed methamphetamine at his father's residence on a later occasion was circumstantial evidence that defendant intentionally or knowingly possessed methamphetamine on an earlier occasion. Defendant's knowledge of the methamphetamine was seriously contested, the time necessary to present the evidence represented a negligible portion of the State's case, and limiting instructions were given. Phillips v. State, 2011 Tex. App. LEXIS 1383, 2011 WL 652846 (Tex. App. Amarillo Feb. 23 2011).

557. In a case in which defendant was convicted of aggravated kidnapping, the trial court did not abuse its discretion by admitting evidence that defendant, after committing the charged offense and on the same day, had ordered two minor girls walking down a street to get in his van where the trial court could have reasonably concluded that the evidence regarding defendant's encounter with the minor girls was relevant and admissible because that evidence revealed defendant's true plans about his encounter with the victim on the day he committed the offense. The trial judge could have reasonably concluded that the inherent probative force of the evidence, along with the State's need for the evidence, substantially outweighed the danger of any unfair prejudice to defendant, and the presentation of the extraneous offense evidence did not consume an inordinate amount of time. Frank v. State, 2011 Tex. App. LEXIS 762, 2011 WL 379041 (Tex. App. Beaumont Feb. 2 2011).

558. In a case in which defendant was convicted of aggravated sexual assault of a child, the trial court did not err under Tex. R. Evid. 403, 404(b) in admitting evidence of defendant's extraneous misconduct where the evidence was admitted for purposes other than character conformity and was more probative than prejudicial because the State's need for the evidence was considerable, and although the content of the evidence was emotional, it made the existence of a material and, perhaps, the ultimate disputed fact at trial-defendant's identity as the perpetrator-more probable. Because the pattern and characteristics of the alleged offense against the victim were so distinctively similar to the misconduct adduced in the evidence that a "signature" by defendant was apparent, the evidence showed a modus operandi that the State used both in its identifying of defendant as the perpetrator and in establishing the manner in which defendant committed the offense. Curcuru v. State, 2010 Tex. App. LEXIS 9748, 2010 WL 5020178 (Tex. App. Corpus Christi Dec. 9 2010).

559. Trial court did not abuse its discretion by admitting the testimony of a fellow prisoner of defendant because it had a strong tendency to suggest that defendant was quick-tempered and prone to respond to the slightest provocation with homicidal violence, and it was directly relevant to the issue of defendant's identity as the murderer, as the prisoner testified that defendant spoke of putting "three in the back of the head" and expressed a preference for .22 caliber weapons, the same used to kill the victims. The trial court did not abuse its discretion by concluding that the probative value of the prisoner's testimony was not substantially outweighed by the danger of unfair

prejudice or undue delay because only 51 pages of the 1347 pages of the reporter's record were devoted to the prisoner's testimony, including 15 pages for voir dire outside the jury's presence. Garcia v. State, 2010 Tex. App. LEXIS 8313, 2010 WL 4053640 (Tex. App. Austin Oct. 12 2010).

560. Trial court did not abuse its discretion by admitting photographs showing defendant's tattoos because a criminal investigator testified that defendant's distinctive tattoos as depicted in the photographs identified him as a member of a particular gang, and defendant did not overcome the presumption that the relevant evidence was more probative than prejudicial. Pate v. State, 2010 Tex. App. LEXIS 8151, 2010 WL 3921177 (Tex. App. Corpus Christi Oct. 7 2010).

561. Defendant failed to preserve for appellate review his claim that the district court erred by excluding evidence regarding the motivation of the authorities to prosecute the case against him because he failed to objected on the basis of Tex. R. Evid. 404(b) during the trial. Even assuming that defendant had preserved error, the trial court did not abuse its discretion because: (1) the proffered evidence had no relevance to the issue of whether defendant had committed the offense of unauthorized use of a motor vehicle; (2) the trial court could have found that the evidence would have put the officers and the police department on trial, confused the issues, and caused undue delay; and (3) there was considerable evidence showing that defendant committed the offense, particularly the videotape showing defendant entering the bait vehicle on three separate dates. Bishop v. State, 2010 Tex. App. LEXIS 7056, 2010 WL 3369845 (Tex. App. Austin Aug. 26 2010).

562. Trial court did not abuse its discretion by admitting evidence of a prior robbery during defendant's aggravated robbery trial because: (1) it was committed the evening prior to the instant robbery; (2) defendant and his accomplice acted together in both robberies; (3) both robberies were committed against lone, older women using surprise, speed, and strength through force or the threat of force; and (4) both robberies were committed while using the same vehicle as a means of escape. Therefore, the probative value of the evidence was great, as it showed that defendant and his accomplice acted together in a continuing criminal enterprise and rebutted defendant's theory that he was not a party to the instant robbery but was merely present in the vehicle while it occurred. Davis v. State, 2010 Tex. App. LEXIS 6949, 2010 WL 3341514 (Tex. App. Tyler Aug. 25 2010).

563. Trial court did not err by admitting into evidence photographs of defendant's tattoos because a criminal investigator testified that defendant's distinctive tattoos identified him as a member of particular street gang, which was an element of the charged offense of organized criminal activity. Defendant did not overcome the presumption that the relevant evidence was more probative than prejudicial. Pate v. State, 2010 Tex. App. LEXIS 6980, 2010 WL 3341853 (Tex. App. Corpus Christi Aug. 25 2010).

564. Even without medical evidence to verify it, defendant's volunteered statement to a police officer that he was HIV positive had probative value to show he was infected by the HIV virus when he sexually assaulted a child victim and was relevant as a circumstance of the offense that the jury could consider in assessing punishment under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). Lewis v. State, 2010 Tex. App. LEXIS 4545 (Tex. App. Amarillo June 16 2010).

565. In defendant's drug case, the court did not err by admitting evidence of an extraneous drug offense because the officer testified that he purchased methamphetamine from defendant, which made the intent to deliver much more probable, and the circumstances of the offense were just a simple transaction, which involved no violence or any potential inflaming factors. The testimony of was not a time consuming part of the trial, and while intent might have been proven by circumstantial evidence, the evidence was needed to rebut the defensive theories brought out during cross-examination of the witnesses. Padilla v. State, 2010 Tex. App. LEXIS 674, 2010 WL 337673 (Tex. App. El Paso Jan. 29 2010).

566. In a case in which a jury had convicted a habeas corpus applicant of possession of a controlled substance, methamphetamine, in the amount of 200 grams or more, but less than 400 grams, applicant demonstrated that trial counsel was deficient at the punishment stage of trial because counsel failed to: (1) object to a DEA agent's testimony on the dangers and societal costs caused by methamphetamine constituted deficient performance; (2) request pre-trial notice of the State's experts; (3) determine that a DEA agent would testify about methamphetamine addiction; (4) properly object to the agent's testimony about addiction and the number of people who could get high from the methamphetamine that applicant possessed; and (5) call an expert in rebuttal. During the punishment stage of trial, the prosecutors asked for a life sentence, relying heavily on the objectionable testimony that was introduced during both phases of trial, and because applicant had received a life sentence, the maximum sentence available for her offense, she had shown that there was a reasonable probability--one sufficient to undermine confidence in the result--that the outcome at the punishment stage would have been different but for her counsel's deficient performance. Ex Parte Lane, 303 S.W.3d 702, 2009 Tex. Crim. App. LEXIS 1750 (Tex. Crim. App. 2009).

567. In defendant's online solicitation case, the trial court did not err by admitting the chat logs between defendant and the officer posing as a teenager because the inherent probative force of the chat logs was considerable as the logs established the sexually explicit content of the chats. That evidence tended to make it more probable than not that defendant had engaged in the online solicitation of a minor. Bailey v. State, 2009 Tex. App. LEXIS 9440, 2009 WL 4725348 (Tex. App. Dallas Dec. 11 2009), *cert. denied*, 131 S. Ct. 475, 178 L. Ed. 2d 301, 2010 U.S. LEXIS 7971 (U.S. 2010).

568. In defendant's aggravated sexual assault of a child case, the court properly admitted evidence from a witness that defendant liked young girls and oral sex because defendant was accused of fondling the breast of his victim and of performing oral sex on the victim who was ten years old, the evidence pertained to defendant's thoughts and did not implicate any conduct on his part, defendant's statements were the primary evidence of his intent and state of mind, and, the State had a significant need for the evidence. Jones v. State, 2009 Tex. App. LEXIS 8923, 2009 WL 3858016 (Tex. App. Waco Nov. 18 2009).

569. In a murder case, evidence of defendant's drug dealing was properly admitted because, according to a witness, defendant and the victim were rival drug dealers, and proof of motive was important to the State's case because the State was unable to produce an eyewitness who actually saw defendant shoot the victim. The time spent attempting to prove that defendant sold illegal drugs was not out of proportion to the time required to present such evidence. Koy Timon Moore v. State, 2009 Tex. App. LEXIS 7847 (Tex. App. Houston 14th Dist. Oct. 8 2009).

570. Court did not err by admitting extraneous offense evidence of defendant's assaultive behavior occurring prior to, and after, the sexual assault because the extraneous offense evidence was admissible to show the context in which the criminal act occurred because defendant's assaultive behavior was "blended, or connected" to the sexual assault forming an "indivisible criminal transaction." Moreover, the evidence was helpful to the jury in their determination whether defendant used or exhibited a deadly weapon during the "same criminal episode." Quincy v. State, 304 S.W.3d 489, 2009 Tex. App. LEXIS 7645 (Tex. App. Amarillo Sept. 30 2009).

571. In defendant's tampering with a witness case, the trial court did not err in excluding evidence that the victim's father had recently kicked her out of his house because it was uncontested that defendant had previously threatened to kick the victim out if she became pregnant. That evidence served to establish a motive, if any, for the victim to make false accusations against defendant; the additional evidence regarding the victim's father's decision to kick her out, if true, did not lend any additional weight to that theory. Davis v. State, 2009 Tex. App. LEXIS 6685 (Tex. App. Corpus Christi Aug. 26 2009).

572. Court did not erroneously admit evidence of an undercover drug buy the day before defendant's warrant was executed because the evidence of the undercover buy served to make a fact of consequence--defendant's care, custody, and control of the contraband with intent to distribute--more or less probable than without the evidence.

Further, the court instructed the jury that it could consider the evidence of the undercover drug buy only if it believed beyond a reasonable doubt that defendant committed the offense. Stewart v. State, 2009 Tex. App. LEXIS 6391, 2009 WL 2488504 (Tex. App. Dallas Aug. 17 2009).

573. In a sexual assault of a child case, evidence that defendant had been subjected to unusual sexual events in his youth and that he related those events to the sexual assault of the child tended to rebut a contention that any contact with the child's penis was simply an accident, and therefore, the evidence was properly admitted. Additionally, the evidence took no additional time to develop initially, and was mentioned again during the trial only when defendant took the stand and denied making some of the statements. Watterson v. State, 2009 Tex. App. LEXIS 2938, 2009 WL 1148751 (Tex. App. Amarillo Apr. 29 2009).

574. Court properly admitted extraneous offense evidence because the extraneous offenses admitted tended to "make the existence" of a fact of consequence "more probable" and established that: defendant's gang was a criminal street gang, defendant had an affiliation with the gang, and defendant committed the instant offense as a member of a criminal street gang. Furthermore, the probative force and the State's need to admit the extraneous offenses outweighed the factors that favored exclusion; the evidence was not only relevant, but essential to the State's burden of proof. Fuentes v. State, 2009 Tex. App. LEXIS 2544, 2009 WL 997508 (Tex. App. Houston 14th Dist. Apr. 14 2009).

575. In a case involving indecency with a child, testimony from defendant's former wife regarding defendant's sexual behavior with neighborhood boys and with his niece was relevant under Tex. R. Evid. 401 because it was helpful to the jury in determining an appropriate sentence, and any issues relating to truthfulness or a lack of specificity went to the weight, not the admissibility, of the evidence and was for the jury to determine; moreover, the extraneous offense testimony was not inadmissible under Tex. R. Evid. 403 because it was probative, it would not have irrationally impressed the jury, the time needed to develop the evidence was minimal, and the State needed the evidence. To the extent the evidence showed defendant's sexual conduct with children, it was not unfairly prejudicial. Orr v. State, 2009 Tex. App. LEXIS 4152, 2009 WL 485502 (Tex. App. Dallas Feb. 27 2009).

576. In defendant's injury to a child case, the court did not err in admitting photographs of the child because a deputy testified to his initial observations of the child before being life-flighted to the burn center; the boy had a large knot on the left side of his head and blood coming out of his nose. The photos were clearly relevant and needed by the State to rebut defendant's statements denying causing any other injuries to the child and defendant's claim of accidental injury. Smith v. State, 2009 Tex. App. LEXIS 401, 2009 WL 1941999 (Tex. App. Corpus Christi Jan. 22 2009).

577. In defendant's capital murder case, the court properly admitted photographs because the exhibits constituted only two photographs and depicted nothing more than the reality of the brutal crime committed. The victim's body was clothed, and they were not extreme close-up shots. Badgett v. State, 2009 Tex. App. LEXIS 342, 2009 WL 142324 (Tex. App. San Antonio Jan. 21 2009).

578. Trial court did not err by admitting evidence that defendant tried to flee from police during his arrest because it was relevant, as defendant failed to show that his flight was unconnected to the capital murder offense based on his testimony that he did so because he was wanted for a probation violation and did not want to go back to jail. The evidence was probative because it showed the context and circumstances of defendant's arrest, the State spent relatively time developing the evidence, and the evidence did not have a tendency to suggest a decision on an improper basis or that it impressed the jury in an irrational way. Baker v. State, 2008 Tex. App. LEXIS 9416 (Tex. App. Dallas Dec. 18 2008).

579. Defendant complained that the admission of evidence that he had left a note containing his name, jail address, and other information in the women's room was irrelevant and prejudicial; however, the trial court determined that the probative value of the evidence was substantial. Wilson v. State, 2008 Tex. App. LEXIS 9395 (Tex. App. Waco Dec. 17 2008).

580. In an aggravated assault case, a trial court did not err by allowing a victim's father to testify during the guilt/innocence phase of the case because his brief testimony, which included basic information about himself, the victim, the evening of the shooting, and the victim's condition, was relevant and not overly prejudicial. Sanchez v. State, 2008 Tex. App. LEXIS 9072 (Tex. App. Eastland Dec. 4 2008).

581. In defendant's drug case, the trial court did not abuse its discretion by admitting in evidence the shotgun found on the back seat of the vehicle that defendant was driving just before his arrest because the probative value of the shotgun was considerable and significantly necessary to the State's case because it was a link tending to show that defendant knowingly possessed the cocaine. Additionally, the evidence of the shotgun was relevant to prove defendant's knowledge that he possessed narcotics. Harris v. State, 2008 Tex. App. LEXIS 9090 (Tex. App. Fort Worth Dec. 4 2008).

582. Court properly admitted photographs of defendant's tattoos at sentencing because the tattoos were probative of defendant's character for continuing to engage in criminal activities; defendant's relatives offered evidence regarding defendant's capability for rehabilitation, but those concepts differed significantly with the ideas portrayed by tattoos of Adolf Hitler and Klansmen with shotguns and nooses, among other images. Dean v. State, 2008 Tex. App. LEXIS 8441 (Tex. App. Fort Worth Nov. 6, 2008).

583. In a capital murder case, the court properly admitted two photographs because the photographs bolstered a State witness's testimony that testifying as a "snitch" had detrimental consequences -- injury to his sister, the photographs presented little, if any, prejudice to defendant because no party suggested to the jury that defendant was connected to the stabbing of the witness's sister, and the time involved in the introduction of the two photographs was minimal and unlikely to distract the jury from considering the charged offense when compared to having the witness's sister testify before the jury. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

584. Items seized at the scene of a house fire were relevant under Tex. R. Evid 401, 402, 403, 404(b) to show that the fire started as a result of the cooking of methamphetamine on the stove and that the debris found in the burned house pertained to the use or manufacture of illegal drugs; defendant failed to establish that the trial court abused its discretion or that the determination fell outside of the zone of reasonable disagreement. Dentler v. State, 2008 Tex. App. LEXIS 5708 (Tex. App. Eastland July 31 2008).

585. Trial court did not abuse its discretion by admitting evidence of a life insurance policy covering her husband, of which defendant was the beneficiary, because the fact that defendant may have been motivated to shoot her husband by the $ 300,000 life insurance policy was relevant under Tex. R. Evid. 401 to the State's attempt to prove defendant acted knowingly and intentionally. The trial court could have reasonably concluded the existence of the husband's life insurance policy related directly to the charged offense, did not have a tendency to confuse or distract the jury from the main issues in the case or have any tendency to be given undue weight by the jury; defendant admitted she shot her husband but claimed it was partially in self-defense and partially an accident; the trial court could have reasonably concluded that it was unlikely that presentation of the evidence of life insurance would consume an inordinate amount of time or merely repeat evidence already admitted. Armstrong v. State, 2008 Tex. App. LEXIS 5448 (Tex. App. Dallas July 24 2008).

586. In an illegal possession of a weapon case, audio portions of the patrol-car videotape were properly admitted because an issue during trial was the course and conduct of the officer's investigation of defendants, and the statements concerned one defendant's friend's alleged drug use, and did not concern any drug use by either of the defendants. Gomez v. State, 2008 Tex. App. LEXIS 2966 (Tex. App. Austin Apr. 24 2008).

587. Trial court did not err in denying defendant's motions to continue his indecency with a child trial so that he could flesh out allegations in a report to child protective services (CPS) that the victim (who was four years old at the time) was "purging" at home and in school and was caught by her uncle in bed with her four-year-old cousin's head between her legs, which allegations defendant believed were exculpatory where defendant's argument was founded on a defective factual basis because nothing in the CPS report exculpated him; nothing in the report suggested that defendant did not molest the child as alleged in the indictment, even if the circumstances mentioned in the report were deemed true, but, rather, the circumstances described (when intertwined with imagination) suggested that the child could have been the victim of other molestation at the hands of unknown parties, or so a reasonable jurist could have interpreted the circumstances. Reder v. State, 2008 Tex. App. LEXIS 2624 (Tex. App. Amarillo Apr. 10 2008).

588. In defendant's murder case, a trooper was properly allowed to testify concerning defendant's apparent false theft report because it was consistent with the State's theory that it was defendant's addiction to gambling that was at the heart of the money problems that essentially poisoned the relationship between defendant and the victim, his wife; part of the State's theory was that the victim was murdered when she threatened to quit her job and thus, cut off any further support of defendant's gambling. Stafford v. State, 248 S.W.3d 400, 2008 Tex. App. LEXIS 1280 (Tex. App. Beaumont 2008).

589. In defendant's robbery case, the State properly presented evidence of an extraneous robbery because the offenses occurred within three miles of one another and within a six-day time period, both took place late in the morning in large retail parking lots, and both acts were perpetrated quickly, snatching purses from unaccompanied females walking or standing in the parking lots; additionally, the testimony rebutted defendant's theories of alibi and that one victim's brief opportunity to view the perpetrator led to a mistaken identification; therefore, the probative value of the evidence was not substantially outweighed by its prejudicial effect. Evans v. State, 2008 Tex. App. LEXIS 477 (Tex. App. Houston 14th Dist. Jan. 22 2008).

590. In defendant's murder case, the court properly allowed the State to reveal defendant's tattoos because the evidence was relevant to support the State's theory that defendant was a gang member who murdered rival gang members in retaliation; in addition, given the other evidence indicating defendant's admitted gang membership, the evidence was not unfairly prejudicial. Reyes v. State, 2008 Tex. App. LEXIS 293 (Tex. App. San Antonio Jan. 16 2008).

591. Trial court did not abuse its discretion in admitting evidence of a gun found by the witness because its probative value was not outweighed by the risk of unfair prejudice, when the witness testified that he found the gun around the same time as the aggravated robbery, lying on the road a few blocks away from the store, and this was approximately the same location where the officer observed defendant driving a car matching the description of the suspect's vehicle provided by police dispatchers at the time of the aggravated robbery and from which the officer observed defendant extend his hand and arm out of the window and then back into the car. Mouton v. State, 2007 Tex. App. LEXIS 10076 (Tex. App. Houston 1st Dist. Dec. 20 2007).

592. In defendant's murder case, although the court erred in excluding the testimony and notes of a licensed counselor who had counseled defendant hours before the murder because the testimony provided some insight into defendant's state of mind at the time of the murder, the error was harmless; defendant's expert's testimony concerning defendant's sanity at the time of the offense was considerably more direct and probative than the tangentially relevant testimony of the counselor. Bradshaw v. State, 244 S.W.3d 490, 2007 Tex. App. LEXIS 9427

(Tex. App. Texarkana 2007).

593. During defendant's trial for sexual assault of a child, in violation of Tex. Penal Code Ann. § 22.011, evidence of the post-incident impact on the victim was relevant and probative of whether the assault did, indeed, occur, where defendant never formally admitted at trial that the victim had been sexually assaulted by someone (even by someone other than himself); furthermore, the potential prejudice that the evidence might have engendered was not outweighed by its probative value. Warren v. State, 236 S.W.3d 844, 2007 Tex. App. LEXIS 7636 (Tex. App. Texarkana 2007).

594. Trial court properly admitted a photograph of a murder victim and his family because it was relevant to show a true appearance of the victim before his death, and its probative value was not substantially outweighed by its prejudicial effect. While it showed the family smiling, the photograph was not the type that would impress the jury in an irrational but indelible way, no mention was made of the photograph during closing argument, and only one mention was made of the victim's children. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

595. Trial court properly admitted autopsy photographs of a murder victim because they did no more than visually depict what the medical examiner's testimony had already described, which was that the victim died of multiple gunshot wounds, and the probative value of the autopsy photographs was not substantially outweighed by their prejudicial effect because they were neither gruesome nor unnecessarily graphic, and because minimal time was spent on actually introducing the photographs following the medical examiner's testimony. While the manner of the victim's death was not disputed, the circumstances surrounding it were disputed, and the photographs lent visual support to the witnesses' description of those events. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

596. At defendant's capital murder trial, the trial court properly admitted evidence pursuant to Tex. R. Evid. 404(b) that defendant possessed a semi-automatic weapon the week before the offense where the evidence showed that the victim was shot seven times by a semi-automatic weapon, and there was also ample evidence that defendant shot the victim. The evidence was not more prejudicial than probative because the State did not impute defendant's possession of the semi-automatic weapon to be a crime, the State did not imply that defendant was generally a criminal because he possessed the weapon, and there was no indication that the weapon might have been used in another offense. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

597. In a suit on a sworn account brought by a law firm to recover its legal fees, the trial court questioned the law firm's principal witness to establish that the underlying legal matter was settled. The trial court acted within its discretion in attempting to limit the jury's exposure to needless and possibly confusing or misleading evidence under Tex. R. Evid. 401 and 403; the trial court did not impermissibly comment on the weight of the evidence. Alam v. Wilshire & Scott, P.C., 2007 Tex. App. LEXIS 5501 (Tex. App. Houston 1st Dist. July 12 2007).

598. In a capital murder case, evidence of appellant's gang affiliation was properly admitted pursuant to Tex. R. Evid. 402 because it was relevant pursuant to Tex. R. Evid. 401 and its probative value was not substantially outweighed by the danger of unfair prejudice as described in Tex. R. Evid. 403; there was ample evidence connecting appellant to the gang and their plan regarding the victim, and it included the gang's violent activities. Moreover, the evidence was not admitted to show that the murder was gang activity, but that it was predictable that a homicide would occur as the result of the conspiracy, in which some participants were violent gang members, to rob the victim. Arroyo v. State, 239 S.W.3d 282, 2007 Tex. App. LEXIS 5111 (Tex. App. Tyler 2007).

599. Evidence of gang affiliation was properly admitted as relevant under Tex. R. Evid. 401 and Tex. R. Evid. 402 since it was offered to show a motive for a murder; the evidence was not limited under Tex. R. Evid. 404(b), and the

probative value substantially outweighed the danger of unfair prejudice. Rodrigues v. State, 2007 Tex. App. LEXIS 4441 (Tex. App. Houston 14th Dist. June 7 2007).

600. In a strict product liability action, the trial court properly excluded evidence regarding the drug use and prior kidnapping conviction of the deceased, an individual involved in a vehicle accident, because the evidence added nothing to the central issue of the trial, the design defect of a seat belt buckle, and the risk of unfair prejudice greatly outweighed the probative value of the evidence. The vehicle manufacturer did not establish that the exclusion of the evidence probably resulted in an incorrect judgment. AlliedSignal, Inc. v. Moran, 231 S.W.3d 16, 2007 Tex. App. LEXIS 3883, CCH Prod. Liab. Rep. P17758 (Tex. App. Corpus Christi 2007).

601. In an aggravated sexual assault case, the court properly allowed a neighbor's testimony that on two occasions she caught defendant looking into her daughters' bedrooms while the girls were undressing because it demonstrated that defendant displayed an inappropriate sexual interest in teenage girls, thus rebutting the defensive theory that he was the victim of a frame-up; in addition, the evidence was probative of defendant's intent to commit the sexual offenses against the victims by showing that he had a similar pattern of gratifying his sexual desires through watching the neighbor's daughters undress, the evidence, which did not involve any physical touching, was not worse than the charged offenses and was not graphic, and the State's need for the evidence was significant. Mayfield v. State, 2007 Tex. App. LEXIS 2545 (Tex. App. Fort Worth Mar. 29 2007).

602. In a driving while intoxicated case, a court did not abuse its discretion in admitting the portion of a videotape that contained defendant's statements regarding Xanax and Valium because defendant's statement that he took the medications was in response to a question by the officer, and the question was relevant as a predicate inquiry to the administration of a field sobriety test. Layton v. State, 263 S.W.3d 179, 2007 Tex. App. LEXIS 1191 (Tex. App. Houston 1st Dist. 2007).

603. Trial court did not abuse its discretion by admitting evidence that police found a pistol in the trunk of his car when they arrested him because: (1) the extraneous offense in question, being a felon in possession of a firearm, was never presented to the jury; (2) the victim's description of the pistols used during the robbery general matched the pistol found in defendant's vehicle; (3) the weapon was found in a vehicle that closely matched the victim's description of a vehicle on the scene of the robbery; and (4) admission of the gun did not unfairly prejudice defendant. Young v. State, 2006 Tex. App. LEXIS 11371 (Tex. App. Houston 14th Dist. Dec. 21 2006).

604. Evidence of other contraband that police officers found in the room and evidence of the drugs found on the person of defendant's girlfriend, found while executing a search warrant was admissible when defendant was charged with possession of methadone that was found in the room because the evidence tended to establish the requisite affirmative link to the contraband. Davis v. State, 2006 Tex. App. LEXIS 10721 (Tex. App. Eastland Dec. 14 2006).

605. Trial court did not err by admitting evidence relating to the search of the girlfriend and the discovery of the crack pipe because under Tex. R. Evid. 404(b) because the evidence was relevant to the issue of whether the contraband and drug paraphernalia were present in the house and tended to prove an affirmative link between defendant and the methadone, and therefore the evidence was relevant to show defendant's knowledge or intent to possess the methadone. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because it had high probative value in affirmatively linking defendant to the methadone. Davis v. State, 2006 Tex. Crim. App. LEXIS 2526 (Tex. Crim. App. Dec. 14, 2006).

606. In defendant's robbery and drug possession case, a court properly admitted evidence of a "drug ledger" seized at defendant's apartment because, while searching the apartment for evidence related to drug transactions and defendant's possession offense, the officers discovered identification documents taken from the robbery

victims, the drug ledger evidence assisted the jury in understanding how the officers linked defendant to the robberies and the circumstances under which he possessed cocaine, and the drug ledger was admissible as res gestae of defendant's offenses. Villegas v. State, 2006 Tex. App. LEXIS 9334 (Tex. App. Dallas Oct. 27 2006).

607. In a robbery case, evidence from a videotape that defendant convinced an accomplice to claim the gun was his was properly admitted because defendant's participation was hotly contested at trial, the State needed to show the relationship between the two men and to show that defendant had influence over the accomplice, the evidence showed that defendant had a significant effect on the accomplice, and it supported testimony that defendant planned the robbery; in addition, the time spent introducing the evidence and developing the link was not substantial, taking approximately fifty pages of a twelve-hundred sixty-six page record on guilt/innocence. Smith v. State, 2006 Tex. App. LEXIS 9116 (Tex. App. Dallas Oct. 24 2006).

608. In defendant's criminal street gang case, defendant's prior conviction for aggravated assault, as well as other extraneous offenses, was properly admitted because evidence showing that defendant stabbed an African-American security guard who interfered when defendant and several other men were beating a Hispanic man was both relevant and highly probative; although the evidence was prejudicial in that it rebutted the defense effort to portray defendant as reformed, the jury had already heard graphic testimony from numerous witnesses about the assault, providing ample proof of defendant's propensity for brutal behavior. Chaddock v. State, 203 S.W.3d 916, 2006 Tex. App. LEXIS 8861 (Tex. App. Dallas 2006).

609. In defendant's assault case, extraneous offense evidence regarding defendant's having cut a witness with a knife on a prior occasion was properly admitted because, under defendant's self defense theory, his intent in stabbing the victim was to defend himself and the State's theory was that defendant was the aggressor and his intent was not defensive; in addition, the evidence was more probative than prejudicial; the time the prosecution devoted to developing the evidence did not present a danger of unfair prejudice, confusion of the issues, or undue delay. Salazar v. State, 222 S.W.3d 10, 2006 Tex. App. LEXIS 8382 (Tex. App. Amarillo 2006).

610. Defendant's motion to suppress the DNA evidence was properly denied because there was sufficient authentication evidence through the victim's sexual assault kit's markings and witness testimony showing that the kit was what it purported to be, and there was no affirmative evidence that the victim's samples were commingled, altered, or tampered with prior to their submission for DNA testing in April 2003. Dossett v. State, 216 S.W.3d 7, 2006 Tex. App. LEXIS 7428 (Tex. App. San Antonio 2006).

611. Defendant's oral statements about a dream containing details of the victim's murder were properly admitted into evidence because they were inculpatory admissions that were probative of his guilt; the statements revealed his knowledge of details about the crime scene that had not been released to the public, particularly the location and position of the body inside the business; the probative value of defendant's statements was strong because they constituted an admission against interest, revealing defendant's knowledge of the crime scene details not disclosed to the public; the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because the time used to develop the evidence during trial was relatively brief, the State's need for the evidence was high as the only other evidence linking defendant to the murder was DNA evidence, and it was the only direct evidence of defendant's intent to kill the victim rather than just sexually assault her. Dossett v. State, 216 S.W.3d 7, 2006 Tex. App. LEXIS 7428 (Tex. App. San Antonio 2006).

612. In a trial for indecency with a child, it was proper to exclude evidence of conduct by the complainant's mother, such as extramarital affairs and involvement in pornography and drug abuse, because the probative value in establishing a motive for the complainant to make false accusations against defendant was low. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

613. In defendant's murder case, evidence of the history of physical abuse in the relationship between defendant and the victim was relevant and properly admitted; the extraneous-offense evidence rebutted defendant's claim of accident and showed that he intended to cause death, serious bodily injury, or bodily injury; in addition, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Brown v. State, 2006 Tex. App. LEXIS 5163 (Tex. App. Austin June 16 2006).

614. Trial court did not err when it allowed the introduction of defendant's threatening statement to a jailor relating to his release from prison under Tex. Code Crim. Proc. Ann. art. 37.07. § 3(a); this statement was highly relevant in assessing punishment for the attempted murder of police officers, and it was not unfairly prejudicial under Tex. R. Evid. 403. Espinosa v. State, 194 S.W.3d 703, 2006 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. 2006).

615. In defendant's capital murder case, the court properly admitted autopsy photographs of the victim where the photographs were taken before the autopsy procedure began and showed the condition of the body as it was received from the hospital; the photographs showed the bullet wound that testimony indicated was the cause of death, they illustrated that the victim was not otherwise bruised or injured as he would have been if there had been a fight before he was shot, and they showed no more than the nature of the victim's injury. Gray v. State, 2006 Tex. App. LEXIS 2363 (Tex. App. Dallas Mar. 29 2006).

616. During defendant's trial for indecent exposure, the danger of unfair prejudice did not substantially outweigh the probative value of evidence that defendant walked around nude in front of his stepdaughters, masturbated in the presence of his stepdaughter, and inappropriately touched his stepdaughter because the evidence was probative to show defendant's intent and motive to sexually gratify himself in the presence of others and to rebut his defensive theory of mistake. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

617. In an action in which a trial court awarded more than $ 2 million to a pedestrian for injuries she sustained when she was struck by a city transit bus driven by an employee of a transit authority contractor, the trial court did not err when it admitted into evidence the graphic photographs of the pedestrian's injuries; even though the driver objected to the admission of the photographs, any error was waived by the failure to object to testimony of the conditions depicted in those photographs; at trial, witnesses testified they saw the pedestrian in the crosswalk when she was struck and dragged by the bus, and the orthopedic trauma surgeon who treated the pedestrian when she arrived at the hospital and amputated her leg testified, without objection, about the nature and extent of her injuries. Castro v. Cammerino, 186 S.W.3d 671, 2006 Tex. App. LEXIS 1765 (Tex. App. Dallas 2006).

618. In a capital murder case, a court properly admitted photographs of the victim's corpse where the photographs were probative of the crime scene and the injuries received by the victim, they were necessary for the State in developing its case, and, because they were not overly gruesome, the photographs did not pose the potential of impressing the jury in some irrational way. Shuffield v. State, 189 S.W.3d 782, 2006 Tex. Crim. App. LEXIS 365 (Tex. Crim. App. 2006).

619. In a capital murder case, a court did not err by excluding testimony in mitigation of punishment regarding a history of family sexual abuse of multiple generations of children in defendant's family because the fact that others in defendant's family were abused did not by itself make him more or less morally culpable for the crime for which he was on trial, nor did it, by itself, make a jury's finding of mitigation any more or less probable than it would have been without the evidence. Shuffield v. State, 189 S.W.3d 782, 2006 Tex. Crim. App. LEXIS 365 (Tex. Crim. App. 2006).

620. Defense counsel's lack of an objection to evidence that defendant put his hands over his front pockets during his pat-down, ran from the police, and discarded "little white bags" while in flight did not establish ineffective assistance of counsel because the evidence was relevant to show defendant's motive for striking a police officer

and the reason for his flight, and the fact that the bags were never found did not make the officer's testimony inadmissible for lack of relevance or probativeness; furthermore, the evidence might also have been viewed as same transaction contextual evidence under Tex. R. Evid. 404(b) because the events surrounding the stop, flight, and arrest were so connected that they formed an indivisible criminal transaction. LeBleu v. State, 2006 Tex. App. LEXIS 887 (Tex. App. Beaumont Feb. 1 2006).

621. Court rejected defendant's claim that the trial court erred in admitting a photograph of the victim's head after the shooting, showing the bullet entry; the court found no actual reference to the photograph in testimony, and given that the court had to presume the probative value outweighed any prejudicial effect, the court was unable to say that the picture inflamed the jurors to convict on an irrational basis, considering that the picture was not enlarged, gory, or gruesome, and the evidence was relevant and could have aided the jury in understanding the testimony regarding the victim's wound and death. Whitmire v. State, 2005 Tex. App. LEXIS 9593 (Tex. App. Houston 14th Dist. Nov. 17 2005), opinion withdrawn by, substituted opinion at 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

622. In a murder case, the trial court was within its discretion in denying the admission of evidence regarding the gang membership of four State's witnesses under Tex. R. Evid. 403 as it was highly prejudicial: the only purpose for allowing the gang membership testimony was to show bias, and it was not relevant. Barlow v. State, 175 S.W.3d 839, 2005 Tex. App. LEXIS 7110 (Tex. App. Texarkana 2005).

623. In a murder trial, defendant waived his Tex. R. Evid. 401 and 403 objections to the portion of a surveillance videotape that depicted the victim's wife kneeling and crying over the victim's body after defendant had fled the store. Two witnesses testified, without objection, regarding actions depicted on the videotape and verbally conveyed the same imagery. Fernandez v. State, 2005 Tex. App. LEXIS 7068 (Tex. App. Houston 14th Dist. Aug. 30 2005).

624. Court properly admitted defendant's statement regarding his involvement in a Mexican drug organization which was relevant as to whether he knew the marijuana was concealed in the car, it also demonstrated motive and intent, and the testimony was corroborating in that it tended to connect defendant to the offense. Mora v. State, 2005 Tex. App. LEXIS 6975 (Tex. App. El Paso Aug. 25 2005).

625. Court did not err by admitting evidence concerning the circumstances of a prior sexual assault conviction where defendant encountered the victims in the parking lot of their residences, waited for the victims to return to their rooms, approached them under the guise of needing help, and made advances toward raping them but ejaculated before penetration. Because intent was a material element of the offense on which the State carried the burden of proof, the probative value of the witness's testimony was high and was not overcome by the danger of unfair prejudice. Fields v. State, 2005 Tex. App. LEXIS 5494 (Tex. App. Austin July 14 2005).

626. In an injury to a child case where defendant contested his guilt by claiming that he did not injure the child but that she fell, the trial court did not err in permitting the State to introduce evidence that defendant had previously committed an extraneous offense against another young child as it may have been helpful to the jury to rebut defendant's defensive theory and show that he injured the victim. Furthermore, evidence of the extraneous offense was not of such a nature as to impair the efficacy of a limiting instruction: the evidence showed that the child involved in the extraneous offense was not seriously injured but, at most, had bruises on her face from defendant's hands. Harrell v. State, 2005 Tex. App. LEXIS 4578 (Tex. App. Eastland June 16 2005).

627. In a trial for indecency with a child, the trial court properly admitted evidence of a prior indecency conviction. The current charge arose from defendant's exposing himself, and he argued that he had merely forgotten to zip his pants; the extraneous offense evidence therefore tended to make a fact of consequence--whether defendant had or

lacked intent to arouse or gratify sexual desire--more or less probable. Arp v. State, 2005 Tex. App. LEXIS 4535 (Tex. App. Texarkana June 15 2005).

628. Evidence of juvenile appellant's negative drug test was properly found to be unreliable where his probation officer failed to test his urine sample for adulterants that could produce a false negative because she was out of the necessary supplies. Furthermore, the evidence had low probative value to rebut appellant's marijuana possession charge and was outweighed by the risk of jury confusion under Tex. R. Evid. 403 because an undercover officer testified that he saw appellant take approximately two puffs from a marijuana cigar, and appellant's expert testified that if appellant had only smoked such a small amount of marijuana, there was only a 15 percent chance that he would have tested positive for marijuana on a urinalysis test. In re J.A.C., 2005 Tex. App. LEXIS 4519 (Tex. App. Houston 14th Dist. June 14 2005).

629. In a murder trial, evidence was properly admitted, under Tex. R. Evid. 401 -- 404, of a shooting incident that occurred eight days after the murder. The extraneous offense evidence was relevant to the development of the case and was admissible to show the development of the investigation and defendant's intent or knowledge regarding the gun; as to prejudice, the evidence was presented almost matter-of-factly and included no injuries, disturbing photographs, or emotional testimony. Gonzales v. State, 2005 Tex. App. LEXIS 4532 (Tex. App. Amarillo June 14 2005).

630. Although it could not be said that defendant's act of kicking out the window of a police officer's patrol car after he was arrested for burglary of a habitation was so intertwined with the charged offense to make it admissible as same-transaction contextual evidence, or that defendant's act was material to an issue in the case, even if the trial court abused its discretion by admitting the officer's testimony, the admission of the evidence did not have a substantial and injurious effect on the jury's verdict and therefore did not affect defendant's substantial rights because there was substantial evidence of his guilt. Franklin v. State, 2005 Tex. App. LEXIS 4401 (Tex. App. Fort Worth June 9 2005).

631. Trial court did not err in admitting evidence of prior statements made to police by two individuals whom the State contended were with defendant at the time of a shooting where evidence that both individuals made statements that defendant admitted to being involved in a freeway shooting and later recanted them was relevant because the statements, even if recanted, indicated that the witnesses had knowledge that a freeway shooting had occurred and showed the witnesses' willingness to implicate defendant in order to exonerate themselves, thus making the State's theory that all three men were involved more probable than the theory would have been without the evidence. Furthermore, defendant had not demonstrated that the negative attributes of the statements substantially outweighed their probative value because the State had made clear that the statements had been recanted so that the jury was not given the impression that the witnesses still maintained that defendant had admitted the shooting to them. Dinh Tan Ho v. State, 171 S.W.3d 295, 2005 Tex. App. LEXIS 4405 (Tex. App. Houston 14th Dist. 2005).

632. Trial court did not abuse its discretion in admitting evidence of a bullet hole in a car allegedly involved in a freeway shooting because the existence of the bullet hole in the car had a tendency to make the fact that the car was involved in the shooting more probable and was thus relevant under Tex. R. Evid. 401. Furthermore, evidence of the bullet hole was not unfairly prejudicial because there was no definitive evidence that the bullet hole occurred during another shooting at a caf, as defendant alleged, and because the jury did not even know about the cafe shooting. Dinh Tan Ho v. State, 171 S.W.3d 295, 2005 Tex. App. LEXIS 4405 (Tex. App. Houston 14th Dist. 2005).

633. Trial court should have excluded as irrelevant and prejudicial a BB gun that was found in a defendant's truck and that was not used during the charged burglary. The error was harmless, however, because the court did not have fair assurances that the mind of an average juror would have found the State's case less persuasive had the BB gun not been admitted. Moreno v. State, 2005 Tex. App. LEXIS 4487 (Tex. App. Houston 1st Dist. June 9

2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 6371 (Tex. App. Houston 1st Dist. Aug. 11, 2005).

634. In a trial for burglary, a photograph of the victim's daughter was properly admitted under Tex. R. Evid. 403, even though the daughter was not present. The small, studio-quality photograph was not unduly prejudicial, and it was relevant because the victim, defendant's former girlfriend, testified that her conduct toward defendant was motivated by the desire to protect her young daughter from confrontation. Wight v. State, 2005 Tex. App. LEXIS 4334 (Tex. App. Amarillo June 7 2005).

635. Trial court did not abuse its discretion in admitting defendant's statement under Tex. R. Evid. 404(b) where it appeared that it believed that the portion of the statement in which defendant admitted to threatening a prostitute with a box cutter referred to the complainant because the statement corroborated the complainant's testimony and was relevant to the issue of consent. Furthermore, the statement was not inadmissible under Tex. R. Evid. 403 because it strengthened the State's case on the consent issue and because, while the acts described in the statement were probably distasteful to at least some, if not all, of the jury members, they were not any more inflammatory than the charged offense. Marc v. State, 166 S.W.3d 767, 2005 Tex. App. LEXIS 4228 (Tex. App. Fort Worth 2005).

636. Court did not err by admitting an investigation videotape into evidence because, although the content of the video might have been unpleasant to view, it depicted the reality of the brutal crime committed, it contained material that was the subject of testimony presented during the State's case in chief, and it was probative of the fact and manner of the victim's death and defendant's culpable mental state. Ramirez v. State, 2005 Tex. App. LEXIS 4185 (Tex. App. San Antonio June 1 2005).

637. Defendant's convictions for aggravated sexual assault and indecency with a child under Tex. Penal Code Ann. §§ 21.11(a)(1), 22.021(a)(B)(iii)-(iv), 22.021(a)(2)(A)(ii) (Supp. 2004-05) were affirmed because the trial court did not err in admitting DNA evidence found on the victim because the location of defendant's DNA was consistent with the victim's account of the attack and the DNA evidence was clearly relevant in determining the credibility of the victim's accusation. Also, the DNA evidence was not unfairly prejudicial because it provided circumstantial proof of the offense charged; and the State's need for the evidence was great because there were no witnesses that could disprove defendant's contention that his DNA was innocently transferred onto the victim, but the discovery of his DNA on top of a fresh bruise served to dispute his theory. Rivera v. State, 2005 Tex. App. LEXIS 3997 (Tex. App. Austin May 26 2005).

638. Trial court did not abuse its discretion by overruling defendant's objection to testimony regarding whom an officer had named as the "defendant" in the case, which defendant claimed was unfairly prejudicial because it had the prejudicial effect of telling the jury that he was the subject of investigation from the very beginning and that he had to be guilty, because the trial court could have reasonably concluded that the testimony was relevant to the jury's evaluation of the complainant's allegations. Nor could it be said that the probative value of the testimony was outweighed by the danger of unfair prejudice because the officer's testimony was not the type of testimony that would suggest that the jury make a decision on an improper basis. Dunbar v. State, 2005 Tex. App. LEXIS 3676 (Tex. App. Fort Worth May 12 2005).

639. In an action for subsurface trespass brought by oil and gas lessors against their lessee, the trial court did not err by admitting into evidence an internal memorandum written by an employee of the lessee more than 20 years earlier where the memo was relevant under Tex. R. Evid. 401, 402 on the ground that its recommendation to drill despite title problems could have helped the jury to decide whether the lessee was reasonable in delaying its development of a tract of land because of title problems with another tract. Furthermore, language in the memo about "illiterate Mexicans" was not unfairly prejudicial under Tex. R. Evid. 403 because the memo could not be considered an appeal to prejudice in language clear and strong, especially because it was written by an employee

of the lessee and did not ask the jury to decide the case on an improper basis. Mission Res., Inc. v. Garza Energy Trust, 2005 Tex. App. LEXIS 2650 (Tex. App. Corpus Christi Apr. 7 2005), opinion withdrawn by, substituted opinion at 166 S.W.3d 301, 2005 Tex. App. LEXIS 3443, 160 Oil & Gas Rep. 1144 (Tex. App. Corpus Christi 2005).

640. Photographs of a murder victim were relevant under Tex. R. Evid. 401 and were not unduly prejudicial to defendant under Tex. R. Evid. 403 because a photograph of the victim lying in an ambulance immediately after firefighters removed her body from a burning house was both material and probative, as it established her condition at the crime scene, and because a photograph of her face taken during autopsy was also material and probative of the fact that the autopsy was performed on the same person removed from the crime scene by ambulance. The numerous autopsy photographs were also probative of the victim's cause of death, a material element in the offense of capital murder, and although the detail in the photographs was graphic, each served the purpose of illustrating the nature and extent of the victim's injuries. Vargas v. State, 2005 Tex. App. LEXIS 2417 (Tex. App. Houston 1st Dist. Mar. 31 2005).

641. Trial court did not abuse its discretion by ruling that a witness's testimony that he sold a gun to defendant's friend was relevant and that its probative value was not outweighed by the danger of unfair prejudice under Tex. R. Evid. 401 and 403. Even if the gun was not the one used in the murders, the testimony was some evidence of the friend's interest in weapons of the sort used to commit the murders. Scott v. State, 165 S.W.3d 27, 2005 Tex. App. LEXIS 2168 (Tex. App. Austin 2005).

642. During defendant's robbery trial, the trial court properly engaged in the balancing test required by Tex. R. Evid. 403 when it admitted into evidence two extraneous offenses that occurred after the robbery and after defendant had been arrested because the contested evidence was relevant to the issue of whether defendant, by his appearance, language, and conduct, placed the victim in fear of imminent bodily injury at the time that he stole beer from the victim's convenience store and because his subsequent conduct showed his ability to place another in fear of imminent bodily injury, it was, therefore, relevant under Tex. R. Evid. 401. Furthermore, the evidence, which was that defendant had kicked out the back window of the patrol car and, while being taken to jail, had kicked a deputy, was admissible as same transaction contextual evidence. Hayden v. State, 155 S.W.3d 640, 2005 Tex. App. LEXIS 243 (Tex. App. Eastland 2005).

643. In an indecency with a child case, because intent to satisfy sexual appetite was an element of the crime, the victim's younger sister's testimony that defendant had "french" kissed her when he took her alone for a ride and asked that she not tell anyone was relevant; thus, the trial court properly allowed it. Further, this evidence showing that defendant acted inappropriately with another young girl was highly probative, making the fact of defendant's sexual contact with the victim more probable, gave credibility to the victim's complaint, and diminished defendant's credibility. Mejia v. State, 2004 Tex. App. LEXIS 11615 (Tex. App. Tyler Dec. 22 2004).

644. In an aggravated sexual assault of a child case, a court did not err by excluding a portion of the testimony of an attorney representing the victim's mother who was present at a custody hearing involving the victim because something occurring at the custody hearing had no probative value in showing who committed a sexual assault that occurred a month before the hearing. Additionally, even if the testimony was somehow relevant, the trial court could have reasonably decided that its admission would lead to unfair prejudice, greatly mislead the jury, and confuse the issues with which the jury was presented. Holmes v. State, 2004 Tex. App. LEXIS 10661 (Tex. App. Dallas Nov. 30 2004).

645. In an aggravated assault case, the trial court did not err by admitting the kitchen knife used in the assault into evidence because the knife was relevant under Tex. R. Evid. 401 to prove the allegation that defendant used or exhibited a deadly weapon, and was not unfairly prejudicial under Tex. R. Evid. 403 because it did not have an undue tendency to suggest that a decision be made on an improper basis. Hardy v. State, 2004 Tex. App. LEXIS

3214 (Tex. App. Fort Worth Apr. 8 2004).

646. In defendant's sexual assault case, a court did not err permitting the victim's stepfather to testify that he saw defendant in the parking lot of the family's apartment complex a few weeks after the victim made her outcry where that evidence tended to corroborate the victim's testimony and was not, in itself, evidence of misconduct or bad character. The prosecutors' description of defendant as a "sexual predator" was a logical inference from his overall behavior as shown by the victim's testimony. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

647. Testimony of a witness that a defendant stated that if he found out who helped his wife move out of their apartment, he was going to kill that person, was relevant under Tex. R. Evid. 401 to show the defendant's mental state a few days prior to the commission of a murder; the evidence was not unfairly prejudicial under Tex. R. Evid. 403 because its prejudicial effect was related to its probative value rather than to an unrelated matter. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App. LEXIS 7512 (Tex. App. Beaumont 2003).

648. Under Tex. R. Evid. 401, the trial court did not err in admitting evidence that a defendant ingested methamphetamine shortly before a murder was committed because the jury could have inferred from the evidence that the defendant's reasoning was altered, the evidence was offered to show the defendant's mental state rather than as character evidence, and the trial court engaged in a Tex. R. Evid. 403 balancing test and did not abuse its discretion in admitting the evidence. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App. LEXIS 7512 (Tex. App. Beaumont 2003).

649. In making the initial determination of admissibility of evidence, Texas courts must apply the principles set forth in the evidentiary rules governing relevancy under Tex. R. Evid. 401- 403; to meet the relevancy test, the proffered evidence must, first, have probative value, and second, be of consequence to some issue in the trial under Tex. R. Evid. 401. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

650. Evidence of defendant's prior history of sexual assault against a child victim was relevant under Tex. R. Evid. 401 as "other crimes, wrongs, or acts" pursuant to Tex. Code Crim. Proc. Ann. art. 38.37. McCulloch v. State, 39 S.W.3d 678, 2001 Tex. App. LEXIS 1327 (Tex. App. Beaumont 2001).

651. Defendant's death sentence for capital murder was vacated where the probative value of the admission of a photograph under Tex. R. Evid. 401 of the victim in her casket was substantially outweighed by the danger of unfair prejudice to the defendant under Tex. R. Evid. 403. Reese v. State, 33 S.W.3d 238, 2000 Tex. Crim. App. LEXIS 108 (Tex. Crim. App. 2000).

652. Where defendant was convicted of sexual assault, trial court did not err under Tex. R. Evid. 401, 402, 403 in admitting testimony from the victim and his sister of the effect of the assault on the victim; testimony of an inflammatory or sympathetic nature will not bar its admissibility if it is relevant to the issue at trial, and the issue need not be contested. Ranels v. State, 1996 Tex. App. LEXIS 2867 (Tex. App. Beaumont Mar. 20 1996).

Evidence : Relevance : Liability Insurance

653. Pursuant to Tex. R. Evid. 401 and 403, the testimony of a claims representative for defendant's insurer that the insurer was liable was not barred by Tex. R. Evid. 411 because it allowed for an inference of fault on the part of defendant, which was a fact of consequence in the manslaughter prosecution under Tex. Penal Code Ann. § 19.04. Mitchell v. State, 377 S.W.3d 21, 2011 Tex. App. LEXIS 8970, 2011 WL 5994154 (Tex. App. Waco Nov. 9 2011).

654. Mistrial was properly granted in a manslaughter/criminally negligent homicide prosecution after the prosecutor asked defendant's expert about a finding by defendant's insurer that defendant was at fault because the question was manifestly improper under Tex. R. Evid. 401-403. What the insurer concluded had very little probative value on the question of whether defendant caused the fatal accident, and it was extremely prejudicial, likely to confuse and mislead the jury, and lead to time-consuming collateral litigation. Ex parte Wheeler, 203 S.W.3d 317, 2006 Tex. Crim. App. LEXIS 1968 (Tex. Crim. App. 2006).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

655. Evidence of methamphetamine found at the murder scene was properly admitted because it was relevant to establish a motive for defendant's actions and to rebut her claim of accidentally shooting the victim; there was no evidence presented that defendant was in possession of the drugs, and the evidence was admissible because the jury could infer that the prior relationship between the victim and defendant was one that involved drugs. Taylor v. State, 2014 Tex. App. LEXIS 7282 (Tex. App. Corpus Christi July 3 2014).

656. Court properly allowed evidence of defendant's prior conviction for possession of cocaine because the defensive theory was that he did not know the cocaine was in his pocket because it was placed there while he was unconscious; therefore, the evidence was relevant to rebut defendant's defensive theory. Rios v. State, 2014 Tex. App. LEXIS 5867 (Tex. App. El Paso May 30 2014).

657. At defendant's trial for aggravated sexual assault of a child, the trial court did not err in admitting testimony that he committed extraneous offenses in that he supplied drugs to the victim in the course of his sexual assaults. The evidence helped to fill in the gaps and explain the circumstances surrounding the offense. Washington v. State, 2014 Tex. App. LEXIS 933 (Tex. App. Austin Jan. 30 2014).

658. Evidence that defendant on trial for reckless injury to his five-week-old daughter previously put a blanket tip into the victim's mouth to quiet her cries was properly admitted as a prior bad act because it was relevant to the issue of his intent to harm the victim and to demonstrate the character of his relationship with her; the evidence's probative value outweighed its unfair prejudice because there was little danger it would impress on the jury in some irrational way, it took little time to develop, and the State needed it to prove defendant's mental state. Sanchez v. State, 2014 Tex. App. LEXIS 896, 2014 WL 298322 (Tex. App. Houston 1st Dist. Jan. 28 2014).

659. Evidence that defendant on trial for reckless injury to his five-week-old daughter previously put a blanket tip into the victim's mouth to quiet her cries was properly admitted as a prior bad act because it was relevant to the issue of his intent to harm the victim and to demonstrate the character of his relationship with her; the evidence's probative value outweighed its unfair prejudice because there was little danger it would impress on the jury in some irrational way, it took little time to develop, and the State needed it to prove defendant's mental state. Sanchez v. State, 2014 Tex. App. LEXIS 896, 2014 WL 298322 (Tex. App. Houston 1st Dist. Jan. 28 2014).

660. Trial court did not err in admitting testimony showing that defendant was the driver of a vehicle involved in a drive-by shooting four days before the alleged victim was shot because the evidence was probative to show opportunity and identity and to rebut defendant's defensive theory that he was not the perpetrator, and there was nothing confusing or misleading about the evidence. Williams v. State, 2013 Tex. App. LEXIS 14602, 2013 WL 6253764 (Tex. App. San Antonio Dec. 4 2013).

661. Trial court did not abuse its discretion by admitting evidence because in light of the defensive theory to attack State's evidence, evidence that defendant chewed and destroyed crack cocaine during a prior traffic stop increased the likelihood that defendant did the same during the instant traffic stop. The court could not hold that the probative value of showing a lack of accident or mistake was substantially outweighed by the danger of unfair prejudice or the

misleading nature of the evidence. Williams v. State, 2013 Tex. App. LEXIS 12925, 2013 WL 5676226 (Tex. App. Eastland Oct. 17 2013).

662. Testimony from a State's witness that defendant appeared to be either high on drugs or coming off a high on the morning of his attack against the complainant was admissible because it established an affirmative link between defendant's earlier condition and the offense, rather than being mere background contextual evidence; defendant appeared high earlier in the day, asked the witness for money, and told the complainant he broke into her house because he was looking for money. Steele v. State, 2013 Tex. App. LEXIS 10488 (Tex. App. Dallas Aug. 20 2013).

663. Trial court did not abuse its discretion by admitting an extraneous offense regarding marijuana found on defendant's person and in his car because it was admissible same transaction contextual evidence; defendant's possession of an illegal substance explained his possible motive for hitting a detective and fleeing the scene before the drugs could be found, and he was not acting suspiciously until the detective moved closer. Finney v. State, 2013 Tex. App. LEXIS 8317 (Tex. App. Dallas July 8 2013).

664. Defense counsel preserved for review the issue of whether the trial court erred in admitting an extraneous offense because defense counsel emphasized what rules his request for a running objection was based on, and the trial court stated that the evidence was admitted as inextricably intertwined with the offense. Finney v. State, 2013 Tex. App. LEXIS 8317 (Tex. App. Dallas July 8 2013).

665. Court did not abuse its discretion in admitting the extraneous offense evidence (unadjudicated aggravated robbery) over defendant's objections, because the evidence supported the State's theory that defendant intended to participate in the offenses. Menendez v. State, 2013 Tex. App. LEXIS 7742 (Tex. App. Beaumont June 26 2013).

666. Trial court did not err during defendant's murder trial in admitting extraneous offense evidence of defendant's theft of a truck because the evidence was not relevant just to show character conformity, but was relevant under Tex. R. Evid. 401 and admissible under Tex. R. Evid. 404(b) to corroborate defendant's confession to police, in which he stated that he stole a green truck from a certain location and then drove that truck to the victim's home, where he then committed the murder. At trial, the State was able to corroborate that portion of defendant's confession by introducing evidence from a witness that his green truck had been stolen on the same day and from the same location as defendant indicated in his confession, and a police officer confirmed that he wrote a report for a stolen truck by the witness at the same time and location as described by defendant in his confession. Shuff v. State, 2013 Tex. App. LEXIS 5469 (Tex. App. Houston 1st Dist. May 2 2013).

667. Evidence of defendant's cocaine use after the charged murder offense was admissible to show his consciousness of guilt and had relevancy beyond character conformity because defendant stated that he went on a cocaine binge because he felt guilty about the murder. Shuff v. State, 2013 Tex. App. LEXIS 5469 (Tex. App. Houston 1st Dist. May 2 2013).

668. Trial court did not abuse its discretion by concluding that evidence that two co-defendants had committed a nearly identical robbery just a few days before the instant robbery and that defendant knew about that robbery was relevant to show defendant's intent to participate in the instant robbery and was relevant to the State's theory that defendant had conspired with the two co-defendants to commit the instant robbery. The trial court did not abuse its discretion by concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence because the evidence tended to rebut defendant's theory that she had nothing to do with the instant robbery and capital murder. Ohlfs v. State, 2013 Tex. App. LEXIS 4660 (Tex. App. Fort Worth Apr. 11 2013).

669. At defendant's trial for unlawfully appropriating a firearm, the trial court did not err in admitting the evidence of another rifle theft and pawn transaction because it was relevant under Tex. R. Evid. 401 to provide the same

transaction context for the single theft of the rifles. Defendant's theft of the two rifles was a single act to deprive the victim of his property. Sutterfield v. State, 2013 Tex. App. LEXIS 3972, 2013 WL 1281843 (Tex. App. Eastland Mar. 28 2013).

670. Appellant did not object at trial on Tex. R. Evid. 404(b) grounds or any grounds that would have put the trial court on notice that he was objecting to the introduction of such evidence, plus his hearsay, speculation, and relevancy objections did not preserve error under Rule 404(b), such that he failed to preserve this issue for review under Tex. R. App. P. 33.1(a). Hawkins v. State, 2013 Tex. App. LEXIS 2282 (Tex. App. Eastland Mar. 7 2013).

671. Trial court did not err in admitting evidence that defendant had previously, knowingly disregarded the lawful commands of a police officer because the State was entitled to rebut defendant's assertion that had he known they were police officers, he would not have pointed his firearm at them. Flores v. State, 2013 Tex. App. LEXIS 1809 (Tex. App. Dallas Feb. 26 2013).

672. Trial court did not err by admitting evidence that defendant lied about his military service because his fictitious military involvement and explanations to his wife about living at various military posts set forth the necessary facts to explain to the jury how defendant isolated the minor victim from her mother, defendant's wife, during the period of abuse; without defendant's stories of military service, the victim's testimony about the abuse made little or no sense. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

673. Even though the trial court abused its discretion by admitting defendant's military record into evidence, as the fact that defendant was charged with escape and had been discharged for misconduct did not make it more or less likely that he had committed the sexual assault offenses, the error was harmless because there was evidence supporting defendant's conviction, other evidence showed that he was untruthful about his military service, and the State never mentioned the extraneous offenses contained in defendant's military record. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

674. Trial court did not abuse its discretion by admitting evidence that he held the child victim's mother at gunpoint several days after the alleged assault occurred under Tex. R. Evid. 404(b) because it constituted same transaction contextual evidence and was relevant, as the evidence showed that defendant confronted the victim's mother because he wanted to interrogate the victim about the assault and showed the jury how defendant reacted violently to the victim's outcry; the evidence was also necessary to show how defendant gained access to the victim's house to leave a letter in which he admitted to touching the victim. The admission of the evidence did not violate Tex. R. Evid. 403 because it made a fact of consequence, defendant's touching of the victim's genitals, more probable. Rodriguez v. State, 2013 Tex. App. LEXIS 213, 2013 WL 135723 (Tex. App. Waco Jan. 10 2013).

675. Defendant's statement to police that he had, 20 years earlier, been accused of improper conduct with his former stepdaughter, was not relevant to prove defendant's intent under Tex. R. Evid. 401 and Tex. R. Evid. 404(b), and it was unduly prejudicial under Tex. R. Evid. 403. Defendant did not "open the door" to admission of the statement, Tex. R. Evid. 107, by responding to a question by the State. However, given the evidence of guilt, the error was harmless. Cressman v. State, 2012 Tex. App. LEXIS 9849, 2012 WL 5974013 (Tex. App. Waco Nov. 29 2012).

676. Defendant's relevancy objections did not preserve his argument that admission of extraneous offense evidence of uncharged sexual conduct violated Tex. R. Evid. 404; in any event, because the same evidence came in through other testimony without objection, any error was cured. Goodwin v. State, 2012 Tex. App. LEXIS 6918, 2012 WL 3590723 (Tex. App. Corpus Christi Aug. 20 2012).

677. Trial court did not abuse its discretion by admitting portions of the victim's police interview during which he claimed defendant threatened to kill him like he had other boys because the statements were necessary to understand how defendant overcame the victim's resistance to the sexual assault and the evidence was relevant to rebut defendant's claim that he did not threaten the victim. The evidence was probative of whether defendant used or exhibited a deadly weapon to accomplish the assault, presentation of the evidence took little time, and the statements did not suggest an improper basis for deciding the case. Sandles v. State, 2012 Tex. App. LEXIS 5518, 2012 WL 3104377 (Tex. App. Dallas July 11 2012).

678. In a driving while intoxicated case, a trial court did not err by allowing a police officer to give an opinion about appellant's intent to fight at the time of his arrest; the officer was not speculating about appellant's inner thoughts, rather, the officer was drawing an inference from her own observations. The information was relevant, it did not describe an extraneous offense or bad act, the inclusion of the information was not so prejudicial that it should have been excluded on that ground, and it was presented alongside copious evidence that appellant was driving while intoxicated and attempting to flee from police. Link v. State, 2012 Tex. App. LEXIS 3350, 2012 WL 1495182 (Tex. App. Eastland Apr. 30 2012).

679. Because the robberies occurred in the same geographic area within a relatively brief time frame, and all were committed by an assailant who covered his hands with socks or gloves, and whose face was completely covered by a similar covering, leaving only the eyes exposed, there are sufficient common characteristics between each of the robberies, that the extraneous offenses were relevant to prove identity and admissible under Tex. R. Evid. 401, 402, 404(b). Heigelmann v. State, 362 S.W.3d 763, 2012 Tex. App. LEXIS 1670, 2012 WL 688427 (Tex. App. Texarkana Mar. 2 2012).

680. In a trial for the aggravated kidnapping of a former girlfriend, extraneous acts evidence from another former girlfriend was relevant to rebut the defense theories that the current charges were exaggerated and that the witness testified to an admission by defendant because of her relationship with the complainant. Vela v. State, 2011 Tex. App. LEXIS 6917, 2011 WL 3821045 (Tex. App. Corpus Christi Aug. 25 2011).

681. In a case in which defendant was convicted of harassment in violation of Tex. Penal Code Ann. § 42.07(a)(2), the trial court did not err by admitting evidence of defendant's prior bad acts toward the complainant, his estranged wife, because the evidence was relevant to show both defendant's intent and the reasonable likelihood that the complainant was alarmed by defendant's threats, and because the evidence was relevant to rebut the defense's theory of the case. The trial court properly and adequately weighed the probative value of the evidence, which was not needlessly cumulative, against its potentially prejudicial effect, and the danger of undue prejudice to defendant was not so great that the trial court's decision to allow it should be disturbed. Sapp v. State, 2011 Tex. App. LEXIS 5331, 2011 WL 2732229 (Tex. App. Beaumont July 13 2011).

682. At defendant's trial for burglary of a habitation based on evidence showing that defendant and his brother broke into a mobile home and stole a TV set, the trial court ruled that evidence of two extraneous burglaries committed by his brother was relevant under Tex. R. Evid. 401, probative, and admissible under Tex. R. Evid. 404(b). The appellate court held that defendant was not harmed by the admission of the evidence because it was not unduly emphasized by the State, and it did not have a substantial effect on the jury's verdict. Crutchfield v. State, 2011 Tex. App. LEXIS 4959, 2011 WL 2638402 (Tex. App. Tyler June 30 2011).

683. Trial court erred by admitting into evidence other lawsuits, verdicts, and judgments against the corporation that owned and operated the cemetery concerning the double sale of burial plots because the evidence was not relevant under Tex. R. Evid. 401, as the events occurred at different cemeteries with different employees, they occurred more than a year apart, and there was no evidence that the events were part of a system, scheme, or plan. The error was not harmless because appellants' attorney intended for the evidence to be a significant and pervasive part of the trial; because there was no evidence of three of the four appellants suffered compensable

mental anguish, the jury's award of $ 100,000 to each had to have been based on something other than properly admitted evidence. Serv. Corp. Int'l v. Guerra, 348 S.W.3d 221, 2011 Tex. LEXIS 417, 54 Tex. Sup. Ct. J. 1191 (Tex. 2011).

684. Jury could reasonably infer that the letter was written by defendant, and that he composed it with an eye toward establishing an alibi or exculpatory evidence regarding his pending charge; all this made a fact of consequence, that defendant knowingly or intentionally possessed the drugs found in the police car where he had just been sitting, more probable, and the letter was relevant evidence. In re F.R., 2011 Tex. App. LEXIS 4104, 2011 WL 2175857 (Tex. App. Texarkana May 27 2011).

685. Child victim's testimony that defendant assaulted her mother immediately after she confronted him about the sexual abuse was relevant to show defendant's unsettled and combative demeanor after the incident, which indicated a consciousness of guilt and as an assault against an adult witness, could be seen as tampering with the witness. Therefore, the evidence was admissible and trial counsel was not ineffective for failing to object. Cueva v. State, 339 S.W.3d 839, 2011 Tex. App. LEXIS 3333 (Tex. App. Corpus Christi May 2 2011).

686. Trial court did not abuse its discretion by admitting evidence concerning a syringe found in defendant's sock in jail following his arrest because the evidence was relevant to establish defendant's knowledge of the methamphetamine and to rebut the defensive theory that defendant had no knowledge of the methamphetamine in either the van or in the vehicle defendant was riding in. Defendant failed to establish that the probative value of the evidence was significantly or substantially outweighed by its prejudicial effect, defendant's knowledge of the methamphetamine was seriously contested, the time necessary to present the evidence represented a negligible portion of the State's case, and limiting instructions were given. Phillips v. State, 2011 Tex. App. LEXIS 1383, 2011 WL 652846 (Tex. App. Amarillo Feb. 23 2011).

687. Trial court did not abuse its discretion by admitting evidence of the circumstances of defendant' arrest in July 2004 because evidence that defendant possessed methamphetamine at his father's residence on a later occasion was circumstantial evidence that defendant intentionally or knowingly possessed methamphetamine on an earlier occasion. Defendant's knowledge of the methamphetamine was seriously contested, the time necessary to present the evidence represented a negligible portion of the State's case, and limiting instructions were given. Phillips v. State, 2011 Tex. App. LEXIS 1383, 2011 WL 652846 (Tex. App. Amarillo Feb. 23 2011).

688. In a case in which defendant was convicted of aggravated kidnapping, the trial court did not abuse its discretion by admitting evidence that defendant, after committing the charged offense and on the same day, had ordered two minor girls walking down a street to get in his van where the trial court could have reasonably concluded that the evidence regarding defendant's encounter with the minor girls was relevant and admissible because that evidence revealed defendant's true plans about his encounter with the victim on the day he committed the offense. The trial judge could have reasonably concluded that the inherent probative force of the evidence, along with the State's need for the evidence, substantially outweighed the danger of any unfair prejudice to defendant, and the presentation of the extraneous offense evidence did not consume an inordinate amount of time. Frank v. State, 2011 Tex. App. LEXIS 762, 2011 WL 379041 (Tex. App. Beaumont Feb. 2 2011).

689. In a case in which defendant was convicted of aggravated sexual assault of a child, the trial court did not err under Tex. R. Evid. 403, 404(b) in admitting evidence of defendant's extraneous misconduct where the evidence was admitted for purposes other than character conformity and was more probative than prejudicial because the State's need for the evidence was considerable, and although the content of the evidence was emotional, it made the existence of a material and, perhaps, the ultimate disputed fact at trial-defendant's identity as the perpetrator-more probable. Because the pattern and characteristics of the alleged offense against the victim were so distinctively similar to the misconduct adduced in the evidence that a "signature" by defendant was apparent, the evidence showed a modus operandi that the State used both in its identifying of defendant as the perpetrator and in

establishing the manner in which defendant committed the offense. Curcuru v. State, 2010 Tex. App. LEXIS 9748, 2010 WL 5020178 (Tex. App. Corpus Christi Dec. 9 2010).

690. Trial court did not abuse its discretion by admitting evidence of a prior robbery during defendant's aggravated robbery trial because: (1) it was committed the evening prior to the instant robbery; (2) defendant and his accomplice acted together in both robberies; (3) both robberies were committed against lone, older women using surprise, speed, and strength through force or the threat of force; and (4) both robberies were committed while using the same vehicle as a means of escape. Therefore, the probative value of the evidence was great, as it showed that defendant and his accomplice acted together in a continuing criminal enterprise and rebutted defendant's theory that he was not a party to the instant robbery but was merely present in the vehicle while it occurred. Davis v. State, 2010 Tex. App. LEXIS 6949, 2010 WL 3341514 (Tex. App. Tyler Aug. 25 2010).

691. Court abused its discretion when it allowed the State to introduce evidence that defendant failed to appear for two drug tests, however, the error did not affect defendant's substantial rights, because the evidence was brief and was not emphasized by the State, defendant had a prior criminal record, and there was direct evidence connecting defendant with the syringe that contained a trace amount of methamphetamine. Hood v. State, 2010 Tex. App. LEXIS 6301, 2010 WL 3049030 (Tex. App. Eastland Aug. 5 2010).

692. In defendant's drug case, the court did not err by admitting evidence of an extraneous drug offense because the officer testified that he purchased methamphetamine from defendant, which made the intent to deliver much more probable, and the circumstances of the offense were just a simple transaction, which involved no violence or any potential inflaming factors. The testimony of was not a time consuming part of the trial, and while intent might have been proven by circumstantial evidence, the evidence was needed to rebut the defensive theories brought out during cross-examination of the witnesses. Padilla v. State, 2010 Tex. App. LEXIS 674, 2010 WL 337673 (Tex. App. El Paso Jan. 29 2010).

693. Trial court did not abuse its discretion during defendant's trial for the aggravated sexual assault of his eleven-year-old step-grandson in admitting pursuant to Tex. R. Evid. 404(b) the testimony of defendant's nephew (one of the State's rebuttal witnesses) that defendant had sexually assaulted him where defendant's defense was that his step-grandson and his granddaughter were fabricating their accusations because defendant had testified in his own behalf and after having been fully admonished as to the consequences, and he denied sexually assaulting not only the victim but also his granddaughter. Moreover, there was no merit in defendant's argument that any remoteness of the extraneous offense automatically made the testimony irrelevant under Tex. R. Evid. 401. Espinoza v. State, 2010 Tex. App. LEXIS 559, 2010 WL 227680 (Tex. App. Eastland Jan. 21 2010).

694. In defendant's sexual assault case, the court properly admitted extraneous offense evidence because the disputed testimony was relevant for several reasons; the disputed evidence was relevant because DNA evidence left by the anal sexual assault connected defendant to the charged offense, and the evidence at trial showed that the same individual committed all of the sexual offenses. The complainant's testimony was relevant as same transaction contextual evidence to show the events in question were closely interwoven and to aid the jury in understanding the context in which those events transpired. Walker v. State, 2009 Tex. App. LEXIS 9780, 2009 WL 5103274 (Tex. App. Dallas Dec. 29 2009).

695. In defendant's aggravated sexual assault of a child case, the court did not err in admitting evidence that the child was in counseling since the alleged sexual assaults and that defendant's children were removed because evidence regarding the child's need for counseling was probative circumstantial evidence that increased the likelihood that she was sexually abused by defendant, and evidence that it was necessary to remove the children was probative circumstantial evidence that tended to show that the state believed something was occurring that warranted removal. Herrera v. State, 2009 Tex. App. LEXIS 9690, 2009 WL 4981327 (Tex. App. San Antonio Dec.

23 2009).

696. In an indecency with a child case, the court erred by admitting extraneous offense evidence due to the lack of similarity between the extraneous offenses and the charged offenses, the duration in time of twenty years between the offenses, and the lack of evidence concerning a continuing course of conduct by defendant. The extraneous acts did not take place in defendant's home and defendant did not ask the witness to touch himself or defendant. Crocker v. State, 2009 Tex. App. LEXIS 9432, 2009 WL 4725299 (Tex. App. Dallas Dec. 11 2009).

697. In defendant's aggravated sexual assault of a child case, the court properly admitted evidence from a witness that defendant liked young girls and oral sex because defendant was accused of fondling the breast of his victim and of performing oral sex on the victim who was ten years old, the evidence pertained to defendant's thoughts and did not implicate any conduct on his part, defendant's statements were the primary evidence of his intent and state of mind, and, the State had a significant need for the evidence. Jones v. State, 2009 Tex. App. LEXIS 8923, 2009 WL 3858016 (Tex. App. Waco Nov. 18 2009).

698. Trial court abused its discretion by admitting evidence of defendant's prior burglary arrest pursuant to Tex. R. Evid. 404(b) where the tendency of the evidence was to show defendant was a bad person or that his character conformed to that of a person from whom criminal conduct might be expected. However, the error did not influence the jury, or had but a slight effect on its verdict of guilt, because the State's presentation of the alleged burglary, although factually detailed, was brief and received only passing mention in closing argument, and because the propensity and potency of the evidence to characterize defendant as a criminal was blunted by the previous, unopposed, admission of evidence of his prior conviction for manslaughter. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

699. Trial court erroneously admitted a 1993 judgment convicting defendant of misdemeanor assault where the judgment was not admissible under Tex. R. Evid. 404(b) because it had no relevance apart from proof of character conformity. Moreover, evidence of the conviction was not available for impeachment under Tex. R. Evid. 609 because the record contained no evidence that the victim of the assault was female, and there was thus no proof that it was a misdemeanor involving moral turpitude. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

700. In a murder case, evidence of defendant's drug dealing was properly admitted because, according to a witness, defendant and the victim were rival drug dealers, and proof of motive was important to the State's case because the State was unable to produce an eyewitness who actually saw defendant shoot the victim. The time spent attempting to prove that defendant sold illegal drugs was not out of proportion to the time required to present such evidence. Koy Timon Moore v. State, 2009 Tex. App. LEXIS 7847 (Tex. App. Houston 14th Dist. Oct. 8 2009).

701. Court did not err by admitting extraneous offense evidence of defendant's assaultive behavior occurring prior to, and after, the sexual assault because the extraneous offense evidence was admissible to show the context in which the criminal act occurred because defendant's assaultive behavior was "blended, or connected" to the sexual assault forming an "indivisible criminal transaction." Moreover, the evidence was helpful to the jury in their determination whether defendant used or exhibited a deadly weapon during the "same criminal episode." Quincy v. State, 304 S.W.3d 489, 2009 Tex. App. LEXIS 7645 (Tex. App. Amarillo Sept. 30 2009).

702. In a sentencing trial for felony assault to a family member, there was no error under Tex. R. Evid. 401, 402 when the trial court admitted testimony from defendant's wife about the circumstances of a prior assault and guilty plea. The testimony was relevant punishment evidence because it illustrated defendant's propensity for family violence and that he was not deterred by his earlier conviction. Murchison v. State, 2009 Tex. App. LEXIS 7481,

2009 WL 3050823 (Tex. App. Houston 1st Dist. Sept. 24 2009).

703. Court did not erroneously admit evidence of an undercover drug buy the day before defendant's warrant was executed because the evidence of the undercover buy served to make a fact of consequence--defendant's care, custody, and control of the contraband with intent to distribute--more or less probable than without the evidence. Further, the court instructed the jury that it could consider the evidence of the undercover drug buy only if it believed beyond a reasonable doubt that defendant committed the offense. Stewart v. State, 2009 Tex. App. LEXIS 6391, 2009 WL 2488504 (Tex. App. Dallas Aug. 17 2009).

704. Where defendant was convicted of three counts of promotion of child pornography and four counts of possession of child pornography, the trial court did not violate Tex. R. Evid. 404(b) by admitting an exhibit showing a list of subfolders and 900 file names from defendant's computer. The evidence was relevant under Tex. R. Evid. 401 for the State to show that defendant organized, stored, and shared the downloaded images and that his doing so was not the result of mistake or accident. Wenger v. State, 292 S.W.3d 191, 2009 Tex. App. LEXIS 4859 (Tex. App. Fort Worth June 25 2009).

705. In a trial for indecency with a child, in violation of Tex. Penal Code Ann. § 21.11(b), there was no error under Tex. R. Evid. 401, 403, 404, in admitting extraneous offense evidence. Evidence of possession of child pornography was relevant to defendant's intent to arouse or gratify his sexual desire; evidence of methamphetamine use was relevant to show defendant's state of mind at the time of the charged offense and tended to show how the offense unfolded and progressed; and evidence that defendant physically abused the victim and two other children, in addition to providing context about the relationship between the victim and defendant, was admissible to show the victim's state of mind and explain why the victim did not speak up earlier about the abuse. Stinson v. State, 2009 Tex. App. LEXIS 3186, 2009 WL 1267348 (Tex. App. Dallas May 8 2009).

706. During defendant's criminal trial for the sexual asault of a child, the State was permitted to introduce extraneous offense evidence that defendant encouraged the victim's involvement in several crimes to rebut defense counsel's opening remarks that defendant was a positive influence on the victim. The trial court determined the extraneous offense evidence was admissible under Tex. R. Evid. 404(b) to correct the false impression created by the defense; the extraneous offense evidence was relevent under Tex. R. Evid. 401, because it tended to make less probable defendant's argument that he was encouraging the victim to be a decent and productive citizen. Ytuarte v. State, 2009 Tex. App. LEXIS 3056, 2009 WL 1232327 (Tex. App. San Antonio May 6 2009).

707. In a sexual assault of a child case, evidence that defendant had been subjected to unusual sexual events in his youth and that he related those events to the sexual assault of the child tended to rebut a contention that any contact with the child's penis was simply an accident, and therefore, the evidence was properly admitted. Additionally, the evidence took no additional time to develop initially, and was mentioned again during the trial only when defendant took the stand and denied making some of the statements. Watterson v. State, 2009 Tex. App. LEXIS 2938, 2009 WL 1148751 (Tex. App. Amarillo Apr. 29 2009).

708. Court properly admitted extraneous offense evidence because the extraneous offenses admitted tended to "make the existence" of a fact of consequence "more probable" and established that: defendant's gang was a criminal street gang, defendant had an affiliation with the gang, and defendant committed the instant offense as a member of a criminal street gang. Furthermore, the probative force and the State's need to admit the extraneous offenses outweighed the factors that favored exclusion; the evidence was not only relevant, but essential to the State's burden of proof. Fuentes v. State, 2009 Tex. App. LEXIS 2544, 2009 WL 997508 (Tex. App. Houston 14th Dist. Apr. 14 2009).

709. In a sexual assault of a child case, the court reversibly erred by admitting extraneous acts evidence because defendant's practice of not using a condom while engaged in consensual sex with an adult companion, or informing the companion of his HIV positive status, had the practical effect of prejudicing any defense raised by defendant regarding the complainant's credibility. Such an effect would have been detrimental to defendant, who sought to discredit the complainant by pointing out factual variances in his outcries, and by suggesting that the complainant was motivated to fabricate the assault to avoid being schooled in an alternative education program. Lopez v. State, 288 S.W.3d 148, 2009 Tex. App. LEXIS 2050 (Tex. App. Corpus Christi Mar. 26 2009).

710. In an aggravated assault case, the trial court did not err in admitting the victim's videotaped statement because defendant raised the issue of self-defense. A witness testified that in defendant's altercation with the victim, the victim was the aggressor and defendant tried to resist retaliating; as a result of that testimony, defendant's alleged assault of the victim was relevant rebuttal evidence to prove that defendant acted with the requisite intent. In re B.H., 2009 Tex. App. LEXIS 1852, 2009 WL 692613 (Tex. App. Tyler Mar. 18 2009).

711. In defendant's assault case, the court did not abuse its discretion by admitting photographs of injuries to the victim's husband's upper arm, neck, wrist, and forehead and a photograph of a broken chair to fully understand the context of the altercation. It was also within the court's discretion to conclude that the injuries to the victim's husband and the means by which they were inflicted were so connected to the injuries alleged in the indictment as to form an indivisible criminal transaction. Lopez v. State, 2009 Tex. App. LEXIS 1755, 2009 WL 638182 (Tex. App. Austin Mar. 12 2009).

712. In defendant's sexual assault of a child case, the trial court did not err in excluding his offer of proof at trial concerning an earlier outcry of sexual abuse by the victim regarding another individual because the testimony of the victim's mother in defendant's offer of proof provided only indirect evidence of any statement by the child. Although it was clear from the mother's testimony that she believed defendant's sister was coaching the child in the 2001 incident, no evidence showed that the specific statement attributed to the victim, then five years old, was false. Gonzales v. State, 2009 Tex. App. LEXIS 1435, 2009 WL 498032 (Tex. App. Amarillo Feb. 27 2009).

713. Victim's knowledge of defendant's violent past was not relevant in a retaliation-by-threat case for purposes of Tex. R. Evid. 401. The witness did not testify that his knowledge that defendant had actually killed a person contributed to his fear. Pollard v. State, 277 S.W.3d 25, 2009 Tex. Crim. App. LEXIS 233 (Tex. Crim. App. 2009).

714. In defendant's aggravated robbery case, evidence during the punishment phase of defendant's gang affiliation was relevant to defendant's punishment and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. An officer testified that defendant's gang was involved in narcotics trafficking, theft, kick burglaries, and other similar offenses. Sutton v. State, 2008 Tex. App. LEXIS 9068 (Tex. App. Houston 1st Dist. Dec. 4 2008).

715. In an aggravated assault case, testimony that defendant was a member of the Mexican Mafia was properly admitted under Tex. R. Evid. 404(b) as it was necessary to prove why the girlfriend gave conflicting statements (intimidation) and supported the State's theory that defendant's motive was to stab the victim for being an ex-member of the gang. Salinas v. State, 2008 Tex. App. LEXIS 6910 (Tex. App. San Antonio Sept. 10, 2008).

716. In defendant's murder case, a trooper was properly allowed to testify concerning defendant's apparent false theft report because it was consistent with the State's theory that it was defendant's addiction to gambling that was at the heart of the money problems that essentially poisoned the relationship between defendant and the victim, his wife; part of the State's theory was that the victim was murdered when she threatened to quit her job and thus, cut off any further support of defendant's gambling. Stafford v. State, 248 S.W.3d 400, 2008 Tex. App. LEXIS 1280

(Tex. App. Beaumont 2008).

717. In a trial for retaliation by threat against a witness, it was error to admit evidence of defendant's 20-year-old murder conviction; the evidence admissible under Tex. R. Evid. 401 as context to explain the witness's fear of defendant because the witness's state of mind was not an element of the offense of retaliation under Tex. Penal Code Ann. § 36.06. Pollard v. State, 255 S.W.3d 184, 2008 Tex. App. LEXIS 609 (Tex. App. San Antonio 2008).

718. In defendant's robbery case, the State properly presented evidence of an extraneous robbery because the offenses occurred within three miles of one another and within a six-day time period, both took place late in the morning in large retail parking lots, and both acts were perpetrated quickly, snatching purses from unaccompanied females walking or standing in the parking lots; additionally, the testimony rebutted defendant's theories of alibi and that one victim's brief opportunity to view the perpetrator led to a mistaken identification; therefore, the probative value of the evidence was not substantially outweighed by its prejudicial effect. Evans v. State, 2008 Tex. App. LEXIS 477 (Tex. App. Houston 14th Dist. Jan. 22 2008).

719. At defendant's capital murder trial, the trial court properly admitted evidence pursuant to Tex. R. Evid. 404(b) that defendant possessed a semi-automatic weapon the week before the offense where the evidence showed that the victim was shot seven times by a semi-automatic weapon, and there was also ample evidence that defendant shot the victim. The evidence was not more prejudicial than probative because the State did not impute defendant's possession of the semi-automatic weapon to be a crime, the State did not imply that defendant was generally a criminal because he possessed the weapon, and there was no indication that the weapon might have been used in another offense. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

720. In a fraud action brought by the principals of a home health business against an investor, the testimony of the investor's prior business partner was admissible pursuant to Tex. R. Evid. 404(b) as proof of the investor's motive in seeking involvement with the business, his intent to commit fraud by association with the business, and his plan for gaining control over the business's financial affairs and siphoning off the business's assets. The prior business partner testified that he had also sued the investor for fraud under circumstances very similar to those in the underlying case. Rogers v. Alexander, 244 S.W.3d 370, 2007 Tex. App. LEXIS 5103 (Tex. App. Dallas 2007).

721. In an aggravated sexual assault case, the court properly allowed a neighbor's testimony that on two occasions she caught defendant looking into her daughters' bedrooms while the girls were undressing because it demonstrated that defendant displayed an inappropriate sexual interest in teenage girls, thus rebutting the defensive theory that he was the victim of a frame-up; in addition, the evidence was probative of defendant's intent to commit the sexual offenses against the victims by showing that he had a similar pattern of gratifying his sexual desires through watching the neighbor's daughters undress, the evidence, which did not involve any physical touching, was not worse than the charged offenses and was not graphic, and the State's need for the evidence was significant. Mayfield v. State, 2007 Tex. App. LEXIS 2545 (Tex. App. Fort Worth Mar. 29 2007).

722. In a burglary trial, there was no error in the admission of evidence that defendant had, in his possession when he was arrested, items taken in a subsequent burglary from the same victim; the evidence was admissible to rebut a line of questioning directed at burglaries that occurred after defendant was in custody. Ellis v. State, 2007 Tex. App. LEXIS 414 (Tex. App. Tyler Jan. 24 2007).

723. Trial court did not abuse its discretion by admitting evidence that police found a pistol in the trunk of his car when they arrested him because: (1) the extraneous offense in question, being a felon in possession of a firearm, was never presented to the jury; (2) the victim's description of the pistols used during the robbery general matched the pistol found in defendant's vehicle; (3) the weapon was found in a vehicle that closely matched the victim's description of a vehicle on the scene of the robbery; and (4) admission of the gun did not unfairly prejudice

defendant. Young v. State, 2006 Tex. App. LEXIS 11371 (Tex. App. Houston 14th Dist. Dec. 21 2006).

724. Extraneous offense testimony was relevant under Tex. R. Evid. 401 to the issue of identity and was admissible to prove that defendant posed as a police officer and sexually assaulted a prostitute; the facts of the charged offense and the extraneous offenses showed a pattern of conduct sufficiently distinctive to constitute a signature. Page v. State, 2006 Tex. Crim. App. LEXIS 2521 (Dec. 20, 2006).

725. Trial court did not err by admitting evidence relating to the search of the girlfriend and the discovery of the crack pipe because under Tex. R. Evid. 404(b) because the evidence was relevant to the issue of whether the contraband and drug paraphernalia were present in the house and tended to prove an affirmative link between defendant and the methadone, and therefore the evidence was relevant to show defendant's knowledge or intent to possess the methadone. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because it had high probative value in affirmatively linking defendant to the methadone. Davis v. State, 2006 Tex. Crim. App. LEXIS 2526 (Tex. Crim. App. Dec. 14, 2006).

726. In defendant's robbery and drug possession case, a court properly admitted evidence of a "drug ledger" seized at defendant's apartment because, while searching the apartment for evidence related to drug transactions and defendant's possession offense, the officers discovered identification documents taken from the robbery victims, the drug ledger evidence assisted the jury in understanding how the officers linked defendant to the robberies and the circumstances under which he possessed cocaine, and the drug ledger was admissible as res gestae of defendant's offenses. Villegas v. State, 2006 Tex. App. LEXIS 9334 (Tex. App. Dallas Oct. 27 2006).

727. In defendant's assault case, extraneous offense evidence regarding defendant's having cut a witness with a knife on a prior occasion was properly admitted because, under defendant's self defense theory, his intent in stabbing the victim was to defend himself and the State's theory was that defendant was the aggressor and his intent was not defensive; in addition, the evidence was more probative than prejudicial; the time the prosecution devoted to developing the evidence did not present a danger of unfair prejudice, confusion of the issues, or undue delay. Salazar v. State, 222 S.W.3d 10, 2006 Tex. App. LEXIS 8382 (Tex. App. Amarillo 2006).

728. Evidence of a judgment that terminated defendant's parental rights to three of her children after the date that she allegedly murdered her newborn infant was relevant at her capital murder trial under Tex. R. Evid. 401, and had relevance apart from mere proof of character conformity in compliance with Tex. R. Evid. 404(b), because an extraneous offense/bad act that took place subsequent to the offense for which a defendant was on trial did not make the extraneous offense/bad act inadmissible per se; furthermore, the judgment was introduced by the State after defendant had testified that the infant's death on the night in question was not the result of any intentional or knowing conduct on defendant's part, and the termination judgment contained findings by the trial judge that defendant "knowingly" placed or allowed her other children to remain in conditions dangerous to their physical or emotional well-being, which at least arguably made it more probable that defendant's acts or omissions on the night in question were done either intentionally or knowingly. Fergerson v. State, 2006 Tex. App. LEXIS 6589 (Tex. App. Beaumont July 26 2006).

729. In defendant's murder case, evidence of the history of physical abuse in the relationship between defendant and the victim was relevant and properly admitted; the extraneous-offense evidence rebutted defendant's claim of accident and showed that he intended to cause death, serious bodily injury, or bodily injury; in addition, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Brown v. State, 2006 Tex. App. LEXIS 5163 (Tex. App. Austin June 16 2006).

730. In a murder trial, there was no error in allowing a witness to testify that he had seen defendant in possession of a gun four to five years before the murders. Springsteen v. State, 2006 Tex. Crim. App. LEXIS 2340 (Tex. Crim.

App. May 24 2006).

731. Trial court did not err when it admitted evidence that defendant had been seen selling drugs a month before her indicted offense of being a felon in possession of a firearm because the testimony, elicited from a witness present when the indicted offense was committed, was relevant and tended to make the existence of defendant's intent to possess a firearm more likely than not, as the witness testified that he knew of five prior occasions on which defendant sold crack cocaine and also commented that drug dealers were often armed to protect themselves from being robbed. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

732. In a resisting arrest case, counsel was ineffective where, inter alia, counsel failed to investigate or interview defendant in detail about his criminal history or his prior contacts with the arresting officer; failed to seek discovery from the State; failed to file and obtain rulings on a motion in limine to require the State to raise extraneous matters outside the presence of the jury; failed to prepare defendant to testify; failed to object to evidence of inadmissible extraneous matters during the guilt phase; invited evidence of unadjudicated arrests during the punishment phase; and failed to object to failure of the punishment-phase charge to include a reasonable doubt instruction. Walker v. State, 195 S.W.3d 250, 2006 Tex. App. LEXIS 1381 (Tex. App. San Antonio 2006).

733. Where defendant was convicted of intoxication manslaughter, the trial court did not err by admitting evidence of his prior driving record at the punishment phase; the evidence was relevant to sentencing, because it gave the jury a complete picture of defendant's driving history. Bernal v. State, 2006 Tex. App. LEXIS 1002 (Tex. App. San Antonio Feb. 8 2006).

734. Defense counsel's lack of an objection to evidence that defendant put his hands over his front pockets during his pat-down, ran from the police, and discarded "little white bags" while in flight did not establish ineffective assistance of counsel because the evidence was relevant to show defendant's motive for striking a police officer and the reason for his flight, and the fact that the bags were never found did not make the officer's testimony inadmissible for lack of relevance or probativeness; furthermore, the evidence might also have been viewed as same transaction contextual evidence under Tex. R. Evid. 404(b) because the events surrounding the stop, flight, and arrest were so connected that they formed an indivisible criminal transaction. LeBleu v. State, 2006 Tex. App. LEXIS 887 (Tex. App. Beaumont Feb. 1 2006).

735. In a criminal prosecution for capital murder, the trial court did not err by allowing the prosecutor's questions regarding the possible exchange of sexual favors for forgiveness of a drug debt; the evidence was admissible to show the relationship between defendant and the victim. Whitmire v. State, 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

736. Trial court did not err in admitting into evidence extraneous offense evidence, specifically, nine other images of children engaged in types of sexual conduct, because (1) a jury could find beyond a reasonable doubt that defendant knowingly and intentionally possessed the additional nine images of child pornography; (2) the extraneous offenses made it more probable that defendant intentionally possessed the one image for which he was indicted; (3) the extraneous offenses were relevant to rebut the defensive theory of mistake; and (4) the probative value of the evidence outweighed the possibility of unfair prejudice. Boyd v. State, 2005 Tex. App. LEXIS 6907 (Tex. App. Eastland Aug. 25 2005).

737. Habeas petitioner's counsel's failure to object to the admission of evidence that the petitioner had used and sold illegal drugs roughly 10 years before his arrest for sex crimes was not relevant to the jury's sentencing determination. The petitioner's involvement with illegal drugs was separate and unrelated to his sex crimes, and was therefore not helpful to the jury in making its sentencing determination. Ward v. Dretke, 420 F.3d 479, 2005 U.S. App. LEXIS 16596 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1621, 164 L. Ed. 2d 334, 2006

U.S. LEXIS 2520, 74 U.S.L.W. 3543 (U.S. 2006).

738. Habeas petitioner's counsel's failure to object to the admission during the jury's sentencing determination of images of adult bestiality taken from the petitioner's computer. The images did not form part of the factual basis for the charges to which the petitioner had plead guilty, and had no relevance to the jury's sentencing determination apart from demonstrating the depths of depravity to which the petitioner had sunk; even if the evidence were relevant in some tangential way to the determination of his sentence, it was highly probable that considerations of unfair prejudice would have sufficed to keep this evidence from the jury. Ward v. Dretke, 420 F.3d 479, 2005 U.S. App. LEXIS 16596 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1621, 164 L. Ed. 2d 334, 2006 U.S. LEXIS 2520, 74 U.S.L.W. 3543 (U.S. 2006).

739. Evidence of an extraneous assault offense that defendant allegedly committed against his wife after her aggravated kidnapping and six days before his trial on that charge was admissible under Tex. R. Evid. 404(b) for the purpose of showing his intent to inflict bodily injury on his wife where defendant's intent was a fact of consequence because the indictment included an allegation that he intended to commit murder or to inflict bodily injury when he abducted his wife. Furthermore, evidence of defendant's subsequent alleged assault of his wife was relevant because his subsequent conduct made it more probable that he intended to inflict bodily injury on his wife during the charged offense. Simoneaux v. State, 2005 Tex. App. LEXIS 5628 (Tex. App. Tyler July 20 2005).

740. Court did not err by admitting evidence concerning the circumstances of a prior sexual assault conviction where defendant encountered the victims in the parking lot of their residences, waited for the victims to return to their rooms, approached them under the guise of needing help, and made advances toward raping them but ejaculated before penetration. Because intent was a material element of the offense on which the State carried the burden of proof, the probative value of the witness's testimony was high and was not overcome by the danger of unfair prejudice. Fields v. State, 2005 Tex. App. LEXIS 5494 (Tex. App. Austin July 14 2005).

741. In an injury to a child case where defendant contested his guilt by claiming that he did not injure the child but that she fell, the trial court did not err in permitting the State to introduce evidence that defendant had previously committed an extraneous offense against another young child as it may have been helpful to the jury to rebut defendant's defensive theory and show that he injured the victim. Furthermore, evidence of the extraneous offense was not of such a nature as to impair the efficacy of a limiting instruction: the evidence showed that the child involved in the extraneous offense was not seriously injured but, at most, had bruises on her face from defendant's hands. Harrell v. State, 2005 Tex. App. LEXIS 4578 (Tex. App. Eastland June 16 2005).

742. In a trial for indecency with a child, the trial court properly admitted evidence of a prior indecency conviction. The current charge arose from defendant's exposing himself, and he argued that he had merely forgotten to zip his pants; the extraneous offense evidence therefore tended to make a fact of consequence--whether defendant had or lacked intent to arouse or gratify sexual desire--more or less probable. Arp v. State, 2005 Tex. App. LEXIS 4535 (Tex. App. Texarkana June 15 2005).

743. In a murder trial, evidence was properly admitted, under Tex. R. Evid. 401 -- 404, of a shooting incident that occurred eight days after the murder. The extraneous offense evidence was relevant to the development of the case and was admissible to show the development of the investigation and defendant's intent or knowledge regarding the gun; as to prejudice, the evidence was presented almost matter-of-factly and included no injuries, disturbing photographs, or emotional testimony. Gonzales v. State, 2005 Tex. App. LEXIS 4532 (Tex. App. Amarillo June 14 2005).

744. Trial court should have excluded as irrelevant and prejudicial a BB gun that was found in a defendant's truck and that was not used during the charged burglary. The error was harmless, however, because the court did not

have fair assurances that the mind of an average juror would have found the State's case less persuasive had the BB gun not been admitted. Moreno v. State, 2005 Tex. App. LEXIS 4487 (Tex. App. Houston 1st Dist. June 9 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 6371 (Tex. App. Houston 1st Dist. Aug. 11, 2005).

745. Trial court did not abuse its discretion in admitting defendant's statement under Tex. R. Evid. 404(b) where it appeared that it believed that the portion of the statement in which defendant admitted to threatening a prostitute with a box cutter referred to the complainant because the statement corroborated the complainant's testimony and was relevant to the issue of consent. Furthermore, the statement was not inadmissible under Tex. R. Evid. 403 because it strengthened the State's case on the consent issue and because, while the acts described in the statement were probably distasteful to at least some, if not all, of the jury members, they were not any more inflammatory than the charged offense. Marc v. State, 166 S.W.3d 767, 2005 Tex. App. LEXIS 4228 (Tex. App. Fort Worth 2005).

746. In an aggravated assault trial, the fact that defendant was known to carry guns did not pertain to prior bad acts and was relevant to the disputed issue of whether defendant was in fact carrying a gun on the night in question. Morga v. State, 2005 Tex. App. LEXIS 2975 (Tex. App. Dallas Apr. 20 2005).

747. Trial court did not err in admitting evidence of two prior extraneous acts in defendant's trial on charges of possession of pseudoephedrine with the intent to manufacture methamphetamine because there was no direct evidence of defendant's intent, and intent could not necessarily be inferred from the act itself. The evidence of the prior extraneous act in which defendant was found with fresh track marks in his arm was relevant under Tex. R. Evid. 401 because methamphetamine use and addiction was highly probative regarding commission of the charged offense, and the evidence was admissible under Tex. R. Evid. 404(b) to show intent, plan, and absence of mistake. Fulfer v. State, 2005 Tex. App. LEXIS 2449 (Tex. App. El Paso Mar. 31 2005).

748. In a criminal trial for aggravated sexual assault, defendant's statement about robbing someone was part of a continuum of activity beginning with his presence in the victim's apartment. The statement was offered to assist the jury in identifying defendant as the perpetrator; the trial court properly admitted the statement. Williams v. State, 161 S.W.3d 680, 2005 Tex. App. LEXIS 2014 (Tex. App. Beaumont 2005).

749. Where defendant was tried for aiding seven men escape from prison, evidence of the post-escape crimes committed by the seven men bore heavily upon defendant's character and moral blameworthiness; the evidence was admissible to help the jury determine an appropriate sentence for defendant's crimes. Rodriguez v. State, 163 S.W.3d 115, 2005 Tex. App. LEXIS 1084 (Tex. App. San Antonio 2005).

750. In a murder trial, extraneous evidence was properly admitted regarding the specifics of cocaine that was purchased together by defendant and the victim because the evidence was relevant to motive. The ruling was within the zone of reasonable disagreement as to whether the evidence was more probative than prejudicial. Worsham v. State, 2004 Tex. App. LEXIS 4342 (Tex. App. Fort Worth May 13 2004).

751. Under Tex. R. Evid. 401, the trial court did not err in admitting evidence that a defendant ingested methamphetamine shortly before a murder was committed because the jury could have inferred from the evidence that the defendant's reasoning was altered, the evidence was offered to show the defendant's mental state rather than as character evidence, and the trial court engaged in a Tex. R. Evid. 403 balancing test and did not abuse its discretion in admitting the evidence. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App. LEXIS 7512 (Tex. App. Beaumont 2003).

752. There were sufficient similarities between aggravated robbery with a deadly weapon, the offense with which defendant was charged, and the extraneous offenses of aggravated sexual assault/aggravated kidnapping and kidnapping, to uphold the trial court's determination that the extraneous offense evidence was relevant under Tex. R. Evid. 401 and 404(b). Booker v. State, 103 S.W.3d 521, 2003 Tex. App. LEXIS 611 (Tex. App. Fort Worth 2003).

753. Court did not err in admitting the alleged victim's testimony that after defendant accused her of infidelity, he assaulted a neighbor, because the testimony was admissible as same-transaction contextual evidence. Lewis v. State, 2014 Tex. App. LEXIS 1837, 2014 WL 644812 (Tex. App. El Paso Feb. 19 2014).

Evidence : Relevance : Relevant Evidence

754. Information in defendant's driver's license record was properly admitted because it confirmed that his driver's license number was used to pawn rings on the day of the robbery, and it showed defendant's height, which indicated he was the person who had held a gun; the evidence supported a fact of consequence-that defendant participated in the robbery. Deleon v. State, 2014 Tex. App. LEXIS 9009 (Tex. App. Fort Worth Aug. 14 2014).

755. During defendant's trial for sexual assault of a child, the court did not err in excluding as irrelevant his proffered evidence that he had hepatitis B and the complainant did not because he did not offer direct evidence that he had hepatitis B at the time of the 2010 sexual assault; the actual evidence of his hepatitis B infection was his statement to the complainant's mother sometime in 2003 that he was infected. Liriano v. State, 2014 Tex. App. LEXIS 8772 (Tex. App. Houston 14th Dist. Aug. 12 2014).

756. Witness's testimony was relevant because the fact that defendant was angry and agitated earlier the same evening of the stabbing tended to prove his intent to commit an act clearly dangerous to human life against the victim without a reasonable belief that deadly force was necessary to protect himself. Allen v. State, 2014 Tex. App. LEXIS 7895 (Tex. App. Houston 14th Dist. July 22 2014).

757. Evidence of methamphetamine found at the murder scene was properly admitted because it was relevant to establish a motive for defendant's actions and to rebut her claim of accidentally shooting the victim; there was no evidence presented that defendant was in possession of the drugs, and the evidence was admissible because the jury could infer that the prior relationship between the victim and defendant was one that involved drugs. Taylor v. State, 2014 Tex. App. LEXIS 7282 (Tex. App. Corpus Christi July 3 2014).

758. Court did not abuse its discretion by excluding the testimony of defendant's expert as irrelevant as to whether the trooper was lawfully discharging an official duty when defendant drove at him because the expert's opinion regarding the justification for the use of force was not based on any information regarding the trooper's encounter with defendant. Ramos v. State, 2014 Tex. App. LEXIS 6818 (Tex. App. Austin June 26 2014).

759. Defendant did not point to any evidence that the victim's mother hit the victim order to get the victim to lie about being sexually assaulted; evidence that the mother had allegedly hit the victim, without more, was irrelevant to the mother's veracity. Coleman v. State, 2014 Tex. App. LEXIS 6691, 2014 WL 2809064 (Tex. App. Fort Worth June 19 2014).

760. Where defendant appealed his conviction for intoxication manslaughter, the trial court did not err by allowing one of the State's experts to testify about the results of his blood test and by admitting her report into evidence. His blood alcohol concentration near the time of the collision was relevant to whether he had lost the use of his normal physical and mental faculties at the time of the collision. Martin v. State, 2014 Tex. App. LEXIS 6544, 2014 WL 2802912 (Tex. App. San Antonio June 18 2014).

761. Appellant's conviction for felony theft was affirmed because the trial court did not abuse its discretion in excluding evidence where nothing about the other individual's arrest for the January 30 break-in made any facts of consequence to the determination of appellant's guilt or innocence in the January 25 theft any more or less probable. Graves v. State, 2014 Tex. App. LEXIS 6522 (Tex. App. Houston 1st Dist. June 17 2014).

762. Where a former employee alleged that a former employer terminated the employee because the employee refused to drive a truck without a required permit and a jury found in favor of the employer, any error in excluding seven overweight permits as irrelevant was harmless because the excluded permits were not relevant to the first jury question since whether the truck was overweight on the day in question was not relevant to whether the employee was discharged, and the jury did not reach the remaining questions. Nezat v. Tucker Energy Servs., 437 S.W.3d 541, 2014 Tex. App. LEXIS 6518, 38 I.E.R. Cas. (BNA) 1033 (Tex. App. Houston 14th Dist. June 17 2014).

763. In a sexual assault case, the jury was to determine whether defendant penetrated the child's sexual organ and an expert properly relied on a case study to support his opinion that penetration of the child's sexual organ could have occurred even in the absence of physical evidence of penetration; therefore, the discussion of the study served to make the fact of penetration more probable in light of the expert's medical examination findings. Allen v. State, 436 S.W.3d 815, 2014 Tex. App. LEXIS 6465, 2014 WL 2619438 (Tex. App. Texarkana June 13 2014).

764. Court properly allowed evidence of defendant's prior conviction for possession of cocaine because the defensive theory was that he did not know the cocaine was in his pocket because it was placed there while he was unconscious; therefore, the evidence was relevant to rebut defendant's defensive theory. Rios v. State, 2014 Tex. App. LEXIS 5867 (Tex. App. El Paso May 30 2014).

765. Counsel's testimony was insufficient to support an award of attorney's fees in a suit affecting the parent-child relationship because the mother did not identify her counsel as an expert on attorney's fees in response to the father's request for disclosure and did not show good cause or a lack of unfair surprise or prejudice, which made the attorney's testimony incompetent and irrelevant. In re B.L.B., 2014 Tex. App. LEXIS 5447 (Tex. App. Corpus Christi May 22 2014).

766. Trial court abused its discretion in denying the deletions and revisions in the lease drafts on hearsay and relevancy grounds in parties' dispute over the terms of an oil and gas lease because they were offered to show what was said, such that they were not hearsay, and they were clearly relevant to the parties' intentions. PNP Petroleum I, LP v. Taylor, 438 S.W.3d 723, 2014 Tex. App. LEXIS 5402, 180 Oil & Gas Rep. 1049 (Tex. App. San Antonio May 21 2014).

767. Because a mandatory settlement credit did not have to be pleaded as an affirmative defense, the trial court did not err in admitting the settlement agreement into evidence; the existence and amount of the settlement were facts of consequence in the case. Dalworth Restoration, Inc. v. Rife-Marshall, 433 S.W.3d 773, 2014 Tex. App. LEXIS 5271, 2014 WL 1941822 (Tex. App. Fort Worth May 15 2014).

768. Assault defendant failed to request notice of other crimes and acts evidence under Tex. R. Evid. 404(b) and therefore could not complain of the adequacy of the State's notice; moreover, the notice gave her reasonable notice of a neighbor's expected testimony that defendant sought to bribe her to say that the victim struck defendant first. Additionally, this bribery evidence was relevant as consciousness of guilt and was not unfairly prejudicial. Cavazos v. State, 2014 Tex. App. LEXIS 5045, 2014 WL 1881691 (Tex. App. Amarillo May 8 2014).

769. Defendant was not was denied the right to present a full defense when the trial court refused to allow his DNA expert to testify regarding lab bias because the expert's proposed testimony was not relevant to the issues before the jury; absent any evidence of lab bias, the substance of the proposed testimony-that context could

influence experts and that all human beings had bias-was more appropriate for cross-examination than for expert testimony. Millage v. State, 2014 Tex. App. LEXIS 3801, 2014 WL 1407331 (Tex. App. Dallas Apr. 8 2014).

770. Child victim's therapist's testimony was relevant in defendant's continuous sexual abuse of a child trial where: (1) the therapist testified that the child was in group therapy with him for approximately 10 sessions; (2) he described the child's demeanor in therapy and her ability to interact with others in the group; (3) he testified he came up with an individual treatment plan for her; and (4) he gave more general testimony concerning the many ways children make their outcries after abuse, including the issue of delayed outcry that was tied to the case in that the jury would need to evaluate the credibility of the child's delayed outcry. Paramo v. State, 2014 Tex. App. LEXIS 3717, 2014 WL 1413794 (Tex. App. Dallas Apr. 7 2014).

771. Trial court did not abuse its discretion by admitting evidence regarding defendant's membership in a gang because it was relevant to show defendant's motive for shooting the two victims and to rebut defendant's theory that he shot at the vehicle in self-defense. Johnson v. State, 2014 Tex. App. LEXIS 3618 (Tex. App. Houston 14th Dist. Apr. 3 2014).

772. Trial court did not abuse its discretion by admitting defendant's shirts with gun shot residue particles on them because the evidence was relevant, as the shirts were collected from defendant's vehicle two days after the murder. The evidence was not prejudicial because it showed defendant's connection to a discharged weapon, directly or indirectly, at some point in time. Burks v. State, 2014 Tex. App. LEXIS 3243, 2014 WL 1285731 (Tex. App. Austin Mar. 26 2014).

773. Statement that defendant made in jail to the effect that he was in jail for not following the rules could reasonably have led to an inference that he knew and chose not to follow the "rule" that he was not allowed to be in possession of a firearm because he was a felon; the statement was relevant to whether or not he was the individual who was in possession of the firearm. Greer v. State, 436 S.W.3d 1, 2014 Tex. App. LEXIS 3192, 2014 WL 1621787 (Tex. App. Waco Mar. 20 2014).

774. Because defendant failed to object to the relevance of his jailhouse tattoos, as opposed to an alleged gang affiliation, and failed to object to the State's continued questioning about his tattoos, testimony concerning his tattoos was admitted into evidence without objection. While defendant failed to obtain an adverse ruling in the first place, even if he had, he would have waived the objection by failing to either interpose it each time the evidence in question was offered or seek a running objection. Shipley v. State, 2014 Tex. App. LEXIS 2868, 2014 WL 1004498 (Tex. App. Texarkana Mar. 14 2014).

775. Trial court did not abuse its discretion by not allowing defendant to cross-examine the CPS supervisor about an investigation into the victims' adoptive grandfather because testimony was irrelevant, as the supervisor testified that the grandfather sexually abused his sons not his daughters and there was no evidence that any victims identified the grandfather as the perpetrator of the sexual abuse. Oliver v. State, 2014 Tex. App. LEXIS 2836, 2014 WL 1016244 (Tex. App. Waco Mar. 13 2014).

776. Trial court did not abuse its discretion by not allowing defendant to cross-examine the foster mother because the evidence was not relevant, as none of the victims made outcries of sexual abuse against their adopted grandfather, the foster mother's adult son, or the foster mother's ex-husband, and the foster mother's testimony was that none of the victims were left alone with any of those men. The foster's mother's encounters with CPS and her own past experience as a victim of sexual abuse was also irrelevant. Oliver v. State, 2014 Tex. App. LEXIS 2836, 2014 WL 1016244 (Tex. App. Waco Mar. 13 2014).

777. Defendant's conviction for driving while intoxicated was appropriate because testimony that defendant showed signs of impairment consistent with the use of hydrocodone supplied a logical connection between defendant's admitted use of hydrocodone and his driving. As such, that testimony was relevant; because the challenged evidence was relevant and reliable, the trial court did not abuse its discretion in admitting the videorecording of defendant's statement and the expert's testimony. Everitt v. State, 2014 Tex. App. LEXIS 1667, 2014 WL 586100 (Tex. App. Houston 1st Dist. Feb. 13 2014).

778. Exclusion of testimony by defendant's wife, who was also the complainant's older sister, regarding alleged prior sexual abuse by the complainant's father was proper because it would have confused or distracted the jury from the main issue-whether defendant perpetrated the crimes against the complainant-and would have been more prejudicial than probative. The complainant, who was twenty-three at the time of trial, positively identified defendant, and no one else, as the perpetrator of the charged offenses, and when questioned outside the presence of the jury, the complainant denied any sexual abuse at the hands of her father. Johnson v. State, 2014 Tex. App. LEXIS 1369, 2014 WL 505332 (Tex. App. Waco Feb. 6 2014).

779. At defendant's trial for robbery, the trial court did not err in admitting testimony regarding his efforts to resist arrest because evidence relevant to his flight from the scene was a circumstance indicative of guilt. Johnson v. State, 2014 Tex. App. LEXIS 471, 2014 WL 222929 (Tex. App. Corpus Christi Jan. 16 2014).

780. To be relevant in this driving while intoxicated case, the evidence needed to influence the jury's determination of whether defendant was intoxicated. Parr v. State, 2014 Tex. App. LEXIS 183, 2014 WL 69567 (Tex. App. Corpus Christi Jan. 9 2014).

781. Defendant admitted to taking a Xanax pill at noon and drinking at least two drinks at a bar on the day he was arrested, and he was arrested about four hours after consuming the Xanax, such that the pharmacist's testimony was relevant to the jury's determination about whether the combination of Xanax and alcohol contributed to defendant's intoxication. Parr v. State, 2014 Tex. App. LEXIS 183, 2014 WL 69567 (Tex. App. Corpus Christi Jan. 9 2014).

782. Taxing Authorities' legal theory concerning abandonment of ownership rights had to fail because none of the Taxing Authorities' evidence concerning activities or conditions on the property was relevant to the trial court's inquiry of who was entitled to the excess proceeds. Dallas County City of Grand Prairie v. Sides, 430 S.W.3d 649, 2014 Tex. App. LEXIS 5042, 2014 WL 1847415 (Tex. App. Dallas May 8 2014).

783. Without knowing the terms of the settlement agreement, there was no basis for finding that the location, amount or expenditure of the settlement funds was relevant to a claim or defense in the underlying suit or was calculated to lead to the discovery of admissible evidence; discovering the total amount of the settlement would not reveal anything about the owner's alleged role in hiring a company. In re Bdpj Houston, Llc, 420 S.W.3d 309, 2013 Tex. App. LEXIS 15491, 2013 WL 6907155 (Tex. App. Houston 14th Dist. Dec. 31 2013).

784. Discovery regarding the location, amount, or expenditure of the settlement funds would not be relevant to whether the owner held money which in equity belonged to the manager, and thus the trial court abused its discretion in compelling discovery that was not relevant, and conditional mandamus relief was granted. In re Bdpj Houston, Llc, 420 S.W.3d 309, 2013 Tex. App. LEXIS 15491, 2013 WL 6907155 (Tex. App. Houston 14th Dist. Dec. 31 2013).

785. Sometimes a settlement agreement is protected with conditions of confidentiality, but that does not make the agreement or its contents undiscoverable as a matter of law, and the rule provides that a settlement agreement is discoverable if relevant to the underlying litigation without regard to the settlement's confidential nature. In re Bdpj

Houston, Llc, 420 S.W.3d 309, 2013 Tex. App. LEXIS 15491, 2013 WL 6907155 (Tex. App. Houston 14th Dist. Dec. 31 2013).

786. Owner consistently argued that the information regarding a settlement was not relevant, the manager did not cite authority showing that an objection was ineffective because it was not based on privilege or confidentiality, and the owner did not waive its objections. In re Bdpj Houston, Llc, 420 S.W.3d 309, 2013 Tex. App. LEXIS 15491, 2013 WL 6907155 (Tex. App. Houston 14th Dist. Dec. 31 2013).

787. Defendant suffered no harm from the admission of evidence of a prior offense of aggravated assault/family violence against the same victim because, by his plea, defendant admitted he had a dating relationship with the victim, and the State only referenced the exhibit in its final argument to show a dating relationship between defendant and the victim. Pickett v. State, 2013 Tex. App. LEXIS 15410, 2013 WL 6923977 (Tex. App. Waco Dec. 27 2013).

788. Upon entry of an agreed final divorce decree, the husband filed a motion for new trial in which he alleged his attorney lacked the authority to sign a settlement agreement on his behalf while he was in federal prison. The trial court did not abuse its discretion when it excluded an exhibit consisting of an engagement letter between the husband and his attorney, because the husband failed to explain how the letter made it more probable that the presumption of authority to settle could be overcome. Phillips v. Phillips, 2013 Tex. App. LEXIS 15275, 2013 WL 6726819 (Tex. App. Houston 14th Dist. Dec. 19 2013).

789. On appeal of defendant's murder conviction, his complaint that the trial court abused its discretion by overruling his Rule 401 relevancy objection to three of the State's exhibits was not preserved for review. His appellate brief lacked a legal argument supported by authority asserting how the trial court abused its discretion or how the evidence to which he objected was irrelevant. Green v. State, 2013 Tex. App. LEXIS 14355 (Tex. App. El Paso Nov. 22 2013).

790. State was properly permitted to use a demonstrative exhibit of a photograph of two capsules of a prescription drug because it had unmistakable relevance, as it corroborated the victim's testimony, and it had little to no inflammatory effect unrelated to its probative value; the evidence tended to solve an issue in the case by shedding some light on the subject at hand-the drug that was given to the victim and her half-brothers to make them sleepy so that defendant could commit the child sexual assualt offenses against the victim. Ruiz v. State, 2013 Tex. App. LEXIS 14013, 2013 WL 6047030 (Tex. App. Houston 14th Dist. Nov. 14 2013).

791. Court did not abuse its discretion by not allowing the patient's counsel to pose certain questions, because counsel provided an extensive cross-examination of the doctor concerning his opinion that the patient had a behavioral abnormality that made him likely to commit a predatory act of sexual violence, and courts were allowed discretion to control testimony to avoid confusing the jury. In re Romo, 2013 Tex. App. LEXIS 13495 (Tex. App. Beaumont Oct. 31 2013).

792. In a civil commitment proceeding, defense counsel's cross-examination of an expert was not improperly limited because counsel sought to elicit information that did not make the existence of any fact of consequence to the determination of whether an inmate was a sexually violent predator more or less probable. In re Ramirez, 2013 Tex. App. LEXIS 12917, 2013 WL 5658597 (Tex. App. Beaumont Oct. 17 2013).

793. Because defendant presented no evidence showing the relevance of the witness's prior misdemeanor conviction or the circumstances surrounding his alleged dismissal from the sheriff's department, the trial court did not err by limiting her cross-examination of him. Sheffield v. State, 2013 Tex. App. LEXIS 12789, 2013 WL 5638878

(Tex. App. Houston 1st Dist. Oct. 15 2013).

794. Trial court could have found that the pages from the company's website in 2010 were not relevant because the issue was whether the company made an offer on its website in 2009, and as the court found that the plain meaning of the words on the website in 2009 was not an offer, the homeowners did not show that the ruling probably caused the rendition of an improper judgment. Mcatee v. City of Austin, 2013 Tex. App. LEXIS 12518, 2013 WL 5855638 (Tex. App. Austin Oct. 10 2013).

795. Trial court did not abuse its discretion by precluding defense counsel from asking a witness whether she saw the child victim play with her sexual organs based on Tex. R. Evid. 412 because the testimony was not enough to make it probable that a three-year-old child masturbating in some vague way two days before the assault caused the presence of physical trauma two days later. In addition, the incomplete information was of minimal probative value, even if relevant. Turner v. State, 2013 Tex. App. LEXIS 12690, 2013 WL 5614311 (Tex. App. Amarillo Oct. 10 2013).

796. Trial court did not abuse its discretion in admitting a photograph of defendant's back yard taken in 2006 because it showed defendant's knowledge and intent, as some lumber and a yellow chair were in defendant's backyard three years before similar items were added to the waste pile after defendant's encounter with an officer. Mellen v. State, 2013 Tex. App. LEXIS 12091, 2013 WL 5520369 (Tex. App. Eastland Sept. 26 2013).

797. In a prosecution for interference with child custody in violation of Tex. Penal Code Ann. § 25.03(a)(1), as there was no mutual agreement between defendant and the children's mother to vary from the divorce decree's terms of possession, evidence of their past dealings regarding possession of the children was properly excluded as irrelevant. Gallegos v. State, 2013 Tex. App. LEXIS 12149, 2013 WL 5460044 (Tex. App. Amarillo Sept. 26 2013).

798. In a prosecution for interference with child custody, the trial court properly excluded evidence that defendant sought to present to show that the mother was not a fit custodial parent, as it was not relevant to any issue in the case. Gallegos v. State, 2013 Tex. App. LEXIS 12149, 2013 WL 5460044 (Tex. App. Amarillo Sept. 26 2013).

799. Medical records were properly excluded in a medical malpractice action because no expert testified that the child's twin's records were significant to an opinion on the cause of the child's death or the standard of care, the expert did not list the twin's records among the records he had reviewed in formulating his opinions, nor did he discuss the twin's hospitalization in his testimony. Woodard v. Sherwood, 2013 Tex. App. LEXIS 11923 (Tex. App. Amarillo Sept. 23 2013).

800. In a sexually violent predator civil commitment case brought under Tex. Health & Safety Code Ann. § 841.003(a)(2), the trial court did not err in admitting a videotape appellant had made of a comatose woman that demonstrated the extent of his voyeurism and the escalation of his voyeurism to sexual assault, pursuant to Tex. R. Evid. 401. In re Chapman, 2013 Tex. App. LEXIS 11404, 2013 WL 4773231 (Tex. App. Beaumont Sept. 5 2013).

801. Trial court did not abuse its discretion by admitting a shovel into evidence because the State's theory was that defendant dumped the victim's body in a wooded area and covered the body with grass clippings, rocks, leaves, and bamboo, and the fact he had a shovel readily available to assist him was relevant. Briscoe v. State, 2013 Tex. App. LEXIS 10859 (Tex. App. Austin Aug. 29 2013).

802. Trial court did not abuse its discretion in overruling defense counsel's relevance objection to a question posed to defendant's girlfriend regarding whether members of the Nigerian community generally preferred to handle themselves matters that were otherwise appropriate for law enforcement because it was relevant to the question of

whether defendant's witnesses were biased against the State. Agbogwe v. State, 414 S.W.3d 820, 2013 Tex. App. LEXIS 11103 (Tex. App. Houston 1st Dist. Aug. 29 2013).

803. Defendant's conviction for driving while intoxicated was proper because the statutory-warning form did not constitute improper "bolstering" of the officer's earlier testimony. Although the form confirmed the officer's testimony that defendant had refused to provide a blood sample and had refused to sign the form, it also contained the statutory warnings themselves, a physical description of defendant, identifying information such as defendant's date of birth and driver's license number, and information concerning the date and time of the alleged offense. Condarco v. State, 2013 Tex. App. LEXIS 10741 (Tex. App. Austin Aug. 27 2013).

804. Because the evidence of defendant's extraneous rule violations at the treatment center was irrelevant to prove that she consumed alcohol on a specific date, any error in the admission of that evidence was harmless. Strother v. State, 2013 Tex. App. LEXIS 10606 (Tex. App. Houston 14th Dist. Aug. 22 2013).

805. Testimony from a State's witness that defendant appeared to be either high on drugs or coming off a high on the morning of his attack against the complainant was admissible because it established an affirmative link between defendant's earlier condition and the offense, rather than being mere background contextual evidence; defendant appeared high earlier in the day, asked the witness for money, and told the complainant he broke into her house because he was looking for money. Steele v. State, 2013 Tex. App. LEXIS 10488 (Tex. App. Dallas Aug. 20 2013).

806. Daughter's statements in her affidavit signed two days after the night her mother came to pick her up were not statements of her then existing state of mind or spontaneous remarks made while a sensation was being experienced such that they were admissible; the affidavit containing the daughter's statements in a conservatorship proceeding nearly two years prior to her death were not relevant to the damages suffered by the father due to the loss of his daughter's companionship and society. In re Estate of Macdonald, 2013 Tex. App. LEXIS 10135, 2013 WL 4081419 (Tex. App. Dallas Aug. 13 2013).

807. At issue in the case was the father's mental anguish following the death of his daughter; the single picture of the daughter's body was relevant to that issue and was properly admitted. In re Estate of Macdonald, 2013 Tex. App. LEXIS 10135, 2013 WL 4081419 (Tex. App. Dallas Aug. 13 2013).

808. Expert's deposition testimony and accompanying report did not constitute admissible evidence, because the deposition testimony and report were conclusory and lacked indicia of reliability. Schronk v. Laerdal Med. Corp., 2013 Tex. App. LEXIS 9916 (Tex. App. Waco Aug. 8 2013).

809. At the punishment phase of defendant's trial for robbery, the trial court did not abuse its discretion by admitting into evidence photographs of his wife after a domestic violence incident because the photographs were "relevant" for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) to a police officer's testimony that defendant might have a propensity toward intoxication and violence; the photographs were also helpful to the jury in assessing a proper sentence. The definition of "relevant," as stated in Tex. R. Evid. 401, did not readily apply. Cordova v. State, 2013 Tex. App. LEXIS 9947 (Tex. App. Corpus Christi Aug. 8 2013).

810. In defendant's unauthorized use of a motor vehicle case, a court did not err during punishment the phase by admitting a photograph of defendant's chest tattoo that read "murder is my motive" because a defendant's choice of tattoos was some evidence of his character, and therefore, the photograph was relevant to defendant's character. Gossett v. State, 2013 Tex. App. LEXIS 9474, 2013 WL 3943108 (Tex. App. El Paso July 31 2013).

811. In defendant's evading arrest case, the court did not err during the punishment phase by admitting a photograph of defendant's chest tattoo that read "murder is my motive" because a defendant's choice of tattoos was some evidence of his character, and therefore, the photograph was relevant to defendant's character. Gossett v. State, 2013 Tex. App. LEXIS 9473, 2013 WL 3943120 (Tex. App. El Paso July 31 2013).

812. During defendant's sentencing hearing for his aggravated robbery convictions, the court did not err in admitting evidence regarding the general reputation of a gang and his tattoos because the probative value of a detective's testimony was not substantially outweighed by the danger of unfair prejudice; the testimony was relevant. Hickman v. State, 2013 Tex. App. LEXIS 9323 (Tex. App. Dallas July 29 2013).

813. Trial court did not abuse its discretion by admitting evidence of defendant and an accomplice entering a casino shortly after robbing the victim because it provided at least a small nudge in providing corroboration of the accomplice's testimony, whose credibility was highly contested. Maldonado v. State, 2013 Tex. App. LEXIS 9277 (Tex. App. Waco July 25 2013).

814. Trial court did not abuse its discretion by admitting baggies of cocaine and a lab report because the evidence was relevant, as there was testimony by multiple witnesses that defendant and his accomplices used cocaine together after the murder, the baggies were found with the money that had been taped in the trunk of the vehicle in which defendant and his accomplices were riding at the time of their arrest and helped corroborate the accomplice's testimony. Maldonado v. State, 2013 Tex. App. LEXIS 9277 (Tex. App. Waco July 25 2013).

815. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

816. Where defendant was convicted of multiples counts of aggravated sexual assault, attempted aggravated sexual assault, and indecency with a child, the trial court did not err in admitting the testimony of the two sexual assault nurse examiners. The testimony of the nurses as to the children's accounts of abuse by their grandfather tended to make more probable the fact that the abuse actually took place; accordingly, the evidence was relevant. Trevino v. State, 2013 Tex. App. LEXIS 8618 (Tex. App. Corpus Christi July 11 2013).

817. In a misappropriation of trade secrets action, the court did not err in excluding appellees' prior pleadings in which they accused 16 parties of conspiring to steal trade secrets; the minimal relevance of the pleadings was substantially outweighed by the risk of distracting the factfinder from the issues by provoking speculation regarding the disposition or settlement of the cases against the former defendants. Southwestern Energy Prod. Co. v. Berry-Helfand, 411 S.W.3d 581, 2013 Tex. App. LEXIS 8549, 182 Oil & Gas Rep. 798 (Tex. App. Tyler July 10 2013).

818. Proffered expert testimony, even if relevant, was not necessarily admissible, and assuming the trial court erred in limiting appellant's cross-examination of the expert, given his testimony on his credentials and that supporting his methodology, any error likely made no difference in the jury's verdict. In re Weissinger, 2013 Tex. App. LEXIS 7819, 2013 WL 3355758 (Tex. App. Beaumont June 27 2013).

819. In a liability insurance coverage dispute, testimony on whether the claimants had contracted asbestosis was properly excluded as irrelevant and confusing because bodily injury, as defined in the policies, occurred upon exposure to asbestos and was not determined on a case-by-case basis. Certain Underwriters at Lloyd's v. Chi. Bridge & Iron Co., 406 S.W.3d 326, 2013 Tex. App. LEXIS 7856, 2013 WL 3270615 (Tex. App. Beaumont June 27 2013).

820. Although some of the testimony concerning the course of litigation was relevant to the attorney's breach of contract claim, other evidence that was admitted without objection was relevant only to the client's affirmative defense of prior material breach; it was clear the parties understood the issue of prior breach and that the issue was actually tried. James A. West, P.C. v. Pugh, 2013 Tex. App. LEXIS 7911 (Tex. App. Houston 1st Dist. June 27 2013).

821. Facts in the certificates of account status were relevant, in connection with a claim that a company could not affirmatively seek to enforce an arbitration clause by not meeting all franchise tax requirements under Tex. Tax Code Ann. § 171.253, and thus it was appropriate for the court to take judicial notice of the certificates from the Texas Comptroller. Dish Network L.L.C. v. Brenner, 2013 Tex. App. LEXIS 7838, 163 Lab. Cas. (CCH) P61367 (Tex. App. Corpus Christi June 27 2013).

822. Jury had the responsibility of resolving a credibility issue, and the court presumed the jury did so in favor of the verdict; furthermore, this particular testimony was not relevant to the appeal. Zavadil v. State, 2013 Tex. App. LEXIS 7840 (Tex. App. Corpus Christi June 27 2013).

823. Court did not abuse its discretion in admitting the extraneous offense evidence (unadjudicated aggravated robbery) over defendant's objections, because the evidence supported the State's theory that defendant intended to participate in the offenses. Menendez v. State, 2013 Tex. App. LEXIS 7742 (Tex. App. Beaumont June 26 2013).

824. Officer saw appellant had slurred speech, bloodshot eyes, was unsteady on his feet, and smelled of alcohol, and this supported a finding of intoxication; furthermore, the officer said appellant displayed all clues of intoxication on a horizontal gaze nystagmus test, appellant said he had consumed a drink that evening and he refused to submit to a blood alcohol test or other field sobriety test, which was relevant to intoxication, and his speeding was also a factor the jury could have considered in his driving while intoxicated trial. Lovett v. State, 2013 Tex. App. LEXIS 7636 (Tex. App. Houston 14th Dist. June 25 2013).

825. Relevant to the offense of aggravated assault was a weapon, and the exhibit gun had no inflammatory attributes and was presented only as an aid to the firearm expert's testimony, such that the trial court did not err in admitting the exhibit for demonstrative purposes. Moore v. State, 2013 Tex. App. LEXIS 7436 (Tex. App. San Antonio June 19 2013).

826. During defendant's trial for burglary of a habitation with intent to commit sexual assault, the court did not err in allowing a witness to testify that he made sexual advances toward her while they were on a date and that she rejected his advances because the testimony was relevant to determining his intent and state of mind when he entered the victim's house about two hours later. Badura v. State, 2013 Tex. App. LEXIS 7249 (Tex. App. Eastland June 13 2013).

827. Cost of one complainant's medical care was not relevant to any guilt/innocence issue because it did not tend to make more or less probable the existence of any fact of consequence related to the elements of the crime of intoxication assault, but this was not reversible error under Tex. R. App. P. 44.2(b) and did not have a substantial or injurious effect on the jury's determination of guilt, given that (1) the extent of the complainants' injuries was not contested and the evidence each one suffered serious injuries was overwhelming, (2) when later evidence of medical expenses were admitted, defendant did not object, (3) evidence of the various injuries suffered was properly admitted to prove an element of the offense, that each complainant suffered serious bodily injury, and (4) the jury would likely have surmised that the required medical care would have been costly. Sharp v. State, 2013 Tex. App. LEXIS 7235 (Tex. App. Eastland June 13 2013).

828. Negotiability of the note was not relevant in this case between the original parties to the note; precedent established that the elements of a claim for nonpayment of a promissory note were the same whether the instrument was negotiable or not. Ropa Exploration Corp. v. Barash Energy, 2013 Tex. App. LEXIS 7290 (Tex. App. Fort Worth June 13 2013).

829. Based on his conviction for first-degree felony offense burglary of a habitation with intent to commit sexual assault, defendant did not show why it was reasonable for him to believe that the findings of fact and conclusions of law established he was not required to comply with sex-offender registration, Tex. Code Crim. Proc. Ann. art. 62.001(5)(D); it was within the trial court's discretion to determine that the findings of fact and conclusions of law were not relevant evidence. Durham v. State, 2013 Tex. App. LEXIS 7301 (Tex. App. Houston 1st Dist. June 13 2013).

830. Relevance was not the only grounds on which the evidence was excluded; alleged rebuttal evidence and to be offered to rebut other evidence, not as part of the case-in-chief, and in many instances the evidence was sought to be offered as part of appellant's case-in-chief or the rebuttal arguments they made were in response to argument not in evidence. Estate of Muniz v. Ford Motor Co., 2013 Tex. App. LEXIS 7158 (Tex. App. San Antonio June 12 2013).

831. Limited liability company's argument that the forum-selection clause was procured through fraud was relevant, if at all, to the enforceability of the clause, not to whether the parties otherwise entered into an agreement that contained the clause. In re Harris Corp., 2013 Tex. App. LEXIS 6769, 2013 WL 2631700 (Tex. App. Austin June 4 2013).

832. Father claimed there should have been separate trials, but the issue to be resolved against the father and mother was whether their rights to the child were to be terminated, and the petition alleged the same grounds, and the facts supporting grounds for termination under Tex. Fam. Code Ann. § 161.001(1)(E), (2) showed that one parent's endangering conduct often related to the other's same conduct; the parents' admitted drug use, the mother's inability to provide a safe environment, and the father's repeated incarcerations supported the claim that the father endangered the child, and these facts were relevant to the best interest determination because the children were often left with the mother when the father was incarcerated, and neither one was able to provide a safe environment long-term, plus they lacked adequate family support, and the housing the father provided created unsanitary living conditions, and thus the case against the mother and father were not properly severable because the two cases involved the same issues and facts and were intertwined, for purposes of Tex. R. Civ. P. 41, 174. In the Interest of T.G., 2013 Tex. App. LEXIS 6714 (Tex. App. Tyler May 31 2013).

833. Appellant objected to testimony on grounds that it was more prejudicial than probative, presumably under Tex. R. Evid. 403, and when the State sought to admit photographs, appellant set forth a relevance objection, but at neither time did appellant assert a due course of law or due process objection, plus he failed to continue objecting and did not obtain a running objection or ask for a hearing outside of the jury's presence, and thus he failed to preserve this claim for review. Mccowan v. State, 2013 Tex. App. LEXIS 6138 (Tex. App. Fort Worth May 16 2013).

834. Although a corporation tried to argue its declaratory judgment sought relief that was broader than a mere denial of a company's clams, any such argument was irrelevant; the corporation failed to establish its ownership interest in the stock, and the corporation could not maintain a declaratory judgment claim for the right to cancel preferred shares because it did not own any shares to cancel, and the trial court did not err in granting summary judgment in this regard. Hydroscience Techs., Inc. v. Hydroscience, Inc., 401 S.W.3d 783, 2013 Tex. App. LEXIS 5575 (Tex. App. Dallas May 7 2013).

835. Evidence of defendant's cocaine use after the charged murder offense was admissible to show his consciousness of guilt and had relevancy beyond character conformity because defendant stated that he went on a cocaine binge because he felt guilty about the murder. Shuff v. State, 2013 Tex. App. LEXIS 5469 (Tex. App. Houston 1st Dist. May 2 2013).

836. Lender discussed the irrelevancy of the failure to pay a fee, the existence or not of a closing, and other items, but these factors had no relevance as to whether an informal fiduciary relationship existed; the court had to look to the evidence of the parties' relationship prior to the specific transaction. Constr. Fin. Servs., Inc. v. Chicago. Title INS. Co., 2013 Tex. App. LEXIS 5339 (Tex. App. San Antonio May 1 2013).

837. It was not necessary to have a written agreement between the lender and title company, or an actual purchase of services, and the absence of consideration was not relevant; it was enough to establish consumer status, for purposes of Tex. Bus. & Com. Code Ann. § 17.45(4), if the lender sought to acquire the services of the title company in good faith. Constr. Fin. Servs., Inc. v. Chicago. Title INS. Co., 2013 Tex. App. LEXIS 5339 (Tex. App. San Antonio May 1 2013).

838. Trial court did not abuse its discretion by excluding evidence of another potential suspect because defendant made an offer of proof but did not tender any other evidence connecting his brother's alleged drug use or dealing to his murder. Honish v. State, 2013 Tex. App. LEXIS 5139 (Tex. App. Fort Worth Apr. 25 2013).

839. Father said he would keep living with the mother as long as she was making efforts to fight her alcohol problem, and his refusal or inability to grasp how the alcoholism affected the children was a major issue, such that the trial court could have properly considered the severity of the mother's alcoholism as relevant to the issue of whether the father's rights were to be terminated. In re O.N.H., 401 S.W.3d 681, 2013 Tex. App. LEXIS 5000, 2013 WL 1749419 (Tex. App. San Antonio Apr. 24 2013).

840. Trial court did not err by excluding a defense witness's testimony as it related to defendant's neighbor's arrests and drug-related involvement with police because while there was evidence indicating that the neighbor might have been the anonymous tipster, there was no evidence that he planted the drugs, and therefore the fact that he may have been tipster was not relevant to the jury's determination of whether defendant possessed drugs. Even if the evidence was relevant, the trial court could have reasonably concluded that the relevance was substantially outweighed by the danger of confusing the jury or causing undue delay. Ivie v. State, 407 S.W.3d 305, 2013 Tex. App. LEXIS 4876 (Tex. App. Eastland Apr. 18 2013).

841. Trial court did not err by excluding an agent's testimony concerning the identity of the tipster because the agent stated he did not know but only had ideas as to who the tipster was. Ivie v. State, 407 S.W.3d 305, 2013 Tex. App. LEXIS 4876 (Tex. App. Eastland Apr. 18 2013).

842. Trial court did not err by refusing to allow defendant to cross-examine an officer about the confidential informant because the disallowed questions were not relevant to the issue of defendant's guilt or innocence, as the State did not rely on events related to obtaining the search warrant in proving defendant's guilt. Nwaogu v. State, 2013 Tex. App. LEXIS 4588, 2013 WL 1490489 (Tex. App. Houston 1st Dist. Apr. 11 2013).

843. Expert must testify before the jury has received the jury charge and before it has been instructed on specific elements and standards concerning specific claims, and the expert must have some leeway to reference the controlling legal terms and related concepts while testifying, otherwise, a jury would not be able to make sense of the expert's testimony or measure it against the charge's requirements, and the sponsoring litigant could not meet a motion for directed verdict; it follows that the standards governing admission of expert testimony do not automatically foreclose every reference to legal terms or the disciplinary rules in the course of expert testimony

addressing an attorney's alleged breaches of the duties owed to a client, and such an expert properly may include these references when the trial court sets appropriate limits, and the continuum of potentially relevant testimony from an expert likely will vary according to the specific facts and the specific legal standards being litigated in specific cases. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist. Apr. 9 2013).

844. Court did not err in prohibiting defendant from cross-examining two State witnesses regarding criminal charges that were pending against them when they testified; defendant failed to show how identifying their pending charges would have tended to show that their testimony might be biased in an unrelated prosecution of defendant for murder. Johnson v. State, 2013 Tex. App. LEXIS 4467 (Tex. App. Houston 1st Dist. Apr. 9 2013).

845. Trial court did not err by admitting into evidence a letter defendant wrote to the woman who leased the apartment where the drugs were found because it was relevant, as defendant's statement in the letter that he had the "best dope around" could be seen as indicative of a willingness to provide the woman and perhaps others with dope, further connecting him to the woman and suggesting an intent to deliver. In addition, the letter was strongly probative to rebut any contention that his presence in the apartment was merely fortuitous and assisted the State with its proof that defendant's possession of the drugs was knowing. Bible v. State, 2013 Tex. App. LEXIS 4455, 2013 WL 1411849 (Tex. App. Amarillo Apr. 8 2013).

846. Assuming character evidence was relevant, the error in excluding it was subject to a harm analysis for nonconstitutional error. Bundick v. State, 2013 Tex. App. LEXIS 4350 (Tex. App. Houston 14th Dist. Apr. 4 2013).

847. Assuming evidence was relevant, appellant did not provide a harm analysis, and the court could not find from its own review that the error, if any, had a substantial effect on the verdict, given that the State made a strong case for appellant's guilt, which evidence included eyewitness testimony that appellant fired a gun that killed the victim, as well as the victim's dying declaration that identified appellant as the shooter; the excluded testimony tried to establish a history of conflict between appellant and one witness, and while appellant discussed Tex. R. Evid. 404(a)(2), this applied to one who raised self-defense, which appellant did not, and nothing showed that the victim or witness had been carrying a gun. Bundick v. State, 2013 Tex. App. LEXIS 4350 (Tex. App. Houston 14th Dist. Apr. 4 2013).

848. Evidence was relevant to support explanations by witnesses that they lied to police because they were scared, and while appellant argued against admissibility, the court did not find his arguments persuasive, given that (1) the evidence was offered to show he had the ability to carry out his threats, and to corroborate the testimony, there was no requirement that the evidence show he owned or used the weapons, but only that he had access to them, and (2) the trial court did not weigh witness credibility to make a determination about admissibility of evidence. Hurst v. State, 406 S.W.3d 617, 2013 Tex. App. LEXIS 4282 (Tex. App. Eastland Apr. 4 2013).

849. Employer claimed the trial court erred in denying its new trial motion based on no notice because the clerk did not send notice of the default judgment as per Tex. R. Civ. P. 239a, but the employer failed to cite authorities supporting this claim other than the rule itself; whether or not the trial court mailed notice was irrelevant because failure to do so was not reversible error in a restricted appeal. Lcs Corr. Serv. v. Chavera, 2013 Tex. App. LEXIS 4410 (Tex. App. Corpus Christi Apr. 4 2013).

850. To the extent that records of other injuries or medical conditions showed a personal injury claimant had back pain before a slip and fall incident, the records were relevant and admissible under Tex. R. Evid. 401, 402. Absent evidence of other litigation, the medical evidence was not overly prejudicial under Tex. R. Evid. 403, and the admission of irrelevant medical records unrelated to back pain was harmless error under Tex. R. App. P. 44.1(a)(1) because the judgment did not turn on records regarding unrelated conditions. Sparks v. Exxon Mobil Corp., 2013

Tex. App. LEXIS 4206 (Tex. App. Houston 14th Dist. Apr. 2 2013).

851. At defendant's trial for unlawfully appropriating a firearm, the trial court did not err in admitting the evidence of another rifle theft and pawn transaction because it was relevant under Tex. R. Evid. 401 to provide the same transaction context for the single theft of the rifles. Defendant's theft of the two rifles was a single act to deprive the victim of his property. Sutterfield v. State, 2013 Tex. App. LEXIS 3972, 2013 WL 1281843 (Tex. App. Eastland Mar. 28 2013).

852. In a child sexual assault case, testimony that a victim's mother sent inappropriate text messages to her underage step-daughter was not relevant under Tex. R. Evid. 401; this did not show that the mother manipulated the victim into making a false accusation. Because the trial court did not err in excluding the evidence in question, the appellate court did not need to determine if the exclusion of that evidence prevented appellant from presenting a meaningful defense. Garcia v. State, 397 S.W.3d 860, 2013 Tex. App. LEXIS 4035, 2013 WL 1248305 (Tex. App. Houston 14th Dist. Mar. 28 2013).

853. Within one issue, appellant did not make any attempt to apply law to the facts or those adduced in the offer of proof, and thus appellant's issue was inadequately briefed, but even if the court found it properly briefed, the trial court did not err in excluding the evidence in question; appellant did not explain how the victim's depression was relevant to impeach her credibility as a witness in this sexual assault case, her mental stability, or her memory, plus appellant did not ask questions about the victim's medication and its effects, and the trial court was not given the change to consider the issue at the offer of proof, such that the trial court's decision to exclude the evidence set forth in the offer of proof was not error. Mathis v. State, 397 S.W.3d 332, 2013 Tex. App. LEXIS 4110, 2013 WL 1313775 (Tex. App. Dallas Mar. 28 2013).

854. Appellees' no-evidence motion was concerned only with the pastor's personal liability, and thus issues of the church's liability and the fraud claim were irrelevant. Williams v. Bell, 402 S.W.3d 28, 2013 Tex. App. LEXIS 3208, 2013 WL 1197760 (Tex. App. Houston 14th Dist. Mar. 26 2013).

855. Defendant's conviction for capital murder was proper because the admission of evidence was relevant, probative, and offered in rebuttal to defendant's portrayal of himself as a gentle, even-handed father. Although the State's need for the evidence was minimal, it took very little time to present evidence of both extraneous offenses and, in light of the entire record, that evidence had little, if any, potential to sway the jury in an irrational yet indelible way. Duncan v. State, 2013 Tex. App. LEXIS 3169, 2013 WL 1258449 (Tex. App. Dallas Mar. 22 2013).

856. Owner did not provide the trial court with a complete record of the arbitration proceedings that would have shown that the information he sought was relevant or necessary for the case, and thus the court could not find that the trial court erred in confirming the award despite the owner's claim of an error in the discovery ruling. Goldman v. Buchanan, 2013 Tex. App. LEXIS 3086, 2013 WL 1281744 (Tex. App. Dallas Mar. 21 2013).

857. Appellant raised Tex. R. Evid. 401, 403 objections to a certain incident, but he did not claim that the extraneous offense evidence was improper character evidence, and as he did not object under Tex. R. Evid. 404(b), his complaint on appeal did not comport with his objections at trial, for purposes of Tex. R. App. P. 33.1(a), and thus he did not preserve his complaint for review. Rudzavice v. State, 2013 Tex. App. LEXIS 3140, 2013 WL 1188924 (Tex. App. Waco Mar. 21 2013).

858. Evidence of tenants' activities on commercial premises was relevant under Tex. R. Evid. 401, 402 to establish damages claimed by the tenants and to rebutting the landlord's assertions that the tenants did not have a legitimate operation. Rhey v. Redic, 408 S.W.3d 440, 2013 Tex. App. LEXIS 3054, 2013 WL 1150197 (Tex. App. El

Paso Mar. 20 2013).

859. Evidence was admissible for determining the children's best interests, and the testimony was relevant to the best interest factors, such that it was not necessary for the mother's counsel to object to the testimony about extraneous offenses, counsel was not ineffective for failing to do so, and the court overruled appellant's issue related to a Daubert hearing. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

860. Although the court agreed that the motion for protective order under Tex. R. Civ. P. 192.6(b) did not specifically state why the discovery sought was not relevant, the attorney and firm made their objections and arguments to the trial court, and noted that all causes had been fully resolved by summary judgment, such that any information appellee could have provided was irrelevant; the arguments made were not conclusory and were supported by the record, and as the information appellants sought was irrelevant and would not have aided in the enforcement of the judgment for purposes of Tex. R. Civ. P. 621a, the trial court did not abuse its discretion in granting the protective order. Blankinship v. Brown, 399 S.W.3d 303, 2013 Tex. App. LEXIS 2740 (Tex. App. Dallas Mar. 14 2013).

861. Evidence of other crimes may be admissible if it is relevant for other purposes apart from showing character conformity. Wilson v. State, 2013 Tex. App. LEXIS 2428 (Tex. App. Houston 14th Dist. Mar. 12 2013).

862. Evidence that appellant possessed another stolen wallet was likely not probative of whether appellant had robbed the victim in this aggravated robbery case apart from character conformity, and while the State could not introduce the extraneous evidence to show appellant robbed the victim because he robbed the other person in the extraneous case, the State could introduce the evidence to show it was less likely appellant had innocently obtained the victim's purse because he also possessed a stolen wallet; the trial court did not abuse its discretion in admitting evidence of the extraneous offense robbery, as this tended to show that appellant's explanation that he innocently obtained the purse from another party was false, and evidence of the prior robbery was relevant for the non-character purpose of rebutting the defensive theory. Wilson v. State, 2013 Tex. App. LEXIS 2428 (Tex. App. Houston 14th Dist. Mar. 12 2013).

863. Testimony was relevant to explain what led to the purchase of cocaine from appellant, and detective's testimony did not implicate appellant in any extraneous offense. Hawkins v. State, 2013 Tex. App. LEXIS 2282 (Tex. App. Eastland Mar. 7 2013).

864. Court properly admitted evidence that defendant's girlfriend purchased a silver .38 caliber revolver shortly before the victim's death because a codefendant testified that defendant had used a silver gun, and another witness testified that defendant was carrying a "chrome .38, snub-nose revolver" on the day the victim was killed. The inherent probative force of the evidence concerning the guns was its tendency to show that defendant was the shooter, and although the evidence was prejudicial, it was not unfairly prejudicial. Buckley v. State, 2013 Tex. App. LEXIS 2246 (Tex. App. Houston 14th Dist. Mar. 7 2013).

865. In defendant's evading arrest case, the court properly allowed testimony concerning typical behavior during a traffic stop because the testimony that very few people fled when a squad car initiated a stop by activating its lights was relevant to the offense of evading arrest, and went to defendant's intent. The fact that most people pulled over after the police initiated a stop made it more probable that defendant intentionally disregarded the officer's attempt to pull him over. Spencer v. State, 2013 Tex. App. LEXIS 2227, 2013 WL 1282307 (Tex. App. Dallas Mar. 6 2013).

866. In a divorce, it was not error to admit a husband's prescription bottles because the bottles were relevant, as the husband (1) introduced a photograph of the husband's prescription bottles, (2) elicited testimony from the wife

which appeared to explain circumstances such as stress and depression related to the husband taking prescription medication, and (3) the wife's counsel specifically sought to introduce the bottles to rebut the husband's questioning on cross-examination as to whether the medications were current. Howell v. Howell, 2013 Tex. App. LEXIS 1991, 2013 WL 784542 (Tex. App. Corpus Christi Feb. 28 2013).

867. Finding that respondent was a sexually violent predator (SVP) was proper under Tex. Health & Safety Code Ann. § 841.002(5) because there was no error in failing to allow respondent's counsel to question a witness on the interpretation of the SVP statute, Tex. Health & Safety Code Ann. § 841.001-851.151. The questions respondent was not allowed to ask did not address a fact of consequence that would have made the doctor's prognosis more or less probable. In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

868. Defendant made no showing that the complainant's immigration status was relevant to proving a material issue in the case and the trial court did not abuse its discretion by sustaining the State's relevance objection, Tex. R. Evid. 401; the trial court could have concluded that the prejudice from defense counsel's deportation and immigration-based questions far outweighed any probative value, Tex. R. Evid. 403. Lopez v. State, 2013 Tex. App. LEXIS 2042, 2013 WL 1277883 (Tex. App. Dallas Feb. 28 2013).

869. Trial court did not err by admitting evidence that defendant lied about his military service because his fictitious military involvement and explanations to his wife about living at various military posts set forth the necessary facts to explain to the jury how defendant isolated the minor victim from her mother, defendant's wife, during the period of abuse; without defendant's stories of military service, the victim's testimony about the abuse made little or no sense. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

870. Court did not abuse its discretion by excluding additional evidence regarding the receipt of text messages, because the record indicated that the evidence defendant wanted the jury to hear, the jury did in fact hear; the jury heard the evidence, though perhaps from fewer witnesses and in less detail than defendant would have preferred. Wooten v. State, 2013 Tex. App. LEXIS 1658, 2013 WL 625734 (Tex. App. Amarillo Feb. 20 2013).

871. In proceedings on a petition to civilly commit an inmate as a sexually violent predator, it was not error to exclude evidence on the inmate's super intensive supervision parole plan because the issue was whether the inmate was a repeat sexually violent offender with a behavioral abnormality making the inmate likely to commit a predatory act of sexual violence, under Tex. Health & Safety Code Ann. § 841.003(a), so the inmate's parole supervision level was irrelevant. In re Smith, 2013 Tex. App. LEXIS 1095, 2013 WL 476771 (Tex. App. Beaumont Feb. 7 2013).

872. While the court agrees that a transferee's awareness of the fraudulent nature of a transfer is not one of the elements of a Tex. Bus. & Com. Code Ann. § 24.005(a)(1) claim and that evidence of one badge of fraud is not conclusive, the evidence in this case included many factors that were relevant to the lessor's claim, including that the relatives' deemed admissions conclusively established that the transfers were made to insiders with no consideration right before a judgment was entered against the debtors, and the transfer's purposes was to hinder and defraud the lessor; this evidence, which was not rebutted, was sufficient to support the finding of the requisite intent under Tex. Bus. & Com. Code Ann. § 24.005(a)(1). Qui Phloc Ho v. Macarthur Ranch, Llc, 395 S.W.3d 325, 2013 Tex. App. LEXIS 1199, 2013 WL 458323 (Tex. App. Dallas Feb. 7 2013).

873. At defendant's trial for possession with intent to deliver a controlled substance, cocaine, in a drug free zone, the trial court did not err in admitting evidence of weapons found at the location where defendant was arrested; it was relevant under Tex. R. Evid. 401, 402 to show that the weapons were used for protection of the drugs. Blue v. State, 2013 Tex. App. LEXIS 1231, 2013 WL 489998 (Tex. App. Waco Feb. 7 2013).

874. As the evidence appeared to show that claimed heirs were the decedent's heirs at law, and her will poured her estate into the disputed trust, the trust documents were relevant to the claimed heirs' claims and would be discoverable, such that the executor did not show a clear abuse of discretion by the trial court's ordering the trust documents to be produced, for purposes of Tex. R. App. P. 52.3, 52.7; the court denied mandamus relief. In re Paschall, 2013 Tex. App. LEXIS 1254 (Tex. App. Waco Feb. 7 2013).

875. Trial court did not abuse its discretion by admitting booking photos of defendant and his father because the photos were relevant under Tex. R. Evid. 401 as they aided the prosecution in properly identifying and distinguishing defendant from his father. Wood v. State, 2013 Tex. App. LEXIS 866 (Tex. App. Corpus Christi Jan. 31 2013).

876. Trial court did not abuse its discretion by admitting into evidence defendant's jail telephone call recordings and summaries because they aided the State in its rebuttal of defendant's defense that he had no involvement or knowledge of the dealership's transactions. The trial court was within the zone of reasonable disagreement to find that the probative value of the recordings and summaries were not substantially outweighed by the danger of unfair prejudice. Wood v. State, 2013 Tex. App. LEXIS 866 (Tex. App. Corpus Christi Jan. 31 2013).

877. In appellant's murder case, the State offered a photograph to establish that the woman a sergeant identified as the victim was the same women whose autopsy he attended, and the sergeant identified the number visible in the exhibit as the number that applied to this case, and there was no error in the admission of the photograph in addition to the admission of the sergeant's testimony, for purposes of Tex. R. Evid. 403; the fact that the State offered the photograph in addition to the sergeant's testimony did not destroy the photograph's probative value, and it was still relevant evidence. Jackson v. State, 2013 Tex. App. LEXIS 889 (Tex. App. Houston 1st Dist. Jan. 31 2013).

878. Dates of affidavits in this case were highly relevant and indicated untrusthworthiness, and thus the affidavits did not fall under the business records exception and the court's holding in another case was not inconsistent with this case. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

879. Buyer of imported vehicles failed to preserve its objection to a composite exhibit consisting of sales contracts and an invoice, although one contract showed a seller other than the plaintiff seller, by failing to specify which parts were inadmissible as irrelevant under Tex. R. Evid. 401. Sunl Group, Inc. v. Zhejiang Yongkang Top Imp. & Exp. Co., 394 S.W.3d 812, 2013 Tex. App. LEXIS 832, 2013 WL 326324 (Tex. App. Dallas Jan. 29 2013).

880. State was required to prove that appellant either intentionally or knowingly threatened or put the victim in fear of imminent bodily injury or death, under Tex. Penal Code Ann. § 29.02(a)(2), and her testimony that she had a friend who was robbed more than once and was killed in the last one could have been construed as relevant to the element of fearing injury or death; the court could not say that the trial court erred in overruling the objection. Williams v. State, 2013 Tex. App. LEXIS 695 (Tex. App. Amarillo Jan. 24 2013).

881. Trial court did not err during defendant's murder trial in admitting photographs that were taken at the crime scene and at the victim's autopsy because the photographs had probative value; they were accurate depictions of both the crime scene and the victim's body that would assist a jury to visualize the crime scene as well as the extent of the victim's injuries caused by defendant's criminal act. Jameson v. State, 2013 Tex. App. LEXIS 242, 2013 WL 150281 (Tex. App. Amarillo Jan. 14 2013).

882. City was entitled to mandamus relief, because the owner failed to object to the city's discovery requests, and the discovery information the city sought went to the heart of the owner's lost profits claim for inverse condemnation

through a regulatory taking; the owner had a duty to supplement its answers to the city's requests for production and failed to do so, and the requested documents were relevant. In re City of Houston, 2013 Tex. App. LEXIS 21 (Tex. App. Houston 14th Dist. Jan. 4 2013).

883. There was evidence that once the victim voluntarily entered a car, he was prevented from leaving and later he was dragged out and beaten, and while it was true the men permitted the victim to leave, it appeared they only did so because they were already in the process of beating him to death, and to the extent appellant claimed the victim was released in a safe place, that would only be relevant for mitigation of punishment, and it was not relevant in this case; the evidence supported a finding that appellant restrained the victim for purposes of Tex. Penal Code Ann. § 20.01(2), and the evidence supported a finding that appellant, as a principal or party, caused the victim's death in the course of the kidnapping. PeÃ»a v. State, 2013 Tex. App. LEXIS 32 (Tex. App. Corpus Christi Jan. 3 2013).

884. In case law, the court held that a doctor's letter submitted to an attorney during litigation was not a routine entry in the patient's medical history and was inadmissible under the business record exception, but this was not relevant to the issue in this case, where a witness who was at trial also submitted a document that detailed when she worked in corroboration of her testimony. Ryland Enter. v. Weatherspoon, 2012 Tex. App. LEXIS 10794, 2012 WL 6754966 (Tex. App. Houston 1st Dist. Dec. 28 2012).

885. Defendant failed to show how excluded evidence about his relative's death in jail was relevant to any fact of consequence because he offered the evidence to show his purported fear of law enforcement and explain his flight from the officer; however, the proffered evidence merely demonstrated that his relative died while he was incarcerated in the county jail. Defendant offered no evidence that the death resulted from any actions or wrongdoing by law enforcement officials. Sheppard v. State, 2012 Tex. App. LEXIS 10638, 2012 WL 6698963 (Tex. App. Austin Dec. 21 2012).

886. Issue in this debt collection case was not whether the company's attorney constituted a debt collector, but whether the company was a debt collector and if that deprived the company of standing; thus, it was not relevant whether the company's attorney could have met the debt collector definition. Avdeef v. Rbs Citizens, N.A., 2012 Tex. App. LEXIS 10603, 2012 WL 6632754 (Tex. App. Fort Worth Dec. 21 2012).

887. Because an expansion joint was the subject matter of the claims in question, it was undisputed that the joint was relevant to the litigation. Miner Dederick Constr., Llp v. Gulf Chem. & Metallurgical Corp., 2012 Tex. App. LEXIS 10129, 2012 WL 6082714 (Tex. App. Houston 1st Dist. Dec. 6 2012).

888. Evidence that the victim was a drug dealer would have been irrelevant and inadmissible if offered to show that his life was not as valuable as other society members, and the trial court was within its discretion to limit the cross-examination in this regard during the punishment phase, as the victim's status as a drug dealer was collateral and irrelevant to the assessment of an appropriate sentence, and this status was not directly relevant to the murder charge; permitting impeachment of the victim's character with extrinsic evidence would have confused the issues and wasted the jury's time, and it was within the trial court's discretion to exclude the evidence under Tex. R. Evid. 403. Gladney v. State, 2012 Tex. App. LEXIS 9806, 2012 WL 5949473 (Tex. App. Dallas Nov. 28 2012).

889. In his aggravated assault on a peace officer trial, appellant opened the door to extraneous offense evidence under Tex. R. Evid. 404(b) by giving misleading testimony concerning his relationship with a neighbor, the person he thought he shot; appellant's testimony was relevant and necessary to (1) clarify the false impression, (2) rebut the reasonableness of his self-defense theory, and (3) show that he was prohibited from possession a firearm outside his house as a bond condition. Moten v. State, 2012 Tex. App. LEXIS 9541, 2012 WL 5696200 (Tex. App.

Waco Nov. 15 2012).

890. In a case stemming from a house fire and the resulting product liability lawsuit filed by real parties in interest against the manufacturer of a computer power supply/surge protector and others, the trial court abused its discretion in ordering the manufacturer to produce certain of its back up power supply products, discovery produced in relation to another lawsuit, and other documents because real parties failed to establish a correlation between the specific model they had purchased and another of the manufacturer's product lines, failed to show that their request was not narrowly tailored to include only relevant materials, and failed to show that the litigation information they sought was relevant. In re Am. Power Conversion Corp., 2012 Tex. App. LEXIS 9369, 2012 WL 5507111 (Tex. App. San Antonio Nov. 14 2012).

891. Trial court could have reasonably concluded that the phone records from the two and one-half hour window immediately before and after the accident were reasonably calculated to lead to the discovery of admissible evidence to support the pleadings, and the trial court did not abuse its discretion in ordering production of the phone records from 4:30 p.m. to 7:00 p.m. on the date of the accident; whether the mother made threats to the driver did not make it more or less probable that she negligently entrusted the go-cart to her son, or that her son was negligent in driving the go-cart, Tex. R. Civ. P. 192.3, Tex. R. Evid. 401, and the trial court abused its discretion in ordering those records to be produced. In re Moor, 2012 Tex. App. LEXIS 9232, 2012 WL 5463193 (Tex. App. Houston 14th Dist. Nov. 8 2012).

892. Trial court did not err by refusing to allow a witness to testify that another witness had engaged in fraud and had accused her of assault because the testimony was not relevant in defendant's trial for engaging in organized criminal activity. Pittman v. State, 2012 Tex. App. LEXIS 9057 (Tex. App. Tyler Oct. 31 2012).

893. There was no evidence that certain persons would have information that was relevant to residents' allegations, and although the company claimed that employees from a Texas entity would provide expert testimony, the company agreed if the case was dismissed to produce the entity witnesses in Louisiana. In re Mantle Oil & Gas, LLC, 426 S.W.3d 182, 2012 Tex. App. LEXIS 8898, 183 Oil & Gas Rep. 364, 2012 WL 5323584 (Tex. App. Houston 1st Dist. Oct. 25 2012).

894. In considering whether litigating in Texas would result in a substantial injustice to the company, the company argued that many witnesses were residents of Louisiana and beyond the compulsory subpoena power of the trial court under Tex. R. Civ. P. 176.3(a), and the company was not required to identify specific evidence or witnesses that it could not obtain via subpoena power; the company identified agency employees who had relevant information who were based in Louisiana, and none of them were subject to the Texas court's compulsory subpoena power, and as the company was already defending substantively identical claims in Louisiana, and witnesses and evidence were located there and beyond Texas compulsory subpoena power, the court found this factor weighed in favor of dismissal. In re Mantle Oil & Gas, LLC, 426 S.W.3d 182, 2012 Tex. App. LEXIS 8898, 183 Oil & Gas Rep. 364, 2012 WL 5323584 (Tex. App. Houston 1st Dist. Oct. 25 2012).

895. There was nothing to indicate that working interest owners played a role in operating the well or in decisions that might have led to the well blowout, and thus these owners were irrelevant to the dispute, in connection with the court's analysis of dismissal on forum non conveniens grounds. In re Mantle Oil & Gas, LLC, 426 S.W.3d 182, 2012 Tex. App. LEXIS 8898, 183 Oil & Gas Rep. 364, 2012 WL 5323584 (Tex. App. Houston 1st Dist. Oct. 25 2012).

896. Residents overlooked witnesses and evidence that was relevant to the case that was not located in Texas, and these were beyond the reach of Texas trial court subpoena power under Tex. R. Civ. P. 176.3, plus relevant physical evidence was located in Louisiana, and the residents did not point to specific acts or omissions on the company's part that took place in Texas; considering the public and private factors weighed in favor of dismissal. In

re Mantle Oil & Gas, LLC, 426 S.W.3d 182, 2012 Tex. App. LEXIS 8898, 183 Oil & Gas Rep. 364, 2012 WL 5323584 (Tex. App. Houston 1st Dist. Oct. 25 2012).

897. Defendant's allegation that the complainant's unlawful sexual contact with her thirteen years prior to the assault was irrelevant to disproving the allegation of a dating relationship was rebutted by the State because the complainant testified he and defendant were dating at the time he was injured, and defendant testified that during a phone call she made to the victim after he was injured, she told him "I love you" several times. Smith v. State, 2012 Tex. App. LEXIS 8848, 2012 WL 5238280 (Tex. App. Dallas Oct. 24 2012).

898. Evidence of drug use by appellant and others was relevant to show a motive for the robbery, and the trial court could have found that their drug issues provided a motive for individuals with no income. Biera v. State, 391 S.W.3d 204, 2012 Tex. App. LEXIS 8782, 2012 WL 5199374 (Tex. App. Amarillo Oct. 22 2012).

899. One witness's car had a direct connection to the robbery, and testimony of an accomplice's use of the credit cards to keep gas in her vehicle was relevant to show the use of the witness's car at the time of the robbery, such that the trial court could have found that evidence of the accomplice's credit card use was relevant to show the identity of the accomplice and appellant as the robbers; the ruling that the credit card evidence had relevance beyond character conformity in appellant's aggravated robbery case was not an abuse of discretion. Biera v. State, 391 S.W.3d 204, 2012 Tex. App. LEXIS 8782, 2012 WL 5199374 (Tex. App. Amarillo Oct. 22 2012).

900. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because evidence of the victim being in contact with a registered sex offender did not demonstrate a relevant alternative source of sexual knowledge. Thus, the trial court did not abuse its discretion in refusing to admit it. Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

901. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because, with regard to the victim's alleged prior sexual behavior, other than her involvement, there was no similarity between those incidents and the current allegations against defendant currently, Tex. R. Evid. 401, 402, 403, and 412(b). Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

902. Video recordings showing sex acts between dancers and patrons of the adult establishment were relevant, and therefore the trial court did not abuse its discretion by admitting them during defendant's trial, because they tended to show that the establishment was a prostitution enterprise and was relevant to the charged offense of aggravated promotion of prostitution. Coutta v. State, 385 S.W.3d 641, 2012 Tex. App. LEXIS 8692 (Tex. App. El Paso Oct. 17 2012).

903. Though the court agrees that deportation, like incarceration, is a factor that may be considered (albeit an insufficient one in and of itself to establish endangerment), its relevance to endangerment depends on the circumstances, and under the appellate court's reasoning, the mere threat of deportation or incarceration resulting from an unlawful act, regardless of severity, would establish endangerment, and the Texas Supreme Court disagrees with that analysis; many offenses can lead to an immigrant's deportation, including entering the country unlawfully, and under the appellate court's reasoning, virtually any offense that could lead to deportation, even a minor one committed long before the parent's children were born, would create such an unstable and uncertain environment as to establish endangerment, subjecting countless immigrants to the potential loss of their children. The appellate court's broad reasoning necessarily applies to citizens as well, and any offense committed by a citizen that could lead to imprisonment or confinement would also apparently establish endangerment, simply because the parent's ability to be present in his children's lives would be uncertain, but the nation's Constitution forbids such a far-reaching interpretation of parental rights termination statutes. In the Interest of E.N.C., 384

S.W.3d 796, 2012 Tex. LEXIS 866, 56 Tex. Sup. Ct. J. 19 (Tex. 2012).

904. Court agrees that an offense occurring before a person's children are born can be a relevant factor in establishing an endangering course of conduct, but the Texas Department of Family and Protective Services bears the burden of introducing evidence concerning the offense and establishing that the offense was part of a voluntary course of conduct that endangered the children's well-being. In the Interest of E.N.C., 384 S.W.3d 796, 2012 Tex. LEXIS 866, 56 Tex. Sup. Ct. J. 19 (Tex. 2012).

905. In connection with appellant's murder conviction as a party, the State focused on appellant's post-offense conduct, and while this was relevant, it could not stand alone, as there also had to be sufficient evidence of an understanding or scheme to commit a crime; the evidence did not show that appellant anticipated that his brother-in-law would shoot the victim, and nothing showed that he he assisted or encouraged his brother-in-law to kill the victim. Gross v. State, 380 S.W.3d 181, 2012 Tex. Crim. App. LEXIS 1329 (Tex. Crim. App. Oct. 10 2012).

906. Appellate court noted that actions occurring after the event were relevant, but there was no prior or contemporaneous plan to shoot the victim, and it was speculation to conclude otherwise; the court agreed, and while appellant's post-offense actions could have supported a charge of hindering apprehension or prosecution, evidence of his involvement was insufficient to support his murder conviction under the law of parties. Gross v. State, 380 S.W.3d 181, 2012 Tex. Crim. App. LEXIS 1329 (Tex. Crim. App. Oct. 10 2012).

907. Complainant's letter noted the apartment complex where she lived with her family and appellant, and thus the letter was relevant, for purposes of Tex. R. Evid. 401, 402, in connecting appellant to where the aggravated sexual assaults took place. Conteh v. State, 2012 Tex. App. LEXIS 8440, 2012 WL 4788386 (Tex. App. Houston 14th Dist. Oct. 9 2012).

908. In evaluating ineffective-assistance claims for the failure to call witnesses, the Texas Court of Criminal Appeals has held that the failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony; the court believes the principle underlying this rule applies to the failure to call witnesses at a revocation hearing. Brown v. State, 2012 Tex. App. LEXIS 8223, 2012 WL 4477378 (Tex. App. Austin Sept. 28 2012).

909. Incidents about which appellant wanted to introduce testimony did not implicate himself, and the victim did not make any threat toward him, nor did the victim's prior conduct show that he had any animosity toward appellant, and the evidence was not probative of the victim's state of mind as it related to the situation with appellant two years after the incidents took place, given that before the shooting, the two did not know each other; while appellant could introduce reputation or opinion testimony suggesting the victim was the first aggressor, appellant could not introduce specific acts because that was not admissible for these purposes, and nothing showed that the proffered testimony would have been relevant for any purpose besides character conformity, for purposes of Tex. R. Evid. 404(b). Bottorff v. State, 2012 Tex. App. LEXIS 8220, 2012 WL 4477396 (Tex. App. Austin Sept. 28 2012).

910. Trial court did not abuse its discretion by excluding the testimony of two witnesses concerning the victim's prior sexual history because it did not make it more or less probable that defendant touched the victim's breast and therefore was not relevant under Tex. R. Evid. 401. In addition, the evidence was properly excluded because it was an attempt to impeach the victim through the inquiry of specific instance of conduct, which was improper under Tex. R. Evid. 608(b). Gonzalez v. State, 2012 Tex. App. LEXIS 8246, 2012 WL 4497999 (Tex. App. Tyler Sept. 28 2012).

911. In a murder case, the trial court did not err when it denied defendant the opportunity to question an eyewitness about her experience with burning people to establish her as an alternate perpetrator. With little details

regarding the alleged past conduct, the trial court did not err in sustaining the State's relevancy objection under Tex. R. Evid. 401. Dayne Adenauer White v. State, 2012 Tex. App. LEXIS 8107 (Tex. App. Houston 1st Dist. Sept. 27 2012).

912. In defendant's DWI case, he objected to the State's introduction of his blood-test results and extrapolation testimony because the blood draw occurred two hours after he was arrested and therefore was not relevant under Tex. R. Evid. 401 to whether he had the normal use of his faculties at the time of the alleged offense. The trial court overruled the objection. Crenshaw v. State, 378 S.W.3d 460, 2012 Tex. Crim. App. LEXIS 1254, 2012 WL 4372284 (Tex. Crim. App. Sept. 26 2012).

913. At defendant's trial for indecency with a child by contact, the trial court did not err by admitting his recorded interview with an investigator from the district attorney's office. Defendant's description of his sexual urges toward children was relevant to the elements of the offense. Mattingly v. State, 382 S.W.3d 611, 2012 Tex. App. LEXIS 8126, 2012 WL 4457713 (Tex. App. Amarillo Sept. 26 2012).

914. Taken in isolation, a father's conviction arguably could have been irrelevant, but his criminal history as a whole demonstrated that he had been convicted once every two years on average for almost 20 years, and taken in connection with his outstanding charges for murder and aggravated assault, this was relevant on the issue of whether the father engaged in a course of conduct that endangered the child; counsel could have found that objecting to the admission of prior convictions would have been futile, and the court could not find counsel deficient in this regard. Medellin v. Tex. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 8225, 2012 WL 4466511 (Tex. App. Austin Sept. 26 2012).

915. During the punishment phase of defendant's trial for intoxication assault, the trial court did not err by admitting a statement probative of defendant's general attitude of selfishness because the statement was relevant under Tex. R. Evid. 401 to show defendant's character and helpful to the jury in determining whether she was a good candidate for community supervision. Ford v. State, 2012 Tex. App. LEXIS 8034, 2012 WL 4243715 (Tex. App. Waco Sept. 20 2012).

916. Trial court did not abuse its discretion by admitting the testimony of the sexual assault nurse examiner who examined the child victim during the course of the State's investigation because she was deemed an expert in sexual abuse examinations, so her expert testimony could be helpful to the jury, including to explain why physical evidence would not necessarily be present on the body of a sexual assault complainant. The nurse merely reported the events of the examination and her clinical findings, and she did not offer an opinion as to whether the victim had been sexually assaulted and did not comment on the victim's veracity. Owens v. State, 381 S.W.3d 696, 2012 Tex. App. LEXIS 7922, 2012 WL 4098990 (Tex. App. Texarkana Sept. 19 2012).

917. Regarding evidentiary matters on damages, the court did not need to consider them because the issues were not relevant, as the company was not found liable for conduct upon which a damage award could be based. Schmieding v. Mission Petroleum Carriers, Inc., 2012 Tex. App. LEXIS 7907, 2012 WL 4092716 (Tex. App. Amarillo Sept. 18 2012).

918. Trial court properly admitted a sex offender's prior written statements in his sexually violent predator commitment proceeding because the statements were relevant apart from their tendency to prove the sex offender's stipulated convictions. The prior inconsistent statements were neither unduly prejudicial nor cumulative of the matters that the sex offender admitted in his requests for admissions. In re Commitment of Bath, 2012 Tex. App. LEXIS 7586, 2012 WL 3860631 (Tex. App. Beaumont Sept. 6 2012).

919. Considering the admission of photographs of text messages under Tex. R. Evid. 404(b), the text conversations that led up appellant's arrival at his ex-girlfriend's home were relevant in order to prove the motive appellant had for having a gun, and the messages provided contextual evidence, as they were sent immediately before appellant arrived. Trammell v. State, 2012 Tex. App. LEXIS 7149, 2012 WL 3612518 (Tex. App. Corpus Christi Aug. 23 2012).

920. Text messages' probative value was not substantially outweighed by the prejudice in their admission, under Tex. R. Evid. 403, given that (1) the messages were relevant to the crime, and (2) even if there was error in admitting the messages, there was no harm; even without the text messages, there was enough evidence to substantiate appellant's anger. Trammell v. State, 2012 Tex. App. LEXIS 7149, 2012 WL 3612518 (Tex. App. Corpus Christi Aug. 23 2012).

921. Police video of appellant in a patrol car after his arrest, which the State wanted to show his comments about possessing a gun, was relevant to whether he had access to a gun that he was accused of wielding during the aggravated assault, and he testified concerning his criminal history and drug use, and thus even if the trial court erred, such was harmless and the court found no abuse of discretion. Trammell v. State, 2012 Tex. App. LEXIS 7149, 2012 WL 3612518 (Tex. App. Corpus Christi Aug. 23 2012).

922. Court erred during defendant's trial for sexual assault of a child in admitting portions of recorded telephone conversations between defendant and a detective, which stated that defendant would rather spend time with kids, because while the evidence was relevant to intent, the evidence was more prejudicial than probative. Dekneef v. State, 379 S.W.3d 423, 2012 Tex. App. LEXIS 7024 (Tex. App. Amarillo Aug. 22 2012).

923. Because the extraneous offense evidence showed that appellant was arrested in close proximity to the victim's house after a reported break-in, the trial court was within its discretion to find that evidence of the prior burglary had non-character conforming relevance that rebutted appellant's defensive theory of conspiracy. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

924. Court did not abuse its discretion in admitting evidence regarding the underlying offense for which defendant was required to register as a sex offender because the State introduced statements made by defendant to officers that he did not think he should have to register as a sex offender because the sex with his thirteen-year-old stepdaughter was consensual. The State argued such evidence was relevant to show defendant's casual attitude regarding sex offender registration requirements and defendant's intent to ignore them; presentation of the disputed evidence did not consume an inordinate amount of time. Toliver v. State, 2012 Tex. App. LEXIS 6902, 2012 WL 3553380 (Tex. App. Dallas Aug. 17 2012).

925. Appellant failed to meet his burden under the test for ineffective assistance, given that (1) he did not offer any authority or argument, under Tex. R. App. P. 38.1(i), showing that the trial court would have erred in overruling an objection under Tex. R. Evid. 401, 402, 403, (2) the trial court did overrule appellant's relevance objection under Tex. R. Evid. 402 as to a deputy's testimony, (3) appellant did not raise the issue on appeal, although he claimed that one reason counsel should have objected on relevancy grounds was to preserve the issue for appeal, and (4) counsel's failure to object might have been sound trial strategy, as the testimony was brief, counsel already objected to relevance of the testimony, and a later objection was successful and the trial court instructed the jury to disregard the testimony concerning whether committing a crime was something to be expected from persons with a certain disease; the court could not say that counsel's failure to further object was ineffective assistance. Ozuna v. State, 2012 Tex. App. LEXIS 6858, 2012 WL 3525635 (Tex. App. Corpus Christi Aug. 16 2012).

926. Court rejected appellant's claim that photographs of the victim were more prejudicial than probative under Tex. R. Evid. 403; although they were gruesome, the photographs were probative of the extent and nature of the

victim's injuries, and they did not portray anymore than the gruesomeness appellant inflicted. Dempsey v. State, 2012 Tex. App. LEXIS 6871, 2012 WL 3525653 (Tex. App. Corpus Christi Aug. 16 2012).

927. Facts underlying two summary judgment motions were identical, such that reversal of the insured's summary judgment required reversal of the excess insured's summary judgment; although the insured's cross-appeal was filed one day late under Tex. R. App. P. 26.1(d), 26.3, because the insured was entitled to reversal of the excess insurer's judgment, the timeliness of the cross-appeal was not relevant, and the motion to dismiss was moot. United States Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 2012 Tex. App. LEXIS 6770 (Tex. App. San Antonio Aug. 15 2012).

928. In a murder case, the court properly admitted photographs of defendant's tattoos because the "REDRUM" and revolver tattoos were especially probative of defendant's intent and attitude relevant to his defense and testimony that he would never point a gun at someone else first. Given defendant's own counsel's indication that everyone had tattoos and criminal records, on both sides, there was no indication the evidence unfairly aroused the jury's hostility or sympathy. Luckett v. State, 2012 Tex. App. LEXIS 6686, 2012 WL 3241802 (Tex. App. Dallas Aug. 10 2012).

929. During defendant's trial for aggravated sexual assault of a child, the court did not err in admitting, over defense counsel's objections, evidence of photographic lineups featuring a second suspect because the evidence was relevant as it showed that the victims picked defendant out of 12 different photographs rather than just six. Hendershot v. State, 2012 Tex. App. LEXIS 6632 (Tex. App. Corpus Christi Aug. 9 2012).

930. For purposes of Tex. Fam. Code Ann. § 152.202(a)(1), the record failed to show that substantial evidence was not available in Texas regarding the care of the children; the court could not presume there was no evidence in Texas that was relevant to the welfare of the children, and thus the ex-husband did not show that the Texas trial court lost exclusive jurisdiction under the statute. In re Brown, 2012 Tex. App. LEXIS 6732 (Tex. App. Houston 14th Dist. Aug. 8 2012).

931. Passenger's evidence concerning her physical, emotional, and economic limitations was properly excluded by the trial court because even if it was relevant, it was merely the presentation of cumulative evidence; the passenger's 2008 motion for reinstatement did not raise the issue of how her health and finances may have limited her ability to pursue her claim. Welborn v. Ferrell Enters., 376 S.W.3d 902, 2012 Tex. App. LEXIS 6378 (Tex. App. Dallas Aug. 2 2012).

932. Whether appellant's associate was the focus of the affidavit was not relevant, as the issue was whether probable cause to search the apartment was established by the affidavit; given the information given by a confidential informant, the magistrate had a substantial basis to find a reasonable probability that the evidence related to the sale of drugs would be found in the apartment, and the trial court did not err in denying appellant's motion to suppress. Loera v. State, 2012 Tex. App. LEXIS 6434, 2012 WL 3156004 (Tex. App. Austin Aug. 2 2012).

933. On appeal of defendant's conviction for continuous sexual abuse of a child, his complaint that the trial court erred by refusing to allow him to confront a witness was not preserved for appellate review because defense counsel did not articulate that either U.S. Const. amend. VI or Tex. Const. art. I, § 10 demanded admission of testimony about the victim's sexual relations with her boyfriend. Defense counsel's argument that the testimony was admissible as relevant evidence under Tex. R. Evid. 401 was not sufficient to preserve the Confrontation Clause claim for review. Dukes v. State, 2012 Tex. App. LEXIS 6151 (Tex. App. Corpus Christi July 26 2012).

934. Appellant did not qualify a witness as an expert or prove to the trial court that the purported testimony was relevant and reliable, and thus the testimony was inadmissible under Tex. R. Evid. 702 and the Sixth Amendment

right to compulsory process was not violated. Clark v. State, 2012 Tex. App. LEXIS 5973, 2012 WL 3025685 (Tex. App. San Antonio July 25 2012).

935. Appellant did not provide the records at issue, and thus the court could not evaluate whether the records were relevant to the defense or any prejudice resulted from their omission, for ineffective assistance purposes. Noland v. State, 2012 Tex. App. LEXIS 5911, 2012 WL 2989256 (Tex. App. Austin July 20 2012).

936. There was no merit to the argument that the trial court prevented appellant from showing a Brady violation by excluding testimony and records, and the documents appellant characterized as a subpoena duces tecum was merely a list of witnesses, and the excluded testimony had nothing to do with whether appellant committed harassment of officers at a jail where appellant was an inmate; the trial court would not have erred in finding that such was not relevant to the case. Hills v. State, 2012 Tex. App. LEXIS 5910, 2012 WL 2989260 (Tex. App. Austin July 20 2012).

937. Jury charge contained the impairment theory only of intoxication under Tex. Penal Code Ann. § 49.01(2), and a rational trier of fact could have found that appellant was intoxicated when he was stopped by the officer, given that (1) his blood alcohol content was more than twice the limit only 34 minutes after being stopped, and (2) even with no retrograde extrapolation, the results were relevant and probative under the impairment theory, as the results tended to make it more probable that he was intoxicated when he was driving; furthermore, the officer testified that appellant had watery and bloodshot eyes, smelled of alcohol, and exhibited intoxication clues during field sobriety tests, and the officer believed appellant lost the normal use of his faculties given the alcohol, plus appellant's refusal to provide a blood sample, for purposes of Tex. Transp. Code Ann. § 724.061, tended to show a consciousness of guilt, and thus the evidence supported appellant's conviction of driving while intoxicated with a child passenger under Tex. Penal Code Ann. § 49.045. Lane v. State, 2012 Tex. App. LEXIS 5830, 2012 WL 2923324 (Tex. App. Fort Worth July 19 2012).

938. Appellant did not show that the dispute in question was relevant to the lawfulness of the conduct used in obtaining the evidence, and thus the trial court did not err in denying an instruction under Tex. Code Crim. Proc. Ann. art. 38.23. Criswell v. State, 2012 Tex. App. LEXIS 5882, 2012 WL 2989144 (Tex. App. Eastland July 19 2012).

939. On appeal from his convictions for compelling prostitution, sexual assault of a child, and sexual performance of a child, the appellate court found that the admission of photographs of items seized from a trash can outside of the studio were admissible because they were relevant and the probative value was not substantially outweighed by the danger of unfair prejudice. Although the evidence might not have pertained directly to the complainant, proof of the activities at the studio was relevant to whether, in employing the complainant at the studio, defendant intended that she engage in sexual performance and prostitution. Wilkerson v. State, 2012 Tex. App. LEXIS 5656, 2012 WL 2877623 (Tex. App. Dallas July 16 2012).

940. Trial court did not abuse its discretion by preventing defense counsel from asking the medical examiner about the percentage of people who died from violent deaths while having narcotics in their bodies because the question would not have elicited any relevant testimony, as the percentage did not make defendant more of less culpable of the victim's murder and did not make a jury's finding of mitigation any more or less probable than it would be without the evidence. Herrera v. State, 2012 Tex. App. LEXIS 5594, 2012 WL 2861673 (Tex. App. Corpus Christi July 12 2012).

941. As the extraneous offenses were not relevant for any reason beside character conformity, the trial court abused its discretion in admitting the evidence. Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270

(Tex. App. Eastland July 12 2012).

942. Appellant claimed the trial court erred in denying his motion to suppress the videotape of the arrest, but there was no such recording; as the videotape was not relevant, the court went forward as if appellant challenged evidence suppression in general, as this was a fair reading of his argument. Varnado v. State, 2012 Tex. App. LEXIS 5597, 2012 WL 2860704 (Tex. App. Corpus Christi July 12 2012).

943. Officer testified that he stopped appellant because the officer witnessed appellant driving without turning on his headlights, for purposes of Tex. Transp. Code Ann. § 547.302(a)(1), and it was shown that it was nighttime; any of the officer's subjective motives were not relevant, and the evidence supported the finding that the officer's detention was reasonable and the trial court did not err in denying appellant's motion to suppress. Baldez v. State, 386 S.W.3d 324, 2012 Tex. App. LEXIS 5466, 2012 WL 2834043 (Tex. App. San Antonio July 11 2012).

944. Trial court did not abuse its discretion by admitting into evidence a portion of defendant's statement to the police about manipulating and threatening other children into proposed sexual activity because the evidence made it more likely that he threatened the victim and it rebutted the defensive theory that defendant was guilty of only sexual assault, not aggravated sexual assault. Sandles v. State, 2012 Tex. App. LEXIS 5518, 2012 WL 3104377 (Tex. App. Dallas July 11 2012).

945. Trial court did not abuse its discretion by allowing two witnesses to testify about extraneous offenses because it could have concluded that the evidence was relevant, probative, and necessary to rebut defendant's theory that the victim fabricated her allegation against defendant. The State's presentation of the evidence consumed very little time, and it was presented in a fashion to prove defendant's intent or knowledge of the offenses charged in the indictment. Guardado v. State, 2012 Tex. App. LEXIS 5514, 2012 WL 2832561 (Tex. App. El Paso July 11 2012).

946. Store was entitled to partial conditional writ of mandamus, because the claimant's discovery requests for information relating to incidents at all 23 grocery stores in the slip and fall case was overbroad, the claimant's discovery request for accident and/or incident reports regarding other incidents was overbroad, and the trial court could have reasonably concluded that floor safety training records of managers, maintenance partners, and partners who were working in the area where the claimant fell could lead to relevant, admissible evidence to support the pleading. In re Heb Grocery Co., L.P., 375 S.W.3d 497, 2012 Tex. App. LEXIS 5409 (Tex. App. Houston 14th Dist. July 10 2012).

947. In the attorney's capacity as a paralegal working for the defendants, he spoke with his clients' former counsel about some or all of the clients and the status of the case, and the trial court could have found that the attorney would have been a material witness in the case, for purposes of Tex. Disciplinary R. Prof. Conduct 3.08, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Tex. State Bar R. art. X, sec. 9), and would give relevant testimony concerning essential facts, and by its nature, such testimony was likely to be prejudicial to a party; the court found the trial court's decision to disqualify the attorney as attorney for the clients was not unreasonable, and the court denied the attorney's request for mandamus relief. In re Getz, 2012 Tex. App. LEXIS 5385 (Tex. App. Amarillo July 9 2012).

948. Trial court did not abuse its discretion by excluding expert psychological testimony who allegedly would have testified that as a result of his mental defects defendant was incapable of forming the necessary mens rea to commit an assault because defendant's amnesia was caused by his head injury, which occurred after the assault, and therefore could not be relevant to his intent at the time of the assault. In addition, the expert's report only noted that defendant told the expert that he had post-traumatic stress disorder, and nothing suggested that the expert himself confirmed the diagnosis. Iniquez v. State, 374 S.W.3d 611, 2012 Tex. App. LEXIS 5436, 2012 WL 2742632

(Tex. App. Austin July 6 2012).

949. Stepmother's conversion was discoverable, and the stepson knew of the stepmother's assumption of control over his property as early as February 2008; that he might not have known that the property would never be returned was not relevant, as the conversion took place when the stepmother exercised control over the property or refused a demand for its return, and the stepson did not show that the discovery rule deferred the start of the limitations period as to his conversion claim. Carpenter v. Carpenter, 2012 Tex. App. LEXIS 5322, 2012 WL 2887932 (Tex. App. Fort Worth July 5 2012).

950. Defendant failed to show an abuse by the trial court in excluding evidence where he did not show the exclusion of relevant and reliable evidence, Tex. R. Evid. 401, 402, that formed such a vital part of his case that its exclusion effectively precluded him from presenting a defense, U.S. Const. amends. VI, XIV. Houston v. State, 2012 Tex. App. LEXIS 5276, 2012 WL 2511588 (Tex. App. Dallas July 2 2012).

951. Determination of the identity of the person fleeing from the police officer was a fact of significant consequence to the determination of the action, and an extraneous offense may be admissible, to show the identity of the accused, Tex. R. Evid. 403(b); therefore, evidence pertaining to identity was relevant and the trial court's decision to deny defendant's objection on the basis of Tex. R. Evid. 401 was within the zone of reasonable disagreement. White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

952. Determination of the identity of the person fleeing from the police officer was a fact of significant consequence to the determination of the action, and an extraneous offense may be admissible, to show the identity of the accused, Tex. R. Evid. 403(b); therefore, evidence pertaining to identity was relevant and the trial court's decision to deny defendant's objection on the basis of Tex. R. Evid. 401 was within the zone of reasonable disagreement. White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

953. Where defendant entered a plea of guilty to four aggravated robberies, the trial court did not abuse its discretion in admitting evidence of defendant's tattoos as it was relevant under Tex. R. Evid. 401 to the jury's determination of his suitability for community supervision. Jackson v. State, 2012 Tex. App. LEXIS 5221, 2012 WL 2445052 (Tex. App. Dallas June 28 2012).

954. Trial court did not abuse its discretion by admitting pornography that was found at defendant's home during his trial for continuous sexual abuse of a young child or children in violation of Tex. Penal Code Ann. § 21.02(b) because they depicted events similar to some of the instances of sexual abuse described by the daughter and thus had a tendency to make the daughter's claims more plausible, and defendant did not overcome the presumption that the evidence was more probative than prejudicial. Brown v. State, 381 S.W.3d 565, 2012 Tex. App. LEXIS 5164 (Tex. App. Eastland June 28 2012).

955. Tex. R. Evid. 401 is helpful in determining what evidence should be admissible under Tex. Code Crim. Proc. art. 37.07, § 3(a), but the definition is not a perfect fit in the punishment phase; relevance is a question of what is helpful to the jury to determine the appropriate sentence for the particular defendant, however, evidence that is relevant may be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence. Ex Parte Rogers, 369 S.W.3d 858, 2012 Tex. Crim. App. LEXIS 856 (Tex. Crim. App. 2012).

956. There was no reasonable strategy for counsel not to object to a witness's testimony in the punishment phase, and even though applicant did not address this matter in his habeas corpus writ, such was relevant, given that in the prior offense and this case, applicant exhibited behavior that was similar, and the attack on the witness was different, and this called into question the probative value of this evidence; had counsel adequately investigated this assault prior to trial, he would have had a stronger basis to ask for exclusion of the prejudicial testimony, and the

witness's testimony was likely inflammatory, such that the danger of unfair prejudice substantially outweighed the probative value of the evidence. Ex Parte Rogers, 369 S.W.3d 858, 2012 Tex. Crim. App. LEXIS 856 (Tex. Crim. App. 2012).

957. Exclusion of the photographic evidence, of marginal relevance at best, was not calculated to cause, nor did it probably cause, the rendition of an improper judgment; because the photographs in question did not purport to show the condition of the property at the time of the annexation, but later, the trial court did not abuse its discretion in excluding them. City of Lufkin v. Akj Props., Inc., 2012 Tex. App. LEXIS 5057, 2012 WL 2393087 (Tex. App. Texarkana June 26 2012).

958. In this termination trial, the court could not say the trial court committed error in considering certain facts and addressing such in conclusions of law, including the return of the mother's son to her; it was indicated that the couple tried to show that the mother used drugs with her pregnancy and she permitted her son to be raised by relatives, and afterwards the trial court heard testimony that the son had been retuned to the mother based on various factors that could have been considered as relevant to the best interest issue. In re A.L.D.H., 373 S.W.3d 187, 2012 Tex. App. LEXIS 5044 (Tex. App. Amarillo June 25 2012).

959. Trial court did not err by excluding opinion testimony from the officer because his opinion on the difficulty of obtaining a conviction when the victim of a sexual assault suffered from mental impairments did not make any of the facts the jury had to determine more or less probable, and therefore the evidence was not relevant. Myles v. State, 2012 Tex. App. LEXIS 4911, 2012 WL 2357426 (Tex. App. Houston 1st Dist. June 21 2012).

960. Appellant did not object to evidence of narcotics use when the State posed a question or when the witness answered, but at a bench conference, he argued that the evidence was not relevant, and this was sufficient to preserve the relevance objection given that the objection was deemed to apply when the evidence was subsequently admitted, for purposes of Tex. R. Evid. 103(a)(1); at the bench conference, appellant did not object on prejudicial effect grounds, the objection at trial did not comport with the one on appeal, and he failed to preserve error on the claim that the testimony was prejudicial. Miles v. State, 2012 Tex. App. LEXIS 4929, 2012 WL 2356478 (Tex. App. Houston 14th Dist. June 21 2012).

961. Under Tex. R. Evid. 401, 402, the statement by the witness that she was afraid to select the photo of defendant in the photo lineup was relevant and admissible because it showed that she identified defendant as the person that perpetrated the victim's murder. Benavides v. State, 2012 Tex. App. LEXIS 4971, 2012 WL 2353731 (Tex. App. Dallas June 21 2012).

962. For purposes of appellant's driving while intoxicated case, appellant refused to give a breath sample on an Intoxilyzer machine; evidence of such was relevant to show a consciousness of guilt. Hill v. State, 2012 Tex. App. LEXIS 4812, 2012 WL 2226610 (Tex. App. Texarkana June 18 2012).

963. Ex-wife did not provide the court with a record from a hearing, so the court could not address her arguments related to whatever evidence was presented at that hearing; regardless, as the issue addressed the final possession order, the court considered any evidence that was relevant to possession cited and contained in the record, in considering custody for purposes of Tex. Fam. Code Ann. § 153.312. Michelena v. Michelena, 2012 Tex. App. LEXIS 4823, 2012 WL 3012642 (Tex. App. Corpus Christi June 15 2012).

964. In a fraudulent transfer case, the exclusion of title insurance evidence and various documents as irrelevant and potentially confusing under Tex. R. Evid. 401, 402, 403 was not error; moreover, any error that might have occurred was harmless. Hahn v. Love, 394 S.W.3d 14, 2012 Tex. App. LEXIS 4702, 2012 WL 2153675 (Tex. App.

Houston 1st Dist. June 14 2012).

965. Appellants' claims of intentional infliction of emotional distress failed given that they were grounded on the same conduct as their defamation claims, which had also failed; evidence of any alleged kickback plan was not relevant to the elements of these claims. Bell v. Express Energy Servs. Operating, Lp, 2012 Tex. App. LEXIS 4491, 2012 WL 2036437 (Tex. App. Fort Worth June 7 2012).

966. Trial court did not err by admitting into evidence a picture of a pornographic videotape that contained adult pornography during defendant's trial on charges of indecency with a child and sexual assault of a child because it had some probative value, as a complainant testified that defendant used pornography in his bedroom immediately before sexually assaulting her and an officer testified about the use of pornography in grooming sexual assault victims. Admission of the picture was not unfairly prejudicial because defendant called the complainant's credibility into question, the officer provided unobjected-to testimony about similar materials found on defendant's computer, and the State focused on the evidence for a relatively short amount of time. Allen v. State, 2012 Tex. App. LEXIS 4598, 2012 WL 2106550 (Tex. App. Houston 1st Dist. June 7 2012).

967. Trial court did not err by admitting into evidence a school principal's testimony about one of the complainant's bad hygiene during defendant's trial on charges of indecency with a child and sexual assault of a child because the State represented that its relevance would be demonstrated through later testimony and defendant did not argue that the relevance of the testimony was not demonstrated with later evidence. Allen v. State, 2012 Tex. App. LEXIS 4598, 2012 WL 2106550 (Tex. App. Houston 1st Dist. June 7 2012).

968. Trial court was not allowed to consider certain statutory arguments in determining the validity of an arbitration clause, as the arguments challenged the formation and performance of the contract as a whole instead of just the arbitration clause alone; the only relevant issues would have been those that were related to the specific making of the arbitration agreement. Aetna Life INS. Co. v. Weslaco Indep. Sch. Dist., 2012 Tex. App. LEXIS 4379, 2012 WL 1964576 (Tex. App. Corpus Christi May 31 2012).

969. Evidence at trial showed that the amount found on defendant during booking was 0.15 grams and was found in a one-dollar bill, and although the amount and packaging of cocaine found on each male were similar, they were not identical; in addition, the officer testified that suspects typically transported narcotics in bills of money such that the trial court did not err in excluding the evidence. Arreola v. State, 2012 Tex. App. LEXIS 4166, 2012 WL 1868680 (Tex. App. Eastland May 24 2012).

970. For materiality and relevance purposes, the State's theory that appellant had ill will towards the victim was aided through introducing prior extraneous acts, and because the nature of the parties' relationship was material in order to show motive, the trial court did not abuse its discretion in finding the prior acts were admissible, for purposes of Tex. R. Evid. 404(b). Jurasek v. State, 2012 Tex. App. LEXIS 3973, 2012 WL 1810197 (Tex. App. Corpus Christi May 17 2012).

971. Appellant claimed that even if the extraneous acts were relevant, they should have not been admitted under Tex. R. Evid. 403, but the State's establishment of motive relied almost exclusively on the extraneous acts against the victim or in retaliation for the current charge against appellant, and the parties' relationship was probative in helping develop the State's case and show motive; there was no abuse of discretion on the trial court's part in overruling appellant's objection. Jurasek v. State, 2012 Tex. App. LEXIS 3973, 2012 WL 1810197 (Tex. App. Corpus Christi May 17 2012).

972. Trial court had not erred by excluding defendant's testimony regarding his attorney's advice and why defendant had left the country where the proffered testimony was immaterial, and therefore inadmissible, because it

was not shown to be addressed to the proof of a material proposition. Claudio v. State, 2012 Tex. App. LEXIS 3818, 2012 WL 1656328 (Tex. App. Corpus Christi May 10 2012).

973. Worker's employer offered expert witness testimony and a video to explain how diesel reacted to an open flame, and this evidence was relevant because the increased volatility of gasoline instead of diesel was important concerning the determination of various issues; the volatility of gasoline was still relevant even though there was no evidence that the fuel used was pure gasoline, and the lack of volatility of diesel fuel was also relevant, plus the oil company did not object to the expert's testimony, which was cumulative of evidence in the video, and for purposes of Tex. R. App. P. 44.1, the erroneous admission of evidence was harmless if it was just cumulative. Gardner Oil, Inc. v. Chavez, 2012 Tex. App. LEXIS 3655, 2012 WL 1623420 (Tex. App. Tyler May 9 2012).

974. Evidence of appellant's prior convictions was directly relevant to many issues in the case including knowledge of the illegality of the substance and appellant's credibility, for purposes of Tex. R. Evide. 403 and appellant's drug possession case. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

975. Trial court cut off questioning on certain issues, but those issues were not mentioned in the motion for a new trial based on ineffective assistance; there was no abuse of discretion on the trial court's part in sustaining these relevancy objections. Arroyos v. State, 2012 Tex. App. LEXIS 3574, 2012 WL 1555900 (Tex. App. Fort Worth May 3 2012).

976. In a driving while intoxicated case, a trial court did not err by allowing a police officer to give an opinion about appellant's intent to fight at the time of his arrest; the officer was not speculating about appellant's inner thoughts, rather, the officer was drawing an inference from her own observations. The information was relevant, it did not describe an extraneous offense or bad act, the inclusion of the information was not so prejudicial that it should have been excluded on that ground, and it was presented alongside copious evidence that appellant was driving while intoxicated and attempting to flee from police. Link v. State, 2012 Tex. App. LEXIS 3350, 2012 WL 1495182 (Tex. App. Eastland Apr. 30 2012).

977. Grantees could only receive the interest that was owned and conveyed to them by a farming trust, which was a one-fourth mineral interest, and thus the settlement agreement between the trust and others was irrelevant regarding the disputed mineral interest, which never passed to the trust via application of the case law doctrine or under a deed. Philipello v. Taylor, 2012 Tex. App. LEXIS 3324, 2012 WL 1435171 (Tex. App. Waco Apr. 25 2012).

978. Appellant's statements to his wife and testimony that his statements were not truthful did not indicate involuntariness, and the inquiry was to be considered without regard to truth or falsity; nothing from appellant's meeting with his wife indicated involuntariness, appellant affirmatively wanted to continue the interrogation, and his belief about being in custody was irrelevant to whether he was in custody for Miranda purposes. Morales v. State, 2012 Tex. App. LEXIS 3150, 2012 WL 1406458 (Tex. App. Houston 14th Dist. Apr. 24 2012).

979. During defendant's trial for sexual assault of a child, the court did not err in allowing witnesses to testify during the punishment phase because defendant's membership in an organization that promoted and practiced polygamy and underage marriages that resulted in the sexual assault of children was relevant to the question of his character for purposes of punishment. Jessop v. State, 368 S.W.3d 653, 2012 Tex. App. LEXIS 3176, 2012 WL 1402117 (Tex. App. Austin Apr. 19 2012).

980. State was allowed to rebut testimony about appellant's character for truthfulness by asking about specific conduct instances, and appellant did not claim they were irrelevant, and they shared many similarities; the court is aware of no authority that restricts the State from asking whether the witness had heard that the defendant was

convicted of a particular crime. Ethridge v. State, 2012 Tex. App. LEXIS 3110, 2012 WL 1379648 (Tex. App. Tyler Apr. 18 2012).

981. Fact that members of the allegedly targeted group sat on the jury did not necessarily defeat the prima facie case showing, but was relevant in the finding of discriminatory practices, and the fact that the State kept some of its strikes did not defeat the case. Ethridge v. State, 2012 Tex. App. LEXIS 3110, 2012 WL 1379648 (Tex. App. Tyler Apr. 18 2012).

982. For purposes of appellant's conviction of intentionally or knowingly causing serious bodily injury to a child, the means by which appellant injured the baby was not relevant; what was important was that appellant knowingly or intentionally caused a serious injury by at least one of the ways listed in the indictment, and the evidence supported the finding. Herrera v. State, 367 S.W.3d 762, 2012 Tex. App. LEXIS 2940, 2012 WL 1297553 (Tex. App. Houston 14th Dist. Apr. 17 2012).

983. In its new trial motion, a landlord made an argument regarding a list of expenses being improperly admitted, but the objection was untimely and did not preserve the complaint for reivew; to hold otherwise would have permitted the landlord to agree to the relevancy of the list, wait for a verdict that was not favorable, and then complain about relevance. Breof Bnk Tex., L.P. v. D.H. Hill Advisors, Inc., 370 S.W.3d 58, 2012 Tex. App. LEXIS 2942, 2012 WL 1301231 (Tex. App. Houston 14th Dist. Apr. 17 2012).

984. In a murder case, a text message sent by appellant to his girlfriend after a shooting was relevant under Tex. R. Evid. 401 to show state of mind and that appellant did not act in self-defense; it was not subject to exclusion under Tex. R. Evid. 403 because it was the only evidence of state of mind following the shooting, despite the fact that it contained a derogatory term. Guerra v. State, 2012 Tex. App. LEXIS 2973, 2012 WL 1297718 (Tex. App. Dallas Apr. 17 2012).

985. Appellant objected on grounds of hearsay and relevancy and he claimed the evidence was more prejudicial than probative, but he did not raise an objection on confrontation or insufficiency grounds at trial and thus he did not preserve those arguments for review. Mclamore v. State, 2012 Tex. App. LEXIS 2909 (Tex. App. Fort Worth Apr. 12 2012).

986. In defendant's trial for indecency with a child in violation of Tex. Penal Code Ann. § 21.11, the trial court properly excluded as speculative and irrelevant defendant's evidence that the victims' mother's friend, with whom the mother was drinking at the time of the incidents, was a convicted child molester whose probation was revoked due to his proximity to the two boys. Smikal v. State, 2012 Tex. App. LEXIS 2904, 2012 WL 1259127 (Tex. App. Corpus Christi Apr. 12 2012).

987. In his murder trial, appellant argued that the photographs depicting the victim's dismembered body, a crime scene videotape, and related testimony amounted to inadmissible evidence of the offense of abuse of a corpse under Tex. Penal Code Ann. § 42.08; because the dismemberment evidence was relevant to show an intent to conceal evidence or consciousness of guilt, the trial court did not abuse its discretion in overruling appellant's objection under Tex. R. Evid. 404(b). Jones v. State, 2012 Tex. App. LEXIS 2381, 2012 WL 1004735 (Tex. App. Dallas Mar. 27 2012).

988. In this murder trial, the trial court did not abuse its discretion in admitting autopsy evidence and finding it was relevant for purposes of Tex. R. Evid. 401, 402, given that (1) the medical examiner testified that the photographs would help him explain his findings and would help the jury understand the victim's injuries, (2) the testimony and autopsy report concerned the cause of death, which was relevant, and (3) the photographs, while not entirely clear, appeared to depict only the initial condition of the body and not autopsy mutilation; the court's analysis was the

same whether or not a third photograph was admitted and shown to the jury. Jones v. State, 2012 Tex. App. LEXIS 2381, 2012 WL 1004735 (Tex. App. Dallas Mar. 27 2012).

989. Heir relied on the perpetuities clause, for purposes of Tex. Prop. Code Ann. § 112.036, in support of her will interpretation, but the clause did not contradict the language terminating the trusts and directing the distribution of assets, and the trusts did not terminate in accordance with this clause; because the trusts had already terminated, and the clause addressed asset distribution in the even the trusts failed to terminate within the time set forth in the rule against perpetuities, it was irrelevant to how the trust assets were to be divided. Nash v. Beckett, 365 S.W.3d 131, 2012 Tex. App. LEXIS 2308, 2012 WL 967698 (Tex. App. Texarkana Mar. 23 2012).

990. Motion for rehearing contained arguments that a creditor did not prove her claim, and these statements were responsive to the motion and were relevant; the court overruled the claim that the trial court erred in overruling objections in this regard. Moore v. Ellsworth, 2012 Tex. App. LEXIS 2180, 2012 WL 954626 (Tex. App. Texarkana Mar. 21 2012).

991. Pictures of shell casings on appellant's porch and the dent in his truck did not make any fact of consequence, here the claim of self-defense, more or less probable, for purposes of Tex. R. Evid. 401, 402; one officer testified that it was found that the dent had nothing to do with the shooting, and given that the evidence suggested appellant shot the victim from inside his truck and one shell casing was found in the vehicle, there was little to no relevance the casings on the porch could have had to the offense, and thus the pictures were improperly admitted. Dyke v. State, 2012 Tex. App. LEXIS 2181, 2012 WL 954625 (Tex. App. Texarkana Mar. 21 2012).

992. Erroneous admission of irrelevant photographs of a dent in appellant's vehicle and shell casings on his porch did not influence the jury or had only a slight effect, for purposes of Tex. R. App. P. 44.2(b), given that neither were discussed at voir dire, most of the State's argument addressed the self-defense claim, and to the extent references to appellant's driving and shooting habits could have related to the photographs, they could have also related to the testimony of another witness. Dyke v. State, 2012 Tex. App. LEXIS 2181, 2012 WL 954625 (Tex. App. Texarkana Mar. 21 2012).

993. Appellant claimed the purpose for which the State offered the evidence was not a purpose discussed in the rules; however, the exceptions to the hearsay rules are not dependent on the reason why a party wants to offer the hearsay, and the only relevant inquiry concerning the purpose of hearsay is whether the out-of-court statement is being offered for the truth of the matter asserted. Why the proponent wishes to admit the evidence, beyond offering it for the truth of the matter asserted, is immaterial, and how the hearsay evidence supports the proponent's trial theory or fits into the proponent's trial strategy does not affect its admissibility under an exception under the rules. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

994. Appellant objected to a witness's testimony under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), suggesting a relevancy complaint, but he did not object on expert qualification or reliability grounds or on Tex. R. Evid. 403 grounds; thus, the only issue preserved for review was the claim that the witness's testimony was inadmissible because it was not linked to appellant. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

995. Testimony of a witness and doctor showed the beliefs and character of appellant as shown by his association with a church, and the court did not construe the evidence to be that of victim impact; here, where appellant was charged with a sexual crime against a child, membership in an organization that routinely engaged in activities resulting in sexual crimes against children was relevant because it related to appellant's character. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

996. If the defendant's membership in an organization and the organization's nature and activities give the jury valuable information regarding the character of the defendant, such information should be allowed into evidence, as the jury is concerned at the punishment phase with evaluating a defendant's background and character, and a person's beliefs and associations reflect his background and character; thus, evidence of a defendant's membership in an organization and that organization's activities is admissible because it is relevant to the issue of the defendant's character. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

997. Evidence showed that appellant was a member of a church and the church engaged in illegal practices, including the promotion of underage and plural marriages and resulted in the sexual assault of children; thus, appellant's membership in an organization that practiced and promoted polygamy and underage marriages resulting in sexual assaults to children was relevant to appellant's character for punishment purposes, and the trial court did not abuse its discretion in allowing testimony in this regard. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

998. Because appellant did not offer argument or authority on his claims under Tex. R. Evid. 401, 402, 403, 404(b) and his claims for due process and due course of law, the complaints were inadequately briefed and presented nothing for review. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

999. Trial court did not abuse its discretion by admitting the results of the blood test showing that defendant had a prescription drug in his system because the evidence was relevant during defendant's driving under the influence trial, as it assisted the jury in determining whether defendant's intoxication was due to the drug. Armstrong v. State, 2012 Tex. App. LEXIS 2041, 2012 WL 864778 (Tex. App. Dallas Mar. 15 2012).

1000. Grant of summary judgment in favor of the company men and others in the employee's action, in part, for defamation was proper because no evidence existed to support the defamation claims and any inferences of a kickback scheme were not relevant. Bell v. Bennett, 2012 Tex. App. LEXIS 2097, 2012 WL 858603 (Tex. App. Fort Worth Mar. 15 2012).

1001. Grant of summary judgment in favor of the company men and others in the employee's defamation action was proper because expert testimony about bankruptcy was not relevant to any element of the defamation claims, nor was the bankruptcy testimony relevant to any element of the employee's other pleaded claims. Thus, the expert was property struck as an expert witness. Bell v. Bennett, 2012 Tex. App. LEXIS 2097, 2012 WL 858603 (Tex. App. Fort Worth Mar. 15 2012).

1002. Although the jury found appellee was in breach, the issue of its substantial performance was irrelevant because the jury found that any breach was excused, based on appellant's material breach, and appellee did not have to prove its substantial performance. 1.9 Little York, Ltd. v. Allice Trading Inc., 2012 Tex. App. LEXIS 2112, 2012 WL 897776 (Tex. App. Houston 1st Dist. Mar. 15 2012).

1003. When the landowner purchased its tract, it did not obtain an assignment of claims possessed by the predecessor in interest, an estate, and although the landowner later obtained assignments from estate heirs, this was not done until almost one year after the lawsuit was filed; this made it irrelevant for purposes of deciding whether the landowner had standing, given that a later-acquired interest did not confer standing retroactively. La Tierra De Simmons Familia, Ltd. v. Main Event Entm't, Lp, 2012 Tex. App. LEXIS 1928, 2012 WL 753184 (Tex. App. Austin Mar. 9 2012).

1004. There was some disagreement about whether the characterization of an injury was relevant to the issue of standing, but the court did not need to decide the question because even if there was relevance in this regard, the

injury to the tract was permanent and accrued before the landowner obtained the property. La Tierra De Simmons Familia, Ltd. v. Main Event Entm't, Lp, 2012 Tex. App. LEXIS 1928, 2012 WL 753184 (Tex. App. Austin Mar. 9 2012).

1005. Court agrees with its sister courts that Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) allows evidence of an unadjudicated juvenile offense to be admitted so long as it is relevant and shown beyond a reasonable doubt that it was the defendant that committed the offense; the statutory construction argument raised by appellant had already been rejected, and he did not challenge the sufficiency of the evidence to show that he committed the unadjudicated crime of which he complained. Alvarado v. State, 2012 Tex. App. LEXIS 1936, 2012 WL 762026 (Tex. App. Amarillo Mar. 9 2012).

1006. Given the vague nature of a witness's allegations, it could hardly be said that he showed appellant committed some kind of a crime, and the history of the witness and appellant was not necessarily relevant; counsel asked what the parties' problem was, the witness answered, and the trial court did not abuse its discretion in allowing the answer to stand. Vertiz v. State, 2012 Tex. App. LEXIS 1730, 2012 WL 690398 (Tex. App. Tyler Feb. 29 2012).

1007. Court properly allowed an expert witness to testify about the similarity of physical evidence recovered from the crime scene because the tapes from the crime scene and defendant's home were offered to show that because the tapes were similar, it was more likely that they came from a common source, and if they came from a common source, it was more likely that the tape in defendant's home came from the packaging for the marijuana in the murder victim's home. The testimony showed the similarities of the tapes and was therefore relevant to show that defendant was at the crime scene and had a motive for shooting the victims. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

1008. State argued that appellant's relevance objection did not preserve an objection under Tex. R. Evid. 403, and any error was harmless in any event, and the court agreed; the court did not find any objection to a witness's testimony about treaties between gangs on the basis of Rule 403, and thus no issue was preserved in this regard. Zavala v. State, 2012 Tex. App. LEXIS 1447, 2012 WL 601412 (Tex. App. Corpus Christi Feb. 23 2012).

1009. In a capital murder case, a trial court did not abuse its discretion by admitting a video recording and a photograph because their probative value was not substantially outweighed by the potential for undue prejudice. The evidence was probative to show appellant's presence at the scene of the crime and the degree of cooperation between appellant and his brother, the prejudice to appellant was not unfair, the challenged evidence did not create or add to any confusion regarding the events, there was little danger of misleading the jury, and, given the highly probative nature of the recording and photographs, the trial court could have concluded that there was no undue delay and that their presentation was necessary. Mccuin v. State, 2012 Tex. App. LEXIS 1363, 2012 WL 566796 (Tex. App. El Paso Feb. 22 2012).

1010. Although a contractor challenged the jury's finding of control, it also claimed the finding was immaterial, but the finding was relevant to determine whether the contractor owed a duty to the worker. Nowak Constr. Co. v. Avalos, 2012 Tex. App. LEXIS 1170, 2012 WL 473500 (Tex. App. El Paso Feb. 15 2012).

1011. Court properly admitted the contents of social networking web pages because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be -- web pages the contents of which defendant was responsible for. There were numerous photographs of defendant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring, and there was a reference to the victim's death and the music from his funeral. Tienda v. State, 358 S.W.3d 633, 2012 Tex. Crim. App. LEXIS 244

(Tex. Crim. App. 2012).

1012. In defendant's capital murder case, the trial court properly barred evidence of the victim's possible HIV condition because it found it irrelevant and too speculative; the proffered evidence showed only that the victim bit an accomplice, as the victim attempted to defend himself, and that the accomplice knew of the victim's possible HIV infection. The evidence was not enough to support defendant's defense of independent impulse and it lacked probative value. Gonzalez v. State, 2012 Tex. App. LEXIS 927, 2012 WL 361733 (Tex. App. Corpus Christi Feb. 2 2012).

1013. In defendant's capital murder case, the trial court properly admitted autopsy photographs because they were not any more gruesome than what would be expected, the photographs tracked the doctor's testimony, and the photographs depicted the victim's bloody and bruised face and were vital to the State's case to the jury with regard to the manner and method of the victim's death. Gonzalez v. State, 2012 Tex. App. LEXIS 927, 2012 WL 361733 (Tex. App. Corpus Christi Feb. 2 2012).

1014. Appellant's attempt to impeach a doctor's credibility was not covered under Tex. R. Evid. 806, and when applicable, the rule allowed the declarant's credibility to be challenged; the declarant's credibility was not an issue at trial, and a witness's testimony regarding information he received from the declarant was relevant only if the jury found the declarant's statement was accurate and truthful, and because the declarant's statement was offered to prove the truth of the matter asserted, it was inadmissible and the trial court properly excluded it. Lozano v. State, 359 S.W.3d 790, 2012 Tex. App. LEXIS 718 (Tex. App. Fort Worth Jan. 26 2012).

1015. Trial court did not err by prohibiting defendant from eliciting testimony at trial that pertained to the drug seller's identity because the trial court could have reasonably determined that even if defendant and the seller were not the same person, it was not logically less probable that defendant possessed cocaine with intent to deliver it on the date of his arrest merely because someone else did so at the apartment on other occasions. Harris v. State, 2012 Tex. App. LEXIS 732, 2012 WL 254086 (Tex. App. Fort Worth Jan. 26 2012).

1016. Under Tex. R. Evid. 401, the trial court found that defendant's acquittal in the assault charge on police officers had no tendency to make the existence of any fact of consequence to the determination of the aggravated sexual assault charge more or less probable. Lopez v. State, 2012 Tex. App. LEXIS 676, 2012 WL 256103 (Tex. App. Corpus Christi Jan. 26 2012).

1017. Appellant did not assert an objection to the extraneous-offense evidence under Tex. R. Evid. 403, nor was such an objection apparent from the context of his objection for relevance under Tex. R. Evid. 401 and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), and thus this was not preserved for review under Tex. R. App. P. 33.1(a)(1). Bryant v. State, 2012 Tex. App. LEXIS 479, 2012 WL 171243 (Tex. App. Fort Worth Jan. 19 2012).

1018. Although the State had not elicited testimony connecting appellant to another armed robbery when the State offered certain evidence, the State later offered evidence through other testimony, from which the jury could have found that appellant committed that robbery; evidence was not to be excluded merely because its relevance might depend on other evidence being produced later in the trial, for purposes of Tex. R. Evid. 104(b), and the court saw no reason why this standard should not have applied when the trial court made its admissibility finding of the extraneous evidence at punishment, especially given that the trial court had the chance to reconsider the same evidence when appellant objected. To the extent appellant argued that the extraneous evidence was irrelevant, the court found no abuse of discretion. Bryant v. State, 2012 Tex. App. LEXIS 479, 2012 WL 171243 (Tex. App. Fort Worth Jan. 19 2012).

1019. To the extent appellant challenged the extraneous-offense evidence under Tex. Code Crim. Proc. Ann. art. 37.07, in determining the threshold issue of admissibility of relevant evidence, the trial court did not abuse its discretion by admitting the evidence on condition that the State connect appellant to the offense through evidence elicited from other witnesses, which the State did, and by determining that the evidence was admissible. Bryant v. State, 2012 Tex. App. LEXIS 479, 2012 WL 171243 (Tex. App. Fort Worth Jan. 19 2012).

1020. Appellant claimed that his medical records were admissible under Tex. R. Evid. 803(4), (6), but this was not presented at trial as a ground for overruling the State's hearsay objection under Tex. R. Evid. 801(d), and although the records were included in the bill of exceptions, such was not made on the predicate for admission under either hearsay exception appellant raised for the first time on appeal; even if the court assumed that the trial court understood the bill of exceptions to be a proffer of admission, the records did not establish that appellant suffered from a medical condition that was relevant to his prosecution for driving while intoxicated, the patient history did not show that he had a condition that mimicked the symptoms of intoxication, and no other potential relevance for the records was shown, such that exclusion of the records did not affect a substantial right under Tex. R. App. P. 44.2(b). Bradley v. State, 2012 Tex. App. LEXIS 410, 2012 WL 150969 (Tex. App. Beaumont Jan. 18 2012).

1021. No adverse ruling regarding appellant's father's testimony about appellant's medical records apepared, his offer of proof had no testimony from the father, and the record contained no explanation of how a diagnosis of neurofibromatosis was relevant to any contested issue in this driving while intoxicated case, such that the issue was not preserved for review, for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(2), (b). Bradley v. State, 2012 Tex. App. LEXIS 410, 2012 WL 150969 (Tex. App. Beaumont Jan. 18 2012).

1022. Appellant objected on relevance grounds when one question was posed, but appellant did not further pursue the objection and only objected further on the grounds of speculation; the record did not show a Tex. R. Evid. 404(b) objection, the trial court was not put on notice of the complaint that the evidence was improper character or extraneous offense evidence, the objections made did not preserve error for a complaint under Rule 404(b), and moreover an officer did not specifically refer to appellant's extraneous offense evidence. The issue was waived. Phillips v. State, 2012 Tex. App. LEXIS 244, 2012 WL 113047 (Tex. App. Houston 14th Dist. Jan. 12 2012).

1023. Appellant did not make an offer of proof regarding the contents of a letter and the relevance thereof, and therefore he failed to preserve this issue for review. Lewis v. State, 2012 Tex. App. LEXIS 100, 2012 WL 29326 (Tex. App. Corpus Christi Jan. 5 2012).

1024. Under Tex. R. Evid. 103(a)(2), appellant had to proffer with some degree of specificity the substantive evidence he intended to present with regard to the victim's anger and the relevance thereof, but he failed to do so, and thus he did not preserve this argument for review. Lewis v. State, 2012 Tex. App. LEXIS 100, 2012 WL 29326 (Tex. App. Corpus Christi Jan. 5 2012).

1025. Hearing to determine counsel's strategy would not be necessary when determining if appellant established prejudice, given that counsel's strategy was not relevant to whether the result of the trial would have been different. Lewis v. State, 2012 Tex. App. LEXIS 86, 2012 WL 28707 (Tex. App. Waco Jan. 4 2012).

1026. Fact that no cocaine was found on appellant or in her house would have been relevant to assessing whether she possessed cocaine on an earlier point in time, but although the court found that matters concerning the search and arrest warrant were relevant, limiting the scope of cross-examination of a detective, while error, did not contribute to appellant's conviction or punishment, given that (1) the detective's testimony was cumulative to a certain extent, (2) much of his testimony was corroborated by recordings that were admitted into evidence, (3) appellant did not introduce evidence that contradicted the detective's testimony, (4) appellant was allowed to fully cross-examine the detective, except for search warrant testimony, and (5) the State presented a strong case.

Bussey v. State, 2012 Tex. App. LEXIS 1505, 2012 WL 626316 (Tex. App. Houston 14th Dist. Jan. 3 2012).

1027. Defense counsel pursued a subject in a backdoor effort to introduce evidence of appellant's acquittal, and thus the trial court did not abuse its discretion by restricting the cross-examination under Tex. R. Evid. 611(b); appellant did not present anything other than her acquittal that would have raised double jeopardy issues, and thus testimony concerning her acquittal was not relevant. Bussey v. State, 2012 Tex. App. LEXIS 1505, 2012 WL 626316 (Tex. App. Houston 14th Dist. Jan. 3 2012).

1028. Court disagreed that appellant's relevance objection preserved his objection under Tex. R. Evid. 404(b), and even if it had, appellant failed to preserve any issue because his objection was untimely as made after the question was asked and answered. Cavazos v. State, 2011 Tex. App. LEXIS 10185, 2011 WL 6917580 (Tex. App. Corpus Christi Dec. 29 2011).

1029. Actions of appellant's supervisors were irrelevant in determining whether appellant was in custody when he gave his statement. Aguilera v. State, 425 S.W.3d 448, 2011 Tex. App. LEXIS 10211 (Tex. App. Houston 1st Dist. Dec. 29 2011).

1030. Appellant testified that, although he first did not have a thought either way as to whether he could leave, he later thought he could not leave when the officer went with him to the restroom after appellant gave his statement; however, this alleged incident was irrelevant in determining whether appellant was in custody earlier when he gave the officer his statement. Aguilera v. State, 425 S.W.3d 448, 2011 Tex. App. LEXIS 10211 (Tex. App. Houston 1st Dist. Dec. 29 2011).

1031. As the State pointed out, testimony of the child's caregiver concerning the child's medical condition 14 months after sustaining his injuries was relevant and probative of appellant's intent and the fact that serious bodily injury was inflicted although appellant admitted only to mildly shaking the child; the caregiver's testimony was relevant for the State to meet its burden, in appellant's injury to a child trial, of proving that the child had sustained serious bodily injury as alleged in the indictment and defined in Tex. Penal Code Ann. § 1.07(a)(46), and the trial court did not err in overruling appellant's relevancy objection. Gonzales v. State, 2011 Tex. App. LEXIS 10119, 2011 WL 6415125 (Tex. App. Fort Worth Dec. 22 2011).

1032. Photographs of the child at the hospital were probative, under Tex. R. Evid. 401, of the trauma inflicted on the child and the fact that serious bodily injury had been inflicted, in connection with appellant's injury to a child trial. Gonzales v. State, 2011 Tex. App. LEXIS 10119, 2011 WL 6415125 (Tex. App. Fort Worth Dec. 22 2011).

1033. Hypothetically correct jury charge for aggravated assault was that (1) appellant (2) intentionally, knowingly, or recklessly (3) caused the victim bodily injury by striking him in the head, (4) appellant used or exhibited a baseball bat during the assault, and (5) a bat was a deadly weapon under Tex. Penal Code Ann. § 1.07(17); a rational jury could have found appellant guilty, given that a witness testified that appellant hit the victim on the side of the head with the bat, a weapon which can obviously cause death or serious bodily injury, the victim had a "busted lip" and appellant had injuries consistent with being the aggressor, the court found nothing unbelievable about the witness's testimony, the jury was free to resolve any conflict in the testimony of all witnesses, and the fact that appellant could not cross-examine the victim, who did not testify, was irrelevant. Vega v. State, 2011 Tex. App. LEXIS 10017, 2011 WL 6742504 (Tex. App. El Paso Dec. 21 2011).

1034. Evidence of appellant's prior drug use and drug sale involving the informant was relevant to disproving the defense theory that appellant had no knowledge of the drug deal, and the trial court could have found that appellant's previous drug-related transactions with the informant were probative to the jury's determining if the drugs were in appellant's possession, either actually or constructively; the trial court also could have admitted the

extraneous crimes because they were probative to show appellant's presence at the place that was part of the plan to deliver the informant the drugs, and appellant's prior relationship with the informant was relevant to show appellant knew that his meeting with the informant was for delivering drugs. Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

1035. Informant's possible bias was made known to the jury, and the trial court allowed appellant to develop other testimony regarding the informant's possible bias, plus the jury heard evidence concerning the existence of an outstanding warrant against the informant for failure to stop and give information following and accident; given the information that the jury had about the accident and warrant, the trial court could have found that allowing more details about the incident would have wasted the jury's time, for purposes of Tex. R. Evid. 401, 403, and the court found that appellant was not deprived of the right to confront the informant and the trial court did not err in limiting the testimony in this regard. Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

1036. In the proceeding to commit respondent as a sexually violent predator (SVP), the trial court did not abuse its discretion by restricting respondent's cross-examination of one of the State's experts, because the doctor's subjective feelings concerning the verdict in respondent's attempted aggravated sexual assault case was not a fact of consequence in respondent's SVP case for purposes of Tex. R. Evid. 401. Respondent could not challenge the facts of his final convictions in the SVP proceeding, and attempted aggravated sexual assault of a child was one of his predicate convictions under Tex. Health & Safety Code Ann. § 841.002(8)(A). In re Dees, 2011 Tex. App. LEXIS 9807 (Tex. App. Beaumont Dec. 15 2011).

1037. In a sexual assault of a child case, the evidence of the victim's emotional problems was not relevant or admissible under Tex. R. Evid. 401, 402 as the evidence could not be used to impeach her because there was no suggestion that her emotional problems could impair her ability to recall events or would compromise her credibility. Lester v. State, 2011 Tex. App. LEXIS 9728, 2011 WL 6238157 (Tex. App. Texarkana Dec. 14 2011).

1038. Appellant's alleged use of marijuana and Xanax might be relevant to whether his decision to waive his rights was done in a manner that was both knowing and intelligent. Williams v. State, 2011 Tex. App. LEXIS 9800, 2011 WL 6229164 (Tex. App. Beaumont Dec. 14 2011).

1039. Young child told officers to come in, and the first officer did not see a man before he entered the house, and thus that the man did not contradict the child's invitation was not relevant to an inquiry about the officers' belief before entering the home; there was nothing in the record from which the trial court could have inferred any level of maturity of the child, who was estimated to be around six to eight years old, that would have allowed the officers to believe that she had apparent authority to consent to the officers' entry, and thus the trial court erred in finding the officers' entry was legal and in denying appellant's motion to suppress. The court did consider the realities the officers faced in responding to a call for assistance from Child Protective Services, but without some objective evidence that the child had authority to invite the officers in, they could not enter without a warrant or some other exception to the warrant requirement. Caldwell v. State, 2011 Tex. App. LEXIS 9545, 2011 WL 6061525 (Tex. App. Dallas Dec. 7 2011).

1040. During defendant's trial for sexual assault of a child, the court did not err in admitting pornographic photographs and videos seized from defendant's home; the evidence was relevant because it served to demonstrate defendant's intent, demonstrate defendant's identity, and bolster the victim's testimony, the credibility of which had been attacked. Pallm v. State, 2011 Tex. App. LEXIS 9402, 2011 WL 6043025 (Tex. App. Tyler Nov. 30 2011).

1041. Exhibit, consisting of an indictment of the father for aggravated sexual assault of a child, a complaint against the father, and a judgment based on his guilty plea to indecency with a child, was relevant to the father's defense to the sole ground of termination alleged under Tex. Fam. Code Ann. § 161.001(1)(Q), as well as the best interests of the child issue; it was reasonable to believe that a relevancy objection would have been overruled, and the failure of counsel to raise that objection did not fall below an objective standard of reasonableness. In the Interest of T.E., 2011 Tex. App. LEXIS 9251, 2011 WL 5865712 (Tex. App. Texarkana Nov. 23 2011).

1042. Property owners' expert's testimony was properly admitted because the expert's opinion was that the owners' property flooded because of an increase in elevation of the development relative to the owners' property; that testimony was neither speculative nor otherwise unreliable. The expert specifically testified the increase in elevation altered historical surface water drainage patterns, and his testimony was based on his own visual inspection of the property where he noted diversions from the historical drainage patterns due to increases in elevation, as well as a drainage area map used by the company that constructed the development. Marin Real Estate Partners., L.P. v. Vogt, 373 S.W.3d 57, 2011 Tex. App. LEXIS 9259, 2011 WL 5869520 (Tex. App. San Antonio Nov. 23 2011).

1043. Property owners' appraiser's testimony was properly admitted because the appraiser specifically stated he developed his estimate based on the one-acre tract as a property independent from the nineteen-acre tract. To develop his estimate, he researched comparable sales in an attempt to find the best comparison possible and he also prepared his appraisal using the "highest and best use" analysis, which required the appraiser to consider what was the potential best use for the property being appraised. Marin Real Estate Partners., L.P. v. Vogt, 373 S.W.3d 57, 2011 Tex. App. LEXIS 9259, 2011 WL 5869520 (Tex. App. San Antonio Nov. 23 2011).

1044. Trial court erred in sustaining appellees' objections to letters attached to a summary judgment affidavit by a testator's cousin because the letters were relevant to an evaluation of appellees' limitations defense; the letters were not included as summary judgment evidence to prove the truth stated in the letters, but to provide some evidence as to when a controversy arose between the parties on the issue of the testator's intent. Estate of Denman, 362 S.W.3d 134, 2011 Tex. App. LEXIS 9262, 2011 WL 5869479 (Tex. App. San Antonio Nov. 23 2011).

1045. Pursuant to Tex. R. Evid. 401 and 402, the exclusion of the photographs of a witness based on irrelevance was within the trial court's discretion because defense counsel did not establish that the photographs depicted gang activity and only stated that it could show gang signs. Oliva v. State, 2011 Tex. App. LEXIS 8940, 2011 WL 5428965 (Tex. App. Houston 1st Dist. Nov. 10 2011).

1046. Evidence concerning the child's death was relevant to show that appellant had a motive for starting the fire in question; given appellant's contentious relationship with the child's mother and appellant's anger over the child's being, the jury could have inferred that appellant started the fire to divert any blame for the death of the child.

1047. Although appellants argued that the trial court could have allowed testimony about conversations between trial counsel concerning the parties' agreement under Tex. Disciplinary R. Prof. Conduct 3.08(a)(5), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (2005) (Tex. State Bar R. art. X, sec. 9), appellants did not cite to any cases that held that where the trial court could have taken a certain action but did not, it necessarily amounted to an abuse of discretion, and there were competing interests of appellees to go forward with their counsel and of appellants to present evidence; the timing of the proposed offer to revive the parties' agreement led the court to find that the evidence was not relevant, and the trial court did not abuse its discretion. Rancho La Valencia, Inc. v. Aquaplex, Inc., 357 S.W.3d 137, 2011 Tex. App. LEXIS 8935 (Tex. App. Amarillo Nov. 9 2011).

1048. In a case involving the civil commitment of a sexually violent predator, to the extent that a patient complained about the foundational data used by experts in reaching their opinions, the complaint was not preserved

for appellate review because no objection was made to the use of records or actuarial tests. To the extent that the patient challenged the expert opinions as baseless and not relevant, the testimony of the experts was not conclusory or speculative; the experts testified that they based their opinions on the facts and date gathered from the records they reviewed, their interviews with the patient, the risk assessment conducted, and the actuarial tests administered. In re Mason, 2011 Tex. App. LEXIS 8531 (Tex. App. Beaumont Oct. 27 2011).

1049. State did not refer to defendant as a drug dealer or elicit testimony that he was known as a drug dealer, and there was no dispute that defendant possessed marijuana; the State presented evidence that the marijuana was packaged for sale and that no one would purchase marijuana that had been in a person's underwear, and the trial court did not abuse its discretion in admitting the testimony. Eastland v. State, 2011 Tex. App. LEXIS 8748, 2011 WL 5221252 (Tex. App. Waco Oct. 26 2011).

1050. Court did not abuse its discretion in excluding the evidence of bias, because the grandmother was not a witness at trial and Tex. R. Evid. 613(b) did not allow defendant to question the mother about the grandmother's actions in an attempt to show the grandmother's bias, interest or motive, and to the extent defendant argued the evidence of the mother's abuse when she was five years old was relevant to show bias or motive, he did not establish either ground through mother's testimony outside the jury's presence. Sturgeon v. State, 2011 Tex. App. LEXIS 8467, 2011 WL 5042087 (Tex. App. Dallas Oct. 25 2011).

1051. Because a crayon drawing found in the victim's clothes during the autopsy did not provide a small nudge toward proving or disproving some fact of consequence, the drawing was irrelevant and inadmissible under Tex. R. Evid. 401 and 402; however, under Tex. R. App. P. 44.2(b), admission of the drawing was harmless error as the evidence against defendant was substantial and the drawing was not so emotionally charged that it prevented the jury from rationally considering the evidence before it. Soto v. State, 2011 Tex. App. LEXIS 8360, 2011 WL 5000393 (Tex. App. Corpus Christi Oct. 20 2011).

1052. Bills included fees relative to a forcible detainer action, but the lessors did not prevail because the lessee vacated the premises before trial, and awarding the lessors the total fees included in the bills would have been tantamount to awarding fees for a separate action on which the lessors did not prevail; although termination of the lessee's right of possession was relevant to the lessors' claims for purposes of showing that this did not release the lessee's obligations, such did not result from the termination, and the lessors did not conclusively establish that the total amount of fees requested were reasonable and necessary. Mnc Spring Shadows, L.P. v. Kearney, 2011 Tex. App. LEXIS 8075, 2011 WL 4794949 (Tex. App. Houston 14th Dist. Oct. 11 2011).

1053. Trial court clarified that certain evidence fell outside the scope of a prior limine ruling, appellant objected to admission of the evidence on the basis of relevance, and the trial court noted the objection and granted appellant a running objection; thus, appellant preserved his relevance objection for review, under Tex. R. App. P. 33.1(a)(1)(A). Gonzalez v. State, 2011 Tex. App. LEXIS 7764 (Tex. App. Amarillo Sept. 28 2011).

1054. Court assumed that the evidence of appellant's head-butting of a man at a restaurant was erroneously admitted for relevance purposes, but given that (1) the jury heard the victim's extensive testimony regarding appellant's assault, (2) there was testimony from a nurse confirming the nature of the victim's injuries, and (3) the State only briefly mentioned the head-butting incident and the victim testified briefly about the incident, the admission of the evidence was harmless under Tex. R. App. P. 44.2(b) because the evidence had no impact on appellant's substantial rights. Gonzalez v. State, 2011 Tex. App. LEXIS 7764 (Tex. App. Amarillo Sept. 28 2011).

1055. Evidence of one's sexual orientation may be relevant to show bias under unique circumstances when coupled with a logical connection to one's motive to testify in a certain manner, but that was not the case here, and the evidence of the victim's sexual orientation was inadmissible and irrelevant under Tex. R. Evid. 401, 402;

furthermore, under these circumstances when there was no connection between the victim's relationship with her female friend and any motive for her to exaggerate the incident involving appellant juvenile, any de minimis probative value of that information would be substantially outweighed by the danger of unfair prejudice in putting the victim on trial for her sexual orientation. In re O.O.A., 358 S.W.3d 352, 2011 Tex. App. LEXIS 7416 (Tex. App. Houston 14th Dist. Sept. 13 2011).

1056. Court saw no connection between the victim's relationship with her female friend and any motive for her to exaggerate the incident in question involving appellant juvenile, and the nature of the victim's relationship with her friend did not make the victim's account of the incident involving appellant more or less probable; even assuming the victim were homosexual, a person's sexual orientation, alone, had no bearing on his or her propensity for truthfulness, and injecting evidence of a witness's sexual orientation into trial under circumstances like those in this case would risk derailing the focus of the trial and putting the victim on trial, for purposes of Tex. R. Evid. 412(a), (b)(2)(C). In re O.O.A., 358 S.W.3d 352, 2011 Tex. App. LEXIS 7416 (Tex. App. Houston 14th Dist. Sept. 13 2011).

1057. State needed to explain the relationship between appellant and the victim, and letters from appellant to the victim helped explain the dynamics of their relationship and thus were relevant; appellant did not identify specific instances of prior misconduct contained in the letters that were introduced or would suggest that he acted in conformity with his character in committing the offense, nor was it shown that the letters were more prejudicial than probative, and the trial court did not err in admitting the letters. Munsinger v. State, 2011 Tex. App. LEXIS 7318, 2011 WL 3915671 (Tex. App. Tyler Sept. 7 2011).

1058. Company president's arrest and behavior thereafter had nothing to do with the intent of the parties concerning the execution of their agreements or the termination of one agreement; the president's basis for terminating, not his reason, was what was relevant, and the testimony about the arrest was irrelevant, plus presented a clear danger of unfair prejudice, even though the court did not condone the president's actions. Nichols v. State, 349 S.W.3d 612, 2011 Tex. App. LEXIS 7253 (Tex. App. Texarkana Sept. 6 2011).

1059. In defendant's stalking case, a reasonable fact finder could have found that the telephone number the victim attributed to defendant was his telephone number, and that defendant sent the electronic communications attributed to him by the State and depicted in the challenged exhibits. Accordingly, the challenged exhibits were relevant, and the trial court did not abuse its discretion by admitting them. Manuel v. State, 357 S.W.3d 66, 2011 Tex. App. LEXIS 7152 (Tex. App. Tyler Aug. 31 2011).

1060. Much of the testimony was relevant to appellant's defensive theories, for purposes of Tex. R. Evid. 404(b), because the testimony showed his knowledge of sulfuric acid, its volatility, and his manufacture of methamphetamine at the residence where the children, including the one injured and the victim in this case, could access the equipment; thus, the trial court did not err in admitting evidence concerning appellant's use or manufacture of methamphetamine in his trial for aggravated injury to a child with a deadly weapon under Tex. Penal Code Ann. § 22.04(a), (e). Escobedo v. State, 2011 Tex. App. LEXIS 7113, 2011 WL 3836438 (Tex. App. Fort Worth Aug. 31 2011).

1061. Information sought by an injured person in the request for production was relevant and discoverable because, whether or not the accident was caused because the waste management company did not properly train its drivers in safety matters, or improperly scheduled them, or because it did not employ a safety director when other locations did, was relevant to the claim that the office was deficient in its safety training and management. In re Waste Mgmt. of Tex., Inc., 2011 Tex. App. LEXIS 7192, 2011 WL 3855745 (Tex. App. Corpus Christi Aug. 31 2011).

1062. Exhibit, a computer-generated animation of the crime scene, was relevant, and the fact that the cars in the animation might have looked similar or that the background was either not to scale or not there did not cause the probative value of the evidence to be outweighed by unfair prejudice under Tex. R. Evid. 403; the exhibit was not cumulative of other evidence and the trial court did not abuse its discretion in admitting it. Murphy v. State, 2011 Tex. App. LEXIS 7230, 2011 WL 3860444 (Tex. App. Eastland Aug. 31 2011).

1063. Defendant argued that photographs were not relevant because he pleaded guilty, but the court noted that the introduction of evidence was to enable to jury to intelligently assess a penalty. Murphy v. State, 2011 Tex. App. LEXIS 7230, 2011 WL 3860444 (Tex. App. Eastland Aug. 31 2011).

1064. Photographs were helpful because they showed the victim's wounds; although the body was nude, that was only one factor the court was to consider in its analysis under Tex. R. Evid. 403, and the trial court's holding that the probative value of the photographs was not substantially outweighed by unfair prejudice was within the zone of reasonable disagreement. Murphy v. State, 2011 Tex. App. LEXIS 7230, 2011 WL 3860444 (Tex. App. Eastland Aug. 31 2011).

1065. In a dispute concerning whether a workers' compensation claimant who was injured while driving home had been paid for driving other employees, the trial court reasonably could have excluded deposition testimony from two company executives based on relevance under Tex. R. Evid. 401, 402 and/or personal knowledge under Tex. R. Evid. 602. The executives did not know the claimant and were not present when he was hired, and testimony regarding the tax treatment of the payments was not material to whether the per diem payments were for driving. Tex. Prop. & Cas. Ins. Guar. Ass'n v. Brooks, 2011 Tex. App. LEXIS 7269, 2011 WL 3890405 (Tex. App. Austin Aug. 31 2011).

1066. Appellant was not prevented from asking alternative questions seeking the kind of information that he claimed was relevant, and he did not ask more specific questions or make a bill of exception, such that it was not shown that the trial court abused its discretion in sustaining the State's relevancy objection. Watson v. State, 2011 Tex. App. LEXIS 6942, 2011 WL 3796137 (Tex. App. Austin Aug. 26 2011).

1067. During defendant's trial for murder, the court did not err in limiting defendant's cross-examination of a witness because the line of cross-examination sought by defendant did not demonstrate any bias or prejudice by the witness against defendant; even if the testimony was somehow marginally relevant, the trial court retained wide discretion to impose a limit on the cross-examination. Requeno-portillo v. State, 2011 Tex. App. LEXIS 6898, 2011 WL 3820747 (Tex. App. Houston 1st Dist. Aug. 25 2011).

1068. Fraud that an agent committed on an investor was for an annuity amount, not the extent of his agency or ability to bind the insurance company, such that it was notice of the limitations of his agency that was relevant to the apparent authority issue. Nat'l W. Life Ins. Co. v. Newman, 2011 Tex. App. LEXIS 6401 (Tex. App. Fort Worth Aug. 11 2011).

1069. Urban studies were relevant to the city's regulation of adult businesses' operations, as the studies indicated what such businesses attracted; the city relied on relevant studies, its experience, and public comment when adopting the new sexually-oriented business ordinance. E.B.S. Enters. v. City of El Paso, 347 S.W.3d 404, 2011 Tex. App. LEXIS 6232 (Tex. App. El Paso Aug. 10 2011).

1070. Doctor's definition of complication, as interpreted within the medical community, was relevant to give the settlement term a meaning consistent with that to which it was susceptible; the trial court did not err in accepting this definition. Contreras v. Clint Indep. Sch. Dist., 347 S.W.3d 413, 2011 Tex. App. LEXIS 6231 (Tex. App. El Paso

Aug. 10 2011).

1071. Appellees' affirmative defenses of accord and satisfaction, release, and res judicata were relevant to the patient's breach of contract claim and specifically tailored to that claim in appellees' summary judgment motion. Contreras v. Clint Indep. Sch. Dist., 347 S.W.3d 413, 2011 Tex. App. LEXIS 6231 (Tex. App. El Paso Aug. 10 2011).

1072. Parties cited authority for the argument that an investigating officer could testify as to causation, but this was irrelevant, given that the expert did not serve as an investigating officer in this case. Husain v. Petrucciani, 2011 Tex. App. LEXIS 6180, 2011 WL 3449497 (Tex. App. Houston 14th Dist. Aug. 9 2011).

1073. Appellant offered no argument at trial or on appeal as to the relevancy of certain evidence, and thus the trial court did not abuse its discretion by sustaining the State's relevancy objection. Villasenor v. State, 2011 Tex. App. LEXIS 6172, 2011 WL 3435376 (Tex. App. Dallas Aug. 8 2011).

1074. Property owner was entitled to mandamus relief from an order requiring the owner to produce tax returns in an action by a trust for asbestos contamination; assuming the relevance of the tax returns, they were not material because the trust did not carry its burden of demonstrating that the information it sought had not already been provided in a different form or that it was not available through less intrusive means. In re Beeson, 378 S.W.3d 8, 2011 Tex. App. LEXIS 6058 (Tex. App. Houston 1st Dist. Aug. 4 2011).

1075. Trial court did not abuse its discretion by finding that the knives recovered from defendant's vehicle to be relevant because defendant admitted in his statement made in 2005 that he had collected knives since he was a child and he carried a knife in his vehicle 1989 for protection. This evidence was relevant to show defendant's considerable familiarity with knives and to provide a "small nudge" toward demonstrating his opportunity, means, and capacity to have committed the murder of the victim, who was stabbed to death. Tilford v. State, 2011 Tex. App. LEXIS 5933, 2011 WL 3273543 (Tex. App. El Paso July 29 2011).

1076. In a criminal solicitation of a minor for sexual assault case, under Tex. R. Evid. 401, 402, the trial court did not abuse its discretion in excluding the defense witness's testimony about the veracity of the chat room logs because it was irrelevant as he could not say whether the State's or defendant's version of the chat logs was an accurate version of the actual chat sessions. Pudasaini v. State, 2011 Tex. App. LEXIS 5582, 2011 WL 2905592 (Tex. App. Dallas July 21 2011).

1077. Because the testimony contained in the record addressing the victim's pending driving while intoxicated (DWI) charge reflected that he had no agreement with the State regarding a dismissal of the charge, and he had no expectation of leniency in return for his testimony against defendant, the trial court was entitled to conclude that the victim's pending DWI charge was not relevant on the question of the victim's motivations in testifying. Smith v. State, 2011 Tex. App. LEXIS 5338, 2011 WL 2732270 (Tex. App. Beaumont July 13 2011).

1078. Because the trial court could reasonably decide that the existence of a pending driving while intoxicated charge was not relevant to show bias, and because the trial court could have decided that the possibility of prejudice from the testimony to the proceedings outweighed the probative value of the excluded testimony, the trial court did not abuse its discretion by disallowing defendant to recall the victim during the presentation of defendant's case to the jury. Smith v. State, 2011 Tex. App. LEXIS 5338, 2011 WL 2732270 (Tex. App. Beaumont July 13 2011).

1079. In an action against a trucking company for wrongful death, which arose from a collision between the decedent's vehicle and an 18-wheel truck, the court erred in admitting two positive drug tests of the truck driver because one drug test occurred four years prior to the accident and the second test occurred eight months after the accident; the evidence was not relevant. Tornado Trucking, Inc. v. Dodd, 2011 Tex. App. LEXIS 5123, 2011 WL 2641272 (Tex. App. Waco July 6 2011).

1080. At defendant's trial for burglary of a habitation based on evidence showing that defendant and his brother broke into a mobile home and stole a TV set, the trial court ruled that evidence of two extraneous burglaries committed by his brother was relevant under Tex. R. Evid. 401, probative, and admissible under Tex. R. Evid. 404(b). The appellate court held that defendant was not harmed by the admission of the evidence because it was not unduly emphasized by the State, and it did not have a substantial effect on the jury's verdict. Crutchfield v. State, 2011 Tex. App. LEXIS 4959, 2011 WL 2638402 (Tex. App. Tyler June 30 2011).

1081. Trial court did not err in sustaining the State's objection to evidence about a civil lawsuit stemming from the same incident where the deputy's testimony was not the only means through which defendant could have communicated to the jury that he threatened civil litigation in the media. Lewis v. State, 2011 Tex. App. LEXIS 4861, 2011 WL 2536161 (Tex. App. Houston 14th Dist. June 28 2011).

1082. There was no evidence that a handgun being in a backpack had any relevance to the commission of the offense of murder or to appellant's self-defense claim, and for purposes of Tex. R. Evid. 402, the trial court did not err in excluding testimony concerning how to safely carry a handgun. Knapper v. State, 2011 Tex. App. LEXIS 4782, 2011 WL 2503463 (Tex. App. Houston 1st Dist. June 23 2011).

1083. Law concerning when a peace officer can use deadly force is different from the law concerning when someone other than a peace officer can use deadly force; even if testimony about when an officer could use deadly force was relevant, the trial court would not have erred in excluding the evidence based on the danger that the jury could have been confused by the evidence, for purposes of Tex. R. Evid. 403. Knapper v. State, 2011 Tex. App. LEXIS 4782, 2011 WL 2503463 (Tex. App. Houston 1st Dist. June 23 2011).

1084. Trial court erred by admitting into evidence other lawsuits, verdicts, and judgments against the corporation that owned and operated the cemetery concerning the double sale of burial plots because the evidence was not relevant under Tex. R. Evid. 401, as the events occurred at different cemeteries with different employees, they occurred more than a year apart, and there was no evidence that the events were part of a system, scheme, or plan. The error was not harmless because appellants' attorney intended for the evidence to be a significant and pervasive part of the trial; because there was no evidence of three of the four appellants suffered compensable mental anguish, the jury's award of $ 100,000 to each had to have been based on something other than properly admitted evidence. Serv. Corp. Int'l v. Guerra, 348 S.W.3d 221, 2011 Tex. LEXIS 417, 54 Tex. Sup. Ct. J. 1191 (Tex. 2011).

1085. Trial court improperly admitted evidence that the decedent's widow would put any punitive damages she received from the corporation that owned and operated the cemetery into a trust to pay for funerals for persons who could not afford them because it was not relevant to proving any of the factors to be considered when determining the amount of punitive damages or to penalizing or punishing the corporation. Serv. Corp. Int'l v. Guerra, 348 S.W.3d 221, 2011 Tex. LEXIS 417, 54 Tex. Sup. Ct. J. 1191 (Tex. 2011).

1086. Even if one assumed that statements were party-opponent admissions under Tex. R. Evid. 801(e)(2)(A) and relevant under Tex. R. Evid. 401, otherwise relevant evidence could be excluded under Tex. R. Evid. 403; in addition to possibly confusing the jury and unfairly prejudicing the State's case, admission of the statements would have been cumulative, and the trial court did not err in excluding these statements. Mcneal v. State, 2011 Tex. App.

LEXIS 4629, 2011 WL 2420271 (Tex. App. Dallas June 17 2011).

1087. During appellant's civil commitment trial, the trial court did not err by excluding an expert's testimony that appellant did not commit the crimes for which he had been convicted because the issue of whether appellant had been wrongfully convicted was not at issue. In re Commitment of Hinkle, 2011 Tex. App. LEXIS 4504 (Tex. App. Beaumont June 16 2011).

1088. For purposes of Tex. Lab. Code Ann. § 401.013(a)(2), the trial court could have found that a lay witness was competent to testify regarding the employee's physical and mental faculties during his shift and the minutes preceding his death, her testimony was relevant on the issue of whether he was intoxicated, and her testimony was not rendered irrelevant because she did not observe the employee at the exact minute of his death; the witness's testimony supported the findings that the employee was alert and possessed the normal use of his faculties at the time of his death. Dallas Nat'l Ins. Co. v. Lewis, 2011 Tex. App. LEXIS 4564, 2011 WL 2436505 (Tex. App. Houston 1st Dist. June 16 2011).

1089. Evidence supported appellant's conviction of attempted burglary of a habitation under Tex. Penal Code Ann. §§ 15.01(a), 30.02(a)(1), as the fact finder could have inferred that he intended to commit theft when he tried to enter through a window he had broken, he fled when he was interrupted, he was unemployed, and he gave inconsistent explanations; the court disagreed with the appellate court to the extent it suggested that a reasonable fact finder could not consider appellant's lack of money as a circumstance relevant to his intent. Gear v. State, 340 S.W.3d 743, 2011 Tex. Crim. App. LEXIS 829 (Tex. Crim. App. 2011).

1090. At least part of an acceptable method of calculating partial-taking damages required determining the market value of the landowners' entire tract of land before the taking; thus, the testimony of the landowners' appraisal expert as to the property's pre-taking value was relevant, and the trial court did not abuse its discretion in admitting the testimony. State v. Petropoulos, 346 S.W.3d 525, 2011 Tex. LEXIS 416, 54 Tex. Sup. Ct. J. 1133 (Tex. 2011).

1091. Evidence of the decedent's unredacted will did not tend to make the likelihood that the decedent forged the quitclaim deeds more probable or less probable than it would be without this evidence; thus, it was properly excluded. Kingsley v. Beck, 2011 Tex. App. LEXIS 4294, 2011 WL 2225537 (Tex. App. Texarkana June 7 2011).

1092. Second judge's decision to hear a motion to suppress amounted to an agreement to reconsider the matter, and any error committed by a first judgment regarding the motion was irrelevant because that holding was nullified by the second judge's denial of the motion. Williams v. State, 2011 Tex. App. LEXIS 4246, 2011 WL 2163716 (Tex. App. Dallas June 3 2011).

1093. Evidence appellant admitted weighed against him was sufficient for a jury to have found him guilty of driving while intoxicated, given that two officers testified that appellant displayed signs of intoxication, which testimony alone was sufficient to support the conviction, plus appellant's refusal to submit a breath test tended to show consciousness of guilt and was relevant, for purposes of Tex. Transp. Code Ann. § 724.061; the jury also considered one officer's testimony that he found all six clues for intoxication on a horizontal nystagmus gaze test, which the court considered even though this officer's testimony was inadmissible, the jury viewed a videotape of appellant's performance, and the jury was free to consider appellant's claims and reconcile that with other evidence tending to show his intoxication. Hall v. State, 2011 Tex. App. LEXIS 4183, 2011 WL 2150195 (Tex. App. Houston 14th Dist. June 2 2011).

1094. When defendant was convicted of failing to comply with sex offender registration requirements, the trial court did not violate his right to present a defense by excluding evidence of his defense that he was prosecuted under the wrong statute. A police officer's opinion about which charge was "easier to prove" was not relevant under

Tex. R. Evid. 401 to whether defendant was guilty of failing to register a change of address because he was able to fully litigate whether he was living with a woman at unregistered address or simply visiting her. Davoust v. State, 2011 Tex. App. LEXIS 4114, 2011 WL 2090260 (Tex. App. Dallas May 27 2011).

1095. Jury could reasonably infer that the letter was written by defendant, and that he composed it with an eye toward establishing an alibi or exculpatory evidence regarding his pending charge; all this made a fact of consequence, that defendant knowingly or intentionally possessed the drugs found in the police car where he had just been sitting, more probable, and the letter was relevant evidence. In re F.R., 2011 Tex. App. LEXIS 4104, 2011 WL 2175857 (Tex. App. Texarkana May 27 2011).

1096. Trial court did not err by refusing to exclude the blood alcohol test under Tex. R. Evid. 401 because the test result was circumstantial evidence that, coupled with other evidence, tended to show that defendant was intoxicated at the time she drove. Damon v. State, 2011 Tex. App. LEXIS 4017, 2011 WL 2112807 (Tex. App. Houston 1st Dist. May 26 2011).

1097. Although hearsay was a frequent objection to summary judgment evidence, other grounds included that the statements were irrelevant, defectively vague, and violated of the Statute of Frauds and the Statute of Conveyances; because the trial court may have granted the objections for reasons other than hearsay and those grounds were not challenged, appellant waived his complaint regarding objections that were sustained. Goodenberger v. Ellis, 343 S.W.3d 536, 2011 Tex. App. LEXIS 4062 (Tex. App. Dallas May 26 2011).

1098. Appellant did not object to the State's introduction of evidence concerning an alleged fight with an inmate, such that he failed to tell the trial court that he wanted he trial court to determine the threshold issue of relevancy, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), and he failed to preserve any alleged error. Hardeman v. State, 2011 Tex. App. LEXIS 3858, 2011 WL 1901978 (Tex. App. Fort Worth May 19 2011).

1099. Appellant did request a bench conference regarding the admissibility of evidence concerning his alleged assault on the detention officer, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), and contrary to appellant's claim, there was no requirement that the initial determination of whether an extraneous offense was relevant be made following a hearing instead of some other form of review; the prosecutor's statement that he intended to prove the assault through testimony by the officer was sufficient for the trial court to make an initial determination of relevance. Hardeman v. State, 2011 Tex. App. LEXIS 3858, 2011 WL 1901978 (Tex. App. Fort Worth May 19 2011).

1100. At defendant's criminal trial for aggravated sexual assault and indecency with a child, a witness was permitted to testify that defendant said that he had given the victim a vaginal exam; Tex. R. Evid. 404(b) did not apply, because the testimony was not about an extraneous act or offense. Since the testimony constituted evidence that defendant admitted touching the victim's sexual organ, it was not more prejudicial than probative under Tex. R. Evid. 401. Babineaux v. State, 2011 Tex. App. LEXIS 3632, 2011 WL 1833123 (Tex. App. Fort Worth May 12 2011).

1101. Because the child victim's mother's testimony that, because of the incident, she gave up a job and a wedding, was relevant to rebut defendant's contention that the mother manipulated the victim to fabricate the assault so that they could get back into the good graces of her family, defense counsel was not ineffective for failing to object to the testimony. Cueva v. State, 339 S.W.3d 839, 2011 Tex. App. LEXIS 3333 (Tex. App. Corpus Christi May 2 2011).

1102. Child victim's testimony that defendant assaulted her mother immediately after she confronted him about the sexual abuse was relevant to show defendant's unsettled and combative demeanor after the incident, which

indicated a consciousness of guilt and as an assault against an adult witness, could be seen as tampering with the witness. Therefore, the evidence was admissible and trial counsel was not ineffective for failing to object. Cueva v. State, 339 S.W.3d 839, 2011 Tex. App. LEXIS 3333 (Tex. App. Corpus Christi May 2 2011).

1103. Court rejected the contention that a business's claims should fail because the owner's claims failed, because the resolution of the owner's claims was irrelevant to the analysis of the business's indemnification claims. Petroleum Solutions, Inc. v. Head, 454 S.W.3d 518, 2011 Tex. App. LEXIS 3289 (Tex. App. Corpus Christi Apr. 29 2011).

1104. Appellant contended that the complainants did not own partnership assets, but that was irrelevant to the theft count; appellant was accused of unlawfully appropriating the money the complainants invested in the partnerships. Bender v. State, 2011 Tex. App. LEXIS 3096, 2011 WL 1561994 (Tex. App. Austin Apr. 19 2011).

1105. Photograph of a deceased person's hand wearing a glove had probative value because it established that the assailants took precautions to avoid leaving fingerprints; the photograph also had probative value as to appellant's liability as a party, plus no other photographs of the deceased person were admitted, and thus the photograph was relevant and its probative value outweighed any possible prejudicial effect under Tex. R. Evid. 403. Garcia v. State, 2011 Tex. App. LEXIS 2848, 2011 WL 1442341 (Tex. App. Corpus Christi Apr. 14 2011).

1106. In a criminal prosecution for aggravated assault with a deadly weapon, evidence that defendant was driving a vehicle that matched the description of the vehicle involved in the shooting and that he attempted to flee from officers when one of them tried to pull him over was probative of his consciousness of guilt. Therefore, defendant's flight was relevant evidence under Tex. R. Evid. 401; the probative value of the evidence was not outweighed by its prejudicial effect under Tex. R. Evid. 403. Owens v. State, 2011 Tex. App. LEXIS 2871, 2011 WL 1435499 (Tex. App. Fort Worth Apr. 14 2011).

1107. Court reviewed sealed records and found nothing of any impeachment value relevant to this case, and the trial court's actions in sealing the records did not deprive appellant of any favorable evidence. Brewer v. State, 2011 Tex. App. LEXIS 2327, 2011 WL 1169243 (Tex. App. Dallas Mar. 31 2011).

1108. Appellant did not meet his burden of showing it was reasonably probable that the outcome of the trial would have been different if the prosecutor had emphasized an apparently clerical error; whether or not appellant was released or in jail on the day of his arrest was not relevant to the issue of whether he possessed cocaine with intent to deliver. Brewer v. State, 2011 Tex. App. LEXIS 2327, 2011 WL 1169243 (Tex. App. Dallas Mar. 31 2011).

1109. Complainant's tattoos indicated possible gang affiliation, but nothing indicated that the altercation leading to the murder was gang-related; the trial court could have found that the tattoo words had little probative value. Smith v. State, 355 S.W.3d 138, 2011 Tex. App. LEXIS 2426 (Tex. App. Houston 1st Dist. Mar. 31 2011).

1110. Trial court did not abuse its discretion by excluding from evidence an affidavit regarding drug use and the victim's desire not to prosecute appellant, given that (1) the trial court could have found that the victim's drug use was not relevant under Tex. R. Evid. 401 because it did not affect appellant's culpability, (2) appellant was allowed to question the victim regarding the possible effects of her drug use, but she did not say that the offense did not occur or that she compelled appellant's actions due to using drugs, (3) voluntary intoxication was not a defense to the commission of a crime under Tex. Penal Code § 8.04(a), and (4) the trial court could have found that the victim's desire not to prosecute was not relevant to any issue in the case during the guilt-innocence phase and invaded the trier of fact's province; furthermore, appellant did not offer only the admissible portions of the affidavit. Deaton v. State, 2011 Tex. App. LEXIS 2229, 2011 WL 1126041 (Tex. App. Dallas Mar. 29 2011).

1111. Court remanded the cause for a jury trial on only the amount of the attorney's fees, and any evidence concerning property owners' claims for trespass, or any other claims, was irrelevant, for purposes of Tex. R. Evid. 401, 402. Ogu v. C.I.A. Servs., 2011 Tex. App. LEXIS 1979, 2011 WL 947008 (Tex. App. Houston 1st Dist. Mar. 17 2011).

1112. Court acted within its discretion in concluding that the complainant's alleged prior use of alcohol with her mom was not relevant to whether the complainant could accurately recollect events that took place when she was not staying in her mother's home, because such testimony would not be relevant to the complainant's ability to recollect the events of the crimes alleged, which occurred when the complainant was staying with defendant, not her mother, during spring break. Vega v. State, 2011 Tex. App. LEXIS 1852, 2011 WL 882329 (Tex. App. Houston 14th Dist. Mar. 15 2011).

1113. While defendant claimed evidence of the nature of an arrest warrant was irrelevant under Tex. R. Evid. 401 in his prosecution for, inter alia, evading arrest, defendant waived his argument because he failed to object every time the nature of his arrest warrant came into evidence or obtain a running objection. Even if the argument had not been waived, an error would have been harmless under Tex. R. App. P. 44.2(b) because strong evidence of defendant's guilt was presented, including video recordings of the police pursuit and the testimony of the police officers regarding the fact that defendant drove his car toward the first police officer. Williams v. State, 2011 Tex. App. LEXIS 1426, 2011 WL 677390 (Tex. App. Austin Feb. 25 2011).

1114. Trial court did not abuse its discretion by determining that defendant's statement was relevant because the discussion of "I'll find a way out" without "snitching" and his reference to the "footage" made it more probable that defendant had some involvement in the crime. The trial court did not abuse its discretion by determining that there was not unfair prejudice requiring exclusion of the statement because if the jury chose to credit it, it would not have been on an improper basis; rather, it would have been on the basis that defendant was part of the crime. Quintanilla v. State, 2011 Tex. App. LEXIS 1353, 2011 WL 665328 (Tex. App. Houston 14th Dist. Feb. 24 2011).

1115. Trial court did not abuse its discretion by determining that defendant's statement was relevant because his words "they don't have anything on me" could be interpreted as an assertion that he escaped detection by the police because otherwise he would already have been arrested. It made it more probable that defendant was part of the crime in question Quintanilla v. State, 2011 Tex. App. LEXIS 1353, 2011 WL 665328 (Tex. App. Houston 14th Dist. Feb. 24 2011).

1116. Trial court did not abuse its discretion by determining that defendant's statement "I can't take it for life, they might as well kill me" was relevant and probative because it indicated that defendant believe that he could go to prison for life if convicted, and therefore the statement made it more probable that defendant committed the crime. Quintanilla v. State, 2011 Tex. App. LEXIS 1353, 2011 WL 665328 (Tex. App. Houston 14th Dist. Feb. 24 2011).

1117. Trial court did not abuse its discretion by determining that defendant's statement "it could have been anybody, fool" was relevant because the context made clear that defendant was happy about his belief that nobody could be identified from the tapes, thus keeping his name "out their mouth." In addition, the statements made it more probable than not that defendant participated in the crime. Quintanilla v. State, 2011 Tex. App. LEXIS 1353, 2011 WL 665328 (Tex. App. Houston 14th Dist. Feb. 24 2011).

1118. Trial court did not abuse its discretion by admitting defendant's statement about another associate "snitching" on him because it could be probative as it gave an indication of defendant's culpability and made it more probable that he committed the crime. Quintanilla v. State, 2011 Tex. App. LEXIS 1353, 2011 WL 665328 (Tex. App. Houston 14th Dist. Feb. 24 2011).

1119. Trial court did not abuse its discretion by admitting defendant's admission that he was paid after the crime because the State had the burden to prove that defendant received renumeration for the killing in order to prove its capital murder charge, and therefore defendant's statement about receiving money was relevant. Quintanilla v. State, 2011 Tex. App. LEXIS 1353, 2011 WL 665328 (Tex. App. Houston 14th Dist. Feb. 24 2011).

1120. In an action for breach of a gas purchase agreement, evidence of early pays and appellant's relationship with a third party was properly admitted to show they had oral agreements and the third party's authority was not encompassed by the sole written contract between them. This evidence was relevant under Tex. R. Evid. 401 for purposes of establishing apparent agency. Reliant Energy Servs. v. Cotton Valley Compression, Llc, 336 S.W.3d 764, 2011 Tex. App. LEXIS 959, 173 Oil & Gas Rep. 732 (Tex. App. Houston 1st Dist. Feb. 10 2011).

1121. Testimony concerning matters disposed of by summary judgment in a dispute between a condominium association and a unit owner was irrelevant under Tex. R. Evid. 401, 402. Bosch v. Cedar Vill. Townhomes Homeowners Ass'n, 2011 Tex. App. LEXIS 804, 2011 WL 346317 (Tex. App. Houston 1st Dist. Feb. 3 2011).

1122. Gang evidence admitted at punishment was relevant under case law and probative of appellant's character, the testimony did not consume an inordinate amount of time at the hearing, and the jury sentenced appellant to much lower than the permitted 99 years in each possession with intent to deliver case, such that the probative value of the gang evidence was not substantially outweighed by the danger of unfair prejudice. Gilmore v. State, 2011 Tex. App. LEXIS 616 (Tex. App. Dallas Jan. 28 2011).

1123. In defendant's murder case, whether the complainant used drugs over a month earlier did not rebut the toxicology report showing no drugs in her system at the time she was shot, and thus, the trial court did not abuse its discretion in finding the evidence irrelevant. The only evidence defendant offered was testimony that defendant's daughter would not stay with them after her grandfather's funeral because of the complainant's drug use. Mcghee v. State, 2011 Tex. App. LEXIS 675 (Tex. App. Houston 1st Dist. Jan. 27 2011).

1124. Appellant argued that the bedroom was under his exclusive control, and thus the police had probable cause to believe that appellant committed, within their view, the offense of unlawful possession of marijuana, for purposes of Tex. Code Crim. Proc. Ann. art. 14.01(b) and Tex. Health & Safety Code Ann. § 481.121(a); thus, the police were authorized to arrest appellant without a warrant, and the subjective intention of the police, to interrogate appellant concerning a capital murder, was irrelevant to whether appellant's arrest was illegal. Crenshaw v. State, 2011 Tex. App. LEXIS 665, 2011 WL 286126 (Tex. App. Houston 1st Dist. Jan. 27 2011).

1125. Defendant was not entitled under Tex. Code Crim. Proc. Ann. art. 38.36(a) to offer evidence of diminished capacity because his experts' reports, which did not address the standard for recklessness under Tex. Penal Code Ann. § 6.03(c) or knowledge under § 6.03(a), could not support a claim that defendant was guilty only of manslaughter under Tex. Penal Code Ann. § 19.04(a), rather than murder under Tex. Penal Code Ann. § 19.02. Thus, the experts' testimony was irrelevant under Tex. R. Evid. 401 and was properly excluded under Tex. R. Evid. 702. Quick v. State, 2011 Tex. App. LEXIS 680, 2011 WL 286155 (Tex. App. Houston 1st Dist. Jan. 27 2011).

1126. Texas Department of Family and Protective Services had to prove that at least one statutory ground for termination occurred and that termination was in the best interest of the children; any evidence that the mother engaged in conduct constituting a ground for termination or that related to the best interest of the children was relevant. In re D.O., 338 S.W.3d 29, 2011 Tex. App. LEXIS 407 (Tex. App. Eastland Jan. 20 2011).

1127. Fact that one child placed a Nazi symbol on his book was relevant to determining whether the mother endangered the child's well-being and also to evaluating his best interests; it was not shown that the admission of the evidence unfairly prejudiced the mother under Tex. R. Evid. 403, and if the trial court did err in allowing the

evidence, the error was harmless. In re D.O., 338 S.W.3d 29, 2011 Tex. App. LEXIS 407 (Tex. App. Eastland Jan. 20 2011).

1128. Evidence pertaining to appellant's conduct with two other women, where he allegedly anally raped one and forced the other to engaged in sexual acts at gunpoint, had logical relevance apart from character conformity because it showed that the victim's allegations were less likely to be fabricated, plus it rebutted appellant's statements that he would not have engaged in the alleged conduct; thus, the trial court did not abuse its discretion in overruling appellant's objection under Tex. R. Evid. 404(b). Jordan v. State, 2010 Tex. App. LEXIS 10244, 2010 WL 5541695 (Tex. App. Eastland Dec. 30 2010).

1129. During defendant's trial for sexual assault of a child, the court did not err in admitting into evidence five child pornography photographs found on defendant's computer; his possession or viewing of child pornography was relevant circumstantial evidence of his intent to arouse or gratify his sexual desire. Wooley v. State, 2010 Tex. App. LEXIS 10306 (Tex. App. Dallas Dec. 30 2010).

1130. In an eminent domain proceeding, the trial court abused its discretion in excluding evidence of the prior owner's environmental remediation agreement. Exclusion of the evidence was harmful, because it was relevant under Tex. R. Evid. 401-402 to the jury's determination of the market value of the property. Caffe Ribs, Inc. v. State, 328 S.W.3d 919, 2010 Tex. App. LEXIS 10188 (Tex. App. Houston 14th Dist. Dec. 28 2010).

1131. In a product liability action against a tire manufacturer, the trial court was within its discretion in excluding evidence regarding nylon cap plies; while the addition of a nylon cap ply might have prevented injury to a mother and children, a father did not demonstrate why evidence of the way tires were manufactured 12 years after the manufacture of the tire at issue would have been relevant to the feasibility of adding nylon cap plies in 1997. Hathcock v. Hankook Tire Am. Corp., 330 S.W.3d 733, 2010 Tex. App. LEXIS 10032 (Tex. App. Texarkana Dec. 17 2010).

1132. In defendant's trial for four counts of sexual assault of a child, the trial court did not err by refusing to admit evidence of specific instances of conduct under Tex. R. Evid. 608(b) to show that the victim's father had also been indicted for aggravated sexual assault of a child. For purposes of relevance under Tex. R. Evid. 401, defendant failed to show how the offense made more probable the existence of any motive, bias, or interest on the part of the witness; in fact, the evidence posed a risk of confusing or misleading the jury. Harris v. State, 2010 Tex. App. LEXIS 9999 (Tex. App. Eastland Dec. 16 2010).

1133. Where defendant convicted of driving while intoxicated after a traffic stop challenged the officer's basis for stopping him, the trial court erred by not including an Tex. Crim. Proc. Code Ann. art. 38.23(a) instruction in the jury charge. The videotape of the stop and the officers' testimony about the videotape was relevant for purposes of Tex. R. Evid. 401, because it created some affirmative evidence to show that the stop was not justified. Dyer v. State, 2010 Tex. App. LEXIS 9964 (Tex. App. Fort Worth Dec. 16 2010).

1134. Trial court did not err by admitting testimony regarding an alleged threat defendant made against the unborn child of a witness because the testimony was relevant to the jury's determination of defendant's future dangerousness because it had a tendency to make the existence of defendant's future dangerousness more probable than it would be without the evidence. The statement had probative value, as the fact that he would make such a statement to a pregnant woman regarding an unborn child was some evidence of defendant's character, and it was not unfairly prejudicial, as it was not mentioned again after the witness testified. Martinez v. State, 327 S.W.3d 727, 2010 Tex. Crim. App. LEXIS 1653 (Tex. Crim. App. 2010), *cert. denied*, No. 10-9833, --U.S. --, 131 S. Ct. 2966, 180 L. Ed.2d 253, 2011 U.S. LEXIS 4238 (2011).

1135. Trial court did not abuse its discretion in denying appellant's motion for a continuance, for purposes of Tex. Code Crim. Proc. Ann. arts. 29.03, 29.08, given that (1) the State disclosed its witness list in February and appellant and counsel knew they were going to trial almost one month before the trial setting, (2) appellant provided no explanation of why counsel could not have interviewed the witnesses or hired an expert sometime between February and April, (3) appellant did not provide affidavits showing what testimony he would have elicited from the witnesses, had a continuance been granted, (4) if records were not relevant to the case, he could not show that he was harmed by their late production, and (5) the trial was not overly complex and counsel presented a competent defense. Suazo v. State, 2010 Tex. App. LEXIS 9781, 2010 WL 5018971 (Tex. App. Austin Dec. 10 2010).

1136. In defendant's prosecution for interference with child custody under Tex. Penal Code Ann. § 25.03(a)(1), evidence that he continued to pay child support after July 2006 was relevant and not unfairly prejudicial as it tended to rebut his claim that he and the complainant had reconciled and that he believed that the divorce decree was void. Long v. State, 2010 Tex. App. LEXIS 9804 (Tex. App. Houston 1st Dist. Dec. 9 2010).

1137. Mother did not object at trial to relevance or that any relevance was outweighed by the risk of unfair prejudice and she did not preserve this complaint for review, under Tex. R. App. P. 33.1; furthermore, the mother testified without objection to the substance of certain testimony, and any error in admitting evidence was cured where the same evidence came in elsewhere without objection. In the Interest of S.R., 2010 Tex. App. LEXIS 9681, 2010 WL 4983484 (Tex. App. Waco Dec. 8 2010).

1138. Evidence of the mother's drug or alcohol impairment while driving was relevant in determining whether she engaged in conduct that endangered the children and in determining the best interest of the children; for purposes of Tex. R. Evid. 403, the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice. In the Interest of S.R., 2010 Tex. App. LEXIS 9681, 2010 WL 4983484 (Tex. App. Waco Dec. 8 2010).

1139. Had the Texas Department of Child Protective Services sought termination of the mother's parental rights due at least in part to her alleged failure to comply with the trial court's orders, then the transcript of the adversary hearing might have arguably been relevant, but, because the Department abandoned that ground, and the trial court did not charge the jury on that ground, the transcript had no tendency to make any fact of consequence more or less probable; thus, the trial court did not abuse its discretion by excluding the transcript of the adversary hearing from evidence under Tex. R. Evid. 401. In the Interest of T.T.F., 331 S.W.3d 461, 2010 Tex. App. LEXIS 9599 (Tex. App. Fort Worth Dec. 2 2010).

1140. Court presumed without deciding that an objection to relevance preserved the alleged error that testimony did not assist the trier of fact for purposes of Tex. R. Evid. 702; the court did not need to decide this issue because appellant's argument failed on the merits. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

1141. Officer, based on her experience, testified that sexually abused children often cry out to multiple persons, making the child's similar actions appropriate, and this enhanced an inference drawn from the fact that the child cried out to multiple adults and made it more probable that she was sexually abused; the officer's testimony was about a child victim's behavior, not a direct opinion on whether the child was telling the truth, and thus the trial court did not abuse its discretion in admitting the officer's testimony, as it was relevant and assisted the trier of fact. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

1142. Nowhere did the court see an objection to the reliability or relevance of the witness's testimony and the context did not suggest that appellant objected on either of these grounds, for preservation purposes; it might have been apparent from the context that appellant objection on qualifications grounds, but he did not argue this on

appeal. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

1143. Appellant pointed to actions by the trial court during the punishment phase of the trial, but those actions were irrelevant for purposes of this appeal, as appellant's challenge related only to his self-defense theory at the guilt-innocence phase. Garcia v. State, 2010 Tex. App. LEXIS 8834, 2010 WL 4361885 (Tex. App. Corpus Christi Nov. 4 2010).

1144. Text messages received by appellant were relevant evidence of his ability to follow community supervision conditions and terms, if granted, including those under Tex. Code Crim. Proc. Ann. art. 42.12, § 11(a)(1)-(2), (14), and this evidence was also proper to aid the jury in determining the appropriate length of his sentence, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1); the trial court could have reasonably found that the State introduced the text messages not for the truth of the matter asserted, but to impeach the credibility of character witnesses to test their knowledge of appellant, and no abuse of discretion was found. Barrientos v. State, 2010 Tex. App. LEXIS 8879, 2010 WL 4395423 (Tex. App. Houston 1st Dist. Nov. 4 2010).

1145. Police officer was properly permitted to testify as to the number of intoxicated people he had encountered during his career as it was relevant under Tex. R. Evid. 401 to establish the basis for his opinion that appellant was intoxicated. Schmidt v. State, 2010 Tex. App. LEXIS 8795, 2010 WL 4354027 (Tex. App. Beaumont Nov. 3 2010).

1146. Trial court did not abuse its discretion by refusing to admit evidence of a fight between the victim and his older brother because defendant failed to show the victim's propensity to fight when challenged was a pertinent character trait that had any relevance in a sexual assault on a child case. Soto v. State, 2010 Tex. App. LEXIS 8709, 2010 WL 4273173 (Tex. App. San Antonio Oct. 29 2010).

1147. When defendant pleaded guilty to intoxication manslaughter in violation of Tex. Penal Code Ann. § 49.08(a), the doctrines of double jeopardy and collateral estoppel did not preclude the trial court at sentencing from determining that defendant's prior offense involved alcohol even though the State had reduced the charge in the prior case from driving while intoxicated (DWI) to obstruction of a highway or other passageway; double jeopardy did not attach, because there were no common factual elements between DWI and obstruction of a highway or other passageway. Under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and Tex. R. Evid. 401-402, the trial court was permitted to consider all relevant evidence at sentencing. Cherian v. State, 2010 Tex. App. LEXIS 8646, 2010 WL 4244002 (Tex. App. Houston 1st Dist. Oct. 28 2010).

1148. Expert testimony valuing property on which a large natural gas processing plant had been built as vacant rural residential property was irrelevant under Tex. R. Evid. 401 and was unreliable under Tex. R. Evid. 702 because the expert failed to explain why the existing use of the property would not be presumed as the highest and best use, did not offer fair market value of the land based on its condition at the time of the condemnation, and did not account for all relevant factors affecting valuation. Enbridge Pipeline (east Texas) L.P. v. Avinger Timber, L.L.C., 326 S.W.3d 390, 2010 Tex. App. LEXIS 8629, 172 Oil & Gas Rep. 722 (Tex. App. Texarkana Oct. 27 2010).

1149. In a case in which a client sued an attorney and a law firm for breach of fiduciary duty, fraud, negligence (legal malpractice), and negligent misrepresentation, which was premised on the contention that the trial judge in the underlying action did not tell the attorney the parties would be limited to five days to try the case, the equal inference rule did not apply, and the trial court erred in granting no-evidence summary judgment on that ground because the record as a whole contained sufficient circumstantial evidence to enable a reasonable juror to infer that the alleged conversation in which the judge told the attorney he would limit trial time did not occur. The judge's testimony that it was his habit or practice not to limit the time to try a case, not to engage in substantive conversations about a case with only one side, and not to discuss pending cases in social settings, was evidence tending to make it less probable the purported conversation with the attorney occurred, and the pretrial history of

the underlying litigation, together with the judge's testimony, taken as a whole and viewed in the light most favorable to the client, was sufficient to raise a fact issue on whether the judge made the alleged comment to the attorney. Total Clean, Llc v. Cox Smith Matthews, Inc., 330 S.W.3d 657, 2010 Tex. App. LEXIS 8369 (Tex. App. San Antonio Oct. 20 2010).

1150. Although defendant contended that the trial court erred in sustaining the State's objection when defendant offered the ticket and booking information pertaining to an individual arrested on the night and at the location where defendant was arrested, defendant provided no argument for the relevance of the excluded evidence, other than asserting that such evidence allegedly impeached the arresting officer's testimony regarding the basis for the arrest of the other person. Because the evidence was not relevant to the issues in this case, the trial court did not err in excluding it. Howard v. State, 2010 Tex. App. LEXIS 8362, 2010 WL 4069330 (Tex. App. Houston 14th Dist. Oct. 19 2010).

1151. Trial court did not abuse its discretion by allowing the victim's mother to testify that the victim had experienced approximately 12 episodes of urinary incontinence at school because it tended to corroborate the victim's accusations and made the existence of the alleged penetration more probable. Arredondo v. State, 2010 Tex. App. LEXIS 8465, 2010 WL 4137425 (Tex. App. Austin Oct. 19 2010).

1152. Trial court did not abuse its discretion by admitting the testimony of a fellow prisoner of defendant because it had a strong tendency to suggest that defendant was quick-tempered and prone to respond to the slightest provocation with homicidal violence, and it was directly relevant to the issue of defendant's identity as the murderer, as the prisoner testified that defendant spoke of putting "three in the back of the head" and expressed a preference for .22 caliber weapons, the same used to kill the victims. The trial court did not abuse its discretion by concluding that the probative value of the prisoner's testimony was not substantially outweighed by the danger of unfair prejudice or undue delay because only 51 pages of the 1347 pages of the reporter's record were devoted to the prisoner's testimony, including 15 pages for voir dire outside the jury's presence. Garcia v. State, 2010 Tex. App. LEXIS 8313, 2010 WL 4053640 (Tex. App. Austin Oct. 12 2010).

1153. Trial court did not abuse its discretion by admitting photographs showing defendant's tattoos because a criminal investigator testified that defendant's distinctive tattoos as depicted in the photographs identified him as a member of a particular gang, and defendant did not overcome the presumption that the relevant evidence was more probative than prejudicial. Pate v. State, 2010 Tex. App. LEXIS 8151, 2010 WL 3921177 (Tex. App. Corpus Christi Oct. 7 2010).

1154. Trial court did not err by admitting during sentencing an audio recording of jokes defendant told his brother on the telephone while in jail over his First Amendment objection because it was within the zone of reasonable disagreement that the evidence was indicative of defendant's character and thus relevant to the issue of future dangerousness; the jocks, which defendant told after raping, beating, and murdering a 15-year-old girl showed that he found the topics of violence and disrespect towards women to be humorous. The evidence was relevant under Tex. R. Evid. 401 because it had a tendency to make the existence of defendant's future dangerousness more probable, and it was not so prejudicial that there was a clear disparity between the degree of prejudice and its probative value. Davis v. State, 329 S.W.3d 798, 2010 Tex. Crim. App. LEXIS 1207 (Tex. Crim. App. 2010).

1155. Trial court did not err when it allowed the State to present evidence that defendant had become a Satanist while imprisoned on death row because the evidence was relevant to the issue of defendant's future dangerousness and outside the protection of the First Amendment, as an expert testified that some members of the religion advocated violence, that Satanic religious publications like the ones found in defendant's cell discussed rituals of destruction and human sacrifice, and that various people had committed murder and mutilation in the name of Satan. Davis v. State, 329 S.W.3d 798, 2010 Tex. Crim. App. LEXIS 1207 (Tex. Crim. App. 2010).

1156. While the use of the term "all" in a discovery request to a company president and his wife appeared to be quite broad, the request was restricted to a class of documents and by date; the discovery requests were not overly broad and were relevant to the trace the purported transferring of money and assets to deflate the net worth of companies, for purposes of Tex. R. App. P. 24.1(a)(1) and Tex. Civ. Prac. & Rem. Code Ann. § 52.006, so as to inhibit the individual from collecting on his judgment, and the court rejected a privacy claim by the president and wife. In re Williams, 328 S.W.3d 103, 2010 Tex. App. LEXIS 7779 (Tex. App. Corpus Christi Sept. 23 2010).

1157. Individual's discovery requests spanning several years was relevant in proving his allegations that companies' net worth, for purposes of Tex. R. App. P. 24.1(a)(1) and Tex. Civ. Prac. & Rem. Code Ann. § 52.006, was inaccurate at the time the cash deposits in lieu of supersedeas bond were made because of the purported fraudulent transfers, for purposes of Tex. Bus. & Com. Code Ann. §§ 24.001-.013. In re Williams, 328 S.W.3d 103, 2010 Tex. App. LEXIS 7779 (Tex. App. Corpus Christi Sept. 23 2010).

1158. For purposes of Tex. R. App. P. 24.1(a)(1), Tex. R. Civ. P. 192.3(a), and Tex. Civ. Prac. & Rem. Code Ann. § 52.006, the trial court did not abuse its discretion in requiring the president and wife to produce other records and documentation of their personal finances in ascertaining the net worth of the companies; for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a), a jury in an underlying case awarded an individual punitive damages against a company, and the court found the award supported by the evidence, and with the exception of the personal income tax returns, the financial information the individual sought to obtain through post-judgment discovery was highly relevant and material to determining the net worth of the company. In re Williams, 328 S.W.3d 103, 2010 Tex. App. LEXIS 7779 (Tex. App. Corpus Christi Sept. 23 2010).

1159. Scope of individual's discovery requests needed to be broad so as to trace the purported moving of assets and money that allegedly occurred in preparation for a possible negative jury verdict in the underlying case; the court was not persuaded by relevancy and broadness arguments. In re Williams, 328 S.W.3d 103, 2010 Tex. App. LEXIS 7779 (Tex. App. Corpus Christi Sept. 23 2010).

1160. In appellant's trial for driving while intoxicated with child passengers, the court was not suggesting the amount of drugs in appellant's body was irrelevant to the inquiry of whether his condition was caused by the prescription drugs; while a quantitative analysis would have strengthened the State's case, it was not performed and such an analysis was not required. Smarr v. State, 2010 Tex. App. LEXIS 7478, 2010 WL 3518746 (Tex. App. Texarkana Sept. 10 2010).

1161. During a civil commitment hearing, the trial court did not err in sustaining the State's relevancy objection to a question to a psychologist concerning whether a diagnosis of pedophilia predisposed a person to commit acts of sexual violence because the psychologist had not diagnosed respondent with pedophilia. In re Commitment of Robertson, 2010 Tex. App. LEXIS 7421 (Tex. App. Beaumont Sept. 9 2010).

1162. Evidence regarding a child-welfare complaint investigation was relevant to prove the State's allegation that appellant knew an investigation of drug possession and/or child welfare complaint was in progress; thus, the trial court did not err in admitting evidence regarding the welfare complaint because it went to a material element of the State's tampering case under Tex. Penal Code Ann. § 37.09(a)(1) and was not an extraneous offense under Tex. R. Evid. 404(b). Beck v. State, 2010 Tex. App. LEXIS 7265, 2010 WL 3434075 (Tex. App. Waco Sept. 1 2010).

1163. Given what the State had to prove regarding the evading arrest and tampering counts, the evidence describing how methamphetamine was made was relevant under Tex. R. Evid. 401 because it tended to show that the stop was lawful for the evading arrest indictment and it tended to show that a knowing offense was being committed for the tampering indictment, and thus the trial court did not err in overruling appellant's relevancy

objection. Lewis v. State, 2010 Tex. App. LEXIS 7292, 2010 WL 3433992 (Tex. App. Fort Worth Aug. 31 2010).

1164. Certain testimony and a DVD were relevant to the elements of both counts of evading arrest and tampering, and the testimony also corroborated accomplice testimony regarding appellant's intent; the testimony in question did not unduly delay the trial and appellant raised no argument about the DVD's length, such that the trial court did not err in overruling appellant's Tex. R. Evid. 403 objection and in admitting the evidence. Lewis v. State, 2010 Tex. App. LEXIS 7292, 2010 WL 3433992 (Tex. App. Fort Worth Aug. 31 2010).

1165. Court did not abuse its discretion in admitting the still photos, because the trial court could have properly determined the still photos had a connection to defendant and a bearing on the case; the photos were relevant to show that someone in defendant's home had sexual proclivities toward anal sex and female bondage, which corroborated the complainant's description of events. Shakouri v. State, 2010 Tex. App. LEXIS 7064, 2010 WL 3386598 (Tex. App. Dallas Aug. 30 2010).

1166. To the extent certain matters were relevant to the court's analysis, the court took judicial notice of those matters. Vista Healthcare, Inc. v. Tex. Mut. Ins. Co., 324 S.W.3d 264, 2010 Tex. App. LEXIS 7046 (Tex. App. Austin Aug. 26 2010).

1167. Trial court did not err by admitting into evidence photographs of defendant's tattoos because a criminal investigator testified that defendant's distinctive tattoos identified him as a member of particular street gang, which was an element of the charged offense of organized criminal activity. Defendant did not overcome the presumption that the relevant evidence was more probative than prejudicial. Pate v. State, 2010 Tex. App. LEXIS 6980, 2010 WL 3341853 (Tex. App. Corpus Christi Aug. 25 2010).

1168. Defendant failed to preserve for appellate review his claim that the trial court erred by allowing the State to question him about testimony he gave in a prior trial because at trial defendant specifically objected to the testimony under Tex. R. Evid. 403, but on appeal he argued that the testimony was not relevant under Tex. R. Evid. 401. Garcia v. State, 2010 Tex. App. LEXIS 6738, 2010 WL 3279386 (Tex. App. Corpus Christi Aug. 19 2010).

1169. Although a shareholder requested a hearing on appellee's objections, he did not request a privilege log or an in camera inspection on all withheld documents, for purposes of Tex. R. Civ. P. 193.3(b); the shareholder did not contend that appellees possessed specific responsive documents and failed to disclose them, nor did the shareholder contend that the documents sought in his motion to compel were relevant to the determination of certain issues, such that the shareholder failed to show that the trial court's denial of his motion to compel probably caused the trial court to improperly grant summary judgment for appellees, for purposes of Tex. R. App. P. 44.1(a). Haase v. Gim Res., Inc., 2010 Tex. App. LEXIS 6832 (Tex. App. Houston 1st Dist. Aug. 19 2010).

1170. Appellant alleged that a witness was not called and could have been beneficial, but appellant did not show that the witness was able to testify at trial, there was little of any testimony that would have been relevant to the trial, and certain remarks did not show that counsel provided ineffective assistance. Mcclanathan v. State, 2010 Tex. App. LEXIS 6598 (Tex. App. Dallas Aug. 16 2010).

1171. Evidence of trace quantities of controlled substances that were found in defendant's car during the same search in which the methadone was found was relevant and admissible because it was visible in a baggie and on a scale, and the baggie was found in the location where the trooper had seen defendant secret something. Lamkin v. State, 2010 Tex. App. LEXIS 6484, 2010 WL 3170647 (Tex. App. Eastland Aug. 12 2010).

1172. Trial court did not abuse its discretion by overruling defendant's Tex. R. Evid. 401 objection to a family counselor's testimony because the evidence was relevant, as the counselor's testimony identified some behavioral manifestations of sexual abuse and how the victim exhibited some of those behaviors. Berzley v. State, 2010 Tex. App. LEXIS 6463, 2010 WL 3159875 (Tex. App. San Antonio Aug. 11 2010).

1173. Trial court did not abuse its discretion in excluding documents dating from 2004 and 2005 on the basis of the State's objection that they were irrelevant to the issue of whether family violence had been committed. Goad v. State, 2010 Tex. App. LEXIS 6349 (Tex. App. Austin Aug. 6 2010).

1174. Complaints about the actions of the assistant district attorney were not relevant to the issue of the constitutionality of Title IV of the Texas Family Code and the ex-husband did not show the statutes at issue were unconstitutional as applied to him. Goad v. State, 2010 Tex. App. LEXIS 6349 (Tex. App. Austin Aug. 6 2010).

1175. For purposes of Tex. R. Evid. 401, 402, 404(b), the trial court could have reasonably determined that the testimony about appellant's pretrial supervision and having been found competent to stand trial in a separate case was relevant rebuttal testimony that appellant was motivated to commit the underlying offenses to demonstrate that he was not competent to stand trial in the other case. Espinosa v. State, 328 S.W.3d 32, 2010 Tex. App. LEXIS 6341 (Tex. App. Corpus Christi Aug. 5 2010).

1176. When a letter was offered into evidence at trial, defense counsel said "no objection," thereby waiving any alleged error in admission of that evidence, plus there was testimony about the letter, to which there was no objection; moreover, attempts by one to fabricate evidence were admissible, the evidence showing that appellant fabricated evidence was probative, and he did not show that the evidence had the potential to impress the jury in an irrational way. Seeger v. State, 2010 Tex. App. LEXIS 6064, 2010 WL 2998750 (Tex. App. Tyler July 30 2010).

1177. Amended pleadings added claims arising from or related to the conduct of the husband in contemplation of marriage and during marriage; even if the scope of proper discovery excluded inquiry into the husband's conduct before the wife's amended pleadings, after it was served, the rules authorized proper discovery, and the court declined to grant mandamus based on the executor's contention that the trial court abused its discretion by not sustaining his relevancy objection to the wife's production requests. In re Rogers, 2010 Tex. App. LEXIS 6210, 2010 WL 2991144 (Tex. App. Amarillo July 30 2010).

1178. Relevancy objection was properly overruled pursuant to Tex. R. Evid. 401 and 702 in a case involving sexual abuse of a child because defense counsel had previously cross-examined the nurse practitioner about her experience with false allegations of sexual abuse and circumstances involving the absence of physical findings; thus, the redirect of the nurse practitioner regarding statistics of confirmed cases of sexual abuse where there were no physical findings was relevant. Cortez v. State, 2010 Tex. App. LEXIS 5854, 2010 WL 2889670 (Tex. App. Fort Worth July 22 2010).

1179. Question to appellant's aunt in the punishment phase regarding the criminal history of appellant's brother and sister was relevant under Tex. R. Evid. 401 because one of the issues was whether appellant was a suitable candidate for community supervision and, in determining that issue, the character and criminal background of family members with whom appellant would associate was relevant under Tex. Code Crim. Proc. Ann. art. 42.12, § 11(a)(3); any error was harmless under Tex. R. App. P. 44.2(b) because the aunt never responded and appellant had, inter alia, tested positive for alcohol on two separate occasions during urinalysis tests while out on bond. Jones v. State, 2010 Tex. App. LEXIS 5860, 2010 WL 2889690 (Tex. App. Fort Worth July 22 2010).

1180. Testimony of defendant's former girlfriend during the punishment phase as to the impact of an extraneous offense on her was not victim impact evidence because she was the victim of that extraneous offense, and the

testimony was admissible in a case of evading arrest or detention using a motor vehicle. Guerra v. State, 2010 Tex. App. LEXIS 5655, 2010 WL 2816215 (Tex. App. Amarillo July 19 2010).

1181. Trial court did not abuse its discretion in excluding the affiant's deposition concerning a different case because that deposition did not pertain to the original lender, for relevance purposes, and the debtor never challenged the trustworthiness of the lender's documents. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

1182. Trial court did not abuse its discretion by prohibiting defendant from questioning his daughter about the victim's use of marijuana because whether the victim used drugs over a month earlier would not rebut the toxicology report showing no drugs in her system at the time she was killed. Mcghee v. State, 2010 Tex. App. LEXIS 5561 (Tex. App. Houston 1st Dist. July 15 2010).

1183. In appellant's aggravated sexual assault of a child trial, appellant's admission of how he contracted gonorrhea, which the victim also had, was relevant, and the failure to object to admissible evidence was not ineffective assistance. Edens v. State, 2010 Tex. App. LEXIS 5485, 2010 WL 2784438 (Tex. App. Tyler July 14 2010).

1184. Evidence of the burglary to view pornography was admissible at the punishment stage of the trial because it was relevant to sentencing in appellant's aggravated sexual assault of a child trial, and the failure to object to admissible evidence was not ineffective assistance. Edens v. State, 2010 Tex. App. LEXIS 5485, 2010 WL 2784438 (Tex. App. Tyler July 14 2010).

1185. Appellant did not meet his burden of affirmatively showing his flight was directly connected to the pending drug charges and not connected with the murder charge, and thus evidence of appellant's flight was relevant. Staley v. State, 2010 Tex. App. LEXIS 5167, 2010 WL 2680000 (Tex. App. San Antonio July 7 2010).

1186. Ineffective assistance of counsel in violation of U.S. Const. amend. VI was shown where defendant's counsel failed to object to evidence that one of two women who died after being run over by defendant's truck was pregnant; evidence of her pregnancy was irrelevant under Tex. R. Evid. 401 and Tex. R. Evid. 402 because the fact that the woman was pregnant did not tend to make it more or less probable that defendant had the requisite intent to injure her and there was no evidence that defendant in fact even was aware of the woman's pregnancy. White v. Thaler, 610 F.3d 890, 2010 U.S. App. LEXIS 13329 (5th Cir. Tex. 2010).

1187. Court acted within its discretion in admitting the challenged testimony, because evidence that defendant wore a shirt commemorating a notorious gang founder with a violent history was relevant to explain his motive for urging his accomplice to shoot the store employee. Carey v. State, 2010 Tex. App. LEXIS 4876, 2010 WL 2573846 (Tex. App. Houston 14th Dist. June 29 2010).

1188. Defendant's conviction for engaging in organized criminal activity, with the two predicate offenses being aggravated sexual assault of a child, was improper because evidence that the children's current foster parent had been accused of sexually molesting foster children under his care in the past was certainly relevant to the defense. Thus, the trial court's exclusion of that evidence on relevancy grounds was erroneous. Kelly v. State, 321 S.W.3d 583, 2010 Tex. App. LEXIS 4506 (Tex. App. Houston 14th Dist. June 17 2010).

1189. For purposes of Tex. Code Crim. Proc. Ann. art. 37.071, § 2(a)(1) and Tex. R. Evid. 401, though circumstantial, the evidence clearly proved that appellant killed the victim's cat, which suffered wounds similar to those suffered by the victim; that appellant would kill a house cat was some evidence of his violent nature, the

prosecutor's assessment of this evidence as showing appellant's brutality was rational and was a legitimate reason for admitting the evidence, and the trial court did not abuse its discretion under Tex. R. Evid. 403 in admitting this evidence. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1190. Appellant appeared to claim that a doctor's testimony was admissible because it was relevant and no rule of evidence required its exclusion, but this contention was incorrect because the evidence was rendered legally irrelevant by Tex. Penal Code Ann. § 8.04. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1191. Cross-examiner must still show the relevance of the vulnerable status or other alleged source of bias to the witness's testimony and it is not enough to say that all witnesses who may, coincidentally, be on probation, have pending charges, be in the country illegally, or have some other vulnerable status are automatically subject to cross-examination with that status regardless of its lack of relevance to the testimony of that witness; thus, to the extent that Maxwell v. State, 48 S.W.3d 196 (Tex. Crim. App. 2001), is inconsistent with Carpenter v. State, 979 S.W.2d 633 (Tex. Crim. App. 1998), the court overrules it. Irby v. State, 327 S.W.3d 138, 2010 Tex. Crim. App. LEXIS 725 (Tex. Crim. App. 2010).

1192. Probationary status, pending charges, unadjudicated crimes, or other bad acts may be admissible to show motive or bias if the proponent makes a logical connection between the base fact and the witness's testimony; otherwise, it is irrelevant. Irby v. State, 327 S.W.3d 138, 2010 Tex. Crim. App. LEXIS 725 (Tex. Crim. App. 2010).

1193. Texas has an important interest in protecting the anonymity of juvenile offenders and under Tex. R. Evid. 609(d), Tex. Fam. Code Ann. § 51.13(b), that anonymity is explicitly protected, and to hold that any juvenile who happens to be on probation at the time that he also is the victim of a crime or a witness in a criminal proceeding automatically loses that privacy protection is not required by the constitution or by common sense; Davis v. Alaska, 415 U.S. 308 (1974), is not a blunderbuss that decimates all other evidentiary statutes, rules, and relevance requirements in matters of witness impeachment, and it is a rapier that targets only a specific mode of impeachment--bias and motive--when the cross-examiner can show a logical connection between the evidence suggesting bias or motive and the witness's testimony. The court therefore rejects the absolutist position that a probationer, particularly a probationer whose guilt has not yet been adjudicated, is always in a vulnerable relationship with the State and that mere status is always automatically relevant to show a witness's possible bias and motive to testify favorably for the State as inconsistent with Texas and United States Supreme Court precedent. Irby v. State, 327 S.W.3d 138, 2010 Tex. Crim. App. LEXIS 725 (Tex. Crim. App. 2010).

1194. Any evidence showing that the juvenile victim had a motive to make up this story was relevant and admissible for impeachment purposes, but the court agreed with the trial court and court of appeals that appellant failed to make a logical connection between the victim's testimony concerning his sexual encounters with appellant and his entirely separate probationary status, such that the trial court did not abuse its discretion in excluding this impeachment evidence because it was irrelevant. Irby v. State, 327 S.W.3d 138, 2010 Tex. Crim. App. LEXIS 725 (Tex. Crim. App. 2010).

1195. Appellant failed to preserve any error associated with the trial court's exclusion of answers to certain questions; after the State objected, appellant did not tell the trial court how the questions were relevant, nor was such apparent from the context of the questions asked, and although appellant properly preserved a complaint by informing the trial court that he wanted to cross-examine a witness about certain issues, the trial court was concerned about interrogation that was repetitive and appellant had already asked several questions in this regard, such that the trial court did not err in limiting the cross-examination. Ramirez v. State, 2010 Tex. App. LEXIS 4365 (Tex. App. Houston 1st Dist. June 10 2010).

1196. Even if defendant had objected to a witness's testimony at trial, the trial court would not have abused its discretion in allowing the testimony under Tex. R. Evid. 404(b), given that evidence that defendant had delivered drugs to another person about two weeks before his arrest was relevant to show that, on the date of his arrest, he possessed the methamphetamine with the intent to deliver. Gately v. State, 321 S.W.3d 72, 2010 Tex. App. LEXIS 3785 (Tex. App. Eastland May 20 2010).

1197. Because forgery was not pleaded as an affirmative defense under Tex. R. Civ. P. 94 in a suit for a constructive trust, handwriting evidence was not helpful and thus was irrelevant under Tex. R. Evid. 401, 402, 702. Estate of Wallis, 2010 Tex. App. LEXIS 3710, 2010 WL 1987514 (Tex. App. Tyler May 19 2010).

1198. Identity of the driver was contested and was one of the key contested points before the trial court; that a hoodie, possibly belonging to defendant, was found in the car at the time of the arrest the next day, when defendant was indisputably driving, did not tend to make it more likely that defendant had been the driver the previous day, for purposes of Tex. R. Evid. 401. Johnson v. State, 2010 Tex. App. LEXIS 3884, 2010 WL 2010762 (Tex. App. Austin May 19 2010).

1199. To the extent that the State argued that the evidence, certain drawings, somehow showed that defendant was the mastermind behind the crime, it was undisputed that the three men were friends and that defendant's nickname was "G-Money," but it was unclear how a drawing on which "G-Money" was displayed would corroborate certain evidence; it was not shown that the hoodie in which the drawing was found was defendant's or that the drawing was his, and the court could not find that the trial court's decision to admit the evidence as relevant was within the zone of reasonable disagreement. Johnson v. State, 2010 Tex. App. LEXIS 3884, 2010 WL 2010762 (Tex. App. Austin May 19 2010).

1200. Even if the trial court erred by admitting drawings, defendant had not demonstrate reversible error under Tex. R. App. P. 44.2(b), given that nothing connected the drawings to any sort of organized gang and there was no indication that these drawings amounted to any sort of gang affiliation evidence; the trial court admitted the drawings as one more means of showing defendant's presence in the vehicle at the time the aggravated robbery occurred, defendant's argument that the evidence was unfairly prejudicial found little support in the record, and at most, by showing that the evidence lacked relevance, defendant showed that the evidence did not tend to prove or disprove any disputed fact, not that his substantial rights were affected by the drawings' admission. Johnson v. State, 2010 Tex. App. LEXIS 3884, 2010 WL 2010762 (Tex. App. Austin May 19 2010).

1201. There was sufficient evidence to support the finding that the ex-husband, who was an attorney, became the ex-wife's attorney, investment advisor, and custodian of her assets prior to the parties' marriage, and thus the ex-husband owed the ex-wife a fiduciary duty, which was separate from his fiduciary obligation as a spouse; even if the only fiduciary responsibility arose from the general duty between spouses, such a duty would remain relevant to the court's analysis of the statutory affirmative defenses to enforcement of a post-marital agreement. 4.105. Izzo v. Izzo, 2010 Tex. App. LEXIS 3623, 2010 WL 1930179 (Tex. App. Austin May 14 2010).

1202. In considering the enforceability of the parties' agreement, the evidence supported a finding that the ex-wife did not understand the meaning or effect of the agreement at the time it was executed, given that (1) she was unaware of the value of her ex-husband's law practice, (2) the trial court was free to disbelieve the ex-husband's claim that the ex-wife had access to the firm's records and books, as testimony suggested that she did not have the requisite financial and computer literacy to obtain financial information, and (3) information as to the potential value of contingency fee cases, while relevant to the firm's value, could not be ascertained from a review of the firm's bank statements. Izzo v. Izzo, 2010 Tex. App. LEXIS 3623, 2010 WL 1930179 (Tex. App. Austin May 14 2010).

1203. For purposes of Tex. R. Evid. 403, the trial court did not abuse its discretion in admitting autopsy photographs, given that (1) the medical examiner's testimony about the wounds was relevant and the pictures were a visual representation of that testimony, (2) the wounds were described in the autopsy report, which was admitted without objection, and (3) defendant's argument was that the results of the crime were horrific, but the result of the crime was the very issue that was relevant. Jett v. State, 319 S.W.3d 846, 2010 Tex. App. LEXIS 3559 (Tex. App. San Antonio May 12 2010).

1204. Defendant's tattoo constituted some evidence that he was a member of the gang and was admissible under Tex. Code Crim. Proc. Ann. art. 37.07 as probative of his character, even without the State's compliance with the requirements of case law, and thus the trial court could have reasonably concluded that such evidence of defendant's gang affiliation was relevant in the punishment phase of the trial. Anderson v. State, 2010 Tex. App. LEXIS 3440, 2010 WL 1839945 (Tex. App. Houston 1st Dist. May 6 2010).

1205. Evidence of valuable narcotics left in plain view may tend to prove that a robbery was not the motive for the shooting of a victim and thus the trial court could have reasonably concluded that the photographs and diagram were relevant to disproving defendant's alternate theory of how the victim was killed; defendant did not explain how the negative attributes of the photographs and diagram substantially outweighed any probative value and the photographs and diagram were not unfairly prejudicial because no evidence identified the narcotics as defendant's. The trial court did not err in admitting the evidence. Anderson v. State, 2010 Tex. App. LEXIS 3440, 2010 WL 1839945 (Tex. App. Houston 1st Dist. May 6 2010).

1206. Firearms, viewed together, served to disprove defendant's theory that the victim was shot during a robbery because such valuable property would have been the target of any robbery, and defendant's concealment of the murder weapon along with the other firearms showed a consciousness of guilt, a relevant fact at issue and the court could have found that the additional firearms were relevant. Anderson v. State, 2010 Tex. App. LEXIS 3440, 2010 WL 1839945 (Tex. App. Houston 1st Dist. May 6 2010).

1207. Although an owner requested a hearing on appellees' objections, he did not request a privilege log or an in camera inspection of all withheld documents under Tex. R. Civ. P. 193.3(b), and the trial court denied the owner's motion to compel upon the findings that the responses were adequate; the owner did not contend that the documents sought in his motion to compel were relevant to the determination of certain issues and thus he failed to show that the trial court's denial of the motion to compel probably caused the trial court to improperly grant summary judgment in favor of appellees, for purposes of Tex. R. App. P. 44.1(a). Haase v. Gim Res., Inc., 2010 Tex. App. LEXIS 3431 (Tex. App. Houston 1st Dist. May 6 2010).

1208. Photographs of defendant, his car, and its contents were relevant, as the identity of the convenience store robber was a fact of consequence in this aggravated robbery case and the evidence obtained at another store made the determination of whether defendant was the robber more probable, for purposes of Tex. R. Evid. 401, 402. Lively v. State, 2010 Tex. App. LEXIS 3387, 2010 WL 1780138 (Tex. App. Texarkana May 5 2010).

1209. Trial court acted within its wide discretion during defendant's murder and engaging in organized criminal activity trial by admitting a gang unit police officer's testimony that defendant had previously been the victim of a shooting; although evidence of the earlier shooting did not establish conclusively that the shooting in the instant case was gang-related, it nonetheless provided a "small nudge" toward proving that it was, and that was all that was required. Lucio v. State, 2010 Tex. App. LEXIS 3241 (Tex. App. Fort Worth Apr. 29 2010).

1210. Witness overheard a conversation between the child victim and her brother; given the circumstances, the trial court could have found that the witness's opinion regarding the emotional undercurrent of the conversation was rationally based on her hearing perception, and the witness's opinion was relevant to help the jury's credibility

determination regarding prior testimony by the brother. Cockrell v. State, 2010 Tex. App. LEXIS 3208, 2010 WL 1705538 (Tex. App. Amarillo Apr. 28 2010).

1211. Defendant's intent, and the absence of mistake or accident, was a fact of consequence in this case alleging a violation of Tex. Code Crim. Proc. Ann. art. 62.055(a), and evidence of defendant's employment and failure to report his employment status was relevant because it tended to establish an elemental fact and rebut a defensive theory; the fact that defendant did not inform the police department of his employment was some evidence establishing his intent to violate the registration requirements, and it was sufficient that the evidence provided a small nudge toward proving or disproving a fact of consequence, and the trial court did not err in admitting this evidence. Garcia v. State, 2010 Tex. App. LEXIS 2899, 2010 WL 1611006 (Tex. App. Houston 14th Dist. Apr. 22 2010).

1212. Whether the child victim was penetrated by defendant was at issue in this case for aggravated sexual assault and indecency; the trial court could have reasonably determined that the pediatrician expert's testimony that children who are sexually abused by way of penetration might not show any physical injuries was relevant and assisted the jury in understanding the evidence in this case, such that the trial court did not err in admitting the expert's testimony. Casillas v. State, 2010 Tex. App. LEXIS 2888, 2010 WL 1609697 (Tex. App. San Antonio Apr. 21 2010).

1213. Private club was entitled to mandamus relief from a discovery order requiring it to produce documents containing members' names in a defamation suit; although the names of members who allegedly made defamatory statements might be relevant under Tex. R. Evid. 401 and subject to discovery under Tex. R. Civ. P. 192.3(b), other members' names were not, and the order was thus overbroad. In re Houstonian Campus, Llc, 312 S.W.3d 178, 2010 Tex. App. LEXIS 2805 (Tex. App. Houston 14th Dist. Apr. 16 2010).

1214. It is not enough that the evidence is relevant; pursuant to Tex. R. Evid. 403, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of delay or needless presentation of cumulative evidence. King v. State, 2010 Tex. App. LEXIS 2811, 2010 WL 1510204 (Tex. App. Tyler Apr. 16 2010).

1215. Court did not err in excluding all of defendant's proffered evidence at sentencing, because defendant did not separate the admissible evidence from the inadmissible evidence. Fegans v. State, 2010 Tex. App. LEXIS 2588, 2010 WL 1571217 (Tex. App. Houston 1st Dist. Apr. 8 2010).

1216. Evidence indicating that defendant's son's siblings had also been subject to medical child abuse was relevant to understanding the magnitude of the motivational force, which the average person would have difficulty comprehending; the medical record and testimonial evidence showing that the siblings were also victims of medical child abuse was relevant to prove motive and the evidence was admissible pursuant to Tex. R. Evid. 404(b) in defendant's injury to a child trial. Williamson v. State, 356 S.W.3d 1, 2010 Tex. App. LEXIS 3432 (Tex. App. Houston 1st Dist. May 6 2010).

1217. Explanation of an objection did not appear to argue a violation of the right against self-incrimination, but assuming the objection was preserved, defendant's complaint about having to show his tattoos on his legs to the jury had no merit; it had been repeatedly held that the display of a defendant's tattoos to the jury was not a violation of the right against self-incrimination, because the defense was an attempt to show that the victims were mistaken as to defendant's identity, evidence of a name tattoo was relevant, and that the tattoo may have been his name mattered little because it was no less identifying that eye or hair color, which an accused could be compelled to disclose to the jury. Sauceda v. State, 309 S.W.3d 767, 2010 Tex. App. LEXIS 2437 (Tex. App. Amarillo Apr. 5

2010).

1218. Evidence regarding the bar staff's affirmative conduct was relevant to issues of negligence and causation under the premises-liability claim. Del Lago Ptnrs. v. Smith, 307 S.W.3d 762, 2010 Tex. LEXIS 284, 53 Tex. Sup. Ct. J. 514 (Tex. 2010).

1219. Defendant failed to explain how letters would have impeached his girlfriend's credibility, and on their face the letters did not evince relevance or impeachment value and the trial court did not abuse its discretion in excluding the letters. George v. State, 2010 Tex. App. LEXIS 2425, 2010 WL 1269676 (Tex. App. Waco Mar. 31 2010).

1220. Photographic lineup, testimony about why defendant's picture was included in the lineup, and the victim's identification of defendant had a tendency to make his identity more probable than it would be without the evidence; therefore, the lineup was relevant. Morgan v. State, 2010 Tex. App. LEXIS 2853, 2010 WL 1224318 (Tex. App. Dallas Mar. 31 2010).

1221. Although defendant argued that the trial court erred in overruling his relevancy objection to certain testimony, defendant did not dispute the crux of the testimony against him and it was reasonable to believe that the claimed fraudulent acts provided some guidance about whether defendant was to be continued on probation or imprisoned, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), such that the trial court did not err in admitting the testimony. Fletcher v. State, 2010 Tex. App. LEXIS 2218 (Tex. App. Dallas Mar. 29 2010).

1222. During defendant's trial for unlawful possession of a firearm and possession of cocaine, the trial court, without abusing its discretion, could have determined that the fact that defendant's adult daughter previously possessed and disposed of a handgun was not probative of any fact of consequence to the determination of defendant's guilt; the court could have determined that any relevance the evidence possessed was substantially outweighed by the danger of confusion of the issues involved in defendant's prosecution. Taylor v. State, 2010 Tex. App. LEXIS 2024, 2010 WL 1027534 (Tex. App. Amarillo Mar. 22 2010).

1223. Defendant had made a relevancy objection at trial, but this did not preserve error concerning a Tex. R. Evid. 404(b)claim, and thus he could not argue on appeal that the evidence constituted inadmissible character evidence, which he did not assert in the trial court. Gilmore v. State, 2010 Tex. App. LEXIS 1944 (Tex. App. Houston 1st Dist. Mar. 18 2010).

1224. There was no evidence in this case that defendant's stepfather's experience in the sex offender treatment program would be the same as her experience and thus the trial court did not err in sustaining a relevance objection and excluding the testimony. Hoselton v. State, 2010 Tex. App. LEXIS 2009 (Tex. App. Texarkana Mar. 18 2010).

1225. After noting the victim's symptoms of post-traumatic stress from defendant's repeated abuse, including being burned with a lighter on his genital area, a State expert testified, for purposes of Tex. Code Crim. Proc. Ann. art. 42.12, § 5(a), that it would be in the best interest of the eight-year-old victim for defendant to be denied community supervision; defendant did not contest this evaluation, her expert was not involved with the victim and thus her testimony was not relevant to this finding, and even if the trial court erred in excluding defendant's expert's testimony, it did not affect defendant's substantial rights and had to be disregarded under Tex. R. App. P. 44.2(b). Hoselton v. State, 2010 Tex. App. LEXIS 2009 (Tex. App. Texarkana Mar. 18 2010).

1226. State was required to prove the victim's death was caused by a gunshot wound to the head and photographs were used to explain the manner and circumstances of death; although the photographs might have

been gruesome, they were relevant and the trial court did not err in overruling defendant's relevance objection. Davis v. State, 2010 Tex. App. LEXIS 2008, 2010 WL 746428 (Tex. App. Texarkana Mar. 5 2010).

1227. When the workers' compensation administrative record was admitted into evidence under Tex. Lab. Code Ann. § 410.306(b), redacted documents properly could have been excluded under Tex. R. Evid. 401 as irrelevant in part and under Tex. R. Evid. 403 because of the likelihood of confusion; thus, the trial court adequately informed the jury of the appeals panel's decision under Tex. Lab. Code Ann. § 410.304(b). Fort Worth Indep. Sch. Dist. v. Seifert, 2010 Tex. App. LEXIS 1575, 2010 WL 730362 (Tex. App. Waco Mar. 3 2010).

1228. Record showed that statements from potential witnesses would not necessarily have been beneficial to defendant, and the record was otherwise silent as to the significance and relevance of the statements; given the lack of evidence establishing the relevance of the statements, and given the potentially harmful nature of portions of their statements, defendant failed to rebut the presumption that counsel's decision to not offer their statements was a reasonable one. White v. State, 2010 Tex. App. LEXIS 1351, 2010 WL 668902 (Tex. App. Austin Feb. 26 2010).

1229. In order to refute defendant's self-defense claim in his murder trial, based on the 2004 murder of his brother, it was relevant for the State to show that on another occasion, defendant used a knife to cut a man, without provocation or threat; thus, that 2006 offense was relevant under Tex. R. Evid. 401 to rebut the self-defense theory. Oakes v. State, 2010 Tex. App. LEXIS 1349, 2010 WL 668541 (Tex. App. Amarillo Feb. 25 2010).

1230. State was required to prove that a death of a particular individual had occurred in the manner alleged, which was shooting, and a photograph helped supply such proof and thus had a tendency to make the existence of a fact that was of consequence to the determination of the action more probable than it would be without the evidence, for purposes of Tex. R. Evid. 401. Oakes v. State, 2010 Tex. App. LEXIS 1349, 2010 WL 668541 (Tex. App. Amarillo Feb. 25 2010).

1231. Trial court did not abuse its discretion in refusing to grant a spoliation finding in a customer's slip-and-fall negligence action against a grocery store because even though at least one hour of video footage of the events preceding the customer's fall was relevant, the footage would not have shown whether liquid was on the floor, how long it was on the floor, whether a walk through by an employee was done, and when it was done. Clark v. Randalls Food, 317 S.W.3d 351, 2010 Tex. App. LEXIS 1431 (Tex. App. Houston 1st Dist. Feb. 25 2010).

1232. Ex-wife's testimony describing how defendant forced her into unwanted sexual activity had no tendency to prove or disprove the suggestion that defendant's wife was a manipulative control freak who would or could coerce her daughters into making false accusations against their father. Schoff v. State, 2010 Tex. App. LEXIS 1350, 2010 WL 668904 (Tex. App. Austin Feb. 23 2010).

1233. In defendant's aggravated assault against a public servant trial, the State was required to prove that defendant acted intentionally or knowingly under Tex. Penal Code Ann. § 6.03; none of the excluded evidence regarding defendant's mental health explained how defendant's psychotic state affected her ability to perceive that the officer was a public servant or showed that defendant was so delusional that she was unaware that she was striking his vehicle, such that the trial court could have found the evidence was not relevant under Tex. R. Evid. 401. Woods v. State, 306 S.W.3d 905, 2010 Tex. App. LEXIS 1106 (Tex. App. Beaumont Feb. 17 2010).

1234. In defendant's aggravated assault against a public servant trial, assuming the evidence of defendant's mental state was relevant, the trial court was within its discretion to exclude the evidence on the grounds that the probative value of the evidence of defendant's hospitalization three days after the incident was substantially outweighed by the danger that the evidence would confuse the issues under Tex. R. Evid. 403; without being tied to defendant's actions at the time of the offense or having its significance explained in terms of the effect of her mental

illness on her perceptions, the fact of her hospitalization might merely evoke fear or pity and affect the jury in some irrational way. Woods v. State, 306 S.W.3d 905, 2010 Tex. App. LEXIS 1106 (Tex. App. Beaumont Feb. 17 2010).

1235. Because the DIC-24 Statutory Warning Form was relevant to prove that defendant refused to submit to the taking of a specimen of breath and was provided with the required information before her specimen was requested, a trial court did not err in admitting the DIC-24 Form during defendant's driving while intoxicated trial. The DIC-24 Form contained the information that Tex. Transp. Code Ann. § 724.015 required to be given in writing. Zamora v. State, 2010 Tex. App. LEXIS 943, 2010 WL 456941 (Tex. App. Houston 14th Dist. Feb. 11 2010).

1236. Given that a contract was between appellant and appellee and not a corporation, the corporation's status or ability to tender payment was irrelevant. Giannakopoulos v. Eris, 2010 Tex. App. LEXIS 897, 2010 WL 431273 (Tex. App. Houston 14th Dist. Feb. 9 2010).

1237. Appellant did not appeal the finding that he breached the contract with appellee and thus whether he asserted other claims that would support an award of attorney fees was irrelevant. Giannakopoulos v. Eris, 2010 Tex. App. LEXIS 897, 2010 WL 431273 (Tex. App. Houston 14th Dist. Feb. 9 2010).

1238. Extraneous evidence linked defendant to a car chase and thus sufficient evidence existed for the jury to find that defendant committed the extraneous offenses, and the trial court did not err in admitting this evidence as relevant to punishment, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). Frederickson v. State, 2010 Tex. App. LEXIS 830, 2010 WL 395183 (Tex. App. Fort Worth Feb. 4 2010).

1239. In defendant's felony murder case, the court properly allowed the victim's daughter to testify to her relationship with her father because the gist of the witness's testimony set up the circumstances immediately leading up to the murder, and was relevant to show the probative circumstances of the crime. Arguably, the two questions regarding the relationship between the victim and the witness were necessary to establish the connection between them, as well as the victim's actions immediately prior to his death. Flores v. State, 2010 Tex. App. LEXIS 822, 2010 WL 411747 (Tex. App. Corpus Christi Feb. 4 2010).

1240. In defendant's felony murder case, a court properly admitted a photo of the victim prior to death because it demonstrated the victim's health and physical characteristics, the photo of the victim while alive furnished a basis of contrast and comparison with other photos showing the wounds inflicted by the assault, and the fact that several witnesses identified the victim did not necessarily reduce the probative value of the photo. Flores v. State, 2010 Tex. App. LEXIS 822, 2010 WL 411747 (Tex. App. Corpus Christi Feb. 4 2010).

1241. Trial court did not abuse its discretion in admitting certain messages, which were clearly relevant to motive in defendant's murder trial and the probative value was not substantially outweighed by any prejudicial effect. Lopez v. State, 314 S.W.3d 54, 2010 Tex. App. LEXIS 725 (Tex. App. San Antonio Feb. 3 2010).

1242. In defendant's aggravated sexual assault case, the trial court did not abuse its discretion in overruling defendant's relevancy objection to the testimony of the victim's mother that defendant owned pornography because the mother's testimony corroborated the fact that defendant owned pornography he could have shown to the victim. Defendant's ownership of pornography was relevant to the allegation of sexual assault and relevant on the issue of intent. Garrett v. State, 2010 Tex. App. LEXIS 685, 2010 WL 338202 (Tex. App. Dallas Feb. 1 2010).

1243. In defendant's murder case, the court properly admitted testimony regarding the victim having worked for defendant as a prostitute because the witness testified that the cycle of violence evolved from "slapping" to the point of "pretty brutal beatings." That testimony tended to show that defendant was violent toward the victim in the

past and that his violence toward her was escalating; therefore, the testimony was relevant to the charge of murder. Wilson v. State, 2010 Tex. App. LEXIS 604, 2010 WL 323537 (Tex. App. Fort Worth Jan. 28 2010).

1244. Company did not explain on what issue the dates on photographs were relevant and the company did not demonstrate how the exclusion of the dates on the back of the photographs led to the rendition of an improper judgment for purposes of Tex. R. App. P. 44.1. Weeks Marine, Inc. v. Barrera, 2010 Tex. App. LEXIS 438, 2010 WL 307878 (Tex. App. San Antonio Jan. 27 2010).

1245. Trial court did not abuse its discretion during defendant's trial for the aggravated sexual assault of his eleven-year-old step-grandson in admitting pursuant to Tex. R. Evid. 404(b) the testimony of defendant's nephew (one of the State's rebuttal witnesses) that defendant had sexually assaulted him where defendant's defense was that his step-grandson and his granddaughter were fabricating their accusations because defendant had testified in his own behalf and after having been fully admonished as to the consequences, and he denied sexually assaulting not only the victim but also his granddaughter. Moreover, there was no merit in defendant's argument that any remoteness of the extraneous offense automatically made the testimony irrelevant under Tex. R. Evid. 401. Espinoza v. State, 2010 Tex. App. LEXIS 559, 2010 WL 227680 (Tex. App. Eastland Jan. 21 2010).

1246. In defendant's indecency trial, and in relation to his nephew's testimony that defendant sexually assaulted him, the defense was that the victim in the current case and the nephew fabricated their accusations, such that the trial court's ruling to allow the nephew's testimony under Tex. R. Evid. 404(b) was not outside the zone of reasonableness; the court also disagreed with defendant's argument that any remoteness of the extraneous offense automatically made the testimony irrelevant under Tex. R. Evid. 401. Espinoza v. State, 2010 Tex. App. LEXIS 523, 2010 WL 227661 (Tex. App. Eastland Jan. 21 2010).

1247. Trial court did not err in allowing a witness's testimony, which was not about science or scientific causation, but rather was about actual practice and a general understanding in the oil and gas industry as to what constituted commencement of operations; the witness was qualified to testify about the practices in the industry with which he was familiar, despite the fact that he was not a driller, and because the issue of a nonoperator's compliance with the joint operating agreement's requirement of commencement of operations was submitted to the jury, this kind of evidence was relevant and appropriate. Valence Operating Co. v. Anadarko Petroleum Corp., 303 S.W.3d 435, 2010 Tex. App. LEXIS 300 (Tex. App. Texarkana Jan. 15 2010).

1248. Complained-of statement was not relevant in the court's analysis and thus the trial court could have granted a motion for summary judgment without considering the statements or evidence, which were challenged by special exception. Brown v. Am. Fid. Assur. Co., 2010 Tex. App. LEXIS 296 (Tex. App. Fort Worth Jan. 14 2010).

1249. Affidavit was not relevant in the court's analysis and the trial court could have granted a motion for summary judgment without considering the challenged affidavit, which was challenged by special exception. Brown v. Am. Fid. Assur. Co., 2010 Tex. App. LEXIS 296 (Tex. App. Fort Worth Jan. 14 2010).

1250. Neighbors' videotaping inside the landowners' house from their property, over the fence, constituted an actionable invasion of privacy; even if the court held that the advice of the animal control unit to videotape the landowners' dog was somehow relevant to the issue of liability, there was no evidence that the dog was barking at the time of the filming, inside the kitchen at the time of the filming, or that the neighbors were advised to film inside the landowners' house. Baugh v. Fleming, 2009 Tex. App. LEXIS 9847, 2009 WL 5149928 (Tex. App. Austin Dec. 31 2009).

1251. Picture of spinner rims was properly admitted because it aided the jury in understanding the police officers' testimony about the improvements that defendant made to the rental car he drove for approximately one week; that

was helpful to the jury by enabling them to determine if the installation of spinner rims tended to demonstrate defendant's control over the rental car. In addition, a photograph of the spinner rims that were actually installed on the rental car would have been relevant for the same reason and admissible at trial. Rollins v. State, 2009 Tex. App. LEXIS 9891 (Tex. App. Houston 1st Dist. Dec. 31, 2009).

1252. To corroborate an accomplice's testimony, for purposes of Tex. Code Crim. Proc. Ann. art. 38.14, the State offered the testimony of one witness and defendant's parole officer; because the officer's identification testimony identified defendant as the male robber in the photographs taken during the robbery, the testimony tended to make it more probable, for purposes of Tex. R. Evid. 401, 402, that he was the male robber, and thus the testimony was relevant and the trial court did not abuse its discretion in admitting the evidence as relevant. Mendez v. State, 2009 Tex. App. LEXIS 9785, 2009 WL 5150071 (Tex. App. San Antonio Dec. 30 2009).

1253. Defendant's parole officer's identification testimony substantively contributed to make the existence of a fact, that defendant was the male robber depicted in photographs, more likely, and the evidence was offered in an effort to corroborate accomplice-witness testimony, and thus the officer's testimony did not constitute improper bolstering. Mendez v. State, 2009 Tex. App. LEXIS 9785, 2009 WL 5150071 (Tex. App. San Antonio Dec. 30 2009).

1254. In an aggravated assault case, even if photographs of dead cattle were irrelevant, their admission was harmless error because testimony describing the dead cattle was admitted without objection. Walls v. State, 2009 Tex. App. LEXIS 9783, 2009 WL 5150073 (Tex. App. San Antonio Dec. 30 2009).

1255. In defendant's sexual assault case, the court properly admitted extraneous offense evidence because the disputed testimony was relevant for several reasons; the disputed evidence was relevant because DNA evidence left by the anal sexual assault connected defendant to the charged offense, and the evidence at trial showed that the same individual committed all of the sexual offenses. The complainant's testimony was relevant as same transaction contextual evidence to show the events in question were closely interwoven and to aid the jury in understanding the context in which those events transpired. Walker v. State, 2009 Tex. App. LEXIS 9780, 2009 WL 5103274 (Tex. App. Dallas Dec. 29 2009).

1256. In defendant's aggravated sexual assault of a child case, the court did not err in admitting evidence that the child was in counseling since the alleged sexual assaults and that defendant's children were removed because evidence regarding the child's need for counseling was probative circumstantial evidence that increased the likelihood that she was sexually abused by defendant, and evidence that it was necessary to remove the children was probative circumstantial evidence that tended to show that the state believed something was occurring that warranted removal. Herrera v. State, 2009 Tex. App. LEXIS 9690, 2009 WL 4981327 (Tex. App. San Antonio Dec. 23 2009).

1257. In defendant's capital murder trial, defendant maintained that he did not know how the victim was injured and thus the nature of the injuries and the victim's cause of death were at issue; one exhibit was not duplicative of another because each exhibit showed a different side of the victim's skull, a doctor used both exhibits to explain his testimony, while the photographs were gruesome, they were no more gruesome than would be expected given the injuries, and because the doctor's testimony was relevant, the photographs were also relevant. Nothing demonstrated that trial counsel's failure to object to the photographs was deficient, such that the court heeded the strong presumption that trial counsel provided reasonable professional assistance. Andrus v. State, 2009 Tex. App. LEXIS 9574, 2009 WL 4856202 (Tex. App. Houston 1st Dist. Dec. 17 2009).

1258. In a case in which a jury had convicted a habeas corpus applicant of possession of a controlled substance, methamphetamine, in the amount of 200 grams or more, but less than 400 grams, applicant demonstrated that trial counsel was deficient for failing to object to: (1) an officer's testimony regarding the extent of the methamphetamine

problem; and (2) the prosecutor's argument, that "people" were bringing methamphetamine into the county to poison the children and turn them into addicts and that children were in fact shooting up and smoking methamphetamine. However, applicant's claim of ineffective assistance of counsel failed because she was unable to show that there was a reasonable probability, sufficient to undermine confidence in the outcome that, but for counsel's deficient performance, the result of the trial would have been different. Ex Parte Lane, 303 S.W.3d 702, 2009 Tex. Crim. App. LEXIS 1750 (Tex. Crim. App. 2009).

1259. Expert's opinions in a products liability case on how a fire started were subjective and conclusory because they were unsupported by testing; thus, they were not relevant under Tex. R. Evid. 401, were not based on a reliable foundation under Tex. R. Evid. 702, and constituted no evidence that an alleged design defect in a dryer caused the fire. Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 2009 Tex. LEXIS 1041, 53 Tex. Sup. Ct. J. 179 (Tex. 2009).

1260. Trial court did not abuse its discretion in excluding the a creditor's employee's deposition concerning a different case because that deposition did not pertain to the lender and the debtor never challenged the trustworthiness of the lender's business record documents. Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist. Dec. 10 2009).

1261. In a felony murder case, defendant was not harmed by the trial court's exclusion of expert testimony of two of her witnesses on her affirmative defense of insanity because, although relevant and probative of her defense, the excluded testimony was repetitive of the evidence of the history of mental illness, as described by defendant's husband. More importantly, the excluded evidence did not directly pertain to the question of whether defendant was sane at the time of the collision because neither witness ever evaluated defendant for sanity. Fisher-Riza v. State, 2009 Tex. App. LEXIS 9769, 2009 WL 4358622 (Tex. App. Houston 1st Dist. Dec. 3 2009).

1262. In defendant's injury to a child causing serious bodily injury trial, a doctor testified as to the child's physical and neurological development, and because the testimony was directly related to the issue of protracted loss or impairment, it was relevant under Tex. R. Evid. 401 to the question of serious bodily injury under Tex. Penal Code Ann. § 1.07 (a)(46); because the doctor's testimony made it more probable that the child suffered serious bodily injury than it would have been without the evidence, the testimony was relevant and the trial court did not abuse its discretion in admitting the testimony. Santiago v. State, 2009 Tex. App. LEXIS 9069, 2009 WL 4138952 (Tex. App. San Antonio Nov. 25 2009).

1263. Court disagreed with an architecture firm that expert testimony as to whether the firm breached an architect's standard of care would serve any relevant purpose for the trial court prior to trial; the trial court was perfectly capable of determining whether the contract required the firm to apply the law in its design, whether the law prohibited the use of a septic system, and whether the design included a septic system, such that a certificate of merit would not be required for the trial court to determine if the claim had merit. Parker County Veterinary Clinic, Inc. v. Gsbs Batenhorst, Inc., 2009 Tex. App. LEXIS 8986, 2009 WL 3938051 (Tex. App. Fort Worth Nov. 19 2009).

1264. Testimony regarding the number of people imprisoned as a result of the informant's work was not relevant to the issue of defendant's guilt, however, the objection was abandoned, because defendant failed to request a running objection or to otherwise make an objection outside the presence of the jury on the issue, and additional testimony was offered on the issue by the informant without objection. Perkins v. State, 2009 Tex. App. LEXIS 8855, 2009 WL 3834116 (Tex. App. Texarkana Nov. 18 2009).

1265. In defendant's drug case, error occasioned by the admission of improper testimony was harmless because the evidence of credibility was cumulative of testimony provided by the witness and was unrelated to the evidence upon which defendant was convicted. The admission of the testimony in question was not error of such magnitude

that the jury's proper evaluation of the evidence was disrupted. Perkins v. State, 2009 Tex. App. LEXIS 8862, 2009 WL 3834119 (Tex. App. Texarkana Nov. 18 2009).

1266. There was no abuse of discretion in allowing the testimony of the State's expert, a clinical supervisor and therapist, regarding the effects of sexual abuse on children, because the expert's generic testimony was connected to the facts of the case through the complainant's testimony, and the admission of the testimony, if erroneous, did not have a substantial and injurious effect or influence in determining the jury's verdict. Bullock v. State, 2009 Tex. App. LEXIS 8872, 2009 WL 3838861 (Tex. App. Dallas Nov. 18 2009).

1267. In defendant's murder trial, the trial court did not abuse its discretion by admitting burglary evidence, for purposes of Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 38.36(a); the victim had ended her relationship with defendant, he had not been living at her apartment for at least a month prior to her death, her apartment had been burglarized about a month before her death, a witness testified that he and defendant had committed the burglary, defendant's commission of the offense rebutted the claim that his relationship with the victim was amiable, and the burglary evidence was relevant to show defendant's state of mind at the time of the offense and a possible motive for the murder. Woods v. State, 2009 Tex. App. LEXIS 8749 (Tex. App. El Paso Nov. 12 2009).

1268. Testimony in defendant's aggravated robbery case that defendant struck the victim in the face was not met with any objection and was relevant, even though assault with bodily injury was not an element of the crime, because it gave the jury information essential to understanding the context and circumstances of events which legally were interwoven. Nelson v. State, 2009 Tex. App. LEXIS 8630, 2009 WL 3734953 (Tex. App. Texarkana Nov. 10 2009).

1269. On considering whether the jury should have been instructed on the lesser included offense of theft in defendant's robbery trial, whether none or some of the stolen property was recovered had no relevance to any threat component and the issue was whether the statement, "I only stole cigarettes from that store," was any evidence tending to refute the other evidence of a threat by defendant; the victim testified that he feared for his life based on defendant's actions and the evidence failed to satisfy the requirement that, if a jury found defendant guilty, he was guilty only of the lesser offense of theft. Thus, there was no error in failing to submit theft to the jury. O'Neal v. State, 2009 Tex. App. LEXIS 8523, 2009 WL 3643789 (Tex. App. Texarkana Nov. 5 2009).

1270. Trial court erroneously admitted a 1993 judgment convicting defendant of misdemeanor assault where the judgment was not admissible under Tex. R. Evid. 404(b) because it had no relevance apart from proof of character conformity. Moreover, evidence of the conviction was not available for impeachment under Tex. R. Evid. 609 because the record contained no evidence that the victim of the assault was female, and there was thus no proof that it was a misdemeanor involving moral turpitude. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

1271. Evidence pertaining to defendant's flight from justice and efforts to arrest him for assault on a public servant was relevant and admissible at sentencing under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), which governed the ruling on relevance instead of the general Tex. R. Evid. 401 definition, because defendant's flight was an extension of his conduct during the offense and showed his lack of respect for lawful authority. Campbell v. State, 2009 Tex. App. LEXIS 8643, 2009 WL 3593481 (Tex. App. Texarkana Oct. 28 2009).

1272. Photograph depicted the victim holding his newborn baby and there was testimony that his daughter had been born the month prior to the victim's kidnapping and murder; the photograph was relevant in defendant's capital murder trial to show a true appearance of the victim prior to his death. Acevedo v. State, 2009 Tex. App. LEXIS

8109, 2009 WL 3353625 (Tex. App. Dallas Oct. 20 2009).

1273. Defendant did not complain that the State failed to prove beyond a reasonable doubt that the acts were attributable to him or that evidence of these acts was irrelevant, and for purposes of Tex. Penal Code Ann. § 12.45, the fact that defendant had not been finally convicted of the two pleaded and barred offenses did not matter; thus, the trial court did not err in admitting the evidence under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). McClenny v. State, 2009 Tex. App. LEXIS 7908, 2009 WL 3246774 (Tex. App. Fort Worth Oct. 8 2009).

1274. Because defendant did not object to each question regarding a bag and its contents or request a running objection and obtain a ruling, for purposes of Tex. R. App. P. 33.1(a)(1), (2), defendant did not preserve either the issue of relevance or prejudice regarding the evidence for appellate review. Esparza v. State, 2009 Tex. App. LEXIS 7756, 2009 WL 3153253 (Tex. App. Fort Worth Oct. 1 2009).

1275. Because defendant pleaded true to multiple allegations in the State's motion to adjudicate, a witness's testimony would not have been relevant to the trial court's decision to proceed to adjudication. Mccarthy v. State, 2009 Tex. App. LEXIS 7488, 2009 WL 3048701 (Tex. App. Austin Sept. 24 2009).

1276. Trial court did not abuse its discretion in refusing to admit evidence of a co-defendant's sentence, which was not relevant to the issue of what punishment defendant was to receive. Mccarthy v. State, 2009 Tex. App. LEXIS 7488, 2009 WL 3048701 (Tex. App. Austin Sept. 24 2009).

1277. Witness's testimony was relevant to rebut the contention that defendant would have stopped if the victim really meant no because the testimony evidenced that, shortly before this incident, defendant did not stop in response to an unambiguous no and the trial court did not abuse its discretion when it found that the witness's testimony was admissible under Tex. R. Evid. 404(b) in defendant's trial under Tex. Penal Code Ann. § 21.11. Villarreal v. State, 2009 Tex. App. LEXIS 7305, 2009 WL 2965281 (Tex. App. Eastland Sept. 17 2009).

1278. Trial court did not err in admitting the extraneous offense evidence under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), given that (1) evidence of the hit-and-run collision was relevant because it revealed a pattern of lawbreaking, deception, and evasion, (2) the jury was instructed to consider the evidence only if it found that defendant committed the act beyond a reasonable doubt, and (3) defendant's identity was proven by fingerprints and a driver's license. Ashire v. State, 296 S.W.3d 331, 2009 Tex. App. LEXIS 7316 (Tex. App. Houston 1st Dist. Sept. 17 2009).

1279. Any abusive or neglectful conduct by the mother towards the child's older sibling was relevant in an inquiry to determine whether the mother's parental rights to the child were to be terminated under Tex. Fam. Code Ann. § 161.001(1)(E). Mann v. Dep't of Family & Protective Servs., 2009 Tex. App. LEXIS 7326, 2009 WL 2961396 (Tex. App. Houston 1st Dist. Sept. 17 2009).

1280. Even if Tex. R. Evid. 412 was not applicable, the victim's sexual history was inadmissible under Tex. R. Evid. 401, 403, given that there was nothing reflecting that the prior sexual assault made the victim's lack of consent more or less probable and the probative value, if any, was substantially outweighed by its prejudicial effect because the evidence had the potential to impress the jury in a irrational and indelible way and defendant cited to little if any need for the evidence. Woods v. State, 301 S.W.3d 327, 2009 Tex. App. LEXIS 7252 (Tex. App. Houston 14th Dist. Sept. 10 2009).

1281. In a driving while intoxicated case, a trial court did not err by admitting a DIC-24 form into evidence because it was relevant to prove that defendant refused to submit to the taking of a specimen of his breath and that

defendant was provided with the required information under Tex. Transp. Code Ann. § 724.015 before his specimen was requested. Frnka v. State, 2009 Tex. App. LEXIS 7095, 2009 WL 2882939 (Tex. App. San Antonio Sept. 9 2009).

1282. In a driving while intoxicated case, even though defendant made several challenges to the trial court's admission of a DC-24 form into evidence, because the only objection made at trial was for relevance, that was the only issue preserved for appellate review. Frnka v. State, 2009 Tex. App. LEXIS 7095, 2009 WL 2882939 (Tex. App. San Antonio Sept. 9 2009).

1283. Evidence was factually sufficient to support defendant's conviction as a party of aggravated assault with a deadly weapon while engaging in organized criminal activity, given that (1) defendant's friend fired at a vehicle in which the victim was hiding, (2) a witness testified that she saw defendant outside and that he pointed a gun with a silver-colored barrel at a car, (3) the fact that no ammunition was found in the street matching the chrome pistol was irrelevant because under the law of parties, it was not necessary for defendant to have actually fired the gun, (4) the jury was entitled to credit certain testimony and discount defendant's alibi, and (5) the court could look at defendant's actions, in displaying the pistol and attempting to secretly leave the scene, plus the fact that he owned the assault rifle used by another, as evidence of a common purpose. Vasquez v. State, 2009 Tex. App. LEXIS 6970, 2009 WL 2914263 (Tex. App. Corpus Christi Aug. 31 2009).

1284. Jury was authorized under the indictment, the evidence, and the jury charge to convict defendant of deadly conduct while engaging in organized criminal activity under the law of parties; thus, it was irrelevant that defendant did not actually fire the gun himself because his conviction rested on his assistance to another in committing the offense and defendant did not explain why his conviction for deadly conduct was improper by addressing the evidence under the law of parties. He had not provided the court with a valid ground to reverse the conviction. Vasquez v. State, 2009 Tex. App. LEXIS 6970, 2009 WL 2914263 (Tex. App. Corpus Christi Aug. 31 2009).

1285. In defendant's tampering with a witness case, the trial court did not err in excluding evidence that the victim's father had recently kicked her out of his house because it was uncontested that defendant had previously threatened to kick the victim out if she became pregnant. That evidence served to establish a motive, if any, for the victim to make false accusations against defendant; the additional evidence regarding the victim's father's decision to kick her out, if true, did not lend any additional weight to that theory. Davis v. State, 2009 Tex. App. LEXIS 6685 (Tex. App. Corpus Christi Aug. 26 2009).

1286. In a child pornography case, habeas relief was denied to an accused on the basis of ineffectiveness of trial counsel relating to a failure to object on the basis of relevance because, since the gravamen of the offense was the accused's intentional or knowing possession of images of child pornography, the images themselves and how the accused intentionally or knowingly possessed them (via his home computers) were highly relevant to the prosecution. Ex Parte Yusafi, 2009 Tex. App. LEXIS 6715, 2008 WL 6740798 (Tex. App. Beaumont Aug. 26 2009).

1287. In a murder case, autopsy photographs were properly admitted because the State had to prove that defendant caused the victim's death by shooting him with a deadly weapon, and a doctor's testimony described the type of injuries the victim received, the extent of those injuries, and the cause of his death. Additionally, although the photographs were somewhat gruesome, they were not enlarged. Ramirez v. State, 2009 Tex. App. LEXIS 6640, 2009 WL 4377427 (Tex. App. Corpus Christi Aug. 25 2009).

1288. Jury properly found that an employee did not sustain a compensable injury because the State offered expert medical opinion that the employee's injury was a neuropathic stress fracture caused by pre-existing diabetes, which he had difficulty controlling, and not arising out of the employee's employment. Lyons v. State Office of Risk Mgmt.,

2009 Tex. App. LEXIS 6651, 2009 WL 2596053 (Tex. App. Corpus Christi Aug. 25 2009).

1289. In defendant's capital murder case, the court properly denied defendant's request for a social worker to testify as to a recommendation for the children's placement because there was ample testimony presented by others with firsthand knowledge that the child's mother was a bad parent, and the social worker's recommendation did not have any direct or logical connection to the proposition that some other adult caused the injury to the child. Munoz v. State, 2009 Tex. App. LEXIS 6475, 2009 WL 2517664 (Tex. App. El Paso Aug. 19 2009).

1290. In defendant's capital murder case, the court properly denied defendant's witness's testimony relating to the field of false confessions because the witness's testimony could not have assisted the jury in understanding the evidence or in making a determination of a fact issue. He did not intend to offer an opinion as to the truth or falsity of defendant's confession, and during cross-examination defendant admitted the truth of the portions of his confession that he earlier claimed were inaccurate. Munoz v. State, 2009 Tex. App. LEXIS 6475, 2009 WL 2517664 (Tex. App. El Paso Aug. 19 2009).

1291. Trial court did not abuse its discretion by admitting the recording of a telephone conversation defendant had with his brother while he was incarcerated, given that (1) the contents were not tremendously probative of whether defendant was intoxicated and the contents were not unfairly prejudicial, (2) both sides of the conversation were relevant for the arguable inference that defendant tacitly admitted committing the offense of driving while intoxicated, and (3) while the coarseness of the language used might have offended some jurors, the court was not persuaded that it made the jury more likely to convict defendant; even if the admission of the recording was error, it did not harm defendant, for purposes of Tex. R. App. P. 44.2(b), given that (1) defendant admitted that it was his fault for drinking and driving, (2) the arresting officer reported observing signs consistent with intoxication while defendant was driving and while he was performing field sobriety tests, and (3) defendants' blood alcohol concentration was well above the level for legal driving. DiCarlo v. State, 2009 Tex. App. LEXIS 6371, 2009 WL 2476630 (Tex. App. Austin Aug. 14 2009).

1292. Crime at issue was aggravated assault, and possession of or conviction of possession of a controlled substance by the victim was a collateral issue, and the simple fact that the victim had been convicted of, and was still on probation for, a felony bore on his credibility such that the specifics of any particular crime were duplicative and irrelevant; evidence of items seized under a 1998 search warrant had little, if any, bearing on the victim's credibility, and thus was inadmissible and the court overruled defendant's claim that the trial court erred in not applying the Confrontation clause exception to Tex. R. Evid. 608(b). Aguilar v. State, 2009 Tex. App. LEXIS 6369, 2009 WL 2476628 (Tex. App. Austin Aug. 14 2009).

1293. In termination cases, for best interest purposes, because some listed factors may be inapplicable to some cases and other factors not on the list may also be considered when appropriate, the court will only discuss the factors which were made relevant by the evidence submitted at the trial and will combine the court's analysis of factors where the evidence may concurrently apply. In re K.P., 2009 Tex. App. LEXIS 6301, 2009 WL 2462564 (Tex. App. Fort Worth Aug. 13 2009).

1294. Evidence that defendant did not comprehend the reasons for his wife's arrest and that his speech was slurred would tend to make it more probable that he was intoxicated, such that the evidence was relevant, for purposes of Tex. R. Evid. 401, 402. Hernandez v. State, 2009 Tex. App. LEXIS 6356, 2009 WL 2476523 (Tex. App. Houston 14th Dist. Aug. 13 2009).

1295. Detective's testimony was relevant to explain how defendant became a suspect; the testimony did not present evidence of a prior crime or connect defendant to any crime or bad act. Galvez v. State, 2009 Tex. App.

LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1296. Because a mother failed to challenge at least one ground for termination, the court normally would not have addressed the sufficiency of the evidence supporting the trial court's findings as to the other two grounds, but because the evidence relevant to those two endangerment grounds was also relevant in evaluating the findings as to the father, the court addressed them as well. In re V.R., 2009 Tex. App. LEXIS 5953, 2009 WL 2356906 (Tex. App. Fort Worth July 30 2009).

1297. In defendant's trial for aggravated sexual assault of a child under the age of fourteen in violation of Tex. Penal Code Ann. § 22.021, the trial court did not abuse its discretion in admitting the rebuttal testimony of the State's expert who testified that the complainant's "normal" behavior would not necessarily negate sexual abuse; the testimony was relevant under Tex. R. Evid. 401 because it directly rebutted the defense witnesses' testimony and because it tended to make less probable the defense contention that observed interactions between the complainant and defendant suggested a normal relationship. Briones v. State, 2009 Tex. App. LEXIS 5944, 2009 WL 2356626 (Tex. App. Houston 14th Dist. July 30 2009).

1298. Assuming a father's proffered testimony concerning the possibility of parole was relevant, even if he was successful in obtaining parole the next time he was eligible, it would be more than two years from the date of the filing of the petition to terminate, and the evidence was sufficient to justify the trial court in its conclusion that the father was unable to care for the children while he was incarcerated; he did not arrange for a caregiver for the children before going to prison, he did nothing to protect them while he was out of prison and left them with the unfit mother when he went to prison, and there was evidence that the father had neither supported the children, nor been involved in their lives for some time. In re D.H., 2009 Tex. App. LEXIS 5998 (Tex. App. Eastland July 30 2009).

1299. Given that the court was required to consider the commission of family violence in determining child custody, for purposes of Tex. Fam. Code Ann. § 153.004(c), questions regarding custody proceedings would have been relevant to the victim's motivation to exaggerate her testimony at defendant's assault trial. Ryan v. State, 2009 Tex. App. LEXIS 5412 (Tex. App. San Antonio July 15 2009).

1300. Trial court could have found that evidence of defendant's drug dealing, for purposes of Tex. R. Evid. 404(b), had some logical relevance aside from character conformity, plus the evidence was not outweighed by the danger of unfair prejudice, given the other evidence admitted at trial, including evidence of defendant's gang membership; assuming it was error to admit the extraneous offense evidence, defendant's substantial rights were not affected under Tex. R. App. P. 44.2(b), given that the jury was instructed to use the evidence for the limited purpose of determining a relationship between defendant and another and the drug dealing was not mentioned by the State in closing arguments and thus was not emphasized. Mata v. State, 2009 Tex. App. LEXIS 5410, 2009 WL 2045250 (Tex. App. San Antonio July 15 2009).

1301. Because defendant did not analyze his complaint the expert testimony was not relevant, defendant waived the issue, but even if the court addressed the issue, the testimony was admissible; defendant argued that the victim continued to see him, making her assault story unlikely, and in light of defendant's posture, the witness's testimony of how victims of domestic violence interact with their abusers and why the victims might lie was relevant to the case. Booker v. State, 2009 Tex. App. LEXIS 5541, 2009 WL 2006428 (Tex. App. Dallas July 13 2009).

1302. Trial court did not improperly consider the State's exhibits in assessing punishment, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a), given that (1) the photographs of the items found in a storage unit and in defendant's car were relevant to punishment because they showed the circumstances and context of the offense, and (2) because the trial court was determining punishment for possession of methamphetamine with intent to deliver, the context in which the offense was committed, including evidence connecting defendant to the

manufacture of methamphetamine, was relevant to this case; even if the trial court erred, the error was harmless under Tex. R. App. P. 44.2(b) as there was no indication that these exhibits had any particular influence on the trial court in determining punishment. Ridgway v. State, 2009 Tex. App. LEXIS 5151, 2009 WL 1929460 (Tex. App. Dallas July 7 2009).

1303. In an aggravated robbery case, defendant was properly denied the opportunity to impeach a victim regarding the amount of her paycheck because it was not relevant to the offense charged. Moore v. State, 2009 Tex. App. LEXIS 4982, 2009 WL 1886450 (Tex. App. Waco July 1 2009).

1304. Trial court did not abuse its discretion in admitting extraneous offense evidence in defendant's trial for indecency with a child in violation of Tex. Penal Code Ann. § 21.11(a)(1); defendant's opening statement opened the door to admission of the evidence under Tex. R. Evid. 404(b), the evidence was relevant under Tex. R. Evid. 401 to combat the defensive theory of fabrication by the victim, and the probative value of rebutting the allegations of fabrication and accidental touching outweighed the prejudicial impact for purposes of Tex. R. Evid. 403. Norwood v. State, 2009 Tex. App. LEXIS 4979, 2009 WL 1941291 (Tex. App. Amarillo June 30 2009).

1305. One court concluded it should not ignore the reality that a search is rarely conducted by an officer without some knowledge of the prior investigation and, therefore, the court should adopt a more pragmatic and common-sense approach permitting some deficiencies to be cured by an officer's more extensive knowledge of the premises; although the court emphasizes that an officer's knowledge of the premises cannot be used to entirely replace the description in the warrant and emphasize that the better practice is for the description in the warrant and affidavit to be sufficiently descriptive, the court adopts the reasoning of the one court and concludes the executing officer's knowledge of the premises to be searched is relevant to the validity of the search warrant. The court emphasizes this knowledge is being considered only on the issue of the description of the premises, not as to the probable cause to believe a crime had been committed. Rogers v. State, 291 S.W.3d 148, 2009 Tex. App. LEXIS 4897 (Tex. App. Texarkana June 26 2009).

1306. Trial counsel presented a relevancy objection based upon Tex. R. Evid. 401 and made no objection that the probative value of the exhibits were substantially outweighed by the danger of unfair prejudice; therefore, nothing was presented for review. McGinnis v. State, 2009 Tex. App. LEXIS 4799, 2009 WL 1800826 (Tex. App. Eastland June 25 2009).

1307. Where defendant was convicted of three counts of promotion of child pornography and four counts of possession of child pornography, the trial court did not violate Tex. R. Evid. 404(b) by admitting an exhibit showing a list of subfolders and 900 file names from defendant's computer. The evidence relevant under Tex. R. Evid. 401 for the State to show that defendant organized, stored, and shared the downloaded images and that his doing so was not the result of mistake or accident. Wenger v. State, 292 S.W.3d 191, 2009 Tex. App. LEXIS 4859 (Tex. App. Fort Worth June 25 2009).

1308. Testimony regarding the firing of a gun was relevant under Tex. R. Evid. 401 to two facts in issue in defendant's trial for aggravated sexual assault of a child: whether defendant, in fact, used or exhibited a deadly weapon and whether the victim was in the car with defendant against her will. Yepez v. State, 2009 Tex. App. LEXIS 4694, 2009 WL 1835330 (Tex. App. San Antonio June 24 2009).

1309. In a trespass to try title action, the trial court erred in finding that a couple's 28-acre deed was sufficient because nothing identified which 28 acres out of a larger tract was being conveyed; although the couple presented parol evidence showing that taxing authorities and others identified the couple as the owners of the 28-acre tract and they erected a fence and gate, none of this evidence was relevant to the sufficiency of the deed because it was not referenced within the deed, and thus the deed was void for an insufficient description and the court rendered

judgment for the claimants. Lowell v. Miguel R., 293 S.W.3d 764, 2009 Tex. App. LEXIS 4696 (Tex. App. San Antonio June 24 2009).

1310. Any alleged misstatements contained in documents outside the appellate record were irrelevant to the issues on appeal such that the motion to appoint a special master was denied. Whatley v. Walker, 302 S.W.3d 314, 2009 Tex. App. LEXIS 4699 (Tex. App. Houston 14th Dist. June 18 2009).

1311. Court did not err by refusing to allow defense counsel to cross-examine a police officer about prior incidents in which the officer allegedly used excessive force because the officer's character was not an essential element of the charge, claim, or defense to attempting to take a weapon from a peace officer, and the proffered testimony was not material because it did not address any fact of importance to the outcome of the action. Rico v. State, 2009 Tex. App. LEXIS 4141, 2009 WL 1623343 (Tex. App. Corpus Christi June 11 2009).

1312. Defendant objected to the victim's testimony concerning a book on the grounds of leading, and after he made his hearsay objection, the State rephrased its questions and no objections were raised, and when the exhibit was offered, defendant objected on the grounds of duplicity and relevancy, such that defendant failed to preserve error under Tex. R. App. P. 33.1 on claims that the testimony was hearsay and irrelevant; moreover, the victim's statements were not offered to prove the truth of the matter asserted, but were offered to show his state of mind and basis for his actions, such that the statements were not hearsay and were relevant. Miller v. State, 2009 Tex. App. LEXIS 4157, 2009 WL 1653070 (Tex. App. Eastland June 11 2009).

1313. In defendant's capital murder case, the court properly allowed photographs of the victim to be admitted because the medical examiner who performed the autopsy stated that photographs of the child's body before and during the autopsy would assist him in describing his findings to the jury, the testimony was probative of the child's condition at the time defendant brought the child to a witness's house, and the testimony demonstrated the scope and extent of the child's injuries and the cause of death. Williams v. State, 294 S.W.3d 674, 2009 Tex. App. LEXIS 4201 (Tex. App. Houston 1st Dist. June 11 2009).

1314. In order for a love poem to have been admissible, it had to be authenticated under Tex. R. Evid. 901(a), but it was not, and failure to authenticate a document rendered it inadmissible even if otherwise relevant and admissible; the trial court did not abuse its discretion in excluding the love poem because it was not relevant to punishment, for purposes of Tex. R. Evid. 401 and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a), and the poem's impact on the jury could have been to imply that the victim deserved her fate. Akeredolu v. State, 2009 Tex. App. LEXIS 4112, 2009 WL 1609372 (Tex. App. El Paso June 10 2009).

1315. Summary judgment evidence showed that a fence was built correctly on a boundary line as set out by a prior judgment; even if an affidavit was relevant at this juncture, it was so rife with qualifying language that it simply did not specify a correct location, and it specified where a location might have been found based on information given by an individual. Freeman v. Cherokee Water Co., 2009 Tex. App. LEXIS 3984 (Tex. App. Texarkana June 5 2009).

1316. Counsel's failure to object to extraneous offense evidence did not show that counsel was functioning ineffectively; counsel could have reasonably concluded that the previous offense was relevant, and hence admissible under Tex. R. Evid. 404(b), to prove defendant's knowledge of the victims' house and his intent to steal their property in his burglary trial and to substantiate defendant's identity as the burglar, and it was also reasonable for counsel to conclude that the evidence was more probative than unfairly prejudicial under Tex. R. Evid. 403. Counsel could not be deemed ineffective for failing to object to evidence that was, on balance, unobjectionable. Santos v. State, 2009 Tex. App. LEXIS 3876, 2009 WL 1563571 (Tex. App. Austin June 3 2009).

1317. Defendant's disregard of his stepbrother's conditions of community supervision and his placing the victim in danger by leaving her at his stepbrother's residence unsupervised were relevant and highly probative with respect to the jury's determination of punishment for sexual assault. Worthy v. State, 295 S.W.3d 685, 2009 Tex. App. LEXIS 3672 (Tex. App. Eastland May 28 2009).

1318. There was evidence that defendant possessed a practice bomb with the intent to cause alarm or a reaction of any type by an official of a public safety agency organized to deal with emergencies, namely, the police, and the fact that neither of the officers dispatched to the scene was especially alarmed by the practice bomb was irrelevant, as the question was what defendant intended. Ahmad v. State, 2009 Tex. App. LEXIS 4038, 2009 WL 1507052 (Tex. App. Fort Worth May 28 2009).

1319. Defendant and one other man in the photo array had medium length hair, three men, short hair, and one man, a receding hair line, but even if the court concluded this aspect of the procedure was suggestive, it was not impermissibly so because the difference in hair length would not have been relevant to the victim's identification of defendant because the perpetrator was wearing a cap. Moore v. State, 2009 Tex. App. LEXIS 3719 (Tex. App. Houston 14th Dist. May 21 2009).

1320. Title problems were not relevant to a termination provision in a sales contract; a survey included 5,531.6 acres and resulted in a variance of more than 10 percent under the contract, such that either party could have terminated the contract. Fawcett, Ltd. v. Idaho N. & Pac. R.R. Co., 293 S.W.3d 240, 2009 Tex. App. LEXIS 3304 (Tex. App. Eastland May 14 2009).

1321. Examination did open the door to the State's question concerning defendant's child protective services history, as defense counsel asked questions concerning background checks on all of the child's adult family members except defendant and the only possible relevance of these questions would have been to show that other family members had a history of bad acts concerning children; it would have been fundamentally unfair to allow defense counsel to ask these questions about all other family members and not allow the State to ask the same question about defendant, the child's mother, in defendant's injury to a child trial. Gutierrez v. State, 2009 Tex. App. LEXIS 3296, 2009 WL 1335154 (Tex. App. Dallas May 14 2009).

1322. During defendant's criminal trial for the sexual asault of a child, the State was permitted to introduce extraneous offense evidence that defendant encouraged the victim's involvement in several crimes to rebut defense counsel's opening remarks that defendant was a positive influence on the victim. The trial court determined the extraneous offense evidence was admissible under Tex. R. Evid. 404(b) to correct the false impression created by the defense; the extraneous offense evidence was relevent under Tex. R. Evid. 401, because it tended to make less probable defendant's argument that he was encouraging the victim to be a decent and productive citizen. Ytuarte v. State, 2009 Tex. App. LEXIS 3056, 2009 WL 1232327 (Tex. App. San Antonio May 6 2009).

1323. To the extent that the evidence that a patient was selectively mute is relevant to the distress and deterioration finding, the court found such evidence insufficient. State ex rel. E.R., 287 S.W.3d 297, 2009 Tex. App. LEXIS 2933 (Tex. App. Texarkana Apr. 29 2009).

1324. Because defendant waived his right to counsel, his complaint that his appointed attorney was never officially relieved of her duties to represent him was irrelevant. Colomb v. State, 2009 Tex. App. LEXIS 2973, 2009 WL 1163413 (Tex. App. Waco Apr. 29 2009).

1325. In an indecency with a child case, the court committed reversible error in the admission of sex toys because there was no suggestion that sex toys were used in any way related to the complainant, and the State emphasized those items in providing a detailed description of each item, making certain to emphasize their graphic nature by

carrying them in a single plastic tub, pointing out the testifying officer's wearing of gloves, and repeatedly apologizing to the jury for the graphic nature of those items. Warr v. State, 418 S.W.3d 617, 2009 Tex. App. LEXIS 2538 (Tex. App. Texarkana Apr. 15 2009).

1326. Defendant's conviction for capital murder was appropriate because a photograph of the victim and her family at an amusement park did not portray the victim as part of a family living an ideal life, nor did it depict the other family members as victims; furthermore, three of the family members depicted were also victims in the shooting. The evidence, although circumstantial, strongly supported defendant's guilt; the appellate court had a fair assurance that the admission of the photograph did not influence the jury or had but slight affect and thus, even if its admission was an abuse of discretion, it was not reversible. Jones v. State, 2009 Tex. App. LEXIS 5866, 2009 WL 988647 (Tex. App. Dallas Apr. 13 2009).

1327. Defendant's conviction for capital murder was appropriate because a crime-scene video was relevant to show the victim's death and the consistency of the physical evidence with an eyewitness' testimony. It did not involve an unusual and overwhelming emotional impact. Jones v. State, 2009 Tex. App. LEXIS 5866, 2009 WL 988647 (Tex. App. Dallas Apr. 13 2009).

1328. Homeowners presented no citation to the record that demonstrated that appellants' alleged misrepresentation about being registered with the Texas Residential Construction Commission Act was a producing cause of their damages and the court failed to see how appellants' registration or failure to register with the Act had relevance to damages caused to the homeowners, and thus the trial court properly granted a directed verdict on the homeowners' claim under the Deceptive Trade Practices Act, Tex. Bus. & Com. Code Ann. §§ 17.41-.63. B&W Supply, Inc. v. Beckman, 305 S.W.3d 10, 2009 Tex. App. LEXIS 2413 (Tex. App. Houston 1st Dist. Apr. 9 2009).

1329. There was evidence of a significant number of substantial violations of the restrictions and this evidence supported a finding that the fundamental character of the neighborhood had been abandoned, as was the developer's affirmative defense; the landowners presented no evidence of any prior attempts to enforce the restrictions or that they purchased their properties in reliance on the restrictions and their individual intent was relevant to the abandonment analysis only to the extent that they purchased in reliance on the restrictions, which they did not, and that they attempted to previously enforce the restrictions, which they did not, and the trial court did not err in holding that the landowners waived the nonwaiver provision. Musgrove v. Westridge St. Partners I, LLC, 2009 Tex. App. LEXIS 2660, 2009 WL 976010 (Tex. App. Fort Worth Apr. 9 2009).

1330. Because the State had to prove that defendant had two prior driving while intoxicated (DWI) convictions, the State's two exhibits were relevant to establish an element of the offense of felony DWI and to demonstrate that defendant was the same person as the person convicted of the prior two DWIs; thus, the value of these records was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury when defendant had not stipulated to the prior convictions, for purposes of Tex. R. Evid. 403. Paschall v. State, 285 S.W.3d 166, 2009 Tex. App. LEXIS 2201 (Tex. App. Fort Worth Apr. 2 2009).

1331. Evidence regarding the allegedly subpar work by various subcontractors was relevant to many claims, including proportional responsibility, and the court was not persuaded that evidence regarding the quality of the house was unfairly prejudicial to appellants merely because a third-party subcontractor potentially responsible for a particular task was absent from the trial after settling with the homeowners. Daneshjou Co. v. Bullock, 2009 Tex. App. LEXIS 2001, 2009 WL 790200 (Tex. App. Austin Mar. 27 2009).

1332. In a breach of lease case relating to oil and gas leases, a previous lessee contended that testimony that wells had not been fully developed was conclusory and was unable to support a judgment; the testimony did not change the evidence, which showed that the previous lessee complied with a contract by drilling at least two wells

that produced in paying quantities. Exxon Corp. v. Emerald Oil & Gas Co., L.C., 2009 Tex. LEXIS 113, 52 Tex. Sup. Ct. J. 467 (Tex. 2009).

1333. Defendant did not show that the result of the trial would have been different even had counsel made a particular objection because the areas of inquiry he challenged were not necessarily relevant to whether or not he was guilty, and thus defendant failed to show ineffective assistance of counsel. Kesse v. State, 2009 Tex. App. LEXIS 2095, 2009 WL 793755 (Tex. App. Houston 1st Dist. Mar. 26 2009).

1334. Evidence regarding the value of a sawmill and the amount of money expended in trying to close the sale of the real estate related solely to reliance damages, which were precluded by the liquidated damages clause of the earnest money contract; only the evidence of the amount of money actually collected by the buyer through sales of material salvaged from the dismantled sawmill was relevant to the oral escrow agreement and the alleged breach thereof. Tiger Truck, LLC v. Bruce's Pulp & Paper, LLC, 282 S.W.3d 176, 2009 Tex. App. LEXIS 1910 (Tex. App. Beaumont Mar. 19 2009).

1335. Trial court did not abuse its discretion by admitting the utility knife, the pocket knife, and wire cutters that were found on defendant's person after his arrest into evidence because they were relevant, as the officer testified that such items were commonly used for burglaries and the State's purpose for introducing the items was to show defendant's intent; defendant's possession of the items tended to show his intent to commit the offense of burglary and assisted the jury in drawing an inference that he entered the garage with the intent to commit theft. Enloe v. State, 2009 Tex. App. LEXIS 1866 (Tex. App. Corpus Christi Mar. 19 2009).

1336. In an aggravated assault case, the trial court did not err in admitting the victim's videotaped statement because defendant raised the issue of self-defense. A witness testified that in defendant's altercation with the victim, the victim was the aggressor and defendant tried to resist retaliating; as a result of that testimony, defendant's alleged assault of the victim was relevant rebuttal evidence to prove that defendant acted with the requisite intent. In re B.H., 2009 Tex. App. LEXIS 1852, 2009 WL 692613 (Tex. App. Tyler Mar. 18 2009).

1337. In a dispute concerning the location of an express access easement, the parties both purchased land owned by the original grantor; the trial court did not err by excluding all evidence of defendants' proposed location for the easement because it showed that the easement was to be located through property that was not part of the original tract. The excluded evidence was not relevant under Tex. R. Evid. 401. Shed, L.L.C. v. Edom Wash 'N Dry, L.L.C., 2009 Tex. App. LEXIS 1853, 2009 WL 692609 (Tex. App. Tyler Mar. 18 2009).

1338. In defendant's assault case, the court did not abuse its discretion by admitting photographs of injuries to the victim's husband's upper arm, neck, wrist, and forehead and a photograph of a broken chair to fully understand the context of the altercation. It was also within the court's discretion to conclude that the injuries to the victim's husband and the means by which they were inflicted were so connected to the injuries alleged in the indictment as to form an indivisible criminal transaction. Lopez v. State, 2009 Tex. App. LEXIS 1755, 2009 WL 638182 (Tex. App. Austin Mar. 12 2009).

1339. Trial court's decision to overrule a relevancy objection based on Tex. R. Evid. 401 regarding questions about the criminal history of defendant's family members was not beyond the zone of reasonable disagreement because the character of the people he would have worked and associated with was relevant to his suitability for community supervision. Williams v. State, 2009 Tex. App. LEXIS 1810 (Tex. App. Fort Worth Mar. 12 2009).

1340. Trial court did not err in not allowing the result of a polygraph examination into evidence, given that (1) the authorities cited by defendant were not more compelling that the authorities found to be unpersuasive on this issue, (2) the witness testified that the theory beyond polygraph examinations was scientifically valid, but his testimony did

not stand up to scrutiny, (3) the witness's testimony as to how well defendant did on the test and his experience in giving the test did not show that the theory behind the technique was valid, (4) nothing showed that the test was reliable or that the specific theory behind it was valid, and (5) defendant offered little evidence to support a conclusion that polygraph evidence was based on a valid underlying scientific theory or that the examiner's conclusions would be relevant. Cyphers v. State, 2009 Tex. App. LEXIS 1716, 2009 WL 606550 (Tex. App. Tyler Mar. 11 2009).

1341. In defendant's evading arrest case, the court properly excluded a defense witness's testimony because the proffered testimony that it was "standard operating procedure" for law enforcement agencies in general to routinely make video and audio recordings of police pursuits was not germane. The witness did not have personal knowledge as to the standard procedures of the Corpus Christi Police Department regarding recordings of police pursuits. Gomez v. State, 2009 Tex. App. LEXIS 1700 (Tex. App. Corpus Christi Mar. 5 2009).

1342. Sexual assault nurse examiner testified that the victim had suffered an internal vaginal laceration consistent with an aggressive sexual assault and that the nurse had only seen a similar laceration once before in her 18 years performing such examinations, in which a woman was raped with a beer bottle; defendant contended that the previous incident had no probative value because there was no suggestion that he penetrated the victim with a beer bottle, but the mere fact that the previous victim's injury was occasioned by forceful penetration was probative, even if the specific mechanism of injury might not have been, plus defendant did not ask that the jury be instructed to disregard the nonresponsive beer bottle portion of the witness's answer in defendant's sexual assault trial. Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

1343. Defendant was not harmed when a nurse admitted that her testimony, which was unfavorable to defendant, was motivated by a desire to make sure the victim got justice; the evidence of the nurse's possible bias might have helped, not hurt, the defense in defendant's sexual assault trial, and the error, if any, of the admission of the nurse's allegedly irrelevant testimony did not affect defendant's substantial rights for purposes of Tex. R. App. P. 44.2(b). Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

1344. Defendant limited one issue to the admissibility of a sexual assault nurse examiner's testimony under Tex. R. Evid. 401, 402 and he did not object under Tex. R. Evid. 403 or request a balancing test; thus, the court limited its review solely to determining whether the nurse's testimony had any relevance to the issues contested at trial in defendant's sexual assault trial. Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

1345. Defendant was indicted for sexual assault under Tex. Penal Code Ann. § 22.011(a)(1)(A), (b)(1), he claimed he engaged in consensual sexual relations with the victim but no penetration, and thus evidence that would tend to prove or disprove penetration or the use of force or violence would meet the materiality component of relevance, plus the proffered evidence satisfied the probative component as well; the evidence from a sexual assault nurse examiner tended to prove that defendant, using force or violence, penetrated the victim's sexual organ and the nurse's testimony tended to prove that certain lacerations suffered by the victim generally did not occur in the absence of forceful vaginal penetration, which was a consequential fact for the jury's determination. Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

1346. Case law held that a Tex. R. Evid. 403 objection was not implicitly contained in relevancy or Tex. R. Evid. 404(b) objections and rather, a specific Tex. R. Evid. 403 objection had to be raised to preserve error; the court does not hold, however, that a litigant must expressly invoke "Rule 403" to preserve error. Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

1347. Although the testimony an ex-husband cited might have been relevant to his assault claim, it did not establish that the trial court erred in refusing to award damages on that claim, plus he failed to provide any relevant citations to authority under Tex. R. App. P. 38.1(h), and thus the court overruled his claim that the trial court erred in refusing to award damages on his claims for assault, intentional infliction of emotional distress, and defamation. Siddiqui v. Siddiqui, 2009 Tex. App. LEXIS 1443, 2009 WL 508260 (Tex. App. Houston 14th Dist. Mar. 3 2009).

1348. Mostly all of defendant's excluded testimony referred to alleged instances of his father's manipulative conduct during defendant's childhood many years earlier, which was time far too remote for the events to have qualified as an imminent threat; because the excluded testimony did not relate to an imminent threat for duress purposes under Tex. Penal Code Ann. § 8.05(a), the trial court did not abuse its discretion by deciding the proffered evidence was irrelevant to defendant's duress defense. Solley v. State, 2009 Tex. App. LEXIS 1118, 2009 WL 396268 (Tex. App. Houston 14th Dist. Feb. 19 2009).

1349. Because defendant was offering the evidence in question rather than attempting to exclude it, the only issue affecting admissibility was whether the evidence was relevant under Tex. R. Evid. 401. Vazquez v. State, 2009 Tex. App. LEXIS 1058 (Tex. App. Dallas Feb. 17 2009).

1350. Victim testified that her mother was not present when the sexual assaults by defendant occurred and the mother testified that she continued her relationship with defendant because she thought the case would not come to trial, not because she believed the assaults never occurred; thus, the mother's continuing relationship with defendant was not relevant, for purposes of Tex. R. Evid. 401, 402, to the issue of whether the victim was telling the truth in defendant's aggravated sexual assault trial, and whether or not the mother believed the assaults occurred was not relevant to whether the victim was telling the truth, as the testimony of a child sexual abuse victim was alone sufficient to support a conviction, for purposes of Tex. Code Crim. Proc. Ann. art. 38.07 Vazquez v. State, 2009 Tex. App. LEXIS 1058 (Tex. App. Dallas Feb. 17 2009).

1351. Victim's knowledge of defendant's violent past was not relevant in a retaliation-by-threat case for purposes of Tex. R. Evid. 401. The witness did not testify that his knowledge that defendant had actually killed a person contributed to his fear. Pollard v. State, 277 S.W.3d 25, 2009 Tex. Crim. App. LEXIS 233 (Tex. Crim. App. 2009).

1352. Because the trial court did not err in its determination that the measure of damages was the cost to complete the project that exceeded the costs that would have been payable to the contractor, the value of the proposed building was not relevant to an issue of material fact, for purposes of Tex. R. Evid. 401; even if the trial court erred in precluding the use of an income stream in determining the value of the proposed building, or if the trial court erred in excluding testimony on such value, such error did not probably cause the rendition of an improper judgment under Tex. R. App. P. 44.1(a). Stonehill-PRM WC I, L.P. v. Chasco Constructors, Ltd., L.L.P., 2009 Tex. App. LEXIS 1019, 2009 WL 349136 (Tex. App. Austin Feb. 11 2009).

1353. Extraneous offense evidence in a pistol, bullets, and marijuana were relevant apart from proving defendant's action in conformity therewith, and thus the evidence was admissible. Mathis v. State, 2009 Tex. App. LEXIS 1466, 2009 WL 3003252 (Tex. App. Houston 14th Dist. Feb. 10 2009).

1354. Marijuana and bullets were relevant under Tex. R. Evid. 401 to proving or disproving a fact of consequence beyond mere action in conformity with bad character under Tex. R. Evid. 404(b), given that (1) the bullets found in defendant's apartment were the same caliber and manufactured by the same company as those found at the crime scene, (2) possession of the casings was not indicative of illegal activity but the bullets provided a connection to the murder, and (3) testimony suggested that defendant took some marijuana from the victim, which could have established motive and corroborated a witness's account of the events after the murder. Mathis v. State, 2009 Tex.

App. LEXIS 1466, 2009 WL 3003252 (Tex. App. Houston 14th Dist. Feb. 10 2009).

1355. Because defendant fled and pointed a pistol at officer when they attempted to arrest him, the gun was admissible and relevant to display a consciousness of guilt. Mathis v. State, 2009 Tex. App. LEXIS 1466, 2009 WL 3003252 (Tex. App. Houston 14th Dist. Feb. 10 2009).

1356. Trial court did not err by implicitly sustaining the State's relevance objection to a victim's excluded testimony, for purposes of Tex. R. Evid. 401, given that the important fact of consequence was the animus between the families and its general source, not the underlying details. Svitak v. State, 2009 Tex. App. LEXIS 796, 2009 WL 279462 (Tex. App. Fort Worth Feb. 5 2009).

1357. Trial court did not abuse its discretion by sustaining the State's relevance objections to defendant's wife's testimony about reports she made to the state child protective services department; the trial court did not understand how it was relevant that reports were made if there had not been a showing that anyone knew the wife was the source of the report. Svitak v. State, 2009 Tex. App. LEXIS 796, 2009 WL 279462 (Tex. App. Fort Worth Feb. 5 2009).

1358. In a driving while intoxicated case, evidence of defendant's use of prescription medications was not relevant because there was no evidence as to the dosage, the exact times of ingestion, or the half-life of the drug; a lay juror was not in a position to determine whether the drugs, taken more than 12 hours before arrest, would have any effect on defendant's intoxication. Without expert testimony to provide the foundation required to admit scientific evidence, the testimony regarding defendant's use of prescription medications was not relevant. Layton v. State, 280 S.W.3d 235, 2009 Tex. Crim. App. LEXIS 149 (Tex. Crim. App. 2009).

1359. For qualified immunity and First Amendment analysis purposes, the speech at issue consisted of a peace officer's report to a district attorney's office alleging that police officers unlawfully tampered with an existing government record; the identity of the person who created the record was irrelevant. Turner v. Perry, 278 S.W.3d 806, 2009 Tex. App. LEXIS 470 (Tex. App. Houston 14th Dist. Jan. 27 2009).

1360. Whether a lessor fraudulently represented to lessees and a guarantor that another entity was the lessor at the time the leases were entered into was relevant to counterclaims but not to the lessor's burden of proving that it was currently the lessor who could enforce the leases and guaranties with respect to its breach of contract claims. A.J. Morris, M.D., P.A. v. De Lage Landen Fin. Servs., 2009 Tex. App. LEXIS 457, 2009 WL 161065 (Tex. App. Fort Worth Jan. 22 2009).

1361. For purposes of Tex. R. Evid. 403, evidence of defendant's sales of cocaine was relevant to the issue of his motive to conspire to kill the victim; there was substantial evidence of defendant's guilt in the delivery of controlled substance cases, which would have subjected him to some of the highest penalty ranges available, and the victim's potential testimony would have been an integral part of any successful prosecution of those cases, and thus this factor weighed in favor of the admission of the extraneous-offense evidence. Toliver v. State, 279 S.W.3d 391, 2009 Tex. App. LEXIS 345 (Tex. App. Texarkana Jan. 21 2009).

1362. Defendant's only objection was on the basis of relevance, plus he failed to object to certain questions and testimony on recross-examination, such that defendant, under Tex. R. App. P. 33.1(a)(1)(A), failed to preserve error on his claim that the State improperly impeached defendant's witness under Tex. R. Evid. 608(a), (b), 609(f). Scott v. State, 2009 Tex. App. LEXIS 131, 2009 WL 51035 (Tex. App. Fort Worth Jan. 8 2009).

1363. Because defendant failed to respond to the State's relevance objection and because there was nothing in the record to show that a witness actually made any prior inconsistent statements, for purposes of Tex. R. Evid. 801(e)(1)(A), to which Scott's hearsay exceptions under Tex. R. Evid. 613(a), 803(8) would apply, the court could not say that the trial court abused its discretion by not allowing defendant to impeach the witness. Scott v. State, 2009 Tex. App. LEXIS 131, 2009 WL 51035 (Tex. App. Fort Worth Jan. 8 2009).

1364. In a case in which a jury found defendant guilty of the offense of murder, the trial court did not err in excluding defendant's testimony regarding the specifics about the "immoral teachings" that he believed his children's grandmother and the complainant had been exposing the children to because defendant did not explain, nor was a reviewing court able to discern, how any testimony about the contents of any "immoral teachings" would have had any tendency to make his self-defense claim more or less probable. Washington v. State, 2009 Tex. App. LEXIS 4434, 2009 WL 40168 (Tex. App. Houston 1st Dist. Jan. 8 2009).

1365. Issue of the certainty of conviction absent the prejudicial event was not relevant in this case because the improper statement occurred during the punishment phase, after defendant had already been convicted. Moore v. State, 278 S.W.3d 444, 2009 Tex. App. LEXIS 9 (Tex. App. Houston 14th Dist. Jan. 6 2009).

1366. Evidence that defendant failed to appear in 1999 and that his bond was forfeited was relevant and admissible as evidence of guilt, and defendant failed to present any evidence showing that his failure to appear was not flight from prosecution, plus he presented no argument that the probative value of the evidence was substantially outweighed by its prejudicial effect under Tex. R. Evid. 403; thus, he did not show that the trial court abused its discretion or committed reversible error in admitting the evidence, for purposes of Tex. R. App. P. 44.2(b). Pratte v. State, 2008 Tex. App. LEXIS 9716 (Tex. App. Austin Dec. 31 2008).

1367. Trial court did not err by admitting evidence that defendant tried to flee from police during his arrest because it was relevant, as defendant failed to show that his flight was unconnected to the capital murder offense based on his testimony that he did so because he was wanted for a probation violation and did not want to go back to jail. The evidence was probative because it showed the context and circumstances of defendant's arrest, the State spent relatively time developing the evidence, and the evidence did not have a tendency to suggest a decision on an improper basis or that it impressed the jury in an irrational way. Baker v. State, 2008 Tex. App. LEXIS 9416 (Tex. App. Dallas Dec. 18 2008).

1368. Defendant complained that the admission of evidence that he had left a note containing his name, jail address, and other information in the women's room was irrelevant and prejudicial; however, the trial court determined that the probative value of the evidence was substantial. Wilson v. State, 2008 Tex. App. LEXIS 9395 (Tex. App. Waco Dec. 17 2008).

1369. Defendant argued that the pretrial identification was tainted because officers did not take written descriptions from witnesses until after the identification, but the statements were not in evidence, defendant did not explain the relevance of the statements, and he cited no case law in support of his contention, contrary to Tex. R. App. P. 38.1(h). Reed v. State, 2008 Tex. App. LEXIS 9500 (Tex. App. Austin Dec. 17 2008).

1370. Because defense counsel failed to lay any predicate regarding the inception of defendant's tattoos, the existence or non-existence of the tattoos was not relevant to identification and the trial court did not abuse its discretion in disallowing the evidence; one victim identified defendant and another victim did not recall seeing any tattoos, such that it would have been improper for defendant to show his tattoos to the jury without an explanation of when they were acquired, and without the proper predicate, the proffered evidence was not relevant and was more prejudicial than probative. Harris v. State, 2008 Tex. App. LEXIS 9474 (Tex. App. Houston 14th Dist. Dec. 16 2008).

1371. Because no seizure occurred when the police took possession of abandoned property, as in this case, the lawfulness of the arrest, for purposes of Tex. Code Crim. Proc. Ann. art. 14.01, was not relevant. Bailey v. State, 2008 Tex. App. LEXIS 9213 (Tex. App. Houston 1st Dist. Dec. 11 2008).

1372. In defendant's trial for sexual assault of a child under Tex. Penal Code Ann. § 22.021(a)(B)(i), the trial court did not err in admitting extraneous evidence under Tex. Code Crim. Proc. Ann. art. 38.37, § 2; the victim testified that defendant fondled her several times, beginning at age 11 or 12, and this testimony was relevant to the state of mind of the victim and defendant, as well as the previous relationship between them. Hawkins v. State, 2008 Tex. App. LEXIS 9208 (Tex. App. Houston 1st Dist. Dec. 11 2008).

1373. Trial court did not abuse its discretion by admitting a photograph of defendant holding a pistol during his trial for possessing more than four grams of cocaine with intent to deliver and for possessing more than four ounces of marihuana where the photograph was relevant because it made it more probable that defendant knowingly possessed both the contraband and the pistol, and where that relevance was not outweighed by the risk of unfair prejudice because no significant amount of time was required to introduce the photograph. Furthermore, even though the photograph had the potential for impressing the jury in an improper way pursuant to Tex. R. Evid. 404(b) by suggesting that defendant was the sort of person who brandished a pistol during a telephone conversation, by linking defendant to the pistol found in the night stand of his motel room, albeit indirectly, the photograph was some evidence that defendant used the pistol to protect his drugs and money, and the State's only other evidence of such use, beyond defendant's simple possession of the weapon, was a police officer's testimony describing defendant's ambiguous movements when the officers entered his motel room. Rangel v. State, 2008 Tex. App. LEXIS 9008 (Tex. App. Austin Dec. 5 2008).

1374. In an aggravated assault case, a trial court did not err by allowing a victim's father to testify during the guilt/innocence phase of the case because his brief testimony, which included basic information about himself, the victim, the evening of the shooting, and the victim's condition, was relevant and not overly prejudicial. Sanchez v. State, 2008 Tex. App. LEXIS 9072 (Tex. App. Eastland Dec. 4 2008).

1375. In defendant's drug case, the trial court did not abuse its discretion by admitting in evidence the shotgun found on the back seat of the vehicle that defendant was driving just before his arrest because the probative value of the shotgun was considerable and significantly necessary to the State's case because it was a link tending to show that defendant knowingly possessed the cocaine. Additionally, the evidence of the shotgun was relevant to prove defendant's knowledge that he possessed narcotics. Harris v. State, 2008 Tex. App. LEXIS 9090 (Tex. App. Fort Worth Dec. 4 2008).

1376. Court properly sustained the prosecutor's relevance objections because defense counsel did not limit his questions specifically to the assault victim's experience during the period surrounding the incident in question; the questions regarding whether Paxil could be used to treat "obsessive/compulsive disorder" and whether its side effects included "agitation and anxiety"--were asked in a general fashion, not about the victim's own experience on the medication. Scott v. State, 2008 Tex. App. LEXIS 9142 (Tex. App. Houston 14th Dist. Dec. 4 2008).

1377. In a capital murder case, a trial court did not violate defendant's right to due process or right to present a defense by excluding a digital video disk (DVD) from evidence because defendant was able to present an effective defense and place the credibility of the witness into question without the admission of the DVD recording. Moreover, the only showing made by defendant concerning the DVD's relevance was that the DVD contained additional statements made by the witness that were similar to those made at trial; therefore, the DVD added nothing to the defense, and its exclusion was within the zone of reasonable disagreement. Gonzalez v. State, 2008 Tex. App. LEXIS 8954 (Tex. App. San Antonio Dec. 3 2008).

1378. In defendant's indecency with a child case, the court properly excluded evidence that a boyfriend of the victims' mother was a registered sex offender because evidence of the boyfriend's registered-sex-offender status would only have been relevant if the identity of the alleged perpetrator of the offenses was an issue in the case. However, evidence of an alternative perpetrator was not relevant to the determination of whether the alleged offenses occurred. Shaw v. State, 2008 Tex. App. LEXIS 9038 (Tex. App. Waco Dec. 3 2008).

1379. Admission of a victim's testimony that he would not feel safe if defendant were released was relevant during the punishment phase of defendant's trial. Boone v. State, 2008 Tex. App. LEXIS 8665 (Tex. App. Dallas Nov. 19 2008).

1380. Defendant's claim of ineffective assistance failed under the prejudice prong of the test; there were credibility concerns regarding a jailer, whom defendant claimed counsel was ineffective for not bringing in to testify, plus duplicate testimony that defendant requested and was refused a breath test was only slightly relevant to the issue of whether defendant was intoxicated, not nearly to the degree that its absence undermined the court's confidence in the verdict of guilty of felony driving while intoxicated under Tex. Penal Code Ann. §§ 49.04, 49.09. Baker v. State, 2008 Tex. App. LEXIS 8621 (Tex. App. Texarkana Nov. 18 2008).

1381. Court properly admitted photographs of defendant's tattoos at sentencing because the tattoos were probative of defendant's character for continuing to engage in criminal activities; defendant's relatives offered evidence regarding defendant's capability for rehabilitation, but those concepts differed significantly with the ideas portrayed by tattoos of Adolf Hitler and Klansmen with shotguns and nooses, among other images. Dean v. State, 2008 Tex. App. LEXIS 8441 (Tex. App. Fort Worth Nov. 6, 2008).

1382. For purposes of Tex. R. Evid. 404(a)(2), 405, the trial court did not err in refusing to allow defendant to offer evidence of the victim's two assault convictions; the mere fact that the victim assaulted another in 2001 did not suggest any intent or motive for the victim to attack defendant years later, no connection was shown with the victim's more recent assault conviction and the events in question, and neither conviction was relevant to demonstrate either the reasonableness of defendant's fear of danger, for self-defense purposes, or that the victim was the first aggressor. Nolan v. State, 2008 Tex. App. LEXIS 8662 (Tex. App. Austin Oct. 31 2008).

1383. Evidence of defendant's association with white supremacists and racist beliefs was relevant, for purposes of Tex. R. Evid. 401, 402, because it provided the motive for defendant's violent sexual assault on the victim; based on defendant's use of racial slurs before and during the incident, the court could not say the trial court abused its discretion in finding such evidence relevant for the purpose of demonstrating motive. Tuck v. State, 2008 Tex. App. LEXIS 8525 (Tex. App. Houston 1st Dist. Oct. 30 2008).

1384. Trial court did not err in finding that the potential character conformity inference did not substantially outweigh the relevant purpose of showing motive for the aggravated sexual assault with evidence of defendant's skinhead and neo-Nazi affiliation, given that (1) the evidence was probative for establishing motive, (2) the record did not support the notion that the evidence was going to tend to impress the jury in an irrational manner, (3) the trial court instructed the jury to consider defendant's other bad acts only for the purposes of determining the motive and intent, (4) the court presumed the jury followed the trial judge's instructions, (5) the evidence was developed quickly, and (6) although the evidence was not essential to the State's case, the State had a compelling reason for presenting the evidence. Tuck v. State, 2008 Tex. App. LEXIS 8525 (Tex. App. Houston 1st Dist. Oct. 30 2008).

1385. Extraneous offenses were same transaction contextual evidence under Tex. R. Evid. 404(b), relevant under Tex. R. Evid. 401, and properly admitted by the trial court, given that the events were interwoven and provided information to the jury that was essential to understanding the context of the offense of assault on a public servant; the evidence of the circumstances of the assault was essential because it tended to prove the allegations in the

indictment, and based on defendant's aversion to arrest, the jury could have inferred the requisite intent to cause bodily injury to the trooper, plus even if evidence of the extraneous offenses was not admissible, any error was harmless, given that the trooper was asked what charges were filed against defendant. Mosley v. State, 2008 Tex. App. LEXIS 7091 (Tex. App. Tyler Sept. 24, 2008).

1386. For best interest purposes, the court disagreed with the child's guardian ad litem's contention that because (1) the child cried uncontrollably during the mother's first visit, when the child was six months old, and (2) the child referred to her foster parents as mommy and daddy, this was evidence that she preferred them over her biological parents; evidence that a parent is unable to console her infant child may be relevant to other of the factors, such as the emotional and physical needs of the child and the parental abilities of the parent, but it is doubtful that such evidence is indicative of the infant's conscious, volitional desire to maintain a parent-child relationship or to permanently sever that relationship, and it is likewise doubtful that evidence an infant or toddler refers to her foster parents as mommy and daddy is probative on this issue. Evidence of an infant's or a toddler's conduct and statements like those of the child in question is not relevant to the issue of whether the child desires termination of the parent-child relationship, for purposes of Tex. Fam. Code Ann. §§ 153.008, 153.009. In the Interest of S.N., 272 S.W.3d 45, 2008 Tex. App. LEXIS 7020 (Tex. App. Waco 2008).

1387. Trial court did not abuse its discretion in ordering discovery sought by real parties in interest from relators, and thus the court denied mandamus relief, given that (1) the financial documents real parties requested were relevant to the cause of action alleged, (2) relators offered no evidence as to why the production of the financial documents were privileged or exempted from discovery, (3) relators cited no authority in support of an asserted constitutional right to privacy and it had previously been determined that there was no constitutionally protected privacy right in one's personal financial records, and (4) relators did not carry their burden of showing that the requests were overbroad. In re Manion, 2008 Tex. App. LEXIS 6813 (Tex. App. Amarillo Sept. 11 2008).

1388. In a breach of contract suit by former employees of a corporation, the admission of certain documents on the corporation's operators' misappropriation counterclaim was proper as they were relevant in establishing the amount of reimbursement sought by the operators due to an employee's actions in falsifying customer invoices, which required the operators to reimburse the customers. Tucker v. Inter-American Oil Works, 2008 Tex. App. LEXIS 6944 (Tex. App. Eastland Sept. 11 2008).

1389. Evidence of one's subjective belief about what a contract said or about whether an amendment occurred was not relevant to whether there was a meeting of the minds sufficient to amend the contract. Paciwest, Inc. v. Warner Alan Props., LLC, 266 S.W.3d 559, 2008 Tex. App. LEXIS 6812 (Tex. App. Fort Worth 2008).

1390. For purposes of Tex. Code Crim. Proc. Ann. art. 38.36(a), defendant's membership in a prison gang was relevant to the circumstances of the murder and the evidence was not offered solely to show that defendant murdered the victim because he acted in conformity with his bad character; for purposes of Tex. R. Evid. 403, the probative force and the State's need to admit evidence that the victim and defendant were members of the same prison gang outweighed factors that favored exclusion, as the evidence of guilt was so compelling, the gang evidence did not consume inordinate time, and such was not mentioned in closing argument. Vasquez v. State, 2008 Tex. App. LEXIS 6831 (Tex. App. Fort Worth Sept. 4, 2008).

1391. Trial court did not abuse its discretion in admitting evidence of defendant's statement, which contained a list of persons to whom defendant admitted he had sold methamphetamine as well as his admissions that he had bought approximately a half-ounce of methamphetamine every week for the last three years, that he used about a quarter-ounce every week, that he sold the rest, and that he sold enough methamphetamine to support his habit, because those portions of the statement that related to defendant's selling methamphetamine were relevant to proving intent to deliver, which was an essential element of defendant's offense, possession of a controlled substance with intent to deliver. Furthermore, the probative force and the State's need to admit the statement

outweighed the factors that favored exclusion because defendant's admission that he regularly sold methamphetamine was compelling evidence that he intended to sell methamphetamine, and his admission further served to rebut his theories that the drugs were planted on him and that the money that he carried when he was arrested had come, not from selling drugs, but from payments from his rental properties. Bridges v. State, 2008 Tex. App. LEXIS 6634 (Tex. App. Fort Worth Aug. 29, 2008).

1392. Trial court properly admitted nine autopsy/crime scene photographs of the deceased victims involved in a fatal car crash where they depicted the victims' bodies at the scene of the collision and as they were received at the morgue, and they were offered during the medical examiner's testimony to identify the victims prior to autopsy. Cortez v. State, 2008 Tex. App. LEXIS 6533 (Tex. App. Corpus Christi Aug. 27, 2008).

1393. In a theft case, a court reversibly erred by excluding evidence that the complainant was a prostitute because the jury could not properly evaluate a witness's story that he was the complainant's bodyguard and would have intervened to protect her, and his business interest, if she had been in danger. Thomas v. State, 2008 Tex. App. LEXIS 6498 (Tex. App. Dallas Aug. 26, 2008).

1394. Evidence supported the jury's finding against a carrier under Tex. Ins. Code Ann. §§ 541.060, 541.061, given that (1) the jury had proof that a claims adjuster denied or disputed the claim the first day the adjuster looked at the file and she ignored accepted methods of investigating a claim, (2) there was proof that the claimant's attorneys provided the carrier with medical records, but the carrier failed to forward a crucial page to its medical expert and failed to do so on more than one occasion, (3) the carrier offered no evidence that it had any reason to believe that any new or pre-existing injury was the sole cause of the claimant's herniation that would have precluded coverage, (4) the jury could have found that the carrier's assertions were merely a pretext to justify its refusal to pay for the claimant's surgery, (5) whether a medical records authorization signed by the claimant's wife would have enabled the carrier to obtain the claimant's records was irrelevant because the evidence did not show that the carrier sought to obtain any records with it and was refused, and the evidence showed that the claimant himself gave an authorization to obtain records, and (6) the jury was asked if the claimant committed fraud by not revealing a prior injury and found that he did not commit fraud; the evidence was sufficient to support a finding that (1) the carrier refused to pay the claim without conducting a reasonable investigation with respect to the claim, and (2) the carrier failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of the claim when its liability had become reasonably clear. Tex. Mut. Ins. Co. v. Morris, 2008 Tex. App. LEXIS 9868 (Tex. App. Houston 14th Dist. Aug. 26 2008).

1395. Defendant did not raise the issue of relevancy on appeal and those objections did not support defendant's present complaint of hearsay or the denial of his right to confrontation; as to his final hearsay objection and denial of the right to confront certain witnesses, defendant did not show a legitimate reason for the delay in raising these complaints until after the publication of the audio recordings to the jury, and thus the final objection raising these issues was untimely and these issues were not preserved for review. Bates v. State, 2008 Tex. App. LEXIS 6130 (Tex. App. Amarillo Aug. 13, 2008).

1396. Evidence against the individual was placed before the jury in the historical context of the relationship between the parties and their dealings prior to the individual's arrest incident; thus, there was at least a logical connection between this line of questioning and the propositions that the owners were trying to prove regarding their easement claim, and thus the evidence was relevant for purposes of Tex. R. Evid. 401. South Plains Lamesa R.R. v. Heinrich, 280 S.W.3d 357, 2008 Tex. App. LEXIS 6038 (Tex. App. Amarillo 2008).

1397. Given that Tex. R. Evid. 402 provided that evidence that was not relevant was not admissible, the court first had to determine if the evidence was relevant. South Plains Lamesa R.R. v. Heinrich, 280 S.W.3d 357, 2008 Tex. App. LEXIS 6038 (Tex. App. Amarillo 2008).

1398. Although an heir argued that testimony of an argument between the heir and his parents was prejudicial for purposes of Tex. R. Evid. 403, the heir did not demonstrate that the entire case turned on the disputed testimony, and the disputed testimony was relevant to show how the heir interacted and responded to his parents; given the claims, it was important for the jury to be given historical information regarding this relationship and the trial court did not abuse its discretion in admitting this evidence. Dace v. Dace, 2008 Tex. App. LEXIS 5779 (Tex. App. Houston 1st Dist. July 31 2008).

1399. Widow's conclusory allegation that the area was widely known to be dangerous and that many crimes occurred in the general area was insufficient to survive a no-evidence summary judgment motion against the restaurant, as conclusory or speculative opinion testimony did not tend to make the existence of a material fact more or less probable and was not relevant under Tex. R. Evid. 401 nor competent, and thus an opinion that the widow's husband's murder was not foreseeable to the restaurant, as supported by the facts recited from unchallenged police reports and crime statistics, was uncontroverted; the court recognized that, because the question of duty was a question of law for the court, an expert could not properly opine regarding the existence of a duty, and expert testimony alone was insufficient to raise a fact issue on foreseeability, but the widow failed to produce more than a scintilla of evidence showing that the restaurant had a duty to the husband and that it breached that duty, such that the trial court properly entered summary judgment in the restaurant's favor. Pouncy-Pittman v. Pappadeaux Seafood Kitchen, 2008 Tex. App. LEXIS 5780 (Tex. App. Houston 1st Dist. July 31 2008).

1400. Defendant's arrest photo was properly admitted as relevant on the question of identification because defendant looked very different from how he looked in the courtroom. Defendant raised only a relevancy objection at trial and did not preserve his argument based on Tex. R. Evid. 403. Avendano v. State, 2008 Tex. App. LEXIS 5832 (Tex. App. El Paso July 31, 2008).

1401. Items seized at the scene of a house fire were relevant under Tex. R. Evid 401, 402, 403, 404(b) to show that the fire started as a result of the cooking of methamphetamine on the stove and that the debris found in the burned house pertained to the use or manufacture of illegal drugs; defendant failed to establish that the trial court abused its discretion or that the determination fell outside of the zone of reasonable disagreement. Dentler v. State, 2008 Tex. App. LEXIS 5708 (Tex. App. Eastland July 31 2008).

1402. In a sexual assault case, the court properly allowed the victim to read her poem to the jury during punishment because it was relevant to show that the consequences of defendant's act included the victim's sadness at having lost the sense of safety she once knew with defendant, her mixed feelings, her anger, her need to apologize for her promise not to tell, and implicitly, for breaking that promise. Mansfield v. State, 2008 Tex. App. LEXIS 5615 (Tex. App. Houston 14th Dist. July 29 2008).

1403. Trial court did not abuse its discretion by admitting evidence of a life insurance policy covering her husband, of which defendant was the beneficiary, because the fact that defendant may have been motivated to shoot her husband by the $ 300,000 life insurance policy was relevant under Tex. R. Evid. 401 to the State's attempt to prove defendant acted knowingly and intentionally. The trial court could have reasonably concluded the existence of the husband's life insurance policy related directly to the charged offense, did not have a tendency to confuse or distract the jury from the main issues in the case or have any tendency to be given undue weight by the jury; defendant admitted she shot her husband but claimed it was partially in self-defense and partially an accident; the trial court could have reasonably concluded that it was unlikely that presentation of the evidence of life insurance would consume an inordinate amount of time or merely repeat evidence already admitted. Armstrong v. State, 2008 Tex. App. LEXIS 5448 (Tex. App. Dallas July 24 2008).

1404. In defendant's assault on a public servant trial, a spitting incident was properly admitted under Tex. R. Evid. 404(b) to show intent and there was no violation of Tex. R. Evid. 403, given that (1) the inherent probative value of the evidence was great, (2) although evidence of the spitting incident could potentially impress the jury, it was not of

such a nature as to have impressed the jury in an irrational or indelible way, (3) the record did not indicate that the time needed to develop this evidence was such that the jury would be distracted from the indicted offense, and (4) although the evidence was relevant to defendant's intent, several witnesses identified defendant as the attacker, such that the need for the evidence factor weighed against admissibility, but the factors as a whole weighed in favor of admissibility and the trial court did not err in admitting the evidence. Collins v. State, 2008 Tex. App. LEXIS 5481 (Tex. App. Waco July 23 2008).

1405. Trial court did not abuse its discretion in excluding the weight demonstration because defendant's weight at trial was not relevant and the demonstration would do nothing to establish what he weighed at the time of his arrest. Tyler v. State, 2008 Tex. App. LEXIS 5211 (Tex. App. Dallas July 15 2008).

1406. Informant could offer no testimony about the actual offense and there was no evidence that the informant participated in the offense for which defendant was charged, nor was there evidence that the informant was an eyewitness to the search, for purposes of Tex. R. Evid. 508; the informant's testimony would only have been relevant to the issue of probable cause, thus making it unnecessary for the identity of the informant to be disclosed, and thus the trial court did not abuse its discretion in refusing to hold an in-camera hearing or to disclose the identity of the informant. Johnson v. State, 2008 Tex. App. LEXIS 3494 (Tex. App. Waco May 14 2008).

1407. In defendant's child sexual assault case, the trial court did not err by determining that details of alleged abuse by another person were not relevant to the determination of whether defendant sexually assaulted the child, and that such details did not tend to make the existence of a material fact more or less probable; the trial court did not abuse its discretion when it ruled that the details of any alleged previous abuse by the other person were not relevant. Bargas v. State, 252 S.W.3d 876, 2008 Tex. App. LEXIS 3443 (Tex. App. Houston 14th Dist. 2008).

1408. In defendant's trial for burglary of a habitation, the testimony made clear that defendant did not possess any of the victims' belongings at his apartment, nor did the State offer testimony showing that the items found there were stolen; defendant's possession of the unusual items, to the extent his possession of them constituted an extraneous offense under Tex. R. Evid. 404, was relevant to his intent when he was discovered walking near the victims' home with a black bag, and it cast doubt on his claim that a neighbor made a mistake in identifying defendant as a burglar, plus the jury was instructed that if it heard any testimony about defendant committing extraneous offenses, it could not consider the testimony for any purpose unless it believed beyond a reasonable doubt that defendant had committed the offenses and it could consider the offenses only in determining the intent, knowledge or lack of mistake of defendant, if any, in connection with the offense alleged against him in this case, such that the trial court did not abuse its discretion in admitting the evidence. Brown v. State, 2008 Tex. App. LEXIS 3377 (Tex. App. Dallas May 9 2008).

1409. Evidence of defendant's flight was relevant in defendant's burglary of a habitation trial because defendant fled from his own apartment when he saw police officers there to arrest him, and the State was generally entitled to put on evidence showing the circumstances of a defendant's arrest; defendant did not meet his burden to show that the flight was directly connected to some other transaction and was not connected with the burglary offense in this case, and thus the trial court did not err in admitting this evidence. Brown v. State, 2008 Tex. App. LEXIS 3377 (Tex. App. Dallas May 9 2008).

1410. To properly preserve error, counsel needed to have either objected to each purportedly irrelevant question or requested a running objection; counsel only objected when the prosecutor posed the first query and then toward the end of the exchange and counsel failed to object to the vast majority of the supposedly objectionable questions or request a running objection, plus defendant failed to lodge any objection to the questions and answers he claimed harmed him the most, and thus, no error was preserved. Gonzalez v. State, 2008 Tex. App. LEXIS 3371 (Tex. App. Houston 14th Dist. May 8 2008).

1411. Driver's consumption of alcohol was relevant to the element of causation in his negligence suit against a trucker because the trucker presented evidence that the accident could have been avoided had the driver steered his vehicle to the right to avoid the trucker's trailer, and in failing to do so, the driver caused the accident. PPC Transp. v. Metcalf, 254 S.W.3d 636, 2008 Tex. App. LEXIS 3291 (Tex. App. Tyler 2008).

1412. For purposes of Tex. R. Evid. 401, 402, the trial court did not abuse its discretion in refusing to admit evidence of a doctor's scrubs in this medical malpractice case because there was no evidence that the patient ever saw the doctor wearing scrubs or that he relied on the language on the scrubs in forming a belief that the doctor or the hospital and its parent company were holding the doctor out as an agent, and there was no evidence that the patient's wife was influenced by the language on the scrubs. Farlow v. Harris Methodist Fort Worth Hosp., 284 S.W.3d 903, 2008 Tex. App. LEXIS 9836, 64 A.L.R.6th 741 (Tex. App. Fort Worth 2008).

1413. In a medical malpractice case, there was no evidence that anyone saw or relied on a hospital wall plaque in forming a belief as to whether a doctor was an agent of a hospital and its parent company, and thus the trial court did not abuse its discretion in refusing to admit this evidence for purposes of Tex. R. Evid. 401, 402; moreover, the evidence, even if considered to show an affirmative holding out by the hospital and its parent company of doctors as employees, was negated by evidence that the hospital and company included language in its admissions paperwork specifically disclaiming any such relationship. Thus, even if the trial court erred, the court could not say that error, cumulatively or individually, resulted in the rendition of an improper judgment under Tex. R. App. P. 44.1(a)(1). Farlow v. Harris Methodist Fort Worth Hosp., 284 S.W.3d 903, 2008 Tex. App. LEXIS 9836, 64 A.L.R.6th 741 (Tex. App. Fort Worth 2008).

1414. Because defendant claimed self-defense against both victims, the court agreed with the State that defendant's experience with firearms prior to the shootings was relevant to rebut defendant's defensive theory, as the testimony spoke to defendant's lack of maturity and good judgment in handling his weapon and was relevant to show absence of mistake or accident regarding the victims' deaths; the photograph of defendant at a firing range was relevant to provide a link between defendant, a cellular phone, and the handgun used in the shooting, and thus the trial court did not abuse its discretion by admitting the testimony and photograph over defendant's Tex. R. App. P. 404(b) objection, and, for purposes of Tex. R. Evid. 403, the ruling to admit the testimony and photograph did not fall outside the zone of reasonable disagreement, as the record did not support the notion that the evidence tended to impress the jury irrationally, the evidence was developed quickly and a disproportionate amount of time was not spent on the subject, and the State had a compelling reason to present the evidence to rebut defendant's theory of self-defense. Lopez v. State, 2008 Tex. App. LEXIS 3167 (Tex. App. Houston 1st Dist. May 1 2008).

1415. Evidence was sufficient to support the robbery element of defendant's capital murder offense, given that (1) accomplice testimony showed that defendant and his companions had devoted their afternoon to robbing vulnerable ice cream vendors, (2) the vendor shot by defendant said the young men had tried to rob him, (3) the evidence showed that defendant and his cohort attempted to rob the vendor and then temporarily fled from the scene, but before making an escape, defendant went back to the vendor and shot him, and (4) it was irrelevant to the court's analysis that defendant's control of the vendor's money had been thwarted and that he might have abandoned the theft component of the offense at the time of the shooting. Zubiri v. State, 2008 Tex. App. LEXIS 3069 (Tex. App. Dallas Apr. 29 2008).

1416. In an illegal possession of a weapon case, audio portions of the patrol-car videotape were properly admitted because an issue during trial was the course and conduct of the officer's investigation of defendants, and the statements concerned one defendant's friend's alleged drug use, and did not concern any drug use by either of the defendants. Gomez v. State, 2008 Tex. App. LEXIS 2966 (Tex. App. Austin Apr. 24 2008).

1417. In determining the relevancy of a photograph offered as punishment evidence, the court did not ask if it made a fact in issue more or less probable, but whether it was admissible under Tex. Code Crim. Proc. Ann. art.

37.07. Thomas v. State, 2008 Tex. App. LEXIS 3050 (Tex. App. Eastland Apr. 24 2008).

1418. Trial court did not abuse its discretion in admitting the testimony about the victim's physical capabilities before the incident (not using a cane, doing yard work and hunting), because this was victim character evidence since it showed the victim's uniqueness as a human being and was a quick glimpse into his life. Dotson v. State, 2008 Tex. App. LEXIS 2673 (Tex. App. Dallas Apr. 15 2008).

1419. Records showing that defendant obtained hydrocodone and other prescriptions many times in the past from different doctors made it more probable that, when defendant was unable to get a doctor to refill his prescription, he knowingly asked a co-worker to refill it through fraudulent means, and thus the trial court did not err in finding that the records were relevant for purposes of defendant's conviction of possession of a controlled substance, dihydrocodeinone (hydrocodone), by fraud, in violation of Tex. Health & Safety Code Ann. § 481.129(a); considering that the only direct evidence of defendant's culpable mental state was the co-worker's testimony and she was impeached, the trial court could have found (1) that the probative force of and the State's need for the records were considerable, (2) the records were not inflammatory and did not suggest a decision on an improper basis, (3) the records would not have misled the jury, and (4) the probative value of the records was not substantially outweighed by the countervailing factors specified in Tex. R. Evid. 403. Starn v. State, 2008 Tex. App. LEXIS 2402 (Tex. App. Fort Worth Apr. 3 2008).

1420. Sole issue at trial was whether the mother's parental rights were to be terminated, and termination of parental rights merely clears the way for the possibility of an adoption, which would have to be decided in a separate proceeding and which, as all parties agreed, would not necessarily have resulted in adoption by the foster parents, and thus the court agreed that the merits of a prospective adoptive home were irrelevant, for purposes of Tex. R. Evid. 401, Tex. R. Evid. 402, to the issue of whether the mother's parental rights were to be terminated. Bennett v. Tex. Dep't of Family & Protective Servs., 2008 Tex. App. LEXIS 2420 (Tex. App. Austin Apr. 3 2008).

1421. In the State's action under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) that alleged that appellants, a husband and wife who operated a business assisting Spanish speaking individuals with immigration matters, had counseled consumers without legal authorization or qualification, appellants raised no valid complaints regarding the admissibility of the evidence and the trial court's rulings thereon where an exhibit consisting of a summary of the more than 2,180 G-28 forms filed by the husband was itself a business record entitled to be treated as other business records, making Tex. R. Evid. 1006 inapplicable, and where the testimony of an intelligence research specialist with the Citizenship and Immigration Services Branch of the United States Department of Homeland Security established the necessary predicate required by Tex. R. Evid. 803(6) because the specialist testified that the exhibit was a business record made in the ordinary course of business at Citizenship and Immigration Services, made at or near the time his department received the G-28 forms, by a person with knowledge of the events being recorded; furthermore, the trial court did not err in refusing to allow a previous client of appellants who was testifying for the State to answer when asked if she obtained her residency status because any testimony going to the gravity of the harm done by engaging in the prohibited act was irrelevant and inadmissible. Avila v. State, 252 S.W.3d 632, 2008 Tex. App. LEXIS 2270 (Tex. App. Tyler 2008).

1422. In a murder case, the trial court did not abuse its discretion in admitting photographs of the victim at the crime scene because some of the photographs were used by the experts to explain the manner of the death and the amount of force used by defendant when hitting the victim with the baseball bat, tending to disprove his self-defense claim; other photographs, along with the testimony of the blood-spatter expert, addressed the absence of any struggle between the victim and defendant and that the victim was either on his knees or on the ground while being beaten, while some photographs depicted the brutality of the crime and the severity of the injuries and were probative of the manner of the victim's death. Grayson v. State, 2008 Tex. App. LEXIS 2210 (Tex. App. Houston 1st Dist. Mar. 27 2008).

1423. Trial court did not err in denying defendant's motion for a continuance under Tex. Code Crim. Proc. Ann. art. 29.06, given that (1) defendant's written motion contained none of the required witness information, (2) the motion was filed four days before trial, and did not identify the witnesses who were unable to appear, (3) while defendant claimed not to have notice of certain issues, the motion failed to show any support for those assertions, (4) even if the court considered defendant's oral motions, they did not satisfy the statute, (5) the required diligence was not shown, and (6) defendant failed to show the relevance or materiality of the absent witness's testimony and thus failed to show actual prejudice from the denial of the continuance motion. Cline v. State, 2008 Tex. App. LEXIS 2242 (Tex. App. Austin Mar. 26 2008).

1424. Contrary to Tex. R. App. P. 38, the intended purchaser cited no authority for the claim that the trial court was required to hear an expert's testimony before ruling on its admissibility and the purchaser provided no argument regarding the relevancy of the excluded evidence to particular elements of his various causes, and thus he waived this issue; even absent waiver, the court found no abuse of discretion in the trial court's ruling, as the subject areas excluded by the trial court involved matters inappropriate for expert testimony under Tex. R. Evid. 702, and the court found no merit in the challenge to the trial court's ruling limiting the testimony. Petras v. Criswell, 248 S.W.3d 471, 2008 Tex. App. LEXIS 2017 (Tex. App. Dallas 2008).

1425. Intended purchaser's partner was not party to this suit and thus his detrimental reliance was irrelevant to the purchasers promissory estoppel claim; absent any evidence of the purchaser's substantial detrimental reliance, the trial court did not err in granting summary judgment on this promissory estoppel claim. Petras v. Criswell, 248 S.W.3d 471, 2008 Tex. App. LEXIS 2017 (Tex. App. Dallas 2008).

1426. Trial court's disposition of the no-evidence summary judgment motion turned on whether an intended purchaser met his burden; any evidence submitted by the owner was irrelevant to that determination, and the purchaser failed to establish any reversible error. Petras v. Criswell, 248 S.W.3d 471, 2008 Tex. App. LEXIS 2017 (Tex. App. Dallas 2008).

1427. In defendant's trial for retaliation, aggravated kidnapping, and aggravated assault, the fact that defendant had also locked another girlfriend in the same trunk in the past made it more probable that he had done the same to his current ex-girlfriend, and the first girlfriend's testimony that she did not feel free to leave him tended to rebut his claim that his ex-girlfriend remained with him voluntarily, and thus the first girlfriend's testimony was relevant under Tex. R. Evid. 401 and the trial court did not abuse its discretion in admitting the evidence over a Tex. R. Evid. 402 objection; because the first and third factors under Tex. R. Evid. 403 weighed heavily in favor of admissibility, given that the jury was drawn away from the indicted offenses only briefly and the testimony was compelling and supported the ex-girlfriend's claims, and the second and fourth factors were neutral, the trial court did not err in finding that the danger of unfair prejudice did not substantially outweigh the probative value of this evidence. Stephenson v. State, 255 S.W.3d 652, 2008 Tex. App. LEXIS 2072 (Tex. App. Fort Worth 2008).

1428. State did not explain how a video recording of a prior drug deal was relevant, the trial court did not explain any such relevance, and the court failed to see any relevance, plus defendant was not contesting motive, opportunity, intent, identity, or absence of mistake or accident, and thus these issues would not have been a fact of consequence and the admission of a video recording was outside the zone of reasonable disagreement; however, the error was harmless under Tex. R. App. P. 44 because the same facts shown on the video were proved by other properly admitted evidence. Toliver v. State, 2008 Tex. App. LEXIS 1974 (Tex. App. Tyler Mar. 19 2008).

1429. Ironworker explained, during voir dire, that he could not make a correlation between the fifteen checks he offered and the twenty-eight invoices at issue, and he testified that he did business with the steel company all year and there were more than twenty-eight transactions with many checks written to cover all of the invoices for the year; therefore, the checks did not make the consequential fact that he paid the particular invoices at issue more or less probable; therefore, the trial court did not act arbitrarily or unreasonably without reference to guiding rules or

principles. Martinez v. Rio Grande Steel, Ltd., 2008 Tex. App. LEXIS 1860 (Tex. App. Corpus Christi Mar. 13 2008).

1430. Trial court did not abuse its discretion in excluding part of defendant's employer's testimony concerning the employer's son's prescription medication and a videotape of defendant's 2000 arrest for driving while intoxicated because the evidence was not relevant under Tex. R. Evid. 401 to whether defendant was guilty of the charged crimes of driving while intoxicated and evading arrest. Peavey v. State, 248 S.W.3d 455, 2008 Tex. App. LEXIS 1818 (Tex. App. Austin 2008).

1431. Evidence was both legally and factually sufficient to support defendant's burglary of a motor vehicle conviction under Tex. Penal Code Ann. § 30.04(a), given that (1) defendant was riding in a car with three other juveniles shortly after a car burglary occurred half a mile away, (2) in plain sight inside the vehicle were burglary tools and stolen property, and (3) near defendant was specific stolen property, including a master key to a victim's property, and thus this constituted circumstantial evidence of defendant's knowledge of the burglary, plus (4) the jury was free to disbelieve testimony in defendant's favor concerning timing, (5) the lack of cuts on defendant's hands was not relevant to her innocence, as many inculpatory acts would not subject a burglar to such cuts, (6) for purposes of Tex. Penal Code Ann. § 3.01(1), the trial court could have inferred that defendant's blanket was part of a common scheme or plan for the four persons in the vehicle to burglarize motor vehicles, (7) none of the other occupants of the vehicle testified that defendant joined them after the burglary and had no knowledge thereof, and (8) the evidence supported the finding that defendant was an active participant in the robberies. Campos v. State, 2008 Tex. App. LEXIS 1511 (Tex. App. Dallas Feb. 29 2008).

1432. Trial court did not abuse its discretion during defendant's trial for the Class A misdemeanor offense of assault causing bodily injury in refusing to allow defendant to cross-examine the complainant regarding past accusations of spousal abuse where the complainant's character for truthfulness was not attacked by opinion or reputation evidence or otherwise as required by Tex. R. Evid. 608; instead, during cross-examination, defendant attempted to inquire into prior accusations of abuse that the complainant made against her ex-husband for the purpose of attacking the complainant's credibility, and, pursuant to Tex. R. Evid. 401, Tex. R. Evid. 402, Tex. R. Evid. 608, the probative value of the evidence sought to be admitted was extremely low, particularly because defense counsel admitted during trial that he had no evidence that the complainant lied about the abuse and that the accusations occurred a long time ago. Sullivan v. State, 2008 Tex. App. LEXIS 1394 (Tex. App. San Antonio Feb. 27 2008).

1433. In defendant's aggravated robbery trial under Tex. Penal Code Ann. § 29.03, the trial court did not err in admitting extraneous offense evidence of two subsequent robberies, for purposes of Tex. R. Evid. 404, given that identity was an issue in this case, defendant's physical appearance linked him to all three incidents, and the proximity in time and place, the common mode of committing the offenses, and the circumstances surrounding the offenses were sufficiently similar for the extraneous offense evidence to be relevant under Tex. R. Evid. 401 to the issue of identity. Ina v. State, 2008 Tex. App. LEXIS 1220 (Tex. App. Houston 14th Dist. Feb. 21 2008).

1434. Court disagreed that the cross-examination of defendant's estranged wife about her extramarital affair would have been proper to impeach her credibility under Tex. R. Evid. 608; as to her motive to lie in an effort to gain custody of the minor child, this was at best only relevant to a collateral matter, and whether the wife had sexual relations while the child was in an adjacent room or asleep was relevant neither to the crime for which defendant was indicted -- unlawful interception, use, and disclosure of a wire communication -- nor to any defense, and thus the trial court did not err in limiting defendant's cross-examination of the wife. Green v. State, 2008 Tex. App. LEXIS 1193 (Tex. App. San Antonio Feb. 20 2008).

1435. Because a stock option agreement was not ambiguous, the employee's testimony on his understanding of a certain paragraph was not relevant and constituted no evidence supporting the jury's finding in his favor, and because there was no evidence supporting the jury's damage finding, the trial court correctly granted a judgment

notwithstanding the verdict on this issue. Simplified Dev. Corp. v. Garfield, 2008 Tex. App. LEXIS 1127 (Tex. App. Houston 14th Dist. Feb. 14 2008).

1436. In an action involving a fire and who was the cause of it, a proper foundation had not been laid to qualify an expert to testify whether he had any criticism of the plumbing company's work and the admission of testimony that an individual was not seeking to recover anything from the plumbing company was irrelevant since none of it even remotely related to whether the plumbing company was liable for the fire; however, those errors were harmless since they did not cause the rendition of an improper verdict and therefore, a reversal was not required. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 245 S.W.3d 646, 2008 Tex. App. LEXIS 963 (Tex. App. Fort Worth 2008).

1437. In a products liability action, an expert's lint ignition testimony was based on an objective observation of lint build-up in the dryer cabinet, independent observations supported the expert's testimony regarding how an ember survived to ignite the clothes in the dryer and then spread from the dryer, and this expert and another expert relied on objective criteria in the record and their own experience to conclude that the dryer caused the fire; while the manufacturer might have disagreed with their conclusions, the experts explained the basis for their opinions and based those opinions on objective facts, and the trial court did not err in admitting this evidence, for purposes of Tex. R. Evid. 702. Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 2008 Tex. App. LEXIS 356 (Tex. App. Corpus Christi 2008).

1438. In defendant's murder case, the court properly allowed the State to reveal defendant's tattoos because the evidence was relevant to support the State's theory that defendant was a gang member who murdered rival gang members in retaliation; in addition, given the other evidence indicating defendant's admitted gang membership, the evidence was not unfairly prejudicial. Reyes v. State, 2008 Tex. App. LEXIS 293 (Tex. App. San Antonio Jan. 16 2008).

1439. In defendant's murder case, the trial court properly excluded defendant's testimony about the victim's alleged indifference to her pregnancy and the problems she encountered just before her son's birth because the proffered evidence was not probative of the alleged reasonableness of defendant's belief that the victim had used, was using, or even might use deadly force at the time that she shot and killed him. Eisenman v. State, 2008 Tex. App. LEXIS 282 (Tex. App. Corpus Christi Jan. 10 2008).

1440. In defendant's murder case, the court did not err by omitting evidence of pornography found on the victim's computer because there was no showing by defendant that the pornographic images were related to the shooting, that the images were the subject of the argument that preceded the shooting, or that the images played any part whatsoever during the events leading up to the shooting. Eisenman v. State, 2008 Tex. App. LEXIS 282 (Tex. App. Corpus Christi Jan. 10 2008).

1441. Although defendant's proffered alternative perpetrator evidence was relevant under Tex. R. Evid. 401 because identity was a material issue in the case and vigorously contested at defendant's aggravated robbery trial, and although there was no danger that the evidence would create a side issue that would unduly distract the jury from the main issues under Tex. R. Evid. 403 because the evidence addressed a material issue in the case, the trial court's exclusion of the evidence was not error because defendant failed to show the required nexus between the alleged alternative perpetrator and the offense-at-issue; although the alleged alternative perpetrator's indictments and convictions indicated that he engaged in a spree of robberies overlapping the offense-at-issue, that evidence supported no conclusions other than that he was committing robberies around the time of the offense-at-issue, and defendant did not present evidence that the alleged alternative perpetrator's offenses were committed at or near the location of the offense-at-issue or present testimony from any of the witnesses identifying that individual as the robber. Dickson v. State, 246 S.W.3d 733, 2007 Tex. App. LEXIS 9859 (Tex. App. Houston 14th Dist. 2007).

1442. Trial court did not abuse its discretion in admitting evidence of a gun found by the witness because its probative value was not outweighed by the risk of unfair prejudice, when the witness testified that he found the gun around the same time as the aggravated robbery, lying on the road a few blocks away from the store, and this was approximately the same location where the officer observed defendant driving a car matching the description of the suspect's vehicle provided by police dispatchers at the time of the aggravated robbery and from which the officer observed defendant extend his hand and arm out of the window and then back into the car. Mouton v. State, 2007 Tex. App. LEXIS 10076 (Tex. App. Houston 1st Dist. Dec. 20 2007).

1443. During defendant's murder trial, the trial court did not abuse its discretion in excluding a crime scene investigator's testimony that drugs were found in the victim's apartment and a medical examiner's testimony that the victim had ingested marijuana and cocaine prior to the victim's death where there was nothing in the record that connected the possession and use of marijuana and cocaine to the victim's alleged violent acts. Moore v. State, 2007 Tex. App. LEXIS 9512 (Tex. App. Waco Dec. 5 2007).

1444. In defendant's murder case, although the court erred in excluding the testimony and notes of a licensed counselor who had counseled defendant hours before the murder because the testimony provided some insight into defendant's state of mind at the time of the murder, the error was harmless; defendant's expert's testimony concerning defendant's sanity at the time of the offense was considerably more direct and probative than the tangentially relevant testimony of the counselor. Bradshaw v. State, 244 S.W.3d 490, 2007 Tex. App. LEXIS 9427 (Tex. App. Texarkana 2007).

1445. Probative value of a photograph was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403, given that (1) a photograph of defendant in possession of the same handgun used to commit the murder was highly probative of defendant having committed the murder, (2) while the photograph was prejudicial, it directly related to the charged offense of murder and the photograph did not have a great potential to impress the jury in an irrational way and would not have tempted the jury into a guilt finding on improper grounds, (3) the time involved in the introduction of the photograph was minimal and thus unlikely to have distracted the jury, and (4) the photograph was related to a disputed issue and the State had a need for the evidence, to connect defendant to the murder. Andrade v. State, 246 S.W.3d 217, 2007 Tex. App. LEXIS 9288 (Tex. App. Houston 14th Dist. 2007).

1446. As defendant had an absolute right to make an offer of proof under Tex. R. Evid. 103 as to excluded testimony, the trial court erred when it prohibited defendant from making his offer, but because defendant did not raise an issue arguing error in this regard, an abatement to permit counsel to develop the appellate record would have served no purpose as it would not have resulted in the development of any information relevant to the appeal, and thus the error was harmless. Andrade v. State, 246 S.W.3d 217, 2007 Tex. App. LEXIS 9288 (Tex. App. Houston 14th Dist. 2007).

1447. Trial court did not abuse its discretion in defendant's murder trial in admitting into evidence a photograph of defendant holding two handguns; the photograph was relevant under Tex. R. Evid. 401, given that the State had the burden to prove that defendant caused the victim's death by shooting him with a deadly weapon and the photograph of defendant holding the murder weapon had a tendency to make the existence of a fact of consequence to the determination of the action. Andrade v. State, 246 S.W.3d 217, 2007 Tex. App. LEXIS 9288 (Tex. App. Houston 14th Dist. 2007).

1448. In an aggravated assault case, the trial court did not abuse its discretion in refusing to allow defendant to cross-examine the complainant and her mother because his allegations suggesting that the complainant and her mother lied about the assault because they took his personal belongings from the house while he was jailed did not fairly tend to raise an inference that the complainant and her mother had motive to testify falsely. McClendon v. State, 2007 Tex. App. LEXIS 9300 (Tex. App. Houston 14th Dist. Nov. 29 2007).

1449. In a murder case, there was no abuse of discretion in the trial court's exclusion of evidence regarding the victim's drug use because that evidence was irrelevant and inadmissible; there was nothing in the record that connected the victim's possession and use of marijuana and cocaine to the victim's alleged violent acts. Moore v. State, 2007 Tex. App. LEXIS 9036 (Tex. App. Waco Nov. 14 2007).

1450. Trial court did not abuse its discretion in finding that the evidence was relevant because (1) a police officer testified that track marks on a person's arms were the result of heroin use; (2) during a raid on defendant's residence, police officers discovered 19.34 grams of heroin on the premises, along with numerous syringes that a police officer testified were commonly used to shoot heroin; and (3) evidence of track marks on defendant's arms made his alleged involvement with the criminal activity at the residence more probable than it would be without the evidence. Gomez v. State, 2007 Tex. App. LEXIS 8853 (Tex. App. Austin Nov. 9 2007).

1451. No offer of proof was made to documents excluded by the trial court, such that the contents of the documents and relevance could not be determined on appeal, and the alleged error was therefore not preserved. Roberts v. Davis, 2007 Tex. App. LEXIS 8672 (Tex. App. Texarkana Nov. 1 2007).

1452. Trial court did not err by refusing to allow defendant to further question two of the State's witnesses about defendant's duty or authority as a peace officer because he had already established that neither witness had any law enforcement training or education, and therefore the questions failed to meet the requirements of Tex. R. Evid. 701 (personal perception or knowledge) and Tex. R. Evid. 401 (relevance requiring both materiality and probativeness). King v. State, 2007 Tex. App. LEXIS 8766 (Tex. App. Beaumont Oct. 31 2007).

1453. Court did not address the hearsay objection under Tex. R. Evid. 801 as to certain exhibits because they were not relevant under Tex. R. Evid. 401 to the resolution of the issues before the court, even if they fell under a hearsay exception; another exhibit contained an affidavit from an attorney in another case and contained the same information found in that case and had no bearing on the issues before the court. Southtex 66 Pipeline Co. v. Spoor, 238 S.W.3d 538, 2007 Tex. App. LEXIS 8352, 168 Oil & Gas Rep. 68 (Tex. App. Houston 14th Dist. 2007).

1454. Termination of the mother's parental rights was in the child's best interests, given that (1) the child's physical needs were great, (2) the mother's repeated drug use, including during the pregnancy, endangered the child and indicated that their relationship was not a proper one, (3) the mother was a poor parent to the child and her six other children at least in part due to her drug problem, (4) the trial court could have found that she would not provide a stable home for the child, (5) the child's foster parents wanted to adopt the child, which was relevant to the issue of best interests, (6) because the mother consistently refused to take drug tests, the trial court was entitled to believe that she still had a problem, despite her attempts at rehabilitation and several counseling sessions, and (7) while it might have been true that the mother was not as bad as some parents, it did not excuse her acts and omissions. In re J.A.B., 2007 Tex. App. LEXIS 8294 (Tex. App. Fort Worth Oct. 18 2007).

1455. During a capital murder trial, the State admitted an unauthenticated letter, written by a third party and sent to defendant at the county jail for the purpose of impeaching defendant's trial court testimony that she never had sex with another woman; the letter was not relevant to anything at issue, was not proper impeachment, and the trial court erred in admitting the letter. Abdygapparova v. State, 243 S.W.3d 191, 2007 Tex. App. LEXIS 8205 (Tex. App. San Antonio 2007).

1456. Defense counsel's concise statement and examination of the victim's father was reasonably specific to have shown the trial court the substance of the excluded evidence and to preserve error for review, for purposes of Tex. R. App. P. 33, Tex. R. Evid. 103; counsel made a reasonably specific summary of the evidence and argued the relevancy thereof, it was apparent by the State's Tex. R. Evid. 412 objection that it knew the precise nature of the excluded evidence, and the trial court was aware of the testimony defendant was trying to illicit by the nature of the

trial court's ruling. Ladesic v. State, 2007 Tex. App. LEXIS 8106 (Tex. App. Fort Worth Oct. 11 2007).

1457. Evidence of a partnership accounting and capital contribution was relevant not only to prove an action for breach of partnership duties, but it was relevant to the defense against a tort action, and thus trial by consent was inapplicable. Brogan, Ltd. v. W. Charles Brogan, III, M.D., Ph.D, P.A., 2007 Tex. App. LEXIS 8125 (Tex. App. Amarillo Oct. 11 2007).

1458. Testimony relating to the nature of the relationship between defendant and his wife was previously found to be relevant and admissible under Tex. R. Evid. 404(b), and testimony about security measures taken during the serving of divorce papers related to the nature of their relationship, such that the testimony was relevant pursuant to Tex. R. Evid. 401 and admissible under Tex. R. Evid. 404(b); for purposes of Tex. R. Evid. 403, the court found that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Garcia v. State, 246 S.W.3d 121, 2007 Tex. App. LEXIS 8051 (Tex. App. San Antonio 2007), *cert. denied*, 555 U.S. 949, 129 S. Ct. 404, 172 L. Ed. 2d 295, 2008 U.S. LEXIS 7457 (2008).

1459. Witness's testimony of a conversation she had with the victim, defendant's wife, before the crime, when the victim was highly upset and crying, was admissible as an excited utterance under Tex. R. Evid. 803, plus defendant admitted that the statements were cumulative, and thus any error was harmless; because the statements related to the nature of the relationship between defendant and his wife, the statements were relevant and admissible under Tex. R. Evid. 404(b), and as they were not merely an attack on defendant's character, the trial court therefore did not err in overruling defendant's Tex. R. Evid. 403 objection. Garcia v. State, 246 S.W.3d 121, 2007 Tex. App. LEXIS 8051 (Tex. App. San Antonio 2007), *cert. denied*, 555 U.S. 949, 129 S. Ct. 404, 172 L. Ed. 2d 295, 2008 U.S. LEXIS 7457 (2008).

1460. Statements made by the victim, defendant's wife, were admissible under Tex. R. Evid. 803 because they went to her state of mind, and although defendant claimed that statements that she was afraid of him were not relevant, it had previously been determined that the circumstances surrounding their relationship were relevant under Tex. Code Crim. Proc. Ann. art. 38.36(a), and thus the court held that the statements were relevant under Tex. R. Evid. 401; given that the jury had been told of the "dicey" relationship between defendant and his wife, the trial court did not believe there was going to be any confusion of the issues, and the court agreed and held that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury for purposes of Tex. R. Evid. 403. Garcia v. State, 246 S.W.3d 121, 2007 Tex. App. LEXIS 8051 (Tex. App. San Antonio 2007), *cert. denied*, 555 U.S. 949, 129 S. Ct. 404, 172 L. Ed. 2d 295, 2008 U.S. LEXIS 7457 (2008).

1461. Trial court did not err in overruling defendant's objection to photographs of the victim's injuries under Tex. R. Evid. 403, and the court assumed the photographs were presented to the jury in color; the State is required to prove serious bodily injury for aggravated assault under Tex. Penal Code Ann § 22.02(a)(1) and the photographs were offered into evidence for that purpose, the objected-to photographs depicted the victim's face cleaned up in preparation for surgery and showed her injuries in a less gruesome manner than described by witnesses, and the court concluded the photographs were relevant and not overly gruesome. Jones v. State, 2007 Tex. App. LEXIS 7920 (Tex. App. Amarillo Oct. 4 2007).

1462. Although defendant argued that a portion of a videotape was not relevant, defendant's brief, for purposes of Tex. R. App. P. 38.1(h), did not frame the contention as an issue nor did it present supported record citations and authorities, and thus the question was not properly before the court; even if the issue was raised, the evidence of defendant's demeanor and speech in defendant's case for driving while intoxicated would have been relevant, as in a trial for driving while intoxicated, evidence could include relevant photographs or videotapes. Lovington v. State, 2007 Tex. App. LEXIS 7816 (Tex. App. Amarillo Sept. 28 2007).

1463. Trial court did not abuse its discretion under Tex. R. Evid. 403 in admitting photographs of the victim's body in a capital murder case because they were relevant under Tex. R. Evid. 401 and were highly probative to show the victim's injuries and the specific circumstances of the murder. Gallo v. State, 239 S.W.3d 757, 2007 Tex. Crim. App. LEXIS 1234 (Tex. Crim. App. 2007).

1464. Trial court acted within its discretion in finding that the original weapons were unavailable because they had corroded and degraded and replicas were thus necessary to show the jury the state of the guns at the time of the offense; the original weapons were admissible and relevant under Tex. R. Evid. 401 to a material issue because the jury was charged with finding whether defendant committed aggravated assault using or exhibiting a deadly weapon, and by admitting the gun as demonstrative evidence, the trial court allowed the jury to see examples of the weapons used during the offenses; the demonstrative weapons were the same models as the original ones, had no inflammatory attributes, and the trial court properly advised the jury on this issue, and defendant's reliance on the Best Evidence Rule was misguided because it applies only to writings or documents and the rule did not apply to weapons. Bang v. State, 2007 Tex. App. LEXIS 7680 (Tex. App. Houston 14th Dist. Sept. 25 2007).

1465. During defendant's trial for sexual assault of a child, in violation of Tex. Penal Code Ann. § 22.011, evidence of the post-incident impact on the victim was relevant and probative of whether the assault did, indeed, occur, where defendant never formally admitted at trial that the victim had been sexually assaulted by someone (even by someone other than himself); furthermore, the potential prejudice that the evidence might have engendered was not outweighed by its probative value. Warren v. State, 236 S.W.3d 844, 2007 Tex. App. LEXIS 7636 (Tex. App. Texarkana 2007).

1466. Videotape showing the route taken by defendant during a chase was not an experiment or a reconstruction that required expert explanation, but instead it was a videotape version of a print map showing defendant's efforts to avoid officers and was used to show the jury the route followed, and the jury was instructed that its consideration of the evidence was limited to that purpose; relevant to the issue of intent in defendant's trial for aggravated assault on a public servant with a deadly weapon finding, under Tex. Penal Code Ann. § 22.02, was the preceding flight and the court did not find that the admission of the evidence in question was error. Timmons v. State, 2007 Tex. App. LEXIS 7519 (Tex. App. Texarkana Sept. 17 2007).

1467. In a personal injury action, the driver failed to produce the original photographs of her car, better copies of them, or some other evidence to rebut the suggestion that she deliberately produced photographs that did not accurately depict the damage, or she could have explained what happened to the originals, but she did not do so; given the motorist's testimony on a matter to which the photographs had particular relevance and the lack of an explanation from the driver for her failure to produce the photographs, a spoliation jury instruction was proper, for purposes of Tex. R. Civ. P. 277; additionally, the driver failed to comply with the trial court's order on the motion to compel evidence and failed to explain her noncompliance to the trial court's satisfaction, and the trial court had authority to sanction a party in this regard with a spoliation instruction. Conditt v. Morato, 2007 Tex. App. LEXIS 7532 (Tex. App. Fort Worth Sept. 13 2007).

1468. In a drug case, evidence that there was conflicting information in the police report was relevant and admissible under Tex. R. Evid. 401 for the purpose of impeaching the credibility of the officers. Cameron v. State, 241 S.W.3d 15, 2007 Tex. Crim. App. LEXIS 1120 (Tex. Crim. App. 2007).

1469. Trial court should not have considered certain petitions on summary judgment because they did not appear to be certified; in any event, neither petition alleged what project the subcontractors in the current case worked on, and thus even if the court considered the petitions in its review of a denial of summary judgment, the information would not have been relevant to the disposition of the case, for purposes of Tex. R. Evid. 401 and 402. Souder v. Cannon, 235 S.W.3d 841, 2007 Tex. App. LEXIS 7363 (Tex. App. Fort Worth 2007).

1470. For purposes of defendant's felony driving while intoxicated conviction, two exhibits consisting of certified copies of judgments in two of defendant's prior driving while intoxicated convictions were relevant and the trial court did not abuse its discretion in admitting them. Nall v. State, 2007 Tex. App. LEXIS 7289 (Tex. App. Houston 14th Dist. Sept. 4 2007).

1471. Fact that Travis County called a Denton police department to say that defendant was incarcerated in Travis County for a theft offense, and the fact that defendant was released from Denton County in 2004 did not relieve defendant from his duty to report his change of address to his primary registration authority seven days prior to the change pursuant to Tex. Code Crim. Proc. Ann. art. 62.055(a), and defendant did not show that he was prevented from reporting by jail authorities, but the evidence showed that either before he was jailed or after he was released, he changed his address without first providing notice to his registration authority, and the State's awareness of the portion of time that defendant spent in jail was irrelevant to the violation of his duty to report and irrelevant to the doctrines of equitable and judicial estoppel; because defendant did not register or attempt to do so, the State never had notice of his address for purposes of the statute and the doctrines of equitable and judicial estoppel did not apply, and the court further noted that defendant failed to provide the court with any relevant citations to the record and the appellate court was free to overrule the point as inadequately briefed. Kosick v. State, 2007 Tex. App. LEXIS 7284 (Tex. App. Fort Worth Aug. 31 2007).

1472. The appropriate authorities were required to notify defendant of the applicable requirements when he was released from his incarceration on an indecency with a child offense under Tex. Penal Code Ann. § 21.11, and the notification had to cover defendant's responsibility to tell local authorities seven days prior to or after an intended change of address; defendant received proper notification upon his initial release for prison in 2002 and he had actual knowledge of his requirements, and although defendant argued that he was required to get additional notice in June 2004, he was in jail for theft, which is not a reportable conviction under Tex. Code Crim. Proc. Ann. art. 62.001(5) requiring notice, and thus his evidence regarding a lack of notice after being released for the nonreportable conviction was irrelevant and the trial court did not err in excluding this evidence. Kosick v. State, 2007 Tex. App. LEXIS 7284 (Tex. App. Fort Worth Aug. 31 2007).

1473. Defendant's relevancy issue concerning photographs taken of the deceased while alive failed because the photographs showed the normal appearance of the victims before the infliction of the wounds. Wilson v. State, 2007 Tex. App. LEXIS 7173 (Tex. App. Corpus Christi Aug. 30 2007).

1474. Victim's brother testified that he was riding in the car with defendant when they saw a police car turn onto the street going the same direction they were driving; defendant became very nervous and when the police attempted to stop them, defendant sped away; when the victim's brother asked defendant why he did not stop, defendant told him there was a warrant for his arrest for touching the victim; thus, defendant did not show that his flight from the police was connected to some other transaction, and not with the indecency with a child offense, and, therefore, the trial court properly overruled defendant's objection that his flight from the police was not relevant to his indecency with a child offense. Mestas v. State, 2007 Tex. App. LEXIS 6947 (Tex. App. Dallas Aug. 29 2007).

1475. Although clients argued that a law firm waived its argument concerning the current value of stock by failing to object to the jury charge, the firm preserved the issue by raising it in a post-judgment motion; because the firm did not request that the jury be instructed to deduct the current value of the stock and did not object to the omission of such an instruction, the court considered the evidence in light of the charge given, and because the jury was not given instructions about the calculations to use, all evidence of the stock's fair market value, however calculated, was relevant to the inquiry. Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 232 S.W.3d 883, 2007 Tex. App. LEXIS 6954 (Tex. App. Dallas 2007).

1476. In a child abuse case, an objection to relevance was properly overruled concerning testimony about the death of a victim's grandmother because it appeared that the prosecutor was merely trying to establish why she

would not have been testifying at trial; the grandmother had been on the telephone when the victim was found to be unresponsive. Taylor v. State, 2007 Tex. App. LEXIS 6898 (Tex. App. Dallas Aug. 28 2007).

1477. Defendant claimed that the trial court's evidentiary rulings effectively prevented her from presenting her defense to capital murder, that the child victim's parents were the perpetrators of the crime, and the court analyzed the evidence to determine if the trial court's evidentiary rulings were clearly erroneous; the court found that (1) absent evidence that the children became involved in the physical disputes the parents previously had, the court was unable to hold that the trial court abused its discretion in excluding this evidence, and in any event, defendant did not raise her due process argument in this regard to the trial court, such that two related subpoints were not properly before the court, (2) certain excluded evidence did not add much, if anything, to the defense and did not prevent defendant from putting on a defense, such that defendant's due process rights were not violated, and (3) another witness statement was hearsay and did not meet any exceptions, and the exclusion of the statement in question did not prevent defendant from putting on a defense, and no indicia of reliability existed concerning the witness's statement, and defendant did not call this witness to testify. Stevens v. State, 234 S.W.3d 748, 2007 Tex. App. LEXIS 6845 (Tex. App. Fort Worth 2007).

1478. In considering the factual sufficiency of defendant's capital murder conviction, the exact time of the fatal injury was disputed, and it might have occurred up to 48 hours before the child's death; thus, the events in the days immediately preceding the child's death were relevant and the court detailed them in its evidentiary review. Stevens v. State, 234 S.W.3d 748, 2007 Tex. App. LEXIS 6845 (Tex. App. Fort Worth 2007).

1479. Defendant sought to introduce evidence that the victim's involvement in a gay dating service was admissible as character evidence under Tex. R. Evid. 405, but the character trait essential to the defense was not whether the victim was a sexually active person, but whether he was a violent person capable of sexually assaulting another man, and the fact that the victim participated in a dating service was irrelevant under Tex. R. Evid. 401 to this inquiry, and the victim's participation in the service was not admissible as character evidence; it was also not improper to rule against its admission for purposes of proving intent and motive for purposes of Tex. R. Evid. 404(b), and evidence proving an individual used a dating service in no way tends to prove the individual had the intent or motive to rape someone who would not consent to sexual relations. Arredondo v. State, 2007 Tex. App. LEXIS 6686 (Tex. App. San Antonio Aug. 22 2007).

1480. Defendant claimed that the trial court erred in admitting evidence of drugs and paraphernalia, but defendant cited no case law under Tex. R. App. P. 38.1(h) and thus the matter was waived; even if not waived, the trial court did not reversibly err because the evidence was seized contemporaneously with defendant's arrest, in plain sight, or as a result of his arrest and subsequent search, the trial court found the evidence relevant and that the probative value outweighed the evidence's prejudicial impact under Tex. R. Evid. 401, and this ruling was not outside the zone of reasonable disagreement. Wilborn v. State, 2007 Tex. App. LEXIS 6700 (Tex. App. Tyler Aug. 22 2007).

1481. In defendant's capital murder case, evidence in the guilt-innocence phase that painted a picture of the victim as a young man with a promising future whose life defendant had ended prematurely was irrelevant and appealed to the jury's sympathies. However, the error was harmless; defendant admitted to participating in the shooting, and a witness testified that defendant shot the victim and grabbed the bag of codeine. Durand v. State, 2007 Tex. App. LEXIS 6535 (Tex. App. Houston 1st Dist. Aug. 16 2007).

1482. In this bench trial in which an employer challenged the reasonableness of the number of hours worked by the employee's attorney for attorney fee purposes under the Fair Labor Standards Act, the court was unable to find that the trial court abused its discretion by finding relevant settlement offers on the matter of whether the attorney's claim of the number of hours he worked was reasonable. Vernon v. CAC Distribs., 2007 Tex. App. LEXIS 6294 (Tex. App. Houston 1st Dist. Aug. 9 2007).

1483. Decision refusing to allow defendant to cross-examine the complainant regarding the sexual abuse allegations against her father was affirmed because defendant failed to demonstrate that cross-examining the complainant regarding her allegations against her father was constitutionally required, and the district court's decision to limit the cross-examination did not violate the defendant's constitutional right to confront the witnesses against him; evidence demonstrating that the complainant had made allegations against her father, without more, would not have been relevant to a determination of whether the complainant fabricated her allegations against defendant, defendant failed to produce any evidence indicating that the complainant's prior allegations against her father were false, and the complainant's credibility had already been impeached through the testimony of one of the State's witnesses indicating that the complainant had made false allegations against other individuals while in therapy. Davis v. State, 2007 Tex. App. LEXIS 6360 (Tex. App. Austin Aug. 9 2007).

1484. Trial court did not violate defendant's due process rights during his trial for aggravated sexual assault of a child by excluding testimony of the complainant's neighbor and her adult son that concerned the complainant's threats to falsely accuse them of molestation where, in light of the remoteness in time and the dissimilarity between the alleged threats toward the neighbor and her son and the accusation in the charged offense, their testimony was not relevant because it was not probative regarding the complainant's credibility at the time of the instant offense. Billodeau v. State, 263 S.W.3d 318, 2007 Tex. App. LEXIS 6404 (Tex. App. Houston 1st Dist. 2007).

1485. Even though the trial court erred by admitting photographs of the corpse of defendant's murdered wife, because it had no tendency to make more or less probable any fact of consequence to the determination of defendant's guilt, the error was harmless given other devastating evidence against defendant; this evidence included the fact that defendant's prior conviction was for murder and that he appeared calm and unemotional after his wife's murder. Smith v. State, 2007 Tex. App. LEXIS 6023 (Tex. App. Tyler July 31 2007).

1486. Defendant's trial objection to extraneous offense evidence under Tex. R. Evid. 404 was that it was irrelevant, but the proper legal basis for the objection should have been that the evidence was offered to prove an extraneous uncharged offense not within the scope of the rule and was offered to show that defendant was a criminal generally, and thus he failed to make a proper objection at trial to preserve error for review, but in an abundance of caution, the court addressed defendant's complaint; defendant was charged with indecency with a child under Tex. Penal Code Ann. § 21.11 and the evidence of the extraneous offense defendant sought to exclude referred to an ongoing sexual relationship with the victim, a child under 17 years old, such that the evidence of the extraneous incident met the requirements of Tex. Code Crim. Proc. Ann. art. 38.37, § 2 and was admissible at trial. Jochims v. State, 2007 Tex. App. LEXIS 5905 (Tex. App. Corpus Christi July 26 2007).

1487. Evidence that a company pointed to involved events after a business employee signed the rental agreement in question, but this evidence was not relevant to whether the employee had the appearance of authority when he signed the agreement. Mission Linen Supply, Inc. v. Sandy's Signals, Inc., 2007 Tex. App. LEXIS 5968 (Tex. App. Fort Worth July 26 2007).

1488. In a negligence case arising from a fire at a condominium complex, speculative testimony regarding the adequacy of plumbing work was irrelevant and inadmissible and no showing of expert qualifications was made under Tex. R. Evid. 702; however, the trial court's error in admitting the testimony was harmless under Tex. R. App. P. 44. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 2007 Tex. App. LEXIS 5977 (Tex. App. Fort Worth July 26 2007).

1489. Trial court erred by admitting into evidence a letter that was written to her while she was in jail because the letter was not relevant to defendant's capital murder trial, as the letter, sent to defendant by a man, living in another state and whom she had never met, outlining his sexual desires and fantasies with defendant and other women, did not tend to make anything as to defendant, much less her sexual orientation or whether she committed sexual assault, any more or less probable. Abdygapparova v. State, 2007 Tex. App. LEXIS 5806 (Tex. App. San Antonio

July 25 2007).

1490. On appeal of a conviction of misdemeanor theft, the trial court did not err in sustaining the State's objection to the offender's question concerning profit margin in her inquiry as to the value of stolen retail property because the offender did not point to any offer of proof as required by Tex. R. Evid. 103, and the substance of the evidence she sought to offer was not apparent; thus, she forfeited her issue pursuant to Tex. R. App. P. 33; moreover, had she preserved her complaint, the trial court did not err; the offender complained that the trial court should not have sustained the State's relevance objection, but evidence that the victim had a profit margin did not tend to rebut the fact that the victim's sales price was at a fair market value. Smith v. State, 2007 Tex. App. LEXIS 5880 (Tex. App. Waco July 25 2007).

1491. Defense counsel lodged objections to extraneous evidence, but counsel did not urge an objection that the State failed to provide notice; the court agreed with the State that a trial objection regarding extraneous offenses that did not comport with the complaint raised on appeal did not preserve the contention for appellate review. Hohnstein v. State, 2007 Tex. App. LEXIS 5975 (Tex. App. Amarillo July 24 2007).

1492. Trial court did not err in admitting a 911 tape over defendant's objection under Tex. R. Evid. 403 in his murder trial; the tape was made immediately after boys found their mother's body and verified their testimony in many respects, the tape did not unfairly implicate defendant as he was not mentioned on the tape, and while dramatic, the tape was relevant in providing a framework for the State's evidence, and its relevance was not substantially outweighed by the danger of unfair prejudice. Chon Ki Yi v. State, 2007 Tex. App. LEXIS 5648 (Tex. App. Houston 1st Dist. July 19 2007).

1493. Given that the finding of fraud, including under Tex. Bus. & Com. Code Ann. § 27.01, was supported based on the owner's representation that the roof did not leak, it was irrelevant whether the evidence was sufficient to show that he did not intend to inspect the roof or make repairs to the space and the court did not need to address these other issues pursuant to Tex. R. App. P. 47.1. Pierre v. Tilley, 2007 Tex. App. LEXIS 5719 (Tex. App. Fort Worth July 19 2007).

1494. In defendant's trial for aggravated sexual assault of a child and indecency with a child, the fact of the victim's discussion with her sister might well have been admitted to clarify certain matters as to how the information came to light in her family, rather than to prove an implied statement to the sister that defendant molested the victim, and given the relevance of the evidence for other purposes, the trial court did not abuse its discretion in admitting it, and the court overruled defendant's claim that the trial court erred in admitting hearsay evidence under Tex. R. Evid. 801. Montgomery v. State, 2007 Tex. App. LEXIS 5682 (Tex. App. Dallas July 19 2007).

1495. Because defendant elicited an expert's testimony and failed to object on the basis of a non-responsive answer, defendant was precluded from complaining about the testimony on appeal; moreover, the complaint on appeal did not comport with the running relevancy objection at trial, such that the issue was not preserved for review under Tex. R. App. P. 33.1. Montgomery v. State, 2007 Tex. App. LEXIS 5682 (Tex. App. Dallas July 19 2007).

1496. Trial court did not err in admitting expert testimony in defendant's trial for attempted sexual assault; the expert was asked to describe in general, hypothetical terms behaviors that might be exhibited by a child who had been subjected to sexual abuse trauma, and the fact that the jury could have drawn a comparison between the expert's hypothetical child and the victim did not mean that the expert's testimony amounted to a direct comment on the victim's credibility; the expert's testimony was circumstantial evidence that something traumatic happened to the victim, and the fact that the evidence in some measure corroborated the victim's testimony did not make it any less

relevant. Sanchez v. State, 2007 Tex. App. LEXIS 5691 (Tex. App. Austin July 19 2007).

1497. In defendant's trial for aggravated assault on a public servant in violation of Tex. Penal Code Ann. § 22.02(a)(2), the trial court did not err in allowing the victim to display his ankle injury to the jury, given that (1) the injury had probative force because it showed that the victim sustained bodily injury, one of the elements the State had to prove, (2) the State needed to show the injury because there were no pictures thereof, (3) nothing suggested that the injury was inflammatory, (4) the presentation of the injury did not distract from the main issue, was not misleading, did not take much time, and was not needlessly repetitive, and (5) nothing suggested that the jury was going to give undue weight to the evidence; after considering all the factors under Tex. R. Evid. 403, the court held that the probative value of the injury was not substantially outweighed by the danger of unfair prejudice. Aguirre v. State, 2007 Tex. App. LEXIS 5556 (Tex. App. San Antonio July 18 2007).

1498. Court did not need to address defendant's claim that his statement to an investigator was not relevant as substantive evidence of guilt on the charged offense because the extraneous offenses were otherwise relevant under Tex. R. Evid. 404(b) to prove identity. Burton v. State, 230 S.W.3d 846, 2007 Tex. App. LEXIS 5540 (Tex. App. Houston 14th Dist. 2007).

1499. In a fraud action brought by the principals of a home health business against an investor, the testimony of the investor's prior business partner was admissible pursuant to Tex. R. Evid. 404(b) as proof of the investor's motive in seeking involvement with the business, his intent to commit fraud by association with the business, and his plan for gaining control over the business's financial affairs and siphoning off the business's assets. The prior business partner testified that he had also sued the investor for fraud under circumstances very similar to those in the underlying case. Rogers v. Alexander, 244 S.W.3d 370, 2007 Tex. App. LEXIS 5103 (Tex. App. Dallas 2007).

1500. In a capital murder case, evidence of appellant's gang affiliation was properly admitted pursuant to Tex. R. Evid. 402 because it was relevant pursuant to Tex. R. Evid. 401 and its probative value was not substantially outweighed by the danger of unfair prejudice as described in Tex. R. Evid. 403; there was ample evidence connecting appellant to the gang and their plan regarding the victim, and it included the gang's violent activities. Moreover, the evidence was not admitted to show that the murder was gang activity, but that it was predictable that a homicide would occur as the result of the conspiracy, in which some participants were violent gang members, to rob the victim. Arroyo v. State, 239 S.W.3d 282, 2007 Tex. App. LEXIS 5111 (Tex. App. Tyler 2007).

1501. Assuming arguendo that testimony regarding money found in defendant's glove box was evidence of an extraneous offense under Tex. R. Evid. 404, the evidence was relevant to assist the jury in assessing a defense witness's testimony and his credibility, as the jury could have determined that it was highly unlikely that defendant would have loaned his car that contained a large sum of money to this witness for a week as he claimed. Blanco v. State, 2007 Tex. App. LEXIS 5008 (Tex. App. El Paso June 28 2007).

1502. Defense counsel never invoked Tex. R. Evid. 403 or claimed that the probative value of evidence was outweighed by prejudice, and a Tex. R. Evid. 403 objection was not implicitly contained in a relevancy objection, which counsel did make, and thus the probative value/prejudice argument was not preserved for appeal. Blanco v. State, 2007 Tex. App. LEXIS 5008 (Tex. App. El Paso June 28 2007).

1503. Two photographs of defendant's tattoos were relevant under Tex. R. Evid. 401 to show a connection between defendant and the evidence of chemical precursors to drugs found in a backpack and were admissible on the element of possession in defendant's trial for possession of certain chemicals with intent to manufacture a controlled substance, to wit, methamphetamine, in violation of Tex. Health & Safety Code Ann. § 481.124, and the evidence also served to corroborate an officer's testimony that defendant acknowledged that the backpack was his; the jury could have disbelieved the officer's testimony but still found the requisite link between defendant and the

backpack, and the trial court did not abuse its discretion under Tex. R. Evid. 403 in finding the evidence admissible. Owen v. State, 2007 Tex. App. LEXIS 5083 (Tex. App. Austin June 27 2007).

1504. Defendant contended that the issue for the court was whether reversible error occurred because the jury heard defendant's wife's testimony regarding possible other crimes under Tex. R. Evid. 404(b), which could not have been disregarded, however, a mistrial could only be granted where there had been error first, and in this case, it would have been the jury hearing inadmissible evidence; defendant did not request or obtain a ruling on the admissibility of the evidence other than based on his motion in limine, and the trial court's ruling on that motion did not address the admissibility of the evidence, but only that a hearing would have to be held on admissibility before the State would be free to mention such matters; defendant's brief also did not challenge or address the admissibility of the statement in question, either in terms of relevance or unfair prejudice under Tex. R. Evid. 403, and without demonstrating that the statement in question was inadmissible, defendant's contentions that the trial court violated the motion in limine and the statement could not have been disregarded by the jury did not demonstrate that the trial court erred in denying his mistrial motion. Nitsche v. State, 2007 Tex. App. LEXIS 4926 (Tex. App. Houston 14th Dist. June 26 2007).

1505. In defendant's trial for attempted sexual assault, defendant's ex-girlfriend's application for a protective order was relevant under Tex. R. Evid. 401 because the application was some evidence that the ex-girlfriend no longer wanted a relationship with defendant and that the encounter with defendant was not consensual; any Tex. R. Evid. 403 objection was waived because it was not raised to the trial court and the Tex. R. Evid. 401 objection did not preserve the complaint under Tex. R. Evid. 403. Sapp v. State, 2007 Tex. App. LEXIS 4790 (Tex. App. Houston 14th Dist. June 21 2007).

1506. In defendant's trial for aggravated robbery, where identity was an issue, the trial court did not abuse its discretion in permitting several witnesses to disclose evidence of defendant's Oklahoma burglary at trial, and the acts undertaken during both offenses did not matter because the focus was on the identity between the weapons taken by defendant during the Oklahoma offense and later used at the Texas offense, and thus the extraneous burglary and the property taken during it was relevant to an element in dispute; because evidence of extraneous offenses was admissible to prove identity under Tex. R. Evid. 404(b) and evidence of the Oklahoma burglary furthered that purpose at bar, there was no abuse of discretion found. Edwards v. State, 228 S.W.3d 450, 2007 Tex. App. LEXIS 4848 (Tex. App. Amarillo 2007).

1507. In defendant's aggravated sexual assault on a child case, even if the trial court erred by admitting a statement defendant made to a witness regarding young women, the error was harmless; by the time the comment was admitted, the jury had already heard the victim's detailed testimony describing the sexual assault and defendant's wife's testimony regarding defendant's admission that he engaged in, at least, some sexual contact with the victim. Silva v. State, 2007 Tex. App. LEXIS 4720 (Tex. App. Houston 14th Dist. June 19 2007).

1508. Evidence of gang affiliation was properly admitted as relevant under Tex. R. Evid. 401 and Tex. R. Evid. 402 since it was offered to show a motive for a murder; the evidence was not limited under Tex. R. Evid. 404(b), and the probative value substantially outweighed the danger of unfair prejudice. Rodrigues v. State, 2007 Tex. App. LEXIS 4441 (Tex. App. Houston 14th Dist. June 7 2007).

1509. Defendant complained that the State did not produce a chain of custody for the videotape and the baseball bat; however, those exhibits were properly authenticated and there was no evidence that they had been tampered with; defendant also contended that her statements on the videotape and the testimony regarding the bat were irrelevant under Tex. R. Evid. 401, but the evidence was relevant if it had any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence; thus, the evidence was relevant, and the trial court properly denied defendant's motion to suppress that evidence. Barnes v. State, 2007

Tex. App. LEXIS 4502 (Tex. App. Austin June 7 2007).

1510. In a capital-murder trial, the perpetrator's videotaped statement, which was relevant and probative to the State's case, was not improperly admitted over the perpetrator's Tex. R. Evid. 403 objection, since the perpetrator did not overcome the presumption that the evidence was more probative than prejudicial since he admitted his direct involvement in causing at least one of the victim's stab wounds and starting the fire in her bedroom. Mata v. State, 2007 Tex. App. LEXIS 4505 (Tex. App. Fort Worth June 7 2007).

1511. Defendant's death sentence after being convicted of capital murder was appropriate, in part because the trial court did not err in admitting autopsy photographs since the medical examiner used the autopsy photographs to help explain his testimony about the victim's gunshot wounds. Saldano v. State, 232 S.W.3d 77, 2007 Tex. Crim. App. LEXIS 698 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1232, 128 S. Ct. 1446, 170 L. Ed. 2d 278, 2008 U.S. LEXIS 2119 (2008).

1512. In defendant's murder trial, testimony that a witness bought drugs from defendant out of his apartment was relevant because it rebutted the suggestion that defendant had no interest in any of the drugs that might have been stolen from the apartment, and the evidence was not subject to exclusion under Tex. R. Evid. 403 because (1) the testimony went to defendant's motive, (2) the testimony consisted of only two questions, (3) the State needed to establish a motive, and (4) the evidence was not likely to impress the jury in some irrational way. Freeman v. State, 230 S.W.3d 392, 2007 Tex. App. LEXIS 3965 (Tex. App. Eastland 2007).

1513. In a case involving injury to a child, there was no error in the State's admission of a golf club, similar to one found in defendant's apartment, to show that it could have been the type of weapon used to inflict injuries to a victim; the club had some probative value as demonstrative evidence. Lynch v. State, 2007 Tex. App. LEXIS 4107 (Tex. App. Amarillo May 23 2007).

1514. Defendant's wife's statements were testimonial because they served to establish or prove past events potentially relevant to later criminal prosecution, and thus an officer's testimony about the wife's out of court statements violated the Confrontation Clause, and the trial court erred in admitting them; because the officer was the only witness to testify at defendant's trial and the officer's testimony regarding the wife's statements provided evidence critical to establishing the elements of the offense of assault under Tex. Penal Code Ann. § 22.01, the court was unable to find that the error did not contribute to defendant's conviction, for purposes of Tex. R. App. P. 44.2. Zapata v. State, 2007 Tex. App. LEXIS 3844 (Tex. App. Houston 1st Dist. May 17 2007).

1515. In a strict product liability action, the trial court properly excluded evidence regarding the drug use and prior kidnapping conviction of the deceased, an individual involved in a vehicle accident, because the evidence added nothing to the central issue of the trial, the design defect of a seat belt buckle, and the risk of unfair prejudice greatly outweighed the probative value of the evidence. The vehicle manufacturer did not establish that the exclusion of the evidence probably resulted in an incorrect judgment. AlliedSignal, Inc. v. Moran, 231 S.W.3d 16, 2007 Tex. App. LEXIS 3883, CCH Prod. Liab. Rep. P17758 (Tex. App. Corpus Christi 2007).

1516. In a case involving the sexual abuse of a child, a trial court did not err by allowing the introduction of evidence that a young victim saw defendant having sexual relations with his own sister around the time of an alleged abuse incident because this was relevant since it was similar to the charged offense; moreover, it rebutted a defensive theory that family members had conspired to frame defendant. Belt v. State, 227 S.W.3d 339, 2007 Tex. App. LEXIS 3749 (Tex. App. Texarkana 2007).

1517. In defendant's aggravated sexual assault case, the mere fact the complainant might have had intercourse with defendant's nephew did not rebut the scientific proof provided by the State showing a probability of greater

than 99.99 percent that defendant fathered the complainant's child. More importantly, paternity of the child did not bear on defendant's guilt. Reagan v. State, 2007 Tex. App. LEXIS 3589 (Tex. App. El Paso May 10 2007).

1518. Defendant objected to certain evidence on relevancy grounds, but not on grounds under Tex. R. Evid. 404(b), and nothing in the record indicated that the correct ground of exclusion was obvious to the trial judge or opposing counsel; because defendant's objection did not address the correct evidentiary basis for exclusion, which did not afford the trial judge a chance to rule on the issue, the argument was not preserved for appeal under Tex. R. App. P. 33. Washington v. State, 2007 Tex. App. LEXIS 3699 (Tex. App. Houston 1st Dist. May 10 2007).

1519. Trial court did not err in limiting the scope of defense counsel's cross-examination, for confrontation purposes; the court found that (1) certain testimony was cumulative under Tex. R. Evid. 403, (2) counsel's proffered question sought evidence to rebut testimony that the victim was a fun person, not to show another pertinent fact, such as defendant's assertion that he acted in self-defense, for purposes of Tex. R. Evid. 404, and (3) whether the witness took a gun from defendant was irrelevant under Tex. R. Evid. 401. Jones v. State, 2007 Tex. App. LEXIS 3527 (Tex. App. Beaumont May 9 2007).

1520. In defendant's trial for burglary of a habitation with intent to commit sexual assault in violation of Tex. Penal Code Ann. § 30.02, evidence regarding defendant's prior sexual assault was relevant to prove the instant victim's lack of consent and defendant's intent to commit sexual assault only to the extent that the extraneous offense and the charged offense were shown to have been sufficiently similar to have invoked the doctrine of chances, and the trial court did not abuse its discretion in ruling that the similarities warranted admission of the extraneous offense under Tex. R. Evid. 404(b) and that the probative value of the evidence outweighed the danger of unfair prejudice; however, the State failed to introduce all the proffered evidence regarding the similarities between the charged and extraneous offenses on which the relevance of the extraneous offense depended, and had defendant moved to strike and the trial court overruled the motion, it was possible that reversible error would have been presented, but defendant did not renew the objection or move to strike, and the court had to conclude that any error in the admission of the testimony in question was not preserved for review. MacKenzie v. State, 2007 Tex. App. LEXIS 3465 (Tex. App. Austin May 3 2007).

1521. In a sexual assault case in which the complainants were an adult and a child, evidence that defendant possessed sex toys and nude photos was relevant and admissible under Tex. R. Evid. 402 for the purpose of showing how defendant was grooming the complainants, and this evidence was not overly prejudicial under Tex. R. Evid. 403. Petronella v. State, 2007 Tex. App. LEXIS 3198 (Tex. App. Eastland Apr. 26 2007).

1522. Trial court properly excluded evidence of extraneous acts under Tex. R. Evid. 404(b) related to defendant's codefendant, as even if it was relevant, it was inadmissible for purposes of Tex. R. Evid. 403, given that the evidence, which did not amount to a "signature act" by codefendant, carried little probative weight and was highly prejudicial. Moore v. State, 2007 Tex. App. LEXIS 3209 (Tex. App. El Paso Apr. 26 2007).

1523. Assuming without deciding that certain evidence was relevant for a purpose other than to show character conformity, its relevance had to not be substantially outweighed by the danger of unfair prejudice; any relevance of the evidence of alleged prior violence and false police reports was outweighed by its danger of unfair prejudice, given that (1) the probative value, assuming there was some, was very limited, and (2) the jury was exposed to defendant's theory that the victim had a motive to lie, and thus the trial court did not err in excluding this evidence. Hudson v. State, 2007 Tex. App. LEXIS 2965 (Tex. App. Houston 14th Dist. Apr. 19 2007).

1524. Because defendant only objected to evidence on relevance grounds, and no separate Tex. R. Evid. 403 objection was specifically made to the trial court, that claim was waived. Sapp v. State, 2007 Tex. App. LEXIS 2875

(Tex. App. Houston 14th Dist. Apr. 17 2007).

1525. Application for a protective order was some evidence that the victim no longer wanted a relationship with defendant and that the encounter between the two was not consensual, and thus the trial court did not abuse its discretion in admitting the document over a relevancy objection in defendant's attempted sexual assault trial. Sapp v. State, 2007 Tex. App. LEXIS 2875 (Tex. App. Houston 14th Dist. Apr. 17 2007).

1526. Admission of another's indictment was relevant to material issues in the termination trial, whether the mother engaged in a course of endangering conduct and whether termination was in the child's best interests, and given that relevant evidence was admissible, the trial court did not err in admitting this testimony. In re G.C.F., 2007 Tex. App. LEXIS 2680 (Tex. App. Fort Worth Apr. 5 2007).

1527. In a father's termination case, the mother and father had a relationship and the mother had the requisite personal knowledge under Tex. R. Evid. 602 to testify as to whether the father was complying with his service plan; the issue was relevant, for purposes of Tex. R. Evid. 401, as to whether his parental rights were to be terminated and the admission of the mother's testimony was not error. In re G.C.F., 2007 Tex. App. LEXIS 2680 (Tex. App. Fort Worth Apr. 5 2007).

1528. For purposes of Tex. R. Evid. 404(b), the trial court did not err in admitting the testimony of a witness regarding defendant's admission that he had committed another murder because it was relevant to the issue of intent to rebut the defensive theory of accident in defendant's capital murder trial. Bookman v. State, 2007 Tex. App. LEXIS 2681 (Tex. App. Houston 1st Dist. Apr. 5 2007).

1529. Although a patient made an offer of proof, the patient failed to make any argument as to why evidence of a surgeon's reputation in the medical community and alleged mistreatment of other patients was improperly excluded or why it should have been admitted, and the patient failed to specify the purpose for which the evidence was offered; because both steps were required to avoid waiver, the patient failed to preserve certain issues for review. Montgomery v. Varon, 2007 Tex. App. LEXIS 2582 (Tex. App. Houston 14th Dist. Apr. 3 2007).

1530. Patient's claim that an expert's testimony concerning a radiologist's alleged mistreatment and misdiagnosis of patients other than the patient was not properly preserved for review, because although the patient included some evidence in this regard in an offer of proof, the patient failed to state why the evidence was improperly excluded or why it should have been admitted, and the patient failed to specify the purpose for which the evidence was offered; in any event, the trial court did not abuse its discretion in excluding this evidence given that the expert's testimony in one aspect amounted to pure speculation and the patient did not establish how the testimony was material to the radiologist's interpretation of certain scans, such that the trial court did not abuse its discretion in finding the testimony was not relevant under Tex. R. Evid. 401, or that even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Montgomery v. Varon, 2007 Tex. App. LEXIS 2582 (Tex. App. Houston 14th Dist. Apr. 3 2007).

1531. In defendant's trial for possession of more than 200 grams but less than 400 grams of a prohibited substance, methamphetamine, the court rejected defendant's claim of ineffective assistance of counsel, given that (1) counsel seemed to have a particular strategy, and nothing suggested that defendant was eligible for community supervision or that counsel was denied access to information, (2) there was nothing to suggest that certain evidence was relevant, (3) it was not shown or alleged that had counsel filed certain motions, the trial would have been affected, (4) defendant's brief failed to specify what defendant now alleged to have been the proper course of action, and the matter was inadequately briefed, and (5) an instructed verdict would have been improper, given the evidence that supported the State's version, and counsel was not ineffective for failing to do a useless thing. Duck

v. State, 2007 Tex. App. LEXIS 2587 (Tex. App. Texarkana Apr. 3 2007).

1532. No objection was lodged to the improper inquiry into a witness's extensive criminal history, the trial court had no chance to rule on its relevance, and it was clear that the failure to object waived error; because no objection was made, there was no error on the trial court's part in permitting the cross-examination to continue. Duck v. State, 2007 Tex. App. LEXIS 2587 (Tex. App. Texarkana Apr. 3 2007).

1533. In defendant's trial for attempted sexual assault, the trial court erred in admitting evidence of a prior conviction of indecency with a child, which was an extraneous offense, and while the conviction might have been relevant, such did not make it admissible, given that (1) the evidence was unnecessary because the acts currently charged spoke for themselves, (2) the probative value of the extraneous conviction was substantially outweighed by its prejudicial impact for purposes of Tex. R. Evid. 403, as the evidence had the potential for improperly influencing the jury and more than just a small amount of attention was focused on the extraneous crime, (3) given the victim's testimony, the need for the extraneous conviction was slight, and (4) the evidence was used in a way to illustrate a modus operandi, such that the use of the prior conviction had the risk of confusion or misinterpretation. Bjorgaard v. State, 220 S.W.3d 555, 2007 Tex. App. LEXIS 2514 (Tex. App. Amarillo 2007).

1534. Admission of an extraneous conviction amounted to harm under Tex. R. App. P. 44.2(b); while there was enough evidence to convict defendant of attempted sexual assault without the conviction, there was some contradictory evidence and the error involved the introduction of evidence, a prior conviction for indecency with a child, that was inherently inflammatory; although the trial court gave a limiting instruction, the relevance of the evidence was suspect and the court had little choice but to recognize the high likelihood that the prior conviction influenced one or more of the jurors. Bjorgaard v. State, 220 S.W.3d 555, 2007 Tex. App. LEXIS 2514 (Tex. App. Amarillo 2007).

1535. Court recognizes a distinction between relevance and admissibility: to be admissible, evidence must be relevant, but not all relevant evidence is admissible. Bjorgaard v. State, 220 S.W.3d 555, 2007 Tex. App. LEXIS 2514 (Tex. App. Amarillo 2007).

1536. Presence of defendant's DNA in a database was relevant to show how defendant became the focus of a police investigation for aggravated sexual assault. Mata v. State, 2007 Tex. App. LEXIS 2319 (Tex. App. Dallas Mar. 26 2007).

1537. While the court strongly questioned the State's need for including the evidence, allowing testimony that defendant's DNA profile was found in a database was not an abuse of discretion on the trial court's part for purposes of Tex. R. Evid. 403; the court found that (1) although relevant to show how police focused their attention on defendant, the evidence was not necessary to show a fact of consequence in proving defendant committed the aggravated sexual assault, (2) the testimony had the potential to impress the jury in an irrational manner, but the testimony that the database was analogous to a fingerprint database that held government employees' fingerprints prevented the court from reaching the conclusion that the jury was irrationally impressed, and (3) the time the State needed to develop the evidence was minimal. Mata v. State, 2007 Tex. App. LEXIS 2319 (Tex. App. Dallas Mar. 26 2007).

1538. Defendant objected that certain photographs and his wallet were irrelevant and should not have been admitted into evidence; however, defendant did not attempt to explain how the wallet and pictures harmed him, other than to generally say that harm was evidenced by his lengthy punishment. That explanation is insufficient; thus, defendant's complaints with regard to those exhibits were overruled. Arnold v. State, 2007 Tex. App. LEXIS 2187 (Tex. App. Corpus Christi Mar. 22 2007).

1539. Evidence was factually sufficient to support defendant's capital murder conviction; the testimony of the doctors, that the death of the baby was not an accident, was compelling and the evidence of how defendant interacted with his own children had little if any relevance to his conduct with the baby. Lewis v. State, 2007 Tex. App. LEXIS 2256 (Tex. App. Eastland Mar. 22 2007).

1540. For purposes of Tex. R. Evid. 404(b), the trial court did not err in admitting testimony that defendant molested the child victim's cousin; the cousin's testimony served to rebut defendant's conspiracy theory and lack of opportunity theory in his trial for indecency with a child, and although the testimony regarding defendant's extraneous offense would have been inadmissible character evidence if offered to prove that defendant acted in conformity therewith in the present case, the cousin's testimony was relevant for at least two permissible purposes. Maldonado v. State, 2007 Tex. App. LEXIS 2276 (Tex. App. Fort Worth Mar. 22 2007).

1541. Trial court did not err in overruling defendant's objection to the admission of a police "money log" from defendant's arrest, as the form showed that the cataloging process described by a detective was what happened, and an unknown signature at the bottom of the form did not place the accuracy of the report by the seizing officers in question, nor did the signature affect the log's relevance, which tended to prove that defendant was involved in buying or selling amounts of contraband for purposes of defendant's trial for unlawful possession of cocaine with intent to distribute; Tex. R. Evid. 803 did not require a business record to be sponsored by its custodian, as defendant claimed. Dixon v. State, 2007 Tex. App. LEXIS 2110 (Tex. App. Dallas Mar. 20 2007).

1542. Certain exhibits of handguns were relevant in defendant's trial for aggravated robbery and aggravated assault, for purposes of Tex. R. Evid. 401, to the determination of defendant's guilt; while the handguns might not have actually been used in the robbery, they tended to make it more probable that defendant was able to arm himself and codefendants on the night in question. Denton v. State, 2007 Tex. App. LEXIS 1706 (Tex. App. Tyler Mar. 7 2007).

1543. Absent a showing of relevance, coupled with a Tex. R. Evid. 404 exception, the Texas Rules of Evidence do not permit the defendant to show prior specific acts to demonstrate that the victim is a bad person. Oliver v. State, 2007 Tex. App. LEXIS 1732 (Tex. App. Beaumont Mar. 7 2007).

1544. Defendant's use of a knife was a threat of force, for purposes of Tex. Penal Code Ann. § 9.04 and there was no evidence that the victim used or attempted to use unlawful force on the day of the incident and thus the history of altercations between the parties did not tend to show that defendant was legally justified in threatening the victim under Tex. Penal Code Ann. § 9.31(a); furthermore, defendant did not argue any exceptions to the general rule prohibiting testimony about prior specific acts under Tex. R. Evid. 404(b), and thus defendant failed to show of the evidence was relevant to the charged conduct under Tex. Penal Code Ann. § 22.02 and the exclusion of the evidence was not error. Oliver v. State, 2007 Tex. App. LEXIS 1732 (Tex. App. Beaumont Mar. 7 2007).

1545. Even though the trial court erred by admitting into evidence during defendant's aggravated sexual assault trial photographs of defendant, his co-defendant, and his roommate having sex, appearing to be intoxicated, and flashing a gang sign, the error was harmless because: (1) the photographs of defendant and the two others partying were not scandalous or shocking, but were innocuous in comparison to the photographs of the complainant and other women, who were naked and unconscious; (2) except for one comment during closing arguments, the State did not emphasize the evidence; (3) there was very little contemporaneous testimony concerning the photographs when they were admitted into evidence; and (4) the jury was manifestly able to consider the probative evidence and separate it from marginally relevant evidence because it acquitted the co-defendant and convicted defendant of the lesser-included offense of sexual assault. Casey v. State, 215 S.W.3d 870, 2007 Tex. Crim. App. LEXIS 230 (Tex. Crim. App. 2007).

1546. Appellate court considers rulings on relevance and Tex. R. Evid. 403 objections under an abuse of discretion standard. Gore v. State, 2007 Tex. App. LEXIS 1124 (Tex. App. Houston 14th Dist. Feb. 15 2007).

1547. In a driving while intoxicated case, a court did not abuse its discretion in admitting the portion of a videotape that contained defendant's statements regarding Xanax and Valium because defendant's statement that he took the medications was in response to a question by the officer, and the question was relevant as a predicate inquiry to the administration of a field sobriety test. Layton v. State, 263 S.W.3d 179, 2007 Tex. App. LEXIS 1191 (Tex. App. Houston 1st Dist. 2007).

1548. Defendant argued that the trial court erred in admitting the testimony of a probation officer, but because defendant failed at first to object to the officer's expertise or lack thereof, the trial court did not have a chance to assess the complaint, and defendant's objections to a question and answer preserved only the asserted complaints of relevance and invading the jury's province, for purposes of Tex. R. App. P. 33, and there was no reason for a late objection to the officer's lack of expertise; notwithstanding any preservation issues, the record showed no abuse of discretion by the trial court in admitting the officer's testimony under Tex. R. Evid. 702 because the trial court could have found that the officer was qualified, given the officer's experience, to testify on the subject matter. Merito v. State, 2007 Tex. App. LEXIS 827 (Tex. App. Fort Worth Feb. 1 2007).

1549. Trial court did not abuse its discretion by requiring appellant, who was on trial for capital murder, to display his gang-related tattoo to the jury because the tattoos were admissible to prove the "criminal street gang" element of the offense, and their probative value was not outweighed by the danger of unfair prejudice. Garza v. State, 213 S.W.3d 338, 2007 Tex. Crim. App. LEXIS 98 (Tex. Crim. App. 2007).

1550. In defendant's murder trial, the trial court did not err in admitting evidence of defendant's connection to a street gang, as it was relevant under Tex. R. Evid. 401 and not unduly prejudicial under Tex. R. Evid. 403; the evidence was relevant to rebut the claim that defendant was not a violent person and tended to make it more probable that defendant was willing to use deadly force in situations where defendant was not directly threatened with serious injury or death, and defendant's willingness to use deadly force made it more probable than not that defendant was not acting in self defense when the victim was shot; the likelihood that the evidence impressed the jury in an irrational way was slight, the evidence was not graphic and defendant never admitted to being a gang member, the State's need for the evidence was high, and the time needed to develop the evidence was minimal. Alvarez v. State, 2007 Tex. App. LEXIS 386 (Tex. App. Fort Worth Jan. 18 2007).

1551. Photograph of the complainant's children was relevant to the case where, at trial, the complainant and her sister testified the complainant's two young daughters were in the car at the time of the shooting, while other witnesses claimed they did not see the girls in the car. The photograph showed the girls' size at the time of the offense and allowed the jury to evaluate whether the children would be visible in the car, particularly if they had ducked down when the shooting began. Brown v. State, 2007 Tex. App. LEXIS 237 (Tex. App. Dallas Jan. 12 2007).

1552. In defendant's trial for aggravated sexual assault of a child conviction, evidence that those who interviewed the child were trained to ask open-ended and non-leading questions was relevant under Tex. R. Evid. 401 and made defendant's theory of fabrication less likely, and thus was not improperly admitted. Gauna v. State, 2006 Tex. App. LEXIS 11128 (Tex. App. Austin Dec. 29 2006).

1553. Defendant's conviction for aggravated robbery was appropriate because extraneous-offense evidence was relevant since the trial court could have reasonably concluded that the evidence compellingly served to make it more probable that the identification of the robber as defendant was accurate. Leija v. State, 2006 Tex. App. LEXIS

10966 (Tex. App. Houston 1st Dist. Dec. 21 2006).

1554. Defendant did not attempt to introduce evidence showing that a witness was unavailable or that defendant made diligent attempts to contact the witness, and thus defendant failed to establish prejudice, for speedy trial purposes, based on the unavailability of the witness, as well as the materiality and relevance of the witness's testimony; although defendant asserted the missing witness would have impeached an officer's testimony by countering assertions that the witness was intoxicated, this line of testimony was already deemed irrelevant. Davies v. State, 2006 Tex. App. LEXIS 11159 (Tex. App. Fort Worth Dec. 21 2006).

1555. In an aggravated robbery case, the court properly allowed the State to present a witness's testimony that defendant had robbed her at gunpoint at a time when defendant's witness testified that he was working for her because the testimony had significant potential value to prove that defendant's alibi witness was not truthful; in light of the instructions given, the evidence did not have the potential to impress the jury in an irrational way, and no other evidence except the witness's significantly assisted the State in contradicting the account of defendant's whereabouts. Davis v. State, 214 S.W.3d 101, 2006 Tex. App. LEXIS 10866 (Tex. App. Beaumont 2006).

1556. Extraneous offense testimony was relevant under Tex. R. Evid. 401 to the issue of identity and was admissible to prove that defendant posed as a police officer and sexually assaulted a prostitute; the facts of the charged offense and the extraneous offenses showed a pattern of conduct sufficiently distinctive to constitute a signature. Page v. State, 2006 Tex. Crim. App. LEXIS 2521 (Dec. 20, 2006).

1557. Trial court did not err in denying defendant's motion for a continuance and by excluding the transcript of an expert's pretrial testimony because the expert's testimony was irrelevant to the knowledge of consent issue in defendant's trial for debit card abuse in violation of Tex. Penal Code Ann. § 32.31(b)(1)(A) and unauthorized use of a motor vehicle in violation of Tex. Penal Code Ann. § 31.07(a); what the expert suggested regarding defendant's manic episode was not relevant to whether defendant believed at the time of the offense that the victim consented to defendant's use of the ambulance and debit card, there is no analogy to Tex. Code Crim. Proc. Ann. art. 38.36(a) that makes mental illness evidence relevant to prosecutions for debit card abuse and unauthorized use of a motor vehicle, and the expert's testimony did not tend to negate the culpable mental state for the offense but provided an excuse or explanation for defendant's intentional acts. Fleece v. State, 2006 Tex. App. LEXIS 10631 (Tex. App. Fort Worth Dec. 14 2006).

1558. Evidence of other contraband that police officers found in the room and evidence of the drugs found on the person of defendant's girlfriend, found while executing a search warrant was admissible when defendant was charged with possession of methadone that was found in the room because the evidence tended to establish the requisite affirmative link to the contraband. Davis v. State, 2006 Tex. App. LEXIS 10721 (Tex. App. Eastland Dec. 14 2006).

1559. Testimony about when and how defendant left the state tended to show that it was more likely defendant left in response to the victim's outcry and defendant's departure made the existence of some consciousness of guilt more probable, such that the evidence was relevant under Tex. R. Evid. 401; although defendant testified to intending to return, defendant did not and acknowledged leaving a school maintenance job because of the allegations, and the trial court did not err in finding that the value of the testimony about defendant's departure was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Horton v. State, 2006 Tex. App. LEXIS 10521 (Tex. App. Fort Worth Dec. 7 2006).

1560. Because defendant made no objection based on relevance, defendant forfeited the complaint for failure to comply with Tex. R. App. P. 33.1. Horton v. State, 2006 Tex. App. LEXIS 10521 (Tex. App. Fort Worth Dec. 7

2006).

1561. In an aggravated assault and aggravated sexual assault case, pursuant to Tex. R. Evid. 401, the trial court did not abuse its discretion by admitting testimony of a victim's former sexual partner that the victim had not engaged in sadomasochistic activities with her former partner prior to or after defendant's assault as it was relevant to determine whether she consented to sexual encounter and to having defendant brand his initials on her buttocks. Reed v. State, 2006 Tex. App. LEXIS 10107 (Tex. App. Houston 1st Dist. Nov. 22 2006).

1562. Although a medical study referred to by a doctor in his testimony at defendant's trial for aggravated sexual assault of a child under the age of 14 involved females older than the complainant and under different circumstances, the evidence was relevant because the doctor was in the best position to explain to the jury why the genitalia of sexually abused victims often exhibited no physical signs of penetration, and he tied the study to his earlier conclusion that he was not surprised about the lack of physical evidence of penetration in the complainant's genital examination, which assisted the trier of fact to understand the lack of physical evidence; the testimony showed that the farther away in time the examination was from the abuse, the less likely there would be physical evidence of penetration, and, accordingly, the trial court properly admitted the testimony. Whitfield v. State, 2006 Tex. App. LEXIS 9726 (Tex. App. Dallas Nov. 9 2006).

1563. Trial court did not err in admitting extraneous sexual offense evidence under Tex. R. Evid. 404 as such was admissible to show opportunity and an essential element, and by presenting his activities on the day in question to show a lack of opportunity to commit the crime, defendant opened the door to admission of the evidence. Morales v. State, 2006 Tex. App. LEXIS 11350 (Tex. App. Corpus Christi Nov. 9 2006).

1564. In defendant's trial for the capital murder of his 14-month-old stepdaughter, the trial court did not err by admitting autopsy photographs because photographs were relevant and probative because they revealed the nature and extent of the stepdaughter's injuries which were not otherwise apparent and established the intentional and knowing manner in which she was killed. Dismuke v. State, 2006 Tex. App. LEXIS 9613 (Tex. App. Dallas Nov. 7 2006).

1565. Because a corporation conceded that it did not test a car seat for rollovers, that issue was not rendered more or less probable if the corporation also failed to do rollover testing of high chairs or strollers, under Tex. R. Evid. 401. In re Graco Children's Prods., 210 S.W.3d 598, 2006 Tex. LEXIS 1073, 50 Tex. Sup. Ct. J. 87 (Tex. 2006).

1566. In the slaughterhouses' appeal of the trial court's issuance of a permanent injunction and award of expenses to the State, pursuant to Tex. Health & Safety Code Ann. § 433.099, the appellate court rejected the slaughterhouses' claim that the trial court erred by admitting the State's exhibits, which included photographs depicting conditions both inside and outside the slaughterhouse during the inspections, because evidence that tends to make the slaughterhouses' past or continued violations more or less probable was relevant to the issue of whether conduct constituting violations should be enjoined and was admissible, as provided in Tex. R. Evid. 401. Qaddura v. State, 2006 Tex. App. LEXIS 9209 (Tex. App. Fort Worth Oct. 26 2006).

1567. In a robbery case, evidence from a videotape that defendant convinced an accomplice to claim the gun was his was properly admitted because defendant's participation was hotly contested at trial, the State needed to show the relationship between the two men and to show that defendant had influence over the accomplice, the evidence showed that defendant had a significant effect on the accomplice, and it supported testimony that defendant planned the robbery; in addition, the time spent introducing the evidence and developing the link was not substantial, taking approximately fifty pages of a twelve-hundred sixty-six page record on guilt/innocence. Smith v.

State, 2006 Tex. App. LEXIS 9116 (Tex. App. Dallas Oct. 24 2006).

1568. In defendant's criminal street gang case, defendant's prior conviction for aggravated assault, as well as other extraneous offenses, was properly admitted because evidence showing that defendant stabbed an African-American security guard who interfered when defendant and several other men were beating a Hispanic man was both relevant and highly probative; although the evidence was prejudicial in that it rebutted the defense effort to portray defendant as reformed, the jury had already heard graphic testimony from numerous witnesses about the assault, providing ample proof of defendant's propensity for brutal behavior. Chaddock v. State, 203 S.W.3d 916, 2006 Tex. App. LEXIS 8861 (Tex. App. Dallas 2006).

1569. Where defendant was charged with intoxication manslaughter and aggravated assault following a vehicular accident, the State's chemist was permitted to give expert testimony concerning the presence of a cocaine metabolite in defendant's blood and the effect of cocaine withdrawal; the evidence was relevant to the State's theory that defendant was fatigued and sleepy, because he was suffering withdrawal from cocaine. Bannister v. State, 2006 Tex. App. LEXIS 8522 (Tex. App. Amarillo Sept. 29 2006).

1570. For purposes of Tex. R. Evid. 404(b), the State argued that defendant's conduct in providing a police officer with a false name was admissible as evidence of consciousness of guilt, and the trial court could have reasonably believed that the evidence was relevant to show defendant's knowledge that a crime had been committed and that defendant was a likely suspect in the aggravated assault. Gray v. State, 2006 Tex. App. LEXIS 8128 (Tex. App. Fort Worth Sept. 14 2006).

1571. Trial court did not err in permitting the State to question defendant about an extraneous offense because defendant opened the door to the admission of the evidence that defendant was the aggressor in an altercation in prison when defendant claimed not to be the aggressor in the present altercation, in defendant's trial for aggravated assault; the extraneous offense evidence that defendant allegedly assaulted an inmate became relevant to rebut defendant's defense. Gray v. State, 2006 Tex. App. LEXIS 8128 (Tex. App. Fort Worth Sept. 14 2006).

1572. Defendant objected to the introduction of an autopsy photograph under relevance and prejudice grounds, and the objection was sufficient to preserve error because the specific grounds were apparent from the context of the objection. Lewis v. State, 2006 Tex. App. LEXIS 8141 (Tex. App. Waco Sept. 13 2006).

1573. Tex. R. Evid. 401 is "helpful" to determine relevancy under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a). Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

1574. Although defendant claimed that a trial court erred in not allowing him to cross-examine his arresting officer concerning another officer's relationship with a former girlfriend of defendant, there was no evidence presented of any bias or prejudice on the part of the arresting officer, only that six months after the incident he became aware that a fellow officer was dating a woman who had a relationship with defendant; having established no possible bias or prejudice, defendant had not shown that the evidence was relevant or that the trial judge abused his discretion by failing to allow testimony of the post-arrest knowledge obtained by the arresting officer. Waldrop v. State, 2006 Tex. App. LEXIS 8017 (Tex. App. Fort Worth Sept. 7 2006).

1575. Evidence of defendant's prior conviction for delivering drugs was admissible where, through his questioning of a defense witness, defense counsel had sought to paint defendant as a "white knight" not involved with drugs, thereby creating a false impression before the jury; by doing so, defendant opened the door to testimony to correct that false impression, and the prosecutor could only correct that false impression by cross-examination of the witness who created it. Jones v. State, 2006 Tex. App. LEXIS 7917 (Tex. App. Dallas Sept. 5 2006).

1576. Counsel could have anticipated that evidence of prior incarcerations and past drug activity would have come in anyway, for purposes of Tex. R. Evid. 404(b), given that the current offense of felony murder under Tex. Penal Code Ann. § 19.02(b)(3) arose out of a drug transaction, and thus evidence related to defendant's past involvement with drugs was directly related to the offense and was relevant; the court also found that had counsel objected, it was unlikely that the trial court would not have allowed the evidence to be admitted and the court rejected defendant's claim of ineffective assistance of counsel in this regard. Saint James v. State, 2006 Tex. App. LEXIS 7649 (Tex. App. Austin Aug. 31 2006).

1577. Compensatory and exemplary damage award entered in favor of the property owner was proper because the evidence that showed his neighbor's consultant harassed and intimidated the owner was relevant, as required by Tex. R. Evid. 401, to the issue of whether the neighbor or her agent maintained a nuisance with malice; the record contained evidence that the consultant, on the neighbor's behalf, went beyond "litigation tactics" in attempting to harass and intimidate the property owner and third parties, as part of a scheme to maintain the nuisance and delay the litigation. Reed v. Hepker, 2006 Tex. App. LEXIS 7654 (Tex. App. Austin Aug. 31 2006).

1578. Trial court properly excluded evidence of the apartment owner's prior lawsuit with the city because the evidence was not relevant to the question of whether or not the on-site apartment manager violated city ordinances when she did not have a certificate of occupancy displayed for the complex. Vargas v. State, 2006 Tex. App. LEXIS 7688 (Tex. App. Houston 1st Dist. Aug. 31 2006).

1579. Court disagreed that counsel was ineffective, and while counsel failed to call the authors of letters from treatment centers, the court presumed that the trial court was aware of the letters' contents and defendant failed to show how the authors would have testified to additional facts that would have been relevant to sentencing for possession of a controlled substance and fraudulent use or possession of identifying information; defendant did not overcome the presumption that counsel acted reasonably or that the result would have been different had the authors testified; the authors appeared to have presumed that defendant could have been put back on community supervision, but after the trial court adjudicated guilt, defendant was not eligible for such because the trial court found habitual offender notices true, for purposes of Tex. Penal Code Ann. § 12.42. Jamison v. State, 2006 Tex. App. LEXIS 7826 (Tex. App. Fort Worth Aug. 31 2006).

1580. Defendant failed to preserve, pursuant to Tex. R. App. P. 33.1, a complaint on the issue of an extraneous arrest and incarceration in alleged violation of Tex. R. Evid. 404(b); while defendant objected on grounds of relevance and Tex. R. Evid. 403, defendant did not object on the basis of Tex. R. Evid. 404, and the other objections did not address the correct evidentiary basis for the exclusion of the testimony and did not comport with the point of error raised on appeal. Jones v. State, 2006 Tex. App. LEXIS 7690 (Tex. App. Waco Aug. 30 2006).

1581. During a murder trial, the victim's mother identified a photograph of her son taken before the murder; the trial court did not abuse its discretion in admitting the photograph; the mother's identification had probative value in identifying the son as the victim. Brown v. State, 2006 Tex. App. LEXIS 7556 (Tex. App. Austin Aug. 25 2006).

1582. While defendant should have been allowed to question the arresting officer based on the field sobriety test manual regarding the horizontal gaze nystagmus test, the disallowance was not harmful under Tex. R. App. P. 44.2 because it did not prevent defendant from arguing that the horizontal gaze nystagmus test was improperly administered. Howell v. State, 2006 Tex. App. LEXIS 7558 (Tex. App. Austin Aug. 25 2006).

1583. Defendant's oral statements about a dream containing details of the victim's murder were properly admitted into evidence because they were inculpatory admissions that were probative of his guilt; the statements revealed his knowledge of details about the crime scene that had not been released to the public, particularly the location and position of the body inside the business; the probative value of defendant's statements was strong because

they constituted an admission against interest, revealing defendant's knowledge of the crime scene details not disclosed to the public; the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because the time used to develop the evidence during trial was relatively brief, the State's need for the evidence was high as the only other evidence linking defendant to the murder was DNA evidence, and it was the only direct evidence of defendant's intent to kill the victim rather than just sexually assault her. Dossett v. State, 216 S.W.3d 7, 2006 Tex. App. LEXIS 7428 (Tex. App. San Antonio 2006).

1584. In a trial for aggravated sexual assault, defendant's theory of defense was that the victim consented to the sexual encounter, and thus defendant placed his intent in issue and the extraneous offense evidence was relevant under Tex. R. Evid. 401 to show his intent; although defendant claimed the extraneous evidence was too remote, the court noted that Tex. R. Evid. 404 did not impose time limits, and thus the trial court did not err in admitting the evidence over defendant's objection. Hernandez v. State, 2006 Tex. App. LEXIS 7540 (Tex. App. Waco Aug. 23 2006).

1585. Summary judgment was granted to a psychiatrist in an action brought under the Texas Liability and Improvement Act, because experts did not establish causation based on the act of prescribing a drug to a patient, who later committed embezzlement and other forms of debauchery allegedly due to taking medication for attention deficit disorder; the evidence did not show that a psychiatrist had knowledge of an alleged propensity towards addictive behavior, expert testimony based on this conclusion was merely speculation and conjecture, and a trial court did not abuse the patient's due process rights by failing to consider the evidence under those circumstances. Price v. Divita, 224 S.W.3d 331, 2006 Tex. App. LEXIS 6929 (Tex. App. Houston 1st Dist. 2006).

1586. Trial court did not err in admitting blood alcohol concentration (BAC) evidence from tests that were taken 2 hours after defendant hit a pedestrian without expert testimony of retrograde extrapolation because other evidence was presented to jury from which it could decide if defendant was intoxicated at the time of the accident; defendant admitted to drinking, a officer testified that he observed signs of intoxication and administered sobriety tests, and defendant's BAC of 0.18 was over twice the amount determined by the legislature for a person to be intoxicated per se in Texas under Tex. Penal Code Ann. § 49.01(2)(B); defendant's BAC was only one piece in the "evidentiary puzzle" for the jury's consideration and, as such, was relevant to the issue of intoxication and admissible. Christ v. State, 2006 Tex. App. LEXIS 6585 (Tex. App. Beaumont July 26 2006).

1587. Evidence of a judgment that terminated defendant's parental rights to three of her children after the date that she allegedly murdered her newborn infant was relevant at her capital murder trial under Tex. R. Evid. 401, and had relevance apart from mere proof of character conformity in compliance with Tex. R. Evid. 404(b), because an extraneous offense/bad act that took place subsequent to the offense for which a defendant was on trial did not make the extraneous offense/bad act inadmissible per se; furthermore, the judgment was introduced by the State after defendant had testified that the infant's death on the night in question was not the result of any intentional or knowing conduct on defendant's part, and the termination judgment contained findings by the trial judge that defendant "knowingly" placed or allowed her other children to remain in conditions dangerous to their physical or emotional well-being, which at least arguably made it more probable that defendant's acts or omissions on the night in question were done either intentionally or knowingly. Fergerson v. State, 2006 Tex. App. LEXIS 6589 (Tex. App. Beaumont July 26 2006).

1588. In an injury to a child case, testimony about whether defendant cried when he saw the mother while he was at Navy Boot Camp tended to show what his relationship with the mother was like before she became pregnant; testimony about defendant's sexual relationship with the mother before, during, and after her pregnancy tended to show how defendant's physical relationship with the mother deteriorated after she became pregnant and gave birth; and testimony about defendant's indifference about whether the mother kept the baby or not tended to show defendant's apathy or malice towards the child; all of that evidence supported the State's theory about defendant's motive, and was therefore relevant. Lopez v. State, 200 S.W.3d 246, 2006 Tex. App. LEXIS 9199 (Tex. App.

Houston 14th Dist. 2006).

1589. Trial court did not err in admitting into evidence during the punishment phase of defendant's trial for possession of less than one gram of a controlled substance in violation of Tex. Health & Safety Code Ann. § 481.115 a photograph of defendant's tattoo suggesting gang-related activity; such evidence was relevant because it related to defendant's character, which was admissible during the punishment phase pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). Lecourias v. State, 2006 Tex. App. LEXIS 6442 (Tex. App. Houston 1st Dist. July 20 2006).

1590. Where defendant was on trial for possessing or transporting chemicals with the intent to manufacture methamphetamine, the trial court did not err in admitting photographs which showed a vapor cloud spraying from canisters found in defendant's car over defendant's Tex. R. Evid. 403 objection as they were not so alarming in nature that they would have clouded the jury's mind with fear; instead, they provided a visual depiction of the disposal methods described through police testimony, and were relevant to police officers' belief that the canisters contained anhydrous ammonia. Daigger v. State, 2006 Tex. App. LEXIS 5846 (Tex. App. Austin July 7 2006).

1591. Trial court rejected defendant's claim of ineffective assistance of counsel because his counsel's objection was not beyond the scope of reasonable trial strategy. Goshorn v. State, 2006 Tex. App. LEXIS 5453 (Tex. App. Houston 14th Dist. June 27 2006).

1592. In a driving while intoxicated case, a court erred in refusing to allow defendant to cross-examine the arresting officer with a field sobriety test manual concerning the horizontal gaze nystagmus test because the portion of the manual regarding whether optokinetic nystagmus, which was not caused by alcohol consumption, might be caused by watching quickly moving objects was relevant. Howell v. State, 2006 Tex. App. LEXIS 5343 (Tex. App. Austin June 23 2006), substituted opinion at, opinion withdrawn by 2006 Tex. App. LEXIS 7558 (Tex. App. Austin Aug. 25, 2006).

1593. In defendant's capital murder trial, autopsy photographs showed the wounds that caused the deaths of the victims, and thus the photographs were relevant under Tex. R. Evid. 401 in the guilt/innocence phase. Singleton v. State, 2006 Tex. App. LEXIS 5318 (Tex. App. Dallas June 22 2006).

1594. Judgment convicting defendant of aggravated sexual assault, indecency with a child by exposure, and indecency with a child by contact was affirmed; the trial court did not err in refusing to admit the testimony of a doctor who defendant had not designated as an expert where the doctor's testimony was not direct rebuttal to a nurse's testimony; the doctor's testimony was on a collateral issue and was not relevant under Tex. R. Evid. 401. Cunningham v. State, 2006 Tex. App. LEXIS 5400 (Tex. App. Eastland June 22 2006).

1595. In a trial for driving while intoxicated, evidence of defendant's medical condition, including that she had lupus and allergies, was properly excluded on the basis that there was no expert medical testimony as to what effect the medicines that she was taking would have on a person's conduct or condition, or on a person's normal use of mental and physical faculties; the proffered evidence was properly subject to a relevancy objection because it was a self-serving, sympathy-provoking recitation of her health and current medication without any showing of a link or nexus to any fact that is of consequence. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

1596. In defendant's murder case, evidence of the history of physical abuse in the relationship between defendant and the victim was relevant and properly admitted; the extraneous-offense evidence rebutted defendant's claim of accident and showed that he intended to cause death, serious bodily injury, or bodily injury; in addition, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Brown v. State,

2006 Tex. App. LEXIS 5163 (Tex. App. Austin June 16 2006).

1597. In a case involving indecency with a child, a trial court erred by admitting photographs of the victim showing weight gain; however, the error was harmless considering the amount of inculpatory evidence against defendant. Dehart v. State, 2006 Tex. App. LEXIS 5111 (Tex. App. Amarillo June 14 2006).

1598. Because defendant's brief did not explain how a witness was qualified as an expert on blood alcohol concentration or how the testing methodology was scientifically reliable and relevant based on its similarity to the facts in issue, given the jury charge of intoxication in defendant's driving while intoxicated trial, the court had no basis to find that the trial court abused its discretion in excluding the testimony for purposes of Tex. R. Evid. 702. Evans v. State, 2006 Tex. App. LEXIS 5027 (Tex. App. Houston 14th Dist. June 13 2006).

1599. In defendant's sexual abuse of a child trial, expert testimony was relevant to correct defendant's potentially misleading argument, the expert was not permitted to give an opinion that the victim was sexually abused, and the expert was limited to testifying about whether the physical examination ruled out the possibility of abuse; because there was no indication that the expert's testimony was unfairly prejudicial or confusing, the trial court did not err in admitting the evidence under Tex. R. Evid. 403. Estes v. State, 2006 Tex. App. LEXIS 5028 (Tex. App. Houston 14th Dist. June 13 2006).

1600. Appellate court held the trial court did not abuse its discretion in excluding a statement defendant's mother made to the wounded officer that it was the drugs that made defendant shoot the officer as it was a collateral issue and not relevant under Tex. R. Evid. 401. Townsend v. State, 2006 Tex. App. LEXIS 4929 (Tex. App. Eastland June 8 2006).

1601. During defendant's trial for intoxication manslaughter, testimony about the difference between punishment for murder and intoxication manslaughter was relevant because it gave the jury complete information about how the punishment range for a particular criminal offense varies when a mental state is proven; defendant claimed that the collision was an accident or a mistake. Hackler v. State, 2006 Tex. App. LEXIS 4995 (Tex. App. Fort Worth June 8 2006).

1602. In defendant's retaliation trial under Tex. Penal Code Ann. § 36.06(a)(1)(A), the trial court did not abuse its discretion in sustaining the State's objection because the evidence defendant sought as to an officer's nicknames was irrelevant to the case; the contention that defendant's statements to the officer were justifiable because of the effect the nicknames had on him was not valid and did not excuse the fact that defendant committed retaliation, and there was no evidence that defendant's substantial rights were affected under Tex. R. App. P. 44. Garcia v. State, 2006 Tex. App. LEXIS 4708 (Tex. App. Corpus Christi June 1 2006).

1603. Trial court did not err when it allowed the introduction of defendant's threatening statement to a jailor relating to his release from prison under Tex. Code Crim. Proc. Ann. art. 37.07. § 3(a); this statement was highly relevant in assessing punishment for the attempted murder of police officers, and it was not unfairly prejudicial under Tex. R. Evid. 403. Espinosa v. State, 194 S.W.3d 703, 2006 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. 2006).

1604. Testimony of a witness not named in an indictment did not constitute irrelevant victim impact testimony because her reaction to witnessing the shooting of a police officer was admissible as circumstances of the crime under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a). Espinosa v. State, 194 S.W.3d 703, 2006 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. 2006).

1605. Court properly limited defense counsel's cross-examination of a State's witness where his question regarding whether the prosecutor told the witness she needed a different attorney was not relevant and did not reveal evidence having any tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would be without the evidence. Roda v. State, 2006 Tex. App. LEXIS 4475 (Tex. App. Corpus Christi May 25 2006).

1606. Considering the conflict in the testimony concerning when a letter from defendant to his wife was written, the trial court's determination that the letter was relevant to defendant's trial for assault did not constitute a clear abuse of discretion. Hernandez v. State, 205 S.W.3d 555, 2006 Tex. App. LEXIS 4426 (Tex. App. Amarillo 2006).

1607. In defendant's trial on charges of aggravated sexual assault of a child, the trial court did not err in excluding evidence concerning the victim's emotional stability because although defendant sought to introduce evidence for the stated purpose of showing that the victim was a troubled teen falsifying the charge to get attention from her mother, the evidence was not relevant in that it did not show a motive to lie, or show bias or prejudice. Baker v. State, 2006 Tex. App. LEXIS 4308 (Tex. App. Texarkana May 18 2006).

1608. Trial court did not abuse its discretion by determining that alleged threats made more than a year after defendant fled were not relevant to his state of mind at the time he fled. Reyes v. State, 2006 Tex. App. LEXIS 4160 (Tex. App. Houston 14th Dist. May 16 2006).

1609. In defendant's murder trial under Tex. Penal Code Ann. § 19.02, regarding testimony of an extraneous offense under Tex. R. Evid. 404(b) of an unrelated alleged murder, while the materiality of the testimony was problematic, the error, if any, was harmless under Tex. R. App. P. 44.2(b); defendant injected this killing in defendant's cross-examination of a witness, and defendant was not free to complain of invited error. Shabazz v. State, 2006 Tex. App. LEXIS 4025 (Tex. App. Corpus Christi May 11 2006).

1610. Notes written by defendant entitled "Plausible Deniability" were relevant during his murder trial because they demonstrated that he was so zealous to conceal evidence of the crime that he made a schedule for doing so; the title alone was significant, and the notes appeared to outline a schedule for obtaining supplies, dismembering the victim's body, and cleaning the scene. Williams v. State, 2006 Tex. App. LEXIS 4251 (Tex. App. Houston 14th Dist. May 11 2006).

1611. In an aggravated assault of a peace officer case, the trial court did not err in admitting the photographs of the officer, whose injuries were the basis for the arrest warrant, as the State did not wilfully withhold the photographs, defendant did not contend that he was surprised or otherwise disadvantaged by the introduction of the photographs, and whether defendant assaulted the officer was not at issue. Dunklin v. State, 194 S.W.3d 14, 2006 Tex. App. LEXIS 3596 (Tex. App. Tyler 2006).

1612. Earlier threats were relevant under Tex. R. Evid. 401 to support defendant's claim that defendant fled due to the threat, but the trial court did not abuse its discretion in finding that alleged threats made more than one year after defendant fled were not relevant to defendant's state of mind when defendant fled. Reyes v. State, 2006 Tex. App. LEXIS 3649 (Tex. App. Houston 14th Dist. Apr. 27 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 4160 (Tex. App. Houston 14th Dist. May 16, 2006).

1613. Because a witness testified to a sexual assault for three pages of the record before defendant objected, defendant forfeited the complaint, for purposes of Tex. R. App. P. 33.1; the court noted that defendant's complaint at trial was to relevance, but on appeal it was regarding prejudicial effect under Tex. R. Evid. 403, and the court assumed without deciding that defendant's complaint on appeal comported with the trial objection. Pippillion v.

State, 2006 Tex. App. LEXIS 3347 (Tex. App. Waco Apr. 26 2006).

1614. In a criminal prosecution for misdemeanor driving while intoxicated, the trial court did not err by refusing to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias. The issues defendant sought to explore had no relevance to the defense theory that the officer tended to act hasty or jump to conclusions at the crime scene without conducting a proper investigation. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

1615. Because an employee's request for relief from a contempt order based on an injunction was still pending before an appellate court at the time of trial, the contempt judgment against the employee was not final and therefore was inadmissible against the employee under Tex. R. Evid. 609(e); ultimately, the appellate court had determined that the trial court's injunction order was not clear and the court rejected appellees' attempt to parse the contempt proceedings and circumvent the final disposition of the contempt judgment, and therefore the trial court erred in admitting such evidence of contempt and the employee's resulting incarceration, as this information was not relevant under Tex. R. Evid. 401, and this error probably resulted in an improper judgment under Tex. R. App. P. 44.1(a) and was prejudicial under Tex. R. Evid. 403 because evidence of the contempt proceeding presented the jury with a clear indication of the judge's opinion, and it was too great of a risk that the evidence irreparably influenced the jury's decision. Houston v. Millennium Ins. Agency, Inc., 2006 Tex. App. LEXIS 3156 (Tex. App. Corpus Christi Apr. 20 2006).

1616. Because an employee's request for relief from a contempt order based on an injunction was still pending before an appellate court at the time of trial, the contempt judgment against the employee was not final and therefore was inadmissible against the employee. Houston v. Millennium Ins. Agency, Inc., 2006 Tex. App. LEXIS 3156 (Tex. App. Corpus Christi Apr. 20 2006).

1617. Trial court properly admitted the autopsy photographs of defendant's infant son because the injuries that caused the child's death were not immediately apparent and the photographs were relevant as required under Tex. R. Evid. 401. Martinez v. State, 2006 Tex. App. LEXIS 2985 (Tex. App. Dallas Apr. 13 2006).

1618. Because defendant's trial objection, that evidence was irrelevant and prejudicial under Tex. R. Evid. 401, 403, was different from defendant's appeal objection, that evidence was being used to improperly impeach a witness under Tex. R. Evid. 609, defendant waived error. Bedwell v. State, 2006 Tex. App. LEXIS 3248 (Tex. App. Houston 14th Dist. Apr. 13 2006).

1619. Because defendant's trial objection, that evidence was irrelevant and prejudicial under Tex. R. Evid. 401, was different from defendant's appeal objection, that evidence was being used to improperly impeach a witness under Tex. R. Evid. 609, defendant waived error. Bedwell v. State, 2006 Tex. App. LEXIS 3248 (Tex. App. Houston 14th Dist. Apr. 13 2006).

1620. Photographs used by defendant's opponent in a mayoral election referring to defendant's automobile accident were properly excluded from his trial on an intoxication assault charge because the tactics used by defendant's opponent were irrelevant to the issue of defendant's guilt. Rodriguez v. State, 191 S.W.3d 428, 2006 Tex. App. LEXIS 2841 (Tex. App. Corpus Christi 2006).

1621. Because defendant did not raise the issue of self-defense under Tex. Penal Code Ann. § 9.31(a), defendant failed to establish that his wife's prior acts were relevant, and thus the court rejected defendant's claim that the trial court erred in excluding extraneous offense evidence against his wife in defendant's trial for misdemeanor assault involving family violence. McRay v. State, 2006 Tex. App. LEXIS 2746 (Tex. App. Dallas Apr. 6 2006).

1622. Because questions sought information about the adult eyewitnesses and the juveniles at the playground where the aggravated assault took place, and sought no information about the adult victim or the victim's relationship with defendant, the trial court correctly held that the questions sought irrelevant evidence, and the court overruled defendant's claim that the trial court erred in excluding evidence of the relationship with the juveniles. Crochette v. State, 2006 Tex. App. LEXIS 2767 (Tex. App. Fort Worth Apr. 6 2006).

1623. Trial court did not err in permitting the motorist to testify over objection about the effects of the injuries on the motorist's ability to work; the evidence was relevant to the motorist's claims for pain and suffering and physical impairment. Nat'l Freight, Inc. v. Snyder, 191 S.W.3d 416, 2006 Tex. App. LEXIS 2833 (Tex. App. Eastland 2006).

1624. In defendant's capital murder case, the court properly admitted autopsy photographs of the victim where the photographs were taken before the autopsy procedure began and showed the condition of the body as it was received from the hospital; the photographs showed the bullet wound that testimony indicated was the cause of death, they illustrated that the victim was not otherwise bruised or injured as he would have been if there had been a fight before he was shot, and they showed no more than the nature of the victim's injury. Gray v. State, 2006 Tex. App. LEXIS 2363 (Tex. App. Dallas Mar. 29 2006).

1625. Defendant's testimony that others, while armed, threatened to immediately send people to harm defendant's family was sufficiently probative on the issue of whether the others threatened imminent death or serious bodily injury, for purposes of defendant's duress defense under Tex. Penal Code Ann. § 8.05(a), and the fact that the testimony did not provide more detail about the specifics of the threatened harm went to the weight of the testimony, not its admissibility. Hernandez v. State, 191 S.W.3d 370, 2006 Tex. App. LEXIS 2533 (Tex. App. Waco 2006).

1626. Messages retrieved from a murder victim's voicemail were not hearsay under Tex. R. Evid. 801 and were relevant under Tex. R. Evid. 401 because they were not offered to prove the truth of the matters asserted therein and they assisted the jury in establishing the time of the victim's death. White v. State, 2006 Tex. App. LEXIS 2224 (Tex. App. Houston 1st Dist. Mar. 23 2006).

1627. While the trial court's ruling accurately reflected the general limits placed on impeachment, the court found that defendant's wife, the victim, opened the door to impeachment evidence concerning her earlier plea in a domestic violence case because her testimony left a false impression concerning her past criminal history, and thus, the trial court's reliance on the general rule concerning remote evidence was misplaced in this case, and the trial court abused its discretion; the wife's denial was directly relevant to the offense charged of family violence and the defense raised to that charge, and the State was free to offer extrinsic evidence rebutting her statement. Winegarner v. State, 188 S.W.3d 379, 2006 Tex. App. LEXIS 2163 (Tex. App. Dallas 2006).

1628. Trial court did not err in admitting testimony regarding a threatening phone call made to a store manager, one of the victims, because the testimony had the effect of making defendant's identity more probable than if it had not been admitted, and thus was relevant under Tex. R. Evid. 401; the evidence was more probative than prejudicial given that the trial court minimized the prejudicial effect by refusing to allow the manager to testify of being told that defendant had connections to the mafia and the trial court gave limiting instructions. Garcia v. State, 2006 Tex. App. LEXIS 2041 (Tex. App. Houston 14th Dist. Mar. 16 2006).

1629. During defendant's trial for indecent exposure, the danger of unfair prejudice did not substantially outweigh the probative value of evidence that defendant walked around nude in front of his stepdaughters, masturbated in the presence of his stepdaughter, and inappropriately touched his stepdaughter because the evidence was probative to show defendant's intent and motive to sexually gratify himself in the presence of others and to rebut his

defensive theory of mistake. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

1630. During defendant's trial for indecent exposure, the trial court properly excluded evidence that the victim called the police regarding various disturbances at her residence on several occasions following the report of exposure because the decision was within the zone of reasonable disagreement; the trial court maintained broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative and collateral evidence, and, under Tex. R. Evid. 608(b), specific instances of conduct, other than conviction of a crime, when offered to attack the witness's credibility could not be explored on cross-examination. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

1631. Trial court did not err in admitting evidence of defendant's extraneous offense of failure to appear; defendant was aware of the trial setting but did not appear, which was indicative of flight, and the failure to appear had some relevance apart from character conformity under Tex. R. Evid. 404(b) because it tended to show defendant's consciousness of guilt. Mieth v. State, 2006 Tex. App. LEXIS 1895 (Tex. App. Fort Worth Mar. 9 2006).

1632. Trial court did not err when it admitted evidence that defendant had been seen selling drugs a month before her indicted offense of being a felon in possession of a firearm because the testimony, elicited from a witness present when the indicted offense was committed, was relevant and tended to make the existence of defendant's intent to possess a firearm more likely than not, as the witness testified that he knew of five prior occasions on which defendant sold crack cocaine and also commented that drug dealers were often armed to protect themselves from being robbed. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

1633. In an action in which a trial court awarded more than $ 2 million to a pedestrian for injuries she sustained when she was struck by a city transit bus driven by an employee of a transit authority contractor, the trial court did not err when it admitted into evidence the graphic photographs of the pedestrian's injuries; even though the driver objected to the admission of the photographs, any error was waived by the failure to object to testimony of the conditions depicted in those photographs; at trial, witnesses testified they saw the pedestrian in the crosswalk when she was struck and dragged by the bus, and the orthopedic trauma surgeon who treated the pedestrian when she arrived at the hospital and amputated her leg testified, without objection, about the nature and extent of her injuries. Castro v. Cammerino, 186 S.W.3d 671, 2006 Tex. App. LEXIS 1765 (Tex. App. Dallas 2006).

1634. Evidence that defendant was involved in a homosexual relationship with a woman was relevant under Tex. R. Evid. 401 in defendant's forgery trial under Tex. Penal Code Ann. § 32.21 and the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice pursuant to Tex. R. Evid. 403; the court was not convinced that the influence on the jury was indelible, the State used very little time to develop the evidence, and the State needed the evidence in order to prove either of its two theories of forgery, which made the evidence relevant. Davis v. State, 2006 Tex. App. LEXIS 1719 (Tex. App. Texarkana Mar. 2 2006).

1635. Autopsy photographs, depicting one victim and her fetus, were properly admitted in defendant's capital murder trial; the photographs were relevant to a contested issue in the case, whether the fetus was alive or dead at the time of the victim's death, and the trial court performed the proper balancing test under Tex. R. Evid. 403 and did not abuse its discretion. Rogers v. State, 2006 Tex. App. LEXIS 1609 (Tex. App. Dallas Mar. 1 2006).

1636. In an aggravated sexual assault case, testimony regarding the victim's sexual behavior after he was placed in foster care was relevant because it had a tendency to make more or less probable a fact of consequence at the guilt stage, specifically, whether defendant committed the crime at all. Pittillo v. State, 2006 Tex. App. LEXIS 1646 (Tex. App. Waco Mar. 1 2006).

1637. District court judge did not err in ordering disclosure of the names and addresses of other insured property owners whose claims were handled by the investigator that denied the insured homeowner's water damage claim because Tex. R. Civ. P. 192.3(e)(5) specifically provided that a party could discover any bias of the witness and did not contain any requirement that an expert's credibility must be an issue for evidence of the expert's potential bias to be discoverable; further, the insurer failed to show the names and addresses were not relevant as provided in Tex. R. Evid. 401 or that they were within any constitutionally protected zone of privacy. In re Kemper Lloyds Ins. Co., 2006 Tex. App. LEXIS 1602 (Tex. App. Tyler Feb. 28 2006).

1638. In a resisting arrest case, counsel was ineffective where, inter alia, counsel failed to investigate or interview defendant in detail about his criminal history or his prior contacts with the arresting officer; failed to seek discovery from the State; failed to file and obtain rulings on a motion in limine to require the State to raise extraneous matters outside the presence of the jury; failed to prepare defendant to testify; failed to object to evidence of inadmissible extraneous matters during the guilt phase; invited evidence of unadjudicated arrests during the punishment phase; and failed to object to failure of the punishment-phase charge to include a reasonable doubt instruction. Walker v. State, 195 S.W.3d 250, 2006 Tex. App. LEXIS 1381 (Tex. App. San Antonio 2006).

1639. Because much of the State's case termination of parental rights action under Tex. Fam. Code Ann. § 161.001(1)(E) was founded on the contention that one of the parents had abused one child, while the other did not prevent the abuse, the autopsy photographs were relevant to show that the child sustained multiple injuries that were not accidental, and the trial court could have found that the relevance of the photographs were not substantially outweighed by unfair prejudice, for purposes of Tex. R. Evid. 403. In re P.M., 2006 Tex. App. LEXIS 1429 (Tex. App. Amarillo Feb. 22, 2006).

1640. Defendant's extraneous contacts with another supposedly minor child on the Internet were clearly relevant to show that defendant, although he claimed he thought the minor child at issue was an adult who was just "playing with him," repeatedly contacted female children and wanted to engage in sexual relations with them; thus, the extraneous contacts were relevant to show defendant's knowledge, intent, and lack of mistake, for purposes of Tex. R. Evid. 404(b), and while the acts were prejudicial, the probative value was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Newberry v. State, 2006 Tex. App. LEXIS 1360 (Tex. App. Dallas Feb. 17 2006).

1641. Trial court did not abuse its discretion in excluding certain testimony as irrelevant in a hearing on defendant's motion for a new trial, considering the evidence in light of the remand order, the trial testimony, and the motion for a new trial record. Alvarado v. State, 2006 Tex. App. LEXIS 1183 (Tex. App. San Antonio Feb. 15 2006).

1642. In a capital murder case, a court properly admitted photographs of the victim's corpse where the photographs were probative of the crime scene and the injuries received by the victim, they were necessary for the State in developing its case, and, because they were not overly gruesome, the photographs did not pose the potential of impressing the jury in some irrational way. Shuffield v. State, 189 S.W.3d 782, 2006 Tex. Crim. App. LEXIS 365 (Tex. Crim. App. 2006).

1643. In a capital murder case, a court did not err by excluding testimony in mitigation of punishment regarding a history of family sexual abuse of multiple generations of children in defendant's family because the fact that others in defendant's family were abused did not by itself make him more or less morally culpable for the crime for which he was on trial, nor did it, by itself, make a jury's finding of mitigation any more or less probable than it would have been without the evidence. Shuffield v. State, 189 S.W.3d 782, 2006 Tex. Crim. App. LEXIS 365 (Tex. Crim. App. 2006).

1644. State argued that evidence regarding a burglary of a victim's home, for purposes of Tex. R. Evid. 404(b), explained defendant's motive to invade another's home armed, and was relevant to show that defendant and accomplices sexually assaulted other victims and murdered one of them to get revenge; the trial court did not abuse its discretion in concluding that the challenged evidence was relevant to the issue of motive in defendant's capital murder case. Russell v. State, 2006 Tex. App. LEXIS 1296 (Tex. App. Waco Feb. 15 2006).

1645. Evidence of abuse of three older children was relevant not only to support the trial court's endangerment finding under Tex. Fam. Code Ann. § 161.001(1)(E), but also to support the best-interest determination. Rochelle v. Dep't of Family & Protective Servs., 2006 Tex. App. LEXIS 1141 (Tex. App. Houston 1st Dist. Feb. 9 2006).

1646. Where defendant was convicted of intoxication manslaughter, the trial court did not err by admitting evidence of his prior driving record at the punishment phase; the evidence was relevant to sentencing, because it gave the jury a complete picture of defendant's driving history. Bernal v. State, 2006 Tex. App. LEXIS 1002 (Tex. App. San Antonio Feb. 8 2006).

1647. In a criminal prosecution for indecency with a child by sexual contact, evidence of defendant's flight was relevant to show guilt. Howard v. State, 2006 Tex. App. LEXIS 1083 (Tex. App. Waco Feb. 8 2006).

1648. In a murder case, the trial court did not abuse its discretion in excluding evidence because the evidence was not sufficient to show a nexus between the crime charged and the alleged alternate perpetrators. Michaelwicz v. State, 186 S.W.3d 601, 2006 Tex. App. LEXIS 952 (Tex. App. Austin 2006).

1649. Because a police officer's testimony concerning the environment and activities in and around the club at which defendant was arrested explained why the police officers were there and how defendant became a suspect, defense counsel's failure to object to that evidence was not sufficient to establish ineffective assistance of counsel; subject to certain exceptions not applicable to defendant's case, an officer's testimony explaining how he happened to be at the scene of a crime or accident would almost always be relevant. LeBleu v. State, 2006 Tex. App. LEXIS 887 (Tex. App. Beaumont Feb. 1 2006).

1650. For purposes of U.S. Const. amend. VI and Tex. R. Evid. 613(b), the trial court did not abuse its discretion in refusing to allow defendant to question a witness about another charge because the testimony established that that crime was unrelated to the instant offense and the trial court's ruling did not prevent defendant from pursuing all relevant avenues of cross-examination with the witness; an unrelated offense for which there was no evidence demonstrating the witness's involvement was not relevant. Gongora v. State, 2006 Tex. Crim. App. LEXIS 2531 (Tex. Crim. App. Feb. 1 2006).

1651. Because another crime was not related to the instant crime, and because the commission of that offense had no bearing on the plea agreement reached with one person, testimony about the the other crime was not relevant to defendant's trial, and the trial court's ruling did not violate defendant's federal confrontation rights and the trial court did not abuse its discretion when it prohibited this testimony. Gongora v. State, 2006 Tex. Crim. App. LEXIS 2531 (Tex. Crim. App. Feb. 1 2006).

1652. In a homeowner's breach of contract action against a contractor, the trial court did not err in admitting the testimony of the homeowner's expert witness because the witness's testimony, based on firsthand observations and accompanied by the knowledge and experience of his subcontractors and an outside expert, was reliable. Facundo v. Solis, 2006 Tex. App. LEXIS 318 (Tex. App. Austin Jan. 12 2006).

1653. In a criminal prosecution for capital murder, the trial court did not err by allowing the prosecutor's questions regarding the possible exchange of sexual favors for forgiveness of a drug debt; the evidence was admissible to show the relationship between defendant and the victim. Whitmire v. State, 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

1654. Certain requested findings were not relevant to the cause of action for breach of contract, and thus there was no error in the trial court's failure to make the findings. Coldwell Banker Whiteside Assocs. v. Ryan Equity Partners, Ltd., 181 S.W.3d 879, 2006 Tex. App. LEXIS 135 (Tex. App. Dallas 2006).

1655. In a breach of contract case, the trial court did not abuse its discretion in denying a motion to compel discovery; the documents sought, which were tax returns, did not constitute relevant information because the terms of the parties' contract did not give rise to the duties alleged. Wakeland v. Wakeland, 2006 Tex. App. LEXIS 6 (Tex. App. San Antonio Jan. 4 2006).

1656. In a murder case, the prosecutor's affidavit regarding trial strategy was relevant and admissible under Tex. R. Evid. 401and Tex. R. Evid. 602 at a new trial hearing because it addressed the issue of effective assistance and included some statements made from personal knowledge; defendant did not seek to limit the scope of the affidavit pursuant to Tex. R. Evid. 105(a). Shanklin v. State, 190 S.W.3d 154, 2005 Tex. App. LEXIS 10675 (Tex. App. Houston 1st Dist. 2005).

1657. Where defendant, a large Caucasian man, was accused of burglarizing the homes of two Hispanic families, photographs of defendant's tattoos were admissible as evidence of defendant's selfishness and his impact on the victims. The photographs were not admissible to establish that defendant's race would make him more likely to engage in future criminal conduct. Hicks v. State, 2005 Tex. App. LEXIS 10663 (Tex. App. Dallas Dec. 28 2005).

1658. Because an investigator's notes were not helpful in determining the truth or falsity of any fact relevant to the lawsuit for purposes of Tex. R. Evid. 401, they were not relevant and not admissible; furthermore, the notes were inadmissible because they memorialized out-of-court observations of a third party's interview of the victim and were hearsay within hearsay under Tex. R. Evid. 805. Khoshayand v. State, 179 S.W.3d 779, 2005 Tex. App. LEXIS 10404 (Tex. App. Dallas 2005).

1659. Court rejected defendant's claim that the trial court erred in admitting a photograph of the victim's head after the shooting, showing the bullet entry; the court found no actual reference to the photograph in testimony, and given that the court had to presume the probative value outweighed any prejudicial effect, the court was unable to say that the picture inflamed the jurors to convict on an irrational basis, considering that the picture was not enlarged, gory, or gruesome, and the evidence was relevant and could have aided the jury in understanding the testimony regarding the victim's wound and death. Whitmire v. State, 2005 Tex. App. LEXIS 9593 (Tex. App. Houston 14th Dist. Nov. 17 2005), opinion withdrawn by, substituted opinion at 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

1660. State's cross-examination of defendant could have been construed two ways, and the record supported the state's assertion that the line of questioning was an attempt to connect defendant to the handgun used in the crime, which represented an appropriate line of inquiry relevant to the issue of whether the handgun belonged to defendant, which was relevant to the issue of whether her husband first threatened her with the handgun and whether she was the first to employ deadly force. Johnson v. State, 181 S.W.3d 760, 2005 Tex. App. LEXIS 9441 (Tex. App. Waco 2005).

1661. Trial court did not err under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) in admitting evidence at punishment regarding defendant's admission to a hospital after the guilty verdict, which was described as

malingering, and defendant's conduct in jail once discharged from the hospital, which involved acting like defendant was unable to do anything personally, although defendant later walked into court unassisted. Johnson v. State, 181 S.W.3d 760, 2005 Tex. App. LEXIS 9441 (Tex. App. Waco 2005).

1662. In a hearing to revoke defendant's community supervision, the State was permitted to introduce evidence of the underlying offense of cruelty to animals; the evidence was relevant to whether defendant was entitled to a reduced sentence. Davis v. State, 181 S.W.3d 426, 2005 Tex. App. LEXIS 9093 (Tex. App. Waco 2005).

1663. In a hearing to revoke defendant's community supervision, the State was permitted to introduce evidence of the underlying offense of cruelty to animals; the evidence was relevant to whether defendant was entitled to a reduced sentence. Davis v. State, 181 S.W.3d 426, 2005 Tex. App. LEXIS 9093 (Tex. App. Waco 2005).

1664. In a negligence action arising from an oil field accident, the trial court did not err in excluding, as irrelevant under Tex. R. Evid. 401, 402, a letter written by an OSHA investigator; the letter was not equivalent to a regulation or standard, and there was no evidence that witnesses who testified at trial had spoken with the investigator. Carrillo v. Star Tool Co., 2005 Tex. App. LEXIS 8992 (Tex. App. Houston 14th Dist. Nov. 1 2005).

1665. Defendant faced an indictment that did not identify a victim and charged a drug offense of cocaine possession, and, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a), a witness's punishment phase testimony in the form of victim-impact and victim-character testimony regarding an extraneous offense was irrelevant under Tex. R. Evid. 401 to the determination of the appropriate sentence for defendant's case. Haley v. State, 173 S.W.3d 510, 2005 Tex. Crim. App. LEXIS 1621 (Tex. Crim. App. 2005).

1666. Pursuant to Tex. R. App. P. 33.1, defendant's trial objection based only on Tex. R. Evid. 401, 403 waived any objection beyond those based on those rules, but even if the court considered defendant's argument as a Tex. R. Evid. 702 argument, there still was no error; the doctor testified that the findings of the physical examination were consistent with abuse allegations, that frequently there were no physical signs of abuse, and that the examination results did not prove that any abuse occurred at all, and the testimony was relevant to the issue of whether the victim was abused and thus the trial court did not err in finding that the testimony would have aided the jury and was not overly prejudicial under the circumstances. Segura v. State, 2005 Tex. App. LEXIS 7783 (Tex. App. Austin Sept. 23 2005).

1667. Trial court did not err, in connection with defendant's trial for aggravated kidnapping in violation of Tex. Penal Code Ann. § 20.04(a)(4), in allowing the State to introduce unadjudicated extraneous offense evidence under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a); given the relevance of the extraneous offenses that involved similar circumstances as the charged offense and the victim identifications of defendant, no arguable issue was raised regarding the trial court's decision to admit the evidence. Barraza v. State, 2005 Tex. App. LEXIS 7553 (Tex. App. Dallas Sept. 14 2005).

1668. In a murder case, the trial court was within its discretion in denying the admission of evidence regarding the gang membership of four State's witnesses under Tex. R. Evid. 403 as it was highly prejudicial: the only purpose for allowing the gang membership testimony was to show bias, and it was not relevant. Barlow v. State, 175 S.W.3d 839, 2005 Tex. App. LEXIS 7110 (Tex. App. Texarkana 2005).

1669. In a prosecution of defendant juvenile for felony murder, the trial court did not err in refusing to admit a picture of the scene of an intersection where a motor vehicle accident occurred; the photograph was taken approximately two months after the accident had occurred; a defense witness testified that he did not go the scene of the intersection on the night of the accident; as a result, the witness could not testify that the picture taken months later accurately depicted the intersection on the night of the accident. In re E.B.M., 2005 Tex. App. LEXIS

7255 (Tex. App. Fort Worth Aug. 31 2005).

1670. In a murder trial, defendant waived his Tex. R. Evid. 401 and 403 objections to the portion of a surveillance videotape that depicted the victim's wife kneeling and crying over the victim's body after defendant had fled the store. Two witnesses testified, without objection, regarding actions depicted on the videotape and verbally conveyed the same imagery. Fernandez v. State, 2005 Tex. App. LEXIS 7068 (Tex. App. Houston 14th Dist. Aug. 30 2005).

1671. Trial court did not err in admitting into evidence extraneous offense evidence, specifically, nine other images of children engaged in types of sexual conduct, because (1) a jury could find beyond a reasonable doubt that defendant knowingly and intentionally possessed the additional nine images of child pornography; (2) the extraneous offenses made it more probable that defendant intentionally possessed the one image for which he was indicted; (3) the extraneous offenses were relevant to rebut the defensive theory of mistake; and (4) the probative value of the evidence outweighed the possibility of unfair prejudice. Boyd v. State, 2005 Tex. App. LEXIS 6907 (Tex. App. Eastland Aug. 25 2005).

1672. Court properly admitted defendant's statement regarding his involvement in a Mexican drug organization which was relevant as to whether he knew the marijuana was concealed in the car, it also demonstrated motive and intent, and the testimony was corroborating in that it tended to connect defendant to the offense. Mora v. State, 2005 Tex. App. LEXIS 6975 (Tex. App. El Paso Aug. 25 2005).

1673. Defendant's claim that a trial court erred in excluding evidence in the guilt/innocence phase of his murder trial that his co-offender died in an unrelated armed confrontation with police, on the ground that how he died was not relevant, was resolved against him because, even assuming that the trial court erred in excluding the evidence that the roommate died in an armed confrontation with police, any error was harmless, as similar evidence was introduced by defendant when he testified. Perez v. State, 2005 Tex. App. LEXIS 6814 (Tex. App. Dallas Aug. 23 2005), writ of certiorari denied by 126 S. Ct. 2897, 165 L. Ed. 2d 924, 2006 U.S. LEXIS 4763, 74 U.S.L.W. 3703 (U.S. 2006).

1674. Court knows of no authority that obligates a trial court to admit irrelevant evidence. Pasley v. Pasley, 2005 Tex. App. LEXIS 6680 (Tex. App. Amarillo Aug. 18 2005).

1675. Trial court did not err in finding that payments or gifts made by a corporation to a father's children were irrelevant to the issue of whether the father breached his fiduciary duties arising from his status as executor of the mother's estate and trustee of the trusts; stockholders did not personally own the assets of the corporation. Pasley v. Pasley, 2005 Tex. App. LEXIS 6680 (Tex. App. Amarillo Aug. 18 2005).

1676. Because drugs and a large sum of cash recovered from defendant's safe went to establish defendant's intent to deliver methamphetamine, the evidence of the money was relevant, under Tex. R. Evid. 401, to whether defendant committed the offense; the probative value of the evidence was high, and because it was unlikely that the admission of the money improperly suggested that jurors were to make a decision based on emotion, the evidence was not outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Ortiz v. State, 2005 Tex. App. LEXIS 6721 (Tex. App. Fort Worth Aug. 18 2005).

1677. In a case of indecency with a child, the admission of irrelevant evidence at punishment that the victim's brother also abused the victim was harmless error under Tex. R. App. P. 44.2(b) because the victim testified that defendant did not know of the brother's abuse and because proper evidence of defendant's conduct warranted the sentence imposed. Dustman v. State, 2005 Tex. App. LEXIS 6588 (Tex. App. Tyler Aug. 17 2005).

1678. Trial court did not err in admitting evidence of extraneous offenses committed by defendant against the victim, pursuant to Tex. R. Evid. 404(b); the evidence of prior threats of violence was relevant, apart from character conformity, to establish motive and intent and to rebut the theory that the victim committed suicide, and under Tex. R. Evid. 403, the prejudicial effect did not outweigh the probative value of the evidence. Orozco v. State, 2005 Tex. App. LEXIS 6473 (Tex. App. Dallas Aug. 15 2005).

1679. Trial court erred when admitting a BB gun into evidence in defendant's criminal case because that gun had no relevance to any issue in the case. The error was harmless however pursuant to Tex. R. App. P. 44.2(b) because the court did not have fair assurances that the mind of an average juror would have found the State's case less persuasive had that gun not been admitted into evidence. Moreno v. State, 2005 Tex. App. LEXIS 6371 (Tex. App. Houston 1st Dist. Aug. 11 2005).

1680. In a trial for manufactured methamphetamine, there was no error in the admission of evidence concerning a subsequent arrest, seven months later, for possession of chemicals with intent to manufacture methamphetamine. That evidence tended to make less probable defendant's argument that he possessed items used to manufacture methamphetamine solely for use in bartering for drugs; thus, the evidence was relevant under Tex. R. Evid 401 and 402. Tarpley v. State, 2005 Tex. App. LEXIS 6289 (Tex. App. Dallas Aug. 10 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 8782 (Tex. App. Dallas Oct. 24, 2005).

1681. In a trial for arson based on defendant's setting fire to a piece of cloth in the gas tank of his ex-girlfriend's car, it was not error to exclude the ex-girlfriend's testimony concerning her new boyfriend. The relevancy was not readily apparent, given that neither the girlfriend nor her new boyfriend was present when the arson was committed. Flores v. State, 2005 Tex. App. LEXIS 6255 (Tex. App. Amarillo Aug. 8 2005).

1682. Documents relating to purchases of a vehicle were properly admitted in a trial for possession of marihuana that was found in a false compartment in the vehicle because the documents were relevant under Tex. R. Evid. 401 to prove the chain of custody, possession, or ownership of the vehicle from two prior owners to defendant. Trevino v. State, 2005 Tex. App. LEXIS 6139 (Tex. App. Corpus Christi Aug. 4 2005).

1683. Defendant's conviction for indecent exposure was proper where defendant did not contend, nor did the court find, that he filed a motion requiring the State to elect any one occurrence upon which to base its conviction. Thus, the trial court did not err in admitting the objected-to evidence or in denying his request for a limiting instruction because the evidence was not extraneous offense evidence. Routt v. State, 2005 Tex. App. LEXIS 6180 (Tex. App. Fort Worth Aug. 4 2005).

1684. Defendant's conviction for murder was proper pursuant to Tex. R. Evid. 401 and 403 because the district court did not err by admitting evidence regarding her alleged interest in pornography. The email and photos related to her depiction of the level of her voluntary involvement in the general course of her sexual relationship with the victim and their relationship in general, which also bore on her version of the events on the day of the shooting, including whether they had a dispute about those activities while she feared for her safety. Pierce v. State, 2005 Tex. App. LEXIS 6229 (Tex. App. Austin Aug. 3 2005).

1685. Trial court did not err in admitting an officer's testimony of the numerous weapons found in the apartment where defendant was arrested because defendant was charged with attempted capital murder, and the evidence of the amount and type of weapons showed it was more probable than not that defendant was familiar with weapons and practiced in the use of sophisticated weaponry, and thus the evidence was relevant under Tex. R. Evid. 401 to refute defendant's claim of accident, for purposes of Tex. R. Evid. 404(b); furthermore, the court did not find that the evidence was more prejudicial than probative under Tex. R. Evid. 403. Jones v. State, 2005 Tex. App. LEXIS 5876

(Tex. App. Dallas July 28 2005).

1686. With respect to breach of contract and promissory estoppel claims, a letter written in connection with the settlement of an unrelated lawsuit was relevant and admissible under Tex. R. Evid. 401, 402 as proof of an agreement to pay a claimed sum; hence, it was not barred by Tex. R. Evid. 408. MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc., 179 S.W.3d 51, 2005 Tex. App. LEXIS 5796 (Tex. App. San Antonio 2005).

1687. For purposes of Tex. R. Evid. 401, certain testimony did not amount to any evidence at all as to the company's lost profits or out of pocket damages because there was no evidence as to the basis of the witness's opinions and conclusions, and thus there was no summary judgment evidence raising a fact issue as to these damages. El Dorado Motors, Inc. v. Koch, 168 S.W.3d 360, 2005 Tex. App. LEXIS 5816 (Tex. App. Dallas 2005).

1688. Admission of photos of a sexual assault victim, depicting her at the age she was when the assults allegedly occurred, was relevant to give a perspective on the victim's credibility. Baker v. State, 2005 Tex. App. LEXIS 5842 (Tex. App. Houston 14th Dist. July 26 2005).

1689. Evidence of an extraneous assault offense that defendant allegedly committed against his wife after her aggravated kidnapping and six days before his trial on that charge was admissible under Tex. R. Evid. 404(b) for the purpose of showing his intent to inflict bodily injury on his wife where defendant's intent was a fact of consequence because the indictment included an allegation that he intended to commit murder or to inflict bodily injury when he abducted his wife. Furthermore, evidence of defendant's subsequent alleged assault of his wife was relevant because his subsequent conduct made it more probable that he intended to inflict bodily injury on his wife during the charged offense. Simoneaux v. State, 2005 Tex. App. LEXIS 5628 (Tex. App. Tyler July 20 2005).

1690. Court did not err by admitting evidence concerning the circumstances of a prior sexual assault conviction where defendant encountered the victims in the parking lot of their residences, waited for the victims to return to their rooms, approached them under the guise of needing help, and made advances toward raping them but ejaculated before penetration. Because intent was a material element of the offense on which the State carried the burden of proof, the probative value of the witness's testimony was high and was not overcome by the danger of unfair prejudice. Fields v. State, 2005 Tex. App. LEXIS 5494 (Tex. App. Austin July 14 2005).

1691. While defendant's hospital records, which indicated that he had a history of alcohol abuse, were irrelevant and should not have been admitted at his trial for driving while intoxicated, the error was harmless because the records did not have a substantial or injurious effect on the jury's verdict and did not affect defendant's substantial rights. Young v. State, 2005 Tex. App. LEXIS 5571 (Tex. App. Fort Worth July 14 2005).

1692. Trial court did not abuse its discretion in excluding evidence of alleged misconduct that occurred months after the abuse and change in behavior of the child because the evidence was irrelevant, and another exhibit was properly excluded, despite the fact that it related to events that occurred before the incident in question, because the allegations were distinguished from the trauma that a physician testified could have explained the child's change in behavior. Even assuming the evidence should have been admitted, any error from the exclusion was harmless under Tex. R. App. P. 44.2(b) because the jury heard testimony from the victim and an outcry witness and the exclusion of the evidence did not have a substantial effect on the jury's verdict, which found defendant guilty of indecency with a child by contact in violation of Tex. Penal Code Ann. § 21.11. Patterson v. State, 2005 Tex. App. LEXIS 5260 (Tex. App. Austin July 8 2005).

1693. Defendant answered trial counsel's question regarding a witness's alleged drug use on the record, and thus counsel preserved the issue for appeal pursuant to Tex. R. Evid. 103(a)(2); however, the trial court's decision to exclude defendant's testimony was not unreasonable, and counsel did not demonstrate how the purported evidence

about the witness's drug use was relevant to the defense under Tex. R. Evid. 401. Edwards v. State, 178 S.W.3d 139, 2005 Tex. App. LEXIS 5132 (Tex. App. Houston 1st Dist. 2005).

1694. Trial court did not err by refusing to allow defense counsel to cross-examine a witness about pending criminal charges because defendant did not establish a nexus between the witness's testimony and the charges; the trial court permitted defense counsel to cross-examine the witness outside of the jury's presence and concluded that the cross-examination was not relevant, and thus the trial court's ruling limiting cross-examination did not constitute an impermissible restriction of defendant's Sixth Amendment rights under the Confrontation Clause. Singh v. State, 2005 Tex. App. LEXIS 5142 (Tex. App. Fort Worth June 30 2005).

1695. In a trial for indecency with a child, the trial court properly admitted evidence of a prior indecency conviction. The current charge arose from defendant's exposing himself, and he argued that he had merely forgotten to zip his pants; the extraneous offense evidence therefore tended to make a fact of consequence--whether defendant had or lacked intent to arouse or gratify sexual desire--more or less probable. Arp v. State, 2005 Tex. App. LEXIS 4535 (Tex. App. Texarkana June 15 2005).

1696. Evidence of juvenile appellant's negative drug test was properly found to be unreliable where his probation officer failed to test his urine sample for adulterants that could produce a false negative because she was out of the necessary supplies. Furthermore, the evidence had low probative value to rebut appellant's marijuana possession charge and was outweighed by the risk of jury confusion under Tex. R. Evid. 403 because an undercover officer testified that he saw appellant take approximately two puffs from a marijuana cigar, and appellant's expert testified that if appellant had only smoked such a small amount of marijuana, there was only a 15 percent chance that he would have tested positive for marijuana on a urinalysis test. In re J.A.C., 2005 Tex. App. LEXIS 4519 (Tex. App. Houston 14th Dist. June 14 2005).

1697. In a murder trial, evidence was properly admitted, under Tex. R. Evid. 401 -- 404, of a shooting incident that occurred eight days after the murder. The extraneous offense evidence was relevant to the development of the case and was admissible to show the development of the investigation and defendant's intent or knowledge regarding the gun; as to prejudice, the evidence was presented almost matter-of-factly and included no injuries, disturbing photographs, or emotional testimony. Gonzales v. State, 2005 Tex. App. LEXIS 4532 (Tex. App. Amarillo June 14 2005).

1698. Although it could not be said that defendant's act of kicking out the window of a police officer's patrol car after he was arrested for burglary of a habitation was so intertwined with the charged offense to make it admissible as same-transaction contextual evidence, or that defendant's act was material to an issue in the case, even if the trial court abused its discretion by admitting the officer's testimony, the admission of the evidence did not have a substantial and injurious effect on the jury's verdict and therefore did not affect defendant's substantial rights because there was substantial evidence of his guilt. Franklin v. State, 2005 Tex. App. LEXIS 4401 (Tex. App. Fort Worth June 9 2005).

1699. Trial court did not err in admitting evidence of prior statements made to police by two individuals whom the State contended were with defendant at the time of a shooting where evidence that both individuals made statements that defendant admitted to being involved in a freeway shooting and later recanted them was relevant because the statements, even if recanted, indicated that the witnesses had knowledge that a freeway shooting had occurred and showed the witnesses' willingness to implicate defendant in order to exonerate themselves, thus making the State's theory that all three men were involved more probable than the theory would have been without the evidence. Furthermore, defendant had not demonstrated that the negative attributes of the statements substantially outweighed their probative value because the State had made clear that the statements had been recanted so that the jury was not given the impression that the witnesses still maintained that defendant had admitted the shooting to them. Dinh Tan Ho v. State, 171 S.W.3d 295, 2005 Tex. App. LEXIS 4405 (Tex. App.

Houston 14th Dist. 2005).

1700. Trial court did not abuse its discretion in admitting evidence of a bullet hole in a car allegedly involved in a freeway shooting because the existence of the bullet hole in the car had a tendency to make the fact that the car was involved in the shooting more probable and was thus relevant under Tex. R. Evid. 401. Furthermore, evidence of the bullet hole was not unfairly prejudicial because there was no definitive evidence that the bullet hole occurred during another shooting at a caf, as defendant alleged, and because the jury did not even know about the cafe shooting. Dinh Tan Ho v. State, 171 S.W.3d 295, 2005 Tex. App. LEXIS 4405 (Tex. App. Houston 14th Dist. 2005).

1701. Trial court did not abuse its discretion in overruling defendant's objection to the testimony concerning his citizenship status as inadmissible, because United States citizenship status was relevant to an objective determination of defendant's ability to understand English because if it could be established that a person was a United States citizen, it was more probable that he knew the English language. Indeed, the context of the citizenship question surrounded defendant's ability to understand English, and within such context, the State pointed out that defendant was answering questions before the interpreter had a chance to rephrase them in Spanish. Magallon v. State, 2005 Tex. App. LEXIS 4474 (Tex. App. Houston 1st Dist. June 9 2005).

1702. In a murder case in which defendant shot and killed one of the occupants of a car that approached his house, the trial court did not err in excluding evidence of marijuana blunts in the victim's car because that evidence was irrelevant. Richardson v. State, 2005 Tex. App. LEXIS 4342 (Tex. App. San Antonio June 8 2005).

1703. In a murder case in which defendant shot and killed one of the occupants of a car that approached his house, a rifle belonging to defendant's brother was relevant evidence because the trial court's charge authorized the jury to convict defendant under the law of parties and the rifle showed the context in which the shooting occurred. Richardson v. State, 2005 Tex. App. LEXIS 4342 (Tex. App. San Antonio June 8 2005).

1704. Trial court did not abuse its discretion in admitting defendant's statement under Tex. R. Evid. 404(b) where it appeared that it believed that the portion of the statement in which defendant admitted to threatening a prostitute with a box cutter referred to the complainant because the statement corroborated the complainant's testimony and was relevant to the issue of consent. Furthermore, the statement was not inadmissible under Tex. R. Evid. 403 because it strengthened the State's case on the consent issue and because, while the acts described in the statement were probably distasteful to at least some, if not all, of the jury members, they were not any more inflammatory than the charged offense. Marc v. State, 166 S.W.3d 767, 2005 Tex. App. LEXIS 4228 (Tex. App. Fort Worth 2005).

1705. Court did not err by admitting an investigation videotape into evidence because, although the content of the video might have been unpleasant to view, it depicted the reality of the brutal crime committed, it contained material that was the subject of testimony presented during the State's case in chief, and it was probative of the fact and manner of the victim's death and defendant's culpable mental state. Ramirez v. State, 2005 Tex. App. LEXIS 4185 (Tex. App. San Antonio June 1 2005).

1706. Defendant's convictions for aggravated sexual assault and indecency with a child under Tex. Penal Code Ann. §§ 21.11(a)(1), 22.021(a)(B)(iii)-(iv), 22.021(a)(2)(A)(ii) (Supp. 2004-05) were affirmed because the trial court did not err in admitting DNA evidence found on the victim because the location of defendant's DNA was consistent with the victim's account of the attack and the DNA evidence was clearly relevant in determining the credibility of the victim's accusation. Also, the DNA evidence was not unfairly prejudicial because it provided circumstantial proof of the offense charged; and the State's need for the evidence was great because there were no witnesses that could disprove defendant's contention that his DNA was innocently transferred onto the victim, but the discovery of his DNA on top of a fresh bruise served to dispute his theory. Rivera v. State, 2005 Tex. App. LEXIS 3997 (Tex.

App. Austin May 26 2005).

1707. Trial court did not err in excluding two exhibits, and although defendant claimed that the exclusion of the exhibits impaired defendant's right to cross-examine the victim, defendant did not explain how this was true in that the trial court allowed defendant to fully question the victim regarding the exhibits; defendant cited no portions of the exhibits that referred to any facts in the case, supported a conspiratorial fabrication regarding the victim's allegations, or could not have been brought to the jury's attention through questions addressed to the victim, and defendant's predicate for introducing the exhibits failed to establish either that they had any relevance to issues in the case or were otherwise admissible, for example, under Tex. R. Evid. 613. Ford v. State, 2005 Tex. App. LEXIS 4046 (Tex. App. Houston 14th Dist. May 24 2005).

1708. In a robbery trial, the court did not have to admit evidence of the complainant's prior conviction for misdemeanor assault against defendant's nephew. Contrary to defendant's argument, the two-year-old conviction was not relevant to show that the complainant ran from his apartment because he feared a physical confrontation. Allison v. State, 2005 Tex. App. LEXIS 4055 (Tex. App. Houston 14th Dist. May 24 2005).

1709. Trial court did not err in not admitting an entire tape that included threatening phone calls from the victim, defendant's former wife, because defendant sought to admit the entire tape, and the messages on the tape that were unidentified had no relevance as to the victim and her alleged motives, and lacked a proper predicate for admission under Tex. R. Evid. 401, 402, and 404(b). Davis v. State, 2005 Tex. App. LEXIS 3649 (Tex. App. Fort Worth May 12 2005).

1710. Trial court did not abuse its discretion by overruling defendant's objection to testimony regarding whom an officer had named as the "defendant" in the case, which defendant claimed was unfairly prejudicial because it had the prejudicial effect of telling the jury that he was the subject of investigation from the very beginning and that he had to be guilty, because the trial court could have reasonably concluded that the testimony was relevant to the jury's evaluation of the complainant's allegations. Nor could it be said that the probative value of the testimony was outweighed by the danger of unfair prejudice because the officer's testimony was not the type of testimony that would suggest that the jury make a decision on an improper basis. Dunbar v. State, 2005 Tex. App. LEXIS 3676 (Tex. App. Fort Worth May 12 2005).

1711. Although a driver had the right under U.S. Const. amend. XIV, § 1 and Tex. Const. art. I, § 19 to cross-examine the officer who arrested him for driving while intoxicated after he was involved in an auto accident, the administrative law judge (ALJ) who suspended his driver's license was within her discretion to limit questioning on relevancy grounds pursuant to Tex. R. Evid. 401 because the record showed that when the officer was asked by the ALJ if he had taken the driver's driving and possible culpability in causing the accident into consideration for probable cause to arrest him, the officer responded negatively. Because the officer did not take the fault of the accident into consideration in determining probable cause for intoxication, the issue was irrelevant. Tex. Dep't of Pub. Safety v. Burrer, 2005 Tex. App. LEXIS 3534 (Tex. App. San Antonio May 11 2005).

1712. Where the State had already established on direct examination that the complainant was serving a deferred adjudication probation during one point in her relationship with defendant, any further inquiry would not have made the existence of any fact of consequence to the determination of defendant's alleged offense more or less probable than it was without the evidence, and such testimony was not relevant to any bias, motive, or interest to help the State, making it an impermissible method of impeachment; accordingly, the trial court was within its discretion to limit the question posed by defendant's counsel on cross-examination. Crook v. State, 2005 Tex. App. LEXIS 3485 (Tex. App. Dallas May 6 2005).

1713. In a case of aggravated sexual assault of a child, the trial court did not err in admitting testimony of the complaining witness and two other children about extraneous acts by defendant; although defendant argued that the testimony was irrelevant under Tex. R. Evid. 401 and was not admissible under Tex. R. Evid. 404(b) because it was not necessary to prove elements of the offense that were essentially uncontested, such as identity, intent, plan, preparation, and opportunity, the evidence was relevant under Tex. Code Crim. Proc. Ann. art. 38.37, § 2 to show defendant's intentions toward the complaining witness. Nesby v. State, 2005 Tex. App. LEXIS 3379 (Tex. App. Austin May 5 2005).

1714. Evidence that there was no fence on a claimed property line in recent years was relevant and admissible under Tex. R. Evid. 401 because it made the alleged continuous existence of a fence during a previous 10-year period, proof of which was required for adverse possession under Tex. Civ. Prac. & Rem. Code Ann. § 16.026(a), less probable. Melendez v. De Leon, 2005 Tex. App. LEXIS 3360 (Tex. App. San Antonio May 4 2005).

1715. Court presumed that photographs were relevant because defendant did not argue otherwise at trial or in the brief. Adame v. State, 2005 Tex. App. LEXIS 3277 (Tex. App. Dallas Apr. 29 2005).

1716. In an aggravated assault trial, the fact that defendant was known to carry guns did not pertain to prior bad acts and was relevant to the disputed issue of whether defendant was in fact carrying a gun on the night in question. Morga v. State, 2005 Tex. App. LEXIS 2975 (Tex. App. Dallas Apr. 20 2005).

1717. Trial court did not err in admitting defendant's intoxilyzer test results into evidence in the absence of retrograde extrapolation evidence on defendant's claim that the results were irrelevant under Rule 401 because the results of breath tests were relevant without retrograde extrapolation evidence. Trillo v. State, 165 S.W.3d 763, 2005 Tex. App. LEXIS 2792 (Tex. App. San Antonio 2005).

1718. In an action for subsurface trespass brought by oil and gas lessors against their lessee, the trial court did not err by admitting into evidence an internal memorandum written by an employee of the lessee more than 20 years earlier where the memo was relevant under Tex. R. Evid. 401, 402 on the ground that its recommendation to drill despite title problems could have helped the jury to decide whether the lessee was reasonable in delaying its development of a tract of land because of title problems with another tract. Furthermore, language in the memo about "illiterate Mexicans" was not unfairly prejudicial under Tex. R. Evid. 403 because the memo could not be considered an appeal to prejudice in language clear and strong, especially because it was written by an employee of the lessee and did not ask the jury to decide the case on an improper basis. Mission Res., Inc. v. Garza Energy Trust, 2005 Tex. App. LEXIS 2650 (Tex. App. Corpus Christi Apr. 7 2005), opinion withdrawn by, substituted opinion at 166 S.W.3d 301, 2005 Tex. App. LEXIS 3443, 160 Oil & Gas Rep. 1144 (Tex. App. Corpus Christi 2005).

1719. Child victim's mother's testimony was relevant to show that defendant placed the victim in fear, which was essential to proving that defendant was guilty of the charged offense under Tex. Penal Code Ann. § 29.02; thus, the testimony that the family moved from their house because the victim was scared was relevant pursuant to Tex. R. Evid. 401. Smith v. State, 2005 Tex. App. LEXIS 2723 (Tex. App. Houston 1st Dist. Apr. 7 2005).

1720. In defendant's murder case, where the State wholly failed to present any evidence, direct or circumstantial, that defendant had any knowledge that his wife was a beneficiary under the victim's life insurance policy, the State's insurance motive evidence was irrelevant and should have been excluded from the consideration of the jury by the trial court. Eby v. State, 165 S.W.3d 723, 2005 Tex. App. LEXIS 2580 (Tex. App. San Antonio 2005).

1721. Photographs of a murder victim were relevant under Tex. R. Evid. 401 and were not unduly prejudicial to defendant under Tex. R. Evid. 403 because a photograph of the victim lying in an ambulance immediately after firefighters removed her body from a burning house was both material and probative, as it established her condition

at the crime scene, and because a photograph of her face taken during autopsy was also material and probative of the fact that the autopsy was performed on the same person removed from the crime scene by ambulance. The numerous autopsy photographs were also probative of the victim's cause of death, a material element in the offense of capital murder, and although the detail in the photographs was graphic, each served the purpose of illustrating the nature and extent of the victim's injuries. Vargas v. State, 2005 Tex. App. LEXIS 2417 (Tex. App. Houston 1st Dist. Mar. 31 2005).

1722. Trial court did not err in admitting evidence of two prior extraneous acts in defendant's trial on charges of possession of pseudoephedrine with the intent to manufacture methamphetamine because there was no direct evidence of defendant's intent, and intent could not necessarily be inferred from the act itself. The evidence of the prior extraneous act in which defendant was found with fresh track marks in his arm was relevant under Tex. R. Evid. 401 because methamphetamine use and addiction was highly probative regarding commission of the charged offense, and the evidence was admissible under Tex. R. Evid. 404(b) to show intent, plan, and absence of mistake. Fulfer v. State, 2005 Tex. App. LEXIS 2449 (Tex. App. El Paso Mar. 31 2005).

1723. Trial court did not abuse its discretion by ruling that a witness's testimony that he sold a gun to defendant's friend was relevant and that its probative value was not outweighed by the danger of unfair prejudice under Tex. R. Evid. 401 and 403. Even if the gun was not the one used in the murders, the testimony was some evidence of the friend's interest in weapons of the sort used to commit the murders. Scott v. State, 165 S.W.3d 27, 2005 Tex. App. LEXIS 2168 (Tex. App. Austin 2005).

1724. In an aggravated sexual assault of a child case, the trial court did not err in admitting testimony of the complainant and other children about defendant's extraneous acts as the evidence was relevant to show the relationship between defendant and the complainant and their respective states of mind. Nesby v. State, 2005 Tex. App. LEXIS 2182 (Tex. App. Austin Mar. 24 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 3379 (Tex. App. Austin May 5, 2005).

1725. Judgment in favor of property owner and surface lessee and sublessee was reversed because their expert's opinion that the mineral lessee and seismic company's employee started a barn fire by carelessly disposing of a cigarette was based entirely on assumptions and was not supported by evidence. The expert's testimony was conclusory and speculative, thus it was not relevant evidence under Tex. R. Evid. 401. W. Atlas Int'l v. Randolph, 2005 Tex. App. LEXIS 2199 (Tex. App. Corpus Christi Mar. 24 2005).

1726. In a criminal trial for aggravated sexual assault, defendant's statement about robbing someone was part of a continuum of activity beginning with his presence in the victim's apartment. The statement was offered to assist the jury in identifying defendant as the perpetrator; the trial court properly admitted the statement. Williams v. State, 161 S.W.3d 680, 2005 Tex. App. LEXIS 2014 (Tex. App. Beaumont 2005).

1727. In an aggravated assault case, the trial court did not err in admitting into evidence several items of bloody clothing worn by the victim; although defendant pleaded guilty, the evidence of the victim's extensive bleeding was properly admitted because it indicated the gravity of defendant's crime and was relevant to assessing punishment. Cervantez v. State, 2005 Tex. App. LEXIS 1949 (Tex. App. Amarillo Mar. 15 2005).

1728. Existence of a bullet hole in the car in which defendant was riding had a tendency to make the fact that the car was involved in a freeway shooting more probable, and thus was relevant under Tex. R. Evid. 401; there was no evidence that the bullet hole occurred during a cafe shooting and the jury never heard any mention of the cafe shooting during the guilt-innocence phase of defendant's murder trial, and thus the bullet hole evidence could not have been unfairly prejudicial to defendant under Tex. R. Evid. 403 and the evidence was properly admitted. Dinh Tan Ho v. State, 2005 Tex. App. LEXIS 2111 (Tex. App. Houston 14th Dist. Mar. 15 2005), opinion withdrawn by,

substituted opinion at 171 S.W.3d 295, 2005 Tex. App. LEXIS 4405 (Tex. App. Houston 14th Dist. 2005).

1729. In a drug case, in light of the offense charged and the evidence adduced at trial, the evidence that defendant possessed a bogus license did not unfairly prejudice the jury or confuse the issues. Accordingly, the trial court did not abuse its discretion in admitting the evidence. Gregory v. State, 159 S.W.3d 254, 2005 Tex. App. LEXIS 1660 (Tex. App. Beaumont 2005).

1730. Trial court did not abuse its discretion in admitting evidence of drug paraphernalia found in a vehicle outside a residence in which police arrested defendant because the State demonstrated that the evidence was relevant under Tex. R. Evid. 401 to the issue of defendant's intent to deliver crack cocaine by connecting a woman in the residence to the vehicle in which the contraband was found. With the connection between the contraband in the vehicle and the residence, along with scales, razor blades, and testimony that defendant was seen directing traffic in front of the location, the evidence had a tendency to prove that defendant possessed crack cocaine with intent to deliver. Guy v. State, 160 S.W.3d 606, 2005 Tex. App. LEXIS 1289 (Tex. App. Fort Worth 2005).

1731. Trial court did not err in admitting a photograph of the victim in a praying position in connection with defendant's murder trial. The court presumed the photograph was relevant because defendant did not object to relevancy at trial, the photograph was relevant to identifying the victim, and defendant gave no explanation as to how the photograph was unfairly prejudicial under Tex. R. Evid. 403. Castillo v. State, 2005 Tex. App. LEXIS 1382 (Tex. App. Houston 14th Dist. Feb. 15 2005), writ of certiorari denied by 126 S. Ct. 1624, 164 L. Ed. 2d 339, 2006 U.S. LEXIS 2567, 74 U.S.L.W. 3543 (U.S. 2006).

1732. State was properly allowed to present evidence of defendant's gang affiliation in defendant's murder trial, given that the evidence was relevant both to the State's theory and defendant's defense and put the circumstances of the crime in context for the jury. The evidence was relevant of motive to show an intent to kill and was permissible under Tex. R. Evid. 404(b), and furthermore, the danger of any unfair prejudice did not substantially outweigh the probative value of the evidence under Tex. R. Evid. 403. Castillo v. State, 2005 Tex. App. LEXIS 1382 (Tex. App. Houston 14th Dist. Feb. 15 2005), writ of certiorari denied by 126 S. Ct. 1624, 164 L. Ed. 2d 339, 2006 U.S. LEXIS 2567, 74 U.S.L.W. 3543 (U.S. 2006).

1733. Trial court did not abuse its discretion in admitting evidence during the sentencing phase that a gun used in the commission of the assault on the victim was operable even though the jury had not found that defendant had possessed a deadly weapon during the guilt phase of the trial as the trial court could have reasonably believed that it was relevant and would be helpful for the jury to know whether the pistol was capable of being fired since it was available for defendant's use in the midst of a volatile situation. Kerr v. State, 2005 Tex. App. LEXIS 1081 (Tex. App. Tyler Feb. 10 2005).

1734. Where defendant was tried for aiding seven men escape from prison, evidence of the post-escape crimes committed by the seven men bore heavily upon defendant's character and moral blameworthiness; the evidence was admissible to help the jury determine an appropriate sentence for defendant's crimes. Rodriguez v. State, 163 S.W.3d 115, 2005 Tex. App. LEXIS 1084 (Tex. App. San Antonio 2005).

1735. Trial court did not err by excluding proffered evidence under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) to show that defendant was in psychiatric hospital at the time of his arrest for sexual assault in order to show his state of mind following the commission of the offense because even though defendant's mental state during and after the offense might have been relevant under Tex. R. Evid. 401 to the jury's determination of an appropriate punishment, his location at the time of his arrest and his mental state were not one and the same. Furthermore, defendant was not prohibited from introducing direct evidence of his mental condition because he could have offered significantly more relevant testimony to establish a diminished mental capacity by testifying as to whether he

had ever been treated for drug addiction or mental illness and by calling the doctor who certified him competent to stand trial to testify to the significant mental deficits noted in his competency evaluation of defendant. Lamb v. State, 2005 Tex. App. LEXIS 879 (Tex. App. Corpus Christi Feb. 3 2005).

1736. In the absence of any request to limit the scope of a prosecutor's affidavit, the court upheld the trial court's ruling under Tex. R. Evid. 105(a) because parts of the material in the affidavit were relevant under Tex. R. Evid. 401 as they recounted the prosecutors' recollection regarding voir dire in defendant's theft trial under Tex. Penal Code Ann. § 31.03(a), and the affidavit was not inadmissible under Tex. R. Evid. 403; the trial court was the fact finder and there was less danger that it was influenced by improper suggestion. Biagas v. State, 177 S.W.3d 161, 2005 Tex. App. LEXIS 947 (Tex. App. Houston 1st Dist. 2005).

1737. Trial court erred in admitting evidence that was probative only of defendant's character and propensity to sexually assault children because the extraneous offense against a different victim did not fall within the false impression exception, nor was the evidence relevant to prove a material issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, however, the error was harmless because it probably did not influence the jury or had only a slight influence on its verdict. The alleged victim testified that defendant sexually assaulted her, which was corroborated by the pediatric nurse who examined her, one inmate testified that he heard defendant acknowledge sexually assaulting the victim and a second inmate testified, without objection, that defendant boasted of having sex with minor girls. Tipton v. State, 2005 Tex. App. LEXIS 871 (Tex. App. Waco Feb. 2 2005).

1738. Trial court erred in overruling defendant's relevance objections under Tex. R. Evid. 401 and 402 to testimony regarding injuries sustained by motorists and passengers in other vehicles as a result of a collision involving defendant's vehicle, as the testimony was relevant to the force of impact and the speed and manner in which defendant was driving and, thus, to the issue of whether she was driving while intoxicated. Allcott v. State, 158 S.W.3d 73, 2005 Tex. App. LEXIS 786 (Tex. App. Houston 14th Dist. 2005).

1739. There was no abuse of discretion by not allowing the witness to testify about the victim's alleged history of prostitution in defendant's trial for aggravated sexual assault because defendant did not argue that the excluded testimony satisfied the minimum requirement of relevancy, Tex. R. Evid. 401, nor had defendant argued that if the excluded testimony was relevant, it properly fell within the confines of Tex. R. Evid. 412(b). Orellana v. State, 2005 Tex. App. LEXIS 380 (Tex. App. Eastland Jan. 20 2005).

1740. In an employment discrimination action, the trial court did not err in determining that evidence of executive compensation was relevant. U.S. Auto. Ass'n v. Brite, 161 S.W.3d 566, 2005 Tex. App. LEXIS 367 (Tex. App. San Antonio 2005).

1741. Defendant's taped statements were properly authenticated under Tex. R. Evid. 901 because the detective participating in the taped conversation testified he was the operator of the recording equipment, it was functioning properly, and that the recording accurately reflected the conversation. Additionally, the tape statements were relevant because they contained defendant's version of the events. Thus, the trial court did not abuse its discretion in admitting the statements at his trial. Raveiro v. State, 2005 Tex. App. LEXIS 218 (Tex. App. Houston 14th Dist. Jan. 13 2005).

1742. During defendant's robbery trial, the trial court properly engaged in the balancing test required by Tex. R. Evid. 403 when it admitted into evidence two extraneous offenses that occurred after the robbery and after defendant had been arrested because the contested evidence was relevant to the issue of whether defendant, by his appearance, language, and conduct, placed the victim in fear of imminent bodily injury at the time that he stole beer from the victim's convenience store and because his subsequent conduct showed his ability to place another

in fear of imminent bodily injury, it was, therefore, relevant under Tex. R. Evid. 401. Furthermore, the evidence, which was that defendant had kicked out the back window of the patrol car and, while being taken to jail, had kicked a deputy, was admissible as same transaction contextual evidence. Hayden v. State, 155 S.W.3d 640, 2005 Tex. App. LEXIS 243 (Tex. App. Eastland 2005).

1743. In a joint trial on the offense of sexual assault, a trial court's decision to admit a portion of a videotape showing one co-defendant's presence during the accidental overdose of a friend was not erroneous because the trial court repeatedly instructed the jury that defendant was not there. Klock v. State, 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

1744. Trial court's decision to exclude testimony from a former prisoner regarding confinement conditions during sentencing was not erroneous because the trial court could have reasonably concluded that the testimony would not have been helpful to the jury in determining the appropriate sentence in a sexual assault case; moreover, the trial court could have reasonably concluded that the testimony went beyond the scope of any door opened by the State. Klock v. State, 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

1745. In an aggravated sexual assault case, a court properly excluded a defense witness's testimony where it described prison life as he had observed it several years before, rather than present prison life, and the court could have reasonably concluded that the testimony was not helpful to determining an appropriate sentence. Zunker v. State, 177 S.W.3d 72, 2005 Tex. App. LEXIS 320 (Tex. App. Houston 1st Dist. 2005).

1746. Where defendant was charged with the murder of her ex-boyfriend's new girlfriend, the trial court did not err in admitting into evidence a letter written by defendant to her ex-boyfriend. In the letter, defendant described the intensity of her feelings for him and her concern about the possibility of his philandering. Defendant's statements proved that she had a motive to kill the complainant. Harris v. State, 2005 Tex. App. LEXIS 346 (Tex. App. Houston 1st Dist. Jan. 13 2005).

1747. Trial court did not err in admitting into evidence the booking photograph of defendant because the photograph was relevant under Tex. R. Evid. 401, given that defendant asserted self-defense and the photograph was introduced to rebut this claim, and there was no unfair risk of prejudice under Tex. R. Evid. 403 because the photograph was strongly probative, did not have the potential to impress the jury in some irrational way, the evidence was addressed for only a brief period of time, and the classification of the photograph as a "booking photograph" did not reveal additional prejudicial facts about defendant. Hajjar v. State, 176 S.W.3d 554, 2004 Tex. App. LEXIS 11824 (Tex. App. Houston 1st Dist. 2004).

1748. In an indecency with a child case, because intent to satisfy sexual appetite was an element of the crime, the victim's younger sister's testimony that defendant had "french" kissed her when he took her alone for a ride and asked that she not tell anyone was relevant; thus, the trial court properly allowed it. Further, this evidence showing that defendant acted inappropriately with another young girl was highly probative, making the fact of defendant's sexual contact with the victim more probable, gave credibility to the victim's complaint, and diminished defendant's credibility. Mejia v. State, 2004 Tex. App. LEXIS 11615 (Tex. App. Tyler Dec. 22 2004).

1749. Because the trial court did not improperly admit extraneous offense evidence under Tex. R. Evid. 404(b) of other acts of sexual misconduct, it did not err in failing to grant the male individual's motion for a new trial. The evidence was probative, pursuant to Tex. R. Evid. 401 and Tex. R. Civ. Evid. 402, of the intent, plan, and scheme of the male individual in reference to the female individual's abuse, the evidence was fair, not misleading, and was helpful to the jury pursuant to Tex. R. Evid. 403, and defendant failed to show harm pursuant to Tex. R. App. P. 44.1(a). Olivarez v. Doe, 164 S.W.3d 427, 2004 Tex. App. LEXIS 11055 (Tex. App. Tyler 2004).

1750. In an aggravated sexual assault of a child case, a court did not err by excluding a portion of the testimony of an attorney representing the victim's mother who was present at a custody hearing involving the victim because something occurring at the custody hearing had no probative value in showing who committed a sexual assault that occurred a month before the hearing. Additionally, even if the testimony was somehow relevant, the trial court could have reasonably decided that its admission would lead to unfair prejudice, greatly mislead the jury, and confuse the issues with which the jury was presented. Holmes v. State, 2004 Tex. App. LEXIS 10661 (Tex. App. Dallas Nov. 30 2004).

1751. In the punishment phase of defendant's murder case, autopsy photographs were properly admitted because they supplied complete information regarding the nature of the wounds, that information was helpful to the court in devising an appropriate sentence, and they were probative as to the extent and nature of the injuries. Therefore, the autopsy photographs were relevant and were not unduly prejudicial. Williams v. State, 176 S.W.3d 476, 2004 Tex. App. LEXIS 10561 (Tex. App. Houston 1st Dist. 2004).

1752. Certain OSHA exhibits were properly admitted as they were relevant to the operator's design defect claim, because to establish a design defect in the forklift, the operator bore the burden of establishing there was a safer alternative design for the product, Tex. Civ. Prac. & Rem. Code Ann. § 82.005(a)(1). The operator contended the forklift would have been safer had it been designed with a door to hold him in the forklift's compartment as the forklift dropped over the edge of the loading dock, and to counter this claim, the manufacturer was permitted to introduce evidence tending to show that inclusion of a door in the design of the forklift was not a safer alternative design. Costilla v. Crown Equip. Corp., 148 S.W.3d 736, 2004 Tex. App. LEXIS 10163 (Tex. App. Dallas 2004).

1753. In defendant's manslaughter case, the trial judge did not err in excluding evidence that a toxicology report revealed that a passenger had cocaine in her system at the time of her death where the evidence was not relevant because defendant presented no evidence that the driver used drugs on the day of the accident, and the fact that the passenger had cocaine in her system did not mean that the driver in the same car likewise had used cocaine. Tijerina v. State, 2004 Tex. App. LEXIS 9539 (Tex. App. Dallas Oct. 28 2004).

1754. Photographs of a murder victim related to defendant's prior robbery were not overly prejudicial under Tex. R. Evid. 403 and were properly admitted under Tex. R. Evid. 401 in connection with defendant's murder trial; the photographs were introduced for the purpose of tailoring an appropriate sentence, and the sentence given by the jury contradicted the assertion that the photographs influenced the jury. Toledo v. State, 2004 Tex. App. LEXIS 9596 (Tex. App. El Paso Oct. 28 2004).

1755. Through testimony, defendant went beyond a simple plea of not guilty and made intent a material issue in defendant's murder trial under Tex. Penal Code Ann. § 19.02, and thus the trial court did not err in finding, under Tex. R. Evid. 404(b), defendant's prior assault of the victim, committed in the same manner as the charged offense, was relevant under Tex. R. Evid. 401 to defendant's intent and to rebut the defensive theory; the substantial similarity between the prior assault and the charged offense rendered the extraneous offense evidence highly probative, which outweighed the danger of unfair prejudice pursuant to Tex. R. Evid. 403. McCottry v. State, 2004 Tex. App. LEXIS 9432 (Tex. App. San Antonio Oct. 27 2004).

1756. Defendant's blood test results were obtained properly admitted under Tex. R. Evid. 401 and 402 because they tended to make it more probable that defendant was intoxicated at the time he drove because the test results provided evidence that he had consumed alcohol. The jury did not need to establish defendant's exact blood alcohol at the time he drove, rather the jury only needed to believe beyond a reasonable doubt that either his blood alcohol concentration was 0.08 or more, or that he failed to have the normal use of his mental or physical faculties by reason of the introduction of alcohol. Gattis v. State, 2004 Tex. App. LEXIS 9284 (Tex. App. Houston 14th Dist. Oct. 21 2004).

1757. Trial court erred under Tex. R. Evid. 401 in excluding a witness's testimony that the driver of the vehicle in which defendant had been riding when she was arrested had provided the witness with cocaine from a small bottle just like what was found in the vehicle; the evidence would have allowed the jury to infer that the cocaine belonged to the driver, not defendant. The error was not of constitutional dimension under Tex. R. App. P. 44.2(b) because defendant was able to present a defense. Ray v. State, 148 S.W.3d 218, 2004 Tex. App. LEXIS 9165 (Tex. App. Texarkana 2004), reversed by 178 S.W.3d 833, 2005 Tex. Crim. App. LEXIS 1965 (Tex. Crim. App. 2005).

1758. In an aggravated assault case, a court properly admitted evidence of a witness that she miscarried after jumping out a window because it was relevant to show the witness's physical and emotional state during and following the assault. Smith v. State, 2004 Tex. App. LEXIS 9172 (Tex. App. Dallas Oct. 19 2004).

1759. What training might have been required of other professionals not administering a field sobriety test could not be said to be relevant, pursuant to Tex. R. Evid. 401, to the determination of whether defendant was intoxicated, as defined in Tex. Penal Code Ann. § 49.01(2)(B), and thus the trial court properly sustained the State's relevancy objection to defendant's cross-examination; any improper limitation of cross-examination would have violated Tex. Const. art. I, § 10, and thus it was subject to harmless error analysis, and in this case, even if error occurred, the error was harmless under Tex. R. App. P. 44.2(a) because any error did not contribute to defendant's conviction of driving while intoxicated, given that two breath tests indicated twice the alcohol concentration of legal intoxication. Bailey v. State, 2004 Tex. App. LEXIS 9143 (Tex. App. Dallas Oct. 15 2004).

1760. Testimony regarding the dismissal of a charge on an extraneous offense during the punishment phase of defendant's trial for capital murder, where the prosecutor made the comment that a previous case may have been dismissed because of who the victim was, was relevant in that the fact that prosecutors and courts sometimes dismissed cases due to the less than ideal credibility of the victim or identification witness may have aided the jury in deciding whether defendant had committed this unadjudicated offense for which the charge against him was dismissed. Threadgill v. State, 146 S.W.3d 654, 2004 Tex. Crim. App. LEXIS 1730 (Tex. Crim. App. 2004), *cert. denied*, 132 S. Ct. 1095, 181 L. Ed. 2d 984, 2012 U.S. LEXIS 871 (2012).

1761. Deed, when coupled with other testimony concerning the property, rendered more probable the fact that the school district owned the property, and thus the decision to overrule defendant's objection to the admission of the deed on the basis of relevance pursuant to Tex. R. Evid. 401 was not an abuse of discretion in connection with defendant's trial for possessing a controlled substance (cocaine) in a drug-free zone. Johnson v. State, 2004 Tex. App. LEXIS 8847 (Tex. App. Amarillo Oct. 1 2004).

1762. Defendant's argument that the trial court erred in admitting the officer's testimony about the manufacture and distribution of Ecstasy in general and specifically about the use of Ecstacy at rave parties were not preserved for appellate review because defendant made a global objection to the testimony claiming that the evidence was not relevant and lacked probative value, defendant failed to point to which objection applied to which portion of the testimony, and failed to identify which topics were admissible, which ones were not and on which particular objection he relied. Galindo v. State, 2004 Tex. App. LEXIS 8834 (Tex. App. Fort Worth Sept. 30 2004).

1763. In a murder case, the trial court did not abuse its discretion by admitting autopsy photographs of the victim because the danger of unfair prejudice did not substantially outweigh the probative value of the photographs, as they corroborated the testimony of a medical examiner, and showed no more than the effect of the wounds upon the victim's body. Davis v. State, 2004 Tex. App. LEXIS 7987 (Tex. App. El Paso Aug. 31 2004).

1764. Substantial evidence pursuant to Tex. Gov't Code Ann. § 2001.174 supported an order of the Public Utility Commission of Texas that raised the fuel factor component of the price-to-beat for an affiliated retail electric provider (AREP) because the Commission linked the measurement of the adequacy of the fuel factor to reflect

significant changes in market price and the mechanism to correct inadequacies, and concluded that the New York Mercantile Exchange (NYMEX) was sufficient for both tasks, and because the Commission did not err in barring the order's opponents from presenting relevant evidence under Tex. R. Evid. 401 where evidence regarding the AREP's purchase price and any windfall profits resulting from the fuel-factor adjustment did not bear on whether the NYMEX index had changed the requisite amount. Furthermore, the fuel-factor increase did not violate a set limit on the price-to-beat under Tex. Util. Code Ann. § 39.202 because the adjustments under § 39.202(l) were not limited by § 39.202(p). City of Alvin v. PUC of Tex., 143 S.W.3d 872, 2004 Tex. App. LEXIS 7685 (Tex. App. Austin 2004).

1765. Trial court did not err in admitting evidence that defendant had sexually assaulted another woman approximately three months prior to the instant assault where the state was not allowed to use the extraneous sexual assault evidence until defendant had presented his defensive theory of consent in his testimony. Martin v. State, 144 S.W.3d 29, 2004 Tex. App. LEXIS 7755 (Tex. App. Beaumont 2004), affirmed by 173 S.W.3d 463, 2005 Tex. Crim. App. LEXIS 1618 (Tex. Crim. App. 2005).

1766. Trial court did not err in admitting evidence of five extraneous acts in connection with defendant's burglary with intent to commit assault trial in violation of Tex. Penal Code Ann. § 30.02(a) because (1) the acts were relevant under Tex. R. Evid. 404(b), given that (a) they assisted the trier of fact in determining defendant's intent, (b) defendant's intent was a fact of consequence, (c) defendant's previous conduct made it more probable that defendant entered the house with the intent to commit assault, and thus evidence of the conduct was relevant under Tex. R. Evid. 401, (d) defendant made intent a contested issue given defendant's cross-examination of witnesses, and (e) even if the trial court erred in finding that the acts were relevant, the error was harmless by defendant's questioning of a State's witness, and (2) the trial court did not err in finding, under Tex. R. Evid. 403, that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because (a) the evidence was inherently probative because it provided proof of defendant's intent, (b) any potential to impress the jury in some irrational way was minor and not compelling enough to exclude the evidence, (c) the testimony of the acts was limited in comparison to the rest of the State's evidence, and (d) the acts assisted the jurors to determine defendant's intent at the time of the act. Boudreaux v. State, 2004 Tex. App. LEXIS 7562 (Tex. App. Houston 14th Dist. Aug. 24 2004).

1767. It was within the trial court's discretion to conclude that the excluded evidence, the use of force and injuries defendant suffered in prison in 1999, was not relevant in defendant's criminal case of possession of a deadly weapon in a penal institution; defendant admitted that none of the guards involved in the present criminal case, including the one who allegedly planted the shank, were involved in the civil rights action, and defendant failed to show that any of the guards involved in the instant case had anything to do with the alleged incident in 1999. Shelby v. State, 2004 Tex. App. LEXIS 7186 (Tex. App. Houston 14th Dist. Aug. 12 2004), writ of certiorari denied by 126 S. Ct. 135, 163 L. Ed. 2d 138, 2005 U.S. LEXIS 7005, 74 U.S.L.W. 3205 (U.S. 2005).

1768. In a capital murder case, a court did not err by admitting bullet fragments where there was a weapon already connected to the crime, there was no dispute that the accomplice had the gun that evening, the fragments recovered from the apartment were similar both in appearance and in chemical composition to those recovered from the victim's body, defendant was admittedly at the apartment once that evening and at the complex a second time, he did not accounted for a sizeable portion of his own time line, and all the jury had to infer was that he and the accomplice test-fired the weapon in contemplation of using it in the robbery. Jacques v. State, 2004 Tex. App. LEXIS 7264 (Tex. App. El Paso Aug. 12 2004).

1769. Trial court did not abuse its discretion in finding three autopsy photographs relevant in the culpability phase of defendant's trial for reckless endangerment of a child. The photographs aided the medical examiner in explaining the manner of the child's death; although they depicted horrific wounds on the nude body of the child and were no doubt disturbing to the jurors, they showed how small the child was in comparison to the size of the wounds and teeth marks left by a tiger and illustrated the power and ferocity of the tiger more than any mere verbal description

could. Hranicky v. State, 2004 Tex. App. LEXIS 7212 (Tex. App. Corpus Christi Aug. 12 2004).

1770. Defendant was not entitled to have his murder conviction overturned based on his claim that he received ineffective assistance of counsel because counsel did not object to the introduction of the photographs of the shooting victim, defendant's nephew where such evidence was relevant and defendant did not show that the probative value of such evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Goodwin v. State, 2004 Tex. App. LEXIS 6692 (Tex. App. Texarkana July 23 2004).

1771. Questions of relevance should be left largely to the trial court, relying on its own observations and experience, and will not be reversed absent an abuse of discretion. Day v. State, 2004 Tex. App. LEXIS 6238 (Tex. App. Austin July 15 2004).

1772. In a child sexual abuse case, where defendant sought to introduce evidence of letters written by one of the victims, which allegedly discussed sexual topics, to show that the victim was not innocent, a trial court did not abuse its discretion by refusing to admit the letters since the letters were written after the abuse had occurred. Whitehorn v. State, 2004 Tex. App. LEXIS 6373 (Tex. App. Waco July 14 2004), writ of certiorari denied by 126 S. Ct. 67, 163 L. Ed. 2d 92, 2005 U.S. LEXIS 6247, 74 U.S.L.W. 3203 (U.S. 2005).

1773. Trial court did not abuse its discretion in admitting an expert's testimony as to why victims in general change their minds concerning prosecution of domestic abuse where the testimony was relevant to help the jury understand why the victim initially contacted the police about the assault and then later filed three affidavits of nonprosecution. Williams v. State, 2004 Tex. App. LEXIS 5548 (Tex. App. Eastland June 24 2004).

1774. Recovery of the murder weapon and the circumstances surrounding its recovery were relevant under Tex. R. Evid. 401 in connection with defendant's trial for capital murder, and the trial court did not abuse its discretion in determining pursuant to Tex. R. Evid. 403 that this evidence was not unfairly prejudicial. Avila v. State, 2004 Tex. App. LEXIS 5549 (Tex. App. Eastland June 24 2004).

1775. Trial court did not abuse its discretion in determining that testimony describing the crime scene and pictures showing the crime scene were relevant under Tex. R. Evid. 401 in connection with defendant's trial for capital murder; moreover, because evidence that gang graffiti found near the bodies was not new and was not linked to the murders in the case, the error, if any, in the admission of such evidence was not reversible error under Tex. R. App. P. 44.2. Avila v. State, 2004 Tex. App. LEXIS 5549 (Tex. App. Eastland June 24 2004).

1776. Trial court did not abuse its discretion in admitting evidence of defendant's gang membership or evidence of the victims' gang affiliation in connection with defendant's trial for capital murder because the gangs involved were rivals, defendant had experienced difficulties with the rival gang in the past, the evidence showing gang membership was relevant under Tex. R. Evid. 401 to show defendant's motive for the murders, and the trial court could reasonably have determined that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403 or the potential character conformity inference. Avila v. State, 2004 Tex. App. LEXIS 5549 (Tex. App. Eastland June 24 2004).

1777. Trial court did not err in excluding the testimony of a certain witness in connection with defendant's trial for aggravated robbery in violation of Tex. Penal Code Ann. § 29.03 because the testimony did not make the existence of any fact that was of consequence to the determination of aggravated robbery more or less probable pursuant to Tex. R. Evid. 401, and thus, the evidence was not relevant and not admissible under Tex. R. Evid. 402; the testimony did not raise any inference that the officers who testified at trial had a motive to testify falsely. Hadamek

v. State, 2004 Tex. App. LEXIS 5587 (Tex. App. Corpus Christi June 24 2004).

1778. When an inmate was charged with harassment by persons in certain correctional facilities for throwing urine and feces at two correctional officers, the officers' testimony about how they felt when defendant engaged in this conduct was circumstantial evidence relevant to the element of whether defendant had the intent to harass and alarm and annoy another person, so it could not be said that it was not relevant, under Tex. R. Evid. 401, or admissible, under Tex. R. Evid. 402. Wheatly v. State, 2004 Tex. App. LEXIS 5671 (Tex. App. Waco June 23 2004).

1779. Defendant argued that the trial court erred by excluding evidence relating to his strained marital relationship with the victim because that evidence was probative of his state of mind and motivation at the time of his actions; however, because the only conduct elements potentially implicated for the crime of aggravated assault were the nature of the conduct and the result of the conduct, the circumstances surrounding the conduct were not relevant and were properly excluded. Novillo v. State, 2004 Tex. App. LEXIS 5086 (Tex. App. Austin June 10 2004).

1780. In a possession and manufacture of methamphetamine case, admission of evidence regarding defendant's arrest in another county was proper as issues of who was in care, custody, or control of the clandestine laboratory equipment and the methamphetamine, and of defendant's intent and knowledge, were in dispute, and that he had the same type of equipment used in the manufacture on his own property in the other county was therefore relevant to those issues. Tullos v. State, 2004 Tex. App. LEXIS 5186 (Tex. App. Beaumont June 9 2004).

1781. During the punishment phase of a criminal trial where defendant was charged with endangering a child, the trial court did not abuse its discretion by admitting evidence from defendant's ex-boyfriend who was convicted of sexually assaulting defendant's daughter since the probative value of the confession was not substantially outweighed by its prejudice. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

1782. Fact that a witness might have suffered a shoulder injury as a result of the accident did not tend to make the parents' allegation that their son suffered a shoulder injury as a result of the accident more or less probable than it would be without the evidence; thus, the witness's testimony was irrelevant under Tex. Evid. R. 401 and was properly excluded. Therefore, the trial court did not err in denying the parents' motion for a new trial. McGaffigan v. Mora, 2004 Tex. App. LEXIS 4697 (Tex. App. San Antonio May 26 2004).

1783. Relevance of an allegation of sexual assault on a minor made over two years after the one at bar, without more, was extremely minimal, and under those circumstances, the trial court did not err in excluding the evidence. Keith v. State, 2004 Tex. App. LEXIS 4450 (Tex. App. Texarkana May 18 2004).

1784. Relevance of an allegation of sexual assault on a minor made over two years after the one at bar, without more, was extremely minimal, and under those circumstances, the trial court did not err in excluding the evidence. Keith v. State, 2004 Tex. App. LEXIS 4450 (Tex. App. Texarkana May 18 2004).

1785. In revoking community supervision, the trial court did not abuse its discretion in overruling defendant's objection to a police officer's testimony regarding his conduct in evading arrest by using a vehicle, as the evidence was relevant to sentencing. Cooper v. State, 2004 Tex. App. LEXIS 4334 (Tex. App. Fort Worth May 13 2004).

1786. Witness's testimony that defendant discharged a firearm at passing vehicles as defendant fled the scene of an assault was admissible both as evidence of defendant's intent and as same transaction contextual evidence; such evidence was relevant. Williams v. State, 2004 Tex. App. LEXIS 4367 (Tex. App. Houston 1st Dist. May 13

2004).

1787. Defendant's convictions and sentences for aggravated sexual assault and sexual assault were confirmed because the trial court, which repeatedly instructed the jury that they could not consider videotapes showing one of defendant's co-defendants abusing a person on two occasions other than the sexual assault, did not err in admitting the videotape. Klock v. State, 2004 Tex. App. LEXIS 4377 (Tex. App. Houston 1st Dist. May 13 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

1788. Defendant's convictions and sentences for aggravated sexual assault and sexual assault were confirmed because the trial court did not err by excluding the testimony of an ex-convict as to what the conditions of prison life would be like for defendant and his co-defendants. Klock v. State, 2004 Tex. App. LEXIS 4377 (Tex. App. Houston 1st Dist. May 13 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

1789. In defendant's burglary case, although the testimony of the victims regarding illegal drugs taken during the robbery was of only slight probative value, it was relevant for purposes of sentencing because it pertained to the circumstances of the offense, and therefore, the trial court erred by excluding it. In addition, although the victims denied any involvement in drug-related activities, the jury should have been allowed to assess their credibility and demeanor and the jury may have considered those circumstances in assessing defendant's sentence; therefore, the error was harmful. McKaine v. State, 2004 Tex. App. LEXIS 3777 (Tex. App. Corpus Christi Apr. 29 2004), substituted opinion at, opinion withdrawn by 170 S.W.3d 285, 2005 Tex. App. LEXIS 7147 (Tex. App. Corpus Christi 2005).

1790. Trial court did not err in admitting the victim's testimony about incidents of property damage that were not included in the stalking indictment, which included testimony that someone piled her trash in front of her door, flipped her breaker box, flooded her yard, damaged her yard decorations, pulled down an outside light fixture, cut her satellite cable, and spray-painted her gate, because (1) the evidence was not improper character evidence under Tex. Evid. R. 404(a) as the victim never claimed that defendant committed the acts; and (2) the victim's testimony that the offenses against her property had occurred was relevant to establishing her state of mind at the time of the events in the stalking indictment. Marsh v. State, 2004 Tex. App. LEXIS 3620 (Tex. App. Fort Worth Apr. 22 2004).

1791. In defendant's trial for sexual assault on a child, the trial court properly refused to admit evidence about another man who allegedly occasionally visited the child's mother; this evidence was irrelevant. Helton v. State, 2004 Tex. App. LEXIS 3391 (Tex. App. Houston 14th Dist. Apr. 15 2004).

1792. Defendant's argument that the trial court erred in admitting three autopsy photos as being more prejudicial than probative, was overruled because the appellate court could not see how the autopsy photos led to a verdict founded on inappropriate emotions; the photos were graphic, but the appellate court could understand the State's need to fully develop evidence of the manner of death. Torres v. State, 2004 Tex. App. LEXIS 3441 (Tex. App. El Paso Apr. 15 2004), writ of certiorari denied by 544 U.S. 908, 125 S. Ct. 1597, 161 L. Ed. 2d 283, 2005 U.S. LEXIS 2298, 73 U.S.L.W. 3530 (2005).

1793. In a sexual assault case, a court properly allowed an expert to testify regarding sexual abuse where, although the State did not tie the testimony to the facts of the case, the testimony was relevant, it had a relatively close association with the evidence, and it was better for the expert not to tie his or her testimony too tightly to the particular child victim, but instead, to limit the import of such testimony to general characteristics and empirically obtained data, so that the jury could draw its own conclusions. Carey v. State, 2004 Tex. App. LEXIS 3188 (Tex.

App. Texarkana Apr. 8, 2004).

1794. In an aggravated assault case, the trial court did not err by admitting the kitchen knife used in the assault into evidence because the knife was relevant under Tex. R. Evid. 401 to prove the allegation that defendant used or exhibited a deadly weapon, and was not unfairly prejudicial under Tex. R. Evid. 403 because it did not have an undue tendency to suggest that a decision be made on an improper basis. Hardy v. State, 2004 Tex. App. LEXIS 3214 (Tex. App. Fort Worth Apr. 8 2004).

1795. In defendant's sexual assault case, a court did not err permitting the victim's stepfather to testify that he saw defendant in the parking lot of the family's apartment complex a few weeks after the victim made her outcry where that evidence tended to corroborate the victim's testimony and was not, in itself, evidence of misconduct or bad character. The prosecutors' description of defendant as a "sexual predator" was a logical inference from his overall behavior as shown by the victim's testimony. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

1796. In a firefighter's action alleging intentional failure to implement relief granted to him by a grievance examiner, the trial court did not err in excluding evidence of a demand letter because it was irrelevant. City of Houston v. Jackson, 135 S.W.3d 891, 2004 Tex. App. LEXIS 2942 (Tex. App. Houston 1st Dist. 2004), reversed by 192 S.W.3d 764, 2006 Tex. LEXIS 258, 49 Tex. Sup. Ct. J. 492, 152 Lab. Cas. (CCH) P60178 (Tex. 2006).

1797. Trial court did not abuse its discretion in refusing to admit evidence about defendant's prior relationship with a victim in defendant's trial for sexual assault, as an investigation had been conducted, and the investigation of sexual exploitation was determined to be without merit. As such, the evidence was irrelevant. Beckett v. State, 2004 Tex. App. LEXIS 2991 (Tex. App. Fort Worth Apr. 1 2004), writ of certiorari denied by 125 S. Ct. 2551, 162 L. Ed. 2d 276, 2005 U.S. LEXIS 4535, 73 U.S.L.W. 3709 (U.S. 2005).

1798. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

1799. In drug and robbery case, although defendant's relevancy objection to evidence of the other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

1800. Tex. R. Evid. 401 definition of relevant evidence is not a perfect fit in the punishment context. Mendoza v. State, 2004 Tex. App. LEXIS 2486 (Tex. App. Houston 1st Dist. Mar. 18 2004).

1801. In a prosecution for murder, the medical records of defendant's shooting victims were properly admitted at the sentencing phase; the medical records were relevant to the circumstances of the murder and provided evidence of bad acts for which defendant could be held criminally responsible. Mendoza v. State, 2004 Tex. App. LEXIS

2486 (Tex. App. Houston 1st Dist. Mar. 18 2004).

1802. In a prosecution for unauthorized use of a motor vehicle, because the consequential fact in the case was the unauthorized use of the owner's car, that some other car may have been wrecked by the witness at a different time was of no relevance to the issue to be decided. Thus, there was no error in excluding a picture of the other car. Kirksey v. State, 132 S.W.3d 49, 2004 Tex. App. LEXIS 2448 (Tex. App. Beaumont 2004).

1803. In trial for the aggravated kidnapping of a two-year-old girl, the trial court's decision to admit the evidence about defendant purchasing a condom the night before the kidnapping was within the zone of reasonable disagreement. The evidence about defendant's condom purchase tended to make the existence of a material fact, that defendant had planned to sexually assault the victim during the kidnapping, more probable than it would have been without the evidence; thus, the evidence was relevant and admissible. Howe v. State, 2004 Tex. App. LEXIS 2417 (Tex. App. Texarkana Mar. 16 2004).

1804. In a prosecution for intentionally and knowingly causing serious bodily injury to a child in violation of Tex. Penal Code Ann. § 22.04, evidence that defendant had personal knowledge that his girlfriend, the child's mother, had a fight with her sister and that anger management classes resulted did not appear to meet the relevance test of Tex. R. Evid. 401; further, defendant failed to reveal the "meaningful" defense that he was deprived of presenting by virtue of the excluded evidence. Ortiz v. State, 2004 Tex. App. LEXIS 2246 (Tex. App. Austin Mar. 11 2004).

1805. Trial court's evidentiary rulings were not an abuse of discretion, as the evidence admitted in a dialysis service provider's action against a self-insurer, seeking recovery for services rendered, was relevant to the claims made by each party pursuant to Tex. R. Evid. 401; other payment plans, other providers' acceptance of the rates provided by Blue Cross, and other lawsuits filed by the provider were relevant to the reasonable value of the services rendered under the provider's quantum meruit claim. H.E. Butt Grocery Co. v. Rencare, Ltd., 2004 Tex. App. LEXIS 1005 (Tex. App. San Antonio Feb. 4 2004).

1806. In a probate proceeding where the testator's wife contested the testator's daughter inventory of property, the first exhibit the daughters sought to admit into evidence was relevant under Tex. R. Evid. 401; without either that exhibit or the second exhibit in evidence before the trial court, the trial court could not determine the community property agreement's validity and whether the agreement was enforceable, which were both issues of consequence to the determination of the declaratory judgment action. Haugen v. Olson, 2003 Tex. App. LEXIS 10495 (Tex. App. Dallas Dec. 15 2003).

1807. In a sexual assault case, a court did not err by refusing to admit entries from the victim's diary, because the diary contained no reference to the sexual assault and the entries were not relevant, except as an effort to show a general untruthful character. West v. State, 121 S.W.3d 95, 2003 Tex. App. LEXIS 8506 (Tex. App. Fort Worth 2003).

1808. In a sexual assault case, the trial court did not err in refusing to admit a diary entry of the victim at trial because the diary entry, describing a kiss with a boy at school, lacked probative value. West v. State, 121 S.W.3d 95, 2003 Tex. App. LEXIS 8506 (Tex. App. Fort Worth 2003).

1809. Testimony of a witness that a defendant stated that if he found out who helped his wife move out of their apartment, he was going to kill that person, was relevant under Tex. R. Evid. 401 to show the defendant's mental state a few days prior to the commission of a murder; the evidence was not unfairly prejudicial under Tex. R. Evid. 403 because its prejudicial effect was related to its probative value rather than to an unrelated matter. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App. LEXIS 7512 (Tex. App. Beaumont 2003).

1810. Under Tex. R. Evid. 401, the trial court did not err in admitting evidence that a defendant ingested methamphetamine shortly before a murder was committed because the jury could have inferred from the evidence that the defendant's reasoning was altered, the evidence was offered to show the defendant's mental state rather than as character evidence, and the trial court engaged in a Tex. R. Evid. 403 balancing test and did not abuse its discretion in admitting the evidence. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App. LEXIS 7512 (Tex. App. Beaumont 2003).

1811. Trial court did not err in admitting the consumer's expert's testimony pursuant to Tex. R. Evid. 702 in connection with a products liability case; the expert properly focused the examination on the finished product, and thus the analysis of the composition of the final product was sufficiently tied to the facts of the case so that it aided the jury in resolving the factual dispute and thus was relevant. Johnson Controls Battery Group, Inc. v. Runnels, 2003 Tex. App. LEXIS 10956 (Tex. App. Tyler May 21 2003).

1812. In a capital murder trial under Tex. Penal Code Ann. § 19.03(a), the trial court did not err in admitting the expert testimony of an FBI agent because the agent's testimony was relevant under Tex. R. Evid. 401 to rebut defendant's defensive theory of insanity. Resendiz v. State, 112 S.W.3d 541, 2003 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 2003), *cert. denied*, Resendiz v. Texas, 541 U.S. 1032, 124 S. Ct. 2098, 158 L. Ed. 2d 713, 2004 U.S. LEXIS 3274 (2004).

1813. Videotape that was offered as evidence about "the system" and was not offered as information about the capital defendant, or about how the capital defendant might be handled, was not relevant evidence that was admissible during the proceedings against the capital defendant; Tex. R. Evid. 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Sells v. State, 121 S.W.3d 748, 2003 Tex. Crim. App. LEXIS 63 (Tex. Crim. App. 2003), *cert. denied*, 540 U.S. 986, 124 S. Ct. 511, 2003 U.S. LEXIS 8067 (2003).

1814. There were sufficient similarities between aggravated robbery with a deadly weapon, the offense with which defendant was charged, and the extraneous offenses of aggravated sexual assault/aggravated kidnapping and kidnapping, to uphold the trial court's determination that the extraneous offense evidence was relevant under Tex. R. Evid. 401 and 404(b). Booker v. State, 103 S.W.3d 521, 2003 Tex. App. LEXIS 611 (Tex. App. Fort Worth 2003).

1815. In making the initial determination of admissibility of evidence, Texas courts must apply the principles set forth in the evidentiary rules governing relevancy under Tex. R. Evid. 401- 403; to meet the relevancy test, the proffered evidence must, first, have probative value, and second, be of consequence to some issue in the trial under Tex. R. Evid. 401. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

1816. Trial court properly excluded evidence of a witness's mental health problems under Tex. R. Evid. 401 where there was no reasonable logical nexus connecting the ability of the witness to observe the details of an assault and communicate those details to the police and the witness's mental health problems. The evidence concerning the mental health problems of the witness was therefore not relevant. Goodwin v. State, 91 S.W.3d 912, 2002 Tex. App. LEXIS 8455 (Tex. App. Fort Worth 2002).

1817. Although plaintiffs claimed that the information requested, which the company claimed was a trade secret, was relevant, they had to show more; a plaintiff must also show the information is necessary for a fair adjudication of their claims. Schmidt v. Goodyear Tire & Rubber Co., 2002 U.S. Dist. LEXIS 28596 (E.D. Tex. July 31 2002).

1818. Subject to certain exceptions, all relevant evidence is admissible in a criminal prosecution under Tex. R. Evid. 402, and 401; "relevant evidence" means evidence having any tendency to make the existence of any fact

that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Haliburton v. State, 80 S.W.3d 309, 2002 Tex. App. LEXIS 4822 (Tex. App. Fort Worth 2002).

1819. Trial court did not abuse its discretion in admitting evidence that the two men, who defendant was with when he was arrested, were involved in a robbery a short time before the arrest, because it was within the zone of reasonable disagreement whether the robbery was so intertwined with the stop and arrest that the jury's understanding of the offense would have been obscured without it. Haliburton v. State, 80 S.W.3d 309, 2002 Tex. App. LEXIS 4822 (Tex. App. Fort Worth 2002).

1820. Trial court did not abuse its discretion in admitting testimony, in defendant's trial under Tex. Penal Code Ann. § 7.01(a) and Tex. Penal Code Ann. § 7.02(a)(2) for being a party to his wife's murder, as to defendant's statement regarding researching how to make a silencer for a gun on the ground that it was relevant to a fact of consequence as set forth in Tex. R. Evid. 401. Guevara v. State, 2001 Tex. App. LEXIS 8520 (Tex. App. San Antonio Dec. 26 2001), opinion withdrawn by, substituted opinion at 103 S.W.3d 549, 2003 Tex. App. LEXIS 960 (Tex. App. San Antonio 2003).

1821. According to the rules of evidence, relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Pack v. Crossroads, Inc., 53 S.W.3d 492, 2001 Tex. App. LEXIS 5061 (Tex. App. Fort Worth 2001).

1822. Evidence of defendant's prior history of sexual assault against a child victim was relevant under Tex. R. Evid. 401 as "other crimes, wrongs, or acts" pursuant to Tex. Code Crim. Proc. Ann. art. 38.37. McCulloch v. State, 39 S.W.3d 678, 2001 Tex. App. LEXIS 1327 (Tex. App. Beaumont 2001).

1823. Defendant's death sentence for capital murder was vacated where the probative value of the admission of a photograph under Tex. R. Evid. 401 of the victim in her casket was substantially outweighed by the danger of unfair prejudice to the defendant under Tex. R. Evid. 403. Reese v. State, 33 S.W.3d 238, 2000 Tex. Crim. App. LEXIS 108 (Tex. Crim. App. 2000).

1824. Officer's testimony that the quantity of marijuana recovered from the defendant's vehicle indicated that it was possessed for resale rather than for personal use was relevant under Tex. R. Evid. 403 and Tex. R. Evid. 401. Gallegos v. State, 1999 Tex. App. LEXIS 5042 (Tex. App. Dallas July 9 1999).

1825. Where defendant was convicted of sexual assault, trial court did not err under Tex. R. Evid. 401, 402, 403 in admitting testimony from the victim and his sister of the effect of the assault on the victim; testimony of an inflammatory or sympathetic nature will not bar its admissibility if it is relevant to the issue at trial, and the issue need not be contested. Ranels v. State, 1996 Tex. App. LEXIS 2867 (Tex. App. Beaumont Mar. 20 1996).

1826. Under Tex. R. Evid. 401 and Tex. R. Evid. 402, finding a piece of evidence to be relevant is the first step in a trial court's determination of whether the evidence should be admitted before the jury. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

1827. In defendant's trial on two counts of indecency with a child, testimony from defendant's ex-wife that defendant occasionally paraded around in front of his minor daughters, the complainants, in the nude with an erection was relevant under Tex. R. Evid. 401 and, thus, admissible under Tex. R. Evid. 402, and its prejudicial effect did not substantially outweigh its probative value under Tex. R. Evid. 403 because the State had to prove, beyond a reasonable doubt, that defendant had contact with the complainants and the contact was done for his

sexual gratification, and because the evidence was relevant to prove sexual motive in as much as the manner that defendant acted around his own children was the only proof of defendant's possible sexual motive if the touching did in fact occur. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

1828. Relevancy is defined to be that which conduces to the proof of a pertinent hypothesis--a pertinent hypothesis being one which, if sustained would logically influence the issue. Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue more or less probable. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

1829. In deciding whether a particular piece of evidence is relevant, a trial court judge should ask whether a reasonable person, with some experience in the real world, would believe that a particular piece of evidence is helpful in determining the truth or falsity of any fact that is of consequence to the lawsuit. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

1830. Once a proponent of an item of evidence shows that the evidence is logically relevant to some issue in the trial under Tex. R. Evid. 401, it is admissible under Tex. R. Evid. 402 unless the opponent of the evidence demonstrates that it should be excluded because of some other provision, whether constitutional, statutory, or evidentiary. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

1831. Court properly admitted autopsy photos because, although they were gruesome, they were no more gruesome than the injuries that defendant inflicted upon the victim when he committed the offense of intoxication manslaughter. Each of the six photographs depicted a different view of the victim and showed the different injuries that she suffered, and the State did not offer a large number of photographs, nor were the photographs it offered cumulative of the victim's injuries. Booth v. State, 2014 Tex. App. LEXIS 2351, 2014 WL 887286 (Tex. App. Eastland Feb. 28 2014).

1832. As a police officer had reasonable suspicion to detain defendant based upon the information in the NCIC system, such that ownership of the vehicle was not relevant to the detention, the trial court did not err in excluding evidence regarding the actual ownership of the vehicle that defendant was in when he was stopped. Thornton v. State, 2014 Tex. App. LEXIS 2273, 2014 WL 813745 (Tex. App. Waco Feb. 27 2014).

1833. During defendant's trial for DWI, the court erred in admitting evidence of a passenger's possession of marijuana and possession of drug paraphernalia because the State failed to explain how evidence of the passenger's drug possession made it more probable that defendant was intoxicated. Brewer v. State, 2014 Tex. App. LEXIS 1992, 2014 WL 709549 (Tex. App. Austin Feb. 21 2014).

Evidence : Relevance : Routine Practices

1834. In a case in which a client sued an attorney and a law firm for breach of fiduciary duty, fraud, negligence (legal malpractice), and negligent misrepresentation, which was premised on the contention that the trial judge in the underlying action did not tell the attorney the parties would be limited to five days to try the case, the equal inference rule did not apply, and the trial court erred in granting no-evidence summary judgment on that ground because the record as a whole contained sufficient circumstantial evidence to enable a reasonable juror to infer that the alleged conversation in which the judge told the attorney he would limit trial time did not occur. The judge's testimony that it was his habit or practice not to limit the time to try a case, not to engage in substantive conversations about a case with only one side, and not to discuss pending cases in social settings, was evidence tending to make it less probable the purported conversation with the attorney occurred, and the pretrial history of the underlying litigation, together with the judge's testimony, taken as a whole and viewed in the light most favorable to the client, was sufficient to raise a fact issue on whether the judge made the alleged comment to the

attorney. Total Clean, Llc v. Cox Smith Matthews, Inc., 330 S.W.3d 657, 2010 Tex. App. LEXIS 8369 (Tex. App. San Antonio Oct. 20 2010).

Evidence : Relevance : Sex Offenses : General Overview

1835. At defendant's criminal trial for aggravated sexual assault and indecency with a child, a witness was permitted to testify that defendant said that he had given the victim a vaginal exam; Tex. R. Evid. 404(b) did not apply, because the testimony was not about an extraneous act or offense. Since the testimony constituted evidence that defendant admitted touching the victim's sexual organ, it was not more prejudicial than probative under Tex. R. Evid. 401. Babineaux v. State, 2011 Tex. App. LEXIS 3632, 2011 WL 1833123 (Tex. App. Fort Worth May 12 2011).

1836. In a trial for child sexual assault, there was no error under Tex. R. Evid. 401 in determining that defendant could not cross-examine the mother of the victims as to the details of a prior sexual assault she allegedly suffered as a child. Garcia v. State, 2010 Tex. App. LEXIS 9524, 2010 WL 4901389 (Tex. App. Corpus Christi Nov. 30 2010).

1837. Trial court did not abuse its discretion by overruling defendant's Tex. R. Evid. 401 objection to a family counselor's testimony because the evidence was relevant, as the counselor's testimony identified some behavioral manifestations of sexual abuse and how the victim exhibited some of those behaviors. Berzley v. State, 2010 Tex. App. LEXIS 6463, 2010 WL 3159875 (Tex. App. San Antonio Aug. 11 2010).

1838. There was no abuse of discretion in allowing the testimony of the State's expert, a clinical supervisor and therapist, regarding the effects of sexual abuse on children, because the expert's generic testimony was connected to the facts of the case through the complainant's testimony, and the admission of the testimony, if erroneous, did not have a substantial and injurious effect or influence in determining the jury's verdict. Bullock v. State, 2009 Tex. App. LEXIS 8872, 2009 WL 3838861 (Tex. App. Dallas Nov. 18 2009).

Evidence : Relevance : Sex Offenses : Rape Shield Laws

1839. Trial court did not abuse its discretion by precluding defense counsel from asking a witness whether she saw the child victim play with her sexual organs based on Tex. R. Evid. 412 because the testimony was not enough to make it probable that a three-year-old child masturbating in some vague way two days before the assault caused the presence of physical trauma two days later. In addition, the incomplete information was of minimal probative value, even if relevant. Turner v. State, 2013 Tex. App. LEXIS 12690, 2013 WL 5614311 (Tex. App. Amarillo Oct. 10 2013).

1840. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because, with regard to the victim's alleged prior sexual behavior, other than her involvement, there was no similarity between those incidents and the current allegations against defendant currently, Tex. R. Evid. 401, 402, 403, and 412(b). Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview

1841. In a trial for child sexual assault, testimony about extraneous acts was properly admitted from a complainant, defendant's stepdaughter, because the testimony concerning two sexual encounters was relevant, under Tex. R. Evid. 401, as to defendant's intent to engage in the charged offenses and the states of mind of defendant and the stepdaughter. Miller v. State, 2005 Tex. App. LEXIS 6227 (Tex. App. El Paso Aug. 4 2005).

Evidence : Relevance : Sex Offenses : Similar Crimes : Child Molestation Cases

1842. Trial court did not abuse its discretion in a case in which defendant was convicted of continuous sexual abuse of a child, his two daughters, by allowing evidence of computer searches for child pornography on defendant's laptop because the complained-of testimony showed that defendant viewed the father-daughter relationship as a sexual one; his viewing of child pornography, particularly father-daughter pornography, was relevant circumstantial evidence of his intent to arouse or gratify his sexual desire. Watkins v. State, 2013 Tex. App. LEXIS 1512, 2013 WL 531062 (Tex. App. Fort Worth Feb. 14 2013).

1843. In a trial for indecency with a child by contact there was no error under Tex. R. Evid. 401, 402, in admitting evidence of prior convictions for attempting the same offense. The evidence was relevant to defendant's intent in the charged interaction. Hernandez v. State, 2010 Tex. App. LEXIS 851, 2010 WL 391850 (Tex. App. Austin Feb. 5 2010).

Evidence : Relevance : Spoliation

1844. Employee who claimed sexual harassment was not entitled to a spoliation instruction as to two computer hard drives that were destroyed 11 months before and the month of her termination; she failed to show that the hard drives contained material or relevant information. She failed to identify a single document that she suspected was altered or explain the factual basis for her suspicions; when deposing the authors of the documents, she did not investigate the falsification allegations. Hunicke v. Seafarers Int'l Union, 2013 Tex. App. LEXIS 6794 (Tex. App. Houston 14th Dist. June 4 2013).

Evidence : Scientific Evidence : General Overview

1845. Trial court did not abuse its discretion by admitting a forensic chemist's testimony regarding the results of gunshot residue tests on the ground that the tests were administered too long after the shooting to be reliable because the trial court was entitled to accept the testimony before it and determine that the test was reliable; the expert testified that the gunshot residue test was reliable after four hours but that the state of the evidence may have degraded; the trial court also knew the details of the testing performed on the four individuals, with the ultimate results consistent with the testimony concerning the test methodology; even if the admission was in error, it was harmless error, given the overwhelming evidence in the case and the fact that the testimony concerning the gunshot residue was not emphasized and was not crucial to defendant's conviction. Saunders v. State, 2008 Tex. App. LEXIS 3383 (Tex. App. Austin May 8 2008).

Evidence : Scientific Evidence : Autopsies

1846. Probative value of the two autopsy photographs substantially outweighed the danger of unfair prejudice because defendant stated that he did not intentionally hurt the six-year-old child, but the medical examiner testified that neither of the two fatal injuries that the child sustained could have been caused accidentally or unintentionally; and the extent of the child's brain injury could not be determined from looking at the outside of his head. West v. State, 2013 Tex. App. LEXIS 9612 (Tex. App. Houston 1st Dist. Aug. 1 2013).

1847. In a murder trial, there was no error in admitting autopsy photographs because they were highly probative to show the full extent of the victim's injuries and portrayed no more than the gruesomeness of the injuries inflicted. Salazar v. State, 2012 Tex. App. LEXIS 4983, 2012 WL 2357744 (Tex. App. Corpus Christi June 21 2012).

1848. Trial court did not err in admitting a color photograph of a murder victim taken at her autopsy, which depicted a side shot of her from the neck up and showed a placard placed beside her body bearing a unique autopsy number, because the photo was not gruesome, and because the State needed to identify the person in the photo as that of the victim. The probative value of the photo was not substantially outweighed by the danger of unfair prejudice. Bibbs v. State, 371 S.W.3d 564, 2012 Tex. App. LEXIS 4677, 2012 WL 2135561 (Tex. App. Amarillo June 13 2012).

1849. Trial court did not abuse its discretion in admitting an autopsy photograph depicting a murder victim's brain after it was removed from his body where the photograph had probative value because it showed the extent of the victim's injury and helped the jury understand how blunt force trauma-which other evidence showed came in the form of defendant's having kicked the victim in the head-caused the victim's death. Because the photograph had probative value and was not unnecessarily gruesome, the danger of unfair prejudice does did outweigh its probative value. Malone v. State, 2011 Tex. App. LEXIS 8602, 2011 WL 5118820 (Tex. App. Fort Worth Oct. 27 2011).

1850. In a murder trial involving a child victim, there was no error under Tex. R. Evid. 401, 402, 403 in admitting an autopsy photograph because it demonstrated the scope and extent of the child's injuries and the cause of death. It was not cumulative because it showed injuries to the victim's neck and head from a side view, whereas two other photographs showed injuries from a frontal view. Williams v. State, 2009 Tex. App. LEXIS 1045 (Tex. App. Houston 1st Dist. Feb. 12 2009).

1851. Under Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1(a), a murder defendant waived the argument that autopsy photos were not relevant because an objection under Tex. R. Evid. 403 did not preserve error under Tex. R. Evid. 401. Williams v. State, 2007 Tex. App. LEXIS 6397 (Tex. App. Fort Worth Aug. 9 2007).

1852. Trial court properly admitted autopsy photographs of a murder victim because they did no more than visually depict what the medical examiner's testimony had already described, which was that the victim died of multiple gunshot wounds, and the probative value of the autopsy photographs was not substantially outweighed by their prejudicial effect because they were neither gruesome nor unnecessarily graphic, and because minimal time was spent on actually introducing the photographs following the medical examiner's testimony. While the manner of the victim's death was not disputed, the circumstances surrounding it were disputed, and the photographs lent visual support to the witnesses' description of those events. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

1853. In an assault trial, it was proper to admit an autopsy photo of a child victim in a manslaughter conviction alleged for enhancement; although the photograph may have been disturbing, it depicted nothing more than the reality of the crime committed; it was therefore relevant under Tex. R. Evid. 401 and any danger of unfair prejudice did not substantially outweigh its probative value under Tex. R. Evid 403. Aragon v. State, 229 S.W.3d 716, 2007 Tex. App. LEXIS 871 (Tex. App. San Antonio 2007).

1854. In a murder trial, autopsy photographs showing a fatal cut in the victim's neck did not have to be excluded under Tex. R. Evid. 401, even though identity and cause of death were undisputed, because the photographs were relevant to defendant's disputed claim of self-defense and, although gruesome, depicted nothing more than the nature of the victim's injuries. Hernandez v. State, 2006 Tex. App. LEXIS 10395 (Tex. App. San Antonio Dec. 6 2006).

1855. Under Tex. R. Evid. 401, autopsy photographs were properly admitted in a murder trial because there was some probative value in helping the jury understand the nature of the victim's wounds and they helped to show that the victim was shot in the back, an issue that was relevant to defendant's claim of self defense. Davila v. State,

2006 Tex. App. LEXIS 5230 (Tex. App. Dallas June 20 2006).

1856. In a trial for attempted murder, it was proper to admit an autopsy report regarding a different victim, which included details about the angle of the wound and photographs of the body. The evidence was relevant because it tended to refute defendant's argument that someone else shot the victim. Adams v. State, 2004 Tex. App. LEXIS 8999 (Tex. App. Houston 14th Dist. Oct. 12 2004).

Evidence : Scientific Evidence : Blood Alcohol

1857. Blood test results were relevant under Tex. R. Evid. 401 in a trial for intoxication manslaughter, even if no one specifically tied the presence of amphetamine and methamphetamine in defendant's blood to lack of normal use, because the failure of proof would not render the evidence irrelevant but insufficient. Dunn v. State, 176 S.W.3d 880, 2005 Tex. App. LEXIS 8334 (Tex. App. Fort Worth 2005).

Evidence : Scientific Evidence : Blood & Bodily Fluids

1858. In an aggravated assault case, the trial court did not err in admitting into evidence several items of bloody clothing worn by the victim; although defendant pleaded guilty, the evidence of the victim's extensive bleeding was properly admitted because it indicated the gravity of defendant's crime and was relevant to assessing punishment. Cervantez v. State, 2005 Tex. App. LEXIS 1949 (Tex. App. Amarillo Mar. 15 2005).

1859. Testimony regarding a physician's ability to detect semen on clothing versus skin was properly admitted in a child sexual assault trial. Whether sperm was found on the victim's skin or clothing and a physician's method of viewing and collecting sperm directly related to physical evidence that would make guilt or innocence more or less probable. Croft v. State, 148 S.W.3d 533, 2004 Tex. App. LEXIS 8398 (Tex. App. Houston 14th Dist. 2004).

Evidence : Scientific Evidence : Daubert Standard

1860. Evidence of juvenile appellant's negative drug test was properly found to be unreliable where his probation officer failed to test his urine sample for adulterants that could produce a false negative because she was out of the necessary supplies. Furthermore, the evidence had low probative value to rebut appellant's marijuana possession charge and was outweighed by the risk of jury confusion under Tex. R. Evid. 403 because an undercover officer testified that he saw appellant take approximately two puffs from a marijuana cigar, and appellant's expert testified that if appellant had only smoked such a small amount of marijuana, there was only a 15 percent chance that he would have tested positive for marijuana on a urinalysis test. In re J.A.C., 2005 Tex. App. LEXIS 4519 (Tex. App. Houston 14th Dist. June 14 2005).

Evidence : Scientific Evidence : DNA

1861. Defendant's motion to suppress the DNA evidence was properly denied because there was sufficient authentication evidence through the victim's sexual assault kit's markings and witness testimony showing that the kit was what it purported to be, and there was no affirmative evidence that the victim's samples were commingled, altered, or tampered with prior to their submission for DNA testing in April 2003. Dossett v. State, 216 S.W.3d 7, 2006 Tex. App. LEXIS 7428 (Tex. App. San Antonio 2006).

1862. Defendant's convictions for aggravated sexual assault and indecency with a child under Tex. Penal Code Ann. §§ 21.11(a)(1), 22.021(a)(B)(iii)-(iv), 22.021(a)(2)(A)(ii) (Supp. 2004-05) were affirmed because the trial court did not err in admitting DNA evidence found on the victim because the location of defendant's DNA was consistent with the victim's account of the attack and the DNA evidence was clearly relevant in determining the credibility of

the victim's accusation. Also, the DNA evidence was not unfairly prejudicial because it provided circumstantial proof of the offense charged; and the State's need for the evidence was great because there were no witnesses that could disprove defendant's contention that his DNA was innocently transferred onto the victim, but the discovery of his DNA on top of a fresh bruise served to dispute his theory. Rivera v. State, 2005 Tex. App. LEXIS 3997 (Tex. App. Austin May 26 2005).

Evidence : Scientific Evidence : Sobriety Tests

1863. In a driving while intoxicated case, a court erred in refusing to allow defendant to cross-examine the arresting officer with a field sobriety test manual concerning the horizontal gaze nystagmus test because the portion of the manual regarding whether optokinetic nystagmus, which was not caused by alcohol consumption, might be caused by watching quickly moving objects was relevant. Howell v. State, 2006 Tex. App. LEXIS 5343 (Tex. App. Austin June 23 2006), substituted opinion at, opinion withdrawn by 2006 Tex. App. LEXIS 7558 (Tex. App. Austin Aug. 25, 2006).

1864. Trial court did not err in admitting defendant's intoxilyzer test results into evidence in the absence of retrograde extrapolation evidence on defendant's claim that the results were irrelevant under Rule 401 because the results of breath tests were relevant without retrograde extrapolation evidence. Trillo v. State, 165 S.W.3d 763, 2005 Tex. App. LEXIS 2792 (Tex. App. San Antonio 2005).

1865. Exclusion of an intoxilyzer test result was an abuse of discretion because: (1) the intoxilyzer results were probative of intoxication under both the per se and impairment definitions of intoxication; (2) the results were not unfairly prejudicial because the evidence related directly to the charged driving while intoxicated offense; and (3) for the same reason, a jury could not be distracted away from the charged offense regardless of the required time to present the results. State v. Mechler, 153 S.W.3d 435, 2005 Tex. Crim. App. LEXIS 5 (Tex. Crim. App. 2005).

Evidence : Scientific Evidence : Toxicology

1866. Trial court did not abuse its discretion by admitting the results of the blood test showing that defendant had a prescription drug in his system because the evidence was relevant during defendant's driving under the influence trial, as it assisted the jury in determining whether defendant's intoxication was due to the drug. Armstrong v. State, 2012 Tex. App. LEXIS 2041, 2012 WL 864778 (Tex. App. Dallas Mar. 15 2012).

1867. Where defendant was charged with intoxication manslaughter and aggravated assault following a vehicular accident, the State's chemist was permitted to give expert testimony concerning the presence of a cocaine metabolite in defendant's blood and the effect of cocaine withdrawal; the evidence was relevant to the State's theory that defendant was fatigued and sleepy, because he was suffering withdrawal from cocaine. Bannister v. State, 2006 Tex. App. LEXIS 8522 (Tex. App. Amarillo Sept. 29 2006).

Evidence : Testimony : Credibility : General Overview

1868. Defendant's conviction for driving while intoxicated was proper because the statutory-warning form did not constitute improper "bolstering" of the officer's earlier testimony. Although the form confirmed the officer's testimony that defendant had refused to provide a blood sample and had refused to sign the form, it also contained the statutory warnings themselves, a physical description of defendant, identifying information such as defendant's date of birth and driver's license number, and information concerning the date and time of the alleged offense. Condarco v. State, 2013 Tex. App. LEXIS 10741 (Tex. App. Austin Aug. 27 2013).

1869. On a charge of unlawful possession of a firearm, the trial court properly did not allow defendant to impeach the State's witness by explaining that the witness testified to the same effect in an earlier trial arising from the same events and that the prior jury found that defendant did assault the witness. The court reasoned in part that the prior jury's finding was not relevant. Macias v. State, 136 S.W.3d 702, 2004 Tex. App. LEXIS 4193 (Tex. App. Texarkana 2004).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances

1870. Defendant did not point to any evidence that the victim's mother hit the victim order to get the victim to lie about being sexually assaulted; evidence that the mother had allegedly hit the victim, without more, was irrelevant to the mother's veracity. Coleman v. State, 2014 Tex. App. LEXIS 6691, 2014 WL 2809064 (Tex. App. Fort Worth June 19 2014).

1871. Trial court did not abuse its discretion during defendant's trial for the Class A misdemeanor offense of assault causing bodily injury in refusing to allow defendant to cross-examine the complainant regarding past accusations of spousal abuse where the complainant's character for truthfulness was not attacked by opinion or reputation evidence or otherwise as required by Tex. R. Evid. 608; instead, during cross-examination, defendant attempted to inquire into prior accusations of abuse that the complainant made against her ex-husband for the purpose of attacking the complainant's credibility, and, pursuant to Tex. R. Evid. 401, Tex. R. Evid. 402, Tex. R. Evid. 608, the probative value of the evidence sought to be admitted was extremely low, particularly because defense counsel admitted during trial that he had no evidence that the complainant lied about the abuse and that the accusations occurred a long time ago. Sullivan v. State, 2008 Tex. App. LEXIS 1394 (Tex. App. San Antonio Feb. 27 2008).

1872. In a sexual assault case, the trial court did not err in refusing to admit a diary entry of the victim at trial because the diary entry, describing a kiss with a boy at school, lacked probative value. West v. State, 121 S.W.3d 95, 2003 Tex. App. LEXIS 8506 (Tex. App. Fort Worth 2003).

Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice

1873. Trial court did not abuse its discretion in overruling defense counsel's relevance objection to a question posed to defendant's girlfriend regarding whether members of the Nigerian community generally preferred to handle themselves matters that were otherwise appropriate for law enforcement because it was relevant to the question of whether defendant's witnesses were biased against the State. Agbogwe v. State, 414 S.W.3d 820, 2013 Tex. App. LEXIS 11103 (Tex. App. Houston 1st Dist. Aug. 29 2013).

1874. In a criminal prosecution for misdemeanor driving while intoxicated, the trial court did not err by refusing to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias. The issues defendant sought to explore had no relevance to the defense theory that the officer tended to act hasty or jump to conclusions at the crime scene without conducting a proper investigation. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview

1875. During defendant's trial for indecent exposure, the trial court properly excluded evidence that the victim called the police regarding various disturbances at her residence on several occasions following the report of exposure because the decision was within the zone of reasonable disagreement; the trial court maintained broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative and collateral evidence, and, under Tex. R. Evid. 608(b), specific instances of conduct, other than conviction of a crime, when offered to attack the witness's

credibility could not be explored on cross-examination. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility

1876. Because defendant presented no evidence showing the relevance of the witness's prior misdemeanor conviction or the circumstances surrounding his alleged dismissal from the sheriff's department, the trial court did not err by limiting her cross-examination of him. Sheffield v. State, 2013 Tex. App. LEXIS 12789, 2013 WL 5638878 (Tex. App. Houston 1st Dist. Oct. 15 2013).

Evidence : Testimony : Credibility : Impeachment : Mental Incapacity

1877. In a sexual assault of a child case, the evidence of the victim's emotional problems was not relevant or admissible under Tex. R. Evid. 401, 402 as the evidence could not be used to impeach her because there was no suggestion that her emotional problems could impair her ability to recall events or would compromise her credibility. Lester v. State, 2011 Tex. App. LEXIS 9728, 2011 WL 6238157 (Tex. App. Texarkana Dec. 14 2011).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

1878. Trial court did not abuse its discretion by excluding the testimony of two witnesses concerning the victim's prior sexual history because it did not make it more or less probable that defendant touched the victim's breast and therefore was not relevant under Tex. R. Evid. 401. In addition, the evidence was properly excluded because it was an attempt to impeach the victim through the inquiry of specific instance of conduct, which was improper under Tex. R. Evid. 608(b). Gonzalez v. State, 2012 Tex. App. LEXIS 8246, 2012 WL 4497999 (Tex. App. Tyler Sept. 28 2012).

1879. In defendant's trial for four counts of sexual assault of a child, the trial court did not err by refusing to admit evidence of specific instances of conduct under Tex. R. Evid. 608(b) to show that the victim's father had also been indicted for aggravated sexual assault of a child. For purposes of relevance under Tex. R. Evid. 401, defendant failed to show how the offense made more probable the existence of any motive, bias, or interest on the part of the witness; in fact, the evidence posed a risk of confusing or misleading the jury. Harris v. State, 2010 Tex. App. LEXIS 9999 (Tex. App. Eastland Dec. 16 2010).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

1880. Trial court erred by admitting into evidence a letter that was written to her while she was in jail because the letter was not relevant to defendant's capital murder trial, as the letter, sent to defendant by a man, living in another state and whom she had never met, outlining his sexual desires and fantasies with defendant and other women, did not tend to make anything as to defendant, much less her sexual orientation or whether she committed sexual assault, any more or less probable. Abdygapparova v. State, 2007 Tex. App. LEXIS 5806 (Tex. App. San Antonio July 25 2007).

Evidence : Testimony : Examination : General Overview

1881. Although a driver had the right under U.S. Const. amend. XIV, § 1 and Tex. Const. art. I, § 19 to cross-examine the officer who arrested him for driving while intoxicated after he was involved in an auto accident, the administrative law judge (ALJ) who suspended his driver's license was within her discretion to limit questioning on relevancy grounds pursuant to Tex. R. Evid. 401 because the record showed that when the officer was asked by the ALJ if he had taken the driver's driving and possible culpability in causing the accident into consideration for probable cause to arrest him, the officer responded negatively. Because the officer did not take the fault of the

accident into consideration in determining probable cause for intoxication, the issue was irrelevant. Tex. Dep't of Pub. Safety v. Burrer, 2005 Tex. App. LEXIS 3534 (Tex. App. San Antonio May 11 2005).

Evidence : Testimony : Examination : Cross-Examination : General Overview

1882. Court did not abuse its discretion by not allowing the patient's counsel to pose certain questions, because counsel provided an extensive cross-examination of the doctor concerning his opinion that the patient had a behavioral abnormality that made him likely to commit a predatory act of sexual violence, and courts were allowed discretion to control testimony to avoid confusing the jury. In re Romo, 2013 Tex. App. LEXIS 13495 (Tex. App. Beaumont Oct. 31 2013).

Evidence : Testimony : Examination : Cross-Examination : Scope

1883. In a drug trial, there was no error in limiting defendant's cross-examination of a detective as to (1) payments made to an informant who was admittedly in the country illegally, (2) whether or not those payments were reported to the Internal Revenue Service, and (3) whether or not the detective sought or received permission from federal authorities to have the informant in the country working as an agent of law enforcement. Defendant failed to show how the evidence sought was relevant under Tex. R. Evid. 401, 402, to the claimed purpose of showing bias and a motive to lie. Perez-gonzalez v. State, 2010 Tex. App. LEXIS 3045, 2010 WL 1645062 (Tex. App. Dallas Apr. 26 2010).

Evidence : Testimony : Experts : General Overview

1884. Court did not abuse its discretion by excluding the testimony of defendant's expert as irrelevant as to whether the trooper was lawfully discharging an official duty when defendant drove at him because the expert's opinion regarding the justification for the use of force was not based on any information regarding the trooper's encounter with defendant. Ramos v. State, 2014 Tex. App. LEXIS 6818 (Tex. App. Austin June 26 2014).

1885. In a sexual assault case, the jury was to determine whether defendant penetrated the child's sexual organ and an expert properly relied on a case study to support his opinion that penetration of the child's sexual organ could have occurred even in the absence of physical evidence of penetration; therefore, the discussion of the study served to make the fact of penetration more probable in light of the expert's medical examination findings. Allen v. State, 436 S.W.3d 815, 2014 Tex. App. LEXIS 6465, 2014 WL 2619438 (Tex. App. Texarkana June 13 2014).

1886. Medical records were properly excluded in a medical malpractice action because no expert testified that the child's twin's records were significant to an opinion on the cause of the child's death or the standard of care, the expert did not list the twin's records among the records he had reviewed in formulating his opinions, nor did he discuss the twin's hospitalization in his testimony. Woodard v. Sherwood, 2013 Tex. App. LEXIS 11923 (Tex. App. Amarillo Sept. 23 2013).

1887. Relevancy objection was properly overruled pursuant to Tex. R. Evid. 401 and 702 in a case involving sexual abuse of a child because defense counsel had previously cross-examined the nurse practitioner about her experience with false allegations of sexual abuse and circumstances involving the absence of physical findings; thus, the redirect of the nurse practitioner regarding statistics of confirmed cases of sexual abuse where there were no physical findings was relevant. Cortez v. State, 2010 Tex. App. LEXIS 5854, 2010 WL 2889670 (Tex. App. Fort Worth July 22 2010).

1888. In a wrongful death action in which respondents alleged that a halogen lamp, purchased from a retailer, caused a fire, the testimony of respondents' expert was legally insufficient to support causation. While the expert lay

a general foundation for the dangers of halogen lamps, the expert's specific causation theory amounted to little more than speculation. Wal-mart Stores, Inc. v. Merrell, 313 S.W.3d 837, 2010 Tex. LEXIS 447, 53 Tex. Sup. Ct. J. 869 (Tex. 2010).

1889. In a driving while intoxicated case, evidence of defendant's use of prescription medications was not relevant because there was no evidence as to the dosage, the exact times of ingestion, or the half-life of the drug; a lay juror was not in a position to determine whether the drugs, taken more than 12 hours before arrest, would have any effect on defendant's intoxication. Without expert testimony to provide the foundation required to admit scientific evidence, the testimony regarding defendant's use of prescription medications was not relevant. Layton v. State, 280 S.W.3d 235, 2009 Tex. Crim. App. LEXIS 149 (Tex. Crim. App. 2009).

1890. In a suit challenging a real estate tax assessment, the trial court properly allowed expert testimony from the taxpayer's appraiser. The testimony was relevant, within the meaning of Tex. R. Evid. 401, 402, and 702 because the appraiser found a reasonable number of comparable properties, made appropriate adjustments, and compared the median appraisal value of those properties to the appraisal value applied to the property at issue, as required by Tex. Tax Code § 42.26. Harris County Appraisal v. Hartman Reit Operating P'ship, L.P., 186 S.W.3d 155, 2006 Tex. App. LEXIS 103 (Tex. App. Houston 1st Dist. 2006).

1891. In an action arising from a car fire, a verdict against car manufacturer was reversed because there was no evidence that the fire and death were caused by a defect that allowed gas to siphon from the fuel system. The difficulty was that there were significant conflicts in and between testimony by plaintiff's two experts as to nature of the leak, one of whom opined that gasoline had siphoned from the rear hose but offered no basis; opinion testimony that was conclusory or speculative was not relevant evidence. GMC v. Iracheta, 161 S.W.3d 462, 2005 Tex. LEXIS 304, 48 Tex. Sup. Ct. J. 529, CCH Prod. Liab. Rep. P17372 (Tex. 2005).

1892. Judgment in favor of property owner and surface lessee and sublessee was reversed because their expert's opinion that the mineral lessee and seismic company's employee started a barn fire by carelessly disposing of a cigarette was based entirely on assumptions and was not supported by evidence. The expert's testimony was conclusory and speculative, thus it was not relevant evidence under Tex. R. Evid. 401. W. Atlas Int'l v. Randolph, 2005 Tex. App. LEXIS 2199 (Tex. App. Corpus Christi Mar. 24 2005).

1893. Affidavits of expert witnesses offered in support of homeowners' motion against summary judgment in an action seeking losses for a house fire failed to meet the requirements of Tex. R. Evid. 401, 403, 702, and 703, as the testimony was a pyramid of inferences lacking probative force because it was based on assumed facts that varied from the actual undisputed facts. Rayon v. Energy Specialties, Inc., 121 S.W.3d 7, 2002 Tex. App. LEXIS 9160 (Tex. App. Fort Worth 2002).

Evidence : Testimony : Experts : Admissibility

1894. Expert's deposition testimony and accompanying report did not constitute admissible evidence, because the deposition testimony and report were conclusory and lacked indicia of reliability. Schronk v. Laerdal Med. Corp., 2013 Tex. App. LEXIS 9916 (Tex. App. Waco Aug. 8 2013).

1895. In a trial of inmate's civil commitment as a sexually violent predator under Tex. Health & Safety Code Ann. § 841.062, the trial court properly excluded the inmate's expert's testimony that one of the victims had recanted pursuant to Tex. R. Evid. 401, 402, and 702, because such evidence represented a collateral attack on the underlying convictions, which had not been set aside. In re Barron, 2013 Tex. App. LEXIS 8495, 2013 WL 3487385 (Tex. App. Beaumont July 11 2013).

1896. Trial court did not abuse its discretion during defendant's trial for aggravated assault and endangering a child in permitting a State witness to testify as an expert witness where the witness's expertise fit with the subject matter at issue, which was whether the damages to the victims' vehicles were consistent with their accounts of how the damage occurred. The witness had seventeen years of experience in the automotive industry and thirteen years of experience as an estimator for damaged vehicles, and his testimony did not involve a complex subject, but rather consisted of matching up paint transfer and damages to the victims' vehicles with damages to defendant's truck. Ibarra v. State, 2013 Tex. App. LEXIS 169, 2013 WL 123705 (Tex. App. Corpus Christi Jan. 10 2013).

1897. Trial court did not abuse its discretion by admitting the testimony of the sexual assault nurse examiner who examined the child victim during the course of the State's investigation because she was deemed an expert in sexual abuse examinations, so her expert testimony could be helpful to the jury, including to explain why physical evidence would not necessarily be present on the body of a sexual assault complainant. The nurse merely reported the events of the examination and her clinical findings, and she did not offer an opinion as to whether the victim had been sexually assaulted and did not comment on the victim's veracity. Owens v. State, 381 S.W.3d 696, 2012 Tex. App. LEXIS 7922, 2012 WL 4098990 (Tex. App. Texarkana Sept. 19 2012).

1898. Court properly allowed an expert witness to testify about the similarity of physical evidence recovered from the crime scene because the tapes from the crime scene and defendant's home were offered to show that because the tapes were similar, it was more likely that they came from a common source, and if they came from a common source, it was more likely that the tape in defendant's home came from the packaging for the marijuana in the murder victim's home. The testimony showed the similarities of the tapes and was therefore relevant to show that defendant was at the crime scene and had a motive for shooting the victims. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

1899. In the proceeding to commit respondent as a sexually violent predator (SVP), the trial court did not abuse its discretion by restricting respondent's cross-examination of one of the State's experts, because the doctor's subjective feelings concerning the verdict in respondent's attempted aggravated sexual assault case was not a fact of consequence in respondent's SVP case for purposes of Tex. R. Evid. 401. Respondent could not challenge the facts of his final convictions in the SVP proceeding, and attempted aggravated sexual assault of a child was one of his predicate convictions under Tex. Health & Safety Code Ann. § 841.002(8)(A). In re Dees, 2011 Tex. App. LEXIS 9807 (Tex. App. Beaumont Dec. 15 2011).

1900. Property owners' expert's testimony was properly admitted because the expert's opinion was that the owners' property flooded because of an increase in elevation of the development relative to the owners' property; that testimony was neither speculative nor otherwise unreliable. The expert specifically testified the increase in elevation altered historical surface water drainage patterns, and his testimony was based on his own visual inspection of the property where he noted diversions from the historical drainage patterns due to increases in elevation, as well as a drainage area map used by the company that constructed the development. Marin Real Estate Partners., L.P. v. Vogt, 373 S.W.3d 57, 2011 Tex. App. LEXIS 9259, 2011 WL 5869520 (Tex. App. San Antonio Nov. 23 2011).

1901. Property owners' appraiser's testimony was properly admitted because the appraiser specifically stated he developed his estimate based on the one-acre tract as a property independent from the nineteen-acre tract. To develop his estimate, he researched comparable sales in an attempt to find the best comparison possible and he also prepared his appraisal using the "highest and best use" analysis, which required the appraiser to consider what was the potential best use for the property being appraised. Marin Real Estate Partners., L.P. v. Vogt, 373 S.W.3d 57, 2011 Tex. App. LEXIS 9259, 2011 WL 5869520 (Tex. App. San Antonio Nov. 23 2011).

1902. In a case involving the civil commitment of a sexually violent predator, to the extent that a patient complained about the foundational data used by experts in reaching their opinions, the complaint was not preserved

for appellate review because no objection was made to the use of records or actuarial tests. To the extent that the patient challenged the expert opinions as baseless and not relevant, the testimony of the experts was not conclusory or speculative; the experts testified that they based their opinions on the facts and date gathered from the records they reviewed, their interviews with the patient, the risk assessment conducted, and the actuarial tests administered. In re Mason, 2011 Tex. App. LEXIS 8531 (Tex. App. Beaumont Oct. 27 2011).

1903. During appellant's civil commitment trial, the trial court did not err by excluding an expert's testimony that appellant did not commit the crimes for which he had been convicted because the issue of whether appellant had been wrongfully convicted was not at issue. In re Commitment of Hinkle, 2011 Tex. App. LEXIS 4504 (Tex. App. Beaumont June 16 2011).

1904. Defendant was not entitled under Tex. Code Crim. Proc. Ann. art. 38.36(a) to offer evidence of diminished capacity because his experts' reports, which did not address the standard for recklessness under Tex. Penal Code Ann. § 6.03(c) or knowledge under § 6.03(a), could not support a claim that defendant was guilty only of manslaughter under Tex. Penal Code Ann. § 19.04(a), rather than murder under Tex. Penal Code Ann. § 19.02. Thus, the experts' testimony was irrelevant under Tex. R. Evid. 401 and was properly excluded under Tex. R. Evid. 702. Quick v. State, 2011 Tex. App. LEXIS 680, 2011 WL 286155 (Tex. App. Houston 1st Dist. Jan. 27 2011).

1905. Expert's opinions in a products liability case on how a fire started were subjective and conclusory because they were unsupported by testing; thus, they were not relevant under Tex. R. Evid. 401, were not based on a reliable foundation under Tex. R. Evid. 702, and constituted no evidence that an alleged design defect in a dryer caused the fire. Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 2009 Tex. LEXIS 1041, 53 Tex. Sup. Ct. J. 179 (Tex. 2009).

1906. In defendant's capital murder case, the court properly denied defendant's witness's testimony relating to the field of false confessions because the witness's testimony could not have assisted the jury in understanding the evidence or in making a determination of a fact issue. He did not intend to offer an opinion as to the truth or falsity of defendant's confession, and during cross-examination defendant admitted the truth of the portions of his confession that he earlier claimed were inaccurate. Munoz v. State, 2009 Tex. App. LEXIS 6475, 2009 WL 2517664 (Tex. App. El Paso Aug. 19 2009).

1907. In defendant's trial for aggravated sexual assault of a child under the age of fourteen in violation of Tex. Penal Code Ann. § 22.021, the trial court did not abuse its discretion in admitting the rebuttal testimony of the State's expert who testified that the complainant's "normal" behavior would not necessarily negate sexual abuse; the testimony was relevant under Tex. R. Evid. 401 because it directly rebutted the defense witnesses' testimony and because it tended to make less probable the defense contention that observed interactions between the complainant and defendant suggested a normal relationship. Briones v. State, 2009 Tex. App. LEXIS 5944, 2009 WL 2356626 (Tex. App. Houston 14th Dist. July 30 2009).

1908. Trial court did not abuse its discretion by admitting a forensic chemist's testimony regarding the results of gunshot residue tests on the ground that the tests were administered too long after the shooting to be reliable because the trial court was entitled to accept the testimony before it and determine that the test was reliable; the expert testified that the gunshot residue test was reliable after four hours but that the state of the evidence may have degraded; the trial court also knew the details of the testing performed on the four individuals, with the ultimate results consistent with the testimony concerning the test methodology; even if the admission was in error, it was harmless error, given the overwhelming evidence in the case and the fact that the testimony concerning the gunshot residue was not emphasized and was not crucial to defendant's conviction. Saunders v. State, 2008 Tex. App. LEXIS 3383 (Tex. App. Austin May 8 2008).

1909. In a tax dispute regarding valuation, an expert's premise that an underground storage tank (UST), once installed, became salvage material was a faulty absolute and likely rendered his valuation of the USTs, which represented the largest deviation in the valuations, unreliable; unreliable testimony did not constitute evidence. Harris County Appraisal Dist. v. Sigmor Corp., 2008 Tex. App. LEXIS 2456 (Tex. App. Houston 1st Dist. Apr. 3 2008).

1910. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

1911. Probation officer was properly allowed to testify that defendant was not a suitable candidate for community supervision because suitability is a matter relevant to sentencing under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) when a defendant seeks placement on community supervision; the court noted that the trial judge still had operate within the bounds of Tex. R. Evid. 401. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

Evidence : Testimony : Experts : Criminal Trials

1912. Defendant was not was denied the right to present a full defense when the trial court refused to allow his DNA expert to testify regarding lab bias because the expert's proposed testimony was not relevant to the issues before the jury; absent any evidence of lab bias, the substance of the proposed testimony-that context could influence experts and that all human beings had bias-was more appropriate for cross-examination than for expert testimony. Millage v. State, 2014 Tex. App. LEXIS 3801, 2014 WL 1407331 (Tex. App. Dallas Apr. 8 2014).

1913. Trial court did not abuse its discretion during defendant's trial for aggravated assault and endangering a child in permitting a State witness to testify as an expert witness where the witness's expertise fit with the subject matter at issue, which was whether the damages to the victims' vehicles were consistent with their accounts of how the damage occurred. The witness had seventeen years of experience in the automotive industry and thirteen years of experience as an estimator for damaged vehicles, and his testimony did not involve a complex subject, but rather consisted of matching up paint transfer and damages to the victims' vehicles with damages to defendant's truck. Ibarra v. State, 2013 Tex. App. LEXIS 169, 2013 WL 123705 (Tex. App. Corpus Christi Jan. 10 2013).

1914. In a case in which defendant was convicted of aggravated sexual assault of a child, the trial court did not err by admitting a pediatrician's testimony where: (1) the pediatrician, a specialist in child maltreatment, had published research in the area of maltreatment, particularly in the area of child abuse; (2) the pediatrician had personally examined over one thousand children and was considered an expert in the area of sexual abuse; and (3) the pediatrician's ten-page curriculum vitae, which was admitted into evidence without objection, reflected her extensive training, skills, education, experience, and publications in the area of child sexual abuse. The prosecutor specifically requested the pediatrician's opinion based on her training and experience, as well as her examinations of children who had made a delayed outcry, for an opinion on why sexually abused children might delay outcry, which did not require a greater or more specific degree of expertise in the psychology or sociology of sexually abused children than possessed by the pediatrician, and the pediatrician's testimony would assist the jury in understanding why children might delay reporting sexual abuse. Salinas v. State, 2009 Tex. App. LEXIS 7828, 2009 WL 3210941 (Tex. App. Houston 14th Dist. Oct. 8 2009).

1915. In a case in which defendant was convicted of intentionally causing serious bodily injury to his stepson, causing his death, and intentionally or knowingly concealing the body, the trial court did not err by completely

excluding the testimony of a defense expert pathologist who was board certified in both clinical and anatomical pathology, but was not a forensic pathologist, where the trial court could have reasonably concluded that the defense did not demonstrate that the pathologist was sufficiently qualified in the sub-speciality of forensic pathology and that his methodology, without accessing or viewing the corpse, was not scientifically reliable; defendant did not demonstrate to the trial court that the pathologist had any experience with strangulations or decomposed bodies. Crunk v. State, 2009 Tex. App. LEXIS 7329, 2009 WL 2973474 (Tex. App. Corpus Christi Sept. 17 2009).

1916. In the penalty phase of a capital murder trial, there was no error in allowing testimony about Texas prison conditions in general and that violence could occur within the Texas prison system; an issue for the jury's determination was future dangerousness; therefore, the testimony was relevant to whether defendant would have opportunities to commit violent acts in prison. Lucero v. State, 246 S.W.3d 86, 2008 Tex. Crim. App. LEXIS 219 (Tex. Crim. App. 2008).

1917. In a sexual assault case, a court properly allowed an expert to testify regarding sexual abuse where, although the State did not tie the testimony to the facts of the case, the testimony was relevant, it had a relatively close association with the evidence, and it was better for the expert not to tie his or her testimony too tightly to the particular child victim, but instead, to limit the import of such testimony to general characteristics and empirically obtained data, so that the jury could draw its own conclusions. Carey v. State, 2004 Tex. App. LEXIS 3188 (Tex. App. Texarkana Apr. 8, 2004).

Evidence : Testimony : Experts : Daubert Standard

1918. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

Evidence : Testimony : Experts : Helpfulness

1919. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

1920. Trial court did not err by excluding opinion testimony from the officer because his opinion on the difficulty of obtaining a conviction when the victim of a sexual assault suffered from mental impairments did not make any of the facts the jury had to determine more or less probable, and therefore the evidence was not relevant. Myles v. State, 2012 Tex. App. LEXIS 4911, 2012 WL 2357426 (Tex. App. Houston 1st Dist. June 21 2012).

1921. Trial court did not err by permitting a doctor to testify regarding patterns of disclosure of sexual abuse by children under Tex. R. Evid. 702 because the doctor was qualified by virtue of her education, knowledge, training, and experience, and because the testimony would aid the jury in understanding why the victim waited four years before telling her father about the sexual assault; the doctor testified that it was common for a child to delay making an outcry to an adult if the perpetrator had threatened to harm someone the child loved. Fletcher v. State, 2010 Tex. App. LEXIS 7915, 2010 WL 3783946 (Tex. App. El Paso Sept. 29 2010).

1922. Because forgery was not pleaded as an affirmative defense under Tex. R. Civ. P. 94 in a suit for a constructive trust, handwriting evidence was not helpful and thus was irrelevant under Tex. R. Evid. 401, 402, 702. Estate of Wallis, 2010 Tex. App. LEXIS 3710, 2010 WL 1987514 (Tex. App. Tyler May 19 2010).

1923. In a trial for child sexual assault, a State medical expert did not testify that the victim was truthful or that sexual abuse victims, as a class, were truthful. To the contrary, the expert properly testified, under Tex. R. Evid. 401, 702, that, although not definitive, the complainant's physical condition was consistent with the abuse later described. Reyes v. State, 274 S.W.3d 724, 2008 Tex. App. LEXIS 5921 (Tex. App. San Antonio 2008).

1924. Although a medical study referred to by a doctor in his testimony at defendant's trial for aggravated sexual assault of a child under the age of 14 involved females older than the complainant and under different circumstances, the evidence was relevant because the doctor was in the best position to explain to the jury why the genitalia of sexually abused victims often exhibited no physical signs of penetration, and he tied the study to his earlier conclusion that he was not surprised about the lack of physical evidence of penetration in the complainant's genital examination, which assisted the trier of fact to understand the lack of physical evidence; the testimony showed that the farther away in time the examination was from the abuse, the less likely there would be physical evidence of penetration, and, accordingly, the trial court properly admitted the testimony. Whitfield v. State, 2006 Tex. App. LEXIS 9726 (Tex. App. Dallas Nov. 9 2006).

Evidence : Testimony : Experts : Qualifications

1925. In an aggravated sexual assault of a child younger than 14 years old case, where a doctor's testimony and opinions were based on his experience and training as a physician at the child advocacy center, his educational and professional background was relevant to prove his expertise in the evaluation and treatment of child victims and to lay the predicate for his testimony; thus, without a showing of harm, evidence, like the doctor's curriculum vitae, was properly admitted to assist the jury in making its determination as it served a relevant purpose beyond solely bolstering the witness and any extraneous information included on the curriculum vitae had only slight effect. Walker v. State, 2010 Tex. App. LEXIS 8452 (Tex. App. Houston 1st Dist. Oct. 21 2010).

1926. Trial court did not err by permitting a doctor to testify regarding patterns of disclosure of sexual abuse by children under Tex. R. Evid. 702 because the doctor was qualified by virtue of her education, knowledge, training, and experience, and because the testimony would aid the jury in understanding why the victim waited four years before telling her father about the sexual assault; the doctor testified that it was common for a child to delay making an outcry to an adult if the perpetrator had threatened to harm someone the child loved. Fletcher v. State, 2010 Tex. App. LEXIS 7915, 2010 WL 3783946 (Tex. App. El Paso Sept. 29 2010).

1927. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview

1928. In a breach of lease case relating to oil and gas leases, a previous lessee contended that testimony that wells had not been fully developed was conclusory and was unable to support a judgment; the testimony did not change the evidence, which showed that the previous lessee complied with a contract by drilling at least two wells that produced in paying quantities. Exxon Corp. v. Emerald Oil & Gas Co., L.C., 2009 Tex. LEXIS 113, 52 Tex. Sup.

Ct. J. 467 (Tex. 2009).

1929. Where defendant was charged with aggravated sexual assault of a child, the State's expert to give expert opinion testimony as to the truthfulness of the complaining witness. The defense opened the door to the testimony by questioning the expert about the manipulation of children who make allegations of sexual abuse. Johnson v. State, 2005 Tex. App. LEXIS 7412 (Tex. App. Tyler Sept. 7 2005).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions

1930. There was no error under Tex. R. Evid. 401, 701 in allowing the State to ask defendant's wife, on cross-examination, whether she believed the complainants had someone else shoot them, just to get her husband in trouble. The trial court could have found that the question was grounded in the wife's objective perceptions and not on speculation about the complainants' state of mind and that this opinion was helpful to eliminate a possible alternative theory of the crime. Harris v. State, 2011 Tex. App. LEXIS 6794, 2011 WL 3717046 (Tex. App. Houston 14th Dist. Aug. 25 2011).

1931. Trial court did not err by refusing to allow defendant to further question two of the State's witnesses about defendant's duty or authority as a peace officer because he had already established that neither witness had any law enforcement training or education, and therefore the questions failed to meet the requirements of Tex. R. Evid. 701 (personal perception or knowledge) and Tex. R. Evid. 401 (relevance requiring both materiality and probativeness). King v. State, 2007 Tex. App. LEXIS 8766 (Tex. App. Beaumont Oct. 31 2007).

1932. Where defendant used a car jack to strike the hood of the complainant's SUV, the arresting officer was permitted to testify that $1500 was the estimated cost of repairing the damage based on his years of experience with criminal mischief cases; the officer also testified that the body shop's repair estimate was $ 1,530.01. Barnes v. State, 248 S.W.3d 217, 2007 Tex. App. LEXIS 4261 (Tex. App. Houston 1st Dist. 2007).

Evidence : Testimony : Lay Witnesses : Personal Knowledge

1933. Trial court did not err by excluding an agent's testimony concerning the identity of the tipster because the agent stated he did not know but only had ideas as to who the tipster was. Ivie v. State, 407 S.W.3d 305, 2013 Tex. App. LEXIS 4876 (Tex. App. Eastland Apr. 18 2013).

1934. In defendant's evading arrest case, the court properly excluded a defense witness's testimony because the proffered testimony that it was "standard operating procedure" for law enforcement agencies in general to routinely make video and audio recordings of police pursuits was not germane. The witness did not have personal knowledge as to the standard procedures of the Corpus Christi Police Department regarding recordings of police pursuits. Gomez v. State, 2009 Tex. App. LEXIS 1700 (Tex. App. Corpus Christi Mar. 5 2009).

Evidence : Testimony : Presentation of Evidence

1935. Because the trial court could reasonably decide that the existence of a pending driving while intoxicated charge was not relevant to show bias, and because the trial court could have decided that the possibility of prejudice from the testimony to the proceedings outweighed the probative value of the excluded testimony, the trial court did not abuse its discretion by disallowing defendant to recall the victim during the presentation of defendant's case to the jury. Smith v. State, 2011 Tex. App. LEXIS 5338, 2011 WL 2732270 (Tex. App. Beaumont July 13 2011).

Family Law : Child Custody : Awards : General Overview

1936. In a child custody proceeding, evidence about the relationship that the mother's boyfriend had with his own child had some relevance in determining the best interests of the children at issue because the testimony showed that the boyfriend would be involved in their lives. In re Marriage of Ivers, 2004 Tex. App. LEXIS 3800 (Tex. App. Texarkana Apr. 30 2004).

Family Law : Child Custody : Procedures

1937. In a custody dispute, there was no error under Tex. R. Evid. 401, in excluding evidence that the brother of one parent was a registered sex offender and that the brother had contact with the child. Goodson v. Castellanos, 214 S.W.3d 741, 2007 Tex. App. LEXIS 364 (Tex. App. Austin 2007).

Family Law : Family Protection & Welfare : Elderly Persons : Abuse, Endangerment & Neglect

1938. In the trial on an employee's claim of retaliatory discharge under Tex. Health & Safety Code Ann. § 242.133, the trial court properly excluded the employee's previous employment history under Tex. R. Evid. 401 because reasons provided by previous employers for termination were not relevant. Senior Living Props., L.L.C. v. Cole, 2007 Tex. App. LEXIS 7610 (Tex. App. Waco Sept. 19 2007).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview

1939. Had the Texas Department of Child Protective Services sought termination of the mother's parental rights due at least in part to her alleged failure to comply with the trial court's orders, then the transcript of the adversary hearing might have arguably been relevant, but, because the Department abandoned that ground, and the trial court did not charge the jury on that ground, the transcript had no tendency to make any fact of consequence more or less probable; thus, the trial court did not abuse its discretion by excluding the transcript of the adversary hearing from evidence under Tex. R. Evid. 401. In the Interest of T.T.F., 331 S.W.3d 461, 2010 Tex. App. LEXIS 9599 (Tex. App. Fort Worth Dec. 2 2010).

1940. In a termination of parental rights proceeding arising from the death of a sibling, there was no error under Tex. R. Evid. 401, 402, 403 when the trial court admitted the recordings of the parent's phone calls from jail to home on the night of the sibling's death and admitted evidence of the parent's prior criminal convictions, some of which were more than 10 years old. Murray v. Tex. Dep't of Family & Protective Servs., 294 S.W.3d 360, 2009 Tex. App. LEXIS 6372 (Tex. App. Austin Aug. 13 2009).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Child Abuse

1941. Trial court did not abuse its discretion by admitting evidence concerning sexual abuse allegations made against the father because the Texas Department of Family and Protective Services did not seek to terminate the father's parental rights based on those allegations, the Department did not contend that the allegations were true, and the trial court gave the jury a limiting instruction concerning the evidence. J.H. v. Tex. Dep't of Family & Protective Servs., 2011 Tex. App. LEXIS 4434, 2011 WL 2297723 (Tex. App. Austin June 9 2011).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

1942. Trial court did not abuse its discretion in admitting evidence of a pending assault charge against the father because it was relevant in determining whether termination of the father's rights was in the best interest of the child.. Defendant failed to show that its admission confused or misled the jury, was cumulative of other evidence, or unfairly prejudiced the jury under Tex. R. Evid. 403; a key issue in the trial was defendant's criminal history, and the

pending charge was only a small fraction of that history. Davis v. Tex. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 1315, 2012 WL 512674 (Tex. App. Austin Feb. 15 2012).

Governments : Legislation : Sunday Closing Laws

1943. Trial court erred in excluding from jury consideration evidence of discriminatory enforcement of the Blue Law, former Tex. Rev. Civ. Stat. Ann. art. 9001; however, the error was harmless in that there was no hint of any reason that constituted the kind of invidious enforcement that gave rise to constitutional protection. Wolf v. State, 661 S.W.2d 765, 1983 Tex. App. LEXIS 5456 (Tex. App. Fort Worth 1983).

Governments : Local Governments : Employees & Officials

1944. In a trial for assault on a public servant, testimony that defendant was a convicted felon and in possession of drugs and a handgun was properly admitted under Tex. R. Evid. 401, because it was relevant to motive. Thurman v. State, 2007 Tex. App. LEXIS 135 (Tex. App. Tyler Jan. 10 2007).

1945. In a firefighter's action alleging intentional failure to implement relief granted to him by a grievance examiner, the trial court did not err in excluding evidence of a demand letter because it was irrelevant. City of Houston v. Jackson, 135 S.W.3d 891, 2004 Tex. App. LEXIS 2942 (Tex. App. Houston 1st Dist. 2004), reversed by 192 S.W.3d 764, 2006 Tex. LEXIS 258, 49 Tex. Sup. Ct. J. 492, 152 Lab. Cas. (CCH) P60178 (Tex. 2006).

Governments : Local Governments : Ordinances & Regulations

1946. There was substantial evidence that the driver's violation of the ordinance occurred within the city limits because the administrative law judge could have reasonably inferred from the evidence that the sergeant witnessed the driver peel out inside the city limits or it could have taken judicial notice of the fact that the incident took place in the city. Tex. Dep't of Pub. Safety v. Botsford, 2014 Tex. App. LEXIS 2649, 2014 WL 902567 (Tex. App. Austin Mar. 7 2014).

1947. In a challenge to the facial validity of an ordinance, discovery regarding the government interests at stake and the city's prior enforcement of the ordinance was not relevant. Patterson v. City of Bellmead, 2013 Tex. App. LEXIS 3136, 2013 WL 1188929 (Tex. App. Waco Mar. 21 2013).

Immigration Law : Duties & Rights of Aliens : Discrimination

1948. Illegal immigrant status of defendant driver should not have been admitted in a wrongful death and survival action stemming from a multi-fatality vehicular accident. Under Tex. R. Evid. 401, 402, 403, the evidence was not relevant to claims of negligent hiring and negligent entrustment, even if the employer's failure to screen and thus its failure to discover the driver's inability to work in the United States furnished a condition that made the accident possible, because the driver's immigration status did not cause the collision. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

Immigration Law : Immigrants : General Overview

1949. In a wrongful death and survival action, evidence of the deceased worker's illegal immigrant status was properly excluded under Tex. R. Evid. 401, 403. Although immigration status could be a relevant consideration in determining pecuniary loss damages, the usefulness was limited and was not made less speculative by testimony about an immigration raid. Republic Waste Servs. v. Martinez, 335 S.W.3d 401, 2011 Tex. App. LEXIS 540, 79 A.L.R.6th 745 (Tex. App. Houston 1st Dist. Jan. 20 2011).

Labor & Employment Law : Discrimination : Age Discrimination : Proof : Circumstantial Evidence

1950. In an age discrimination case, the employee's averment that a supervisor and a company vice president repeatedly made comments to him about his age and asked when he was going to retire was relevant under Tex. R. Evid. 401 to determining the motivating factor for the employee's discharge. Clemons v. Tex. Concrete Materials, Ltd., 2010 Tex. App. LEXIS 8394, 160 Lab. Cas. (CCH) P61072 (Tex. App. Amarillo Oct. 19 2010).

Labor & Employment Law : Discrimination : Harassment : Sexual Harassment : Burdens of Proof : Employee Burdens

1951. Employee who claimed sexual harassment was not entitled to a spoliation instruction as to two computer hard drives that were destroyed 11 months before and the month of her termination; she failed to show that the hard drives contained material or relevant information. She failed to identify a single document that she suspected was altered or explain the factual basis for her suspicions; when deposing the authors of the documents, she did not investigate the falsification allegations. Hunicke v. Seafarers Int'l Union, 2013 Tex. App. LEXIS 6794 (Tex. App. Houston 14th Dist. June 4 2013).

Labor & Employment Law : Discrimination : Retaliation : General Overview

1952. In an employment retaliation case, there was no error under Tex. R. Evid. 401, 403 in admitting a report of the employer's internal investigation of sexual harassment, which was initiated by the employee's memo detailing the sexual harassment of another employee. The report provided evidence that the employee engaged in a protected activity and was also relevant to credibility. Tex. Dep't of Pub. Safety v. Williams, 2010 Tex. App. LEXIS 1178, 2010 WL 797145 (Tex. App. Austin Feb. 19 2010).

Labor & Employment Law : Occupational Safety & Health : General Overview

1953. In a negligence action arising from an oil field accident, the trial court did not err in excluding, as irrelevant under Tex. R. Evid. 401, 402, a letter written by an OSHA investigator; the letter was not equivalent to a regulation or standard, and there was no evidence that witnesses who testified at trial had spoken with the investigator. Carrillo v. Star Tool Co., 2005 Tex. App. LEXIS 8992 (Tex. App. Houston 14th Dist. Nov. 1 2005).

Legal Ethics : Client Relations : General Overview

1954. Upon entry of an agreed final divorce decree, the husband filed a motion for new trial in which he alleged his attorney lacked the authority to sign a settlement agreement on his behalf while he was in federal prison. The trial court did not abuse its discretion when it excluded an exhibit consisting of an engagement letter between the husband and his attorney, because the husband failed to explain how the letter made it more probable that the presumption of authority to settle could be overcome. Phillips v. Phillips, 2013 Tex. App. LEXIS 15275, 2013 WL 6726819 (Tex. App. Houston 14th Dist. Dec. 19 2013).

Legal Ethics : Client Relations : Confidentiality of Information

1955. Disqualification of opposing counsel in a suit affecting the parent-child relationship was proper because the product of the risk and the consequences was great enough that the representation was adverse, and there was a reasonable probability that the representation would have violated the rule pertaining to confidential information where opposing counsel had represented a family member of a father's fiancee in a previous custody case, and her medical history was relevant to a child's best interest. In re C.G.H., 2013 Tex. App. LEXIS 8202, 2013 WL 3377421 (Tex. App. Tyler July 3 2013).

Real Property Law : Adverse Possession : General Overview

1956. Evidence that there was no fence on a claimed property line in recent years was relevant and admissible under Tex. R. Evid. 401 because it made the alleged continuous existence of a fence during a previous 10-year period, proof of which was required for adverse possession under Tex. Civ. Prac. & Rem. Code Ann. § 16.026(a), less probable. Melendez v. De Leon, 2005 Tex. App. LEXIS 3360 (Tex. App. San Antonio May 4 2005).

Real Property Law : Eminent Domain Proceedings : Procedure

1957. In an eminent domain proceeding in which a land planner designated as an expert by the owner testified that the owner could not achieve full compliance with the town's zoning ordinances after the State's condemnation and that the owner would be required to demolish all of its buildings, the trial court abused its discretion by admitting the land planner's opinion about the allegedly required demolition of the owner's buildings because his opinion was impermissibly speculative and conjectural. Reversal was required because there was a reasonable probability that the inadmissible evidence that characterized the demolition of the owner's buildings as a certainty, rather than a market-affecting factor, improperly influenced the jury's verdict on remainder damages. State v. Little Elm Plaza, Ltd., 2012 Tex. App. LEXIS 8880 (Tex. App. Fort Worth Oct. 25 2012).

Real Property Law : Eminent Domain Proceedings : Valuation

1958. At least part of an acceptable method of calculating partial-taking damages required determining the market value of the landowners' entire tract of land before the taking; thus, the testimony of the landowners' appraisal expert as to the property's pre-taking value was relevant, and the trial court did not abuse its discretion in admitting the testimony. State v. Petropoulos, 346 S.W.3d 525, 2011 Tex. LEXIS 416, 54 Tex. Sup. Ct. J. 1133 (Tex. 2011).

1959. Expert testimony valuing property on which a large natural gas processing plant had been built as vacant rural residential property was irrelevant under Tex. R. Evid. 401 and was unreliable under Tex. R. Evid. 702 because the expert failed to explain why the existing use of the property would not be presumed as the highest and best use, did not offer fair market value of the land based on its condition at the time of the condemnation, and did not account for all relevant factors affecting valuation. Enbridge Pipeline (east Texas) L.P. v. Avinger Timber, L.L.C., 326 S.W.3d 390, 2010 Tex. App. LEXIS 8629, 172 Oil & Gas Rep. 722 (Tex. App. Texarkana Oct. 27 2010).

Real Property Law : Property Valuation

1960. Defendant's offer to purchase permanently damaged property for its full value was not relevant to the fair market value of the property. Therefore, the offer should not have been admitted and there was no evidence for the jury's finding that there was no diminution of value. Mieth v. Ranchquest, Inc., 2004 Tex. App. LEXIS 4601 (Tex. App. Houston 1st Dist. May 20 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 296, 2005 Tex. App. LEXIS 2079 (Tex. App. Houston 1st Dist. 2005).

Tax Law : State & Local Taxes : Personal Property Tax : Tangible Property : General Overview

1961. In a tax dispute regarding valuation, an expert's premise that an underground storage tank (UST), once installed, became salvage material was a faulty absolute and likely rendered his valuation of the USTs, which represented the largest deviation in the valuations, unreliable; unreliable testimony did not constitute evidence. Harris County Appraisal Dist. v. Sigmor Corp., 2008 Tex. App. LEXIS 2456 (Tex. App. Houston 1st Dist. Apr. 3 2008).

Tax Law : State & Local Taxes : Real Property Tax : General Overview

1962. In a suit challenging a real estate tax assessment, the trial court properly allowed expert testimony from the taxpayer's appraiser. The testimony was relevant, within the meaning of Tex. R. Evid. 401, 402, and 702 because the appraiser found a reasonable number of comparable properties, made appropriate adjustments, and compared the median appraisal value of those properties to the appraisal value applied to the property at issue, as required by Tex. Tax Code § 42.26. Harris County Appraisal v. Hartman Reit Operating P'ship, L.P., 186 S.W.3d 155, 2006 Tex. App. LEXIS 103 (Tex. App. Houston 1st Dist. 2006).

Torts : Business Torts : Negligent Hiring & Supervision : General Overview

1963. Illegal immigrant status of defendant driver should not have been admitted in a wrongful death and survival action stemming from a multi-fatality vehicular accident. Under Tex. R. Evid. 401, 402, 403, the evidence was not relevant to claims of negligent hiring and negligent entrustment, even if the employer's failure to screen and thus its failure to discover the driver's inability to work in the United States furnished a condition that made the accident possible, because the driver's immigration status did not cause the collision. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

Torts : Damages : Compensatory Damages : Lost Income : Award Calculations

1964. In a wrongful death and survival action, evidence of the deceased worker's illegal immigrant status was properly excluded under Tex. R. Evid. 401, 403. Although immigration status could be a relevant consideration in determining pecuniary loss damages, the usefulness was limited and was not made less speculative by testimony about an immigration raid. Republic Waste Servs. v. Martinez, 335 S.W.3d 401, 2011 Tex. App. LEXIS 540, 79 A.L.R.6th 745 (Tex. App. Houston 1st Dist. Jan. 20 2011).

Torts : Damages : Punitive Damages : Conduct Supporting Awards

1965. Trial court improperly admitted evidence that the decedent's widow would put any punitive damages she received from the corporation that owned and operated the cemetery into a trust to pay for funerals for persons who could not afford them because it was not relevant to proving any of the factors to be considered when determining the amount of punitive damages or to penalizing or punishing the corporation. Serv. Corp. Int'l v. Guerra, 348 S.W.3d 221, 2011 Tex. LEXIS 417, 54 Tex. Sup. Ct. J. 1191 (Tex. 2011).

1966. In a case arising from a fatal vehicle accident, a petition for a writ of mandamus was granted in relation to the discovery of financial records in a gross negligence case because the records sought were not duplicative of balance sheets produced; the balance sheets were not audited or certified, and they did not contain an affidavit or statement that they represented the net worth of a truck owner and an employer; evidence of net worth was relevant to this lawsuit and discoverable because punitive damages were sought under Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a). In re Brewer Leasing, Inc., 255 S.W.3d 708, 2008 Tex. App. LEXIS 3021 (Tex. App. Houston 1st Dist. 2008).

Torts : Malpractice & Professional Liability : Healthcare Providers

1967. Summary judgment was granted to a psychiatrist in an action brought under the Texas Liability and Improvement Act, because experts did not establish causation based on the act of prescribing a drug to a patient, who later committed embezzlement and other forms of debauchery allegedly due to taking medication for attention deficit disorder; the evidence did not show that a psychiatrist had knowledge of an alleged propensity towards addictive behavior, expert testimony based on this conclusion was merely speculation and conjecture, and a trial court did not abuse the patient's due process rights by failing to consider the evidence under those circumstances. Price v. Divita, 224 S.W.3d 331, 2006 Tex. App. LEXIS 6929 (Tex. App. Houston 1st Dist. 2006).

Torts : Negligence : Causation : General Overview

1968. Driver's consumption of alcohol was relevant to the element of causation in his negligence suit against a trucker because the trucker presented evidence that the accident could have been avoided had the driver steered his vehicle to the right to avoid the trucker's trailer, and in failing to do so, the driver caused the accident. PPC Transp. v. Metcalf, 254 S.W.3d 636, 2008 Tex. App. LEXIS 3291 (Tex. App. Tyler 2008).

Torts : Products Liability : Design Defects

1969. In a product liability case involving an allegedly defective surge protector, the trial court properly ordered discovery relating to a recall of a predecessor product that caused overheating and fires, but erred in allowing discovery of complaints regarding models that were not similar to the model in question and in failing to limit the scope of the requests as to time and locale. In re Am. Power Conversion Corp., 2012 Tex. App. LEXIS 5310, 2012 WL 2584290 (Tex. App. San Antonio July 5 2012).

1970. Discovery order in a product liability case requiring the manufacturer to produce documents about protective systems on several model years was not overbroad; evidence about similar products was relevant under Tex. R. Civ. P. 192.3(a), Tex. R. Evid. 401 to a safer alternative design as contemplated by Tex. Civ. Prac. & Rem. Code Ann. § 82.005, and the manufacturer did not meet its burden under Tex. R. Civ. P. 193.4(a), 199.6 of showing that the time parameters were burdensome or otherwise presenting proof to support its objections. In re Exmark Mfg. Co., 299 S.W.3d 519, 2009 Tex. App. LEXIS 8469 (Tex. App. Corpus Christi Oct. 30 2009).

Torts : Products Liability : Negligence

1971. In an action arising from a car fire, a verdict against car manufacturer was reversed because there was no evidence that the fire and death were caused by a defect that allowed gas to siphon from the fuel system. The difficulty was that there were significant conflicts in and between testimony by plaintiff's two experts as to nature of the leak, one of whom opined that gasoline had siphoned from the rear hose but offered no basis; opinion testimony that was conclusory or speculative was not relevant evidence. GMC v. Iracheta, 161 S.W.3d 462, 2005 Tex. LEXIS 304, 48 Tex. Sup. Ct. J. 529, CCH Prod. Liab. Rep. P17372 (Tex. 2005).

1972. Certain OSHA exhibits were properly admitted as they were relevant to the operator's design defect claim, because to establish a design defect in the forklift, the operator bore the burden of establishing there was a safer alternative design for the product, Tex. Civ. Prac. & Rem. Code Ann. § 82.005(a)(1). The operator contended the forklift would have been safer had it been designed with a door to hold him in the forklift's compartment as the forklift dropped over the edge of the loading dock, and to counter this claim, the manufacturer was permitted to introduce evidence tending to show that inclusion of a door in the design of the forklift was not a safer alternative design. Costilla v. Crown Equip. Corp., 148 S.W.3d 736, 2004 Tex. App. LEXIS 10163 (Tex. App. Dallas 2004).

Torts : Transportation Torts : Rail Transportation : Federal Employers' Liability Act

1973. In an action under the the Federal Employers Liability Act, in the absence of any evidence that a railroad employee had a genetic predisposition to such injuries, the trial court did not abuse its discretion by excluding testimony that genetics was a cause of degenerative disc disease. BNSF Ry. Co. v. Phillips, 434 S.W.3d 675, 2014 Tex. App. LEXIS 5533 (Tex. App. Fort Worth May 22 2014).

Transportation Law : Private Vehicles : Traffic Regulation : Speed Limits : Drag Racing

1974. Trial court did not abuse its discretion during defendant's trial for racing on a highway in admitting photographs that showed images of high performance additions to defendant's car, including the type of engine and several after-market additions, where the arresting officer testified the additions were commonly added to high-performance vehicles owned by racers to enhance a vehicle's overall performance. Based on the arresting officer's testimony, the photographs were relevant under Tex. R. Evid. 401 to the alleged racing charge because the photographs had a tendency to make the determination that defendant was racing more or less probable by showing his car had high performance additions commonly used by racing vehicles. Sony v. State, 307 S.W.3d 348, 2009 Tex. App. LEXIS 8688 (Tex. App. San Antonio Nov. 11 2009).

Workers' Compensation & SSDI : Administrative Proceedings : Evidence : Medical Evidence

1975. Jury properly found that an employee did not sustain a compensable injury because the State offered expert medical opinion that the employee's injury was a neuropathic stress fracture caused by pre-existing diabetes, which he had difficulty controlling, and not arising out of the employee's employment. Lyons v. State Office of Risk Mgmt., 2009 Tex. App. LEXIS 6651, 2009 WL 2596053 (Tex. App. Corpus Christi Aug. 25 2009).

Workers' Compensation & SSDI : Administrative Proceedings : Judicial Review : General Overview

1976. When the workers' compensation administrative record was admitted into evidence under Tex. Lab. Code Ann. § 410.306(b), redacted documents properly could have been excluded under Tex. R. Evid. 401 as irrelevant in part and under Tex. R. Evid. 403 because of the likelihood of confusion; thus, the trial court adequately informed the jury of the appeals panel's decision under Tex. Lab. Code Ann. § 410.304(b). Fort Worth Indep. Sch. Dist. v. Seifert, 2010 Tex. App. LEXIS 1575, 2010 WL 730362 (Tex. App. Waco Mar. 3 2010).

End of Document

Tex. Evid. R. 402

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 402 General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

-- the United States or Texas Constitution;
-- a statute;
-- these rules; or
-- other rules prescribed under statutory authority.

Irrelevant evidence is not admissible.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 22, *Rules Affecting Admissibility* .

Case Notes

Civil Procedure : Jurisdiction : Personal Jurisdiction & In Rem Actions : In Personam Actions : General Overview
Civil Procedure : Pleading & Practice : Service of Process : Methods : General Overview
Civil Procedure : Discovery : Disclosures : Sanctions
Civil Procedure : Discovery : Methods : Stipulations
Civil Procedure : Discovery : Relevance
Civil Procedure : Summary Judgment : Evidence
Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials
Civil Procedure : Remedies : Damages : Compensatory Damages
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Civil Procedure : Eminent Domain Proceedings : Experts
Computer & Internet Law : General Overview
Computer & Internet Law : Criminal Offenses : General Overview
Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Scope of Protection

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Assistance of Counsel
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Simple Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Coercion : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : Elements
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : Elements
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : First-Degree Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Consciousness of Guilt
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements
Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Weapons : Use : Commission of Another Crime : Elements
Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims
Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Tangible Objects : Scope
Criminal Law & Procedure : Eyewitness Identification : Photo Identifications
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Examination of Witnesses : Admission of Codefendant Statements
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Prison Attire & Restraints
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Defenses : General Overview
Criminal Law & Procedure : Defenses : Self-Defense
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Sentencing : Imposition : Evidence

Criminal Law & Procedure : Sentencing : Imposition : Victim Statements
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Classification
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Registration
Criminal Law & Procedure : Appeals : Reversible Errors : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Authentication : General Overview
Evidence : Competency : Attorneys
Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Photographs
Evidence : Hearsay : Exceptions : Statements Against Interest
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Hearsay : Rule Components : General Overview
Evidence : Hearsay : Rule Components : Truth of Matter Asserted
Evidence : Inferences & Presumptions : Inferences
Evidence : Judicial Notice
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Preliminary Questions : General Overview
Evidence : Procedural Considerations : Preliminary Questions : Weight & Credibility of Evidence
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : Character Evidence
Evidence : Relevance : Compromise & Settlement Negotiations
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Liability Insurance
Evidence : Relevance : Pleas & Related Statements
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : General Overview
Evidence : Relevance : Sex Offenses : Rape Shield Laws
Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview
Evidence : Relevance : Sex Offenses : Similar Crimes : Child Molestation Cases
Evidence : Scientific Evidence : Autopsies
Evidence : Scientific Evidence : Blood Alcohol
Evidence : Scientific Evidence : Blood & Bodily Fluids
Evidence : Scientific Evidence : Sobriety Tests
Evidence : Scientific Evidence : Toxicology
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances
Evidence : Testimony : Credibility : Impeachment : Mental Incapacity
Evidence : Testimony : Examination : General Overview
Evidence : Testimony : Examination : Cross-Examination : Scope
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility

Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Experts : Daubert Standard
Evidence : Testimony : Experts : Helpfulness
Evidence : Testimony : Experts : Qualifications
Evidence : Testimony : Lay Witnesses : General Overview
Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions
Evidence : Testimony : Lay Witnesses : Personal Knowledge
Family Law : Child Custody : Procedures
Family Law : Family Protection & Welfare : Cohabitants & Spouses : Abuse, Endangerment & Neglect
Family Law : Family Protection & Welfare : Elderly Persons : Abuse, Endangerment & Neglect
Family Law : Family Protection & Welfare : Involuntary Commitment
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview
Immigration Law : Duties & Rights of Aliens : Discrimination
Labor & Employment Law : Occupational Safety & Health : General Overview
Real Property Law : Eminent Domain Proceedings : Procedure
Real Property Law : Eminent Domain Proceedings : Valuation
Real Property Law : Nonmortgage Liens : Mechanics' Liens
Real Property Law : Property Valuation
Tax Law : State & Local Taxes : Personal Property Tax : Tangible Property : General Overview
Tax Law : State & Local Taxes : Real Property Tax : General Overview
Torts : Business Torts : Negligent Hiring & Supervision : General Overview
Torts : Damages : Compensatory Damages : Medical Expenses
Torts : Damages : Punitive Damages : Award Calculations : Factors
Torts : Damages : Punitive Damages : Conduct Supporting Awards
Torts : Intentional Torts : Defamation : Elements : Libel
Torts : Malpractice & Professional Liability : Healthcare Providers
Torts : Negligence : General Overview
Torts : Negligence : Causation : General Overview
Torts : Negligence : Defenses : Contributory Negligence : Procedure : General Overview
Torts : Premises Liability & Property : Trespass : Defenses : Consent
Torts : Products Liability : Design Defects

LexisNexis (R) Notes

Civil Procedure : Jurisdiction : Personal Jurisdiction & In Rem Actions : In Personam Actions : General Overview

1. In an appeal from the denial of a special appearance, the court rejected a foreign manufacturer's argument that some exhibits were irrelevant in that they related to other companies, which the opposing party asserted were predecessors. The court determined that the opposing party met its initial burden of pleading sufficient allegations to bring the manufacturer within the provisions of the Texas long-arm statute and therefore that the relevancy argument was without merit. Ho Wah Genting Kintron Sdn Bhd v. Leviton Mfg. Co., 163 S.W.3d 120, 2005 Tex. App. LEXIS 1414, CCH Prod. Liab. Rep. P17391 (Tex. App. San Antonio 2005).

Civil Procedure : Pleading & Practice : Service of Process : Methods : General Overview

2. Bill of review was denied in a paternity case because a purported father waived his argument regarding substituted service under Tex. R. Civ. P. 106 based on statements that his attorney made to the trial court; further, due to the waiver, the issue relating to substituted service was not preserved for appellate review. Moreover, since actual notice was not required for substituted service to be effective, evidence regarding actual notice was not heard as it was not relevant and did not affect the substantial rights of the parties. Thomas v. Wheeler, 2008 Tex. App. LEXIS 5617 (Tex. App. Texarkana July 29 2008).

Civil Procedure : Discovery : Disclosures : Sanctions

3. Trial court did not err by refusing to allow damage evidence in a condemnation case under Tex. R. Civ. P. 193 because the evidence in question was not disclosed under Tex. R. Civ. P. 194; there was no good cause shown due to counsel's inadvertence, and an owner would have been prejudiced thereby; moreover, cross-examination on this issue was properly excluded since it was not relevant to the case. Harris County v. Inter Nos, Ltd., 199 S.W.3d 363, 2006 Tex. App. LEXIS 3849 (Tex. App. Houston 1st Dist. 2006).

Civil Procedure : Discovery : Methods : Stipulations

4. In a personal injury case, a trial court did not err in admitting evidence of negligence because, even though there was a stipulation to the issues of negligence and proximate cause, an employer and an employee did not stipulate to the manner in which responsibility should be apportioned between them. Additionally, they did not stipulate to the employee's liability for exemplary damages. Matbon, Inc. v. Gries, 288 S.W.3d 471, 2009 Tex. App. LEXIS 268 (Tex. App. Eastland Jan. 15 2009).

Civil Procedure : Discovery : Relevance

5. In a case stemming from a house fire and the resulting product liability lawsuit filed by real parties in interest against the manufacturer of a computer power supply/surge protector and others, the trial court abused its discretion in ordering the manufacturer to produce certain of its back up power supply products, discovery produced in relation to another lawsuit, and other documents because real parties failed to establish a correlation between the specific model they had purchased and another of the manufacturer's product lines, failed to show that their request was not narrowly tailored to include only relevant materials, and failed to show that the litigation information they sought was relevant. In re Am. Power Conversion Corp., 2012 Tex. App. LEXIS 9369, 2012 WL 5507111 (Tex. App. San Antonio Nov. 14 2012).

6. In a product liability case involving an allegedly defective surge protector, the trial court properly ordered discovery relating to a recall of a predecessor product that caused overheating and fires, but erred in allowing discovery of complaints regarding models that were not similar to the model in question and in failing to limit the scope of the requests as to time and locale. In re Am. Power Conversion Corp., 2012 Tex. App. LEXIS 5310, 2012 WL 2584290 (Tex. App. San Antonio July 5 2012).

Civil Procedure : Summary Judgment : Evidence

7. Corporation provided an assignment document in a breach of contract dispute in its supplemental response to a concrete company's motions for summary judgment. A trial court did not abuse its discretion in admitting the evidence because the evidence was relevant. All Metals Fabricating, Inc. v. Ramer Concrete, Inc., 338 S.W.3d 557, 2009 Tex. App. LEXIS 1654 (Tex. App. El Paso Mar. 12 2009).

Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials

8. Employer was properly denied a new trial on its claim that the trial court erred by excluding a witness's testimony that the former employee who was complaining of sexual harassment by a coworker had regularly injected sexual discussions into the work environment because the trial court's belief that the testimony had no relevance other than to unfairly prejudice the jury was not arbitrary or unreasonable. Waffle House, Inc. v. Williams, 314 S.W.3d 1, 2007 Tex. App. LEXIS 843, 100 Fair Empl. Prac. Cas. (BNA) 451 (Tex. App. Fort Worth 2007).

Civil Procedure : Remedies : Damages : Compensatory Damages

9. Trial court did not err by refusing to allow damage evidence in a condemnation case under Tex. R. Civ. P. 193 because the evidence in question was not disclosed under Tex. R. Civ. P. 194; there was no good cause shown due to counsel's inadvertence, and an owner would have been prejudiced thereby; moreover, cross-examination on this issue was properly excluded since it was not relevant to the case. Harris County v. Inter Nos, Ltd., 199 S.W.3d 363, 2006 Tex. App. LEXIS 3849 (Tex. App. Houston 1st Dist. 2006).

Civil Procedure : Appeals : Reviewability : Preservation for Review

10. Bill of review was denied in a paternity case because a purported father waived his argument regarding substituted service under Tex. R. Civ. P. 106 based on statements that his attorney made to the trial court; further, due to the waiver, the issue relating to substituted service was not preserved for appellate review. Moreover, since actual notice was not required for substituted service to be effective, evidence regarding actual notice was not heard as it was not relevant and did not affect the substantial rights of the parties. Thomas v. Wheeler, 2008 Tex. App. LEXIS 5617 (Tex. App. Texarkana July 29 2008).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

11. Where a former employee alleged that a former employer terminated the employee because the employee refused to drive a truck without a required permit and a jury found in favor of the employer, any error in excluding seven overweight permits as irrelevant was harmless because the excluded permits were not relevant to the first jury question since whether the truck was overweight on the day in question was not relevant to whether the employee was discharged, and the jury did not reach the remaining questions. Nezat v. Tucker Energy Servs., 437 S.W.3d 541, 2014 Tex. App. LEXIS 6518, 38 I.E.R. Cas. (BNA) 1033 (Tex. App. Houston 14th Dist. June 17 2014).

12. In a negligence case arising from a fire at a condominium complex, speculative testimony regarding the adequacy of plumbing work was irrelevant and inadmissible and no showing of expert qualifications was made under Tex. R. Evid. 702; however, the trial court's error in admitting the testimony was harmless under Tex. R. App. P. 44. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 2007 Tex. App. LEXIS 5977 (Tex. App. Fort Worth July 26 2007).

Civil Procedure : Eminent Domain Proceedings : Experts

13. In an eminent domain proceeding in which a land planner designated as an expert by the owner testified that the owner could not achieve full compliance with the town's zoning ordinances after the State's condemnation and that the owner would be required to demolish all of its buildings, the trial court abused its discretion by admitting the land planner's opinion about the allegedly required demolition of the owner's buildings because his opinion was impermissibly speculative and conjectural. Reversal was required because there was a reasonable probability that the inadmissible evidence that characterized the demolition of the owner's buildings as a certainty, rather than a market-affecting factor, improperly influenced the jury's verdict on remainder damages. State v. Little Elm Plaza, Ltd., 2012 Tex. App. LEXIS 8880 (Tex. App. Fort Worth Oct. 25 2012).

14. In an action arising from the State's partial taking of owners' property for use in a highway project, the trial court did not abuse its discretion in denying the State's pretrial motion to exclude the expert testimony of the owners' designated real estate appraiser where his testimony was relevant because the market value of the whole property prior to the taking was a fact of consequence to the determination of the disputed element of the measure of damages. Moreover, the owners met their burden to show that the appraiser's expert testimony was reliable because he provided data of comparable sales with a variety of possible uses for the property and also testified that he performed a feasibility study on the possible uses for the property considering such factors as the impervious cover limitations, and although the State's experts provided conflicting testimony of the property's highest and best

use as an office building and the property's market value based on four different land sales with a different unit of comparison, it was for the jury to resolve the conflicting evidence of the experts to determine the market value of the whole property prior to the taking. State v. Petropoulos, 346 S.W.3d 619, 2009 Tex. App. LEXIS 3021 (Tex. App. Austin Apr. 28 2009).

Computer & Internet Law : General Overview

15. Court properly admitted the contents of social networking web pages because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be -- web pages the contents of which defendant was responsible for. There were numerous photographs of defendant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring, and there was a reference to the victim's death and the music from his funeral. Tienda v. State, 358 S.W.3d 633, 2012 Tex. Crim. App. LEXIS 244 (Tex. Crim. App. 2012).

Computer & Internet Law : Criminal Offenses : General Overview

16. In a murder trial, there was no error under Tex. R. Evid. 401, 402, 403, 404 in admitting a video of a social networking page, on which defendant was depicted holding a gun. The evidence was relevant because a witness testified that the gun in the video was the same gun the witness saw defendant use in the murder; it wass unlikely that the jury would have felt compelled to convict defendant of murder simply because he acted like a "bad boy" and brandished a weapon on camera. Brumfield v. State, 2010 Tex. App. LEXIS 10137, 2010 WL 5187690 (Tex. App. Houston 1st Dist. Dec. 23 2010).

17. In a trial for a murder by ligature strangulation, there was no error in admitting exhibits relating to defendant's use of an erotic asphyxiation Web site, in part because images of unrelated sexual activity and nudity were eliminated, leaving only those images showing ligature and manual strangulation that defendant had viewed in the five weeks before the murder; the State was able to tie some of the viewings to the dates that defendant visited other female homeowners and realtors, in order to show intent and motive in the murder of the female victim during an ostensible viewing of her home. Russo v. State, 228 S.W.3d 779, 2007 Tex. App. LEXIS 4499 (Tex. App. Austin 2007).

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Scope of Protection

18. In a case where a former girlfriend's request for a final protective order was granted, a former boyfriend's due process rights were not violated because he was not deprived of the opportunity to present evidence. The boyfriend was able to confront and cross-examine the girlfriend, even though a trial court did limit questioning regarding threats made against the boyfriend by an acquaintance of the girlfriend, because those questions had nothing to do with whether family violence had occurred in the past or was likely to occur in the future. Ford v. Harbour, 2009 Tex. App. LEXIS 1796, 2009 WL 679672 (Tex. App. Houston 14th Dist. Mar. 17 2009).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Assistance of Counsel

19. Ineffective assistance of counsel in violation of U.S. Const. amend. VI was shown where defendant's counsel failed to object to evidence that one of two women who died after being run over by defendant's truck was pregnant; evidence of her pregnancy was irrelevant under Tex. R. Evid. 401 and Tex. R. Evid. 402 because the fact that the woman was pregnant did not tend to make it more or less probable that defendant had the requisite intent to injure her and there was no evidence that defendant in fact even was aware of the woman's pregnancy. White v. Thaler, 610 F.3d 890, 2010 U.S. App. LEXIS 13329 (5th Cir. Tex. 2010).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

20. Defendant's Sixth Amendment right to confrontation was not violated by the exclusion of testimony regarding mishandling of evidence at the crime lab where the excluded testimony was not directed at the credibility or qualifications of the witnesses, but was offered to prove that there were problems with the identification and handling of evidence in general at the crime lab. A witness testified that she was unaware of mishandling in defendant's case and did not believe the evidence had been mishandled; therefore, the evidence was irrelevant because the witness did not testify that there were problems with the handling of the evidence in defendant's case. Pope v. State, 161 S.W.3d 114, 2004 Tex. App. LEXIS 11529 (Tex. App. Fort Worth 2004).

21. Judgment convicting and sentencing defendant of first degree felony offense of aggravated sexual assault of a child was reversed and remanded for a new trial, where the trial court erred in excluding evidence that defendant met with the victim, since he believed she was in danger of being molested by her cousin, and the improper limitation of defendant's cross-examination was an error of constitutional magnitude and harmful. Cooper v. State, 95 S.W.3d 488, 2002 Tex. App. LEXIS 8498 (Tex. App. Houston 1st Dist. 2002).

22. Judgment convicting and sentencing defendant of first degree felony offense of aggravated sexual assault of a child was reversed and remanded for a new trial, where the trial court erred in excluding evidence that defendant met with the victim, since he believed she was in danger of being molested by her cousin, and the improper limitation of defendant's cross-examination was error of constitutional magnitude and harmful. Cooper v. State, 95 S.W.3d 488, 2002 Tex. App. LEXIS 8498 (Tex. App. Houston 1st Dist. 2002).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview

23. In a trial for manufactured methamphetamine, there was no error in the admission of evidence concerning a subsequent arrest, seven months later, for possession of chemicals with intent to manufacture methamphetamine. That evidence tended to make less probable defendant's argument that he possessed items used to manufacture methamphetamine solely for use in bartering for drugs; thus, the evidence was relevant under Tex. R. Evid 401 and 402. Tarpley v. State, 2005 Tex. App. LEXIS 6289 (Tex. App. Dallas Aug. 10 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 8782 (Tex. App. Dallas Oct. 24, 2005).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

24. Evidence of trace quantities of controlled substances that were found in defendant's car during the same search in which the methadone was found was relevant and admissible because it was visible in a baggie and on a scale, and the baggie was found in the location where the trooper had seen defendant secret something. Lamkin v. State, 2010 Tex. App. LEXIS 6484, 2010 WL 3170647 (Tex. App. Eastland Aug. 12 2010).

25. In a drug case, the trial court did not err in refusing to allow defendant's girlfriend to testify that another person had stated that the contraband belonged to him; the proffered evidence was not relevant, under Tex. R. Evid. 402, to whether defendant possessed a controlled substance with intent to deliver it, in violation of Tex. Health & Safety Code Ann. § 481.112(a), and defendant offered no independent facts corroborating the hearsay statement under Tex. R. Evid. 803(24). Menton v. State, 2005 Tex. App. LEXIS 7799 (Tex. App. Amarillo Sept. 22 2005).

26. In a trial for heroin possession, gang-membership evidence was relevant because it was specifically linked to the case and was not used as character conformity evidence. The expert testified about defendant's affiliation with a gang and about the gang's trade being the trafficking of heroin, primarily by using a female's body cavity to transport the contraband, and having that female accompanied by a gang member; that evidence was relevant to the offense, which was charged after defendant entered the country with a woman who was carrying heroin in her vaginal cavity. Ojeda v. State, 2004 Tex. App. LEXIS 8557 (Tex. App. El Paso Sept. 24 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview

27. In a driving while intoxicated trial, evidence that cocaine was located in plain view next to the driver's seat in the vehicle defendant was driving was relevant to prove the State's allegation in the indictment that defendant was intoxicated, and, because the possession of cocaine evidence went to a material element of the State's case, it was not an extraneous offense. Lopez v. State, 2013 Tex. App. LEXIS 2064, 2013 WL 765711 (Tex. App. Waco Feb. 28 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

28. In an aggravated assault case, a court properly admitted evidence of a witness that she miscarried after jumping out a window because it was relevant to show the witness's physical and emotional state during and following the assault. Smith v. State, 2004 Tex. App. LEXIS 9172 (Tex. App. Dallas Oct. 19 2004).

29. Defendant argued that the trial court erred by excluding evidence relating to his strained marital relationship with the victim because that evidence was probative of his state of mind and motivation at the time of his actions; however, because the only conduct elements potentially implicated for the crime of aggravated assault were the nature of the conduct and the result of the conduct, the circumstances surrounding the conduct were not relevant and were properly excluded. Novillo v. State, 2004 Tex. App. LEXIS 5086 (Tex. App. Austin June 10 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

30. In a trial for aggravated assault on a public servant, it was proper to admit a rifle and associated photographs to show that defendant had access to the rifle, which was located in the same room. Airheart v. State, 2012 Tex. App. LEXIS 3235, 2012 WL 1431762 (Tex. App. El Paso Apr. 25 2012).

31. In a case alleging aggravated assault with a deadly weapon, defendant's right to present a defensive theory that some other person perpetrated the offense against a child was not denied when a trial court refused to allow him to question witnesses about a previously filed child abuse complaint because there was no nexus shown between this complaint and the charged offense; defendant was the only adult present when the injuries were sustained, the prior investigation ruled out abuse by a grandparent, and it was not relevant in showing that the mother, or any other adult, could have abused the child. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Simple Offenses

32. Trial court did not abuse its discretion by excluding expert psychological testimony who allegedly would have testified that as a result of his mental defects defendant was incapable of forming the necessary mens rea to commit an assault because defendant's amnesia was caused by his head injury, which occurred after the assault, and therefore could not be relevant to his intent at the time of the assault. In addition, the expert's report only noted that defendant told the expert that he had post-traumatic stress disorder, and nothing suggested that the expert himself confirmed the diagnosis. Iniquez v. State, 374 S.W.3d 611, 2012 Tex. App. LEXIS 5436, 2012 WL 2742632 (Tex. App. Austin July 6 2012).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Coercion : General Overview

33. When an inmate was charged with harassment by persons in certain correctional facilities for throwing urine and feces at two correctional officers, the officers' testimony about how they felt when defendant engaged in this conduct was circumstantial evidence relevant to the element of whether defendant had the intent to harass and alarm and annoy another person, so it could not be said that it was not relevant, under Tex. R. Evid. 401, or admissible, under Tex. R. Evid. 402. Wheatly v. State, 2004 Tex. App. LEXIS 5671 (Tex. App. Waco June 23 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

34. In a child abuse trial, the child's foster mother was properly allowed to testify that when she changed dressings in the child's vaginal area, the child said that her daddy had touched her there. The evidence rebutted the father's defense that the child's burns were accidental, arguably supported a finding that there was a pattern of abuse, and was not explicit in a way that would impress the jury in an irrational and indelible way. Wooten v. State, 2004 Tex. App. LEXIS 4296 (Tex. App. Austin May 13 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview

35. In a trial for injury to a child, defendant's letters to his girlfriend while awaiting trial were relevant because they contained apologies, some specific and bordering on admissions, and also contained attempts to persuade the girlfriend to recant, both circumstances indicating consciousness of guilt. Pizano v. State, 2013 Tex. App. LEXIS 7459, 2013 WL 3155954 (Tex. App. Houston 1st Dist. June 20 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : Elements

36. Defendant's posts on a social media website regarding his attitude toward children were relevant, although attenuated, in the case charging him with injury to a child. Copeland v. State, 2013 Tex. App. LEXIS 14675, 2013 WL 6388585 (Tex. App. Texarkana Dec. 5 2013).

37. In a murder trial involving a child victim, there was no error under Tex. R. Evid. 401, 402, 403 in admitting an autopsy photograph because it demonstrated the scope and extent of the child's injuries and the cause of death. It was not cumulative because it showed injuries to the victim's neck and head from a side view, whereas two other photographs showed injuries from a frontal view. Williams v. State, 2009 Tex. App. LEXIS 1045 (Tex. App. Houston 1st Dist. Feb. 12 2009).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault

38. In a trial under Tex. Penal Code Ann. § 22.02 for assault with a deadly weapon on a family member, evidence that the complainant's parent had a gun was properly excluded as irrelevant because the fact had no bearing on who had access to the gun and did not make it less likely that defendant assaulted the complainant with a gun; therefore, limiting defendant's cross-examination of the complainant on that issue did not violate Tex. Const. art. I, § 10. Dancy v. State, 2007 Tex. App. LEXIS 9806 (Tex. App. Houston 1st Dist. Dec. 13 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

39. Because the robberies occurred in the same geographic area within a relatively brief time frame, and all were committed by an assailant who covered his hands with socks or gloves, and whose face was completely covered by a similar covering, leaving only the eyes exposed, there are sufficient common characteristics between each of the robberies, that the extraneous offenses were relevant to prove identity and admissible under Tex. R. Evid. 401, 402, 404(b). Heigelmann v. State, 362 S.W.3d 763, 2012 Tex. App. LEXIS 1670, 2012 WL 688427 (Tex. App. Texarkana Mar. 2 2012).

40. In a trial for capital murder arising from a robbery and shooting, it was reversible error to admit evidence that defendant committed an armed robbery of a grocery store a month after the charged murder because any probative value as to intent under Tex. R. Evid. 401, 402 was outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Jackson v. State, 320 S.W.3d 873, 2010 Tex. App. LEXIS 6572 (Tex. App. Texarkana Aug. 12 2010).

41. In a robbery trial, the court did not have to admit evidence of the complainant's prior conviction for misdemeanor assault against defendant's nephew. Contrary to defendant's argument, the two-year-old conviction was not relevant to show that the complainant ran from his apartment because he feared a physical confrontation. Allison v. State, 2005 Tex. App. LEXIS 4055 (Tex. App. Houston 14th Dist. May 24 2005).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview

42. In a stalking case, the trial court did not err by allowing the cross-examination of a defense witness regarding whether she was aware that defendant had been charged with a crime following an alleged domestic violence incident with the victim and whether she was aware that he had violated a protective order and assaulted his former wife; this evidence was relevant to defendant's good character after the witness testified that she had called the victim and asked her to give defendant another chance. Allen v. State, 218 S.W.3d 905, 2007 Tex. App. LEXIS 2527 (Tex. App. Beaumont 2007).

Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : General Overview

43. In an intoxication manslaughter with a deadly weapon case, an enhanced videotape of the accident revealed that it was highly probative of the fact and manner of an officer's death; thus, it was clearly relevant under Tex. R. Evid. 402. Adams v. State, 2007 Tex. App. LEXIS 1165 (Tex. App. Fort Worth Feb. 15 2007).

44. In defendant's manslaughter case, the trial judge did not err in excluding evidence that a toxicology report revealed that a passenger had cocaine in her system at the time of her death where the evidence was not relevant because defendant presented no evidence that the driver used drugs on the day of the accident, and the fact that the passenger had cocaine in her system did not mean that the driver in the same car likewise had used cocaine. Tijerina v. State, 2004 Tex. App. LEXIS 9539 (Tex. App. Dallas Oct. 28 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

45. In a trial for defendant's murder of his wife, evidence that he remarried a month after being released on bond was relevant to motive. Davis v. State, 2011 Tex. App. LEXIS 8372, 2011 WL 5026403 (Tex. App. Houston 1st Dist. Oct. 20 2011).

46. In a murder trial, there was no error under Tex. R. Evid. 401, 402, 403, 404 in admitting a video of a social networking page, on which defendant was depicted holding a gun. The evidence was relevant because a witness testified that the gun in the video was the same gun the witness saw defendant use in the murder; it wass unlikely that the jury would have felt compelled to convict defendant of murder simply because he acted like a "bad boy" and brandished a weapon on camera. Brumfield v. State, 2010 Tex. App. LEXIS 10137, 2010 WL 5187690 (Tex. App.

Houston 1st Dist. Dec. 23 2010).

47. In a murder trial, shell casings that were retrieved from defendant's residence prior to the charged offense were relevant under Tex. R. Evid. 402 because they were circumstantial evidence of a connection between defendant and the murder weapon. Quesada v. State, 2006 Tex. App. LEXIS 1011 (Tex. App. San Antonio Feb. 8 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 6181 (Tex. App. San Antonio July 19, 2006).

48. In a trial for murder and robbery, evidence that a gun was taken in a prior robbery was same transaction contextual evidence and was relevant to show preparation for the planned robbery and murder at issue. The evidence was not unduly prejudicial, given the other evidence that the stolen gun was the murder weapon. Hill v. State, 2004 Tex. App. LEXIS 8474 (Tex. App. Tyler Sept. 22 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

49. State established that the flight evidence was relevant to show defendant's consciousness of guilt for the capital murder because defendant admitted to going on the run after the shooting, the police had a warrant to arrest him for capital murder, and, when the police tried to arrest him in a parking lot using marked vehicles, he led them on a high-speed chase. Goldsmith v. State, 2014 Tex. App. LEXIS 754, 2014 WL 261007 (Tex. App. Houston 14th Dist. Jan. 23 2014).

50. State established that the flight evidence was relevant to show defendant's consciousness of guilt for the capital murder because defendant admitted to going on the run after the shooting, the police had a warrant to arrest him for capital murder, and, when the police tried to arrest him in a parking lot using marked vehicles, he led them on a high-speed chase. Goldsmith v. State, 2014 Tex. App. LEXIS 754, 2014 WL 261007 (Tex. App. Houston 14th Dist. Jan. 23 2014).

51. In a murder trial, there was no error under Tex. R. Evid. 401, 403, 404(b) in admitting the extraneous offense evidence of an aggravated robbery that defendant and an accomplice allegedly committed six days prior to the murder because it was reasonable to conclude that the evidence went directly to the issue of intent, given that the extraneous robbery occurred less than a week prior to the shooting and had several similarities to the charged offense. Maxwell v. State, 2010 Tex. App. LEXIS 9036, 2010 WL 4595702 (Tex. App. Austin Nov. 12 2010).

52. In a trial for capital murder arising from a robbery and shooting, it was reversible error to admit evidence that defendant committed an armed robbery of a grocery store a month after the charged murder because any probative value as to intent under Tex. R. Evid. 401, 402 was outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Jackson v. State, 320 S.W.3d 873, 2010 Tex. App. LEXIS 6572 (Tex. App. Texarkana Aug. 12 2010).

53. In a capital murder case, a trial court did not err by refusing to allow the introduction of evidence that a victim had drugs in his system because any probative value the evidence might have had was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Tex. R. Evid. 403. The appellate court rejected defendant's argument that the evidence was relevant to the issue of the previous relationship between defendant and the victim and to show the condition of defendant's mind at the time of the offense. Anderson v. State, 2009 Tex. App. LEXIS 6809, 2009 WL 2915011 (Tex. App. Corpus Christi Aug. 27 2009).

54. In a capital murder trial, there was no error under Tex. R. Evid. 402 in admitting testimony from witnesses who had encounters with defendant either six months or three months before the offense; the evidence was not too remote to be relevant. Russo v. State, 228 S.W.3d 779, 2007 Tex. App. LEXIS 4499 (Tex. App. Austin 2007).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : Elements

55. Evidence of a judgment that terminated defendant's parental rights to three of her children after the date that she allegedly murdered her newborn infant was relevant at her capital murder trial under Tex. R. Evid. 401, and had relevance apart from mere proof of character conformity in compliance with Tex. R. Evid. 404(b), because an extraneous offense/bad act that took place subsequent to the offense for which a defendant was on trial did not make the extraneous offense/bad act inadmissible per se; furthermore, the judgment was introduced by the State after defendant had testified that the infant's death on the night in question was not the result of any intentional or knowing conduct on defendant's part, and the termination judgment contained findings by the trial judge that defendant "knowingly" placed or allowed her other children to remain in conditions dangerous to their physical or emotional well-being, which at least arguably made it more probable that defendant's acts or omissions on the night in question were done either intentionally or knowingly. Fergerson v. State, 2006 Tex. App. LEXIS 6589 (Tex. App. Beaumont July 26 2006).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : First-Degree Murder : General Overview

56. In defendant's murder case, the court properly admitted testimony regarding the victim having worked for defendant as a prostitute because the witness testified that the cycle of violence evolved from "slapping" to the point of "pretty brutal beatings." That testimony tended to show that defendant was violent toward the victim in the past and that his violence toward her was escalating; therefore, the testimony was relevant to the charge of murder. Wilson v. State, 2010 Tex. App. LEXIS 604, 2010 WL 323537 (Tex. App. Fort Worth Jan. 28 2010).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : General Overview

57. In defendant's evading arrest case, the court properly allowed testimony concerning typical behavior during a traffic stop because the testimony that very few people fled when a squad car initiated a stop by activating its lights was relevant to the offense of evading arrest, and went to defendant's intent. The fact that most people pulled over after the police initiated a stop made it more probable that defendant intentionally disregarded the officer's attempt to pull him over. Spencer v. State, 2013 Tex. App. LEXIS 2227, 2013 WL 1282307 (Tex. App. Dallas Mar. 6 2013).

58. In a criminal prosecution for indecency with a child by sexual contact, evidence of defendant's flight was relevant to show guilt. Howard v. State, 2006 Tex. App. LEXIS 1083 (Tex. App. Waco Feb. 8 2006).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Consciousness of Guilt

59. At defendant's trial for robbery, the trial court did not err in admitting testimony regarding his efforts to resist arrest because evidence relevant to his flight from the scene was a circumstance indicative of guilt. Johnson v. State, 2014 Tex. App. LEXIS 471, 2014 WL 222929 (Tex. App. Corpus Christi Jan. 16 2014).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly

60. In a case where defendant was convicted of violating Tex. Penal Code Ann. § 71.02, evidence of violent gang activities that were wholly unconnected to defendant was properly admitted into evidence because it was relevant, and the probative value of such was not substantially outweighed by the danger of unfair prejudice. Huan Huu Nguyen v. State, 2008 Tex. App. LEXIS 6263 (Tex. App. Dallas Aug. 18 2008).

61. Defendant did not object to testimony about gang affiliation during the guilt-innocence phase of a murder trial and therefore failed to preserved error under Tex. R. Evid. 402. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

62. In a trial for heroin possession, gang-membership evidence was relevant because it was specifically linked to the case and was not used as character conformity evidence. The expert testified about defendant's affiliation with a gang and about the gang's trade being the trafficking of heroin, primarily by using a female's body cavity to transport the contraband, and having that female accompanied by a gang member; that evidence was relevant to the offense, which was charged after defendant entered the country with a woman who was carrying heroin in her vaginal cavity. Ojeda v. State, 2004 Tex. App. LEXIS 8557 (Tex. App. El Paso Sept. 24 2004).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements

63. In a burglary trial, there was no error in the admission of evidence that defendant had, in his possession when he was arrested, items taken in a subsequent burglary from the same victim; the evidence was admissible to rebut a line of questioning directed at burglaries that occurred after defendant was in custody. Ellis v. State, 2007 Tex. App. LEXIS 414 (Tex. App. Tyler Jan. 24 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : General Overview

64. In defendant's child pornography case, it was within the zone of reasonable disagreement as to whether each of the pieces of evidence objected to possessed some relevance to matters of consequence because defendant denied that he had any connection to the child pornography found within his townhouse or that he had shown pornography to a child. Each of the items arguably served to tie defendant to the computer equipment in question as well as to the child pornography thereon. Checo v. State, 402 S.W.3d 440, 2013 Tex. App. LEXIS 7029 (Tex. App. Houston 14th Dist. June 11 2013).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

65. In an aggravated assault and aggravated sexual assault case, pursuant to Tex. R. Evid. 402, the trial court did not abuse its discretion by admitting testimony of a victim's former sexual partner that the victim had not engaged in sadomasochistic activities with her former partner prior to or after defendant's assault as it was relevant to determine whether she consented to sexual encounter and to having defendant brand his initials on her buttocks. Reed v. State, 2006 Tex. App. LEXIS 10107 (Tex. App. Houston 1st Dist. Nov. 22 2006).

66. At the punishment phase of a trial for the sexual assault of an 11-year-old child, evidence that should have been allowed under Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a)(1) to show circumstances and for mitigation included that the victim frequently called defendant and that she lied about her age. Eaves v. State, 141 S.W.3d 686, 2004 Tex. App. LEXIS 4728 (Tex. App. Texarkana 2004).

67. In the sentencing phase of defendant's sexual assault case, a court properly excluded testimony regarding prison conditions and defendant's potential status of being "fresh meat" in prison where the witness's testimony was elicited specifically to educate the jury on what defendant's prison experiences would be, and the testimony would not have been helpful to the jury in determining the appropriate sentence. Zunker v. State, 2004 Tex. App. LEXIS 4376 (Tex. App. Houston 1st Dist. May 13 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 72, 2005 Tex. App. LEXIS 320 (Tex. App. Houston 1st Dist. 2005).

68. Evidence of sperm located on a victim's clothing after a sexual assault was not relevant at trial because there was no evidence that defendant ejaculated during the crime. Davis v. State, 2004 Tex. App. LEXIS 3815 (Tex. App. Fort Worth Apr. 29 2004).

69. In defendant's sexual assault case, a court did not err by taking judicial notice of defendant's birth date where the alleged discrepancy regarding defendant's date of birth was not reflected in the appellate record, and as to the age difference, the victim testified without objection that she was 14 years old and that defendant told her he was 35 years old. The jury could also draw its own conclusions from the appearance of the victim and defendant in the courtroom. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

70. In defendant's trial on two counts of indecency with a child, testimony from defendant's ex-wife that defendant occasionally paraded around in front of his minor daughters, the complainants, in the nude with an erection was relevant under Tex. R. Evid. 401 and, thus, admissible under Tex. R. Evid. 402, and its prejudicial effect did not substantially outweigh its probative value under Tex. R. Evid. 403 because the State had to prove, beyond a reasonable doubt, that defendant had contact with the complainants and the contact was done for his sexual gratification, and because the evidence was relevant to prove sexual motive in as much as the manner that defendant acted around his own children was the only proof of defendant's possible sexual motive if the touching did in fact occur. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

71. Testimony of a sexual assault nurse examiner was relevant, even thought the examination took place two years after the last alleged act of child sexual abuse, because it refuted defense questioning of other witnesses about the absence of trauma or physical evidence to establish that the alleged acts occurred. Kaizer v. State, 2013 Tex. App. LEXIS 7271 (Tex. App. Corpus Christi June 13 2013).

72. In a trial for indecency with a child, there was no error under Tex. R. Evid. 401, 402 in admitting testimony about the complainant's delayed outcry. The trial court was within its discretion to find that fear of defendant by his son was relevant because it explained the complainant's fear of defendant, which was the proffered reason for her prior denial when the son reported the abuse and for the complainant's delayed outcry. Welch v. State, 2011 Tex. App. LEXIS 2692, 2011 WL 1364970 (Tex. App. Texarkana Apr. 12 2011).

73. In a trial for child sexual assault, statements about a phone conversation between defendant and his priest and testimony from a forensic examiner who interviewed the complainant were relevant under Tex. R. Evid. 401, 402 to rebut defendant's claim that the complainant fabricated the allegation. Gutierrez v. State, 2010 Tex. App. LEXIS 8952, 2010 WL 4484350 (Tex. App. Houston 1st Dist. Nov. 10 2010).

74. In a trial for sexual assault of a child and indecency with a child, defendant failed to preserve an argument, as required by Tex. R. App. P. 33, regarding testimony that the Texas Department of Family and Protective Services (DFPS) had "reason to believe" the allegations; the appellate argument under Tex. R. Evid. 702 was not presented in the court below through an objection under Tex. R. Evid. 402. Todd v. State, 242 S.W.3d 126, 2007 Tex. App. LEXIS 9053 (Tex. App. Texarkana 2007).

75. In defendant's aggravated sexual assault case, the mere fact the complainant might have had intercourse with defendant's nephew did not rebut the scientific proof provided by the State showing a probability of greater than 99.99 percent that defendant fathered the complainant's child. More importantly, paternity of the child did not bear

on defendant's guilt. Reagan v. State, 2007 Tex. App. LEXIS 3589 (Tex. App. El Paso May 10 2007).

76. In an aggravated sexual assault case, a biologist's testimony regarding possible DNA testing of defendant's nephew to compare his DNA with that of complainant's child was properly excluded because the biologist testified that it would not have affected the testing she conducted on defendant's DNA that included a greater than 99.99 percent probability that he was the biological father of the complainant's child. Because the evidence was speculative, mere conjecture, and irrelevant, the testimony was properly excluded. Reagan v. State, 2007 Tex. App. LEXIS 3589 (Tex. App. El Paso May 10 2007).

77. In a trial for indecency with a child, it was proper to exclude evidence of conduct by the complainant's mother, such as extramarital affairs and involvement in pornography and drug abuse, because the probative value in establishing a motive for the complainant to make false accusations against defendant was low. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements

78. Complainant testified that defendant fondled and kissed her in an escalating fashion when she was between the ages of six and 10, that he felt her under her clothes when she was 10, and that he had sexual intercourse with her when she was 13. Because the testimony was relevant to the state of mind of the complainant and defendant, as well as to the previous and subsequent relationship between the complainant and defendant, pursuant to Tex. Code Crim. Proc. Ann. art. 38.37, § 2, the trial court did not err in admitting the extraneous offense evidence. Parker v. State, 2006 Tex. App. LEXIS 8834 (Tex. App. Houston 1st Dist. Oct. 12 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

79. Trial court did not abuse its discretion in excluding part of defendant's employer's testimony concerning the employer's son's prescription medication and a videotape of defendant's 2000 arrest for driving while intoxicated because the evidence was not relevant under Tex. R. Evid. 401 to whether defendant was guilty of the charged crimes of driving while intoxicated and evading arrest. Peavey v. State, 248 S.W.3d 455, 2008 Tex. App. LEXIS 1818 (Tex. App. Austin 2008).

80. In a trial for driving while intoxicated, evidence of defendant's medical condition, including that she had lupus and allergies, was properly excluded on the basis that there was no expert medical testimony as to what effect the medicines that she was taking would have on a person's conduct or condition, or on a person's normal use of mental and physical faculties; the proffered evidence was properly subject to a relevancy objection because it was a self-serving, sympathy-provoking recitation of her health and current medication without any showing of a link or nexus to any fact that is of consequence. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

81. Evidence of a police officer's administration of a modified alphabet test to defendant suspected of driving while intoxicated (DWI) was properly admitted because it was highly probative of whether defendant had the normal use of her mental faculties. The evidence did not have the potential to impress the jury in some irrational but indelible way because intoxication and, more specifically, defendant's loss of her normal mental or physical faculties was among the issues that a jury had to consider in a DWI trial, and, furthermore, the evidence was addressed for only a very brief period of time. Bergman v. State, 2005 Tex. App. LEXIS 3046 (Tex. App. Houston 1st Dist. Apr. 21 2005).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

82. In defendant's DWI case, he objected to the State's introduction of his blood-test results and extrapolation testimony because the blood draw occurred two hours after he was arrested and therefore was not relevant under Tex. R. Evid. 402 to whether he had the normal use of his faculties at the time of the alleged offense. The trial court overruled the objection. Crenshaw v. State, 378 S.W.3d 460, 2012 Tex. Crim. App. LEXIS 1254, 2012 WL 4372284 (Tex. Crim. App. Sept. 26 2012).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

83. In a driving while intoxicated case, a trial court did not err by admitting a DIC-24 form into evidence because it was relevant to prove that defendant refused to submit to the taking of a specimen of his breath and that defendant was provided with the required information under Tex. Transp. Code Ann. § 724.015 before his specimen was requested. Frnka v. State, 2009 Tex. App. LEXIS 7095, 2009 WL 2882939 (Tex. App. San Antonio Sept. 9 2009).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements

84. In a driving while intoxicated trial, evidence that cocaine was located in plain view next to the driver's seat in the vehicle defendant was driving was relevant to prove the State's allegation in the indictment that defendant was intoxicated, and, because the possession of cocaine evidence went to a material element of the State's case, it was not an extraneous offense. Lopez v. State, 2013 Tex. App. LEXIS 2064, 2013 WL 765711 (Tex. App. Waco Feb. 28 2013).

Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview

85. Trial court did not err when it admitted evidence that defendant had been seen selling drugs a month before her indicted offense of being a felon in possession of a firearm because the testimony, elicited from a witness present when the indicted offense was committed, was relevant and tended to make the existence of defendant's intent to possess a firearm more likely than not, as the witness testified that he knew of five prior occasions on which defendant sold crack cocaine and also commented that drug dealers were often armed to protect themselves from being robbed. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

Criminal Law & Procedure : Criminal Offenses : Weapons : Use : Commission of Another Crime : Elements

86. In a trial for failing to stop and render aid, evidence of the complainant's intoxication was properly excluded because the complainant's intoxication or sobriety when he was struck or his degree of fault in the accident was not relevant. Soto v. State, 2012 Tex. App. LEXIS 10071, 2012 WL 6049112 (Tex. App. Fort Worth Dec. 6 2012).

Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims

87. It was not reversible Brady error to exclude evidence that one of the officers involved in a search was later convicted of theft of property from crime scenes because the State disclosed the fact of the conviction and there was no evidence that the officer had anything to do with the money in the current case. Ramirez v. State, 2014 Tex. App. LEXIS 8144, 2014 WL 3735290 (Tex. App. Dallas July 28 2014).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Tangible Objects : Scope

88. In defendant's trial for indecency with a child by contact in violation of Tex. Penal Code Ann. § 21.11, the trial court properly ruled that certain letters to and from the victim that were in the possession of the prosecution were not discoverable under Tex. Code Crim. Proc. Ann. art. 39.14 nor admissible under Tex. R. Evid. 402 because they were not relevant to the issues at trial and were not exculpatory. Shaw v. State, 2009 Tex. App. LEXIS 5109, 2009 WL 1896068 (Tex. App. Austin July 3 2009).

Criminal Law & Procedure : Eyewitness Identification : Photo Identifications

89. Under Tex. R. Evid. 401, 402, the statement by the witness that she was afraid to select the photo of defendant in the photo lineup was relevant and admissible because it showed that she identified defendant as the person that perpetrated the victim's murder. Benavides v. State, 2012 Tex. App. LEXIS 4971, 2012 WL 2353731 (Tex. App. Dallas June 21 2012).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

90. Trial court did not err by denying defendant's motion to suppress statements made by correctional officers and witnesses because the testimony was not illegally obtained; because the jury was the exclusive judge of the credibility of witnesses and the weight to be given their testimony, the trial court did not err by denying the motion. Macon v. State, 2007 Tex. App. LEXIS 211 (Tex. App. Fort Worth Jan. 11 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

91. Defendant did not show that his trial counsel rendered ineffective assistance by failing to raise a relevance objection because testimony about defendant's remarks to the victim was relevant in that it revealed the victim's motive for distancing himself from defendant and helped to explain his reticence to involve himself with defendant. Perkins v. State, 2013 Tex. App. LEXIS 15003, 2013 WL 6569874 (Tex. App. Houston 1st Dist. Dec. 12 2013).

92. Defendant failed to prove that defense counsel was ineffective because she opened the door under Tex. R. Evid. 402 to damaging character evidence about his gang membership during his robbery trial. The record was silent as to counsel's trial strategy; the record did not show that counsel knew defendant was a gang member or that defendant's tattoos were indicative of gang membership. Huerta v. State, 359 S.W.3d 887, 2012 Tex. App. LEXIS 852, 2012 WL 311677 (Tex. App. Houston 14th Dist. Feb. 2 2012).

93. During defendant's trial for delivering more than one gram but less than four grams of cocaine, in violation of Tex. Health & Safety Code Ann. § 481.112, his trial counsel did not provide ineffective assistance by failing to object to certain portions of an undercover narcotics officer's testimony where counsel might have made the strategic decision to not object because he reasonably believed such an objection (whether on relevancy, confrontation, or other grounds) would likely be overruled by the trial court because such testimony was arguably admissible; the record indicated that the complained-of testimony was being offered as background information so that the jury could understand why the undercover officer was not surprised to see defendant appear at the motel room where the officer was working, even though the officer had initially been scheduled to meet a different suspected drug dealer, and such evidence could be considered relevant by a trial court, which could then choose to admit such evidence over any evidentiary objection under Tex. R. Evid. 402. Henderson v. State, 2007 Tex. App. LEXIS 9843 (Tex. App. Texarkana Dec. 20 2007).

94. Even if trial counsel should have objected to testimony from a murder victim's parent, defendant admitted shooting the victim three times; therefore, it was unlikely that the outcome of the trial would have been different if trial counsel had objected to the relevance of the evidence; defendant therefore failed to show that counsel was ineffective in failing to object. Kearse v. State, 2007 Tex. App. LEXIS 9828 (Tex. App. San Antonio Dec. 19 2007).

95. In a drug trial, counsel was not rendered ineffective by failing to object to an officer's statement that people associated with methamphetamine labs were dangerous because the statement provided support for the reasonableness of the officers' protective sweep and initial detention of the suspects; the probative value was not outweighed by any danger that the jurors would infer that defendant was dangerous because "dangerousness" was

not an element of the crimes charged. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

96. In a trial for aggravated robbery, counsel was not rendered ineffective by failing to object to evidence that showed the complainant suffered actual serious bodily injury rather than that he was threatened and placed in fear of imminent bodily injury or death. The contextual evidence admitted to prove the crime was clearly admissible because it placed the offense in its proper setting so that the jury could evaluate it. Washington v. State, 2004 Tex. App. LEXIS 11809 (Tex. App. Houston 1st Dist. Dec. 30 2004).

97. In a driving while intoxicated case, counsel was not ineffective for failing to object to a recording of defendant's postarrest phone conversation where, during the conversation, defendant was argumentative and used offensive language; the conversation was relevant because it provided a physical exemplar of defendant's demeanor and manner of speech, which could have been used by the jury as evidence of defendant's intoxication level. Campbell v. State, 2004 Tex. App. LEXIS 3509 (Tex. App. San Antonio Apr. 21 2004).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

98. Judgment convicting and sentencing defendant of first degree felony offense of aggravated sexual assault of a child was reversed and remanded for a new trial, where the trial court erred in excluding evidence that defendant met with the victim, since he believed she was in danger of being molested by her cousin, and the improper limitation of defendant's cross-examination was an error of constitutional magnitude and harmful. Cooper v. State, 95 S.W.3d 488, 2002 Tex. App. LEXIS 8498 (Tex. App. Houston 1st Dist. 2002).

99. Judgment convicting and sentencing defendant of first degree felony offense of aggravated sexual assault of a child was reversed and remanded for a new trial, where the trial court erred in excluding evidence that defendant met with the victim, since he believed she was in danger of being molested by her cousin, and the improper limitation of defendant's cross-examination was error of constitutional magnitude and harmful. Cooper v. State, 95 S.W.3d 488, 2002 Tex. App. LEXIS 8498 (Tex. App. Houston 1st Dist. 2002).

Criminal Law & Procedure : Trials : Examination of Witnesses : Admission of Codefendant Statements

100. Fact that defendant's spouse confessed to the unadjudicated offense of possession of marijuana did not make it any more or less probable that defendant was a party to the offense; thus, it was proper to exclude the spouse's admission. Moore v. State, 2014 Tex. App. LEXIS 5823, 2014 WL 2521537 (Tex. App. Tyler May 30 2014).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

101. Trial court did not err by refusing to allow defendant to cross-examine an officer about the confidential informant because the disallowed questions were not relevant to the issue of defendant's guilt or innocence, as the State did not rely on events related to obtaining the search warrant in proving defendant's guilt. Nwaogu v. State, 2013 Tex. App. LEXIS 4588, 2013 WL 1490489 (Tex. App. Houston 1st Dist. Apr. 11 2013).

102. Defendant failed to show an abuse by the trial court in excluding evidence where he did not show the exclusion of relevant and reliable evidence, Tex. R. Evid. 401, 402, that formed such a vital part of his case that its exclusion effectively precluded him from presenting a defense, U.S. Const. amends. VI, XIV. Houston v. State, 2012 Tex. App. LEXIS 5276, 2012 WL 2511588 (Tex. App. Dallas July 2 2012).

103. In a stalking case, the trial court did not err by allowing the cross-examination of a defense witness regarding whether she was aware that defendant had been charged with a crime following an alleged domestic violence incident with the victim and whether she was aware that he had violated a protective order and assaulted his former wife; this evidence was relevant to defendant's good character after the witness testified that she had called the victim and asked her to give defendant another chance. Allen v. State, 218 S.W.3d 905, 2007 Tex. App. LEXIS 2527 (Tex. App. Beaumont 2007).

104. Although defendant claimed that a trial court erred in not allowing him to cross-examine his arresting officer concerning another officer's relationship with a former girlfriend of defendant, there was no evidence presented of any bias or prejudice on the part of the arresting officer, only that six months after the incident he became aware that a fellow officer was dating a woman who had a relationship with defendant; having established no possible bias or prejudice, defendant had not shown that the evidence was relevant or that the trial judge abused his discretion by failing to allow testimony of the post-arrest knowledge obtained by the arresting officer. Waldrop v. State, 2006 Tex. App. LEXIS 8017 (Tex. App. Fort Worth Sept. 7 2006).

Criminal Law & Procedure : Trials : Prison Attire & Restraints

105. Video (but not audio) of defendant's interview with a detective was properly excluded because the jury could discern that defendant was in custody, given the venue; his ill-fitting, monochrome jail uniform with the name of a county jail stenciled on the back; and a plastic identification bracelet. The court deferred to the trial court's finding that the probative value was diminished by the State's ability to recreate defendant's pantomime of the events in question through its witness. State v. Pringle, 2013 Tex. App. LEXIS 7671 (Tex. App. Tyler June 25 2013).

Criminal Law & Procedure : Witnesses : Impeachment

106. Where the State had already established on direct examination that the complainant was serving a deferred adjudication probation during one point in her relationship with defendant, any further inquiry would not have made the existence of any fact of consequence to the determination of defendant's alleged offense more or less probable than it was without the evidence, and such testimony was not relevant to any bias, motive, or interest to help the State, making it an impermissible method of impeachment; accordingly, the trial court was within its discretion to limit the question posed by defendant's counsel on cross-examination. Crook v. State, 2005 Tex. App. LEXIS 3485 (Tex. App. Dallas May 6 2005).

Criminal Law & Procedure : Defenses : General Overview

107. Trial court did not violate defendant's due process right to introduce additional evidence to establish that an alternative perpetrator committed a murder because evidence of the alternative perpetrator's prior crimes did not demonstrate the required nexus between the crime charged and the alternative perpetrator because the evidence did not tend to connect the alternative perpetrator to the murder of the victim. Villa v. State, 2008 Tex. App. LEXIS 1025 (Tex. App. San Antonio Feb. 13 2008).

108. In a case alleging aggravated assault with a deadly weapon, defendant's right to present a defensive theory that some other person perpetrated the offense against a child was not denied when a trial court refused to allow him to question witnesses about a previously filed child abuse complaint because there was no nexus shown between this complaint and the charged offense; defendant was the only adult present when the injuries were sustained, the prior investigation ruled out abuse by a grandparent, and it was not relevant in showing that the mother, or any other adult, could have abused the child. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

Criminal Law & Procedure : Defenses : Self-Defense

109. In a case in which a jury found defendant guilty of the offense of murder, the trial court did not err in excluding defendant's testimony regarding the specifics about the "immoral teachings" that he believed his children's grandmother and the complainant had been exposing the children to because defendant did not explain, nor was a reviewing court able to discern, how any testimony about the contents of any "immoral teachings" would have had any tendency to make his self-defense claim more or less probable. Washington v. State, 2009 Tex. App. LEXIS 4434, 2009 WL 40168 (Tex. App. Houston 1st Dist. Jan. 8 2009).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

110. In defendant's aggravated robbery case, the trial court did not err in declining to strike the previously admitted evidence of the knife and a witness's testimony about the knife because the knife was relevant, it was admitted into evidence before the witness testified, and a photograph showed the exact location where the knife was found. Because the evidence was properly admitted, the trial court did not err by refusing defendant's request for a limiting instruction. Jones v. State, 2009 Tex. App. LEXIS 9570, 2009 WL 4856420 (Tex. App. Houston 1st Dist. Dec. 17 2009).

111. In drug and robbery case, although defendant's relevancy objection to evidence of the other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

112. When defendant pleaded guilty to intoxication manslaughter in violation of Tex. Penal Code Ann. § 49.08(a), the doctrines of double jeopardy and collateral estoppel did not preclude the trial court at sentencing from determining that defendant's prior offense involved alcohol even though the State had reduced the charge in the prior case from driving while intoxicated (DWI) to obstruction of a highway or other passageway; double jeopardy did not attach, because there were no common factual elements between DWI and obstruction of a highway or other passageway. Under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and Tex. R. Evid. 401-402, the trial court was permitted to consider all relevant evidence at sentencing. Cherian v. State, 2010 Tex. App. LEXIS 8646, 2010 WL 4244002 (Tex. App. Houston 1st Dist. Oct. 28 2010).

113. In a sentencing trial for felony assault to a family member, there was no error under Tex. R. Evid. 401, 402 when the trial court admitted testimony from defendant's wife about the circumstances of a prior assault and guilty plea. The testimony was relevant punishment evidence because it illustrated defendant's propensity for family violence and that he was not deterred by his earlier conviction. Murchison v. State, 2009 Tex. App. LEXIS 7481, 2009 WL 3050823 (Tex. App. Houston 1st Dist. Sept. 24 2009).

114. Probation officer was properly allowed to testify that defendant was not a suitable candidate for community supervision because suitability is a matter relevant to sentencing under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) when a defendant seeks placement on community supervision; the court noted that the trial judge still had operate within the bounds of Tex. R. Evid. 402. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

115. In a case of indecency with a child, the admission of irrelevant evidence at punishment that the victim's brother also abused the victim was harmless error under Tex. R. App. P. 44.2(b) because the victim testified that defendant did not know of the brother's abuse and because proper evidence of defendant's conduct warranted the

sentence imposed. Dustman v. State, 2005 Tex. App. LEXIS 6588 (Tex. App. Tyler Aug. 17 2005).

116. In a joint trial on the offense of sexual assault, a trial court's decision to admit a portion of a videotape showing one co-defendant's presence during the accidental overdose of a friend was not erroneous because the trial court repeatedly instructed the jury that defendant was not there. Klock v. State, 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

117. Trial court's decision to exclude testimony from a former prisoner regarding confinement conditions during sentencing was not erroneous because the trial court could have reasonably concluded that the testimony would not have been helpful to the jury in determining the appropriate sentence in a sexual assault case; moreover, the trial court could have reasonably concluded that the testimony went beyond the scope of any door opened by the State. Klock v. State, 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

118. In an aggravated sexual assault case, a court properly excluded a defense witness's testimony where it described prison life as he had observed it several years before, rather than present prison life, and the court could have reasonably concluded that the testimony was not helpful to determining an appropriate sentence. Zunker v. State, 177 S.W.3d 72, 2005 Tex. App. LEXIS 320 (Tex. App. Houston 1st Dist. 2005).

119. At the punishment phase of a trial for the sexual assault of an 11-year-old child, evidence that should have been allowed under Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a)(1) to show circumstances and for mitigation included that the victim frequently called defendant and that she lied about her age. Eaves v. State, 141 S.W.3d 686, 2004 Tex. App. LEXIS 4728 (Tex. App. Texarkana 2004).

120. In the sentencing phase of defendant's sexual assault case, a court properly excluded testimony regarding prison conditions and defendant's potential status of being "fresh meat" in prison where the witness's testimony was elicited specifically to educate the jury on what defendant's prison experiences would be, and the testimony would not have been helpful to the jury in determining the appropriate sentence. Zunker v. State, 2004 Tex. App. LEXIS 4376 (Tex. App. Houston 1st Dist. May 13 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 72, 2005 Tex. App. LEXIS 320 (Tex. App. Houston 1st Dist. 2005).

Criminal Law & Procedure : Sentencing : Imposition : Victim Statements

121. Even if trial counsel should have objected to testimony from a murder victim's parent, defendant admitted shooting the victim three times; therefore, it was unlikely that the outcome of the trial would have been different if trial counsel had objected to the relevance of the evidence; defendant therefore failed to show that counsel was ineffective in failing to object. Kearse v. State, 2007 Tex. App. LEXIS 9828 (Tex. App. San Antonio Dec. 19 2007).

122. Where defendant was convicted of sexual assault, trial court did not err under Tex. R. Evid. 401, 402, 403 in admitting testimony from the victim and his sister of the effect of the assault on the victim; testimony of an inflammatory or sympathetic nature will not bar its admissibility if it is relevant to the issue at trial, and the issue need not be contested. Ranels v. State, 1996 Tex. App. LEXIS 2867 (Tex. App. Beaumont Mar. 20 1996).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview

123. In defendant's indecency with a child case, the court properly excluded evidence that a boyfriend of the victims' mother was a registered sex offender because evidence of the boyfriend's registered-sex-offender status would only have been relevant if the identity of the alleged perpetrator of the offenses was an issue in the case. However, evidence of an alternative perpetrator was not relevant to the determination of whether the alleged offenses occurred. Shaw v. State, 2008 Tex. App. LEXIS 9038 (Tex. App. Waco Dec. 3 2008).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

124. Admission of evidence of a sex offender's 1975 murder conviction during a proceeding to commit him as a sexually violent predator was not error because the conviction and the facts surrounding his nonsexual criminal history were relevant to the issue of whether he suffered from a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

125. In a trial of inmate's civil commitment as a sexually violent predator under Tex. Health & Safety Code Ann. § 841.062, the trial court properly excluded the inmate's expert's testimony that one of the victims had recanted pursuant to Tex. R. Evid. 401, 402, and 702, because such evidence represented a collateral attack on the underlying convictions, which had not been set aside. In re Barron, 2013 Tex. App. LEXIS 8495, 2013 WL 3487385 (Tex. App. Beaumont July 11 2013).

126. In a case in which a sex offender was civilly committed after a jury found him to be a sexually violent predator, the trial court could have reasonably determined that the opinion of the State's expert concerning the sex offender's risk of recidivism was admissible as relevant evidence because the expert's explanation of the term "likely" was consistent with how dictionaries commonly defined that term and with the Texas Supreme Court's construction of Tex. Health & Safety Code Ann. § 841.003(a)(2). In re Weatherread, 2012 Tex. App. LEXIS 9757 (Tex. App. Beaumont Nov. 29 2012).

127. Sex offender's civil commitment as a sexually violent predator was proper where it could not be said that the testimony of one of the State's experts lacked probative value because, using evidence-based support, the expert had presented a professional opinion expressing a reasoned judgment based upon established research and techniques for his profession and not the mere ipse dixit of a credentialed witness. Moreover, the sex offender's claim that the testimony of another of the State's experts amounted to no evidence because it contained significant analytical gaps was not supported by the record, which reflected that the expert had described the factors he considered, and had explained why he felt those factors significant. In re Weatherread, 2012 Tex. App. LEXIS 9757 (Tex. App. Beaumont Nov. 29 2012).

128. Trial court erred by excluding defendant's sole expert witness, a forensic psychiatrist, from testifying at trial concerning his commitment to outpatient treatment under Tex. Health & Safety Code Ann. § 841.081 on the basis of his supposed disbelief in the existence of "behavioral abnormality" because the psychiatrist's opinion was based on his methodology, which he explained and applied to the particular facts of the case, including the commission of repeated sexual assault against elderly nursing home patients; the improperly excluded testimony related to a critical issue that was submitted to the jury, namely whether defendant suffered from a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence. The error was not harmless under Tex. R. App. P. 44.1 because the psychiatrist's testimony was the only evidence defendant had favoring a finding that he would not likely reoffend, and defendant's risk of reoffending was one of the central disputed issues. In re Commitment of Winkle, 362 S.W.3d 241, 2012 Tex. App. LEXIS 1820, 2012 WL 746298 (Tex. App. Beaumont Mar. 8 2012).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Classification

129. Admission of evidence of a sex offender's 1975 murder conviction during a proceeding to commit him as a sexually violent predator was not error because the conviction and the facts surrounding his nonsexual criminal history were relevant to the issue of whether he suffered from a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

130. Finding that respondent was a sexually violent predator (SVP) was proper under Tex. Health & Safety Code Ann. § 841.002(5) because there was no error in failing to allow respondent's counsel to question a witness on the interpretation of the SVP statute, Tex. Health & Safety Code Ann. § 841.001-851.151. The questions respondent was not allowed to ask did not address a fact of consequence that would have made the doctor's prognosis more or less probable. In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Registration

131. Based on his conviction for first-degree felony offense burglary of a habitation with intent to commit sexual assault, defendant did not show why it was reasonable for him to believe that the findings of fact and conclusions of law established he was not required to comply with sex-offender registration, Tex. Code Crim. Proc. Ann. art. 62.001(5)(D); it was within the trial court's discretion to determine that the findings of fact and conclusions of law were not relevant evidence. Durham v. State, 2013 Tex. App. LEXIS 7301 (Tex. App. Houston 1st Dist. June 13 2013).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

132. Trial court erred by excluding defendant's sole expert witness, a forensic psychiatrist, from testifying at trial concerning his commitment to outpatient treatment under Tex. Health & Safety Code Ann. § 841.081 on the basis of his supposed disbelief in the existence of "behavioral abnormality" because the psychiatrist's opinion was based on his methodology, which he explained and applied to the particular facts of the case, including the commission of repeated sexual assault against elderly nursing home patients; the improperly excluded testimony related to a critical issue that was submitted to the jury, namely whether defendant suffered from a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence. The error was not harmless under Tex. R. App. P. 44.1 because the psychiatrist's testimony was the only evidence defendant had favoring a finding that he would not likely reoffend, and defendant's risk of reoffending was one of the central disputed issues. In re Commitment of Winkle, 362 S.W.3d 241, 2012 Tex. App. LEXIS 1820, 2012 WL 746298 (Tex. App. Beaumont Mar. 8 2012).

133. In an indecency with a child case, the court committed reversible error in the admission of sex toys because there was no suggestion that sex toys were used in any way related to the complainant, and the State emphasized those items in providing a detailed description of each item, making certain to emphasize their graphic nature by carrying them in a single plastic tub, pointing out the testifying officer's wearing of gloves, and repeatedly apologizing to the jury for the graphic nature of those items. Warr v. State, 418 S.W.3d 617, 2009 Tex. App. LEXIS 2538 (Tex. App. Texarkana Apr. 15 2009).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

134. Defendant's statements to police which contradicted other evidence presented at trial were relevant and admissible to show his consciousness of guilt. Although the tapes contained references to drugs, crime, nicknames, extraneous offenses and bad acts, defendant did not specify where these references could be found in the three hour tapes. Ross v. State, 154 S.W.3d 804, 2004 Tex. App. LEXIS 11407 (Tex. App. Houston 14th Dist. 2004).

135. Defendant's conviction of intoxication manslaughter was upheld where he waived the issue of relevance of the photograph of the victim's charred body; the only objection made in the district court went to probative value and unfair prejudice under Tex. R. Evid. 403. Anderson v. State, 2003 Tex. App. LEXIS 10122 (Tex. App. Dallas Dec. 2 2003).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

136. Where defendant was convicted for two counts of aggravated sexual assault of a child with a deadly weapon, his claim that the trial court abused its discretion in refusing to admit evidence of the child's promiscuity over the State's relevance and Tex. R. Evid. 402 objections was not preserved for review. Defendant did not seek to offer evidence of the child's promiscuity at trial; by withdrawing a line of questioning on the subject, defendant prevented the trial court from ruling on the issue. Riley v. State, 2014 Tex. App. LEXIS 2830, 2014 WL 1016240 (Tex. App. Waco Mar. 13 2014).

137. Because at trial defense counsel did not object to pictures of his tattoos on the basis of Tex. R. Evid. 402 and 403, defendant's complaint on appeal was not preserved. Mejia v. State, 2012 Tex. App. LEXIS 6862, 2012 WL 3525641 (Tex. App. Corpus Christi Aug. 16 2012).

138. Trial court did not err by admitting testimony from two witnesses about defendant's past use and sale of methamphetamine under Tex. R. Evid. 404 because defendant's relevance objection did not preserve his Rule 404 complaints and because he lodged no objection to the testimony about his past use and sale of methamphetamine by one of the witnesses. Norris v. State, 2012 Tex. App. LEXIS 108, 2012 WL 34453 (Tex. App. Beaumont Jan. 4 2012).

139. Defendant failed to show that the trial court abused its discretion during the punishment phase of the trial by admitting extraneous offense evidence to which jeopardy had attached, because none of the objections were based on a double-jeopardy violation, and the undisputed facts showed that defendant's claim of a double jeopardy violation was not clearly apparent on the face of the record, when the facts establishing double jeopardy were disputed. Williams v. State, 2010 Tex. App. LEXIS 9561, 2010 WL 4910243 (Tex. App. Houston 1st Dist. Dec. 2 2010).

140. In a driving while intoxicated case, even though defendant made several challenges to the trial court's admission of a DC-24 form into evidence, because the only objection made at trial was for relevance, that was the only issue preserved for appellate review. Frnka v. State, 2009 Tex. App. LEXIS 7095, 2009 WL 2882939 (Tex. App. San Antonio Sept. 9 2009).

141. Defendant failed to preserve an issue for review because defendant made an objection, early in the complainant's testimony, that questions regarding the complainant's cancer treatment were irrelevant and unfairly prejudicial, that objection was overruled, and defendant did not at that time request a continuing objection nor lodge any further objection. The prosecutor went on to ask the complainant nine more questions about her cancer treatment, and the complainant responded with details about her treatment, including its nature and frequency, without any objections from defendant as to relevance or unfair prejudice. Thierry v. State, 288 S.W.3d 80, 2009 Tex. App. LEXIS 1043 (Tex. App. Houston 1st Dist. Feb. 12 2009).

142. Defendant did not object to testimony about gang affiliation during the guilt-innocence phase of a murder trial and therefore failed to preserved error under Tex. R. Evid. 402. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

143. In a trial for sexual assault of a child and indecency with a child, defendant failed to preserve an argument, as required by Tex. R. App. P. 33, regarding testimony that the Texas Department of Family and Protective Services (DFPS) had "reason to believe" the allegations; the appellate argument under Tex. R. Evid. 702 was not presented in the court below through an objection under Tex. R. Evid. 402. Todd v. State, 242 S.W.3d 126, 2007 Tex. App. LEXIS 9053 (Tex. App. Texarkana 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

144. Although defendant on trial for sexually molesting his stepdaughter objected to the admission of the report of the sexual assault nurse examiner as improper bolstering and a violation of Tex. R. Evid. 403, defendant did not identify at trial which Texas Rule of Evidence, if any, was violated by the admission of the nurse's report. As such, he failed to preserve his objection for appeal. Rivas v. State, 2007 Tex. App. LEXIS 4395 (Tex. App. San Antonio June 6 2007).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

145. In drug and robbery case, although defendant's relevancy objection to evidence of the other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

146. During defendant's criminal trial for burglary of a building, the trial court overruled defendant's Tex. R. Evid. 402 relevancy objection to testimony about his methamphetamine addiction. The Court of Appeals of Texas held that the failure to reassert his earlier objection waived the issue for appellate review in accordance with Tex. R. App. P. 33.1. Greenlee v. State, 2008 Tex. App. LEXIS 9438 (Tex. App. Texarkana Dec. 19 2008).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

147. Court did not abuse its discretion in admitting the evidence because the trial court's decision to admit evidence of defendant's knowledge that he was prohibited from owning a firearm fell within the zone of reasonable disagreement. Tran v. State, 2014 Tex. App. LEXIS 2387, 2014 WL 859674 (Tex. App. Texarkana Mar. 4 2014).

148. Court did not abuse its discretion in the exclusion of the proffered evidence because the excluded testimony failed to establish the existence of "bad blood" between defendant and the alleged victim. Tran v. State, 2014 Tex. App. LEXIS 2387, 2014 WL 859674 (Tex. App. Texarkana Mar. 4 2014).

149. In a criminal solicitation of a minor for sexual assault case, under Tex. R. Evid. 401, 402, the trial court did not abuse its discretion in excluding the defense witness's testimony about the veracity of the chat room logs because it was irrelevant as he could not say whether the State's or defendant's version of the chat logs was an accurate version of the actual chat sessions. Pudasaini v. State, 2011 Tex. App. LEXIS 5582, 2011 WL 2905592 (Tex. App. Dallas July 21 2011).

150. Trial court did not abuse its discretion by prohibiting defendant from questioning his daughter about the victim's use of marijuana because whether the victim used drugs over a month earlier would not rebut the toxicology report showing no drugs in her system at the time she was killed. Mcghee v. State, 2010 Tex. App. LEXIS 5561 (Tex. App. Houston 1st Dist. July 15 2010).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

151. In a case of indecency with a child, the admission of irrelevant evidence at punishment that the victim's brother also abused the victim was harmless error under Tex. R. App. P. 44.2(b) because the victim testified that defendant did not know of the brother's abuse and because proper evidence of defendant's conduct warranted the sentence imposed. Dustman v. State, 2005 Tex. App. LEXIS 6588 (Tex. App. Tyler Aug. 17 2005).

152. Trial court should have excluded as irrelevant and prejudicial a BB gun that was found in a defendant's truck and that was not used during the charged burglary. The error was harmless, however, because the court did not have fair assurances that the mind of an average juror would have found the State's case less persuasive had the BB gun not been admitted. Moreno v. State, 2005 Tex. App. LEXIS 4487 (Tex. App. Houston 1st Dist. June 9 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 6371 (Tex. App. Houston 1st Dist. Aug. 11, 2005).

153. Judgment convicting and sentencing defendant of first degree felony offense of aggravated sexual assault of a child was reversed and remanded for a new trial, where the trial court erred in excluding evidence that defendant met with the victim, since he believed she was in danger of being molested by her cousin, and the improper limitation of defendant's cross-examination was an error of constitutional magnitude and harmful. Cooper v. State, 95 S.W.3d 488, 2002 Tex. App. LEXIS 8498 (Tex. App. Houston 1st Dist. 2002).

154. Judgment convicting and sentencing defendant of first degree felony offense of aggravated sexual assault of a child was reversed and remanded for a new trial, where the trial court erred in excluding evidence that defendant met with the victim, since he believed she was in danger of being molested by her cousin, and the improper limitation of defendant's cross-examination was error of constitutional magnitude and harmful. Cooper v. State, 95 S.W.3d 488, 2002 Tex. App. LEXIS 8498 (Tex. App. Houston 1st Dist. 2002).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

155. Trial court's alleged error in permitting the complainant to testify as to the punishment he would like defendant to receive had no more than a very slight effect on the jury's determination of punishment; presuming there was error, such error was harmless. Hines v. State, 396 S.W.3d 706, 2013 Tex. App. LEXIS 2000, 2013 WL 748755 (Tex. App. Houston 14th Dist. Feb. 28 2013).

156. In a driving while intoxicated (DWI) case, it was error to admit the entirety of defendant's driving record because it contained evidence of extraneous offenses beyond the prior DWI convictions that were elements of a charged offense. However, the error was harmless because evidence of guilt was ample. Bridges v. State, 2011 Tex. App. LEXIS 9104, 2011 WL 5557534 (Tex. App. Dallas Nov. 16 2011).

157. Because a crayon drawing found in the victim's clothes during the autopsy did not provide a small nudge toward proving or disproving some fact of consequence, the drawing was irrelevant and inadmissible under Tex. R. Evid. 401 and 402; however, under Tex. R. App. P. 44.2(b), admission of the drawing was harmless error as the evidence against defendant was substantial and the drawing was not so emotionally charged that it prevented the jury from rationally considering the evidence before it. Soto v. State, 2011 Tex. App. LEXIS 8360, 2011 WL 5000393 (Tex. App. Corpus Christi Oct. 20 2011).

158. In a capital murder trial, any error under Tex. R. Evid. 401, 402 in admitting a drawing by a witness to the shooting that showed both the shooting and the immediate aftermath was harmless under Tex. R. App. P. 44.2(b) because the events depicted in the drawing were testified to by several other witnesses, surveillance videos showed defendant's actions, and defendant confessed. Petty v. State, 346 S.W.3d 200, 2011 Tex. App. LEXIS 5494 (Tex. App. Amarillo July 19 2011).

159. In an indecency with a child case, the court erred by admitting extraneous offense evidence due to the lack of similarity between the extraneous offenses and the charged offenses, the duration in time of twenty years between the offenses, and the lack of evidence concerning a continuing course of conduct by defendant. The extraneous acts did not take place in defendant's home and defendant did not ask the witness to touch himself or defendant.

Crocker v. State, 2009 Tex. App. LEXIS 9432, 2009 WL 4725299 (Tex. App. Dallas Dec. 11 2009).

160. Trial court abused its discretion by admitting evidence of defendant's prior burglary arrest pursuant to Tex. R. Evid. 404(b) where the tendency of the evidence was to show defendant was a bad person or that his character conformed to that of a person from whom criminal conduct might be expected. However, the error did not influence the jury, or had but a slight effect on its verdict of guilt, because the State's presentation of the alleged burglary, although factually detailed, was brief and received only passing mention in closing argument, and because the propensity and potency of the evidence to characterize defendant as a criminal was blunted by the previous, unopposed, admission of evidence of his prior conviction for manslaughter. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

161. In a sexual assault of a child case, the court reversibly erred by admitting extraneous acts evidence because defendant's practice of not using a condom while engaged in consensual sex with an adult companion, or informing the companion of his HIV positive status, had the practical effect of prejudicing any defense raised by defendant regarding the complainant's credibility. Such an effect would have been detrimental to defendant, who sought to discredit the complainant by pointing out factual variances in his outcries, and by suggesting that the complainant was motivated to fabricate the assault to avoid being schooled in an alternative education program. Lopez v. State, 288 S.W.3d 148, 2009 Tex. App. LEXIS 2050 (Tex. App. Corpus Christi Mar. 26 2009).

162. Trial court erred by admitting an extraneous offense of marijuana possession under Tex. R. Evid. 404(b) in a case involving unlawful possession of a weapon because it was irrelevant where defendant did not challenge the legality of a search; however, the error was harmless since defendant's sole defensive theory was negated by his admission to police. Defendant contended that he had no knowledge of gun found under the driver's seat of a vehicle, but he told a police officer that searched the vehicle that there was a weapon inside. Provencio v. State, 2008 Tex. App. LEXIS 6073 (Tex. App. Amarillo Aug. 11 2008).

163. In a trial for aggravated robbery, it was error to admit testimony from an officer that people in the area commonly did not call police when they found a gun; however, the error in admitting the irrelevant evidence was harmless under Tex. R. App. P. 44 because the evidence of guilt, while not overwhelming, was substantial; defendant admitted to involvement, and the complainant's testimony placed the gun squarely in defendant's hands during a robbery. Brown v. State, 2008 Tex. App. LEXIS 1406 (Tex. App. Houston 14th Dist. Feb. 28 2008).

164. During the guilt-innocence phase of defendant's murder trial, the trial court erred under Tex. R. Evid. 104 in admitting evidence regarding the theft of a rifle from the store where defendant worked based on the State's proffer where although the proffer might well have identified defendant as one of several possible suspects in the theft, it fell short of providing legally sufficient evidence to allow the trier of fact to reasonably find that defendant committed the offense because, based on the proffer, the only link between defendant and the theft was that he was one of possibly 14 managers with a key to the gun locker and that he "mentioned" that the store was selling a small child's rifle; furthermore, the erroneous admission of the extraneous offense evidence had a substantial and injurious effect or influence on the jury's verdict, thereby affecting defendant's substantial rights pursuant to Tex. R. App. P. 44. Fischer v. State, 235 S.W.3d 470, 2007 Tex. App. LEXIS 8378 (Tex. App. San Antonio 2007).

165. In defendant's capital murder case, evidence in the guilt-innocence phase that painted a picture of the victim as a young man with a promising future whose life defendant had ended prematurely was irrelevant and appealed to the jury's sympathies. However, the error was harmless; defendant admitted to participating in the shooting, and a witness testified that defendant shot the victim and grabbed the bag of codeine. Durand v. State, 2007 Tex. App. LEXIS 6535 (Tex. App. Houston 1st Dist. Aug. 16 2007).

166. Even though the trial court erred by admitting into evidence during defendant's aggravated sexual assault trial photographs of defendant, his co-defendant, and his roommate having sex, appearing to be intoxicated, and flashing a gang sign, the error was harmless because: (1) the photographs of defendant and the two others partying were not scandalous or shocking, but were innocuous in comparison to the photographs of the complainant and other women, who were naked and unconscious; (2) except for one comment during closing arguments, the State did not emphasize the evidence; (3) there was very little contemporaneous testimony concerning the photographs when they were admitted into evidence; and (4) the jury was manifestly able to consider the probative evidence and separate it from marginally relevant evidence because it acquitted the co-defendant and convicted defendant of the lesser-included offense of sexual assault. Casey v. State, 215 S.W.3d 870, 2007 Tex. Crim. App. LEXIS 230 (Tex. Crim. App. 2007).

Evidence : Authentication : General Overview

167. In defendant's stalking case, a reasonable fact finder could have found that the telephone number the victim attributed to defendant was his telephone number, and that defendant sent the electronic communications attributed to him by the State and depicted in the challenged exhibits. Accordingly, the challenged exhibits were relevant, and the trial court did not abuse its discretion by admitting them. Manuel v. State, 357 S.W.3d 66, 2011 Tex. App. LEXIS 7152 (Tex. App. Tyler Aug. 31 2011).

Evidence : Competency : Attorneys

168. In a failing to change a driver's license address case, defense counsel's testimony that he told the prosecutor before trial that defendant was a student, and therefore had two addresses, was relevant to rebut the suggestion that defendant, represented by counsel, should somehow have personally communicated the information to the prosecution; the error was not harmless because the officer admitted that if defendant had told him he was a student he would not have given him a ticket. Callahan v. State, 2008 Tex. App. LEXIS 3817 (Tex. App. Dallas May 28 2008).

Evidence : Demonstrative Evidence : Admissibility

169. In a driving while intoxicated case, counsel was not ineffective for failing to object to a recording of defendant's postarrest phone conversation where, during the conversation, defendant was argumentative and used offensive language; the conversation was relevant because it provided a physical exemplar of defendant's demeanor and manner of speech, which could have been used by the jury as evidence of defendant's intoxication level. Campbell v. State, 2004 Tex. App. LEXIS 3509 (Tex. App. San Antonio Apr. 21 2004).

Evidence : Demonstrative Evidence : Photographs

170. At defendant's murder trial, the court did not err by admitting an autopsy photograph depicting the bullet lodged in the tissue at the back of the victim's neck; the photograph was relevant to the cause of death--a gunshot wound to the head, and manner of death--homicide. Barr v. State, 2014 Tex. App. LEXIS 1714, 2014 WL 641351 (Tex. App. Austin Feb. 14 2014).

171. In a murder trial, any error was harmless from the admission of photographs showing unusual items found during a search of defendant's home, including a plastic manikin torso and head suspended by a noose around its neck and replica human skulls; the jury had the means to discern whether the items in the photographs represented an obsession with violence or merely poor taste and a penchant for collecting strange things. Kirk v. State, 421 S.W.3d 772, 2014 Tex. App. LEXIS 788, 2014 WL 252086 (Tex. App. Fort Worth Jan. 23 2014).

172. In a murder trial, any error was harmless from the admission of photographs showing unusual items found during a search of defendant's home, including a plastic manikin torso and head suspended by a noose around its neck and replica human skulls; the jury had the means to discern whether the items in the photographs represented an obsession with violence or merely poor taste and a penchant for collecting strange things. Kirk v. State, 421 S.W.3d 772, 2014 Tex. App. LEXIS 788, 2014 WL 252086 (Tex. App. Fort Worth Jan. 23 2014).

173. Pursuant to Tex. R. Evid. 401 and 402, the exclusion of the photographs of a witness based on irrelevance was within the trial court's discretion because defense counsel did not establish that the photographs depicted gang activity and only stated that it could show gang signs. Oliva v. State, 2011 Tex. App. LEXIS 8940, 2011 WL 5428965 (Tex. App. Houston 1st Dist. Nov. 10 2011).

174. Picture of spinner rims was properly admitted because it aided the jury in understanding the police officers' testimony about the improvements that defendant made to the rental car he drove for approximately one week; that was helpful to the jury by enabling them to determine if the installation of spinner rims tended to demonstrate defendant's control over the rental car. In addition, a photograph of the spinner rims that were actually installed on the rental car would have been relevant for the same reason and admissible at trial. Rollins v. State, 2009 Tex. App. LEXIS 9891 (Tex. App. Houston 1st Dist. Dec. 31, 2009).

175. In a murder case, autopsy photographs were properly admitted because the State had to prove that defendant caused the victim's death by shooting him with a deadly weapon, and a doctor's testimony described the type of injuries the victim received, the extent of those injuries, and the cause of his death. Additionally, although the photographs were somewhat gruesome, they were not enlarged. Ramirez v. State, 2009 Tex. App. LEXIS 6640, 2009 WL 4377427 (Tex. App. Corpus Christi Aug. 25 2009).

176. In defendant's capital murder case, the court properly allowed photographs of the victim to be admitted because the medical examiner who performed the autopsy stated that photographs of the child's body before and during the autopsy would assist him in describing his findings to the jury, the testimony was probative of the child's condition at the time defendant brought the child to a witness's house, and the testimony demonstrated the scope and extent of the child's injuries and the cause of death. Williams v. State, 294 S.W.3d 674, 2009 Tex. App. LEXIS 4201 (Tex. App. Houston 1st Dist. June 11 2009).

177. In a driving while intoxicated case, a booking photograph of defendant was not excluded from evidence under Tex. R. Evid. 403 because it was not unfairly prejudicial; even though the picture was not flattering, it did not have the potential to impress the jury in some irrational way. Moreover, it was relevant to show defendant's condition near the time of arrest. Hester v. State, 2008 Tex. App. LEXIS 9242 (Tex. App. Texarkana Dec. 15 2008).

178. In a capital murder case, the court properly admitted two photographs because the photographs bolstered a State witness's testimony that testifying as a "snitch" had detrimental consequences -- injury to his sister, the photographs presented little, if any, prejudice to defendant because no party suggested to the jury that defendant was connected to the stabbing of the witness's sister, and the time involved in the introduction of the two photographs was minimal and unlikely to distract the jury from considering the charged offense when compared to having the witness's sister testify before the jury. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

179. In a murder case, the trial court did not abuse its discretion in admitting photographs of the victim at the crime scene because some of the photographs were used by the experts to explain the manner of the death and the amount of force used by defendant when hitting the victim with the baseball bat, tending to disprove his self-defense claim; other photographs, along with the testimony of the blood-spatter expert, addressed the absence of any struggle between the victim and defendant and that the victim was either on his knees or on the ground while

being beaten, while some photographs depicted the brutality of the crime and the severity of the injuries and were probative of the manner of the victim's death. Grayson v. State, 2008 Tex. App. LEXIS 2210 (Tex. App. Houston 1st Dist. Mar. 27 2008).

180. During a murder trial, the victim's mother identified a photograph of her son taken before the murder; the trial court did not abuse its discretion in admitting the photograph; the mother's identification had probative value in identifying the son as the victim. Brown v. State, 2006 Tex. App. LEXIS 7556 (Tex. App. Austin Aug. 25 2006).

181. Photographs of a murder victim were relevant under Tex. R. Evid. 401 and were not unduly prejudicial to defendant under Tex. R. Evid. 403 because a photograph of the victim lying in an ambulance immediately after firefighters removed her body from a burning house was both material and probative, as it established her condition at the crime scene, and because a photograph of her face taken during autopsy was also material and probative of the fact that the autopsy was performed on the same person removed from the crime scene by ambulance. The numerous autopsy photographs were also probative of the victim's cause of death, a material element in the offense of capital murder, and although the detail in the photographs was graphic, each served the purpose of illustrating the nature and extent of the victim's injuries. Vargas v. State, 2005 Tex. App. LEXIS 2417 (Tex. App. Houston 1st Dist. Mar. 31 2005).

182. Court properly admitted autopsy photos because, although they were gruesome, they were no more gruesome than the injuries that defendant inflicted upon the victim when he committed the offense of intoxication manslaughter. Each of the six photographs depicted a different view of the victim and showed the different injuries that she suffered, and the State did not offer a large number of photographs, nor were the photographs it offered cumulative of the victim's injuries. Booth v. State, 2014 Tex. App. LEXIS 2351, 2014 WL 887286 (Tex. App. Eastland Feb. 28 2014).

Evidence : Hearsay : Exceptions : Statements Against Interest

183. In a drug case, the trial court did not err in refusing to allow defendant's girlfriend to testify that another person had stated that the contraband belonged to him; the proffered evidence was not relevant, under Tex. R. Evid. 402, to whether defendant possessed a controlled substance with intent to deliver it, in violation of Tex. Health & Safety Code Ann. § 481.112(a), and defendant offered no independent facts corroborating the hearsay statement under Tex. R. Evid. 803(24). Menton v. State, 2005 Tex. App. LEXIS 7799 (Tex. App. Amarillo Sept. 22 2005).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

184. Evidence of bathing incident between defendant and his niece was admissible, Tex. R. Evid. 402, 403, 404(b), as it showed the nature of defendant's relationship with and mindset towards his niece, Tex. Code Crim. Proc. Ann. art. 38.37 Gragert v. State, 2011 Tex. App. LEXIS 3948, 2011 WL 2027955 (Tex. App. Amarillo May 24 2011).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

185. In a medical malpractice case, the probative value of statements from superseded pleadings regarding two nonsuited doctors was not outweighed by the danger of unfair prejudice because counsel, representing the parents of an injured child, first alluded to the doctor's party status, thus opening the door to rebuttal, and the statements, which were made by the parents, constituted admissions by party-opponents under Tex. R. Evid. 801, and were not hearsay. Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231, 2007 Tex. LEXIS 527, 50 Tex. Sup. Ct. J. 866 (Tex. 2007).

Evidence : Hearsay : Rule Components : General Overview

186. Messages retrieved from a murder victim's voicemail were not hearsay under Tex. R. Evid. 801 and were relevant under Tex. R. Evid. 401 because they were not offered to prove the truth of the matters asserted therein and they assisted the jury in establishing the time of the victim's death. White v. State, 2006 Tex. App. LEXIS 2224 (Tex. App. Houston 1st Dist. Mar. 23 2006).

Evidence : Hearsay : Rule Components : Truth of Matter Asserted

187. Trial court did not abuse its discretion by not permitting defendant to cross-examine a detective about statements allegedly made by a third party during the murder investigation because the statements could not provide defendant with a defense to the capital murder charge unless the jury believed the statements, as they were offered to prove that the third party, not defendant, was the last person to see the victim alive. Therefore, the statements were hearsay, and because defendant did not argue that they were admissible under a hearsay exception, they were inadmissible. Tilford v. State, 2011 Tex. App. LEXIS 5933, 2011 WL 3273543 (Tex. App. El Paso July 29 2011).

Evidence : Inferences & Presumptions : Inferences

188. In a trial for possession hydromorphone, it was proper to admit unsealed and opened vials of medicine to support an inference that defendant's possession was not a one-time mistake. Moore v. State, 2014 Tex. App. LEXIS 5823, 2014 WL 2521537 (Tex. App. Tyler May 30 2014).

Evidence : Judicial Notice

189. In defendant's sexual assault case, a court did not err by taking judicial notice of defendant's birth date where the alleged discrepancy regarding defendant's date of birth was not reflected in the appellate record, and as to the age difference, the victim testified without objection that she was 14 years old and that defendant told her he was 35 years old. The jury could also draw its own conclusions from the appearance of the victim and defendant in the courtroom. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

Evidence : Procedural Considerations : Curative Admissibility

190. In a case alleging aggravated assault with a deadly weapon, defendant was not allowed to question witnesses regarding a previous child abuse complaint against the same child since it was not relevant or material to the offense, and a mother could not have been questioned about specific instances of conduct; moreover, the mother's testimony during direct examination did not leave a misleading impression with the jury which needed clarification under Tex. R. Evid. 107; the focus of the prior investigation was a grandmother, who was not a witness in the case. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

191. Evidence of defendant's prior conviction for delivering drugs was admissible where, through his questioning of a defense witness, defense counsel had sought to paint defendant as a "white knight" not involved with drugs, thereby creating a false impression before the jury; by doing so, defendant opened the door to testimony to correct that false impression, and the prosecutor could only correct that false impression by cross-examination of the witness who created it. Jones v. State, 2006 Tex. App. LEXIS 7917 (Tex. App. Dallas Sept. 5 2006).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

192. In a criminal prosecution for capital murder, the trial court did not err by allowing the prosecutor's questions regarding the possible exchange of sexual favors for forgiveness of a drug debt; the evidence was admissible to

show the relationship between defendant and the victim. Whitmire v. State, 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

193. No reversible error was presented under Tex. R. Evid. 402, 403, and 404(b) by an arresting officer's testimony that defendant told the officer during a traffic stop about defendant's prior arrests because the videotape of the stop, including defendant's own statement of the arrests, was admitted without objection under R. 402, 403, and 404(b). Tunstall v. State, 2005 Tex. App. LEXIS 6336 (Tex. App. Beaumont Aug. 10 2005).

194. Defendant's statements to police which contradicted other evidence presented at trial were relevant and admissible to show his consciousness of guilt. Although the tapes contained references to drugs, crime, nicknames, extraneous offenses and bad acts, defendant did not specify where these references could be found in the three hour tapes. Ross v. State, 154 S.W.3d 804, 2004 Tex. App. LEXIS 11407 (Tex. App. Houston 14th Dist. 2004).

195. Defendant argued that the trial court erred by excluding evidence relating to his strained marital relationship with the victim because that evidence was probative of his state of mind and motivation at the time of his actions; however, because the only conduct elements potentially implicated for the crime of aggravated assault were the nature of the conduct and the result of the conduct, the circumstances surrounding the conduct were not relevant and were properly excluded. Novillo v. State, 2004 Tex. App. LEXIS 5086 (Tex. App. Austin June 10 2004).

196. Defendant did not establish the relevancy, Tex. R. Evid. 401, of certain evidence regarding the alleged sexual relationship between the two victims, who were step-brothers, as a material issue in the case in which he was found guilty of two counts of fondling/indecency with a child and one count of aggravated sexual assault of a child, so as to justify admission of evidence of an alleged victim's sexual behavior under Tex. R. Evid. 412(b)(2)(E); thus, the evidence was properly excluded under Tex. R. Evid. 402. Hale v. State, 140 S.W.3d 381, 2004 Tex. App. LEXIS 2333 (Tex. App. Fort Worth 2004).

197. Defendant did not establish the relevancy, Tex. R. Evid. 401, of certain evidence regarding the alleged sexual relationship between the two victims, who were step-brothers, as a material issue in the case in which he was found guilty of two counts of fondling/indecency with a child and one count of aggravated sexual assault of a child, so as to justify admission of evidence of an alleged victim's sexual behavior under Tex. R. Evid. 412(b)(2)(E); thus, the evidence was properly excluded under Tex. R. Evid. 402. Hale v. State, 140 S.W.3d 381, 2004 Tex. App. LEXIS 2333 (Tex. App. Fort Worth 2004).

198. Subject to certain exceptions, all relevant evidence is admissible in a criminal prosecution under Tex. R. Evid. 402 and 401; "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Haliburton v. State, 80 S.W.3d 309, 2002 Tex. App. LEXIS 4822 (Tex. App. Fort Worth 2002).

199. Trial court did not abuse its discretion in admitting evidence that the two men, who defendant was with when he was arrested, were involved in a robbery a short time before the arrest, because it was within the zone of reasonable disagreement whether the robbery was so intertwined with the stop and arrest that the jury's understanding of the offense would have been obscured without it. Haliburton v. State, 80 S.W.3d 309, 2002 Tex. App. LEXIS 4822 (Tex. App. Fort Worth 2002).

200. In defendant's trial on two counts of indecency with a child, testimony from defendant's ex-wife that defendant occasionally paraded around in front of his minor daughters, the complainants, in the nude with an erection was relevant under Tex. R. Evid. 401 and, thus, admissible under Tex. R. Evid. 402, and its prejudicial effect did not substantially outweigh its probative value under Tex. R. Evid. 403 because the State had to prove, beyond a reasonable doubt, that defendant had contact with the complainants and the contact was done for his sexual

gratification, and because the evidence was relevant to prove sexual motive in as much as the manner that defendant acted around his own children was the only proof of defendant's possible sexual motive if the touching did in fact occur. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

201. Under Tex. R. Evid. 401 and Tex. R. Evid. 402, finding a piece of evidence to be relevant is the first step in a trial court's determination of whether the evidence should be admitted before the jury. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

202. Once a proponent of an item of evidence shows that the evidence is logically relevant to some issue in the trial under Tex. R. Evid. 401, it is admissible under Tex. R. Evid. 402 unless the opponent of the evidence demonstrates that it should be excluded because of some other provision, whether constitutional, statutory, or evidentiary. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

Evidence : Procedural Considerations : Preliminary Questions : General Overview

203. In making the initial determination of admissibility of evidence, Texas courts must apply the principles set forth in the evidentiary rules governing relevancy under Tex. R. Evid. 401-403; to meet the relevancy test, the proffered evidence must, first, have probative value, and second, be of consequence to some issue in the trial under Tex. R. Evid. 401. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

Evidence : Procedural Considerations : Preliminary Questions : Weight & Credibility of Evidence

204. During the guilt-innocence phase of defendant's murder trial, the trial court erred under Tex. R. Evid. 104 in admitting evidence regarding the theft of a rifle from the store where defendant worked based on the State's proffer where although the proffer might well have identified defendant as one of several possible suspects in the theft, it fell short of providing legally sufficient evidence to allow the trier of fact to reasonably find that defendant committed the offense because, based on the proffer, the only link between defendant and the theft was that he was one of possibly 14 managers with a key to the gun locker and that he "mentioned" that the store was selling a small child's rifle; furthermore, the erroneous admission of the extraneous offense evidence had a substantial and injurious effect or influence on the jury's verdict, thereby affecting defendant's substantial rights pursuant to Tex. R. App. P. 44. Fischer v. State, 235 S.W.3d 470, 2007 Tex. App. LEXIS 8378 (Tex. App. San Antonio 2007).

Evidence : Procedural Considerations : Rulings on Evidence

205. Court did not err in excluding all of defendant's proffered evidence at sentencing, because defendant did not separate the admissible evidence from the inadmissible evidence. Fegans v. State, 2010 Tex. App. LEXIS 2588, 2010 WL 1571217 (Tex. App. Houston 1st Dist. Apr. 8 2010).

206. On appeal of a conviction of misdemeanor theft, the trial court did not err in sustaining the State's objection to the offender's question concerning profit margin in her inquiry as to the value of stolen retail property because the offender did not point to any offer of proof as required by Tex. R. Evid. 103, and the substance of the evidence she sought to offer was not apparent; thus, she forfeited her issue pursuant to Tex. R. App. P. 33; moreover, had she preserved her complaint, the trial court did not err; the offender complained that the trial court should not have sustained the State's relevance objection, but evidence that the victim had a profit margin did not tend to rebut the fact that the victim's sales price was at a fair market value. Smith v. State, 2007 Tex. App. LEXIS 5880 (Tex. App. Waco July 25 2007).

207. Where defendant used a car jack to strike the hood of the complainant's SUV, the arresting officer was permitted to testify that $1500 was the estimated cost of repairing the damage based on his years of experience

with criminal mischief cases; the officer also testified that the body shop's repair estimate was $ 1,530.01. Barnes v. State, 248 S.W.3d 217, 2007 Tex. App. LEXIS 4261 (Tex. App. Houston 1st Dist. 2007).

208. In a personal injury suit arising from an automobile accident, evidence regarding the defense expert's alleged bias was not material to the outcome of the case. The trial court's exclusion of this evidence did not cause the rendition of an improper judgment. Gill v. Slovak, 2005 Tex. App. LEXIS 8876 (Tex. App. Corpus Christi Oct. 27 2005).

209. Trial court did not err in not admitting an entire tape that included threatening phone calls from the victim, defendant's former wife, because defendant sought to admit the entire tape, and the messages on the tape that were unidentified had no relevance as to the victim and her alleged motives, and lacked a proper predicate for admission under Tex. R. Evid. 401, 402, and 404(b). Davis v. State, 2005 Tex. App. LEXIS 3649 (Tex. App. Fort Worth May 12 2005).

210. Trial court did not abuse its discretion under Tex. R. App. P. 44.1(a)(1) in excluding an exhibit that was offered to show that a lienholder was in voluntary compliance with the rules and regulations of the Texas Board of Professional Engineers and the former Texas Engineering Practice Act on the grounds that it was irrelevant because the exhibit did not specify that the lienholder had a licensed engineer as a regular, full-time employee or address the appropriate time period. Centurion Planning Corp. v. Seabrook Venture II, 176 S.W.3d 498, 2004 Tex. App. LEXIS 11079 (Tex. App. Houston 1st Dist. 2004).

211. As a police officer had reasonable suspicion to detain defendant based upon the information in the NCIC system, such that ownership of the vehicle was not relevant to the detention, the trial court did not err in excluding evidence regarding the actual ownership of the vehicle that defendant was in when he was stopped. Thornton v. State, 2014 Tex. App. LEXIS 2273, 2014 WL 813745 (Tex. App. Waco Feb. 27 2014).

Evidence : Relevance : Character Evidence

212. Defendant failed to prove that defense counsel was ineffective because she opened the door under Tex. R. Evid. 402 to damaging character evidence about his gang membership during his robbery trial. The record was silent as to counsel's trial strategy; the record did not show that counsel knew defendant was a gang member or that defendant's tattoos were indicative of gang membership. Huerta v. State, 359 S.W.3d 887, 2012 Tex. App. LEXIS 852, 2012 WL 311677 (Tex. App. Houston 14th Dist. Feb. 2 2012).

213. Court did not err by refusing to allow defense counsel to cross-examine a police officer about prior incidents in which the officer allegedly used excessive force because the officer's character was not an essential element of the charge, claim, or defense to attempting to take a weapon from a peace officer, and the proffered testimony was not material because it did not address any fact of importance to the outcome of the action. Rico v. State, 2009 Tex. App. LEXIS 4141, 2009 WL 1623343 (Tex. App. Corpus Christi June 11 2009).

214. In a trial for interfering with the lawful custody of a child, proffered character testimony was irrelevant on its face because whether defendants had ever helped other children in the past was not evidence having any tendency to make the existence of any fact that was of consequence more or less probable. Little v. State, 246 S.W.3d 391, 2008 Tex. App. LEXIS 1126 (Tex. App. Amarillo 2008).

Evidence : Relevance : Compromise & Settlement Negotiations

215. With respect to breach of contract and promissory estoppel claims, a letter written in connection with the settlement of an unrelated lawsuit was relevant and admissible under Tex. R. Evid. 401, 402 as proof of an

agreement to pay a claimed sum; hence, it was not barred by Tex. R. Evid. 408. MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc., 179 S.W.3d 51, 2005 Tex. App. LEXIS 5796 (Tex. App. San Antonio 2005).

216. In a drug case, in light of the offense charged and the evidence adduced at trial, the evidence that defendant possessed a bogus license did not unfairly prejudice the jury or confuse the issues. Accordingly, the trial court did not abuse its discretion in admitting the evidence. Gregory v. State, 159 S.W.3d 254, 2005 Tex. App. LEXIS 1660 (Tex. App. Beaumont 2005).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

217. Appellant's conviction for felony theft was affirmed because the trial court did not abuse its discretion in excluding evidence where nothing about the other individual's arrest for the January 30 break-in made any facts of consequence to the determination of appellant's guilt or innocence in the January 25 theft any more or less probable. Graves v. State, 2014 Tex. App. LEXIS 6522 (Tex. App. Houston 1st Dist. June 17 2014).

218. Trial court did not abuse its discretion by admitting defendant's shirts with gun shot residue particles on them because the evidence was relevant, as the shirts were collected from defendant's vehicle two days after the murder. The evidence was not prejudicial because it showed defendant's connection to a discharged weapon, directly or indirectly, at some point in time. Burks v. State, 2014 Tex. App. LEXIS 3243, 2014 WL 1285731 (Tex. App. Austin Mar. 26 2014).

219. Court did not abuse its discretion in admitting evidence of defendant's apology to the alleged victim because the apology was indicative of a consciousness of guilt and, thus, was highly probative and not outweighed by any danger of unfair prejudice. Smith v. State, 2013 Tex. App. LEXIS 11678 (Tex. App. Austin Sept. 17 2013).

220. Court properly admitted evidence that defendant's girlfriend purchased a silver .38 caliber revolver shortly before the victim's death because a codefendant testified that defendant had used a silver gun, and another witness testified that defendant was carrying a "chrome .38, snub-nose revolver" on the day the victim was killed. The inherent probative force of the evidence concerning the guns was its tendency to show that defendant was the shooter, and although the evidence was prejudicial, it was not unfairly prejudicial. Buckley v. State, 2013 Tex. App. LEXIS 2246 (Tex. App. Houston 14th Dist. Mar. 7 2013).

221. Trial court properly admitted a sex offender's prior written statements in his sexually violent predator commitment proceeding because the statements were relevant apart from their tendency to prove the sex offender's stipulated convictions. The prior inconsistent statements were neither unduly prejudicial nor cumulative of the matters that the sex offender admitted in his requests for admissions. In re Commitment of Bath, 2012 Tex. App. LEXIS 7586, 2012 WL 3860631 (Tex. App. Beaumont Sept. 6 2012).

222. Because at trial defense counsel did not object to pictures of his tattoos on the basis of Tex. R. Evid. 402 and 403, defendant's complaint on appeal was not preserved. Mejia v. State, 2012 Tex. App. LEXIS 6862, 2012 WL 3525641 (Tex. App. Corpus Christi Aug. 16 2012).

223. In a murder case, the court properly admitted photographs of defendant's tattoos because the "REDRUM" and revolver tattoos were especially probative of defendant's intent and attitude relevant to his defense and testimony that he would never point a gun at someone else first. Given defendant's own counsel's indication that everyone had tattoos and criminal records, on both sides, there was no indication the evidence unfairly aroused the jury's hostility or sympathy. Luckett v. State, 2012 Tex. App. LEXIS 6686, 2012 WL 3241802 (Tex. App. Dallas Aug. 10 2012).

224. Determination of the identity of the person fleeing from the police officer was a fact of significant consequence to the determination of the action, and an extraneous offense may be admissible, to show the identity of the accused, Tex. R. Evid. 403(b); therefore, evidence pertaining to identity was relevant and the trial court's decision to deny defendant's objection on the basis of Tex. R. Evid. 401 was within the zone of reasonable disagreement. White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

225. Determination of the identity of the person fleeing from the police officer was a fact of significant consequence to the determination of the action, and an extraneous offense may be admissible, to show the identity of the accused, Tex. R. Evid. 403(b); therefore, evidence pertaining to identity was relevant and the trial court's decision to deny defendant's objection on the basis of Tex. R. Evid. 401 was within the zone of reasonable disagreement. White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

226. Defendant was free to present other evidence of the complainant's purported financial hardship, and the trial court did not abuse its discretion in sustaining the State's objection to introduction of evidence relating to the complainant's civil suit against a railroad company because it was not relevant and did not give rise to an inference of bias. West v. State, 2012 Tex. App. LEXIS 3612, 2012 WL 1606239 (Tex. App. Houston 14th Dist. May 8 2012).

227. Trial court did not err by admitting evidence of defendant's gang affiliation during the guilt phase of his trial because the evidence was relevant and admissible to show defendant's motive and to rebut his self-defense theory. The probative value of the evidence outweighed any unfair prejudice, and the State did not devote an excessive amount of time to presenting the evidence. Rodriguez v. State, 2011 Tex. App. LEXIS 10156 (Tex. App. Houston 1st Dist. Dec. 22 2011).

228. Defendant was not prevented from showing that the victim and other family members were biased and had a motive to testify against him because there was animosity between the victim's family and defendant, but the trial court did not err in not admitting evidence of the victim's family's use of drugs as the behavior that was criticized because it was not admissible under the Tex. R. Evid. 403 balancing test and was not shown to be relevant to any issue in the case under Tex. R. Evid. 402. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

229. Photographs of the victim wearing an allegedly sexually suggestive T-shirt were excludable under either Tex. R. Evid. 402 as irrelevant or Tex. R. Evid. 403 because the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

230. In a case in which defendant was convicted of aggravated kidnapping, the trial court did not abuse its discretion by admitting evidence that defendant, after committing the charged offense and on the same day, had ordered two minor girls walking down a street to get in his van where the trial court could have reasonably concluded that the evidence regarding defendant's encounter with the minor girls was relevant and admissible because that evidence revealed defendant's true plans about his encounter with the victim on the day he committed the offense. The trial judge could have reasonably concluded that the inherent probative force of the evidence, along with the State's need for the evidence, substantially outweighed the danger of any unfair prejudice to defendant, and the presentation of the extraneous offense evidence did not consume an inordinate amount of time. Frank v. State, 2011 Tex. App. LEXIS 762, 2011 WL 379041 (Tex. App. Beaumont Feb. 2 2011).

231. Trial court did not abuse its discretion by admitting evidence of a prior robbery during defendant's aggravated robbery trial because: (1) it was committed the evening prior to the instant robbery; (2) defendant and his accomplice acted together in both robberies; (3) both robberies were committed against lone, older women using surprise, speed, and strength through force or the threat of force; and (4) both robberies were committed while

using the same vehicle as a means of escape. Therefore, the probative value of the evidence was great, as it showed that defendant and his accomplice acted together in a continuing criminal enterprise and rebutted defendant's theory that he was not a party to the instant robbery but was merely present in the vehicle while it occurred. Davis v. State, 2010 Tex. App. LEXIS 6949, 2010 WL 3341514 (Tex. App. Tyler Aug. 25 2010).

232. Trial court did not abuse its discretion in determining that the probative value of the child victim's mother's testimony outweighed any prejudicial effect because the testimony, identifying defendant as the individual who left bite marks on the victim when they were playing, was relevant and probative of the relationship between defendant and the victim. Samora v. State, 2010 Tex. App. LEXIS 6759, 2010 WL 3279536 (Tex. App. Corpus Christi Aug. 19 2010).

233. In a murder case, evidence of defendant's drug dealing was properly admitted because, according to a witness, defendant and the victim were rival drug dealers, and proof of motive was important to the State's case because the State was unable to produce an eyewitness who actually saw defendant shoot the victim. The time spent attempting to prove that defendant sold illegal drugs was not out of proportion to the time required to present such evidence. Koy Timon Moore v. State, 2009 Tex. App. LEXIS 7847 (Tex. App. Houston 14th Dist. Oct. 8 2009).

234. In a capital murder case, a trial court did not err by refusing to allow the introduction of evidence that a victim had drugs in his system because any probative value the evidence might have had was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Tex. R. Evid. 403. The appellate court rejected defendant's argument that the evidence was relevant to the issue of the previous relationship between defendant and the victim and to show the condition of defendant's mind at the time of the offense. Anderson v. State, 2009 Tex. App. LEXIS 6809, 2009 WL 2915011 (Tex. App. Corpus Christi Aug. 27 2009).

235. In defendant's tampering with a witness case, the trial court did not err in excluding evidence that the victim's father had recently kicked her out of his house because it was uncontested that defendant had previously threatened to kick the victim out if she became pregnant. That evidence served to establish a motive, if any, for the victim to make false accusations against defendant; the additional evidence regarding the victim's father's decision to kick her out, if true, did not lend any additional weight to that theory. Davis v. State, 2009 Tex. App. LEXIS 6685 (Tex. App. Corpus Christi Aug. 26 2009).

236. In a sexual assault of a child case, evidence that defendant had been subjected to unusual sexual events in his youth and that he related those events to the sexual assault of the child tended to rebut a contention that any contact with the child's penis was simply an accident, and therefore, the evidence was properly admitted. Additionally, the evidence took no additional time to develop initially, and was mentioned again during the trial only when defendant took the stand and denied making some of the statements. Watterson v. State, 2009 Tex. App. LEXIS 2938, 2009 WL 1148751 (Tex. App. Amarillo Apr. 29 2009).

237. Court erred in failing to instruct the jury to disregard the State's reference to plea negotiations because, given the manner in which the State's question to defendant was posed, one could reasonably interpret it as disclosing that plea negotiations had occurred, that potential offers were made and rejected, and that defendant's desires presented the major obstacle to arriving at a bargain. Bowley v. State, 280 S.W.3d 530, 2009 Tex. App. LEXIS 1448 (Tex. App. Amarillo Mar. 2 2009).

238. Defendant complained that the admission of evidence that he had left a note containing his name, jail address, and other information in the women's room was irrelevant and prejudicial; however, the trial court determined that the probative value of the evidence was substantial. Further, any evidence of an extraneous act was admissible during the punishment phase, pursuant to Tex. Code Crim. Proc. Ann. art. 37.07. Wilson v. State,

2008 Tex. App. LEXIS 9395 (Tex. App. Waco Dec. 17 2008).

239. In a driving while intoxicated case, a booking photograph of defendant was not excluded from evidence under Tex. R. Evid. 403 because it was not unfairly prejudicial; even though the picture was not flattering, it did not have the potential to impress the jury in some irrational way. Moreover, it was relevant to show defendant's condition near the time of arrest. Hester v. State, 2008 Tex. App. LEXIS 9242 (Tex. App. Texarkana Dec. 15 2008).

240. In an aggravated assault case, a trial court did not err by allowing a victim's father to testify during the guilt/innocence phase of the case because his brief testimony, which included basic information about himself, the victim, the evening of the shooting, and the victim's condition, was relevant and not overly prejudicial. Sanchez v. State, 2008 Tex. App. LEXIS 9072 (Tex. App. Eastland Dec. 4 2008).

241. In defendant's drug case, the trial court did not abuse its discretion by admitting in evidence the shotgun found on the back seat of the vehicle that defendant was driving just before his arrest because the probative value of the shotgun was considerable and significantly necessary to the State's case because it was a link tending to show that defendant knowingly possessed the cocaine. Additionally, the evidence of the shotgun was relevant to prove defendant's knowledge that he possessed narcotics. Harris v. State, 2008 Tex. App. LEXIS 9090 (Tex. App. Fort Worth Dec. 4 2008).

242. In a case where defendant was convicted of violating Tex. Penal Code Ann. § 71.02, evidence of violent gang activities that were wholly unconnected to defendant was properly admitted into evidence because it was relevant, and the probative value of such was not substantially outweighed by the danger of unfair prejudice. Huan Huu Nguyen v. State, 2008 Tex. App. LEXIS 6263 (Tex. App. Dallas Aug. 18 2008).

243. In a capital murder case, the court properly admitted two photographs because the photographs bolstered a State witness's testimony that testifying as a "snitch" had detrimental consequences -- injury to his sister, the photographs presented little, if any, prejudice to defendant because no party suggested to the jury that defendant was connected to the stabbing of the witness's sister, and the time involved in the introduction of the two photographs was minimal and unlikely to distract the jury from considering the charged offense when compared to having the witness's sister testify before the jury. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

244. Items seized at the scene of a house fire were relevant under Tex. R. Evid 401, 402, 403, 404(b) to show that the fire started as a result of the cooking of methamphetamine on the stove and that the debris found in the burned house pertained to the use or manufacture of illegal drugs; defendant failed to establish that the trial court abused its discretion or that the determination fell outside of the zone of reasonable disagreement. Dentler v. State, 2008 Tex. App. LEXIS 5708 (Tex. App. Eastland July 31 2008).

245. In defendant's robbery case, the State properly presented evidence of an extraneous robbery because the offenses occurred within three miles of one another and within a six-day time period, both took place late in the morning in large retail parking lots, and both acts were perpetrated quickly, snatching purses from unaccompanied females walking or standing in the parking lots; additionally, the testimony rebutted defendant's theories of alibi and that one victim's brief opportunity to view the perpetrator led to a mistaken identification; therefore, the probative value of the evidence was not substantially outweighed by its prejudicial effect. Evans v. State, 2008 Tex. App. LEXIS 477 (Tex. App. Houston 14th Dist. Jan. 22 2008).

246. In defendant's murder case, the court properly allowed the State to reveal defendant's tattoos because the evidence was relevant to support the State's theory that defendant was a gang member who murdered rival gang members in retaliation; in addition, given the other evidence indicating defendant's admitted gang membership, the

evidence was not unfairly prejudicial. Reyes v. State, 2008 Tex. App. LEXIS 293 (Tex. App. San Antonio Jan. 16 2008).

247. Trial court did not abuse its discretion in admitting evidence of a gun found by the witness because its probative value was not outweighed by the risk of unfair prejudice, when the witness testified that he found the gun around the same time as the aggravated robbery, lying on the road a few blocks away from the store, and this was approximately the same location where the officer observed defendant driving a car matching the description of the suspect's vehicle provided by police dispatchers at the time of the aggravated robbery and from which the officer observed defendant extend his hand and arm out of the window and then back into the car. Mouton v. State, 2007 Tex. App. LEXIS 10076 (Tex. App. Houston 1st Dist. Dec. 20 2007).

248. In defendant's murder case, although the court erred in excluding the testimony and notes of a licensed counselor who had counseled defendant hours before the murder because the testimony provided some insight into defendant's state of mind at the time of the murder, the error was harmless; defendant's expert's testimony concerning defendant's sanity at the time of the offense was considerably more direct and probative than the tangentially relevant testimony of the counselor. Bradshaw v. State, 244 S.W.3d 490, 2007 Tex. App. LEXIS 9427 (Tex. App. Texarkana 2007).

249. In a capital murder case, evidence of appellant's gang affiliation was properly admitted pursuant to Tex. R. Evid. 402 because it was relevant pursuant to Tex. R. Evid. 401 and its probative value was not substantially outweighed by the danger of unfair prejudice as described in Tex. R. Evid. 403; there was ample evidence connecting appellant to the gang and their plan regarding the victim, and it included the gang's violent activities. Moreover, the evidence was not admitted to show that the murder was gang activity, but that it was predictable that a homicide would occur as the result of the conspiracy, in which some participants were violent gang members, to rob the victim. Arroyo v. State, 239 S.W.3d 282, 2007 Tex. App. LEXIS 5111 (Tex. App. Tyler 2007).

250. In a medical malpractice case, the probative value of statements from superseded pleadings regarding two nonsuited doctors was not outweighed by the danger of unfair prejudice because counsel, representing the parents of an injured child, first alluded to the doctor's party status, thus opening the door to rebuttal, and the statements, which were made by the parents, constituted admissions by party-opponents under Tex. R. Evid. 801, and were not hearsay. Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231, 2007 Tex. LEXIS 527, 50 Tex. Sup. Ct. J. 866 (Tex. 2007).

251. Evidence of gang affiliation was properly admitted as relevant under Tex. R. Evid. 401 and Tex. R. Evid. 402 since it was offered to show a motive for a murder; the evidence was not limited under Tex. R. Evid. 404(b), and the probative value substantially outweighed the danger of unfair prejudice. Rodrigues v. State, 2007 Tex. App. LEXIS 4441 (Tex. App. Houston 14th Dist. June 7 2007).

252. In a driving while intoxicated case, a court did not abuse its discretion in admitting the portion of a videotape that contained defendant's statements regarding Xanax and Valium because defendant's statement that he took the medications was in response to a question by the officer, and the question was relevant as a predicate inquiry to the administration of a field sobriety test. Layton v. State, 263 S.W.3d 179, 2007 Tex. App. LEXIS 1191 (Tex. App. Houston 1st Dist. 2007).

253. Evidence of other contraband that police officers found in the room and evidence of the drugs found on the person of defendant's girlfriend, found while executing a search warrant was admissible when defendant was charged with possession of methadone that was found in the room because the evidence tended to establish the requisite affirmative link to the contraband. Davis v. State, 2006 Tex. App. LEXIS 10721 (Tex. App. Eastland Dec.

14 2006).

254. Trial court did not err by admitting evidence relating to the search of the girlfriend and the discovery of the crack pipe because under Tex. R. Evid. 404(b) because the evidence was relevant to the issue of whether the contraband and drug paraphernalia were present in the house and tended to prove an affirmative link between defendant and the methadone, and therefore the evidence was relevant to show defendant's knowledge or intent to possess the methadone. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because it had high probative value in affirmatively linking defendant to the methadone. Davis v. State, 2006 Tex. Crim. App. LEXIS 2526 (Tex. Crim. App. Dec. 14, 2006).

255. In a trial for indecency with a child, it was proper to exclude evidence of conduct by the complainant's mother, such as extramarital affairs and involvement in pornography and drug abuse, because the probative value in establishing a motive for the complainant to make false accusations against defendant was low. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

256. In an aggravated assault case, a court properly admitted evidence of another collision caused by defendant because defendant claimed his reckless driving was the product of intoxication, failure to wear glasses, and mechanical problems with his vehicle; the motorcycle accident evidence, when combined with the other evidence admitted at trial, rebutted that defense by showing a pattern of behavior during the course of what was essentially a single event or transaction. Gattis v. State, 2006 Tex. App. LEXIS 5668 (Tex. App. Austin June 29 2006).

257. In defendant's murder case, evidence of the history of physical abuse in the relationship between defendant and the victim was relevant and properly admitted; the extraneous-offense evidence rebutted defendant's claim of accident and showed that he intended to cause death, serious bodily injury, or bodily injury; in addition, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Brown v. State, 2006 Tex. App. LEXIS 5163 (Tex. App. Austin June 16 2006).

258. During defendant's trial for being a felon in possession of a firearm, the trial court did not err in allowing a witness to testify regarding defendant's prior drug dealing because the risk of convicting defendant solely on the fact that she was a drug dealer did not substantially outweigh the probative value of establishing her state of mind. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

259. Defense counsel's lack of an objection to evidence that defendant put his hands over his front pockets during his pat-down, ran from the police, and discarded "little white bags" while in flight did not establish ineffective assistance of counsel because the evidence was relevant to show defendant's motive for striking a police officer and the reason for his flight, and the fact that the bags were never found did not make the officer's testimony inadmissible for lack of relevance or probativeness; furthermore, the evidence might also have been viewed as same transaction contextual evidence under Tex. R. Evid. 404(b) because the events surrounding the stop, flight, and arrest were so connected that they formed an indivisible criminal transaction. LeBleu v. State, 2006 Tex. App. LEXIS 887 (Tex. App. Beaumont Feb. 1 2006).

260. Court did not err by admitting evidence concerning the circumstances of a prior sexual assault conviction where defendant encountered the victims in the parking lot of their residences, waited for the victims to return to their rooms, approached them under the guise of needing help, and made advances toward raping them but ejaculated before penetration. Because intent was a material element of the offense on which the State carried the burden of proof, the probative value of the witness's testimony was high and was not overcome by the danger of unfair prejudice. Fields v. State, 2005 Tex. App. LEXIS 5494 (Tex. App. Austin July 14 2005).

261. In an injury to a child case where defendant contested his guilt by claiming that he did not injure the child but that she fell, the trial court did not err in permitting the State to introduce evidence that defendant had previously committed an extraneous offense against another young child as it may have been helpful to the jury to rebut defendant's defensive theory and show that he injured the victim. Furthermore, evidence of the extraneous offense was not of such a nature as to impair the efficacy of a limiting instruction: the evidence showed that the child involved in the extraneous offense was not seriously injured but, at most, had bruises on her face from defendant's hands. Harrell v. State, 2005 Tex. App. LEXIS 4578 (Tex. App. Eastland June 16 2005).

262. In a trial for indecency with a child, the trial court properly admitted evidence of a prior indecency conviction. The current charge arose from defendant's exposing himself, and he argued that he had merely forgotten to zip his pants; the extraneous offense evidence therefore tended to make a fact of consequence--whether defendant had or lacked intent to arouse or gratify sexual desire--more or less probable. Arp v. State, 2005 Tex. App. LEXIS 4535 (Tex. App. Texarkana June 15 2005).

263. In a murder trial, evidence was properly admitted, under Tex. R. Evid. 401 -- 404, of a shooting incident that occurred eight days after the murder. The extraneous offense evidence was relevant to the development of the case and was admissible to show the development of the investigation and defendant's intent or knowledge regarding the gun; as to prejudice, the evidence was presented almost matter-of-factly and included no injuries, disturbing photographs, or emotional testimony. Gonzales v. State, 2005 Tex. App. LEXIS 4532 (Tex. App. Amarillo June 14 2005).

264. Trial court should have excluded as irrelevant and prejudicial a BB gun that was found in a defendant's truck and that was not used during the charged burglary. The error was harmless, however, because the court did not have fair assurances that the mind of an average juror would have found the State's case less persuasive had the BB gun not been admitted. Moreno v. State, 2005 Tex. App. LEXIS 4487 (Tex. App. Houston 1st Dist. June 9 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 6371 (Tex. App. Houston 1st Dist. Aug. 11, 2005).

265. Trial court did not abuse its discretion by overruling defendant's objection to testimony regarding whom an officer had named as the "defendant" in the case, which defendant claimed was unfairly prejudicial because it had the prejudicial effect of telling the jury that he was the subject of investigation from the very beginning and that he had to be guilty, because the trial court could have reasonably concluded that the testimony was relevant to the jury's evaluation of the complainant's allegations. Nor could it be said that the probative value of the testimony was outweighed by the danger of unfair prejudice because the officer's testimony was not the type of testimony that would suggest that the jury make a decision on an improper basis. Dunbar v. State, 2005 Tex. App. LEXIS 3676 (Tex. App. Fort Worth May 12 2005).

266. In a drug trial, evidence that defendant was from Saudi Arabia and had attended flight school was admissible because the State had to affirmatively link defendant to drugs found in an apartment he did not lease. When viewed with defendant's flight school identification, the evidence was relevant to show that defendant was established in the apartment. Himat v. State, 2005 Tex. App. LEXIS 3152 (Tex. App. Dallas Apr. 27 2005).

267. Evidence of a police officer's administration of a modified alphabet test to defendant suspected of driving while intoxicated (DWI) was properly admitted because it was highly probative of whether defendant had the normal use of her mental faculties. The evidence did not have the potential to impress the jury in some irrational but indelible way because intoxication and, more specifically, defendant's loss of her normal mental or physical faculties was among the issues that a jury had to consider in a DWI trial, and, furthermore, the evidence was addressed for only a very brief period of time. Bergman v. State, 2005 Tex. App. LEXIS 3046 (Tex. App. Houston 1st Dist. Apr. 21 2005).

268. In an action for subsurface trespass brought by oil and gas lessors against their lessee, the trial court did not err by admitting into evidence an internal memorandum written by an employee of the lessee more than 20 years earlier where the memo was relevant under Tex. R. Evid. 401, 402 on the ground that its recommendation to drill despite title problems could have helped the jury to decide whether the lessee was reasonable in delaying its development of a tract of land because of title problems with another tract. Furthermore, language in the memo about "illiterate Mexicans" was not unfairly prejudicial under Tex. R. Evid. 403 because the memo could not be considered an appeal to prejudice in language clear and strong, especially because it was written by an employee of the lessee and did not ask the jury to decide the case on an improper basis. Mission Res., Inc. v. Garza Energy Trust, 2005 Tex. App. LEXIS 2650 (Tex. App. Corpus Christi Apr. 7 2005), opinion withdrawn by, substituted opinion at 166 S.W.3d 301, 2005 Tex. App. LEXIS 3443, 160 Oil & Gas Rep. 1144 (Tex. App. Corpus Christi 2005).

269. Photographs of a murder victim were relevant under Tex. R. Evid. 401 and were not unduly prejudicial to defendant under Tex. R. Evid. 403 because a photograph of the victim lying in an ambulance immediately after firefighters removed her body from a burning house was both material and probative, as it established her condition at the crime scene, and because a photograph of her face taken during autopsy was also material and probative of the fact that the autopsy was performed on the same person removed from the crime scene by ambulance. The numerous autopsy photographs were also probative of the victim's cause of death, a material element in the offense of capital murder, and although the detail in the photographs was graphic, each served the purpose of illustrating the nature and extent of the victim's injuries. Vargas v. State, 2005 Tex. App. LEXIS 2417 (Tex. App. Houston 1st Dist. Mar. 31 2005).

270. In an aggravated sexual assault of a child case, a court did not err by excluding a portion of the testimony of an attorney representing the victim's mother who was present at a custody hearing involving the victim because something occurring at the custody hearing had no probative value in showing who committed a sexual assault that occurred a month before the hearing. Additionally, even if the testimony was somehow relevant, the trial court could have reasonably decided that its admission would lead to unfair prejudice, greatly mislead the jury, and confuse the issues with which the jury was presented. Holmes v. State, 2004 Tex. App. LEXIS 10661 (Tex. App. Dallas Nov. 30 2004).

271. Evidence of a personal injury plaintiff's alcohol consumption in the months before the accident was properly admitted when it bore directly upon the degree of pain and anguish suffered as a result of the accident; according to the plaintiff's pain management expert, use of alcohol was important to pain management because of its exacerbating effect and bearing on treatment methodology. The alcohol evidence was highly probative in that it related to the fair and reasonable compensation for the mental anguish experienced by the pedestrian as a result of the accident. Fitz v. San Antonio Hospitality Invs., Inc., 2004 Tex. App. LEXIS 3507 (Tex. App. San Antonio Apr. 21 2004).

272. Defendant's conviction of intoxication manslaughter was upheld where he waived the issue of relevance of the photograph of the victim's charred body; the only objection made in the district court went to probative value and unfair prejudice under Tex. R. Evid. 403. Anderson v. State, 2003 Tex. App. LEXIS 10122 (Tex. App. Dallas Dec. 2 2003).

273. Appellant's contention that his actions, while criminally insane, were not relevant to the finding required for recommitment under Tex. Health & Safety Code Ann. § 574.035 and that their admission at his recommitment hearing was unfairly prejudicial under Tex. R. Evid. 402 and Tex. R. Evid. 403 was rejected because the determination of whether a person should remain committed because of a mental illness required more than a snapshot of a single year in the person's life and required a psychological history. Campbell v. State, 118 S.W.3d 788, 2003 Tex. App. LEXIS 6671 (Tex. App. Houston 14th Dist. 2003), appeal dismissed by 2004 Tex. App. LEXIS 2376 (Tex. App. Houston 14th Dist. Mar. 16, 2004).

274. In making the initial determination of admissibility of evidence, Texas courts must apply the principles set forth in the evidentiary rules governing relevancy under Tex. R. Evid. 401-403; to meet the relevancy test, the proffered evidence must, first, have probative value, and second, be of consequence to some issue in the trial under Tex. R. Evid. 401. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

275. Where defendant was convicted of sexual assault, trial court did not err under Tex. R. Evid. 401, 402, 403 in admitting testimony from the victim and his sister of the effect of the assault on the victim; testimony of an inflammatory or sympathetic nature will not bar its admissibility if it is relevant to the issue at trial, and the issue need not be contested. Ranels v. State, 1996 Tex. App. LEXIS 2867 (Tex. App. Beaumont Mar. 20 1996).

Evidence : Relevance : Liability Insurance

276. Mistrial was properly granted in a manslaughter/criminally negligent homicide prosecution after the prosecutor asked defendant's expert about a finding by defendant's insurer that defendant was at fault because the question was manifestly improper under Tex. R. Evid. 401-403. What the insurer concluded had very little probative value on the question of whether defendant caused the fatal accident, and it was extremely prejudicial, likely to confuse and mislead the jury, and lead to time-consuming collateral litigation. Ex parte Wheeler, 203 S.W.3d 317, 2006 Tex. Crim. App. LEXIS 1968 (Tex. Crim. App. 2006).

Evidence : Relevance : Pleas & Related Statements

277. Court erred in failing to instruct the jury to disregard the State's reference to plea negotiations because, given the manner in which the State's question to defendant was posed, one could reasonably interpret it as disclosing that plea negotiations had occurred, that potential offers were made and rejected, and that defendant's desires presented the major obstacle to arriving at a bargain. Bowley v. State, 280 S.W.3d 530, 2009 Tex. App. LEXIS 1448 (Tex. App. Amarillo Mar. 2 2009).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

278. Although the evidence from the neighbor's apartment was not same transaction contextual evidence and the trial court abused its discretion in admitting it, the error was harmless given that the extent of the other evidence for defendant's guilt because the State found the marijuana hidden in defendant's truck, an officer observed defendant exit the apartment building appearing to hide something under his shirt, and defendant chose to lead police on a high-speech chase instead of submitting to the traffic stop. Gonzalez v. State, 510 S.W.3d 10, 2014 Tex. App. LEXIS 8934 (Tex. App. Corpus Christi Aug. 14 2014).

279. Evidence of methamphetamine found at the murder scene was properly admitted because it was relevant to establish a motive for defendant's actions and to rebut her claim of accidentally shooting the victim; there was no evidence presented that defendant was in possession of the drugs, and the evidence was admissible because the jury could infer that the prior relationship between the victim and defendant was one that involved drugs. Taylor v. State, 2014 Tex. App. LEXIS 7282 (Tex. App. Corpus Christi July 3 2014).

280. In defendant's murder case, the trial court did not abuse its discretion in admitting testimony as evidence of identity because, in both offenses, a green vehicle blocked the roadway and a young man approached the blocked-in vehicle with a "silver" handgun. The witness identified defendant as the "young man" from her aggravated robbery, and he used an accomplice's mother's vehicle to commit that offense; the challenged evidence made defendant's identity more probable, took little time to develop, and supported the element of identity. Torres v. State, 2012 Tex. App. LEXIS 9134 (Tex. App. Corpus Christi Nov. 1 2012).

281. Because the robberies occurred in the same geographic area within a relatively brief time frame, and all were committed by an assailant who covered his hands with socks or gloves, and whose face was completely covered by a similar covering, leaving only the eyes exposed, there are sufficient common characteristics between each of the robberies, that the extraneous offenses were relevant to prove identity and admissible under Tex. R. Evid. 401, 402, 404(b). Heigelmann v. State, 362 S.W.3d 763, 2012 Tex. App. LEXIS 1670, 2012 WL 688427 (Tex. App. Texarkana Mar. 2 2012).

282. Trial court did not err by admitting testimony from two witnesses about defendant's past use and sale of methamphetamine under Tex. R. Evid. 404 because defendant's relevance objection did not preserve his Rule 404 complaints and because he lodged no objection to the testimony about his past use and sale of methamphetamine by one of the witnesses. Norris v. State, 2012 Tex. App. LEXIS 108, 2012 WL 34453 (Tex. App. Beaumont Jan. 4 2012).

283. Trial court did not err by admitting evidence of defendant's gang affiliation during the guilt phase of his trial because the evidence was relevant and admissible to show defendant's motive and to rebut his self-defense theory. The probative value of the evidence outweighed any unfair prejudice, and the State did not devote an excessive amount of time to presenting the evidence. Rodriguez v. State, 2011 Tex. App. LEXIS 10156 (Tex. App. Houston 1st Dist. Dec. 22 2011).

284. In a driving while intoxicated (DWI) case, it was error to admit the entirety of defendant's driving record because it contained evidence of extraneous offenses beyond the prior DWI convictions that were elements of a charged offense. However, the error was harmless because evidence of guilt was ample. Bridges v. State, 2011 Tex. App. LEXIS 9104, 2011 WL 5557534 (Tex. App. Dallas Nov. 16 2011).

285. In a trial for the aggravated kidnapping of a former girlfriend, extraneous acts evidence from another former girlfriend was relevant to rebut the defense theories that the current charges were exaggerated and that the witness testified to an admission by defendant because of her relationship with the complainant. Vela v. State, 2011 Tex. App. LEXIS 6917, 2011 WL 3821045 (Tex. App. Corpus Christi Aug. 25 2011).

286. At defendant's trial for burglary of a habitation based on evidence showing that defendant and his brother broke into a mobile home and stole a TV set, the trial court ruled that evidence of two extraneous burglaries committed by his brother was relevant under Tex. R. Evid. 402, probative, and admissible under Tex. R. Evid. 404(b). The appellate court held that defendant was not harmed by the admission of the evidence because it was not unduly emphasized by the State, and it did not have a substantial effect on the jury's verdict. Crutchfield v. State, 2011 Tex. App. LEXIS 4959, 2011 WL 2638402 (Tex. App. Tyler June 30 2011).

287. In a case in which defendant was convicted of aggravated kidnapping, the trial court did not abuse its discretion by admitting evidence that defendant, after committing the charged offense and on the same day, had ordered two minor girls walking down a street to get in his van where the trial court could have reasonably concluded that the evidence regarding defendant's encounter with the minor girls was relevant and admissible because that evidence revealed defendant's true plans about his encounter with the victim on the day he committed the offense. The trial judge could have reasonably concluded that the inherent probative force of the evidence, along with the State's need for the evidence, substantially outweighed the danger of any unfair prejudice to defendant, and the presentation of the extraneous offense evidence did not consume an inordinate amount of time. Frank v. State, 2011 Tex. App. LEXIS 762, 2011 WL 379041 (Tex. App. Beaumont Feb. 2 2011).

288. When police officers responded to a domestic disturbance call at the residence of defendant and his wife, she told the officers that defendant had repeatedly struck her with a cane and held a gun to her head during an argument. At defendant's trial for assault, he did not object to the officers' testimony describing the discovery and

seizure of the weapon; the evidence was relevant and admissible under Tex. R. Evid. 402 as same transaction contextual evidence. Smith v. State, 2011 Tex. App. LEXIS 859, 2011 WL 350434 (Tex. App. Austin Feb. 2 2011).

289. Trial court did not abuse its discretion by admitting evidence of a prior robbery during defendant's aggravated robbery trial because: (1) it was committed the evening prior to the instant robbery; (2) defendant and his accomplice acted together in both robberies; (3) both robberies were committed against lone, older women using surprise, speed, and strength through force or the threat of force; and (4) both robberies were committed while using the same vehicle as a means of escape. Therefore, the probative value of the evidence was great, as it showed that defendant and his accomplice acted together in a continuing criminal enterprise and rebutted defendant's theory that he was not a party to the instant robbery but was merely present in the vehicle while it occurred. Davis v. State, 2010 Tex. App. LEXIS 6949, 2010 WL 3341514 (Tex. App. Tyler Aug. 25 2010).

290. In an indecency with a child case, the court erred by admitting extraneous offense evidence due to the lack of similarity between the extraneous offenses and the charged offenses, the duration in time of twenty years between the offenses, and the lack of evidence concerning a continuing course of conduct by defendant. The extraneous acts did not take place in defendant's home and defendant did not ask the witness to touch himself or defendant. Crocker v. State, 2009 Tex. App. LEXIS 9432, 2009 WL 4725299 (Tex. App. Dallas Dec. 11 2009).

291. In a sexual assault case, a court properly admitted extraneous offense evidence that defendant had threatened a witness not to testify because defendant threatened to accuse the witness and his wife of sexually abusing defendant's girlfriend's children if the witness testified against him. The testimony was relevant to show defendant's consciousness of guilt. Ramsey v. State, 2009 Tex. App. LEXIS 9449, 2009 WL 4755175 (Tex. App. Fort Worth Dec. 10 2009).

292. Trial court abused its discretion by admitting evidence of defendant's prior burglary arrest pursuant to Tex. R. Evid. 404(b) where the tendency of the evidence was to show defendant was a bad person or that his character conformed to that of a person from whom criminal conduct might be expected. However, the error did not influence the jury, or had but a slight effect on its verdict of guilt, because the State's presentation of the alleged burglary, although factually detailed, was brief and received only passing mention in closing argument, and because the propensity and potency of the evidence to characterize defendant as a criminal was blunted by the previous, unopposed, admission of evidence of his prior conviction for manslaughter. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

293. Trial court erroneously admitted a 1993 judgment convicting defendant of misdemeanor assault where the judgment was not admissible under Tex. R. Evid. 404(b) because it had no relevance apart from proof of character conformity. Moreover, evidence of the conviction was not available for impeachment under Tex. R. Evid. 609 because the record contained no evidence that the victim of the assault was female, and there was thus no proof that it was a misdemeanor involving moral turpitude. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

294. In a murder case, evidence of defendant's drug dealing was properly admitted because, according to a witness, defendant and the victim were rival drug dealers, and proof of motive was important to the State's case because the State was unable to produce an eyewitness who actually saw defendant shoot the victim. The time spent attempting to prove that defendant sold illegal drugs was not out of proportion to the time required to present such evidence. Koy Timon Moore v. State, 2009 Tex. App. LEXIS 7847 (Tex. App. Houston 14th Dist. Oct. 8 2009).

295. In a sentencing trial for felony assault to a family member, there was no error under Tex. R. Evid. 401, 402 when the trial court admitted testimony from defendant's wife about the circumstances of a prior assault and guilty plea. The testimony was relevant punishment evidence because it illustrated defendant's propensity for family

violence and that he was not deterred by his earlier conviction. Murchison v. State, 2009 Tex. App. LEXIS 7481, 2009 WL 3050823 (Tex. App. Houston 1st Dist. Sept. 24 2009).

296. In a burglary trial, reversible error occurred when the State introduced evidence that the complainant's girlfriend was suffering from mental retardation and that defendant engaged in sex with her shortly after the alleged burglary. The evidence was not relevant to alibi under Tex. R. Evid. 402 because, contrary to the State's argument, defendant did not assert a defense of alibi by stating that he did not remember on which Friday night he went to a bar with the complainant and then to the complainant's home. Rodriguez v. State, 2009 Tex. App. LEXIS 6335, 2009 WL 5821033 (Tex. App. Corpus Christi Aug. 13 2009).

297. In defendant's capital murder case, the court properly admitted evidence of an aggravated robbery because the defensive claims that defendant raised by his statements placed the intent element of his capital murder offense at issue, which entitled the State to rebut defendant's claimed lack of intent with evidence of his unadjudicated extraneous offense of the aggravated robbery. Gomez v. Tex., 2009 Tex. App. LEXIS 4521, 2009 WL 1688233 (Tex. App. Houston 1st Dist. June 18 2009).

298. During defendant's criminal trial for the sexual asault of a child, the State was permitted to introduce extraneous offense evidence that defendant encouraged the victim's involvement in several crimes to rebut defense counsel's opening remarks that defendant was a positive influence on the victim. The trial court determined the extraneous offense evidence was admissible under Tex. R. Evid. 404(b) to correct the false impression created by the defense; the extraneous offense evidence was relevent for purposes of Tex. R. Evid. 402, because it tended to make less probable defendant's argument that he was encouraging the victim to be a decent and productive citizen. Ytuarte v. State, 2009 Tex. App. LEXIS 3056, 2009 WL 1232327 (Tex. App. San Antonio May 6 2009).

299. In a sexual assault of a child case, evidence that defendant had been subjected to unusual sexual events in his youth and that he related those events to the sexual assault of the child tended to rebut a contention that any contact with the child's penis was simply an accident, and therefore, the evidence was properly admitted. Additionally, the evidence took no additional time to develop initially, and was mentioned again during the trial only when defendant took the stand and denied making some of the statements. Watterson v. State, 2009 Tex. App. LEXIS 2938, 2009 WL 1148751 (Tex. App. Amarillo Apr. 29 2009).

300. In a sexual assault of a child case, the court reversibly erred by admitting extraneous acts evidence because defendant's practice of not using a condom while engaged in consensual sex with an adult companion, or informing the companion of his HIV positive status, had the practical effect of prejudicing any defense raised by defendant regarding the complainant's credibility. Such an effect would have been detrimental to defendant, who sought to discredit the complainant by pointing out factual variances in his outcries, and by suggesting that the complainant was motivated to fabricate the assault to avoid being schooled in an alternative education program. Lopez v. State, 288 S.W.3d 148, 2009 Tex. App. LEXIS 2050 (Tex. App. Corpus Christi Mar. 26 2009).

301. In an aggravated assault case, the trial court did not err in admitting the victim's videotaped statement because defendant raised the issue of self-defense. A witness testified that in defendant's altercation with the victim, the victim was the aggressor and defendant tried to resist retaliating; as a result of that testimony, defendant's alleged assault of the victim was relevant rebuttal evidence to prove that defendant acted with the requisite intent. In re B.H., 2009 Tex. App. LEXIS 1852, 2009 WL 692613 (Tex. App. Tyler Mar. 18 2009).

302. In an aggravated sexual assault case, a trial court did not err by admitting evidence under Tex. R. Evid. 404(b) regarding defendant's commission of indecency with a child because defendant opened the door to such when his wife testified that it was physically impossible for him to have committed the assault due to their close living quarters. Moreover, the evidence was relevant to rebut allegations of lack of opportunity and fabrication.

Isenberger v. State, 2008 Tex. App. LEXIS 9224 (Tex. App. Houston 1st Dist. Dec. 11 2008).

303. Trial court erred by admitting an extraneous offense of marijuana possession under Tex. R. Evid. 404(b) in a case involving unlawful possession of a weapon because it was irrelevant where defendant did not challenge the legality of a search; however, the error was harmless since defendant's sole defensive theory was negated by his admission to police. Defendant contended that he had no knowledge of gun found under the driver's seat of a vehicle, but he told a police officer that searched the vehicle that there was a weapon inside. Provencio v. State, 2008 Tex. App. LEXIS 6073 (Tex. App. Amarillo Aug. 11 2008).

304. In defendant's robbery case, the State properly presented evidence of an extraneous robbery because the offenses occurred within three miles of one another and within a six-day time period, both took place late in the morning in large retail parking lots, and both acts were perpetrated quickly, snatching purses from unaccompanied females walking or standing in the parking lots; additionally, the testimony rebutted defendant's theories of alibi and that one victim's brief opportunity to view the perpetrator led to a mistaken identification; therefore, the probative value of the evidence was not substantially outweighed by its prejudicial effect. Evans v. State, 2008 Tex. App. LEXIS 477 (Tex. App. Houston 14th Dist. Jan. 22 2008).

305. In a fraud action brought by the principals of a home health business against an investor, the testimony of the investor's prior business partner was admissible pursuant to Tex. R. Evid. 404(b) as proof of the investor's motive in seeking involvement with the business, his intent to commit fraud by association with the business, and his plan for gaining control over the business's financial affairs and siphoning off the business's assets. The prior business partner testified that he had also sued the investor for fraud under circumstances very similar to those in the underlying case. Rogers v. Alexander, 244 S.W.3d 370, 2007 Tex. App. LEXIS 5103 (Tex. App. Dallas 2007).

306. Where defendant was alleged to have committed a sexual assault against a thirteen-year-old child, the trial court was permitted to admit the child's testimony of defendant's use and sale of marijuana; the evidence was relevant under Tex. R. Evid. 402 to show defendant's attempt to cultivate a relationship with the child by bringing him to his house to smoke marijuana. Valdez v. State, 2007 Tex. App. LEXIS 4612 (Tex. App. Amarillo June 12 2007).

307. In a burglary trial, there was no error in the admission of evidence that defendant had, in his possession when he was arrested, items taken in a subsequent burglary from the same victim; the evidence was admissible to rebut a line of questioning directed at burglaries that occurred after defendant was in custody. Ellis v. State, 2007 Tex. App. LEXIS 414 (Tex. App. Tyler Jan. 24 2007).

308. Trial court did not err by admitting evidence relating to the search of the girlfriend and the discovery of the crack pipe because under Tex. R. Evid. 404(b) because the evidence was relevant to the issue of whether the contraband and drug paraphernalia were present in the house and tended to prove an affirmative link between defendant and the methadone, and therefore the evidence was relevant to show defendant's knowledge or intent to possess the methadone. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because it had high probative value in affirmatively linking defendant to the methadone. Davis v. State, 2006 Tex. Crim. App. LEXIS 2526 (Tex. Crim. App. Dec. 14, 2006).

309. Complainant testified that defendant fondled and kissed her in an escalating fashion when she was between the ages of six and 10, that he felt her under her clothes when she was 10, and that he had sexual intercourse with her when she was 13. Because the testimony was relevant to the state of mind of the complainant and defendant, as well as to the previous and subsequent relationship between the complainant and defendant, pursuant to Tex. Code Crim. Proc. Ann. art. 38.37, § 2, the trial court did not err in admitting the extraneous offense evidence. Parker

v. State, 2006 Tex. App. LEXIS 8834 (Tex. App. Houston 1st Dist. Oct. 12 2006).

310. Evidence of a judgment that terminated defendant's parental rights to three of her children after the date that she allegedly murdered her newborn infant was relevant at her capital murder trial under Tex. R. Evid. 401, and had relevance apart from mere proof of character conformity in compliance with Tex. R. Evid. 404(b), because an extraneous offense/bad act that took place subsequent to the offense for which a defendant was on trial did not make the extraneous offense/bad act inadmissible per se; furthermore, the judgment was introduced by the State after defendant had testified that the infant's death on the night in question was not the result of any intentional or knowing conduct on defendant's part, and the termination judgment contained findings by the trial judge that defendant "knowingly" placed or allowed her other children to remain in conditions dangerous to their physical or emotional well-being, which at least arguably made it more probable that defendant's acts or omissions on the night in question were done either intentionally or knowingly. Fergerson v. State, 2006 Tex. App. LEXIS 6589 (Tex. App. Beaumont July 26 2006).

311. In an aggravated assault case, a court properly admitted evidence of another collision caused by defendant because defendant claimed his reckless driving was the product of intoxication, failure to wear glasses, and mechanical problems with his vehicle; the motorcycle accident evidence, when combined with the other evidence admitted at trial, rebutted that defense by showing a pattern of behavior during the course of what was essentially a single event or transaction. Gattis v. State, 2006 Tex. App. LEXIS 5668 (Tex. App. Austin June 29 2006).

312. In defendant's murder case, evidence of the history of physical abuse in the relationship between defendant and the victim was relevant and properly admitted; the extraneous-offense evidence rebutted defendant's claim of accident and showed that he intended to cause death, serious bodily injury, or bodily injury; in addition, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Brown v. State, 2006 Tex. App. LEXIS 5163 (Tex. App. Austin June 16 2006).

313. In a murder trial, there was no error in allowing a witness to testify that he had seen defendant in possession of a gun four to five years before the murders. Springsteen v. State, 2006 Tex. Crim. App. LEXIS 2340 (Tex. Crim. App. May 24 2006).

314. Trial court did not err when it admitted evidence that defendant had been seen selling drugs a month before her indicted offense of being a felon in possession of a firearm because the testimony, elicited from a witness present when the indicted offense was committed, was relevant and tended to make the existence of defendant's intent to possess a firearm more likely than not, as the witness testified that he knew of five prior occasions on which defendant sold crack cocaine and also commented that drug dealers were often armed to protect themselves from being robbed. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

315. During defendant's trial for being a felon in possession of a firearm, the trial court did not err in allowing a witness to testify regarding defendant's prior drug dealing because the risk of convicting defendant solely on the fact that she was a drug dealer did not substantially outweigh the probative value of establishing her state of mind. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

316. Defense counsel's lack of an objection to evidence that defendant put his hands over his front pockets during his pat-down, ran from the police, and discarded "little white bags" while in flight did not establish ineffective assistance of counsel because the evidence was relevant to show defendant's motive for striking a police officer and the reason for his flight, and the fact that the bags were never found did not make the officer's testimony inadmissible for lack of relevance or probativeness; furthermore, the evidence might also have been viewed as same transaction contextual evidence under Tex. R. Evid. 404(b) because the events surrounding the stop, flight, and arrest were so connected that they formed an indivisible criminal transaction. LeBleu v. State, 2006 Tex. App.

LEXIS 887 (Tex. App. Beaumont Feb. 1 2006).

317. In a criminal prosecution for capital murder, the trial court did not err by allowing the prosecutor's questions regarding the possible exchange of sexual favors for forgiveness of a drug debt; the evidence was admissible to show the relationship between defendant and the victim. Whitmire v. State, 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

318. No reversible error was presented under Tex. R. Evid. 402, 403, and 404(b) by an arresting officer's testimony that defendant told the officer during a traffic stop about defendant's prior arrests because the videotape of the stop, including defendant's own statement of the arrests, was admitted without objection under R. 402, 403, and 404(b). Tunstall v. State, 2005 Tex. App. LEXIS 6336 (Tex. App. Beaumont Aug. 10 2005).

319. Court did not err by admitting evidence concerning the circumstances of a prior sexual assault conviction where defendant encountered the victims in the parking lot of their residences, waited for the victims to return to their rooms, approached them under the guise of needing help, and made advances toward raping them but ejaculated before penetration. Because intent was a material element of the offense on which the State carried the burden of proof, the probative value of the witness's testimony was high and was not overcome by the danger of unfair prejudice. Fields v. State, 2005 Tex. App. LEXIS 5494 (Tex. App. Austin July 14 2005).

320. In an injury to a child case where defendant contested his guilt by claiming that he did not injure the child but that she fell, the trial court did not err in permitting the State to introduce evidence that defendant had previously committed an extraneous offense against another young child as it may have been helpful to the jury to rebut defendant's defensive theory and show that he injured the victim. Furthermore, evidence of the extraneous offense was not of such a nature as to impair the efficacy of a limiting instruction: the evidence showed that the child involved in the extraneous offense was not seriously injured but, at most, had bruises on her face from defendant's hands. Harrell v. State, 2005 Tex. App. LEXIS 4578 (Tex. App. Eastland June 16 2005).

321. In a trial for indecency with a child, the trial court properly admitted evidence of a prior indecency conviction. The current charge arose from defendant's exposing himself, and he argued that he had merely forgotten to zip his pants; the extraneous offense evidence therefore tended to make a fact of consequence--whether defendant had or lacked intent to arouse or gratify sexual desire--more or less probable. Arp v. State, 2005 Tex. App. LEXIS 4535 (Tex. App. Texarkana June 15 2005).

322. In a murder trial, evidence was properly admitted, under Tex. R. Evid. 401 -- 404, of a shooting incident that occurred eight days after the murder. The extraneous offense evidence was relevant to the development of the case and was admissible to show the development of the investigation and defendant's intent or knowledge regarding the gun; as to prejudice, the evidence was presented almost matter-of-factly and included no injuries, disturbing photographs, or emotional testimony. Gonzales v. State, 2005 Tex. App. LEXIS 4532 (Tex. App. Amarillo June 14 2005).

323. Trial court should have excluded as irrelevant and prejudicial a BB gun that was found in a defendant's truck and that was not used during the charged burglary. The error was harmless, however, because the court did not have fair assurances that the mind of an average juror would have found the State's case less persuasive had the BB gun not been admitted. Moreno v. State, 2005 Tex. App. LEXIS 4487 (Tex. App. Houston 1st Dist. June 9 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 6371 (Tex. App. Houston 1st Dist. Aug. 11, 2005).

324. Appellant's contention that his actions, while criminally insane, were not relevant to the finding required for recommitment under Tex. Health & Safety Code Ann. § 574.035 and that their admission at his recommitment

hearing was unfairly prejudicial under Tex. R. Evid. 402 and Tex. R. Evid. 403 was rejected because the determination of whether a person should remain committed because of a mental illness required more than a snapshot of a single year in the person's life and required a psychological history. Campbell v. State, 118 S.W.3d 788, 2003 Tex. App. LEXIS 6671 (Tex. App. Houston 14th Dist. 2003), appeal dismissed by 2004 Tex. App. LEXIS 2376 (Tex. App. Houston 14th Dist. Mar. 16, 2004).

Evidence : Relevance : Relevant Evidence

325. Information in defendant's driver's license record was properly admitted because it confirmed that his driver's license number was used to pawn rings on the day of the robbery, and it showed defendant's height, which indicated he was the person who had held a gun; the evidence supported a fact of consequence-that defendant participated in the robbery. Deleon v. State, 2014 Tex. App. LEXIS 9009 (Tex. App. Fort Worth Aug. 14 2014).

326. Although the evidence from the neighbor's apartment was not same transaction contextual evidence and the trial court abused its discretion in admitting it, the error was harmless given that the extent of the other evidence for defendant's guilt because the State found the marijuana hidden in defendant's truck, an officer observed defendant exit the apartment building appearing to hide something under his shirt, and defendant chose to lead police on a high-speech chase instead of submitting to the traffic stop. Gonzalez v. State, 510 S.W.3d 10, 2014 Tex. App. LEXIS 8934 (Tex. App. Corpus Christi Aug. 14 2014).

327. During defendant's trial for sexual assault of a child, the court did not err in excluding as irrelevant his proffered evidence that he had hepatitis B and the complainant did not because he did not offer direct evidence that he had hepatitis B at the time of the 2010 sexual assault; the actual evidence of his hepatitis B infection was his statement to the complainant's mother sometime in 2003 that he was infected. Liriano v. State, 2014 Tex. App. LEXIS 8772 (Tex. App. Houston 14th Dist. Aug. 12 2014).

328. Evidence of methamphetamine found at the murder scene was properly admitted because it was relevant to establish a motive for defendant's actions and to rebut her claim of accidentally shooting the victim; there was no evidence presented that defendant was in possession of the drugs, and the evidence was admissible because the jury could infer that the prior relationship between the victim and defendant was one that involved drugs. Taylor v. State, 2014 Tex. App. LEXIS 7282 (Tex. App. Corpus Christi July 3 2014).

329. Appellant's conviction for felony theft was affirmed because the trial court did not abuse its discretion in excluding evidence where nothing about the other individual's arrest for the January 30 break-in made any facts of consequence to the determination of appellant's guilt or innocence in the January 25 theft any more or less probable. Graves v. State, 2014 Tex. App. LEXIS 6522 (Tex. App. Houston 1st Dist. June 17 2014).

330. Where a former employee alleged that a former employer terminated the employee because the employee refused to drive a truck without a required permit and a jury found in favor of the employer, any error in excluding seven overweight permits as irrelevant was harmless because the excluded permits were not relevant to the first jury question since whether the truck was overweight on the day in question was not relevant to whether the employee was discharged, and the jury did not reach the remaining questions. Nezat v. Tucker Energy Servs., 437 S.W.3d 541, 2014 Tex. App. LEXIS 6518, 38 I.E.R. Cas. (BNA) 1033 (Tex. App. Houston 14th Dist. June 17 2014).

331. Because a mandatory settlement credit did not have to be pleaded as an affirmative defense, the trial court did not err in admitting the settlement agreement into evidence; the existence and amount of the settlement were facts of consequence in the case. Dalworth Restoration, Inc. v. Rife-Marshall, 433 S.W.3d 773, 2014 Tex. App. LEXIS 5271, 2014 WL 1941822 (Tex. App. Fort Worth May 15 2014).

332. Trial court did not abuse its discretion by admitting defendant's shirts with gun shot residue particles on them because the evidence was relevant, as the shirts were collected from defendant's vehicle two days after the murder. The evidence was not prejudicial because it showed defendant's connection to a discharged weapon, directly or indirectly, at some point in time. Burks v. State, 2014 Tex. App. LEXIS 3243, 2014 WL 1285731 (Tex. App. Austin Mar. 26 2014).

333. At defendant's murder trial, the court did not err by admitting an autopsy photograph depicting the bullet lodged in the tissue at the back of the victim's neck; the photograph was relevant to the cause of death--a gunshot wound to the head, and manner of death--homicide. Barr v. State, 2014 Tex. App. LEXIS 1714, 2014 WL 641351 (Tex. App. Austin Feb. 14 2014).

334. Defendant's conviction for driving while intoxicated was appropriate because testimony that defendant showed signs of impairment consistent with the use of hydrocodone supplied a logical connection between defendant's admitted use of hydrocodone and his driving. As such, that testimony was relevant; because the challenged evidence was relevant and reliable, the trial court did not abuse its discretion in admitting the videorecording of defendant's statement and the expert's testimony. Everitt v. State, 2014 Tex. App. LEXIS 1667, 2014 WL 586100 (Tex. App. Houston 1st Dist. Feb. 13 2014).

335. State established that the flight evidence was relevant to show defendant's consciousness of guilt for the capital murder because defendant admitted to going on the run after the shooting, the police had a warrant to arrest him for capital murder, and, when the police tried to arrest him in a parking lot using marked vehicles, he led them on a high-speed chase. Goldsmith v. State, 2014 Tex. App. LEXIS 754, 2014 WL 261007 (Tex. App. Houston 14th Dist. Jan. 23 2014).

336. State established that the flight evidence was relevant to show defendant's consciousness of guilt for the capital murder because defendant admitted to going on the run after the shooting, the police had a warrant to arrest him for capital murder, and, when the police tried to arrest him in a parking lot using marked vehicles, he led them on a high-speed chase. Goldsmith v. State, 2014 Tex. App. LEXIS 754, 2014 WL 261007 (Tex. App. Houston 14th Dist. Jan. 23 2014).

337. At defendant's trial for robbery, the trial court did not err in admitting testimony regarding his efforts to resist arrest because evidence relevant to his flight from the scene was a circumstance indicative of guilt. Johnson v. State, 2014 Tex. App. LEXIS 471, 2014 WL 222929 (Tex. App. Corpus Christi Jan. 16 2014).

338. Defendant's conviction for continuous sexual assault of a child under the age of 14 was appropriate even though the trial court erred in admitting a chart stating a timeline of the sexual assault incidents testified to by the complainant because the error was harmless. The jury heard testimony from the complainant regarding the incidents of abuse summarized on the chart and defendant did not argue that the chart was inaccurate or misleading. Castillo v. State, 2014 Tex. App. LEXIS 200, 2014 WL 61035 (Tex. App. Dallas Jan. 8 2014).

339. Taxing Authorities' legal theory concerning abandonment of ownership rights had to fail because none of the Taxing Authorities' evidence concerning activities or conditions on the property was relevant to the trial court's inquiry of who was entitled to the excess proceeds. Dallas County City of Grand Prairie v. Sides, 430 S.W.3d 649, 2014 Tex. App. LEXIS 5042, 2014 WL 1847415 (Tex. App. Dallas May 8 2014).

340. Defendant did not show that his trial counsel rendered ineffective assistance by failing to raise a relevance objection because testimony about defendant's remarks to the victim was relevant in that it revealed the victim's motive for distancing himself from defendant and helped to explain his reticence to involve himself with defendant.

Perkins v. State, 2013 Tex. App. LEXIS 15003, 2013 WL 6569874 (Tex. App. Houston 1st Dist. Dec. 12 2013).

341. Defendant's posts on a social media website regarding his attitude toward children were relevant, although attenuated, in the case charging him with injury to a child. Copeland v. State, 2013 Tex. App. LEXIS 14675, 2013 WL 6388585 (Tex. App. Texarkana Dec. 5 2013).

342. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

343. Where defendant was convicted of multiples counts of aggravated sexual assault, attempted aggravated sexual assault, and indecency with a child, the trial court did not err in admitting the testimony of the two sexual assault nurse examiners. The testimony of the nurses as to the children's accounts of abuse by their grandfather tended to make more probable the fact that the abuse actually took place; accordingly, the evidence was relevant. Trevino v. State, 2013 Tex. App. LEXIS 8618 (Tex. App. Corpus Christi July 11 2013).

344. In a misappropriation of trade secrets action, the court did not err in excluding appellees' prior pleadings in which they accused 16 parties of conspiring to steal trade secrets; the minimal relevance of the pleadings was substantially outweighed by the risk of distracting the factfinder from the issues by provoking speculation regarding the disposition or settlement of the cases against the former defendants. Southwestern Energy Prod. Co. v. Berry-Helfand, 411 S.W.3d 581, 2013 Tex. App. LEXIS 8549, 182 Oil & Gas Rep. 798 (Tex. App. Tyler July 10 2013).

345. Based on his conviction for first-degree felony offense burglary of a habitation with intent to commit sexual assault, defendant did not show why it was reasonable for him to believe that the findings of fact and conclusions of law established he was not required to comply with sex-offender registration, Tex. Code Crim. Proc. Ann. art. 62.001(5)(D); it was within the trial court's discretion to determine that the findings of fact and conclusions of law were not relevant evidence. Durham v. State, 2013 Tex. App. LEXIS 7301 (Tex. App. Houston 1st Dist. June 13 2013).

346. In defendant's child pornography case, it was within the zone of reasonable disagreement as to whether each of the pieces of evidence objected to possessed some relevance to matters of consequence because defendant denied that he had any connection to the child pornography found within his townhouse or that he had shown pornography to a child. Each of the items arguably served to tie defendant to the computer equipment in question as well as to the child pornography thereon. Checo v. State, 402 S.W.3d 440, 2013 Tex. App. LEXIS 7029 (Tex. App. Houston 14th Dist. June 11 2013).

347. Trial court did not err by refusing to allow defendant to cross-examine an officer about the confidential informant because the disallowed questions were not relevant to the issue of defendant's guilt or innocence, as the State did not rely on events related to obtaining the search warrant in proving defendant's guilt. Nwaogu v. State, 2013 Tex. App. LEXIS 4588, 2013 WL 1490489 (Tex. App. Houston 1st Dist. Apr. 11 2013).

348. To the extent that records of other injuries or medical conditions showed a personal injury claimant had back pain before a slip and fall incident, the records were relevant and admissible under Tex. R. Evid. 401, 402. Absent evidence of other litigation, the medical evidence was not overly prejudicial under Tex. R. Evid. 403, and the admission of irrelevant medical records unrelated to back pain was harmless error under Tex. R. App. P. 44.1(a)(1) because the judgment did not turn on records regarding unrelated conditions. Sparks v. Exxon Mobil Corp., 2013 Tex. App. LEXIS 4206 (Tex. App. Houston 14th Dist. Apr. 2 2013).

349. Evidence of tenants' activities on commercial premises was relevant under Tex. R. Evid. 401, 402 to establish damages claimed by the tenants and to rebutting the landlord's assertions that the tenants did not have a legitimate operation. Rhey v. Redic, 408 S.W.3d 440, 2013 Tex. App. LEXIS 3054, 2013 WL 1150197 (Tex. App. El Paso Mar. 20 2013).

350. Court properly admitted evidence that defendant's girlfriend purchased a silver .38 caliber revolver shortly before the victim's death because a codefendant testified that defendant had used a silver gun, and another witness testified that defendant was carrying a "chrome .38, snub-nose revolver" on the day the victim was killed. The inherent probative force of the evidence concerning the guns was its tendency to show that defendant was the shooter, and although the evidence was prejudicial, it was not unfairly prejudicial. Buckley v. State, 2013 Tex. App. LEXIS 2246 (Tex. App. Houston 14th Dist. Mar. 7 2013).

351. In defendant's evading arrest case, the court properly allowed testimony concerning typical behavior during a traffic stop because the testimony that very few people fled when a squad car initiated a stop by activating its lights was relevant to the offense of evading arrest, and went to defendant's intent. The fact that most people pulled over after the police initiated a stop made it more probable that defendant intentionally disregarded the officer's attempt to pull him over. Spencer v. State, 2013 Tex. App. LEXIS 2227, 2013 WL 1282307 (Tex. App. Dallas Mar. 6 2013).

352. Finding that respondent was a sexually violent predator (SVP) was proper under Tex. Health & Safety Code Ann. § 841.002(5) because there was no error in failing to allow respondent's counsel to question a witness on the interpretation of the SVP statute, Tex. Health & Safety Code Ann. § 841.001-851.151. The questions respondent was not allowed to ask did not address a fact of consequence that would have made the doctor's prognosis more or less probable. In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

353. Trial court's alleged error in permitting the complainant to testify as to the punishment he would like defendant to receive had no more than a very slight effect on the jury's determination of punishment; presuming there was error, such error was harmless. Hines v. State, 396 S.W.3d 706, 2013 Tex. App. LEXIS 2000, 2013 WL 748755 (Tex. App. Houston 14th Dist. Feb. 28 2013).

354. At defendant's trial for aggravated sexual assault of two boys under the age of fourteen, the trial court did not err by refusing to allow defendant to offer evidence the testimony of a psychologist that one of the children was living with a sex offender several years earlier because it was not relevant to the offense charged under Tex. R. Evid. 402. Bullock v. State, 2013 Tex. App. LEXIS 1491, 2013 WL 593829 (Tex. App. Corpus Christi Feb. 14 2013).

355. At defendant's trial for aggravated sexual assault of two boys under the age of fourteen, the trial court did not err by refusing to allow defendant to offer evidence regarding disturbances at the children's home because he did not explain how these events were relevant to the sexual assault offenses being tried against him under Tex. R. Evid. 402. Bullock v. State, 2013 Tex. App. LEXIS 1491, 2013 WL 593829 (Tex. App. Corpus Christi Feb. 14 2013).

356. At defendant's trial for possession with intent to deliver a controlled substance, cocaine, in a drug free zone, the trial court did not err in admitting evidence of weapons found at the location where defendant was arrested; it was relevant under Tex. R. Evid. 401, 402 to show that the weapons were used for protection of the drugs. Blue v. State, 2013 Tex. App. LEXIS 1231, 2013 WL 489998 (Tex. App. Waco Feb. 7 2013).

357. Defendant failed to show how excluded evidence about his relative's death in jail was relevant to any fact of consequence because he offered the evidence to show his purported fear of law enforcement and explain his flight from the officer; however, the proffered evidence merely demonstrated that his relative died while he was incarcerated in the county jail. Defendant offered no evidence that the death resulted from any actions or wrongdoing by law enforcement officials. Sheppard v. State, 2012 Tex. App. LEXIS 10638, 2012 WL 6698963 (Tex.

App. Austin Dec. 21 2012).

358. In a case in which a sex offender was civilly committed after a jury found him to be a sexually violent predator, the trial court could have reasonably determined that the opinion of the State's expert concerning the sex offender's risk of recidivism was admissible as relevant evidence because the expert's explanation of the term "likely" was consistent with how dictionaries commonly defined that term and with the Texas Supreme Court's construction of Tex. Health & Safety Code Ann. § 841.003(a)(2). In re Weatherread, 2012 Tex. App. LEXIS 9757 (Tex. App. Beaumont Nov. 29 2012).

359. In a case stemming from a house fire and the resulting product liability lawsuit filed by real parties in interest against the manufacturer of a computer power supply/surge protector and others, the trial court abused its discretion in ordering the manufacturer to produce certain of its back up power supply products, discovery produced in relation to another lawsuit, and other documents because real parties failed to establish a correlation between the specific model they had purchased and another of the manufacturer's product lines, failed to show that their request was not narrowly tailored to include only relevant materials, and failed to show that the litigation information they sought was relevant. In re Am. Power Conversion Corp., 2012 Tex. App. LEXIS 9369, 2012 WL 5507111 (Tex. App. San Antonio Nov. 14 2012).

360. In defendant's murder case, the trial court did not abuse its discretion in admitting testimony as evidence of identity because, in both offenses, a green vehicle blocked the roadway and a young man approached the blocked-in vehicle with a "silver" handgun. The witness identified defendant as the "young man" from her aggravated robbery, and he used an accomplice's mother's vehicle to commit that offense; the challenged evidence made defendant's identity more probable, took little time to develop, and supported the element of identity. Torres v. State, 2012 Tex. App. LEXIS 9134 (Tex. App. Corpus Christi Nov. 1 2012).

361. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because little boys comparing private parts was not similar to the sexual acts charged against defendant. Therefore, the trial court did not abuse its discretion in refusing to admit it. Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

362. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because evidence of the victim being in contact with a registered sex offender did not demonstrate a relevant alternative source of sexual knowledge. Thus, the trial court did not abuse its discretion in refusing to admit it. Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

363. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because, with regard to the victim's alleged prior sexual behavior, other than her involvement, there was no similarity between those incidents and the current allegations against defendant currently, Tex. R. Evid. 401, 402, 403, and 412(b). Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

364. Complainant's letter noted the apartment complex where she lived with her family and appellant, and thus the letter was relevant, for purposes of Tex. R. Evid. 401, 402, in connecting appellant to where the aggravated sexual assaults took place. Conteh v. State, 2012 Tex. App. LEXIS 8440, 2012 WL 4788386 (Tex. App. Houston 14th Dist. Oct. 9 2012).

365. In defendant's DWI case, he objected to the State's introduction of his blood-test results and extrapolation testimony because the blood draw occurred two hours after he was arrested and therefore was not relevant under Tex. R. Evid. 402 to whether he had the normal use of his faculties at the time of the alleged offense. The trial court

overruled the objection. Crenshaw v. State, 378 S.W.3d 460, 2012 Tex. Crim. App. LEXIS 1254, 2012 WL 4372284 (Tex. Crim. App. Sept. 26 2012).

366. Trial court did not abuse its discretion by admitting the testimony of the sexual assault nurse examiner who examined the child victim during the course of the State's investigation because she was deemed an expert in sexual abuse examinations, so her expert testimony could be helpful to the jury, including to explain why physical evidence would not necessarily be present on the body of a sexual assault complainant. The nurse merely reported the events of the examination and her clinical findings, and she did not offer an opinion as to whether the victim had been sexually assaulted and did not comment on the victim's veracity. Owens v. State, 381 S.W.3d 696, 2012 Tex. App. LEXIS 7922, 2012 WL 4098990 (Tex. App. Texarkana Sept. 19 2012).

367. Escrow agreement and the letter to the property owner's predecessor were relevant and had probative value regarding one of the disputed issues in the owner's trespass action, namely whether the owner consented to the entry of waste beneath its tracts by the operator of neigboring the wastewater disposal facility . Fpl Farming Ltd. v. Envtl. Processing Sys., L.C., 383 S.W.3d 274, 2012 Tex. App. LEXIS 7769, 178 Oil & Gas Rep. 510, 2012 WL 4017388 (Tex. App. Beaumont Sept. 13 2012).

368. Trial court properly admitted a sex offender's prior written statements in his sexually violent predator commitment proceeding because the statements were relevant apart from their tendency to prove the sex offender's stipulated convictions. The prior inconsistent statements were neither unduly prejudicial nor cumulative of the matters that the sex offender admitted in his requests for admissions. In re Commitment of Bath, 2012 Tex. App. LEXIS 7586, 2012 WL 3860631 (Tex. App. Beaumont Sept. 6 2012).

369. Trial court did not abuse its discretion by determining that the complained-of evidence, regarding the trustee's tax filings, "perceptual capacity," financial skills, purported medical treatments, or alleged use of alcohol and narcotics was not relevant to a determination of a reasonable and necessary attorney's fee. Lesikar v. Moon, 2012 Tex. App. LEXIS 7311, 2012 WL 3776365 (Tex. App. Houston 14th Dist. Aug. 30 2012).

370. Appellant failed to meet his burden under the test for ineffective assistance, given that (1) he did not offer any authority or argument, under Tex. R. App. P. 38.1(i), showing that the trial court would have erred in overruling an objection under Tex. R. Evid. 401, 402, 403, (2) the trial court did overrule appellant's relevance objection under Tex. R. Evid. 402 as to a deputy's testimony, (3) appellant did not raise the issue on appeal, although he claimed that one reason counsel should have objected on relevancy grounds was to preserve the issue for appeal, and (4) counsel's failure to object might have been sound trial strategy, as the testimony was brief, counsel already objected to relevance of the testimony, and a later objection was successful and the trial court instructed the jury to disregard the testimony concerning whether committing a crime was something to be expected from persons with a certain disease; the court could not say that counsel's failure to further object was ineffective assistance. Ozuna v. State, 2012 Tex. App. LEXIS 6858, 2012 WL 3525635 (Tex. App. Corpus Christi Aug. 16 2012).

371. In a murder case, the court properly admitted photographs of defendant's tattoos because the "REDRUM" and revolver tattoos were especially probative of defendant's intent and attitude relevant to his defense and testimony that he would never point a gun at someone else first. Given defendant's own counsel's indication that everyone had tattoos and criminal records, on both sides, there was no indication the evidence unfairly aroused the jury's hostility or sympathy. Luckett v. State, 2012 Tex. App. LEXIS 6686, 2012 WL 3241802 (Tex. App. Dallas Aug. 10 2012).

372. During defendant's trial for aggravated sexual assault of a child, the court did not err in admitting, over defense counsel's objections, evidence of photographic lineups featuring a second suspect because the evidence was relevant as it showed that the victims picked defendant out of 12 different photographs rather than just six.

Hendershot v. State, 2012 Tex. App. LEXIS 6632 (Tex. App. Corpus Christi Aug. 9 2012).

373. On appeal from his convictions for compelling prostitution, sexual assault of a child, and sexual performance of a child, the appellate court found that the admission of photographs of items seized from a trash can outside of the studio were admissible because they were relevant and the probative value was not substantially outweighed by the danger of unfair prejudice. Although the evidence might not have pertained directly to the complainant, proof of the activities at the studio was relevant to whether, in employing the complainant at the studio, defendant intended that she engage in sexual performance and prostitution. Wilkerson v. State, 2012 Tex. App. LEXIS 5656, 2012 WL 2877623 (Tex. App. Dallas July 16 2012).

374. Trial court did not abuse its discretion by excluding expert psychological testimony who allegedly would have testified that as a result of his mental defects defendant was incapable of forming the necessary mens rea to commit an assault because defendant's amnesia was caused by his head injury, which occurred after the assault, and therefore could not be relevant to his intent at the time of the assault. In addition, the expert's report only noted that defendant told the expert that he had post-traumatic stress disorder, and nothing suggested that the expert himself confirmed the diagnosis. Iniquez v. State, 374 S.W.3d 611, 2012 Tex. App. LEXIS 5436, 2012 WL 2742632 (Tex. App. Austin July 6 2012).

375. Defendant failed to show an abuse by the trial court in excluding evidence where he did not show the exclusion of relevant and reliable evidence, Tex. R. Evid. 401, 402, that formed such a vital part of his case that its exclusion effectively precluded him from presenting a defense, U.S. Const. amends. VI, XIV. Houston v. State, 2012 Tex. App. LEXIS 5276, 2012 WL 2511588 (Tex. App. Dallas July 2 2012).

376. Determination of the identity of the person fleeing from the police officer was a fact of significant consequence to the determination of the action, and an extraneous offense may be admissible, to show the identity of the accused, Tex. R. Evid. 403(b); therefore, evidence pertaining to identity was relevant and the trial court's decision to deny defendant's objection on the basis of Tex. R. Evid. 401 was within the zone of reasonable disagreement. White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

377. Determination of the identity of the person fleeing from the police officer was a fact of significant consequence to the determination of the action, and an extraneous offense may be admissible, to show the identity of the accused, Tex. R. Evid. 403(b); therefore, evidence pertaining to identity was relevant and the trial court's decision to deny defendant's objection on the basis of Tex. R. Evid. 401 was within the zone of reasonable disagreement. White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

378. Trial court did not err by excluding opinion testimony from the officer because his opinion on the difficulty of obtaining a conviction when the victim of a sexual assault suffered from mental impairments did not make any of the facts the jury had to determine more or less probable, and therefore the evidence was not relevant. Myles v. State, 2012 Tex. App. LEXIS 4911, 2012 WL 2357426 (Tex. App. Houston 1st Dist. June 21 2012).

379. Under Tex. R. Evid. 401, 402, the statement by the witness that she was afraid to select the photo of defendant in the photo lineup was relevant and admissible because it showed that she identified defendant as the person that perpetrated the victim's murder. Benavides v. State, 2012 Tex. App. LEXIS 4971, 2012 WL 2353731 (Tex. App. Dallas June 21 2012).

380. In a fraudulent transfer case, the exclusion of title insurance evidence and various documents as irrelevant and potentially confusing under Tex. R. Evid. 401, 402, 403 was not error; moreover, any error that might have occurred was harmless. Hahn v. Love, 394 S.W.3d 14, 2012 Tex. App. LEXIS 4702, 2012 WL 2153675 (Tex. App.

Houston 1st Dist. June 14 2012).

381. Evidence at trial showed that the amount found on defendant during booking was 0.15 grams and was found in a one-dollar bill, and although the amount and packaging of cocaine found on each male were similar, they were not identical; in addition, the officer testified that suspects typically transported narcotics in bills of money such that the trial court did not err in excluding the evidence. Arreola v. State, 2012 Tex. App. LEXIS 4166, 2012 WL 1868680 (Tex. App. Eastland May 24 2012).

382. Defendant was free to present other evidence of the complainant's purported financial hardship, and the trial court did not abuse its discretion in sustaining the State's objection to introduction of evidence relating to the complainant's civil suit against a railroad company because it was not relevant and did not give rise to an inference of bias. West v. State, 2012 Tex. App. LEXIS 3612, 2012 WL 1606239 (Tex. App. Houston 14th Dist. May 8 2012).

383. In this murder trial, the trial court did not abuse its discretion in admitting autopsy evidence and finding it was relevant for purposes of Tex. R. Evid. 401, 402, given that (1) the medical examiner testified that the photographs would help him explain his findings and would help the jury understand the victim's injuries, (2) the testimony and autopsy report concerned the cause of death, which was relevant, and (3) the photographs, while not entirely clear, appeared to depict only the initial condition of the body and not autopsy mutilation; the court's analysis was the same whether or not a third photograph was admitted and shown to the jury. Jones v. State, 2012 Tex. App. LEXIS 2381, 2012 WL 1004735 (Tex. App. Dallas Mar. 27 2012).

384. Erroneous admission of irrelevant photographs of a dent in appellant's vehicle and shell casings on his porch did not influence the jury or had only a slight effect, for purposes of Tex. R. App. P. 44.2(b), given that neither were discussed at voir dire, most of the State's argument addressed the self-defense claim, and to the extent references to appellant's driving and shooting habits could have related to the photographs, they could have also related to the testimony of another witness. Dyke v. State, 2012 Tex. App. LEXIS 2181, 2012 WL 954625 (Tex. App. Texarkana Mar. 21 2012).

385. Pictures of shell casings on appellant's porch and the dent in his truck did not make any fact of consequence, here the claim of self-defense, more or less probable, for purposes of Tex. R. Evid. 401, 402; one officer testified that it was found that the dent had nothing to do with the shooting, and given that the evidence suggested appellant shot the victim from inside his truck and one shell casing was found in the vehicle, there was little to no relevance the casings on the porch could have had to the offense, and thus the pictures were improperly admitted. Dyke v. State, 2012 Tex. App. LEXIS 2181, 2012 WL 954625 (Tex. App. Texarkana Mar. 21 2012).

386. Because appellant did not offer argument or authority on his claims under Tex. R. Evid. 401, 402, 403, 404(b) and his claims for due process and due course of law, the complaints were inadequately briefed and presented nothing for review. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

387. Grant of summary judgment in favor of the company men and others in the employee's defamation action was proper because expert testimony about bankruptcy was not relevant to any element of the defamation claims, nor was the bankruptcy testimony relevant to any element of the employee's other pleaded claims. Thus, the expert was property struck as an expert witness. Bell v. Bennett, 2012 Tex. App. LEXIS 2097, 2012 WL 858603 (Tex. App. Fort Worth Mar. 15 2012).

388. Court properly allowed an expert witness to testify about the similarity of physical evidence recovered from the crime scene because the tapes from the crime scene and defendant's home were offered to show that because the tapes were similar, it was more likely that they came from a common source, and if they came from a common source, it was more likely that the tape in defendant's home came from the packaging for the marijuana in the

murder victim's home. The testimony showed the similarities of the tapes and was therefore relevant to show that defendant was at the crime scene and had a motive for shooting the victims. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

389. Court properly admitted the contents of social networking web pages because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be -- web pages the contents of which defendant was responsible for. There were numerous photographs of defendant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring, and there was a reference to the victim's death and the music from his funeral. Tienda v. State, 358 S.W.3d 633, 2012 Tex. Crim. App. LEXIS 244 (Tex. Crim. App. 2012).

390. Court rejected appellant's Brady claim because the trial court could have found that the witness's role in gathering evidence in appellant's case was not a material fact concerning appellant's defense, plus the involvement of the witness in other cases was not shown to be material or relevant to appellant's case for purposes of Tex. R. Evid. 402; appellant never claimed that the State did not establish a proper chain of custody, the State's case against appellant was strong, and the State did not call the witness during the trial. Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

391. In the proceeding to commit respondent as a sexually violent predator (SVP), the trial court did not abuse its discretion by restricting respondent's cross-examination of one of the State's experts, because the doctor's subjective feelings concerning the verdict in respondent's attempted aggravated sexual assault case was not a fact of consequence in respondent's SVP case for purposes of Tex. R. Evid. 402. Respondent could not challenge the facts of his final convictions in the SVP proceeding, and attempted aggravated sexual assault of a child was one of his predicate convictions under Tex. Health & Safety Code Ann. § 841.002(8)(A). In re Dees, 2011 Tex. App. LEXIS 9807 (Tex. App. Beaumont Dec. 15 2011).

392. In a sexual assault of a child case, the evidence of the victim's emotional problems was not relevant or admissible under Tex. R. Evid. 401, 402 as the evidence could not be used to impeach her because there was no suggestion that her emotional problems could impair her ability to recall events or would compromise her credibility. Lester v. State, 2011 Tex. App. LEXIS 9728, 2011 WL 6238157 (Tex. App. Texarkana Dec. 14 2011).

393. During defendant's trial for sexual assault of a child, the court did not err in admitting pornographic photographs and videos seized from defendant's home; the evidence was relevant because it served to demonstrate defendant's intent, demonstrate defendant's identity, and bolster the victim's testimony, the credibility of which had been attacked. Pallm v. State, 2011 Tex. App. LEXIS 9402, 2011 WL 6043025 (Tex. App. Tyler Nov. 30 2011).

394. Pursuant to Tex. R. Evid. 401 and 402, the exclusion of the photographs of a witness based on irrelevance was within the trial court's discretion because defense counsel did not establish that the photographs depicted gang activity and only stated that it could show gang signs. Oliva v. State, 2011 Tex. App. LEXIS 8940, 2011 WL 5428965 (Tex. App. Houston 1st Dist. Nov. 10 2011).

395. Appellate court correctly determined that the trial court did not improperly comment on the weight of the evidence in its answer to a jury question, because the trial court merely responded to the jury's question concerning a subject identified by the jury alone; the trial court merely provided a correct statement of law that family members with relevant evidence were not prohibited from testifying, and from this, the jury could have permissibly inferred either that none of the available family members could provide relevant information or that the petitioner did not call the available family members to testify because they would supply evidence unfavorable to him. Lucio v. State, 353

S.W.3d 873, 2011 Tex. Crim. App. LEXIS 1514 (Tex. Crim. App. Nov. 9 2011).

396. Because a crayon drawing found in the victim's clothes during the autopsy did not provide a small nudge toward proving or disproving some fact of consequence, the drawing was irrelevant and inadmissible under Tex. R. Evid. 401 and 402; however, under Tex. R. App. P. 44.2(b), admission of the drawing was harmless error as the evidence against defendant was substantial and the drawing was not so emotionally charged that it prevented the jury from rationally considering the evidence before it. Soto v. State, 2011 Tex. App. LEXIS 8360, 2011 WL 5000393 (Tex. App. Corpus Christi Oct. 20 2011).

397. Evidence of one's sexual orientation may be relevant to show bias under unique circumstances when coupled with a logical connection to one's motive to testify in a certain manner, but that was not the case here, and the evidence of the victim's sexual orientation was inadmissible and irrelevant under Tex. R. Evid. 401, 402; furthermore, under these circumstances when there was no connection between the victim's relationship with her female friend and any motive for her to exaggerate the incident involving appellant juvenile, any de minimis probative value of that information would be substantially outweighed by the danger of unfair prejudice in putting the victim on trial for her sexual orientation. In re O.O.A., 358 S.W.3d 352, 2011 Tex. App. LEXIS 7416 (Tex. App. Houston 14th Dist. Sept. 13 2011).

398. Evidence of inflammatory statements in materials found in defendant's room tended to show he had an interest in gangs, drugs, and sexual assault; this evidence was admissible as relevant. Stephenson v. State, 2011 Tex. App. LEXIS 7434, 2011 WL 4027721 (Tex. App. Amarillo Sept. 12 2011).

399. Company president's arrest and behavior thereafter had nothing to do with the intent of the parties concerning the execution of their agreements or the termination of one agreement; the president's basis for terminating, not his reason, was what was relevant, and the testimony about the arrest was irrelevant, plus presented a clear danger of unfair prejudice, even though the court did not condone the president's actions. Nichols v. State, 349 S.W.3d 612, 2011 Tex. App. LEXIS 7253 (Tex. App. Texarkana Sept. 6 2011).

400. In defendant's stalking case, a reasonable fact finder could have found that the telephone number the victim attributed to defendant was his telephone number, and that defendant sent the electronic communications attributed to him by the State and depicted in the challenged exhibits. Accordingly, the challenged exhibits were relevant, and the trial court did not abuse its discretion by admitting them. Manuel v. State, 357 S.W.3d 66, 2011 Tex. App. LEXIS 7152 (Tex. App. Tyler Aug. 31 2011).

401. Trial court had discretion to find that appellant's conduct of laughing and blowing kisses to a rival gang member posed a great danger to the community and caused the death of an innocent bystander, plus appellant's reluctance to cooperate showed his disregard for the value of life; this evidence was relevant to appellant's character and for assessing punishment, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), and that persons might have considered appellant's conduct as legitimate and innocent did not affect the relevance of the evidence. Brown v. State, 2011 Tex. App. LEXIS 7170, 2011 WL 3849106 (Tex. App. El Paso Aug. 31 2011).

402. For purposes of Tex. R. Evid. 402, evidence of appellant's conduct prior to the shooting and during the police interview was relevant to assessing punishment under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), plus the evidence's potential to have an overwhelming effect on the jury was limited by an instruction, and it did not appear that the evidence required an inordinate amount of time to develop; because the evidence spoke directly to appellant's character and his lack of concern for others, the evidence was necessary to help the jury determine punishment, and the trial court did not err in admitting the evidence under Tex. R. Evid. 403. Brown v. State, 2011 Tex. App. LEXIS 7170, 2011 WL 3849106 (Tex. App. El Paso Aug. 31 2011).

403. In a dispute concerning whether a workers' compensation claimant who was injured while driving home had been paid for driving other employees, the trial court reasonably could have excluded deposition testimony from two company executives based on relevance under Tex. R. Evid. 401, 402 and/or personal knowledge under Tex. R. Evid. 602. The executives did not know the claimant and were not present when he was hired, and testimony regarding the tax treatment of the payments was not material to whether the per diem payments were for driving. Tex. Prop. & Cas. Ins. Guar. Ass'n v. Brooks, 2011 Tex. App. LEXIS 7269, 2011 WL 3890405 (Tex. App. Austin Aug. 31 2011).

404. In a criminal solicitation of a minor for sexual assault case, under Tex. R. Evid. 401, 402, the trial court did not abuse its discretion in excluding the defense witness's testimony about the veracity of the chat room logs because it was irrelevant as he could not say whether the State's or defendant's version of the chat logs was an accurate version of the actual chat sessions. Pudasaini v. State, 2011 Tex. App. LEXIS 5582, 2011 WL 2905592 (Tex. App. Dallas July 21 2011).

405. In an action against a trucking company for wrongful death, which arose from a collision between the decedent's vehicle and an 18-wheel truck, the court erred in admitting two positive drug tests of the truck driver because one drug test occurred four years prior to the accident and the second test occurred eight months after the accident; the evidence was not relevant. Tornado Trucking, Inc. v. Dodd, 2011 Tex. App. LEXIS 5123, 2011 WL 2641272 (Tex. App. Waco July 6 2011).

406. At defendant's trial for burglary of a habitation based on evidence showing that defendant and his brother broke into a mobile home and stole a TV set, the trial court ruled that evidence of two extraneous burglaries committed by his brother was relevant under Tex. R. Evid. 402, probative, and admissible under Tex. R. Evid. 404(b). The appellate court held that defendant was not harmed by the admission of the evidence because it was not unduly emphasized by the State, and it did not have a substantial effect on the jury's verdict. Crutchfield v. State, 2011 Tex. App. LEXIS 4959, 2011 WL 2638402 (Tex. App. Tyler June 30 2011).

407. There was no evidence that a handgun being in a backpack had any relevance to the commission of the offense of murder or to appellant's self-defense claim, and for purposes of Tex. R. Evid. 402, the trial court did not err in excluding testimony concerning how to safely carry a handgun. Knapper v. State, 2011 Tex. App. LEXIS 4782, 2011 WL 2503463 (Tex. App. Houston 1st Dist. June 23 2011).

408. Trial court improperly admitted evidence that the decedent's widow would put any punitive damages she received from the corporation that owned and operated the cemetery into a trust to pay for funerals for persons who could not afford them because it was not relevant to proving any of the factors to be considered when determining the amount of punitive damages or to penalizing or punishing the corporation. Serv. Corp. Int'l v. Guerra, 348 S.W.3d 221, 2011 Tex. LEXIS 417, 54 Tex. Sup. Ct. J. 1191 (Tex. 2011).

409. During appellant's civil commitment trial, the trial court did not err by excluding an expert's testimony that appellant did not commit the crimes for which he had been convicted because the issue of whether appellant had been wrongfully convicted was not at issue. In re Commitment of Hinkle, 2011 Tex. App. LEXIS 4504 (Tex. App. Beaumont June 16 2011).

410. Because appellant's statements in his January 2nd letter were found by the trial court to be libel per se, the anonymous letter was wholly irrelevant to the issue of whether appellant's prior letter defamed appellee. Hancock v. Variyam, 345 S.W.3d 157, 2011 Tex. App. LEXIS 4647 (Tex. App. Amarillo June 16 2011).

411. Evidence of the decedent's unredacted will did not tend to make the likelihood that the decedent forged the quitclaim deeds more probable or less probable than it would be without this evidence; thus, it was properly

excluded. Kingsley v. Beck, 2011 Tex. App. LEXIS 4294, 2011 WL 2225537 (Tex. App. Texarkana June 7 2011).

412. Defendant was not prevented from showing that the victim and other family members were biased and had a motive to testify against him because there was animosity between the victim's family and defendant, but the trial court did not err in not admitting evidence of the victim's family's use of drugs as the behavior that was criticized because it was not admissible under the Tex. R. Evid. 403 balancing test and was not shown to be relevant to any issue in the case under Tex. R. Evid. 402. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

413. Photographs of the victim wearing an allegedly sexually suggestive T-shirt were excludable under either Tex. R. Evid. 402 as irrelevant or Tex. R. Evid. 403 because the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

414. Evidence of bathing incident between defendant and his niece was admissible, Tex. R. Evid. 402, 403, 404(b), as it showed the nature of defendant's relationship with and mindset towards his niece, Tex. Code Crim. Proc. Ann. art. 38.37 Gragert v. State, 2011 Tex. App. LEXIS 3948, 2011 WL 2027955 (Tex. App. Amarillo May 24 2011).

415. Court remanded the cause for a jury trial on only the amount of the attorney's fees, and any evidence concerning property owners' claims for trespass, or any other claims, was irrelevant, for purposes of Tex. R. Evid. 401, 402. Ogu v. C.I.A. Servs., 2011 Tex. App. LEXIS 1979, 2011 WL 947008 (Tex. App. Houston 1st Dist. Mar. 17 2011).

416. Court acted within its discretion in concluding that the complainant's alleged prior use of alcohol with her mom was not relevant to whether the complainant could accurately recollect events that took place when she was not staying in her mother's home, because such testimony would not be relevant to the complainant's ability to recollect the events of the crimes alleged, which occurred when the complainant was staying with defendant, not her mother, during spring break. Vega v. State, 2011 Tex. App. LEXIS 1852, 2011 WL 882329 (Tex. App. Houston 14th Dist. Mar. 15 2011).

417. Testimony concerning matters disposed of by summary judgment in a dispute between a condominium association and a unit owner was irrelevant under Tex. R. Evid. 401, 402. Bosch v. Cedar Vill. Townhomes Homeowners Ass'n, 2011 Tex. App. LEXIS 804, 2011 WL 346317 (Tex. App. Houston 1st Dist. Feb. 3 2011).

418. When police officers responded to a domestic disturbance call at the residence of defendant and his wife, she told the officers that defendant had repeatedly struck her with a cane and held a gun to her head during an argument. At defendant's trial for assault, he did not object to the officers' testimony describing the discovery and seizure of the weapon; the evidence was relevant and admissible under Tex. R. Evid. 402 as same transaction contextual evidence. Smith v. State, 2011 Tex. App. LEXIS 859, 2011 WL 350434 (Tex. App. Austin Feb. 2 2011).

419. In defendant's murder case, whether the complainant used drugs over a month earlier did not rebut the toxicology report showing no drugs in her system at the time she was shot, and thus, the trial court did not abuse its discretion in finding the evidence irrelevant. The only evidence defendant offered was testimony that defendant's daughter would not stay with them after her grandfather's funeral because of the complainant's drug use. Mcghee v. State, 2011 Tex. App. LEXIS 675 (Tex. App. Houston 1st Dist. Jan. 27 2011).

420. In an eminent domain proceeding, the trial court abused its discretion in excluding evidence of the prior owner's environmental remediation agreement. Exclusion of the evidence was harmful, because it was relevant under Tex. R. Evid. 401-402 to the jury's determination of the market value of the property. Caffe Ribs, Inc. v. State, 328 S.W.3d 919, 2010 Tex. App. LEXIS 10188 (Tex. App. Houston 14th Dist. Dec. 28 2010).

421. In a product liability action against a tire manufacturer, the trial court was within its discretion in excluding evidence regarding nylon cap plies; while the addition of a nylon cap ply might have prevented injury to a mother and children, a father did not demonstrate why evidence of the way tires were manufactured 12 years after the manufacture of the tire at issue would have been relevant to the feasibility of adding nylon cap plies in 1997. Hathcock v. Hankook Tire Am. Corp., 330 S.W.3d 733, 2010 Tex. App. LEXIS 10032 (Tex. App. Texarkana Dec. 17 2010).

422. When defendant pleaded guilty to intoxication manslaughter in violation of Tex. Penal Code Ann. § 49.08(a), the doctrines of double jeopardy and collateral estoppel did not preclude the trial court at sentencing from determining that defendant's prior offense involved alcohol even though the State had reduced the charge in the prior case from driving while intoxicated (DWI) to obstruction of a highway or other passageway; double jeopardy did not attach, because there were no common factual elements between DWI and obstruction of a highway or other passageway. Under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and Tex. R. Evid. 401-402, the trial court was permitted to consider all relevant evidence at sentencing. Cherian v. State, 2010 Tex. App. LEXIS 8646, 2010 WL 4244002 (Tex. App. Houston 1st Dist. Oct. 28 2010).

423. Although defendant contended that the trial court erred in sustaining the State's objection when defendant offered the ticket and booking information pertaining to an individual arrested on the night and at the location where defendant was arrested, defendant provided no argument for the relevance of the excluded evidence, other than asserting that such evidence allegedly impeached the arresting officer's testimony regarding the basis for the arrest of the other person. Because the evidence was not relevant to the issues in this case, the trial court did not err in excluding it. Howard v. State, 2010 Tex. App. LEXIS 8362, 2010 WL 4069330 (Tex. App. Houston 14th Dist. Oct. 19 2010).

424. During a civil commitment hearing, the trial court did not err in sustaining the State's relevancy objection to a question to a psychologist concerning whether a diagnosis of pedophilia predisposed a person to commit acts of sexual violence because the psychologist had not diagnosed respondent with pedophilia. In re Commitment of Robertson, 2010 Tex. App. LEXIS 7421 (Tex. App. Beaumont Sept. 9 2010).

425. Trial court did not abuse its discretion in determining that the probative value of the child victim's mother's testimony outweighed any prejudicial effect because the testimony, identifying defendant as the individual who left bite marks on the victim when they were playing, was relevant and probative of the relationship between defendant and the victim. Samora v. State, 2010 Tex. App. LEXIS 6759, 2010 WL 3279536 (Tex. App. Corpus Christi Aug. 19 2010).

426. In an aggravated assault case, the trial court did not err in admitting evidence about the bullet damage to the interior of a particular home. The evidence was relevant to rebut defendant's theory that he merely fired a gun into the air to deter and stop a man whom he believed to be a burglar, and the evidence was not particularly inflammatory or of such a nature as to distract, confuse, or be given undue weight by the jury. Richardson v. State, 2010 Tex. App. LEXIS 6659, 2010 WL 3245443 (Tex. App. Dallas Aug. 18 2010).

427. Evidence of trace quantities of controlled substances that were found in defendant's car during the same search in which the methadone was found was relevant and admissible because it was visible in a baggie and on a scale, and the baggie was found in the location where the trooper had seen defendant secret something. Lamkin v.

State, 2010 Tex. App. LEXIS 6484, 2010 WL 3170647 (Tex. App. Eastland Aug. 12 2010).

428. For purposes of Tex. R. Evid. 401, 402, 404(b), the trial court could have reasonably determined that the testimony about appellant's pretrial supervision and having been found competent to stand trial in a separate case was relevant rebuttal testimony that appellant was motivated to commit the underlying offenses to demonstrate that he was not competent to stand trial in the other case. Espinosa v. State, 328 S.W.3d 32, 2010 Tex. App. LEXIS 6341 (Tex. App. Corpus Christi Aug. 5 2010).

429. Trial court did not abuse its discretion by prohibiting defendant from questioning his daughter about the victim's use of marijuana because whether the victim used drugs over a month earlier would not rebut the toxicology report showing no drugs in her system at the time she was killed. Mcghee v. State, 2010 Tex. App. LEXIS 5561 (Tex. App. Houston 1st Dist. July 15 2010).

430. Ineffective assistance of counsel in violation of U.S. Const. amend. VI was shown where defendant's counsel failed to object to evidence that one of two women who died after being run over by defendant's truck was pregnant; evidence of her pregnancy was irrelevant under Tex. R. Evid. 401 and Tex. R. Evid. 402 because the fact that the woman was pregnant did not tend to make it more or less probable that defendant had the requisite intent to injure her and there was no evidence that defendant in fact even was aware of the woman's pregnancy. White v. Thaler, 610 F.3d 890, 2010 U.S. App. LEXIS 13329 (5th Cir. Tex. 2010).

431. Court acted within its discretion in admitting the challenged testimony, because evidence that defendant wore a shirt commemorating a notorious gang founder with a violent history was relevant to explain his motive for urging his accomplice to shoot the store employee. Carey v. State, 2010 Tex. App. LEXIS 4876, 2010 WL 2573846 (Tex. App. Houston 14th Dist. June 29 2010).

432. Because forgery was not pleaded as an affirmative defense under Tex. R. Civ. P. 94 in a suit for a constructive trust, handwriting evidence was not helpful and thus was irrelevant under Tex. R. Evid. 401, 402, 702. Estate of Wallis, 2010 Tex. App. LEXIS 3710, 2010 WL 1987514 (Tex. App. Tyler May 19 2010).

433. During defendant's trial for aggravated sexual assault of a child, the court properly prohibited defendant from cross-examining several witnesses about whether the victim had made accusations against others of sexual assault because the probative value of the excluded evidence was substantially outweighed by the danger of unfair prejudice; accusations against third parties, even other members of the victim's family or household, of different and separate sexual assaults were inconsequential and not probative of the accusations against defendant. Hubbard v. State, 2010 Tex. App. LEXIS 3408, 2010 WL 1818950 (Tex. App. Texarkana May 7 2010).

434. Photographs of defendant, his car, and its contents were relevant, as the identity of the convenience store robber was a fact of consequence in this aggravated robbery case and the evidence obtained at another store made the determination of whether defendant was the robber more probable, for purposes of Tex. R. Evid. 401, 402. Lively v. State, 2010 Tex. App. LEXIS 3387, 2010 WL 1780138 (Tex. App. Texarkana May 5 2010).

435. Court did not err in excluding all of defendant's proffered evidence at sentencing, because defendant did not separate the admissible evidence from the inadmissible evidence. Fegans v. State, 2010 Tex. App. LEXIS 2588, 2010 WL 1571217 (Tex. App. Houston 1st Dist. Apr. 8 2010).

436. Even if appellant adequately briefed her points, there was no abuse of discretion in the trial court's evidentiary rulings, for purposes of Tex. R. Evid. 402, 601, 802 and Tex. R. App. P. 44.1. Pool v. Diana, 2010 Tex.

App. LEXIS 2208 (Tex. App. Austin Mar. 24 2010).

437. During defendant's trial for unlawful possession of a firearm and possession of cocaine, the trial court, without abusing its discretion, could have determined that the fact that defendant's adult daughter previously possessed and disposed of a handgun was not probative of any fact of consequence to the determination of defendant's guilt; the court could have determined that any relevance the evidence possessed was substantially outweighed by the danger of confusion of the issues involved in defendant's prosecution. Taylor v. State, 2010 Tex. App. LEXIS 2024, 2010 WL 1027534 (Tex. App. Amarillo Mar. 22 2010).

438. During defendant's murder trial, the court did not err in admitting a transcript of defendant's conversation with a codefendant because it was highly probative to establish a motive and identity for participating in the murder; evidence of defendant's payment for the commission of the murder, as well as defendant's association with gang assassins, was relevant to show that defendant assisted in the murder and defendant's intent to do so. Reta v. State, 2010 Tex. App. LEXIS 1482, 2010 WL 724395 (Tex. App. San Antonio Mar. 3 2010).

439. Court did not err in excluding the expert testimony regarding the genuineness of the testator's signature on the beneficiary designation forms, because the claimant admitted that she did not raise the issue of forgery regarding these signatures, and the evidence from the handwriting expert regarding the issue had no relationship to any issue in the constructive trust suit. In the Estate of Wallis, 2010 Tex. App. LEXIS 1441, 2010 WL 702267 (Tex. App. Tyler Feb. 26 2010).

440. In defendant's felony murder case, the court properly allowed the victim's daughter to testify to her relationship with her father because the gist of the witness's testimony set up the circumstances immediately leading up to the murder, and was relevant to show the probative circumstances of the crime. Arguably, the two questions regarding the relationship between the victim and the witness were necessary to establish the connection between them, as well as the victim's actions immediately prior to his death. Flores v. State, 2010 Tex. App. LEXIS 822, 2010 WL 411747 (Tex. App. Corpus Christi Feb. 4 2010).

441. In defendant's murder case, the court properly admitted testimony regarding the victim having worked for defendant as a prostitute because the witness testified that the cycle of violence evolved from "slapping" to the point of "pretty brutal beatings." That testimony tended to show that defendant was violent toward the victim in the past and that his violence toward her was escalating; therefore, the testimony was relevant to the charge of murder. Wilson v. State, 2010 Tex. App. LEXIS 604, 2010 WL 323537 (Tex. App. Fort Worth Jan. 28 2010).

442. Picture of spinner rims was properly admitted because it aided the jury in understanding the police officers' testimony about the improvements that defendant made to the rental car he drove for approximately one week; that was helpful to the jury by enabling them to determine if the installation of spinner rims tended to demonstrate defendant's control over the rental car. In addition, a photograph of the spinner rims that were actually installed on the rental car would have been relevant for the same reason and admissible at trial. Rollins v. State, 2009 Tex. App. LEXIS 9891 (Tex. App. Houston 1st Dist. Dec. 31, 2009).

443. To corroborate an accomplice's testimony, for purposes of Tex. Code Crim. Proc. Ann. art. 38.14, the State offered the testimony of one witness and defendant's parole officer; because the officer's identification testimony identified defendant as the male robber in the photographs taken during the robbery, the testimony tended to make it more probable, for purposes of Tex. R. Evid. 401, 402, that he was the male robber, and thus the testimony was relevant and the trial court did not abuse its discretion in admitting the evidence as relevant. Mendez v. State, 2009 Tex. App. LEXIS 9785, 2009 WL 5150071 (Tex. App. San Antonio Dec. 30 2009).

444. Defendant's parole officer's identification testimony substantively contributed to make the existence of a fact, that defendant was the male robber depicted in photographs, more likely, and the evidence was offered in an effort to corroborate accomplice-witness testimony, and thus the officer's testimony did not constitute improper bolstering. Mendez v. State, 2009 Tex. App. LEXIS 9785, 2009 WL 5150071 (Tex. App. San Antonio Dec. 30 2009).

445. In defendant's aggravated robbery case, the trial court did not err in declining to strike the previously admitted evidence of the knife and a witness's testimony about the knife because the knife was relevant, it was admitted into evidence before the witness testified, and a photograph showed the exact location where the knife was found. Because the evidence was properly admitted, the trial court did not err by refusing defendant's request for a limiting instruction. Jones v. State, 2009 Tex. App. LEXIS 9570, 2009 WL 4856420 (Tex. App. Houston 1st Dist. Dec. 17 2009).

446. In a sexual assault case, a court properly admitted extraneous offense evidence that defendant had threatened a witness not to testify because defendant threatened to accuse the witness and his wife of sexually abusing defendant's girlfriend's children if the witness testified against him. The testimony was relevant to show defendant's consciousness of guilt. Ramsey v. State, 2009 Tex. App. LEXIS 9449, 2009 WL 4755175 (Tex. App. Fort Worth Dec. 10 2009).

447. Trial court erroneously admitted a 1993 judgment convicting defendant of misdemeanor assault where the judgment was not admissible under Tex. R. Evid. 404(b) because it had no relevance apart from proof of character conformity. Moreover, evidence of the conviction was not available for impeachment under Tex. R. Evid. 609 because the record contained no evidence that the victim of the assault was female, and there was thus no proof that it was a misdemeanor involving moral turpitude. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

448. In a driving while intoxicated case, a trial court did not err by admitting a DIC-24 form into evidence because it was relevant to prove that defendant refused to submit to the taking of a specimen of his breath and that defendant was provided with the required information under Tex. Transp. Code Ann. § 724.015 before his specimen was requested. Frnka v. State, 2009 Tex. App. LEXIS 7095, 2009 WL 2882939 (Tex. App. San Antonio Sept. 9 2009).

449. In a driving while intoxicated case, even though defendant made several challenges to the trial court's admission of a DC-24 form into evidence, because the only objection made at trial was for relevance, that was the only issue preserved for appellate review. Frnka v. State, 2009 Tex. App. LEXIS 7095, 2009 WL 2882939 (Tex. App. San Antonio Sept. 9 2009).

450. In defendant's tampering with a witness case, the trial court did not err in excluding evidence that the victim's father had recently kicked her out of his house because it was uncontested that defendant had previously threatened to kick the victim out if she became pregnant. That evidence served to establish a motive, if any, for the victim to make false accusations against defendant; the additional evidence regarding the victim's father's decision to kick her out, if true, did not lend any additional weight to that theory. Davis v. State, 2009 Tex. App. LEXIS 6685 (Tex. App. Corpus Christi Aug. 26 2009).

451. In a murder case, autopsy photographs were properly admitted because the State had to prove that defendant caused the victim's death by shooting him with a deadly weapon, and a doctor's testimony described the type of injuries the victim received, the extent of those injuries, and the cause of his death. Additionally, although the photographs were somewhat gruesome, they were not enlarged. Ramirez v. State, 2009 Tex. App. LEXIS 6640, 2009 WL 4377427 (Tex. App. Corpus Christi Aug. 25 2009).

452. In defendant's capital murder case, the court properly denied defendant's request for a social worker to testify as to a recommendation for the children's placement because there was ample testimony presented by others with firsthand knowledge that the child's mother was a bad parent, and the social worker's recommendation did not have any direct or logical connection to the proposition that some other adult caused the injury to the child. Munoz v. State, 2009 Tex. App. LEXIS 6475, 2009 WL 2517664 (Tex. App. El Paso Aug. 19 2009).

453. In defendant's capital murder case, the court properly denied defendant's witness's testimony relating to the field of false confessions because the witness's testimony could not have assisted the jury in understanding the evidence or in making a determination of a fact issue. He did not intend to offer an opinion as to the truth or falsity of defendant's confession, and during cross-examination defendant admitted the truth of the portions of his confession that he earlier claimed were inaccurate. Munoz v. State, 2009 Tex. App. LEXIS 6475, 2009 WL 2517664 (Tex. App. El Paso Aug. 19 2009).

454. Evidence that defendant did not comprehend the reasons for his wife's arrest and that his speech was slurred would tend to make it more probable that he was intoxicated, such that the evidence was relevant, for purposes of Tex. R. Evid. 401, 402. Hernandez v. State, 2009 Tex. App. LEXIS 6356, 2009 WL 2476523 (Tex. App. Houston 14th Dist. Aug. 13 2009).

455. In defendant's trial for indecency with a child by contact in violation of Tex. Penal Code Ann. § 21.11, the trial court properly ruled that certain letters to and from the victim that were in the possession of the prosecution were not discoverable under Tex. Code Crim. Proc. Ann. art. 39.14 nor admissible under Tex. R. Evid. 402 because they were not relevant to the issues at trial and were not exculpatory. Shaw v. State, 2009 Tex. App. LEXIS 5109, 2009 WL 1896068 (Tex. App. Austin July 3 2009).

456. In defendant's capital murder case, the court properly admitted evidence of an aggravated robbery because the defensive claims that defendant raised by his statements placed the intent element of his capital murder offense at issue, which entitled the State to rebut defendant's claimed lack of intent with evidence of his unadjudicated extraneous offense of the aggravated robbery. Gomez v. Tex., 2009 Tex. App. LEXIS 4521, 2009 WL 1688233 (Tex. App. Houston 1st Dist. June 18 2009).

457. Court did not err by refusing to allow defense counsel to cross-examine a police officer about prior incidents in which the officer allegedly used excessive force because the officer's character was not an essential element of the charge, claim, or defense to attempting to take a weapon from a peace officer, and the proffered testimony was not material because it did not address any fact of importance to the outcome of the action. Rico v. State, 2009 Tex. App. LEXIS 4141, 2009 WL 1623343 (Tex. App. Corpus Christi June 11 2009).

458. In defendant's capital murder case, the court properly allowed photographs of the victim to be admitted because the medical examiner who performed the autopsy stated that photographs of the child's body before and during the autopsy would assist him in describing his findings to the jury, the testimony was probative of the child's condition at the time defendant brought the child to a witness's house, and the testimony demonstrated the scope and extent of the child's injuries and the cause of death. Williams v. State, 294 S.W.3d 674, 2009 Tex. App. LEXIS 4201 (Tex. App. Houston 1st Dist. June 11 2009).

459. During defendant's criminal trial for the sexual asault of a child, the State was permitted to introduce extraneous offense evidence that defendant encouraged the victim's involvement in several crimes to rebut defense counsel's opening remarks that defendant was a positive influence on the victim. The trial court determined the extraneous offense evidence was admissible under Tex. R. Evid. 404(b) to correct the false impression created by the defense; the extraneous offense evidence was relevent for purposes of Tex. R. Evid. 402, because it tended to make less probable defendant's argument that he was encouraging the victim to be a decent and productive citizen.

Ytuarte v. State, 2009 Tex. App. LEXIS 3056, 2009 WL 1232327 (Tex. App. San Antonio May 6 2009).

460. In an indecency with a child case, the court committed reversible error in the admission of sex toys because there was no suggestion that sex toys were used in any way related to the complainant, and the State emphasized those items in providing a detailed description of each item, making certain to emphasize their graphic nature by carrying them in a single plastic tub, pointing out the testifying officer's wearing of gloves, and repeatedly apologizing to the jury for the graphic nature of those items. Warr v. State, 418 S.W.3d 617, 2009 Tex. App. LEXIS 2538 (Tex. App. Texarkana Apr. 15 2009).

461. In an aggravated assault case, the trial court did not err in admitting the victim's videotaped statement because defendant raised the issue of self-defense. A witness testified that in defendant's altercation with the victim, the victim was the aggressor and defendant tried to resist retaliating; as a result of that testimony, defendant's alleged assault of the victim was relevant rebuttal evidence to prove that defendant acted with the requisite intent. In re B.H., 2009 Tex. App. LEXIS 1852, 2009 WL 692613 (Tex. App. Tyler Mar. 18 2009).

462. In a dispute concerning the location of an express access easement, the parties both purchased land owned by the original grantor; the trial court did not err by excluding all evidence of defendants' proposed location for the easement because it showed that the easement was to be located through property that was not part of the original tract. The excluded evidence was irrelevant for purposes of Tex. R. Evid. 402. Shed, L.L.C. v. Edom Wash 'N Dry, L.L.C., 2009 Tex. App. LEXIS 1853, 2009 WL 692609 (Tex. App. Tyler Mar. 18 2009).

463. Corporation provided an assignment document in a breach of contract dispute in its supplemental response to a concrete company's motions for summary judgment. A trial court did not abuse its discretion in admitting the evidence because the evidence was relevant. All Metals Fabricating, Inc. v. Ramer Concrete, Inc., 338 S.W.3d 557, 2009 Tex. App. LEXIS 1654 (Tex. App. El Paso Mar. 12 2009).

464. In defendant's evading arrest case, the court properly excluded a defense witness's testimony because the proffered testimony that it was "standard operating procedure" for law enforcement agencies in general to routinely make video and audio recordings of police pursuits was not germane. The witness did not have personal knowledge as to the standard procedures of the Corpus Christi Police Department regarding recordings of police pursuits. Gomez v. State, 2009 Tex. App. LEXIS 1700 (Tex. App. Corpus Christi Mar. 5 2009).

465. Defendant limited one issue to the admissibility of a sexual assault nurse examiner's testimony under Tex. R. Evid. 401, 402 and he did not object under Tex. R. Evid. 403 or request a balancing test; thus, the court limited its review solely to determining whether the nurse's testimony had any relevance to the issues contested at trial in defendant's sexual assault trial. Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

466. In a case arising from a car accident, the evidence was legally insufficient to support an award of past medical care expenses because Tex. Civ. Prac. & Rem. Code Ann. § 41.0105 limited the recovery to the amount actually paid or incurred by or on behalf of an injured party; an amount that had been written off could not have been recovered. Because the evidence here did not relate to the amount of damages sustained under a proper measure of damages, the evidence was both irrelevant and legally insufficient to support the judgment; however, due to undisputed facts, a voluntary remittitur was suggested. De Escabedo v. Haygood, 283 S.W.3d 3, 2009 Tex. App. LEXIS 1101 (Tex. App. Tyler Feb. 18 2009).

467. Victim testified that her mother was not present when the sexual assaults by defendant occurred and the mother testified that she continued her relationship with defendant because she thought the case would not come to trial, not because she believed the assaults never occurred; thus, the mother's continuing relationship with

defendant was not relevant, for purposes of Tex. R. Evid. 401, 402, to the issue of whether the victim was telling the truth in defendant's aggravated sexual assault trial, and whether or not the mother believed the assaults occurred was not relevant to whether the victim was telling the truth, as the testimony of a child sexual abuse victim was alone sufficient to support a conviction, for purposes of Tex. Code Crim. Proc. Ann. art. 38.07 Vazquez v. State, 2009 Tex. App. LEXIS 1058 (Tex. App. Dallas Feb. 17 2009).

468. Defendant failed to preserve an issue for review because defendant made an objection, early in the complainant's testimony, that questions regarding the complainant's cancer treatment were irrelevant and unfairly prejudicial, that objection was overruled, and defendant did not at that time request a continuing objection nor lodge any further objection. The prosecutor went on to ask the complainant nine more questions about her cancer treatment, and the complainant responded with details about her treatment, including its nature and frequency, without any objections from defendant as to relevance or unfair prejudice. Thierry v. State, 288 S.W.3d 80, 2009 Tex. App. LEXIS 1043 (Tex. App. Houston 1st Dist. Feb. 12 2009).

469. In a driving while intoxicated case, evidence of defendant's use of prescription medications was not relevant because there was no evidence as to the dosage, the exact times of ingestion, or the half-life of the drug; a lay juror was not in a position to determine whether the drugs, taken more than 12 hours before arrest, would have any effect on defendant's intoxication. Without expert testimony to provide the foundation required to admit scientific evidence, the testimony regarding defendant's use of prescription medications was not relevant. Layton v. State, 280 S.W.3d 235, 2009 Tex. Crim. App. LEXIS 149 (Tex. Crim. App. 2009).

470. In a personal injury case, a trial court did not err in admitting evidence of the deaths of two motorists because it was relevant to show the jury why they did not testify at trial. Matbon, Inc. v. Gries, 288 S.W.3d 471, 2009 Tex. App. LEXIS 268 (Tex. App. Eastland Jan. 15 2009).

471. In a personal injury case, a trial court did not err in admitting evidence of events that occurred after an accident because it was relevant to the jury's consideration of the factors under Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981), in the context of exemplary damages. Matbon, Inc. v. Gries, 288 S.W.3d 471, 2009 Tex. App. LEXIS 268 (Tex. App. Eastland Jan. 15 2009).

472. In a personal injury case, a trial court did not err in admitting evidence of negligence because, even though there was a stipulation to the issues of negligence and proximate cause, an employer and an employee did not stipulate to the manner in which responsibility should be apportioned between them. Additionally, they did not stipulate to the employee's liability for exemplary damages. Matbon, Inc. v. Gries, 288 S.W.3d 471, 2009 Tex. App. LEXIS 268 (Tex. App. Eastland Jan. 15 2009).

473. In an aggravated assault case where insanity was an issue, a trial court did not err by excluding the testimony of a psychiatrist regarding defendant's mental condition in 2007 as irrelevant because the psychiatrist did not have any information regarding defendant's mental state in 2005 when the crime was committed. Likewise, records of defendant's visit to an emergency room in 2007 where he saw the psychiatrist were properly excluded for the same reason. Wiley v. State, 2009 Tex. App. LEXIS 225, 2008 WL 5501149 (Tex. App. Beaumont Jan. 14 2009).

474. In a case in which a jury found defendant guilty of the offense of murder, the trial court did not err in excluding defendant's testimony regarding the specifics about the "immoral teachings" that he believed his children's grandmother and the complainant had been exposing the children to because defendant did not explain, nor was a reviewing court able to discern, how any testimony about the contents of any "immoral teachings" would have had any tendency to make his self-defense claim more or less probable. Washington v. State, 2009 Tex. App. LEXIS 4434, 2009 WL 40168 (Tex. App. Houston 1st Dist. Jan. 8 2009).

475. Evidence that defendant failed to appear in 1999 and that his bond was forfeited was relevant and admissible as evidence of guilt, and defendant failed to present any evidence showing that his failure to appear was not flight from prosecution, plus he presented no argument that the probative value of the evidence was substantially outweighed by its prejudicial effect under Tex. R. Evid. 403; thus, he did not show that the trial court abused its discretion or committed reversible error in admitting the evidence, for purposes of Tex. R. App. P. 44.2(b). Pratte v. State, 2008 Tex. App. LEXIS 9716 (Tex. App. Austin Dec. 31 2008).

476. During defendant's criminal trial for burglary of a building, the trial court overruled defendant's Tex. R. Evid. 402 relevancy objection to testimony about his methamphetamine addiction. The Court of Appeals of Texas held that the failure to reassert his earlier objection waived the issue for appellate review in accordance with Tex. R. App. P. 33.1. Greenlee v. State, 2008 Tex. App. LEXIS 9438 (Tex. App. Texarkana Dec. 19 2008).

477. Defendant complained that the admission of evidence that he had left a note containing his name, jail address, and other information in the women's room was irrelevant and prejudicial; however, the trial court determined that the probative value of the evidence was substantial. Further, any evidence of an extraneous act was admissible during the punishment phase, pursuant to Tex. Code Crim. Proc. Ann. art. 37.07. Wilson v. State, 2008 Tex. App. LEXIS 9395 (Tex. App. Waco Dec. 17 2008).

478. In an aggravated sexual assault case, a trial court did not err by admitting evidence under Tex. R. Evid. 404(b) regarding defendant's commission of indecency with a child because defendant opened the door to such when his wife testified that it was physically impossible for him to have committed the assault due to their close living quarters. Moreover, the evidence was relevant to rebut allegations of lack of opportunity and fabrication. Isenberger v. State, 2008 Tex. App. LEXIS 9224 (Tex. App. Houston 1st Dist. Dec. 11 2008).

479. In an aggravated assault case, a trial court did not err by allowing a victim's father to testify during the guilt/innocence phase of the case because his brief testimony, which included basic information about himself, the victim, the evening of the shooting, and the victim's condition, was relevant and not overly prejudicial. Sanchez v. State, 2008 Tex. App. LEXIS 9072 (Tex. App. Eastland Dec. 4 2008).

480. In defendant's drug case, the trial court did not abuse its discretion by admitting in evidence the shotgun found on the back seat of the vehicle that defendant was driving just before his arrest because the probative value of the shotgun was considerable and significantly necessary to the State's case because it was a link tending to show that defendant knowingly possessed the cocaine. Additionally, the evidence of the shotgun was relevant to prove defendant's knowledge that he possessed narcotics. Harris v. State, 2008 Tex. App. LEXIS 9090 (Tex. App. Fort Worth Dec. 4 2008).

481. Court properly sustained the prosecutor's relevance objections because defense counsel did not limit his questions specifically to the assault victim's experience during the period surrounding the incident in question; the questions regarding whether Paxil could be used to treat "obsessive/compulsive disorder" and whether its side effects included "agitation and anxiety"--were asked in a general fashion, not about the victim's own experience on the medication. Scott v. State, 2008 Tex. App. LEXIS 9142 (Tex. App. Houston 14th Dist. Dec. 4 2008).

482. In defendant's indecency with a child case, the court properly excluded evidence that a boyfriend of the victims' mother was a registered sex offender because evidence of the boyfriend's registered-sex-offender status would only have been relevant if the identity of the alleged perpetrator of the offenses was an issue in the case. However, evidence of an alternative perpetrator was not relevant to the determination of whether the alleged offenses occurred. Shaw v. State, 2008 Tex. App. LEXIS 9038 (Tex. App. Waco Dec. 3 2008).

483. Evidence of defendant's association with white supremacists and racist beliefs was relevant, for purposes of Tex. R. Evid. 401, 402, because it provided the motive for defendant's violent sexual assault on the victim; based on defendant's use of racial slurs before and during the incident, the court could not say the trial court abused its discretion in finding such evidence relevant for the purpose of demonstrating motive. Tuck v. State, 2008 Tex. App. LEXIS 8525 (Tex. App. Houston 1st Dist. Oct. 30 2008).

484. Defendant argued that a deputy's employment of the horizontal gaze nystagmus test was not reliable for purposes of Tex. R. Evid. 705(c), and the testimony was not only not helpful to the jury, but was misleading and unfairly prejudicial, for purposes of Tex. R. Evid. 402, 403, 702, but defendant's objection, which referred broadly to the deputy's administration of the test, was not specific enough to have informed the trial court of the basis of the argument defendant now raised on appeal so as to have afforded the trial court the opportunity to rule on it, for purposes of Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103; thus, defendant waived error, if any. Gowin v. State, 2008 Tex. App. LEXIS 6873 (Tex. App. Tyler Sept. 17 2008).

485. In a breach of contract suit by former employees of a corporation, the admission of certain documents on the corporation's operators' misappropriation counterclaim was proper as they were relevant in establishing the amount of reimbursement sought by the operators due to an employee's actions in falsifying customer invoices, which required the operators to reimburse the customers. Tucker v. Inter-American Oil Works, 2008 Tex. App. LEXIS 6944 (Tex. App. Eastland Sept. 11 2008).

486. Given that Tex. R. Evid. 402 provided that evidence that was not relevant was not admissible, the court first had to determine if the evidence was relevant. South Plains Lamesa R.R. v. Heinrich, 280 S.W.3d 357, 2008 Tex. App. LEXIS 6038 (Tex. App. Amarillo 2008).

487. In a family violence protective order hearing, the victim's violation of her alcohol probation terms was irrelevant for purposes of Tex. R. Evid. 402 to the issue of whether defendant had committed dating violence in the past or whether it was likely that he would do so in the future. The trial court did not err by excluding the evidence which was offered to impeach the victim's credibility. Mercer v. State, 2008 Tex. App. LEXIS 5794 (Tex. App. Corpus Christi July 31 2008).

488. Items seized at the scene of a house fire were relevant under Tex. R. Evid 401, 402, 403, 404(b) to show that the fire started as a result of the cooking of methamphetamine on the stove and that the debris found in the burned house pertained to the use or manufacture of illegal drugs; defendant failed to establish that the trial court abused its discretion or that the determination fell outside of the zone of reasonable disagreement. Dentler v. State, 2008 Tex. App. LEXIS 5708 (Tex. App. Eastland July 31 2008).

489. Trial court did not err in permitting the State to raise gang-related evidence at defendant's robbery trial, given that (1) although defendant claimed the gang-related testimony was inadmissible because it was irrelevant, the case law defendant relied upon was inapposite, (2) because evidence of defendant's gang affiliation was relevant to show his motive for the robbery, rather than mere conformity with character, it was admissible under Tex. R. Evid. 402, 404, (3) the fact that the victim was unsure whether defendant was a particular gang member did not render the gang-related evidence inadmissible, the jury was the judge of the credibility of the witnesses, and the jury could have inferred that defendant was affiliated with or a member of a particular gang, and (4) the trial court did not err in finding that the potential character conformity inference did not substantially outweigh the relevant purpose of showing motive, as defendant's gang affiliation was not only relevant but critical to show the motive for his crime. Spencer v. State, 2008 Tex. App. LEXIS 5524 (Tex. App. Houston 14th Dist. July 24 2008).

490. In a failing to change a driver's license address case, defense counsel's testimony that he told the prosecutor before trial that defendant was a student, and therefore had two addresses, was relevant to rebut the suggestion

that defendant, represented by counsel, should somehow have personally communicated the information to the prosecution; the error was not harmless because the officer admitted that if defendant had told him he was a student he would not have given him a ticket. Callahan v. State, 2008 Tex. App. LEXIS 3817 (Tex. App. Dallas May 28 2008).

491. In defendant's child sexual assault case, the trial court did not err by determining that details of alleged abuse by another person were not relevant to the determination of whether defendant sexually assaulted the child, and that such details did not tend to make the existence of a material fact more or less probable; the trial court did not abuse its discretion when it ruled that the details of any alleged previous abuse by the other person were not relevant. Bargas v. State, 252 S.W.3d 876, 2008 Tex. App. LEXIS 3443 (Tex. App. Houston 14th Dist. 2008).

492. Driver's consumption of alcohol was relevant to the element of causation in his negligence suit against a trucker because the trucker presented evidence that the accident could have been avoided had the driver steered his vehicle to the right to avoid the trucker's trailer, and in failing to do so, the driver caused the accident. PPC Transp. v. Metcalf, 254 S.W.3d 636, 2008 Tex. App. LEXIS 3291 (Tex. App. Tyler 2008).

493. For purposes of Tex. R. Evid. 401, 402, the trial court did not abuse its discretion in refusing to admit evidence of a doctor's scrubs in this medical malpractice case because there was no evidence that the patient ever saw the doctor wearing scrubs or that he relied on the language on the scrubs in forming a belief that the doctor or the hospital and its parent company were holding the doctor out as an agent, and there was no evidence that the patient's wife was influenced by the language on the scrubs. Farlow v. Harris Methodist Fort Worth Hosp., 284 S.W.3d 903, 2008 Tex. App. LEXIS 9836, 64 A.L.R.6th 741 (Tex. App. Fort Worth 2008).

494. In a medical malpractice case, there was no evidence that anyone saw or relied on a hospital wall plaque in forming a belief as to whether a doctor was an agent of a hospital and its parent company, and thus the trial court did not abuse its discretion in refusing to admit this evidence for purposes of Tex. R. Evid. 401, 402; moreover, the evidence, even if considered to show an affirmative holding out by the hospital and its parent company of doctors as employees, was negated by evidence that the hospital and company included language in its admissions paperwork specifically disclaiming any such relationship. Thus, even if the trial court erred, the court could not say that error, cumulatively or individually, resulted in the rendition of an improper judgment under Tex. R. App. P. 44.1(a)(1). Farlow v. Harris Methodist Fort Worth Hosp., 284 S.W.3d 903, 2008 Tex. App. LEXIS 9836, 64 A.L.R.6th 741 (Tex. App. Fort Worth 2008).

495. Records showing that defendant obtained hydrocodone and other prescriptions many times in the past from different doctors made it more probable that, when defendant was unable to get a doctor to refill his prescription, he knowingly asked a co-worker to refill it through fraudulent means, and thus the trial court did not err in finding that the records were relevant for purposes of defendant's conviction of possession of a controlled substance, dihydrocodeinone (hydrocodone), by fraud, in violation of Tex. Health & Safety Code Ann. § 481.129(a); considering that the only direct evidence of defendant's culpable mental state was the co-worker's testimony and she was impeached, the trial court could have found (1) that the probative force of and the State's need for the records were considerable, (2) the records were not inflammatory and did not suggest a decision on an improper basis, (3) the records would not have misled the jury, and (4) the probative value of the records was not substantially outweighed by the countervailing factors specified in Tex. R. Evid. 403. Starn v. State, 2008 Tex. App. LEXIS 2402 (Tex. App. Fort Worth Apr. 3 2008).

496. Sole issue at trial was whether the mother's parental rights were to be terminated, and termination of parental rights merely clears the way for the possibility of an adoption, which would have to be decided in a separate proceeding and which, as all parties agreed, would not necessarily have resulted in adoption by the foster parents, and thus the court agreed that the merits of a prospective adoptive home were irrelevant, for purposes of Tex. R. Evid. 401, Tex. R. Evid. 402, to the issue of whether the mother's parental rights were to be terminated. Bennett v.

Tex. Dep't of Family & Protective Servs., 2008 Tex. App. LEXIS 2420 (Tex. App. Austin Apr. 3 2008).

497. In a murder case, the trial court did not abuse its discretion in admitting photographs of the victim at the crime scene because some of the photographs were used by the experts to explain the manner of the death and the amount of force used by defendant when hitting the victim with the baseball bat, tending to disprove his self-defense claim; other photographs, along with the testimony of the blood-spatter expert, addressed the absence of any struggle between the victim and defendant and that the victim was either on his knees or on the ground while being beaten, while some photographs depicted the brutality of the crime and the severity of the injuries and were probative of the manner of the victim's death. Grayson v. State, 2008 Tex. App. LEXIS 2210 (Tex. App. Houston 1st Dist. Mar. 27 2008).

498. In defendant's trial for retaliation, aggravated kidnapping, and aggravated assault, the fact that defendant had also locked another girlfriend in the same trunk in the past made it more probable that he had done the same to his current ex-girlfriend, and the first girlfriend's testimony that she did not feel free to leave him tended to rebut his claim that his ex-girlfriend remained with him voluntarily, and thus the first girlfriend's testimony was relevant under Tex. R. Evid. 401 and the trial court did not abuse its discretion in admitting the evidence over a Tex. R. Evid. 402 objection; because the first and third factors under Tex. R. Evid. 403 weighed heavily in favor of admissibility, given that the jury was drawn away from the indicted offenses only briefly and the testimony was compelling and supported the ex-girlfriend's claims, and the second and fourth factors were neutral, the trial court did not err in finding that the danger of unfair prejudice did not substantially outweigh the probative value of this evidence. Stephenson v. State, 255 S.W.3d 652, 2008 Tex. App. LEXIS 2072 (Tex. App. Fort Worth 2008).

499. Trial court did not abuse its discretion in excluding part of defendant's employer's testimony concerning the employer's son's prescription medication and a videotape of defendant's 2000 arrest for driving while intoxicated because the evidence was not relevant under Tex. R. Evid. 401 to whether defendant was guilty of the charged crimes of driving while intoxicated and evading arrest. Peavey v. State, 248 S.W.3d 455, 2008 Tex. App. LEXIS 1818 (Tex. App. Austin 2008).

500. Trial court did not abuse its discretion during defendant's trial for the Class A misdemeanor offense of assault causing bodily injury in refusing to allow defendant to cross-examine the complainant regarding past accusations of spousal abuse where the complainant's character for truthfulness was not attacked by opinion or reputation evidence or otherwise as required by Tex. R. Evid. 608; instead, during cross-examination, defendant attempted to inquire into prior accusations of abuse that the complainant made against her ex-husband for the purpose of attacking the complainant's credibility, and, pursuant to Tex. R. Evid. 401, Tex. R. Evid. 402, Tex. R. Evid. 608, the probative value of the evidence sought to be admitted was extremely low, particularly because defense counsel admitted during trial that he had no evidence that the complainant lied about the abuse and that the accusations occurred a long time ago. Sullivan v. State, 2008 Tex. App. LEXIS 1394 (Tex. App. San Antonio Feb. 27 2008).

501. Trial court did not abuse its discretion in admitting evidence of defendant's gang affiliation during the punishment phase of trial, under the First Amendment of the United States Constitution right to associate, because the State sufficiently established that defendant was a member of a gang and that the gang engaged in violent and illegal activities, including fighting and assaults within the jail facility; evidence of defendant's gang membership was relevant at the punishment phase for its probative bearing on defendant's character. Cantu v. State, 2008 Tex. App. LEXIS 1028 (Tex. App. San Antonio Feb. 13 2008).

502. Trial court did not violate defendant's due process right to introduce additional evidence to establish that an alternative perpetrator committed a murder because evidence of the alternative perpetrator's prior crimes did not demonstrate the required nexus between the crime charged and the alternative perpetrator because the evidence did not tend to connect the alternative perpetrator to the murder of the victim. Villa v. State, 2008 Tex. App. LEXIS

1025 (Tex. App. San Antonio Feb. 13 2008).

503. In an action involving a fire and who was the cause of it, a proper foundation had not been laid to qualify an expert to testify whether he had any criticism of the plumbing company's work and the admission of testimony that an individual was not seeking to recover anything from the plumbing company was irrelevant since none of it even remotely related to whether the plumbing company was liable for the fire; however, those errors were harmless since they did not cause the rendition of an improper verdict and therefore, a reversal was not required. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 245 S.W.3d 646, 2008 Tex. App. LEXIS 963 (Tex. App. Fort Worth 2008).

504. In defendant's murder case, the court properly allowed the State to reveal defendant's tattoos because the evidence was relevant to support the State's theory that defendant was a gang member who murdered rival gang members in retaliation; in addition, given the other evidence indicating defendant's admitted gang membership, the evidence was not unfairly prejudicial. Reyes v. State, 2008 Tex. App. LEXIS 293 (Tex. App. San Antonio Jan. 16 2008).

505. During defendant's trial for delivering more than one gram but less than four grams of cocaine, in violation of Tex. Health & Safety Code Ann. § 481.112, his trial counsel did not provide ineffective assistance by failing to object to certain portions of an undercover narcotics officer's testimony where counsel might have made the strategic decision to not object because he reasonably believed such an objection (whether on relevancy, confrontation, or other grounds) would likely be overruled by the trial court because such testimony was arguably admissible; the record indicated that the complained-of testimony was being offered as background information so that the jury could understand why the undercover officer was not surprised to see defendant appear at the motel room where the officer was working, even though the officer had initially been scheduled to meet a different suspected drug dealer, and such evidence could be considered relevant by a trial court, which could then choose to admit such evidence over any evidentiary objection under Tex. R. Evid. 402. Henderson v. State, 2007 Tex. App. LEXIS 9843 (Tex. App. Texarkana Dec. 20 2007).

506. Trial court did not abuse its discretion in admitting evidence of a gun found by the witness because its probative value was not outweighed by the risk of unfair prejudice, when the witness testified that he found the gun around the same time as the aggravated robbery, lying on the road a few blocks away from the store, and this was approximately the same location where the officer observed defendant driving a car matching the description of the suspect's vehicle provided by police dispatchers at the time of the aggravated robbery and from which the officer observed defendant extend his hand and arm out of the window and then back into the car. Mouton v. State, 2007 Tex. App. LEXIS 10076 (Tex. App. Houston 1st Dist. Dec. 20 2007).

507. In defendant's murder case, although the court erred in excluding the testimony and notes of a licensed counselor who had counseled defendant hours before the murder because the testimony provided some insight into defendant's state of mind at the time of the murder, the error was harmless; defendant's expert's testimony concerning defendant's sanity at the time of the offense was considerably more direct and probative than the tangentially relevant testimony of the counselor. Bradshaw v. State, 244 S.W.3d 490, 2007 Tex. App. LEXIS 9427 (Tex. App. Texarkana 2007).

508. Trial court erred in admitting photograph of sexual items, namely a penis pump, a package of "Wet N Wild" condoms, a bottle of flavored personal lubricant, and various issues of Playboy (R) magazine, that were found in defendant's duffle bag where none of the items had a tendency to make the existence of any fact that was of consequence to the determination of defendant's action in taking a sexually compromising photograph of the child victim more probable than it would have been without the evidence. Young v. State, 242 S.W.3d 192, 2007 Tex. App. LEXIS 9350 (Tex. App. Tyler 2007).

509. In a murder case, there was no abuse of discretion in the trial court's exclusion of evidence regarding the victim's drug use because that evidence was irrelevant and inadmissible; there was nothing in the record that connected the victim's possession and use of marijuana and cocaine to the victim's alleged violent acts. Moore v. State, 2007 Tex. App. LEXIS 9036 (Tex. App. Waco Nov. 14 2007).

510. Appellant's aggravated sexual assault conviction was upheld because it was not an abuse of discretion to exclude evidence of the complainant's kissing and flirting with another person at a party under a "rape shield" law since, inter alia, (1) evidence of the complainant's sexual conduct with another man, whether a stranger or not, was not evidence of consent with appellant, and (2) appellant provided no support for the argument that the evidence was probative of the complainant's "motive and bias" in testifying about whether the encounter with appellant was consensual. Barrera v. State, 2007 Tex. App. LEXIS 8662 (Tex. App. Dallas Oct. 31 2007).

511. In a drug case, evidence that there was conflicting information in the police report was relevant and admissible under Tex. R. Evid. 402 for the purpose of impeaching the credibility of the officers. Cameron v. State, 241 S.W.3d 15, 2007 Tex. Crim. App. LEXIS 1120 (Tex. Crim. App. 2007).

512. Trial court should not have considered certain petitions on summary judgment because they did not appear to be certified; in any event, neither petition alleged what project the subcontractors in the current case worked on, and thus even if the court considered the petitions in its review of a denial of summary judgment, the information would not have been relevant to the disposition of the case, for purposes of Tex. R. Evid. 401 and 402. Souder v. Cannon, 235 S.W.3d 841, 2007 Tex. App. LEXIS 7363 (Tex. App. Fort Worth 2007).

513. For purposes of Tex. R. Evid. 402, because there was no evidence suggesting that defendant intended the register under Tex. Code Crim. Proc. Ann. art. 62.055(a) but the police or jailers prevented him from doing so after his arrest, the trial court did not err in refusing to admit evidence of the incarceration; even if the evidence was improperly excluded, defendant was unable to show harm under Tex. R. App. P. 44, given that the jury was presented with ample evidence showing that defendant violated the mens rea element of the statute. Kosick v. State, 2007 Tex. App. LEXIS 7284 (Tex. App. Fort Worth Aug. 31 2007).

514. In a case alleging aggravated assault with a deadly weapon, defendant was not allowed to question witnesses regarding a previous child abuse complaint against the same child since it was not relevant or material to the offense, and a mother could not have been questioned about specific instances of conduct; moreover, the mother's testimony during direct examination did not leave a misleading impression with the jury which needed clarification under Tex. R. Evid. 107; the focus of the prior investigation was a grandmother, who was not a witness in the case. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

515. Defendant claimed that the trial court's evidentiary rulings effectively prevented her from presenting her defense to capital murder, that the child victim's parents were the perpetrators of the crime, and the court analyzed the evidence to determine if the trial court's evidentiary rulings were clearly erroneous; the court found that (1) absent evidence that the children became involved in the physical disputes the parents previously had, the court was unable to hold that the trial court abused its discretion in excluding this evidence, and in any event, defendant did not raise her due process argument in this regard to the trial court, such that two related subpoints were not properly before the court, (2) certain excluded evidence did not add much, if anything, to the defense and did not prevent defendant from putting on a defense, such that defendant's due process rights were not violated, and (3) another witness statement was hearsay and did not meet any exceptions, and the exclusion of the statement in question did not prevent defendant from putting on a defense, and no indicia of reliability existed concerning the witness's statement, and defendant did not call this witness to testify. Stevens v. State, 234 S.W.3d 748, 2007 Tex. App. LEXIS 6845 (Tex. App. Fort Worth 2007).

516. In defendant's capital murder case, evidence in the guilt-innocence phase that painted a picture of the victim as a young man with a promising future whose life defendant had ended prematurely was irrelevant and appealed to the jury's sympathies. However, the error was harmless; defendant admitted to participating in the shooting, and a witness testified that defendant shot the victim and grabbed the bag of codeine. Durand v. State, 2007 Tex. App. LEXIS 6535 (Tex. App. Houston 1st Dist. Aug. 16 2007).

517. Decision refusing to allow defendant to cross-examine the complainant regarding the sexual abuse allegations against her father was affirmed because defendant failed to demonstrate that cross-examining the complainant regarding her allegations against her father was constitutionally required, and the district court's decision to limit the cross-examination did not violate the defendant's constitutional right to confront the witnesses against him; evidence demonstrating that the complainant had made allegations against her father, without more, would not have been relevant to a determination of whether the complainant fabricated her allegations against defendant, defendant failed to produce any evidence indicating that the complainant's prior allegations against her father were false, and the complainant's credibility had already been impeached through the testimony of one of the State's witnesses indicating that the complainant had made false allegations against other individuals while in therapy. Davis v. State, 2007 Tex. App. LEXIS 6360 (Tex. App. Austin Aug. 9 2007).

518. In a negligence case arising from a fire at a condominium complex, speculative testimony regarding the adequacy of plumbing work was irrelevant and inadmissible and no showing of expert qualifications was made under Tex. R. Evid. 702; however, the trial court's error in admitting the testimony was harmless under Tex. R. App. P. 44. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 2007 Tex. App. LEXIS 5977 (Tex. App. Fort Worth July 26 2007).

519. On appeal of a conviction of misdemeanor theft, the trial court did not err in sustaining the State's objection to the offender's question concerning profit margin in her inquiry as to the value of stolen retail property because the offender did not point to any offer of proof as required by Tex. R. Evid. 103, and the substance of the evidence she sought to offer was not apparent; thus, she forfeited her issue pursuant to Tex. R. App. P. 33; moreover, had she preserved her complaint, the trial court did not err; the offender complained that the trial court should not have sustained the State's relevance objection, but evidence that the victim had a profit margin did not tend to rebut the fact that the victim's sales price was at a fair market value. Smith v. State, 2007 Tex. App. LEXIS 5880 (Tex. App. Waco July 25 2007).

520. Because the trial court acted within its discretion in dismissing the patient's claims that the doctor was negligent in deciding to perform the surgery without attempting more conservative treatment and in failing to provide adequate follow-up care, the patient was not entitled to submit evidence in support of those claims. Bryan v. Watumull, 230 S.W.3d 503, 2007 Tex. App. LEXIS 5789 (Tex. App. Dallas 2007).

521. In a fraud action brought by the principals of a home health business against an investor, the testimony of the investor's prior business partner was admissible pursuant to Tex. R. Evid. 404(b) as proof of the investor's motive in seeking involvement with the business, his intent to commit fraud by association with the business, and his plan for gaining control over the business's financial affairs and siphoning off the business's assets. The prior business partner testified that he had also sued the investor for fraud under circumstances very similar to those in the underlying case. Rogers v. Alexander, 244 S.W.3d 370, 2007 Tex. App. LEXIS 5103 (Tex. App. Dallas 2007).

522. In a capital murder case, evidence of appellant's gang affiliation was properly admitted pursuant to Tex. R. Evid. 402 because it was relevant pursuant to Tex. R. Evid. 401 and its probative value was not substantially outweighed by the danger of unfair prejudice as described in Tex. R. Evid. 403; there was ample evidence connecting appellant to the gang and their plan regarding the victim, and it included the gang's violent activities. Moreover, the evidence was not admitted to show that the murder was gang activity, but that it was predictable that a homicide would occur as the result of the conspiracy, in which some participants were violent gang members, to

rob the victim. Arroyo v. State, 239 S.W.3d 282, 2007 Tex. App. LEXIS 5111 (Tex. App. Tyler 2007).

523. Where defendant was alleged to have committed a sexual assault against a thirteen-year-old child, the trial court was permitted to admit the child's testimony of defendant's use and sale of marijuana; the evidence was relevant under Tex. R. Evid. 402 to show defendant's attempt to cultivate a relationship with the child by bringing him to his house to smoke marijuana. Valdez v. State, 2007 Tex. App. LEXIS 4612 (Tex. App. Amarillo June 12 2007).

524. Evidence of gang affiliation was properly admitted as relevant under Tex. R. Evid. 401 and Tex. R. Evid. 402 since it was offered to show a motive for a murder; the evidence was not limited under Tex. R. Evid. 404(b), and the probative value substantially outweighed the danger of unfair prejudice. Rodrigues v. State, 2007 Tex. App. LEXIS 4441 (Tex. App. Houston 14th Dist. June 7 2007).

525. In defendant's aggravated sexual assault case, the mere fact the complainant might have had intercourse with defendant's nephew did not rebut the scientific proof provided by the State showing a probability of greater than 99.99 percent that defendant fathered the complainant's child. More importantly, paternity of the child did not bear on defendant's guilt. Reagan v. State, 2007 Tex. App. LEXIS 3589 (Tex. App. El Paso May 10 2007).

526. In an aggravated sexual assault case, a biologist's testimony regarding possible DNA testing of defendant's nephew to compare his DNA with that of complainant's child was properly excluded because the biologist testified that it would not have affected the testing she conducted on defendant's DNA that included a greater than 99.99 percent probability that he was the biological father of the complainant's child. Because the evidence was speculative, mere conjecture, and irrelevant, the testimony was properly excluded. Reagan v. State, 2007 Tex. App. LEXIS 3589 (Tex. App. El Paso May 10 2007).

527. In a sexual assault case in which the complainants were an adult and a child, evidence that defendant possessed sex toys and nude photos was relevant and admissible under Tex. R. Evid. 402 for the purpose of showing how defendant was grooming the complainants, and this evidence was not overly prejudicial under Tex. R. Evid. 403. Petronella v. State, 2007 Tex. App. LEXIS 3198 (Tex. App. Eastland Apr. 26 2007).

528. In a father's termination case, the mother and father had a relationship and the mother had the requisite personal knowledge under Tex. R. Evid. 602 to testify as to whether the father was complying with his service plan; the issue was relevant, for purposes of Tex. R. Evid. 402, as to whether his parental rights were to be terminated and the admission of the mother's testimony was not error. In re G.C.F., 2007 Tex. App. LEXIS 2680 (Tex. App. Fort Worth Apr. 5 2007).

529. Admission of another's indictment was relevant to material issues in the termination trial, whether the mother engaged in a course of endangering conduct and whether termination was in the child's best interests, and given that relevant evidence was admissible, the trial court did not err in admitting this testimony. In re G.C.F., 2007 Tex. App. LEXIS 2680 (Tex. App. Fort Worth Apr. 5 2007).

530. Defendant's use of a knife was a threat of force, for purposes of Tex. Penal Code Ann. § 9.04 and there was no evidence that the victim used or attempted to use unlawful force on the day of the incident and thus the history of altercations between the parties did not tend to show that defendant was legally justified in threatening the victim under Tex. Penal Code Ann. § 9.31(a); furthermore, defendant did not argue any exceptions to the general rule prohibiting testimony about prior specific acts under Tex. R. Evid. 404(b), and thus defendant failed to show of the evidence was relevant to the charged conduct under Tex. Penal Code Ann. § 22.02 and the exclusion of the evidence was not error. Oliver v. State, 2007 Tex. App. LEXIS 1732 (Tex. App. Beaumont Mar. 7 2007).

531. Even though the trial court erred by admitting into evidence during defendant's aggravated sexual assault trial photographs of defendant, his co-defendant, and his roommate having sex, appearing to be intoxicated, and flashing a gang sign, the error was harmless because: (1) the photographs of defendant and the two others partying were not scandalous or shocking, but were innocuous in comparison to the photographs of the complainant and other women, who were naked and unconscious; (2) except for one comment during closing arguments, the State did not emphasize the evidence; (3) there was very little contemporaneous testimony concerning the photographs when they were admitted into evidence; and (4) the jury was manifestly able to consider the probative evidence and separate it from marginally relevant evidence because it acquitted the co-defendant and convicted defendant of the lesser-included offense of sexual assault. Casey v. State, 215 S.W.3d 870, 2007 Tex. Crim. App. LEXIS 230 (Tex. Crim. App. 2007).

532. In an intoxication manslaughter with a deadly weapon case, an enhanced videotape of the accident revealed that it was highly probative of the fact and manner of an officer's death; thus, it was clearly relevant under Tex. R. Evid. 402. Adams v. State, 2007 Tex. App. LEXIS 1165 (Tex. App. Fort Worth Feb. 15 2007).

533. In a driving while intoxicated case, a court did not abuse its discretion in admitting the portion of a videotape that contained defendant's statements regarding Xanax and Valium because defendant's statement that he took the medications was in response to a question by the officer, and the question was relevant as a predicate inquiry to the administration of a field sobriety test. Layton v. State, 263 S.W.3d 179, 2007 Tex. App. LEXIS 1191 (Tex. App. Houston 1st Dist. 2007).

534. Employer was properly denied a new trial on its claim that the trial court erred by excluding a witness's testimony that the former employee who was complaining of sexual harassment by a coworker had regularly injected sexual discussions into the work environment because the trial court's belief that the testimony had no relevance other than to unfairly prejudice the jury was not arbitrary or unreasonable. Waffle House, Inc. v. Williams, 314 S.W.3d 1, 2007 Tex. App. LEXIS 843, 100 Fair Empl. Prac. Cas. (BNA) 451 (Tex. App. Fort Worth 2007).

535. Trial court did not err by denying defendant's motion to suppress statements made by correctional officers and witnesses because the testimony was not illegally obtained; because the jury was the exclusive judge of the credibility of witnesses and the weight to be given their testimony, the trial court did not err by denying the motion. Macon v. State, 2007 Tex. App. LEXIS 211 (Tex. App. Fort Worth Jan. 11 2007).

536. Evidence of other contraband that police officers found in the room and evidence of the drugs found on the person of defendant's girlfriend, found while executing a search warrant was admissible when defendant was charged with possession of methadone that was found in the room because the evidence tended to establish the requisite affirmative link to the contraband. Davis v. State, 2006 Tex. App. LEXIS 10721 (Tex. App. Eastland Dec. 14 2006).

537. In an aggravated assault and aggravated sexual assault case, pursuant to Tex. R. Evid. 402, the trial court did not abuse its discretion by admitting testimony of a victim's former sexual partner that the victim had not engaged in sadomasochistic activities with her former partner prior to or after defendant's assault as it was relevant to determine whether she consented to sexual encounter and to having defendant brand his initials on her buttocks. Reed v. State, 2006 Tex. App. LEXIS 10107 (Tex. App. Houston 1st Dist. Nov. 22 2006).

538. Although a medical study referred to by a doctor in his testimony at defendant's trial for aggravated sexual assault of a child under the age of 14 involved females older than the complainant and under different circumstances, the evidence was relevant because the doctor was in the best position to explain to the jury why the genitalia of sexually abused victims often exhibited no physical signs of penetration, and he tied the study to his earlier conclusion that he was not surprised about the lack of physical evidence of penetration in the complainant's

genital examination, which assisted the trier of fact to understand the lack of physical evidence; the testimony showed that the farther away in time the examination was from the abuse, the less likely there would be physical evidence of penetration, and, accordingly, the trial court properly admitted the testimony. Whitfield v. State, 2006 Tex. App. LEXIS 9726 (Tex. App. Dallas Nov. 9 2006).

539. In the slaughterhouses' appeal of the trial court's issuance of a permanent injunction and award of expenses to the State, pursuant to Tex. Health & Safety Code Ann. § 433.099, the appellate court rejected the slaughterhouses' claim that the trial court erred by admitting the State's exhibits, which included photographs depicting conditions both inside and outside the slaughterhouse during the inspections, because evidence that tends to make the slaughterhouses' past or continued violations more or less probable was relevant to the issue of whether conduct constituting violations should be enjoined and was admissible, as provided in Tex. R. Evid. 402. Qaddura v. State, 2006 Tex. App. LEXIS 9209 (Tex. App. Fort Worth Oct. 26 2006).

540. Where defendant was charged with intoxication manslaughter and aggravated assault following a vehicular accident, the State's chemist was permitted to give expert testimony concerning the presence of a cocaine metabolite in defendant's blood and the effect of cocaine withdrawal; the evidence was relevant to the State's theory that defendant was fatigued and sleepy, because he was suffering withdrawal from cocaine. Bannister v. State, 2006 Tex. App. LEXIS 8522 (Tex. App. Amarillo Sept. 29 2006).

541. Although defendant claimed that a trial court erred in not allowing him to cross-examine his arresting officer concerning another officer's relationship with a former girlfriend of defendant, there was no evidence presented of any bias or prejudice on the part of the arresting officer, only that six months after the incident he became aware that a fellow officer was dating a woman who had a relationship with defendant; having established no possible bias or prejudice, defendant had not shown that the evidence was relevant or that the trial judge abused his discretion by failing to allow testimony of the post-arrest knowledge obtained by the arresting officer. Waldrop v. State, 2006 Tex. App. LEXIS 8017 (Tex. App. Fort Worth Sept. 7 2006).

542. Evidence of defendant's prior conviction for delivering drugs was admissible where, through his questioning of a defense witness, defense counsel had sought to paint defendant as a "white knight" not involved with drugs, thereby creating a false impression before the jury; by doing so, defendant opened the door to testimony to correct that false impression, and the prosecutor could only correct that false impression by cross-examination of the witness who created it. Jones v. State, 2006 Tex. App. LEXIS 7917 (Tex. App. Dallas Sept. 5 2006).

543. During a murder trial, the victim's mother identified a photograph of her son taken before the murder; the trial court did not abuse its discretion in admitting the photograph; the mother's identification had probative value in identifying the son as the victim. Brown v. State, 2006 Tex. App. LEXIS 7556 (Tex. App. Austin Aug. 25 2006).

544. While defendant should have been allowed to question the arresting officer based on the field sobriety test manual regarding the horizontal gaze nystagmus test, the disallowance was not harmful under Tex. R. App. P. 44.2 because it did not prevent defendant from arguing that the horizontal gaze nystagmus test was improperly administered. Howell v. State, 2006 Tex. App. LEXIS 7558 (Tex. App. Austin Aug. 25 2006).

545. Sufficient evidence supported defendant's conviction of the murder of his roommate under Tex. Penal Code Ann. § 19.02 where conflicting evidence was presented and the jury chose to reject defendant's testimony and credit the consistent testimony of two disinterested witnesses who stated they saw defendant repeatedly stab the victim and who were familiar with the roommates; also, expert testimony on eyewitness misidentification was properly excluded because even if the expert's testimony was reliable and relevant, the expert did not apply his abstract theories to the specific facts of the case; therefore the excluded expert testimony would have had little probative effect and was properly excluded under Tex. R. Evid. 403. Rodriguez v. State, 2006 Tex. App. LEXIS

6650 (Tex. App. Dallas July 27 2006).

546. Trial court did not err in admitting blood alcohol concentration (BAC) evidence from tests that were taken 2 hours after defendant hit a pedestrian without expert testimony of retrograde extrapolation because other evidence was presented to jury from which it could decide if defendant was intoxicated at the time of the accident; defendant admitted to drinking, a officer testified that he observed signs of intoxication and administered sobriety tests, and defendant's BAC of 0.18 was over twice the amount determined by the legislature for a person to be intoxicated per se in Texas under Tex. Penal Code Ann. § 49.01(2)(B); defendant's BAC was only one piece in the "evidentiary puzzle" for the jury's consideration and, as such, was relevant to the issue of intoxication and admissible. Christ v. State, 2006 Tex. App. LEXIS 6585 (Tex. App. Beaumont July 26 2006).

547. Evidence of a judgment that terminated defendant's parental rights to three of her children after the date that she allegedly murdered her newborn infant was relevant at her capital murder trial under Tex. R. Evid. 401, and had relevance apart from mere proof of character conformity in compliance with Tex. R. Evid. 404(b), because an extraneous offense/bad act that took place subsequent to the offense for which a defendant was on trial did not make the extraneous offense/bad act inadmissible per se; furthermore, the judgment was introduced by the State after defendant had testified that the infant's death on the night in question was not the result of any intentional or knowing conduct on defendant's part, and the termination judgment contained findings by the trial judge that defendant "knowingly" placed or allowed her other children to remain in conditions dangerous to their physical or emotional well-being, which at least arguably made it more probable that defendant's acts or omissions on the night in question were done either intentionally or knowingly. Fergerson v. State, 2006 Tex. App. LEXIS 6589 (Tex. App. Beaumont July 26 2006).

548. Finding in favor of the patient in his medical malpractice action against the medical center was proper because the medical center failed to prove, as required by Tex. R. Evid. 402, that subsequent medical records and related expert testimony were relevant to show that the medical center's negligence did not cause the patient's ulcer; those records and testimony were also not admitted because of the potential to confuse and mislead the jury under Tex. R. Evid. 403 and the medical center did not show that the probative value of the evidence outweighed the potential to confuse and mislead the jury; as a result, the medical center presented nothing for review, Tex. R. App. P. 38.1. Columbia Med. Ctr. Subsidiary, L.P. v. Meier, 198 S.W.3d 408, 2006 Tex. App. LEXIS 6368 (Tex. App. Dallas 2006).

549. In a driving while intoxicated case, a court erred in refusing to allow defendant to cross-examine the arresting officer with a field sobriety test manual concerning the horizontal gaze nystagmus test because the portion of the manual regarding whether optokinetic nystagmus, which was not caused by alcohol consumption, might be caused by watching quickly moving objects was relevant. Howell v. State, 2006 Tex. App. LEXIS 5343 (Tex. App. Austin June 23 2006), substituted opinion at, opinion withdrawn by 2006 Tex. App. LEXIS 7558 (Tex. App. Austin Aug. 25, 2006).

550. In a trial for driving while intoxicated, evidence of defendant's medical condition, including that she had lupus and allergies, was properly excluded on the basis that there was no expert medical testimony as to what effect the medicines that she was taking would have on a person's conduct or condition, or on a person's normal use of mental and physical faculties; the proffered evidence was properly subject to a relevancy objection because it was a self-serving, sympathy-provoking recitation of her health and current medication without any showing of a link or nexus to any fact that is of consequence. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

551. In defendant's murder case, evidence of the history of physical abuse in the relationship between defendant and the victim was relevant and properly admitted; the extraneous-offense evidence rebutted defendant's claim of accident and showed that he intended to cause death, serious bodily injury, or bodily injury; in addition, the

probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Brown v. State, 2006 Tex. App. LEXIS 5163 (Tex. App. Austin June 16 2006).

552. In defendant's retaliation trial under Tex. Penal Code Ann. § 36.06(a)(1)(A), the trial court did not abuse its discretion in sustaining the State's objection because the evidence defendant sought as to an officer's nicknames was irrelevant to the case; the contention that defendant's statements to the officer were justifiable because of the effect the nicknames had on him was not valid and did not excuse the fact that defendant committed retaliation, and there was no evidence that defendant's substantial rights were affected under Tex. R. App. P. 44. Garcia v. State, 2006 Tex. App. LEXIS 4708 (Tex. App. Corpus Christi June 1 2006).

553. In defendant's trial on charges of aggravated sexual assault of a child, the trial court did not err in excluding evidence concerning the victim's emotional stability because although defendant sought to introduce evidence for the stated purpose of showing that the victim was a troubled teen falsifying the charge to get attention from her mother, the evidence was not relevant in that it did not show a motive to lie, or show bias or prejudice. Baker v. State, 2006 Tex. App. LEXIS 4308 (Tex. App. Texarkana May 18 2006).

554. Because a witness testified to a sexual assault for three pages of the record before defendant objected, defendant forfeited the complaint, for purposes of Tex. R. App. P. 33.1; the court noted that defendant's complaint at trial was to relevance, but on appeal it was regarding prejudicial effect under Tex. R. Evid. 403, and the court assumed without deciding that defendant's complaint on appeal comported with the trial objection. Pippillion v. State, 2006 Tex. App. LEXIS 3347 (Tex. App. Waco Apr. 26 2006).

555. Messages retrieved from a murder victim's voicemail were not hearsay under Tex. R. Evid. 801 and were relevant under Tex. R. Evid. 401 because they were not offered to prove the truth of the matters asserted therein and they assisted the jury in establishing the time of the victim's death. White v. State, 2006 Tex. App. LEXIS 2224 (Tex. App. Houston 1st Dist. Mar. 23 2006).

556. Trial court did not err when it admitted evidence that defendant had been seen selling drugs a month before her indicted offense of being a felon in possession of a firearm because the testimony, elicited from a witness present when the indicted offense was committed, was relevant and tended to make the existence of defendant's intent to possess a firearm more likely than not, as the witness testified that he knew of five prior occasions on which defendant sold crack cocaine and also commented that drug dealers were often armed to protect themselves from being robbed. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

557. During defendant's trial for being a felon in possession of a firearm, the trial court did not err in allowing a witness to testify regarding defendant's prior drug dealing because the risk of convicting defendant solely on the fact that she was a drug dealer did not substantially outweigh the probative value of establishing her state of mind. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

558. In a criminal prosecution for indecency with a child by sexual contact, evidence of defendant's flight was relevant to show guilt. Howard v. State, 2006 Tex. App. LEXIS 1083 (Tex. App. Waco Feb. 8 2006).

559. Trial court's restrictions on a witness's testimony were within its discretion where the court was avoiding needless consumption of time because defendant was asking questions about what the witness did not consider to be a violation of the restrictive covenants at issue in the case, whether the witness had protested the value assigned to his own property for property tax purposes, and whether individuals could enforce deed restrictions; those lines of questioning were either irrelevant to the legal question of whether defendant had violated the applicable deed restrictions or improperly called for a legal conclusion. Daniels v. Balcones Woods Club, Inc., 2006

Tex. App. LEXIS 957 (Tex. App. Austin Feb. 2 2006).

560. In a homeowner's breach of contract action against a contractor, the trial court did not err in admitting the testimony of the homeowner's expert witness because the witness's testimony, based on firsthand observations and accompanied by the knowledge and experience of his subcontractors and an outside expert, was reliable; because the testimony was properly admitted, it could be considered probative evidence on which to base a judgment favoring the homeowner. Facundo v. Solis, 2006 Tex. App. LEXIS 318 (Tex. App. Austin Jan. 12 2006).

561. In a criminal prosecution for capital murder, the trial court did not err by allowing the prosecutor's questions regarding the possible exchange of sexual favors for forgiveness of a drug debt; the evidence was admissible to show the relationship between defendant and the victim. Whitmire v. State, 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

562. Under Tex. R. Evid. 402 and Tex. R. Evid. 403, parties were allowed to present material and relevant evidence unless it was overly prejudicial, and there was no violation of Rule 403 in the admission of an empty ceramic heater box with dimensions different than the fan box allegedly used in the commission of a theft because the state used the heater box only for the purpose of demonstrating the approximate dimensions of the fan box, the testimony made clear that the actual box used had varying dimensions from the heater box, the jury was able to view the dimensions of the replica fan box presented by defendant, and the trial court did not err in finding that the probative value outweighed the danger of unfair prejudice. Onwukwe v. State, 186 S.W.3d 81, 2005 Tex. App. LEXIS 9603 (Tex. App. Houston 1st Dist. 2005).

563. In a negligence action arising from an oil field accident, the trial court did not err in excluding, as irrelevant under Tex. R. Evid. 401, 402, a letter written by an OSHA investigator; the letter was not equivalent to a regulation or standard, and there was no evidence that witnesses who testified at trial had spoken with the investigator. Carrillo v. Star Tool Co., 2005 Tex. App. LEXIS 8992 (Tex. App. Houston 14th Dist. Nov. 1 2005).

564. In a personal injury suit arising from an automobile accident, evidence regarding the defense expert's alleged bias was not material to the outcome of the case. The trial court's exclusion of this evidence did not cause the rendition of an improper judgment. Gill v. Slovak, 2005 Tex. App. LEXIS 8876 (Tex. App. Corpus Christi Oct. 27 2005).

565. In a drug case, the trial court did not err in refusing to allow defendant's girlfriend to testify that another person had stated that the contraband belonged to him; the proffered evidence was not relevant, under Tex. R. Evid. 402, to whether defendant possessed a controlled substance with intent to deliver it, in violation of Tex. Health & Safety Code Ann. § 481.112(a), and defendant offered no independent facts corroborating the hearsay statement under Tex. R. Evid. 803(24). Menton v. State, 2005 Tex. App. LEXIS 7799 (Tex. App. Amarillo Sept. 22 2005).

566. In a case of indecency with a child, the admission of irrelevant evidence at punishment that the victim's brother also abused the victim was harmless error under Tex. R. App. P. 44.2(b) because the victim testified that defendant did not know of the brother's abuse and because proper evidence of defendant's conduct warranted the sentence imposed. Dustman v. State, 2005 Tex. App. LEXIS 6588 (Tex. App. Tyler Aug. 17 2005).

567. In a trial for manufactured methamphetamine, there was no error in the admission of evidence concerning a subsequent arrest, seven months later, for possession of chemicals with intent to manufacture methamphetamine. That evidence tended to make less probable defendant's argument that he possessed items used to manufacture methamphetamine solely for use in bartering for drugs; thus, the evidence was relevant under Tex. R. Evid 401 and 402. Tarpley v. State, 2005 Tex. App. LEXIS 6289 (Tex. App. Dallas Aug. 10 2005), opinion withdrawn by,

substituted opinion at 2005 Tex. App. LEXIS 8782 (Tex. App. Dallas Oct. 24, 2005).

568. Defendant's conviction for indecent exposure was proper where defendant did not contend, nor did the court find, that he filed a motion requiring the State to elect any one occurrence upon which to base its conviction. Thus, the trial court did not err in admitting the objected-to evidence or in denying his request for a limiting instruction because the evidence was not extraneous offense evidence. Routt v. State, 2005 Tex. App. LEXIS 6180 (Tex. App. Fort Worth Aug. 4 2005).

569. With respect to breach of contract and promissory estoppel claims, a letter written in connection with the settlement of an unrelated lawsuit was relevant and admissible under Tex. R. Evid. 401, 402 as proof of an agreement to pay a claimed sum; hence, it was not barred by Tex. R. Evid. 408. MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc., 179 S.W.3d 51, 2005 Tex. App. LEXIS 5796 (Tex. App. San Antonio 2005).

570. Court did not err by admitting evidence concerning the circumstances of a prior sexual assault conviction where defendant encountered the victims in the parking lot of their residences, waited for the victims to return to their rooms, approached them under the guise of needing help, and made advances toward raping them but ejaculated before penetration. Because intent was a material element of the offense on which the State carried the burden of proof, the probative value of the witness's testimony was high and was not overcome by the danger of unfair prejudice. Fields v. State, 2005 Tex. App. LEXIS 5494 (Tex. App. Austin July 14 2005).

571. Testimony of a witness provided evidence relevant to one of the offenses, Tex. Penal Code Ann. § 38.12(a)(4), with which defendant was charged, and thus the trial court did not err in admitting this relevant evidence pursuant to Tex. R. Evid. 402, and the court agreed with the State that the testimony did not constitute an extraneous offense. Crook v. State, 2005 Tex. App. LEXIS 5075 (Tex. App. El Paso June 30 2005).

572. In a trial for indecency with a child, the trial court properly admitted evidence of a prior indecency conviction. The current charge arose from defendant's exposing himself, and he argued that he had merely forgotten to zip his pants; the extraneous offense evidence therefore tended to make a fact of consequence--whether defendant had or lacked intent to arouse or gratify sexual desire--more or less probable. Arp v. State, 2005 Tex. App. LEXIS 4535 (Tex. App. Texarkana June 15 2005).

573. In a murder trial, evidence was properly admitted, under Tex. R. Evid. 401 -- 404, of a shooting incident that occurred eight days after the murder. The extraneous offense evidence was relevant to the development of the case and was admissible to show the development of the investigation and defendant's intent or knowledge regarding the gun; as to prejudice, the evidence was presented almost matter-of-factly and included no injuries, disturbing photographs, or emotional testimony. Gonzales v. State, 2005 Tex. App. LEXIS 4532 (Tex. App. Amarillo June 14 2005).

574. In a robbery trial, the court did not have to admit evidence of the complainant's prior conviction for misdemeanor assault against defendant's nephew. Contrary to defendant's argument, the two-year-old conviction was not relevant to show that the complainant ran from his apartment because he feared a physical confrontation. Allison v. State, 2005 Tex. App. LEXIS 4055 (Tex. App. Houston 14th Dist. May 24 2005).

575. Trial court did not err in not admitting an entire tape that included threatening phone calls from the victim, defendant's former wife, because defendant sought to admit the entire tape, and the messages on the tape that were unidentified had no relevance as to the victim and her alleged motives, and lacked a proper predicate for admission under Tex. R. Evid. 401, 402, and 404(b). Davis v. State, 2005 Tex. App. LEXIS 3649 (Tex. App. Fort Worth May 12 2005).

576. Trial court did not abuse its discretion by overruling defendant's objection to testimony regarding whom an officer had named as the "defendant" in the case, which defendant claimed was unfairly prejudicial because it had the prejudicial effect of telling the jury that he was the subject of investigation from the very beginning and that he had to be guilty, because the trial court could have reasonably concluded that the testimony was relevant to the jury's evaluation of the complainant's allegations. Nor could it be said that the probative value of the testimony was outweighed by the danger of unfair prejudice because the officer's testimony was not the type of testimony that would suggest that the jury make a decision on an improper basis. Dunbar v. State, 2005 Tex. App. LEXIS 3676 (Tex. App. Fort Worth May 12 2005).

577. Where the State had already established on direct examination that the complainant was serving a deferred adjudication probation during one point in her relationship with defendant, any further inquiry would not have made the existence of any fact of consequence to the determination of defendant's alleged offense more or less probable than it was without the evidence, and such testimony was not relevant to any bias, motive, or interest to help the State, making it an impermissible method of impeachment; accordingly, the trial court was within its discretion to limit the question posed by defendant's counsel on cross-examination. Crook v. State, 2005 Tex. App. LEXIS 3485 (Tex. App. Dallas May 6 2005).

578. In a drug trial, evidence that defendant was from Saudi Arabia and had attended flight school was admissible because the State had to affirmatively link defendant to drugs found in an apartment he did not lease. When viewed with defendant's flight school identification, the evidence was relevant to show that defendant was established in the apartment. Himat v. State, 2005 Tex. App. LEXIS 3152 (Tex. App. Dallas Apr. 27 2005).

579. Evidence of a police officer's administration of a modified alphabet test to defendant suspected of driving while intoxicated (DWI) was properly admitted because it was highly probative of whether defendant had the normal use of her mental faculties. The evidence did not have the potential to impress the jury in some irrational but indelible way because intoxication and, more specifically, defendant's loss of her normal mental or physical faculties was among the issues that a jury had to consider in a DWI trial, and, furthermore, the evidence was addressed for only a very brief period of time. Bergman v. State, 2005 Tex. App. LEXIS 3046 (Tex. App. Houston 1st Dist. Apr. 21 2005).

580. In an action for subsurface trespass brought by oil and gas lessors against their lessee, the trial court did not err by admitting into evidence an internal memorandum written by an employee of the lessee more than 20 years earlier where the memo was relevant under Tex. R. Evid. 401, 402 on the ground that its recommendation to drill despite title problems could have helped the jury to decide whether the lessee was reasonable in delaying its development of a tract of land because of title problems with another tract. Furthermore, language in the memo about "illiterate Mexicans" was not unfairly prejudicial under Tex. R. Evid. 403 because the memo could not be considered an appeal to prejudice in language clear and strong, especially because it was written by an employee of the lessee and did not ask the jury to decide the case on an improper basis. Mission Res., Inc. v. Garza Energy Trust, 2005 Tex. App. LEXIS 2650 (Tex. App. Corpus Christi Apr. 7 2005), opinion withdrawn by, substituted opinion at 166 S.W.3d 301, 2005 Tex. App. LEXIS 3443, 160 Oil & Gas Rep. 1144 (Tex. App. Corpus Christi 2005).

581. Photographs of a murder victim were relevant under Tex. R. Evid. 401 and were not unduly prejudicial to defendant under Tex. R. Evid. 403 because a photograph of the victim lying in an ambulance immediately after firefighters removed her body from a burning house was both material and probative, as it established her condition at the crime scene, and because a photograph of her face taken during autopsy was also material and probative of the fact that the autopsy was performed on the same person removed from the crime scene by ambulance. The numerous autopsy photographs were also probative of the victim's cause of death, a material element in the offense of capital murder, and although the detail in the photographs was graphic, each served the purpose of illustrating the nature and extent of the victim's injuries. Vargas v. State, 2005 Tex. App. LEXIS 2417 (Tex. App.

Houston 1st Dist. Mar. 31 2005).

582. In an aggravated assault case, the trial court did not err in admitting into evidence several items of bloody clothing worn by the victim; although defendant pleaded guilty, the evidence of the victim's extensive bleeding was properly admitted because it indicated the gravity of defendant's crime and was relevant to assessing punishment. Cervantez v. State, 2005 Tex. App. LEXIS 1949 (Tex. App. Amarillo Mar. 15 2005).

583. In a drug case, in light of the offense charged and the evidence adduced at trial, the evidence that defendant possessed a bogus license did not unfairly prejudice the jury or confuse the issues. Accordingly, the trial court did not abuse its discretion in admitting the evidence. Gregory v. State, 159 S.W.3d 254, 2005 Tex. App. LEXIS 1660 (Tex. App. Beaumont 2005).

584. Trial court erred in overruling defendant's relevance objections under Tex. R. Evid. 401 and 402 to testimony regarding injuries sustained by motorists and passengers in other vehicles as a result of a collision involving defendant's vehicle, as the testimony was relevant to the force of impact and the speed and manner in which defendant was driving and, thus, to the issue of whether she was driving while intoxicated. Allcott v. State, 158 S.W.3d 73, 2005 Tex. App. LEXIS 786 (Tex. App. Houston 14th Dist. 2005).

585. In a joint trial on the offense of sexual assault, a trial court's decision to admit a portion of a videotape showing one co-defendant's presence during the accidental overdose of a friend was not erroneous because the trial court repeatedly instructed the jury that defendant was not there. Klock v. State, 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

586. Trial court's decision to exclude testimony from a former prisoner regarding confinement conditions during sentencing was not erroneous because the trial court could have reasonably concluded that the testimony would not have been helpful to the jury in determining the appropriate sentence in a sexual assault case; moreover, the trial court could have reasonably concluded that the testimony went beyond the scope of any door opened by the State. Klock v. State, 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

587. In an aggravated sexual assault case, a court properly excluded a defense witness's testimony where it described prison life as he had observed it several years before, rather than present prison life, and the court could have reasonably concluded that the testimony was not helpful to determining an appropriate sentence. Zunker v. State, 177 S.W.3d 72, 2005 Tex. App. LEXIS 320 (Tex. App. Houston 1st Dist. 2005).

588. Defendant's Sixth Amendment right to confrontation was not violated by the exclusion of testimony regarding mishandling of evidence at the crime lab where the excluded testimony was not directed at the credibility or qualifications of the witnesses, but was offered to prove that there were problems with the identification and handling of evidence in general at the crime lab. A witness testified that she was unaware of mishandling in defendant's case and did not believe the evidence had been mishandled; therefore, the evidence was irrelevant because the witness did not testify that there were problems with the handling of the evidence in defendant's case. Pope v. State, 161 S.W.3d 114, 2004 Tex. App. LEXIS 11529 (Tex. App. Fort Worth 2004).

589. Trial court did not abuse its discretion under Tex. R. App. P. 44.1(a)(1) in excluding an exhibit that was offered to show that a lienholder was in voluntary compliance with the rules and regulations of the Texas Board of Professional Engineers and the former Texas Engineering Practice Act on the grounds that it was irrelevant because the exhibit did not specify that the lienholder had a licensed engineer as a regular, full-time employee or address the appropriate time period. Centurion Planning Corp. v. Seabrook Venture II, 176 S.W.3d 498, 2004 Tex. App. LEXIS 11079 (Tex. App. Houston 1st Dist. 2004).

590. Because the trial court did not improperly admit extraneous offense evidence under Tex. R. Evid. 404(b) of other acts of sexual misconduct, it did not err in failing to grant the male individual's motion for a new trial. The evidence was probative, pursuant to Tex. R. Evid. 401 and Tex. R. Civ. Evid. 402, of the intent, plan, and scheme of the male individual in reference to the female individual's abuse, the evidence was fair, not misleading, and was helpful to the jury pursuant to Tex. R. Evid. 403, and defendant failed to show harm pursuant to Tex. R. App. P. 44.1(a). Olivarez v. Doe, 164 S.W.3d 427, 2004 Tex. App. LEXIS 11055 (Tex. App. Tyler 2004).

591. In an aggravated sexual assault of a child case, a court did not err by excluding a portion of the testimony of an attorney representing the victim's mother who was present at a custody hearing involving the victim because something occurring at the custody hearing had no probative value in showing who committed a sexual assault that occurred a month before the hearing. Additionally, even if the testimony was somehow relevant, the trial court could have reasonably decided that its admission would lead to unfair prejudice, greatly mislead the jury, and confuse the issues with which the jury was presented. Holmes v. State, 2004 Tex. App. LEXIS 10661 (Tex. App. Dallas Nov. 30 2004).

592. In a murder case, the trial court did not err by excluding defendant's rebuttal evidence that his codefendant, a State's witness, sexually assaulted another witness's daughter because it had no relevance to the daughter's opinion as to the codefendant's credibility and because, even if it did, any probative value as to that issue was substantially outweighed by the danger of unfair prejudice. Dennis v. State, 2004 Tex. App. LEXIS 10377 (Tex. App. El Paso Nov. 18 2004).

593. In defendant's manslaughter case, the trial judge did not err in excluding evidence that a toxicology report revealed that a passenger had cocaine in her system at the time of her death where the evidence was not relevant because defendant presented no evidence that the driver used drugs on the day of the accident, and the fact that the passenger had cocaine in her system did not mean that the driver in the same car likewise had used cocaine. Tijerina v. State, 2004 Tex. App. LEXIS 9539 (Tex. App. Dallas Oct. 28 2004).

594. Defendant's blood test results were properly admitted under Tex. R. Evid. 401 and 402 because they tended to make it more probable that defendant was intoxicated at the time he drove because the test results provided evidence that he had consumed alcohol. The jury did not need to establish defendant's exact blood alcohol at the time he drove, rather the jury only needed to believe beyond a reasonable doubt that either his blood alcohol concentration was 0.08 or more, or that he failed to have the normal use of his mental or physical faculties by reason of the introduction of alcohol. Gattis v. State, 2004 Tex. App. LEXIS 9284 (Tex. App. Houston 14th Dist. Oct. 21 2004).

595. In an aggravated assault case, a court properly admitted evidence of a witness that she miscarried after jumping out a window because it was relevant to show the witness's physical and emotional state during and following the assault. Smith v. State, 2004 Tex. App. LEXIS 9172 (Tex. App. Dallas Oct. 19 2004).

596. Defendant's aggravated robbery conviction was proper pursuant to Tex. R. Evid. 402 and 404(b) where the trial court did not err by admitting evidence concerning the aggravated robbery in which defendant obtained the vehicle used in the charged offense because the evidence concerning the vehicle constituted same transaction contextual evidence indivisibly connected to the charged offenses and therefore was relevant under Tex. R. Evid. 402 and 404(b). Lamb v. State, 2004 Tex. App. LEXIS 5886 (Tex. App. Houston 1st Dist. July 1 2004).

597. Theft report prepared by the store's loss and prevention officer did not constitute improper bolstering, because at most, the report merely corroborated the testimony of the loss and prevention officer. Ramirez v. State, 2004 Tex. App. LEXIS 5977 (Tex. App. Tyler June 30 2004).

598. Trial court did not abuse its discretion in finding that photographs from a medical article were relevant to illustrate the testimony of a treating physician who believed that a nine-year-old child had been sexually abused due to the lack of hymen tissue where the photographs depicted the absence of a hymen due to repeated penetration versus the presence of hymen tissue. Salazar v. State, 2004 Tex. App. LEXIS 5520 (Tex. App. Austin June 24 2004).

599. Trial court did not err in excluding the testimony of a certain witness in connection with defendant's trial for aggravated robbery in violation of Tex. Penal Code Ann. § 29.03 because the testimony did not make the existence of any fact that was of consequence to the determination of aggravated robbery more or less probable pursuant to Tex. R. Evid. 401, and thus, the evidence was not relevant and not admissible under Tex. R. Evid. 402; the testimony did not raise any inference that the officers who testified at trial had a motive to testify falsely. Hadamek v. State, 2004 Tex. App. LEXIS 5587 (Tex. App. Corpus Christi June 24 2004).

600. When an inmate was charged with harassment by persons in certain correctional facilities for throwing urine and feces at two correctional officers, the officers' testimony about how they felt when defendant engaged in this conduct was circumstantial evidence relevant to the element of whether defendant had the intent to harass and alarm and annoy another person, so it could not be said that it was not relevant, under Tex. R. Evid. 401, or admissible, under Tex. R. Evid. 402. Wheatly v. State, 2004 Tex. App. LEXIS 5671 (Tex. App. Waco June 23 2004).

601. Defendant argued that the trial court erred by excluding evidence relating to his strained marital relationship with the victim because that evidence was probative of his state of mind and motivation at the time of his actions; however, because the only conduct elements potentially implicated for the crime of aggravated assault were the nature of the conduct and the result of the conduct, the circumstances surrounding the conduct were not relevant and were properly excluded. Novillo v. State, 2004 Tex. App. LEXIS 5086 (Tex. App. Austin June 10 2004).

602. Trial court did not err in allowing testimony on defendant's breath test results because the Texas Court of Criminal Appeals, in Stewart v. State, held that evidence of breath test results was probative and admissible. Lopez v. State, 2004 Tex. App. LEXIS 5045 (Tex. App. San Antonio June 9 2004).

603. Defendant's convictions and sentences for aggravated sexual assault and sexual assault were confirmed because the trial court did not err by excluding the testimony of an ex-convict as to what the conditions of prison life would be like for defendant and his co-defendants. Klock v. State, 2004 Tex. App. LEXIS 4377 (Tex. App. Houston 1st Dist. May 13 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

604. Defendant's convictions and sentences for aggravated sexual assault and sexual assault were confirmed because the trial court, which repeatedly instructed the jury that they could not consider videotapes showing one of defendant's co-defendants abusing a person on two occasions other than the sexual assault, did not err in admitting the videotape. Klock v. State, 2004 Tex. App. LEXIS 4377 (Tex. App. Houston 1st Dist. May 13 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 53, 2005 Tex. App. LEXIS 317 (Tex. App. Houston 1st Dist. 2005).

605. Evidence of sperm located on a victim's clothing after a sexual assault was not relevant at trial because there was no evidence that defendant ejaculated during the crime. Davis v. State, 2004 Tex. App. LEXIS 3815 (Tex. App. Fort Worth Apr. 29 2004).

606. Evidence of a personal injury plaintiff's alcohol consumption in the months before the accident was properly admitted when it bore directly upon the degree of pain and anguish suffered as a result of the accident; according to the plaintiff's pain management expert, use of alcohol was important to pain management because of its

exacerbating effect and bearing on treatment methodology. The alcohol evidence was highly probative in that it related to the fair and reasonable compensation for the mental anguish experienced by the pedestrian as a result of the accident. Fitz v. San Antonio Hospitality Invs., Inc., 2004 Tex. App. LEXIS 3507 (Tex. App. San Antonio Apr. 21 2004).

607. In a driving while intoxicated case, counsel was not ineffective for failing to object to a recording of defendant's postarrest phone conversation where, during the conversation, defendant was argumentative and used offensive language; the conversation was relevant because it provided a physical exemplar of defendant's demeanor and manner of speech, which could have been used by the jury as evidence of defendant's intoxication level. Campbell v. State, 2004 Tex. App. LEXIS 3509 (Tex. App. San Antonio Apr. 21 2004).

608. In defendant's sexual assault case, a court did not err by taking judicial notice of defendant's birth date where the alleged discrepancy regarding defendant's date of birth was not reflected in the appellate record, and as to the age difference, the victim testified without objection that she was 14 years old and that defendant told her he was 35 years old. The jury could also draw its own conclusions from the appearance of the victim and defendant in the courtroom. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

609. In drug and robbery case, although defendant's relevancy objection to evidence of the other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

610. In a prosecution for unauthorized use of a motor vehicle, because the consequential fact in the case was the unauthorized use of the owner's car, that some other car may have been wrecked by the witness at a different time was of no relevance to the issue to be decided. Thus, there was no error in excluding a picture of the other car. Kirksey v. State, 132 S.W.3d 49, 2004 Tex. App. LEXIS 2448 (Tex. App. Beaumont 2004).

611. Defendant did not establish the relevancy, Tex. R. Evid. 401, of certain evidence regarding the alleged sexual relationship between the two victims, who were step-brothers, as a material issue in the case in which he was found guilty of two counts of fondling/indecency with a child and one count of aggravated sexual assault of a child, so as to justify admission of evidence of an alleged victim's sexual behavior under Tex. R. Evid. 412(b)(2)(E); thus, the evidence was properly excluded under Tex. R. Evid. 402. Hale v. State, 140 S.W.3d 381, 2004 Tex. App. LEXIS 2333 (Tex. App. Fort Worth 2004).

612. Defendant did not establish the relevancy, Tex. R. Evid. 401, of certain evidence regarding the alleged sexual relationship between the two victims, who were step-brothers, as a material issue in the case in which he was found guilty of two counts of fondling/indecency with a child and one count of aggravated sexual assault of a child, so as to justify admission of evidence of an alleged victim's sexual behavior under Tex. R. Evid. 412(b)(2)(E); thus, the evidence was properly excluded under Tex. R. Evid. 402. Hale v. State, 140 S.W.3d 381, 2004 Tex. App. LEXIS 2333 (Tex. App. Fort Worth 2004).

613. Defendant's conviction of intoxication manslaughter was upheld where he waived the issue of relevance of the photograph of the victim's charred body; the only objection made in the district court went to probative value and unfair prejudice under Tex. R. Evid. 403. Anderson v. State, 2003 Tex. App. LEXIS 10122 (Tex. App. Dallas Dec. 2 2003).

614. Only relevant evidence is admissible at trial under Tex. R. Evid. 402; relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Baggett v. State, 110 S.W.3d 704, 2003 Tex. App. LEXIS 5849 (Tex. App. Houston 14th Dist. 2003).

615. In making the initial determination of admissibility of evidence, Texas courts must apply the principles set forth in the evidentiary rules governing relevancy under Tex. R. Evid. 401-403; to meet the relevancy test, the proffered evidence must, first, have probative value, and second, be of consequence to some issue in the trial under Tex. R. Evid. 401. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

616. Subject to certain exceptions, all relevant evidence is admissible in a criminal prosecution under Tex. R. Evid. 402 and 401; "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Haliburton v. State, 80 S.W.3d 309, 2002 Tex. App. LEXIS 4822 (Tex. App. Fort Worth 2002).

617. Trial court did not abuse its discretion in admitting evidence that the two men, who defendant was with when he was arrested, were involved in a robbery a short time before the arrest, because it was within the zone of reasonable disagreement whether the robbery was so intertwined with the stop and arrest that the jury's understanding of the offense would have been obscured without it. Haliburton v. State, 80 S.W.3d 309, 2002 Tex. App. LEXIS 4822 (Tex. App. Fort Worth 2002).

618. Where defendant was convicted of sexual assault, trial court did not err under Tex. R. Evid. 401, 402, 403 in admitting testimony from the victim and his sister of the effect of the assault on the victim; testimony of an inflammatory or sympathetic nature will not bar its admissibility if it is relevant to the issue at trial, and the issue need not be contested. Ranels v. State, 1996 Tex. App. LEXIS 2867 (Tex. App. Beaumont Mar. 20 1996).

619. Under Tex. R. Evid. 401 and Tex. R. Evid. 402, finding a piece of evidence to be relevant is the first step in a trial court's determination of whether the evidence should be admitted before the jury. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

620. Court properly admitted autopsy photos because, although they were gruesome, they were no more gruesome than the injuries that defendant inflicted upon the victim when he committed the offense of intoxication manslaughter. Each of the six photographs depicted a different view of the victim and showed the different injuries that she suffered, and the State did not offer a large number of photographs, nor were the photographs it offered cumulative of the victim's injuries. Booth v. State, 2014 Tex. App. LEXIS 2351, 2014 WL 887286 (Tex. App. Eastland Feb. 28 2014).

621. As a police officer had reasonable suspicion to detain defendant based upon the information in the NCIC system, such that ownership of the vehicle was not relevant to the detention, the trial court did not err in excluding evidence regarding the actual ownership of the vehicle that defendant was in when he was stopped. Thornton v. State, 2014 Tex. App. LEXIS 2273, 2014 WL 813745 (Tex. App. Waco Feb. 27 2014).

622. During defendant's trial for DWI, the court erred in admitting evidence of a passenger's possession of marijuana and possession of drug paraphernalia because the State failed to explain how evidence of the passenger's drug possession made it more probable that defendant was intoxicated. Brewer v. State, 2014 Tex. App. LEXIS 1992, 2014 WL 709549 (Tex. App. Austin Feb. 21 2014).

Evidence : Relevance : Sex Offenses : General Overview

623. In a trial for child sexual assault, there was no error under Tex. R. Evid. 402 in determining that defendant could not cross-examine the mother of the victims as to the details of a prior sexual assault she allegedly suffered as a child. Garcia v. State, 2010 Tex. App. LEXIS 9524, 2010 WL 4901389 (Tex. App. Corpus Christi Nov. 30 2010).

Evidence : Relevance : Sex Offenses : Rape Shield Laws

624. Where defendant was convicted for two counts of aggravated sexual assault of a child with a deadly weapon, his claim that the trial court abused its discretion in refusing to admit evidence of the child's promiscuity over the State's relevance and Tex. R. Evid. 402 objections was not preserved for review. Defendant did not seek to offer evidence of the child's promiscuity at trial; by withdrawing a line of questioning on the subject, defendant prevented the trial court from ruling on the issue. Riley v. State, 2014 Tex. App. LEXIS 2830, 2014 WL 1016240 (Tex. App. Waco Mar. 13 2014).

625. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because, with regard to the victim's alleged prior sexual behavior, other than her involvement, there was no similarity between those incidents and the current allegations against defendant currently, Tex. R. Evid. 401, 402, 403, and 412(b). Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

626. In a trial for sexual assault of a child and indecency with a child, there was no error in excluding evidence as to whether the complainant had engaged in sexual conduct with a younger cousin, whether the complainant allowed one or more pets to play with the complainant's sexual organs, whether the complainant's parent had told an employee about fearing that the complainant would accuse the parent's new romantic partner of molestation, or whether the complainant's parent kept pornography in the home. Todd v. State, 242 S.W.3d 126, 2007 Tex. App. LEXIS 9053 (Tex. App. Texarkana 2007).

627. Appellant's aggravated sexual assault conviction was upheld because it was not an abuse of discretion to exclude evidence of the complainant's kissing and flirting with another person at a party under a "rape shield" law since, inter alia, (1) evidence of the complainant's sexual conduct with another man, whether a stranger or not, was not evidence of consent with appellant, and (2) appellant provided no support for the argument that the evidence was probative of the complainant's "motive and bias" in testifying about whether the encounter with appellant was consensual. Barrera v. State, 2007 Tex. App. LEXIS 8662 (Tex. App. Dallas Oct. 31 2007).

628. Defendant did not establish the relevancy, Tex. R. Evid. 401, of certain evidence regarding the alleged sexual relationship between the two victims, who were step-brothers, as a material issue in the case in which he was found guilty of two counts of fondling/indecency with a child and one count of aggravated sexual assault of a child, so as to justify admission of evidence of an alleged victim's sexual behavior under Tex. R. Evid. 412(b)(2)(E); thus, the evidence was properly excluded under Tex. R. Evid. 402. Hale v. State, 140 S.W.3d 381, 2004 Tex. App. LEXIS 2333 (Tex. App. Fort Worth 2004).

629. Defendant did not establish the relevancy, Tex. R. Evid. 401, of certain evidence regarding the alleged sexual relationship between the two victims, who were step-brothers, as a material issue in the case in which he was found guilty of two counts of fondling/indecency with a child and one count of aggravated sexual assault of a child, so as to justify admission of evidence of an alleged victim's sexual behavior under Tex. R. Evid. 412(b)(2)(E); thus, the evidence was properly excluded under Tex. R. Evid. 402. Hale v. State, 140 S.W.3d 381, 2004 Tex. App. LEXIS 2333 (Tex. App. Fort Worth 2004).

Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview

630. Evidence of sperm located on a victim's clothing after a sexual assault was not relevant at trial because there was no evidence that defendant ejaculated during the crime. Davis v. State, 2004 Tex. App. LEXIS 3815 (Tex. App. Fort Worth Apr. 29 2004).

Evidence : Relevance : Sex Offenses : Similar Crimes : Child Molestation Cases

631. In a trial for indecency with a child by contact there was no error under Tex. R. Evid. 401, 402, in admitting evidence of prior convictions for attempting the same offense. The evidence was relevant to defendant's intent in the charged interaction. Hernandez v. State, 2010 Tex. App. LEXIS 851, 2010 WL 391850 (Tex. App. Austin Feb. 5 2010).

Evidence : Scientific Evidence : Autopsies

632. In a murder trial involving a child victim, there was no error under Tex. R. Evid. 401, 402, 403 in admitting an autopsy photograph because it demonstrated the scope and extent of the child's injuries and the cause of death. It was not cumulative because it showed injuries to the victim's neck and head from a side view, whereas two other photographs showed injuries from a frontal view. Williams v. State, 2009 Tex. App. LEXIS 1045 (Tex. App. Houston 1st Dist. Feb. 12 2009).

633. In a trial for attempted murder, it was proper to admit an autopsy report regarding a different victim, which included details about the angle of the wound and photographs of the body. The evidence was relevant because it tended to refute defendant's argument that someone else shot the victim. Adams v. State, 2004 Tex. App. LEXIS 8999 (Tex. App. Houston 14th Dist. Oct. 12 2004).

Evidence : Scientific Evidence : Blood Alcohol

634. In a personal injury suit stemming from a collision between a motorist and a bicyclist, evidence of the bicyclist's intoxication was rebuttably presumed to be admissible under Tex. R. Evid. 402 because the bicyclist's vigilance, judgment and reactions were at issue; contrary to the bicyclist's assertions, the motorist did not base her allegations of contributory negligence solely on evidence of intoxication, but offered testimony that the bicyclist suddenly veered in front of her; moreover, the bicyclist 's alcohol consumption prior to the accident bore on the weight afforded to his recollection of events. Ticknor v. Doolan, 2006 Tex. App. LEXIS 6717 (Tex. App. Houston 14th Dist. July 27 2006).

Evidence : Scientific Evidence : Blood & Bodily Fluids

635. In an aggravated assault case, the trial court did not err in admitting into evidence several items of bloody clothing worn by the victim; although defendant pleaded guilty, the evidence of the victim's extensive bleeding was properly admitted because it indicated the gravity of defendant's crime and was relevant to assessing punishment. Cervantez v. State, 2005 Tex. App. LEXIS 1949 (Tex. App. Amarillo Mar. 15 2005).

Evidence : Scientific Evidence : Sobriety Tests

636. In a driving while intoxicated case, a court erred in refusing to allow defendant to cross-examine the arresting officer with a field sobriety test manual concerning the horizontal gaze nystagmus test because the portion of the manual regarding whether optokinetic nystagmus, which was not caused by alcohol consumption, might be caused by watching quickly moving objects was relevant. Howell v. State, 2006 Tex. App. LEXIS 5343 (Tex. App. Austin June 23 2006), substituted opinion at, opinion withdrawn by 2006 Tex. App. LEXIS 7558 (Tex. App. Austin Aug. 25, 2006).

Evidence : Scientific Evidence : Toxicology

637. Where defendant was charged with intoxication manslaughter and aggravated assault following a vehicular accident, the State's chemist was permitted to give expert testimony concerning the presence of a cocaine metabolite in defendant's blood and the effect of cocaine withdrawal; the evidence was relevant to the State's theory that defendant was fatigued and sleepy, because he was suffering withdrawal from cocaine. Bannister v. State, 2006 Tex. App. LEXIS 8522 (Tex. App. Amarillo Sept. 29 2006).

Evidence : Testimony : Credibility : General Overview

638. Although defendant on trial for sexually molesting his stepdaughter objected to the admission of the report of the sexual assault nurse examiner as improper bolstering and a violation of Tex. R. Evid. 403, defendant did not identify at trial which Texas Rule of Evidence, if any, was violated by the admission of the nurse's report. As such, he failed to preserve his objection for appeal. Rivas v. State, 2007 Tex. App. LEXIS 4395 (Tex. App. San Antonio June 6 2007).

639. In a personal injury suit arising from an automobile accident, evidence regarding the defense expert's alleged bias was not material to the outcome of the case. The trial court's exclusion of this evidence did not cause the rendition of an improper judgment. Gill v. Slovak, 2005 Tex. App. LEXIS 8876 (Tex. App. Corpus Christi Oct. 27 2005).

640. On a charge of unlawful possession of a firearm, the trial court properly did not allow defendant to impeach the State's witness by explaining that the witness testified to the same effect in an earlier trial arising from the same events and that the prior jury found that defendant did assault the witness. The court reasoned in part that the prior jury's finding was not relevant. Macias v. State, 136 S.W.3d 702, 2004 Tex. App. LEXIS 4193 (Tex. App. Texarkana 2004).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances

641. Trial court did not abuse its discretion during defendant's trial for the Class A misdemeanor offense of assault causing bodily injury in refusing to allow defendant to cross-examine the complainant regarding past accusations of spousal abuse where the complainant's character for truthfulness was not attacked by opinion or reputation evidence or otherwise as required by Tex. R. Evid. 608; instead, during cross-examination, defendant attempted to inquire into prior accusations of abuse that the complainant made against her ex-husband for the purpose of attacking the complainant's credibility, and, pursuant to Tex. R. Evid. 401, Tex. R. Evid. 402, Tex. R. Evid. 608, the probative value of the evidence sought to be admitted was extremely low, particularly because defense counsel admitted during trial that he had no evidence that the complainant lied about the abuse and that the accusations occurred a long time ago. Sullivan v. State, 2008 Tex. App. LEXIS 1394 (Tex. App. San Antonio Feb. 27 2008).

Evidence : Testimony : Credibility : Impeachment : Mental Incapacity

642. In a sexual assault of a child case, the evidence of the victim's emotional problems was not relevant or admissible under Tex. R. Evid. 401, 402 as the evidence could not be used to impeach her because there was no suggestion that her emotional problems could impair her ability to recall events or would compromise her credibility. Lester v. State, 2011 Tex. App. LEXIS 9728, 2011 WL 6238157 (Tex. App. Texarkana Dec. 14 2011).

Evidence : Testimony : Examination : General Overview

643. Trial court's restrictions on a witness's testimony were within its discretion where the court was avoiding needless consumption of time because defendant was asking questions about what the witness did not consider to

be a violation of the restrictive covenants at issue in the case, whether the witness had protested the value assigned to his own property for property tax purposes, and whether individuals could enforce deed restrictions; those lines of questioning were either irrelevant to the legal question of whether defendant had violated the applicable deed restrictions or improperly called for a legal conclusion. Daniels v. Balcones Woods Club, Inc., 2006 Tex. App. LEXIS 957 (Tex. App. Austin Feb. 2 2006).

Evidence : Testimony : Examination : Cross-Examination : Scope

644. In a drug trial, there was no error in limiting defendant's cross-examination of a detective as to (1) payments made to an informant who was admittedly in the country illegally, (2) whether or not those payments were reported to the Internal Revenue Service, and (3) whether or not the detective sought or received permission from federal authorities to have the informant in the country working as an agent of law enforcement. Defendant failed to show how the evidence sought was relevant under Tex. R. Evid. 401, 402, to the claimed purpose of showing bias and a motive to lie. Perez-gonzalez v. State, 2010 Tex. App. LEXIS 3045, 2010 WL 1645062 (Tex. App. Dallas Apr. 26 2010).

645. Trial court did not err by refusing to allow damage evidence in a condemnation case under Tex. R. Civ. P. 193 because the evidence in question was not disclosed under Tex. R. Civ. P. 194; there was no good cause shown due to counsel's inadvertence, and an owner would have been prejudiced thereby; moreover, cross-examination on this issue was properly excluded since it was not relevant to the case. Harris County v. Inter Nos, Ltd., 199 S.W.3d 363, 2006 Tex. App. LEXIS 3849 (Tex. App. Houston 1st Dist. 2006).

Evidence : Testimony : Experts : General Overview

646. In a driving while intoxicated case, evidence of defendant's use of prescription medications was not relevant because there was no evidence as to the dosage, the exact times of ingestion, or the half-life of the drug; a lay juror was not in a position to determine whether the drugs, taken more than 12 hours before arrest, would have any effect on defendant's intoxication. Without expert testimony to provide the foundation required to admit scientific evidence, the testimony regarding defendant's use of prescription medications was not relevant. Layton v. State, 280 S.W.3d 235, 2009 Tex. Crim. App. LEXIS 149 (Tex. Crim. App. 2009).

647. In a suit challenging a real estate tax assessment, the trial court properly allowed expert testimony from the taxpayer's appraiser. The testimony was relevant, within the meaning of Tex. R. Evid. 401, 402, and 702 because the appraiser found a reasonable number of comparable properties, made appropriate adjustments, and compared the median appraisal value of those properties to the appraisal value applied to the property at issue, as required by Tex. Tax Code § 42.26. Harris County Appraisal v. Hartman Reit Operating P'ship, L.P., 186 S.W.3d 155, 2006 Tex. App. LEXIS 103 (Tex. App. Houston 1st Dist. 2006).

Evidence : Testimony : Experts : Admissibility

648. In a trial of inmate's civil commitment as a sexually violent predator under Tex. Health & Safety Code Ann. § 841.062, the trial court properly excluded the inmate's expert's testimony that one of the victims had recanted pursuant to Tex. R. Evid. 401, 402, and 702, because such evidence represented a collateral attack on the underlying convictions, which had not been set aside. In re Barron, 2013 Tex. App. LEXIS 8495, 2013 WL 3487385 (Tex. App. Beaumont July 11 2013).

649. Trial court did not abuse its discretion during defendant's trial for aggravated assault and endangering a child in permitting a State witness to testify as an expert witness where the witness's expertise fit with the subject matter at issue, which was whether the damages to the victims' vehicles were consistent with their accounts of how the damage occurred. The witness had seventeen years of experience in the automotive industry and thirteen years of

experience as an estimator for damaged vehicles, and his testimony did not involve a complex subject, but rather consisted of matching up paint transfer and damages to the victims' vehicles with damages to defendant's truck. Ibarra v. State, 2013 Tex. App. LEXIS 169, 2013 WL 123705 (Tex. App. Corpus Christi Jan. 10 2013).

650. Sex offender's civil commitment as a sexually violent predator was proper where it could not be said that the testimony of one of the State's experts lacked probative value because, using evidence-based support, the expert had presented a professional opinion expressing a reasoned judgment based upon established research and techniques for his profession and not the mere ipse dixit of a credentialed witness. Moreover, the sex offender's claim that the testimony of another of the State's experts amounted to no evidence because it contained significant analytical gaps was not supported by the record, which reflected that the expert had described the factors he considered, and had explained why he felt those factors significant. In re Weatherread, 2012 Tex. App. LEXIS 9757 (Tex. App. Beaumont Nov. 29 2012).

651. Trial court did not abuse its discretion by admitting the testimony of the sexual assault nurse examiner who examined the child victim during the course of the State's investigation because she was deemed an expert in sexual abuse examinations, so her expert testimony could be helpful to the jury, including to explain why physical evidence would not necessarily be present on the body of a sexual assault complainant. The nurse merely reported the events of the examination and her clinical findings, and she did not offer an opinion as to whether the victim had been sexually assaulted and did not comment on the victim's veracity. Owens v. State, 381 S.W.3d 696, 2012 Tex. App. LEXIS 7922, 2012 WL 4098990 (Tex. App. Texarkana Sept. 19 2012).

652. Court properly allowed an expert witness to testify about the similarity of physical evidence recovered from the crime scene because the tapes from the crime scene and defendant's home were offered to show that because the tapes were similar, it was more likely that they came from a common source, and if they came from a common source, it was more likely that the tape in defendant's home came from the packaging for the marijuana in the murder victim's home. The testimony showed the similarities of the tapes and was therefore relevant to show that defendant was at the crime scene and had a motive for shooting the victims. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

653. In the proceeding to commit respondent as a sexually violent predator (SVP), the trial court did not abuse its discretion by restricting respondent's cross-examination of one of the State's experts, because the doctor's subjective feelings concerning the verdict in respondent's attempted aggravated sexual assault case was not a fact of consequence in respondent's SVP case for purposes of Tex. R. Evid. 402. Respondent could not challenge the facts of his final convictions in the SVP proceeding, and attempted aggravated sexual assault of a child was one of his predicate convictions under Tex. Health & Safety Code Ann. § 841.002(8)(A). In re Dees, 2011 Tex. App. LEXIS 9807 (Tex. App. Beaumont Dec. 15 2011).

654. During appellant's civil commitment trial, the trial court did not err by excluding an expert's testimony that appellant did not commit the crimes for which he had been convicted because the issue of whether appellant had been wrongfully convicted was not at issue. In re Commitment of Hinkle, 2011 Tex. App. LEXIS 4504 (Tex. App. Beaumont June 16 2011).

655. Court did not err in excluding the expert testimony regarding the genuineness of the testator's signature on the beneficiary designation forms, because the claimant admitted that she did not raise the issue of forgery regarding these signatures, and the evidence from the handwriting expert regarding the issue had no relationship to any issue in the constructive trust suit. In the Estate of Wallis, 2010 Tex. App. LEXIS 1441, 2010 WL 702267 (Tex. App. Tyler Feb. 26 2010).

656. In defendant's capital murder case, the court properly denied defendant's witness's testimony relating to the field of false confessions because the witness's testimony could not have assisted the jury in understanding the evidence or in making a determination of a fact issue. He did not intend to offer an opinion as to the truth or falsity of defendant's confession, and during cross-examination defendant admitted the truth of the portions of his confession that he earlier claimed were inaccurate. Munoz v. State, 2009 Tex. App. LEXIS 6475, 2009 WL 2517664 (Tex. App. El Paso Aug. 19 2009).

657. In a tax dispute regarding valuation, an expert's premise that an underground storage tank (UST), once installed, became salvage material was a faulty absolute and likely rendered his valuation of the USTs, which represented the largest deviation in the valuations, unreliable; unreliable testimony did not constitute evidence. Harris County Appraisal Dist. v. Sigmor Corp., 2008 Tex. App. LEXIS 2456 (Tex. App. Houston 1st Dist. Apr. 3 2008).

658. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

659. Court did not err in admitting a utility company's expert testimony as to the market value of the condemned property in which he did not factor in the improvements that were over 4000 feet from the power lines in assessing damages because, inter alia, the landowners' own expert relied upon several articles that specifically stated the negative impact of power lines to a property diminished with increased distance and disappeared beyond 500 feet. Utley v. LCRA Transmission Servs. Corp., 2006 Tex. App. LEXIS 9129 (Tex. App. San Antonio Oct. 25 2006).

660. Probation officer was properly allowed to testify that defendant was not a suitable candidate for community supervision because suitability is a matter relevant to sentencing under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) when a defendant seeks placement on community supervision; the court noted that the trial judge still had operate within the bounds of Tex. R. Evid. 402. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

661. Sufficient evidence supported defendant's conviction of the murder of his roommate under Tex. Penal Code Ann. § 19.02 where conflicting evidence was presented and the jury chose to reject defendant's testimony and credit the consistent testimony of two disinterested witnesses who stated they saw defendant repeatedly stab the victim and who were familiar with the roommates; also, expert testimony on eyewitness misidentification was properly excluded because even if the expert's testimony was reliable and relevant, the expert did not apply his abstract theories to the specific facts of the case; therefore the excluded expert testimony would have had little probative effect and was properly excluded under Tex. R. Evid. 403. Rodriguez v. State, 2006 Tex. App. LEXIS 6650 (Tex. App. Dallas July 27 2006).

Evidence : Testimony : Experts : Criminal Trials

662. Trial court did not abuse its discretion during defendant's trial for aggravated assault and endangering a child in permitting a State witness to testify as an expert witness where the witness's expertise fit with the subject matter at issue, which was whether the damages to the victims' vehicles were consistent with their accounts of how the damage occurred. The witness had seventeen years of experience in the automotive industry and thirteen years of experience as an estimator for damaged vehicles, and his testimony did not involve a complex subject, but rather consisted of matching up paint transfer and damages to the victims' vehicles with damages to defendant's truck.

Ibarra v. State, 2013 Tex. App. LEXIS 169, 2013 WL 123705 (Tex. App. Corpus Christi Jan. 10 2013).

663. In a case in which defendant was convicted of aggravated sexual assault of a child, the trial court did not err by admitting a pediatrician's testimony where: (1) the pediatrician, a specialist in child maltreatment, had published research in the area of maltreatment, particularly in the area of child abuse; (2) the pediatrician had personally examined over one thousand children and was considered an expert in the area of sexual abuse; and (3) the pediatrician's ten-page curriculum vitae, which was admitted into evidence without objection, reflected her extensive training, skills, education, experience, and publications in the area of child sexual abuse. The prosecutor specifically requested the pediatrician's opinion based on her training and experience, as well as her examinations of children who had made a delayed outcry, for an opinion on why sexually abused children might delay outcry, which did not require a greater or more specific degree of expertise in the psychology or sociology of sexually abused children than possessed by the pediatrician, and the pediatrician's testimony would assist the jury in understanding why children might delay reporting sexual abuse. Salinas v. State, 2009 Tex. App. LEXIS 7828, 2009 WL 3210941 (Tex. App. Houston 14th Dist. Oct. 8 2009).

664. In a case in which defendant was convicted of intentionally causing serious bodily injury to his stepson, causing his death, and intentionally or knowingly concealing the body, the trial court did not err by completely excluding the testimony of a defense expert pathologist who was board certified in both clinical and anatomical pathology, but was not a forensic pathologist, where the trial court could have reasonably concluded that the defense did not demonstrate that the pathologist was sufficiently qualified in the sub-speciality of forensic pathology and that his methodology, without accessing or viewing the corpse, was not scientifically reliable; defendant did not demonstrate to the trial court that the pathologist had any experience with strangulations or decomposed bodies. Crunk v. State, 2009 Tex. App. LEXIS 7329, 2009 WL 2973474 (Tex. App. Corpus Christi Sept. 17 2009).

Evidence : Testimony : Experts : Daubert Standard

665. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

Evidence : Testimony : Experts : Helpfulness

666. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

667. Trial court did not err by excluding opinion testimony from the officer because his opinion on the difficulty of obtaining a conviction when the victim of a sexual assault suffered from mental impairments did not make any of the facts the jury had to determine more or less probable, and therefore the evidence was not relevant. Myles v. State, 2012 Tex. App. LEXIS 4911, 2012 WL 2357426 (Tex. App. Houston 1st Dist. June 21 2012).

668. Trial court did not err by permitting a doctor to testify regarding patterns of disclosure of sexual abuse by children under Tex. R. Evid. 702 because the doctor was qualified by virtue of her education, knowledge, training, and experience, and because the testimony would aid the jury in understanding why the victim waited four years before telling her father about the sexual assault; the doctor testified that it was common for a child to delay making an outcry to an adult if the perpetrator had threatened to harm someone the child loved. Fletcher v. State, 2010

Tex. App. LEXIS 7915, 2010 WL 3783946 (Tex. App. El Paso Sept. 29 2010).

669. Because forgery was not pleaded as an affirmative defense under Tex. R. Civ. P. 94 in a suit for a constructive trust, handwriting evidence was not helpful and thus was irrelevant under Tex. R. Evid. 401, 402, 702. Estate of Wallis, 2010 Tex. App. LEXIS 3710, 2010 WL 1987514 (Tex. App. Tyler May 19 2010).

670. In an aggravated assault case where insanity was an issue, a trial court did not err by excluding the testimony of a psychiatrist regarding defendant's mental condition in 2007 as irrelevant because the psychiatrist did not have any information regarding defendant's mental state in 2005 when the crime was committed. Likewise, records of defendant's visit to an emergency room in 2007 where he saw the psychiatrist were properly excluded for the same reason. Wiley v. State, 2009 Tex. App. LEXIS 225, 2008 WL 5501149 (Tex. App. Beaumont Jan. 14 2009).

671. Although a medical study referred to by a doctor in his testimony at defendant's trial for aggravated sexual assault of a child under the age of 14 involved females older than the complainant and under different circumstances, the evidence was relevant because the doctor was in the best position to explain to the jury why the genitalia of sexually abused victims often exhibited no physical signs of penetration, and he tied the study to his earlier conclusion that he was not surprised about the lack of physical evidence of penetration in the complainant's genital examination, which assisted the trier of fact to understand the lack of physical evidence; the testimony showed that the farther away in time the examination was from the abuse, the less likely there would be physical evidence of penetration, and, accordingly, the trial court properly admitted the testimony. Whitfield v. State, 2006 Tex. App. LEXIS 9726 (Tex. App. Dallas Nov. 9 2006).

Evidence : Testimony : Experts : Qualifications

672. Trial court did not err by permitting a doctor to testify regarding patterns of disclosure of sexual abuse by children under Tex. R. Evid. 702 because the doctor was qualified by virtue of her education, knowledge, training, and experience, and because the testimony would aid the jury in understanding why the victim waited four years before telling her father about the sexual assault; the doctor testified that it was common for a child to delay making an outcry to an adult if the perpetrator had threatened to harm someone the child loved. Fletcher v. State, 2010 Tex. App. LEXIS 7915, 2010 WL 3783946 (Tex. App. El Paso Sept. 29 2010).

673. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

Evidence : Testimony : Lay Witnesses : General Overview

674. Trial court's restrictions on a witness's testimony were within its discretion where the court was avoiding needless consumption of time because defendant was asking questions about what the witness did not consider to be a violation of the restrictive covenants at issue in the case, whether the witness had protested the value assigned to his own property for property tax purposes, and whether individuals could enforce deed restrictions; those lines of questioning were either irrelevant to the legal question of whether defendant had violated the applicable deed restrictions or improperly called for a legal conclusion. Daniels v. Balcones Woods Club, Inc., 2006 Tex. App. LEXIS 957 (Tex. App. Austin Feb. 2 2006).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions

675. In a driving while intoxicated case, testimony from defendant's mother on the issue of whether defendant was intoxicated was not admissible under Tex. R. Evid. 701 because the mother did not personally observe a traffic stop or defendant's interaction with an arresting officer; the mother did not acquire personal knowledge at the time of the event. Because the testimony was not relevant, defendant's argument that her due process right to present a complete defense was violated was not addressed. Hartin v. State, 2009 Tex. App. LEXIS 2765, 2009 WL 1076799 (Tex. App. Beaumont Apr. 22 2009).

676. Where defendant used a car jack to strike the hood of the complainant's SUV, the arresting officer was permitted to testify that $1500 was the estimated cost of repairing the damage based on his years of experience with criminal mischief cases; the officer also testified that the body shop's repair estimate was $ 1,530.01. Barnes v. State, 248 S.W.3d 217, 2007 Tex. App. LEXIS 4261 (Tex. App. Houston 1st Dist. 2007).

Evidence : Testimony : Lay Witnesses : Personal Knowledge

677. In a driving while intoxicated case, testimony from defendant's mother on the issue of whether defendant was intoxicated was not admissible under Tex. R. Evid. 701 because the mother did not personally observe a traffic stop or defendant's interaction with an arresting officer; the mother did not acquire personal knowledge at the time of the event. Because the testimony was not relevant, defendant's argument that her due process right to present a complete defense was violated was not addressed. Hartin v. State, 2009 Tex. App. LEXIS 2765, 2009 WL 1076799 (Tex. App. Beaumont Apr. 22 2009).

678. In defendant's evading arrest case, the court properly excluded a defense witness's testimony because the proffered testimony that it was "standard operating procedure" for law enforcement agencies in general to routinely make video and audio recordings of police pursuits was not germane. The witness did not have personal knowledge as to the standard procedures of the Corpus Christi Police Department regarding recordings of police pursuits. Gomez v. State, 2009 Tex. App. LEXIS 1700 (Tex. App. Corpus Christi Mar. 5 2009).

Family Law : Child Custody : Procedures

679. In a custody dispute, there was no error under Tex. R. Evid. 402 in excluding evidence that the brother of one parent was a registered sex offender and that the brother had contact with the child. Goodson v. Castellanos, 214 S.W.3d 741, 2007 Tex. App. LEXIS 364 (Tex. App. Austin 2007).

Family Law : Family Protection & Welfare : Cohabitants & Spouses : Abuse, Endangerment & Neglect

680. In a case where a former girlfriend's request for a final protective order was granted, a former boyfriend's due process rights were not violated because he was not deprived of the opportunity to present evidence. The boyfriend was able to confront and cross-examine the girlfriend, even though a trial court did limit questioning regarding threats made against the boyfriend by an acquaintance of the girlfriend, because those questions had nothing to do with whether family violence had occurred in the past or was likely to occur in the future. Ford v. Harbour, 2009 Tex. App. LEXIS 1796, 2009 WL 679672 (Tex. App. Houston 14th Dist. Mar. 17 2009).

Family Law : Family Protection & Welfare : Elderly Persons : Abuse, Endangerment & Neglect

681. In the trial on an employee's claim of retaliatory discharge under Tex. Health & Safety Code Ann. § 242.133, the trial court properly excluded the employee's previous employment history under Tex. R. Evid. 402 because reasons provided by previous employers for termination were not relevant. Senior Living Props., L.L.C. v. Cole, 2007 Tex. App. LEXIS 7610 (Tex. App. Waco Sept. 19 2007).

Family Law : Family Protection & Welfare : Involuntary Commitment

682. Appellant's contention that his actions, while criminally insane, were not relevant to the finding required for recommitment under Tex. Health & Safety Code Ann. § 574.035 and that their admission at his recommitment hearing was unfairly prejudicial under Tex. R. Evid. 402 and Tex. R. Evid. 403 was rejected because the determination of whether a person should remain committed because of a mental illness required more than a snapshot of a single year in the person's life and required a psychological history. Campbell v. State, 118 S.W.3d 788, 2003 Tex. App. LEXIS 6671 (Tex. App. Houston 14th Dist. 2003), appeal dismissed by 2004 Tex. App. LEXIS 2376 (Tex. App. Houston 14th Dist. Mar. 16, 2004).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview

683. In a termination of parental rights proceeding arising from the death of a sibling, there was no error under Tex. R. Evid. 401, 402, 403 when the trial court admitted the recordings of the parent's phone calls from jail to home on the night of the sibling's death and admitted evidence of the parent's prior criminal convictions, some of which were more than 10 years old. Murray v. Tex. Dep't of Family & Protective Servs., 294 S.W.3d 360, 2009 Tex. App. LEXIS 6372 (Tex. App. Austin Aug. 13 2009).

Immigration Law : Duties & Rights of Aliens : Discrimination

684. Illegal immigrant status of defendant driver should not have been admitted in a wrongful death and survival action stemming from a multi-fatality vehicular accident. Under Tex. R. Evid. 401, 402, 403, the evidence was not relevant to claims of negligent hiring and negligent entrustment, even if the employer's failure to screen and thus its failure to discover the driver's inability to work in the United States furnished a condition that made the accident possible, because the driver's immigration status did not cause the collision. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

Labor & Employment Law : Occupational Safety & Health : General Overview

685. In a negligence action arising from an oil field accident, the trial court did not err in excluding, as irrelevant under Tex. R. Evid. 401, 402, a letter written by an OSHA investigator; the letter was not equivalent to a regulation or standard, and there was no evidence that witnesses who testified at trial had spoken with the investigator. Carrillo v. Star Tool Co., 2005 Tex. App. LEXIS 8992 (Tex. App. Houston 14th Dist. Nov. 1 2005).

Real Property Law : Eminent Domain Proceedings : Procedure

686. In an eminent domain proceeding in which a land planner designated as an expert by the owner testified that the owner could not achieve full compliance with the town's zoning ordinances after the State's condemnation and that the owner would be required to demolish all of its buildings, the trial court abused its discretion by admitting the land planner's opinion about the allegedly required demolition of the owner's buildings because his opinion was impermissibly speculative and conjectural. Reversal was required because there was a reasonable probability that the inadmissible evidence that characterized the demolition of the owner's buildings as a certainty, rather than a market-affecting factor, improperly influenced the jury's verdict on remainder damages. State v. Little Elm Plaza, Ltd., 2012 Tex. App. LEXIS 8880 (Tex. App. Fort Worth Oct. 25 2012).

Real Property Law : Eminent Domain Proceedings : Valuation

687. Court did not err in admitting a utility company's expert testimony as to the market value of the condemned property in which he did not factor in the improvements that were over 4000 feet from the power lines in assessing damages because, inter alia, the landowners' own expert relied upon several articles that specifically stated the

negative impact of power lines to a property diminished with increased distance and disappeared beyond 500 feet. Utley v. LCRA Transmission Servs. Corp., 2006 Tex. App. LEXIS 9129 (Tex. App. San Antonio Oct. 25 2006).

Real Property Law : Nonmortgage Liens : Mechanics' Liens

688. Trial court did not abuse its discretion under Tex. R. App. P. 44.1(a)(1) in excluding an exhibit that was offered to show that a lienholder was in voluntary compliance with the rules and regulations of the Texas Board of Professional Engineers and the former Texas Engineering Practice Act on the grounds that it was irrelevant because the exhibit did not specify that the lienholder had a licensed engineer as a regular, full-time employee or address the appropriate time period. Centurion Planning Corp. v. Seabrook Venture II, 176 S.W.3d 498, 2004 Tex. App. LEXIS 11079 (Tex. App. Houston 1st Dist. 2004).

Real Property Law : Property Valuation

689. Defendant's offer to purchase permanently damaged property for its full value was not relevant to the fair market value of the property. Therefore, evidence or the offer should not have been admitted and there was no evidence for the jury's finding that there was no diminution of value. Mieth v. Ranchquest, Inc., 2004 Tex. App. LEXIS 4601 (Tex. App. Houston 1st Dist. May 20 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 296, 2005 Tex. App. LEXIS 2079 (Tex. App. Houston 1st Dist. 2005).

Tax Law : State & Local Taxes : Personal Property Tax : Tangible Property : General Overview

690. In a tax dispute regarding valuation, an expert's premise that an underground storage tank (UST), once installed, became salvage material was a faulty absolute and likely rendered his valuation of the USTs, which represented the largest deviation in the valuations, unreliable; unreliable testimony did not constitute evidence. Harris County Appraisal Dist. v. Sigmor Corp., 2008 Tex. App. LEXIS 2456 (Tex. App. Houston 1st Dist. Apr. 3 2008).

Tax Law : State & Local Taxes : Real Property Tax : General Overview

691. In a suit challenging a real estate tax assessment, the trial court properly allowed expert testimony from the taxpayer's appraiser. The testimony was relevant, within the meaning of Tex. R. Evid. 401, 402, and 702 because the appraiser found a reasonable number of comparable properties, made appropriate adjustments, and compared the median appraisal value of those properties to the appraisal value applied to the property at issue, as required by Tex. Tax Code § 42.26. Harris County Appraisal v. Hartman Reit Operating P'ship, L.P., 186 S.W.3d 155, 2006 Tex. App. LEXIS 103 (Tex. App. Houston 1st Dist. 2006).

Torts : Business Torts : Negligent Hiring & Supervision : General Overview

692. Illegal immigrant status of defendant driver should not have been admitted in a wrongful death and survival action stemming from a multi-fatality vehicular accident. Under Tex. R. Evid. 401, 402, 403, the evidence was not relevant to claims of negligent hiring and negligent entrustment, even if the employer's failure to screen and thus its failure to discover the driver's inability to work in the United States furnished a condition that made the accident possible, because the driver's immigration status did not cause the collision. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

Torts : Damages : Compensatory Damages : Medical Expenses

693. In a case arising from a car accident, the evidence was legally insufficient to support an award of past medical care expenses because Tex. Civ. Prac. & Rem. Code Ann. § 41.0105 limited the recovery to the amount

actually paid or incurred by or on behalf of an injured party; an amount that had been written off could not have been recovered. Because the evidence here did not relate to the amount of damages sustained under a proper measure of damages, the evidence was both irrelevant and legally insufficient to support the judgment; however, due to undisputed facts, a voluntary remittitur was suggested. De Escabedo v. Haygood, 283 S.W.3d 3, 2009 Tex. App. LEXIS 1101 (Tex. App. Tyler Feb. 18 2009).

Torts : Damages : Punitive Damages : Award Calculations : Factors

694. In a personal injury case, a trial court did not err in admitting evidence of events that occurred after an accident because it was relevant to the jury's consideration of the factors under Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908 (Tex. 1981), in the context of exemplary damages. Matbon, Inc. v. Gries, 288 S.W.3d 471, 2009 Tex. App. LEXIS 268 (Tex. App. Eastland Jan. 15 2009).

Torts : Damages : Punitive Damages : Conduct Supporting Awards

695. Trial court improperly admitted evidence that the decedent's widow would put any punitive damages she received from the corporation that owned and operated the cemetery into a trust to pay for funerals for persons who could not afford them because it was not relevant to proving any of the factors to be considered when determining the amount of punitive damages or to penalizing or punishing the corporation. Serv. Corp. Int'l v. Guerra, 348 S.W.3d 221, 2011 Tex. LEXIS 417, 54 Tex. Sup. Ct. J. 1191 (Tex. 2011).

Torts : Intentional Torts : Defamation : Elements : Libel

696. Because appellant's statements in his January 2nd letter were found by the trial court to be libel per se, the anonymous letter was wholly irrelevant to the issue of whether appellant's prior letter defamed appellee. Hancock v. Variyam, 345 S.W.3d 157, 2011 Tex. App. LEXIS 4647 (Tex. App. Amarillo June 16 2011).

Torts : Malpractice & Professional Liability : Healthcare Providers

697. Because the trial court acted within its discretion in dismissing the patient's claims that the doctor was negligent in deciding to perform the surgery without attempting more conservative treatment and in failing to provide adequate follow-up care, the patient was not entitled to submit evidence in support of those claims. Bryan v. Watumull, 230 S.W.3d 503, 2007 Tex. App. LEXIS 5789 (Tex. App. Dallas 2007).

Torts : Negligence : General Overview

698. Evidence of a personal injury plaintiff's alcohol consumption in the months before the accident was properly admitted when it bore directly upon the degree of pain and anguish suffered as a result of the accident; according to the plaintiff's pain management expert, use of alcohol was important to pain management because of its exacerbating effect and bearing on treatment methodology. The alcohol evidence was highly probative in that it related to the fair and reasonable compensation for the mental anguish experienced by the pedestrian as a result of the accident. Fitz v. San Antonio Hospitality Invs., Inc., 2004 Tex. App. LEXIS 3507 (Tex. App. San Antonio Apr. 21 2004).

Torts : Negligence : Causation : General Overview

699. Driver's consumption of alcohol was relevant to the element of causation in his negligence suit against a trucker because the trucker presented evidence that the accident could have been avoided had the driver steered his vehicle to the right to avoid the trucker's trailer, and in failing to do so, the driver caused the accident. PPC Transp. v. Metcalf, 254 S.W.3d 636, 2008 Tex. App. LEXIS 3291 (Tex. App. Tyler 2008).

Torts : Negligence : Defenses : Contributory Negligence : Procedure : General Overview

700. In a personal injury suit stemming from a collision between a motorist and a bicyclist, evidence of the bicyclist's intoxication was rebuttably presumed to be admissible under Tex. R. Evid. 402 because the bicyclist's vigilance, judgment and reactions were at issue; contrary to the bicyclist's assertions, the motorist did not base her allegations of contributory negligence solely on evidence of intoxication, but offered testimony that the bicyclist suddenly veered in front of her; moreover, the bicyclist 's alcohol consumption prior to the accident bore on the weight afforded to his recollection of events. Ticknor v. Doolan, 2006 Tex. App. LEXIS 6717 (Tex. App. Houston 14th Dist. July 27 2006).

Torts : Premises Liability & Property : Trespass : Defenses : Consent

701. Escrow agreement and the letter to the property owner's predecessor were relevant and had probative value regarding one of the disputed issues in the owner's trespass action, namely whether the owner consented to the entry of waste beneath its tracts by the operator of neigboring the wastewater disposal facility . Fpl Farming Ltd. v. Envtl. Processing Sys., L.C., 383 S.W.3d 274, 2012 Tex. App. LEXIS 7769, 178 Oil & Gas Rep. 510, 2012 WL 4017388 (Tex. App. Beaumont Sept. 13 2012).

Torts : Products Liability : Design Defects

702. In a product liability case involving an allegedly defective surge protector, the trial court properly ordered discovery relating to a recall of a predecessor product that caused overheating and fires, but erred in allowing discovery of complaints regarding models that were not similar to the model in question and in failing to limit the scope of the requests as to time and locale. In re Am. Power Conversion Corp., 2012 Tex. App. LEXIS 5310, 2012 WL 2584290 (Tex. App. San Antonio July 5 2012).

Tex. Evid. R. 403, Part 1 of 2

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 403 Excluding Relevant Evidence for Prejudice, Confusion, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 22, *Rules Affecting Admissibility* ; Unit 23, *Policies Excluding Evidence*.

Case Notes

Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Appeals : Reviewability : Preservation for Review
Computer & Internet Law : Criminal Offenses : General Overview
Computer & Internet Law : Criminal Offenses : Child Pornography
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Simple Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : Elements
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Custodial Interference
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Penalties
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Endangerment : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Fraud : False Pretenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : Elements
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Felony Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : First-Degree Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Voluntary Manslaughter : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Bail Jumping & Failure to Appear
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Cruelty to Animals : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Consciousness of Guilt
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Money Laundering : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Resisting Arrest : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Witness Tampering
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Forgery : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : Elements
Criminal Law & Procedure : Criminal Offenses : Racketeering : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Obscenity : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Rape : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Hit & Run Accidents : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Vehicular Homicide : Elements
Criminal Law & Procedure : Criminal Offenses : Weapons : General Overview

Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview
Criminal Law & Procedure : Interrogation : General Overview
Criminal Law & Procedure : Interrogation : Noncustodial Confessions & Statements
Criminal Law & Procedure : Discovery & Inspection : Subpoenas : Challenges & Modifications
Criminal Law & Procedure : Preliminary Proceedings : Pretrial Diversion : Violations
Criminal Law & Procedure : Bail : General Overview
Criminal Law & Procedure : Eyewitness Identification : Fair Identification Requirement
Criminal Law & Procedure : Eyewitness Identification : Photo Identifications
Criminal Law & Procedure : Pretrial Motions & Procedures : Joinder & Severance : Severance of Offenses
Criminal Law & Procedure : Guilty Pleas : Admissibility at Trial
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Tests
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Closing Arguments : General Overview
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Due Process
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Judicial Discretion
Criminal Law & Procedure : Trials : Motions for Mistrial
Criminal Law & Procedure : Trials : Prison Attire & Restraints
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Witnesses : Presentation
Criminal Law & Procedure : Witnesses : Sequestration
Criminal Law & Procedure : Defenses : General Overview
Criminal Law & Procedure : Defenses : Right to Present
Criminal Law & Procedure : Defenses : Alibi
Criminal Law & Procedure : Defenses : Burdens of Proof
Criminal Law & Procedure : Defenses : Diminished Capacity
Criminal Law & Procedure : Defenses : Necessity
Criminal Law & Procedure : Defenses : Right to Present
Criminal Law & Procedure : Defenses : Self-Defense
Criminal Law & Procedure : Scienter : General Overview
Criminal Law & Procedure : Scienter : General Intent
Criminal Law & Procedure : Scienter : Knowledge
Criminal Law & Procedure : Scienter : Specific Intent
Criminal Law & Procedure : Jury Instructions : Curative Instructions
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence
Criminal Law & Procedure : Sentencing : Alternatives : Probation : Eligibility
Criminal Law & Procedure : Sentencing : Appeals : Appealability
Criminal Law & Procedure : Sentencing : Appeals : Standards of Review : General Overview
Criminal Law & Procedure : Sentencing : Capital Punishment : General Overview
Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances
Criminal Law & Procedure : Sentencing : Capital Punishment : Mitigating Circumstances
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Sentencing : Imposition : Victim Statements
Criminal Law & Procedure : Sentencing : Mental Incapacity
Criminal Law & Procedure : Sentencing : Presentence Reports
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Appeals : Procedures : Briefs

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Jury Instructions
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Waiver Triggers Generally
Criminal Law & Procedure : Appeals : Standards of Review : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Clearly Erroneous Review : Findings of Fact
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Estate, Gift & Trust Law : Will Contests : General Overview
Evidence : Demonstrative Evidence : General Overview
Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Photographs
Evidence : Demonstrative Evidence : Recordings
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Documentary Evidence : General Overview
Evidence : Documentary Evidence : Completeness
Evidence : Documentary Evidence : Writings : General Overview
Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence
Evidence : Hearsay : Exceptions : Statements Against Interest
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Exemptions : Confessions : General Overview
Evidence : Hearsay : Exemptions : Statements by Coconspirators : General Overview
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Hearsay : Rule Components : Truth of Matter Asserted
Evidence : Inferences & Presumptions : Inferences
Evidence : Judicial Notice
Evidence : Procedural Considerations : Burdens of Proof : General Overview
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : Limitations
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof
Evidence : Procedural Considerations : Preliminary Questions : General Overview
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Relevance : Character Evidence
Evidence : Relevance : Circumstantial & Direct Evidence
Evidence : Relevance : Compromise & Settlement Negotiations
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs

LexisNexis (R) Notes

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

1. Affidavits of expert witnesses offered in support of homeowners' motion against summary judgment in an action seeking losses for a house fire failed to meet the requirements of Tex. R. Evid. 401, 403, 702, and 703, as the testimony was a pyramid of inferences lacking probative force because it was based on assumed facts that varied from the actual undisputed facts. Rayon v. Energy Specialties, Inc., 121 S.W.3d 7, 2002 Tex. App. LEXIS 9160 (Tex. App. Fort Worth 2002).

Civil Procedure : Appeals : Reviewability : Preservation for Review

2. Objection under Tex. R. Evid. 403 was not preserved by an argument that photographs had no probative value. Smith v. East, 411 S.W.3d 519, 2013 Tex. App. LEXIS 1753, 2013 WL 692456 (Tex. App. Austin Feb. 22 2013).

Computer & Internet Law : Criminal Offenses : General Overview

3. In a trial for defendant's online harassment of a psychic, there was no error under Tex. R. Evid. 403, 404 in admitting evidence that before and after the offense, defendant sent the victim a condom and panties because it showed intent to harm the victim, rather than to test her psychic abilities, when masquerading online as her hairdresser. Taylor v. State, 2012 Tex. App. LEXIS 2279, 2012 WL 955383 (Tex. App. Fort Worth Mar. 22 2012).

Computer & Internet Law : Criminal Offenses : Child Pornography

4. In a trial for defendant's sexual assault of a grandchild, there was no error in admitting evidence of child pornography seized from defendant's computer because the evidence rebutted defendant's testimony that defendant would not abuse the victim because the victim was a blood relative and that defendant did not have the same type of urge for children. Garreans v. State, 2008 Tex. App. LEXIS 852 (Tex. App. Dallas Feb. 5 2008).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

5. Out-of-court statements were non-testimonial and did not violate the Confrontation Clause because the statements were non-hearsay statements made by a co-conspirator; moreover, the trial court did not abuse its discretion in finding the probative value of the evidence was not outweighed by the danger of unfair prejudice. Agyin v. State, 2013 Tex. App. LEXIS 13337 (Tex. App. San Antonio Oct. 30 2013).

6. At defendant's trial for the aggravated sexual assault of a child, the trial court erred because it refused to allow defendant to cross-examine the State's witnesses in violation of the Sixth Amendment and the Fourteenth Amendment regarding the complainant's sexual assault of his younger sister. The balancing test under Tex. R. Evid. 403 did not authorize exclusion of the impeachment evidence, because Tex. R. Evid. 101(c) established that the Constitution of the United States controlled over a conflicting evidentiary rule or civil statute. Johnson v. State, 2013 Tex. App. LEXIS 1515, 2013 WL 531079 (Tex. App. Fort Worth Feb. 14 2013).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : General Overview

7. In a drug trial, there was no error under Tex. R. Evid. 403, 404(b), Rule 608(a) in excluding evidence, offered to show bias, that an officer was investigated for planting drugs on a defendant in an unrelated case because the allegations were determined to be unfounded. Brown v. State, 2010 Tex. App. LEXIS 5432, 2010 WL 2772488 (Tex. App. San Antonio July 14 2010).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview

8. Trial court did not err in admitting evidence of two prior extraneous acts in defendant's trial on charges of possession of pseudoephedrine with the intent to manufacture methamphetamine because there was no direct evidence of defendant's intent, and intent could not necessarily be inferred from the act itself. The evidence of the prior extraneous act in which defendant was found with fresh track marks in his arm was relevant under Tex. R. Evid. 401 because methamphetamine use and addiction was highly probative regarding commission of the charged offense, and the evidence was admissible under Tex. R. Evid. 404(b) to show intent, plan, and absence of mistake. Fulfer v. State, 2005 Tex. App. LEXIS 2449 (Tex. App. El Paso Mar. 31 2005).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

9. Trial court did not abuse its discretion in performing its Tex. R. Evid. 403 balancing test regarding evidence of trace quantities of controlled substances that were found in defendant's car during the same search in which the methadone was found and finding that the evidence was admissible because: (1) the evidence made the fact that defendant knew the pill bottle contained contraband more probable; (2) defendant's possession of the baggie and the scale dusted with methamphetamine and cocaine was necessary to prove scienter; (3) the evidence had little potential to impress the jury in an irrational way; (4) since all of the contraband was discovered during the same search of defendant's car, little extra time was spent by the State to develop the evidence; and (5) the State's need for the evidence was great, as it needed to link defendant to the knowing possession of the methadone in the pill bottle by showing that defendant knowingly possessed other contraband at the time of his arrest. Lamkin v. State, 2010 Tex. App. LEXIS 6484, 2010 WL 3170647 (Tex. App. Eastland Aug. 12 2010).

10. In a drug trial, even if it was error under Tex. R. Evid. 403 to admit 19 bags containing an untested substance into evidence, the error was harmless under Tex. R. App. P. 44.2(b) because there was still overwhelming evidence that the narcotics found in defendant's possession amounted to more than four grams: 20 of the 39 bags found in defendant's possession tested positive for heroin, and their combined weight totaled 4.094 grams. Cantu v. State, 2010 Tex. App. LEXIS 3355, 2010 WL 1817804 (Tex. App. San Antonio May 5 2010).

11. In a cocaine possession trial, there was no error under Tex. R. Evid. 403 in excluding evidence tending to show that a detective did not immediately file charges against defendant for all of the drugs found in his possession during an earlier search, despite defendant's claim that the evidence showed illegal police conduct as well as bias and lack of credibility. The district court could have found that the probative value was unclear and the time needed to develop the evidence significant. Perez v. State, 2010 Tex. App. LEXIS 3407, 2010 WL 1818944 (Tex. App. Austin May 5 2010).

12. In trial for possession of methamphetamine, extraneous offense evidence pertaining to other controlled substances and illegal narcotics found at the same time as the methamphetamine was properly admitted because it was relevant to an affirmative links analysis and was not likely to impress a jury in an irrational but nevertheless indelible way, given that the evidence supporting the charged offense was far more damaging. Johnson v. State, 2007 Tex. App. LEXIS 7773 (Tex. App. Fort Worth Sept. 27 2007).

13. In a trial for heroin possession, gang-membership evidence was not unduly prejudicial. The State's closing argument made it clear to the jury that the gang evidence was being used to show motive, intent, and knowledge; the State did not inflame the jury by mentioning the gang membership. Ojeda v. State, 2004 Tex. App. LEXIS 8557 (Tex. App. El Paso Sept. 24 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements

14. In a drug trial, video excerpts from a seized camera were properly admitted under Tex. R. Evid. 401, 403, because they were material to the issues of possession-with-intent-to-deliver a controlled substance and a deadly

weapon finding, in that they placed defendant in a drug house around the money and guns. They were not unduly prejudicial because they did not show actual drug dealing. Mincey v. State, 2009 Tex. App. LEXIS 2825, 2009 WL 1058734 (Tex. App. Dallas Apr. 21 2009).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview

15. Trial court did not abuse its discretion in admitting extraneous-offense evidence during defendant's trial on a charge of possession of less than one gram of cocaine because the extraneous offense, which was committed while defendant was on bail awaiting the instant trial, also involved possession of cocaine thereby establishing defendant's familiarity with the substance and the jury was given an appropriate limiting instruction; the extraneous offense involved over six grams of cocaine. Baker v. State, 2013 Tex. App. LEXIS 11745, 2013 WL 12297784 (Tex. App. Texarkana Sept. 18 2013).

16. In a driving while intoxicated trial, evidence that cocaine was located in plain view next to the driver's seat in the vehicle defendant was driving was relevant to prove the State's allegation in the indictment that defendant was intoxicated, and, because the possession of cocaine evidence went to a material element of the State's case, it was not an extraneous offense. Lopez v. State, 2013 Tex. App. LEXIS 2064, 2013 WL 765711 (Tex. App. Waco Feb. 28 2013).

17. In a possession of marijuana case, the trial court did not err by admitting extraneous offense evidence under Tex. R. Evid. 404(b) as it served to illustrate defendant's involvement in a transaction that started at the residence and included depictions of behavior that tended to show his awareness of the contents (drugs) in the back of the vehicle. As there was great inherent probative force of the complained-of evidence, in that it served to place the charged offense in its proper perspective, the trial court did not err in finding that the probative force of the evidence substantially outweighed any prejudicial effect pursuant to Tex. R. Evid. 403. Duarte v. State, 2008 Tex. App. LEXIS 5837 (Tex. App. El Paso July 31 2008).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

18. There was no error in admitting evidence of prior assault by defendant. Jeter v. State, 2013 Tex. App. LEXIS 8945 (Tex. App. Amarillo July 18 2013); Bazile v. State, 2010 Tex. App. LEXIS 9385, 2010 WL 4813786 (Tex. App. Dallas Nov. 29 2010); White v. State, 2010 Tex. App. LEXIS 5604, 2010 WL 2803018 (Tex. App. Eastland July 15 2010).

19. In an assault trial arising from an incident in which defendant was bounced from a bar, there was no error under Tex. R. Evid. 401, 403 in admitting evidence that defendant was taking prescription medication to control temper. Dudzik v. State, 276 S.W.3d 554, 2008 Tex. App. LEXIS 9073 (Tex. App. Waco 2008).

20. In defendant's trial for causing serious bodily injury to a child, the trial court did not violate Tex. R. Evid. 403 by admitting hospital and autopsy photographs of the child because they were admitted during the testimony of both the treating physician and the medical examiner who performed the autopsy, both testified as to the child's injuries, and the autopsy photographs, coupled with the examiner's testimony, provided crucial evidence of the severe force used by defendant to inflict the child's injuries. Rodriguez v. State, 2007 Tex. App. LEXIS 460 (Tex. App. Fort Worth Jan. 25 2007).

21. Trial court did not abuse its discretion under Tex. R. Evid. 403 in admitting into evidence photographs of the complainant's injuries where defendant was charged with aggravated assault causing serious bodily injury under

Tex. Penal Code Ann. § 22.02(a)(1). The photographs, which showed multiple cuts and bruises on the complainant's face, his apparent blood-soaked hair, and a cut on his thumb, were relevant to show the nature of the wounds and were not particularly shocking or gruesome. Siale v. State, 2005 Tex. App. LEXIS 5153 (Tex. App. Fort Worth June 30 2005).

22. Defendant argued that the trial court erred by excluding evidence relating to his strained marital relationship with the victim because that evidence was probative of his state of mind and motivation at the time of his actions; however, because the only conduct elements potentially implicated for the crime of aggravated assault were the nature of the conduct and the result of the conduct, the circumstances surrounding the conduct were not relevant and were properly excluded. Novillo v. State, 2004 Tex. App. LEXIS 5086 (Tex. App. Austin June 10 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

23. In a trial for aggravated assault on a public servant, it was proper to admit a rifle and associated photographs to show that defendant had access to the rifle, which was located in the same room. Airheart v. State, 2012 Tex. App. LEXIS 3235, 2012 WL 1431762 (Tex. App. El Paso Apr. 25 2012).

24. For purposes of defendant's aggravated assault convictions, the photographs of the crime scene were admissible because their probative value was not substantially outweighed by their prejudicial value under Tex. R. Evid. 403 as the photographs showed the injuries defendant inflicted on the victims, and they helped the jury to determine whether serious bodily injury resulted from the shooting. Hernandez v. State, 2012 Tex. App. LEXIS 344, 2012 WL 135675 (Tex. App. San Antonio Jan. 18 2012).

25. In a trial for aggravated assault on a public servant, testimony from defendant's wife about his assault on her earlier the same evening was admissible under Tex. R. Evid. 403. Given vivid video evidence showing the uncontrolled violent nature of defendant's conduct, the wife's description was not likely to unduly impress the jury in an irrational, indelible way. Hester v. State, 2009 Tex. App. LEXIS 9311, 2009 WL 4597948 (Tex. App. Texarkana Dec. 8 2009).

26. In an aggravated assault case, a trial court did not err by admitting photographs of a victim's injuries over a Tex. R. Evid. 403 objection because the inherent probative force of the photographs was considerable since they provided context for the offense; moreover, they were relevant and necessary for the prosecution to aid the jury in understanding the testimony regarding the extent of the victim's injuries. Even if the photographs were in color, the images were not of such a horrifying or appalling nature that a juror of normal sensitivity would have had difficulty rationally deciding the critical issues of the case after viewing any of them individually or cumulatively; further, they could not have possibly distracted the jury from the issue at hand, the jury was not misled, and the time involved in the introduction of the photographs was minimal. Houston v. State, 2009 Tex. App. LEXIS 4357, 2009 WL 1677860 (Tex. App. Houston 14th Dist. June 4 2009).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Simple Offenses

27. Trial court did not abuse its discretion by excluding expert psychological testimony who allegedly would have testified that as a result of his mental defects defendant was incapable of forming the necessary mens rea to commit an assault because defendant's amnesia was caused by his head injury, which occurred after the assault, and therefore could not be relevant to his intent at the time of the assault. In addition, the expert's report only noted that defendant told the expert that he had post-traumatic stress disorder, and nothing suggested that the expert himself confirmed the diagnosis. Iniquez v. State, 374 S.W.3d 611, 2012 Tex. App. LEXIS 5436, 2012 WL 2742632 (Tex. App. Austin July 6 2012).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

28. In a trial for injuring a baby by shaking her, the use of a doll during trial was appropriate for: (1) a detective to demonstrate how defendant had shaken a doll during an interview; (2) defendant to be cross-examined following his testimony that he would grow frustrated and angry and that his bouncing of the baby would grow more intense; and (3) the State to summarize the evidence in closing arguments. The use was not unduly prejudicial because it related to defendant's actions, and the doll was shown to be similar to the doll used during the interview. Moore v. State, 154 S.W.3d 703, 2004 Tex. App. LEXIS 11125 (Tex. App. Fort Worth 2004).

29. In a child abuse trial, the child's foster mother was properly allowed to testify that when she changed dressings in the child's vaginal area, the child said that her daddy had touched her there. The evidence rebutted the father's defense that the child's burns were accidental, arguably supported a finding that there was a pattern of abuse, and was not explicit in a way that would impress the jury in an irrational and indelible way. Wooten v. State, 2004 Tex. App. LEXIS 4296 (Tex. App. Austin May 13 2004).

30. Burglary defendant's statement that his three children were waiting next door was properly admitted. The fact that he left the children unattended while engaged in a burglary was prejudicial, but to his credit, the statement also displayed his concern for the welfare of the children; the probative value was not substantially outweighed by the danger of unfair prejudice. Carter v. State, 2004 Tex. App. LEXIS 3394 (Tex. App. Austin Apr. 15 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : Elements

31. Even though the trial court erred by admitting defendant's posts to a social media website regarding his attitude toward children as they were unduly prejudicial under Tex. R. Evid. 403, the error was harmless given the strength of the evidence against defendant and the fact that the presentation of the evidence consumed less than half a page of the record. Copeland v. State, 2013 Tex. App. LEXIS 14675, 2013 WL 6388585 (Tex. App. Texarkana Dec. 5 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Custodial Interference

32. In defendant's prosecution for interference with child custody under Tex. Penal Code Ann. § 25.03(a)(1), evidence that he continued to pay child support after July 2006 was relevant and not unfairly prejudicial as it tended to rebut his claim that he and the complainant had reconciled and that he believed that the divorce decree was void. Long v. State, 2010 Tex. App. LEXIS 9804 (Tex. App. Houston 1st Dist. Dec. 9 2010).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Penalties

33. In the punishment phase of a domestic assault trial, evidence of an unprosecuted and recanted allegation of sexual assault by defendant's daughter was more probative than prejudicial, even though the offense was remote in time, because it provided another example of a criminal act that defendant might have committed against a household member and helped show a pattern of conduct that might have informed the jury's decision about whether to place him on community supervision. Sanders v. State, 422 S.W.3d 809, 2014 Tex. App. LEXIS 1090, 2014 WL 325028 (Tex. App. Fort Worth Jan. 30 2014).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Endangerment : General Overview

34. During the punishment phase of a criminal trial where defendant was charged with endangering a child, the trial court did not abuse its discretion by admitting evidence from defendant's ex-boyfriend who was convicted of sexually assaulting defendant's daughters, and the probative value of the confession was not substantially outweighed by its prejudice. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview

35. In an aggravated kidnapping case, an objection under Tex. R. Evid. 403 was properly overruled because of the probative value of a folding knife found in a truck; this supported the State's allegation that the kidnapping was aggravated, and there was little or no danger of confusion of the issues. Moreover, evidence of checks was probative to identify appellant as a participant in the kidnapping, and an argument that the trial court failed to conduct the Rule 403 balancing test before admitting the challenged evidence was rejected because the judge was presumed to have engaged in the required balancing test when Rule 403 was invoked. Padilla v. State, 2012 Tex. App. LEXIS 8519 (Tex. App. Fort Worth Oct. 11 2012).

36. In a kidnapping trial, evidence that the complainant bought Oxycontin from defendant before the complainant learned of her pregnancy was admissible under Tex. R. Evid. 404(b), 403 because it was relevant to the defenses of immunity, necessity, and defense of third person, which were based on a claim that the complainant was endangering and abusing or neglecting her unborn child by consuming Oxycontin while pregnant. Scroggs v. State, 396 S.W.3d 1, 2010 Tex. App. LEXIS 3769, 2010 WL 1993676 (Tex. App. Amarillo May 19 2010).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

37. In a robbery trial, it was proper to admit evidence that that defendant associated with a man carrying the same kind of identification card as used by one of the robbers because no evidence showed that jurors would know what the card was or that they could infer the holder was a convicted felon by possessing it; the evidence explained how police connected the suspects in a traffic stop to the robbery at a nightclub. Robinson v. State, 2012 Tex. App. LEXIS 365, 2012 WL 130616 (Tex. App. Dallas Jan. 18 2012).

38. In a trial for the robbery of a pickup truck, the trial court properly admitted a police chase video of the robbers' pickup along with testimony about the chase, even though defendant was not in the truck, as well as evidence of three handguns found in the pickup; the evidence was not unfairly prejudicial under Tex. R. Evid. 403. Hawkins v. State, 2006 Tex. App. LEXIS 6439 (Tex. App. Houston 1st Dist. July 20 2006).

39. In a trial for robbery, extraneous offense evidence was properly admitted under Tex. R. Evid. 404(b) and 403 because the similarity in the offenses made the evidence compelling as to identity. In both robberies, the assailants drove into an apartment complex parking lot, wore shirts bearing Houston police insignia, claimed to be police officers, and searched Hispanic male victims; money was taken in both robberies with a silver pistol. Casique v. State, 2005 Tex. App. LEXIS 6517 (Tex. App. El Paso Aug. 16 2005).

40. In a robbery trial, admission was proper of extraneous acts evidence, including defendant's escape, aggravated assault on a police officer, aggravated assault, and unauthorized use of two vehicles. The evidence was not more prejudicial than probative under Tex. R. Evid. 403. Russell v. State, 2005 Tex. App. LEXIS 3703 (Tex. App. Texarkana May 13 2005).

41. In an aggravated robbery case, the trial court did not err in admitting the witnesses' extraneous offenses testimony under Tex. R. Evid. 404(b) for the purpose of proving identity over defendant's objection because (1)

defendant placed his identity in issue with the testimony of two alibi witnesses and the testimony of another individual, that he, and not defendant, was the robber; and (2) the danger of unfair prejudice from the witnesses' testimony was minimal because the jury was instructed that the witnesses' testimony could only be considered for the limited purposes set out in Tex. R. Evid. 404(b). Chatman v. State, 2004 Tex. App. LEXIS 5410 (Tex. App. Houston 1st Dist. June 17 2004).

42. Evidence that defendant had previously carried a black gun was admissible in an aggravated robbery case where it tended to identify defendant as the perpetrator in a crime where a black handgun was used; the trial court did not abuse its discretion in admitting the evidence under Tex. R. Evid. 403 where it had relevance beyond its value as character evidence, and it was not necessarily prejudicial because the previous handgun possession could have been lawful. Page v. State, 125 S.W.3d 640, 2003 Tex. App. LEXIS 10198 (Tex. App. Houston 1st Dist. 2003).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview

43. In a trial for aggravated robbery, there was no error in admitting an unadjudicated extraneous robbery offense because the similarities made it highly relevant. The two aggravated robberies of older complainants occurred within 20 minutes and three miles of each other and involved an unidentified accomplice, a request for an unknown individual, use of a silver/chrome gun, forced entry, and forcing the complainants to lie on the floor. Villar v. State, 2013 Tex. App. LEXIS 11084 (Tex. App. Houston 1st Dist. Aug. 29 2013).

44. In a robbery trial, there was no error under Tex. R. Evid. 401, 403 in admitting evidence that after the robbery, someone stole the complainant's tools from the complainant's vehicle and set the vehicle on fire. The extraneous offenses were contextual evidence that helped to explain why the police became involved in the case that led to the investigation of the underlying facts and how the police ultimately arrested defendant for robbery. Flores v. State, 2007 Tex. App. LEXIS 6539 (Tex. App. Houston 1st Dist. Aug. 16 2007).

Criminal Law & Procedure : Criminal Offenses : Fraud : False Pretenses : General Overview

45. Appellate court did not consider whether a trial court erred by failing to exclude evidence of a forgery under Tex. R. Evid. 403 in a case involving the misapplication of fiduciary property where defendant's motion in limine did not preserve the issue for review; although the motion in limine referred to Rule 403, defendant's later objection during trial did not refer to "unfair prejudice" or Rule 403. Martinez v. State, 2003 Tex. App. LEXIS 9963 (Tex. App. Dallas Nov. 21 2003).

Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : General Overview

46. In a homicide trial, there was no error in admitting evidence of defendant's gang membership. Under Tex. R. Evid. 401, 403, the evidence was admissible to explain defendant's anger at the victim's alleged false claim regarding prison time and gang affiliation. McCallum v. State, 311 S.W.3d 9, 2010 Tex. App. LEXIS 440 (Tex. App. San Antonio Jan. 27 2010).

47. In an intoxication manslaughter with a deadly weapon case, an enhanced videotape of the accident revealed that it was highly probative of the fact and manner of an officer's death; thus, it was clearly relevant under Tex. R. Evid. 402. Adams v. State, 2007 Tex. App. LEXIS 1165 (Tex. App. Fort Worth Feb. 15 2007).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

48. In a murder case, the court erred by failing to require the State to redact portions of defendant's recorded statement admitting he had previously been in prison three times, but the error was harmless because the statement had no more than a slight effect on the jury's verdict. Barley v. State, 2013 Tex. App. LEXIS 13313, 2013 WL 5827728 (Tex. App. Houston 1st Dist. Oct. 29 2013).

49. In a murder case, a trial court did not err by admitting autopsy photographs because they were probative of the issue of whether a death where a victim was run over by a car was an intentional killing with multiple injuries inflicted. The probative value of the photographs was not substantially outweighed by their prejudicial effect; none of the photos showed any mutilation to the body caused by the medical examiner's examination. Ogle v. State, 2013 Tex. App. LEXIS 1084, 2013 WL 453257 (Tex. App. Dallas Feb. 6 2013).

50. In a trial for defendant's murder of his cousin, no error resulted from allowing a relative to testify that, in the days before the shooting, defendant was angry with the victim for not bailing him out of jail. The testimony demonstrated defendant's motive, and evidence of the reason defendant was in jail--a stabbing--was excluded. Nieto v. State, 2012 Tex. App. LEXIS 8787 (Tex. App. Houston 1st Dist. Oct. 18 2012).

51. In a murder trial, it was proper to admit evidence of defendant's character trait of offering to handle the problems of other people with a firearm and a specific extraneous bad act to demonstrate this character trait because the evidence was probative to rebut the defense that only a third person, and not defendant, had a motive to harm the complainant. Williams v. State, 2012 Tex. App. LEXIS 7728 (Tex. App. Houston 1st Dist. Aug. 30 2012).

52. In a trial for a murder that occurred in a game room, there was no error in admitting evidence that minutes before the murder defendant approached the game room and left. That evidence was of an extraneous offense because it showed only that defendant and an accomplice were denied entry. Dronso v. State, 2012 Tex. App. LEXIS 3720, 2012 WL 1624065 (Tex. App. Fort Worth May 10 2012).

53. In a murder trial, evidence relating to an alleged alternative perpetrator was properly excluded on the basis that there was an insufficient nexus between the alleged alternative and the offense, notwithstanding the theory that the alleged alternative had a motive to want the victim (a witness to a previous shooting) dead, his alleged involvement in a shotgun shooting in the same neighborhood just a few days earlier, and his presence in the area near the time the charged murder occurred. Caldwell v. State, 356 S.W.3d 42, 2011 Tex. App. LEXIS 8437 (Tex. App. Texarkana Oct. 21 2011).

54. In a trial for defendant's murder of his wife, evidence that he remarried a month after being released on bond was relevant to motive. Davis v. State, 2011 Tex. App. LEXIS 8372, 2011 WL 5026403 (Tex. App. Houston 1st Dist. Oct. 20 2011).

55. In a murder trial, there was no error under Tex. R. Evid. 403 in admitting the testimony of a forensic anthropologist regarding the science of toolmark analysis; the expert opined that toolmarks on bone fragments found in defendant's yard were consistent with being made by either a hunting knife or a saw, that the bone fragments had characteristics consistent with being human, and that they showed no signs of healing, indicating that the cuts occurred at or near the time of death. Shepherd v. State, 2011 Tex. App. LEXIS 133, 2011 WL 166893 (Tex. App. Houston 14th Dist. Jan. 11 2011).

56. In a murder trial, there was no error under Tex. R. Evid. 401, 402, 403, 404 in admitting a video of a social networking page, on which defendant was depicted holding a gun. The evidence was relevant because a witness testified that the gun in the video was the same gun the witness saw defendant use in the murder; it wass unlikely that the jury would have felt compelled to convict defendant of murder simply because he acted like a "bad boy" and

brandished a weapon on camera. Brumfield v. State, 2010 Tex. App. LEXIS 10137, 2010 WL 5187690 (Tex. App. Houston 1st Dist. Dec. 23 2010).

57. In a murder trial, no error occurred when the trial court admitted tape-recorded phone conversations that included defendant's statements regarding illegal drug use after the victim's hospitalization; its probative value outweighed its unfairly prejudicial effect, as it suggested defendant's lack of remorse or concern about the victim. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

58. Pursuant to Tex. R. Evid. 403, the trial court did not err by admitting testimony that the cadaver dogs alerted on the scent of human remains because the evidence was not more prejudicial than probative of whether defendant had disposed of the murder victim's body where he said that he did, and the evidence did not point to other suspects. Trejos v. State, 243 S.W.3d 30, 2007 Tex. App. LEXIS 4045 (Tex. App. Houston 1st Dist. 2007).

59. In a trial for a "shaken-baby" murder, any error arising from the admission of an investigator's opinion on guilt was harmless. Although defendant objected to the testimony under Tex. R. Evid. 403 during the prosecution's re-direct, the same question and answer had come in without objection during the defense's prior cross-examination. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

60. Where defendant was charged with the murder of her ex-boyfriend's new girlfriend, the trial court did not err in admitting into evidence a letter written by defendant to her ex-boyfriend in which she described the intensity of her feelings for him and her concern about the possibility of his philandering. Defendant's statements proved that she had a motive to kill the complainant; the prejudice of the letter did not substantially outweigh its probative value. Harris v. State, 2005 Tex. App. LEXIS 346 (Tex. App. Houston 1st Dist. Jan. 13 2005).

61. In a trial for murder and robbery, evidence that a gun was taken in a prior robbery was same transaction contextual evidence and was relevant to show preparation for the planned robbery and murder at issue. The evidence was not unduly prejudicial, given the other evidence that the stolen gun was the murder weapon. Hill v. State, 2004 Tex. App. LEXIS 8474 (Tex. App. Tyler Sept. 22 2004).

62. Where defendant's cell mate described what defendant had told him about the instant murder and also about another killing, the trial court had not erred in admitting the evidence of the other shooting because the extreme degree of similarity between the two murders made the evidence of the other murder highly probative. In addition, without evidence of defendant's involvement in the other murder, it would have been more difficult for the jury to resolve whether the cell mate was a credible witness. Corona v. State, 2004 Tex. App. LEXIS 5042 (Tex. App. San Antonio June 9 2004).

63. In defendant's murder case, the trial court did not abuse its discretion by admitting three autopsy photographs where the three objected-to autopsy photographs were the only photographs that documented the internal autopsy findings of the entry wounds, the fractures caused by the gunshots, the proximity of the wounds to each other and to the body, and the trajectories of the bullets. The photographs were highly relevant to explain the manner of death by documenting the entrance wounds, the proximity of the wounds to each other, the trajectory of the bullets, and the resulting fractures, and the jury would not have been prejudiced in some irrational, but nevertheless indelible way by viewing autopsy photos of the deceased's head under those circumstances. Hall v. State, 137 S.W.3d 847, 2004 Tex. App. LEXIS 4402 (Tex. App. Houston 1st Dist. 2004).

64. In a criminal prosecution for murder, autopsy photographs of the victim were admissible to establish the victim's cause of death. The photographs had a high probative value, were not excessively gruesome, and owed any disturbing nature to the crime itself. Troncoso v. State, 2004 Tex. App. LEXIS 2578 (Tex. App. Texarkana Mar.

24, 2004).

65. In a prosecution for murder, the medical records of defendant's shooting victims were properly admitted at the sentencing phase; the medical records were relevant to the circumstances of the murder and provided evidence of bad acts for which defendant could be held criminally responsible. The probative value of the medical records was not substantially outweighed by the danger of undue prejudice. Mendoza v. State, 2004 Tex. App. LEXIS 2486 (Tex. App. Houston 1st Dist. Mar. 18 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

66. In a murder trial, there was no error in admitting extraneous offense evidence regarding a robbery/shooting that occurred ten minutes before the murder or regarding an assault that occurred as the suspects drove away from the robbery victim's apartment. The other offenses bore bear striking similarities to the offense for which defendant was convicted and were relevant to the hotly contested issue of identity. Mason v. State, 416 S.W.3d 720, 2013 Tex. App. LEXIS 13527, 2013 WL 5861492 (Tex. App. Houston 14th Dist. Oct. 31 2013).

67. Accomplice's testimony that he and defendant were involved in another aggravated robbery of a taxi cab driver four days before the murder was not inadmissible because it tended to make defendant's theory that he was not the responsible party much less probable, the trial court gave a limiting instruction, an insignificant amount of time was needed to develop the evidence, and it was needed to show defendant's intent to commit a robbery and his intent to kill. Stephens v. State, 2013 Tex. App. LEXIS 10188 (Tex. App. El Paso Aug. 14 2013).

68. In a capital murder trial, it was proper to admit testimony about defendant's prior act of pulling out a gun during a disagreement with the complainant because it was relevant to show defendant's hostility or ill will toward the complainant and his motive to later kill her. It was not necessary to show that the complainant was threatened in the prior incident. Jackson v. State, 2012 Tex. App. LEXIS 10062, 2012 WL 6049074 (Tex. App. Fort Worth Dec. 6 2012).

69. In a trial for capital murder in the course of a burglary, it was error under Tex. R. Evid. 403 to admit an autopsy photograph of the victim's unborn fetus because there was little probative value in relation to the offense, as to which the death of the fetus was not an element, and other evidence was admitted of the pregnancy and the fetus's death. Rolle v. State, 367 S.W.3d 746, 2012 Tex. App. LEXIS 2699 (Tex. App. Houston 14th Dist. Apr. 5 2012).

70. In a murder trial, Tex. R. Evid. 403 permitted the admission of audio recordings from defendant's telephone calls from the county jail because they tended to show defendant's relationship with the victims (a girlfriend and her daughter) and defendant's suspicions; as to prejudice, defendant spoke about his "swinger" lifestyle, sexual and drug-related activities, and his volatile relationships with various individuals in much greater detail during extensive video-recorded interviews. Mckee v. State, 2012 Tex. App. LEXIS 2421, 2012 WL 1021446 (Tex. App. Dallas Mar. 28 2012).

71. In a murder trial, there was no error under Tex. R. Evid. 401, 403, 404(b) in admitting the extraneous offense evidence of an aggravated robbery that defendant and an accomplice allegedly committed six days prior to the murder because it was reasonable to conclude that the evidence went directly to the issue of intent, given that the extraneous robbery occurred less than a week prior to the shooting and had several similarities to the charged offense. Maxwell v. State, 2010 Tex. App. LEXIS 9036, 2010 WL 4595702 (Tex. App. Austin Nov. 12 2010).

72. In a trial for capital murder arising from a robbery and shooting, it was reversible error to admit evidence that defendant committed an armed robbery of a grocery store a month after the charged murder because any probative value as to intent under Tex. R. Evid. 401, 402 was outweighed by the danger of unfair prejudice under Tex. R.

Evid. 403. Jackson v. State, 320 S.W.3d 873, 2010 Tex. App. LEXIS 6572 (Tex. App. Texarkana Aug. 12 2010).

73. In a capital murder case, a trial court did not err by refusing to allow the introduction of evidence that a victim had drugs in his system because any probative value the evidence might have had was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Tex. R. Evid. 403. The appellate court rejected defendant's argument that the evidence was relevant to the issue of the previous relationship between defendant and the victim and to show the condition of defendant's mind at the time of the offense. Anderson v. State, 2009 Tex. App. LEXIS 6809, 2009 WL 2915011 (Tex. App. Corpus Christi Aug. 27 2009).

74. In a capital murder trial, there was no error under Tex. R. Evid. 403 in admitting evidence of actions taken by witnesses while interacting with defendant (taking precautionary measures, staying away from defendant, checking on a child, or calling family, friends or police) or their expressions of concern; the witnesses' testimony provided significant background information about the circumstances under which the events occurred. Russo v. State, 228 S.W.3d 779, 2007 Tex. App. LEXIS 4499 (Tex. App. Austin 2007).

75. In a murder trial, photographs of the deceased were properly introduced into evidence under Tex. R. Evid. 403, even though they showed the gruesome appearance of the body, which was badly burned in arson, because the photographs showed the position of stab wounds that caused death; although graphic, the photographs did not inject any additional, intangible, or inappropriate emotional element into the case such that the trial court should have necessarily excluded these photographs. Ledbetter v. State, 208 S.W.3d 723, 2006 Tex. App. LEXIS 10040 (Tex. App. Texarkana 2006).

76. In defendant's capital murder case, a court did not err by admitting testimony about defendant's confession where the trial court properly concluded that the evidence was a significant part of the State's case because defendant's confession linked him to the store at the time of the robbery and murder, making it more likely that he left his fingerprint on the cash drawer at the time of the offense. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

77. Where defendant was charged with capital murder in violation of Tex. Penal Code Ann. § 19.03, two witnesses placed defendant at the scene of the crime, but their testimony conflicted, and defendant developed evidence of a relationship to suggest an innocent reason for the presence of defendant at the crime scene and the presence of his DNA under the victim's fingernails, therefore, the State's introduction of evidence of a highly similar extraneous capital murder committed by defendant when he was a juvenile was affirmed because: (1) based on testimony elicited by the defense about a relationship between defendant and the victim, identity was an issue under Tex. R. Evid. 404(b), and thus, the extraneous offense evidence was admissible under Tex. R. Evid. 404(b), and (2) because all of the factors weighed in favor of the admission of the extraneous offense evidence, its probative value was not substantially outweighed by the danger of unfair prejudice and the evidence was admissible under Tex. R. Evid. 403. Ortiz v. State, 2003 Tex. App. LEXIS 2242 (Tex. App. Fort Worth Mar. 13 2003).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : Elements

78. Because the Tex. R. Evid. 404(b) evidence was relevant in identifying defendant and showing his intent to commit capital murder, and the evidence was not so prejudicial as to overcome the effectiveness of the limiting instruction, under Tex. R. Evid. 403, the trial court did not abuse its discretion in allowing the extraneous offense evidence. Castoreno v. State, 2012 Tex. App. LEXIS 3636 (Tex. App. San Antonio May 9 2012).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Felony Murder : General Overview

79. In a felony murder trial, with driving while intoxicated as the underlying felony, there was no error under Tex. R. Evid. 403 in admitting a post-collision photograph showing part of the interior of the car defendant was driving, including a deceased passenger lying in the passenger seat. Alami v. State, 333 S.W.3d 881, 2011 Tex. App. LEXIS 135 (Tex. App. Fort Worth Jan. 6 2011).

80. In a murder trial, there was no error under Tex. R. Evid. 404(b) and 403 in allowing an accomplice to testify about two prior attempted robberies by defendant and the same accomplices. The testimony was relevant to prove that the group's plan was to rob an Hispanic man whom they believed to be carrying cash and to prove that defendant was the member of the group who carried the gun, rebutting the defensive theory that he was not the shooter. Howard v. State, 2010 Tex. App. LEXIS 1388 (Tex. App. Dallas Feb. 26 2010).

81. In a trial for felony murder, it was error to admit extraneous offense evidence relating to attempted extortion; the offense, a threat made against an accomplice to her family, was only distantly related to the charged offense and the danger of unfair prejudice substantially outweighed the probative value. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

82. In a trial for felony murder, it was error to admit extraneous offense evidence that at the time of arrest defendant was returning to a hotel after attempting to steal a car; the evidence, unlike other evidence of car theft, did not tend to show flight and added nothing to a showing of consciousness of guilt and therefore was more prejudicial than probative; the error was harmless under Tex. R. App. P. 44.2 because it was unlikely that the admission had a substantial effect on the verdict, given all of the evidence before the jury. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

83. In a trial for felony murder, there was no error in the admission of extraneous offense evidence relating to forgery of documents, automobile theft, and possession of a firearm as the evidence was relevant and probative. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : First-Degree Murder : General Overview

84. In defendant's murder case, the court did not err by omitting evidence of pornography found on the victim's computer because there was no showing by defendant that the pornographic images were related to the shooting, that the images were the subject of the argument that preceded the shooting, or that the images played any part whatsoever during the events leading up to the shooting. Eisenman v. State, 2008 Tex. App. LEXIS 282 (Tex. App. Corpus Christi Jan. 10 2008).

Criminal Law & Procedure : Criminal Offenses : Homicide : Voluntary Manslaughter : General Overview

85. Trial court did not abuse its discretion by admitting a text message purportedly sent by defendant to the victim because the trial court could have properly concluded that the State needed the message before the jury to establish the consensual sexual relationship between defendant and the victim in order to show that her shouting rape was a reckless act that she should have realized would likely elicit a violent response from her husband, whom she knew carried a firearm, and not a true cry for help. Roberson v. State, 2010 Tex. App. LEXIS 6421, 2010 WL 3075612 (Tex. App. Fort Worth Aug. 5 2010).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Bail Jumping & Failure to Appear

86. In a criminal prosecution for capital murder, the trial court did not violate Tex. R. Evid. 403 by admitting evidence that defendant failed to appear for a previous trial date; defendant's failure to appear was not the type of

misconduct that had a great unfair prejudicial danger. Lewis v. State, 2007 Tex. App. LEXIS 8218 (Tex. App. Dallas Oct. 17 2007).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Cruelty to Animals : General Overview

87. In an animal cruelty case, defendant did not preserve an objection under Tex. R. Evid. 403, 404(b), regarding the prejudicial effect of testimony from a neighbor who found dog carcasses and drag marks on his property. That argument did not comport with a relevance objection at trial, as required by Tex. R. App. P. 33.1(a). Holz v. State, 2010 Tex. App. LEXIS 2017, 2010 WL 1041068 (Tex. App. Texarkana Mar. 23 2010).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : General Overview

88. In a trial for evading arrest with a motor vehicle, it was proper to admit into evidence a video showing the lighting "pursuit package" on a patrol car because the evidence was relevant to the defensive theory that defendant did not know the officer was a police officer at all prior to his arrest. Carter v. State, 2013 Tex. App. LEXIS 12266, 2013 WL 5460043 (Tex. App. Amarillo Sept. 27 2013).

89. In a fleeing and eluding case, a trial court did not err by allowing the State to introduce evidence of an unadjudicated offense during the punishment phase of the trial. Evidence that defendant previously ran from police had probative value, it was not inherently inflammatory, it did not take long to present, and the prejudicial effect of the evidence did not unduly outweigh its probative value. Crumpton v. State, 2009 Tex. App. LEXIS 6753 (Tex. App. Beaumont Aug. 26 2009).

90. In a trial for evading arrest, there was no error under Tex. R. Evid. 401, 403, or 404 in the admission of evidence that defendant placed a marijuana cigar on the pavement outside his motor vehicle while fleeing from a deputy sheriff. The evidence was relevant because it helped to prove that defendant intentionally fled; it was not submitted to show that defendant acted in conformity with his character because it indicated a motive; and it was highly probative in establishing intent, an essential element of the charge. Slaughter v. State, 2006 Tex. App. LEXIS 8694 (Tex. App. Houston 14th Dist. Oct. 3 2006).

91. In a trial for evading arrest, evidence that defendant was on parole at the time was probative of his motive to get away from the police officer and made less probable the defensive argument that defendant was not aware the police were behind him; the risk of undue prejudice was minimized by the fact that the jury was not told what crime led to the parole status. Steele v. State, 2014 Tex. App. LEXIS 1532, 2014 WL 580200 (Tex. App. Tyler Feb. 12 2014).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Consciousness of Guilt

92. Trial court did not abuse its discretion in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence of flight because an eyewitness who was at the house during the shooting, testified that defendant shot the complainant, in comparison to the inherently graphic testimony given by the medical examiner, the evidence of flight had little tendency to influence the jury in an irrational way, and the State needed to introduce the evidence of flight. Goldsmith v. State, 2014 Tex. App. LEXIS 754, 2014 WL 261007 (Tex. App. Houston 14th Dist. Jan. 23 2014).

93. Trial court did not abuse its discretion in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence of flight because an eyewitness who was at the house during the shooting, testified that defendant shot the complainant, in comparison to the inherently graphic testimony given by the medical examiner, the evidence of flight had little tendency to influence the jury in an irrational way, and the State needed to introduce the evidence of flight. Goldsmith v. State, 2014 Tex. App. LEXIS 754, 2014 WL 261007 (Tex. App. Houston 14th Dist. Jan. 23 2014).

94. At defendant's trial for robbery, the trial court did not err in admitting testimony regarding his efforts to resist arrest because evidence relevant to his flight from the scene was a circumstance indicative of guilt. The testimony encompassed only a few pages of the multiple-volume reporter's record and was not emphasized by the State; the probative value of the testimony was not outweighed by any danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. Johnson v. State, 2014 Tex. App. LEXIS 471, 2014 WL 222929 (Tex. App. Corpus Christi Jan. 16 2014).

95. In a trial for aggravated sexual assault, there was no error in admitting evidence that defendant, after being confronted by the victim's mother and fleeing to a nearby apartment complex, was seen fleeing from the complex, in which a fire had been started. A reasonable inference from the evidence was that defendant started the fire to aid his flight from the apartment complex; thus, the evidence was of value in establishing consciousness of guilt. Craft v. State, 2012 Tex. App. LEXIS 199, 2012 WL 112527 (Tex. App. El Paso Jan. 11 2012).

96. In a criminal prosecution for aggravated assault with a deadly weapon, evidence that defendant was driving a vehicle that matched the description of the vehicle involved in the shooting and that he attempted to flee from officers when one of them tried to pull him over was probative of his consciousness of guilt. The prejudicial effect of the evidence of defendant's flight did not outweigh its probative value under Tex. R. Evid. 403. Owens v. State, 2011 Tex. App. LEXIS 2871, 2011 WL 1435499 (Tex. App. Fort Worth Apr. 14 2011).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Money Laundering : General Overview

97. In a trial for money laundering, the trial court properly allowed extraneous offense evidence that defendant had been stopped on one occasion with more than $67,000 in his van and on another with more than 80 pounds of marijuana in his vehicle. The extraneous acts were relevant to show that defendant, although he claimed not to know about money hidden in the van on the current charge, repeatedly carried large amounts of cash and drugs hidden in his vehicle; the extraneous acts were not rendered inadmissible merely because they occurred after the charged offense. Stallworth v. State, 2005 Tex. App. LEXIS 993 (Tex. App. Dallas Feb. 9 2005).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Resisting Arrest : General Overview

98. In a case of resisting arrest or transportation, the probative value of a videotape of defendant's struggle with a police officer after a traffic stop, which was relevant in establishing force and intent, was not substantially outweighed by the prejudicial effect of defendant's use of curse words. Hartis v. State, 183 S.W.3d 793, 2005 Tex. App. LEXIS 10330 (Tex. App. Houston 14th Dist. 2005).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly

99. Admission of defendant's gang affiliation was not inadmissible under this rule because the State's purpose was to show that defendant's statement to the witness was in fact a threat and without the evidence the jury would have been less able to understand defendant's statement as a credible threat. Simmang v. State, 2013 Tex. App. LEXIS

11529 (Tex. App. Austin Sept. 11 2013).

100. Trial court did not err by finding that probative value of the sergeant's testimony regarding the Mexican Mafia and defendant's membership in the organization did not outweigh its prejudicial effect on defendant under Tex. R. Evid. 403 because it countered defendant's testimony that he shot two victims under the influence of sudden passion and provided an explanation to the jury as to why defendant shot the victims even though they were fighting with another man and not defendant. The testimony about the Mexican Mafia's reputation for violence and defendant's membership in the organization countered the testimony of defendant's friends and family that he was a non-violent and peaceful person. Hernandez v. State, 2013 Tex. App. LEXIS 5228 (Tex. App. Houston 1st Dist. Apr. 30 2013).

101. Trial court did not err by finding that probative value of a lay witness's testimony regarding the Mexican Mafia and defendant's membership in the organization did not outweigh its prejudicial effect on defendant under Tex. R. Evid. 403 because it was spoke to defendant's character, explained why defendant shot the two victims even though he did not know them and did not seem to have any personal motive for doing so, and it countered the testimony of defendant's family and friends that he was a non-violent and peaceful person. Hernandez v. State, 2013 Tex. App. LEXIS 5228 (Tex. App. Houston 1st Dist. Apr. 30 2013).

102. Admitting extraneous acts of gang violence during the punishment stage of a murder trial was proper under Tex. Code Crim. Proc. Ann. art. 37.07; the probative value of the evidence gang membership was not substantially outweighed by its prejudice under Tex. R. Evid. 403. Clark v. State, 2008 Tex. App. LEXIS 1430 (Tex. App. Beaumont Feb. 27 2008).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Witness Tampering

103. Assault defendant failed to request notice of other crimes and acts evidence under Tex. R. Evid. 404(b) and therefore could not complain of the adequacy of the State's notice; moreover, the notice gave her reasonable notice of a neighbor's expected testimony that defendant sought to bribe her to say that the victim struck defendant first. Additionally, this bribery evidence was relevant as consciousness of guilt and was not unfairly prejudicial. Cavazos v. State, 2014 Tex. App. LEXIS 5045, 2014 WL 1881691 (Tex. App. Amarillo May 8 2014).

104. Evidence of defendant's alleged witness tampering--phone calls offering the witness money not to testify--was properly admitted under Tex. R. Evid. 403, 404, as evidence of consciousness of guilt in a burglary trial. Livingston v. State, 2011 Tex. App. LEXIS 9054, 2011 WL 5535332 (Tex. App. Texarkana Nov. 15 2011).

105. In a trial for child sexual assault, the complainant's parent was properly allowed to testify that, after the parent discovered defendant, a pastor, watching an R-rated movie with the complainant, defendant threatened to take away the parent's children, house, business, and car if the parent did not sign some papers and that when the parent refused, defendant told the parent to commit suicide; the disputed statement was probative of defendant's state of mind and consciousness of guilt and was properly admitted under Tex. R. Evid. 401, Tex. R. Evid. 403. Hinson v. State, 2008 Tex. App. LEXIS 554 (Tex. App. Fort Worth Jan. 24 2008).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson : General Overview

106. In a trial for first-degree arson resulting in the death of defendant's spouse, there was no error under Tex. R. Evid. 403 in admitting autopsy photographs. There were four moderately-sized photographs, which were probative to depict the injuries received as a result of the fire; they did not depict any mutilation caused by the autopsy. Orr v. State, 306 S.W.3d 380, 2010 Tex. App. LEXIS 1196 (Tex. App. Fort Worth Feb. 18 2010).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : General Overview

107. In a criminal trial for burglary, the court did not err by allowing a police officer to testify as to the contents of defendant's van. The testimony was needed to show that defendant was in recent possession of stolen property; the testimony was not character evidence of other crimes or wrong acts. Middleton v. State, 187 S.W.3d 134, 2006 Tex. App. LEXIS 578 (Tex. App. Texarkana 2006).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary

108. In a burglary trial, there was no error under Tex. R. Evid. 401, 404(b), 403 in admitting evidence of an extraneous burglary in order to show intent. The prior burglary was near in time and location to the charged burglary. Martinez v. State, 304 S.W.3d 642, 2010 Tex. App. LEXIS 413 (Tex. App. Amarillo Jan. 21 2010).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements

109. In a burglary trial, there was no error in the admission of evidence that defendant had, in his possession when he was arrested, items taken in a subsequent burglary from the same victim; the evidence was admissible to rebut a line of questioning directed at burglaries that occurred after defendant was in custody. Ellis v. State, 2007 Tex. App. LEXIS 414 (Tex. App. Tyler Jan. 24 2007).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Forgery : General Overview

110. In a trial for felony murder, there was no errorr in the admission of extraneous offense evidence relating to forgery of documents; the evidence was relevant in order to show motive, relationship of the parties, and consciousness of guilt; the fact that defendant had equipment to produce fake checks was unlikely to make an unfair impression on the jury. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview

111. In a theft case arising from defendant's failure to complete a construction contract, evidence that defendant had done the same thing to another person was not excluded under Tex. R. Evid. 403 because the testimony was very compelling to prove defendant's intent to commit theft, rather than a failure to perform due to circumstances out of his control. The evidence was quickly and clearly presented such that it did not take too much time and was not confusing; moreover, the testimony was not so outrageous that it would affect the jury in an indelible way, and a jury instruction likely would not have had any effect. Gill v. State, 2008 Tex. App. LEXIS 9261 (Tex. App. Eastland Dec. 11 2008).

112. In a trial for theft of services, the trial court did not err in allowing evidence regarding the deposit of checks into defendant's account and the subsequent debits to that account when those checks were returned. The checks were important proof to establish the manner in which defendant attempted to falsely inflate the balance of the account and established defendant's knowledge that checks written on the account would not have sufficient funds to cover them. Ingram v. State, 2005 Tex. App. LEXIS 42 (Tex. App. San Antonio Jan. 5 2005).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : Elements

113. In defendant's trial for theft for transferring $6,000 from her employer to her credit card accounts, the trial court did not err in excluding testimony regarding the bitterness of her divorce and the possibility that her ex-husband was attempting to make her look bad or was trying to reduce the amounts owed on the cards, because

there was no evidence of any nexus between the ex-husband and the crime. Emmert v. State, 2014 Tex. App. LEXIS 6624, 2014 WL 2807987 (Tex. App. Dallas June 18 2014).

Criminal Law & Procedure : Criminal Offenses : Racketeering : General Overview

114. Trial court did not err by admitting into evidence multiple extraneous offenses during defendant's trial on charges of engaging in organized criminal activity because the evidence, namely the letterhead, testimony about the ongoing mortgage fraud, the forged signature on the articles of incorporation and diverted money, was all admissible as evidence to establish the existence of the combination, its members and its ongoing criminal activities, which were elements of the offense; the diversion of money was also admissible under Tex. R. Evid. 404(b) as evidence of motive, knowledge and intent, common scheme or plan, or absence of mistake. The court further held that the probative value of the evidence was not substantially outweighed by any prejudicial effect. Marriott v. State, 2010 Tex. App. LEXIS 5804, 2010 WL 2869781 (Tex. App. Waco July 21 2010).

115. Objection to extraneous offense evidence was not successful because testimony that stolen parts were removed from defendant's residence after his arrest, along with testimony that defendant had purchased stolen parts, was probative evidence of the elements of the offense of engaging in organized criminal activity; the testimony was evidence relevant to the element of combination and the collaboration in carrying on criminal activities, and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. The evidence tended to prove defendant had the intent to establish, maintain, or participate in a combination or in the profits of a combination, an essential element of the offense of engaging in organized criminal activities. Marban v. State, 2009 Tex. App. LEXIS 6760, 2009 WL 2618343 (Tex. App. Beaumont Aug. 26 2009).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : General Overview

116. Even if the sexually-explicit pictures found at defendant's residence were relevant to show "intent to arouse," they failed the Tex. R. Evid. 403 test because the controversy was not defendant's intent to gratify himself, it was whether the incident the victims described in fact occurred, and the graphic images were of a nature that a limiting instruction would not likely have been effective; therefore, the trial court abused its discretion by admitting them into evidence. Thrift v. State, 134 S.W.3d 475, 2004 Tex. App. LEXIS 2584 (Tex. App. Waco 2004), *aff'd,*176 S.W.3d 221, 2005 Tex. Crim. App. LEXIS 1862 (Tex. Crim. App. 2005).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : General Overview

117. In a trial for possession of child pornography, there was no error in admitting evidence of defendant's semen on two articles of children's clothing because it was relevant to rebut his defensive theory that it was his wife who downloaded the child pornography in order to obtain an advantage in their divorce proceedings. Mestas v. State, 2014 Tex. App. LEXIS 8543 (Tex. App. Amarillo Aug. 5 2014).

118. Admission of extraneous-offense evidence, regarding defendant's two encounters with children in public restrooms, did not affect defendant's substantial rights because testimony regarding the encounters did not consume an inordinate amount of time during trial, the State focused the majority of its closing argument on the evidence establishing the charged offenses, and the trial court gave a limiting instruction. Hoard v. State, 2013 Tex. App. LEXIS 11760 (Tex. App. Beaumont Sept. 18 2013).

119. In defendant's pornography case, the chat logs had probative value, and the entire exchange between the prosecutor and a witness constituted no more than ten lines of testimony in the reporters' record. There was a need for the evidence to establish defendant's control over and use of the computer equipment, which also contained

pornographic images of children for which he was being prosecuted. Checo v. State, 402 S.W.3d 440, 2013 Tex. App. LEXIS 7029 (Tex. App. Houston 14th Dist. June 11 2013).

120. Trial court did not err by admitting into evidence testimony about voluminous pornographic images found on defendant's computer under Tex. R. Evid. 403 because: (1) the testimony was probative as it assisted the jury in determining that the images did not arrive there by accident or mistake; (2) the State needed the testimony to rebut defensive theories; (3) limiting instructions were given; and (4) the amount of time required to develop the evidence was relatively short. Bethards v. State, 2011 Tex. App. LEXIS 5603, 2011 WL 2937875 (Tex. App. Waco July 20 2011).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Obscenity : General Overview

121. In an indecent exposure case, a court properly admitted evidence where defendant's comment about a prior incident to the undercover officer was compelling evidence that he intended to expose himself to gratify his sexual desire, not just to urinate. In addition, the State spent only a few pages of the trial record developing the evidence regarding the prior incident, and the evidence was not of such a nature that the jury would have been likely to disregard an instruction to consider it only on the issue of defendant's intent rather than as evidence that he was a criminal generally. Elkin v. State, 2004 Tex. App. LEXIS 5832 (Tex. App. Fort Worth July 1 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

122. Defendant was entitled to a new trial on two counts of aggravated sexual abuse of a child where the trial court reversibly erred by admitting the testimony of the officer and a child protective services investigator regarding the victim's prior statements because it was inadmissible impeachment evidence of the victim's trial testimony, during which she recanted her allegations against defendant; the error was not harmless because without the investigator's testimony, the State would not have proven penetration. Klein v. State, 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

123. In a trial for indecency with a child, testimony from a parole officer that defendant was restricted from contact with children was properly admitted under Tex. R. Evid. 403 because the testimony was highly probative of intent; it indicated that defendant knew that contact with a child was prohibited and thus showed that his questionable behavior around the victim did not have an alternative explanation. Turner v. State, 2006 Tex. App. LEXIS 944 (Tex. App. El Paso Feb. 2 2006).

124. In defendant's indecency with a child case, although the extraneous offense evidence of other sexual offenses against young boys was inadmissible to confront false-impression evidence, the State's alternate reason, that the extraneous offense evidence was admissible to rebut defensive theories propounded by defendant, was a proper basis for the admission of the extraneous offense evidence. Blackwell v. State, 193 S.W.3d 1, 2006 Tex. App. LEXIS 903 (Tex. App. Houston 1st Dist. 2006).

125. In defendant's indecency with a child case, defendant's extraneous sexual offenses were admissible to rebut the defensive theory that he lacked the intent to have sexual contact with the victim because, by asserting that defendant was a regular parent who did a good job of raising two other young boys, he impliedly suggested that he lacked the intent to have sexual contact with the victim. Blackwell v. State, 193 S.W.3d 1, 2006 Tex. App. LEXIS 903 (Tex. App. Houston 1st Dist. 2006).

126. In a criminal trial for aggravated sexual assault of a child, the court did not abuse its discretion in admitting evidence of defendant's having solicited the third party to have sexual intercourse with the minor; the State needed the evidence because defendant denied having any type of sexual contact with the victim and contended she was

fabricating the allegations against him. The factors weighed in favor of admissibility; and the trial court gave a limiting instruction, minimizing any impermissible inference of character conformity. Comeaux v. State, 2005 Tex. App. LEXIS 3748 (Tex. App. Houston 14th Dist. May 17 2005).

127. In a trial for sexual assault, defendant failed to object on the basis of Tex. R. Evid. 403 to an expert witness's use of the term "survivor" when describing the procedures involved in administering a sexual assault examination. Defendant therefore waived that issue on appeal. King v. State, 2005 Tex. App. LEXIS 2568 (Tex. App. San Antonio Apr. 6 2005).

128. Admission of both a transcript and tape of a conversation between defendant and the victim during punishment phase after defendant pleaded guilty to aggravated sexual assault of a child was proper, as the admission of the tape and transcript was more probative than prejudicial; the telephone conversation showed, among other things, defendant's relationship with the victim, and his lack of remorse. Maynard v. State, 2005 Tex. App. LEXIS 666 (Tex. App. El Paso Jan. 27 2005).

129. In an indecency with a child case, because intent to satisfy sexual appetite was an element of the crime, the victim's younger sister's testimony that defendant had "french" kissed her when he took her alone for a ride and asked that she not tell anyone was relevant; thus, the trial court properly allowed it. Further, this evidence showing that defendant acted inappropriately with another young girl was highly probative, making the fact of defendant's sexual contact with the victim more probable, gave credibility to the victim's complaint, and diminished defendant's credibility. Mejia v. State, 2004 Tex. App. LEXIS 11615 (Tex. App. Tyler Dec. 22 2004).

130. In a trial for child sexual assault, the victim's medical records, containing her statement about prior incidents, were properly admitted. The evidence was probative of both the previous relationship between defendant and the victim and of defendant's state of mind; the evidence is not graphically prejudicial, providing no details of the purported prior incident. Perez v. State, 2004 Tex. App. LEXIS 11395 (Tex. App. Fort Worth Dec. 16 2004).

131. In a defendant's trial for indecency with his granddaughter, testimony was properly admitted from defendant's stepdaughter that he had "messed around" with her and her sister, after defendant testified in his own defense and denied sexually abusing his two stepdaughters or ever having had a similar problem in his life. Green v. State, 2004 Tex. App. LEXIS 8523 (Tex. App. Eastland Sept. 23 2004).

132. Trial court did not err in admitting evidence that defendant had sexually assaulted another woman approximately three months prior to the instant assault where the state was not allowed to use the extraneous sexual assault evidence until defendant had presented his defensive theory of consent in his testimony. Martin v. State, 144 S.W.3d 29, 2004 Tex. App. LEXIS 7755 (Tex. App. Beaumont 2004), affirmed by 173 S.W.3d 463, 2005 Tex. Crim. App. LEXIS 1618 (Tex. Crim. App. 2005).

133. In an aggravated sexual assault of a child case, although the sexually explicit images that defendant showed to the victim had the potential to impress the jury, they were not so prejudicial as to affect the jury in an irrational manner. While sexually related misconduct and misconduct involving children was inherently inflammatory, the computer images did not create a grave potential for the jury to find defendant guilty on an improper basis; thus, pursuant to Tex. R. Evid. 403, the probative value of the images was not substantially outweighed by their unfair prejudice, and they were admissible into evidence. Pinson v. State, 2004 Tex. App. LEXIS 6916 (Tex. App. El Paso July 29 2004).

134. Where defendant was charged with two counts of aggravated sexual assault of a child, photographs of the genitalia of the two victims photographs depicting penetrating trauma to the genitalia of the two complainants was admissible as the photographs were not gruesome, and they actually served a medical purpose since they helped

explain and illustrate the doctor's findings that one child suffered "penetrative vaginal trauma." Umphres v. State, 2004 Tex. App. LEXIS 5737 (Tex. App. Amarillo June 25 2004).

135. In a sexual assault case, court properly admitted photographs of injuries to the victim where the photographs were of average size, in color, and few in number, the injuries had been testified to by the victim, but because they had healed by the time of trial, there were no other available means to demonstrate that they had been sustained, as no other witnesses testified to having observed the injuries, and although the victim was naked in the photographs and the pictures were close-up shots, that was necessary given the nature of the injuries, i.e., a series of bites on the genital area. Thus, the probative value of the four photographs outweighed their potentially prejudicial effect. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

136. In defendant's sexual assault case, a court did not err by taking judicial notice of defendant's birth date where the alleged discrepancy regarding defendant's date of birth was not reflected in the appellate record, and as to the age difference, the victim testified without objection that she was 14 years old and that defendant told her he was 35 years old. The jury could also draw its own conclusions from the appearance of the victim and defendant in the courtroom. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

137. In defendant's sexual assault case, a court did not err in permitting the victim's stepfather to testify that defendant told him that he, defendant, did not know the victim's age and was sorry about what had happened where, although defendant's statements fell short of an express confession of guilt, they could reasonably have been understood as an admission of improper conduct given the circumstances under which they were made. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

138. In defendant's sexual assault case, a court did not err in permitting the victim's stepfather to testify that he saw defendant in the parking lot of the family's apartment complex a few weeks after the victim made her outcry where that evidence tended to corroborate the victim's testimony and was not, in itself, evidence of misconduct or bad character. The prosecutors' description of defendant as a "sexual predator" was a logical inference from his overall behavior as shown by the victim's testimony. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

139. In defendant's sexual assault of a child case, a court did not err in admitting evidence of defendant's physical abuse of the complainant where, once the trial court determined that the physical assault evidence was admissible under Tex. Code Crim. Proc. Ann. art. 38.37, it was incumbent upon defendant to ask the trial court to exclude the evidence by its authority under Tex. R. Evid. 403, on the ground that the probative value of the evidence was nevertheless substantially outweighed by the danger of unfair prejudice; defendant did not object, and it was presumed from the record that the trial court conducted the balancing test and found the evidence more probative than prejudicial. Joseph v. State, 2004 Tex. App. LEXIS 2945 (Tex. App. Houston 1st Dist. Apr. 1, 2004).

140. In defendant's aggravated sexual assault of a child case, a court did not err in the sentencing phase, by admitting a videotape depicting him engaging in sexual activity with an unidentified adult female where the State's attempt to establish defendant's character for sexual depravity was a legitimate purpose for permitting the videotape to be shown. Moreover, even if the trial court committed error in permitting the videotape to be played to the jury, the record did not necessarily establish that defendant suffered harm from its admission; as a result of a prior felony conviction, the applicable punishment range for the conviction for indecency with a child was enhanced to the range of 5 to 99 years or life. Chambers v. State, 2004 Tex. App. LEXIS 2693 (Tex. App. Eastland Mar. 25 2004).

141. In defendant's trial on two counts of indecency with a child, testimony from defendant's ex-wife that defendant occasionally paraded around in front of his minor daughters, the complainants, in the nude with an erection was relevant under Tex. R. Evid. 401 and, thus, admissible under Tex. R. Evid. 402, and its prejudicial effect did not substantially outweigh its probative value under Tex. R. Evid. 403 because the State had to prove, beyond a reasonable doubt, that defendant had contact with the complainants and the contact was done for his sexual gratification, and because the evidence was relevant to prove sexual motive in as much as the manner that defendant acted around his own children was the only proof of defendant's possible sexual motive if the touching did in fact occur. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements

142. Probative value of the prior sexual assault was not substantially outweighed by the danger of unfair prejudice because the evidence was very compelling regarding the issue of consent as the two assaults were very similar to each other, the trial court gave a limiting instruction, the presentation of the evidence took less than a complete day of the trial, and the State needed the evidence to show that the sexual assault against the instant victim was without her consent. Morales v. State, 2014 Tex. App. LEXIS 312, 2014 WL 108770 (Tex. App. Amarillo Jan. 10 2014).

143. In a trial for defendant's sexual assault of his wife, who recanted in her trial testimony, there was no error in allowing the State to impeach the victim with a prior inconsistent statement about how she broke her nose six months before the charged assault; to the extent that defendant argued the evidence was inadmissible under under Tex. R. Evid. 403, he did not object on that basis in the trial court and the issue was waived under Tex. R. App. P. 33.1. Davis v. State, 2007 Tex. App. LEXIS 352 (Tex. App. Dallas Jan. 18 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

144. In defendant's trial for continuous sexual abuse of a child under fourteen years of age, evidence from two of the victim's cousins that defendant also molested them while they were visiting defendant and sleeping in the same bed with the victim was contextual and therefore admissible under Tex. R. Evid. 403 and 404(b). Doss v. State, 2014 Tex. App. LEXIS 5702 (Tex. App. Dallas May 28 2014).

145. In a case in which defendant was found guilty of two counts of indecency with a child for the sexual abuse of his granddaughter, a prior victim's testimony that defendant, a family friend, sexually assaulted her when she was seven years old was probative to rebut the defensive theory of fabrication and was admissible. Bible v. State, 2013 Tex. App. LEXIS 8354 (Tex. App. Beaumont July 10 2013).

146. Trial court did not abuse its discretion in a case in which defendant was convicted of continuous sexual abuse of a child, his two daughters, by admitting the testimony of an investigator for the district attorney's office over defendant's Tex. R. Evid. 403 objection because defendant's viewing of child pornography, specifically father-daughter pornography-even on a different computer than the one he used when he lived with his family-tended to corroborate the victims' testimony, and because the investigator's testimony had little potential to impress on the jury in some irrational way, as the State offered only the testimony about the searches, not the images or videos found on defendant's laptop. Moreover, the investigator's testimony took very little time to develop, and the State needed the evidence of defendant's searches for "daddy" plus "daughter" plus "images" or "videos" to lend credibility to other testimony. Watkins v. State, 2013 Tex. App. LEXIS 1512, 2013 WL 531062 (Tex. App. Fort Worth Feb. 14 2013).

147. In a trial for aggravated sexual assault on a child, there was no error under Tex. R. Evid. 403 in admitting into evidence a videotape depicting defendant and his ex-wife acting out a father/daughter fantasy. Richert v. State,

2012 Tex. App. LEXIS 7719 (Tex. App. Houston 1st Dist. Aug. 30 2012).

148. Defendant did not preserve a challenge under Tex. R. Evid. 403 to testimony regarding other acts of child sexual abuse because his only objection was under Tex. R. Evid. 404. Richert v. State, 2012 Tex. App. LEXIS 7719 (Tex. App. Houston 1st Dist. Aug. 30 2012).

149. In a trial for indecency with a child, there was no reversible error in admitting a statement by the complainant's mother about her personal feelings of guilt when she learned that the child's extra money did not come from stealing, for which she had been punished; any error was harmless because the comment was very brief and was unrelated to defendant's guilt, it was not emphasized by either side, and there was substantial evidence of guilt. Santos v. State, 2012 Tex. App. LEXIS 3360, 2012 WL 1501074 (Tex. App. Dallas Apr. 30 2012).

150. Under Tex. R. Evid. 403, 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37, § 2, the evidence of harsh discipline imposed by defendant on his four children, including the victim of the aggravated sexual assaults, was admissible because it had significant probative value as that evidence served to explain to the jury how defendant perpetrated frequent sexual assaults on his young daughter over a period of years. Soria v. State, 2012 Tex. App. LEXIS 3345, 2012 WL 1570969 (Tex. App. Amarillo Apr. 27 2012).

151. Under Tex. R. Evid. 403, the trial court did not err when it ruled that the videotape showing the struggle that occurred when the police removed defendant from his jail cell was irrelevant in the context of defendant's aggravated sexual assault charge against the child victim. Lopez v. State, 2012 Tex. App. LEXIS 676, 2012 WL 256103 (Tex. App. Corpus Christi Jan. 26 2012).

152. In defendant's sexual assault on a child case, the victim's testimony about her extraneous sexual encounters with defendant was not likely to create such prejudice in the juror's minds that they would be unable to consider the evidence for its proper purpose because the portions of her testimony detailing the prior sexual activities were short, and prior to the testimony and in the jury charge, the trial court specifically instructed the jury about how to consider evidence concerning the prior sexual encounters. Chang Hyeong Lee v. State, 2011 Tex. App. LEXIS 3623, 2011 WL 1833142 (Tex. App. Fort Worth May 12 2011).

153. In a trial for indecency with a child, there was no error under Tex. Code Crim. Proc. Ann. art. 1.04 in excluding evidence that a third person known to the complainant's mother had sex offender status. That evidence could have been found more prejudicial than probative under Tex. R. Evid. 403 because there was no evidence that the third person had any opportunity to molest the complainant. Welch v. State, 2011 Tex. App. LEXIS 2692, 2011 WL 1364970 (Tex. App. Texarkana Apr. 12 2011).

154. In a situation where a few factors weighed against admitting the testimony of two witnesses who were also abused as children by defendant, and a few factors weighed in favor of admitting their testimony, the trial court could have reasonably concluded that the witnesses' testimony was admissible under Tex. R. Evid. 403 because 1) without their testimony, the State's case would have basically come down to the victim's word against defendant's word; 2) the evidence did not tend to confuse or distract the jury as their testimony was straightforward and directly relevant to whether defendant abused the victim; 3) their testimony concerned matters easily comprehensible by laypeople; 4) the evidence was not given undue weight by the jury as the witnesses were on the stand for relatively brief periods of time; and 5) the evidence was not too time-consuming or repetitive. Gaytan v. State, 331 S.W.3d 218, 2011 Tex. App. LEXIS 444 (Tex. App. Austin Jan. 21 2011).

155. In a trial for child sexual assault, admitting testimony about a phone conversation between defendant and his priest did not violate Tex. R. Evid. 403 because defendant's statements that he was getting help and had confessed were probative of guilt, the testimony likely did not impress the jury in an irrational way, and the evidence was

necessary to rebut defendant's claim that the complainant fabricated the allegation. Gutierrez v. State, 2010 Tex. App. LEXIS 8952, 2010 WL 4484350 (Tex. App. Houston 1st Dist. Nov. 10 2010).

156. In a trial for child sexual assault, there was no error under Tex. R. Evid. 403 in admitting testimony from a forensic examiner who interviewed the complainant. The testimony was probative as it served to rebut defendant's claim that the complainant fabricated her allegations, and it did not tempt the jury to find defendant guilty on improper grounds. Gutierrez v. State, 2010 Tex. App. LEXIS 8952, 2010 WL 4484350 (Tex. App. Houston 1st Dist. Nov. 10 2010).

157. In a trial for sexual assault of a child there was no error under Tex. R. Evid. 403) when the trial court admitted extraneous-act evidence about defendant's inappropriate interaction with another student in order to rebut a defense theory of fabrication. The State's need could be found considerable, as there were no witnesses or physical evidence, and the tendency to suggest a verdict on an improper basis was counterbalanced to some extent by the trial court's limiting instruction. James v. State, 2010 Tex. App. LEXIS 1337, 2010 WL 654522 (Tex. App. Waco Feb. 24 2010).

158. In a child sexual assault case involving a victim who was 10 at the time of the offenses and 24 at the time of trial, evidence of extraneous offenses was properly admitted under Tex. R. Evid. 403, 404 to rebut defensive theories that defendant lacked opportunity and that the complainant fabricated his allegations. Given the similarities of action, place, and modus operandi, the time differential alone did not render the evidence irrelevant or lacking in probative value. Villa v. State, 2009 Tex. App. LEXIS 6965, 2009 WL 2914255 (Tex. App. Corpus Christi Aug. 31 2009).

159. In a case involving aggravated sexual assault of a child and indecency with a child, a Tex. R. Evid. 403 objection was properly overruled; a miniature dildo possessed significant probative value based on one child's allegations, the presence of condoms in a married couple's home was not prejudicial, and the prejudicial value of an adult magazine was limited since there was other evidence of pornography in the home. Rousseau v. State, 2009 Tex. App. LEXIS 380, 2009 WL 141857 (Tex. App. Eastland Jan. 22 2009).

160. In a trial for child sexual assault, there was no error under Tex. R. Evid. 403 in admitting evidence that guns and ammunition were found at the site of defendant's arrest because the evidence was probative of the victims' fear of defendant. The evidence did not divert the attention of the jury from the indicted offenses, given that it was admitted at the end of a multi-day trial in which the jury heard the details of numerous sexual assaults on several children. Harms v. State, 2008 Tex. App. LEXIS 8982 (Tex. App. Houston 14th Dist. Nov. 25 2008).

161. In a trial for child sexual assault, there was no error under Tex. R. Evid. 403 in admitting victim testimony about uncharged incidents. The evidence showed defendant's state of mind and the previous and subsequent relationship with the victims. Flores v. State, 2008 Tex. App. LEXIS 6580 (Tex. App. Amarillo Aug. 27, 2008).

162. In a trial for child sexual abuse, there was no error under Tex. R. Evid. 403 when the trial court admitted evidence of extraneous assaults on defendant's spouse, which helped to establish the complainant's belief that defendant's threats were serious. Consuelo v. State, 2008 Tex. App. LEXIS 6203 (Tex. App. Dallas Aug. 15 2008).

163. In defendant's trial for sexual indecency with a child, evidence that defendant offered the victim cocaine and that they smoked it together in a hotel room where the assault took place was not unduly prejudicial under Tex. R. Evid. 403 because there was no showing that defendant's cocaine use had the potential to impress the jury in some irrational, indelible way. Madrid v. State, 2008 Tex. App. LEXIS 5834 (Tex. App. El Paso July 31 2008).

164. In a sexual assault of a child case. did not abuse its discretion by admitting extraneous offense evidence that defendant used cocaine at the time of the offense as it was same transaction contextual evidence that the State had to introduce. The record did not show that the evidence of defendant's cocaine usage had the potential to impress the jury in some irrational, indelible way, and any prejudice suffered by defendant was to some degree counterbalanced by the complainant's drug usage and her admission she had used it before. Madrid v. State, 2008 Tex. App. LEXIS 5838 (Tex. App. El Paso July 31 2008).

165. In defendant's child sexual assault case, the court properly allowed evidence that defendant "gave" the victim to his drug dealer in lieu of payment because, although the testimony about what the drug dealer did to her and defendant's involvement might have inflamed the jury, the incident, although heinous, paled in comparison to the victim's graphic testimony about defendant's repeated sexual assaults of her, and the brief testimony about the incident with the drug dealer was followed by a specific limiting instruction Sanders v. State, 255 S.W.3d 754, 2008 Tex. App. LEXIS 3413 (Tex. App. Fort Worth 2008).

166. Although the medical records detailing the sexual assault of the 10-year-old complainant were cumulative because they contained the same information that the complainant had already testified to, they were not needlessly cumulative within the meaning of Tex. R. Evid. 403; thus, the trial court properly overruled defendant's cumulative evidence objection. Davidson v. State, 2006 Tex. App. LEXIS 9178 (Tex. App. Dallas Oct. 25 2006).

167. In a sexual assault of a child case, pursuant to Tex. Code Crim. Proc. Ann. art. 38.37, § 2, extraneous offense evidence involving previous sexual contacts between defendant and the complainant, was probative of the state of mind of defendant and the complainant, and illustrated the nature of the relationship between complainant and defendant; also, evidence of past sexual contact between the complainant and defendant placed the underlying allegations in the broader context of the relationship between the two and aided in explaining acts that would not otherwise appear plausible; thus, pursuant to Tex. R. Evid. 403, the trial court did not err in concluding that the probative value of the evidence of the extraneous offenses was not substantially outweighed by the danger of unfair prejudice and in admitting the complainant's testimony about them. Parker v. State, 2006 Tex. App. LEXIS 8834 (Tex. App. Houston 1st Dist. Oct. 12 2006).

168. In a trial for indecency with a child, it was proper to exclude evidence of conduct by the complainant's mother, such as extramarital affairs and involvement in pornography and drug abuse, because the probative value in establishing a motive for the complainant to make false accusations against defendant was low. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

169. In defendant's sexual assault of a child case, the court properly admitted expert testimony regarding sadism because the alleged abuse was sadistic in nature, the expert's testimony regarding sadism shed light on such relevant issues as how the abuse might have injured and psychologically affected the victims, how the victims might have been threatened and placed in fear, and whether any behavior the victims engaged in with each other might have been coerced. Hatter v. State, 2006 Tex. App. LEXIS 4516 (Tex. App. Austin May 26 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements

170. Trial court did not abuse its discretion in determining the admission of the photographs was not substantially more prejudicial than probative because the complainant could not recall the precise dates on which defendant had intercourse with her, but she testified that he had sex with her on the days he photographed her. Thus, the photographs established that the acts of sexual abuse occurred during a period that was 30 or more days in duration, a necessary element of the crime of continuous sexual abuse of a child. Moreno v. State, 409 S.W.3d 723, 2013 Tex. App. LEXIS 8744 (Tex. App. Houston 1st Dist. July 16 2013).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Rape : Elements

171. In an inmate's trial for the sexual assault of another inmate while both were in a trustee unit, evidence that defendant told the victim he had been in prison and was probably going back did not violate Tex. R. Evid. 403 because he was already incarcerated, and the evidence explained why the victim feared defendant, although the victim was larger. Esparza v. State, 2014 Tex. App. LEXIS 9175, 2014 WL 4179435 (Tex. App. Austin Aug. 20 2014).

172. In a sexual assault case alleging use of a date rape drug, there was no error under Tex. R. Evid. 403, 404 in admitting testimony from women other than the complainant who claimed to have been drugged by defendant. Corbo v. State, 2009 Tex. App. LEXIS 7809, 2009 WL 5551376 (Tex. App. Houston 14th Dist. Sept. 24 2009).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

173. Evidence of a police officer's administration of a modified alphabet test to defendant suspected of driving while intoxicated (DWI) was properly admitted because it was highly probative of whether defendant had the normal use of her mental faculties. The evidence did not have the potential to impress the jury in some irrational but indelible way because intoxication and, more specifically, defendant's loss of her normal mental or physical faculties was among the issues that a jury had to consider in a DWI trial, and, furthermore, the evidence was addressed for only a very brief period of time. Bergman v. State, 2005 Tex. App. LEXIS 3046 (Tex. App. Houston 1st Dist. Apr. 21 2005).

174. Trial court properly admitted intoxilyzer test results for tests that were administered approximately one hour after defendant's stop and which indicated that defendant had consumed alcohol because they tended to make it more probable that defendant was intoxicated at the time of driving under both the per se and impairment definitions of intoxication. Furthermore, the test results were not unfairly prejudicial because they related directly to a charged offense, and, as a result, the jury could not be distracted away from the charged offense regardless of the required time to present the results. Trillo v. State, 165 S.W.3d 763, 2005 Tex. App. LEXIS 2792 (Tex. App. San Antonio 2005).

175. Where defendant was tried for driving while intoxicated, the trial court did not err by admitting the breath test evidence taken approximately eighty minutes after she stopped driving showing a BAC level of 0.160 and 0.154. The breath test results were not unfairly prejudicial because the evidence related directly to the charged offense of DWI. Stewart v. State, 162 S.W.3d 269, 2005 Tex. App. LEXIS 1088 (Tex. App. San Antonio 2005).

176. Balancing all the factors, the appellate court found there was not a clear disparity between the degree of prejudice of defendant's Intoxilyzer results and their probative value. Thus, the trial court did not abuse its discretion in admitting the evidence of the results of the Intoxilyzer without extrapolation. Adams v. State, 156 S.W.3d 152, 2005 Tex. App. LEXIS 567 (Tex. App. Beaumont 2005).

177. In a trial for felony driving while intoxicated (DWI), a trial court did not violate Tex. Code Crim. Proc. Ann. art. 36.01 or Tex. R. Evid. 403 when it allowed the prosecution to refer to a stipulation in which defendant admitted to two prior DWI convictions while the indictment was being read to the jury, during voir dire, and in opening and closing arguments, because the prior convictions were elements of a felony DWI offense, and art. 36.01 suggested by negative implication that the jurisdictional elements of an offense could be read from an indictment to a jury. Hollen v. State, 117 S.W.3d 798, 2003 Tex. Crim. App. LEXIS 302 (Tex. Crim. App. 2003).

178. Where defendant offered to stipulate that jurisdictional convictions existed, the probative value of evidence of the same convictions was substantially outweighed by the danger of unfair prejudice, and under Tex. R. Evid. 403,

admission of defendant's prior DWI convictions was error; thus, under Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 37.07(2)(a), the conviction should not be based on the assumption that the accused was a criminal generally or that he was a person of bad character. Robles v. State, 85 S.W.3d 211, 2002 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 2002).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

179. In weighing the factors under Tex. R. Evid. 403, the trial court did not abuse its discretion by admitting evidence of defendant's blood alcohol concentration (BAC) without extrapolating back to the time of the offense. The BAC made it more likely that defendant had an illegal amount of alcohol in her blood at the time of the accident; the test results also helped the State establish that defendant's symptoms were due to intoxication and not the aftereffects of the crash; and the results spoke directly to the charged offense and did not impact the jury in an irrational way. Hernandez v. State, 2011 Tex. App. LEXIS 3115, 2011 WL 1631011 (Tex. App. El Paso Apr. 27 2011).

180. In a driving while intoxicated case, defendant failed to preserve an error based on Tex. R. Evid. 403 relating to a trial court's decision to grant the State's motion in limine, which sought to exclude the quantitative results of a portable breath test. Defendant did not attempt to offer the evidence, and he did not object to the trial testimony. Bookman v. State, 2008 Tex. App. LEXIS 6012 (Tex. App. Waco Aug. 6 2008).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Hit & Run Accidents : General Overview

181. In a trial for failing to stop and give information after a motor vehicle accident, defendant's objection to testimony about a wreck with a semi on relevance grounds was not sufficient to require a Tex. R. Evid. 403 balancing test. Dudley v. State, 205 S.W.3d 82, 2006 Tex. App. LEXIS 8564 (Tex. App. Tyler 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Vehicular Homicide : Elements

182. Trial court did not abuse its discretion by admitting defendant's blood alcohol test results into evidence during her intoxication manslaughter trial because: (1) the results were probative on the issue of whether defendant was intoxicated, as she denied consuming any alcohol; (2) the result was the only direct evidence establishing that defendant had consumed alcohol; (3) it was not unfairly prejudicial because it related directly the an element of the charged offense; and (4) the time to present the evidence was relatively short. Damon v. State, 2011 Tex. App. LEXIS 4017, 2011 WL 2112807 (Tex. App. Houston 1st Dist. May 26 2011).

Criminal Law & Procedure : Criminal Offenses : Weapons : General Overview

183. Trial court did not abuse its discretion by admitting testimony that the pistol used in the shooting was stolen despite defendant's Tex. R. Evid. 403 objection because the record showed that the probative force and need for the evidence was low, and there was a slight tendency that the evidence would suggest an improper basis for decision, distract the jury from the main issue, or would be given undue weight. The evidence took very little time to present and was not cumulative. Codina v. State, 2010 Tex. App. LEXIS 6550, 2010 WL 3192966 (Tex. App. Dallas Aug. 13 2010).

Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview

184. Trial court did not err by allowing the State to present evidence that defendant was in possession of a weapon the day before the murder under Tex. R. Evid. 403 because that evidence made it more probable that defendant used that gun to cause the victim's death. The evidence did not suggest a decision on an improper basis, nor did it have the tendency to confuse or distract the jury, and it did not take an inordinate amount of time to

present to the jury. Benitez v. State, 2011 Tex. App. LEXIS 9871, 2011 WL 6306643 (Tex. App. Houston 1st Dist. Dec. 15 2011).

185. In a trial for child sexual assault, there was no error under Tex. R. Evid. 403 in admitting evidence that guns and ammunition were found at the site of defendant's arrest because the evidence was probative of the victims' fear of defendant. The evidence did not divert the attention of the jury from the indicted offenses, given that it was admitted at the end of a multi-day trial in which the jury heard the details of numerous sexual assaults on several children. Harms v. State, 2008 Tex. App. LEXIS 8982 (Tex. App. Houston 14th Dist. Nov. 25 2008).

186. In a trial for possession of marihuana and a bulletproof vest, the trial court did not abuse its discretion when it admitted 11 firearms into evidence during the guilt/innocence phase of trial over defendant's Tex. R. Evid. 403 objection; the evidence was both probative and necessary as a circumstance tending to affirmatively link defendant to the bulletproof vest and marihuana, thereby helping to make more probable a fact of consequence: his knowing and intentional possession of those items. Hargrove v. State, 211 S.W.3d 379, 2006 Tex. App. LEXIS 6160 (Tex. App. San Antonio 2006).

Criminal Law & Procedure : Interrogation : General Overview

187. Probative value of defendant's statement was not substantially outweighed by the danger of unfair prejudice, given the inability of the victims to positively identify defendant and the risk that a jailhouse informant's testimony could have made him appear less than credible. Malone v. State, 2010 Tex. App. LEXIS 1786, 2010 WL 851409 (Tex. App. Fort Worth Mar. 11 2010).

Criminal Law & Procedure : Interrogation : Noncustodial Confessions & Statements

188. Motion to suppress statements given to hospital personnel after a police officer was killed was properly denied because they were not statements given as the result of an interrogation; moreover, the the probative value of the statements was not substantially outweighed by the danger of unfair prejudice since they were probative of defendant's intent and of whether defendant knew that the victim was a police officer at the time of the shooting. Escamilla v. State, 143 S.W.3d 814, 2004 Tex. Crim. App. LEXIS 1032 (Tex. Crim. App. 2004), writ of certiorari denied by 544 U.S. 950, 125 S. Ct. 1697, 161 L. Ed. 2d 528, 2005 U.S. LEXIS 2827, 73 U.S.L.W. 3569 (2005).

Criminal Law & Procedure : Discovery & Inspection : Subpoenas : Challenges & Modifications

189. Trial court did not abuse its discretion by quashing defendant's subpoena of the school principal because her testimony would not have been material, as the evidence was undisputed that defendant was absent from the scene at the school when the social worker made the decision and notified the other family members that the children would be removed. Wyatt v. State, 2012 Tex. App. LEXIS 1308, 2012 WL 512654 (Tex. App. Austin Feb. 16 2012).

Criminal Law & Procedure : Preliminary Proceedings : Pretrial Diversion : Violations

190. In a case involving a revocation of deferred adjudication community supervision, a trial court did not err in considering all of the violations alleged by the State because defendant failed to make an objection under Tex. R. Evid. 403. Campbell v. State, 2009 Tex. App. LEXIS 3009, 2009 WL 1161785 (Tex. App. Houston 1st Dist. Apr. 30 2009).

Criminal Law & Procedure : Bail : General Overview

191. Under Tex. R. Evid. 403, the evidence of defendant's bond papers for unrelated misdemeanor offenses from a house adjacent to the house where the shooting occurred was relevant and probative because (1) it established or suggested that the dwelling next to the murder scene was defendant's house or home base, which was a contested issue; and (2) it buttressed the State's argument that defendant's flight to Mexico was indicative of guilt; in addition, because the charged offense of murder was so weighty, it was unlikely that any impression that evidence might have made on the jury would overcome their judgment; furthermore, the amount of time needed to develop the evidence was low, and the need for the evidence was high as it placed defendant near the scene of the shooting and explained his flight to Mexico. Arroyo v. State, 259 S.W.3d 831, 2008 Tex. App. LEXIS 1519 (Tex. App. Tyler 2008).

Criminal Law & Procedure : Eyewitness Identification : Fair Identification Requirement

192. In an aggravated robbery case, balancing the prejudicial nature of the evidence against its probative value, the trial court did not abuse its discretion by admitting an eyewitness's tentative identification testimony where the State presented other probative identification evidence, the victim identified defendant as the robber, but defendant attacked their identification based on their initial statements to police that the robber was Hispanic. Accordingly, the State needed the witness's tentative identification testimony to help prove the contested issue of identity. McKnight v. State, 2005 Tex. App. LEXIS 4205 (Tex. App. Dallas June 1 2005).

Criminal Law & Procedure : Eyewitness Identification : Photo Identifications

193. Identification of defendant by the witness who stated that she was afraid to identify defendant from a photo lineup was highly probative evidence for the State in the murder case, and while certainly prejudicial to defendant, it was not unfairly prejudicial under Tex. R. Evid. 403. Benavides v. State, 2012 Tex. App. LEXIS 4971, 2012 WL 2353731 (Tex. App. Dallas June 21 2012).

Criminal Law & Procedure : Pretrial Motions & Procedures : Joinder & Severance : Severance of Offenses

194. In a murder trial, there was no "effective denial" of defendant's severance right when the trial court admitted evidence of the purported attempt to dispose of the body. Although relevant to a severed charge for tampering with evidence, the evidence was also relevant to the murder charge and under Tex. R. Evid. 403 was not unduly prejudicial, given that it was clear that defendant did not physically participate in transporting or disposing of the body. King v. State, 189 S.W.3d 347, 2006 Tex. App. LEXIS 2100 (Tex. App. Fort Worth 2006).

Criminal Law & Procedure : Guilty Pleas : Admissibility at Trial

195. Trial court did not abuse its discretion in admitting defendant's letter to an officer regarding his plea agreement because the statements were not covered by Tex. R. Evid. 410. In addition, the letter's probative value was not substantially outweighed by the risk of unfair prejudice under Tex. R. Evid. 403 because: (1) the letter was probative of whether defendant committed the charged offense; (2) given the brevity and clarity of the letter and the fact that it was directly related to the charged offense, the amount of time required to develop it was negligible; and (3) the letter was important to the prosecution's case and had a significant tendency to make defendant's guilt more probable. Willis v. State, 2010 Tex. App. LEXIS 5931, 2010 WL 2935772 (Tex. App. San Antonio July 28 2010).

196. In a murder trial, no harm occurred when the trial court admitted tape-recorded phone conversations that included defendant's statement about a plea offer on an unrelated offense; defendant's remark was in the middle of the State's first tape-recorded conversation, it was not singled out at trial, and the State did not attempt to introduce other evidence regarding the previous offense. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

197. Defendant failed to prove that his trial counsel was ineffective for failing to object to 214 pages of allegedly improper character evidence contained in the presentence investigation report because: (1) defendant failed to rebut the presumption that his counsel's decisions were reasonable, as there was no evidence from counsel explaining his actions; (2) defendant did not show that counsel's performance was deficient as he cited no authority supporting his argument that the number of statements was unfairly prejudicial under Tex. R. Evid. 403; and (3) defendant failed to show that his 20-year sentence for intoxication manslaughter would have been different, as defendant was drunk when he drove over 90 miles per hour on a highway, hitting two cars and killing the victim. Sanchez v. State, 2013 Tex. App. LEXIS 822, 2013 WL 328954 (Tex. App. Houston 14th Dist. Jan. 29 2013).

198. Counsel was not ineffective for failing to object to the State's offer of four extraneous offenses during sentencing and affirmatively stipulating to their admissibility because the record was silent concerning counsel's reasons for not objecting and counsel could have concluded that an objection would have been overruled. Crocker v. State, 441 S.W.3d 306, 2013 Tex. App. LEXIS 643, 2013 WL 269122 (Tex. App. Houston 1st Dist. Jan. 24 2013).

199. Where the record was silent as to why defense counsel elected not to object during the penalty phase of trial to the admission of evidence concerning defendant's assaults of his girlfriend, a reviewing court could not say that counsel was ineffective for failing to object to the evidence on the ground that its relevance was substantially outweighed by the danger of unfair prejudice. Arnolie v. State, 2012 Tex. App. LEXIS 2673 (Tex. App. Houston 1st Dist. Apr. 5 2012).

200. In a case in which a jury had convicted a habeas corpus applicant of possession of a controlled substance, methamphetamine, in the amount of 200 grams or more, but less than 400 grams, applicant demonstrated that trial counsel was deficient at the punishment stage of trial because counsel failed to: (1) object to a DEA agent's testimony on the dangers and societal costs caused by methamphetamine constituted deficient performance; (2) request pre-trial notice of the State's experts; (3) determine that a DEA agent would testify about methamphetamine addiction; (4) properly object to the agent's testimony about addiction and the number of people who could get high from the methamphetamine that applicant possessed; and (5) call an expert in rebuttal. During the punishment stage of trial, the prosecutors asked for a life sentence, relying heavily on the objectionable testimony that was introduced during both phases of trial, and because applicant had received a life sentence, the maximum sentence available for her offense, she had shown that there was a reasonable probability--one sufficient to undermine confidence in the result--that the outcome at the punishment stage would have been different but for her counsel's deficient performance. Ex Parte Lane, 303 S.W.3d 702, 2009 Tex. Crim. App. LEXIS 1750 (Tex. Crim. App. 2009).

201. Habeas petitioner's counsel's failure to object to the admission of evidence that the petitioner had used and sold illegal drugs roughly 10 years before his arrest for sex crimes was not relevant to the jury's sentencing determination. Any probative value the petitioner's involvement with illegal drugs may have had with respect to determining the appropriate length of the petitioner's sentence was far outweighed by the danger that it would give rise to unfair prejudice. Ward v. Dretke, 420 F.3d 479, 2005 U.S. App. LEXIS 16596 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1621, 164 L. Ed. 2d 334, 2006 U.S. LEXIS 2520, 74 U.S.L.W. 3543 (U.S. 2006).

202. Habeas petitioner's counsel's failure to object to the admission during the jury's sentencing determination of images of adult bestiality taken from the petitioner's computer. The images did not form part of the factual basis for the charges to which the petitioner had plead guilty, and had no relevance to the jury's sentencing determination apart from demonstrating the depths of depravity to which the petitioner had sunk; even if the evidence were relevant in some tangential way to the determination of his sentence, it was highly probable that considerations of unfair prejudice would have sufficed to keep this evidence from the jury. Ward v. Dretke, 420 F.3d 479, 2005 U.S. App. LEXIS 16596 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1621, 164 L. Ed. 2d 334, 2006 U.S. LEXIS 2520, 74 U.S.L.W. 3543 (U.S. 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Tests

203. In a trial for aggravated-sexual assault of a child, counsel was not rendered ineffective by failing to object to evidence of extraneous acts against the same victim because the evidence was probative of defendant's relationship with the victim (his nephew), increased the probability that defendant would have felt sufficiently confident to assault the victim on the date charged, and helped explain why there was a delay in the victim's outcry. Burke v. State, 371 S.W.3d 252, 2011 Tex. App. LEXIS 8368, 2011 WL 5023008 (Tex. App. Houston 1st Dist. Oct. 20 2011).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

204. In case where defendant was convicted of felony murder and intentionally or knowingly causing serious bodily injury to a child, her daughter, counsel's failure to object to the testimony of defendant's sister that she once observed defendant strike the child with a belt did not constitute ineffective assistance because the trial court could have concluded that the probative value of the sister's testimony was not substantially outweighed by the risk of unfair prejudice to defendant as the testimony was probative not only as to the type of discipline defendant imposed on the child but also as to defendant's credibility because she told an officer that she only physically disciplined the child with her hand. Sandoval v. State, 2014 Tex. App. LEXIS 8608 (Tex. App. Houston 14th Dist. Aug. 7 2014).

205. Defendant did not show that his trial counsel was ineffective for failing to specifically include a Tex. R. Evid. 403 objection in his objection to testimony because trial counsel reasonably could have concluded that the testimony described past criminal behavior and not just inchoate statements. Perkins v. State, 2013 Tex. App. LEXIS 15003, 2013 WL 6569874 (Tex. App. Houston 1st Dist. Dec. 12 2013).

206. Counsel was not ineffective for failing to object to evidence that defendant viewed pornography and consumed alcohol under Tex. R. Evid. 403 because the failure to object could have been based on trial strategy and therefore the court had to presume counsel's performance was adequate. Weeks v. State, 2013 Tex. App. LEXIS 1428, 2013 WL 557015 (Tex. App. Texarkana Feb. 14 2013).

207. In defendant's unlawful possession of a firearm by a felon case, counsel was not ineffective for failing to object to the admission of defendant's prior felonies because counsel could have concluded that it would be better for the jury to be aware that the prior convictions had been for nonviolent offenses such as failing to register as a sex offender than to have the jury potentially be concerned about a violent felon possessing a gun. Tapps v. State, 2008 Tex. App. LEXIS 2809 (Tex. App. Austin Apr. 17 2008).

208. Even though it was error to admit evidence of defendant's prior conviction of felony driving while intoxicated (DWI), the inmate could not show that he was prejudiced, and therefore the inmate's petition for a writ of habeas corpus under Tex. Code Crim. Proc. Ann. art. 11.072 was properly denied, because the convictions were read to the jury from the indictment at the beginning of the trial and in the jury charge and the indictment instructed the jury to disregard the previous convictions in deciding whether the inmate was guilty of the current DWI. Ex parte Thompson, 2007 Tex. App. LEXIS 7190 (Tex. App. Corpus Christi Aug. 30 2007).

209. Defense counsel was not ineffective for failing to request that the trial court conduct a balancing test under Tex. R. Evid. 403 because the trial court rejected defendant's Tex. R. Evid. 403 objection, and therefore the court presumed that the trial court did conduct a balancing test. Hassenplug v. State, 2007 Tex. App. LEXIS 4998 (Tex. App. Houston 14th Dist. June 28 2007).

210. In a drug trial, counsel was not rendered ineffective by failing to object under Tex. R. Evid. 403 to the admission of photographs of defendant's nephew and testimony that the appearance of track-marks on one's inner arm indicated the use of intravenous drugs; even if the testimony was objectionable, no harm resulted from

counsel's failure to object because there was no reasonable probability that the evidence contributed to the conviction. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

211. In a drug trial, counsel was not rendered ineffective by failing to object to an officer's statement that people associated with methamphetamine labs were dangerous because the statement provided support for the reasonableness of the officers' protective sweep and initial detention of the suspects; the probative value was not outweighed by any danger that the jurors would infer that defendant was dangerous because "dangerousness" was not an element of the crimes charged. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

212. In a murder case, counsel was not ineffective for failing to object under Tex. R. Evid. 403 to a witness' impeachment with a prior inconsistent statement under Tex. R. Evid. 607 because defendant did not show that the State called the witness with the primary intent of placing inadmissible substantive evidence in front of the jury. Torres v. State, 2006 Tex. App. LEXIS 10181 (Tex. App. Dallas Nov. 29 2006).

213. In a murder case, as defendant offered no evidence that his counsel's decision not to request a limiting instruction and a corresponding jury instruction on reasonable doubt with respect to extraneous offense offenses introduced by the State fell below an objective standard of reasonableness under prevailing professional norms, he failed to show his counsel was ineffective; the decision not to do so could have been valid trial strategy. Given that defendant had previously testified in his defense that he had never before choked his wife, he could not show that the trial court would have committed an error in overruling a Tex. R. Evid. 403 objection as the extraneous evidence could have been used to rebut a defensive theory. Mendez v. State, 2005 Tex. App. LEXIS 6192 (Tex. App. Corpus Christi Aug. 4 2005).

214. In a criminal prosecution for indecency with a child, defendant failed to show that his trial counsel was ineffective for failing to object to the introduction into evidence of his mental health records, which defendant claimed contained evidence of inadmissible extraneous bad conduct. Defendant was not prejudiced by the admission of the mental health records, because the victim's testimony alone was sufficient to support his conviction. Taylor v. State, 2004 Tex. App. LEXIS 4581 (Tex. App. Dallas May 20 2004).

215. In a driving while intoxicated case, counsel was not ineffective for failing to object to a recording of defendant's postarrest phone conversation where, during the conversation, defendant was argumentative and used offensive language; the conversation was relevant because it provided a physical exemplar of defendant's demeanor and manner of speech, which could have been used by the jury as evidence of defendant's intoxication level. Campbell v. State, 2004 Tex. App. LEXIS 3509 (Tex. App. San Antonio Apr. 21 2004).

Criminal Law & Procedure : Trials : Closing Arguments : General Overview

216. Defendant failed to preserve error as to improper jury argument about his arrest because he failed to raise that objection at trial and because other evidence about his arrest was admitted without objection. Gonzales v. State, 2006 Tex. App. LEXIS 4020 (Tex. App. Corpus Christi May 11 2006).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

217. In an assault case, there was no reversible error based on hearsay, relevance, undue prejudice, improper opinion, and violations of the confrontation clause because the challenged evidence had come in during other portions of the trial without objection. Hecht v. State, 2009 Tex. App. LEXIS 521, 2009 WL 200979 (Tex. App. Dallas Jan. 29 2009).

218. Trial court did not abuse its discretion by limiting defendant's cross-examination of the child victim by prohibiting questions about prior molestation accusations and threats made by the victim to impeach his credibility because the trial court could have reasonably concluded that the evidence was inadmissible under Tex. R. Evid. 608 and that the Confrontation Clause did not mandate its admission; the alleged false accusations the victim made towards others occurred over a year after the instant offense by defendant, there was no evidence at trial that the victim had a propensity to lie, and the victim denied making any threats or accusations; the victim's testimony concerning false accusations was likely to unduly prejudice and confuse the jury because the record indicated that his threats were not identical to his accusation against defendant. Billodeau v. State, 2007 Tex. App. LEXIS 4462 (Tex. App. Houston 1st Dist. June 7 2007).

219. Officer testified as to statements defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified; even if the State called the complainants to testify so that otherwise inadmissible prior inconsistent statements could be admitted, there was no harm committed because the jury had already heard the substance of the complainants' statements through a police officers' statements. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Due Process

220. In defendant's child sexual abuse case, defendant's right to present a defense was not violated by the exclusion of "alternative perpetrator" evidence because the fact that the "alternative perpetrator" abused his sister when she was between two and five years old, or that he admitted to sexually abusing children at his church, did not show that he committed any crime against the victim; defendant established no nexus between the "alternative perpetrator" and the crime charged, and the threat of confusing the jury with speculative, meager evidence was too high to properly admit the evidence. Ramirez v. State, 2006 Tex. App. LEXIS 7156 (Tex. App. Houston 14th Dist. Aug. 15 2006).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

221. Trial court did not impermissibly restrict appellant's right to cross-examine the State's psychologist about his rate of error during proceedings to commit him as a sexually violent predator because it could have reasonably concluded that the jury would have been confused. In re Alexander, 2013 Tex. App. LEXIS 12077, 2013 WL 5425557 (Tex. App. Beaumont Sept. 26 2013).

222. Trial court did not abuse its discretion in limiting defendant's cross-examination of a child sexual assault complainant regarding his threats to falsely accuse a neighbor and her adult son of molestation where the trial court could have reasonably concluded that the evidence was inadmissible under Tex. R. Evid. 608 and that the Confrontation Clause did not mandate its admission because the alleged threats, which the complainant denied having made, took place over a year after the instant offense by defendant, there was no evidence at trial that the complainant had a propensity to lie or a vengeful temper toward adults prior to or upon the complainant's allegation toward defendant, and the complainant's threats against the neighbor and her son were not identical, as defendant urged, to the complainant's accusation against defendant. Billodeau v. State, 263 S.W.3d 318, 2007 Tex. App. LEXIS 6404 (Tex. App. Houston 1st Dist. 2007).

223. Court did not violate defendant's right to confrontation under the Sixth Amendment in a sexual assault on a child case by limiting cross examination of the victim and his mother about the victim's alleged behavioral problems because the evidence in question was not relevant to punishment under Tex. Code Crim. Proc. Ann. art. 37.07; in addition, because Tex. R. Evid. 403 fell within the exceptions to the Confrontation Clause, the trial court did not violate the Confrontation Clause in limiting defendant's cross examination. Dinger v. State, 2007 Tex. App. LEXIS

4767 (Tex. App. Tyler June 20 2007).

224. During defendant's trial for indecent exposure, the trial court properly excluded evidence that the victim called the police regarding various disturbances at her residence on several occasions following the report of exposure because the decision was within the zone of reasonable disagreement; the trial court maintained broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative and collateral evidence, and, under Tex. R. Evid. 608(b), specific instances of conduct, other than conviction of a crime, when offered to attack the witness's credibility could not be explored on cross-examination. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

Criminal Law & Procedure : Trials : Judicial Discretion

225. Court of appeals failed to properly defer to a trial court's decision where the trial court was within its discretion to hold that the probative value of evidence of a handgun and of defendant's parole status was not substantially outweighed by the danger of unfair prejudice, given that the jury was not informed of the crime for which defendant was on parole, that the strength or weakness of the handgun's connection to defendant reflected equally on the issues of probative value and prejudice, and that there was reason to believe that the State had a significant need for the evidence. Powell v. State, 189 S.W.3d 285, 2006 Tex. Crim. App. LEXIS 681 (Tex. Crim. App. 2006).

226. Admission of photographic evidence is committed to the discretion of the trial court. Turner v. State, 2004 Tex. App. LEXIS 7903 (Tex. App. Austin Aug. 31 2004).

Criminal Law & Procedure : Trials : Motions for Mistrial

227. Trial court did not err in denying a mistrial in an aggravated assault case because an instruction to disregard was sufficient to cure any prejudice resulting from the prosecutor's asking a witness whether she was aware of other shootings that had taken place in the area and the witness' reply that she had heard about it; there was no Tex. R. Evid. 404(b) violation because defendant was not clearly implicated in an extraneous offense, and the question was not extremely inflammatory under Tex. R. Evid. 403. Holland v. State, 2006 Tex. App. LEXIS 6584 (Tex. App. Beaumont July 26 2006).

Criminal Law & Procedure : Trials : Prison Attire & Restraints

228. Video (but not audio) of defendant's interview with a detective was properly excluded because the jury could discern that defendant was in custody, given the venue; his ill-fitting, monochrome jail uniform with the name of a county jail stenciled on the back; and a plastic identification bracelet. The court deferred to the trial court's finding that the probative value was diminished by the State's ability to recreate defendant's pantomime of the events in question through its witness. State v. Pringle, 2013 Tex. App. LEXIS 7671 (Tex. App. Tyler June 25 2013).

Criminal Law & Procedure : Witnesses : Credibility

229. Defendant was convicted for organized criminal activity based on gambling promotion, because he organized a raffle drawing to benefit his political campaign, his employees distributed and sold raffle tickets, and defendant deposited the ticket sales proceeds into his bank account. The trial court did not err by excluding evidence attacking the credibility of the State's witnesses who were defendant's former employees, because the jury was aware that all three witnesses had possible motives to make false accusations; the evidence tended to be needlessly cumulative, risked confusion of the issues, or misleading the jury. Evans v. State, 2014 Tex. App. LEXIS 1430, 2014 WL 425613 (Tex. App. Dallas Jan. 31 2014).

230. Court properly limited cross-examination of a witness because defendant's attempt to use an instance during an officer's career in which he wrote "phantom" warning citations was nothing more than an instance of wrongdoing in his life and was not shown to bear on his general reputation for truthfulness. There was nothing which revealed that the act of wrongdoing created a bias on the part of the officer against defendant or caused the officer to have a motive to testify untruthfully. McMillon v. State, 294 S.W.3d 198, 2009 Tex. App. LEXIS 6238 (Tex. App. Texarkana Aug. 12 2009).

Criminal Law & Procedure : Witnesses : Impeachment

231. Trial court did not err during defendant's trial for indecency with a child when it allowed the prosecutor, for the limited purpose of impeachment, to question the victim's mother about her knowledge of defendant's prior convictions for aggravated sexual assault of two other children because the mother's testimony on direct examination by defendant's counsel that she had no reason to suspect that defendant would abuse her children opened the door and put at issue her credibility. Delacruz v. State, 2013 Tex. App. LEXIS 13492, 2013 WL 5890796 (Tex. App. Eastland Oct. 31 2013).

232. Because a witness's testimony was admissible only to rebut defendant's statement of good conduct with minors, a court should have given an instruction to use the testimony only in assessing defendant's credibility, not as proof that he committed the offense or as proof of a plan to have a sexual relationship with the victim. Daggett v. State, 187 S.W.3d 444, 2005 Tex. Crim. App. LEXIS 2127 (Tex. Crim. App. 2005).

233. In an assault case, a trial court did not err by excluding evidence regarding a victim's suspicions that defendant was seeing another woman because, although the issue was properly preserved when defense counsel established the general subject matter of the intended cross-examination, the evidence did not show evidence of a mental condition; moreover, the evidence was cumulative at any rate because the victim had given direct testimony about mental illness. Mumphrey v. State, 155 S.W.3d 651, 2005 Tex. App. LEXIS 370 (Tex. App. Texarkana 2005).

234. Where defendant was tried for murdering the victim in exchange for his wife's promise for a share of the insurance proceeds, the State's failure to charge the wife was irrelevant to the credibility of the State's key witness, defendant's girlfriend. The trial court did not abuse its discretion in excluding the proffered impeachment evidence. Day v. State, 2004 Tex. App. LEXIS 6238 (Tex. App. Austin July 15 2004).

Criminal Law & Procedure : Witnesses : Presentation

235. Defendant was not entitled to any relief as to his conviction for burglary of a habitation because Tex. R. App. P. 33.1 provided that defendant waived the right to challenge the admission of the evidence of his accomplice's conviction for the burglary at defendant's trial by arguing at trial that the evidence of the accomplice's conviction was not relevant and raising the different argument on appeal that the evidence was inadmissible under Tex. R. Evid. 403 because its prejudicial effect outweighed its probative value. Evans v. State, 2002 Tex. App. LEXIS 2705 (Tex. App. Amarillo Apr. 15 2002).

Criminal Law & Procedure : Witnesses : Sequestration

236. Defendant's objection under Tex. R. Evid. 403 to the presence of the complainants at the punishment phase of trial did not comport with his appellate argument under Tex. Code Crim. Proc. Ann. arts. 36.06, 36.03 and Tex. R. Evid. 614, as required to preserve the issue. Reed v. State, 2012 Tex. App. LEXIS 1650, 2012 WL 662327 (Tex. App. Waco Feb. 29 2012).

Criminal Law & Procedure : Defenses : General Overview

237. Court properly excluded defendant's "alternative perpetrator" evidence because, although defendant suggested that the testimony of a witness raised the possibility that the child was injured before the time that defendant babysat for her, the testimony by the other witnesses offered no corroboration to that theory. To the extent that the proffered evidence would have been even marginally relevant to the defense theory, the trial court could have reasonably concluded that its probative value was substantially outweighed by confusing the issues or misleading the jury. Contreras v. State, 2009 Tex. App. LEXIS 91, 2009 WL 50601 (Tex. App. El Paso Jan. 8 2009).

238. Although defendant's proffered alternative perpetrator evidence was relevant under Tex. R. Evid. 401 because identity was a material issue in the case and vigorously contested at defendant's aggravated robbery trial, and although there was no danger that the evidence would create a side issue that would unduly distract the jury from the main issues under Tex. R. Evid. 403 because the evidence addressed a material issue in the case, the trial court's exclusion of the evidence was not error because defendant failed to show the required nexus between the alleged alternative perpetrator and the offense-at-issue. Dickson v. State, 246 S.W.3d 733, 2007 Tex. App. LEXIS 9859 (Tex. App. Houston 14th Dist. 2007).

Criminal Law & Procedure : Defenses : Right to Present

Criminal Law & Procedure : Defenses : Alibi

239. Officer was properly allowed to testify that defendant's alibi witness had stated that defendant was his boyfriend; the legitimate basis for the introduction of that statement was its impeachment value as a prior inconsistent statement indicating a closer emotional tie between the witness and defendant than the witness had admitted; the reviewing court was unconvinced that the suggestion of homosexuality impressed the jury in some irrational way and unfairly prejudiced the defense. McKay v. State, 2006 Tex. App. LEXIS 6736 (Tex. App. Tyler July 31 2006).

240. Extraneous offense evidence was properly admitted under Tex. R. Evid. 404(b) and 403 to refute defendant's alibi. Casique v. State, 2005 Tex. App. LEXIS 6517 (Tex. App. El Paso Aug. 16 2005).

Criminal Law & Procedure : Defenses : Burdens of Proof

241. In a murder trial, alternative perpetrator evidence was properly excluded under Tex. R. Evid. 403 because defendant did not contend that the proffered evidence even identified a particular alternative perpetrator, much less that the asserted perpetrator committed some act directly connecting him or her with the murder. Mendez v. State, 2009 Tex. App. LEXIS 7652, 2009 WL 3127483 (Tex. App. Amarillo Sept. 30 2009).

Criminal Law & Procedure : Defenses : Diminished Capacity

242. Defendant who killed his brother with a hammer and who presented evidence of mental illness under Tex. Code Crim. Proc. Ann. art. 38.36(a) was not then entitled to argue to the jury that defendant did not have the capacity to intentionally or knowingly perform the act. This evidence still had to meet the admissibility requirements of Tex. R. Evid. 403. Jackson v. State, 160 S.W.3d 568, 2005 Tex. Crim. App. LEXIS 568 (Tex. Crim. App. 2005).

Criminal Law & Procedure : Defenses : Necessity

243. In defendant's aggravated kidnapping case, the court did not err by excluding evidence going to her professed motive to "protect her son" because the evidence would have interjected into trial an emotionally charged set of collateral issues with great potential to confuse and mislead the jury. Additionally, defendant failed to present

legally sufficient evidence that she "reasonably believed" kidnapping the child was "immediately necessary" to avoid "imminent harm." Dewalt v. State, 307 S.W.3d 437, 2010 Tex. App. LEXIS 423 (Tex. App. Austin Jan. 22 2010).

Criminal Law & Procedure : Defenses : Right to Present

244. Defendant failed to preserve for review her claim that she was deprived of her right to present a complete defense under the Sixth Amendment due to the fact that the trial court excluded from evidence a videotaped interview with the victim because at trial defendant relied on Tex. R. Evid. 404(b) but never asserted her right to present a complete defense and did not cite the Holmes case; her attorney's statement at the end of his bill of exception that defendant was denied her constitutional rights was insufficient preserve the Holmes issue for appeal. Even if the issue had been preserved, defendant failed to show that any constitutional error occurred because the trial court excluded the videotape based on Tex. R. Evid. 403 and the substance of the defense, that the videotape would have enabled the jury to judge whether the victim initially failed to implicate her mother because she was truly afraid, was presented to the jury, through cross-examination of the victim and a caseworker. Sanchez v. State, 2011 Tex. App. LEXIS 10169, 2011 WL 6916418 (Tex. App. El Paso Dec. 28 2011).

Criminal Law & Procedure : Defenses : Self-Defense

245. Trial court did not abuse its discretion by excluding evidence of defendant's prior assault of another victim during his trial on charges of aggravated assault and manslaughter under Tex. R> Evid. 403 because it had high probative value on the issue of whether defendant was the aggressor in the instant offense. The prior crime was similar to the charged offenses and occurred only six months before the charged crimes. Render v. State, 347 S.W.3d 905, 2011 Tex. App. LEXIS 6623 (Tex. App. Eastland Aug. 18 2011).

246. In an assault trial, there was no error under Tex. R. Evid. 403 and 404(b) in admitting evidence of an assault that defendant committed against his common-law wife to rebut his theory of self-defense. White v. State, 2010 Tex. App. LEXIS 5604, 2010 WL 2803018 (Tex. App. Eastland July 15 2010).

247. Because the extraneous-offense evidence was relevant to disprove defendant's claim of self-defense, the appellate court could not say the trial court abused its discretion in admitting the evidence on that basis; the foregoing evidence was probative and not substantially outweighed by unfair prejudice, where the extraneous offenses were similar to the charged offense and were therefore probative on the critical point at issue, defendant's status as an aggressor. Diogu v. State, 2004 Tex. App. LEXIS 7123 (Tex. App. Houston 14th Dist. Aug. 10 2004), appeal dismissed by 2006 Tex. App. LEXIS 184 (Tex. App. Houston 14th Dist. Jan. 12, 2006).

248. In the assault trial of a father who shot his son, the trial court properly excluded a post-shooting psychological evaluation of the son, and any evidence of the son's violent nature that surfaced after the shooting was at best only minimally relevant and was outweighed by the danger of unfair prejudice or confusion of the issues concerning the father's assertion of self-defense. Iverson v. State, 2004 Tex. App. LEXIS 7007 (Tex. App. Texarkana Aug. 2 2004).

Criminal Law & Procedure : Scienter : General Overview

249. In a trial for intoxication manslaughter, there was no error under Tex. R. Evid. 403 in excluding expert testimony on defendant's mental state. Bayas v. State, 2011 Tex. App. LEXIS 5306, 2011 WL 2714114 (Tex. App. El Paso July 13 2011).

Criminal Law & Procedure : Scienter : General Intent

250. Trial court did not err in admitting evidence of extraneous assaults where they had sufficient similarities to the charged offense to have been introduced to show intent, and under the doctrine of chances those offenses had a multiplicative effect where each additional offense made the issue of intent more compelling, and the prejudicial effect of the evidence did not outweigh its probative value. Rickerson v. State, 138 S.W.3d 528, 2004 Tex. App. LEXIS 4884 (Tex. App. Houston 14th Dist. 2004).

Criminal Law & Procedure : Scienter : Knowledge

251. Trial court did not err in admitting items used in the manufacture of methamphetamine and amphetamine in the case against defendant for possession of amphetamine as these items went to the issue of knowledge or criminal intent which was an element in the possession case; thus the probative value of the items were not outweighed by their potential for prejudice. Popp v. State, 2005 Tex. App. LEXIS 631 (Tex. App. Waco Jan. 26 2005).

Criminal Law & Procedure : Scienter : Specific Intent

252. Photographs of a victim who was shot in the eye, shown with her eyelid closed, were properly admitted because their prejudicial weight, if any, did not overcome their probative value with regard to the issue of transferred intent. Tucker v. State, 2013 Tex. App. LEXIS 6588 (Tex. App. Fort Worth May 30 2013).

Criminal Law & Procedure : Jury Instructions : Curative Instructions

253. In a case in which defendant was convicted of robbery under Tex. Penal Code Ann. § 29.02, although defendant argued that the trial court erred in admitting over defense objection evidence of an extraneous offense, the robbery of another bank, during the State's case-in-chief, defendant did not explain in his briefing, nor did a reviewing court find evidence in the record, that a federal agent's fleeting reference to the other robbery was so inflammatory that it could not have been cured by the trial court's instruction. Accordingly, any possible error in admitting the testimony about the other robbery was cured by the trial court's instruction to disregard. Johnson v. State, 2009 Tex. App. LEXIS 3337, 2009 WL 1331857 (Tex. App. Houston 1st Dist. May 14 2009).

254. Trial court did not err in denying a mistrial in an aggravated assault case because an instruction to disregard was sufficient to cure any prejudice resulting from the prosecutor's asking a witness whether she was aware of other shootings that had taken place in the area and the witness' reply that she had heard about it; there was no Tex. R. Evid. 404(b) violation because defendant was not clearly implicated in an extraneous offense, and the question was not extremely inflammatory under Tex. R. Evid. 403. Holland v. State, 2006 Tex. App. LEXIS 6584 (Tex. App. Beaumont July 26 2006).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

255. In drug and robbery case, although defendant's relevancy objection to evidence of other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

256. Defendant was not entitled to any relief as to his conviction for burglary of a habitation because Tex. R. App. P. 33.1 provided that defendant waived the right to challenge the admission of the evidence of his accomplice's conviction for the burglary at defendant's trial by arguing at trial that the evidence of the accomplice's conviction was not relevant and raising the different argument on appeal that the evidence was inadmissible under Tex. R.

Evid. 403 because its prejudicial effect outweighed its probative value. Evans v. State, 2002 Tex. App. LEXIS 2705 (Tex. App. Amarillo Apr. 15 2002).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence

257. On review of appellant's conviction for aggravated sexual assault of a child, claims that the trial court erred under Tex. R. Evid. 403, by admitting evidence of threats the appellant made to child, were waived for failure to object at trial, and even if the claims had been preserved for review, limiting instructions given to the jury overruled any unfair prejudice. Mark v. State, 2003 Tex. App. LEXIS 879 (Tex. App. Houston 14th Dist. Jan. 30 2003).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : Eligibility

258. FBI agent's testimony was admissible under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) as it reflected defendant's ongoing relationship, or defendant's willingness to maintain an ongoing relationship, with a known fugitive and was probative of defendant's character and suitability for community supervision, but it was not unfairly prejudicial under Tex. R. Evid. 403. Jeffs v. State, 2012 Tex. App. LEXIS 3779, 2012 WL 1660612 (Tex. App. Austin May 10 2012).

259. In an aggravated sexual assault case, a trial court did not err by allowing evidence during the punishment phase under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) that defendant had molested another young girl 10 years after the crimes for which he was convicted because such evidence was useful in deciding if he was a good candidate for probation. The testimony of the girl who was the victim of the extraneous offense was sufficient to prove the occurrence of that assault, and the jury assessed only a mid-range punishment. Jackson v. State, 2009 Tex. App. LEXIS 6443, 2009 WL 2517306 (Tex. App. Tyler Aug. 19 2009).

Criminal Law & Procedure : Sentencing : Appeals : Appealability

260. By failing to object, defendant waived any error in the admission of evidence of a prior conviction for aggravated robbery at the punishment phase of trial. Williams v. State, 2014 Tex. App. LEXIS 6191, 2014 WL 2592991 (Tex. App. Houston 1st Dist. June 10 2014).

Criminal Law & Procedure : Sentencing : Appeals : Standards of Review : General Overview

261. In the sentencing phase of a trial for possession of cocaine, it was error under Tex. R. Evid. 403 to admit testimony from an officer on the impact of cocaine use on the community. However, the error was harmless because defendant was sentenced to 30 years when the range 5 to 99 years, there was abundant evidence on which the jury could have based its assessment of punishment, and the negative impact of drug use on the community was common knowledge. Rowell v. State, 2009 Tex. App. LEXIS 3386, 2009 WL 1364351 (Tex. App. Austin May 14 2009).

Criminal Law & Procedure : Sentencing : Capital Punishment : General Overview

262. Even if a reverend's testimony regarding how the death penalty was carried out, how it affected those who assisted in carrying it out, and how it affected the families of the crime victims could be viewed as marginally relevant, the trial court was within its discretion to exclude it under Tex. R. Evid. 403 because the evidence was not particularized to defendant, and therefore the trial court might have reasonably concluded that the risk of confusing and distracting the jury substantially outweighed any probative value the evidence might have had. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances

263. Trial court did not err by admitting during sentencing an audio recording of jokes defendant told his brother on the telephone while in jail over his First Amendment objection because it was within the zone of reasonable disagreement that the evidence was indicative of defendant's character and thus relevant to the issue of future dangerousness; the jocks, which defendant told after raping, beating, and murdering a 15-year-old girl showed that he found the topics of violence and disrespect towards women to be humorous. The evidence was relevant under Tex. R. Evid. 401 because it had a tendency to make the existence of defendant's future dangerousness more probable, and it was not so prejudicial that there was a clear disparity between the degree of prejudice and its probative value. Davis v. State, 329 S.W.3d 798, 2010 Tex. Crim. App. LEXIS 1207 (Tex. Crim. App. 2010).

Criminal Law & Procedure : Sentencing : Capital Punishment : Mitigating Circumstances

264. In a capital murder case, a court did not err by excluding testimony in mitigation of punishment regarding a history of family sexual abuse of multiple generations of children in defendant's family because the fact that others in defendant's family were abused did not by itself make him more or less morally culpable for the crime for which he was on trial, nor did it, by itself, make a jury's finding of mitigation any more or less probable than it would have been without the evidence. Shuffield v. State, 189 S.W.3d 782, 2006 Tex. Crim. App. LEXIS 365 (Tex. Crim. App. 2006).

265. Victim impact testimony was admissible as relevant to a mitigation special issue under Tex. R. Evid. 403 as the testimony was neither prejudicial nor cumulative. Jackson v. State, 992 S.W.2d 469, 1999 Tex. Crim. App. LEXIS 42 (Tex. Crim. App. 1999).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History

266. Appellant waived error in the State's admission of juvenile adjudications during the punishment phase of trial without prior identification. Defense counsel stipulated to appellant's identity for prior convictions and her objection to admission of the prior offenses based on Tex. R. Evid. 403, 404 was overruled. Lynch v. State, 2005 Tex. App. LEXIS 1095 (Tex. App. Amarillo Feb. 8 2005).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

267. Admission during the punishment phase of a recorded jailhouse phone conversation between defendant and his brother was proper where it was probative with regard to a punishment determination, as it allowed the jury to gauge defendant's acceptance of responsibility for the crime by showing he was willing to allow his own brother to take responsibility for his crime, even if it meant his brother would be arrested. Given the force of the other evidence of bad acts presented at the punishment phase, the admission of the phone recording was not likely to create such unfair prejudice in the minds of the jurors that they sentenced defendant in a way disproportionate to his crime and past criminal history. Scales v. State, 2014 Tex. App. LEXIS 1744 (Tex. App. San Antonio Feb. 19 2014).

268. Trial court did not abuse its discretion in admitting evidence of toys and pictures from defendant's computer under because the evidence regarding the toys was relevant to determine defendant's sentence, photographs of the toys standing alone were innocuous, and the computer photographs were of young males in various states of undress and were more probative than prejudicial in determining defendant's punishment. Fiala v. State, 2013 Tex. App. LEXIS 8860 (Tex. App. Dallas July 17 2013).

269. Trial court did not err during the punishment phase in refusing to exclude evidence of the bad acts (gang involvement and possessing contraband) defendant committed in prison before his conviction was reversed because the evidence was relevant and was not unfairly prejudicial. That defendant engaged in bad acts while in

prison revealed aspects of his character, and he failed to suggest that the State focused much attention upon or spent much time discussing the acts' setting. Nunez v. State, 2013 Tex. App. LEXIS 5480 (Tex. App. Amarillo May 1 2013).

270. During the punishment phase of defendant's trial for intoxication assault, the trial court did not err by admitting a statement probative of defendant's general attitude of selfishness because the statement was relevant under Tex. R. Evid. 401 to show defendant's character and helpful to the jury in determining whether she was a good candidate for community supervision. The trial court did not abuse its discretion in overruling defendant's Tex. R. Evid. 403 objection, because the State needed the statement to counter testimony from family and friends as to defendant's sweet nature and tender-heartedness. Ford v. State, 2012 Tex. App. LEXIS 8034, 2012 WL 4243715 (Tex. App. Waco Sept. 20 2012).

271. Where the record was silent as to why defense counsel elected not to object during the penalty phase of trial to the admission of evidence concerning defendant's assaults of his girlfriend, a reviewing court could not say that counsel was ineffective for failing to object to the evidence on the ground that its relevance was substantially outweighed by the danger of unfair prejudice. Arnolie v. State, 2012 Tex. App. LEXIS 2673 (Tex. App. Houston 1st Dist. Apr. 5 2012).

272. Sheriff's deputy, who was a member of a gang suppression unit, provided expert testimony that certain of defendant's tattoos were common to members of a gang, provided sound evidence of defendant's gang membership, and testified that the gang that defendant was a member of was a criminal street gang with a purpose of engaging in activities to make money for its members; thus, under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(l), the trial court did not abuse its discretion in admitting evidence during the punishment phase of the trial that defendant was a gang member or had been a gang member, and the evidence was neither irrelevant nor unfairly prejudicial under Tex. R. Evid. 403. Horton v. State, 2011 Tex. App. LEXIS 1528, 2011 WL 742654 (Tex. App. Houston 14th Dist. Mar. 3 2011).

273. During the punishment phase of defendant's trial for aggravated sexual assault of a child, the trial court did not abuse its discretion in admitting the testimony of three of defendant's sisters that he sexually assaulted them and a fourth sister when they were children and defendant was a juvenile, even though the acts had occurred between forty-four and sixty years before trial, because Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) contained no time restriction on punishment evidence, and because the sisters' testimony was quite probative of the punishment issue before the jury-the appropriate sentence for a particular defendant in a particular case-as it demonstrated a pattern of conduct over many years. The sisters' testimony did not occupy an undue amount of time, and it did not have the potential to impress the jury in some irrational, but nevertheless indelible way. Rodriguez v. State, 345 S.W.3d 504, 2011 Tex. App. LEXIS 834 (Tex. App. Waco Feb. 2 2011).

274. Testimony from the victim's girlfriend regarding the victim's violent tendencies towards her and his history of drug use was not admissible during the punishment phase of the trial under Tex. R. Evid. 403 because it would result in the jury focusing its attention on the victim's character rather than on defendant's personal responsibility and moral culpability. King v. Tex., 2011 Tex. App. LEXIS 729, 2011 WL 381743 (Tex. App. San Antonio Feb. 2 2011).

275. During the punishment phase of defendant's trial, pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), the trial court did not err in admitting (1) the evidence of an accomplice's previous robbery as the evidence was relevant to defendant's culpability in the robbery at a bank because it reflected poorly on defendant's decision to associate with the accomplice that day, especially when combined with other evidence showing defendant's knowledge that the accomplice had previously shot someone, which was especially true when considering defendant's strategy of minimizing his role in the robbery to request a lenient sentence; (2) the photographs of the girlfriend's injuries caused by defendant even if they also displayed injuries caused by his mother; and (3) a

detective's testimony regarding defendant's tattoos and gang membership as the evidence was not unfairly prejudicial under Tex. R. Evid. 403. Collins v. State, 2011 Tex. App. LEXIS 392, 2011 WL 167223 (Tex. App. Fort Worth Jan. 13 2011).

276. Even if the trial court abused its discretion by admitting evidence depicting bestiality during the punishment phase of the trial under Tex. R. Evid. 403, the error was harmless given the volume of the child pornography-related evidence considered by the jury and the lack of emphasis that the State placed on the bestiality images from defendant's laptop. The evidence during the guilt phase overwhelmingly supported the jury's determination that defendant possessed and promoted child pornography, and because defendant testified during the punishment phase, the jury had the opportunity to judge his credibility, his admission that email accounts were his, and his excuses of his behavior; the trial court also included an extraneous offensive limiting instruction. Crosthwait v. State, 2010 Tex. App. LEXIS 9967 (Tex. App. Fort Worth Dec. 16 2010).

277. At defendant's sentencing hearing after his guilty plea to two counts of aggravated sexual assault of a child and one count of indecency with a child, a taped statement's probative value outweighed any prejudicial effect under Tex. R. Evid. 403 because defense counsel claimed that defendant's guilty plea indicated his willingness to accept responsibility for his conduct but the statement indicated that defendant initially denied responsibility and tried to blame others, including his wife, for the incident. Hernandez v. State, 2010 Tex. App. LEXIS 8538, 2010 WL 4148359 (Tex. App. Eastland Oct. 21 2010).

278. Upon defendant's conviction for aggravated assault of a child, the trial court did not err in concluding that defendant's 1970 youth conviction for interstate transport of a stolen vehicle was relevant to the jury's determination of an appropriate punishment and admissible under Tex. Crim. Proc. Code Ann. art. 37.07, § 3(a). Because the probative value of the evidence of the conviction was not substantially outweighed by the danger of unfair prejudice to defendant, the trial court did not abuse its discretion in overruling his Tex. R. Evid. 403 objection. Foxworth v. State, 2010 Tex. App. LEXIS 7190, 2010 WL 3431598 (Tex. App. Tyler Sept. 1 2010).

279. There was no error under Tex. R. Evid. 401, 403 when the trial court admitted, at the punishment phase of a murder trial, a video of sexual acts involving defendant and the victim, his wife, who was unconscious due to alleged intoxication, because the video countered defendant's assertions of sudden passion and that he was law abiding until the murder. Skolnik v. State, 2010 Tex. App. LEXIS 5509, 2010 WL 2783872 (Tex. App. Corpus Christi July 15 2010).

280. Trial court did not abuse its discretion by admitting into evidence during sentence a recording of a telephone conversation defendant had while he was in jail waiting for his murder trial to begin because the conversation, during which defendant threatened to kill a man or break the man's nose, was relevant, as it illustrated defendant's propensity for violence and that he was not deterred by his earlier convictions, the instant victim's murder, or by being incarcerated. The evidence did not have an undue effect on the jury's decision under Tex. R. Evid. 403 because: (1) the comments were the only evidence of defendant's propensity to commit further violence following the victim's murder and therefore the State's need for the evidence was high; (2) the entire conversation was only 15 minutes long and the comments constituted only a few seconds of the conversation; and (3) although the State requested the jury sentence defendant to 99 years' confinement or life in prison, the jury sentenced him to 40 years' confinement. Walker v. State, 2010 Tex. App. LEXIS 5376, 2010 WL 2698782 (Tex. App. Dallas July 9 2010).

281. Even without medical evidence to verify it, defendant's volunteered statement to a police officer that he was HIV positive had probative value to show he was infected by the HIV virus when he sexually assaulted a child victim and was relevant as a circumstance of the offense that the jury could consider in assessing punishment under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). Lewis v. State, 2010 Tex. App. LEXIS 4545 (Tex. App. Amarillo June 16 2010).

282. During the punishment phase of a robbery trial, there was no error in admitting evidence that defendant displayed a firearm at the robbed food store some months before the robbery. Although the record was silent as to whether the trial court performed a balancing test under Tex. R. Evid. 403, the trial court could have properly decided that the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. Onyeche v. State, 2010 Tex. App. LEXIS 3659, 2010 WL 1946772 (Tex. App. Fort Worth May 13 2010).

283. In the punishment phase of a manslaughter trial, there was no error under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) or Tex. R. Evid. 403 when the trial court admitted a picture of a person who was not present on the night of the charged offense, who was holding a weapon that was not involved in the charged offense. Zuniga v. State, 2010 Tex. App. LEXIS 419 (Tex. App. Austin Jan. 26 2010).

284. In defendant's drug case, the court properly admitted evidence of defendant's gang affiliation at sentencing because the presentation of the evidence took only a short time and the probative value of the evidence was high. Defendant's prior admission of his affiliation with a prison gang and the reputation of that gang for commission of offenses, both inside prison and in the general community, was a factor that the jury was entitled to consider in determining defendant's propensity for further criminal activity should he be released from incarceration. Meier v. State, 2009 Tex. App. LEXIS 8078, 2009 WL 3335282 (Tex. App. Amarillo Oct. 16 2009).

285. In a fleeing and eluding case, a trial court did not err by allowing the State to introduce evidence of an unadjudicated offense during the punishment phase of the trial. Evidence that defendant previously ran from police had probative value, it was not inherently inflammatory, it did not take long to present, and the prejudicial effect of the evidence did not unduly outweigh its probative value. Crumpton v. State, 2009 Tex. App. LEXIS 6753 (Tex. App. Beaumont Aug. 26 2009).

286. In a case where defendant failed to register as a sex offender, a trial court did not err by allowing the victim of the underlying offense to testify during the punishment phase because the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403; the victim's testimony helped the jury determine the appropriate sentence, and the details of the offense provided the jury with probative information of defendant's character. Moreover, the State needed the evidence to explain why defendant was required to follow the registration process, and the victim's testimony was only concerning the facts of the crime. Turner v. State, 2009 Tex. App. LEXIS 5246, 2009 WL 1959240 (Tex. App. Dallas July 9 2009).

287. In a case where defendant failed to register as a sex offender, defendant failed to preserve error based on a trial court's alleged failure to conduct a balancing test under Tex. R. Evid. 403 before admitting testimony from the victim of the underlying offenses during the punishment stage of the trial because there was no evidence in the record that the trial court refused to perform the balancing test or that defendant objected to a refusal. Turner v. State, 2009 Tex. App. LEXIS 5246, 2009 WL 1959240 (Tex. App. Dallas July 9 2009).

288. During the punishment phase of defendant's murder trial, the trial court acted within her discretion by excluding evidence that the victim was a registered sex offender. This kind of comparative evidence offered to mitigate defendant's punishment by showing that the victim's life was of little value was unfairly prejudicial under Tex. R. Evid. 403. Hayden v. State, 296 S.W.3d 549, 2009 Tex. Crim. App. LEXIS 510 (Tex. Crim. App. 2009).

289. Trial court did not err during the punishment phase by admitting testimony from a sheriff's deputy about defendant's gang involvement under Tex. Code Crim. Proc. Ann. art. 61.02 because the deputy's testimony that defendant's tattoos had distinctive meanings and were common in a particular gang supplied sound evidence of defendant's gang membership, and was probative of defendant's character. The deputy also testified about the character and reputation of the gang. Elizondo v. State, 2009 Tex. App. LEXIS 809, 2009 WL 276754 (Tex. App.

Houston 1st Dist. Feb. 5 2009).

290. Court properly admitted at punishment defendant's medical records showing that he had been HIV positive since 1991 because the evidence showed that defendant knew of his HIV status at the time he attempted to engage the victim in sexual conduct, and it was a viable concern at the punishment stage of a trial for attempted sexual performance of a child. Atkins v. State, 2008 Tex. App. LEXIS 5407 (Tex. App. Dallas July 23 2008).

291. Defendant's convictions for aggravated assault with a deadly weapon and assault of a public servant, which were entered upon his guilty pleas to a jury, were upheld where there was no error by the trial court under Tex. Code Crim. Proc. Ann. art. 37.07 or Tex. R. Evid. 403 in admitting a videotape into evidence during the punishment phase of both offenses showing defendant committing the assault on a public servant, a police officer, because the State's right to introduce the videotape was not restricted by defendant's guilty plea; although defendant argued that the videotape was unnecessarily cumulative because he pled guilty and that its admission was for the purpose of obtaining a greater sentence, and although the two victims, defendant's girlfriend and the officer, testified about the circumstances surrounding the offenses, because the jury had to determine what punishment to assess, a video recording could provide a more panoramic representation of the evidence, and, thus, could be more helpful to the jury in assessing punishment than oral testimony. Perez v. State, 2008 Tex. App. LEXIS 509 (Tex. App. Waco Jan. 23 2008).

292. In the punishment phase of a kidnapping trial, defendant failed to demonstrate error under Tex. R. Evid. 403 in the admission of extraneous evidence of the victim's murder because defendant's brief lacked any analysis of the four Tex. R. Evid. 403 factors. Leffew v. State, 2008 Tex. App. LEXIS 389 (Tex. App. El Paso Jan. 17 2008).

293. In a case in which defendant was charged with driving while intoxicated, the probative value of testimony was not substantially outweighed by the danger of unfair prejudice or misleading the jury where it appeared that the trial court admitted the testimony from a probation officer, a county counseling services employee, and an assistant county attorney to give the jury complete information about the punishment options for driving while intoxicated so that it could tailor the sentence to the particular offense, and none of the testimony from the three witnesses suggested to the jury that defendant was eligible for jury recommended probation, nor did the testimony suggest to the jury that it should reach its decision on an improper basis, such as an emotional one; even if the trial court had erred by admitting the testimony, defendant had not shown reversible error because he had not demonstrated that he received a longer sentence or was harmed by the admission of the testimony concerning the conditions of and his eligibility for probation. Ivey v. State, 250 S.W.3d 121, 2007 Tex. App. LEXIS 8283 (Tex. App. Austin 2007).

294. In an assault trial, there was no error in admitting opinion evidence at the sentencing phase relating to defendant's gang membership; the expert opinion testimony that certain of defendant's tattoos had distinctive meanings and were common in certain gangs supplied sound evidence of gang membership, which was relevant to defendant's character. Garcia v. State, 239 S.W.3d 862, 2007 Tex. App. LEXIS 8307 (Tex. App. Houston 1st Dist. 2007).

295. In a case of aggravated assault with a deadly weapon, a penitentiary packet showing that defendant previously had been convicted of two burglary offenses was admissible at punishment in accordance with Tex. Code Crim. Proc. Ann. art. 37.07, § 3, and the trial court could have found under Tex. R. Evid. 403 that the relevant and probative information in the packet outweighed its prejudicial effect. Latchie v. State, 2007 Tex. App. LEXIS 6127 (Tex. App. Corpus Christi Aug. 2 2007).

296. Trial court did not err by admitting evidence of prior extraneous acts of indecency with minors during sentencing because the language of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) established that the conduct described by the witnesses was relevant to the assessment of defendant's punishment; the three witnesses

described conduct by defendant that was similar to his conduct against the victim, and given that similarity, the trial court did not abuse its discretion in concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Rodriguez v. State, 2007 Tex. App. LEXIS 4618 (Tex. App. Eastland June 14 2007).

297. Trial court did not abuse its discretion by excluding from evidence during sentencing the plea-bargained punishments assessed against defendant's nontestifying accomplices because the evidence was inadmissible under Tex. R. Evid. 403 as public policy favored the conclusion of litigation by compromise and settlement. Eichelberger v. State, 232 S.W.3d 225, 2007 Tex. App. LEXIS 4331 (Tex. App. Fort Worth 2007).

298. Evidence of defendant's commission of an offense similar to the ones for which she pleaded guilty, allegedly committed during the pendency of the indictment, was clearly relevant to the issue of whether community supervision was appropriate; the danger of unfair prejudice under Tex. R. Evid. 403 was greatly reduced because the judge was sitting as the trier of fact, and the court rejected the argument that the evidence was unfair in that it contributed to the punishment assessed. Terrell v. State, 2006 Tex. App. LEXIS 9780 (Tex. App. Austin Nov. 10 2006).

299. In defendant's trial for helping his son and six other inmates escape from prison, evidence that the escapees were on a month-long crime spree while evading the police was relevant at sentencing and was not unduly prejudicial under Tex. R. Evid. 403. Rather than confusing the issues, the evidence served to further the jury's understanding of the issues by explaining the circumstances surrounding the escape. Rodriguez v. State, 203 S.W.3d 837, 2006 Tex. Crim. App. LEXIS 1931 (Tex. Crim. App. 2006).

300. Probation officer was properly allowed to testify that defendant was not a suitable candidate for community supervision because suitability is a matter relevant to sentencing under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) when a defendant seeks placement on community supervision; the court noted that the trial judge still had operate within the bounds of Tex. R. Evid. 403. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

301. Evidence of a prior conviction was properly admitted during the sentencing phase of a trial for burglary of a habitation because defendant failed to preserve a Tex. R. Evid. 403 objection; moreover, any evidence deemed relevant to sentencing was admissible during this stage of the trial. Chavez v. State, 2006 Tex. App. LEXIS 7878 (Tex. App. El Paso Aug. 31 2006).

302. In a murder case, the trial court did not abuse its discretion by ruling that the probative value of the weapon, a knife, outweighed the danger of unfair prejudice and that the knife was not merely cumulative of other evidence; the size of the knife was relevant to sentencing, and because the photograph did not convey its size, the State had a need to offer the knife itself into evidence. Griffith v. State, 2006 Tex. App. LEXIS 5757 (Tex. App. Fort Worth June 29 2006).

303. Trial court did not err when it allowed the introduction of defendant's threatening statement to a jailor relating to his release from prison under Tex. Code Crim. Proc. Ann. art. 37.07. § 3(a); this statement was highly relevant in assessing punishment for the attempted murder of police officers, and it was not unfairly prejudicial under Tex. R. Evid. 403. Espinosa v. State, 194 S.W.3d 703, 2006 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. 2006).

304. Where defendant was convicted of intoxication manslaughter, the trial court did not err by admitting defendant's driving record that showed his involvement in two non-injury traffic accidents; evidence of defendant's prior traffic accidents was relevant to sentencing; the probative value of the driving record was not substantially outweighed by the danger of unfair prejudice. Bernal v. State, 2006 Tex. App. LEXIS 1002 (Tex. App. San Antonio

Feb. 8 2006).

305. Where defendant, a large Caucasian man, was accused of burglarizing the homes of two Hispanic families, photographs of defendant's tattoos were admissible as evidence of defendant's selfishness and his impact on the victims. Counsel was not ineffective for failing to raise an objection under Tex. R. Evid. 403. Hicks v. State, 2005 Tex. App. LEXIS 10663 (Tex. App. Dallas Dec. 28 2005).

306. In an aggravated assault case, the trial court did not err during the punishment phase of trial by admitting extraneous offense testimony under Tex. Code Crim. Proc. Ann. art. 37.07 as it would have been impracticable for the witness to avoid describing the extraneous offenses when she narrated the events that lead to defendant's prior misdemeanor assault conviction; the testimony was highly probative of defendant's character and thus instrumental in giving complete information to the jury so that it could tailor an appropriate sentence. Lamb v. State, 186 S.W.3d 136, 2005 Tex. App. LEXIS 9994 (Tex. App. Houston 1st Dist. 2005).

307. Habeas petitioner's counsel's failure to object to the admission during the jury's sentencing determination of images of adult bestiality taken from the petitioner's computer. The images did not form part of the factual basis for the charges to which the petitioner had plead guilty, and had no relevance to the jury's sentencing determination apart from demonstrating the depths of depravity to which the petitioner had sunk; even if the evidence were relevant in some tangential way to the determination of his sentence, it was highly probable that considerations of unfair prejudice would have sufficed to keep this evidence from the jury. Ward v. Dretke, 420 F.3d 479, 2005 U.S. App. LEXIS 16596 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1621, 164 L. Ed. 2d 334, 2006 U.S. LEXIS 2520, 74 U.S.L.W. 3543 (U.S. 2006).

308. In a murder case, the trial court did not err in allowing testimony during punishment regarding racial language on a tattoo; defendant's unfair prejudice argument lacked merit because defendant's tattoo was relevant to the issue of motive and defendant did not ask for a limiting instruction. Woodward v. State, 170 S.W.3d 726, 2005 Tex. App. LEXIS 5255 (Tex. App. Waco 2005).

309. Where defendant was tried for aiding seven men escape from prison, evidence of the post-escape crimes committed by the seven men bore heavily upon defendant's character and moral blameworthiness. The evidence was admissible to help the jury determine an appropriate sentence for defendant's crimes; and the trial court's decision to admit the evidence did not lay outside the "zone of reasonable disagreement." Rodriguez v. State, 163 S.W.3d 115, 2005 Tex. App. LEXIS 1084 (Tex. App. San Antonio 2005).

310. In an indecency and sexual assault of a child case, the trial court did not err by admitting extraneous offense evidence at punishment as the testimony by a prior complainant was highly probative, given the similarity of the allegations she made to the allegations of the victim in the current offenses, and the State needed the extraneous offense evidence to show that defendant should not have received probation when defendant claimed that what happened with the victim was an isolated occurrence. Woods v. State, 2005 Tex. App. LEXIS 711 (Tex. App. Fort Worth Jan. 27 2005).

311. Court properly admitted pre-autopsy photographs to the victim during the punishment phase of defendant's trial where, although unsettling, they were not particularly gruesome or horrible; instead, they appeared rather clinical given the setting and the posture of the body. Gallegos v. State, 2004 Tex. App. LEXIS 11516 (Tex. App. Amarillo Dec. 22 2004).

312. In the punishment phase of defendant's murder case, autopsy photographs were properly admitted because they supplied complete information regarding the nature of the wounds, that information was helpful to the court in devising an appropriate sentence, and they were probative as to the extent and nature of the injuries. Therefore, the

autopsy photographs were relevant and were not unduly prejudicial. Williams v. State, 176 S.W.3d 476, 2004 Tex. App. LEXIS 10561 (Tex. App. Houston 1st Dist. 2004).

313. In the punishment phase of a trial for drug possession, evidence of a taped phone conversation, in which statements indicated defendant's involvement in the narcotics business, was properly admitted. The evidence was relevant to the sentence determination because it went directly to the scope of his involvement in the drug trade and manifested his intent to continue his drug "business" in the future, despite his pending drug charges. Given the other evidence of his involvement in the drug business, the recording was probative of continued involvement and was not unfairly prejudicial. Wiggins v. State, 2004 Tex. App. LEXIS 8835 (Tex. App. Fort Worth Sept. 30 2004).

314. In an assault case, evidence of lewd behavior was admissible at sentencing pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a), over defendant's Tex. Evid. R. 403 objection, because the evidence helped to define defendant's character for the jury and also helped to establish a pattern of continuing conduct. Webster v. State, 2004 Tex. App. LEXIS 4333 (Tex. App. Fort Worth May 13 2004).

315. In defendant's aggravated sexual assault of a child case, a court did not err in the sentencing phase, by admitting a videotape depicting him engaging in sexual activity with an unidentified adult female where the State's attempt to establish defendant's character for sexual depravity was a legitimate purpose for permitting the videotape to be shown. Moreover, even if the trial court committed error in permitting the videotape to be played to the jury, the record did not necessarily establish that defendant suffered harm from its admission; as a result of a prior felony conviction, the applicable punishment range for the conviction for indecency with a child was enhanced to the range of 5 to 99 years or life. Chambers v. State, 2004 Tex. App. LEXIS 2693 (Tex. App. Eastland Mar. 25 2004).

316. In a prosecution for murder, the medical records of defendant's shooting victims were properly admitted at the sentencing phase; the medical records were relevant to the circumstances of the murder and provided evidence of bad acts for which defendant could be held criminally responsible. The probative value of the medical records was not substantially outweighed by the danger of undue prejudice. Mendoza v. State, 2004 Tex. App. LEXIS 2486 (Tex. App. Houston 1st Dist. Mar. 18 2004).

317. Admission of aggravated assault conviction during the punishment phase of a DWI trial was upheld where, at sentencing, defendant objected under Tex. R. Evid. 403, but on appeal, he argued under Tex. R. Evid. 609; an objection raised on appeal would not be considered if it varied from the objection made at trial, and on appeal, defendant made no argument under Tex. R. Evid. 403. Flores v. State, 125 S.W.3d 744, 2003 Tex. App. LEXIS 10584 (Tex. App. Houston 1st Dist. 2003).

318. As used in Tex. R. Evid. 403, unfair prejudice means the undue tendency of the evidence to suggest a decision on an improper basis. Davis v. State, 68 S.W.3d 273, 2002 Tex. App. LEXIS 1047 (Tex. App. Dallas 2002).

Criminal Law & Procedure : Sentencing : Imposition : Victim Statements

319. In a murder trial, the court did not err when it admitted victim impact evidence consisting of testimony and photographs that provided information about defendant's life and character, as the evidence had some tendency to remind the jury that he was a unique human being. Although the evidence emphasized that the victim was a good man and had a lot of good qualities, the evidence did not encourage the jury to engage in a worth comparison; the probative value of the evidence was not substantially outweighed by unfair prejudice. Evans v. State, 2013 Tex. App. LEXIS 13748, 2013 WL 7985593 (Tex. App. Eastland Nov. 7 2013).

320. In an intoxication manslaughter case, victim impact evidence was properly admitted because the evidence regarding how one victim's death impacted her family and her friend's family illustrated the consequences that defendant's actions had on the victim's family and friends. Additionally, the testimony comprised about twenty pages, and the questions and answers were brief, to the point, and not needlessly cumulative. Mole v. State, 2009 Tex. App. LEXIS 2838, 2009 WL 1099433 (Tex. App. Fort Worth Apr. 23 2009).

321. In defendant's trial for the aggravated assault of his wife, the trial court erred in admitting a "day in the life" video depicting the wife's activities at a rehabilitation facility during the innocence/guilt phase of the trial because it constituted inadmissible victim-impact evidence in that it portrayed the physical and emotional effects of the crime upon the wife and her struggle in daily living. However, the error was harmless in light of defendant's admission that he hit his wife and the medical evidence that showed her injuries were consistent with being beaten multiple times with someone's hands. Petruccelli v. State, 174 S.W.3d 761, 2005 Tex. App. LEXIS 6593 (Tex. App. Waco 2005).

322. In sentencing defendant after he had been found guilty of indecency with child younger than 17, the trial court did not err when it admitted the testimony of defendant's former step-daughter who testified that defendant had sexually abused her when she was a minor for many years until she ran away from home. The trial court could have properly determined evidence that defendant sexually assaulted his stepdaughter for 13 years remained highly probative of what an appropriate sentence would be. Rollings v. State, 2004 Tex. App. LEXIS 10580 (Tex. App. Dallas Nov. 22 2004).

323. In a criminal appeal, defendant's claim that the State's presentation of victim-impact testimony was unfairly prejudicial did not comport with his relevancy objection at trial and presented nothing for review. Adams v. State, 2004 Tex. App. LEXIS 3766 (Tex. App. Houston 14th Dist. Apr. 29 2004).

324. Trial court did not abuse its discretion by admitting victim-impact evidence of the victim's parents in violation of Tex. R. Evid. 403 because nothing in the record suggested that the State engaged in a comparison of the worth of defendant and the victim; the testimony came from immediate family members who related the uniqueness of the victim's character and the impact of his death on his family. Neither the tenor nor the volume of the evidence was such that it was unfairly prejudicial, nor would any prejudice resulting from the evidence substantially outweigh its probative value. Gutierrez v. State, 2004 Tex. Crim. App. LEXIS 2211 (Tex. Crim. App. Apr. 21 2004).

325. Where defendant was convicted of sexual assault, trial court did not err under Tex. R. Evid. 401, 402, 403 in admitting testimony from the victim and his sister of the effect of the assault on the victim; testimony of an inflammatory or sympathetic nature will not bar its admissibility if it is relevant to the issue at trial, and the issue need not be contested. Ranels v. State, 1996 Tex. App. LEXIS 2867 (Tex. App. Beaumont Mar. 20 1996).

Criminal Law & Procedure : Sentencing : Mental Incapacity

326. In a case where the patient murdered a woman, was found not guilty by reason of insanity, and was committed to a state hospital, pursuant to Tex. R. Evid. 403, because the evidence of the patient's past conduct was highly probative of his progress, the trial court did not abuse its discretion when it allowed the State to introduce evidence of the patient's past acts that he committed while insane. Long v. State, 130 S.W.3d 419, 2004 Tex. App. LEXIS 2182 (Tex. App. Houston 14th Dist. 2004).

Criminal Law & Procedure : Sentencing : Presentence Reports

327. Defendant failed to prove that his trial counsel was ineffective for failing to object to 214 pages of allegedly improper character evidence contained in the presentence investigation report because: (1) defendant failed to rebut the presumption that his counsel's decisions were reasonable, as there was no evidence from counsel

explaining his actions; (2) defendant did not show that counsel's performance was deficient as he cited no authority supporting his argument that the number of statements was unfairly prejudicial under Tex. R. Evid. 403; and (3) defendant failed to show that his 20-year sentence for intoxication manslaughter would have been different, as defendant was drunk when he drove over 90 miles per hour on a highway, hitting two cars and killing the victim. Sanchez v. State, 2013 Tex. App. LEXIS 822, 2013 WL 328954 (Tex. App. Houston 14th Dist. Jan. 29 2013).

328. In a trial for indecency with a child by contact there was no error under Tex. R. Evid. 403, in admitting a presentence investigation report regarding defendant's lack of remorse because the testimony was minimal. Hernandez v. State, 2010 Tex. App. LEXIS 851, 2010 WL 391850 (Tex. App. Austin Feb. 5 2010).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview

329. In a civil commitment proceeding involving a sexually violent predator, testimony from a witness that sexual acts with a patient were not consensual was not cumulative; it constituted impeachment or rebuttal because it conflicted with the patient's testimony on this issue. In re Diaz, 2009 Tex. App. LEXIS 6930, 2009 WL 2749958 (Tex. App. Beaumont Aug. 31 2009).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

330. In the sexually violent predator trial, the trial court did not err in admitting the offender's prior statement because the statement, which detailed his sexual history, had probative value regarding his behavioral abnormality, which was not outweighed by unfair prejudice. In re Commitment of Meyer, 2014 Tex. App. LEXIS 1650, 2014 WL 580723 (Tex. App. Beaumont Feb. 13 2014).

331. Details of a sex offender's 1975 murder conviction were property admitted during his sexually violent predator commitment proceeding because the State's expert explained the facts he considered in forming his opinions and how those facts affected his evaluation of the offender; the trial judge performed a balancing test and could have reasonably concluded the evidence assisted the jury in weighing the testimony and was not unfairly prejudicial, and it also gave the jury a limiting instruction explaining that the information reviewed by the experts was admitted only for the purpose of showing the basis of the expert's opinion. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

332. Trial court did not impermissibly restrict appellant's right to cross-examine the State's psychologist about his rate of error during proceedings to commit him as a sexually violent predator because it could have reasonably concluded that the jury would have been confused. In re Alexander, 2013 Tex. App. LEXIS 12077, 2013 WL 5425557 (Tex. App. Beaumont Sept. 26 2013).

333. Trial court did not abuse its discretion by overruling defendant's objection to the State's use of the phrase "sexually violent predator" under Tex. R. Evid. 403 because the use of the term was not intended to inflame the jury, as the term appeared in the charging statute, Tex. Health & Safety Code Ann. § 841.085, in the final judgment, order of commitment, supervision, and GPS tracking service requirements. Malone v. State, 405 S.W.3d 917, 2013 Tex. App. LEXIS 7766 (Tex. App. Beaumont June 26 2013).

334. In a case involving the civil commitment of a sexual predator, a patient failed to preserve an error under Tex. R. Evid. 403 relating to the details of his offenses because he did not object and obtain an adverse ruling each time the complained-of evidence was presented or obtain a running objection to the evidence; the patient did not waive error by waiting until the evidence was repeated to complain that it was prejudicial because it was needlessly cumulative. Even if the patient had preserved error regarding the experts' discussion of the details of the offenses, there was no unfair prejudice under Rule 403; the evidence assisted the jury in weighing each expert's testimony

and opinion that each expert offered regarding the ultimate issue in the case. In re Ford, 2012 Tex. App. LEXIS 2221, 2012 WL 983323 (Tex. App. Beaumont Mar. 22 2012).

335. During appellant's civil commitment trial, the trial court erred by excluding the testimony of appellant's expert witness, based on its conclusion that the expert's testimony would confuse the jury under Tex. R. Evid. 403, because the trial court acknowledged that he qualified as an expert under Tex. R. Evid. 702, and, despite the trial court's belief that the expert would testify that behavioral abnormality did not exist, the offer of proof established that the expert would have told the jury that the ultimate issue in the case, whether appellant suffered from a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence, could not be determined by scientific method alone. The error was not harmless because without the expert's testimony, the State's experts' testimony regarding their diagnoses of personality disorder and their scoring of the actuarial instruments went unchallenged by any expert in the field of psychiatry or psychology. In re Commitment of Hinkle, 2011 Tex. App. LEXIS 4504 (Tex. App. Beaumont June 16 2011).

336. Trial court acted within its discretion in allowing the experts to discuss the details of the patient's offenses and other bad acts he committed that were contained in the records they reviewed in determining that the patient was a sexually violent predator because having each expert explain which facts were considered and how those facts influenced his evaluation assisted the jury in weighing each expert's testimony and the opinion each offered regarding the ultimate issue in the case. In re Day, 342 S.W.3d 193, 2011 Tex. App. LEXIS 3573 (Tex. App. Beaumont May 12 2011).

Criminal Law & Procedure : Appeals : Procedures : Briefs

337. On appeal of defendant's murder conviction, his complaint that the trial court abused its discretion by overruling his Rule 403 objections to various exhibits was inadequately briefed. He failed to set forth the required balancing test or identify any portion of the test which the trial court failed to perform; he did not apply the law to any facts or present any legal arguments explaining how the trial court abused its discretion or how the evidence was prejudicial to his case. Green v. State, 2013 Tex. App. LEXIS 14355 (Tex. App. El Paso Nov. 22 2013).

338. Defendant's briefing was inadequate because beyond his assertions that each of the exhibits at issue violated this rule, he did not explain why he believed the exhibits should have been excluded. Haley v. State, 2013 Tex. App. LEXIS 11450 (Tex. App. Houston 14th Dist. Sept. 5 2013).

339. Court questioned whether an issue under Tex. R. Evid. 403 was adequately briefed because defendant did not attempt to analyze the evidence in light of the appropriate balancing test and the specific factors considered on review. Miller v. State, 2012 Tex. App. LEXIS 6693 (Tex. App. Beaumont Aug. 10 2012).

340. Defendant failed to adequately brief Tex. R. Evid. 403 factors. Garreans v. State, 2008 Tex. App. LEXIS 852 (Tex. App. Dallas Feb. 5 2008). Leffew v. State, 2008 Tex. App. LEXIS 389 (Tex. App. El Paso Jan. 17 2008). Sain v. State, 2007 Tex. App. LEXIS 9882 (Tex. App. Fort Worth Dec. 20 2007). San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005). Hernandez v. State, 2004 Tex. App. LEXIS 9713 (Tex. App. Amarillo Nov. 2 2004). Smith v. State, 2004 Tex. App. LEXIS 9341 (Tex. App. Houston 1st Dist. Oct. 21 2004). Torres v. State, 979 S.W.2d 668, 1998 Tex. App. LEXIS 1963 (Tex. App. San Antonio 1998).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

341. In an indecency with a child case, the court committed reversible error in the admission of sex toys because there was no suggestion that sex toys were used in any way related to the complainant, and the State emphasized those items in providing a detailed description of each item, making certain to emphasize their graphic nature by

carrying them in a single plastic tub, pointing out the testifying officer's wearing of gloves, and repeatedly apologizing to the jury for the graphic nature of those items. Warr v. State, 418 S.W.3d 617, 2009 Tex. App. LEXIS 2538 (Tex. App. Texarkana Apr. 15 2009).

342. In an assault case, there was no reversible error based on hearsay, relevance, undue prejudice, improper opinion, and violations of the confrontation clause because the challenged evidence had come in during other portions of the trial without objection. Hecht v. State, 2009 Tex. App. LEXIS 521, 2009 WL 200979 (Tex. App. Dallas Jan. 29 2009).

343. In a trial for child sexual assault, there was no reversible error under Tex. R. Evid. 403 from the admission of evidence that defendant was a former police officer. Nino v. State, 223 S.W.3d 749, 2007 Tex. App. LEXIS 3519 (Tex. App. Houston 14th Dist. 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

344. Issues are inadequately briefed and presented nothing for appellate review because the brief merely contended that the trial court did not conduct a balancing test as is required by this rule before allowing admission of the evidence. Jackson v. State, 424 S.W.3d 140, 2014 Tex. App. LEXIS 1170, 2014 WL 409946 (Tex. App. Texarkana Feb. 4 2014).

345. The trial court allowed the State to conduct a height comparison between defendant and the prosecutor and defense counsel made only a general objection; defendant's claim that the comparison was irrelevant or highly prejudicial was not preserved for review. Jackson v. State, 2006 Tex. App. LEXIS 6724 (Tex. App. Dallas July 28 2006).

346. Defendant failed to properly object to evidence that was admitted at trial concerning unindicted aggravated robberies, even though he filed a motion in limine, because he failed to make objections under Tex. R. Evid. 403 when the evidence was admitted at trial. Ashford v. State, 2006 Tex. App. LEXIS 2770 (Tex. App. Fort Worth Apr. 6 2006).

347. In a trial for driving while intoxicated, defendant forfeited his arguments that his blood test results were improperly admitted under Tex. R. Evid. 403 and that he was entitled to an instruction under Tex. R. Evid. 105(a). Although defendant objected when a blood-draw kit was offered into evidence, he failed to object when the report with the blood-test results was offered. Walker v. State, 2006 Tex. App. LEXIS 1328 (Tex. App. Fort Worth Feb. 16 2006).

348. In a criminal prosecution for theft, the trial court did not abuse its discretion in admitting evidence of the extraneous offenses suffered by the victim; because defendant did not raise a separate trial objection to the evidence based upon Tex. R. Evid. 403, this argument was not properly before the appellate court. Buttz v. State, 2006 Tex. App. LEXIS 919 (Tex. App. Fort Worth Feb. 2 2006).

349. In a trial for aggravated robbery, defendant failed to preserve an issue under Tex. R. Evid. 403 regarding an extraneous offense because he did not specifically object on Rule 403(b) grounds. Jefferson v. State, 2005 Tex. App. LEXIS 7288 (Tex. App. Houston 1st Dist. Aug. 31 2005).

350. In a trial for arson, defendant failed to preserve error under Tex. R. App. P. 33.1(a) as to the admission of evidence regarding his prior threats to kill the victim and her family. Although he had objected, under Tex. R. Evid. 403 and 404, to the admission of prior threats involving arson, he failed to object to a question broadening the

scope to other threats. Flores v. State, 2005 Tex. App. LEXIS 6255 (Tex. App. Amarillo Aug. 8 2005).

351. In a trial for sexual assault, defendant failed to object on the basis of Tex. R. Evid. 403 to an expert witness's use of the term "survivor" when describing the procedures involved in administering a sexual assault examination. Defendant therefore waived that issue on appeal. King v. State, 2005 Tex. App. LEXIS 2568 (Tex. App. San Antonio Apr. 6 2005).

352. In a criminal trial for aggravated sexual assault, defendant objected to the court's admission of his statement concerning a robbery on the grounds of Tex. R. Evid. 404. As to defendant's argument that the robbery evidence was highly prejudicial, the appellate court was not required to engage in a Tex. R. Evid. 403 analysis because no timely Rule 403 objection was made. Williams v. State, 161 S.W.3d 680, 2005 Tex. App. LEXIS 2014 (Tex. App. Beaumont 2005).

353. Ruling on a motion in limine did not preserve error with regard to a burglary defendant's argument that his failure to identify himself properly to a police officer was an extraneous offense and that a hotel registration card was hearsay. Defendant failed to specifically object to the admission of the evidence during the trial and thus waived his complaints. Rodriguez v. State, 2005 Tex. App. LEXIS 1164 (Tex. App. Amarillo Feb. 11 2005).

354. Defendant's claim that the prejudicial effect of testimony elicited during his trial for sexually assaulting his daughter from his stepdaughter that he sexually abused her as well substantially outweighed its probative value in violation of Tex. R. Evid. 403 was not preserved for appeal because defendant failed to object when, during the victim's testimony, after she had detailed what defendant had been doing to her, she testified that she found out defendant had been doing the same thing to his stepdaughter. Patron v. State, 2005 Tex. App. LEXIS 902 (Tex. App. Fort Worth Feb. 3 2005).

355. Defendant failed to preserve error for review where counsel cited Tex. R. Evid. 403 and 611 as the basis for the objection to the testimony of the victim's parents at sentencing. It was unclear from the record which part of Rule 611 was the basis of the objection, and the issue on appeal was different from the objection at trial. Foust v. State, 2005 Tex. App. LEXIS 12 (Tex. App. Dallas Jan. 4 2005).

356. Defendant's statements to police which contradicted other evidence presented at trial were relevant and admissible to show his consciousness of guilt. Although the tapes contained references to drugs, crime, nicknames, extraneous offenses and bad acts, defendant did not specify where these references could be found in the three hour tapes. Ross v. State, 154 S.W.3d 804, 2004 Tex. App. LEXIS 11407 (Tex. App. Houston 14th Dist. 2004).

357. Where defendant did not object under Tex. R. Evid. 403 until after a witness to his sexual assault had finished testifying, defendant's rule 403 objection was untimely and preserved nothing for review. Rollings v. State, 2004 Tex. App. LEXIS 10580 (Tex. App. Dallas Nov. 22 2004).

358. During the punishment phase of a criminal prosecution for possession of a controlled substance with intent to deliver or manufacture, the trial court did not err by allowing testimony from a witness about an alleged plot by defendant to kill police officers as defendant failed to make a Tex. R. Evid. 403 complaint at trial; therefore, his complaint that the testimony was inadmissible because its probative value was outweighed by the danger of unfair prejudice, was not preserved for review. Revill v. State, 2004 Tex. App. LEXIS 5654 (Tex. App. Tyler June 23 2004).

359. Defendant did not preserve her issue regarding whether extraneous offense evidence was prejudicial because she did not object at trial to the admission of the evidence, but rather objected to the State's failure to give

notice of its intent to introduce such evidence. Jordan v. State, 2004 Tex. App. LEXIS 4593 (Tex. App. Houston 1st Dist. May 20 2004).

360. In a drug case, defense counsel's general objection to the trial court's exclusion of testimony under Tex. R. Evid. 403 did not preserve error under Tex. R. App. P. 33.1(a). Thompson v. State, 2004 Tex. App. LEXIS 4602 (Tex. App. Houston 1st Dist. May 20 2004).

361. In a criminal appeal, defendant's claim that the State's presentation of victim-impact testimony was unfairly prejudicial did not comport with his relevancy objection at trial and presented nothing for review. Adams v. State, 2004 Tex. App. LEXIS 3766 (Tex. App. Houston 14th Dist. Apr. 29 2004).

362. Where defendant objected at trial to the admission of a video showing his jewelry box, which was ornamented with a picture of Hitler, but failed to make a specific Tex. R. Evid. 403 objection when the video was introduced into evidence, defendant waived his right to make a Tex. R. Evid. 403 argument on appeal in regard to the video of the jewelry box. Smith v. State, 2004 Tex. App. LEXIS 1121 (Tex. App. Houston 1st Dist. Feb. 5 2004), writ of certiorari denied by 544 U.S. 961, 125 S. Ct. 1726, 161 L. Ed. 2d 602, 2005 U.S. LEXIS 2975, 73 U.S.L.W. 3593 (2005).

363. Defendant, who was convicted of aggravated robbery and aggravated kidnapping, failed to preserve for review a claim that admission of a letter defendant wrote violated Tex. R. Evid. 403, where he did not identify either specific portions of the letter that were inadmissible or specific Rule 403 grounds for exclusion; even if defendant's objection had been sufficiently specific, the admissions contained in the letter and its evidence about defendant's character were relevant and were not substantially outweighed by the letter's prejudicial effects. Diaz v. State, 2003 Tex. App. LEXIS 10681 (Tex. App. Houston 14th Dist. Dec. 18 2003).

364. Defendant's conviction of intoxication manslaughter was upheld where he waived the issue of relevance of the photograph of the victim's charred body; the only objection made in the district court went to probative value and unfair prejudice under Tex. R. Evid. 403. Anderson v. State, 2003 Tex. App. LEXIS 10122 (Tex. App. Dallas Dec. 2 2003).

365. Defendant was not entitled to any relief as to his conviction for burglary of a habitation because Tex. R. App. P. 33.1 provided that defendant waived the right to challenge the admission of the evidence of his accomplice's conviction for the burglary at defendant's trial by arguing at trial that the evidence of the accomplice's conviction was not relevant and raising the different argument on appeal that the evidence was inadmissible under Tex. R. Evid. 403 because its prejudicial effect outweighed its probative value. Evans v. State, 2002 Tex. App. LEXIS 2705 (Tex. App. Amarillo Apr. 15 2002).

366. Failure to identify the prejudice under Tex. R. Evid. 403 constitutes inadequate briefing as provided in Tex. R. App. P. 38.1(h). Torres v. State, 979 S.W.2d 668, 1998 Tex. App. LEXIS 1963 (Tex. App. San Antonio 1998).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

367. At the punishment phase of defendant's trial for robbery, the trial court admitted into evidence photographs of his wife after a domestic violence incident. Because defendant objected on the basis of relevance, his claim that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice was not preserved for review. Cordova v. State, 2013 Tex. App. LEXIS 9947 (Tex. App. Corpus Christi Aug. 8 2013).

368. Defendant failed to preserve for appellate review his contention that the probative value of a photograph of his tattoo was outweighed by the danger of unfair prejudice because at no time did he object to the prejudicial value of the photograph. Gossett v. State, 2013 Tex. App. LEXIS 9476 (Tex. App. El Paso July 31 2013).

369. Defendant failed to preserve for appellate review his contention that the probative value of a photograph of his tattoo was outweighed by the danger of unfair prejudice because at no time did he object to the prejudicial value of the photograph. Gossett v. State, 2013 Tex. App. LEXIS 9475 (Tex. App. El Paso July 31 2013).

370. Defendant failed to preserve for appellate review his contention that the probative value of a photograph of his tattoo was outweighed by the danger of unfair prejudice because at no time did he object to the prejudicial value of the photograph. Gossett v. State, 2013 Tex. App. LEXIS 9477 (Tex. App. El Paso July 31 2013).

371. Defendant failed to preserve for appellate review his contention that the probative value of a photograph of his tattoo was outweighed by the danger of unfair prejudice because at no time did he object to the prejudicial value of the photograph. Gossett v. State, 2013 Tex. App. LEXIS 9479 (Tex. App. El Paso July 31 2013).

372. Defendant's conviction for DWI, third or more was proper because the trial court properly overruled his sole objection related to "unadjudicated offenses" and the evidence introduced by the State which did not consist of judgments of convictions was permitted as extraneous bad acts. Because no Tex. R. Evid. 403 arguments were raised below, they were unpreserved on appeal, Tex. R. App. P. 33.1. Capps v. State, 2013 Tex. App. LEXIS 2770, 2013 WL 1091232 (Tex. App. Texarkana Mar. 15 2013).

373. Objection under Tex. R. Evid. 403 did not preserve a relevance argument. Whiddon v. State, 2013 Tex. App. LEXIS 2074 (Tex. App. El Paso Feb. 27 2013).

374. Defendant's contention that the probative value of video recordings showing sex acts between dancers and patrons of the adult establishment owned and operated by defendant were substantially outweighed by a danger of unfair prejudice was not preserved for appellate review because while defendant raised a Tex. R. Evid. 403 objection in her motion in limine in her first trial but sought only to have the State approach the bench before mentioning or offering the video recordings in the instant trial. Coutta v. State, 385 S.W.3d 641, 2012 Tex. App. LEXIS 8692 (Tex. App. El Paso Oct. 17 2012).

375. Defendant's relevancy objections did not preserve his argument that admission of extraneous offense evidence of uncharged sexual conduct violated Tex. R. Evid. 404; in any event, because the same evidence came in through other testimony without objection, any error was cured. Goodwin v. State, 2012 Tex. App. LEXIS 6918, 2012 WL 3590723 (Tex. App. Corpus Christi Aug. 20 2012).

376. Because at trial defense counsel did not object to pictures of his tattoos on the basis of Tex. R. Evid. 402 and 403, defendant's complaint on appeal was not preserved. Mejia v. State, 2012 Tex. App. LEXIS 6862, 2012 WL 3525641 (Tex. App. Corpus Christi Aug. 16 2012).

377. Defendant failed to preserve for review his claim that the trial court abused its discretion by admitting the covers of commercial pornography video recording that were found in his home because the argument that the covers were more prejudicial than probative was preserved at trial, it was not argued on appeal. Although the argument that the covers improperly impeached the witness with other acts was argued on appeal, it was not preserved for review. Fletcher v. State, 2012 Tex. App. LEXIS 5429, 2012 WL 2783298 (Tex. App. Texarkana July 10 2012).

378. Defendant waived his complaint that the trial court should have undertaken a Tex. R. Evid. 403 balancing test concerning photographs showing the condition of defendant's home because at trial defendant relied on his objection that the evidence was not relevant. Brown v. State, 381 S.W.3d 565, 2012 Tex. App. LEXIS 5164 (Tex. App. Eastland June 28 2012).

379. Objection under Tex. R. Evid. 403 did not preserve hearsay or confrontation objections to the admission of a letter that an accomplice received in jail. Green v. State, 2012 Tex. App. LEXIS 3611, 2012 WL 1606238 (Tex. App. Houston 14th Dist. May 8 2012).

380. Defendant failed to preserve for review his claim that the trial court erred by admitting evidence of an extraneous offense during sentencing because at trial, defendant objected that the evidence was hearsay and admitting it denied defendant his right of confrontation, but on appeal he contended that the evidence was not relevant and that the probative value was substantially outweighed by the danger of unfair prejudice. Dirden v. State, 2012 Tex. App. LEXIS 2207, 2012 WL 983182 (Tex. App. Beaumont Mar. 21 2012).

381. Defendant failed to preserve for review her claim that she was deprived of her right to present a complete defense under the Sixth Amendment due to the fact that the trial court excluded from evidence a videotaped interview with the victim because at trial defendant relied on Tex. R. Evid. 404(b) but never asserted her right to present a complete defense and did not cite the Holmes case. Sanchez v. State, 2011 Tex. App. LEXIS 10169, 2011 WL 6916418 (Tex. App. El Paso Dec. 28 2011).

382. Objection under Tex. R. Evid. 404, 405 did not preserve defendant's complaints under Tex. R. Evid. 401, 403 regarding evidence of his gang affiliation. Martin v. State, 2011 Tex. App. LEXIS 5624, 2011 WL 2937423 (Tex. App. Corpus Christi July 21 2011).

383. Because defendant failed to challenge on appeal the trial court's ruling that the probative value of evidence of a witness's juvenile adjudication for attempted capital murder 16 years earlier was substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403, he did not preserve the issue for review. The court further held that even if the trial court had erred, the error was harmless because self-defense, which defendant sought to prove by admitting the witness's juvenile adjudication, could not have been utilized to justify manslaughter. Marsh v. State, 343 S.W.3d 475, 2011 Tex. App. LEXIS 4391 (Tex. App. Texarkana June 10 2011).

384. On appeal of defendant's conviction for aggravated assault with a deadly weapon, he claimed the trial court abused its discretion by admitting evidence that two of the guns found in his apartment were stolen. Because the jury had already heard evidence from two different witnesses that the guns were stolen without any objection from defendant, his claim that the trial court abused its discretion in admitting this evidence under Tex. R. Evid. 403 was not preserved for review. Chenier v. State, 2011 Tex. App. LEXIS 678, 2011 WL 286156 (Tex. App. Houston 1st Dist. Jan. 27 2011).

385. Because defendant counsel did not specify any of the five grounds that served as a basis of objection under Tex. R. Evid. 403 when objecting to an autopsy photograph, the alleged error was not preserved for appellate review. Conway v. State, 2011 Tex. App. LEXIS 238 (Tex. App. Houston 14th Dist. Jan. 13 2011).

386. Defendant failed to preserve for appellate review his claim that the district court erred by excluding evidence regarding the motivation of the authorities to prosecute the case against him because he failed to objected on the basis of Tex. R. Evid. 404(b) during the trial. Even assuming that defendant had preserved error, the trial court did not abuse its discretion because: (1) the proffered evidence had no relevance to the issue of whether defendant had committed the offense of unauthorized use of a motor vehicle; (2) the trial court could have found that the evidence would have put the officers and the police department on trial, confused the issues, and caused undue

delay; and (3) there was considerable evidence showing that defendant committed the offense, particularly the videotape showing defendant entering the bait vehicle on three separate dates. Bishop v. State, 2010 Tex. App. LEXIS 7056, 2010 WL 3369845 (Tex. App. Austin Aug. 26 2010).

387. Defendant failed to preserve for appellate review his claim that the trial court erred allowing into evidence information about his alleged prior bad acts in violation of Tex. R. Evid. 403 and 404 because defendant did not object each time the witness testified about defendant's purported extraneous bad acts, nor did he obtain a running objection from the trial court. Even if he had preserved the claim, the trial court did not abuse its discretion by admitting the testimony because it fell within the purview of Tex. Code Crim. Proc. Ann. art. 38.37, § 2, as the testimony described the history of the relationship between defendant and the child victim and established defendant's consistently hostile behavior or his statement of made as it related to the victim. Samora v. State, 2010 Tex. App. LEXIS 6759, 2010 WL 3279536 (Tex. App. Corpus Christi Aug. 19 2010).

388. It could be argued that defendant waived an objection under Tex. R. App. P. 33.1 to evidence under Tex. R. Evid. 401, 403 because objections that the evidence was not fair and cumulative did not comport with the objection on appeal. McCallum v. State, 311 S.W.3d 9, 2010 Tex. App. LEXIS 440 (Tex. App. San Antonio Jan. 27 2010).

389. In an aggravated assault case, an objection that photographs of dead cattle were irrelevant did not preserve for review a claim that they were prejudicial under Tex. R. Evid. 403. Walls v. State, 2009 Tex. App. LEXIS 9783, 2009 WL 5150073 (Tex. App. San Antonio Dec. 30 2009).

390. In a case involving aggravated sexual assault of a child, defendant failed to preserve error relating to the admission of testimony from the mother of the victim that the family had moved many times to get away from defendant's violent behavior. Although defendant argued to a trial court that he had not opened the door to evidence of abuse by cross-examining the mother, he did not object that admission of the evidence violated Tex. R. Evid. 403, Tex. R. Evid. 404, and Tex. R. Evid. 405, as he argued on appeal. Gamble v. State, 2009 Tex. App. LEXIS 2134, 2009 WL 806879 (Tex. App. Fort Worth Mar. 27 2009).

391. Defendant failed preserve error because he failed to object under either Tex. Rs. Evid. 403 or 404 to admission of prior offenses; the State posed questions to defendant to clarify the nature of the prior convictions, and counsel objected neither to the court's ruling allowing the evidence nor to the procedure used to arrive at the ruling. Williams v. State, 2009 Tex. App. LEXIS 1032, 2009 WL 350608 (Tex. App. Houston 1st Dist. Feb. 12 2009).

392. In a drug trial, defendant's objection under Tex. R. Evid. 404(b) to evidence of extraneous violent conduct toward defendant's spouse was not sufficient under Tex. R. App. P. 33 to preserve error under Tex. R. Evid. 403. Huneycutt v. State, 2007 Tex. App. LEXIS 9975 (Tex. App. Amarillo Dec. 21 2007).

393. In a drug trial, defendant failed, under Tex. R. App. P. 33.1, to preserve an argument that the trial court abused its discretion under Tex. R. Evid. 403 in allowing the State to introduce evidence of weapons found at the scene; although defendant objected to the introduction of photos that allegedly depicted the weapons, defendant did not object initially when several witnesses testified regarding the weapons. Johns v. State, 2007 Tex. App. LEXIS 9125 (Tex. App. San Antonio Nov. 21 2007).

394. Defendant failed to preserve for review his challenge to the admission into evidence of marijuana that was found inside his tractor trailer because, even though he objected to the lifting of the motion in limine, he never renewed an objection when the evidence was admitted; even if the challenge was preserved for review, it was without merit because the marijuana was admissible under Tex. R. Evid. 404(b) as the cocaine, which defendant was charged with possessing, and the marijuana were part of the same transaction; the marijuana was relevant as an officer testified that he smelled the odor of raw marijuana when he stopped the tractor trailer, and keeping

evidence about the marijuana from the jury would deprive them of an understanding of the offense; the evidence of the marijuana was crucial when it came to evaluating the propriety of the officer's search of the truck. McMorris v. State, 2007 Tex. App. LEXIS 7202 (Tex. App. Tyler Aug. 31 2007).

395. Defendant's argument that evidence that marijuana was found along with the cocaine in the secret compartment in the trailer was improperly admitted into evidence was not preserved for appellate review because after objecting to lifting the motion in limine, defense counsel failed to object when the evidence was admitted; even if the argument had been preserved for review, it was without merit because it was admissible under Tex. R. Evid. 404(b) as the cocaine and marijuana were part of the same transaction and the marijuana was crucial when it came to evaluating the propriety of the officer's search of the tractor trailer. Thomas v. State, 2007 Tex. App. LEXIS 7203 (Tex. App. Tyler Aug. 31 2007).

396. On review of defendant's conviction for indecency with a child, he cited to various portions of the record where he allegedly requested the trial court to conduct a Tex. R. Evid. 403 balancing test; defendant's relevancy objection was not sufficient to preserve the error for review. Ficarro v. State, 2007 Tex. App. LEXIS 3166 (Tex. App. Corpus Christi Apr. 26 2007).

397. Because defendant objected to a deputy's testimony on the ground that it was not relevant, her argument on appeal that the testimony was unfair or prejudicial under Tex. R. Evid. 403 was not preserved for review. Chase v. State, 2007 Tex. App. LEXIS 2270 (Tex. App. Fort Worth Mar. 22 2007).

398. In a trial for aggravated robbery, defendant did not preserve a complaint under Tex. R. Evid. 403 as to the admission of testimony about two bags containing drugs that were in defendant's possession at the time of arrest; counsel raised only a general objection concerning the extraneous nature of the evidence. Padrino v. State, 2007 Tex. App. LEXIS 623 (Tex. App. Dallas Jan. 30 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

399. Evidence was properly admitted as possession of a certain amount of cash was relevant to the issue of possession of firearm, Tex. R. Evid. 403; trial counsel's relevance objection with respect to defendant's personal items failed to preserve error, Tex. R. App. P. 33.1, as to the prejudicial effect of defendant's testimony of the amount of cash in his possession. Tyson v. State, 2012 Tex. App. LEXIS 5059, 2012 WL 2393083 (Tex. App. Texarkana June 26 2012).

400. Defendant did not preserve error for review by failing to object. Williams v. State, 2009 Tex. App. LEXIS 324, 2009 WL 112774 (Tex. App. Fort Worth Jan. 15 2009). Smith v. State, 2008 Tex. App. LEXIS 2081 (Tex. App. Fort Worth Mar. 20 2008). Wilson v. State, 2007 Tex. App. LEXIS 9261 (Tex. App. Dallas Nov. 29 2007). Craig v. State, 2007 Tex. App. LEXIS 6027 (Tex. App. Tyler July 31 2007). Belt v. State, 227 S.W.3d 339, 2007 Tex. App. LEXIS 3749 (Tex. App. Texarkana 2007). Chavez v. State, 2006 Tex. App. LEXIS 7878 (Tex. App. El Paso Aug. 31 2006). Cotton v. State, 2006 Tex. App. LEXIS 5445 (Tex. App. Houston 14th Dist. June 27 2006). Thomas v. State, 2006 Tex. App. LEXIS 5032 (Tex. App. Dallas June 13 2006). Gonzales v. State, 2006 Tex. App. LEXIS 4020 (Tex. App. Corpus Christi May 11 2006). Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006). Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Jury Instructions

401. Reviewing court did not address defendant's arguments that it was error under Tex. R. Evid. 403 to allow the State to introduce an out-of-court statement of its own witness in the guise of impeachment and that the error was compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule

403 grounds, as required by Tex. R. App. P. 33.1(a), and did not request a limiting instruction, as required by Tex. R. Evid. 105(a). Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

402. It was not error under Tex. R. Evid. 403 for the trial court to allow the State to introduce an out-of-court statement of its own witness in the guise of impeachment, and the error was not compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds, as required by Tex. R. App. P. 33.1(a), and did not request a limiting instruction, as required by Tex. R. Evid. 105(a). Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

403. Defense counsel preserved for review the issue of whether the trial court erred in admitting an extraneous offense because defense counsel emphasized what rules his request for a running objection was based on, and the trial court stated that the evidence was admitted as inextricably intertwined with the offense. Finney v. State, 2013 Tex. App. LEXIS 8317 (Tex. App. Dallas July 8 2013).

404. Defendant did not preserve a challenge under Tex. R. Evid. 403 to testimony regarding other acts of child sexual abuse because his only objection was under Tex. R. Evid. 404. Richert v. State, 2012 Tex. App. LEXIS 7719 (Tex. App. Houston 1st Dist. Aug. 30 2012).

405. Defendant's objection under Tex. R. Evid. 403 to the presence of the complainants at the punishment phase of trial did not comport with his appellate argument under Tex. Code Crim. Proc. Ann. arts. 36.06, 36.03 and Tex. R. Evid. 614, as required to preserve the issue. Reed v. State, 2012 Tex. App. LEXIS 1650, 2012 WL 662327 (Tex. App. Waco Feb. 29 2012).

406. Although defendant argued that the trial court erred by admitting certain photographs of him into evidence, defendant never specified that the photos were objectionable because they depicted "large" tattoos on his body. Because defendant failed to state the grounds for his objection to the photos with sufficient specificity, defendant waived this issue on appeal. Burton v. State, 2011 Tex. App. LEXIS 5897, 2011 WL 3274012 (Tex. App. Tyler July 29 2011).

407. Tex. R. Evid. 403 was not invoked by a "not probative" argument. Therefore the issue was not preserved for appeal. Welch v. State, 2011 Tex. App. LEXIS 2692, 2011 WL 1364970 (Tex. App. Texarkana Apr. 12 2011).

408. Defendant preserved an issue relating to the admission of autopsy photographs, even though he did not specifically invoke Tex. R. Evid. 403, because he objected on the basis that they were unfairly prejudicial and that they were needlessly cumulative, satisfying Tex. R. App. P. 33.1(A). Kilgore v. State, 2009 Tex. App. LEXIS 6904, 2009 WL 2707175 (Tex. App. Tyler Aug. 28 2009).

409. In an appeal from a kidnapping conviction, the court reviewed arguments relating to the admission of evidence, even though defendant failed to object, because defendant's complaints were apparent from the context of defendant's objections; therefore, Tex. R. App. P. 33.1 was satisfied. Leffew v. State, 2008 Tex. App. LEXIS 389 (Tex. App. El Paso Jan. 17 2008).

410. Under Tex. R. App. P. 33, defendant failed to preserve an argument regarding a demonstration of his arms because at trial he conceded that he could be required to show the tattoos on his arms; objections that a requirement for defendant to bare his chest was "improper identification" and "improperly suggestive" did not comport with an appellate argument under Tex. R. Evid. 403. Melchor v. State, 2007 Tex. App. LEXIS 8434 (Tex.

App. El Paso Oct. 25 2007).

411. Under Tex. R. Evid. 103(a) and Tex. R. App. P. 33.1(a), a murder defendant waived the argument that autopsy photos were not relevant because an objection under Tex. R. Evid. 403 did not preserve error under Tex. R. Evid. 401. Williams v. State, 2007 Tex. App. LEXIS 6397 (Tex. App. Fort Worth Aug. 9 2007).

412. Although defendant on trial for sexually molesting his stepdaughter objected to the admission of the report of the sexual assault nurse examiner as improper bolstering and a violation of Tex. R. Evid. 403, defendant did not identify at trial which Texas Rule of Evidence, if any, was violated by the admission of the nurse's report. As such, he failed to preserve his objection for appeal. Rivas v. State, 2007 Tex. App. LEXIS 4395 (Tex. App. San Antonio June 6 2007).

413. In a trial for indecency with and sexual assault of a child, defendant failed to preserve an argument under Tex. R. Evid. 403, 607 to the State's calling a witness who the State knew would testify adversely to its case, solely so that it could impeach its own witness with defendant's extraneous offense. Defendant raised only a general objection under Tex. R. Evid. 403 and 404 and thus was not specific, as required by Tex. R. App. P. 33.1. Starnes v. State, 2007 Tex. App. LEXIS 3144 (Tex. App. Texarkana Apr. 26 2007).

414. Because defendant did not raise Tex. R. Evid. 403 as a ground for excluding statements either during pretrial hearings or during trial, defendant failed to preserve the issue for review under Tex. R. App. P. 33. Cordero v. State, 2007 Tex. App. LEXIS 10087 (Tex. App. El Paso Jan. 17 2007).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

415. In a murder trial, defendant waived his Tex. R. Evid. 401 and 403 objections to the portion of a surveillance videotape that depicted the victim's wife kneeling and crying over the victim's body after defendant had fled the store. Two witnesses testified, without objection, regarding actions depicted on the videotape and verbally conveyed the same imagery. Fernandez v. State, 2005 Tex. App. LEXIS 7068 (Tex. App. Houston 14th Dist. Aug. 30 2005).

416. Appellant waived error in the State's admission of juvenile adjudications during the punishment phase of trial without prior identification. Defense counsel stipulated to appellant's identity for prior convictions and her objection to admission of the prior offenses based on Tex. R. Evid. 403, 404 was overruled. Lynch v. State, 2005 Tex. App. LEXIS 1095 (Tex. App. Amarillo Feb. 8 2005).

417. In drug and robbery case, although defendant's relevancy objection to evidence of other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

418. During defendant's criminal trial for burglary of a building, the trial court overruled defendant's Tex. R. Evid. 403 objection to the prejudicial effect of testimony about his methamphetamine addiction. The Court of Appeals of Texas held that the failure to reassert his earlier objection waived the issue for appellate review in accordance with Tex. R. App. P. 33.1. Greenlee v. State, 2008 Tex. App. LEXIS 9438 (Tex. App. Texarkana Dec. 19 2008).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Waiver Triggers Generally

419. Defendant on a drug delivery charge was estopped from raising on appeal any error in the admission of subsequent deliveries at the guilt phase because he admitted his guilt at the penalty phase of trial; further, there was no error under Tex. R. Evid. 403 or Tex. R. Evid. 404 because his counsel opened the door by suggesting that defendant was only a marginal participant in the drug trade and that the charged transaction constituted his sole involvement in the drug business. Houston v. State, 208 S.W.3d 585, 2006 Tex. App. LEXIS 3056 (Tex. App. Austin 2006).

Criminal Law & Procedure : Appeals : Standards of Review : General Overview

420. Eventhough Texas has long discouraged needless presentation of cumulative evidence, pursuant to Tex. R. Evid. 403, the mere fact that another witness may have given the same or substantially the same testimony is not the decisive factor, as recognized pursuant to Tex. R. Evid 103(a)(2), since error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and the substance of the objection was made known to the trial court by offer of proof; however, in this termination of parental rights case, the mother's attorney adequately described the substance of the proposed testimony, introduced the witness's letter and referenced the best interest of the children, and the appeals court found this showing sufficient under the circumstances, by considering whether the excluded testimony would have added substantial weight to the mother's case. In re N.R.C., 94 S.W.3d 799, 2002 Tex. App. LEXIS 8566 (Tex. App. Houston 14th Dist. 2002).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

421. Trial court does not abuse its discretion in admitting photographs if they will help the jury to understand verbal testimony such as technical language used by a medical doctor in describing injuries sustained. Umphres v. State, 2004 Tex. App. LEXIS 5737 (Tex. App. Amarillo June 25 2004).

422. Where pictorial evidence will help the jury understand verbal testimony, such as the technical language used by a medical doctor in describing the injuries sustained by a victim of a crime, a trial court does not abuse its discretion in admitting these photographs. Troncoso v. State, 2004 Tex. App. LEXIS 2578 (Tex. App. Texarkana Mar. 24, 2004).

423. Where pictorial evidence will help the jury understand verbal testimony, such as the technical language used by a medical doctor in describing the injuries sustained by a victim of a crime, a trial court does not abuse its discretion in admitting these photographs. Troncoso v. State, 2004 Tex. App. LEXIS 2578 (Tex. App. Texarkana Mar. 24, 2004).

424. Trial court's determination to exclude evidence under Tex. R. Evid. 403 should be reviewed for a clear abuse of discretion. Martinez Sanchez v. State, 122 S.W.3d 347, 2003 Tex. App. LEXIS 9836 (Tex. App. Texarkana 2003).

425. Questions of admissibility of evidence under Tex. R. Evid. 403 are assigned to the trial court and are reviewable on appeal only for abuse of discretion. Moreno v. State, 1 S.W.3d 846, 1999 Tex. App. LEXIS 6657 (Tex. App. Corpus Christi 1999).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

426. Trial court did not abuse its discretion when it admitted the evidence of defendant's gang member because the evidence was relevant, the State's need for the evidence was great to establish defendant's motive for the shooting and to rebut his theory of self-defense, it directly related to the circumstances surrounding the shootings,

and the time used to develop the evidence was not so great that it distracted the jury from considering the charged offense. Johnson v. State, 2014 Tex. App. LEXIS 3618 (Tex. App. Houston 14th Dist. Apr. 3 2014).

427. Trial court's decision to overrule defendant's objection to exhibits was within the zone of reasonable disagreement because the evidence had probative value identifying defendant as a suspect; there was evidence that items stolen from the complainant during the sexual assault were collected from the owner of the stolen vehicle defendant was found driving, and a detective testified that he went to the home of the owner of the stolen vehicle and collected the exhibits. Reyes v. State, 2013 Tex. App. LEXIS 11611 (Tex. App. Dallas Sept. 11 2013).

428. Trial court did not abuse its discretion by excluding evidence of another potential suspect because defendant made an offer of proof but did not tender any other evidence connecting his brother's alleged drug use or dealing to his murder. Honish v. State, 2013 Tex. App. LEXIS 5139 (Tex. App. Fort Worth Apr. 25 2013).

429. Trial court did not abuse its discretion under Tex. R. Evid. 403 by allowing the State's use of defendant's investigator's bills to cross-examine defendant because while the evidence may have been prejudicial it was not unfairly prejudicial. Pardee v. State, 2012 Tex. App. LEXIS 6823, 2012 WL 3516485 (Tex. App. Texarkana Aug. 16 2012).

430. Trial court did not abuse its discretion by admitting into evidence three series of photographs depicting the injuries suffered by the victim because their admission did not violate Tex. R. Evid. 403, as: (1) the photos were black and white and did not show gruesome scenes; (2) the amount of time spent offering and discussing the photos did not unduly delay the trial; (3) while many of the photos were of the same area of the victim's body, they did not show the same degree of injury as they were taken at different times; and (4) the photos, showing the apparent anger of defendant by the lasting imprint his teeth on the victim's arm and head, went directly to the totality of the circumstances of the assault. Betliskey v. State, 2010 Tex. App. LEXIS 9150, 2010 WL 4644500 (Tex. App. Amarillo Nov. 17 2010).

431. Trial court did not abuse its discretion when the State sought to introduce into evidence State's exhibit number 12 because there was nothing in the record to indicate that the trial court did not perform a Tex. R. Evid. 403 balancing test or that the trial court refused to include its findings on the record. Kneeland v. State, 2008 Tex. App. LEXIS 9249 (Tex. App. Fort Worth Dec. 11 2008).

432. Trial court did not err by refusing to admit into evidence under Tex. R. Evid. 403 two photographs of the victim's home, which showed two posters that defendant alleged showed that the victim and his brother glorified a lifestyle of drugs and violence, because the prejudicial effect of the photographs substantially outweighed the probative value. The court determined that: (1) the photographs of a movie poster and a human silhouette poster had little, if any, probative value as to whether defendant committed aggravated robbery; (2) the photographs would be prejudicial to the State in their potential to suggest that a person who hangs a movie poster in his house automatically identifies with the lifestyle portrayed in the film; (3) the time involved in the introduction of the photographs was minimal; and (4) defendant introduced a substantial amount of additional probative evidence to help support his defensive theory, including evidence that the victim and his brother were drug dealers, that they identified with a life of guns and violence, and that the incident was a drug deal gone bad, not a robbery. Conerly v. State, 2008 Tex. App. LEXIS 5517 (Tex. App. Houston 14th Dist. July 24 2008).

433. Trial court did not err by admitting into evidence defendant's book-in photograph because defendant did not object at trial or complain of an improperly suggestive photographic identification procedure by the State; the photograph was not prejudicial merely because defendant had an "angry look;" the photograph, which was used by a witness during her deposition to identify defendant as the perpetrator, was relevant as identity was an essential

element of any criminal offense. King v. State, 2007 Tex. App. LEXIS 8766 (Tex. App. Beaumont Oct. 31 2007).

434. On defendant's petition for discretionary review under Tex. R. App. P. 66.3(c), the court held that the trial court could have reasonably concluded that the probative value of the breath test results was not substantially outweighed by the countervailing factors specified in Tex. R. Evid. 403: (1) the inherent probative force of the test results was considerable, as they showed that defendant had consumed a substantial amount of alcohol and therefore tended to make more probable defendant's intoxication when he was driving; (2) the results did not have a tendency to suggest decision on an improper basis, and did not have tendency to confuse or distract the jury from the main issues in the case; (3) the results did not have any tendency to be given undue weight by the jury, as a witness testified that the results could not be used to determine what defendant's breath alcohol concentration was at the time he was stopped; and (4) it was unlikely that presentation of the results would consume an inordinate amount of time or merely repeat evidence already admitted. Gigliobianco v. State, 210 S.W.3d 637, 2006 Tex. Crim. App. LEXIS 2450 (Tex. Crim. App. 2006).

435. It was not an abuse of discretion for the trial court to admit evidence of defendant's sexual relationship with a woman and evidence of an extraneous offense showing that defendant had child pornography on a second computer because the probative value of the evidence was not substantially outweighed by the unfair prejudicial effect or by needless presentation of cumulative evidence; the evidence that defendant demanded that the woman present herself for sex in a manner resembling a young female child and that he displayed child pornography to her on his computer was probative because it served to rebut defendant's theory of lack of knowledge that the pornography was on his computer, it was unlikely that the impression was an irrational one, the time required to present the evidence weighed in favor of the State, and the State needed the evidence to show that defendant knowingly possessed child pornography. Zaratti v. State, 2006 Tex. App. LEXIS 7828 (Tex. App. Houston 1st Dist. Aug. 31 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Clearly Erroneous Review : Findings of Fact

436. Defendant could not appeal a drug conviction on the basis that the evidence was factually insufficient to support the jury's implied finding under Tex. Code Crim. Proc. Ann. art. 38.23 that cocaine was lawfully seized. The court distinguished "sufficiency" from "admissibility," which related to the fairness of introducing evidence and its logical relevance under Tex. R. Evid. 403. Salazar v. State, 2008 Tex. App. LEXIS 7068 (Tex. App. Houston 14th Dist. Aug. 28, 2008).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

437. Court properly admitted photographs regarding an extraneous offense during defendant's punishment phase showing injuries the victim sustained because an officer testified that the victim was "very frightened, very upset, scared" and unable to speak, and he testified that he noticed both of her arms were severely bleeding and skin was hanging off. Considering the record as a whole, defendant was not harmed as a result of the admission of the photos depicting the victim's injuries. Johnson v. State, 2011 Tex. App. LEXIS 4905, 2011 WL 2566285 (Tex. App. Houston 14th Dist. June 30 2011).

438. In a capital murder case, even if the trial court erred in admitting the testimony of defendant's former fiancee, the error was harmless as there was a great amount of properly admitted evidence to provide fair assurance that the jury's decision was not based on any improper extraneous evidence. This included evidence that defendant provided a large knife to his co-assailant, was present at the scene of the crime, provided him with liquor and viewed a violent movie with him before the murder, instructed him on how to more efficiently hold the knife provided, allowed him a safe harbor after the killing, concealed the weapon in his apartment, and allegedly participated in the stabbing of the victim. Elder v. State, 2005 Tex. App. LEXIS 5453 (Tex. App. Corpus Christi July

14 2005).

439. Trial court did not abuse its discretion in excluding autopsy photographs in a murder case where the State did not contest that the victim sustained a bullet wound to the front of his body, a medical examiner's testimony comprised convincing evidence to establish that the victim was shot in the front of the body, and the tattooing throughout the victim's body more likely than not would have inflamed the minds of the jurors. Moreover, any error was harmless because other evidence showed that the victim was not a law-abiding citizen and that he had previously threatened defendant and because the trial court assessed punishment at the lower end of the punishment range. Elizondo v. State, 2005 Tex. App. LEXIS 3680 (Tex. App. Corpus Christi May 12 2005).

440. While evidence that defendant was driving a stolen car when he committed a burglary was improperly admitted under Tex. R. Evid. 403 because it was not related to the indicted offenses, the error was harmless because there were several references to the stolen vehicle including defendant's counsel's closing statement, and the jury was instructed to consider extraneous offenses only if they found the defendant committed them, and then it might only be considered in determining the defendant's motive, opportunity, intent, plan, identity, knowledge or absence of mistake, if any, alleged against him in the indictment. Therefore, the admission did not affect defendant's substantial rights under Tex. R. Evid. 44.2(b). Heard v. State, 2004 Tex. App. LEXIS 10378 (Tex. App. El Paso Nov. 18 2004).

441. Trial court's failure to accept defendant's proposed stipulation, thus excluding evidence of defendant's prior conviction, was harmless as the primary offense was failure to register, and the conformity inference of the prior conviction was simply to show generally that defendant was a criminal. Because the indictment referred to the prior attempted indecency with a child conviction, the jury would have known the identity of the prior offense even if all further references to that offense had been excluded. Herring v. State, 147 S.W.3d 390, 2004 Tex. Crim. App. LEXIS 1649 (Tex. Crim. App. 2004).

442. Testimony concerning defendant's plans following release from jail was minimal compared to the testimony concerning the charged offenses, and it did not influence the jury or had only a slight effect; therefore, any error was rendered harmless. Ellinberg v. State, 2004 Tex. App. LEXIS 2753 (Tex. App. Dallas Mar. 26 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

443. In an intoxication-manslaughter case, the trial court did not err in the admission of the dash camera video from the police vehicle because defendant admitted to drinking alcohol on the video at issue, but claimed that he had only had two beers -- a fact refuted by significant other evidence, including a witness's testimony about how much alcohol defendant had consumed before the accident; defendant did not overcome the presumption that the relevant video was more probative than prejudicial; and defendant did not argue that the impact of the evidence would not be rendered harmless by the substantial other evidence at trial of his intoxication. Calbas v. State, 2014 Tex. App. LEXIS 6666, 2014 WL 2809809 (Tex. App. Houston 1st Dist. June 19 2014).

444. Even though the trial court erred by excluding a witness's testimony that the victim had performed oral sex on defendant two days before the sexual assault, as consent was at issue even before the witness testified and the evidence had probative value that outweighed the danger of undue prejudice, the error was harmless because defendant was able to produce considerable evidence that the victim had shown sexual interest in defendant before the assault. The witness testified that defendant and the victim had had sexually charged contact and had gone together into the witness's bedroom. Gotcher v. State, 435 S.W.3d 367, 2014 Tex. App. LEXIS 6181, 2014 WL 2576061 (Tex. App. Texarkana June 10 2014).

445. Trial court did not err in admitting evidence, Tex. R. Evid. 403, 404(b), given the evidence already accumulated against defendant, and any error was harmless. Hicks v. State, 419 S.W.3d 555, 2013 Tex. App. LEXIS 14091, 2013 WL 6076468 (Tex. App. Amarillo Nov. 18 2013).

446. In a robbery/murder trial, any error in admitting evidence of defendant's gang affiliation was harmless because a surviving witness unequivocally identified defendant. Vallejo v. State, 2013 Tex. App. LEXIS 6952 (Tex. App. Corpus Christi June 6 2013).

447. In a child sexual abuse case, even if evidence that appellant spanked his daughters with a cable cord did not fall under Tex. Code Crim. Proc. Ann. art. 38.37, the admission of the testimony was harmless and did not affect appellant's substantial rights where the daughters testified about the years of sexual abuse that they suffered. Appellant failed to preserve his Tex. R. Evid. 403 and Tex. R. Evid. 404(b) objections in the trial court. Arellano-Sanchez v. State, 2013 Tex. App. LEXIS 5438 (Tex. App. Fort Worth May 2 2013).

448. Trial court's alleged error in permitting the complainant to testify as to the punishment he would like defendant to receive had no more than a very slight effect on the jury's determination of punishment; presuming there was error, such error was harmless. Hines v. State, 396 S.W.3d 706, 2013 Tex. App. LEXIS 2000, 2013 WL 748755 (Tex. App. Houston 14th Dist. Feb. 28 2013).

449. In a murder trial, any error in admitting testimony that defendant brought a gun to an encounter with another person shortly before he shot the victim was harmless because the allegedly improperly admitted evidence was insignificant in comparison to eyewitness testimony and physical evidence that defendant pulled the slide back on the gun, which chambered a round, placed the gun to the victim's head, and fired it. Nieto v. State, 2012 Tex. App. LEXIS 8787 (Tex. App. Houston 1st Dist. Oct. 18 2012).

450. Error under Tex. R. Evid. 403 was harmless when an autopsy photograph was admitted of a murder victim's unborn fetus because the State did not dwell on or emphasize the single color photograph depicting the intact fetus; there was other, unobjected-to evidence of the fetus's death; and, although there was no eyewitness testimony that defendant fired the shots, the photograph did not affect the determination of defendant's guilt. Rolle v. State, 367 S.W.3d 746, 2012 Tex. App. LEXIS 2699 (Tex. App. Houston 14th Dist. Apr. 5 2012).

451. In a robbery trial, any error was harmless when the trial court allowed evidence of defendant's tattoos because an accomplice admitted he robbed the shoe store and testified that defendant was also involved in the robbery. Further, defendant's fingerprint was found on one of the shoe boxes handled by the robbers. Jefferson v. State, 2012 Tex. App. LEXIS 663, 2012 WL 234116 (Tex. App. Dallas Jan. 26 2012).

452. In a driving while intoxicated (DWI) case, it was error to admit the entirety of defendant's driving record because it contained evidence of extraneous offenses beyond the prior DWI convictions that were elements of a charged offense. However, the error was harmless because evidence of guilt was ample. Bridges v. State, 2011 Tex. App. LEXIS 9104, 2011 WL 5557534 (Tex. App. Dallas Nov. 16 2011).

453. Even though the trial court erred by allowing the State to introduce evidence that a witness had been threatened by an unknown person, as the evidence did nothing to bolster the witness's credibility and was highly prejudicial under Tex. R. Evid. 403, the error was harmless under Tex. R. App. P. 44.2(b) because it did not affect defendant's substantial rights given the other evidence of guilt, including numerous statements to others by defendant. Newland v. State, 363 S.W.3d 205, 2011 Tex. App. LEXIS 4587, 2011 WL 2480312 (Tex. App. Waco June 15 2011).

454. In a sexual abuse case, the court's error in admitting defendant's statement to an officer that he had cocaine and alcohol problems and he sometimes did not remember things when he was drunk or high was harmless because defendant gave a written confession that he sexually abused the child, and the children gave statements detailing the abuse. Henriquez v. State, 2011 Tex. App. LEXIS 4072, 2011 WL 2119679 (Tex. App. Fort Worth May 26 2011).

455. Even if the trial court erred by denying defendant's request to present testimony from the victim's ex-wife about the victim's propensity for violence without engaging in the Tex. R. Evid. 403 balancing test, the error was harmless because: (1) the trial court found that the ex-wife's testimony was too remote in time from the instant shooting; and (2) the ex-wife's testimony did not form a vital portion of defendant's case and its exclusion did not prevent defendant from presenting the substance of his self-defense claim. Defendant and others testified that the victim had previously gotten into fights. Hart v. State, 2011 Tex. App. LEXIS 3996, 2011 WL 2028216 (Tex. App. Dallas May 25 2011).

456. Trial court did not abuse its discretion in admitting a witness's testimony because whether the witness's testimony about an incident of intoxication unrelated to the current felony driving while intoxicated offense was relevant and admissible under the Tex. R. Evid. 403 balancing test was within the zone of reasonable disagreement; furthermore, even if the trial court erred in admitting the challenged testimony, the error was harmless under Tex. R. App. P. 44.2(b) because the State placed extremely little emphasis on the witness's testimony that he had previously seen defendant intoxicated. Snyder v. State, 2010 Tex. App. LEXIS 10203, 2010 WL 5541120 (Tex. App. Texarkana Dec. 29 2010).

457. Trial court did not err by allowing cross-examination on whether the salon incident occurred where the jury was left only with evidence that the incident did not occur; even if there was error, it was harmless because defendant could not show how he was harmed by the question as the record contained no evidence showing that the incident occurred. Dye v. State, 2010 Tex. App. LEXIS 8012, 2010 WL 3833947 (Tex. App. Houston 1st Dist. Sept. 30 2010).

458. In a drug trial, even if it was error under Tex. R. Evid. 403 to admit 19 bags containing an untested substance into evidence, the error was harmless under Tex. R. App. P. 44.2(b) because there was still overwhelming evidence that the narcotics found in defendant's possession amounted to more than four grams: 20 of the 39 bags found in defendant's possession tested positive for heroin, and their combined weight totaled 4.094 grams. Cantu v. State, 2010 Tex. App. LEXIS 3355, 2010 WL 1817804 (Tex. App. San Antonio May 5 2010).

459. Admission of 12 autopsy photographs in a homicide case was error under Tex. R. Evid. 403 because they were only marginally relevant, given that the cause of death and blood loss were not disputed, and they were highly detailed color photographs focusing on internal injuries and thus may have distracted the jurors. However, the error was harmless under Tex. R. App. P. 44.2(b) because little attention was devoted to these exhibits after they were admitted in evidence. Brown v. State, 2010 Tex. App. LEXIS 273, 2010 WL 138331 (Tex. App. Waco Jan. 13 2010).

460. In a child abuse case, any error in allowing an officer to offer demonstrative evidence by striking a table in the courtroom with an electrical cord found in defendant's residence was harmless under Tex. R. App. P. 44.2 because defendant admitted biting and striking his children, and their bodies were literally covered with scars and lesions. In addition to seeing the photographs depicting the complainants' external injuries, the jury heard medical testimony describing the complainants' many broken bones, the complainants' malnutrition, and the adverse physiological and psychological consequences. Mojica v. State, 2009 Tex. App. LEXIS 5310, 2009 WL 1980942 (Tex. App. Austin July 8 2009).

461. In the sentencing phase of a trial for possession of cocaine, it was error under Tex. R. Evid. 403 to admit testimony from an officer on the impact of cocaine use on the community. However, the error was harmless because defendant was sentenced to 30 years when the range 5 to 99 years, there was abundant evidence on which the jury could have based its assessment of punishment, and the negative impact of drug use on the community was common knowledge. Rowell v. State, 2009 Tex. App. LEXIS 3386, 2009 WL 1364351 (Tex. App. Austin May 14 2009).

462. Hearsay testimony relating to a DNA results report that a detective had not personally prepared was harmless because a DNA analyst had testified without objection about the test results on the swabs contained in the victim's sexual assault kit; the detective's testimony was cumulative of the DNA analyst's testimony. Alvarez v. State, 2009 Tex. App. LEXIS 3039, 2009 WL 1176440 (Tex. App. Fort Worth Apr. 30 2009).

463. In defendant's drug case, any error by the admission of testimony concerning the search warrant being assigned to the gang unit was harmless because, by the time the officer testified, the following evidence had already been admitted: defendant claimed membership in the past in two gangs, and defendant had gang membership tattoos and photographs of the tattoos were admitted into evidence. Cedillo v. State, 2008 Tex. App. LEXIS 9485 (Tex. App. Fort Worth Dec. 18 2008).

464. In a murder trial, no harm occurred when the trial court admitted tape-recorded phone conversations that included defendant's statement about a plea offer on an unrelated offense; defendant's remark was in the middle of the State's first tape-recorded conversation, it was not singled out at trial, and the State did not attempt to introduce other evidence regarding the previous offense. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

465. In defendant's capital murder case, evidence in the guilt-innocence phase that painted a picture of the victim as a young man with a promising future whose life defendant had ended prematurely was irrelevant and appealed to the jury's sympathies. However, the error was harmless; defendant admitted to participating in the shooting, and a witness testified that defendant shot the victim and grabbed the bag of codeine. Durand v. State, 2007 Tex. App. LEXIS 6535 (Tex. App. Houston 1st Dist. Aug. 16 2007).

466. Showing the jury photographs of a murder victim's internal organs, by themselves, without additional testimony, was error under Tex. R. Evid. 403 because the photographs did nothing to depict the nature or location of the wound or to help the jury make its decision on an element of the charged offense when they had already seen the body and positioning of the gunshot wounds and heard testimony that the cause of death was multiple gunshot wounds; the error was harmless under Tex. R. App. P. 44.2(b), however, because the photographs were merely cumulative in the context of the entire case. Williams v. State, 2007 Tex. App. LEXIS 6397 (Tex. App. Fort Worth Aug. 9 2007).

467. Evidence of defendant mentioning an attorney on the tape was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403, and therefore it should have been suppressed; although the evidence had some probative value as evidence of defendant's speech pattern, the State did not have a distinct need for the evidence in light of other portions of the tape providing the same evidence; the error was not harmless under Tex. R. App. P. 44.2 because the evidence of guilt was not overwhelming, as it consisted of only defendant's refusal to perform a breath test, his slow speech, and his poor performance on a horizontal gaze nystagmus test. Lajoie v. State, 237 S.W.3d 345, 2007 Tex. App. LEXIS 4318 (Tex. App. Fort Worth 2007).

468. In a drug trial, counsel was not rendered ineffective by failing to object under Tex. R. Evid. 403 to the admission of photographs of defendant's nephew and testimony that the appearance of track-marks on one's inner

arm indicated the use of intravenous drugs; even if the testimony was objectionable, no harm resulted from counsel's failure to object because there was no reasonable probability that the evidence contributed to the conviction. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

469. Defendant was not entitled to reversal of a conviction for indecency with a child because of the admission of a confession that referred to other bad acts; any violation of Tex. R. Evid. 403 was harmless error under Tex. R. App. P. 44.2 because the confession strongly supported the verdict and a proper limiting instruction was given. Diaz v. State, 2006 Tex. App. LEXIS 8084 (Tex. App. Amarillo Sept. 12 2006).

Estate, Gift & Trust Law : Will Contests : General Overview

470. Nursing home records contained a number of facts the jury was entitled to consider and they were probative because they provided a general background from which jurors could understand the general status of the decedent's health in periods of time relevant to the contested will issues the jury was asked to decide; thus, the probate court could reasonably conclude that the probative value of the records outweighed any potential prejudicial effect under Tex. R. Evid. 403 and admit those records into evidence. In the Estate of Kremer, 2011 Tex. App. LEXIS 1726, 2011 WL 846137 (Tex. App. Beaumont Mar. 10 2011).

Evidence : Demonstrative Evidence : General Overview

471. Trial court did not abuse its discretion by admitting into evidence the bra and shirt that the victim was wearing at the time of the stabbing under Tex. R. Evid. 403 because they were admitted to show where the knife went into the victim's torso, which could orient the jury to the location and nature of the victim's wounds. Matez v. State, 2007 Tex. App. LEXIS 4418 (Tex. App. Corpus Christi June 7 2007).

472. In an action in which a trial court awarded more than $ 2 million to a pedestrian for injuries she sustained when she was struck by a city transit bus driven by an employee of a transit authority contractor, the trial court did not err when it admitted into evidence the graphic photographs of the pedestrian's injuries; even though the driver objected to the admission of the photographs, any error was waived by the failure to object to testimony of the conditions depicted in those photographs; at trial, witnesses testified they saw the pedestrian in the crosswalk when she was struck and dragged by the bus, and the orthopedic trauma surgeon who treated the pedestrian when she arrived at the hospital and amputated her leg testified, without objection, about the nature and extent of her injuries; however, even if the driver's objection was not waived, the photographs were relevant and admissible as evidence of the driver's liability and the pedestrian's physical pain and suffering. Castro v. Cammerino, 186 S.W.3d 671, 2006 Tex. App. LEXIS 1765 (Tex. App. Dallas 2006).

473. Where a picture of a murder victim's four children was nothing more than a typical snapshot of smiling children and no endearing description was written on it nor was there anything else which would have led the jury to decide the case on an emotional basis rather than on the other evidence presented at trial, it did not have to be excluded under Tex. R. Evid. 403. Rivera v. State, 2005 Tex. App. LEXIS 5532 (Tex. App. Dallas July 15 2005).

474. In the punishment phase of a murder trial, a photograph of the victim's unborn child (which had been removed during the victim's autopsy) was inadmissible as the State did not need the photograph for any relevant purpose and it was substantially more prejudicial than probative; the photograph of the fetus had almost no probative value in that it added nothing helpful to the already-admitted testimony that the victim was pregnant, that defendant knew she was pregnant, and that the fetus died as a result of the victim's death. Erazo v. State, 144 S.W.3d 487, 2004 Tex. Crim. App. LEXIS 1007 (Tex. Crim. App. 2004).

475. Based on defendant's own admission that color photographs that depicted the bruising of a larynx of a victim that was not externally visible, and because the photographs were relevant to that manner of death of the victim, which was manual strangulation, the probative value of the photographs outweighed the danger of any prejudice under the balancing test of Tex. R. Evid. 403. Ripkowski v. State, 61 S.W.3d 378, 2001 Tex. Crim. App. LEXIS 98 (Tex. Crim. App. 2001), writ of certiorari denied by 539 U.S. 916, 123 S. Ct. 2274, 156 L. Ed. 2d 133, 2003 U.S. LEXIS 4463, 71 U.S.L.W. 3758 (2003).

Evidence : Demonstrative Evidence : Admissibility

476. Demonstration in which the prosecutor instructed defendant to stab the air 20 times while the prosecutor positioned himself in the place of the murder victim was relevant because it raised an inference that defendant had a motive to murder his wife. Davis v. State, 2011 Tex. App. LEXIS 8372, 2011 WL 5026403 (Tex. App. Houston 1st Dist. Oct. 20 2011).

477. In a driving while intoxicated case, there was no error under Tex. R. Evid. 403, 701, in admitting a CD to assist the arresting officer in explaining the effects of alcohol on a person's eyes with and without increased nystagmus. The exhibit was not offered as substantive evidence of intoxication but rather as a tool to help the arresting police officer explain the horizontal gaze nystagmus test. Redfearn v. State, 2010 Tex. App. LEXIS 7018, 2010 WL 3377796 (Tex. App. Fort Worth Aug. 26 2010).

478. In defendant's capital murder case, the court properly admitted autopsy photographs of the victim where the photographs were taken before the autopsy procedure began and showed the condition of the body as it was received from the hospital; the photographs showed the bullet wound that testimony indicated was the cause of death, they illustrated that the victim was not otherwise bruised or injured as he would have been if there had been a fight before he was shot, and they showed no more than the nature of the victim's injury. Gray v. State, 2006 Tex. App. LEXIS 2363 (Tex. App. Dallas Mar. 29 2006).

479. In a capital murder case, a court properly admitted photographs of the victim's corpse where the photographs were probative of the crime scene and the injuries received by the victim, they were necessary for the State in developing its case, and, because they were not overly gruesome, the photographs did not pose the potential of impressing the jury in some irrational way; the danger of unfair prejudice did not substantially outweigh the probative value of the photographs. Shuffield v. State, 189 S.W.3d 782, 2006 Tex. Crim. App. LEXIS 365 (Tex. Crim. App. 2006).

480. State was properly allowed to demonstrate its version of defendant's murder of her husband in order to illustrate the state's theory that the multiple stabbing was planned rather than defensive; the demonstration was not more prejudical than probative because, although the demonstration may have impressed the jury, it did not do so in an irrational yet indelible way. Wright v. State, 178 S.W.3d 905, 2005 Tex. App. LEXIS 9609 (Tex. App. Houston 14th Dist. 2005).

481. Court did not err by admitting an investigation videotape into evidence because, although the content of the video might have been unpleasant to view, it depicted the reality of the brutal crime committed, it contained material that was the subject of testimony presented during the State's case in chief, and it was probative of the fact and manner of the victim's death and defendant's culpable mental state. Ramirez v. State, 2005 Tex. App. LEXIS 4185 (Tex. App. San Antonio June 1 2005).

482. In a murder trial, the trial court properly excluded a video reenactment that purported to establish that the victim could have exited defendant's car easily; it was offered to counter the State's position that the car was difficult to exit. The evidence was of little relevance because there were testimony and pictures on the same issue; further,

such reenactments were highly prejudicial. Rossel v. State, 2005 Tex. App. LEXIS 1158 (Tex. App. Houston 1st Dist. Feb. 10 2005), writ of certiorari denied by 126 S. Ct. 1035, 163 L. Ed. 2d 872, 2006 U.S. LEXIS 186 (U.S. 2006).

483. Trial court did not err in allowing the State to play a 911 tape aloud to the jury, instead of admitting a written transcript of the 911 tape, during defendant's capital murder trial, which arose from a robbery, because although two of the robbery victims were excited and distraught on the 911 recording, they did not display such emotion as to inflame the jurors to act on emotion rather than on the evidence in violation of Tex. R. Evid. 403. Sierra v. State, 157 S.W.3d 52, 2004 Tex. App. LEXIS 11374 (Tex. App. Fort Worth 2004).

484. Court did not abuse its discretion when it allowed a videotape of the crime scene into evidence because the State offered several still photos of the victims and the crime scene, and the video presented a three dimensional perspective of the evidence already before the jury. Although the videotape was partially cumulative of the still photographs, the trial court could have reasonably concluded that the probative value of the videotape was not substantially outweighed by the danger of unfair prejudice. Avila v. State, 2004 Tex. App. LEXIS 11021 (Tex. App. San Antonio Dec. 8 2004).

485. In an injury to a child case, the trial court did err in admitting autopsy photos of one of the children as the danger of unfair prejudice was not substantially outweighed by the probative value of the photographs: the photos depicted the injuries suffered by the child, were not unnecessarily gruesome or cumulative, were introduced into evidence during the testimony of the medical examiner, and were used to aid him in explaining the cause of the child's death. Aranda v. State, 2004 Tex. App. LEXIS 10370 (Tex. App. Corpus Christi Nov. 18 2004).

486. In defendant's manslaughter case, the trial judge did not err in admitting photographs of the accident scene where the photographs showed the condition and location of the victims' bodies at the scene; the photographs were the subject of trial testimony, including the other driver's testimony that at the time of the impact, the victim fell into his lap. Although graphic, the photographs were not so horrifying that after viewing them, any juror of normal sensitivity would have difficulty rationally deciding the critical issues. Tijerina v. State, 2004 Tex. App. LEXIS 9539 (Tex. App. Dallas Oct. 28 2004).

487. In a murder case, the trial judge did not err by admitting autopsy photographs as they were probative of the manner of the victim's death and assisted the jury in making its decision on punishment. In depicting the body's position at the crime scene and the location and angle of wounds as seen by the medical examiner at the autopsy, the photographs did not have the ability to impress the jury in some irrational, yet indelible way. Stubbs v. State, 2004 Tex. App. LEXIS 8916 (Tex. App. Beaumont Oct. 6 2004).

488. In an aggravated robbery case, a court properly admitted a videotape showing the victim's wounds where the videotape was made three weeks after the attack, the video depicted no more than the injuries inflicted upon the victim, five photos, all admitted without objection, showed the victim in the intensive care unit, and the videotape was the only evidence offered by the State to show the actual injuries sustained by the victim. Allen v. State, 2004 Tex. App. LEXIS 6722 (Tex. App. Dallas July 23 2004).

489. In a sexual assault case, court properly admitted photographs of injuries to the victim where the photographs were of average size, in color, and few in number, the injuries had been testified to by the victim, but because they had healed by the time of trial, there were no other available means to demonstrate that they had been sustained, as no other witnesses testified to having observed the injuries, and although the victim was naked in the photographs and the pictures were close-up shots, that was necessary given the nature of the injuries, i.e., a series of bites on the genital area. Thus, the probative value of the four photographs outweighed their potentially

prejudicial effect. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

490. In defendant's murder case, the trial court did not abuse its discretion by admitting three autopsy photographs where the three objected-to autopsy photographs were the only photographs that documented the internal autopsy findings of the entry wounds, the fractures caused by the gunshots, the proximity of the wounds to each other and to the body, and the trajectories of the bullets. The photographs were highly relevant to explain the manner of death by documenting the entrance wounds, the proximity of the wounds to each other, the trajectory of the bullets, and the resulting fractures, and the jury would not have been prejudiced in some irrational, but nevertheless indelible way by viewing autopsy photos of the deceased's head under those circumstances. Hall v. State, 137 S.W.3d 847, 2004 Tex. App. LEXIS 4402 (Tex. App. Houston 1st Dist. 2004).

491. Autopsy photographs are generally admissible unless they depict mutilation caused by the autopsy itself; Tex. R. Evid. 403 provides that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by consideration of undue delay, or needless presentation of cumulative evidence. Rayford v. State, 125 S.W.3d 521, 2003 Tex. Crim. App. LEXIS 842 (Tex. Crim. App. 2003), *cert. denied*, 543 U.S. 823, 125 S. Ct. 39, 160 L. Ed. 2d 35, 2004 U.S. LEXIS 5715, 73 U.S.L.W. 3207 (2004).

492. Trial court's exclusion of a tape was proper where it was reasonable for the trial court to conclude that the risks of confusing the jury substantially outweighed any probative value the video might have; under Tex. R. Evid. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Sells v. State, 121 S.W.3d 748, 2003 Tex. Crim. App. LEXIS 63 (Tex. Crim. App. 2003), *cert. denied*, 540 U.S. 986, 124 S. Ct. 511, 2003 U.S. LEXIS 8067 (2003).

Evidence : Demonstrative Evidence : Photographs

493. Court did not abuse its discretion in admitting the challenged photographs, because the probative value was not substantially outweighed by the prejudicial effect, when the photographs illustrated the condition of the premises where defendant kept the mistreated, unattended animals. Graham v. State, 2014 Tex. App. LEXIS 8857, 2014 WL 3939957 (Tex. App. Tyler Aug. 13 2014).

494. In an intoxication-manslaughter case, defendant did not demonstrate that the trial court abused its discretion in admitting photographs of the decedent and the collision scene because the photographs were not cumulative, and each photograph was relevant and not unduly prejudicial. Calbas v. State, 2014 Tex. App. LEXIS 6666, 2014 WL 2809809 (Tex. App. Houston 1st Dist. June 19 2014).

495. In a forgery case, the trial court did not abuse its discretion in admitting a photograph showing the pickup truck defendant was driving when he returned to the store. The photograph was relevant because it was given to the local authorities to aid their investigation; defendant advanced no theory as to how the photograph unduly prejudiced him or led the jury to decide the case on an improper basis. Resendez v. State, 2014 Tex. App. LEXIS 2587, 2014 WL 972297 (Tex. App. Eastland Mar. 6 2014).

496. At defendant's murder trial, the court did not err by admitting an autopsy photograph depicting the bullet lodged in the tissue at the back of the victim's neck; the photograph was relevant to the cause of death--a gunshot wound to the head, and manner of death--homicide. The autopsy photograph was also useful in assisting the medical examiner's testimony; the probative value was not outweighed by the prejudicial effect, because the photograph was not gruesome or enhanced in any way. Barr v. State, 2014 Tex. App. LEXIS 1714, 2014 WL

641351 (Tex. App. Austin Feb. 14 2014).

497. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

498. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

499. In a murder trial, any error was harmless from the admission of photographs showing unusual items found during a search of defendant's home, including a plastic manikin torso and head suspended by a noose around its neck and replica human skulls; the jury had the means to discern whether the items in the photographs represented an obsession with violence or merely poor taste and a penchant for collecting strange things. Kirk v. State, 421 S.W.3d 772, 2014 Tex. App. LEXIS 788, 2014 WL 252086 (Tex. App. Fort Worth Jan. 23 2014).

500. In a murder trial, any error was harmless from the admission of photographs showing unusual items found during a search of defendant's home, including a plastic manikin torso and head suspended by a noose around its neck and replica human skulls; the jury had the means to discern whether the items in the photographs represented an obsession with violence or merely poor taste and a penchant for collecting strange things. Kirk v. State, 421 S.W.3d 772, 2014 Tex. App. LEXIS 788, 2014 WL 252086 (Tex. App. Fort Worth Jan. 23 2014).

501. Trial court did not abuse its discretion in admitting a photograph of defendant's back yard taken in 2006 because it showed defendant's knowledge and intent, as some lumber and a yellow chair were in defendant's backyard three years before similar items were added to the waste pile after defendant's encounter with an officer. Mellen v. State, 2013 Tex. App. LEXIS 12091, 2013 WL 5520369 (Tex. App. Eastland Sept. 26 2013).

502. In a murder trial, there was no error in admitting 14 photographs taken of the victim's remains at the crime scene and used in conjunction with a forensic anthropologist's testimony. Henderson v. State, 2013 Tex. App. LEXIS 11883 (Tex. App. Waco Sept. 19 2013).

503. In a prosecution for evading arrest, the trial court did not err by admitting the State's photographs over defendant's objection under this rule because defendant challenged the officer's version of the events, there was no other evidence except the officers' testimony to establish that defendant refused to comply, and the pictures were not gruesome. King v. State, 2013 Tex. App. LEXIS 11185 (Tex. App. Corpus Christi Aug. 30 2013).

504. In a trial for the murder and sexual assault of a 78-year-old victim, there was no error in admitting crime scene photographs because they were accurate depictions of the scene and the body, corroborated testimony on the cause of death, and depicted the force used. Hardge v. State, 2013 Tex. App. LEXIS 11102 (Tex. App. Houston 1st Dist. Aug. 29 2013).

505. Trial court did not abuse its discretion by admitting autopsy photographs because they were useful in assisting the medical examiner's testimony and they portrayed no more than the gruesomeness of the injuries inflicted by defendant and his accomplices. Maldonado v. State, 2013 Tex. App. LEXIS 9277 (Tex. App. Waco July 25 2013).

506. Trial court did not abuse its discretion by admitting crime scene photographs because they corroborated an accomplice's testimony that regarding how defendant and the accomplice dragged the victim's body through the woods by his legs, the position of the body when they left it, and showed the single bullet wound. Maldonado v. State, 2013 Tex. App. LEXIS 9277 (Tex. App. Waco July 25 2013).

507. In a trial for the death of a three-year-old child, there was no error in admitting autopsy photographs because the close-ups of the fatal injuries to the child's brain showed the level of trauma, which was probative of defendant's intent. They were not unduly prejudicial. Copeland v. State, 2013 Tex. App. LEXIS 9101 (Tex. App. El Paso July 24 2013).

508. Trial court did not abuse its discretion by admitting into evidence photographs of the victim taken in the hospital because they were visual representations of the officers' testimony regarding her condition, the mere fact that the photographs depicted the victim's badly bruised body did not automatically render them more prejudicial than probative, and they refuted defendant's claims that she never noticed anything wrong with the victim or that the bruising might have been caused by the efforts to resuscitate the victim. Sifuentes v. State, 2013 Tex. App. LEXIS 8105 (Tex. App. San Antonio July 3 2013).

509. Trial court did not abuse its discretion by admitting graphic photographs depicting the murder victim's injuries into evidence because they were probative of the manner of death and could be interpreted to indicate that the victim was shot twice in the back and that defendant planted the knife in the victim's hand, which was relevant to defendant's claim of self-defense. The court could not say that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice because while the photographic depiction of the entrance wound was no doubt made more gruesome due to postmortem changes, that information was submitted to the jury solely by way of the autopsy report and the State did not focus on the condition of the wound. Rider v. State, 2013 Tex. App. LEXIS 5050 (Tex. App. Texarkana Apr. 25 2013).

510. Trial court did not abuse its discretion by admitting three autopsy photographs because they were highly probative of the manner of death and therefore did not violate Tex. R. Evid. 403. The photos were used in progression to explain where and how the bullet entered the victim's body, the distance traveled, trajectory, and path of the bullet, and the mechanism of death. Wilson v. State, 2013 Tex. App. LEXIS 4791 (Tex. App. Corpus Christi Apr. 18 2013).

511. Trial court did not abuse its discretion in admitting the photographs where they were pictures of the locations at which the assaults took place and pictures of the victim's injuries; none of the photographs were gruesome, the victim was clothed, and none were cumulative. Hill v. State, 392 S.W.3d 850, 2013 Tex. App. LEXIS 453, 2013 WL 174062 (Tex. App. Amarillo Jan. 16 2013).

512. In defendant's murder case, the probative value of nine crime scene photographs outweighed their unfair prejudice because the photos did not show the victim's sexual organs and only showed his abdomen to the extent necessary to view the gunshot wound. The photos did nothing more than depict the crime scene, and they were unlikely to elicit an irrational decision. Gabriel v. State, 2012 Tex. App. LEXIS 10771, 2012 WL 6743557 (Tex. App. San Antonio Dec. 31 2012).

513. Autopsy photographs were properly admitted into evidence because they illustrated the medical examiner's testimony about the murder victim's wounds and portrayed no more than the gruesomeness of the injuries inflicted by defendant. Henderson v. State, 2012 Tex. App. LEXIS 9141 (Tex. App. Dallas Nov. 5 2012).

514. Trial court did not abuse its discretion by admitting a photograph of the victim's head after her body was discovered in the closet despite defendant's Tex. R. Evid. 403 objection because it was probative of the injuries

sustained by the victim, the single photograph did not require a great deal of time to present to the jury, and, though gruesome, depicted no more than the unpleasant, natural consequences of defendant's crime of murder. Hernandez-Sandoval v. State, 2012 Tex. App. LEXIS 7660, 2012 WL 3870306 (Tex. App. Amarillo Sept. 6 2012).

515. In defendant's aggravated assault, family violence penalty trial, the trial court did not err in admitting two photos of the victim lying in a hospital bed, attached to a ventilator with I-Vs in her arm and with a brace on her neck over defendant's Tex. R. Evid. 403 objection. Mejias v. State, 2012 Tex. App. LEXIS 5616, 2012 WL 2866303 (Tex. App. Waco July 12 2012).

516. Where defendant entered a plea of guilty to four aggravated robberies, the trial court did not abuse its discretion in admitting photographs of defendant's tattoos as they were relevant to the jury's determination of his suitability for community supervision. Two of the tattoos indicated defendant's religious beliefs, one resembled knowledge, and another tattoo depicted a caretaker of death pouring down beer; nothing in the tattoos was so unfairly prejudicial that its exclusion was required under Tex. R. Evid. 403. Jackson v. State, 2012 Tex. App. LEXIS 5221, 2012 WL 2445052 (Tex. App. Dallas June 28 2012).

517. In a murder trial, there was no error in admitting autopsy photographs because they were highly probative to show the full extent of the victim's injuries and portrayed no more than the gruesomeness of the injuries inflicted. Salazar v. State, 2012 Tex. App. LEXIS 4983, 2012 WL 2357744 (Tex. App. Corpus Christi June 21 2012).

518. Photograph of a murder victim taken at the crime scene after she had been shot by defendant was properly admitted where: (1) witnesses identified the picture as that of the victim; (2) the photo was not gruesome and showed no indication that the body had been posed or otherwise disturbed; and (3) the jury saw a video that showed the entire episode without objection. The photo simply depicted the result of a violent assault by one person, defendant, on another person, the victim, and the photo's probative value was not substantially outweighed by danger of unfair prejudice. Bibbs v. State, 371 S.W.3d 564, 2012 Tex. App. LEXIS 4677, 2012 WL 2135561 (Tex. App. Amarillo June 13 2012).

519. Trial court did not abuse its discretion under Tex. R. Evid. 403 by admitting autopsy photographs of the child victim that showed injuries to areas other than her vagina because: (1) they helped to disprove defendant's theory that the victim's injuries were the result of an accident that occurred prior to the day she died; (2) the photographs were not inflammatory as they were essential parts of the State's case against defendant and were addressed in a straightforward manner not designed to influence the jury in an emotional manner; (3) they were key evidence in proving the State's case and the fact that they documented the results of a particularly horrific crime did not make them overly inflammatory or likely to mislead the jury; and (4) the time involved in presenting the photographs to the jury and discussing them during the trial was minimal when compared to the overall length of the trial. Coe v. State, 2012 Tex. App. LEXIS 4169, 2012 WL 1899179 (Tex. App. Houston 14th Dist. May 24 2012).

520. In a manslaughter trial arising from a multi-vehicle collision, autopsy photographs of the five deceased victims were properly admitted during the guilt-innocence phase because they linked the victims to their individual autopsies; the single photograph of each deceased victim portrayed no more than the condition of the victim due to the injuries inflicted. Jones v. State, 2012 Tex. App. LEXIS 4104, 2012 WL 1861033 (Tex. App. Dallas May 23 2012).

521. In a trial for capital murder in the course of a burglary, it was error under Tex. R. Evid. 403 to admit an autopsy photograph of the victim's unborn fetus because there was little probative value in relation to the offense, as to which the death of the fetus was not an element, and other evidence was admitted of the pregnancy and the fetus's death. Rolle v. State, 367 S.W.3d 746, 2012 Tex. App. LEXIS 2699 (Tex. App. Houston 14th Dist. Apr. 5

2012).

522. Error under Tex. R. Evid. 403 was harmless when an autopsy photograph was admitted of a murder victim's unborn fetus because the State did not dwell on or emphasize the single color photograph depicting the intact fetus; there was other, unobjected-to evidence of the fetus's death; and, although there was no eyewitness testimony that defendant fired the shots, the photograph did not affect the determination of defendant's guilt. Rolle v. State, 367 S.W.3d 746, 2012 Tex. App. LEXIS 2699 (Tex. App. Houston 14th Dist. Apr. 5 2012).

523. Where defendant entered a plea of guilty to intoxication manslaughter with a deadly weapon, the trial court did not err by admitting photographs depicting the victim's body at the scene of the collision. Because the photographs showed the violence of the impact and the injuries to the victim, the trial court could have properly determined that their prejudicial effect did not substantially outweigh their probative value under Tex. R. Evid. 403. Deas v. State, 2012 Tex. App. LEXIS 2066, 2012 WL 858627 (Tex. App. Fort Worth Mar. 15 2012).

524. Seven autopsy photographs were properly admitted in a murder trial, even though defendant did not contest the cause of death, because they showed the severely decomposed state of the corpse, which the jury could have concluded contradicted defendant's claim that he cared deeply about her and killed her in sudden passion. Cantu v. State, 2012 Tex. App. LEXIS 1639, 2012 WL 664939 (Tex. App. Corpus Christi Mar. 1 2012).

525. In a murder trial, there was no error under Tex. R. Evid. 403 in admitting autopsy photographs of the complainant's stab wounds, even though they graphs were gruesome, because the nature of the wounds was relevant to defendant's claim of self-defense. Crime scene photographs were not cumulative because they did not show the wounds on the victim's back. Mcpeters v. State, 2012 Tex. App. LEXIS 854, 2012 WL 356184 (Tex. App. Houston 14th Dist. Feb. 2 2012).

526. In defendant's capital murder case, the trial court properly admitted autopsy photographs because they were not any more gruesome than what would be expected, the photographs tracked the doctor's testimony, and the photographs depicted the victim's bloody and bruised face and were vital to the State's case to the jury with regard to the manner and method of the victim's death. Gonzalez v. State, 2012 Tex. App. LEXIS 927, 2012 WL 361733 (Tex. App. Corpus Christi Feb. 2 2012).

527. Trial court did not abuse its discretion by admitting four photographs from the victim's autopsy because they helped the jury understand the extent of the victim's injuries, were demonstrative of defendant's intent, and did not constitute a large part of the pathologist's testimony and the State's case. The photographs were highly relevant and probative and not unfairly prejudicial. Ramirez v. State, 2012 Tex. App. LEXIS 455, 2012 WL 170996 (Tex. App. Corpus Christi Jan. 19 2012).

528. For purposes of defendant's aggravated assault convictions, the photographs of the crime scene were admissible because their probative value was not substantially outweighed by their prejudicial value under Tex. R. Evid. 403 as the photographs showed the injuries defendant inflicted on the victims, and they helped the jury to determine whether serious bodily injury resulted from the shooting. Hernandez v. State, 2012 Tex. App. LEXIS 344, 2012 WL 135675 (Tex. App. San Antonio Jan. 18 2012).

529. Trial court did not err by admitting two crime scene photographs of the victim's body under Tex. R. Evid. 403 because: (1) the photographs helped the State illustrate the paramedic's testimony by depicting both the crime scene and the victim's injuries; (2) the photographs were no more gruesome than the facts of the offense itself; and (3) the State did not spend a lot of time presenting the photographs to the jury. Suarez v. State, 2011 Tex. App. LEXIS 6190 (Tex. App. San Antonio Aug. 10 2011).

530. Trial court did not abuse its discretion by admitting into evidence autopsy photographs of the victim under Tex. R. Evid. 403 because they allowed the jury to compare defendant's description of the victim in his statement to the photographs, and aided the jury in understanding and evaluating the medical examiner's testimony. Tilford v. State, 2011 Tex. App. LEXIS 5933, 2011 WL 3273543 (Tex. App. El Paso July 29 2011).

531. Trial court did not abuse its discretion by admitting into evidence six photographs of the baby's injuries under Tex. R. Evid. 403 because they were important for the jury in understanding testimony offered by a pediatric surgeon and for forming their own conclusions regarding the cause of injury to the baby's genitals and leg. A key issue raised in the case was whether the baby's injury could have been inflicted by a small dog or whether it was caused by a sharp instrument in the hands of a person. Nadal v. State, 348 S.W.3d 304, 2011 Tex. App. LEXIS 5104 (Tex. App. Houston 14th Dist. July 7 2011).

532. In defendant's sexual assault on a child case, the court did not err by admitting two photographs of a box containing a used condom and condom wrapper because the photographs corroborated the victim's and the officer's testimony, there were only two black and white photographs offered, and those photographs were not gruesome. Chang Hyeong Lee v. State, 2011 Tex. App. LEXIS 3623, 2011 WL 1833142 (Tex. App. Fort Worth May 12 2011).

533. At defendant's criminal trial for aggravated assault with a deadly weapon, the trial court did not abuse its discretion in admitting a videotape showing the layout of the apartment with a sign indicating no one was allowed to open the refrigerator; the evidence was necessary to prove the victim was outside defendant's apartment when he was shot and to develop defendant's motive by showing he was angry because he believed the victim was stealing beer from him. The presence of pornography or Nazi paraphernalia was not so inflammatory or prejudicial under Tex. R. Evid. 403 as to outweigh the need of the State to present the video evidence. Amador v. State, 2011 Tex. App. LEXIS 3404, 2011 WL 1706474 (Tex. App. Corpus Christi May 5 2011).

534. Trial court did not abuse its discretion by admitting four photographs of the victim's autopsy and the crime scene into evidence under Tex. R. Evid. 403 because: (1) the photograph of the victim's injuries resulting from the gunshot was relevant and probative to show the location and state of the victim's body when it was discovered and the injuries inflicted on it; (2) the autopsy photographs were probative because they depicted the injuries defendant inflicted on the victim and illustrated the medical examiner's explanation of the victim's injuries; (3) the record showed that the admission of the photographs took very little time; and (4) the State needed the crime scene photographs to provide a necessary visual component that helped the jury understand the witnesses' testimony describing the victim's injuries and the manner in which she was discovered. The autopsy photographs were not cumulative of other evidence and were relevant to the manner and circumstances of the victim's death. Jiles v. State, 2011 Tex. App. LEXIS 3317, 2011 WL 1711228 (Tex. App. Houston 14th Dist. May 3 2011).

535. Trial court did not abuse its discretion in admitting a photograph that showed a murder victim on the ground at the crime scene where, although some blood was visible on the victim's clothing and his chest was bared, the photograph was not gruesome, did not show a close-up of any injury, and merely depicted the victim in relation to his surroundings. The probative value of the photograph was not substantially outweighed by any prejudicial effect. Acevedo v. State, 2011 Tex. App. LEXIS 2047, 2011 WL 1044402 (Tex. App. San Antonio Mar. 23 2011).

536. Trial court did not err by admitting into evidence several photographs of the victim at the scene of the murder based on Tex. R. Evid. 403 because: (1) only two of the photographs could be considered close-ups, and none were autopsy photos; (2) the photographs corroborated the testimony of the responding officer and the pathologist at to the location and manner of the crime; and (3) a photograph of the victim's state of dress did not indicate that she was sexually assaulted and the State did not present any evidence at trial suggesting a sexual assault took place. Reese v. State, 340 S.W.3d 838, 2011 Tex. App. LEXIS 1900 (Tex. App. San Antonio Mar. 16 2011).

537. Trial court did not err in finding that the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice to defendant where the evidence was probative that defendant was the victim's assailant.

538. Photograph was properly admitted because the State offered a single crime scene photograph and no autopsy photographs, the picture was in color, the body was covered by a blanket except for the face, and the body had not been altered in any way, but depicted the scene of the crime as it existed when discovered by police. The fact that decomposition of the body had begun did not mean that the photograph depicted more than the nature of the crime. Mcghee v. State, 2011 Tex. App. LEXIS 675 (Tex. App. Houston 1st Dist. Jan. 27 2011).

539. In a felony murder trial, with driving while intoxicated as the underlying felony, there was no error under Tex. R. Evid. 403 in admitting a post-collision photograph showing part of the interior of the car defendant was driving, including a deceased passenger lying in the passenger seat. Alami v. State, 333 S.W.3d 881, 2011 Tex. App. LEXIS 135 (Tex. App. Fort Worth Jan. 6 2011).

540. In a murder case, photographs of a van that had been set on fire were not unduly prejudicial under Tex. R. Evid. 403 and were relevant to establishing that the fire was intentionally set; defendant's counsel was not ineffective for not objecting to some of the photographs; and the extraneous offense of the burning of the van was admissible as same transaction contextual evidence and thus did not require a limiting instruction. Balderas v. State, 2010 Tex. App. LEXIS 9752, 2010 WL 5621288 (Tex. App. Corpus Christi Dec. 9 2010).

541. Even though the trial court erred by admitting three autopsy photographs that showed the surgical mutilation caused by the autopsy, the error was harmless because the medical examiner's testimony was brief and came four days before deliberations began, each set of autopsy photographs were admitted as a group, the medical examiner briefly explained what each photograph showed, and no particular emphasis was given to the offending photographs. Garcia v. State, 2010 Tex. App. LEXIS 8313, 2010 WL 4053640 (Tex. App. Austin Oct. 12 2010).

542. Trial court did not abuse its discretion by admitting the photographs and video recording of the victim's body being removed from her apartment because they were probative of the manner of the victim's death and the manner in which defendant tried to destroy evidence of his fingerprints on her body by setting fire to it. Garcia v. State, 2010 Tex. App. LEXIS 7168, 2010 WL 3419184 (Tex. App. Corpus Christi Aug. 31 2010).

543. Trial court did not abuse its discretion by admitting a photograph of the victim taken at the crime scene because it was not unduly prejudicial under Tex. R. Evid. 403, even though it showed the victim at the time her body was discovered by police. The court held that: (1) the crime scene photo was relevant because it accurately reflected the location and state of the victim's body when it was discovered and the injuries inflicted on it; (2) it did not depict more than the nature of the crime and the nature of the gunshot wounds inflicted on the victim; and (3) only one photograph was introduced and very little time was needed to develop the evidence. Mcghee v. State, 2010 Tex. App. LEXIS 5561 (Tex. App. Houston 1st Dist. July 15 2010).

544. Trial court did not abuse its discretion during defendant's trial for aggravated assault with a deadly weapon and unlawful possession of a firearm by a felon by concluding that the probative value of photographs of one of the complainant's wounds was not substantially outweighed by the danger of unfair prejudice or by admitting the photographs because the pictures were apparently introduced to help the complainant explain his multiple gunshot wounds and injuries, and, whether it was the State's intent or not, the pictures helped rebut defendant's self-defense argument because they, along with unobjected-to testimony by the second complainant, showed that a bullet entered his back. While the pictures were gruesome, they portrayed no more than the gruesomeness of the injuries defendant inflicted. Burleson v. State, 2010 Tex. App. LEXIS 3250 (Tex. App. Fort Worth Apr. 29 2010).

545. There was no error under Tex. Rule Evid. 403 in admitting autopsy photographs into evidence to show both the stabbing injuries caused by defendant in killing the deceased and also burns caused to the deceased's body, including his genitalia, when defendant doused the body or the area around it with gasoline and set the body on fire. Bradford v. State, 2010 Tex. App. LEXIS 2839, 2010 WL 1224307 (Tex. App. Dallas Mar. 31 2010).

546. Balancing test under Tex. R. Evid 403 was sufficient where the judge responded affirmatively when the prosecutor asked if he wanted to look at autopsy photographs ahead of time, and the judge stated that he had engaged in a rule 403 balancing test. Bradford v. State, 2010 Tex. App. LEXIS 2839, 2010 WL 1224307 (Tex. App. Dallas Mar. 31 2010).

547. In a trial for capital murder, autopsy photographs were admissible under Tex. R. Evid. 403 because they illustrated the medical examiner's testimony about the victim's wounds and did not depict the body during or post autopsy. Pabst v. State, 2010 Tex. App. LEXIS 1886 (Tex. App. Dallas Mar. 18 2010).

548. In defendant's felony murder case, a court properly admitted a photo of the victim prior to death because it demonstrated the victim's health and physical characteristics, the photo of the victim while alive furnished a basis of contrast and comparison with other photos showing the wounds inflicted by the assault, and the fact that several witnesses identified the victim did not necessarily reduce the probative value of the photo. Flores v. State, 2010 Tex. App. LEXIS 822, 2010 WL 411747 (Tex. App. Corpus Christi Feb. 4 2010).

549. In a murder trial, there was no error under Tex. R. Evid. 403 in admitting photographs showing the victim's body and injuries from different angles and showing various views of the wounds because the photographs did nothing more than portray the consequences of defendant's actions. Tolopka v. State, 2010 Tex. App. LEXIS 714 (Tex. App. Amarillo Jan. 31 2010).

550. In defendant's murder case, the court properly admitted photographs depicting the condition of the victim's body as it was found in the lake because the photographs were relevant to show the circumstances of the killing and the crime scene at the time the victim's body was found. Although the photographs of the victim's body at the crime scene may be somewhat disturbing, their disturbing effect was due to the circumstances of the crime rather than any particular images depicted in the photographs. Wilson v. State, 2010 Tex. App. LEXIS 604, 2010 WL 323537 (Tex. App. Fort Worth Jan. 28 2010).

551. In the punishment phase of a manslaughter trial, there was no error under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) or Tex. R. Evid. 403 when the trial court admitted a picture of a person who was not present on the night of the charged offense, who was holding a weapon that was not involved in the charged offense. Zuniga v. State, 2010 Tex. App. LEXIS 419 (Tex. App. Austin Jan. 26 2010).

552. Admission of 12 autopsy photographs in a homicide case was error under Tex. R. Evid. 403 because they were only marginally relevant, given that the cause of death and blood loss were not disputed, and they were highly detailed color photographs focusing on internal injuries and thus may have distracted the jurors. However, the error was harmless under Tex. R. App. P. 44.2(b) because little attention was devoted to these exhibits after they were admitted in evidence. Brown v. State, 2010 Tex. App. LEXIS 273, 2010 WL 138331 (Tex. App. Waco Jan. 13 2010).

553. In defendant's capital murder case, the court did not err by admitting photographs of the victims because the photographs were introduced to assist the medical examiner in explaining the injuries and to rebut defendant's self-defense argument. The photographs, particularly the close-ups of the bullet wounds, were gruesome; however, they portrayed no more than the gruesomeness of the injuries inflicted by defendant. Williams v. State, 301 S.W.3d 675, 2009 Tex. Crim. App. LEXIS 1751 (Tex. Crim. App. 2009).

554. In a murder trial, there was no error under Tex. R. Evid. 403 in the admission of color autopsy photographs, which were necessary to a thorough examination of the victim's injuries. Fonseca v. State, 2009 Tex. App. LEXIS 9314, 2009 WL 4599971 (Tex. App. Dallas Dec. 8 2009).

555. Three of four autopsy photographs admitted into evidence in a murder case were not subject to exclusion under Tex. R. Evid. 403 because they were not unnecessarily gruesome. The other photo had at most a slight effect on the jury; thus, any error was harmless under Tex. R. App. P. 44.2(b). Smith v. State, 2009 Tex. App. LEXIS 9297, 2009 WL 4547907 (Tex. App. Dallas Dec. 7 2009).

556. During defendant's murder trial, the trial court did not err in admitting into evidence certain autopsy photographs, because the probative value of the photographs was not substantially outweighed by their prejudicial effect under Tex. R. Evid. 403. The doctor used the photographs to explain the nature and extent of the complainant's internal injuries resulting from the blows from the bat; the photographs were no more gruesome than would be expected. Barnes v. State, 2009 Tex. App. LEXIS 7931, 2009 WL 3248172 (Tex. App. Houston 1st Dist. Oct. 8 2009).

557. Autopsy photographs were properly admitted, under Tex. R. Evid. 403, in a capital murder because the sole contested issue was whether the victim was murdered or committed suicide, and the expert's testimony, aided by the photographs, was crucial to establishing that the victim was strangled. Kilgore v. State, 2009 Tex. App. LEXIS 6904, 2009 WL 2707175 (Tex. App. Tyler Aug. 28 2009).

558. In an intoxication manslaughter case, the court properly allowed photos of the scene because, while there were a large number of color photographs, there were no closeups of bodies, defendant's sister was covered, none of the pictures were gruesome, and there was no other way to adequately portray the events to the jury. Martinez v. State, 2009 Tex. App. LEXIS 6631 (Tex. App. Tyler Aug. 25 2009).

559. In a murder case, autopsy photographs were properly admitted because the State had to prove that defendant caused the victim's death by shooting him with a deadly weapon, and a doctor's testimony described the type of injuries the victim received, the extent of those injuries, and the cause of his death. Additionally, although the photographs were somewhat gruesome, they were not enlarged. Ramirez v. State, 2009 Tex. App. LEXIS 6640, 2009 WL 4377427 (Tex. App. Corpus Christi Aug. 25 2009).

560. Nine photographs of injuries to a child were admissible under Tex. R. Evid. 403 because the photographs were taken from different angles and locations, they were no more gruesome than the crime defendant committed, and they were not cumulative in nature. Williams v. State, 2009 Tex. App. LEXIS 5920, 2009 WL 2343259 (Tex. App. Dallas July 31 2009).

561. Court properly admitted autopsy photographs because, although the pictures were somewhat gruesome, and both were disagreeable to look at, they depicted nothing more than the reality of the brutal crime committed. The photographs were probative of defendant's use of a deadly weapon, the type of wounds sustained, and the brutality and seriousness of the crime, which bore on the issues of guilt and punishment. Rodriguez v. State, 398 S.W.3d 246, 2009 Tex. App. LEXIS 4838, 2009 WL 1801264 (Tex. App. Corpus Christi June 25 2009).

562. In defendant's capital murder case, autopsy photographs were properly admitted because the photographs provided a necessary visual component to, and understanding of, the expert's testimony regarding the nature and extent of the victim's injuries. The photographs were probative because they showed the full extent and non-accidental nature of those injuries; thus, they were necessary for the State to develop its case. Nunez v. State, 2009 Tex. App. LEXIS 4476, 2009 WL 1677821 (Tex. App. Dallas June 17 2009).

563. In defendant's capital murder case, photographs of the victim were not cumulative because one showed injuries to the child's neck and head from a side view, whereas two other photos showed injuries from a frontal view. Williams v. State, 294 S.W.3d 674, 2009 Tex. App. LEXIS 4201 (Tex. App. Houston 1st Dist. June 11 2009).

564. In a capital murder, case, autopsy photographs were properly admitted under Tex. R. Evid. 403 because their probative value substantially outweighed the danger of unfair prejudice; they were used to show injuries not seen on the surface of a victim's body, and there was no danger that a jury would have attributed autopsy damage to defendant. Wiggins v. State, 2009 Tex. App. LEXIS 4320, 2009 WL 1395928 (Tex. App. Dallas May 20 2009).

565. In defendant's murder case, the court properly admitted a photograph of the victim because, although the photo depicted the victim's bloodied face, his dentures (which had fallen out of his mouth), and a piece of his beard that had been detached from his face, the photo was the most comprehensive picture of the victim's blunt-trauma injuries, and its probative value was high. Even though it was probative, the picture was gruesome, meaning that it was disagreeable to look at; however, it depicted nothing more than the reality of the brutal crime. Wilson v. State, 2009 Tex. App. LEXIS 2954 (Tex. App. Corpus Christi Apr. 30 2009).

566. In defendant's capital murder case, an autopsy identification photograph of the victim was properly admitted at the guilt phase of trial because it was relevant and not cumulative of the autopsy photographs exhibiting the wounds. The complained-of picture was not particularly gruesome or detailed, it was not enhanced in any way, and it portrayed no more than the condition of the victim due to the injuries inflicted. Young v. State, 283 S.W.3d 854, 2009 Tex. Crim. App. LEXIS 979 (Tex. Crim. App. 2009).

567. Tex. R. Evid. 403 factors weighed in favor of admissibility of close-up photos of the victim because (1) the photos contained substantial probative value about the crime scene, the injuries received by the victim, and the State's theory that defendant's actions were intentional and not done in self-defense; (2) the photographs had very little potential to impress the jury in an irrational way because they were not overly gruesome; (3) the State took very little time in developing the testimony about the photos; and (4) the State needed the photos because there were no other close-up, crime-scene photos of the victim's wounds and the blood pattern from the wounds. Thus, the probative value of the photos was not substantially outweighed by the danger of unfair prejudice and the photos were admissible. Martinez v. State, 2009 Tex. App. LEXIS 2274, 2009 WL 884785 (Tex. App. Austin Apr. 3 2009).

568. Trial court did not abuse its discretion by admitting crime-scene photographs despite defendant's Tex. R. Evid. 403 objection because the five photographs were not exactly alike, were not unnecessarily duplicative, took almost no time to introduce into evidence, and had very little, if any, potential to impress the jury in an irrational but indelible way. The photos were relevant to show the circumstances of the killing and the crime scene at the time. Hilliard v. State, 2009 Tex. App. LEXIS 2429, 2009 WL 838241 (Tex. App. Houston 14th Dist. Mar. 31 2009).

569. Trial court did not abuse its discretion by admitting nine autopsy photographs despite defendant's Tex. R. Evid. 403 objection because there was only one photograph of each gunshot wound showing its general location on the victim's torso and only one close-up view of it. The photographs were not duplicative and showed only the extent and nature of the wounds; the assistant medical examiner referred to all of the photographs during her testimony. Hilliard v. State, 2009 Tex. App. LEXIS 2429, 2009 WL 838241 (Tex. App. Houston 14th Dist. Mar. 31 2009).

570. In defendant's capital murder case, the court properly admitted a photograph of the decedent in his military uniform because the State offered the photograph so that the jury could identify what the victim looked like before he was murdered. The trial court even took steps to eliminate any prejudicial effect by admitting the photograph only after the State cropped the victim's medals off of his uniform, and little time was spent introducing and discussing the photograph. Gonzalez v. State, 296 S.W.3d 620, 2009 Tex. App. LEXIS 1144 (Tex. App. El Paso

Feb. 19 2009).

571. Trial court did not err by admitting autopsy photos during the punishment phase of a murder trial because they were not unduly prejudicial under Tex. R. Evid. 403; they had probative value, they did not show mutilation, the presentation of the photos constituted only a few pages of the record, and they were necessary to determine punishment. Defendant had entered a plea of guilty to the charge, but was before the jury seeking community supervision as punishment. Farnsworth v. State, 2009 Tex. App. LEXIS 1038, 2009 WL 349799 (Tex. App. Houston 1st Dist. Feb. 12 2009).

572. In a murder trial, there was no error under Tex. R. Evid. 403 in admitting photographs depicting the wounds inflicted on the complainant's body alongside forensic equipment used to measure and locate those wounds. Although the photos were graphic and fully depicted the gravity of the offense suffered by the complainant, they were clinical rather than gratuitous; because each photo measured a different body part, there was no cumulative effect when viewing the photos as a complete series. Driver v. State, 2009 Tex. App. LEXIS 778, 2009 WL 276539 (Tex. App. Houston 1st Dist. Feb. 5 2009).

573. During defendant's trial for murdering his wife, the trial court did not err under Tex. R. Evid. 403 by admitting into evidence a picture that defendant described as his "mug shot" where the picture, which showed the head and shoulders of a shirtless defendant with red marks on his shoulder, arm, and upper chest, was offered to support his accomplice's testimony that she had continued having sex with defendant after the victim's death, and where defendant did not allege that the photo was taken for a previous offense. In addition, prior to the photo being admitted, testimony revealed that defendant had been taken into custody on the day the photo was taken, with defendant even conceding that it was taken while in police custody for the present offense, and the picture contained no overt markings specifically identifying it as a "mug shot," such as a chest plate depicting the name of the police department or case number. Vasquez v. State, 2009 Tex. App. LEXIS 377 (Tex. App. Corpus Christi Jan. 22 2009).

574. In defendant's injury to a child case, the court did not err in admitting photographs of the child because a deputy testified to his initial observations of the child before being life-flighted to the burn center; the boy had a large knot on the left side of his head and blood coming out of his nose. The photos were clearly relevant and needed by the State to rebut defendant's statements denying causing any other injuries to the child and defendant's claim of accidental injury. Smith v. State, 2009 Tex. App. LEXIS 401, 2009 WL 1941999 (Tex. App. Corpus Christi Jan. 22 2009).

575. In defendant's capital murder case, the court properly admitted photographs because the exhibits constituted only two photographs and depicted nothing more than the reality of the brutal crime committed. The victim's body was clothed, and they were not extreme close-up shots. Badgett v. State, 2009 Tex. App. LEXIS 342, 2009 WL 142324 (Tex. App. San Antonio Jan. 21 2009).

576. In a capital murder case, a court did not err by admitting autopsy photographs because the photographs, which were taken after the bodies were cleaned, showed no mutilation, and they were not otherwise gruesome or wrenching in any way. Although there were nineteen challenged photographs, they were not duplicative of other evidence in the case or of each other, and the medical examiner spent a substantial amount of time discussing the challenged photographs, but that time was not unreasonable given the large number of injuries. Lopez v. State, 2009 Tex. App. LEXIS 296, 2009 WL 103332 (Tex. App. Houston 1st Dist. Jan. 15 2009).

577. In a driving while intoxicated case, a booking photograph of defendant was not excluded from evidence under Tex. R. Evid. 403 because it was not unfairly prejudicial; even though the picture was not flattering, it did not have the potential to impress the jury in some irrational way. Moreover, it was relevant to show defendant's condition

near the time of arrest. Hester v. State, 2008 Tex. App. LEXIS 9242 (Tex. App. Texarkana Dec. 15 2008).

578. Trial court did not abuse its discretion by admitting a photograph of defendant holding a pistol during his trial for possessing more than four grams of cocaine with intent to deliver and for possessing more than four ounces of marihuana where the photograph was relevant because it made it more probable that defendant knowingly possessed both the contraband and the pistol, and where that relevance was not outweighed by the risk of unfair prejudice because no significant amount of time was required to introduce the photograph. Furthermore, even though the photograph had the potential for impressing the jury in an improper way pursuant to Tex. R. Evid. 404(b) by suggesting that defendant was the sort of person who brandished a pistol during a telephone conversation, by linking defendant to the pistol found in the night stand of his motel room, albeit indirectly, the photograph was some evidence that defendant used the pistol to protect his drugs and money, and the State's only other evidence of such use, beyond defendant's simple possession of the weapon, was a police officer's testimony describing defendant's ambiguous movements when the officers entered his motel room. Rangel v. State, 2008 Tex. App. LEXIS 9008 (Tex. App. Austin Dec. 5 2008).

579. In defendant's murder case, photographs of the victim's boyfriend's injuries were properly admitted because they assisted the doctor's descriptions of the boyfriend's injuries, and they were highly probative to show the full extent of the injuries the boyfriend suffered at the hands of defendant, who had claimed self-defense. Young v. State, 2008 Tex. App. LEXIS 7010 (Tex. App. Waco Sept. 17, 2008).

580. In defendant's murder case, a photograph of the victim's body at the crime scene was properly admitted because the photograph was probative of both the manner of the victim's death and defendant's mental state, given that he argued self-defense. The State used very little time introducing the photograph, and while gruesome, it depicted nothing more than the reality of the brutal crime committed by defendant. Young v. State, 2008 Tex. App. LEXIS 7010 (Tex. App. Waco Sept. 17, 2008).

581. In defendant's murder case, photographs of the victim's autopsy were properly admitted because the three photographs were necessary to assist the witness with explaining her testimony about the victim's stab wounds, especially given the fact that no one injury caused the victim's death. They were highly probative to show the full extent of the injuries defendant inflicted on the victim. Young v. State, 2008 Tex. App. LEXIS 7010 (Tex. App. Waco Sept. 17, 2008).

582. In a driving while intoxicated case, the trial court did not err in refusing to admit the photographs allegedly showing the conditions of the road where the officer conducted the traffic stop because defendant's explanation for why he was swerving on the road was already before the jury, and the trial court could have concluded that photographs taken one year after the arrest were, at best, unnecessary and, at worst, could have misled the jury into believing the road conditions were worse than they actually were. Davis v. State, 2008 Tex. App. LEXIS 6459 (Tex. App. Austin Aug. 20, 2008).

583. In the sentencing phase of defendant's drug case, the court properly admitted photographs showing a victim's injuries following his 1999 beating and the crime scene of that beating because the photographs were probative as to defendant's character and provided information to assist the jury in tailoring the appropriate sentence, the photographs had little, if any, tendency to suggest decision on an improper basis, and the State used the photographs as visual aids to supplement the beating victim's testimony as he described the incident. Aguilar v. State, 2008 Tex. App. LEXIS 6268 (Tex. App. Dallas Aug. 18 2008).

584. In a capital murder case, the court properly admitted two photographs because the photographs bolstered a State witness's testimony that testifying as a "snitch" had detrimental consequences -- injury to his sister, the photographs presented little, if any, prejudice to defendant because no party suggested to the jury that defendant

was connected to the stabbing of the witness's sister, and the time involved in the introduction of the two photographs was minimal and unlikely to distract the jury from considering the charged offense when compared to having the witness's sister testify before the jury. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

585. Defendant's felony-murder conviction was proper because the admission was autopsy photographs was appropriate. The photographs were quite clinical in nature and the fracture and hemorrhaging would not have been visible to the jury without the photographs; it took little time to develop the evidence of the injuries. Bromon v. State, 2008 Tex. App. LEXIS 5886 (Tex. App. Houston 14th Dist. Aug. 5 2008).

586. Autopsy photographs of a murder victim were not unduly prejudicial under Tex. R. Evid. 403 because the photographs were 4 x 5 inches in size and were not particularly gruesome as no blood was evident from the photos and the victim's wound was clean. Nor did the photos depict mutilation of the victim caused by the autopsy itself. Avendano v. State, 2008 Tex. App. LEXIS 5832 (Tex. App. El Paso July 31, 2008).

587. In defendant's intoxication manslaughter case, the court properly admitted a photograph of the victim because the photograph showed the victim's condition at the scene of the accident, he was clothed and depicted lying face up on a flat board, and the photograph was not particularly gruesome. The photograph showed only some blood on the victim's face, and the victim's condition as depicted in the photograph was the subject of trial testimony. Villasana v. State, 2008 Tex. App. LEXIS 5462 (Tex. App. Dallas July 24 2008).

588. In defendant's murder case, the court properly admitted autopsy photographs because the medical examiner explained the contents of each photograph as it was projected onto a screen for the jury's view; the photos depicted mutilation to the body other than that caused by the gunshot wound, however, the witness distinguished for the jury the damage caused by the fatal gunshot from the marks that indicated life-saving attempts and the autopsy itself. Mata v. State, 2008 Tex. App. LEXIS 3476 (Tex. App. San Antonio May 14 2008).

589. There was no error under Tex. R. Evid. 403 in admitting four photographs depicting the scene of an aggravated assault and 11 autopsy photographs depicting the victim's injuries, even though the photographs were explicit, because when considered in light of the crime, they were not overly gruesome. Aviles v. State, 2008 Tex. App. LEXIS 3042 (Tex. App. Dallas Apr. 28 2008).

590. In a murder case, the trial court did not abuse its discretion in admitting photographs of the victim at the crime scene because some of the photographs were used by the experts to explain the manner of the death and the amount of force used by defendant when hitting the victim with the baseball bat, tending to disprove his self-defense claim; other photographs, along with the testimony of the blood-spatter expert, addressed the absence of any struggle between the victim and defendant and that the victim was either on his knees or on the ground while being beaten, while some photographs depicted the brutality of the crime and the severity of the injuries and were probative of the manner of the victim's death. Grayson v. State, 2008 Tex. App. LEXIS 2210 (Tex. App. Houston 1st Dist. Mar. 27 2008).

591. In defendant's manslaughter case, the court properly admitted autopsy photographs because they provided a visual component to, and understanding of, the medical examiner's testimony about the extent and nature of the victim's injuries, not all of the photographs offered by the State were admitted by the trial court, and neither of the photographs showed any mutilation caused by the autopsy. Ashorali v. State, 2008 Tex. App. LEXIS 1976 (Tex. App. Dallas Mar. 19 2008).

592. In a murder trial, there was no error in admitting an eighth grade photograph of the 17-year-old victim, shown with several school friends, as proof of identity; the victim's parent testified that the picture depicted what the victim

looked like just prior to death. Hornsby v. State, 2008 Tex. App. LEXIS 345 (Tex. App. Beaumont Jan. 16 2008).

593. In a murder trial, there was no error under Tex. R. Evid. 403 in admitting photographs showing a gunshot wound to the head of the victim; the photographs were rather clinical in nature and relevant to the manner of death. Bounkhoun v. State, 2007 Tex. App. LEXIS 8784 (Tex. App. Amarillo Nov. 5 2007).

594. Trial court did not err by admitting into evidence defendant's book-in photograph because defendant did not object at trial or complain of an improperly suggestive photographic identification procedure by the State; the photograph was not prejudicial merely because defendant had an "angry look;" the photograph, which was used by a witness during her deposition to identify defendant as the perpetrator, was relevant as identity was an essential element of any criminal offense. King v. State, 2007 Tex. App. LEXIS 8766 (Tex. App. Beaumont Oct. 31 2007).

595. Trial court did not abuse its discretion under Tex. R. Evid. 403 in admitting photographs of the victim's body in a capital murder case because they were relevant under Tex. R. Evid. 401 and were highly probative to show the victim's injuries and the specific circumstances of the murder. Gallo v. State, 239 S.W.3d 757, 2007 Tex. Crim. App. LEXIS 1234 (Tex. Crim. App. 2007).

596. In a trial for intoxication assault arising from a car crash caused by defendant, there was no error in admitting photographs that showed, in graphic detail, the complainant's injuries, which included damage such that the complainant's liver was extruding from the complainant's body; the photographs were relevant to explain the nature of the injuries and the procedures used to treat the complainant, and, while undoubtedly explicit, they were not more emotionally loaded than any usual clinical photograph of a patient who sustained serious wounds. Strickland v. State, 2007 Tex. App. LEXIS 7383 (Tex. App. Texarkana Sept. 11 2007).

597. In a capital murder case, photographs of skeletal remains as they were recovered from an excavation site, the remains in a body bag prior to autopsy, and the remains laid out on an autopsy table were properly admitted under Tex. R. Evid. 403 because they showed defendant's culpable mental state, the reason no tissue injuries were found, and the cause of death. Moreover, the pictures were not so horrifying that a juror of normal sensitivity would have encountered difficulty in rationally deciding the issues of the case after reviewing them. Small v. State, 2007 Tex. App. LEXIS 6545 (Tex. App. Corpus Christi Aug. 16 2007).

598. Trial court properly admitted a photograph of a murder victim and his family because it was relevant to show a true appearance of the victim before his death, and its probative value was not substantially outweighed by its prejudicial effect. While it showed the family smiling, the photograph was not the type that would impress the jury in an irrational but indelible way, no mention was made of the photograph during closing argument, and only one mention was made of the victim's children. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

599. In a murder trial, it was proper to admit an autopsy photograph of the victim's scalp pulled back, which exposed extensive hemorrhaging under the skull. The photograph did not depict mutilation caused by the autopsy, but the nature, location, and extent of the wounds, and was important in determining the manner of death because the wounds were separate from the gunshot wound, which was the cause of death. In re J.B.C., 233 S.W.3d 88, 2007 Tex. App. LEXIS 5978 (Tex. App. Fort Worth 2007).

600. In defendant's capital murder case, photographs of the victim taken at the crime scene and at the autopsy were properly admitted because the photographs did not depict internal organs or show damage to the corpse resulting from the autopsy as opposed to the attack; that the wounds were inflicted by accomplices did not make the photographs unfairly prejudicial in the prosecution of defendant as a party to the murder. Randall v. State, 232

S.W.3d 285, 2007 Tex. App. LEXIS 5860 (Tex. App. Beaumont 2007).

601. In a murder trial, there was no error under Tex. R. Evid. 403 in the admission of gruesome photographs; it was precisely because they depicted the reality of the offense that they were powerful visual evidence, probative of various aspects of the State's case. Pecina v. State, 2007 Tex. App. LEXIS 3424 (Tex. App. Fort Worth May 3 2007).

602. Where defendant was charged with aggravated sexual assault of a child and indecency with a child, the State was permitted to admit evidence of pornographic photos taken from defendant's computer which depicted the kind of activity in which he was alleged to have engaged in; under Tex. R. Evid. 403, the probative value of the photographs substantially outweighed their prejudicial effect. Ficarro v. State, 2007 Tex. App. LEXIS 3166 (Tex. App. Corpus Christi Apr. 26 2007).

603. During defendant's criminal prosecution for capital murder, the trial court did not abuse its discretion under Tex. R. Evid. 403 by determining that the probative value of the autopsy photographs of the three victims was not substantially outweighed by the danger of unfair prejudice. Although the photographs were gruesome, they depicted nothing more than the reality of the brutal crime committed. Confer v. State, 2007 Tex. App. LEXIS 2002 (Tex. App. Dallas Mar. 15 2007).

604. In a murder trial, photographs of the victim's burned body were properly admitted under Tex. R. Evid. 403 because the crime scene photographs, while disturbing to view, merely depicted the gruesome reality of the injuries sustained. McKinney v. State, 2007 Tex. App. LEXIS 95 (Tex. App. Dallas Jan. 9 2007).

605. In a murder trial, there was no error under Tex. R. Evid. 403 in the admission of a photograph of the victim's head showing the underlying soft tissue of the victim's skull; while graphic, the photograph was highly probative regarding the cause of death and defendant's intent, and the prejudicial effect, if any, was slight. Bigler v. State, 2006 Tex. App. LEXIS 10490 (Tex. App. Fort Worth Dec. 7 2006).

606. In a criminal trial for aggravated robbery, the trial court did not err by admitting gruesome photos of the victim; the State needed the photographs to explain the extent of the victim's injuries and the level of damage caused by the rifle bullet; the probative value of the photographs was not outweighed by their prejudicial effect. Hicks v. State, 2006 Tex. App. LEXIS 10375 (Tex. App. Dallas Dec. 4 2006).

607. In a murder trial, photographs of the deceased were properly introduced into evidence under Tex. R. Evid. 403, even though they showed the gruesome appearance of the body, which was badly burned in arson, because the photographs showed the position of stab wounds that caused death; although graphic, the photographs did not inject any additional, intangible, or inappropriate emotional element into the case such that the trial court should have necessarily excluded these photographs. Ledbetter v. State, 208 S.W.3d 723, 2006 Tex. App. LEXIS 10040 (Tex. App. Texarkana 2006).

608. Although defendant argued that the trial court erred in admitting an enlarged color autopsy photograph of the stab wounds on the murder victim's back, the photograph's probative value was not outweighed by its possible prejudicial effect because the photograph, although somewhat graphic, was not so gruesome or horrifying as to cause a juror of normal sensitivity to have difficulty rationally deciding the critical issues in the case, as the body and the wounds were clean, and the wounds, although large, were not gaping and did not show internal organs. Edwards v. State, 2006 Tex. App. LEXIS 8688 (Tex. App. Dallas Oct. 9 2006).

609. During a murder trial, the victim's mother identified a photograph of her son taken before the murder; the trial court did not abuse its discretion in admitting the photograph; the mother's identification had probative value in identifying the son as the victim; because the photograph was not a gruesome autopsy or crime scene photograph, any danger of prejudice was slight. Brown v. State, 2006 Tex. App. LEXIS 7556 (Tex. App. Austin Aug. 25 2006).

610. In a murder case, autopsy photographs were properly admitted because, although the photographs were explicit, they were not particularly gruesome and the wounds were small pellet marks rather than large gunshot wounds or lacerations; the danger of unfair prejudice did not substantially outweigh the probative value of the photographs. Terrazas v. State, 2006 Tex. App. LEXIS 6696 (Tex. App. Austin July 28 2006).

611. Where defendant was on trial for possessing or transporting chemicals with the intent to manufacture methamphetamine, the trial court did not err in admitting photographs which showed a vapor cloud spraying from canisters found in defendant's car over defendant's Tex. R. Evid. 403 objection as they were not so alarming in nature that they would have clouded the jury's mind with fear; instead, they provided a visual depiction of the disposal methods described through police testimony, and were relevant to police officers' belief that the canisters contained anhydrous ammonia. Daigger v. State, 2006 Tex. App. LEXIS 5846 (Tex. App. Austin July 7 2006).

612. In defendant's murder case, the court properly admitted photographs of the victim because the crime scene photographs illustrated that defendant attempted to destroy any incriminating evidence left in the victim's truck, the autopsy photographs did not depict any mutilation of the victim's body caused by the autopsy itself, and the photographs, which were taken from different angles, were not cumulative or repetitive. Henderson v. State, 2006 Tex. App. LEXIS 5644 (Tex. App. Houston 1st Dist. June 29 2006).

613. Pre-autopsy photographs were properly admitted in a murder trial; they illustrated the medical examiner's testimony and did not depict the body during or post autopsy; they displayed the bullet wound and condition of the body upon recovery and the result of the murder, dragging, and subsequent abandonment in the woods. Johnson v. State, 2006 Tex. App. LEXIS 5214 (Tex. App. Dallas June 19 2006).

614. In a murder case, a court properly admitted autopsy photographs of the deceased because, although graphic, the photographs were probative of the manner in which the victim incurred the fatal injury and were necessary for the State in developing its case; although the photographs were explicit and gruesome, the trial court did not abuse its discretion in admitting them, as the danger of unfair prejudice did not substantially outweigh the probative value of the photographs. Brown v. State, 2006 Tex. App. LEXIS 5163 (Tex. App. Austin June 16 2006).

615. External autopsy photographs depicted a bruise behind the victim's ear and a bruise on her forehead; the photographs were approximately eight and a half by ten and three-fourths inches in size, were moderately close-up, were offered in color, and were not gruesome; also, the autopsy photographs showing bleeding under the victim's scalp and on her brain, although gruesome, showed a considerable amount of blood on the brain, and illustrated a doctor's testimony; thus, the probative value of the photographs was not substantially outweighed by their prejudicial effect. Montgomery v. State, 198 S.W.3d 67, 2006 Tex. App. LEXIS 3377 (Tex. App. Fort Worth 2006).

616. State argued that the burn evidence, which constituted other crimes evidence under Tex. R. Evid. 404(b), was admissible because in defendant's written statements, he stated that any injury that he inflicted on the victim, a 16-month old child, the night of her fatal injury was accidental; the burn evidence was relevant to show defendant's state of mind and his relationship with the victim and rebutted his claim of the accidental nature of the injury that resulted in her death; further, the testimony and photograph of the burn was not so graphic that it would have impressed the jury in an irrational, yet indelible way, and the State had a compelling need for the evidence because its case was entirely circumstantial, and defendant contested both his identity as the perpetrator and his state of

mind. Montgomery v. State, 198 S.W.3d 67, 2006 Tex. App. LEXIS 3377 (Tex. App. Fort Worth 2006).

617. In a criminal prosecution for capital murder, the trial court did not err by admitting a photograph of the victim's head after the shooting; the photograph was not enlarged or changed in any way, and it was repetitive of another photograph. Whitmire v. State, 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

618. Where defendant, a large Caucasian man, was accused of burglarizing the homes of two Hispanic families, photographs of defendant's tattoos were admissible as evidence of defendant's selfishness and his impact on the victims. Counsel was not ineffective for failing to raise an objection under Tex. R. Evid. 403. Hicks v. State, 2005 Tex. App. LEXIS 10663 (Tex. App. Dallas Dec. 28 2005).

619. Trial court did not abuse its discretion by admitting autopsy photographs in a capital murder trial where the photographs did not depict mutilation caused by the autopsy, but the nature, location, and extent of the wounds as testified to by the medical examiner who performed the victim's autopsy; thus, the photographs had the effect of illustrating the examiner's testimony. Frank v. State, 183 S.W.3d 63, 2005 Tex. App. LEXIS 10647 (Tex. App. Fort Worth 2005).

620. Trial court did not abuse its discretion by admitting crime scene photographs in a capital murder trial because the photographs provided strong visual evidence corroborating testimony of how the victim was murdered, the injuries inflicted, and the ultimate result of the events that took place on the date in question; although the photographs arguably depicted disagreeable realities, they depicted nothing more than the reality of the brutal crime committed and helped the jury to understand the verbal testimony. Frank v. State, 183 S.W.3d 63, 2005 Tex. App. LEXIS 10647 (Tex. App. Fort Worth 2005).

621. In a murder case, the trial court did not err in admitting a poster-sized photograph of the victim into evidence; the trial court reasonably concluded that the larger image was helpful to the jury in understanding the victim's condition, and the gruesome nature of the photograph did not render it more prejudicial than probative. Williams v. State, 2005 Tex. App. LEXIS 8203 (Tex. App. Texarkana Oct. 5 2005).

622. Autopsy photographs were properly admitted in a trial for a "shaken-baby" murder because they were described in the medical examiner's unchallenged testimony. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

623. In a trial for a "shaken-baby" murder, defendant failed to provide a clear and concise argument, as required by Tex. R. App. P. 38.1(h), for his argument that photographs of the baby in her hospital bed should not have been admitted. He did not explain how, in his objection under Tex. R. Evid. 403, why the photographs were prejudicial. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

624. In a trial for driving while intoxicated, there was no error in admitting a video tape of defendant, even though he was handcuffed. The video was highly probative and not unduly prejudicial because it was limited to information that was otherwise admissible under Tex. Transp. Code Ann. § 724.061, defendant's refusal to submit to blood and breath tests, and also demonstrated appellant's physical condition and behavior close in time to the events at issue. Garcia v. State, 2005 Tex. App. LEXIS 6691 (Tex. App. Austin Aug. 18 2005).

625. Trial court conducted an appropriate balancing test under Tex. R. Evid. 403 and did not abuse its discretion in admitting pre-autopsy photographs of manslaughter victims that were limited in number, showed very little blood, and were used by the medical examiner for the purpose of explaining the injuries suffered by the victims. Close-up photographs were used for identification and did not depict injuries, and none of the photographs depicted any

inappropriate nudity. Winkle v. State, 2005 Tex. App. LEXIS 6250 (Tex. App. Amarillo Aug. 8 2005).

626. In a criminal trial for aggravated assault with a deadly weapon, the court did not abuse its discretion by admitting photographs of the crime scene that were taken during daylight hours. While the shooting actually occurred at night, the jury was made aware of the lighting differences. Rivera v. State, 2005 Tex. App. LEXIS 5459 (Tex. App. Corpus Christi July 14 2005).

627. Trial court did not err in admitting crime scene and autopsy photographs of the victim in defendant's trial for the murder of his wife because their probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury as provided in Tex. R. Evid. 403. The photographs were probative of the injury to the victim, the distance from the gun to the victim when fired, and the procedures followed by the medical examiner, and none of the photographs reflected the body after it had been opened for autopsy, nor did they show an excessive amount of blood. Dunn v. State, 2005 Tex. App. LEXIS 5412 (Tex. App. Dallas July 13 2005).

628. Pre-autopsy photographs including the victim's body in a hospital gown, the victim's nude body, upper and lower torso, and two photographs of the bullet wound, one close-up and one with the ear for reference, illustrated and clarified the medical examiner's description of the injuries, and the trial court therefore did not abuse its discretion in admitting them. The photographs were not gruesome, vulgar, or indecent, and they did not depict mutilation of the body caused by the autopsy. Smith v. State, 2005 Tex. App. LEXIS 5316 (Tex. App. Dallas July 7 2005).

629. Trial court did not abuse its discretion under Tex. R. Evid. 403 in admitting into evidence photographs of the complainant's injuries where defendant was charged with aggravated assault causing serious bodily injury under Tex. Penal Code Ann. § 22.02(a)(1). The photographs, which showed multiple cuts and bruises on the complainant's face, his apparent blood-soaked hair, and a cut on his thumb, were relevant to show the nature of the wounds and were not particularly shocking or gruesome. Siale v. State, 2005 Tex. App. LEXIS 5153 (Tex. App. Fort Worth June 30 2005).

630. Autopsy photographs of a murder victim were more probative than prejudicial under Tex. R. Evid. 403. Although the photographs were shown on a screen, they were in black and white, limited in number, and except for the incision made by hospital personnel, assisted the jury in visualizing the wounds. Garcia v. State, 2005 Tex. App. LEXIS 4424 (Tex. App. Corpus Christi June 9 2005).

631. In a trial for burglary, a photograph of the victim's daughter was properly admitted under Tex. R. Evid. 403, even though the daughter was not present. The small, studio-quality photograph was not unduly prejudicial, and it was relevant because the victim, defendant's former girlfriend, testified that her conduct toward defendant was motivated by the desire to protect her young daughter from confrontation. Wight v. State, 2005 Tex. App. LEXIS 4334 (Tex. App. Amarillo June 7 2005).

632. Autopsy photographs in defendant's murder trial were not more prejudicial than they were probative because they were introduced during the coroner's testimony, and they were a small part of the overall evidence introduced during the entire trial. Holford v. State, 177 S.W.3d 454, 2005 Tex. App. LEXIS 3602 (Tex. App. Houston 1st Dist. 2005).

633. Trial court did not abuse its discretion in excluding autopsy photographs in a murder case where the State did not contest that the victim sustained a bullet wound to the front of his body, a medical examiner's testimony comprised convincing evidence to establish that the victim was shot in the front of the body, and the tattooing throughout the victim's body more likely than not would have inflamed the minds of the jurors. Moreover, any error

was harmless because other evidence showed that the victim was not a law-abiding citizen and that he had previously threatened defendant and because the trial court assessed punishment at the lower end of the punishment range. Elizondo v. State, 2005 Tex. App. LEXIS 3680 (Tex. App. Corpus Christi May 12 2005).

634. Photographs of a murder victim were relevant under Tex. R. Evid. 401 and were not unduly prejudicial to defendant under Tex. R. Evid. 403 because a photograph of the victim lying in an ambulance immediately after firefighters removed her body from a burning house was both material and probative, as it established her condition at the crime scene, and because a photograph of her face taken during autopsy was also material and probative of the fact that the autopsy was performed on the same person removed from the crime scene by ambulance. The numerous autopsy photographs were also probative of the victim's cause of death, a material element in the offense of capital murder, and although the detail in the photographs was graphic, each served the purpose of illustrating the nature and extent of the victim's injuries. Vargas v. State, 2005 Tex. App. LEXIS 2417 (Tex. App. Houston 1st Dist. Mar. 31 2005).

635. Trial court erred by admitting certain photographs in violation of Tex. R. Evid. 404(b), 403, and 901 because although the photographs that were found in defendant's kitchen the day after the alleged sexual assault that showed the victim naked and unconscious were properly admitted as they were essential to understanding the circumstances of the assault and tended to confirm her testimony; other photographs that showed unidentified men sexually assaulting another woman, and that showed defendant's house mate having sexual intercourse, and defendant urinating against the wall giving a gang sign were improperly admitted. There was no evidence that defendant took the other photographs or knew of their existence and they suggested an improper basis upon which to convict defendant. Casey v. State, 160 S.W.3d 218, 2005 Tex. App. LEXIS 1807 (Tex. App. Austin 2005).

636. In a capital murder case, a photograph of a victim and his family was admitted under Tex. R. Evid. 403 because it was not cumulative, and the picture was used for identification because a gunshot wound had caused significant damage to the victim's face; moreover, an autopsy photograph of a portion of the victim's reconstructed face was also admissible because it was used to show the type of gunshot wound inflicted. Gonzales v. State, 2005 Tex. App. LEXIS 1705 (Tex. App. Fort Worth Mar. 3 2005), writ of certiorari denied by 126 S. Ct. 1372, 164 L. Ed. 2d 80, 2006 U.S. LEXIS 1407, 74 U.S.L.W. 3472 (U.S. 2006).

637. In a murder trial, it was not error to admit autopsy photographs of the victim's burnt, mutilated and decomposed body. Denoso v. State, 156 S.W.3d 166, 2005 Tex. App. LEXIS 878 (Tex. App. Corpus Christi 2005).

638. Trial court admitted an autopsy photograph of a murder victim in accordance with Tex. R. Evid. 403 because the photograph was used to identify the body and because there were no other such photographs before the jury. Furthermore, the photograph was not particularly gruesome, and it did not depict mutilation caused by the autopsy. Flores v. State, 2005 Tex. App. LEXIS 456 (Tex. App. El Paso Jan. 20 2005).

639. Trial court did not abuse its discretion in a murder case in admitting autopsy photographs showing the severity of the injuries to the victim's head, which she suffered after she was thrown off defendant's car. Although gruesome, the photographs reflected nothing more than the reality of the crime committed and were offered to document the injuries the medical examiner was describing. Foust v. State, 2005 Tex. App. LEXIS 12 (Tex. App. Dallas Jan. 4 2005).

640. Trial court did not err by overruling defendant's objection to three autopsy photographs of a murder victim's body, which showed close-up views of a bullet entry wound on the victim's back, the large bruise on the front of his chest where the bullet tried to exit, and his bloodied face, in a case in which the photos were admitted during the State medical examiner's testimony and assisted him in describing his findings for the jury and illustrating to the jury the location and nature of the victim's wounds. The photos depicted the extent and nature of the victim's wounds

and did not show any alteration to his body resulting from autopsy or medical procedures, and thus, were not unnecessarily gruesome or so inflammatory that they would be excludable from the capital murder trial on grounds that their probative value, to show circumstances of crime and to depict reality of offense, was substantially outweighed by danger of unfair prejudice in violation of Tex. R. Evid. 403. Sierra v. State, 157 S.W.3d 52, 2004 Tex. App. LEXIS 11374 (Tex. App. Fort Worth 2004).

641. Trial court did not err in admitting the four photographs of the victim at the crime scene because although the photographs may have been disturbing, they depicted nothing more than the reality of the crime committed. Barrera v. State, 2004 Tex. App. LEXIS 11917 (Tex. App. San Antonio Nov. 3 2004).

642. In a trial for attempted murder, it was proper to admit an autopsy report regarding a different victim, which included details about the angle of the wound and photographs of the body. The autopsy report was highly technical and contained no inflammatory language likely to influence the jury in an irrational way; the photographs were not unnecessarily gruesome. Adams v. State, 2004 Tex. App. LEXIS 8999 (Tex. App. Houston 14th Dist. Oct. 12 2004).

643. In a criminal prosecution for capital murder where defendant killed the deceased by hitting him repeatedly on the head with a hammer, the trial court did not err in admitting an autopsy photograph of the victim showing the floor of the cranial cavity and a hinge fracture. The photograph, while not pleasant to view, was not particularly gruesome. Turner v. State, 2004 Tex. App. LEXIS 7903 (Tex. App. Austin Aug. 31 2004).

644. Use of autopsy photographs to illustrate the testimony of medical examiners is consistently approved. Turner v. State, 2004 Tex. App. LEXIS 7903 (Tex. App. Austin Aug. 31 2004).

645. Admission of photographic evidence is committed to the discretion of the trial court. Turner v. State, 2004 Tex. App. LEXIS 7903 (Tex. App. Austin Aug. 31 2004).

646. Trial court did not abuse its discretion in defendant's murder case in allowing the admission into evidence of a photograph of the victim's upper body, which showed the gunshot wounds on the body, as it was the only photograph that was admitted to show the location of the wounds, the photograph was not more prejudicial than probative, and testimony regarding the same injuries would have been admissible. Hughes v. State, 2004 Tex. App. LEXIS 6267 (Tex. App. Tyler July 14 2004).

647. In a capital murder case, autopsy photographs of a dead police officer were admissible because their probative value was not greatly outweighed by the prejudicial impact on the jury; the photographs in question helped explain a medical examiner's testimony describing a victim's various wounds for which defendant was responsible. Escamilla v. State, 143 S.W.3d 814, 2004 Tex. Crim. App. LEXIS 1032 (Tex. Crim. App. 2004), writ of certiorari denied by 544 U.S. 950, 125 S. Ct. 1697, 161 L. Ed. 2d 528, 2005 U.S. LEXIS 2827, 73 U.S.L.W. 3569 (2005).

648. Where defendant was charged with two counts of aggravated sexual assault of a child, photographs of the genitalia of the two victims photographs depicting penetrating trauma to the genitalia of the two complainants was admissible as the photographs were not gruesome, and they actually served a medical purpose since they helped explain and illustrate the doctor's findings that one child suffered "penetrative vaginal trauma." Umphres v. State, 2004 Tex. App. LEXIS 5737 (Tex. App. Amarillo June 25 2004).

649. Trial court does not abuse its discretion in admitting photographs if they will help the jury to understand verbal testimony such as technical language used by a medical doctor in describing injuries sustained. Umphres v. State,

2004 Tex. App. LEXIS 5737 (Tex. App. Amarillo June 25 2004).

650. Where defendant contended that the bloody trail depicted in crime scene photographs would have had such an emotional impact on the jury that its decision would be based on emotion, the appellate court found that the trial court had not abused its discretion in admitting them since the amount of time devoted to developing the evidence was minimal, and the photographs did not depict any bodies and, although they depicted blood, they were not particularly gruesome. Corona v. State, 2004 Tex. App. LEXIS 5042 (Tex. App. San Antonio June 9 2004).

651. In a capital murder trial, the trial judge did not err in admitting a photograph of the victim's charred body. The photo was black and white and was the only photograph of the front part of the victim's body and, as such, was the only visual evidence illustrating the complete condition of the body when it was found; it was also relevant in that it aided in depicting the nature and extent of the victim's wounds and it was not so gruesome as to be unfairly prejudicial. Windland v. State, 2004 Tex. App. LEXIS 4709 (Tex. App. Dallas May 26 2004).

652. Trial judge abused his discretion in admitting a photograph of defendant's prior family assault victim where the State had other evidence of defendant's intent, specifically defendant's testimony that he had been convicted three times of similar assaults; the probative value of the photograph was not particularly compelling in light of his admission to the offense, and a limiting instruction would likely not have been effective because of the indelible impression photographic evidence of this nature leaves. Randolph v. State, 2004 Tex. App. LEXIS 4363 (Tex. App. Waco May 12 2004).

653. Trial court did not abuse its discretion by admitting 14 autopsy photographs into evidence because they were relevant, as they accurately reflected the state of the victim's body when it was discovered and the injuries inflicted on him. None of the photographs were especially large, all were taken from different angles, and they were not gruesome simply because they showed the body in a state of decomposition. Gutierrez v. State, 2004 Tex. Crim. App. LEXIS 2211 (Tex. Crim. App. Apr. 21 2004).

654. In a case involving the crime of intoxication manslaughter, a trial court did not abuse its discretion by admitting the pre-autopsy photograph of a victim during sentencing because its probative value was not substantially outweighed by its inflammatory nature where the evidence showed that the photograph was of average size, it was not a close-up shot, the victim had been cleaned of extraneous blood, and the victim was depicted in a sterile environment; the fact that the victim was nude and the picture was in color was not sufficient to preclude its admission into evidence, and, even if the decision to admit the photograph was erroneous, it was harmless because no substantial rights were affected since defendant failed to object to the admission of other postmortem photographs. Grindele v. State, 2004 Tex. App. LEXIS 2861 (Tex. App. Dallas Mar. 31 2004).

655. Appellate court could not say that the trial court erred in admitting photos of the decedent in defendant's murder trial, as the photos depicted the gunshot wounds that caused decedent's death, and they did not show mutilations caused by autopsy. Moraida v. State, 2004 Tex. App. LEXIS 2833 (Tex. App. Dallas Mar. 30 2004).

656. In a criminal prosecution for murder, autopsy photographs of the victim were admissible to establish the victim's cause of death. The photographs had a high probative value, were not excessively gruesome, and owed any disturbing nature to the crime itself. Troncoso v. State, 2004 Tex. App. LEXIS 2578 (Tex. App. Texarkana Mar. 24, 2004).

657. Autopsy photographs are admissible unless they depict mutilations of the victim due to the autopsy itself. Troncoso v. State, 2004 Tex. App. LEXIS 2578 (Tex. App. Texarkana Mar. 24, 2004).

658. Where pictorial evidence will help the jury understand verbal testimony, such as the technical language used by a medical doctor in describing the injuries sustained by a victim of a crime, a trial court does not abuse its discretion in admitting these photographs. Troncoso v. State, 2004 Tex. App. LEXIS 2578 (Tex. App. Texarkana Mar. 24, 2004).

659. In a capital murder trial, photographs of other crimes committed by defendant were properly excluded under Tex. R. Evid. 403, as they did not establish that defendant was insane at the time of a specific murder and the jury could have been confused; while the photographs were relevant to the issue of defendant's sanity, merely viewing the photographs would not necessarily have proven that defendant was legally insane, and their probative value was limited. Resendiz v. State, 112 S.W.3d 541, 2003 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 2003), *cert. denied*, Resendiz v. Texas, 541 U.S. 1032, 124 S. Ct. 2098, 158 L. Ed. 2d 713, 2004 U.S. LEXIS 3274 (2004).

660. Autopsy photographs are relevant to show the identity of the victim and the manner and means of death. Moreno v. State, 1 S.W.3d 846, 1999 Tex. App. LEXIS 6657 (Tex. App. Corpus Christi 1999).

661. Photographs of bodies of murder victims were admissible at the trial of the murderers because the photos were used to show the wounds that were ascertained during the autopsy and the causes of death. Moreno v. State, 1 S.W.3d 846, 1999 Tex. App. LEXIS 6657 (Tex. App. Corpus Christi 1999).

662. Court properly admitted autopsy photos because, although they were gruesome, they were no more gruesome than the injuries that defendant inflicted upon the victim when he committed the offense of intoxication manslaughter. Each of the six photographs depicted a different view of the victim and showed the different injuries that she suffered, and the State did not offer a large number of photographs, nor were the photographs it offered cumulative of the victim's injuries. Booth v. State, 2014 Tex. App. LEXIS 2351, 2014 WL 887286 (Tex. App. Eastland Feb. 28 2014).

Evidence : Demonstrative Evidence : Recordings

663. Where defendant was convicted of capital murder for shooting his wife and her lover, the trial court did not violate this rule by allowing the State to introduce a recorded call from a customer who called 9-1-1 after hearing gunshots; 9-1-1 calls are admissible in the guilt/innocence phase to provide a framework within which the particulars of the State's evidence may be developed. Mendoza v. State, 2013 Tex. App. LEXIS 11728 (Tex. App. San Antonio Sept. 18 2013).

664. Where defendant was convicted of capital murder for shooting his wife and her lover, the trial court's admission of a video recording of the bloody crime scene did not result in unfair prejudice or duplicate the medical examiner's testimony and crime scene photograph. Mendoza v. State, 2013 Tex. App. LEXIS 11728 (Tex. App. San Antonio Sept. 18 2013).

665. Trial court did not err by admitting a recording of a 9-1-1 call under this section because the call was not emotionally charged or otherwise inflammatory where the caller's behavior was consistent with any reasonable person tending to a severely injured party. Moreover, the call was admissible to provide a framework for the State to develop its case because the victim was unable to provide full information regarding the events after the incident due to a loss of consciousness. Woods v. State, 2013 Tex. App. LEXIS 9396 (Tex. App. Houston 14th Dist. July 30 2013).

666. At defendant's trial for indecency with a child by contact, the trial court did not abuse its discretion by overruling defendant's Tex. R. Evid. 403 objection to the portions of a recorded interview in which he admitted viewing pornography, masturbating, and having sexual urges toward children. The prejudicial impact of the

evidence was low in light of the allegations against him, and defendant's description of his sexual urges toward children was relevant to the elements of the offense. Mattingly v. State, 382 S.W.3d 611, 2012 Tex. App. LEXIS 8126, 2012 WL 4457713 (Tex. App. Amarillo Sept. 26 2012).

667. Trial court did not abuse its discretion by excluding from evidence video recordings appellants took of appellee because from the video, there was no way to know what had been edited out, and therefore the trial court could have determined that audio of appellee making harassing comments on various dates in 2006 could mislead the jury. Vaughn v. Drennon, 372 S.W.3d 726, 2012 Tex. App. LEXIS 5488, 2012 WL 2833847 (Tex. App. Tyler July 11 2012).

668. No error resulted from the State's failure to mute a recording in which a detective told defendant "there is a time to quit," and said he needed to stop whatever types of issues he was having and that the police were watching him because the prejudicial effect of the statements was slight. Basinger v. State, 2012 Tex. App. LEXIS 3847, 2012 WL 1704322 (Tex. App. Dallas May 16 2012).

669. During defendant's trial for the felony offense of driving while intoxicated, the State was permitted to admit some audio portions of an video recording of defendant in the intoxilyzer room. Because the audio portion of the videotape informed the jury of defendant's level of impairment close in time to his operation of a motor vehicle, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Kelly v. State, 2011 Tex. App. LEXIS 1152 (Tex. App. Waco Feb. 16 2011).

670. Recordings of telephone calls defendant made from jail, in which he admitted running from the police, were properly admitted under Tex. R. Evid. 403. Although the beginning portion of the recordings indicated defendant was an inmate, no date was mentioned, no information was provided regarding the length of defendant's stay in jail, and the testimony before the jury contained no references to defendant as an inmate or that he was in jail at the time of the calls. White v. State, 2010 Tex. App. LEXIS 2723 (Tex. App. Dallas Apr. 1 2010).

671. In a trial for aggravated assault on a public servant, there was no error in the admission of compilation exhibits in which the audio recording of defendant's conversation with a 911 operator was paired and played with videotapes of a pursuit taken from patrol cars; the exhibits were properly admitted under Tex. R. Evid. 403 because they showed the timing of the events and demonstrated that defendant intentionally or knowingly aimed a vehicle at officers, even though the jury was advised through a detective's testimony that the synchronization of the audio track with the video tracks was not perfectly accurate. Jarrell v. State, 2007 Tex. App. LEXIS 6357 (Tex. App. Austin Aug. 10 2007).

672. In a capital-murder trial, the perpetrator's videotaped statement, which was relevant and probative to the State's case, was not improperly admitted over the perpetrator's Tex. R. Evid. 403 objection, since the perpetrator did not overcome the presumption that the evidence was more probative than prejudicial since he admitted his direct involvement in causing at least one of the victim's stab wounds and starting the fire in her bedroom. Mata v. State, 2007 Tex. App. LEXIS 4505 (Tex. App. Fort Worth June 7 2007).

673. Where defendant pleaded guilty to three counts of sexual assault of a child and a fourth count of indecency with a child, at sentencing the jury was permitted to view seven pornographic videotapes that defendant took to the hotel and viewed before engaging in sexual acts with the victim; the jury could reasonably conclude that the tapes played a role in the sexual assault and showed defendant's sexual interests; the probative value of the videotapes was not substantially outweighed by the danger of unfair prejudice. Taylor v. State, 2006 Tex. App. LEXIS 9982 (Tex. App. Waco Nov. 15 2006).

Evidence : Demonstrative Evidence : Visual Formats

674. Defendant's conviction for recklessly causing serious bodily injury to a child was appropriate because the trial court did not abuse its discretion in admitting into evidence a video recording of the infant while he was in the hospital. The video had probative value because it demonstrated the seriousness of the infant's brain injury and the trial court could have reasonably concluded that the video aided the jury's understanding of the mother's testimony regarding the long-term effects of the injury as it showed the infant's diminished ability to see or speak; further, the recording depicted nothing more emotional or graphic than the photographs. Holte v. State, 2013 Tex. App. LEXIS 12207, 2013 WL 5498134 (Tex. App. Houston 1st Dist. Oct. 1 2013).

675. In a trial for aggravated sexual assault on a child, there was no error under Tex. R. Evid. 403 in admitting into evidence a videotape depicting defendant and his ex-wife acting out a father/daughter fantasy. Richert v. State, 2012 Tex. App. LEXIS 7719 (Tex. App. Houston 1st Dist. Aug. 30 2012).

676. In a capital murder case, a crime scene video was properly not excluded under Tex. R. Evid. 403 because it was not duplicative of autopsy photographs; moreover, the fact that the video showed burns and nudity was not a sufficient reason for exclusion either. Even if the video was improperly admitted, it had a slight or no effect on the jury's verdict. Denson v. State, 2012 Tex. App. LEXIS 5971, 2012 WL 3025845 (Tex. App. San Antonio July 25 2012).

677. Because defendant did not establish how the slower version videos and the single frame pictures were more prejudicial than the real-time video, the admission of that evidence did not violate Tex. R. Evid. 403. Evans v. State, 2012 Tex. App. LEXIS 1991, 2012 WL 848142 (Tex. App. San Antonio Mar. 14 2012).

678. Trial court did not abuse its discretion by admitting a video recording depicting the nature of the victim's injuries because it was relevant to proving serious bodily injury, an element of aggravated assault. The video was not unduly prejudicial under Tex. R. Evid. 403 because: (1) it communicated that the victim's injuries were serious in a non-technical way; (2) it was recorded a week before the trial and therefore was more current than other evidence; (3) it lasted only two minutes; and (4) it was only played once for the jury without sound. Rodriguez v. State, 352 S.W.3d 548, 2011 Tex. App. LEXIS 8130 (Tex. App. Beaumont Oct. 12 2011).

679. In a trial for aggravated assault, there was no error under Tex. R. Evid. 403, 1001(a) in admitting a crime scene videotape that showed the bodies of two murdered individuals who were not the victims of the charged offense. The video gave the jury a three dimensional perspective in understanding the chaotic sequence of events on the night in question. Dotson v. State, 2011 Tex. App. LEXIS 5255, 2011 WL 2714058 (Tex. App. San Antonio July 13 2011).

680. Trial court did not abuse its discretion by admitting the photographs and video recording of the victim's body being removed from her apartment because they were probative of the manner of the victim's death and the manner in which defendant tried to destroy evidence of his fingerprints on her body by setting fire to it. Garcia v. State, 2010 Tex. App. LEXIS 7168, 2010 WL 3419184 (Tex. App. Corpus Christi Aug. 31 2010).

681. In a murder and assault trial, counsel was not rendered ineffective by not moving exclude an in-store video of defendant's ammunition purchase because the evidence was admissible under Tex. R. Evid. 403. Julius v. State, 2009 Tex. App. LEXIS 8555, 2009 WL 3673089 (Tex. App. Houston 1st Dist. Nov. 5 2009).

682. In a drug trial, video excerpts from a seized camera were properly admitted under Tex. R. Evid. 401, 403, because they were material to the issues of possession-with-intent-to-deliver a controlled substance and a deadly weapon finding, in that they placed defendant in a drug house around the money and guns. They were not unduly

prejudicial because they did not show actual drug dealing. Mincey v. State, 2009 Tex. App. LEXIS 2825, 2009 WL 1058734 (Tex. App. Dallas Apr. 21 2009).

683. In a trial for aggravated assault on a public servant, there was no error in the admission of compilation exhibits in which the audio recording of defendant's conversation with a 911 operator was paired and played with videotapes of a pursuit taken from patrol cars; the exhibits were properly admitted under Tex. R. Evid. 403 because they showed the timing of the events and demonstrated that defendant intentionally or knowingly aimed a vehicle at officers, even though the jury was advised through a detective's testimony that the synchronization of the audio track with the video tracks was not perfectly accurate. Jarrell v. State, 2007 Tex. App. LEXIS 6357 (Tex. App. Austin Aug. 10 2007).

684. In a juvenile defendant's murder case, the court did not err by admitting a videotape of the crime scene, although nine photographs of the crime scene were also admitted, because an officer testified that the video depicted items not included in the photographs such as the path that the cab took once it left the pavement, some blood spatter on a house, a tennis shoe in the driveway, and the position of the body inside the cab. In re E.C.D., 2007 Tex. App. LEXIS 1270 (Tex. App. San Antonio Feb. 21 2007).

Evidence : Documentary Evidence : General Overview

685. In defendant's drug case, the court properly admitted a letter a witness received from defendant while they were both in jail for the offense because the letter was probative of defendant's relationship with the witness, as well as his guilt. Although the letter contained some derogatory racial language, the language was used by defendant to refer to himself, and other racial references were directed at the witness. Caballero v. State, 2012 Tex. App. LEXIS 10098, 2012 WL 6035259 (Tex. App. Dallas Dec. 5 2012).

686. In a sexual abuse case, any risk of unfair prejudice from the statements attributing the victim's suicidal thoughts to defendant's abusive conduct did not substantially outweigh the probative value of that evidence because nothing in the record reflects the jury was confused, misled, or unable to evaluate the probative force of any of the evidence. Further, the presentation of the letter did not take an inordinate amount of time, and it did not merely repeat evidence already admitted. Lofton v. State, 2011 Tex. App. LEXIS 9664, 2011 WL 6225415 (Tex. App. Dallas Dec. 9 2011).

687. In a murder trial, photographs, which were used along with the forensic pathologist's testimony, were properly admitted since the photographs themselves were not particularly offensive, nor were they portrayed in any manner more gruesome than that of the injuries inflicted, and none of the photographs showed any injury resulting from autopsy procedures done to the body of the decedent. Braziel v. State, 2004 Tex. App. LEXIS 6101 (Tex. App. El Paso July 8 2004).

Evidence : Documentary Evidence : Completeness

688. In an intoxication manslaughter case, the trial court's decision to exclude the statements at issue did not violate the doctrine of optional completeness because the officer's testimony that people at the scene said they saw what happened did not leave a false impression with the jury, and the excluded statements were not necessary to fully understand the officer's testimony; he further testified that people were approaching him while he was laying the flare line on the scene and that he gave one person a stack of affidavits so that witnesses could begin writing down what they saw. The officer testified that he did not talk to every witness on the scene, thus informing the jury that not all witnesses testified at trial. Mole v. State, 2009 Tex. App. LEXIS 2838, 2009 WL 1099433 (Tex. App. Fort Worth Apr. 23 2009).

689. In defendant's murder case, the trial court properly excluded a psychiatrist's memo because the entirety of it was not on the same subject as the portion read aloud by the doctor during direct examination. The memo covered her entire conversation with defendant which took place over more than six hours, and much of the memo was not on the same subject as the portion read into evidence by the prosecutor. Whipple v. State, 281 S.W.3d 482, 2008 Tex. App. LEXIS 6344 (Tex. App. El Paso 2008).

Evidence : Documentary Evidence : Writings : General Overview

690. In a forgery case, the trial court was within its discretion in admitting defendant's letter into evidence over her Tex. R. Evid. 403 objection. The letter indicated a consciousness of guilt and had great probative value to the main issue at trial -- the identity of the forger. Shaw v. State, 2012 Tex. App. LEXIS 2543 (Tex. App. Texarkana Mar. 30 2012).

Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence

691. In a trial for defendant's murder of a stepchild, defendant was not entitled to introduce, as a prior inconsistent statement under Tex. R. Evid. 801, a statement by the child's other parent about hating children because defendant called the other parent to the stand for the primary purpose of placing before the jury the inadmissible hearsay statement as substantive evidence of the other parent's guilt; any probative value the impeachment evidence might have had was substantially outweighed by its prejudicial effect under Tex. R. Evid. 403. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

Evidence : Hearsay : Exceptions : Statements Against Interest

692. Declarant's statements were properly admitted as statements against interest because there were sufficient corroborating circumstances that clearly indicated the trustworthiness of the statements. The declarant made the statements in response to questions from his common law wife about his involvement in the robbery, the declarant's guilt was not inconsistent with defendants, and the testimony bore significant probative force and was valuable in proving the State's case in chief. Gonzalez v. State, 2011 Tex. App. LEXIS 7084, 2011 WL 3849393 (Tex. App. San Antonio Aug. 31 2011).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

693. Evidence of bathing incident between defendant and his niece was admissible, Tex. R. Evid. 402, 403, 404(b), as it showed the nature of defendant's relationship with and mindset towards his niece, Tex. Code Crim. Proc. Ann. art. 38.37 Gragert v. State, 2011 Tex. App. LEXIS 3948, 2011 WL 2027955 (Tex. App. Amarillo May 24 2011).

694. Where defendant was charged with multiple counts of indecency with a child by contact, the court properly excluded expert testimony that the complainants' allegations were the result of manipulation, peer pressure, and improper interview techniques. The court was not convinced that the study in question was reliable, and the probative value of the study was substantially outweighed by the danger of unfair prejudice. Music v. State, 2005 Tex. App. LEXIS 7789 (Tex. App. Austin Sept. 22 2005).

Evidence : Hearsay : Exemptions : Confessions : General Overview

695. In defendant's capital murder case, a court did not err by admitting testimony about defendant's confession where the trial court properly concluded that the evidence was a significant part of the State's case because defendant's confession linked him to the store at the time of the robbery and murder, making it more likely that he

left his fingerprint on the cash drawer at the time of the offense. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Evidence : Hearsay : Exemptions : Statements by Coconspirators : General Overview

696. Out-of-court statements were non-testimonial and did not violate the Confrontation Clause because the statements were non-hearsay statements made by a co-conspirator; moreover, the trial court did not abuse its discretion in finding the probative value of the evidence was not outweighed by the danger of unfair prejudice. Agyin v. State, 2013 Tex. App. LEXIS 13337 (Tex. App. San Antonio Oct. 30 2013).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

697. Trial court did not abuse its discretion in admitting statements that defendant made to a jailer where the evidence was admissible as an admission by a party-opponent, as it was offered to prove that defendant admitted guilt in the instant case-he was being held for murder and said he would have to limit himself to one murder every two years. The jailer's testimony clarified the circumstances surrounding the victim's shooting, directly contradicted defendant's theory of the case that his accomplices were wrongly accusing him of firing the gun so that they would receive a favorable deal in their own cases, and was not likely to impress the jury in some irrational but nevertheless indelible way. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

698. Trial court did not abuse its discretion in admitting defendant's statement to a witness who had been in jail with him before the trial, that defendant was the "shooter," where the State did not offer the inmate's testimony as evidence of an extraneous offense separate and apart from the charged offense but, instead offered the evidence as proof that defendant fired the shots that killed the victim. The statement was an admission by a party-opponent, supported the allegation that defendant killed the victim, directly contradicted defendant's defensive theory that his accomplices only named him as the shooter to get a reduced sentence, and was not likely to impress the jury in some irrational but nevertheless indelible way. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

699. Trial court did not err by admitting into evidence statements defendant made in a letter concerning the murder because the statements were not hearsay under Tex. R. Evid. 801, as they were admissible as admissions of a party opponent. The statements were relevant because in the letter defendant did not claim, as he did at trial, that the shooting was accidental, and they were not inadmissible under Tex. R. Evid. 403, as the statements supported the State's contention that defendant intentionally shot the victim, it related to defendant's state of mind which was a central issue at trial, and the letter was brief and not cumulative of other evidence. Benitez v. State, 2011 Tex. App. LEXIS 9871, 2011 WL 6306643 (Tex. App. Houston 1st Dist. Dec. 15 2011).

700. In a medical malpractice case, the probative value of statements from superseded pleadings regarding two nonsuited doctors was not outweighed by the danger of unfair prejudice because counsel, representing the parents of an injured child, first alluded to the doctor's party status, thus opening the door to rebuttal, and the statements, which were made by the parents, constituted admissions by party-opponents under Tex. R. Evid. 801, and were not hearsay. Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231, 2007 Tex. LEXIS 527, 50 Tex. Sup. Ct. J. 866 (Tex. 2007).

Evidence : Hearsay : Rule Components : Truth of Matter Asserted

701. Trial court did not err by excluding evidence of the father's psychological evaluation, which included an evaluation of his predilection to pedophilia, because since the father's stated reason to admit the evidence could be accomplished by permitting the mother to testify concerning actions she took to investigate allegations of child abuse against the father in 2003, the trial court was within its discretion to find that there was no other purpose for

which the evaluation could have been offered than for the truth of its contents. In addition, the trial court was within its discretion to decide that the evaluation itself would have been cumulative of the mother's testimony and that admitting it would have needlessly confused the jury. In the Interest of W.B.W., 2012 Tex. App. LEXIS 5562, 2012 WL 2856067 (Tex. App. Eastland July 12 2012).

702. In defendant's drug case, the court did not err by admitting a videotape of a witness's interrogation by police because it was introduced to "rebut the witness's claims that the police threatened and coerced her into falsely stating that defendant was at the parking lot in order to conduct the drug deal;" the trial court negated any tendency of the evidence to suggest to the jury that defendant was guilty, or to distract the jury from the coercion issue, by instructing the jury that it was not to consider the videotape for the truth of the matters asserted therein. Kennedy v. State, 2008 Tex. App. LEXIS 3424 (Tex. App. Fort Worth May 8 2008).

703. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive and the trial court had to admonish her during her testimony for offering explanations rather than answers. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

Evidence : Inferences & Presumptions : Inferences

704. In a trial for possession hydromorphone, it was proper to admit unsealed and opened vials of medicine to support an inference that defendant's possession was not a one-time mistake. Moore v. State, 2014 Tex. App. LEXIS 5823, 2014 WL 2521537 (Tex. App. Tyler May 30 2014).

Evidence : Judicial Notice

705. In defendant's sexual assault case, a court did not err by taking judicial notice of defendant's birth date where the alleged discrepancy regarding defendant's date of birth was not reflected in the appellate record, and as to the age difference, the victim testified without objection that she was 14 years old and that defendant told her he was 35 years old. The jury could also draw its own conclusions from the appearance of the victim and defendant in the courtroom. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

Evidence : Procedural Considerations : Burdens of Proof : General Overview

706. In connection with defendant's trial for injury to a child causing bodily injury, the trial court did not err in admitting photographs of injuries to the child that defendant claimed were caused by a sibling's bite because it was a matter for the jury to determine whether certain injuries were consistent with a bite mark; the photographs were not unnecessarily inflammatory and the trial court properly applied the balancing test under Tex. R. Evid. 403 and found that they were admissible. Bondy v. State, 2004 Tex. App. LEXIS 5629 (Tex. App. Fort Worth June 24 2004).

Evidence : Procedural Considerations : Curative Admissibility

707. Trial court did not err during defendant's trial for indecency with a child when it allowed the prosecutor, for the limited purpose of impeachment, to question the victim's mother about her knowledge of defendant's prior convictions for aggravated sexual assault of two other children because the mother's testimony on direct examination by defendant's counsel that she had no reason to suspect that defendant would abuse her children

opened the door and put at issue her credibility. Delacruz v. State, 2013 Tex. App. LEXIS 13492, 2013 WL 5890796 (Tex. App. Eastland Oct. 31 2013).

708. Defendant's statement to police that he had, 20 years earlier, been accused of improper conduct with his former stepdaughter, was not relevant to prove defendant's intent under Tex. R. Evid. 401 and Tex. R. Evid. 404(b), and it was unduly prejudicial under Tex. R. Evid. 403. Defendant did not "open the door" to admission of the statement, Tex. R. Evid. 107, by responding to a question by the State. However, given the evidence of guilt, the error was harmless. Cressman v. State, 2012 Tex. App. LEXIS 9849, 2012 WL 5974013 (Tex. App. Waco Nov. 29 2012).

709. Evidence of defendant's prior conviction for delivering drugs was admissible where, through his questioning of a defense witness, defense counsel had sought to paint defendant as a "white knight" not involved with drugs, thereby creating a false impression before the jury; by doing so, defendant opened the door to testimony to correct that false impression, and the prosecutor could only correct that false impression by cross-examination of the witness who created it. Jones v. State, 2006 Tex. App. LEXIS 7917 (Tex. App. Dallas Sept. 5 2006).

710. It was not an error for the trial court to admit testimony that a computer was found at defendant's residence containing child pornography under Tex. R. Evid. 403 because the State was merely walking through the door opened by defendant, and defendant's objection occurred well after the evidence was before the jury; during cross-examination by defense counsel, a witness identified the "pedophile"-laden computer and a pedophile website found on it, and two additional questions were asked about the computer; therefore, later testimony that the computer did in fact contain pornographic images was properly admitted. Hale v. State, 2006 Tex. App. LEXIS 7825 (Tex. App. Fort Worth Aug. 31 2006).

711. Defendant on a drug delivery charge was estopped from raising on appeal any error in the admission of subsequent deliveries at the guilt phase because he admitted his guilt at the penalty phase of trial; further, there was no error under Tex. R. Evid. 403 or Tex. R. Evid. 404 because his counsel opened the door by suggesting that defendant was only a marginal participant in the drug trade and that the charged transaction constituted his sole involvement in the drug business. Houston v. State, 208 S.W.3d 585, 2006 Tex. App. LEXIS 3056 (Tex. App. Austin 2006).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

712. In a criminal trial for burglary, the court did not err by allowing a police officer to testify as to the contents of defendant's van. The testimony was needed to show that defendant was in recent possession of stolen property; the testimony was not character evidence of other crimes or wrong acts. Middleton v. State, 187 S.W.3d 134, 2006 Tex. App. LEXIS 578 (Tex. App. Texarkana 2006).

713. In a criminal prosecution for capital murder, the trial court did not err by allowing the prosecutor's questions regarding the defendant's possible exchange of sexual favors for forgiveness of a drug debt; the evidence was admissible to show the relationship between defendant and the victim. Whitmire v. State, 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

714. Where defendant, a large Caucasian man, was accused of burglarizing the homes of two Hispanic families, photographs of defendant's tattoos were admissible as evidence of defendant's selfishness and his impact on the victims. Counsel was not ineffective for failing to raise an objection under Tex. R. Evid. 403. Hicks v. State, 2005 Tex. App. LEXIS 10663 (Tex. App. Dallas Dec. 28 2005).

715. Where defendant was charged with multiple counts of indecency with a child by contact, the court properly excluded expert testimony that the complainants' allegations were the result of manipulation, peer pressure, and improper interview techniques. The court was not convinced that the study in question was reliable, and the probative value of the study was substantially outweighed by the danger of unfair prejudice. Music v. State, 2005 Tex. App. LEXIS 7789 (Tex. App. Austin Sept. 22 2005).

716. No reversible error was presented under Tex. R. Evid. 402, 403, and 404(b) by an arresting officer's testimony that defendant told the officer during a traffic stop about defendant's prior arrests because the videotape of the stop, including defendant's own statement of the arrests, was admitted without objection under R. 402, 403, and 404(b). Tunstall v. State, 2005 Tex. App. LEXIS 6336 (Tex. App. Beaumont Aug. 10 2005).

717. In a criminal trial for aggravated assault with a deadly weapon, the court did not abuse its discretion by admitting photographs of the crime scene that were taken during daylight hours. While the shooting actually occurred at night, the jury was made aware of the lighting differences. Rivera v. State, 2005 Tex. App. LEXIS 5459 (Tex. App. Corpus Christi July 14 2005).

718. Pre-autopsy photographs including the victim's body in a hospital gown, the victim's nude body, upper and lower torso, and two photographs of the bullet wound, one close-up and one with the ear for reference, illustrated and clarified the medical examiner's description of the injuries, and the trial court therefore did not abuse its discretion in admitting them. The photographs were not gruesome, vulgar, or indecent, and they did not depict mutilation of the body caused by the autopsy. Smith v. State, 2005 Tex. App. LEXIS 5316 (Tex. App. Dallas July 7 2005).

719. In a murder case, the trial court did not err in allowing testimony during punishment regarding racial language on a tattoo; defendant's unfair prejudice argument lacked merit because defendant's tattoo was relevant to the issue of motive and defendant did not ask for a limiting instruction. Woodward v. State, 170 S.W.3d 726, 2005 Tex. App. LEXIS 5255 (Tex. App. Waco 2005).

720. Trial court properly admitted evidence of an extraneous assault offense under Tex. R. Evid. 403 and 404(b) where defendant's wife's testimony on behalf of the defense was an attempt to show that her injury was caused by an accident, not the intentional actions of defendant. Thus, a videotape in which defendant admitted a prior assault on his wife made the defensive theory of accident less probable and was relevant to rebut the defensive theory of accident. Iroegbu v. State, 2005 Tex. App. LEXIS 5296 (Tex. App. Dallas July 6 2005).

721. In a child sexual assault case, the trial court did not err in admitting defendant's medical records for the purpose of showing that he had herpes, which the victim had contracted from the assault; the probative value of the medical records was not substantially outweighed, for purposes of Tex. R. Evid. 403, by the prejudicial impact. Eslora v. State, 2005 Tex. App. LEXIS 2564 (Tex. App. San Antonio Apr. 6 2005).

722. Where defendant was charged with the murder of her ex-boyfriend's new girlfriend, the trial court did not err in admitting into evidence a letter written by defendant to her ex-boyfriend in which she described the intensity of her feelings for him and her concern about the possibility of his philandering. Defendant's statements proved that she had a motive to kill the complainant; the prejudice of the letter did not substantially outweigh its probative value. Harris v. State, 2005 Tex. App. LEXIS 346 (Tex. App. Houston 1st Dist. Jan. 13 2005).

723. Defendant's statements to police which contradicted other evidence presented at trial were relevant and admissible to show his consciousness of guilt. Although the tapes contained references to drugs, crime, nicknames, extraneous offenses and bad acts, defendant did not specify where these references could be found in the three

hour tapes. Ross v. State, 154 S.W.3d 804, 2004 Tex. App. LEXIS 11407 (Tex. App. Houston 14th Dist. 2004).

724. Evidence admissible under Tex. Code Crim. Proc. Ann. art. 38.36 must still meet the requirements of Tex. R. Evid. 403 and Tex. R. Evid. 404(b). Navarro v. State, 154 S.W.3d 795, 2004 Tex. App. LEXIS 11429 (Tex. App. Houston 14th Dist. 2004).

725. In a robbery case, extraneous offense evidence was admissible under Tex. R. Evid. 404(b) to establish defendant's identity, which was at issue because defense counsel had challenged the accuracy of the victim's identification of defendant, and the evidence was not unduly prejudicial under Tex. R. Evid. 403 because proper instructions were given. Thompson v. State, 2004 Tex. App. LEXIS 11088 (Tex. App. Houston 1st Dist. Dec. 9 2004).

726. State may offer otherwise inadmissible evidence to "complete the picture" when a defendant has presented an incomplete picture of an incident. The admission of otherwise inadmissible evidence is limited, however, to evidence germane to the subject opened by the defendant and by Tex. R. Evid. 403's requirement that its probative value not be substantially outweighed by its prejudicial effect. Hernandez v. State, 2004 Tex. App. LEXIS 8448 (Tex. App. Austin Sept. 23 2004).

727. Trial court did not err in admitting evidence of extraneous conduct concerning defendant's physical abuse of the victims of his sexual contact, as that abuse was relevant to show why the one victim was fearful of defendant and did not report the sexual abuse sooner; further, such evidence was admissible because its probative value was not substantially outweighed by the danger of unfair prejudice. Wade v. State, 2004 Tex. App. LEXIS 6786 (Tex. App. San Antonio July 28 2004).

728. Where defendant was tried for murdering the victim in exchange for his wife's promise for a share of the insurance proceeds, the State's failure to charge the wife was irrelevant to the credibility of the State's key witness, defendant's girlfriend. The trial court did not abuse its discretion in excluding the proffered impeachment evidence. Day v. State, 2004 Tex. App. LEXIS 6238 (Tex. App. Austin July 15 2004).

729. Trial court did not abuse its discretion in defendant's murder case in allowing the admission into evidence of a photograph of the victim's upper body, which showed the gunshot wounds on the body, as it was the only photograph that was admitted to show the location of the wounds, the photograph was not more prejudicial than probative, and testimony regarding the same injuries would have been admissible. Hughes v. State, 2004 Tex. App. LEXIS 6267 (Tex. App. Tyler July 14 2004).

730. Where defendant's cell mate described what defendant had told him about the instant murder and also about another killing, the trial court had not erred in admitting the evidence of the other shooting because the extreme degree of similarity between the two murders made the evidence of the other murder highly probative. In addition, without evidence of defendant's involvement in the other murder, it would have been more difficult for the jury to resolve whether the cell mate was a credible witness. Corona v. State, 2004 Tex. App. LEXIS 5042 (Tex. App. San Antonio June 9 2004).

731. Where defendant contended that the bloody trail depicted in crime scene photographs would have had such an emotional impact on the jury that its decision would be based on emotion, the appellate court found that the trial court had not abused its discretion in admitting them since the amount of time devoted to developing the evidence was minimal, and the photographs did not depict any bodies and, although they depicted blood, they were not particularly gruesome. Corona v. State, 2004 Tex. App. LEXIS 5042 (Tex. App. San Antonio June 9 2004).

732. In a drug case, defense counsel's general objection to the trial court's exclusion of testimony under Tex. R. Evid. 403 did not preserve error under Tex. R. App. P. 33.1(a). Thompson v. State, 2004 Tex. App. LEXIS 4602 (Tex. App. Houston 1st Dist. May 20 2004).

733. In a criminal prosecution for indecency with a child, defendant failed to show that his trial counsel was ineffective for failing to object to the introduction into evidence of his mental health records, which defendant claimed contained evidence of inadmissible extraneous bad conduct. Defendant was not prejudiced by the admission of the mental health records, because the victim's testimony alone was sufficient to support his conviction. Taylor v. State, 2004 Tex. App. LEXIS 4581 (Tex. App. Dallas May 20 2004).

734. In an aggravated assault case, the trial court did not err by admitting the kitchen knife used in the assault into evidence because the knife was relevant under Tex. R. Evid. 401 to prove the allegation that defendant used or exhibited a deadly weapon, and was not unfairly prejudicial under Tex. R. Evid. 403 because it did not have an undue tendency to suggest that a decision be made on an improper basis. Hardy v. State, 2004 Tex. App. LEXIS 3214 (Tex. App. Fort Worth Apr. 8 2004).

735. In an aggravated assault case, the trial court did not abuse its discretion by admitting into evidence the bloody clothing of defendant's companion, which was reasonably found to be relevant and not overly prejudicial because it illustrated the severity of the victim's wounds, supported the argument that the cuts were not made in self-defense but resulted from two individuals attacking one, and was no more gory than other evidence in the case. Ferguson v. State, 2004 Tex. App. LEXIS 2884 (Tex. App. Amarillo Mar. 30 2004).

736. Testimony concerning defendant's plans following release from jail was minimal compared to the testimony concerning the charged offenses, and it did not influence the jury or had only a slight effect; therefore, any error was rendered harmless. Ellinberg v. State, 2004 Tex. App. LEXIS 2753 (Tex. App. Dallas Mar. 26 2004).

737. In a criminal prosecution for murder, autopsy photographs of the victim were admissible to establish the victim's cause of death. The photographs had a high probative value, were not excessively gruesome, and owed any disturbing nature to the crime itself. Troncoso v. State, 2004 Tex. App. LEXIS 2578 (Tex. App. Texarkana Mar. 24, 2004).

738. Autopsy photographs are admissible unless they depict mutilations of the victim due to the autopsy itself. Troncoso v. State, 2004 Tex. App. LEXIS 2578 (Tex. App. Texarkana Mar. 24, 2004).

739. Where pictorial evidence will help the jury understand verbal testimony, such as the technical language used by a medical doctor in describing the injuries sustained by a victim of a crime, a trial court does not abuse its discretion in admitting these photographs. Troncoso v. State, 2004 Tex. App. LEXIS 2578 (Tex. App. Texarkana Mar. 24, 2004).

740. Where pictorial evidence will help the jury understand verbal testimony, such as the technical language used by a medical doctor in describing the injuries sustained by a victim of a crime, a trial court does not abuse its discretion in admitting these photographs. Troncoso v. State, 2004 Tex. App. LEXIS 2578 (Tex. App. Texarkana Mar. 24, 2004).

741. In a murder case, the trial court did not abuse its discretion in admitting, under Tex. R. Evid. 404(b), evidence that the victim's debt to defendant resulted from a drug transaction; such evidence was relevant to motive and was not excessively prejudicial under Tex. R. Evid. 403. Collier v. State, 2004 Tex. App. LEXIS 1955 (Tex. App. Tyler

Feb. 27 2004).

742. Where defendant objected at trial to the admission of a video showing his jewelry box, which was ornamented with a picture of Hitler, but failed to make a specific Tex. R. Evid. 403 objection when the video was introduced into evidence, defendant waived his right to make a Tex. R. Evid. 403 argument on appeal in regard to the video of the jewelry box. Smith v. State, 2004 Tex. App. LEXIS 1121 (Tex. App. Houston 1st Dist. Feb. 5 2004), writ of certiorari denied by 544 U.S. 961, 125 S. Ct. 1726, 161 L. Ed. 2d 602, 2005 U.S. LEXIS 2975, 73 U.S.L.W. 3593 (2005).

743. Defendant's objections that the admission of a video showing racist and gang affiliation items in his home was improper because (1) it constituted hearsay, (2) was not a true and accurate depiction of the scene, and (3) was more prejudicial than probative under Tex. R. Evid. 403 were not sufficient to preserve error on "guilt by association" or First Amendment grounds. Smith v. State, 2004 Tex. App. LEXIS 1121 (Tex. App. Houston 1st Dist. Feb. 5 2004), writ of certiorari denied by 544 U.S. 961, 125 S. Ct. 1726, 161 L. Ed. 2d 602, 2005 U.S. LEXIS 2975, 73 U.S.L.W. 3593 (2005).

744. In a drunk driving case, it was not error for the State to place defendant's stipulation of two prior convictions, which were jurisdictional elements of a felony offense, into evidence and to mention it in closing argument; the stipulation was evidence, could be received as such by the jury as the fact finder, and did not create a risk of unfair prejudice within the meaning of Tex. R. Evid. 403, 404(b). Shugart v. State, 2004 Tex. App. LEXIS 427 (Tex. App. Fort Worth Jan. 15 2004).

745. Pursuant to Tex. R. Evid. 403, in the context of implied consent, a refusal or purported refusal to take a breath or blood test, like any other evidence, can be admitted as relevant evidence, at the trial court's discretion, unless a defendant can overcome the statutory presumption of admissibility by showing undue prejudice or the like. State v. Marrs, 104 S.W.3d 914, 2003 Tex. App. LEXIS 3834 (Tex. App. Corpus Christi 2003).

746. Trial court's exclusion of a tape was proper where it was reasonable for the trial court to conclude that the risks of confusing the jury substantially outweighed any probative value the video might have; under Tex. R. Evid. 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Sells v. State, 121 S.W.3d 748, 2003 Tex. Crim. App. LEXIS 63 (Tex. Crim. App. 2003), *cert. denied*, 540 U.S. 986, 124 S. Ct. 511, 2003 U.S. LEXIS 8067 (2003).

747. Tex. R. Evid. 403 balancing test is an inherent part of Tex. R. Evid. 404(b). Lucky v. State, 2003 Tex. App. LEXIS 11 (Tex. App. Dallas Jan. 6 2003).

748. Admission of knives recovered from defendant's truck did not violate Tex. R. Evid. 403, because the prosecutor never mentioned to the jury that the double-edged knife that was recovered was illegal and the second knife was a swiss army knife and was not illegal, and thus, the jury would not be unfairly prejudiced against defendant simply because two apparently legal knives were recovered from his truck. Goldberg v. State, 95 S.W.3d 345, 2002 Tex. App. LEXIS 6114 (Tex. App. Houston 1st Dist. 2002), *cert. denied*, 540 U.S. 1190, 124 S. Ct. 1436, 158 L. Ed. 2d 99, 2004 U.S. LEXIS 1219 (2004).

749. Admission of a notebook did not violate Tex. R. Evid. 403; although it was very prejudicial because it exposed defendant's murderous fantasies to the jury, the need for the evidence was extremely great to establish both identity and motive and without the evidence the State would have had no evidence to explain why a seemingly normal teenager would commit such a senseless crime. Goldberg v. State, 95 S.W.3d 345, 2002 Tex. App. LEXIS 6114 (Tex. App. Houston 1st Dist. 2002), *cert. denied*, 540 U.S. 1190, 124 S. Ct. 1436, 158 L. Ed. 2d 99, 2004

U.S. LEXIS 1219 (2004).

750. In trial for arson, trial court properly excluded evidence that a known fire-starter was thrown out of the burned restaurant a few days prior to the fire and was standing across the street watching it burn when neither defendant nor the fire investigators believed that the known fire-starter had the intellectual capacity to plan, organize, and carry out the arson and the evidence was offered only to show that the fire-starter was acting as an assistant to an unknown alternative perpetrator. Wiley v. State, 74 S.W.3d 399, 2002 Tex. Crim. App. LEXIS 67 (Tex. Crim. App. 2002), *cert. denied*, 537 U.S. 949, 123 S. Ct. 415, 154 L. Ed. 2d 294, 2002 U.S. LEXIS 7625 (2002).

751. Officer's testimony that the quantity of marijuana recovered from the defendant's vehicle indicated that it was possessed for resale rather than for personal use was relevant under Tex. R. Evid. 403 and Tex. R. Evid. 401. Gallegos v. State, 1999 Tex. App. LEXIS 5042 (Tex. App. Dallas July 9 1999).

752. Pursuant to Tex. R. Crim. Evid. 403, expert testimony admitted from a law enforcement officer on the elements of a "jugging" offense was properly admitted where the cause involved the execution of a planned ambush upon two individuals as they returned from the bank with a substantial amount of money. The probative value of the expert testimony outweighed any risk of prejudice to defendant given that it was a direct attempt to assist the jury to understand the various pieces of evidence, the significance of each piece of evidence, and how these pieces all fit together to form the complete criminal episode. Foster v. State, 909 S.W.2d 86, 1995 Tex. App. LEXIS 1896 (Tex. App. Houston 14th Dist. 1995).

Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : Limitations

753. In a suit on a sworn account brought by a law firm to recover its legal fees, the trial court questioned the law firm's principal witness to establish that the underlying legal matter was settled. The trial court acted within its discretion in attempting to limit the jury's exposure to needless and possibly confusing or misleading evidence under Tex. R. Evid. 401 and 403; the trial court did not impermissibly comment on the weight of the evidence. Alam v. Wilshire & Scott, P.C., 2007 Tex. App. LEXIS 5501 (Tex. App. Houston 1st Dist. July 12 2007).

Evidence : Procedural Considerations : Limited Admissibility

754. In a criminal prosecution for aggravated assault, an officer was permitted to testify that when he was talking to appellant he observed appellant take out a pistol and throw it on the ground. The evidence was not unfairly prejudicial, since the trial judge gave limiting instructions and did not allow the officer to testify that appellant had just fired the gun and was attempting to evade the police when they arrested him. Payne v. State, 2004 Tex. App. LEXIS 9785 (Tex. App. Houston 14th Dist. Nov. 4 2004).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

755. In a criminal prosecution for aggravated assault, the trial court did not abuse its discretion in admitting evidence of defendant's prior acts of aggression; defendant made no objection on the basis of Tex. R. Evid. 403, and therefore did not preserve the issue for review. Vidal v. State, 2006 Tex. App. LEXIS 1913 (Tex. App. Eastland Mar. 9 2006).

756. In a criminal prosecution for theft, the trial court did not abuse its discretion in admitting evidence of the extraneous offenses suffered by the victim; because defendant did not raise a separate trial objection to the evidence based upon Tex. R. Evid. 403, this argument was not properly before the appellate court. Buttz v. State, 2006 Tex. App. LEXIS 919 (Tex. App. Fort Worth Feb. 2 2006).

757. Defendant's claim that the prejudicial effect of testimony elicited during his trial for sexually assaulting his daughter from his stepdaughter that he sexually abused her as well substantially outweighed its probative value in violation of Tex. R. Evid. 403 was not preserved for appeal because defendant failed to object when, during the victim's testimony, after she had detailed what defendant had been doing to her, she testified that she found out defendant had been doing the same thing to his stepdaughter. Patron v. State, 2005 Tex. App. LEXIS 902 (Tex. App. Fort Worth Feb. 3 2005).

758. Defendant failed to preserve error for review where counsel cited Tex. R. Evid. 403 and 611 as the basis for the objection to the testimony of the victim's parents at sentencing. It was unclear from the record which part of Rule 611 was the basis of the objection, and the issue on appeal was different from the objection at trial. Foust v. State, 2005 Tex. App. LEXIS 12 (Tex. App. Dallas Jan. 4 2005).

759. Once a defendant objects to evidence on the basis of Tex. R. Evid. 403, the trial court must weigh the probative value of the evidence against its potential for unfair prejudice. Lewis v. State, 2003 Tex. App. LEXIS 10408 (Tex. App. Houston 1st Dist. Dec. 11 2003).

760. Court found no Tex. R. Evid. 403 objection to the evidence where appellant's objection was only, "it's an extraneous matter which has nothing to do with this case." Mark v. State, 2003 Tex. App. LEXIS 879 (Tex. App. Houston 14th Dist. Jan. 30 2003).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

761. In a murder case, the trial court did not err when it denied defendant the opportunity to question an eyewitness about her experience with burning people to establish her as an alternate perpetrator. With little details regarding the alleged past conduct, the trial court did not err in sustaining the State's relevancy objection under Tex. R. Evid. 403 because the court could not determine whether the excluded testimony was sufficient to show a nexus between the crime charged and the alleged alternative perpetrator to avoid confusing the issues at trial. Dayne Adenauer White v. State, 2012 Tex. App. LEXIS 8107 (Tex. App. Houston 1st Dist. Sept. 27 2012).

Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof

762. In a capital murder case, a trial court did not err by excluding a digital video disk (DVD) containing defendant's statement because an inappropriate proffer was made since defendant did not identify which statements he thought were admissible for impeachment purposes; even if a proffer was made, the DVD was cumulative under Tex. R. Evid. 403 because the witness stated during his testimony and on the DVD that he had been pressured by the police during the interrogation and said things that they wanted to hear. Gonzalez v. State, 2008 Tex. App. LEXIS 8954 (Tex. App. San Antonio Dec. 3 2008).

Evidence : Procedural Considerations : Preliminary Questions : General Overview

763. In making the initial determination of admissibility of evidence, Texas courts must apply the principles set forth in the evidentiary rules governing relevancy under Tex. R. Evid. 401-403; to meet the relevancy test, the proffered evidence must, first, have probative value, and second, be of consequence to some issue in the trial under Tex. R. Evid. 401. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

Evidence : Procedural Considerations : Rulings on Evidence

764. Where defendant was convicted of capital murder for shooting his wife and her lover, the trial court did not violate this rule by allowing the State to introduce a recorded call from a customer who called 9-1-1 after hearing

gunshots; 9-1-1 calls are admissible in the guilt/innocence phase to provide a framework within which the particulars of the State's evidence may be developed. Mendoza v. State, 2013 Tex. App. LEXIS 11728 (Tex. App. San Antonio Sept. 18 2013).

765. Trial court did not abuse its discretion when it did not exclude evidence of an extraneous murder pursuant to Tex. R. Evid. 403 where: (1) the extraneous offense evidence made defendant's identity as the murderer of the victim in the instant case more probable; (2) the pictures relating to the extraneous murder were some evidence of the similarity in the modus operandi of the attacks, which was highly probative; (3) the trial court instructed the jurors to limit their consideration of the extraneous offense evidence; and (4) the State's need for the evidence favored admissibility of the extraneous murder. The trial court was within the zone of reasonable disagreement when it implicitly ruled that the probative value of the extraneous murder was not substantially outweighed by its prejudicial effect. Mcgregor v. State, 394 S.W.3d 90, 2012 Tex. App. LEXIS 6552, 2012 WL 3244196 (Tex. App. Houston 1st Dist. Aug. 9 2012).

766. In a personal injury suit arising from an automobile accident, evidence regarding the defense expert's alleged bias was not material to the outcome of the case. The trial court's exclusion of this evidence did not cause the rendition of an improper judgment. Gill v. Slovak, 2005 Tex. App. LEXIS 8876 (Tex. App. Corpus Christi Oct. 27 2005).

767. Trial court did not abuse its discretion under Tex. R. Evid. 403 by excluding the testimony of a physician's expert where the record demonstrated a legitimate basis, the similarity in opinions and credentials, for the trial court's exclusion of the expert's testimony as needlessly cumulative of another expert's testimony. Due to the similarly in both experts' credentials and opinions, the record did not show that the exclusion of the testimony probably caused the rendition of an improper judgment under Tex. R. App. P. 44.1(a)(1). Welch v. McLean, 191 S.W.3d 147, 2005 Tex. App. LEXIS 4231 (Tex. App. Fort Worth 2005).

Evidence : Procedural Considerations : Weight & Sufficiency

768. Defendant's conviction for engaging in organized crime was proper because the nonaccomplice evidence placed defendant at or near the scene of the crime at or about the time of its commission under suspicious circumstances and because, although the forensic examiner testified that he did not know who actually sent or received the text messages, the circumstances were sufficient to allow a jury reasonably to find that defendant sent and received the messages. Because intent to commit forgery could not be inferred, the prior conviction showing strikingly similar facts made the existence of a material fact, that was, whether defendant possessed forged checks with the intent to defraud or harm another, more probable and defendant did not show that the trial court acted outside the zone of reasonable disagreement by balancing the factors in favor of admissibility, Tex. R. Evid. 403. Franklin v. State, 2012 Tex. App. LEXIS 8513 (Tex. App. Dallas Oct. 10 2012).

Evidence : Relevance : Character Evidence

769. In a murder trial, it was error to exclude evidence of defendant's peaceful character through a friend who had known him for almost 30 years. Turner v. State, 413 S.W.3d 442, 2012 Tex. App. LEXIS 6619 (Tex. App. Fort Worth Aug. 9 2012).

770. Appellant's affiliation with the Aryan Brotherhood was relevant and the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice because appellant's membership in the gang and his obligation to follow a higher-ranking member's orders were relevant to show appellant's motive for the crime. Evidence of appellant's membership in the Aryan Brotherhood was offered to show appellant's motive, was not introduced to show character conformity, did not violate Tex. R. Evid. 404, and was not unduly prejudicial under Tex. R. Evid. 403. Guffey v. State, 2012 Tex. App. LEXIS 3293, 2012 WL 1470185 (Tex. App. Eastland Apr. 26

2012).

771. Evidence of the victim's extraneous offenses should have been allowed, Tex. R. Evid. 403, but because defendant denied hitting the victim with the baseball bat, he could not have employed the theory of self-defense for that part of the alleged assault; the trial court was free to disbelieve defendant's assertion that he only punched the victim once and that he did not hit him with the baseball bat, and the jury was free to believe the victim's testimony that defendant was the first aggressor. Tomasheski v. State, 2010 Tex. App. LEXIS 4709, 2010 WL 2512618 (Tex. App. Texarkana June 23 2010).

772. There was no evidence that at the time of the altercation defendant and his brother were defending their mother against a violent act by the stepfather; under the circumstances presented, considering the other evidence of stepfather's violence admitted, the trial court did not err in excluding the specific evidence of the stepfather's violence toward the mother at defendant's trial for murdering the stepfather. Drake v. State, 2009 Tex. App. LEXIS 8001, 2009 WL 3295580 (Tex. App. Beaumont Oct. 14 2009).

773. In defendant's sexual assault case, evidence was improperly excluded because there was no allegation that the evidence was self-serving or unreliable. The evidence was relevant to the complaining witness's credibility, and further, the State failed to show how the probative value of the evidence was outweighed by the danger of unfair prejudice. State v. Moreno, 297 S.W.3d 512, 2009 Tex. App. LEXIS 7642 (Tex. App. Houston 14th Dist. Oct. 1 2009).

774. At the punishment phase of a criminal trial, evidence of defendant's tattoos could be presented as character evidence. Likewise, his choice of tattoos could demonstrate a motive for his crime; the probative value of the evidence was not outweighed by the danger of unfair prejudice. Albarado v. State, 2009 Tex. App. LEXIS 5471, 2009 WL 2055947 (Tex. App. Eastland July 16 2009).

775. Court properly excluded testimony from third parties establishing defendant's knowledge of the complainant's propensity for violence because a witness testified that she saw the complainant hit her mother multiple times, she and other family members had called the police multiple times regarding the complainant's domestic violence, and defendant told a witness after the shooting that defendant thought the complainant was trying to hurt him. Segovia v. State, 2009 Tex. App. LEXIS 4559, 2009 WL 1678024 (Tex. App. Houston 14th Dist. June 9 2009).

776. In a murder trial, there was no error, after allowing testimony about a conversation in which defendant expressed a desire to get rid of the victim, in excluding further evidence offered under Tex. R. Evid. 107, the rule of optional completeness; the evidence that defendant sought--allegations that the victim had sexually abused their child and was involved with child pornography--was properly found to be more prejudicial than probative under Tex. R. Evid. 403 because the evidence did not tend to show that defendant's desire to get rid of the victim was any less serious. Glover v. State, 2007 Tex. App. LEXIS 8852 (Tex. App. Austin Nov. 8 2007).

777. In a retaliation case, a court properly refused to allow defendant to question the State's character witnesses as to the victim's prior crimes where the remoteness of the prior convictions tended to diminish any potential they might have for impressing the jury in some improper manner, defendant called other witnesses who testified that the victim's character for truthfulness was not good, and thus, his need to cross-examine the State's witnesses regarding the victim's prior convictions was lessened. Moore v. State, 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

778. Danger of prejudice to a defendant is usually highest when evidence of defendant's extraneous acts is offered to prove that defendant acted in the same way in the offense on trial. The danger of prejudice may be much

lower when evidence of a third party's extraneous acts is offered. Castaldo v. State, 78 S.W.3d 345, 2002 Tex. Crim. App. LEXIS 138 (Tex. Crim. App. 2002).

Evidence : Relevance : Circumstantial & Direct Evidence

779. Admission of testimony was not an abuse of discretion and did not cause the rendition of an improper judgment, because the court could reasonably conclude that the facts and details related to the patient's underlying offenses would be helpful to the jury to explain how the psychologist and medical doctor formed their opinions that the patient suffered from a behavioral abnormality. In re Commitment of Cardenas, 2014 Tex. App. LEXIS 6441, 2014 WL 2616972 (Tex. App. Beaumont June 12 2014).

Evidence : Relevance : Compromise & Settlement Negotiations

780. Evidence related to a second victim of an alleged sexual assault involved in two other indictments than those on which appellant was being tried was not more unfairly prejudicial than probative under Tex. R. Evid. 403 as the testimony regarding the second victim was limited and the State was consistently cautiioned by the trial court. Downs v. State, 2010 Tex. App. LEXIS 6241, 2010 WL 3030487 (Tex. App. El Paso Aug. 4 2010).

781. During defendant's trial for the aggravated robbery of a car wash patron, the trial court did not err in admitting evidence of the fact that defendant also robbed a second car wash patron at gun point where the State proved the evidence of defendant's other crime was relevant under Tex. R. Evid. 404(b) for purposes other than any tendency to prove his character or action in conformity therewith because the other crime was particularly relevant to defendant's intent to rob the complainant, a fact disputed at trial, and, additionally, evidence of the other crime, which occurred just minutes after the crime for which defendant was being tried, showed the absence of any mistake by defendant. Moreover, the trial court did not err in concluding that the evidence was admissible under Tex. R. Evid. 403 because evidence of the other crime was highly probative of a disputed issue, defendant's intent to steal, and thus outweighed the danger of unfair prejudice. Moore v. State, 2005 Tex. App. LEXIS 6273 (Tex. App. Houston 14th Dist. Aug. 4 2005).

782. Because defendant couched an objection to evidence in terms of prejudice, the trial court was required to conduct the balancing test under Tex. R. Evid. 403. Jones v. State, 2005 Tex. App. LEXIS 5093 (Tex. App. Tyler June 30 2005).

783. In a drug case, in light of the offense charged and the evidence adduced at trial, the evidence that defendant possessed a bogus license did not unfairly prejudice the jury or confuse the issues. Accordingly, the trial court did not abuse its discretion in admitting the evidence. Gregory v. State, 159 S.W.3d 254, 2005 Tex. App. LEXIS 1660 (Tex. App. Beaumont 2005).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

784. In an inmate's trial for the sexual assault of another inmate while both were in a trustee unit, evidence that defendant told the victim he had been in prison and was probably going back did not violate Tex. R. Evid. 403 because he was already incarcerated, and the evidence explained why the victim feared defendant, although the victim was larger. Esparza v. State, 2014 Tex. App. LEXIS 9175, 2014 WL 4179435 (Tex. App. Austin Aug. 20 2014).

785. During defendant's capital murder trial, the court did not err in admitting evidence related to another murder because the probative value of the evidence was not substantially outweighed by its prejudicial effect; the trial court's instructions informed the jury that it could consider evidence of the other murder only for the purposes of

establishing identity and not for character-conformity purposes. Norwood v. State, 2014 Tex. App. LEXIS 9069, 2014 WL 4058820 (Tex. App. Austin Aug. 15 2014).

786. During defendant's trial for sexual assault of a child, the danger of unfair prejudice did not substantially outweigh the probative value of evidence of defendant's two prior convictions for attempted aggravated sexual assault of a child and indecency with a child; the State needed the evidence to rebut challenges to the victim's credibility. Thompson v. State, 2014 Tex. App. LEXIS 8916 (Tex. App. Corpus Christi Aug. 14 2014).

787. Although the evidence from the neighbor's apartment was not same transaction contextual evidence and the trial court abused its discretion in admitting it, the error was harmless given that the extent of the other evidence for defendant's guilt because the State found the marijuana hidden in defendant's truck, an officer observed defendant exit the apartment building appearing to hide something under his shirt, and defendant chose to lead police on a high-speech chase instead of submitting to the traffic stop. Gonzalez v. State, 510 S.W.3d 10, 2014 Tex. App. LEXIS 8934 (Tex. App. Corpus Christi Aug. 14 2014).

788. Trial court did not err in admitting evidence of an officer's encounter with defendant at an apartment two days before a search of the apartment because the evidence was relevant to defendant's connection with the apartment; the evidence was not of such an inflammatory nature so as to prevent the jury from considering it solely for the purpose of intent. Jackson v. State, 2014 Tex. App. LEXIS 9059, 2014 WL 3955171 (Tex. App. Dallas Aug. 14 2014).

789. Court properly admitted two telephone calls that defendant placed from jail because they constituted the only direct admission by defendant that he "shot at" someone, they directly concerned the offenses, and the State played less than ten minutes of the first call and only thirty-three seconds of the second call. Reed v. State, 2014 Tex. App. LEXIS 8643 (Tex. App. Houston 1st Dist. Aug. 7 2014).

790. In case where defendant was convicted of felony murder and intentionally or knowingly causing serious bodily injury to a child, her daughter, counsel's failure to object to the testimony of defendant's sister that she once observed defendant strike the child with a belt did not constitute ineffective assistance because the trial court could have concluded that the probative value of the sister's testimony was not substantially outweighed by the risk of unfair prejudice to defendant as the testimony was probative not only as to the type of discipline defendant imposed on the child but also as to defendant's credibility because she told an officer that she only physically disciplined the child with her hand. Sandoval v. State, 2014 Tex. App. LEXIS 8608 (Tex. App. Houston 14th Dist. Aug. 7 2014).

791. During defendant's murder trial, the court did not err in admitting evidence that the two-year-old victim had sustained injuries to her thigh and genitals because the evidence was admissible under Tex. R. Evid. 404(b)to show that her injuries were not sustained accidentally; the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Sparks v. State, 2014 Tex. App. LEXIS 8392 (Tex. App. Fort Worth July 31 2014).

792. Court did not err in refusing to exclude the extraneous offense testimony to rebut a defensive theory of fabrication, because the extraneous evidence tended to make the defensive claim of fabrication less probable, and the extraneous offense evidence was probative to rebut defendant's defensive theories that defendant was not the type of person who would sexually abuse a child and that the abuse allegations were fabricated. Shockley v. State, 2014 Tex. App. LEXIS 8345, 2014 WL 3756301 (Tex. App. Dallas July 30 2014).

793. Trial court did not abuse its discretion by admitting evidence of the victim's half-sister about sexual abuse that defendant had inflicted upon her under this rule because it tended to rebut defendant's theory that the victim had fabricated her claims and there were similarities between defendant's conduct as described by both. The prejudicial

effect of the testimony did not substantially outweigh its probative value because it was not so graphic as to be worse than the specifics to which the victim had already testified. Hosey v. State, 2014 Tex. App. LEXIS 7876, 2014 WL 3621796 (Tex. App. Texarkana July 23 2014).

794. Although defendant argued that the testimony was substantially more prejudicial than probative because he asserted that the State was attempting to "use the cover of impeachment to place before the jury otherwise inadmissible evidence," there was no evidence that was otherwise inadmissible. Stairhime v. State, 439 S.W.3d 499, 2014 Tex. App. LEXIS 7905 (Tex. App. Houston 1st Dist. July 22 2014).

795. Murder victim's girlfriend was properly allowed to testify regarding an attempted drive-by shooting defendant committed against the victim, during which she was shot in the hand, and which occurred ten months before the murder, pursuant to Tex. Code Crim. Proc. Ann. art. 38.36(a) and Tex. R. Evid. 403 and Tex. R. Evid. 404(b). Jones v. State, 2014 Tex. App. LEXIS 7739, 2014 WL 3556587 (Tex. App. Waco July 17 2014).

796. Evidence of methamphetamine found at the murder scene was properly admitted because it was relevant to establish a motive for defendant's actions and to rebut her claim of accidentally shooting the victim; there was no evidence presented that defendant was in possession of the drugs, and the evidence was admissible because the jury could infer that the prior relationship between the victim and defendant was one that involved drugs. Taylor v. State, 2014 Tex. App. LEXIS 7282 (Tex. App. Corpus Christi July 3 2014).

797. Where appellant was convicted for indecency with a child by exposure, it was not an abuse of discretion to admit under Tex. R. Evid. 403 the extraneous offense testimony of a nephew, who testified that appellant had sexually assaulted the nephew when the nephew was 14 years old, because the factors weighed in favor of admission since, inter alia, the trial court could have reasonably concluded that the State's need for the extraneous offense evidence was high. Laube v. State, 2014 Tex. App. LEXIS 7076, 2014 WL 2993823 (Tex. App. Dallas June 30 2014).

798. In a prosecution of defendant for aggravated sexual assault of a child less than 14 years old, the probative value of defendant's prior conviction for indecent exposure was greater than its prejudicial effect. Therefore, the trial court did not abuse its discretion by admitting the prior conviction evidence. Smith v. State, 439 S.W.3d 451, 2014 Tex. App. LEXIS 7108 (Tex. App. Houston 1st Dist. June 30 2014).

799. During defendant's trial for sexual assault of his daughter, the court did not err in admitting evidence of a condom and DNA analysis of it; the probative value of the evidence was not substantially outweighed by unfair prejudice. James v. State, 2014 Tex. App. LEXIS 6994 (Tex. App. Austin June 27 2014).

800. GPS evidence was properly admitted because, in establishing defendant's flight after the murder, it demonstrated his consciousness of guilt, and tended to rebut defendant's misidentification theory of defense; due to the nature of the technical details and technology involved, it was not the type of information that might otherwise have caused an inflammatory response. Longoria v. State, 2014 Tex. App. LEXIS 6800 (Tex. App. Beaumont June 25 2014).

801. In an intoxication-manslaughter case, the trial court did not err in the admission of the dash camera video from the police vehicle because defendant admitted to drinking alcohol on the video at issue, but claimed that he had only had two beers -- a fact refuted by significant other evidence, including a witness's testimony about how much alcohol defendant had consumed before the accident; defendant did not overcome the presumption that the relevant video was more probative than prejudicial; and defendant did not argue that the impact of the evidence would not be rendered harmless by the substantial other evidence at trial of his intoxication. Calbas v. State, 2014

Tex. App. LEXIS 6666, 2014 WL 2809809 (Tex. App. Houston 1st Dist. June 19 2014).

802. In an intoxication-manslaughter case, defendant did not demonstrate that the trial court abused its discretion in admitting photographs of the decedent and the collision scene because the photographs were not cumulative, and each photograph was relevant and not unduly prejudicial. Calbas v. State, 2014 Tex. App. LEXIS 6666, 2014 WL 2809809 (Tex. App. Houston 1st Dist. June 19 2014).

803. Prior sexual assault incident with the victim's teachers was in no way similar to the sexual assault allegation against defendant, and even assuming this evidence was relevant, because the allegation of the prior sexual assault incident was not the same as the allegation, its probative value to show that the victim was confusing the incidents was slight; the trial court could have reasonably concluded that the threat of confusion of the issues and unfair prejudice outweighed any probative value. Coleman v. State, 2014 Tex. App. LEXIS 6691, 2014 WL 2809064 (Tex. App. Fort Worth June 19 2014).

804. In defendant's trial for theft for transferring $6,000 from her employer to her credit card accounts, the trial court did not err in excluding testimony regarding the bitterness of her divorce and the possibility that her ex-husband was attempting to make her look bad or was trying to reduce the amounts owed on the cards, because there was no evidence of any nexus between the ex-husband and the crime. Emmert v. State, 2014 Tex. App. LEXIS 6624, 2014 WL 2807987 (Tex. App. Dallas June 18 2014).

805. Appellant's conviction for felony theft was affirmed because the trial court did not abuse its discretion in excluding evidence where nothing about the other individual's arrest for the January 30 break-in made any facts of consequence to the determination of appellant's guilt or innocence in the January 25 theft any more or less probable. Graves v. State, 2014 Tex. App. LEXIS 6522 (Tex. App. Houston 1st Dist. June 17 2014).

806. Admission of testimony was not an abuse of discretion and did not cause the rendition of an improper judgment, because the court could reasonably conclude that the facts and details related to the patient's underlying offenses would be helpful to the jury to explain how the psychologist and medical doctor formed their opinions that the patient suffered from a behavioral abnormality. In re Commitment of Cardenas, 2014 Tex. App. LEXIS 6441, 2014 WL 2616972 (Tex. App. Beaumont June 12 2014).

807. Even though the trial court erred by excluding a witness's testimony that the victim had performed oral sex on defendant two days before the sexual assault, as consent was at issue even before the witness testified and the evidence had probative value that outweighed the danger of undue prejudice, the error was harmless because defendant was able to produce considerable evidence that the victim had shown sexual interest in defendant before the assault. The witness testified that defendant and the victim had had sexually charged contact and had gone together into the witness's bedroom. Gotcher v. State, 435 S.W.3d 367, 2014 Tex. App. LEXIS 6181, 2014 WL 2576061 (Tex. App. Texarkana June 10 2014).

808. Court did not abuse its discretion in allowing the jury to hear evidence of defendant's prior conviction for possession of cocaine because the evidence made defendant's intent and his knowledge of the cocaine in his pocket more probable. Further, in light of the evidence presented, the trial court could have reasonably found that the State needed the evidence of the prior conviction to show that defendant knowingly possessed the cocaine. Rios v. State, 2014 Tex. App. LEXIS 5867 (Tex. App. El Paso May 30 2014).

809. Witness's testimony that defendant coerced her through his position as police officer, took her to the same place as the victim in this case to assault her, and did so on the same night strongly rebutted defendant's defensive argument that the victim was fabricating her story in order to gain a U-Visa and a civil-lawsuit victory. Because the extraneous-offense evidence was so similar to the charged offense, it was probative as modus operandi evidence

to rebut the issue of intent. Joseph v. State, 2014 Tex. App. LEXIS 5712 (Tex. App. Houston 14th Dist. May 29 2014).

810. There was no basis for the exclusion of expert testimony of a licensed professional counselor, as the expert did not express an opinion on whether she believed a victim was telling the truth or whether the victim could be believed, but told the jury what she observed and explained that these symptoms were consistent with trauma based on her experiences with patients suffering from post-traumatic stress disorder. Kinsey v. State, 2014 Tex. App. LEXIS 5551 (Tex. App. Eastland May 22 2014).

811. Assault defendant failed to request notice of other crimes and acts evidence under Tex. R. Evid. 404(b) and therefore could not complain of the adequacy of the State's notice; moreover, the notice gave her reasonable notice of a neighbor's expected testimony that defendant sought to bribe her to say that the victim struck defendant first. Additionally, this bribery evidence was relevant as consciousness of guilt and was not unfairly prejudicial. Cavazos v. State, 2014 Tex. App. LEXIS 5045, 2014 WL 1881691 (Tex. App. Amarillo May 8 2014).

812. Any error in the trial court's exclusion of evidence regarding the victim's prior acts because, even though the evidence was relevant to show the victim's tendency to provoke fights, the evidence already admitted showed that the victim was being combative and aggressive with defendant on the day in question. Waggoner v. State, 2014 Tex. App. LEXIS 4983 (Tex. App. Fort Worth May 8 2014).

813. Trial court did not err in admitting testimony that the court had temporarily modified a divorce decree to give a father custody because, inter alia, admitting the testimony was not tantamount to admitting the temporary orders, and the jury's finding that the father should have permanent custody did not turn on any evidence indicating the trial court had temporarily modified custody prior to trial. In the Interest of A.D., 474 S.W.3d 715, 2014 Tex. App. LEXIS 4860, 2014 WL 1800082 (Tex. App. Houston 14th Dist. May 6 2014).

814. Court properly allowed defendant's former stepdaughter to testify about instances of molestation because, although the extraneous offense was fairly remote in time, the offenses were similar enough that evidence of the prior one did not distract the jury from the instant offense, and the State expended no more than fifteen minutes to develop the testimony. Donato v. State, 2014 Tex. App. LEXIS 4698 (Tex. App. Fort Worth Apr. 30 2014).

815. On appeal from his conviction for possession of methamphetamine, the trial court did not abuse its discretion in admitting evidence that the officer stopped the vehicle because of its association with a prior burglary since the testimony showed that the officer had a valid reason to stop the vehicle and was not an attempt to establish an extraneous offense to prove defendant's character in order to show action in conformity with that character; the testimony was critical and its probative value was clearly not substantially outweighed by the danger of unfair prejudice. Mancilla v. State, 2014 Tex. App. LEXIS 4649 (Tex. App. Dallas Apr. 29 2014).

816. Trial court heard both the State's and defendant's arguments in favor and against other act admission, recognized it was a close call, and favored admission, and the ruling was within the zone of reasonable disagreement and not an abuse of discretion. Almaguer v. State, 2014 Tex. App. LEXIS 3842, 2014 WL 1415182 (Tex. App. Corpus Christi Apr. 10 2014).

817. Child victim's therapist's testimony did not amount to improper bolstering of a child victim's credibility because the therapist's testimony that he was treating the child and testimony about that treatment could lead the jury to assume that she was abused, as the therapist did not testify that he believed the child was being truthful; the fact that the child was being treated did not usurp the jury's role to determine if the child's allegations were true. Paramo v. State, 2014 Tex. App. LEXIS 3717, 2014 WL 1413794 (Tex. App. Dallas Apr. 7 2014).

818. Trial court did not abuse its discretion when it admitted the evidence of defendant's gang member because the evidence was relevant, the State's need for the evidence was great to establish defendant's motive for the shooting and to rebut his theory of self-defense, it directly related to the circumstances surrounding the shootings, and the time used to develop the evidence was not so great that it distracted the jury from considering the charged offense. Johnson v. State, 2014 Tex. App. LEXIS 3618 (Tex. App. Houston 14th Dist. Apr. 3 2014).

819. Trial court did not err in admitting evidence of a robbery allegedly committed by defendant two days prior to the charged offense, because the similarities in the proximity of time and setting, the mode of commission of the two offenses, and the victims' similar descriptions of the robber and his hoodie constituted sufficiently distinguishing characteristics to allow the evidence as evidence of identity. Collins v. State, 2014 Tex. App. LEXIS 3549, 2014 WL 1318882 (Tex. App. Houston 1st Dist. Mar. 31 2014).

820. Trial court did not abuse its discretion by admitting defendant's shirts with gun shot residue particles on them because the evidence was relevant, as the shirts were collected from defendant's vehicle two days after the murder. The evidence was not prejudicial because it showed defendant's connection to a discharged weapon, directly or indirectly, at some point in time. Burks v. State, 2014 Tex. App. LEXIS 3243, 2014 WL 1285731 (Tex. App. Austin Mar. 26 2014).

821. Statement that defendant made in jail to the effect that he was in jail for not following the rules could reasonably have led to an inference that he knew and chose not to follow the "rule" that he was not allowed to be in possession of a firearm because he was a felon; the statement was relevant to whether or not he was the individual who was in possession of the firearm and would not have improperly influenced the jury in any way. Greer v. State, 436 S.W.3d 1, 2014 Tex. App. LEXIS 3192, 2014 WL 1621787 (Tex. App. Waco Mar. 20 2014).

822. At the punishment phase of defendant's trial for aggravated robbery with a deadly weapon, the trial court did not abuse its discretion by admitting evidence of an uncharged murder through the testimony of his accomplice who said that defendant hold him he had "gotten rid of somebody." The evidence was highly probative of defendant's character and showed why his accomplice was afraid of him; any danger of unfair prejudice was mitigated because the evidence was elicited to show the effect defendant's statement had on his accomplice. Saenz v. State, 2014 Tex. App. LEXIS 2989, 2014 WL 1089744 (Tex. App. San Antonio Mar. 19 2014).

823. In a forgery case, the trial court did not abuse its discretion in admitting a photograph showing the pickup truck defendant was driving when he returned to the store. The photograph was relevant because it was given to the local authorities to aid their investigation; defendant advanced no theory as to how the photograph unduly prejudiced him or led the jury to decide the case on an improper basis. Resendez v. State, 2014 Tex. App. LEXIS 2587, 2014 WL 972297 (Tex. App. Eastland Mar. 6 2014).

824. Admission of the extraneous evidence was not improper under this rule because it was strikingly similar to the charged offense, it tended to prove he did not have the physical inability he claimed, absent the evidence of defendant's past conduct the State had no way to rebut defendant's claim of physical inability, any prejudice was limited by the trial court's limiting instructions, and the presentation of the evidence did not consume an inordinate amount of time. Arteaga v. State, 2014 Tex. App. LEXIS 2434, 2014 WL 866461 (Tex. App. San Antonio Mar. 5 2014).

825. Admission during the punishment phase of a recorded jailhouse phone conversation between defendant and his brother was proper where it was probative with regard to a punishment determination, as it allowed the jury to gauge defendant's acceptance of responsibility for the crime by showing he was willing to allow his own brother to take responsibility for his crime, even if it meant his brother would be arrested. Given the force of the other evidence of bad acts presented at the punishment phase, the admission of the phone recording was not likely to create such

unfair prejudice in the minds of the jurors that they sentenced defendant in a way disproportionate to his crime and past criminal history. Scales v. State, 2014 Tex. App. LEXIS 1744 (Tex. App. San Antonio Feb. 19 2014).

826. At defendant's murder trial, the court did not err by admitting an autopsy photograph depicting the bullet lodged in the tissue at the back of the victim's neck; the photograph was relevant to the cause of death--a gunshot wound to the head, and manner of death--homicide. The autopsy photograph was also useful in assisting the medical examiner's testimony; the probative value was not outweighed by the prejudicial effect, because the photograph was not gruesome or enhanced in any way. Barr v. State, 2014 Tex. App. LEXIS 1714, 2014 WL 641351 (Tex. App. Austin Feb. 14 2014).

827. In the sexually violent predator trial, the trial court did not err in admitting the offender's prior statement because the statement, which detailed his sexual history, had probative value regarding his behavioral abnormality, which was not outweighed by unfair prejudice. In re Commitment of Meyer, 2014 Tex. App. LEXIS 1650, 2014 WL 580723 (Tex. App. Beaumont Feb. 13 2014).

828. Exclusion of testimony by defendant's wife, who was also the complainant's older sister, regarding alleged prior sexual abuse by the complainant's father was proper because it would have confused or distracted the jury from the main issue-whether defendant perpetrated the crimes against the complainant-and would have been more prejudicial than probative. The complainant, who was twenty-three at the time of trial, positively identified defendant, and no one else, as the perpetrator of the charged offenses, and when questioned outside the presence of the jury, the complainant denied any sexual abuse at the hands of her father. Johnson v. State, 2014 Tex. App. LEXIS 1369, 2014 WL 505332 (Tex. App. Waco Feb. 6 2014).

829. Issues are inadequately briefed and presented nothing for appellate review because the brief merely contended that the trial court did not conduct a balancing test as is required by this rule before allowing admission of the evidence. Jackson v. State, 424 S.W.3d 140, 2014 Tex. App. LEXIS 1170, 2014 WL 409946 (Tex. App. Texarkana Feb. 4 2014).

830. There was no error in admitting the letter because defendant voluntarily wrote the letter to his wife in which it could have been interpreted that he expressed remorse for his actions, thus, as his comments could have been considered an admission of guilt, the letter was probative of whether he committed the charged offense. Also, it was not unfairly prejudicial because the evidence related directly to the charged offense and the State needed little time to develop the evidence because the victim identified the letter and the prosecutor read it into evidence. Beans v. State, 2014 Tex. App. LEXIS 1159, 2014 WL 357340 (Tex. App. Dallas Jan. 31 2014).

831. Defendant was convicted for organized criminal activity based on gambling promotion, because he organized a raffle drawing to benefit his political campaign, his employees distributed and sold raffle tickets, and defendant deposited the ticket sales proceeds into his bank account. The trial court did not err by excluding evidence attacking the credibility of the State's witnesses who were defendant's former employees, because the jury was aware that all three witnesses had possible motives to make false accusations; the evidence tended to be needlessly cumulative, risked confusion of the issues, or misleading the jury. Evans v. State, 2014 Tex. App. LEXIS 1430, 2014 WL 425613 (Tex. App. Dallas Jan. 31 2014).

832. At defendant's trial for aggravated sexual assault of a child, the trial court did not err in admitting testimony that he committed extraneous offenses in that he supplied drugs to the victim in the course of his sexual assaults; the evidence helped to fill in the gaps and explain the circumstances surrounding the offense. The appellate court overruled his claim that the probative value of the evidence was outweighed by its prejudicial effect and that it confused the issues and misled the jury. Washington v. State, 2014 Tex. App. LEXIS 933 (Tex. App. Austin Jan. 30

2014).

833. Testimony of two other purported victims of sexual assault by a defendant while the victims were incapable of consent was properly admitted since the issue of consent could be viewed as the most pivotal one in the trial, and evidence tending to prove lack of consent was quite probative and not unduly prejudicial. Dilg v. State, 2014 Tex. App. LEXIS 963, 2014 WL 458019 (Tex. App. Amarillo Jan. 29 2014).

834. Evidence that defendant on trial for reckless injury to his five-week-old daughter previously put a blanket tip into the victim's mouth to quiet her cries was properly admitted as a prior bad act because it was relevant to the issue of his intent to harm the victim and to demonstrate the character of his relationship with her; the evidence's probative value outweighed its unfair prejudice because there was little danger it would impress on the jury in some irrational way, it took little time to develop, and the State needed it to prove defendant's mental state. Sanchez v. State, 2014 Tex. App. LEXIS 896, 2014 WL 298322 (Tex. App. Houston 1st Dist. Jan. 28 2014).

835. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

836. Evidence that defendant on trial for reckless injury to his five-week-old daughter previously put a blanket tip into the victim's mouth to quiet her cries was properly admitted as a prior bad act because it was relevant to the issue of his intent to harm the victim and to demonstrate the character of his relationship with her; the evidence's probative value outweighed its unfair prejudice because there was little danger it would impress on the jury in some irrational way, it took little time to develop, and the State needed it to prove defendant's mental state. Sanchez v. State, 2014 Tex. App. LEXIS 896, 2014 WL 298322 (Tex. App. Houston 1st Dist. Jan. 28 2014).

837. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

838. Trial court did not err in refusing to allow an inmate to testify about his plans upon his release from prison because the inmate had already testified before the jury that he was going to move back home and look for work after he was released; therefore, the trial court could have reasonably concluded that the slight probative value, if any, of the excluded evidence was substantially outweighed by the needless presentation of cumulative evidence. In re King, 2014 Tex. App. LEXIS 724, 2014 WL 346109 (Tex. App. Beaumont Jan. 23 2014).

839. Trial court did not abuse its discretion in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence of flight because an eyewitness who was at the house during the shooting, testified that defendant shot the complainant, in comparison to the inherently graphic testimony given by the medical examiner, the evidence of flight had little tendency to influence the jury in an irrational way, and the State needed to introduce the evidence of flight. Goldsmith v. State, 2014 Tex. App. LEXIS 754, 2014 WL 261007 (Tex. App. Houston 14th Dist. Jan. 23 2014).

840. As the 911 call evidence explained the circumstances surrounding the crime, the evidence was not unduly prejudicial, and even if the admission of the evidence were an abuse of discretion, defendant's substantial rights were not affected. Seibel v. State, 2014 Tex. App. LEXIS 781, 2014 WL 261053 (Tex. App. Fort Worth Jan. 23 2014).

841. Defendant was convicted for organized criminal activity and gambling promotion, because he organized a raffle drawing to benefit his political campaign, his employees distributed and sold raffle tickets, and defendant deposited the ticket sales proceeds into his bank account. The trial court did not err by excluding evidence attacking the credibility of the State's witnesses who were defendant's former employees, because the jury was aware that all three witnesses had possible motives to make false accusations; additional evidence tended to be needlessly cumulative, risked confusion of the issues, or misleading the jury. Evans v. State, 2014 Tex. App. LEXIS 823, 2014 WL 261063 (Tex. App. Dallas Jan. 23 2014).

842. Trial court did not err in refusing to allow an inmate to testify about his plans upon his release from prison because the inmate had already testified before the jury that he was going to move back home and look for work after he was released; therefore, the trial court could have reasonably concluded that the slight probative value, if any, of the excluded evidence was substantially outweighed by the needless presentation of cumulative evidence. In re King, 2014 Tex. App. LEXIS 724, 2014 WL 346109 (Tex. App. Beaumont Jan. 23 2014).

843. Trial court did not abuse its discretion in concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence of flight because an eyewitness who was at the house during the shooting, testified that defendant shot the complainant, in comparison to the inherently graphic testimony given by the medical examiner, the evidence of flight had little tendency to influence the jury in an irrational way, and the State needed to introduce the evidence of flight. Goldsmith v. State, 2014 Tex. App. LEXIS 754, 2014 WL 261007 (Tex. App. Houston 14th Dist. Jan. 23 2014).

844. As the 911 call evidence explained the circumstances surrounding the crime, the evidence was not unduly prejudicial, and even if the admission of the evidence were an abuse of discretion, defendant's substantial rights were not affected. Seibel v. State, 2014 Tex. App. LEXIS 781, 2014 WL 261053 (Tex. App. Fort Worth Jan. 23 2014).

845. Defendant was convicted for organized criminal activity and gambling promotion, because he organized a raffle drawing to benefit his political campaign, his employees distributed and sold raffle tickets, and defendant deposited the ticket sales proceeds into his bank account. The trial court did not err by excluding evidence attacking the credibility of the State's witnesses who were defendant's former employees, because the jury was aware that all three witnesses had possible motives to make false accusations; additional evidence tended to be needlessly cumulative, risked confusion of the issues, or misleading the jury. Evans v. State, 2014 Tex. App. LEXIS 823, 2014 WL 261063 (Tex. App. Dallas Jan. 23 2014).

846. At defendant's trial for robbery, the trial court did not err in admitting testimony regarding his efforts to resist arrest because evidence relevant to his flight from the scene was a circumstance indicative of guilt. The testimony encompassed only a few pages of the multiple-volume reporter's record and was not emphasized by the State; the probative value of the testimony was not outweighed by any danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence. Johnson v. State, 2014 Tex. App. LEXIS 471, 2014 WL 222929 (Tex. App. Corpus Christi Jan. 16 2014).

847. Trial court did not abuse its discretion when it admitted evidence of the phone calls that defendant made to the friend from jail because the record supported the determination that the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice and, even if error were assumed, any error was harmless because the evidence of defendant's guilt was abundant. Dyer v. State, 2014 Tex. App. LEXIS 524, 2014 WL 268571 (Tex. App. Eastland Jan. 16 2014).

848. Probative value of the expert's testimony was not substantially outweighed by the danger of unfair prejudice or by needless presentation of cumulative evidence, as the testimony was relevant, and the witness was not

unqualified. Eldred v. State, 431 S.W.3d 177, 2014 Tex. App. LEXIS 2460, 2014 WL 856636 (Tex. App. Texarkana Mar. 5 2014).

849. Defendant suffered no harm from the admission of evidence of a prior offense of aggravated assault/family violence against the same victim because, by his plea, defendant admitted he had a dating relationship with the victim, and the State only referenced the exhibit in its final argument to show a dating relationship between defendant and the victim. Pickett v. State, 2013 Tex. App. LEXIS 15410, 2013 WL 6923977 (Tex. App. Waco Dec. 27 2013).

850. At defendant's trial for aggravated sexual assault of a child, the trial court did not err by introducing evidence of other injuries because the victim's bone fractures suggested that defendant intended to hurt the victim by placing his finger in her female sexual organ when he became frustrated with her crying. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, as it was compelling in showing the abusive nature of the relationship defendant had with the victim. Rucker v. State, 2013 Tex. App. LEXIS 15212, 2013 WL 6730172 (Tex. App. Corpus Christi Dec. 19 2013).

851. Court did not abuse its discretion by allowing the experts to testify about the non-testifying experts' opinions because the matters were reviewed by the experts to form opinions, the court gave a limiting instruction, and the court could reasonably conclude that the probative value of the testimony outweighed its capacity to prejudice the jury. In re Commitment of Garcia, 2013 Tex. App. LEXIS 14986 (Tex. App. Beaumont Dec. 12 2013).

852. Extraneous evidence was not unduly prejudicial because by establishing that defendant did similar things to a different child victim under similar circumstances, the evidence corroborated the instant child victim's testimony and made it more credible than it otherwise would be standing alone, and there was an absence of any other eyewitnesses who could give direct testimony about defendant's conduct. Cruz v. State, 2013 Tex. App. LEXIS 14659, 2013 WL 7964238 (Tex. App. Corpus Christi Dec. 5 2013).

853. Even though the trial court erred by admitting defendant's posts to a social media website regarding his attitude toward children as they were unduly prejudicial under Tex. R. Evid. 403, the error was harmless given the strength of the evidence against defendant and the fact that the presentation of the evidence consumed less than half a page of the record. Copeland v. State, 2013 Tex. App. LEXIS 14675, 2013 WL 6388585 (Tex. App. Texarkana Dec. 5 2013).

854. Trial court did not err by admitting evidence of defendant's prior conviction of unlawfully carrying a weapon because it was relevant to rebutting his defensive theory of insanity, the trial court instructed the jury not to consider that as evidence he was guilty of the charged offense, and the State only asked two questions about the prior crime, one of which the jury was instructed to disregard. Thomas v. State, 2013 Tex. App. LEXIS 14744, 2013 WL 6405479 (Tex. App. Houston 1st Dist. Dec. 5 2013).

855. Trial court did not err in admitting testimony showing that defendant was the driver of a vehicle involved in a drive-by shooting four days before the alleged victim was shot because the evidence was probative to show opportunity and identity and to rebut defendant's defensive theory that he was not the perpetrator, and there was nothing confusing or misleading about the evidence. Williams v. State, 2013 Tex. App. LEXIS 14602, 2013 WL 6253764 (Tex. App. San Antonio Dec. 4 2013).

856. Trial court did not err in admitting an autopsy photograph of a murder victim during defendant's trial; the photograph, coupled with the medical examiner's testimony, was probative because it distinguished the laceration and stab wound from the sutured incision caused by emergency personnel's attempts to save the victim's life. Sanchez v. State, 418 S.W.3d 302, 2013 Tex. App. LEXIS 14555, 2013 WL 6198862 (Tex. App. Fort Worth Nov. 27

2013).

857. State had to prove that defendants caused the child's injuries in ths injury to a child case, and in assessing photographs under the rule, they were probative to negate the theory that the child had a medical condition that prevented him from gaining weight, as a doctor testified that the only treatment progressing the child's recovery was regular feeding. Oliphant-Alston v. State, 2013 Tex. App. LEXIS 14562, 2013 WL 6198844 (Tex. App. Fort Worth Nov. 27 2013).

858. Probative value of the photographs of the child in this injury to a child case was not substantially outweighed by unfair prejudice or the needless presentation of cumulative evidence; the photographs showed no more than the injuries defendants were charged with causing, and they were not needlessly cumulative, as they showed various injuries and different parts of the child's body, detailing his improvement over a period of time, and thus there was no abuse of discretion in admitting the photographs. Oliphant-Alston v. State, 2013 Tex. App. LEXIS 14562, 2013 WL 6198844 (Tex. App. Fort Worth Nov. 27 2013).

859. Photographs were projected for viewing by the jury, but the record did not indicate details on the projection of the images, and without more, the court could not say that the projections made the photographs unfairly prejudicial. Oliphant-Alston v. State, 2013 Tex. App. LEXIS 14562, 2013 WL 6198844 (Tex. App. Fort Worth Nov. 27 2013).

860. Witnesses used photographs of the child to show the conspicuous nature of the child's injuries in this criminal case, as the child had an undeveloped body and wrinkled skin showing extreme dehydration, and thus the photographs were strong evidence of the nature of the child's injuries and were probative of defendants' awareness of the injuries, for purposes of an analysis under the rule. Oliphant-Alston v. State, 2013 Tex. App. LEXIS 14562, 2013 WL 6198844 (Tex. App. Fort Worth Nov. 27 2013).

861. On appeal of defendant's murder conviction, his complaint that the trial court abused its discretion by overruling his Rule 403 objections to various exhibits was inadequately briefed. He failed to set forth the required balancing test or identify any portion of the test which the trial court failed to perform; he did not apply the law to any facts or present any legal arguments explaining how the trial court abused its discretion or how the evidence was prejudicial to his case. Green v. State, 2013 Tex. App. LEXIS 14355 (Tex. App. El Paso Nov. 22 2013).

862. Trial court did not err in admitting evidence, Tex. R. Evid. 403, 404(b), given the evidence already accumulated against defendant, and any error was harmless. Hicks v. State, 419 S.W.3d 555, 2013 Tex. App. LEXIS 14091, 2013 WL 6076468 (Tex. App. Amarillo Nov. 18 2013).

863. At defendant's trial for possession of a controlled substance, a witness's comment during direct examination that defendant was out on parole did not warrant a mistrial because the statement was not highly prejudicial. The State was developing a narrative, it did not anticipate a reference to an extraneous offense, the reference was not a concrete statement of a prior offense, and the instruction to disregard prevented any elaboration on the offense. Joseph v. State, 2013 Tex. App. LEXIS 13998, 2013 WL 6045902 (Tex. App. Houston 14th Dist. Nov. 12 2013).

864. In a murder trial, the court did not err when it admitted victim impact evidence consisting of testimony and photographs that provided information about defendant's life and character, as the evidence had some tendency to remind the jury that he was a unique human being. Although the evidence emphasized that the victim was a good man and had a lot of good qualities, the evidence did not encourage the jury to engage in a worth comparison; the probative value of the evidence was not substantially outweighed by unfair prejudice. Evans v. State, 2013 Tex. App. LEXIS 13748, 2013 WL 7985593 (Tex. App. Eastland Nov. 7 2013).

865. Trial court did not abuse its discretion by excluding evidence pertaining to the general contractor's tax returns because the property owner did not argue that evidence pertaining to the asserted ability to mitigate damages was unavailable from other sources. Azad v. Mrco, Inc., 2013 Tex. App. LEXIS 13776, 2013 WL 6700285 (Tex. App. Houston 14th Dist. Nov. 7 2013).

866. Testimony regarding the prior theft was probative to rebut defendant's testimony that the witness lied in testifying that she stole the wine and the State's need for the evidence to assist in establishing that the witness was more credible. Johnson v. State, 2013 Tex. App. LEXIS 13693, 2013 WL 5950124 (Tex. App. San Antonio Nov. 6 2013).

867. During defendant's trial for indecency with a child, the trial court did not err in admitting evidence of an extraneous offense-indecency with a child by contact-against the victim's sister where the evidence showed the victim's allegations of indecency by grinding and other acts were less likely to be fabricated, as defendant claimed, because defendant had similar contact with the victim's sister in the same house under similar circumstances; defendant's conduct with the sister showed a similar motive, plan, opportunity, and intent to assault the victim. Delacruz v. State, 2013 Tex. App. LEXIS 13492, 2013 WL 5890796 (Tex. App. Eastland Oct. 31 2013).

868. In a proceeding to civilly commit a patient as a sexually violent predator, the trial court did not abuse its discretion in admitting the factual details of defendant's crimes over his objection; the experts testified how these facts affected their determination of whether defendant suffered from a behavioral abnormality. Given the purpose for admitting this evidence, its cumulative nature, and the trial court's limiting instructions, the trial court's conclusion that the evidence was not unfairly prejudicial was reasonable. In re Commitment Jackson, 2013 Tex. App. LEXIS 13507, 2013 WL 5874446 (Tex. App. Beaumont Oct. 31 2013).

869. Details of a sex offender's 1975 murder conviction were property admitted during his sexually violent predator commitment proceeding because the State's expert explained the facts he considered in forming his opinions and how those facts affected his evaluation of the offender; the trial judge performed a balancing test and could have reasonably concluded the evidence assisted the jury in weighing the testimony and was not unfairly prejudicial, and it also gave the jury a limiting instruction explaining that the information reviewed by the experts was admitted only for the purpose of showing the basis of the expert's opinion. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

870. Court did not abuse its discretion by not allowing the patient's counsel to pose certain questions, because counsel provided an extensive cross-examination of the doctor concerning his opinion that the patient had a behavioral abnormality that made him likely to commit a predatory act of sexual violence, and courts were allowed discretion to control testimony to avoid confusing the jury. In re Romo, 2013 Tex. App. LEXIS 13495 (Tex. App. Beaumont Oct. 31 2013).

871. On appeal of defendant's conviction for two counts of aggravated sexual assault of a child and one count of continuous sexual abuse of a child, his complaint that the trial court erred by admitting a judgment to show that he had a prior conviction for indecency with a child was not preserved for review. Defendant's trial objection that the prejudicial effect of the judgment outweighed its probative value under Tex. R. Evid. 403 was not sufficient to preserve his Tex. R. Evid. 404 complaint for review. Loveday v. State, 2013 Tex. App. LEXIS 13364, 2013 WL 5874280 (Tex. App. Beaumont Oct. 30 2013).

872. Trial court did not abuse its discretion by admitting evidence because in light of the defensive theory to attack State's evidence, evidence that defendant chewed and destroyed crack cocaine during a prior traffic stop increased the likelihood that defendant did the same during the instant traffic stop. The court could not hold that the probative value of showing a lack of accident or mistake was substantially outweighed by the danger of unfair prejudice or the

misleading nature of the evidence. Williams v. State, 2013 Tex. App. LEXIS 12925, 2013 WL 5676226 (Tex. App. Eastland Oct. 17 2013).

873. Extraneous offense evidence that the complainant's life had been threatened because she was a witness to the aggravated robbery was not substantially more prejudicial than probative because: (1) a limiting instruction was given; (2) an officer testified the threat was not directly connected to defendant; (3) in closing, the prosecutor stated the jury should not consider the evidence for an impermissible purpose; (4) little trial time was spent developing the evidence; and (5) the State needed the evidence to counterbalance the continuous attack on the complainant, the State's sole witness to the crime. Wilhite v. State, 2013 Tex. App. LEXIS 12608, 2013 WL 5604741 (Tex. App. Houston 1st Dist. Oct. 10 2013).

874. Defendant's conviction for recklessly causing serious bodily injury to a child was appropriate because the trial court did not abuse its discretion in admitting into evidence a video recording of the infant while he was in the hospital. The video had probative value because it demonstrated the seriousness of the infant's brain injury and the trial court could have reasonably concluded that the video aided the jury's understanding of the mother's testimony regarding the long-term effects of the injury as it showed the infant's diminished ability to see or speak; further, the recording depicted nothing more emotional or graphic than the photographs. Holte v. State, 2013 Tex. App. LEXIS 12207, 2013 WL 5498134 (Tex. App. Houston 1st Dist. Oct. 1 2013).

875. Where defendant was convicted of capital murder for shooting his wife and her lover, the trial court's admission of a video recording of the bloody crime scene did not result in unfair prejudice or duplicate the medical examiner's testimony and crime scene photograph. Mendoza v. State, 2013 Tex. App. LEXIS 11728 (Tex. App. San Antonio Sept. 18 2013).

876. At defendant's trial for sexual assault, sexual assault of a child, and attempted sexual assault, the trial court abused its discretion when it admitted thousands of extraneous-offense pornographic images over his objection because the evidence was unfairly prejudicial. As the State had multiple victims testifying about specific incidents of inappropriate sexual behavior and the similarities in their stories were striking, the State's need for the extraneous-offense evidence was not great. Pawlak v. State, 420 S.W.3d 807, 2013 Tex. Crim. App. LEXIS 1322 (Tex. Crim. App. Sept. 18 2013).

877. Court did not abuse its discretion in admitting evidence of defendant's apology to the alleged victim because the apology was indicative of a consciousness of guilt and, thus, was highly probative and not outweighed by any danger of unfair prejudice. Smith v. State, 2013 Tex. App. LEXIS 11678 (Tex. App. Austin Sept. 17 2013).

878. Extraneous burglary was nearly identical to the offenses in question, as the burglary took place at almost the same time of day with the same number of perpetrators of the same ethnic background and the stolen items were similar, and the evidence tipped in favor of admitting the extrinsic evidence going to the identity issue; a cautionary instruction was given, and the probative value of the evidence outweighed its prejudicial effect. Houston v. State, 2013 Tex. App. LEXIS 11753 (Tex. App. Amarillo Sept. 17 2013).

879. Admission of defendant's gang affiliation was not inadmissible under this rule because the State's purpose was to show that defendant's statement to the witness was in fact a threat and without the evidence the jury would have been less able to understand defendant's statement as a credible threat. Simmang v. State, 2013 Tex. App. LEXIS 11529 (Tex. App. Austin Sept. 11 2013).

880. Trial court's decision to overrule defendant's objection to exhibits was within the zone of reasonable disagreement because the evidence had probative value identifying defendant as a suspect; there was evidence that items stolen from the complainant during the sexual assault were collected from the owner of the stolen vehicle

defendant was found driving, and a detective testified that he went to the home of the owner of the stolen vehicle and collected the exhibits. Reyes v. State, 2013 Tex. App. LEXIS 11611 (Tex. App. Dallas Sept. 11 2013).

881. Trial court did not abuse its discretion by concluding that the probative value of the extraneous-offense evidence was not outweighed by the danger of unfair prejudice because, on cross-examination of the State's witnesses, the defense placed identity in issue by eliciting testimony suggesting that someone other than defendant committed the charged offense. Lawson v. State, 2013 Tex. App. LEXIS 11334 (Tex. App. Beaumont Sept. 4 2013).

882. In a prosecution for evading arrest, the trial court did not err by admitting the State's photographs over defendant's objection under this rule because defendant challenged the officer's version of the events, there was no other evidence except the officers' testimony to establish that defendant refused to comply, and the pictures were not gruesome. King v. State, 2013 Tex. App. LEXIS 11185 (Tex. App. Corpus Christi Aug. 30 2013).

883. Given the minimal danger of the jury drawing any unfair conclusions from defendant's presence when his brother displayed the gun and the probative value of being able to link defendant to the murder weapon, the trial court did not err in overruling defendant's Tex. R. Evid. 403 objection; the trial court could have reasonably concluded that the probative value of the testimony about the gun was not substantially outweighed by the danger of unfair prejudice. Steward v. State, 2013 Tex. App. LEXIS 10761 (Tex. App. Houston 1st Dist. Aug. 27 2013).

884. Trial court did not abuse its discretion in admitting five mug shots of defendant because the fact that the police officers' testimony concerning the Class C arrests was not supported by certified court records did not render the mug shots irrelevant, and the mug shots' probative value was not substantially outweighed by the danger of unfair prejudice merely because the arrests at issue did not result in convictions. Riojas v. State, 2013 Tex. App. LEXIS 10874 (Tex. App. Dallas Aug. 27 2013).

885. Trial court did not abuse its discretion in determining that the extraneous offense evidence was not substantially more prejudicial than probative because the issue of defendant's identity was central to the State's case, the jury was provided with these express written and oral instructions limiting its consideration of the extraneous offense evidence, and the State's need for the extraneous offense evidence was considerable. Morin v. State, 2013 Tex. App. LEXIS 10549 (Tex. App. Houston 1st Dist. Aug. 22 2013).

886. Decision that the extraneous offense evidence was not substantially outweighed by the potential for unfair prejudice was not an abuse of discretion, given that the evidence was compelling on the issue of identity, and the evidence, while sexual in nature, was unlikely to affect the jury in an irrational way based on the sexual characteristics of the murder in question. Reed v. State, 2013 Tex. App. LEXIS 10489 (Tex. App. Dallas Aug. 20 2013).

887. Accomplice's testimony that he and defendant were involved in another aggravated robbery of a taxi cab driver four days before the murder was not inadmissible because it tended to make defendant's theory that he was not the responsible party much less probable, the trial court gave a limiting instruction, an insignificant amount of time was needed to develop the evidence, and it was needed to show defendant's intent to commit a robbery and his intent to kill. Stephens v. State, 2013 Tex. App. LEXIS 10188 (Tex. App. El Paso Aug. 14 2013).

888. At issue in the case was the father's mental anguish following the death of his daughter; the single picture of the daughter's body was relevant to that issue and was properly admitted. In re Estate of Macdonald, 2013 Tex. App. LEXIS 10135, 2013 WL 4081419 (Tex. App. Dallas Aug. 13 2013).

889. At the punishment phase of defendant's trial for robbery, the trial court admitted into evidence photographs of his wife after a domestic violence incident. Because defendant objected on the basis of relevance, his claim that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice was not preserved for review. Cordova v. State, 2013 Tex. App. LEXIS 9947 (Tex. App. Corpus Christi Aug. 8 2013).

890. Trial court did not abuse its discretion by admitting evidence of extraneous offenses committed against his younger stepdaughter because they were so intertwined with the sexual assaults against the older stepdaughter that the jury's understanding of the offenses would have been obscured without them. The evidence also rebutted the defensive theory of fabrication, was sufficiently similar to the charged offense, and only limited details were introduced. Campos v. State, 2013 Tex. App. LEXIS 9593 (Tex. App. Eastland Aug. 1 2013).

891. Probative value of the two autopsy photographs substantially outweighed the danger of unfair prejudice because defendant stated that he did not intentionally hurt the six-year-old child, but the medical examiner testified that neither of the two fatal injuries that the child sustained could have been caused accidentally or unintentionally; and the extent of the child's brain injury could not be determined from looking at the outside of his head. West v. State, 2013 Tex. App. LEXIS 9612 (Tex. App. Houston 1st Dist. Aug. 1 2013).

892. Trial court did not abuse its discretion in admitting extraneous offense evidence because the probative value of the evidence was high and had the tendency to show that appellant's attempted sexual assault in this case was part of a pattern of offensive conduct, and the trial court could have found that the testimony was not excessively graphic and did not have a tendency to confuse the issues or mislead the jury. Womble v. State, 2013 Tex. App. LEXIS 9407 (Tex. App. Austin July 31 2013).

893. Defendant failed to preserve for appellate review his contention that the probative value of a photograph of his tattoo was outweighed by the danger of unfair prejudice because at no time did he object to the prejudicial value of the photograph. Gossett v. State, 2013 Tex. App. LEXIS 9476 (Tex. App. El Paso July 31 2013).

894. Defendant failed to preserve for appellate review his contention that the probative value of a photograph of his tattoo was outweighed by the danger of unfair prejudice because at no time did he object to the prejudicial value of the photograph. Gossett v. State, 2013 Tex. App. LEXIS 9475 (Tex. App. El Paso July 31 2013).

895. Defendant failed to preserve for appellate review his contention that the probative value of a photograph of his tattoo was outweighed by the danger of unfair prejudice because at no time did he object to the prejudicial value of the photograph. Gossett v. State, 2013 Tex. App. LEXIS 9477 (Tex. App. El Paso July 31 2013).

896. Defendant failed to preserve for appellate review his contention that the probative value of a photograph of his tattoo was outweighed by the danger of unfair prejudice because at no time did he object to the prejudicial value of the photograph. Gossett v. State, 2013 Tex. App. LEXIS 9479 (Tex. App. El Paso July 31 2013).

897. Trial court did not err by admitting a recording of a 9-1-1 call under this section because the call was not emotionally charged or otherwise inflammatory where the caller's behavior was consistent with any reasonable person tending to a severely injured party. Moreover, the call was admissible to provide a framework for the State to develop its case because the victim was unable to provide full information regarding the events after the incident due to a loss of consciousness. Woods v. State, 2013 Tex. App. LEXIS 9396 (Tex. App. Houston 14th Dist. July 30 2013).

898. Trial court did not err in excluding evidence of drugs and finding that its probative value was outweighed by its prejudicial effect, as the complainant's involvement in drug dealing had little relevance to appellant's defense,

and evidence that the complainant sold drugs would have infected the trial with irrelevant innuendo. Moreno v. State, 2013 Tex. App. LEXIS 9394 (Tex. App. Houston 14th Dist. July 30 2013).

899. During defendant's sentencing hearing for his aggravated robbery convictions, the court did not err in admitting evidence regarding the general reputation of a gang and his tattoos because the probative value of a detective's testimony was not substantially outweighed by the danger of unfair prejudice; the testimony satisfied the Beasley factors. Hickman v. State, 2013 Tex. App. LEXIS 9323 (Tex. App. Dallas July 29 2013).

900. Trial court did not abuse its discretion by permitting State to introduce evidence of sexual assault of one victim by accomplice because the facts of the case would have been incomplete and difficult to follow had it been excised from the sequence of events, as it occurred while other victim was being killed and before first victim was kidnapped and locked in her car. The probative force of the evidence and the State's need for the evidence favored admission and it took minimal time to develop. Smith v. State, 424 S.W.3d 588, 2013 Tex. App. LEXIS 9093, 2013 WL 3832691 (Tex. App. Texarkana July 25 2013).

901. Because the evidence of a prior victim of an assault by defendant was probative as to who was the aggressor in the present aggravated assault case, the trial court did not err in admitting the extraneous offense testimony of the prior victim. Jeter v. State, 2013 Tex. App. LEXIS 8945 (Tex. App. Amarillo July 18 2013).

902. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. The appellate court held that the prejudicial effect of the testimony was not greater than its probative value. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

903. Trial court did not abuse its discretion in admitting evidence of toys and pictures from defendant's computer under because the evidence regarding the toys was relevant to determine defendant's sentence, photographs of the toys standing alone were innocuous, and the computer photographs were of young males in various states of undress and were more probative than prejudicial in determining defendant's punishment. Fiala v. State, 2013 Tex. App. LEXIS 8860 (Tex. App. Dallas July 17 2013).

904. Trial court did not abuse its discretion in balancing the factors in favor of the admission three autopsy photographs because the photographs demonstrated the reality of the crime that was committed, the measures taken to save the victim's life, and the steps taken to preserve evidence after those measures failed. The photographs were powerful visual evidence, probative of various aspects of the State's case. Oliver v. State, 2013 Tex. App. LEXIS 8863 (Tex. App. Dallas July 17 2013).

905. Trial court did not abuse its discretion in determining the admission of the photographs was not substantially more prejudicial than probative because the complainant could not recall the precise dates on which defendant had intercourse with her, but she testified that he had sex with her on the days he photographed her. Thus, the photographs established that the acts of sexual abuse occurred during a period that was 30 or more days in duration, a necessary element of the crime of continuous sexual abuse of a child. Moreno v. State, 409 S.W.3d 723, 2013 Tex. App. LEXIS 8744 (Tex. App. Houston 1st Dist. July 16 2013).

906. Photographs were relevant to prove appellant's identity and that he entered the establishment, and nothing depicted in the photographs was unfairly prejudicial, such that the trial court could have found that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. Wise v. State, 2013 Tex. App. LEXIS 8446 (Tex. App. Eastland July 11 2013).

907. Court did not abuse its discretion in admitting the victim's testimony or the State's exhibit (computer images/files) over defendant's objections, because balancing the necessary factors, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Aponte v. State, 2013 Tex. App. LEXIS 8560 (Tex. App. Waco July 11 2013).

908. In a case in which a jury found defendant guilty of four counts of indecency with a child, the trial court did not err in allowing extraneous evidence of drugs and drug use. In addition to the fact trial court gave the jury a limiting instruction, the drug evidence was only a small part of the evidence used by the State to show that defendant had been grooming one of the victims to accept defendant's advances. Bonilla v. State, 2013 Tex. App. LEXIS 8569 (Tex. App. Waco July 11 2013).

909. In a case in which defendant was found guilty of two counts of indecency with a child for the sexual abuse of his granddaughter, a prior victim's testimony that defendant, a family friend, sexually assaulted her when she was seven years old was probative to rebut the defensive theory of fabrication and was admissible. Bible v. State, 2013 Tex. App. LEXIS 8354 (Tex. App. Beaumont July 10 2013).

910. In a misappropriation of trade secrets action, the court did not err in excluding appellees' prior pleadings in which they accused 16 parties of conspiring to steal trade secrets; the minimal relevance of the pleadings was substantially outweighed by the risk of distracting the factfinder from the issues by provoking speculation regarding the disposition or settlement of the cases against the former defendants. Southwestern Energy Prod. Co. v. Berry-Helfand, 411 S.W.3d 581, 2013 Tex. App. LEXIS 8549, 182 Oil & Gas Rep. 798 (Tex. App. Tyler July 10 2013).

911. Trial court did not abuse its discretion by admitting into evidence photographs of the victim taken in the hospital because they were visual representations of the officers' testimony regarding her condition, the mere fact that the photographs depicted the victim's badly bruised body did not automatically render them more prejudicial than probative, and they refuted defendant's claims that she never noticed anything wrong with the victim or that the bruising might have been caused by the efforts to resuscitate the victim. Sifuentes v. State, 2013 Tex. App. LEXIS 8105 (Tex. App. San Antonio July 3 2013).

912. Video showing an individual's eyes with nystagmus on a Horizontal Gaze Nystagmus test was not inadmissible under Tex. R. Evid. 403 because the record did not show that it had any tendency to confuse or distract the jury from the main issue in the case and the limiting instruction the trial court gave before the testimony about the video avoided a risk that the jury would think that defendant's eyes looked like the eyes on the video. Guerrero v. State, 2013 Tex. App. LEXIS 8102 (Tex. App. Houston 1st Dist. July 2 2013).

913. Trial court had discretion to exclude a misleading line of questions, and the fact that the trial court improperly disallowed the questioning on the recidivism rate among patients in appellant's offer of proof did not preclude him from properly presenting his appeal; even if the court assumed there had been no recidivism in the treated class of those committed to a program, it did not follow that expert testimony appellant would likely reoffend was incorrect. In re Weissinger, 2013 Tex. App. LEXIS 7819, 2013 WL 3355758 (Tex. App. Beaumont June 27 2013).

914. In a liability insurance coverage dispute, testimony on whether the claimants had contracted asbestosis was properly excluded as irrelevant and confusing because bodily injury, as defined in the policies, occurred upon exposure to asbestos and was not determined on a case-by-case basis. Certain Underwriters at Lloyd's v. Chi. Bridge & Iron Co., 406 S.W.3d 326, 2013 Tex. App. LEXIS 7856, 2013 WL 3270615 (Tex. App. Beaumont June 27 2013).

915. Defendant did not meet his burden to prove that any prejudice he had suffered substantially outweighed the probative value of his testimony to show that an incident occurred relating to defendant's subsequent relationship to

the victim. Flores v. State, 2013 Tex. App. LEXIS 7829 (Tex. App. Corpus Christi June 27 2013).

916. Court did not abuse its discretion in admitting the extraneous offense evidence (unadjudicated aggravated robbery) over defendant's objections, because the evidence supported the State's theory that defendant intended to participate in the offenses. Menendez v. State, 2013 Tex. App. LEXIS 7742 (Tex. App. Beaumont June 26 2013).

917. Trial court did not abuse its discretion by overruling defendant's objection to the State's use of the phrase "sexually violent predator" under Tex. R. Evid. 403 because the use of the term was not intended to inflame the jury, as the term appeared in the charging statute, Tex. Health & Safety Code Ann. § 841.085, in the final judgment, order of commitment, supervision, and GPS tracking service requirements. Malone v. State, 405 S.W.3d 917, 2013 Tex. App. LEXIS 7766 (Tex. App. Beaumont June 26 2013).

918. Trial court did not abuse its discretion by admitting photographs of defendant's tattoos because the photographs explained how the courtesy officer knew defendant by sight. Ladouceur v. State, 2013 Tex. App. LEXIS 7792 (Tex. App. Dallas June 25 2013).

919. Trial court's admission of jailhouse letters from defendant to the victim apologizing for assaulting her did not violate Tex. R. Evid. 403 because the letters were highly probative. The time needed to present them was not substantial, and they were not cumulative of other evidence. Kappel v. State, 402 S.W.3d 490, 2013 Tex. App. LEXIS 7480 (Tex. App. Houston 14th Dist. June 20 2013).

920. Trial court did not abuse its discretion in admitting statements that defendant made to a jailer where the evidence was admissible as an admission by a party-opponent, as it was offered to prove that defendant admitted guilt in the instant case-he was being held for murder and said he would have to limit himself to one murder every two years. The jailer's testimony clarified the circumstances surrounding the victim's shooting, directly contradicted defendant's theory of the case that his accomplices were wrongly accusing him of firing the gun so that they would receive a favorable deal in their own cases, and was not likely to impress the jury in some irrational but nevertheless indelible way. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

921. Trial court did not abuse its discretion in admitting defendant's statement to a witness who had been in jail with him before the trial, that defendant was the "shooter," where the State did not offer the inmate's testimony as evidence of an extraneous offense separate and apart from the charged offense but, instead offered the evidence as proof that defendant fired the shots that killed the victim. The statement was an admission by a party-opponent, supported the allegation that defendant killed the victim, directly contradicted defendant's defensive theory that his accomplices only named him as the shooter to get a reduced sentence, and was not likely to impress the jury in some irrational but nevertheless indelible way. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

922. Trial court did not abuse its discretion when it permitted a witness who had been in jail with defendant before the trial to testify that defendant threatened to kill him where the threat was a relevant extraneous offense, as the testimony was evidence that defendant made the threat to instill fear in the witness and to prevent him from testifying. Defendant's actions were probative of guilt, and the testimony was not unfairly prejudicial because defendant did not try to connect his threat to a different offense, and because the record was devoid of any evidence that the threat was related to anything else. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

923. For purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), although 911 recordings were emotionally charged and disturbing, they depicted no more than the crime and the surrounding circumstances, and while prejudicial to defendant, they were not unfairly prejudicial; the recordings were probative of the circumstances of the

crime and of defendant's guilt, and their probative value was not outweighed by emotional and prejudicial aspects under Tex. R. Evid. 403. Patterson v. State, 2013 Tex. App. LEXIS 7287 (Tex. App. Fort Worth June 13 2013).

924. Regarding other similar incidents an expert investigated, even if appellant preserved the complaint for review, the expert admitted that defendant reached a different conclusion regarding the cause of the incident in each of the cases, which supported defendant's objection that the testimony would have required a mini-trial on causation for each case, and thus the trial court would not have abused its discretion in excluding the testimony under Tex. R. Evid. 403. Estate of Muniz v. Ford Motor Co., 2013 Tex. App. LEXIS 7158 (Tex. App. San Antonio June 12 2013).

925. Trial court did not abuse its discretion in excluding details of certain complaints under Tex. R. Evid. 403, given that prolonged proof of what happened in other accidents could not be used to distract the jury's attention from what happened in the instant case, plus appellants did not make an offer of proof as to the contents of the complaints until filing a statutory offer of proof, while Tex. R. Evid. 103(b) required an offer to be made before the charge was read to the jury, and the record did not show that the procedure required in filing a formal bill of exception under Tex. R. App. P. 33.2 was followed. Estate of Muniz v. Ford Motor Co., 2013 Tex. App. LEXIS 7158 (Tex. App. San Antonio June 12 2013).

926. Appellant's statements about whether the transmission was substantially similar did not address the Tex. R. Evid. 403 objection, and thus appellants' complaint was waived because they failed to address all possible bases for the ruling; even if the court addressed the issue, an alleged defect in a gear shift lever was different than an alleged defect in a transmission. Estate of Muniz v. Ford Motor Co., 2013 Tex. App. LEXIS 7158 (Tex. App. San Antonio June 12 2013).

927. Trial court did not err by admitting defendant's prior conviction into evidence because it was offered to prove that defendant was a felony in possession of a firearm on the date of his arrest and the trial court gave a limiting instruction. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

928. Trial court could have reasonably concluded that the probative value of the impeachment evidence offered by defendant was substantially outweighed by the danger of unfair prejudice or confusion of the issues because the absence of record of the witness' arrest in July 1984 for misdemeanor theft and assault suggested that the Houston Police Department did not arrest the witness on that date but did not prove that no entity in Harris County arrested defendant on that date. The Houston Police Department's records included some acts that had no relevance to the witness' credibility and other acts that resulted in convictions the witness had already testified about; defendant was able to explore the discrepancies in the witness' various statements without resorting to the records. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

929. In defendant's pornography case, the chat logs had probative value, and the entire exchange between the prosecutor and a witness constituted no more than ten lines of testimony in the reporters' record. There was a need for the evidence to establish defendant's control over and use of the computer equipment, which also contained pornographic images of children for which he was being prosecuted. Checo v. State, 402 S.W.3d 440, 2013 Tex. App. LEXIS 7029 (Tex. App. Houston 14th Dist. June 11 2013).

930. Testimony about an aggravated robbery provided the contextual background for the consequent police pursuit of defendant's vehicle and was admissible in his trial for evading arrest and detention using a motor vehicle under the balancing test of Tex. R. Evid. 403. The officers testified that defendant was not charged in the robbery. Villarreal v. State, 2013 Tex. App. LEXIS 7142 (Tex. App. Dallas June 11 2013).

931. At defendant's trial for failure to comply with sex offender registration requirements, the trial court did not err by admitting evidence that defendant moved several times while continuing to report his previous address because

the probative value was not substantially outweighed by the danger of undue prejudice under Tex. R. Evid. 403. Hogan v. State, 2013 Tex. App. LEXIS 6706 (Tex. App. Dallas May 30 2013).

932. Appellant objected to testimony on grounds that it was more prejudicial than probative, presumably under Tex. R. Evid. 403, and when the State sought to admit photographs, appellant set forth a relevance objection, but at neither time did appellant assert a due course of law or due process objection, plus he failed to continue objecting and did not obtain a running objection or ask for a hearing outside of the jury's presence, and thus he failed to preserve this claim for review. Mccowan v. State, 2013 Tex. App. LEXIS 6138 (Tex. App. Fort Worth May 16 2013).

933. Given that his co-conspirator shot the victim in the course of the prior robbery, the extraneous offense evidence supported the State's theory that defendant reasonably should have anticipated that these same co-conspirators, or others, might shoot and kill someone in their next robbery; the evidence was directly relevant to an essential element of the charged crime, and was not needlessly duplicative as there was little other evidence that defendant knew his companions would use violence or carried guns. Pagoada v. State, 2013 Tex. App. LEXIS 6077 (Tex. App. Houston 1st Dist. May 16 2013).

934. At defendant's trial for assault on a family member, Tex. R. Evid. 613(b) permitted the admission of proof showing bias on the part of defendant's wife because they were involved in divorce proceedings in which she had a pecuniary interest; the trial court did not err in refusing to permit further cross-examination about the divorce under Tex. R. Evid. 403 to prevent harassment, prejudice, confusion of the issues, harm to the witness, and repetitive or marginally relevant interrogation. Baker v. State, 2013 Tex. App. LEXIS 6084 (Tex. App. Houston 1st Dist. May 16 2013).

935. Finding that the insurer take nothing on its claim for declaratory judgment against the insured was appropriate, in part because the trial court could have concluded the probative value from the introduction of a signed application and the questioning of witnesses about it would have been substantially outweighed by the danger of confusion of the issues or misleading the jury. The insured testified that he signed the exhibit but also testified that he had never seen two other exhibit and that the signatures on those documents were not his; he also testified that no one at his office had the authority to sign his name to insurance applications. Medicus Ins. Co. v. Todd, 400 S.W.3d 670, 2013 Tex. App. LEXIS 6505 (Tex. App. Dallas May 10 2013).

936. Trial court did not abuse its discretion during defendant's murder trial in concluding that the probative value of extraneous offense evidence of his theft of a truck and cocaine use after the charged offense was not substantially outweighed by the danger of unfair prejudice where the evidence of the stolen truck and the cocaine use took very little time to develop and did not distract the jury from the charged offense for any significant period of time during the trial. Moreover, the State had a great need for the evidence of the stolen truck to corroborate defendant's confession, and while the State's need for admitting the cocaine use was not as great, showing defendant's consciousness of guilt was one more factor used in establishing the charged offense. Shuff v. State, 2013 Tex. App. LEXIS 5469 (Tex. App. Houston 1st Dist. May 2 2013).

937. Trial court did not err during the punishment phase in refusing to exclude evidence of the bad acts (gang involvement and possessing contraband) defendant committed in prison before his conviction was reversed because the evidence was relevant and was not unfairly prejudicial. That defendant engaged in bad acts while in prison revealed aspects of his character, and he failed to suggest that the State focused much attention upon or spent much time discussing the acts' setting. Nunez v. State, 2013 Tex. App. LEXIS 5480 (Tex. App. Amarillo May 1 2013).

938. Trial court did not abuse its discretion by admitting evidence of two additional stolen trailers on defendant's property under Tex. R. Evid. 403 because testimony established that defendant only had access and control of the

property, and the evidence rebutted defendant's strategy of mistake or accident in which he attempted to cast doubt regarding his knowledge of the improper registration of the stolen trailers. Whited v. State, 2013 Tex. App. LEXIS 5225 (Tex. App. Eastland Apr. 30 2013).

939. Trial court did not err by finding that probative value of the sergeant's testimony regarding the Mexican Mafia and defendant's membership in the organization did not outweigh its prejudicial effect on defendant under Tex. R. Evid. 403 because it countered defendant's testimony that he shot two victims under the influence of sudden passion and provided an explanation to the jury as to why defendant shot the victims even though they were fighting with another man and not defendant. The testimony about the Mexican Mafia's reputation for violence and defendant's membership in the organization countered the testimony of defendant's friends and family that he was a non-violent and peaceful person. Hernandez v. State, 2013 Tex. App. LEXIS 5228 (Tex. App. Houston 1st Dist. Apr. 30 2013).

940. Trial court did not err by finding that probative value of a lay witness's testimony regarding the Mexican Mafia and defendant's membership in the organization did not outweigh its prejudicial effect on defendant under Tex. R. Evid. 403 because it was spoke to defendant's character, explained why defendant shot the two victims even though he did not know them and did not seem to have any personal motive for doing so, and it countered the testimony of defendant's family and friends that he was a non-violent and peaceful person. Hernandez v. State, 2013 Tex. App. LEXIS 5228 (Tex. App. Houston 1st Dist. Apr. 30 2013).

941. Trial court did not abuse its discretion by admitting graphic photographs depicting the murder victim's injuries into evidence because they were probative of the manner of death and could be interpreted to indicate that the victim was shot twice in the back and that defendant planted the knife in the victim's hand, which was relevant to defendant's claim of self-defense. The court could not say that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice because while the photographic depiction of the entrance wound was no doubt made more gruesome due to postmortem changes, that information was submitted to the jury solely by way of the autopsy report and the State did not focus on the condition of the wound. Rider v. State, 2013 Tex. App. LEXIS 5050 (Tex. App. Texarkana Apr. 25 2013).

942. Trial court did not abuse its discretion by admitting evidence tending to show that a witness had observed defendant in possession of a firearm on the night of the robbery under Tex. R. Evid. 404(b) because the testimony tended to establish defendant's identity as one of the gunmen during the robbery and to corroborate the accomplices' testimony and the evidence qualified as same transaction contextual evidence. The trial court could have found that the probative value of the evidence was high, as the victims of the robbery were unable to identify the men who had robbed them at gunpoint and the State needed the testimony to corroborate the accomplices' testimony who had identified defendant as one of the gunmen. Head v. State, 2013 Tex. App. LEXIS 5109 (Tex. App. Austin Apr. 24 2013).

943. Under Tex. R. Evid. 403, the photograph of defendant nude in a bathtub with his nude infant son was relevant and material to rebutting defendant's defense that he was not the perpetrator and its probative value was not outweighed by the danger of unfair prejudice; the trial court did not abuse its discretion in admitting the photograph. Bentley v. State, 2013 Tex. App. LEXIS 4925 (Tex. App. Dallas Apr. 19 2013).

944. At defendant's assault trial, the admission of defendant's prior robberies was not unduly prejudicial because the probative value of the similar offenses was not outweighed by the possibility of unfair prejudice, given similarities between the crimes. Plata v. State, 2013 Tex. App. LEXIS 4795 (Tex. App. Corpus Christi Apr. 18 2013).

945. Trial court did not err by excluding a defense witness's testimony as it related to defendant's neighbor's arrests and drug-related involvement with police because while there was evidence indicating that the neighbor

might have been the anonymous tipster, there was no evidence that he planted the drugs, and therefore the fact that he may have been tipster was not relevant to the jury's determination of whether defendant possessed drugs. Even if the evidence was relevant, the trial court could have reasonably concluded that the relevance was substantially outweighed by the danger of confusing the jury or causing undue delay. Ivie v. State, 407 S.W.3d 305, 2013 Tex. App. LEXIS 4876 (Tex. App. Eastland Apr. 18 2013).

946. Trial court did not err by admitting evidence of an aggravated robbery that occurred 45 minutes before the instant offense of murder under Tex. R. Evid. 404(b) because the fact that defendant admitted to committing the robbery with a deadly weapon, the same gun that was used in the murder, tended to rebut his claim of duress. The trial court could have reasonably concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because the evidence was highly probative, as it tended to rebut defendant's claim of duress, discussion of the offense only took one day of a six-day trial, it did not divert the jury's attention from the crucial issues in the case, and the State's need for the evidence was high, as it had no other direct evidence to rebut defendant's claim of duress. Ibarra v. State, 2013 Tex. App. LEXIS 4772, 2013 WL 1641493 (Tex. App. San Antonio Apr. 17 2013).

947. In a capital murder case, admitting a computer-generated animation with moving figures that purported to illustrate the testimony of a witness was error because the animation contained speculative details not found in the record. The error was harmless under Tex. R. App. P. 44.2(b), however, because the animation had little bearing on the contested issues; moreover, the trial court gave a timely instruction to disregard. Hamilton v. State, 399 S.W.3d 673, 2013 Tex. App. LEXIS 4839 (Tex. App. Amarillo Apr. 17 2013).

948. Because appellant's contention that the officer's testimony constituted evidence of an extraneous offense under Tex. R. Evid. 404(b) was rejected, his Tex. R. Evid. 403 contention was also rejected. Garza v. State, 2013 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. Apr. 11 2013).

949. Trial court did not abuse its discretion by denying him permission to cross-examine the complainant on the reasons for her 1991 military discharge because there was no authority explaining how a suicide attempt 20 years ago would affect the complainant's credibility during trial. Duff v. State, 2013 Tex. App. LEXIS 4662 (Tex. App. Fort Worth Apr. 11 2013).

950. Trial court did not abuse its discretion by concluding that evidence that two co-defendants had committed a nearly identical robbery just a few days before the instant robbery and that defendant knew about that robbery was relevant to show defendant's intent to participate in the instant robbery and was relevant to the State's theory that defendant had conspired with the two co-defendants to commit the instant robbery. The trial court did not abuse its discretion by concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence because the evidence tended to rebut defendant's theory that she had nothing to do with the instant robbery and capital murder. Ohlfs v. State, 2013 Tex. App. LEXIS 4660 (Tex. App. Fort Worth Apr. 11 2013).

951. Trial court did not abuse its discretion during defendant's indecency with a child trial in admitting an extraneous offense and bad act testified to by another child under seventeen years of age who resided at the apartment complex where the incident took place because the extraneous offense evidence was relevant to prove the sole disputed issue at trial--knowledge that a child was present--and its probative value was not substantially outweighed by the danger of unfair prejudice. While the extraneous offense evidence was not overwhelming evidence of defendant's knowledge of the child's presence, it was some evidence of that vital fact, and the time needed to develop the evidence was inconsequential, while the need for the evidence weighed heavily in favor of its admission to prove knowledge. Henderson v. State, 2013 Tex. App. LEXIS 4512 (Tex. App. Texarkana Apr. 10 2013).

952. During defendant's trial for possession with intent to deliver methamphetamine, the court did not err in admitting into a evidence a switchblade knife found in his car because it was relevant as evidence of his intent to deliver narcotics, an element of the charged offense; not only was the evidence probative, but the State spent very little time developing it and there was little risk that it would impress the jury in an irrational way. Wetmore v. State, 2013 Tex. App. LEXIS 4466, 2013 WL 1451164 (Tex. App. Houston 1st Dist. Apr. 9 2013).

953. Trial court did not err by admitting into evidence a letter defendant wrote to the woman who leased the apartment where the drugs were found because it was relevant, as defendant's statement in the letter that he had the "best dope around" could be seen as indicative of a willingness to provide the woman and perhaps others with dope, further connecting him to the woman and suggesting an intent to deliver. In addition, the letter was strongly probative to rebut any contention that his presence in the apartment was merely fortuitous and assisted the State with its proof that defendant's possession of the drugs was knowing. Bible v. State, 2013 Tex. App. LEXIS 4455, 2013 WL 1411849 (Tex. App. Amarillo Apr. 8 2013).

954. Trial court did not err by admitting evidence of an extraneous offense of attempted capital murder, based on defendant swerving towards an officer laying traffic spikes, because the 40 minute chase that began in one county and ended in another was one, indivisible criminal transaction, and the need for context outweighed any unfairly prejudicial effect to defendant. Capps v. State, 2013 Tex. App. LEXIS 4438 (Tex. App. Dallas Apr. 5 2013).

955. Question was whether the evidence's probative value was substantially outweighed by dangers of prejudice or confusion of the issues, and the record did not show that the trial court abused its discretion when it allowed evidence of weapons and ammunition found in a search of appellant's last two residences, in light of allegations he had threatened three witnesses, plus the jury was instructed to consider the evidence only for the purpose of corroborating prior witness testimony. Hurst v. State, 406 S.W.3d 617, 2013 Tex. App. LEXIS 4282 (Tex. App. Eastland Apr. 4 2013).

956. During defendant's trial for robbery of a fast-food restaurant, the court did not err in admitting evidence of another robbery at a nearby fast-food restaurant because the two robberies were similar; the extraneous offense was not likely to create such prejudice in the minds of the jurors that they would be unable to consider the evidence for its proper purpose. Mcneil v. State, 2013 Tex. App. LEXIS 4234 (Tex. App. San Antonio Apr. 3 2013).

957. To the extent that records of other injuries or medical conditions showed a personal injury claimant had back pain before a slip and fall incident, the records were relevant and admissible under Tex. R. Evid. 401, 402. Absent evidence of other litigation, the medical evidence was not overly prejudicial under Tex. R. Evid. 403, and the admission of irrelevant medical records unrelated to back pain was harmless error under Tex. R. App. P. 44.1(a)(1) because the judgment did not turn on records regarding unrelated conditions. Sparks v. Exxon Mobil Corp., 2013 Tex. App. LEXIS 4206 (Tex. App. Houston 14th Dist. Apr. 2 2013).

958. Defendant's conviction for capital murder was proper because the admission of evidence was relevant, probative, and offered in rebuttal to defendant's portrayal of himself as a gentle, even-handed father. Although the State's need for the evidence was minimal, it took very little time to present evidence of both extraneous offenses and, in light of the entire record, that evidence had little, if any, potential to sway the jury in an irrational yet indelible way. Duncan v. State, 2013 Tex. App. LEXIS 3169, 2013 WL 1258449 (Tex. App. Dallas Mar. 22 2013).

959. Appellant raised Tex. R. Evid. 401, 403 objections to a certain incident, but he did not claim that the extraneous offense evidence was improper character evidence, and as he did not object under Tex. R. Evid. 404(b), his complaint on appeal did not comport with his objections at trial, for purposes of Tex. R. App. P. 33.1(a), and thus he did not preserve his complaint for review. Rudzavice v. State, 2013 Tex. App. LEXIS 3140, 2013 WL

1188924 (Tex. App. Waco Mar. 21 2013).

960. Having already concluded that the prior conviction for family-violence assault under Tex. Penal Code Ann. § 22.01(b)(2) was an element of the offense and not just an enhancement provision, a sufficient stipulation by defendant would have to specifically show that he was previously convicted of a family-violence assault; therefore, neither Tex. R. Evid. 403 nor Old Chief, required the trial court to allow defendant's proposed stipulation. Olivas v. State, 2013 Tex. App. LEXIS 3052, 2013 WL 1182208 (Tex. App. El Paso Mar. 20 2013).

961. Defendant's conviction for DWI, third or more was proper because the trial court properly overruled his sole objection related to "unadjudicated offenses" and the evidence introduced by the State which did not consist of judgments of convictions was permitted as extraneous bad acts. Because no Tex. R. Evid. 403 arguments were raised below, they were unpreserved on appeal, Tex. R. App. P. 33.1. Capps v. State, 2013 Tex. App. LEXIS 2770, 2013 WL 1091232 (Tex. App. Texarkana Mar. 15 2013).

962. Trial court acted within its discretion during defendant's trial for aggravated assault with a deadly weapon in admitting the victim's medical records without expert testimony where the records were relevant to prove the victim suffered bodily injury as a result of the assault, and the trial court could have reasonably concluded that the victim's injuries were within the common knowledge and experience of the jurors and did not require expert testimony. The trial court also could have reasonably concluded that the probative value of the medical records was considerable compared to its potential for confusing or misleading the jury. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

963. Court properly admitted evidence that defendant's girlfriend purchased a silver .38 caliber revolver shortly before the victim's death because a codefendant testified that defendant had used a silver gun, and another witness testified that defendant was carrying a "chrome .38, snub-nose revolver" on the day the victim was killed. The inherent probative force of the evidence concerning the guns was its tendency to show that defendant was the shooter, and although the evidence was prejudicial, it was not unfairly prejudicial. Buckley v. State, 2013 Tex. App. LEXIS 2246 (Tex. App. Houston 14th Dist. Mar. 7 2013).

964. In a divorce, testimony that a husband made statements to the witness about having had sex with young girls was not barred under Tex. R. Evid. 403 because the testimony was relevant to the issue of the best interests of the parties' child. Howell v. Howell, 2013 Tex. App. LEXIS 1991, 2013 WL 784542 (Tex. App. Corpus Christi Feb. 28 2013).

965. Trial court's alleged error in permitting the complainant to testify as to the punishment he would like defendant to receive had no more than a very slight effect on the jury's determination of punishment; presuming there was error, such error was harmless. Hines v. State, 396 S.W.3d 706, 2013 Tex. App. LEXIS 2000, 2013 WL 748755 (Tex. App. Houston 14th Dist. Feb. 28 2013).

966. Defendant made no showing that the complainant's immigration status was relevant to proving a material issue in the case and the trial court did not abuse its discretion by sustaining the State's relevance objection, Tex. R. Evid. 401; the trial court could have concluded that the prejudice from defense counsel's deportation and immigration-based questions far outweighed any probative value, Tex. R. Evid. 403. Lopez v. State, 2013 Tex. App. LEXIS 2042, 2013 WL 1277883 (Tex. App. Dallas Feb. 28 2013).

967. Admission of the poster was proper as it served to illustrate defendant's mens rea on the element of intent to deliver; the time spent on developing the evidence was minimal, and the probative value of the posters was not substantially outweighed by their potential prejudice. Mendoza-Torres v. State, 2013 Tex. App. LEXIS 1963, 2013

WL 708492 (Tex. App. Amarillo Feb. 27 2013).

968. Trial court did not err in admitting evidence that defendant had previously, knowingly disregarded the lawful commands of a police officer because the State was entitled to rebut defendant's assertion that had he known they were police officers, he would not have pointed his firearm at them. Flores v. State, 2013 Tex. App. LEXIS 1809 (Tex. App. Dallas Feb. 26 2013).

969. Trial court did not abuse its discretion by excluding evidence of the minor victim's prior sexual conduct under Tex. R. Evid. 412 to explain the State's medical evidence because, even though the State opened the door to the victim's prior sexual history by asking whether ongoing sexual assaults could explain the nonexistence of trauma in a nonacute exam, the evidence could have been introduced without inquiry into the victim's prior sexual history, and therefore the probative value of the evidence did not outweigh its prejudicial effect. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

970. Counsel was not ineffective for failing to object to evidence that defendant viewed pornography and consumed alcohol under Tex. R. Evid. 403 because the failure to object could have been based on trial strategy and therefore the court had to presume counsel's performance was adequate. Weeks v. State, 2013 Tex. App. LEXIS 1428, 2013 WL 557015 (Tex. App. Texarkana Feb. 14 2013).

971. Trial court did not abuse its discretion in a case in which defendant was convicted of continuous sexual abuse of a child, his two daughters, by admitting the testimony of an investigator for the district attorney's office over defendant's Tex. R. Evid. 403 objection because defendant's viewing of child pornography, specifically father-daughter pornography-even on a different computer than the one he used when he lived with his family-tended to corroborate the victims' testimony, and because the investigator's testimony had little potential to impress on the jury in some irrational way, as the State offered only the testimony about the searches, not the images or videos found on defendant's laptop. Moreover, the investigator's testimony took very little time to develop, and the State needed the evidence of defendant's searches for "daddy" plus "daughter" plus "images" or "videos" to lend credibility to other testimony. Watkins v. State, 2013 Tex. App. LEXIS 1512, 2013 WL 531062 (Tex. App. Fort Worth Feb. 14 2013).

972. At defendant's trial for the aggravated sexual assault of a child, the trial court erred because it refused to allow defendant to cross-examine the State's witnesses in violation of the Sixth Amendment and the Fourteenth Amendment regarding the complainant's sexual assault of his younger sister. The balancing test under Tex. R. Evid. 403 did not authorize exclusion of the impeachment evidence, because Tex. R. Evid. 101(c) established that the Constitution of the United States controlled over a conflicting evidentiary rule or civil statute. Johnson v. State, 2013 Tex. App. LEXIS 1515, 2013 WL 531079 (Tex. App. Fort Worth Feb. 14 2013).

973. At defendant's trial for aggravated sexual assault of two boys under the age of fourteen, the trial court did not err by refusing to allow defendant to offer evidence regarding disturbances at the children's home or the testimony of a psychologist that one of the children was living with a sex offender because the court could have concluded that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Bullock v. State, 2013 Tex. App. LEXIS 1491, 2013 WL 593829 (Tex. App. Corpus Christi Feb. 14 2013).

974. Trial court did not abuse its discretion in determining the testimony of a witness that appellant had been in jail was not substantially more prejudicial than probative under Tex. R. Evid. 403 because 1) the evidence had probative value as it demonstrated appellant's possible motive for shooting the victim; 2) the witness's testimony about motive was brief and directly relevant to appellant's motive and the intent element of the charged offense and, as such, had less potential to distract the jury from the charged offense; and 3) evidence of the reason

appellant was in jail was excluded, which mitigated any potential for the jury to give undue weight to the evidence. Nieto v. State, 2013 Tex. App. LEXIS 1239, 2013 WL 485762 (Tex. App. Houston 1st Dist. Feb. 7 2013).

975. At defendant's trial for possession with intent to deliver a controlled substance, cocaine, in a drug free zone, the trial court did not err in admitting evidence of weapons found at the location where defendant was arrested; it was relevant to show that the weapons were used for protection of the drugs. The probative value of the evidence outweighed the prejudicial effect under Tex. R. Evid. 403. Blue v. State, 2013 Tex. App. LEXIS 1231, 2013 WL 489998 (Tex. App. Waco Feb. 7 2013).

976. Because the expert's calculations did not include an amount to be paid to appellant as reasonable compensation for his management services, the expert's calculations were not complete, and therefore the proffered evidence could have confused or misled the jury. Nacogdoches Heart Clinic, P.A. v. Pokala, 2013 Tex. App. LEXIS 1066, 2013-1 Trade Cas. (CCH) P78252, 2013 WL 451810 (Tex. App. Tyler Feb. 6 2013).

977. In a murder case, a trial court did not err by admitting autopsy photographs because they were probative of the issue of whether a death where a victim was run over by a car was an intentional killing with multiple injuries inflicted. The probative value of the photographs was not substantially outweighed by their prejudicial effect; none of the photos showed any mutilation to the body caused by the medical examiner's examination. Ogle v. State, 2013 Tex. App. LEXIS 1084, 2013 WL 453257 (Tex. App. Dallas Feb. 6 2013).

978. In a murder case, the admission of an autopsy photo of the victim's brain was not an abuse of discretion because (1) the photo assisted the jury in understanding the victim's injury, (2) the photo was not excessively gruesome, (3) nothing showed the jury would have given the photo undue weight, and (4) the photo would not have caused the jury to make the jury's decision on an improper basis. Wilson v. State, 2013 Tex. App. LEXIS 1166, 2013 WL 461060 (Tex. App. El Paso Feb. 6 2013).

979. Trial court did not abuse its discretion by admitting into evidence defendant's jail telephone call recordings and summaries because they aided the State in its rebuttal of defendant's defense that he had no involvement or knowledge of the dealership's transactions; The trial court was within the zone of reasonable disagreement to find that the probative value of the recordings and summaries were not substantially outweighed by the danger of unfair prejudice. The jailhouse phone calls did not tend to connect defendant to any prior bad acts or crimes that he might have committed. Wood v. State, 2013 Tex. App. LEXIS 866 (Tex. App. Corpus Christi Jan. 31 2013).

980. In appellant's murder case, the State offered a photograph to establish that the woman a sergeant identified as the victim was the same women whose autopsy he attended, and the sergeant identified the number visible in the exhibit as the number that applied to this case, and there was no error in the admission of the photograph in addition to the admission of the sergeant's testimony, for purposes of Tex. R. Evid. 403; the fact that the State offered the photograph in addition to the sergeant's testimony did not destroy the photograph's probative value, and it was still relevant evidence. Jackson v. State, 2013 Tex. App. LEXIS 889 (Tex. App. Houston 1st Dist. Jan. 31 2013).

981. Defendant's commitment as a sexually violent predator was appropriate because the jury could have reasonably found beyond a reasonable doubt that he had a behavioral abnormality that made him likely to engage in a predatory act of sexual violence. Further, each expert explained the facts considered and how those facts affected that expert's evaluation; the evidence assisted the jury in weighing the testimony and the opinion each expert offered and the trial judge could have reasonably concluded that the experts' testimony was not unfairly prejudicial. In re Anderson, 392 S.W.3d 878, 2013 Tex. App. LEXIS 602 (Tex. App. Beaumont Jan. 24 2013).

982. To the extent appellant claimed evidence was prejudicial, he did not object on grounds of Tex. R. Evid. 403, and thus this issue was not preserved for review. Williams v. State, 2013 Tex. App. LEXIS 695 (Tex. App. Amarillo Jan. 24 2013).

983. Trial court did not err by admitting evidence of defendant's prior misconduct with a teenager under Tex. R. Evid. 404(b) because defense counsel's questions exploring a civil lawsuit opened the door to evidence offered to rebut the implication that the victim's mother had induced the victim to fabricate charges against defendant to create grounds for a lawsuit with a potential financial payoff. The trial court did not abuse its discretion by concluding that the danger of unfair prejudice did not substantially outweigh probative value under Tex. R. Evid. 403 because the State's need for the evidence was substantial, given the lack of physical evidence to corroborate the testimony of the victim and his mother and testimony about the prior offense occupied very few pages of the record. Hetherington v. State, 2013 Tex. App. LEXIS 437, 2013 WL 173760 (Tex. App. Fort Worth Jan. 17 2013).

984. Trial court did not abuse its discretion in admitting the photographs where they were pictures of the locations at which the assaults took place and pictures of the victim's injuries; none of the photographs were gruesome, the victim was clothed, and none were cumulative. Hill v. State, 392 S.W.3d 850, 2013 Tex. App. LEXIS 453, 2013 WL 174062 (Tex. App. Amarillo Jan. 16 2013).

985. Trial court did not err during defendant's murder trial in admitting photographs that were taken at the crime scene and at the victim's autopsy because the photographs were not so horrifying or appalling that a juror of normal sensitivity would necessarily encounter difficulty rationally deciding the critical issues of the case after viewing them. Jameson v. State, 2013 Tex. App. LEXIS 242, 2013 WL 150281 (Tex. App. Amarillo Jan. 14 2013).

986. Trial court did not abuse its discretion by admitting evidence that he held the child victim's mother at gunpoint several days after the alleged assault occurred under Tex. R. Evid. 404(b) because it constituted same transaction contextual evidence and was relevant, as the evidence showed that defendant confronted the victim's mother because he wanted to interrogate the victim about the assault and showed the jury how defendant reacted violently to the victim's outcry; the evidence was also necessary to show how defendant gained access to the victim's house to leave a letter in which he admitted to touching the victim. The admission of the evidence did not violate Tex. R. Evid. 403 because it made a fact of consequence, defendant's touching of the victim's genitals, more probable. Rodriguez v. State, 2013 Tex. App. LEXIS 213, 2013 WL 135723 (Tex. App. Waco Jan. 10 2013).

987. Defendant's conviction for continuous sexual abuse of a child was proper because the trial court could have reasonably concluded the extraneous offense evidence regarding an alleged victim and defendant's sexual acts toward her was offered to rebut defendant's several defensive theories. The extraneous offense was sufficiently similar to the charged offense to be admissible, both individuals were related to defendant's wife, both the extraneous offense and some of incidents involving the complainant occurred at defendant's workplace, and Tex. R. Evid. 403 factors favored admission because the extraneous offense evidence was probative to rebut defendant's defensive theories that appellant was not the type of person who would sexually abuse a child, Lopez v. State, 2013 Tex. App. LEXIS 338 (Tex. App. Dallas Jan. 3 2013).

988. In defendant's murder case, the probative value of nine crime scene photographs outweighed their unfair prejudice because the photos did not show the victim's sexual organs and only showed his abdomen to the extent necessary to view the gunshot wound. The photos did nothing more than depict the crime scene, and they were unlikely to elicit an irrational decision. Gabriel v. State, 2012 Tex. App. LEXIS 10771, 2012 WL 6743557 (Tex. App. San Antonio Dec. 31 2012).

989. In a termination of parental right case, the court did not err by admitting testimony regarding the child's outcries of abuse because the child made her initial outcries to a doctor while being treated, and after she began

therapy, she made separate reports of the same events. That testimony was probative, and was not substantially outweighed by any unfair prejudice. In the Interest of C.T., 2012 Tex. App. LEXIS 10746 (Tex. App. Corpus Christi Dec. 27 2012).

990. Trial court did not err by allowing a physician to testify as an expert witness and testify generally as to the patterns of sexual offenders and how those offenders typically victimized children because the trial court could have concluded that the testimony would be helpful to the jury in its deliberations of the evidence and defendant failed to explain how the testimony about statistical correlations in families with sex offenders or the vulnerability of a child born into such a family carried with it unfair prejudice or how there was a clear disparity between its probative value and its degree of prejudice. Beltran v. State, 2012 Tex. App. LEXIS 10639 (Tex. App. Austin Dec. 21 2012).

991. Trial court did not abuse its discretion by admitting testimony of defendant's 2007 sexual encounter with an adult female where the jury was instructed on how it should use the evidence at issue, which reduced the possibility that admitting the testimony created any harmful error. Cross v. State, 2012 Tex. App. LEXIS 10487, 2012 WL 6643832 (Tex. App. Beaumont Dec. 19 2012).

992. Admission of testimony by defendant's girlfriend regarding defendant's prior drug use was not unduly prejudicial; considering expert testimony concerning the effect of methamphetamine on defendant's mental health condition and any prescribed medication for the condition, the trial judge could have reasonably concluded that the evidence of defendant's prior use of methamphetamine tended to rebut defendant's insanity defense. Dana v. State, 420 S.W.3d 158, 2012 Tex. App. LEXIS 10265, 2012 WL 6213501 (Tex. App. Beaumont Dec. 12 2012).

993. In defendant's drug case, the court properly admitted a letter a witness received from defendant while they were both in jail for the offense because the letter was probative of defendant's relationship with the witness, as well as his guilt. Although the letter contained some derogatory racial language, the language was used by defendant to refer to himself, and other racial references were directed at the witness. Caballero v. State, 2012 Tex. App. LEXIS 10098, 2012 WL 6035259 (Tex. App. Dallas Dec. 5 2012).

994. Court did not err by admitting evidence of extraneous offenses, because an issue in the case was whether defendant could form the intent necessary to commit the offense even if he did not meet the legal definition of insanity, and the evidence at issue was probative of defendant's intent and indicated the nature of his relationship with his wife in the days leading up to the offense of aggravated assault with a deadly weapon, causing serious bodily injury, and involving family violence. Wilson v. State, 2012 Tex. App. LEXIS 10004 (Tex. App. Dallas Dec. 4 2012).

995. Evidence that the victim was a drug dealer would have been irrelevant and inadmissible if offered to show that his life was not as valuable as other society members, and the trial court was within its discretion to limit the cross-examination in this regard during the punishment phase, as the victim's status as a drug dealer was collateral and irrelevant to the assessment of an appropriate sentence, and this status was not directly relevant to the murder charge; permitting impeachment of the victim's character with extrinsic evidence would have confused the issues and wasted the jury's time, and it was within the trial court's discretion to exclude the evidence under Tex. R. Evid. 403. Gladney v. State, 2012 Tex. App. LEXIS 9806, 2012 WL 5949473 (Tex. App. Dallas Nov. 28 2012).

996. Where defendant was convicted for aggravated sexual assault of a child -- his daughter, testimony about an extraneous offense he committed against his son was properly admitted because it rebutted the defensive claim of fabrication. The testimony did not appear to be so unfairly prejudicial under Tex. R. Evid. 403 as to make its admission outside the range of the trial court's discretion. Korp v. State, 2012 Tex. App. LEXIS 9832, 2012 WL 5961662 (Tex. App. Texarkana Nov. 28 2012).

997. During defendant's capital murder trial, the court did not err under the rule in excluding testimony about illegal drug use and promiscuous, extramarital sexual behavior by his wife, one of the victims, because the jury was made thoroughly aware through other evidence of the emotional stress caused by their volatile marriage. Hernandez v. State, 390 S.W.3d 310, 2012 Tex. Crim. App. LEXIS 1601 (Tex. Crim. App. Nov. 21 2012).

998. Concerning appellant's conviction of aggravated assault on a peace officer, the trial court did not abuse its discretion in admitting appellant's testimony concerning a certain prior incident and the attendant consequences over appellant's objection under Tex. R. Evid. 403; appellant sought to establish a theory of self-defense, and testimony about the prior incident was probative in (1) clarifying the false impression appellant gave about his relationship with a neighbor, the person appellant thought he shot, (2) undermining his self-defense theory, and (3) showing that he was prohibited from possessing a gun outside his house on the date in question, and appellant did not overcome the presumption that the testimony about the incident was more probative than prejudicial. Moten v. State, 2012 Tex. App. LEXIS 9541, 2012 WL 5696200 (Tex. App. Waco Nov. 15 2012).

999. Without affirmative evidence establishing the proposed questions' probative value, the questions defendant sought to ask would constitute nothing more than a mere fishing expedition with a substantial prejudicial effect; therefore, the trial court did not abuse its discretion in excluding the testimony of the confidential informant. Bolton v. State, 2012 Tex. App. LEXIS 9402, 2012 WL 5507404 (Tex. App. Texarkana Nov. 14 2012).

1000. In defendant's criminal solicitation of a minor case, the court did not err by allowing evidence of his Internet address book, which showed he had contacts with females with sexually suggestive and youthful names because the evidence was probative in that it tended to show defendant was not on the Internet looking for babysitting services. The evidence did not include any specifics of any extraneous misconduct and there was therefore little danger the jury would either give the evidence undue weight or decide the case on an improper basis. Meadows v. State, 2012 Tex. App. LEXIS 9416, 2012 WL 5504017 (Tex. App. Dallas Nov. 14 2012).

1001. In defendant's attempted sexual assault case, a witness's testimony regarding other inappropriate conduct allegedly perpetrated by defendant was properly admitted because the testimony showed that defendant acted inappropriately with other underage girls in the household and, thus, corroborated the victim's testimony and showed defendant's predilection for underage girls. Additionally, the State needed the testimony to rebut the mother's assertion that nothing inappropriate had ever transpired between defendant and the victim. Baker v. State, 2012 Tex. App. LEXIS 9345, 2012 WL 5458474 (Tex. App. Waco Nov. 8 2012).

1002. In defendant's murder case, the trial court did not abuse its discretion in admitting testimony as evidence of identity because, in both offenses, a green vehicle blocked the roadway and a young man approached the blocked-in vehicle with a "silver" handgun. The witness identified defendant as the "young man" from her aggravated robbery, and he used an accomplice's mother's vehicle to commit that offense; the challenged evidence made defendant's identity more probable, took little time to develop, and supported the element of identity. Torres v. State, 2012 Tex. App. LEXIS 9134 (Tex. App. Corpus Christi Nov. 1 2012).

1003. Appellant only raised a general objection to the admission of extraneous offenses, which was insufficient to preserve a Tex. R. Evid. 403 objection for review, and thus this issue was overruled. Martinez v. State, 2012 Tex. App. LEXIS 8994 (Tex. App. Amarillo Oct. 30 2012).

1004. In an indecent exposure case, the court properly allowed evidence of defendant's prior conviction of failing to register as a sex offender over his objection because it was a crime of deception and was a significant piece of evidence bearing on his character for truthfulness; the manner in which the State presented evidence of defendant's conviction did not likely leave an indelible impression on the jurors to encourage an irrational decision. Tristan v. State, 393 S.W.3d 806, 2012 Tex. App. LEXIS 8895, 2012 WL 5285673 (Tex. App. Houston 1st Dist. Oct.

25 2012).

1005. As appellant's identity as a robber was a major dispute and the evidence corroborating accomplice-witness testimony was mostly circumstantial, the trial court could have considered other evidence, including stolen credit card evidence, probative and necessary; the credit card evidence had little prejudicial effect as character conformity evidence because there was testimony the card was not given to appellant, nothing showed the evidence tended to confuse or mislead the jury, and the jury was instructed on how to consider extraneous offense testimony, such that the court found no abuse of discretion in the trial court's finding that the evidence was not precluded by Tex. R. Evid. 403. Biera v. State, 391 S.W.3d 204, 2012 Tex. App. LEXIS 8782, 2012 WL 5199374 (Tex. App. Amarillo Oct. 22 2012).

1006. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because, with regard to the victim's alleged prior sexual behavior, other than her involvement, there was no similarity between those incidents and the current allegations against defendant currently, Tex. R. Evid. 401, 402, 403, and 412(b). Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

1007. Although Tex. R. Evid. 107 is limited by Tex. R. Evid. 403, appellant failed to object that the evidence was substantially more prejudicial than probative, and to the extent he tried to raise a Rule 403 complaint on appeal, he did not preserve this issue for review under Tex. R. App. P. 33.1(a)(1). Hailey v. State, 413 S.W.3d 457, 2012 Tex. App. LEXIS 8717, 2012 WL 4936655 (Tex. App. Fort Worth Oct. 18 2012).

1008. Defendant's contention that the probative value of video recordings showing sex acts between dancers and patrons of the adult establishment owned and operated by defendant were substantially outweighed by a danger of unfair prejudice was not preserved for appellate review because while defendant raised a Tex. R. Evid. 403 objection in her motion in limine in her first trial but sought only to have the State approach the bench before mentioning or offering the video recordings in the instant trial. Coutta v. State, 385 S.W.3d 641, 2012 Tex. App. LEXIS 8692 (Tex. App. El Paso Oct. 17 2012).

1009. In an aggravated kidnapping case, an objection under Tex. R. Evid. 403 was properly overruled because of the probative value of a folding knife found in a truck; this supported the State's allegation that the kidnapping was aggravated, and there was little or no danger of confusion of the issues. Moreover, evidence of checks was probative to identify appellant as a participant in the kidnapping, and an argument that the trial court failed to conduct the Rule 403 balancing test before admitting the challenged evidence was rejected because the judge was presumed to have engaged in the required balancing test when Rule 403 was invoked. Padilla v. State, 2012 Tex. App. LEXIS 8519 (Tex. App. Fort Worth Oct. 11 2012).

1010. Defendant's conviction for engaging in organized crime was proper because the nonaccomplice evidence placed defendant at or near the scene of the crime at or about the time of its commission under suspicious circumstances and because, although the forensic examiner testified that he did not know who actually sent or received the text messages, the circumstances were sufficient to allow a jury reasonably to find that defendant sent and received the messages. Because intent to commit forgery could not be inferred, the prior conviction showing strikingly similar facts made the existence of a material fact, that was, whether defendant possessed forged checks with the intent to defraud or harm another, more probable and defendant did not show that the trial court acted outside the zone of reasonable disagreement by balancing the factors in favor of admissibility, Tex. R. Evid. 403. Franklin v. State, 2012 Tex. App. LEXIS 8513 (Tex. App. Dallas Oct. 10 2012).

1011. Trial court did not abuse its discretion in admitting into evidence a letter defendant wrote while awaiting trial. The time needed to develop and present the evidence was minimal, and the evidence was needed to prove

defendant intentionally caused the victim's death. Case v. State, 2012 Tex. App. LEXIS 8349, 2012 WL 4757929 (Tex. App. Houston 14th Dist. Oct. 4 2012).

1012. In a murder case, the trial court did not err when it denied defendant the opportunity to question an eyewitness about her experience with burning people to establish her as an alternate perpetrator. With little details regarding the alleged past conduct, the trial court did not err in sustaining the State's relevancy objection under Tex. R. Evid. 403 because the court could not determine whether the excluded testimony was sufficient to show a nexus between the crime charged and the alleged alternative perpetrator to avoid confusing the issues at trial. Dayne Adenauer White v. State, 2012 Tex. App. LEXIS 8107 (Tex. App. Houston 1st Dist. Sept. 27 2012).

1013. At defendant's trial for indecency with a child by contact, the trial court did not abuse its discretion by overruling defendant's Tex. R. Evid. 403 objection to the portions of a recorded interview in which he admitted viewing pornography, masturbating, and having sexual urges toward children. The prejudicial impact of the evidence was low in light of the allegations against him, and defendant's description of his sexual urges toward children was relevant to the elements of the offense. Mattingly v. State, 382 S.W.3d 611, 2012 Tex. App. LEXIS 8126, 2012 WL 4457713 (Tex. App. Amarillo Sept. 26 2012).

1014. Record did not affirmatively show that potential objections to evidence would have been successful, or if so, would have resulted in the exclusion of the evidence; nothing indicated that the proper foundation could not have been provided if objected to, and nothing indicated that the trial court would have excluded the evidence as unduly prejudicial, and thus the father failed to show that had counsel objected, the evidence would have been excluded, and the court did not find counsel was deficient for failing to objection. Medellin v. Tex. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 8225, 2012 WL 4466511 (Tex. App. Austin Sept. 26 2012).

1015. During the punishment phase of defendant's trial for intoxication assault, the trial court did not err by admitting a statement probative of defendant's general attitude of selfishness because the statement was relevant under Tex. R. Evid. 401 to show defendant's character and helpful to the jury in determining whether she was a good candidate for community supervision. The trial court did not abuse its discretion in overruling defendant's Tex. R. Evid. 403 objection, because the State needed the statement to counter testimony from family and friends as to defendant's sweet nature and tender-heartedness. Ford v. State, 2012 Tex. App. LEXIS 8034, 2012 WL 4243715 (Tex. App. Waco Sept. 20 2012).

1016. At defendant's trial for DWI, any error in the admission of medical records containing extraneous offense evidence under Tex. R. Evid. 403 did not have a substantial effect on the verdict because the jury heard evidence that defendant was passed out in his vehicle with a bottle of alcohol between his legs; the officer noticed defendant's glassy and bloodshot eyes, defendant admitted he consumed alcohol and prescription medications, and field sobriety test results suggested intoxication. The record contained sufficient evidence from which the jury could find defendant guilty of DWI beyond a reasonable doubt. Lorenz v. State, 2012 Tex. App. LEXIS 7777, 2012 WL 4017766 (Tex. App. Beaumont Sept. 12 2012).

1017. Photograph showed the complainant's male fetus about 18 weeks in gestational age, who died when the complainant died, there was some indication that the photograph was not displayed on a screen overhead, and appellant challenged the admission of the photograph on Tex. R. Evid. 403 grounds; however, appellant was charged with the capital murder of the complainant and the unborn child, the photograph related to one victim, only one photograph was used during the medical examiner's testimony, and the photograph was not gruesome, nor did it depict mutilation, and thus the trial court did not abuse its discretion in admitting the photograph. Zapata v. State, 2012 Tex. App. LEXIS 7700, 2012 WL 3892878 (Tex. App. Dallas Sept. 10 2012).

1018. Trial court properly admitted a sex offender's prior written statements in his sexually violent predator commitment proceeding because the statements were relevant apart from their tendency to prove the sex offender's stipulated convictions. The prior inconsistent statements were neither unduly prejudicial nor cumulative of the matters that the sex offender admitted in his requests for admissions. In re Commitment of Bath, 2012 Tex. App. LEXIS 7586, 2012 WL 3860631 (Tex. App. Beaumont Sept. 6 2012).

1019. Trial court did not abuse its discretion by admitting a photograph of the victim's head after her body was discovered in the closet despite defendant's Tex. R. Evid. 403 objection because it was probative of the injuries sustained by the victim, the single photograph did not require a great deal of time to present to the jury, and, though gruesome, depicted no more than the unpleasant, natural consequences of defendant's crime of murder. Hernandez-Sandoval v. State, 2012 Tex. App. LEXIS 7660, 2012 WL 3870306 (Tex. App. Amarillo Sept. 6 2012).

1020. Court properly admitted extraneous offense evidence because the State was required to prove that defendant committed the aggravated assault with intent to participate as a member of a criminal street gang and the intent element was hotly contested because defendant asserted that the crimes were not gang-related but simply an argument over a woman that escalated into a fight; it was the State's theory that the gang members assaulted the victim in retaliation for him disrespecting another gang member by interfering with his advances on a woman. There was no evidence the jury gave the evidence undue weight. Romero v. State, 2012 Tex. App. LEXIS 7573, 2012 WL 3834917 (Tex. App. El Paso Sept. 5 2012).

1021. In a tampering with evidence case, the court properly admitted Tex. R. Evid. 404(b) evidence that defendant police officer had been at parties and that he was drinking with underage females because defendant attempted to show that the State was engaging in selective prosecution, and the State introduced the evidence to rebut the defensive theory. The State's evidence to rebut the defensive theory was not overly broad, and the court heard the testimony outside the presence of the jury. Shults v. State, 2012 Tex. App. LEXIS 7478, 2012 WL 3799209 (Tex. App. Waco Aug. 30 2012).

1022. In a domestic assault case, the court properly admitted evidence because the fact that defendant had a prior conviction for assault-family violence was an essential element of the repeat-offender charge, and the victim did not appear at trial to testify so the State needed the evidence to rebut the defensive theory of fabrication. Additionally, the victim's mother, when testifying to the extraneous offense, did not go into graphic detail regarding the circumstances surrounding the prior assault, and the documents relating to the offense also did not provide much detail in describing the assault. Garcia v. State, 2012 Tex. App. LEXIS 7543 (Tex. App. Austin Aug. 29 2012).

1023. Trial court did not abuse its discretion by admitting evidence that defendant offered to pay for an abortion for another teenager with whom he had sex because the record did not establish the requisite level of danger of unfair prejudice under Tex. R. Evid. 403, as the alleged act occurred in another town in the mid-1990s and the trial court could have found that the evidence was helpful in creating a fuller picture of defendant for the jurors, much like the evidence of his good work and family ties. Chavez v. State, 2012 Tex. App. LEXIS 7127, 2012 WL 3629619 (Tex. App. Austin Aug. 24 2012).

1024. Trial court did not abuse its discretion by admitting hundreds of digital images of gay pornography seized from defendant's home computer, including some that depicted children, under Tex. R. Evid. 404(b) because the trial court found that a defense witness's testimony opened the door to the pornography, as the defense elicited testimony about her opinion as to whether defendant could have committed the charges complained of and as a result, left a false impression with the jury. The trial court did not err by admitting the evidence over defendant's Tex. R. Evid. 403 objection because the State did not spend an excessive amount of time on the evidence and the pictures were no more heinous than the testimony elicited of the victims. Pawlak v. State, 2012 Tex. App. LEXIS 7109, 2012 WL 3612493 (Tex. App. Corpus Christi Aug. 23 2012).

1025. Text messages' probative value was not substantially outweighed by the prejudice in their admission, under Tex. R. Evid. 403, given that (1) the messages were relevant to the crime, and (2) even if there was error in admitting the messages, there was no harm; even without the text messages, there was enough evidence to substantiate appellant's anger. Trammell v. State, 2012 Tex. App. LEXIS 7149, 2012 WL 3612518 (Tex. App. Corpus Christi Aug. 23 2012).

1026. Court erred during defendant's trial for sexual assault of a child in admitting portions of recorded telephone conversations between defendant and a detective, which stated that defendant would rather spend time with kids, on the ground that the evidence was more prejudicial than probative. Dekneef v. State, 379 S.W.3d 423, 2012 Tex. App. LEXIS 7024 (Tex. App. Amarillo Aug. 22 2012).

1027. To the extent appellant claimed the trial court erred in not conducting a Tex. R. Evid. 403 balancing analysis on the record, the court disagreed because there was no requirement that such be on the record, and the court presumed the test was conducted once an objection was made, unless the record showed otherwise. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1028. There was no abuse of discretion by the trial court's admission of extraneous offense evidence, because all of the Tex. R. Evid. 403 factors weighed in favor of admitting the evidence. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1029. Probative nature of the extraneous offense was high as it arguably rebutted appellant's claim that the charges were fabricated as part of a conspiracy; the extraneous offense showed that appellant was arrested while driving his truck away from a lot behind the victim's house, the truck was spotted while police investigated a break-in report at the victim's house, and the break-in took place within days of the charged offense, and this weighed in favor of admitting the evidence. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1030. Potential of the extraneous offense evidence to impress the jury in an irrational but indelible way was not high, given that the evidence did not involve a crime of violence and the trial court gave a limiting instruction, and this factor weighed in favor of admitting the evidence. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1031. Extraneous offense was not discussed until cross-examination of appellant and then in the State's rebuttal case, and the testimony covered 50 pages out of more than 400 pages of testimony, which was not excessive; this factor weighed in favor of admitting the evidence. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1032. State's need for the evidence was high because it needed the extraneous offense evidence in order to rebut appellant's defensive theories, including conspiracy. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1033. Trial court did not err by admitting the testimony of an officer and a bail bondsman employee regarding defendant's prior arrest for felony possession of cocaine and subsequent bail under Tex. R. Evid. 404(b) because the State was entitled to rebut defendant's testimony that he accidentally struck the police vehicles while attempting to flee and it tended to establish that defendant's motive for assaulting the officer was to avoid revocation of his felony bail. The court held that the admission of the evidence was proper under Tex. R. Evid. 403 because: (1) created an inference that the assault on the officer was not accidental and defendant had a motive for attempting to flee; (2) the evidence exhibited little potential to improperly impress the jury; (3) the development of the evidence took only a short portion of the trial; and (4) the State needed the evidence because defendant testified that striking

the officers' vehicles was accidental and he had no reason to flee from or assault the officer. Freeman v. State, 2012 Tex. App. LEXIS 6996 (Tex. App. Amarillo Aug. 20 2012).

1034. Court did not abuse its discretion in admitting evidence regarding the underlying offense for which defendant was required to register as a sex offender because the State introduced statements made by defendant to officers that he did not think he should have to register as a sex offender because the sex with his thirteen-year-old stepdaughter was consensual. The State argued such evidence was relevant to show defendant's casual attitude regarding sex offender registration requirements and defendant's intent to ignore them; presentation of the disputed evidence did not consume an inordinate amount of time. Toliver v. State, 2012 Tex. App. LEXIS 6902, 2012 WL 3553380 (Tex. App. Dallas Aug. 17 2012).

1035. Trial court did not abuse its discretion under Tex. R. Evid. 403 by allowing the State's use of defendant's investigator's bills to cross-examine defendant because while the evidence may have been prejudicial it was not unfairly prejudicial. Pardee v. State, 2012 Tex. App. LEXIS 6823, 2012 WL 3516485 (Tex. App. Texarkana Aug. 16 2012).

1036. In a negligence suit under the Jones Act, 46 U.S.C.S. § 30104, the trial court abused its discretion by sustaining a Tex. R. Evid. 403 objection to prohibit an injured seaman who slipped and fell on deck from impeaching the captain by questioning him about the subsequent painting of the boat's entire wooden deck with non-skid paint. By asking the captain about the use or non-use of non-skid paint on a vessel not involved in the lawsuit, the operator of the boat opened the door for the injured seaman to cross-examine the captain about the operator's use of non-skid paint on other vessels in its fleet. Hewitt v. Ryan Marine Servs., 2012 Tex. App. LEXIS 6808, 2012 WL 3525408 (Tex. App. Houston 14th Dist. Aug. 16 2012).

1037. Because at trial defense counsel did not object to pictures of his tattoos on the basis of Tex. R. Evid. 402 and 403, defendant's complaint on appeal was not preserved. Mejia v. State, 2012 Tex. App. LEXIS 6862, 2012 WL 3525641 (Tex. App. Corpus Christi Aug. 16 2012).

1038. At a bench conference, counsel made an argument under Tex. R. Evid. 403 regarding a videotape, and although counsel failed to reassert her objection during the sentencing part of the trial, because the bench conference discussing the videotape was done outside of the jury's presence, the issue was preserved for review, for purposes of Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1). Garza v. State, 2012 Tex. App. LEXIS 6865, 2012 WL 3525634 (Tex. App. Corpus Christi Aug. 16 2012).

1039. Appellant failed to meet his burden under the test for ineffective assistance, given that (1) he did not offer any authority or argument, under Tex. R. App. P. 38.1(i), showing that the trial court would have erred in overruling an objection under Tex. R. Evid. 401, 402, 403, (2) the trial court did overrule appellant's relevance objection under Tex. R. Evid. 402 as to a deputy's testimony, (3) appellant did not raise the issue on appeal, although he claimed that one reason counsel should have objected on relevancy grounds was to preserve the issue for appeal, and (4) counsel's failure to object might have been sound trial strategy, as the testimony was brief, counsel already objected to relevance of the testimony, and a later objection was successful and the trial court instructed the jury to disregard the testimony concerning whether committing a crime was something to be expected from persons with a certain disease; the court could not say that counsel's failure to further object was ineffective assistance. Ozuna v. State, 2012 Tex. App. LEXIS 6858, 2012 WL 3525635 (Tex. App. Corpus Christi Aug. 16 2012).

1040. Court rejected appellant's claim that photographs of the victim were more prejudicial than probative under Tex. R. Evid. 403; although they were gruesome, the photographs were probative of the extent and nature of the victim's injuries, and they did not portray anymore than the gruesomeness appellant inflicted. Dempsey v. State,

2012 Tex. App. LEXIS 6871, 2012 WL 3525653 (Tex. App. Corpus Christi Aug. 16 2012).

1041. Court found no abuse of discretion with the admission of photographs of the trial scene, which appellant claimed were more prejudicial than probative under Tex. R. Evid. 403; the photographs were necessary to show location and the brutality of the offense of attempted capital murder. Dempsey v. State, 2012 Tex. App. LEXIS 6871, 2012 WL 3525653 (Tex. App. Corpus Christi Aug. 16 2012).

1042. In a sexual assault case, the court did not err by allowing evidence of a 2008 kidnap and sexual assault of another victim because both victims were forcefully taken and isolated from anyone who could help them; after defendant had each woman in his car, he restrained each of them, and used derogatory terms towards both. He physically assaulted each woman; ripped off their clothing; and in each case forcefully penetrated their vaginas with his fingers or his hand. Ramos v. State, 2012 Tex. App. LEXIS 6780, 2012 WL 3363348 (Tex. App. El Paso Aug. 15 2012).

1043. At defendant's trial for family violence assault, the trial court did not abuse its discretion by admitting evidence of his prior assault against the victim to explain the victim's fear of retaliation and to rebut the defensive theory that the victim fabricated the allegations. While evidence of the prior assault was unfavorable to defendant, it was not unfairly prejudicial for purposes of Tex. R. Evid. 403. Stanley v. State, 2012 Tex. App. LEXIS 7064, 2012 WL 3601128 (Tex. App. Austin Aug. 14 2012).

1044. In a murder case, the court properly admitted photographs of defendant's tattoos because the "REDRUM" and revolver tattoos were especially probative of defendant's intent and attitude relevant to his defense and testimony that he would never point a gun at someone else first. Given defendant's own counsel's indication that everyone had tattoos and criminal records, on both sides, there was no indication the evidence unfairly aroused the jury's hostility or sympathy. Luckett v. State, 2012 Tex. App. LEXIS 6686, 2012 WL 3241802 (Tex. App. Dallas Aug. 10 2012).

1045. Trial court did not abuse its discretion when it did not exclude evidence of an extraneous murder pursuant to Tex. R. Evid. 403 where: (1) the extraneous offense evidence made defendant's identity as the murderer of the victim in the instant case more probable; (2) the pictures relating to the extraneous murder were some evidence of the similarity in the modus operandi of the attacks, which was highly probative; (3) the trial court instructed the jurors to limit their consideration of the extraneous offense evidence; and (4) the State's need for the evidence favored admissibility of the extraneous murder. The trial court was within the zone of reasonable disagreement when it implicitly ruled that the probative value of the extraneous murder was not substantially outweighed by its prejudicial effect. Mcgregor v. State, 394 S.W.3d 90, 2012 Tex. App. LEXIS 6552, 2012 WL 3244196 (Tex. App. Houston 1st Dist. Aug. 9 2012).

1046. To the extent autopsy photographs could be seen as disturbing as they showed the victim lifeless, the photographs did not portray any more than the consequences of appellant's felony murder, and under Tex. R. Evid. 403, the trial court could have found that the probative value of the photographs was not substantially outweighed by its inflammatory nature, if there was any; the trial court did not abuse its discretion in overruling appellant's Rule 403 objections and admitting the photographs. Dittman v. State, 2012 Tex. App. LEXIS 6428, 2012 WL 3139873 (Tex. App. Dallas Aug. 3 2012).

1047. Passenger's evidence concerning her physical, emotional, and economic limitations was properly excluded by the trial court because even if it was relevant, it was merely the presentation of cumulative evidence; the passenger's 2008 motion for reinstatement did not raise the issue of how her health and finances may have limited her ability to pursue her claim. Welborn v. Ferrell Enters., 376 S.W.3d 902, 2012 Tex. App. LEXIS 6378 (Tex. App.

Dallas Aug. 2 2012).

1048. Naming of the Texas Department of Family and Protective Services as permanent managing conservator of the mother's children was proper because her contention that by failing to object to questions, her trial counsel allowed the State to improperly comment on the attorney-client relationship was without merit. The evidence was relevant to the State's allegations that the mother had a pattern of alternating between periods when she was stable and had her illness under control followed by relapses in which she exhibited erratic behavior leading to confrontations with other people; the mother did not argue on what basis the trial court would have excluded such evidence, and considering other evidence of the mother's behavior during the case, it was not substantially more prejudicial than probative. In the Interest of S.W., 2012 Tex. App. LEXIS 6363, 2012 WL 3115749 (Tex. App. Fort Worth Aug. 2 2012).

1049. Naming of the Texas Department of Family and Protective Services as permanent managing conservator of the mother's children was proper because she failed to show that her counsel was ineffective. The evidence as to the mother's inability to manage her finances was not substantially more prejudicial than probative as it showed her continued problems with basic life skills even though her mental status appeared to have temporarily improved as trial approached; thus, her trial counsel was not ineffective for failing to object to the questions regarding her 2010 tax return. In the Interest of S.W., 2012 Tex. App. LEXIS 6363, 2012 WL 3115749 (Tex. App. Fort Worth Aug. 2 2012).

1050. During defendant's trial for indecency with a child by contact, the court did not err under the rule in excluding evidence of the subsequent kidnapping and sexual assault of the victim; the kidnapping and sexual assault could have tended to confuse or distract the jury from the main issues in defendant's case. Woodall v. State, 376 S.W.3d 122, 2012 Tex. App. LEXIS 6245 (Tex. App. Texarkana July 31 2012).

1051. Regarding appellant's convictions of robbery and aggravated robbery, identity was at issue, and each robbery, including the extraneous offense, took place at night in convenience or dollar stores, the perpetrator made victims retreat to the back of the store, the perpetrator demanded cash via a note in three of the four offenses, and in two of the robberies, appellant's note identified the cash denominations sought, and it was not an abuse of discretion to admit this evidence, for purposes of Tex. R. Evid. 404(b); concerning the Tex. R. Evid. 403 component of this analysis, any prejudicial effect was mitigated because this was a bench trial, and the decision to admit the evidence was within the zone of reasonable disagreement. Williams v. State, 2012 Tex. App. LEXIS 6338, 2012 WL 3104390 (Tex. App. Tyler July 31 2012).

1052. Trial court did not abuse its discretion by admitting evidence of extraneous offenses committed by defendant during his trial for murdering his girlfriend's five-year-child because it was admissible under Tex. R. Evid. 403, as: (1) defendant's ex-girlfriend's testimony regarding defendant's distinctively similar pattern of assaultive behavior and manner of abuse toward her son strongly served to make it more probable that it was defendant that assaulted the child leading to her death; (2) the State's need for the testimony was high as only two people could testify regarding the events of the day the child died presented completely contradictory accounts of those events; 93) the trial court instructed the jury regarding the appropriate use of the testimony; and (4) the nature of defendant's assault on his ex-girlfriend's child, which did not cause his death or apparently any serious or permanent injury, was less emotional than the testimony regarding the nature of his assault on his girlfriend's child. Castro v. State, 2012 Tex. App. LEXIS 6233, 2012 WL 3104817 (Tex. App. Amarillo July 30 2012).

1053. Appellant did not dispute that the proffered evidence was hearsay, and it was his responsibility to specify the exception on which he relied, but he failed to cite one; even if the court found the evidence was admissible under Tex. R. Evid. 403, on which appellant focused, appellant did not address the hearsay issue, and thus the trial court did not abuse its discretion in excluding the testimony on inadmissible hearsay grounds. Quevedo v. State, 2012

Tex. App. LEXIS 6178, 2012 WL 3055470 (Tex. App. Dallas July 27 2012).

1054. In a capital murder case, a crime scene video was properly not excluded under Tex. R. Evid. 403 because it was not duplicative of autopsy photographs; moreover, the fact that the video showed burns and nudity was not a sufficient reason for exclusion either. Even if the video was improperly admitted, it had a slight or no effect on the jury's verdict. Denson v. State, 2012 Tex. App. LEXIS 5971, 2012 WL 3025845 (Tex. App. San Antonio July 25 2012).

1055. On appeal from his convictions for compelling prostitution, sexual assault of a child, and sexual performance of a child, the appellate court found that the admission of photographs of items seized from a trash can outside of the studio were admissible because they were relevant and the probative value was not substantially outweighed by the danger of unfair prejudice. Although the evidence might not have pertained directly to the complainant, proof of the activities at the studio was relevant to whether, in employing the complainant at the studio, defendant intended that she engage in sexual performance and prostitution. Wilkerson v. State, 2012 Tex. App. LEXIS 5656, 2012 WL 2877623 (Tex. App. Dallas July 16 2012).

1056. Trial court did not err by admitting testimony by the shooter about previous attempts defendant had made on her husband's life under Tex. R. Evid. 403 because the testimony was probative as the acts testified to were virtually identical to that with which defendant was charged, it tended to show defendant's motive and intent to end her husband's life, and a witness testified later, without objection, about two instances when defendant sought her advice or assistance in locating someone who could kill her husband, and therefore defendant was not harmed by the admission of the shooter's testimony. Grigsby v. State, 2012 Tex. App. LEXIS 5598, 2012 WL 2861670 (Tex. App. Corpus Christi July 12 2012).

1057. Because the extraneous offense evidence was not admissible, the court did not need to decide if the probative value of the evidence was outweighed by the danger of unfair prejudice. Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270 (Tex. App. Eastland July 12 2012).

1058. Trial court did not err by excluding evidence of the father's psychological evaluation, which included an evaluation of his predilection to pedophilia, because since the father's stated reason to admit the evidence could be accomplished by permitting the mother to testify concerning actions she took to investigate allegations of child abuse against the father in 2003, the trial court was within its discretion to find that there was no other purpose for which the evaluation could have been offered than for the truth of its contents. In addition, the trial court was within its discretion to decide that the evaluation itself would have been cumulative of the mother's testimony and that admitting it would have needlessly confused the jury. In the Interest of W.B.W., 2012 Tex. App. LEXIS 5562, 2012 WL 2856067 (Tex. App. Eastland July 12 2012).

1059. In defendant's aggravated assault, family violence penalty trial, the trial court did not err in admitting two photos of the victim lying in a hospital bed, attached to a ventilator with I-Vs in her arm and with a brace on her neck over defendant's Tex. R. Evid. 403 objection. Mejias v. State, 2012 Tex. App. LEXIS 5616, 2012 WL 2866303 (Tex. App. Waco July 12 2012).

1060. Trial court did not abuse its discretion by excluding from evidence video recordings appellants took of appellee because from the video, there was no way to know what had been edited out, and therefore the trial court could have determined that audio of appellee making harassing comments on various dates in 2006 could mislead the jury. Vaughn v. Drennon, 372 S.W.3d 726, 2012 Tex. App. LEXIS 5488, 2012 WL 2833847 (Tex. App. Tyler July 11 2012).

1061. Trial court did not abuse its discretion by admitting portions of the victim's police interview during which he claimed defendant threatened to kill him like he had other boys because the statements were necessary to understand how defendant overcame the victim's resistance to the sexual assault and the evidence was relevant to rebut defendant's claim that he did not threaten the victim. The evidence was probative of whether defendant used or exhibited a deadly weapon to accomplish the assault, presentation of the evidence took little time, and the statements did not suggest an improper basis for deciding the case. Sandles v. State, 2012 Tex. App. LEXIS 5518, 2012 WL 3104377 (Tex. App. Dallas July 11 2012).

1062. Trial court did not abuse its discretion by allowing two witnesses to testify about extraneous offenses because it could have concluded that the evidence was relevant, probative, and necessary to rebut defendant's theory that the victim fabricated her allegation against defendant. The State's presentation of the evidence consumed very little time, and it was presented in a fashion to prove defendant's intent or knowledge of the offenses charged in the indictment. Guardado v. State, 2012 Tex. App. LEXIS 5514, 2012 WL 2832561 (Tex. App. El Paso July 11 2012).

1063. Defendant failed to preserve for review his claim that the trial court abused its discretion by admitting the covers of commercial pornography video recording that were found in his home because the argument that the covers were more prejudicial than probative was preserved at trial, it was not argued on appeal. Although the argument that the covers improperly impeached the witness with other acts was argued on appeal, it was not preserved for review. Fletcher v. State, 2012 Tex. App. LEXIS 5429, 2012 WL 2783298 (Tex. App. Texarkana July 10 2012).

1064. Determination of the identity of the person fleeing from the police officer was a fact of significant consequence to the determination of the action, and an extraneous offense may be admissible, to show the identity of the accused, Tex. R. Evid. 403(b); therefore, evidence pertaining to identity was relevant and the trial court's decision to deny defendant's objection on the basis of Tex. R. Evid. 401 was within the zone of reasonable disagreement. White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

1065. Determination of the identity of the person fleeing from the police officer was a fact of significant consequence to the determination of the action, and an extraneous offense may be admissible, to show the identity of the accused, Tex. R. Evid. 403(b); therefore, evidence pertaining to identity was relevant and the trial court's decision to deny defendant's objection on the basis of Tex. R. Evid. 401 was within the zone of reasonable disagreement. White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

1066. Trial court did not abuse its discretion in admitting into evidence photographs of the victim's body at the crime scene as it reviewed the photographs with the Tex. R. Evid. 403 standard invoked in mind, and the court repeated part of that standard in the midst of its ruling. Gonzalez v. State, 2012 Tex. App. LEXIS 5215, 2012 WL 2509693 (Tex. App. Dallas June 28 2012).

1067. Where defendant entered a plea of guilty to four aggravated robberies, the trial court did not abuse its discretion in admitting photographs of defendant's tattoos as they were relevant to the jury's determination of his suitability for community supervision. Two of the tattoos indicated defendant's religious beliefs, one resembled knowledge, and another tattoo depicted a caretaker of death pouring down beer; nothing in the tattoos was so unfairly prejudicial that its exclusion was required under Tex. R. Evid. 403. Jackson v. State, 2012 Tex. App. LEXIS 5221, 2012 WL 2445052 (Tex. App. Dallas June 28 2012).

1068. Defendant waived his complaint that the trial court should have undertaken a Tex. R. Evid. 403 balancing test concerning photographs showing the condition of defendant's home because at trial defendant relied on his objection that the evidence was not relevant. Brown v. State, 381 S.W.3d 565, 2012 Tex. App. LEXIS 5164 (Tex.

App. Eastland June 28 2012).

1069. Tex. R. Evid. 401 is helpful in determining what evidence should be admissible under Tex. Code Crim. Proc. art. 37.07, § 3(a), but the definition is not a perfect fit in the punishment phase; relevance is a question of what is helpful to the jury to determine the appropriate sentence for the particular defendant, however, evidence that is relevant may be excluded if the danger of unfair prejudice substantially outweighs the probative value of the evidence. Ex Parte Rogers, 369 S.W.3d 858, 2012 Tex. Crim. App. LEXIS 856 (Tex. Crim. App. 2012).

1070. There was no reasonable strategy for counsel not to object to a witness's testimony in the punishment phase, and even though applicant did not address this matter in his habeas corpus writ, such was relevant, given that in the prior offense and this case, applicant exhibited behavior that was similar, and the attack on the witness was different, and this called into question the probative value of this evidence; had counsel adequately investigated this assault prior to trial, he would have had a stronger basis to ask for exclusion of the prejudicial testimony, and the witness's testimony was likely inflammatory, such that the danger of unfair prejudice substantially outweighed the probative value of the evidence. Ex Parte Rogers, 369 S.W.3d 858, 2012 Tex. Crim. App. LEXIS 856 (Tex. Crim. App. 2012).

1071. Evidence was properly admitted as possession of a certain amount of cash was relevant to the issue of possession of firearm, Tex. R. Evid. 403; trial counsel's relevance objection with respect to defendant's personal items failed to preserve error, Tex. R. App. P. 33.1, as to the prejudicial effect of defendant's testimony of the amount of cash in his possession. Tyson v. State, 2012 Tex. App. LEXIS 5059, 2012 WL 2393083 (Tex. App. Texarkana June 26 2012).

1072. Exclusion of the photographic evidence, of marginal relevance at best, was not calculated to cause, nor did it probably cause, the rendition of an improper judgment; because the photographs in question did not purport to show the condition of the property at the time of the annexation, but later, the trial court did not abuse its discretion in excluding them. City of Lufkin v. Akj Props., Inc., 2012 Tex. App. LEXIS 5057, 2012 WL 2393087 (Tex. App. Texarkana June 26 2012).

1073. Appellant did not object to evidence of narcotics use when the State posed a question or when the witness answered, but at a bench conference, he argued that the evidence was not relevant, and this was sufficient to preserve the relevance objection given that the objection was deemed to apply when the evidence was subsequently admitted, for purposes of Tex. R. Evid. 103(a)(1); at the bench conference, appellant did not object on prejudicial effect grounds, the objection at trial did not comport with the one on appeal, and he failed to preserve error on the claim that the testimony was prejudicial. Miles v. State, 2012 Tex. App. LEXIS 4929, 2012 WL 2356478 (Tex. App. Houston 14th Dist. June 21 2012).

1074. Identification of defendant by the witness who stated that she was afraid to identify defendant from a photo lineup was highly probative evidence for the State in the murder case, and while certainly prejudicial to defendant, it was not unfairly prejudicial under Tex. R. Evid. 403. Benavides v. State, 2012 Tex. App. LEXIS 4971, 2012 WL 2353731 (Tex. App. Dallas June 21 2012).

1075. Trial court did not err in admitting a color photograph of a murder victim taken at her autopsy, which depicted a side shot of her from the neck up and showed a placard placed beside her body bearing a unique autopsy number, because the photo was not gruesome, and because the State needed to identify the person in the photo as that of the victim. The probative value of the photo was not substantially outweighed by the danger of unfair prejudice. Bibbs v. State, 371 S.W.3d 564, 2012 Tex. App. LEXIS 4677, 2012 WL 2135561 (Tex. App. Amarillo June 13 2012).

1076. Photograph of a murder victim taken at the crime scene after she had been shot by defendant was properly admitted where: (1) witnesses identified the picture as that of the victim; (2) the photo was not gruesome and showed no indication that the body had been posed or otherwise disturbed; and (3) the jury saw a video that showed the entire episode without objection. The photo simply depicted the result of a violent assault by one person, defendant, on another person, the victim, and the photo's probative value was not substantially outweighed by danger of unfair prejudice. Bibbs v. State, 371 S.W.3d 564, 2012 Tex. App. LEXIS 4677, 2012 WL 2135561 (Tex. App. Amarillo June 13 2012).

1077. Trial court did not err by admitting into evidence a picture of a pornographic videotape that contained adult pornography during defendant's trial on charges of indecency with a child and sexual assault of a child because it had some probative value, as a complainant testified that defendant used pornography in his bedroom immediately before sexually assaulting her and an officer testified about the use of pornography in grooming sexual assault victims. Admission of the picture was not unfairly prejudicial because defendant called the complainant's credibility into question, the officer provided unobjected-to testimony about similar materials found on defendant's computer, and the State focused on the evidence for a relatively short amount of time. Allen v. State, 2012 Tex. App. LEXIS 4598, 2012 WL 2106550 (Tex. App. Houston 1st Dist. June 7 2012).

1078. Trial court did not err by admitting into evidence a school principal's testimony about one of the complainant's bad hygiene during defendant's trial on charges of indecency with a child and sexual assault of a child because the State represented that its relevance would be demonstrated through later testimony and defendant did not argue that the relevance of the testimony was not demonstrated with later evidence. Allen v. State, 2012 Tex. App. LEXIS 4598, 2012 WL 2106550 (Tex. App. Houston 1st Dist. June 7 2012).

1079. In appellant's aggravated sexual assault trial, a therapist testified that the victim showed behavior that was consistent with sexual abuse; the trial court did not abuse its discretion in admitting the testimony under Tex. R. Evid. 403. Lopez v. State, 2012 Tex. App. LEXIS 4533, 2012 WL 2053846 (Tex. App. Waco June 6 2012).

1080. Counsel was not ineffective for making a Tex. R. Evid. 404(b) objection to extraneous offenses because it would have been overruled, as Tex. Code Crim. Proc. Ann. art. 38.37, § 2 permitted the admissibility of evidence that defendant provided alcohol and pornography to the child victims to lure or groom them. Counsel was not ineffective for failing to make a Tex. R. Evid. 403 objection because the factors of the balancing test weighed in factor of admitting the evidence, as it was probative of the relationship between defendant and the victims. Odom v. State, 2012 Tex. App. LEXIS 4316, 2012 WL 1964580 (Tex. App. Houston 14th Dist. May 31 2012).

1081. At defendant's trial for aggravated sexual assault, the trial court did not err in admitting evidence that he sexually assaulted two other women because the extraneous offenses were admissible under Tex. R. Evid. 404(b) to show intent in response to the defense theory that the complainant consented. The trial court did not abuse its discretion in determining the evidence was not substantially more prejudicial than probative under Tex. R. Evid. 403, because only one fifth of the testimony involved the extraneous offense evidence and the jury was given proper limiting instructions. Brown v. State, 2012 Tex. App. LEXIS 4150, 2012 WL 1893700 (Tex. App. Houston 1st Dist. May 24 2012).

1082. In a trial for injury to a child, in which the trial court admitted evidence of extraneous wrongs committed by defendant, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because there appeared little chance that the evidence was likely to influence the jury irrationally, as the conduct at issue did not involve instances where defendant caused other injuries. Moreover, the State did not spend an excessive amount of time developing the evidence. Quirk v. State, 2012 Tex. App. LEXIS 4123, 2012 WL 1882934 (Tex. App. Beaumont May 23 2012).

1083. Trial court did not abuse its discretion by admitting evidence of extraneous offenses based on Tex. R. Evid. 403 because: (1) the inherent probative force of the evidence was significant as it tended to rebut defendant's self-defense theory and was highly probative of defendant's intent in assaulting the victim, a material issue at trial; (2) it took the State little time to present the evidence to the jury; and (3) defendant identified no similar evidence the State could have used to rebut his defensive theory. Castillo v. State, 2012 Tex. App. LEXIS 3997, 2012 WL 1764089 (Tex. App. Dallas May 18 2012).

1084. Appellant claimed that even if the extraneous acts were relevant, they should have not been admitted under Tex. R. Evid. 403, but the State's establishment of motive relied almost exclusively on the extraneous acts against the victim or in retaliation for the current charge against appellant, and the parties' relationship was probative in helping develop the State's case and show motive; there was no abuse of discretion on the trial court's part in overruling appellant's objection. Jurasek v. State, 2012 Tex. App. LEXIS 3973, 2012 WL 1810197 (Tex. App. Corpus Christi May 17 2012).

1085. Trial court did not abuse its discretion by admitting into evidence during defendant's stalking trial the victim's testimony about defendant's prior conviction for attempted murder because its prejudicial effect did not outweigh its probative value under Tex. R. Evid. 403, as: (1) the victim's testimony was probative of both the existence and reasonableness of her fear; (2) the State needed to elicit the victim's testimony since much of defendant's conduct not overtly hostile or threatening; and (3) the trial court gave an instruction limiting the jury's consideration of the evidence to prove the victim's and defendant's state of mind. Ramroop v. State, 2012 Tex. App. LEXIS 3688, 2012 WL 1649890 (Tex. App. Houston 1st Dist. May 10 2012).

1086. FBI agent's testimony was admissible under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) as it reflected defendant's ongoing relationship, or defendant's willingness to maintain an ongoing relationship, with a known fugitive and was probative of defendant's character and suitability for community supervision, but it was not unfairly prejudicial under Tex. R. Evid. 403. Jeffs v. State, 2012 Tex. App. LEXIS 3779, 2012 WL 1660612 (Tex. App. Austin May 10 2012).

1087. For purposes of Tex. R. Evid. 403, appellant's blood test result amounted to evidence that he had alcohol, which tended to increase the probability that he was intoxicated when he was driving, especially since there was nothing to show that appellant consumed any alcohol after the accident; because the consumption issue was contested, the test result was probative, and this factor weighed in favor of admissibility. Morales v. State, 2012 Tex. App. LEXIS 3634 (Tex. App. San Antonio May 9 2012).

1088. Blood draw results related to the charged offense of driving while intoxicated, and thus the trial court could have found that the jury would not be confused by the test, and testimony about the blood draw did not take an inordinate amount of time, such that the trial court could have found that this weighed in favor of admissibility. Morales v. State, 2012 Tex. App. LEXIS 3634 (Tex. App. San Antonio May 9 2012).

1089. Expert did not give the jury a definitive driving blood alcohol content, the trial court could have found that the jury was able to able to evaluate the force of the blood test result, and the test result admission did not necessarily encourage the jury to conduct its own retrograde extrapolation because the jury did not have to establish blood alcohol concentration at the time of driving, based on the intoxication definition submitted; the jury only had to find that appellant did not have the normal use of his faculties by introducing alcohol into himself when he drove, and the test results could be considered with all evidence to determine if appellant was impaired, such that the trial court could have found that this weighed in favor of admissibility. Morales v. State, 2012 Tex. App. LEXIS 3634 (Tex. App. San Antonio May 9 2012).

1090. Under Tex. R. Evid. 403 and considering all the factors, the trial court could have found that a blood test result's probative value was not substantially outweighed by the danger of unfair prejudice in appellant's driving while intoxicated trial; at worst, the ruling of the trial court was within the zone of reasonable disagreement. Morales v. State, 2012 Tex. App. LEXIS 3634 (Tex. App. San Antonio May 9 2012).

1091. Without results of field sobriety test, given that the evidence of intoxication was subjective, the State needed objective evidence in this driving while intoxicated case, like the blood draw test results, in order to support evidence of impairment, and the trial court could have found that the need for the evidence weighed in favor of the evidence being admissible under Tex. R. Evid. 403. Morales v. State, 2012 Tex. App. LEXIS 3634 (Tex. App. San Antonio May 9 2012).

1092. Appellant claimed that the result of his blood draw taken over five hours after the accident, which result was just at the limit, could force the jury to engage in retrograde extrapolation, but the criminal appeals court had already rejected this claim; the blood test result that showed appellant consumed alcohol was not unfairly prejudicial as it related directly the offense of driving while intoxicated as charged in the indictment, and the evidence did not have major potential to impress the jury irrationally, such the trial court could have found that this weighed in favor of admitting the evidence under Tex. R. Evid. 403. Morales v. State, 2012 Tex. App. LEXIS 3634 (Tex. App. San Antonio May 9 2012).

1093. Because the Tex. R. Evid. 404(b) evidence was relevant in identifying defendant and showing his intent to commit capital murder, and the evidence was not so prejudicial as to overcome the effectiveness of the limiting instruction, under Tex. R. Evid. 403, the trial court did not abuse its discretion in allowing the extraneous offense evidence. Castoreno v. State, 2012 Tex. App. LEXIS 3636 (Tex. App. San Antonio May 9 2012).

1094. Defendant was free to present other evidence of the complainant's purported financial hardship, and the trial court did not abuse its discretion in sustaining the State's objection to introduction of evidence relating to the complainant's civil suit against a railroad company because it was not relevant and did not give rise to an inference of bias. West v. State, 2012 Tex. App. LEXIS 3612, 2012 WL 1606239 (Tex. App. Houston 14th Dist. May 8 2012).

1095. Bag from appellant's wallet contained trace amounts of methamphetamine, and the State had to prove via evidence other than possession that appellant knew the substance was a controlled substance; for purposes of Tex. R. Evid. 403, the trial court could have found that evidence of appellant's prior convictions for possession of a controlled substance showed his knowledge of such and were probative to the issue of his knowledge. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

1096. For purposes of Tex. R. Evid. 403, the trial court could have found that evidence of appellant's criminal history was needed by the State, given that (1) appellant's credibility was at issue, and (2) the State had to prove that appellant knew of the illegality of the substance he possessed. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

1097. For purposes of Tex. R. Evid. 403, although evidence of appellant's prior convictions might have had a tenancy to suggest an outcome on a basis that was improper based on the convictions' prejudicial nature, that was true of all evidence of appellant's prior convictions; Tex. R. Evid. 609 explicitly provides for impeachment with prior convictions for felonies and crimes of moral turpitude, the court presumed that the jury following the instruction to consider the prior convictions only for purposes of impeachment, nothing showed these instructions were disregarded, and the trial court did try to mitigate any improper influence. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

1098. Evidence of appellant's prior convictions was directly relevant to many issues in the case including knowledge of the illegality of the substance and appellant's credibility, for purposes of Tex. R. Evide. 403 and appellant's drug possession case. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

1099. Because the prior convictions concerned matters that laypersons could easily understand, the convictions were not prone to the tendency of misleading the jury, for Tex. R. Evid. 403 purposes. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

1100. For purposes of Tex. R. Evid. 403, the evidence of appellant's prior convictions was presented in a short amount of time and was not repetitive. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

1101. Appellant claimed that evidence was unnecessarily cumulative as the State could have used only certain convictions and not others; however, Tex. R. Evid. 609 places no restriction on the number of previous convictions that may be used to impeach a witness's credibility, and arguably, the number of previous convictions corresponds to the level of impeachment of the witness's credibility: the more previous convictions, the greater the impeachment. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

1102. Considering all factors for purposes of Tex. R. Evid. 403, the court did not find that the probative value of appellant's prior convictions were outweighed by the potential for unfair prejudice; the trial court did not abuse its discretion in admitting the evidence in light of the State's burden of proof in this drug possession case and the matters the defense put in issue, including defendant's credibility. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

1103. Counsel objected to evidence under Tex. R. Evid. 403 and counsel said he was not objecting under Tex. R. Evid. 609; thus, appellant did not preserve for review his Rule 609 issue, the case law factors that guided the balancing test under Rule 609 were not applicable, and the court only considered the Tex. R. Evid. 403 issue based on the factors that had to be considered in a Rule 403 balancing test. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

1104. Appellant's convictions for possession of a controlled substance were felony offense convictions, and a misdemeanor family violence assault conviction was a crime of moral turpitude, for purposes of Tex. R. Evid. 609(a), plus burglary of a motor vehicle was a crime of deception; the trial court could have found, for purposes of Tex. R. Evid. 403, that these convictions were probative of credibility of appellant. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

1105. Under Tex. R. Evid. 403, 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37, § 2, the evidence of harsh discipline imposed by defendant on his four children, including the victim of the aggravated sexual assaults, was admissible because it had significant probative value as that evidence served to explain to the jury how defendant perpetrated frequent sexual assaults on his young daughter over a period of years. Soria v. State, 2012 Tex. App. LEXIS 3345, 2012 WL 1570969 (Tex. App. Amarillo Apr. 27 2012).

1106. Appellant's affiliation with the Aryan Brotherhood was relevant and the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice because appellant's membership in the gang and his obligation to follow a higher-ranking member's orders were relevant to show appellant's motive for the crime. Evidence of appellant's membership in the Aryan Brotherhood was offered to show appellant's motive, was not introduced to show character conformity, did not violate Tex. R. Evid. 404, and was not unduly prejudicial under Tex. R. Evid. 403. Guffey v. State, 2012 Tex. App. LEXIS 3293, 2012 WL 1470185 (Tex. App. Eastland Apr. 26

2012).

1107. During defendant's trial for sexual assault of a child, evidence of his Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) membership was obviously unfavorable to him, but it was not unfairly prejudicial; it came as part of a larger examination of his character, behavior, and beliefs, which included the endorsement of and participation in the FLDS practice of underage marriage that subjected children to sexual assault. Jessop v. State, 368 S.W.3d 653, 2012 Tex. App. LEXIS 3176, 2012 WL 1402117 (Tex. App. Austin Apr. 19 2012).

1108. Probative value of the evidence regarding the drug ledger was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403 because the ledger and the testimony regarding the ledger were inherently probative of whether there was a drug enterprise and whether defendant possessed, with intent to deliver, methamphetamine under Tex. Health & Safety Code Ann. § 481.112. Martinez v. State, 2012 Tex. App. LEXIS 3048, 2012 WL 1344715 (Tex. App. Dallas Apr. 18 2012).

1109. In a murder case, a text message sent by appellant to his girlfriend after a shooting was relevant under Tex. R. Evid. 401 to show state of mind and that appellant did not act in self-defense; it was not subject to exclusion under Tex. R. Evid. 403 because it was the only evidence of state of mind following the shooting, despite the fact that it contained a derogatory term. Guerra v. State, 2012 Tex. App. LEXIS 2973, 2012 WL 1297718 (Tex. App. Dallas Apr. 17 2012).

1110. Appellant objected on grounds of hearsay and relevancy and he claimed the evidence was more prejudicial than probative, but he did not raise an objection on confrontation or insufficiency grounds at trial and thus he did not preserve those arguments for review. Mclamore v. State, 2012 Tex. App. LEXIS 2909 (Tex. App. Fort Worth Apr. 12 2012).

1111. In a termination of parental rights case, an issue under Tex. R. Evid. 403 was not addressed on appellate review because it was not raised in a mother's statement of points of error on appeal. In the Interest of L.M., 2012 Tex. App. LEXIS 2720 (Tex. App. Waco Apr. 4 2012).

1112. In a forgery case, the trial court was within its discretion in admitting defendant's letter into evidence over her Tex. R. Evid. 403 objection. The letter indicated a consciousness of guilt and had great probative value to the main issue at trial -- the identity of the forger. Shaw v. State, 2012 Tex. App. LEXIS 2543 (Tex. App. Texarkana Mar. 30 2012).

1113. In a defamation case, a trial court did not err by admitting three documents that were drafted for a file because they were not unfair or highly prejudicial compared to the weight of their probative value; the documents were prepared by an executive director and tended to show his state of mind and were relevant in rebutting the theory that the director acted reckless in response to a complaint about a service provider without any basis. Collins v. Sunrise Senior Living Mgmt., 2012 Tex. App. LEXIS 2457, 2012 WL 1067953 (Tex. App. Houston 1st Dist. Mar. 29 2012).

1114. In a case involving the civil commitment of a sexual predator, a patient failed to preserve an error under Tex. R. Evid. 403 relating to the details of his offenses because he did not object and obtain an adverse ruling each time the complained-of evidence was presented or obtain a running objection to the evidence; the patient did not waive error by waiting until the evidence was repeated to complain that it was prejudicial because it was needlessly cumulative. Even if the patient had preserved error regarding the experts' discussion of the details of the offenses, there was no unfair prejudice under Rule 403; the evidence assisted the jury in weighing each expert's testimony and opinion that each expert offered regarding the ultimate issue in the case. In re Ford, 2012 Tex. App. LEXIS

2221, 2012 WL 983323 (Tex. App. Beaumont Mar. 22 2012).

1115. Trial court did not abuse its discretion in admitting the crime scene photographs as the danger of unfair prejudice did not substantially outweigh the probative value; the exhibits merely depicted the crime scene and the condition of the victim's body. Robinson v. State, 2012 Tex. App. LEXIS 2231, 2012 WL 987840 (Tex. App. Houston 14th Dist. Mar. 22 2012).

1116. On appeal from his convictions for continuous sexual abuse, aggravated sexual assault, and indecency with a child, the trial court did not abuse its discretion by admitting the child's interview under Tex. R. Evid. 107 and did not abuse its discretion by admitting the evidence over defendant's Tex. R. Evid. 403 objection. The interview was inherently probative to the issue of whether the interviewer's technique amounted to "coaching" the child and was the only evidence of whether the child equivocated in the interview; moreover, it was unlikely to distract the jury from the issues in the case. Ibenyenwa v. State, 367 S.W.3d 420, 2012 Tex. App. LEXIS 2333, 2012 WL 955401 (Tex. App. Fort Worth Mar. 22 2012).

1117. Appellant objected to a witness's testimony under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), suggesting a relevancy complaint, but he did not object on expert qualification or reliability grounds or on Tex. R. Evid. 403 grounds; thus, the only issue preserved for review was the claim that the witness's testimony was inadmissible because it was not linked to appellant. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

1118. Appellant's membership in a church was unfavorable but not unfairly prejudicial, because it came as part of the examination of his character and devoted beliefs, which included the endorsement of the practice of underage marriage and the sexual assault of children; the evidence of the church membership was one of the factors that permitted the jury to gauge whether appellant would commit a similar crime, and the trial court did not err in admitting this evidence, for purposes of Tex. R. Evid. 403. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

1119. Because appellant did not offer argument or authority on his claims under Tex. R. Evid. 401, 402, 403, 404(b) and his claims for due process and due course of law, the complaints were inadequately briefed and presented nothing for review. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

1120. Where defendant entered a plea of guilty to intoxication manslaughter with a deadly weapon, the trial court did not err by admitting photographs depicting the victim's body at the scene of the collision. Because the photographs showed the violence of the impact and the injuries to the victim, the trial court could have properly determined that their prejudicial effect did not substantially outweigh their probative value under Tex. R. Evid. 403. Deas v. State, 2012 Tex. App. LEXIS 2066, 2012 WL 858627 (Tex. App. Fort Worth Mar. 15 2012).

1121. Defendant's burglary conviction was appropriate because, assuming without deciding that the extraneous-offense evidence posed some danger of unfair prejudice, defendant's argument neither addressed the fact that the trial court granted his request for limiting instructions to the jury, nor explained why the limiting instructions were ineffective. Webb v. State, 2012 Tex. App. LEXIS 2111, 2012 WL 897766 (Tex. App. Houston 1st Dist. Mar. 15 2012).

1122. Because defendant did not establish how the slower version videos and the single frame pictures were more prejudicial than the real-time video, the admission of that evidence did not violate Tex. R. Evid. 403. Evans v. State, 2012 Tex. App. LEXIS 1991, 2012 WL 848142 (Tex. App. San Antonio Mar. 14 2012).

1123. In a capital murder case, the trial court did not abuse its discretion in admitting photographs of the deceased child. Though gruesome, the photographs were probative of the full extent of the internal and external injuries inflicted. Desormeaux v. State, 362 S.W.3d 233, 2012 Tex. App. LEXIS 1831, 2012 WL 746297 (Tex. App. Beaumont Mar. 7 2012).

1124. Because there were sufficient common characteristics between each of the robberies, the issue of identity was a fact of great consequence, and the extraneous offense evidence was needed in order to identify defendant as the assailant, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Heigelmann v. State, 362 S.W.3d 763, 2012 Tex. App. LEXIS 1670, 2012 WL 688427 (Tex. App. Texarkana Mar. 2 2012).

1125. Trial court did not err by preventing the cross-examination of the child as to whether she committed perjury on the witness stand when she denied taking and posting provocative photographs of herself on a social media website pursuant to Tex. R. Evid. 403 because the jury was already aware that the child had lied and therefore the excluded impeachment evidence was cumulative. Other evidence that the child had recanted on several occasions had already been admitted. In re E.A.G., 373 S.W.3d 129, 2012 Tex. App. LEXIS 1532, 2012 WL 651605 (Tex. App. San Antonio Feb. 29 2012).

1126. Court properly allowed an expert witness to testify about the similarity of physical evidence recovered from the crime scene because the tapes from the crime scene and defendant's home were offered to show that because the tapes were similar, it was more likely that they came from a common source, and if they came from a common source, it was more likely that the tape in defendant's home came from the packaging for the marijuana in the murder victim's home. The testimony showed the similarities of the tapes and was therefore relevant to show that defendant was at the crime scene and had a motive for shooting the victims. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

1127. Defendant raised the issue of his identity as the perpetrator of the eight linked burglaries; therefore, the trial court did not err under Tex. R. Evid. 403 and Tex. R. Evid. 404 in admitting evidence of an extraneous burglary offense during which defendant and his car were placed at the victim's home at the time of the burglary. The crime was sufficiently similar in that it occurred while the victim was at work, defendant's car was located there, it occurred within two months of the eight burglaries, and the victim's property, like the property from the eight burglaries, was found in a hotel room associated with defendant. Mejia v. State, 2012 Tex. App. LEXIS 1434, 2012 WL 579455 (Tex. App. Fort Worth Feb. 23 2012).

1128. Even if appellant's speculation objections preserved his Tex. R. Evid. 403 objections, in both instances he failed to preserve the issue because his objections were untimely, as he did not object until after an objectionable question had been both asked and answered; furthermore, the court noted that similar evidence was admitted without any objection. Zavala v. State, 2012 Tex. App. LEXIS 1447, 2012 WL 601412 (Tex. App. Corpus Christi Feb. 23 2012).

1129. State argued that appellant's relevance objection did not preserve an objection under Tex. R. Evid. 403, and any error was harmless in any event, and the court agreed; the court did not find any objection to a witness's testimony about treaties between gangs on the basis of Rule 403, and thus no issue was preserved in this regard. Zavala v. State, 2012 Tex. App. LEXIS 1447, 2012 WL 601412 (Tex. App. Corpus Christi Feb. 23 2012).

1130. In a capital murder case, a trial court did not abuse its discretion by admitting a video recording and a photograph because their probative value was not substantially outweighed by the potential for undue prejudice. The evidence was probative to show appellant's presence at the scene of the crime and the degree of cooperation between appellant and his brother, the prejudice to appellant was not unfair, the challenged evidence did not create

or add to any confusion regarding the events, there was little danger of misleading the jury, and, given the highly probative nature of the recording and photographs, the trial court could have concluded that there was no undue delay and that their presentation was necessary. Mccuin v. State, 2012 Tex. App. LEXIS 1363, 2012 WL 566796 (Tex. App. El Paso Feb. 22 2012).

1131. trial court did not abuse its discretion by quashing defendant's subpoena of the school principal because her testimony would not have been material, as the evidence was undisputed that defendant was absent from the scene at the school when the social worker made the decision and notified the other family members that the children would be removed. Wyatt v. State, 2012 Tex. App. LEXIS 1308, 2012 WL 512654 (Tex. App. Austin Feb. 16 2012).

1132. Defendant's convictions for aggravated sexual assault of a child by penetration of her sexual organ and indecency with a child were proper because the trial court did not err in admitting evidence of defendant propositioning another individual while he was married to the victim's mother. It appeared that the defense strategy was to convey an image to the jury that defendant was hardworking and truthful, that his wife was unfaithful but he was not, and that the victim made up the outcry to help her mother; thus, the State was entitled to call the women that he allegedly propositioned and the probative value of that proposed testimony outweighed its prejudicial nature, Tex. R. Evid. 403, 404(a). Horton v. State, 2012 Tex. App. LEXIS 1313, 2012 WL 554454 (Tex. App. Eastland Feb. 16 2012).

1133. Trial court did not abuse its discretion in admitting evidence of a pending assault charge against the father because it was relevant in determining whether termination of the father's rights was in the best interest of the child.. Defendant failed to show that its admission confused or misled the jury, was cumulative of other evidence, or unfairly prejudiced the jury under Tex. R. Evid. 403; a key issue in the trial was defendant's criminal history, and the pending charge was only a small fraction of that history. Davis v. Tex. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 1315, 2012 WL 512674 (Tex. App. Austin Feb. 15 2012).

1134. In defendant's capital murder case, the trial court properly barred evidence of the victim's possible HIV condition because it found it irrelevant and too speculative; the proffered evidence showed only that the victim bit an accomplice, as the victim attempted to defend himself, and that the accomplice knew of the victim's possible HIV infection. The evidence was not enough to support defendant's defense of independent impulse and it lacked probative value. Gonzalez v. State, 2012 Tex. App. LEXIS 927, 2012 WL 361733 (Tex. App. Corpus Christi Feb. 2 2012).

1135. In defendant's capital murder case, the trial court properly admitted autopsy photographs because they were not any more gruesome than what would be expected, the photographs tracked the doctor's testimony, and the photographs depicted the victim's bloody and bruised face and were vital to the State's case to the jury with regard to the manner and method of the victim's death. Gonzalez v. State, 2012 Tex. App. LEXIS 927, 2012 WL 361733 (Tex. App. Corpus Christi Feb. 2 2012).

1136. Under Tex. R. Evid. 403, the trial court did not err when it ruled that the videotape showing the struggle that occurred when the police removed defendant from his jail cell was irrelevant in the context of defendant's aggravated sexual assault charge against the child victim. Lopez v. State, 2012 Tex. App. LEXIS 676, 2012 WL 256103 (Tex. App. Corpus Christi Jan. 26 2012).

1137. Trial court did not abuse its discretion by admitting four photographs from the victim's autopsy because they helped the jury understand the extent of the victim's injuries, were demonstrative of defendant's intent, and did not constitute a large part of the pathologist's testimony and the State's case. The photographs were highly relevant and probative and not unfairly prejudicial. Ramirez v. State, 2012 Tex. App. LEXIS 455, 2012 WL 170996 (Tex.

App. Corpus Christi Jan. 19 2012).

1138. Appellant did not assert an objection to the extraneous-offense evidence under Tex. R. Evid. 403, nor was such an objection apparent from the context of his objection for relevance under Tex. R. Evid. 401 and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), and thus this was not preserved for review under Tex. R. App. P. 33.1(a)(1). Bryant v. State, 2012 Tex. App. LEXIS 479, 2012 WL 171243 (Tex. App. Fort Worth Jan. 19 2012).

1139. Trial court did not abuse its discretion by admitting a witness's testimony to rebut defendant's assertion that he would not sexually abuse a nine-year-old girl where the extraneous-offense evidence was not unfairly prejudicial and was probative of defendant's credibility--and his sexual attraction to nine-year-old girls--because it showed defendant's response on cross-examination was inconsistent with his history of assaulting another female when she was the same age (or about the same age) as the victim. The trial court minimized the potential of the witness's testimony to impress the jury in an irrational and indelible way by including a limiting instruction in its charge, the record showed that the witness's testimony was not lengthy, and the State did not need the witness's testimony to prove its case-in-chief. Jones v. State, 2012 Tex. App. LEXIS 363, 2012 WL 130612 (Tex. App. Dallas Jan. 18 2012).

1140. Trial court did not err in finding that the probative value of appellant's disciplinary history was not substantially outweighed by the danger of unfair prejudice, given that the number of violations enhanced their probative value relative to showing appellant's character for purposes of sentencing. Martin v. State, 2011 Tex. App. LEXIS 10177 (Tex. App. Houston 14th Dist. Dec. 29 2011).

1141. Appellant never raised the State's alleged inability to prove that he committed certain violations as a challenge to admissibility of the evidence, and it was unclear whether he suggested that the State's inability to prove the violations amounted to a reason that their value was outweighed by the danger of unfair prejudice; he failed to preserve error to the extent he presented a complaint under Tex. Code Crim. Proc. Ann. art. 37.07, and as to Tex. R. Evid. 403, he did not raise this particular issue, only that the violations were repetitive in nature. Martin v. State, 2011 Tex. App. LEXIS 10177 (Tex. App. Houston 14th Dist. Dec. 29 2011).

1142. Trial court said it found the probative value of certain evidence outweighed the prejudicial value, but specific findings were not recited; a trial court was not required to sua sponte recite findings in this regard, and the court presumed that the trial court engaged in the required balancing test once Tex. R. Evid. 403 was invoked and the record's silence did not imply otherwise. Martin v. State, 2011 Tex. App. LEXIS 10177 (Tex. App. Houston 14th Dist. Dec. 29 2011).

1143. During defendant's trial for intentionally or knowingly causing serious bodily injury to a child, his eight-month-old daughter, the court did not err under in admitting evidence of extraneous bad acts showing that he had a drinking problem and had shaken the child's car seat in irritation after drinking alcohol on a prior occasion; the prior shaking of the car seat was not so dissimilar to weigh in favor of inadmissibility simply because defendant did not shake her vigorously enough to cause a fatal injury. Guerrero v. State, 2011 Tex. App. LEXIS 10080, 2011 WL 6808314 (Tex. App. Houston 14th Dist. Dec. 22 2011).

1144. In connection with appellant's injury to a child trial, photographs of the child in the hospital showed no more than the treatment of the injuries he had suffered shortly before he arrived at the hospital, and the court could not say that the trial court abused its discretion in finding that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice to appellant. Gonzales v. State, 2011 Tex. App. LEXIS 10119, 2011 WL 6415125 (Tex. App. Fort Worth Dec. 22 2011).

1145. Trial court did not err by admitting evidence of defendant's gang affiliation during the guilt phase of his trial because the evidence was relevant and admissible to show defendant's motive and to rebut his self-defense theory. The probative value of the evidence outweighed any unfair prejudice, and the State did not devote an excessive amount of time to presenting the evidence. Rodriguez v. State, 2011 Tex. App. LEXIS 10156 (Tex. App. Houston 1st Dist. Dec. 22 2011).

1146. Informant's possible bias was made known to the jury, and the trial court allowed appellant to develop other testimony regarding the informant's possible bias, plus the jury heard evidence concerning the existence of an outstanding warrant against the informant for failure to stop and give information following and accident; given the information that the jury had about the accident and warrant, the trial court could have found that allowing more details about the incident would have wasted the jury's time, for purposes of Tex. R. Evid. 401, 403, and the court found that appellant was not deprived of the right to confront the informant and the trial court did not err in limiting the testimony in this regard. Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

1147. Trial court did not err by allowing the State to present evidence that defendant was in possession of a weapon the day before the murder under Tex. R. Evid. 403 because that evidence made it more probable that defendant used that gun to cause the victim's death. The evidence did not suggest a decision on an improper basis, nor did it have the tendency to confuse or distract the jury, and it did not take an inordinate amount of time to present to the jury. Benitez v. State, 2011 Tex. App. LEXIS 9871, 2011 WL 6306643 (Tex. App. Houston 1st Dist. Dec. 15 2011).

1148. There was no abuse of discretion by admitting the child's interview under Tex. R. Evid. 107 and over defendant's Tex. R. Evid. 403 objection, because the interview was inherently probative and necessary for the Tex. R. Evid. 107 purpose for which it was admitted, and it was unlikely to distract the jury from the issues in the case; although the defense argued that the State should just be allowed to ask follow-up questions, the jury would not have had any yardstick by which to measure the effect of the interviewer's questions and techniques on the child, which occurred before the child testified at trial, other than by seeing the actual interview. Ibenyenwa v. State, 2011 Tex. App. LEXIS 9908, 2011 WL 6260874 (Tex. App. Fort Worth Dec. 15 2011).

1149. Because the trial concerning the welfare of the children could deteriorate into a trial on the practices of the Texas Department of Family and Protective Services, Child Protective Services Division in its selection of foster homes, the trial court could have believed that the danger of confusion of the issues in the termination of parental rights case outweighed the probative value of the tales concerning the post-removal experiences of the children under Tex. R. Evid. 403. In re R.N., 356 S.W.3d 568, 2011 Tex. App. LEXIS 9632 (Tex. App. Texarkana Dec. 9 2011).

1150. Although evidence that the victim was suicidal due to defendant's abusive conduct created a risk that the jury's heightened emotions could lead it to reach an erroneous conclusion, nothing in the record reflected the jury was confused, misled, or unable to evaluate the probative force of any of the evidence; further, the presentation of the letter did not take an inordinate amount of time. Finally, the evidence did not merely repeat evidence already admitted, and although the jury heard other evidence that the victim had suicidal thoughts, that evidence did not relate specifically to the time period in which the victim wrote the letter. Lofton v. State, 2011 Tex. App. LEXIS 9666 (Tex. App.--Dallas Dec. 9, 2011).

1151. Court properly admitted evidence of defendant's extraneous bad acts committed after his arrest because witnesses testified about defendant "revving" his engine in front of the victim's house, repeatedly calling the victim, and the victim testified that he felt threatened by the conduct. Additionally, the evidence was unlikely to influence the jury in an irrational way; to the contrary, it was rational to conclude that defendant threatened the victim and his best friend because defendant was guilty of the offense. Lofton v. State, 2011 Tex. App. LEXIS 9666 (Tex. App.--

Dallas Dec. 9, 2011).

1152. In a sexual abuse case, any risk of unfair prejudice from the statements attributing the victim's suicidal thoughts to defendant's abusive conduct did not substantially outweigh the probative value of that evidence because nothing in the record reflects the jury was confused, misled, or unable to evaluate the probative force of any of the evidence. Further, the presentation of the letter did not take an inordinate amount of time, and it did not merely repeat evidence already admitted. Lofton v. State, 2011 Tex. App. LEXIS 9664, 2011 WL 6225415 (Tex. App. Dallas Dec. 9 2011).

1153. In a sexual abuse case, the evidence of defendant's conduct following his arrest was properly admitted because it was probative of defendant's consciousness of guilt. The State's need for the evidence was significant because the victim and defendant were the only two witnesses to the actual conduct, and defendant denied touching the victim; it was rational to conclude defendant threatened the victim and his best friend because defendant was guilty of the offense. Lofton v. State, 2011 Tex. App. LEXIS 9664, 2011 WL 6225415 (Tex. App. Dallas Dec. 9 2011).

1154. Although appellant's objection at trial was largely based on Tex. R. Evid. 403, he also objected to the introduction of photographs because they went to specific prior bad acts, and thus appellant preserved for review his claim that the trial court erred under Tex. R. Evid. 404(b). Falade v. State, 2011 Tex. App. LEXIS 9408, 2011 WL 5984536 (Tex. App. Fort Worth Dec. 1 2011).

1155. During defendant's trial for sexual assault of a child, the court did not err in admitting pornographic photographs and videos seized from defendant's home; defendant's possession of the pornographic material was likely to be construed as less heinous by the jury than the detailed evidence it heard concerning his sexually assaulting the victim while his wife slept in a medicated state in the same room. Pallm v. State, 2011 Tex. App. LEXIS 9402, 2011 WL 6043025 (Tex. App. Tyler Nov. 30 2011).

1156. Because evidence is rarely excluded under Tex. R. Evid. 403 in parental rights termination cases, and in light of the trial court's discretion in determining admissibility, trial counsel's failure to object to an exhibit concerning the father's criminal convictions and issues did not amount to deficient performance. In the Interest of T.E., 2011 Tex. App. LEXIS 9251, 2011 WL 5865712 (Tex. App. Texarkana Nov. 23 2011).

1157. Victim's friend's testimony was clear and addressed the probability of the victim fabricating her allegations, and the testimony's potential for impressing the jury in an irrational manner was minimal as the friend's allegations were less egregious; the State needed the friend's testimony, and the trial court did not err in overruling appellant's Tex. R. Evid. 403 objection to extraneous offense evidence in his aggravated sexual assault of a child trial. Roberts v. State, 2011 Tex. App. LEXIS 9189, 2011 WL 5607620 (Tex. App. Fort Worth Nov. 17 2011).

1158. For purposes of Tex. R. Evid. 403, certain case law factors favored admission in appellant's arson case of evidence that the child was dead before the fire started because it supported the theory that appellant had a motive to commit arson; motive evidence could have assisted the jury in determining credibility issues.

1159. Evidence of a child's death created a risk in appellant's arson case that the jury's heightened emotions would lead to a wrong decision, but the trial court excluded evidence that might have led the jury to find that appellant was responsible for the child's death, and the State reminded the jury that the cause of death was a mystery and nothing pointed to appellant being at fault; the risk of unfair prejudice did not substantially outweigh the probative value of that evidence to show a motive for arson, as limited, and the trial court did not err in admitting the evidence.

1160. During a trial for failure to comply with sex offender registration requirements, defense counsel was not ineffective for failing to object to two State exhibits that defendant filled out in compliance with defendant's bond conditions because the documents contained probative information and were more likely to assist the jury on the issues rather than confuse or inflame it. Darnell v. State, 2011 Tex. App. LEXIS 9049, 2011 WL 5515470 (Tex. App. Fort Worth Nov. 10 2011).

1161. Trial court did not abuse its discretion in admitting an autopsy photograph depicting a murder victim's brain after it was removed from his body where the photograph had probative value because it showed the extent of the victim's injury and helped the jury understand how blunt force trauma-which other evidence showed came in the form of defendant's having kicked the victim in the head-caused the victim's death. Because the photograph had probative value and was not unnecessarily gruesome, the danger of unfair prejudice does did outweigh its probative value. Malone v. State, 2011 Tex. App. LEXIS 8602, 2011 WL 5118820 (Tex. App. Fort Worth Oct. 27 2011).

1162. Trial court did not abuse its discretion by admitting testimony from the State's investigator regarding an alleged retaliation statement made by defendant under Rule 403 because: (1) it assisted the jury in determining defendant's intent; (2) the trial court gave the jury a limiting instruction; and (3) the investigator's testimony was only about 14 pages of the reporter's record. Castillo v. State, 2011 Tex. App. LEXIS 8726, 2011 WL 5221238 (Tex. App. Waco Oct. 26 2011).

1163. Defendant did not mention on appeal what information an expert would present that would not be cumulative of the evidence already brought forth during the punishment hearing. Blair v. State, 2011 Tex. App. LEXIS 8741, 2011 WL 5221256 (Tex. App. Waco Oct. 26 2011).

1164. State did not refer to defendant as a drug dealer or elicit testimony that he was known as a drug dealer, and there was no dispute that defendant possessed marijuana; the State presented evidence that the marijuana was packaged for sale and that no one would purchase marijuana that had been in a person's underwear, and the trial court did not abuse its discretion in admitting the testimony. Eastland v. State, 2011 Tex. App. LEXIS 8748, 2011 WL 5221252 (Tex. App. Waco Oct. 26 2011).

1165. Trial court did not abuse its discretion by admitting a video recording depicting the nature of the victim's injuries because it was relevant to proving serious bodily injury, an element of aggravated assault. The video was not unduly prejudicial under Tex. R. Evid. 403 because: (1) it communicated that the victim's injuries were serious in a non-technical way; (2) it was recorded a week before the trial and therefore was more current than other evidence; (3) it lasted only two minutes; and (4) it was only played once for the jury without sound. Rodriguez v. State, 352 S.W.3d 548, 2011 Tex. App. LEXIS 8130 (Tex. App. Beaumont Oct. 12 2011).

1166. Trial court did not err by admitting evidence of defendant's extraneous sexual offense with a child during his trial for continuous sexual abuse of a child, indecency with a child, and three counts of aggravated sexual assault of a child; both victims were young girls, both had their privates rubbed by defendant, and both offenses occurred while the victims were in bed. Evidence of similar sexual conduct with another young girl tended to make defendant's theories of revenge, fabrication, and lack of opportunity much less probable; therefore, the trial court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Struckman v. State, 2011 Tex. App. LEXIS 8042, 2011 WL 4712236 (Tex. App. Waco Oct. 5 2011).

1167. Trial court did not act without guiding rules or principles when it determined that the Taproot Incident Report was inadmissible as a subsequent remedial measure; the report could not be used to show feasibility, there was cumulative evidence to the same effect, and the workers would not suffer unfair prejudice from its exclusion. Belmarez v. Formosa Plastics Corp., 2011 Tex. App. LEXIS 7945, 2011 WL 4696750 (Tex. App. Corpus Christi

Sept. 30 2011).

1168. Because the evidence of the similar abusive conduct by defendant against a former cell mate made defendant's self-defense theory much less probable and the State needed the extraneous offense evidence to question whether defendant acted in self defense at all, under Tex. R. Evid. 403 and 404(b), the trial court did not abuse its discretion in admitting the former cell mate's testimony. Svenningsen v. State, 2011 Tex. App. LEXIS 7681 (Tex. App. Waco Sept. 21 2011).

1169. Trial court did not abuse its discretion by allowing the captain to testify to clarify the extent of defendant's disciplinary record because defendant's testimony created a false impression that he had not been disciplined after the discovery of unsecured evidence in his office; while testifying as a rebuttal witness, the captain testified that defendant had in fact been suspended, and that that disciplinary action was taken as a result of the unsecured evidence investigation. Any prejudice stemming from the extraneous evidence did not outweigh its probative value, as the discussion with the captain consumed only a small portion of the record and was necessary to impeach defendant and to provide the jury with a complete and accurate understanding of the facts. Milton v. State, 2011 Tex. App. LEXIS 7592, 2011 WL 4361482 (Tex. App. Houston 14th Dist. Sept. 20 2011).

1170. Evidence of one's sexual orientation may be relevant to show bias under unique circumstances when coupled with a logical connection to one's motive to testify in a certain manner, but that was not the case here, and the evidence of the victim's sexual orientation was inadmissible and irrelevant under Tex. R. Evid. 401, 402; furthermore, under these circumstances when there was no connection between the victim's relationship with her female friend and any motive for her to exaggerate the incident involving appellant juvenile, any de minimis probative value of that information would be substantially outweighed by the danger of unfair prejudice in putting the victim on trial for her sexual orientation. In re O.O.A., 358 S.W.3d 352, 2011 Tex. App. LEXIS 7416 (Tex. App. Houston 14th Dist. Sept. 13 2011).

1171. In an aggravated kidnapping case, the trial court did not err in admitting a photograph of a chair and the victim's testimony that she was tied to the chair. The testimony and photograph had little potential to impress the jury in some irrational but nevertheless indelible way. Gaither v. State, 2011 Tex. App. LEXIS 7304, 2011 WL 3915820 (Tex. App. San Antonio Sept. 7 2011).

1172. State needed to explain the relationship between appellant and the victim, and letters from appellant to the victim helped explain the dynamics of their relationship and thus were relevant; appellant did not identify specific instances of prior misconduct contained in the letters that were introduced or would suggest that he acted in conformity with his character in committing the offense, nor was it shown that the letters were more prejudicial than probative, and the trial court did not err in admitting the letters. Munsinger v. State, 2011 Tex. App. LEXIS 7318, 2011 WL 3915671 (Tex. App. Tyler Sept. 7 2011).

1173. Appellant did not attempt to explain how he was denied the opportunity to present a viable defense through the application of Tex. R. Evid. 412(b)(3), and he did not meet his burden to show how the rule permitted the admission of the testimony in question; as appellant did not show why the leeway discussed in case law should apply, the court could not allow him to forego addressing Rule 412(b)(3) and show how the supposed probative value of the evidence outweighed the danger of unfair prejudice. Nichols v. State, 349 S.W.3d 612, 2011 Tex. App. LEXIS 7253 (Tex. App. Texarkana Sept. 6 2011).

1174. Case law did state that in trials involving sexual assault, the Rules of Evidence should be used sparingly to exclude relevant, otherwise admissible evidence that might bear upon the credibility of either the defendant or complainant in "he said, she said" cases, but nowhere in that missive does the court find the directive to always ignore the Rules of Evidence in general or those specifically pertaining to the balancing test encompassed by either

Rules 403 or Tex. R. Evid. 412(b)(3); it is not enough to merely suggest that because the victim supposedly lied before she must be lying now, as one could reasonably liken such effort to the type of general attack upon a witness's credibility falling outside the admonishment about when to use the rules of evidence sparingly. Chitwood v. State, 350 S.W.3d 746, 2011 Tex. App. LEXIS 7301 (Tex. App. Amarillo Sept. 6 2011).

1175. Appellant had the burden to establish that the trial court abused its discretion and thus he had to show that the probative value of the evidence did not substantially outweigh its prejudicial effect, but he did not attempt to do so, and thus it did not matter whether or not the conviction fell outside the 10-year window, for purposes of Tex. R. Evid. 609(b). Chitwood v. State, 350 S.W.3d 746, 2011 Tex. App. LEXIS 7301 (Tex. App. Amarillo Sept. 6 2011).

1176. Had defense counsel objected that the prejudicial value of testimony outweighed its probative value, the trial court would have been required to perform the balancing test under Tex. R. Evid. 403; if that was the intent of the objection, which was not obvious, objecting that the question was improper did not inform the trial court that appellant sought the balancing test under the rule, and the issue was not preserved for review. Vallair v. State, 2011 Tex. App. LEXIS 7055, 2011 WL 3847418 (Tex. App. Beaumont Aug. 31 2011).

1177. Trial court did not err by admitting evidence that defendant had sexually assaulted another child under Tex. R. Evid. 404(b) and 403 during his trial on charges of sexual assault and aggravated sexual assault because it rebutted the defenses of lack of opportunity and fabrication. Theragood v. State, 2011 Tex. App. LEXIS 7141, 2011 WL 3848840 (Tex. App. El Paso Aug. 31 2011).

1178. Declarant's statements were properly admitted as statements against interest because there were sufficient corroborating circumstances that clearly indicated the trustworthiness of the statements. The declarant made the statements in response to questions from his common law wife about his involvement in the robbery, the declarant's guilt was not inconsistent with defendants, and the testimony bore significant probative force and was valuable in proving the State's case in chief. Gonzalez v. State, 2011 Tex. App. LEXIS 7084, 2011 WL 3849393 (Tex. App. San Antonio Aug. 31 2011).

1179. For purposes of Tex. R. Evid. 402, evidence of appellant's conduct prior to the shooting and during the police interview was relevant to assessing punishment under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), plus the evidence's potential to have an overwhelming effect on the jury was limited by an instruction, and it did not appear that the evidence required an inordinate amount of time to develop; because the evidence spoke directly to appellant's character and his lack of concern for others, the evidence was necessary to help the jury determine punishment, and the trial court did not err in admitting the evidence under Tex. R. Evid. 403. Brown v. State, 2011 Tex. App. LEXIS 7170, 2011 WL 3849106 (Tex. App. El Paso Aug. 31 2011).

1180. Exhibit, a computer-generated animation of the crime scene, was relevant, and the fact that the cars in the animation might have looked similar or that the background was either not to scale or not there did not cause the probative value of the evidence to be outweighed by unfair prejudice under Tex. R. Evid. 403; the exhibit was not cumulative of other evidence and the trial court did not abuse its discretion in admitting it. Murphy v. State, 2011 Tex. App. LEXIS 7230, 2011 WL 3860444 (Tex. App. Eastland Aug. 31 2011).

1181. Trial court did not abuse its discretion by admitting evidence of defendant's possible gang affiliation under Tex. R. Evid. 404(b), 403 because the evidence that defendant initially approached a man and asked more than once if he was a member of a particular gang showed the context in which the encounter began that resulted in defendant shooting the victim. The trial court did not err by denying defendant's motion for a mistrial. Salazar v. State, 2011 Tex. App. LEXIS 6835, 2011 WL 3770297 (Tex. App. Dallas Aug. 26 2011).

1182. Court did not err in admitting extraneous-offense evidence under Tex. Code Crim. Proc. Ann. art. 38.37, § 2 because it showed a pattern of behavior on the part of defendant that was consistent with the concept of "grooming," and the evidence of the extraneous acts before the charged sexual assault fell squarely within the type of evidence allowed under art. 38.37. The victim's testimony about the June 2008 assault was also more graphic and time-consuming than the evidence of the extraneous acts, thus likely overshadowing any inflammatory response the jury might have had to testimony about the extraneous acts. Castro v. State, 2011 Tex. App. LEXIS 6900, 2011 WL 3796104 (Tex. App. Austin Aug. 26 2011).

1183. Testimony of other victims of the extraneous crimes, who identified defendant as the man who had also robbed them in a quite similar way to how he robbed the victim, had substantial probative value; the evidence about the extraneous offenses focused, rather than distracted, the jury on the main issue in the case: whether defendant was the person who committed the crime against the victim. Price v. State, 351 S.W.3d 148, 2011 Tex. App. LEXIS 6848 (Tex. App. Fort Worth Aug. 25 2011).

1184. During defendant's trial for capital murder, the court did not err in admitting photographs of the victim because it was not outside the zone of reasonable disagreement to conclude that the probative value was not outweighed by the prejudicial effect; a medical examiner's testimony about the victim's wounds was relevant and the pictures were merely a visual representation of that testimony. Estrada v. State, 352 S.W.3d 762, 2011 Tex. App. LEXIS 6739 (Tex. App. San Antonio Aug. 24 2011).

1185. Defendant's argument and questioning of the witnesses attempted to portray the victim as the aggressor and defendant as merely defending himself and lacking criminal intent; thus, the trial court's ruling that evidence of the prior assaults was admissible under Tex. R. Evid. 403 and 404(b) was not an abuse of its discretion. Watkins v. State, 2011 Tex. App. LEXIS 6992, 2011 WL 3925583 (Tex. App. Beaumont Aug. 24 2011).

1186. Trial court did not abuse its discretion by excluding evidence of defendant's prior assault of another victim during his trial on charges of aggravated assault and manslaughter under Tex. R> Evid. 403 because it had high probative value on the issue of whether defendant was the aggressor in the instant offense. The prior crime was similar to the charged offenses and occurred only six months before the charged crimes. Render v. State, 347 S.W.3d 905, 2011 Tex. App. LEXIS 6623 (Tex. App. Eastland Aug. 18 2011).

1187. Trial court did not abuse its discretion by admitting evidence that defendant's blood contained a cocaine metabolite and marijuana under Tex. R. Evid. 403 because: (1) the evidence was probative of the allegation that defendant's recklessness was caused in part by driving a motor vehicle with cocaine and marijuana in his body; (2) the evidence was not unfairly prejudicial; (3) the evidence could not have distracted the jury from the indicated offense because it was proof of the indicted offense; and (4) the State had no other evidence to establish that defendant recklessly caused the victim's death by driving with cocaine and marijuana in his body. Leblanc v. State, 2011 Tex. App. LEXIS 6273, 2011 WL 3556952 (Tex. App. Houston 1st Dist. Aug. 11 2011).

1188. Trial court did not abuse its discretion by admitting evidence about cocaine withdraw under Tex. R. Evid. 403 because the trial court could have concluded that the evidence of the effects of cocaine withdrawal were relevant to defendant's operation of his truck. Leblanc v. State, 2011 Tex. App. LEXIS 6273, 2011 WL 3556952 (Tex. App. Houston 1st Dist. Aug. 11 2011).

1189. Trial court did not abuse its discretion by admitting evidence of the presence of marijuana in the cab of his truck at the time of the accident under Tex. R. Evid. 403 because it was directly related to the charged offense of manslaughter and its potential to irrationally impress the jury to find guilt on grounds apart from the offense charge was minimal. Leblanc v. State, 2011 Tex. App. LEXIS 6273, 2011 WL 3556952 (Tex. App. Houston 1st Dist. Aug.

11 2011).

1190. Trial court did not err by admitting two crime scene photographs of the victim's body under Tex. R. Evid. 403 because: (1) the photographs helped the State illustrate the paramedic's testimony by depicting both the crime scene and the victim's injuries; (2) the photographs were no more gruesome than the facts of the offense itself; and (3) the State did not spend a lot of time presenting the photographs to the jury. Suarez v. State, 2011 Tex. App. LEXIS 6190 (Tex. App. San Antonio Aug. 10 2011).

1191. Appellate court found that it would not be outside the zone of reasonable disagreement for the trial court to resolve the Tex. R. Evid. 403 analysis in favor of allowing the State to elicit the prior inconsistent statements, because the witness was one of the two alleged victims in the case, the issue of the witness's credibility was crucial to both the State and defendant, the State was surprised by the witness's unfavorable testimony, and the elicited favorable testimony, although limited, would support a finding that the State did not call the witness for the primary purpose of eliciting otherwise inadmissible evidence. Polston v. State, 2011 Tex. App. LEXIS 6126, 2011 WL 3435389 (Tex. App. Austin Aug. 5 2011).

1192. Letters that defendant wrote to another person were properly admitted, Tex. R. Evid. 403, as they constituted attempts by defendant to hinder his prosecution and, as such, were evidence of his consciousness of guilt; the probative value of the letters, establishing defendant's consciousness of guilt, was not substantially outweighed by the danger of unfair prejudice. Sandoval v. State, 2011 Tex. App. LEXIS 5971, 2011 WL 3273900 (Tex. App. Amarillo Aug. 1 2011).

1193. Trial court did not abuse its discretion by admitting into evidence autopsy photographs of the victim under Tex. R. Evid. 403 because they allowed the jury to compare defendant's description of the victim in his statement to the photographs, and aided the jury in understanding and evaluating the medical examiner's testimony. Tilford v. State, 2011 Tex. App. LEXIS 5933, 2011 WL 3273543 (Tex. App. El Paso July 29 2011).

1194. Trial court did not err by admitting into evidence testimony about voluminous pornographic images found on defendant's computer under Tex. R. Evid. 403 because: (1) the testimony was probative as it assisted the jury in determining that the images did not arrive there by accident or mistake; (2) the State needed the testimony to rebut defensive theories; (3) limiting instructions were given; and (4) the amount of time required to develop the evidence was relatively short. Bethards v. State, 2011 Tex. App. LEXIS 5603, 2011 WL 2937875 (Tex. App. Waco July 20 2011).

1195. Because defendant sought to recall the victim after stating that he had no more questions, the trial court could have decided that recalling the victim on a matter collateral to the shooting to provide testimony that no quid-pro-quo existed for his testimony against defendant would risk an undue delay in the proceedings, risk causing confusion about the importance of the testimony to the shooting, and risk the jury taking the existence of the victim's pending charge out of context, as the questions to the victim about the pending driving while intoxicated charge would not then be asked at the time the jury heard other evidence about the victim's background. Smith v. State, 2011 Tex. App. LEXIS 5338, 2011 WL 2732270 (Tex. App. Beaumont July 13 2011).

1196. Trial court did not abuse its discretion by admitting evidence of other offenses that occurred on the day before the offenses for which he was convicted where the court could reasonably have deemed testimony about defendant's escape from custody on February 11 relevant to his motive, intent, plan, or absence of mistake in taking the actions he did on February 12; the trial court did not err by admitting the evidence because it could reasonably have decided that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. Morse v. State, 2011 Tex. App. LEXIS 5173, 2011 WL 2651915 (Tex. App. Austin July 8 2011).

1197. Trial court did not abuse its discretion by admitting into evidence six photographs of the baby's injuries under Tex. R. Evid. 403 because they were important for the jury in understanding testimony offered by a pediatric surgeon and for forming their own conclusions regarding the cause of injury to the baby's genitals and leg. A key issue raised in the case was whether the baby's injury could have been inflicted by a small dog or whether it was caused by a sharp instrument in the hands of a person. Nadal v. State, 348 S.W.3d 304, 2011 Tex. App. LEXIS 5104 (Tex. App. Houston 14th Dist. July 7 2011).

1198. Trial court did not err by admitting into evidence three firearms that were not connected to the shooting that were found in defendant's motel room when he was arrested because: (1) defendant's possession of the firearms did not necessarily amount to extraneous offense evidence under Tex. R. Evid. 404(b); and (2) the evidence was probative of defendant's connection to the drug dealer's gang and to the State's efforts to prove that the victim was murdered in retaliation for informing on the drug dealer, Assuming that defendant was prejudiced, any error was harmless because there was ample evidence of defendant's guilt. Gonzalez v. State, 2011 Tex. App. LEXIS 5139, 2011 WL 2652162 (Tex. App. Corpus Christi July 7 2011).

1199. Evidence of defendant's membership in the same gang as a witness was admissible to show that the witness was biased to testify in favor of defendant. The probative value of the impeachment evidence was high because the State wanted to show why the witness testified that he had lied to police about the statements defendant had made to him. Mccuin v. State, 2011 Tex. App. LEXIS 5031, 2011 WL 2611234 (Tex. App. Fort Worth June 30 2011).

1200. In defendant's sexual assault on a child case, the court properly admitted extraneous offenses because defendant failed to object, and in addition, defendant cited no authority for the proposition that a "more serious" extraneous offense automatically required a conclusion that the prejudicial effect of the offense substantially outweighed its probative value. Martines v. State, 371 S.W.3d 232, 2011 Tex. App. LEXIS 4773, 2011 WL 2502839 (Tex. App. Houston 1st Dist. June 23 2011).

1201. Law concerning when a peace officer can use deadly force is different from the law concerning when someone other than a peace officer can use deadly force; even if testimony about when an officer could use deadly force was relevant, the trial court would not have erred in excluding the evidence based on the danger that the jury could have been confused by the evidence, for purposes of Tex. R. Evid. 403. Knapper v. State, 2011 Tex. App. LEXIS 4782, 2011 WL 2503463 (Tex. App. Houston 1st Dist. June 23 2011).

1202. Defendant did not show how the evidence of his gang membership unfairly prejudiced the jury against recommending community supervision; the trial court did not act outside its discretion by concluding that the evidence was not unfairly prejudicial as it was highly probative of defendant's character at the time of the offenses, which were gang-related. Kelly v. State, 2011 Tex. App. LEXIS 4656, 2011 WL 2438517 (Tex. App. Dallas June 20 2011).

1203. Even if one assumed that statements were party-opponent admissions under Tex. R. Evid. 801(e)(2)(A) and relevant under Tex. R. Evid. 401, otherwise relevant evidence could be excluded under Tex. R. Evid. 403; in addition to possibly confusing the jury and unfairly prejudicing the State's case, admission of the statements would have been cumulative, and the trial court did not err in excluding these statements. Mcneal v. State, 2011 Tex. App. LEXIS 4629, 2011 WL 2420271 (Tex. App. Dallas June 17 2011).

1204. Trial court did not err in declining to exclude extraneous offense evidence under Tex. R. Evid. 403, given that (1) the State needed the testimony in question to establish that appellant had previously been seen holding a weapon that was similar to the one he used to threaten an officer, (2) the impermissible inference of character conformity was minimized by the trial court's limiting instruction, and (3) the amount of time used for the testimony

was not excessive. Benites-vijil v. State, 2011 Tex. App. LEXIS 4574, 2011 WL 2435942 (Tex. App. Houston 1st Dist. June 16 2011).

1205. Appellant provided a general discussion on the application of Tex. R. Evid. 403, 404, and 405, most of which was not germane to the punishment phase, but he failed to specify the bad acts or extraneous offenses he found inadmissible or provide any references to their admission over objection; in the absence of references and citation of authority, this complaint under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) was waived. Crutchfield v. State, 2011 Tex. App. LEXIS 4490, 2011 WL 2420380 (Tex. App. Tyler June 15 2011).

1206. Even though the trial court erred by allowing the State to introduce evidence that a witness had been threatened by an unknown person, as the evidence did nothing to bolster the witness's credibility and was highly prejudicial under Tex. R. Evid. 403, the error was harmless under Tex. R. App. P. 44.2(b) because it did not affect defendant's substantial rights given the other evidence of guilt, including numerous statements to others by defendant. Newland v. State, 363 S.W.3d 205, 2011 Tex. App. LEXIS 4587, 2011 WL 2480312 (Tex. App. Waco June 15 2011).

1207. Where defendant did not challenge the trial court's ruling that the probative value of evidence of witness's juvenile adjudication of attempted capital murder was substantially outweighed by the danger of undue prejudice under Tex. R. Evid. 403, the court upheld the trial court's ruling excluding the evidence on that ground. Marsh v. State, 343 S.W.3d 158, 2011 Tex. App. LEXIS 4390 (Tex. App. Texarkana June 10 2011).

1208. Father did not present argument or briefing that the exclusion of the decedent's unredacted will probably caused the rendition of an improper judgment; the probative value of the evidence on the issue of forgery was minimal. Kingsley v. Beck, 2011 Tex. App. LEXIS 4294, 2011 WL 2225537 (Tex. App. Texarkana June 7 2011).

1209. At defendant's trial for attempted burglary of a habitation with intent to commit theft, the State was permitted to offer evidence regarding the theft of a vehicle in the same neighborhood because the vehicle's keys were found in defendant's pocket. The evidence was admissible under Tex. R. Evid. 403 because it was probative on the issue of whether defendant was merely trespassing or intended to commit theft or burglary. Dickson v. State, 2011 Tex. App. LEXIS 4774 (Tex. App. Houston 1st Dist. June 6 2011).

1210. Defendant was not prevented from showing that the victim and other family members were biased and had a motive to testify against him because there was animosity between the victim's family and defendant, but the trial court did not err in not admitting evidence of the victim's family's use of drugs as the behavior that was criticized because it was not admissible under the Tex. R. Evid. 403 balancing test and was not shown to be relevant to any issue in the case under Tex. R. Evid. 402. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

1211. Under Tex. R. Evid. 608 and 609, the trial court did not abuse its discretion in allowing the State to ask defendant about his prior arrests after he opened the door with his testimony or in determining that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

1212. Photographs of the victim wearing an allegedly sexually suggestive T-shirt were excludable under either Tex. R. Evid. 402 as irrelevant or Tex. R. Evid. 403 because the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

1213. Trial court did not err in admitting defendant's letter in to evidence as its potentially prejudicial impact did not substantially outweigh the probative value. In re F.R., 2011 Tex. App. LEXIS 4104, 2011 WL 2175857 (Tex. App. Texarkana May 27 2011).

1214. Trial court did not abuse its discretion by admitting defendant's blood alcohol test results into evidence during her intoxication manslaughter trial because: (1) the results were probative on the issue of whether defendant was intoxicated, as she denied consuming any alcohol; (2) the result was the only direct evidence establishing that defendant had consumed alcohol; (3) it was not unfairly prejudicial because it related directly the an element of the charged offense; and (4) the time to present the evidence was relatively short. Damon v. State, 2011 Tex. App. LEXIS 4017, 2011 WL 2112807 (Tex. App. Houston 1st Dist. May 26 2011).

1215. In a sexual abuse case, the court's error in admitting defendant's statement to an officer that he had cocaine and alcohol problems and he sometimes did not remember things when he was drunk or high was harmless because defendant gave a written confession that he sexually abused the child, and the children gave statements detailing the abuse. Henriquez v. State, 2011 Tex. App. LEXIS 4072, 2011 WL 2119679 (Tex. App. Fort Worth May 26 2011).

1216. Even if the trial court erred by denying defendant's request to present testimony from the victim's ex-wife about the victim's propensity for violence without engaging in the Tex. R. Evid. 403 balancing test, the error was harmless because: (1) the trial court found that the ex-wife's testimony was too remote in time from the instant shooting; and (2) the ex-wife's testimony did not form a vital portion of defendant's case and its exclusion did not prevent defendant from presenting the substance of his self-defense claim. Defendant and others testified that the victim had previously gotten into fights. Hart v. State, 2011 Tex. App. LEXIS 3996, 2011 WL 2028216 (Tex. App. Dallas May 25 2011).

1217. Evidence of bathing incident between defendant and his niece was admissible, Tex. R. Evid. 402, 403, 404(b), as it showed the nature of defendant's relationship with and mindset towards his niece, Tex. Code Crim. Proc. Ann. art. 38.37 Gragert v. State, 2011 Tex. App. LEXIS 3948, 2011 WL 2027955 (Tex. App. Amarillo May 24 2011).

1218. Nature of appellant's relationship with the victim on the night before her murder was probative of the circumstances surrounding her death, the evidence from witnesses was needed to show the relationship, there was no reason to believe that disputed evidence gave rise to any tendency to confuse or distract the jury, and the presentation of the evidence did not take an inordinate amount of time, and the evidence met the requirements of Tex. R. Evid. 403. Sanders v. State, 2011 Tex. App. LEXIS 3673, 2011 WL 1843508 (Tex. App. Dallas May 16 2011).

1219. At defendant's criminal trial for aggravated sexual assault and indecency with a child, a witness was permitted to testify that defendant said that he had given the victim a vaginal exam; Tex. R. Evid. 404(b) did not apply, because the testimony was not about an extraneous act or offense. Since the testimony constituted evidence that defendant admitted touching the victim's sexual organ, it was not more prejudicial than probative under Tex. R. Evid. 403. Babineaux v. State, 2011 Tex. App. LEXIS 3632, 2011 WL 1833123 (Tex. App. Fort Worth May 12 2011).

1220. In defendant's sexual assault on a child case, the victim's testimony about her extraneous sexual encounters with defendant was not likely to create such prejudice in the juror's minds that they would be unable to consider the evidence for its proper purpose because the portions of her testimony detailing the prior sexual activities were short, and prior to the testimony and in the jury charge, the trial court specifically instructed the jury about how to consider evidence concerning the prior sexual encounters. Chang Hyeong Lee v. State, 2011 Tex.

App. LEXIS 3623, 2011 WL 1833142 (Tex. App. Fort Worth May 12 2011).

1221. During defendant's trial for capital murder, the court did not err under Tex. R. Evid. 608(b) in admitting a photograph of defendant and a third person holding guns pointed at the head of another individual because on direct examination, defendant stated that defendant had never pointed a gun at someone; the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice. Lemon v. State, 2011 Tex. App. LEXIS 3473, 2011 WL 1837680 (Tex. App. Houston 14th Dist. May 10 2011).

1222. At defendant's criminal trial for aggravated assault with a deadly weapon, the trial court did not abuse its discretion in admitting a videotape showing the layout of the apartment with a sign indicating no one was allowed to open the refrigerator; the evidence was necessary to prove the victim was outside defendant's apartment when he was shot and to develop defendant's motive by showing he was angry because he believed the victim was stealing beer from him. The presence of pornography or Nazi paraphernalia was not so inflammatory or prejudicial under Tex. R. Evid. 403 as to outweigh the need of the State to present the video evidence. Amador v. State, 2011 Tex. App. LEXIS 3404, 2011 WL 1706474 (Tex. App. Corpus Christi May 5 2011).

1223. Trial court did not abuse its discretion in admitting a photograph of appellant with cuts and blood on his hands, for purposes of Tex. R. Evid. 403, given that (1) the trial court could have found that the evidence was probative that appellant was the victim's assailant, (2) the offer of stipulation to the fact that appellant had cuts on his hands did not render the photograph less probative, (3) any stipulation would not be as strong as the jury's observations of appellants's injuries, which no other evidence established, (4) nothing indicated that it would be obvious to a viewer that the hand gesture was a gang sign, and (5) little time was spent on the photograph. Barron v. State, 2011 Tex. App. LEXIS 3330, 2011 WL 1744110 (Tex. App. San Antonio May 4 2011).

1224. For purposes of Tex. R. Evid. 403, the photographs of the victim had more than minimal probative value because the defense argued that medical negligence, not the gunshot wounds, caused the victim's death, and thus it was important for the State to establish the seriousness of the wounds, plus a pathologist testified that the autopsy photographs would assist the jury in understanding her testimony; the photographs were not likely to impress the jury in an irrational way, and the State did not spend a lot of time presenting the photographs, and their admission in appellant's murder trial was not error. Crank v. State, 2011 Tex. App. LEXIS 3266, 2011 WL 1642598 (Tex. App. El Paso Apr. 29 2011).

1225. In a Tex. R. Evid. 403 analysis regarding photographs of the victim, while the State arguably could have gotten by with the pathologist's testimony and diagrams, the photographs were more powerful, plus appellant disputed the seriousness of the wounds, which the photographs depicted; the admission of the photographs was not an abuse of discretion. Crank v. State, 2011 Tex. App. LEXIS 3266, 2011 WL 1642598 (Tex. App. El Paso Apr. 29 2011).

1226. In weighing the factors under Tex. R. Evid. 403, the trial court did not abuse its discretion by admitting evidence of defendant's blood alcohol concentration (BAC) without extrapolating back to the time of the offense. The BAC made it more likely that defendant had an illegal amount of alcohol in her blood at the time of the accident; the test results also helped the State establish that defendant's symptoms were due to intoxication and not the aftereffects of the crash; and the results spoke directly to the charged offense and did not impact the jury in an irrational way. Hernandez v. State, 2011 Tex. App. LEXIS 3115, 2011 WL 1631011 (Tex. App. El Paso Apr. 27 2011).

1227. Under Tex. R. Evid. 403, the videotape was properly admitted as it was not gruesome or grotesque, Tex. Code Crim. Proc. Ann. art. 37.07, §/Aa3(a)(1); admission of the photographs was harmless error, Tex. R. App. P. 44.2(b), because it could not have inflamed the minds of the jurors given the other similar photographs admitted

without objection. Kolanowski v. State, 2011 Tex. App. LEXIS 3047 (Tex. App. Fort Worth Apr. 21 2011).

1228. Appellant did not seem to raise the overruling of the Tex. R. Evid. 403 objection as an issue on appeal, but in any event the court did not find that the trial court erred in overruling the Rule 403 objection because the probative value of the extraneous offense evidence was not substantially outweighed by the risk of unfair prejudice. Calvin v. State, 2011 Tex. App. LEXIS 3091, 2011 WL 1562138 (Tex. App. Austin Apr. 21 2011).

1229. Damage to a witness's credibility that appellant wanted, for purposes of Tex. R. Evid. 609(a), was inflicted by the witness's own testimony, and jail records were cumulative on the issue of whether she had been jailed; the trial court did not err in excluding jail records and the custodian's testimony for purposes of Tex. R. Evid. 403. Calvin v. State, 2011 Tex. App. LEXIS 3091, 2011 WL 1562138 (Tex. App. Austin Apr. 21 2011).

1230. Even if the court found that purported discrepancy in the number of jailings of a witness made evidence non-cumulative under Tex. R. Evid. 403 and justified admitting the records evidence to impeach the witness under Tex. R. Evid. 609(a), its exclusion was harmless under Tex. R. App. P. 44.2 because there was no showing that appellant's constitutional rights were denied, and the exclusion of the records did not influence the jury or had more than a slight effect. Calvin v. State, 2011 Tex. App. LEXIS 3091, 2011 WL 1562138 (Tex. App. Austin Apr. 21 2011).

1231. In reviewing a claim under Tex. R. Evid. 403, the court found that (1) evidence that a witness was threatened by unknown persons with no proven connection to appellant had minimal capacity to make a fact more or less probable, (2) the Spanish term "La Eme" alone, with no explanation, had little potential to impress the jury in an irrational way, (3) there was other testimony during trial about threats of retaliation against testifying witnesses, and (4) the time required for the State to develop the evidence was minimal and the State had little need for the evidence to prove the charge, such that the isolated unexplained reference in Spanish to "La Eme" was harmless error under Tex. R. App. P. 44.2(b). Miranda v. State, 350 S.W.3d 141, 2011 Tex. App. LEXIS 2938 (Tex. App. San Antonio Apr. 20 2011).

1232. In a criminal prosecution for indecency with a child, a child forensic interviewer was permitted to testify about behavioral characteristics of child sexual abuse victims; the expert explained the concept of a rolling disclosure pattern. Her testimony was not unfairly prejudicial for purposes of Tex. R. Evid. 403, because it did not suggest an improper basis for reaching a decision. Dison v. State, 2011 Tex. App. LEXIS 2809, 2011 WL 1435201 (Tex. App. Eastland Apr. 14 2011).

1233. Photograph of a deceased person's hand wearing a glove had probative value because it established that the assailants took precautions to avoid leaving fingerprints; the photograph also had probative value as to appellant's liability as a party, plus no other photographs of the deceased person were admitted, and thus the photograph was relevant and its probative value outweighed any possible prejudicial effect under Tex. R. Evid. 403. Garcia v. State, 2011 Tex. App. LEXIS 2848, 2011 WL 1442341 (Tex. App. Corpus Christi Apr. 14 2011).

1234. In a criminal prosecution for aggravated assault with a deadly weapon, evidence that defendant was driving a vehicle that matched the description of the vehicle involved in the shooting and that he attempted to flee from officers when one of them tried to pull him over was probative of his consciousness of guilt. The prejudicial effect of the evidence of defendant's flight did not outweigh its probative value under Tex. R. Evid. 403. Owens v. State, 2011 Tex. App. LEXIS 2871, 2011 WL 1435499 (Tex. App. Fort Worth Apr. 14 2011).

1235. Trial court did not abuse its discretion by overruling defendant's Tex. R. Evid. 403 objection as there was no clear disparity between the danger of unfair prejudice posed by the extraneous-offense evidence and its probative value; the factors did not weight in favor of exclusion of the evidence. Bethards v. State, 2011 Tex. App. LEXIS

2802 (Tex. App. Waco Apr. 13 2011).

1236. Photographs of the victim's body were admitted over appellant's objection on Tex. R. Evid. 403 grounds, a ruling he did not challenge on appeal; the logo on the victim's clothing was still visible and helped to identify the body, and the trial court did not abuse its discretion in overruling appellant's Rule 403 objections. Reyes v. State, 2011 Tex. App. LEXIS 2328, 2011 WL 1169247 (Tex. App. Dallas Mar. 31 2011).

1237. Use of the words depicted in the tattoos to show the complainant was a bad person and that he acted in conformity with his bad character during the altercation weighed against admission, as this would have been improper; because the words presented a danger of unfair prejudice, the trial court did not abuse its discretion in excluding the evidence under Tex. R. Evid. 403. Smith v. State, 355 S.W.3d 138, 2011 Tex. App. LEXIS 2426 (Tex. App. Houston 1st Dist. Mar. 31 2011).

1238. Evidence of a worker's prior use of pain medication was inadmissible under Tex. R. Evid. 608(b) for general impeachment purposes, the insurer did not raise intoxication as a defense under Tex. Lab. Code Ann. § 406.032(a)(1) in the worker's compensation administrative proceeding, and the insurer's suggestion that the worker might have fabricated his claim to obtain prescription drugs was speculative. Thus, the evidence was properly excluded as prejudicial under Tex. R. Evid. 403. Commerce & Indus. Ins. Co. v. Ferguson-Stewart, 339 S.W.3d 744, 2011 Tex. App. LEXIS 2446 (Tex. App. Houston 1st Dist. Mar. 31 2011).

1239. Appellant developed his defense and aspects of the victim's racial animus were already put into the trial, such that the trial court acted within its discretion to avoid raising emotional fires through admitting overtly racial and inflammatory epithets. Cummings v. State, 2011 Tex. App. LEXIS 2303, 2011 WL 1157882 (Tex. App. Amarillo Mar. 30 2011).

1240. Trial court did not abuse its discretion by overruling defendant's Tex. R. Evid. 403 objection where there was not a clear disparity between the danger of unfair prejudice posed by the extraneous-offense evidence and its probative value. Bethards v. State, 2011 Tex. App. LEXIS 2308 (Tex. App. Waco Mar. 30 2011).

1241. Trial court did not abuse its discretion in admitting a photograph that showed a murder victim on the ground at the crime scene where, although some blood was visible on the victim's clothing and his chest was bared, the photograph was not gruesome, did not show a close-up of any injury, and merely depicted the victim in relation to his surroundings. The probative value of the photograph was not substantially outweighed by any prejudicial effect. Acevedo v. State, 2011 Tex. App. LEXIS 2047, 2011 WL 1044402 (Tex. App. San Antonio Mar. 23 2011).

1242. Trial court did not err by admitting into evidence several photographs of the victim at the scene of the murder based on Tex. R. Evid. 403 because: (1) only two of the photographs could be considered close-ups, and none were autopsy photos; (2) the photographs corroborated the testimony of the responding officer and the pathologist at to the location and manner of the crime; and (3) a photograph of the victim's state of dress did not indicate that she was sexually assaulted and the State did not present any evidence at trial suggesting a sexual assault took place. Reese v. State, 340 S.W.3d 838, 2011 Tex. App. LEXIS 1900 (Tex. App. San Antonio Mar. 16 2011).

1243. Nursing home records contained a number of facts the jury was entitled to consider and they were probative because they provided a general background from which jurors could understand the general status of the decedent's health in periods of time relevant to the contested will issues the jury was asked to decide; thus, the probate court could reasonably conclude that the probative value of the records outweighed any potential prejudicial effect under Tex. R. Evid. 403 and admit those records into evidence. In the Estate of Kremer, 2011 Tex. App.

LEXIS 1726, 2011 WL 846137 (Tex. App. Beaumont Mar. 10 2011).

1244. Trial court did not abuse its discretion by excluding text messages and voicemail messages offered for impeachment of the child victim's mother because the probative value of the evidence was minimal, as it did not directly refute any element of the charged offense, which was established by the victim's testimony, and none of the messages concerned the sexual abuse. The evidence was also cumulative of other evidence admitted at trial, as defense counsel cross-examined the victim's mother regarding her marriage to defendant, and the testimony of the victim and her brother corroborated the turbulent nature of the mother's marriage to defendant. Smith v. State, 340 S.W.3d 41, 2011 Tex. App. LEXIS 1739 (Tex. App. Houston 1st Dist. Mar. 10 2011).

1245. Trial court was cautious in conducting the Tex. R. Evid. 403 balancing test regarding photographs of the victim, as, in part, the trial court did not allow the State to display the photographs on a larger screen unless it was necessary; although the photographs were gruesome, that alone did not render the probative value outweighed by prejudice, the photographs depicted the crime scene and condition of the victim's body due to appellant's action, and the photographs had probative value in appellant's murder trial, in depicting his efforts to hide the crime and dispose of the body, such that the trial court did not abuse its discretion in admitting the photographs. Ziegler v. State, 2011 Tex. App. LEXIS 1679, 2011 WL 810060 (Tex. App. El Paso Mar. 9 2011).

1246. Pursuant to Tex. R. Evid. 613 and the balancing test in Tex. R. Evid. 403, the State had proper reasons to call defendant's father as a witness in a murder case and to point out that the account he gave to the police and to another witness were diametrically opposed. Westbrook v. State, 2011 Tex. App. LEXIS 1443, 2011 WL 686396 (Tex. App. Tyler Feb. 28 2011).

1247. Trial court did not abuse its discretion by determining that defendant's statement was relevant because the discussion of "I'll find a way out" without "snitching" and his reference to the "footage" made it more probable that defendant had some involvement in the crime. The trial court did not abuse its discretion by determining that there was not unfair prejudice requiring exclusion of the statement because if the jury chose to credit it, it would not have been on an improper basis; rather, it would have been on the basis that defendant was part of the crime. Quintanilla v. State, 2011 Tex. App. LEXIS 1353, 2011 WL 665328 (Tex. App. Houston 14th Dist. Feb. 24 2011).

1248. Trial court did not err in finding that the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice to defendant where the evidence was probative that defendant was the victim's assailant.

1249. Trial court did not abuse its discretion by admitting evidence concerning a syringe found in defendant's sock in jail following his arrest because the evidence was relevant to establish defendant's knowledge of the methamphetamine and to rebut the defensive theory that defendant had no knowledge of the methamphetamine in either the van or in the vehicle defendant was riding in. Defendant failed to establish that the probative value of the evidence was significantly or substantially outweighed by its prejudicial effect, defendant's knowledge of the methamphetamine was seriously contested, the time necessary to present the evidence represented a negligible portion of the State's case, and limiting instructions were given. Phillips v. State, 2011 Tex. App. LEXIS 1383, 2011 WL 652846 (Tex. App. Amarillo Feb. 23 2011).

1250. Trial court did not abuse its discretion by admitting evidence of the circumstances of defendant' arrest in July 2004 because evidence that defendant possessed methamphetamine at his father's residence on a later occasion was circumstantial evidence that defendant intentionally or knowingly possessed methamphetamine on an earlier occasion. Defendant's knowledge of the methamphetamine was seriously contested, the time necessary to present the evidence represented a negligible portion of the State's case, and limiting instructions were given.

Phillips v. State, 2011 Tex. App. LEXIS 1383, 2011 WL 652846 (Tex. App. Amarillo Feb. 23 2011).

1251. Court did not reach the question of whether defense counsel's failure to identify a objectionable photograph by exhibit number was sufficient to preserve the complaint because the failure to state a particular basis for objection under Tex. R. Evid. 403 preserved nothing for review. Conway v. State, 2011 Tex. App. LEXIS 849 (Tex. App. Houston 14th Dist. Feb. 3 2011).

1252. In a case in which defendant was convicted of aggravated kidnapping, the trial court did not abuse its discretion by admitting evidence that defendant, after committing the charged offense and on the same day, had ordered two minor girls walking down a street to get in his van where the trial court could have reasonably concluded that the evidence regarding defendant's encounter with the minor girls was relevant and admissible because that evidence revealed defendant's true plans about his encounter with the victim on the day he committed the offense. The trial judge could have reasonably concluded that the inherent probative force of the evidence, along with the State's need for the evidence, substantially outweighed the danger of any unfair prejudice to defendant, and the presentation of the extraneous offense evidence did not consume an inordinate amount of time. Frank v. State, 2011 Tex. App. LEXIS 762, 2011 WL 379041 (Tex. App. Beaumont Feb. 2 2011).

1253. Trial court did not abuse its discretion by admitting evidence of defendant's drug transaction and drug use during his capital murder trial because it was same-transaction contextual evidence and background contextual evidence that put in context the conspiracy offense that defendant was charged with; the State sought to show that defendant was an active participant with his sons in a large-volume and dangerous drug business, and not just an after the fact bus driver, to explain why defendant would have entered into the conspiracy with his sons to rob the victim. Given the State's need for circumstantial evidence to prove that defendant entered into the conspiracy to rob the victim, the court could not say that there was a clear disparity between the danger of unfair prejudice posed by the evidence and its probative value. Davis v. State, 2011 Tex. App. LEXIS 835, 2011 WL 322877 (Tex. App. Waco Feb. 2 2011).

1254. During the punishment phase of defendant's trial for aggravated sexual assault of a child, the trial court did not abuse its discretion in admitting the testimony of three of defendant's sisters that he sexually assaulted them and a fourth sister when they were children and defendant was a juvenile, even though the acts had occurred between forty-four and sixty years before trial, because Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) contained no time restriction on punishment evidence, and because the sisters' testimony was quite probative of the punishment issue before the jury-the appropriate sentence for a particular defendant in a particular case-as it demonstrated a pattern of conduct over many years. The sisters' testimony did not occupy an undue amount of time, and it did not have the potential to impress the jury in some irrational, but nevertheless indelible way. Rodriguez v. State, 345 S.W.3d 504, 2011 Tex. App. LEXIS 834 (Tex. App. Waco Feb. 2 2011).

1255. Under Tex. R. Evid. 403, the trial court did not err in excluding the girlfriend's testimony during the guilt-innocence phase of the trial because that evidence amounted to no more than speculation that another person might have killed the victim; defendant not only did not provide a nexus between an alternative perpetrator and the victim's murder, but he also failed to identify any particular individual who might have been responsible for killing the victim; and the evidence would present a threat of confusing the issues since the State would be forced to disprove defendant's contention that some unknown person might have committed the murder. King v. Tex., 2011 Tex. App. LEXIS 729, 2011 WL 381743 (Tex. App. San Antonio Feb. 2 2011).

1256. Testimony from the victim's girlfriend regarding the victim's violent tendencies towards her and his history of drug use was not admissible during the punishment phase of the trial under Tex. R. Evid. 403 because it would result in the jury focusing its attention on the victim's character rather than on defendant's personal responsibility and moral culpability. King v. Tex., 2011 Tex. App. LEXIS 729, 2011 WL 381743 (Tex. App. San Antonio Feb. 2

2011).

1257. Gang evidence admitted at punishment was relevant under case law and probative of appellant's character, the testimony did not consume an inordinate amount of time at the hearing, and the jury sentenced appellant to much lower than the permitted 99 years in each possession with intent to deliver case, such that the probative value of the gang evidence was not substantially outweighed by the danger of unfair prejudice. Gilmore v. State, 2011 Tex. App. LEXIS 616 (Tex. App. Dallas Jan. 28 2011).

1258. On appeal of defendant's conviction for aggravated assault with a deadly weapon, he claimed the trial court abused its discretion by admitting evidence that two of the guns found in his apartment were stolen. Because the jury had already heard evidence from two different witnesses that the guns were stolen without any objection from defendant, his claim that the trial court abused its discretion in admitting this evidence under Tex. R. Evid. 403 was not preserved for review. Chenier v. State, 2011 Tex. App. LEXIS 678, 2011 WL 286156 (Tex. App. Houston 1st Dist. Jan. 27 2011).

1259. In a situation where a few factors weighed against admitting the testimony of two witnesses who were also abused as children by defendant, and a few factors weighed in favor of admitting their testimony, the trial court could have reasonably concluded that the witnesses' testimony was admissible under Tex. R. Evid. 403 because 1) without their testimony, the State's case would have basically come down to the victim's word against defendant's word; 2) the evidence did not tend to confuse or distract the jury as their testimony was straightforward and directly relevant to whether defendant abused the victim; 3) their testimony concerned matters easily comprehensible by laypeople; 4) the evidence was not given undue weight by the jury as the witnesses were on the stand for relatively brief periods of time; and 5) the evidence was not too time-consuming or repetitive. Gaytan v. State, 331 S.W.3d 218, 2011 Tex. App. LEXIS 444 (Tex. App. Austin Jan. 21 2011).

1260. Fact that one child placed a Nazi symbol on his book was relevant to determining whether the mother endangered the child's well-being and also to evaluating his best interests; it was not shown that the admission of the evidence unfairly prejudiced the mother under Tex. R. Evid. 403, and if the trial court did err in allowing the evidence, the error was harmless. In re D.O., 338 S.W.3d 29, 2011 Tex. App. LEXIS 407 (Tex. App. Eastland Jan. 20 2011).

1261. Trial court's determination that any unfair prejudice did not outweigh the probative value of the extraneous offense evidence regarding the testimony of another sexual assault victim because the State also presented DNA evidence against defendant, the extraneous offense evidence did not have a large potential to impress the jury in an irrational way nor did the State spend a significant amount of time presenting the other victim's testimony, the State had a need for the other victim's testimony as there was no DNA evidence that linked defendant to the victim and there was no DNA evidence that verified the evidence of sexual assault had come from the victim, and the other victim's testimony served to undermine the defensive theories aimed at punching holes in the weight of the DNA evidence. Dreyer v. State, 2011 Tex. App. LEXIS 353, 2011 WL 193494 (Tex. App. Beaumont Jan. 19 2011).

1262. During the punishment phase of defendant's trial, pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), the trial court did not err in admitting (1) the evidence of an accomplice's previous robbery as the evidence was relevant to defendant's culpability in the robbery at a bank because it reflected poorly on defendant's decision to associate with the accomplice that day, especially when combined with other evidence showing defendant's knowledge that the accomplice had previously shot someone, which was especially true when considering defendant's strategy of minimizing his role in the robbery to request a lenient sentence; (2) the photographs of the girlfriend's injuries caused by defendant even if they also displayed injuries caused by his mother; and (3) a detective's testimony regarding defendant's tattoos and gang membership as the evidence was not unfairly prejudicial under Tex. R. Evid. 403. Collins v. State, 2011 Tex. App. LEXIS 392, 2011 WL 167223 (Tex. App. Fort

Worth Jan. 13 2011).

1263. Trial court did not abuse its discretion by admitting evidence of a community activist's fee sharing agreement during her defamation trial because ordinary malice was an issue for the jury as both mayors pleaded exemplary damages and the probative value of the evidence did not outweigh its prejudicial value. Salinas v. Townsend, 365 S.W.3d 368, 2011 Tex. App. LEXIS 91, 2011 WL 61844 (Tex. App. Corpus Christi Jan. 6 2011).

1264. Extraneous offenses occurred relatively close in time, involved highly unusual events that were unlikely to repeat themselves inadvertently, rebutted appellant's fabrication allegation, and the prosecutor did not seek to offer the evidence until after appellant testified in the guilt/innocence phase; in reviewing the balancing factors under Tex. R. Evid. 403, the court found no abuse of discretion by the trial court in finding that the value of the evidence was not substantially outweighed by the danger of unfair prejudice. Jordan v. State, 2010 Tex. App. LEXIS 10244, 2010 WL 5541695 (Tex. App. Eastland Dec. 30 2010).

1265. During defendant's trial for sexual assault of a child, the court did not err in admitting into evidence five child pornography photographs found on defendant's computer; his possession or viewing of child pornography was relevant circumstantial evidence of his intent to arouse or gratify his sexual desire. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Wooley v. State, 2010 Tex. App. LEXIS 10306 (Tex. App. Dallas Dec. 30 2010).

1266. Photographs of defendant's tattoos on his hand and across his stomach were admissible for purposes of identification under Tex. R. Evid. 404(b) and the danger of unfair prejudice resulting from the admission of that evidence did not substantially outweigh its probative value under Tex. R. Evid. 403 where the tattoos were physical evidence linking defendant to a nickname that several witnesses used in identifying defendant and where the jury already heard testimony regarding defendant's gang membership. Arias v. State, 2010 Tex. App. LEXIS 10217, 2010 WL 5541118 (Tex. App. San Antonio Dec. 29 2010).

1267. Trial court did not abuse its discretion by admitting extraneous offense evidence of another robbery under the identity exception to Tex. R. Evid. 404(b) because both robberies were committed in the same area within an hour of each other, a clean-cut African-American man approached the victims on foot just after they had exited their vehicles in the parking lots of their respective apartment complexes, both victims heard the sound of a gun cocking just before they saw a man with a silver gun, both victims saw a red bandana, the man with the gun immediately asked for the victims' purse/wallet and took their cell phones, and both victims identified defendant as the robber. The trial court did not err by failing to exclude the evidence under Tex. R. Evid. 403 because: (1) the evidence was probative as it assisted the jury in determining the robber's identity; (2) identity was the seminal issue in dispute; (3) the trial court gave the jury a limiting instruction; and (4) the testimony about the other robbery was only about 30 pages of the reporter's record. Carroll v. State, 2010 Tex. App. LEXIS 10003, 2010 WL 5142386 (Tex. App. Waco Dec. 15 2010).

1268. In a case in which defendant was convicted of aggravated sexual assault of a child, the trial court did not err under Tex. R. Evid. 403, 404(b) in admitting evidence of defendant's extraneous misconduct where the evidence was admitted for purposes other than character conformity and was more probative than prejudicial because the State's need for the evidence was considerable, and although the content of the evidence was emotional, it made the existence of a material and, perhaps, the ultimate disputed fact at trial-defendant's identity as the perpetrator-more probable. Because the pattern and characteristics of the alleged offense against the victim were so distinctively similar to the misconduct adduced in the evidence that a "signature" by defendant was apparent, the evidence showed a modus operandi that the State used both in its identifying of defendant as the perpetrator and in establishing the manner in which defendant committed the offense. Curcuru v. State, 2010 Tex. App. LEXIS 9748, 2010 WL 5020178 (Tex. App. Corpus Christi Dec. 9 2010).

1269. Mother did not object at trial to relevance or that any relevance was outweighed by the risk of unfair prejudice and she did not preserve this complaint for review, under Tex. R. App. P. 33.1; furthermore, the mother testified without objection to the substance of certain testimony, and any error in admitting evidence was cured where the same evidence came in elsewhere without objection. In the Interest of S.R., 2010 Tex. App. LEXIS 9681, 2010 WL 4983484 (Tex. App. Waco Dec. 8 2010).

1270. Evidence of the mother's drug or alcohol impairment while driving was relevant in determining whether she engaged in conduct that endangered the children and in determining the best interest of the children; for purposes of Tex. R. Evid. 403, the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice. In the Interest of S.R., 2010 Tex. App. LEXIS 9681, 2010 WL 4983484 (Tex. App. Waco Dec. 8 2010).

1271. Court assumed that appellant's testimony about his sexual relationship with the victim, where the victim paid appellant for sexual activity, was relevant in the punishment phase, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), but nothing suggested a connection between the alleged sexual arrangement between appellant and the victim and the aggravated robbery, as there was no mention that the victim failed to pay for one of the encounters or that appellant was shortchanged, plus the testimony would tend to suggest a decision on an improper basis and tend to distract the jury, and the evidence would have been partially repetitious; for purposes of Tex. R. Evid. 403, the trial court did not err in excluding the testimony. Peters v. State, 2010 Tex. App. LEXIS 9397, 2010 WL 4813675 (Tex. App. Waco Nov. 24 2010).

1272. Trial court did not abuse its discretion in overruling appellant's Tex. R. Evid. 403 objection; given his sole defensive theory of fabrication, the inherent probative force of the niece's testimony, for purposes of Tex. R. Evid. 404(b), strongly served to make the existence of a fact of consequence more probable, and considering the Tex. R. Evid. 403 factors, the balancing determination by the trial court did not show a clear abuse of discretion, as the trial court gave limiting instructions and the presentation of the testimony was brief and not particularly graphic. Dial v. State, 2010 Tex. App. LEXIS 9273, 2010 WL 4705529 (Tex. App. Dallas Nov. 22 2010).

1273. Trial court did not abuse its discretion by admitting into evidence three series of photographs depicting the injuries suffered by the victim because their admission did not violate Tex. R. Evid. 403, as: (1) the photos were black and white and did not show gruesome scenes; (2) the amount of time spent offering and discussing the photos did not unduly delay the trial; (3) while many of the photos were of the same area of the victim's body, they did not show the same degree of injury as they were taken at different times; and (4) the photos, showing the apparent anger of defendant by the lasting imprint his teeth on the victim's arm and head, went directly to the totality of the circumstances of the assault. Betliskey v. State, 2010 Tex. App. LEXIS 9150, 2010 WL 4644500 (Tex. App. Amarillo Nov. 17 2010).

1274. In an aggravated robbery case, the evidence of a prior offense was admissible because the State needed it to demonstrate defendant's intent to steal a second vehicle within 13 minutes after his first attempt ended with an immovable truck in a drainage culvert; although defendant killed the victim in the prior offense, that would not inflame the jury any more than the second victim's testimony about being shot five times at close range by defendant, particularly in light of the descriptions of his wounds and the photographs of them that were presented to the jury; and the prejudicial nature of the contextual evidence did not render the evidence inadmissible where it set the stage for the jury's comprehension of the whole criminal transaction. Wilson v. State, 2010 Tex. App. LEXIS 8685, 2010 WL 4261872 (Tex. App. Fort Worth Oct. 28 2010).

1275. At defendant's sentencing hearing after his guilty plea to two counts of aggravated sexual assault of a child and one count of indecency with a child, a taped statement's probative value outweighed any prejudicial effect under Tex. R. Evid. 403 because defense counsel claimed that defendant's guilty plea indicated his willingness to accept responsibility for his conduct but the statement indicated that defendant initially denied responsibility and tried to blame others, including his wife, for the incident. Hernandez v. State, 2010 Tex. App. LEXIS 8538, 2010 WL

4148359 (Tex. App. Eastland Oct. 21 2010).

1276. Even though the trial court erred by allowing the State to ask a police officer if defendant had assaulted two other inmates upon arriving at the city's holding facility, as it showed defendant's propensity to be aggressive and perpetrate assaults, the error was harmless because there was a significant amount of evidence that went to the issue of defendant's intent and the State mentioned the evidence only minimally during closing arguments. Parson v. State, 2010 Tex. App. LEXIS 8330, 2010 WL 4053782 (Tex. App. Amarillo Oct. 15 2010).

1277. Trial court did not abuse its discretion by admitting the testimony of a fellow prisoner of defendant because it had a strong tendency to suggest that defendant was quick-tempered and prone to respond to the slightest provocation with homicidal violence, and it was directly relevant to the issue of defendant's identity as the murderer, as the prisoner testified that defendant spoke of putting "three in the back of the head" and expressed a preference for .22 caliber weapons, the same used to kill the victims. The trial court did not abuse its discretion by concluding that the probative value of the prisoner's testimony was not substantially outweighed by the danger of unfair prejudice or undue delay because only 51 pages of the 1347 pages of the reporter's record were devoted to the prisoner's testimony, including 15 pages for voir dire outside the jury's presence. Garcia v. State, 2010 Tex. App. LEXIS 8313, 2010 WL 4053640 (Tex. App. Austin Oct. 12 2010).

1278. Even though the trial court erred by admitting three autopsy photographs that showed the surgical mutilation caused by the autopsy, the error was harmless because the medical examiner's testimony was brief and came four days before deliberations began, each set of autopsy photographs were admitted as a group, the medical examiner briefly explained what each photograph showed, and no particular emphasis was given to the offending photographs. Garcia v. State, 2010 Tex. App. LEXIS 8313, 2010 WL 4053640 (Tex. App. Austin Oct. 12 2010).

1279. Trial court did not abuse its discretion by admitting photographs showing defendant's tattoos because a criminal investigator testified that defendant's distinctive tattoos as depicted in the photographs identified him as a member of a particular gang, and defendant did not overcome the presumption that the relevant evidence was more probative than prejudicial. Pate v. State, 2010 Tex. App. LEXIS 8151, 2010 WL 3921177 (Tex. App. Corpus Christi Oct. 7 2010).

1280. While an expert witness's general testimony about sex offenders' hesitancy to speak about their offenses was not particularly probative on the disputed issues, neither was it unduly prejudicial, because the expert never linked his observations to defendant; thus, pursuant to Tex. R. Evid. 403, the expert's testimony was not unduly prejudicial. Cook v. State, 2010 Tex. App. LEXIS 8095, 2010 WL 3910585 (Tex. App. Beaumont Oct. 6 2010).

1281. In an aggravated assault case in which defendant shot a person who had brandished a hammer, the trial court reasonably found that any prejudice from the admission of photographs of the pickup truck from which the complainant got the hammer did not greatly outweigh the probative value of the exhibits. Sierra v. State, 2010 Tex. App. LEXIS 8039, 2010 WL 3866270 (Tex. App. Houston 14th Dist. Oct. 5 2010).

1282. Other than the fact the victim was intubated, the photographs, which the court assumed were shown to the jury in color, showed no more than the injuries the victim suffered, and because the gruesomeness of the photographs emanated from nothing more than the crime itself, the trial court did abuse its discretion in admitting them under Tex. R. Evid. 403. Gunter v. State, 2010 Tex. App. LEXIS 7909, 2010 WL 3769528 (Tex. App. Dallas Sept. 29 2010).

1283. To the extent appellant claimed testimony should have been excluded because it was hearsay and violated Tex. R. Evid. 403, nothing was presented for review; appellant cited no authority and made only a cursory argument that the admission of testimony violated Rule 403. Mccutchen v. State, 2010 Tex. App. LEXIS 7760, 2010 WL

3699987 (Tex. App. San Antonio Sept. 22 2010).

1284. Victims testified that defendant made them watch pornographic images and videos depicting both children and adults, that defendant made them perform acts depicted in the pornographic images they were forced to watch, and that defendant would make them remove their clothing as they were watching the videos then sexually assault them afterward; based on that testimony, the evidence regarding child pornography found on the DVD's constituted same-transaction-contextual evidence and the evidence of child pornography was so intertwined with the sexual assaults of the victims that the jury's understanding of the offenses would have been obscured without it. The evidence was also admissible under Fed. R. Evid. 404(b) on the issue of defendant's intent, and although the evidence of child pornography was undoubtedly prejudicial, the State limited the visual evidence to two 30-second segments, and the appellate court could not say that the district court abused its discretion by ruling that the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice. Bonner v. State, 2010 Tex. App. LEXIS 7440, 2010 WL 3503858 (Tex. App. Waco Sept. 8 2010).

1285. Certain testimony and a DVD were relevant to the elements of both counts of evading arrest and tampering, and the testimony also corroborated accomplice testimony regarding appellant's intent; the testimony in question did not unduly delay the trial and appellant raised no argument about the DVD's length, such that the trial court did not err in overruling appellant's Tex. R. Evid. 403 objection and in admitting the evidence. Lewis v. State, 2010 Tex. App. LEXIS 7292, 2010 WL 3433992 (Tex. App. Fort Worth Aug. 31 2010).

1286. Trial court did not abuse its discretion by admitting evidence of a prior robbery during defendant's aggravated robbery trial because: (1) it was committed the evening prior to the instant robbery; (2) defendant and his accomplice acted together in both robberies; (3) both robberies were committed against lone, older women using surprise, speed, and strength through force or the threat of force; and (4) both robberies were committed while using the same vehicle as a means of escape. Therefore, the probative value of the evidence was great, as it showed that defendant and his accomplice acted together in a continuing criminal enterprise and rebutted defendant's theory that he was not a party to the instant robbery but was merely present in the vehicle while it occurred. Davis v. State, 2010 Tex. App. LEXIS 6949, 2010 WL 3341514 (Tex. App. Tyler Aug. 25 2010).

1287. Trial court did not err by admitting into evidence photographs of defendant's tattoos because a criminal investigator testified that defendant's distinctive tattoos identified him as a member of particular street gang, which was an element of the charged offense of organized criminal activity. Defendant did not overcome the presumption that the relevant evidence was more probative than prejudicial. Pate v. State, 2010 Tex. App. LEXIS 6980, 2010 WL 3341853 (Tex. App. Corpus Christi Aug. 25 2010).

1288. Trial court did not abuse its discretion in determining that the probative value of the child victim's mother's testimony outweighed any prejudicial effect because the testimony, identifying defendant as the individual who left bite marks on the victim when they were playing, was relevant and probative of the relationship between defendant and the victim. Samora v. State, 2010 Tex. App. LEXIS 6759, 2010 WL 3279536 (Tex. App. Corpus Christi Aug. 19 2010).

1289. In an aggravated assault case, the trial court did not err in admitting evidence about the bullet damage to the interior of a particular home. The evidence was relevant to rebut defendant's theory that he merely fired a gun into the air to deter and stop a man whom he believed to be a burglar, and the evidence was not particularly inflammatory or of such a nature as to distract, confuse, or be given undue weight by the jury. Richardson v. State, 2010 Tex. App. LEXIS 6659, 2010 WL 3245443 (Tex. App. Dallas Aug. 18 2010).

1290. Trial court did not abuse its discretion by admitting testimony that the pistol used in the shooting was stolen despite defendant's Tex. R. Evid. 403 objection because the record showed that the probative force and need for

the evidence was low, and there was a slight tendency that the evidence would suggest an improper basis for decision, distract the jury from the main issue, or would be given undue weight. The evidence took very little time to present and was not cumulative. Codina v. State, 2010 Tex. App. LEXIS 6550, 2010 WL 3192966 (Tex. App. Dallas Aug. 13 2010).

1291. Trial court did not abuse its discretion in performing its Tex. R. Evid. 403 balancing test regarding evidence of trace quantities of controlled substances that were found in defendant's car during the same search in which the methadone was found and finding that the evidence was admissible because: (1) the evidence made the fact that defendant knew the pill bottle contained contraband more probable; (2) defendant's possession of the baggie and the scale dusted with methamphetamine and cocaine was necessary to prove scienter; (3) the evidence had little potential to impress the jury in an irrational way; (4) since all of the contraband was discovered during the same search of defendant's car, little extra time was spent by the State to develop the evidence; and (5) the State's need for the evidence was great, as it needed to link defendant to the knowing possession of the methadone in the pill bottle by showing that defendant knowingly possessed other contraband at the time of his arrest. Lamkin v. State, 2010 Tex. App. LEXIS 6484, 2010 WL 3170647 (Tex. App. Eastland Aug. 12 2010).

1292. Trial court did not abuse its discretion by overruling defendant's Tex. R. Evid. 403 objection to a family counselor's testimony because: (1) the only direct evidence of sexual abuse came from the child victim, and the counselor's testimony tended to establish that the victim had indeed experienced a traumatic event consistent with sexual abuse; (2) the counselor testified briefly about each behavioral manifestation exhibited by the victim and spoke in general, not specific terms, and the trial court limited the counselor's testimony so that she did not testify about the content of the victim's nightmares; (3) defendant admitted that the counselor's testimony was not too terribly long; (4) most of the counselor's testimony was not cumulative of other evidence; and (5) the State needed the counselor's testimony because it tended to rebut the defense's theory that the abuse did not occur. Berzley v. State, 2010 Tex. App. LEXIS 6463, 2010 WL 3159875 (Tex. App. San Antonio Aug. 11 2010).

1293. Evidence that appellant was on pretrial supervision in another case in which he was found competent was probative of determining his motive for committing the offenses and thus the evidence was needed by the State to rebut appellant's insanity claim; the trial court protected the jury from deciding the matter on an improper basis, there was no indication that the evidence would confuse the jury, nor did it take an inordinate amount of time to present the evidence, and the decision to admit the evidence under Tex. R. Evid. 403 was not an abuse of discretion. Espinosa v. State, 328 S.W.3d 32, 2010 Tex. App. LEXIS 6341 (Tex. App. Corpus Christi Aug. 5 2010).

1294. During defendant's trial for possession of child pornography, the court did not err in admitting nine photographs recovered from his cell phone depicting naked adult females because the pictures depicting adults in similar poses as those depicted in the pictures of his niece rebutted the defensive theory that he only possessed the pictures of his niece for the purpose of trying to help her; the trial court gave both oral and written limiting instructions to the jury regarding the challenged pictures. Morris v. State, 2010 Tex. App. LEXIS 6282 (Tex. App. Eastland Aug. 5 2010).

1295. There was no error in admitting into evidence over defendant's objections the rifle, magazine/clip, shell casings, police in-car video, ammunition, and the gunshot residue trace evidence kit, because the probative value of the exhibits was not substantially outweighed by any danger of unfair prejudice, when the fingerprints on the magazine/clip that fit the rifle and ammunition matched defendant's fingerprints, the video confirmed that defendant was a rear passenger in the vehicle, and the results of the residue test made it more probable that defendant was in fact not only around gunfire, but also the shooter. Jones v. State, 2010 Tex. App. LEXIS 6270, 2010 WL 3041963 (Tex. App. Beaumont Aug. 4 2010).

1296. Appellate court could not say that it was shown that a Tex. R. Evid. 403 objection could be properly sustained to the admission of spoliation evidence in a store customer's slip and fall action, based on the store's

destruction of the bulk of the videotape recording surrounding the area where the customer fell because the evidence of spoliation rose beyond speculation and conjecture and because no reasonable explanation for the missing existed, as the store should have known from the seriousness of the accident and the customer's subsequent medical treatment that there was a substantial chance for litigation. Brookshire Bro, Ltd. v. Aldridge, 2010 Tex. App. LEXIS 6065, 2010 WL 2982902 (Tex. App. Tyler July 30 2010).

1297. When a letter was offered into evidence at trial, defense counsel said "no objection," thereby waiving any alleged error in admission of that evidence, plus there was testimony about the letter, to which there was no objection; moreover, attempts by one to fabricate evidence were admissible, the evidence showing that appellant fabricated evidence was probative, and he did not show that the evidence had the potential to impress the jury in an irrational way. Seeger v. State, 2010 Tex. App. LEXIS 6064, 2010 WL 2998750 (Tex. App. Tyler July 30 2010).

1298. Trial court did not err by overruling his Tex. R. Evid. 403 objection to the admission of letters he wrote to the complainant after the incident because it could have reasonably concluded that the probative value of the letters was not substantially outweighed by the countervailing factors specified in the rule, as the letters illustrated the nature of the relationship between defendant and the complainant and indicated his consciousness of guilt. White v. State, 2010 Tex. App. LEXIS 5985, 2010 WL 2951748 (Tex. App. Dallas July 29 2010).

1299. Trial court did not abuse its discretion in admitting defendant's letter to an officer regarding his plea agreement because the statements were not covered by Tex. R. Evid. 410. In addition, the letter's probative value was not substantially outweighed by the risk of unfair prejudice under Tex. R. Evid. 403 because: (1) the letter was probative of whether defendant committed the charged offense; (2) given the brevity and clarity of the letter and the fact that it was directly related to the charged offense, the amount of time required to develop it was negligible; and (3) the letter was important to the prosecution's case and had a significant tendency to make defendant's guilt more probable. Willis v. State, 2010 Tex. App. LEXIS 5931, 2010 WL 2935772 (Tex. App. San Antonio July 28 2010).

1300. Trial court could have reasonably determined that the probative value of the extraneous offense evidence of a robbery during defendant's capital murder trial was not substantially outweighed by the countervailing factors specified in Tex. R. Evid. 403 because: (1) the evidence was highly probative to show defendant's identity as one of the perpetrators of both crimes; (2) although the evidence had the potential to evoke an emotional response in the jury, it was clear from the record that the State introduced the evidence to explain defendant's identity as on of the assailants; (3) the State's presentation of the evidence consumed only approximately two hours and 49 minutes of the three-day trial; (4) the State did not suggested that the evidence could be used to convict defendant of capital murder, and the evidence was presented in a fashion to prove defendant's participation in the instant robbery and murder; and (5) the trial court could have reasonably concluded that the presentation of the evidence would not consume an inordinate amount of time and that it was not cumulative of other evidence presented at trial. Dodson v. State, 2010 Tex. App. LEXIS 5859, 2010 WL 2889693 (Tex. App. Fort Worth July 22 2010).

1301. Trial court did not abuse its discretion in admitting into evidence testimony about extraneous acts described by a child witness under Tex. R. Evid. 403 because the issue of whether defendant was correctly identified by the victim was strongly contested, and therefore evidence showing defendant had been previously identified as engaging in sexual acts involving a child materially refuted the defense claims of mistake; the jury was instructed that it was not to consider the previous acts unless it believed beyond a reasonable doubt that defendant had committed them. Gillespie v. State, 2010 Tex. App. LEXIS 5701, 2010 WL 2839481 (Tex. App. Dallas July 21 2010).

1302. Trial court did not err by admitting into evidence multiple extraneous offenses during defendant's trial on charges of engaging in organized criminal activity because the evidence, namely the letterhead, testimony about the ongoing mortgage fraud, the forged signature on the articles of incorporation and diverted money, was all admissible as evidence to establish the existence of the combination, its members and its ongoing criminal

activities, which were elements of the offense; the diversion of money was also admissible under Tex. R. Evid. 404(b) as evidence of motive, knowledge and intent, common scheme or plan, or absence of mistake. The court further held that the probative value of the evidence was not substantially outweighed by any prejudicial effect. Marriott v. State, 2010 Tex. App. LEXIS 5804, 2010 WL 2869781 (Tex. App. Waco July 21 2010).

1303. Trial court did not abuse its discretion by admitting into evidence during sentence a recording of a telephone conversation defendant had while he was in jail waiting for his murder trial to begin because the conversation, during which defendant threatened to kill a man or break the man's nose, was relevant, as it illustrated defendant's propensity for violence and that he was not deterred by his earlier convictions, the instant victim's murder, or by being incarcerated. The evidence did not have an undue effect on the jury's decision under Tex. R. Evid. 403 because: (1) the comments were the only evidence of defendant's propensity to commit further violence following the victim's murder and therefore the State's need for the evidence was high; (2) the entire conversation was only 15 minutes long and the comments constituted only a few seconds of the conversation; and (3) although the State requested the jury sentence defendant to 99 years' confinement or life in prison, the jury sentenced him to 40 years' confinement. Walker v. State, 2010 Tex. App. LEXIS 5376, 2010 WL 2698782 (Tex. App. Dallas July 9 2010).

1304. During defendant's trial for possession of methamphetamine, the court would not have abused its discretion in determining that extraneous evidence concerning the finding of marijuana and drug paraphernalia inside a car would have been admissible under the rule had an objection been made; the possibility that the evidence impressed the jury in some irrational way was minimal because the record reflected that defendant's son was the only person arrested for marijuana possession. Brumbalow v. State, 2010 Tex. App. LEXIS 5333, 2010 WL 2696712 (Tex. App. Eastland July 8 2010).

1305. In appellant's murder case, the evidence of appellant's flight had probative value because it concerned a fact of consequence, his guilt, and because appellant claimed he acted in self-defense, the State needed the evidence to further substantiate its case; the State took very little time to develop the evidence and the flight evidence had little potential to confuse the jury, and the probative value of evidence of appellant's flight was not substantially outweighed by the danger of unfair prejudice. Staley v. State, 2010 Tex. App. LEXIS 5167, 2010 WL 2680000 (Tex. App. San Antonio July 7 2010).

1306. Strength of the State's need for the evidence supported the trial court's decision to admit the extraneous offense evidence under Tex. R. Evid. 403; although the State's evidence of identity was strong, appellant challenged the probative value of much of the evidence, and the extraneous offense evidence was not unfairly prejudicial. Fletcher v. State, 2010 Tex. App. LEXIS 5084, 2010 WL 2650008 (Tex. App. Houston 14th Dist. July 6 2010).

1307. For purposes of a Tex. R. Evid. 403 analysis, the charged and extraneous offenses were identical in a number of respects and thus highly probative on the issue of identity; although appellant argued that identity was not seriously contested at trial, defense counsel raised the issue at opening statements, during trial, and in closing arguments. Fletcher v. State, 2010 Tex. App. LEXIS 5084, 2010 WL 2650008 (Tex. App. Houston 14th Dist. July 6 2010).

1308. Second and third factors of a Tex. R. Evid. 403 analysis weighed in favor of the trial court's decision to admit extraneous offense evidence; the trial court gave a limiting instruction and the State did not spend an unduly lengthy amount of time to develop the evidence. Fletcher v. State, 2010 Tex. App. LEXIS 5084, 2010 WL 2650008 (Tex. App. Houston 14th Dist. July 6 2010).

1309. During defendant's trial for murdering his wife, the court did not err in admitting an exhibit containing his voluntary statement to the police for the purpose of establishing the nature of his relationship with his wife prior to

her death; defendant failed to demonstrate that a "significant disparity" existed between the degree of potential prejudice presented by the admissions, as compared to the probative value of the evidence to establish the nature of his relationship with his wife, and to rebut his defense. Allen v. State, 2010 Tex. App. LEXIS 4925 (Tex. App. El Paso June 30 2010).

1310. Evidence of an extraneous robbery was offer to show identity, and for purposes of Tex. R. Evid. 403, 404(b), (1) given the similar distinctive characteristics shared by both robberies, a witness's identification of appellant as the robber in the extraneous offense case provided compelling evidence of his identity as the robber of the instant robbery, (2) the court did not see how the evidence of the extraneous robbery had the potential to impress the jury irrationally, plus the jury's consideration was properly limited, and (3) the State needed the evidence because the reliability of the direct evidence could be undermined; despite the inordinate time involved in proving the extraneous robbery, the court believed that the probative value of the evidence of that robbery was not substantially outweighed by the danger of unfair prejudice. Lively v. State, 2010 Tex. App. LEXIS 4999 (Tex. App. Tyler June 30 2010).

1311. Twenty-seven percent of the State's direct examination was devoted to proof of an extraneous offense; the evidence was needed and inherently probative, but the expenditure of so much time proving the extraneous offense risked diverting the jury's attention from the charged offense. Lively v. State, 2010 Tex. App. LEXIS 4999 (Tex. App. Tyler June 30 2010).

1312. Evidence of the victim's extraneous offenses should have been allowed, Tex. R. Evid. 403, but because defendant denied hitting the victim with the baseball bat, he could not have employed the theory of self-defense for that part of the alleged assault; the trial court was free to disbelieve defendant's assertion that he only punched the victim once and that he did not hit him with the baseball bat, and the jury was free to believe the victim's testimony that defendant was the first aggressor. Tomasheski v. State, 2010 Tex. App. LEXIS 4709, 2010 WL 2512618 (Tex. App. Texarkana June 23 2010).

1313. Because appellant failed to develop any argument specifically with regard to a certain witness, the court presumed the reference to this testimony fell under the general rubric of appellant's Tex. R. Evid. 403 argument. Sung Mo Hong v. State, 2010 Tex. App. LEXIS 4688, 2010 WL 2510333 (Tex. App. Dallas June 23 2010).

1314. Even if the State failed to relate the breath test back to the time of arrest, such a failure afforded no basis for the exclusion of the test and the court's inquiry was confined to the admissibility of the breath test under Tex. R. Evid. 403. Sung Mo Hong v. State, 2010 Tex. App. LEXIS 4688, 2010 WL 2510333 (Tex. App. Dallas June 23 2010).

1315. Ultimate issue at trial was whether appellant was driving while intoxicated and it was axiomatic that the breath test was probative to this fact and there was no potential for jury distraction, plus the results were not unfairly prejudicial, there was no basis to conclude that there was any tendency for the evidence to be given undue weight by the jury, the amount of time spent on the evidence was not unduly lengthy, and the State had a considerable need for the evidence; thus, the probative value of the breath test results was not substantially outweighed by the danger of unfair prejudice for purposes of Tex. R. Evid. 403. Sung Mo Hong v. State, 2010 Tex. App. LEXIS 4688, 2010 WL 2510333 (Tex. App. Dallas June 23 2010).

1316. For purposes of Tex. R. Evid. 403, the court could not conclude that the evidence of a convenience store robbery lacked inherent probative force or that there was no need for the evidence; the evidence of the robbery a few hours after the offense at issue corroborated certain testimony, appellant did not contend that the evidence consumed an inordinate amount of time, and the court did not find that the jury, which was given a limiting instruction, was confused or distracted. Chamberlain v. State, 2010 Tex. App. LEXIS 4653, 2010 WL 2473341 (Tex.

App. Dallas June 21 2010).

1317. Court abused its discretion in overruling defendant's Tex. R. Evid. 403 objections, because the court impermissibly allowed the State to interject extremely prejudicial evidence of multiple other sexual offenses allegedly committed by defendant (and others), when the evidence of extraneous acts admitted did not show a plan to sexually assault the two alleged victims, but rather it was evidence of repeated occurrences of the same bad act, compounded by numerous additional bad acts. Pittman v. State, 321 S.W.3d 565, 2010 Tex. App. LEXIS 4504 (Tex. App. Houston 14th Dist. June 17 2010).

1318. For purposes of Tex. Code Crim. Proc. Ann. art. 37.071, § 2(a)(1) and Tex. R. Evid. 401, though circumstantial, the evidence clearly proved that appellant killed the victim's cat, which suffered wounds similar to those suffered by the victim; that appellant would kill a house cat was some evidence of his violent nature, the prosecutor's assessment of this evidence as showing appellant's brutality was rational and was a legitimate reason for admitting the evidence, and the trial court did not abuse its discretion under Tex. R. Evid. 403 in admitting this evidence. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1319. Even without medical evidence to verify it, defendant's volunteered statement to a police officer that he was HIV positive had probative value to show he was infected by the HIV virus when he sexually assaulted a child victim and was relevant as a circumstance of the offense that the jury could consider in assessing punishment under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). Lewis v. State, 2010 Tex. App. LEXIS 4545 (Tex. App. Amarillo June 16 2010).

1320. Trial court did not err in an employee's sexual harassment action in excluding the deposition testimony of a coworker because diverting the trial's focus to an investigation of the employee's general sexual proclivities was potentially highly prejudicial. Waffle House, Inc. v. Williams, 313 S.W.3d 796, 2010 Tex. LEXIS 416, 53 Tex. Sup. Ct. J. 809, 109 Fair Empl. Prac. Cas. (BNA) 1082, 30 I.E.R. Cas. (BNA) 1496 (Tex. 2010).

1321. Defendant's conviction for indecency with a child by contact was proper because, given the lack of evidence that a tape was in fact what defendant claimed it to have been, the trial court acted within its discretion in determining that the recording's authenticity had not been sufficiently established to allow its admission into evidence. Further, even if the tape had been properly authenticated, the probative value of the recording was outweighed by the danger of unfair prejudice; allowing the jury to hear a tape recording allegedly of the complainant's mother yelling at her young daughter and calling her derogatory names presented a significant risk of unfair prejudice and confusion of the issues. Sosa v. State, 2010 Tex. App. LEXIS 4428, 2010 WL 2330304 (Tex. App. Austin June 10 2010).

1322. Trial court's decision to admit a videotape under Tex. R. Evid. 404(b) fell within the zone of reasonable disagreement, given that (1) the charge contained a limiting instruction of how the evidence of another wrong was to be considered, and (2) the videotape, which showed defendant struggling with police, was probative of the issue of whether defendant intentionally kicked an officer or did so by accident; the actions depicted on the videotape did not warrant the conclusion that the probative value was substantially outweighed by its prejudicial effect under Tex. R. Evid. 403 and the trial court did not abuse its discretion in admitting the videotape into evidence on substantive grounds. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1323. Although defendant initially preserved error under Tex. R. Evid. 403 by objecting and obtaining a ruling before a detective's identification, defendant subsequently waived any error by failing to object when he was brought into court to be identified by witnesses on other occasions, plus defendant voluntarily appeared in court for all of the proceedings on the certain days of testimony, during which defendant was again in handcuffs, restrained in a wheelchair, and wearing jail clothes and a mask; defense counsel did not make a Rule 403 objection to

defendant's appearance before the jury on these occasions and thus defendant did not preserve his error because he failed to object to the "evidence" each time it was presented to the jury. Jett v. State, 319 S.W.3d 846, 2010 Tex. App. LEXIS 3559 (Tex. App. San Antonio May 12 2010).

1324. For purposes of Tex. R. Evid. 403, the trial court did not abuse its discretion in admitting autopsy photographs, given that (1) the medical examiner's testimony about the wounds was relevant and the pictures were a visual representation of that testimony, (2) the wounds were described in the autopsy report, which was admitted without objection, and (3) defendant's argument was that the results of the crime were horrific, but the result of the crime was the very issue that was relevant. Jett v. State, 319 S.W.3d 846, 2010 Tex. App. LEXIS 3559 (Tex. App. San Antonio May 12 2010).

1325. Even if a court erred during defendant's murder trial by allowing into evidence testimony regarding a prior attempt by defendant to shoot the victim, there was still overwhelming evidence that defendant conspired to commit aggravated assault, one or more of the conspirators murdered the victim, the murder was in furtherance of the assault, and defendant should have anticipated that the victim would die as a result of the assault; it was unlikely that the admission of the shooting attempt had a substantial effect on the verdict. Cruz v. State, 2010 Tex. App. LEXIS 3552, 2010 WL 1904990 (Tex. App. San Antonio May 12 2010).

1326. Evidence of valuable narcotics left in plain view may tend to prove that a robbery was not the motive for the shooting of a victim and thus the trial court could have reasonably concluded that the photographs and diagram were relevant to disproving defendant's alternate theory of how the victim was killed; defendant did not explain how the negative attributes of the photographs and diagram substantially outweighed any probative value and the photographs and diagram were not unfairly prejudicial because no evidence identified the narcotics as defendant's. The trial court did not err in admitting the evidence. Anderson v. State, 2010 Tex. App. LEXIS 3440, 2010 WL 1839945 (Tex. App. Houston 1st Dist. May 6 2010).

1327. Witness testified, without objection, that defendant left the firearms in her apartment such that evidence of defendant's arsenal, if any, was already before the jury, and the admission into evidence of the additional two firearms did not create such negative impact to be unfairly prejudicial. Anderson v. State, 2010 Tex. App. LEXIS 3440, 2010 WL 1839945 (Tex. App. Houston 1st Dist. May 6 2010).

1328. Probative value of defendant's gang affiliation was low since an investigator did not testify about the gang's activities, and its prejudice was also correspondingly low; the trial court instructed the jury that it could not consider the gang affiliation unless the State proved that defendant committed an extraneous bad act by such affiliation beyond a reasonable doubt, this instruction likely curtailed the jury's consideration of the gang membership more than a case law instruction would have, and the trial court did not err in admitting evidence of defendant's gang affiliation. Anderson v. State, 2010 Tex. App. LEXIS 3440, 2010 WL 1839945 (Tex. App. Houston 1st Dist. May 6 2010).

1329. Because defendant opened the door by testifying that he had pled guilty to two previous offenses because he was guilty of them, the prosecutor's question as to whether he did not plead to the current offense because there was no plea agreement was not substantially more prejudicial than probative, and defendant was not entitled to an instruction to disregard the prosecutor's reference to plea negotiations. Bowley v. State, 310 S.W.3d 431, 2010 Tex. Crim. App. LEXIS 553 (Tex. Crim. App. 2010).

1330. During defendant's trial for aggravated sexual assault of a child, his daughter, the testimony by a witness that she was also sexually assaulted by defendant was offered to rebut the defense theory that the victim was untruthful and fabricated her allegations; in light of the defense theory, and the question of the victim's credibility as raised by defendant, the probative value of the testimony was not substantially outweighed by the danger of unfair

prejudice. Saunders v. State, 2010 Tex. App. LEXIS 3358, 2010 WL 1796232 (Tex. App. El Paso May 5 2010).

1331. Trial court did not abuse its discretion during defendant's trial for aggravated assault with a deadly weapon and unlawful possession of a firearm by a felon by concluding that the probative value of photographs of one of the complainant's wounds was not substantially outweighed by the danger of unfair prejudice or by admitting the photographs because the pictures were apparently introduced to help the complainant explain his multiple gunshot wounds and injuries, and, whether it was the State's intent or not, the pictures helped rebut defendant's self-defense argument because they, along with unobjected-to testimony by the second complainant, showed that a bullet entered his back. While the pictures were gruesome, they portrayed no more than the gruesomeness of the injuries defendant inflicted. Burleson v. State, 2010 Tex. App. LEXIS 3250 (Tex. App. Fort Worth Apr. 29 2010).

1332. Although photographs of the child depicted some gruesome details, there were no more gruesome than the facts of the case, plus they provided a necessary visual to understand paramedics' testimony regarding the victim's injuries; the photographs were probative because they showed the extent and arguably non-accidental nature of many of those injuries, the State spent little time authenticating the photographs, and the photographs were not overly prejudicial and did not pose the danger of influencing the jury in an irrational way and the trial court did not err in admitting them. Latimer v. State, 319 S.W.3d 128, 2010 Tex. App. LEXIS 3149 (Tex. App. Waco Apr. 28 2010).

1333. Assuming the trial court erred by allowing into evidence a witness's pretrial identification, the error was harmless because there was other, extensive evidence identifying defendant as the only driver of a van and the witness's testimony about how the van was taken was not overly prejudicial under Tex. R. Evid. 403; to the extent defendant complained about the admission of the evidence about how the van was stolen, his failure to object waived error concerning the admission of the evidence, and the story about how the van was stolen has minor dramatic significance when compared to the dramatic evidence introduced at trial about the collision. Murphy v. State, 2010 Tex. App. LEXIS 2953 (Tex. App. Houston 1st Dist. Apr. 22 2010).

1334. It is not enough that the evidence is relevant; pursuant to Tex. R. Evid. 403, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of delay or needless presentation of cumulative evidence. King v. State, 2010 Tex. App. LEXIS 2811, 2010 WL 1510204 (Tex. App. Tyler Apr. 16 2010).

1335. Jury could have found from the evidence that defendant previously tried to shoot another person and was a violent person, which was the inference forbidden for this kind of evidence, but a significant amount of time was not required to develop the evidence, and the State had need for this evidence to establish a fact of consequence, which was defendant's intent, and the evidence supported the trial court's ruling to admit the extraneous evidence. King v. State, 2010 Tex. App. LEXIS 2811, 2010 WL 1510204 (Tex. App. Tyler Apr. 16 2010).

1336. Reasonable minds could have differed as to the admission of evidence because of a tenuous connection between the incidents and because of the chance that the jury would look unfavorably on defendant, who had previously tried to shoot another individual, and these kinds of rulings are subject to harmless error analysis; given that the jury found insufficient evidence that defendant acted intentionally, the jury did not misuse the evidence or make the forbidden inference that he intended to shoot the victim, and any residual bias the jury might have against defendant because of certain evidence would not necessarily intrude on the jury's evaluation of the evidence. King v. State, 2010 Tex. App. LEXIS 2811, 2010 WL 1510204 (Tex. App. Tyler Apr. 16 2010).

1337. During defendant's trial for engaging in organized criminal activity relating to the underlying offense of aggravated robbery with a deadly weapon, the court erred in admitting specific evidence relating to two offenses not involving defendant; any probative value of the evidence was substantially outweighed by the danger of unfair

prejudice. Jackson v. State, 314 S.W.3d 118, 2010 Tex. App. LEXIS 2730 (Tex. App. Houston 1st Dist. Apr. 15 2010).

1338. Because defendant's argument on appeal did not comport with any objection raised in the trial court, defendant failed to preserve for appellate review her Tex. R. Evid. 403 challenge to certain evidence, for purposes of Tex. R. App. P. 33.1(a). Williamson v. State, 356 S.W.3d 1, 2010 Tex. App. LEXIS 3432 (Tex. App. Houston 1st Dist. May 6 2010).

1339. For purposes of Tex. R. Evid. 403, the trial court did not err in admitting evidence for defendant's son's siblings regarding the medical abuse they suffered at the hands of defendant, as well as evidence that defendant used the children's alleged illnesses to get money and gifts from others, given that (1) the evidence was highly probative to show motive and provide context, (2) the trial court could have found that the disputed evidence did not have a tendency to suggest a decision on an improper basis, (3) it was clear that the evidence was offered to explain motive and context and the jury was properly instructed, (4) the trial court could have found that the evidence did not have a tendency to confuse the jury or be given undue weight, and (5) the trial court could have found that the evidence would not consume an inordinate amount of time or be cumulative. Williamson v. State, 356 S.W.3d 1, 2010 Tex. App. LEXIS 3432 (Tex. App. Houston 1st Dist. May 6 2010).

1340. In reviewing whether a video was properly admitted under Tex. R. Evid. 403, the court found that (1) the video was probative because it linked defendant with narcotics paraphernalia, (2) the trial court could have found that the State needed the video, (3) the video had a limited potential to impress the jury in an irrational way, and (4) the video only lasted 79 seconds and was not repetitious and thus could not have caused confusion; the court could not say that there was a clear disparity between the danger of unfair prejudice posed by the video and its probative value, and the trial court did not err in overruling defendant's Rule 403 objection. George v. State, 2010 Tex. App. LEXIS 2425, 2010 WL 1269676 (Tex. App. Waco Mar. 31 2010).

1341. During defendant's trial for unlawful possession of a firearm and possession of cocaine, the trial court, without abusing its discretion, could have determined that the fact that defendant's adult daughter previously possessed and disposed of a handgun was not probative of any fact of consequence to the determination of defendant's guilt; the court could have determined that any relevance the evidence possessed was substantially outweighed by the danger of confusion of the issues involved in defendant's prosecution. Taylor v. State, 2010 Tex. App. LEXIS 2024, 2010 WL 1027534 (Tex. App. Amarillo Mar. 22 2010).

1342. During defendant's murder trial, the court did not err in admitting a transcript of defendant's conversation with a codefendant because it was highly probative to establish a motive and identity for participating in the murder; evidence of defendant's payment for the commission of the murder, as well as defendant's association with gang assassins, was relevant to show that defendant assisted in the murder and defendant's intent to do so. Reta v. State, 2010 Tex. App. LEXIS 1482, 2010 WL 724395 (Tex. App. San Antonio Mar. 3 2010).

1343. Evidence of extraneous offenses against the victim, defendant's adopted daughter, was highly probative because it demonstrated the history and progression of the relationship between the victim and defendant and provided insight into their states of mind, for purposes of Tex. Code Crim. Proc. Ann. art. 38.37, plus the evidence was necessary to help the jury understand why the victim delayed in disclosing the offenses and the State needed the evidence; the trial court could have found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Saenz v. State, 2010 Tex. App. LEXIS 1519 (Tex. App. San Antonio Mar. 3 2010).

1344. When the workers' compensation administrative record was admitted into evidence under Tex. Lab. Code Ann. § 410.306(b), redacted documents properly could have been excluded under Tex. R. Evid. 401 as irrelevant in

part and under Tex. R. Evid. 403 because of the likelihood of confusion; thus, the trial court adequately informed the jury of the appeals panel's decision under Tex. Lab. Code Ann. § 410.304(b). Fort Worth Indep. Sch. Dist. v. Seifert, 2010 Tex. App. LEXIS 1575, 2010 WL 730362 (Tex. App. Waco Mar. 3 2010).

1345. During defendant's trial for sexual assault of a child, the court did not err in overruling defendant's objection to the victim's testimony about all the times he had sexually assaulted her over a two-year period because defendant did not object that the probative value of the evidence was substantially outweighed by its prejudicial effect; defendant's Tex. R. Evid. 404(b) objection was not sufficient to preserve review under Tex. R. Evid. 403. Mayfield v. State, 2010 Tex. App. LEXIS 1387 (Tex. App. Dallas Feb. 26 2010).

1346. Challenged photograph was no more gruesome or prejudicial than other photographs admitted at defendant's murder trial and the court found the probative value of the photograph was not substantially outweighed by its possible prejudicial effect, for purposes of Tex. R. Evid. 403. Oakes v. State, 2010 Tex. App. LEXIS 1349, 2010 WL 668541 (Tex. App. Amarillo Feb. 25 2010).

1347. In a case in which defendant was convicted of theft from a person, there was no merit in defendant's claim that the trial court did not require the State to follow the proper procedure in admitting his accomplice's prior inconsistent statement for impeachment purposes where the trial court did not permit the predicate requirements of Tex. R. Evid. 613(a) to be violated because extrinsic evidence of the accomplice's statement to a detective was not offered before the jury, and, furthermore, the trial court took the extra step of instructing the jury that it could only consider the prior statements for impeachment purposes. The trial court did not abuse its discretion in overruling defendant's objection under Tex. R. Evid. 403 because the accomplice's version of the events was critical to defendant's prosecution, because the probative value of impeaching the accomplice's potentially untrue testimony was not substantially outweighed by the potential misuse by the jury of his previous statement to the detective, and because the trial court expressly determined that there was no evidence that the State anticipated that the accomplice's trial testimony would be inconsistent with his statements to the detective or that the State called the accomplice as a witness in bad faith. Cervantes v. State, 2010 Tex. App. LEXIS 1149, 2010 WL 548503 (Tex. App. Eastland Feb. 18 2010).

1348. Assuming without deciding that defendant's objection was sufficient to preserve a Tex. R. Evid. 403 complaint, the court could not find that the trial court abused its discretion in admitting the photographs of the victim's body in defendant's capital murder case; defendant did not articulate how the photographs were unduly prejudicial, although the photographs showed some decomposition the body suffered due to the manner defendant chose to dispose of the body, the photographs showed nothing more than the reality of the brutal crime committed, and the extent of the victim's injuries as shown in the photographs was highly probative in light of defendant's claim of self defense. Armstrong v. State, 2010 Tex. App. LEXIS 1133 (Tex. App. Dallas Feb. 18 2010).

1349. Bearing in mind that the issue before the jury was defendant's punishment, the trial court did not abuse its discretion in admitting the testimony about a statement defendant made, given that (1) the evidence did not take an inordinate time to present, (2) there was little danger that the evidence misled or confused the jury, (3) the statement was probative of defendant's personal responsibility and moral culpability and suggested a lack of empathy for the victim and remorse for defendant's conduct, (4) the statement aided the jury in understanding the punishment issues, (5) although the statement might have been prejudicial, it was not unfairly so, and (6) the evidence only suggested that defendant be punished for his moral blameworthiness and his character, which were proper bases for the jury to consider. Dacus v. State, 2010 Tex. App. LEXIS 1072, 2010 WL 546691 (Tex. App. El Paso Feb. 17 2010).

1350. In defendant's aggravated assault against a public servant trial, assuming the evidence of defendant's mental state was relevant, the trial court was within its discretion to exclude the evidence on the grounds that the probative value of the evidence of defendant's hospitalization three days after the incident was substantially

outweighed by the danger that the evidence would confuse the issues under Tex. R. Evid. 403; without being tied to defendant's actions at the time of the offense or having its significance explained in terms of the effect of her mental illness on her perceptions, the fact of her hospitalization might merely evoke fear or pity and affect the jury in some irrational way. Woods v. State, 306 S.W.3d 905, 2010 Tex. App. LEXIS 1106 (Tex. App. Beaumont Feb. 17 2010).

1351. In a case alleging negligent spraying of herbicide, the trial court's exclusion from evidence of a notice of violation, findings, and an order issued by the Texas Agriculture Commission could have been proper under either Tex. R. Evid. 403 because the evidence was potentially confusing or under Tex. R. Evid. 408 because it involved a settlement. Davis v. Jordan, 305 S.W.3d 895, 2010 Tex. App. LEXIS 1151 (Tex. App. Amarillo Feb. 17 2010).

1352. Court did not abuse its discretion in admitting the contested items, because the evidence defendant complained of was much less graphic and disturbing than the pictures for which he was indicted, defendant's knowledge of and preoccupation with pictures of children, both those that might be termed pornographic and otherwise, was critical to proving the State's case of possession of child pornography, and the items did not distract the jury from their main inquiry, nor, did the evidence create a situation where the jury would give undue credence to the evidence; an officer found the two pictures that were the basis of defendant's indictments, along with computer generated pictures of young girls engaged in various sexual acts, magazine advertisements of children with the heads and faces cut out, adult pornography, and a spiral notebook with handwritten sexually explicit stories about young females. Bolles v. State, 2010 Tex. App. LEXIS 1080, 2010 WL 539684 (Tex. App. Amarillo Feb. 16 2010).

1353. Evidence of extraneous offenses admitted under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) did not violate Tex. R. Evid. 403 given that (1) sufficient evidence existed for the jury to find that he committed the offenses, (2) defendant sought probation, but evidence of the extraneous offenses showed that he was not a good probation candidate, (3) the evidence did not appeal to improper emotion or create confusion, and (4) the evidence was not cumulative. Frederickson v. State, 2010 Tex. App. LEXIS 830, 2010 WL 395183 (Tex. App. Fort Worth Feb. 4 2010).

1354. In defendant's felony murder case, a court properly admitted a photo of the victim prior to death because it demonstrated the victim's health and physical characteristics, the photo of the victim while alive furnished a basis of contrast and comparison with other photos showing the wounds inflicted by the assault, and the fact that several witnesses identified the victim did not necessarily reduce the probative value of the photo. Flores v. State, 2010 Tex. App. LEXIS 822, 2010 WL 411747 (Tex. App. Corpus Christi Feb. 4 2010).

1355. Trial court did not abuse its discretion in admitting certain messages, which were clearly relevant to motive in defendant's murder trial and the probative value was not substantially outweighed by any prejudicial effect. Lopez v. State, 314 S.W.3d 54, 2010 Tex. App. LEXIS 725 (Tex. App. San Antonio Feb. 3 2010).

1356. In defendant's indecency with a child case, the court did not err by excluding evidence related to the victim's sexual relationship with her boyfriend who lived at the residence where the events took place because the victim's sexual history and relationship with her boyfriend had little or no probative value. The defensive theory was that the victim was motivated to fabricate the allegations because of defendant's complaints to the victim about her boyfriend's failure to contribute to household expenses; however, evidence of the victim's sexual relationship with her boyfriend would show only that she was sexually active with an older male who lived in the apartment. Franklin v. State, 2010 Tex. App. LEXIS 619, 2010 WL 337334 (Tex. App. Tyler Jan. 29 2010).

1357. There was no err in excluding the expert's opinion under Tex. R. Evid. 403, because the expert simply opined that the doctor should have ordered that the claimant's arm be x-rayed in order to check for the presence of suspected glass, and the expert failed to show from his testimony that his opinion regarding the doctor's impairment

was anything more than one possible scenario. Fitzpatrick v. Watson, 2010 Tex. App. LEXIS 631, 2010 WL 337330 (Tex. App. Tyler Jan. 29 2010).

1358. In a drug case, a court erred in admitting a picture depicting lewd and salacious activity on the part of defendant during the punishment phase of the trial because the picture was extremely graphic, and the photograph was so inflammatory that it suggested the jury punish defendant for participating in such an act. Padilla v. State, 2010 Tex. App. LEXIS 674, 2010 WL 337673 (Tex. App. El Paso Jan. 29 2010).

1359. In defendant's drug case, the court did not err by admitting evidence of an extraneous drug offense because the officer testified that he purchased methamphetamine from defendant, which made the intent to deliver much more probable, and the circumstances of the offense were just a simple transaction, which involved no violence or any potential inflaming factors. The testimony of was not a time consuming part of the trial, and while intent might have been proven by circumstantial evidence, the evidence was needed to rebut the defensive theories brought out during cross-examination of the witnesses. Padilla v. State, 2010 Tex. App. LEXIS 674, 2010 WL 337673 (Tex. App. El Paso Jan. 29 2010).

1360. Defendant's complaints to evidence under Tex. R. Evid. 403 were raised for the first time on appeal and because his argument on appeal did not comport with any objection raised in the trial court, defendant failed to preserve this issue for appellate review under Tex. R. App. P. 33.1(a). Whitton v. State, 2010 Tex. App. LEXIS 486, 2010 WL 307911 (Tex. App. Houston 14th Dist. Jan. 28 2010).

1361. In defendant's capital murder case, the court properly admitted other acts evidence that defendant removed a windowscreen on the witness's enclosed patio, squatted in the dark wearing only boxer-shorts, and told her he wanted to get inside her apartment and needed a place to hide because the evidence proved that defendant was in the vicinity of the victim's apartment and was looking for a place to hide near the time of the murder. Additionally, the testimony was not particularly emotional or otherwise likely to inflame the jury, and the State did not have other evidence to show defendant's behavior and presence near the time of the murder. Gregory v. State, 2010 Tex. App. LEXIS 618, 2010 WL 323884 (Tex. App. Fort Worth Jan. 28 2010).

1362. Company did not timely object or request an instruction to disregard, and thus any violation of a limine ruling was waived unless the company could show that an instruction to disregard could not have cured the prejudice; however, the company failed to explain how the testimony in question unfairly prejudiced the case or was calculated to inflame the jury and the trial court did not abuse its discretion in denying a mistrial. Weeks Marine, Inc. v. Barrera, 2010 Tex. App. LEXIS 438, 2010 WL 307878 (Tex. App. San Antonio Jan. 27 2010).

1363. Defendant claimed the trial court erred in admitting testimony over his Tex. R. Evid. 403 objection, but this same evidence was introduced without objection, for purposes of Tex. R. Evid. 103 and Tex. R. App. P. 33.1(a), through defendant's own testimony, and thus any error the trial court might have made in admitting the challenged testimony was cured. Philip v. State, 2010 Tex. App. LEXIS 353, 2010 WL 183524 (Tex. App. Houston 14th Dist. Jan. 21 2010).

1364. Nothing in the record indicated that the trial court conducted an improper Tex. R. Evid. 403 analysis regarding defendant's parole officer's identification testimony, given that (1) the evidence did not possess the potential to impress the jury in some irrational way, (2) nothing indicated that the evidence had an undue tendency to cause the jury to make a decision on an improper basis, (3) the evidence corroborated an accomplice's testimony, (4) the amount of time the State used to develop the testimony covered only four pages of the multi-volume record, and (5) the State needed the evidence, and thus the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. Mendez v. State, 2009 Tex. App. LEXIS 9785, 2009 WL

5150071 (Tex. App. San Antonio Dec. 30 2009).

1365. In an aggravated assault case, an objection that photographs of dead cattle were irrelevant did not preserve for review a claim that they were prejudicial under Tex. R. Evid. 403. Walls v. State, 2009 Tex. App. LEXIS 9783, 2009 WL 5150073 (Tex. App. San Antonio Dec. 30 2009).

1366. In defendant's capital murder case, the trial court properly denied defendant's motion to suppress hair-comparison analysis because the hair-comparison analysis was probative because it helped to show the similarity of the hair in defendant's vehicle to the victim's hair. The evidence was not unfairly prejudicial, did not confuse the issues, did not mislead the jury, and was not cumulative. Arciba v. State, 2009 Tex. App. LEXIS 9815, 2009 WL 5155532 (Tex. App. Waco Dec. 30 2009).

1367. Testimony about defendant's failure to cooperate with a deputy sheriff and attempt to flee was admissible under Tex. R. Evid. 404(b) as same transaction contextual evidence in a theft case because it tended to establish intent; moreover, its probative value was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Matthews v. State, 2009 Tex. App. LEXIS 9816, 2009 WL 5155688 (Tex. App. Waco Dec. 30 2009).

1368. Testimony of the officers regarding statements made by and the conduct and demeanor of defendant were properly admitted, because the demeanor and language used by defendant made it more likely that he intended to spotlight the aircraft in that he was angry with the military and was attempting to videotape the helicopter, as opposed to potentially an inadvertent act. Amspacher v. State, 311 S.W.3d 564, 2009 Tex. App. LEXIS 9819 (Tex. App. Waco Dec. 30 2009).

1369. In defendant's aggravated sexual assault of a child case, the court did not err in admitting evidence that the child was in counseling since the alleged sexual assaults and that defendant's children were removed because evidence regarding the child's need for counseling was probative circumstantial evidence that increased the likelihood that she was sexually abused by defendant, and evidence that it was necessary to remove the children was probative circumstantial evidence that tended to show that the state believed something was occurring that warranted removal. Herrera v. State, 2009 Tex. App. LEXIS 9690, 2009 WL 4981327 (Tex. App. San Antonio Dec. 23 2009).

1370. In defendant's aggravated kidnapping case, the court did not err by admitting extraneous offense involving the same victim because the intent to terrorize, harm, or abuse the victim must have been present prior to or at the particular time; thus, evidence of extraneous misconduct prior to the abduction was relevant apart from showing character conformity because it made more probable the elemental fact of defendant's intent at the time of the abduction. Additionally, only a small percentage of the time expended in the four-day jury trial was devoted to mention of the extraneous offenses. Crews v. State, 2009 Tex. App. LEXIS 9677, 2009 WL 4907423 (Tex. App. Texarkana Dec. 22 2009).

1371. In defendant's capital murder case, the court did not err by admitting photographs of the victims because the photographs were introduced to assist the medical examiner in explaining the injuries and to rebut defendant's self-defense argument. The photographs, particularly the close-ups of the bullet wounds, were gruesome; however, they portrayed no more than the gruesomeness of the injuries inflicted by defendant. Williams v. State, 301 S.W.3d 675, 2009 Tex. Crim. App. LEXIS 1751 (Tex. Crim. App. 2009).

1372. In defendant's capital murder case, the court did not err by admitting evidence of extraneous murders because defendant opened the door by deliberately choosing to question the witness about the extraneous murders. The State was presenting the evidence to rebut defendant's claim of self-defense. Williams v. State, 301

S.W.3d 675, 2009 Tex. Crim. App. LEXIS 1751 (Tex. Crim. App. 2009).

1373. In defendant's online solicitation case, the trial court did not err by admitting the chat logs between defendant and the officer posing as a teenager because the inherent probative force of the chat logs was considerable as the logs established the sexually explicit content of the chats. That evidence tended to make it more probable than not that defendant had engaged in the online solicitation of a minor. Bailey v. State, 2009 Tex. App. LEXIS 9440, 2009 WL 4725348 (Tex. App. Dallas Dec. 11 2009), *cert. denied*, 131 S. Ct. 475, 178 L. Ed. 2d 301, 2010 U.S. LEXIS 7971 (U.S. 2010).

1374. In defendant's sexual assault case, a court properly admitted extraneous offense evidence because the witness's testimony that defendant threatened him to keep him from testifying was highly probative of defendant's consciousness of his guilt; it was rational to conclude that defendant threatened the witness because he was guilty of the offense. A review of the record showed that the witness's testimony consumed no more than two pages of the record, and the State's need for the evidence was significant because consent was a contested issue and evidence that defendant was conscious of his guilt tended to show that he knew that the victim had not consented. Ramsey v. State, 2009 Tex. App. LEXIS 9449, 2009 WL 4755175 (Tex. App. Fort Worth Dec. 10 2009).

1375. Autopsy photographs (1) were close-ups of the victim's upper body and torso, (2) did not depict the body in an inflammatory manner, (3) were the only photographs depicting four stab wounds and were not duplicative, and (4) the large incision and chest tube were not the result of an autopsy, but were the result of life-saving attempts by medical personnel, such that the probative value of the exhibits was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403 and the trial court did not err in admitting them in defendant's murder trial. Green v. State, 2009 Tex. App. LEXIS 9300, 2009 WL 4575146 (Tex. App. Houston 14th Dist. Dec. 8 2009).

1376. Three of four autopsy photographs admitted into evidence in a murder case were not subject to exclusion under Tex. R. Evid. 403 because they were not unnecessarily gruesome. The other photo had at most a slight effect on the jury; thus, any error was harmless under Tex. R. App. P. 44.2(b). Smith v. State, 2009 Tex. App. LEXIS 9297, 2009 WL 4547907 (Tex. App. Dallas Dec. 7 2009).

1377. In defendant's felony murder case, the court properly excluded evidence that the trooper used the word "psychotic" in his accident report to impeach his trial testimony because the trooper could not properly testify as an expert or lay witness that defendant was psychotic, and therefore, the label had no probative value as primary evidence. Additionally, there was a strong tendency of the evidence to suggest decision on an improper basis, the tendency of the evidence to confuse or distract the jury from the main issues, and the tendency of the evidence to be given undue weight by the jury. Fisher-Riza v. State, 2009 Tex. App. LEXIS 9769, 2009 WL 4358622 (Tex. App. Houston 1st Dist. Dec. 3 2009).

1378. In a felony murder case, defendant was not harmed by the trial court's exclusion of expert testimony of two of her witnesses on her affirmative defense of insanity because, although relevant and probative of her defense, the excluded testimony was repetitive of the evidence of the history of mental illness, as described by defendant's husband. More importantly, the excluded evidence did not directly pertain to the question of whether defendant was sane at the time of the collision because neither witness ever evaluated defendant for sanity. Fisher-Riza v. State, 2009 Tex. App. LEXIS 9769, 2009 WL 4358622 (Tex. App. Houston 1st Dist. Dec. 3 2009).

1379. In defendant's indecency with a child case, the court properly allowed testimony of an officer that he had seen defendant watching children on a playground with binoculars because much of the State's case was built around the theory of "grooming" and that defendant spent significant time with the victim; because the bulk of the defensive case consisted of witnesses who said defendant had provided safe child care, that evidence was relevant to rebutting the defensive theory. Additionally, the time spent proving the extraneous act was negligible. Orange v.

State, 2009 Tex. App. LEXIS 8934, 2009 WL 3851068 (Tex. App. Texarkana Nov. 19 2009).

1380. Defense opened the door to extraneous offense evidence from another girl, who said defendant sexually assaulted her, when the defense left a false impression that defendant would never commit aggravated sexual assault of a child; while prejudicial, the probative value of the evidence was not outweighed by the danger of unfair prejudice, the girl's testimony was brief and not cumulative, and it could be argued that it had the potential to assist defendant, given that the girl was shaky while testifying, but the victim was calm and composed, which raised the argument that maybe not the same thing happened to the victim. Reyes v. State, 2009 Tex. App. LEXIS 8842, 2009 WL 3856198 (Tex. App. San Antonio Nov. 18 2009).

1381. In defendant's aggravated sexual assault of a child case, the court properly admitted evidence from a witness that defendant liked young girls and oral sex because defendant was accused of fondling the breast of his victim and of performing oral sex on the victim who was ten years old, the evidence pertained to defendant's thoughts and did not implicate any conduct on his part, defendant's statements were the primary evidence of his intent and state of mind, and, the State had a significant need for the evidence. Jones v. State, 2009 Tex. App. LEXIS 8923, 2009 WL 3858016 (Tex. App. Waco Nov. 18 2009).

1382. Balancing the factors for purposes of Tex. R. Evid. 403, the trial court did not abuse its discretion in admitting extraneous offense evidence, given that (1) intent of defendant was a contested fact and evidence regarding intent was thus necessary, (2) evidence of the extraneous offense was highly probative as to intent based on timing, (3) the extraneous offense and the current offense were similar, (4) the evidence was not inflammatory or repetitive, and (5) the jury was instructed that the extraneous offense could be considered only in determining intent. Talley v. State, 2009 Tex. App. LEXIS 8830 (Tex. App. Dallas Nov. 17 2009).

1383. While photographs were certainly prejudicial to defendant, they did nothing more than depict the victim's condition after he was struck by defendant, and while graphic, they were not gruesome; furthermore, there was testimony that defendant struck the victim in the face, and the court did not find that the danger of unfair prejudice outweighed the probative value of the photographs, for purposes of Tex. R. Evid. 403, and the trial court did not err in admitting them. Nelson v. State, 2009 Tex. App. LEXIS 8630, 2009 WL 3734953 (Tex. App. Texarkana Nov. 10 2009).

1384. Evidence that defendant possessed the crack pipe was not unfairly prejudicial, because the trial court overruled the objection after concluding that his possession of the crack pipe was relevant to explain the basis for his arrest and as same transaction contextual evidence, and that the probative value of the evidence outweighed any unfair prejudice; any error was harmless and did not prejudice defendant's substantial rights, as the testimony regarding the crack pipe was brief and matter-of-fact, the State did not seek to emphasize the possession of the pipe and made no further reference to it during the trial, and the only mention of the pipe during closing arguments was by defense counsel. Shrader v. State, 2009 Tex. App. LEXIS 8777, 2009 WL 3806147 (Tex. App. Austin Nov. 10 2009).

1385. In defendant's murder case, the court did not err by allowing the State to present the testimony of two witnesses in rebuttal regarding other sexual offenses alleged to have been committed by defendant because the best evidence that the State had to connect defendant to the murder was the fact that defendant had been with the victim until shortly before the murder, the statements of the two seasoned felons, whose credibility had been strongly attacked, and DNA evidence in the vehicle which was not particularly strong. Therefore, the State had a need for the evidence. Additionally, the presentation of the testimony did not take such a great amount of time as to confuse or distract the jury from the main issue of the case. Asberry v. State, 2009 Tex. App. LEXIS 8512 (Tex. App. Waco Nov. 4 2009).

1386. In an aggravated sexual assault of a child case, the court properly admitted excerpts from defendant's civil deposition and witness testimony because the defense was theorizing that the victim fabricated the allegations against defendant, and by offering the excerpts where he admitted to performing sexual acts with the witness the State was attempting to show that defendant's claim of fabrication-for-money defense was less probable. The witness's testimony was brief and the court gave a limiting instruction. Slutz v. State, 2009 Tex. App. LEXIS 8326 (Tex. App. Amarillo Oct. 29 2009).

1387. In defendant's capital murder trial, a photograph of victim was probative of the victim's appearance and the State took little time developing the evidence, plus this was the only pre-death photograph offered; the court found it unlikely that the photograph, which depicted the victim holding his newborn child, generated any more sympathy than that generated by certain testimony and no mention of the photograph was made during closing arguments, such that the probative value of the evidence was not outweighed by the danger of unfair prejudice. Acevedo v. State, 2009 Tex. App. LEXIS 8109, 2009 WL 3353625 (Tex. App. Dallas Oct. 20 2009).

1388. In defendant's drug case, the court properly admitted evidence of defendant's gang affiliation at sentencing because the presentation of the evidence took only a short time and the probative value of the evidence was high. Defendant's prior admission of his affiliation with a prison gang and the reputation of that gang for commission of offenses, both inside prison and in the general community, was a factor that the jury was entitled to consider in determining defendant's propensity for further criminal activity should he be released from incarceration. Meier v. State, 2009 Tex. App. LEXIS 8078, 2009 WL 3335282 (Tex. App. Amarillo Oct. 16 2009).

1389. Because a roommate's testimony helped to affirmatively link defendant to the cocaine found in their apartment and to establish that defendant possessed it with the intent to deliver, the trial court did not abuse its discretion in admitting the testimony under Tex. R. Evid. 403, 404(b) to show intent, motive, opportunity, and lack of mistake. Hatcher v. State, 2009 Tex. App. LEXIS 8045, 2009 WL 3326758 (Tex. App. Eastland Oct. 15 2009).

1390. In defendant's murder case, a witness's testimony that defendant wanted to go kill someone and that he had a gun was not inadmissible evidence of an extraneous offense because defendant's statements and actions made it more probable that he did intend to seriously injure or kill the victim. The fact that he had a gun at the time was prejudicial, but it did not outweigh the probative value of his admission and his action at the time. Walton v. State, 2009 Tex. App. LEXIS 8046, 2009 WL 3326759 (Tex. App. Eastland Oct. 15 2009), *cert. denied*, 131 S. Ct. 512, 178 L. Ed. 2d 379, 2010 U.S. LEXIS 8559 (U.S. 2010).

1391. In a murder case, evidence of defendant's drug dealing was properly admitted because, according to a witness, defendant and the victim were rival drug dealers, and proof of motive was important to the State's case because the State was unable to produce an eyewitness who actually saw defendant shoot the victim. The time spent attempting to prove that defendant sold illegal drugs was not out of proportion to the time required to present such evidence. Koy Timon Moore v. State, 2009 Tex. App. LEXIS 7847 (Tex. App. Houston 14th Dist. Oct. 8 2009).

1392. During defendant's murder trial, the trial court did not err in admitting into evidence certain autopsy photographs, because the probative value of the photographs was not substantially outweighed by their prejudicial effect under Tex. R. Evid. 403. The doctor used the photographs to explain the nature and extent of the complainant's internal injuries resulting from the blows from the bat; the photographs were no more gruesome than would be expected. Barnes v. State, 2009 Tex. App. LEXIS 7931, 2009 WL 3248172 (Tex. App. Houston 1st Dist. Oct. 8 2009).

1393. In defendant's sexual assault case, evidence was improperly excluded because there was no allegation that the evidence was self-serving or unreliable. The evidence was relevant to the complaining witness's credibility, and further, the State failed to show how the probative value of the evidence was outweighed by the danger of unfair

prejudice. State v. Moreno, 297 S.W.3d 512, 2009 Tex. App. LEXIS 7642 (Tex. App. Houston 14th Dist. Oct. 1 2009).

1394. Court did not err by admitting extraneous offense evidence of defendant's assaultive behavior occurring prior to, and after, the sexual assault because the extraneous offense evidence was admissible to show the context in which the criminal act occurred because defendant's assaultive behavior was "blended, or connected" to the sexual assault forming an "indivisible criminal transaction." Moreover, the evidence was helpful to the jury in their determination whether defendant used or exhibited a deadly weapon during the "same criminal episode." Quincy v. State, 304 S.W.3d 489, 2009 Tex. App. LEXIS 7645 (Tex. App. Amarillo Sept. 30 2009).

1395. Where defendant told a confidential informant that she was manufacturing methamphetamine at the site, the officer found methamphetamine, manufacturing precursors, and drug manufacturing paraphernalia in plain sight when they executed a search warrant; at defendant's trial for possession of a controlled substance in violation of Tex. Health & Safety Code Ann. § 481.115, the trial court did not err by admitting evidence of additional items found in the camper including: a plastic bag containing 2.2 grams of a white powder believed to be methamphetamine, a twelve gauge shotgun, four lithium batteries, five boxes of pseudoephedrine pills, a wooden box containing miscellaneous drug paraphernalia, a syringe with a clear liquid inside, a bottle of muriatic acid, a bottle of iodine, and a gas generator. The items seized during the search of the camper were relevant pursuant to Tex. R. Evid. 404(b) to establish that defendant was in possession of the methamphetamine; the probative value outweighed any prejudicial effect under Tex. R. Evid. 403. Judd v. State, 2009 Tex. App. LEXIS 7400, 2009 WL 3019712 (Tex. App. Tyler Sept. 23 2009).

1396. Decision to admit the extraneous-offense evidence was within the zone of reasonable disagreement, because although the testimony regarding the extraneous sexual assaults had the potential to inflame the jury, the evidence was relevant to rebut defendant's theory of fabrication, the testimony was not particularly graphic, nor lengthy, and the trial court instructed the jury to consider the testimony only for a limited purpose. Abrego v. State, 2009 Tex. App. LEXIS 7288, 2009 WL 2959640 (Tex. App. San Antonio Sept. 16 2009).

1397. Given that (1) witness one's testimony was probative on the issue of defendant's identity and was used to support witness two's testimony and was thus highly probative, (2) the need for the extraneous offense testimony was high because all other identification evidence was disputed, (3) the extraneous offense testimony of witness two did not have the tendency to suggest a decision on an improper basis, (4) witness one's testimony did not consume so much time that it would have confused the jury, and (5) witness one's testimony was not cumulative and it was unlikely the jury gave the testimony improper weight, such that the probative value of witness one's testimony was not substantially outweighed by the danger of unfair prejudice and the trial court did not err in admitting witness one's testimony. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

1398. Extraneous offense was highly probative on the issue of identity because of its similarity to the charged offense, the evidence was only introduced after defendant asserted an alibi, thus making the evidence probative to disprove that defense, and all the evidence bearing on identity was disputed, thus elevating the State's need for extraneous offense testimony; given that (1) the testimony was not so graphic or appalling that it would impress the jury in some irrational, but indelible way, (2) the trial court gave a limiting instruction, (3) the extraneous offense testimony was presented after all the evidence of the charged crime was presented and it did not consume an inordinate amount of time, (4) there was nothing about the witness's testimony that would cause jurors to improperly rely on her statements, and (5) her testimony was not repetitive of other evidence already admitted, the danger of unfair prejudice did not substantially outweigh the probative value of the extraneous offense evidence and the trial court did not err in admitting it. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

1399. Trial court overruling an objection to evidence of extraneous offenses was not required to specify that it had conducted a Tex. R. Evid. 403 balancing test, which it necessarily did when overruling the objection; moreover, the record did not show any confusion, distraction, or undue prejudicial impact resulting from the evidence of extraneous offenses. Martinez v. State, 2009 Tex. App. LEXIS 7207, 2009 WL 2914154 (Tex. App. Amarillo Sept. 11 2009).

1400. Even if Tex. R. Evid. 412 was not applicable, the victim's sexual history was inadmissible under Tex. R. Evid. 401, 403, given that there was nothing reflecting that the prior sexual assault made the victim's lack of consent more or less probable and the probative value, if any, was substantially outweighed by its prejudicial effect because the evidence had the potential to impress the jury in a irrational and indelible way and defendant cited to little if any need for the evidence. Woods v. State, 301 S.W.3d 327, 2009 Tex. App. LEXIS 7252 (Tex. App. Houston 14th Dist. Sept. 10 2009).

1401. While the extraneous-offense evidence of a prior sex offense was not admissible in defendant's aggravated sexual assault trial under the "doctrine of chances," the defense did open the door to the testimony when it left a false impression with the jury that defendant would never have committed this type of act; while the evidence was certainly prejudicial to defendant, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The prior victim's testimony was brief and not cumulative, and it could even have been argued that it had the potential to assist defendant. Reyes v. State, 2009 Tex. App. LEXIS 6990, 2009 WL 2871893 (Tex. App. San Antonio Sept. 2 2009).

1402. In a civil commitment proceeding involving a sexually violent predator, testimony from a witness that sexual acts with a patient were not consensual was not cumulative; it constituted impeachment or rebuttal because it conflicted with the patient's testimony on this issue. In re Diaz, 2009 Tex. App. LEXIS 6930, 2009 WL 2749958 (Tex. App. Beaumont Aug. 31 2009).

1403. In an aggravated assault case, extraneous conduct of theft of a firearm was properly admitted because the victim testified that defendant had showed him a pistol that defendant had stolen, and it was clear that the evidence was offered to negate defendant's theory that the victim was the first aggressor and establish that defendant intentionally attacked the victim because defendant believed that the victim had "snitched" on him. While the evidence was prejudicial, such prejudice was not unfair. White v. State, 2009 Tex. App. LEXIS 6875, 2009 WL 2914480 (Tex. App. Corpus Christi Aug. 28 2009).

1404. In a capital murder case, a trial court did not err by refusing to allow the introduction of evidence that a victim had drugs in his system because any probative value the evidence might have had was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Tex. R. Evid. 403. The appellate court rejected defendant's argument that the evidence was relevant to the issue of the previous relationship between defendant and the victim and to show the condition of defendant's mind at the time of the offense. Anderson v. State, 2009 Tex. App. LEXIS 6809, 2009 WL 2915011 (Tex. App. Corpus Christi Aug. 27 2009).

1405. In defendant's tampering with a witness case, the trial court did not err in excluding evidence that the victim's father had recently kicked her out of his house because it was uncontested that defendant had previously threatened to kick the victim out if she became pregnant. That evidence served to establish a motive, if any, for the victim to make false accusations against defendant; the additional evidence regarding the victim's father's decision to kick her out, if true, did not lend any additional weight to that theory. Davis v. State, 2009 Tex. App. LEXIS 6685 (Tex. App. Corpus Christi Aug. 26 2009).

1406. In defendant's drug case, the court did not err by allowing the State to introduce evidence regarding defendant's alleged driving while intoxicated stop because testimony regarding the officer's observations of defendant before, during, and after the traffic stop gave the jury information essential to understanding the context and circumstances of defendant's arrest and subsequent charges. The officer described defendant's erratic driving that led to the stop, his physical condition during the stop, and his behavior during the field sobriety tests. Mason v. State, 2009 Tex. App. LEXIS 6705, 2009 WL 2623363 (Tex. App. El Paso Aug. 26 2009).

1407. In an intoxication manslaughter case, the court properly allowed photos of the scene because, while there were a large number of color photographs, there were no closeups of bodies, defendant's sister was covered, none of the pictures were gruesome, and there was no other way to adequately portray the events to the jury. Martinez v. State, 2009 Tex. App. LEXIS 6631 (Tex. App. Tyler Aug. 25 2009).

1408. Court properly admitted testimony because the witness's testimony rebutted defendant's theory that he did not intend to commit the alleged offense, and the witness's testimony showed that defendant was involved in a similar crime involving intent to commit a robbery subsequent to kidnapping the victim. Additionally, the evidence was presented in a short and concise manner and did not include unnecessarily graphic details. Dale v. State, 2009 Tex. App. LEXIS 6417, 2009 WL 2525421 (Tex. App. San Antonio Aug. 19 2009).

1409. In defendant's manslaughter case, the court properly admitted evidence about an incident in 2004 when defendant pointed a gun at a motorist and pulled the trigger because he testimony of the victim of the deadly conduct was relevant to rebut the defense of accident and mistake in the shooting of the victim. Immediately prior to the testimony, the trial court instructed the jury that the evidence was being admitted for the limited purpose of whether it rebutted the defensive theory of accident. King v. State, 2009 Tex. App. LEXIS 6447, 2009 WL 2517174 (Tex. App. Tyler Aug. 19 2009).

1410. Court properly admitted evidence that defendant sexually assaulted his step-daughter twenty-five years earlier because both victims were defendant's step-daughters; both were ten when defendant sexually assaulted them; both were similar in appearance; and defendant abused both of them for several years. The State demonstrated that it needed this evidence to rebut defendant's claim of fabrication, and the time needed to develop the evidence amounted to about 116 pages out of the 426 pages of testimony. Newton v. State, 301 S.W.3d 315, 2009 Tex. App. LEXIS 6534 (Tex. App. Waco Aug. 19 2009).

1411. Court did not erroneously admit evidence of an undercover drug buy the day before defendant's warrant was executed because the evidence of the undercover buy served to make a fact of consequence--defendant's care, custody, and control of the contraband with intent to distribute--more or less probable than without the evidence. Further, the court instructed the jury that it could consider the evidence of the undercover drug buy only if it believed beyond a reasonable doubt that defendant committed the offense. Stewart v. State, 2009 Tex. App. LEXIS 6391, 2009 WL 2488504 (Tex. App. Dallas Aug. 17 2009).

1412. Trial court did not abuse its discretion by admitting the recording of a telephone conversation defendant had with his brother while he was incarcerated, given that (1) the contents were not tremendously probative of whether defendant was intoxicated and the contents were not unfairly prejudicial, (2) both sides of the conversation were relevant for the arguable inference that defendant tacitly admitted committing the offense of driving while intoxicated, and (3) while the coarseness of the language used might have offended some jurors, the court was not persuaded that it made the jury more likely to convict defendant; even if the admission of the recording was error, it did not harm defendant, for purposes of Tex. R. App. P. 44.2(b), given that (1) defendant admitted that it was his fault for drinking and driving, (2) the arresting officer reported observing signs consistent with intoxication while defendant was driving and while he was performing field sobriety tests, and (3) defendants' blood alcohol concentration was well above the level for legal driving. DiCarlo v. State, 2009 Tex. App. LEXIS 6371, 2009 WL

2476630 (Tex. App. Austin Aug. 14 2009).

1413. Defendant did not explain why a jury would infer he was intoxicated because his wife had been arrested for larceny and defendant did not attempt to demonstrate that the evidence was unfairly prejudicial, confused the issues, misled the jury, caused undue delay, or was cumulative, for purposes of Tex. R. Evid. 403; thus, defendant failed to show that the trial court abused its discretion in refusing to exclude the evidence in his driving while intoxicated trial. Hernandez v. State, 2009 Tex. App. LEXIS 6356, 2009 WL 2476523 (Tex. App. Houston 14th Dist. Aug. 13 2009).

1414. In defendant's assault on a public servant case, the court properly admitted evidence of his prior arrests because the extraneous-arrest evidence was probative of both how well a character witness knew defendant and the foundation for her characterization of him, the trial court gave a limiting instruction, the extraneous arrests took up only four pages in the 564-page record, the question of whether defendant was threatening the officers was directly related to his intent, and the State did not have other evidence with which to rebut the witness's characterization of defendant's character. Morales v. State, 293 S.W.3d 901, 2009 Tex. App. LEXIS 6241 (Tex. App. Texarkana Aug. 12 2009).

1415. Court properly limited cross-examination of a witness because defendant's attempt to use an instance during an officer's career in which he wrote "phantom" warning citations was nothing more than an instance of wrongdoing in his life and was not shown to bear on his general reputation for truthfulness. There was nothing which revealed that the act of wrongdoing created a bias on the part of the officer against defendant or caused the officer to have a motive to testify untruthfully. McMillon v. State, 294 S.W.3d 198, 2009 Tex. App. LEXIS 6238 (Tex. App. Texarkana Aug. 12 2009).

1416. Given that the extraneous offense evidence was admissible to rebut defendant's theory of fabrication, the inherent probative value of the evidence was great, for purposes of Tex. R. Evid. 403. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1417. While the offenses were no doubt prejudicial, they were not unfairly so in proportion to their probative value; moreover, the jury received an instruction limiting their consideration of the offenses to the issue of fabrication, and this factor favored admissibility under Tex. R. Evid. 403. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1418. Although the State spent some time developing the evidence, it was not excessive and this factor favored admissibility of the extraneous offense evidence under Tex. R. Evid. 403. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1419. Because all the factors weighed in favor of admissibility, the extraneous-offense evidence was admissible under Tex. R. Evid. 403. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1420. Nine photographs of injuries to a child were admissible under Tex. R. Evid. 403 because the photographs were taken from different angles and locations, they were no more gruesome than the crime defendant committed, and they were not cumulative in nature. Williams v. State, 2009 Tex. App. LEXIS 5920, 2009 WL 2343259 (Tex. App. Dallas July 31 2009).

1421. In a child sexual assault case, the court properly allowed the victim's brother to testify regarding extraneous offenses against him because the boys were the same age when defendant allegedly sexually abused them, and

the manner and location of the abuse alleged by the brothers were identical. A substantial part of defendant's cross examination of the victim was devoted to the attempt to undermine the victim's credibility. Boyd v. State, 2009 Tex. App. LEXIS 5970, 2009 WL 2370730 (Tex. App. Tyler July 31 2009).

1422. In a child sexual assault case, the court properly allowed defendant's daughter to testify regarding extraneous offenses against her because the daughter's testimony tended to show that defendant was a sexual predator, and her testimony also had relevance apart from its tendency to show character conformity. It forcefully served to rebut the defense that defendant was the victim of a retaliatory "frame up." Boyd v. State, 2009 Tex. App. LEXIS 5970, 2009 WL 2370730 (Tex. App. Tyler July 31 2009).

1423. Given that defendant did not object at trial that photographs were unduly prejudicial, he failed to preserve that issue for appeal, for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(1). Wallace v. State, 2009 Tex. App. LEXIS 5794, 2009 WL 2265023 (Tex. App. San Antonio July 29 2009).

1424. Under the Tex. R. Evid. 403 balancing test, the probative value of a witness's testimony under Tex. R. Evid. 404(b) was not substantially outweighed by the danger of unfair prejudice, given that (1) the testimony was probative to rebut defendant's defensive theory of a lack of intent, which was an issue in the aggravated kidnapping case, (2) the evidence was presented in a short and concise manner, (3) the testimony was preceded by a limiting instruction, plus the jury charge clarified that the evidence was offered only for its noncharacter conformity purpose of determining defendant's intent, and (4) while the witness's testimony injured defendant's case, it did not adversely affect defendant beyond its purpose of tending to prove his intent to commit the offense, and the trial court did not err in admitting the testimony. Dale v. State, 2009 Tex. App. LEXIS 5784, 2009 WL 2264230 (Tex. App. San Antonio July 29 2009).

1425. On appeal of the order terminating parental rights, the mother's statement of points for appeal preserved her complaint regarding the trial court's admission of an alleged sexual abuse incident between her and her younger brother; the trial court erred in holding that her appeal was frivolous. The evidence had little, if any, connection to the termination suit; such evidence tended to have an extreme prejudicial impact that could give rise to reversible error under Tex. R. Evid. 403. Loehr v. Tex. Dep't of Family & Protective Servs., 2009 Tex. App. LEXIS 5693 (Tex. App. Austin July 22 2009).

1426. Court properly admitted defendant's threat to take the officer's gun and kill him because that was probative evidence of defendant's precise intentions at the time he was assaulting the officer. It offered significant proof of defendant's commission of the charged offense of attempting to take a weapon from a peace officer with the intention of harming the officer. Presley v. State, 2009 Tex. App. LEXIS 5613, 2009 WL 2152559 (Tex. App. Dallas July 21 2009).

1427. Trial court could have found that evidence of defendant's drug dealing, for purposes of Tex. R. Evid. 404(b), had some logical relevance aside from character conformity, plus the evidence was not outweighed by the danger of unfair prejudice, given the other evidence admitted at trial, including evidence of defendant's gang membership; assuming it was error to admit the extraneous offense evidence, defendant's substantial rights were not affected under Tex. R. App. P. 44.2(b), given that the jury was instructed to use the evidence for the limited purpose of determining a relationship between defendant and another and the drug dealing was not mentioned by the State in closing arguments and thus was not emphasized. Mata v. State, 2009 Tex. App. LEXIS 5410, 2009 WL 2045250 (Tex. App. San Antonio July 15 2009).

1428. Trial court did not err in concluding the probative value of an expert's testimony was not substantially outweighed by the prejudicial harm under Tex. R. Evid. 403, given that (1) the expert's testimony was probative of whether the victim tended to act like other victims of domestic violence, (2) the testimony was in response to

defendant's theory that the victim assaulted him and continued to see him, making her assault story against him unlikely, (3) the expert's testimony was not inflammatory, and (4) nothing suggested that the evidence had any tendency to confuse or mislead the jury from the main issues, plus the expert testified that she did not have specific knowledge of the relationship between defendant and the victim. Booker v. State, 2009 Tex. App. LEXIS 5541, 2009 WL 2006428 (Tex. App. Dallas July 13 2009).

1429. Defense made no objection as to two felonies, the State offered evidence of these convictions, and defendant did not object or raise a Tex. R. Evid. 403 complaint; thus, he had not preserved that complaint for appellate review, and to the extent that his remoteness objection encompassed these two felonies, they were less than 10 years old and admissible under Tex. R. Evid. 609. John v. State, 2009 Tex. App. LEXIS 4853, 2009 WL 1815650 (Tex. App. Fort Worth June 25 2009).

1430. Trial court's ruling implicitly suggested a probative/prejudicial determination and defendant's 1999 and 2003 felony convictions were sufficient to insulate 1993 offenses from a remoteness objection; applying the proper test, the could held that the evidence of defendant's 1993 convictions was admissible under Tex. R. Evid. 609. John v. State, 2009 Tex. App. LEXIS 4853, 2009 WL 1815650 (Tex. App. Fort Worth June 25 2009).

1431. Inasmuch as the record presented to the court presented no Tex. R. Evid. 403 objection to an exhibit, nothing was preserved for review; even if error were preserved, the court saw no reason why any probative value of a picture of blood found at the scene of the crime was substantially outweighed by the danger of unfair prejudice. McGinnis v. State, 2009 Tex. App. LEXIS 4799, 2009 WL 1800826 (Tex. App. Eastland June 25 2009).

1432. Inasmuch as one exhibit, an autopsy photograph, showed that there was only one gunshot wound in the victim's mid-right chest and inasmuch as the exhibit was the only autopsy picture showing what appeared to be a surgical incision, the court found that a doctor was describing the incision shown in that exhibit; as with the other exhibits complained of, defendant made no argument of prejudice specific to a photograph and disregarding the surgical incision contained in one exhibit, it depicted the realities of the crime committed and was no more graphic than the rest of the photographs that were admitted into evidence. The presence of the incision was explained to the jury as being the result of medical intervention and the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. McGinnis v. State, 2009 Tex. App. LEXIS 4799, 2009 WL 1800826 (Tex. App. Eastland June 25 2009).

1433. Defense counsel's objection to the testimony was untimely because it was not made at the earliest opportunity and consequently, nothing was presented for review; the trial court allowed the testimony as evidence of motive, instructing the jury not to consider the evidence for any other purpose, defendant made no argument or showing on this appeal that the evidence was inadmissible for that purpose and no specific argument why, if properly admitted for that purpose, its probative value was substantially outweighed by the danger of unfair prejudice,a nd the court overruled this claim. McGinnis v. State, 2009 Tex. App. LEXIS 4799, 2009 WL 1800826 (Tex. App. Eastland June 25 2009).

1434. Court properly admitted autopsy photographs because, although the pictures were somewhat gruesome, and both were disagreeable to look at, they depicted nothing more than the reality of the brutal crime committed. The photographs were probative of defendant's use of a deadly weapon, the type of wounds sustained, and the brutality and seriousness of the crime, which bore on the issues of guilt and punishment. Rodriguez v. State, 398 S.W.3d 246, 2009 Tex. App. LEXIS 4838, 2009 WL 1801264 (Tex. App. Corpus Christi June 25 2009).

1435. Where defendant was convicted of three counts of promotion of child pornography and four counts of possession of child pornography, the trial court did not violate Tex. R. Evid. 404(b) by admitting an exhibit showing a list of subfolders and 900 file names from defendant's computer. For purposes of the balancing test under Tex. R.

Evid. 403, the probative value of the evidence was not substantially outweighed by the danger of undue prejudice; the exhibit was the best and least prejudicial method of rebutting the defense theory that he may have downloaded images of child pornography accidentally or shared them without knowledge of their content. Wenger v. State, 292 S.W.3d 191, 2009 Tex. App. LEXIS 4859 (Tex. App. Fort Worth June 25 2009).

1436. In defendant's trial for aggravated sexual assault of a child, the inherent probative force of the testimony regarding defendant's shooting the gun was its tendency to show that the victim did not willingly get into or remain in the car, and although the testimony was prejudicial, it was not unfairly prejudicial, as the testimony tended to corroborate the victim's testimony that defendant used or exhibited a deadly weapon; defendant agreed the testimony did not consume an inordinate amount of time and the court found that the testimony did not have any tendency to confuse or mislead the jury, such that it was admissible under Tex. R. Evid. 403. Yepez v. State, 2009 Tex. App. LEXIS 4694, 2009 WL 1835330 (Tex. App. San Antonio June 24 2009).

1437. In defendant's aggravated robbery case, the court properly admitted evidence of an extraneous aggravated robbery because the extraneous offense and the instant offense occurred on the same night, within an hour of each other, in the same area, in each offense, two men approached the complainants while each complainant was in his or her car, held the complainants at gunpoint, and shot the complainants. Additionally, the State's need for the evidence was significant because, although one complainant identified defendant as the second perpetrator, the record also showed that the complainant could not see defendant's face because of the bandana. Hackaday v. State, 2009 Tex. App. LEXIS 4501, 2009 WL 1687957 (Tex. App. Houston 1st Dist. June 18 2009).

1438. In a capital murder case, a court properly admitted extraneous offense evidence of an aggravated robbery because the offense occurred four days after the charged offense and was compelling evidence tending to prove intent; given the specific instructions provided to the jury that they were only to use the extraneous evidence in consideration of defendant's intent in the death of the victim, it did not impress the jury in some irrational way. Gomez v. Tex., 2009 Tex. App. LEXIS 4521, 2009 WL 1688233 (Tex. App. Houston 1st Dist. June 18 2009).

1439. In defendant's capital murder case, autopsy photographs were properly admitted because the photographs provided a necessary visual component to, and understanding of, the expert's testimony regarding the nature and extent of the victim's injuries. The photographs were probative because they showed the full extent and non-accidental nature of those injuries; thus, they were necessary for the State to develop its case. Nunez v. State, 2009 Tex. App. LEXIS 4476, 2009 WL 1677821 (Tex. App. Dallas June 17 2009).

1440. In defendant's capital murder case, photographs of the victim were not cumulative because one showed injuries to the child's neck and head from a side view, whereas two other photos showed injuries from a frontal view. Williams v. State, 294 S.W.3d 674, 2009 Tex. App. LEXIS 4201 (Tex. App. Houston 1st Dist. June 11 2009).

1441. Court properly excluded testimony from third parties establishing defendant's knowledge of the complainant's propensity for violence because a witness testified that she saw the complainant hit her mother multiple times, she and other family members had called the police multiple times regarding the complainant's domestic violence, and defendant told a witness after the shooting that defendant thought the complainant was trying to hurt him. Segovia v. State, 2009 Tex. App. LEXIS 4559, 2009 WL 1678024 (Tex. App. Houston 14th Dist. June 9 2009).

1442. For purposes of Tex. Code Crim. Proc. Ann. art. 38.36(a), a psychiatrist's testimony would have been repetitive of defendant's testimony that he suffered from bipolar disorder and had prescription medication and the psychiatrist could express no opinion as to whether the multiple stabbing was the result of defendant's disorder; thus, defendant failed to elicit any evidence from the psychiatrist that negated the mens rea element of the offense of murder and the trial court did not abuse its discretion in excluding the psychiatrist's testimony, nor did the trial

court abuse its discretion in ruling that the psychiatrist's testimony did not meet the requirements of Tex. R. Evid. 403 because of unnecessary delay, possible accumulation of evidence, and misleading the jury. Gassaway v. State, 2009 Tex. App. LEXIS 3919, 2009 WL 1547756 (Tex. App. Dallas June 4 2009).

1443. In defendant's manslaughter punishment trial, photographs clarified and developed an officer's testimony concerning the victim's injuries and the circumstances under which her body was found, and thus the trial court did not abuse its discretion in admitting the photographs, for purposes of Tex. R. Evid. 403. Ehrhart v. State, 2009 Tex. App. LEXIS 3901, 2009 WL 1547757 (Tex. App. Dallas June 4 2009).

1444. In an aggravated assault case, a trial court did not err by admitting photographs of a victim's injuries over a Tex. R. Evid. 403 objection because the inherent probative force of the photographs was considerable since they provided context for the offense; moreover, they were relevant and necessary for the prosecution to aid the jury in understanding the testimony regarding the extent of the victim's injuries. Even if the photographs were in color, the images were not of such a horrifying or appalling nature that a juror of normal sensitivity would have had difficulty rationally deciding the critical issues of the case after viewing any of them individually or cumulatively; further, they could not have possibly distracted the jury from the issue at hand, the jury was not misled, and the time involved in the introduction of the photographs was minimal. Houston v. State, 2009 Tex. App. LEXIS 4357, 2009 WL 1677860 (Tex. App. Houston 14th Dist. June 4 2009).

1445. In a civil commitment case involving a sexually violent predator, a trial court acted within its discretion in concluding that the underlying facts or data used by experts were not unfairly prejudicial and that the danger of improper use did not outweigh the value of the facts or data as explanation or support for expert opinions. The trial court did not err in overruling an objection to alleged cumulative and repetitive testimony regarding a patient's sexual convictions, the details of his non-sexual convictions, juvenile convictions, alleged un-adjudicated crimes, and his disciplinary history while incarcerated; moreover, a limiting instruction was not insufficient. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

1446. Defense counsel made no specific reference to Tex. R. Evid. 403 and did not succinctly state that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, but the court believed that counsel's statements were sufficient to bring before the trial court the issue of whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice Worthy v. State, 295 S.W.3d 685, 2009 Tex. App. LEXIS 3672 (Tex. App. Eastland May 28 2009).

1447. Probative value of the evidence that defendant's stepbrother was a registered sex offender was not substantially outweighed by the danger of unfair prejudice, given that (1) the court knew of no other way for the State to show that defendant had little regard for sex offender community supervision conditions and to show the danger he put the victim in by having her unsupervised at his stepbrother's place of residence other than to show that his stepbrother was a registered sex offender, and (2) little time was consumed in presenting the evidence and the evidence was not repetitive. Worthy v. State, 295 S.W.3d 685, 2009 Tex. App. LEXIS 3672 (Tex. App. Eastland May 28 2009).

1448. In a capital murder, case, autopsy photographs were properly admitted under Tex. R. Evid. 403 because their probative value substantially outweighed the danger of unfair prejudice; they were used to show injuries not seen on the surface of a victim's body, and there was no danger that a jury would have attributed autopsy damage to defendant. Wiggins v. State, 2009 Tex. App. LEXIS 4320, 2009 WL 1395928 (Tex. App. Dallas May 20 2009).

1449. Regarding a Tex. R. Evid. 403 issue, the court's review had a somewhat limited scope in that the court had already concluded the evidence was admissible because of a particular line of inquiry by the defense, and thus the court addressed the case law factors in terms of that line of inquiry. Gutierrez v. State, 2009 Tex. App. LEXIS 3296,

2009 WL 1335154 (Tex. App. Dallas May 14 2009).

1450. Once the jury had heard evidence that defendant's husband, sister, brother-in-law, and mother had all been investigated by child protective services (CPS) and that the investigator found some CPS history on those people, then evidence of any similar background check on defendant became highly probative in defendant's injury to a child trial; while the evidence would make an impression on the jury, the court viewed that fact in light of the evidence the jury had already heard about other family members, the evidence took minimal time to develop, the State did need the evidence of defendant's background to give a fair treatment of the subject to the jury, and although the court did not question that the evidence was prejudicial to defendant, the probative value was not substantially outweighed by the danger of unfair prejudice. Gutierrez v. State, 2009 Tex. App. LEXIS 3296, 2009 WL 1335154 (Tex. App. Dallas May 14 2009).

1451. During defendant's criminal trial for the sexual asault of a child, the State was permitted to introduce extraneous offense evidence that defendant encouraged the victim's involvement in several crimes to rebut defense counsel's opening remarks that defendant was a positive influence on the victim. The trial court determined the extraneous offense evidence was admissible under Tex. R. Evid. 404(b) to correct the false impression created by the defense; the probative value of the evidence substantially outweighed any prejudicial effect under Tex. R. Evid. 403. Ytuarte v. State, 2009 Tex. App. LEXIS 3056, 2009 WL 1232327 (Tex. App. San Antonio May 6 2009).

1452. In a professional negligence case, a trial court did not err by excluding evidence of a deceased lawyer's drug and alcohol use during the time that he was representing a client under Tex. R. Evid. 403 because the evidence fell short of supporting an inference that the lawyer's performance when negotiating a mediated settlement agreement was actually impaired by alcohol or drugs. Even crediting an opinion that alcohol and drug addiction adversely impacted a lawyer's judgment, there was nothing linking this general observation to the lawyer's performance during the settlement negotiations. Beck v. Law Offices of Edwin J. Terry, Jr., P.C., 284 S.W.3d 416, 2009 Tex. App. LEXIS 2994 (Tex. App. Austin May 1 2009).

1453. Hearsay testimony relating to a DNA results report that a detective had not personally prepared was harmless because a DNA analyst had testified without objection about the test results on the swabs contained in the victim's sexual assault kit; the detective's testimony was cumulative of the DNA analyst's testimony. Alvarez v. State, 2009 Tex. App. LEXIS 3039, 2009 WL 1176440 (Tex. App. Fort Worth Apr. 30 2009).

1454. In a sexual assault of a child case, evidence that defendant had been subjected to unusual sexual events in his youth and that he related those events to the sexual assault of the child tended to rebut a contention that any contact with the child's penis was simply an accident, and therefore, the evidence was properly admitted. Additionally, the evidence took no additional time to develop initially, and was mentioned again during the trial only when defendant took the stand and denied making some of the statements. Watterson v. State, 2009 Tex. App. LEXIS 2938, 2009 WL 1148751 (Tex. App. Amarillo Apr. 29 2009).

1455. In an aggravated sexual assault of a child case, extraneous offense evidence was properly admitted because it made the defense's theory of fabrication less probable, and the State needed the evidence to rebut defendant's theory of fabrication and frame-up, which was promulgated in opening statements, on cross-examination, during the defense's case-in-chief, and during closing arguments. Wells v. State, 2009 Tex. App. LEXIS 2762, 2009 WL 1108796 (Tex. App. El Paso Apr. 23 2009).

1456. In an aggravated sexual assault of a child case, extraneous offense evidence was properly admitted because it made the defense's theory of fabrication less probable, and the State needed the evidence to rebut defendant's theory of fabrication and frame-up, which was promulgated in opening statements, on cross-examination, during the defense's case-in-chief, and during closing arguments. Wells v. State, 2009 Tex. App.

LEXIS 2767, 2009 WL 1108665 (Tex. App. El Paso Apr. 23 2009).

1457. In an aggravated sexual assault of a child case, extraneous offense evidence was properly admitted because it made the defense's theory of fabrication less probable, and the State needed the evidence to rebut defendant's theory of fabrication and frame-up, which was promulgated in opening statements, on cross-examination, during the defense's case-in-chief, and during closing arguments. Wells v. State, 2009 Tex. App. LEXIS 2768, 2009 WL 1108663 (Tex. App. El Paso Apr. 23 2009).

1458. In an intoxication manslaughter case, the trial court's decision to exclude the statements at issue did not violate the doctrine of optional completeness because the officer's testimony that people at the scene said they saw what happened did not leave a false impression with the jury, and the excluded statements were not necessary to fully understand the officer's testimony; he further testified that people were approaching him while he was laying the flare line on the scene and that he gave one person a stack of affidavits so that witnesses could begin writing down what they saw. The officer testified that he did not talk to every witness on the scene, thus informing the jury that not all witnesses testified at trial. Mole v. State, 2009 Tex. App. LEXIS 2838, 2009 WL 1099433 (Tex. App. Fort Worth Apr. 23 2009).

1459. In defendant's capital murder case, an autopsy identification photograph of the victim was properly admitted at the guilt phase of trial because it was relevant and not cumulative of the autopsy photographs exhibiting the wounds. The complained-of picture was not particularly gruesome or detailed, it was not enhanced in any way, and it portrayed no more than the condition of the victim due to the injuries inflicted. Young v. State, 283 S.W.3d 854, 2009 Tex. Crim. App. LEXIS 979 (Tex. Crim. App. 2009).

1460. In defendant's capital murder case, the court properly permitted the admission of evidence at punishment regarding an extraneous shooting incident because defendant's out-of-court admissions that he committed the act of misconduct, along with his possession of the weapon and forensic evidence, constituted "clear proof" that he committed the extraneous offense. The trial court did not err in holding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Young v. State, 283 S.W.3d 854, 2009 Tex. Crim. App. LEXIS 979 (Tex. Crim. App. 2009).

1461. Defendant pleaded guilty to assault and aggravated assault and several exhibits were introduced concerning previous charges and convictions, plus many other unadjudicated bad acts were introduced; thus, even if the failure to object under Tex. R. Evid. 403 to certain unadjudicated bad acts was error, which the court did not decide, the error did not deprive defendant of a fair trial. Schroeder v. State, 2009 Tex. App. LEXIS 2688, 2009 WL 1035223 (Tex. App. Fort Worth Apr. 16 2009).

1462. In a sexual assault of a child case, evidence of defendant's arrest for possession of child pornography was properly admitted because it explained the reason for the investigation of defendant, the State needed it to adequately describe the circumstances of the charged offenses, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Greene v. State, 287 S.W.3d 277, 2009 Tex. App. LEXIS 2855 (Tex. App. Eastland Apr. 16 2009).

1463. In a sexual assault of a child case, the trial court did not err in admitting evidence of statements defendant made to a witness and the child about his feelings for the child because it was relevant to, and highly probative of, defendant's state of mind and the relationship between defendant and the child. The record did not demonstrate that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Greene v. State, 287 S.W.3d 277, 2009 Tex. App. LEXIS 2855 (Tex. App. Eastland Apr. 16 2009).

1464. Court properly admitted extraneous offense evidence because the extraneous offenses admitted tended to "make the existence" of a fact of consequence "more probable" and established that: defendant's gang was a criminal street gang, defendant had an affiliation with the gang, and defendant committed the instant offense as a member of a criminal street gang. Furthermore, the probative force and the State's need to admit the extraneous offenses outweighed the factors that favored exclusion; the evidence was not only relevant, but essential to the State's burden of proof. Fuentes v. State, 2009 Tex. App. LEXIS 2544, 2009 WL 997508 (Tex. App. Houston 14th Dist. Apr. 14 2009).

1465. Defendant's conviction for capital murder was appropriate because a crime-scene video was relevant to show the victim's death and the consistency of the physical evidence with an eyewitness' testimony. It did not involve an unusual and overwhelming emotional impact. Jones v. State, 2009 Tex. App. LEXIS 5866, 2009 WL 988647 (Tex. App. Dallas Apr. 13 2009).

1466. During defendant's trial for indecency with a child, the trial court abused its discretion under Tex. R. Evid. 403 in preventing defendant from (1) cross-examining the complainant about the contents of the medical records when defendant took her to the hospital to be examined for a possible sexual assault; (2) offering those records into evidence if the complainant denied their accuracy; and (3) preventing defendant from offering testimony that the complainant told a friend that the sexual activities that night were consensual and with her boyfriend, not assaultive with defendant. There was nothing in the record that would support a finding that the prejudicial effect of this evidence outweighed its probative value. Hammer v. State, 296 S.W.3d 555, 2009 Tex. Crim. App. LEXIS 513 (Tex. Crim. App. 2009).

1467. During the punishment phase of defendant's murder trial, the trial court acted within her discretion by excluding evidence that the victim was a registered sex offender. This kind of comparative evidence offered to mitigate defendant's punishment by showing that the victim's life was of little value was unfairly prejudicial under Tex. R. Evid. 403. Hayden v. State, 296 S.W.3d 549, 2009 Tex. Crim. App. LEXIS 510 (Tex. Crim. App. 2009).

1468. Tex. R. Evid. 403 factors weighed in favor of admissibility of close-up photos of the victim because (1) the photos contained substantial probative value about the crime scene, the injuries received by the victim, and the State's theory that defendant's actions were intentional and not done in self-defense; (2) the photographs had very little potential to impress the jury in an irrational way because they were not overly gruesome; (3) the State took very little time in developing the testimony about the photos; and (4) the State needed the photos because there were no other close-up, crime-scene photos of the victim's wounds and the blood pattern from the wounds. Thus, the probative value of the photos was not substantially outweighed by the danger of unfair prejudice and the photos were admissible. Martinez v. State, 2009 Tex. App. LEXIS 2274, 2009 WL 884785 (Tex. App. Austin Apr. 3 2009).

1469. Because the State had to prove that defendant had two prior driving while intoxicated (DWI) convictions, the State's two exhibits were relevant to establish an element of the offense of felony DWI and to demonstrate that defendant was the same person as the person convicted of the prior two DWIs; thus, the value of these records was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury when defendant had not stipulated to the prior convictions, for purposes of Tex. R. Evid. 403. Paschall v. State, 285 S.W.3d 166, 2009 Tex. App. LEXIS 2201 (Tex. App. Fort Worth Apr. 2 2009).

1470. Trial court did not abuse its discretion by admitting crime-scene photographs despite defendant's Tex. R. Evid. 403 objection because the five photographs were not exactly alike, were not unnecessarily duplicative, took almost no time to introduce into evidence, and had very little, if any, potential to impress the jury in an irrational but indelible way. The photos were relevant to show the circumstances of the killing and the crime scene at the time. Hilliard v. State, 2009 Tex. App. LEXIS 2429, 2009 WL 838241 (Tex. App. Houston 14th Dist. Mar. 31 2009).

1471. Trial court did not abuse its discretion by admitting nine autopsy photographs despite defendant's Tex. R. Evid. 403 objection because there was only one photograph of each gunshot wound showing its general location on the victim's torso and only one close-up view of it. The photographs were not duplicative and showed only the extent and nature of the wounds; the assistant medical examiner referred to all of the photographs during her testimony. Hilliard v. State, 2009 Tex. App. LEXIS 2429, 2009 WL 838241 (Tex. App. Houston 14th Dist. Mar. 31 2009).

1472. In an aggravated sexual abuse of a child case, evidence of physical violence perpetrated upon a victim was admissible under Tex. Code Crim. Proc. Ann. art. 38.37, § 2 because it showed the relationship between defendant and the victim both before and after the alleged assault; moreover, threats to the child showed why a prompt outcry was not made, and the evidence showed defendant's dominance over the victim. Even though the physical abuse evidence was horrific and undoubtedly prejudicial to defendant, it was probative and the Tex. R. Evid. 403 factors, when considered as a whole, did not clearly weigh in favor of holding that the evidence's unfair prejudice substantially outweighed its probative value; this was a close case because, even though the State needed to introduce the evidence to show why the victim waited years to make an outcry and testimony regarding this evidence did not take up an inordinate amount of time, there was a definite tendency to suggest a decision on an improper basis, and the evidence tended to distract the jury from the main issue in the case. Gamble v. State, 2009 Tex. App. LEXIS 2134, 2009 WL 806879 (Tex. App. Fort Worth Mar. 27 2009).

1473. Trial court did not abuse its discretion by admitting evidence of voice messages defendant left for his former girlfriend in which he threatened to kill her husband because the evidence was properly admitted to prove defendant's knowledge and intent; a reasonable person could view the messages as creating an inference that defendant, knowing he would see the husband that day, intentionally brought the gun with him in order to harm or further threaten the husband. The trial court did not abuse its discretion by overruling defendant's Tex. R. Evid. 403 objections because the messages were left a few hours before defendant drove to the husband's home with a gun in the back of his truck, the trial court specifically directed the State not to delve into the details of the messages, the time the State needed to admit the messages was minimal, and the evidence was an integral part of the State's theory that defendant took the gun with him to further threaten the husband. Rice v. State, 2009 Tex. App. LEXIS 2062, 2009 WL 790178 (Tex. App. Austin Mar. 26 2009).

1474. Tex. R. Evid. 403 was not violated where the trial court allowed extraneous offense evidence, namely that defendant's confidential informant had twice before planted fake drugs to frame an innocent person, to be admitted during defendant's trial on charges of knowingly making false statements in a police report and aggravated perjury for making the same false statements under oath because the evidence made facts of consequence, the falsity of defendant's statements and his knowledge that those statements were false, more likely. The evidence that defendant committed the extraneous acts was strong, as in each instance the confidential informant and the set-up dealer testified that there was no contact or delivery; the accuracy of defendant's statement that he saw the confidential informant and the suspect in the instant case make contact and his knowledge of its accuracy were the two hotly contested issues at trial, and the extraneous acts had high probative value in showing that defendant repeatedly put false statements of what he purportedly saw during the buy-bust deals in his reports. De La Paz v. State, 279 S.W.3d 336, 2009 Tex. Crim. App. LEXIS 426 (Tex. Crim. App. 2009).

1475. In defendant's aggravated assault case, evidence of third-party threats against the complainants was properly admitted under Tex. R. Evid. 403 because the trial court reasonably could have concluded that the evidence that the two key eyewitnesses had been threatened, which would explain inconsistencies in their testimony, was indirectly probative of all of the elements of the charged offense. Additionally, the State's need for the testimony about threats--the only evidence available to explain the witnesses' inconsistent accounts of who was present during the shooting--was considerable, and the evidence of threats that was presented to the jury consumed only forty-three lines of testimony. Cox v. State, 2009 Tex. App. LEXIS 1902, 2009 WL 807491 (Tex. App. Houston 14th Dist. Mar. 19 2009).

1476. Trial court did not abuse its discretion by admitting the utility knife, the pocket knife, and wire cutters that were found on defendant's person after his arrest into evidence because the items were probative, as they showed defendant's intent as well as the context and circumstances of his actions of entering the victims' garage, and the probative value did not substantially outweigh the risk of unfair prejudice. The State spent relatively little time developing the evidence and the evidence did not have a tendency to suggest a decision on an improper basis. Enloe v. State, 2009 Tex. App. LEXIS 1866 (Tex. App. Corpus Christi Mar. 19 2009).

1477. In a murder case, evidence of a prior relationship between defendant and his victim was properly admitted into evidence under Tex. Code Crim. Proc. Ann. art. 38.36(a); moreover, the evidence was not offered to show that defendant acted in conformity with his propensity for violence, in violation of Tex. R. Evid. 404(b). Evidence that defendant had beaten the victim in the past was no more inflammatory or prejudicial than the evidence that he beat the victim on the night of the murder. Chavez v. State, 399 S.W.3d 168, 2009 Tex. App. LEXIS 1840, 2009 WL 700658 (Tex. App. San Antonio Mar. 18 2009).

1478. In a murder case, the court properly admitted evidence of a subsequent shooting involving defendant because, in both cases, defendant fired a gun from the driver's side window, once when he was sitting on the passenger side, both incidents occurred in the early morning, and in each instance defendant was responding to a perceived slight to one of his friends, rather than to himself, by conducting a drive-by shooting. Additionally, defendant's alibi defense and challenges to witness credibility raised identity, and in light of the importance of proving the identity of the perpetrator, the State had a strong need for the challenged evidence. Williams v. State, 2009 Tex. App. LEXIS 1725, 2009 WL 585986 (Tex. App. Houston 14th Dist. Mar. 10 2009).

1479. In a case involving aggravated assault using a deadly weapon, a trial court did not abuse its discretion by admitting evidence of defendant's other convictions involving the same complainant under Tex. R. Evid. 403 because the State needed the evidence to explain the complainant's fear of defendant, and the evidence was not confusing, distracting, or cumulative. The prior convictions were addressed briefly, no details of the offenses were revealed, and the presentation of the evidence did not take an inordinate amount of time. Miranda v. State, 2009 Tex. App. LEXIS 1727, 2009 WL 586005 (Tex. App. Houston 14th Dist. Mar. 10 2009).

1480. Defendant limited one issue to the admissibility of a sexual assault nurse examiner's testimony under Tex. R. Evid. 401, 402 and he did not object under Tex. R. Evid. 403 or request a balancing test; thus, the court limited its review solely to determining whether the nurse's testimony had any relevance to the issues contested at trial in defendant's sexual assault trial. Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

1481. Case law held that a Tex. R. Evid. 403 objection was not implicitly contained in relevancy or Tex. R. Evid. 404(b) objections and rather, a specific Tex. R. Evid. 403 objection had to be raised to preserve error; the court does not hold, however, that a litigant must expressly invoke "Rule 403" to preserve error. Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

1482. Court erred in failing to instruct the jury to disregard the State's reference to plea negotiations because, given the manner in which the State's question to defendant was posed, one could reasonably interpret it as disclosing that plea negotiations had occurred, that potential offers were made and rejected, and that defendant's desires presented the major obstacle to arriving at a bargain. Bowley v. State, 280 S.W.3d 530, 2009 Tex. App. LEXIS 1448 (Tex. App. Amarillo Mar. 2 2009).

1483. In a case involving indecency with a child, testimony from defendant's former wife regarding defendant's sexual behavior with neighborhood boys and with his niece was relevant under Tex. R. Evid. 401 because it was helpful to the jury in determining an appropriate sentence, and any issues relating to truthfulness or a lack of

specificity went to the weight, not the admissibility, of the evidence and was for the jury to determine; moreover, the extraneous offense testimony was not inadmissible under Tex. R. Evid. 403 because it was probative, it would not have irrationally impressed the jury, the time needed to develop the evidence was minimal, and the State needed the evidence. To the extent the evidence showed defendant's sexual conduct with children, it was not unfairly prejudicial. Orr v. State, 2009 Tex. App. LEXIS 4152, 2009 WL 485502 (Tex. App. Dallas Feb. 27 2009).

1484. Trial court did not err by admitting autopsy photos during the punishment phase of a murder trial because they were not unduly prejudicial under Tex. R. Evid. 403; they had probative value, they did not show mutilation, the presentation of the photos constituted only a few pages of the record, and they were necessary to determine punishment. Defendant had entered a plea of guilty to the charge, but was before the jury seeking community supervision as punishment. Farnsworth v. State, 2009 Tex. App. LEXIS 1038, 2009 WL 349799 (Tex. App. Houston 1st Dist. Feb. 12 2009).

1485. In an aggravated sexual assault of a child case, prior bad acts evidence was properly admitted at sentencing because the collective testimony was probative of defendant's ongoing, repeated pattern of abuse, which the witnesses could not individually establish, and the collective testimony assisted the jury in evaluating defendant's character and his moral blameworthiness for punishment purposes. Cintron v. State, 2009 Tex. App. LEXIS 889, 2009 WL 330963 (Tex. App. San Antonio Feb. 11 2009).

1486. Trial court could have reasonably concluded that (1) defendant's half-brother's testimony did not substantially outweigh its prejudicial value. (2) the State's need for the evidence was considerable since it suggested that defendant misled the jury about the reason for his expulsion from the family home, and (3) the half-brother's testimony did not tend to suggest that the jury decide the case on an improper basis; the conduct in which the half-brother testified that appellant engaged with him, inappropriate touching and oral genital contact, was no more serious and potentially inflammatory than the offense defendant was charged with committing against the victim in this aggravated sexual assault trial and the testimony did not confuse or distract the or take an inordinate amount of time, and thus the trial court did not abuse its discretion by determining that the probative value of testimony outweighed any unfairly prejudicial impact and the testimony was admissible under the rule of optional completeness. Goodwin v. State, 2009 Tex. App. LEXIS 875, 2009 WL 311457 (Tex. App. Dallas Feb. 10 2009).

1487. Determination that evidence was relevant under Tex. Code Crim. Proc. Ann. art. 38.37 did not end the inquiry, as the court still had to balance whether the evidence's probative value was substantially outweighed by the danger of unfair prejudice. Gonzalez v. State, 2009 Tex. App. LEXIS 879, 2009 WL 311448 (Tex. App. Dallas Feb. 10 2009).

1488. Defendant's previous molestation of his daughter offered relevant evidence about his relationship with her and to rebut his defensive theory, the daughter's testimony was detailed and brief on this matter, and her graphic descriptions of the main events surrounding the offenses overshadowed any inflammatory response the jury might have had to the testimony, and thus the court found defendant was not unfairly prejudiced by the testimony and the trial court did not abuse its discretion in admitting it. Gonzalez v. State, 2009 Tex. App. LEXIS 879, 2009 WL 311448 (Tex. App. Dallas Feb. 10 2009).

1489. Because the record was silent as to the trial court's balancing of the factors, the court presumed the trial court conducted the balancing test under Tex. R. Evid. 403. Mathis v. State, 2009 Tex. App. LEXIS 1466, 2009 WL 3003252 (Tex. App. Houston 14th Dist. Feb. 10 2009).

1490. Trial court did not abuse its discretion under Tex. R. Evid. 403 in admitting extraneous offense evidence in defendant's capital murder trial, given that (1) the evidence tended to make some facts more or less probable, (2) it was unlikely that the jury was impressed in an indelible way by admission of a pistol, marijuana, and bullets, (3) the

State did not emphasize the evidence or spend an inordinate amount of time developing the evidence, despite the State's need to development evidence in light of the circumstantial case, and (4) in considering the overwhelming evidence of defendant's guilt, it was unlikely that the evidence had anything more than a slight effect on the jury's considerations. Mathis v. State, 2009 Tex. App. LEXIS 1466, 2009 WL 3003252 (Tex. App. Houston 14th Dist. Feb. 10 2009).

1491. In a case involving the possession of hydrocodone, the State was properly allowed to introduce extraneous offense evidence under Tex. R. Evid. 404(b) showing that defendant had subsequently been arrested for the same offense because this rebutted defendant's assertions that was unaware that the pills were in his car and that they belonged to someone else. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Smith v. State, 2009 Tex. App. LEXIS 751, 2009 WL 279490 (Tex. App. Fort Worth Feb. 5 2009).

1492. In a case involving aggravated sexual assault of a child and indecency with a child, a Tex. R. Evid. 403 objection was properly overruled; a miniature dildo possessed significant probative value based on one child's allegations, the presence of condoms in a married couple's home was not prejudicial, and the prejudicial value of an adult magazine was limited since there was other evidence of pornography in the home. Rousseau v. State, 2009 Tex. App. LEXIS 380, 2009 WL 141857 (Tex. App. Eastland Jan. 22 2009).

1493. Evidence of defendant's serial drug dealing had a significant potential to inflame the jury's perception of defendant as a criminal in general, and taken in conjunction with the charged crime of conspiracy to commit capital murder and the fact that several of the State's witnesses were prison or jail inmates relating statements made to them by defendant while incarcerated with him, there was a substantial amount of evidence before the jury which could very well have affected its view of defendant in an irrational or indelible manner; while motive was not an element which must be proven in defendant's case, it was nonetheless an appropriate and permissible area of evidence, and evidence of defendant's history of drug dealing had at least the potential to unfairly prejudice the jury, such that this factor weighed against admission of the evidence. Toliver v. State, 279 S.W.3d 391, 2009 Tex. App. LEXIS 345 (Tex. App. Texarkana Jan. 21 2009).

1494. About 23 percent of the State's case centered on extraneous offenses, plus the State played three videos of the drug transactions in question; while bearing in mind the complexity and difficulty of proving conspiracy, the court nonetheless found that the amount of time used to prove the extraneous offenses here weighed against their admission. Toliver v. State, 279 S.W.3d 391, 2009 Tex. App. LEXIS 345 (Tex. App. Texarkana Jan. 21 2009).

1495. While the State had other competent evidence tending to prove the conspiracy to commit capital murder, the court could not say that the State did not have some need for the extraneous offense evidence, especially considering the degree that the harsh penalties to which defendant was susceptible for the drug delivery charges would serve as motive for the conspiracy and the integral part which the proposed victim of the murder plot would have played as a witness in defendant's pending trials; the court was not in a position to determine which parts of the evidence should have been excluded and it was this kind of decision that was in the trial court's discretion, and the trial court did not abuse its discretion in finding that the danger of unfair prejudice did not substantially outweigh the probative nature of the State's proffered extraneous-offense evidence. Toliver v. State, 279 S.W.3d 391, 2009 Tex. App. LEXIS 345 (Tex. App. Texarkana Jan. 21 2009).

1496. After finding the trial court did not abuse its discretion in admitting the extraneous evidence, the court next reviewed the trial court's balancing of the prejudicial nature of this evidence against its probative value under Tex. R. Evid. 403. Toliver v. State, 279 S.W.3d 391, 2009 Tex. App. LEXIS 345 (Tex. App. Texarkana Jan. 21 2009).

1497. For purposes of Tex. R. Evid. 403, evidence of defendant's sales of cocaine was relevant to the issue of his motive to conspire to kill the victim; there was substantial evidence of defendant's guilt in the delivery of controlled substance cases, which would have subjected him to some of the highest penalty ranges available, and the victim's potential testimony would have been an integral part of any successful prosecution of those cases, and thus this factor weighed in favor of the admission of the extraneous-offense evidence. Toliver v. State, 279 S.W.3d 391, 2009 Tex. App. LEXIS 345 (Tex. App. Texarkana Jan. 21 2009).

1498. In defendant's capital murder case, the court properly admitted photographs because the exhibits constituted only two photographs and depicted nothing more than the reality of the brutal crime committed. The victim's body was clothed, and they were not extreme close-up shots. Badgett v. State, 2009 Tex. App. LEXIS 342, 2009 WL 142324 (Tex. App. San Antonio Jan. 21 2009).

1499. In an aggravated assault case, defendant failed to preserve error under Tex. R. App. P. 33.1(a)(1) regarding the testimony of a former army investigator about a prior murder that defendant committed because an objection was not made when essentially the same testimony was given by defendant's girlfriend. Even if the error was preserved, the trial court did not err by applying the presumption of admissibility under Tex. R. Evid. 403; the circumstances surrounding the twenty-five-year-old murder and those surrounding the present charge were very similar, the State limited the information provided to the jury by having the investigator briefly testify as to the facts surrounding the prior murder, and the investigator's testimony provided the jury with an understanding of defendant's prior history of violence towards women. Williams v. State, 2009 Tex. App. LEXIS 324, 2009 WL 112774 (Tex. App. Fort Worth Jan. 15 2009).

1500. Court properly excluded defendant's "alternative perpetrator" evidence because, although defendant suggested that the testimony of a witness raised the possibility that the child was injured before the time that defendant babysat for her, the testimony by the other witnesses offered no corroboration to that theory. To the extent that the proffered evidence would have been even marginally relevant to the defense theory, the trial court could have reasonably concluded that its probative value was substantially outweighed by confusing the issues or misleading the jury. Contreras v. State, 2009 Tex. App. LEXIS 91, 2009 WL 50601 (Tex. App. El Paso Jan. 8 2009).

1501. In defendant's aggravated sexual assault case, the trial court properly excluded evidence of drug use at the victim's home because the fact that two of the victim's parents' house guests used cocaine in their bathroom had no probative value of a material fact issue in this case. The extraneous offense, the victim's mother's house guests using cocaine in the bathroom, did not tend to make the existence of a material fact -- whether defendant sexually assaulted the victim -- more or less probable. Mendenhall v. State, 2009 Tex. App. LEXIS 22 (Tex. App. Dallas Jan. 6 2009).

1502. Evidence that defendant failed to appear in 1999 and that his bond was forfeited was relevant and admissible as evidence of guilt, and defendant failed to present any evidence showing that his failure to appear was not flight from prosecution, plus he presented no argument that the probative value of the evidence was substantially outweighed by its prejudicial effect under Tex. R. Evid. 403; thus, he did not show that the trial court abused its discretion or committed reversible error in admitting the evidence, for purposes of Tex. R. App. P. 44.2(b). Pratte v. State, 2008 Tex. App. LEXIS 9716 (Tex. App. Austin Dec. 31 2008).

1503. During defendant's criminal trial for burglary of a building, the trial court overruled defendant's Tex. R. Evid. 403 objection to the prejudicial effect of testimony about his methamphetamine addiction. The Court of Appeals of Texas held that the failure to reassert his earlier objection waived the issue for appellate review in accordance with Tex. R. App. P. 33.1. Greenlee v. State, 2008 Tex. App. LEXIS 9438 (Tex. App. Texarkana Dec. 19 2008).

1504. Trial court did not err by admitting evidence that defendant tried to flee from police during his arrest because it was relevant, as defendant failed to show that his flight was unconnected to the capital murder offense based on his testimony that he did so because he was wanted for a probation violation and did not want to go back to jail. The evidence was probative because it showed the context and circumstances of defendant's arrest, the State spent relatively time developing the evidence, and the evidence did not have a tendency to suggest a decision on an improper basis or that it impressed the jury in an irrational way. Baker v. State, 2008 Tex. App. LEXIS 9416 (Tex. App. Dallas Dec. 18 2008).

1505. Where defendant was convicted of burglary of a building, the trial court did not err by admitting extraneous offense evidence under Tex. R. Evid. 404(b). The evidence of a similar attempted burglary that was committed less than one month later was relevant to intent, motive, identity, opportunity, preparation, plan, knowledge, or absence of mistake or accident; and the probative value of the evidence outweighed any prejudicial effect under Tex. R. Evid. 403. Phegley v. State, 2008 Tex. App. LEXIS 9406 (Tex. App. Eastland Dec. 18 2008).

1506. In defendant's drug case, any error by the admission of testimony concerning the search warrant being assigned to the gang unit was harmless because, by the time the officer testified, the following evidence had already been admitted: defendant claimed membership in the past in two gangs, and defendant had gang membership tattoos and photographs of the tattoos were admitted into evidence. Cedillo v. State, 2008 Tex. App. LEXIS 9485 (Tex. App. Fort Worth Dec. 18 2008).

1507. In defendant's sexual assault of a child case, the court did not err by refusing to allow defendant to question the victim and her mother about whether the victim had made an outcry against her grandfather because even if the grandfather had abused the victim, that did not bear on whether defendant also abused her. Defendant did not establish a connection between the grandfather and the abuse the victim alleged. Ruiz v. State, 272 S.W.3d 819, 2008 Tex. App. LEXIS 9491 (Tex. App. Austin 2008).

1508. Defendant complained that the admission of evidence that he had left a note containing his name, jail address, and other information in the women's room was irrelevant and prejudicial; however, the trial court determined that the probative value of the evidence was substantial. Wilson v. State, 2008 Tex. App. LEXIS 9395 (Tex. App. Waco Dec. 17 2008).

1509. Because defense counsel failed to lay any predicate regarding the inception of defendant's tattoos, the existence or non-existence of the tattoos was not relevant to identification and the trial court did not abuse its discretion in disallowing the evidence; one victim identified defendant and another victim did not recall seeing any tattoos, such that it would have been improper for defendant to show his tattoos to the jury without an explanation of when they were acquired, and without the proper predicate, the proffered evidence was not relevant and was more prejudicial than probative. Harris v. State, 2008 Tex. App. LEXIS 9474 (Tex. App. Houston 14th Dist. Dec. 16 2008).

1510. In a driving while intoxicated case, a booking photograph of defendant was not excluded from evidence under Tex. R. Evid. 403 because it was not unfairly prejudicial; even though the picture was not flattering, it did not have the potential to impress the jury in some irrational way. Moreover, it was relevant to show defendant's condition near the time of arrest. Hester v. State, 2008 Tex. App. LEXIS 9242 (Tex. App. Texarkana Dec. 15 2008).

1511. Trial court did not abuse its discretion when the State sought to introduce into evidence State's exhibit number 12 because there was nothing in the record to indicate that the trial court did not perform a Tex. R. Evid. 403 balancing test or that the trial court refused to include its findings on the record. Kneeland v. State, 2008 Tex. App. LEXIS 9249 (Tex. App. Fort Worth Dec. 11 2008).

1512. In a theft case arising from defendant's failure to complete a construction contract, evidence that defendant had done the same thing to another person was not excluded under Tex. R. Evid. 403 because the testimony was very compelling to prove defendant's intent to commit theft, rather than a failure to perform due to circumstances out of his control. The evidence was quickly and clearly presented such that it did not take too much time and was not confusing; moreover, the testimony was not so outrageous that it would affect the jury in an indelible way, and a jury instruction likely would not have had any effect. Gill v. State, 2008 Tex. App. LEXIS 9261 (Tex. App. Eastland Dec. 11 2008).

1513. In a drug case, extraneous offenses regarding other transactions were admissible under Tex. R. Evid. 403 because the probative value of the evidence was not substantially outweighed by its prejudicial effect. The evidence in question tended to show that an undercover officer had the opportunity to observe and listen to defendant on more than one occasion, the trial court instructed the jury to only consider the evidence for purposes of determining motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, the testimony took up only five pages of the trial transcript, and it tended to rebut the insinuation raised by defendant that he had not engaged in drug activity before. Stebbins v. State, 2008 Tex. App. LEXIS 9199 (Tex. App. Amarillo Dec. 10 2008).

1514. Trial court did not abuse its discretion by admitting a photograph of defendant holding a pistol during his trial for possessing more than four grams of cocaine with intent to deliver and for possessing more than four ounces of marihuana where the photograph was relevant because it made it more probable that defendant knowingly possessed both the contraband and the pistol, and where that relevance was not outweighed by the risk of unfair prejudice because no significant amount of time was required to introduce the photograph. Furthermore, even though the photograph had the potential for impressing the jury in an improper way pursuant to Tex. R. Evid. 404(b) by suggesting that defendant was the sort of person who brandished a pistol during a telephone conversation, by linking defendant to the pistol found in the night stand of his motel room, albeit indirectly, the photograph was some evidence that defendant used the pistol to protect his drugs and money, and the State's only other evidence of such use, beyond defendant's simple possession of the weapon, was a police officer's testimony describing defendant's ambiguous movements when the officers entered his motel room. Rangel v. State, 2008 Tex. App. LEXIS 9008 (Tex. App. Austin Dec. 5 2008).

1515. In an aggravated assault case, a trial court did not err by allowing a victim's father to testify during the guilt/innocence phase of the case because his brief testimony, which included basic information about himself, the victim, the evening of the shooting, and the victim's condition, was relevant and not overly prejudicial. Sanchez v. State, 2008 Tex. App. LEXIS 9072 (Tex. App. Eastland Dec. 4 2008).

1516. In defendant's drug case, the trial court did not abuse its discretion by admitting in evidence the shotgun found on the back seat of the vehicle that defendant was driving just before his arrest because the probative value of the shotgun was considerable and significantly necessary to the State's case because it was a link tending to show that defendant knowingly possessed the cocaine. Additionally, the evidence of the shotgun was relevant to prove defendant's knowledge that he possessed narcotics. Harris v. State, 2008 Tex. App. LEXIS 9090 (Tex. App. Fort Worth Dec. 4 2008).

1517. In a case in which defendant was convicted of aggravated sexual assault of a child under fourteen years of age, the trial court did not abuse its discretion by concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence of defendant's extraneous acts involving the victim where: (1) the evidence of physical abuse gave compelling insight as to why the incident at issue transpired and why the victim waited so long to tell anyone; (2) the State demonstrated a considerable need to develop the evidence because the physical abuse evidence corroborated the victim's testimony that he feared for his life and that his fear was the reason he was afraid to tell anyone about the sexual abuse for so many years; (3) presenting the jury with the victim's brief testimony and the short testimony from two later witnesses concerning the physical abuse did not lead

to a decision on an improper basis; (4) the evidence did not have a tendency to confuse or distract the jury from the main issues; (5) the evidence did not have a tendency to be given undue weight by the jury because, even though the abuse details were horrific, the evidence went straight to the important issue of why the victim waited six years to speak out by explaining the basis for his belief that defendant might kill him; and (6) developing the evidence did not consume an inordinate amount of time. Under the circumstances, the Tex. R. Evid. 403 factors weighed in favor of the trial court admitting the evidence of extraneous offenses under Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37. Gamble v. State, 2008 Tex. App. LEXIS 8914 (Tex. App. Fort Worth Nov. 26 2008).

1518. Extraneous offense witness testimony strongly served to make the sexual assault on the victim more probable, given that the offenses were very similar, the State had a great need for the evidence, as consent was the only issue in the case and the State had no uncontested evidence to prove that the sexual encounter was without the victim's consent, and the presentation of the extraneous offense testimony did not take such a great amount of time as to have confused or distracted the jury; the evidence did not present any unnecessary cumulative evidence and the trial court did not abuse its discretion in admitting the extraneous offense evidence over defendant's Tex. R. Evid. 403 objection. Yarbrough v. State, 2008 Tex. App. LEXIS 9056 (Tex. App. Waco Nov. 26 2008).

1519. Given the similarity of the assailant's modus operandi and the relative proximity of the rape, plus the witnesses' in-court identification of defendant, the extraneous offense evidence was compelling as to the issue of identity, as the defense impeached the victim on the issue of identity, thus providing the State with a reason to develop the extraneous offense evidence in defendant's trial for aggravated sexual assault; the victim's description of her attacker and the modus operandi of the crime matched the other two offenses, making the victim's identification of defendant more probable, and thus the trial court did not abuse its discretion in admitting the extraneous offenses, for purposes of Tex. R. Evid. 403, 404(b). Jabari v. State, 273 S.W.3d 745, 2008 Tex. App. LEXIS 8814 (Tex. App. Houston 1st Dist. 2008).

1520. Admission of the extraneous offenses carried a risk of irrationally impressing the jury of defendant's character conformity, which the law seeks to avoid, but the trial court gave a limiting instruction and the testimony in question did not take up a significant portion of the trial for aggravated sexual assault, and the trial court did not err in admitting the evidence. Jabari v. State, 273 S.W.3d 745, 2008 Tex. App. LEXIS 8814 (Tex. App. Houston 1st Dist. 2008).

1521. In defendant's trial for aggravated sexual assault, the State's need for extraneous offense evidence was strong, given the victim's initial struggle to identify defendant as her attacker and her impeachment by the defense, and the trial court was within the zone of reasonable disagreement when it ruled that the probative value of the evidence of two unadjudicated extraneous offenses was not substantially outweighed by the danger of unfair prejudice, and thus the trial court did not abuse its discretion in admitting the evidence under Tex. R. Evid. 403. Jabari v. State, 273 S.W.3d 745, 2008 Tex. App. LEXIS 8814 (Tex. App. Houston 1st Dist. 2008).

1522. Trial court did not err by admitting into evidence a videotaped interview of the daughter taken by a forensic investigator because, although the interview contained information similar to the daughter's prior testimony, it was not needlessly cumulative under Tex. R. Evid. 403 because the videotape rebutted the defense's effort to impugn her motive for report that defendant had sexually assaulted her; the videotape was recorded closer in time to the incidents and included the daughter's reluctance to report the abuse, which was not present in her trial testimony. For the same reasons, the trial court did not abuse its discretion in admitting the videotape over defendant's bolstering objection. Biggers v. State, 2008 Tex. App. LEXIS 8439 (Tex. App. Houston 1st Dist. Nov. 6, 2008).

1523. In defendant's aggravated sexual assault of a child case, the trial court did not abuse its discretion by permitting the State to question him regarding a statutory rape charge filed against him in 1983 because the statutory rape charge and testimony were relevant rebuttal evidence to show the jury that the victim's parents were not motivated by greed or money in making the allegations against defendant. Additionally, State did not elicit

detailed accounts of the offenses, but only asked a few questions in order to show similarities to the charged offenses, and other than the details and circumstances of the charged offenses, the State had no other evidence to rebut the defensive theory. Martin v. State, 2008 Tex. App. LEXIS 8437 (Tex. App. Fort Worth Nov. 6, 2008).

1524. Trial court did not err, under Tex. R. Evid. 403, in admitting evidence that defendant possessed the stolen property found in his girlfriend's car because (1) the evidence of the stolen property tended to prove that he intended to commit the current burglary offense; (2) although there was some risk that the jury might convict defendant solely because they believed that he committed an extraneous offense, that risk did not substantially outweigh the probative value of the evidence as it pertained to his intent; (3) it was highly unlikely that the evidence about the previously stolen items distracted the jury from the indicted offense; and (4) the issue of intent was disputed, and the extraneous offense evidence strengthened the inference that defendant had intended to commit a theft. Kirksey v. State, 2008 Tex. App. LEXIS 8429 (Tex. App. Houston 1st Dist. Nov. 6, 2008).

1525. Trial court did not err in finding that the potential character conformity inference did not substantially outweigh the relevant purpose of showing motive for the aggravated sexual assault with evidence of defendant's skinhead and neo-Nazi affiliation, given that (1) the evidence was probative for establishing motive, (2) the record did not support the notion that the evidence was going to tend to impress the jury in an irrational manner, (3) the trial court instructed the jury to consider defendant's other bad acts only for the purposes of determining the motive and intent, (4) the court presumed the jury followed the trial judge's instructions, (5) the evidence was developed quickly, and (6) although the evidence was not essential to the State's case, the State had a compelling reason for presenting the evidence. Tuck v. State, 2008 Tex. App. LEXIS 8525 (Tex. App. Houston 1st Dist. Oct. 30 2008).

1526. In his brief, defendant did not cite authority to support his issues regarding victim photographs, which violated Tex. R. App. P. 38.1(h), but in the interest of justice, the court addressed the issues; the victim testified that the pictures accurately depicted their injuries, although two pictures depicted one victim's bloodied face, the pictures were not overly gruesome, and the pictures enabled the State to show the level and extent of the injuries the victims sustained, such that the trial court did not abuse its discretion in admitting the photographs, for purposes of Tex. R. Evid. 403. Garza v. State, 2008 Tex. App. LEXIS 7004 (Tex. App. Austin Sept. 19, 2008).

1527. Defendant argued that a deputy's employment of the horizontal gaze nystagmus test was not reliable for purposes of Tex. R. Evid. 705(c), and the testimony was not only not helpful to the jury, but was misleading and unfairly prejudicial, for purposes of Tex. R. Evid. 402, 403, 702, but defendant's objection, which referred broadly to the deputy's administration of the test, was not specific enough to have informed the trial court of the basis of the argument defendant now raised on appeal so as to have afforded the trial court the opportunity to rule on it, for purposes of Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103; thus, defendant waived error, if any. Gowin v. State, 2008 Tex. App. LEXIS 6873 (Tex. App. Tyler Sept. 17 2008).

1528. In defendant's murder case, photographs of the victim's boyfriend's injuries were properly admitted because they assisted the doctor's descriptions of the boyfriend's injuries, and they were highly probative to show the full extent of the injuries the boyfriend suffered at the hands of defendant, who had claimed self-defense. Young v. State, 2008 Tex. App. LEXIS 7010 (Tex. App. Waco Sept. 17, 2008).

1529. In defendant's murder case, a photograph of the victim's body at the crime scene was properly admitted because the photograph was probative of both the manner of the victim's death and defendant's mental state, given that he argued self-defense. The State used very little time introducing the photograph, and while gruesome, it depicted nothing more than the reality of the brutal crime committed by defendant. Young v. State, 2008 Tex. App. LEXIS 7010 (Tex. App. Waco Sept. 17, 2008).

1530. In defendant's murder case, photographs of the victim's autopsy were properly admitted because the three photographs were necessary to assist the witness with explaining her testimony about the victim's stab wounds, especially given the fact that no one injury caused the victim's death. They were highly probative to show the full extent of the injuries defendant inflicted on the victim. Young v. State, 2008 Tex. App. LEXIS 7010 (Tex. App. Waco Sept. 17, 2008).

1531. In an arson and drug case, the court properly admitted evidence of defendant purchase of pseudoephedrine because defendant's purchases during the four months leading up to the fire were probative evidence of defendant's intent to unlawfully manufacture methamphetamine. The State needed that probative evidence to demonstrate a required element of the crime, the admission of the evidence was not repetitious, and it did not take an inordinate amount of time to present. Stone v. State, 2008 Tex. App. LEXIS 6738 (Tex. App. Tyler Sept. 10, 2008).

1532. In an aggravated assault case, while evidence of defendant's gang affiliation may have had some influence on the jury, and while the State's argument played to the emotional aspect of gang wars in the community, it was not so emotionally charged as to prevent the jury from rationally considering the evidence before it. The evidence was properly admitted as the State used the evidence during cross-examination of witnesses and it was used to prove both defendant's motive in the knifing incident and that the girlfriend feared defendant. Salinas v. State, 2008 Tex. App. LEXIS 6910 (Tex. App. San Antonio Sept. 10, 2008).

1533. For purposes of Tex. Code Crim. Proc. Ann. art. 38.36(a), defendant's membership in a prison gang was relevant to the circumstances of the murder and the evidence was not offered solely to show that defendant murdered the victim because he acted in conformity with his bad character; for purposes of Tex. R. Evid. 403, the probative force and the State's need to admit evidence that the victim and defendant were members of the same prison gang outweighed factors that favored exclusion, as the evidence of guilt was so compelling, the gang evidence did not consume inordinate time, and such was not mentioned in closing argument. Vasquez v. State, 2008 Tex. App. LEXIS 6831 (Tex. App. Fort Worth Sept. 4, 2008).

1534. Trial court did not abuse its discretion in admitting evidence of defendant's statement, which contained a list of persons to whom defendant admitted he had sold methamphetamine as well as his admissions that he had bought approximately a half-ounce of methamphetamine every week for the last three years, that he used about a quarter-ounce every week, that he sold the rest, and that he sold enough methamphetamine to support his habit, because those portions of the statement that related to defendant's selling methamphetamine were relevant to proving intent to deliver, which was an essential element of defendant's offense, possession of a controlled substance with intent to deliver. Furthermore, the probative force and the State's need to admit the statement outweighed the factors that favored exclusion because defendant's admission that he regularly sold methamphetamine was compelling evidence that he intended to sell methamphetamine, and his admission further served to rebut his theories that the drugs were planted on him and that the money that he carried when he was arrested had come, not from selling drugs, but from payments from his rental properties. Bridges v. State, 2008 Tex. App. LEXIS 6634 (Tex. App. Fort Worth Aug. 29, 2008).

1535. Trial court abused its discretion under Tex. R. Evid. 403 in admitting a memo that lacked probative value and arguably contained an ethnic slur, which inflamed the jury and resulted in unreasonably high damage findings for a mineral lease breach. Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 2008 Tex. LEXIS 771, 52 Tex. Sup. Ct. J. 55, 172 Oil & Gas Rep. 521 (Tex. 2008).

1536. Trial court properly admitted autopsy/crime scene photographs of the victims of a car collision where each set of photographs depicted a different victim, only minor injuries were apparent, the photographs were used to identify the victims, and they were not especially gruesome. Cortez v. State, 2008 Tex. App. LEXIS 6533 (Tex. App.

Corpus Christi Aug. 27, 2008).

1537. In a case involving kidnapping and aggravated robbery, testimony about defendant's drug use in the days prior to the crime was admitted under Tex. R. Evid. 404(b) because it was relevant to show the victim's state of mind; defendant had contended that no crimes had been committed against the victim because she acted voluntarily. The probative value of the evidence was not substantially outweighed by the dangers of unfair prejudice since the extraneous offense evidence made facts of consequence more or less probable, the testimony was unlikely to irrationally affect the jury, the time spent on the issue was very brief, and the testimony was necessary to rebut a defensive theory; moreover, no limiting instruction was required because the drug use and the crimes involved in the case at issue were not similar. Padilla v. State, 2008 Tex. App. LEXIS 6356 (Tex. App. Corpus Christi Aug. 21 2008).

1538. In defendant's solicitation case, the trial court did not abuse its discretion in refusing to grant defendant's motion for mistrial because a witness testified, without objection, that defendant and the victim were involved in another "high-profile case," in explaining why his "people" would not carry out the alleged plot to kill the victim. Additionally, the complained of testimony was elicited by defendant's trial counsel, thus supporting a finding that the testimony was given inadvertently. Simpson v. State, 2008 Tex. App. LEXIS 6382 (Tex. App. Corpus Christi Aug. 21 2008).

1539. In defendant's murder case, the trial court properly excluded a psychiatrist's memo because the entirety of it was not on the same subject as the portion read aloud by the doctor during direct examination. The memo covered her entire conversation with defendant which took place over more than six hours, and much of the memo was not on the same subject as the portion read into evidence by the prosecutor. Whipple v. State, 281 S.W.3d 482, 2008 Tex. App. LEXIS 6344 (Tex. App. El Paso 2008).

1540. In a child pornography case, the trial court properly admitted evidence that defendant posted child pornography to an internet group because the evidence was probative of defendant's intent to view and store child pornography on his computer and to explain why his house was searched for child pornography. Furthermore, the State's need for the evidence was moderate because it established the reason why defendant's house was searched, and the presentation did not consume an inordinate amount of time. Perry v. State, 2008 Tex. App. LEXIS 6446 (Tex. App. Fort Worth Aug. 21, 2008).

1541. In a murder case, the court properly admitted prior offenses because the State offered the evidence of another death and theft of a ring to show that even if both the victim's daughter and defendant had equal access to insulin, only defendant could be connected to a modus operandi; that particular modus operandi was to murder elderly patients via insulin overdose and steal from them. The State's need for the evidence was significant because it was the only evidence available to the State to rebut the defensive theory that the victim's daughter was a more plausible source of the insulin than defendant. Hannah v. State, 2008 Tex. App. LEXIS 6361 (Tex. App. Corpus Christi Aug. 21, 2008).

1542. In a driving while intoxicated case, the trial court did not err in refusing to admit the photographs allegedly showing the conditions of the road where the officer conducted the traffic stop because defendant's explanation for why he was swerving on the road was already before the jury, and the trial court could have concluded that photographs taken one year after the arrest were, at best, unnecessary and, at worst, could have misled the jury into believing the road conditions were worse than they actually were. Davis v. State, 2008 Tex. App. LEXIS 6459 (Tex. App. Austin Aug. 20, 2008).

1543. In the sentencing phase of defendant's drug case, the court properly admitted photographs showing a victim's injuries following his 1999 beating and the crime scene of that beating because the photographs were

probative as to defendant's character and provided information to assist the jury in tailoring the appropriate sentence, the photographs had little, if any, tendency to suggest decision on an improper basis, and the State used the photographs as visual aids to supplement the beating victim's testimony as he described the incident. Aguilar v. State, 2008 Tex. App. LEXIS 6268 (Tex. App. Dallas Aug. 18 2008).

1544. In defendant's indecency with a child case, the court properly admitted testimony that defendant "leered" at the victim because the witness did not testify that defendant "leered" or stared at the victim in a suggestive manner; he said the stare was "unusual." Additionally, there was other unobjected-to testimony that defendant stared at the victim; the victim's mother testified that she saw defendant looking at the victim, who was dressed in a swimsuit, in a way that made her uncomfortable; Fugate v. State, 2008 Tex. App. LEXIS 6266 (Tex. App. Dallas Aug. 18, 2008).

1545. In a capital murder case, the court properly admitted two photographs because the photographs bolstered a State witness's testimony that testifying as a "snitch" had detrimental consequences -- injury to his sister, the photographs presented little, if any, prejudice to defendant because no party suggested to the jury that defendant was connected to the stabbing of the witness's sister, and the time involved in the introduction of the two photographs was minimal and unlikely to distract the jury from considering the charged offense when compared to having the witness's sister testify before the jury. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

1546. Trial court properly allowed testimony under Tex. R. Evid. 403 regarding 13,000 images of child pornography possessed by defendant because they demonstrated the circumstances surrounding the crimes, were relevant to the jury's determination of the appropriate sentence and to a trial court's decision to make the sentences be served consecutively, and showed that defendant's possession of 116 other images was not accidental. The trial court conducted the necessary balancing test because, after arguments were made with regard to the evidence at issue, the trial court allowed the testimony to put it in context of volume, but refused to allow testimony that this was the largest child pornography case that had been worked by a witness. Nicholas v. State, 2008 Tex. App. LEXIS 5918 (Tex. App. San Antonio Aug. 6 2008).

1547. In a driving while intoxicated case, defendant failed to preserve an error based on Tex. R. Evid. 403 relating to a trial court's decision to grant the State's motion in limine, which sought to exclude the quantitative results of a portable breath test. Defendant did not attempt to offer the evidence, and he did not object to the trial testimony. Bookman v. State, 2008 Tex. App. LEXIS 6012 (Tex. App. Waco Aug. 6 2008).

1548. Defendant's felony-murder conviction was proper because the admission was autopsy photographs was appropriate. The photographs were quite clinical in nature and the fracture and hemorrhaging would not have been visible to the jury without the photographs; it took little time to develop the evidence of the injuries. Bromon v. State, 2008 Tex. App. LEXIS 5886 (Tex. App. Houston 14th Dist. Aug. 5 2008).

1549. Although an heir argued that testimony of an argument between the heir and his parents was prejudicial for purposes of Tex. R. Evid. 403, the heir did not demonstrate that the entire case turned on the disputed testimony, and the disputed testimony was relevant to show how the heir interacted and responded to his parents; given the claims, it was important for the jury to be given historical information regarding this relationship and the trial court did not abuse its discretion in admitting this evidence. Dace v. Dace, 2008 Tex. App. LEXIS 5779 (Tex. App. Houston 1st Dist. July 31 2008).

1550. In defendant's trial for sexual indecency with a child, evidence that defendant offered the victim cocaine and that they smoked it together in a hotel room where the assault took place was not unduly prejudicial under Tex. R. Evid. 403 because there was no showing that defendant's cocaine use had the potential to impress the jury in some

irrational, indelible way. Madrid v. State, 2008 Tex. App. LEXIS 5834 (Tex. App. El Paso July 31 2008).

1551. In a sexual assault of a child case. did not abuse its discretion by admitting extraneous offense evidence that defendant used cocaine at the time of the offense as it was same transaction contextual evidence that the State had to introduce. The record did not show that the evidence of defendant's cocaine usage had the potential to impress the jury in some irrational, indelible way, and any prejudice suffered by defendant was to some degree counterbalanced by the complainant's drug usage and her admission she had used it before. Madrid v. State, 2008 Tex. App. LEXIS 5838 (Tex. App. El Paso July 31 2008).

1552. Items seized at the scene of a house fire were relevant under Tex. R. Evid 401, 402, 403, 404(b) to show that the fire started as a result of the cooking of methamphetamine on the stove and that the debris found in the burned house pertained to the use or manufacture of illegal drugs; defendant failed to establish that the trial court abused its discretion or that the determination fell outside of the zone of reasonable disagreement. Dentler v. State, 2008 Tex. App. LEXIS 5708 (Tex. App. Eastland July 31 2008).

1553. For purposes of Tex. R. Evid. 404(b), 403, the trial court did not abuse its discretion in admitting evidence concerning an extraneous homicide to establish defendant's identity as the victim's murderer, given that (1) defendant attempted to establish an alibi defense, (2) defendant cross-examined a witness and attempted to impeach the reliability of her identification of defendant, and (3) the trial court admitted portions of defendant's statement that placed defendant, in possession of a gun, at a place a few weeks before the shooting in question, and .45 bullet jackets from a homicide committed at that place were fired by the same .45 firearm used in this murder. Johnson v. State, 2008 Tex. App. LEXIS 5591 (Tex. App. Dallas July 28 2008).

1554. Trial court did not abuse its discretion by admitting evidence of a life insurance policy covering her husband, of which defendant was the beneficiary, because the fact that defendant may have been motivated to shoot her husband by the $ 300,000 life insurance policy was relevant under Tex. R. Evid. 401 to the State's attempt to prove defendant acted knowingly and intentionally. The trial court could have reasonably concluded the existence of the husband's life insurance policy related directly to the charged offense, did not have a tendency to confuse or distract the jury from the main issues in the case or have any tendency to be given undue weight by the jury; defendant admitted she shot her husband but claimed it was partially in self-defense and partially an accident; the trial court could have reasonably concluded that it was unlikely that presentation of the evidence of life insurance would consume an inordinate amount of time or merely repeat evidence already admitted. Armstrong v. State, 2008 Tex. App. LEXIS 5448 (Tex. App. Dallas July 24 2008).

1555. In defendant's intoxication manslaughter case, the court properly admitted a photograph of the victim because the photograph showed the victim's condition at the scene of the accident, he was clothed and depicted lying face up on a flat board, and the photograph was not particularly gruesome. The photograph showed only some blood on the victim's face, and the victim's condition as depicted in the photograph was the subject of trial testimony. Villasana v. State, 2008 Tex. App. LEXIS 5462 (Tex. App. Dallas July 24 2008).

1556. Trial court did not err in permitting the State to raise gang-related evidence at defendant's robbery trial, given that (1) although defendant claimed the gang-related testimony was inadmissible because it was irrelevant, the case law defendant relied upon was inapposite, (2) because evidence of defendant's gang affiliation was relevant to show his motive for the robbery, rather than mere conformity with character, it was admissible under Tex. R. Evid. 402, 404, (3) the fact that the victim was unsure whether defendant was a particular gang member did not render the gang-related evidence inadmissible, the jury was the judge of the credibility of the witnesses, and the jury could have inferred that defendant was affiliated with or a member of a particular gang, and (4) the trial court did not err in finding that the potential character conformity inference did not substantially outweigh the relevant purpose of showing motive, as defendant's gang affiliation was not only relevant but critical to show the motive for

his crime. Spencer v. State, 2008 Tex. App. LEXIS 5524 (Tex. App. Houston 14th Dist. July 24 2008).

1557. In defendant's assault on a public servant trial, a spitting incident was properly admitted under Tex. R. Evid. 404(b) to show intent and there was no violation of Tex. R. Evid. 403, given that (1) the inherent probative value of the evidence was great, (2) although evidence of the spitting incident could potentially impress the jury, it was not of such a nature as to have impressed the jury in an irrational or indelible way, (3) the record did not indicate that the time needed to develop this evidence was such that the jury would be distracted from the indicted offense, and (4) although the evidence was relevant to defendant's intent, several witnesses identified defendant as the attacker, such that the need for the evidence factor weighed against admissibility, but the factors as a whole weighed in favor of admissibility and the trial court did not err in admitting the evidence. Collins v. State, 2008 Tex. App. LEXIS 5481 (Tex. App. Waco July 23 2008).

1558. In defendant's murder case, the court properly admitted a forensic firearms report without expert testimony regarding its contents because the statements in the report tended to explain the physical evidence already admitted at trial. Edwards v. State, 2008 Tex. App. LEXIS 5170 (Tex. App. Dallas July 14 2008).

1559. In a sexual assault case, testimony that defendant's DNA was in a database was not improper because it showed circumstances surrounding defendant's arrest and was relevant to the identity of the attacker; the evidence had probative value because it showed how the investigation began and how defendant became a suspect. Jackson v. State, 2008 Tex. App. LEXIS 4890 (Tex. App. Dallas July 1 2008).

1560. In defendant's sexual assault of a child case, the trial court did not abuse its discretion in admitting extraneous-offense evidence that another child had had sex with defendant because the State spent minimal time developing the witness's testimony, and it was neither lengthy nor graphic; because defendant strongly contested the victim's allegations, the State demonstrated the need to counter defendant's theory that the victim fabricated the allegations in order to retaliate against defendant for not returning her amorous feelings. Dinsmore v. State, 2008 Tex. App. LEXIS 3730 (Tex. App. Houston 14th Dist. May 20 2008).

1561. In defendant's murder case, the court properly admitted autopsy photographs because the medical examiner explained the contents of each photograph as it was projected onto a screen for the jury's view; the photos depicted mutilation to the body other than that caused by the gunshot wound, however, the witness distinguished for the jury the damage caused by the fatal gunshot from the marks that indicated life-saving attempts and the autopsy itself. Mata v. State, 2008 Tex. App. LEXIS 3476 (Tex. App. San Antonio May 14 2008).

1562. Trial court did not abuse its discretion in admitting two photographs of the victim into evidence, for purposes of Tex. R. Evid. 403; one photograph was of the victim prior to his injuries, and the second was of the victim in the emergency medical services unit on a stretcher, which photograph was taken at the crime scene and which photograph was small and showed only the injuries that the victim received and was no more gruesome than would have been expected. Davis v. State, 2008 Tex. App. LEXIS 3478 (Tex. App. San Antonio May 14 2008).

1563. Extraneous-offense evidence that defendant had sexually assaulted his former live-in girlfriend's fourteen-year-old daughter was properly admitted because the extraneous-offense testimony rebutted the defensive theory of retaliation, the State spent minimal time developing the witness's testimony, and it was neither lengthy nor graphic, and because defendant strongly contested the child's allegations on a theory of retaliation, the State demonstrated the need to counter the theory that the child fabricated the allegations in order to avoid living with defendant. Bargas v. State, 252 S.W.3d 876, 2008 Tex. App. LEXIS 3443 (Tex. App. Houston 14th Dist. 2008).

1564. In defendant's child sexual assault case, the court properly allowed evidence that defendant "gave" the victim to his drug dealer in lieu of payment because, although the testimony about what the drug dealer did to her

and defendant's involvement might have inflamed the jury, the incident, although heinous, paled in comparison to the victim's graphic testimony about defendant's repeated sexual assaults of her, and the brief testimony about the incident with the drug dealer was followed by a specific limiting instruction Sanders v. State, 255 S.W.3d 754, 2008 Tex. App. LEXIS 3413 (Tex. App. Fort Worth 2008).

1565. In defendant's drug case, the court did not err by admitting a videotape of a witness's interrogation by police because it was introduced to "rebut the witness's claims that the police threatened and coerced her into falsely stating that defendant was at the parking lot in order to conduct the drug deal;" the trial court negated any tendency of the evidence to suggest to the jury that defendant was guilty, or to distract the jury from the coercion issue, by instructing the jury that it was not to consider the videotape for the truth of the matters asserted therein. Kennedy v. State, 2008 Tex. App. LEXIS 3424 (Tex. App. Fort Worth May 8 2008).

1566. Driver's consumption of alcohol was relevant to the element of causation in his negligence suit against a trucker because the trucker presented evidence that the accident could have been avoided had the driver steered his vehicle to the right to avoid the trucker's trailer, and in failing to do so, the driver caused the accident. PPC Transp. v. Metcalf, 254 S.W.3d 636, 2008 Tex. App. LEXIS 3291 (Tex. App. Tyler 2008).

1567. Defendant argued that the trial court erred in refusing to admit toxicology reports under Tex. Code Crim. Proc. Ann. art. 38.36(a) and the court agreed that because the reports reflected the facts and circumstances surrounding the killing, they were admissible under the statute; however, the trial court found the value did not outweigh the danger of unfair prejudice under Tex. R. Evid. 403 and defendant failed to address this analysis, and the court found no abuse of discretion on the trial court's part. Lopez v. State, 2008 Tex. App. LEXIS 3167 (Tex. App. Houston 1st Dist. May 1 2008).

1568. Because defendant claimed self-defense against both victims, the court agreed with the State that defendant's experience with firearms prior to the shootings was relevant to rebut defendant's defensive theory, as the testimony spoke to defendant's lack of maturity and good judgment in handling his weapon and was relevant to show absence of mistake or accident regarding the victims' deaths; the photograph of defendant at a firing range was relevant to provide a link between defendant, a cellular phone, and the handgun used in the shooting, and thus the trial court did not abuse its discretion by admitting the testimony and photograph over defendant's Tex. R. App. P. 404(b) objection, and, for purposes of Tex. R. Evid. 403, the ruling to admit the testimony and photograph did not fall outside the zone of reasonable disagreement, as the record did not support the notion that the evidence tended to impress the jury irrationally, the evidence was developed quickly and a disproportionate amount of time was not spent on the subject, and the State had a compelling reason to present the evidence to rebut defendant's theory of self-defense. Lopez v. State, 2008 Tex. App. LEXIS 3167 (Tex. App. Houston 1st Dist. May 1 2008).

1569. Trial court, in refusing to admit toxicology results, weighed the probative value of the evidence against the danger of unfair prejudice or confusion under Tex. R. Evid. 403, and given that a doctor could not speak to whether toxicology results showed either victim was behaving aggressively on the night of the shooting, the probative value of the evidence was minimal; the ruling did not effectively preclude defendant from presenting a defense on this issue because defendant offered testimony that both victims were intoxicated, and thus the ruling was not arbitrary and defendant's Sixth Amendment rights were not violated. Lopez v. State, 2008 Tex. App. LEXIS 3167 (Tex. App. Houston 1st Dist. May 1 2008).

1570. In an illegal possession of a weapon case, audio portions of the patrol-car videotape were properly admitted because an issue during trial was the course and conduct of the officer's investigation of defendants, and the statements concerned one defendant's friend's alleged drug use, and did not concern any drug use by either of the defendants. Gomez v. State, 2008 Tex. App. LEXIS 2966 (Tex. App. Austin Apr. 24 2008).

1571. Trial court did not err in admitting a photograph of the victim while on a cruise, given that prior to seeing the picture, the jury's only visual depictions of the victim were police and medical examiner photographs of his bones, the jury heard testimony that the victim's body had skeletonized, that his bones had been scattered by animals, and that they showed signs of animal scavenging, plus the jury knew that the picture did not accurately portray the victim at the time of his death; while the victim's ex-wife and son confirmed that the victim's drug use had taken a toll on his appearance, the photograph was still relevant as punishment evidence for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) because it reminded the jury that, despite his issues, the victim was still a human being and that defendant had taken his life, and because of the disclosures accompanying the photograph, its probative value was not outweighed by the danger of unfair prejudice. Thomas v. State, 2008 Tex. App. LEXIS 3050 (Tex. App. Eastland Apr. 24 2008).

1572. In defendant's aggravated robbery case, the court properly admitted evidence of a third attempted aggravated robbery that occurred on the same night as the other two robberies because the dispatch description that led to defendant's apprehension after the third attempted aggravated robbery also led to the discovery that defendant had in his possession personal items belonging to the complainants of both the first and second robbery, and that discovery was a probative piece of evidence tying defendant to the first and second aggravated robberies. Carson v. State, 2008 Tex. App. LEXIS 3091 (Tex. App. Fort Worth Apr. 24 2008).

1573. Court properly admitted evidence of defendant's statement of gang affiliation made to a deputy at the time of his arrest because defendant did not simply state that the deputy should watch his back but told him that he should watch his back because defendant ran with the Mexican Mafia; thus, defendant used the Mexican Mafia reference to give more weight to his threat; additionally, the State did not introduce any other evidence about defendant's gang affiliation or the activities of the Mexican Mafia and it did not mention defendant's claimed gang affiliation again in the presence of the jury. Bejarano v. State, 2008 Tex. App. LEXIS 2762 (Tex. App. El Paso Apr. 17 2008).

1574. In defendant's unlawful possession of a firearm by a felon case, counsel was not ineffective for failing to object to the admission of defendant's prior felonies because counsel could have concluded that it would be better for the jury to be aware that the prior convictions had been for nonviolent offenses such as failing to register as a sex offender than to have the jury potentially be concerned about a violent felon possessing a gun. Tapps v. State, 2008 Tex. App. LEXIS 2809 (Tex. App. Austin Apr. 17 2008).

1575. Trial court did not err in denying defendant's motions to continue his indecency with a child trial so that he could flesh out allegations in a report to child protective services (CPS) that the victim (who was four years old at the time) was "purging" at home and in school and was caught by her uncle in bed with her four-year-old cousin's head between her legs, which allegations defendant believed were exculpatory where defendant's argument was founded on a defective factual basis because nothing in the CPS report exculpated him; nothing in the report suggested that defendant did not molest the child as alleged in the indictment, even if the circumstances mentioned in the report were deemed true, but, rather, the circumstances described (when intertwined with imagination) suggested that the child could have been the victim of other molestation at the hands of unknown parties, or so a reasonable jurist could have interpreted the circumstances. Reder v. State, 2008 Tex. App. LEXIS 2624 (Tex. App. Amarillo Apr. 10 2008).

1576. Records showing that defendant obtained hydrocodone and other prescriptions many times in the past from different doctors made it more probable that, when defendant was unable to get a doctor to refill his prescription, he knowingly asked a co-worker to refill it through fraudulent means, and thus the trial court did not err in finding that the records were relevant for purposes of defendant's conviction of possession of a controlled substance, dihydrocodeinone (hydrocodone), by fraud, in violation of Tex. Health & Safety Code Ann. § 481.129(a); considering that the only direct evidence of defendant's culpable mental state was the co-worker's testimony and she was impeached, the trial court could have found (1) that the probative force of and the State's need for the records were considerable, (2) the records were not inflammatory and did not suggest a decision on an improper

basis, (3) the records would not have misled the jury, and (4) the probative value of the records was not substantially outweighed by the countervailing factors specified in Tex. R. Evid. 403. Starn v. State, 2008 Tex. App. LEXIS 2402 (Tex. App. Fort Worth Apr. 3 2008).

1577. In a murder case, the trial court did not abuse its discretion in admitting photographs of the victim at the crime scene because some of the photographs were used by the experts to explain the manner of the death and the amount of force used by defendant when hitting the victim with the baseball bat, tending to disprove his self-defense claim; other photographs, along with the testimony of the blood-spatter expert, addressed the absence of any struggle between the victim and defendant and that the victim was either on his knees or on the ground while being beaten, while some photographs depicted the brutality of the crime and the severity of the injuries and were probative of the manner of the victim's death. Grayson v. State, 2008 Tex. App. LEXIS 2210 (Tex. App. Houston 1st Dist. Mar. 27 2008).

1578. Defendant was required under Tex. R. App. P. 33 to make an objection with sufficient specificity that the trial court could be aware of what defendant was complaining about, and because the initial hearsay objection was to the entirety of medical records, the objection was too general and insufficient and the court was unable to say that the inadmissible material that formed the basis of the objection was apparent from the context, and thus error was not preserved; even assuming that the hearsay objection was sufficient to preserve error, the statements in question were made by medical personnel for the purpose of diagnosis and treatment under Tex. R. Evid. 803, although defendant complained of certain injuries, his actions were inconsistent with any desire for treatment, and that defendant was escorted to a police car following his return to the emergency room was consistent with admission of the evidence for diagnosis and treatment and defendant did not show that the probative value of the evidence was outweighed by its prejudicial nature. Cline v. State, 2008 Tex. App. LEXIS 2242 (Tex. App. Austin Mar. 26 2008).

1579. In defendant's trial for retaliation, aggravated kidnapping, and aggravated assault, the fact that defendant had also locked another girlfriend in the same trunk in the past made it more probable that he had done the same to his current ex-girlfriend, and the first girlfriend's testimony that she did not feel free to leave him tended to rebut his claim that his ex-girlfriend remained with him voluntarily, and thus the first girlfriend's testimony was relevant under Tex. R. Evid. 401 and the trial court did not abuse its discretion in admitting the evidence over a Tex. R. Evid. 402 objection; because the first and third factors under Tex. R. Evid. 403 weighed heavily in favor of admissibility, given that the jury was drawn away from the indicted offenses only briefly and the testimony was compelling and supported the ex-girlfriend's claims, and the second and fourth factors were neutral, the trial court did not err in finding that the danger of unfair prejudice did not substantially outweigh the probative value of this evidence. Stephenson v. State, 255 S.W.3d 652, 2008 Tex. App. LEXIS 2072 (Tex. App. Fort Worth 2008).

1580. Defendant's argument that the trial court reversibly erred and abused its discretion by allowing one of his victims to testify during punishment that she was concerned about her future safety because the evidence was irrelevant and more prejudicial than probative was rejected because defendant failed to preserve his claim for review under Tex. R. App. P. 33 by failing to object on the ground that the evidence was not relevant. Smith v. State, 2008 Tex. App. LEXIS 2081 (Tex. App. Fort Worth Mar. 20 2008).

1581. Trial court did not err by admitting evidence of an extraneous offense where the cross-examination made the relationship between defendant and the complainant, including the beating, relevant and it was necessary to explain the context within which the charged crime occurred; the evidence gave context to the demand of only $50, when the complainant apparently had more money, and explained the complainant's reluctance to immediately report the crime. Lopez v. State, 261 S.W.3d 103, 2008 Tex. App. LEXIS 1963 (Tex. App. San Antonio 2008).

1582. Trial court did not err by admitting two witnesses' testimony concerning encounters they had with defendant that were similar to his encounters with the complainant under Tex. R. Evid. 404(b) because the evidence was

relevant to show defendant's motive and intent, and to show that people other than the complainant had the same reaction of fear from defendant's actions; the trial court determined that the evidence's probative value substantially outweighed the danger of unfair prejudice. Sawyer v. State, 2008 Tex. App. LEXIS 1975 (Tex. App. Tyler Mar. 19 2008).

1583. In defendant's manslaughter case, the court properly admitted autopsy photographs because they provided a visual component to, and understanding of, the medical examiner's testimony about the extent and nature of the victim's injuries, not all of the photographs offered by the State were admitted by the trial court, and neither of the photographs showed any mutilation caused by the autopsy. Ashorali v. State, 2008 Tex. App. LEXIS 1976 (Tex. App. Dallas Mar. 19 2008).

1584. Trial court did not err under Tex. R. Evid. 403 during defendant's murder trial by admitting the testimony of defendant's husband regarding an extraneous offense in 2001 in which defendant threatened him with a knife and nicked him on the arm to rebut defendant's self-defense theory because although the incidents might not have presented the same resulting injury, the testimony was probative, as it showed that, under similar argumentative circumstances with a loved one, defendant picked up a knife and threatened the other individual, and thus it tended to show that she had been the initial aggressor in the past, which served to make the fact that she was the initial aggressor in the incident with the victim more likely. Smith v. State, 2008 Tex. App. LEXIS 1726 (Tex. App. Fort Worth Mar. 6 2008).

1585. Under Tex. R. Evid. 403, the evidence of defendant's bond papers for unrelated misdemeanor offenses from a house adjacent to the house where the shooting occurred was relevant and probative because (1) it established or suggested that the dwelling next to the murder scene was defendant's house or home base, which was a contested issue; and (2) it buttressed the State's argument that defendant's flight to Mexico was indicative of guilt; in addition, because the charged offense of murder was so weighty, it was unlikely that any impression that evidence might have made on the jury would overcome their judgment; furthermore, the amount of time needed to develop the evidence was low, and the need for the evidence was high as it placed defendant near the scene of the shooting and explained his flight to Mexico. Arroyo v. State, 259 S.W.3d 831, 2008 Tex. App. LEXIS 1519 (Tex. App. Tyler 2008).

1586. In defendant's murder case, a trooper was properly allowed to testify concerning defendant's apparent false theft report because it was consistent with the State's theory that it was defendant's addiction to gambling that was at the heart of the money problems that essentially poisoned the relationship between defendant and the victim, his wife; part of the State's theory was that the victim was murdered when she threatened to quit her job and thus, cut off any further support of defendant's gambling. Stafford v. State, 248 S.W.3d 400, 2008 Tex. App. LEXIS 1280 (Tex. App. Beaumont 2008).

1587. Trial court did not abuse its discretion in requiring defendant to display his tattoos for a jury because evidence of defendant's gang membership was relevant at the punishment phase for its probative bearing on defendant's character, the viewing and description of the tattoos was brief, and, while it may have been true that the actual viewing of the tattoos had a greater impact on the jury than a description of the tattoos, that did not mean that the viewing of the tattoos was unfairly prejudicial, under Tex. R. Evid. 403. Cantu v. State, 2008 Tex. App. LEXIS 1028 (Tex. App. San Antonio Feb. 13 2008).

1588. Even if evidence of an alternative perpetrator's prior crimes had some marginal relevance, a trial court did not abuse its discretion in excluding the evidence under Tex. R. Evid. 403 because the probative value of the testimony was slight and presented a great threat of confusion of the issues because it would have forced the State to attempt to disprove the nebulous allegation that perhaps the alternative perpetrator committed the murder. Villa v. State, 2008 Tex. App. LEXIS 1025 (Tex. App. San Antonio Feb. 13 2008).

1589. Defendant's convictions for aggravated assault with a deadly weapon and assault of a public servant, which were entered upon his guilty pleas to a jury, were upheld where there was no error by the trial court under Tex. Code Crim. Proc. Ann. art. 37.07 or Tex. R. Evid. 403 in admitting a videotape into evidence during the punishment phase of both offenses showing defendant committing the assault on a public servant, a police officer, because the State's right to introduce the videotape was not restricted by defendant's guilty plea; although defendant argued that the videotape was unnecessarily cumulative because he pled guilty and that its admission was for the purpose of obtaining a greater sentence, and although the two victims, defendant's girlfriend and the officer, testified about the circumstances surrounding the offenses, because the jury had to determine what punishment to assess, a video recording could provide a more panoramic representation of the evidence, and, thus, could be more helpful to the jury in assessing punishment than oral testimony. Perez v. State, 2008 Tex. App. LEXIS 509 (Tex. App. Waco Jan. 23 2008).

1590. In defendant's robbery case, the State properly presented evidence of an extraneous robbery because the offenses occurred within three miles of one another and within a six-day time period, both took place late in the morning in large retail parking lots, and both acts were perpetrated quickly, snatching purses from unaccompanied females walking or standing in the parking lots; additionally, the testimony rebutted defendant's theories of alibi and that one victim's brief opportunity to view the perpetrator led to a mistaken identification; therefore, the probative value of the evidence was not substantially outweighed by its prejudicial effect. Evans v. State, 2008 Tex. App. LEXIS 477 (Tex. App. Houston 14th Dist. Jan. 22 2008).

1591. For purposes of Tex. R. Evid. 403, the trial court did not err in admitting certain autopsy photographs into evidence in defendant's murder trial; the medical examiner used the photographs to help explain the victim's injuries, certain photographs depicted the way in which the medical examiner received the victim's body, others depicted the gunshot wounds and various lacerations to the victim's body, and other photographs were offered to show that the victim's injuries were consistent with him stumbling to find help after he was shot and that he tried to defend himself, and the trial court did not abuse its discretion in finding that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. Quang Khac Tran v. State, 2008 Tex. App. LEXIS 1159 (Tex. App. Dallas Feb. 19 2008).

1592. In a products liability action, an expert's lint ignition testimony was based on an objective observation of lint build-up in the dryer cabinet, independent observations supported the expert's testimony regarding how an ember survived to ignite the clothes in the dryer and then spread from the dryer, and this expert and another expert relied on objective criteria in the record and their own experience to conclude that the dryer caused the fire; while the manufacturer might have disagreed with their conclusions, the experts explained the basis for their opinions and based those opinions on objective facts, and the trial court did not err in admitting this evidence, for purposes of Tex. R. Evid. 702. Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 2008 Tex. App. LEXIS 356 (Tex. App. Corpus Christi 2008).

1593. In defendant's murder case, the court properly allowed the State to reveal defendant's tattoos because the evidence was relevant to support the State's theory that defendant was a gang member who murdered rival gang members in retaliation; in addition, given the other evidence indicating defendant's admitted gang membership, the evidence was not unfairly prejudicial. Reyes v. State, 2008 Tex. App. LEXIS 293 (Tex. App. San Antonio Jan. 16 2008).

1594. Evidence was not admitted in violation of Tex. R. Evid. 403 as (1) the evidence was probative; (2) the potential for prejudice was minimized as the jury heard all the facts surrounding the evidence; (3) the jury had the ability to weigh the evidence; and (4) the evidence was relevant to a highly contested issue in the case. Goldine v. State, 2008 Tex. App. LEXIS 68 (Tex. App. Dallas Jan. 8 2008).

1595. Although defendant's proffered alternative perpetrator evidence was relevant under Tex. R. Evid. 401 because identity was a material issue in the case and vigorously contested at defendant's aggravated robbery trial, and although there was no danger that the evidence would create a side issue that would unduly distract the jury from the main issues under Tex. R. Evid. 403 because the evidence addressed a material issue in the case, the trial court's exclusion of the evidence was not error because defendant failed to show the required nexus between the alleged alternative perpetrator and the offense-at-issue; although the alleged alternative perpetrator's indictments and convictions indicated that he engaged in a spree of robberies overlapping the offense-at-issue, that evidence supported no conclusions other than that he was committing robberies around the time of the offense-at-issue, and defendant did not present evidence that the alleged alternative perpetrator's offenses were committed at or near the location of the offense-at-issue or present testimony from any of the witnesses identifying that individual as the robber. Dickson v. State, 246 S.W.3d 733, 2007 Tex. App. LEXIS 9859 (Tex. App. Houston 14th Dist. 2007).

1596. Trial court did not abuse its discretion in admitting evidence of a gun found by the witness because its probative value was not outweighed by the risk of unfair prejudice, when the witness testified that he found the gun around the same time as the aggravated robbery, lying on the road a few blocks away from the store, and this was approximately the same location where the officer observed defendant driving a car matching the description of the suspect's vehicle provided by police dispatchers at the time of the aggravated robbery and from which the officer observed defendant extend his hand and arm out of the window and then back into the car. Mouton v. State, 2007 Tex. App. LEXIS 10076 (Tex. App. Houston 1st Dist. Dec. 20 2007).

1597. By failing to identify what photographs were objectionable, the court found that defendant waived any error associated with the admission of those photographs, for purposes of Tex. R. App. P. 33, and even if the court addressed the issue by examining all photographs in which the victim's body was visible, the complaint lacked merit because the photographs aided a witness in describing the scene and defendant did not object to this testimony, plus the photographs were not so gruesome or horrifying as to have caused a juror of normal sensitivity to have difficult rationally deciding the case, and the court found no abuse of discretion in the admission of the photographs under Tex. R. Evid. 403. Earl v. State, 2007 Tex. App. LEXIS 9580 (Tex. App. Dallas Dec. 7 2007).

1598. Nothing in the record indicated that the trial court did not perform a Tex. R. Evid. 403 balancing test when it admitted extraneous offenses under Tex. Code Crim. Proc. Ann. art. 38.37 or that defendant requested and the trial court refused to include its findings on the record; thus, the trial court did not abuse its discretion in overruling defendant's objection to the extraneous offenses. Clark v. State, 2007 Tex. App. LEXIS 9452 (Tex. App. Dallas Dec. 4 2007).

1599. In defendant's murder case, although the court erred in excluding the testimony and notes of a licensed counselor who had counseled defendant hours before the murder because the testimony provided some insight into defendant's state of mind at the time of the murder, the error was harmless; defendant's expert's testimony concerning defendant's sanity at the time of the offense was considerably more direct and probative than the tangentially relevant testimony of the counselor. Bradshaw v. State, 244 S.W.3d 490, 2007 Tex. App. LEXIS 9427 (Tex. App. Texarkana 2007).

1600. Record demonstrated that defendant did not ask the trial court to conduct a balancing test under Tex. R. Evid. 403 or object when it failed to do so; therefore, he did not preserve for appellate review his argument that the trial court failed to properly conduct a balancing test. Wilson v. State, 2007 Tex. App. LEXIS 9261 (Tex. App. Dallas Nov. 29 2007).

1601. Probative value of a photograph was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403, given that (1) a photograph of defendant in possession of the same handgun used to commit the murder was highly probative of defendant having committed the murder, (2) while the photograph was prejudicial, it directly related to the charged offense of murder and the photograph did not have a great potential to impress the

jury in an irrational way and would not have tempted the jury into a guilt finding on improper grounds, (3) the time involved in the introduction of the photograph was minimal and thus unlikely to have distracted the jury, and (4) the photograph was related to a disputed issue and the State had a need for the evidence, to connect defendant to the murder. Andrade v. State, 246 S.W.3d 217, 2007 Tex. App. LEXIS 9288 (Tex. App. Houston 14th Dist. 2007).

1602. Although the State argued that the trial court, when conducting a Tex. R. Evid. 403 analysis, had a limited right to be wrong, case law held that the trial court had no right to be wrong if it appeared to the court, affording all due deference, that the evidence was substantially more prejudicial than probative. Andrade v. State, 246 S.W.3d 217, 2007 Tex. App. LEXIS 9288 (Tex. App. Houston 14th Dist. 2007).

1603. Trial court did not err in admitting evidence of a robbery defendant's extraneous bad acts because such acts were admissible to show motive, as rebuttal of his effort to characterize his actions as a legitimate, or as contextual transactional proof. Maranda v. State, 253 S.W.3d 762, 2007 Tex. App. LEXIS 9285 (Tex. App. Amarillo 2007).

1604. Defendant's conviction for murder was proper because the admission of photographs of defendant's gang-related tattoos was not erroneous since the evidence was probative in that a tattoo was highly indicative of gang affiliation; the photographs were used to show his gang membership in one particular gang and also connected him to another gang. Rivers v. State, 2007 Tex. App. LEXIS 8898 (Tex. App. Houston 1st Dist. Nov. 8 2007).

1605. Tex. R. Evid. 403 does not require the exclusion of all cumulative evidence; rather it requires exclusion if the probative value of the evidence is substantially outweighed by the needless presentation of cumulative evidence. Trinh v. State, 2007 Tex. App. LEXIS 9196 (Tex. App. Houston 14th Dist. Nov. 1 2007).

1606. In defendant's murder trial, the trial court did not err under Tex. Code Crim. Proc. Ann. art. 38.36(a) in admitting evidence that defendant had attacked and kidnapped his wife six months before her death; the relationship between defendant and his wife was a material issue, the evidence was not overly emphasized in that it was only one of many instances of heated arguments between the two, and the trial court did not abuse its discretion in finding that the probative value of the evidence was not outweighed by the danger of unfair prejudice. Barnes v. State, 2007 Tex. App. LEXIS 8633 (Tex. App. San Antonio Oct. 31 2007).

1607. In a child sexual abuse case, the trial court did not err when it excluded evidence of the complainant's prior bad conduct as too remote; such evidence is subject to exclusion under Tex. R. Evid. 608, and although remoteness in time is not a concept generally considered under Tex. R. Evid. 608, it was pertinent to a Tex. R. Evid. 403 analysis. Blanchard v. State, 2007 Tex. App. LEXIS 8403 (Tex. App. Texarkana Oct. 25 2007).

1608. In a criminal prosecution for capital murder, the trial court did not violate Tex. R. Evid. 403 by admitting evidence that defendant failed to appear for a previous trial date; defendant's failure to appear was not the type of misconduct that had a great unfair prejudicial danger. Lewis v. State, 2007 Tex. App. LEXIS 8218 (Tex. App. Dallas Oct. 17 2007).

1609. Testimony relating to the nature of the relationship between defendant and his wife was previously found to be relevant and admissible under Tex. R. Evid. 404(b), and testimony about security measures taken during the serving of divorce papers related to the nature of their relationship, such that the testimony was relevant pursuant to Tex. R. Evid. 401 and admissible under Tex. R. Evid. 404(b); for purposes of Tex. R. Evid. 403, the court found that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Garcia v. State, 246 S.W.3d 121, 2007 Tex. App. LEXIS 8051 (Tex. App. San Antonio 2007), *cert. denied*, 555 U.S. 949, 129 S. Ct. 404, 172 L. Ed. 2d 295, 2008 U.S. LEXIS 7457 (2008).

1610. Witness's testimony of a conversation she had with the victim, defendant's wife, before the crime, when the victim was highly upset and crying, was admissible as an excited utterance under Tex. R. Evid. 803, plus defendant admitted that the statements were cumulative, and thus any error was harmless; because the statements related to the nature of the relationship between defendant and his wife, the statements were relevant and admissible under Tex. R. Evid. 404(b), and as they were not merely an attack on defendant's character, the trial court therefore did not err in overruling defendant's Tex. R. Evid. 403 objection. Garcia v. State, 246 S.W.3d 121, 2007 Tex. App. LEXIS 8051 (Tex. App. San Antonio 2007), *cert. denied*, 555 U.S. 949, 129 S. Ct. 404, 172 L. Ed. 2d 295, 2008 U.S. LEXIS 7457 (2008).

1611. Statements made by the victim, defendant's wife, were admissible under Tex. R. Evid. 803 because they went to her state of mind, and although defendant claimed that statements that she was afraid of him were not relevant, it had previously been determined that the circumstances surrounding their relationship were relevant under Tex. Code Crim. Proc. Ann. art. 38.36(a), and thus the court held that the statements were relevant under Tex. R. Evid. 401; given that the jury had been told of the "dicey" relationship between defendant and his wife, the trial court did not believe there was going to be any confusion of the issues, and the court agreed and held that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury for purposes of Tex. R. Evid. 403. Garcia v. State, 246 S.W.3d 121, 2007 Tex. App. LEXIS 8051 (Tex. App. San Antonio 2007), *cert. denied*, 555 U.S. 949, 129 S. Ct. 404, 172 L. Ed. 2d 295, 2008 U.S. LEXIS 7457 (2008).

1612. Tex. R. Evid. 403 gives the trial court considerable latitude to assess the courtroom dynamics, to judge the tone and tenor of the witness' testimony and its impact upon the jury, and to conduct the necessary balancing. Winegarner v. State, 235 S.W.3d 787, 2007 Tex. Crim. App. LEXIS 1383 (Tex. Crim. App. 2007).

1613. Although the Texas Rules of Evidence are intentionally slanted toward the inclusion of all relevant evidence, Tex. R. Evid. 403 gives the trial court considerable discretion to exclude evidence when it appears to that individual judge, in the context of that particular trial, to be insufficiently probative when measured against the countervailing factors specified in the rule; the rule thus allows different trial judges to reach different conclusions in different trials on substantially similar facts without abuse of discretion. Winegarner v. State, 235 S.W.3d 787, 2007 Tex. Crim. App. LEXIS 1383 (Tex. Crim. App. 2007).

1614. Trial court's decision denying defendant's request to impeach the victim, his wife, with evidence of a remote assault by her of her former husband was not an abuse of discretion; the trial court could have found that the probative value of the evidence was mostly outweighed by the danger of unfair prejudice under Tex. R. Evid. 403, and whether the court would have reached a different conclusion than the trial court was not the standard of appellate review. Winegarner v. State, 235 S.W.3d 787, 2007 Tex. Crim. App. LEXIS 1383 (Tex. Crim. App. 2007).

1615. In defendant's capital murder trial, the trial court's finding that the probative value of the photographs, three of the crime scene and one taken prior to the victim's autopsy, was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403 was within the zone of reasonable disagreement; the court found that (1) the photographs were probative because they supported the State's theory that the victim was killed by a gunshot wound to the back of the head, (2) the photographs only had a slight potential to impress the jury in an irrational way because they depicted only the results of defendant's actions, (3) the State used little time to develop the evidence, (4) the State needed the photographs to corroborate the testimony of those who took the photographs, (5) the photographs aided the jury's understanding of the injuries to the victim and the nature of the crime, (6) all photographs were eight by ten inches in size and while the crime scene photographs might have been disturbing to those unused to viewing such images, they were not especially gruesome, and (7) to the extent that the autopsy photograph was gruesome, it was no more gruesome than the facts of the offense; the court noted that only black and white photographs were included in the appellate record and if defendant believed that the colors in the actual photographs would have affected the court's analysis, then he should have made sure that the original photographs

were included in the record. Trinh v. State, 2007 Tex. App. LEXIS 7678 (Tex. App. Houston 14th Dist. Sept. 25 2007).

1616. In connection with defendant's capital murder conviction, the court rejected defendant's cumulative objection to certain photographs under Tex. R. Evid. 403; although all the photographs are cumulative to the extent that they all showed some aspect of the victim's injuries, the photographs were not needlessly cumulative because they allowed the jury to see the victim's head injuries in greater detail and an autopsy photograph depicted the victim in the condition in which defendant left him. Trinh v. State, 2007 Tex. App. LEXIS 7678 (Tex. App. Houston 14th Dist. Sept. 25 2007).

1617. Court evaluated defendant's claim of error regarding the admission of testimony of prior bad acts under case law addressing the State's misuse of its ability under Tex. R. Evid. 607 to impeach its own witness, and defendant's trial objection under Tex. R. Evid. 403 provided the proper framework for analysis of any error in the trial court's ruling permitting the line of questioning, and the trial court did not err in permitting the State to question the victim, defendant's mother, about her prior statements to police; there was little risk of prejudice, as the dispute was over the use of a firearm, and none of the extraneous offenses involved a firearm, and the line of questioning sought to serve the State's case by providing the jury with a reason to discount the victim's testimonial effort to mitigate her son's offense, not by giving the jury evidence of guilt that was not otherwise admissible. Mendoza v. State, 2007 Tex. App. LEXIS 7679 (Tex. App. Amarillo Sept. 24 2007).

1618. Although defendant complained that the trial court failed to balance the probative value of evidence against the risk of unfair prejudice under Tex. R. Evid. 403, the State correctly noted that the required balancing did not need to be affirmatively shown on the record, defendant did not request the trial court to articulate its balancing, and nothing indicated that the trial court failed to do so. Mendoza v. State, 2007 Tex. App. LEXIS 7679 (Tex. App. Amarillo Sept. 24 2007).

1619. Defendant's murder conviction was proper because the admission of autopsy photographs of the victim were not unduly prejudicial since the photographs demonstrated the appearance of the child's body and, together with a doctor's testimony and autopsy report, aided in demonstrating the cause and manner of the child's death. Pierott v. State, 2007 Tex. App. LEXIS 7502 (Tex. App. Beaumont Sept. 12 2007).

1620. The trial court did not abuse its discretion in admitting exhibits consisting of certified copies of judgments in two of defendant's prior driving while intoxicated convictions, for purposes of Tex. R. Evid. 403 and defendant's felony driving while intoxicated conviction; the court found that (1) the exhibits were highly probative as they served to establish jurisdiction in the trial court, (2) defendant's failure to stipulate to the jurisdictional prior convictions took defendant out of the rule that the prosecution should not read or prove the prior convictions, and the exhibits did not have a great potential to impress the jury in an irrational way, and (3) the time involved in the disputed testimony was short and was unlikely to have distracted the jury, and thus defendant did not meet his burden to show that the probative value of the evidence substantially outweighed its prejudicial effect. Nall v. State, 2007 Tex. App. LEXIS 7289 (Tex. App. Houston 14th Dist. Sept. 4 2007).

1621. For purposes of Tex. R. Evid. 403, because there was no evidence suggesting that defendant intended the register under Tex. Code Crim. Proc. Ann. art. 62.055(a) but the police or jailers prevented him from doing so after his arrest, the trial court did not err in refusing to admit evidence of the incarceration; even if the evidence was improperly excluded, defendant was unable to show harm under Tex. R. App. P. 44, given that the jury was presented with ample evidence showing that defendant violated the mens rea element of the statute. Kosick v. State, 2007 Tex. App. LEXIS 7284 (Tex. App. Fort Worth Aug. 31 2007).

1622. Trial court did not abuse its discretion in admitting photographs of the victims; the number of photographs was mitigated by the fact that there were two victims, and while the detail was graphic and some photographs were gruesome and showed one victim nude, the medical examiner referred to most of the photographs while explaining his testimony, and one photograph, showing the scalp pulled back, was the only way to show the damage to the bone. Wilson v. State, 2007 Tex. App. LEXIS 7173 (Tex. App. Corpus Christi Aug. 30 2007).

1623. Probative value of the witness testimony was not substantially outweighed by the danger of unfair prejudice or misleading the jury, because none of the testimony suggested to the jury that defendant was eligible for jury recommended probation, nor did the testimony from these three witnesses suggest to the jury that it should reach its decision on an improper basis, such as an emotional one, and even if the trial court erred by admitting the testimony, defendant had not demonstrated reversible error, when defendant had not demonstrated that he received a longer sentence or was harmed by the admission of the testimony concerning the conditions of and his eligibility for probation. Ivey v. State, 2007 Tex. App. LEXIS 7241 (Tex. App. Austin Aug. 30 2007).

1624. Appellate court overruled defendant's assertion that the evidence of his possession of child pornography at sentencing for sexual assault was irrelevant and should have been excluded, because while the potential prejudice that the admitted pictures could cause was high, the potential unfair prejudice of admitting pictures was marginal at best since the pictures merely showed the commission of the extraneous offense, and the trial court was thus well within the zone of reasonable disagreement when it decided that the unfair prejudice did not substantially outweigh the probative value. Bitterman v. State, 2007 Tex. App. LEXIS 7235 (Tex. App. Austin Aug. 28 2007).

1625. Defendant claimed that the trial court's evidentiary rulings effectively prevented her from presenting her defense to capital murder, that the child victim's parents were the perpetrators of the crime, and the court analyzed the evidence to determine if the trial court's evidentiary rulings were clearly erroneous; the court found that (1) absent evidence that the children became involved in the physical disputes the parents previously had, the court was unable to hold that the trial court abused its discretion in excluding this evidence, and in any event, defendant did not raise her due process argument in this regard to the trial court, such that two related subpoints were not properly before the court, (2) certain excluded evidence did not add much, if anything, to the defense and did not prevent defendant from putting on a defense, such that defendant's due process rights were not violated, and (3) another witness statement was hearsay and did not meet any exceptions, and the exclusion of the statement in question did not prevent defendant from putting on a defense, and no indicia of reliability existed concerning the witness's statement, and defendant did not call this witness to testify. Stevens v. State, 234 S.W.3d 748, 2007 Tex. App. LEXIS 6845 (Tex. App. Fort Worth 2007).

1626. In defendant's capital murder case, evidence in the guilt-innocence phase that painted a picture of the victim as a young man with a promising future whose life defendant had ended prematurely was irrelevant and appealed to the jury's sympathies. However, the error was harmless; defendant admitted to participating in the shooting, and a witness testified that defendant shot the victim and grabbed the bag of codeine. Durand v. State, 2007 Tex. App. LEXIS 6535 (Tex. App. Houston 1st Dist. Aug. 16 2007).

1627. Where defendant was convicted of the aggravated assault of a ten-year-old child, the trial court did not err by permitting the child to testify as to defendant's threats and act of throwing the child to the ground; defendant's nudity; his prior drug use; and display of a crack pipe during the altercation; the child's testimony related to a single episode and gave context to the jury; the probative value of the evidence was not substantially outweighed by any unfair prejudice that might have resulted. Jones v. State, 2007 Tex. App. LEXIS 6414 (Tex. App. Houston 14th Dist. Aug. 14 2007).

1628. Admission of evidence regarding defendant's use of drugs and alcohol, having sex with an older man, running away from home, and being a liar was properly admitted because she chose to marry an older man and, thus, had sex with an older man, she ran away from home, and she put her maturity, sophistication, and

independence at issue by claiming she was under her husband's control; further, the fact that defendant lied about being pregnant, which "necessitated" a marriage, went to her ability to tell the truth; the use of drugs went to defendant's then-existing state of mind. Vega v. State, 255 S.W.3d 87, 2007 Tex. App. LEXIS 6315 (Tex. App. Corpus Christi 2007).

1629. In defendant's trial for aggravated assault, when the State elicited evidence of defendant's prior conviction for aggravated assault, a proper objection should have been made under Tex. R. Evid. 404 and Tex. R. Evid. 403; even if error existed, and it was preserved, error was harmless because introduction of evidence was not prejudicial to defendant. Moore v. State, 2007 Tex. App. LEXIS 6354 (Tex. App. Austin Aug. 9 2007).

1630. Decision refusing to allow defendant to cross-examine the complainant regarding the sexual abuse allegations against her father was affirmed because defendant failed to demonstrate that cross-examining the complainant regarding her allegations against her father was constitutionally required, and the district court's decision to limit the cross-examination did not violate the defendant's constitutional right to confront the witnesses against him; evidence demonstrating that the complainant had made allegations against her father, without more, would not have been relevant to a determination of whether the complainant fabricated her allegations against defendant, defendant failed to produce any evidence indicating that the complainant's prior allegations against her father were false, and the complainant's credibility had already been impeached through the testimony of one of the State's witnesses indicating that the complainant had made false allegations against other individuals while in therapy. Davis v. State, 2007 Tex. App. LEXIS 6360 (Tex. App. Austin Aug. 9 2007).

1631. During defendant's trial for aggravated robbery with a deadly weapon, the trial court did not err in overruling defendant's objection to a large mounted photograph of the victim's infant daughter; a single photograph was involved and it was not gruesome in any way; the photograph was not prejudicial. Minos v. State, 2007 Tex. App. LEXIS 6394 (Tex. App. Fort Worth Aug. 9 2007).

1632. Because Tex. R. Evid. 403 falls within the exceptions to the right of confrontation that have been delineated by Texas courts, and because Rule 403 only allows for the exclusion of testimony where its probative value is substantially outweighed by concerns found within these exceptions, no additional weighing by the appellate court is necessary; testimony properly excluded under Rule 403 is also properly excluded under the Confrontation Clause, and because defendant did not directly attack the trial court's Rule 403 ruling, the trial court did not err in limiting defendant's cross-examination. Dinger v. State, 2007 Tex. App. LEXIS 6253 (Tex. App. Tyler Aug. 8 2007).

1633. Trial court properly admitted a photograph of a murder victim and his family because it was relevant to show a true appearance of the victim before his death, and its probative value was not substantially outweighed by its prejudicial effect. While it showed the family smiling, the photograph was not the type that would impress the jury in an irrational but indelible way, no mention was made of the photograph during closing argument, and only one mention was made of the victim's children. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

1634. Trial court properly admitted autopsy photographs of a murder victim because they did no more than visually depict what the medical examiner's testimony had already described, which was that the victim died of multiple gunshot wounds, and the probative value of the autopsy photographs was not substantially outweighed by their prejudicial effect because they were neither gruesome nor unnecessarily graphic, and because minimal time was spent on actually introducing the photographs following the medical examiner's testimony. While the manner of the victim's death was not disputed, the circumstances surrounding it were disputed, and the photographs lent visual support to the witnesses' description of those events. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

1635. At defendant's capital murder trial, the trial court properly admitted evidence pursuant to Tex. R. Evid. 404(b) that defendant possessed a semi-automatic weapon the week before the offense where the evidence showed that the victim was shot seven times by a semi-automatic weapon, and there was also ample evidence that defendant shot the victim. The evidence was not more prejudicial than probative because the State did not impute defendant's possession of the semi-automatic weapon to be a crime, the State did not imply that defendant was generally a criminal because he possessed the weapon, and there was no indication that the weapon might have been used in another offense. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

1636. In a case of aggravated assault with a deadly weapon, a penitentiary packet showing that defendant previously had been convicted of two burglary offenses was admissible at punishment in accordance with Tex. Code Crim. Proc. Ann. art. 37.07, § 3, and the trial court could have found under Tex. R. Evid. 403 that the relevant and probative information in the packet outweighed its prejudicial effect. Latchie v. State, 2007 Tex. App. LEXIS 6127 (Tex. App. Corpus Christi Aug. 2 2007).

1637. Where defendant was charged with aggravated sexual assault of the thirteen-year-old victim, Tex. R. Evid. 403 did not require the exclusion of evidence of three extraneous acts of sexual intercourse; the extraneous acts of intercourse differed from the tried offense only in their locations and dates; because the trial court gave a limiting instruction, there was not a significant risk of distracting the jury from consideration of the offense being tried. Smith v. State, 2007 Tex. App. LEXIS 6004 (Tex. App. Amarillo July 30 2007).

1638. In defendant's capital murder case, photographs of the victim taken at the crime scene and at the autopsy were properly admitted because the photographs did not depict internal organs or show damage to the corpse resulting from the autopsy as opposed to the attack; that the wounds were inflicted by accomplices did not make the photographs unfairly prejudicial in the prosecution of defendant as a party to the murder. Randall v. State, 232 S.W.3d 285, 2007 Tex. App. LEXIS 5860 (Tex. App. Beaumont 2007).

1639. Defendant's Tex. R. Evid. 403 objection went to crime scene photographs of the victim's body, rather than to family pictures; defendant wholly failed to identify how the family pictures would have created an indelible and irrational sympathy in the jury and the court concluded that defendant failed to show that the trial court abused its discretion in admitting the family photographs. Castilleja v. State, 2007 Tex. App. LEXIS 5974 (Tex. App. Amarillo July 24 2007).

1640. Although defendant argued that the trial court did not properly perform the balancing test required by Tex. R. Evid. 403 in ruling on the admission of photographs, the court noted that unless the trial court refused to perform the balancing test, the overruling of a Tex. R. Evid. 403 objection without further comment did not establish that the trial court failed to conduct the test and was not going to support the finding of an abuse of discretion. Castilleja v. State, 2007 Tex. App. LEXIS 5974 (Tex. App. Amarillo July 24 2007).

1641. Defense counsel lodged objections to extraneous evidence, but counsel did not urge an objection that the State failed to provide notice; the court agreed with the State that a trial objection regarding extraneous offenses that did not comport with the complaint raised on appeal did not preserve the contention for appellate review. Hohnstein v. State, 2007 Tex. App. LEXIS 5975 (Tex. App. Amarillo July 24 2007).

1642. In defendant's murder trial, the trial court did not err in admitting crime scene photographs, for purposes of Tex. R. Evid. 403; the photographs depicted nothing more than the reality of the gruesome crime itself, and their probative value was not substantially outweighed by unfair prejudice. Chon Ki Yi v. State, 2007 Tex. App. LEXIS 5648 (Tex. App. Houston 1st Dist. July 19 2007).

1643. Trial court did not err in admitting an autopsy photograph in defendant's murder trial, which photograph showed defendant's ex-wife's brain after the top of her skull had been removed; the State had to prove that she was killed by stab wounds caused by scissors, and the medical examiner testified that one of the stab wounds penetrated the skull into the brain and was alone fatal, and the wound to the brain would not have been visible had the skull been left intact. Chon Ki Yi v. State, 2007 Tex. App. LEXIS 5648 (Tex. App. Houston 1st Dist. July 19 2007).

1644. Trial court did not err in admitting a 911 tape over defendant's objection under Tex. R. Evid. 403 in his murder trial; the tape was made immediately after boys found their mother's body and verified their testimony in many respects, the tape did not unfairly implicate defendant as he was not mentioned on the tape, and while dramatic, the tape was relevant in providing a framework for the State's evidence, and its relevance was not substantially outweighed by the danger of unfair prejudice. Chon Ki Yi v. State, 2007 Tex. App. LEXIS 5648 (Tex. App. Houston 1st Dist. July 19 2007).

1645. Trial court did not abuse its discretion in failing to grant defendant's motion for a mistrial, raised when the victim's mother was permitted to give her personal opinion about the victim's character for being truthful; any error from the testimony occurred only one time, the jury was specifically instructed to disregard the testimony, which did not contribute to the mother's prior testimony, and the court did not perceive the testimony to be highly prejudicial and incurable. Montgomery v. State, 2007 Tex. App. LEXIS 5682 (Tex. App. Dallas July 19 2007).

1646. Trial court did not violate defendant's constitutional right to present a defense by excluding photographs of the victim, a man, dressed as a woman; other testimony established the victim's appearance on the night in question and because defendant was able to provide other probative evidence establishing the victim's identity, his need for the photographs was slight. Rodriguez v. State, 2007 Tex. App. LEXIS 5651 (Tex. App. Waco July 18 2007).

1647. Trial court did not abuse its discretion in admitting evidence of a prior assault under Tex. R. Evid. 404(b), because the extraneous offense served to show that it was more probable that defendant would sexually assault girls younger than fourteen, and the jury was given a limiting instruction to consider the testimony only to rebut the defensive theory of fabrication; the witness testified that defendant sexually assaulted her when she was twelve years old, and without the witness's testimony, the State only had the victim's testimony to prove the charged offenses took place, testimony contradicted by defendant's testimony and the testimony of friends of the victim that the victim indicated nothing happened between her and defendant. Braz v. State, 2007 Tex. App. LEXIS 5531 (Tex. App. Dallas July 16 2007).

1648. In a suit on a sworn account brought by a law firm to recover its legal fees, the trial court questioned the law firm's principal witness to establish that the underlying legal matter was settled. The trial court acted within its discretion in attempting to limit the jury's exposure to needless and possibly confusing or misleading evidence under Tex. R. Evid. 401 and 403; the trial court did not impermissibly comment on the weight of the evidence. Alam v. Wilshire & Scott, P.C., 2007 Tex. App. LEXIS 5501 (Tex. App. Houston 1st Dist. July 12 2007).

1649. Trial court properly admitted evidence of a protective order defendant's wife had obtained against him during defendant's capital murder trial because: (1) the State was entitled to prove intent through evidence of other crimes, wrongs, or acts as defendant's cross-examination of the State's witnesses brought his intent into question as a defensive theory; (2) because the detectives found the protective order in defendant's truck, its introduction was relevant to help the jury understand how the circumstances surrounding the charged crime fit together; and (3) the protective order was highly probative as the wife secured it a few months before her death and a copy of the order was found in defendant's truck, and the jury heard about it only briefly. Price v. State, 245 S.W.3d 532, 2007 Tex. App. LEXIS 5294 (Tex. App. Houston 1st Dist. 2007).

1650. Under Tex. R. App. P. 33.1, defendant did not preserve for review the complaint that the prejudicial value of a witness's testimony outweighed its probative value under Tex. R. Evid. 403; although defendant used the word "prejudicial" in an objection, the trial court construed the objection as an objection to the nonresponsive nature of the witness's answer, such that defendant did not obtain a ruling on his Tex. R. Evid. 403 objection, and he did not object to the trial court's failure to rule on this objection. Bass v. State, 2007 Tex. App. LEXIS 5344 (Tex. App. Corpus Christi July 5 2007).

1651. In a capital murder case, evidence of appellant's gang affiliation was properly admitted pursuant to Tex. R. Evid. 402 because it was relevant pursuant to Tex. R. Evid. 401 and its probative value was not substantially outweighed by the danger of unfair prejudice as described in Tex. R. Evid. 403; there was ample evidence connecting appellant to the gang and their plan regarding the victim, and it included the gang's violent activities. Moreover, the evidence was not admitted to show that the murder was gang activity, but that it was predictable that a homicide would occur as the result of the conspiracy, in which some participants were violent gang members, to rob the victim. Arroyo v. State, 239 S.W.3d 282, 2007 Tex. App. LEXIS 5111 (Tex. App. Tyler 2007).

1652. Record indicated that defendant objected under "4 or 3," which the court presumed was a typographical error by the court reporter because defendant went on to urge that a videotape was far more prejudicial than probative, which the court interpreted as a reference to Tex. R. Evid. 403. Akins v. State, 2007 Tex. App. LEXIS 4989 (Tex. App. Houston 14th Dist. June 28 2007).

1653. In defendant's trial for driving while intoxicated, although the audio portion of a videotape showing defendant performing field sobriety tests would have resolved the contested issue of whether the officer properly instructed defendant on each test, the absence of audio impacted both defendant and the State equally, given that the absence of audio gave no more credence to the officer's claim that he explained the tests to defendant than it did to defendant's claim of receiving no instruction; however, the videotape depicted precisely how defendant physically performed the tests immediately before her arrest and thus it was probative of the state of her physical faculties, and thus defendant failed to rebut the presumption that the videotape was more probative than prejudicial for purposes of Tex. R. Evid. 403. Akins v. State, 2007 Tex. App. LEXIS 4989 (Tex. App. Houston 14th Dist. June 28 2007).

1654. Trial court did not err by admitting evidence of extraneous offenses concerning defendant's sexual abuse of other family members because the trial court did not abuse its discretion in concluding that defendant's brother's testimony created a false impression as to the observations of defendant's family members regarding his behavior around women and children; the trial court did not abuse its discretion by determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403 because the testimony was highly probative of the veracity of the brother's statement indicating that none of his family members had ever seen defendant do anything inappropriate around a child. Hassenplug v. State, 2007 Tex. App. LEXIS 4998 (Tex. App. Houston 14th Dist. June 28 2007).

1655. Defense counsel never invoked Tex. R. Evid. 403 or claimed that the probative value of evidence was outweighed by prejudice, and a Tex. R. Evid. 403 objection was not implicitly contained in a relevancy objection, which counsel did make, and thus the probative value/prejudice argument was not preserved for appeal. Blanco v. State, 2007 Tex. App. LEXIS 5008 (Tex. App. El Paso June 28 2007).

1656. Defendant contended that the issue for the court was whether reversible error occurred because the jury heard defendant's wife's testimony regarding possible other crimes under Tex. R. Evid. 404(b), which could not have been disregarded, however, a mistrial could only be granted where there had been error first, and in this case, it would have been the jury hearing inadmissible evidence; defendant did not request or obtain a ruling on the admissibility of the evidence other than based on his motion in limine, and the trial court's ruling on that motion did not address the admissibility of the evidence, but only that a hearing would have to be held on admissibility before

the State would be free to mention such matters; defendant's brief also did not challenge or address the admissibility of the statement in question, either in terms of relevance or unfair prejudice under Tex. R. Evid. 403, and without demonstrating that the statement in question was inadmissible, defendant's contentions that the trial court violated the motion in limine and the statement could not have been disregarded by the jury did not demonstrate that the trial court erred in denying his mistrial motion. Nitsche v. State, 2007 Tex. App. LEXIS 4926 (Tex. App. Houston 14th Dist. June 26 2007).

1657. Although defendant's brief contended that a doctor's testimony was exactly what was in the victim's medical record, the brief cited no portions of the record where there was any duplication, let alone any duplication that could have been unfairly prejudicial; he claimed that admitting the redacted portion of the record was highly prejudicial, but his argument would have suggested that any redacted exhibit would have been inadmissible under Tex. R. Evid. 403, and thus he failed to demonstrate error in the admission of the medical records. Rivera v. State, 2007 Tex. App. LEXIS 4931 (Tex. App. Houston 14th Dist. June 26 2007).

1658. In defendant's trial for attempted sexual assault, defendant's ex-girlfriend's application for a protective order was relevant under Tex. R. Evid. 401 because the application was some evidence that the ex-girlfriend no longer wanted a relationship with defendant and that the encounter with defendant was not consensual; any Tex. R. Evid. 403 objection was waived because it was not raised to the trial court and the Tex. R. Evid. 401 objection did not preserve the complaint under Tex. R. Evid. 403. Sapp v. State, 2007 Tex. App. LEXIS 4790 (Tex. App. Houston 14th Dist. June 21 2007).

1659. Court did not violate defendant's right to confrontation under the Sixth Amendment in a sexual assault on a child case by limiting cross examination of the victim and his mother about the victim's alleged behavioral problems because the evidence in question was not relevant to punishment under Tex. Code Crim. Proc. Ann. art. 37.07; in addition, because Tex. R. Evid. 403 fell within the exceptions to the Confrontation Clause, the trial court did not violate the Confrontation Clause in limiting defendant's cross examination. Dinger v. State, 2007 Tex. App. LEXIS 4767 (Tex. App. Tyler June 20 2007).

1660. Any error in admitting certain evidence, a statement about defendant being on probation, without the State having responded to a request for notice under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) was harmless under Tex. R. App. P. 44.2(b); the reference to an extraneous offense was in a recorded statement by defendant that was produced in discovery well before trial, and it strained credulity to think that defendant was not on notice that the State intended to use the videotape in which defendant confessed to the crime, and the admission of the evidence was not overly prejudicial for purposes of Tex. R. Evid. 403, as the statement in question did not undermine his defense theory. Hopson v. State, 2007 Tex. App. LEXIS 4851 (Tex. App. Beaumont June 20 2007).

1661. Where defendant was alleged to have committed a sexual assault against a thirteen-year-old child, trial court did not violate Tex. R. Evid. 403 by admitting the child's testimony of defendant's use and sale of marijuana; the evidence was admissible to show the attempt by defendant to cultivate a relationship with the child; it took only a few moments to present the evidence and there was little chance that this evidence distracted the jury from the consideration of the indicted offense. Valdez v. State, 2007 Tex. App. LEXIS 4612 (Tex. App. Amarillo June 12 2007).

1662. In a medical malpractice case, the probative value of statements from superseded pleadings regarding two nonsuited doctors was not outweighed by the danger of unfair prejudice because counsel, representing the parents of an injured child, first alluded to the doctor's party status, thus opening the door to rebuttal, and the statements, which were made by the parents, constituted admissions by party-opponents under Tex. R. Evid. 801, and were not hearsay. Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231, 2007 Tex. LEXIS 527, 50 Tex. Sup. Ct. J. 866 (Tex. 2007).

1663. Trial court did not abuse its discretion by admitting into evidence the bra and shirt that the victim was wearing at the time of the stabbing under Tex. R. Evid. 403 because they were admitted to show where the knife went into the victim's torso, which could orient the jury to the location and nature of the victim's wounds. Matez v. State, 2007 Tex. App. LEXIS 4418 (Tex. App. Corpus Christi June 7 2007).

1664. Evidence of gang affiliation was properly admitted as relevant under Tex. R. Evid. 401 and Tex. R. Evid. 402 since it was offered to show a motive for a murder; the evidence was not limited under Tex. R. Evid. 404(b), and the probative value substantially outweighed the danger of unfair prejudice. Rodrigues v. State, 2007 Tex. App. LEXIS 4441 (Tex. App. Houston 14th Dist. June 7 2007).

1665. Trial court's decision during defendant's trial for sexually molesting his stepdaughter to allow the report of the sexual assault nurse examiner in evidence was not outside the zone of reasonable disagreement. The probative value of the report was not substantially outweighed by the danger of unfair prejudice where: (1) the report spoke directly to the offense, and, as such, it did not confuse or distract the jury from the main issue; (2) although the report was cumulative evidence and was, therefore, not essential to the State's case, the presentation of the evidence did not consume an inordinate amount of time; (3) the report did not have a tendency to be given undue weight by a jury that had not been equipped to evaluate the probative force of the evidence because at the time of its admission, the jury had already heard the testimony of the victim and the investigating officer, and thus the description of the assaults could not have surprised the jury; and (4) unfair prejudice did not arise from the mere fact that evidence injured defendant's case. Rivas v. State, 2007 Tex. App. LEXIS 4395 (Tex. App. San Antonio June 6 2007).

1666. Defendant's death sentence after being convicted of capital murder was appropriate, in part because the trial court did not err in admitting autopsy photographs since the medical examiner used the autopsy photographs to help explain his testimony about the victim's gunshot wounds. Saldano v. State, 232 S.W.3d 77, 2007 Tex. Crim. App. LEXIS 698 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1232, 128 S. Ct. 1446, 170 L. Ed. 2d 278, 2008 U.S. LEXIS 2119 (2008).

1667. In a burglary case, a Tex. R. Evid. 403 argument based on a decision to admit a prior deadly conduct conviction was meritless because there was no argument on why such a ruling made at a bench conference conveyed an opinion on guilt, in violation of Tex. Code Crim. Proc. Ann. art. 38.05. Cooper v. State, 2007 Tex. App. LEXIS 4342 (Tex. App. Houston 14th Dist. June 5 2007).

1668. Evidence of defendant mentioning an attorney on the tape was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403, and therefore it should have been suppressed; although the evidence had some probative value as evidence of defendant's speech pattern, the State did not have a distinct need for the evidence in light of other portions of the tape providing the same evidence; the error was not harmless under Tex. R. App. P. 44.2 because the evidence of guilt was not overwhelming, as it consisted of only defendant's refusal to perform a breath test, his slow speech, and his poor performance on a horizontal gaze nystagmus test. Lajoie v. State, 237 S.W.3d 345, 2007 Tex. App. LEXIS 4318 (Tex. App. Fort Worth 2007).

1669. Trial court did not abuse its discretion by excluding from evidence during sentencing the plea-bargained punishments assessed against defendant's nontestifying accomplices because the evidence was inadmissible under Tex. R. Evid. 403 as public policy favored the conclusion of litigation by compromise and settlement. Eichelberger v. State, 232 S.W.3d 225, 2007 Tex. App. LEXIS 4331 (Tex. App. Fort Worth 2007).

1670. In defendant's murder trial, testimony that a witness bought drugs from defendant out of his apartment was relevant because it rebutted the suggestion that defendant had no interest in any of the drugs that might have been

stolen from the apartment, and the evidence was not subject to exclusion under Tex. R. Evid. 403 because (1) the testimony went to defendant's motive, (2) the testimony consisted of only two questions, (3) the State needed to establish a motive, and (4) the evidence was not likely to impress the jury in some irrational way. Freeman v. State, 230 S.W.3d 392, 2007 Tex. App. LEXIS 3965 (Tex. App. Eastland 2007).

1671. Pursuant to Tex. R. Evid. 403, the trial court did not err by admitting testimony that the cadaver dogs alerted on the scent of human remains because the evidence was not more prejudicial than probative of whether defendant had disposed of the murder victim's body where he said that he did, and the evidence did not point to other suspects. Trejos v. State, 243 S.W.3d 30, 2007 Tex. App. LEXIS 4045 (Tex. App. Houston 1st Dist. 2007).

1672. In defendant's capital murder case, admission of evidence of defendant's "hidden pregnancies" and the abandonment of another infant were properly admitted because the State argued that the subsequent hidden pregnancy and abandonment of the infant showed that defendant "was keeping the children fathered by one man, and discarding the children fathered by other men," thus demonstrating her motive and her intent to kill the child. Berry v. State, 233 S.W.3d 847, 2007 Tex. Crim. App. LEXIS 651 (Tex. Crim. App. 2007).

1673. Trial court did not abuse its discretion when it allowed the State to present testimony by one victim's mother that the victim acted afraid of defendant when she saw him in court prior to the start of trial because the probative value of the evidence was not substantially outweighed by its prejudicial effect; the State introduced the evidence to rebut defendant's defensive theory that the victims and the mother recently fabricated the allegation of sexual abuse as revenge for defendant's dishonest conduct in an aborted automobile swap and for paying the other victim's mother for sex; the evidence directly rebutted defendant's defensive theory, the time involved in the disputed testimony was short, encompassing just over two pages in the reporter's record of the trial, and the State needed the testimony to rebut defendant's theory. Cirlos v. State, 2007 Tex. App. LEXIS 3774 (Tex. App. Houston 14th Dist. May 17 2007).

1674. Probative value of three extraneous aggravated robbery offenses was not substantially outweighed by the danger of unfair prejudice where the evidence made it more probable that the appellant was the person who caused the victim's death and the trial court had instructed the jury to limit consideration of the evidence to the issues of motive, intent, and identity. Baskin v. State, 2007 Tex. App. LEXIS 3803 (Tex. App. Houston 1st Dist. May 17 2007).

1675. In a strict product liability action, the trial court properly excluded evidence regarding the drug use and prior kidnapping conviction of the deceased, an individual involved in a vehicle accident, because the evidence added nothing to the central issue of the trial, the design defect of a seat belt buckle, and the risk of unfair prejudice greatly outweighed the probative value of the evidence. The vehicle manufacturer did not establish that the exclusion of the evidence probably resulted in an incorrect judgment. AlliedSignal, Inc. v. Moran, 231 S.W.3d 16, 2007 Tex. App. LEXIS 3883, CCH Prod. Liab. Rep. P17758 (Tex. App. Corpus Christi 2007).

1676. Trial court did not abuse its discretion by admitting evidence of an extraneous offense at the guilt-innocence phase of defendant's aggravated robbery trial for purposes of Tex. R. Evid. 403; evidence that defendant stole the victim's van and traded it for drugs served to make the fact or consequence that defendant committed the crime more probable by providing a possible motive, the testimony was brief and not emphasized by the State, the jury was not irrationally impressed, and the evidence was necessary for the State. Washington v. State, 2007 Tex. App. LEXIS 3699 (Tex. App. Houston 1st Dist. May 10 2007).

1677. Although defendant made a Tex. R. Evid. 404(b) objection, defendant failed to make any argument pursuant to Tex. R. Evid. 403 and thus defendant waived error, if any. Craig v. State, 2007 Tex. App. LEXIS 3524 (Tex. App.

Tyler May 9 2007).

1678. Trial court did not err in limiting the scope of defense counsel's cross-examination, for confrontation purposes; the court found that (1) certain testimony was cumulative under Tex. R. Evid. 403, (2) counsel's proffered question sought evidence to rebut testimony that the victim was a fun person, not to show another pertinent fact, such as defendant's assertion that he acted in self-defense, for purposes of Tex. R. Evid. 404, and (3) whether the witness took a gun from defendant was irrelevant under Tex. R. Evid. 401. Jones v. State, 2007 Tex. App. LEXIS 3527 (Tex. App. Beaumont May 9 2007).

1679. In a sexual assault case in which the complainants were an adult and a child, evidence that defendant possessed sex toys and nude photos was relevant and admissible under Tex. R. Evid. 401 for the purpose of showing how defendant was grooming the complainants, and this evidence was not overly prejudicial under Tex. R. Evid. 403. Petronella v. State, 2007 Tex. App. LEXIS 3198 (Tex. App. Eastland Apr. 26 2007).

1680. On review of defendant's conviction for indecency with a child, he cited to various portions of the record where he allegedly requested the trial court to conduct a Tex. R. Evid. 403 balancing test; defendant's relevancy objection was not sufficient to preserve the error for review. Ficarro v. State, 2007 Tex. App. LEXIS 3166 (Tex. App. Corpus Christi Apr. 26 2007).

1681. Where defendant was charged with aggravated sexual assault of a child and indecency with a child, the State was permitted to admit evidence of pornographic photos taken from defendant's computer which depicted the kind of activity in which he was alleged to have engaged in; under Tex. R. Evid. 403, the probative value of the photographs substantially outweighed their prejudicial effect. Ficarro v. State, 2007 Tex. App. LEXIS 3166 (Tex. App. Corpus Christi Apr. 26 2007).

1682. Trial court properly excluded evidence of extraneous acts under Tex. R. Evid. 404(b) related to defendant's codefendant, as even if it was relevant, it was inadmissible for purposes of Tex. R. Evid. 403, given that the evidence, which did not amount to a "signature act" by codefendant, carried little probative weight and was highly prejudicial. Moore v. State, 2007 Tex. App. LEXIS 3209 (Tex. App. El Paso Apr. 26 2007).

1683. In a case where defendant murdered her husband, under Tex. R. Evid. 404(b), the trial court did not abuse its discretion in admitting prior bad acts evidence that defendant twice shot at her former husband because the evidence was relevant aside from its tendency to show that she acted in conformity with bad character since (1) defendant put the shooter's identity at issue by undermining the evidence against her and advancing the theory that the victim committed suicide; (2) the evidence went to the very fundamental fact of consequence, whether there was an act of murder; and (3) the evidence was relevant to rebut defendant's claim that the victim shot himself; also, under Tex. R. Evid. 403, the evidence was admissible because the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Scott v. State, 2007 Tex. App. LEXIS 3055 (Tex. App. Texarkana Apr. 20 2007).

1684. Because defendant only objected to evidence on relevance grounds, and no separate Tex. R. Evid. 403 objection was specifically made to the trial court, that claim was waived. Sapp v. State, 2007 Tex. App. LEXIS 2875 (Tex. App. Houston 14th Dist. Apr. 17 2007).

1685. Given defendant's reason to admit the evidence, a videotaped statement of the child victim, to show demeanor and character, the trial court would have been within its discretion to exclude the evidence because the videotape would have been cumulative of the victim's trial testimony, for purposes of Tex. R. Evid. 403, and because the court found that the trial court did not abuse its discretion in excluding the evidence on non-hearsay grounds, the court did not need to analyze whether the evidence fell within an exception to the hearsay rule under

Tex. R. Evid. 803(1), for purposes of Tex. R. App. P. 47.1; the court noted that had the tape been offered to show the truth of the matters asserted, it would have been hearsay under Tex. R. Evid. 801(d). Shanta v. State, 2007 Tex. App. LEXIS 2887 (Tex. App. Houston 1st Dist. Apr. 12 2007).

1686. Regarding the introduction of defendant's children's medical records in defendant's felony injury to a child trial, in which the State's theory was that defendant, the mother, had Munchausen Syndrome by Proxy (MSBP), the court found that the evidence that defendant induced illnesses in her children could have affected the jury in an emotional way, and many witnesses spent significant time testifying about matters in the records, but showing defendant had MSBP was critical to establish motive and provide context for the offense, and while prejudicial to defendant, for purposes of Tex. R. Evid. 403, it was not unfairly prejudicial and the trial court did not err in admitting the evidence. Austin v. State, 222 S.W.3d 801, 2007 Tex. App. LEXIS 2739 (Tex. App. Houston 14th Dist. 2007).

1687. For purposes of Tex. R. Evid. 403, the trial court did not abuse its discretion by admitting extraneous offense evidence under Tex. R. Evid. 404(b) because defendant did not show that the verdict was unduly prejudiced by the testimony; intent was at issue and the testimony made a fact of consequence, that defendant acted intentionally, more probable, and the State did not mention the testimony in closing arguments. Bookman v. State, 2007 Tex. App. LEXIS 2681 (Tex. App. Houston 1st Dist. Apr. 5 2007).

1688. Although a patient made an offer of proof, the patient failed to make any argument as to why evidence of a surgeon's reputation in the medical community and alleged mistreatment of other patients was improperly excluded or why it should have been admitted, and the patient failed to specify the purpose for which the evidence was offered; because both steps were required to avoid waiver, the patient failed to preserve certain issues for review. Montgomery v. Varon, 2007 Tex. App. LEXIS 2582 (Tex. App. Houston 14th Dist. Apr. 3 2007).

1689. Patient's claim that an expert's testimony concerning a radiologist's alleged mistreatment and misdiagnosis of patients other than the patient was not properly preserved for review, because although the patient included some evidence in this regard in an offer of proof, the patient failed to state why the evidence was improperly excluded or why it should have been admitted, and the patient failed to specify the purpose for which the evidence was offered; in any event, the trial court did not abuse its discretion in excluding this evidence given that the expert's testimony in one aspect amounted to pure speculation and the patient did not establish how the testimony was material to the radiologist's interpretation of certain scans, such that the trial court did not abuse its discretion in finding the testimony was not relevant under Tex. R. Evid. 401, or that even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Montgomery v. Varon, 2007 Tex. App. LEXIS 2582 (Tex. App. Houston 14th Dist. Apr. 3 2007).

1690. In defendant's trial for attempted sexual assault, the trial court erred in admitting evidence of a prior conviction of indecency with a child, which was an extraneous offense, and while the conviction might have been relevant, such did not make it admissible, given that (1) the evidence was unnecessary because the acts currently charged spoke for themselves, (2) the probative value of the extraneous conviction was substantially outweighed by its prejudicial impact for purposes of Tex. R. Evid. 403, as the evidence had the potential for improperly influencing the jury and more than just a small amount of attention was focused on the extraneous crime, (3) given the victim's testimony, the need for the extraneous conviction was slight, and (4) the evidence was used in a way to illustrate a modus operandi, such that the use of the prior conviction had the risk of confusion or misinterpretation. Bjorgaard v. State, 220 S.W.3d 555, 2007 Tex. App. LEXIS 2514 (Tex. App. Amarillo 2007).

1691. Admission of an extraneous conviction amounted to harm under Tex. R. App. P. 44.2(b); while there was enough evidence to convict defendant of attempted sexual assault without the conviction, there was some contradictory evidence and the error involved the introduction of evidence, a prior conviction for indecency with a child, that was inherently inflammatory; although the trial court gave a limiting instruction, the relevance of the evidence was suspect and the court had little choice but to recognize the high likelihood that the prior conviction

influenced one or more of the jurors. Bjorgaard v. State, 220 S.W.3d 555, 2007 Tex. App. LEXIS 2514 (Tex. App. Amarillo 2007).

1692. In an aggravated sexual assault case, the court properly allowed a neighbor's testimony that on two occasions she caught defendant looking into her daughters' bedrooms while the girls were undressing because it demonstrated that defendant displayed an inappropriate sexual interest in teenage girls, thus rebutting the defensive theory that he was the victim of a frame-up; in addition, the evidence was probative of defendant's intent to commit the sexual offenses against the victims by showing that he had a similar pattern of gratifying his sexual desires through watching the neighbor's daughters undress, the evidence, which did not involve any physical touching, was not worse than the charged offenses and was not graphic, and the State's need for the evidence was significant. Mayfield v. State, 2007 Tex. App. LEXIS 2545 (Tex. App. Fort Worth Mar. 29 2007).

1693. In a sexual assault case, the court properly admitted evidence that defendant sexually abused his stepdaughter because if the jury believed that defendant committed the extraneous offenses, that made it more probable that the victim was not fabricating her allegations against defendant; although the evidence did not tend to disprove fabrication directly, it tended circumstantially to prove that the victim did not fabricate her allegations, both parties argued to the jury that it could not consider the evidence apart from those circumstances and for that purpose, and the State's presentation of the testimony of which defendant complained was brief. Newton v. State, 2007 Tex. App. LEXIS 2477 (Tex. App. Waco Mar. 28 2007).

1694. Where defendant was charged with aggravated robbery based on his involvement in a gang-style offense with two other men, the trial court did not err in admitting into evidence an extraneous robbery that was committed by two or three Hispanic men; the facts of the robberies were similar, and personal documents taken during the extraneous robbery were found in defendant's apartment; under Tex. R. Evid. 403, the trial court found that the probative value of the evidence substantially outweighed any prejudicial affect that it might have. Gonzalez v. State, 2007 Tex. App. LEXIS 2318 (Tex. App. Dallas Mar. 26 2007).

1695. While the court strongly questioned the State's need for including the evidence, allowing testimony that defendant's DNA profile was found in a database was not an abuse of discretion on the trial court's part for purposes of Tex. R. Evid. 403; the court found that (1) although relevant to show how police focused their attention on defendant, the evidence was not necessary to show a fact of consequence in proving defendant committed the aggravated sexual assault, (2) the testimony had the potential to impress the jury in an irrational manner, but the testimony that the database was analogous to a fingerprint database that held government employees' fingerprints prevented the court from reaching the conclusion that the jury was irrationally impressed, and (3) the time the State needed to develop the evidence was minimal. Mata v. State, 2007 Tex. App. LEXIS 2319 (Tex. App. Dallas Mar. 26 2007).

1696. Child victim's cousin's testimony that defendant had molested her in the past was highly probative and an important part of the State's case of indecency with a child because whether the offensive touching occurred was contested; because two witnesses testified to lack of opportunity, the cousin's testimony gave credibility to the victim's testimony, and given that the time the State needed to develop the extraneous offense evidence was minimal, the danger of unfair prejudice did not substantially outweigh the evidence's probative value. Maldonado v. State, 2007 Tex. App. LEXIS 2276 (Tex. App. Fort Worth Mar. 22 2007).

1697. During defendant's criminal prosecution for capital murder, the trial court did not abuse its discretion under Tex. R. Evid. 403 by determining that the probative value of the autopsy photographs of the three victims was not substantially outweighed by the danger of unfair prejudice. Although the photographs were gruesome, they depicted nothing more than the reality of the brutal crime committed. Confer v. State, 2007 Tex. App. LEXIS 2002 (Tex. App. Dallas Mar. 15 2007).

1698. In defendant's capital murder case, the court properly admitted extraneous offense evidence consisting of defendant's 1979 statement in which he admitted setting a fire that caused a person's death because there were no eyewitnesses, defendant had joined in placing identity at issue by claiming that another person who had quarreled with his brother was the perpetrator, and the 1979 offense was highly compelling evidence that made defendant's identity challenge much less probable. Powell v. State, 2007 Tex. App. LEXIS 2103 (Tex. App. Houston 1st Dist. Mar. 15 2007).

1699. Although defendant claimed that the admission of exhibits of handguns was overly prejudicial for purposes of Tex. R. Evid. 403, by the time the handguns were admitted, testimony was admitted without objection that the handguns had been seized from defendant's shed, witnesses testified that defendant was armed during the offense, and defendant testified to keeping guns and arming himself and codefendants, such that the court found the admission of the exhibits either did not influence the jury or had but a slight effect under Tex. R. App. P. 44.2, and thus error, if any, was harmless. Denton v. State, 2007 Tex. App. LEXIS 1706 (Tex. App. Tyler Mar. 7 2007).

1700. During defendant's trial for the unauthorized use of a motor vehicle, the trial court did not abuse its discretion by admitting evidence that defendant sold or pawned jewelry and other items stolen from the victims' residence over defendant's Tex. R. Evid. 404(b) objection; the evidence was relevant to prove that defendant knew that the truck was stolen and the probative value of the challenged evidence outweighed the danger that it might impress the jury in some irrational way. O'Donnell v. State, 2007 Tex. App. LEXIS 1551 (Tex. App. Austin Mar. 1 2007).

1701. Trial court did not err by admitting into evidence photographs found in defendant's home depicting unidentified women who were naked and unconscious under Tex. R. Evid. 404(b) because they had a logical relevance apart from character conformity; there were numerous similarities between the charged incident, sexual assault, and the photographs, and the photographs were relevant to rebut the defensive theories that the complainant brought the GHB, initiated the sexual activity, and consented to the photographic depiction of it; the risk of unfair prejudice from admitting the photographs did not substantially outweigh their probative value because the photographs were circumstantial evidence that the complainant did not consent in the offense and the evidence demonstrated a modus operandi of group sex, drugs, and photography and rebutted the defensive theory that the complainant brought the drugs, initiated the sex, and consented to the photography. Casey v. State, 215 S.W.3d 870, 2007 Tex. Crim. App. LEXIS 230 (Tex. Crim. App. 2007).

1702. In a juvenile defendant's murder case, the court did not err by admitting a videotape of the crime scene, although nine photographs of the crime scene were also admitted, because an officer testified that the video depicted items not included in the photographs such as the path that the cab took once it left the pavement, some blood spatter on a house, a tennis shoe in the driveway, and the position of the body inside the cab. In re E.C.D., 2007 Tex. App. LEXIS 1270 (Tex. App. San Antonio Feb. 21 2007).

1703. Appellate court considers rulings on relevance and Tex. R. Evid. 403 objections under an abuse of discretion standard. Gore v. State, 2007 Tex. App. LEXIS 1124 (Tex. App. Houston 14th Dist. Feb. 15 2007).

1704. Defendant appeared to argue that a Tex. R. Evid. 403 objection to evidence of defendant's flight should have been sustained because evidence that tended to rebut the inference of guilt from defendant's flight would have been too prejudicial, had it been elicited on cross-examination; however, the unfair prejudice in Tex. R. Evid. 403 must come from the offered evidence itself, not from evidence that would have to be offered in rebuttal, and to the extent this argument constituted a separate appellate issue, it was overruled. Gore v. State, 2007 Tex. App. LEXIS 1124 (Tex. App. Houston 14th Dist. Feb. 15 2007).

1705. In an intoxication manslaughter with a deadly weapon case, an enhanced videotape of the accident revealed that it was highly probative of the fact and manner of an officer's death; thus, it was clearly relevant under Tex. R. Evid. 402. Adams v. State, 2007 Tex. App. LEXIS 1165 (Tex. App. Fort Worth Feb. 15 2007).

1706. In defendant's trial for causing serious bodily injury to a child, the trial court did not violate Tex. R. Evid. 403 by admitting hospital and autopsy photographs of the child because they were admitted during the testimony of both the treating physician and the medical examiner who performed the autopsy, both testified as to the child's injuries, and the autopsy photographs, coupled with the examiner's testimony, provided crucial evidence of the severe force used by defendant to inflict the child's injuries. Rodriguez v. State, 2007 Tex. App. LEXIS 460 (Tex. App. Fort Worth Jan. 25 2007).

1707. In defendant's murder trial, the trial court did not err in admitting evidence of defendant's connection to a street gang, as it was relevant under Tex. R. Evid. 401 and not unduly prejudicial under Tex. R. Evid. 403; the evidence was relevant to rebut the claim that defendant was not a violent person and tended to make it more probable that defendant was willing to use deadly force in situations where defendant was not directly threatened with serious injury or death, and defendant's willingness to use deadly force made it more probable than not that defendant was not acting in self defense when the victim was shot; the likelihood that the evidence impressed the jury in an irrational way was slight, the evidence was not graphic and defendant never admitted to being a gang member, the State's need for the evidence was high, and the time needed to develop the evidence was minimal. Alvarez v. State, 2007 Tex. App. LEXIS 386 (Tex. App. Fort Worth Jan. 18 2007).

1708. In defendant's murder trial, the trial court properly admitted autopsy photographs because they had significant probative value as the State used them to rebut defendant's theory that his girlfriend committed the crime by trying to show that a woman was not capable of causing the internal injuries shown, including cutting through bone and cutting all the way from the victim's front and back ribs; for purposes of Tex. R. Evid. 403, the probative value was not substantially outweighed by the danger of unfair prejudice, and although the photographs were graphic, color photographs that depicted internal body parts separated from the rest of the body, these factors alone did not require exclusion. Hobday v. State, 2007 Tex. App. LEXIS 109 (Tex. App. San Antonio Jan. 10 2007).

1709. Where the owner of a grocery store was robbed at gunpoint, Tex. R. Evid. 404 permitted the trial court to admit evidence of an extraneous robbery two days earlier to confirm the identity of defendant as the perpetrator of the charged robbery. Any prejudice was substantially attenuated by the trial court's instruction to the jury to consider the evidence only for purposes of identity. Carter v. State, 2007 Tex. App. LEXIS 75 (Tex. App. Houston 14th Dist. Jan. 9 2007).

1710. Testimony in defendant's trial for aggravated sexual assault of a child concerning the child victim's account of what happened, was prejudicial to defendant under Tex. R. Evid. 403, but although it allowed an inference that the child told a consistent story, it was not likely to inflame the emotions of the jurors and thus was admissible. Gauna v. State, 2006 Tex. App. LEXIS 11128 (Tex. App. Austin Dec. 29 2006).

1711. Where defendant was charged with possession of cocaine with intent to deliver in a drug free zone, the trial court did not err by admitting evidence of another sale of cocaine by defendant to the police informant just days after the charged offense; the similarity between the crimes helped identify defendant as the dealer in both instances; the trial court correctly denied defendant's Tex. R. Evid. 403 objection. Smith v. State, 211 S.W.3d 476, 2006 Tex. App. LEXIS 11133 (Tex. App. Amarillo 2006).

1712. Defendant's conviction for aggravated robbery was appropriate because extraneous-offense evidence was relevant since the trial court could have reasonably concluded that the evidence compellingly served to make it more probable that the identification of the robber as defendant was accurate. Leija v. State, 2006 Tex. App. LEXIS

10966 (Tex. App. Houston 1st Dist. Dec. 21 2006).

1713. Trial court did not abuse its discretion by admitting evidence that police found a pistol in the trunk of his car when they arrested him because: (1) the extraneous offense in question, being a felon in possession of a firearm, was never presented to the jury; (2) the victim's description of the pistols used during the robbery general matched the pistol found in defendant's vehicle; (3) the weapon was found in a vehicle that closely matched the victim's description of a vehicle on the scene of the robbery; and (4) admission of the gun did not unfairly prejudice defendant. Young v. State, 2006 Tex. App. LEXIS 11371 (Tex. App. Houston 14th Dist. Dec. 21 2006).

1714. Admission of two prior similar acts by defendant into evidence did not violate Tex. R. Evid. 403 or 404(b), and defendant's convictions of sexual assault and impersonation of a public servant should not have been reversed, because the trial court testimony of the complainant and the two witnesses showed that the three incidents all occurred in mid-1997 and were similar in several significant respects. Page v. State, 213 S.W.3d 332, 2006 Tex. Crim. App. LEXIS 2446 (Tex. Crim. App. 2006).

1715. On defendant's petition for discretionary review under Tex. R. App. P. 66.3(c), the court held that the trial court could have reasonably concluded that the probative value of the breath test results was not substantially outweighed by the countervailing factors specified in Tex. R. Evid. 403: (1) the inherent probative force of the test results was considerable, as they showed that defendant had consumed a substantial amount of alcohol and therefore tended to make more probable defendant's intoxication when he was driving; (2) the results did not have a tendency to suggest decision on an improper basis, and did not have tendency to confuse or distract the jury from the main issues in the case; (3) the results did not have any tendency to be given undue weight by the jury, as a witness testified that the results could not be used to determine what defendant's breath alcohol concentration was at the time he was stopped; and (4) it was unlikely that presentation of the results would consume an inordinate amount of time or merely repeat evidence already admitted. Gigliobianco v. State, 210 S.W.3d 637, 2006 Tex. Crim. App. LEXIS 2450 (Tex. Crim. App. 2006).

1716. In an aggravated robbery case, the court properly allowed the State to present a witness's testimony that defendant had robbed her at gunpoint at a time when defendant's witness testified that he was working for her because the testimony had significant potential value to prove that defendant's alibi witness was not truthful; in light of the instructions given, the evidence did not have the potential to impress the jury in an irrational way, and no other evidence except the witness's significantly assisted the State in contradicting the account of defendant's whereabouts. Davis v. State, 214 S.W.3d 101, 2006 Tex. App. LEXIS 10866 (Tex. App. Beaumont 2006).

1717. Extraneous offense testimony was relevant under Tex. R. Evid. 401 to the issue of identity and was admissible to prove that defendant posed as a police officer and sexually assaulted a prostitute; the facts of the charged offense and the extraneous offenses showed a pattern of conduct sufficiently distinctive to constitute a signature. Page v. State, 2006 Tex. Crim. App. LEXIS 2521 (Dec. 20, 2006).

1718. Evidence of other contraband that police officers found in the room and evidence of the drugs found on the person of defendant's girlfriend, found while executing a search warrant was admissible when defendant was charged with possession of methadone that was found in the room because the evidence tended to establish the requisite affirmative link to the contraband. Davis v. State, 2006 Tex. App. LEXIS 10721 (Tex. App. Eastland Dec. 14 2006).

1719. Trial court did not err by admitting evidence relating to the search of the girlfriend and the discovery of the crack pipe because under Tex. R. Evid. 404(b) because the evidence was relevant to the issue of whether the contraband and drug paraphernalia were present in the house and tended to prove an affirmative link between defendant and the methadone, and therefore the evidence was relevant to show defendant's knowledge or intent to

possess the methadone. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because it had high probative value in affirmatively linking defendant to the methadone. Davis v. State, 2006 Tex. Crim. App. LEXIS 2526 (Tex. Crim. App. Dec. 14, 2006).

1720. Trial court did not abuse its discretion by admitting 14 autopsy photographs into evidence because they were relevant, as they accurately reflected the state of the victim's body when it was discovered and the injuries inflicted on him. None of the photographs were especially large, all were taken from different angles, and they were not gruesome simply because they showed the body in a state of decomposition. Gutierrez v. State, 2004 Tex. Crim. App. LEXIS 2211 (Tex. Crim. App. Apr. 21 2004).

1721. Trial court did not abuse its discretion by admitting victim-impact evidence of the victim's parents in violation of Tex. R. Evid. 403 because nothing in the record suggested that the State engaged in a comparison of the worth of defendant and the victim; the testimony came from immediate family members who related the uniqueness of the victim's character and the impact of his death on his family. Neither the tenor nor the volume of the evidence was such that it was unfairly prejudicial, nor would any prejudice resulting from the evidence substantially outweigh its probative value. Gutierrez v. State, 2004 Tex. Crim. App. LEXIS 2211 (Tex. Crim. App. Apr. 21 2004).

1722. Court properly admitted autopsy photos because, although they were gruesome, they were no more gruesome than the injuries that defendant inflicted upon the victim when he committed the offense of intoxication manslaughter. Each of the six photographs depicted a different view of the victim and showed the different injuries that she suffered, and the State did not offer a large number of photographs, nor were the photographs it offered cumulative of the victim's injuries. Booth v. State, 2014 Tex. App. LEXIS 2351, 2014 WL 887286 (Tex. App. Eastland Feb. 28 2014).

1723. Detective's testimony was not hearsay because his testimony concerning the police department's prior investigations for the "same type of offense" was not offered to establish that defendant had been investigated for or committed other instances of indecent exposure. Rather, the testimony was offered to explain the course of his investigation and how defendant came to be a suspect, which was an acceptable, non-hearsay purpose for admitting an out-of-court statement. Denmon v. State, 2014 Tex. App. LEXIS 2180, 2014 WL 857671 (Tex. App. Austin Feb. 27 2014).

1724. As a police officer had reasonable suspicion to detain defendant based upon the information in the NCIC system, such that ownership of the vehicle was not relevant to the detention, the trial court did not err in excluding evidence regarding the actual ownership of the vehicle that defendant was in when he was stopped. Thornton v. State, 2014 Tex. App. LEXIS 2273, 2014 WL 813745 (Tex. App. Waco Feb. 27 2014).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

1725. Although the evidence from the neighbor's apartment was not same transaction contextual evidence and the trial court abused its discretion in admitting it, the error was harmless given that the extent of the other evidence for defendant's guilt because the State found the marijuana hidden in defendant's truck, an officer observed defendant exit the apartment building appearing to hide something under his shirt, and defendant chose to lead police on a high-speech chase instead of submitting to the traffic stop. Gonzalez v. State, 510 S.W.3d 10, 2014 Tex. App. LEXIS 8934 (Tex. App. Corpus Christi Aug. 14 2014).

1726. Court did not err in refusing to exclude the extraneous offense testimony to rebut a defensive theory of fabrication, because the extraneous evidence tended to make the defensive claim of fabrication less probable, and the extraneous offense evidence was probative to rebut defendant's defensive theories that defendant was not the type of person who would sexually abuse a child and that the abuse allegations were fabricated. Shockley v. State,

2014 Tex. App. LEXIS 8345, 2014 WL 3756301 (Tex. App. Dallas July 30 2014).

1727. Trial court did not abuse its discretion by admitting evidence of the victim's half-sister about sexual abuse that defendant had inflicted upon her under this rule because it tended to rebut defendant's theory that the victim had fabricated her claims and there were similarities between defendant's conduct as described by both. The prejudicial effect of the testimony did not substantially outweigh its probative value because it was not so graphic as to be worse than the specifics to which the victim had already testified. Hosey v. State, 2014 Tex. App. LEXIS 7876, 2014 WL 3621796 (Tex. App. Texarkana July 23 2014).

1728. Murder victim's girlfriend was properly allowed to testify regarding an attempted drive-by shooting defendant committed against the victim, during which she was shot in the hand, and which occurred ten months before the murder, pursuant to Tex. Code Crim. Proc. Ann. art. 38.36(a) and Tex. R. Evid. 403 and Tex. R. Evid. 404(b). Jones v. State, 2014 Tex. App. LEXIS 7739, 2014 WL 3556587 (Tex. App. Waco July 17 2014).

1729. Evidence of methamphetamine found at the murder scene was properly admitted because it was relevant to establish a motive for defendant's actions and to rebut her claim of accidentally shooting the victim; there was no evidence presented that defendant was in possession of the drugs, and the evidence was admissible because the jury could infer that the prior relationship between the victim and defendant was one that involved drugs. Taylor v. State, 2014 Tex. App. LEXIS 7282 (Tex. App. Corpus Christi July 3 2014).

1730. Where appellant was convicted for indecency with a child by exposure, it was not an abuse of discretion to admit under Tex. R. Evid. 403 the extraneous offense testimony of a nephew, who testified that appellant had sexually assaulted the nephew when the nephew was 14 years old, because the factors weighed in favor of admission since, inter alia, the trial court could have reasonably concluded that the State's need for the extraneous offense evidence was high. Laube v. State, 2014 Tex. App. LEXIS 7076, 2014 WL 2993823 (Tex. App. Dallas June 30 2014).

1731. Court did not abuse its discretion in allowing the jury to hear evidence of defendant's prior conviction for possession of cocaine because the evidence made defendant's intent and his knowledge of the cocaine in his pocket more probable. Further, in light of the evidence presented, the trial court could have reasonably found that the State needed the evidence of the prior conviction to show that defendant knowingly possessed the cocaine. Rios v. State, 2014 Tex. App. LEXIS 5867 (Tex. App. El Paso May 30 2014).

1732. Witness's testimony that defendant coerced her through his position as police officer, took her to the same place as the victim in this case to assault her, and did so on the same night strongly rebutted defendant's defensive argument that the victim was fabricating her story in order to gain a U-Visa and a civil-lawsuit victory. Because the extraneous-offense evidence was so similar to the charged offense, it was probative as modus operandi evidence to rebut the issue of intent. Joseph v. State, 2014 Tex. App. LEXIS 5712 (Tex. App. Houston 14th Dist. May 29 2014).

1733. In defendant's trial for continuous sexual abuse of a child under fourteen years of age, evidence from two of the victim's cousins that defendant also molested them while they were visiting defendant and sleeping in the same bed with the victim was contextual and therefore admissible under Tex. R. Evid. 403 and 404(b).

End of Document

Tex. Evid. R. 404, Part 1 of 2

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 404 Character Evidence; Crimes or Other Acts

(a) ***Character Evidence.***

(1) ***Prohibited Uses.***--Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions for an Accused.***

(A) In a criminal case, a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) In a civil case, a party accused of conduct involving moral turpitude may offer evidence of the party's pertinent trait, and if the evidence is admitted, the accusing party may offer evidence to rebut it.

(3) ***Exceptions for a Victim.***

(A) In a criminal case, subject to the limitations in Rule 412, a defendant may offer evidence of a victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.

(B) In a homicide case, the prosecutor may offer evidence of the victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(C) In a civil case, a party accused of assaultive conduct may offer evidence of the victim's trait of violence to prove self-defense, and if the evidence is admitted, the accusing party may offer evidence of the victim's trait of peacefulness.

(4) ***Exceptions for a Witness.***--Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(5) *Definition of "Victim."* --In this rule, "victim" includes an alleged victim.

(b) ***Crimes, Wrongs, or Other Acts.***

(1) ***Prohibited Uses.***--Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in Criminal Case.***--This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence - other than that arising in the same transaction - in its case-in-chief.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; Unit 40, *Hearsay*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*.

Case Notes

Civil Procedure : Pretrial Matters : Separate Trials
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
Computer & Internet Law : Criminal Offenses : General Overview
Computer & Internet Law : Criminal Offenses : Child Pornography
Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Double Jeopardy
Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Scope of Protection
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Penalties
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : Elements
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Simple Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Coercion : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Elements
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Penalties
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General

Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : Elements
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Felony Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Voluntary Manslaughter : General Overview
Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Bail Jumping & Failure to Appear
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Cruelty to Animals : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Consciousness of Guilt
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Money Laundering : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Resisting Arrest : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Witness Tampering
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Destruction of Property : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Forgery : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Forgery : Elements
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview
Criminal Law & Procedure : Criminal Offenses : Racketeering : General Overview
Criminal Law & Procedure : Criminal Offenses : Racketeering : Extortion : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Indecent Exposure : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Indecent Exposure : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Obscenity : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Prostitution : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Penalties
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Rape : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : License Violations
Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Weapons : Use : General Overview
Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : General Overview
Criminal Law & Procedure : Grand Juries : Procedures : Return of Indictments : Refusals to Indict
Criminal Law & Procedure : Accusatory Instruments : Indictments : General Overview
Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims
Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : General Overview
Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Prior Record of Defendant
Criminal Law & Procedure : Discovery & Inspection : Discovery Misconduct : General Overview

Criminal Law & Procedure : Pretrial Motions & Procedures : Joinder & Severance : Severance of Defendants
Criminal Law & Procedure : Pretrial Motions & Procedures : Joinder & Severance : Severance of Offenses
Criminal Law & Procedure : Guilty Pleas : Admissibility at Trial
Criminal Law & Procedure : Guilty Pleas : Allocution & Colloquy
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Tests
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Counsel : Prosecutors
Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : General Overview
Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury : Invasion of Jury's Province
Criminal Law & Procedure : Trials : Burdens of Proof : Prosecution
Criminal Law & Procedure : Trials : Closing Arguments : General Overview
Criminal Law & Procedure : Trials : Continuances
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance
Criminal Law & Procedure : Trials : Examination of Witnesses : General Overview
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Judicial Discretion
Criminal Law & Procedure : Trials : Motions for Mistrial
Criminal Law & Procedure : Trials : Opening Statements
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Witnesses : Presentation
Criminal Law & Procedure : Defenses : General Overview
Criminal Law & Procedure : Defenses : Alibi
Criminal Law & Procedure : Defenses : Necessity
Criminal Law & Procedure : Defenses : Right to Present
Criminal Law & Procedure : Defenses : Self-Defense
Criminal Law & Procedure : Scienter : General Overview
Criminal Law & Procedure : Scienter : General Intent
Criminal Law & Procedure : Scienter : Knowledge
Criminal Law & Procedure : Scienter : Specific Intent
Criminal Law & Procedure : Jury Instructions : General Overview
Criminal Law & Procedure : Jury Instructions : Curative Instructions
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Jury Instructions : Objections
Criminal Law & Procedure : Jury Instructions : Particular Instructions : Accomplice Testimony
Criminal Law & Procedure : Jury Instructions : Particular Instructions : Reasonable Doubt
Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence
Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview
Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Standards
Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Sentencing : Imposition : Factors
Criminal Law & Procedure : Sentencing : Presentence Reports
Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Appeals : Procedures : Briefs
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview
Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

Criminal Law & Procedure : Appeals : Reversible Errors : Prosecutorial Misconduct
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Waiver Triggers Generally
Criminal Law & Procedure : Appeals : Right to Appeal : Defendants
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Mistrial
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Jury Instructions
Criminal Law & Procedure : Habeas Corpus : Appeals : General Overview
Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Evidentiary Rulings
Criminal Law & Procedure : Habeas Corpus : Review : Specific Claims : Evidentiary Errors
Evidence : Authentication : General Overview
Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Photographs
Evidence : Demonstrative Evidence : Recordings
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Rule Components
Evidence : Judicial Admissions : Admissions During Trials
Evidence : Procedural Considerations : Circumstantial & Direct Evidence
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof
Evidence : Procedural Considerations : Preliminary Questions : General Overview
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Relevance : Character Evidence
Evidence : Relevance : Compromise & Settlement Negotiations
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs

LexisNexis (R) Notes

Civil Procedure : Pretrial Matters : Separate Trials

1. Trial court did not err in denying a juvenile's motion to sever six counts of aggravated sexual assault for separate trials, in part because the juvenile made no showing that evidence of the extraneous offenses would not have been admissible in severed cases. In re D.L., 160 S.W.3d 155, 2005 Tex. App. LEXIS 1447 (Tex. App. Tyler 2005).

Civil Procedure : Appeals : Reviewability : Preservation for Review

2. Objection on relevance grounds did not preserve error under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1) as to an asserted Tex. R. Evid. 404(b) error. Helping Hands Home Care, Inc. v. Home Health of Tarrant County, Inc., 393 S.W.3d 492, 2013 Tex. App. LEXIS 820, 2013 WL 326319 (Tex. App. Dallas Jan. 29 2013).

3. Error was not preserved for review under Tex. R. App. P. 33.1 in a negligence case with regard to spoliation of evidence in the context of a venue transfer and the admission of character evidence at trial because no request was made to deem venue facts established as a sanction for discovery misconduct under Tex. R. Civ. P. 215.2(b)(3) and no objections were raised to the admission of testimony reflecting on character under Tex. R. Evid. 404(a), (b). Duff v. Spearman, 322 S.W.3d 869, 2010 Tex. App. LEXIS 7420 (Tex. App. Beaumont Sept. 9 2010).

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

4. Evidence that defendant had previously choked and violently sexually assaulted an individual 12 years ago was not admissible under Tex. R. Evid. 404(b) to aid the jury in determining that the victim did not consent to sexual intercourse with defendant because the evidence of the other crime only showed character conformity which is not a proper purpose for admission under Rule 404(b). Curtis v. State, 89 S.W.3d 163, 2002 Tex. App. LEXIS 6915 (Tex. App. Fort Worth 2002).

Computer & Internet Law : Criminal Offenses : General Overview

5. In a trial for defendant's online harassment of a psychic, there was no error under Tex. R. Evid. 403, 404 in admitting evidence that before and after the offense, defendant sent the victim a condom and panties because it showed intent to harm the victim, rather than to test her psychic abilities, when masquerading online as her hairdresser. Taylor v. State, 2012 Tex. App. LEXIS 2279, 2012 WL 955383 (Tex. App. Fort Worth Mar. 22 2012).

6. In a murder trial, there was no error under Tex. R. Evid. 401, 402, 403, 404 in admitting a video of a social networking page, on which defendant was depicted holding a gun. The evidence was relevant because a witness testified that the gun in the video was the same gun the witness saw defendant use in the murder; it wass unlikely that the jury would have felt compelled to convict defendant of murder simply because he acted like a "bad boy" and brandished a weapon on camera. Brumfield v. State, 2010 Tex. App. LEXIS 10137, 2010 WL 5187690 (Tex. App. Houston 1st Dist. Dec. 23 2010).

Computer & Internet Law : Criminal Offenses : Child Pornography

7. In a trial for defendant's sexual assault of a grandchild, there was no error in admitting evidence of child pornography seized from defendant's computer because the evidence rebutted defendant's testimony that defendant would not abuse the victim because the victim was a blood relative and that defendant did not have the same type of urge for children. Garreans v. State, 2008 Tex. App. LEXIS 852 (Tex. App. Dallas Feb. 5 2008).

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Double Jeopardy

8. Under Tex. R. Evid. 404, because appellant was not prosecuted for the extraneous offense of the attempted murder of his mother-in-law in his trial for the murder of his estranged wife, his constitutional right to double jeopardy protection under the Fifth Amendment and Tex. Const. art. I, § 14 was not implicated; thus, appellant's constitutional right guarantee against double jeopardy was not violated. Milner v. State, 263 S.W.3d 353, 2008 Tex. App. LEXIS 1457 (Tex. App. Houston 1st Dist. 2008).

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Scope of Protection

9. In a case involving indecency with a child, defendant's due process rights were not violated by the admission of extraneous offense evidence because it was admissible to rebut the contention that a victim was fabricating her allegations and that defendant was not the type of person who would have engaged in these acts. Bass v. Tex., 2009 Tex. App. LEXIS 4736, 2009 WL 3839003 (Tex. App. Houston 14th Dist. June 18 2009).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : General Overview

10. In a drug trial, there was no error under Tex. R. Evid. 403, 404(b), Rule 608(a) in excluding evidence, offered to show bias, that an officer was investigated for planting drugs on a defendant in an unrelated case because the allegations were determined to be unfounded. Brown v. State, 2010 Tex. App. LEXIS 5432, 2010 WL 2772488 (Tex. App. San Antonio July 14 2010).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale

11. Defendant's murder indictment alleged that defendant murdered the victim in retaliation for her cooperation with the police, which eventually led to defendant's conviction for delivery of cocaine; thus, the prior drug conviction was not an irrelevant, extraneous offense that showed only that defendant was a criminal generally. Therefore, the admission of two photographs related to that conviction and the cross-examination by the State regarding those photographs and his prior drug conviction were not erroneous. Russell v. State, 155 S.W.3d 176, 2005 Tex. Crim. App. LEXIS 150 (Tex. Crim. App. 2005).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview

12. In a trial for manufactured methamphetamine, there was no error in the admission of evidence concerning a subsequent arrest, seven months later, for possession of chemicals with intent to manufacture methamphetamine. That evidence tended to make less probable defendant's argument that he possessed items used to manufacture methamphetamine solely for use in bartering for drugs; because it refuted a defense, had relevance separate from character conformity and was admissible under Tex. R. Evid. 404. Tarpley v. State, 2005 Tex. App. LEXIS 6289 (Tex. App. Dallas Aug. 10 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 8782 (Tex. App. Dallas Oct. 24, 2005).

13. In a criminal prosecution for possession of a controlled substance with intent to deliver or manufacture, the trial court properly admitted evidence that defendant had some chemicals and scales at his house before the police raid where this rebuttal evidence was admissible to show the defensive theory that defendant knew nothing on the subject of methamphetamine lacked merit. Revill v. State, 2004 Tex. App. LEXIS 5654 (Tex. App. Tyler June 23 2004).

14. In a possession and manufacture of methamphetamine case, admission of evidence regarding defendant's arrest in another county was proper as issues of who was in care, custody, or control of the clandestine laboratory equipment and the methamphetamine, and of defendant's intent and knowledge, were in dispute, and that he had the same type of equipment used in the manufacture on his own property in the other county was therefore relevant to those issues. Tullos v. State, 2004 Tex. App. LEXIS 5186 (Tex. App. Beaumont June 9 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

15. Evidence of trace quantities of controlled substances that were found in defendant's car during the same search in which the methadone was found was admissible under Tex. R. Evid. 404(b), even though it was not admissible as same transaction contextual evidence, because the evidence constituted a recognized link to drug possession and refuted defendant's contention that his possession of the pill bottle containing methadone was merely inadvertent. Lamkin v. State, 2010 Tex. App. LEXIS 6484, 2010 WL 3170647 (Tex. App. Eastland Aug. 12

2010).

16. In a case in which defendant was convicted of felony possession of a controlled substance by fraud under Tex. Health & Safety Code Ann. § 481.129(a)(5), (d), the trial court did not err by admitting extraneous offense evidence where, to the extent that there were differences between the instant offense and the extraneous offense, the offenses were sufficiently similar to be admissible under Tex. R. Evid. 404(b) for purposes of proving defendant's identity because: (1) the two offenses were committed within six weeks of each other; (2) in each instance, defendant presented a fraudulent prescription for 120 pills of dihydrocodeinone (an amount far in excess of normal prescription amounts); (3) the prescription slip had been created using an incorrect typeface and physician signature (as opposed to theft of an actual physician's prescription pad); (4) neither named physician had a patient by the name of the person listed on the prescription to receive the dihydrocodeinone; and (5) an employee from each pharmacy noticed defendant's distinctive tattoo and identified him from a photo line-up. Greer v. State, 2010 Tex. App. LEXIS 5632, 2010 WL 2813404 (Tex. App. Fort Worth July 15 2010).

17. In trial for possession of methamphetamine, extraneous offense evidence pertaining to other controlled substances and illegal narcotics found at the same time as the methamphetamine was properly admitted because it was relevant to an affirmative links analysis and was not likely to impress a jury in an irrational but nevertheless indelible way, given that the evidence supporting the charged offense was far more damaging. Johnson v. State, 2007 Tex. App. LEXIS 7773 (Tex. App. Fort Worth Sept. 27 2007).

18. Drug use is not an essential element of the crime of possession of a controlled substance; a defendant may not, therefore, use specific instances of drug use; rather, he may only use reputation or opinion testimony to prove his good character. Norton v. State, 2006 Tex. App. LEXIS 2333 (Tex. App. Houston 14th Dist. Mar. 28 2006).

19. In defendant's drug case, a court did not err by admitting "extraneous offense" evidence of his meeting with an undercover agent the morning of his arrest because defendant's presence at and participation in the negotiation regarding the drugs was not a separate offense, but was part of the evidence showing that defendant knowingly exercised care, custody, control and management of the marihuana on the date alleged in the indictment; as such, it was part of the charged offense. Urias v. State, 2006 Tex. App. LEXIS 1495 (Tex. App. El Paso Feb. 23 2006).

20. Where defendant was charged with possession of methamphetamine, a controlled substance, the arresting officer was permitted to testify to finding a sawed-off shotgun during the search of defendant's residence; possession of an illegal weapon qualified as same transaction contextual evidence in the circumstances of this offense, which established affirmative links between the methamphetamine and defendant. Longoria v. State, 2006 Tex. App. LEXIS 1158 (Tex. App. Corpus Christi Feb. 9 2006).

21. Trial court did not err in admitting items used in the manufacture of methamphetamine and amphetamine in the case against defendant for possession of amphetamine as these items went to the issue of knowledge or criminal intent which was an element in the possession case. Popp v. State, 2005 Tex. App. LEXIS 631 (Tex. App. Waco Jan. 26 2005).

22. In a trial for heroin possession, gang-membership evidence was admissible under Tex. R. Evid. 404 because the evidence was interlaced with the offense; the offense's obscurity was eliminated with evidence that the defendant was a gang member. The expert testified about the gang's trade being the trafficking of heroin, primarily by using a female's body cavity to transport the contraband, and having that female accompanied by a gang member; defendant was stopped entering the country with a woman who was carrying heroin in her vaginal cavity. Ojeda v. State, 2004 Tex. App. LEXIS 8557 (Tex. App. El Paso Sept. 24 2004).

23. In a possession and manufacture of methamphetamine case, admission of evidence regarding defendant's arrest in another county was proper as issues of who was in care, custody, or control of the clandestine laboratory equipment and the methamphetamine, and of defendant's intent and knowledge, were in dispute, and that he had the same type of equipment used in the manufacture on his own property in the other county was therefore relevant to those issues. Tullos v. State, 2004 Tex. App. LEXIS 5186 (Tex. App. Beaumont June 9 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute

24. Trial court did not abuse its discretion by admitting extraneous drug offense evidence because the extraneous offense evidence showed that defendant sold and delivered cocaine to an officer during an undercover buy which took place the day before the search warrant was executed. That extraneous drug offense evidence was relevant to show that defendant had knowledge of the cocaine located within the residence and possessed it with intent to deliver. Banal v. State, 2012 Tex. App. LEXIS 10661, 2012 WL 6681946 (Tex. App. El Paso Dec. 21 2012).

25. In a trial for drug possession with intent to deliver, evidence that a gun was found with the drugs was properly admitted under Tex. R. Evid. 404(b) because defendant was also charged with using or exhibiting a deadly weapon during the offense. De La Cruz v. State, 2010 Tex. App. LEXIS 2336, 2010 WL 1254537 (Tex. App. Corpus Christi Apr. 1 2010).

26. Under Tex. R. Evid. 404(b), it was error in a trial for possession with intent to deliver 34 grams of crack cocaine to admit evidence that defendant had previously possessed .88 grams of cocaine because the prior possession did not tend to make defendant's intent to deliver the cocaine in the current case more or less likely. However, the error was harmless under Tex. R. App. P. 44.2 because there was evidence that, while in jail, defendant directed the continued sale of crack cocaine and that the cocaine rocks at issue belonged to him, rendering possession of .88 grams of crack cocaine three years earlier almost insignificant in comparison with his current conduct. De La Cruz v. State, 2010 Tex. App. LEXIS 2336, 2010 WL 1254537 (Tex. App. Corpus Christi Apr. 1 2010).

27. Where defendant was charged with possession of cocaine with intent to deliver in a drug free zone, the trial court did not err by admitting evidence of another sale of cocaine by defendant to the police informant just days after the charged offense; the similarity between the crimes helped identify defendant as the dealer in both instances. Smith v. State, 211 S.W.3d 476, 2006 Tex. App. LEXIS 11133 (Tex. App. Amarillo 2006).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements

28. In a drug trial, there was no error under Tex. R. App. P. 404(b) in admitting video excerpts showing defendant in a drug house because they showed intent, knowledge, and absence of mistake or accident in light of the indicted possession-with-intent-to-deliver offense. Mincey v. State, 2009 Tex. App. LEXIS 2825, 2009 WL 1058734 (Tex. App. Dallas Apr. 21 2009).

29. Trial court did not abuse its discretion in admitting evidence of defendant's statement, which contained a list of persons to whom defendant admitted he had sold methamphetamine as well as his admissions that he had bought approximately a half-ounce of methamphetamine every week for the last three years, that he used about a quarter-ounce every week, that he sold the rest, and that he sold enough methamphetamine to support his habit, because those portions of the statement that related to defendant's selling methamphetamine were relevant to proving intent to deliver, which was an essential element of defendant's offense, possession of a controlled substance with intent to deliver. Furthermore, the probative force and the State's need to admit the statement outweighed the factors that favored exclusion because defendant's admission that he regularly sold methamphetamine was compelling evidence that he intended to sell methamphetamine, and his admission further served to rebut his theories that the drugs were planted on him and that the money that he carried when he was arrested had come, not from selling

drugs, but from payments from his rental properties. Bridges v. State, 2008 Tex. App. LEXIS 6634 (Tex. App. Fort Worth Aug. 29, 2008).

30. Evidence of a defendant's previous drug sales was admissible under Tex. R. Evid. 404 at his trial for possession of methamphetamine with intent to deliver because this evidence belied his defense that he was unaware of the large amount of methamphetamine hidden in a motel room registered in his name, and it showed his awareness of the drug and his intent to sell it. Hernandez v. State, 2008 Tex. App. LEXIS 2634 (Tex. App. Dallas Apr. 11 2008).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Penalties

31. In a drug case, the State was not collaterally estopped from using evidence of a manufacturing facility as extraneous offense evidence relevant to prove the knowing possession of methamphetamine; because the record of a prior trial where the result was an acquittal and a hung jury was not introduced at trial or made a part of the appellate record, the collateral estoppel claim did not prevail. Tyler v. State, 2007 Tex. App. LEXIS 6462 (Tex. App. Beaumont Aug. 15 2007).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview

32. Trial court did not abuse its discretion in admitting extraneous-offense evidence during defendant's trial on a charge of possession of less than one gram of cocaine because the extraneous offense, which was committed while defendant was on bail awaiting the instant trial, also involved possession of cocaine thereby establishing defendant's familiarity with the substance and the jury was given an appropriate limiting instruction; the extraneous offense involved over six grams of cocaine. Baker v. State, 2013 Tex. App. LEXIS 11745, 2013 WL 12297784 (Tex. App. Texarkana Sept. 18 2013).

33. In a driving while intoxicated trial, evidence that cocaine was located in plain view next to the driver's seat in the vehicle defendant was driving was relevant to prove the State's allegation in the indictment that defendant was intoxicated, and, because the possession of cocaine evidence went to a material element of the State's case, it was not an extraneous offense. Lopez v. State, 2013 Tex. App. LEXIS 2064, 2013 WL 765711 (Tex. App. Waco Feb. 28 2013).

34. In a possession of marijuana case, the trial court did not err by admitting extraneous offense evidence under Tex. R. Evid. 404(b) as it served to illustrate defendant's involvement in a transaction that started at the residence and included depictions of behavior that tended to show his awareness of the contents (drugs) in the back of the vehicle; he was placed in the garage, where marijuana was found with packaging similar to the packaging of the marijuana found in the vehicle. All of this evidence tended to show the same continuous transaction and to demonstrate defendant's intentional and knowing possession of the marijuana in the vehicle. Duarte v. State, 2008 Tex. App. LEXIS 5837 (Tex. App. El Paso July 31 2008).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : Elements

35. In a drug trial, it was proper under Tex. R. Evid. 404 to admit evidence of recent sting operations that had each led to defendant's arrest for delivery of a controlled substance in order to show defendant's knowledge of the cocaine found in defendant's car. Armstrong v. State, 2008 Tex. App. LEXIS 1328 (Tex. App. Austin Feb. 21 2008).

36. In a drug possession trial, evidence of defendant's extraneous violent conduct toward defendant's spouse was properly admitted under Tex. R. Evid. 404(b) in light of the claim that the drugs found in the spouse's purse belonged to the spouse because the evidence of violent conduct was relevant to show that the spouse feared and was controlled by defendant and that the spouse put the drugs in the purse at defendant's direction. Huneycutt v. State, 2007 Tex. App. LEXIS 9975 (Tex. App. Amarillo Dec. 21 2007).

37. In a trial for possession of marihuana, evidence was properly admitted regarding defendant's prior drug use because it was relevant to whether defendant had the requisite intent and knowledge, issues that defendant contested. Wingfield v. State, 197 S.W.3d 922, 2006 Tex. App. LEXIS 6810 (Tex. App. Dallas 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

38. In an assault trial, evidence of defendant's extraneous assault on and arguments with his girlfriend was admissible under Tex. R. Evid. 404(b) because the evidence was relevant to proving defendant's motive for returning to the girlfriend's home later that evening and brandishing a gun when confronted by her mother. The assault of the girlfriend was also same transaction contextual evidence, providing the jury with a context to show the relevant surrounding facts and circumstances relating to the assault against the mother. Bazile v. State, 2010 Tex. App. LEXIS 9385, 2010 WL 4813786 (Tex. App. Dallas Nov. 29 2010).

39. In an assault trial, there was no error under Tex. R. Evid. 403 and 404(b) in admitting evidence of an assault that defendant committed against his common-law wife to rebut his theory of self-defense. White v. State, 2010 Tex. App. LEXIS 5604, 2010 WL 2803018 (Tex. App. Eastland July 15 2010).

40. In a criminal prosecution for aggravated assault, the trial court did not abuse its discretion in admitting evidence of defendant's prior acts of aggression; the prior violent acts presented by the State were admissible to show defendant's intent and to rebut her theory of self-defense. Vidal v. State, 2006 Tex. App. LEXIS 1913 (Tex. App. Eastland Mar. 9 2006).

41. In a criminal prosecution for aggravated assault, an officer was permitted to testify that when he was talking to appellant he observed appellant take out a pistol and throw it on the ground. The testimony was relevant to whether the appellant committed aggravated assault by pointing a gun at the complainant just hours before his arrest. Payne v. State, 2004 Tex. App. LEXIS 9785 (Tex. App. Houston 14th Dist. Nov. 4 2004).

42. In an assault case, evidence of gun possession was properly allowed as an extraneous offense because it was indivisibly connected to the charged offense, and it explained the context of the offense for which defendant was tried; the evidence showed that defendant committed the crime of felon in possession of a handgun by placing a gun in a vehicle before threatening two law enforcement officers. Morales v. State, 2004 Tex. App. LEXIS 3602 (Tex. App. Eastland Apr. 22 2004).

43. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past.

Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

44. In defendant's assault case, a court did not err in admitting testimony that defendant had previously assaulted the victim where the court admitted the testimony in order to remedy an impression created by defendant's cross-examination that the victim's father was being evasive and was racially biased against defendant. By repeatedly questioning the victim's father as to his reason for disapproving of defendant, defendant opened the door to the testimony that the disapproval was due to the prior offense. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

45. In a criminal prosecution for assault causing bodily injury to a family member, evidence of phone calls defendant made threatening the victim was admissible under Tex. R. Evid. 404 to rebut the defense theory that because the victim was not afraid of defendant, the offense did not occur. Martinez v. State, 2004 Tex. App. LEXIS 1418 (Tex. App. Fort Worth Feb. 12 2004).

46. In a criminal prosecution for assaulting a public servant, the trial court did not violate Tex. R. Evid. 404 by admitting evidence of the defendant's status as a parolee at the time of the offense. Defendant's desire to avoid being incarcerated for violating his parole was the triggering factor of the chain of events that ultimately resulted in the assault of a police officer. Hall v. State, 2004 Tex. App. LEXIS 489 (Tex. App. San Antonio Jan. 21 2004).

47. Trial judge properly applied the balancing test found in Tex. R. Evid. 403 to exclude from a trial for aggravated assault evidence with respect to the victim's extraneous acts of violence in order to show defendant's state of mind under Tex. R. Evid. 404(b). Mozon v. State, 991 S.W.2d 841, 1999 Tex. Crim. App. LEXIS 39 (Tex. Crim. App. 1999).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

48. In a shooting case, it was proper to admit extraneous offenses as same transaction contextual evidence because shooting two other victims at the same place and time as the victim of the charged shooting, flight, and assault on a deputy were relevant to the issues of identity and rebutting defendant's other-shooter theory. Hignojos v. State, 2013 Tex. App. LEXIS 8929 (Tex. App. Eastland July 18 2013).

49. In an aggravated assault case under Tex. Penal Code Ann. §§ 22.01(a)(1) and 22.02(a), defendant was not entitled to use a specific act of violence to show that the victim was the first aggressor as only opinion and reputation testimony was admissible to show the victim's character for violence and defendant's use was an attempt to prove that the victim's conduct in conformity with his violent character, which Tex. R. Evid. 404(a) and 405(a) prohibited; also, the record did not suggest that defendant attempted to use a witness's testimony that the victim had choked her for any admissible purpose. Thus, the trial court did not abuse its discretion by excluding the witness's testimony. Hawthorne v. State, 2011 Tex. App. LEXIS 1728, 2011 WL 846121 (Tex. App. Beaumont Mar. 9 2011).

50. In a trial for aggravated assault on a public servant, evidence of defendant's assault on his wife earlier the same evening was admissible under Tex. R. Evid. 401, 404 as same transaction contextual evidence or as background contextual evidence. The series of events that took place that night was an uninterrupted continuum of conduct that was, in essence, a single event. Hester v. State, 2009 Tex. App. LEXIS 9311, 2009 WL 4597948 (Tex. App. Texarkana Dec. 8 2009).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

51. In an aggravated assault with a deadly weapon case, the trial court did not err in admitting the evidence of prior violence by defendant toward the victim because it could help establish that the breakup motivated defendant to act violently toward the victim and by extension toward the boyfriend who had taken his place beyond the tendency of the evidence to show defendant's inclination toward violence. Gray v. State, 2014 Tex. App. LEXIS 3, 2014 WL 24410 (Tex. App. Texarkana Jan. 2 2014).

52. In an assault trial arising from a drive-by shooting, evidence was properly admitted under Tex. R. Evid. 403, 404 that defendant, the driver, was charged with the offense of unlawfully carrying a weapon while he was out on bond for the instant case. The evidence was relevant to rebut a defensive theory that defendant did not know a passenger in the backseat possessed a sawed-off shotgun at the time of the drive-by shooting. Ramirez v. State, 2006 Tex. App. LEXIS 3245 (Tex. App. Houston 14th Dist. Apr. 25 2006).

53. In an assault trial arising from a drive-by shooting, evidence was properly admitted under Tex. R. Evid. 404 that defendant, the driver, was charged with the offense of unlawfully carrying a weapon while he was out on bond for the instant case; the evidence was relevant to rebut a defensive theory that defendant did not know a passenger in the backseat possessed a sawed-off shotgun at the time of the drive-by shooting. Ramirez v. State, 2006 Tex. App. LEXIS 3245 (Tex. App. Houston 14th Dist. Apr. 25 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Simple Offenses

54. In a trial for assault on a public servant, testimony that defendant was a convicted felon and in possession of drugs and a handgun was properly admitted under Tex. R. Evid. 404(b) because it was relevant to motive. Thurman v. State, 2007 Tex. App. LEXIS 135 (Tex. App. Tyler Jan. 10 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Coercion : General Overview

55. In a retaliation case, the trial court did not err in admitting evidence of extraneous offenses as the first threat was sufficiently similar to that charged in the instant case to render it admissible on the issue of intent; the threats were made at the same location, to the same person, close in time, and for the similar purpose of punishing the threatened individual. Woolverton v. State, 2004 Tex. App. LEXIS 10502 (Tex. App. Houston 14th Dist. Nov. 24 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

56. Mistrial was not required on a charge of indecency with a child, even though a witness testified regarding an extraneous act after the trial court ruled the evidence inadmissible, because the statement was isolated, did not include details, and was not the result of prosecutorial misconduct. The court presumed that a curative instruction was effective. Vickery v. State, 2005 Tex. App. LEXIS 7664 (Tex. App. Fort Worth Sept. 15 2005).

57. In a trial for child sexual assault, testimony about extraneous acts was properly admitted under Tex. Code Crim. Proc. art. 38.37, notwithstanding Tex. R. Evid. 404 and 405. The testimony from a complainant, defendant's stepdaughter, concerned two sexual encounters and was highly probative of both defendant's intent to engage in the charged offenses and the states of mind of defendant and the stepdaughter. Miller v. State, 2005 Tex. App. LEXIS 6227 (Tex. App. El Paso Aug. 4 2005).

58. In a child abuse case, pictures of injuries suffered by a sibling should not have been admitted because they did not show that defendant caused a cigarette burn on a child's hand where the evidence established that both defendant and the mother had caused the sibling's injuries, and there was no evidence of any cigarette burns of the sibling. Johnston v. State, 145 S.W.3d 215, 2004 Tex. Crim. App. LEXIS 1478 (Tex. Crim. App. 2004).

59. In a child abuse case, pictures of injuries suffered by a sibling should not have been admitted because they did not show an absence of mistake on the part of defendant; defendant contended that a cigarette burn on a child's hand was accidentally caused by the child's mother. Johnston v. State, 145 S.W.3d 215, 2004 Tex. Crim. App. LEXIS 1478 (Tex. Crim. App. 2004).

60. In a child abuse trial, the child's foster mother was properly allowed to testify that when she changed dressings in the child's vaginal area, the child said that her daddy had touched her there. The evidence rebutted the father's defense that the child's burns were accidental, arguably supported a finding that there was a pattern of abuse, and was not explicit in a way that would impress the jury in an irrational and indelible way. Wooten v. State, 2004 Tex. App. LEXIS 4296 (Tex. App. Austin May 13 2004).

61. Burglary defendant's statement that his three children were waiting next door during the burglary was properly admitted. The trial court's ruling that the statement did not reveal an extraneous offense or bad act was within the zone of reasonable disagreement; the State also pointed out that evidence was admissible as proof of opportunity. Carter v. State, 2004 Tex. App. LEXIS 3394 (Tex. App. Austin Apr. 15 2004).

62. In a murder trial, incidences of domestic violence were properly admitted as an indication of the prior relationship between defendant and the victim, his wife. The significant probative value as to self defense and intent outweighed any prejudice. Heard v. State, 2004 Tex. App. LEXIS 3254 (Tex. App. El Paso Apr. 8 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview

63. In a trial for the murder of defendant's 4-month-old child, there was no error under Tex. R. Evid. 403, 404(b) in admitting evidence that defendant physically abused the child's mother. The evidence negated the defense theory that the mother was actually the person who beat the child and caused the fatal injury. Miller v. State, 2012 Tex. App. LEXIS 6693 (Tex. App. Beaumont Aug. 10 2012).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children

64. There was no error in admitting extraneous offense evidence that defendant parent had cause to believe and failed to report that there was abuse of the child years before the charged offense, because the evidence was relevant to counter the defensive theory that the child was lying both about the abuse and about telling defendant it had occurred. Cannell v. State, 2013 Tex. App. LEXIS 15299, 2013 WL 6729857 (Tex. App. Houston 1st Dist. Dec. 19 2013).

65. Inappropriate touching reported by a witness occurred in the midst of the on-going sexual abuse at issue in a trial for failure to report; therefore, the testimony did not concern an extraneous offense and prior notice was not required. Cannell v. State, 2013 Tex. App. LEXIS 15299, 2013 WL 6729857 (Tex. App. Houston 1st Dist. Dec. 19 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault

66. In a trial for assault on a family member, elevated to a third-degree felony by a prior conviction, it was reversible error not to allow defendant to stipulate to one prior conviction for assault on a family member, rather than admitting evidence of two prior convictions. Taylor v. State, 442 S.W.3d 747, 2014 Tex. App. LEXIS 8750 (Tex. App. Amarillo Aug. 8 2014).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Elements

67. Trial court's admission of an assault victim's testimony concerning allegations contained in a divorce petition she filed against defendant, if erroneous, was harmless under Tex. R. App. P. 44.2(b) where testimony presented by the responding officers and pictures of the victim on the night of the incident revealing redness in the victim's left eye and bruising around the eye were admitted without objection and were amply sufficient to enable the jury to find that defendant, at a minimum, recklessly caused bodily injury to the victim. Furthermore, because the State did not emphasize the divorce petition evidence in its argument to the jury, the victim's testimony regarding the divorce petition had no more than a slight effect, if any, on the jury's decision. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Penalties

68. In the punishment phase of a domestic assault trial, defendant was not entitled to notice of the State's intent to introduce his daughter's statement about an unprosecuted allegation of sexual assault because the court found nothing in the record showing that he requested notice of extraneous offenses before the statement was offered. Sanders v. State, 422 S.W.3d 809, 2014 Tex. App. LEXIS 1090, 2014 WL 325028 (Tex. App. Fort Worth Jan. 30 2014).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview

69. In a kidnapping trial, evidence that the complainant bought Oxycontin from defendant before the complainant learned of her pregnancy was admissible under Tex. R. Evid. 404(b), 403 because it was relevant to the defenses of immunity, necessity, and defense of third person, which were based on a claim that the complainant was endangering and abusing or neglecting her unborn child by consuming Oxycontin while pregnant. Scroggs v. State, 396 S.W.3d 1, 2010 Tex. App. LEXIS 3769, 2010 WL 1993676 (Tex. App. Amarillo May 19 2010).

70. In a case charging that defendant kidnapped a car salesperson to collect a debt, defendant should have been permitted to introduce testimony from five business associates that defendant was an honest, non-violent businessperson, whom they trusted; the evidence was pertinent to the charged crime and admissible to show that, in light of defendant's character, it was unlikely that defendant committed the charged offense. Melgar v. State, 236 S.W.3d 302, 2007 Tex. App. LEXIS 2207 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

71. Because the robberies occurred in the same geographic area within a relatively brief time frame, and all were committed by an assailant who covered his hands with socks or gloves, and whose face was completely covered by a similar covering, leaving only the eyes exposed, there are sufficient common characteristics between each of the robberies, that the extraneous offenses were relevant to prove identity and admissible under Tex. R. Evid. 401, 402, 404(b). Heigelmann v. State, 362 S.W.3d 763, 2012 Tex. App. LEXIS 1670, 2012 WL 688427 (Tex. App. Texarkana Mar. 2 2012).

72. In a trial for capital murder arising from a robbery and shooting, it was reversible error under Tex. R. Evid. 404 to admit evidence that defendant committed an armed robbery of a grocery store a month after the charged murder. The mere fact that both offenses were armed robberies did not make them sufficiently similar to prove identity; the evidence was not admissible as to intent because intent was not at issue. The other crimes evidence had substantial potential to convince the jury that defendant was a criminal in general and, therefore, probably committed the charged offense. Jackson v. State, 320 S.W.3d 873, 2010 Tex. App. LEXIS 6572 (Tex. App. Texarkana Aug. 12 2010).

73. In a robbery trial, there was no error under Tex. R. Evid. 404(b) in admitting testimony about defendant's prior aggravated assault and criminal mischief. The evidence was relevant to correct a false impression left by defendant's testimony that he had no prior arrests, charges, or trouble with the police and to rebut a defensive theory of duress. Hemphill v. State, 2009 Tex. App. LEXIS 8330, 2009 WL 3488053 (Tex. App. Waco Oct. 28 2009).

74. In a robbery trial, substantial similarities supported the admission under Tex. R. Evid. 403 and 404(b) of evidence of an extraneous offense, when similarities included similarly described perpetrators attempting nighttime robberies of taquerias located in similar neighborhoods when the complainant was alone. In both cases, the perpetrator fitting defendant's description was armed with a pistol, both victims spoke limited English, and the offenders apparently approached and left the taquerias on foot. Vela v. State, 2007 Tex. App. LEXIS 2336 (Tex. App. Houston 14th Dist. Mar. 27 2007).

75. Where the owner of a grocery store was robbed at gunpoint, Tex. R. Evid. 404 permitted the trial court to admit evidence of an extraneous robbery two days earlier to confirm the identity of defendant as the perpetrator of the charged robbery. There were several similarities between the offenses indicating defendant's handiwork; in both instances, the robber concealed his face by covering it with his shirt and attacked the individuals while they filled a coffee pot next to the cash booth inside the store. Carter v. State, 2007 Tex. App. LEXIS 75 (Tex. App. Houston 14th Dist. Jan. 9 2007).

76. In a robbery trial, similarities between an extraneous offense and the charged aggravated robbery offenses were sufficient to allow the introduction of the extraneous offense under Tex. R. Evid. 404; the extraneous robbery and the charged robberies all occurred within hours of each other in the same area; each victim was an older female and was dragged or thrown to the ground as her purse was pulled from her arm; defendant's vehicle was used in all three robberies; and the witnesses' descriptions of the perpetrator generally matched defendant. Hutchins v. State, 2006 Tex. App. LEXIS 8464 (Tex. App. Corpus Christi Sept. 28 2006).

77. In a trial for the robbery of a pickup truck, the trial court properly admitted a police chase video of the robbers' pickup along with testimony about the chase, even though defendant was not in the truck, as well as evidence of three handguns found in the pickup; the evidence was admissible under Tex. R. Evid. 404(b) as same transaction contextual evidence because the robbers used their truck to find their target, followed that vehicle to the complainant's residence, and blocked the complainant's vehicle in the driveway with theirs and both vehicles left together and only separated after officers turned on their emergency lights; by introducing evidence of the subsequent police chase of the robbers' pickup and the handguns located within, the State painted a full picture for the jury. Hawkins v. State, 2006 Tex. App. LEXIS 6439 (Tex. App. Houston 1st Dist. July 20 2006).

78. In a trial for aggravated robbery, there was no error in admitting evidence regarding an extraneous offense involving a drug transaction with one of the victims. From defendant's participation in the previous drug transaction, it was reasonable for the jury to infer that he knew or should have known that the victims would have cash on them. Jefferson v. State, 2005 Tex. App. LEXIS 7288 (Tex. App. Houston 1st Dist. Aug. 31 2005).

79. In a trial for robbery, extraneous offense evidence was properly admitted under Tex. R. Evid. 404(b) and 403 because the similarity in the offenses made the evidence compelling as to identity. In both robberies, the assailants drove into an apartment complex parking lot, wore shirts bearing Houston police insignia, claimed to be police officers, and searched Hispanic male victims; money was taken in both robberies with a silver pistol. Casique v. State, 2005 Tex. App. LEXIS 6517 (Tex. App. El Paso Aug. 16 2005).

80. Admission was proper of extraneous acts evidence, including defendant's escape, aggravated assault on a police officer, aggravated assault, and unauthorized use of two vehicles. Defendant's motive for robbery could be explained by the fact that he had escaped from prison and needed money; the events occurred in one afternoon and during the same contextual transaction; identity was contested; and the contemporaneous evidence proved that defendant had the same gun and car as the person who committed the robbery. Russell v. State, 2005 Tex. App. LEXIS 3703 (Tex. App. Texarkana May 13 2005).

81. In a criminal prosecution for aggravated robbery, evidence of the three previous instances in which appellant had taken money or personal property from the complainant was relevant to rebut his defensive theory and show motive. Guillory v. State, 2005 Tex. App. LEXIS 155 (Tex. App. Houston 14th Dist. Jan. 11 2005).

82. In a trial for aggravated robbery, extraneous evidence of other robberies had relevance apart from character conformity in that it tended to prove defendant's intent to permanently deprive the owners of their property, even if he had no reason to do so. Defendant had argued that he made so much money selling drugs that he did not need to rob people. Humphrey v. State, 2004 Tex. App. LEXIS 10622 (Tex. App. Dallas Nov. 29 2004).

83. In an aggravated robbery case, the witnesses' extraneous offenses testimony was admissible under Tex. R. Evid. 404(b) for the purpose of proving identity because the robberies were sufficiently similar so as to mark them as defendant's handiwork because: (1) the time interval between the commission of the robberies was relatively short -- a three-week period; and (2) defendant used the same general modus operandi in all three robberies -- he entered the dry cleaning businesses carrying a jacket, asked each of the employees to dry clean his jacket, pulled out a knife when the employees' attentions were directed elsewhere, forced the employees to give him money, and then instructed them to stay in the businesses' bathrooms. Chatman v. State, 2004 Tex. App. LEXIS 5410 (Tex. App. Houston 1st Dist. June 17 2004).

84. In an aggravated robbery case, the trial court did not err in admitting the witnesses' extraneous offenses testimony under Tex. R. Evid. 404(b) for the purpose of proving identity over defendant's objection because (1) defendant placed his identity in issue with the testimony of two alibi witnesses and the testimony of another individual, that he, and not defendant, was the robber; and (2) the danger of unfair prejudice from the witnesses' testimony was minimal because the jury was instructed that the witnesses' testimony could only be considered for the limited purposes set out in Tex. R. Evid. 404(b). Chatman v. State, 2004 Tex. App. LEXIS 5410 (Tex. App. Houston 1st Dist. June 17 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview

85. In a trial for aggravated robbery, an unadjudicated extraneous robbery offense was properly admitted to show identity because the offenses were sufficiently similar. The two aggravated robberies of older complainants occurred within 20 minutes and three miles of each other and involved an unidentified accomplice, a request for an unknown individual, use of a silver/chrome gun, forced entry, and forcing the complainants to lie on the floor. Villar v. State, 2013 Tex. App. LEXIS 11084 (Tex. App. Houston 1st Dist. Aug. 29 2013).

86. In an aggravated robbery case, defendant's complaint that he did not receive notice that extraneous evidence of a check-cashing incident would be used at trial was without merit as he acknowledged receiving the report which included the check-cashing incident. Cross v. State, 2013 Tex. App. LEXIS 8535 (Tex. App. Dallas July 10 2013).

87. In an aggravated robbery case, the extraneous evidence of a check-cashing incident was same-transaction contextual evidence, and, as such, no notice that it would be introduced at trial was required. Cross v. State, 2013 Tex. App. LEXIS 8535 (Tex. App. Dallas July 10 2013).

88. Under Tex. R. Evid. 404(b), the evidence of the shooting of the first victim and the other evidence collected at the crime scene pertaining to the shooting (such as the truck in the culvert) demonstrated defendant's motive, intent, and identity with regard to the aggravated robbery of the driver and the second victim, who was shot when defendant tried to steal the driver's car. Wilson v. State, 2010 Tex. App. LEXIS 8685, 2010 WL 4261872 (Tex. App. Fort Worth Oct. 28 2010).

89. During defendant's trial for aggravated robbery, the trial court did not err under Tex. R. Evid. 404 in allowing the State to present extraneous offense evidence of a robbery committed the day of the offense-at-issue for the purpose of identification where although the extraneous offenses were not so intermixed as to form a single, indivisible criminal transaction, and therefore the evidence was not admissible as contextual evidence, defendant raised the issue of identity in his cross-examination of the State's witnesses and in his case-in-chief, and the offenses were sufficiently similar; the offenses were proximate in both time and place because both were committed on the same night and in approximately the same location, and the offenses were committed by a common mode of commission because the robber approached his victims as they walked to or from their apartments and threatened them with a gun. Dickson v. State, 246 S.W.3d 733, 2007 Tex. App. LEXIS 9859 (Tex. App. Houston 14th Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview

90. In a stalking case, the trial court did not err by allowing the cross-examination of a defense witness regarding whether she was aware that defendant had been charged with a crime following an alleged domestic violence incident with the victim and whether she was aware that he had violated a protective order and assaulted his former wife; this evidence was relevant to defendant's good character after the witness testified that she had called the victim and asked her to give defendant another chance. Allen v. State, 218 S.W.3d 905, 2007 Tex. App. LEXIS 2527 (Tex. App. Beaumont 2007).

91. In a trial for stalking, defendant's prior murder conviction was relevant to the reasonableness of the complainant's fear of bodily injury or death and to whether defendant reasonably believed that his course of conduct would be regarded as threatening such injury. Defendant should have known that the complainant would be aware of his identity and his prior conviction for murder because of the involvement of private investigators and the police. Martinez v. State, 2005 Tex. App. LEXIS 7476 (Tex. App. Austin Sept. 9 2005).

92. In defendant's retaliation case, testimony concerning burglaries was not offered to prove that defendant had a record, but rather to assist the jury's understanding of the events by providing a context for an officer's subsequent actions. The testimony was admissible as proof of knowledge, absence of mistake, or accident, plan or intent; because the testimony. Martin v. State, 2004 Tex. App. LEXIS 7142 (Tex. App. Texarkana Aug. 11 2004).

93. Trial court did not err in admitting the victim's testimony about incidents of property damage that were not included in the stalking indictment, which included testimony that someone piled her trash in front of her door, flipped her breaker box, flooded her yard, damaged her yard decorations, pulled down an outside light fixture, cut her satellite cable, and spray-painted her gate, because (1) the evidence was not improper character evidence

under Tex. Evid. R. 404(a) as the victim never claimed that defendant committed the acts; and (2) the victim's testimony that the offenses against her property had occurred was relevant to establishing her state of mind at the time of the events in the stalking indictment. Marsh v. State, 2004 Tex. App. LEXIS 3620 (Tex. App. Fort Worth Apr. 22 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : General Overview

94. In a murder trial, the trial court properly determined that the victim's action of rising from a chair and reaching for a knife was an unambiguous aggressive act and therefore evidence of the victim's character and prior acts of violence was not necessary to explain his actions. Johnson v. State, 2013 Tex. App. LEXIS 12819, 2013 WL 5657425 (Tex. App. Tyler Oct. 16 2013).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

95. In a trial alleging defendant's murder of his wife, it was proper to admit evidence of the wife's prior black eyes that she and defendant said were caused by accidents, that she had been arrested, and that police had responded to multiple 911 calls at the residence, some from a male and some from a female callers, because the evidence did not relate to defendant's extraneous bad conduct; even if it had, it was admissible to show the nature of the relationship. Tretter v. State, 2014 Tex. App. LEXIS 8591 (Tex. App. Austin Aug. 7 2014).

96. In a murder case, the court erred by failing to require the State to redact portions of defendant's recorded statement admitting he had previously been in prison three times, but the error was harmless because the statement had no more than a slight effect on the jury's verdict. Barley v. State, 2013 Tex. App. LEXIS 13313, 2013 WL 5827728 (Tex. App. Houston 1st Dist. Oct. 29 2013).

97. In a murder trial, it was proper to admit evidence of defendant's character trait of offering to handle the problems of other people with a firearm and a specific extraneous bad act to demonstrate this character trait because the evidence was probative to rebut the defense that only a third person, and not defendant, had a motive to harm the complainant. Williams v. State, 2012 Tex. App. LEXIS 7728 (Tex. App. Houston 1st Dist. Aug. 30 2012).

98. Trial court did not abuse its discretion by admitting evidence of extraneous offenses committed by defendant during his trial for murdering his girlfriend's five-year-child because it was admissible under Tex. R. Evid. 404(b), as: (1) the identity of the perpetrator was in issue throughout the trial; (2) the overall pattern of abuse described by defendant's ex-girlfriend was significantly similar to the pattern of abuse described by his girlfriend; and (3) the ex-girlfriend's description of defendant's abuse of her son was strikingly similar to the girlfriend's description of defendant's deadly assault of her child. Castro v. State, 2012 Tex. App. LEXIS 6233, 2012 WL 3104817 (Tex. App. Amarillo July 30 2012).

99. In a trial for a murder that occurred in a game room, there was no error in admitting evidence that minutes before the murder defendant approached the game room and left. That evidence was of an extraneous offense because it showed only that defendant and an accomplice were denied entry. Dronso v. State, 2012 Tex. App. LEXIS 3720, 2012 WL 1624065 (Tex. App. Fort Worth May 10 2012).

100. In a murder trial, evidence relating to an alleged alternative perpetrator was properly excluded on the basis that there was an insufficient nexus between the alleged alternative and the offense, notwithstanding the theory that the alleged alternative had a motive to want the victim (a witness to a previous shooting) dead, his alleged involvement in a shotgun shooting in the same neighborhood just a few days earlier, and his presence in the area near the time the charged murder occurred. Caldwell v. State, 356 S.W.3d 42, 2011 Tex. App. LEXIS 8437 (Tex.

App. Texarkana Oct. 21 2011).

101. In a murder trial, there was no error under Tex. R. Evid. 401, 402, 403, 404 in admitting a video of a social networking page, on which defendant was depicted holding a gun. The evidence was relevant because a witness testified that the gun in the video was the same gun the witness saw defendant use in the murder; it wass unlikely that the jury would have felt compelled to convict defendant of murder simply because he acted like a "bad boy" and brandished a weapon on camera. Brumfield v. State, 2010 Tex. App. LEXIS 10137, 2010 WL 5187690 (Tex. App. Houston 1st Dist. Dec. 23 2010).

102. In a murder trial, there was no error under Tex. R. Evid. 404 in allowing the State to introduce evidence of a threatening phone call made by defendant hours after the death of the complainant because the evidence tended to establish that defendant's motive or intent was to cause the death of complainant in retaliation for money stolen, at the request of complainant, by the person to whom defendant made the threat; the trial court could have reasonably determined that, because the statements established motive or intent and were made on the same day as the murder, the statements provided information essential to the jury's understanding of the context and circumstances surrounding the murder, and therefore no notice was required by the State. Matos v. State, 2008 Tex. App. LEXIS 1808 (Tex. App. Houston 1st Dist. Mar. 13 2008).

103. In a murder trial, no error occurred when the trial court admitted tape-recorded phone conversations that included defendant's statements regarding illegal drug use after the victim's hospitalization; its probative value outweighed its unfairly prejudicial effect, as it suggested defendant's lack of remorse or concern about the victim. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

104. In a murder trial, there was no error under Tex. R. Evid. 404(b) in admitting shell casings that were retrieved from defendant's residence prior to the charged offense or a redacted photograph of defendant holding a firearm because the items did not show illegal activity and were not introduced to prove defendant's character. Quesada v. State, 2006 Tex. App. LEXIS 1011 (Tex. App. San Antonio Feb. 8 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 6181 (Tex. App. San Antonio July 19, 2006).

105. Defendant's murder indictment alleged that defendant murdered the victim in retaliation for her cooperation with the police, which eventually led to defendant's conviction for delivery of cocaine; thus, the prior drug conviction was not an irrelevant, extraneous offense that showed only that defendant was a criminal generally. Therefore, the admission of two photographs related to that conviction and the cross-examination by the State regarding those photographs and his prior drug conviction were not erroneous. Russell v. State, 155 S.W.3d 176, 2005 Tex. Crim. App. LEXIS 150 (Tex. Crim. App. 2005).

106. In a trial for murder and robbery, evidence that a gun was taken in a prior robbery was same-transaction contextual evidence and was relevant to show preparation for the planned robbery and murder at issue. The evidence was not unduly prejudicial, given the other evidence that the stolen gun was the murder weapon. Hill v. State, 2004 Tex. App. LEXIS 8474 (Tex. App. Tyler Sept. 22 2004).

107. In a murder case where the State alleged that defendant hit the victim in the head, which eventually led to her death, the trial court did not abuse its discretion in admitting, pursuant to Tex. R. Evid. 404(b), the testimony from the victim's father, sister, and co-workers regarding other incidents where defendant abused the victim and his religious beliefs because it was relevant to rebut defendant's defensive theory that the victim's injuries resulted from a variety of different accidents and that he did not beat her to death. Simeon v. State, 2004 Tex. App. LEXIS 626 (Tex. App. Houston 1st Dist. Jan. 22, 2004), *cert. denied*, 555 U.S. 1035, 129 S. Ct. 604, 172 L. Ed. 2d 463, 2008 U.S. LEXIS 8496 (2008).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

108. In a murder trial, there was no error in admitting extraneous offense evidence regarding a robbery/shooting that occurred ten minutes before the murder or regarding an assault that occurred as the suspects drove away from the robbery victim's apartment. The other offenses bore bear striking similarities to the offense for which defendant was convicted and were relevant to the hotly contested issue of identity. Mason v. State, 416 S.W.3d 720, 2013 Tex. App. LEXIS 13527, 2013 WL 5861492 (Tex. App. Houston 14th Dist. Oct. 31 2013).

109. Accomplice's testimony that he and defendant were involved in another aggravated robbery of a taxi cab driver four days before the murder was not inadmissible because it showed that defendant was involved in a virtually identical aggravated robbery, it was relevant to show defendant's intent to commit a robbery, his intent to kill, and that it was reasonably foreseeable that a death would occur, and it rebutted defendant's contention that the accomplice murdered the taxi driver. Stephens v. State, 2013 Tex. App. LEXIS 10188 (Tex. App. El Paso Aug. 14 2013).

110. In a capital murder trial, it was proper to admit testimony about defendant's prior act of pulling out a gun during a disagreement with the complainant because it was relevant to show defendant's hostility or ill will toward the complainant and his motive to later kill her. It was not necessary to show that the complainant was threatened in the prior incident. Jackson v. State, 2012 Tex. App. LEXIS 10062, 2012 WL 6049074 (Tex. App. Fort Worth Dec. 6 2012).

111. In a trial for capital murder arising from a robbery and shooting, it was reversible error under Tex. R. Evid. 404 to admit evidence that defendant committed an armed robbery of a grocery store a month after the charged murder. The mere fact that both offenses were armed robberies did not make them sufficiently similar to prove identity; the evidence was not admissible as to intent because intent was not at issue. The other crimes evidence had substantial potential to convince the jury that defendant was a criminal in general and, therefore, probably committed the charged offense. Jackson v. State, 320 S.W.3d 873, 2010 Tex. App. LEXIS 6572 (Tex. App. Texarkana Aug. 12 2010).

112. In a robbery-murder trial, there was no error under Tex. R. Evid. 404(b) in admitting evidence that defendant committed a similar extraneous crime three days after the charged murders because defendant put identity at issue. The offenses were sufficiently similar because they were both robberies committed at gunpoint; they occurred three days apart and in the late evening or early night hours; they occurred in the same geographic area; defendant was placed at the both scenes by eyewitness or DNA evidence; in both cases, he had an African-American male accomplice, used a revolver, emptied the cash register, and rifled through the shelves beneath the cash register. Hartsfield v. State, 305 S.W.3d 859, 2010 Tex. App. LEXIS 764 (Tex. App. Texarkana Feb. 4 2010).

113. Even if character evidence of a decedent was improperly introduced during a capital murder case, this constituted harmless error since defendant's substantial rights were not affected; defendant admitted that she knew her boyfriend was using a weapon in robberies, she participated after learning of a shooting, and she helped dispose of the weapon. Harris v. State, 2008 Tex. App. LEXIS 3225 (Tex. App. Amarillo May 2 2008).

114. In defendant's capital murder case involving the murder of her child, the court did not err by admitting "bad act" evidence because evidence of the removal of the child by the State and reunification evidence was a form of relationship evidence that showed the prior and existing relationship between defendant and her child, and a witness's answer was an isolated reference to "guns and drugs" which was not repeated during trial, and therefore it was not so prejudicial that the court's instruction to disregard could not cure the error. Alexander v. State, 229 S.W.3d 731, 2007 Tex. App. LEXIS 3358 (Tex. App. San Antonio 2007).

115. In an attempted capital murder case, the State was allowed to introduce extraneous evidence regarding defendant's shooting during a similar burglary because intent was the only challenged issue in the case where defendant contended that the shooting was only intended to scare the victim of the charged offense, but the extraneous evidence showed that defendant threatened to kill another victim with a gun during a similar burglary. Cisneros v. State, 143 S.W.3d 269, 2004 Tex. App. LEXIS 6370 (Tex. App. Waco 2004).

116. Evidence presented by the state that a capital defendant had excessively dunked his two-year-old stepchild in a swimming pool, had "thumped" the back of her head, had pushed her with his foot, had made her sit still on a couch for over two hours, and had hit her the night before her death, was evidence of extraneous acts, which were generally inadmissible at the guilt/innocence stage of a trial since Tex. R. Evid. 404(b) states that evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Ex parte Varelas, 45 S.W.3d 627, 2001 Tex. Crim. App. LEXIS 12 (Tex. Crim. App. 2001).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : Elements

117. At defendant's trial for capital murder where the indictment alleged that he committed the murder of the complainant in the course of committing a robbery the trial court did not err in admitting evidence of an extraneous robbery offense committed by defendant. Because defendant asserted there was no indication that a shooting took place during a robbery and the element of his specific intent to kill the complainant was at issue, the extraneous offense was admissible to rebut the defense theory. Smith v. State, 420 S.W.3d 207, 2013 Tex. App. LEXIS 15280, 2013 WL 6699495 (Tex. App. Houston 1st Dist. Dec. 19 2013).

118. Because the Tex. R. Evid. 404(b) evidence was relevant in identifying defendant and showing his intent to commit capital murder, and the evidence was not so prejudicial as to overcome the effectiveness of the limiting instruction, under Tex. R. Evid. 403, the trial court did not abuse its discretion in allowing the extraneous offense evidence. Castoreno v. State, 2012 Tex. App. LEXIS 3636 (Tex. App. San Antonio May 9 2012).

119. In a father's trial for murdering his two unborn children, evidence of bruises on the mother when she presented at the hospital, and the resulting notification of the police, were admissible as same transaction contextual evidence; under Tex. R. Evid. 403, the evidence had probative value because it served to explain the context of the police presence after the stillbirths of the twins and the assaultive environment in which the twins died. Flores v. State, 215 S.W.3d 520, 2007 Tex. App. LEXIS 516 (Tex. App. Beaumont 2007).

120. Evidence of a judgment that terminated defendant's parental rights to three of her children after the date that she allegedly murdered her newborn infant was relevant at her capital murder trial under Tex. R. Evid. 401, and had relevance apart from mere proof of character conformity in compliance with Tex. R. Evid. 404(b), because an extraneous offense/bad act that took place subsequent to the offense for which a defendant was on trial did not make the extraneous offense/bad act inadmissible per se; furthermore, the judgment was introduced by the State after defendant had testified that the infant's death on the night in question was not the result of any intentional or knowing conduct on defendant's part, and the termination judgment contained findings by the trial judge that defendant "knowingly" placed or allowed her other children to remain in conditions dangerous to their physical or emotional well-being, which at least arguably made it more probable that defendant's acts or omissions on the night in question were done either intentionally or knowingly. Fergerson v. State, 2006 Tex. App. LEXIS 6589 (Tex. App. Beaumont July 26 2006).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Felony Murder : General Overview

121. In a murder trial, there was no error under Tex. R. Evid. 404(b) and 403 in allowing an accomplice to testify about two prior attempted robberies by defendant and the same accomplices. The testimony was relevant to prove that the group's plan was to rob an Hispanic man whom they believed to be carrying cash and to prove that

defendant was the member of the group who carried the gun, rebutting the defensive theory that he was not the shooter. Howard v. State, 2010 Tex. App. LEXIS 1388 (Tex. App. Dallas Feb. 26 2010).

122. In a trial for felony murder, there was no errorr in the admission of extraneous offense evidence relating to forgery of documents; the evidence was relevant in order to show motive, relationship of the parties, and consciousness of guilt; the fact that defendant had equipment to produce fake checks was unlikely to make an unfair impression on the jury. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

123. In a trial for felony murder, there was no error in the admission of extraneous offense evidence relating to automobile theft; the evidence was relevant in order to show defendant's flight and attempt to conceal identity, both of which demonstrated a consciousness of guilt; it was not likely to leave any unfair or irrational impression upon the jury. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

124. In a trial for felony murder, there was no error in the admission of extraneous offense evidence relating to possession of a firearm; the evidence was probative because it provided the jury with information essential to understanding the context and circumstances of the crime; it was not unfairly prejudicial, in part because mere possession of a handgun in a temporary home and while traveling was not, in and of itself, a criminal offense or a bad act under Tex. Penal Code Ann. § 46.15. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

125. In a trial for felony murder, it was error to admit extraneous offense evidence relating to attempted extortion; the offense, a threat made against an accomplice to her family, was only distantly related to the charged offense and the danger of unfair prejudice substantially outweighed the probative value. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Homicide : Voluntary Manslaughter : General Overview

126. In defendant's murder case, a court abused its discretion by admitting evidence of defendant's prior voluntary manslaughter conviction under Tex. R. Evid. 609 because voluntary manslaughter was an offense involving violence, and did not involve deception, the prior offense and the charged offense were similar, defendant's testimony was critical to his claim of self-defense, and the State also had impeachment evidence of a prior conviction of forgery, which was a crime involving deception and moral turpitude and was better suited for impeachment purposes; however, the evidence was properly admitted under Tex. R. Evid. 404(b) to prove intent and to rebut defendant's claim of self-defense. High v. State, 2006 Tex. App. LEXIS 877 (Tex. App. Houston 1st Dist. Feb. 2 2006).

Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy : General Overview

127. Trial court did not abuse its discretion by admitting evidence of guns and cash during his capital murder trial because, to put the conspiracy offense in context, evidence that defendant and his sons were drug dealers who dealt in large amounts of cash and guns to protect their drugs and case was necessary, and therefore the evidence was same-transaction contextual evidence and background contextual evidence excepted from Tex. R. Evid. 404(b). Davis v. State, 2011 Tex. App. LEXIS 835, 2011 WL 322877 (Tex. App. Waco Feb. 2 2011).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Bail Jumping & Failure to Appear

128. Although defendant testified he did not believe he was required to go to court because of the lawsuit he filed against the government, under Tex. R. Evid. 404(b), evidence that he concealed his identity and left the state was

admissible and probative as to his mental state and whether he was aware that he committed a crime when he failed to appear in court. Marascio v. State, 2012 Tex. App. LEXIS 1178, 2012 WL 472920 (Tex. App. Dallas Feb. 15 2012).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Cruelty to Animals : General Overview

129. In an animal cruelty case, defendant did not preserve an objection under Tex. R. Evid. 403, 404(b), regarding the prejudicial effect of testimony from a neighbor who found dog carcasses and drag marks on his property. That argument did not comport with a relevance objection at trial, as required by Tex. R. App. P. 33.1(a). Holz v. State, 2010 Tex. App. LEXIS 2017, 2010 WL 1041068 (Tex. App. Texarkana Mar. 23 2010).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : General Overview

130. Evidence admitted at defendant's trial did not refer to defendant's "flight," nor demonstrate defendant had fled Texas; rather, it showed defendant stated he was homeless to his probation officer, went to a homeless shelter in St. Louis, and was arrested there. Thus, the evidence presented at trial merely showed the circumstances surrounding defendant's arrest and did not characterize defendant's presence in St. Louis as the result of his "flight." Garner v. State, 2012 Tex. App. LEXIS 9404, 2012 WL 5503995 (Tex. App. Dallas Nov. 14 2012).

131. In a trial for evading arrest, there was no error under Tex. R. Evid. 401, 403, or 404 in the admission of evidence that defendant placed a marijuana cigar on the pavement outside his motor vehicle while fleeing from a deputy sheriff. The evidence was relevant because it helped to prove that defendant intentionally fled; it was not submitted to show that defendant acted in conformity with his character because it indicated a motive; and it was highly probative in establishing intent, an essential element of the charge. Slaughter v. State, 2006 Tex. App. LEXIS 8694 (Tex. App. Houston 14th Dist. Oct. 3 2006).

132. In a case where defendant was charged with fleeing from police, evidence that defendant was found underneath a house when officers tried to serve a warrant for arrest was properly admitted by a trial court because it tended to prove knowledge of guilt; even if the admission was erroneous, it was disregarded on appeal since defendant's substantial rights were not affected; it would have been difficult to explain the circumstances of the arrest without such evidence, and the State did not mention the evidence in its final argument. Jacobs v. State, 2004 Tex. App. LEXIS 4239 (Tex. App. Texarkana May 11 2004).

133. In a trial for evading arrest, evidence that defendant was on parole at the time was probative of his motive to get away from the police officer and made less probable the defensive argument that defendant was not aware the police were behind him; the risk of undue prejudice was minimized by the fact that the jury was not told what crime led to the parole status. Steele v. State, 2014 Tex. App. LEXIS 1532, 2014 WL 580200 (Tex. App. Tyler Feb. 12 2014).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Consciousness of Guilt

134. In a trial for aggravated sexual assault, there was no error in admitting evidence that defendant, after being confronted by the victim's mother and fleeing to a nearby apartment complex, was seen fleeing from the complex, in which a fire had been started. A reasonable inference from the evidence was that defendant started the fire to aid his flight from the apartment complex; thus, the evidence was of value in establishing consciousness of guilt. Craft v. State, 2012 Tex. App. LEXIS 199, 2012 WL 112527 (Tex. App. El Paso Jan. 11 2012).

135. In a criminal prosecution for aggravated assault with a deadly weapon, evidence that defendant was driving a vehicle that matched the description of the vehicle involved in the shooting and that he attempted to flee from officers when one of them tried to pull him over was probative of his consciousness of guilt and relevant to prove his identity under Tex. R. Evid. 404(b). The trial court did not abuse its discretion by determining that the evidence was relevant for purposes other than character conformity. Owens v. State, 2011 Tex. App. LEXIS 2871, 2011 WL 1435499 (Tex. App. Fort Worth Apr. 14 2011).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Money Laundering : General Overview

136. In a trial for money laundering, the trial court properly allowed extraneous offense evidence that defendant had been stopped on one occasion with more than $67,000 in his van and on another with more than 80 pounds of marijuana in his vehicle. The extraneous acts were relevant to show that defendant, although he claimed not to know about money hidden in the van on the current charge, repeatedly carried large amounts of cash and drugs hidden in his vehicle. The extraneous acts were not rendered inadmissible merely because they occurred after the charged offense. Stallworth v. State, 2005 Tex. App. LEXIS 993 (Tex. App. Dallas Feb. 9 2005).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Resisting Arrest : General Overview

137. In a trial for assault on a peace officer, evidence was properly admitted as to defendant's 40-year sentence on a prior drug conviction because the sentence was the catalyst for defendant's attack on two deputies. Because the 40-year sentence was not a crime, wrong, or act committed by defendant, Tex. R. Evid. 404(b) was inapplicable. Wheatfall v. State, 2004 Tex. App. LEXIS 1622 (Tex. App. Houston 1st Dist. Feb. 19, 2004).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly

138. Evidence of defendant's gang affiliation was admissible to illuminate the nature of the crime alleged because his affiliation with the gang was evidence of his capacity to carry out the threat, or have it carried out, which in turn made it more likely that he made the threat as the witness testified. Simmang v. State, 2013 Tex. App. LEXIS 11529 (Tex. App. Austin Sept. 11 2013).

139. In a trial for aggravated assault, there was no error under Tex. R. Evid. 404, 405 in admitting evidence of defendant's gang affiliation because the evidence raised an inference that defendant's motive for stabbing the complainant was to harm him because of his race. Defendant stated during booking that he was a member of a particular gang and did not want to be jailed with any black people. Martin v. State, 2011 Tex. App. LEXIS 5624, 2011 WL 2937423 (Tex. App. Corpus Christi July 21 2011).

140. Defendant did not object to testimony about gang affiliation during the guilt-innocence phase of a murder trial and therefore failed to preserved error under Tex. R. Evid. 404. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

141. In a trial for heroin possession, gang-membership evidence was admissible under Tex. R. Evid. 404 because the evidence was interlaced with the offense; the offense's obscurity was eliminated with evidence that the defendant was a gang member. The expert testified about the gang's trade being the trafficking of heroin, primarily by using a female's body cavity to transport the contraband, and having that female accompanied by a gang member; defendant was stopped entering the country with a woman who was carrying heroin in her vaginal cavity. Ojeda v. State, 2004 Tex. App. LEXIS 8557 (Tex. App. El Paso Sept. 24 2004).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Witness Tampering

142. Assault defendant failed to request notice of other crimes and acts evidence under Tex. R. Evid. 404(b) and therefore could not complain of the adequacy of the State's notice; moreover, the notice gave her reasonable notice of a neighbor's expected testimony that defendant sought to bribe her to say that the victim struck defendant first. Additionally, this bribery evidence was relevant as consciousness of guilt and was not unfairly prejudicial. Cavazos v. State, 2014 Tex. App. LEXIS 5045, 2014 WL 1881691 (Tex. App. Amarillo May 8 2014).

143. Trial court did not abuse its discretion when it admitted testimony showing that defendant called his friend and asked him to change his testimony. Even if it did rise to the level of witness tampering, the testimony showing that defendant told the friends to tell the jury that he was holding a cell phone instead of a gun was admissible as evidence of consciousness of guilt. Dyer v. State, 2014 Tex. App. LEXIS 524, 2014 WL 268571 (Tex. App. Eastland Jan. 16 2014).

144. Evidence of defendant's alleged witness tampering--phone calls offering the witness money not to testify--was properly admitted under Tex. R. Evid. 403, 404, as evidence of consciousness of guilt in a burglary trial. Livingston v. State, 2011 Tex. App. LEXIS 9054, 2011 WL 5535332 (Tex. App. Texarkana Nov. 15 2011).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : General Overview

145. In a criminal trial for burglary, the court did not err by allowing a police officer to testify as to the contents of defendant's van. The testimony was needed to show that defendant was in recent possession of stolen property; the testimony was not character evidence of other crimes or wrong acts. Middleton v. State, 187 S.W.3d 134, 2006 Tex. App. LEXIS 578 (Tex. App. Texarkana 2006).

146. In a criminal prosecution for burglary of a habitation where defendant claimed that he did not have the "intent to commit a felony, theft, or an assault," the jury was permitted to consider evidence of defendant's six prior convictions for burglary of a habitation and one time for felony theft to the extent the evidence was helpful in determining defendant's intent in relation to the present burglary. Harris v. State, 2004 Tex. App. LEXIS 7666 (Tex. App. Tyler Aug. 25 2004).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary

147. In a burglary case, the evidence of a prior burglary was admissible during the guilt/innocence phase to prove identify. Because a credit card stolen from the first victim was found in the second victims' apartment and apparently was used to force open the locked door, it created a link between the crime; defendant was identified in store pictures as the person carrying the stolen wallet that contained the credit card. Martinez v. State, 2014 Tex. App. LEXIS 824, 2014 WL 458015 (Tex. App. Amarillo Jan. 23 2014).

148. In a burglary case, the evidence of a prior burglary was admissible during the guilt/innocence phase to prove identify. Because a credit card stolen from the first victim was found in the second victims' apartment and apparently was used to force open the locked door, it created a link between the crime; defendant was identified in store pictures as the person carrying the stolen wallet that contained the credit card. Martinez v. State, 2014 Tex. App. LEXIS 824, 2014 WL 458015 (Tex. App. Amarillo Jan. 23 2014).

149. In defendant's burglary case, the court properly admitted evidence of other burglaries because they were committed in close proximity to defendant's home, the burglaries were similar, and the burglaries were both daytime residential burglaries by forced entry in which the homes were ransacked. The property stolen at the burglaries was commingled at defendant's residence. Box v. State, 2013 Tex. App. LEXIS 4077, 2013 WL 1319359 (Tex. App.

Dallas Mar. 28 2013).

150. In a burglary trial, there was no error under Tex. R. Evid. 401, 404(b), 403 in admitting evidence of an extraneous burglary in order to show intent. The prior burglary was near in time and location to the charged burglary. Martinez v. State, 304 S.W.3d 642, 2010 Tex. App. LEXIS 413 (Tex. App. Amarillo Jan. 21 2010).

151. In a burglary of a habitation case, in light of the fact that intent was the central issue in defendant's case, evidence that he possessed stolen property found in his girlfriend's car, which had been used in previous burglaries at the apartment complex, was relevant and admissible under Tex. R. Evid. 404(b) to show defendant's motive, intent, plan, and the absence of mistake or accident. Kirksey v. State, 2008 Tex. App. LEXIS 8429 (Tex. App. Houston 1st Dist. Nov. 6, 2008).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements

152. Evidence regarding defendant's sexual assault of a complainant in a prior case was relevant in his trial for burglary of a habitation with intent to commit sexual assault to prove the lack of consent of the complainant in the present case and defendant's intent to commit sexual assault only to the extent that the extraneous offense and the charged offense were shown to be sufficiently similar to invoke the doctrine of chances. Mackenzie v. State, 2007 Tex. App. LEXIS 1776 (Tex. App. Austin Mar. 7 2007).

153. In a burglary trial, there was no error in the admission of evidence that defendant had, in his possession when he was arrested, items taken in a subsequent burglary from the same victim; the evidence was admissible to rebut a line of questioning directed at burglaries that occurred after defendant was in custody. Ellis v. State, 2007 Tex. App. LEXIS 414 (Tex. App. Tyler Jan. 24 2007).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Destruction of Property : General Overview

154. In a criminal mischief case, extraneous offense evidence under Tex. R. Evid. 404(b) was properly used to show identity; although a trial court could have presumed that appellant's wife or someone else could have installed a jumper on an electric meter at his residence, finding one on appellant's business made it less likely that he was innocent. Giles v. State, 2013 Tex. App. LEXIS 4044, 2013 WL 1319343 (Tex. App. Dallas Mar. 28 2013).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Forgery : General Overview

155. In a forgery case, the trial court did not abuse its discretion by admitting evidence of three other forged checks as relevant under Tex. R. Evid. 404 to prove defendant's guilty knowledge and intent. The fact that each of these forgeries was substantially identical tended to rebut defendant's claim that she had passed the first check without knowing that it was forged. Williams v. State, 2011 Tex. App. LEXIS 857, 2011 WL 350477 (Tex. App. Austin Feb. 2 2011).

156. In a trial for felony murder, there was no errorr in the admission of extraneous offense evidence relating to forgery of documents; the evidence was relevant in order to show motive, relationship of the parties, and consciousness of guilt; the fact that defendant had equipment to produce fake checks was unlikely to make an unfair impression on the jury. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Forgery : Elements

157. Trial court did not abuse its discretion in admitting a copy of a check allegedly forged and presented by defendant because the State offered the evidence to establish defendant's knowledge that a copy of another check, which was identified in the indictment, was a forgery and that defendant therefore acted with the requisite intent to commit the offense of forgery and that there was no mistake or lack of intent, as defendant asserted at trial. Duncan v. State, 2014 Tex. App. LEXIS 4678, 2014 WL 1788173 (Tex. App. Corpus Christi May 1 2014).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview

158. In defendant's theft case, evidence of subsequent offenses was admissible because those offenses provided the jury with proof of defendant's identity, showed his knowledge, and showed a scheme -- all purposes expressly permitted under Tex. R. Evid. 404(b), and the trial court unequivocally overruled a Tex. R. Evid. 403 objection. At no point did defendant request that the findings and conclusions of the trial court's balancing test be placed on the record. Boswell v. State, 2012 Tex. App. LEXIS 7177, 2012 WL 3629922 (Tex. App. Austin Aug. 23 2012).

159. In a theft case based on a failure to complete a construction contract, evidence that defendant had done the same thing to another person was admissible under Tex. R. Evid. 404(b) to show defendant's intent and lack of accident or mistake; defendant contended that he was unable to finish the job that gave rise to the charges due to circumstances beyond his control. Gill v. State, 2008 Tex. App. LEXIS 9261 (Tex. App. Eastland Dec. 11 2008).

160. In a trial for felony murder, it was error to admit extraneous offense evidence that at the time of arrest defendant was returning to a hotel after attempting to steal a car; the evidence, unlike other evidence of car theft, did not tend to show flight and added nothing to a showing of consciousness of guilt and therefore was more prejudicial than probative; the error was harmless under Tex. R. App. P. 44.2 because it was unlikely that the admission had a substantial effect on the verdict, given all of the evidence before the jury. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

161. In a trial for felony murder, there was no error in the admission of extraneous offense evidence relating to automobile theft; the evidence was relevant in order to show defendant's flight and attempt to conceal identity, both of which demonstrated a consciousness of guilt; it was not likely to leave any unfair or irrational impression upon the jury. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

162. In a trial for theft of services, the trial court did not err in allowing evidence regarding the deposit of checks into defendant's account and the subsequent debits to that account when those checks were returned. The checks were important proof to establish the manner in which defendant attempted to falsely inflate the balance of the account and established defendant's knowledge that checks written on the account would not have sufficient funds to cover them. Ingram v. State, 2005 Tex. App. LEXIS 42 (Tex. App. San Antonio Jan. 5 2005).

Criminal Law & Procedure : Criminal Offenses : Racketeering : General Overview

163. Trial court did not err by admitting into evidence multiple extraneous offenses during defendant's trial on charges of engaging in organized criminal activity because the evidence, namely the letterhead, testimony about the ongoing mortgage fraud, the forged signature on the articles of incorporation and diverted money, was all admissible as evidence to establish the existence of the combination, its members and its ongoing criminal activities, which were elements of the offense. The diversion of money was also admissible under Tex. R. Evid. 404(b) as evidence of motive, knowledge and intent, common scheme or plan, or absence of mistake. Marriott v. State, 2010 Tex. App. LEXIS 5804, 2010 WL 2869781 (Tex. App. Waco July 21 2010).

164. Objection to extraneous offense evidence was not successful because testimony that stolen parts were removed from defendant's residence after his arrest, along with testimony that defendant had purchased stolen parts, was probative evidence of the elements of the offense of engaging in organized criminal activity; the testimony was evidence relevant to the element of combination and the collaboration in carrying on criminal activities, and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. The evidence tended to prove defendant had the intent to establish, maintain, or participate in a combination or in the profits of a combination, an essential element of the offense of engaging in organized criminal activities. Marban v. State, 2009 Tex. App. LEXIS 6760, 2009 WL 2618343 (Tex. App. Beaumont Aug. 26 2009).

Criminal Law & Procedure : Criminal Offenses : Racketeering : Extortion : General Overview

165. In a trial for felony murder, it was error to admit extraneous offense evidence relating to attempted extortion; the offense, a threat made against an accomplice to her family, was only distantly related to the charged offense and the danger of unfair prejudice substantially outweighed the probative value. Robinson v. State, 236 S.W.3d 260, 2007 Tex. App. LEXIS 1192 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : General Overview

166. Admission of extraneous-offense evidence, regarding defendant's two encounters with children in public restrooms, did not affect defendant's substantial rights because testimony regarding the encounters did not consume an inordinate amount of time during trial, the State focused the majority of its closing argument on the evidence establishing the charged offenses, and the trial court gave a limiting instruction. Hoard v. State, 2013 Tex. App. LEXIS 11760 (Tex. App. Beaumont Sept. 18 2013).

167. Trial court did not abuse its discretion by admitting photographs of defendant naked and/or exposing his genitals, penis, and anus under Tex. R. Evid. 404(b) because the photographs were relevant to link defendant to the child pornography on his computer and showing intent. De Leon v. State, 2011 Tex. App. LEXIS 7029, 2011 WL 3847180 (Tex. App. Corpus Christi Aug. 30 2011).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Indecent Exposure : General Overview

168. In a trial for indecent exposure, testimony that a park was a popular location for lewd or indecent behavior or was a high crime area would have been admissible under Tex. R. Evid. 404(b). Jenson v. State, 2008 Tex. App. LEXIS 6301 (Tex. App. Houston 14th Dist. Aug. 19 2008).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Indecent Exposure : Elements

169. Trial court did not abuse its discretion by admitting into evidence under this rule that defendant had previously pled no contest to indecent exposure and was placed on deferred adjudication because it had a tendency to make defendant's defensive theory, that he had a physical inability that prevented him from developing an intent to sexually arouse or gratify himself, less probable. Arteaga v. State, 2014 Tex. App. LEXIS 2434, 2014 WL 866461 (Tex. App. San Antonio Mar. 5 2014).

170. Jury charge was not erroneous because the alleged error did not suggest that defendant acted with the intent to arouse or gratify his sexual desire when read in the context of the next sentence, in which the trial court clearly stated that the jury had to find, beyond a reasonable doubt, that the act was committed. There was no error in the second paragraph simply because it failed to track the language of this rule. Arteaga v. State, 2014 Tex. App. LEXIS 2434, 2014 WL 866461 (Tex. App. San Antonio Mar. 5 2014).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Obscenity : General Overview

171. In an indecent exposure case, a court properly admitted evidence where defendant's comment about a prior incident to the undercover officer was compelling evidence that he intended to expose himself to gratify his sexual desire, not just to urinate. Elkin v. State, 2004 Tex. App. LEXIS 5832 (Tex. App. Fort Worth July 1 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Prostitution : General Overview

172. In a trial for sexual assault of a child and compelling prostitution, defendant was not entitled to a mistrial after a witness testified that defendant threatened to kill the witness outside the presence of the complainant. Nothing in the record suggested that the jury failed to follow an instruction to disregard the extraneous offense evidence, and there was other evidence presented that defendant threatened both the witness and the complainant. Puckett v. State, 2005 Tex. App. LEXIS 8188 (Tex. App. Dallas Oct. 4 2005).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

173. In a trial for a mother's sexual abuse of her son, it was error under Tex. R. Evid. 404 to admit evidence that defendant had been a victim of sexual assault as a child to show that she was more likely to commit the offense; the error was harmful under Tex. R. App. P. 44.2 and Tex. R. Evid. 103 because it was a close case resolved by a credibility determination between the child and defendant. Kirby v. State, 208 S.W.3d 568, 2006 Tex. App. LEXIS 2785 (Tex. App. Austin 2006).

174. In defendant's trial for aggravated sexual assault of child under 14 years of age, it was not error to admit a tape recording of the child's message to her mother in which the child's crying was audible but the child did not say anything; the State was not required to give notice of the tape. Johnson v. State, 190 S.W.3d 838, 2006 Tex. App. LEXIS 2496 (Tex. App. Fort Worth 2006).

175. In a trial for indecency with a child, testimony from a parole officer that defendant was restricted from contact with children did not constitute extraneous offense evidence because the testimony did not show what crime, if any, had been committed. Turner v. State, 2006 Tex. App. LEXIS 944 (Tex. App. El Paso Feb. 2 2006).

176. In defendant's indecency with a child case, although the extraneous offense evidence of other sexual offenses against young boys was inadmissible to confront false-impression evidence, the State's alternate reason, that the extraneous offense evidence was admissible to rebut defensive theories propounded by defendant, was a proper basis for the admission of the extraneous offense evidence. Blackwell v. State, 193 S.W.3d 1, 2006 Tex. App. LEXIS 903 (Tex. App. Houston 1st Dist. 2006).

177. In defendant's indecency with a child case, defendant's extraneous sexual offenses were admissible to rebut the defensive theory that he lacked the intent to have sexual contact with the victim because, by asserting that defendant was a regular parent who did a good job of raising two other young boys, he impliedly suggested that he lacked the intent to have sexual contact with the victim. Blackwell v. State, 193 S.W.3d 1, 2006 Tex. App. LEXIS 903 (Tex. App. Houston 1st Dist. 2006).

178. In a trial for sexual assault of a child and compelling prostitution, defendant was not entitled to a mistrial after a witness testified that defendant threatened to kill the witness outside the presence of the complainant. Nothing in the record suggested that the jury failed to follow an instruction to disregard the extraneous offense evidence, and there was other evidence presented that defendant threatened both the witness and the complainant. Puckett v.

State, 2005 Tex. App. LEXIS 8188 (Tex. App. Dallas Oct. 4 2005).

179. In a criminal trial for aggravated sexual assault of a child, the court did not abuse its discretion in admitting evidence of defendant's having solicited the third party to have sexual intercourse with the minor. The evidence was admissible under Tex. Code Crim. Proc. Ann. art. 38.37, § 2, which superseded Tex. R. Evid. 404; the trial court gave a limiting instruction, minimizing any impermissible inference of character conformity. Comeaux v. State, 2005 Tex. App. LEXIS 3748 (Tex. App. Houston 14th Dist. May 17 2005).

180. In a case of aggravated sexual assault of a child, the trial court did not err in admitting testimony of the complaining witness and two other children about extraneous acts by defendant; although defendant argued that the testimony was irrelevant under Tex. R. Evid. 401 and was not admissible under Tex. R. Evid. 404(b) because it was not necessary to prove elements of the offense that were essentially uncontested, such as identity, intent, plan, preparation, and opportunity, the evidence was relevant under Tex. Code Crim. Proc. Ann. art. 38.37, § 2 to show defendant's intentions toward the complaining witness. Nesby v. State, 2005 Tex. App. LEXIS 3379 (Tex. App. Austin May 5 2005).

181. In an aggravated sexual assault of a child case, the trial court did not err in admitting testimony of the complainant and other children about defendant's extraneous acts as the evidence was relevant to show the relationship between defendant and the complainant and their respective states of mind. Nesby v. State, 2005 Tex. App. LEXIS 2182 (Tex. App. Austin Mar. 24 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 3379 (Tex. App. Austin May 5, 2005).

182. In a criminal trial for aggravated sexual assault, the trial court did not err in admitting an extraneous robbery offense. Because defendant's statement about robbing someone was part of a continuum of activity beginning with his presence in the victim's apartment, notice was not required. Williams v. State, 161 S.W.3d 680, 2005 Tex. App. LEXIS 2014 (Tex. App. Beaumont 2005).

183. Where defendant was charged with the murder of a woman with whom he had sexual relations, the trial court committed reversible error by admitting the testimony of a department store clerk that defendant made sexual gestures toward her approximately one month before the victim's death. The two incidents did not appear sufficiently similar to establish defendant's identity as the person who killed the victim. Webb v. State, 2005 Tex. App. LEXIS 1431 (Tex. App. San Antonio Feb. 23 2005).

184. In an indecency with a child case, because intent to satisfy sexual appetite was an element of the crime, the victim's younger sister's testimony that defendant had "french" kissed her when he took her alone for a ride and asked that she not tell anyone was relevant; thus, the trial court properly allowed it. Further, this evidence showing that defendant acted inappropriately with another young girl was highly probative, making the fact of defendant's sexual contact with the victim more probable, gave credibility to the victim's complaint, and diminished defendant's credibility. Mejia v. State, 2004 Tex. App. LEXIS 11615 (Tex. App. Tyler Dec. 22 2004).

185. In an aggravated sexual assault of a child case, admission of extraneous offense evidence involving a sexual assault defendant committed against another victim was proper as the State used it to rebut defendant's "lack of opportunity" defense theory. Guzman v. State, 2004 Tex. App. LEXIS 7693 (Tex. App. Corpus Christi Aug. 26 2004).

186. Trial court did not err in admitting evidence that defendant had sexually assaulted another woman approximately three months prior to the instant assault where the state was not allowed to use the extraneous sexual assault evidence until defendant had presented his defensive theory of consent in his testimony. Martin v. State, 144 S.W.3d 29, 2004 Tex. App. LEXIS 7755 (Tex. App. Beaumont 2004), affirmed by 173 S.W.3d 463, 2005

Tex. Crim. App. LEXIS 1618 (Tex. Crim. App. 2005).

187. In a case where defendant was convicted of the aggravated sexual assault of his daughter, a child younger than 14 years of age, in violation of Tex. Penal Code Ann. § 22.021(a)(1)(B)(i), (iii) and (2)(B), defendant's niece's testimony that he sexually assaulted her 16 years prior to the current offense was not admissible under Tex. R. Evid. 404(b) because: (1) the State's direct evidence showing the intent or knowledge element of the crime was uncontradicted by defendant and not undermined by cross-examination of the State's witnesses; (2) nothing in the niece's testimony explained why he would assault his daughter; (3) there was no "lack of opportunity" defense that the State had to rebut; and (4) the niece's testimony was not admissible to rebut a defensive theory of recent fabrication as defendant did not call his daughter's credibility into question. Harrison v. State, 2004 Tex. App. LEXIS 6418 (Tex. App. Dallas July 19 2004).

188. In defendant's sexual assault case, a court did not err in permitting the victim's stepfather to testify that he saw defendant in the parking lot of the family's apartment complex a few weeks after the victim made her outcry where that evidence tended to corroborate the victim's testimony and was not, in itself, evidence of misconduct or bad character. The prosecutors' description of defendant as a "sexual predator" was a logical inference from his overall behavior as shown by the victim's testimony. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

189. In a child sexual abuse case, the trial court did not err in allowing the State to elicit testimony from the victim concerning instances of abuse subsequent to the charged incident; defendant's request for notice under Tex. R. Evid. 404(b), which the trial court granted, did not require the State to provide notice of other crimes evidence when it introduced the victim's testimony in accordance with Tex. Code Crim. Proc. Ann. art. 38.37, §§ 2, 3. Lazalde v. State, 2004 Tex. App. LEXIS 388 (Tex. App. Houston 1st Dist. Jan. 15, 2004).

190. In a criminal trial for the aggravated sexual assault of a child, the child's mother was permitted to testify as to threats the appellant made to keep the child from reporting the assault, and the evidence was relevant under Tex. R. Evid. 404 for the non-propensity purpose to show why the child did not make a prompt outcry. Mark v. State, 2003 Tex. App. LEXIS 879 (Tex. App. Houston 14th Dist. Jan. 30 2003).

191. In defendant's trial on two counts of indecency with a child, testimony from defendant's ex-wife that defendant occasionally paraded around in front of his minor daughters, the complainants, in the nude with an erection was admissible under Tex. R. Crim. Evid. 404(b), because the State had to prove, beyond a reasonable doubt, that defendant had contact with the complainants and the contact was done for his sexual gratification, and because the evidence was relevant to prove sexual motive in as much as the manner that defendant acted around his own children was the only proof of defendant's possible sexual motive if the touching did in fact occur. Montgomery v. State, 810 S.W.2d 372, 1990 Tex. Crim. App. LEXIS 90 (Tex. Crim. App. 1990).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : General Overview

192. In a sexual assault case, the court properly admitted testimony of another sexual assault victim who identified defendant as her attacker because, like the victim, the witness lived alone, and her attacker was a black male in his late twenties who broke in through the back patio door in the early morning hours. Like the victim's attacker, the witness's attacker demanded her ATM card. Ledbetter v. State, 2012 Tex. App. LEXIS 1472, 2012 WL 593424 (Tex. App. Dallas Feb. 24 2012).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements

193. Trial court did not abuse its discretion by admitting an extraneous offense, a prior sexual assault, into evidence because defendant opened the door to its admissibility through his cross-examination of the victim, which implied that she consented to the sexual intercourse. Morales v. State, 2014 Tex. App. LEXIS 312, 2014 WL 108770 (Tex. App. Amarillo Jan. 10 2014).

194. In a trial for defendant's sexual assault of his wife, who recanted in her trial testimony, there was no error under Tex. R. Evid. 404(b) in allowing the State to impeach the victim with a prior inconsistent statement about how she broke her nose six months before the charged assault; the statements were offered as prior inconsistent statements to challenge the victim's credibility, as permitted by Tex. R. Evid. 613. Davis v. State, 2007 Tex. App. LEXIS 352 (Tex. App. Dallas Jan. 18 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

195. In defendant's trial for continuous sexual abuse of a child under fourteen years of age, evidence from two of the victim's cousins that defendant also molested them while they were visiting defendant and sleeping in the same bed with the victim was contextual and therefore admissible under Tex. R. Evid. 403 and 404(b). Doss v. State, 2014 Tex. App. LEXIS 5702 (Tex. App. Dallas May 28 2014).

196. In a trial for continuous sexual abuse of young children, there was no error in admitting evidence of an extraneous offense because the testimony that defendant abused the witness while her mother was sleeping next to her in the same bed rebutted defense counsels lack-of-opportunity argument, specifically, that it did not add up for defendant to molest children sleeping on a couch while other children were on the floor asleep in the same room. Macintosh v. State, 2014 Tex. App. LEXIS 3105, 2014 WL 1087926 (Tex. App. Fort Worth Mar. 20 2014).

197. Court did not abuse its discretion in allowing defendant's niece to testify about defendant's alleged sexual assault upon her because the testimony had logical relevance apart from character conformity when it showed that the alleged victim's allegations were less likely to be fabricated, was properly admitted to rebut the defense's theory of fabrication, and served to show defendant's course of conduct, motive, and intent. Munger v. State, 2013 Tex. App. LEXIS 14728, 2013 WL 6512674 (Tex. App. Eastland Dec. 5 2013).

198. In a prosecution for aggravated sexual assault, the trial court did not err in admitting evidence of extraneous acts of child sexual abuse that occurred in another county because the court instructed that the jury could not consider testimony regarding defendant having committed extraneous offenses for any purpose unless it found and believed beyond a reasonable doubt that defendant committed such other offenses and that it could only consider the testimony for the specific purposes listed in the charge, including its bearing on the previous and subsequent relationship between the defendant and the child. Foley v. State, 2013 Tex. App. LEXIS 14638, 2013 WL 6244540 (Tex. App. Dallas Dec. 3 2013).

199. In a case in which defendant was found guilty of two counts of indecency with a child for the sexual abuse of his granddaughter, a prior victim's testimony that defendant, a family friend, sexually assaulted her when she was seven years old was probative to rebut the defensive theory of fabrication and was admissible. Bible v. State, 2013 Tex. App. LEXIS 8354 (Tex. App. Beaumont July 10 2013).

200. Trial court did not abuse its discretion in a case in which defendant was convicted of continuous sexual abuse of a child, his two daughters, by allowing evidence of computer searches for child pornography on defendant's laptop because the complained-of testimony showed that defendant viewed the father-daughter relationship as a sexual one; his viewing of child pornography, particularly father-daughter pornography, was relevant circumstantial evidence of his intent to arouse or gratify his sexual desire. Watkins v. State, 2013 Tex. App. LEXIS 1512, 2013 WL

531062 (Tex. App. Fort Worth Feb. 14 2013).

201. In a trial for child sexual abuse, it was proper for the prosecutor to comment on extraneous-offense evidence because the prosecutor argued that the jury should not convict defendant based on the uncharged conduct and did not argue that the evidence should be considered for purposes impermissible under Tex. Code Crim. Proc. Ann. art. 38.37, § 2; Tex. R. Evid. 404(b). Kuhn v. State, 393 S.W.3d 519, 2013 Tex. App. LEXIS 1038, 2013 WL 490746 (Tex. App. Austin Jan. 31 2013).

202. In a trial for aggravated sexual assault of a child, it was proper to admit evidence of prior extraneous offenses because the defense arguably advanced a fabrication theory when it stated in opening that the complainant's mother had created the allegations to get back at defendant and got her daughter to go along. Moore v. State, 2013 Tex. App. LEXIS 154, 2013 WL 86592 (Tex. App. San Antonio Jan. 9 2013).

203. Defendant did not preserve a challenge under Tex. R. Evid. 403 to testimony regarding other acts of child sexual abuse because his only objection was under Tex. R. Evid. 404. Richert v. State, 2012 Tex. App. LEXIS 7719 (Tex. App. Houston 1st Dist. Aug. 30 2012).

204. In a trial for aggravated sexual assault on a child, there was no error under Tex. R. Evid. 404 in admitting into evidence a videotape depicting defendant and his ex-wife acting out a father/daughter fantasy or testimony of the complainant's younger sister and defendant's former student concerning his sexual abuse of them. Richert v. State, 2012 Tex. App. LEXIS 7719 (Tex. App. Houston 1st Dist. Aug. 30 2012).

205. Evidence regarding prior false allegations of sexual abuse by the child victim was not admissible under Tex. R. Evid. 404(b) because defendant failed to show that the victim made any prior false allegations of sexual abuse against her grandmother or father and failed to show that any allegations were similar to the accusation in defendant's case. Luevano v. State, 2012 Tex. App. LEXIS 4108, 2012 WL 1883115 (Tex. App. El Paso May 23 2012).

206. Under Tex. R. Evid. 403, 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37, § 2, the evidence of harsh discipline imposed by defendant on his four children, including the victim of the aggravated sexual assaults, was admissible because it had significant probative value as that evidence served to explain to the jury how defendant perpetrated frequent sexual assaults on his young daughter over a period of years. Soria v. State, 2012 Tex. App. LEXIS 3345, 2012 WL 1570969 (Tex. App. Amarillo Apr. 27 2012).

207. Evidence of defendant's harsh discipline of his children and testimony that the children feared him was admissible over a Tex. R. Evid. 404(b) objection to explain why the victim of sexual assault did not make a prompt outcry. Soria v. State, 2012 Tex. App. LEXIS 3345, 2012 WL 1570969 (Tex. App. Amarillo Apr. 27 2012).

208. Defendant's argument that although the State elected at the close of its case-in-chief and the jury was informed of that election, the State's election violated his due process rights was without merit where, because the State made a proper election, the trial court could order the State to elect before close of its evidence. Criswell v. State, 2011 Tex. App. LEXIS 7112, 2011 WL 3836442 (Tex. App. Fort Worth Aug. 31 2011).

209. While the parties had stipulated to the characterization of prior acts as extraneous offenses, based on the language "on or about" in the indictment, the prior acts were not extraneous as they were allegedly committed before the return of the indictment and within the limitations period for aggravated sexual assault of a child in Tex. Code Crim. Proc. Ann. art. 12.01(5). Garza v. State, 2010 Tex. App. LEXIS 9613, 2010 WL 5106329 (Tex. App.

Houston 14th Dist. Dec. 7 2010).

210. In a trial for sexual assault of a child, there was no error under Tex. R. Evid. 404(b) when the trial court admitted extraneous-act evidence about defendant's inappropriate interaction with another student to rebut the defense fabrication claim because the acts were sufficiently similar: both involved 16- and 15-year-old female students who confided their personal problems in defendant, and defendant complimented each on their looks and shook their hands similarly by continuing to hold their hands after shaking them and invited each to his apartment. James v. State, 2010 Tex. App. LEXIS 1337, 2010 WL 654522 (Tex. App. Waco Feb. 24 2010).

211. In a trial for aggravated assault on a child, defendant was not deprived of his Sixth Amendment right to effective assistance of counsel, even though counsel violated Tex. R. Evid. 404(b), 412(b), (c), by introducing evidence about two other situations in which defendant had sexual conduct with girls who were three years younger than him and younger than the age for consensual sex, because the evidence could have been introduced to show a pattern of consensual activities and of involvment with girls relatively close to defendant in age. McGuire v. State, 2010 Tex. App. LEXIS 673, 2010 WL 322988 (Tex. App. Texarkana Jan. 29 2010).

212. In a child sexual assault case involving a victim who was 10 at the time of the offenses and 24 at the time of trial, evidence of extraneous offenses was properly admitted under Tex. R. Evid. 403, 404 to rebut defensive theories that defendant lacked opportunity and that the complainant fabricated his allegations. Given the similarities of action, place, and modus operandi, the time differential alone did not render the evidence irrelevant or lacking in probative value. Villa v. State, 2009 Tex. App. LEXIS 6965, 2009 WL 2914255 (Tex. App. Corpus Christi Aug. 31 2009).

213. In a trial for indecency with a child, in violation of Tex. Penal Code Ann. § 21.11(b), there was no error under Tex. R. Evid. 401, 403, 404, in admitting extraneous offense evidence. Evidence of possession of child pornography was relevant to defendant's intent to arouse or gratify his sexual desire; evidence of methamphetamine use was relevant to show defendant's state of mind at the time of the charged offense and tended to show how the offense unfolded and progressed; and evidence that defendant physically abused the victim and two other children, in addition to providing context about the relationship between the victim and defendant, was admissible to show the victim's state of mind and explain why the victim did not speak up earlier about the abuse. Stinson v. State, 2009 Tex. App. LEXIS 3186, 2009 WL 1267348 (Tex. App. Dallas May 8 2009).

214. In defendant's aggravated sexual assault of a child case, the trial court did not err in admitting testimony and evidence of an extraneous offense committed by defendant against a witness because the extraneous offense evidence was properly admitted to rebut a defensive theory of fabrication and frame-up. The witness identified defendant in court, and testified that he tried to put his hands down her pants. Wells v. State, 2009 Tex. App. LEXIS 2762, 2009 WL 1108796 (Tex. App. El Paso Apr. 23 2009).

215. In defendant's aggravated sexual assault of a child case, the trial court did not err in admitting testimony and evidence of an extraneous offense committed by defendant against a witness because the extraneous offense evidence was properly admitted to rebut a defensive theory of fabrication and frame-up. The witness identified defendant in court, and testified that he tried to put his hands down her pants. Wells v. State, 2009 Tex. App. LEXIS 2767, 2009 WL 1108665 (Tex. App. El Paso Apr. 23 2009).

216. In defendant's aggravated sexual assault of a child case, the trial court did not err in admitting testimony and evidence of an extraneous offense committed by defendant against a witness because the extraneous offense evidence was properly admitted to rebut a defensive theory of fabrication and frame-up. The witness identified defendant in court, and testified that he tried to put his hands down her pants. Wells v. State, 2009 Tex. App. LEXIS

2768, 2009 WL 1108663 (Tex. App. El Paso Apr. 23 2009).

217. In defendant's trial for sexual indecency with a child, evidence that defendant offered the victim cocaine and that they smoked it together in a hotel room where the assault took place was admissible because it was intertwined with the assault offense. It was not an extraneous offense requiring the State to give notice under Tex. R. Evid. 404. Madrid v. State, 2008 Tex. App. LEXIS 5834 (Tex. App. El Paso July 31 2008).

218. In a sexual assault of a child case. did not abuse its discretion by admitting extraneous offense evidence that defendant used cocaine at the time of the offense as it was same transaction contextual evidence; evidence showing defendant and the victim used cocaine together was intertwined with the evidence of the assaultive conduct and it would have been impractical to describe the events of that day without relating the cocaine use. Further, the evidence illuminated the nature of the crime and helped explain why the victim went to the motel room with defendant. Madrid v. State, 2008 Tex. App. LEXIS 5838 (Tex. App. El Paso July 31 2008).

219. In defendant's aggravated sexual assault of a child case, evidence that a witness saw defendant's hand in another child's underwear was properly admitted because the testimony rebutted defendant's theory that any touching was accidental. Johnson v. State, 2008 Tex. App. LEXIS 3713 (Tex. App. El Paso May 22 2008).

220. In defendant's child sexual assault case, the court properly allowed evidence that defendant "gave" the victim to his drug dealer in lieu of payment because it revealed defendant's relationship with the victim by demonstrating that defendant saw sex with the victim as a tradable good that he took lightly; defendant's allowing an adult male to sexually abuse the victim thus demonstrated his own state of mind and relationship with the victim. Sanders v. State, 255 S.W.3d 754, 2008 Tex. App. LEXIS 3413 (Tex. App. Fort Worth 2008).

221. Trial court did not err by denying defendant's request for an extraneous offense instruction in the jury charge because the extraneous offenses were so intertwined with the sexual assault that the jury's understanding of the sexual assault would have been obscured without them; the extraneous offenses all occurred closely in time to the sexual assault and a description of each offense was necessary to properly explain the assault and the circumstances under which it took place, as: (1) defendant's encounter with another man demonstrated how defendant ensured that the victim was alone; (2) the cocaine use of defendant and the victim just before the sexual assault demonstrated that defendant might have completed his crime by lowering the victim's inhibitions; and (3) the evidence that defendant gave the victim a bag of crack cocaine for her mother immediately after the assault demonstrated that the mother might have set up an encounter between defendant and the victim as part of a drug deal. Taylor v. State, 263 S.W.3d 304, 2007 Tex. App. LEXIS 6198 (Tex. App. Houston 1st Dist. 2007).

222. Where defendant was charged with aggravated sexual assault of the thirteen-year-old victim, the trial court did not abuse its discretion by admitting evidence of three extraneous acts of sexual intercourse; the evidence was admissible under Tex. R. Evid. 404 to counter his attack on her credibility and show that a relationship existed. Smith v. State, 2007 Tex. App. LEXIS 6004 (Tex. App. Amarillo July 30 2007).

223. Where defendant was alleged to have committed a sexual assault against a thirteen-year-old child, trial court did not violate Tex. R. Evid. 404 by admitting the child's testimony of defendant's use and sale of marijuana; the evidence was admissible to show the attempt by defendant to cultivate a relationship with the child by bringing him to his house to smoke marijuana. Valdez v. State, 2007 Tex. App. LEXIS 4612 (Tex. App. Amarillo June 12 2007).

224. In a trial for indecency with children, defendant should have been allowed to elicit testimony that he had a reputation in the community for the ethical treatment of children; the error in excluding that evidence was not harmless under Tex. R. App. P. 44.2(b), even though there was other testimony as to his reputation for being peaceful and law-abiding, because evidence of a reputation as being law-abiding was far too generic to address the

specific character trait of pedophilia. Moody v. State, 2006 Tex. App. LEXIS 9788 (Tex. App. Houston 1st Dist. Nov. 9 2006).

225. Relevancy of the defendant's pornographic magazines that portrayed underaged young women in sexual situations lay in their tendency to make it more probable that defendant intended to sexually assault his daughter, a child under age 17, because it demonstrated his predilection for underaged females. Kenley v. State, 2006 Tex. App. LEXIS 8864 (Tex. App. Fort Worth Oct. 12 2006).

226. Defendant's admission in a videotape regarding other acts involving a child victim of sexual abuse was admissible under Tex. Code Crim. Proc. Ann. art. 38.37, § 2; the statement was also admissible under Tex. R. Evid. 404(b) because he attempted to rebut a showing of motive, opportunity, and intent. White v. State, 2006 Tex. App. LEXIS 4973 (Tex. App. Austin June 9 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements

227. Evidence of another sexual assault by defendant on the same victim at another location was admissible under Tex. R. Evid. 404(b); the appellate court would not speculate as to why counsel did not request a limiting instruction at the time the jury heard testimony about the offense. Bock v. State, 2013 Tex. App. LEXIS 8743 (Tex. App. Houston 1st Dist. July 16 2013).

228. During defendant's trial for attempted indecency with a child, the trial court did not err by admitting evidence of a recorded interview conducted by police officials, during which defendant confessed to previously sexually assaulting an eight-year-old girl, a victim separate from the one in the case at bar, where, in addition to outlining during his opening statement a defensive theory about the lack of intent, defendant pursued an attack on the State's evidence via cross-examination that furthered that previously-outlined defensive strategy, and only thereafter did the State seek admission of the at-issue Tex. R. Evid. 404 evidence. Erickson v. State, 2008 Tex. App. LEXIS 1134 (Tex. App. Texarkana Feb. 15 2008).

229. In an aggravated sexual assault case where defendant was convicted of sexually assaulting his 10-year-old stepgranddaughter, the fact that defendant suggested he was only wrestling with or tickling the victim brought into issue his intent; thus, the evidence of prior instances of sexual conduct with children became relevant. Therefore, under Tex. R. Evid. 404(b), the trial court did not abuse its discretion by admitting the evidence of prior acts of sexual misconduct with other children, including his two stepdaughters. Phillips v. State, 2006 Tex. App. LEXIS 10622 (Tex. App. Texarkana Dec. 14 2006).

230. Defendant presented evidence that he was away from the house for most of the day obtaining stickers for both his and his ex-wife's vehicles; that permitted the trial court to make a reasonable inference that defendant was suggesting that he did not have the time to commit the alleged acts; by presenting his activities on the day in question to demonstrate lack of opportunity to commit the crime, defendant opened the door to admission of the extraneous evidence under Tex. R. Evid. 404(b) to show that he had the opportunity to commit the crime of aggravated sexual assault of a child. Morales v. State, 222 S.W.3d 134, 2006 Tex. App. LEXIS 9771 (Tex. App. Corpus Christi 2006), *corrected by*--S.W.3d--, 2006 Tex. App. LEXIS 11350 (Tex. App. -- Corpus Christi 2006.

231. Another child's testimony that defendant assaulted her logically demonstrated that the current child victim was a credible witness by showing that an incestuous relationship could arise between a step-grandfather and his step-grandchildren; thus, the trial court did not err in admitting evidence of those extraneous sexual offenses under Tex. R. Evid. 404(b) because defendant challenged the victim's credibility and the other child's testimony was needed to support the victim's testimony of the sexual assault that a jury might not otherwise want to acknowledge

as existing in some familial relationships. Morales v. State, 222 S.W.3d 134, 2006 Tex. App. LEXIS 9771 (Tex. App. Corpus Christi 2006), *corrected by*--S.W.3d--, 2006 Tex. App. LEXIS 11350 (Tex. App. -- Corpus Christi 2006.

232. Complainant testified that defendant fondled and kissed her in an escalating fashion when she was between the ages of six and 10, that he felt her under her clothes when she was 10, and that he had sexual intercourse with her when she was 13. Because the testimony was relevant to the state of mind of the complainant and defendant, as well as to the previous and subsequent relationship between the complainant and defendant, pursuant to Tex. Code Crim. Proc. Ann. art. 38.37, § 2, the trial court did not err in admitting the extraneous offense evidence. Parker v. State, 2006 Tex. App. LEXIS 8834 (Tex. App. Houston 1st Dist. Oct. 12 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Penalties

233. In a penalty trial for aggravated-sexual assault of a child, it was proper to allow the State to ask defendant's mother whether she had heard about an extraneous offense after she testified that her son was a good boy and that she knew he did not do it. Burke v. State, 371 S.W.3d 252, 2011 Tex. App. LEXIS 8368, 2011 WL 5023008 (Tex. App. Houston 1st Dist. Oct. 20 2011).

234. In an aggravated sexual assault and indecency with a child case, while defendant did not receive adequate notice of the bad act evidence of showing a pornographic videotape to the victim, as required by Tex. Code Crim. Proc. Ann. art. 37.07, this error was harmless under Tex. R. App. P. 44.2(b) as the victim testified unequivocally concerning sexual contact between defendant and her, and defendant received much less than the possible maximum sentence. Flores v. State, 2007 Tex. App. LEXIS 2506 (Tex. App. Eastland Mar. 29, 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Rape : Elements

235. In a sexual assault case alleging use of a date rape drug, there was no error under Tex. R. Evid. 403, 404 in admitting testimony from women other than the complainant who claimed to have been drugged by defendant. Corbo v. State, 2009 Tex. App. LEXIS 7809, 2009 WL 5551376 (Tex. App. Houston 14th Dist. Sept. 24 2009).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

236. To the extent that defendant convicted of driving while intoxicated (DWI), second offense, had sought to characterize the technical violations that he committed during his previous community supervision for DWI as new offenses, and thereby require the State to provide pretrial notice of its intent to introduce evidence regarding technical community supervision violations in a future prosecution pursuant to Tex. Code Crim. Proc. Ann. art. 37.07 or Tex. R. Evid. 404(b), his argument found no support in Texas statutes or caselaw because the legislature has not taken steps to include "technical" violations of community supervision within the scope of the term "offense," as that term is commonly used by Texas statutes and caselaw. Coffel v. State, 242 S.W.3d 907, 2007 Tex. App. LEXIS 9993 (Tex. App. Texarkana 2007).

237. Trial court did not err during defendant's trial for driving while intoxicated by admitting evidence under Tex. R. Evid. 404(b) of defendant's alcoholism and attendance at alcohol rehabilitation because the State was allowed to show a more complete picture of defendant's health -- the fact that she also suffered from alcoholism -- in order to rebut her defensive theory that she suffered generally from depression and panic attacks and that her suffering from such an attack caused her to appear intoxicated on the occasion in question. Manor v. State, 2006 Tex. App. LEXIS 8276 (Tex. App. Eastland Sept. 21 2006).

238. Where defendant offered to stipulate that jurisdictional convictions existed, the probative value of evidence of the same convictions was substantially outweighed by the danger of unfair prejudice, and under Tex. R. Evid. 403, admission of defendant's prior DWI convictions was error; thus, under Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 37.07, § 2(a), the conviction should not be based on the assumption that the accused was a criminal generally or that he was a person of bad character. Robles v. State, 85 S.W.3d 211, 2002 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 2002).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : License Violations

239. In a case where defendant was accused of making a counterfeit insurance card to procure the dismissal of a traffic ticket, there was no error in admitting evidence of a similar incident under Tex. R. Evid. 404(b) because the evidence tended to show that defendant's actions were taken with the conscious objective of defrauding a court. Moreover, the differences between the two incidents, which occurred just two months apart, were not significant for purposes of Rule 404(b) since intent was the material issue. Vera v. State, 2008 Tex. App. LEXIS 5549 (Tex. App. Amarillo July 24 2008).

Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview

240. Trial court did not err by admitting into evidence three firearms that were not connected to the shooting that were found in defendant's motel room when he was arrested because: (1) the court did not believe that possession of a firearm was, in and of itself, extraneous misconduct; and (2) defendant made no assertion or argument that he was surprised or otherwise harmed by the State's failure to include the firearms in its Tex. R. Evid. 404(b) notice. Gonzalez v. State, 2011 Tex. App. LEXIS 5139, 2011 WL 2652162 (Tex. App. Corpus Christi July 7 2011).

241. Where defendant was charged with possession of methamphetamine, a controlled substance, the arresting officer was permitted to testify to finding a sawed-off shotgun during the search of defendant's residence; possession of an illegal weapon qualified as same transaction contextual evidence in the circumstances of this offense, which established affirmative links between the methamphetamine and defendant. Longoria v. State, 2006 Tex. App. LEXIS 1158 (Tex. App. Corpus Christi Feb. 9 2006).

242. In defendant's criminal trial for evading arrest in a vehicle, the trial court abused its discretion by permitting the State to introduce evidence of the handgun found in his vehicle and his parole status; because identity was the main issue in the case, the State did not have a compelling need to prove motive via defendant's parole status and the handgun. The trial court abused its discretion by concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Powell v. State, 151 S.W.3d 646, 2004 Tex. App. LEXIS 9368 (Tex. App. Waco 2004), reversed by 189 S.W.3d 285, 2006 Tex. Crim. App. LEXIS 681 (Tex. Crim. App. 2006).

243. In an assault case, evidence of gun possession was properly allowed as an extraneous offense because it was indivisibly connected to the charged offense, and it explained the context of the offense for which defendant was tried; the evidence showed that defendant committed the crime of felon in possession of a handgun by placing a gun in a vehicle before threatening two law enforcement officers. Morales v. State, 2004 Tex. App. LEXIS 3602 (Tex. App. Eastland Apr. 22 2004).

Criminal Law & Procedure : Criminal Offenses : Weapons : Use : General Overview

244. In a murder case involving multiple gunshot wounds, there was no error under Tex. R. Evid. 404(b) in admitting evidence that defendant produced a weapon several hours before the shooting because the assault was same transaction contextual evidence; the record showed an ongoing course of events from the time defendant threatened the assault victim with the gun until defendant shot the murder victim. Miller v. State, 2007 Tex. App.

LEXIS 6511 (Tex. App. Dallas Aug. 10 2007).

245. In an aggravated robbery case, the witnesses' extraneous offenses testimony was admissible under Tex. R. Evid. 404(b) for the purpose of proving identity because the robberies were sufficiently similar so as to mark them as defendant's handiwork because: (1) the time interval between the commission of the robberies was relatively short -- a three-week period; and (2) defendant used the same general modus operandi in all three robberies -- he entered the dry cleaning businesses carrying a jacket, asked each of the employees to dry clean his jacket, pulled out a knife when the employees' attentions were directed elsewhere, forced the employees to give him money, and then instructed them to stay in the businesses' bathrooms. Chatman v. State, 2004 Tex. App. LEXIS 5410 (Tex. App. Houston 1st Dist. June 17 2004).

Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : General Overview

246. In an aggravated sexual assault of a child under 14 years of age case, juvenile defendant's 10-year commitment was reversed as the trial court's error in allowing the admission of an extraneous unadjudicated offense defendant allegedly committed against another child in violation of Tex. R. Evid. 404(b) was not harmless. The only purpose for offering the evidence was to show that defendant, while on probation, had sexually assaulted another young child just months earlier than the offense alleged in the petition to adjudicate. In re C.J.M., 167 S.W.3d 892, 2005 Tex. App. LEXIS 4606 (Tex. App. Fort Worth 2005).

247. Tex. Fam. Code Ann. § 51.17 if followed by the court and the rules of evidence applicable to criminal cases are applied to issues of admissibility at the disposition phase of all juvenile cases. Tex. R. Evid. 404(b) is applicable to criminal cases. In re C.J.M., 167 S.W.3d 892, 2005 Tex. App. LEXIS 4606 (Tex. App. Fort Worth 2005).

248. Trial court did not err in denying a juvenile's motion to sever six counts of aggravated sexual assault for separate trials, in part because the juvenile made no showing that evidence of the extraneous offenses would not have been admissible in severed cases. In re D.L., 160 S.W.3d 155, 2005 Tex. App. LEXIS 1447 (Tex. App. Tyler 2005).

249. Tex. R. Evid. 404(b) requires that, upon timely request by a defendant in a criminal case, reasonable notice be given in advance of the trial of the State's intent to introduce in the State's case-in-chief evidence of other crimes, wrongs, or acts, and where defendant juvenile objected to the extraneous offense evidence elicited upon cross-examination by the State after the State presented its case-in-chief and rested, defendant's Tex. R. Evid. 404(b) objection was without merit. In re V.M.S., 2004 Tex. App. LEXIS 5938 (Tex. App. Houston 1st Dist. July 1 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 9833 (Tex. App. Houston 1st Dist. Nov. 4, 2004).

Criminal Law & Procedure : Grand Juries : Procedures : Return of Indictments : Refusals to Indict

250. In a case involving indecency with a child, a trial court did not err by refusing to admit into evidence a grand jury's no-bill relating to an extraneous offense because it was not material to the defense of the case at hand. Bass v. Tex., 2009 Tex. App. LEXIS 4736, 2009 WL 3839003 (Tex. App. Houston 14th Dist. June 18 2009).

Criminal Law & Procedure : Accusatory Instruments : Indictments : General Overview

251. Court did not err in ruling that the State had given timely and adequate notice of its intention to introduce evidence of extraneous offenses where the State's notice as to each extraneous offense gave information, either in the notice itself or by reference to a specific numbered count of the indictment, sufficient to allow defendant to prepare for trial. In addition, over 10 days elapsed from the date of notice to the beginning of the trial. Splawn v.

State, 160 S.W.3d 103, 2005 Tex. App. LEXIS 752 (Tex. App. Texarkana 2005), writ of certiorari denied by 126 S. Ct. 2035, 164 L. Ed. 2d 793, 2006 U.S. LEXIS 3830, 74 U.S.L.W. 3640 (U.S. 2006).

Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims

252. Because evidence of the investigation into the arresting officer was not admissible under this rule, as the investigation about whether the officer had violated the Occupations Code had no bearing on his propensity for violence or whether he was the first aggressor, the trial court did not abuse its discretion by determining that defendant did not establish a Brady violation. Smith v. State, 2013 Tex. App. LEXIS 9194 (Tex. App. Houston 1st Dist. July 25 2013).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : General Overview

253. State was not required to give notice of the punishment phase testimony of two witnesses because, at no point, did defendant formally request notice prior to the commencement of the punishment phase. Also, the trial court's actions gave defendant several days to prepare for the testimony of the two new witnesses even though he was legally entitled to none. Flores v. State, 2014 Tex. App. LEXIS 611, 2014 WL 235276 (Tex. App. San Antonio Jan. 22 2014).

254. State was not required to give notice of the punishment phase testimony of two witnesses because, at no point, did defendant formally request notice prior to the commencement of the punishment phase. Also, the trial court's actions gave defendant several days to prepare for the testimony of the two new witnesses even though he was legally entitled to none. Flores v. State, 2014 Tex. App. LEXIS 611, 2014 WL 235276 (Tex. App. San Antonio Jan. 22 2014).

255. Tex. R. Evid. 404(b)'s requirement that the State give a defendant reasonable notice before trial of its intention to offer evidence of other crimes, wrongs, or acts does not apply when the other crimes, wrongs, or acts arise in the same transaction; other crimes may be admissible as same transaction contextual evidence where several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony of any one of them cannot be given without showing the others. Gregory v. State, 56 S.W.3d 164, 2001 Tex. App. LEXIS 4519 (Tex. App. Houston 14th Dist. 2001), writ of certiorari denied by 538 U.S. 978, 123 S. Ct. 1787, 155 L. Ed. 2d 667, 2003 U.S. LEXIS 2967, 71 U.S.L.W. 3666 (2003).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Prior Record of Defendant

256. Appellant's solicitation came in a motion asking the trial court to order the State to give notice and that the order encompass discovery of all the State's evidence that would be used to establish each prior crime, but the trial court never ruled on the motion, which was required before the State's duty to produce or disclose was triggered; the court could not say the trial court erred in admitting the evidence even if prior notice of the State's intent to do so was not provided. Benitez v. State, 2013 Tex. App. LEXIS 13146, 2013 WL 5782923 (Tex. App. Amarillo Oct. 22 2013).

257. State did provide notice of its intent to offer evidence of extraneous offenses related to a prior kidnapping involving the same victim as in the current case, and a supplemental notice was also filed in advance of the trial; the subject matter of the pictures in question overlapped with the subject matter of the victim's testimony, such that no harm resulted from the admission of the pictures, assuming the State failed to provide reasonable prior notice. Benitez v. State, 2013 Tex. App. LEXIS 13146, 2013 WL 5782923 (Tex. App. Amarillo Oct. 22 2013).

258. Defendant argued that he did not receive proper notice regarding a witness's extraneous-offense testimony, but the notice requirements of Tex. R. Evid. 404(b) applied only to evidence presented during the State's case-in-chief, not to rebuttal evidence. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

259. Defendant argued that a description, for purposes of Tex. R. Evid. 404(b), did not properly indicate that the assault was of a public servant, but the State's next entry on the notice had the same date and a similar cause number and contained an offense description of resisting arrest and search. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

260. Given that (1) the prosecutor called defense counsel to inform him of the existence of a videotape as soon as the prosecutor learned of it, and he narrated a portion of the events to counsel, and (2) a copy of the videotape was made available on April 9th, and counsel received the video on April 13th, the day before trial, the trial court did not err in finding that the prosecution gave counsel reasonable notice of the evidence. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

261. Even if defendant had shown that the trial court abused its discretion in either admitting the videotape or in finding that notice was reasonable under Tex. R. Evid. 404(b), defendant failed to show what harm resulted under Tex. R. App. P. 44.2(b); the other evidence provided reasonable assurance that even the erroneous admission of the videotape would have had only a slight effect, if any, on the jury, and defendant did not show how the lack of reasonable notice prejudiced the defense in any way. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

262. In an aggravated sexual assault and indecency with a child case, while defendant did not receive adequate notice of the bad act evidence of showing a pornographic videotape to the victim, as required by Tex. Code Crim. Proc. Ann. art. 37.07, this error was harmless under Tex. R. App. P. 44.2(b) as the victim testified unequivocally concerning sexual contact between defendant and her, and defendant received much less than the possible maximum sentence. Flores v. State, 2007 Tex. App. LEXIS 2506 (Tex. App. Eastland Mar. 29, 2007).

263. For purposes of Tex. R. Evid. 404(b), the court agreed with defendant that the State should have entitled its additional notices as "supplemental" or "additional" rather than "amended," but the trial court did not err in finding that the State intended to supplement, not amend, its prior notices and defendant did not suffer unfair prejudice. Icenogle v. State, 2007 Tex. App. LEXIS 339 (Tex. App. San Antonio Jan. 19 2007).

264. Trial court did not err in allowing the State to introduce extraneous evidence during the punishment phase; notice given under Tex. R. Evid. 404(b) six days before a trial was not per se unreasonable as defendant claimed, the trial court refused to allow the State to present the evidence during its case-in-chief, the evidence was ultimately offered almost two weeks after defendant received notice, and defendant did not request a continuance. Icenogle v. State, 2007 Tex. App. LEXIS 339 (Tex. App. San Antonio Jan. 19 2007).

265. For purposes of Tex. R. Evid. 404(b), notice given six days before a trial is not per se unreasonable. Icenogle v. State, 2007 Tex. App. LEXIS 339 (Tex. App. San Antonio Jan. 19 2007).

266. State was not required by Tex. R. Evid. 404(b) to give advance notice to defendant of its intent to introduce evidence of her alcoholism because the evidence of alcoholism of which defendant complained was introduced in cross-examination and not in the State's case-in-chief. Manor v. State, 2006 Tex. App. LEXIS 8276 (Tex. App. Eastland Sept. 21 2006).

267. In an aggravated assault and murder case, the trial court did not abuse its discretion by admitting the extraneous offense evidence as defendant had adequate time to prepare a defense and could not demonstrate surprise by its introduction. Gabriel v. State, 2004 Tex. App. LEXIS 7979 (Tex. App. Corpus Christi Aug. 31 2004).

Criminal Law & Procedure : Discovery & Inspection : Discovery Misconduct : General Overview

268. In a driving while intoxicated sentencing proceeding, the court did not err in admitting a scene video from a prior conviction, with testimony from the arresting officer, despite the State's failure to disclose. Defendant had argued that the admission was erroneous under Tex. R. Evid. 404(b). Oprean v. State, 2005 Tex. App. LEXIS 1895 (Tex. App. Houston 1st Dist. Mar. 10 2005).

269. In a trial for indecency with a child, the trial court properly admitted extraneous offense evidence, which related to defendant's touching of the victim's cousin, without the notice required by Tex. Code Crim. Proc. Ann. art. 38.37, § 3. The evidence was closely related in time, location, and subject matter with the charged offense, and therefore it was within the trial court's discretion to find that it was evidence "arising in the same transaction." McDonald v. State, 148 S.W.3d 598, 2004 Tex. App. LEXIS 8855 (Tex. App. Houston 14th Dist. 2004), *aff'd*, 179 S.W.3d 571, 2005 Tex. Crim. App. LEXIS 2010 (Tex. Crim. App. 2005). no pet.

270. Evidence of taped phone conversation, in which defendant indicated his involvement in the narcotics business, was properly admitted to rebut evidence that defendant desired to change his life, was capable of following the law if released, and made his living as a mechanic. The State was not required to give defendant notice of its intent to use the phone conversation as rebuttal during punishment. Wiggins v. State, 2004 Tex. App. LEXIS 8835 (Tex. App. Fort Worth Sept. 30 2004).

Criminal Law & Procedure : Pretrial Motions & Procedures : Joinder & Severance : Severance of Defendants

271. Defendants, the mother of the victim and her boyfriend, failed to prove that they were prejudiced by their joint trial because: (1) the mother's request for severance was based entirely upon antagonistic defenses; (2) any error based on the mother's prior conviction of second-degree injury to a child was harmless because the conviction was not admitted into evidence; and (3) the boyfriend failed to timely present his claim that the mother's prior conviction was relevant to whether he had a motive to confess falsely; the boyfriend knew about his own motives before trial, and therefore was obligated to raise before trial any claim based on those motives, but he failed to raise the claim in his pretrial severance motion. Qualley v. State, 206 S.W.3d 624, 2006 Tex. Crim. App. LEXIS 1007 (Tex. Crim. App. 2006).

Criminal Law & Procedure : Pretrial Motions & Procedures : Joinder & Severance : Severance of Offenses

272. Although the trial court erred when it failed to grant defendant's motions to sever, based upon the overwhelming evidence of guilt as to each offense, defendant's substantial rights were not adversely affected by the joinder of the offenses of sexual assault, aggravated sexual assault, and indecency with a child by exposure into a single trial. Because the trial court in a separate trial for each offense could have admitted evidence of the other offenses to show same transaction context or to rebut defendant's suggestion of fabrication, separate juries would have heard similar evidence. Rodriguez v. State, 2014 Tex. App. LEXIS 1018 (Tex. App. Eastland Jan. 30 2014).

273. Court did not err by denying defendant's motion to sever offenses because it was probable that the evidence relating to the victim's allegations against defendant would have been admissible for the purpose of rebutting defendant's theory that the victim was not telling the truth even if a severance had been granted, and defendant was able to concentrate his defense on the lack of physical evidence, the victim's inconsistent statements, and implications that she embellished and fabricated facts to please the outcry interviewer and others. Galbraith v.

State, 2008 Tex. App. LEXIS 8433 (Tex. App. Fort Worth Nov. 6, 2008).

274. Severance of offenses was properly denied in defendant's indecency and sexual assault on a child case because the record did not reflect that, had the cases been severed, defendant would have asserted different defensive theories for each victim; in addition, because of the allegedly similar patterns of abuse, and because two of the victims were living together, it was also likely that the testimony of the other victims would have been admissible to show opportunity, intent, preparation, or plan. Sparks v. State, 2008 Tex. App. LEXIS 2810 (Tex. App. Austin Apr. 17 2008).

Criminal Law & Procedure : Guilty Pleas : Admissibility at Trial

275. Tex. R. Evid. 404 was implicated by a murder defendant's statements in tape-recorded phone conversations about a plea offer on an unrelated offense because a rational jury could have believed that the reference to a plea agreement was evidence of another crime. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

276. In a murder trial, no harm occurred when the trial court admitted tape-recorded phone conversations that included defendant's statement about a plea offer on an unrelated offense; defendant's remark was in the middle of the State's first tape-recorded conversation, it was not singled out at trial, and the State did not attempt to introduce other evidence regarding the previous offense. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

Criminal Law & Procedure : Guilty Pleas : Allocution & Colloquy

277. Failure to admonish defendant on the consequences of a guilty plea, specifically the requirement of registering as a sex offender, as required by Tex. Code Crim. Proc. Ann. art. 26.13, was harmless error under Tex. R. App. P. 44 because the State presented substantial evidence of guilt, including Tex. R. Evid. 404 evidence regarding other children who had allegedly been abused by defendant and because the omitted admonition regarding the sex-offender registration requirement did not apply to or affect defendant, given that defendant would not be eligible for parole until serving 100 years of the sentence. Bessey v. State, 239 S.W.3d 809, 2007 Tex. Crim. App. LEXIS 1630 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

278. Defendant failed to show that her counsel was ineffective for failing to request notice of the State's intent to introduce evidence of extraneous offenses or bad acts during punishment, particularly the officer's testimony that defendant continued to post web-advertisements for escorting services up until the trial setting, because defendant did not identify what counsel could have discovered with timely notice of the State's intent. Defendant did not identify any particular witness or other evidence her counsel could have present to rebut the inference that she continued to work in the sex industry. Brown v. State, 2012 Tex. App. LEXIS 3685 (Tex. App. Houston 1st Dist. May 10 2012).

279. Defendant in a methamphetamine possession case failed to show that his counsel was ineffective when evidence of an extraneous offense of manufacture of controlled substance was admitted during the punishment phase under Tex. Code Crim. Proc. Ann. art. 37.07. Counsel only told defendant he would not be indicted for the extraneous offense, not that it was inadmissible. Talbert v. State, 2008 Tex. App. LEXIS 5697 (Tex. App. Eastland July 31 2008).

280. Defendant's counsel was not ineffective for failure to object to the extraneous offenses mentioned in the presentence report, because defendant's complaints were based on Tex. R. Evid 404(b) (extraneous evidence) and 802 (hearsay), and because the rules of evidence, including the rules pertaining to hearsay, did not apply to the contents of the presentence report. Champion v. State, 126 S.W.3d 686, 2004 Tex. App. LEXIS 964 (Tex. App. Amarillo 2004).

Criminal Law & Procedure : Counsel : Effective Assistance : Tests

281. In a trial for aggravated-sexual assault of a child, counsel was not rendered ineffective by failing to object under Tex. R. Evid. 404(b) to evidence of extraneous acts against the same victim that took place in a different county because the evidence was admissible under Tex. Code Crim. Proc. Ann. art. 38.37 to show the relationship between defendant and the victim (defendant's nephew), to show their respective states of mind, and to show why the victim did not make a prompt outcry. Burke v. State, 371 S.W.3d 252, 2011 Tex. App. LEXIS 8368, 2011 WL 5023008 (Tex. App. Houston 1st Dist. Oct. 20 2011).

282. In a drug trial, counsel was not rendered ineffective by failing to object under Tex. R. Evid. 404(b) to the admission of a patrol-car video of a traffic stop in which the dispatcher and officer referred to defendant's other crimes, given a limiting instruction already provided by the trial court, the unintelligibility of much of the language in the video, the difficulty in establishing who was speaking in the video, and the applicable presumption of a sound trial strategy. Sorrells v. State, 2010 Tex. App. LEXIS 2519, 2010 WL 1404625 (Tex. App. Austin Apr. 9 2010).

283. Defendant did not meet the Strickland test for proving that his counsel was ineffective in failing to timely object to the introduction of defendant's alleged extraneous conduct because the record was devoid of evidence regarding counsel's reasons or strategy concerning his failure to object to such evidence, and there was no showing that the trial's result would have differed if such evidence had been excluded. Franklin v. State, 2007 Tex. App. LEXIS 6128 (Tex. App. Corpus Christi Aug. 2 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

284. Because the record was silent as to why counsel failed to object to the admission of a syringe and evidence of methamphetamine use, the court presumed that his conduct was reasonable. Griffis v. State, 441 S.W.3d 599, 2014 Tex. App. LEXIS 4598 (Tex. App. San Antonio Apr. 30 2014).

285. Even if counsel's performance was deficient in opening the door to evidence of defendant's remote prior convictions, there was no prejudice because the trial court would still have had the discretion to allow such evidence to be introduced by the State for impeachment purposes and the evidence of guilty was substantial. Howard v. State, 2014 Tex. App. LEXIS 3051, 2014 WL 2619087 (Tex. App. Corpus Christi Mar. 20 2014).

286. Counsel was not ineffective for failing to object to the introduction of extraneous offense evidence that he had assaulted his wife and a peace officer because counsel did object, the evidence constituted the same transaction contextual evidence and was admissible as an exception under this rule and because the record was silent the court presumed that counsel's actions were motivated by sound trial strategy. Hernandez v. State, 2014 Tex. App. LEXIS 3079, 2014 WL 1101587 (Tex. App. Houston 1st Dist. Mar. 20 2014).

287. There was nothing in the record to suggest that defense counsel purposely elicited extraneous-offense evidence from his client or otherwise intentionally opened the door to such evidence, as defense counsel's decision to call a witness as a limited character witness represented a strategy within the bounds of the objective standard of reasonableness and counsel took steps to limit any damage incurred from the State's questioning, requesting a limiting instruction. Johnson v. State, 432 S.W.3d 552, 2014 Tex. App. LEXIS 5162, 2014 WL 1998711 (Tex. App.

Texarkana May 15 2014).

288. Defendant did not show that his trial counsel was ineffective for failing to specifically include a Tex. R. Evid. 403 objection in his objection to testimony because trial counsel reasonably could have concluded that the testimony described past criminal behavior and not just inchoate statements. Perkins v. State, 2013 Tex. App. LEXIS 15003, 2013 WL 6569874 (Tex. App. Houston 1st Dist. Dec. 12 2013).

289. Because the record did not clearly establish that defense counsel did not receive notice of the State's intent to introduce the testimony of defendant's girlfriend and the victim concerning defendant's attempts to persuade them to drop the charges, the court could not conclude that counsel's failure to object on the ground that he lacked notice under this rule constituted deficient performance. Agbogwe v. State, 414 S.W.3d 820, 2013 Tex. App. LEXIS 11103 (Tex. App. Houston 1st Dist. Aug. 29 2013).

290. Defendant's counsel was ineffective for opening the door to allow the State to introduce evidence of his prior convictions of sexual assault and sexual assault of a child by asking defendant's ex-girlfriend whether defendant was a violent person and she responded that he was not; therefore, on cross-examination the State was permitted to ask the ex-girlfriend whether she knew that defendant had pleaded guilty to two prior sexual assaults, allowing prejudicial and otherwise inadmissible evidence to be presented before the jury, which could not be considered sound trial strategy. The court held that defendant was prejudiced because the credibility of defendant's testimony was a key component of his defense strategy, given that he claimed he was trying to get away from the victim and had no intention of hurting anyone; although the trial court gave the jury a limiting instruction as to how it could consider the prior convictions, the instruction specifically allowed the jury to consider the convictions for the sole purpose of determining defendant's character for violence. Hernandez v. State, 2013 Tex. App. LEXIS 6365, 2013 WL 2301989 (Tex. App. Eastland May 23 2013).

291. In the absence of a record, the court could not conclude that defense counsel's failure to object to the admission of defendant's prior marijuana conviction was so outrageous that no competent attorney would have engaged in it. The court further held that defendant also failed to show that a reasonable possibility existed that, but for counsel's error, the result of the trial would have been different because excluding the complained-of prior offense, the evidence amply supported defendant's convictions. Mccook v. State, 402 S.W.3d 47, 2013 Tex. App. LEXIS 4337 (Tex. App. Houston 14th Dist. Apr. 4 2013).

292. In a case where the victim's wife and appellant were having an affair, defense counsel was not ineffective for not objecting to the evidence regarding appellant's prior threats toward the victim as identity was an issue in the case and appellant's threats towards the victim could have been admitted to show proof of identity, motive, and intent under Tex. R. Evid. 404(b). Lemons v. State, 426 S.W.3d 267, 2013 Tex. App. LEXIS 4227, 2013 WL 1339002 (Tex. App. Texarkana Apr. 4 2013).

293. Trial counsel was not ineffective for failing to file a motion to secure notice from the State of its intent to introduce extraneous offense evidence because counsel was already aware of the evidence, as seen by counsel's preemptive attempts to exclude it by objecting. Matthews v. State, 2013 Tex. App. LEXIS 47, 2013 WL 53748 (Tex. App. Corpus Christi Jan. 3 2013).

294. Because the record did not contain any evidence of trial counsel's strategy in failing to file a motion in limine to exclude extraneous offense evidence, the court was constrained to presume that counsel's performance was effective. Matthews v. State, 2013 Tex. App. LEXIS 47, 2013 WL 53748 (Tex. App. Corpus Christi Jan. 3 2013).

295. Defendant failed to show that his trial counsel was deficient in failing to make a Tex. R. Evid. 404(b) objection where defendant failed to show that the trial court would have been required to sustain the objection; the evidence

at issue was arguably admissible to explain why the victim finally reported the abuse to the police. Sanchez v. State, 2012 Tex. App. LEXIS 2019, 2012 WL 868010 (Tex. App. El Paso Mar. 14 2012).

296. In a sexual assault trial, counsel was not shown to be ineffective in failing to request a limiting instruction when the victim testified, pursuant to Tex. Code Crim. Proc. Ann. art. 38.37 § 2, about other extraneous acts of sexual abuse defendant committed against her because the record contained no explanation for counsel's decision. Taylor v. State, 2012 Tex. App. LEXIS 581 (Tex. App. Houston 1st Dist. Jan. 26 2012).

297. Trial counsel was not ineffective in failing to object to evidence of extraneous offenses and in failing to move to suppress the suggestive pre-trial identification of defendant because (1) defendant had not established that some of the complained of evidence was inadmissible under Tex. R. Evid. 404(b), and trial counsel's decision to elicit testimony to discredit the evidence identifying defendant as the person who committed the burglary was based on sound trial strategy; and (2) a complainant was not shown a photo lineup for identification purposes as she was not a witness to the burglary and defendant's trial counsel used her testimony about tattoos to discredit her recognition of defendant as a person who had been by the house about a week before the burglary. Mott v. State, 2010 Tex. App. LEXIS 10007, 2010 WL 5117251 (Tex. App. Waco Dec. 15 2010).

298. Defendant failed to meet his burden to prove by a preponderance of the evidence that his trial counsel was ineffective for failing to object to the admission of extraneous offenses because the court could not conclude that the trial court would have erred by overruling such an objection, and therefore defendant failed to show a reasonable probability that, but for counsel's error, the result of the trial would have been different. It was within the trial court's discretion to conclude that counsel's cross-examination of the victim called into question a material detail of defendant and, as a result, put defendant's identity at issue; in addition, the record showed that the extraneous offense was sufficiently similar to the instant offense under Tex. R. Evid. 404(b) because both were acts of indecency towards a child, were committed on the morning of October 6, 2008, were committed between the hours of 7 a.m. and 8 a.m., were committed in the same kind of car, and occurred within a one block radius. Woods v. State, 2010 Tex. App. LEXIS 5894 (Tex. App. Houston 1st Dist. July 22 2010).

299. Counsel was not ineffective for eliciting evidence from defendant's girlfriend about previous drug transactions and failing to object to such testimony under Tex. R. Evid. 404(b) because the record supported a conclusion that this was part of counsel's trial strategy to show that the arresting officer and defendant's girlfriend were not credible. Chandler v. State, 2010 Tex. App. LEXIS 963, 2010 WL 457444 (Tex. App. Houston 1st Dist. Feb. 11 2010).

300. In a trial for aggravated assault on a child, defendant was not deprived of his Sixth Amendment right to effective assistance of counsel, even though counsel violated Tex. R. Evid. 404(b), 412(b), (c), by introducing evidence about two other situations in which defendant had sexual conduct with girls who were three years younger than him and younger than the age for consensual sex, because the evidence could have been introduced to show a pattern of consensual activities and of involvment with girls relatively close to defendant in age. McGuire v. State, 2010 Tex. App. LEXIS 673, 2010 WL 322988 (Tex. App. Texarkana Jan. 29 2010).

301. In a driving while intoxicated case, counsel was not ineffective for failing to object or request a limiting instruction with regard to a witness's testimony about defendant's bribery of a witness because evidence of the alleged bribe was admissible to impeach the witness's testimony and to indicate defendant's consciousness of guilt. The record reflected that counsel objected to the testimony, and defendant did not show how any limiting instruction would have been consistent with the defensive issues raised at trial. White v. State, 2010 Tex. App. LEXIS 406, 2010 WL 196938 (Tex. App. Corpus Christi Jan. 21 2010).

302. Counsel was ineffective because counsel's conduct in introducing and opening the door to a prior sexual assault and other "bad acts" evidence, along with his failure to object or request a limiting instruction, showed his

lack of investigation of the relevant law and facts in advance of trial. Such conduct led to the admission of evidence that undermined defendant's credibility, which was dependent on the strength of his own credibility as compared to that of the complainant. Garcia v. State, 308 S.W.3d 62, 2009 Tex. App. LEXIS 9692 (Tex. App. San Antonio Dec. 23 2009).

303. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

304. In a child pornography case, habeas relief was denied to an accused on the basis of ineffectiveness of trial counsel relating to a failure to request Tex. R. Evid. 404(b) notice because trial counsel's affidavit stated that he did not make the request since the State provided the information prior to trial; the State's discovery response and trial counsel's affidavit also indicated that the State had an open-file policy which permitted trial counsel to inspect and review the State's files up to the day of trial. Moreover, the accused failed to show that the failure to make Rule 404(b) objections was professionally unreasonable or would have changed the outcome of the case. Ex Parte Yusafi, 2009 Tex. App. LEXIS 6715, 2008 WL 6740798 (Tex. App. Beaumont Aug. 26 2009).

305. In a case involving aggravated sexual assault of a child, trial counsel did not perform ineffectively, even though no limiting instruction was requested concerning evidence of prior acts, crimes, or wrongs, because the decision might have been strategic. The record was silent regarding the reasons for the failure to request the instruction, and an argument was made that certain activities brought up by the State were normal family interactions. Arcement v. State, 2009 Tex. App. LEXIS 1096, 2009 WL 383398 (Tex. App. Texarkana Feb. 18 2009).

306. In defendant's aggravated robbery case, counsel was not ineffective for eliciting details of defendant's prior conviction because defendant raised the issue of self-defense, and it was likely that the details of the offense would have been admitted to rebut that theory. In eliciting details of the offense, defense counsel gave defendant the opportunity to explain his version of the prior offense in the best light possible. McClure v. State, 2008 Tex. App. LEXIS 9026 (Tex. App. Austin Dec. 4 2008).

307. Trial court properly denied the inmate habeas corpus relief on his claim that defense counsel was ineffective for failing to object to a witness's nonresponsive testimony concerning defendant's propensity for violence because the inmate failed to meet his burden to prove that counsel's representation fell below the standard of prevailing professional norms, as the court was not in a position to judge whether the risk of the jury focusing their view on the inmate outweighed the prejudicial nature of the testimony. Ex parte McAndrew, 2008 Tex. App. LEXIS 656 (Tex. App. Tyler Jan. 31 2008).

308. Defendant did not meet the Strickland test for proving that his counsel was ineffective in failing to timely object to the introduction of defendant's alleged extraneous conduct because the record was devoid of evidence regarding counsel's reasons or strategy concerning his failure to object to such evidence, and there was no

showing that the trial's result would have differed if such evidence had been excluded. Franklin v. State, 2007 Tex. App. LEXIS 6128 (Tex. App. Corpus Christi Aug. 2 2007).

309. In defendant's capital murder case, counsel was not ineffective for not cross-examining a witness about his prior testimony concerning the same murder and robbery at issue in the instant case because counsel testified that if the jury found out that defendant had been involved in another robbery similar to the one in the instant case, committed almost in the same manner and with one of the same parties, the jury would likely not have considered other evidence. Rivas v. State, 2007 Tex. App. LEXIS 5623 (Tex. App. Corpus Christi July 12 2007).

310. In defendant's aggravated assault case, counsel was not ineffective for failing to object to the admission of prior episodes of domestic violence, including photographs of injuries from other alleged acts of abuse and letters to the victim, because the evidence might have been relevant and admissible to provide context for defendant's spontaneous conduct on the night in question, the victim's response to defendant's threats, and to respond to defendant's testimony of denial and that he was the one threatened by the victim on that and prior occasions. Keeton v. State, 2007 Tex. App. LEXIS 4873 (Tex. App. Austin June 19 2007).

311. In a drug trial, counsel was not rendered ineffective by failing to object under Tex. R. Evid. 404, to the admission of the portion of defendant's written statement that referred to an extraneous offense; any error was harmless because there is no reasonable probability that the evidence contributed to the conviction. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

312. In a drug case, defense counsel was not ineffective for failing to object to extraneous offense evidence because, at least some of the uncharged contraband discovered in defendant's vehicle would have been admissible; therefore, it could not be said that the result of the proceeding would have been different if counsel had objected or requested a limiting instruction. Batiste v. State, 217 S.W.3d 74, 2006 Tex. App. LEXIS 8822 (Tex. App. Houston 1st Dist. 2006).

313. During defendant's criminal trial for aggravated sexual assault of a child, counsel was not ineffective for failing to request notice of the State's intent to offer evidence of defendant's extraneous offenses under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g); Tex. R. Evid. 404(b); the record did not indicate counsel's reasons for not objecting to evidence of defendant's extraneous offenses. Bishop v. State, 2006 Tex. App. LEXIS 4874 (Tex. App. Waco June 7 2006).

314. Where defendant was convicted of aggravated sexual assault of a child under two indictments, counsel was not ineffective for failing to request a limiting instruction regarding extraneous offense evidence that may have been admissible under Tex. R. Evid. 404. Tomlinson v. State, 2006 Tex. App. LEXIS 3643 (Tex. App. Houston 14th Dist. Apr. 27 2006).

315. In a resisting arrest case, counsel was ineffective where, inter alia, counsel failed to investigate or interview defendant in detail about his criminal history or his prior contacts with the arresting officer; failed to seek discovery from the State; failed to file and obtain rulings on a motion in limine to require the State to raise extraneous matters outside the presence of the jury; failed to prepare defendant to testify; failed to object to evidence of inadmissible extraneous matters during the guilt phase; invited evidence of unadjudicated arrests during the punishment phase; and failed to object to failure of the punishment-phase charge to include a reasonable doubt instruction. Walker v. State, 195 S.W.3d 250, 2006 Tex. App. LEXIS 1381 (Tex. App. San Antonio 2006).

316. In a criminal prosecution for murder, defense counsel was not ineffective for failing to cross-examine witnesses on certain discrepancies. A defense strategy that avoids the introduction of extraneous offenses is not constitutionally ineffective. Ex parte McFarland, 163 S.W.3d 743, 2005 Tex. Crim. App. LEXIS 740 (Tex. Crim. App.

2005).

317. In defendant's drug case, counsel was ineffective where counsel failed to object to the omission of an accomplice witness instruction, allowing the jury to convict without any corroborating evidence, and counsel failed to object to the State's use of defendant's previous charges and arrests, which were not clearly related or relevant to the instant crime. In addition, counsel failed to object to the prosecutor's comment on defendant's failure to offer an explanation of the drugs in the trunk; therefore, there was a reasonable probability that, but for counsel's deficiencies during trial, the result would have been different. Hall v. State, 161 S.W.3d 142, 2005 Tex. App. LEXIS 508 (Tex. App. Texarkana 2005).

318. In a criminal prosecution for indecency with a child, defendant failed to show that his trial counsel was ineffective for failing to object to the introduction into evidence of his mental health records, which defendant claimed contained evidence of inadmissible extraneous bad conduct. Defendant was not prejudiced by counsel's actions; even without the mental health records, the victim's testimony alone would have been sufficient to support his conviction. Taylor v. State, 2004 Tex. App. LEXIS 4581 (Tex. App. Dallas May 20 2004).

319. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

320. Defendant failed to show that his counsel was ineffective during his criminal trial, as her closing arguments emphasized defendant's claim that he did not intentionally or knowingly possess a bag of marijuana that was found in his newly rented apartment; the apartment manager's testimony that drug trafficking had been occurring at defendant's apartment was arguably admissible for purposes of showing intent, knowledge, or absence of mistake or accident pursuant to Tex. R. Evid. 404(b), and accordingly, his counsel's failure to object was not shown to have been unreasonable. Anang v. State, 2004 Tex. App. LEXIS 1902 (Tex. App. El Paso Feb. 26 2004).

321. Criminal defendant's trial counsel was not deficient for failing to call witnesses to testify as to specific instances of good conduct, which would be in violation of Tex. R. Evid. 404(a)(1) as proof of character may only be admitted at trial in the form of reputation or opinion testimony. Monarrez v. State, 2003 Tex. App. LEXIS 997 (Tex. App. Dallas Jan. 31 2003).

Criminal Law & Procedure : Counsel : Prosecutors

322. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, the trial court properly overruled defendant's objection to the prosecutor's remarks during opening statement that the two fathers of the victims were incarcerated where the prosecutor's remarks were improper character evidence, not within the exceptions provided by Tex. R. Evid. 404(b). Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : General Overview

323. Jury's request for previous charges and convictions did not implicate Tex. R. Evid. 404(b) but was a request for the relevant exhibits. Alvis v. State, 2011 Tex. App. LEXIS 4301, 2011 WL 2120510 (Tex. App. Dallas May 31 2011).

Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury : Invasion of Jury's Province

324. In a case involving the possession of hydrocodone, there was no error in admitting evidence of an extraneous offense under Tex. R. Evid. 404(b) based on the holding of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), because that holding stated that a jury was required to make factual determinations in a jury trial; moreover, it held that a trial judge was unable to usurp the province of a jury in making determinations of fact. Defendant unsuccessfully tried to argue that, because no jury had ever found him guilty of the extraneous offense, it was improper to submit it to the jury in the instant case. Smith v. State, 2009 Tex. App. LEXIS 751, 2009 WL 279490 (Tex. App. Fort Worth Feb. 5 2009).

Criminal Law & Procedure : Trials : Burdens of Proof : Prosecution

325. In the punishment phase of a murder trial, the trial court was not required to instruct the jury that the State had to prove beyond a reasonable doubt extraneous offenses for which defendant had previously been convicted. Johnson v. State, 176 S.W.3d 94, 2004 Tex. App. LEXIS 9589 (Tex. App. Houston 1st Dist. 2004).

Criminal Law & Procedure : Trials : Closing Arguments : General Overview

326. Defendant failed to preserve error as to improper jury argument about his arrest because he failed to raise that objection at trial and because other evidence about his arrest was admitted without objection. Gonzales v. State, 2006 Tex. App. LEXIS 4020 (Tex. App. Corpus Christi May 11 2006).

Criminal Law & Procedure : Trials : Continuances

327. Trial court did not abuse its discretion in refusing to grant defendant's motion for continuance based on lack of notice or in admitting extraneous offense evidence during punishment because the State was not obligated to inform defendant regarding extraneous offenses that it intended to use during the punishment phase of trial due to defendant's failure to properly request notice of the extraneous acts. Defendant's request was made pursuant to Tex. R. Evid. 404(b) and made no reference to Tex. Code Crim. Proc. Ann. art. 37.07, and a request made pursuant to Tex. R. Evid. 404(b) was not sufficient to obligate the State to disclose extraneous evidence that it intended to introduce at the punishment phase of trial. Miller v. State, 2005 Tex. App. LEXIS 2717 (Tex. App. Houston 1st Dist. Apr. 7 2005).

328. Where defendant pleaded guilty to criminal mischief, he failed to show that the trial court abused its discretion by denying his oral motion for continuance because the State gave inadequate notice of its intent to introduce evidence of prior bad acts. Defendant was only entitled to reasonable notice, and he did not dispute that the State provided notice as soon as the information became available. Burns v. State, 2014 Tex. App. LEXIS 1892, 2014 WL 708548 (Tex. App. Houston 14th Dist. Feb. 20 2014).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

329. In a trial for aggravated assault with a deadly weapon under, the trial court did not err by excluding the hearsay recitals in an arrest warrant affidavit and complaint indicating the complainant had previously committed an assault on the defendant; defendant was not prevented from confronting the complainant concerning his prior bad acts; he was permitted to cross-examine the complainant concerning his previous conviction for aggravated assault. Bradshaw v. State, 2006 Tex. App. LEXIS 5891 (Tex. App. Houston 1st Dist. July 6 2006).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance

330. Trial counsel was not ineffective in failing to object to evidence of extraneous offenses and in failing to move to suppress the suggestive pre-trial identification of defendant because (1) defendant had not established that some of the complained of evidence was inadmissible under Tex. R. Evid. 404(b), and trial counsel's decision to elicit testimony to discredit the evidence identifying defendant as the person who committed the burglary was based on sound trial strategy; and (2) a complainant was not shown a photo lineup for identification purposes as she was not a witness to the burglary and defendant's trial counsel used her testimony about tattoos to discredit her recognition of defendant as a person who had been by the house about a week before the burglary. Mott v. State, 2010 Tex. App. LEXIS 10007, 2010 WL 5117251 (Tex. App. Waco Dec. 15 2010).

Criminal Law & Procedure : Trials : Examination of Witnesses : General Overview

331. Criminal defendant's trial counsel was not deficient for failing to call witnesses to testify as to specific instances of good conduct, which would be in violation of Tex. R. Evid. 404(a)(1) as proof of character may only be admitted at trial in the form of reputation or opinion testimony. Monarrez v. State, 2003 Tex. App. LEXIS 997 (Tex. App. Dallas Jan. 31 2003).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

332. Trial court did not abuse its discretion under Tex. R. Evid. 404(a)(3), 608(a), 613 by denying defendant the opportunity to cross-examine a witness about whether the witness was untruthful to the judge that presided over the witness's guilty plea to an assault charge. Reyes v. State, 2010 Tex. App. LEXIS 2359, 2010 WL 1254543 (Tex. App. Corpus Christi Apr. 1 2010).

333. In defendant's sexual assault case, a court did not err by allowing extraneous offense evidence under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) and Tex. R. Evid. 404(b) because, although the State did not provide prior notice of its intent to utilize the evidence, the State presented the evidence during cross examination of defendant. Hope v. State, 2009 Tex. App. LEXIS 657, 2009 WL 223134 (Tex. App. Tyler Jan. 30 2009).

334. Defendant advanced the theory that the charged offenses of three counts of sexual assault and two counts of indecency with a child were an anomaly in his life and that the chance of reoffense was very small; that theory was subject to rebuttal and cross-examination by the State; the fact that the victim alleged that more instances had occurred than were charged could be seen as relevant to defendant's assertions that the charged offenses were anomalies in his life and that it was unlikely that he would reoffend; therefore, under Tex. R. Evid. 404 and Tex. Code Crim. Proc. Ann. art. 37.07, the trial court did not abuse its discretion in allowing the extraneous offenses to be brought into evidence by the State on cross-examination and rebuttal even without notice to defendant. Norman v. State, 2007 Tex. App. LEXIS 9463 (Tex. App. San Antonio Dec. 5 2007).

335. In a stalking case, the trial court did not err by allowing the cross-examination of a defense witness regarding whether she was aware that defendant had been charged with a crime following an alleged domestic violence incident with the victim and whether she was aware that he had violated a protective order and assaulted his former wife; this evidence was relevant to defendant's good character after the witness testified that she had called the victim and asked her to give defendant another chance. Allen v. State, 218 S.W.3d 905, 2007 Tex. App. LEXIS 2527 (Tex. App. Beaumont 2007).

336. During defendant's trial for indecent exposure, the trial court properly excluded evidence that the victim called the police regarding various disturbances at her residence on several occasions following the report of exposure

because the decision was within the zone of reasonable disagreement; the trial court maintained broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative and collateral evidence, and, under Tex. R. Evid. 608(b), specific instances of conduct, other than conviction of a crime, when offered to attack the witness's credibility could not be explored on cross-examination. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

337. In a criminal prosecution for murder, defense counsel was not ineffective for failing to cross-examine witnesses on certain discrepancies. A defense strategy that avoids the introduction of extraneous offenses is not constitutionally ineffective. Ex parte McFarland, 163 S.W.3d 743, 2005 Tex. Crim. App. LEXIS 740 (Tex. Crim. App. 2005).

338. For proof of identity to be a valid purpose for the introduction of extraneous bad acts under Tex. R. Evid. 404(b), it must be an issue in the case, and the identity can be raised by defense cross-examination, such as when the identifying witness is impeached on a material detail of the identification. Page v. State, 137 S.W.3d 75, 2004 Tex. Crim. App. LEXIS 936 (Tex. Crim. App. 2004).

339. Vigorous cross-examination can, by itself, place in issue a nonconformity purpose under Tex. R. Evid. 404(b). Page v. State, 137 S.W.3d 75, 2004 Tex. Crim. App. LEXIS 936 (Tex. Crim. App. 2004).

Criminal Law & Procedure : Trials : Judicial Discretion

340. Court of appeals failed to properly defer to a trial court's decision where the trial court was within its discretion to hold that the probative value of evidence of a handgun and of defendant's parole status was not substantially outweighed by the danger of unfair prejudice, given that the jury was not informed of the crime for which defendant was on parole, that the strength or weakness of the handgun's connection to defendant reflected equally on the issues of probative value and prejudice, and that there was reason to believe that the State had a significant need for the evidence. Powell v. State, 189 S.W.3d 285, 2006 Tex. Crim. App. LEXIS 681 (Tex. Crim. App. 2006).

Criminal Law & Procedure : Trials : Motions for Mistrial

341. Mistrial was not required by the use by a state witness of defendant's nickname, which was suggestive of other crimes, even though the use violated the trial court's order, because there was no showing that the prosecutor intentionally violated the order and the witness stopped using the nickname after being warned by the trial court that it would not honor the witness's deal with the state. Simons v. State, 2014 Tex. App. LEXIS 8111, 2014 WL 3700667 (Tex. App. Dallas July 24 2014).

342. At defendant's trial for possession of a controlled substance, a witness's comment during direct examination that defendant was out on parole did not warrant a mistrial, because the State's questioning was developing the narrative, the State did not anticipate a reference to an extraneous offense, and the reference was not a concrete statement of a prior offense. The prompt objection and instruction to disregard prevented any elaboration on the offense. Joseph v. State, 2013 Tex. App. LEXIS 13998, 2013 WL 6045902 (Tex. App. Houston 14th Dist. Nov. 12 2013).

343. Statement made by a testifying officer about defendant's prior arrests did not require a mistrial under Tex. R. Evid. 404(b) because it was not given in answer to a question designed to elicit testimony about any extraneous offenses. Rather, the question was to determine when during a stop the officer asked for permission to search the vehicle. Nunn v. State, 2009 Tex. App. LEXIS 7794, 2009 WL 3189361 (Tex. App. Amarillo Oct. 6 2009).

344. In defendant's solicitation case, the trial court did not abuse its discretion in refusing to grant defendant's motion for mistrial because a witness testified, without objection, that defendant and the victim were involved in another "high-profile case," in explaining why his "people" would not carry out the alleged plot to kill the victim. Additionally, the complained of testimony was elicited by defendant's trial counsel, thus supporting a finding that the testimony was given inadvertently. Simpson v. State, 2008 Tex. App. LEXIS 6382 (Tex. App. Corpus Christi Aug. 21 2008).

345. In a criminal trial for aggravated sexual assault, the complainant testified that she waited several years to tell anyone about the abuse as she was afraid of defendant because she saw him beat her mother; the complainant also testified that defendant came to her house to buy drugs; the trial court instructed the jury to disregard the improper statements, therefore curing any prejudice; defendant was not entitled to a mistrial. Degollado v. State, 2007 Tex. App. LEXIS 6032 (Tex. App. San Antonio Aug. 1 2007).

346. Defendant argued that the trial court erred by allowing evidence of an extraneous offense before the jury; the evidence of which defendant complained was the admission of his statements in the videotaped interview that his daughter had threatened to report him to the authorities because he "scratched her little girl's butt;" defendant could complain on appeal that he should have been granted a mistrial due to the improper admission of the evidence of an extraneous offense; however, the appellate court, having decided all of the Mosley factors adversely to defendant, overruled the issue. Badeaux v. State, 2007 Tex. App. LEXIS 2710 (Tex. App. Beaumont Apr. 4 2007).

347. Trial court did not err in denying a mistrial in an aggravated assault case because an instruction to disregard was sufficient to cure any prejudice resulting from the prosecutor's asking a witness whether she was aware of other shootings that had taken place in the area and the witness' reply that she had heard about it; there was no Tex. R. Evid. 404(b) violation because defendant was not clearly implicated in an extraneous offense, and the question was not extremely inflammatory under Tex. R. Evid. 403. Holland v. State, 2006 Tex. App. LEXIS 6584 (Tex. App. Beaumont July 26 2006).

348. Mistrial was not required on a charge of indecency with a child, even though a witness testified regarding an extraneous act after the trial court ruled the evidence inadmissible, because the statement was isolated, did not include details, and was not the result of prosecutorial misconduct. The court presumed that a curative instruction was effective. Vickery v. State, 2005 Tex. App. LEXIS 7664 (Tex. App. Fort Worth Sept. 15 2005).

349. Trial court did not err in denying a request for mistrial in a cocaine possession case after a detective testified that he had already suspected defendant of drug trafficking; the passing reference to the detective's prior suspicions was not prejudicial in light of the prompt jury instruction to disregard. Legarda v. State, 2005 Tex. App. LEXIS 1403 (Tex. App. Amarillo Feb. 17 2005).

350. Trial court did not abuse its discretion by denying defendant's motion for a mistrial in a drug case based on an officer's reference to knowing people in a certain town because the statement did not constitute an improper reference to extraneous offenses, and any improper impression created by the statement was cured by the trial court's prompt instruction to disregard. Moss v. State, 2004 Tex. App. LEXIS 4219 (Tex. App. Dallas May 10 2004).

Criminal Law & Procedure : Trials : Opening Statements

351. Under Tex. R. Evid. 404(b), defendant's opening statement was sufficient to raise a theory of fabrication that entitled the State to offer extraneous-offense evidence in rebuttal because defendant's attorney provided the victim's motive for fabricating her story; he said that there was no evidence to support her allegations; and he claimed that her story changed. Gaytan v. State, 331 S.W.3d 218, 2011 Tex. App. LEXIS 444 (Tex. App. Austin

Jan. 21 2011).

352. Defense opening statement opens the door to the admission of extraneous-offense evidence to rebut the defensive theory presented in the defense opening statement. Bass v. State, 270 S.W.3d 557, 2008 Tex. Crim. App. LEXIS 859 (Tex. Crim. App. 2008).

353. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, the trial court properly overruled defendant's objection to the prosecutor's remarks during opening statement that the two fathers of the victims were incarcerated where the prosecutor's remarks were improper character evidence, not within the exceptions provided by Tex. R. Evid. 404(b). Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

Criminal Law & Procedure : Witnesses : Credibility

354. In defendant's aggravated assault case, Tex. R. Evid. 404(b) did not exclude evidence of third-party threats against the complainants because it was relevant to explain the inconsistencies in the complainants' testimony; evidence of threats against any witnesses to the shootings tended to explain the complainants' motivation to potentially understate the number of their family members that, in fact, might have witnessed the shootings. Cox v. State, 2009 Tex. App. LEXIS 1902, 2009 WL 807491 (Tex. App. Houston 14th Dist. Mar. 19 2009).

Criminal Law & Procedure : Witnesses : Impeachment

355. Trial court did not err during defendant's trial for indecency with a child when it allowed the prosecutor, for the limited purpose of impeachment, to question the victim's mother about her knowledge of defendant's prior convictions for aggravated sexual assault of two other children because the mother's testimony on direct examination by defendant's counsel that she had no reason to suspect that defendant would abuse her children opened the door and put at issue her credibility. Delacruz v. State, 2013 Tex. App. LEXIS 13492, 2013 WL 5890796 (Tex. App. Eastland Oct. 31 2013).

356. Because a witness's testimony was admissible only to rebut defendant's statement of good conduct with minors, a court should have given an instruction to use the testimony only in assessing defendant's credibility, not as proof that he committed the offense or as proof of a plan to have a sexual relationship with the victim. Daggett v. State, 187 S.W.3d 444, 2005 Tex. Crim. App. LEXIS 2127 (Tex. Crim. App. 2005).

Criminal Law & Procedure : Witnesses : Presentation

357. In a capital murder trial, there was no error under Tex. R. Evid. 404 in admitting extraneous offense evidence that was offered to show why an accomplice witness was fearful of defendant and did not report the murders to the authorities. Segura v. State, 2010 Tex. App. LEXIS 6589, 2010 WL 3190252 (Tex. App. Austin Aug. 13 2010).

Criminal Law & Procedure : Defenses : General Overview

358. Another sexual assault victim's testimony was admissible under Tex. R. Evid. 404(b) to rebut the defense's claim of fabrication or frame-up by the victim and because the evidence had relevance apart from character conformity. Dreyer v. State, 2011 Tex. App. LEXIS 353, 2011 WL 193494 (Tex. App. Beaumont Jan. 19 2011).

Criminal Law & Procedure : Defenses : Alibi

359. In an aggravated robbery case, the court properly allowed the State to present a witness's testimony that defendant had robbed her at gunpoint at a time when defendant's witness testified that he was working for her because the testimony had significant potential value to prove that defendant's alibi witness was not truthful; in light of the instructions given, the evidence did not have the potential to impress the jury in an irrational way, and no other evidence except the witness's significantly assisted the State in contradicting the account of defendant's whereabouts. Davis v. State, 214 S.W.3d 101, 2006 Tex. App. LEXIS 10866 (Tex. App. Beaumont 2006).

360. Extraneous offense evidence was properly admitted under Tex. R. Evid. 404(b) and 403 to refute defendant's alibi. Casique v. State, 2005 Tex. App. LEXIS 6517 (Tex. App. El Paso Aug. 16 2005).

Criminal Law & Procedure : Defenses : Necessity

361. Trial court did not err when it admitted evidence that defendant had been seen selling drugs a month before her indicted offense of being a felon in possession of a firearm because the testimony, elicited from a witness present when the indicted offense was committed, was relevant and tended to make the existence of defendant's intent to possess a firearm more likely than not, as the witness testified that he knew of five prior occasions on which defendant sold crack cocaine and also commented that drug dealers were often armed to protect themselves from being robbed; furthermore, Tex. R. Evid. 404(b) did not prevent the State from introducing evidence of extraneous acts to help rebut defendant's necessity defense and other evidence offered to rebut intentional or knowing possession of a firearm because in order to prove that defendant was a felon in possession of a firearm, it was necessary for the State to establish she acted with the requisite mental state. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

Criminal Law & Procedure : Defenses : Right to Present

362. Defendant failed to preserve for review her claim that she was deprived of her right to present a complete defense under the Sixth Amendment due to the fact that the trial court excluded from evidence a videotaped interview with the victim because at trial defendant relied on Tex. R. Evid. 404(b) but never asserted her right to present a complete defense and did not cite the Holmes case; her attorney's statement at the end of his bill of exception that defendant was denied her constitutional rights was insufficient preserve the Holmes issue for appeal. Even if the issue had been preserved, defendant failed to show that any constitutional error occurred because the trial court excluded the videotape based on Tex. R. Evid. 403 and the substance of the defense, that the videotape would have enabled the jury to judge whether the victim initially failed to implicate her mother because she was truly afraid, was presented to the jury, through cross-examination of the victim and a caseworker. Sanchez v. State, 2011 Tex. App. LEXIS 10169, 2011 WL 6916418 (Tex. App. El Paso Dec. 28 2011).

Criminal Law & Procedure : Defenses : Self-Defense

363. Witness's testimony that defendant was angry and agitated earlier the same evening of the stabbing was admissible under this rule to prove defendant's motive or intent and to rebut his theory of self-defense. Allen v. State, 2014 Tex. App. LEXIS 7895 (Tex. App. Houston 14th Dist. July 22 2014).

364. Trial court did not err by admitting into evidence extraneous offense testimony because it was relevant to rebut defendant's theory of self-defense. Defendant raised the issue of self-defense when he testified that he felt threatened and thought his life was in grave danger at the time he shot at the front tire of the complainant's vehicle; the State presented evidence of two prior violent acts in which he acted as an aggressor and later asserted that he had acted in self-defense. Franks v. State, 2013 Tex. App. LEXIS 14442 (Tex. App. Houston 1st Dist. Nov. 26 2013).

365. In defendant's murder case, the court did not erroneously exclude evidence regarding the victim's violent character because the evidence did not tend to show that the victim was the first aggressor; the fact that victim once told a witness that he would "take care of her husband and brother if they came looking for her" did not serve to demonstrate the victim's intent the night of the murder. Defendant's preferred testimony that the victim was a member of a prison gang that was "running fast" and "doing hits" was similarly irrelevant other than to show the victim's character conformity. Vasquez v. State, 2012 Tex. App. LEXIS 7428, 2012 WL 6863860 (Tex. App. Corpus Christi Aug. 27 2012).

366. Under Tex. R. Evid. 404(b), the extraneous-offense evidence that defendant had engaged in abusive behavior with a former cell mate, similar to what had been inflicted on the murder victim, rebutted the theory that defendant acted in self-defense. Svenningsen v. State, 2011 Tex. App. LEXIS 7681 (Tex. App. Waco Sept. 21 2011).

367. Because the evidence of the similar abusive conduct by defendant against a former cell mate made defendant's self-defense theory much less probable and the State needed the extraneous offense evidence to question whether defendant acted in self defense at all, under Tex. R. Evid. 403 and 404(b), the trial court did not abuse its discretion in admitting the former cell mate's testimony. Svenningsen v. State, 2011 Tex. App. LEXIS 7681 (Tex. App. Waco Sept. 21 2011).

368. Trial court did not abuse its discretion by admitting evidence of defendant's prior assault of another victim during his trial on charges of aggravated assault and manslaughter because it was admissible under Tex. R. Evid. 404(b) to show defendant's intent and to rebut his theory of self-defense. Render v. State, 347 S.W.3d 905, 2011 Tex. App. LEXIS 6623 (Tex. App. Eastland Aug. 18 2011).

369. When defendant was charged with causing injury to an elderly person by reckless conduct, the State was permitted to rebut defendant's claim of self-defense with evidence of his prior assault conviction under Tex. R. Evid. 404(b). The evidence was quite probative and did not have a tendency to confuse or mislead the jury. Kelley v. State, 2011 Tex. App. LEXIS 1780, 2011 WL 832862 (Tex. App. Amarillo Mar. 9 2011).

370. In an assault trial, there was no error under Tex. R. Evid. 403 and 404(b) in admitting evidence of an assault that defendant committed against his common-law wife to rebut his theory of self-defense. White v. State, 2010 Tex. App. LEXIS 5604, 2010 WL 2803018 (Tex. App. Eastland July 15 2010).

371. In an assault trial arising from a bar fight, it was error under Tex. R. Evid. 404(b) to exclude evidence of a prior violent act by the victim because there was evidence that the victim was the first aggressor. The error did not require reversal because the excluded testimony did not have a substantial effect on the rejection of defendant's self-defense claim, given that defendant did not attempt to retreat but pulled a knife during a physical altercation and stabbed the unarmed victim, who did not not use deadly force. Dudzik v. State, 276 S.W.3d 554, 2008 Tex. App. LEXIS 9073 (Tex. App. Waco 2008).

372. In a criminal prosecution for aggravated assault with a deadly weapon, the trial court did not err by allowing the State to introduce evidence of prior assaults by defendant on the victim to rebut the self-defense theory raised in the opening statement by the defense; Tex. R. Evid. 404 did not render the evidence inadmissible. Jones v. State, 241 S.W.3d 666, 2007 Tex. App. LEXIS 9490 (Tex. App. Texarkana 2007).

373. Trial court did not err by allowing the State to introduce evidence of the victim's character under Tex. R. Evid. 404 because the claim of self-defense was raised by the defense, as defense counsel had indicated during opening argument that defendant's actions were justified and the State introduced defendant's statement in its entirety, which included evidence in support of his self-defense claim. Cruz v. State, 2007 Tex. App. LEXIS 9002 (Tex. App.

El Paso Nov. 15 2007).

374. In a criminal prosecution for aggravated assault, the trial court did not abuse its discretion in admitting evidence of defendant's prior acts of aggression; the prior violent acts presented by the State were admissible to show defendant's intent and to rebut her theory of self-defense. Vidal v. State, 2006 Tex. App. LEXIS 1913 (Tex. App. Eastland Mar. 9 2006).

375. In a murder prosecution where a defendant claimed self-defense, the deceased's prior threats could be admitted under Tex. R. Evid. 404(b), even though those threats were not directed at the defendant, as long as the proffered threats explain the outward aggressive conduct of the deceased at the time of the killing, and in a manner other than demonstrating character conformity only; however, where a jury convicted a defendant for manslaughter, the Court of Criminal Appeals of Texas did not need to decide whether evidence of an individual's two-year-old specific acts of violence against defendant was admissible under Tex. R. Evid. 404(b) because self-defense was unavailable to a defendant who recklessly injured or killed an innocent third person. Hayes v. State, 161 S.W.3d 507, 2005 Tex. Crim. App. LEXIS 652 (Tex. Crim. App. 2005).

376. When the accused claimed self-defense, the State may introduce evidence of other violent acts where the defendant was the aggressor to show the defendant's intent; defendant asked for and received an instruction on self-defense in the charge, and the extraneous-offense evidence tended to make it less probable that defendant was acting in self-defense and more probable that he was the first aggressor, such that because the extraneous-offense evidence was relevant to disprove defendant's claim of self-defense, the trial court did not abuse its discretion in admitting the evidence on this basis pursuant to Tex. R. Evid. 404(b). Diogu v. State, 2004 Tex. App. LEXIS 7123 (Tex. App. Houston 14th Dist. Aug. 10 2004), appeal dismissed by 2006 Tex. App. LEXIS 184 (Tex. App. Houston 14th Dist. Jan. 12, 2006).

377. In the assault trial of a father who shot his son, the trial court properly excluded a post-shooting psychological evaluation of the son, and any evidence of the son's violent nature that surfaced after the shooting was at best only minimally relevant and was outweighed by the danger of unfair prejudice or confusion of the issues concerning the father's assertion of self-defense. Iverson v. State, 2004 Tex. App. LEXIS 7007 (Tex. App. Texarkana Aug. 2 2004).

378. Defendant's prior crimes or bad acts could be admissible for other purposes, such as proof of motive, intent, plan, knowledge, or lack of mistake or accident, and when a defendant claimed self-defense, the State could introduce evidence of other violent acts where the defendant was an aggressor in order to show intent, and the appellate court saw no reason to depart from precedent and found that the trial court properly admitted the evidence of the extraneous offenses. Hamilton v. State, 2004 Tex. App. LEXIS 5444 (Tex. App. Beaumont June 16 2004).

379. In a criminal prosecution for murder where defendant claimed self-defense, the trial court properly excluded evidence of the victim's previous violent acts against people other than defendant. Defendant offered the previous violent acts only for the purpose of demonstrating that the victim had acted in conformity with his violent character in violation of Tex. R. Evid. 404. Deavila v. State, 2004 Tex. App. LEXIS 3562 (Tex. App. Dallas Apr. 22 2004).

380. Where the record showed that defendant and the intended victim engaged in an altercation, which left a bystander dead, and defendant claimed self-defense in shooting at the intended victim, defendant's manslaughter conviction was affirmed; the exclusion of testimony about extraneous acts of aggression by the intended victim was proper under Tex. R. Evid. 404(a)(2) where defendant failed to show that he had any knowledge of those violent acts, and therefore the acts could not have influenced defendant's state of mind. Hayes v. State, 124 S.W.3d 781, 2003 Tex. App. LEXIS 9841 (Tex. App. Houston 1st Dist. 2003), affirmed by 161 S.W.3d 507, 2005 Tex. Crim. App.

LEXIS 652 (Tex. Crim. App. 2005).

381. Defendant's manslaughter conviction was affirmed where the exclusion of testimony about extraneous acts of aggression by the intended victim was proper; defendant could have introduced character evidence suggesting that the intended victim was the aggressor, but he could not have introduced evidence of the specific acts and events where such evidence was not admissible for other purposes under Tex. R. Evid. 404(b). Hayes v. State, 124 S.W.3d 781, 2003 Tex. App. LEXIS 9841 (Tex. App. Houston 1st Dist. 2003), affirmed by 161 S.W.3d 507, 2005 Tex. Crim. App. LEXIS 652 (Tex. Crim. App. 2005).

382. Evidence that a witness feared for her life because the deceased victim had told her that if she did not tell him where his girlfriend was, he would hurt her and her children, should not have been excluded from defendant's murder trial because, as defendant's defense was that he acted in self-defense, he was permitted, pursuant to Tex. R. Evid. 404(a)(2), to introduce evidence of his victim's violent character as long as there was some evidence of aggression by the victim before the introduction of the character evidence and, in defendant's trial, before the witness was called to testify, there was evidence that the victim had climbed up a balcony, uninvited, early in the morning, which was an act of aggression by the victim that tended to raise the issue of self defense. Torres v. State, 117 S.W.3d 891, 2003 Tex. Crim. App. LEXIS 595 (Tex. Crim. App. 2003).

383. Defendant should have been permitted to introduce evidence of his victim's character in support of his claim of self-defense pursuant to Tex. R. Evid. 404(a)(2) because, as evidence had been admitted that the victim had engaged in an act of aggression by climbing up a balcony, uninvited, early in the morning, it was not necessary for defendant to also provide evidence of a "fray" between himself and the victim before the introduction of the character evidence. Torres v. State, 117 S.W.3d 891, 2003 Tex. Crim. App. LEXIS 595 (Tex. Crim. App. 2003).

Criminal Law & Procedure : Scienter : General Overview

384. In a case where defendant was charged with fleeing from police, evidence that defendant was found underneath a house when officers tried to serve a warrant for arrest was properly admitted by a trial court because it tended to prove knowledge of guilt; even if the admission was erroneous, it was disregarded on appeal since defendant's substantial rights were not affected; it would have been difficult to explain the circumstances of the arrest without such evidence, and the State did not mention the evidence in its final argument. Jacobs v. State, 2004 Tex. App. LEXIS 4239 (Tex. App. Texarkana May 11 2004).

Criminal Law & Procedure : Scienter : General Intent

385. During a confrontation over a stolen bike, defendant stabbed the victim with a knife. After defendant testified that the victim was the aggressor and was injured when he fell, the State was permitted to prove defendant's intent through extraneous offense evidence under Tex. R. Evid. 404(b) showing that he had threatened others with violence and chased another individual with a knife when he believed the individual had stolen money from him. McDonald v. State, 2007 Tex. App. LEXIS 7139 (Tex. App. Amarillo Aug. 29 2007).

386. Trial court did not err in admitting evidence of extraneous assaults where they had sufficient similarities to the charged offense to have been introduced to show intent, and under the doctrine of chances those offenses had a multiplicative effect where each additional offense made the issue of intent more compelling, and the prejudicial effect of the evidence did not outweigh its probative value. Rickerson v. State, 138 S.W.3d 528, 2004 Tex. App. LEXIS 4884 (Tex. App. Houston 14th Dist. 2004).

Criminal Law & Procedure : Scienter : Knowledge

387. Trial court did not err in admitting items used in the manufacture of methamphetamine and amphetamine in the case against defendant for possession of amphetamine as these items went to the issue of knowledge or criminal intent which was an element in the possession case. Popp v. State, 2005 Tex. App. LEXIS 631 (Tex. App. Waco Jan. 26 2005).

Criminal Law & Procedure : Scienter : Specific Intent

388. At defendant's trial for indecent exposure, the court did not err in allowing the State to question him regarding his prior conviction for indecency with a child because the circumstances surrounding the earlier offense made it more probable that defendant exposed himself with intent to arouse sexual desire. Rodriguez v. State, 2013 Tex. App. LEXIS 14268, 2013 WL 6147789 (Tex. App. Houston 14th Dist. Nov. 21 2013).

389. Where defendant was charged with aggravated sexual assault of a child and indecency with a child, the State was permitted to admit evidence of pornographic photos taken from defendant's computer; the images were indicative of defendant's intent to commit the sexual offense of indecency with a child and sexual assault, and thus were admissible pursuant to Tex. R. Evid. 404(b). Ficarro v. State, 2007 Tex. App. LEXIS 3166 (Tex. App. Corpus Christi Apr. 26 2007).

390. Because defendant denied that he intentionally and knowingly causing the deaths of the two murder victims, his intent was an essential disputed issue in the case, and evidence of defendant's involvement in a similar murder was properly admitted pursuant to Tex. R. Evid. 404(b) as relevant to the jury's determination of whether defendant anticipated or intended the murders of the victims in the present case. Sorto v. State, 173 S.W.3d 469, 2005 Tex. Crim. App. LEXIS 1622 (Tex. Crim. App. 2005), writ of certiorari denied by 126 S. Ct. 2982, 2006 U.S. LEXIS 5229 (U.S. 2006).

391. Evidence of an extraneous assault offense that defendant allegedly committed against his wife after her aggravated kidnapping and six days before his trial on that charge was admissible under Tex. R. Evid. 404(b) for the purpose of showing his intent to inflict bodily injury on his wife where defendant's intent was a fact of consequence because the indictment included an allegation that he intended to commit murder or to inflict bodily injury when he abducted his wife. Furthermore, evidence of defendant's subsequent alleged assault of his wife was relevant because his subsequent conduct made it more probable that he intended to inflict bodily injury on his wife during the charged offense. Simoneaux v. State, 2005 Tex. App. LEXIS 5628 (Tex. App. Tyler July 20 2005).

392. Intent can be characterized as a contested issue for purposes of justifying the admission of extraneous offense evidence to help prove intent if the required intent for the primary offense cannot be inferred by the act itself or if the accused presents evidence to rebut the inference that the required intent existed. Harris v. State, 2004 Tex. App. LEXIS 7666 (Tex. App. Tyler Aug. 25 2004).

393. In an attempted capital murder case, the State was allowed to introduce extraneous evidence regarding defendant's shooting during a similar burglary because intent was the only challenged issue in the case where defendant contended that the shooting was only intended to scare the victim of the charged offense, but the extraneous evidence showed that defendant threatened to kill another victim with a gun during a similar burglary. Cisneros v. State, 143 S.W.3d 269, 2004 Tex. App. LEXIS 6370 (Tex. App. Waco 2004).

Criminal Law & Procedure : Jury Instructions : General Overview

394. Because the second instruction to the jury was a new and different instruction and contradicted the original correct instruction, the jury was free to disregard the initial instruction and to consider the extraneous offense evidence to determine defendant's guilt on the present robbery charge, in violation of Tex. R. Evid. 404(b).

Heigelmann v. State, 362 S.W.3d 763, 2012 Tex. App. LEXIS 1670, 2012 WL 688427 (Tex. App. Texarkana Mar. 2 2012).

Criminal Law & Procedure : Jury Instructions : Curative Instructions

395. In a burglary trial, it was error under Tex. R. Evid. 404 to admit testimony about a prior theft, but the trial court's instruction to disregard was curative. Stine v. State, 300 S.W.3d 52, 2009 Tex. App. LEXIS 8121 (Tex. App. Texarkana Oct. 21 2009).

396. During defendant's murder trial, the detective testified that he had seen defendant in a crime stoppers listing on an unrelated shooting. Assuming that the testimony violated Tex. R. Evid. 404(b), defendant was not entiitled to a mistrial because the trial judge instructed the jury to disregard the statement. Gamboa v. State, 296 S.W.3d 574, 2009 Tex. Crim. App. LEXIS 512 (Tex. Crim. App. 2009).

397. Trial court did not err by refusing to grant a mistrial based on defendant's assertion that Tex. R. Evid. 404(b) was violated when a witness testified that defendant's wife had stated that defendant had murdered someone; the statement was in the middle of the testimony, it was not repeated, it was not connected to a charged assault, and the jury was told to disregard the testimony. Moreover, nothing in the record suggested that the jury would have rendered a different verdict without the complained-of statement. Hecht v. State, 2009 Tex. App. LEXIS 521, 2009 WL 200979 (Tex. App. Dallas Jan. 29 2009).

398. Trial court did not err in denying a mistrial in an aggravated assault case because an instruction to disregard was sufficient to cure any prejudice resulting from the prosecutor's asking a witness whether she was aware of other shootings that had taken place in the area and the witness' reply that she had heard about it; there was no Tex. R. Evid. 404(b) violation because defendant was not clearly implicated in an extraneous offense, and the question was not extremely inflammatory under Tex. R. Evid. 403. Holland v. State, 2006 Tex. App. LEXIS 6584 (Tex. App. Beaumont July 26 2006).

399. In a murder case, any prejudice caused by the admission of defendant's extraneous offense was cured by the trial court's instruction; the State brought attention to the extraneous offense on only one occasion where it asked a witness if she knew that defendant had been convicted of a felony, after the witness had voiced a favorable opinion of defendant's character. That question was followed immediately by a sustained objection and a curative instruction by the trial court. Nickleson v. State, 2005 Tex. App. LEXIS 6658 (Tex. App. Corpus Christi Aug. 18 2005).

400. In a sexual assault trial, the complainant's comment that she had been told of defendant's actions with other girls did not require a mistrial. The trial court instructed jury to disregard the comment, the testimony was unsolicited, and the comment was not calculated to inflame the minds of the jurors. Mass v. State, 2004 Tex. App. LEXIS 2551 (Tex. App. San Antonio Mar. 24 2004).

401. In a sexual assault trial, the complainant's comment that she had been told of defendant's actions with other girls did not require a mistrial. The trial court instructed jury to disregard the comment, the testimony was unsolicited, and the comment was not calculated to inflame the minds of the jurors. Mass v. State, 2004 Tex. App. LEXIS 2551 (Tex. App. San Antonio Mar. 24 2004).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

402. There was nothing in the record to suggest that defense counsel purposely elicited extraneous-offense evidence from his client or otherwise intentionally opened the door to such evidence, as defense counsel's decision

to call a witness as a limited character witness represented a strategy within the bounds of the objective standard of reasonableness and counsel took steps to limit any damage incurred from the State's questioning, requesting a limiting instruction. Johnson v. State, 432 S.W.3d 552, 2014 Tex. App. LEXIS 5162, 2014 WL 1998711 (Tex. App. Texarkana May 15 2014).

403. Where the trial court properly instructed the jury to consider extraneous offense evidence only for the purposes allowed under this rule, which included determining identity, it was not necessary to submit a limiting instruction on the defensive theory of misidentification. Mason v. State, 416 S.W.3d 720, 2013 Tex. App. LEXIS 13527, 2013 WL 5861492 (Tex. App. Houston 14th Dist. Oct. 31 2013).

404. Despite defendant's contention to the contrary, the record showed that the trial court properly instructed the jury that it could consider the extraneous offense evidence only if it believed beyond a reasonable doubt that defendant had committed the offense and only in determining the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of defendant. Nash v. State, 2013 Tex. App. LEXIS 10452 (Tex. App. Houston 1st Dist. Aug. 20 2013).

405. Trial court was not obligated to issue an instruction limiting the usage of evidence pertaining to a pornographic video that defendant showed to his child sexual assault victim (his teenaged daughter) because the complained-of evidence constituted same-transaction contextual evidence; the evidence was properly received as general evidence. Freeman v. State, 2013 Tex. App. LEXIS 8566 (Tex. App. Waco July 11 2013).

406. Court did not err in admitting extraneous-offense evidence under Tex. R. Evid. 404(b) because, throughout trial, defendant's defensive theory was that the complainant consented to the sexual encounter; defendant neither objected to the instruction provided nor did he request a different limiting instruction that he deemed to be appropriate. The evidence was admissible under the opportunity, plan, and intent exceptions to Rule 404(b) and as evidence of modus operandi. Bailey v. State, 2012 Tex. App. LEXIS 8593, 2012 WL 4841465 (Tex. App. Waco Oct. 11 2012).

407. In a case involving burglary of a habitation, a trial court did not err by admitting evidence of appellant's subsequent assault on one apartment resident under Tex. R. Evid. 404(b), who was attempting to retrieve the purse and keys of appellant's victim. This was admissible as same-transaction contextual evidence because it provided the jury with information essential to understanding the context and circumstances of blended or interwoven events, and a limiting instruction was not required. Jennings v. State, 2012 Tex. App. LEXIS 7400, 2012 WL 3765083 (Tex. App. Eastland Aug. 31 2012).

408. Any error by the trial court in failing to given the jury a contemporaneous limiting instruction as the extraneous offenses admitted against defendant was harmless because the record reflected ample evidence of defendant's guilt, the extraneous evidence was not more heinous or inflammatory than the evidence pertaining to the charged offenses, and the jury charged contained a limiting instruction with regard to the extraneous conduct committed by defendant. Guardado v. State, 2012 Tex. App. LEXIS 5514, 2012 WL 2832561 (Tex. App. El Paso July 11 2012).

409. During a capital murder trial, the court erred in its charge to the jury regarding extraneous acts of credit card abuse because it did not require the jury to find beyond a reasonable doubt that defendant committed the extraneous acts. The error was harmless under Tex. Code Crim. Proc. Ann. art. 36.19, because the jury was admonished by a limiting instruction to consider the credit card evidence under Tex. R. Evid. 404 for the limited purpose of showing defendant's motive for the murders. Smith v. State, 2012 Tex. App. LEXIS 2890, 2012 WL 1263567 (Tex. App. Corpus Christi Apr. 12 2012).

410. Defendant was not entitled to a limiting instruction in the jury charge on extraneous offense evidence because he did not request a limiting instruction when the evidence was first introduced. Harris v. State, 2012 Tex. App. LEXIS 2143, 2012 WL 952248 (Tex. App. Houston 14th Dist. Mar. 20 2012).

411. Trial court did not err, under Tex. R. Evid. 404(b), by allowing the jury to hear evidence of defendant's extraneous offenses during the guilt/innocence stage of the trial because the evidence was not admitted to show that defendant had actually committed the prior offense, but to show that he had lied to the officer about whether he had been previously arrested. The trial court properly instructed the jury to use the evidence solely for the purpose of showing the existence of defendant's untruth about a prior arrest, providing some support for the officer to have a reasonable suspicion about the nature of defendant's activities. Davila v. State, 2012 Tex. App. LEXIS 959, 2012 WL 376634 (Tex. App. Texarkana Feb. 7 2012).

412. Even though the trial court erred by failing to include extraneous offense limiting instructions in the jury charge during the guilt phase of defendant's trial, the error was harmless because: (1) the complainant and two officers testified that defendant, a convicted felon, possessed a firearm at the time of his arrest; (2) defense counsel admitted during closing arguments that the evidence was probably sufficient to support a conviction for that offense; (3) the trial court provided the requisite oral instruction twice to the jury and included it in the written charge in the companion case; and (4) the prosecutor did not emphasize the extraneous offenses during closing arguments. Williams v. State, 2011 Tex. App. LEXIS 3312 (Tex. App. Houston 14th Dist. May 3 2011).

413. Even though the trial court erred by failing to provide a written instruction to the jury regarding the extraneous offenses during the punishment phase as required by Tex. Code Crim. Proc. Ann. art. 37.07, § 3(b) (Supp. 2009), the error was harmless because: (1) defendant received the minimum sentence for the being a felon in possession of a firearm offense; and (2) as to the aggravated robbery offense, defendant stipulated to nine prior felony convictions, he received a sentence on the low end of the statutory range, the evidence of the extraneous offenses was strong and uncontroverted, and the prosecutor mentioned the extraneous offenses only once during closing arguments. Williams v. State, 2011 Tex. App. LEXIS 3312 (Tex. App. Houston 14th Dist. May 3 2011).

414. In a murder case, photographs of a van that had been set on fire were not unduly prejudicial under Tex. R. Evid. 403 and were relevant to establishing that the fire was intentionally set; defendant's counsel was not ineffective for not objecting to some of the photographs; and the extraneous offense of the burning of the van was admissible as same transaction contextual evidence and thus did not require a limiting instruction. Balderas v. State, 2010 Tex. App. LEXIS 9752, 2010 WL 5621288 (Tex. App. Corpus Christi Dec. 9 2010).

415. In a case involving aggravated sexual assault of a child, trial counsel did not perform ineffectively, even though no limiting instruction was requested concerning evidence of prior acts, crimes, or wrongs, because the decision might have been strategic. The record was silent regarding the reasons for the failure to request the instruction, and an argument was made that certain activities brought up by the State were normal family interactions. Arcement v. State, 2009 Tex. App. LEXIS 1096, 2009 WL 383398 (Tex. App. Texarkana Feb. 18 2009).

416. In finding that a limiting instruction should have been given concerning an extraneous offense, the reviewing court noted that the State's contextual-evidence argument would have been more appropriate to the consideration of whether such evidence was admissible over an objection under Tex. R. Evid. 404 than whether a limiting instruction was required. Pedersen v. State, 237 S.W.3d 882, 2007 Tex. App. LEXIS 8383 (Tex. App. Texarkana 2007).

417. In a drug case, the trial court was not required under Tex. Code Crim. Proc. Ann. art. 36.14 to instruct the jury sua sponte on the burden of proof when considering evidence of an extraneous offense during the guilt phase;

even if a limiting instruction under Tex. R. Evid. 404(b) would have been appropriate, defendant failed to request a limiting instruction under Tex. R. Evid. 105 when the evidence was offered. Delgado v. State, 235 S.W.3d 244, 2007 Tex. Crim. App. LEXIS 1235 (Tex. Crim. App. 2007).

418. Where defendant was convicted of aggravated sexual assault of a child under two indictments, counsel was not ineffective for failing to request a limiting instruction regarding extraneous offense evidence that may have been admissible under Tex. R. Evid. 404. Tomlinson v. State, 2006 Tex. App. LEXIS 3643 (Tex. App. Houston 14th Dist. Apr. 27 2006).

419. Request for a limiting instruction was not required concerning an assault defendant's white power and Adolph Hitler tattoos because defendant did not request a limiting instruction at the time the evidence was admitted. Furthermore, the court could find no authority that evidence of tattoos should be considered by a jury for only a limited purpose. Oldfield v. State, 2004 Tex. App. LEXIS 11310 (Tex. App. Waco Dec. 15 2004).

420. Any extraneous offense testimony by an officer regarding the buying and selling of prescription drugs was contextual to the murder of the victim. Thus, the trial court did not err in denying defendant's request for a limiting instruction. Singleton v. State, 2004 Tex. App. LEXIS 9620 (Tex. App. Fort Worth Oct. 28 2004).

421. In defendant's drug and robbery case, although defendant's relevancy objection to evidence of other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

Criminal Law & Procedure : Jury Instructions : Objections

422. In a trial for sexual assault of a child, the trial court was not required to instruct the jury, sua sponte, not to consider evidence of extraneous offenses because all of the extraneous offense evidence pertained to offenses that defendant committed against the complainant and thus was admissible under Tex. Code Crim. Proc. Ann. art. 38.37, §§ 1 and 2. Allen v. State, 180 S.W.3d 260, 2005 Tex. App. LEXIS 9709 (Tex. App. Fort Worth 2005).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Accomplice Testimony

423. Trial court did not err by including "corroboration" in the list of acceptable uses for extraneous offense evidence because the corroborative nature of the extraneous offense evidence was not unduly emphasized by including "corroboration" in the instruction, and "corroboration" was given no more or less emphasis than any other proper use of the extraneous evidence. Lacaze v. State, 346 S.W.3d 113, 2011 Tex. App. LEXIS 5095 (Tex. App. Houston 14th Dist. July 7 2011).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Reasonable Doubt

424. Defendant convicted of arson failed to show she suffered egregious harm as a result of the trial court's failure to instruct the jury during sentencing that the State had to prove extraneous offenses beyond a reasonable doubt because she did not argue that the evidence of her extraneous misconduct was insufficient to support a conviction or was lacking in credibility, and neither did she provide authority or other considerations indicating that, if an instruction had been given, the jury would likely have disregarded the evidence or imposed a lighter sentence; she faced up to 99 years' imprisonment and up to a $10,000 fine, but the jury only assessed a 14-year sentence and a $3,000 fine. Sanders v. State, 2014 Tex. App. LEXIS 830, 2014 WL 2619398 (Tex. App. Eastland Jan. 24 2014).

425. Evidence of extraneous bad acts were not admitted at the punishment phase of defendant's trial for aggravated sexual assault of a child, because the State's questions on cross-examination regarding his other child were not evidence; therefore, the trial court was not required to provide a reasonable doubt jury instruction regarding extraneous offenses. Bolte v. State, 2013 Tex. App. LEXIS 1490, 2013 WL 593834 (Tex. App. Corpus Christi Feb. 14 2013).

426. Trial court did not err by not sua sponte providing a reasonable doubt instruction under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) when evidence of extrinsic acts was offered during the guilt/innocence phase of defendant's trial because the Huizar-required reasonable doubt instruction did not apply to the guilt/innocence phase of the trial. Brown v. State, 243 S.W.3d 141, 2007 Tex. App. LEXIS 7458 (Tex. App. Eastland 2007).

427. Because the jury assessed defendant's punishment for the aggravated kidnapping of his ex-girlfriend at 15 years, and rejected probation, on the facts surrounding the kidnapping and not based on passing references to prior bad acts, the failure to give the reasonable doubt instruction as to prior bad acts could not have caused egregious harm. Thomas v. State, 2005 Tex. App. LEXIS 3054 (Tex. App. Dallas Apr. 21 2005).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence

428. Trial court did not err in including a reference to extraneous offenses because the jury charge properly instructed the jury in how it could consider the extraneous offense evidence, and it limited the jury's use of the evidence to only those purposes explicitly permitted by Texas Rules of Evidence. Perkinson v. State, 2013 Tex. App. LEXIS 9948 (Tex. App. Corpus Christi Aug. 8 2013).

429. It was not error for the trial court to deny defendant's request for an instruction during the sentencing phase concerning the burden of proof element required for prior crimes, pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3, because the conduct at issue was not admitted into evidence during the penalty phase or mentioned by either of the attorneys during the closing argument. Burks v. State, 227 S.W.3d 138, 2006 Tex. App. LEXIS 10663 (Tex. App. Houston 1st Dist. 2006).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview

430. Defendant's argument that testimony of his having exposed himself to a woman at the post office was an inadmissible extraneous offense was improperly overruled was upheld because at the time the case was tried, Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) prohibited the admission of extraneous offense evidence at the punishment phase of a non-capital offense unless it was permitted by the Texas Rules of Evidence and satisfied art. 37.07, § 3(a)'s definition of prior criminal record. Mireles v. State, 1997 Tex. App. LEXIS 2179 (Tex. App. Corpus Christi Apr. 24 1997).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Standards

431. To the extent that defendant convicted of driving while intoxicated (DWI), second offense, had sought to characterize the technical violations that he committed during his previous community supervision for DWI as new offenses, and thereby require the State to provide pretrial notice of its intent to introduce evidence regarding technical community supervision violations in a future prosecution pursuant to Tex. Code Crim. Proc. Ann. art. 37.07 or Tex. R. Evid. 404(b), his argument found no support in Texas statutes or caselaw because the legislature has not taken steps to include "technical" violations of community supervision within the scope of the term "offense," as that term is commonly used by Texas statutes and caselaw. Coffel v. State, 242 S.W.3d 907, 2007 Tex. App. LEXIS 9993 (Tex. App. Texarkana 2007).

Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances

432. In a death penalty case, the State's introduction of extraneous offenses committed while defendant was a juvenile as an aggravating factor did not constitute a violation of due process because the State clearly proved the commission of various adjudicated and unadjudicated offenses through certified court records and live testimony; further, the State was also permitted to admit evidence concerning unadjudicated extraneous offenses. Escamilla v. State, 143 S.W.3d 814, 2004 Tex. Crim. App. LEXIS 1032 (Tex. Crim. App. 2004), writ of certiorari denied by 544 U.S. 950, 125 S. Ct. 1697, 161 L. Ed. 2d 528, 2005 U.S. LEXIS 2827, 73 U.S.L.W. 3569 (2005).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History

433. In a criminal proceeding, the document filed by the State served a dual purpose as both a motion to enhance punishment and as notice to defendant of intent to enhance punishment based on his prior convictions. Because defendant pled true to the enhancement allegations and stipulated to the evidence in support of them, any error by the State in alleging the prior convictions in the form of a motion, as opposed to in the form of a notice, was harmless. Green v. State, 2014 Tex. App. LEXIS 1753 (Tex. App. San Antonio Feb. 19 2014).

434. Notice requirements of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) did not apply to the evidence of defendant's trips to truancy court, because the State did not question defendant on this matter during its case in chief on punishment, but rather during its cross-examination of defendant. Torres v. State, 2010 Tex. App. LEXIS 3904, 2010 WL 2044900 (Tex. App. Dallas May 25 2010).

435. Under Tex. R. Evid. 404(b), evidence of prior convictions was properly admitted at the punishment phase where it met the requirements of Tex. Code Crim. Proc. Ann. art. 37.07, § 3. Hernandez v. State, 2006 Tex. App. LEXIS 4548 (Tex. App. Fort Worth May 25 2006).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History

436. Appellant waived error in the State's admission of juvenile adjudications during the punishment phase of trial without prior identification. Defense counsel stipulated to appellant's identity for prior convictions and her objection to admission of the prior offenses based on Tex. R. Evid. 403, 404 was overruled. Lynch v. State, 2005 Tex. App. LEXIS 1095 (Tex. App. Amarillo Feb. 8 2005).

437. Defendant's reliance on the notice provisions of Tex. R. Evid. 404(b) to object to the amount of notice given by a prosecutor of his intent to introduce defendant's prior crimes during the sentencing phase of defendant's trial was misplaced because Tex. R. Evid. 404(b) did not apply to the penal or punishment phase of a bifurcated trial. Patton v. State, 25 S.W.3d 387, 2000 Tex. App. LEXIS 5295 (Tex. App. Austin 2000).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

438. In a drug case, although a trial court should not have admitted two illegal arrest records during sentencing because the State failed to prove beyond a reasonable doubt that the crimes had actually been committed by appellant in the two arrests, there was little to no affect on the jury where appellant had 35 arrest records. Simmons v. State, 2013 Tex. App. LEXIS 7833 (Tex. App. Corpus Christi June 27 2013).

439. Trial court did not abuse its discretion by finding that defendant had reasonable notice of extraneous offenses introduced into evidence by the State because, as to one set of offenses, although written notice was not provided 10 days prior to trial, defense counsel was given reasonable notice of those offenses through multiple conversations with the prosecutor more than 10 days prior to trial; as to another extraneous offense, the trial court could have impliedly found that even though neither written or oral notice was provided 10 days prior to trial, the

State had reasonably notified defendant of the offense and the victim shortly after the State itself was informed of the circumstances of the offense. Even if the State had failed to provide reasonable notice, it was not harmful, as there was no allegation that the State acted in bad faith, defendant did not move for a continuance, and written notice was provided a week before the evidence was admitted at the punishment hearing. Head v. State, 2013 Tex. App. LEXIS 5109 (Tex. App. Austin Apr. 24 2013).

440. When defendant pleaded guilty to the unauthorized use of a motor vehicle, the State gave reasonable notice of its intent to proffer evidence of extraneous offenses and prior convictions during the punishment phase. The extraneous offenses were contained in a police report given to defendant long before trial, and the State gave notice of the prior convictions in an amended motion to enhance punishment filed seven days before trial. Campbell v. State, 2013 Tex. App. LEXIS 4353 (Tex. App. Amarillo Apr. 3 2013).

441. Trial court did not err by allowing the prosecutor to impeach defendant's witnesses concerning his good character and fitness for probation because the prosecutor rested his case in the punishment phase without referring to other convictions or wrongful acts, and therefore the State was not required to give defendant notice of extraneous offenses referred to during cross-examination under Tex. Code Crim. Proc. art. 37.07. Morales v. State, 389 S.W.3d 915, 2013 Tex. App. LEXIS 109, 2013 WL 80154 (Tex. App. Houston 14th Dist. Jan. 8 2013).

442. In a sexual assault case, the court did not err by allowing a witness to testify that she had had sex with defendant because the prosecutor met with defendant's counsel minutes after learning of the witness's claim about having sex with defendant and the prosecutor later gave written notice of the State's intent to use that evidence. Additionally, the record included significant evidence, apart from the witness's testimony, of defendant actually having sex with underage girls and desiring to have sex with others. Cooper v. State, 2012 Tex. App. LEXIS 9643, 2012 WL 5869600 (Tex. App. Fort Worth Nov. 21 2012).

443. Trial court did not abuse its discretion by admitting evidence that defendant offered to pay for an abortion for another teenager with whom he had sex without notice under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) because the evidence was adduced during sentencing on cross-examination in rebuttal to mitigation evidence and therefore was not subject to the notice requirement. Chavez v. State, 2012 Tex. App. LEXIS 7127, 2012 WL 3629619 (Tex. App. Austin Aug. 24 2012).

444. On appeal of defendant's conviction for robbery, he claimed he was deprived of his right to fair notice by the State's untimely disclosure of its intent to present evidence of his gang membership. Because the evidence was introduced at the punishment phase of trial, Tex. Code Crim. Proc. Ann. art. 37.07(3)(g)--rather than Tex. R. Evid. 404(b)--applied. Rea v. State, 2012 Tex. App. LEXIS 7063, 2012 WL 3601126 (Tex. App. Austin Aug. 14 2012).

445. No reversible error occurred from the admission of extraneous offense evidence at punishment, even if the State failed to give defendant timely written notice, because the record did not show bad faith or surprise, the state did not emphasize the unnoticed prior conviction, and the jury imposed a lower sentence than urged by the State. Collins v. State, 2012 Tex. App. LEXIS 1636, 2012 WL 661686 (Tex. App. Dallas Mar. 1 2012).

446. Trial court did not err in the sentencing phase of defendant's trial by admitting into evidence testimony from a police officer concerning uncharged misconduct on defendant's part because Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) specifically provided that, notwithstanding Tex. R. Evid. 404, the trial court could admit, at the punishment stage, evidence of an extraneous crime or bad act that was shown beyond a reasonable doubt by evidence to have been committed by the defendant. Vinez v. State, 2012 Tex. App. LEXIS 817, 2012 WL 335557 (Tex. App. El Paso Feb. 1 2012).

447. In a penalty trial for aggravated-sexual assault of a child, it was proper to allow the State to ask defendant's mother whether she had heard about an extraneous offense after she testified that her son was a good boy and that she knew he did not do it. Burke v. State, 371 S.W.3d 252, 2011 Tex. App. LEXIS 8368, 2011 WL 5023008 (Tex. App. Houston 1st Dist. Oct. 20 2011).

448. In a criminal prosecution for aggravated sexual assault of a child, defendant was not harmed by the trial court's erroneous admission of statements at the penalty phase from an outcry witness concerning an extraneous offense even though the State's notice of intent was unreasonable under Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) for lack of any reference to the county in which the act allegedly occurred or its date. The error was harmless because the alleged incident was part of the series of events for which defendant was being prosecuted, and there was no indication that he was surprised by the allegations or statements. Schatte v. State, 2011 Tex. App. LEXIS 4100, 2011 WL 2112025 (Tex. App. Texarkana May 26 2011).

449. Even if the trial court erred by admitting evidence of an extraneous sexual assault during sentencing on the ground that the State did not properly provide defendant notice of its intention to do so, the error was harmless because defendant did not claim that the evidence caused him surprise, as the sexual assault was a charge pending against defendant in the same court as the instant charges and the trial court determined defendant had actual notice of the charge. Gonzalez v. State, 337 S.W.3d 473, 2011 Tex. App. LEXIS 1967 (Tex. App. Houston 1st Dist. Mar. 17 2011).

450. Even if the trial court erred by failing to instruct the jury regarding the burden of proof for extraneous offenses, any such error did not egregiously harm defendant because defendant was convicted of causing the victim's death by acting alone or as a party to her murder; evidence that he attempted to conceal evidence by destroying a car was only part of the evidence that the jury had to consider in assessing punishment. The evidence also showed that defendant was involved in gang activity, offered conflicting information to police about his own involvement in the crime, and assisted the victim's murderer before, during, and after the crime. Smith v. State, 2010 Tex. App. LEXIS 9419, 2010 WL 4878847 (Tex. App. Houston 14th Dist. Nov. 30 2010).

451. In defendant's drug case, the court properly admitted evidence of defendant's gang affiliation at sentencing because the presentation of the evidence took only a short time and the probative value of the evidence was high. Defendant's prior admission of his affiliation with a prison gang and the reputation of that gang for commission of offenses, both inside prison and in the general community, was a factor that the jury was entitled to consider in determining defendant's propensity for further criminal activity should he be released from incarceration. Meier v. State, 2009 Tex. App. LEXIS 8078, 2009 WL 3335282 (Tex. App. Amarillo Oct. 16 2009).

452. Punishment phase extraneous offense evidence was properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07 because there was evidence that defendant was the only adult with the complainant, the autopsy showed a variety of injuries to the complainant, and a doctor testified that the injuries all occurred within the same twenty-four-hour period. Roberts v. State, 2009 Tex. App. LEXIS 7816, 2009 WL 6338618 (Tex. App. Houston 14th Dist. Sept. 24 2009).

453. Defendant was not harmed by the State's failure to provide him with notice of its intent to introduce deferred adjudications involving unauthorized use of a motor vehicle under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) because defendant's ability to prepare to meet other, more serious offenses (of which he was given notice) was not affected by the State's failure to provide notice of its intent to introduce the orders of deferred adjudication. Weeks v. State, 2009 Tex. App. LEXIS 5106, 2009 WL 1896066 (Tex. App. Austin July 1 2009).

454. In defendant's murder case, a pretrial motion in limine regarding extraneous offenses was insufficient to trigger a duty by the State to provide notice under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) and therefore, the

trial court did not abuse its discretion by allowing the prosecutor to impeach a defense witness during the punishment phase of trial without notice to defendant. Additionally, any error was harmless because defendant shot the victim four times in the back. Ridley v. State, 2009 Tex. App. LEXIS 4242, 2009 WL 1653083 (Tex. App. Dallas June 15 2009).

455. In defendant's aggravated robbery case, evidence during the punishment phase of defendant's gang affiliation was relevant to defendant's punishment and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. An officer testified that defendant's gang was involved in narcotics trafficking, theft, kick burglaries, and other similar offenses. Sutton v. State, 2008 Tex. App. LEXIS 9068 (Tex. App. Houston 1st Dist. Dec. 4 2008).

456. Where defendant was convicted of aggravated kidnapping and aggravated assault, the prosecutor and defense counsel discussed the extraneous offense evidence the State intended to offer under Tex. R. Evid. 404 in great detail; defendant was provided with copies of documents and the prosecutor orally communicated information about the extraneous offense evidence. Defendant was not harmed by the State's failure to provide prior, written notice of its intent to introduce evidence of extraneous crimes or bad acts at the punishment phase. Jones v. State, 2008 Tex. App. LEXIS 8541 (Tex. App. Dallas Nov. 13 2008).

457. In a criminal prosecution for possession of cocaine, the trial court abused its discretion during the punishment phase of trial by allowing the State to prove defendant's previous convictions through judgments and a fingerprint expert; defendant was aware of the previous convictions, due to notices filed by the State pursuant Tex. Code Crim. Proc. Ann. art. 37.07 and Tex. R. Evid. 404. Lewis v. State, 2007 Tex. App. LEXIS 8218 (Tex. App. Dallas Oct. 17 2007).

458. Trial court did not err by admitting evidence of prior extraneous acts of indecency with minors during sentencing because the language of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) established that the conduct described by the witnesses was relevant to the assessment of defendant's punishment; the three witnesses described conduct by defendant that was similar to his conduct against the victim, and given that similarity, the trial court did not abuse its discretion in concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Rodriguez v. State, 2007 Tex. App. LEXIS 4618 (Tex. App. Eastland June 14 2007).

459. Months before defendant's trial for indecency with a child, the prosecutor filed an amended document informing defendant of his intention to offer evidence of other crimes, including defendant's act of manslaughter of his infant son; defendant was afforded prior notice of the State's intent to offer evidence that he previously committed manslaughter. Sharp v. State, 210 S.W.3d 835, 2006 Tex. App. LEXIS 11033 (Tex. App. Amarillo 2006).

460. Cross-examination of defendant, who was adjudged guilty of evading arrest, as to an extraneous offense was permissible under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), which does not require notice under Tex. R. Evid. 404(b) when extraneous offense evidence relevant to sentencing is introduced during cross-examination at punishment. Blackwelder v. State, 2006 Tex. App. LEXIS 10489 (Tex. App. Fort Worth Dec. 7 2006).

461. In defendant's aggravated assault case, the court properly allowed a witness to testify during the punishment phase of the trial that defendant had bragged about getting away with a murder in Virginia because defendant could not be convicted of murder on the basis of his confession without proof of a corpus delicti or corroboration of the statement and those procedural requirements did not apply in the context of extraneous acts introduced at a punishment hearing; in order to be persuaded beyond a reasonable doubt that defendant had committed a murder in Virginia, all that was necessary was for the trial court to believe that defendant had told the witness that he had committed the murder and that defendant was telling the truth. Scott v. State, 2006 Tex. App. LEXIS 10358 (Tex.

App. Tyler Dec. 1 2006).

462. At the punishment phase of defendant's criminal trial for aggravated sexual assault of a child under 14 years of age, the trial court did not err by admitting evidence of a pen packet establishing that defendant had two prior convictions; the State's failure to provide defendant reasonable notice under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) did not affect his ability to respond to the extraneous offense evidence. Contreras v. State, 2006 Tex. App. LEXIS 9059 (Tex. App. Fort Worth Oct. 19 2006).

463. In a criminal trial for drug possession, defendant was not entitled to a mistrial after a State's witness testified regarding an extraneous offense; the trial court's instruction to disregard cured any prejudice to defendant. Coleman v. State, 2006 Tex. App. LEXIS 8133 (Tex. App. Fort Worth Sept. 14 2006).

464. In a drunk driving case, the State's notice of intent to offer bad act evidence at punishment met the requirements of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) and Tex. R. Evid. 404(b) because it listed a prior conviction and the date of arrest and indicated that the State would introduce acts identified in the offense report and other related documents. Ewing v. State, 2006 Tex. App. LEXIS 5755 (Tex. App. Fort Worth June 29 2006).

465. During defendant's criminal trial for aggravated sexual assault of a child, counsel was not ineffective for failing to request notice of the State's intent to offer evidence of defendant's extraneous offenses under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g); Tex. R. Evid. 404(b); the record did not indicate counsel's reasons for not objecting to evidence of defendant's extraneous offenses. Bishop v. State, 2006 Tex. App. LEXIS 4874 (Tex. App. Waco June 7 2006).

466. In an indecency with a child case, the trial court did not err by allowing the State to present evidence of extraneous offenses during the punishment phase as defendant placed his suitability for probation at issue by calling witnesses who offered their assistance in ensuring that he was capable of abiding by the conditions imposed; thus, he opened the door for evidence of specific instances of misconduct that tended to mitigate against his suitability for probation. Further, defendant was not entitled to notice of the State's use of extraneous offenses in rebuttal. McClellan v. State, 2005 Tex. App. LEXIS 6668 (Tex. App. El Paso Aug. 18 2005).

467. Murder defendant waived the right to raise complaints on appeal concerning the admission, at the punishment phase, of an alleged extraneous offense under Tex. Code Crim. Proc. art. 37.07, § 3(a)(1) and Tex. R. Evid. 404(b). His objections at trial did not preserve error under Tex. R. App. P. 33.1(a)(1)(A) because they did not address the issues raised on appeal: lack of notice of the intention to offer evidence of an extraneous bad act and the trial court's failure to make a threshold determination of admissibility. Juarez v. State, 2005 Tex. App. LEXIS 6460 (Tex. App. Austin Aug. 11 2005).

468. Trial court did not abuse its discretion in refusing to grant defendant's motion for continuance based on lack of notice or in admitting extraneous offense evidence during punishment because the State was not obligated to inform defendant regarding extraneous offenses that it intended to use during the punishment phase of trial due to defendant's failure to properly request notice of the extraneous acts. Defendant's request was made pursuant to Tex. R. Evid. 404(b) and made no reference to Tex. Code Crim. Proc. Ann. art. 37.07, and a request made pursuant to Tex. R. Evid. 404(b) was not sufficient to obligate the State to disclose extraneous evidence that it intended to introduce at the punishment phase of trial. Miller v. State, 2005 Tex. App. LEXIS 2717 (Tex. App. Houston 1st Dist. Apr. 7 2005).

469. In an aggravated robbery case, pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), extraneous offense or bad act evidence was admissible during the punishment phase without regard to Tex. R. Evid. 404. Raby

v. State, 2005 Tex. App. LEXIS 2380 (Tex. App. Beaumont Mar. 30 2005).

470. Where defendant was tried for aiding seven men escape from prison, evidence of the post-escape crimes committed by the seven men bore heavily upon defendant's character and moral blameworthiness; the evidence was admissible to help the jury determine an appropriate sentence for defendant's crimes. Rodriguez v. State, 163 S.W.3d 115, 2005 Tex. App. LEXIS 1084 (Tex. App. San Antonio 2005).

471. Although the State failed to provide notice of its intent to introduce evidence of defendant's immigration status, there was no indication from the record that the omission was intended to mislead defendant and prevent him from preparing a defense where the State apparently notified the defense that it intended to question defendant about his immigration status at some point before the punishment phase as indicated by the hearing held while the jury deliberated guilt-innocence. Alvarado v. State, 2004 Tex. App. LEXIS 5019 (Tex. App. Houston 1st Dist. June 3 2004).

472. Evidence of defendant's gang affiliation and of a fight that defendant was involved in while in prison could be admitted during the punishment phase of the trial and Tex. R. Evid. 404(b) was not applicable to the admission of the evidence during the penalty phase. Shaw v. State, 2004 Tex. App. LEXIS 3798 (Tex. App. Amarillo Apr. 29 2004).

473. While inadmissible under Tex. R. Evid. 404(a)(1), specific acts of good conduct may be admissible before the sentencing court under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) to prove a defendant's good character. Monarrez v. State, 2003 Tex. App. LEXIS 997 (Tex. App. Dallas Jan. 31 2003).

474. At the punishment phase of a capital trial, evidence regarding a defendant's character is relevant. Gang membership is relevant character evidence and therefore admissible. Moreno v. State, 1 S.W.3d 846, 1999 Tex. App. LEXIS 6657 (Tex. App. Corpus Christi 1999).

475. Evidence of gang membership was admissible as character evidence at punishment under Tex. R. Evid. 404 and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a). Moreno v. State, 1 S.W.3d 846, 1999 Tex. App. LEXIS 6657 (Tex. App. Corpus Christi 1999).

Criminal Law & Procedure : Sentencing : Imposition : Factors

476. Defendant's argument that testimony of his having exposed himself to a woman at the post office was an inadmissible extraneous offense was improperly overruled was upheld because at the time the case was tried, Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) prohibited the admission of extraneous offense evidence at the punishment phase of a non-capital offense unless it was permitted by the Texas Rules of Evidence and satisfied art. 37.07, § 3(a)'s definition of prior criminal record. Mireles v. State, 1997 Tex. App. LEXIS 2179 (Tex. App. Corpus Christi Apr. 24 1997).

Criminal Law & Procedure : Sentencing : Presentence Reports

477. Defendant waived his assertion that the trial court erred in relying on allegedly inaccurate extraneous offenses listed in the pre-sentence investigation report, because defendant waived this contention by failing to first object or make the required showing before raising the issue on appeal. Harrison v. State, 2010 Tex. App. LEXIS 1141, 2010 WL 547388 (Tex. App. Houston 1st Dist. Feb. 18 2010).

478. Defendant's counsel was not ineffective for failure to object to the extraneous offenses mentioned in the presentence report, because defendant's complaints were based on Tex. R. Evid 404(b) (extraneous evidence) and 802 (hearsay), and because the rules of evidence, including the rules pertaining to hearsay, did not apply to the contents of the presentence report. Champion v. State, 126 S.W.3d 686, 2004 Tex. App. LEXIS 964 (Tex. App. Amarillo 2004).

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

479. In a trial for assault--family violence, any error under Tex. R. Evid. 404(b), 802 from an unredacted video containing a hearsay statement of an alleged prior extraneous offense could be cured by a new trial rather than dismissal. State v. Harbor, 425 S.W.3d 508, 2012 Tex. App. LEXIS 3033 (Tex. App. Houston 1st Dist. Apr. 19 2012).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview

480. Defendant in a drug trial could not claim that he was surprised by testimony at sentencing regarding failure to comply with sex offender requirements because he did not request notice of bad acts prior to trial under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) and Tex. R. Evid. 404(b). Free v. State, 2012 Tex. App. LEXIS 1554, 2012 WL 651638 (Tex. App. El Paso Feb. 29 2012).

481. In a case in which defendant was convicted of violating the terms of his civil conviction under the Texas Civil Commitment of Sexually Violent Predators Act, Tex. Health & Safety Code Ann. ch. 841, the trial court did not abuse its discretion in excluding evidence of specific instances of defendant's compliance with his commitment order because that evidence was not admissible under Tex. R. Evid. 404(a), 405(a). Moreover, because the State did not ever imply that defendant had violated the terms of commitment before the charged offenses, the State did not open the door to evidence of defendant's compliance prior to those offenses. Jones v. State, 333 S.W.3d 615, 2009 Tex. App. LEXIS 3997 (Tex. App. Dallas May 29 2009).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

482. Trial court acted within its discretion in allowing the experts to discuss the details of the patient's offenses and other bad acts he committed that were contained in the records they reviewed in determining that the patient was a sexually violent predator because having each expert explain which facts were considered and how those facts influenced his evaluation assisted the jury in weighing each expert's testimony and the opinion each offered regarding the ultimate issue in the case. In re Day, 342 S.W.3d 193, 2011 Tex. App. LEXIS 3573 (Tex. App. Beaumont May 12 2011).

Criminal Law & Procedure : Appeals : Procedures : Briefs

483. In a trial for defendant's sexual assault of a grandchild, defendant inadequately briefed arguments under Tex. R. Evid. 404 that it was error to admit evidence that defendant had previously sexually assaulted an adopted child; defendant failed to brief the specific theory of admissibility upon which the trial court allowed the testimony and failed to apply the Tex. R. Evid. 403 factors to the facts of the case, as required by Tex. R. App. P. 38.1. Garreans v. State, 2008 Tex. App. LEXIS 852 (Tex. App. Dallas Feb. 5 2008).

484. Under Tex. R. App. P. 38.1(e), (g), (h), defendant waived any claims to error under Tex. R. Evid. 405(a) because defendant's brief discussed only Tex. R. Evid. 404(a). Error under R. 404(a) was also inadequately briefed with regard to unanswered questions about contraband. Sanchez v. State, 2007 Tex. App. LEXIS 7130 (Tex. App. Texarkana Sept. 4 2007).

485. Assuming that defense counsel's mention of "character" preserved for review an issue under Tex. R. Evid. 404, defendant failed on appeal to apply the extraneous-offense and character-propensity law to the facts in the case; thus, he failed to brief that portion of his point adequately under Tex. R. App. P. 38.1(h), and the court would not address it. Springsteen v. State, 2006 Tex. Crim. App. LEXIS 2340 (Tex. Crim. App. May 24 2006).

486. Defendant labeled the testimony at trial as extremely prejudicial; however, defendant neither explained how or why the evidence was extremely prejudicial, nor how or why the evidence would have had any substantial effect on the punishment. The appellate court declined to draft an argument for defendant. Smith v. State, 2004 Tex. App. LEXIS 9341 (Tex. App. Houston 1st Dist. Oct. 21 2004).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

487. In a murder case, a court did not err in admitting four photographs depicting gang-related graffiti on defendant's bedroom walls where the photos were primarily offered not as prior acts evidence, but to impeach a witness's credibility because her testimony at trial conflicted with her prior statements to the police. In addition, because the gang symbols depicted in the photos were also before the jury through other evidence of defendant's gang affiliation, which was admitted without objection, any error in admitting the photos for purposes of showing gang affiliation and intent or motive was not reversible. Garza v. State, 2005 Tex. App. LEXIS 6843 (Tex. App. San Antonio Aug. 24 2005).

488. In an aggravated sexual assault of a child under 14 years of age case, juvenile defendant's 10-year commitment was reversed as the trial court's error in allowing the admission of an extraneous unadjudicated offense defendant allegedly committed against another child in violation of Tex. R. Evid. 404(b) was not harmless. The only purpose for offering the evidence was to show that defendant, while on probation, had sexually assaulted another young child just months earlier than the offense alleged in the petition to adjudicate. In re C.J.M., 167 S.W.3d 892, 2005 Tex. App. LEXIS 4606 (Tex. App. Fort Worth 2005).

489. Where defendant was charged with the murder of a woman with whom he had sexual relations, the trial court committed reversible error by admitting the testimony of a department store clerk that defendant made sexual gestures toward her approximately one month before the victim's death. The two incidents did not appear sufficiently similar to establish defendant's identity as the person who killed the victim. Webb v. State, 2005 Tex. App. LEXIS 1431 (Tex. App. San Antonio Feb. 23 2005).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

490. Trial court erred by admitting extraneous conduct evidence that he inappropriately touched another child a decade before instant assault because it had no relevance as to motive, issue of opportunity was not raised, defendant never claimed he lacked intent, and there was no logical link between the prior act and an ultimate plan to have sex with the instant victim. The error was not harmless because the evidence against defendant was not overwhelming and the evidence was inherently inflammatory. Sandoval v. State, 409 S.W.3d 259, 2013 Tex. App. LEXIS 11657 (Tex. App. Austin Sept. 13 2013).

491. Complaint on appeal premised on Tex. R. Evid. 404 was not preserved for review because the trial objection was not based on Rule 404. Further, the same evidence was subsequently admitted without objection. Buckaloo v. State, 2013 Tex. App. LEXIS 1326 (Tex. App. Dallas Feb. 12 2013).

492. Even if extraneous offense evidence relating to a shotgun found during the execution of a search warrant was improperly admitted in a drug case, a reversal was not warranted under Tex. R. App. P. 44.2 because defendant's substantial rights were not affected; the jury did not find that defendant had the intent to deliver drugs, despite the

fact that the evidence showed that defendant kept a vicious dog, a surveillance camera was outside his residence, and he was kept scales, baggies, and a drug ledger. In addition, an 85-year prison sentence was likely to have resulted from the fact that defendant had two prior convictions for similar offenses. Lester v. State, 2008 Tex. App. LEXIS 6006 (Tex. App. Waco Aug. 6 2008).

493. Trial court abused its discretion by admitting evidence of an extraneous offense under Tex. R. Evid. 404(b) because the testimony of defendant's former stepdaughter about his sexual abuse of her was not admissible to rebut defendant's fabrication defense; the evidence could not assist the jury in determining whether defendant abused the instant victim, other than to show character conformity. The error was not harmless, and therefore defendant's convictions of indecency with a child and aggravated sexual assault by contact were reversed. Newton v. State, 283 S.W.3d 361, 2007 Tex. App. LEXIS 4634 (Tex. App. Waco 2007).

Criminal Law & Procedure : Appeals : Reversible Errors : Prosecutorial Misconduct

494. Defendant failed to preserve error on his contention that the State committed prosecutorial misconduct by eliciting testimony suggesting that defendant stole the gun because defendant objected only at the beginning of the witness's testimony but did not object to the remainder. Defendant objected to admission of the testimony on relevancy grounds, but did not assert that introduction of the allegedly irrelevant testimony constituted prosecutorial misconduct warranting a mistrial. Thibodeaux v. State, 2009 Tex. App. LEXIS 4964, 2009 WL 1748747 (Tex. App. Houston 14th Dist. June 23 2009).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

495. Defendant failed to properly object to evidence that was admitted at trial concerning unindicted aggravated robberies, even though he filed a motion in limine, because he failed to make objections under Tex. R. Evid. 404(b) when the evidence was admitted at trial. Ashford v. State, 2006 Tex. App. LEXIS 2770 (Tex. App. Fort Worth Apr. 6 2006).

496. Defendant failed to properly object to the trial court's admission of a bulletproof vest because when the vest was admitted, he objected on the ground that it was not relevant; therefore he did not preserve for appellate review on the ground that the vest was admitted in violation of Tex. R. Evid. 404(b). Ashford v. State, 2006 Tex. App. LEXIS 2770 (Tex. App. Fort Worth Apr. 6 2006).

497. In a criminal trial for aggravated sexual assault, the State gave notice of its intention to use evidence of extraneous offenses committed by defendant and the trial court admitted the evidence. Because defendant did not object on the ground that the State's notice was untimely, the issue was not preserved for review. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

498. Murder defendant waived the right to raise complaints on appeal concerning the admission, at the punishment phase, of an alleged extraneous offense under Tex. Code Crim. Proc. art. 37.07, § 3(a)(1) and Tex. R. Evid. 404(b). His objections at trial did not preserve error under Tex. R. App. P. 33.1(a)(1)(A) because they did not address the issues raised on appeal: lack of notice of the intention to offer evidence of an extraneous bad act and the trial court's failure to make a threshold determination of admissibility. Juarez v. State, 2005 Tex. App. LEXIS 6460 (Tex. App. Austin Aug. 11 2005).

499. In a trial for arson, defendant failed to preserve error under Tex. R. App. P. 33.1(a) as to the admission of evidence regarding his prior threats to kill the victim and her family. Although he had objected, under Tex. R. Evid. 403 and 404, to the admission of prior threats involving arson, he failed to object to a question broadening the

scope to other threats. Flores v. State, 2005 Tex. App. LEXIS 6255 (Tex. App. Amarillo Aug. 8 2005).

500. Because counsel raised no objection under Tex. R. Evid. 404 to the police officer's wife's statement that defendant smelled of alcohol, no complaint was preserved for appeal under Tex. R. App. P. 33.1(a)(1); however, it was nonetheless harmless in light of other evidence available to the jury. Martinez v. State, 2005 Tex. App. LEXIS 6136 (Tex. App. Corpus Christi Aug. 4 2005).

501. Defendant's conviction for murder was proper where the trial court did not err by overruling his relevancy objection to extraneous offense evidence under Tex. R. Evid. 404(b) relating to his drug use because he only made a relevancy objection at trial; such an objection did not preserve error concerning a R. 404(b) extraneous offense claim. Shivers v. State, 2005 Tex. App. LEXIS 3204 (Tex. App. Amarillo Apr. 26 2005).

502. Defendant did not preserve for review under Tex. R. App. P. 33.1(a)(1) and (2) the issue of admission of evidence of an extraneous offense under Tex. R. Evid. 404(b), such as false impersonation as a member of the clergy, because defendant's attorney opened the door for the questioning by referring to defendant as "father" in his opening statement. While defendant objected to the first mention of the existence or nonexistence of his credentials from any religious group, defendant did not ask for a running objection to this testimony. Givens v. State, 2004 Tex. App. LEXIS 11333 (Tex. App. El Paso Dec. 16 2004).

503. Request for a limiting instruction was not required concerning an assault defendant's white power and Adolph Hitler tattoos because defendant did not request a limiting instruction at the time the evidence was admitted. Furthermore, the court could find no authority that evidence of tattoos should be considered by a jury for only a limited purpose. Oldfield v. State, 2004 Tex. App. LEXIS 11310 (Tex. App. Waco Dec. 15 2004).

504. In a trial for attempted murder, it was proper to admit an autopsy report regarding a different victim, which included details about the angle of the wound and photographs of the body. Defendant did not object under Tex. R. Evid. 404, and there was no indication the trial court ruled on character conformity; the reviewing court therefore declined to address the issue. Adams v. State, 2004 Tex. App. LEXIS 8999 (Tex. App. Houston 14th Dist. Oct. 12 2004).

505. Defendant in a sexual assault trial failed to preserve error as to extraneous offenses or bad acts testimony because he failed to request an instruction to disregard, although he objected after each incident. The comments were not so inflammatory that an instruction would not have cured any error. Mass v. State, 2004 Tex. App. LEXIS 2551 (Tex. App. San Antonio Mar. 24 2004).

506. Defendant in a sexual assault trial failed to preserve error as to extraneous offenses or bad acts testimony because he failed to request an instruction to disregard, although he objected after each incident. The comments were not so inflammatory that an instruction would not have cured any error. Mass v. State, 2004 Tex. App. LEXIS 2551 (Tex. App. San Antonio Mar. 24 2004).

507. In a trial for indecency with a child under the age of 17 years, defendant objected, during a psychiatric witness's voir dire, to testimony regarding the complainant's statements about one incident; the separate objections under Tex. R. Evid. 403, 404(b), 602, 803(1) and 803(4), were overruled and appellant was not required to later repeat the individual objections before the jury. However, defendant argued on appeal that it was error to admit the hearsay statements for the purpose of medical diagnosis when the child did not have personal knowledge of the incident, in that the child was not sure whether he was touched by a penis or a finger; this argument appeared to be a unique blend of Tex. R. Evid. 602 and 803(4), which was not presented to the trial court with sufficient specificity to preserve the objection and which was also contrary to the law because defendant was not challenging the lack of personal knowledge by the witnesses. Ramirez v. State, 2004 Tex. App. LEXIS 1063 (Tex. App. Austin Feb. 5

2004).

508. In a trial for sexual assault of a child, an objection that testimony from defendant's ex-wife was outside the scope of relevancy and a request to instruct the jury to disregard did not preserve the complaint on appeal that Tex. R. Evid. 404 prohibited the admission of evidence of extraneous wrongs. Kirk v. State, 2004 Tex. App. LEXIS 710 (Tex. App. Dallas Jan. 26 2004).

509. After the trial court overruled an appellant's Tex. R. Evid. 404(b) objection, the appellant was required to make further objection under Tex. R. Evid. 403 in order to preserve the complaint for review. Mark v. State, 2003 Tex. App. LEXIS 879 (Tex. App. Houston 14th Dist. Jan. 30 2003).

510. Where a defense attorney objected that the testimony of the complainant, defendant's estranged wife, was irrelevant, prejudicial, and probative-irrelevant, she made only a relevancy objection, which did not preserve error concerning a Tex. R. Evid. 404 extraneous offense claim. Fullylove v. State, 2001 Tex. App. LEXIS 8009 (Tex. App. Corpus Christi Nov. 29 2001).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

511. Defendant failed to show the court reversibly erred by admitting evidence of an extraneous offense, because by objecting to the evidence as "extraneous," defendant preserved only a complaint that the evidence was not admissible under Tex. R. Evid. 404(b) since it served no probative purpose, and even assuming the trial court abused its discretion, any error was harmless, as the State spent very little time developing the evidence, which was minor compared to the rest of the evidence implicating defendant in the robbery. Barrett v. State, 2014 Tex. App. LEXIS 6160 (Tex. App. Fort Worth June 5 2014).

512. At defendant's trial for robbery, the trial court did not err in admitting testimony regarding his efforts to resist arrest because evidence relevant to his flight from the scene was a circumstance indicative of guilt. As defense counsel objected to the evidence about the details of the arrest on the grounds of relevance, defendant's argument under Tex. R. Evid. 404(b) was not preserved for review. Johnson v. State, 2014 Tex. App. LEXIS 471, 2014 WL 222929 (Tex. App. Corpus Christi Jan. 16 2014).

513. On appeal of defendant's conviction for burglary of a habitation and possession of a controlled substance, cocaine, in an amount of less than one gram, he claimed that the State violated his right to a fair trial by introducing, without the required notice, evidence of his prior crimes, wrongs, or acts. Because defendant did not complain that he had not been given proper notice, the error was not preserved for review. Washington v. State, 2013 Tex. App. LEXIS 13793, 2013 WL 5952144 (Tex. App. Waco Nov. 7 2013).

514. Any error in the admission of extraneous offenses evidence was not preserved for review because defendant did not explicitly challenge the admission of the evidence on appeal but rather, his argument was confined to the propriety of the limiting instruction contained in the jury charge. Perkinson v. State, 2013 Tex. App. LEXIS 9948 (Tex. App. Corpus Christi Aug. 8 2013).

515. Defendant failed to preserve for appellate review his claim that the trial court erred by admitting evidence of an extraneous offense because he did not make the court aware he was objecting to the failure of the State to include the offense in a Tex. R. Evid. 404(b) notice. Sanchez-Hernandez v. State, 2013 Tex. App. LEXIS 4548 (Tex. App. Amarillo Apr. 9 2013).

516. Complaint on appeal premised on Tex. R. Evid. 404 was not preserved for review because the trial objection was not based on Rule 404. Further, the same evidence was subsequently admitted without objection. Buckaloo v. State, 2013 Tex. App. LEXIS 1326 (Tex. App. Dallas Feb. 12 2013).

517. Even if the trial court erred by admitting into evidence a witness's testimony that defendant had been trying to send someone to harm him and his family, any error was cured when the same type of evidence concerning witnesses' fear of defendant was admitted elsewhere without objection, both before and after the complained-of testimony. Prior to the complained-of testimony, a co-defendant testified that he did not want to tell authorities about defendant's involvement in the offense because "snitches get stitches," and a second co-defendant testified that he gave three different statements to the police because he feared that defendant would harm his family in retaliation; after the complained-of testimony, defendant's ex-wife testified without objection that she came forward with what she knew about defendant's involvement because she feared that defendant would harm her because she no longer wanted to be involved with him. Brown v. State, 2013 Tex. App. LEXIS 1058, 2013 WL 476764 (Tex. App. Beaumont Feb. 6 2013).

518. Defendant's relevancy objections did not preserve his argument that admission of extraneous offense evidence of uncharged sexual conduct violated Tex. R. Evid. 404; in any event, because the same evidence came in through other testimony without objection, any error was cured. Goodwin v. State, 2012 Tex. App. LEXIS 6918, 2012 WL 3590723 (Tex. App. Corpus Christi Aug. 20 2012).

519. Defendant waived any error in the admission of evidence of the additional injury to his daughter because he did not object to the admission of his written statement in which he admitted to throwing his daughter onto the bed prior to the date of the offense. Smith v. State, 2012 Tex. App. LEXIS 5167, 2012 WL 2469548 (Tex. App. Eastland June 28 2012).

520. Defendant failed to preserve for review his claim that the trial court erred by admitting evidence of an extraneous offense during sentencing because at trial, defendant objected that the evidence was hearsay and admitting it denied defendant his right of confrontation, but on appeal he contended that the evidence was not relevant and that the probative value was substantially outweighed by the danger of unfair prejudice. Dirden v. State, 2012 Tex. App. LEXIS 2207, 2012 WL 983182 (Tex. App. Beaumont Mar. 21 2012).

521. Trial court did not err by admitting testimony from two witnesses about defendant's past use and sale of methamphetamine under Tex. R. Evid. 404 because defendant's relevance objection did not preserve his Rule 404 complaints and because he lodged no objection to the testimony about his past use and sale of methamphetamine by one of the witnesses. Norris v. State, 2012 Tex. App. LEXIS 108, 2012 WL 34453 (Tex. App. Beaumont Jan. 4 2012).

522. Defendant failed to preserve for review her claim that she was deprived of her right to present a complete defense under the Sixth Amendment due to the fact that the trial court excluded from evidence a videotaped interview with the victim because at trial defendant relied on Tex. R. Evid. 404(b) but never asserted her right to present a complete defense and did not cite the Holmes case; her attorney's statement at the end of his bill of exception that defendant was denied her constitutional rights was insufficient preserve the Holmes issue for appeal. Even if the issue had been preserved, defendant failed to show that any constitutional error occurred because the trial court excluded the videotape based on Tex. R. Evid. 403 and the substance of the defense, that the videotape would have enabled the jury to judge whether the victim initially failed to implicate her mother because she was truly afraid, was presented to the jury, through cross-examination of the victim and a caseworker. Sanchez v. State, 2011 Tex. App. LEXIS 10169, 2011 WL 6916418 (Tex. App. El Paso Dec. 28 2011).

523. Defendant failed to preserve for appellate review his claim that the trial court erred by allowing the State to present evidence that defendant was in possession of a weapon the day before the murder under Tex. R. Evid. 404(b) because he failed to make an objection under Rule 404(b). Benitez v. State, 2011 Tex. App. LEXIS 9871, 2011 WL 6306643 (Tex. App. Houston 1st Dist. Dec. 15 2011).

524. Objection under Tex. R. Evid. 403 to prior acts evidence did not preserve for review a complaint under Tex. R. Evid. 404(b). Vela v. State, 2011 Tex. App. LEXIS 6917, 2011 WL 3821045 (Tex. App. Corpus Christi Aug. 25 2011).

525. Although defendant, who was convicted of aggravated sexual assault of a child, argued the trial court erred in admitting evidence regarding an extraneous incident involving another child, defendant's issue was overruled because defendant's objection in the trial court did not correspond with his argument on appeal. In addition, defendant's argument was untimely, and the trial court did not issue an adverse ruling to defendant excluding this evidence Gilmore v. State, 2010 Tex. App. LEXIS 9822, 2010 WL 5132560 (Tex. App. Houston 14th Dist. Dec. 14 2010).

526. Defendant failed to preserve for appellate review his claim that the trial court erred by refusing to allow him to question the victim about a juvenile felony theft conviction because defendant did not inform the trial court that he was seeking admission of the evidence pursuant to Tex. R. Evid. 404(a)(2). Soto v. State, 2010 Tex. App. LEXIS 8709, 2010 WL 4273173 (Tex. App. San Antonio Oct. 29 2010).

527. Trial court did not abuse its discretion by refusing to admit evidence of a fight between the victim and his older brother because defendant failed to show the victim's propensity to fight when challenged was a pertinent character trait that had any relevance in a sexual assault on a child case. Soto v. State, 2010 Tex. App. LEXIS 8709, 2010 WL 4273173 (Tex. App. San Antonio Oct. 29 2010).

528. Defendant failed to preserve for appellate review his claim that the district court erred by excluding evidence regarding the motivation of the authorities to prosecute the case against him because he failed to objected on the basis of Tex. R. Evid. 404(b) during the trial. Even assuming that defendant had preserved error, the trial court did not abuse its discretion because: (1) the proffered evidence had no relevance to the issue of whether defendant had committed the offense of unauthorized use of a motor vehicle; (2) the trial court could have found that the evidence would have put the officers and the police department on trial, confused the issues, and caused undue delay; and (3) there was considerable evidence showing that defendant committed the offense, particularly the videotape showing defendant entering the bait vehicle on three separate dates. Bishop v. State, 2010 Tex. App. LEXIS 7056, 2010 WL 3369845 (Tex. App. Austin Aug. 26 2010).

529. Defendant failed to preserve for appellate review his claim that the trial court erred allowing into evidence information about his alleged prior bad acts in violation of Tex. R. Evid. 403 and 404 because defendant did not object each time the witness testified about defendant's purported extraneous bad acts, nor did he obtain a running objection from the trial court. Even if he had preserved the claim, the trial court did not abuse its discretion by admitting the testimony because it fell within the purview of Tex. Code Crim. Proc. Ann. art. 38.37, § 2, as the testimony described the history of the relationship between defendant and the child victim and established defendant's consistently hostile behavior or his statement of made as it related to the victim. Samora v. State, 2010 Tex. App. LEXIS 6759, 2010 WL 3279536 (Tex. App. Corpus Christi Aug. 19 2010).

530. Defendant's objection to extraneous offense evidence that four truckloads of stolen car parts were found at his house, along with evidence that he had purchased stolen car parts in the past, was preserved for appellate review because a bench conference conducted outside of the jury's presence provided the trial court the opportunity to consider the necessary factors and rule on the objection. Marban v. State, 2009 Tex. App. LEXIS

6760, 2009 WL 2618343 (Tex. App. Beaumont Aug. 26 2009).

531. In a driving while intoxicated case, defendant did not preserve an issue relating to extraneous offense evidence for appellate review under Tex. R. App. P. 33.1 because no objection was lodged; the record was replete with evidence of a homicide, its investigation, and a grand jury's return of a "no-bill" in favor of defendant. Vanderburgh v. State, 2009 Tex. App. LEXIS 4643, 2009 WL 1740053 (Tex. App. Fort Worth June 18 2009).

532. Where defendant did not raise an objection in the trial court based on inadmissibility of evidence under Tex. R. Evid. 404(b) due to character conformity, the argument was not preserved for review under Tex. R. App. P. 33.1. Mincey v. State, 2009 Tex. App. LEXIS 2825, 2009 WL 1058734 (Tex. App. Dallas Apr. 21 2009).

533. In a case involving aggravated sexual assault of a child, defendant failed to preserve error relating to the admission of testimony from the mother of the victim that the family had moved many times to get away from defendant's violent behavior. Although defendant argued to a trial court that he had not opened the door to evidence of abuse by cross-examining the mother, he did not object that admission of the evidence violated Tex. R. Evid. 403, Tex. R. Evid. 404, and Tex. R. Evid. 405, as he argued on appeal. Gamble v. State, 2009 Tex. App. LEXIS 2134, 2009 WL 806879 (Tex. App. Fort Worth Mar. 27 2009).

534. Defendant failed preserve error because he failed to object under either Tex. Rs. Evid. 403 or 404 to admission of prior offenses; the State posed questions to defendant to clarify the nature of the prior convictions, and counsel objected neither to the court's ruling allowing the evidence nor to the procedure used to arrive at the ruling. Williams v. State, 2009 Tex. App. LEXIS 1032, 2009 WL 350608 (Tex. App. Houston 1st Dist. Feb. 12 2009).

535. Defendant did not object to testimony about gang affiliation during the guilt-innocence phase of a murder trial and therefore failed to preserved error under Tex. R. Evid. 404. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

536. Under Tex. R. App. P. 33, a murder defendant failed to preserve an argument that the State should not have been allowed to introduce evidence of defendant's prior dealings in narcotics because the arguments asserted on appeal failed to comport with the hearsay and relevancy objections raised at trial. Marshal v. State, 2008 Tex. App. LEXIS 1411 (Tex. App. Houston 14th Dist. Feb. 28 2008).

537. In a drug trial, defendant's objection under Tex. R. Evid. 404(b) to evidence of extraneous violent conduct toward defendant's spouse was not sufficient under Tex. R. App. P. 33 to preserve error under Tex. R. Evid. 403. Huneycutt v. State, 2007 Tex. App. LEXIS 9975 (Tex. App. Amarillo Dec. 21 2007).

538. Defendant did not preserve error under Tex. R. App. P. 33 and Tex. R. Evid. 103 as to the timeliness of the State's notice under Tex. R. Evid. 404 of its intent to introduce extraneous offense evidence in a child sexual abuse case because, although he raised the issue, he did not object to any specific testimony or obtain a ruling. Jared v. State, 2007 Tex. App. LEXIS 8448 (Tex. App. Fort Worth Oct. 25 2007).

539. Defendant failed to preserve for review his challenge to the admission into evidence of marijuana that was found inside his tractor trailer because, even though he objected to the lifting of the motion in limine, he never renewed an objection when the evidence was admitted; even if the challenge was preserved for review, it was without merit because the marijuana was admissible under Tex. R. Evid. 404(b) as the cocaine, which defendant was charged with possessing, and the marijuana were part of the same transaction; the marijuana was relevant as an officer testified that he smelled the odor of raw marijuana when he stopped the tractor trailer, and keeping evidence about the marijuana from the jury would deprive them of an understanding of the offense; the evidence of

the marijuana was crucial when it came to evaluating the propriety of the officer's search of the truck. McMorris v. State, 2007 Tex. App. LEXIS 7202 (Tex. App. Tyler Aug. 31 2007).

540. Defendant's argument that evidence that marijuana was found along with the cocaine in the secret compartment in the trailer was improperly admitted into evidence was not preserved for appellate review because after objecting to lifting the motion in limine, defense counsel failed to object when the evidence was admitted; even if the argument had been preserved for review, it was without merit because it was admissible under Tex. R. Evid. 404(b) as the cocaine and marijuana were part of the same transaction and the marijuana was crucial when it came to evaluating the propriety of the officer's search of the tractor trailer. Thomas v. State, 2007 Tex. App. LEXIS 7203 (Tex. App. Tyler Aug. 31 2007).

541. Under Tex. R. App. P. 33.1, a robbery defendant waived an argument that it was error under Tex. R. Evid. 404 to admit evidence that after the robbery, someone stole the complainant's tools from the complainant's vehicle and set the vehicle on fire. An objection under Tex. R. Evid. 403 did not preserve this extraneous act argument for review. Flores v. State, 2007 Tex. App. LEXIS 6539 (Tex. App. Houston 1st Dist. Aug. 16 2007).

542. Because defendant did not voice any of the following objections in the trial court regarding the testimony of the three witnesses in the State's rebuttal case, they were not preserved for appellate review: (1) that the witnesses' testimony was not relevant; (2) that their testimony only tended to show defendant's propensity to commit the offense of indecency with a child; and (3) that their testimony was inadmissible character evidence under Tex. R. Evid. 404. Hassenplug v. State, 2007 Tex. App. LEXIS 4998 (Tex. App. Houston 14th Dist. June 28 2007).

543. In a capital murder trial, any objection under Tex. R. Evid. 404 was not preserved under Tex. R. App. P. 33.1 by defendant's general relevancy objection. Russo v. State, 228 S.W.3d 779, 2007 Tex. App. LEXIS 4499 (Tex. App. Austin 2007).

544. Under Tex. R. App. P. 33.1, defendant failed to preserve his argument that he should have had a hearing regarding the admission of prior convictions, which the state had noticed under Tex. Code Crim. Proc. Ann. art. 37.07 and Tex. R. Evid. 404(b); although defendant's written pretrial motion contained a request for a hearing, defendant did not orally object to the lack of a hearing when the court denied his motion. Fletcher v. State, 2006 Tex. App. LEXIS 10163 (Tex. App. Dallas Nov. 28 2006).

545. Where defendant testified that the police found a glass pipe in his pocket when they arrested him for DWI, the trial court did not err by overruling his relevancy objection during the punishment phase when the prosecutor asked him if he had ever smoked marijuana; defendant's relevancy objection did not preserve his Tex. R. Evid. 404(b) claim for review. Bradshaw v. State, 2006 Tex. App. LEXIS 10029 (Tex. App. Fort Worth Nov. 16 2006).

546. Under Tex. R. App. P. 33, defendant did not preserve a complaint, and any error was cured, with regard to the admission of extraneous offense evidence; he did not request a running objection to evidence concerning the offense and did not object to the evidence that the State elicited on cross-examination of defendant. Davila v. State, 2006 Tex. App. LEXIS 6865 (Tex. App. Waco Aug. 2 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

547. Court did not err in allowing the State to offer the extraneous offense evidence, because the rule required that a request be submitted by the accused to trigger the Rule and no such request was given. Pompa v. State, 2014 Tex. App. LEXIS 9079, 2014 WL 4049880 (Tex. App. Corpus Christi Aug. 14 2014).

548. On appeal of defendant's conviction for two counts of aggravated sexual assault of a child and one count of continuous sexual abuse of a child, his complaint that the trial court erred by admitting a judgment to show that he had a prior conviction for indecency with a child was not preserved for review because defendant did not raise his Tex. R. Evid. 404 objection at trial. Loveday v. State, 2013 Tex. App. LEXIS 13364, 2013 WL 5874280 (Tex. App. Beaumont Oct. 30 2013).

549. In a drug case, an issue relating to the similarity of a charged crime and extraneous offenses was not preserved for review since no objection was made on that basis. Stebbins v. State, 2008 Tex. App. LEXIS 9199 (Tex. App. Amarillo Dec. 10 2008).

550. Because defendant did not object and obtain a ruling as to the admission of extraneous evidence (a witness's testimony during the State's case-in-chief that defendant and his brother had "jacked" people around in the past), defendant had failed to preserve error on appeal. Redden v. State, 2008 Tex. App. LEXIS 1333 (Tex. App. Austin Feb. 21 2008).

551. On appeal of his conviction for theft, defendant argued that the trial court erred in admitting evidence concerning various instances of prior bad acts in violation of Tex. R. Evid. 404(b); because defendant did not object to the testimony when it was first elicted, he waived any error concerning the admissibility of such testimony according to Tex. R. App. P. 33.1. Craig v. State, 2007 Tex. App. LEXIS 6027 (Tex. App. Tyler July 31 2007).

552. Because defendant failed to make a Tex. R. Evid. 404 conformity-of-character objection to a witness's testimony, his claim was not preserved for review. Hale v. State, 2006 Tex. App. LEXIS 7825 (Tex. App. Fort Worth Aug. 31 2006).

553. During defendant's murder trial, the State questioned him about two extraneous offenses and defense counsel did not object under Tex. R. Evid. 403, Tex. R. Evid. 404, or Tex. R. Evid. 609 regarding either offense; in accordance with Tex. R. App. P. 33.1, defendant could not raise these issues on appeal. Cotton v. State, 2006 Tex. App. LEXIS 5445 (Tex. App. Houston 14th Dist. June 27 2006).

554. Defendant failed to preserve error as to improper jury argument about his arrest because he failed to raise that objection at trial and because other evidence about his arrest was admitted without objection. Gonzales v. State, 2006 Tex. App. LEXIS 4020 (Tex. App. Corpus Christi May 11 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

555. Defense counsel preserved for review the issue of whether the trial court erred in admitting an extraneous offense because defense counsel emphasized what rules his request for a running objection was based on, and the trial court stated that the evidence was admitted as inextricably intertwined with the offense. Finney v. State, 2013 Tex. App. LEXIS 8317 (Tex. App. Dallas July 8 2013).

556. Defendant did not preserve a challenge under Tex. R. Evid. 403 to testimony regarding other acts of child sexual abuse because his only objection was under Tex. R. Evid. 404. Richert v. State, 2012 Tex. App. LEXIS 7719 (Tex. App. Houston 1st Dist. Aug. 30 2012).

557. Defendant waived a complaint under Tex. R. Evid. 609 regarding the admission of prior crimes impeachment evidence because it did not comport with his objection at trial under Tex. R. Evid. 404. Pearson v. State, 2012 Tex. App. LEXIS 5690, 2012 WL 2899766 (Tex. App. Houston 14th Dist. July 17 2012).

558. In defendant's aggravated sexual assault of a child case, since defendant did not raise the identity exception to the general rule of inadmissible character conformity evidence, he failed to preserve any complaint regarding the admissibility of the evidence as relevant to the issue of identity and waived the issue; defendant's stated reason for seeking the victim's brother's testimony was to establish the brother's alleged propensity to commit sexual offenses, the purpose specifically prohibited by Tex. R. Evid. 404. Gonzales v. State, 2007 Tex. App. LEXIS 4613 (Tex. App. Amarillo June 12 2007).

559. In a burglary case, defendant's purported error regarding character evidence was rejected on appeal because the objection before the trial court was not the same as the issue raised on appeal; at trial, defendant contended that character evidence was irrelevant, but on appeal he contended that it was uninvited. Cooper v. State, 2007 Tex. App. LEXIS 4342 (Tex. App. Houston 14th Dist. June 5 2007).

560. In a trial for indecency with and sexual assault of a child, defendant failed to preserve an argument under Tex. R. Evid. 403, 607 to the State's calling a witness who the State knew would testify adversely to its case, solely so that it could impeach its own witness with defendant's extraneous offense. Defendant raised only a general objection under Tex. R. Evid. 403 and 404 and thus was not specific, as required by Tex. R. App. P. 33.1. Starnes v. State, 2007 Tex. App. LEXIS 3144 (Tex. App. Texarkana Apr. 26 2007).

561. Where the State failed to introduce before the jury all the proffered evidence regarding the similarities between the charged and extraneous offenses on which the relevance of the extraneous offense depended, had defendant moved to strike the extraneous offense testimony of the complainant in the prior case at the close of the State's case and had the trial court overruled the motion, it was possible that reversible error would have been presented; however, any error in the admission of the testimony of the complainant in the prior case was not preserved for review because defendant did not renew his objection and did not move to strike the testimony. Mackenzie v. State, 2007 Tex. App. LEXIS 1776 (Tex. App. Austin Mar. 7 2007).

562. Defendant adequately preserved error under Tex. R. App. P. 33.1 as to the exclusion of character evidence under Tex. R. Evid. 404 and satisfied Tex. R. Evid. 103(a)(2), even though he did not make an offer of proof, because counsel told the trial court that he wanted to elicit evidence of defendant's reputation for the ethical treatment of children; accordingly, the nature of the disputed evidence was apparent to all. Moody v. State, 2006 Tex. App. LEXIS 9788 (Tex. App. Houston 1st Dist. Nov. 9 2006).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

563. Appellant waived error in the State's admission of juvenile adjudications during the punishment phase of trial without prior identification. Defense counsel stipulated to appellant's identity for prior convictions and her objection to admission of the prior offenses based on Tex. R. Evid. 403, 404 was overruled. Lynch v. State, 2005 Tex. App. LEXIS 1095 (Tex. App. Amarillo Feb. 8 2005).

564. In defendant's drug and robbery case, although defendant's relevancy objection to evidence of other thefts sufficiently apprised the trial court of the nature of his complaint, where defendant did not object under Tex. R. Evid. 403 and obtain a ruling as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect, nor ask for a limiting instruction, defendant waived at trial any complaint over admission of evidence of extraneous thefts. Loftin v. State, 2004 Tex. App. LEXIS 2651 (Tex. App. Corpus Christi Mar. 25 2004).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

565. On appeal of defendant's conviction for aggravated robbery, he claimed the trial court abused its discretion when it allowed evidence of four prior convictions that were over ten years old to be admitted during the

guilt/innocence phase of the trial. Because defendant introduced the evidence of his prior convictions on direct examination, he had waived any error. Richardson v. State, 2014 Tex. App. LEXIS 1723, 2014 WL 645801 (Tex. App. Eastland Feb. 14 2014).

566. On appeal of defendant's conviction for robbery causing bodily injury and aggravated robbery with a deadly weapon, he claimed the trial court erred in considering information regarding an extraneous offense involving a cell phone. Because defendant failed to object to this evidence during his sentencing hearing, the issue was waived. Delgado v. State, 2013 Tex. App. LEXIS 9774 (Tex. App. Houston 14th Dist. Aug. 6 2013).

567. In an aggravated robbery case, defendant waived any straight forward, substantive objection to the admission of testimony concerning extraneous evidence of a check-cashing incident because he did not make that objection at trial. Cross v. State, 2013 Tex. App. LEXIS 8535 (Tex. App. Dallas July 10 2013).

568. Defendant in a child sexual assault case waived his objection to testimony regarding extraneous bad acts, including two prior incidents involving the same victim, which he contended were inadmissible under Tex. R. Evid. 404(b), by failing to object to the evidence when it was offered at trial as required by Tex. R. App. P. 33.1. Walker v. State, 2009 Tex. App. LEXIS 3249, 2009 WL 1314227 (Tex. App. Tyler May 13 2009).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Waiver Triggers Generally

569. Defendant on a drug delivery charge was estopped from raising on appeal any error in the admission of subsequent deliveries at the guilt phase because he admitted his guilt at the penalty phase of trial; further, there was no error under Tex. R. Evid. 403 or Tex. R. Evid. 404 because his counsel opened the door by suggesting that defendant was only a marginal participant in the drug trade and that the charged transaction constituted his sole involvement in the drug business. Houston v. State, 208 S.W.3d 585, 2006 Tex. App. LEXIS 3056 (Tex. App. Austin 2006).

Criminal Law & Procedure : Appeals : Right to Appeal : Defendants

570. Pursuant to the DeGarmo doctrine, defendant was estopped from challenging the admission of the extraneous offense evidence because he unequivocally admitted his guilt during the punishment phase of his trial and because the admission of the legally obtained extraneous offense evidence did not implicate a fundamental right. Jarmon v. State, 263 S.W.3d 25, 2006 Tex. App. LEXIS 3809 (Tex. App. Houston 1st Dist. 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

571. Trial court's Tex. R. Evid. 404(b) ruling is reviewed under an abuse of discretion standard. Page v. State, 137 S.W.3d 75, 2004 Tex. Crim. App. LEXIS 936 (Tex. Crim. App. 2004).

572. Trial court did not abuse its discretion by denying defendant's motion for a mistrial in a drug case based on an officer's reference to knowing people in a certain town because the statement did not constitute an improper reference to extraneous offenses, and any improper impression created by the statement was cured by the trial court's prompt instruction to disregard. Moss v. State, 2004 Tex. App. LEXIS 4219 (Tex. App. Dallas May 10 2004).

573. There was no abuse of discretion by a trial court in its admission of evidence of defendant's actions between the time of a robbery at a fast food restaurant and when he was identified by the restaurant employees, which actions included the burglary of a house, as such evidence was properly admitted under the "same transaction contextual evidence" exception to Tex. R. Evid. 404(b); the finding that the probative value of the evidence was not outweighed by the prejudicial effect was also not an abuse of discretion. Goodwin v. State, 2004 Tex. App. LEXIS

997 (Tex. App. San Antonio Feb. 4, 2004).

574. Trial court's rulings on whether to admit or exclude evidence under Tex. R. Evid. 404(b) are reviewed under an abuse of discretion standard. Prescott v. State, 123 S.W.3d 506, 2003 Tex. App. LEXIS 8792 (Tex. App. San Antonio 2003).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

575. Trial court did not abuse its discretion when it admitted defendant's prior robbery conviction because he raised the issue of identity by challenging the eyewitness's description, challenged defendant's identity as the robber, and challenged the photo array. The robberies were similar because they occurred six days apart, they occurred shortly after 10 p.m., they occurred in the same area, both businesses were convenience stores, the suspects in both robberies were wearing the same type of zip-up hoodies, and both robberies occurred when only one clerk was present inside the store. Dudley v. State, 2014 Tex. App. LEXIS 3083, 2014 WL 1101563 (Tex. App. Eastland Mar. 20 2014).

576. Trial court did not err by admitting extraneous offense evidence of two witnesses concerning prior sexual assaults because defendant opened the door to the admission of evidence to rebut his defensive theory of fabrication. Implicit in defense counsel's opening statement was the victim fabricated her outcry and in his cross-examination of several witnesses counsel repeatedly asked witnesses about the custody battle between defendant and the victim's aunt and uncle and the victim's truthfulness. Jones v. State, 2013 Tex. App. LEXIS 12150, 2013 WL 5494678 (Tex. App. Waco Sept. 26 2013).

577. Trial court did not abuse its discretion by admitting an extraneous offense regarding marijuana found on defendant's person and in his car because it was admissible same transaction contextual evidence; defendant's possession of an illegal substance explained his possible motive for hitting a detective and fleeing the scene before the drugs could be found, and he was not acting suspiciously until the detective moved closer. Finney v. State, 2013 Tex. App. LEXIS 8317 (Tex. App. Dallas July 8 2013).

578. Trial court did not abuse its discretion by admitting evidence of the burglary in violation of Tex. R. Evid. 404(b) because it was necessary to show the chain of events that occurred immediately prior to the shooting, why the officer was in pursuit of defendant's brother, and led to the confrontation between defendant and the officer and defendant's shooting the officer. Castillo v. State, 2013 Tex. App. LEXIS 2034, 2013 WL 781776 (Tex. App. San Antonio Mar. 1 2013).

579. Trial court did not abuse its discretion by admitting defendant's girlfriend's testimony that defendant called her the day before the assault and threatened to harm her if he found her and the complainant together under Tex. R. Evid. 404(b) because the trial court could have reasonably concluded that the testimony constituted admissible same-transaction contextual evidence. Defendant's telephone threat the day before placed the assault in context and was necessary to the jury's understanding of defendant's intent, state of mind, and motivation to forcibly enter the girlfriend's house and repeatedly stab the complainant; the evidence also tended to rebut defendant's self-defense theory. Morales v. State, 389 S.W.3d 915, 2013 Tex. App. LEXIS 109, 2013 WL 80154 (Tex. App. Houston 14th Dist. Jan. 8 2013).

580. Trial court did not abuse its discretion by overruling defendant's objection to testimony about an extraneous offense against a corrections officer under Tex. R. Evid. 404(b) because the victim testified that defendant hit her with the corrections officer's riot baton, and therefore the question of how the baton went from the officer's holder to defendant's hand to being used against the victim in short order was contextual evidence relating to the charged assault. In addition, defendant's objection came well after the extensive testimony about defendant hitting the officer

and he only object to the officer's description of her injury; the court further held that the admission of the officer's statement regarding a slight swelling of her face did not affect a substantial right. Mayfield v. State, 2012 Tex. App. LEXIS 5487, 2012 WL 2832529 (Tex. App. Tyler July 11 2012).

581. Trial court did not abuse its discretion by admitting evidence of extraneous offenses under Tex. R. Evid. 404(b) because the trial court could have reasonably concluded that, beginning with the opening statement, defendant attempted to portray the victim as the aggressor and defendant as merely defending himself, and therefore the State was allowed to rebut with evidence of other crimes, wrongs, or acts where defendant was the aggressor. Castillo v. State, 2012 Tex. App. LEXIS 3997, 2012 WL 1764089 (Tex. App. Dallas May 18 2012).

582. Trial court did not abuse its discretion by admitting extraneous evidence under Tex. R. Evid. 404(b) of defendant's theft of his friend's gun, the aggravated assault of one victim, the killing of the victim from whom he stole the vehicle, and the robbery of yet another victim, because the State needed the evidence to give context to defendant's crime spree. Defendant did not rest between incidents and showed that he stole the gun to go after women with whom he had had personal relationships and to then effectuate his flight to his mother's home. Devoe v. State, 354 S.W.3d 457, 2011 Tex. Crim. App. LEXIS 1669 (Tex. Crim. App. Dec. 14 2011).

583. Trial court did not abuse its discretion by admitting into evidence allegations made by the victim's sister under Tex. R. Evid. 404(b) because the complained-of instances did not rise to the level of extraneous misconduct evidence. The prosecutor's comments during the opening statement did not include any specifics regarding the allegations made by the victim's sister, as neither defendant nor any specific act or conduct were mentioned, and the victim's mother did not include any specific information related to the sister's allegations. Guillory v. State, 2011 Tex. App. LEXIS 8337, 2011 WL 4996465 (Tex. App. Corpus Christi Oct. 20 2011).

584. Trial court did not abuse its discretion by admitting evidence of an extraneous offense under Tex. R. Evid. 404(b), namely a firearm that was found in defendant's vehicle because, although defendant's first question to the officer was specific as to whether weapons were found on defendant's person, defendant's follow-up question was more general and asked the officer whether weapons were found. The officer's negative response left the jury with the impression that defendant had no weapons, but because a loaded weapon was found in the general vicinity of the driver's side floorboard, it was possible that defendant was either armed during the burglary or was attempting to arm himself when the officers ordered him to exit his own vehicle; therefore, the evidence was relevant and admissible to correct the false impression left by the officer's testimony. Thomas v. State, 2010 Tex. App. LEXIS 6207 (Tex. App. Houston 14th Dist. Aug. 3 2010).

585. Trial court did not abuse its discretion by deciding that extraneous offense evidence that defendant had molested two girls other than the victim on church property was admissible to rebut defensive theories because it was at least subject to reasonable disagreement whether extraneous offense evidence was admissible for noncharacter-conforming purpose of rebutting defendant's theory that the victim fabricated her allegations against him and of rebutting the defensive theory clearly suggesting that defendant, as a "real deal" and "genuine" pastor, would not engage in the type of conduct alleged in the indictment. Bass v. State, 270 S.W.3d 557, 2008 Tex. Crim. App. LEXIS 859 (Tex. Crim. App. 2008).

586. Trial court did not abuse its discretion by admitting evidence of another aggravated robbery that occurred at another convenience store under Tex. R. Evid. 404(b) because the issue of identity was contested, as various witnesses gave conflicting descriptions of the suspect and defendant testified that another man committed the instant offense. In addition, the robberies were committed within a few days of each other, at the same type of store, in the same area of town, and with a sawed-off shotgun. Both suspects wore a mask and were white males with a short build. Raymer v. State, 2008 Tex. App. LEXIS 5463 (Tex. App. Waco July 23 2008).

587. Trial court did not abuse its discretion during defendant's trial for the robbery of a store and the stabbing murder of a store employee in admitting evidence that defendant had, on previous occasions, possessed a knife because the trial court's ruling that the evidence was admissible to show intent, preparation, or plan was not outside the zone of reasonable disagreement. Cantu v. State, 2006 Tex. App. LEXIS 2907 (Tex. App. San Antonio Apr. 12 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Mistrial

588. Trial court did not abuse its discretion by denying defendant's motion for a mistrial because the officer's reference to defendant's "criminal history," without any further detail, was not so inflammatory that the trial court's instruction to disregard could not cure the harm. Francis v. State, 445 S.W.3d 307, 2013 Tex. App. LEXIS 4815 (Tex. App. Houston 1st Dist. Apr. 18 2013).

589. During defendant's trial for sexual assault, a witness testified that defendant was listed as a sex offender; the trial court told the jury to disregard the evidence; the trial court did not abuse its discretion in denying defendant's motion for mistrial based on the quality and quantity of evidence against him; the victim testified that defendant sexually assaulted her, DNA evidence linked defendant to the crime, and there was no contrary evidence presented. Carnes v. State, 2007 Tex. App. LEXIS 6025 (Tex. App. Tyler July 31 2007).

590. In a trial for child sexual assault, defendant was not entitled to a mistrial after a detective testified about another case in which the police investigated defendant as a suspect because the detective testified only that he interviewed defendant and did not believe him to be a suspect; any inference of other bad acts was slight, and defendant did not show that an instruction to disregard would not have been effective to cure any error. Garza v. State, 2006 Tex. App. LEXIS 8308 (Tex. App. Austin Sept. 21 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

591. Failure to admonish defendant on the consequences of a guilty plea, specifically the requirement of registering as a sex offender, as required by Tex. Code Crim. Proc. Ann. art. 26.13, was harmless error under Tex. R. App. P. 44 because the State presented substantial evidence of guilt, including Tex. R. Evid. 404 evidence regarding other children who had allegedly been abused by defendant and because the omitted admonition regarding the sex-offender registration requirement did not apply to or affect defendant, given that defendant would not be eligible for parole until serving 100 years of the sentence. Bessey v. State, 239 S.W.3d 809, 2007 Tex. Crim. App. LEXIS 1630 (Tex. Crim. App. 2007).

592. It was error to admit evidence of an almost 30-year-old acquittal for attempted murder because the gap made the prior charge too remote; the error was harmless, however, because the evidence was introduced to rebut self-defense, and that claim was not supported because a reasonable person would have retreated. Wyatt v. State, 2006 Tex. App. LEXIS 2288 (Tex. App. Fort Worth Mar. 23 2006).

593. In a trial for defendant's sexual assault of his daughter, any error was harmless when the trial court excluded testimony from the complainant's mother regarding disciplinary problems defendant had with the complainant, through which defendant sought to show the complainant's motive for the allegation. Any such motive was established by the complainant's testimony on cross-examination. Pruitt v. State, 2006 Tex. App. LEXIS 1669 (Tex. App. Fort Worth Mar. 2 2006).

594. In a case of aggravated sexual assault of a child, the State provided notice of other crimes evidence pursuant to Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37, regarding previous inappropriate touching; the lack of an allegation of an exact date did not necessarily render notice insufficient as to a crime against a child, and

any error was harmless under Tex. R. App. P. 44.2 because defendant was not surprised by the evidence. Hindaoui v. State, 2006 Tex. App. LEXIS 1021 (Tex. App. Houston 14th Dist. Feb. 9 2006).

595. In a trial for defendant's murder of his estranged wife, the admission of evidence that defendant hit the victim 25 years earlier was not reversible error, even if it was evidence of character conformity in violation of Tex. R. Evid. 404(b). Any error was harmless under Tex. R. App. P. 44.2(b) because of the significant evidence of guilt, including defendant's DNA under the victim's fingernails, the fact that he had recently learned that the victim failed to file the divorce papers he had relied on in remarrying, and his confession. McCann v. State, 2005 Tex. App. LEXIS 7343 (Tex. App. Houston 14th Dist. Sept. 1 2005).

596. Where defendant was charged with aggravated sexual assault of a child, the appellate court assumed the admission of pornographic photographs of adult women taken from his computer was erroneous. However, the error was harmless; the photographs were less shocking and offensive than the complainant's graphic description of the acts defendant engaged in with her and there was ample testimonial evidence of defendant's guilt. Breland v. State, 2005 Tex. App. LEXIS 5925 (Tex. App. Fort Worth July 28 2005).

597. Gang affiliation evidence was relevant evidence to show an intent to kill and was permissible under Tex. R. Evid. 404(b) where the State's theory was that defendant intentionally opened fire at a vehicle because the driver was a member of a rival sect in the same gang. Moreover, any error was harmless under Tex. R. App. P. 44.2(a) because the jury heard other, substantial evidence related to defendant's conduct. Trevino v. State, 2005 Tex. App. LEXIS 4449 (Tex. App. Corpus Christi June 9 2005), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 4938 (Tex. App. Corpus Christi June 8, 2006).

598. Because the jury assessed defendant's punishment for the aggravated kidnapping of his ex-girlfriend at 15 years, and rejected probation, on the facts surrounding the kidnapping and not based on passing references to prior bad acts, the failure to give the reasonable doubt instruction as to prior bad acts could not have caused egregious harm. Thomas v. State, 2005 Tex. App. LEXIS 3054 (Tex. App. Dallas Apr. 21 2005).

599. Although pictures of injures suffered by a sibling should not have been admitted in a child abuse case, a remand for a harm analysis was not necessary where the evidence showed that the pictures depicted very minor abuse, the pictures of the child who was the subject of the indictment were much more serious and disturbing, defendant admitted to abusing the children, and the pictures were not mentioned in closing arguments. Johnston v. State, 145 S.W.3d 215, 2004 Tex. Crim. App. LEXIS 1478 (Tex. Crim. App. 2004).

600. In defendant's sexual assault on a child case, a court's error in the admission of extraneous offense evidence was harmless where the evidence introduced at trial that supported the verdict was compelling and included the testimony of the victim, his mother, and a therapist. An outcry witness testified that the victim recounted the events, that testimony was consistent with the victim's testimony, the victim's mother and his therapist testified to the victim's behavior and personality after the incident, and a doctor testified that the symptoms the victim exhibited supported the possibility that the victim had been sexually abused. Cervantes v. State, 2004 Tex. App. LEXIS 7442 (Tex. App. Corpus Christi Aug. 19 2004).

601. Where both defendant and the State discussed the niece's inadmissible extraneous offense testimony and because the niece's testimony significantly bolstered the State's case, the erroneous admission of her testimony affected defendant's substantial rights and was not harmless to defendant; thus, defendant's conviction of aggravated sexual assault of his daughter, a child younger than 14 years of age, was reversed. Harrison v. State, 2004 Tex. App. LEXIS 6418 (Tex. App. Dallas July 19 2004).

602. In a trial for a violent sexual assault of a child, it was error to admit a letter that defendant wrote from prison in which he asserted that the victim lied about her age and that he defended himself when she attacked him, and because his testimony, prior to admission of the letter, was consistent with those claims, the letter was not relevant to guilt and was only relevant to defendant's promiscuous sexual conduct, which he also discussed in the letter; however, the error was harmless because the letter was largely exculpatory and the evidence of guilt was overwhelming. Reed v. State, 2004 Tex. App. LEXIS 5389 (Tex. App. Fort Worth June 17 2004).

603. Although the State failed to provide notice of its intent to introduce evidence of defendant's immigration status, there was no indication from the record that the omission was intended to mislead defendant and prevent him from preparing a defense where the State apparently notified the defense that it intended to question defendant about his immigration status at some point before the punishment phase as indicated by the hearing held while the jury deliberated guilt-innocence. Alvarado v. State, 2004 Tex. App. LEXIS 5019 (Tex. App. Houston 1st Dist. June 3 2004).

604. In an aggravated felony theft case, any error in permitting the State to question defendant about why she was fired from the another job was harmless; the reference to the "financial irregularities" at the place of her former employment was only one sentence and was no more damaging than references to the other "bad acts" that were mentioned. Furthermore, the prosecutor's argument paled in comparison to the quantum of evidence presented by the State and the absence of any controverting witnesses or documentation by defendant. Dugan v. State, 2004 Tex. App. LEXIS 3548 (Tex. App. Tyler Apr. 21 2004).

605. Testimony concerning defendant's plans following release from jail was minimal compared to the testimony concerning the charged offenses, and it did not influence the jury or had only a slight effect; therefore, any error was rendered harmless. Ellinberg v. State, 2004 Tex. App. LEXIS 2753 (Tex. App. Dallas Mar. 26 2004).

606. Defendant's argument that testimony of his having exposed himself to a woman at the post office was an inadmissible extraneous offense was improperly overruled was upheld because at the time the case was tried, Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) prohibited the admission of extraneous offense evidence at the punishment phase of a non-capital offense unless it was permitted by the Texas Rules of Evidence and satisfied art. 37.07, § 3(a)'s definition of prior criminal record. Mireles v. State, 1997 Tex. App. LEXIS 2179 (Tex. App. Corpus Christi Apr. 24 1997).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

607. Although the evidence from the neighbor's apartment was not same transaction contextual evidence and the trial court abused its discretion in admitting it, the error was harmless given that the extent of the other evidence for defendant's guilt because the State found the marijuana hidden in defendant's truck, an officer observed defendant exit the apartment building appearing to hide something under his shirt, and defendant chose to lead police on a high-speech chase instead of submitting to the traffic stop. Gonzalez v. State, 510 S.W.3d 10, 2014 Tex. App. LEXIS 8934 (Tex. App. Corpus Christi Aug. 14 2014).

608. At defendant's trial for four counts of tampering with a governmental record she prepared as a case-worker for the Texas Department of Family and Protective Services, she was not harmed by the admission of extraneous-offense testimony even though she did not receive sufficient notice. Because defendant received reasonable notice that the State intended to introduce extraneous-offense evidence that she made false entries claiming she made trips to the home of one family, the court could not see how her defensive strategy might have been different had she been given notice about the State's intent to introduce evidence of false entries in travel logs with respect to the second family. Washington v. State, 2014 Tex. App. LEXIS 7742, 2014 WL 3556525 (Tex. App. Waco July 17 2014).

609. Even if the court erred by admitting evidence about defendant's gang affiliation, the error was harmless because defendant and other individuals were in the bedroom with over ninety grams of crack cocaine, the packaging was consistent with the sale of drugs, and the house contained surveillance cameras. Villarreal v. State, 2014 Tex. App. LEXIS 7296, 2014 WL 3056509 (Tex. App. Dallas July 7 2014).

610. Exclusion of character evidence that a murder victim occasionally drank to excess and was violent when he drank was harmless error, given that defendant was able to present his defense that the victim was drunk and pulled a shotgun on defendant, which defendant then used to kill the victim. Milliff v. State, 2014 Tex. App. LEXIS 4589, 2014 WL 1713897 (Tex. App. Houston 14th Dist. Apr. 29 2014).

611. Even though the trial court err by excluding the portion of defendant's testimony regarding the victim's prior specific instances of violence against her to support her claim of self-defense, the error was harmless because defendant admitting yelling at the victim because she was mad at him, which led to an argument, and she slapped him during the argument. Defendant was permitted to testify that she was afraid of the victim and she had slapped him because she was scared. Rodriguez v. State, 2013 Tex. App. LEXIS 14876, 2013 WL 6533378 (Tex. App. San Antonio Dec. 11 2013).

612. Trial court did not err in admitting evidence, Tex. R. Evid. 403, 404(b), given the evidence already accumulated against defendant, and any error was harmless. Hicks v. State, 419 S.W.3d 555, 2013 Tex. App. LEXIS 14091, 2013 WL 6076468 (Tex. App. Amarillo Nov. 18 2013).

613. Although the State did not provide notice of its intent to introduce evidence of marijuana taken from defendant at the scene of his DWI arrest as required by Tex. R. Evid. 404(b), defendant's counsel was aware of the existence of the marijuana evidence, did not ask for a continuance of the trial, and did not show how his trial strategy would have been different if he had been provided notice; therefore, any error was harmless. Voltmann v. State, 2013 Tex. App. LEXIS 11445 (Tex. App. Houston 14th Dist. Sept. 5 2013).

614. Similar crimes evidence admitted under Tex. R. Evid. 404(b) against a defendant convicted of aggravated assault with a deadly weapon, Tex. Penal Code Ann. § 22.02(a)(2), if error, did not have a substantial effect on the jury's verdict given other evidence that defendant was the perpetrator of the assault. Tovar v. State, 2013 Tex. App. LEXIS 10404 (Tex. App. Austin Aug. 20 2013).

615. Even if the trial court erred by admitting a witness's testimony about the burglary of vehicle, the error was harmless given the strength of the State's case, the limited scope of the witness's testimony, defendant pleaded guilty before the jury to burglarizing the witness's vehicle, and an officer repeated the substance of the witness's testimony without objection. Rendon v. State, 2013 Tex. App. LEXIS 10103 (Tex. App. Austin Aug. 14 2013).

616. Even if the trial court erred by allowing the State to elicit testimony from defendant's wife about an incident involving defendant and the child victim without notice, the error was harmless because defendant learned of the testimony before trial and he was prepared and cross-examined the wife about the incident. Lair v. State, 2013 Tex. App. LEXIS 9906 (Tex. App. Fort Worth Aug. 8 2013).

617. Defendant's conviction for abuse of official capacity was improper because the jury's verdict was substantially influenced by the admission of improper extraneous offense evidence and the error was not harmless, Tex. R. Evid. 404(b), Tex. R. App. P. 44.2(b); the evidence of guilty was not overwhelming. The improper use of extraneous offense evidence included arguments by the State that defendant should be found guilty of the charged offense because he and his employees were in the "business" of criminal activity. Lomas v. State, 2013 Tex. App. LEXIS 6866 (Tex. App. Corpus Christi June 6 2013).

618. In a robbery/murder trial, any error in admitting evidence of defendant's gang affiliation was harmless because a surviving witness unequivocally identified defendant. Vallejo v. State, 2013 Tex. App. LEXIS 6952 (Tex. App. Corpus Christi June 6 2013).

619. Even though the trial court erred by admitting evidence that defendant was previously in prison or jail for another crime, was a gang member, or had sold or possessed marijuana under Tex. R. Evid. 404(b), the error was harmless because the net effect of the improperly admitted evidence was to show that defendant had some relatively minor criminal history, circumstantial evidence supported the verdict that defendant participated in the victim's murder, the State did not refer to defendant's previous conviction, imprisonment, gang affiliation, or marijuana sales during its jury argument, and the trial court limited the jury's consideration of all evidence of other offenses to a determination of defendant's state of mind at the time of the instant offense. Childs v. State, 2013 Tex. App. LEXIS 5392 (Tex. App. Texarkana May 2 2013).

620. In a child sexual abuse case, even if evidence that appellant spanked his daughters with a cable cord did not fall under Tex. Code Crim. Proc. Ann. art. 38.37, the admission of the testimony was harmless and did not affect appellant's substantial rights where the daughters testified about the years of sexual abuse that they suffered. Appellant failed to preserve his Tex. R. Evid. 403 and Tex. R. Evid. 404(b) objections in the trial court. Arellano-Sanchez v. State, 2013 Tex. App. LEXIS 5438 (Tex. App. Fort Worth May 2 2013).

621. Even though the trial court abused its discretion by admitting defendant's military record into evidence, as the fact that defendant was charged with escape and had been discharged for misconduct did not make it more or less likely that he had committed the sexual assault offenses, the error was harmless because there was evidence supporting defendant's conviction, other evidence showed that he was untruthful about his military service, and the State never mentioned the extraneous offenses contained in defendant's military record. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

622. Trial court did not abuse its discretion by admitting defendant's girlfriend's testimony that she lied to the police because she was scared of defendant, that they fought a lot, he would hit her, and that it was normal for them to fight. Even if the trial court had erred by admitting the evidence, the error was harmless because there was ample other evidence that it was normal for defendant and his girlfriend to fight and it was extremely doubtful that the jury gave much credence to the girlfriend's testimony concerning why she lied to police. Moreno v. State, 2012 Tex. App. LEXIS 10403, 2012 WL 6582556 (Tex. App. Eastland Dec. 13 2012).

623. No reversible error resulted from the state's alleged failure to provide notice of extraneous offense evidence because defendant was given the opportunity to-and did-develop evidence to rebut the testimony. Nieto v. State, 2012 Tex. App. LEXIS 8787 (Tex. App. Houston 1st Dist. Oct. 18 2012).

624. At defendant's trial for DWI, the admission of medical records containing extraneous offense evidence under Tex. R. Evid. 404(b) did not have a substantial effect on the verdict because the jury heard evidence that defendant was passed out in his vehicle with a bottle of alcohol between his legs; the officer noticed defendant's glassy and bloodshot eyes, defendant admitted he consumed alcohol and prescription medications, and field sobriety test results suggested intoxication. The record contained sufficient evidence from which the jury could find defendant guilty of DWI beyond a reasonable doubt. Lorenz v. State, 2012 Tex. App. LEXIS 7777, 2012 WL 4017766 (Tex. App. Beaumont Sept. 12 2012).

625. Trial court did not abuse its discretion when it took into consideration during punishment an unadjudicated offense that had been dismissed, Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a), as any error was harmless as the trial court considered the positive steps defendant had made since his arrest, but was uncertain that defendant understood the seriousness of the offense. Meighen v. State, 2012 Tex. App. LEXIS 7401, 2012 WL 3799664 (Tex.

App. Eastland Aug. 31 2012).

626. Even though the trial court erred by admitting evidence concerning defendant's suicide attempt shortly after his arrest on the instant charges under Tex. R. Evid. 404(b) because it was not part of the same transaction and therefore the State was required to give notice before the day of trial, the error was harmless because: (1) defendant was not surprised; (2) he did not request a continuance; and (3) similar evidence was admitted elsewhere without objection. Fletcher v. State, 2012 Tex. App. LEXIS 5429, 2012 WL 2783298 (Tex. App. Texarkana July 10 2012).

627. In a driving while intoxicated case, even if a brief mention of appellant's parole status was in error under Tex. R. Evid. 404(b), it was harmless under Tex. R. App. P. 44.2(b); the evidence supporting the verdict was substantial, the jury was not told why appellant was on parole, and the testimony had a slight effect on the jury, if it had any effect at all. Link v. State, 2012 Tex. App. LEXIS 3350, 2012 WL 1495182 (Tex. App. Eastland Apr. 30 2012).

628. Even if the trial court erred by admitting extraneous offense evidence, the error did not affect defendant's substantial rights because: (1) the record did not indicate that the State specifically mentioned the agent's testimony regarding the 20 instances when similar counterfeit bills were passed; (2) the trial court instructed the jury that it could not consider extraneous offenses unless it found beyond a reasonable doubt that defendant committed the offenses; and (3) the record contained sufficient other evidence to support defendant's forgery conviction. Mookdasnit v. State, 2012 Tex. App. LEXIS 2220, 2012 WL 983333 (Tex. App. Beaumont Mar. 21 2012).

629. No reversible error occurred from the admission of penalty-phase evidence that defendant was a member of a street gang prior to becoming a member of a prison gang; even if the State erroneously failed to provide notice, there was no unfair surprise. Zubia v. State, 2012 Tex. App. LEXIS 551, 2012 WL 225470 (Tex. App. El Paso Jan. 25 2012).

630. In a driving while intoxicated (DWI) case, it was error to admit the entirety of defendant's driving record because it contained evidence of extraneous offenses beyond the prior DWI convictions that were elements of a charged offense. However, the error was harmless because evidence of guilt was ample. Bridges v. State, 2011 Tex. App. LEXIS 9104, 2011 WL 5557534 (Tex. App. Dallas Nov. 16 2011).

631. Even though the trial court erred by admitted evidence of extraneous misconduct that occurred two days after the date of the instant altercation, the error was harmless because: (1) the State presented considerable evidence of defendant's guilt, as numerous witnesses testified they saw defendant hit the victim; (2) there was considerable evidence of injuries to the victim; (3) the State did not reemphasize the details of the extraneous offense during closing argument; and (4) the trial court included a limiting instruction in the jury charge. Vaughn v. State, 2011 Tex. App. LEXIS 5037, 2011 WL 2621327 (Tex. App. Austin July 1 2011).

632. At defendant's trial for burglary of a habitation based on evidence showing that defendant and his brother broke into a mobile home and stole a TV set, the trial court ruled that evidence of two extraneous burglaries committed by his brother was relevant, probative, and admissible under Tex. R. Evid. 404(b). The appellate court held that defendant was not harmed by the admission of the evidence because it was not unduly emphasized by the State, and it did not have a substantial effect on the jury's verdict. Crutchfield v. State, 2011 Tex. App. LEXIS 4959, 2011 WL 2638402 (Tex. App. Tyler June 30 2011).

633. Trial court did not abuse its discretion in admitting a witness's testimony because whether the witness's testimony about an incident of intoxication unrelated to the current felony driving while intoxicated offense was relevant and admissible under the Tex. R. Evid. 403 balancing test was within the zone of reasonable disagreement; furthermore, even if the trial court erred in admitting the challenged testimony, the error was

harmless under Tex. R. App. P. 44.2(b) because the State placed extremely little emphasis on the witness's testimony that he had previously seen defendant intoxicated. Snyder v. State, 2010 Tex. App. LEXIS 10203, 2010 WL 5541120 (Tex. App. Texarkana Dec. 29 2010).

634. Even if four days' notice of an extraneous offense was insufficient under the standards of Tex. Code Crim. Proc. Ann. art. 37.07 § 3(g) and Tex. R. Evid. 404, there was no evidence of harm because defendant admitted that he knew about the offense for two months and was not surprised by the introduction of the evidence. Gonzalez v. State, 2010 Tex. App. LEXIS 9805, 2010 WL 5060634 (Tex. App. Houston 1st Dist. Dec. 9 2010).

635. Even though the trial court erred by refusing defendant's request to redact his medical records to delete the doctor's diagnosis of cocaine abuse and drug abuse-marijuana, as it constituted inadmissible character-conformity evidence, the error was harmless because it did not substantially affect the verdict, as there was other evidence, including the results of a urinalysis and defendant's statements to hospital staff that he used crack cocaine and had smoked three or four rocks that day, revealing defendant's drug use. Montgomery v. State, 2010 Tex. App. LEXIS 9220, 2010 WL 4668952 (Tex. App. Eastland Nov. 18 2010).

636. Even if the trial court abused its discretion by refusing to allow defendant to present evidence that the victim had previously threatened two witnesses, the error did not amount to reversible error because defendant was able to present his defense, as the jury was properly instructed on the law of self-defense and defendant was testified about prior threats the victim had made to him and about the circumstances of the shooting; other witnesses also testified about threats the victim had allegedly made. There was also evidence presented contradicting defendant's self-defense claim, including evidence that: (1) defendant had threatened to kill the victim shortly before the victim was shot; (2) no evidence showed that the victim was armed or attempted to use deadly force; (3) none of the witnesses that were in the area when the shooting occurred or that responded to the scene reported seeking a sniper; and (4) when defendant drove to the sheriff's office and admitted that he shot the victim, he did not mention a sniper. Currin v. State, 2010 Tex. App. LEXIS 7051, 2010 WL 3370059 (Tex. App. Austin Aug. 27 2010).

637. Defendant's contention that the State failed to provide reasonable notice of extraneous offenses that it intended to offer under Tex. R. Evid. 404(b) was rejected because: (1) the State choose not to introduce evidence of theft of the electronic device charger; (2) defense counsel admitted that he had notice that the State intended to offer evidence related to the burglary of a skate shop; and (3) defendant was not surprised or harmed by the introduction of evidence relating to a robbery because prior to defendant's trial, the State produced transcripts of court proceedings against an accomplice for that robbery that disclosed defendant's role in the robbery and the potential witnesses against him, and the State's witness list in the instant case disclosed the robbery victim's identity. Davis v. State, 2010 Tex. App. LEXIS 6949, 2010 WL 3341514 (Tex. App. Tyler Aug. 25 2010).

638. State gave defendant notice that it intended to introduce defendant's prior criminal trespass under Tex. R. Evid. 404(b) where the prosecutor stated on the record that several months before trial, he had delivered to defendant numerous discovery documents, including a copy of the offense report that referenced a statement that the instant burglary victims had report to authorities that defendant had criminally trespassed on their residence. Even if the State had not provided such notice, defendant was not harmed because his counsel made no claim that he was actually surprised by the evidence, and in light of the fact that the criminal trespass involved the same property and the same property owners as the charged offense, it was unlikely that defendant was aware that the State would attempt to admit the evidence. Castle v. State, 2010 Tex. App. LEXIS 7039, 2010 WL 3370057 (Tex. App. Austin Aug. 25 2010).

639. Court abused its discretion when it allowed the State to introduce evidence that defendant failed to appear for two drug tests, however, the error did not affect defendant's substantial rights, because the evidence was brief and was not emphasized by the State, defendant had a prior criminal record, and there was direct evidence connecting defendant with the syringe that contained a trace amount of methamphetamine. Hood v. State, 2010 Tex. App.

LEXIS 6301, 2010 WL 3049030 (Tex. App. Eastland Aug. 5 2010).

640. Any error in the admission of prior acts testimony was harmless because the complainant testified to years of sexual abuse at the hands of defendant, her grandfather, and a detective testified that during his interview with the complainant, the complainant told him about having sexual intercourse with her grandfather. In light of the more detailed, first-hand testimony of the complainant, the mother's testimony regarding defendant's behavior towards her did not influence the jury or had but a slight effect. Barrera v. State, 2010 Tex. App. LEXIS 401, 2010 WL 188312 (Tex. App. Dallas Jan. 21 2010).

641. In an indecency with a child case, the court erred by admitting extraneous offense evidence due to the lack of similarity between the extraneous offenses and the charged offenses, the duration in time of twenty years between the offenses, and the lack of evidence concerning a continuing course of conduct by defendant. The extraneous acts did not take place in defendant's home and defendant did not ask the witness to touch himself or defendant. Crocker v. State, 2009 Tex. App. LEXIS 9432, 2009 WL 4725299 (Tex. App. Dallas Dec. 11 2009).

642. Trial court abused its discretion by admitting evidence of defendant's prior burglary arrest pursuant to Tex. R. Evid. 404(b) where the tendency of the evidence was to show defendant was a bad person or that his character conformed to that of a person from whom criminal conduct might be expected. However, the error did not influence the jury, or had but a slight effect on its verdict of guilt, because the State's presentation of the alleged burglary, although factually detailed, was brief and received only passing mention in closing argument, and because the propensity and potency of the evidence to characterize defendant as a criminal was blunted by the previous, unopposed, admission of evidence of his prior conviction for manslaughter. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

643. Defendant was not harmed by the State's failure to provide him with notice of its intent to introduce deferred adjudications involving unauthorized use of a motor vehicle under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) because defendant's ability to prepare to meet other, more serious offenses (of which he was given notice) was not affected by the State's failure to provide notice of its intent to introduce the orders of deferred adjudication. Weeks v. State, 2009 Tex. App. LEXIS 5106, 2009 WL 1896066 (Tex. App. Austin July 1 2009).

644. Even if the trial court erred by allowing the State to introduce any of defendant's recorded phone conversations under Tex. R. Evid. 404(b), any error was harmless because the jury heard ample evidence of defendant's guilt apart from the conversations, the State did not rely upon the conversations during either its opening or closing statements, and the conversations did not constitute a critical part of the State's case. Jimenez v. State, 307 S.W.3d 325, 2009 Tex. App. LEXIS 4701 (Tex. App. San Antonio June 24 2009).

645. In defendant's murder case, a pretrial motion in limine regarding extraneous offenses was insufficient to trigger a duty by the State to provide notice under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) and therefore, the trial court did not abuse its discretion by allowing the prosecutor to impeach a defense witness during the punishment phase of trial without notice to defendant. Additionally, any error was harmless because defendant shot the victim four times in the back. Ridley v. State, 2009 Tex. App. LEXIS 4242, 2009 WL 1653083 (Tex. App. Dallas June 15 2009).

646. Trial court erred when extraneous offense evidence of marihuana possession was admitted under Tex. R. Evid. 404(b) because it did not relate to defendant's perception or state of mind in a murder case; even if it was relevant, the probative value was weak and substantially outweighed by the danger of unfair prejudice. However, defendant's substantial rights under Tex. R. App. P. 44.2(b) were not affected because defendant admitted shooting the victim, he had threatened the victim previously, a witness testified about crack cocaine on her person, and the forensic evidence showed that the victim was shot at close range with a gun found in defendant's possession.

Harbert v. State, 2009 Tex. App. LEXIS 3305 (Tex. App. Eastland May 14 2009).

647. In a sexual assault of a child case, the court reversibly erred by admitting extraneous acts evidence because defendant's practice of not using a condom while engaged in consensual sex with an adult companion, or informing the companion of his HIV positive status, had the practical effect of prejudicing any defense raised by defendant regarding the complainant's credibility. Such an effect would have been detrimental to defendant, who sought to discredit the complainant by pointing out factual variances in his outcries, and by suggesting that the complainant was motivated to fabricate the assault to avoid being schooled in an alternative education program. Lopez v. State, 288 S.W.3d 148, 2009 Tex. App. LEXIS 2050 (Tex. App. Corpus Christi Mar. 26 2009).

648. In a case involving sexual assault of a child, the State's notice of its intent to use extraneous offenses was not unreasonable because it involved a time span of 6 years; because the testimony regarding when defendant lived in El Salvador was not precise, the notice giving a range of dates for the extraneous offenses alleged to have occurred in El Salvador was not unreasonable. Even if the notice was unreasonable, the error was not harmful because defendant did not contend that he was surprised, he did not seek a continuance, and he failed to show how his defense strategy had been different had the intent notice been more specific. Sagastume v. State, 2009 Tex. App. LEXIS 1093, 2009 WL 387182 (Tex. App. Dallas Feb. 18 2009).

649. Alleged error regarding the admission of an extraneous offense was disregarded in a robbery case under the standard in Tex. R. App. P. 44.2(b) because defendant's substantial rights were not affected; there was ample evidence of defendant's guilt, a limiting instruction was given, and there was other evidence regarding defendant's untruthfulness. Moreover, whether or not defendant had stolen a truck used to flee the robbery scene had minimal relevance as to whether he used a deadly weapon during the robbery. Crump v. State, 2009 Tex. App. LEXIS 760, 2009 WL 279606 (Tex. App. Fort Worth Feb. 5 2009).

650. In a sexual assault of a child case, the trial court abused its discretion by admitting a graphic story written by defendant for purposes of showing defendant's intent to gratify his sexual desire because intent was not an issue at trial. However, the error was harmless because the victim testified regarding the abuse perpetrated by defendant, testimony established that defendant routinely slept in the same bed with her, and the State presented other evidence that defendant did not have an appropriate relationship with his adolescent daughter. Mayer v. State, 2008 Tex. App. LEXIS 9483 (Tex. App. Fort Worth Dec. 18 2008).

651. In a sexual assault case, other acts evidence was properly admitted because, although defendant claimed surprise, there was evidence that he was aware of the allegations that sexual abuse occurred while the victim was a minor, and he did not seek a continuance to obtain evidence to establish an alibi defense or otherwise rebut the testimony. Defendant did not show how his defense strategy might have been different if he had been given notice fourteen days before trial, as he requested, rather than the day of jury selection. Merlos v. State, 2008 Tex. App. LEXIS 6514 (Tex. App. Dallas Aug. 26, 2008).

652. Trial court erred by admitting an extraneous offense of marijuana possession under Tex. R. Evid. 404(b) in a case involving unlawful possession of a weapon because it was irrelevant where defendant did not challenge the legality of a search; however, the error was harmless since defendant's sole defensive theory was negated by his admission to police. Defendant contended that he had no knowledge of gun found under the driver's seat of a vehicle, but he told a police officer that searched the vehicle that there was a weapon inside. Provencio v. State, 2008 Tex. App. LEXIS 6073 (Tex. App. Amarillo Aug. 11 2008).

653. Even if character evidence of a decedent was improperly introduced during a capital murder case, this constituted harmless error since defendant's substantial rights were not affected; defendant admitted that she knew her boyfriend was using a weapon in robberies, she participated after learning of a shooting, and she helped

dispose of the weapon. Harris v. State, 2008 Tex. App. LEXIS 3225 (Tex. App. Amarillo May 2 2008).

654. Any error was harmless when the State failed to notify defendant, as required under Tex. R. Evid. 404, of its intent to introduce extraneous offense evidence of a fight between a murder defendant and the victim three months earlier; although that evidence may have shown a motive for the crime, it was insignificant in light of the other evidence. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

655. In a trial for defendant's aggravated assault of a former romantic partner, it was error to admit without the notice required by Tex. R. Evid. 404 evidence that defendant drove by the victim's workplace and threatened to kill the victim; however, the error was harmless because there was no showing that the defensive strategy would have been different if the State had given proper notice or that the defense was injuriously affected by the lack of notice. Padilla v. State, 254 S.W.3d 585, 2008 Tex. App. LEXIS 2719 (Tex. App. Eastland 2008).

656. In defendant's unlawful possession of a firearm by a felon case, the court did not err by allowing the State to ask a witness whether she knew defendant was a convicted sex offender because inquiry into the nature of the relationship between defendant and a witness was relevant to show potential bias by the witness or challenge the witness's credibility; additionally, any error was harmless; in the jury's presence, the parties stipulated to the admission into evidence of records pertaining to defendant's conviction for failure to register as a sex offender. Tapps v. State, 2008 Tex. App. LEXIS 2809 (Tex. App. Austin Apr. 17 2008).

657. In an aggravated robbery case in which a trial court allowed the State to present extraneous offense evidence of a robbery committed the day of the offense-at-issue for the purpose of identification, even if the trial court prematurely admitted the extraneous offense evidence pursuant to Tex. R. Evid. 404, the error was rendered harmless by subsequently admitted evidence; in defendant's case-in-chief, he presented an alibi defense, thus affirmatively raising the issue of identity by positing that he could not be the person who robbed the victim because he was at a different location at the time of the robbery. Dickson v. State, 246 S.W.3d 733, 2007 Tex. App. LEXIS 9859 (Tex. App. Houston 14th Dist. 2007).

658. Appellant was entitled to a new trial based on the erroneous admission of improper character evidence that appellant failed a drug test, contrary to Tex. R. Evid. 404(b); the evidence of the drug-test results, which occurred after the assault for which appellant was on trial, came in unexpectedly and was later explained by appellant, yet it was embraced by the State and emphasized throughout trial in an effort to tie the drug-test results to the assault; consequently, the error in admitting the evidence was not harmless under Tex. R. App. P. 44 and Tex. R. Evid. 103. Simmons v. State, 2007 Tex. App. LEXIS 9732 (Tex. App. Texarkana Dec. 14 2007).

659. In a murder trial, no harm occurred when the trial court admitted tape-recorded phone conversations that included defendant's statement about a plea offer on an unrelated offense; defendant's remark was in the middle of the State's first tape-recorded conversation, it was not singled out at trial, and the State did not attempt to introduce other evidence regarding the previous offense. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

660. Defendant was not substantially harmed by the trial court's error in admitting a witness's reputation testimony because evidence of the victim's character as a peaceful person was properly presented to the jury. Cruz v. State, 2007 Tex. App. LEXIS 9002 (Tex. App. El Paso Nov. 15 2007).

661. In defendant's sexual assault on a child case, a court did not err in admitting a prior bad act because, in regard to the breast touching incident, the record reflected that defendant and her lead trial counsel were both present at a deposition where the incident was explored extensively at least four months before her trial; under such circumstances, defendant failed to show that she was surprised by the substance of the testimony or that her ability

to prepare cross examination or mitigating evidence was affected; therefore, the trial court's error, if any, in admitting the testimony was harmless. Dinger v. State, 2007 Tex. App. LEXIS 4767 (Tex. App. Tyler June 20 2007).

662. In a trial for indecency with and sexual assault of a child, it was error under Tex. R. Evid. 404 to admit electronic mail messages as evidence of defendant's prior bad acts because the purpose of the evidence was to prove defendant's bad character. The error was harmless because the evidence had at most a slight effect in light of the complainant's testimony about the abuse and medical evidence of rectal tearing. Starnes v. State, 2007 Tex. App. LEXIS 3144 (Tex. App. Texarkana Apr. 26 2007).

663. In a drug trial, counsel was not rendered ineffective by failing to object under Tex. R. Evid. 404, to the admission of the portion of defendant's written statement that referred to an extraneous offense; any error was harmless because there is no reasonable probability that the evidence contributed to the conviction. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

664. In a trial for aggravated robbery, any error was harmless under Tex. R. App. P. 44.2 when the trial court allowed testimony regarding extraneous acts evidence under Tex. R. Evid. 404(b), specifically that defendant possessed drugs at the time of arrest; the extraneous acts were less serious than the charged offense, the trial court gave a limiting instruction, and there was a plethora of evidence establishing guilt. Padrino v. State, 2007 Tex. App. LEXIS 623 (Tex. App. Dallas Jan. 30 2007).

665. In a criminal prosecution for indecency with a child, the trial court did not err by allowing a sexual assault nurse examiner to testify about the child's statements that defendant touched the child victim's breasts and buttocks on various occasions; the State's failure to give defendant prior notice of intent to tender the evidence as required by Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 38.072 was harmless; defendant was not surprised by the evidence. Sharp v. State, 210 S.W.3d 835, 2006 Tex. App. LEXIS 11033 (Tex. App. Amarillo 2006).

666. In a trial for indecency with children, defendant should have been allowed to elicit testimony that he had a reputation in the community for the ethical treatment of children; the error in excluding that evidence was not harmless under Tex. R. App. P. 44.2(b), even though there was other testimony as to his reputation for being peaceful and law-abiding, because evidence of a reputation as being law-abiding was far too generic to address the specific character trait of pedophilia. Moody v. State, 2006 Tex. App. LEXIS 9788 (Tex. App. Houston 1st Dist. Nov. 9 2006).

667. In an aggravated robbery case, extraneous conduct evidence of a shooting incident involving defendant was improperly admitted because the shooting offense was different than the aggravated robbery offense, however, the error was harmless; the aggravated robbery victim made a positive identification of defendant and a witness also implicated defendant. Jimenez v. State, 2006 Tex. App. LEXIS 9282 (Tex. App. El Paso Oct. 26 2006).

668. Defendant was not entitled to reversal of a conviction for indecency with a child because of the admission of a confession that referred to other bad acts; any violation of Tex. R. Evid. 404 was harmless error under Tex. R. App. P. 44.2 because the confession strongly supported the verdict and a proper limiting instruction was given. Diaz v. State, 2006 Tex. App. LEXIS 8084 (Tex. App. Amarillo Sept. 12 2006).

669. Even if the trial court erred by admitting evidence of defendant's two prior aggravated sexual assault offenses during his murder trial, the error was harmless because the incriminating evidence was substantial, consisting of DNA evidence showing that defendant had sexually assaulted the victim and defendant's oral and written statements about his dream that showed his detailed knowledge of the victim's murder scene. Dossett v. State, 216 S.W.3d 7, 2006 Tex. App. LEXIS 7428 (Tex. App. San Antonio 2006).

670. Even though the trial court abused its discretion by allowing the State to introduce extraneous-offense evidence relating to the theft of a purse and a cell phone, as the State failed to give notice under Tex. R. Evid. 404(b) by failing to list the offense in its notice of intent, the error was harmless because while the evidence may have reinforced the State's proof that defendant fled after the shooting, it was insignificant compared to evidence that defendant never returned to his home or his job, abandoned his car in Louisiana, and was apprehended in Virginia. Allen v. State, 2006 Tex. App. LEXIS 5186 (Tex. App. Fort Worth June 15 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 7349 (Tex. App. Fort Worth Aug. 17, 2006).

671. Although the tape was not properly authenticated, the evidence of an extraneous offense under Tex. R. Evid. 404 could not be said to have infringed on defendant's substantial rights because the evidence was before the jury via an undercover officer's unobjected-to testimony; therefore, admission of the extraneous offense evidence was harmless. Roberson v. State, 2006 Tex. App. LEXIS 4282 (Tex. App. Houston 1st Dist. May 18 2006).

672. Trial court's admission of an assault victim's testimony concerning allegations contained in a divorce petition she filed against defendant, if erroneous, was harmless under Tex. R. App. P. 44.2(b) where testimony presented by the responding officers and pictures of the victim on the night of the incident revealing redness in the victim's left eye and bruising around the eye were admitted without objection and were amply sufficient to enable the jury to find that defendant, at a minimum, recklessly caused bodily injury to the victim. Furthermore, because the State did not emphasize the divorce petition evidence in its argument to the jury, the victim's testimony regarding the divorce petition had no more than a slight effect, if any, on the jury's decision. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Jury Instructions

673. Defendant convicted of arson failed to show she suffered egregious harm as a result of the trial court's failure to instruct the jury during sentencing that the State had to prove extraneous offenses beyond a reasonable doubt because she did not argue that the evidence of her extraneous misconduct was insufficient to support a conviction or was lacking in credibility, and neither did she provide authority or other considerations indicating that, if an instruction had been given, the jury would likely have disregarded the evidence or imposed a lighter sentence; she faced up to 99 years' imprisonment and up to a $10,000 fine, but the jury only assessed a 14-year sentence and a $3,000 fine. Sanders v. State, 2014 Tex. App. LEXIS 830, 2014 WL 2619398 (Tex. App. Eastland Jan. 24 2014).

674. Even if the trial court erred in including a reference to extraneous offenses in the jury charge, defendant could not show that he was harmed by the error because if the trial court had sustained defense counsel's objection and excluded the instruction, the jury would have been free to consider evidence of defendant's extraneous offenses for any purpose, including character conformity. Perkinson v. State, 2013 Tex. App. LEXIS 9948 (Tex. App. Corpus Christi Aug. 8 2013).

675. Trial court's extraneous offense instruction did not cause defendant egregious harm because defendant's driving offenses were irrelevant to an intent to deliver cocaine because the instruction neither suggested nor required that the jury draw any particular inference about defendant's intent based on the offenses he committed but rather permitted the jury to assign the offenses their appropriate relevance in determining defendant's intent. Limas v. State, 2013 Tex. App. LEXIS 827, 2013 WL 328988 (Tex. App. Houston 14th Dist. Jan. 29 2013).

676. In a case in which defendant was convicted of aggravated sexual assault of a child younger than 14 years of age, the trial court erred by failing to give a limiting instruction with regard to extraneous acts contained in a prosecution's exhibit when the exhibit was first admitted into evidence. However, the trial court's error had no more than a slight effect on the jury's verdict and, thus, was harmless. Mccormick v. State, 2012 Tex. App. LEXIS 2026, 2012 WL 851696 (Tex. App. Waco Mar. 14 2012).

677. To the extent that the district court's failure to include an instruction regarding recent fabrication was an error in defendant's sexual assault trial, it was a harmless error because the instruction given prohibited consideration of testimony from three of the victim's relatives who claimed that defendant had also abused them for any reason other than specifically identified, the trial court's failure to include an instruction on recent fabrication benefited, rather than harmed, defendant. Tobar v. State, 2006 Tex. App. LEXIS 5161 (Tex. App. Austin June 16 2006).

Criminal Law & Procedure : Habeas Corpus : Appeals : General Overview

678. Trial court properly denied the inmate habeas corpus relief on his claim that defense counsel was ineffective for failing to object to a witness's nonresponsive testimony concerning defendant's propensity for violence because the inmate failed to meet his burden to prove that counsel's representation fell below the standard of prevailing professional norms, as the court was not in a position to judge whether the risk of the jury focusing their view on the inmate outweighed the prejudicial nature of the testimony. Ex parte McAndrew, 2008 Tex. App. LEXIS 656 (Tex. App. Tyler Jan. 31 2008).

Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Evidentiary Rulings

679. State inmate was denied habeas relief under 28 U.S.C.S. § 2254(d) because, inter alia, the State's failure to notify him of its intent to introduce prior bad act evidence under Tex. R. Evid. 404(b) at his third trial for murdering his wife did not violate due process, as it failed to raise an issue of federal constitutional dimension. Garcia v. Quarterman, 2009 U.S. Dist. LEXIS 82214 (S.D. Tex. Sept. 10 2009).

Criminal Law & Procedure : Habeas Corpus : Review : Specific Claims : Evidentiary Errors

680. Testimony of a victim who survived a rape and attack perpetrated by an inmate was admissible under Tex. R. Evid. 404(b) to establish the inmate's identity as the perpetrator of similar attacks and murders where identity was a hotly contested issue in the case; thus, the inmate was not entitled to a writ of habeas corpus on the ground that the admission of the victim's testimony violated the inmate's rights. Wood v. Dretke, 2006 U.S. Dist. LEXIS 36083 (N.D. Tex. June 2 2006).

681. Testimony of a victim who survived a rape and attack perpetrated by an inmate was admissible under Tex. R. Evid. 404 to establish the inmate's identity as the perpetrator of similar attacks and murders where identity was a hotly contested issue in the case; thus, the inmate was not entitled to a writ of habeas corpus on the ground that the admission of the victim's testimony violated the inmate's rights. Wood v. Dretke, 2006 U.S. Dist. LEXIS 15740 (N.D. Tex. Apr. 4 2006).

Evidence : Authentication : General Overview

682. Although the tape was not properly authenticated, the evidence of an extraneous offense under Tex. R. Evid. 404 could not be said to have infringed on defendant's substantial rights because the evidence was before the jury via an undercover officer's unobjected-to testimony; therefore, admission of the extraneous offense evidence was harmless. Roberson v. State, 2006 Tex. App. LEXIS 4282 (Tex. App. Houston 1st Dist. May 18 2006).

Evidence : Demonstrative Evidence : Admissibility

683. Prison guards' testimony and videotape of a melee were relevant to show defendant's intent to help her boyfriend escape and were admissible under Tex. R. Evid. 404(b). Jones v. State, 2005 Tex. App. LEXIS 1850 (Tex. App. Houston 14th Dist. Mar. 10 2005).

Evidence : Demonstrative Evidence : Photographs

684. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

685. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

686. Trial court did not abuse its discretion under Tex. R. Evid. 404(b) by admitting autopsy photographs of the victim that showed injuries to areas other than her vagina because they were admissible to show the context in which the offense occurred, as defendant's assaultive behavior was so connected to the sexual assault that they formed an indivisible criminal transaction. Coe v. State, 2012 Tex. App. LEXIS 4169, 2012 WL 1899179 (Tex. App. Houston 14th Dist. May 24 2012).

687. Trial court did not abuse its discretion by admitting a photograph of defendant holding a pistol during his trial for possessing more than four grams of cocaine with intent to deliver and for possessing more than four ounces of marihuana where the photograph was relevant because it made it more probable that defendant knowingly possessed both the contraband and the pistol, and where that relevance was not outweighed by the risk of unfair prejudice because no significant amount of time was required to introduce the photograph. Furthermore, even though the photograph had the potential for impressing the jury in an improper way pursuant to Tex. R. Evid. 404(b) by suggesting that defendant was the sort of person who brandished a pistol during a telephone conversation, by linking defendant to the pistol found in the night stand of his motel room, albeit indirectly, the photograph was some evidence that defendant used the pistol to protect his drugs and money, and the State's only other evidence of such use, beyond defendant's simple possession of the weapon, was a police officer's testimony describing defendant's ambiguous movements when the officers entered his motel room. Rangel v. State, 2008 Tex. App. LEXIS 9008 (Tex. App. Austin Dec. 5 2008).

688. State argued that the burn evidence, which constituted other crimes evidence under Tex. R. Evid. 404(b), was admissible because in defendant's written statements, he stated that any injury that he inflicted on the victim, a 16-month old child, the night of her fatal injury was accidental; the burn evidence was relevant to show defendant's state of mind and his relationship with the victim and rebutted his claim of the accidental nature of the injury that resulted in her death; further, the testimony and photograph of the burn was not so graphic that it would have impressed the jury in an irrational, yet indelible way, and the State had a compelling need for the evidence because its case was entirely circumstantial, and defendant contested both his identity as the perpetrator and his state of mind. Montgomery v. State, 198 S.W.3d 67, 2006 Tex. App. LEXIS 3377 (Tex. App. Fort Worth 2006).

689. Trial court erred by admitting certain photographs in violation of Tex. R. Evid. 404(b), 403, and 901 because although the photographs that were found in defendant's kitchen the day after the alleged sexual assault that showed the victim naked and unconscious were properly admitted as they were essential to understanding the circumstances of the assault and tended to confirm her testimony; other photographs that showed unidentified men sexually assaulting another woman, and that showed defendant's house mate having sexual intercourse, and defendant urinating against the wall giving a gang sign were improperly admitted. There was no evidence that defendant took the other photographs or knew of their existence and they suggested an improper basis upon which to convict defendant. Casey v. State, 160 S.W.3d 218, 2005 Tex. App. LEXIS 1807 (Tex. App. Austin 2005).

690. Trial judge abused his discretion in admitting a photograph of defendant's prior family assault victim where the State had other evidence of defendant's intent, specifically defendant's testimony that he had been convicted three times of similar assaults; the probative value of the photograph was not particularly compelling in light of his admission to the offense, and a limiting instruction would likely not have been effective because of the indelible impression photographic evidence of this nature leaves. Randolph v. State, 2004 Tex. App. LEXIS 4363 (Tex. App. Waco May 12 2004).

Evidence : Demonstrative Evidence : Recordings

691. No error resulted from the State's failure to mute a recording in which a detective told defendant "there is a time to quit," and said he needed to stop whatever types of issues he was having and that the police were watching him because the statements were so general that they did not constitute evidence of other crimes. Basinger v. State, 2012 Tex. App. LEXIS 3847, 2012 WL 1704322 (Tex. App. Dallas May 16 2012).

692. Where defendant pleaded guilty to three counts of sexual assault of a child and a fourth count of indecency with a child, the jury was permitted to view seven pornographic videotapes that defendant took to the hotel and viewed before engaging in sexual acts with the victim; at no time did defendant lodge a Tex. R. Evid. 404 objection to the exhibits; defendant's relevancy and forgery objections did not preserve his complaint for review. Taylor v. State, 2006 Tex. App. LEXIS 9982 (Tex. App. Waco Nov. 15 2006).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

693. Evidence of bathing incident between defendant and his niece was admissible, Tex. R. Evid. 402, 403, 404(b), as it showed the nature of defendant's relationship with and mindset towards his niece, Tex. Code Crim. Proc. Ann. art. 38.37 Gragert v. State, 2011 Tex. App. LEXIS 3948, 2011 WL 2027955 (Tex. App. Amarillo May 24 2011).

694. Complainant initially told her school counselor that defendant had touched her inappropriately; however, the complainant testified at trial that she had made up the scenario; a videotape of complainant was admissible because defendant's attorney opened the door, and moreover, defendant failed to object that admission of the videotape was improper impeachment evidence; rather, defendant objected that the videotape was prior bad acts evidence. Roberts v. State, 2007 Tex. App. LEXIS 6214 (Tex. App. Houston 14th Dist. Aug. 7 2007).

695. During defendant's child sexual assault trial, the trial court was not required to deny admission of the victim's testimony detailing the history of defendant's sexually assaulting her because the State gave defendant sufficient notice by filing a notice of intent to use the outcry statement pursuant to Tex. Code Crim. Proc. Ann. art. 38.072, and by filing multiple notices pursuant to Tex. R. Evid. 404(b), of its intent to offer evidence of other crimes, wrongs, or acts, specifically the introduction of the evidence of the images of children found at defendant's residence. Pratt v. State, 2005 Tex. App. LEXIS 10657 (Tex. App. Fort Worth Dec. 22 2005).

Evidence : Hearsay : Rule Components

696. Because defendant did not request notice of the State's intent to use evidence of crimes committed by third persons under Tex. R. Evid. 404(b), no notice was required of the intent to use evidence that a grandmother attempted to bribe a child to remain quiet about sexual abuse; moreover, the evidence was not hearsay under Tex. R. Evid. 801(d) because it was merely offered to show that the child maintained the allegations despite the bribe. Franco v. State, 2004 Tex. App. LEXIS 1655 (Tex. App. Dallas Feb. 19 2004).

Evidence : Judicial Admissions : Admissions During Trials

697. Defendant on a drug delivery charge was estopped from raising on appeal any error in the admission of subsequent deliveries at the guilt phase because he admitted his guilt at the penalty phase of trial; further, there was no error under Tex. R. Evid. 403 or Tex. R. Evid. 404 because his counsel opened the door by suggesting that defendant was only a marginal participant in the drug trade and that the charged transaction constituted his sole involvement in the drug business. Houston v. State, 208 S.W.3d 585, 2006 Tex. App. LEXIS 3056 (Tex. App. Austin 2006).

Evidence : Procedural Considerations : Circumstantial & Direct Evidence

698. Admission of a pistol into evidence during defendant's trial for aggravated sexual assault was not prohibited by Tex. R. Evid. 404(b). Because the pistol fit the description of the gun used during the assault, defendant's possession of the pistol was circumstantial evidence that he had the opportunity and means to commit the armed assault. Sargeon v. State, 2012 Tex. App. LEXIS 1857, 2012 WL 761210 (Tex. App. Houston 1st Dist. Mar. 8 2012).

Evidence : Procedural Considerations : Curative Admissibility

699. Trial court did not err during defendant's trial for indecency with a child when it allowed the prosecutor, for the limited purpose of impeachment, to question the victim's mother about her knowledge of defendant's prior convictions for aggravated sexual assault of two other children because the mother's testimony on direct examination by defendant's counsel that she had no reason to suspect that defendant would abuse her children opened the door and put at issue her credibility. Delacruz v. State, 2013 Tex. App. LEXIS 13492, 2013 WL 5890796 (Tex. App. Eastland Oct. 31 2013).

700. Defendant's statement to police that he had, 20 years earlier, been accused of improper conduct with his former stepdaughter, was not relevant to prove defendant's intent under Tex. R. Evid. 401 and Tex. R. Evid. 404(b), and it was unduly prejudicial under Tex. R. Evid. 403. Defendant did not "open the door" to admission of the statement, Tex. R. Evid. 107, by responding to a question by the State. However, given the evidence of guilt, the error was harmless. Cressman v. State, 2012 Tex. App. LEXIS 9849, 2012 WL 5974013 (Tex. App. Waco Nov. 29 2012).

701. In a murder trial, defendant opened the door to evidence of his past misconduct because his brother testified that defendant had a mellower and more peaceful disposition than his brothers. The same testimony cured error in extraneous-offense evidence admitted prior to the testimony. Gonzalez v. State, 2012 Tex. App. LEXIS 7938, 2012 WL 4101900 (Tex. App. El Paso Sept. 19 2012).

702. Trial court properly allowed defendant's daughter to testify concerning defendant's sexually abuse of her because defendant's unequivocal statement that he never sexually abused either of his children opened the door for the State to rebut the false impression that he would not and did not sexually abuse his children. Vesely v. State, 2007 Tex. App. LEXIS 5611 (Tex. App. Tyler July 18 2007).

703. Evidence of defendant's prior conviction for delivering drugs was admissible where, through his questioning of a defense witness, defense counsel had sought to paint defendant as a "white knight" not involved with drugs, thereby creating a false impression before the jury; by doing so, defendant opened the door to testimony to correct that false impression, and the prosecutor could only correct that false impression by cross-examination of the witness who created it. Jones v. State, 2006 Tex. App. LEXIS 7917 (Tex. App. Dallas Sept. 5 2006).

704. Defendant on a drug delivery charge was estopped from raising on appeal any error in the admission of subsequent deliveries at the guilt phase because he admitted his guilt at the penalty phase of trial; further, there

was no error under Tex. R. Evid. 403 or Tex. R. Evid. 404 because his counsel opened the door by suggesting that defendant was only a marginal participant in the drug trade and that the charged transaction constituted his sole involvement in the drug business. Houston v. State, 208 S.W.3d 585, 2006 Tex. App. LEXIS 3056 (Tex. App. Austin 2006).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

705. In a criminal trial for burglary, the court did not err by allowing a police officer to testify as to the contents of defendant's van. The testimony was needed to show that defendant was in recent possession of stolen property; the testimony was not character evidence of other crimes or wrong acts. Middleton v. State, 187 S.W.3d 134, 2006 Tex. App. LEXIS 578 (Tex. App. Texarkana 2006).

706. In a drug and weapons possession case, evidence that defendant lived at a house in which drugs were being manufactured was admissible to show why a police officer was watching defendant's house; thus, under the circumstances, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Summerville v. State, 2005 Tex. App. LEXIS 6773 (Tex. App. Fort Worth Aug. 18 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 9715 (Tex. App. Fort Worth Nov. 15, 2005).

707. No reversible error was presented under Tex. R. Evid. 402, 403, and 404(b) by an arresting officer's testimony that defendant told the officer during a traffic stop about defendant's prior arrests because the videotape of the stop, including defendant's own statement of the arrests, was admitted without objection under R. 402, 403, and 404(b). Tunstall v. State, 2005 Tex. App. LEXIS 6336 (Tex. App. Beaumont Aug. 10 2005).

708. Where defendant was charged with aggravated sexual assault of a child, the appellate court assumed the admission of pornographic photographs of adult women taken from his computer was erroneous. However, the error was harmless; the photographs were less shocking and offensive than the complainant's graphic description of the acts defendant engaged in with her and there was ample testimonial evidence of defendant's guilt. Breland v. State, 2005 Tex. App. LEXIS 5925 (Tex. App. Fort Worth July 28 2005).

709. Trial court properly admitted evidence of an extraneous assault offense under Tex. R. Evid. 403 and 404(b) where defendant's wife's testimony on behalf of the defense was an attempt to show that her injury was caused by an accident, not the intentional actions of defendant. Thus, a videotape in which defendant admitted a prior assault on his wife made the defensive theory of accident less probable and was relevant to rebut the defensive theory of accident. Iroegbu v. State, 2005 Tex. App. LEXIS 5296 (Tex. App. Dallas July 6 2005).

710. In a burglary case in which several houses were broken into at about the same time, the extraneous offense evidence was admissible under Tex. R. Evid. 404(b) as same transaction contextual evidence. Trevino v. State, 2005 Tex. App. LEXIS 4556 (Tex. App. Amarillo June 15 2005), writ of certiorari denied by 126 S. Ct. 1885, 164 L. Ed. 2d 573, 2006 U.S. LEXIS 3325, 74 U.S.L.W. 3598 (U.S. 2006).

711. In a criminal trial for aggravated sexual assault of a child, the court did not abuse its discretion in admitting evidence of defendant's having solicited the third party to have sexual intercourse with the minor. The evidence was admissible under Tex. Code Crim. Proc. Ann. art. 38.37, § 2, which superseded Tex. R. Evid. 404; the trial court gave a limiting instruction, minimizing any impermissible inference of character conformity. Comeaux v. State, 2005 Tex. App. LEXIS 3748 (Tex. App. Houston 14th Dist. May 17 2005).

712. Where defendant charged with injury to a disabled person went beyond merely entering a guilty plea and cross-examined the victim in an attempt to attack her credibility, the victim's testimony that defendant had assaulted her on several occasions was admissible to show intent, opportunity, and absence of accident. Phillips v. State,

2005 Tex. App. LEXIS 3035 (Tex. App. Eastland Apr. 21 2005).

713. During the guilt phase of defendant's trial for aggravated robbery with a deadly weapon, the trial court erred by admitting evidence of an extraneous offense for carjacking; the extraneous offense evidence was not so unusual or distinctive that it showed a unique signature crime. McKay v. State, 2005 Tex. App. LEXIS 2261 (Tex. App. Fort Worth Mar. 17 2005).

714. Evidence admissible under Tex. Code Crim. Proc. Ann. art. 38.36 must still meet the requirements of Tex. R. Evid. 403 and Tex. R. Evid. 404(b). Navarro v. State, 154 S.W.3d 795, 2004 Tex. App. LEXIS 11429 (Tex. App. Houston 14th Dist. 2004).

715. In a robbery case, extraneous offense evidence was admissible under Tex. R. Evid. 404(b) to establish defendant's identity, which was at issue because defense counsel had challenged the accuracy of the victim's identification of defendant, and the evidence was not unduly prejudicial under Tex. R. Evid. 403 because proper instructions were given. Thompson v. State, 2004 Tex. App. LEXIS 11088 (Tex. App. Houston 1st Dist. Dec. 9 2004).

716. Defendant maintained that the trial court abused its discretion in allowing testimony that defendant went back to the victim's house to shoot a witness to the murder; however, the trial court did not abuse its discretion in admitting the evidence under a same transaction analysis. Palacios v. State, 2004 Tex. App. LEXIS 9912 (Tex. App. San Antonio Nov. 10 2004).

717. Defendant's argument on appeal that the trial court erred in allowing the admission of extraneous offense evidence in his case where he was charged with the unauthorized use of a motor vehicle was rejected, as defendant's failure to object to the admission of that evidence meant that he did not preserve that alleged error for review. Smith v. State, 2004 Tex. App. LEXIS 7505 (Tex. App. El Paso Aug. 19 2004).

718. Where defendant's cell mate described what defendant had told him about the instant murder and also about another killing, the trial court had not erred in admitting the evidence of the other shooting because the extreme degree of similarity between the two murders made the evidence of the other murder highly probative. In addition, without evidence of defendant's involvement in the other murder, it would have been more difficult for the jury to resolve whether the cell mate was a credible witness. Corona v. State, 2004 Tex. App. LEXIS 5042 (Tex. App. San Antonio June 9 2004).

719. In a criminal trial, evidence of defendant's extraneous offenses was admissible to show identity since there was a discrepancy between defendant's actual weight and the description of the perpetrator's weight given to the police by an eyewitness. Page v. State, 137 S.W.3d 75, 2004 Tex. Crim. App. LEXIS 936 (Tex. Crim. App. 2004).

720. In a criminal prosecution for indecency with a child, defendant failed to show that his trial counsel was ineffective for failing to object to the introduction into evidence of his mental health records, which defendant claimed contained evidence of inadmissible extraneous bad conduct. Defendant was not prejudiced by counsel's actions; even without the mental health records, the victim's testimony alone would have been sufficient to support his conviction. Taylor v. State, 2004 Tex. App. LEXIS 4581 (Tex. App. Dallas May 20 2004).

721. Testimony concerning defendant's plans following release from jail was minimal compared to the testimony concerning the charged offenses, and it did not influence the jury or had only a slight effect; therefore, any error was rendered harmless. Ellinberg v. State, 2004 Tex. App. LEXIS 2753 (Tex. App. Dallas Mar. 26 2004).

722. Regardless of the adequacy of the notice under Tex. R. Evid. 404(b), the extraneous evidence was properly admitted in defendant's trial for indecency with a child under Tex. Code Crim. Proc. Ann. art. 38.37. Avery v. State, 2004 Tex. App. LEXIS 464 (Tex. App. Dallas Jan. 20, 2004).

723. In a drunk driving case, it was not error for the State to place defendant's stipulation of two prior convictions, which were jurisdictional elements of a felony offense, into evidence and to mention it in closing argument; the stipulation was evidence, could be received as such by the jury as the fact finder, and did not create a risk of unfair prejudice within the meaning of Tex. R. Evid. 403, 404(b). Shugart v. State, 2004 Tex. App. LEXIS 427 (Tex. App. Fort Worth Jan. 15 2004).

724. Tex. R. Evid. 403 balancing test is an inherent part of Tex. R. Evid. 404(b). Lucky v. State, 2003 Tex. App. LEXIS 11 (Tex. App. Dallas Jan. 6 2003).

725. In a criminal trial for defendant's charge of possession of cocaine, evidence of citations issued to the driver of the car where the offense occurred was background contextual evidence inadmissible under Tex. R. Evid. 404(b). Lucky v. State, 2003 Tex. App. LEXIS 11 (Tex. App. Dallas Jan. 6 2003).

726. Background contextual evidence is not one of the "other purposes" listed in Tex. R. Evid. 404(b) justifying the introduction of otherwise inadmissible character or propensity evidence. Lucky v. State, 2003 Tex. App. LEXIS 11 (Tex. App. Dallas Jan. 6 2003).

727. Acts of misconduct by the defendant not necessary to the proof of the primary offense constitute background contextual evidence and are not exempt under Tex. R. Evid. 404(b) from the general prohibition of the admission of character or propensity evidence against the accused set out in Tex. R. Evid. 404(a). Lucky v. State, 2003 Tex. App. LEXIS 11 (Tex. App. Dallas Jan. 6 2003).

728. Only if the facts and circumstances of the charged offense would make little or no sense without the introduction of the same transaction contextual evidence, should the same transaction contextual evidence be admitted under Tex. R. Evid. 404. Lucky v. State, 2003 Tex. App. LEXIS 11 (Tex. App. Dallas Jan. 6 2003).

729. Tex. R. Evid. 404(b) applies to other acts of third parties as well as those of the accused. Lucky v. State, 2003 Tex. App. LEXIS 11 (Tex. App. Dallas Jan. 6 2003).

730. Tex. R. Evid. 404(b) excludes acts of persons other than the defendant that tend to show the defendant's propensity to commit the charged offenses. Lucky v. State, 2003 Tex. App. LEXIS 11 (Tex. App. Dallas Jan. 6 2003).

731. A defendant alleged that the fatal shot which killed his father was fired accidentally, and the evidence of a subsequent arrest, in which it took three officers to subdue the defendant, was admissible pursuant to Tex. R. Evid. 404(b) to show the absence of an accident, where the victim could not have possibly taken the gun away from the defendant or caused it to discharge as the result of a struggle. Skeen v. State, 96 S.W.3d 567, 2002 Tex. App. LEXIS 8181 (Tex. App. Texarkana 2002).

732. Testimony that an area is a high crime area is admissible under Tex. R. Evid. 404(b) as facts and circumstances surrounding the commission of the offense. Charlot v. State, 1999 Tex. App. LEXIS 5736 (Tex. App. Amarillo July 30 1999).

Evidence : Procedural Considerations : Limited Admissibility

733. During defendant's trial for the aggravated robbery of an elderly person, the jury was instructed to consider extraneous offense evidence only in determining the plan, identity, or absence of mistake by defendant in connection with the offense; defendant was not entitled to reversal on appeal; the trial court properly limited the jury's consideration of the evidence to a permissible purpose. Jaramillo v. State, 2007 Tex. App. LEXIS 7440 (Tex. App. San Antonio Sept. 12 2007).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

734. In a criminal trial for aggravated sexual assault, the State gave notice of its intention to use evidence of extraneous offenses committed by defendant and the trial court admitted the evidence. Because defendant did not object on the ground that the State's notice was untimely, the issue was not preserved for review. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

735. Faced with an objection, the proponent of the evidence of other crimes, wrongs, or acts must satisfy the trial court that the extraneous act has relevance apart from its tendency to prove character conformity. "Other crimes, wrongs, or acts evidence" has noncharacter-conformity relevance where it logically serves to make less probable defensive evidence that undermines an elemental fact. Harris v. State, 2004 Tex. App. LEXIS 7666 (Tex. App. Tyler Aug. 25 2004).

736. Defendant's argument on appeal that the trial court erred in allowing the admission of extraneous offense evidence in his case where he was charged with the unauthorized use of a motor vehicle was rejected, as defendant's failure to object to the admission of that evidence meant that he did not preserve that alleged error for review. Smith v. State, 2004 Tex. App. LEXIS 7505 (Tex. App. El Paso Aug. 19 2004).

737. After the trial court overruled an appellant's Tex. R. Evid. 404(b) objection, the appellant was required to make further objection under Tex. R. Evid. 403 in order to preserve the complaint for review. Mark v. State, 2003 Tex. App. LEXIS 879 (Tex. App. Houston 14th Dist. Jan. 30 2003).

Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof

738. Defendant's contention that the trial court erred by not allowing her to present testimony regarding her drinking habits was rejected because she testified without objection that she always carried cash for a taxi, had a taxi cab company programmed into her telephone, or shared a ride with another person, and counsel did not make an offer of proof regarding any additional evidence to be admitted. Pierce v. State, 2013 Tex. App. LEXIS 9876 (Tex. App. Dallas Aug. 7 2013).

739. Defendant adequately preserved error under Tex. R. App. P. 33.1 as to the exclusion of character evidence under Tex. R. Evid. 404 and satisfied Tex. R. Evid. 103(a)(2), even though he did not make an offer of proof, because counsel told the trial court that he wanted to elicit evidence of defendant's reputation for the ethical treatment of children; accordingly, the nature of the disputed evidence was apparent to all. Moody v. State, 2006 Tex. App. LEXIS 9788 (Tex. App. Houston 1st Dist. Nov. 9 2006).

Evidence : Procedural Considerations : Preliminary Questions : General Overview

740. In an assault trial, the court did not err by admitting, without notice from the State, evidence of defendant's extraneous assault offense; the evidence was introduced by defendant, with additional testimony elicited by the State on rebuttal. Jordan v. State, 2004 Tex. App. LEXIS 4593 (Tex. App. Houston 1st Dist. May 20 2004).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview

741. Complainant initially told her school counselor that defendant had touched her inappropriately; however, the complainant testified at trial that she had made up the scenario; a videotape of complainant was admissible because defendant's attorney opened the door, and moreover, defendant failed to object that admission of the videotape was improper impeachment evidence; rather, defendant objected that the videotape was prior bad acts evidence. Roberts v. State, 2007 Tex. App. LEXIS 6214 (Tex. App. Houston 14th Dist. Aug. 7 2007).

Evidence : Procedural Considerations : Rulings on Evidence

742. At defendant's trial for failure to comply with sex offender registration requirements, the trial court did not abuse its discretion by overruling his objections to the admission of evidence of an extraneous bad act under Tex. R. Evid. 404(b); the evidence that defendant moved several times while continuing to report his previous address to local law enforcement authorities had substantial probative value as to his knowledge of the reporting requirements and his intent respecting compliance. Hogan v. State, 2013 Tex. App. LEXIS 6706 (Tex. App. Dallas May 30 2013).

743. In a case in which defendant was convicted of cocaine possession, a probation officer's testimony did not place defendant's drug use in the context of his operation of the vehicle in which the cocaine was found because, insofar as it served to prove defendant's knowing possession of cocaine on the date of the instant offense, it did so only by showing that defendant was a chronic drug abuser, i.e., by character conformity. However, in light of the other evidence properly admitted, the admission of the probation officer's testimony did not affect defendant's substantial rights pursuant to Tex. R. App. P. 44.2(b). Bell v. State, 2010 Tex. App. LEXIS 9034, 2010 WL 4595704 (Tex. App. Austin Nov. 9 2010).

744. Defendant had not preserved for appellate review his complaint concerning the timeliness of the State's notice of its intent to introduce evidence of extraneous offenses during trial where defendant objected to the reasonableness of the State's notice, but he did not request that the trial court grant him a continuance. In any event, it could not be said that the trial court abused its discretion when it overruled defendant's objection to the reasonableness of the State's notice under Tex. Code Crim. Proc. Ann. art. 38.37, § 3 and Tex. R. Evid. 404(b) because the trial court could have determined that the State's notice was adequate and reasonable under the circumstances of the case. Greer v. State, 2010 Tex. App. LEXIS 5632, 2010 WL 2813404 (Tex. App. Fort Worth July 15 2010).

745. Tape-recorded evidence of defendant's various extraneous crimes was improperly admitted during his capital murder trial because the prosecution did not comply with the notice provisions of Tex. R. Evid. 404(b). His conviction was affirmed, however, because under the Tex. R. App. P. 44.2(b) harm standard, the error in admitting the evidence did not have a substantial and injurious effect or influence in determining the jury's verdict. Hernandez v. State, 176 S.W.3d 821, 2005 Tex. Crim. App. LEXIS 1857 (Tex. Crim. App. 2005).

746. Where defendant charged with injury to a disabled person went beyond merely entering a guilty plea and cross-examined the victim in an attempt to attack her credibility, the victim's testimony that defendant had assaulted her on several occasions was admissible to show intent, opportunity, and absence of accident. Phillips v. State, 2005 Tex. App. LEXIS 3035 (Tex. App. Eastland Apr. 21 2005).

Evidence : Procedural Considerations : Weight & Sufficiency

747. Defendant's conviction for engaging in organized crime was proper because the nonaccomplice evidence placed defendant at or near the scene of the crime at or about the time of its commission under suspicious circumstances and because, although the forensic examiner testified that he did not know who actually sent or

received the text messages, the circumstances were sufficient to allow a jury reasonably to find that defendant sent and received the messages. Because intent to commit forgery could not be inferred, the prior conviction showing strikingly similar facts made the existence of a material fact, that was, whether defendant possessed forged checks with the intent to defraud or harm another, more probable, Tex. R. Evid. 404(b) Franklin v. State, 2012 Tex. App. LEXIS 8513 (Tex. App. Dallas Oct. 10 2012).

Evidence : Relevance : Character Evidence

748. Exclusion of character evidence that a murder victim occasionally drank to excess and was violent when he drank was harmless error, given that defendant was able to present his defense that the victim was drunk and pulled a shotgun on defendant, which defendant then used to kill the victim. Milliff v. State, 2014 Tex. App. LEXIS 4589, 2014 WL 1713897 (Tex. App. Houston 14th Dist. Apr. 29 2014).

749. Even if the victim's conduct at the car dealership showed her ability to "intimidate, harass, manipulate, and physically abuse" defendant, the conduct was not relevant because it did not involve the victim injuring herself or fabricating allegations that defendant injured her. It, therefore, was not relevant evidence essential to prove the theory of defense, and the trial court did not abuse its discretion by excluding the witness's testimony. Vasquez v. State, 2014 Tex. App. LEXIS 3714, 2014 WL 1413809 (Tex. App. Dallas Apr. 7 2014).

750. In a case in which a jury found defendant guilty of continuous sexual abuse of his eight-year-old stepdaughter, the trial court did not err in not allowing defendant's uncle to testify that defendant was not the kind of person who would molest a child. This was an impermissible attempt to put on evidence of specific instances of conduct to support the inference that it was unlikely the accused would have engaged in the criminal conduct charged. Hernandez v. State, 2014 Tex. App. LEXIS 162, 2014 WL 50544 (Tex. App. Dallas Jan. 7 2014).

751. Even though the trial court err by excluding the portion of defendant's testimony regarding the victim's prior specific instances of violence against her to support her claim of self-defense, the error was harmless because defendant admitting yelling at the victim because she was mad at him, which led to an argument, and she slapped him during the argument. Defendant was permitted to testify that she was afraid of the victim and she had slapped him because she was scared. Rodriguez v. State, 2013 Tex. App. LEXIS 14876, 2013 WL 6533378 (Tex. App. San Antonio Dec. 11 2013).

752. In a murder trial, the trial court properly determined that the victim's action of rising from a chair and reaching for a knife was an unambiguous aggressive act and therefore evidence of the victim's character and prior acts of violence was not necessary to explain his actions. Johnson v. State, 2013 Tex. App. LEXIS 12819, 2013 WL 5657425 (Tex. App. Tyler Oct. 16 2013).

753. Defendant's contention that the trial court erred by not allowing her to present testimony regarding her drinking habits was rejected because she testified without objection that she always carried cash for a taxi, had a taxi cab company programmed into her telephone, or shared a ride with another person, and counsel did not make an offer of proof regarding any additional evidence to be admitted. Pierce v. State, 2013 Tex. App. LEXIS 9876 (Tex. App. Dallas Aug. 7 2013).

754. Because evidence of the investigation into the arresting officer was not admissible under this rule, as the investigation about whether the officer had violated the Occupations Code had no bearing on his propensity for violence or whether he was the first aggressor, the trial court did not abuse its discretion by determining that defendant did not establish a Brady violation. Smith v. State, 2013 Tex. App. LEXIS 9194 (Tex. App. Houston 1st Dist. July 25 2013).

755. Evidence unambiguously established that defendant's husband was the first aggressor, and apart from establishing this, defendant did not suggest that the evidence in question was otherwise admissible for non-character purposes such as intent, motive, or state of mind, and thus the trial court did not abuse its discretion in excluding the evidence, for purposes of Tex. R. Evid. 404(a). Perusquia v. State, 2013 Tex. App. LEXIS 7154 (Tex. App. San Antonio June 12 2013).

756. It was clear from the record that the trial court's ruling on the motion in limine permitted testimony that the victim suffered from post-traumatic stress disorder (PTSD), but the trial court intended to exclude evidence that his actions were a result of his PTSD diagnosis without expert testimony; the court found no waiver of appellant's complaint on appeal, and although appellant might have made an offer of proof concerning how the victim's PTSD diagnosis related to her belief of his actions on the day in question, such an offer was not necessary because counsel made the trial court aware of the content of the testimony. Strache v. State, 2013 Tex. App. LEXIS 6494 (Tex. App. San Antonio May 29 2013).

757. Although appellant was not permitted to testify in detail about the victim's diagnosis of post-traumatic stress disorder (PTSD), she was permitted to testify that he was so diagnosed and appellant's knowledge of such, along with the victim's prior violent acts, led appellant to fear for her safety and act in self-defense; she cited case law noting that a defendant could offer evidence of acts of violence by the victim to show the reasonableness of a claim of apprehension of danger, and as appellant was permitted to adequately present her claim of self-defense in her assault-bodily injury-married trial based on her knowledge of the victim's PTSD, the court overruled her issue. Strache v. State, 2013 Tex. App. LEXIS 6494 (Tex. App. San Antonio May 29 2013).

758. Assuming character evidence was relevant, the error in excluding it was subject to a harm analysis for nonconstitutional error. Bundick v. State, 2013 Tex. App. LEXIS 4350 (Tex. App. Houston 14th Dist. Apr. 4 2013).

759. Assuming evidence was relevant, appellant did not provide a harm analysis, and the court could not find from its own review that the error, if any, had a substantial effect on the verdict, given that the State made a strong case for appellant's guilt, which evidence included eyewitness testimony that appellant fired a gun that killed the victim, as well as the victim's dying declaration that identified appellant as the shooter; the excluded testimony tried to establish a history of conflict between appellant and one witness, and while appellant discussed Tex. R. Evid. 404(a)(2), this applied to one who raised self-defense, which appellant did not, and nothing showed that the victim or witness had been carrying a gun. Bundick v. State, 2013 Tex. App. LEXIS 4350 (Tex. App. Houston 14th Dist. Apr. 4 2013).

760. Appellant argued that the evidence the trial court excluded about an extraneous act of violence the victim allegedly committed was relevant and admissible for showing that appellant reasonably believed his life was in danger, and to be admissible for showing state of mind for purposes of Tex. R. Evid. 404(a)(2) and Tex. Code Crim. Proc. Ann. art. 38.36, appellant had to have known of the act of the victim before the murder; appellant was aware of the victim's specific extraneous act, as appellant offered testimony that he heard the victim shot appellant's friend, but even assuming it was an abuse of discretion to exclude evidence of the misconduct of the victim, appellant did not show harm and the court did not find any. Flores v. State, 2012 Tex. App. LEXIS 9785, 2012 WL 5951977 (Tex. App. Eastland Nov. 29 2012).

761. Appellant argued that the evidence the trial court excluded, for purposes of Tex. R. Evid. 404(a)(2) and Tex. Code Crim. Proc. Ann. art. 38.36, about an extraneous act of violence the victim allegedly committed, amounted to constitutional error, but the court disagreed; appellant was not precluded from presenting his defense, and thus the court analyzed the claim under Tex. R. App. P. 44.2(b). Flores v. State, 2012 Tex. App. LEXIS 9785, 2012 WL 5951977 (Tex. App. Eastland Nov. 29 2012).

762. Jury was properly instructed on self-defense, and the facts did not show aggression by the victim that would have justified appellant's use of deadly force, and thus appellant was not harmed by the exclusion of the evidence about an extraneous act of violence the victim allegedly committed, for purposes of Tex. R. Evid. 404(a)(2) and Tex. Code Crim. Proc. Ann. art. 38.36; the specific misconduct of the victim that was excluded, that appellant heard the victim shot someone, did nothing more than add to the existing proof of the victim's bad reputation and that appellant was afraid of him, the exclusion of further evidence of the victim's criminal history would have been harmless, and appellant's substantial rights were not affected. Flores v. State, 2012 Tex. App. LEXIS 9785, 2012 WL 5951977 (Tex. App. Eastland Nov. 29 2012).

763. Appellant wanted to offer evidence of specific instances of conduct of the victim, but he was not entitled to offer evidence of any specific prior violent acts in order to show the victim was the first aggressor; the proffered testimony was an attempt to prove the victim's conduct in conformity with his character for violence, which was prohibited by Tex. R. Evid. 404(a), 405(a). Bottorff v. State, 2012 Tex. App. LEXIS 8220, 2012 WL 4477396 (Tex. App. Austin Sept. 28 2012).

764. Incidents about which appellant wanted to introduce testimony did not implicate himself, and the victim did not make any threat toward him, nor did the victim's prior conduct show that he had any animosity toward appellant, and the evidence was not probative of the victim's state of mind as it related to the situation with appellant two years after the incidents took place, given that before the shooting, the two did not know each other; while appellant could introduce reputation or opinion testimony suggesting the victim was the first aggressor, appellant could not introduce specific acts because that was not admissible for these purposes, and nothing showed that the proffered testimony would have been relevant for any purpose besides character conformity, for purposes of Tex. R. Evid. 404(b). Bottorff v. State, 2012 Tex. App. LEXIS 8220, 2012 WL 4477396 (Tex. App. Austin Sept. 28 2012).

765. In defendant's murder case, the court did not erroneously exclude evidence regarding the victim's violent character because the evidence did not tend to show that the victim was the first aggressor; the fact that victim once told a witness that he would "take care of her husband and brother if they came looking for her" did not serve to demonstrate the victim's intent the night of the murder. Defendant's preferred testimony that the victim was a member of a prison gang that was "running fast" and "doing hits" was similarly irrelevant other than to show the victim's character conformity. Vasquez v. State, 2012 Tex. App. LEXIS 7428, 2012 WL 6863860 (Tex. App. Corpus Christi Aug. 27 2012).

766. In a murder trial, it was error to exclude evidence of defendant's peaceful character through a friend who had known him for almost 30 years. Turner v. State, 413 S.W.3d 442, 2012 Tex. App. LEXIS 6619 (Tex. App. Fort Worth Aug. 9 2012).

767. Appellant's affiliation with the Aryan Brotherhood was relevant and the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice because appellant's membership in the gang and his obligation to follow a higher-ranking member's orders were relevant to show appellant's motive for the crime. Evidence of appellant's membership in the Aryan Brotherhood was offered to show appellant's motive, was not introduced to show character conformity, did not violate Tex. R. Evid. 404, and was not unduly prejudicial under Tex. R. Evid. 403. Guffey v. State, 2012 Tex. App. LEXIS 3293, 2012 WL 1470185 (Tex. App. Eastland Apr. 26 2012).

768. State was allowed to rebut testimony about appellant's character for truthfulness by asking about specific conduct instances, and appellant did not claim they were irrelevant, and they shared many similarities; the court is aware of no authority that restricts the State from asking whether the witness had heard that the defendant was convicted of a particular crime. Ethridge v. State, 2012 Tex. App. LEXIS 3110, 2012 WL 1379648 (Tex. App. Tyler Apr. 18 2012).

769. Challenged evidence concerning appellant's sexually-oriented emails and alleged fantasizing about his stepdaughter was admissible as rebuttal, for purposes of Tex. R. Evid. 404(a)(1)(A), as appellant had testified about his own good conduct involving his stepdaughter. Zavala v. State, 401 S.W.3d 171, 2011 Tex. App. LEXIS 8671, 2011 WL 5156843 (Tex. App. Houston 14th Dist. Nov. 1 2011).

770. There was no error regarding character evidence made in this case during the prosecutor's argument. Baines v. State, 401 S.W.3d 104, 2011 Tex. App. LEXIS 1694, 2011 WL 816810 (Tex. App. Houston 14th Dist. Mar. 10 2011).

771. State did not use the photograph to prove defendant's gang activity; the photograph was admitted to prove defendant's identity as the assailant and it was properly admitted to prove the identity of the perpetrator of the crime, Tex. R. Evid. 404(b).

772. Even though the trial court erred by refusing defendant's request to redact his medical records to delete the doctor's diagnosis of cocaine abuse and drug abuse-marijuana, as it constituted inadmissible character-conformity evidence, the error was harmless because it did not substantially affect the verdict, as there was other evidence, including the results of a urinalysis and defendant's statements to hospital staff that he used crack cocaine and had smoked three or four rocks that day, revealing defendant's drug use. Montgomery v. State, 2010 Tex. App. LEXIS 9220, 2010 WL 4668952 (Tex. App. Eastland Nov. 18 2010).

773. Defendant failed to preserve for appellate review his claim that the trial court erred by refusing to allow him to question the victim about a juvenile felony theft conviction because defendant did not inform the trial court that he was seeking admission of the evidence pursuant to Tex. R. Evid. 404(a)(2). Soto v. State, 2010 Tex. App. LEXIS 8709, 2010 WL 4273173 (Tex. App. San Antonio Oct. 29 2010).

774. Error was not preserved for review under Tex. R. App. P. 33.1 in a negligence case with regard to spoliation of evidence in the context of a venue transfer and the admission of character evidence at trial because no request was made to deem venue facts established as a sanction for discovery misconduct under Tex. R. Civ. P. 215.2(b)(3) and no objections were raised to the admission of testimony reflecting on character under Tex. R. Evid. 404(a), (b). Duff v. Spearman, 322 S.W.3d 869, 2010 Tex. App. LEXIS 7420 (Tex. App. Beaumont Sept. 9 2010).

775. Even if the trial court abused its discretion by refusing to allow defendant to present evidence that the victim had previously threatened two witnesses, the error did not amount to reversible error because defendant was able to present his defense, as the jury was properly instructed on the law of self-defense and defendant was testified about prior threats the victim had made to him and about the circumstances of the shooting; other witnesses also testified about threats the victim had allegedly made. There was also evidence presented contradicting defendant's self-defense claim, including evidence that: (1) defendant had threatened to kill the victim shortly before the victim was shot; (2) no evidence showed that the victim was armed or attempted to use deadly force; (3) none of the witnesses that were in the area when the shooting occurred or that responded to the scene reported seeking a sniper; and (4) when defendant drove to the sheriff's office and admitted that he shot the victim, he did not mention a sniper. Currin v. State, 2010 Tex. App. LEXIS 7051, 2010 WL 3370059 (Tex. App. Austin Aug. 27 2010).

776. Evidence of the victim's extraneous offenses should have been allowed, Tex. R. Evid. 403, but because defendant denied hitting the victim with the baseball bat, he could not have employed the theory of self-defense for that part of the alleged assault; the trial court was free to disbelieve defendant's assertion that he only punched the victim once and that he did not hit him with the baseball bat, and the jury was free to believe the victim's testimony that defendant was the first aggressor. Tomasheski v. State, 2010 Tex. App. LEXIS 4709, 2010 WL 2512618 (Tex. App. Texarkana June 23 2010).

777. During defendant's trial for indecency with a child, the court did not err under Tex. R. Evid. 404(a) in not allowing defense witnesses to testify that defendant had good character and propensity for moral and safe relations with small children or young girls; the questions were an impermissible attempt to put on evidence of specific instances of good conduct to support the inference that it was unlikely that defendant touched the victim inappropriately. Fernandez v. State, 2010 Tex. App. LEXIS 2628, 2010 WL 1486971 (Tex. App. Houston 14th Dist. Apr. 15 2010).

778. Court properly excluded character evidence because defendant testified that the victim told him "he's been in a lot of fights and that he's been in trouble for fighting." That general statement was not sufficient to establish that defendant was aware that the victim had committed an assault for which he was placed on deferred adjudication community supervision. Evans v. State, 2010 Tex. App. LEXIS 810, 2010 WL 376940 (Tex. App. Waco Feb. 3 2010).

779. Defendant opened the door to testimony concerning the victim's peaceable and inoffensive nature by eliciting evidence regarding the possibility that the victim had been fighting or arguing before the murder; even if it was assumed that the victim was the one referred to in certain excerpts, the State was entitled to offer a 911 tape as rebuttal evidence, under Tex. R. Evid. 404(a). Green v. State, 2009 Tex. App. LEXIS 9300, 2009 WL 4575146 (Tex. App. Houston 14th Dist. Dec. 8 2009).

780. In defendant's sexual assault case, evidence was improperly excluded because there was no allegation that the evidence was self-serving or unreliable. The evidence was relevant to the complaining witness's credibility, and further, the State failed to show how the probative value of the evidence was outweighed by the danger of unfair prejudice. State v. Moreno, 297 S.W.3d 512, 2009 Tex. App. LEXIS 7642 (Tex. App. Houston 14th Dist. Oct. 1 2009).

781. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

782. In defendant's murder case, the court properly excluded evidence that the victim purportedly was always armed with a gun because defendant failed to satisfy his burden of producing evidence demonstrating his shooting of the victim stemmed from a reasonable belief that the victim was attempting to use unlawful deadly force at that exact moment, the two had no prior relationship, and the trial court did permit defendant to establish that the victim's reputation in the community for violence was bad. Welch v. State, 2009 Tex. App. LEXIS 6292, 2009 WL 2461172 (Tex. App. Beaumont Aug. 12 2009).

783. Court did not err by refusing to allow defense counsel to cross-examine a police officer about prior incidents in which the officer allegedly used excessive force because the officer's character was not an essential element of the charge, claim, or defense to attempting to take a weapon from a peace officer, and the proffered testimony was not material because it did not address any fact of importance to the outcome of the action. Rico v. State, 2009 Tex.

App. LEXIS 4141, 2009 WL 1623343 (Tex. App. Corpus Christi June 11 2009).

784. Court properly excluded testimony from third parties establishing defendant's knowledge of the complainant's propensity for violence because a witness testified that she saw the complainant hit her mother multiple times, she and other family members had called the police multiple times regarding the complainant's domestic violence, and defendant told a witness after the shooting that defendant thought the complainant was trying to hurt him. Segovia v. State, 2009 Tex. App. LEXIS 4559, 2009 WL 1678024 (Tex. App. Houston 14th Dist. June 9 2009).

785. While petitioner state inmate argued his counsel was ineffective for not presenting additional witnesses to show the 9-year-old victim of his sexual assault was motivated to lie in retaliation for the inmate having disciplined the victim, nothing showed such testimony would have been admissible since, consistent with Tex. R. Evid. 608(b) and a pre trial order, defense counsel and defense witnesses were precluded from mentioning, directly or indirectly, any specific instance of conduct by the victim without first approaching the bench; under Tex. R. Evid. 613(b), specific instances of conduct could be used to establish that a witness had specific bias, self-interest, or motive for testifying, and under Tex. R. Evid. 404(b), specific acts of misconduct could also be used to establish a person's motive for performing an act, such as making a false allegation, but where credibility was concerned, a witness's general character for truthfulness could be shown only through reputation or opinion testimony under Rule 608(a). Mendez v. Quarterman, 625 F. Supp. 2d 415, 2009 U.S. Dist. LEXIS 47543 (S.D. Tex. June 4 2009).

786. In a case in which defendant was convicted of violating the terms of his civil conviction under the Texas Civil Commitment of Sexually Violent Predators Act, Tex. Health & Safety Code Ann. ch. 841, the trial court did not abuse its discretion in excluding evidence of specific instances of defendant's compliance with his commitment order because that evidence was not admissible under Tex. R. Evid. 404(a), 405(a). Moreover, because the State did not ever imply that defendant had violated the terms of commitment before the charged offenses, the State did not open the door to evidence of defendant's compliance prior to those offenses. Jones v. State, 333 S.W.3d 615, 2009 Tex. App. LEXIS 3997 (Tex. App. Dallas May 29 2009).

787. State argued that, since defendant never obtained a ruling on his motion for discovery asking the State to disclose its intent to use extraneous offense evidence, the State had no duty to do so, but the court did not need to address the State's position because the duty was imposed by the trial court's granting of the motion in limine and admonishment to the State to warn its witnesses not to discuss any extraneous offense evidence without prior ruling from the court. State v. Clayton, 2009 Tex. App. LEXIS 906, 2009 WL 322869 (Tex. App. Texarkana Feb. 11 2009).

788. By arguing that a witness's insertion of an extraneous offense denied defendant the constitutionally protected right of a criminal defendant to a fair and impartial trial, as is required in order to obtain due process, defendant articulated a valid claim in his motion for new trial. State v. Clayton, 2009 Tex. App. LEXIS 906, 2009 WL 322869 (Tex. App. Texarkana Feb. 11 2009).

789. Defendant's claim that a witness's insertion of an extraneous offense denied defendant the constitutionally protected right of a criminal defendant to a fair and impartial trial was substantiated by evidence in the record. State v. Clayton, 2009 Tex. App. LEXIS 906, 2009 WL 322869 (Tex. App. Texarkana Feb. 11 2009).

790. Both character evidence in the form of opinion testimony and extraneous-offense testimony may be admissible during trial, even if the opinion testimony is based on facts brought forth from the extraneous-offense testimony. Sims v. State, 273 S.W.3d 291, 2008 Tex. Crim. App. LEXIS 820 (Tex. Crim. App. 2008).

791. In defendant's unlawful possession of a firearm by a felon case, the court did not err by allowing the State to ask a witness whether she knew defendant was a convicted sex offender because inquiry into the nature of the

relationship between defendant and a witness was relevant to show potential bias by the witness or challenge the witness's credibility; additionally, any error was harmless; in the jury's presence, the parties stipulated to the admission into evidence of records pertaining to defendant's conviction for failure to register as a sex offender. Tapps v. State, 2008 Tex. App. LEXIS 2809 (Tex. App. Austin Apr. 17 2008).

792. Evidence of a defendant's previous drug sales was admissible under Tex. R. Evid. 404 at his trial for possession of methamphetamine with intent to deliver because this evidence belied his defense that he was unaware of the large amount of methamphetamine hidden in a motel room registered in his name, and it showed his awareness of the drug and his intent to sell it. Hernandez v. State, 2008 Tex. App. LEXIS 2634 (Tex. App. Dallas Apr. 11 2008).

793. Because defendant did not assert in the trial court that certain records constituted inadmissible character evidence, defendant forfeited that complaint under Tex. R. App. P. 33; furthermore, when making objections, defendant agreed that the records were business records, but appeared to argue that they contained double hearsay, but defendant failed to specify or identify the objectionable part of the exhibit, and thus the objections were insufficiently specific to have preserved the hearsay complaint defendant also made on appeal. Starn v. State, 2008 Tex. App. LEXIS 2402 (Tex. App. Fort Worth Apr. 3 2008).

794. Trial court's decision to admit the testimony of defendant's two adult stepchildren concerning sexual abuse was not an abuse of discretion under Tex. R. Evid. 404 because the challenged testimony was offered to rebut character evidence presented by defendant. Green v. State, 2008 Tex. App. LEXIS 2135 (Tex. App. Tyler Mar. 26 2008).

795. Defendant was not substantially harmed by the trial court's error in admitting a witness's reputation testimony because evidence of the victim's character as a peaceful person was properly presented to the jury. Cruz v. State, 2007 Tex. App. LEXIS 9002 (Tex. App. El Paso Nov. 15 2007).

796. In an action against the owner of a corporation for breach of an employment contract and breach of a stock option agreement, a trial court did not abuse its discretion by admitting testimony as to the owner's dishonest character because the owner himself was a witness and thus his credibility was at issue. Simplified Dev. Corp. v. Garfield, 2007 Tex. App. LEXIS 8840 (Tex. App. Houston 14th Dist. Nov. 6 2007).

797. It was not an error for the trial court to overrule defendant's objections, during the punishment phase, to questions the State asked a witness regarding a criminal charge against defendant that had been dismissed because by raising the defensive theory that defendant was a nice guy or of good character, defendant, through the witness, opened the door for the State to cross-examine the witness regarding an extraneous offense if the extraneous offense would tend to correct the false impression left by the witness's direct examination. Romero v. State, 2006 Tex. App. LEXIS 7552 (Tex. App. El Paso Aug. 24 2006).

798. Appellate court held the trial court did not abuse its discretion in excluding testimony by defendant's father about defendant's use of firearms as the testimony did not offer evidence of a pertinent character trait of defendant. Townsend v. State, 2006 Tex. App. LEXIS 4929 (Tex. App. Eastland June 8 2006).

799. In a trial for a mother's sexual abuse of her son, it was error under Tex. R. Evid. 404 to admit evidence that defendant had been a victim of sexual assault as a child to show that she was more likely to commit the offense; the error was harmful under Tex. R. App. P. 44.2 and Tex. R. Evid. 103 because it was a close case resolved by a credibility determination between the child and defendant. Kirby v. State, 208 S.W.3d 568, 2006 Tex. App. LEXIS 2785 (Tex. App. Austin 2006).

800. Drug use is not an essential element of the crime of possession of a controlled substance; a defendant may not, therefore, use specific instances of drug use; rather, he may only use reputation or opinion testimony to prove his good character. Norton v. State, 2006 Tex. App. LEXIS 2333 (Tex. App. Houston 14th Dist. Mar. 28 2006).

801. Although the husband claimed that expert testimony should have been excluded because it contained improper character evidence under Tex. R. Evid. 404(b), the husband opened the door during direct examination, and because the witness was offered as an expert witness, the wife was permitted, under Tex. R. Evid. 705(a) to disclose the underlying facts the witness used to form an opinion regarding the husband. Moyer v. Moyer, 2005 Tex. App. LEXIS 6966 (Tex. App. Austin Aug. 26 2005).

802. In a murder case, any prejudice caused by the admission of defendant's extraneous offense was cured by the trial court's instruction; the State brought attention to the extraneous offense on only one occasion where it asked a witness if she knew that defendant had been convicted of a felony, after the witness had voiced a favorable opinion of defendant's character. That question was followed immediately by a sustained objection and a curative instruction by the trial court. Nickleson v. State, 2005 Tex. App. LEXIS 6658 (Tex. App. Corpus Christi Aug. 18 2005).

803. Where defendant was charged with aggravated sexual assault of a child, the appellate court assumed the admission of pornographic photographs of adult women taken from his computer was erroneous. However, the error was harmless; the photographs were less shocking and offensive than the complainant's graphic description of the acts defendant engaged in with her and there was ample testimonial evidence of defendant's guilt. Breland v. State, 2005 Tex. App. LEXIS 5925 (Tex. App. Fort Worth July 28 2005).

804. Defendant did not place character or reputation at issue through a particular witness's testimony, and thus the State should not have been allowed, under Tex. R. Evid. 405(a), 404(a)(1), to ask the witness "were you aware" questions, and although the court did not approve of the prosecution's arguments, the error was harmless under Tex. R. App. P. 44.2(b) because the error probably did not influence the jury or had only a slight influence on the jury's verdict. Harrison v. State, 2005 Tex. App. LEXIS 5705 (Tex. App. Waco July 20 2005), opinion withdrawn by, substituted opinion at, review dismissed by 2005 Tex. App. LEXIS 8654 (Tex. App. Waco Oct. 19, 2005).

805. Trial court erred in admitting evidence that was probative only of defendant's character and propensity to sexually assault children because the extraneous offense against a different victim did not fall within the false impression exception, nor was the evidence relevant to prove a material issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, however, the error was harmless because it probably did not influence the jury or had only a slight influence on its verdict. The alleged victim testified that defendant sexually assaulted her, which was corroborated by the pediatric nurse who examined her, one inmate testified that he heard defendant acknowledge sexually assaulting the victim and a second inmate testified, without objection, that defendant boasted of having sex with minor girls. Tipton v. State, 2005 Tex. App. LEXIS 871 (Tex. App. Waco Feb. 2 2005).

806. Trial court did not abuse its discretion in refusing to admit evidence of the victim's violent character under Tex. R. Evid. 404(a)(2), 405(a) in connection with defendant's murder trial; defendant failed to provide any evidence that connected the victim's previous violent acts with the events leading up to the victim's murder or any evidence that shed light on the victim's state of mind or intention in inciting the altercation with defendant. Toledo v. State, 2004 Tex. App. LEXIS 9596 (Tex. App. El Paso Oct. 28 2004).

807. Trial court did not abuse its discretion in excluding the testimony of eight witnesses who, according to defendant, would have described events that occurred in the days and weeks before the shooting. None of the witnesses at trial described any aggressive action by the victim close to the time of the shooting, and because the

evidence did not raise the issue of self-defense, the excluded testimony was not relevant. Wortham v. State, 2004 Tex. App. LEXIS 8810 (Tex. App. Tyler Sept. 30 2004).

808. Trial court abused its discretion in a murder trial in permitting the State to introduce evidence under Tex. Code Crim. Proc. Ann. art. 38.36(a) that, two years earlier, defendant had forced the victim out of his car during an argument; however, the incident was not probative of defendant's motive and intent under Tex. R. Evid. 404(b) and was not proper rebuttal evidence under Rule 404(a)(1)(A), but the error was harmful under Tex. R. App. P. 44.2(b), given the emphasis placed on the incident and the fact that the evidence of defendant's guilt was circumstantial and not overwhelming.

809. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, the trial court properly overruled defendant's objection to the prosecutor's remarks during opening statement that the two fathers of the victims were incarcerated where the prosecutor's remarks were improper character evidence, not within the exceptions provided by Tex. R. Evid. 404(b). Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

810. In a case where defendant was charged with fleeing from police, evidence that defendant was found underneath a house when officers tried to serve a warrant for arrest was properly admitted by a trial court because it tended to prove knowledge of guilt; even if the admission was erroneous, it was disregarded on appeal since defendant's substantial rights were not affected; it would have been difficult to explain the circumstances of the arrest without such evidence, and the State did not mention the evidence in its final argument. Jacobs v. State, 2004 Tex. App. LEXIS 4239 (Tex. App. Texarkana May 11 2004).

811. In a criminal prosecution for murder where defendant claimed self-defense, the trial court properly excluded evidence of the victim's previous violent acts against people other than defendant. Defendant offered the previous violent acts only for the purpose of demonstrating that the victim had acted in conformity with his violent character in violation of Tex. R. Evid. 404. Deavila v. State, 2004 Tex. App. LEXIS 3562 (Tex. App. Dallas Apr. 22 2004).

812. In defendant's retaliation case, the State's objections to defendant's offer of opinion evidence of his good character for being peaceful and law-abiding were properly sustained where the court did permit reputation evidence, and the defendant did not suggest how opinion evidence would have been preferable to reputation evidence; defendant's "substantial rights" were not affected by the limitation of evidence to reputation evidence. Moore v. State, 2004 Tex. App. LEXIS 3017 (Tex. App. Waco Mar. 31 2004), opinion withdrawn by 2004 Tex. App. LEXIS 6584 (Tex. App. Waco July 21, 2004), substituted opinion at 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

813. Where the record showed that defendant and the intended victim engaged in an altercation, which left a bystander dead, and defendant claimed self-defense in shooting at the intended victim, defendant's manslaughter conviction was affirmed; the exclusion of testimony about extraneous acts of aggression by the intended victim was proper under Tex. R. Evid. 404(a)(2) where defendant failed to show that he had any knowledge of those violent acts, and therefore the acts could not have influenced defendant's state of mind. Hayes v. State, 124 S.W.3d 781, 2003 Tex. App. LEXIS 9841 (Tex. App. Houston 1st Dist. 2003), affirmed by 161 S.W.3d 507, 2005 Tex. Crim. App. LEXIS 652 (Tex. Crim. App. 2005).

814. Defendant's manslaughter conviction was affirmed where the exclusion of testimony about extraneous acts of aggression by the intended victim was proper; defendant could have introduced character evidence suggesting that the intended victim was the aggressor, but he could not have introduced evidence of the specific acts and events where such evidence was not admissible for other purposes under Tex. R. Evid. 404(b). Hayes v. State, 124 S.W.3d 781, 2003 Tex. App. LEXIS 9841 (Tex. App. Houston 1st Dist. 2003), affirmed by 161 S.W.3d 507, 2005

Tex. Crim. App. LEXIS 652 (Tex. Crim. App. 2005).

815. Evidence that a witness feared for her life because the deceased victim had told her that if she did not tell him where his girlfriend was, he would hurt her and her children, should not have been excluded from defendant's murder trial because, as defendant's defense was that he acted in self-defense, he was permitted, pursuant to Tex. R. Evid. 404(a)(2), to introduce evidence of his victim's violent character as long as there was some evidence of aggression by the victim before the introduction of the character evidence and, in defendant's trial, before the witness was called to testify, there was evidence that the victim had climbed up a balcony, uninvited, early in the morning, which was an act of aggression by the victim that tended to raise the issue of self defense. Torres v. State, 117 S.W.3d 891, 2003 Tex. Crim. App. LEXIS 595 (Tex. Crim. App. 2003).

816. Defendant should have been permitted to introduce evidence of his victim's character in support of his claim of self-defense pursuant to Tex. R. Evid. 404(a)(2) because, as evidence had been admitted that the victim had engaged in an act of aggression by climbing up a balcony, uninvited, early in the morning, it was not necessary for defendant to also provide evidence of a "fray" between himself and the victim before the introduction of the character evidence. Torres v. State, 117 S.W.3d 891, 2003 Tex. Crim. App. LEXIS 595 (Tex. Crim. App. 2003).

817. Under Tex. R. Evid. 404(b), defendant charged with assault of a child after spanking the child with an extension cord was not prejudiced when the trial court erroneously excluded school records showing the child's disciplinary record; although the records were relevant to defendant's claim that he disciplined the way he did based on the child's continuing trouble at school, the error was harmless because defendant was able to establish the same thing through other means. Davis v. State, 104 S.W.3d 177, 2003 Tex. App. LEXIS 2709 (Tex. App. Waco 2003).

818. Where a victim's unambiguous, violent or aggressive act needs no explaining, evidence of the victim's extraneous conduct admitted in conjunction with his unambiguous act has no relevance apart from its tendency to prove the victim's character conformity, and thus is inadmissible under Tex. R. Evid. 404(b). Reyna v. State, 99 S.W.3d 344, 2003 Tex. App. LEXIS 1391 (Tex. App. Fort Worth 2003).

819. While inadmissible under Tex. R. Evid. 404(a)(1), specific acts of good conduct may be admissible before the sentencing court under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) to prove a defendant's good character. Monarrez v. State, 2003 Tex. App. LEXIS 997 (Tex. App. Dallas Jan. 31 2003).

820. Criminal defendant's trial counsel was not deficient for failing to call witnesses to testify as to specific instances of good conduct, which would be in violation of Tex. R. Evid. 404(a)(1) as proof of character may only be admitted at trial in the form of reputation or opinion testimony. Monarrez v. State, 2003 Tex. App. LEXIS 997 (Tex. App. Dallas Jan. 31 2003).

821. Where a defendant was a passenger in a vehicle whose driver was arrested for driving while intoxicated and possession of marijuana, at defendant's trial on a charge of possession of marijuana, the evidence of the driver's conduct was inadmissible extraneous offense evidence under Tex. R. Evid. 404(b), which applied to the conduct of third parties. Castaldo v. State, 78 S.W.3d 345, 2002 Tex. Crim. App. LEXIS 138 (Tex. Crim. App. 2002).

822. Where a defendant was a passenger in a vehicle whose driver was arrested for driving while intoxicated and possession of marijuana, at defendant's trial on a charge of possession of marijuana, the evidence of defendant's alcohol intoxication was admissible as same transaction contextual evidence and no limiting instruction was required. Castaldo v. State, 78 S.W.3d 345, 2002 Tex. Crim. App. LEXIS 138 (Tex. Crim. App. 2002).

823. Reason that Tex. R. Evid. 404(b) prohibits using evidence of acts to prove character, even when character is at issue under one of the three exceptions in Rule 404(a), is the danger of prejudice outweighing probative value. Castaldo v. State, 78 S.W.3d 345, 2002 Tex. Crim. App. LEXIS 138 (Tex. Crim. App. 2002).

824. Danger of prejudice to a defendant is usually highest when evidence of defendant's extraneous acts is offered to prove that defendant acted in the same way in the offense on trial. The danger of prejudice may be much lower when evidence of a third party's extraneous acts is offered. Castaldo v. State, 78 S.W.3d 345, 2002 Tex. Crim. App. LEXIS 138 (Tex. Crim. App. 2002).

825. Where defendant offered to stipulate that jurisdictional convictions existed, the probative value of evidence of the same convictions was substantially outweighed by the danger of unfair prejudice, and under Tex. R. Evid. 403, admission of defendant's prior DWI convictions was error; thus, under Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 37.07, § 2(a), the conviction should not be based on the assumption that the accused was a criminal generally or that he was a person of bad character. Robles v. State, 85 S.W.3d 211, 2002 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 2002).

826. If an objection is made to extraneous offense evidence under Tex. R. Evid. 404(b), the proponent of the evidence must persuade the trial court that the evidence has relevance apart from character conformity or that it tends to establish some elemental fact such as identity or intent; that it tends to establish some evidentiary fact such as motive, opportunity, or preparation leading inferentially to an elemental fact; or that it rebuts a defensive theory, such as the absence of mistake or accident. Abshire v. State, 62 S.W.3d 857, 2001 Tex. App. LEXIS 7862 (Tex. App. Texarkana 2001).

827. "Propensity rule" contained in Tex. R. Evid. 404 regarding character evidence was not available to defendant because Tex. R. Evid. 404 did not govern the admission of character evidence in a capital trial. Jackson v. State, 992 S.W.2d 469, 1999 Tex. Crim. App. LEXIS 42 (Tex. Crim. App. 1999).

Evidence : Relevance : Compromise & Settlement Negotiations

828. In a drug case, in light of the offense charged and the evidence adduced at trial, the evidence that defendant possessed a bogus license did not unfairly prejudice the jury or confuse the issues. Accordingly, the trial court did not abuse its discretion in admitting the evidence. Gregory v. State, 159 S.W.3d 254, 2005 Tex. App. LEXIS 1660 (Tex. App. Beaumont 2005).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

829. Court did not err in refusing to exclude the extraneous offense testimony to rebut a defensive theory of fabrication, because the extraneous evidence tended to make the defensive claim of fabrication less probable, and the extraneous offense evidence was probative to rebut defendant's defensive theories that defendant was not the type of person who would sexually abuse a child and that the abuse allegations were fabricated. Shockley v. State, 2014 Tex. App. LEXIS 8345, 2014 WL 3756301 (Tex. App. Dallas July 30 2014).

830. Trial court did not abuse its discretion by admitting evidence of the victim's half-sister about sexual abuse that defendant had inflicted upon her under this rule because it tended to rebut defendant's theory that the victim had fabricated her claims and there were similarities between defendant's conduct as described by both. The prejudicial effect of the testimony did not substantially outweigh its probative value because it was not so graphic as to be worse than the specifics to which the victim had already testified. Hosey v. State, 2014 Tex. App. LEXIS 7876, 2014 WL 3621796 (Tex. App. Texarkana July 23 2014).

831. Murder victim's girlfriend was properly allowed to testify regarding an attempted drive-by shooting defendant committed against the victim, during which she was shot in the hand, and which occurred ten months before the murder, pursuant to Tex. Code Crim. Proc. Ann. art. 38.36(a) and Tex. R. Evid. 403 and Tex. R. Evid. 404(b). Jones v. State, 2014 Tex. App. LEXIS 7739, 2014 WL 3556587 (Tex. App. Waco July 17 2014).

832. Any error in the trial court's exclusion of evidence regarding the victim's prior acts because, even though the evidence was relevant to show the victim's tendency to provoke fights, the evidence already admitted showed that the victim was being combative and aggressive with defendant on the day in question. Waggoner v. State, 2014 Tex. App. LEXIS 4983 (Tex. App. Fort Worth May 8 2014).

833. Trial court did not err in admitting evidence of a robbery allegedly committed by defendant two days prior to the charged offense, because the similarities in the proximity of time and setting, the mode of commission of the two offenses, and the victims' similar descriptions of the robber and his hoodie constituted sufficiently distinguishing characteristics to allow the evidence as evidence of identity. Collins v. State, 2014 Tex. App. LEXIS 3549, 2014 WL 1318882 (Tex. App. Houston 1st Dist. Mar. 31 2014).

834. Admission of the extraneous evidence was not improper under this rule because it was strikingly similar to the charged offense, it tended to prove he did not have the physical inability he claimed, absent the evidence of defendant's past conduct the State had no way to rebut defendant's claim of physical inability, any prejudice was limited by the trial court's limiting instructions, and the presentation of the evidence did not consume an inordinate amount of time. Arteaga v. State, 2014 Tex. App. LEXIS 2434, 2014 WL 866461 (Tex. App. San Antonio Mar. 5 2014).

835. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

836. In the murder case, the court did not abuse its discretion by sustaining the State's objection to a photograph showing the deceased's gang affiliation because the picture depicting a memorial to the deceased did not indicate he was violent and the photograph would have been cumulative. Wilson v. State, 2014 Tex. App. LEXIS 918, 2014 WL 310117 (Tex. App. Dallas Jan. 28 2014).

837. Trial court did not err by admitting evidence of defendant's prior conviction of unlawfully carrying a weapon because it was relevant to rebutting his defensive theory of insanity, the trial court instructed the jury not to consider that as evidence he was guilty of the charged offense, and the State only asked two questions about the prior crime, one of which the jury was instructed to disregard. Thomas v. State, 2013 Tex. App. LEXIS 14744, 2013 WL 6405479 (Tex. App. Houston 1st Dist. Dec. 5 2013).

838. Trial court did not err in admitting testimony showing that defendant was the driver of a vehicle involved in a drive-by shooting four days before the alleged victim was shot because the evidence was probative to show opportunity and identity and to rebut defendant's defensive theory that he was not the perpetrator, and there was nothing confusing or misleading about the evidence. Williams v. State, 2013 Tex. App. LEXIS 14602, 2013 WL 6253764 (Tex. App. San Antonio Dec. 4 2013).

839. Trial court did not abuse its discretion by admitting evidence because in light of the defensive theory to attack State's evidence, evidence that defendant chewed and destroyed crack cocaine during a prior traffic stop increased the likelihood that defendant did the same during the instant traffic stop. The court could not hold that the probative value of showing a lack of accident or mistake was substantially outweighed by the danger of unfair prejudice or the

misleading nature of the evidence. Williams v. State, 2013 Tex. App. LEXIS 12925, 2013 WL 5676226 (Tex. App. Eastland Oct. 17 2013).

840. Trial court did not abuse its discretion by admitting evidence of extraneous offenses committed against his younger stepdaughter because they were so intertwined with the sexual assaults against the older stepdaughter that the jury's understanding of the offenses would have been obscured without them. The evidence also rebutted the defensive theory of fabrication, was sufficiently similar to the charged offense, and only limited details were introduced. Campos v. State, 2013 Tex. App. LEXIS 9593 (Tex. App. Eastland Aug. 1 2013).

841. Trial court did not abuse its discretion by permitting State to introduce evidence of sexual assault of one victim by accomplice because the facts of the case would have been incomplete and difficult to follow had it been excised from the sequence of events, as it occurred while other victim was being killed and before first victim was kidnapped and locked in her car. The probative force of the evidence and the State's need for the evidence favored admission and it took minimal time to develop. Smith v. State, 424 S.W.3d 588, 2013 Tex. App. LEXIS 9093, 2013 WL 3832691 (Tex. App. Texarkana July 25 2013).

842. Trial court did not abuse its discretion in admitting defendant's statement to a witness who had been in jail with him before the trial, that defendant was the "shooter," where the State did not offer the inmate's testimony as evidence of an extraneous offense separate and apart from the charged offense but, instead offered the evidence as proof that defendant fired the shots that killed the victim. The statement was an admission by a party-opponent, supported the allegation that defendant killed the victim, directly contradicted defendant's defensive theory that his accomplices only named him as the shooter to get a reduced sentence, and was not likely to impress the jury in some irrational but nevertheless indelible way. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

843. Trial court did not abuse its discretion when it permitted a witness who had been in jail with defendant before the trial to testify that defendant threatened to kill him where the threat was a relevant extraneous offense, as the testimony was evidence that defendant made the threat to instill fear in the witness and to prevent him from testifying. Defendant's actions were probative of guilt, and the testimony was not unfairly prejudicial because defendant did not try to connect his threat to a different offense, and because the record was devoid of any evidence that the threat was related to anything else. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

844. Given that his co-conspirator shot the victim in the course of the prior robbery, the extraneous offense evidence supported the State's theory that defendant reasonably should have anticipated that these same co-conspirators, or others, might shoot and kill someone in their next robbery; the evidence was directly relevant to an essential element of the charged crime, and was not needlessly duplicative as there was little other evidence that defendant knew his companions would use violence or carried guns. Pagoada v. State, 2013 Tex. App. LEXIS 6077 (Tex. App. Houston 1st Dist. May 16 2013).

845. Trial court did not abuse its discretion by admitting evidence of two additional stolen trailers on defendant's property under Tex. R. Evid. 403 because testimony established that defendant only had access and control of the property, and the evidence rebutted defendant's strategy of mistake or accident in which he attempted to cast doubt regarding his knowledge of the improper registration of the stolen trailers. Whited v. State, 2013 Tex. App. LEXIS 5225 (Tex. App. Eastland Apr. 30 2013).

846. Trial court did not abuse its discretion by admitting evidence tending to show that a witness had observed defendant in possession of a firearm on the night of the robbery under Tex. R. Evid. 404(b) because the testimony tended to establish defendant's identity as one of the gunmen during the robbery and to corroborate the

accomplices' testimony and the evidence qualified as same transaction contextual evidence. The trial court could have found that the probative value of the evidence was high, as the victims of the robbery were unable to identify the men who had robbed them at gunpoint and the State needed the testimony to corroborate the accomplices' testimony who had identified defendant as one of the gunmen. Head v. State, 2013 Tex. App. LEXIS 5109 (Tex. App. Austin Apr. 24 2013).

847. Because appellant's contention that the officer's testimony constituted evidence of an extraneous offense under Tex. R. Evid. 404(b) was rejected, his Tex. R. Evid. 403 contention was also rejected. Garza v. State, 2013 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. Apr. 11 2013).

848. Trial court did not abuse its discretion in determining the testimony of a witness that appellant had been in jail was not substantially more prejudicial than probative under Tex. R. Evid. 403 because 1) the evidence had probative value as it demonstrated appellant's possible motive for shooting the victim; 2) the witness's testimony about motive was brief and directly relevant to appellant's motive and the intent element of the charged offense and, as such, had less potential to distract the jury from the charged offense; and 3) evidence of the reason appellant was in jail was excluded, which mitigated any potential for the jury to give undue weight to the evidence. Nieto v. State, 2013 Tex. App. LEXIS 1239, 2013 WL 485762 (Tex. App. Houston 1st Dist. Feb. 7 2013).

849. Trial court did not abuse its discretion by admitting into evidence defendant's jail telephone call recordings and summaries because they aided the State in its rebuttal of defendant's defense that he had no involvement or knowledge of the dealership's transactions; The trial court was within the zone of reasonable disagreement to find that the probative value of the recordings and summaries were not substantially outweighed by the danger of unfair prejudice. The jailhouse phone calls did not tend to connect defendant to any prior bad acts or crimes that he might have committed. Wood v. State, 2013 Tex. App. LEXIS 866 (Tex. App. Corpus Christi Jan. 31 2013).

850. Trial court did not abuse its discretion by admitting evidence that he held the child victim's mother at gunpoint several days after the alleged assault occurred under Tex. R. Evid. 404(b) because it constituted same transaction contextual evidence and was relevant, as the evidence showed that defendant confronted the victim's mother because he wanted to interrogate the victim about the assault and showed the jury how defendant reacted violently to the victim's outcry; the evidence was also necessary to show how defendant gained access to the victim's house to leave a letter in which he admitted to touching the victim. The admission of the evidence did not violate Tex. R. Evid. 403 because it made a fact of consequence, defendant's touching of the victim's genitals, more probable. Rodriguez v. State, 2013 Tex. App. LEXIS 213, 2013 WL 135723 (Tex. App. Waco Jan. 10 2013).

851. In defendant's criminal solicitation of a minor case, the court did not err by allowing evidence of his Internet address book, which showed he had contacts with females with sexually suggestive and youthful names because the evidence was probative in that it tended to show defendant was not on the Internet looking for babysitting services. The evidence did not include any specifics of any extraneous misconduct and there was therefore little danger the jury would either give the evidence undue weight or decide the case on an improper basis. Meadows v. State, 2012 Tex. App. LEXIS 9416, 2012 WL 5504017 (Tex. App. Dallas Nov. 14 2012).

852. In defendant's attempted sexual assault case, a witness's testimony regarding other inappropriate conduct allegedly perpetrated by defendant was properly admitted because the testimony showed that defendant acted inappropriately with other underage girls in the household and, thus, corroborated the victim's testimony and showed defendant's predilection for underage girls. Additionally, the State needed the testimony to rebut the mother's assertion that nothing inappropriate had ever transpired between defendant and the victim. Baker v. State, 2012 Tex. App. LEXIS 9345, 2012 WL 5458474 (Tex. App. Waco Nov. 8 2012).

853. In defendant's murder case, the trial court did not abuse its discretion in admitting testimony as evidence of identity because, in both offenses, a green vehicle blocked the roadway and a young man approached the blocked-in vehicle with a "silver" handgun. The witness identified defendant as the "young man" from her aggravated robbery, and he used an accomplice's mother's vehicle to commit that offense; the challenged evidence made defendant's identity more probable, took little time to develop, and supported the element of identity. Torres v. State, 2012 Tex. App. LEXIS 9134 (Tex. App. Corpus Christi Nov. 1 2012).

854. In an indecent exposure case, the court properly allowed evidence of defendant's prior conviction of failing to register as a sex offender over his objection because it was a crime of deception and was a significant piece of evidence bearing on his character for truthfulness; the manner in which the State presented evidence of defendant's conviction did not likely leave an indelible impression on the jurors to encourage an irrational decision. Tristan v. State, 393 S.W.3d 806, 2012 Tex. App. LEXIS 8895, 2012 WL 5285673 (Tex. App. Houston 1st Dist. Oct. 25 2012).

855. Court properly admitted extraneous offense evidence because the State was required to prove that defendant committed the aggravated assault with intent to participate as a member of a criminal street gang and the intent element was hotly contested because defendant asserted that the crimes were not gang-related but simply an argument over a woman that escalated into a fight; it was the State's theory that the gang members assaulted the victim in retaliation for him disrespecting another gang member by interfering with his advances on a woman. There was no evidence the jury gave the evidence undue weight. Romero v. State, 2012 Tex. App. LEXIS 7573, 2012 WL 3834917 (Tex. App. El Paso Sept. 5 2012).

856. In a tampering with evidence case, the court properly admitted Tex. R. Evid. 404(b) evidence that defendant police officer had been at parties and that he was drinking with underage females because defendant attempted to show that the State was engaging in selective prosecution, and the State introduced the evidence to rebut the defensive theory. The State's evidence to rebut the defensive theory was not overly broad, and the court heard the testimony outside the presence of the jury. Shults v. State, 2012 Tex. App. LEXIS 7478, 2012 WL 3799209 (Tex. App. Waco Aug. 30 2012).

857. In a domestic assault case, the court properly admitted evidence because the fact that defendant had a prior conviction for assault-family violence was an essential element of the repeat-offender charge, and the victim did not appear at trial to testify so the State needed the evidence to rebut the defensive theory of fabrication. Additionally, the victim's mother, when testifying to the extraneous offense, did not go into graphic detail regarding the circumstances surrounding the prior assault, and the documents relating to the offense also did not provide much detail in describing the assault. Garcia v. State, 2012 Tex. App. LEXIS 7543 (Tex. App. Austin Aug. 29 2012).

858. Trial court did not abuse its discretion by admitting evidence that defendant offered to pay for an abortion for another teenager with whom he had sex because the record did not establish the requisite level of danger of unfair prejudice under Tex. R. Evid. 403, as the alleged act occurred in another town in the mid-1990s and the trial court could have found that the evidence was helpful in creating a fuller picture of defendant for the jurors, much like the evidence of his good work and family ties. Chavez v. State, 2012 Tex. App. LEXIS 7127, 2012 WL 3629619 (Tex. App. Austin Aug. 24 2012).

859. In defendant's theft case, evidence of subsequent offenses was admissible because those offenses provided the jury with proof of defendant's identity, showed his knowledge, and showed a scheme -- all purposes expressly permitted under Tex. R. Evid. 404(b), and the trial court unequivocally overruled a Tex. R. Evid. 403 objection. At no point did defendant request that the findings and conclusions of the trial court's balancing test be placed on the record. Boswell v. State, 2012 Tex. App. LEXIS 7177, 2012 WL 3629922 (Tex. App. Austin Aug. 23 2012).

860. In a sexual assault case, the court did not err by allowing evidence of a 2008 kidnap and sexual assault of another victim because both victims were forcefully taken and isolated from anyone who could help them; after defendant had each woman in his car, he restrained each of them, and used derogatory terms towards both. He physically assaulted each woman; ripped off their clothing; and in each case forcefully penetrated their vaginas with his fingers or his hand. Ramos v. State, 2012 Tex. App. LEXIS 6780, 2012 WL 3363348 (Tex. App. El Paso Aug. 15 2012).

861. Trial court did not abuse its discretion by admitting evidence of extraneous offenses committed by defendant during his trial for murdering his girlfriend's five-year-child because it was admissible under Tex. R. Evid. 403, as: (1) defendant's ex-girlfriend's testimony regarding defendant's distinctively similar pattern of assaultive behavior and manner of abuse toward her son strongly served to make it more probable that it was defendant that assaulted the child leading to her death; (2) the State's need for the testimony was high as only two people could testify regarding the events of the day the child died presented completely contradictory accounts of those events; 93) the trial court instructed the jury regarding the appropriate use of the testimony; and (4) the nature of defendant's assault on his ex-girlfriend's child, which did not cause his death or apparently any serious or permanent injury, was less emotional than the testimony regarding the nature of his assault on his girlfriend's child. Castro v. State, 2012 Tex. App. LEXIS 6233, 2012 WL 3104817 (Tex. App. Amarillo July 30 2012).

862. Trial court did not abuse its discretion by allowing two witnesses to testify about extraneous offenses because it could have concluded that the evidence was relevant, probative, and necessary to rebut defendant's theory that the victim fabricated her allegation against defendant. The State's presentation of the evidence consumed very little time, and it was presented in a fashion to prove defendant's intent or knowledge of the offenses charged in the indictment. Guardado v. State, 2012 Tex. App. LEXIS 5514, 2012 WL 2832561 (Tex. App. El Paso July 11 2012).

863. Counsel was not ineffective for making a Tex. R. Evid. 404(b) objection to extraneous offenses because it would have been overruled, as Tex. Code Crim. Proc. Ann. art. 38.37, § 2 permitted the admissibility of evidence that defendant provided alcohol and pornography to the child victims to lure or groom them. Counsel was not ineffective for failing to make a Tex. R. Evid. 403 objection because the factors of the balancing test weighed in factor of admitting the evidence, as it was probative of the relationship between defendant and the victims. Odom v. State, 2012 Tex. App. LEXIS 4316, 2012 WL 1964580 (Tex. App. Houston 14th Dist. May 31 2012).

864. In a trial for injury to a child, in which the trial court admitted evidence of extraneous wrongs committed by defendant, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because there appeared little chance that the evidence was likely to influence the jury irrationally, as the conduct at issue did not involve instances where defendant caused other injuries. Moreover, the State did not spend an excessive amount of time developing the evidence. Quirk v. State, 2012 Tex. App. LEXIS 4123, 2012 WL 1882934 (Tex. App. Beaumont May 23 2012).

865. Appellant's affiliation with the Aryan Brotherhood was relevant and the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice because appellant's membership in the gang and his obligation to follow a higher-ranking member's orders were relevant to show appellant's motive for the crime. Evidence of appellant's membership in the Aryan Brotherhood was offered to show appellant's motive, was not introduced to show character conformity, did not violate Tex. R. Evid. 404, and was not unduly prejudicial under Tex. R. Evid. 403. Guffey v. State, 2012 Tex. App. LEXIS 3293, 2012 WL 1470185 (Tex. App. Eastland Apr. 26 2012).

866. Trial court did not abuse its discretion by admitting a witness's testimony to rebut defendant's assertion that he would not sexually abuse a nine-year-old girl where the extraneous-offense evidence was not unfairly prejudicial and was probative of defendant's credibility--and his sexual attraction to nine-year-old girls--because it showed defendant's response on cross-examination was inconsistent with his history of assaulting another female when she

was the same age (or about the same age) as the victim. The trial court minimized the potential of the witness's testimony to impress the jury in an irrational and indelible way by including a limiting instruction in its charge, the record showed that the witness's testimony was not lengthy, and the State did not need the witness's testimony to prove its case-in-chief. Jones v. State, 2012 Tex. App. LEXIS 363, 2012 WL 130612 (Tex. App. Dallas Jan. 18 2012).

867. Court properly admitted evidence of defendant's extraneous bad acts committed after his arrest because witnesses testified about defendant "revving" his engine in front of the victim's house, repeatedly calling the victim, and the victim testified that he felt threatened by the conduct. Additionally, the evidence was unlikely to influence the jury in an irrational way; to the contrary, it was rational to conclude that defendant threatened the victim and his best friend because defendant was guilty of the offense. Lofton v. State, 2011 Tex. App. LEXIS 9666 (Tex. App.--Dallas Dec. 9, 2011).

868. In a sexual abuse case, the evidence of defendant's conduct following his arrest was properly admitted because it was probative of defendant's consciousness of guilt. The State's need for the evidence was significant because the victim and defendant were the only two witnesses to the actual conduct, and defendant denied touching the victim; it was rational to conclude defendant threatened the victim and his best friend because defendant was guilty of the offense. Lofton v. State, 2011 Tex. App. LEXIS 9664, 2011 WL 6225415 (Tex. App. Dallas Dec. 9 2011).

869. State's Exhibit 221 had substantial probative value because it strongly tended to prove one of the elements of Counts 2 and 3, namely, that defendant acted with intent to participate in a criminal street gang, and for this same reason, the State had a considerable need for this evidence; any potential to create undue prejudice would have been counteracted by the trial court's limiting instruction which restricted the jury's consideration of the gang activity evidence to the intent element of Counts 2 and 3, and the trial court did not abuse its discretion by overruling defendant's objections and admitting State's Exhibit 221. White v. State, 2011 Tex. App. LEXIS 8118, 2011 WL 4825650 (Tex. App. El Paso Oct. 12 2011).

870. Trial court did not abuse its discretion by allowing the captain to testify to clarify the extent of defendant's disciplinary record because defendant's testimony created a false impression that he had not been disciplined after the discovery of unsecured evidence in his office; while testifying as a rebuttal witness, the captain testified that defendant had in fact been suspended, and that that disciplinary action was taken as a result of the unsecured evidence investigation. Any prejudice stemming from the extraneous evidence did not outweigh its probative value, as the discussion with the captain consumed only a small portion of the record and was necessary to impeach defendant and to provide the jury with a complete and accurate understanding of the facts. Milton v. State, 2011 Tex. App. LEXIS 7592, 2011 WL 4361482 (Tex. App. Houston 14th Dist. Sept. 20 2011).

871. Defendant's argument and questioning of the witnesses attempted to portray the victim as the aggressor and defendant as merely defending himself and lacking criminal intent; thus, the trial court's ruling that evidence of the prior assaults was admissible under Tex. R. Evid. 403 and 404(b) was not an abuse of its discretion. Watkins v. State, 2011 Tex. App. LEXIS 6992, 2011 WL 3925583 (Tex. App. Beaumont Aug. 24 2011).

872. Evidence of defendant's membership in the same gang as a witness was admissible to show that the witness was biased to testify in favor of defendant. The probative value of the impeachment evidence was high because the State wanted to show why the witness testified that he had lied to police about the statements defendant had made to him. Mccuin v. State, 2011 Tex. App. LEXIS 5031, 2011 WL 2611234 (Tex. App. Fort Worth June 30 2011).

873. Trial court did not abuse its discretion by admitting evidence concerning a syringe found in defendant's sock in jail following his arrest because the evidence was relevant to establish defendant's knowledge of the

methamphetamine and to rebut the defensive theory that defendant had no knowledge of the methamphetamine in either the van or in the vehicle defendant was riding in. Defendant failed to establish that the probative value of the evidence was significantly or substantially outweighed by its prejudicial effect, defendant's knowledge of the methamphetamine was seriously contested, the time necessary to present the evidence represented a negligible portion of the State's case, and limiting instructions were given. Phillips v. State, 2011 Tex. App. LEXIS 1383, 2011 WL 652846 (Tex. App. Amarillo Feb. 23 2011).

874. Trial court did not abuse its discretion by admitting evidence of the circumstances of defendant' arrest in July 2004 because evidence that defendant possessed methamphetamine at his father's residence on a later occasion was circumstantial evidence that defendant intentionally or knowingly possessed methamphetamine on an earlier occasion. Defendant's knowledge of the methamphetamine was seriously contested, the time necessary to present the evidence represented a negligible portion of the State's case, and limiting instructions were given. Phillips v. State, 2011 Tex. App. LEXIS 1383, 2011 WL 652846 (Tex. App. Amarillo Feb. 23 2011).

875. In a case in which defendant was convicted of aggravated kidnapping, the trial court did not abuse its discretion by admitting evidence that defendant, after committing the charged offense and on the same day, had ordered two minor girls walking down a street to get in his van where the trial court could have reasonably concluded that the evidence regarding defendant's encounter with the minor girls was relevant and admissible because that evidence revealed defendant's true plans about his encounter with the victim on the day he committed the offense. The trial judge could have reasonably concluded that the inherent probative force of the evidence, along with the State's need for the evidence, substantially outweighed the danger of any unfair prejudice to defendant, and the presentation of the extraneous offense evidence did not consume an inordinate amount of time. Frank v. State, 2011 Tex. App. LEXIS 762, 2011 WL 379041 (Tex. App. Beaumont Feb. 2 2011).

876. Trial court did not abuse its discretion by admitting evidence of defendant's drug transaction and drug use during his capital murder trial because it was same-transaction contextual evidence and background contextual evidence that put in context the conspiracy offense that defendant was charged with; the State sought to show that defendant was an active participant with his sons in a large-volume and dangerous drug business, and not just an after the fact bus driver, to explain why defendant would have entered into the conspiracy with his sons to rob the victim. Given the State's need for circumstantial evidence to prove that defendant entered into the conspiracy to rob the victim, the court could not say that there was a clear disparity between the danger of unfair prejudice posed by the evidence and its probative value. Davis v. State, 2011 Tex. App. LEXIS 835, 2011 WL 322877 (Tex. App. Waco Feb. 2 2011).

877. Photographs of defendant's tattoos on his hand and across his stomach were admissible for purposes of identification under Tex. R. Evid. 404(b) and the danger of unfair prejudice resulting from the admission of that evidence did not substantially outweigh its probative value under Tex. R. Evid. 403 where the tattoos were physical evidence linking defendant to a nickname that several witnesses used in identifying defendant and where the jury already heard testimony regarding defendant's gang membership. Arias v. State, 2010 Tex. App. LEXIS 10217, 2010 WL 5541118 (Tex. App. San Antonio Dec. 29 2010).

878. Testimony of two police officers that defendant had twice before been found in possession of cocaine while in or near the vehicle in which the cocaine for the present possession offense was found was plainly relevant, beyond mere character conformity, to rebut defendant's suggestion that he was an innocent victim of circumstance, and, under the circumstances, a trial court did not abuse its discretion under Tex. R. Evid. 404(b) by admitting the officers' testimony to rebut defendant's claim that he was unaware of the cocaine found in the vehicle. It was also not an abuse of discretion under Tex. R. Evid. 403 for the trial court to conclude that the relevance of the testimony, which consumed only sixteen pages of the reporter's record, outweighed the danger of unfair prejudice or confusion of the issues. Bell v. State, 2010 Tex. App. LEXIS 9034, 2010 WL 4595704 (Tex. App. Austin Nov. 9 2010).

879. Even though the trial court erred by allowing the State to ask a police officer if defendant had assaulted two other inmates upon arriving at the city's holding facility, as it showed defendant's propensity to be aggressive and perpetrate assaults, the error was harmless because there was a significant amount of evidence that went to the issue of defendant's intent and the State mentioned the evidence only minimally during closing arguments. Parson v. State, 2010 Tex. App. LEXIS 8330, 2010 WL 4053782 (Tex. App. Amarillo Oct. 15 2010).

880. Defendant failed to preserve for appellate review his claim that the district court erred by excluding evidence regarding the motivation of the authorities to prosecute the case against him because he failed to objected on the basis of Tex. R. Evid. 404(b) during the trial. Even assuming that defendant had preserved error, the trial court did not abuse its discretion because: (1) the proffered evidence had no relevance to the issue of whether defendant had committed the offense of unauthorized use of a motor vehicle; (2) the trial court could have found that the evidence would have put the officers and the police department on trial, confused the issues, and caused undue delay; and (3) there was considerable evidence showing that defendant committed the offense, particularly the videotape showing defendant entering the bait vehicle on three separate dates. Bishop v. State, 2010 Tex. App. LEXIS 7056, 2010 WL 3369845 (Tex. App. Austin Aug. 26 2010).

881. Trial court did not abuse its discretion by admitting evidence of a prior robbery during defendant's aggravated robbery trial because: (1) it was committed the evening prior to the instant robbery; (2) defendant and his accomplice acted together in both robberies; (3) both robberies were committed against lone, older women using surprise, speed, and strength through force or the threat of force; and (4) both robberies were committed while using the same vehicle as a means of escape. Therefore, the probative value of the evidence was great, as it showed that defendant and his accomplice acted together in a continuing criminal enterprise and rebutted defendant's theory that he was not a party to the instant robbery but was merely present in the vehicle while it occurred. Davis v. State, 2010 Tex. App. LEXIS 6949, 2010 WL 3341514 (Tex. App. Tyler Aug. 25 2010).

882. Trial court did not abuse its discretion in determining that the probative value of the child victim's mother's testimony outweighed any prejudicial effect because the testimony, identifying defendant as the individual who left bite marks on the victim when they were playing, was relevant and probative of the relationship between defendant and the victim. Samora v. State, 2010 Tex. App. LEXIS 6759, 2010 WL 3279536 (Tex. App. Corpus Christi Aug. 19 2010).

883. Evidence of the victim's extraneous offenses should have been allowed, Tex. R. Evid. 403, but because defendant denied hitting the victim with the baseball bat, he could not have employed the theory of self-defense for that part of the alleged assault; the trial court was free to disbelieve defendant's assertion that he only punched the victim once and that he did not hit him with the baseball bat, and the jury was free to believe the victim's testimony that defendant was the first aggressor. Tomasheski v. State, 2010 Tex. App. LEXIS 4709, 2010 WL 2512618 (Tex. App. Texarkana June 23 2010).

884. Trial court could have reasonably concluded that the evidence of a convenience store robbery rebutted appellant's defensive theory, and thus the court could not find that the trial court abused its discretion when it overruled appellant's objection under Tex. R. Evid. 404(b). Chamberlain v. State, 2010 Tex. App. LEXIS 4653, 2010 WL 2473341 (Tex. App. Dallas June 21 2010).

885. Tex. R. Evid. 404(b) is not limited to the extraneous acts of a defendant, and applies to the conduct of a third party. Chamberlain v. State, 2010 Tex. App. LEXIS 4653, 2010 WL 2473341 (Tex. App. Dallas June 21 2010).

886. Court abused its discretion in overruling defendant's Tex. R. Evid. 403 objections, because the court impermissibly allowed the State to interject extremely prejudicial evidence of multiple other sexual offenses allegedly committed by defendant (and others), when the evidence of extraneous acts admitted did not show a plan

to sexually assault the two alleged victims, but rather it was evidence of repeated occurrences of the same bad act, compounded by numerous additional bad acts. Pittman v. State, 321 S.W.3d 565, 2010 Tex. App. LEXIS 4504 (Tex. App. Houston 14th Dist. June 17 2010).

887. Court did not abuse its discretion in admitting the contested items, because the evidence defendant complained of was much less graphic and disturbing than the pictures for which he was indicted, defendant's knowledge of and preoccupation with pictures of children, both those that might be termed pornographic and otherwise, was critical to proving the State's case of possession of child pornography, and the items did not distract the jury from their main inquiry, nor, did the evidence create a situation where the jury would give undue credence to the evidence; an officer found the two pictures that were the basis of defendant's indictments, along with computer generated pictures of young girls engaged in various sexual acts, magazine advertisements of children with the heads and faces cut out, adult pornography, and a spiral notebook with handwritten sexually explicit stories about young females. Bolles v. State, 2010 Tex. App. LEXIS 1080, 2010 WL 539684 (Tex. App. Amarillo Feb. 16 2010).

888. In defendant's aggravated robbery case, the court did not err by admitting extraneous offense evidence of a prior robbery because the identity of the robber was at issue; defendant persistently attacked the victim's certainty of identification and offered an alibi for his presence at the time the robbery took place. Additionally, both the robber in the instant case and the prior case had features and dress in common, both tried to hide their faces, both were brandishing a pistol, and both were seen leaving and departing in a blue vehicle. Lively v. State, 2010 Tex. App. LEXIS 863 (Tex. App. Texarkana Feb. 5 2010).

889. In defendant's indecency with a child case, the court did not err by excluding evidence related to the victim's sexual relationship with her boyfriend who lived at the residence where the events took place because the victim's sexual history and relationship with her boyfriend had little or no probative value. The defensive theory was that the victim was motivated to fabricate the allegations because of defendant's complaints to the victim about her boyfriend's failure to contribute to household expenses; however, evidence of the victim's sexual relationship with her boyfriend would show only that she was sexually active with an older male who lived in the apartment. Franklin v. State, 2010 Tex. App. LEXIS 619, 2010 WL 337334 (Tex. App. Tyler Jan. 29 2010).

890. In defendant's drug case, the court did not err by admitting evidence of an extraneous drug offense because the officer testified that he purchased methamphetamine from defendant, which made the intent to deliver much more probable, and the circumstances of the offense were just a simple transaction, which involved no violence or any potential inflaming factors. The testimony of was not a time consuming part of the trial, and while intent might have been proven by circumstantial evidence, the evidence was needed to rebut the defensive theories brought out during cross-examination of the witnesses. Padilla v. State, 2010 Tex. App. LEXIS 674, 2010 WL 337673 (Tex. App. El Paso Jan. 29 2010).

891. In defendant's capital murder case, the court properly admitted other acts evidence that defendant removed a windowscreen on the witness's enclosed patio, squatted in the dark wearing only boxer-shorts, and told her he wanted to get inside her apartment and needed a place to hide because the evidence proved that defendant was in the vicinity of the victim's apartment and was looking for a place to hide near the time of the murder. Additionally, the testimony was not particularly emotional or otherwise likely to inflame the jury, and the State did not have other evidence to show defendant's behavior and presence near the time of the murder. Gregory v. State, 2010 Tex. App. LEXIS 618, 2010 WL 323884 (Tex. App. Fort Worth Jan. 28 2010).

892. In defendant's aggravated kidnapping case, the court did not err by admitting extraneous offense involving the same victim because the intent to terrorize, harm, or abuse the victim must have been present prior to or at the particular time; thus, evidence of extraneous misconduct prior to the abduction was relevant apart from showing character conformity because it made more probable the elemental fact of defendant's intent at the time of the

abduction. Additionally, only a small percentage of the time expended in the four-day jury trial was devoted to mention of the extraneous offenses. Crews v. State, 2009 Tex. App. LEXIS 9677, 2009 WL 4907423 (Tex. App. Texarkana Dec. 22 2009).

893. In defendant's indecency with a child case, the court properly allowed testimony of an officer that he had seen defendant watching children on a playground with binoculars because much of the State's case was built around the theory of "grooming" and that defendant spent significant time with the victim; because the bulk of the defensive case consisted of witnesses who said defendant had provided safe child care, that evidence was relevant to rebutting the defensive theory. Additionally, the time spent proving the extraneous act was negligible. Orange v. State, 2009 Tex. App. LEXIS 8934, 2009 WL 3851068 (Tex. App. Texarkana Nov. 19 2009).

894. In defendant's aggravated sexual assault of a child case, the court properly admitted evidence from a witness that defendant liked young girls and oral sex because defendant was accused of fondling the breast of his victim and of performing oral sex on the victim who was ten years old, the evidence pertained to defendant's thoughts and did not implicate any conduct on his part, defendant's statements were the primary evidence of his intent and state of mind, and, the State had a significant need for the evidence. Jones v. State, 2009 Tex. App. LEXIS 8923, 2009 WL 3858016 (Tex. App. Waco Nov. 18 2009).

895. In defendant's murder case, the court did not err by allowing the State to present the testimony of two witnesses in rebuttal regarding other sexual offenses alleged to have been committed by defendant because the best evidence that the State had to connect defendant to the murder was the fact that defendant had been with the victim until shortly before the murder, the statements of the two seasoned felons, whose credibility had been strongly attacked, and DNA evidence in the vehicle which was not particularly strong. Therefore, the State had a need for the evidence. Additionally, the presentation of the testimony did not take such a great amount of time as to confuse or distract the jury from the main issue of the case. Asberry v. State, 2009 Tex. App. LEXIS 8512 (Tex. App. Waco Nov. 4 2009).

896. In an aggravated sexual assault of a child case, the court properly admitted excerpts from defendant's civil deposition and witness testimony because the defense was theorizing that the victim fabricated the allegations against defendant, and by offering the excerpts where he admitted to performing sexual acts with the witness the State was attempting to show that defendant's claim of fabrication-for-money defense was less probable. The witness's testimony was brief and the court gave a limiting instruction. Slutz v. State, 2009 Tex. App. LEXIS 8326 (Tex. App. Amarillo Oct. 29 2009).

897. Because a roommate's testimony helped to affirmatively link defendant to the cocaine found in their apartment and to establish that defendant possessed it with the intent to deliver, the trial court did not abuse its discretion in admitting the testimony under Tex. R. Evid. 403, 404(b) to show intent, motive, opportunity, and lack of mistake. Hatcher v. State, 2009 Tex. App. LEXIS 8045, 2009 WL 3326758 (Tex. App. Eastland Oct. 15 2009).

898. In defendant's murder case, a witness's testimony that defendant wanted to go kill someone and that he had a gun was not inadmissible evidence of an extraneous offense because defendant's statements and actions made it more probable that he did intend to seriously injure or kill the victim. The fact that he had a gun at the time was prejudicial, but it did not outweigh the probative value of his admission and his action at the time. Walton v. State, 2009 Tex. App. LEXIS 8046, 2009 WL 3326759 (Tex. App. Eastland Oct. 15 2009), *cert. denied*, 131 S. Ct. 512, 178 L. Ed. 2d 379, 2010 U.S. LEXIS 8559 (U.S. 2010).

899. In a murder case, evidence of defendant's drug dealing was properly admitted because, according to a witness, defendant and the victim were rival drug dealers, and proof of motive was important to the State's case because the State was unable to produce an eyewitness who actually saw defendant shoot the victim. The time

spent attempting to prove that defendant sold illegal drugs was not out of proportion to the time required to present such evidence. Koy Timon Moore v. State, 2009 Tex. App. LEXIS 7847 (Tex. App. Houston 14th Dist. Oct. 8 2009).

900. In defendant's sexual assault case, evidence was improperly excluded because there was no allegation that the evidence was self-serving or unreliable. The evidence was relevant to the complaining witness's credibility, and further, the State failed to show how the probative value of the evidence was outweighed by the danger of unfair prejudice. State v. Moreno, 297 S.W.3d 512, 2009 Tex. App. LEXIS 7642 (Tex. App. Houston 14th Dist. Oct. 1 2009).

901. Court did not err by admitting extraneous offense evidence of defendant's assaultive behavior occurring prior to, and after, the sexual assault because the extraneous offense evidence was admissible to show the context in which the criminal act occurred because defendant's assaultive behavior was "blended, or connected" to the sexual assault forming an "indivisible criminal transaction." Moreover, the evidence was helpful to the jury in their determination whether defendant used or exhibited a deadly weapon during the "same criminal episode." Quincy v. State, 304 S.W.3d 489, 2009 Tex. App. LEXIS 7645 (Tex. App. Amarillo Sept. 30 2009).

902. Decision to admit the extraneous-offense evidence was within the zone of reasonable disagreement, because although the testimony regarding the extraneous sexual assaults had the potential to inflame the jury, the evidence was relevant to rebut defendant's theory of fabrication, the testimony was not particularly graphic, nor lengthy, and the trial court instructed the jury to consider the testimony only for a limited purpose. Abrego v. State, 2009 Tex. App. LEXIS 7288, 2009 WL 2959640 (Tex. App. San Antonio Sept. 16 2009).

903. In an aggravated assault case, extraneous conduct of theft of a firearm was properly admitted because the victim testified that defendant had showed him a pistol that defendant had stolen, and it was clear that the evidence was offered to negate defendant's theory that the victim was the first aggressor and establish that defendant intentionally attacked the victim because defendant believed that the victim had "snitched" on him. While the evidence was prejudicial, such prejudice was not unfair. White v. State, 2009 Tex. App. LEXIS 6875, 2009 WL 2914480 (Tex. App. Corpus Christi Aug. 28 2009).

904. In defendant's drug case, the court did not err by allowing the State to introduce evidence regarding defendant's alleged driving while intoxicated stop because testimony regarding the officer's observations of defendant before, during, and after the traffic stop gave the jury information essential to understanding the context and circumstances of defendant's arrest and subsequent charges. The officer described defendant's erratic driving that led to the stop, his physical condition during the stop, and his behavior during the field sobriety tests. Mason v. State, 2009 Tex. App. LEXIS 6705, 2009 WL 2623363 (Tex. App. El Paso Aug. 26 2009).

905. Court properly admitted testimony because the witness's testimony rebutted defendant's theory that he did not intend to commit the alleged offense, and the witness's testimony showed that defendant was involved in a similar crime involving intent to commit a robbery subsequent to kidnapping the victim. Additionally, the evidence was presented in a short and concise manner and did not include unnecessarily graphic details. Dale v. State, 2009 Tex. App. LEXIS 6417, 2009 WL 2525421 (Tex. App. San Antonio Aug. 19 2009).

906. In defendant's manslaughter case, the court properly admitted evidence about an incident in 2004 when defendant pointed a gun at a motorist and pulled the trigger because he testimony of the victim of the deadly conduct was relevant to rebut the defense of accident and mistake in the shooting of the victim. Immediately prior to the testimony, the trial court instructed the jury that the evidence was being admitted for the limited purpose of whether it rebutted the defensive theory of accident. King v. State, 2009 Tex. App. LEXIS 6447, 2009 WL 2517174 (Tex. App. Tyler Aug. 19 2009).

907. Court properly admitted evidence that defendant sexually assaulted his step-daughter twenty-five years earlier because both victims were defendant's step-daughters; both were ten when defendant sexually assaulted them; both were similar in appearance; and defendant abused both of them for several years. The State demonstrated that it needed this evidence to rebut defendant's claim of fabrication, and the time needed to develop the evidence amounted to about 116 pages out of the 426 pages of testimony. Newton v. State, 301 S.W.3d 315, 2009 Tex. App. LEXIS 6534 (Tex. App. Waco Aug. 19 2009).

908. Court did not erroneously admit evidence of an undercover drug buy the day before defendant's warrant was executed because the evidence of the undercover buy served to make a fact of consequence--defendant's care, custody, and control of the contraband with intent to distribute--more or less probable than without the evidence. Further, the court instructed the jury that it could consider the evidence of the undercover drug buy only if it believed beyond a reasonable doubt that defendant committed the offense. Stewart v. State, 2009 Tex. App. LEXIS 6391, 2009 WL 2488504 (Tex. App. Dallas Aug. 17 2009).

909. In defendant's assault on a public servant case, the court properly admitted evidence of his prior arrests because the extraneous-arrest evidence was probative of both how well a character witness knew defendant and the foundation for her characterization of him, the trial court gave a limiting instruction, the extraneous arrests took up only four pages in the 564-page record, the question of whether defendant was threatening the officers was directly related to his intent, and the State did not have other evidence with which to rebut the witness's characterization of defendant's character. Morales v. State, 293 S.W.3d 901, 2009 Tex. App. LEXIS 6241 (Tex. App. Texarkana Aug. 12 2009).

910. In a child sexual assault case, the court properly allowed the victim's brother to testify regarding extraneous offenses against him because the boys were the same age when defendant allegedly sexually abused them, and the manner and location of the abuse alleged by the brothers were identical. A substantial part of defendant's cross examination of the victim was devoted to the attempt to undermine the victim's credibility. Boyd v. State, 2009 Tex. App. LEXIS 5970, 2009 WL 2370730 (Tex. App. Tyler July 31 2009).

911. In a child sexual assault case, the court properly allowed defendant's daughter to testify regarding extraneous offenses against her because the daughter's testimony tended to show that defendant was a sexual predator, and her testimony also had relevance apart from its tendency to show character conformity. It forcefully served to rebut the defense that defendant was the victim of a retaliatory "frame up." Boyd v. State, 2009 Tex. App. LEXIS 5970, 2009 WL 2370730 (Tex. App. Tyler July 31 2009).

912. Court properly admitted defendant's threat to take the officer's gun and kill him because that was probative evidence of defendant's precise intentions at the time he was assaulting the officer. It offered significant proof of defendant's commission of the charged offense of attempting to take a weapon from a peace officer with the intention of harming the officer. Presley v. State, 2009 Tex. App. LEXIS 5613, 2009 WL 2152559 (Tex. App. Dallas July 21 2009).

913. In defendant's aggravated robbery case, the court properly admitted evidence of an extraneous aggravated robbery because the extraneous offense and the instant offense occurred on the same night, within an hour of each other, in the same area, in each offense, two men approached the complainants while each complainant was in his or her car, held the complainants at gunpoint, and shot the complainants. Additionally, the State's need for the evidence was significant because, although one complainant identified defendant as the second perpetrator, the record also showed that the complainant could not see defendant's face because of the bandana. Hackaday v. State, 2009 Tex. App. LEXIS 4501, 2009 WL 1687957 (Tex. App. Houston 1st Dist. June 18 2009).

914. Court properly excluded testimony from third parties establishing defendant's knowledge of the complainant's propensity for violence because a witness testified that she saw the complainant hit her mother multiple times, she and other family members had called the police multiple times regarding the complainant's domestic violence, and defendant told a witness after the shooting that defendant thought the complainant was trying to hurt him. Segovia v. State, 2009 Tex. App. LEXIS 4559, 2009 WL 1678024 (Tex. App. Houston 14th Dist. June 9 2009).

915. In a sexual assault of a child case, evidence that defendant had been subjected to unusual sexual events in his youth and that he related those events to the sexual assault of the child tended to rebut a contention that any contact with the child's penis was simply an accident, and therefore, the evidence was properly admitted. Additionally, the evidence took no additional time to develop initially, and was mentioned again during the trial only when defendant took the stand and denied making some of the statements. Watterson v. State, 2009 Tex. App. LEXIS 2938, 2009 WL 1148751 (Tex. App. Amarillo Apr. 29 2009).

916. In a sexual assault of a child case, evidence of defendant's arrest for possession of child pornography was properly admitted because it explained the reason for the investigation of defendant, the State needed it to adequately describe the circumstances of the charged offenses, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Greene v. State, 287 S.W.3d 277, 2009 Tex. App. LEXIS 2855 (Tex. App. Eastland Apr. 16 2009).

917. Court properly admitted extraneous offense evidence because the extraneous offenses admitted tended to "make the existence" of a fact of consequence "more probable" and established that: defendant's gang was a criminal street gang, defendant had an affiliation with the gang, and defendant committed the instant offense as a member of a criminal street gang. Furthermore, the probative force and the State's need to admit the extraneous offenses outweighed the factors that favored exclusion; the evidence was not only relevant, but essential to the State's burden of proof. Fuentes v. State, 2009 Tex. App. LEXIS 2544, 2009 WL 997508 (Tex. App. Houston 14th Dist. Apr. 14 2009).

918. Trial court did not abuse its discretion by admitting evidence of voice messages defendant left for his former girlfriend in which he threatened to kill her husband because the evidence was properly admitted to prove defendant's knowledge and intent; a reasonable person could view the messages as creating an inference that defendant, knowing he would see the husband that day, intentionally brought the gun with him in order to harm or further threaten the husband. The trial court did not abuse its discretion by overruling defendant's Tex. R. Evid. 403 objections because the messages were left a few hours before defendant drove to the husband's home with a gun in the back of his truck, the trial court specifically directed the State not to delve into the details of the messages, the time the State needed to admit the messages was minimal, and the evidence was an integral part of the State's theory that defendant took the gun with him to further threaten the husband. Rice v. State, 2009 Tex. App. LEXIS 2062, 2009 WL 790178 (Tex. App. Austin Mar. 26 2009).

919. Trial court did not abuse its discretion by admitting the utility knife, the pocket knife, and wire cutters that were found on defendant's person after his arrest into evidence because the items were probative, as they showed defendant's intent as well as the context and circumstances of his actions of entering the victims' garage, and the probative value did not substantially outweigh the risk of unfair prejudice. The State spent relatively little time developing the evidence and the evidence did not have a tendency to suggest a decision on an improper basis. Enloe v. State, 2009 Tex. App. LEXIS 1866 (Tex. App. Corpus Christi Mar. 19 2009).

920. In a murder case, evidence of a prior relationship between defendant and his victim was properly admitted into evidence under Tex. Code Crim. Proc. Ann. art. 38.36(a); moreover, the evidence was not offered to show that defendant acted in conformity with his propensity for violence, in violation of Tex. R. Evid. 404(b). Evidence that defendant had beaten the victim in the past was no more inflammatory or prejudicial than the evidence that he beat the victim on the night of the murder. Chavez v. State, 399 S.W.3d 168, 2009 Tex. App. LEXIS 1840, 2009 WL

700658 (Tex. App. San Antonio Mar. 18 2009).

921. In a murder case, the court properly admitted evidence of a subsequent shooting involving defendant because, in both cases, defendant fired a gun from the driver's side window, once when he was sitting on the passenger side, both incidents occurred in the early morning, and in each instance defendant was responding to a perceived slight to one of his friends, rather than to himself, by conducting a drive-by shooting. Additionally, defendant's alibi defense and challenges to witness credibility raised identity, and in light of the importance of proving the identity of the perpetrator, the State had a strong need for the challenged evidence. Williams v. State, 2009 Tex. App. LEXIS 1725, 2009 WL 585986 (Tex. App. Houston 14th Dist. Mar. 10 2009).

922. In an aggravated sexual assault of a child case, prior bad acts evidence was properly admitted at sentencing because the collective testimony was probative of defendant's ongoing, repeated pattern of abuse, which the witnesses could not individually establish, and the collective testimony assisted the jury in evaluating defendant's character and his moral blameworthiness for punishment purposes. Cintron v. State, 2009 Tex. App. LEXIS 889, 2009 WL 330963 (Tex. App. San Antonio Feb. 11 2009).

923. In a case involving the possession of hydrocodone, the State was properly allowed to introduce extraneous offense evidence under Tex. R. Evid. 404(b) showing that defendant had subsequently been arrested for the same offense because this rebutted defendant's assertions that was unaware that the pills were in his car and that they belonged to someone else. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Smith v. State, 2009 Tex. App. LEXIS 751, 2009 WL 279490 (Tex. App. Fort Worth Feb. 5 2009).

924. In defendant's aggravated sexual assault case, the trial court properly excluded evidence of drug use at the victim's home because the fact that two of the victim's parents' house guests used cocaine in their bathroom had no probative value of a material fact issue in this case. The extraneous offense, the victim's mother's house guests using cocaine in the bathroom, did not tend to make the existence of a material fact -- whether defendant sexually assaulted the victim -- more or less probable. Mendenhall v. State, 2009 Tex. App. LEXIS 22 (Tex. App. Dallas Jan. 6 2009).

925. In a drug case, extraneous offenses regarding other transactions were admissible under Tex. R. Evid. 403 because the probative value of the evidence was not substantially outweighed by its prejudicial effect. The evidence in question tended to show that an undercover officer had the opportunity to observe and listen to defendant on more than one occasion, the trial court instructed the jury to only consider the evidence for purposes of determining motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, the testimony took up only five pages of the trial transcript, and it tended to rebut the insinuation raised by defendant that he had not engaged in drug activity before. Stebbins v. State, 2008 Tex. App. LEXIS 9199 (Tex. App. Amarillo Dec. 10 2008).

926. In defendant's drug case, the trial court did not abuse its discretion by admitting in evidence the shotgun found on the back seat of the vehicle that defendant was driving just before his arrest because the probative value of the shotgun was considerable and significantly necessary to the State's case because it was a link tending to show that defendant knowingly possessed the cocaine. Additionally, the evidence of the shotgun was relevant to prove defendant's knowledge that he possessed narcotics. Harris v. State, 2008 Tex. App. LEXIS 9090 (Tex. App. Fort Worth Dec. 4 2008).

927. In a case in which defendant was convicted of aggravated sexual assault of a child under fourteen years of age, the trial court did not abuse its discretion by concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence of defendant's extraneous acts involving the victim where: (1) the

evidence of physical abuse gave compelling insight as to why the incident at issue transpired and why the victim waited so long to tell anyone; (2) the State demonstrated a considerable need to develop the evidence because the physical abuse evidence corroborated the victim's testimony that he feared for his life and that his fear was the reason he was afraid to tell anyone about the sexual abuse for so many years; (3) presenting the jury with the victim's brief testimony and the short testimony from two later witnesses concerning the physical abuse did not lead to a decision on an improper basis; (4) the evidence did not have a tendency to confuse or distract the jury from the main issues; (5) the evidence did not have a tendency to be given undue weight by the jury because, even though the abuse details were horrific, the evidence went straight to the important issue of why the victim waited six years to speak out by explaining the basis for his belief that defendant might kill him; and (6) developing the evidence did not consume an inordinate amount of time. Under the circumstances, the Tex. R. Evid. 403 factors weighed in favor of the trial court admitting the evidence of extraneous offenses under Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37. Gamble v. State, 2008 Tex. App. LEXIS 8914 (Tex. App. Fort Worth Nov. 26 2008).

928. In defendant's aggravated sexual assault of a child case, the trial court did not abuse its discretion by permitting the State to question him regarding a statutory rape charge filed against him in 1983 because the statutory rape charge and testimony were relevant rebuttal evidence to show the jury that the victim's parents were not motivated by greed or money in making the allegations against defendant. Additionally, State did not elicit detailed accounts of the offenses, but only asked a few questions in order to show similarities to the charged offenses, and other than the details and circumstances of the charged offenses, the State had no other evidence to rebut the defensive theory. Martin v. State, 2008 Tex. App. LEXIS 8437 (Tex. App. Fort Worth Nov. 6, 2008).

929. In an arson and drug case, the court properly admitted evidence of defendant purchase of pseudoephedrine because defendant's purchases during the four months leading up to the fire were probative evidence of defendant's intent to unlawfully manufacture methamphetamine. The State needed that probative evidence to demonstrate a required element of the crime, the admission of the evidence was not repetitious, and it did not take an inordinate amount of time to present. Stone v. State, 2008 Tex. App. LEXIS 6738 (Tex. App. Tyler Sept. 10, 2008).

930. In a case involving kidnapping and aggravated robbery, testimony about defendant's drug use in the days prior to the crime was admitted under Tex. R. Evid. 404(b) because it was relevant to show the victim's state of mind; defendant had contended that no crimes had been committed against the victim because she acted voluntarily. The probative value of the evidence was not substantially outweighed by the dangers of unfair prejudice since the extraneous offense evidence made facts of consequence more or less probable, the testimony was unlikely to irrationally affect the jury, the time spent on the issue was very brief, and the testimony was necessary to rebut a defensive theory; moreover, no limiting instruction was required because the drug use and the crimes involved in the case at issue were not similar. Padilla v. State, 2008 Tex. App. LEXIS 6356 (Tex. App. Corpus Christi Aug. 21 2008).

931. In a child pornography case, the trial court properly admitted evidence that defendant posted child pornography to an internet group because the evidence was probative of defendant's intent to view and store child pornography on his computer and to explain why his house was searched for child pornography. Furthermore, the State's need for the evidence was moderate because it established the reason why defendant's house was searched, and the presentation did not consume an inordinate amount of time. Perry v. State, 2008 Tex. App. LEXIS 6446 (Tex. App. Fort Worth Aug. 21, 2008).

932. In a murder case, the court properly admitted prior offenses because the State offered the evidence of another death and theft of a ring to show that even if both the victim's daughter and defendant had equal access to insulin, only defendant could be connected to a modus operandi; that particular modus operandi was to murder elderly patients via insulin overdose and steal from them. The State's need for the evidence was significant because it was the only evidence available to the State to rebut the defensive theory that the victim's daughter was

a more plausible source of the insulin than defendant. Hannah v. State, 2008 Tex. App. LEXIS 6361 (Tex. App. Corpus Christi Aug. 21, 2008).

933. Items seized at the scene of a house fire were relevant under Tex. R. Evid 401, 402, 403, 404(b) to show that the fire started as a result of the cooking of methamphetamine on the stove and that the debris found in the burned house pertained to the use or manufacture of illegal drugs; defendant failed to establish that the trial court abused its discretion or that the determination fell outside of the zone of reasonable disagreement. Dentler v. State, 2008 Tex. App. LEXIS 5708 (Tex. App. Eastland July 31 2008).

934. In defendant's aggravated robbery case, the court properly admitted evidence of a third attempted aggravated robbery that occurred on the same night as the other two robberies because, in the two robberies and third attempted robbery, the perpetrator approached the complainants with a gun, at night in a parking lot, and with a ski mask covering his face, and all three offenses occurred within a few hours of each other. Carson v. State, 2008 Tex. App. LEXIS 3091 (Tex. App. Fort Worth Apr. 24 2008).

935. Court properly admitted evidence of defendant's statement of gang affiliation made to a deputy at the time of his arrest because defendant did not simply state that the deputy should watch his back but told him that he should watch his back because defendant ran with the Mexican Mafia; thus, defendant used the Mexican Mafia reference to give more weight to his threat; additionally, the State did not introduce any other evidence about defendant's gang affiliation or the activities of the Mexican Mafia and it did not mention defendant's claimed gang affiliation again in the presence of the jury. Bejarano v. State, 2008 Tex. App. LEXIS 2762 (Tex. App. El Paso Apr. 17 2008).

936. In defendant's murder case, a trooper was properly allowed to testify concerning defendant's apparent false theft report because it was consistent with the State's theory that it was defendant's addiction to gambling that was at the heart of the money problems that essentially poisoned the relationship between defendant and the victim, his wife; part of the State's theory was that the victim was murdered when she threatened to quit her job and thus, cut off any further support of defendant's gambling. Stafford v. State, 248 S.W.3d 400, 2008 Tex. App. LEXIS 1280 (Tex. App. Beaumont 2008).

937. In defendant's robbery case, the State properly presented evidence of an extraneous robbery because the offenses occurred within three miles of one another and within a six-day time period, both took place late in the morning in large retail parking lots, and both acts were perpetrated quickly, snatching purses from unaccompanied females walking or standing in the parking lots; additionally, the testimony rebutted defendant's theories of alibi and that one victim's brief opportunity to view the perpetrator led to a mistaken identification; therefore, the probative value of the evidence was not substantially outweighed by its prejudicial effect. Evans v. State, 2008 Tex. App. LEXIS 477 (Tex. App. Houston 14th Dist. Jan. 22 2008).

938. In defendant's murder case, the court properly allowed the State to reveal defendant's tattoos because the evidence was relevant to support the State's theory that defendant was a gang member who murdered rival gang members in retaliation; in addition, given the other evidence indicating defendant's admitted gang membership, the evidence was not unfairly prejudicial. Reyes v. State, 2008 Tex. App. LEXIS 293 (Tex. App. San Antonio Jan. 16 2008).

939. Admission of evidence regarding defendant's use of drugs and alcohol, having sex with an older man, running away from home, and being a liar was properly admitted because she chose to marry an older man and, thus, had sex with an older man, she ran away from home, and she put her maturity, sophistication, and independence at issue by claiming she was under her husband's control; further, the fact that defendant lied about being pregnant, which "necessitated" a marriage, went to her ability to tell the truth; the use of drugs went to defendant's then-existing state of mind. Vega v. State, 255 S.W.3d 87, 2007 Tex. App. LEXIS 6315 (Tex. App.

Corpus Christi 2007).

940. In defendant's trial for aggravated assault, when the State elicited evidence of defendant's prior conviction for aggravated assault, a proper objection should have been made under Tex. R. Evid. 404 and Tex. R. Evid. 403; even if error existed, and it was preserved, error was harmless because introduction of evidence was not prejudicial to defendant. Moore v. State, 2007 Tex. App. LEXIS 6354 (Tex. App. Austin Aug. 9 2007).

941. At defendant's capital murder trial, the trial court properly admitted evidence pursuant to Tex. R. Evid. 404(b) that defendant possessed a semi-automatic weapon the week before the offense where the evidence showed that the victim was shot seven times by a semi-automatic weapon, and there was also ample evidence that defendant shot the victim. The evidence was not more prejudicial than probative because the State did not impute defendant's possession of the semi-automatic weapon to be a crime, the State did not imply that defendant was generally a criminal because he possessed the weapon, and there was no indication that the weapon might have been used in another offense. Johnson v. State, 2007 Tex. App. LEXIS 6256 (Tex. App. Dallas Aug. 8 2007).

942. Trial court properly admitted evidence of a protective order defendant's wife had obtained against him during defendant's capital murder trial because: (1) the State was entitled to prove intent through evidence of other crimes, wrongs, or acts as defendant's cross-examination of the State's witnesses brought his intent into question as a defensive theory; (2) because the detectives found the protective order in defendant's truck, its introduction was relevant to help the jury understand how the circumstances surrounding the charged crime fit together; and (3) the protective order was highly probative as the wife secured it a few months before her death and a copy of the order was found in defendant's truck. Price v. State, 245 S.W.3d 532, 2007 Tex. App. LEXIS 5294 (Tex. App. Houston 1st Dist. 2007).

943. Evidence of gang affiliation was properly admitted as relevant under Tex. R. Evid. 401 and Tex. R. Evid. 402 since it was offered to show a motive for a murder; the evidence was not limited under Tex. R. Evid. 404(b), and the probative value substantially outweighed the danger of unfair prejudice. Rodrigues v. State, 2007 Tex. App. LEXIS 4441 (Tex. App. Houston 14th Dist. June 7 2007).

944. In defendant's capital murder case, admission of evidence of defendant's "hidden pregnancies" and the abandonment of another infant were properly admitted because the State argued that the subsequent hidden pregnancy and abandonment of the infant showed that defendant "was keeping the children fathered by one man, and discarding the children fathered by other men," thus demonstrating her motive and her intent to kill the child. Berry v. State, 233 S.W.3d 847, 2007 Tex. Crim. App. LEXIS 651 (Tex. Crim. App. 2007).

945. In a case where defendant murdered her husband, under Tex. R. Evid. 404(b), the trial court did not abuse its discretion in admitting prior bad acts evidence that defendant twice shot at her former husband because the evidence was relevant aside from its tendency to show that she acted in conformity with bad character since (1) defendant put the shooter's identity at issue by undermining the evidence against her and advancing the theory that the victim committed suicide; (2) the evidence went to the very fundamental fact of consequence, whether there was an act of murder; and (3) the evidence was relevant to rebut defendant's claim that the victim shot himself; also, under Tex. R. Evid. 403, the evidence was admissible because the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. Scott v. State, 2007 Tex. App. LEXIS 3055 (Tex. App. Texarkana Apr. 20 2007).

946. Defendant argued that the trial court erred by allowing evidence of an extraneous offense before the jury; the evidence of which defendant complained was the admission of his statements in the videotaped interview that his daughter had threatened to report him to the authorities because he "scratched her little girl's butt;" defendant could complain on appeal that he should have been granted a mistrial due to the improper admission of the evidence of

an extraneous offense; however, the appellate court, having decided all of the Mosley factors adversely to defendant, overruled the issue. Badeaux v. State, 2007 Tex. App. LEXIS 2710 (Tex. App. Beaumont Apr. 4 2007).

947. In an aggravated sexual assault case, the court properly allowed a neighbor's testimony that on two occasions she caught defendant looking into her daughters' bedrooms while the girls were undressing because it demonstrated that defendant displayed an inappropriate sexual interest in teenage girls, thus rebutting the defensive theory that he was the victim of a frame-up; in addition, the evidence was probative of defendant's intent to commit the sexual offenses against the victims by showing that he had a similar pattern of gratifying his sexual desires through watching the neighbor's daughters undress, the evidence, which did not involve any physical touching, was not worse than the charged offenses and was not graphic, and the State's need for the evidence was significant. Mayfield v. State, 2007 Tex. App. LEXIS 2545 (Tex. App. Fort Worth Mar. 29 2007).

948. In a sexual assault case, the court properly admitted evidence that defendant sexually abused his stepdaughter because if the jury believed that defendant committed the extraneous offenses, that made it more probable that the victim was not fabricating her allegations against defendant; although the evidence did not tend to disprove fabrication directly, it tended circumstantially to prove that the victim did not fabricate her allegations, both parties argued to the jury that it could not consider the evidence apart from those circumstances and for that purpose, and the State's presentation of the testimony of which defendant complained was brief. Newton v. State, 2007 Tex. App. LEXIS 2477 (Tex. App. Waco Mar. 28 2007).

949. In defendant's capital murder case, the court properly admitted extraneous offense evidence consisting of defendant's 1979 statement in which he admitted setting a fire that caused a person's death because there were no eyewitnesses, defendant had joined in placing identity at issue by claiming that another person who had quarreled with his brother was the perpetrator, and the 1979 offense was highly compelling evidence that made defendant's identity challenge much less probable. Powell v. State, 2007 Tex. App. LEXIS 2103 (Tex. App. Houston 1st Dist. Mar. 15 2007).

950. Trial court did not abuse its discretion by admitting evidence that police found a pistol in the trunk of his car when they arrested him because: (1) the extraneous offense in question, being a felon in possession of a firearm, was never presented to the jury; (2) the victim's description of the pistols used during the robbery general matched the pistol found in defendant's vehicle; (3) the weapon was found in a vehicle that closely matched the victim's description of a vehicle on the scene of the robbery; and (4) admission of the gun did not unfairly prejudice defendant. Young v. State, 2006 Tex. App. LEXIS 11371 (Tex. App. Houston 14th Dist. Dec. 21 2006).

951. Admission of two prior similar acts by defendant into evidence did not violate Tex. R. Evid. 403 or 404(b), and defendant's convictions of sexual assault and impersonation of a public servant should not have been reversed, because the trial court testimony of the complainant and the two witnesses showed that the three incidents all occurred in mid-1997 and were similar in several significant respects. Page v. State, 213 S.W.3d 332, 2006 Tex. Crim. App. LEXIS 2446 (Tex. Crim. App. 2006).

952. Extraneous offense testimony was relevant under Tex. R. Evid. 401 to the issue of identity and was admissible to prove that defendant posed as a police officer and sexually assaulted a prostitute; the facts of the charged offense and the extraneous offenses showed a pattern of conduct sufficiently distinctive to constitute a signature. Page v. State, 2006 Tex. Crim. App. LEXIS 2521 (Dec. 20, 2006).

953. Trial court did not err by admitting evidence relating to the search of the girlfriend and the discovery of the crack pipe because under Tex. R. Evid. 404(b) because the evidence was relevant to the issue of whether the contraband and drug paraphernalia were present in the house and tended to prove an affirmative link between defendant and the methadone, and therefore the evidence was relevant to show defendant's knowledge or intent to

possess the methadone. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because it had high probative value in affirmatively linking defendant to the methadone. Davis v. State, 2006 Tex. Crim. App. LEXIS 2526 (Tex. Crim. App. Dec. 14, 2006).

954. In a criminal trial for aggravated robbery, the trial court did not err by admitting extraneous offense evidence of a previous robbery committed by defendant; the probativeness factor of the balancing test weighed in favor of admissibility of the extraneous offense evidence, because the robbery victim was unable to identify the robber in a photo lineup. Hicks v. State, 2006 Tex. App. LEXIS 10375 (Tex. App. Dallas Dec. 4 2006).

955. Pursuant to Tex. R. Evid. 403, the probative value of defendant's prior conviction was not substantially outweighed by a danger of unfair prejudice because (1) the prior conviction was probative to rebut defendant's contention that the complainant's injuries resulted from an accident, not an assault; (2) any chance that the jury would be impressed in an irrational way was minimized by the trial court's limiting instructions, both orally and in the jury charge, to consider the prior conviction only for determining an absence of mistake or accident; (3) the evidence of the prior conviction was developed quickly and no further inquiry was made after it was established; and (4) the prior conviction was needed because defendant and the complainant were the only two eyewitnesses to the assault, and whether the complainant's injuries were caused by an accident or an assault was a pivotal fact issue. Carranza v. State, 2006 Tex. App. LEXIS 10137 (Tex. App. Houston 14th Dist. Nov. 28 2006).

956. Trial court did not err by admitting evidence of defendant's association with two white supremacy groups on the ground that the State failed to provide defendant with notice under Tex. R. Evid. 404 because defendant failed to explain how the status of being a member of those groups constituted evidence of other crimes, wrongs, or acts; defendant failed to preserve for review his claim that the evidence was inadmissible under Tex. R. Evid. 403 because he did not renew his objection during a detective's testimony regarding the evidence. Jaynes v. State, 216 S.W.3d 839, 2006 Tex. App. LEXIS 10124 (Tex. App. Corpus Christi 2006).

957. Other child's testimony regarding defendant's sexual assault of her, as direct evidence, had great probative value and provided strong and compelling evidence to establish (1) opportunity and (2) state of mind; also, there were significant similarities and circumstances between the instant offense against the victim and the conduct the other child described in her testimony; thus, the trial court properly conducted the Tex. R. Evid. 403 balancing test and did not abuse its discretion in concluding that the probative value of the extraneous offense evidence under Tex. R. Evid. 404(b) was not substantially outweighed by any prejudicial effect. Morales v. State, 222 S.W.3d 134, 2006 Tex. App. LEXIS 9771 (Tex. App. Corpus Christi 2006), *corrected by*--S.W.3d--, 2006 Tex. App. LEXIS 11350 (Tex. App. -- Corpus Christi 2006.

958. In defendant's robbery and drug possession case, a court properly admitted evidence of a "drug ledger" seized at defendant's apartment because, while searching the apartment for evidence related to drug transactions and defendant's possession offense, the officers discovered identification documents taken from the robbery victims, the drug ledger evidence assisted the jury in understanding how the officers linked defendant to the robberies and the circumstances under which he possessed cocaine, and the drug ledger was admissible as res gestae of defendant's offenses. Villegas v. State, 2006 Tex. App. LEXIS 9334 (Tex. App. Dallas Oct. 27 2006).

959. In defendant's murder case, testimony that defendant had attempted to poison the victim on a prior occasion was admissible because that evidence made more probable the fact that defendant sought to have the victim killed; the State's need for the evidence was significant because it was the sole evidence that defendant had made any direct attempts to kill the victim herself. Cooper v. State, 2006 Tex. App. LEXIS 9010 (Tex. App. Houston 1st Dist. Oct. 19 2006).

960. In defendant's assault case, extraneous offense evidence regarding defendant's having cut a witness with a knife on a prior occasion was properly admitted because, under defendant's self defense theory, his intent in stabbing the victim was to defend himself and the State's theory was that defendant was the aggressor and his intent was not defensive; in addition, the evidence was more probative than prejudicial; the time the prosecution devoted to developing the evidence did not present a danger of unfair prejudice, confusion of the issues, or undue delay. Salazar v. State, 222 S.W.3d 10, 2006 Tex. App. LEXIS 8382 (Tex. App. Amarillo 2006).

961. Trial court did not abuse its discretion in admitting evidence of extraneous offenses during the punishment phase because defendant committed the current drug offense on May 17, 2002 and the State presented evidence of a prior conviction occurring in 1997 and presented evidence of multiple unadjudicated offenses occurring after defendant committed the current offense, six of which were similar to the instant offense in that they were drug related offenses; Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) established that the extraneous offenses were relevant to the assessment of defendant's punishment. Hale v. State, 2006 Tex. App. LEXIS 7987 (Tex. App. Eastland Sept. 7 2006).

962. It was not an error for the trial court to allow the State to present evidence that defendant and the victim were involved in a transaction in which she took money from defendant for a product without providing the produce because it was so intertwined with the aggravated assault that the jury's understanding of the offense would have been obscured without it; further, admission of the product transaction evidence tended to establish some evidentiary fact, such as motive, opportunity, and preparation; the evidence was not more prejudicial than probative because: (1) the evidence was necessary for the jury to understand defendant's actions and motive; (2) the trial court limited reference to the drug transaction by only allowing the State to say a transaction to purchase a product; and (3) the evidence was important to the prosecutors' contention that defendant intentionally committed the aggravated assault and that said assault stemmed from the transaction gone bad. Romero v. State, 2006 Tex. App. LEXIS 7552 (Tex. App. El Paso Aug. 24 2006).

963. During defendant's aggravated kidnapping trial, the trial court did not err in admitting evidence of his generalized assaultive conduct, an assault against another man, and an unadjudicated aggravated assault against the victim because defendant's extraneous conduct in fighting men that he saw with the victim, slapping the victim's male friend, and choking the victim, pointing a gun at her, and dragging her away were clearly relevant to show defendant's motive, intent, plan, and absence of mistake or accident; further, while the extraneous acts were "prejudicial" in the sense that they showed defendant's motive, intent, and plan for kidnapping the victim, their probative value was not substantially outweighed by the danger of unfair prejudice. Parker v. State, 2006 Tex. App. LEXIS 6649 (Tex. App. Dallas July 27 2006).

964. Court properly denied defendant's motion for a mistrial because an officer's testimony regarding an outstanding warrant for possession of a controlled substance was admissible as transactional contextual evidence, it explained defendant's arrest, and it explained the necessary events of the transaction; the testimony was brief and neither the prosecutor nor the officer emphasized the warrant other than to explain the necessary events of the transaction. Mitchell v. State, 2006 Tex. App. LEXIS 6590 (Tex. App. Beaumont July 26 2006).

965. In an injury to a child case, evidence that defendant broke a coffee table because he was frustrated about his argument with the child's mother over breast feeding the child was properly admitted because, considering the violent nature of the crime, the evidence was critical to the State's case; in addition, the evidence was proper under Tex. R. Evid. 403 because it took only eight pages of the guilt/innocence record, which consisted of over 1,000 pages, and the State presented no other evidence of defendant's temperament for the time period immediately preceding the child's death. Lopez v. State, 200 S.W.3d 246, 2006 Tex. App. LEXIS 9199 (Tex. App. Houston 14th Dist. 2006).

966. In an aggravated assault case, a court properly admitted evidence of another collision caused by defendant because defendant claimed his reckless driving was the product of intoxication, failure to wear glasses, and mechanical problems with his vehicle; the motorcycle accident evidence, when combined with the other evidence admitted at trial, rebutted that defense by showing a pattern of behavior during the course of what was essentially a single event or transaction. Gattis v. State, 2006 Tex. App. LEXIS 5668 (Tex. App. Austin June 29 2006).

967. In defendant's murder case, a court properly allowed evidence that defendant had pushed the victim out of the car and left her on the road because the evidence was probative of their relationship, and was necessary to tie together the events beginning with their separation, including the subject matter of their counseling sessions, which ultimately explained why the victim filed for divorce; finally, any potential prejudice was diminished by the trial court's limiting instruction and instruction to disregard. Garcia v. State, 201 S.W.3d 695, 2006 Tex. Crim. App. LEXIS 1284 (Tex. Crim. App. 2006).

968. During defendant's murder trial, the State questioned him about two extraneous offenses and defense counsel did not object under Tex. R. Evid. 403, Tex. R. Evid. 404, or Tex. R. Evid. 609 regarding either offense; in accordance with Tex. R. App. P. 33.1, defendant could not raise these issues on appeal. Cotton v. State, 2006 Tex. App. LEXIS 5445 (Tex. App. Houston 14th Dist. June 27 2006).

969. Trial court did not abuse its discretion under Tex. R. Evid. 403 by admitting testimony from three of the victim's relatives who claimed that defendant had also abused them to rebut defendant's theory of lack of opportunity given the whole record, including defendant's opening statement claiming that he was never alone with the victim, testimony by defendant's mother that he was never alone with the victim, and testimony of defendant's mother and his half-brother that defendant was out of the state for a significant amount of time while the victim was living at defendant's mother's residence; the fact that the testimony was inflammatory did not mean that it left an irrational and indelible impression on the jury, as the trial court explicitly instructed the jury that it could only consider the evidence for the allowable purposes listed in Tex. R. Evid. 404(b). Tobar v. State, 2006 Tex. App. LEXIS 5161 (Tex. App. Austin June 16 2006).

970. In defendant's murder case, evidence of the history of physical abuse in the relationship between defendant and the victim was relevant and properly admitted; the extraneous-offense evidence rebutted defendant's claim of accident and showed that he intended to cause death, serious bodily injury, or bodily injury; in addition, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Brown v. State, 2006 Tex. App. LEXIS 5163 (Tex. App. Austin June 16 2006).

971. Trial court's admission of an officer's testimony regarding extraneous "narcotics transactions" in appellant's trial for possession of a controlled substance (heroin) with the intent to deliver was not reversible error because the testimony was admissible to show the context in which the criminal act occurred, and was relevant to show that appellant had the intent to deliver. Moreno v. State, 195 S.W.3d 321, 2006 Tex. App. LEXIS 4393 (Tex. App. Houston 14th Dist. 2006).

972. Evidence that defendant dismembered a murder victim's body was properly admitted where it was relevant to prove his consciousness of guilt with respect to the victim's murder and was not unfairly prejudicial because the dismemberment showed an attempt to conceal evidence of the murder and avoid detection, and the State needed evidence that defendant dismembered the body to prove that defendant, not his mother, murdered the victim; although the facts of dismemberment were generally gruesome and would tend to leave an emotional impression on the jury, that factor was not compelling enough to outweigh the other factors. Williams v. State, 2006 Tex. App. LEXIS 4251 (Tex. App. Houston 14th Dist. May 11 2006).

973. State argued that the burn evidence, which constituted other crimes evidence under Tex. R. Evid. 404(b), was admissible because in defendant's written statements, he stated that any injury that he inflicted on the victim, a 16-month old child, the night of her fatal injury was accidental; the burn evidence was relevant to show defendant's state of mind and his relationship with the victim and rebutted his claim of the accidental nature of the injury that resulted in her death; further, the testimony and photograph of the burn was not so graphic that it would have impressed the jury in an irrational, yet indelible way, and the State had a compelling need for the evidence because its case was entirely circumstantial, and defendant contested both his identity as the perpetrator and his state of mind. Montgomery v. State, 198 S.W.3d 67, 2006 Tex. App. LEXIS 3377 (Tex. App. Fort Worth 2006).

974. In a trial for sexual assault of a child, the victim's testimony regarding prior incidents of abuse was properly admitted under Tex. Code Crim. Proc. art. 38.37 and Tex. R. Evid. 403, 404, 405. Because defendant had lived with the victim's family for five years, the extraneous acts evidence helped to support the victim's credibility by placing the events in context. Allred v. State, 2006 Tex. App. LEXIS 3118 (Tex. App. Eastland Apr. 20 2006).

975. Trial court's decision to allow evidence of defendant's prior assault of the victim was not error because the trial court reasonably could have found the evidence to be probative that the victim's injury for which he was being tried was not accidental. Defendant did not show that the trial court abused its discretion in its balancing of the probative value and potential for prejudice of evidence of the prior incident because evidence of the prior incident did not distract the jury from its proper consideration of the events for which he was on trial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

976. In a trial for sexual assault of a child, the victim's testimony regarding prior incidents of abuse was properly admitted; because defendant had lived with the victim's family for five years, the extraneous acts evidence helped to support the victim's credibility by placing the events in context. Allred v. State, 2006 Tex. App. LEXIS 3118 (Tex. App. Eastland Apr. 20 2006).

977. Defendant failed to properly object to evidence that was admitted at trial concerning unindicted aggravated robberies, even though he filed a motion in limine, because he failed to make objections under Tex. R. Evid. 404(b) when the evidence was admitted at trial. Ashford v. State, 2006 Tex. App. LEXIS 2770 (Tex. App. Fort Worth Apr. 6 2006).

978. Defendant failed to properly object to the trial court's admission of a bulletproof vest because when the vest was admitted, he objected on the ground that it was not relevant; therefore he did not preserve for appellate review on the ground that the vest was admitted in violation of Tex. R. Evid. 404(b). Ashford v. State, 2006 Tex. App. LEXIS 2770 (Tex. App. Fort Worth Apr. 6 2006).

979. Court of appeals failed to properly defer to a trial court's decision where the trial court was within its discretion to hold that the probative value of evidence of a handgun and of defendant's parole status was not substantially outweighed by the danger of unfair prejudice, given that the jury was not informed of the crime for which defendant was on parole, that the strength or weakness of the handgun's connection to defendant reflected equally on the issues of probative value and prejudice, and that there was reason to believe that the State had a significant need for the evidence. Powell v. State, 189 S.W.3d 285, 2006 Tex. Crim. App. LEXIS 681 (Tex. Crim. App. 2006).

980. In defendant's perjury case, the court did not err by admitting evidence of his wife's bad acts and crimes where defendant relied on a report he obtained from his wife and submitted it as proof that he did not owe money to the apartment complex, he subsequently reaffirmed those facts in his sworn statement, the contested evidence tended to establish that the wife altered the report, and in order to prove that defendant could not have reasonably believed that the document was genuine, the State offered evidence of the wife's criminal history which included

theft and forgery. Robinson v. State, 2006 Tex. App. LEXIS 2189 (Tex. App. El Paso Mar. 23 2006).

981. During defendant's trial for being a felon in possession of a firearm, the trial court did not err in allowing a witness to testify regarding defendant's prior drug dealing because the risk of convicting defendant solely on the fact that she was a drug dealer did not substantially outweigh the probative value of establishing her state of mind. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

982. In defendant's drug case, a court did not err by admitting an officer's testimony regarding his observations of defendant over a period of several days during which the officer saw defendant complete what appeared to be a hand-to-hand transaction involving narcotics because that action was part of the same criminal transaction that led to defendant's arrest; defendant's extraneous behavior was admissible to show the context in which the criminal act occurred and was relevant to show that he had the intent to deliver the drugs. Moreno v. State, 2006 Tex. App. LEXIS 1403 (Tex. App. Houston 14th Dist. Feb. 21 2006), opinion withdrawn by, substituted opinion at 195 S.W.3d 321, 2006 Tex. App. LEXIS 4393 (Tex. App. Houston 14th Dist. 2006).

983. Trial court did not err by allowing evidence pertaining to defendant's sexual assault of one of the children he killed in a house fire because it was offered primarily to show defendant's motive; part of the State's theory was that defendant committed the murders because he was very worried about the pending sexual assault charges, he did not want to go to jail, and was angry at the child's mother for filing the charges and having him removed from the house. The evidence was important to understanding the context of and motivation behind defendant's actions, and was not so embellished or detailed as to become a diversion from the issues presented; the evidence was also highly probative of the chain of events that drove defendant's actions. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

984. In defendant's indecency with a child case, although the extraneous offense evidence of other sexual offenses against young boys was inadmissible to confront false-impression evidence, the State's alternate reason, that the extraneous offense evidence was admissible to rebut defensive theories propounded by defendant, was a proper basis for the admission of the extraneous offense evidence. Blackwell v. State, 193 S.W.3d 1, 2006 Tex. App. LEXIS 903 (Tex. App. Houston 1st Dist. 2006).

985. In defendant's indecency with a child case, defendant's extraneous sexual offenses were admissible to rebut the defensive theory that he lacked the intent to have sexual contact with the victim because, by asserting that defendant was a regular parent who did a good job of raising two other young boys, he impliedly suggested that he lacked the intent to have sexual contact with the victim. Blackwell v. State, 193 S.W.3d 1, 2006 Tex. App. LEXIS 903 (Tex. App. Houston 1st Dist. 2006).

986. In a criminal prosecution for capital murder, the trial court did not err by allowing the prosecutor's questions regarding the defendant's possible exchange of sexual favors for forgiveness of a drug debt; the evidence was admissible to show the relationship between defendant and the victim. Whitmire v. State, 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

987. In defendant's capital murder case, a court properly allowed a police officer to testify about the nature, structure, and activities of criminal street gangs generally and a specific gang because defendant himself asserted that he was acting under orders from his gang's leader, and therefore, the officer's testimony about gang hierarchy and promotion was not just relevant but essential to put defendant's statement and the gang-related testimony of other witnesses into context. His testimony suggested a motive for the victim's slaying that would have otherwise remained hidden. Bradford v. State, 178 S.W.3d 875, 2005 Tex. App. LEXIS 9214 (Tex. App. Fort Worth 2005).

988. In an insurance fraud case, a court did not err by admitting extraneous offense evidence relating to defendant's car being involved in a homicide where the evidence that a witness delivered the car to storage two days before it allegedly was stolen, and reported that defendant told him to destroy the car to cover up evidence of another crime, was helpful to the jury's understanding of defendant's false statements to the insurer that the car was stolen. In addition, the probative value was compelling, as the evidence related to defendant's motive for claiming the vehicle to be stolen in submitting her insurance claim, proof of one of the elements of insurance fraud. Nguyen v. State, 177 S.W.3d 659, 2005 Tex. App. LEXIS 7289 (Tex. App. Houston 1st Dist. 2005).

989. In defendant's trial for attempted sexual assault, the trial court did not err in admitting evidence of extraneous offenses pursuant to Tex. R. Evid. 404(b) and 403 because defense counsel's cross-examination of the victim attempted to impeach her identification of defendant and raised the issue of identity, therefore extraneous offense evidence was admissible under Rule 404(b) for the purpose of proving identity. Also, there were numerous similarities between the extraneous offenses and the charged offense, and the State had no other evidence to establish identity, therefore it had a compelling need to present the extraneous offense evidence. Williams v. State, 2005 Tex. App. LEXIS 6824 (Tex. App. El Paso Aug. 23 2005).

990. In a murder case, court did not err in allowing the State to present evidence of defendant's drug transaction with the victim shortly before the murder because the drug transaction with the victim was relevant to show the motive for the victim's murder, rather than mere conformity with character, there was not an overwhelming potential for the evidence to impress the jury in an irrational way, and the State needed little time to develop the evidence in the course of putting on the witness's testimony. Nickleson v. State, 2005 Tex. App. LEXIS 6658 (Tex. App. Corpus Christi Aug. 18 2005).

991. In a drug and weapons possession case, evidence that defendant lived at a house in which drugs were being manufactured was admissible to show why a police officer was watching defendant's house; thus, under the circumstances, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Summerville v. State, 2005 Tex. App. LEXIS 6773 (Tex. App. Fort Worth Aug. 18 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 9715 (Tex. App. Fort Worth Nov. 15, 2005).

992. In a trial for robbery, extraneous offense evidence was properly admitted under Tex. R. Evid. 404(b) and 403 because the similarity in the offenses made the evidence compelling as to identity. In both robberies, the assailants drove into an apartment complex parking lot, wore shirts bearing Houston police insignia, claimed to be police officers, and searched Hispanic male victims; money was taken in both robberies with a silver pistol. Casique v. State, 2005 Tex. App. LEXIS 6517 (Tex. App. El Paso Aug. 16 2005).

993. Extraneous offense evidence was properly admitted under Tex. R. Evid. 404(b) and 403 to refute defendant's alibi. Casique v. State, 2005 Tex. App. LEXIS 6517 (Tex. App. El Paso Aug. 16 2005).

994. Trial court did not err in excluding evidence regarding other acts of sexual harassment allegedly committed by a former employee's managers where all of the additional acts occurred after the employee's discharge. The excluded evidence would have had negligible relevance to the question of the workplace environment during the employee's tenure and would have been substantially more prejudicial than probative under Tex. R. Evid. 403. Mackey v. U.P. Enters., 2005 Tex. App. LEXIS 6044 (Tex. App. Tyler July 29 2005).

995. Probative value of the extraneous evidence of an assault offense that defendant allegedly committed against his wife after her aggravated kidnapping and six days before his trial on that charge was not substantially outweighed by the dangers of unfair prejudice where the evidence was highly probative for the State because defendant's conduct and the injuries his wife received during the extraneous assault were sufficiently similar to the charged offense to at least weaken defendant's defensive theory, and where the wife's testimony was unlikely to

irrationally affect the jury because the cumulative testimony was not particularly descriptive, nor was the wife unduly anguished by defendant's actions. Furthermore, the time spent developing the wife's testimony was fairly brief, and evidence of the extraneous offense related to the disputed issue of defendant's intent because of its similarity to the charged offense. Simoneaux v. State, 2005 Tex. App. LEXIS 5628 (Tex. App. Tyler July 20 2005).

996. Court did not err by admitting evidence concerning the circumstances of a prior sexual assault conviction where defendant encountered the victims in the parking lot of their residences, waited for the victims to return to their rooms, approached them under the guise of needing help, and made advances toward raping them but ejaculated before penetration. Because intent was a material element of the offense on which the State carried the burden of proof, the probative value of the witness's testimony was high and was not overcome by the danger of unfair prejudice. Fields v. State, 2005 Tex. App. LEXIS 5494 (Tex. App. Austin July 14 2005).

997. Although the testimony of the teenage cousin of defendant's girlfriend of an extraneous sexual assault during defendant's trial for sexually assaulting a minor, his teenage daughter, carried emotional weight and the danger of impressing the jury in an indelible way, the trial court's decision to admit the extraneous offense evidence was within the zone of reasonable disagreement because: (1) the cousin's testimony had similarities to the victim's; (2) the cousin's testimony was not especially graphic, and the jury was correctly instructed to consider it only for a limited purpose; and (3) the cousin's direct examination was not unduly lengthy. Furthermore, because defendant strongly contested that the sexual assault actually occurred, the trial court reasonably could have concluded that the State demonstrated that it needed the cousin's testimony to counter lengthy testimony elicited by defendant, during both direct and cross-examinations of several witnesses, that the victim was angry at him for taking away her cellular telephone and thus fabricated the allegations. Dennis v. State, 178 S.W.3d 172, 2005 Tex. App. LEXIS 5295 (Tex. App. Houston 1st Dist. 2005).

998. Trial court properly admitted evidence of an extraneous assault offense under Tex. R. Evid. 403 and 404(b) where defendant's wife's testimony on behalf of the defense was an attempt to show that her injury was caused by an accident, not the intentional actions of defendant. Thus, a videotape in which defendant admitted a prior assault on his wife made the defensive theory of accident less probable and was relevant to rebut the defensive theory of accident. Iroegbu v. State, 2005 Tex. App. LEXIS 5296 (Tex. App. Dallas July 6 2005).

999. In an injury to a child case where defendant contested his guilt by claiming that he did not injure the child but that she fell, the trial court did not err in permitting the State to introduce evidence that defendant had previously committed an extraneous offense against another young child as it may have been helpful to the jury to rebut defendant's defensive theory and show that he injured the victim. Furthermore, evidence of the extraneous offense was not of such a nature as to impair the efficacy of a limiting instruction: the evidence showed that the child involved in the extraneous offense was not seriously injured but, at most, had bruises on her face from defendant's hands. Harrell v. State, 2005 Tex. App. LEXIS 4578 (Tex. App. Eastland June 16 2005).

1000. In a trial for indecency with a child, the trial court properly admitted evidence of a prior indecency conviction. The current charge arose from defendant's exposing himself, and he argued that he had merely forgotten to zip his pants; the extraneous offense evidence therefore tended to make a fact of consequence--whether defendant had or lacked intent to arouse or gratify sexual desire--more or less probable. Arp v. State, 2005 Tex. App. LEXIS 4535 (Tex. App. Texarkana June 15 2005).

1001. In a murder trial, evidence was properly admitted, under Tex. R. Evid. 401 -- 404, of a shooting incident that occurred eight days after the murder. The extraneous offense evidence was relevant to the development of the case and was admissible to show the development of the investigation and defendant's intent or knowledge regarding the gun; as to prejudice, the evidence was presented almost matter-of-factly and included no injuries, disturbing photographs, or emotional testimony. Gonzales v. State, 2005 Tex. App. LEXIS 4532 (Tex. App. Amarillo

June 14 2005).

1002. Trial court did not abuse its discretion in admitting defendant's statement under Tex. R. Evid. 404(b) where it appeared that it believed that the portion of the statement in which defendant admitted to threatening a prostitute with a box cutter referred to the complainant because the statement corroborated the complainant's testimony and was relevant to the issue of consent. Furthermore, the statement was not inadmissible under Tex. R. Evid. 403 because it strengthened the State's case on the consent issue and because, while the acts described in the statement were probably distasteful to at least some, if not all, of the jury members, they were not any more inflammatory than the charged offense. Marc v. State, 166 S.W.3d 767, 2005 Tex. App. LEXIS 4228 (Tex. App. Fort Worth 2005).

1003. In an indecency with a child case, the trial court did not err in allowing extraneous offense evidence, including the complainant's testimony that defendant asked him to disrobe to make a movie, videotaped him wearing his underwear, had sexual contact with him while he was bathing, and had sexual contact with him on other unspecified dates, as the testimony was probative to show defendant's state of mind and their relationship. When viewed with the other evidence, it was unlikely that this testimony left an indelible impression on the jury that precluded it from rational deliberation, and the State used little time to elicit the testimony. Painter v. State, 2005 Tex. App. LEXIS 4125 (Tex. App. Fort Worth May 26 2005).

1004. Defendant contended throughout his trial that the officer misidentified him as the driver of the suspect vehicle who started firing at the officer with an assault rifle; thus, the evidence of drug paraphernalia (specifically, a bong) seized from defendant's residence bearing defendant's fingerprints provided an affirmative link between defendant and the vehicle, which contained both fingerprints belonging to defendant as well as a marijuana cigarette that was discovered on the vehicle's passenger seat. Therefore, the trial court did not err as a matter of law in admitting the bong evidence as both relevant to a material issue and more probative than prejudicial. Pena v. State, 2005 Tex. App. LEXIS 2355 (Tex. App. San Antonio Mar. 30 2005).

1005. Trial court had not erred in admitting evidence of extraneous offenses committed by defendant against his murder victim wife because the offenses were admissible under Tex. Code Crim. Proc. Ann. art. 38.36(a) to show the previous relationship between defendant and the victim and were relevant to sentencing under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). Furthermore, the extraneous acts were proper rebuttal evidence because defendant's son had testified that the victim had no reason to fear defendant. Ramon v. State, 2005 Tex. App. LEXIS 2036 (Tex. App. El Paso Mar. 17 2005).

1006. In an aggravated sexual assault of a child case, defendant's trial counsel was not ineffective for failing request a limiting instruction to evidence that defendant showed the victim a pornographic movie as no limiting instruction was required for same transaction contextual evidence. Given the defensive theory that the child fabricated the charges, the State's ability to produce a piece of physical evidence to support the victim's testimony outweighed the prejudice inherent in matters concerning pornography. Redwine v. State, 2005 Tex. App. LEXIS 1796 (Tex. App. Beaumont Mar. 9 2005).

1007. Trial court's admission of two victim's statements about prior assaults by defendant was proper as the prior assaults were similar circumstances to the current assault, defendant had raised consent as a defense, and the court limited the use of the evidence. Reyna v. State, 2005 Tex. App. LEXIS 1663 (Tex. App. Amarillo Mar. 2 2005).

1008. Trial court did not violate Tex. R. Civ. P. 404(b) by admitting evidence of extraneous offenses of the victims' children's deaths because although defendant was only charged with the murder of the victims, evidence that the victims' children died of smoke inhalation as the result of a fire defendant set to hide the murders was admissible to corroborate the testimony of defendant's cell mate, who stated that defendant confessed to him by detailing the

manner in which the crimes were committed, and it was admissible as same-transaction contextual evidence because it was intertwined with the State's proof of the charged crime. However, the trial court violated Tex. R. Civ. P. 403 by admitting the children's autopsy photos because it was undisputed that they died of smoke inhalation and the State did not need the photos to explain the crime scene or to corroborate the cell mate's testimony. Prible v. State, 175 S.W.3d 724, 2005 Tex. Crim. App. LEXIS 110 (Tex. Crim. App. 2005), writ of certiorari denied by 126 S. Ct. 481, 163 L. Ed. 2d 367, 2005 U.S. LEXIS 7695, 74 U.S.L.W. 3246 (U.S. 2005).

1009. In an indecency with a child by contact case where a second count involving the victim's friend was ultimately dismissed, the friend's testimony describing how defendant had touched and rubbed her was admissible as it tended to show that defendant acted intentionally and according to a plan when he committed the offense against the victim. Further, the probative value of the friend's testimony was not outweighed by the danger of unfair prejudice because the testimony did not reference facts encompassed in the dismissed count involving the friend. Dinsmore v. State, 2004 Tex. App. LEXIS 11624 (Tex. App. Fort Worth Dec. 23 2004).

1010. In an indecency with a child case, because intent to satisfy sexual appetite was an element of the crime, the victim's younger sister's testimony that defendant had "french" kissed her when he took her alone for a ride and asked that she not tell anyone was relevant; thus, the trial court properly allowed it. Further, this evidence showing that defendant acted inappropriately with another young girl was highly probative, making the fact of defendant's sexual contact with the victim more probable, gave credibility to the victim's complaint, and diminished defendant's credibility. Mejia v. State, 2004 Tex. App. LEXIS 11615 (Tex. App. Tyler Dec. 22 2004).

1011. In an aggravated sexual assault and burglary case, testimony by another person that she had previously discovered defendant outside her apartment window and that he had attempted to gain entry by shooting two small holes in her window near the latch was distinctly similar to the evidence in the instant case; therefore, it was admissible to show identity. Considering the fact that defendant raised identity as an issue during trial, and the degree of similarity between the offenses, the trial judge did not err in holding the probative value of the extraneous evidence outweighed its prejudicial or inflammatory effect. Scally v. State, 2004 Tex. App. LEXIS 11636 (Tex. App. Dallas Dec. 22 2004).

1012. In a robbery case, extraneous offense evidence was admissible under Tex. R. Evid. 404(b) to establish defendant's identity, which was at issue because defense counsel had challenged the accuracy of the victim's identification of defendant, and the evidence was not unduly prejudicial under Tex. R. Evid. 403 because proper instructions were given. Thompson v. State, 2004 Tex. App. LEXIS 11088 (Tex. App. Houston 1st Dist. Dec. 9 2004).

1013. In an indecency case, a court properly admitted evidence from defendant's daughters concerning extraneous offenses committed by him where the fact that defendant intentionally exposed himself to his daughters made the fact that he acted intentionally, not accidentally, when he exposed himself to the victims more probable than not. The probative value of the extraneous offense testimony to show intent and absence of mistake or accident was particularly compelling, and the State had little else with which to prove intent. Sanders v. State, 2004 Tex. App. LEXIS 10677 (Tex. App. Dallas Nov. 30 2004).

1014. Because the witnesses' testimony constituted direct evidence of the element of both offenses, the trial court did not err in admitting the evidence under either Tex. R. Evid. 403 or 404(b). The evidence regarding the carjacking established the elements of the offenses where the victim did not give defendant permission to drive her vehicle, defendant acquired the vehicle alone, and defendant had sole possession of the shotgun. Dominguez v. State, 2004 Tex. App. LEXIS 9942 (Tex. App. Beaumont Nov. 10 2004).

1015. In defendant's criminal trial for evading arrest in a vehicle, the trial court abused its discretion by permitting the State to introduce evidence of the handgun found in his vehicle and his parole status; because identity was the main issue in the case, the State did not have a compelling need to prove motive via defendant's parole status and the handgun. The trial court abused its discretion by concluding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Powell v. State, 151 S.W.3d 646, 2004 Tex. App. LEXIS 9368 (Tex. App. Waco 2004), reversed by 189 S.W.3d 285, 2006 Tex. Crim. App. LEXIS 681 (Tex. Crim. App. 2006).

1016. Relevant criteria in determining whether the prejudice of an extraneous offense outweighs its probative value include: (1) how compellingly the extraneous offense evidence serves to make a fact of consequence more or less probable-a factor which is related to the strength of the evidence presented by the proponent to show the defendant in fact committed the extraneous offense; (2) the potential the other offense evidence has to impress the jury "in some irrational but nevertheless indelible way;" (3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; and (4) the force of the proponent's need for this evidence to prove a fact of consequence. Harris v. State, 2004 Tex. App. LEXIS 7666 (Tex. App. Tyler Aug. 25 2004).

1017. In an aggravated assault case, the trial court improperly permitted the State to elicit testimony about the details of defendant's prior conviction and his strategy of self-defense as the State's delving into the details of the prior shooting was prejudicial because it forced defendant to defend himself against charges that were not the subject of the present suit, implied that he was a violent man, and suggested that the current offense was in conformity with that character. Further, there was little, if any, probative value gained from the admission of the evidence. Arebalo v. State, 143 S.W.3d 402, 2004 Tex. App. LEXIS 7157 (Tex. App. Austin 2004).

1018. Probative value of the extraneous offense evidence was not substantially outweighed by its prejudicial potential where the jury was instructed to consider such testimony only in determining the absence of mistake, or the identity or plan of defendant; defendant seriously contested the ultimate issue to which the extraneous offense evidence was relevant, and the evidence was not of such a nature that it would distract the jury from the charged offense or suggest to them they should convict on a moral or emotional basis rather than on a reasonable response to the relevant evidence. Acker v. State, 2004 Tex. App. LEXIS 6283 (Tex. App. Tyler July 14 2004).

1019. In an aggravated robbery case, the trial court did not err in admitting the witnesses' extraneous offenses testimony under Tex. R. Evid. 404(b) for the purpose of proving identity over defendant's objection because (1) defendant placed his identity in issue with the testimony of two alibi witnesses and the testimony of another individual, that he, and not defendant, was the robber; and (2) the danger of unfair prejudice from the witnesses' testimony was minimal because the jury was instructed that the witnesses' testimony could only be considered for the limited purposes set out in Tex. R. Evid. 404(b). Chatman v. State, 2004 Tex. App. LEXIS 5410 (Tex. App. Houston 1st Dist. June 17 2004).

1020. Where defendant's cell mate described what defendant had told him about the instant murder and also about another killing, the trial court had not erred in admitting the evidence of the other shooting because the extreme degree of similarity between the two murders made the evidence of the other murder highly probative. In addition, without evidence of defendant's involvement in the other murder, it would have been more difficult for the jury to resolve whether the cell mate was a credible witness. Corona v. State, 2004 Tex. App. LEXIS 5042 (Tex. App. San Antonio June 9 2004).

1021. Trial court did not err in admitting evidence of extraneous assaults where they had sufficient similarities to the charged offense to have been introduced to show intent, and under the doctrine of chances those offenses had a multiplicative effect where each additional offense made the issue of intent more compelling, and the prejudicial effect of the evidence did not outweigh its probative value. Rickerson v. State, 138 S.W.3d 528, 2004 Tex. App.

LEXIS 4884 (Tex. App. Houston 14th Dist. 2004).

1022. Trial court did not abuse its discretion under Tex. R. Evid. 404(b), 403 by admitting evidence of defendant's prior deferred adjudication probation for possession of methamphetamine because defendant testified that she did not know a package in her possession contained drugs. The evidence was not likely to create such prejudice in the minds of the jury that it would have been unable to limit its consideration of the evidence to its proper purpose. Owen v. State, 2004 Tex. App. LEXIS 4144 (Tex. App. Fort Worth May 6 2004).

1023. In defendant's sexual assault case, a court did not err in permitting the victim's stepfather to testify that he saw defendant in the parking lot of the family's apartment complex a few weeks after the victim made her outcry where that evidence tended to corroborate the victim's testimony and was not, in itself, evidence of misconduct or bad character. The prosecutors' description of defendant as a "sexual predator" was a logical inference from his overall behavior as shown by the victim's testimony. Williams v. State, 2004 Tex. App. LEXIS 2878 (Tex. App. Austin Apr. 1 2004), writ of certiorari denied by 544 U.S. 927, 125 S. Ct. 1652, 161 L. Ed. 2d 489, 2005 U.S. LEXIS 2556, 73 U.S.L.W. 3556 (2005).

1024. In a murder trial, evidence of a prior shooting was relevant, under Tex. R. Evid. 404(b), to prove that defendant's intended victim was the prior victim, who was standing in a crowd with the complainant at the time of the charged offense. The court rejected an argument that was advanced for the first time on appeal under Tex. R. App. P. 403 because a separate objection was required to preserve that issue. Watters v. State, 2004 Tex. App. LEXIS 1852 (Tex. App. Corpus Christi Feb. 26 2004).

1025. In a criminal prosecution for assaulting a public servant, the trial court did not violate Tex. R. Evid. 404 by admitting evidence of the defendant's status as a parolee at the time of the offense. Defendant's desire to avoid being incarcerated for violating his parole was the triggering factor of the chain of events that ultimately resulted in the assault of a police officer. Hall v. State, 2004 Tex. App. LEXIS 489 (Tex. App. San Antonio Jan. 21 2004).

1026. In a drunk driving case, it was not error for the State to place defendant's stipulation of two prior convictions, which were jurisdictional elements of a felony offense, into evidence and to mention it in closing argument; the stipulation was evidence, could be received as such by the jury as the fact finder, and did not create a risk of unfair prejudice within the meaning of Tex. R. Evid. 403, 404(b). Shugart v. State, 2004 Tex. App. LEXIS 427 (Tex. App. Fort Worth Jan. 15 2004).

1027. In a prosecution for aggravated sexual assault, a woman's testimony, alleging that defendant had sexually assaulted her 25 years earlier, was not unduly prejudicial or too remote, for any extraneous offense or bad act evidence is admissible under Tex. Code Crim. Proc. Ann. art. 37.07, § 3, without regard to Tex. Evid. R. 404. Fowler v. State, 126 S.W.3d 307, 2004 Tex. App. LEXIS 405 (Tex. App. Beaumont 2004).

1028. Evidence admissible under Tex. Code Crim. Proc. Ann. art. 38.36(a) may be excluded under Tex. R. Evid. 404; if a defendant makes a timely objection, before the trial court can properly admit the evidence under Tex. Code Crim. Proc. Ann. art. 38.36(a), it must first determine whether the non-character conformity purpose for which it is proffered is relevant to a material issue and if so, whether the evidence should nevertheless be excluded because its probative value is substantially outweighed by the factors set forth in Tex. R. Evid. 403. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App. LEXIS 7512 (Tex. App. Beaumont 2003).

1029. Testimony of a witness that he and a murder victim had "shorted" the defendant in a marijuana transaction was relevant under Tex. R. Evid. 404(b) as a possible motivating factor for the killing of the victim by the defendant, and it was admissible under Tex. R. Evid. 403 because its probative value was not so slight as to be substantially outweighed by the danger of unfair prejudice to the defendant. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App.

LEXIS 7512 (Tex. App. Beaumont 2003).

1030. Testimony of a witness that a defendant stated that if he found out who helped his wife move out of their apartment, he was going to kill that person, was relevant under Tex. R. Evid. 404(b) to show the defendant's mental state a few days prior to the commission of a murder; the evidence was not unfairly prejudicial under Tex. R. Evid. 403 because its prejudicial effect was related to its probative value rather than to an unrelated matter. Saxer v. State, 115 S.W.3d 765, 2003 Tex. App. LEXIS 7512 (Tex. App. Beaumont 2003).

1031. Under Tex. R. Evid. 404(b), evidence of an extraneous offense may be admitted to prove identity, but an extraneous offense may be admitted to show identity only if identity is an issue in the case, and the defense may raise the issue of identity during cross-examination of the State's witnesses. Ortiz v. State, 2003 Tex. App. LEXIS 2242 (Tex. App. Fort Worth Mar. 13 2003).

1032. Conviction of aggravated sexual assault was affirmed where the extraneous offense was similar enough to be admissible under Tex. R. Evid. 404(b), as both crimes occurred within one week of each other, occurred at the same abandoned van, were violent and involved weapons, and the extraneous offense evidence was probative to the issue of identification under Tex. R. Evid. 403, as defendant made identity an issue when his main defense was that the victim could not positively identify him due to the fact that the crime occurred in near total darkness. Alexander v. State, 2003 Tex. App. LEXIS 1478 (Tex. App. Fort Worth Feb. 13 2003).

1033. After the trial court overruled an appellant's Tex. R. Evid. 404(b) objection, the appellant was required to make further objection under Tex. R. Evid. 403 in order to preserve the complaint for review. Mark v. State, 2003 Tex. App. LEXIS 879 (Tex. App. Houston 14th Dist. Jan. 30 2003).

1034. After the trial court overruled an appellant's Tex. R. Evid. 404(b) objection, the appellant was required to make further objection under Tex. R. Evid. 403 in order to preserve the complaint for review. Mark v. State, 2003 Tex. App. LEXIS 879 (Tex. App. Houston 14th Dist. Jan. 30 2003).

1035. Tex. R. Evid. 403 balancing test is an inherent part of Tex. R. Evid. 404(b). Lucky v. State, 2003 Tex. App. LEXIS 11 (Tex. App. Dallas Jan. 6 2003).

1036. Trial court could have reasonably decided: (1) that pursuant to Tex. R. Evid. 404(b) the extraneous offense evidence that defendant had been accused of child molestation had noncharacter conformity relevance where it rebutted defendant's defensive theory that defendant was framed and showed defendant's motive to solicit capital murder and, (2) that pursuant to Tex. R. Evid. 403 the extraneous offense evidence was not more prejudicial than probative; thus, the trial court did not abuse its discretion in determining that the evidence was admissible. Keen v. State, 85 S.W.3d 405, 2002 Tex. App. LEXIS 7339 (Tex. App. Tyler 2002).

1037. Trial court could have reasonably decided: (1) that pursuant to Tex. R. Evid. 404(b) the extraneous offense evidence that defendant had been accused of child molestation had noncharacter conformity relevance where it rebutted defendant's defensive theory that defendant was framed and showed defendant's motive to solicit capital murder and, (2) that pursuant to Tex. R. Evid. 403 the extraneous offense evidence was not more prejudicial than probative; thus, the trial court did not abuse its discretion in determining that the evidence was admissible. Keen v. State, 85 S.W.3d 405, 2002 Tex. App. LEXIS 7339 (Tex. App. Tyler 2002).

1038. In a prosecution for possession with intent to deliver 400 grams or more of heroin, certain testimony elicited by the state that defendant had been distributing heroin near a particular city prior to the instant offense was admissible under Tex. R. Evid. 403 and Tex. R. Evid. 404(b) because testimony about how the investigation came

to be focused upon defendant could have offered appropriate context in regard to the instant offense. Tapia v. State, 2002 Tex. App. LEXIS 2143 (Tex. App. Dallas Mar. 25 2002).

1039. Trial judge properly applied the balancing test found in Tex. R. Evid. 403 to exclude from a trial for aggravated assault evidence with respect to the victim's extraneous acts of violence in order to show defendant's state of mind under Tex. R. Evid. 404(b). Mozon v. State, 991 S.W.2d 841, 1999 Tex. Crim. App. LEXIS 39 (Tex. Crim. App. 1999).

1040. Detective's testimony was not hearsay because his testimony concerning the police department's prior investigations for the "same type of offense" was not offered to establish that defendant had been investigated for or committed other instances of indecent exposure. Rather, the testimony was offered to explain the course of his investigation and how defendant came to be a suspect, which was an acceptable, non-hearsay purpose for admitting an out-of-court statement. Denmon v. State, 2014 Tex. App. LEXIS 2180, 2014 WL 857671 (Tex. App. Austin Feb. 27 2014).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

1041. During defendant's capital murder trial, the court did not err under Tex. R. Evid. 404(b) in admitting evidence related to another murder on the ground that the two crimes were sufficiently similar such that evidence of the other murder was admissible to prove identity in the current case; the pattern and characteristics of the two murders were so distinctively similar that they constituted a "signature." Norwood v. State, 2014 Tex. App. LEXIS 9069, 2014 WL 4058820 (Tex. App. Austin Aug. 15 2014).

1042. Although the evidence from the neighbor's apartment was not same transaction contextual evidence and the trial court abused its discretion in admitting it, the error was harmless given that the extent of the other evidence for defendant's guilt because the State found the marijuana hidden in defendant's truck, an officer observed defendant exit the apartment building appearing to hide something under his shirt, and defendant chose to lead police on a high-speech chase instead of submitting to the traffic stop. Gonzalez v. State, 510 S.W.3d 10, 2014 Tex. App. LEXIS 8934 (Tex. App. Corpus Christi Aug. 14 2014).

1043. Court did not err in allowing the State to offer the extraneous offense evidence, because the rule required that a request be submitted by the accused to trigger the Rule and no such request was given. Pompa v. State, 2014 Tex. App. LEXIS 9079, 2014 WL 4049880 (Tex. App. Corpus Christi Aug. 14 2014).

1044. Because defendant did not request a limiting instruction when a sexual assault victim testified about alleged other wrongs or acts, Tex. R. Evid. 404(b) never became law applicable to the case, the evidence was admissible for all purposes, and the trial court had no duty to include a Rule 404(b) limiting instruction in the charge. Irielle v. State, 441 S.W.3d 868, 2014 Tex. App. LEXIS 8771 (Tex. App. Houston 14th Dist. Aug. 12 2014).

1045. During defendant's murder trial, the court did not err in admitting evidence that the two-year-old victim had sustained injuries to her thigh and genitals because the evidence was admissible under Tex. R. Evid. 404(b)to show that her injuries were not sustained accidentally. Sparks v. State, 2014 Tex. App. LEXIS 8392 (Tex. App. Fort Worth July 31 2014).

1046. Court did not err in refusing to exclude the extraneous offense testimony to rebut a defensive theory of fabrication, because the extraneous evidence tended to make the defensive claim of fabrication less probable, and the extraneous offense evidence was probative to rebut defendant's defensive theories that defendant was not the type of person who would sexually abuse a child and that the abuse allegations were fabricated. Shockley v. State,

2014 Tex. App. LEXIS 8345, 2014 WL 3756301 (Tex. App. Dallas July 30 2014).

1047. Trial court did not abuse its discretion by admitting evidence of the victim's half-sister about sexual abuse that defendant had inflicted upon her under this rule because it tended to rebut defendant's theory that the victim had fabricated her claims and there were similarities between defendant's conduct as described by both. The prejudicial effect of the testimony did not substantially outweigh its probative value because it was not so graphic as to be worse than the specifics to which the victim had already testified. Hosey v. State, 2014 Tex. App. LEXIS 7876, 2014 WL 3621796 (Tex. App. Texarkana July 23 2014).

1048. Witness's testimony that defendant was angry and agitated earlier the same evening of the stabbing was admissible under this rule to prove defendant's motive or intent and to rebut his theory of self-defense. Allen v. State, 2014 Tex. App. LEXIS 7895 (Tex. App. Houston 14th Dist. July 22 2014).

1049. At defendant's trial for four counts of tampering with a governmental record she prepared as a case-worker for the Texas Department of Family and Protective Services, she was not harmed by the admission of extraneous-offense testimony even though she did not receive sufficient notice. Because defendant received reasonable notice that the State intended to introduce extraneous-offense evidence that she made false entries claiming she made trips to the home of one family, the court could not see how her defensive strategy might have been different had she been given notice about the State's intent to introduce evidence of false entries in travel logs with respect to the second family. Washington v. State, 2014 Tex. App. LEXIS 7742, 2014 WL 3556525 (Tex. App. Waco July 17 2014).

1050. Murder victim's girlfriend was properly allowed to testify regarding an attempted drive-by shooting defendant committed against the victim, during which she was shot in the hand, and which occurred ten months before the murder, pursuant to Tex. Code Crim. Proc. Ann. art. 38.36(a) and Tex. R. Evid. 403 and Tex. R. Evid. 404(b). Jones v. State, 2014 Tex. App. LEXIS 7739, 2014 WL 3556587 (Tex. App. Waco July 17 2014).

1051. Even if the court erred by admitting evidence about defendant's gang affiliation, the error was harmless because defendant and other individuals were in the bedroom with over ninety grams of crack cocaine, the packaging was consistent with the sale of drugs, and the house contained surveillance cameras. Villarreal v. State, 2014 Tex. App. LEXIS 7296, 2014 WL 3056509 (Tex. App. Dallas July 7 2014).

1052. Evidence of methamphetamine found at the murder scene was properly admitted because it was relevant to establish a motive for defendant's actions and to rebut her claim of accidentally shooting the victim; there was no evidence presented that defendant was in possession of the drugs, and the evidence was admissible because the jury could infer that the prior relationship between the victim and defendant was one that involved drugs. Taylor v. State, 2014 Tex. App. LEXIS 7282 (Tex. App. Corpus Christi July 3 2014).

1053. Where appellant was convicted for indecency with a child by exposure, it was not an abuse of discretion to admit the extraneous offense testimony of a nephew, who testified that appellant had sexually assaulted the nephew when the nephew was 14 years old, because appellant raised the defensive theory of fabrication during trial, and the extraneous offense was sufficiently similar to the charged offense. Laube v. State, 2014 Tex. App. LEXIS 7076, 2014 WL 2993823 (Tex. App. Dallas June 30 2014).

1054. During defendant's trial for sexual abuse of his daughter, the court did not err in instructing the jury that it could consider evidence of a 1983 incident in which defendant, then 17 years old, made his sister's seven- or eight-year-old friend undress and then put his penis in her mouth and hand; because defendant indicated that his daughter fabricated the allegations, Tex. R. Evid. 404(b) permitted the jury to consider the extraneous offense to

rebut that theory. James v. State, 2014 Tex. App. LEXIS 6994 (Tex. App. Austin June 27 2014).

1055. GPS evidence was properly admitted because it established defendant's movements (both before and after the murder), as well as the timing of his removal of the GPS device. Longoria v. State, 2014 Tex. App. LEXIS 6800 (Tex. App. Beaumont June 25 2014).

1056. Based on the evidence before it, the trial court could have concluded that the evidence of defendant's extraneous prior abusive conduct toward an ex-wife rebutted the defensive theory presented to the jury, and the trial court's admission of the complained-of-testimony was not an abuse of discretion. Mata v. State, 2014 Tex. App. LEXIS 6736 (Tex. App. Austin June 24 2014).

1057. Defendant failed to show the court reversibly erred by admitting evidence of an extraneous offense, because by objecting to the evidence as "extraneous," defendant preserved only a complaint that the evidence was not admissible under Tex. R. Evid. 404(b) since it served no probative purpose, and even assuming the trial court abused its discretion, any error was harmless, as the State spent very little time developing the evidence, which was minor compared to the rest of the evidence implicating defendant in the robbery. Barrett v. State, 2014 Tex. App. LEXIS 6160 (Tex. App. Fort Worth June 5 2014).

1058. Defendant failed to preserve his issue for appellate review because he created the impression that he was abandoning any objection that he opened the door to extraneous offenses by raising self-defense as a defensive theory, but even if the issue was preserved, the trial court did not abuse its discretion in admitting the extraneous offense evidence to rebut his theory that another person was the aggressor. Mcfadden v. State, 2014 Tex. App. LEXIS 6047, 2014 WL 2566480 (Tex. App. Waco June 5 2014).

1059. Court properly allowed evidence of defendant's prior conviction for possession of cocaine because the defensive theory was that he did not know the cocaine was in his pocket because it was placed there while he was unconscious; therefore, the evidence was relevant to rebut defendant's defensive theory. Rios v. State, 2014 Tex. App. LEXIS 5867 (Tex. App. El Paso May 30 2014).

1060. Witness's extraneous-offense testimony was sufficiently distinctive and similar to the charged offenses to qualify as modus operandi evidence relevant to the issue of consent where both women in this case were waitresses at the same nightclub working the same shift, both women identified as Hispanic, both women were approached by defendant while he wore his uniform and drove his patrol car, and both women were assaulted in the same park and on the same night. Joseph v. State, 2014 Tex. App. LEXIS 5712 (Tex. App. Houston 14th Dist. May 29 2014).

1061. In defendant's trial for continuous sexual abuse of a child under fourteen years of age, evidence from two of the victim's cousins that defendant also molested them while they were visiting defendant and sleeping in the same bed with the victim was contextual and therefore admissible under Tex. R. Evid. 403 and 404(b). Doss v. State, 2014 Tex. App. LEXIS 5702 (Tex. App. Dallas May 28 2014).

1062. Assault defendant failed to request notice of other crimes and acts evidence under Tex. R. Evid. 404(b) and therefore could not complain of the adequacy of the State's notice; moreover, the notice gave her reasonable notice of a neighbor's expected testimony that defendant sought to bribe her to say that the victim struck defendant first. Additionally, this bribery evidence was relevant as consciousness of guilt and was not unfairly prejudicial. Cavazos v. State, 2014 Tex. App. LEXIS 5045, 2014 WL 1881691 (Tex. App. Amarillo May 8 2014).

1063. Any error in the trial court's exclusion of evidence regarding the victim's prior acts because, even though the evidence was relevant to show the victim's tendency to provoke fights, the evidence already admitted showed that the victim was being combative and aggressive with defendant on the day in question. Waggoner v. State, 2014 Tex. App. LEXIS 4983 (Tex. App. Fort Worth May 8 2014).

1064. Trial court did not abuse its discretion in admitting a copy of a check allegedly forged and presented by defendant because the State offered the evidence to establish defendant's knowledge that a copy of another check, which was identified in the indictment, was a forgery and that defendant therefore acted with the requisite intent to commit the offense of forgery and that there was no mistake or lack of intent, as defendant asserted at trial. Duncan v. State, 2014 Tex. App. LEXIS 4678, 2014 WL 1788173 (Tex. App. Corpus Christi May 1 2014).

1065. Defendant had not established an abuse of discretion with respect to a trial court's determination that the State's notice of a copy of a check it sought to admit into evidence was sufficient because defendant's attorney had actual notice of the evidence, which was provided to counsel in the State's discovery packet, and because based on the facts and circumstances set forth in the record, it would be possible for reasonable minds to reach different conclusions about whether the State's notice was reasonable and whether defendant suffered unfair surprise when the State offered the copy of the check into evidence. Duncan v. State, 2014 Tex. App. LEXIS 4678, 2014 WL 1788173 (Tex. App. Corpus Christi May 1 2014).

1066. Defendant's request for notice of a copy of a check the State sought to use to establish defendant's knowledge that the check identified in the indictment was a forgery was deficient in the sense that it was limited to evidence to be offered by the State during the punishment phase of trial, whereas the complained-of evidence was offered during the guilt-innocence phase of trial. Duncan v. State, 2014 Tex. App. LEXIS 4678, 2014 WL 1788173 (Tex. App. Corpus Christi May 1 2014).

1067. Evidence that defendant engaged in similar misconduct in the past-that he would slip out of a bed occupied by a sleeping wife to molest his stepdaughter -undermined the defensive theory that he had "no opportunity" to molest the victim because of the presence of his wife, and therefore, the evidence was properly admitted. Donato v. State, 2014 Tex. App. LEXIS 4698 (Tex. App. Fort Worth Apr. 30 2014).

1068. Because the record was silent as to why counsel failed to object to the admission of a syringe and evidence of methamphetamine use, the court presumed that his conduct was reasonable. Griffis v. State, 441 S.W.3d 599, 2014 Tex. App. LEXIS 4598 (Tex. App. San Antonio Apr. 30 2014).

1069. On appeal from his conviction for possession of methamphetamine, the trial court did not abuse its discretion in admitting evidence that the officer stopped the vehicle because of its association with a prior burglary since the testimony showed that the officer had a valid reason to stop the vehicle and was not an attempt to establish an extraneous offense to prove defendant's character in order to show action in conformity with that character; the testimony was critical and its probative value was clearly not substantially outweighed by the danger of unfair prejudice. Mancilla v. State, 2014 Tex. App. LEXIS 4649 (Tex. App. Dallas Apr. 29 2014).

1070. At defendant's trial for three counts of aggravated sexual assault of a child and two counts of indecency with a child by contact based on conduct occurring over a two-year period, the trial court did not err by admitting evidence about the details of defendant's ongoing sexual misconduct with the victim. Because it was same-transaction contextual evidence, the trial court was not obligated to issue a contemporaneous-limiting instruction. Ramirez v. State, 2014 Tex. App. LEXIS 3955, 2014 WL 1410344 (Tex. App. Waco Apr. 10 2014).

1071. As the proponent of an investigator's testimony, it was incumbent upon the State to satisfy to the trial court that the other crime, wrong, or act had relevance apart from its tendency to prove character in order to show that

she acted in conformity therewith. Almaguer v. State, 2014 Tex. App. LEXIS 3842, 2014 WL 1415182 (Tex. App. Corpus Christi Apr. 10 2014).

1072. Evidence of defendant's parole appointment, and an investigator's follow up with her parole officer had relevance apart from its tendency to prove character conformity, that is, the motive for her departure to Mexico shortly after the child's death and funeral. Almaguer v. State, 2014 Tex. App. LEXIS 3842, 2014 WL 1415182 (Tex. App. Corpus Christi Apr. 10 2014).

1073. Trial court heard both the State's and defendant's arguments in favor and against other act admission, recognized it was a close call, and favored admission, and the ruling was within the zone of reasonable disagreement and not an abuse of discretion. Almaguer v. State, 2014 Tex. App. LEXIS 3842, 2014 WL 1415182 (Tex. App. Corpus Christi Apr. 10 2014).

1074. Trial court did not err in admitting evidence of a robbery allegedly committed by defendant two days prior to the charged offense, because the similarities in the proximity of time and setting, the mode of commission of the two offenses, and the victims' similar descriptions of the robber and his hoodie constituted sufficiently distinguishing characteristics to allow the evidence as evidence of identity. Collins v. State, 2014 Tex. App. LEXIS 3549, 2014 WL 1318882 (Tex. App. Houston 1st Dist. Mar. 31 2014).

1075. Trial court did not abuse its discretion when it admitted defendant's prior robbery conviction because he raised the issue of identity by challenging the eyewitness's description, challenged defendant's identity as the robber, and challenged the photo array. The robberies were similar because they occurred six days apart, they occurred shortly after 10 p.m., they occurred in the same area, both businesses were convenience stores, the suspects in both robberies were wearing the same type of zip-up hoodies, and both robberies occurred when only one clerk was present inside the store. Dudley v. State, 2014 Tex. App. LEXIS 3083, 2014 WL 1101563 (Tex. App. Eastland Mar. 20 2014).

1076. Counsel was not ineffective for failing to object to the introduction of extraneous offense evidence that he had assaulted his wife and a peace officer because counsel did object, the evidence constituted the same transaction contextual evidence and was admissible as an exception under this rule and because the record was silent the court presumed that counsel's actions were motivated by sound trial strategy. Hernandez v. State, 2014 Tex. App. LEXIS 3079, 2014 WL 1101587 (Tex. App. Houston 1st Dist. Mar. 20 2014).

1077. Because similar evidence showing that defendant was a car thief was admitted without objection, the trial court did not abuse its discretion in admitting the portions of defendant's fourth statement to the police. Adams v. State, 2014 Tex. App. LEXIS 2762, 2014 WL 989260 (Tex. App. Beaumont Mar. 12 2014).

1078. Trial court did not abuse its discretion by admitting into evidence under this rule that defendant had previously pled no contest to indecent exposure and was placed on deferred adjudication because it had a tendency to make defendant's defensive theory, that he had a physical inability that prevented him from developing an intent to sexually arouse or gratify himself, less probable. Arteaga v. State, 2014 Tex. App. LEXIS 2434, 2014 WL 866461 (Tex. App. San Antonio Mar. 5 2014).

1079. Admission of the extraneous evidence was not improper under this rule because it was strikingly similar to the charged offense, it tended to prove he did not have the physical inability he claimed, absent the evidence of defendant's past conduct the State had no way to rebut defendant's claim of physical inability, any prejudice was limited by the trial court's limiting instructions, and the presentation of the evidence did not consume an inordinate amount of time. Arteaga v. State, 2014 Tex. App. LEXIS 2434, 2014 WL 866461 (Tex. App. San Antonio Mar. 5

2014).

1080. Jury charge was not erroneous because the alleged error did not suggest that defendant acted with the intent to arouse or gratify his sexual desire when read in the context of the next sentence, in which the trial court clearly stated that the jury had to find, beyond a reasonable doubt, that the act was committed. There was no error in the second paragraph simply because it failed to track the language of this rule. Arteaga v. State, 2014 Tex. App. LEXIS 2434, 2014 WL 866461 (Tex. App. San Antonio Mar. 5 2014).

1081. In a criminal proceeding, the document filed by the State served a dual purpose as both a motion to enhance punishment and as notice to defendant of intent to enhance punishment based on his prior convictions. Because defendant pled true to the enhancement allegations and stipulated to the evidence in support of them, any error by the State in alleging the prior convictions in the form of a motion, as opposed to in the form of a notice, was harmless. Green v. State, 2014 Tex. App. LEXIS 1753 (Tex. App. San Antonio Feb. 19 2014).

1082. On appeal of defendant's conviction for aggravated robbery, he claimed the trial court abused its discretion when it allowed evidence of four prior convictions that were over ten years old to be admitted during the guilt/innocence phase of the trial. Because defendant introduced the evidence of his prior convictions on direct examination, he had waived any error. Richardson v. State, 2014 Tex. App. LEXIS 1723, 2014 WL 645801 (Tex. App. Eastland Feb. 14 2014).

1083. During defendant's trial for murdering her tenth husband, the court did not err in admitting testimony of defendant's affairs, including her recent sexual encounter with one lover and her communications with an ex-husband, for the limited purpose of showing an absence of mistake or accident and motive to kill. Maxwell v. State, 2014 Tex. App. LEXIS 1514, 2014 WL 556377 (Tex. App. Texarkana Feb. 12 2014).

1084. At defendant's trial for aggravated sexual assault of a child, the trial court did not err in admitting testimony that he committed extraneous offenses in that he supplied drugs to the victim in the course of his sexual assaults. The evidence helped to fill in the gaps and explain the circumstances surrounding the offense. Washington v. State, 2014 Tex. App. LEXIS 933 (Tex. App. Austin Jan. 30 2014).

1085. Although the trial court erred when it failed to grant defendant's motions to sever, based upon the overwhelming evidence of guilt as to each offense, defendant's substantial rights were not adversely affected by the joinder of the offenses of sexual assault, aggravated sexual assault, and indecency with a child by exposure into a single trial. Because the trial court in a separate trial for each offense could have admitted evidence of the other offenses to show same transaction context or to rebut defendant's suggestion of fabrication, separate juries would have heard similar evidence. Rodriguez v. State, 2014 Tex. App. LEXIS 1018 (Tex. App. Eastland Jan. 30 2014).

1086. Testimony of two other purported victims of sexual assault by a defendant was properly admitted since the defendant raised the issue of consent and opened the door to evidence of the defendant's intent to engage and a pattern of engaging in sex with victims while they were unable to consent. Dilg v. State, 2014 Tex. App. LEXIS 963, 2014 WL 458019 (Tex. App. Amarillo Jan. 29 2014).

1087. In an arson case arising from an apartment complex fire, the trial court did not err in admitting evidence of extraneous offenses because defendant had argued that she did not start the fire and that the investigators were not able to rule out an accident as the cause of the fire, and in order to show that defendant had a motive and to indicate the lack of accident, evidence of her volatile relationship with one of the complex's residents and evidence that she had set fire to his car on a previous occasion was relevant apart from showing conformity with character; it did not matter that the resident was not named as the victim or the complainant in the indictment. Sanders v. State,

2014 Tex. App. LEXIS 830, 2014 WL 2619398 (Tex. App. Eastland Jan. 24 2014).

1088. Two prior plans to rob the store and burn the store owner's home and stage a car accident directly rebutted defendant's claim of duress, and thus the evidence was admissible. Seibel v. State, 2014 Tex. App. LEXIS 781, 2014 WL 261053 (Tex. App. Fort Worth Jan. 23 2014).

1089. In a burglary case, the evidence of a prior burglary was admissible during the guilt/innocence phase to prove identify. Because a credit card stolen from the first victim was found in the second victims' apartment and apparently was used to force open the locked door, it created a link between the crime; defendant was identified in store pictures as the person carrying the stolen wallet that contained the credit card. Martinez v. State, 2014 Tex. App. LEXIS 824, 2014 WL 458015 (Tex. App. Amarillo Jan. 23 2014).

1090. Two prior plans to rob the store and burn the store owner's home and stage a car accident directly rebutted defendant's claim of duress, and thus the evidence was admissible. Seibel v. State, 2014 Tex. App. LEXIS 781, 2014 WL 261053 (Tex. App. Fort Worth Jan. 23 2014).

1091. In a burglary case, the evidence of a prior burglary was admissible during the guilt/innocence phase to prove identify. Because a credit card stolen from the first victim was found in the second victims' apartment and apparently was used to force open the locked door, it created a link between the crime; defendant was identified in store pictures as the person carrying the stolen wallet that contained the credit card. Martinez v. State, 2014 Tex. App. LEXIS 824, 2014 WL 458015 (Tex. App. Amarillo Jan. 23 2014).

1092. State was not required to give notice of the punishment phase testimony of two witnesses because, at no point, did defendant formally request notice prior to the commencement of the punishment phase. Also, the trial court's actions gave defendant several days to prepare for the testimony of the two new witnesses even though he was legally entitled to none. Flores v. State, 2014 Tex. App. LEXIS 611, 2014 WL 235276 (Tex. App. San Antonio Jan. 22 2014).

1093. State was not required to give notice of the punishment phase testimony of two witnesses because, at no point, did defendant formally request notice prior to the commencement of the punishment phase. Also, the trial court's actions gave defendant several days to prepare for the testimony of the two new witnesses even though he was legally entitled to none. Flores v. State, 2014 Tex. App. LEXIS 611, 2014 WL 235276 (Tex. App. San Antonio Jan. 22 2014).

1094. At defendant's trial for robbery, the trial court did not err in admitting testimony regarding his efforts to resist arrest because evidence relevant to his flight from the scene was a circumstance indicative of guilt. As defense counsel objected to the evidence about the details of the arrest on the grounds of relevance, defendant's argument under Tex. R. Evid. 404(b) was not preserved for review. Johnson v. State, 2014 Tex. App. LEXIS 471, 2014 WL 222929 (Tex. App. Corpus Christi Jan. 16 2014).

1095. Trial court did not abuse its discretion when it admitted testimony showing that defendant called his friend and asked him to change his testimony. Even if it did rise to the level of witness tampering, the testimony showing that defendant told the friends to tell the jury that he was holding a cell phone instead of a gun was admissible as evidence of consciousness of guilt. Dyer v. State, 2014 Tex. App. LEXIS 524, 2014 WL 268571 (Tex. App. Eastland Jan. 16 2014).

1096. Trial court did not err in admitting evidence during the guilt/innocence phase of trial of an extraneous aggravated robbery where, through his testimony, defendant opened the door to this evidence. Thomas v. State,

2014 Tex. App. LEXIS 327, 2014 WL 117421 (Tex. App. Dallas Jan. 13 2014).

1097. Trial court did not abuse its discretion by admitting an extraneous offense, a prior sexual assault, into evidence because defendant opened the door to its admissibility through his cross-examination of the victim, which implied that she consented to the sexual intercourse. Morales v. State, 2014 Tex. App. LEXIS 312, 2014 WL 108770 (Tex. App. Amarillo Jan. 10 2014).

1098. Evidence that defendant voluntarily took drugs on other occasions was relevant to rebut his involuntary intoxication affirmative defense, which would negate the element of his mens rea in this assault case, but even if the court assumed the trial court abused its discretion by admitting the evidence, the three convictions about which defendant complained were hardly the only evidence of his drug use, and the error, if any, did not affected defendant's substantial rights. Quinn v. State, 2014 Tex. App. LEXIS 117 (Tex. App. Houston 1st Dist. Jan. 7 2014).

1099. In an aggravated assault with a deadly weapon case, the trial court did not err in admitting the evidence of prior violence by defendant toward the victim because it could help establish that the breakup motivated defendant to act violently toward the victim and by extension toward the boyfriend who had taken his place beyond the tendency of the evidence to show defendant's inclination toward violence. Gray v. State, 2014 Tex. App. LEXIS 3, 2014 WL 24410 (Tex. App. Texarkana Jan. 2 2014).

1100. Trial court did not err during defendant's aggravated sexual assault trial in allowing the State to offer testimony from the victim during its rebuttal case that defendant sexually assaulted him on at least four occasions when he was twelve or thirteen because defendant had asserted that the victim consented to the alleged sexual encounter; the evidence thus tended to rebut the defensive theory of consent. Hernandez v. State, 426 S.W.3d 820, 2014 Tex. App. LEXIS 2245, 2014 WL 887278 (Tex. App. Eastland Feb. 27 2014).

1101. At defendant's trial for capital murder where the indictment alleged that he committed the murder of the complainant in the course of committing a robbery the trial court did not err in admitting evidence of an extraneous robbery offense committed by defendant. Because defendant asserted there was no indication that a shooting took place during a robbery and the element of his specific intent to kill the complainant was at issue, the extraneous offense was admissible to rebut the defense theory. Smith v. State, 420 S.W.3d 207, 2013 Tex. App. LEXIS 15280, 2013 WL 6699495 (Tex. App. Houston 1st Dist. Dec. 19 2013).

1102. Defendant did not show that his trial counsel was ineffective for failing to specifically include a Tex. R. Evid. 403 objection in his objection to testimony because trial counsel reasonably could have concluded that the testimony described past criminal behavior and not just inchoate statements. Perkins v. State, 2013 Tex. App. LEXIS 15003, 2013 WL 6569874 (Tex. App. Houston 1st Dist. Dec. 12 2013).

1103. Under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) and Tex. R. Evid. 404(b), the police officer's testimony about the database entries was properly admitted because there was no evidence that the entries pertained to a crime or bad act connected with defendant. Loera v. State, 2013 Tex. App. LEXIS 15030, 2013 WL 6628959 (Tex. App. Waco Dec. 12 2013).

1104. Trial court did not abuse its discretion by admitting evidence of extraneous offenses defendant allegedly committed in 1992 because the offenses were extremely similar, no alternative source of proof was available, and by attacking the truth of the child victim's testimony and outcries defendant attempted to eliminate the State's only source of proof. Cruz v. State, 2013 Tex. App. LEXIS 14659, 2013 WL 7964238 (Tex. App. Corpus Christi Dec. 5 2013).

1105. Court did not abuse its discretion in allowing defendant's niece to testify about defendant's alleged sexual assault upon her because the testimony had logical relevance apart from character conformity when it showed that the alleged victim's allegations were less likely to be fabricated, was properly admitted to rebut the defense's theory of fabrication, and served to show defendant's course of conduct, motive, and intent. Munger v. State, 2013 Tex. App. LEXIS 14728, 2013 WL 6512674 (Tex. App. Eastland Dec. 5 2013).

1106. Trial court did not err by admitting evidence of defendant's prior conviction of unlawfully carrying a weapon because it was relevant to rebutting his defensive theory of insanity, the trial court instructed the jury not to consider that as evidence he was guilty of the charged offense, and the State only asked two questions about the prior crime, one of which the jury was instructed to disregard. Thomas v. State, 2013 Tex. App. LEXIS 14744, 2013 WL 6405479 (Tex. App. Houston 1st Dist. Dec. 5 2013).

1107. Witness's statement that defendant had previously been incarcerated was inadmissible under the rule, but the statement that defendant was an ex-con was not more inflammatory than statements made in other cases and an instruction to disregard was given, and thus there was no abuse of discretion in the denial of defendant's mistrial motion. Manderscheid v. State, 2013 Tex. App. LEXIS 14768, 2013 WL 6405470 (Tex. App. Houston 14th Dist. Dec. 5 2013).

1108. Trial court did not err in admitting testimony showing that defendant was the driver of a vehicle involved in a drive-by shooting four days before the alleged victim was shot because the evidence was probative to show opportunity and identity and to rebut defendant's defensive theory that he was not the perpetrator, and there was nothing confusing or misleading about the evidence. Williams v. State, 2013 Tex. App. LEXIS 14602, 2013 WL 6253764 (Tex. App. San Antonio Dec. 4 2013).

1109. Trial court did not err by admitting into evidence extraneous offense testimony because it was relevant to rebut defendant's theory of self-defense. Defendant raised the issue of self-defense when he testified that he felt threatened and thought his life was in grave danger at the time he shot at the front tire of the complainant's vehicle; the State presented evidence of two prior violent acts in which he acted as an aggressor and later asserted that he had acted in self-defense. Franks v. State, 2013 Tex. App. LEXIS 14442 (Tex. App. Houston 1st Dist. Nov. 26 2013).

1110. At defendant's trial for indecent exposure, the court did not err in allowing the State to question him regarding his prior conviction for indecency with a child because the circumstances surrounding the earlier offense made it more probable that defendant exposed himself with intent to arouse sexual desire. Rodriguez v. State, 2013 Tex. App. LEXIS 14268, 2013 WL 6147789 (Tex. App. Houston 14th Dist. Nov. 21 2013).

1111. Trial court did not err in admitting evidence, Tex. R. Evid. 403, 404(b), given the evidence already accumulated against defendant, and any error was harmless. Hicks v. State, 419 S.W.3d 555, 2013 Tex. App. LEXIS 14091, 2013 WL 6076468 (Tex. App. Amarillo Nov. 18 2013).

1112. Counsel could have found that he needed to present evidence of defendant's drug use and theft to explain his behavior and help explain why defendant ran from police, and this was not so outrageous that no attorney would have engaged in it. Williams v. State, 417 S.W.3d 162, 2013 Tex. App. LEXIS 13978, 2013 WL 6028845 (Tex. App. Houston 1st Dist. Nov. 14 2013).

1113. Counsel might have opted not to object to gang affiliation questioning because he did not want to call attention to the evidence, and because he felt the answers adequately dispelled the gang notion, and defendant did not show ineffective assistance of counsel in this regard. Williams v. State, 417 S.W.3d 162, 2013 Tex. App. LEXIS

13978, 2013 WL 6028845 (Tex. App. Houston 1st Dist. Nov. 14 2013).

1114. At defendant's trial for possession of a controlled substance, a witness's comment during direct examination that defendant was out on parole did not warrant a mistrial, because the State's questioning was developing the narrative, the State did not anticipate a reference to an extraneous offense, and the reference was not a concrete statement of a prior offense. The prompt objection and instruction to disregard prevented any elaboration on the offense. Joseph v. State, 2013 Tex. App. LEXIS 13998, 2013 WL 6045902 (Tex. App. Houston 14th Dist. Nov. 12 2013).

1115. On appeal of defendant's conviction for burglary of a habitation and possession of a controlled substance, cocaine, in an amount of less than one gram, he claimed that the State violated his right to a fair trial by introducing, without the required notice, evidence of his prior crimes, wrongs, or acts. Because defendant did not complain that he had not been given proper notice, the error was not preserved for review. Washington v. State, 2013 Tex. App. LEXIS 13793, 2013 WL 5952144 (Tex. App. Waco Nov. 7 2013).

1116. During defendant's trial for indecency with a child, the trial court did not err in admitting evidence of an extraneous offense-indecency with a child by contact-against the victim's sister where the evidence showed the victim's allegations of indecency by grinding and other acts were less likely to be fabricated, as defendant claimed, because defendant had similar contact with the victim's sister in the same house under similar circumstances; defendant's conduct with the sister showed a similar motive, plan, opportunity, and intent to assault the victim. Delacruz v. State, 2013 Tex. App. LEXIS 13492, 2013 WL 5890796 (Tex. App. Eastland Oct. 31 2013).

1117. On appeal of defendant's conviction for two counts of aggravated sexual assault of a child and one count of continuous sexual abuse of a child, his complaint that the trial court erred by admitting a judgment to show that he had a prior conviction for indecency with a child was not preserved for review because defendant did not raise his Tex. R. Evid. 404 objection at trial. Loveday v. State, 2013 Tex. App. LEXIS 13364, 2013 WL 5874280 (Tex. App. Beaumont Oct. 30 2013).

1118. In a murder case, the court erred by failing to require the State to redact portions of defendant's recorded statement admitting he had previously been in prison three times, but the error was harmless because the statement had no more than a slight effect on the jury's verdict. Barley v. State, 2013 Tex. App. LEXIS 13313, 2013 WL 5827728 (Tex. App. Houston 1st Dist. Oct. 29 2013).

1119. Court did not err during defendant's felony murder trial in allowing testimony that he had been trying to sell a shotgun two or three days prior to the shooting; the testimony respecting the attempted sale of the shotgun was same transaction contextual evidence. Mcdonald v. State, 2013 Tex. App. LEXIS 13191, 2013 WL 5774874 (Tex. App. Dallas Oct. 23 2013).

1120. Appellant's solicitation came in a motion asking the trial court to order the State to give notice and that the order encompass discovery of all the State's evidence that would be used to establish each prior crime, but the trial court never ruled on the motion, which was required before the State's duty to produce or disclose was triggered; the court could not say the trial court erred in admitting the evidence even if prior notice of the State's intent to do so was not provided. Benitez v. State, 2013 Tex. App. LEXIS 13146, 2013 WL 5782923 (Tex. App. Amarillo Oct. 22 2013).

1121. State did provide notice of its intent to offer evidence of extraneous offenses related to a prior kidnapping involving the same victim as in the current case, and a supplemental notice was also filed in advance of the trial; the subject matter of the pictures in question overlapped with the subject matter of the victim's testimony, such that no harm resulted from the admission of the pictures, assuming the State failed to provide reasonable prior notice.

Benitez v. State, 2013 Tex. App. LEXIS 13146, 2013 WL 5782923 (Tex. App. Amarillo Oct. 22 2013).

1122. Trial court did not abuse its discretion by admitting evidence because in light of the defensive theory to attack State's evidence, evidence that defendant chewed and destroyed crack cocaine during a prior traffic stop increased the likelihood that defendant did the same during the instant traffic stop. The court could not hold that the probative value of showing a lack of accident or mistake was substantially outweighed by the danger of unfair prejudice or the misleading nature of the evidence. Williams v. State, 2013 Tex. App. LEXIS 12925, 2013 WL 5676226 (Tex. App. Eastland Oct. 17 2013).

1123. Evidence that the complainant's life had been threatened because she was a witness to the aggravated robbery was relevant and admissible because it refuted the defensive theory that she had fabricated the whole episode to conceal the fact that she had stolen the property herself; by attacking the complainant's credibility, defense counsel sought to undermine her identification of defendant as one of the thieves and, in doing so, negate one of the elements of the offense, i.e., defendant's identity. Wilhite v. State, 2013 Tex. App. LEXIS 12608, 2013 WL 5604741 (Tex. App. Houston 1st Dist. Oct. 10 2013).

1124. There was no indication that defendant requested notice of evidence of extraneous acts that the State intended to introduce, and thus no notice was required. Michaels v. State, 2013 Tex. App. LEXIS 12624, 2013 WL 5604757 (Tex. App. Houston 1st Dist. Oct. 10 2013).

1125. Evidence of defendant's absenteeism was intended to prove his identity, as his absenteeism was the event that led to him changing his name, and as the evidence was relevant as to his identity, it was admissible to prove such. Michaels v. State, 2013 Tex. App. LEXIS 12624, 2013 WL 5604757 (Tex. App. Houston 1st Dist. Oct. 10 2013).

1126. State did not emphasize defendant's absenteeism or draw any connection between this evidence and any other evidence, and nothing suggested that the admission of this evidence had an deleterious effect on the jury, such that any error was harmless. Michaels v. State, 2013 Tex. App. LEXIS 12624, 2013 WL 5604757 (Tex. App. Houston 1st Dist. Oct. 10 2013).

1127. Where the homeowner contracted for the completion of her home and failed to make payments, the evidence was sufficient to support the jury's fraud verdict because the homeowner's acts before and after her promise to the contractor were admissible under this rule as circumstantial evidence of her fraudulent intent. Testimony from the prior contractor and an electrician showed a pattern of misconduct involving the same construction project. Zorrilla v. Aypco Constr. Ii, Llc, 421 S.W.3d 54, 2013 Tex. App. LEXIS 12440, 2013 WL 5506697 (Tex. App. Corpus Christi Oct. 3 2013).

1128. Admission of the numerous bad acts committed by defendant prior to his burglary of a hotel were properly admitted to show his intent and motive to burglarize the hotel-to steal money in order to buy more crack-and also to rebut his defense that he was not the driver of a stolen vehicle that collided with a street sweeper. The evidence leading up to the collision showed that defendant was with another individual in the stolen vehicle all day and that the person he claimed was driving was not in the vehicle. Bell v. State, 2013 Tex. App. LEXIS 12086, 2013 WL 5522245 (Tex. App. Eastland Sept. 26 2013).

1129. Trial court did not err by admitting extraneous offense evidence of two witnesses concerning prior sexual assaults because defendant opened the door to the admission of evidence to rebut his defensive theory of fabrication. Implicit in defense counsel's opening statement was the victim fabricated her outcry and in his cross-examination of several witnesses counsel repeatedly asked witnesses about the custody battle between defendant and the victim's aunt and uncle and the victim's truthfulness. Jones v. State, 2013 Tex. App. LEXIS 12150, 2013

WL 5494678 (Tex. App. Waco Sept. 26 2013).

1130. Trial court did not abuse its discretion in admitting extraneous-offense evidence during defendant's trial on a charge of possession of less than one gram of cocaine because the extraneous offense, which was committed while defendant was on bail awaiting the instant trial, also involved possession of cocaine thereby establishing defendant's familiarity with the substance and the jury was given an appropriate limiting instruction; the extraneous offense involved over six grams of cocaine. Baker v. State, 2013 Tex. App. LEXIS 11745, 2013 WL 12297784 (Tex. App. Texarkana Sept. 18 2013).

1131. Admission of extraneous-offense evidence, regarding defendant's two encounters with children in public restrooms, did not affect defendant's substantial rights because testimony regarding the encounters did not consume an inordinate amount of time during trial, the State focused the majority of its closing argument on the evidence establishing the charged offenses, and the trial court gave a limiting instruction. Hoard v. State, 2013 Tex. App. LEXIS 11760 (Tex. App. Beaumont Sept. 18 2013).

1132. Extraneous burglary was nearly identical to the offenses in question, as the burglary took place at almost the same time of day with the same number of perpetrators of the same ethnic background and the stolen items were similar, and the evidence tipped in favor of admitting the extrinsic evidence going to the identity issue; a cautionary instruction was given, and the probative value of the evidence outweighed its prejudicial effect. Houston v. State, 2013 Tex. App. LEXIS 11753 (Tex. App. Amarillo Sept. 17 2013).

1133. Evidence supported defendant's conviction of burglary and attempted burglary, given in part that he fit the description of one of the burglars, he was found in the immediate vicinity of the burgled houses, he resisted an officer's efforts to handcuff him and fled, and the evidence of the extraneous burglary committed six months later was so similar to the instant offenses that the offenses were marked by his handiwork providing circumstantial evidence of identity. Houston v. State, 2013 Tex. App. LEXIS 11753 (Tex. App. Amarillo Sept. 17 2013).

1134. Trial court erred by admitting extraneous conduct evidence that he inappropriately touched another child a decade before instant assault because it had no relevance as to motive, issue of opportunity was not raised, defendant never claimed he lacked intent, and there was no logical link between the prior act and an ultimate plan to have sex with the instant victim. The error was not harmless because the evidence against defendant was not overwhelming and the evidence was inherently inflammatory. Sandoval v. State, 409 S.W.3d 259, 2013 Tex. App. LEXIS 11657 (Tex. App. Austin Sept. 13 2013).

1135. Evidence of defendant's gang affiliation was admissible to illuminate the nature of the crime alleged because his affiliation with the gang was evidence of his capacity to carry out the threat, or have it carried out, which in turn made it more likely that he made the threat as the witness testified. Simmang v. State, 2013 Tex. App. LEXIS 11529 (Tex. App. Austin Sept. 11 2013).

1136. Although the State did not provide notice of its intent to introduce evidence of marijuana taken from defendant at the scene of his DWI arrest as required by Tex. R. Evid. 404(b), defendant's counsel was aware of the existence of the marijuana evidence, did not ask for a continuance of the trial, and did not show how his trial strategy would have been different if he had been provided notice; therefore, any error was harmless. Voltmann v. State, 2013 Tex. App. LEXIS 11445 (Tex. App. Houston 14th Dist. Sept. 5 2013).

1137. Trial court did not abuse its discretion by admitting the three burglaries into evidence for purposes of identity because they were sufficiently similar to the charged offense. The three extraneous burglaries and the charged offense occurred during the daytime hours, in the same area, and close in time. Lawson v. State, 2013 Tex. App.

LEXIS 11334 (Tex. App. Beaumont Sept. 4 2013).

1138. Evidence defendant had money to repay another's debt to the victim from selling drugs, and evidence defendant borrowed that money back to buy more drugs was not relevant to a fact of consequence and was inadmissible; the extraneous offense evidence was not necessary to the jury's understanding of the offense or rebut any defensive theories. Parker v. State, 2013 Tex. App. LEXIS 11232 (Tex. App. Fort Worth Aug. 30 2013).

1139. Extraneous offense evidence regarding drugs did not have a substantial effect on the verdict, as the jury was aware of drug use and defendant conceded he shot the victim. Parker v. State, 2013 Tex. App. LEXIS 11232 (Tex. App. Fort Worth Aug. 30 2013).

1140. Because the record did not clearly establish that defense counsel did not receive notice of the State's intent to introduce the testimony of defendant's girlfriend and the victim concerning defendant's attempts to persuade them to drop the charges, the court could not conclude that counsel's failure to object on the ground that he lacked notice under this rule constituted deficient performance. Agbogwe v. State, 414 S.W.3d 820, 2013 Tex. App. LEXIS 11103 (Tex. App. Houston 1st Dist. Aug. 29 2013).

1141. Evidence of defendant's previous domestic violence offenses was properly admitted because it rebutted the defensive theory presented to the jury. Shelby v. State, 2013 Tex. App. LEXIS 10867 (Tex. App. Austin Aug. 28 2013).

1142. Admission of extraneous offense evidence that defendant used illegal drugs was error because defendant's alleged heroin use was not necessary to the jury's understanding of whether or not defendant committed murder. However, the error was harmless because the witness testified to defendant's other drug use without objection, and the evidence was sufficient to support the conviction without the evidence of defendant's alleged heroin use. Boyd v. State, 2013 Tex. App. LEXIS 10875 (Tex. App. Dallas Aug. 27 2013).

1143. Because the similarities in the proximity of time and place, and the mode of commission of the three offenses (cars set on fire) constituted sufficiently distinguishing characteristics such that the State's introduction of the extraneous offenses to prove defendant's identity was permissible. Morin v. State, 2013 Tex. App. LEXIS 10549 (Tex. App. Houston 1st Dist. Aug. 22 2013).

1144. Similar crimes evidence admitted under Tex. R. Evid. 404(b) against a defendant convicted of aggravated assault with a deadly weapon, Tex. Penal Code Ann. § 22.02(a)(2), if error, did not have a substantial effect on the jury's verdict given other evidence that defendant was the perpetrator of the assault. Tovar v. State, 2013 Tex. App. LEXIS 10404 (Tex. App. Austin Aug. 20 2013).

1145. Despite defendant's contention to the contrary, the record showed that the trial court properly instructed the jury that it could consider the extraneous offense evidence only if it believed beyond a reasonable doubt that defendant had committed the offense and only in determining the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident of defendant. Nash v. State, 2013 Tex. App. LEXIS 10452 (Tex. App. Houston 1st Dist. Aug. 20 2013).

1146. Decision to admit extraneous offense evidence as sufficiently similar was not arbitrary, as the victims were young females alone in their homes, the surviving victims identified defendant as the attacker who threatened to break their necks, and all were strangled to some degree; while there were differences in the offenses, defendant did not show the trial court acted unreasonably in finding the differences did not require exclusion. Reed v. State,

2013 Tex. App. LEXIS 10489 (Tex. App. Dallas Aug. 20 2013).

1147. Decision that the extraneous offense evidence was not substantially outweighed by the potential for unfair prejudice was not an abuse of discretion, given that the evidence was compelling on the issue of identity, and the evidence, while sexual in nature, was unlikely to affect the jury in an irrational way based on the sexual characteristics of the murder in question. Reed v. State, 2013 Tex. App. LEXIS 10489 (Tex. App. Dallas Aug. 20 2013).

1148. Even if it was an abuse its discretion to admit extraneous offense evidence, the error was not reversible because the court had a fair assurance that it did not influence the jury or had but a slight effect, given that the record included other victim testimony identifying defendant as the man who attacked her, plus other witnesses identified defendant in a lineup. Reed v. State, 2013 Tex. App. LEXIS 10489 (Tex. App. Dallas Aug. 20 2013).

1149. Testimony from a State's witness that defendant appeared to be either high on drugs or coming off a high on the morning of his attack against the complainant was admissible because it established an affirmative link between defendant's earlier condition and the offense, rather than being mere background contextual evidence; defendant appeared high earlier in the day, asked the witness for money, and told the complainant he broke into her house because he was looking for money. Steele v. State, 2013 Tex. App. LEXIS 10488 (Tex. App. Dallas Aug. 20 2013).

1150. Even if the trial court erred by admitting a witness's testimony about the burglary of vehicle, the error was harmless given the strength of the State's case, the limited scope of the witness's testimony, defendant pleaded guilty before the jury to burglarizing the witness's vehicle, and an officer repeated the substance of the witness's testimony without objection. Rendon v. State, 2013 Tex. App. LEXIS 10103 (Tex. App. Austin Aug. 14 2013).

1151. Accomplice's testimony that he and defendant were involved in another aggravated robbery of a taxi cab driver four days before the murder was not inadmissible because it showed that defendant was involved in a virtually identical aggravated robbery, it was relevant to show defendant's intent to commit a robbery, his intent to kill, and that it was reasonably foreseeable that a death would occur, and it rebutted defendant's contention that the accomplice murdered the taxi driver. Stephens v. State, 2013 Tex. App. LEXIS 10188 (Tex. App. El Paso Aug. 14 2013).

1152. Even if the trial court erred by allowing the State to elicit testimony from defendant's wife about an incident involving defendant and the child victim without notice, the error was harmless because defendant learned of the testimony before trial and he was prepared and cross-examined the wife about the incident. Lair v. State, 2013 Tex. App. LEXIS 9906 (Tex. App. Fort Worth Aug. 8 2013).

1153. Trial court did not err in including a reference to extraneous offenses because the jury charge properly instructed the jury in how it could consider the extraneous offense evidence, and it limited the jury's use of the evidence to only those purposes explicitly permitted by Texas Rules of Evidence. Perkinson v. State, 2013 Tex. App. LEXIS 9948 (Tex. App. Corpus Christi Aug. 8 2013).

1154. Any error in the admission of extraneous offenses evidence was not preserved for review because defendant did not explicitly challenge the admission of the evidence on appeal but rather, his argument was confined to the propriety of the limiting instruction contained in the jury charge. Perkinson v. State, 2013 Tex. App. LEXIS 9948 (Tex. App. Corpus Christi Aug. 8 2013).

1155. Even if the trial court erred in including a reference to extraneous offenses in the jury charge, defendant could not show that he was harmed by the error because if the trial court had sustained defense counsel's objection and excluded the instruction, the jury would have been free to consider evidence of defendant's extraneous offenses for any purpose, including character conformity. Perkinson v. State, 2013 Tex. App. LEXIS 9948 (Tex. App. Corpus Christi Aug. 8 2013).

1156. On appeal of defendant's conviction for robbery causing bodily injury and aggravated robbery with a deadly weapon, he claimed the trial court erred in considering information regarding an extraneous offense involving a cell phone. Because defendant failed to object to this evidence during his sentencing hearing, the issue was waived. Delgado v. State, 2013 Tex. App. LEXIS 9774 (Tex. App. Houston 14th Dist. Aug. 6 2013).

1157. Trial court did not abuse its discretion by admitting evidence of extraneous offenses committed against his younger stepdaughter because they were so intertwined with the sexual assaults against the older stepdaughter that the jury's understanding of the offenses would have been obscured without them. The evidence also rebutted the defensive theory of fabrication, was sufficiently similar to the charged offense, and only limited details were introduced. Campos v. State, 2013 Tex. App. LEXIS 9593 (Tex. App. Eastland Aug. 1 2013).

1158. Trial court did not abuse its discretion by permitting State to introduce evidence of sexual assault of one victim by accomplice because the facts of the case would have been incomplete and difficult to follow had it been excised from the sequence of events, as it occurred while other victim was being killed and before first victim was kidnapped and locked in her car. The probative force of the evidence and the State's need for the evidence favored admission and it took minimal time to develop. Smith v. State, 424 S.W.3d 588, 2013 Tex. App. LEXIS 9093, 2013 WL 3832691 (Tex. App. Texarkana July 25 2013).

1159. Trial court did not err in admitting evidence of an incident involving a pornographic video that defendant showed to his child sexual assault victim (his teenaged daughter) where the evidence constituted same-transaction contextual evidence because the showing of the pornographic video was intertwined with defendant's efforts to make the victim comfortable with the actual sexual acts perpetrated. The evidence provided pertinent background information that assisted the jury in understanding the underlying sexual assaults. Freeman v. State, 2013 Tex. App. LEXIS 8566 (Tex. App. Waco July 11 2013).

1160. Because evidence pertaining to defendant's showing of a pornographic video to his teenaged daughter constituted same-transaction contextual evidence in defendant's aggravated child sexual assault case, the notice provisions of the rules of evidence and the code of criminal procedure did not apply. Freeman v. State, 2013 Tex. App. LEXIS 8566 (Tex. App. Waco July 11 2013).

1161. Trial court was not obligated to issue an instruction limiting the usage of evidence pertaining to a pornographic video that defendant showed to his child sexual assault victim (his teenaged daughter) because the complained-of evidence constituted same-transaction contextual evidence; the evidence was properly received as general evidence. Freeman v. State, 2013 Tex. App. LEXIS 8566 (Tex. App. Waco July 11 2013).

1162. Identity of a person was at issue, the State had to prove that this person negotiated the drug sale, and the trial court admonished the jury that the extraneous offenses were to be considered only for the purposes of identifying appellant, such that the trial court did not err in allowing a witness to discuss appellant's extraneous offenses. Duarte v. State, 2013 Tex. App. LEXIS 8609 (Tex. App. Corpus Christi July 11 2013).

1163. In a case in which defendant was found guilty of two counts of indecency with a child for the sexual abuse of his granddaughter, a prior victim's testimony that defendant, a family friend, sexually assaulted her when she was seven years old was probative to rebut the defensive theory of fabrication and was admissible. Bible v. State, 2013

Tex. App. LEXIS 8354 (Tex. App. Beaumont July 10 2013).

1164. In an aggravated robbery case, defendant's complaint that he did not receive notice that extraneous evidence of a check-cashing incident would be used at trial was without merit as he acknowledged receiving the report which included the check-cashing incident. Cross v. State, 2013 Tex. App. LEXIS 8535 (Tex. App. Dallas July 10 2013).

1165. In an aggravated robbery case, the extraneous evidence of a check-cashing incident was same-transaction contextual evidence, and, as such, no notice that it would be introduced at trial was required. Cross v. State, 2013 Tex. App. LEXIS 8535 (Tex. App. Dallas July 10 2013).

1166. In an aggravated robbery case, defendant waived any straight forward, substantive objection to the admission of testimony concerning extraneous evidence of a check-cashing incident because he did not make that objection at trial. Cross v. State, 2013 Tex. App. LEXIS 8535 (Tex. App. Dallas July 10 2013).

1167. Trial court did not abuse its discretion by admitting an extraneous offense regarding marijuana found on defendant's person and in his car because it was admissible same transaction contextual evidence; defendant's possession of an illegal substance explained his possible motive for hitting a detective and fleeing the scene before the drugs could be found, and he was not acting suspiciously until the detective moved closer. Finney v. State, 2013 Tex. App. LEXIS 8317 (Tex. App. Dallas July 8 2013).

1168. Defense counsel preserved for review the issue of whether the trial court erred in admitting an extraneous offense because defense counsel emphasized what rules his request for a running objection was based on, and the trial court stated that the evidence was admitted as inextricably intertwined with the offense. Finney v. State, 2013 Tex. App. LEXIS 8317 (Tex. App. Dallas July 8 2013).

1169. In a drug case, although a trial court should not have admitted two illegal arrest records during sentencing because the State failed to prove beyond a reasonable doubt that the crimes had actually been committed by appellant in the two arrests, there was little to no affect on the jury where appellant had 35 arrest records. Simmons v. State, 2013 Tex. App. LEXIS 7833 (Tex. App. Corpus Christi June 27 2013).

1170. Court did not abuse its discretion in admitting the extraneous offense evidence (unadjudicated aggravated robbery) over defendant's objections, because the evidence supported the State's theory that defendant intended to participate in the offenses. Menendez v. State, 2013 Tex. App. LEXIS 7742 (Tex. App. Beaumont June 26 2013).

1171. In a trial for continuous sexual abuse of a child, there was no error in admitting the victim's testimony that defendant physically abused the victim's pets because the evidence rebutted the defensive theory that the allegations were being fabricated and tended to explain why the victim and the siblings feared defendant, were compliant, and did not tell anyone about the abuse. Almager v. State, 2013 Tex. App. LEXIS 7614, 2013 WL 3355722 (Tex. App. Amarillo June 21 2013).

1172. Based on the trial court's instructions, defendant was required to raise a contemporaneous objection to the witnesses' testimony, but when they testified, counsel only objected once, and because he did not raise an extraneous offense objection at trial when the testimony was offered, the complaint was waived. Moore v. State, 2013 Tex. App. LEXIS 7436 (Tex. App. San Antonio June 19 2013).

1173. During defendant's trial for burglary of a habitation with intent to commit sexual assault, the court did not err under Tex. R. Evid. 404(b) in allowing a witness to testify that he made sexual advances toward her while they were

on a date and that she rejected his advances because the testimony was relevant to determining his intent and state of mind when he entered the victim's house about two hours later. Badura v. State, 2013 Tex. App. LEXIS 7249 (Tex. App. Eastland June 13 2013).

1174. Trial court did not abuse its discretion in admitting defendant's statement to a witness who had been in jail with him before the trial, that defendant was the "shooter," where the State did not offer the inmate's testimony as evidence of an extraneous offense separate and apart from the charged offense but, instead offered the evidence as proof that defendant fired the shots that killed the victim. The statement was an admission by a party-opponent, supported the allegation that defendant killed the victim, directly contradicted defendant's defensive theory that his accomplices only named him as the shooter to get a reduced sentence, and was not likely to impress the jury in some irrational but nevertheless indelible way. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

1175. Trial court did not abuse its discretion when it permitted a witness who had been in jail with defendant before the trial to testify that defendant threatened to kill him where the threat was a relevant extraneous offense, as the testimony was evidence that defendant made the threat to instill fear in the witness and to prevent him from testifying. Defendant's actions were probative of guilt, and the testimony was not unfairly prejudicial because defendant did not try to connect his threat to a different offense, and because the record was devoid of any evidence that the threat was related to anything else. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

1176. Defendant claimed the trial court erred in admitting extraneous offense evidence at punishment because the notice was sent late, and although he also claimed the trial court erred in admitting such evidence at guilt-innocence, as he only pointed to evidence adduced during punishment, the court reviewed the issue under Tex. Code Crim. Proc. Ann. art. 37.07 and not Tex. R. Evid. 404(b). Spring v. State, 2013 Tex. App. LEXIS 7292 (Tex. App. Fort Worth June 13 2013).

1177. Counsel asked to note his objection to evidence of gang membership now or at any time during the trial, and the trial court said, "Okay;" this statement did not constitute an adverse ruling for preservation purposes. Mendoza v. State, 2013 Tex. App. LEXIS 7157 (Tex. App. San Antonio June 12 2013).

1178. Defendant did not make a proper Tex. R. Evid. 404(b) objection to the testimony of a witness, and although defendant objected, he said the testimony was speculative, but this did not comport with his complaint on appeal. Mendoza v. State, 2013 Tex. App. LEXIS 7157 (Tex. App. San Antonio June 12 2013).

1179. Assuming defendant preserved error on the admission of evidence of his affiliation with the Mexican Mafia, the trial court abused its discretion in admitting the extraneous evidence because it did not provide context for the crime and was not necessary in this case, and the fear of one to testify alone did not warrant admission of the evidence, plus it did not explain why defendant shot the two victims in this case; thus, the State did not meet its burden of proving that the extraneous Mafia evidence was so intertwined with the shooting that the evidence was essential. Mendoza v. State, 2013 Tex. App. LEXIS 7157 (Tex. App. San Antonio June 12 2013).

1180. Although the trial court erred in admitting the extraneous offense evidence, the error was harmless under Tex. R. App. P. 44.2(b), given that one witness's testimony proved the same facts as the testimony about which defendant complained, plus the State's theory did not benefit from introduction of the gang affiliation and there was no emphasis in the State's closing argument concerning gang affiliation, and thus the evidence did not have a substantial effect on the jury's verdict. Mendoza v. State, 2013 Tex. App. LEXIS 7157 (Tex. App. San Antonio June 12 2013).

1181. Trial court did not err by admitting defendant's prior conviction into evidence because it was offered to prove that defendant was a felony in possession of a firearm on the date of his arrest and the trial court gave a limiting instruction. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

1182. Defendant's conviction for abuse of official capacity was improper because the jury's verdict was substantially influenced by the admission of improper extraneous offense evidence and the error was not harmless, Tex. R. Evid. 404(b), Tex. R. App. P. 44.2(b); the evidence of guilty was not overwhelming. The improper use of extraneous offense evidence included arguments by the State that defendant should be found guilty of the charged offense because he and his employees were in the "business" of criminal activity. Lomas v. State, 2013 Tex. App. LEXIS 6866 (Tex. App. Corpus Christi June 6 2013).

1183. At defendant's trial for failure to comply with sex offender registration requirements, the trial court did not abuse its discretion by overruling his objections to the admission of evidence of an extraneous bad act under Tex. R. Evid. 404(b); the evidence that defendant moved several times while continuing to report his previous address to local law enforcement authorities had substantial probative value as to his knowledge of the reporting requirements and his intent respecting compliance. Hogan v. State, 2013 Tex. App. LEXIS 6706 (Tex. App. Dallas May 30 2013).

1184. Defendant's counsel was ineffective for opening the door to allow the State to introduce evidence of his prior convictions of sexual assault and sexual assault of a child by asking defendant's ex-girlfriend whether defendant was a violent person and she responded that he was not; therefore, on cross-examination the State was permitted to ask the ex-girlfriend whether she knew that defendant had pleaded guilty to two prior sexual assaults, allowing prejudicial and otherwise inadmissible evidence to be presented before the jury, which could not be considered sound trial strategy. The court held that defendant was prejudiced because the credibility of defendant's testimony was a key component of his defense strategy, given that he claimed he was trying to get away from the victim and had no intention of hurting anyone; although the trial court gave the jury a limiting instruction as to how it could consider the prior convictions, the instruction specifically allowed the jury to consider the convictions for the sole purpose of determining defendant's character for violence. Hernandez v. State, 2013 Tex. App. LEXIS 6365, 2013 WL 2301989 (Tex. App. Eastland May 23 2013).

1185. Given that his co-conspirator shot the victim in the course of the prior robbery, the extraneous offense evidence supported the State's theory that defendant reasonably should have anticipated that these same co-conspirators, or others, might shoot and kill someone in their next robbery; the evidence was directly relevant to an essential element of the charged crime, and was not needlessly duplicative as there was little other evidence that defendant knew his companions would use violence or carried guns. Pagoada v. State, 2013 Tex. App. LEXIS 6077 (Tex. App. Houston 1st Dist. May 16 2013).

1186. Trial court did not abuse its discretion by allowing a witness to testify in appellant's aggravated assault on a peace officer trial that appellant pointed his gun at her before officers arrived; the State had given notice that it planned to call the witness about the confrontation that preceded the officers' arrival, but did not say that the witness planned to testify that appellant pointed the gun at her, and the trial court could have found that appellant's alleged action was part of the same transaction and bore on the reasonableness of appellant's expectation that the men were visitors rather than responding officers, and the trial court found no abuse of discretion in the admission of the evidence without statutory notice being given under Tex. R. Evid. 404(b). Isaacson v. State, 2013 Tex. App. LEXIS 5807 (Tex. App. Austin May 10 2013).

1187. Trial court did not err by admitting evidence that defendant kicked the victim after the murder because it was not an extraneous offense under Tex. R. Evid. 404(b), as it was questioning by law enforcement about defendant's role in the instant killing. In addition, a similar statement was admitted into evidence without objection. Childs v. State, 2013 Tex. App. LEXIS 5392 (Tex. App. Texarkana May 2 2013).

1188. Even though the trial court erred by admitting evidence that defendant was previously in prison or jail for another crime, was a gang member, or had sold or possessed marijuana under Tex. R. Evid. 404(b), the error was harmless because the net effect of the improperly admitted evidence was to show that defendant had some relatively minor criminal history, circumstantial evidence supported the verdict that defendant participated in the victim's murder, the State did not refer to defendant's previous conviction, imprisonment, gang affiliation, or marijuana sales during its jury argument, and the trial court limited the jury's consideration of all evidence of other offenses to a determination of defendant's state of mind at the time of the instant offense. Childs v. State, 2013 Tex. App. LEXIS 5392 (Tex. App. Texarkana May 2 2013).

1189. Trial court did not err during defendant's murder trial in admitting extraneous offense evidence of defendant's theft of a truck because the evidence was not relevant just to show character conformity, but was relevant under Tex. R. Evid. 401 and admissible under Tex. R. Evid. 404(b) to corroborate defendant's confession to police, in which he stated that he stole a green truck from a certain location and then drove that truck to the victim's home, where he then committed the murder. At trial, the State was able to corroborate that portion of defendant's confession by introducing evidence from a witness that his green truck had been stolen on the same day and from the same location as defendant indicated in his confession, and a police officer confirmed that he wrote a report for a stolen truck by the witness at the same time and location as described by defendant in his confession. Shuff v. State, 2013 Tex. App. LEXIS 5469 (Tex. App. Houston 1st Dist. May 2 2013).

1190. Evidence of defendant's cocaine use after the charged murder offense was admissible to show his consciousness of guilt and had relevancy beyond character conformity because defendant stated that he went on a cocaine binge because he felt guilty about the murder. Shuff v. State, 2013 Tex. App. LEXIS 5469 (Tex. App. Houston 1st Dist. May 2 2013).

1191. Trial court did not abuse its discretion by admitting evidence of two additional stolen trailers on defendant's property under Tex. R. Evid. 403 because testimony established that defendant only had access and control of the property, and the evidence rebutted defendant's strategy of mistake or accident in which he attempted to cast doubt regarding his knowledge of the improper registration of the stolen trailers. Whited v. State, 2013 Tex. App. LEXIS 5225 (Tex. App. Eastland Apr. 30 2013).

1192. Trial court did not abuse its discretion by admitting evidence tending to show that a witness had observed defendant in possession of a firearm on the night of the robbery under Tex. R. Evid. 404(b) because the testimony tended to establish defendant's identity as one of the gunmen during the robbery and to corroborate the accomplices' testimony and the evidence qualified as same transaction contextual evidence. The trial court could have found that the probative value of the evidence was high, as the victims of the robbery were unable to identify the men who had robbed them at gunpoint and the State needed the testimony to corroborate the accomplices' testimony who had identified defendant as one of the gunmen. Head v. State, 2013 Tex. App. LEXIS 5109 (Tex. App. Austin Apr. 24 2013).

1193. Trial court did not abuse its discretion by finding that defendant had reasonable notice of extraneous offenses introduced into evidence by the State because, as to one set of offenses, although written notice was not provided 10 days prior to trial, defense counsel was given reasonable notice of those offenses through multiple conversations with the prosecutor more than 10 days prior to trial; as to another extraneous offense, the trial court could have impliedly found that even though neither written or oral notice was provided 10 days prior to trial, the State had reasonably notified defendant of the offense and the victim shortly after the State itself was informed of the circumstances of the offense. Even if the State had failed to provide reasonable notice, it was not harmful, as there was no allegation that the State acted in bad faith, defendant did not move for a continuance, and written notice was provided a week before the evidence was admitted at the punishment hearing. Head v. State, 2013 Tex. App. LEXIS 5109 (Tex. App. Austin Apr. 24 2013).

1194. At defendant's assault trial, it was not error to admit evidence of defendant's prior robberies because identity was contested, and there were distinguishing characteristics common to the crimes. Plata v. State, 2013 Tex. App. LEXIS 4795 (Tex. App. Corpus Christi Apr. 18 2013).

1195. Trial court did not abuse its discretion by denying defendant's motion for a mistrial because the officer's reference to defendant's "criminal history," without any further detail, was not so inflammatory that the trial court's instruction to disregard could not cure the harm. Francis v. State, 445 S.W.3d 307, 2013 Tex. App. LEXIS 4815 (Tex. App. Houston 1st Dist. Apr. 18 2013).

1196. Trial court did not err by admitting evidence of an aggravated robbery that occurred 45 minutes before the instant offense of murder under Tex. R. Evid. 404(b) because the fact that defendant admitted to committing the robbery with a deadly weapon, the same gun that was used in the murder, tended to rebut his claim of duress. The trial court could have reasonably concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because the evidence was highly probative, as it tended to rebut defendant's claim of duress, discussion of the offense only took one day of a six-day trial, it did not divert the jury's attention from the crucial issues in the case, and the State's need for the evidence was high, as it had no other direct evidence to rebut defendant's claim of duress. Ibarra v. State, 2013 Tex. App. LEXIS 4772, 2013 WL 1641493 (Tex. App. San Antonio Apr. 17 2013).

1197. Officer's testimony did not constitute evidence of an extraneous offense under Tex. R. Evid. 404(b) because he did not mention appellant's theft of a necklace from a pawn shop or any alleged offense other than the robbery, he did not testify regarding probable cause to stop the vehicle, and his explanation about the stop likely left the jury with the impression that the driver committed a traffic violation. Garza v. State, 2013 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. Apr. 11 2013).

1198. Because appellant's contention that the officer's testimony constituted evidence of an extraneous offense under Tex. R. Evid. 404(b) was rejected, his Tex. R. Evid. 403 contention was also rejected. Garza v. State, 2013 Tex. App. LEXIS 4611 (Tex. App. Houston 14th Dist. Apr. 11 2013).

1199. Trial court did not abuse its discretion by concluding that evidence that two co-defendants had committed a nearly identical robbery just a few days before the instant robbery and that defendant knew about that robbery was relevant to show defendant's intent to participate in the instant robbery and was relevant to the State's theory that defendant had conspired with the two co-defendants to commit the instant robbery. The trial court did not abuse its discretion by concluding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence because the evidence tended to rebut defendant's theory that she had nothing to do with the instant robbery and capital murder. Ohlfs v. State, 2013 Tex. App. LEXIS 4660 (Tex. App. Fort Worth Apr. 11 2013).

1200. In a murder case in which defendant claimed self-defense, the trial court did not err by excluding evidence of the victim's prior arrest for a possible domestic situation; as a specific instance of conduct, the evidence was not admissible to show the victim's violent character under Tex. R. Evid. 404. Pointer v. State, 2013 Tex. App. LEXIS 4658 (Tex. App. Fort Worth Apr. 11 2013).

1201. Appellant claimed that the notice provided by the State, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) and Tex. R. Evid. 404(b), was incomplete and too late, and while the trial court overruled these objections at the time, the trial court invited defense counsel to revisit the issues and then a hearing would be conducted and a final ruling made, but appellant did not cite where he made a follow-up objection based on improper notice, and the court did not find any such objection; defense counsel did not ask for a hearing, renew any objection, or request a running objection, for purposes of Tex. R. Evid. 103(a)(1), and thus appellant did not preserve for review any error that might have taken place when the evidence was admitted without objection. Asael

Furquim Dearruda v. State, 2013 Tex. App. LEXIS 4657 (Tex. App. Fort Worth Apr. 11 2013).

1202. Appellant claimed he did not have enough time to prepare to refute the extraneous offense evidence given the late notice, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) and Tex. R. Evid. 404(b), but he did not seek a postponement or continuance on the basis of surprise, and thus he waived any complaint of surprise. Asael Furquim Dearruda v. State, 2013 Tex. App. LEXIS 4657 (Tex. App. Fort Worth Apr. 11 2013).

1203. Four days between the State's notice of its intent to use extraneous-offense evidence and defendant's trial was not unreasonable because the State provided notice upon discovering the trial was set for the following week and limited its use of Tex. R. Evid. 404(b) evidence at trial to prior convictions only. Joseph v. State, 2013 Tex. App. LEXIS 4692, 2013 WL 1461841 (Tex. App. Corpus Christi Apr. 11 2013).

1204. Trial court did not abuse its discretion during defendant's indecency with a child trial in admitting an extraneous offense and bad act testified to by another child under seventeen years of age who resided at the apartment complex where the incident took place because the extraneous offense evidence was relevant to prove the sole disputed issue at trial--knowledge that a child was present--and its probative value was not substantially outweighed by the danger of unfair prejudice. While the extraneous offense evidence was not overwhelming evidence of defendant's knowledge of the child's presence, it was some evidence of that vital fact, and the time needed to develop the evidence was inconsequential, while the need for the evidence weighed heavily in favor of its admission to prove knowledge. Henderson v. State, 2013 Tex. App. LEXIS 4512 (Tex. App. Texarkana Apr. 10 2013).

1205. During defendant's trial for possession with intent to deliver methamphetamine, the court did not err under Tex. R. Evid. 404(b) in admitting into a evidence a jail book-in card that reflected that he was unemployed; evidence of his unemployment was relevant to link him to the methamphetamine and his status as a narcotics dealer, especially given the quantity of methamphetamine in his possession. Wetmore v. State, 2013 Tex. App. LEXIS 4466, 2013 WL 1451164 (Tex. App. Houston 1st Dist. Apr. 9 2013).

1206. Defendant failed to preserve for appellate review his claim that the trial court erred by admitting evidence of an extraneous offense because he did not make the court aware he was objecting to the failure of the State to include the offense in a Tex. R. Evid. 404(b) notice. Sanchez-Hernandez v. State, 2013 Tex. App. LEXIS 4548 (Tex. App. Amarillo Apr. 9 2013).

1207. Trial court did not err by admitting evidence of an extraneous offense of attempted capital murder, based on defendant swerving towards an officer laying traffic spikes, because the 40 minute chase that began in one county and ended in another was one, indivisible criminal transaction, and the need for context outweighed any unfairly prejudicial effect to defendant. Capps v. State, 2013 Tex. App. LEXIS 4438 (Tex. App. Dallas Apr. 5 2013).

1208. In the absence of a record, the court could not conclude that defense counsel's failure to object to the admission of defendant's prior marijuana conviction was so outrageous that no competent attorney would have engaged in it. The court further held that defendant also failed to show that a reasonable possibility existed that, but for counsel's error, the result of the trial would have been different because excluding the complained-of prior offense, the evidence amply supported defendant's convictions. Mccook v. State, 402 S.W.3d 47, 2013 Tex. App. LEXIS 4337 (Tex. App. Houston 14th Dist. Apr. 4 2013).

1209. In a case where the victim's wife and appellant were having an affair, defense counsel was not ineffective for not objecting to the evidence regarding appellant's prior threats toward the victim as identity was an issue in the case and appellant's threats towards the victim could have been admitted to show proof of identity, motive, and intent under Tex. R. Evid. 404(b). Lemons v. State, 426 S.W.3d 267, 2013 Tex. App. LEXIS 4227, 2013 WL

1339002 (Tex. App. Texarkana Apr. 4 2013).

1210. During defendant's trial for robbery of a fast-food restaurant, the court did not err under Tex. R. Evid. 404(b) in admitting evidence of another robbery at a nearby fast-food restaurant because the two robberies were similar; they both involved a single male actor wearing a ski mask with one hand gloved and the other ungloved, and the actor in each robbery held a gun in his ungloved right hand. Mcneil v. State, 2013 Tex. App. LEXIS 4234 (Tex. App. San Antonio Apr. 3 2013).

1211. When defendant pleaded guilty to the unauthorized use of a motor vehicle, the State gave reasonable notice of its intent to proffer evidence of extraneous offenses and prior convictions during the punishment phase. The extraneous offenses were contained in a police report given to defendant long before trial, and the State gave notice of the prior convictions in an amended motion to enhance punishment filed seven days before trial. Campbell v. State, 2013 Tex. App. LEXIS 4353 (Tex. App. Amarillo Apr. 3 2013).

1212. At defendant's trial for unlawfully appropriating a firearm, the trial court did not err in admitting the evidence of another rifle theft and pawn transaction because it was admissible under Tex. R. Evid. 404(b) to provide the same transaction context for the single theft of the rifles. Defendant's theft of the two rifles was a single act to deprive the victim of his property. Sutterfield v. State, 2013 Tex. App. LEXIS 3972, 2013 WL 1281843 (Tex. App. Eastland Mar. 28 2013).

1213. In a criminal mischief case, extraneous offense evidence under Tex. R. Evid. 404(b) was properly used to show identity; although a trial court could have presumed that appellant's wife or someone else could have installed a jumper on an electric meter at his residence, finding one on appellant's business made it less likely that he was innocent. Giles v. State, 2013 Tex. App. LEXIS 4044, 2013 WL 1319343 (Tex. App. Dallas Mar. 28 2013).

1214. In defendant's burglary case, the court properly admitted evidence of other burglaries because they were committed in close proximity to defendant's home, the burglaries were similar, and the burglaries were both daytime residential burglaries by forced entry in which the homes were ransacked. The property stolen at the burglaries was commingled at defendant's residence. Box v. State, 2013 Tex. App. LEXIS 4077, 2013 WL 1319359 (Tex. App. Dallas Mar. 28 2013).

1215. Issue was whether the trial court erroneously denied a mistrial after sustaining an objection to extraneous offense evidence and instructing the jury to disregard, and appellant did not show that an officer's comment regarding the victim's initial hesitancy in pressing charges given appellant's past was so prejudicial that it was incurable, given in part that the certainty of appellant's conviction of sexual assault absent the officer's remark was high because the evidence proving the assault was overwhelming; appellant admitted taking photographs of the victim's genitalia while she was sleeping and admitted penetrating her with his finger. Brown v. State, 2013 Tex. App. LEXIS 4063, 2013 WL 1281917 (Tex. App. El Paso Mar. 28 2013).

1216. Appellant cited various cases, but his reliance was misplaced, given that the issue was whether the trial court erroneously denied a mistrial after sustaining an objection to extraneous offense evidence and issuing an instruction to disregard, not whether the trial court erred in admitting extraneous offense-evidence over objection, as it was in the cases cited; appellant did not address the issue or cite relevant authority. Brown v. State, 2013 Tex. App. LEXIS 4063, 2013 WL 1281917 (Tex. App. El Paso Mar. 28 2013).

1217. Appellant claimed the trial court erred in admitting evidence of extraneous offenses, for purposes of Tex. R. Evid. 404(b), but by testifying on direct that none of the allegations against him were true and that he was not investigated or convicted of prostitution, being a terrorist, or theft, other than a certain conviction, appellant created a false impression abut his criminal history, and thus under Tex. R. Evid. 609(a), the State was entitled to impeach

appellant with the complained-of evidence. Rowshan v. State, 445 S.W.3d 294, 2013 Tex. App. LEXIS 2987, 2013 WL 1164404 (Tex. App. Houston 1st Dist. Mar. 21 2013).

1218. Appellant raised Tex. R. Evid. 401, 403 objections to a certain incident, but he did not claim that the extraneous offense evidence was improper character evidence, and as he did not object under Tex. R. Evid. 404(b), his complaint on appeal did not comport with his objections at trial, for purposes of Tex. R. App. P. 33.1(a), and thus he did not preserve his complaint for review. Rudzavice v. State, 2013 Tex. App. LEXIS 3140, 2013 WL 1188924 (Tex. App. Waco Mar. 21 2013).

1219. Even if the court found that appellant's objections fit within the confines of Tex. R. Evid. 404(b), appellant did not object each time the State sought to introduce evidence of the incident, nor did appellant obtain a running objection or set forth a proper objection outside the jury's presence, for purposes of Tex. R. Evid. 103(a)(1); because the evidence in question was admitted elsewhere without objection, any error in admitting the evidence was cured. Rudzavice v. State, 2013 Tex. App. LEXIS 3140, 2013 WL 1188924 (Tex. App. Waco Mar. 21 2013).

1220. When asked if appellant ever tested positive for drugs, a community supervision officer testified no, and as this was not evidence of a bad act, the court's review was limited to testimony concerning other issues. Edmondson v. State, 399 S.W.3d 607, 2013 Tex. App. LEXIS 3156, 2013 WL 1154210 (Tex. App. Eastland Mar. 21 2013).

1221. Although appellant objected to extraneous offense testimony due to lack of notice, exhibits stating those grounds for revocation had already been admitted into evidence; by not objecting to the lack of notice each time the evidence of community supervision violations was offered, any alleged error in admitting the testimony was cured by the exhibits already in evidence. Edmondson v. State, 399 S.W.3d 607, 2013 Tex. App. LEXIS 3156, 2013 WL 1154210 (Tex. App. Eastland Mar. 21 2013).

1222. This was not a criminal case, and thus the notice provision of Tex. R. Evid. 404(b) did not apply, and counsel could not be deemed ineffective for not requesting notice. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

1223. Evidence was admissible for determining the children's best interests, and the testimony was relevant to the best interest factors, such that it was not necessary for the mother's counsel to object to the testimony about extraneous offenses, counsel was not ineffective for failing to do so, and the court overruled appellant's issue related to a Daubert hearing. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

1224. Evidence of other crimes may be admissible if it is relevant for other purposes apart from showing character conformity. Wilson v. State, 2013 Tex. App. LEXIS 2428 (Tex. App. Houston 14th Dist. Mar. 12 2013).

1225. Because the court agreed with the State's proposed justification under one basis regarding rebutting a defendant's explanation, the court did not address the other two concerning identity or impeaching testimony, under Tex. R. Evid. 404(b). Wilson v. State, 2013 Tex. App. LEXIS 2428 (Tex. App. Houston 14th Dist. Mar. 12 2013).

1226. Evidence that appellant possessed another stolen wallet was likely not probative of whether appellant had robbed the victim in this aggravated robbery case apart from character conformity, and while the State could not introduce the extraneous evidence to show appellant robbed the victim because he robbed the other person in the extraneous case, the State could introduce the evidence to show it was less likely appellant had innocently obtained the victim's purse because he also possessed a stolen wallet; the trial court did not abuse its discretion in admitting evidence of the extraneous offense robbery, as this tended to show that appellant's explanation that he innocently

obtained the purse from another party was false, and evidence of the prior robbery was relevant for the non-character purpose of rebutting the defensive theory. Wilson v. State, 2013 Tex. App. LEXIS 2428 (Tex. App. Houston 14th Dist. Mar. 12 2013).

1227. Appellant did not object at trial on Tex. R. Evid. 404(b) grounds or any grounds that would have put the trial court on notice that he was objecting to the introduction of such evidence, plus his hearsay, speculation, and relevancy objections did not preserve error under Rule 404(b), such that he failed to preserve this issue for review under Tex. R. App. P. 33.1(a). Hawkins v. State, 2013 Tex. App. LEXIS 2282 (Tex. App. Eastland Mar. 7 2013).

1228. Even assuming the issue was preserved, a question did not relate to an extraneous offense, and the trial court sustained appellant's hearsay objection, after which appellant did not take any action, and as he obtained all the relief he requested, he could not complain on appeal. Hawkins v. State, 2013 Tex. App. LEXIS 2282 (Tex. App. Eastland Mar. 7 2013).

1229. Testimony was relevant to explain what led to the purchase of cocaine from appellant, and detective's testimony did not implicate appellant in any extraneous offense. Hawkins v. State, 2013 Tex. App. LEXIS 2282 (Tex. App. Eastland Mar. 7 2013).

1230. Appellant did not object to any of the prosecutor's statements on the ground that they constituted improper comments on extraneous offenses, and thus he failed to preserve error on this issue. Hawkins v. State, 2013 Tex. App. LEXIS 2282 (Tex. App. Eastland Mar. 7 2013).

1231. Although appellant objected to some comments on other grounds, his extraneous offense complaint did not comport with those raised at trial, and thus his trial objections were not sufficient to preserve error. Hawkins v. State, 2013 Tex. App. LEXIS 2282 (Tex. App. Eastland Mar. 7 2013).

1232. Court did not find that the complained-of statements amounted to improper comments concerning extraneous offenses. Hawkins v. State, 2013 Tex. App. LEXIS 2282 (Tex. App. Eastland Mar. 7 2013).

1233. Trial court did not abuse its discretion by admitting evidence of the burglary in violation of Tex. R. Evid. 404(b) because it was necessary to show the chain of events that occurred immediately prior to the shooting, why the officer was in pursuit of defendant's brother, and led to the confrontation between defendant and the officer and defendant's shooting the officer. Castillo v. State, 2013 Tex. App. LEXIS 2034, 2013 WL 781776 (Tex. App. San Antonio Mar. 1 2013).

1234. Trial court did not err in admitting evidence that defendant had previously, knowingly disregarded the lawful commands of a police officer because the State was entitled to rebut defendant's assertion that had he known they were police officers, he would not have pointed his firearm at them. Flores v. State, 2013 Tex. App. LEXIS 1809 (Tex. App. Dallas Feb. 26 2013).

1235. Trial court erred in denying defendant's motion to sever two stalking charges for separate trials because the fact that the evidence of one charged offense might have been admissible under Tex. R. Evid. 404(b) in the trial of the other charged offense was no proof that defendant was not harmed by being forced to proceed to trial under both together. Werner v. State, 445 S.W.3d 228, 2013 Tex. App. LEXIS 1716, 2013 WL 824040 (Tex. App. Houston 1st Dist. Feb. 21 2013).

1236. Trial court did not err by admitting evidence that defendant lied about his military service because his fictitious military involvement and explanations to his wife about living at various military posts set forth the

necessary facts to explain to the jury how defendant isolated the minor victim from her mother, defendant's wife, during the period of abuse; without defendant's stories of military service, the victim's testimony about the abuse made little or no sense. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

1237. Even though the trial court abused its discretion by admitting defendant's military record into evidence, as the fact that defendant was charged with escape and had been discharged for misconduct did not make it more or less likely that he had committed the sexual assault offenses, the error was harmless because there was evidence supporting defendant's conviction, other evidence showed that he was untruthful about his military service, and the State never mentioned the extraneous offenses contained in defendant's military record. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

1238. At defendant's trial for the aggravated sexual assault of a child, the trial court erred because it refused to allow defendant to cross-examine the State's witnesses in violation of his Sixth Amendment right to confrontation regarding the complainant's sexual assault of his younger sister. The impeachment evidence was admissible under Tex. R. Evid. 404(b) to correct a false impression left with the jury that the complainant's emotional problems, watching pornography, and need for counseling arose as a result of his victimization by defendant. Johnson v. State, 2013 Tex. App. LEXIS 1515, 2013 WL 531079 (Tex. App. Fort Worth Feb. 14 2013).

1239. Appellant did not request a limiting instruction regarding extraneous offenses offered during the punishment phase, but a trial court had a duty to provide such even without objection. Davis v. State, 2013 Tex. App. LEXIS 1452, 2013 WL 593484 (Tex. App. Houston 1st Dist. Feb. 14 2013).

1240. Failure to include a limiting instruction as to extraneous offense evidence admitted during the punishment phase did not cause appellant egregious harm, given that (1) the State did not mention the extraneous offense during voir dire or opening statements, (2) the State put on strong evidence of appellant's guilt of indecency, (3) the jury did not punish appellant's inappropriate touching of one victim more harshly based on the extraneous offense, and (4) the sentence fell within the lower half of the available range. Davis v. State, 2013 Tex. App. LEXIS 1452, 2013 WL 593484 (Tex. App. Houston 1st Dist. Feb. 14 2013).

1241. It was possible that counsel decided not to object to unfavorable evidence to avoid drawing emphasis to that evidence, and the court noted the extraneous offenses were not always inadmissible and counsel was not deficient for failing to make an objection that was futile; in any event, the record was silent as to counsel's strategy, and thus appellant did not rebut the presumption that counsel's performance was reasonable. Davis v. State, 2013 Tex. App. LEXIS 1452, 2013 WL 593484 (Tex. App. Houston 1st Dist. Feb. 14 2013).

1242. Evidence of extraneous bad acts were not admitted at the punishment phase of defendant's trial for aggravated sexual assault of a child, because the State's questions on cross-examination regarding his other child were not evidence; therefore, the trial court was not required to provide a reasonable doubt jury instruction regarding extraneous offenses. Bolte v. State, 2013 Tex. App. LEXIS 1490, 2013 WL 593834 (Tex. App. Corpus Christi Feb. 14 2013).

1243. Because appellant was given the opportunity to, and did, develop evidence to rebut a witness's testimony that appellant was angry with the victim for not bailing him out of jail, the alleged failure of the State to provide reasonable notice of the extraneous offense under Tex. R. Evid. 404(b) did not affect appellant's substantial rights. Nieto v. State, 2013 Tex. App. LEXIS 1239, 2013 WL 485762 (Tex. App. Houston 1st Dist. Feb. 7 2013).

1244. Trial court did not abuse its discretion in determining the testimony of a witness that appellant had been in jail was not substantially more prejudicial than probative under Tex. R. Evid. 403 because 1) the evidence had

probative value as it demonstrated appellant's possible motive for shooting the victim; 2) the witness's testimony about motive was brief and directly relevant to appellant's motive and the intent element of the charged offense and, as such, had less potential to distract the jury from the charged offense; and 3) evidence of the reason appellant was in jail was excluded, which mitigated any potential for the jury to give undue weight to the evidence. Nieto v. State, 2013 Tex. App. LEXIS 1239, 2013 WL 485762 (Tex. App. Houston 1st Dist. Feb. 7 2013).

1245. At defendant's trial for possession with intent to deliver a controlled substance, cocaine, in a drug free zone, the trial court did not err in admitting extraneous offense evidence under Tex. R. Evid. 404(b); evidence that defendant had constructively delivered drugs to an undercover officer two weeks before his arrest was relevant to show that, on the date of his arrest, he possessed the cocaine with the intent to deliver. Blue v. State, 2013 Tex. App. LEXIS 1231, 2013 WL 489998 (Tex. App. Waco Feb. 7 2013).

1246. Even if the trial court erred by admitting into evidence a witness's testimony that defendant had been trying to send someone to harm him and his family, any error was cured when the same type of evidence concerning witnesses' fear of defendant was admitted elsewhere without objection, both before and after the complained-of testimony. Prior to the complained-of testimony, a co-defendant testified that he did not want to tell authorities about defendant's involvement in the offense because "snitches get stitches," and a second co-defendant testified that he gave three different statements to the police because he feared that defendant would harm his family in retaliation; after the complained-of testimony, defendant's ex-wife testified without objection that she came forward with what she knew about defendant's involvement because she feared that defendant would harm her because she no longer wanted to be involved with him. Brown v. State, 2013 Tex. App. LEXIS 1058, 2013 WL 476764 (Tex. App. Beaumont Feb. 6 2013).

1247. Objection on relevance grounds did not preserve error under Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103(a)(1) as to an asserted Tex. R. Evid. 404(b) error. Helping Hands Home Care, Inc. v. Home Health of Tarrant County, Inc., 393 S.W.3d 492, 2013 Tex. App. LEXIS 820, 2013 WL 326319 (Tex. App. Dallas Jan. 29 2013).

1248. Trial court's extraneous offense instruction did not cause defendant egregious harm because defendant's driving offenses were irrelevant to an intent to deliver cocaine because the instruction neither suggested nor required that the jury draw any particular inference about defendant's intent based on the offenses he committed but rather permitted the jury to assign the offenses their appropriate relevance in determining defendant's intent. Limas v. State, 2013 Tex. App. LEXIS 827, 2013 WL 328988 (Tex. App. Houston 14th Dist. Jan. 29 2013).

1249. Trial court did not err by admitting evidence of defendant's prior misconduct with a teenager under Tex. R. Evid. 404(b) because defense counsel's questions exploring a civil lawsuit opened the door to evidence offered to rebut the implication that the victim's mother had induced the victim to fabricate charges against defendant to create grounds for a lawsuit with a potential financial payoff. The trial court did not abuse its discretion by concluding that the danger of unfair prejudice did not substantially outweigh probative value under Tex. R. Evid. 403 because the State's need for the evidence was substantial, given the lack of physical evidence to corroborate the testimony of the victim and his mother and testimony about the prior offense occupied very few pages of the record. Hetherington v. State, 2013 Tex. App. LEXIS 437, 2013 WL 173760 (Tex. App. Fort Worth Jan. 17 2013).

1250. Evidence of defendant's prior conduct (violating a protective order that barred him from being at his wife's residence) was not probative of whether he violated a no-contact condition of probation, absent evidence that conduct occurred that would be a violation. If there is no evidence that the subsequent act occurred, then it is impossible to determine that the defendant acted in conformity with his prior behavior. Hacker v. State, 389 S.W.3d 860, 2013 Tex. Crim. App. LEXIS 157 (Tex. Crim. App. Jan. 16 2013).

1251. Trial court did not abuse its discretion by admitting evidence that he held the child victim's mother at gunpoint several days after the alleged assault occurred under Tex. R. Evid. 404(b) because it constituted same transaction contextual evidence and was relevant, as the evidence showed that defendant confronted the victim's mother because he wanted to interrogate the victim about the assault and showed the jury how defendant reacted violently to the victim's outcry; the evidence was also necessary to show how defendant gained access to the victim's house to leave a letter in which he admitted to touching the victim. The admission of the evidence did not violate Tex. R. Evid. 403 because it made a fact of consequence, defendant's touching of the victim's genitals, more probable. Rodriguez v. State, 2013 Tex. App. LEXIS 213, 2013 WL 135723 (Tex. App. Waco Jan. 10 2013).

1252. Trial court did not abuse its discretion by admitting defendant's girlfriend's testimony that defendant called her the day before the assault and threatened to harm her if he found her and the complainant together under Tex. R. Evid. 404(b) because the trial court could have reasonably concluded that the testimony constituted admissible same-transaction contextual evidence. Defendant's telephone threat the day before placed the assault in context and was necessary to the jury's understanding of defendant's intent, state of mind, and motivation to forcibly enter the girlfriend's house and repeatedly stab the complainant; the evidence also tended to rebut defendant's self-defense theory. Morales v. State, 389 S.W.3d 915, 2013 Tex. App. LEXIS 109, 2013 WL 80154 (Tex. App. Houston 14th Dist. Jan. 8 2013).

1253. Trial court did not err by allowing the prosecutor to impeach defendant's witnesses concerning his good character and fitness for probation because the prosecutor rested his case in the punishment phase without referring to other convictions or wrongful acts, and therefore the State was not required to give defendant notice of extraneous offenses referred to during cross-examination under Tex. Code Crim. Proc. art. 37.07. Morales v. State, 389 S.W.3d 915, 2013 Tex. App. LEXIS 109, 2013 WL 80154 (Tex. App. Houston 14th Dist. Jan. 8 2013).

1254. Trial counsel was not ineffective for failing to file a motion to secure notice from the State of its intent to introduce extraneous offense evidence because counsel was already aware of the evidence, as seen by counsel's preemptive attempts to exclude it by objecting. Matthews v. State, 2013 Tex. App. LEXIS 47, 2013 WL 53748 (Tex. App. Corpus Christi Jan. 3 2013).

1255. Because the record did not contain any evidence of trial counsel's strategy in failing to file a motion in limine to exclude extraneous offense evidence, the court was constrained to presume that counsel's performance was effective. Matthews v. State, 2013 Tex. App. LEXIS 47, 2013 WL 53748 (Tex. App. Corpus Christi Jan. 3 2013).

1256. Defendant's conviction for continuous sexual abuse of a child was proper under Tex. R. Evid. 404(b) because the trial court could have reasonably concluded the extraneous offense evidence regarding an alleged victim and defendant's sexual acts toward her was offered to rebut defendant's several defensive theories. The extraneous offense was sufficiently similar to the charged offense to be admissible because both the extraneous and the charged offense involved underage females that he knew; further, both individuals were related to defendant's wife and both the extraneous offense and some of incidents involving the complainant occurred at defendant's workplace. Lopez v. State, 2013 Tex. App. LEXIS 338 (Tex. App. Dallas Jan. 3 2013).

1257. Trial court did not err by allowing a physician to testify as an expert witness and testify generally as to the patterns of sexual offenders and how those offenders typically victimized children because the trial court could have concluded that the testimony would be helpful to the jury in its deliberations of the evidence and defendant failed to explain how the testimony about statistical correlations in families with sex offenders or the vulnerability of a child born into such a family carried with it unfair prejudice or how there was a clear disparity between its probative value and its degree of prejudice. Beltran v. State, 2012 Tex. App. LEXIS 10639 (Tex. App. Austin Dec. 21 2012).

1258. Trial court did not abuse its discretion by allowing the State to present evidence of defendant's extraneous offenses in violation of Tex. R. Evid. 404(b) during rebuttal because the witness's testimony about defendant's sexual advances toward her tended to rebut his defensive theory of fabrication. In addition, the circumstances of defendant's sexual advances against the witness were sufficiently similar to those in the charged sexual assault against the victim to be admissible, as both the witness and the victim worked for defendant's cleaning business, both were illegal immigrants, and defendant made unwanted sexual advances toward both in a bathroom. Mcmorris v. State, 2012 Tex. App. LEXIS 10545, 2012 WL 6629770 (Tex. App. El Paso Dec. 19 2012).

1259. Trial court did not abuse its discretion by admitting testimony about his 2007 sexual encounter with an adult female as the trial court found that the extraneous offense evidence was probative and relevant because the testimony tended to rebut the theories that defendant raised at trial. Cross v. State, 2012 Tex. App. LEXIS 10487, 2012 WL 6643832 (Tex. App. Beaumont Dec. 19 2012).

1260. Trial court did not abuse its discretion in allowing the testimony of appellant's former girlfriend; other testimony was elicited in support of the defensive theory that appellant was not an abusive person, and the girlfriend's testimony that appellant physically abused her rebutted the defensive theory, for purposes of Tex. R. Evid. 404(b). Garza v. State, 2012 Tex. App. LEXIS 10333 (Tex. App. Corpus Christi Dec. 13 2012).

1261. Assuming the issue was preserved, and assuming that the trial court erred in admitting evidence that appellant was fired from a job for an alleged theft, appellant was unable to show harm under Tex. R. App. P. 44.2(b), as the court was confident that the evidence had little or no effect on the jury; even assuming appellant's credibility was compromised, there was ample other evidence such that reasonable persons could have convicted appellant of capital murder of a child under the age of six, and the theft allegations were not related to the charged offense and was not mentioned again. Garza v. State, 2012 Tex. App. LEXIS 10333 (Tex. App. Corpus Christi Dec. 13 2012).

1262. Trial court did not abuse its discretion by admitting defendant's girlfriend's testimony that she lied to the police because she was scared of defendant, that they fought a lot, he would hit her, and that it was normal for them to fight. Even if the trial court had erred by admitting the evidence, the error was harmless because there was ample other evidence that it was normal for defendant and his girlfriend to fight and it was extremely doubtful that the jury gave much credence to the girlfriend's testimony concerning why she lied to police. Moreno v. State, 2012 Tex. App. LEXIS 10403, 2012 WL 6582556 (Tex. App. Eastland Dec. 13 2012).

1263. Trial court did not err under Tex. R. Evid. 404(b) in admitting testimony by defendant's girlfriend regarding defendant's prior drug use; considering expert testimony concerning the effect of methamphetamine on defendant's mental health condition and any prescribed medication for the condition, the trial judge could have reasonably concluded that the evidence of defendant's prior use of methamphetamine tended to rebut defendant's insanity defense. Dana v. State, 420 S.W.3d 158, 2012 Tex. App. LEXIS 10265, 2012 WL 6213501 (Tex. App. Beaumont Dec. 12 2012).

1264. Defendant's statement to police that he had, 20 years earlier, been accused of improper conduct with his former stepdaughter, was not relevant to prove defendant's intent under Tex. R. Evid. 401 and Tex. R. Evid. 404(b), and it was unduly prejudicial under Tex. R. Evid. 403. Defendant did not "open the door" to admission of the statement, Tex. R. Evid. 107, by responding to a question by the State. However, given the evidence of guilt, the error was harmless. Cressman v. State, 2012 Tex. App. LEXIS 9849, 2012 WL 5974013 (Tex. App. Waco Nov. 29 2012).

1265. Where defendant was convicted for aggravated sexual assault of a child -- his daughter, testimony about an extraneous offense he committed against his son was properly admitted under Tex. R. Evid. 404 because it

rebutted the defensive claim of fabrication. Because the similarity of the nature of the crime and the relationship of each victim involved in the two instances, the revelation of the previous conduct against the son diminished the possibility that the evidence of the daughter's recantation should be believed. Korp v. State, 2012 Tex. App. LEXIS 9832, 2012 WL 5961662 (Tex. App. Texarkana Nov. 28 2012).

1266. In a sexual assault case, the court did not err by allowing a witness to testify that she had had sex with defendant because the prosecutor met with defendant's counsel minutes after learning of the witness's claim about having sex with defendant and the prosecutor later gave written notice of the State's intent to use that evidence. Additionally, the record included significant evidence, apart from the witness's testimony, of defendant actually having sex with underage girls and desiring to have sex with others. Cooper v. State, 2012 Tex. App. LEXIS 9643, 2012 WL 5869600 (Tex. App. Fort Worth Nov. 21 2012).

1267. In his aggravated assault on a peace officer trial, appellant opened the door to extraneous offense evidence under Tex. R. Evid. 404(b) by giving misleading testimony concerning his relationship with a neighbor, the person he thought he shot; appellant's testimony was relevant and necessary to (1) clarify the false impression, (2) rebut the reasonableness of his self-defense theory, and (3) show that he was prohibited from possession a firearm outside his house as a bond condition. Moten v. State, 2012 Tex. App. LEXIS 9541, 2012 WL 5696200 (Tex. App. Waco Nov. 15 2012).

1268. Concerning appellant's conviction of aggravated assault on a peace officer, the trial court did not abuse its discretion in admitting appellant's testimony concerning a certain prior incident and the attendant consequences over appellant's objection under Tex. R. Evid. 403; appellant sought to establish a theory of self-defense, and testimony about the prior incident was probative in (1) clarifying the false impression appellant gave about his relationship with a neighbor, the person appellant thought he shot, (2) undermining his self-defense theory, and (3) showing that he was prohibited from possessing a gun outside his house on the date in question, and appellant did not overcome the presumption that the testimony about the incident was more probative than prejudicial. Moten v. State, 2012 Tex. App. LEXIS 9541, 2012 WL 5696200 (Tex. App. Waco Nov. 15 2012).

1269. Appellant's testimony concerning a prior incident was admissible for more than one reason, and because the testimony touched on several other relevant issues at trial, a limiting instruction to determining appellant's credibility was not required. Moten v. State, 2012 Tex. App. LEXIS 9541, 2012 WL 5696200 (Tex. App. Waco Nov. 15 2012).

1270. In undermining appellant's theory of self-defense, the evidence complained-of was also admissible to prove appellant's state of mind at the time of the shooting, and the trial court did not err in refusing to give a limiting instruction regarding appellant's testimony about a prior incident, in connection with his conviction of aggravated assault on a peace officer. Moten v. State, 2012 Tex. App. LEXIS 9541, 2012 WL 5696200 (Tex. App. Waco Nov. 15 2012).

1271. Evidence admitted at defendant's trial did not refer to defendant's "flight," nor demonstrate defendant had fled Texas; rather, it showed defendant stated he was homeless to his probation officer, went to a homeless shelter in St. Louis, and was arrested there. Thus, the evidence presented at trial merely showed the circumstances surrounding defendant's arrest and did not characterize defendant's presence in St. Louis as the result of his "flight." Garner v. State, 2012 Tex. App. LEXIS 9404, 2012 WL 5503995 (Tex. App. Dallas Nov. 14 2012).

1272. In defendant's criminal solicitation of a minor case, the court did not err by allowing evidence of his Internet address book, which showed he had contacts with females with sexually suggestive and youthful names because the evidence was probative in that it tended to show defendant was not on the Internet looking for babysitting services. The evidence did not include any specifics of any extraneous misconduct and there was therefore little

danger the jury would either give the evidence undue weight or decide the case on an improper basis. Meadows v. State, 2012 Tex. App. LEXIS 9416, 2012 WL 5504017 (Tex. App. Dallas Nov. 14 2012).

1273. In defendant's attempted sexual assault case, a witness's testimony regarding other inappropriate conduct allegedly perpetrated by defendant was properly admitted because the testimony showed that defendant acted inappropriately with other underage girls in the household and, thus, corroborated the victim's testimony and showed defendant's predilection for underage girls. Additionally, the State needed the testimony to rebut the mother's assertion that nothing inappropriate had ever transpired between defendant and the victim. Baker v. State, 2012 Tex. App. LEXIS 9345, 2012 WL 5458474 (Tex. App. Waco Nov. 8 2012).

1274. In defendant's murder case, the trial court did not abuse its discretion in admitting testimony as evidence of identity because, in both offenses, a green vehicle blocked the roadway and a young man approached the blocked-in vehicle with a "silver" handgun. The witness identified defendant as the "young man" from her aggravated robbery, and he used an accomplice's mother's vehicle to commit that offense; the challenged evidence made defendant's identity more probable, took little time to develop, and supported the element of identity. Torres v. State, 2012 Tex. App. LEXIS 9134 (Tex. App. Corpus Christi Nov. 1 2012).

1275. Trial court did not err by allowing the State to offer evidence that defendant sexually assaulted his stepdaughter when she was a child under Tex. R. Evid. 404(b) because defense counsel had made the implicit assertion that defendant had characteristics or had done things that were inconsistent with being the kind of person who would sexually assault a child or in allowing the State to rebut that assertion. Pittman v. State, 2012 Tex. App. LEXIS 9057 (Tex. App. Tyler Oct. 31 2012).

1276. Appellant only raised a general objection to the admission of extraneous offenses, which was insufficient to preserve a Tex. R. Evid. 403 objection for review, and thus this issue was overruled. Martinez v. State, 2012 Tex. App. LEXIS 8994 (Tex. App. Amarillo Oct. 30 2012).

1277. Defendant's threats that he would hurt people who snitched on him were admissible to show consciousness of guilt. Keith v. State, 384 S.W.3d 452, 2012 Tex. App. LEXIS 8860 (Tex. App. Eastland Oct. 25 2012).

1278. In an indecent exposure case, the court properly allowed evidence of defendant's prior conviction of failing to register as a sex offender over his objection because it was a crime of deception and was a significant piece of evidence bearing on his character for truthfulness; the manner in which the State presented evidence of defendant's conviction did not likely leave an indelible impression on the jurors to encourage an irrational decision. Tristan v. State, 393 S.W.3d 806, 2012 Tex. App. LEXIS 8895, 2012 WL 5285673 (Tex. App. Houston 1st Dist. Oct. 25 2012).

1279. In a murder case, the court properly admitted evidence relating to a prior burglary because defendant was alleged to have stolen a firearm and he later used that firearm to shoot at the property where the victim was killed; the burglary and the shooting could therefore be seen as "an indivisible criminal transaction." Shafer v. State, 2012 Tex. App. LEXIS 8941, 2012 WL 5292919 (Tex. App. Corpus Christi Oct. 25 2012).

1280. Appellant's brief failed to contain record references to the testimony he claimed violated Tex. R. Evid. 404(b), but the State's brief filled in the void; the State included record references to certain testimony, but this was not included in appellant's Rule 404(b) complaint, and the court did not consider it further. Biera v. State, 391 S.W.3d 204, 2012 Tex. App. LEXIS 8782, 2012 WL 5199374 (Tex. App. Amarillo Oct. 22 2012).

1281. Evidence of drug use by appellant and others was relevant to show a motive for the robbery, and the trial court could have found that their drug issues provided a motive for individuals with no income. Biera v. State, 391 S.W.3d 204, 2012 Tex. App. LEXIS 8782, 2012 WL 5199374 (Tex. App. Amarillo Oct. 22 2012).

1282. One witness's car had a direct connection to the robbery, and testimony of an accomplice's use of the credit cards to keep gas in her vehicle was relevant to show the use of the witness's car at the time of the robbery, such that the trial court could have found that evidence of the accomplice's credit card use was relevant to show the identity of the accomplice and appellant as the robbers; the ruling that the credit card evidence had relevance beyond character conformity in appellant's aggravated robbery case was not an abuse of discretion. Biera v. State, 391 S.W.3d 204, 2012 Tex. App. LEXIS 8782, 2012 WL 5199374 (Tex. App. Amarillo Oct. 22 2012).

1283. As appellant's identity as a robber was a major dispute and the evidence corroborating accomplice-witness testimony was mostly circumstantial, the trial court could have considered other evidence, including stolen credit card evidence, probative and necessary; the credit card evidence had little prejudicial effect as character conformity evidence because there was testimony the card was not given to appellant, nothing showed the evidence tended to confuse or mislead the jury, and the jury was instructed on how to consider extraneous offense testimony, such that the court found no abuse of discretion in the trial court's finding that the evidence was not precluded by Tex. R. Evid. 403. Biera v. State, 391 S.W.3d 204, 2012 Tex. App. LEXIS 8782, 2012 WL 5199374 (Tex. App. Amarillo Oct. 22 2012).

1284. Court did not err in admitting extraneous-offense evidence under Tex. R. Evid. 404(b) because, throughout trial, defendant's defensive theory was that the complainant consented to the sexual encounter; defendant neither objected to the instruction provided nor did he request a different limiting instruction that he deemed to be appropriate. The evidence was admissible under the opportunity, plan, and intent exceptions to Rule 404(b) and as evidence of modus operandi. Bailey v. State, 2012 Tex. App. LEXIS 8593, 2012 WL 4841465 (Tex. App. Waco Oct. 11 2012).

1285. Defendant's conviction for engaging in organized crime was proper because the nonaccomplice evidence placed defendant at or near the scene of the crime at or about the time of its commission under suspicious circumstances and because, although the forensic examiner testified that he did not know who actually sent or received the text messages, the circumstances were sufficient to allow a jury reasonably to find that defendant sent and received the messages. Because intent to commit forgery could not be inferred, the prior conviction showing strikingly similar facts made the existence of a material fact, that was, whether defendant possessed forged checks with the intent to defraud or harm another, more probable, Tex. R. Evid. 404(b) Franklin v. State, 2012 Tex. App. LEXIS 8513 (Tex. App. Dallas Oct. 10 2012).

1286. Appellant argued that the complainant's letter was not admissible because it contained extraneous bad act references, but the court found that the language was too vague to allow a definitive conclusion that the term "that" referenced sexual conduct, and the letter's mention of rape did not change this because the letter said the rape was imagined in a dream and was not an act that was attributed to appellant; because the letter did not describe any bad acts or criminal activity, it was not excludable. Conteh v. State, 2012 Tex. App. LEXIS 8440, 2012 WL 4788386 (Tex. App. Houston 14th Dist. Oct. 9 2012).

1287. Incidents about which appellant wanted to introduce testimony did not implicate himself, and the victim did not make any threat toward him, nor did the victim's prior conduct show that he had any animosity toward appellant, and the evidence was not probative of the victim's state of mind as it related to the situation with appellant two years after the incidents took place, given that before the shooting, the two did not know each other; while appellant could introduce reputation or opinion testimony suggesting the victim was the first aggressor, appellant could not introduce specific acts because that was not admissible for these purposes, and nothing showed that the proffered testimony would have been relevant for any purpose besides character conformity, for purposes of Tex. R. Evid.

404(b). Bottorff v. State, 2012 Tex. App. LEXIS 8220, 2012 WL 4477396 (Tex. App. Austin Sept. 28 2012).

1288. At defendant's trial for DWI, the admission of medical records containing extraneous offense evidence under Tex. R. Evid. 404(b) did not have a substantial effect on the verdict because the jury heard evidence that defendant was passed out in his vehicle with a bottle of alcohol between his legs; the officer noticed defendant's glassy and bloodshot eyes, defendant admitted he consumed alcohol and prescription medications, and field sobriety test results suggested intoxication. The record contained sufficient evidence from which the jury could find defendant guilty of DWI beyond a reasonable doubt. Lorenz v. State, 2012 Tex. App. LEXIS 7777, 2012 WL 4017766 (Tex. App. Beaumont Sept. 12 2012).

1289. All evidence admitted during the guilt/innocence phase of trial for aggravated sexual assault and sexual assault was readmitted during the punishment phase; because the evidence admitted during the guilt/innocence phase included extraneous offense evidence, the trial court erred in not instructing the jury concerning the burden of proof. Solis v. State, 2012 Tex. App. LEXIS 7512, 2012 WL 3833036 (Tex. App. San Antonio Sept. 5 2012).

1290. Court reviewed whether appellant was harmed under the applicable case law standard for egregious harm, as appellant did not object to the omission of the instruction as to the burden of proof for extraneous offenses. Solis v. State, 2012 Tex. App. LEXIS 7512, 2012 WL 3833036 (Tex. App. San Antonio Sept. 5 2012).

1291. Given that (1) the testimony presented for the first time in the punishment phase was only approximately 30 pages of the record, (2) the charge in the guilt/innocence phase instructed the jury concerning the extraneous offense burden of proof, (3) although such evidence was readmitted, no additional extraneous offense evidence was admitted during the punishment phase, and (4) the prosecutor told the jury it could consider the testimony if the jury believed it beyond a reasonable doubt, the omission of the instruction on the burden of proof regarding extraneous offenses did not amount to egregious harm. Solis v. State, 2012 Tex. App. LEXIS 7512, 2012 WL 3833036 (Tex. App. San Antonio Sept. 5 2012).

1292. Court properly admitted extraneous offense evidence because the State was required to prove that defendant committed the aggravated assault with intent to participate as a member of a criminal street gang and the intent element was hotly contested because defendant asserted that the crimes were not gang-related but simply an argument over a woman that escalated into a fight; it was the State's theory that the gang members assaulted the victim in retaliation for him disrespecting another gang member by interfering with his advances on a woman. There was no evidence the jury gave the evidence undue weight. Romero v. State, 2012 Tex. App. LEXIS 7573, 2012 WL 3834917 (Tex. App. El Paso Sept. 5 2012).

1293. Trial court did not abuse its discretion when it took into consideration during punishment an unadjudicated offense that had been dismissed, Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a), as any error was harmless as the trial court considered the positive steps defendant had made since his arrest, but was uncertain that defendant understood the seriousness of the offense. Meighen v. State, 2012 Tex. App. LEXIS 7401, 2012 WL 3799664 (Tex. App. Eastland Aug. 31 2012).

1294. In a case involving burglary of a habitation, a trial court did not err by admitting evidence of appellant's subsequent assault on one apartment resident under Tex. R. Evid. 404(b), who was attempting to retrieve the purse and keys of appellant's victim. This was admissible as same-transaction contextual evidence because it provided the jury with information essential to understanding the context and circumstances of blended or interwoven events, and a limiting instruction was not required. Jennings v. State, 2012 Tex. App. LEXIS 7400, 2012 WL 3765083 (Tex. App. Eastland Aug. 31 2012).

1295. In a tampering with evidence case, the court properly admitted Tex. R. Evid. 404(b) evidence that defendant police officer had been at parties and that he was drinking with underage females because defendant attempted to show that the State was engaging in selective prosecution, and the State introduced the evidence to rebut the defensive theory. The State's evidence to rebut the defensive theory was not overly broad, and the court heard the testimony outside the presence of the jury. Shults v. State, 2012 Tex. App. LEXIS 7478, 2012 WL 3799209 (Tex. App. Waco Aug. 30 2012).

1296. In a domestic assault case, the court properly admitted evidence because the fact that defendant had a prior conviction for assault-family violence was an essential element of the repeat-offender charge, and the victim did not appear at trial to testify so the State needed the evidence to rebut the defensive theory of fabrication. Additionally, the victim's mother, when testifying to the extraneous offense, did not go into graphic detail regarding the circumstances surrounding the prior assault, and the documents relating to the offense also did not provide much detail in describing the assault. Garcia v. State, 2012 Tex. App. LEXIS 7543 (Tex. App. Austin Aug. 29 2012).

1297. Trial court did not abuse its discretion by admitting evidence that defendant offered to pay for an abortion for another teenager with whom he had sex without notice under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) because the evidence was adduced during sentencing on cross-examination in rebuttal to mitigation evidence and therefore was not subject to the notice requirement. Chavez v. State, 2012 Tex. App. LEXIS 7127, 2012 WL 3629619 (Tex. App. Austin Aug. 24 2012).

1298. Trial court did not abuse its discretion by admitting evidence that defendant offered to pay for an abortion for another teenager with whom he had sex because the record did not establish the requisite level of danger of unfair prejudice under Tex. R. Evid. 403, as the alleged act occurred in another town in the mid-1990s and the trial court could have found that the evidence was helpful in creating a fuller picture of defendant for the jurors, much like the evidence of his good work and family ties. Chavez v. State, 2012 Tex. App. LEXIS 7127, 2012 WL 3629619 (Tex. App. Austin Aug. 24 2012).

1299. Trial court did not abuse its discretion by admitting hundreds of digital images of gay pornography seized from defendant's home computer, including some that depicted children, under Tex. R. Evid. 404(b) because the trial court found that a defense witness's testimony opened the door to the pornography, as the defense elicited testimony about her opinion as to whether defendant could have committed the charges complained of and as a result, left a false impression with the jury. The trial court did not err by admitting the evidence over defendant's Tex. R. Evid. 403 objection because the State did not spend an excessive amount of time on the evidence and the pictures were no more heinous than the testimony elicited of the victims. Pawlak v. State, 2012 Tex. App. LEXIS 7109, 2012 WL 3612493 (Tex. App. Corpus Christi Aug. 23 2012).

1300. Considering the admission of photographs of text messages under Tex. R. Evid. 404(b), the text conversations that led up appellant's arrival at his ex-girlfriend's home were relevant in order to prove the motive appellant had for having a gun, and the messages provided contextual evidence, as they were sent immediately before appellant arrived. Trammell v. State, 2012 Tex. App. LEXIS 7149, 2012 WL 3612518 (Tex. App. Corpus Christi Aug. 23 2012).

1301. In defendant's theft case, evidence of subsequent offenses was admissible because those offenses provided the jury with proof of defendant's identity, showed his knowledge, and showed a scheme -- all purposes expressly permitted under Tex. R. Evid. 404(b), and the trial court unequivocally overruled a Tex. R. Evid. 403 objection. At no point did defendant request that the findings and conclusions of the trial court's balancing test be placed on the record. Boswell v. State, 2012 Tex. App. LEXIS 7177, 2012 WL 3629922 (Tex. App. Austin Aug. 23 2012).

1302. In defendant's theft case, evidence of subsequent offenses was admissible because those offenses provided the jury with proof of defendant's identity, showed his knowledge, and showed a scheme -- all purposes expressly permitted under Tex. R. Evid. 404(b), and the trial court unequivocally overruled a Tex. R. Evid. 403 objection. At no point did defendant request that the findings and conclusions of the trial court's balancing test be placed on the record. Boswell v. State, 2012 Tex. App. LEXIS 7177, 2012 WL 3629922 (Tex. App. Austin Aug. 23 2012).

1303. Trial court did not abuse its discretion to the extent that it determined that the State was not required to give notice of a witness's testimony that she and defendant had a pipe that they used to smoke methamphetamine because their use and possession of the pipe, which was allegedly destroyed in the patrol car, arose out of the same transaction and was part of the charged offense. Hernandez v. State, 2012 Tex. App. LEXIS 7164, 2012 WL 3640012 (Tex. App. Eastland Aug. 23 2012).

1304. Appellant claimed he was deprived of his Sixth Amendment right to counsel when the trial court did not sustain an objection to the introduction of a custodial statement he made, but the court disagreed; appellant had been in jail for burglaries that were allegedly committed by him, he was represented by counsel, the objection related to testimony concerning contraband found in jail, to which he waived his rights, and the burglary cases and the contraband case did not arise from the same facts, such that the trial court did not abuse its discretion in overruling the objection to the admission of extraneous conduct by appellant. Hernandez v. State, 2012 Tex. App. LEXIS 7020, 2012 WL 3600192 (Tex. App. Amarillo Aug. 22 2012).

1305. Court erred during defendant's trial for sexual assault of a child in admitting portions of recorded telephone conversations between defendant and a detective, which stated that defendant would rather spend time with kids, because while the evidence was relevant to intent under Tex. R. Evid. 404(b), the evidence was more prejudicial than probative. Dekneef v. State, 379 S.W.3d 423, 2012 Tex. App. LEXIS 7024 (Tex. App. Amarillo Aug. 22 2012).

1306. Because the extraneous offense evidence showed that appellant was arrested in close proximity to the victim's house after a reported break-in, the trial court was within its discretion to find that evidence of the prior burglary had non-character conforming relevance that rebutted appellant's defensive theory of conspiracy. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1307. There was no abuse of discretion by the trial court's admission of extraneous offense evidence, because all of the Tex. R. Evid. 403 factors weighed in favor of admitting the evidence. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1308. Probative nature of the extraneous offense was high as it arguably rebutted appellant's claim that the charges were fabricated as part of a conspiracy; the extraneous offense showed that appellant was arrested while driving his truck away from a lot behind the victim's house, the truck was spotted while police investigated a break-in report at the victim's house, and the break-in took place within days of the charged offense, and this weighed in favor of admitting the evidence. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1309. Potential of the extraneous offense evidence to impress the jury in an irrational but indelible way was not high, given that the evidence did not involve a crime of violence and the trial court gave a limiting instruction, and this factor weighed in favor of admitting the evidence. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1310. Extraneous offense was not discussed until cross-examination of appellant and then in the State's rebuttal case, and the testimony covered 50 pages out of more than 400 pages of testimony, which was not excessive; this

factor weighed in favor of admitting the evidence. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1311. State's need for the evidence was high because it needed the extraneous offense evidence in order to rebut appellant's defensive theories, including conspiracy. Garcia v. State, 2012 Tex. App. LEXIS 6924, 2012 WL 3574715 (Tex. App. Houston 14th Dist. Aug. 21 2012).

1312. Defendant's relevancy objections did not preserve his argument that admission of extraneous offense evidence of uncharged sexual conduct violated Tex. R. Evid. 404; in any event, because the same evidence came in through other testimony without objection, any error was cured. Goodwin v. State, 2012 Tex. App. LEXIS 6918, 2012 WL 3590723 (Tex. App. Corpus Christi Aug. 20 2012).

1313. Trial court did not err by admitting the testimony of an officer and a bail bondsman employee regarding defendant's prior arrest for felony possession of cocaine and subsequent bail under Tex. R. Evid. 404(b) because the State was entitled to rebut defendant's testimony that he accidentally struck the police vehicles while attempting to flee and it tended to establish that defendant's motive for assaulting the officer was to avoid revocation of his felony bail. The court held that the admission of the evidence was proper under Tex. R. Evid. 403 because: (1) created an inference that the assault on the officer was not accidental and defendant had a motive for attempting to flee; (2) the evidence exhibited little potential to improperly impress the jury; (3) the development of the evidence took only a short portion of the trial; and (4) the State needed the evidence because defendant testified that striking the officers' vehicles was accidental and he had no reason to flee from or assault the officer. Freeman v. State, 2012 Tex. App. LEXIS 6996 (Tex. App. Amarillo Aug. 20 2012).

1314. Even though the trial court denied appellant's motion in limine regarding extraneous bad acts before trial, he still had to object to the evidence when the State offered it for admission; because appellant did not object at trial, he failed to preserve his complaint for review. Baldwin v. State, 2012 Tex. App. LEXIS 6857, 2012 WL 3525642 (Tex. App. Corpus Christi Aug. 16 2012).

1315. In a sexual assault case, the court did not err by allowing evidence of a 2008 kidnap and sexual assault of another victim because both victims were forcefully taken and isolated from anyone who could help them; after defendant had each woman in his car, he restrained each of them, and used derogatory terms towards both. He physically assaulted each woman; ripped off their clothing; and in each case forcefully penetrated their vaginas with his fingers or his hand. Ramos v. State, 2012 Tex. App. LEXIS 6780, 2012 WL 3363348 (Tex. App. El Paso Aug. 15 2012).

1316. Under Tex. R. Evid. 404(b), the State's witness's testimony was admissible to rebut defendant's testimony that he could not obtain a real gun because he was a felon and the false impression it created; the testimony was also admissible as proof of defendant's modus operandi as it showed defendant's opportunity, intent, preparation and plan to commit aggravated robbery. Owens v. State, 2012 Tex. App. LEXIS 6758, 2012 WL 3292962 (Tex. App. Houston 14th Dist. Aug. 14 2012).

1317. On appeal of defendant's conviction for robbery, he claimed he was deprived of his right to fair notice by the State's untimely disclosure of its intent to present evidence of his gang membership. Because the evidence was introduced at the punishment phase of trial, Tex. Code Crim. Proc. Ann. art. 37.07(3)(g)--rather than Tex. R. Evid. 404(b)--applied. Rea v. State, 2012 Tex. App. LEXIS 7063, 2012 WL 3601126 (Tex. App. Austin Aug. 14 2012).

1318. At defendant's trial for family violence assault, the trial court did not abuse its discretion by admitting evidence of his prior assault against the victim under Tex. R. Evid. 404(b) to explain the victim's fear of retaliation and to rebut the defensive theory that the victim fabricated the allegations. Stanley v. State, 2012 Tex. App. LEXIS

7064, 2012 WL 3601128 (Tex. App. Austin Aug. 14 2012).

1319. Trial court did not abuse its discretion in admitting evidence of an extraneous murder pursuant to Tex. R. Evid. 404(b) where it reasonably could have concluded that the extraneous murder was sufficiently similar to the instant murder such that evidence of the extraneous murder was admissible to prove identity in the instant case. Although there were some differences in the surrounding circumstances and the ways in which the instant victim and the other victim were murdered, there were also enough similarities such that the presence of defendant's DNA at the murder scene, either in or close to the victims' bodies, was not the only significant similarity that the two offenses had in common. Mcgregor v. State, 394 S.W.3d 90, 2012 Tex. App. LEXIS 6552, 2012 WL 3244196 (Tex. App. Houston 1st Dist. Aug. 9 2012).

1320. Regarding appellant's convictions of robbery and aggravated robbery, identity was at issue, and each robbery, including the extraneous offense, took place at night in convenience or dollar stores, the perpetrator made victims retreat to the back of the store, the perpetrator demanded cash via a note in three of the four offenses, and in two of the robberies, appellant's note identified the cash denominations sought, and it was not an abuse of discretion to admit this evidence, for purposes of Tex. R. Evid. 404(b); concerning the Tex. R. Evid. 403 component of this analysis, any prejudicial effect was mitigated because this was a bench trial, and the decision to admit the evidence was within the zone of reasonable disagreement. Williams v. State, 2012 Tex. App. LEXIS 6338, 2012 WL 3104390 (Tex. App. Tyler July 31 2012).

1321. Trial court did not abuse its discretion by admitting evidence of extraneous offenses committed by defendant during his trial for murdering his girlfriend's five-year-child because it was admissible under Tex. R. Evid. 404(b), as: (1) the identity of the perpetrator was in issue throughout the trial; (2) the overall pattern of abuse described by defendant's ex-girlfriend was significantly similar to the pattern of abuse described by his girlfriend; and (3) the ex-girlfriend's description of defendant's abuse of her son was strikingly similar to the girlfriend's description of defendant's deadly assault of her child. Castro v. State, 2012 Tex. App. LEXIS 6233, 2012 WL 3104817 (Tex. App. Amarillo July 30 2012).

1322. Trial court did not abuse its discretion by admitting evidence of extraneous offenses committed by defendant during his trial for murdering his girlfriend's five-year-child because it was admissible under Tex. R. Evid. 403, as: (1) defendant's ex-girlfriend's testimony regarding defendant's distinctively similar pattern of assaultive behavior and manner of abuse toward her son strongly served to make it more probable that it was defendant that assaulted the child leading to her death; (2) the State's need for the testimony was high as only two people could testify regarding the events of the day the child died presented completely contradictory accounts of those events; 93) the trial court instructed the jury regarding the appropriate use of the testimony; and (4) the nature of defendant's assault on his ex-girlfriend's child, which did not cause his death or apparently any serious or permanent injury, was less emotional than the testimony regarding the nature of his assault on his girlfriend's child. Castro v. State, 2012 Tex. App. LEXIS 6233, 2012 WL 3104817 (Tex. App. Amarillo July 30 2012).

1323. Assuming that the admission of the extraneous offense evidence was error, any error was harmless under Tex. R. App. P. 44.2(b), given that (1) the State provided ample evidence of appellant's guilt of stalking, (2) the jury was charged on three of appellant's acts alleged in the indictment, (3) the victim testified about the incidents, and the jury was free to believe the victim's testimony, (4) the extraneous offense related to the spray-painting and "keying" of the victim's car, and like the alleged spray-painting incident on a different day, there were no witnesses to the acts, and (5) had witness testimony been available and offered that appellant committed the extraneous offenses, it could have been argued that the extraneous offense evidence influenced the jury, but in the absence of such eyewitness testimony, the court had a fair assurance that any error in admitting the evidence did not have an influence on the verdict. Crowley v. State, 2012 Tex. App. LEXIS 5875 (Tex. App. Eastland July 19 2012).

1324. Trial court did not err by admitting testimony by the shooter about previous attempts defendant had made on her husband's life under Tex. R. Evid. 403 because the testimony was probative as the acts testified to were virtually identical to that with which defendant was charged, it tended to show defendant's motive and intent to end her husband's life, and a witness testified later, without objection, about two instances when defendant sought her advice or assistance in locating someone who could kill her husband, and therefore defendant was not harmed by the admission of the shooter's testimony. Grigsby v. State, 2012 Tex. App. LEXIS 5598, 2012 WL 2861670 (Tex. App. Corpus Christi July 12 2012).

1325. Court analyzed the extraneous offenses using the exceptions listed in Tex. R. Evid. 404(b) because, while the list is not exclusive, it does outline the most common exceptions, and the State did not set forth any novel reason why this evidence was admissible; certain exceptions did not apply. Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270 (Tex. App. Eastland July 12 2012).

1326. Evidence of prior incidents did not show motive for the crime for which appellant was being tried, and that was shown by other evidence, and the prior incidents served only to show that appellant had the same motive at a prior time. Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270 (Tex. App. Eastland July 12 2012).

1327. Appellant claimed that the victim was lying in his case, and the previous crimes did not increase the victim's credibility, and it was not evidence that rehabilitated her truthfulness character under Tex. R. Evid. 608(b); the extraneous offenses did not rebut any defensive theory. Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270 (Tex. App. Eastland July 12 2012).

1328. As the extraneous offenses were not relevant for any reason beside character conformity, the trial court abused its discretion in admitting the evidence. Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270 (Tex. App. Eastland July 12 2012).

1329. Because the extraneous offense evidence was not admissible, the court did not need to decide if the probative value of the evidence was outweighed by the danger of unfair prejudice. Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270 (Tex. App. Eastland July 12 2012).

1330. Although the trial court erred in admitting extraneous offenses, the presentation thereof took a short amount of time, there were other witnesses during the State's case and they did not concern the extraneous offenses, there was only one mention of extraneous offenses in the State's closing argument, and the evidence of appellant's guilt of aggravated kidnapping was dependent on the victim's credibility, and the jury was convinced by her testimony; thus, the extraneous offense testimony likely had little effect on the verdict, and the error was harmless under Tex. R. App. P. 44.2(b). Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270 (Tex. App. Eastland July 12 2012).

1331. Under the indictment for aggravated kidnapping, the State had to prove that appellant knowingly or intentionally abducted the victim by restricting her without her consent, which interfered with her liberty, or by confining her with the intent to prevent her liberation; as the State had to prove that appellant had the specific intent to prevent the victim's liberation by using or threatening deadly force, appellant's intent was inferred from the crime itself, and the extraneous offenses did not shed light on his intent, except to reemphasize that he had the intent required. Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270 (Tex. App. Eastland July 12 2012).

1332. Incidents did not amount to a common plan or scheme, given that they did not indicate steps appellant took to prepare for the commission of the offense; appellant committed similar crimes in the past against the same victim. Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270 (Tex. App. Eastland July 12 2012).

1333. Trial court did not abuse its discretion by overruling defendant's objection to testimony about an extraneous offense against a corrections officer under Tex. R. Evid. 404(b) because the victim testified that defendant hit her with the corrections officer's riot baton, and therefore the question of how the baton went from the officer's holder to defendant's hand to being used against the victim in short order was contextual evidence relating to the charged assault. In addition, defendant's objection came well after the extensive testimony about defendant hitting the officer and he only object to the officer's description of her injury; the court further held that the admission of the officer's statement regarding a slight swelling of her face did not affect a substantial right. Mayfield v. State, 2012 Tex. App. LEXIS 5487, 2012 WL 2832529 (Tex. App. Tyler July 11 2012).

1334. Trial court did not abuse its discretion by admitting portions of the victim's police interview during which he claimed defendant threatened to kill him like he had other boys because the statements were necessary to understand how defendant overcame the victim's resistance to the sexual assault and the evidence was relevant to rebut defendant's claim that he did not threaten the victim. The evidence was probative of whether defendant used or exhibited a deadly weapon to accomplish the assault, presentation of the evidence took little time, and the statements did not suggest an improper basis for deciding the case. Sandles v. State, 2012 Tex. App. LEXIS 5518, 2012 WL 3104377 (Tex. App. Dallas July 11 2012).

1335. Any error by the trial court in failing to given the jury a contemporaneous limiting instruction as the extraneous offenses admitted against defendant was harmless because the record reflected ample evidence of defendant's guilt, the extraneous evidence was not more heinous or inflammatory than the evidence pertaining to the charged offenses, and the jury charged contained a limiting instruction with regard to the extraneous conduct committed by defendant. Guardado v. State, 2012 Tex. App. LEXIS 5514, 2012 WL 2832561 (Tex. App. El Paso July 11 2012).

1336. Even though the trial court erred by admitting evidence concerning defendant's suicide attempt shortly after his arrest on the instant charges under Tex. R. Evid. 404(b) because it was not part of the same transaction and therefore the State was required to give notice before the day of trial, the error was harmless because: (1) defendant was not surprised; (2) he did not request a continuance; and (3) similar evidence was admitted elsewhere without objection. Fletcher v. State, 2012 Tex. App. LEXIS 5429, 2012 WL 2783298 (Tex. App. Texarkana July 10 2012).

1337. Counsel did not object to testimony as extraneous, but that the witness was not a proper outcry witness, and thus the objection below did not comport with the one on appeal, such that the complaint concerning extraneous offenses was not preserved for review. Martinez v. State, 2012 Tex. App. LEXIS 5388, 2012 WL 2728886 (Tex. App. Amarillo July 9 2012).

1338. Because the complained of evidence was not introduced during the State's case-in-chief, but was instead offered in rebuttal to the defense raised by cross-examination of the State's witness, defendant was not entitled to notice pursuant to Tex. R. Evid. 404(b). White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

1339. Because the complained of evidence was not introduced during the State's case-in-chief, but was instead offered in rebuttal to the defense raised by cross-examination of the State's witness, defendant was not entitled to notice pursuant to Tex. R. Evid. 404(b). White v. State, 2012 Tex. App. LEXIS 5271 (Tex. App. Amarillo June 29 2012).

1340. Defendant waived any error in the admission of evidence of the additional injury to his daughter because he did not object to the admission of his written statement in which he admitted to throwing his daughter onto the bed prior to the date of the offense. Smith v. State, 2012 Tex. App. LEXIS 5167, 2012 WL 2469548 (Tex. App. Eastland

June 28 2012).

1341. Even if the trial court committed error when it admitted evidence of extraneous offenses, such was harmless error under Tex. R. App. P. 44.2, given that (1) there was evidence not related to the extraneous offenses that did identify appellant as the shooter, (2) jurors were instructed that they could not consider the crimes unless they believed beyond a reasonable doubt that appellant committed them, and consideration of such was limited to whether there was motive, and (3) a witness did not testify that appellant was a pimp, but rather that he saw appellant interacting with prostitutes, which involved money and drugs. Coleman v. State, 2012 Tex. App. LEXIS 5106, 2012 WL 2402617 (Tex. App. Dallas June 27 2012).

1342. Because appellant did not object to the admission of extraneous offenses, he did not preserve the issue for review under Tex. R. App. P. 33.1(a), and even had appellant preserved the issue, the result would still be the same; the identity of the perpetrator in the capital murder case was contested, the State needed the evidence of the extraneous offenses to connect appellant to the murder, and there was no abuse of discretion in admitting the extraneous offenses. Gonzalez v. State, 2012 Tex. App. LEXIS 4834, 2012 WL 2312696 (Tex. App. Houston 14th Dist. June 19 2012).

1343. Counsel was not ineffective for making a Tex. R. Evid. 404(b) objection to extraneous offenses because it would have been overruled, as Tex. Code Crim. Proc. Ann. art. 38.37, § 2 permitted the admissibility of evidence that defendant provided alcohol and pornography to the child victims to lure or groom them. Counsel was not ineffective for failing to make a Tex. R. Evid. 403 objection because the factors of the balancing test weighed in factor of admitting the evidence, as it was probative of the relationship between defendant and the victims. Odom v. State, 2012 Tex. App. LEXIS 4316, 2012 WL 1964580 (Tex. App. Houston 14th Dist. May 31 2012).

1344. Trial court did not abuse its discretion under Tex. R. Evid. 404(b) by admitting autopsy photographs of the victim that showed injuries to areas other than her vagina because they were admissible to show the context in which the offense occurred, as defendant's assaultive behavior was so connected to the sexual assault that they formed an indivisible criminal transaction. Coe v. State, 2012 Tex. App. LEXIS 4169, 2012 WL 1899179 (Tex. App. Houston 14th Dist. May 24 2012).

1345. Evidence regarding prior false allegations of sexual abuse by the child victim was not admissible under Tex. R. Evid. 404(b) because defendant failed to show that the victim made any prior false allegations of sexual abuse against her grandmother or father and failed to show that any allegations were similar to the accusation in defendant's case. Luevano v. State, 2012 Tex. App. LEXIS 4108, 2012 WL 1883115 (Tex. App. El Paso May 23 2012).

1346. Trial court had not erred during defendant's trial for injuring a child in admitting evidence of three extraneous wrongs because it reasonably could have concluded that defendant's threat to show the victim's maternal grandmother a beating and his providing a false name to police and tampering with his handcuffs were probative of his consciousness of guilt, making them relevant under Tex. R. Evid. 404(b). The evidence tending to show defendant's consciousness of guilt was probative to assist the jury in determining whether the victim's injuries were accidental, as defendant claimed. Quirk v. State, 2012 Tex. App. LEXIS 4123, 2012 WL 1882934 (Tex. App. Beaumont May 23 2012).

1347. In a trial for injury to a child, in which the trial court admitted evidence of extraneous wrongs committed by defendant, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because there appeared little chance that the evidence was likely to influence the jury irrationally, as the conduct at issue did not involve instances where defendant caused other injuries. Moreover, the State did not spend an excessive amount of time developing the evidence. Quirk v. State, 2012 Tex. App. LEXIS 4123, 2012 WL 1882934

(Tex. App. Beaumont May 23 2012).

1348. Trial court did not abuse its discretion by admitting evidence of extraneous offenses under Tex. R. Evid. 404(b) because the trial court could have reasonably concluded that, beginning with the opening statement, defendant attempted to portray the victim as the aggressor and defendant as merely defending himself, and therefore the State was allowed to rebut with evidence of other crimes, wrongs, or acts where defendant was the aggressor. Castillo v. State, 2012 Tex. App. LEXIS 3997, 2012 WL 1764089 (Tex. App. Dallas May 18 2012).

1349. Court disagreed with the State that appellant waived error on a fourth admitted extraneous offense act, and thus the court addressed all four prior acts. Jurasek v. State, 2012 Tex. App. LEXIS 3973, 2012 WL 1810197 (Tex. App. Corpus Christi May 17 2012).

1350. For materiality and relevance purposes, the State's theory that appellant had ill will towards the victim was aided through introducing prior extraneous acts, and because the nature of the parties' relationship was material in order to show motive, the trial court did not abuse its discretion in finding the prior acts were admissible, for purposes of Tex. R. Evid. 404(b). Jurasek v. State, 2012 Tex. App. LEXIS 3973, 2012 WL 1810197 (Tex. App. Corpus Christi May 17 2012).

1351. Appellant claimed that even if the extraneous acts were relevant, they should have not been admitted under Tex. R. Evid. 403, but the State's establishment of motive relied almost exclusively on the extraneous acts against the victim or in retaliation for the current charge against appellant, and the parties' relationship was probative in helping develop the State's case and show motive; there was no abuse of discretion on the trial court's part in overruling appellant's objection. Jurasek v. State, 2012 Tex. App. LEXIS 3973, 2012 WL 1810197 (Tex. App. Corpus Christi May 17 2012).

1352. Defendant failed to show that her counsel was ineffective for failing to request notice of the State's intent to introduce evidence of extraneous offenses or bad acts during punishment, particularly the officer's testimony that defendant continued to post web-advertisements for escorting services up until the trial setting, because defendant did not identify what counsel could have discovered with timely notice of the State's intent. Defendant did not identify any particular witness or other evidence her counsel could have present to rebut the inference that she continued to work in the sex industry. Brown v. State, 2012 Tex. App. LEXIS 3685 (Tex. App. Houston 1st Dist. May 10 2012).

1353. Because the Tex. R. Evid. 404(b) evidence was relevant in identifying defendant and showing his intent to commit capital murder, and the evidence was not so prejudicial as to overcome the effectiveness of the limiting instruction, under Tex. R. Evid. 403, the trial court did not abuse its discretion in allowing the extraneous offense evidence. Castoreno v. State, 2012 Tex. App. LEXIS 3636 (Tex. App. San Antonio May 9 2012).

1354. Appellant did not object to testimony on the ground that it was evidence of an extraneous offense, the jury could have inferred that appellant had an extensive history of crime and would be ineligible for parole, and the court rejected the claim that the trial court erred in admitting extraneous offenses into evidence. Young v. State, 2012 Tex. App. LEXIS 3770, 2012 WL 1664208 (Tex. App. Beaumont May 9 2012).

1355. Evidence of alleged abuse was needed to show what happened just before appellant drove past a house and threw a brick into the yard; the absence of this evidence would make the State's case incomplete, and the trial court did not err in overruling the objection to this evidence. Fletcher v. State, 2012 Tex. App. LEXIS 3437, 2012 WL 1549816 (Tex. App. San Antonio May 2 2012).

1356. In a driving while intoxicated case, even if a brief mention of appellant's parole status was in error under Tex. R. Evid. 404(b), it was harmless under Tex. R. App. P. 44.2(b); the evidence supporting the verdict was substantial, the jury was not told why appellant was on parole, and the testimony had a slight effect on the jury, if it had any effect at all. Link v. State, 2012 Tex. App. LEXIS 3350, 2012 WL 1495182 (Tex. App. Eastland Apr. 30 2012).

1357. In a driving while intoxicated case, a trial court did not err by allowing a police officer to give an opinion about appellant's intent to fight at the time of his arrest; the officer was not speculating about appellant's inner thoughts, rather, the officer was drawing an inference from her own observations. The information was relevant, it did not describe an extraneous offense or bad act, the inclusion of the information was not so prejudicial that it should have been excluded on that ground, and it was presented alongside copious evidence that appellant was driving while intoxicated and attempting to flee from police. Link v. State, 2012 Tex. App. LEXIS 3350, 2012 WL 1495182 (Tex. App. Eastland Apr. 30 2012).

1358. Under Tex. R. Evid. 403, 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37, § 2, the evidence of harsh discipline imposed by defendant on his four children, including the victim of the aggravated sexual assaults, was admissible because it had significant probative value as that evidence served to explain to the jury how defendant perpetrated frequent sexual assaults on his young daughter over a period of years. Soria v. State, 2012 Tex. App. LEXIS 3345, 2012 WL 1570969 (Tex. App. Amarillo Apr. 27 2012).

1359. Evidence of defendant's harsh discipline of his children and testimony that the children feared him was admissible over a Tex. R. Evid. 404(b) objection to explain why the victim of sexual assault did not make a prompt outcry. Soria v. State, 2012 Tex. App. LEXIS 3345, 2012 WL 1570969 (Tex. App. Amarillo Apr. 27 2012).

1360. Witness's testimony that the children were thin and that the home was dark and there was lots of stuff everywhere was not subject to exclusion under Tex. R. Evid. 404(b) because it did not describe bad acts or conduct of defendant. Soria v. State, 2012 Tex. App. LEXIS 3345, 2012 WL 1570969 (Tex. App. Amarillo Apr. 27 2012).

1361. Even assuming that the trial court abused its discretion by admitting extraneous-offense evidence during the State's case-in-chief, any error was cured when defendant testified that another person shot the complainant. Defendant raised an issue regarding identity of the shooter, "opening the door" to extraneous-offense evidence to rebut his testimony. Jackson v. State, 2012 Tex. App. LEXIS 3158, 2012 WL 1424913 (Tex. App. Houston 14th Dist. Apr. 24 2012).

1362. During a capital murder trial, the court erred in its charge to the jury regarding extraneous acts of credit card abuse because it did not require the jury to find beyond a reasonable doubt that defendant committed the extraneous acts. The error was harmless under Tex. Code Crim. Proc. Ann. art. 36.19, because the jury was admonished by a limiting instruction to consider the credit card evidence under Tex. R. Evid. 404 for the limited purpose of showing defendant's motive for the murders. Smith v. State, 2012 Tex. App. LEXIS 2890, 2012 WL 1263567 (Tex. App. Corpus Christi Apr. 12 2012).

1363. At defendant's trial for delivery of a controlled substance, the trial court did not err by permitting the police captain to testify that he was pretty sure that two police officers attempting to conduct an undercover drug buy were describing defendant because the testimony did not necessarily suggest that defendant had committed any prior bad act; therefore, Tex. R. Evid. 404(b) was not applicable. Green v. State, 2012 Tex. App. LEXIS 2666 (Tex. App. Houston 1st Dist. Apr. 5 2012).

1364. Defendant's conviction for aggravated robbery was proper because the trial court did not err in admitting extraneous offense evidence under Tex. R. Evid. 404(b). Defendant had made a bomb threat at another nightclub

on the same night as the offense and that was relevant to show that he had the intent to communicate a threat with the items in his bag at the nightclub. Aguirre v. State, 2012 Tex. App. LEXIS 2526, 2012 WL 1034911 (Tex. App. Dallas Mar. 29 2012).

1365. Tex. R. Evid. 404(b) did not prohibit admission of evidence of a defendant's alleged status as a member of a gang. Lewis v. State, 2012 Tex. App. LEXIS 2248, 2012 WL 987797 (Tex. App. Corpus Christi Mar. 22 2012).

1366. In a murder trial where defendant claimed he acted in self-defense, the trial court did not err by excluding testimony from a psychologist regarding the victim's acts of violence because the psychologist's knowledge of any acts committed by the victim came entirely from his review of the medical records which were not admitted into evidence. While specific acts of violent conduct committed by a victim were admissible under Tex. R. Evid. 404 and 405 to show the victim was the aggressor and defendant acted in self-defense, the psychologist's testimony that the victim had attacked his doctor and others would not have been relevant for any purpose other than character conformity. Mason v. State, 2012 Tex. App. LEXIS 2314, 2012 WL 1058792 (Tex. App. Eastland Mar. 22 2012).

1367. Even if the trial court erred by admitting extraneous offense evidence, the error did not affect defendant's substantial rights because: (1) the record did not indicate that the State specifically mentioned the agent's testimony regarding the 20 instances when similar counterfeit bills were passed; (2) the trial court instructed the jury that it could not consider extraneous offenses unless it found beyond a reasonable doubt that defendant committed the offenses; and (3) the record contained sufficient other evidence to support defendant's forgery conviction. Mookdasnit v. State, 2012 Tex. App. LEXIS 2220, 2012 WL 983333 (Tex. App. Beaumont Mar. 21 2012).

1368. Because appellant did not offer argument or authority on his claims under Tex. R. Evid. 401, 402, 403, 404(b) and his claims for due process and due course of law, the complaints were inadequately briefed and presented nothing for review. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

1369. Defendant failed to show that his trial counsel was deficient in failing to make a Tex. R. Evid. 404(b) objection where defendant failed to show that the trial court would have been required to sustain the objection; the evidence at issue was arguably admissible to explain why the victim finally reported the abuse to the police. Sanchez v. State, 2012 Tex. App. LEXIS 2019, 2012 WL 868010 (Tex. App. El Paso Mar. 14 2012).

1370. Admission of a pistol into evidence during defendant's trial for aggravated sexual assault was not prohibited by Tex. R. Evid. 404(b). Because the pistol fit the description of the gun used during the assault, defendant's possession of the pistol was circumstantial evidence that he had the opportunity and means to commit the armed assault. Sargeon v. State, 2012 Tex. App. LEXIS 1857, 2012 WL 761210 (Tex. App. Houston 1st Dist. Mar. 8 2012).

1371. Because the second instruction to the jury was a new and different instruction and contradicted the original correct instruction, the jury was free to disregard the initial instruction and to consider the extraneous offense evidence to determine defendant's guilt on the present robbery charge, in violation of Tex. R. Evid. 404(b). Heigelmann v. State, 362 S.W.3d 763, 2012 Tex. App. LEXIS 1670, 2012 WL 688427 (Tex. App. Texarkana Mar. 2 2012).

1372. Because the robberies occurred in the same geographic area within a relatively brief time frame, and all were committed by an assailant who covered his hands with socks or gloves, and whose face was completely covered by a similar covering, leaving only the eyes exposed, there are sufficient common characteristics between each of the robberies, that the extraneous offenses were relevant to prove identity and admissible under Tex. R. Evid. 401, 402, 404(b). Heigelmann v. State, 362 S.W.3d 763, 2012 Tex. App. LEXIS 1670, 2012 WL 688427 (Tex.

App. Texarkana Mar. 2 2012).

1373. Given the vague nature of a witness's allegations, it could hardly be said that he showed appellant committed some kind of a crime, and the history of the witness and appellant was not necessarily relevant; counsel asked what the parties' problem was, the witness answered, and the trial court did not abuse its discretion in allowing the answer to stand. Vertiz v. State, 2012 Tex. App. LEXIS 1730, 2012 WL 690398 (Tex. App. Tyler Feb. 29 2012).

1374. In a sexual assault case, the court properly admitted testimony of another sexual assault victim who identified defendant as her attacker because, like the victim, the witness lived alone, and her attacker was a black male in his late twenties who broke in through the back patio door in the early morning hours. Like the victim's attacker, the witness's attacker demanded her ATM card. Ledbetter v. State, 2012 Tex. App. LEXIS 1472, 2012 WL 593424 (Tex. App. Dallas Feb. 24 2012).

1375. Defendant raised the issue of his identity as the perpetrator of the eight linked burglaries; therefore, the trial court did not err under Tex. R. Evid. 403 and Tex. R. Evid. 404 in admitting evidence of an extraneous burglary offense during which defendant and his car were placed at the victim's home at the time of the burglary. The crime was sufficiently similar in that it occurred while the victim was at work, defendant's car was located there, it occurred within two months of the eight burglaries, and the victim's property, like the property from the eight burglaries, was found in a hotel room associated with defendant. Mejia v. State, 2012 Tex. App. LEXIS 1434, 2012 WL 579455 (Tex. App. Fort Worth Feb. 23 2012).

1376. Although defendant testified he did not believe he was required to go to court because of the lawsuit he filed against the government, under Tex. R. Evid. 404(b), evidence that he concealed his identity and left the state was admissible and probative as to his mental state and whether he was aware that he committed a crime when he failed to appear in court. Marascio v. State, 2012 Tex. App. LEXIS 1178, 2012 WL 472920 (Tex. App. Dallas Feb. 15 2012).

1377. For purposes of Tex. R. Evid. 404(b), the trial court did not abuse its discretion in prohibiting a motorist from questioning a driver concerning her driving record. Carter v. Johnson, 2012 Tex. App. LEXIS 1239, 2012 WL 566089 (Tex. App. San Antonio Feb. 15 2012).

1378. Trial court did not err, under Tex. R. Evid. 404(b), by allowing the jury to hear evidence of defendant's extraneous offenses during the guilt/innocence stage of the trial because the evidence was not admitted to show that defendant had actually committed the prior offense, but to show that he had lied to the officer about whether he had been previously arrested. The trial court properly instructed the jury to use the evidence solely for the purpose of showing the existence of defendant's untruth about a prior arrest, providing some support for the officer to have a reasonable suspicion about the nature of defendant's activities. Davila v. State, 2012 Tex. App. LEXIS 959, 2012 WL 376634 (Tex. App. Texarkana Feb. 7 2012).

1379. Trial court did not err in the sentencing phase of defendant's trial by admitting into evidence testimony from a police officer concerning uncharged misconduct on defendant's part because Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) specifically provided that, notwithstanding Tex. R. Evid. 404, the trial court could admit, at the punishment stage, evidence of an extraneous crime or bad act that was shown beyond a reasonable doubt by evidence to have been committed by the defendant. Vinez v. State, 2012 Tex. App. LEXIS 817, 2012 WL 335557 (Tex. App. El Paso Feb. 1 2012).

1380. Trial court did not abuse its discretion by admitting a witness's testimony to rebut defendant's assertion that he would not sexually abuse a nine-year-old girl where the extraneous-offense evidence was not unfairly prejudicial

and was probative of defendant's credibility--and his sexual attraction to nine-year-old girls--because it showed defendant's response on cross-examination was inconsistent with his history of assaulting another female when she was the same age (or about the same age) as the victim. The trial court minimized the potential of the witness's testimony to impress the jury in an irrational and indelible way by including a limiting instruction in its charge, the record showed that the witness's testimony was not lengthy, and the State did not need the witness's testimony to prove its case-in-chief. Jones v. State, 2012 Tex. App. LEXIS 363, 2012 WL 130612 (Tex. App. Dallas Jan. 18 2012).

1381. Appellant objected on relevance grounds when one question was posed, but appellant did not further pursue the objection and only objected further on the grounds of speculation; the record did not show a Tex. R. Evid. 404(b) objection, the trial court was not put on notice of the complaint that the evidence was improper character or extraneous offense evidence, the objections made did not preserve error for a complaint under Rule 404(b), and moreover an officer did not specifically refer to appellant's extraneous offense evidence. The issue was waived. Phillips v. State, 2012 Tex. App. LEXIS 244, 2012 WL 113047 (Tex. App. Houston 14th Dist. Jan. 12 2012).

1382. Trial court did not err by admitting testimony from two witnesses about defendant's past use and sale of methamphetamine under Tex. R. Evid. 404 because defendant's relevance objection did not preserve his Rule 404 complaints and because he lodged no objection to the testimony about his past use and sale of methamphetamine by one of the witnesses. Norris v. State, 2012 Tex. App. LEXIS 108, 2012 WL 34453 (Tex. App. Beaumont Jan. 4 2012).

1383. For purposes of Tex. R. Evid. 404(b), appellant put his relationship with the couple he lived with and their living arrangement at issue, and the impression left upon the jury through the couple's testimony was that they trusted appellant enough to allow him to live with them; appellant opened the door to the prosecution's questions on whether the couple asked appellant to leave and why, and the trial court did not err in admitting this evidence. Sampson v. State, 2012 Tex. App. LEXIS 111, 2012 WL 34457 (Tex. App. Beaumont Jan. 4 2012).

1384. Court disagreed that appellant's relevance objection preserved his objection under Tex. R. Evid. 404(b), and even if it had, appellant failed to preserve any issue because his objection was untimely as made after the question was asked and answered. Cavazos v. State, 2011 Tex. App. LEXIS 10185, 2011 WL 6917580 (Tex. App. Corpus Christi Dec. 29 2011).

1385. During defendant's trial for intentionally or knowingly causing serious bodily injury to a child, his eight-month-old daughter, the court did not err under Tex. R. Evid. 404(b) in admitting evidence of extraneous bad acts showing that he had a drinking problem and had shaken the child's car seat in irritation after drinking alcohol on a prior occasion; the evidence was relevant to a non-character conformity issue of consequence, such as his intent. Guerrero v. State, 2011 Tex. App. LEXIS 10080, 2011 WL 6808314 (Tex. App. Houston 14th Dist. Dec. 22 2011).

1386. Trial court did not err by admitting evidence of defendant's gang affiliation during the guilt phase of his trial because the evidence was relevant and admissible to show defendant's motive and to rebut his self-defense theory. The probative value of the evidence outweighed any unfair prejudice, and the State did not devote an excessive amount of time to presenting the evidence. Rodriguez v. State, 2011 Tex. App. LEXIS 10156 (Tex. App. Houston 1st Dist. Dec. 22 2011).

1387. Evidence of appellant's prior drug use and drug sale involving the informant was relevant to disproving the defense theory that appellant had no knowledge of the drug deal, and the trial court could have found that appellant's previous drug-related transactions with the informant were probative to the jury's determining if the drugs were in appellant's possession, either actually or constructively; the trial court also could have admitted the extraneous crimes because they were probative to show appellant's presence at the place that was part of the plan

to deliver the informant the drugs, and appellant's prior relationship with the informant was relevant to show appellant knew that his meeting with the informant was for delivering drugs. Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

1388. Trial court found in part that evidence of prior drug dealings between appellant and the informant might show knowledge, scheme or design, or absence of mistake or accident; the reasons the trial court gave were valid reasons for admitting the evidence for purposes of Tex. R. Evid. 404(b). Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

1389. Defendant failed to preserve for appellate review his claim that the trial court erred by allowing the State to present evidence that defendant was in possession of a weapon the day before the murder under Tex. R. Evid. 404(b) because he failed to make an objection under Rule 404(b). Benitez v. State, 2011 Tex. App. LEXIS 9871, 2011 WL 6306643 (Tex. App. Houston 1st Dist. Dec. 15 2011).

1390. State failed to establish the extraneous offenses beyond a reasonable doubt, as the jury was asked to rely on a witness's conclusory statement, and thus the trial court erred in admitting this testimony. Higginbotham v. State, 356 S.W.3d 584, 2011 Tex. App. LEXIS 9731 (Tex. App. Texarkana Dec. 14 2011).

1391. While the character of the erroneously admitted evidence weighed in favor of finding harm, the remaining factors favored a finding that the error did not result in harm, for purposes of Tex. R. App. P. 44.2(b), given that (1) the State's emphasis on the evidence was minimal, (2) the trial court correctly instructed the jury that the extraneous offense had to be proven beyond a reasonable doubt, (3) the instruction mitigated any harm that might have resulted from the error in allowing the testimony, and (4) the court presumed that the jury followed the instruction; the court had a fair assurance that the error did not influence the jury or had only a slight effect. Higginbotham v. State, 356 S.W.3d 584, 2011 Tex. App. LEXIS 9731 (Tex. App. Texarkana Dec. 14 2011).

1392. Trial court did not abuse its discretion by admitting extraneous evidence under Tex. R. Evid. 404(b) of defendant's theft of his friend's gun, the aggravated assault of one victim, the killing of the victim from whom he stole the vehicle, and the robbery of yet another victim, because the State needed the evidence to give context to defendant's crime spree. Defendant did not rest between incidents and showed that he stole the gun to go after women with whom he had had personal relationships and to then effectuate his flight to his mother's home. Devoe v. State, 354 S.W.3d 457, 2011 Tex. Crim. App. LEXIS 1669 (Tex. Crim. App. Dec. 14 2011).

1393. Court properly admitted evidence of defendant's extraneous bad acts committed after his arrest because witnesses testified about defendant "revving" his engine in front of the victim's house, repeatedly calling the victim, and the victim testified that he felt threatened by the conduct. Additionally, the evidence was unlikely to influence the jury in an irrational way; to the contrary, it was rational to conclude that defendant threatened the victim and his best friend because defendant was guilty of the offense. Lofton v. State, 2011 Tex. App. LEXIS 9666 (Tex. App.--Dallas Dec. 9, 2011).

1394. In a sexual abuse case, the evidence of defendant's conduct following his arrest was properly admitted because it was probative of defendant's consciousness of guilt. The State's need for the evidence was significant because the victim and defendant were the only two witnesses to the actual conduct, and defendant denied touching the victim; it was rational to conclude defendant threatened the victim and his best friend because defendant was guilty of the offense. Lofton v. State, 2011 Tex. App. LEXIS 9664, 2011 WL 6225415 (Tex. App. Dallas Dec. 9 2011).

1395. Although appellant claimed a violation of Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37, § 2, the trial court did not abuse its discretion by allowing testimony from the complainant that appellant showed her a

computer clip of naked people immediately before he sexually assaulted her; the complainant's testimony, along with appellant asking the complainant if she knew what she was looking at on the clip, showed appellant's attempt to prepare the complainant to engage in sexual activity, and also showed his intent to commit aggravated sexual assault of a child. Williams v. State, 359 S.W.3d 272, 2011 Tex. App. LEXIS 9573 (Tex. App. San Antonio Dec. 7 2011).

1396. Although appellant's objection at trial was largely based on Tex. R. Evid. 403, he also objected to the introduction of photographs because they went to specific prior bad acts, and thus appellant preserved for review his claim that the trial court erred under Tex. R. Evid. 404(b). Falade v. State, 2011 Tex. App. LEXIS 9408, 2011 WL 5984536 (Tex. App. Fort Worth Dec. 1 2011).

1397. For purposes of Tex. R. Evid. 404(b), identity was an issue in the case, given that the victim first accused a different person of the offense, plus defense counsel attacked the credibility of the maintenance man, but the court noted that raising the identity issue did not automatically render extraneous acts admissible. Franklin v. State, 2011 Tex. App. LEXIS 9335, 2011 WL 5925143 (Tex. App. Dallas Nov. 29 2011).

1398. Court agreed that although a prior incident, wherein appellant was found in the attic of an apartment complex, was not a conventional extraneous offense, the incident qualified as prior misconduct and had the requisite similarities in order to be admissible on the issue of identity, and the court disagreed with the claim that the State failed to prove the incident beyond a reasonable doubt. Franklin v. State, 2011 Tex. App. LEXIS 9335, 2011 WL 5925143 (Tex. App. Dallas Nov. 29 2011).

1399. Given that officers testified that they spent hours investigating a man, appellant, who was crawling around in the attic space of an apartment complex, where it was very hot, a juror could have inferred that appellant was up to some misconduct regardless of whether the State proved it constituted a criminal offense under the Texas Penal Code; the court could not say that the trial court erred in allowing evidence of the incident that the State allegedly failed to prove beyond a reasonable doubt. Franklin v. State, 2011 Tex. App. LEXIS 9335, 2011 WL 5925143 (Tex. App. Dallas Nov. 29 2011).

1400. Although appellant argued that the burglary in question and another incident contained only one similarity, the attic, in both cases, appellant entered shared attic space from units in which he had special access, the point of entrance was through a hole in a closet, and the court could not say that committing burglary by using the attic crawl space to enter an apartment was a typical entrance for such offenses and thus made appellant's actions similar in committing the same type of offense; the unusual characteristic common to both incidents created an inference that appellant was the person who committed the burglary, and the trial court did not err in admitting the extraneous act evidence for purposes of identity. Franklin v. State, 2011 Tex. App. LEXIS 9335, 2011 WL 5925143 (Tex. App. Dallas Nov. 29 2011).

1401. Complained-of error regarding extraneous offense evidence was not of constitutional dimension; therefore, the court had to disregard it unless it affected appellant's substantial rights. Franklin v. State, 2011 Tex. App. LEXIS 9335, 2011 WL 5925143 (Tex. App. Dallas Nov. 29 2011).

1402. Even if the trial court erred in admitting extraneous incident evidence, any error was harmless under Tex. R. App. P. 44.2(b), given that (1) while the evidence linking appellant to the crime was circumstantial, it was not so weak that the jury was substantially influenced by the extraneous incident evidence, (2) the State did not mention the incident until rebuttal, after appellant discussed it first, (3) the incident was not the entire emphasis of the State's closing argument, and (4) there was no evidence that the jury had difficulty reaching a verdict in this burglary case. Franklin v. State, 2011 Tex. App. LEXIS 9335, 2011 WL 5925143 (Tex. App. Dallas Nov. 29 2011).

1403. Victim's friend's testimony was clear and addressed the probability of the victim fabricating her allegations, and the testimony's potential for impressing the jury in an irrational manner was minimal as the friend's allegations were less egregious; the State needed the friend's testimony, and the trial court did not err in overruling appellant's Tex. R. Evid. 403 objection to extraneous offense evidence in his aggravated sexual assault of a child trial. Roberts v. State, 2011 Tex. App. LEXIS 9189, 2011 WL 5607620 (Tex. App. Fort Worth Nov. 17 2011).

1404. Regarding appellant's Tex. R. Evid. 404(b) objection to the extraneous offense evidence regarding him hitting the victim's mother, appellant's wife, the court noted that an extraneous offense was admissible to explain why a victim of sexual assault did not make a prompt outcry, and the trial court did not abuse its discretion in overruling appellant's objection in his aggravated sexual assault of a child case. Roberts v. State, 2011 Tex. App. LEXIS 9189, 2011 WL 5607620 (Tex. App. Fort Worth Nov. 17 2011).

1405. In appellant's aggravated sexual abuse of a child case, the State argued that the evidence of appellant hitting the victim's mother, who was appellant's wife, tended to show that appellant used violence to silence the victim; given this, and (1) that an assault on the wife paled in comparison to the months of sexual abuse the victim testified to and would not irrationally impress the jury, (2) any distraction from the State's case was minimal, and (3) the State needed the evidence to rebut appellant's theory that the victim's accusation was fabricated and to provide a reason, fear and abuse, for the delayed outcry, the trial court did not err in overruling appellant's Tex. R. Evid. 403 objection. Roberts v. State, 2011 Tex. App. LEXIS 9189, 2011 WL 5607620 (Tex. App. Fort Worth Nov. 17 2011).

1406. In appellant's aggravated sexual abuse of a child case, the trial court properly overruled appellant's Tex. R. Evid. 404(b) objection and admitted extraneous offense evidence of him molesting the victim's child friend to rebut his defensive theories of fabrication by the victim and retaliation by the victim's mother. Roberts v. State, 2011 Tex. App. LEXIS 9189, 2011 WL 5607620 (Tex. App. Fort Worth Nov. 17 2011).

1407. In a driving while intoxicated (DWI) case, it was error to admit the entirety of defendant's driving record because it contained evidence of extraneous offenses beyond the prior DWI convictions that were elements of a charged offense. However, the error was harmless because evidence of guilt was ample. Bridges v. State, 2011 Tex. App. LEXIS 9104, 2011 WL 5557534 (Tex. App. Dallas Nov. 16 2011).

1408. State's theory was that appellant killed his ex-wife in a rage when confronted about sexual conduct with her daughter, and appellant admitted being accused of molestation before he stabbed the ex-wife; the evidence concerning appellant's sexually-oriented emails and alleged fantasizing about his stepdaughter was probative of motive and intent under Tex. R. Evid. 404(b), plus the trial court gave limiting instructions, and the court found no abuse of discretion on the trial court's part. Zavala v. State, 401 S.W.3d 171, 2011 Tex. App. LEXIS 8671, 2011 WL 5156843 (Tex. App. Houston 14th Dist. Nov. 1 2011).

1409. Trial court did not abuse its discretion by admitting a jailhouse informant's testimony that defendant told him that he had been involved in a shoot-out with a rival gang under Tex. R. Evid. 404(b) because it included the acts that occurred just before the charged offenses and explained why defendant would be fleeing from the police. The trial court did not err by overruling defendant's Tex. R. Evid. 403 objection to the testimony because: (1) there was very little, if any, other evidence to show why defendant would have committed the offenses of assault on a public servant and evading arrest with a vehicle; (2) the trial court gave the jury the standard limiting instruction; and (3) the informant's entire testimony was only 35 pages of the reporter's record. Castillo v. State, 2011 Tex. App. LEXIS 8726, 2011 WL 5221238 (Tex. App. Waco Oct. 26 2011).

1410. Trial court did not abuse its discretion by admitting into evidence allegations made by the victim's sister under Tex. R. Evid. 404(b) because the complained-of instances did not rise to the level of extraneous misconduct evidence. The prosecutor's comments during the opening statement did not include any specifics regarding the

allegations made by the victim's sister, as neither defendant nor any specific act or conduct were mentioned, and the victim's mother did not include any specific information related to the sister's allegations. Guillory v. State, 2011 Tex. App. LEXIS 8337, 2011 WL 4996465 (Tex. App. Corpus Christi Oct. 20 2011).

1411. State's Exhibit 221 had substantial probative value because it strongly tended to prove one of the elements of Counts 2 and 3, namely, that defendant acted with intent to participate in a criminal street gang, and for this same reason, the State had a considerable need for this evidence; any potential to create undue prejudice would have been counteracted by the trial court's limiting instruction which restricted the jury's consideration of the gang activity evidence to the intent element of Counts 2 and 3, and the trial court did not abuse its discretion by overruling defendant's objections and admitting State's Exhibit 221. White v. State, 2011 Tex. App. LEXIS 8118, 2011 WL 4825650 (Tex. App. El Paso Oct. 12 2011).

1412. Evidence of an extraneous offense was not admitted within the meaning of Tex. R. Evid. 404 because defendant answered in the negative when asked whether he had pulled a knife on his high school girlfriend when she broke up with him. Mcnatt v. State, 2011 Tex. App. LEXIS 8037, 2011 WL 4712002 (Tex. App. Fort Worth Oct. 6 2011).

1413. Trial court did not err by admitting evidence of defendant's extraneous sexual offense with a child under Tex. R. Evid. 404(b) during his trial for continuous sexual abuse of a child, indecency with a child, and three counts of aggravated sexual assault of a child; both victims were young girls, both had their privates rubbed by defendant, and both offenses occurred while the victims were in bed. Evidence of similar sexual conduct with another young girl tended to make defendant's theories of revenge, fabrication, and lack of opportunity much less probable. Struckman v. State, 2011 Tex. App. LEXIS 8042, 2011 WL 4712236 (Tex. App. Waco Oct. 5 2011).

1414. Under Tex. R. Evid. 404(b), the extraneous-offense evidence that defendant had engaged in abusive behavior with a former cell mate, similar to what had been inflicted on the murder victim, rebutted the theory that defendant acted in self-defense. Svenningsen v. State, 2011 Tex. App. LEXIS 7681 (Tex. App. Waco Sept. 21 2011).

1415. Because the evidence of the similar abusive conduct by defendant against a former cell mate made defendant's self-defense theory much less probable and the State needed the extraneous offense evidence to question whether defendant acted in self defense at all, under Tex. R. Evid. 403 and 404(b), the trial court did not abuse its discretion in admitting the former cell mate's testimony. Svenningsen v. State, 2011 Tex. App. LEXIS 7681 (Tex. App. Waco Sept. 21 2011).

1416. Trial court did not abuse its discretion by allowing the captain to testify to clarify the extent of defendant's disciplinary record because defendant's testimony created a false impression that he had not been disciplined after the discovery of unsecured evidence in his office; while testifying as a rebuttal witness, the captain testified that defendant had in fact been suspended, and that that disciplinary action was taken as a result of the unsecured evidence investigation. Any prejudice stemming from the extraneous evidence did not outweigh its probative value, as the discussion with the captain consumed only a small portion of the record and was necessary to impeach defendant and to provide the jury with a complete and accurate understanding of the facts. Milton v. State, 2011 Tex. App. LEXIS 7592, 2011 WL 4361482 (Tex. App. Houston 14th Dist. Sept. 20 2011).

1417. For purposes of Tex. R. Evid. 404(b), letters from appellant to the victim were not admitted to show and did not tend to show that he acted in conformity with his character when he assaulted the victim, nor did the letters show that appellant was generally a bad or violent person, and the letters showed that he was trying to convince her not to testify against him; the trial court did not err in admitting the letters. Munsinger v. State, 2011 Tex. App.

LEXIS 7318, 2011 WL 3915671 (Tex. App. Tyler Sept. 7 2011).

1418. State needed to explain the relationship between appellant and the victim, and letters from appellant to the victim helped explain the dynamics of their relationship and thus were relevant; appellant did not identify specific instances of prior misconduct contained in the letters that were introduced or would suggest that he acted in conformity with his character in committing the offense, nor was it shown that the letters were more prejudicial than probative, and the trial court did not err in admitting the letters. Munsinger v. State, 2011 Tex. App. LEXIS 7318, 2011 WL 3915671 (Tex. App. Tyler Sept. 7 2011).

1419. Protective order was not evidence of a prior bad act and did not have the tendency to show that appellant acted in conformity with a character trait; it was an agreed order entered after the alleged assault and was not strictly germane to any contested issue, such that the trial court did not err in overruling appellant's objection that it was inadmissible under Tex. R. Evid. 404(b). Munsinger v. State, 2011 Tex. App. LEXIS 7318, 2011 WL 3915671 (Tex. App. Tyler Sept. 7 2011).

1420. Appellees' claimed that evidence of a company president's arrest and his actions was admissible to show intent, but his intent regarding agreements was not an issue in the case, plus nothing represented a routine practice of an organization or a regular response to a repeated situation. Nichols v. State, 349 S.W.3d 612, 2011 Tex. App. LEXIS 7253 (Tex. App. Texarkana Sept. 6 2011).

1421. Appellant's trial objection was based on Tex. R. Evid. 404(b), but on appeal he referred to Rule 404(a); the arguments differed and the issue was not preserved for review. Chitwood v. State, 350 S.W.3d 746, 2011 Tex. App. LEXIS 7301 (Tex. App. Amarillo Sept. 6 2011).

1422. Trial court did not err by admitting evidence that defendant had sexually assaulted another child under Tex. R. Evid. 404(b) and 403 during his trial on charges of sexual assault and aggravated sexual assault because it rebutted the defenses of lack of opportunity and fabrication. Theragood v. State, 2011 Tex. App. LEXIS 7141, 2011 WL 3848840 (Tex. App. El Paso Aug. 31 2011).

1423. To the extent appellant argued that only some evidence of his use and manufacture of methamphetamine should have been admitted, appellant failed to preserve that complaint by failing to object each time the evidence was offered, or by seeking a running objection. Escobedo v. State, 2011 Tex. App. LEXIS 7113, 2011 WL 3836438 (Tex. App. Fort Worth Aug. 31 2011).

1424. Defendant's argument that although the State elected at the close of its case-in-chief and the jury was informed of that election, the State's election violated his due process rights was without merit where, because the State made a proper election, the trial court could order the State to elect before close of its evidence. Criswell v. State, 2011 Tex. App. LEXIS 7112, 2011 WL 3836442 (Tex. App. Fort Worth Aug. 31 2011).

1425. Trial court did not abuse its discretion by admitting photographs of defendant naked and/or exposing his genitals, penis, and anus under Tex. R. Evid. 404(b) because the photographs were relevant to link defendant to the child pornography on his computer and showing intent. De Leon v. State, 2011 Tex. App. LEXIS 7029, 2011 WL 3847180 (Tex. App. Corpus Christi Aug. 30 2011).

1426. Trial court did not abuse its discretion by admitting evidence of defendant's possible gang affiliation under Tex. R. Evid. 404(b), 403 because the evidence that defendant initially approached a man and asked more than once if he was a member of a particular gang showed the context in which the encounter began that resulted in defendant shooting the victim. The trial court did not err by denying defendant's motion for a mistrial. Salazar v.

State, 2011 Tex. App. LEXIS 6835, 2011 WL 3770297 (Tex. App. Dallas Aug. 26 2011).

1427. In defendant's sexual assault of a child case, the State's notice of intent to use extraneous offenses was not unreasonable because fourteen days was an adequate period to eliminate the possibility of surprise as to a witness's testimony, and the court might have also determined that the State would call another witness to testify about that same event due to defendant's admissions to her regarding sexually molesting children during that same time period. Therefore, the possibility of surprise was eliminated as to the scope of the testimony. Quinones v. State, 2011 Tex. App. LEXIS 6891, 2011 WL 3841586 (Tex. App. Corpus Christi Aug. 25 2011).

1428. Defendant's argument and questioning of the witnesses attempted to portray the victim as the aggressor and defendant as merely defending himself and lacking criminal intent; thus, the trial court's ruling that evidence of the prior assaults was admissible under Tex. R. Evid. 403 and 404(b) was not an abuse of its discretion. Watkins v. State, 2011 Tex. App. LEXIS 6992, 2011 WL 3925583 (Tex. App. Beaumont Aug. 24 2011).

1429. Trial court did not abuse its discretion by admitting evidence of defendant's prior assault of another victim during his trial on charges of aggravated assault and manslaughter because it was admissible under Tex. R. Evid. 404(b) to show defendant's intent and to rebut his theory of self-defense. Render v. State, 347 S.W.3d 905, 2011 Tex. App. LEXIS 6623 (Tex. App. Eastland Aug. 18 2011).

1430. Court did not err during a trial for unlawfully delivering a controlled substance in overruling defendant's objection to evidence of other transactions under Tex. R. Evid. 404(b) because defendant's testimony on direct examination that defendant never offered to sell prescription drugs to an undercover officer was directly relevant to the charged offense and opened the door for the State to impeach defendant's testimony. Imade v. State, 2011 Tex. App. LEXIS 5698, 2011 WL 3064759 (Tex. App. Houston 14th Dist. July 26 2011).

1431. Trial court did not abuse its discretion by admitting evidence of other offenses that occurred on the day before the offenses for which he was convicted where the court could reasonably have deemed testimony about defendant's escape from custody on February 11 relevant to his motive, intent, plan, or absence of mistake in taking the actions he did on February 12; the trial court did not err by admitting the evidence because it could reasonably have decided that the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. Morse v. State, 2011 Tex. App. LEXIS 5173, 2011 WL 2651915 (Tex. App. Austin July 8 2011).

1432. Trial court did not err by including "corroboration" in the list of acceptable uses for extraneous offense evidence because the corroborative nature of the extraneous offense evidence was not unduly emphasized by including "corroboration" in the instruction, and "corroboration" was given no more or less emphasis than any other proper use of the extraneous evidence. Lacaze v. State, 346 S.W.3d 113, 2011 Tex. App. LEXIS 5095 (Tex. App. Houston 14th Dist. July 7 2011).

1433. Trial court did not err by admitting into evidence three firearms that were not connected to the shooting that were found in defendant's motel room when he was arrested because: (1) defendant's possession of the firearms did not necessarily amount to extraneous offense evidence under Tex. R. Evid. 404(b); and (2) the evidence was probative of defendant's connection to the drug dealer's gang and to the State's efforts to prove that the victim was murdered in retaliation for informing on the drug dealer, Assuming that defendant was prejudiced, any error was harmless because there was ample evidence of defendant's guilt. Gonzalez v. State, 2011 Tex. App. LEXIS 5139, 2011 WL 2652162 (Tex. App. Corpus Christi July 7 2011).

1434. Trial court did not err by admitting into evidence three firearms that were not connected to the shooting that were found in defendant's motel room when he was arrested because: (1) the court did not believe that possession of a firearm was, in and of itself, extraneous misconduct; and (2) defendant made no assertion or argument that he

was surprised or otherwise harmed by the State's failure to include the firearms in its Tex. R. Evid. 404(b) notice. Gonzalez v. State, 2011 Tex. App. LEXIS 5139, 2011 WL 2652162 (Tex. App. Corpus Christi July 7 2011).

1435. Trial court did not err in overruling defendant's Tex. R. Evid. 404(b) objection to a witness's testimony during defendant's trial for burglary of a habitation with the intent to commit theft because, from the witness's testimony, the jury could have reasonably inferred that defendant kicked in the witness's door in an attempt to evade detection by authorities following the burglary of the victim's home. Rankin v. State, 2011 Tex. App. LEXIS 5125, 2011 WL 2651566 (Tex. App. Houston 1st Dist. July 7 2011).

1436. Tex. R. Evid. 404(b) is a rule of inclusion rather than exclusion. The rule excludes only that evidence that is offered or will be used solely for the purpose of proving bad character and hence conduct in conformity with that bad character. Rankin v. State, 2011 Tex. App. LEXIS 5125, 2011 WL 2651566 (Tex. App. Houston 1st Dist. July 7 2011).

1437. Even though the trial court erred by admitted evidence of extraneous misconduct that occurred two days after the date of the instant altercation, the error was harmless because: (1) the State presented considerable evidence of defendant's guilt, as numerous witnesses testified they saw defendant hit the victim; (2) there was considerable evidence of injuries to the victim; (3) the State did not reemphasize the details of the extraneous offense during closing argument; and (4) the trial court included a limiting instruction in the jury charge. Vaughn v. State, 2011 Tex. App. LEXIS 5037, 2011 WL 2621327 (Tex. App. Austin July 1 2011).

1438. At defendant's trial for burglary of a habitation based on evidence showing that defendant and his brother broke into a mobile home and stole a TV set, the trial court ruled that evidence of two extraneous burglaries committed by his brother was relevant, probative, and admissible under Tex. R. Evid. 404(b). The appellate court held that defendant was not harmed by the admission of the evidence because it was not unduly emphasized by the State, and it did not have a substantial effect on the jury's verdict. Crutchfield v. State, 2011 Tex. App. LEXIS 4959, 2011 WL 2638402 (Tex. App. Tyler June 30 2011).

1439. Evidence of defendant's membership in the same gang as a witness was admissible to show that the witness was biased to testify in favor of defendant. The probative value of the impeachment evidence was high because the State wanted to show why the witness testified that he had lied to police about the statements defendant had made to him. Mccuin v. State, 2011 Tex. App. LEXIS 5031, 2011 WL 2611234 (Tex. App. Fort Worth June 30 2011).

1440. Trial court did not abuse its discretion in overruling appellant's Tex. R. Evid. 404(b) objection to the victim's testimony about what appellant had told her concerning a prior offense, and even assuming appellant was correct, there were other exceptions under which the trial court could have admitted the evidence, including rebuttal of a defensive theory; evidence that appellant had similarly tied up another girl had the tendency to rebut the theory that the victim had fabricated her outcry. Reyes v. State, 2011 Tex. App. LEXIS 4811, 2011 WL 2507002 (Tex. App. Austin June 24 2011).

1441. Defendant did not demonstrate that the State's failure to give reasonable notice of the extraneous offenses would have affected his trial strategy because defendant had the opportunity to cross-examine the victim, the source of the extraneous offense testimony. Defendant did not argue that his defensive strategy would have changed had the State provided more than six days' notice of the extraneous offenses. Martines v. State, 371 S.W.3d 232, 2011 Tex. App. LEXIS 4773, 2011 WL 2502839 (Tex. App. Houston 1st Dist. June 23 2011).

1442. Trial court erred by admitting into evidence other lawsuits, verdicts, and judgments against the corporation that owned and operated the cemetery concerning the double sale of burial plots because the evidence was not

relevant under Tex. R. Evid. 401, as the events occurred at different cemeteries with different employees, they occurred more than a year apart, and there was no evidence that the events were part of a system, scheme, or plan. The error was not harmless because appellants' attorney intended for the evidence to be a significant and pervasive part of the trial; because there was no evidence of three of the four appellants suffered compensable mental anguish, the jury's award of $ 100,000 to each had to have been based on something other than properly admitted evidence. Serv. Corp. Int'l v. Guerra, 348 S.W.3d 221, 2011 Tex. LEXIS 417, 54 Tex. Sup. Ct. J. 1191 (Tex. 2011).

1443. Because evidence provided necessary context and showed appellant's motive for shooting at an officer, the trial court did not abuse its discretion in admitting the evidence under an exception to Tex. R. Evid. 404(b). Benites-vijil v. State, 2011 Tex. App. LEXIS 4574, 2011 WL 2435942 (Tex. App. Houston 1st Dist. June 16 2011).

1444. Trial court did not err in declining to exclude extraneous offense evidence under Tex. R. Evid. 403, given that (1) the State needed the testimony in question to establish that appellant had previously been seen holding a weapon that was similar to the one he used to threaten an officer, (2) the impermissible inference of character conformity was minimized by the trial court's limiting instruction, and (3) the amount of time used for the testimony was not excessive. Benites-vijil v. State, 2011 Tex. App. LEXIS 4574, 2011 WL 2435942 (Tex. App. Houston 1st Dist. June 16 2011).

1445. Appellant provided a general discussion on the application of Tex. R. Evid. 403, 404, and 405, most of which was not germane to the punishment phase, but he failed to specify the bad acts or extraneous offenses he found inadmissible or provide any references to their admission over objection; in the absence of references and citation of authority, this complaint under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) was waived. Crutchfield v. State, 2011 Tex. App. LEXIS 4490, 2011 WL 2420380 (Tex. App. Tyler June 15 2011).

1446. Appellant did not point to any bad act or extraneous offense for which the proof was doubtful, and the proof of the extraneous offenses introduced was uncontradicted, such that he suffered no egregious harm. Crutchfield v. State, 2011 Tex. App. LEXIS 4490, 2011 WL 2420380 (Tex. App. Tyler June 15 2011).

1447. At defendant's trial for attempted burglary of a habitation with intent to commit theft, the State was permitted to offer evidence regarding the theft of a vehicle in the same neighborhood because the vehicle's keys were found in defendant's pocket. The evidence was admissible under Tex. R. Evid. 404(b) rebut the defense theory that defendant was merely trespassing and lacked intent to commit burglary. Dickson v. State, 2011 Tex. App. LEXIS 4774 (Tex. App. Houston 1st Dist. June 6 2011).

1448. Jury's request for previous charges and convictions did not implicate Tex. R. Evid. 404(b) but was a request for the relevant exhibits. Alvis v. State, 2011 Tex. App. LEXIS 4301, 2011 WL 2120510 (Tex. App. Dallas May 31 2011).

1449. Jury could reasonably infer that the letter was written by defendant, and that he composed it with an eye toward establishing an alibi or exculpatory evidence regarding his pending charge; all this made a fact of consequence, that defendant knowingly or intentionally possessed the drugs found in the police car where he had just been sitting, more probable, and the letter was relevant evidence. In re F.R., 2011 Tex. App. LEXIS 4104, 2011 WL 2175857 (Tex. App. Texarkana May 27 2011).

1450. In a criminal prosecution for aggravated sexual assault of a child, defendant was not harmed by the trial court's erroneous admission of statements at the penalty phase from an outcry witness concerning an extraneous offense even though the State's notice of intent was unreasonable under Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) for lack of any reference to the county in which the act allegedly occurred or its date.

The error was harmless because the alleged incident was part of the series of events for which defendant was being prosecuted, and there was no indication that he was surprised by the allegations or statements. Schatte v. State, 2011 Tex. App. LEXIS 4100, 2011 WL 2112025 (Tex. App. Texarkana May 26 2011).

1451. Evidence of bathing incident between defendant and his niece was admissible, Tex. R. Evid. 402, 403, 404(b), as it showed the nature of defendant's relationship with and mindset towards his niece, Tex. Code Crim. Proc. Ann. art. 38.37 Gragert v. State, 2011 Tex. App. LEXIS 3948, 2011 WL 2027955 (Tex. App. Amarillo May 24 2011).

1452. Because the jury was not informed of any details of appellant's prior conviction, the trial court promptly instructed the jury to disregard, and evidence of other misconduct was already admitted, the trial court did not abuse its discretion in denying appellant's mistrial motion. Cox v. State, 2011 Tex. App. LEXIS 3733, 2011 WL 1884794 (Tex. App. San Antonio May 18 2011).

1453. Challenged testimony of two witnesses illustrated the nature of the relationship between decedent and appellant, for purposes of Tex. Code Crim. Proc. Ann. art. 38.36(a), and the requirements of the statute had been met; because this was a case in which the prior relationship between the victim and appellant was a material issue, the admissibility requirements of Tex. R. Evid. 404(b) were also met. Sanders v. State, 2011 Tex. App. LEXIS 3673, 2011 WL 1843508 (Tex. App. Dallas May 16 2011).

1454. Trial court acted within its discretion in allowing the experts to discuss the details of the patient's offenses and other bad acts he committed that were contained in the records they reviewed in determining that the patient was a sexually violent predator because having each expert explain which facts were considered and how those facts influenced his evaluation assisted the jury in weighing each expert's testimony and the opinion each offered regarding the ultimate issue in the case. In re Day, 342 S.W.3d 193, 2011 Tex. App. LEXIS 3573 (Tex. App. Beaumont May 12 2011).

1455. At defendant's criminal trial for aggravated sexual assault and indecency with a child, a witness was permitted to testify that defendant said that he had given the victim a vaginal exam; Tex. R. Evid. 404(b) did not apply, because the testimony was not about an extraneous act or offense. Babineaux v. State, 2011 Tex. App. LEXIS 3632, 2011 WL 1833123 (Tex. App. Fort Worth May 12 2011).

1456. State relied on a photograph to show the blood and cuts on appellant's hands in order to prove that he was the assailant, and the State did not argue that the photograph proved that appellant was in a gang, and nothing indicated that the photograph would be seen as a gang sign, such that the photograph was not evidence of other crimes under Tex. R. Evid. 404(b). Barron v. State, 2011 Tex. App. LEXIS 3330, 2011 WL 1744110 (Tex. App. San Antonio May 4 2011).

1457. Even though the trial court erred by failing to include extraneous offense limiting instructions in the jury charge during the guilt phase of defendant's trial, the error was harmless because: (1) the complainant and two officers testified that defendant, a convicted felon, possessed a firearm at the time of his arrest; (2) defense counsel admitted during closing arguments that the evidence was probably sufficient to support a conviction for that offense; (3) the trial court provided the requisite oral instruction twice to the jury and included it in the written charge in the companion case; and (4) the prosecutor did not emphasize the extraneous offenses during closing arguments. Williams v. State, 2011 Tex. App. LEXIS 3312 (Tex. App. Houston 14th Dist. May 3 2011).

1458. Even though the trial court erred by failing to provide a written instruction to the jury regarding the extraneous offenses during the punishment phase as required by Tex. Code Crim. Proc. Ann. art. 37.07, § 3(b) (Supp. 2009), the error was harmless because: (1) defendant received the minimum sentence for the being a felon

in possession of a firearm offense; and (2) as to the aggravated robbery offense, defendant stipulated to nine prior felony convictions, he received a sentence on the low end of the statutory range, the evidence of the extraneous offenses was strong and uncontroverted, and the prosecutor mentioned the extraneous offenses only once during closing arguments. Williams v. State, 2011 Tex. App. LEXIS 3312 (Tex. App. Houston 14th Dist. May 3 2011).

1459. Child victim's testimony that defendant assaulted her mother immediately after she confronted him about the sexual abuse was relevant to show defendant's unsettled and combative demeanor after the incident, which indicated a consciousness of guilt and as an assault against an adult witness, could be seen as tampering with the witness. Therefore, the evidence was admissible and trial counsel was not ineffective for failing to object. Cueva v. State, 339 S.W.3d 839, 2011 Tex. App. LEXIS 3333 (Tex. App. Corpus Christi May 2 2011).

1460. Extraneous offense evidence was relevant and admissible under Tex. R. Evid. 404(b) to rebut the defense's theory that appellant had no opportunity to commit the offense. Calvin v. State, 2011 Tex. App. LEXIS 3091, 2011 WL 1562138 (Tex. App. Austin Apr. 21 2011).

1461. Appellant did not seem to raise the overruling of the Tex. R. Evid. 403 objection as an issue on appeal, but in any event the court did not find that the trial court erred in overruling the Rule 403 objection because the probative value of the extraneous offense evidence was not substantially outweighed by the risk of unfair prejudice. Calvin v. State, 2011 Tex. App. LEXIS 3091, 2011 WL 1562138 (Tex. App. Austin Apr. 21 2011).

1462. In a criminal prosecution for aggravated assault with a deadly weapon, evidence that defendant was driving a vehicle that matched the description of the vehicle involved in the shooting and that he attempted to flee from officers when one of them tried to pull him over was probative of his consciousness of guilt and relevant to prove his identity under Tex. R. Evid. 404(b). The trial court did not abuse its discretion by determining that the evidence was relevant for purposes other than character conformity. Owens v. State, 2011 Tex. App. LEXIS 2871, 2011 WL 1435499 (Tex. App. Fort Worth Apr. 14 2011).

1463. Appellant raised fabrication by the victim as his defense theory during opening statements, which opened the door to the admission of another witness's testimony of abuse by appellant, used by the State to rebut appellant's theory; the trial court did not err in admitting this testimony. Layer v. State, 2011 Tex. App. LEXIS 2648, 2011 WL 1331538 (Tex. App. Fort Worth Apr. 7 2011).

1464. Appellant testified that the complainant pulled a knife and attempted to stab him first, and thus the trial court was within its discretion to exclude the evidence as offered solely to show character conformity, under Tex. R. Evid. 404(b). Smith v. State, 355 S.W.3d 138, 2011 Tex. App. LEXIS 2426 (Tex. App. Houston 1st Dist. Mar. 31 2011).

1465. Because it was countered by the direct evidence that the trial court admitted, any error made in excluding the complainant's earlier stabbing incident did not have a substantial and injurious effect or influence in determining the jury's verdict, under Tex. R. App. P. 44.2(b); the jury chose to reject appellant's claims that he acted in self-defense and defense of third party, as was the jury's province. Smith v. State, 355 S.W.3d 138, 2011 Tex. App. LEXIS 2426 (Tex. App. Houston 1st Dist. Mar. 31 2011).

1466. Use of the words depicted in the tattoos to show the complainant was a bad person and that he acted in conformity with his bad character during the altercation weighed against admission, as this would have been improper; because the words presented a danger of unfair prejudice, the trial court did not abuse its discretion in excluding the evidence under Tex. R. Evid. 403. Smith v. State, 355 S.W.3d 138, 2011 Tex. App. LEXIS 2426 (Tex. App. Houston 1st Dist. Mar. 31 2011).

1467. Even if the trial court erred by admitting evidence of an extraneous sexual assault during sentencing on the ground that the State did not properly provide defendant notice of its intention to do so, the error was harmless because defendant did not claim that the evidence caused him surprise, as the sexual assault was a charge pending against defendant in the same court as the instant charges and the trial court determined defendant had actual notice of the charge. Gonzalez v. State, 337 S.W.3d 473, 2011 Tex. App. LEXIS 1967 (Tex. App. Houston 1st Dist. Mar. 17 2011).

1468. State's reference to prior burglaries in its opening statement was a passing reference, and given the brief reference, the lack of connection to appellant, and the immediate instruction to disregard, the trial court did not abuse its discretion in denying appellant's motion for a mistrial. Shipp v. State, 2011 Tex. App. LEXIS 1976, 2011 WL 1005459 (Tex. App. Houston 1st Dist. Mar. 17 2011).

1469. Extraneous offense evidence was admissible under Tex. R. Evid. 404(b) in defendant's prosecution for aggravated sexual assault by threat because that evidence indicated that defendant grabbed a New York victim's breast with sufficient force to cause her pain and that the assault would have ended in sexual assault had the victim not escaped. The extraneous offense evidence rebutted defendant's theory that the Texas victim was lying about the nonconsensual nature of the sexual activity as the circumstances in both cases were similar. Sanchez v. State, 2011 Tex. App. LEXIS 2019, 2011 WL 946992 (Tex. App. Fort Worth Mar. 17 2011).

1470. When defendant was charged with causing injury to an elderly person by reckless conduct, the State was permitted to rebut defendant's claim of self-defense with evidence of his prior assault conviction under Tex. R. Evid. 404(b). The evidence was quite probative and did not have a tendency to confuse or mislead the jury. Kelley v. State, 2011 Tex. App. LEXIS 1780, 2011 WL 832862 (Tex. App. Amarillo Mar. 9 2011).

1471. State did not use the photograph to prove defendant's gang activity; the photograph was admitted to prove defendant's identity as the assailant and it was properly admitted to prove the identity of the perpetrator of the crime, Tex. R. Evid. 404(b).

1472. Trial court did not abuse its discretion by admitting evidence concerning a syringe found in defendant's sock in jail following his arrest because the evidence was relevant to establish defendant's knowledge of the methamphetamine and to rebut the defensive theory that defendant had no knowledge of the methamphetamine in either the van or in the vehicle defendant was riding in. Defendant failed to establish that the probative value of the evidence was significantly or substantially outweighed by its prejudicial effect, defendant's knowledge of the methamphetamine was seriously contested, the time necessary to present the evidence represented a negligible portion of the State's case, and limiting instructions were given. Phillips v. State, 2011 Tex. App. LEXIS 1383, 2011 WL 652846 (Tex. App. Amarillo Feb. 23 2011).

1473. Trial court did not abuse its discretion by admitting evidence of the circumstances of defendant' arrest in July 2004 because evidence that defendant possessed methamphetamine at his father's residence on a later occasion was circumstantial evidence that defendant intentionally or knowingly possessed methamphetamine on an earlier occasion. Defendant's knowledge of the methamphetamine was seriously contested, the time necessary to present the evidence represented a negligible portion of the State's case, and limiting instructions were given. Phillips v. State, 2011 Tex. App. LEXIS 1383, 2011 WL 652846 (Tex. App. Amarillo Feb. 23 2011).

1474. Trial court did not err by refusing to allow defendant to introduce evidence of the meaning of the victim's teardrop tattoo because defendant's determination that he needed to shoot the victim in self-defense could not have been based on apprehension of the victim's previous violent acts or reputation as demonstrated by the tattoo because defendant was unaware of the victim's teardrop tattoo. Hines v. State, 2011 Tex. App. LEXIS 950, 2011

WL 494737 (Tex. App. Houston 1st Dist. Feb. 10 2011).

1475. Testimony that defendant sought to proffer from the complainant about a prior incident in which she allegedly attacked him did nothing more than show character conformity; the trial court did not abuse its discretion by refusing to admit character evidence, Tex. R. Evid. 404(b). James v. State, 335 S.W.3d 719, 2011 Tex. App. LEXIS 1004 (Tex. App. Fort Worth Feb. 10 2011).

1476. In a case in which defendant was convicted of aggravated kidnapping, the trial court did not abuse its discretion by admitting evidence that defendant, after committing the charged offense and on the same day, had ordered two minor girls walking down a street to get in his van where the trial court could have reasonably concluded that the evidence regarding defendant's encounter with the minor girls was relevant and admissible because that evidence revealed defendant's true plans about his encounter with the victim on the day he committed the offense. The trial judge could have reasonably concluded that the inherent probative force of the evidence, along with the State's need for the evidence, substantially outweighed the danger of any unfair prejudice to defendant, and the presentation of the extraneous offense evidence did not consume an inordinate amount of time. Frank v. State, 2011 Tex. App. LEXIS 762, 2011 WL 379041 (Tex. App. Beaumont Feb. 2 2011).

1477. Trial court did not abuse its discretion by admitting evidence of guns and cash during his capital murder trial because, to put the conspiracy offense in context, evidence that defendant and his sons were drug dealers who dealt in large amounts of cash and guns to protect their drugs and case was necessary, and therefore the evidence was same-transaction contextual evidence and background contextual evidence excepted from Tex. R. Evid. 404(b). Davis v. State, 2011 Tex. App. LEXIS 835, 2011 WL 322877 (Tex. App. Waco Feb. 2 2011).

1478. Trial court did not abuse its discretion by admitting evidence of defendant's drug transaction and drug use during his capital murder trial because it was same-transaction contextual evidence and background contextual evidence that put in context the conspiracy offense that defendant was charged with; the State sought to show that defendant was an active participant with his sons in a large-volume and dangerous drug business, and not just an after the fact bus driver, to explain why defendant would have entered into the conspiracy with his sons to rob the victim. Given the State's need for circumstantial evidence to prove that defendant entered into the conspiracy to rob the victim, the court could not say that there was a clear disparity between the danger of unfair prejudice posed by the evidence and its probative value. Davis v. State, 2011 Tex. App. LEXIS 835, 2011 WL 322877 (Tex. App. Waco Feb. 2 2011).

1479. In a forgery case, the trial court did not abuse its discretion by admitting evidence of three other forged checks as relevant under Tex. R. Evid. 404 to prove defendant's guilty knowledge and intent. The fact that each of these forgeries was substantially identical tended to rebut defendant's claim that she had passed the first check without knowing that it was forged. Williams v. State, 2011 Tex. App. LEXIS 857, 2011 WL 350477 (Tex. App. Austin Feb. 2 2011).

1480. Jury could have found from the evidence that appellant remained a member of a certain gang, despite his protestations that he stopped being a member 19 years before trial; the court rejected appellant's argument that the gang evidence was inadmissible at punishment because it did not pertain to appellant's admitted gang membership 19 years before. Gilmore v. State, 2011 Tex. App. LEXIS 616 (Tex. App. Dallas Jan. 28 2011).

1481. Gang evidence admitted at punishment was relevant under case law and probative of appellant's character, the testimony did not consume an inordinate amount of time at the hearing, and the jury sentenced appellant to much lower than the permitted 99 years in each possession with intent to deliver case, such that the probative value of the gang evidence was not substantially outweighed by the danger of unfair prejudice. Gilmore v. State, 2011

Tex. App. LEXIS 616 (Tex. App. Dallas Jan. 28 2011).

1482. Regarding evidence admitted at punishment concerning the character and reputation of the gang, the evidence supported the conclusion that appellant was still a member at the time of the offenses; testimony that the gang was engaged in crime satisfied the second prong of case law regarding when gang affiliation evidence was admissible. Gilmore v. State, 2011 Tex. App. LEXIS 616 (Tex. App. Dallas Jan. 28 2011).

1483. Appellant failed to raise an argument in the trial court and failed to preserve for review the claim that certain gang evidence was inadmissible during the punishment phase. Gilmore v. State, 2011 Tex. App. LEXIS 616 (Tex. App. Dallas Jan. 28 2011).

1484. Tex. R. Evid. 404(b) is not applicable to the prior bad acts of a dog. The rule specifically relates to "a person." Watson v. State, 337 S.W.3d 347, 2011 Tex. App. LEXIS 592 (Tex. App. Eastland Jan. 27 2011).

1485. Tex. R. Evid. 404(b) is not applicable to the prior bad acts of a dog. The rule specifically relates to "a person." Smith v. State, 337 S.W.3d 354, 2011 Tex. App. LEXIS 594 (Tex. App. Eastland Jan. 27 2011).

1486. Under Tex. R. Evid. 404(b), defendant's opening statement was sufficient to raise a theory of fabrication that entitled the State to offer extraneous-offense evidence in rebuttal because defendant's attorney provided the victim's motive for fabricating her story; he said that there was no evidence to support her allegations; and he claimed that her story changed. Gaytan v. State, 331 S.W.3d 218, 2011 Tex. App. LEXIS 444 (Tex. App. Austin Jan. 21 2011).

1487. Another sexual assault victim's testimony was admissible under Tex. R. Evid. 404(b) to rebut the defense's claim of fabrication or frame-up by the victim and because the evidence had relevance apart from character conformity. Dreyer v. State, 2011 Tex. App. LEXIS 353, 2011 WL 193494 (Tex. App. Beaumont Jan. 19 2011).

1488. Defendant's statement to the two-year-old victim's mother that she should shave the victim's legs pertained to defendant's thoughts and did not implicate any conduct on his part that would invoke Tex. R. Evid. 404(b). Ibarra v. State, 2011 Tex. App. LEXIS 259, 2011 WL 193109 (Tex. App. Corpus Christi Jan. 13 2011).

1489. Evidence pertaining to appellant's conduct with two other women, where he allegedly anally raped one and forced the other to engaged in sexual acts at gunpoint, had logical relevance apart from character conformity because it showed that the victim's allegations were less likely to be fabricated, plus it rebutted appellant's statements that he would not have engaged in the alleged conduct; thus, the trial court did not abuse its discretion in overruling appellant's objection under Tex. R. Evid. 404(b). Jordan v. State, 2010 Tex. App. LEXIS 10244, 2010 WL 5541695 (Tex. App. Eastland Dec. 30 2010).

1490. Extraneous offenses occurred relatively close in time, involved highly unusual events that were unlikely to repeat themselves inadvertently, rebutted appellant's fabrication allegation, and the prosecutor did not seek to offer the evidence until after appellant testified in the guilt/innocence phase; in reviewing the balancing factors under Tex. R. Evid. 403, the court found no abuse of discretion by the trial court in finding that the value of the evidence was not substantially outweighed by the danger of unfair prejudice. Jordan v. State, 2010 Tex. App. LEXIS 10244, 2010 WL 5541695 (Tex. App. Eastland Dec. 30 2010).

1491. During defendant's trial for sexual assault of a child, the court did not err under Tex. R. Evid. 404(b) in admitting into evidence five child pornography photographs found on defendant's computer; his possession or viewing of child pornography was relevant circumstantial evidence of his intent to arouse or gratify his sexual

desire. Wooley v. State, 2010 Tex. App. LEXIS 10306 (Tex. App. Dallas Dec. 30 2010).

1492. Trial court did not abuse its discretion in admitting a witness's testimony because whether the witness's testimony about an incident of intoxication unrelated to the current felony driving while intoxicated offense was relevant and admissible under the Tex. R. Evid. 403 balancing test was within the zone of reasonable disagreement; furthermore, even if the trial court erred in admitting the challenged testimony, the error was harmless under Tex. R. App. P. 44.2(b) because the State placed extremely little emphasis on the witness's testimony that he had previously seen defendant intoxicated. Snyder v. State, 2010 Tex. App. LEXIS 10203, 2010 WL 5541120 (Tex. App. Texarkana Dec. 29 2010).

1493. Because the evidence of the drug deal was admissible to explain the reason the two men were planning to meet, and was an intertwined, inseparable part of the victim's murder, the evidence of the drug sale was admissible as same transaction contextual evidence and, as such, did not implicated Tex. R. Evid. 404(b). Arias v. State, 2010 Tex. App. LEXIS 10217, 2010 WL 5541118 (Tex. App. San Antonio Dec. 29 2010).

1494. Photographs of defendant's tattoos on his hand and across his stomach were admissible for purposes of identification under Tex. R. Evid. 404(b) and the danger of unfair prejudice resulting from the admission of that evidence did not substantially outweigh its probative value under Tex. R. Evid. 403 where the tattoos were physical evidence linking defendant to a nickname that several witnesses used in identifying defendant and where the jury already heard testimony regarding defendant's gang membership. Arias v. State, 2010 Tex. App. LEXIS 10217, 2010 WL 5541118 (Tex. App. San Antonio Dec. 29 2010).

1495. Trial court did not abuse its discretion by admitting extraneous offense evidence of another robbery under the identity exception to Tex. R. Evid. 404(b) because both robberies were committed in the same area within an hour of each other, a clean-cut African-American man approached the victims on foot just after they had exited their vehicles in the parking lots of their respective apartment complexes, both victims heard the sound of a gun cocking just before they saw a man with a silver gun, both victims saw a red bandana, the man with the gun immediately asked for the victims' purse/wallet and took their cell phones, and both victims identified defendant as the robber. The trial court did not err by failing to exclude the evidence under Tex. R. Evid. 403 because: (1) the evidence was probative as it assisted the jury in determining the robber's identity; (2) identity was the seminal issue in dispute; (3) the trial court gave the jury a limiting instruction; and (4) the testimony about the other robbery was only about 30 pages of the reporter's record. Carroll v. State, 2010 Tex. App. LEXIS 10003, 2010 WL 5142386 (Tex. App. Waco Dec. 15 2010).

1496. In a case in which defendant was convicted of aggravated sexual assault of a child, the trial court did not err under Tex. R. Evid. 403, 404(b) in admitting evidence of defendant's extraneous misconduct where the evidence was admitted for purposes other than character conformity and was more probative than prejudicial because the State's need for the evidence was considerable, and although the content of the evidence was emotional, it made the existence of a material and, perhaps, the ultimate disputed fact at trial-defendant's identity as the perpetrator-more probable. Because the pattern and characteristics of the alleged offense against the victim were so distinctively similar to the misconduct adduced in the evidence that a "signature" by defendant was apparent, the evidence showed a modus operandi that the State used both in its identifying of defendant as the perpetrator and in establishing the manner in which defendant committed the offense. Curcuru v. State, 2010 Tex. App. LEXIS 9748, 2010 WL 5020178 (Tex. App. Corpus Christi Dec. 9 2010).

1497. In a murder case, photographs of a van that had been set on fire were not unduly prejudicial under Tex. R. Evid. 403 and were relevant to establishing that the fire was intentionally set; defendant's counsel was not ineffective for not objecting to some of the photographs; and the extraneous offense of the burning of the van was admissible as same transaction contextual evidence and thus did not require a limiting instruction. Balderas v.

State, 2010 Tex. App. LEXIS 9752, 2010 WL 5621288 (Tex. App. Corpus Christi Dec. 9 2010).

1498. While the parties had stipulated to the characterization of prior acts as extraneous offenses, based on the language "on or about" in the indictment, the prior acts were not extraneous as they were allegedly committed before the return of the indictment and within the limitations period for aggravated sexual assault of a child in Tex. Code Crim. Proc. Ann. art. 12.01(5). Garza v. State, 2010 Tex. App. LEXIS 9613, 2010 WL 5106329 (Tex. App. Houston 14th Dist. Dec. 7 2010).

1499. Prior convictions were admitted solely to attack appellant's credibility, and it was improper for the State to address the prior convictions to argue appellant had victimized other people in the past; however, reversal was not required because (1) the prior convictions were admitted before the jury and the argument had not injected new facts harmful to the accused, (2) the trial court sustained the objection and instructed the jury to disregard, and (3) the evidence supporting appellant's possession with intent to deliver cocaine conviction was sufficiently strong to assure the court of a high certainty that the jury would have found her guilty even had the improper argument been excluded. Kibble v. State, 340 S.W.3d 14, 2010 Tex. App. LEXIS 9572 (Tex. App. Houston 1st Dist. Dec. 2 2010).

1500. Even if the admission of testimony regarding appellant's possession of illegal drugs was erroneous, the error, if any, was harmless because the same or similar testimony was introduced elsewhere without objection. Watkins v. State, 333 S.W.3d 771, 2010 Tex. App. LEXIS 9641 (Tex. App. Waco Dec. 1 2010).

1501. Even if the trial court erred by failing to instruct the jury regarding the burden of proof for extraneous offenses, any such error did not egregiously harm defendant because defendant was convicted of causing the victim's death by acting alone or as a party to her murder; evidence that he attempted to conceal evidence by destroying a car was only part of the evidence that the jury had to consider in assessing punishment. The evidence also showed that defendant was involved in gang activity, offered conflicting information to police about his own involvement in the crime, and assisted the victim's murderer before, during, and after the crime. Smith v. State, 2010 Tex. App. LEXIS 9419, 2010 WL 4878847 (Tex. App. Houston 14th Dist. Nov. 30 2010).

1502. Trial court did not abuse its discretion in denying appellant's motion for a mistrial, given that the complained-of testimony, wherein a witness said appellant pushed her around when she was pregnant, was not so inflammatory as to have undermined the efficacy of the trial court's instruction to disregard; the trial court explained that the State had no right to preemptively admit extraneous offenses in anticipation of cross-examination and the prosecutor did not report the error or make any reference to the testimony in closing arguments, plus the evidence against appellant was particularly strong, and absent the comment, his conviction was relatively certain. Escudero v. State, 2010 Tex. App. LEXIS 9431, 2010 WL 4840501 (Tex. App. Dallas Nov. 30 2010).

1503. Trial court could have concluded appellant's niece's testimony was offered to rebut appellant's defense of fabrication, for purposes of Tex. R. Evid. 404(b), and the trial court did not abuse its discretion in allowing the testimony as relevant rebuttal evidence. Dial v. State, 2010 Tex. App. LEXIS 9273, 2010 WL 4705529 (Tex. App. Dallas Nov. 22 2010).

1504. Appellant complained about the harm he suffered when the jury heard reference to his extraneous offenses on recordings, but the references were brief and followed by limiting instructions, and one reference was testified to by another witness, such that the court overruled this issue. Dial v. State, 2010 Tex. App. LEXIS 9273, 2010 WL 4705529 (Tex. App. Dallas Nov. 22 2010).

1505. Nothing suggested the reference to appellant's extraneous conduct was so highly prejudicial and incurable that the trial court erred in denying his motion for mistrial, and any error would be harmless because the same evidence was later introduced by appellant's niece who testified he sexually abused her. Dial v. State, 2010 Tex.

App. LEXIS 9273, 2010 WL 4705529 (Tex. App. Dallas Nov. 22 2010).

1506. Trial court did not abuse its discretion in overruling appellant's Tex. R. Evid. 403 objection; given his sole defensive theory of fabrication, the inherent probative force of the niece's testimony, for purposes of Tex. R. Evid. 404(b), strongly served to make the existence of a fact of consequence more probable, and considering the Tex. R. Evid. 403 factors, the balancing determination by the trial court did not show a clear abuse of discretion, as the trial court gave limiting instructions and the presentation of the testimony was brief and not particularly graphic. Dial v. State, 2010 Tex. App. LEXIS 9273, 2010 WL 4705529 (Tex. App. Dallas Nov. 22 2010).

1507. In defendant's prosecution for aggravated sexual assault of a child, assuming without deciding that the State failed to give defendant proper notice of its use of extraneous offenses under Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37, § 3, no harm was shown as defendant never argued surprise and defendant challenged the complainant's credibility regarding the extraneous offenses on cross-examination. Mccullough v. State, 2010 Tex. App. LEXIS 9059, 2010 WL 4611660 (Tex. App. Dallas Nov. 16 2010).

1508. Tex. R. Evid. 404(b) prohibited evidence of the victim's mother prior misconduct--her assault of the victim in 2003--to show that, in 2008, the mother acted in conformity with her misconduct in 2003; the trial court could find that the mother's prior assault of the victim was not almost identical to the acts of the charged crime. Quiroz v. State, 2010 Tex. App. LEXIS 8939, 2010 WL 4492939 (Tex. App. San Antonio Nov. 10 2010).

1509. Testimony of two police officers that defendant had twice before been found in possession of cocaine while in or near the vehicle in which the cocaine for the present possession offense was found was plainly relevant, beyond mere character conformity, to rebut defendant's suggestion that he was an innocent victim of circumstance, and, under the circumstances, a trial court did not abuse its discretion under Tex. R. Evid. 404(b) by admitting the officers' testimony to rebut defendant's claim that he was unaware of the cocaine found in the vehicle. It was also not an abuse of discretion under Tex. R. Evid. 403 for the trial court to conclude that the relevance of the testimony, which consumed only sixteen pages of the reporter's record, outweighed the danger of unfair prejudice or confusion of the issues. Bell v. State, 2010 Tex. App. LEXIS 9034, 2010 WL 4595704 (Tex. App. Austin Nov. 9 2010).

1510. In a case in which defendant was convicted of cocaine possession, a probation officer's testimony did not place defendant's drug use in the context of his operation of the vehicle in which the cocaine was found because, insofar as it served to prove defendant's knowing possession of cocaine on the date of the instant offense, it did so only by showing that defendant was a chronic drug abuser, i.e., by character conformity. However, in light of the other evidence properly admitted, the admission of the probation officer's testimony did not affect defendant's substantial rights pursuant to Tex. R. App. P. 44.2(b). Bell v. State, 2010 Tex. App. LEXIS 9034, 2010 WL 4595704 (Tex. App. Austin Nov. 9 2010).

1511. Under Tex. R. Evid. 404(b), the evidence of the shooting of the first victim and the other evidence collected at the crime scene pertaining to the shooting (such as the truck in the culvert) demonstrated defendant's motive, intent, and identity with regard to the aggravated robbery of the driver and the second victim, who was shot when defendant tried to steal the driver's car. Wilson v. State, 2010 Tex. App. LEXIS 8685, 2010 WL 4261872 (Tex. App. Fort Worth Oct. 28 2010).

1512. Counsel was not ineffective during defendant's trial for aggravated sexual assault for failing to object to evidence that defendant used marijuana because the victim's testimony regarding defendant's marijuana usage was arguably admissible as evidence of plan and preparation under Tex. R. Evid. 404(b). Anderson v. State, 2010 Tex. App. LEXIS 8487, 2010 WL 4140317 (Tex. App. Waco Oct. 20 2010).

1513. Even though the trial court erred by allowing the State to ask a police officer if defendant had assaulted two other inmates upon arriving at the city's holding facility, as it showed defendant's propensity to be aggressive and perpetrate assaults, the error was harmless because there was a significant amount of evidence that went to the issue of defendant's intent and the State mentioned the evidence only minimally during closing arguments. Parson v. State, 2010 Tex. App. LEXIS 8330, 2010 WL 4053782 (Tex. App. Amarillo Oct. 15 2010).

1514. Victims testified that defendant made them watch pornographic images and videos depicting both children and adults, that defendant made them perform acts depicted in the pornographic images they were forced to watch, and that defendant would make them remove their clothing as they were watching the videos then sexually assault them afterward; based on that testimony, the evidence regarding child pornography found on the DVD's constituted same-transaction-contextual evidence and the evidence of child pornography was so intertwined with the sexual assaults of the victims that the jury's understanding of the offenses would have been obscured without it. The evidence was also admissible under Tex. R. Evid. 404(b) on the issue of defendant's intent, and although the evidence of child pornography was undoubtedly prejudicial, the State limited the visual evidence to two 30-second segments, and the appellate court could not say that the district court abused its discretion by ruling that under Tec. R. Evid. 403 the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice. Bonner v. State, 2010 Tex. App. LEXIS 7440, 2010 WL 3503858 (Tex. App. Waco Sept. 8 2010).

1515. Indictment is not evidence of guilt; thus, the phrase "a child welfare complaint" in the indictment was not extraneous-offense evidence prohibited by Tex. R. Evid. 404(b). Beck v. State, 2010 Tex. App. LEXIS 7265, 2010 WL 3434075 (Tex. App. Waco Sept. 1 2010).

1516. Trial court did not err by allowing defendant's daughter to testify that he had repeatedly sexually abused her because it was relevant rebuttal evidence under Tex. R. Evid. 404(b), as it was clear from the record that defense counsel raised the defensive theory of fabrication during his opening statement, cross-examination of the State's witnesses, and case-in-chief. Castro v. State, 2010 Tex. App. LEXIS 7120, 2010 WL 3418273 (Tex. App. Houston 14th Dist. Aug. 31 2010).

1517. In defendant's aggravated assault case, the court did not err in admitting evidence that defendant's coparticipant had pointed a gun at another woman soon before the charged conduct because the State's theory was that defendant and the coparticipant were intentionally threatening young women with the rifle while driving through a parking lot. The State was thus entitled to use the prior victim's testimony to show the context in which the charged offense occurred in order to establish defendant's intent to threaten the victim. Mitchell v. State, 2010 Tex. App. LEXIS 7105, 2010 WL 3418223 (Tex. App. Houston 14th Dist. Aug. 31 2010).

1518. During grandparents' trial for the murder of one granddaughter and serious bodily injury to another granddaughter, defense counsels' performance was not deficient when they failed to object under Tex. R. Evid. 404(b) to testimony that Texas Child Protective Services (CPS) had once been called to the granddaughters' school because they had been seen eating out of trash cans; counsel could have determined that the jury should have known that CPS had already investigated the grandparents and closed the investigation. Ramirez v. State, 2010 Tex. App. LEXIS 7169 (Tex. App. Corpus Christi Aug. 31 2010).

1519. Portions of a video during which defendant admitted to a police officer to having been pulled over based on a report of a similar road rage incident, in which defendant had been accused of threatening to pull a gun on another driver, was properly admitted during defendant's trial for deadly conduct in connection with a road rage incident because the evidence was admissible under Tex. R. Evid. 404(b) to rebut the defensive theory. Hughes v. State, 2010 Tex. App. LEXIS 7233, 2010 WL 3442203 (Tex. App. Austin Aug. 31 2010).

1520. Because challenged evidence had relevance apart from character conformity, the trial court did not abuse its discretion by overruling appellant's Tex. R. Evid. 404 objection. Lewis v. State, 2010 Tex. App. LEXIS 7292, 2010 WL 3433992 (Tex. App. Fort Worth Aug. 31 2010).

1521. Defendant's contention that the State failed to provide reasonable notice of extraneous offenses that it intended to offer under Tex. R. Evid. 404(b) was rejected because: (1) the State choose not to introduce evidence of theft of the electronic device charger; (2) defense counsel admitted that he had notice that the State intended to offer evidence related to the burglary of a skate shop; and (3) defendant was not surprised or harmed by the introduction of evidence relating to a robbery because prior to defendant's trial, the State produced transcripts of court proceedings against an accomplice for that robbery that disclosed defendant's role in the robbery and the potential witnesses against him, and the State's witness list in the instant case disclosed the robbery victim's identity. Davis v. State, 2010 Tex. App. LEXIS 6949, 2010 WL 3341514 (Tex. App. Tyler Aug. 25 2010).

1522. Trial court did not abuse its discretion by admitting evidence of a prior robbery during defendant's aggravated robbery trial because: (1) it was committed the evening prior to the instant robbery; (2) defendant and his accomplice acted together in both robberies; (3) both robberies were committed against lone, older women using surprise, speed, and strength through force or the threat of force; and (4) both robberies were committed while using the same vehicle as a means of escape. Therefore, the probative value of the evidence was great, as it showed that defendant and his accomplice acted together in a continuing criminal enterprise and rebutted defendant's theory that he was not a party to the instant robbery but was merely present in the vehicle while it occurred. Davis v. State, 2010 Tex. App. LEXIS 6949, 2010 WL 3341514 (Tex. App. Tyler Aug. 25 2010).

1523. State gave defendant notice that it intended to introduce defendant's prior criminal trespass under Tex. R. Evid. 404(b) where the prosecutor stated on the record that several months before trial, he had delivered to defendant numerous discovery documents, including a copy of the offense report that referenced a statement that the instant burglary victims had report to authorities that defendant had criminally trespassed on their residence. Even if the State had not provided such notice, defendant was not harmed because his counsel made no claim that he was actually surprised by the evidence, and in light of the fact that the criminal trespass involved the same property and the same property owners as the charged offense, it was unlikely that defendant was aware that the State would attempt to admit the evidence. Castle v. State, 2010 Tex. App. LEXIS 7039, 2010 WL 3370057 (Tex. App. Austin Aug. 25 2010).

1524. Defendant failed to preserve for appellate review his claim that the trial court erred allowing into evidence information about his alleged prior bad acts in violation of Tex. R. Evid. 403 and 404 because defendant did not object each time the witness testified about defendant's purported extraneous bad acts, nor did he obtain a running objection from the trial court. Even if he had preserved the claim, the trial court did not abuse its discretion by admitting the testimony because it fell within the purview of Tex. Code Crim. Proc. Ann. art. 38.37, § 2, as the testimony described the history of the relationship between defendant and the child victim and established defendant's consistently hostile behavior or his statement of made as it related to the victim. Samora v. State, 2010 Tex. App. LEXIS 6759, 2010 WL 3279536 (Tex. App. Corpus Christi Aug. 19 2010).

1525. Evidence of trace quantities of controlled substances that were found in defendant's car during the same search in which the methadone was found was admissible under Tex. R. Evid. 404(b), even though it was not admissible as same transaction contextual evidence, because the evidence constituted a recognized link to drug possession and refuted defendant's contention that his possession of the pill bottle containing methadone was merely inadvertent. Lamkin v. State, 2010 Tex. App. LEXIS 6484, 2010 WL 3170647 (Tex. App. Eastland Aug. 12 2010).

1526. For purposes of Tex. R. Evid. 401, 402, 404(b), the trial court could have reasonably determined that the testimony about appellant's pretrial supervision and having been found competent to stand trial in a separate case

was relevant rebuttal testimony that appellant was motivated to commit the underlying offenses to demonstrate that he was not competent to stand trial in the other case. Espinosa v. State, 328 S.W.3d 32, 2010 Tex. App. LEXIS 6341 (Tex. App. Corpus Christi Aug. 5 2010).

1527. Evidence that appellant was on pretrial supervision in another case in which he was found competent was probative of determining his motive for committing the offenses and thus the evidence was needed by the State to rebut appellant's insanity claim; the trial court protected the jury from deciding the matter on an improper basis, there was no indication that the evidence would confuse the jury, nor did it take an inordinate amount of time to present the evidence, and the decision to admit the evidence under Tex. R. Evid. 403 was not an abuse of discretion. Espinosa v. State, 328 S.W.3d 32, 2010 Tex. App. LEXIS 6341 (Tex. App. Corpus Christi Aug. 5 2010).

1528. Court did not err by admitting evidence that he threatened the witness, because this was evidence of a consciousness of guilt and the witness's testimony described threats that were directly connected to the offenses for which defendant was indicted, engaging in organized criminal activity by conspiring to manufacture methamphetamine. Gillmore v. State, 2010 Tex. App. LEXIS 6303, 2010 WL 3049040 (Tex. App. Eastland Aug. 5 2010).

1529. Court abused its discretion when it allowed the State to introduce evidence that defendant failed to appear for two drug tests, however, the error did not affect defendant's substantial rights, because the evidence was brief and was not emphasized by the State, defendant had a prior criminal record, and there was direct evidence connecting defendant with the syringe that contained a trace amount of methamphetamine. Hood v. State, 2010 Tex. App. LEXIS 6301, 2010 WL 3049030 (Tex. App. Eastland Aug. 5 2010).

1530. During defendant's trial for possession of child pornography, the court did not err under Tex. R. Evid. 404(b) in admitting nine photographs recovered from his cell phone depicting naked adult females because the pictures depicting adults in similar poses as those depicted in the pictures of his niece rebutted the defensive theory that he only possessed the pictures of his niece for the purpose of trying to help her. Morris v. State, 2010 Tex. App. LEXIS 6282 (Tex. App. Eastland Aug. 5 2010).

1531. Admission of evidence related to a second victim of an alleged sexual assault involved in two other indictments than those on which appellant was being tried was proper under Tex. R. Evid. 404(b) as same transaction contextual evidence because the offenses involving both victims, who were kidnapped and assaulted together, were so intermixed as to form a single, indivisible criminal transaction and it would have been impracticable to avoid describing one when narrating the other. Downs v. State, 2010 Tex. App. LEXIS 6241, 2010 WL 3030487 (Tex. App. El Paso Aug. 4 2010).

1532. Trial court did not abuse its discretion by admitting evidence of an extraneous offense under Tex. R. Evid. 404(b), namely a firearm that was found in defendant's vehicle because, although defendant's first question to the officer was specific as to whether weapons were found on defendant's person, defendant's follow-up question was more general and asked the officer whether weapons were found. The officer's negative response left the jury with the impression that defendant had no weapons, but because a loaded weapon was found in the general vicinity of the driver's side floorboard, it was possible that defendant was either armed during the burglary or was attempting to arm himself when the officers ordered him to exit his own vehicle; therefore, the evidence was relevant and admissible to correct the false impression left by the officer's testimony. Thomas v. State, 2010 Tex. App. LEXIS 6207 (Tex. App. Houston 14th Dist. Aug. 3 2010).

1533. Witness did not answer the question to which appellant objected, and the testimony did not show evidence of other crimes, wrongs, or acts under Tex. R. Evid. 404(b), such that the court overruled appellant's claim of error

in this regard. Hawkins v. State, 2010 Tex. App. LEXIS 6090, 2010 WL 3092642 (Tex. App. Eastland July 29 2010).

1534. In a case in which a trial court admitted the testimony of an apartment manager observing that a number of people would come and go from defendant's apartment, it could not be concluded that the trial court abused its discretion in allowing the witness to so testify because that alone was not evidence of a bad act or crime; or, at least such an interpretation would fall within the zone of reasonable disagreement. Mooring v. State, 2010 Tex. App. LEXIS 5879, 2010 WL 2891762 (Tex. App. Amarillo July 23 2010).

1535. Defendant failed to meet his burden to prove by a preponderance of the evidence that his trial counsel was ineffective for failing to object to the admission of extraneous offenses because the court could not conclude that the trial court would have erred by overruling such an objection, and therefore defendant failed to show a reasonable probability that, but for counsel's error, the result of the trial would have been different. It was within the trial court's discretion to conclude that counsel's cross-examination of the victim called into question a material detail of defendant and, as a result, put defendant's identity at issue; in addition, the record showed that the extraneous offense was sufficiently similar to the instant offense under Tex. R. Evid. 404(b) because both were acts of indecency towards a child, were committed on the morning of October 6, 2008, were committed between the hours of 7 a.m. and 8 a.m., were committed in the same kind of car, and occurred within a one block radius. Woods v. State, 2010 Tex. App. LEXIS 5894 (Tex. App. Houston 1st Dist. July 22 2010).

1536. Trial court did not abuse its discretion by admitting extraneous offense evidence of a robbery for the permissible purpose of proving defendant's identity under Tex. R. Evid. 404(b) because defendant conceded that the only issue at trial was whether he was the killer depicted on the surveillance tape and because a comparison of the robbery and the instant offense showed a high degree of similarity. Both crimes, which were committed a week apart, occurred in convenience stores when only one person was working, defendant and his accomplice pretended to purchase beer, the clerks were attacked with the same gun, and that gun and defendant's shoes had the victim's DNA on them. Dodson v. State, 2010 Tex. App. LEXIS 5859, 2010 WL 2889693 (Tex. App. Fort Worth July 22 2010).

1537. Trial court did not err by admitting into evidence testimony about extraneous acts described by a child witness under Tex. R. Evid. 404(b) because one of the defenses was that the victim had erred in identifying defendant, and the child witness's reliability in being able to identify defendant five years after he had allegedly committed the previous acts was for the jury to decide; if the jury chose to believe that defendant committed the previous bad acts, those acts could assist it in determining whether the victim had made a mistake in identifying defendant in the charged offense. Gillespie v. State, 2010 Tex. App. LEXIS 5701, 2010 WL 2839481 (Tex. App. Dallas July 21 2010).

1538. Trial court did not err under Tex. R. Evid. 404(b) by admitting evidence of an extraneous offense for purposes of identity in the guilt-innocence phase of defendant's trial for felony possession of a controlled substance by fraud because identity was an issue at defendant's trial. Cross-examination of the State's identifying witness raised the issue of identity because the witness was impeached about the conditions surrounding the offense charged and the witness's identification of defendant. Greer v. State, 2010 Tex. App. LEXIS 5632, 2010 WL 2813404 (Tex. App. Fort Worth July 15 2010).

1539. Defendant had not preserved for appellate review his complaint concerning the timeliness of the State's notice of its intent to introduce evidence of extraneous offenses during trial where defendant objected to the reasonableness of the State's notice, but he did not request that the trial court grant him a continuance. In any event, it could not be said that the trial court abused its discretion when it overruled defendant's objection to the reasonableness of the State's notice under Tex. Code Crim. Proc. Ann. art. 38.37, § 3 and Tex. R. Evid. 404(b) because the trial court could have determined that the State's notice was adequate and reasonable under the circumstances of the case. Greer v. State, 2010 Tex. App. LEXIS 5632, 2010 WL 2813404 (Tex. App. Fort Worth

July 15 2010).

1540. In a case in which defendant was convicted of felony possession of a controlled substance by fraud under Tex. Health & Safety Code Ann. § 481.129(a)(5), (d), the trial court did not err by admitting extraneous offense evidence where, to the extent that there were differences between the instant offense and the extraneous offense, the offenses were sufficiently similar to be admissible under Tex. R. Evid. 404(b) for purposes of proving defendant's identity because: (1) the two offenses were committed within six weeks of each other; (2) in each instance, defendant presented a fraudulent prescription for 120 pills of dihydrocodeinone (an amount far in excess of normal prescription amounts); (3) the prescription slip had been created using an incorrect typeface and physician signature (as opposed to theft of an actual physician's prescription pad); (4) neither named physician had a patient by the name of the person listed on the prescription to receive the dihydrocodeinone; and (5) an employee from each pharmacy noticed defendant's distinctive tattoo and identified him from a photo line-up. Greer v. State, 2010 Tex. App. LEXIS 5632, 2010 WL 2813404 (Tex. App. Fort Worth July 15 2010).

1541. Strength of the State's need for the evidence supported the trial court's decision to admit the extraneous offense evidence under Tex. R. Evid. 403; although the State's evidence of identity was strong, appellant challenged the probative value of much of the evidence, and the extraneous offense evidence was not unfairly prejudicial. Fletcher v. State, 2010 Tex. App. LEXIS 5084, 2010 WL 2650008 (Tex. App. Houston 14th Dist. July 6 2010).

1542. For purposes of a Tex. R. Evid. 403 analysis, the charged and extraneous offenses were identical in a number of respects and thus highly probative on the issue of identity; although appellant argued that identity was not seriously contested at trial, defense counsel raised the issue at opening statements, during trial, and in closing arguments. Fletcher v. State, 2010 Tex. App. LEXIS 5084, 2010 WL 2650008 (Tex. App. Houston 14th Dist. July 6 2010).

1543. Second and third factors of a Tex. R. Evid. 403 analysis weighed in favor of the trial court's decision to admit extraneous offense evidence; the trial court gave a limiting instruction and the State did not spend an unduly lengthy amount of time to develop the evidence. Fletcher v. State, 2010 Tex. App. LEXIS 5084, 2010 WL 2650008 (Tex. App. Houston 14th Dist. July 6 2010).

1544. During defendant's trial for murdering his wife, the court did not err in admitting an exhibit containing his voluntary statement to the police for the purpose of establishing the nature of his relationship with his wife prior to her death because the State was entitled to present evidence to rebut defendant's identity theory by demonstrating that he had a history of ongoing violent conduct toward his wife; the evidence of domestic abuse contained in the exhibit did not run afoul of the limitations imposed by Tex. R. Evid. 404(b). Allen v. State, 2010 Tex. App. LEXIS 4925 (Tex. App. El Paso June 30 2010).

1545. Evidence of an extraneous robbery was offer to show identity, and for purposes of Tex. R. Evid. 403, 404(b), (1) given the similar distinctive characteristics shared by both robberies, a witness's identification of appellant as the robber in the extraneous offense case provided compelling evidence of his identity as the robber of the instant robbery, (2) the court did not see how the evidence of the extraneous robbery had the potential to impress the jury irrationally, plus the jury's consideration was properly limited, and (3) the State needed the evidence because the reliability of the direct evidence could be undermined; despite the inordinate time involved in proving the extraneous robbery, the court believed that the probative value of the evidence of that robbery was not substantially outweighed by the danger of unfair prejudice. Lively v. State, 2010 Tex. App. LEXIS 4999 (Tex. App. Tyler June 30 2010).

1546. Twenty-seven percent of the State's direct examination was devoted to proof of an extraneous offense; the evidence was needed and inherently probative, but the expenditure of so much time proving the extraneous offense

risked diverting the jury's attention from the charged offense. Lively v. State, 2010 Tex. App. LEXIS 4999 (Tex. App. Tyler June 30 2010).

1547. Because the challenged testimony did not establish prior criminal conduct by appellant, it was not improper extraneous offense evidence. Lively v. State, 2010 Tex. App. LEXIS 4999 (Tex. App. Tyler June 30 2010).

1548. Court held there was no error in the admission of extraneous evidence and the prosecutor was allowed to refer to evidence and made deductions therefrom; the prosecutor's argument was not so egregious as to have denied appellant a fair trial, and in the absence of any objection, no error was preserved. Lively v. State, 2010 Tex. App. LEXIS 4999 (Tex. App. Tyler June 30 2010).

1549. In a prosecution of defendant for engaging in organized criminal activity, any error by the trial court in admitting evidence of defendant's prior convictions was cured when defendant took the stand and testified as to his knowledge and intent. Regardless of what evidence preceded it, defendant's testimony put his knowledge, intent, and plans directly at issue. Leblue v. State, 2010 Tex. App. LEXIS 4822, 2010 WL 2540490 (Tex. App. Austin June 24 2010).

1550. Court abused its discretion in overruling defendant's Tex. R. Evid. 403 objections, because the court impermissibly allowed the State to interject extremely prejudicial evidence of multiple other sexual offenses allegedly committed by defendant (and others), when the evidence of extraneous acts admitted did not show a plan to sexually assault the two alleged victims, but rather it was evidence of repeated occurrences of the same bad act, compounded by numerous additional bad acts. Pittman v. State, 321 S.W.3d 565, 2010 Tex. App. LEXIS 4504 (Tex. App. Houston 14th Dist. June 17 2010).

1551. In defendant's aggravated assault trial for shooting his ex-girlfriend, the victim's sister and best friend were properly permitted under Tex. R. Evid. 404(b) to testify that defendant threatened to shoot them because the evidence constituted same transaction contextual evidence, as defendant's actions formed an indivisible criminal transaction that began with threatening e-mails and culminated with the shooting. In addition, the testimony tended to make the State's theory of the case more probably and helped to rebut defendant's defensive theory. Brown v. State, 2010 Tex. App. LEXIS 4445 (Tex. App. Dallas June 14 2010).

1552. Defendant's conviction for indecency with a child by contact was proper because he presented nothing for review regarding the testimony he sought to elicit on cross-examination and because he failed to establish that any prior allegations of abuse were both false and similar in nature to the allegations at issue in the current case. Thus, the trial court did not abuse its discretion in excluding such evidence under Tex. R. Evid. 404(b). Sosa v. State, 2010 Tex. App. LEXIS 4428, 2010 WL 2330304 (Tex. App. Austin June 10 2010).

1553. Denial of writ of habeas corpus was proper, because the prosecutor did not intend to goad the petitioner into moving for a mistrial by calling the petitioner a bully during the prosecutor's opening statement; the prosecutor's comment was arguably not clearly erroneous since his reference to the petitioner's reputation did not necessarily contravene the motion in limine or the trial court's instructions regarding extraneous offenses and other bad acts, none of which mentioned or referred to reputation or character trait evidence. Ex Parte Cedillo, 2010 Tex. App. LEXIS 3939, 2010 WL 2136607 (Tex. App. Corpus Christi May 27 2010).

1554. Notice requirements of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) did not apply to the evidence of defendant's trips to truancy court, because the State did not question defendant on this matter during its case in chief on punishment, but rather during its cross-examination of defendant. Torres v. State, 2010 Tex. App. LEXIS 3904, 2010 WL 2044900 (Tex. App. Dallas May 25 2010).

1555. Even if defendant had objected to a witness's testimony at trial, the trial court would not have abused its discretion in allowing the testimony under Tex. R. Evid. 404(b), given that evidence that defendant had delivered drugs to another person about two weeks before his arrest was relevant to show that, on the date of his arrest, he possessed the methamphetamine with the intent to deliver. Gately v. State, 321 S.W.3d 72, 2010 Tex. App. LEXIS 3785 (Tex. App. Eastland May 20 2010).

1556. Evidence of prior convictions was admissible under Tex. R. Evid. 404(b) in defendant's trial for evading arrest or detention using a motor vehicle because that evidence was relevant to the element of identity, which defendant put squarely at issue by urging the defensive theory that another person had been driving the car during the pursuit. Thus, the trial court did not err in admitting the evidence with a limiting instruction that the jury was to consider the evidence only for the purpose of showing defendant's motive, as a repeat offender who would be subject to a long prison sentence, to fabricate a story that another person had been driving. Guerra v. State, 2010 Tex. App. LEXIS 3845, 2010 WL 2010929 (Tex. App. Amarillo May 20 2010).

1557. Although defendant, who was convicted of the offense of bodily injury to his wife, argued that the trial court erred in denying his motion for mistrial when a witness referred to an extraneous offense, the testimony was not so prejudicial and of such character to suggest the impossibility of withdrawing the impression produced on the minds of the jurors. Jauregui v. State, 2010 Tex. App. LEXIS 3856, 2010 WL 1997771 (Tex. App. San Antonio May 19 2010).

1558. Trial court's decision to admit a videotape under Tex. R. Evid. 404(b) fell within the zone of reasonable disagreement, given that (1) the charge contained a limiting instruction of how the evidence of another wrong was to be considered, and (2) the videotape, which showed defendant struggling with police, was probative of the issue of whether defendant intentionally kicked an officer or did so by accident; the actions depicted on the videotape did not warrant the conclusion that the probative value was substantially outweighed by its prejudicial effect under Tex. R. Evid. 403 and the trial court did not abuse its discretion in admitting the videotape into evidence on substantive grounds. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1559. Defendant argued that he did not receive proper notice regarding a witness's extraneous-offense testimony, but the notice requirements of Tex. R. Evid. 404(b) applied only to evidence presented during the State's case-in-chief, not to rebuttal evidence. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1560. Defendant argued that a description, for purposes of Tex. R. Evid. 404(b), did not properly indicate that the assault was of a public servant, but the State's next entry on the notice had the same date and a similar cause number and contained an offense description of resisting arrest and search. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1561. Some of the prior acts depicted in a videotape were discussed without objection during certain testimony; as a general rule, overruling an objection to evidence would not result in reversal when other such evidence was received without objection, either before or after the complained-of ruling. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1562. While the State argued that a videotape constituted same-transaction evidence, the court disagreed because the events underlying the charged offense could be easily understood without reference to the videotape. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1563. Given that (1) the prosecutor called defense counsel to inform him of the existence of a videotape as soon as the prosecutor learned of it, and he narrated a portion of the events to counsel, and (2) a copy of the videotape

was made available on April 9th, and counsel received the video on April 13th, the day before trial, the trial court did not err in finding that the prosecution gave counsel reasonable notice of the evidence. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1564. Even if defendant had shown that the trial court abused its discretion in either admitting the videotape or in finding that notice was reasonable under Tex. R. Evid. 404(b), defendant failed to show what harm resulted under Tex. R. App. P. 44.2(b); the other evidence provided reasonable assurance that even the erroneous admission of the videotape would have had only a slight effect, if any, on the jury, and defendant did not show how the lack of reasonable notice prejudiced the defense in any way. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1565. Although defendant claimed that the admission of a videotape violated his rights under U.S. Const. amend. XIV, § 1 and Tex. Const. art. I, § 19, the trial court did not err in admitting the videotape and even the erroneous admission of extraneous-offense evidence did not constitute constitutional error. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1566. For purposes of Tex. Code Crim. Proc. Ann. art. 36.01(a)(7), the trial court did not abuse its discretion in admitting a detective's testimony as rebuttal evidence, given that defendant's sister's testimony regarding defendant's physical disabilities could conceivably support the defensive theory in an assault trial that defendant kicked the officer unintentionally or by accident; the admission of the detective's testimony on rebuttal to show intent or absence of mistake for purposes of Tex. R. Evid. 404(b) fell within the zone of reasonable disagreement, and the court could not find that the effect of the detective's testimony was substantially more prejudicial than probative under Tex. R. Evid. 403. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1567. Defendant did not show how the testimony of a detective, for purposes of Tex. Code Crim. Proc. Ann. art. 36.01 and Tex. R. Evid. 404(b), affected his substantial rights, as the other evidence offered by the State provided reasonable assurance that even erroneous admission of the testimony would have had only a slight effect, if any, on the jury. Salazar v. State, 2010 Tex. App. LEXIS 3619, 2010 WL 1930106 (Tex. App. Austin May 13 2010).

1568. Court did not err in allowing two witnesses for the State to testify about defendant's prior bad acts, because there was no evidence that the officer's reference to defendant being a registered sex offender was calculated to inflame the minds of the jury, and the testimony of defendant's wife that she would not let her daughter around someone who was capable of committing sexual assault opened the door to impeach her testimony with her knowledge that defendant was a registered sex offender. Brownlee v. State, 2010 Tex. App. LEXIS 3679 (Tex. App. Eastland May 13 2010).

1569. During defendant's trial for aggravated sexual assault of a child, his daughter, the testimony by a witness that she was also sexually assaulted by defendant was not offered purely for character conformity purposes under Tex. R. Evid. 404(b), but was offered to rebut the defense theory that the victim was untruthful and fabricated her allegations. Hence, the trial court did not err in admitting the testimony. Saunders v. State, 2010 Tex. App. LEXIS 3358, 2010 WL 1796232 (Tex. App. El Paso May 5 2010).

1570. For purposes of Tex. Code Crim. Proc. Ann. art. 36.14, the trial court's extraneous offense instruction accurately stated the applicable law, and the second paragraph of the instruction simply contained additional instructions to the jury concerning the purposes for which it could consider particular extraneous offenses; the trial court did not err by denying the re-worded instruction defendant requested. Graves v. State, 310 S.W.3d 924, 2010 Tex. App. LEXIS 3388 (Tex. App. Beaumont May 5 2010).

1571. Before jurors can consider any of a defendant's extraneous offenses, they must believe beyond a reasonable doubt that defendant committed the extraneous offenses. Graves v. State, 310 S.W.3d 924, 2010 Tex. App. LEXIS 3388 (Tex. App. Beaumont May 5 2010).

1572. Because the incident the store was not another robbery, the photographs could not have been shown to the jury to prove the character of a person in order to show action in conformity therewith under Tex. R. Evid. 404(b), and the trial court did not err in finding that Rule 404(b) did not preclude inclusion of the photographs taken during the store accident and arrest in defendant's aggravated robbery trial. Lively v. State, 2010 Tex. App. LEXIS 3387, 2010 WL 1780138 (Tex. App. Texarkana May 5 2010).

1573. Court did not need to address defendant's unpreserved Tex. R. Evid. 404(b) contention. Lively v. State, 2010 Tex. App. LEXIS 3387, 2010 WL 1780138 (Tex. App. Texarkana May 5 2010).

1574. State did not allege, and there was no testimony, that it was defendant's vehicle that was used in a previous robbery or that defendant had committed it; thus, the testimony, which did not refer to any prior bad act, was not barred by Tex. R. Evid. 404(b) because it was not being used to show action in conformity therewith in defendant's aggravated robbery trial. Lively v. State, 2010 Tex. App. LEXIS 3387, 2010 WL 1780138 (Tex. App. Texarkana May 5 2010).

1575. Defendant pleaded guilty to aggravated sexual assault of a child, aggravated robbery, and burglary of a habitation with intent to commit aggravated sexual assault of a child, and there was evidence defendant burglarized another home and sexually assaulted another minor while holding a knife to her throat; given the violence involved and evidence of similar extraneous offenses, his life sentences were not unduly harsh. Zelaya v. State, 2010 Tex. App. LEXIS 3205 (Tex. App. Houston 1st Dist. Apr. 29 2010).

1576. Defendant did not object to the reference to any extraneous offenses until after a videotape had played in its entirety, and this was not timely for preservation purposes, such that the court overruled the issue. Reagan v. State, 2010 Tex. App. LEXIS 3158, 2010 WL 1712485 (Tex. App. Waco Apr. 28 2010).

1577. Defendant did not present any authority related to her claim as to why an act did not constitute a bad act or why the State's notice was inadequate; the sole reference was a regurgitation of Tex. R. Evid. 404(b), which was insufficient, and thus under Tex. R. App. P. 38.1(h), the issue was inadequately briefed, and therefore waived. Latimer v. State, 319 S.W.3d 128, 2010 Tex. App. LEXIS 3149 (Tex. App. Waco Apr. 28 2010).

1578. Defendant's intent, and the absence of mistake or accident, was a fact of consequence in this case alleging a violation of Tex. Code Crim. Proc. Ann. art. 62.055(a), and evidence of defendant's employment and failure to report his employment status was relevant because it tended to establish an elemental fact and rebut a defensive theory; the fact that defendant did not inform the police department of his employment was some evidence establishing his intent to violate the registration requirements, and it was sufficient that the evidence provided a small nudge toward proving or disproving a fact of consequence, and the trial court did not err in admitting this evidence. Garcia v. State, 2010 Tex. App. LEXIS 2899, 2010 WL 1611006 (Tex. App. Houston 14th Dist. Apr. 22 2010).

1579. Defendant's objections under Tex. R. Evid. 404(b) and 403 were untimely because they were made after a witness had already testified several times regarding the alleged sexual assault, and error was not preserved under Tex. R. App. P. 33.1(a)(1)(A). Garcia v. State, 2010 Tex. App. LEXIS 2899, 2010 WL 1611006 (Tex. App. Houston 14th Dist. Apr. 22 2010).

1580. Court agreed there were differences between the shooting in this case and the attempted shooting of another person, but the degree of similarity required to rebut a defensive issue was not as great as when the evidence was offered under Tex. R. Evid. 404(b) to prove identity; what was similar was that defendant acted intentionally to shoot another person, and in light of defendant's accident defense, the trial court's decision to allow the extraneous offense evidence to rebut his theory was not an abuse of discretion. King v. State, 2010 Tex. App. LEXIS 2811, 2010 WL 1510204 (Tex. App. Tyler Apr. 16 2010).

1581. It is not enough that the evidence is relevant; pursuant to Tex. R. Evid. 403, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of delay or needless presentation of cumulative evidence. King v. State, 2010 Tex. App. LEXIS 2811, 2010 WL 1510204 (Tex. App. Tyler Apr. 16 2010).

1582. Jury could have found from the evidence that defendant previously tried to shoot another person and was a violent person, which was the inference forbidden for this kind of evidence, but a significant amount of time was not required to develop the evidence, and the State had need for this evidence to establish a fact of consequence, which was defendant's intent, and the evidence supported the trial court's ruling to admit the extraneous evidence. King v. State, 2010 Tex. App. LEXIS 2811, 2010 WL 1510204 (Tex. App. Tyler Apr. 16 2010).

1583. Reasonable minds could have differed as to the admission of evidence because of a tenuous connection between the incidents and because of the chance that the jury would look unfavorably on defendant, who had previously tried to shoot another individual, and these kinds of rulings are subject to harmless error analysis; given that the jury found insufficient evidence that defendant acted intentionally, the jury did not misuse the evidence or make the forbidden inference that he intended to shoot the victim, and any residual bias the jury might have against defendant because of certain evidence would not necessarily intrude on the jury's evaluation of the evidence. King v. State, 2010 Tex. App. LEXIS 2811, 2010 WL 1510204 (Tex. App. Tyler Apr. 16 2010).

1584. During defendant's trial for theft over $ 100,000 but less than $ 200,000, the court did not err under Tex. R. Evid. 404(b) in admitting the testimony of other home repair customers of defendant; the evidence was admissible to show defendant's intent. The evidence from the other customers showed that defendant took money for work that defendant never intended to complete. Lopez v. State, 316 S.W.3d 669, 2010 Tex. App. LEXIS 2633 (Tex. App. Eastland Apr. 15 2010).

1585. Defendant did not preserve his complaint for review, given that (1) a motion in limine did not preserve error, (2) defendant received no adverse ruling from the trial court as required by Tex. R. App. P. 33.1(a)(1), and (3) to the extent defendant complained about the restricted testimony the trial judge allowed, defendant did not object, and thus nothing was presented for review; however, even if error were preserved, no extraneous offense evidence was admitted before the jury under Tex. R. Evid. 404(b), and thus the trial court did not abuse its discretion in admitting the complained-of evidence. Downey v. State, 2010 Tex. App. LEXIS 2722 (Tex. App. Dallas Apr. 6 2010).

1586. Admission of the evidence showing that defendant's son's siblings were also victims of medical child abuse by defendant was permissible to provide context to the offenses of injury to a child, for purposes of Tex. R. Evid. 404(b); the complained-of evidence showed that defendant's conduct toward her son was not isolated behavior, but rather was part of an overall pattern of conduct of medical abuse involving all three of her children, and because it was admissible as same transaction contextual evidence, Rule 404(b) did not require the exclusion of the evidence. Williamson v. State, 356 S.W.3d 1, 2010 Tex. App. LEXIS 3432 (Tex. App. Houston 1st Dist. May 6 2010).

1587. Evidence indicating that defendant's son's siblings had also been subject to medical child abuse was relevant to understanding the magnitude of the motivational force, which the average person would have difficulty comprehending; the medical record and testimonial evidence showing that the siblings were also victims of medical

child abuse was relevant to prove motive and the evidence was admissible pursuant to Tex. R. Evid. 404(b) in defendant's injury to a child trial. Williamson v. State, 356 S.W.3d 1, 2010 Tex. App. LEXIS 3432 (Tex. App. Houston 1st Dist. May 6 2010).

1588. Court did not abuse its discretion in admitting the extraneous offense testimony that defendant sexually molested the witness as a child, because the extraneous offense was clearly similar to the charged offense of aggravated sexual assault of a child, both children were tenants of defendant, defendant baby-sat both children and he assumed a familiar type of relationship with both children to the extent he was considered a putative grandparent, and the sexual assaults in each instance occurred over extended periods of time and both children were young in age. Rotz v. State, 2010 Tex. App. LEXIS 2050, 2010 WL 1076270 (Tex. App. El Paso Mar. 24 2010).

1589. Defendant had made a relevancy objection at trial, but this did not preserve error concerning a Tex. R. Evid. 404(b)claim, and thus he could not argue on appeal that the evidence constituted inadmissible character evidence, which he did not assert in the trial court. Gilmore v. State, 2010 Tex. App. LEXIS 1944 (Tex. App. Houston 1st Dist. Mar. 18 2010).

1590. During defendant's murder trial, the court did not err under Tex. R. Evid. 404(b) in admitting a transcript of defendant's conversation with a codefendant because it was highly probative to establish a motive and identity for participating in the murder. Reta v. State, 2010 Tex. App. LEXIS 1482, 2010 WL 724395 (Tex. App. San Antonio Mar. 3 2010).

1591. Evidence of extraneous offenses against the victim, defendant's adopted daughter, was highly probative because it demonstrated the history and progression of the relationship between the victim and defendant and provided insight into their states of mind, for purposes of Tex. Code Crim. Proc. Ann. art. 38.37, plus the evidence was necessary to help the jury understand why the victim delayed in disclosing the offenses and the State needed the evidence; the trial court could have found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Saenz v. State, 2010 Tex. App. LEXIS 1519 (Tex. App. San Antonio Mar. 3 2010).

1592. During defendant's trial for sexual assault of a child, the court did not err in overruling defendant's objection to the victim's testimony about all the times he had sexually assaulted her over a two-year period because defendant did not object that the probative value of the evidence was substantially outweighed by its prejudicial effect; defendant's Tex. R. Evid. 404(b) objection was not sufficient to preserve review under Tex. R. Evid. 403. Mayfield v. State, 2010 Tex. App. LEXIS 1387 (Tex. App. Dallas Feb. 26 2010).

1593. Trial court did not abuse its discretion by admitting the evidence of the prior theft of a truck to show defendant's knowledge or intent for the instant theft of a truck, because both the thefts involved cargo of food, and the jury could infer from defendant's participation in the prior theft and disposal of its cargo that defendant knew the current truck was stolen and that defendant intended to deprive the owner of the property. Hart v. State, 2010 Tex. App. LEXIS 1630, 2010 WL 851405 (Tex. App. Dallas Feb. 26 2010).

1594. In order to refute defendant's self-defense claim in his murder trial, based on the 2004 murder of his brother, it was relevant for the State to show that on another occasion, defendant used a knife to cut a man, without provocation or threat; thus, that 2006 offense was relevant under Tex. R. Evid. 401 to rebut the self-defense theory. Oakes v. State, 2010 Tex. App. LEXIS 1349, 2010 WL 668541 (Tex. App. Amarillo Feb. 25 2010).

1595. Court did not abuse its discretion by admitting the evidence over the Tex. R. Evid. 403 objection, because the trial court could have reasonably concluded that the probative value of co-defendant's statement on the video

recording was not substantially outweighed by the danger of unfair prejudice; the recordings contained a statement by co-defendant that he and the victim bought Oxycontin from defendant before the victim learned of her pregnancy, and defendant and co-defendant's case was their claimed concern for the victim's unborn child. Scroggs v. State, 2010 Tex. App. LEXIS 1248 (Tex. App. Amarillo Feb. 23 2010), *opinion withdrawn, substituted opinion at* No. 07-07-453-CR, No. 07-07-454-CR, 2010 Tex. App. LEXIS 3769 (Tex. App -- Amarillo May 19, 2010, pet. ref'd).

1596. Ex-wife's testimony that defendant had touched her during their marriage in ways or under circumstances that she found objectionable had little if any tendency to suggest, beyond mere character conformity, that defendant had deliberately penetrated his minor daughters with his finger. Schoff v. State, 2010 Tex. App. LEXIS 1350, 2010 WL 668904 (Tex. App. Austin Feb. 23 2010).

1597. There was nothing showing that a continuance was requested, and given that defendant's complaint related to surprise, his claim that the trial court erred in admitting extraneous offenses for purposes of Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) was not preserved for review. Storey v. State, 2010 Tex. App. LEXIS 1219, 2010 WL 605712 (Tex. App. Amarillo Feb. 22 2010).

1598. Information contained in the documents involved prior instances of defendant selling drugs and tended to establish his knowledge about the drugs in the house, their purpose, and his role in their sale, and thus the trial court's decision to admit the evidence did not amount to an abuse of discretion; furthermore, the same type of evidence came in through other sources and thus the court could not find that the decision to admit the information was harmful, even if inadmissible. Storey v. State, 2010 Tex. App. LEXIS 1219, 2010 WL 605712 (Tex. App. Amarillo Feb. 22 2010).

1599. Defendant waived his assertion that the trial court erred in relying on allegedly inaccurate extraneous offenses listed in the pre-sentence investigation report, because defendant waived this contention by failing to first object or make the required showing before raising the issue on appeal. Harrison v. State, 2010 Tex. App. LEXIS 1141, 2010 WL 547388 (Tex. App. Houston 1st Dist. Feb. 18 2010).

1600. Court did not abuse its discretion in admitting the contested items, because the evidence defendant complained of was much less graphic and disturbing than the pictures for which he was indicted, defendant's knowledge of and preoccupation with pictures of children, both those that might be termed pornographic and otherwise, was critical to proving the State's case of possession of child pornography, and the items did not distract the jury from their main inquiry, nor, did the evidence create a situation where the jury would give undue credence to the evidence; an officer found the two pictures that were the basis of defendant's indictments, along with computer generated pictures of young girls engaged in various sexual acts, magazine advertisements of children with the heads and faces cut out, adult pornography, and a spiral notebook with handwritten sexually explicit stories about young females. Bolles v. State, 2010 Tex. App. LEXIS 1080, 2010 WL 539684 (Tex. App. Amarillo Feb. 16 2010).

1601. Counsel was not ineffective for eliciting evidence from defendant's girlfriend about previous drug transactions and failing to object to such testimony under Tex. R. Evid. 404(b) because the record supported a conclusion that this was part of counsel's trial strategy to show that the arresting officer and defendant's girlfriend were not credible. Chandler v. State, 2010 Tex. App. LEXIS 963, 2010 WL 457444 (Tex. App. Houston 1st Dist. Feb. 11 2010).

1602. Counsel's questioning of a witness was not the only instance in which the door was opened for the State to submit extraneous offense evidence; defendant's testimony belied his contention that counsel's alleged wrongful questioning of the witness was the sole cause for opening the door to the admission of rebuttal testimony, and the court could not say that counsel's questioning of the witness was not the result of a strong and reasonable trial

strategy, such that defendant did not meet his burden to overcome the presumption that counsel provided professional and reasonable assistance. Robertson v. State, 2010 Tex. App. LEXIS 969, 2010 WL 466902 (Tex. App. Corpus Christi Feb. 11 2010).

1603. Witnesses were the victims of the extraneous offense and thus their testimony about the impact that the offense had on them was not victim impact testimony. Thompson v. State, 2010 Tex. App. LEXIS 994 (Tex. App. Houston 1st Dist. Feb. 11, 2010).

1604. In defendant's aggravated robbery case, the court did not err by admitting extraneous offense evidence of a prior robbery because the identity of the robber was at issue; defendant persistently attacked the victim's certainty of identification and offered an alibi for his presence at the time the robbery took place. Additionally, both the robber in the instant case and the prior case had features and dress in common, both tried to hide their faces, both were brandishing a pistol, and both were seen leaving and departing in a blue vehicle. Lively v. State, 2010 Tex. App. LEXIS 863 (Tex. App. Texarkana Feb. 5 2010).

1605. Extraneous evidence linked defendant to a car chase and thus sufficient evidence existed for the jury to find that defendant committed the extraneous offenses, and the trial court did not err in admitting this evidence as relevant to punishment, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). Frederickson v. State, 2010 Tex. App. LEXIS 830, 2010 WL 395183 (Tex. App. Fort Worth Feb. 4 2010).

1606. Evidence of extraneous offenses admitted under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) did not violate Tex. R. Evid. 403 given that (1) sufficient evidence existed for the jury to find that he committed the offenses, (2) defendant sought probation, but evidence of the extraneous offenses showed that he was not a good probation candidate, (3) the evidence did not appeal to improper emotion or create confusion, and (4) the evidence was not cumulative. Frederickson v. State, 2010 Tex. App. LEXIS 830, 2010 WL 395183 (Tex. App. Fort Worth Feb. 4 2010).

1607. Court properly excluded character evidence because defendant testified that the victim told him "he's been in a lot of fights and that he's been in trouble for fighting." That general statement was not sufficient to establish that defendant was aware that the victim had committed an assault for which he was placed on deferred adjudication community supervision. Evans v. State, 2010 Tex. App. LEXIS 810, 2010 WL 376940 (Tex. App. Waco Feb. 3 2010).

1608. Tex. R. Evid. 404(b) was not violated by evidence that defendant was arrested on a Kansas warrant because the jury was not told what charges defendant faced but only that the warrant issued after defendant disobeyed instructions to remain. It was reasonable to conclude that the warrant was contextual evidence; it was offered during a chronological description of the Kansas law enforcement officials' actions and was mentioned as the basis for defendant's subsequent arrest. Ward v. State, 2010 Tex. App. LEXIS 590, 2010 WL 337139 (Tex. App. Eastland Jan. 29 2010).

1609. In a drug case, evidence of defendant's prior arrest was inadmissible because any relevance of evidence showing an arrest eight years prior to trial for transporting methamphetamine, as opposed to evidence that defendant had transported methamphetamine or been convicted of that offense, was relatively slight with respect to showing defendant's knowledge that there was marihuana in the truck he was driving; on the other hand a showing that defendant had previously been arrested for transporting methamphetamine was highly prejudicial. Rascon v. State, 2010 Tex. App. LEXIS 593, 2010 WL 337044 (Tex. App. Eastland Jan. 29 2010).

1610. In defendant's drug case, the court did not err by admitting evidence of an extraneous drug offense because the officer testified that he purchased methamphetamine from defendant, which made the intent to deliver much

more probable, and the circumstances of the offense were just a simple transaction, which involved no violence or any potential inflaming factors. The testimony of was not a time consuming part of the trial, and while intent might have been proven by circumstantial evidence, the evidence was needed to rebut the defensive theories brought out during cross-examination of the witnesses. Padilla v. State, 2010 Tex. App. LEXIS 674, 2010 WL 337673 (Tex. App. El Paso Jan. 29 2010).

1611. In defendant's capital murder case, the court properly admitted other acts evidence that defendant removed a windowscreen on the witness's enclosed patio, squatted in the dark wearing only boxer-shorts, and told her he wanted to get inside her apartment and needed a place to hide because the evidence proved that defendant was in the vicinity of the victim's apartment and was looking for a place to hide near the time of the murder. Additionally, the testimony was not particularly emotional or otherwise likely to inflame the jury, and the State did not have other evidence to show defendant's behavior and presence near the time of the murder. Gregory v. State, 2010 Tex. App. LEXIS 618, 2010 WL 323884 (Tex. App. Fort Worth Jan. 28 2010).

1612. In a driving while intoxicated case, counsel was not ineffective for failing to object or request a limiting instruction with regard to a witness's testimony about defendant's bribery of a witness because evidence of the alleged bribe was admissible to impeach the witness's testimony and to indicate defendant's consciousness of guilt. The record reflected that counsel objected to the testimony, and defendant did not show how any limiting instruction would have been consistent with the defensive issues raised at trial. White v. State, 2010 Tex. App. LEXIS 406, 2010 WL 196938 (Tex. App. Corpus Christi Jan. 21 2010).

1613. Any error in the admission of prior acts testimony was harmless because the complainant testified to years of sexual abuse at the hands of defendant, her grandfather, and a detective testified that during his interview with the complainant, the complainant told him about having sexual intercourse with her grandfather. In light of the more detailed, first-hand testimony of the complainant, the mother's testimony regarding defendant's behavior towards her did not influence the jury or had but a slight effect. Barrera v. State, 2010 Tex. App. LEXIS 401, 2010 WL 188312 (Tex. App. Dallas Jan. 21 2010).

1614. Trial court did not abuse its discretion during defendant's trial for the aggravated sexual assault of his eleven-year-old step-grandson in admitting pursuant to Tex. R. Evid. 404(b) the testimony of defendant's nephew (one of the State's rebuttal witnesses) that defendant had sexually assaulted him where defendant's defense was that his step-grandson and his granddaughter were fabricating their accusations because defendant had testified in his own behalf and after having been fully admonished as to the consequences, and he denied sexually assaulting not only the victim but also his granddaughter. Moreover, there was no merit in defendant's argument that any remoteness of the extraneous offense automatically made the testimony irrelevant under Tex. R. Evid. 401. Espinoza v. State, 2010 Tex. App. LEXIS 559, 2010 WL 227680 (Tex. App. Eastland Jan. 21 2010).

1615. In defendant's indecency trial, and in relation to his nephew's testimony that defendant sexually assaulted him, the defense was that the victim in the current case and the nephew fabricated their accusations, such that the trial court's ruling to allow the nephew's testimony under Tex. R. Evid. 404(b) was not outside the zone of reasonableness; the court also disagreed with defendant's argument that any remoteness of the extraneous offense automatically made the testimony irrelevant under Tex. R. Evid. 401. Espinoza v. State, 2010 Tex. App. LEXIS 523, 2010 WL 227661 (Tex. App. Eastland Jan. 21 2010).

1616. Testimony was nonresponsive to the question asked, was vague, and did not refer to any particular offense, plus the testimony was not emphasized or later referred to; although the testimony informed the jury that defendant was on probation, the response was not calculated to inflame the jury and the court presumed that the jury followed the trial court's instruction to disregard the testimony, and given the evidence, the reference to defendant's status as a probationer likely had little or no effect on the jury's conviction. Wingard v. State, 2009 Tex. App. LEXIS 9880

(Tex. App. Tyler Dec. 31 2009).

1617. Testimony about defendant's failure to cooperate with a deputy sheriff and attempt to flee was admissible under Tex. R. Evid. 404(b) as same transaction contextual evidence in a theft case because it tended to establish intent; moreover, its probative value was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Matthews v. State, 2009 Tex. App. LEXIS 9816, 2009 WL 5155688 (Tex. App. Waco Dec. 30 2009).

1618. In defendant's sexual assault case, the court properly admitted extraneous offense evidence because the disputed testimony was relevant for several reasons; the disputed evidence was relevant because DNA evidence left by the anal sexual assault connected defendant to the charged offense, and the evidence at trial showed that the same individual committed all of the sexual offenses. The complainant's testimony was relevant as same transaction contextual evidence to show the events in question were closely interwoven and to aid the jury in understanding the context in which those events transpired. Walker v. State, 2009 Tex. App. LEXIS 9780, 2009 WL 5103274 (Tex. App. Dallas Dec. 29 2009).

1619. Counsel was ineffective because counsel's conduct in introducing and opening the door to a prior sexual assault and other "bad acts" evidence, along with his failure to object or request a limiting instruction, showed his lack of investigation of the relevant law and facts in advance of trial. Such conduct led to the admission of evidence that undermined defendant's credibility, which was dependent on the strength of his own credibility as compared to that of the complainant. Garcia v. State, 308 S.W.3d 62, 2009 Tex. App. LEXIS 9692 (Tex. App. San Antonio Dec. 23 2009).

1620. In defendant's aggravated sexual assault of a child case, the court did not err in admitting evidence that the child was in counseling since the alleged sexual assaults and that defendant's children were removed because evidence regarding the child's need for counseling was probative circumstantial evidence that increased the likelihood that she was sexually abused by defendant, and evidence that it was necessary to remove the children was probative circumstantial evidence that tended to show that the state believed something was occurring that warranted removal. Herrera v. State, 2009 Tex. App. LEXIS 9690, 2009 WL 4981327 (Tex. App. San Antonio Dec. 23 2009).

1621. In defendant's aggravated kidnapping case, the court did not err by admitting extraneous offense involving the same victim because the intent to terrorize, harm, or abuse the victim must have been present prior to or at the particular time; thus, evidence of extraneous misconduct prior to the abduction was relevant apart from showing character conformity because it made more probable the elemental fact of defendant's intent at the time of the abduction. Additionally, only a small percentage of the time expended in the four-day jury trial was devoted to mention of the extraneous offenses. Crews v. State, 2009 Tex. App. LEXIS 9677, 2009 WL 4907423 (Tex. App. Texarkana Dec. 22 2009).

1622. Defendant failed to show that the trial court erred in ruling that the probative value of evidence of the third-party's fingerprint was not prejudicial and outweighed any prejudicial effect, because the investigator testified that the third-party's name was developed in the case as a witness and that defendant and the third-party were friends, the jury did not hear any evidence of any extraneous-offense conduct, and defendant had not pointed to any place in the record showing that the evidence of extraneous-offense conduct was presented to the jury. McKnight v. State, 2009 Tex. App. LEXIS 9532, 2009 WL 4840201 (Tex. App. Houston 14th Dist. Dec. 17 2009).

1623. Defendant did not object to certain extraneous evidence by the victim and related evidence was admitted without objection as to other witnesses, plus the jury was given a limiting instruction, such that any error that might have occurred was harmless. Dempsey v. State, 2009 Tex. App. LEXIS 9537, 2009 WL 4840158 (Tex. App.

Houston 14th Dist. Dec. 17 2009).

1624. State contended that evidence of defendant "hustling" fell under Tex. R. Evid. 404(b) because it demonstrated his motive for committing the crime; the trial court did not abuse its discretion in admitting the evidence. Dempsey v. State, 2009 Tex. App. LEXIS 9537, 2009 WL 4840158 (Tex. App. Houston 14th Dist. Dec. 17 2009).

1625. Pursuant to Tex. R. App. P. 33.1(a), defendant waived his complaint about the admission of a prior fight because he failed to continuously object to the evidence and he allowed the same evidence to come in through another witness without objection, which cured the error, plus the trial court instructed the jury about the limited purpose of the evidence, such that any error that might have occurred was harmless. Dempsey v. State, 2009 Tex. App. LEXIS 9537, 2009 WL 4840158 (Tex. App. Houston 14th Dist. Dec. 17 2009).

1626. For purposes of Tex. R. Evid. 404(b), evidence of defendant's gang affiliation had some tendency to show that defendant had a motive to commit the crime; the trial court did not abuse its discretion by allowing evidence of defendant's gang affiliation to be introduced to support the State's motive. Dempsey v. State, 2009 Tex. App. LEXIS 9537, 2009 WL 4840158 (Tex. App. Houston 14th Dist. Dec. 17 2009).

1627. In defendant's capital murder case, the court did not err by admitting evidence of extraneous murders because defendant opened the door by deliberately choosing to question the witness about the extraneous murders. The State was presenting the evidence to rebut defendant's claim of self-defense. Williams v. State, 301 S.W.3d 675, 2009 Tex. Crim. App. LEXIS 1751 (Tex. Crim. App. 2009).

1628. In an indecency with a child case, the court erred by admitting extraneous offense evidence due to the lack of similarity between the extraneous offenses and the charged offenses, the duration in time of twenty years between the offenses, and the lack of evidence concerning a continuing course of conduct by defendant. The extraneous acts did not take place in defendant's home and defendant did not ask the witness to touch himself or defendant. Crocker v. State, 2009 Tex. App. LEXIS 9432, 2009 WL 4725299 (Tex. App. Dallas Dec. 11 2009).

1629. In a sexual assault case, a court properly admitted extraneous offense evidence that defendant had threatened a witness not to testify because defendant threatened to accuse the witness and his wife of sexually abusing defendant's girlfriend's children if the witness testified against him. The testimony was relevant to show defendant's consciousness of guilt. Ramsey v. State, 2009 Tex. App. LEXIS 9449, 2009 WL 4755175 (Tex. App. Fort Worth Dec. 10 2009).

1630. In defendant's indecency with a child case, the court properly allowed testimony of an officer that he had seen defendant watching children on a playground with binoculars because much of the State's case was built around the theory of "grooming" and that defendant spent significant time with the victim; because the bulk of the defensive case consisted of witnesses who said defendant had provided safe child care, that evidence was relevant to rebutting the defensive theory. Additionally, the time spent proving the extraneous act was negligible. Orange v. State, 2009 Tex. App. LEXIS 8934, 2009 WL 3851068 (Tex. App. Texarkana Nov. 19 2009).

1631. Defense opened the door to extraneous offense evidence from another girl, who said defendant sexually assaulted her, when the defense left a false impression that defendant would never commit aggravated sexual assault of a child; while prejudicial, the probative value of the evidence was not outweighed by the danger of unfair prejudice, the girl's testimony was brief and not cumulative, and it could be argued that it had the potential to assist defendant, given that the girl was shaky while testifying, but the victim was calm and composed, which raised the argument that maybe not the same thing happened to the victim. Reyes v. State, 2009 Tex. App. LEXIS 8842, 2009

WL 3856198 (Tex. App. San Antonio Nov. 18 2009).

1632. In defendant's aggravated sexual assault of a child case, the court properly admitted evidence from a witness that defendant liked young girls and oral sex because defendant was accused of fondling the breast of his victim and of performing oral sex on the victim who was ten years old, the evidence pertained to defendant's thoughts and did not implicate any conduct on his part, defendant's statements were the primary evidence of his intent and state of mind, and, the State had a significant need for the evidence. Jones v. State, 2009 Tex. App. LEXIS 8923, 2009 WL 3858016 (Tex. App. Waco Nov. 18 2009).

1633. Balancing the factors for purposes of Tex. R. Evid. 403, the trial court did not abuse its discretion in admitting extraneous offense evidence, given that (1) intent of defendant was a contested fact and evidence regarding intent was thus necessary, (2) evidence of the extraneous offense was highly probative as to intent based on timing, (3) the extraneous offense and the current offense were similar, (4) the evidence was not inflammatory or repetitive, and (5) the jury was instructed that the extraneous offense could be considered only in determining intent. Talley v. State, 2009 Tex. App. LEXIS 8830 (Tex. App. Dallas Nov. 17 2009).

1634. Defendant's contention regarding extraneous offenses on appeal did not comport with her trial objections, for purposes of Tex. R. App. P. 33.1(a); in any event, witness testimony showed that defendant selected store items and concealed them in a purse, then met a friend, who concealed the purse under a jacket and left the store, such that the evidence was sufficient to show that defendant was a party to the offense of theft at the store. Talley v. State, 2009 Tex. App. LEXIS 8830 (Tex. App. Dallas Nov. 17 2009).

1635. Defense counsel's performance was not deficient, because defendant failed to rebut the presumption that defense counsel's decision to not object to the extraneous offense and prior bad acts evidence was the product of sound trial strategy, because counsel sought to show that the relationship between defendant and the complainant was volatile and sexual, and that they often fought and reconciled by having sex. Harrison v. State, 2009 Tex. App. LEXIS 8776 (Tex. App. Austin Nov. 13 2009).

1636. On appeal, defendant argued that testimony was inadmissible under extraneous evidence grounds, but defendant's hearsay objection did not preserve the issue for appellate review on a different theory. Norman v. State, 2009 Tex. App. LEXIS 8796, 2009 WL 3805830 (Tex. App. Houston 1st Dist. Nov. 12 2009).

1637. Trial court's prompt instruction to the jury to disregard a statement cured the reference to defendant's prior incarceration; this was not an extreme case where the statement was clearly calculated to inflame the jury. Cherry v. State, 2009 Tex. App. LEXIS 8787, 2009 WL 3805850 (Tex. App. Houston 1st Dist. Nov. 12 2009).

1638. In defendant's murder case, the court did not err by allowing the State to present the testimony of two witnesses in rebuttal regarding other sexual offenses alleged to have been committed by defendant because the best evidence that the State had to connect defendant to the murder was the fact that defendant had been with the victim until shortly before the murder, the statements of the two seasoned felons, whose credibility had been strongly attacked, and DNA evidence in the vehicle which was not particularly strong. Therefore, the State had a need for the evidence. Additionally, the presentation of the testimony did not take such a great amount of time as to confuse or distract the jury from the main issue of the case. Asberry v. State, 2009 Tex. App. LEXIS 8512 (Tex. App. Waco Nov. 4 2009).

1639. Officer's reference to an extraneous offense was cured by a sustained objection and an instruction to disregard, the statement was not calculated to inflame the jury, and the court had to assume that the jury properly heeded the trial court's instructions, as defendant did not prove otherwise, such that the trial court properly denied defendant's motion for a mistrial. Caldwell v. State, 2009 Tex. App. LEXIS 8585, 2009 WL 3646094 (Tex. App.

Waco Nov. 4 2009).

1640. Trial court abused its discretion by admitting evidence of defendant's prior burglary arrest pursuant to Tex. R. Evid. 404(b) where the tendency of the evidence was to show defendant was a bad person or that his character conformed to that of a person from whom criminal conduct might be expected. However, the error did not influence the jury, or had but a slight effect on its verdict of guilt, because the State's presentation of the alleged burglary, although factually detailed, was brief and received only passing mention in closing argument, and because the propensity and potency of the evidence to characterize defendant as a criminal was blunted by the previous, unopposed, admission of evidence of his prior conviction for manslaughter. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

1641. Trial court erroneously admitted a 1993 judgment convicting defendant of misdemeanor assault where the judgment was not admissible under Tex. R. Evid. 404(b) because it had no relevance apart from proof of character conformity. Moreover, evidence of the conviction was not available for impeachment under Tex. R. Evid. 609 because the record contained no evidence that the victim of the assault was female, and there was thus no proof that it was a misdemeanor involving moral turpitude. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

1642. In an aggravated sexual assault of a child case, the court properly admitted excerpts from defendant's civil deposition and witness testimony because the defense was theorizing that the victim fabricated the allegations against defendant, and by offering the excerpts where he admitted to performing sexual acts with the witness the State was attempting to show that defendant's claim of fabrication-for-money defense was less probable. The witness's testimony was brief and the court gave a limiting instruction. Slutz v. State, 2009 Tex. App. LEXIS 8326 (Tex. App. Amarillo Oct. 29 2009).

1643. There was no error under Tex. R. Evid. 404 when a juvenile witness testified that defendant gave her Advil or Tylenol because the witness did not testify about an act of misconduct or a crime to which defendant was connected. Thus, the statement did not demonstrate that an extraneous offense occurred. Stine v. State, 300 S.W.3d 52, 2009 Tex. App. LEXIS 8121 (Tex. App. Texarkana Oct. 21 2009).

1644. In defendant's drug case, the court properly admitted evidence of defendant's gang affiliation at sentencing because the presentation of the evidence took only a short time and the probative value of the evidence was high. Defendant's prior admission of his affiliation with a prison gang and the reputation of that gang for commission of offenses, both inside prison and in the general community, was a factor that the jury was entitled to consider in determining defendant's propensity for further criminal activity should he be released from incarceration. Meier v. State, 2009 Tex. App. LEXIS 8078, 2009 WL 3335282 (Tex. App. Amarillo Oct. 16 2009).

1645. In defendant's aggravated robbery case, the court properly admitted extraneous offense evidence because defendant brought identity into issue, the witnesses were able to specifically testify about defendant's identity, and the poor lighting made it difficult for most of the complainants to specify the exact color of the "dark colored" clothing. The witness's identification of the assailants' clothing and the red bandana was important to the State's case-in-chief. Trevino v. State, 2009 Tex. App. LEXIS 8044, 2009 WL 3321417 (Tex. App. Houston 1st Dist. Oct. 15 2009).

1646. Because a roommate's testimony helped to affirmatively link defendant to the cocaine found in their apartment and to establish that defendant possessed it with the intent to deliver, the trial court did not abuse its discretion in admitting the testimony under Tex. R. Evid. 403, 404(b) to show intent, motive, opportunity, and lack of mistake. Hatcher v. State, 2009 Tex. App. LEXIS 8045, 2009 WL 3326758 (Tex. App. Eastland Oct. 15 2009).

1647. In defendant's murder case, a witness's testimony that defendant wanted to go kill someone and that he had a gun was not inadmissible evidence of an extraneous offense because defendant's statements and actions made it more probable that he did intend to seriously injure or kill the victim. The fact that he had a gun at the time was prejudicial, but it did not outweigh the probative value of his admission and his action at the time. Walton v. State, 2009 Tex. App. LEXIS 8046, 2009 WL 3326759 (Tex. App. Eastland Oct. 15 2009), *cert. denied*, 131 S. Ct. 512, 178 L. Ed. 2d 379, 2010 U.S. LEXIS 8559 (U.S. 2010).

1648. Defendant had been identified as the person who used a knife in an altercation with his stepfather,and his flight when confronted by the police was relevant to the issue of whether or not he committed the crime; the relevancy requirement was satisfied. Nothing suggested that defendant's flight to avoid arrest was related to circumstances other than the charged offense, and the trial court did not err in admitting the evidence of flight. Drake v. State, 2009 Tex. App. LEXIS 8001, 2009 WL 3295580 (Tex. App. Beaumont Oct. 14 2009).

1649. There was no evidence that at the time of the altercation defendant and his brother were defending their mother against a violent act by the stepfather; under the circumstances presented, considering the other evidence of stepfather's violence admitted, the trial court did not err in excluding the specific evidence of the stepfather's violence toward the mother at defendant's trial for murdering the stepfather. Drake v. State, 2009 Tex. App. LEXIS 8001, 2009 WL 3295580 (Tex. App. Beaumont Oct. 14 2009).

1650. In a murder case, evidence of defendant's drug dealing was properly admitted because, according to a witness, defendant and the victim were rival drug dealers, and proof of motive was important to the State's case because the State was unable to produce an eyewitness who actually saw defendant shoot the victim. The time spent attempting to prove that defendant sold illegal drugs was not out of proportion to the time required to present such evidence. Koy Timon Moore v. State, 2009 Tex. App. LEXIS 7847 (Tex. App. Houston 14th Dist. Oct. 8 2009).

1651. Court assumed without deciding that the trial court erred under Tex. R. Evid. 404(b) in admitting a witness's testimony that defendant sold the witness drugs the day of defendant's arrest, but in applying a harm analysis under Tex. R. App. P. 44.2(b), the court found no harm; defendant never made the claim that he was surprised by the State's decision to call the witness to testify, defendant did not seek a continuance, and defense counsel was able to cross-examine the witness, such that defendant's substantial rights were not affected by the admission of the evidence. McClenny v. State, 2009 Tex. App. LEXIS 7908, 2009 WL 3246774 (Tex. App. Fort Worth Oct. 8 2009).

1652. Where defendant claimed self-defense in his criminal prosecution for murder, the trial court did not err by excluding testimony from five witnesses to show that the complainant had an aggressive character; the evidence was not admissible under Tex. R. Evid. 404(b), because defendant did not offer any explanation as to how the complainant's acts toward others were probative as to the complainant's state of mind during the incident with defendant. Barnes v. State, 2009 Tex. App. LEXIS 7931, 2009 WL 3248172 (Tex. App. Houston 1st Dist. Oct. 8 2009).

1653. By affirmatively stating "no objection" to photographs and offering no objection to the offer of a gun and clip, defendant waived any error in the admission of the evidence of the extraneous offense and lost the ability to claim error in that regard. Kernall v. State, 2009 Tex. App. LEXIS 7879, 2009 WL 3230838 (Tex. App. Austin Oct. 7 2009).

1654. When defense counsel accepted the State's assertion that it had provided proper notice under Tex. R. Evid. 404, he relieved the trial court of any obligation to look into the type of notice that was given or to determine whether it was timely, and counsel's acceptance of the State's assertion that it had provided proper notice operated to withdraw his objection; the trial court was no longer required to inquire into notice, the State was not given an chance to further develop the record concerning notice, and the exclusion of evidence based on lack of notice was

no longer requested, such that the court could not reverse on this issue. Jackson v. State, 2009 Tex. App. LEXIS 7751, 2009 WL 3153271 (Tex. App. Fort Worth Oct. 1 2009).

1655. Court did not err by admitting extraneous offense evidence of defendant's assaultive behavior occurring prior to, and after, the sexual assault because the extraneous offense evidence was admissible to show the context in which the criminal act occurred because defendant's assaultive behavior was "blended, or connected" to the sexual assault forming an "indivisible criminal transaction." Moreover, the evidence was helpful to the jury in their determination whether defendant used or exhibited a deadly weapon during the "same criminal episode." Quincy v. State, 304 S.W.3d 489, 2009 Tex. App. LEXIS 7645 (Tex. App. Amarillo Sept. 30 2009).

1656. Defendant did not establish a basis in the trial court for admission of this evidence as an exception to the rules by relating his attorney's past bar grievance history as relevant in a way that might overcome the precepts of Tex. R. Evid. 404(b)-like motive, intent, plan, or pattern; in addition, defendant did not present any evidence that knowing his attorney's history with other clients would have factored into his decision to take a plea, where he made no inquiry into the attorney's history prior to taking the plea, and pointed to no affirmative misrepresentation by the attorney made in connection with the information relevant to the plea. Thus, the trial court did not abuse its discretion in excluding such evidence from defendant's motion for a new trial hearing. Starz v. State, 309 S.W.3d 110, 2009 Tex. App. LEXIS 7711 (Tex. App. Houston 1st Dist. Sept. 30 2009).

1657. Punishment phase extraneous offense evidence was properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07 because there was evidence that defendant was the only adult with the complainant, the autopsy showed a variety of injuries to the complainant, and a doctor testified that the injuries all occurred within the same twenty-four-hour period. Roberts v. State, 2009 Tex. App. LEXIS 7816, 2009 WL 6338618 (Tex. App. Houston 14th Dist. Sept. 24 2009).

1658. Where defendant told a confidential informant that she was manufacturing methamphetamine at the site, the officer found methamphetamine, manufacturing precursors, and drug manufacturing paraphernalia in plain sight when they executed a search warrant; at defendant's trial for possession of a controlled substance in violation of Tex. Health & Safety Code Ann. § 481.115, the trial court did not err by admitting evidence of additional items found in the camper including: a plastic bag containing 2.2 grams of a white powder believed to be methamphetamine, a twelve gauge shotgun, four lithium batteries, five boxes of pseudoephedrine pills, a wooden box containing miscellaneous drug paraphernalia, a syringe with a clear liquid inside, a bottle of muriatic acid, a bottle of iodine, and a gas generator. The items seized during the search of the camper were relevant pursuant to Tex. R. Evid. 404(b), because they were part of an indivisible criminal transaction. Judd v. State, 2009 Tex. App. LEXIS 7400, 2009 WL 3019712 (Tex. App. Tyler Sept. 23 2009).

1659. Witness's testimony was relevant to rebut the contention that defendant would have stopped if the victim really meant no because the testimony evidenced that, shortly before this incident, defendant did not stop in response to an unambiguous no and the trial court did not abuse its discretion when it found that the witness's testimony was admissible under Tex. R. Evid. 404(b) in defendant's trial under Tex. Penal Code Ann. § 21.11. Villarreal v. State, 2009 Tex. App. LEXIS 7305, 2009 WL 2965281 (Tex. App. Eastland Sept. 17 2009).

1660. In deference to defendant's challenge to the extraneous offense evidence, the court did not include that in its factual sufficiency review of his conviction under Tex. Penal Code Ann. § 21.11. Villarreal v. State, 2009 Tex. App. LEXIS 7305, 2009 WL 2965281 (Tex. App. Eastland Sept. 17 2009).

1661. Trial court ruled that testimony was admissible under Tex. R. Evid. 404(b), and when the trial court gave a limiting instruction, defendant did not object; defendant's contention that the trial court failed to correctly instruct the jury had not been preserved. Villarreal v. State, 2009 Tex. App. LEXIS 7305, 2009 WL 2965281 (Tex. App.

Eastland Sept. 17 2009).

1662. Decision to admit the extraneous-offense evidence was within the zone of reasonable disagreement, because although the testimony regarding the extraneous sexual assaults had the potential to inflame the jury, the evidence was relevant to rebut defendant's theory of fabrication, the testimony was not particularly graphic, nor lengthy, and the trial court instructed the jury to consider the testimony only for a limited purpose. Abrego v. State, 2009 Tex. App. LEXIS 7288, 2009 WL 2959640 (Tex. App. San Antonio Sept. 16 2009).

1663. Because defendant did not object to the admission of the additional extraneous offenses during the punishment stage of his trial, he waived this issue on appeal. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

1664. Cross examination of a witness sufficiently opened the door to extraneous offense evidence by placing identity in issue, as, in part, counsel implied through questioning that the witness's identification could be faulty and counsel drew attention to the fact that the witness said the most distinctive identifier about the suspect was his voice, but the lineup suspects were not asked to say anything. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

1665. Extraneous offense testimony was similar enough to the charged offense to be considered testimony about a signature crime. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

1666. Given that (1) witness one's testimony was probative on the issue of defendant's identity and was used to support witness two's testimony and was thus highly probative, (2) the need for the extraneous offense testimony was high because all other identification evidence was disputed, (3) the extraneous offense testimony of witness two did not have the tendency to suggest a decision on an improper basis, (4) witness one's testimony did not consume so much time that it would have confused the jury, and (5) witness one's testimony was not cumulative and it was unlikely the jury gave the testimony improper weight, such that the probative value of witness one's testimony was not substantially outweighed by the danger of unfair prejudice and the trial court did not err in admitting witness one's testimony. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

1667. For extraneous offense purposes, defendant placed his identity in issue by asserting an alibi. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

1668. For purposes of Tex. R. Evid. 404(b), the trial court did not abuse its discretion in determining there were sufficient similarities in the two robberies to find the testimony of a witness relevant to the issue of defendant's identity; the statements made by the suspect in the course of the robberies, the use of a telephone cord to tie up the victim, and the distinct way the suspect asked the witness to open a display case, and then forced him or her into the office were sufficiently unique to constitute a signature crime and the extraneous offense was not admitted for the purpose of proving character conformity, but rather for the permissible purpose of proving the suspect's identity. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

1669. Extraneous offense was highly probative on the issue of identity because of its similarity to the charged offense, the evidence was only introduced after defendant asserted an alibi, thus making the evidence probative to disprove that defense, and all the evidence bearing on identity was disputed, thus elevating the State's need for extraneous offense testimony; given that (1) the testimony was not so graphic or appalling that it would impress the jury in some irrational, but indelible way, (2) the trial court gave a limiting instruction, (3) the extraneous offense testimony was presented after all the evidence of the charged crime was presented and it did not consume an

inordinate amount of time, (4) there was nothing about the witness's testimony that would cause jurors to improperly rely on her statements, and (5) her testimony was not repetitive of other evidence already admitted, the danger of unfair prejudice did not substantially outweigh the probative value of the extraneous offense evidence and the trial court did not err in admitting it. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

1670. In a case of harassment of a public servant, which arose from defendant's conduct while being arrested, evidence of why the officer had been dispatched was admissible over a Tex. R. Evid. 404(b) objection to place the events in context and because the extraneous offenses were intertwined with the officer's initial contact with defendant. Martinez v. State, 2009 Tex. App. LEXIS 7207, 2009 WL 2914154 (Tex. App. Amarillo Sept. 11 2009).

1671. State inmate was denied habeas relief under 28 U.S.C.S. § 2254(d) because, inter alia, the State's failure to notify him of its intent to introduce prior bad act evidence under Tex. R. Evid. 404(b) at his third trial for murdering his wife did not violate due process, as it failed to raise an issue of federal constitutional dimension. Garcia v. Quarterman, 2009 U.S. Dist. LEXIS 82214 (S.D. Tex. Sept. 10 2009).

1672. During defendant's criminal trial for multiple counts of aggravated sexual assault of a child and indecency with a child by contact, defendant was not entitled to a mistrial based on the State's question to the complainant's mother if she had visited defendant in jail. The trial court sustained defendant's Tex. R. Evid. 404 objection and instructed the jury to disregard the question. Madden v. State, 2009 Tex. App. LEXIS 7084, 2009 WL 2857269 (Tex. App. Fort Worth Sept. 3 2009).

1673. In a child sexual assault case involving a victim who was 10 at the time of the offenses and 24 at the time of trial, evidence of extraneous offenses was properly admitted under Tex. R. Evid. 403, 404 to rebut defensive theories that defendant lacked opportunity and that the complainant fabricated his allegations. Given the similarities of action, place, and modus operandi, the time differential alone did not render the evidence irrelevant or lacking in probative value. Villa v. State, 2009 Tex. App. LEXIS 6965, 2009 WL 2914255 (Tex. App. Corpus Christi Aug. 31 2009).

1674. District attorney assured the trial court the inclusion of defendant's references to extraneous involvement with the criminal justice system was unintentional, and the court saw no abuse of discretion in the trial court's apparent acceptance of that explanation. Cordova v. State, 296 S.W.3d 302, 2009 Tex. App. LEXIS 6931 (Tex. App. Amarillo Aug. 31 2009).

1675. Trial court did not err in denying defendant's motion for a mistrial; there was nothing especially inflammatory about the references the jury heard to defendant's prior experience with a court-appointed attorney and his record, the statements complained about were of the nature courts had found curable by instructions to disregard, and the curative instructions were given as promptly as possible under the circumstances and their presumed curative effect was not allayed. Cordova v. State, 296 S.W.3d 302, 2009 Tex. App. LEXIS 6931 (Tex. App. Amarillo Aug. 31 2009).

1676. In an aggravated assault case, extraneous conduct of theft of a firearm was properly admitted because the victim testified that defendant had showed him a pistol that defendant had stolen, and it was clear that the evidence was offered to negate defendant's theory that the victim was the first aggressor and establish that defendant intentionally attacked the victim because defendant believed that the victim had "snitched" on him. While the evidence was prejudicial, such prejudice was not unfair. White v. State, 2009 Tex. App. LEXIS 6875, 2009 WL 2914480 (Tex. App. Corpus Christi Aug. 28 2009).

1677. In defendant's murder case, the court did not err by admitting the evidence showing the commission of arson because the "other purpose" extraneous offense evidence offered by the State regarding the arson arose out of the same transaction as the murder. The evidence of the arson was closely related in time, location, and subject matter to the charged offense of murder. Gallegos v. State, 2009 Tex. App. LEXIS 6707, 2009 WL 2623356 (Tex. App. El Paso Aug. 26 2009).

1678. In defendant's drug case, the court did not err by allowing the State to introduce evidence regarding defendant's alleged driving while intoxicated stop because testimony regarding the officer's observations of defendant before, during, and after the traffic stop gave the jury information essential to understanding the context and circumstances of defendant's arrest and subsequent charges. The officer described defendant's erratic driving that led to the stop, his physical condition during the stop, and his behavior during the field sobriety tests. Mason v. State, 2009 Tex. App. LEXIS 6705, 2009 WL 2623363 (Tex. App. El Paso Aug. 26 2009).

1679. Defendant's objection to extraneous offense evidence that four truckloads of stolen car parts were found at his house, along with evidence that he had purchased stolen car parts in the past, was preserved for appellate review because a bench conference conducted outside of the jury's presence provided the trial court the opportunity to consider the necessary factors and rule on the objection. Marban v. State, 2009 Tex. App. LEXIS 6760, 2009 WL 2618343 (Tex. App. Beaumont Aug. 26 2009).

1680. Objection to extraneous offense evidence was not successful because testimony that stolen parts were removed from defendant's residence after his arrest, along with testimony that defendant had purchased stolen parts, was probative evidence of the elements of the offense of engaging in organized criminal activity; the testimony was evidence relevant to the element of combination and the collaboration in carrying on criminal activities, and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. The evidence tended to prove defendant had the intent to establish, maintain, or participate in a combination or in the profits of a combination, an essential element of the offense of engaging in organized criminal activities. Marban v. State, 2009 Tex. App. LEXIS 6760, 2009 WL 2618343 (Tex. App. Beaumont Aug. 26 2009).

1681. In a child pornography case, habeas relief was denied to an accused on the basis of ineffectiveness of trial counsel relating to a failure to request Tex. R. Evid. 404(b) notice because trial counsel's affidavit stated that he did not make the request since the State provided the information prior to trial; the State's discovery response and trial counsel's affidavit also indicated that the State had an open-file policy which permitted trial counsel to inspect and review the State's files up to the day of trial. Moreover, the accused failed to show that the failure to make Rule 404(b) objections was professionally unreasonable or would have changed the outcome of the case. Ex Parte Yusafi, 2009 Tex. App. LEXIS 6715, 2008 WL 6740798 (Tex. App. Beaumont Aug. 26 2009).

1682. Court properly admitted testimony because the witness's testimony rebutted defendant's theory that he did not intend to commit the alleged offense, and the witness's testimony showed that defendant was involved in a similar crime involving intent to commit a robbery subsequent to kidnapping the victim. Additionally, the evidence was presented in a short and concise manner and did not include unnecessarily graphic details. Dale v. State, 2009 Tex. App. LEXIS 6417, 2009 WL 2525421 (Tex. App. San Antonio Aug. 19 2009).

1683. In defendant's manslaughter case, the court properly admitted evidence about an incident in 2004 when defendant pointed a gun at a motorist and pulled the trigger because he testimony of the victim of the deadly conduct was relevant to rebut the defense of accident and mistake in the shooting of the victim. Immediately prior to the testimony, the trial court instructed the jury that the evidence was being admitted for the limited purpose of whether it rebutted the defensive theory of accident. King v. State, 2009 Tex. App. LEXIS 6447, 2009 WL 2517174

(Tex. App. Tyler Aug. 19 2009).

1684. Court properly admitted evidence that defendant sexually assaulted his step-daughter twenty-five years earlier because both victims were defendant's step-daughters; both were ten when defendant sexually assaulted them; both were similar in appearance; and defendant abused both of them for several years. The State demonstrated that it needed this evidence to rebut defendant's claim of fabrication, and the time needed to develop the evidence amounted to about 116 pages out of the 426 pages of testimony. Newton v. State, 301 S.W.3d 315, 2009 Tex. App. LEXIS 6534 (Tex. App. Waco Aug. 19 2009).

1685. Court did not erroneously admit evidence of an undercover drug buy the day before defendant's warrant was executed because the evidence of the undercover buy served to make a fact of consequence--defendant's care, custody, and control of the contraband with intent to distribute--more or less probable than without the evidence. Further, the court instructed the jury that it could consider the evidence of the undercover drug buy only if it believed beyond a reasonable doubt that defendant committed the offense. Stewart v. State, 2009 Tex. App. LEXIS 6391, 2009 WL 2488504 (Tex. App. Dallas Aug. 17 2009).

1686. In a burglary trial, reversible error occurred under Tex. R. Evid. 404 when the State introduced evidence that the complainant's girlfriend was suffering from mental retardation and that defendant engaged in sex with her shortly after the alleged burglary. The evidence was not relevant to alibi because, contrary to the State's argument, defendant did not assert a defense of alibi by stating that he did not remember on which Friday night he went to a bar with the complainant and then to the complainant's home. Rodriguez v. State, 2009 Tex. App. LEXIS 6335, 2009 WL 5821033 (Tex. App. Corpus Christi Aug. 13 2009).

1687. In defendant's assault on a public servant case, the court properly admitted evidence of his prior arrests because the extraneous-arrest evidence was probative of both how well a character witness knew defendant and the foundation for her characterization of him, the trial court gave a limiting instruction, the extraneous arrests took up only four pages in the 564-page record, the question of whether defendant was threatening the officers was directly related to his intent, and the State did not have other evidence with which to rebut the witness's characterization of defendant's character. Morales v. State, 293 S.W.3d 901, 2009 Tex. App. LEXIS 6241 (Tex. App. Texarkana Aug. 12 2009).

1688. In defendant's murder case, the court properly excluded evidence that the victim purportedly was always armed with a gun because defendant failed to satisfy his burden of producing evidence demonstrating his shooting of the victim stemmed from a reasonable belief that the victim was attempting to use unlawful deadly force at that exact moment, the two had no prior relationship, and the trial court did permit defendant to establish that the victim's reputation in the community for violence was bad. Welch v. State, 2009 Tex. App. LEXIS 6292, 2009 WL 2461172 (Tex. App. Beaumont Aug. 12 2009).

1689. Detective's testimony was relevant to explain how defendant became a suspect; the testimony did not present evidence of a prior crime or connect defendant to any crime or bad act. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1690. Defendant opened the door to admission of the extraneous offense evidence to rebut the defensive theory of fabrication. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1691. Extraneous offenses were sufficiently similar to the charged offense and, assuming the witnesses have a motive to lie, it was sufficiently different from the current victim's alleged motive; the extraneous offenses were admissible under Tex. R. Evid. 404(b) to rebut defendant's theory of fabrication. Galvez v. State, 2009 Tex. App.

LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1692. Given that the extraneous offense evidence was admissible to rebut defendant's theory of fabrication, the inherent probative value of the evidence was great, for purposes of Tex. R. Evid. 403. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1693. While the offenses were no doubt prejudicial, they were not unfairly so in proportion to their probative value; moreover, the jury received an instruction limiting their consideration of the offenses to the issue of fabrication, and this factor favored admissibility under Tex. R. Evid. 403. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1694. Although the State spent some time developing the evidence, it was not excessive and this factor favored admissibility of the extraneous offense evidence under Tex. R. Evid. 403. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1695. Defendant argued that the State could have introduced witness testimony or physical evidence to corroborate the victim's story, but the record did not indicate that the State had such other evidence; thus, it needed this evidence to rebut the defensive theory of fabrication and this factor favored admissibility of the extraneous offense evidence under Tex. R. Evid. 403. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1696. Because all the factors weighed in favor of admissibility, the extraneous-offense evidence was admissible under Tex. R. Evid. 403. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1697. Allowing the State to rebut the defensive theory of fabrication with extraneous-offense evidence did not violate defendant's due process rights. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1698. In a child sexual assault case, the court properly allowed the victim's brother to testify regarding extraneous offenses against him because the boys were the same age when defendant allegedly sexually abused them, and the manner and location of the abuse alleged by the brothers were identical. A substantial part of defendant's cross examination of the victim was devoted to the attempt to undermine the victim's credibility. Boyd v. State, 2009 Tex. App. LEXIS 5970, 2009 WL 2370730 (Tex. App. Tyler July 31 2009).

1699. In a child sexual assault case, the court properly allowed defendant's daughter to testify regarding extraneous offenses against her because the daughter's testimony tended to show that defendant was a sexual predator, and her testimony also had relevance apart from its tendency to show character conformity. It forcefully served to rebut the defense that defendant was the victim of a retaliatory "frame up." Boyd v. State, 2009 Tex. App. LEXIS 5970, 2009 WL 2370730 (Tex. App. Tyler July 31 2009).

1700. State's supplemental notice coupled with the production of a videotaped statement of the eyewitness gave defendant reasonable notice of the nature and content of the expected testimony under Tex. R. Evid. 404(b) and Tex. Code Crim. Proc. Ann. art. 38.37. Even if it were error to admit the evidence, defendant did not attempt to establish how his defense strategy might have differed or whether he was unable to prepare his defense in order to show reversible error under Tex. R. App. P. 44.2. Anderson v. State, 2009 Tex. App. LEXIS 5919, 2009 WL 2341865 (Tex. App. Amarillo July 30 2009).

1701. For purposes of Tex. R. Evid. 404(b), a witness's testimony was admissible as proper rebuttal evidence to show that defendant had the requisite intent to rob or violate or abuse the victim sexually, which was necessary to establish the offense of aggravated kidnapping; given that the witness's testimony showed that defendant was involved in a similar crime, it was at least subject to reasonable disagreement that the witness's testimony made defendant's defensive theory of lack of intent more or less probable, plus under Tex. R. Evid. 105(a), the trial court admitted the evidence for its noncharacter conformity purpose of determining defendant's intent, and the trial court did not abuse its discretion in admitting this evidence. Dale v. State, 2009 Tex. App. LEXIS 5784, 2009 WL 2264230 (Tex. App. San Antonio July 29 2009).

1702. Because defendant claimed he lacked intent to commit the offense of aggravated kidnapping during his opening statement, the trial court did not abuse its discretion in admitting a witness's testimony under Tex. R. Evid. 404(b) as rebuttal evidence. Dale v. State, 2009 Tex. App. LEXIS 5784, 2009 WL 2264230 (Tex. App. San Antonio July 29 2009).

1703. Under the Tex. R. Evid. 403 balancing test, the probative value of a witness's testimony under Tex. R. Evid. 404(b) was not substantially outweighed by the danger of unfair prejudice, given that (1) the testimony was probative to rebut defendant's defensive theory of a lack of intent, which was an issue in the aggravated kidnapping case, (2) the evidence was presented in a short and concise manner, (3) the testimony was preceded by a limiting instruction, plus the jury charge clarified that the evidence was offered only for its noncharacter conformity purpose of determining defendant's intent, and (4) while the witness's testimony injured defendant's case, it did not adversely affect defendant beyond its purpose of tending to prove his intent to commit the offense, and the trial court did not err in admitting the testimony. Dale v. State, 2009 Tex. App. LEXIS 5784, 2009 WL 2264230 (Tex. App. San Antonio July 29 2009).

1704. Trial court did not err in admitting evidence of defendant's extraneous conduct in his trial for aggravated sexual assault of a child; the evidence was admissible under Tex. R. Evid. 403 and 404(b) and under Tex. Code Crim. Proc. Ann. art. 38.37, § 2, as bearing on the state of mind of defendant and the child and as demonstrating the relationship between them. Robinson v. State, 2009 Tex. App. LEXIS 5700, 2009 WL 2196085 (Tex. App. Tyler July 24 2009).

1705. Although there were dissimilarities between the two burglaries, the record contained no evidence that the State was intentionally misleading the trail court rather than simply arguing its position that the burglaries were sufficiently similar to amount to signature offenses; even if the court found such evidence, the error was harmless because the court found that the signature element of the two crimes was not in the dissimilarities defendant cited, the other similarities or dissimilarities were merely similarities that would be common to the type of crime itself and, unlike the evidence of the medical scrubs in both cases, did not affect the court's determination as to the admissibility of evidence of the extraneous offense. The court overruled defendant's due process argument in this regard. Perez v. State, 2009 Tex. App. LEXIS 5689, 2009 WL 2195417 (Tex. App. Austin July 23 2009).

1706. Defendant was correct that certain similarities between the offense at issue and the extraneous offense were merely similarities common to the type of crime at issue, burglary, but they were significantly similar in that they occurred in close proximity on the same day and in both cases, witnesses observed a man wearing blue scrubs and a hat around the same time the crime was committed, and unknown persons wearing blue scrubs were not often seen wandering residential neighborhoods; given that defendant, who was not a health care worker, was found to be in possession of two pairs of blue scrubs when a search warrant of his residence was executed, admission of the extraneous offense for purposes of identification under Tex. R. Evid. 404(b) was a proper exercise of discretion by the trial court. Perez v. State, 2009 Tex. App. LEXIS 5689, 2009 WL 2195417 (Tex. App. Austin July 23 2009).

1707. Court properly admitted defendant's threat to take the officer's gun and kill him because that was probative evidence of defendant's precise intentions at the time he was assaulting the officer. It offered significant proof of defendant's commission of the charged offense of attempting to take a weapon from a peace officer with the intention of harming the officer. Presley v. State, 2009 Tex. App. LEXIS 5613, 2009 WL 2152559 (Tex. App. Dallas July 21 2009).

1708. Trial court could have found that evidence of defendant's drug dealing, for purposes of Tex. R. Evid. 404(b), had some logical relevance aside from character conformity, plus the evidence was not outweighed by the danger of unfair prejudice, given the other evidence admitted at trial, including evidence of defendant's gang membership; assuming it was error to admit the extraneous offense evidence, defendant's substantial rights were not affected under Tex. R. App. P. 44.2(b), given that the jury was instructed to use the evidence for the limited purpose of determining a relationship between defendant and another and the drug dealing was not mentioned by the State in closing arguments and thus was not emphasized. Mata v. State, 2009 Tex. App. LEXIS 5410, 2009 WL 2045250 (Tex. App. San Antonio July 15 2009).

1709. During defendant's trial for assaulting a corrections officer with a razor blade, the trial court did not err under Tex. R. Evid. 404(b) in permitting the State to elicit evidence as to whether razor blades had been found in defendant's mouth because the evidence was used to rebut defendant's evidence that it was impossible to possess a razor blade because of the security measures employed by the prison. Byrd v. State, 2009 Tex. App. LEXIS 4970, 2009 WL 1900412 (Tex. App. San Antonio July 1 2009).

1710. Trial court did not abuse its discretion in admitting extraneous offense evidence in defendant's trial for indecency with a child in violation of Tex. Penal Code Ann. § 21.11(a)(1); defendant's opening statement opened the door to admission of the evidence under Tex. R. Evid. 404(b), the evidence was relevant under Tex. R. Evid. 401 to combat the defensive theory of fabrication by the victim, and the probative value of rebutting the allegations of fabrication and accidental touching outweighed the prejudicial impact for purposes of Tex. R. Evid. 403. Norwood v. State, 2009 Tex. App. LEXIS 4979, 2009 WL 1941291 (Tex. App. Amarillo June 30 2009).

1711. Court properly allowed the State to put on evidence showing extraneous offenses committed by defendant against the accomplice because it showed why the accomplice went through with the crime and why she did not tell the police the truth; the testimony specifically showed that defendant had threatened her in the past with his fists and a gun. Shy v. State, 2009 Tex. App. LEXIS 4921, 2009 WL 1844328 (Tex. App. Dallas June 29 2009).

1712. It was clear that defendant was not harmed by the admission of the complained-of extraneous evidence; therefore, the court assumed, without deciding or commenting, that the trial court erred by admitting the evidence and proceeded directly to the harm analysis under Tex. R. App. P. 44.2(b). Lewis v. State, 2009 Tex. App. LEXIS 4889, 2009 WL 1813132 (Tex. App. Houston 1st Dist. June 25 2009).

1713. Because the court was addressing the harm from the admission of extraneous offense evidence, which was non-constitutional error, Tex. R. App. P. 44.2(b) applied. Lewis v. State, 2009 Tex. App. LEXIS 4889, 2009 WL 1813132 (Tex. App. Houston 1st Dist. June 25 2009).

1714. Any error in admitting extraneous offense evidence was harmless under Tex. R. App. P. 44.2(b), given that (1) the State presented ample evidence of defendant's guilt of murder, (2) the disputed evidence did not serve to improperly bolster other evidence against defendant, but was proffered to help the factfinder in understanding the circumstances under which defendant obtained a murder weapon, (3) the State spent little time eliciting the disputed testimony and made no reference to it in closing argument, and (4) the trial court gave a limiting instruction regarding extraneous offense testimony, which instruction the jury was presumed to have followed, and this presumption was not rebutted by defendant. Lewis v. State, 2009 Tex. App. LEXIS 4889, 2009 WL 1813132 (Tex.

App. Houston 1st Dist. June 25 2009).

1715. Where defendant was convicted of three counts of promotion of child pornography and four counts of possession of child pornography, the trial court did not violate Tex. R. Evid. 404(b) by admitting an exhibit showing a list of subfolders and 900 file names from defendant's computer. The evidence relevant under Tex. R. Evid. 401 for the State to show that defendant organized, stored, and shared the downloaded images; the exhibit was the best and least prejudicial method of rebutting the defense theory that he may have downloaded images of child pornography accidentally or shared them without knowledge of their content. Wenger v. State, 292 S.W.3d 191, 2009 Tex. App. LEXIS 4859 (Tex. App. Fort Worth June 25 2009).

1716. Even if the trial court erred by allowing the State to introduce any of defendant's recorded phone conversations under Tex. R. Evid. 404(b), any error was harmless because the jury heard ample evidence of defendant's guilt apart from the conversations, the State did not rely upon the conversations during either its opening or closing statements, and the conversations did not constitute a critical part of the State's case. Jimenez v. State, 307 S.W.3d 325, 2009 Tex. App. LEXIS 4701 (Tex. App. San Antonio June 24 2009).

1717. Defendant failed to preserve error on his contention that the State committed prosecutorial misconduct by eliciting testimony suggesting that defendant stole the gun because defendant objected only at the beginning of the witness's testimony but did not object to the remainder. Defendant objected to admission of the testimony on relevancy grounds, but did not assert that introduction of the allegedly irrelevant testimony constituted prosecutorial misconduct warranting a mistrial. Thibodeaux v. State, 2009 Tex. App. LEXIS 4964, 2009 WL 1748747 (Tex. App. Houston 14th Dist. June 23 2009).

1718. In defendant's aggravated robbery case, the court properly admitted evidence of an extraneous aggravated robbery because the extraneous offense and the instant offense occurred on the same night, within an hour of each other, in the same area, in each offense, two men approached the complainants while each complainant was in his or her car, held the complainants at gunpoint, and shot the complainants. Additionally, the State's need for the evidence was significant because, although one complainant identified defendant as the second perpetrator, the record also showed that the complainant could not see defendant's face because of the bandana. Hackaday v. State, 2009 Tex. App. LEXIS 4501, 2009 WL 1687957 (Tex. App. Houston 1st Dist. June 18 2009).

1719. In defendant's capital murder case, the court properly admitted evidence of an aggravated robbery because the defensive claims that defendant raised by his statements placed the intent element of his capital murder offense at issue, which entitled the State to rebut defendant's claimed lack of intent with evidence of his unadjudicated extraneous offense of the aggravated robbery. Gomez v. Tex., 2009 Tex. App. LEXIS 4521, 2009 WL 1688233 (Tex. App. Houston 1st Dist. June 18 2009).

1720. In a driving while intoxicated case, defendant did not preserve an issue relating to extraneous offense evidence for appellate review under Tex. R. App. P. 33.1 because no objection was lodged; the record was replete with evidence of a homicide, its investigation, and a grand jury's return of a "no-bill" in favor of defendant. Vanderburgh v. State, 2009 Tex. App. LEXIS 4643, 2009 WL 1740053 (Tex. App. Fort Worth June 18 2009).

1721. In a case involving indecency with a child, defendant's due process rights were not violated by the admission of extraneous offense evidence because it was admissible to rebut the contention that a victim was fabricating her allegations and that defendant was not the type of person who would have engaged in these acts. Bass v. Tex., 2009 Tex. App. LEXIS 4736, 2009 WL 3839003 (Tex. App. Houston 14th Dist. June 18 2009).

1722. In a case involving indecency with a child, a trial court did not err by refusing to admit into evidence a grand jury's no-bill relating to an extraneous offense because it was not material to the defense of the case at hand. Bass

v. Tex., 2009 Tex. App. LEXIS 4736, 2009 WL 3839003 (Tex. App. Houston 14th Dist. June 18 2009).

1723. Although defendant complained about the State's reference to defendant's prior conviction and argued that the State was attempting to show the jury that defense counsel did not know the law, it appeared that the State was referring to the law applicable to the use of evidence admitted in the absence of a limiting instruction; when the State asked defendant about the prior conviction, counsel did not request a limiting instruction, nor did the jury charge contain any such instruction, and thus the conviction was before the jury for all purposes and the State's reference to the conviction was not improper argument, plus the State's remarks appeared to have been in response to defense counsel's argument. Vega v. State, 2009 Tex. App. LEXIS 4102, 2009 WL 1617670 (Tex. App. San Antonio June 10 2009).

1724. Even if arguments were improper, they were not so prejudicial that a mistrial was required, as the trial court instructed the jury that defendant's prior conviction could be considered for impeachment only, in essence telling the jury to disregard the State's argument, and the trial court instructed the jury to disregard the other argument, such that the instructions cured any error. Vega v. State, 2009 Tex. App. LEXIS 4102, 2009 WL 1617670 (Tex. App. San Antonio June 10 2009).

1725. In a sexual assault of a child case, the court properly admitted uncharged offense evidence because the State provided defendant with notice that it intended to introduce evidence that defendant engaged in sexual contact with a child, the notice was more than ten days before trial, and several of the uncharged offenses had been presented in the original indictment but were subsequently quashed. Accordingly, defendant had the requisite notice of the State's intent to introduce evidence of the uncharged offenses, and that evidence was properly admitted pursuant to Tex. Code Crim. Proc. Ann. art. 38.37. Brite v. State, 2009 Tex. App. LEXIS 4096, 2009 WL 1617741 (Tex. App. San Antonio June 10 2009).

1726. State did not offer evidence to show that defendant acted in conformity with his past crimes of selling narcotics to the victim, and instead the evidence served to establish defendant's relationship with the victim, such that the trial court did not err in denying defendant's motion to suppress Lee v. State, 2009 Tex. App. LEXIS 3879, 2009 WL 1562861 (Tex. App. Houston 1st Dist. June 4 2009).

1727. Defendant argued that the trial court erred in admitting evidence of his unlawful entry into the victims' house months earlier, but he did not object to this evidence; the rules of evidence, including Tex. R. Evid. 103(d), do not preclude taking notice of fundamental errors affecting substantial rights that were not brought to the attention of the trial court, but defendant's reliance on case law was misplaced because it applied only to charge error, and thus defendant failed to preserve his complaint regarding extraneous offense evidence. Santos v. State, 2009 Tex. App. LEXIS 3876, 2009 WL 1563571 (Tex. App. Austin June 3 2009).

1728. Counsel's failure to object to extraneous offense evidence did not show that counsel was functioning ineffectively; counsel could have reasonably concluded that the previous offense was relevant, and hence admissible under Tex. R. Evid. 404(b), to prove defendant's knowledge of the victims' house and his intent to steal their property in his burglary trial and to substantiate defendant's identity as the burglar, and it was also reasonable for counsel to conclude that the evidence was more probative than unfairly prejudicial under Tex. R. Evid. 403. Counsel could not be deemed ineffective for failing to object to evidence that was, on balance, unobjectionable. Santos v. State, 2009 Tex. App. LEXIS 3876, 2009 WL 1563571 (Tex. App. Austin June 3 2009).

1729. Even if the trial court granted defendant's motion in limine, his complaint about the admission of extraneous offenses would not have been preserved, as counsel did not object upon the elicitation of these offenses and jury argument relying on the same. Harrison v. State, 2009 Tex. App. LEXIS 4058, 2009 WL 1579002 (Tex. App. Waco

June 3 2009).

1730. Evidence that defendant, in committing the offense of sexual assault, violated the conditions of his stepbrother's community supervision that an unsupervised child under 17 not be at his place of residence was part of the context of the crime of sexual assault and was not an extraneous bad act and thus the State's introduction of this evidence was not in violation of the trial court's order, which only related to extraneous bad acts; the trial court appeared to have been under the impression that the evidence was not contextual and was subject to the notice requirement and that adequate notice had been given, but because the evidence related to the context of the offense and not conduct that was extraneous to his commission of that offense, the trial court was in error in its reasoning and the court rejected the assumption that the evidence consisted of extraneous bad acts. Worthy v. State, 295 S.W.3d 685, 2009 Tex. App. LEXIS 3672 (Tex. App. Eastland May 28 2009).

1731. In addition to the sordid details of the offenses described by the victim, the jury heard testimony of defendant's criminal past, defendant testified in some detail about the circumstances of his juvenile adjudications, and nothing suggested that the lack of notice from the State prevented or hampered his ability to defend against the evidence; the verdicts of 20 and 25 years in prison on two counts of aggravated sexual assault and no fine was at the lower end of the punishment range and the admission of the juvenile adjudications had but a slight effect on the jury, such that it did not affect defendant's substantial rights under Tex. R. App. P. 44.2(b). Ruiz v. State, 293 S.W.3d 685, 2009 Tex. App. LEXIS 3632 (Tex. App. San Antonio May 27 2009).

1732. Had the trial court heard certain evidence as a preliminary matter, it would not have abused its discretion in concluding a jury could find beyond a reasonable doubt that defendant committed the extraneous acts and the court could not hold trial counsel's performance was deficient for failing to object to the evidence or to request a hearing on the admissibility of the evidence. Ruiz v. State, 293 S.W.3d 685, 2009 Tex. App. LEXIS 3632 (Tex. App. San Antonio May 27 2009).

1733. Defendant failed to demonstrate how the punishment assessed by the jury would have been different had his trial counsel requested a hearing; the trial court included an instruction under Tex. Code Crim. Proc. Ann. art. 37.07, the court presumed that the jury did not consider the complained-of evidence for purposes of punishment unless it was convinced defendant committed those bad acts, and defendant failed to show that counsel was ineffective. Ruiz v. State, 293 S.W.3d 685, 2009 Tex. App. LEXIS 3632 (Tex. App. San Antonio May 27 2009).

1734. Notices referred to 27 crimes or bad acts allegedly committed by defendant, but did not mention two juvenile adjudications and it was error to admit evidence of those adjudications; the court had to decide whether the error was harmful. Ruiz v. State, 293 S.W.3d 685, 2009 Tex. App. LEXIS 3632 (Tex. App. San Antonio May 27 2009).

1735. Because defendant did not assert an extraneous evidence objection and testimony about the badge was subsequently elicited without objection, the issue had not been preserved for review under Tex. R. App. P. 33.1(a)(1)(A). Newport v. State, 2009 Tex. App. LEXIS 3711 (Tex. App. Dallas May 26 2009).

1736. Defendant argued that the trial court erred in overruling his motion for mistrial after the prosecutor broached the subject of an extraneous offense, but the trial court did not abuse its discretion in the motion because the improper testimony was not clearly calculated to inflame the juror's minds nor was it of such a character as to suggest the impossibility of withdrawing the impression left on the jury, plus the trial court's instruction to disregard was prompt and unequivocal and was fully sufficient to cure any harm. Newport v. State, 2009 Tex. App. LEXIS 3711 (Tex. App. Dallas May 26 2009).

1737. Defendant presented a true motion in limine and sought to prevent particular matters from coming before the jury, for purposes of Tex. R. Evid. 404(b), and while on appeal he pointed to specific portions thereof, he did not

permit the trial court an opportunity to determine whether that testimony was admissible at the time it was introduced, and thus error was not preserved; even if it was preserved, because the assaults on defendant's wife and her father were part of the same criminal transaction as the burglary and kidnapping, the evidence was properly admitted as same transaction contextual evidence. Francisco v. State, 2009 Tex. App. LEXIS 3408 (Tex. App. Houston 14th Dist. May 19 2009).

1738. Examination did open the door to the State's question concerning defendant's child protective services history, as defense counsel asked questions concerning background checks on all of the child's adult family members except defendant and the only possible relevance of these questions would have been to show that other family members had a history of bad acts concerning children; it would have been fundamentally unfair to allow defense counsel to ask these questions about all other family members and not allow the State to ask the same question about defendant, the child's mother, in defendant's injury to a child trial. Gutierrez v. State, 2009 Tex. App. LEXIS 3296, 2009 WL 1335154 (Tex. App. Dallas May 14 2009).

1739. Once the jury had heard evidence that defendant's husband, sister, brother-in-law, and mother had all been investigated by child protective services (CPS) and that the investigator found some CPS history on those people, then evidence of any similar background check on defendant became highly probative in defendant's injury to a child trial; while the evidence would make an impression on the jury, the court viewed that fact in light of the evidence the jury had already heard about other family members, the evidence took minimal time to develop, the State did need the evidence of defendant's background to give a fair treatment of the subject to the jury, and although the court did not question that the evidence was prejudicial to defendant, the probative value was not substantially outweighed by the danger of unfair prejudice. Gutierrez v. State, 2009 Tex. App. LEXIS 3296, 2009 WL 1335154 (Tex. App. Dallas May 14 2009).

1740. Trial court erred when extraneous offense evidence of marihuana possession was admitted under Tex. R. Evid. 404(b) because it did not relate to defendant's perception or state of mind in a murder case; even if it was relevant, the probative value was weak and substantially outweighed by the danger of unfair prejudice. However, defendant's substantial rights under Tex. R. App. P. 44.2(b) were not affected because defendant admitted shooting the victim, he had threatened the victim previously, a witness testified about crack cocaine on her person, and the forensic evidence showed that the victim was shot at close range with a gun found in defendant's possession. Harbert v. State, 2009 Tex. App. LEXIS 3305 (Tex. App. Eastland May 14 2009).

1741. In defendant's murder case, the court properly allowed witnesses to testify about defendant's participation in a subsequent bank robbery because the court acted to limit the references to defendant's participation in the bank robbery to the sole issue of his participation in the bank robbery as a driver, and connecting the vehicle from the robbery to the vehicle observed at the murder scene was probative evidence because it placed defendant at the scene near the time of the murder. Williams v. State, 290 S.W.3d 407, 2009 Tex. App. LEXIS 3371 (Tex. App. Amarillo May 14 2009).

1742. Defendant in a child sexual assault case waived his objection to testimony regarding extraneous bad acts, including two prior incidents involving the same victim, which he contended were inadmissible under Tex. R. Evid. 404(b), by failing to object to the evidence when it was offered at trial as required by Tex. R. App. P. 33.1. Walker v. State, 2009 Tex. App. LEXIS 3249, 2009 WL 1314227 (Tex. App. Tyler May 13 2009).

1743. In a trial for indecency with a child, in violation of Tex. Penal Code Ann. § 21.11(b), there was no error under Tex. R. Evid. 401, 403, 404, in admitting extraneous offense evidence. Evidence of possession of child pornography was relevant to defendant's intent to arouse or gratify his sexual desire; evidence of methamphetamine use was relevant to show defendant's state of mind at the time of the charged offense and tended to show how the offense unfolded and progressed; and evidence that defendant physically abused the victim and two other children, in addition to providing context about the relationship between the victim and

defendant, was admissible to show the victim's state of mind and explain why the victim did not speak up earlier about the abuse. Stinson v. State, 2009 Tex. App. LEXIS 3186, 2009 WL 1267348 (Tex. App. Dallas May 8 2009).

1744. Trial court did not abuse its discretion in denying defendant's mistrial motion because although a witness's comment about prior bad acts was not responsive to the State's question and was prejudicial to defendant, it was not of such character that an instruction to disregard could not have removed the impression produced in jurors' minds, plus the trial court confirmed with the State after the comment was made that the witness had been subsequently admonished not to mention any prior bad acts in her testimony; the trial court's prompt instruction was sufficient to cure the prejudice caused by the comment. Jaquez v. Tex., 2009 Tex. App. LEXIS 3111 (Tex. App. Eastland May 7 2009).

1745. Omission of a reasonable doubt instruction did not constitute error because the State did not offer evidence of any extraneous offense; a witness's comment about such was not responsive to the State's question, the trial court instructed the jury to disregard the comment, the court presumed the jury followed the instruction, it would have been unreasonable to have required the trial court to include the reasonable doubt instruction about the witness's comment after the trial court previously told the jury to disregard it, and a trial court was not required to sua sponte instruct the jury on the burden of proof to be used when considering evidence of an extraneous offense during the guilt phase. Jaquez v. Tex., 2009 Tex. App. LEXIS 3111 (Tex. App. Eastland May 7 2009).

1746. There was no motion for a new trial and nothing explained why trial counsel did not object to the complained-of extraneous offenses; the court was not required to speculate on trial counsel's actions when confronted with a silent record and defendant did not overcome the presumption that counsel's actions were based on sound trial strategy. Mercado v. State, 2009 Tex. App. LEXIS 3141 (Tex. App. Corpus Christi May 7 2009).

1747. During defendant's criminal trial for the sexual asault of a child, the State was permitted to introduce extraneous offense evidence that defendant encouraged the victim's involvement in several crimes to rebut defense counsel's opening remarks that defendant was a positive influence on the victim. The trial court determined the extraneous offense evidence was admissible under Tex. R. Evid. 404(b) to correct the false impression created by the defense. Ytuarte v. State, 2009 Tex. App. LEXIS 3056, 2009 WL 1232327 (Tex. App. San Antonio May 6 2009).

1748. In a sexual assault of a child case, evidence that defendant had been subjected to unusual sexual events in his youth and that he related those events to the sexual assault of the child tended to rebut a contention that any contact with the child's penis was simply an accident, and therefore, the evidence was properly admitted. Additionally, the evidence took no additional time to develop initially, and was mentioned again during the trial only when defendant took the stand and denied making some of the statements. Watterson v. State, 2009 Tex. App. LEXIS 2938, 2009 WL 1148751 (Tex. App. Amarillo Apr. 29 2009).

1749. In defendant's aggravated sexual assault of a child case, the trial court did not err in admitting testimony and evidence of an extraneous offense committed by defendant against a witness because the extraneous offense evidence was properly admitted to rebut a defensive theory of fabrication and frame-up. The witness identified defendant in court, and testified that he tried to put his hands down her pants. Wells v. State, 2009 Tex. App. LEXIS 2762, 2009 WL 1108796 (Tex. App. El Paso Apr. 23 2009).

1750. In defendant's aggravated sexual assault of a child case, the trial court did not err in admitting testimony and evidence of an extraneous offense committed by defendant against a witness because the extraneous offense evidence was properly admitted to rebut a defensive theory of fabrication and frame-up. The witness identified defendant in court, and testified that he tried to put his hands down her pants. Wells v. State, 2009 Tex. App. LEXIS 2767, 2009 WL 1108665 (Tex. App. El Paso Apr. 23 2009).

1751. In defendant's aggravated sexual assault of a child case, the trial court did not err in admitting testimony and evidence of an extraneous offense committed by defendant against a witness because the extraneous offense evidence was properly admitted to rebut a defensive theory of fabrication and frame-up. The witness identified defendant in court, and testified that he tried to put his hands down her pants. Wells v. State, 2009 Tex. App. LEXIS 2768, 2009 WL 1108663 (Tex. App. El Paso Apr. 23 2009).

1752. Court assumed without deciding error in the admission of the extraneous offense and proceeded directly to a harm analysis under Tex. R. App. P. 44.2(b) because this was nonconstitutional error. Burton v. State, 2009 Tex. App. LEXIS 2781, 2009 WL 1086934 (Tex. App. Houston 1st Dist. Apr. 23 2009).

1753. Any error in admitting extraneous offense evidence did not have a substantial effect on the verdict and did not affect defendant's substantial rights, such that any error was harmless under Tex. R. App. P. 44.2(b), given that (1) the State presented ample evidence of defendant's guilt of aggravated robbery, (2) the only evidence directly supporting one defense theory was a single affirmative response by defendant's former girlfriend, who admitted to having prior felony convictions, and the only evidence of defendant's alibi defense was defendant's father's testimony, (3) although the State referenced the extraneous offense in its closing argument, the State did so to rebut defendant's fabrication and alibi defenses, plus the State told the jury to consider the extraneous offense evidence for rebuttal only, and (4) the trial court also provided a limiting instruction and defendant did not rebut the presumption that the jury followed the instructions given. Burton v. State, 2009 Tex. App. LEXIS 2781, 2009 WL 1086934 (Tex. App. Houston 1st Dist. Apr. 23 2009).

1754. Where defendant did not raise an objection in the trial court based on inadmissibility of evidence under Tex. R. Evid. 404(b) due to character conformity, the argument was not preserved for review under Tex. R. App. P. 33.1. Mincey v. State, 2009 Tex. App. LEXIS 2825, 2009 WL 1058734 (Tex. App. Dallas Apr. 21 2009).

1755. Defendant pleaded guilty to assault and aggravated assault and several exhibits were introduced concerning previous charges and convictions, plus many other unadjudicated bad acts were introduced; thus, even if the failure to object under Tex. R. Evid. 403 to certain unadjudicated bad acts was error, which the court did not decide, the error did not deprive defendant of a fair trial. Schroeder v. State, 2009 Tex. App. LEXIS 2688, 2009 WL 1035223 (Tex. App. Fort Worth Apr. 16 2009).

1756. In a sexual assault of a child case, evidence of defendant's arrest for possession of child pornography was properly admitted because it explained the reason for the investigation of defendant, the State needed it to adequately describe the circumstances of the charged offenses, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Greene v. State, 287 S.W.3d 277, 2009 Tex. App. LEXIS 2855 (Tex. App. Eastland Apr. 16 2009).

1757. In a sexual assault of a child case, the trial court did not err in admitting evidence of statements defendant made to a witness and the child about his feelings for the child because it was relevant to, and highly probative of, defendant's state of mind and the relationship between defendant and the child. The record did not demonstrate that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Greene v. State, 287 S.W.3d 277, 2009 Tex. App. LEXIS 2855 (Tex. App. Eastland Apr. 16 2009).

1758. Court properly admitted extraneous offense evidence because the extraneous offenses admitted tended to "make the existence" of a fact of consequence "more probable" and established that: defendant's gang was a criminal street gang, defendant had an affiliation with the gang, and defendant committed the instant offense as a member of a criminal street gang. Furthermore, the probative force and the State's need to admit the extraneous offenses outweighed the factors that favored exclusion; the evidence was not only relevant, but essential to the State's burden of proof. Fuentes v. State, 2009 Tex. App. LEXIS 2544, 2009 WL 997508 (Tex. App. Houston 14th

Dist. Apr. 14 2009).

1759. During defendant's murder trial, the detective testified that he had seen defendant in a crime stoppers listing on an unrelated shooting. Assuming that the testimony violated Tex. R. Evid. 404(b), defendant was not entiitled to a mistrial because the trial judge instructed the jury to disregard the statement. Gamboa v. State, 296 S.W.3d 574, 2009 Tex. Crim. App. LEXIS 512 (Tex. Crim. App. 2009).

1760. During defendant's trial for indecency with a child, the trial court abused its discretion in preventing defendant from cross-examining the complainant about her previous false allegations of sexual assault. The evidence was relevant under Tex. R. Evid. 404(b) to show the complainant's bias against defendant and her possible motive to testify falsely against him. Hammer v. State, 296 S.W.3d 555, 2009 Tex. Crim. App. LEXIS 513 (Tex. Crim. App. 2009).

1761. Defendant's objection to the offer of extraneous offense evidence of all purposes was sustained, but defendant did not object further or ask for a continuing objection and he acquiesced to the trial court's action in admitting the evidence for a limited purpose; thus, he did not preserve a challenge to the admission of the extraneous offense evidence for a limited purpose under Tex. R. App. P. 33.1(a)(1). Berkley v. State, 2009 Tex. App. LEXIS 2194, 2009 WL 885951 (Tex. App. Fort Worth Apr. 2 2009).

1762. Drive-by was attempted intimidation of a potential witness and the arrest led to the discovery of one of the weapons used in the murder. The full proof by testimony of the organized crime combination under Tex. Penal Code Ann. § 71.02 could not be given without showing that transaction; the testimony was admissible because Tex. R. Evid. 404(b) excluded same transaction evidence from its notice requirements in criminal cases. Saenz v. State, 2009 Tex. App. LEXIS 2254 (Tex. App. Corpus Christi Apr. 2 2009).

1763. Despite a mother's argument that it was inadmissible under Tex. R. Evid. 404(b), a trial court did not err by admitting evidence concerning an oldest daughter, who was not part of a termination of parental rights proceeding, because such evidence was probative of whether the termination was in the best interest of four other children under the factors set forth in Tex. Fam. Code Ann. § 263.307; the State had to prove, by clear and convincing evidence, both the grounds for termination and that termination was in the best interest of the children. It was not necessary for the appellate court to decide whether this issue was preserved by a nonparticularized objection because, even if error was preserved, the trial court did not abuse its discretion in admitting the evidence, which related to a history of abusive or assaultive conduct by the children's family. In re J.A.P., 2009 Tex. App. LEXIS 2422, 2009 WL 839953 (Tex. App. Texarkana Apr. 1 2009).

1764. Act of cross-dressing constitutes "other acts" under Tex. R. Evid. 404(b). Fox v. State, 283 S.W.3d 85, 2009 Tex. App. LEXIS 2433 (Tex. App. Houston 14th Dist. Mar. 31 2009).

1765. In a case involving aggravated sexual assault of a child, defendant failed to preserve error relating to the admission of testimony from the mother of the victim that the family had moved many times to get away from defendant's violent behavior. Although defendant argued to a trial court that he had not opened the door to evidence of abuse by cross-examining the mother, he did not object that admission of the evidence violated Tex. R. Evid. 403, Tex. R. Evid. 404, and Tex. R. Evid. 405, as he argued on appeal. Gamble v. State, 2009 Tex. App. LEXIS 2134, 2009 WL 806879 (Tex. App. Fort Worth Mar. 27 2009).

1766. In a sexual assault of a child case, the court reversibly erred by admitting extraneous acts evidence because defendant's practice of not using a condom while engaged in consensual sex with an adult companion, or informing the companion of his HIV positive status, had the practical effect of prejudicing any defense raised by defendant regarding the complainant's credibility. Such an effect would have been detrimental to defendant, who

sought to discredit the complainant by pointing out factual variances in his outcries, and by suggesting that the complainant was motivated to fabricate the assault to avoid being schooled in an alternative education program. Lopez v. State, 288 S.W.3d 148, 2009 Tex. App. LEXIS 2050 (Tex. App. Corpus Christi Mar. 26 2009).

1767. Trial court did not abuse its discretion by overruling defendant's motion for a mistrial after his former girlfriend testified that defendant had been in and out of prison because the State's questioning of the girlfriend after defendant's objection made it clear that she was referring to the single conviction for possessing marijuana, which was an offense the State was required to prove as part of its case in chief, which charged defendant with possession of a firearm by a felon in violation of Tex. Penal Code Ann. § 46.04. Defendant also declined a the offered limiting instruction, which would have cured any error. Rice v. State, 2009 Tex. App. LEXIS 2062, 2009 WL 790178 (Tex. App. Austin Mar. 26 2009).

1768. Trial court did not abuse its discretion by admitting evidence of voice messages defendant left for his former girlfriend in which he threatened to kill her husband because the evidence was properly admitted to prove defendant's knowledge and intent; a reasonable person could view the messages as creating an inference that defendant, knowing he would see the husband that day, intentionally brought the gun with him in order to harm or further threaten the husband. The trial court did not abuse its discretion by overruling defendant's Tex. R. Evid. 403 objections because the messages were left a few hours before defendant drove to the husband's home with a gun in the back of his truck, the trial court specifically directed the State not to delve into the details of the messages, the time the State needed to admit the messages was minimal, and the evidence was an integral part of the State's theory that defendant took the gun with him to further threaten the husband. Rice v. State, 2009 Tex. App. LEXIS 2062, 2009 WL 790178 (Tex. App. Austin Mar. 26 2009).

1769. In defendant's aggravated assault case, Tex. R. Evid. 404(b) did not exclude evidence of third-party threats against the complainants because it was relevant to explain the inconsistencies in the complainants' testimony; evidence of threats against any witnesses to the shootings tended to explain the complainants' motivation to potentially understate the number of their family members that, in fact, might have witnessed the shootings. Cox v. State, 2009 Tex. App. LEXIS 1902, 2009 WL 807491 (Tex. App. Houston 14th Dist. Mar. 19 2009).

1770. Trial court did not abuse its discretion by admitting the utility knife, the pocket knife, and wire cutters that were found on defendant's person after his arrest into evidence because the items were probative, as they showed defendant's intent as well as the context and circumstances of his actions of entering the victims' garage, and the probative value did not substantially outweigh the risk of unfair prejudice. The State spent relatively little time developing the evidence and the evidence did not have a tendency to suggest a decision on an improper basis. Enloe v. State, 2009 Tex. App. LEXIS 1866 (Tex. App. Corpus Christi Mar. 19 2009).

1771. In an aggravated assault case, the trial court did not err in admitting the victim's videotaped statement because defendant raised the issue of self-defense. A witness testified that in defendant's altercation with the victim, the victim was the aggressor and defendant tried to resist retaliating; as a result of that testimony, defendant's alleged assault of the victim was relevant rebuttal evidence to prove that defendant acted with the requisite intent. In re B.H., 2009 Tex. App. LEXIS 1852, 2009 WL 692613 (Tex. App. Tyler Mar. 18 2009).

1772. In a murder case, evidence of a prior relationship between defendant and his victim was properly admitted into evidence under Tex. Code Crim. Proc. Ann. art. 38.36(a); moreover, the evidence was not offered to show that defendant acted in conformity with his propensity for violence, in violation of Tex. R. Evid. 404(b). Evidence that defendant had beaten the victim in the past was no more inflammatory or prejudicial than the evidence that he beat the victim on the night of the murder. Chavez v. State, 399 S.W.3d 168, 2009 Tex. App. LEXIS 1840, 2009 WL 700658 (Tex. App. San Antonio Mar. 18 2009).

1773. In defendant's assault case, the court did not abuse its discretion by admitting photographs of injuries to the victim's husband's upper arm, neck, wrist, and forehead and a photograph of a broken chair to fully understand the context of the altercation. It was also within the court's discretion to conclude that the injuries to the victim's husband and the means by which they were inflicted were so connected to the injuries alleged in the indictment as to form an indivisible criminal transaction. Lopez v. State, 2009 Tex. App. LEXIS 1755, 2009 WL 638182 (Tex. App. Austin Mar. 12 2009).

1774. In a murder case, the court properly admitted evidence of a subsequent shooting involving defendant because, in both cases, defendant fired a gun from the driver's side window, once when he was sitting on the passenger side, both incidents occurred in the early morning, and in each instance defendant was responding to a perceived slight to one of his friends, rather than to himself, by conducting a drive-by shooting. Additionally, defendant's alibi defense and challenges to witness credibility raised identity, and in light of the importance of proving the identity of the perpetrator, the State had a strong need for the challenged evidence. Williams v. State, 2009 Tex. App. LEXIS 1725, 2009 WL 585986 (Tex. App. Houston 14th Dist. Mar. 10 2009).

1775. Case law held that a Tex. R. Evid. 403 objection was not implicitly contained in relevancy or Tex. R. Evid. 404(b) objections and rather, a specific Tex. R. Evid. 403 objection had to be raised to preserve error; the court does not hold, however, that a litigant must expressly invoke "Rule 403" to preserve error. Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

1776. In defendant's sexual assault of a child case, the trial court did not err in excluding his offer of proof at trial concerning an earlier outcry of sexual abuse by the victim regarding another individual because the testimony of the victim's mother in defendant's offer of proof provided only indirect evidence of any statement by the child. Although it was clear from the mother's testimony that she believed defendant's sister was coaching the child in the 2001 incident, no evidence showed that the specific statement attributed to the victim, then five years old, was false. Gonzales v. State, 2009 Tex. App. LEXIS 1435, 2009 WL 498032 (Tex. App. Amarillo Feb. 27 2009).

1777. In a case involving sexual assault of a child, the State's notice of its intent to use extraneous offenses was not unreasonable because it involved a time span of 6 years; because the testimony regarding when defendant lived in El Salvador was not precise, the notice giving a range of dates for the extraneous offenses alleged to have occurred in El Salvador was not unreasonable. Even if the notice was unreasonable, the error was not harmful because defendant did not contend that he was surprised, he did not seek a continuance, and he failed to show how his defense strategy had been different had the intent notice been more specific. Sagastume v. State, 2009 Tex. App. LEXIS 1093, 2009 WL 387182 (Tex. App. Dallas Feb. 18 2009).

1778. Contrary to defendant's assertion, the State was not required to give notice of extraneous offenses under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) in connection with the offenses found in defendant's presentence investigation report, as the Texas Rules of Evidence, including Tex. R. Evid. 404(b), did not apply to a presentence investigation report; the court agreed with the reasoning in case law that a trial court could consider evidence in a presentence investigation report that could not have otherwise been introduced at the punishment stage and thus the trial court did not err in denying defendant's motion to delete the extraneous offenses in the report and admitting the related testimony. The court noted there the record did not show a request by defendant for notice under Tex. Code Crim. Proc. Ann. art. 37.07 nor a discovery order requiring the State to give such notice. Desanges v. State, 2009 Tex. App. LEXIS 1050, 2009 WL 349805 (Tex. App. Houston 1st Dist. Feb. 12 2009).

1779. Defendant failed preserve error because he failed to object under either Tex. Rs. Evid. 403 or 404 to admission of prior offenses; the State posed questions to defendant to clarify the nature of the prior convictions, and counsel objected neither to the court's ruling allowing the evidence nor to the procedure used to arrive at the ruling. Williams v. State, 2009 Tex. App. LEXIS 1032, 2009 WL 350608 (Tex. App. Houston 1st Dist. Feb. 12 2009).

1780. Victim's knowledge of defendant's violent past was not relevant in a retaliation-by-threat case, because the witness did not testify that his knowledge that defendant had actually killed a person contributed to his fear. Under Tex. R. Evid. 404(b), the trial court erred by admitting evidence of defendant's prior murder conviction. Pollard v. State, 277 S.W.3d 25, 2009 Tex. Crim. App. LEXIS 233 (Tex. Crim. App. 2009).

1781. Trial court found that a witness's statement went to the very heart of the case, hindered defendant's constitutional right to a fair trial, and contributed to his conviction under Tex. Penal Code Ann. § 42.09(2), and since defendant was not provided notice of the extraneous offense, he was not able to investigate, prepare, or defend the issue, which is exactly the type of situation Tex. R. Evid. 404(b) was adopted to prevent; the trial court found harm under Tex. R. App. P. 44.2(b), it was not outside the zone of reasonable disagreement for the trial court to conclude that an instruction to disregard did not cure the error, and thus the trial court did not abuse its discretion in granting a new trial. State v. Clayton, 2009 Tex. App. LEXIS 906, 2009 WL 322869 (Tex. App. Texarkana Feb. 11 2009).

1782. In an aggravated sexual assault of a child case, prior bad acts evidence was properly admitted at sentencing because the collective testimony was probative of defendant's ongoing, repeated pattern of abuse, which the witnesses could not individually establish, and the collective testimony assisted the jury in evaluating defendant's character and his moral blameworthiness for punishment purposes. Cintron v. State, 2009 Tex. App. LEXIS 889, 2009 WL 330963 (Tex. App. San Antonio Feb. 11 2009).

1783. Extraneous offense evidence in a pistol, bullets, and marijuana were relevant apart from proving defendant's action in conformity therewith, and thus the evidence was admissible. Mathis v. State, 2009 Tex. App. LEXIS 1466, 2009 WL 3003252 (Tex. App. Houston 14th Dist. Feb. 10 2009).

1784. Trial court did not abuse its discretion under Tex. R. Evid. 403 in admitting extraneous offense evidence in defendant's capital murder trial, given that (1) the evidence tended to make some facts more or less probable, (2) it was unlikely that the jury was impressed in an indelible way by admission of a pistol, marijuana, and bullets, (3) the State did not emphasize the evidence or spend an inordinate amount of time developing the evidence, despite the State's need to development evidence in light of the circumstantial case, and (4) in considering the overwhelming evidence of defendant's guilt, it was unlikely that the evidence had anything more than a slight effect on the jury's considerations. Mathis v. State, 2009 Tex. App. LEXIS 1466, 2009 WL 3003252 (Tex. App. Houston 14th Dist. Feb. 10 2009).

1785. Marijuana and bullets were relevant under Tex. R. Evid. 401 to proving or disproving a fact of consequence beyond mere action in conformity with bad character under Tex. R. Evid. 404(b), given that (1) the bullets found in defendant's apartment were the same caliber and manufactured by the same company as those found at the crime scene, (2) possession of the casings was not indicative of illegal activity but the bullets provided a connection to the murder, and (3) testimony suggested that defendant took some marijuana from the victim, which could have established motive and corroborated a witness's account of the events after the murder. Mathis v. State, 2009 Tex. App. LEXIS 1466, 2009 WL 3003252 (Tex. App. Houston 14th Dist. Feb. 10 2009).

1786. Because defendant fled and pointed a pistol at officer when they attempted to arrest him, the gun was admissible and relevant to display a consciousness of guilt. Mathis v. State, 2009 Tex. App. LEXIS 1466, 2009 WL 3003252 (Tex. App. Houston 14th Dist. Feb. 10 2009).

1787. Alleged error regarding the admission of an extraneous offense was disregarded in a robbery case under the standard in Tex. R. App. P. 44.2(b) because defendant's substantial rights were not affected; there was ample evidence of defendant's guilt, a limiting instruction was given, and there was other evidence regarding defendant's untruthfulness. Moreover, whether or not defendant had stolen a truck used to flee the robbery scene had minimal relevance as to whether he used a deadly weapon during the robbery. Crump v. State, 2009 Tex. App. LEXIS 760,

2009 WL 279606 (Tex. App. Fort Worth Feb. 5 2009).

1788. In a case involving the possession of hydrocodone, there was no error in admitting evidence of an extraneous offense under Tex. R. Evid. 404(b) based on the holding of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), because that holding stated that a jury was required to make factual determinations in a jury trial; moreover, it held that a trial judge was unable to usurp the province of a jury in making determinations of fact. Defendant unsuccessfully tried to argue that, because no jury had ever found him guilty of the extraneous offense, it was improper to submit it to the jury in the instant case. Smith v. State, 2009 Tex. App. LEXIS 751, 2009 WL 279490 (Tex. App. Fort Worth Feb. 5 2009).

1789. In a case involving the possession of hydrocodone, the State was properly allowed to introduce extraneous offense evidence under Tex. R. Evid. 404(b) showing that defendant had subsequently been arrested for the same offense because this rebutted defendant's assertions that was unaware that the pills were in his car and that they belonged to someone else. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Smith v. State, 2009 Tex. App. LEXIS 751, 2009 WL 279490 (Tex. App. Fort Worth Feb. 5 2009).

1790. Because defendant did not establish that his trial counsel actively represented his own self-interest during the punishment phase of trial, his ineffective-assistance claim failed; although defendant argued that counsel was conflicted by his own self-interest as a victim of an extraneous offense, he failed to explain how counsel, who stated on the record that he did not wish to press charges, could personally benefit from admission of the assault evidence, plus counsel consistently represented defendant's interests by objecting to the evidence and attempting to minimize its effect on the jury. Berry v. State, 278 S.W.3d 492, 2009 Tex. App. LEXIS 752 (Tex. App. Austin Feb. 4 2009).

1791. In defendant's sexual assault case, the complainant's single statement about defendant being violent did not influence the jury in reaching a guilty verdict because the record was replete with testimony and physical evidence supporting the allegations, and a doctor found two transections in the victim's hymen, which indicated vaginal penetration. Gonzales v. State, 2009 Tex. App. LEXIS 680, 2009 WL 242531 (Tex. App. Dallas Feb. 3 2009).

1792. In defendant's sexual assault case, a court did not err by allowing extraneous offense evidence under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g) and Tex. R. Evid. 404(b) because, although the State did not provide prior notice of its intent to utilize the evidence, the State presented the evidence during cross examination of defendant. Hope v. State, 2009 Tex. App. LEXIS 657, 2009 WL 223134 (Tex. App. Tyler Jan. 30 2009).

1793. Trial court did not err by refusing to grant a mistrial based on defendant's assertion that Tex. R. Evid. 404(b) was violated when a witness testified that defendant's wife had stated that defendant had murdered someone; the statement was in the middle of the testimony, it was not repeated, it was not connected to a charged assault, and the jury was told to disregard the testimony. Moreover, nothing in the record suggested that the jury would have rendered a different verdict without the complained-of statement. Hecht v. State, 2009 Tex. App. LEXIS 521, 2009 WL 200979 (Tex. App. Dallas Jan. 29 2009).

1794. During defendant's criminal trial for assault family violence under Tex. Penal Code Ann. § 22.01(a)(1), (b)(2), the trial court did not err by allowing the prosecution to read a stipulation to the jury in which defendant admitted a prior conviction for family violence. There was no violation of Tex. R. Evid. 404(b). Davila v. State, 2009 Tex. App. LEXIS 1568 (Tex. App. El Paso Jan. 29 2009).

1795. For purposes of Tex. R. Evid. 103(d), occasions in taking notice of fundamental errors not brought to the attention of the trial court were rare and defendant simply stated that fundamental error existed while failing to point

to any reason or authority to support that conclusion; moreover, Tex. R. Evid. 404(b), cited by defendant, was inapplicable in this context because it referred to extraneous offenses, and the prosecutor's use of the term "home invasion" was in reference to the offense for which defendant was on trial, burglary, not to any extraneous offense, and thus fundamental error was not shown. Anderson v. State, 2009 Tex. App. LEXIS 406 (Tex. App. Houston 1st Dist. Jan. 22 2009).

1796.

Tex. Evid. R. 405

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 405 Methods of Proving Character

(a) ***By Reputation or Opinion.***

(1) ***In General.***--When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, inquiry may be made into relevant specific instances of the person's conduct.

(2) ***Accused's Character in a Criminal Case.***--In the guilt stage of a criminal case, a witness may testify to the defendant's character or character trait only if, before the day of the offense, the witness was familiar with the defendant's reputation or the facts or information that form the basis of the witness's opinion.

(b) ***By Specific Instances of Conduct.***--When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; Unit 40, *Hearsay*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*.

Case Notes

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Penalties
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Burdens of Proof : Prosecution
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Defenses : Self-Defense
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview
Criminal Law & Procedure : Appeals : Procedures : Briefs
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Mistrial
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Hearsay : Exceptions : Reputation : General Overview
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Relevance : Character Evidence
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : General Overview
Evidence : Relevance : Sex Offenses : Similar Acts
Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview
Evidence : Relevance : Sex Offenses : Similar Crimes : Child Molestation Cases
Evidence : Scientific Evidence : Autopsies
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Opinion & Reputation
Evidence : Testimony : Credibility : Impeachment : Prior Conduct
Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview

LexisNexis (R) Notes

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

1. Drug use is not an essential element of the crime of possession of a controlled substance; a defendant may not, therefore, use specific instances of drug use; rather, he may only use reputation or opinion testimony to prove his good character. Norton v. State, 2006 Tex. App. LEXIS 2333 (Tex. App. Houston 14th Dist. Mar. 28 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

2. In an aggravated assault case under Tex. Penal Code Ann. §§ 22.01(a)(1) and 22.02(a), defendant was not entitled to use a specific act of violence to show that the victim was the first aggressor as only opinion and reputation testimony was admissible to show the victim's character for violence and defendant's use was an attempt

to prove that the victim's conduct in conformity with his violent character, which Tex. R. Evid. 404(a) and 405(a) prohibited; also, the record did not suggest that defendant attempted to use a witness's testimony that the victim had choked her for any admissible purpose. Thus, the trial court did not abuse its discretion by excluding the witness's testimony. Hawthorne v. State, 2011 Tex. App. LEXIS 1728, 2011 WL 846121 (Tex. App. Beaumont Mar. 9 2011).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

3. In a trial for child sexual assault, testimony about extraneous acts was properly admitted under Tex. Code Crim. Proc. art. 38.37, notwithstanding Tex. R. Evid. 404 and 405. The testimony from a complainant, defendant's stepdaughter, concerned two sexual encounters and was highly probative of both defendant's intent to engage in the charged offenses and the states of mind of defendant and the stepdaughter. Miller v. State, 2005 Tex. App. LEXIS 6227 (Tex. App. El Paso Aug. 4 2005).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview

4. In a case charging that defendant kidnapped a car salesperson to collect a debt, defendant should have been permitted to introduce testimony from five business associates that defendant was an honest, non-violent businessperson, whom they trusted; character evidence in the form of an opinion was a proper way of introducing such evidence under Tex. R. Evid. 405. Melgar v. State, 236 S.W.3d 302, 2007 Tex. App. LEXIS 2207 (Tex. App. Houston 1st Dist. 2007).

5. In a case charging that defendant kidnapped a car salesperson to collect a debt, defendant should have been permitted to introduce testimony from five business associates that defendant was an honest, non-violent businessperson, whom they trusted; the error in excluding the evidence required reversal under Tex. R. App. P. 44.2 because the excluded evidence went to the heart of defendant's sole defense, that, in light of the opinions given by the business associates, it was unlikely that defendant would kidnap someone in an effort to collect a debt. Melgar v. State, 236 S.W.3d 302, 2007 Tex. App. LEXIS 2207 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview

6. In a stalking case, the trial court did not err by allowing the cross-examination of a defense witness regarding whether she was aware that defendant had been charged with a crime following an alleged domestic violence incident with the victim and whether she was aware that he had violated a protective order and assaulted his former wife; this evidence was relevant to defendant's good character after the witness testified that she had called the victim and asked her to give defendant another chance. Allen v. State, 218 S.W.3d 905, 2007 Tex. App. LEXIS 2527 (Tex. App. Beaumont 2007).

7. In a retaliation case, a court properly refused to allow defendant to question the State's character witnesses as to the victim's prior crimes where the remoteness of the prior convictions tended to diminish any potential they might have for impressing the jury in some improper manner, defendant called other witnesses who testified that the victim's character for truthfulness was not good, and thus, his need to cross-examine the State's witnesses regarding the victim's prior convictions was lessened. Moore v. State, 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly

8. In a trial for aggravated assault, there was no error under Tex. R. Evid. 404, 405 in admitting evidence of defendant's gang affiliation because the evidence raised an inference that defendant's motive for stabbing the

complainant was to harm him because of his race. Defendant stated during booking that he was a member of a particular gang and did not want to be jailed with any black people. Martin v. State, 2011 Tex. App. LEXIS 5624, 2011 WL 2937423 (Tex. App. Corpus Christi July 21 2011).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

9. Where defendant was charged with aggravated sexual assault of a child, the court assumed the admission of pornographic photographs of adult women taken from his computer was erroneous. The State argued that defendant "opened the door" to the admission of the photographs when he told the jury that sexually assaulting a child was against his morals. Breland v. State, 2005 Tex. App. LEXIS 5925 (Tex. App. Fort Worth July 28 2005).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

10. In a prosecution for aggravated sexual assault, the trial court did not err in admitting evidence of extraneous acts of child sexual abuse that occurred in another county because the court instructed that the jury could not consider testimony regarding defendant having committed extraneous offenses for any purpose unless it found and believed beyond a reasonable doubt that defendant committed such other offenses and that it could only consider the testimony for the specific purposes listed in the charge, including its bearing on the previous and subsequent relationship between the defendant and the child. Foley v. State, 2013 Tex. App. LEXIS 14638, 2013 WL 6244540 (Tex. App. Dallas Dec. 3 2013).

11. In a trial for indecency with children, defendant should have been allowed to elicit testimony that he had a reputation in the community for the ethical treatment of children; the error in excluding that evidence was not harmless under Tex. R. App. P. 44.2(b), even though there was other testimony as to his reputation for being peaceful and law-abiding, because evidence of a reputation as being law-abiding was far too generic to address the specific character trait of pedophilia. Moody v. State, 2006 Tex. App. LEXIS 9788 (Tex. App. Houston 1st Dist. Nov. 9 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements

12. Complainant testified that defendant fondled and kissed her in an escalating fashion when she was between the ages of six and 10, that he felt her under her clothes when she was 10, and that he had sexual intercourse with her when she was 13. Because the testimony was relevant to the state of mind of the complainant and defendant, as well as to the previous and subsequent relationship between the complainant and defendant, pursuant to Tex. Code Crim. Proc. Ann. art. 38.37, § 2, the trial court did not err in admitting the extraneous offense evidence. Parker v. State, 2006 Tex. App. LEXIS 8834 (Tex. App. Houston 1st Dist. Oct. 12 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Penalties

13. In a penalty trial for aggravated-sexual assault of a child, it was proper to allow the State to ask defendant's mother whether she had heard about an extraneous offense after she testified that her son was a good boy and that she knew he did not do it. Burke v. State, 371 S.W.3d 252, 2011 Tex. App. LEXIS 8368, 2011 WL 5023008 (Tex. App. Houston 1st Dist. Oct. 20 2011).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

14. After a witness testified at a punishment hearing in an aggravated assault case that defendant was a good person who needed counseling, the State's "have you heard" questions relating to defendant's history of domestic violence were proper under Tex. R. Evid. 405; thus, counsel was not ineffective for failing to raise objections that would have been overruled. Worry v. State, 2010 Tex. App. LEXIS 3307, 2010 WL 1784022 (Tex. App. Tyler May 5 2010).

15. Defendant in a methamphetamine possession case failed to show that his counsel was ineffective when evidence of an extraneous offense of manufacture of controlled substance was admitted during the punishment phase under Tex. Code Crim. Proc. Ann. art. 37.07. Counsel only told defendant he would not be indicted for the extraneous offense, not that it was inadmissible. Talbert v. State, 2008 Tex. App. LEXIS 5697 (Tex. App. Eastland July 31 2008).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

16. Defendant's counsel was ineffective for opening the door to allow the State to introduce evidence of his prior convictions of sexual assault and sexual assault of a child by asking defendant's ex-girlfriend whether defendant was a violent person and she responded that he was not; therefore, on cross-examination the State was permitted to ask the ex-girlfriend whether she knew that defendant had pleaded guilty to two prior sexual assaults, allowing prejudicial and otherwise inadmissible evidence to be presented before the jury, which could not be considered sound trial strategy. The court held that defendant was prejudiced because the credibility of defendant's testimony was a key component of his defense strategy, given that he claimed he was trying to get away from the victim and had no intention of hurting anyone; although the trial court gave the jury a limiting instruction as to how it could consider the prior convictions, the instruction specifically allowed the jury to consider the convictions for the sole purpose of determining defendant's character for violence. Hernandez v. State, 2013 Tex. App. LEXIS 6365, 2013 WL 2301989 (Tex. App. Eastland May 23 2013).

17. In a sexual assault trial, counsel was not shown to be ineffective in failing to request a limiting instruction when the victim testified, pursuant to Tex. Code Crim. Proc. Ann. art. 38.37 § 2, about other extraneous acts of sexual abuse defendant committed against her because the record contained no explanation for counsel's decision. Taylor v. State, 2012 Tex. App. LEXIS 581 (Tex. App. Houston 1st Dist. Jan. 26 2012).

18. Defendant failed to show that his trial counsel's conduct was so outrageous that no competent attorney would have engaged in it because even though defendant argued that his trial counsel "opened the door" for admission of evidence regarding his prior felony conviction for the offense of possession of a controlled substance to be admitted by placing a reputation witness on the stand and failed to object to the form of the State's cross-examination questions of his reputation witness, Tex. R. Evid. 405(a) did not draw a distinction between "reputation" witnesses and "opinion" witnesses and did not limit cross-examination of character witnesses to any particular form. Further, it could not be said that trial counsel's decision to solicit character testimony from a witness was not grounded in sound trial strategy. Kemp v. State, 2009 Tex. App. LEXIS 9213, 2009 WL 4405793 (Tex. App. Houston 14th Dist. Dec. 3 2009).

Criminal Law & Procedure : Trials : Burdens of Proof : Prosecution

19. In the punishment phase of a murder trial, the trial court was not required to instruct the jury that the State had to prove beyond a reasonable doubt extraneous offenses for which defendant had previously been convicted. Johnson v. State, 176 S.W.3d 94, 2004 Tex. App. LEXIS 9589 (Tex. App. Houston 1st Dist. 2004).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

20. Defendant failed to show that his trial counsel's conduct was so outrageous that no competent attorney would have engaged in it because even though defendant argued that his trial counsel "opened the door" for admission of evidence regarding his prior felony conviction for the offense of possession of a controlled substance to be admitted by placing a reputation witness on the stand and failed to object to the form of the State's cross-examination questions of his reputation witness, Tex. R. Evid. 405(a) did not draw a distinction between "reputation" witnesses and "opinion" witnesses and did not limit cross-examination of character witnesses to any particular form. Further, it could not be said that trial counsel's decision to solicit character testimony from a witness was not grounded in sound trial strategy. Kemp v. State, 2009 Tex. App. LEXIS 9213, 2009 WL 4405793 (Tex. App. Houston 14th Dist. Dec. 3 2009).

21. In a stalking case, the trial court did not err by allowing the cross-examination of a defense witness regarding whether she was aware that defendant had been charged with a crime following an alleged domestic violence incident with the victim and whether she was aware that he had violated a protective order and assaulted his former wife; this evidence was relevant to defendant's good character after the witness testified that she had called the victim and asked her to give defendant another chance. Allen v. State, 218 S.W.3d 905, 2007 Tex. App. LEXIS 2527 (Tex. App. Beaumont 2007).

Criminal Law & Procedure : Witnesses : Impeachment

22. State was not required to tender proof that certain other offenses were committed before asking "have you heard" or "did you know" questions to a witness who testified about defendant's character during the punishment phase of trial because the State was not attempting to admit evidence of extraneous offenses under Tex. Code Crim. Proc. Ann. art. 37.07, but instead was seeking to impeach the credibility of a character witness's opinion about defendant in accordance with Tex. R. Evid. 405. Nunez v. State, 2013 Tex. App. LEXIS 5480 (Tex. App. Amarillo May 1 2013).

23. In defendant's retaliation case, the error in sustaining the State's objection to defendant's impeachment of the State's character witness was harmless; three defense witnesses testified that the victim had a poor character for truthfulness and defendant further impeached the victim with a prior inconsistent statement, but the victim's testimony regarding the elements of the offense was corroborated by several other witnesses, and was contradicted only by defendant's bald denials. Moore v. State, 2004 Tex. App. LEXIS 3017 (Tex. App. Waco Mar. 31 2004), opinion withdrawn by 2004 Tex. App. LEXIS 6584 (Tex. App. Waco July 21, 2004), substituted opinion at 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

Criminal Law & Procedure : Defenses : Self-Defense

24. In defendant's murder case, the court did not erroneously exclude evidence regarding the victim's violent character because the evidence did not tend to show that the victim was the first aggressor; the fact that victim once told a witness that he would "take care of her husband and brother if they came looking for her" did not serve to demonstrate the victim's intent the night of the murder. Defendant's preferred testimony that the victim was a member of a prison gang that was "running fast" and "doing hits" was similarly irrelevant other than to show the victim's character conformity. Vasquez v. State, 2012 Tex. App. LEXIS 7428, 2012 WL 6863860 (Tex. App. Corpus Christi Aug. 27 2012).

25. Defendant's prior crimes or bad acts could be admissible for other purposes, such as proof of motive, intent, plan, knowledge, or lack of mistake or accident, and when a defendant claimed self-defense, the State could introduce evidence of other violent acts where the defendant was an aggressor in order to show intent, and the appellate court saw no reason to depart from precedent and found that the trial court properly admitted the evidence of the extraneous offenses. Hamilton v. State, 2004 Tex. App. LEXIS 5444 (Tex. App. Beaumont June 16 2004).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

26. In a sexual assault trial, counsel was not shown to be ineffective in failing to request a limiting instruction when the victim testified, pursuant to Tex. Code Crim. Proc. Ann. art. 38.37 § 2, about other extraneous acts of sexual abuse defendant committed against her because the record contained no explanation for counsel's decision. Taylor v. State, 2012 Tex. App. LEXIS 581 (Tex. App. Houston 1st Dist. Jan. 26 2012).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview

27. Although the witness testified she was familiar with defendant's poor reputation for being a peaceful and law-abiding citizen and reputation evidence was admissible pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) and Tex. R. Evid. 405(a), the foundation was insufficient to establish the proper predicate for reputation testimony under Rule 405(a), and the trial court abused its discretion in allowing the witness to testify that defendant's reputation for being peaceable and law-abiding was bad. Manning v. State, 126 S.W.3d 552, 2003 Tex. App. LEXIS 9861 (Tex. App. Texarkana 2003).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

28. State was not required to tender proof that certain other offenses were committed before asking "have you heard" or "did you know" questions to a witness who testified about defendant's character during the punishment phase of trial because the State was not attempting to admit evidence of extraneous offenses under Tex. Code Crim. Proc. Ann. art. 37.07, but instead was seeking to impeach the credibility of a character witness's opinion about defendant in accordance with Tex. R. Evid. 405. Nunez v. State, 2013 Tex. App. LEXIS 5480 (Tex. App. Amarillo May 1 2013).

29. In a penalty trial for aggravated-sexual assault of a child, it was proper to allow the State to ask defendant's mother whether she had heard about an extraneous offense after she testified that her son was a good boy and that she knew he did not do it. Burke v. State, 371 S.W.3d 252, 2011 Tex. App. LEXIS 8368, 2011 WL 5023008 (Tex. App. Houston 1st Dist. Oct. 20 2011).

30. Where defendant was tried for aiding seven men escape from prison, evidence of the post-escape crimes committed by the seven men bore heavily upon defendant's character and moral blameworthiness; the evidence was admissible to help the jury determine an appropriate sentence for defendant's crimes. Rodriguez v. State, 163 S.W.3d 115, 2005 Tex. App. LEXIS 1084 (Tex. App. San Antonio 2005).

31. Testimony of an assistant district attorney regarding her opinion of a defendant's character, which was formed based upon two separate child protective services investigations, was properly admitted during the punishment phase of the trial under Tex. R. Evid. 405(a) where the witness based her opinion on facts that occurred prior to the day of the charged offense and was familiar with the underlying facts or information on which her opinion was based. The State was not required to show that the opinion was based upon a community observation or talking to people in the community. Hollingsworth v. State, 15 S.W.3d 586, 2000 Tex. App. LEXIS 2033 (Tex. App. Austin 2000).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview

32. In a case in which defendant was convicted of violating the terms of his civil conviction under the Texas Civil Commitment of Sexually Violent Predators Act, Tex. Health & Safety Code Ann. ch. 841, the trial court did not abuse its discretion in excluding evidence of specific instances of defendant's compliance with his commitment

order because that evidence was not admissible under Tex. R. Evid. 404(a), 405(a). Moreover, because the State did not ever imply that defendant had violated the terms of commitment before the charged offenses, the State did not open the door to evidence of defendant's compliance prior to those offenses. Jones v. State, 333 S.W.3d 615, 2009 Tex. App. LEXIS 3997 (Tex. App. Dallas May 29 2009).

Criminal Law & Procedure : Appeals : Procedures : Briefs

33. Under Tex. R. App. P. 38.1(e), (g), (h), defendant waived any claims to error under Tex. R. Evid. 405(a) because defendant's brief discussed only Tex. R. Evid. 404(a). Error under R. 404(a) was also inadequately briefed with regard to unanswered questions about contraband. Sanchez v. State, 2007 Tex. App. LEXIS 7130 (Tex. App. Texarkana Sept. 4 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

34. In a case involving aggravated sexual assault of a child, defendant failed to preserve error relating to the admission of testimony from the mother of the victim that the family had moved many times to get away from defendant's violent behavior. Although defendant argued to a trial court that he had not opened the door to evidence of abuse by cross-examining the mother, he did not object that admission of the evidence violated Tex. R. Evid. 403, Tex. R. Evid. 404, and Tex. R. Evid. 405, as he argued on appeal. Gamble v. State, 2009 Tex. App. LEXIS 2134, 2009 WL 806879 (Tex. App. Fort Worth Mar. 27 2009).

35. Under Tex. R. App. P. 33, defendant did not preserve a complaint, and any error was cured, with regard to the admission of extraneous offense evidence; he did not request a running objection to evidence concerning the offense and did not object to the evidence that the State elicited on cross-examination of defendant. Davila v. State, 2006 Tex. App. LEXIS 6865 (Tex. App. Waco Aug. 2 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Mistrial

36. Trial court did not abuse its discretion by denying defendant's motion for a mistrial based on the prosecutor's asking defendant's wife during the punishment phase regarding whether she was aware of a prior DWI incident involving defendant because the prosecutor acted in good-faith when he asked the question based on a Texas Crime Information Center report showing that defendant was involved in a prior DWI incident. Defendant had offered his wife's testimony to establish his eligibility for probation and to prevent the suspension of his driver's license, and therefore the State had the right to ask questions tending to rebut defendant's eligibility for probation and to rebut the wife's testimony. Owens v. State, 2013 Tex. App. LEXIS 1766, 2013 WL 657787 (Tex. App. Waco Feb. 21 2013).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

37. Where a defense witness testified during defendant's indecent exposure trial that defendant's reputation for truthfulness was excellent and that she had never witnessed anything inappropriate about him, under Tex. R. Evid. 405, it was proper for the State to counter that testimony by inquiring whether the witness was familiar with any specific instances of untruthful or inappropriate conduct by defendant. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

38. In defendant's retaliation case, the error in sustaining the State's objection to defendant's impeachment of the State's character witness was harmless; three defense witnesses testified that the victim had a poor character for truthfulness and defendant further impeached the victim with a prior inconsistent statement, but the victim's testimony regarding the elements of the offense was corroborated by several other witnesses, and was contradicted only by defendant's bald denials. Moore v. State, 2004 Tex. App. LEXIS 3017 (Tex. App. Waco Mar. 31 2004),

opinion withdrawn by 2004 Tex. App. LEXIS 6584 (Tex. App. Waco July 21, 2004), substituted opinion at 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

39. Although the witness testified she was familiar with defendant's poor reputation for being a peaceful and law-abiding citizen and reputation evidence was admissible pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) and Tex. R. Evid. 405(a), the foundation was insufficient to establish the proper predicate for reputation testimony under Rule 405(a), and the trial court abused its discretion in allowing the witness to testify that defendant's reputation for being peaceable and law-abiding was bad. Manning v. State, 126 S.W.3d 552, 2003 Tex. App. LEXIS 9861 (Tex. App. Texarkana 2003).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

40. Defendant was not substantially harmed by the trial court's error in admitting a witness's reputation testimony because evidence of the victim's character as a peaceful person was properly presented to the jury. Cruz v. State, 2007 Tex. App. LEXIS 9002 (Tex. App. El Paso Nov. 15 2007).

41. In a trial for indecency with children, defendant should have been allowed to elicit testimony that he had a reputation in the community for the ethical treatment of children; the error in excluding that evidence was not harmless under Tex. R. App. P. 44.2(b), even though there was other testimony as to his reputation for being peaceful and law-abiding, because evidence of a reputation as being law-abiding was far too generic to address the specific character trait of pedophilia. Moody v. State, 2006 Tex. App. LEXIS 9788 (Tex. App. Houston 1st Dist. Nov. 9 2006).

Evidence : Hearsay : Exceptions : Reputation : General Overview

42. Although the witness testified she was familiar with defendant's poor reputation for being a peaceful and law-abiding citizen and reputation evidence was admissible pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) and Tex. R. Evid. 405(a), the foundation was insufficient to establish the proper predicate for reputation testimony under Rule 405(a), and the trial court abused its discretion in allowing the witness to testify that defendant's reputation for being peaceable and law-abiding was bad. Manning v. State, 126 S.W.3d 552, 2003 Tex. App. LEXIS 9861 (Tex. App. Texarkana 2003).

Evidence : Procedural Considerations : Curative Admissibility

43. Trial court did not abuse its discretion by denying defendant's motion for a mistrial based on the prosecutor's asking defendant's wife during the punishment phase regarding whether she was aware of a prior DWI incident involving defendant because the prosecutor acted in good-faith when he asked the question based on a Texas Crime Information Center report showing that defendant was involved in a prior DWI incident. Defendant had offered his wife's testimony to establish his eligibility for probation and to prevent the suspension of his driver's license, and therefore the State had the right to ask questions tending to rebut defendant's eligibility for probation and to rebut the wife's testimony. Owens v. State, 2013 Tex. App. LEXIS 1766, 2013 WL 657787 (Tex. App. Waco Feb. 21 2013).

44. In a murder trial, defendant opened the door to evidence of his past misconduct because his brother testified that defendant had a mellower and more peaceful disposition than his brothers. The same testimony cured error in extraneous-offense evidence admitted prior to the testimony. Gonzalez v. State, 2012 Tex. App. LEXIS 7938, 2012 WL 4101900 (Tex. App. El Paso Sept. 19 2012).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

45. Trial court did not abuse its discretion by admitting the officers' testimony regarding their opinions of defendant's bad character where, in the officer's 26 years of law enforcement, he was familiar with defendant, he had experience with defendant, and had been familiar with him for "several years." Smith v. State, 2005 Tex. App. LEXIS 6567 (Tex. App. Texarkana Aug. 18 2005).

46. Where defendant was charged with aggravated sexual assault of a child, the court assumed the admission of pornographic photographs of adult women taken from his computer was erroneous. The State argued that defendant "opened the door" to the admission of the photographs when he told the jury that sexually assaulting a child was against his morals. Breland v. State, 2005 Tex. App. LEXIS 5925 (Tex. App. Fort Worth July 28 2005).

Evidence : Procedural Considerations : Limited Admissibility

47. In a case where two people were being tried for aggravated sexual abuse of a child, "have you heard" questions under Tex. R. Evid. 405 were properly asked when witnesses testified about the character of the co-defendant; defendant failed to request a limiting instruction under Tex. R. Evid. 105, so she could not challenge the issue on appeal; the evidence was not offered to prove the extraneous offense, but to test the qualification of the witnesses to testify regarding character. Little v. State, 2007 Tex. App. LEXIS 4194 (Tex. App. Texarkana May 30 2007).

Evidence : Relevance : Character Evidence

48. Even if the victim's conduct at the car dealership showed her ability to "intimidate, harass, manipulate, and physically abuse" defendant, the conduct was not relevant because it did not involve the victim injuring herself or fabricating allegations that defendant injured her. It, therefore, was not relevant evidence essential to prove the theory of defense, and the trial court did not abuse its discretion by excluding the witness's testimony. Vasquez v. State, 2014 Tex. App. LEXIS 3714, 2014 WL 1413809 (Tex. App. Dallas Apr. 7 2014).

49. Because proving that the complainant had fabricated her allegations was not dependent exclusively upon the character of the victim, testimony as to the complainant's alleged character trait of lying to law enforcement was not admissible under this rule during defendant's trial for attempted sexual performance by a child. Clark v. State, 2014 Tex. App. LEXIS 1765, 2014 WL 708910 (Tex. App. Austin Feb. 19 2014).

50. Court did not abuse its discretion in admitting evidence of extraneous offenses and evidence of defendant's reputation because a witness testified as to her opinion of defendant and the State was entitled to test her knowledge about specific instances of conduct by asking a series of "did you know" questions. Warren v. State, 2013 Tex. App. LEXIS 14124, 2013 WL 6095675 (Tex. App. Houston 14th Dist. Nov. 19 2013).

51. Defendant's conviction for burglary of a habitation was proper because, when two witness's testified that defendant was a good person who would not have committed crimes absent the outside influence of either his brother or other older men, they were testifying to defendant's good character. Therefore, it was permissible for the State to cross-examine them concerning their awareness of relevant specific instances of defendant's conduct. Juarez v. State, 2013 Tex. App. LEXIS 9622 (Tex. App. Dallas July 31 2013).

52. In a murder case in which defendant claimed self-defense, the trial court did not err by excluding evidence of the victim's prior arrest for a possible domestic situation; because nothing in the record showed defendant was aware that the victim had been arrested, the prior conduct was not admissible as "communicated character" evidence. "Uncommunicated character" evidence was available only through reputation and opinion testimony under Tex. R. Evid. 405(a). Pointer v. State, 2013 Tex. App. LEXIS 4658 (Tex. App. Fort Worth Apr. 11 2013).

53. Trial court did not err in denying defendant's request to present evidence of an assault victim's arrest for having a blackjack or club because there was no evidence that defendant had knowledge of those specific acts. Williams v. State, 2013 Tex. App. LEXIS 839, 2013 WL 341900 (Tex. App. Dallas Jan. 30 2013).

54. Defendant's conviction for continuous sexual abuse of a child was proper because the trial court did not erred by allowing defendant's brother to testify regarding what defendant's wife told the brother about an alleged extraneous sexual offense since the brother testified that defendant was not the type of person who would abuse children. Therefore, it was permissible for the State to cross-examine the brother regarding his awareness of relevant specific instances of defendant's conduct under Tex. R. Evid. 405(a). Lopez v. State, 2013 Tex. App. LEXIS 338 (Tex. App. Dallas Jan. 3 2013).

55. Incidents about which appellant wanted to introduce testimony did not implicate himself, and the victim did not make any threat toward him, nor did the victim's prior conduct show that he had any animosity toward appellant, and the evidence was not probative of the victim's state of mind as it related to the situation with appellant two years after the incidents took place, given that before the shooting, the two did not know each other; while appellant could introduce reputation or opinion testimony suggesting the victim was the first aggressor, appellant could not introduce specific acts because that was not admissible for these purposes, and nothing showed that the proffered testimony would have been relevant for any purpose besides character conformity, for purposes of Tex. R. Evid. 404(b). Bottorff v. State, 2012 Tex. App. LEXIS 8220, 2012 WL 4477396 (Tex. App. Austin Sept. 28 2012).

56. Appellant wanted to offer evidence of specific instances of conduct of the victim, but he was not entitled to offer evidence of any specific prior violent acts in order to show the victim was the first aggressor; the proffered testimony was an attempt to prove the victim's conduct in conformity with his character for violence, which was prohibited by Tex. R. Evid. 404(a), 405(a). Bottorff v. State, 2012 Tex. App. LEXIS 8220, 2012 WL 4477396 (Tex. App. Austin Sept. 28 2012).

57. In defendant's murder case, the court did not erroneously exclude evidence regarding the victim's violent character because the evidence did not tend to show that the victim was the first aggressor; the fact that victim once told a witness that he would "take care of her husband and brother if they came looking for her" did not serve to demonstrate the victim's intent the night of the murder. Defendant's preferred testimony that the victim was a member of a prison gang that was "running fast" and "doing hits" was similarly irrelevant other than to show the victim's character conformity. Vasquez v. State, 2012 Tex. App. LEXIS 7428, 2012 WL 6863860 (Tex. App. Corpus Christi Aug. 27 2012).

58. In a murder trial, it was error to exclude evidence of defendant's peaceful character through a friend who had known him for almost 30 years. Turner v. State, 413 S.W.3d 442, 2012 Tex. App. LEXIS 6619 (Tex. App. Fort Worth Aug. 9 2012).

59. Defendant could only offer evidence of his good character trait as a non-drug user in the form of reputation or opinion testimony, and evidence that showed defendant passed a drug test was evidence in the form of a specific instance of conduct, and thus was inadmissible character evidence under Tex. R. Evid. 405; the trial court did not abuse its discretion in excluding this evidence. Arreola v. State, 2012 Tex. App. LEXIS 4166, 2012 WL 1868680 (Tex. App. Eastland May 24 2012).

60. State was allowed to rebut testimony about appellant's character for truthfulness by asking about specific conduct instances, and appellant did not claim they were irrelevant, and they shared many similarities; the court is aware of no authority that restricts the State from asking whether the witness had heard that the defendant was convicted of a particular crime. Ethridge v. State, 2012 Tex. App. LEXIS 3110, 2012 WL 1379648 (Tex. App. Tyler

Apr. 18 2012).

61. In a murder trial where defendant claimed he acted in self-defense, the trial court did not err by excluding testimony from a psychologist regarding the victim's acts of violence because the psychologist's knowledge of any acts committed by the victim came entirely from his review of the medical records which were not admitted into evidence. While specific acts of violent conduct committed by a victim were admissible under Tex. R. Evid. 404 and 405 to show the victim was the aggressor and defendant acted in self-defense, the psychologist's testimony that the victim had attacked his doctor and others would not have been relevant for any purpose other than character conformity. Mason v. State, 2012 Tex. App. LEXIS 2314, 2012 WL 1058792 (Tex. App. Eastland Mar. 22 2012).

62. Witness was asked her opinion of the kind of person appellant was, and the witness responded that he was a "good guy," and the court did not find this testimony could be interpreted so broadly as to have implied that he never engaged in criminal conduct, and thus the testimony did not create a false impression of law abiding conduct; however, it was permissible under Tex. R. Evid. 405 for the State to test the witness's knowledge about specific instances of conduct by asking "did you know" questions, and the court found no error in the admission of the testimony concerning a previous conviction. Hernandez v. State, 351 S.W.3d 156, 2011 Tex. App. LEXIS 7297 (Tex. App. Texarkana Sept. 7 2011).

63. Even assuming evidence was erroneously admitted under Tex. R. Evid. 405, the error was harmless because another witness was questioned about appellant's past criminal history and the jury was given much information about such history, to which there was no defense objection. Hernandez v. State, 351 S.W.3d 156, 2011 Tex. App. LEXIS 7297 (Tex. App. Texarkana Sept. 7 2011).

64. Appellant provided a general discussion on the application of Tex. R. Evid. 403, 404, and 405, most of which was not germane to the punishment phase, but he failed to specify the bad acts or extraneous offenses he found inadmissible or provide any references to their admission over objection; in the absence of references and citation of authority, this complaint under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) was waived. Crutchfield v. State, 2011 Tex. App. LEXIS 4490, 2011 WL 2420380 (Tex. App. Tyler June 15 2011).

65. Use of the words depicted in the tattoos to show the complainant was a bad person and that he acted in conformity with his bad character during the altercation weighed against admission, as this would have been improper; because the words presented a danger of unfair prejudice, the trial court did not abuse its discretion in excluding the evidence under Tex. R. Evid. 403. Smith v. State, 355 S.W.3d 138, 2011 Tex. App. LEXIS 2426 (Tex. App. Houston 1st Dist. Mar. 31 2011).

66. In an aggravated assault case under Tex. Penal Code Ann. §§ 22.01(a)(1) and 22.02(a), defendant was not entitled to use a specific act of violence to show that the victim was the first aggressor as only opinion and reputation testimony was admissible to show the victim's character for violence and defendant's use was an attempt to prove that the victim's conduct in conformity with his violent character, which Tex. R. Evid. 404(a) and 405(a) prohibited; also, the record did not suggest that defendant attempted to use a witness's testimony that the victim had choked her for any admissible purpose. Thus, the trial court did not abuse its discretion by excluding the witness's testimony. Hawthorne v. State, 2011 Tex. App. LEXIS 1728, 2011 WL 846121 (Tex. App. Beaumont Mar. 9 2011).

67. Trial court did not err by refusing to allow defendant to introduce evidence of the meaning of the victim's teardrop tattoo because defendant's determination that he needed to shoot the victim in self-defense could not have been based on apprehension of the victim's previous violent acts or reputation as demonstrated by the tattoo because defendant was unaware of the victim's teardrop tattoo. Hines v. State, 2011 Tex. App. LEXIS 950, 2011

WL 494737 (Tex. App. Houston 1st Dist. Feb. 10 2011).

68. Counsel asked a witness about the decedent's reputation, but the witness twice said he did not know and the trial court halted any further questioning; based on the record, the court found that appellant failed to lay the proper predicate that the witness was substantially familiar with the decedent's reputation for aggression, for purposes of Tex. R. Evid. 405(a), the trial court did not abuse its discretion in refusing to permit further questioning, and appellant's right to compel favorable witnesses under U.S. Const. amend. VI was not violated. Garcia v. State, 2010 Tex. App. LEXIS 8834, 2010 WL 4361885 (Tex. App. Corpus Christi Nov. 4 2010).

69. Even though the substance of the proposed testimony regarding prior violent acts by the decedent appeared in the record through affidavits attached to appellant's motion for a new trial, the court was faced with the issue, for purposes of Tex. R. Evid. 103(b), that the evidence was not offered at trial, and the trial court did not have the opportunity to rule on the admissibility of the testimony, under Tex. R. App. P. 33.1(a); absent a ruling by the trial court on the portion of the evidence of which appellant complained, the court had no cognizable complaint on which to pass judgment, and appellant waived this issue. Garcia v. State, 2010 Tex. App. LEXIS 8834, 2010 WL 4361885 (Tex. App. Corpus Christi Nov. 4 2010).

70. Testimony of appellant's witnesses that they believed appellant could abide by community supervision conditions under Tex. Code Crim. Proc. Ann. art. 42.12, § 11, and testimony that appellant was not a drug dealer and had not received text messages referencing drugs entitled the State to cross-examine these witnesses with "did you know" questions regarding the details of appellant's arrest and his receipt of drug-related text messages, for purposes of Tex. R. Evid. 405(a) and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1). Barrientos v. State, 2010 Tex. App. LEXIS 8879, 2010 WL 4395423 (Tex. App. Houston 1st Dist. Nov. 4 2010).

71. After a witness testified at a punishment hearing in an aggravated assault case that defendant was a good person who needed counseling, the State's "have you heard" questions relating to defendant's history of domestic violence were proper under Tex. R. Evid. 405; thus, counsel was not ineffective for failing to raise objections that would have been overruled. Worry v. State, 2010 Tex. App. LEXIS 3307, 2010 WL 1784022 (Tex. App. Tyler May 5 2010).

72. Court properly excluded character evidence because defendant testified that the victim told him "he's been in a lot of fights and that he's been in trouble for fighting." That general statement was not sufficient to establish that defendant was aware that the victim had committed an assault for which he was placed on deferred adjudication community supervision. Evans v. State, 2010 Tex. App. LEXIS 810, 2010 WL 376940 (Tex. App. Waco Feb. 3 2010).

73. In defendant's murder case, the court properly excluded evidence that the victim purportedly was always armed with a gun because defendant failed to satisfy his burden of producing evidence demonstrating his shooting of the victim stemmed from a reasonable belief that the victim was attempting to use unlawful deadly force at that exact moment, the two had no prior relationship, and the trial court did permit defendant to establish that the victim's reputation in the community for violence was bad. Welch v. State, 2009 Tex. App. LEXIS 6292, 2009 WL 2461172 (Tex. App. Beaumont Aug. 12 2009).

74. Court did not err by refusing to allow defense counsel to cross-examine a police officer about prior incidents in which the officer allegedly used excessive force because the officer's character was not an essential element of the charge, claim, or defense to attempting to take a weapon from a peace officer, and the proffered testimony was not material because it did not address any fact of importance to the outcome of the action. Rico v. State, 2009 Tex. App. LEXIS 4141, 2009 WL 1623343 (Tex. App. Corpus Christi June 11 2009).

75. In a case in which defendant was convicted of violating the terms of his civil conviction under the Texas Civil Commitment of Sexually Violent Predators Act, Tex. Health & Safety Code Ann. ch. 841, the trial court did not abuse its discretion in excluding evidence of specific instances of defendant's compliance with his commitment order because that evidence was not admissible under Tex. R. Evid. 404(a), 405(a). Moreover, because the State did not ever imply that defendant had violated the terms of commitment before the charged offenses, the State did not open the door to evidence of defendant's compliance prior to those offenses. Jones v. State, 333 S.W.3d 615, 2009 Tex. App. LEXIS 3997 (Tex. App. Dallas May 29 2009).

76. In defendant's murder case, the trial court did not err in allowing testimony about defendant's character because defendant's case was based on the defensive theory that the victim was the first aggressor and that defendant acted in self-defense and in defense of his mother. The State was allowed to rebut that with character evidence that defendant was aggressive and not protective toward his mother. Henricks v. State, 293 S.W.3d 267, 2009 Tex. App. LEXIS 3562 (Tex. App. Eastland May 21 2009).

77. To the extent that Hardman v. State suggests that prior convictions or specific acts of misconduct are admissible to prove the violent character of the deceased in a self-defense case, it is contrary to the cited opinions of the Texas Court of Criminal Appeals. Nolan v. State, 2008 Tex. App. LEXIS 8662 (Tex. App. Austin Oct. 31 2008).

78. For purposes of Tex. R. Evid. 404(a)(2), 405, the trial court did not err in refusing to allow defendant to offer evidence of the victim's two assault convictions; the mere fact that the victim assaulted another in 2001 did not suggest any intent or motive for the victim to attack defendant years later, no connection was shown with the victim's more recent assault conviction and the events in question, and neither conviction was relevant to demonstrate either the reasonableness of defendant's fear of danger, for self-defense purposes, or that the victim was the first aggressor. Nolan v. State, 2008 Tex. App. LEXIS 8662 (Tex. App. Austin Oct. 31 2008).

79. Both character evidence in the form of opinion testimony and extraneous-offense testimony may be admissible during trial, even if the opinion testimony is based on facts brought forth from the extraneous-offense testimony. Sims v. State, 273 S.W.3d 291, 2008 Tex. Crim. App. LEXIS 820 (Tex. Crim. App. 2008).

80. Defendant was not substantially harmed by the trial court's error in admitting a witness's reputation testimony because evidence of the victim's character as a peaceful person was properly presented to the jury. Cruz v. State, 2007 Tex. App. LEXIS 9002 (Tex. App. El Paso Nov. 15 2007).

81. Appellate court had reversed the judgment of conviction, holding that the trial court erred in permitting the State to ask a witness "were you aware" questions, but none of the cases relied on by the appellate court supported its holding that the witness's nonresponsive and volunteered testimony did not open the door to character evidence; the witness offered evidence of defendant's character through her statement that he was a good and sweet boy, and although defendant did not intentionally elicit this character testimony, the nonresponsiveness of the statement did not change the fact that it was character evidence offered by a defense witness, and the trial court correctly permitted the State to rebut this evidence with evidence of defendant's prior convictions. Harrison v. State, 241 S.W.3d 23, 2007 Tex. Crim. App. LEXIS 1226 (Tex. Crim. App. 2007).

82. Under Tex. R. Evid. 405, if the defendant offers evidence of his good character, the prosecution can introduce its own character evidence to rebut the implications of the defendant's character evidence; there is no nonresponsiveness exception to this right. Harrison v. State, 241 S.W.3d 23, 2007 Tex. Crim. App. LEXIS 1226 (Tex. Crim. App. 2007).

83. Trial court did not err when it permitted the State to ask defendant's sister if she knew that he had been arrested for two other criminal offenses because the questions were not impermissible on the ground that it was not shown that defendant was convicted of the offenses as the question was a test of the witness's knowledge of the facts and circumstances of defendant's life; defendant did not show that the State lacked a factual basis for the questions. Thomas v. State, 2007 Tex. App. LEXIS 7203 (Tex. App. Tyler Aug. 31 2007).

84. Defendant sought to introduce evidence that the victim's involvement in a gay dating service was admissible as character evidence under Tex. R. Evid. 405, but the character trait essential to the defense was not whether the victim was a sexually active person, but whether he was a violent person capable of sexually assaulting another man, and the fact that the victim participated in a dating service was irrelevant under Tex. R. Evid. 401 to this inquiry, and the victim's participation in the service was not admissible as character evidence; it was also not improper to rule against its admission for purposes of proving intent and motive for purposes of Tex. R. Evid. 404(b), and evidence proving an individual used a dating service in no way tends to prove the individual had the intent or motive to rape someone who would not consent to sexual relations. Arredondo v. State, 2007 Tex. App. LEXIS 6686 (Tex. App. San Antonio Aug. 22 2007).

85. In a case where two people were being tried for aggravated sexual abuse of a child, "have you heard" questions under Tex. R. Evid. 405 were properly asked when witnesses testified about the character of the co-defendant; defendant failed to request a limiting instruction under Tex. R. Evid. 105, so she could not challenge the issue on appeal; the evidence was not offered to prove the extraneous offense, but to test the qualification of the witnesses to testify regarding character. Little v. State, 2007 Tex. App. LEXIS 4194 (Tex. App. Texarkana May 30 2007).

86. In a case charging that defendant kidnapped a car salesperson to collect a debt, defendant should have been permitted to introduce testimony from five business associates that defendant was an honest, non-violent businessperson, whom they trusted; the error in excluding the evidence required reversal under Tex. R. App. P. 44.2 because the excluded evidence went to the heart of defendant's sole defense, that, in light of the opinions given by the business associates, it was unlikely that defendant would kidnap someone in an effort to collect a debt. Melgar v. State, 236 S.W.3d 302, 2007 Tex. App. LEXIS 2207 (Tex. App. Houston 1st Dist. 2007).

87. In a retaliation case that involved a threat against a witness, the trial court properly allowed defendant's sister to be cross-examined under Tex. R. Evid. 405(a) regarding her knowledge of a prior offense after she testified that defendant was not the kind of person to carry out such a threat. Whitehead v. State, 220 S.W.3d 171, 2007 Tex. App. LEXIS 1989 (Tex. App. Eastland 2007).

88. Even assuming defendant's assertion that defense counsel needed an additional objection during defendant's cross-examination was correct, defendant had to show that the evidence was inadmissible for purposes of an ineffective assistance of counsel claim; a defense witness testified that defendant was nonviolent and defendant testified to not carrying a gun, so defendant failed to show that the references to extraneous offenses were inadmissible for purposes of Tex. R. Evid. 405(a). Cooper v. State, 2007 Tex. App. LEXIS 1230 (Tex. App. Houston 14th Dist. Feb. 20 2007).

89. Court rejected defendant's claim of ineffective assistance of counsel; the court assumed a strategic motive of counsel given the silent record, defendant failed to show that counsel's alleged failures to object were unreasonable and (1) it was reasonable for counsel to have found that certain evidence was admissible under Tex. R. Evid. 803(2), given that defendant's wife was extremely upset and nervous when talking to an officer about the incident, (2) counsel could have found that protective orders and testimony concerning defendant's wife's applying for the orders were not proof of extraneous offenses under Tex. R. Evid. 404(b), given that they were issued in response to the same conduct that defendant was on trial for, (3) counsel could have found that defendant's wife's father's testimony opened the door to cross-examination regarding defendant's character by referencing specific examples

of defendant's conduct for purposes of Tex. R. Evid. 405, and (4) counsel might have believed that the wife's inconsistent statements were admissible to impeach her testimony under Tex. R. Evid. 613. Romero v. State, 2006 Tex. App. LEXIS 10723 (Tex. App. Austin Dec. 15 2006).

90. During the punishment stage of defendant's murder trial, his wife testified that he was a loving husband and a wonderful father; the State was permitted to question defendant's wife about going to the police department to file a report against defendant for assault to rebut her testimony of defendant's good character. Banks v. State, 2006 Tex. App. LEXIS 8901 (Tex. App. Fort Worth Oct. 5 2006).

91. It was not an error for the trial court to overrule defendant's objections, during the punishment phase, to questions the State asked a witness regarding a criminal charge against defendant that had been dismissed because by raising the defensive theory that defendant was a nice guy or of good character, defendant, through the witness, opened the door for the State to cross-examine the witness regarding an extraneous offense if the extraneous offense would tend to correct the false impression left by the witness's direct examination. Romero v. State, 2006 Tex. App. LEXIS 7552 (Tex. App. El Paso Aug. 24 2006).

92. During defendant's trial for cocaine possession, the trial court did not err in not allowing defendant to elicit testimony from his girlfriend that he did not use cocaine as evidence tending to prove that he would not have possessed the cocaine because the testimony was not being offered in the form of reputation or opinion testimony and, thus, was inadmissible character evidence. Norton v. State, 2006 Tex. App. LEXIS 2333 (Tex. App. Houston 14th Dist. Mar. 28 2006).

93. Drug use is not an essential element of the crime of possession of a controlled substance; a defendant may not, therefore, use specific instances of drug use; rather, he may only use reputation or opinion testimony to prove his good character. Norton v. State, 2006 Tex. App. LEXIS 2333 (Tex. App. Houston 14th Dist. Mar. 28 2006).

94. Where a defense witness testified during defendant's indecent exposure trial that defendant's reputation for truthfulness was excellent and that she had never witnessed anything inappropriate about him, under Tex. R. Evid. 405, it was proper for the State to counter that testimony by inquiring whether the witness was familiar with any specific instances of untruthful or inappropriate conduct by defendant. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

95. In connection with defendant's trial for indecency with a child, because defense counsel's questions to defendant's mother inquired about his character for moral and safe relations with small children and young girls, not his general character, the State's questions related to defendant's prior robbery conviction were not relevant for purposes of Tex. R. Evid. 405(a) and were not proper impeachment questions. However, any error was harmless under Tex. R. App. P. 44.2(b) because evidence of the robbery conviction was properly admitted later during defendant's testimony and on cross-examination, it did not appear that defendant was forced to take the stand to explain the robbery conviction, and once defendant took the stand, the State could have impeached defendant's testimony under Tex. R. Evid. 609(a) by introducing evidence of the robbery conviction. Reeders v. State, 2005 Tex. App. LEXIS 7682 (Tex. App. Austin Sept. 14 2005).

96. Trial court did not abuse its discretion by admitting the officers' testimony regarding their opinions of defendant's bad character where, in the officer's 26 years of law enforcement, he was familiar with defendant, he had experience with defendant, and had been familiar with him for "several years." Smith v. State, 2005 Tex. App. LEXIS 6567 (Tex. App. Texarkana Aug. 18 2005).

97. Where defendant was charged with aggravated sexual assault of a child, the court assumed the admission of pornographic photographs of adult women taken from his computer was erroneous. The State argued that

defendant "opened the door" to the admission of the photographs when he told the jury that sexually assaulting a child was against his morals. Breland v. State, 2005 Tex. App. LEXIS 5925 (Tex. App. Fort Worth July 28 2005).

98. Defendant did not place character or reputation at issue through a particular witness's testimony, and thus the State should not have been allowed, under Tex. R. Evid. 405(a), 404(a)(1), to ask the witness "were you aware" questions, and although the court did not approve of the prosecution's arguments, the error was harmless under Tex. R. App. P. 44.2(b) because the error probably did not influence the jury or had only a slight influence on the jury's verdict. Harrison v. State, 2005 Tex. App. LEXIS 5705 (Tex. App. Waco July 20 2005), opinion withdrawn by, substituted opinion at, review dismissed by 2005 Tex. App. LEXIS 8654 (Tex. App. Waco Oct. 19, 2005).

99. Direct testimony regarding specific instances of conduct was not admissible under Tex. R. Evid. 404(a)(1)(A), 405(b) because one's character trait was not an essential element of a theft charge; defendant did not segregate and offer the admissible evidence, and thus the trial court did not err in refusing to admit the evidence in defendant's theft trial under Tex. Penal Code Ann. § 31.03(a). Biagas v. State, 177 S.W.3d 161, 2005 Tex. App. LEXIS 947 (Tex. App. Houston 1st Dist. 2005).

100. Trial court did not abuse its discretion in refusing to admit evidence of the victim's violent character under Tex. R. Evid. 404(a)(2), 405(a) in connection with defendant's murder trial; defendant failed to provide any evidence that connected the victim's previous violent acts with the events leading up to the victim's murder or any evidence that shed light on the victim's state of mind or intention in inciting the altercation with defendant. Toledo v. State, 2004 Tex. App. LEXIS 9596 (Tex. App. El Paso Oct. 28 2004).

101. In a retaliation case, a court properly refused to allow defendant to question the State's character witnesses as to the victim's prior crimes where the remoteness of the prior convictions tended to diminish any potential they might have for impressing the jury in some improper manner, defendant called other witnesses who testified that the victim's character for truthfulness was not good, and thus, his need to cross-examine the State's witnesses regarding the victim's prior convictions was lessened. Moore v. State, 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

102. In defendant's retaliation case, the error in sustaining the State's objection to defendant's impeachment of the State's character witness was harmless; three defense witnesses testified that the victim had a poor character for truthfulness and defendant further impeached the victim with a prior inconsistent statement, but the victim's testimony regarding the elements of the offense was corroborated by several other witnesses, and was contradicted only by defendant's bald denials. Moore v. State, 2004 Tex. App. LEXIS 3017 (Tex. App. Waco Mar. 31 2004), opinion withdrawn by 2004 Tex. App. LEXIS 6584 (Tex. App. Waco July 21, 2004), substituted opinion at 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

103. Testimony of an assistant district attorney regarding her opinion of a defendant's character, which was formed based upon two separate child protective services investigations, was properly admitted during the punishment phase of the trial under Tex. R. Evid. 405(a) where the witness based her opinion on facts that occurred prior to the day of the charged offense and was familiar with the underlying facts or information on which her opinion was based. The State was not required to show that the opinion was based upon a community observation or talking to people in the community. Hollingsworth v. State, 15 S.W.3d 586, 2000 Tex. App. LEXIS 2033 (Tex. App. Austin 2000).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

104. In a trial for sexual assault of a child, the victim's testimony regarding prior incidents of abuse was properly admitted under Tex. Code Crim. Proc. art. 38.37 and Tex. R. Evid. 403, 404, 405. Because defendant had lived with

the victim's family for five years, the extraneous acts evidence helped to support the victim's credibility by placing the events in context. Allred v. State, 2006 Tex. App. LEXIS 3118 (Tex. App. Eastland Apr. 20 2006).

105. In a trial for sexual assault of a child, the victim's testimony regarding prior incidents of abuse was properly admitted; because defendant had lived with the victim's family for five years, the extraneous acts evidence helped to support the victim's credibility by placing the events in context. Allred v. State, 2006 Tex. App. LEXIS 3118 (Tex. App. Eastland Apr. 20 2006).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

106. Defendant's counsel was ineffective for opening the door to allow the State to introduce evidence of his prior convictions of sexual assault and sexual assault of a child by asking defendant's ex-girlfriend whether defendant was a violent person and she responded that he was not; therefore, on cross-examination the State was permitted to ask the ex-girlfriend whether she knew that defendant had pleaded guilty to two prior sexual assaults, allowing prejudicial and otherwise inadmissible evidence to be presented before the jury, which could not be considered sound trial strategy. The court held that defendant was prejudiced because the credibility of defendant's testimony was a key component of his defense strategy, given that he claimed he was trying to get away from the victim and had no intention of hurting anyone; although the trial court gave the jury a limiting instruction as to how it could consider the prior convictions, the instruction specifically allowed the jury to consider the convictions for the sole purpose of determining defendant's character for violence. Hernandez v. State, 2013 Tex. App. LEXIS 6365, 2013 WL 2301989 (Tex. App. Eastland May 23 2013).

107. In a murder trial where defendant claimed he acted in self-defense, the trial court did not err by excluding testimony from a psychologist regarding the victim's acts of violence because the psychologist's knowledge of any acts committed by the victim came entirely from his review of the medical records which were not admitted into evidence. While specific acts of violent conduct committed by a victim were admissible under Tex. R. Evid. 404 and 405 to show the victim was the aggressor and defendant acted in self-defense, the psychologist's testimony that the victim had attacked his doctor and others would not have been relevant for any purpose other than character conformity. Mason v. State, 2012 Tex. App. LEXIS 2314, 2012 WL 1058792 (Tex. App. Eastland Mar. 22 2012).

108. Trial court did not err by refusing to allow defendant to introduce evidence of the meaning of the victim's teardrop tattoo because defendant's determination that he needed to shoot the victim in self-defense could not have been based on apprehension of the victim's previous violent acts or reputation as demonstrated by the tattoo because defendant was unaware of the victim's teardrop tattoo. Hines v. State, 2011 Tex. App. LEXIS 950, 2011 WL 494737 (Tex. App. Houston 1st Dist. Feb. 10 2011).

109. Court properly excluded character evidence because defendant testified that the victim told him "he's been in a lot of fights and that he's been in trouble for fighting." That general statement was not sufficient to establish that defendant was aware that the victim had committed an assault for which he was placed on deferred adjudication community supervision. Evans v. State, 2010 Tex. App. LEXIS 810, 2010 WL 376940 (Tex. App. Waco Feb. 3 2010).

110. In defendant's murder case, the court properly excluded evidence that the victim purportedly was always armed with a gun because defendant failed to satisfy his burden of producing evidence demonstrating his shooting of the victim stemmed from a reasonable belief that the victim was attempting to use unlawful deadly force at that exact moment, the two had no prior relationship, and the trial court did permit defendant to establish that the victim's reputation in the community for violence was bad. Welch v. State, 2009 Tex. App. LEXIS 6292, 2009 WL 2461172 (Tex. App. Beaumont Aug. 12 2009).

111. In defendant's murder case, the court properly excluded evidence that the victim purportedly was always armed with a gun because defendant failed to satisfy his burden of producing evidence demonstrating his shooting of the victim stemmed from a reasonable belief that the victim was attempting to use unlawful deadly force at that exact moment, the two had no prior relationship, and the trial court did permit defendant to establish that the victim's reputation in the community for violence was bad. Welch v. State, 2009 Tex. App. LEXIS 6292, 2009 WL 2461172 (Tex. App. Beaumont Aug. 12 2009).

112. In a case involving aggravated sexual assault of a child, defendant failed to preserve error relating to the admission of testimony from the mother of the victim that the family had moved many times to get away from defendant's violent behavior. Although defendant argued to a trial court that he had not opened the door to evidence of abuse by cross-examining the mother, he did not object that admission of the evidence violated Tex. R. Evid. 403, Tex. R. Evid. 404, and Tex. R. Evid. 405, as he argued on appeal. Gamble v. State, 2009 Tex. App. LEXIS 2134, 2009 WL 806879 (Tex. App. Fort Worth Mar. 27 2009).

113. In an aggravated sexual assault of a child case, the court properly admitted evidence about defendant shoving his son, the complainant's brother, during an argument with the complainant because, although it was not physical violence against the complainant, it occurred within the context of acts of violence by defendant against her and was further evidence of defendant's attempts to keep his son out of the relationship between him and his daughter. Mayer v. State, 2008 Tex. App. LEXIS 9483 (Tex. App. Fort Worth Dec. 18 2008).

114. In a murder trial, there was no error under Tex. R. Evid. 404, 405 in excluding evidence of the victim's gang involvement. Assuming that the victim shot at defendant, doing so was an unambiguous act of aggression and violence that needed no explanation; thus, the proffered testimony did nothing more than show character conformity. London v. State, 325 S.W.3d 197, 2008 Tex. App. LEXIS 9039 (Tex. App. Dallas 2008).

115. Defendant in a methamphetamine possession case failed to show that his counsel was ineffective when evidence of an extraneous offense of manufacture of controlled substance was admitted during the punishment phase under Tex. Code Crim. Proc. Ann. art. 37.07. Counsel only told defendant he would not be indicted for the extraneous offense, not that it was inadmissible. Talbert v. State, 2008 Tex. App. LEXIS 5697 (Tex. App. Eastland July 31 2008).

116. Both character evidence in the form of opinion testimony and extraneous-offense testimony may be admissible during trial, even if the opinion testimony is based on facts brought forth from the extraneous-offense testimony. Sims v. State, 273 S.W.3d 291, 2008 Tex. Crim. App. LEXIS 820 (Tex. Crim. App. 2008).

117. Complainant testified that defendant fondled and kissed her in an escalating fashion when she was between the ages of six and 10, that he felt her under her clothes when she was 10, and that he had sexual intercourse with her when she was 13. Because the testimony was relevant to the state of mind of the complainant and defendant, as well as to the previous and subsequent relationship between the complainant and defendant, pursuant to Tex. Code Crim. Proc. Ann. art. 38.37, § 2, the trial court did not err in admitting the extraneous offense evidence. Parker v. State, 2006 Tex. App. LEXIS 8834 (Tex. App. Houston 1st Dist. Oct. 12 2006).

118. Where a defense witness testified during defendant's indecent exposure trial that defendant's reputation for truthfulness was excellent and that she had never witnessed anything inappropriate about him, under Tex. R. Evid. 405, it was proper for the State to counter that testimony by inquiring whether the witness was familiar with any specific instances of untruthful or inappropriate conduct by defendant. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

119. Where defendant was tried for aiding seven men escape from prison, evidence of the post-escape crimes committed by the seven men bore heavily upon defendant's character and moral blameworthiness; the evidence was admissible to help the jury determine an appropriate sentence for defendant's crimes. Rodriguez v. State, 163 S.W.3d 115, 2005 Tex. App. LEXIS 1084 (Tex. App. San Antonio 2005).

120. Defendant's prior crimes or bad acts could be admissible for other purposes, such as proof of motive, intent, plan, knowledge, or lack of mistake or accident, and when a defendant claimed self-defense, the State could introduce evidence of other violent acts where the defendant was an aggressor in order to show intent, and the appellate court saw no reason to depart from precedent and found that the trial court properly admitted the evidence of the extraneous offenses. Hamilton v. State, 2004 Tex. App. LEXIS 5444 (Tex. App. Beaumont June 16 2004).

Evidence : Relevance : Relevant Evidence

121. Court did not err by refusing to allow defense counsel to cross-examine a police officer about prior incidents in which the officer allegedly used excessive force because the officer's character was not an essential element of the charge, claim, or defense to attempting to take a weapon from a peace officer, and the proffered testimony was not material because it did not address any fact of importance to the outcome of the action. Rico v. State, 2009 Tex. App. LEXIS 4141, 2009 WL 1623343 (Tex. App. Corpus Christi June 11 2009).

122. Where defendant was tried for aiding seven men escape from prison, evidence of the post-escape crimes committed by the seven men bore heavily upon defendant's character and moral blameworthiness; the evidence was admissible to help the jury determine an appropriate sentence for defendant's crimes. Rodriguez v. State, 163 S.W.3d 115, 2005 Tex. App. LEXIS 1084 (Tex. App. San Antonio 2005).

Evidence : Relevance : Sex Offenses : General Overview

123. In an aggravated sexual assault of a child case, the court properly admitted evidence about defendant shoving his son, the complainant's brother, during an argument with the complainant because, although it was not physical violence against the complainant, it occurred within the context of acts of violence by defendant against her and was further evidence of defendant's attempts to keep his son out of the relationship between him and his daughter. Mayer v. State, 2008 Tex. App. LEXIS 9483 (Tex. App. Fort Worth Dec. 18 2008).

Evidence : Relevance : Sex Offenses : Similar Acts

124. In a trial for defendant's sexual assault of his young daughter, there was no error under Tex. R. Evid. 403, 404, 405; Tex. Code Crim. Proc. Ann. art. 37.07, section 3(a) in admitting punishment evidence regarding defendant's sexual activity as a minor with a younger cousin and sibling; the State legitimately could use the evidence to demonstrate that defendant's adult sexual misconduct was deeply rooted in his childhood and not a new manifestation of a recent relapse into drug use. Fox v. State, 2011 Tex. App. LEXIS 1205, 2011 WL 582726 (Tex. App. Fort Worth Feb. 17 2011).

Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview

125. In a trial for child sexual assault, testimony about extraneous acts was properly admitted under Tex. Code Crim. Proc. art. 38.37, notwithstanding Tex. R. Evid. 404 and 405. The testimony from a complainant, defendant's stepdaughter, concerned two sexual encounters and was highly probative of both defendant's intent to engage in the charged offenses and the states of mind of defendant and the stepdaughter. Miller v. State, 2005 Tex. App. LEXIS 6227 (Tex. App. El Paso Aug. 4 2005).

Evidence : Relevance : Sex Offenses : Similar Crimes : Child Molestation Cases

126. In a prosecution for aggravated sexual assault, the trial court did not err in admitting evidence of extraneous acts of child sexual abuse that occurred in another county because the court instructed that the jury could not consider testimony regarding defendant having committed extraneous offenses for any purpose unless it found and believed beyond a reasonable doubt that defendant committed such other offenses and that it could only consider the testimony for the specific purposes listed in the charge, including its bearing on the previous and subsequent relationship between the defendant and the child. Foley v. State, 2013 Tex. App. LEXIS 14638, 2013 WL 6244540 (Tex. App. Dallas Dec. 3 2013).

127. In a trial for sexual assault of a child, the victim's testimony regarding prior incidents of abuse was properly admitted under Tex. Code Crim. Proc. art. 38.37 and Tex. R. Evid. 403, 404, 405. Because defendant had lived with the victim's family for five years, the extraneous acts evidence helped to support the victim's credibility by placing the events in context. Allred v. State, 2006 Tex. App. LEXIS 3118 (Tex. App. Eastland Apr. 20 2006).

128. In a trial for sexual assault of a child, the victim's testimony regarding prior incidents of abuse was properly admitted; because defendant had lived with the victim's family for five years, the extraneous acts evidence helped to support the victim's credibility by placing the events in context. Allred v. State, 2006 Tex. App. LEXIS 3118 (Tex. App. Eastland Apr. 20 2006).

Evidence : Scientific Evidence : Autopsies

129. In an assault trial, it was proper under Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a) and Tex. R. Evid. 405, to admit an autopsy photo of a child victim in a prior manslaughter conviction; although the photograph may have been disturbing, it depicted nothing more than the reality of the crime committed. Aragon v. State, 229 S.W.3d 716, 2007 Tex. App. LEXIS 871 (Tex. App. San Antonio 2007).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview

130. Trial court did not abuse its discretion by admitting the officers' testimony regarding their opinions of defendant's bad character where, in the officer's 26 years of law enforcement, he was familiar with defendant, he had experience with defendant, and had been familiar with him for "several years." Smith v. State, 2005 Tex. App. LEXIS 6567 (Tex. App. Texarkana Aug. 18 2005).

131. In a murder case, evidence of defendant's cocaine dealing was admissible under Tex. R. Evid. 405(a) to rebut character evidence that defendant was not violent. Taylor v. State, 2004 Tex. App. LEXIS 2338 (Tex. App. Waco Mar. 10, 2004).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Opinion & Reputation

132. In a murder trial court, it was error to exclude a defense witness's opinion of a State witness's truthfulness because the opinion was admissible under Tex. R. Evid. 608(a); unlike Tex. R. Evid. 405(a), Tex. R. Evid. 608(a) imposed no requirement, when the witness to be impeached was not the accused, that the impeaching witness be familiar with the reputation of the impeached witness or with the underlying facts or information upon which the opinion was based. Peterson v. State, 2006 Tex. App. LEXIS 10431 (Tex. App. Houston 14th Dist. Dec. 7 2006).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

133. In a murder trial, there was no error in excluding a witness's testimony regarding prior acts of violence against her by the victim to rebut another witness's testimony that he had never known the victim to be violent in the past.

Because of the remoteness of the victim's acts and subsequent conviction, the excluded testimony had less probative value to rebut testimony about a more recent observation of the victim's character. Turner v. State, 413 S.W.3d 442, 2012 Tex. App. LEXIS 6619 (Tex. App. Fort Worth Aug. 9 2012).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview

134. In a murder case in which defendant claimed self-defense, the trial court did not err by excluding evidence of the victim's prior arrest for a possible domestic situation; because nothing in the record showed defendant was aware that the victim had been arrested, the prior conduct was not admissible as "communicated character" evidence. "Uncommunicated character" evidence was available only through reputation and opinion testimony under Tex. R. Evid. 405(a). Pointer v. State, 2013 Tex. App. LEXIS 4658 (Tex. App. Fort Worth Apr. 11 2013).

End of Document

Tex. Evid. R. 406

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 406 Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*.

Case Notes

Contracts Law : Remedies : Specific Performance
Criminal Law & Procedure : Appeals : Procedures : Briefs
Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : General Overview
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof
Evidence : Relevance : Character Evidence
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Routine Practices

LexisNexis (R) Notes

Contracts Law : Remedies : Specific Performance

1. In a collection suit by a creditor that purchased the debt from a credit card company, the trial court did not abuse its discretion in excluding the deposition of the creditor's employee concerning a different case because that

deposition did not pertain to the credit card company. The deposition was not relevant under Tex. R. Evid. 401, 406. Simien v. Unifund Ccr Partners, 2010 Tex. App. LEXIS 2687, 2010 WL 1492267 (Tex. App. Houston 1st Dist. Apr. 15 2010).

Criminal Law & Procedure : Appeals : Procedures : Briefs

2. In a case involving cruelty to animals, defendant failed to adequately brief an error alleging that she was not allowed to present evidence under Tex. R. Evid. 406 regarding her past practice of caring for other animals; defendant did not present any legal authority or citation in support of her assertion that the trial court committed reversible error in denying her presentation of this evidence or that she was prevented from presenting a complete defense, which deprived her of due process. Moreover, she did not address any of the governing legal principles supporting her argument that the trial court committed error nor did she apply them to the facts of the case; also, her conclusory statements that contained no authority presented nothing for appellate review. Vavrecka v. State, 2009 Tex. App. LEXIS 474, 2009 WL 179203 (Tex. App. Houston 14th Dist. Jan. 27 2009).

Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : General Overview

3. State court could not admit testimony concerning the fact that a murder victim had once stopped to help change a stranded motorist's tire under Tex. R. Evid. 406: (1) for purposes of applying that rule, "habit" refers to a specific reaction to a specific set of stimuli that is reflexive, repeated, and invariable in nature; and (2) the testimony referred to one instance involving operative facts that were dissimilar from the action which the prosecution sought to establish, which was that the victim stopped and picked up his hitchhiking killer just prior to his murder. The admission of the evidence, even if erroneous, did not amount to a cognizable U.S. Const. amend. VIII, XIV, violation for purposes of obtaining federal habeas corpus relief for the convicted killer because the evidence was cumulative of other evidence that was admitted without objection at the murder trial. Pursley v. Dretke, 114 Fed. Appx. 630, 2004 U.S. App. LEXIS 24094 (5th Cir. Tex. 2004), writ of certiorari denied by 544 U.S. 986, 125 S. Ct. 1859, 161 L. Ed. 2d 745, 2005 U.S. LEXIS 3133, 73 U.S.L.W. 3620 (2005).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

4. State court could not admit testimony concerning the fact that a murder victim had once stopped to help change a stranded motorist's tire under Tex. R. Evid. 406: (1) for purposes of applying that rule, "habit" refers to a specific reaction to a specific set of stimuli that is reflexive, repeated, and invariable in nature; and (2) the testimony referred to one instance involving operative facts that were dissimilar from the action which the prosecution sought to establish, which was that the victim stopped and picked up his hitchhiking killer just prior to his murder. The admission of the evidence, even if erroneous, did not amount to a cognizable U.S. Const. amend. VIII, XIV, violation for purposes of obtaining federal habeas corpus relief for the convicted killer because the evidence was cumulative of other evidence that was admitted without objection at the murder trial. Pursley v. Dretke, 114 Fed. Appx. 630, 2004 U.S. App. LEXIS 24094 (5th Cir. Tex. 2004), writ of certiorari denied by 544 U.S. 986, 125 S. Ct. 1859, 161 L. Ed. 2d 745, 2005 U.S. LEXIS 3133, 73 U.S.L.W. 3620 (2005).

Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof

5. Defendant's contention that the trial court erred by not allowing her to present testimony regarding her drinking habits was rejected because she testified without objection that she always carried cash for a taxi, had a taxi cab company programmed into her telephone, or shared a ride with another person, and counsel did not make an offer of proof regarding any additional evidence to be admitted. Pierce v. State, 2013 Tex. App. LEXIS 9876 (Tex. App. Dallas Aug. 7 2013).

Evidence : Relevance : Character Evidence

6. Defendant's contention that the trial court erred by not allowing her to present testimony regarding her drinking habits was rejected because she testified without objection that she always carried cash for a taxi, had a taxi cab company programmed into her telephone, or shared a ride with another person, and counsel did not make an offer of proof regarding any additional evidence to be admitted. Pierce v. State, 2013 Tex. App. LEXIS 9876 (Tex. App. Dallas Aug. 7 2013).

Evidence : Relevance : Relevant Evidence

7. In a case in which a client sued an attorney and a law firm for breach of fiduciary duty, fraud, negligence (legal malpractice), and negligent misrepresentation, which was premised on the contention that the trial judge in the underlying action did not tell the attorney the parties would be limited to five days to try the case, the equal inference rule did not apply, and the trial court erred in granting no-evidence summary judgment on that ground because the record as a whole contained sufficient circumstantial evidence to enable a reasonable juror to infer that the alleged conversation in which the judge told the attorney he would limit trial time did not occur. The judge's testimony that it was his habit or practice not to limit the time to try a case, not to engage in substantive conversations about a case with only one side, and not to discuss pending cases in social settings, was evidence tending to make it less probable the purported conversation with the attorney occurred, and the pretrial history of the underlying litigation, together with the judge's testimony, taken as a whole and viewed in the light most favorable to the client, was sufficient to raise a fact issue on whether the judge made the alleged comment to the attorney. Total Clean, Llc v. Cox Smith Matthews, Inc., 330 S.W.3d 657, 2010 Tex. App. LEXIS 8369 (Tex. App. San Antonio Oct. 20 2010).

Evidence : Relevance : Routine Practices

8. During defendant's trial for intentionally or knowingly causing serious bodily injury to a child, his eight-month-old daughter, the court did not err in admitting evidence regarding his habitual alcohol use; evidence that he spoke with his wife that day about getting a divorce, along with evidence showing that he might have been under the influence of alcohol at the time of the incident, brought the admissibility of his behavior while under the influence of alcohol within the zone of reasonable disagreement. Guerrero v. State, 2011 Tex. App. LEXIS 10080, 2011 WL 6808314 (Tex. App. Houston 14th Dist. Dec. 22 2011).

9. Appellees' claimed that evidence of a company president's arrest and his actions was admissible to show intent, but his intent regarding agreements was not an issue in the case, plus nothing represented a routine practice of an organization or a regular response to a repeated situation. Nichols v. State, 349 S.W.3d 612, 2011 Tex. App. LEXIS 7253 (Tex. App. Texarkana Sept. 6 2011).

10. There was no abuse of discretion in the trial court's exclusion of the nurse's testimony, because although the nurse testified that she interacted with the doctor before the incident, she did not state what those interactions entailed, how often they occurred, or whether they consisted of consultations, and such testimony alone certainly did not establish the predicate for the admissibility of evidence of the doctor's habit or routine practice; to the extent that the testimony invoked the doctor's habit or routine practice in participating in consultations after the incident, that testimony would not suffice to establish the doctor's conduct on the day of the incident, as the doctor testified that he changed the way he communicated with nurses concerning consultations after the incident occurred. Ortiz v. Glusman, 334 S.W.3d 812, 2011 Tex. App. LEXIS 1094 (Tex. App. El Paso Feb. 16 2011).

11. In a case in which a client sued an attorney and a law firm for breach of fiduciary duty, fraud, negligence (legal malpractice), and negligent misrepresentation, which was premised on the contention that the trial judge in the underlying action did not tell the attorney the parties would be limited to five days to try the case, the equal inference rule did not apply, and the trial court erred in granting no-evidence summary judgment on that ground because the record as a whole contained sufficient circumstantial evidence to enable a reasonable juror to infer that

the alleged conversation in which the judge told the attorney he would limit trial time did not occur. The judge's testimony that it was his habit or practice not to limit the time to try a case, not to engage in substantive conversations about a case with only one side, and not to discuss pending cases in social settings, was evidence tending to make it less probable the purported conversation with the attorney occurred, and the pretrial history of the underlying litigation, together with the judge's testimony, taken as a whole and viewed in the light most favorable to the client, was sufficient to raise a fact issue on whether the judge made the alleged comment to the attorney. Total Clean, Llc v. Cox Smith Matthews, Inc., 330 S.W.3d 657, 2010 Tex. App. LEXIS 8369 (Tex. App. San Antonio Oct. 20 2010).

12. Employer was not entitled to writ of mandamus to compel arbitration with the employee, because although the employer provided admissible routine practice evidence that it had entered into a binding arbitration agreement with the employee, the employer was unable to provide the trial court with an arbitration agreement signed by the employee; the employer's proof was not conclusive. In re Astro Air, L.P., 2010 Tex. App. LEXIS 7550, 31 I.E.R. Cas. (BNA) 1046 (Tex. App. Tyler Sept. 15 2010).

13. Defendant's conviction for indecency with a child by contact was proper because he presented nothing for review regarding the testimony he sought to elicit on cross-examination and because he failed to establish that any prior allegations of abuse were both false and similar in nature to the allegations at issue in the current case. Thus, the trial court did not abuse its discretion in excluding such evidence. Sosa v. State, 2010 Tex. App. LEXIS 4428, 2010 WL 2330304 (Tex. App. Austin June 10 2010).

14. In a case involving cruelty to animals, defendant failed to adequately brief an error alleging that she was not allowed to present evidence under Tex. R. Evid. 406 regarding her past practice of caring for other animals; defendant did not present any legal authority or citation in support of her assertion that the trial court committed reversible error in denying her presentation of this evidence or that she was prevented from presenting a complete defense, which deprived her of due process. Moreover, she did not address any of the governing legal principles supporting her argument that the trial court committed error nor did she apply them to the facts of the case; also, her conclusory statements that contained no authority presented nothing for appellate review. Vavrecka v. State, 2009 Tex. App. LEXIS 474, 2009 WL 179203 (Tex. App. Houston 14th Dist. Jan. 27 2009).

15. Evidence that the victim's partner believed him to have sex with other men at the victim's clients' homes did not demonstrate a habitual behavior of raping men for purposes of Tex. R. Evid. 406, and thus the trial court did not err in excluding it. Arredondo v. State, 2007 Tex. App. LEXIS 6686 (Tex. App. San Antonio Aug. 22 2007).

16. State court could not admit testimony concerning the fact that a murder victim had once stopped to help change a stranded motorist's tire under Tex. R. Evid. 406: (1) for purposes of applying that rule, "habit" refers to a specific reaction to a specific set of stimuli that is reflexive, repeated, and invariable in nature; and (2) the testimony referred to one instance involving operative facts that were dissimilar from the action which the prosecution sought to establish, which was that the victim stopped and picked up his hitchhiking killer just prior to his murder. The admission of the evidence, even if erroneous, did not amount to a cognizable U.S. Const. amend. VIII, XIV, violation for purposes of obtaining federal habeas corpus relief for the convicted killer because the evidence was cumulative of other evidence that was admitted without objection at the murder trial. Pursley v. Dretke, 114 Fed. Appx. 630, 2004 U.S. App. LEXIS 24094 (5th Cir. Tex. 2004), writ of certiorari denied by 544 U.S. 986, 125 S. Ct. 1859, 161 L. Ed. 2d 745, 2005 U.S. LEXIS 3133, 73 U.S.L.W. 3620 (2005).

17. Where defendant did not establish that the woman carried a knife with any degree of frequency and regularity, the appellate court could not say that the trial court abused its discretion in refusing to admit her testimony as habit evidence since the testimony did not establish that carrying a knife for self-protection was a regular response to a repeated specific situation. Davis v. State, 2004 Tex. App. LEXIS 6400 (Tex. App. Fort Worth July 15 2004), writ of

certiorari denied by 544 U.S. 1038, 125 S. Ct. 2265, 161 L. Ed. 2d 1069, 2005 U.S. LEXIS 4047, 73 U.S.L.W. 3672 (2005).

Tex. Evid. R. 407

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 407 Subsequent Remedial Measures; Notification of Defect

(a) ***Subsequent Remedial Measures.***--When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

-- negligence;

-- culpable conduct;

-- a defect in a product or its design; or

-- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or - if disputed - proving ownership, control, or the feasibility of precautionary measures.

(b) ***Notification of Defect.***--A manufacturer's written notification to a purchaser of a defect in one of its products is admissible against the manufacturer to prove the defect.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Comment to 2015 Restyling: Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Case Notes

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Subsequent Remedial Measures
Torts : Negligence : Proof : Evidence : Prior & Subsequent Events
Torts : Premises Liability & Property : General Premises Liability : Duties of Care : Duty on Premises : Invitees

LexisNexis (R) Notes

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

1. Evidence of subsequent remedial measures was inadmissible under Tex. R. Evid. 407 in a premises liability case because there was no dispute about how the curb should have been painted where the injured party fell; however, the admission of this evidence was harmless error under Tex. R. App. P. 44.1(a) because no contested issue was affected by the ruling. Christus Health Southeast Tex. v. Wilson, 305 S.W.3d 392, 2010 Tex. App. LEXIS 592 (Tex. App. Eastland Jan. 29 2010).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

2. Trial court did not act without guiding rules or principles when it determined that the Taproot Incident Report was inadmissible as a subsequent remedial measure; the report could not be used to show feasibility, there was cumulative evidence to the same effect, and the workers would not suffer unfair prejudice from its exclusion. Belmarez v. Formosa Plastics Corp., 2011 Tex. App. LEXIS 7945, 2011 WL 4696750 (Tex. App. Corpus Christi Sept. 30 2011).

Evidence : Relevance : Subsequent Remedial Measures

3. Claimant presented more than a scintilla of evidence that the property owner exercised control over the sidewalk where the injury occurred, because the claimant presented an invoice from a construction company addressed to the owner with a proposal to repair the sidewalk where the injury occurred, which showed that the owner solicited a bid and possibly undertook to repair the sidewalk after the claimant was injured; evidence of subsequent remedial measures was admissible to prove control when the issue was controverted. Cohen v. Landry's Inc., 442 S.W.3d 818, 2014 Tex. App. LEXIS 9136 (Tex. App. Houston 14th Dist. Aug. 19 2014).

4. Absent a request that the trial court admit evidence of a subsequent remedial measure with a limiting instruction under Tex. R. Evid. 105(b) that the jury could consider it only for the products liability claims, the trial court did not err in not admitting the evidence under Tex. R. Evid. 407(a). Moreover, because the claimants did not argue at trial that the evidence was admissible to show control, they failed to preserve this argument for review under Tex. R. App. P. 33.1. Tidwell v. Terex Corp., 2012 Tex. App. LEXIS 7724 (Tex. App. Houston 1st Dist. Aug. 30 2012).

5. In a negligence suit under the Jones Act, 46 U.S.C.S. § 30104, the trial court abused its discretion because it prohibited an injured seaman who slipped and fell on deck from impeaching the captain under Tex. R. Evid. 407(a) by questioning him about the subsequent painting of the boat's entire wooden deck with non-skid paint. The exclusion of this evidence was harmful, as the seaman was unable to effectively counter the false impression that non-skid paint should not be used on wooden decks. Hewitt v. Ryan Marine Servs., 2012 Tex. App. LEXIS 6808, 2012 WL 3525408 (Tex. App. Houston 14th Dist. Aug. 16 2012).

6. Trial court did not act without guiding rules or principles when it determined that the Taproot Incident Report was inadmissible as a subsequent remedial measure; the report could not be used to show feasibility, there was cumulative evidence to the same effect, and the workers would not suffer unfair prejudice from its exclusion. Belmarez v. Formosa Plastics Corp., 2011 Tex. App. LEXIS 7945, 2011 WL 4696750 (Tex. App. Corpus Christi

Sept. 30 2011).

7. In a product liability action against a tire manufacturer, the trial court was within its discretion in excluding evidence regarding nylon cap plies; the trial court was free to conclude that the feasibility exception in Tex. R. Evid. 407(a) did not apply since there was no testimony or other evidence demonstrating that the addition of a nylon cap ply, at some point after the accident, could have established the feasibility of a safer alternative design in 1997. Hathcock v. Hankook Tire Am. Corp., 330 S.W.3d 733, 2010 Tex. App. LEXIS 10032 (Tex. App. Texarkana Dec. 17 2010).

8. In a product liability action, evidence of recall letters regarding a prescription pain patch were properly admissible in evidence under Tex. R. Evid. 407(b) for the purpose of determining whether the defect identified by a family's expert witnesses existed when the drug manufacturer put the patch into the decedent's hands. Alza Corp. v. Thompson, 2010 Tex. App. LEXIS 2347, 2010 WL 1254610 (Tex. App. Corpus Christi Apr. 1 2010).

9. Tex. R. Evid. 407(b) allows a written ratification by a manufacturer of a product defect to be admitted against the manufacturer on the issue of existence of the defect to the extent that it is relevant. The fact that recall letters are admissible is settled by the existence of Rule 407(b).. Alza Corp. v. Thompson, 2010 Tex. App. LEXIS 2347, 2010 WL 1254610 (Tex. App. Corpus Christi Apr. 1 2010).

10. Evidence of subsequent remedial measures was inadmissible under Tex. R. Evid. 407 in a premises liability case because there was no dispute about how the curb should have been painted where the injured party fell; however, the admission of this evidence was harmless error under Tex. R. App. P. 44.1(a) because no contested issue was affected by the ruling. Christus Health Southeast Tex. v. Wilson, 305 S.W.3d 392, 2010 Tex. App. LEXIS 592 (Tex. App. Eastland Jan. 29 2010).

11. In a premises liability suit, evidence of subsequent remedial measures taken by a store following a customer's injuries was inadmissible to show liability under Tex. R. Evid. 407; thus, the customer failed to show that the store had actual or constructive knowledge of the allegedly dangerous condition. Clark v. Lowe's Home Ctrs., Inc., 2007 Tex. App. LEXIS 9106 (Tex. App. Houston 1st Dist. Nov. 15 2007).

12. Evidence of subsequent remedial measures should not have been admitted to impeach the maintenance supervisor for the Texas Department of Transportation since the survivors tendered his testimony, however, the error in admitting other evidence of the subsequent remedial measures was rendered harmless because the survivors' exhibits, both in evidence after the Department's utterance of "no objection" to them, showed the trees, their location, and the sight lines before and after the trees were cut. While the two exhibits did not explicitly demonstrate that the Department cut the trees, a logical deduction was, and the jury could have properly concluded that, the trees, on the Department right-of-way, had been removed by the Department, and any error was rendered harmless if the objecting party subsequently permitted the same or similar evidence to be introduced without objection. Tex. DOT v. Pate, 170 S.W.3d 840, 2005 Tex. App. LEXIS 6484 (Tex. App. Texarkana 2005).

Torts : Negligence : Proof : Evidence : Prior & Subsequent Events

13. In a negligence suit under the Jones Act, 46 U.S.C.S. § 30104, the trial court abused its discretion because it prohibited an injured seaman who slipped and fell on deck from impeaching the captain under Tex. R. Evid. 407(a) by questioning him about the subsequent painting of the boat's entire wooden deck with non-skid paint. The exclusion of this evidence was harmful, as the seaman was unable to effectively counter the false impression that non-skid paint should not be used on wooden decks. Hewitt v. Ryan Marine Servs., 2012 Tex. App. LEXIS 6808, 2012 WL 3525408 (Tex. App. Houston 14th Dist. Aug. 16 2012).

Torts : Premises Liability & Property : General Premises Liability : Duties of Care : Duty on Premises : Invitees

14. In a premises liability suit, evidence of subsequent remedial measures taken by a store following a customer's injuries was inadmissible to show liability under Tex. R. Evid. 407; thus, the customer failed to show that the store had actual or constructive knowledge of the allegedly dangerous condition. Clark v. Lowe's Home Ctrs., Inc., 2007 Tex. App. LEXIS 9106 (Tex. App. Houston 1st Dist. Nov. 15 2007).

Tex. Evid. R. 408

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 408 Compromise Offers and Negotiations

(a) ***Prohibited Uses.***--Evidence of the following is not admissible either to prove or disprove the validity or amount of a disputed claim:

(1)furnishing, promising, or offering - or accepting, promising to accept, or offering to accept - a valuable consideration in compromising or attempting to compromise the claim; and

(2)conduct or statements made during compromise negotiations about the claim.

(b) ***Permissible Uses.***--The court may admit this evidence for another purpose, such as proving a party's or witness's bias, prejudice, or interest, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Comment to 2015 Restyling: Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

The reference to "liability" has been deleted on the ground that the deletion makes the Rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

Finally, the sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

Case Notes

Civil Procedure : Discovery : Relevance
Civil Procedure : Settlements : Settlement Agreements : General Overview
Civil Procedure : Pretrial Matters : Separate Trials
Civil Procedure : Trials : Closing Arguments : General Overview
Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Evidence : Relevance : Compromise & Settlement Negotiations
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Pleas & Related Statements
Evidence : Relevance : Relevant Evidence
Evidence : Scientific Evidence : Polygraphs
Family Law : Child Custody : Procedures
Healthcare Law : Business Administration & Organization : Peer Review : General Overview
Insurance Law : Bad Faith & Extracontractual Liability : General Overview
Real Property Law : Property Valuation
Torts : Malpractice & Professional Liability : Healthcare Providers

LexisNexis (R) Notes

Civil Procedure : Discovery : Relevance

1. Because settlement agreements were directly relevant to the settlement credit under Tex. Civ. Prac. & Rem. Code Ann. § 33.012 and to potential witness bias under Tex. R. Evid. 408, their discovery by a non-settling defendant was authorized by Tex. R. Civ. P. 192.3(g), and production was required under Tex. R. Civ. P. 194.2(h), 194.3. Mandamus relief was appropriate from the partial denial of a motion to compel discovery because there was no adequate remedy on appeal. In re Univar USA, Inc., 311 S.W.3d 175, 2010 Tex. App. LEXIS 2907 (Tex. App. Beaumont Apr. 21 2010).

Civil Procedure : Settlements : Settlement Agreements : General Overview

2. Because the bus company sought to prove that the truck driver had an incentive to lie about the accident because he was a party-defendant to the suit at the time he gave his deposition testimony but had settled before the time of trial, it was not improper for the plaintiffs' counsel to argue that the truck driver had no incentive to lie about his recollection of events under this rule. Via Metro. Transit Auth. v. Barraza, 2013 Tex. App. LEXIS 14609, 2013 WL 6255761 (Tex. App. San Antonio Dec. 4 2013).

Civil Procedure : Pretrial Matters : Separate Trials

3. Because an insurer had offered to settle in full its insured's contract claims for underinsured motorist coverage, severance of the insured's claims under the policy from her extra-contractual bad faith claims was required to avoid the unfair dilemma of whether the insurer should include or exclude evidence of its settlement offer.

4. In a case against an insurer, a trial court abused its discretion in refusing to sever a contract claim from extracontractual claims because: (1) the claims were not inextricably intertwined; and (2) evidence of a settlement offer by the insurer would not be admissible on the contract claim under Tex. R. Evid. 408, and thus a fair trial on the contract claim would become unlikely. In re Allstate Ins. Co., 232 S.W.3d 340, 2007 Tex. App. LEXIS 6428 (Tex. App. Tyler 2007).

5. Trial court erred in denying an insurer's motion to sever and abate a bad faith claim from a contract claim; because the insurer had made a settlement offer on the contract claim, severance and abatement were required to protect the insurer's right to exclude evidence of an offer to compromise as to the contract claim. In re Progressive County Mut. Ins. Co., 2007 Tex. App. LEXIS 889 (Tex. App. Beaumont Feb. 8 2007).

Civil Procedure : Trials : Closing Arguments : General Overview

6. Because the bus company sought to prove that the truck driver had an incentive to lie about the accident because he was a party-defendant to the suit at the time he gave his deposition testimony but had settled before the time of trial, it was not improper for the plaintiffs' counsel to argue that the truck driver had no incentive to lie about his recollection of events under this rule. Via Metro. Transit Auth. v. Barraza, 2013 Tex. App. LEXIS 14609, 2013 WL 6255761 (Tex. App. San Antonio Dec. 4 2013).

Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials

7. Agreed order in a medical disciplinary proceeding, which specified that it was a settlement agreement, was inadmissible in a medical malpractice case and thus did not constitute newly discovered evidence for purposes of a new trial. Allen v. Scott, 2008 Tex. App. LEXIS 572 (Tex. App. Amarillo Jan. 25 2008).

Civil Procedure : Appeals : Reviewability : Preservation for Review

8. In a personal injury case, failure to object waived a claim that statements made in compromise negotiations were inadmissible and were improperly admitted at a hearing on a motion to dismiss; an objection was required to preserve error, as provided in Tex. R. Evid. 408. Hamrick v. Lopez, 2007 Tex. App. LEXIS 8113 (Tex. App. Beaumont Oct. 11 2007).

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

9. Trial court did not abuse its discretion by excluding the property owner's May 12 letter from evidence under Tex. R. Evid. 408 because it was not a demand letter sufficient to trigger a forfeiture under the terms of the lease but rather was part of a settlement demand offered solely to prove the oil company's liability for forfeiture of the leases. Vinson Minerals, Ltd. v. Xto Energy, Inc., 335 S.W.3d 344, 2010 Tex. App. LEXIS 9970, 179 Oil & Gas Rep. 1058 (Tex. App. Fort Worth 2010).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

10. Regardless of whether there was a basis on which the trial court could have admitted appellees' evidence of either settlement offer, appellees failed to explain how, under the circumstances, the exclusion of its proposed settlement offers probably caused the rendition of an improper judgment, as the jury awarded appellant damages well in excess of the settlement offers, and therefore, to the extent that there was any error in the exclusion of the settlement offers, such error was harmless. Wps, Inc. v. Expro Ams., Llc, 369 S.W.3d 384, 2012 Tex. App. LEXIS 892, 2012 WL 310937 (Tex. App. Houston 1st Dist. Jan. 31 2012).

Evidence : Relevance : Compromise & Settlement Negotiations

11. Documents relating to settlement negotiations were admissible to prove notice in an insurance coverage dispute. The documents could not be construed as a concession by either party and were not offered as evidence of an agreement acknowledging liability. Certain Underwriters at Lloyd's v. Chi. Bridge & Iron Co., 406 S.W.3d 326, 2013 Tex. App. LEXIS 7856, 2013 WL 3270615 (Tex. App. Beaumont June 27 2013).

12. Trial court did not abuse its discretion in appellant driver's personal injury action by allowing a line of questioning pertaining to his ability to pay for future medical care for his injuries because appellant was not asked, and no evidence was admitted that showed that he settled with other defendants before trial or the amount of the settlement. Moreover, because appellant had raised the issue of his ability to pay on direct examination, the defense's questions challenging his stated reason on direct for the delay in treatment-inability to pay-were relevant for impeachment purposes, and why he delayed medical treatments was contested and relevant as to the appropriate amount of several categories of damages. Kosaka v. Hook & Anchor Marine & Watersports, LLC, 2012 Tex. App. LEXIS 9487, 2012 WL 5476844 (Tex. App. Austin Nov. 8 2012).

13. Under Tex. R. Evid. 408, the trial court did not err by admitting evidence that the contractor's buyer had ratified the lines transfer; the lines transfer was ratified in relation to all individuals and entities, including the creditors such as the contractor. Citizens Nat'l Bank of Tex. v. Nxs Constr., Inc., 387 S.W.3d 74, 2012 Tex. App. LEXIS 9059 (Tex. App. Houston 14th Dist. Nov. 1 2012).

14. In appellee's action to establish that he was the record title owner of mineral estates, appellant introduced two correspondence packets from appellee's attorney. The correspondence was not inadmissible under Tex. R. Evid. 408, because the letters were clarifications of appellee's claims rather than offers of settlement or compromise. El Paso Prod. Oil & Gas Usa, L.P. v. Sellers, 2012 Tex. App. LEXIS 6154, 2012 WL 3041327 (Tex. App. Corpus Christi July 26 2012).

15. In defendant's trial for possession of a controlled substance and endangering a child, the trial court did not err in admitting a polygraph examiner's testimony about defendant's pre-test statement. The statement was not inadmissible under Tex. R. Evid. 408, because Rule 408 was not applicable to any agreement between the State and defendant concerning her polygraph examination. Herbert v. State, 2012 Tex. App. LEXIS 3126, 2012 WL 1366576 (Tex. App. Waco Apr. 18 2012).

16. Regardless of whether there was a basis on which the trial court could have admitted appellees' evidence of either settlement offer, appellees failed to explain how, under the circumstances, the exclusion of its proposed settlement offers probably caused the rendition of an improper judgment, as the jury awarded appellant damages well in excess of the settlement offers, and therefore, to the extent that there was any error in the exclusion of the settlement offers, such error was harmless. Wps, Inc. v. Expro Ams., Llc, 369 S.W.3d 384, 2012 Tex. App. LEXIS 892, 2012 WL 310937 (Tex. App. Houston 1st Dist. Jan. 31 2012).

17. For purposes of Tex. R. Evid.408, an owner's settlement offer was offered to show that he attempted to pay his overdue assessments, late fees, and attorney fees, and the trial court did not abuse its discretion in admitting evidence of the offer; moreover, the same evidence was admitted earlier without objection, and even if the trial court abused its discretion, the issue was not preserved for appeal under Tex. R. App. P. 33.1(a). Hidden Forest Homeowners Ass'n v. Hern, 2011 Tex. App. LEXIS 4313, 2011 WL 2238563 (Tex. App. San Antonio June 8 2011).

18. Trial court did not abuse its discretion by excluding the property owner's May 12 letter from evidence under Tex. R. Evid. 408 because it was not a demand letter sufficient to trigger a forfeiture under the terms of the lease but rather was part of a settlement demand offered solely to prove the oil company's liability for forfeiture of the leases. Vinson Minerals, Ltd. v. Xto Energy, Inc., 335 S.W.3d 344, 2010 Tex. App. LEXIS 9970, 179 Oil & Gas Rep.

1058 (Tex. App. Fort Worth 2010).

19. Defendant failed to preserve for review her assertion that the trial court erred in failing to hold a hearing on the voluntariness of her confession, because the issue regarding the voluntariness of the confession was not raised, the record revealed that the subject of defendant's confession was not mentioned during the pre-trial hearing, and trial counsel's initial objection did not put the trial court on notice that defendant was seeking to contest the voluntariness of her confession; nothing in Tex. R. Evid. 408 mentioned, alluded to, or could be considered to encompass the voluntariness of a confession. Crittenden v. State, 2010 Tex. App. LEXIS 3049 (Tex. App. Amarillo Apr. 23 2010).

20. Because settlement agreements were directly relevant to the settlement credit under Tex. Civ. Prac. & Rem. Code Ann. § 33.012 and to potential witness bias under Tex. R. Evid. 408, their discovery by a non-settling defendant was authorized by Tex. R. Civ. P. 192.3(g), and production was required under Tex. R. Civ. P. 194.2(h), 194.3. Mandamus relief was appropriate from the partial denial of a motion to compel discovery because there was no adequate remedy on appeal. In re Univar USA, Inc., 311 S.W.3d 175, 2010 Tex. App. LEXIS 2907 (Tex. App. Beaumont Apr. 21 2010).

21. In a case alleging negligent spraying of herbicide, the trial court's exclusion from evidence of a notice of violation, findings, and an order issued by the Texas Agriculture Commission could have been proper under either Tex. R. Evid. 403 because the evidence was potentially confusing or under Tex. R. Evid. 408 because it involved a settlement. Davis v. Jordan, 305 S.W.3d 895, 2010 Tex. App. LEXIS 1151 (Tex. App. Amarillo Feb. 17 2010).

22. In a father's suit to modify the parent-child relationship, the trial court did not err in allowing the mother's counsel to reference negotiations related to the parties' agreed modification of the property settlement provisions of their divorce decree because while settlement negotiations were inadmissible to prove a party's liability, they could be admitted for other reasons, such as establishing a party's state of mind. The statements at issue referred to a post-divorce agreed modification of the divorce decree, in which the mother agreed to release the father from a large portion of his financial obligations under the decree, and the mother took the position at trial that she had done so in an attempt to maintain a cooperative relationship for the child's sake after the parties' divorce. Silverman v. Johnson, 2009 Tex. App. LEXIS 7176, 2009 WL 2902716 (Tex. App. Austin Aug. 26 2009).

23. Although a lottery commission maintained that settlement letters were expressly excepted from disclosure under Tex. Gov't Code Ann. § 552.101 because they contained information considered confidential by judicial decision, there is, however, no judicially recognized privilege exempting settlement negotiations from disclosure, nor do Texas courts recognize a common-law right to withhold settlement negotiations as confidential communications; although settlement negotiations are inadmissible at trial to prove liability for or invalidity of a claim or its amount under Tex. R. Evid. 408, they are admissible for other purposes and are not exempt from discovery under the rules of civil procedure or evidence, as Tex. R. Civ. P. 192.3 allowed discovery of matters not privileged that were relevant and Tex. R. Evid. 408, 501-513 identified discovery privileges, none of which protects settlement negotiations. Abbott v. Gametech Int'l, Inc., 2009 Tex. App. LEXIS 4554, 2009 WL 1708815 (Tex. App. Austin June 17 2009).

24. Agreed order in a medical disciplinary proceeding, which specified that it was a settlement agreement, was inadmissible in a medical malpractice case and thus did not constitute newly discovered evidence for purposes of a new trial. Allen v. Scott, 2008 Tex. App. LEXIS 572 (Tex. App. Amarillo Jan. 25 2008).

25. In a personal injury case, failure to object waived a claim that statements made in compromise negotiations were inadmissible and were improperly admitted at a hearing on a motion to dismiss; an objection was required to preserve error, as provided in Tex. R. Evid. 408. Hamrick v. Lopez, 2007 Tex. App. LEXIS 8113 (Tex. App.

Beaumont Oct. 11 2007).

26. In a case against an insurer, a trial court abused its discretion in refusing to sever a contract claim from extracontractual claims because: (1) the claims were not inextricably intertwined; and (2) evidence of a settlement offer by the insurer would not be admissible on the contract claim under Tex. R. Evid. 408, and thus a fair trial on the contract claim would become unlikely. In re Allstate Ins. Co., 232 S.W.3d 340, 2007 Tex. App. LEXIS 6428 (Tex. App. Tyler 2007).

27. In this bench trial in which an employer challenged the reasonableness of the number of hours worked by the employee's attorney for attorney fee purposes under the Fair Labor Standards Act, the court was unable to find that the trial court abused its discretion by finding relevant settlement offers on the matter of whether the attorney's claim of the number of hours he worked was reasonable. Vernon v. CAC Distribs., 2007 Tex. App. LEXIS 6294 (Tex. App. Houston 1st Dist. Aug. 9 2007).

28. Evidence was offered for aiding the trial court in determining the reasonableness of attorney fees under the Fair Labor Standards Act and the court was unable to conclude that the trial court abused its discretion by determining that Tex. R. Evid. 408 did not prohibit the admission of settlement negotiations on the limited matter of the reasonableness of the number of hours worked by the attorney; the trial court did not err in finding that Tex. R. Evid. 408 was not violated. Vernon v. CAC Distribs., 2007 Tex. App. LEXIS 6294 (Tex. App. Houston 1st Dist. Aug. 9 2007).

29. Tex. R. Evid. 408 does not require exclusion when the evidence is offered for another purpose. Vernon v. CAC Distribs., 2007 Tex. App. LEXIS 6294 (Tex. App. Houston 1st Dist. Aug. 9 2007).

30. Denial of the relator's motion to sever was improper pursuant to Tex. R. Civ. P. 41 and 174(b) where the trial of the contractual claims, along with the bad faith claims would not have afforded the relator an adequate remedy by appeal. Given that the fact finder must consider the promptness of the relator's attempt to settle the claim in deciding the bad faith issue, the court was unpersuaded by the real parties' assertion that the settlement offer was irrelevant to the bad faith claim, Tex. R. Evid. 408. In re Allstate Tex. Lloyd's, 2005 Tex. App. LEXIS 7333 (Tex. App. Houston 14th Dist. Sept. 2 2005).

31. With respect to breach of contract and promissory estoppel claims, a letter written in connection with the settlement of an unrelated lawsuit was relevant and admissible under Tex. R. Evid. 401, 402 as proof of an agreement to pay a claimed sum; hence, it was not barred by Tex. R. Evid. 408. MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc., 179 S.W.3d 51, 2005 Tex. App. LEXIS 5796 (Tex. App. San Antonio 2005).

32. In property owners' suit against an oil and gas lessee to recover damages caused to their surface estate by the lessee's operations at and reentry of an abandoned oil and gas well, the trial court had not erred in allowing the introduction of an unsolicited and unaccepted offer by the lessee to purchase one of the tracts of land as evidence of market value of the property because the offer did not constitute an inadmissible offer of settlement under Tex. R. Evid. 408. The offer stated specifically that it was not a settlement offer and did not ask the owners to compromise their claim in any way. Mieth v. Ranchquest, Inc., 2004 Tex. App. LEXIS 11938 (Mar. 17, 2004).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

33. Trial court properly excluded evidence in defendant's trial for capital murder that defendant was offered a plea bargain of 55 years where such evidence was more prejudicial than probative because the different motives for the offer would confuse the jury. Prystash v. State, 3 S.W.3d 522, 1999 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 1999).

Evidence : Relevance : Pleas & Related Statements

34. Trial court properly excluded evidence in defendant's trial for capital murder that defendant was offered a plea bargain of 55 years where such evidence was more prejudicial than probative because the different motives for the offer would confuse the jury. Prystash v. State, 3 S.W.3d 522, 1999 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 1999).

Evidence : Relevance : Relevant Evidence

35. Trial court did not abuse its discretion in appellant driver's personal injury action by allowing a line of questioning pertaining to his ability to pay for future medical care for his injuries because appellant was not asked, and no evidence was admitted that showed that he settled with other defendants before trial or the amount of the settlement. Moreover, because appellant had raised the issue of his ability to pay on direct examination, the defense's questions challenging his stated reason on direct for the delay in treatment-inability to pay-were relevant for impeachment purposes, and why he delayed medical treatments was contested and relevant as to the appropriate amount of several categories of damages. Kosaka v. Hook & Anchor Marine & Watersports, LLC, 2012 Tex. App. LEXIS 9487, 2012 WL 5476844 (Tex. App. Austin Nov. 8 2012).

36. With respect to breach of contract and promissory estoppel claims, a letter written in connection with the settlement of an unrelated lawsuit was relevant and admissible under Tex. R. Evid. 401, 402 as proof of an agreement to pay a claimed sum; hence, it was not barred by Tex. R. Evid. 408. MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc., 179 S.W.3d 51, 2005 Tex. App. LEXIS 5796 (Tex. App. San Antonio 2005).

Evidence : Scientific Evidence : Polygraphs

37. In defendant's trial for possession of a controlled substance and endangering a child, the trial court did not err in admitting a polygraph examiner's testimony about defendant's pre-test statement. The statement was not inadmissible under Tex. R. Evid. 408, because Rule 408 was not applicable to any agreement between the State and defendant concerning her polygraph examination. Herbert v. State, 2012 Tex. App. LEXIS 3126, 2012 WL 1366576 (Tex. App. Waco Apr. 18 2012).

Family Law : Child Custody : Procedures

38. In a father's suit to modify the parent-child relationship, the trial court did not err in allowing the mother's counsel to reference negotiations related to the parties' agreed modification of the property settlement provisions of their divorce decree because while settlement negotiations were inadmissible to prove a party's liability, they could be admitted for other reasons, such as establishing a party's state of mind. The statements at issue referred to a post-divorce agreed modification of the divorce decree, in which the mother agreed to release the father from a large portion of his financial obligations under the decree, and the mother took the position at trial that she had done so in an attempt to maintain a cooperative relationship for the child's sake after the parties' divorce. Silverman v. Johnson, 2009 Tex. App. LEXIS 7176, 2009 WL 2902716 (Tex. App. Austin Aug. 26 2009).

Healthcare Law : Business Administration & Organization : Peer Review : General Overview

39. Determining whether an appeal regarding the sufficiency of an expert report under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(l) is frivolous, when the doctor has agreed to be sanctioned for the conduct at issue, does not relate to liability or validity of the claim or amount, and is therefore a permissible purpose for which a settlement agreement can be considered under Tex. Occ. Code Ann. § 164.002(d) and Tex. R. Evid. 408. Even considering

such a settlement agreement, a doctor asserted reasonable grounds and therefore his appeal was not frivolous. Kloeris v. Stockdale, 2010 Tex. App. LEXIS 2317, 2010 WL 1241305 (Tex. App. Houston 1st Dist. Apr. 1 2010).

Insurance Law : Bad Faith & Extracontractual Liability : General Overview

40. Because an insurer had offered to settle in full its insured's contract claims for underinsured motorist coverage, severance of the insured's claims under the policy from her extra-contractual bad faith claims was required to avoid the unfair dilemma of whether the insurer should include or exclude evidence of its settlement offer.

41. Trial court erred in denying an insurer's motion to sever and abate a bad faith claim from a contract claim; because the insurer had made a settlement offer on the contract claim, severance and abatement were required to protect the insurer's right to exclude evidence of an offer to compromise as to the contract claim. In re Progressive County Mut. Ins. Co., 2007 Tex. App. LEXIS 889 (Tex. App. Beaumont Feb. 8 2007).

Real Property Law : Property Valuation

42. Defendant's unaccepted offer to purchase permanently damaged property for its full value stated that it was not a settlement offer; because it was not a settlement offer, it did not have to be excluded under Tex. R. Evid. 408. However, the offer was irrelevant to the issue of fair market value and should have been excluded for that reason. Mieth v. Ranchquest, Inc., 2004 Tex. App. LEXIS 4601 (Tex. App. Houston 1st Dist. May 20 2004), opinion withdrawn by, substituted opinion at 177 S.W.3d 296, 2005 Tex. App. LEXIS 2079 (Tex. App. Houston 1st Dist. 2005).

Torts : Malpractice & Professional Liability : Healthcare Providers

43. Determining whether an appeal regarding the sufficiency of an expert report under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(l) is frivolous, when the doctor has agreed to be sanctioned for the conduct at issue, does not relate to liability or validity of the claim or amount, and is therefore a permissible purpose for which a settlement agreement can be considered under Tex. Occ. Code Ann. § 164.002(d) and Tex. R. Evid. 408. Even considering such a settlement agreement, a doctor asserted reasonable grounds and therefore his appeal was not frivolous. Kloeris v. Stockdale, 2010 Tex. App. LEXIS 2317, 2010 WL 1241305 (Tex. App. Houston 1st Dist. Apr. 1 2010).

End of Document

Tex. Evid. R. 409

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS RULES OF EVIDENCE > ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 409 Offers to Pay Medical and Similar Expenses

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Case Notes

Evidence : Relevance : Payment of Medical Expenses
Workers' Compensation & SSDI : Coverage : Actions Against Employers : General Overview

LexisNexis (R) Notes

Evidence : Relevance : Payment of Medical Expenses

1. Under Tex. R. Evid. 409, a tortfeasor may voluntarily pay the person it injures, and the payment cannot then be asserted as an admission that the tortfeasor was negligent. Therefore, the payments to the employee for medical and lost wages, and the employee's acceptance of them, did not raise evidence sufficient to prohibit the employee from enforcing the terms of the written agreement, in which he did not waive his right to sue the hospital. Silsbee Hosp., Inc. v. George, 163 S.W.3d 284, 2005 Tex. App. LEXIS 3236 (Tex. App. Beaumont 2005).

Workers' Compensation & SSDI : Coverage : Actions Against Employers : General Overview

2. Under Tex. R. Evid. 409, a tortfeasor may voluntarily pay the person it injures, and the payment cannot then be asserted as an admission that the tortfeasor was negligent. Therefore, the payments to the employee for medical and lost wages, and the employee's acceptance of them, did not raise evidence sufficient to prohibit the employee from enforcing the terms of the written agreement, in which he did not waive his right to sue the hospital. Silsbee Hosp., Inc. v. George, 163 S.W.3d 284, 2005 Tex. App. LEXIS 3236 (Tex. App. Beaumont 2005).

End of Document

Tex. Evid. R. 410

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 410 Pleas, Plea Discussions, and Related Statements

(a) ***Prohibited Uses in Civil Cases.***--In a civil case, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(1)a guilty plea that was later withdrawn;

(2)a nolo contendere plea;

(3)a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4)a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) ***Prohibited Uses in Criminal Cases.***--In a criminal case, evidence of the following is not admissible against the defendant who made the plea or was a participant in the plea discussions:

(1)a guilty plea that was later withdrawn;

(2)a nolo contendere plea that was later withdrawn;

(3)a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or

(4)a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty or nolo contendere plea or they resulted in a later-withdrawn guilty or nolo contendere plea.

(c) ***Exception.***--In a civil case, the court may admit a statement described in paragraph (a)(3) or (4) and in a criminal case, the court may admit a statement described in paragraph (b)(3) or (4), when another statement made during the same plea or plea discussions has been introduced and in fairness the statements ought to be considered together.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Case Notes

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Perjury : General Overview
Criminal Law & Procedure : Guilty Pleas : General Overview
Criminal Law & Procedure : Guilty Pleas : Admissibility at Trial
Criminal Law & Procedure : Guilty Pleas : Changes & Withdrawals
Criminal Law & Procedure : Guilty Pleas : No Contest Pleas
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview
Criminal Law & Procedure : Appeals : Reversible Errors : Prosecutorial Misconduct
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Judicial Admissions : General Overview
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Pleas & Related Statements
Evidence : Relevance : Relevant Evidence
Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility

LexisNexis (R) Notes

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Perjury : General Overview

1. PlPlea bargaining is statutorily recognized in Texas under Tex. Code Crim. P. art. 26.13(a)(2), but a "timely pass for plea" procedure, in which a defendant charged with murder entered a plea of guilty, and the trial court heard the case on stipulated facts, then announced a proposed decision with defendant being allowed to withdraw the plea if he was unhappy with the sentence, was not the equivalent of a plea negotiation within the meaning of Fed. R. Crim. P. 11, and defendant's statements made during the proceeding which directly contradicted his statements before the grand jury which returned the murder indictment were not inadmissible under Tex. R. Evid. 410(3) as being made during plea negotiations and could be used against defendant in a prosecution for aggravated perjury. State v. Bowie, 137 S.W.3d 95, 2003 Tex. App. LEXIS 1902 (Tex. App. Tyler 2003), reversed by 135 S.W.3d 55, 2004 Tex. Crim. App. LEXIS 898 (Tex. Crim. App. 2004), questioned by Rush v. State, 2005 Tex. App. LEXIS 8146 (Tex. App. Tyler Sept. 30, 2005).

Criminal Law & Procedure : Guilty Pleas : General Overview

2. Defendant's murder conviction was proper because he was not permitted to argue for the first time on appeal that the recordings at issues contained statements about plea bargaining in violation of Tex. R. Evid. 410. Capps v. State, 244 S.W.3d 520, 2007 Tex. App. LEXIS 9602 (Tex. App. Fort Worth 2007).

Criminal Law & Procedure : Guilty Pleas : Admissibility at Trial

3. Trial court did not abuse its discretion in admitting defendant's letter to an officer regarding his plea agreement because the statements were not covered by Tex. R. Evid. 410. In addition, the letter's probative value was not

substantially outweighed by the risk of unfair prejudice under Tex. R. Evid. 403 because: (1) the letter was probative of whether defendant committed the charged offense; (2) given the brevity and clarity of the letter and the fact that it was directly related to the charged offense, the amount of time required to develop it was negligible; and (3) the letter was important to the prosecution's case and had a significant tendency to make defendant's guilt more probable. Willis v. State, 2010 Tex. App. LEXIS 5931, 2010 WL 2935772 (Tex. App. San Antonio July 28 2010).

4. Admission at trial of a stipulation that defendant signed in conjunction with a prior guilty plea was reversible error because his sworn testimony bolstered the victim's testimony, discredited his alibi, and was magnified by the prosecutor's rebuttal argument. Johnson v. State, 2004 Tex. App. LEXIS 10628 (Tex. App. Tyler Nov. 24 2004).

Criminal Law & Procedure : Guilty Pleas : Changes & Withdrawals

5. In a case where defendant pleaded guilty, but later succeeded in having his plea withdrawn, Tex. R. Evid. 410(3) barred the admission at trial of defendant's plea proceeding testimony in which defendant claimed he lied to the grand jury about acting in self-defense. Bowie v. State, 2003 Tex. App. LEXIS 1811 (Tex. App. Dallas Feb. 28 2003), affirmed by 135 S.W.3d 55, 2004 Tex. Crim. App. LEXIS 898 (Tex. Crim. App. 2004).

6. Tex. R. Evid. 410(3) does not protect only a defendant's plea itself from being admitted at a trial following the withdrawal of the plea, rather, Rule 410(3) protects the statements made in the course of plea proceedings. Bowie v. State, 2003 Tex. App. LEXIS 1811 (Tex. App. Dallas Feb. 28 2003), affirmed by 135 S.W.3d 55, 2004 Tex. Crim. App. LEXIS 898 (Tex. Crim. App. 2004).

Criminal Law & Procedure : Guilty Pleas : No Contest Pleas

7. Nolo contendere plea, under Texas law, could not be used against defendant in a civil suit based on securities fraud because it did not constitute an admission under Tex. R. Evid. 410(2). Floyd v. State, 914 S.W.2d 658, 1996 Tex. App. LEXIS 16 (Tex. App. Texarkana 1996).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

8. Tex. R. Evid. 410 did not apply where defendant had entered a plea of nolo contendere. Accordingly, counsel was not ineffective for failing to object under that rule to use at sentencing of a letter that had been produced by defense counsel for the State's consideration during plea bargain negotiations. Weinn v. State, 281 S.W.3d 633, 2009 Tex. App. LEXIS 1015 (Tex. App. Amarillo Feb. 12 2009).

Criminal Law & Procedure : Witnesses : Impeachment

9. During a capital murder trial, the trial court erred in allowing the State to proceed with impeachment questions relating to statements defendant made during plea negotiations; the prosecutor's questions violated Tex. R. Evid. 410. Abdygapparova v. State, 243 S.W.3d 191, 2007 Tex. App. LEXIS 8205 (Tex. App. San Antonio 2007).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

10. Under Tex. R. Evid. 410(3), the trial court erred in admitting defendant's stipulation made during a timely pass for a plea proceeding that he had committed sexual assault of a child, as charged. The error was not harmless under Tex. R. App. P. 44.2(b) because, aside from the stipulation, no other evidence corroborated the testimony of the victim, who had twice recanted her accusations, that contact had occurred. Rush v. State, 2005 Tex. App. LEXIS 8146 (Tex. App. Tyler Sept. 30 2005).

Criminal Law & Procedure : Appeals : Reversible Errors : Prosecutorial Misconduct

11. Although it was improper for the prosecutor to comment in front of the jury about plea negotiations, no reversible error resulted because the comment arose after defendant raised the issue, the trial court immediately instructed the jury to disregard the prosecutor's statement, and there was undisputed evidence that defendant took the theft victim's property without permission. Bassett v. State, 2014 Tex. App. LEXIS 7081, 2014 WL 2993814 (Tex. App. Dallas June 30 2014).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

12. Although defendant's motion to suppress his stipulation did not urge its inadmissibility under Tex. R. Evid. 410(3), but asserted that it was involuntary, the error was preserved under Tex. R. App. P. 33.1(a) because the trial court based its ruling on a subsequently reversed decision. Rush v. State, 2005 Tex. App. LEXIS 8146 (Tex. App. Tyler Sept. 30 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

13. Defendant failed to preserve, under Tex. R. App. P. 33.1, an argument that admitted recordings contained statements about plea bargaining in violation Tex. R. Evid. 410 because defendant did not object below. Capps v. State, 244 S.W.3d 520, 2007 Tex. App. LEXIS 9602 (Tex. App. Fort Worth 2007), (Tex. App. -- Fort Worth, pet. ref'd).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

14. In a capital murder trial, references to the proffer and plea negotiations at the punishment phase by defendant and his father during their cross-examination by the State, after the defense had arguably opened the door to the evidence during its direct examination of the witnesses, did not substantially or injuriously influence the jury's verdict at the punishment phase. The defense relied heavily on the plea negotiations in support of its mitigation case that defendant was willing to accept responsibility and plead guilty to as many life sentences as the State wanted in order to spare his family the ordeal of a trial. Whitaker v. State, 286 S.W.3d 355, 2009 Tex. Crim. App. LEXIS 873 (Tex. Crim. App. 2009).

Evidence : Judicial Admissions : General Overview

15. Nolo contendere plea, under Texas law, could not be used against defendant in a civil suit based on securities fraud because it did not constitute an admission under Tex. R. Evid. 410(2). Floyd v. State, 914 S.W.2d 658, 1996 Tex. App. LEXIS 16 (Tex. App. Texarkana 1996).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

16. In a case where defendant pleaded guilty, but later succeeded in having his plea withdrawn, Tex. R. Evid. 410(3) barred the admission at trial of defendant's plea proceeding testimony in which defendant claimed he lied to the grand jury about acting in self-defense. Bowie v. State, 2003 Tex. App. LEXIS 1811 (Tex. App. Dallas Feb. 28 2003), affirmed by 135 S.W.3d 55, 2004 Tex. Crim. App. LEXIS 898 (Tex. Crim. App. 2004).

17. Tex. R. Evid. 410(3) does not protect only a defendant's plea itself from being admitted at a trial following the withdrawal of the plea, rather, Rule 410(3) protects the statements made in the course of plea proceedings. Bowie v. State, 2003 Tex. App. LEXIS 1811 (Tex. App. Dallas Feb. 28 2003), affirmed by 135 S.W.3d 55, 2004 Tex. Crim. App. LEXIS 898 (Tex. Crim. App. 2004).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

18. Trial court did not abuse its discretion in admitting defendant's letter to an officer regarding his plea agreement because the statements were not covered by Tex. R. Evid. 410. In addition, the letter's probative value was not substantially outweighed by the risk of unfair prejudice under Tex. R. Evid. 403 because: (1) the letter was probative of whether defendant committed the charged offense; (2) given the brevity and clarity of the letter and the fact that it was directly related to the charged offense, the amount of time required to develop it was negligible; and (3) the letter was important to the prosecution's case and had a significant tendency to make defendant's guilt more probable. Willis v. State, 2010 Tex. App. LEXIS 5931, 2010 WL 2935772 (Tex. App. San Antonio July 28 2010).

19. Court erred in failing to instruct the jury to disregard the State's reference to plea negotiations because, given the manner in which the State's question to defendant was posed, one could reasonably interpret it as disclosing that plea negotiations had occurred, that potential offers were made and rejected, and that defendant's desires presented the major obstacle to arriving at a bargain. Bowley v. State, 280 S.W.3d 530, 2009 Tex. App. LEXIS 1448 (Tex. App. Amarillo Mar. 2 2009).

Evidence : Relevance : Pleas & Related Statements

20. Plain language of the rule renders inadmissible any statement made in the course of plea discussions with an attorney for the prosecuting authority, not only statements first induced by a particular promise. Canfield v. State, 429 S.W.3d 54, 2014 Tex. App. LEXIS 1682, 2014 WL 576261 (Tex. App. Houston 1st Dist. Feb. 13 2014).

21. Assuming without deciding that defendant showed counsel's failure to object to the State's use of defendant's affidavit signed during plea negotiations amounted to deficient performance, defendant failed to demonstrate that he was prejudiced; in light of the charges, his testimony, and his defense, the fact that he engaged in some type of plea negotiations would not necessarily have been contrary to his version of events. Canfield v. State, 429 S.W.3d 54, 2014 Tex. App. LEXIS 1682, 2014 WL 576261 (Tex. App. Houston 1st Dist. Feb. 13 2014).

22. Because defendant's letter, which defendant claimed discussed ongoing plea negotiations between his attorney and the State, was directed at his wife, not the prosecuting attorney, the trial court did not err in admitting the letter. Beans v. State, 2014 Tex. App. LEXIS 1159, 2014 WL 357340 (Tex. App. Dallas Jan. 31 2014).

23. Recording of defendant's phone call to his wife from jail was properly admitted because his statements about the possibility of taking a plea were not made to an attorney accountable to the prosecuting authority, nor were they were made to, or in the presence of, any attorney. Aekins v. State, 2013 Tex. App. LEXIS 13694, 2013 WL 5948188 (Tex. App. San Antonio Nov. 6 2013).

24. Appellant objected to evidence that referenced a plea agreement, for purposes of Tex. R. Evid. 410, and the trial court admonished the jury; the trial court did not err in denying a mistrial, as the evidence was admitted inadvertently, the court did not think it would be a surprise to the jury that the State had offered to resolve the case if appellant pleaded guilty, and this was not the kind of evidence that would inflame the jury. Munsinger v. State, 2011 Tex. App. LEXIS 7318, 2011 WL 3915671 (Tex. App. Tyler Sept. 7 2011).

25. Defendant failed to preserve for review her assertion that the trial court erred in failing to hold a hearing on the voluntariness of her confession, because the issue regarding the voluntariness of the confession was not raised, the record revealed that the subject of defendant's confession was not mentioned during the pre-trial hearing, and trial counsel's initial objection did not put the trial court on notice that defendant was seeking to contest the voluntariness of her confession; Tex. R. Evid. 410 dealt with inadmissibility of pleas, plea discussions, and related statements, and was directed at the use of statements made during unsuccessful plea negotiations. Crittenden v.

State, 2010 Tex. App. LEXIS 3049 (Tex. App. Amarillo Apr. 23 2010).

26. Defendant's convictions for aggravated robbery and unlawful possession of a firearm were proper because the trial court did not err in admitting a State exhibit since the State's exhibit was addressed to the detectives or the district attorney and the plain language of Tex. R. Evid. 410(4) applied only to discussion with the prosecuting authority, not detectives. Thus, purported plea offers or other statements to anyone other than an attorney for the prosecution were not covered by R. 410. Carter v. State, 2009 Tex. App. LEXIS 5918, 2009 WL 2343725 (Tex. App. El Paso July 31 2009).

27. In a capital murder trial, references to the proffer and plea negotiations at the punishment phase by defendant and his father during their cross-examination by the State, after the defense had arguably opened the door to the evidence during its direct examination of the witnesses, did not substantially or injuriously influence the jury's verdict at the punishment phase. The defense relied heavily on the plea negotiations in support of its mitigation case that defendant was willing to accept responsibility and plead guilty to as many life sentences as the State wanted in order to spare his family the ordeal of a trial. Whitaker v. State, 286 S.W.3d 355, 2009 Tex. Crim. App. LEXIS 873 (Tex. Crim. App. 2009).

28. Court erred in failing to instruct the jury to disregard the State's reference to plea negotiations because, given the manner in which the State's question to defendant was posed, one could reasonably interpret it as disclosing that plea negotiations had occurred, that potential offers were made and rejected, and that defendant's desires presented the major obstacle to arriving at a bargain. Bowley v. State, 280 S.W.3d 530, 2009 Tex. App. LEXIS 1448 (Tex. App. Amarillo Mar. 2 2009).

29. Defendant's murder conviction was proper because he was not permitted to argue for the first time on appeal that the recordings at issues contained statements about plea bargaining in violation of Tex. R. Evid. 410. Capps v. State, 244 S.W.3d 520, 2007 Tex. App. LEXIS 9602 (Tex. App. Fort Worth 2007).

30. Trial court erred by allowing the State to ask defendant questions relating to statements she made during plea negotiations because defendant's responses during cross-examination did not leave a false impression with the jury and the prosecutor's cross-examination was an attempt to show that defendant was lying to the jury based on her statements made during the plea negotiations. Abdygapparova v. State, 2007 Tex. App. LEXIS 5806 (Tex. App. San Antonio July 25 2007).

31. During the punishment phase of a sexual assault case, the State's references on cross-examination and in closing argument to previous plea discussions were not improper because defendant, not the State, first presented testimony regarding the prior plea discussions when he said that he wanted to plead guilty months earlier. Drone v. State, 2006 Tex. App. LEXIS 6071 (Tex. App. Corpus Christi July 13 2006).

32. Defendant argued that the trial court erred in allowing the State to discuss the fact that defendant offered money to the victim's family, an offer apparently made in plea negotiations, in violation of Tex. R. Evid. 410, but defendant did not object when the discussion of financial resources was first admitted or later when defendant was questioned regarding the offer to pay; defense counsel asked defendant questions on the subject, and a final objection to the matter came after the question had already been answered, and thus, the court held that defendant failed to preserve error on the issue under Tex. R. App. P. 33.1. Freeman v. State, 2006 Tex. App. LEXIS 3528 (Tex. App. Austin Apr. 27 2006).

33. Under Tex. R. Evid. 410(3), the trial court erred in admitting defendant's stipulation made during a timely pass for a plea proceeding that he had committed sexual assault of a child, as charged. The error was not harmless under Tex. R. App. P. 44.2(b) because, aside from the stipulation, no other evidence corroborated the testimony of

the victim, who had twice recanted her accusations, that contact had occurred. Rush v. State, 2005 Tex. App. LEXIS 8146 (Tex. App. Tyler Sept. 30 2005).

34. Although defendant's motion to suppress his stipulation did not urge its inadmissibility under Tex. R. Evid. 410(3), but asserted that it was involuntary, the error was preserved under Tex. R. App. P. 33.1(a) because the trial court based its ruling on a subsequently reversed decision. Rush v. State, 2005 Tex. App. LEXIS 8146 (Tex. App. Tyler Sept. 30 2005).

35. Trial court did not err in admitting the testimony concerning statements defendant made during the plea bargain conference, because the plea bargain discussions were successful; Tex. R. Evid. 410(4) only made inadmissible statements in the course of plea discussions that did not result in a plea of guilty, a plea of nolo contendere, or in situations in which one of those pleas was withdrawn. May v. State, 2005 Tex. App. LEXIS 1885 (Tex. App. Amarillo Mar. 10 2005).

36. Admission of defendant's statements in two trials was improper where punishment testimony offered in the course of a "timely pass for plea" proceeding was protected by Tex. R. Evid. 410, and although the "timely pass for plea" procedure was not identical to procedures under Fed. R. Crim. P. 11, it was comparable to those procedures and consistent with, insofar as it did not conflict with, State plea procedures. Bowie v. State, 135 S.W.3d 55, 2004 Tex. Crim. App. LEXIS 898 (Tex. Crim. App. 2004).

37. Admission of defendant's statements in two trials was improper where punishment testimony offered in the course of a "timely pass for plea" proceeding was protected by Tex. R. Evid. 410, and although the "timely pass for plea" procedure was not identical to procedures under Fed. R. Crim. P. 11, it was comparable to those procedures and consistent with, insofar as it did not conflict with, State plea procedures. Bowie v. State, 135 S.W.3d 55, 2004 Tex. Crim. App. LEXIS 898 (Tex. Crim. App. 2004).

38. PlPlea bargaining is statutorily recognized in Texas under Tex. Code Crim. P. art. 26.13(a)(2), but a "timely pass for plea" procedure, in which a defendant charged with murder entered a plea of guilty, and the trial court heard the case on stipulated facts, then announced a proposed decision with defendant being allowed to withdraw the plea if he was unhappy with the sentence, was not the equivalent of a plea negotiation within the meaning of Fed. R. Crim. P. 11, and defendant's statements made during the proceeding which directly contradicted his statements before the grand jury which returned the murder indictment were not inadmissible under Tex. R. Evid. 410(3) as being made during plea negotiations and could be used against defendant in a prosecution for aggravated perjury. State v. Bowie, 137 S.W.3d 95, 2003 Tex. App. LEXIS 1902 (Tex. App. Tyler 2003), reversed by 135 S.W.3d 55, 2004 Tex. Crim. App. LEXIS 898 (Tex. Crim. App. 2004), questioned by Rush v. State, 2005 Tex. App. LEXIS 8146 (Tex. App. Tyler Sept. 30, 2005).

Evidence : Relevance : Relevant Evidence

39. Although the landlord argued that the trial court abused its discretion in admitting certain evidence, the testimony objected to was relevant to the issue of mitigation and was therefore admissible; the presence of conflicting evidence established that an instructed verdict would have been improper. Western Skies Partnership/Physicians Healthcare Assocs., L.C. v. Physician's Healthcare Assocs., L.C., 2004 Tex. App. LEXIS 4438 (Tex. App. El Paso May 13 2004).

Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility

40. During a capital murder trial, the trial court erred in allowing the State to proceed with impeachment questions relating to statements defendant made during plea negotiations; the prosecutor's questions violated Tex. R. Evid. 410. Abdygapparova v. State, 243 S.W.3d 191, 2007 Tex. App. LEXIS 8205 (Tex. App. San Antonio 2007).

End of Document

Tex. Evid. R. 411

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 411 Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or, if disputed, proving agency, ownership, or control.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*.

Case Notes

Civil Procedure : Pretrial Matters : Separate Trials
Civil Procedure : Trials : Jury Trials : Jury Instructions : General Overview
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Double Jeopardy
Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : Elements
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Liability Insurance

LexisNexis (R) Notes

Civil Procedure : Pretrial Matters : Separate Trials

1. Because Tex. R. Evid. 411 precludes the introduction of insurance upon the issue of whether a person acted negligently or wrongfully and because evidence that a driver was underinsured was not offered for certain exceptions, it appeared the rule supported severance; an insurer was joined based on the driver being underinsured, and given that the trial court did not err in granting summary judgment, the driver was not liable, the insurance issue was moot, and the trial court did not err in severing appellants' claims against the driver for convenience and to avoid prejudice, for purposes of Tex. R. Civ. P. 174(b). Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

Civil Procedure : Trials : Jury Trials : Jury Instructions : General Overview

2. Although insurance coverage should not have been mentioned in a personal injury action involving a fall through a skylight, the trial court properly instructed the jury not to consider the improper statement. Because the size of the verdict was supported by evidence, nothing suggested that the jury did not follow the court's instruction. Taylor v. Am. Fabritech, Inc., 132 S.W.3d 613, 2004 Tex. App. LEXIS 2550 (Tex. App. Houston 14th Dist. 2004).

Civil Procedure : Appeals : Reviewability : Preservation for Review

3. Award of damages to the son in his action against his parents after he fell and broke his elbow at their home was proper because, apart from arguing against the motion in limine under Tex. R. Evid. 411, the son never raised any complaint about the exclusion of insurance once voir dire commenced, and was well established that an adverse ruling on a motion in limine was insufficient to preserve a complaint for appellate review. Thus, his argument that the trial court abused its discretion by filing ot declare a mistrial sua sponte during voir dire was not considered, Tex. R. App. P. 33.1. Perez v. Perez, 2013 Tex. App. LEXIS 962, 2013 WL 398932 (Tex. App. Corpus Christi Jan. 31 2013).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

4. Even if the admission of evidence concerning a condominium association having insurance was improper, the error was harmless because the association was permitted to counter the admission of the existence of insurance coverage with evidence that its insurer had already denied its claim, and the trial court instructed the jury to disregard the existence of insurance for any purpose other than rebutting the association's defensive theory. Canyon Vista Prop. Owners Ass'n v. Laubach, 2014 Tex. App. LEXIS 1099, 2014 WL 411646 (Tex. App. Austin Jan. 31 2014).

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Double Jeopardy

5. In defendant's manslaughter case, a court erred by failing to dismiss defendant's case, on double jeopardy grounds, where the court granted a mistrial, and the prosecutor should have known that his question concerning the insurance carrier's finding of negligence was improper and created a substantial risk that a mistrial would result. Therefore, because the prosecutor intentionally or recklessly caused the trial to end in a mistrial, defendant was entitled to relief. Ex parte Wheeler, 146 S.W.3d 238, 2004 Tex. App. LEXIS 6706 (Tex. App. Fort Worth 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : General Overview

6. Tex. R. Evid. 411 applies equally to criminal cases in which a defendant has been charged with the offenses of manslaughter and criminally negligent homicide. Ex parte Wheeler, 146 S.W.3d 238, 2004 Tex. App. LEXIS 6706 (Tex. App. Fort Worth 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : Elements

7. Pursuant to Tex. R. Evid. 401 and 403, the testimony of a claims representative for defendant's insurer that the insurer was liable was not barred by Tex. R. Evid. 411 because it allowed for an inference of fault on the part of defendant, which was a fact of consequence in the manslaughter prosecution under Tex. Penal Code Ann. § 19.04. Mitchell v. State, 377 S.W.3d 21, 2011 Tex. App. LEXIS 8970, 2011 WL 5994154 (Tex. App. Waco Nov. 9 2011).

Evidence : Procedural Considerations : Curative Admissibility

8. Evidence that a condominium association had insurance was admissible in a condominium owner's action for damages to the floor under his unit because the association opened the door to being cross-examined on the issue of its insurance coverage, evidence of insurance was cumulative, and the owner's counsel sought to cross-examine an association board member on the issue of insurance for the purposes of impeachment. Canyon Vista Prop. Owners Ass'n v. Laubach, 2014 Tex. App. LEXIS 1099, 2014 WL 411646 (Tex. App. Austin Jan. 31 2014).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

9. Mistrial was properly granted in a manslaughter/criminally negligent homicide trial after the prosecutor asked defendant's expert about a finding by defendant's insurer that defendant was at fault. The question was manifestly improper under Tex. R. Evid. 401-403, but Tex. R. Evid. 411 was inapplicable because the question went to the insurer's ultimate decision to accept fault by its insured, rather than to the existence of insurance. Ex parte Wheeler, 203 S.W.3d 317, 2006 Tex. Crim. App. LEXIS 1968 (Tex. Crim. App. 2006).

Evidence : Relevance : Liability Insurance

10. Evidence that a condominium association had insurance was admissible in a condominium owner's action for damages to the floor under his unit because the association opened the door to being cross-examined on the issue of its insurance coverage, evidence of insurance was cumulative, and the owner's counsel sought to cross-examine an association board member on the issue of insurance for the purposes of impeachment. Canyon Vista Prop. Owners Ass'n v. Laubach, 2014 Tex. App. LEXIS 1099, 2014 WL 411646 (Tex. App. Austin Jan. 31 2014).

11. Even if the admission of evidence concerning a condominium association having insurance was improper, the error was harmless because the association was permitted to counter the admission of the existence of insurance coverage with evidence that its insurer had already denied its claim, and the trial court instructed the jury to disregard the existence of insurance for any purpose other than rebutting the association's defensive theory. Canyon Vista Prop. Owners Ass'n v. Laubach, 2014 Tex. App. LEXIS 1099, 2014 WL 411646 (Tex. App. Austin Jan. 31 2014).

12. Evidence of insurance was not admissible in the trial of the passenger's personal injury claims against the company, but evidence of the company's insurance and the passenger's uninsured/underinsured coverage was required to establish any such claims. In re Arcababa, 2013 Tex. App. LEXIS 13571, 2013 WL 5890109 (Tex. App. Waco Oct. 31 2013).

13. Allowing evidence of insurance would have violated the company's right to have its liability decided without mention of insurance, but excluding such evidence would have prejudiced the passenger's presentation of her uninsured/underinsured motorist claim; the company's argument was sufficient to inform the trial court that prejudice would result from the simultaneous trial of the passenger's insurance and personal injury claims. In re Arcababa, 2013 Tex. App. LEXIS 13571, 2013 WL 5890109 (Tex. App. Waco Oct. 31 2013).

14. In an negligence case where a property owner alleged damages to a fence, a boat, and trees, to the extent appellant complained about the trial court's alleged refusal to permit him to mention his homeowner's insurance

coverage, the evidence was not admissible to prove liability or the lack thereof. Jones v. Warren, 2013 Tex. App. LEXIS 11044 (Tex. App. Fort Worth Aug. 29 2013).

15. As the trial court clearly understood the basis of appellant's objection under Tex. R. Evid. 411, the issue was preserved for review under Tex. R. App. P. 33.1(a)(1)(A). Nguyen v. Myers, 442 S.W.3d 434, 2013 Tex. App. LEXIS 2085, 2013 WL 1277838 (Tex. App. Dallas Feb. 14 2013).

16. Even if the trial court erred in overruling appellant's objection under Tex. R. Evid. 411, any error was harmless under Tex. R. App. P. 44.1(a)(1), given that (1) it was undisputed that appellant caused the accident, (2) appellee was injured, and (3) some of the treatment he received was reasonable and necessary; the court could not find that the verdict turned on the isolated mention of insurance companies. Nguyen v. Myers, 442 S.W.3d 434, 2013 Tex. App. LEXIS 2085, 2013 WL 1277838 (Tex. App. Dallas Feb. 14 2013).

17. Award of damages to the son in his action against his parents after he fell and broke his elbow at their home was proper because, apart from arguing against the motion in limine under Tex. R. Evid. 411, the son never raised any complaint about the exclusion of insurance once voir dire commenced, and was well established that an adverse ruling on a motion in limine was insufficient to preserve a complaint for appellate review. Thus, his argument that the trial court abused its discretion by filing ot declare a mistrial sua sponte during voir dire was not considered, Tex. R. App. P. 33.1. Perez v. Perez, 2013 Tex. App. LEXIS 962, 2013 WL 398932 (Tex. App. Corpus Christi Jan. 31 2013).

18. Pursuant to Tex. R. Civ. P. 41, absent a bifurcation order under Tex. R. Civ. P. 174(b), it was necessary to sever negligence claims against a driver and his employer from the claimant's underinsured motorist (UIM) claim against his insurer because the insurance evidence necessary to recover UIM benefits under Tex. Ins. Code Ann. § 1952.106 was inadmissible in the negligence action under Tex. R. Evid. 411. In re James Michael Reynolds & Pelhams Indus. Warehouse, 369 S.W.3d 638, 2012 Tex. App. LEXIS 3878 (Tex. App. Tyler May 16 2012).

19. Pursuant to Tex. R. Evid. 401 and 403, the testimony of a claims representative for defendant's insurer that the insurer was liable was not barred by Tex. R. Evid. 411 because it allowed for an inference of fault on the part of defendant, which was a fact of consequence in the manslaughter prosecution under Tex. Penal Code Ann. § 19.04. Mitchell v. State, 377 S.W.3d 21, 2011 Tex. App. LEXIS 8970, 2011 WL 5994154 (Tex. App. Waco Nov. 9 2011).

20. Because Tex. R. Evid. 411 precludes the introduction of insurance upon the issue of whether a person acted negligently or wrongfully and because evidence that a driver was underinsured was not offered for certain exceptions, it appeared the rule supported severance; an insurer was joined based on the driver being underinsured, and given that the trial court did not err in granting summary judgment, the driver was not liable, the insurance issue was moot, and the trial court did not err in severing appellants' claims against the driver for convenience and to avoid prejudice, for purposes of Tex. R. Civ. P. 174(b). Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

21. Given that an insurer's attorney was never designated of record to be the insured's attorney, there was no basis for invoking Tex. R. Civ. P. 12 to challenge the attorney's actions in misrepresenting his identity to the jury, and the trial court thus erred in allowing the attorney to conceal and deliberately misrepresent his identity before the jury, and because there was no designation or notice of substitution in accordance with Tex. R. Civ. P. 10, there was no basis for the trial court to have recognized the attorney as the insured's attorney; even assuming that the attorney had the insured's consent to representation and assuming that Tex. R. Civ. P. 10 would not have been violated by the attorney's participation without a designation of record, the court agreed with the injured passenger that there was also a fatal conflict of interest that still would have rendered the trial court's ruling erroneous; the court did not see the issues created by the trial court's ruling to be evidentiary in nature so as to have come under

the purview of Tex. R. Evid. 411. Perez v. Kleinert, 211 S.W.3d 468, 2006 Tex. App. LEXIS 11080 (Tex. App. Corpus Christi 2006).

22. Injection of insurance did not cause the rendition of an improper jury verdict where but for a contractor's faulty installation of a heating unit, a fire would not have occurred and the damages would not have existed. Sears, Roebuck & Co. v. Abell, 157 S.W.3d 886, 2005 Tex. App. LEXIS 1102 (Tex. App. El Paso 2005).

23. Tex. R. Evid. 411 applies equally to criminal cases in which a defendant has been charged with the offenses of manslaughter and criminally negligent homicide. Ex parte Wheeler, 146 S.W.3d 238, 2004 Tex. App. LEXIS 6706 (Tex. App. Fort Worth 2004).

24. In defendant's manslaughter case, a court erred by failing to dismiss defendant's case, on double jeopardy grounds, where the court granted a mistrial, and the prosecutor should have known that his question concerning the insurance carrier's finding of negligence was improper and created a substantial risk that a mistrial would result. Therefore, because the prosecutor intentionally or recklessly caused the trial to end in a mistrial, defendant was entitled to relief. Ex parte Wheeler, 146 S.W.3d 238, 2004 Tex. App. LEXIS 6706 (Tex. App. Fort Worth 2004).

End of Document

Tex. Evid. R. 412

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 412 Evidence of Previous Sexual Conduct in Criminal Cases

(a) ***In General.***--The following evidence is not admissible in a prosecution for sexual assault, aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault:

(1)reputation or opinion evidence of a victim's past sexual behavior; or

(2)specific instances of a victim's past sexual behavior.

(b) ***Exceptions for Specific Instances.***--Evidence of specific instances of a victim's past sexual behavior is admissible if:

(1)the court admits the evidence in accordance with subdivisions (c) and (d);

(2)the evidence:

(A)is necessary to rebut or explain scientific or medical evidence offered by the prosecutor;

(B)concerns past sexual behavior with the defendant and is offered by the defendant to prove consent;

(C)relates to the victim's motive or bias;

(D)is admissible under Rule 609; or

(E)is constitutionally required to be admitted; and

(3)the probative value of the evidence outweighs the danger of unfair prejudice.

(c) ***Procedure for Offering Evidence.***--Before offering any evidence of the victim's past sexual behavior, the defendant must inform the court outside the jury's presence. The court must then conduct an in camera hearing, recorded by a court reporter, and determine whether the proposed evidence is admissible. The defendant may not refer to any evidence ruled inadmissible without first requesting and gaining the court's approval outside the jury's presence.

(d) ***Record Sealed.***--The court must preserve the record of the in camera hearing, under seal, as part of the record.

(e) *Definition of "Victim."* --In this rule, "victim" includes an alleged victim.

Annotations

Case Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Scope of Protection
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims
Criminal Law & Procedure : Discovery & Inspection : In Camera Inspections
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Closing Arguments : Defendant's Failure to Testify
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Constitutional Right
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Appeals : Procedures : Briefs
Criminal Law & Procedure : Appeals : Procedures : Records on Appeal
Criminal Law & Procedure : Appeals : Remands & Remittiturs
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Jury Instructions
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Habeas Corpus : Procedural Default : General Overview
Criminal Law & Procedure : Habeas Corpus : Procedural Default : Actual Innocence & Miscarriage of Justice
Criminal Law & Procedure : Habeas Corpus : Procedural Default : Cause & Prejudice Standard : General Overview
Criminal Law & Procedure : Habeas Corpus : Review : Specific Claims : Ineffective Assistance
Evidence : Hearsay : General Overview
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : General Overview
Evidence : Relevance : Sex Offenses : Rape Shield Laws
Evidence : Relevance : Sex Offenses : Similar Acts
Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview
Evidence : Relevance : Sex Offenses : Similar Crimes : Child Molestation Cases
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances
Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice
Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview
Evidence : Testimony : Credibility : Impeachment : Prior Conduct

LexisNexis (R) Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Scope of Protection

1. State trial court's exclusion of evidence of a complainant's statements prior to her involvement with the prisoner did not constitute error so extreme that it constituted denial of fundamental fairness and due process under the Fourteenth Amendment; the referenced hearsay statements, which the prisoner claimed were admissible under

Tex. R. Evid. 412(b), were not of the complainant's prior sexual history or behavior, but rather, of her sexual awareness, attitudes, or wishes that did not rebut or explain the State's scientific evidence; therefore, the exclusion of the statements did not provide a basis for federal habeas corpus relief. Galloway v. Dretke, 2005 U.S. Dist. LEXIS 38726 (S.D. Tex. Dec. 12 2005).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

2. At defendant's trial for the aggravated sexual assault of a child, the trial court erred because it refused to allow defendant to cross-examine the State's witnesses in violation of his Sixth Amendment right to confrontation regarding the complainant's sexual assault of his younger sister. The impeachment evidence was admissible under Tex. R. Evid. 412 to correct a false impression left with the jury that the complainant's emotional problems, watching pornography, and need for counseling arose as a result of his victimization by defendant. Johnson v. State, 2013 Tex. App. LEXIS 1515, 2013 WL 531079 (Tex. App. Fort Worth Feb. 14 2013).

3. In a trial for aggravated sexual assault of a child, there was no violation of the Confrontation Clause when the trial court limited defendant's cross-examination of the complainant's cousin to exclude evidence, under Tex. R. Evid. 403 and Tex. R. Evid. 412, of a past physical relationship between the cousin and the complainant; a review of the cousin's sealed in-camera testimony revealed that the so-called physical relationship did not include any sexual contact; thus, contrary to defendant's assertion, the defense's line of cross-examination would not have explained any bias or motive for the complainant to fabricate the explicit details of the sexual assault described in direct testimony. Peten v. State, 2007 Tex. App. LEXIS 9815 (Tex. App. Houston 1st Dist. Dec. 13 2007).

4. In camera proceeding contemplated by Tex. R. Evid. 412 is an adversarial hearing at which the parties are present and the attorneys are permitted to question witnesses. LaPointe v. State, 225 S.W.3d 513, 2007 Tex. Crim. App. LEXIS 505 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1015, 128 S. Ct. 544, 169 L. Ed. 2d 381 (2007).

5. Where defendant was initially denied the adversarial hearing required by Tex. R. Evid. 412, a retrospective hearing conducted on remand was proper; defense counsel's questions regarding child custody, the victim's alcohol use, and whether the victim was taking medication for bipolar disorder were not inquiries into the victim's past sexual history and did not fall within the order at trial; those questions therefore fell outside the scope of the remand order, and the trial court did not err to exclude them. LaPointe v. State, 225 S.W.3d 513, 2007 Tex. Crim. App. LEXIS 505 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1015, 128 S. Ct. 544, 169 L. Ed. 2d 381 (2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

6. In an aggravated sexual assault of a child case, the trial court did not err by excluding hearsay testimony about the victim's prior sexual activity as the probative value of this hearsay would not have outweighed the danger of unfair prejudice. James v. State, 2005 Tex. App. LEXIS 7972 (Tex. App. Texarkana Sept. 29 2005).

7. In a sexual assault case, a court properly excluded evidence of the victim's fight with her boyfriend and her antidepression medication where those circumstances did not involve specific instances of the victim's past sexual behavior. Chavira v. State, 2004 Tex. App. LEXIS 5653 (Tex. App. Tyler June 23 2004).

8. Evidence of sperm located on a victim's clothing after a sexual assault was not relevant at trial because there was no evidence that defendant ejaculated during the crime. Davis v. State, 2004 Tex. App. LEXIS 3815 (Tex. App. Fort Worth Apr. 29 2004).

9. Before a trial court may admit Tex. R. Evid. 412(b)(2)(A-E) evidence, it must find that the probative value of said evidence outweighs the danger of unfair prejudice. Mungaray v. State, 2004 Tex. App. LEXIS 2595 (Tex. App. El

Paso Mar. 24 2004).

10. Trial court utilizes a two-step test in determining the admissibility of previous-sexual-conduct evidence: (1) the evidence must fall within one of the five enumerated circumstances in Tex. R. Evid. 412(b)(2); and (2) its probative value must outweigh the danger of unfair prejudice. Both prongs of the test must be established in order for the evidence to be admitted. Mungaray v. State, 2004 Tex. App. LEXIS 2595 (Tex. App. El Paso Mar. 24 2004).

11. In a criminal trial for aggravated sexual assault and indecency with a child, the court did not err in refusing evidence of a purported previous sexual assault committed by defendant's brother upon the complainant. The probative value of this evidence was thin compared to the prejudicial effect it would have. Mungaray v. State, 2004 Tex. App. LEXIS 2595 (Tex. App. El Paso Mar. 24 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

12. There was no error in excluding evidence that a child sexual assault victim had gonorrhea because defendant did not inform the trial court that he intended to elicit the testimony, made no argument to the trial court linking the diagnosis to any motive or bias, and did not argue that the probative value of the evidence outweighed any unfair prejudice. Cantu v. State, 2014 Tex. App. LEXIS 8574 (Tex. App. Corpus Christi Aug. 7 2014).

13. Where defendant was charged with aggravated sexual assault of a child under Tex. Penal Code Ann. § 22.021 involving a four-year-old girl and where defendant sought to introduce evidence that the victim had been sexually abused by another family member prior to the accusations made against defendant to explain the testimony from the sexual assault nurse examiner who examined the child and found evidence that the child had engaged in sexual intercourse, the trial court did not err in ruling that the evidence was inadmissible and did not fall within the exception of Tex. R. Evid. 412 because there was no evidence of prior penetration even if there was evidence of touching and the sexual assault nurse could nto say when the victim's penetrating injury occurred. Alvarado v. State, 2012 Tex. App. LEXIS 1479, 2012 WL 593564 (Tex. App. Austin Feb. 24 2012).

14. In a case where defendant was convicted of two counts of sexual assault under Tex. Penal Code Ann. § 22.011, the excluded evidence, with which defendant attempted to show the victim's licentious character, was properly excluded as it did not fall into any of the Tex. R. Evid. 412 exceptions. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

15. In a trial for aggravated assault on a child, defendant was not deprived of his Sixth Amendment right to effective assistance of counsel, even though counsel violated Tex. R. Evid. 404(b), 412(b), (c), by introducing evidence about two other situations in which defendant had sexual conduct with girls who were three years younger than him and younger than the age for consensual sex, because the evidence could have been introduced to show a pattern of consensual activities and of involvment with girls relatively close to defendant in age. McGuire v. State, 2010 Tex. App. LEXIS 673, 2010 WL 322988 (Tex. App. Texarkana Jan. 29 2010).

16. In a trial for sexual assault of a child and indecency with a child, there was no error in excluding evidence as to whether the complainant had engaged in sexual conduct with a younger cousin, whether the complainant allowed one or more pets to play with the complainant's sexual organs, whether the complainant's parent had told an employee about fearing that the complainant would accuse the parent's new romantic partner of molestation, or whether the complainant's parent kept pornography in the home. Todd v. State, 242 S.W.3d 126, 2007 Tex. App. LEXIS 9053 (Tex. App. Texarkana 2007).

17. In an aggravated sexual assault of a child who was younger than 14 case, defendant did not allege that there was any evidence controverting the victim's testimony that she and defendant had sexual intercourse of September 19, 2003; further, defendant did not explain how the probative value of evidence of the child's past sexual behavior outweighed the danger of undue prejudice; thus, defendant failed to show that the trial court abused its discretion in excluding the evidence under Tex. R. Evid. 412. Guerrero v. State, 2006 Tex. App. LEXIS 3723 (Tex. App. Beaumont May 3 2006).

18. In defendant's criminal prosecution for sexual assault of a child, the nurse testified that the complainant's hymen had been torn by blunt force trauma. The complainant was permitted to testify that defendant was the only person with whom she had sexual intercourse; no violation of Tex. R. Evid. 412(b) was shown, because the complainant's testimony concerned the absence of past sexual behavior. Ghant v. State, 2006 Tex. App. LEXIS 3053 (Tex. App. Austin Apr. 13 2006).

19. In defendant's criminal prosecution for sexual assault of a child, the trial court denied defendant's request to question the victim concerning prior sexual abuse by her uncle. Ghant v. State, 2006 Tex. App. LEXIS 3053 (Tex. App. Austin Apr. 13 2006).

20. In defendant's criminal prosecution for sexual assault of a child, the nurse testified that the complainant's hymen had been torn by blunt force trauma; the complainant was permitted to testify that defendant was the only person with whom she had sexual intercourse; no violation of Tex. R. Evid. 412(b) was shown, because the complainant's testimony concerned the absence of past sexual behavior. Ghant v. State, 2006 Tex. App. LEXIS 3053 (Tex. App. Austin Apr. 13 2006).

21. In defendant's criminal prosecution for sexual assault of a child, the trial court denied defendant's request to question the victim concerning prior sexual abuse by her uncle. Ghant v. State, 2006 Tex. App. LEXIS 3053 (Tex. App. Austin Apr. 13 2006).

Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims

22. In a trial for child sexual assault, no Brady violation occurred from any delay in the State's disclosure of a report indicating that the complainant was the victim of a prior sexual assault that the mother delayed reporting to authorities. Noting that under Tex. R. Evid. 412, evidence of specific instances of an alleged victim's past sexual behavior was inadmissible unless certain requirements were satisfied, the court reasoned that the State did not have a duty to disclose the information because the incident report was not admissible. Read v. State, 2010 Tex. App. LEXIS 5910, 2010 WL 2904627 (Tex. App. Dallas July 27 2010).

Criminal Law & Procedure : Discovery & Inspection : In Camera Inspections

23. Defendant's contention that the trial court improperly failed to hold an in camera hearing required by this rule was rejected because the trial court did hold such a hearing, permitted defense counsel to argue why the proffered evidence was admissible, made its ruling, and provided an explanation for it. Mbata v. State, 2014 Tex. App. LEXIS 3241, 2014 WL 1285756 (Tex. App. Austin Mar. 26 2014).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

24. In a trial for aggravated assault on a child, defendant was not deprived of his Sixth Amendment right to effective assistance of counsel, even though counsel violated Tex. R. Evid. 404(b), 412(b), (c), by introducing evidence about two other situations in which defendant had sexual conduct with girls who were three years younger than him and younger than the age for consensual sex, because the evidence could have been introduced to show

a pattern of consensual activities and of involvment with girls relatively close to defendant in age. McGuire v. State, 2010 Tex. App. LEXIS 673, 2010 WL 322988 (Tex. App. Texarkana Jan. 29 2010).

25. In a sexual assault case, defendant was unable to establish that he received ineffective assistance of counsel based on counsel's failure to obtain a ruling on several pre-trial motions since there was no showing that they would have changed the outcome of the case, and he was unable to establish that he would have benefitted from the testimony of his roommate if the trial had been delayed to obtain such; moreover, the claim was also meritless based on a failure to object to a prosecutor's closing argument since a comment regarding victim's rights did not conflict with Tex. R. Evid. 412, and a comment regarding a failure to testify was directed at defendant's roommate, but not defendant. Benjamin v. State, 2007 Tex. App. LEXIS 7010 (Tex. App. Houston 1st Dist. Aug. 30 2007).

Criminal Law & Procedure : Trials : Closing Arguments : Defendant's Failure to Testify

26. In a sexual assault case, defendant was unable to establish that he received ineffective assistance of counsel based on counsel's failure to obtain a ruling on several pre-trial motions since there was no showing that they would have changed the outcome of the case, and he was unable to establish that he would have benefitted from the testimony of his roommate if the trial had been delayed to obtain such; moreover, the claim was also meritless based on a failure to object to a prosecutor's closing argument since a comment regarding victim's rights did not conflict with Tex. R. Evid. 412, and a comment regarding a failure to testify was directed at defendant's roommate, but not defendant. Benjamin v. State, 2007 Tex. App. LEXIS 7010 (Tex. App. Houston 1st Dist. Aug. 30 2007).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

27. In a case in which defendant was convicted of five counts of aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021(a)(1)(B), (2)(B), although the complainant's credibility was an issue because she was the sole witness to the alleged sexual conduct by defendant, the trial court did not abuse its discretion or violate defendant's confrontation rights by preventing the jury from viewing her pregnancy based on Tex. R. Evid. 412 because defendant had not shown that her pregnancy was relevant to motive or bias, and because the exclusion served to avoid prejudice to the complainant and confusion of the issues. When the complainant was on the witness stand, the jury had an unobstructed view of her face, so they could observe her demeanor and assess her credibility, and defendant was not prevented from cross-examining her. Morgan v. State, 2009 Tex. App. LEXIS 3402, 2009 WL 1372965 (Tex. App. Fort Worth May 14 2009).

28. Because defendant did not show that his seven-year-old sexual assault victim made any false prior allegations of sexual abuse against her twelve year-old neighbor that were similar to the allegations in defendant's case, and because the trial court could limit cross-examination to prevent confusion of the issues and undue prejudice, the trial court did not abuse its discretion in limiting cross-examination to exclude such references. Lempar v. State, 191 S.W.3d 230, 2005 Tex. App. LEXIS 10667 (Tex. App. San Antonio 2005).

29. Trial court's exclusion of evidence regarding a child sexual assault victim's relationships with two different boys and her actions and comments involving two cousins did not deprive defendant of his constitutional right to a fair trial where the trial court could have determined, based on the chronology of the events, that they did not explain the State's medical evidence regarding the time of the penetration of the victim's hymen, and, although the trial court excluded the equivocal testimony of the victim's mother about the victim's veracity, the victim's aunt was allowed to testify that she had a bad reputation for being untruthful, and the victim herself admitted lying to defendant, her father, about her report card. Accordingly, the trial court reasonably could have concluded that the matters had, at best, marginal relevance to the victim's alleged motive to testify falsely against defendant, that they would have unduly harassed the victim and confused the issues, and that the danger of unfair prejudice from the evidence would have outweighed its probative value. Pogue v. State, 2005 Tex. App. LEXIS 7819 (Tex. App. Fort

Worth Sept. 22 2005).

30. Tex. R. App. P. 412(c) required the trial court to afford defendant and his counsel an opportunity to be present and cross-examine the alleged victim at an in camera hearing to determine the admissibility of evidence of the alleged victim's previous sexual conduct; although the trial court erred in barring defendant's counsel from the in camera hearing, the trial court could, pursuant to Tex. R. App. P. 44.4, correct the error by holding a proper hearing and again making a determination of what evidence would be admissible under Tex. R. Evid. 412. LaPointe v. State, 166 S.W.3d 287, 2005 Tex. App. LEXIS 3153 (Tex. App. Austin 2005).

31. District court violated defendant's right to confront witnesses against him, and it deprived him of the right to effective assistance of counsel, when it excluded defense counsel from an in camera hearing with the complainant pursuant to Tex. R. Evid. 412. There was nothing about the rape shield law's requirements that prohibited counsel from attending the hearing. LaPointe v. State, 2005 Tex. App. LEXIS 1968 (Tex. App. Austin Mar. 17 2005), opinion withdrawn by, substituted opinion at 166 S.W.3d 287, 2005 Tex. App. LEXIS 3153 (Tex. App. Austin 2005).

32. Trial court's failure to afford parties the opportunity to be present at an in camera hearing and to examine an alleged rape victim regarding specific instances of previous sexual conduct violates a defendant's constitutional rights to confrontation and to effective assistance of counsel. LaPointe v. State, 2005 Tex. App. LEXIS 1968 (Tex. App. Austin Mar. 17 2005), opinion withdrawn by, substituted opinion at 166 S.W.3d 287, 2005 Tex. App. LEXIS 3153 (Tex. App. Austin 2005).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Constitutional Right

33. Tex. R. App. P. 412(c) required the trial court to afford defendant and his counsel an opportunity to be present and cross-examine the alleged victim at an in camera hearing to determine the admissibility of evidence of the alleged victim's previous sexual conduct; although the trial court erred in barring defendant's counsel from the in camera hearing, the trial court could, pursuant to Tex. R. App. P. 44.4, correct the error by holding a proper hearing and again making a determination of what evidence would be admissible under Tex. R. Evid. 412. LaPointe v. State, 166 S.W.3d 287, 2005 Tex. App. LEXIS 3153 (Tex. App. Austin 2005).

34. District court violated defendant's right to confront witnesses against him, and it deprived him of the right to effective assistance of counsel, when it excluded defense counsel from an in camera hearing with the complainant pursuant to Tex. R. Evid. 412. There was nothing about the rape shield law's requirements that prohibited counsel from attending the hearing. LaPointe v. State, 2005 Tex. App. LEXIS 1968 (Tex. App. Austin Mar. 17 2005), opinion withdrawn by, substituted opinion at 166 S.W.3d 287, 2005 Tex. App. LEXIS 3153 (Tex. App. Austin 2005).

35. Trial court's failure to afford parties the opportunity to be present at an in camera hearing and to examine an alleged rape victim regarding specific instances of previous sexual conduct violates a defendant's constitutional rights to confrontation and to effective assistance of counsel. LaPointe v. State, 2005 Tex. App. LEXIS 1968 (Tex. App. Austin Mar. 17 2005), opinion withdrawn by, substituted opinion at 166 S.W.3d 287, 2005 Tex. App. LEXIS 3153 (Tex. App. Austin 2005).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

36. Court did not err in prohibiting cross-examination of the complainant regarding the matters discussed during the rape shield evidentiary hearings because the jury was cognizant of the complainant's purported motive or bias, which defendant's counsel emphasized in his closing argument, and the complainant's credibility was called into question when counsel vigorously cross-examined her, causing her to admit to lapses of memory and to try to explain contradicting portions of her testimony. Dees v. State, 2013 Tex. App. LEXIS 15404, 2013 WL 6869865

(Tex. App. Fort Worth Dec. 27 2013).

37. Trial court did not abuse its discretion by excluding the testimony of two witnesses concerning the child victim's prior sexual history because defendant's defense was that the victim was lying, and he was not prohibited from presenting that defense at trial. Defendant had the opportunity to cross-examine the allege false impression left by the victim's testimony by cross-examining her at trial; he was not entitled to correct the alleged false impression by calling other witnesses. Gonzalez v. State, 2012 Tex. App. LEXIS 8246, 2012 WL 4497999 (Tex. App. Tyler Sept. 28 2012).

Criminal Law & Procedure : Witnesses : Impeachment

38. In a trial for child sexual assault, there was no error under Tex. R. Evid. 412 in excluding questions to the complaining witness about prior sexual conduct, despite defendant's arguments that the complainant's statements to the police about the conduct were inconsistent with the complainant's testimony that the complainant was in love with defendant; even if the witness did create a false impression by the testimony, the court did not understand that to be an exception to Tex. R. Evid. 412. State v. Dudley, 223 S.W.3d 717, 2007 Tex. App. LEXIS 3328 (Tex. App. Tyler 2007).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

39. In a trial for defendant's sexual assault of his 12-year-old daughter, evidence that the victim had been previously assaulted by another relative was properly excluded in the punishment phase after the victim described the impact of the assault, including three attempted suicides, in part because the prior assault did not fit into any of the exceptions under Tex. R. Evid. 412. Delapaz v. State, 297 S.W.3d 824, 2009 Tex. App. LEXIS 7510 (Tex. App. Eastland Sept. 24 2009).

Criminal Law & Procedure : Appeals : Procedures : Briefs

40. In a trial for sexual assault and indecency with a child, defendant failed to preserve for review an argument that he was erroneously prevented him from presenting or eliciting evidence of the complainant's sexual history and sexual sophistication in part because he failed to direct the court to any portion of the record where he adhered to the requirements of this rule. Martinez v. State, 2014 Tex. App. LEXIS 3827, 2014 WL 1396705 (Tex. App. El Paso Apr. 9 2014).

Criminal Law & Procedure : Appeals : Procedures : Records on Appeal

41. Defendant's motion to unseal portions of the reporter's record that were sealed pursuant to Tex. R. Evid. 412 was granted as to the attorneys of record because Rule 412 did not preclude unsealing the record of the in camera proceeding for defense counsel on appeal because it seemed better for the system of justice, as well as to assure defendant's right to effective assistance of counsel on appeal, that defendant's appellate counsel have limited access to the sealed record in order to assert the arguments he deemed best through the use of his professional judgment. The court further held that the complainant's privacy rights and defendant's right to a meaningful appeal could be adequately protected through specific orders from the court. Dees v. State, 508 S.W.3d 312, 2013 Tex. App. LEXIS 1731, 2013 WL 627046 (Tex. App. Fort Worth Feb. 21 2013).

Criminal Law & Procedure : Appeals : Remands & Remittiturs

42. Remedy for a trial court's failure to follow the requirement of an adversarial hearing under Tex. R. Evid. 412 is to abate the appeal and remand the case to the trial court to conduct a proper hearing retrospectively. LaPointe v. State, 225 S.W.3d 513, 2007 Tex. Crim. App. LEXIS 505 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1015, 128

S. Ct. 544, 169 L. Ed. 2d 381 (2007).

43. Where defendant was initially denied the adversarial hearing required by Tex. R. Evid. 412, a retrospective hearing conducted on remand was proper; defense counsel's questions regarding child custody, the victim's alcohol use, and whether the victim was taking medication for bipolar disorder were not inquiries into the victim's past sexual history and did not fall within the order at trial; those questions therefore fell outside the scope of the remand order, and the trial court did not err to exclude them. LaPointe v. State, 225 S.W.3d 513, 2007 Tex. Crim. App. LEXIS 505 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1015, 128 S. Ct. 544, 169 L. Ed. 2d 381 (2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

44. Defendant in a trial for sexual assault of a child failed to preserve for review his argument that evidence of the victim's sexual conduct was admissible pursuant to an exceptions to the rape shield law, Tex. Evid. R. 412(b)(2)(E) and the Confrontation Clause. Because he never raised that argument before the trial court, the reviewing court considered only whether the evidence was admissible under Tex. Code Crim. Proc. Ann. art. 37.07, and affirmed the exclusion. Eaves v. State, 141 S.W.3d 686, 2004 Tex. App. LEXIS 4728 (Tex. App. Texarkana 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

45. In a trial for sexual assault and indecency with a child, defendant failed to preserve for review an argument that he was erroneously prevented him from presenting or eliciting evidence of the complainant's sexual history and sexual sophistication in part because he failed to direct the court to any portion of the record where he adhered to the requirements of this rule. Martinez v. State, 2014 Tex. App. LEXIS 3827, 2014 WL 1396705 (Tex. App. El Paso Apr. 9 2014).

46. In a trial for sexual assault of a child, defendant failed to preserve the argument that it was improper to exclude evidence of the complainant's sexual history because the record did not contain an offer of proof from which the reviewing court could analyze the excluded testimony. Cordero v. State, 2012 Tex. App. LEXIS 2834, 2012 WL 1248064 (Tex. App. El Paso Apr. 11 2012).

47. Defendant waived any argument based on Tex. R. Evid. 412(b)(2)(E) by failing to argue in the trial court that the nurse's testimony was admissible under Tex. R. Evid. 412(b)(2)(E). Murphy v. State, 2008 Tex. App. LEXIS 4372 (Tex. App. Houston 1st Dist. June 5 2008).

48. In a child sexual assault case, defendant was not denied the right to confront and cross-examine the complainant about allegations of previous sexual behavior because defendant's trial objections did not raise his constitutional rights, nor did they apprise the trial court that the evidence should have been admitted under Tex. R. Evid. 412; accordingly, defendant failed to preserve error on the issue of his constitutional right to confront the complainant. Leachman v. State, 2006 Tex. App. LEXIS 7345 (Tex. App. Houston 1st Dist. Aug. 17 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

49. Defendant failed to preserve for appellate review his claim that the trial court erred by instructing the jury that one victim was a virgin prior to the crime because he failed to object, despite the opportunity to do so. After the Tex. R. Evid. 412 hearing, but with the jury absent, the trial court informed the parties that it would so instruct the jury, the jury was brought in, and the instruction was given. Young v. State, 382 S.W.3d 414, 2012 Tex. App. LEXIS 8627, 2012 WL 4874628 (Tex. App. Texarkana Oct. 16 2012).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Jury Instructions

50. Defendant failed to preserve for appellate review his claim that the trial court erred by instructing the jury that one victim was a virgin prior to the crime because he failed to object, despite the opportunity to do so. After the Tex. R. Evid. 412 hearing, but with the jury absent, the trial court informed the parties that it would so instruct the jury, the jury was brought in, and the instruction was given. Young v. State, 382 S.W.3d 414, 2012 Tex. App. LEXIS 8627, 2012 WL 4874628 (Tex. App. Texarkana Oct. 16 2012).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

51. In a trial for sexual assault, defendant failed, under Tex. R. App. P. 33.1, to preserve an argument that evidence relating to the complainant's sexual history was admissible under the Tex. R. Evid. 412 to rebut or explain scientific or medical evidence offered by the State; although defendant raised other grounds for admission of the evidence, defendant did not assert that the impeachment evidence was necessary to rebut or explain scientific or medical evidence offered by the State. Godbolt v. State, 2007 Tex. App. LEXIS 6295 (Tex. App. Houston 1st Dist. Aug. 9 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

52. Trial court's decision to deny defendant the opportunity to cross-examine witnesses about the victim's accusation of sexual assault against another person was not an abuse of discretion because specific instances could not be inquired into under Tex. R. Evid. 608(b), defendant never made a showing that the victim's allegation was false, and defendant was allowed to cross-examine witnesses regarding the victim's recantation of her accusation against her brother. Odom v. State, 2014 Tex. App. LEXIS 5009, 2014 WL 1882754 (Tex. App. Waco May 8 2014).

53. Trial court did not err by excluding evidence about the victim's past sexual behavior with her boyfriend because it was not necessary to rebut a physician's testimony, as the record showed that when the physician testified about the absence of malingering and secondary gain he was conveying his opinions about the statements the victim had made to him regarding the sexual abuse by defendant. Kissoon v. State, 2013 Tex. App. LEXIS 11045 (Tex. App. Fort Worth Aug. 29 2013).

54. Trial court did not abuse its discretion by excluding the victim's prior sexual history to explain the existence of another male's DNA on his wife's mattress because there was no evidence that the victim's prior sexual conduct with anyone other than defendant ever occurred on the wife's bed. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

55. Trial court did not abuse its discretion by excluding the victim's prior sexual history to show the victim's motive to fabricate the allegations against defendant because he was not denied the opportunity to present his fabrication defense and the victim's prior sexual history did not tend to establish that she fabricated the story because she was having sex with others. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

56. Trial court did not err by excluding evidence of the victim's prior sexual conduct with her boyfriend and subsequent abortion under Tex. R. Evid. 412 because evidence that the victim had engaged in sexual conduct with her boyfriend 11 days before the assault would not have explained or rebutted the State's medical evidence regarding notches a nurse observed on the victim's hymen that were indicative of an injury inflicted no more than 24 hours before the exam. The evidence regarding the victim's pregnancy and abortion did not support the theory that the victim fabricated a story that she was sexually assaulted by defendant in order to conceal the fact that she had previously had sexual contact with her boyfriend because the victim's assumption that her pregnancy resulted from

the sexual assault was reasonable, since the pregnancy test given during the sexual assault exam was negative. Rivera v. State, 2010 Tex. App. LEXIS 7691, 2010 WL 3619945 (Tex. App. Austin Sept. 15 2010).

57. In an aggravated sexual assault of a child who was younger than 14 case, defendant did not allege that there was any evidence controverting the victim's testimony that she and defendant had sexual intercourse of September 19, 2003; further, defendant did not explain how the probative value of evidence of the child's past sexual behavior outweighed the danger of undue prejudice; thus, defendant failed to show that the trial court abused its discretion in excluding the evidence under Tex. R. Evid. 412. Guerrero v. State, 2006 Tex. App. LEXIS 3723 (Tex. App. Beaumont May 3 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

58. Even though the trial court erred by excluding a witness's testimony that the victim had performed oral sex on defendant two days before the sexual assault, as consent was at issue even before the witness testified and the evidence had probative value that outweighed the danger of undue prejudice, the error was harmless because defendant was able to produce considerable evidence that the victim had shown sexual interest in defendant before the assault. The witness testified that defendant and the victim had had sexually charged contact and had gone together into the witness's bedroom. Gotcher v. State, 435 S.W.3d 367, 2014 Tex. App. LEXIS 6181, 2014 WL 2576061 (Tex. App. Texarkana June 10 2014).

59. No prejudice resulted from any error in excluding, from a sexual assault and kidnapping trial, recorded conversations between defendant and the victim because defendant was able to present the substance of his defense that the victim voluntarily met him and consented to all of the sexual interactions, and there was overwhelming evidence showing that she did not consent. Jordan v. State, 2012 Tex. App. LEXIS 5733, 2012 WL 2981103 (Tex. App. Austin July 11 2012).

60. Even if the trial court violated defendant's Confrontation Clause rights by excluding evidence of the victim's past sexual behavior under Tex. R. Evid. 412, the error was harmless because even though the victim's testimony against defendant was important to the State's case, the State relied on other testimony and scientific evidence to establish that defendant had sexually assaulted the victim; the victim's epithelial cells and defendant's sperm cells were found on two towels next to the bed that they shared and on a sheet taken from their bed and defendant's ex-wife and the victim's brother testified to suspicious behavior between defendant and the victim, including that they shared a bedroom. While defendant's testimony showed that the victim had threatened to tell the police about their relationship, it did not establish that she threatened to falsely accuse him of sexual assault. Green v. State, 2011 Tex. App. LEXIS 6147, 2011 WL 3426278 (Tex. App. Fort Worth Aug. 4 2011).

61. In a trial for a teacher's sexual assault of a minor student, there was no reversible error in the exclusion of evidence regarding the student's alleged prior sexual relationships, even if the trial court erred in failing to hold the required in camera hearing, because the error was harmless under Tex. R. App. P. 44.2; the hamlessness determination was based on a record that did not include the actual excluded testimony but did include the teacher's theory of what the testimony was expected to show. Evidence indicating that the student had intercourse with someone other than teacher did not, by itself, tend to prove or disprove that the student would fabricate sexual assault charges for purposes of Tex. R. Evid. 412(b)(2)(C); further, the record included compelling evidence of an actual sexual relationship between teacher and the student. San Pedro v. State, 2007 Tex. App. LEXIS 1552 (Tex. App. Austin Feb. 27 2007).

Criminal Law & Procedure : Habeas Corpus : Procedural Default : General Overview

62. State prisoner, in his 28 U.S.C.S. § 2254 petition, argued that the complainant's prior statements were admissible under Tex. R. Evid. 412(b); the issue had been procedurally defaulted, however, and was barred from

consideration by the federal habeas court; previously, in denying relief on this claim, the state habeas court based its decision upon the alternative grounds of procedural default and a rejection of the merits; in its turn, the federal court was obliged to deny habeas relief on account of the procedural default because the prisoner did not show good "cause" and "prejudice" or a miscarriage of justice. Galloway v. Dretke, 2005 U.S. Dist. LEXIS 38726 (S.D. Tex. Dec. 12 2005).

Criminal Law & Procedure : Habeas Corpus : Procedural Default : Actual Innocence & Miscarriage of Justice

63. State prisoner, in his 28 U.S.C.S. § 2254 petition, argued that the complainant's prior statements were admissible under Tex. R. Evid. 412(b); the issue had been procedurally defaulted, however, and was barred from consideration by the federal habeas court; previously, in denying relief on this claim, the state habeas court based its decision upon the alternative grounds of procedural default and a rejection of the merits; in its turn, the federal court was obliged to deny habeas relief on account of the procedural default because the prisoner did not show good "cause" and "prejudice" or a miscarriage of justice. Galloway v. Dretke, 2005 U.S. Dist. LEXIS 38726 (S.D. Tex. Dec. 12 2005).

Criminal Law & Procedure : Habeas Corpus : Procedural Default : Cause & Prejudice Standard : General Overview

64. State prisoner, in his 28 U.S.C.S. § 2254 petition, argued that the complainant's prior statements were admissible under Tex. R. Evid. 412(b); the issue had been procedurally defaulted, however, and was barred from consideration by the federal habeas court; previously, in denying relief on this claim, the state habeas court based its decision upon the alternative grounds of procedural default and a rejection of the merits; in its turn, the federal court was obliged to deny habeas relief on account of the procedural default because the prisoner did not show good "cause" and "prejudice" or a miscarriage of justice. Galloway v. Dretke, 2005 U.S. Dist. LEXIS 38726 (S.D. Tex. Dec. 12 2005).

Criminal Law & Procedure : Habeas Corpus : Review : Specific Claims : Ineffective Assistance

65. Texas inmate who was convicted of aggravated sexual assault of a child under Tex. Penal Code Ann. § 22.011 was not entitled to habeas relief under 28 U.S.C.S. § 2254 because his trial counsel was not ineffective in failing to argue during the punishment phase that the victim's sexual behavior was constitutionally required to be admitted under Tex. R. Evid. 412(b)(2)(E); the inmate failed to show that the evidence was both constitutionally required and relevant for purposes of Rule 412(b) or that the evidence would have been admitted had the argument been made. Piper v. Thaler, 2011 U.S. Dist. LEXIS 1326 (S.D. Tex. Jan. 6 2011).

Evidence : Hearsay : General Overview

66. During defendant's trial for aggravated sexual assault and solicitation of a minor, the trial court did not err in refusing to admit evidence showing that the complainant had knowledge of sexual matters before these alleged events occurred because the evidence was hearsay. While certain evidence of past activities may be admissible under Tex. R. Evid. 412, the latter does not trump application of the hearsay rules. Landers v. State, 2011 Tex. App. LEXIS 2982, 2011 WL 1496154 (Tex. App. Amarillo Apr. 19 2011).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview

67. State trial court's exclusion of evidence of a complainant's statements prior to her involvement with the prisoner did not constitute error so extreme that it constituted denial of fundamental fairness and due process under the Fourteenth Amendment; the referenced hearsay statements, which the prisoner claimed were admissible under Tex. R. Evid. 412(b), were not of the complainant's prior sexual history or behavior, but rather, of her sexual

awareness, attitudes, or wishes that did not rebut or explain the State's scientific evidence; therefore, the exclusion of the statements did not provide a basis for federal habeas corpus relief. Galloway v. Dretke, 2005 U.S. Dist. LEXIS 38726 (S.D. Tex. Dec. 12 2005).

Evidence : Procedural Considerations : Curative Admissibility

68. There was no err in denying defendant's request to present testimony during the guilt/innocence phase from a physician that performed a pelvic examination of the complainant during the previous year based upon an allegation that defendant had sexually assaulted her at that time, because Tex. R. Evid. 412 contained five exceptions, and the rule of optional completeness under Tex. R. Evid. 107 was not listed as one of the exceptions. Williams v. State, 2010 Tex. App. LEXIS 8754, 2010 WL 4324430 (Tex. App. Eastland Oct. 28 2010).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

69. In an aggravated sexual assault case, the trial court properly excluded, under Tex. R. Evid. 412(b)(2)(c), (b)(3), test results reporting that the complainant's blood tested positive for chlamydia; evidence indicating that the complainant had sex with someone else did not imply that she would fabricate sexual assault charges against defendant. Scott v. State, 2005 Tex. App. LEXIS 1872 (Tex. App. Fort Worth Mar. 10 2005).

70. Defendant did not establish the relevancy, Tex. R. Evid. 401, of certain evidence regarding the alleged sexual relationship between the two victims, who were step-brothers, as a material issue in the case in which he was found guilty of two counts of fondling/indecency with a child and one count of aggravated sexual assault of a child, so as to justify admission of evidence of an alleged victim's sexual behavior under Tex. R. Evid. 412(b)(2)(E); thus, the evidence was properly excluded under Tex. R. Evid. 402. Hale v. State, 140 S.W.3d 381, 2004 Tex. App. LEXIS 2333 (Tex. App. Fort Worth 2004).

Evidence : Procedural Considerations : Rulings on Evidence

71. In camera proceeding contemplated by Tex. R. Evid. 412 is an adversarial hearing at which the parties are present and the attorneys are permitted to question witnesses. LaPointe v. State, 225 S.W.3d 513, 2007 Tex. Crim. App. LEXIS 505 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1015, 128 S. Ct. 544, 169 L. Ed. 2d 381 (2007).

72. State trial court's exclusion of evidence of a complainant's statements prior to her involvement with the prisoner did not constitute error so extreme that it constituted denial of fundamental fairness and due process under the Fourteenth Amendment; the referenced hearsay statements, which the prisoner claimed were admissible under Tex. R. Evid. 412(b), were not of the complainant's prior sexual history or behavior, but rather, of her sexual awareness, attitudes, or wishes that did not rebut or explain the State's scientific evidence; therefore, the exclusion of the statements did not provide a basis for federal habeas corpus relief. Galloway v. Dretke, 2005 U.S. Dist. LEXIS 38726 (S.D. Tex. Dec. 12 2005).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

73. Even though the trial court erred by excluding a witness's testimony that the victim had performed oral sex on defendant two days before the sexual assault, as consent was at issue even before the witness testified and the evidence had probative value that outweighed the danger of undue prejudice, the error was harmless because defendant was able to produce considerable evidence that the victim had shown sexual interest in defendant before the assault. The witness testified that defendant and the victim had had sexually charged contact and had gone together into the witness's bedroom. Gotcher v. State, 435 S.W.3d 367, 2014 Tex. App. LEXIS 6181, 2014 WL 2576061 (Tex. App. Texarkana June 10 2014).

74. Trial court did not abuse its discretion by excluding evidence of the minor victim's prior sexual conduct under Tex. R. Evid. 412 to explain the State's medical evidence because, even though the State opened the door to the victim's prior sexual history by asking whether ongoing sexual assaults could explain the nonexistence of trauma in a nonacute exam, the evidence could have been introduced without inquiry into the victim's prior sexual history, and therefore the probative value of the evidence did not outweigh its prejudicial effect. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

75. In defendant's indecency with a child case, the court did not err by excluding evidence related to the victim's sexual relationship with her boyfriend who lived at the residence where the events took place because the victim's sexual history and relationship with her boyfriend had little or no probative value. The defensive theory was that the victim was motivated to fabricate the allegations because of defendant's complaints to the victim about her boyfriend's failure to contribute to household expenses; however, evidence of the victim's sexual relationship with her boyfriend would show only that she was sexually active with an older male who lived in the apartment. Franklin v. State, 2010 Tex. App. LEXIS 619, 2010 WL 337334 (Tex. App. Tyler Jan. 29 2010).

76. In an aggravated sexual assault of a child case, the trial court did not err by excluding hearsay testimony about the victim's prior sexual activity as the probative value of this hearsay would not have outweighed the danger of unfair prejudice. James v. State, 2005 Tex. App. LEXIS 7972 (Tex. App. Texarkana Sept. 29 2005).

77. Trial court's exclusion of evidence regarding a child sexual assault victim's relationships with two different boys and her actions and comments involving two cousins did not deprive defendant of his constitutional right to a fair trial where the trial court could have determined, based on the chronology of the events, that they did not explain the State's medical evidence regarding the time of the penetration of the victim's hymen, and, although the trial court excluded the equivocal testimony of the victim's mother about the victim's veracity, the victim's aunt was allowed to testify that she had a bad reputation for being untruthful, and the victim herself admitted lying to defendant, her father, about her report card. Accordingly, the trial court reasonably could have concluded that the matters had, at best, marginal relevance to the victim's alleged motive to testify falsely against defendant, that they would have unduly harassed the victim and confused the issues, and that the danger of unfair prejudice from the evidence would have outweighed its probative value. Pogue v. State, 2005 Tex. App. LEXIS 7819 (Tex. App. Fort Worth Sept. 22 2005).

78. Before a trial court may admit Tex. R. Evid. 412(b)(2)(A-E) evidence, it must find that the probative value of said evidence outweighs the danger of unfair prejudice. Mungaray v. State, 2004 Tex. App. LEXIS 2595 (Tex. App. El Paso Mar. 24 2004).

79. Trial court utilizes a two-step test in determining the admissibility of previous-sexual-conduct evidence: (1) the evidence must fall within one of the five enumerated circumstances in Tex. R. Evid. 412(b)(2); and (2) its probative value must outweigh the danger of unfair prejudice. Both prongs of the test must be established in order for the evidence to be admitted. Mungaray v. State, 2004 Tex. App. LEXIS 2595 (Tex. App. El Paso Mar. 24 2004).

80. In a criminal trial for aggravated sexual assault and indecency with a child, the court did not err in refusing evidence of a purported previous sexual assault committed by defendant's brother upon the complainant. The probative value of this evidence was thin compared to the prejudicial effect it would have. Mungaray v. State, 2004 Tex. App. LEXIS 2595 (Tex. App. El Paso Mar. 24 2004).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

81. Before a trial court may admit Tex. R. Evid. 412(b)(2)(A-E) evidence, it must find that the probative value of said evidence outweighs the danger of unfair prejudice. Mungaray v. State, 2004 Tex. App. LEXIS 2595 (Tex. App.

El Paso Mar. 24 2004).

82. Trial court utilizes a two-step test in determining the admissibility of previous-sexual-conduct evidence: (1) the evidence must fall within one of the five enumerated circumstances in Tex. R. Evid. 412(b)(2); and (2) its probative value must outweigh the danger of unfair prejudice. Both prongs of the test must be established in order for the evidence to be admitted. Mungaray v. State, 2004 Tex. App. LEXIS 2595 (Tex. App. El Paso Mar. 24 2004).

83. In a criminal trial for aggravated sexual assault and indecency with a child, the court did not err in refusing evidence of a purported previous sexual assault committed by defendant's brother upon the complainant. The probative value of this evidence was thin compared to the prejudicial effect it would have. Mungaray v. State, 2004 Tex. App. LEXIS 2595 (Tex. App. El Paso Mar. 24 2004).

Evidence : Relevance : Relevant Evidence

84. Trial court did not abuse its discretion by precluding defense counsel from asking a witness whether she saw the child victim play with her sexual organs based on Tex. R. Evid. 412 because the testimony was not enough to make it probable that a three-year-old child masturbating in some vague way two days before the assault caused the presence of physical trauma two days later. In addition, the incomplete information was of minimal probative value, even if relevant. Turner v. State, 2013 Tex. App. LEXIS 12690, 2013 WL 5614311 (Tex. App. Amarillo Oct. 10 2013).

85. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because, with regard to the victim's alleged prior sexual behavior, other than her involvement, there was no similarity between those incidents and the current allegations against defendant currently, Tex. R. Evid. 401, 402, 403, and 412(b). Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

86. Evidence of sperm located on a victim's clothing after a sexual assault was not relevant at trial because there was no evidence that defendant ejaculated during the crime. Davis v. State, 2004 Tex. App. LEXIS 3815 (Tex. App. Fort Worth Apr. 29 2004).

87. Defendant did not establish the relevancy, Tex. R. Evid. 401, of certain evidence regarding the alleged sexual relationship between the two victims, who were step-brothers, as a material issue in the case in which he was found guilty of two counts of fondling/indecency with a child and one count of aggravated sexual assault of a child, so as to justify admission of evidence of an alleged victim's sexual behavior under Tex. R. Evid. 412(b)(2)(E); thus, the evidence was properly excluded under Tex. R. Evid. 402. Hale v. State, 140 S.W.3d 381, 2004 Tex. App. LEXIS 2333 (Tex. App. Fort Worth 2004).

Evidence : Relevance : Sex Offenses : General Overview

88. There was no err in denying defendant's request to present testimony during the guilt/innocence phase from a physician that performed a pelvic examination of the complainant during the previous year based upon an allegation that defendant had sexually assaulted her at that time, because Tex. R. Evid. 412 contained five exceptions, and the rule of optional completeness under Tex. R. Evid. 107 was not listed as one of the exceptions. Williams v. State, 2010 Tex. App. LEXIS 8754, 2010 WL 4324430 (Tex. App. Eastland Oct. 28 2010).

89. Decision refusing to allow defendant to cross-examine the complainant regarding the sexual abuse allegations against her father was affirmed because defendant failed to demonstrate that cross-examining the complainant regarding her allegations against her father was constitutionally required, and the district court's decision to limit the

cross-examination did not violate the defendant's constitutional right to confront the witnesses against him; evidence demonstrating that the complainant had made allegations against her father, without more, would not have been relevant to a determination of whether the complainant fabricated her allegations against defendant, defendant failed to produce any evidence indicating that the complainant's prior allegations against her father were false, and the complainant's credibility had already been impeached through the testimony of one of the State's witnesses indicating that the complainant had made false allegations against other individuals while in therapy. Davis v. State, 2007 Tex. App. LEXIS 6360 (Tex. App. Austin Aug. 9 2007).

90. Defendant argued on appeal that evidence of the victim's prior accusations was inadmissible under Tex. R. Evid. 412 and violated U.S. Const. amend. VI, but at trial, defendant did not mention Tex. R. Evid. 412(b) and did not argue that the Confrontation Clause applied; because defendant did not make an offer of proof, it was not clear whether defendant intended to recall prior witnesses or introduce testimony from a new witness, and because defendant failed to put the trial court on notice as to the evidence, no error was preserved for review under Tex. R. App. P. 33.1. Estes v. State, 2006 Tex. App. LEXIS 5028 (Tex. App. Houston 14th Dist. June 13 2006).

91. In defendant's sexual assault on a child case, evidence that one victim had previously had sex with another victim did not fall under any of the exceptions to Tex. R. Evid. 412; the proposed question asked about any sexual activity between the victims occurring prior to the date of the incident, but that question was not highly probative of whether the victim had a motive to lie about sexual activity between the victims during the incident with defendant. Hatter v. State, 2006 Tex. App. LEXIS 4516 (Tex. App. Austin May 26 2006).

Evidence : Relevance : Sex Offenses : Rape Shield Laws

92. Court properly excluded testimony because the proffered testimony centered on what the victim told the witness regarding a boy wanting to have sexual intercourse with her, and therefore, the testimony was improper under this section. Vega v. State, 2014 Tex. App. LEXIS 7948 (Tex. App. Corpus Christi July 24 2014).

93. During defendant's trial for sexual abuse of his daughter, the court did not err in prohibiting defendant from interrogating his daughter about her failure to report her brother's alleged sexual assault; there was no evidence or indication that her brother was her assailant instead of defendant, only that he was possibly an additional assailant. James v. State, 2014 Tex. App. LEXIS 6994 (Tex. App. Austin June 27 2014).

94. During defendant's trial for sexual assault of a child, the court did not err in excluding evidence of two prior sexual abuse incidents because defendant made no effort to establish that the evidence fell into one of the five categories in Tex. R. Evid. 412(b)(2). Cowell v. State, 2014 Tex. App. LEXIS 6278, 2014 WL 2583675 (Tex. App. Dallas June 10 2014).

95. Court did not abuse its discretion by excluding evidence concerning the complainant's claimed past sexual history involving another man, because defendant did not meet the threshold requirements of the rule for the court to conduct an in camera hearing, when defendant did not inform the court out of the jury's hearing prior to asking the question. Cuevas v. State, 2014 Tex. App. LEXIS 4844, 2014 WL 1830116 (Tex. App. Dallas May 5 2014).

96. Defendant's contention that the trial court improperly failed to hold an in camera hearing required by this rule was rejected because the trial court did hold such a hearing, permitted defense counsel to argue why the proffered evidence was admissible, made its ruling, and provided an explanation for it. Mbata v. State, 2014 Tex. App. LEXIS 3241, 2014 WL 1285756 (Tex. App. Austin Mar. 26 2014).

97. Exclusion of testimony by defendant's wife, who was also the complainant's older sister, regarding the alleged prior sexual abuse of the complainant by the complainant's father was proper under the rape shield law because, to

the extent that defendant sought to introduce the testimony to attack the identity element of the crime, the complained-of testimony was irrelevant to the issue of whether he committed the charged offenses of sexual assault of a child and indecency with a child during the time period described in the indictment; the complainant and her mother refuted the complained-of testimony. Johnson v. State, 2014 Tex. App. LEXIS 1369, 2014 WL 505332 (Tex. App. Waco Feb. 6 2014).

98. Court did not err in prohibiting cross-examination of the complainant regarding the matters discussed during the rape shield evidentiary hearings because the jury was cognizant of the complainant's purported motive or bias, which defendant's counsel emphasized in his closing argument, and the complainant's credibility was called into question when counsel vigorously cross-examined her, causing her to admit to lapses of memory and to try to explain contradicting portions of her testimony. Dees v. State, 2013 Tex. App. LEXIS 15404, 2013 WL 6869865 (Tex. App. Fort Worth Dec. 27 2013).

99. Court properly excluded testimony regarding the victim's prior "sexual act" involving alleged penetration of her vagina because witnesses did not give evidence of penetration, and the victim would have had private facts made public when those private facts did not serve to explain the presence of the tear in her hymen. Montgomery v. State, 415 S.W.3d 580, 2013 Tex. App. LEXIS 13141, 2013 WL 5782920 (Tex. App. Amarillo Oct. 22 2013).

100. Trial court did not abuse its discretion by precluding defense counsel from asking a witness whether she saw the child victim play with her sexual organs based on Tex. R. Evid. 412 because the testimony was not enough to make it probable that a three-year-old child masturbating in some vague way two days before the assault caused the presence of physical trauma two days later. In addition, the incomplete information was of minimal probative value, even if relevant. Turner v. State, 2013 Tex. App. LEXIS 12690, 2013 WL 5614311 (Tex. App. Amarillo Oct. 10 2013).

101. Trial court did not err by excluding evidence about the victim's past sexual behavior with her boyfriend because it was not necessary to rebut a physician's testimony, as the record showed that when the physician testified about the absence of malingering and secondary gain he was conveying his opinions about the statements the victim had made to him regarding the sexual abuse by defendant. Kissoon v. State, 2013 Tex. App. LEXIS 11045 (Tex. App. Fort Worth Aug. 29 2013).

102. Trial court did not abuse its discretion by impliedly concluding that the probative value of evidence of the complainant's sexual relationships with other individuals did not outweigh the danger of unfair prejudice and, thus, the proffered evidence was inadmissible. Ferree v. State, 416 S.W.3d 2, 2013 Tex. App. LEXIS 10609 (Tex. App. Houston 14th Dist. Aug. 22 2013).

103. Appellant claimed counsel showed his unfamiliarity with the law, including Tex. R. Evid. 412, but appellant did not show that counsel performed deficiently in questioning the child concerning her sexual history in appellant's aggravated sexual assault of a child trial, and that another attorney would have pursued a different line of questioning did not overcome the presumption that counsel rendered reasonable assistance. Garcia v. State, 2013 Tex. App. LEXIS 2868, 2013 WL 1149288 (Tex. App. San Antonio Mar. 20 2013).

104. Defendant's motion to unseal portions of the reporter's record that were sealed pursuant to Tex. R. Evid. 412 was granted as to the attorneys of record because Rule 412 did not preclude unsealing the record of the in camera proceeding for defense counsel on appeal because it seemed better for the system of justice, as well as to assure defendant's right to effective assistance of counsel on appeal, that defendant's appellate counsel have limited access to the sealed record in order to assert the arguments he deemed best through the use of his professional judgment. The court further held that the complainant's privacy rights and defendant's right to a meaningful appeal could be adequately protected through specific orders from the court. Dees v. State, 508 S.W.3d 312, 2013 Tex.

App. LEXIS 1731, 2013 WL 627046 (Tex. App. Fort Worth Feb. 21 2013).

105. Trial court did not abuse its discretion by excluding evidence of the minor victim's prior sexual conduct under Tex. R. Evid. 412 to explain the State's medical evidence because, even though the State opened the door to the victim's prior sexual history by asking whether ongoing sexual assaults could explain the nonexistence of trauma in a nonacute exam, the evidence could have been introduced without inquiry into the victim's prior sexual history, and therefore the probative value of the evidence did not outweigh its prejudicial effect. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

106. Trial court did not abuse its discretion by excluding the victim's prior sexual history to explain the existence of another male's DNA on his wife's mattress because there was no evidence that the victim's prior sexual conduct with anyone other than defendant ever occurred on the wife's bed. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

107. Trial court did not abuse its discretion by excluding the victim's prior sexual history to show the victim's motive to fabricate the allegations against defendant because he was not denied the opportunity to present his fabrication defense and the victim's prior sexual history did not tend to establish that she fabricated the story because she was having sex with others. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

108. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because, with regard to the victim's alleged prior sexual behavior, other than her involvement, there was no similarity between those incidents and the current allegations against defendant currently, Tex. R. Evid. 401, 402, 403, and 412(b). Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

109. Trial court did not abuse its discretion by excluding the testimony of two witnesses concerning the child victim's prior sexual history because defendant's defense was that the victim was lying, and he was not prohibited from presenting that defense at trial. Defendant had the opportunity to cross-examine the allege false impression left by the victim's testimony by cross-examining her at trial; he was not entitled to correct the alleged false impression by calling other witnesses. Gonzalez v. State, 2012 Tex. App. LEXIS 8246, 2012 WL 4497999 (Tex. App. Tyler Sept. 28 2012).

110. Where defendant was convicted for continuous sexual abuse of a child, the trial court did not abuse its discretion by refusing to allow him to cross-examine the victim about her sexual relations with her boyfriend. After holding an in camera hearing to determine whether the proposed evidence was admissible under Tex. R. Evid. 412, the trial court sustained the prosecutor's relevance objection, and defense counsel withdrew the question. Dukes v. State, 2012 Tex. App. LEXIS 6151 (Tex. App. Corpus Christi July 26 2012).

111. Plain and ordinary meaning of the term "whore" is a woman who engages in sexual acts for money, but on the other hand, the plain and ordinary meaning of the term "bitch" is a lewd or immoral woman; the court believes that these terms are commonly used to reference "sexual matters," which would violate Tex. R. Evid. 412, plus the agreed-upon motion in limine between the parties in this case. Dale v. State, 2012 Tex. App. LEXIS 3127, 2012 WL 1382446 (Tex. App. Waco Apr. 18 2012).

112. Victim referred to herself as a "bitch/whore" on her MySpace page, and this statement did not fall within any of the exceptions listed in Tex. R. Evid. 412(b); the admission was not necessary to rebut or explain evidence, the statement did not concern the history between the victim and appellant, the statement did not go to the issue of consent, the statement was not constitutionally required to be admitted, and the statement was not admissible

under Tex. R. Evid. 609 because it did not concern anything about the victim being convicted of a crime, and as the court did not see how the statement was necessary to show bias or motive, the trial court's decision to exclude the statement was not outside the zone of reasonable disagreement. Dale v. State, 2012 Tex. App. LEXIS 3127, 2012 WL 1382446 (Tex. App. Waco Apr. 18 2012).

113. Where defendant was charged with aggravated sexual assault of a child under Tex. Penal Code Ann. § 22.021 involving a four-year-old girl and where defendant sought to introduce evidence that the victim had been sexually abused by another family member prior to the accusations made against defendant to explain the testimony from the sexual assault nurse examiner who examined the child and found evidence that the child had engaged in sexual intercourse, the trial court did not err in ruling that the evidence was inadmissible and did not fall within the exception of Tex. R. Evid. 412 because there was no evidence of prior penetration even if there was evidence of touching and the sexual assault nurse could nto say when the victim's penetrating injury occurred. Alvarado v. State, 2012 Tex. App. LEXIS 1479, 2012 WL 593564 (Tex. App. Austin Feb. 24 2012).

114. In a trial for defendant's sexual assault on his 12-year-old daughter, the trial court properly excluded a recent sexual incident involving the victim and a boy at school because nothing in the record established that the victim made any false rape allegation. Armstrong v. State, 2011 Tex. App. LEXIS 9760, 2011 WL 6188608 (Tex. App. Dallas Dec. 14 2011).

115. Court saw no connection between the victim's relationship with her female friend and any motive for her to exaggerate the incident in question involving appellant juvenile, and the nature of the victim's relationship with her friend did not make the victim's account of the incident involving appellant more or less probable; even assuming the victim were homosexual, a person's sexual orientation, alone, had no bearing on his or her propensity for truthfulness, and injecting evidence of a witness's sexual orientation into trial under circumstances like those in this case would risk derailing the focus of the trial and putting the victim on trial, for purposes of Tex. R. Evid. 412(a), (b)(2)(C). In re O.O.A., 358 S.W.3d 352, 2011 Tex. App. LEXIS 7416 (Tex. App. Houston 14th Dist. Sept. 13 2011).

116. Evidence of one's sexual orientation may be relevant to show bias under unique circumstances when coupled with a logical connection to one's motive to testify in a certain manner, but that was not the case here, and the evidence of the victim's sexual orientation was inadmissible and irrelevant under Tex. R. Evid. 401, 402; furthermore, under these circumstances when there was no connection between the victim's relationship with her female friend and any motive for her to exaggerate the incident involving appellant juvenile, any de minimis probative value of that information would be substantially outweighed by the danger of unfair prejudice in putting the victim on trial for her sexual orientation. In re O.O.A., 358 S.W.3d 352, 2011 Tex. App. LEXIS 7416 (Tex. App. Houston 14th Dist. Sept. 13 2011).

117. Appellant did not attempt to explain how he was denied the opportunity to present a viable defense through the application of Tex. R. Evid. 412(b)(3), and he did not meet his burden to show how the rule permitted the admission of the testimony in question; as appellant did not show why the leeway discussed in case law should apply, the court could not allow him to forego addressing Rule 412(b)(3) and show how the supposed probative value of the evidence outweighed the danger of unfair prejudice. Nichols v. State, 349 S.W.3d 612, 2011 Tex. App. LEXIS 7253 (Tex. App. Texarkana Sept. 6 2011).

118. Case law did state that in trials involving sexual assault, the Rules of Evidence should be used sparingly to exclude relevant, otherwise admissible evidence that might bear upon the credibility of eitified in estimating a business's sales tax liability and authorized to employ an estimate and/or sampling audit procedure where the evidence at trial included: (1) a comptroller supervisor's testimony concerning required documents that the business did not provide; (2) documents showing the calculations and method employed by the audit division to estimate the tax deficiencies; (3) documents from the administrative proceeding as to the business's first audit; (4) written correspondence between the parties as to both audits; and (5) the comptroller's final determinations of the tax

deficiencies. The trial court reasonably could have credited the State's testimonial and documentary evidence to find that the business did not provide the necessary documents during the audit period and to uphold the method employed by the auditors. Chitwood v. State, 350 S.W.3d 746, 2011 Tex. App. LEXIS 7301 (Tex. App. Amarillo Sept. 6 2011).

119. Even if the trial court violated defendant's Confrontation Clause rights by excluding evidence of the victim's past sexual behavior under Tex. R. Evid. 412, the error was harmless because even though the victim's testimony against defendant was important to the State's case, the State relied on other testimony and scientific evidence to establish that defendant had sexually assaulted the victim; the victim's epithelial cells and defendant's sperm cells were found on two towels next to the bed that they shared and on a sheet taken from their bed and defendant's ex-wife and the victim's brother testified to suspicious behavior between defendant and the victim, including that they shared a bedroom. While defendant's testimony showed that the victim had threatened to tell the police about their relationship, it did not establish that she threatened to falsely accuse him of sexual assault. Green v. State, 2011 Tex. App. LEXIS 6147, 2011 WL 3426278 (Tex. App. Fort Worth Aug. 4 2011).

120. Where defendant and the complainant met through a social networking website and the complainant represented that she was 18 years old, where the complainant accepted defendant's friend request and that gave defendant access to her private information, including that fact the complainant was actually 14 years of age, where the pair agreed to meet and defendant immediately recognized that the girl was under the age of 17, and where, according to the complainant, the pair had sex twice at defendant's apartment, and where defednant was charged with sexual assault of a child, the trial court did not err under Tex. R. Evid. 412 in excluding evidence regarding the complainant's sexual history because a sexual assault complainant was not a volunteer for an exercise in character assassination and defendant's theory that the complainant lied about her involvement with him in order to protect her other sexual partners was simply too tenuous. Nevelow v. State, 2011 Tex. App. LEXIS 5543, 2011 WL 2899377 (Tex. App. Houston 14th Dist. July 21 2011).

121. In a case where defendant was convicted of two counts of sexual assault under Tex. Penal Code Ann. § 22.011, the excluded evidence, with which defendant attempted to show the victim's licentious character, was properly excluded as it did not fall into any of the Tex. R. Evid. 412 exceptions. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

122. During defendant's trial for aggravated sexual assault and solicitation of a minor, the trial court did not err in refusing to admit evidence showing that the complainant had knowledge of sexual matters before these alleged events occurred because the evidence was hearsay. While certain evidence of past activities may be admissible under Tex. R. Evid. 412, the latter does not trump application of the hearsay rules. Landers v. State, 2011 Tex. App. LEXIS 2982, 2011 WL 1496154 (Tex. App. Amarillo Apr. 19 2011).

123. Even assuming that a trial court erred in excluding evidence of a child sexual assault victim's past sexual behavior, the error was harmless under Tex. R. App. P. 44.2(a) because the exclusion did not contribute to defendant's conviction; the State presented scientific evidence showing that the victim's epithelial cells and defendant's sperm cells were found on towels next to the bed they shared and on a sheet taken from the bed. Green v. State, 2011 Tex. App. LEXIS 2827, 2011 WL 1435638 (Tex. App. Fort Worth Apr. 14 2011).

124. Texas inmate who was convicted of aggravated sexual assault of a child under Tex. Penal Code Ann. § 22.011 was not entitled to habeas relief under 28 U.S.C.S. § 2254 because his trial counsel was not ineffective in failing to argue during the punishment phase that the victim's sexual behavior was constitutionally required to be admitted under Tex. R. Evid. 412(b)(2)(E); the inmate failed to show that the evidence was both constitutionally required and relevant for purposes of Rule 412(b) or that the evidence would have been admitted had the argument been made. Piper v. Thaler, 2011 U.S. Dist. LEXIS 1326 (S.D. Tex. Jan. 6 2011).

125. Trial court did not err by excluding evidence of the victim's prior sexual conduct with her boyfriend and subsequent abortion under Tex. R. Evid. 412 because evidence that the victim had engaged in sexual conduct with her boyfriend 11 days before the assault would not have explained or rebutted the State's medical evidence regarding notches a nurse observed on the victim's hymen that were indicative of an injury inflicted no more than 24 hours before the exam. The evidence regarding the victim's pregnancy and abortion did not support the theory that the victim fabricated a story that she was sexually assaulted by defendant in order to conceal the fact that she had previously had sexual contact with her boyfriend because the victim's assumption that her pregnancy resulted from the sexual assault was reasonable, since the pregnancy test given during the sexual assault exam was negative. Rivera v. State, 2010 Tex. App. LEXIS 7691, 2010 WL 3619945 (Tex. App. Austin Sept. 15 2010).

126. During defendant's trial for aggravated sexual assault of a child, the court, applying the balancing test in Tex. R. Evid. 412(b)(3), properly prohibited defendant from cross-examining several witnesses about whether the victim had made accusations against others of sexual assault; evidence of the victim's conduct in other circumstances was of little relevance to the cogent question in the trial. Hubbard v. State, 2010 Tex. App. LEXIS 3408, 2010 WL 1818950 (Tex. App. Texarkana May 7 2010).

127. Tex. R. Evid. 412 restricts certain evidence that might otherwise be admissible; its exception from application to evidence "that is constitutionally required to be admitted," Tex. R. Evid. 412(b)(2)(E), does nothing to trump the admissibility standards of Tex. R. Evid. 403 because both rules are subject to the same constitutional constraints. Hubbard v. State, 2010 Tex. App. LEXIS 3408, 2010 WL 1818950 (Tex. App. Texarkana May 7 2010).

128. During defendant's trial for aggravated sexual assault of a child, the court did not err by excluding testimony by the victim that she had been previously sexually assaulted by a maintenance worker because the complained-of testimony was not admissible under Tex. R. Evid. 412(b)(2)(E); evidence that a third party laid down on the victim's back and "humped" her by moving in a back and forth motion while fully clothed was not sufficiently similar to defendant's licking the victim's female sexual organ, kissing her on the cheeks and mouth, and exposing his penis to her. Bryan v. State, 2010 Tex. App. LEXIS 2144, 2010 WL 1137038 (Tex. App. Fort Worth Mar. 25 2010).

129. Rule applies to evidence of a victim's "past sexual behavior," and courts do not limit its application to consensual behavior. Bryan v. State, 2010 Tex. App. LEXIS 2144, 2010 WL 1137038 (Tex. App. Fort Worth Mar. 25 2010).

130. Tex. R. Evid. 412(b)(2)(C) applies only to evidence relating to motive or bias of the alleged victim, not any third party. Bryan v. State, 2010 Tex. App. LEXIS 2144, 2010 WL 1137038 (Tex. App. Fort Worth Mar. 25 2010).

131. Court disagreed that the medical evidence was vague and thus the court could not conclude that the victim's prior sexual history was admissible under Tex. R. Evid. 412(b)(2)(A) to rebut or explain the evidence the State offered; there was no indication that the victim's sexual history would reveal that she had a relationship with any of defendant's male blood relatives, who were included in the donor pool. Reyes v. State, 2009 Tex. App. LEXIS 8842, 2009 WL 3856198 (Tex. App. San Antonio Nov. 18 2009).

132. Court disagreed that the victim's prior sexual history was necessary to attack the victim's credibility because the evidence did not meet any of the exceptions listed in Tex. R. Evid. 412 and thus the trial court did not err in refusing to admit the victim's prior sexual history. Reyes v. State, 2009 Tex. App. LEXIS 8842, 2009 WL 3856198 (Tex. App. San Antonio Nov. 18 2009).

133. Court found no error in the supplementation of the record in this case, given that the court reporter sealed the transcript for delivery to the court for purposes of Tex. R. Evid. 412(d); defendant was not entitled to review the sealed record from the in camera hearing conducted pursuant to Rule 412 to determine what complaints to raise on

appeal. Escobar v. State, 2009 Tex. App. LEXIS 8118 (Tex. App. Dallas Oct. 21 2009).

134. Following case law, the court applies Tex. R. Evid. 412 in the limited context where an underlying sexual assault offense predicates a non-sexual assault charge. Woods v. State, 301 S.W.3d 327, 2009 Tex. App. LEXIS 7252 (Tex. App. Houston 14th Dist. Sept. 10 2009).

135. Because the underlying offense in the instant case was sexual assault, the court applied Tex. R. Evid. 412 in determining the admissibility of the victim's prior sexual assault and of counseling she had received relating to the prior assault. Woods v. State, 301 S.W.3d 327, 2009 Tex. App. LEXIS 7252 (Tex. App. Houston 14th Dist. Sept. 10 2009).

136. Victim's previous sexual assault did not fit within any of the enumerated exceptions under Tex. R. Evid. 412, given that (1) the prior assault was not necessary to rebut evidence offered by the State, (2) the prior assault did not involve defendant and he failed to show in what way the previous assault showed the victim's bias, if any, (3) the previous assault was not admissible under Tex. R. Evid. 609 nor constitutionally required to be admitted, and (4) because the previous assault was not probative, that value, if any, was substantially outweighed by its prejudicial effect under Tex. R. Evid. 412(b)(3), such that the victim's previous sexual assault and counseling was inadmissible under Rule 412. Woods v. State, 301 S.W.3d 327, 2009 Tex. App. LEXIS 7252 (Tex. App. Houston 14th Dist. Sept. 10 2009).

137. Even if Tex. R. Evid. 412 was not applicable, the victim's sexual history was inadmissible under Tex. R. Evid. 401, 403, given that there was nothing reflecting that the prior sexual assault made the victim's lack of consent more or less probable and the probative value, if any, was substantially outweighed by its prejudicial effect because the evidence had the potential to impress the jury in a irrational and indelible way and defendant cited to little if any need for the evidence. Woods v. State, 301 S.W.3d 327, 2009 Tex. App. LEXIS 7252 (Tex. App. Houston 14th Dist. Sept. 10 2009).

138. In a case in which defendant was convicted of five counts of aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021(a)(1)(B), (2)(B), although the complainant's credibility was an issue because she was the sole witness to the alleged sexual conduct by defendant, the trial court did not abuse its discretion or violate defendant's confrontation rights by preventing the jury from viewing her pregnancy based on Tex. R. Evid. 412 because defendant had not shown that her pregnancy was relevant to motive or bias, and because the exclusion served to avoid prejudice to the complainant and confusion of the issues. When the complainant was on the witness stand, the jury had an unobstructed view of her face, so they could observe her demeanor and assess her credibility, and defendant was not prevented from cross-examining her. Morgan v. State, 2009 Tex. App. LEXIS 3402, 2009 WL 1372965 (Tex. App. Fort Worth May 14 2009).

139. During defendant's trial for indecency with a child, the trial court abused its discretion in preventing defendant from cross-examining the complainant about her previous false allegations of sexual assault. The evidence was admissible under Tex. R. Evid. 412 to show the complainant's bias against defendant and her possible motive to testify falsely against him. Hammer v. State, 296 S.W.3d 555, 2009 Tex. Crim. App. LEXIS 513 (Tex. Crim. App. 2009).

140. Trial court did not abuse its discretion in refusing to admit evidence of the daughter's past sexual history because the evidence did not come within any exception to Tex. R. Evid. 412's general prohibition and the daughter did not testify to her own sexual experience or lack thereof. Biggers v. State, 2008 Tex. App. LEXIS 8439 (Tex. App. Houston 1st Dist. Nov. 6, 2008).

141. Defendant waived any argument based on Tex. R. Evid. 412(b)(2)(E) by failing to argue in the trial court that the nurse's testimony was admissible under Tex. R. Evid. 412(b)(2)(E). Murphy v. State, 2008 Tex. App. LEXIS 4372 (Tex. App. Houston 1st Dist. June 5 2008).

142. In defendant's criminal prosecution for sexual assault of a child, the trial court did not err in refusing to allow his request to introduce evidence regarding the child's past sexual conduct under Tex. R. Evid. 412; the doctor's physical findings did not conclusively show that the child was sexually abused by defendant; therefore, the fact that she had sex with his younger brother was immaterial. Rivera v. State, 2008 Tex. App. LEXIS 2992 (Tex. App. Houston 1st Dist. Apr. 24 2008).

143. Appellant's aggravated sexual assault conviction was upheld because it was not an abuse of discretion to exclude evidence of the complainant's kissing and flirting with another person at a party under a "rape shield" law since, inter alia, (1) evidence of the complainant's sexual conduct with another man, whether a stranger or not, was not evidence of consent with appellant, and (2) appellant provided no support for the argument that the evidence was probative of the complainant's "motive and bias" in testifying about whether the encounter with appellant was consensual. Barrera v. State, 2007 Tex. App. LEXIS 8662 (Tex. App. Dallas Oct. 31 2007).

144. Defense counsel's concise statement and examination of the victim's father was reasonably specific to have shown the trial court the substance of the excluded evidence and to preserve error for review, for purposes of Tex. R. App. P. 33, Tex. R. Evid. 103; counsel made a reasonably specific summary of the evidence and argued the relevancy thereof, it was apparent by the State's Tex. R. Evid. 412 objection that it knew the precise nature of the excluded evidence, and the trial court was aware of the testimony defendant was trying to illicit by the nature of the trial court's ruling. Ladesic v. State, 2007 Tex. App. LEXIS 8106 (Tex. App. Fort Worth Oct. 11 2007).

145. Although defendant argued that certain factors showed the victim's motive in accusing defendant of sexual assault, the evidence suggesting that she lied about their sexual encounters was extremely thin; defendant did not demonstrate a definite and logical link between the victim's past sexual conduct and the alleged motive and bias under Tex. R. Evid. 412, and thus the trial court did not err in excluding the evidence to show the victim's motive or bias, and additionally, what little probative value, if any, the other "sexual acts" content provided would have been far outweighed by the danger of unfair prejudice and embarrassment to the victim, especially given her young age. Ladesic v. State, 2007 Tex. App. LEXIS 8106 (Tex. App. Fort Worth Oct. 11 2007).

146. In defendant's trial for sexual assault under Tex. Penal Code Ann. § 22.011, there was no evidence regarding either counsel's strategy regarding the failure to bring forth evidence of an alleged sexual relationship between defendant and the victim, and it was possible that second counsel proceeded as he did because he knew that trial counsel would have testified that defendant never told him about the relationship, and thus defendant failed to overcome the presumption that second counsel's conduct was reasonable; even if trial counsel had acknowledged being told of the claimed relationship, there was no reasonable probability that this would have affected the outcome of the proceeding because defendant testified that the alleged penetration of the victim's mouth did not occur, and in light of his denial, trial counsel could have reasonably concluded that consent was not an issue and there was no basis under Tex. R. Evid. 412 for the admission of evidence regarding the victim's past sexual conduct. Brissette v. State, 2007 Tex. App. LEXIS 7941 (Tex. App. Austin Oct. 2 2007).

147. Trial court did not abuse its discretion in excluding evidence regarding the victim's prior sexual behavior for purposes of Tex. R. Evid. 412; the victim's testimony that she did not know what was happening referred to defendant sexually assaulting her, and although defense counsel argued that defendant's presence at the victim's house was part of an ongoing pattern of the victim having people over for the purpose of having sex, the evidence did not support this conclusion, as the victim had sex with one other person and the fact that she was afraid to tell her mother about defendant for fear her mother would learn of her past sexual activity in no way impeached her credibility concerning whether defendant forced her to have sex with him. Ezell v. State, 2007 Tex. App. LEXIS

7712 (Tex. App. San Antonio Sept. 26 2007).

148. In a trial for aggravated sexual assault of a child, defendant failed to preserve error regarding his inquiry into complainant's sexual experience by not making an offer of proof; the reviewing court rejected the argument that it should have been apparent to the trial court that defendant was attempting to introduce medical evidence under Tex. R. Evid. 412. Alfaro v. State, 224 S.W.3d 426, 2006 Tex. App. LEXIS 10463 (Tex. App. Houston 1st Dist. 2006).

149. During defendant's trial for aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021(a)(1)(B)(ii), evidence of an alleged prior sexual encounter between defendant and the 13-year-old complainant was properly excluded under Tex. R. Evid. 412(a); the evidence was inadmissible under Tex. R. Evid. 412(b)(2)(B) as evidence of consent because consent was irrelevant to the charge of aggravated sexual assault of a child, nor was the evidence admissible under Tex. R. Evid. 412(b)(2)(B) absent any explanation by defendant as to how the alleged prior encounter would have tended to show motive and bias by the complainant. James v. State, 2006 Tex. App. LEXIS 9274 (Tex. App. Houston 1st Dist. Oct. 26 2006).

150. Under Tex. R. Evid. 412(b)(2)(E), the trial court did not abuse its discretion when it decided that evidence of the victim's prior sexual history was inadmissible to attack her credibility because (1) the victim testified, in an in camera hearing, to participating in sexual activities with a cousin in the first grade and when she was 14 or 15 years old; (2) she did not retract or deny those statements at any time; and (3) defendant did not offer any evidence to establish the falsity of the victim's claim. Thomas v. State, 2006 Tex. App. LEXIS 8826 (Tex. App. Houston 1st Dist. Oct. 12 2006).

151. Even if the victim's prior sexual activity was part of the reason for a staged suicide attempt, it was not apparent how it showed motive or bias or was otherwise probative, and the court found that defendant did not seek admission of the excluded evidence under Tex. R. Evid. 412, nor did defendant 's brief challenge the trial court's ruling that the evidence was unfairly prejudicial, such that the issues were not preserved for review. Molinar v. State, 2006 Tex. App. LEXIS 8373 (Tex. App. Houston 14th Dist. Sept. 26 2006).

152. Although defendant attempted during the punishment phase to recall the victim to develop her sexual history, Tex. R. Evid. 412 was not limited in its applicability to the guilt-innocence phase of the trial. Molinar v. State, 2006 Tex. App. LEXIS 8373 (Tex. App. Houston 14th Dist. Sept. 26 2006).

153. Court noted that under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), evidence could be offered on relevant issues during sentencing, and defendant did not explain how the victim's past sexual relationships with others or the extent of the appearance of a relationship between defendant and the victim would have had any bearing on punishment or mitigation, let alone for any purpose that would have been allowed under Tex. R. Evid. 412, such that the trial court did not err in excluding this testimony. Molinar v. State, 2006 Tex. App. LEXIS 8373 (Tex. App. Houston 14th Dist. Sept. 26 2006).

154. In a child sexual assault case, defendant was not denied the right to confront and cross-examine the complainant about allegations of previous sexual behavior because defendant's trial objections did not raise his constitutional rights, nor did they apprise the trial court that the evidence should have been admitted under Tex. R. Evid. 412; accordingly, defendant failed to preserve error on the issue of his constitutional right to confront the complainant. Leachman v. State, 2006 Tex. App. LEXIS 7345 (Tex. App. Houston 1st Dist. Aug. 17 2006).

155. Court acknowledged the trial court's concern that conducting a hearing under Tex. R. Evid. 412 did not alleviate the emotional impact on the victim of answering questions from the accused regarding her past sexual conduct; however, Tex. R. Evid. 412 acts primarily as an evidentiary shield, preventing the defendant from shifting

the focus of trial from his conduct to the character of the victim, and to the extent it is shown that a witness is uniquely vulnerable or needs protection from specific acts of intimidation, the trial court has discretion to fashion a remedy that both protects the witness and ensures adequate confrontation, pursuant to Tex. R. Evid. 611(a). LaPointe v. State, 196 S.W.3d 831, 2006 Tex. App. LEXIS 4736 (Tex. App. Austin 2006).

156. Trial court did not abuse its discretion in excluding the victim's statements made during an emergency room visit; even taking the report as true, the evidence was not admissible as an exception under Tex. R. Evid. 412(b), the report at best contained only speculation by the victim that she might have been sexually assaulted, and the victim testified to making up the story to cover for the real reason for her injuries. LaPointe v. State, 196 S.W.3d 831, 2006 Tex. App. LEXIS 4736 (Tex. App. Austin 2006).

157. Defendant was given latitude in exploring the victim's prior sexual conduct at the in camera hearing under Tex. R. Evid. 412 and despite the questioning, defendant did not elicit admissible evidence of such conduct; evidence of the victim's relationship with another man and the fact that he could not be excluded as a contributor of DNA found on a bottle collected from defendant's apartment was admitted at defendant's trial for aggravated kidnapping, assault-family violence, and aggravated sexual assault. LaPointe v. State, 196 S.W.3d 831, 2006 Tex. App. LEXIS 4736 (Tex. App. Austin 2006).

158. Defendant did not present any expert testimony or establish that the victim's bipolar disorder or problems with substance abuse would have affected the victim's ability to recall the events or testify at trial, and the jury heard of the victim's hospitalization for alcoholism, and the trial court did not err in excluding further evidence of the disorder and abuse problems in the in camera hearing under Tex. R. Evid. 412. LaPointe v. State, 196 S.W.3d 831, 2006 Tex. App. LEXIS 4736 (Tex. App. Austin 2006).

159. Court's opinion abating defendant's appeal was not a reviewable decision, and thus defendant's pro se petition for discretionary review was not a proper petition and could not have deprived the trial court of jurisdiction, and thus the trial court had jurisdiction to conduct the hearing under Tex. R. Evid. 412 that the court had ordered. LaPointe v. State, 196 S.W.3d 831, 2006 Tex. App. LEXIS 4736 (Tex. App. Austin 2006).

160. Right to confrontation entitled defendant to question witnesses regarding motive and bias at trial, and the record did not indicate that any limitations were placed on defendant's ability to raise certain issues before the jury; Tex. R. Evid. 412 only prohibited cross-examination with regard to instances of prior sexual conduct, and the trial court correctly limited the scope of the hearing to eliciting specific evidence of the victim's prior sexual conduct. LaPointe v. State, 196 S.W.3d 831, 2006 Tex. App. LEXIS 4736 (Tex. App. Austin 2006).

161. Although defendant vaguely asserted that time did not permit the issuance of subpoenas for medical records, defendant did not show what records were sought or how they were useful, and the trial court did not err in overruling in part defendant's continuance motion or by denying defendant's request to recall another witness in connection with hearing under Tex. R. Evid. 412. LaPointe v. State, 196 S.W.3d 831, 2006 Tex. App. LEXIS 4736 (Tex. App. Austin 2006).

162. Trial court's in camera hearing was conducted in compliance with Tex. R. Evid. 412 and the court overruled defendant's related issues. LaPointe v. State, 196 S.W.3d 831, 2006 Tex. App. LEXIS 4736 (Tex. App. Austin 2006).

163. In an aggravated sexual assault of a child who was younger than 14 case, defendant did not allege that there was any evidence controverting the victim's testimony that she and defendant had sexual intercourse of September 19, 2003; further, defendant did not explain how the probative value of evidence of the child's past sexual behavior outweighed the danger of undue prejudice; thus, defendant failed to show that the trial court abused its discretion in

excluding the evidence under Tex. R. Evid. 412. Guerrero v. State, 2006 Tex. App. LEXIS 3723 (Tex. App. Beaumont May 3 2006).

164. In defendant's criminal prosecution for sexual assault of a child, the nurse testified that the complainant's hymen had been torn by blunt force trauma. The complainant was permitted to testify that defendant was the only person with whom she had sexual intercourse; no violation of Tex. R. Evid. 412(b) was shown, because the complainant's testimony concerned the absence of past sexual behavior. Ghant v. State, 2006 Tex. App. LEXIS 3053 (Tex. App. Austin Apr. 13 2006).

165. In defendant's criminal prosecution for sexual assault of a child, the trial court denied defendant's request to question the victim concerning prior sexual abuse by her uncle. Ghant v. State, 2006 Tex. App. LEXIS 3053 (Tex. App. Austin Apr. 13 2006).

166. In defendant's criminal prosecution for sexual assault of a child, the nurse testified that the complainant's hymen had been torn by blunt force trauma; the complainant was permitted to testify that defendant was the only person with whom she had sexual intercourse; no violation of Tex. R. Evid. 412(b) was shown, because the complainant's testimony concerned the absence of past sexual behavior. Ghant v. State, 2006 Tex. App. LEXIS 3053 (Tex. App. Austin Apr. 13 2006).

167. In defendant's criminal prosecution for sexual assault of a child, the trial court denied defendant's request to question the victim concerning prior sexual abuse by her uncle. Ghant v. State, 2006 Tex. App. LEXIS 3053 (Tex. App. Austin Apr. 13 2006).

168. In an aggravated sexual assault case against a juvenile, pursuant to Tex. R. Evid. 412(a), the trial court properly excluded testimony that the victim was seen simulating sex with two dolls. In re J.G., 195 S.W.3d 161, 2006 Tex. App. LEXIS 812 (Tex. App. San Antonio 2006).

169. Because defendant did not show that his seven-year-old sexual assault victim made any false prior allegations of sexual abuse against her twelve year-old neighbor that were similar to the allegations in defendant's case, and because the trial court could limit cross-examination to prevent confusion of the issues and undue prejudice, the trial court did not abuse its discretion in limiting cross-examination to exclude such references. Lempar v. State, 191 S.W.3d 230, 2005 Tex. App. LEXIS 10667 (Tex. App. San Antonio 2005).

170. Trial court did not err in excluding testimony of a witness concerning the victim's sexual activities; the testimony consisted of speculation that the victim and another engaged in some sort of sexual activity, the court questioned whether the evidence qualified as a specific instance of past sexual behavior as contemplated by Tex. R. Evid. 412, it was difficult to find that the evidence explained or rebutted the medical evidence, for purposes of Rule 412(b)(2)(A), and the prejudicial effect of the testimony outweighed the probative value such that the evidence constituted inadmissible hearsay. Kennedy v. State, 184 S.W.3d 309, 2005 Tex. App. LEXIS 10126 (Tex. App. Texarkana 2005).

171. By Tex. R. Evid. 412's express language, the issues regarding the victim's allegations of abuse and alleged fabrication did not concern defendant's indecency with a child convictions. Kennedy v. State, 184 S.W.3d 309, 2005 Tex. App. LEXIS 10126 (Tex. App. Texarkana 2005).

172. Evidence from a witness that the victim said she had 33 sexual partners did not rebut or explain, for purposes of Tex. R. Evid. 412(b)(2)(A), the medical evidence, given that there was no evidence as to when the alleged encounters took place, and the excluded evidence constituted inadmissible hearsay; even if the trial court had been

incorrect in its application of Rule 412, the court would have upheld the ruling on an alternative holding. Kennedy v. State, 184 S.W.3d 309, 2005 Tex. App. LEXIS 10126 (Tex. App. Texarkana 2005).

173. Trial court's exclusion of evidence regarding a child sexual assault victim's relationships with two different boys and her actions and comments involving two cousins did not deprive defendant of his constitutional right to a fair trial where the trial court could have determined, based on the chronology of the events, that they did not explain the State's medical evidence regarding the time of the penetration of the victim's hymen, and, although the trial court excluded the equivocal testimony of the victim's mother about the victim's veracity, the victim's aunt was allowed to testify that she had a bad reputation for being untruthful, and the victim herself admitted lying to defendant, her father, about her report card. Accordingly, the trial court reasonably could have concluded that the matters had, at best, marginal relevance to the victim's alleged motive to testify falsely against defendant, that they would have unduly harassed the victim and confused the issues, and that the danger of unfair prejudice from the evidence would have outweighed its probative value. Pogue v. State, 2005 Tex. App. LEXIS 7819 (Tex. App. Fort Worth Sept. 22 2005).

174. In an aggravated sexual assault of a child case, as defense counsel had no evidence of the victim's prior sexual history to rebut medical evidence and only sought to admit testimony about the victim's sexual activities after her physical examination, the testimony was irrelevant and therefore inadmissible under Tex. R. Evid. 412. Castellanos v. State, 2005 Tex. App. LEXIS 6621 (Tex. App. Corpus Christi Aug. 18 2005).

175. Excluded testimony only established that the victim had previously used condoms during sex, but it did not establish that the sexual intercourse between she and defendant was consensual, and the appellate court agreed with the State's contentions both at trial and on appeal that the evidence did not fall within any of the Tex. R. Evid. 412 exceptions for admitting specific instances of previous sexual conduct; therefore, the trial court's ruling denying defendant the opportunity to cross-examine the victim about her prior sexual experience with condoms was not in error. Patel v. State, 2005 Tex. App. LEXIS 6023 (Tex. App. Corpus Christi July 28 2005).

176. Tex. R. App. P. 412(c) required the trial court to afford defendant and his counsel an opportunity to be present and cross-examine the alleged victim at an in camera hearing to determine the admissibility of evidence of the alleged victim's previous sexual conduct; although the trial court erred in barring defendant's counsel from the in camera hearing, the trial court could, pursuant to Tex. R. App. P. 44.4, correct the error by holding a proper hearing and again making a determination of what evidence would be admissible under Tex. R. Evid. 412. LaPointe v. State, 166 S.W.3d 287, 2005 Tex. App. LEXIS 3153 (Tex. App. Austin 2005).

177. Evidence of the complainant's relationship with other adult men was not evidence regarding either the circumstances of the offense or defendant himself, nor is it evidence a juror might have regarded as reducing defendant's moral blameworthiness; therefore, the trial court did not abuse its discretion by excluding the complainant's testimony under Tex. R. Evid. 412 and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a). Ellison v. State, 165 S.W.3d 774, 2005 Tex. App. LEXIS 2776 (Tex. App. San Antonio 2005).

178. District court violated defendant's right to confront witnesses against him, and it deprived him of the right to effective assistance of counsel, when it excluded defense counsel from an in camera hearing with the complainant pursuant to Tex. R. Evid. 412. There was nothing about the rape shield law's requirements that prohibited counsel from attending the hearing. LaPointe v. State, 2005 Tex. App. LEXIS 1968 (Tex. App. Austin Mar. 17 2005), opinion withdrawn by, substituted opinion at 166 S.W.3d 287, 2005 Tex. App. LEXIS 3153 (Tex. App. Austin 2005).

179. Trial court's failure to afford parties the opportunity to be present at an in camera hearing and to examine an alleged rape victim regarding specific instances of previous sexual conduct violates a defendant's constitutional rights to confrontation and to effective assistance of counsel. LaPointe v. State, 2005 Tex. App. LEXIS 1968 (Tex.

App. Austin Mar. 17 2005), opinion withdrawn by, substituted opinion at 166 S.W.3d 287, 2005 Tex. App. LEXIS 3153 (Tex. App. Austin 2005).

180. In an aggravated sexual assault case, the trial court properly excluded, under Tex. R. Evid. 412(b)(2)(c), (b)(3), test results reporting that the complainant's blood tested positive for chlamydia; evidence indicating that the complainant had sex with someone else did not imply that she would fabricate sexual assault charges against defendant. Scott v. State, 2005 Tex. App. LEXIS 1872 (Tex. App. Fort Worth Mar. 10 2005).

181. There was no abuse of discretion by not allowing the witness to testify about the victim's alleged history of prostitution in defendant's trial for aggravated sexual assault because defendant did not argue that the excluded testimony satisfied the minimum requirement of relevancy, Tex. R. Evid. 401, nor had defendant argued that if the excluded testimony was relevant, it properly fell within the confines of Tex. R. Evid. 412(b). Orellana v. State, 2005 Tex. App. LEXIS 380 (Tex. App. Eastland Jan. 20 2005).

182. In a sexual assault case, a court properly excluded evidence of the victim's fight with her boyfriend and her antidepression medication where those circumstances did not involve specific instances of the victim's past sexual behavior. Chavira v. State, 2004 Tex. App. LEXIS 5653 (Tex. App. Tyler June 23 2004).

183. Tex. R. Evid. 412 was inapplicable because the testimony by the victim's uncle did not concern the victim's sexual reputation or prior sexual behavior, but rather her threat to falsely accuse him if he did not change his behavior towards her. Hamrick v. State, 2004 Tex. App. LEXIS 4418 (Tex. App. El Paso May 13 2004).

184. The victim's sending a picture of herself in a swimsuit over the internet to a boy was not within the meaning of "sexual behavior" under Tex. R. Evid. 412; therefore, Tex. R. Evid. 412 was not the appropriate rule for determining the admissibility of this evidence. Because the victim's sending a picture of herself in a swimsuit over the internet to a boy tended to establish motive, it should have been admitted, pursuant to Tex. R. Evid. 404(b), subject to the balancing test of Tex. R. Evid. 403. Thomas v. State, 137 S.W.3d 792, 2004 Tex. App. LEXIS 4361 (Tex. App. Waco 2004).

185. Trial court did not err by refusing to exclude evidence that a victim of sexual abuse had been involved in other sexual contact because there was nothing to show that the other activities established the victim's bias or motive; the minor victim alleged that sexual contact had also occurred with a 17-year-old and a seven-year-old. Leachman v. State, 2004 Tex. App. LEXIS 3283 (Tex. App. Houston 1st Dist. Apr. 8 2004).

186. Defendant did not establish the relevancy, Tex. R. Evid. 401, of certain evidence regarding the alleged sexual relationship between the two victims, who were step-brothers, as a material issue in the case in which he was found guilty of two counts of fondling/indecency with a child and one count of aggravated sexual assault of a child, so as to justify admission of evidence of an alleged victim's sexual behavior under Tex. R. Evid. 412(b)(2)(E); thus, the evidence was properly excluded under Tex. R. Evid. 402. Hale v. State, 140 S.W.3d 381, 2004 Tex. App. LEXIS 2333 (Tex. App. Fort Worth 2004).

187. Under Tex. R. Evid. 412(b), in a prosecution for sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is not admissible except in limited circumstances. Hughes v. State, 2001 Tex. App. LEXIS 7624 (Tex. App. Austin Nov. 15 2001).

188. Evidence of one victim's prior sexual conduct was unnecessary to rebut or explain medical testimony offered by state; thus, the trial court did not abuse its discretion in excluding such evidence under Tex. R. Evid. 412(b). Hughes v. State, 2001 Tex. App. LEXIS 7624 (Tex. App. Austin Nov. 15 2001).

Evidence : Relevance : Sex Offenses : Similar Acts

189. During defendant's trial for aggravated sexual assault of a child, the court did not err by excluding testimony by the victim that she had been previously sexually assaulted by a maintenance worker because the complained-of testimony was not admissible under Tex. R. Evid. 412(b)(2)(E); evidence that a third party laid down on the victim's back and "humped" her by moving in a back and forth motion while fully clothed was not sufficiently similar to defendant's licking the victim's female sexual organ, kissing her on the cheeks and mouth, and exposing his penis to her. Bryan v. State, 2010 Tex. App. LEXIS 2144, 2010 WL 1137038 (Tex. App. Fort Worth Mar. 25 2010).

Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview

190. In defendant's indecency with a child case, the court did not err by excluding evidence related to the victim's sexual relationship with her boyfriend who lived at the residence where the events took place because the victim's sexual history and relationship with her boyfriend had little or no probative value. The defensive theory was that the victim was motivated to fabricate the allegations because of defendant's complaints to the victim about her boyfriend's failure to contribute to household expenses; however, evidence of the victim's sexual relationship with her boyfriend would show only that she was sexually active with an older male who lived in the apartment. Franklin v. State, 2010 Tex. App. LEXIS 619, 2010 WL 337334 (Tex. App. Tyler Jan. 29 2010).

191. Evidence of sperm located on a victim's clothing after a sexual assault was not relevant at trial because there was no evidence that defendant ejaculated during the crime. Davis v. State, 2004 Tex. App. LEXIS 3815 (Tex. App. Fort Worth Apr. 29 2004).

Evidence : Relevance : Sex Offenses : Similar Crimes : Child Molestation Cases

192. Where defendant was convicted of indecency with a child and aggravated sexual assault of a child, he failed to prove that the trial court erred by ruling that a question concerning the witness' prior false allegation of abuse was improper under Tex. R. Evid. 608(b) which forbade inquiry into specific instances of a witness' conduct for the purpose of attacking or impeaching that witness' credibility. While the State's objection was based on Tex. R. Evid. 412, it did not apply in this case because the alleged false accusations concerned defendant's alleged molestation of his biological daughter and not the alleged victim. Pierson v. State, 398 S.W.3d 406, 2013 Tex. App. LEXIS 4868 (Tex. App. Texarkana Apr. 19 2013).

193. Because defendant did not raise certain arguments under Tex. R. Evid. 412 before the trial court, nor were the complaints apparent from the context in which they occurred, for purposes of Tex. R. App. P. 33.1, defendant did not preserve error for review; the trial court indicated that the testimony sought was inadmissible under Tex. R. Evid. 412 and defendant made an offer of proof, but defendant did not offer any other grounds for admitting the excluded testimony when the offer of proof was made. Denton v. State, 2006 Tex. App. LEXIS 6662 (Tex. App. Fort Worth July 27 2006).

Evidence : Testimony : Credibility : General Overview

194. Under Tex. R. Evid. 412(b)(2)(E), the trial court did not abuse its discretion when it decided that evidence of the victim's prior sexual history was inadmissible to attack her credibility because (1) the victim testified, in an in camera hearing, to participating in sexual activities with a cousin in the first grade and when she was 14 or 15 years old; (2) she did not retract or deny those statements at any time; and (3) defendant did not offer any evidence to establish the falsity of the victim's claim. Thomas v. State, 2006 Tex. App. LEXIS 8826 (Tex. App. Houston 1st Dist. Oct. 12 2006).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview

195. In defendant's trial for sexual assault on a child, defendant argued that the trial court failed to permit him to question the victim about entries in her diaries relating to her sexual activity with persons other than defendant, in violation of Tex. R. Evid. 412(b)(2)(C); however, any motive the complainant might have had to concoct a sexual assault charge against defendant was well developed by defendant's counsel at trial, without resort to evidence of the other alleged sexual liaisons with boys. Herrera v. State, 2004 Tex. App. LEXIS 1703 (Tex. App. El Paso Feb. 20 2004).

196. In defendant's trial for sexual assault on a child, defendant argued that the trial court failed to permit him to question the victim about entries in her diaries relating to her sexual activity with persons other than defendant, in violation of Tex. R. Evid. 412(b)(2)(C); however, any motive the complainant might have had to concoct a sexual assault charge against defendant was well developed by defendant's counsel at trial, without resort to evidence of the other alleged sexual liaisons with boys. Herrera v. State, 2004 Tex. App. LEXIS 1703 (Tex. App. El Paso Feb. 20 2004).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances

197. Trial court's decision to deny defendant the opportunity to cross-examine witnesses about the victim's accusation of sexual assault against another person was not an abuse of discretion because specific instances could not be inquired into under Tex. R. Evid. 608(b), defendant never made a showing that the victim's allegation was false, and defendant was allowed to cross-examine witnesses regarding the victim's recantation of her accusation against her brother. Odom v. State, 2014 Tex. App. LEXIS 5009, 2014 WL 1882754 (Tex. App. Waco May 8 2014).

198. Where defendant was convicted of indecency with a child and aggravated sexual assault of a child, he failed to prove that the trial court erred by ruling that a question concerning the witness' prior false allegation of abuse was improper under Tex. R. Evid. 608(b) which forbade inquiry into specific instances of a witness' conduct for the purpose of attacking or impeaching that witness' credibility. While the State's objection was based on Tex. R. Evid. 412, it did not apply in this case because the alleged false accusations concerned defendant's alleged molestation of his biological daughter and not the alleged victim. Pierson v. State, 398 S.W.3d 406, 2013 Tex. App. LEXIS 4868 (Tex. App. Texarkana Apr. 19 2013).

Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice

199. At defendant's trial for the aggravated sexual assault of a child, the trial court erred because it refused to allow defendant to cross-examine the State's witnesses in violation of his Sixth Amendment right to confrontation regarding the complainant's sexual assault of his younger sister. The impeachment evidence was admissible under Tex. R. Evid. 412 to correct a false impression left with the jury that the complainant's emotional problems, watching pornography, and need for counseling arose as a result of his victimization by defendant. Johnson v. State, 2013 Tex. App. LEXIS 1515, 2013 WL 531079 (Tex. App. Fort Worth Feb. 14 2013).

200. During defendant's trial for indecency with a child, the trial court abused its discretion in preventing defendant from cross-examining the complainant about her previous false allegations of sexual assault. The evidence was admissible under Tex. R. Evid. 412 to show the complainant's bias against defendant and her possible motive to testify falsely against him. Hammer v. State, 296 S.W.3d 555, 2009 Tex. Crim. App. LEXIS 513 (Tex. Crim. App. 2009).

Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview

201. In defendant's trial for sexual assault on a child, defendant argued that the trial court failed to permit him to question the victim about entries in her diaries relating to her sexual activity with persons other than defendant, in violation of Tex. R. Evid. 412(b)(2)(C); however, any motive the complainant might have had to concoct a sexual assault charge against defendant was well developed by defendant's counsel at trial, without resort to evidence of the other alleged sexual liaisons with boys. Herrera v. State, 2004 Tex. App. LEXIS 1703 (Tex. App. El Paso Feb. 20 2004).

202. In defendant's trial for sexual assault on a child, defendant argued that the trial court failed to permit him to question the victim about entries in her diaries relating to her sexual activity with persons other than defendant, in violation of Tex. R. Evid. 412(b)(2)(C); however, any motive the complainant might have had to concoct a sexual assault charge against defendant was well developed by defendant's counsel at trial, without resort to evidence of the other alleged sexual liaisons with boys. Herrera v. State, 2004 Tex. App. LEXIS 1703 (Tex. App. El Paso Feb. 20 2004).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

203. In defendant's trial for sexual assault on a child, defendant argued that the trial court failed to permit him to question the victim about entries in her diaries relating to her sexual activity with persons other than defendant, in violation of Tex. R. Evid. 412(b)(2)(C); however, any motive the complainant might have had to concoct a sexual assault charge against defendant was well developed by defendant's counsel at trial, without resort to evidence of the other alleged sexual liaisons with boys. Herrera v. State, 2004 Tex. App. LEXIS 1703 (Tex. App. El Paso Feb. 20 2004).

204. In defendant's trial for sexual assault on a child, defendant argued that the trial court failed to permit him to question the victim about entries in her diaries relating to her sexual activity with persons other than defendant, in violation of Tex. R. Evid. 412(b)(2)(C); however, any motive the complainant might have had to concoct a sexual assault charge against defendant was well developed by defendant's counsel at trial, without resort to evidence of the other alleged sexual liaisons with boys. Herrera v. State, 2004 Tex. App. LEXIS 1703 (Tex. App. El Paso Feb. 20 2004).

Tex. Evid. R. 501

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 501 Privileges in General

Unless a Constitution, a statute, or these or other rules prescribed under statutory authority provide otherwise, no person has a privilege to:

(a) refuse to be a witness;

(b) refuse to disclose any matter;

(c) refuse to produce any object or writing; or

(d) prevent another from being a witness, disclosing any matter, or producing any object or writing.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*; Ch. 114, *Motions in Limine*.

Case Notes

Civil Procedure : Discovery : Methods : Expert Witness Discovery
Civil Procedure : Discovery : Privileged Matters : General Overview
Evidence : Privileges : General Overview
Evidence : Privileges : Attorney-Client Privilege
Evidence : Privileges : Psychotherapist-Patient Privilege : Exceptions
Evidence : Testimony : Experts : Criminal Trials
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure
Healthcare Law : Business Administration & Organization : Patient Confidentiality : General Overview

LexisNexis (R) Notes

Civil Procedure : Discovery : Methods : Expert Witness Discovery

1. In a nuisance and negligence case, several homeowners were required to disclose the names and telephone numbers of persons contacted in a telephone poll under Tex. R. Civ. P. 194.2(f)(4)(A) because the results of the poll were relied upon by their testifying expert, and the documents were not privileged as a scientific study under Tex. R. Evid. 501 or 45 C.F.R. § 46.116(a)(5). In re Jobe Concrete Prods., 101 S.W.3d 122, 2002 Tex. App. LEXIS 9268 (Tex. App. El Paso 2002).

Civil Procedure : Discovery : Privileged Matters : General Overview

2. Although a lottery commission maintained that settlement letters were expressly excepted from disclosure under Tex. Gov't Code Ann. § 552.101 because they contained information considered confidential by judicial decision, there is, however, no judicially recognized privilege exempting settlement negotiations from disclosure, nor do Texas courts recognize a common-law right to withhold settlement negotiations as confidential communications; although settlement negotiations are inadmissible at trial to prove liability for or invalidity of a claim or its amount under Tex. R. Evid. 408, they are admissible for other purposes and are not exempt from discovery under the rules of civil procedure or evidence, as Tex. R. Civ. P. 192.3 allowed discovery of matters not privileged that were relevant and Tex. R. Evid. 408, 501-513 identified discovery privileges, none of which protects settlement negotiations. Abbott v. Gametech Int'l, Inc., 2009 Tex. App. LEXIS 4554, 2009 WL 1708815 (Tex. App. Austin June 17 2009).

3. In a nuisance and negligence case, several homeowners were required to disclose the names and telephone numbers of persons contacted in a telephone poll under Tex. R. Civ. P. 194.2(f)(4)(A) because the results of the poll were relied upon by their testifying expert, and the documents were not privileged as a scientific study under Tex. R. Evid. 501 or 45 C.F.R. § 46.116(a)(5). In re Jobe Concrete Prods., 101 S.W.3d 122, 2002 Tex. App. LEXIS 9268 (Tex. App. El Paso 2002).

Evidence : Privileges : General Overview

4. District attorney and the Texas Department of Family and Protective Services raised various arguments as to why the officer's testimony was privileged, but (1) there was no rule or statute that gave police officers a privilege from being called to testify, (2) Tex. R. Evid. 501 stated that except as otherwise provided, no person had a privilege to refuse to be a witness, (3) the full nature and extent of the officer's testimony was not easily ascertainable before the officer actually testified, (4) the court was not provided with a basis upon which the court could evaluate the officer's future testimony, and (5) there were procedural tools that could be used to prohibit disclosure of privileged information; the court could not find that the trial court erred in compelling the officer to testify, such that mandamus relief was not appropriate. In re Hays County Crim. Dist. Attorney's Office & Tex. Dep't of Family & Protective Servs., 2010 Tex. App. LEXIS 8088, 2010 WL 3927615 (Tex. App. Austin Oct. 1 2010).

5. Although a lottery commission maintained that settlement letters were expressly excepted from disclosure under Tex. Gov't Code Ann. § 552.101 because they contained information considered confidential by judicial decision, there is, however, no judicially recognized privilege exempting settlement negotiations from disclosure, nor do Texas courts recognize a common-law right to withhold settlement negotiations as confidential communications; although settlement negotiations are inadmissible at trial to prove liability for or invalidity of a claim or its amount under Tex. R. Evid. 408, they are admissible for other purposes and are not exempt from discovery under the rules of civil procedure or evidence, as Tex. R. Civ. P. 192.3 allowed discovery of matters not privileged that were relevant and Tex. R. Evid. 408, 501-513 identified discovery privileges, none of which protects settlement negotiations. Abbott v. Gametech Int'l, Inc., 2009 Tex. App. LEXIS 4554, 2009 WL 1708815 (Tex. App. Austin June 17 2009).

6. Essential to a case law holding was the concept that federal courts were authorized under Fed. R. Evid. 501 to determine new discovery privileges, but Texas courts have no such authority; Tex. R. Evid. 501 provides that only privileges grounded in certain specified sources--the Constitution, statute, the rules of evidence, or other rules established pursuant to statute--are recognized in Texas, and the court has no authority to create a new common-law discovery privilege protecting settlement negotiations. Abbott v. Gametech Int'l, Inc., 2009 Tex. App. LEXIS 4554, 2009 WL 1708815 (Tex. App. Austin June 17 2009).

7. Tex. R. Evid. 501 did not recognize a private investigator privilege and the investigators' reliance on the Texas Private Investigators and Private Security Agencies Act, Tex. Occ. Code Ann. § 1702.001 et seq., was misplaced because the investigators could be compelled by a trial court in a civil matter to disclose information. Landry v. Burge, 2000 Tex. App. LEXIS 6606 (Tex. App. Dallas Oct. 2 2000).

Evidence : Privileges : Attorney-Client Privilege

8. Testimony about an expert's failure to request additional testing was a violation of the defendant's work-product privilege because it effectively disclosed the expert's mental impressions with regard to those tests. Pope v. State, 161 S.W.3d 114, 2004 Tex. App. LEXIS 11529 (Tex. App. Fort Worth 2004).

Evidence : Privileges : Psychotherapist-Patient Privilege : Exceptions

9. In proceedings to terminate a mother's parental rights to four children, the trial court properly admitted the testimony and report of a psychologist who examined the mother because the mother was informed her communications with the psychologist would not be privileged, the communications occurred in a court-ordered evaluation that related to the mother's mental or emotional condition, and the psychologist's evaluation was relevant to the mother's abilities to parent the children. In the Interest of A.L., 2014 Tex. App. LEXIS 6953 (Tex. App. Beaumont June 26 2014).

Evidence : Testimony : Experts : Criminal Trials

10. Once the identity of the defendant's expert was disclosed to the state, it was no longer privileged. Pope v. State, 161 S.W.3d 114, 2004 Tex. App. LEXIS 11529 (Tex. App. Fort Worth 2004).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

11. In proceedings to terminate a mother's parental rights to four children, the trial court properly admitted the testimony and report of a psychologist who examined the mother because the mother was informed her communications with the psychologist would not be privileged, the communications occurred in a court-ordered evaluation that related to the mother's mental or emotional condition, and the psychologist's evaluation was relevant to the mother's abilities to parent the children. In the Interest of A.L., 2014 Tex. App. LEXIS 6953 (Tex. App. Beaumont June 26 2014).

Healthcare Law : Business Administration & Organization : Patient Confidentiality : General Overview

12. In a nuisance and negligence case, several homeowners were required to disclose the names and telephone numbers of persons contacted in a telephone poll under Tex. R. Civ. P. 194.2(f)(4)(A) because the results of the poll were relied upon by their testifying expert, and the documents were not privileged as a scientific study under Tex. R. Evid. 501 or 45 C.F.R. § 46.116(a)(5). In re Jobe Concrete Prods., 101 S.W.3d 122, 2002 Tex. App. LEXIS 9268 (Tex. App. El Paso 2002).

End of Document

Tex. Evid. R. 502

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 502 Required Reports Privileged By Statute

(a) ***In General.***--If a law requiring a return or report to be made so provides:

(1)a person, corporation, association, or other organization or entity - whether public or private - that makes the required return or report has a privilege to refuse to disclose it and to prevent any other person from disclosing it; and

(2)a public officer or agency to whom the return or report must be made has a privilege to refuse to disclose it.

(b) ***Exceptions.***--This privilege does not apply in an action involving perjury, false statements, fraud in the return or report, or other failure to comply with the law in question.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*.

Case Notes

LexisNexis (R) Notes

Evidence : Privileges : General Overview

1. Denial of relator's mandamus proceeding after the trial court ordered relator to produce documents that relator contended were not subject to discovery relief was proper, in part because the absence of statutory protection for reports to the Consumer Product Safety Act was also fatal to any argument that the Rule provided a basis for the recognition of a self-critical analysis privilege. Rule 502 In re Fisher & Paykel Appliances, Inc., 420 S.W.3d 842,

2014 Tex. App. LEXIS 654, 2014 WL 231040 (Tex. App. Dallas Jan. 22 2014).

2. Denial of relator's mandamus proceeding after the trial court ordered relator to produce documents that relator contended were not subject to discovery relief was proper, in part because the absence of statutory protection for reports to the Consumer Product Safety Act was also fatal to any argument that the Rule provided a basis for the recognition of a self-critical analysis privilege. Rule 502 In re Fisher & Paykel Appliances, Inc., 420 S.W.3d 842, 2014 Tex. App. LEXIS 654, 2014 WL 231040 (Tex. App. Dallas Jan. 22 2014).

End of Document

Tex. Evid. R. 503

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 503 Lawyer-Client Privilege

(a) ***Definitions.***--In this rule:

(1)A "client" is a person, public officer, or corporation, association, or other organization or entity - whether public or private - that:

(A)is rendered professional legal services by a lawyer; or

(B)consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2)A "client's representative" is:

(A)a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; or

(B)any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3)A "lawyer" is a person authorized, or who the client reasonably believes is authorized, to practice law in any state or nation.

(4)A "lawyer's representative" is:

(A)one employed by the lawyer to assist in the rendition of professional legal services; or

(B)an accountant who is reasonably necessary for the lawyer's rendition of professional legal services.

(5)A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A)to whom disclosure is made to further the rendition of professional legal services to the client; or

(B)reasonably necessary to transmit the communication.

(b) ***Rules of Privilege.***

(1) ***General Rule.***--A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A)between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B)between the client's lawyer and the lawyer's representative;

(C)by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D)between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

(2) ***Special Rule in a Criminal Case.***--In a criminal case, a client has a privilege to prevent a lawyer or lawyer's representative from disclosing any other fact that came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney-client relationship.

(c) ***Who May Claim.***--The privilege may be claimed by:

(1) the client;

(2) the client's guardian or conservator;

(3) a deceased client's personal representative; or

(4) the successor, trustee, or similar representative of a corporation, association, or other organization or entity - whether or not in existence.

The person who was the client's lawyer or the lawyer's representative when the communication was made may claim the privilege on the client's behalf - and is presumed to have authority to do so.

(d) ***Exceptions.***--This privilege does not apply:

(1) ***Furtherance of Crime or Fraud.***--If the lawyer's services were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.

(2) ***Claimants Through Same Deceased Client.***--If the communication is relevant to an issue between parties claiming through the same deceased client.

(3) ***Breach of Duty By a Lawyer or Client.***--If the communication is relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer.

(4) ***Document Attested By a Lawyer.***--If the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness.

(5) ***Joint Clients.***--If the communication:

(A) is offered in an action between clients who retained or consulted a lawyer in common;

(B) was made by any of the clients to the lawyer; and

(C) is relevant to a matter of common interest between the clients.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*.

Comment to 1998 change The addition of subsection (a)(2)(B) adopts a subject matter test for the privilege of an entity, in place of the control group test previously used. *See National Tank Co. v. Brotherton*, 851 S.W.2d 193, 197--198 (Tex. 1993).

Pre-March 1, 1998 Comment This rule governs only the lawyer/client privilege. It does not restrict the scope of the work product doctrine. *See*

Case Notes

Bankruptcy Law : Practice & Proceedings : Adversary Proceedings : Discovery
Civil Procedure : Counsel : General Overview
Civil Procedure : Counsel : Disqualifications
Civil Procedure : Discovery : Methods : Oral Depositions
Civil Procedure : Discovery : Motions to Compel
Civil Procedure : Discovery : Privileged Matters : General Overview
Civil Procedure : Discovery : Privileged Matters : Attorney-Client Privilege
Civil Procedure : Discovery : Privileged Matters : Work Product : Scope
Civil Procedure : Discovery : Privileged Matters : Work Product : Waivers
Civil Procedure : Judgments : Entry of Judgments : Enforcement & Execution : Fraudulent Transfers
Civil Procedure : Remedies : Writs : General Overview
Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Estate, Gift & Trust Law : Powers of Attorney : Durable Powers
Evidence : Authentication : Self-Authentication
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Documentary Evidence : Completeness
Evidence : Hearsay : Rule Components
Evidence : Privileges : General Overview
Evidence : Privileges : Attorney-Client Privilege
Evidence : Privileges : Attorney-Client Privilege : General Overview
Evidence : Privileges : Attorney-Client Privilege : Elements
Evidence : Privileges : Attorney-Client Privilege : Exceptions
Evidence : Privileges : Attorney-Client Privilege : Scope
Evidence : Privileges : Attorney-Client Privilege : Waiver
Evidence : Privileges : Government Privileges : Waiver
Evidence : Privileges : Psychotherapist-Patient Privilege
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure
Insurance Law : Motor Vehicle Insurance : Obligations : Disclosure
Legal Ethics : Client Relations : Client Funds
Legal Ethics : Client Relations : Confidentiality of Information
Legal Ethics : Client Relations : Conflicts of Interest
Legal Ethics : Client Relations : Perjury
Legal Ethics : Sanctions : Suspensions
Torts : Intentional Torts : Breach of Fiduciary Duty : General Overview

LexisNexis (R) Notes

Bankruptcy Law : Practice & Proceedings : Adversary Proceedings : Discovery

1. Chapter 7 trustee was correct when he claimed that some documents he was ordered to produce in an adversary proceeding were privileged under Tex. R. Evid. 503 irrespective of the common interest privilege, and did not have to be produced. However, the court rejected the trustee's argument that the applicable date for applying the common interest privilege was the date the debtor declared bankruptcy and not the date the trustee filed his adversary proceeding; Rule 503(b)(1)(C) had a "pending action" requirement, and the date the trustee filed his action was the date that requirement arose. Schmidt v. Rodriguez (in re Rodriguez), 2012 Bankr. LEXIS 4233 (Bankr. S.D. Tex. Sept. 12 2012).

Civil Procedure : Counsel : General Overview

2. In a divorce action, the trial court properly denied the husband's motion to substitute counsel on the ground of disqualification under Tex. Disciplinary R. Prof. Conduct 1.09(a)(3), because the wife had consulted an attorney from the same firm; the trial court reasonably could have concluded that the wife, who was a client as defined in Tex. R. Evid. 503(a)(1), divulged confidential information, within the meaning of Tex. Disc. R. Prof. Conduct 1.05(a), during her meeting with the attorney. In re Gerry, 173 S.W.3d 901, 2005 Tex. App. LEXIS 8637 (Tex. App. Tyler 2005).

Civil Procedure : Counsel : Disqualifications

3. In a defamation action, the trial court did not abuse its discretion by denying a motion to disqualify defense counsel; although there was evidence of a joint defense agreement that existed in prior litigation, defense counsel was not shown to have had access to any confidential information to which the joint defense privilege applied. Peeler v. Baylor Univ., 2009 Tex. App. LEXIS 7283, 38 Media L. Rep. (BNA) 1411 (Tex. App. Waco Sept. 16 2009).

4. Trial court did not abuse its discretion when it disqualified a husband's lawyer in a divorce case in accordance with Tex. Disciplinary R. Prof. Conduct 1.05(b)(3) and Tex. R. Evid. 503(a)(1) based on possible disclosure of confidential information when the wife consulted the lawyer. In re Englehardt, 2006 Tex. App. LEXIS 8170 (Tex. App. Houston 1st Dist. Sept. 11 2006).

5. Law firm had to be disqualified from representing an environmental services company in a licensing dispute with a corporate executive because the joint defense privilege of Tex. R. Evid. 503(b)(1)(C) protected confidential communications made by the executive to one of the firm's lawyers in a prior case involving similar issues at another company. In re Sharplin, 2006 Tex. App. LEXIS 6834 (Tex. App. Fort Worth Aug. 3 2006).

Civil Procedure : Discovery : Methods : Oral Depositions

6. Injured pedestrian could not discover information communicated to and from the attorney as counsel for the vehicle owner's corporations because such information was privileged under Tex. R. Civ. P. 192.5 and Tex. R. Evid. 503; however, the attorney was required to testify as to non-privileged communications made to him in his capacity as corporate secretary. In re Southpak Container Corp., 418 S.W.3d 360, 2013 Tex. App. LEXIS 14633, 2013 WL 6237695 (Tex. App. Dallas Dec. 3 2013).

Civil Procedure : Discovery : Motions to Compel

7. Trial court did not abuse its discretion by ordering the production of a joint defense agreement because the insurer, who was opposing production, never satisfied its burden to support its claim of privilege. In re Lexington Ins. Co., 2004 Tex. App. LEXIS 1053 (Tex. App. Houston 14th Dist. Feb. 2 2004).

Civil Procedure : Discovery : Privileged Matters : General Overview

8. In a mandamus proceeding involving a discovery dispute in a case against an insurer for violations of the insurance code, breach of contract, and breach of Stowers duty in a related personal injury case, the waiver of the attorney-client privilege by one of the insurer's insureds did not operate to waive the other insured's privilege as well, as the underlying litigation in the case was not a suit between trial counsel's two joint clients. No authority has been found to support an argument that one client may waive the attorney-client privilege on behalf of another client. In re Unitrin County Mut. Ins. Co., 2010 Tex. App. LEXIS 5797, 2010 WL 2867326 (Tex. App. Austin July 22 2010).

9. In a mandamus proceeding involving a discovery dispute in a case against an insurer for violations of the insurance code, breach of contract, and breach of Stowers duty in a related personal injury case, the insurer had properly made a prima facie showing of privilege as to certain documents the trial court had ordered to be produced because the documents were sufficient to support a rational inference that the attorney-client and work-product privileges applied. Because the insurer had made a prima facie showing of privilege and tendered documents for inspection, the trial court's failure to conduct an in camera review before compelling production was an abuse of discretion, subject to mandamus relief. In re Unitrin County Mut. Ins. Co., 2010 Tex. App. LEXIS 5797, 2010 WL 2867326 (Tex. App. Austin July 22 2010).

10. In an auto accident case, the appellate court rejected the decedent's parents' claims that the trial court abused its discretion in overruling their objections to the auto insurer's claim that documents about the insurer's investigations regarding who was driving at the time of the accident were privileged under the attorney-client privilege in Tex. R. Evid. 503 and the work-product privilege in Tex. R. Civ. P. 192.5 because Tex. R. Civ. P. 193.4 specifically allows affidavits as evidence to support a privilege; the crime/fraud exception to the attorney-client privilege in Tex. R. Evid. 503(d)(1) did not apply merely because the parents' cause of action involved fraudulent conduct; rather the parents were required to show the alleged fraud occurred at or during the time the document was prepared and in order to perpetrate the fraud. Coats v. Ruiz, 198 S.W.3d 863, 2006 Tex. App. LEXIS 7108 (Tex. App. Dallas 2006).

11. Trial court erred by granting crusher manufacturer's motion to compel discovery because relators established that the disputed documents were protected by the attorney-client, joint defense, and work product privileges under Tex. R. Evid. 503 and Tex. R. Civ. P. 192.5, and the manufacturer did not establish a prima facie case of contemplated fraud or that the crime-fraud exception provided in Tex. R. Evid. 503(d)(1) was applicable. In re Seigel, 198 S.W.3d 21, 2006 Tex. App. LEXIS 1332 (Tex. App. El Paso 2006).

12. Where documents filed by a borrower with a trial court under seal, which a lender sought to have released, did not contain or refer to any communications between the borrower and his attorneys, and where the borrower's attorneys were not acting in a legal capacity in the instances, the attorney-client privilege was not implicated because the communications at issue did not involve the rendition of professional legal services pursuant to Tex. R. Evid. 503(b)(1). Kelly v. Gaines, 181 S.W.3d 394, 2005 Tex. App. LEXIS 7969 (Tex. App. Waco 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 9628 (Tex. App. Waco Nov. 16, 2005).

13. Conditional grant of the relators' petition for a writ of mandamus was proper where the information sought was confidential communications between the client and attorney. Further, an order that the attorney's fees be disclosed was improper because the fees were patently irrelevant and were not reasonably calculated to lead to the discovery of admissible evidence. In re AIG Aviation (Texas), Inc., 2004 Tex. App. LEXIS 7323 (Tex. App. San Antonio May 26 2004).

14. Where defendant company served on plaintiffs a privilege log describing the documents withheld from discovery pursuant to the work-product privilege in Tex. R. Civ. P. 192.5 and the attorney-client privilege in Tex. R

Evid. 503, and tendered the documents to the court, and where plaintiffs requested a hearing challenging the company's privilege claims, the trial court abused its discretion in denying defendant's claim of privilege without conducting an in-camera review. In re DuPont de Nemours & Co., 136 S.W.3d 218, 2004 Tex. LEXIS 445, 47 Tex. Sup. Ct. J. 583 (Tex. 2004).

15. In a contract case involving a fraud counterclaim, the trial court did not err by excluding a letter to an attorney that tended to suggest fraud; the inadvertent production of the letter did not waive the attorney-client privilege under Tex. R. Civ. P. 193.3(d), and the fraud exception of Tex. R. Evid. 503 did not apply because there was no evidence of an ongoing or contemplated fraud when the letter was written. Warrantech Corp. v. Computer Adapters Servs., 134 S.W.3d 516, 2004 Tex. App. LEXIS 3212 (Tex. App. Fort Worth 2004).

16. Driver's witness statement was privileged because the insurance adjuster recorded the witness statement while acting as driver's representative, and thus statement constituted confidential communications between a client, a client's attorney, and a client's representatives for the purpose of facilitating the rendition of professional legal services to the client; the insurance adjuster's role in recording the witness statements in lieu of the relator's legal defense would reasonably be interpreted as representing the client, such that the adjuster's role in collecting the driver's witness statement was as a representative acting with the purpose of obtaining and facilitating the driver's legal representation, rendering their communication protected by the attorney-client privilege. In re Arden, 2004 Tex. App. LEXIS 2596 (Tex. App. El Paso Mar. 24 2004).

Civil Procedure : Discovery : Privileged Matters : Attorney-Client Privilege

17. Trial court did not improperly require production of privileged communications in a motor vehicle collision case; an order stating that assertions of privilege had to be established by evidence, and via a privilege log if requested, comported with the governing law. In re Kristensen, 2014 Tex. App. LEXIS 8404, 2014 WL 3778903 (Tex. App. Houston 14th Dist. July 31 2014).

18. Relator was entitled to mandamus relief, because the cited rules of civil procedure did not extend to the witness's communications protected by the attorney-client privilege; the witness was retained to work for relator on the administration of the trust. In re Segner, 441 S.W.3d 409, 2013 Tex. App. LEXIS 14796 (Tex. App. Dallas Dec. 5 2013).

19. Injured pedestrian could not discover information communicated to and from the attorney as counsel for the vehicle owner's corporations because such information was privileged under Tex. R. Civ. P. 192.5 and Tex. R. Evid. 503; however, the attorney was required to testify as to non-privileged communications made to him in his capacity as corporate secretary. In re Southpak Container Corp., 418 S.W.3d 360, 2013 Tex. App. LEXIS 14633, 2013 WL 6237695 (Tex. App. Dallas Dec. 3 2013).

20. Trial court abused its discretion by not conducting an in camera inspection before ordering production because a bank established a prima facie case for the work product and attorney-client privileges by presenting affidavits of bank officers and an attorney, while a borrower did not make a prima facie showing of the crime-fraud exception absent evidence to rebut the presumption a third party's payment was a purchase of the loan. In re Park Cities Bank, 409 S.W.3d 859, 2013 Tex. App. LEXIS 10254 (Tex. App. Tyler Aug. 15 2013).

21. Prima facie showing was made that the common interest privilege applied to documents pertaining to a pending action within the relevant time periods, but not as to other documents outside the time periods or not shown to relate to the pending action. In re Park Cities Bank, 409 S.W.3d 859, 2013 Tex. App. LEXIS 10254 (Tex. App. Tyler Aug. 15 2013).

22. Where defendant attorney placed documents in his former business partner's computer while defendant was working as a network administrator for the company, he took steps to protect confidentiality by setting up the network such that only he had access to the documents; after he was locked out of the office and no longer working for the company, he understood that someone else had gained access over network permissions but failed to notify the third party or anyone else about the confidential material on the hard drive and failed to ask for it to be deleted or returned. In a dispute concerning the administration of a trust, the issue of whether defendant waived the right to claim the attorney-client privilege and work-product protection as to the documents was not governed by Tex. R. Evid. 503 because the disclosure did not occur in discovery in a court proceeding; applying the common law waiver rule, the district court held that defendant waived the privilege because he failed to take reasonable steps to protect confidentiality. Alpert v. Riley, 267 F.R.D. 202, 2010 U.S. Dist. LEXIS 38331, 76 Fed. R. Serv. 3d (Callaghan) 542, 82 Fed. R. Evid. Serv. (CBC) 484 (S.D. Tex. Apr. 19 2010).

23. In an oil and gas lease dispute, court erred in compelling relator to produce a memorandum because the crime-fraud exception did not apply; the "evidence" demonstrating that relator engaged its attorney for fraudulent purposes was the opposing party's own allegations of fraud, which served as the basis of its lawsuit. In re Small, 346 S.W.3d 657, 2009 Tex. App. LEXIS 4114 (Tex. App. El Paso June 10 2009).

24. In an oil and gas lease dispute, court abused its discretion by ordering emails to be disclosed because the emails were not disclosed to any party other than those individuals involved in the furtherance of the attorney's representation of relators. Therefore, there was no waiver by disclosure, and the trial court abused its discretion by ordering the emails to be disclosed on that ground. In re Small, 346 S.W.3d 657, 2009 Tex. App. LEXIS 4114 (Tex. App. El Paso June 10 2009).

25. In a suit brought against an insurer by an insured's judgment creditor, the insurer could not assert the attorney-client privilege of Tex. R. Evid. 503 or the work product privilege of Tex. R. Civ. P. 192 on behalf of the insured with regard to a claims file because the insured's assignment of its rights to its judgment creditor waived the attorney-client privilege under Tex. R. Evid. 511; however, the insurer's Tex. R. Civ. P. 193 privilege log established that some communications between counsel and the insurer were covered by the insurer's own attorney-client privilege. In re General Agents Ins. Co. of Am., Inc., 224 S.W.3d 806, 2007 Tex. App. LEXIS 3690 (Tex. App. Houston 14th Dist. 2007).

26. Chemical company was entitled to conditional mandamus relief when a trial court ordered the company to produce a confidential research memorandum prepared by an attorney from a law firm that had represented the company in a failed real estate transaction; although a limited partnership claimed that the trial court had discretion to order production of a writing used to refresh memory for the purpose of testifying and Tex. R. Evid. 612 generally dealt with writings used to refresh recollection, the memorandum also was privileged, and Tex. R. Evid. 503 rather than Tex. R. Evid. 612 described the circumstances under which a document subject to the attorney-client privilege was subject to disclosure; the company did not waive the privilege on the ground that the memorandum established that the company possessed a certain document on an earlier date than admitted by the company through its witnesses and in the company's discovery responses because the witness testified that he did not recall whether he had a copy of the document when he helped draft a certain document and the company amended the relevant discovery response to reflect that its counsel possessed the document in question ten days before the date of an initial research memorandum; thus, the memorandum was consistent with the discovery responses. In re Chevron Phillips Chem. Co. LP, 2006 Tex. App. LEXIS 9186 (Tex. App. Beaumont Oct. 25 2006).

27. Chemical company was entitled to conditional mandamus relief when a trial court ordered the company to produce a confidential research memorandum prepared by an attorney from a law firm that had represented the company in a failed real estate transaction because the memorandum was privileged under Tex. R. Evid. 503 and the company did not waive that privilege under Tex. R. Evid. 511 through voluntary disclosure of a significant part of the memorandum in a second memorandum that counsel distributed to a third party, as the company did not

voluntarily disclose any part of the memorandum; a limited partnership (LP) seeking disclosure of the memorandum argued that because the disclosed memorandum was based upon the privileged memorandum, the company waived its privilege; however, the LP failed to distinguish between using core attorney work product to prepare a document for dissemination to third parties and disclosing the privileged document itself. In re Chevron Phillips Chem. Co. LP, 2006 Tex. App. LEXIS 9186 (Tex. App. Beaumont Oct. 25 2006).

28. Chemical company was entitled to conditional mandamus relief when a trial court ordered the company to produce a confidential research memorandum prepared by an attorney from a law firm that had represented the company in a failed real estate transaction because the memorandum was privileged under Tex. R. Evid. 503 and the company did not waive that privilege through offensive use of the memorandum because its production was not the only means through which a limited partnership might obtain the evidence it claimed was outcome determinative of the company's claims. In re Chevron Phillips Chem. Co. LP, 2006 Tex. App. LEXIS 9186 (Tex. App. Beaumont Oct. 25 2006).

29. Attorney-client privilege was not satisfied; in all its briefing, there was no mention of the attorney-client privilege with respect to five documents, and the only reason cited for asserting the privilege with respect to the 11 documents plaintiff obtained from its insurance broker was that defendant itself claimed privilege with respect to its own communications with the broker. Kimberly-Clark Corp. v. Cont'l Cas. Co., 2006 U.S. Dist. LEXIS 63576 (N.D. Tex. Aug. 18 2006).

Civil Procedure : Discovery : Privileged Matters : Work Product : Scope

30. Although certain documents were not protected by Tex. R. Evid. 503(b)(1)(C) because the communications were made prior to the date an adversary complaint was filed, they were protected from discovery by Fed. R. Civ. P. 26(b)(3) and (b)(4). Schmidt v. Rodriguez (in re Rodriguez), 2012 Bankr. LEXIS 3620 (Bankr. S.D. Tex. Aug. 7 2012).

Civil Procedure : Discovery : Privileged Matters : Work Product : Waivers

31. Relator was not entitled to mandamus relief because the trial court did not abuse its discretion by compelling counsel for the driver of a vehicle insured by a policy issued by relator to produce his complete defense file to the driver's estate representative in subsequent litigation between relator and the assignees of the insureds' claims. The trial court did not disregard established rules and principles when it declined to recognize the insurance company's assertion of privilege in the face of the insured's assignment of the claim and the right to waive attorney-client and work product privileges. In re Mid Century Ins. Co., 2014 Tex. App. LEXIS 2804, 2014 WL 989726 (Tex. App. Beaumont Mar. 13 2014).

Civil Procedure : Judgments : Entry of Judgments : Enforcement & Execution : Fraudulent Transfers

32. Crime/fraud exception to the attorney-client privilege under Tex. R. Evid. 503(d)(1) did not apply to a judgment creditor's claim of fraudulent transfer because there was no concealment. In re General Agents Ins. Co. of Am., Inc., 224 S.W.3d 806, 2007 Tex. App. LEXIS 3690 (Tex. App. Houston 14th Dist. 2007).

Civil Procedure : Remedies : Writs : General Overview

33. In a bank's breach of contract suit against a bank member, the trial court's disqualification of the member's counsel was an abuse of discretion as the trial court found facts regarding counsel's alleged knowledge of the bank's confidential or proprietary information which were unsupported by probative evidence; while, pursuant to its commercial employment contract with a debt collection company (where the member's counsel previously worked as corporate counsel) a bank affiliate provided the company with certain confidential or proprietary information from

a variety of sources, one being the bank, this contractual relinquishment of the bank's confidential or proprietary information to the company did not occur during any pending action and therefore could not concern a matter of common interest therein for purposes of Tex. R. Evid. 503(b)(1)(C); further, the bank and its affiliate were never clients of the member's counsel, and the bank presented no evidence that either it or its affiliate were ever a codefendant with the company in which shared confidences were exchanged in furtherance of a joint defense. In re Dalco, 186 S.W.3d 660, 2006 Tex. App. LEXIS 1709 (Tex. App. Beaumont 2006).

Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus

34. Employer's writ of mandamus was conditionally granted and the trial court was directed to vacate her order denying the employer's motion for protection of the July 14, 2010 conversation between the former employee and employer's counsel and enter an order granting the motion; under Tex. R. Evid. 503, the trial court abused its discretion in determining that the employer failed to prove attorney-client privilege applied to a conversation between the employee and employer's counsel, and that communication was confidential. In re United States Waste Mgmt. Res., L.L.C., 387 S.W.3d 92, 2012 Tex. App. LEXIS 9152 (Tex. App. Houston 14th Dist. Nov. 2 2012).

35. In a mandamus proceeding involving a discovery dispute in a case against an insurer for violations of the insurance code, breach of contract, and breach of Stowers duty in a related personal injury case, the insurer had properly made a prima facie showing of privilege as to certain documents the trial court had ordered to be produced because the documents were sufficient to support a rational inference that the attorney-client and work-product privileges applied. Because the insurer had made a prima facie showing of privilege and tendered documents for inspection, the trial court's failure to conduct an in camera review before compelling production was an abuse of discretion, subject to mandamus relief. In re Unitrin County Mut. Ins. Co., 2010 Tex. App. LEXIS 5797, 2010 WL 2867326 (Tex. App. Austin July 22 2010).

36. Trial court abused its discretion in ordering an oral deposition of an attorney for a non-party fact witness on the subject matter of the underlying litigation without first requiring a showing that less intrusive discovery methods were unavailable to obtain the work-product information. In re Burroughs, 203 S.W.3d 858, 2006 Tex. App. LEXIS 8300 (Tex. App. Beaumont 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

37. In a trial for an aggravated robbery that occurred in a motel, the trial court did not err in refusing to admit into evidence, as an admission by a party opponent, the complainant's civil pleading in his lawsuit against the motel; the complainant was not a party opponent. Because the court found that the civil pleading would contain inadmissible hearsay, it did not reach the issue of whether admission of the pleading would also be barred by the attorney-client privilege Tex. R. Evid. 503. Davis v. State, 177 S.W.3d 355, 2005 Tex. App. LEXIS 2714 (Tex. App. Houston 1st Dist. 2005).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

38. In a drug trial, defense counsel was not rendered ineffective at the sentencing stage by failing to object to the State's questioning of a defense expert about testing administered to defendant for attention deficit hyperactivity disorder (ADHD) and about notes taken during an interview of defendant because the information was not a privileged communication under Tex. R. Evid. 503. Under Tex. R. Evid. 705(a), once defendant's witness offered an expert opinion, the State was entitled to examine the witness about the factual underpinning of that opinion. Weinn v. State, 281 S.W.3d 633, 2009 Tex. App. LEXIS 1015 (Tex. App. Amarillo Feb. 12 2009).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

39. Trial counsel was not ineffective for failing to move to quash the State's subpoena for medical records containing information about defendant's prior bad acts and extraneous offenses or for allowing defendant to testify to prior bad acts and extraneous offenses during defendant's aggravated sexual assault of a child trial where the defense's primary strategy was to confess to prior wrongs and offenses, to demonstrate defendant's honesty, to show the jury that defendant was sincerely penitent about his prior bad acts and recognized the errors in his prior thoughts, and to show that he was actively and successfully changing his ways through therapy. An integral part of the strategy was for defendant to show that he was in therapy and making progress, and, given counsel's evident strategy, he might well have determined that it was better to allow the State to access therapy records revealing prior bad acts, and to open his witness to the State's examination concerning those acts, than to forego the strategy of defendant's testifying fully to matters showing his remorse, honesty, and improvement through therapy. Berg v. State, 2005 Tex. App. LEXIS 1315 (Tex. App. Houston 1st Dist. Feb. 17 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

40. Defendant's claim that a trial court erred by refusing to allow his former attorney to testify absent a complete waiver of the attorney-client privilege was not preserved for review where the proffered testimony did not implicate a confidential communication between defendant and the former attorney which would be covered under Tex. R. Evid. 503(b)(1)(A), but instead implicated the work product of the former attorney and was covered by Tex. R. Evid. 503(b)(2), which was expressly designated as a special rule of privilege in criminal cases. According to the record, the trial judge and both attorneys focused their contentions and analysis on the attorney-client communication privilege, but the work-product privilege was not addressed by either attorney or the judge because defendant did not contend that the evidence was admissible under the special provision covering attorney work-product privilege or inform the trial court that the attorney-client privilege was not applicable, and, regarding the waiver of his privilege, defendant's final statement was that he declined to waive his privilege. Cameron v. State, 2006 Tex. App. LEXIS 1018 (Tex. App. Amarillo Feb. 8 2006).

41. Defendant failed to preserve for review his argument that the trial court erred in refusing to allow his former trial attorney to testify absent a complete waiver of the attorney-client privilege. The court did not decide if the lawyer-client privilege was implicated. Cameron v. State, 2004 Tex. App. LEXIS 7412 (Tex. App. Amarillo Aug. 16 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

42. In a drug case, defendant did not have to waive his attorney-client privilege to obtain testimony from a former attorney regarding the attorney's notes on conflicting information in the police report; no waiver was required under the work product privilege of Tex. R. Evid. 503, and a discussion regarding the admissibility of the evidence, combined with defendant's offer of proof, sufficed to preserve error under Tex. R. App. P. 33.1 and Tex. R. Evid. 103 as to the exclusion of the evidence. Cameron v. State, 241 S.W.3d 15, 2007 Tex. Crim. App. LEXIS 1120 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

43. In a murder trial, defendant waived any argument under Tex. R. Evid. 503, 701, 704 to allowing a State's witness to speculate regarding what defendant told his trial counsel. There were no objections on grounds relating to those rules, as required to preserve error under Tex. R. App. P. 33.1(a). Young v. State, 2009 Tex. App. LEXIS 8022, 2009 WL 3295763 (Tex. App. Beaumont Oct. 14 2009).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

44. Court improperly admitted evidence of defendant's former trial counsel's work product through a witness's testimony about his telephone conversation with counsel because the telephone conversation in connection with representation of defendant constituted protected work product; the witness evaluated defendant and was retained to do so at counsel's request. However, the error was harmless because the State did not emphasize the witness's testimony regarding his conversation with counsel, nor did the State refer to that testimony during closing argument. Wright v. State, 374 S.W.3d 564, 2012 Tex. App. LEXIS 5046, 41 Media L. Rep. (BNA) 1533, 2012 WL 2389455 (Tex. App. Houston 14th Dist. June 26 2012).

Estate, Gift & Trust Law : Powers of Attorney : Durable Powers

45. Because the person holding defendant's durable power of attorney was not a licensed attorney and could not act on defendant's behalf in his criminal prosecution, defendant could not invoke the attorney-client privilege to exclude a recording of his phone conversation with his attorney in fact under Tex. R. Evid. 503. Mcdonald v. State, 2010 Tex. App. LEXIS 7977, 2010 WL 3910424 (Tex. App. El Paso Sept. 30 2010).

Evidence : Authentication : Self-Authentication

46. Where defendant company served on plaintiffs a privilege log describing the documents withheld from discovery pursuant to the work-product privilege in Tex. R. Civ. P. 192.5 and the attorney-client privilege in Tex. R Evid. 503, and tendered the documents to the court, and where plaintiffs requested a hearing challenging the company's privilege claims, the trial court abused its discretion in denying defendant's claim of privilege without conducting an in-camera review. In re DuPont de Nemours & Co., 136 S.W.3d 218, 2004 Tex. LEXIS 445, 47 Tex. Sup. Ct. J. 583 (Tex. 2004).

Evidence : Demonstrative Evidence : Visual Formats

47. In a trial for aggravated sexual assault on a child, there was no error in admitting into evidence a videotape depicting defendant and his ex-wife acting out a father/daughter fantasy. The videotape was not covered by the attorney-client privilege, even though the phrase "attorney/client privilege" was written on the outside of the tape. Richert v. State, 2012 Tex. App. LEXIS 7719 (Tex. App. Houston 1st Dist. Aug. 30 2012).

Evidence : Documentary Evidence : Completeness

48. Probate court did not abuse its discretion by admitting redacted billing statements and excluding unredacted statements in a dispute over attorney's fees and expenses because the rule of optional completeness under Tex. R. Evid. 106, 107 was not an exception to the attorney-client privilege, and it did not mandate a waiver of the privilege. Even if the rule of optional completeness was found to apply, an administrator did not show that unredacted statements were necessary for the probate court to understand the attorney's fees recoverable from an estate; significant information was provided to the court in the redacted billing statements, and, when combined with the testimony of the guardian's attorneys, further information was not necessary for the court to understand the matter. In the Estate of Johnston, 2012 Tex. App. LEXIS 4255, 2012 WL 1940656 (Tex. App. San Antonio May 30 2012).

Evidence : Hearsay : Rule Components

49. In a trial for an aggravated robbery that occurred in a motel, the trial court did not err in refusing to admit into evidence, as an admission by a party opponent, the complainant's civil pleading in his lawsuit against the motel; the complainant was not a party opponent. Because the court found that the civil pleading would contain inadmissible hearsay, it did not reach the issue of whether admission of the pleading would also be barred by the attorney-client privilege Tex. R. Evid. 503. Davis v. State, 177 S.W.3d 355, 2005 Tex. App. LEXIS 2714 (Tex. App. Houston 1st Dist. 2005).

Evidence : Privileges : General Overview

50. Investigators' disclosure of the law firm or asbestos company that hired them was not protected by Tex. R. Evid. 503 because the mere identity of the law firm or asbestos company would not reveal the purpose for which the investigators were hired. Landry v. Burge, 2000 Tex. App. LEXIS 6606 (Tex. App. Dallas Oct. 2 2000).

Evidence : Privileges : Attorney-Client Privilege

51. Where defendant's cell mate was a former attorney who surrendered his license to practice law in lieu of disciplinary proceedings, he was not a "lawyer" as defined in Tex. R. Evid. 503(a)(1). The cell mate was permitted to testify that defendant had confessed to him; the attorney-client privilege did not apply. Salatini v. State, 2005 Tex. App. LEXIS 10664 (Tex. App. Dallas Dec. 28, 2005).

52. Defendant's conviction for murder was proper pursuant to Tex. R. Evid. 503(b)(1) because her attorney-client privilege was not violated. The court was unable to find any authority to support the proposition that the State could not inquire whether, how often, how long, and how recently defendant had met with her attorneys. Pierce v. State, 2005 Tex. App. LEXIS 6229 (Tex. App. Austin Aug. 3 2005).

53. In a retaliation trial, which arose from defendant's statement to his interpreter that he was going to kill the prosecutor in a previous burglary case, the trial court did not err in admitting the interpreter's testimony. The attorney-client privilege under Tex. R. Evid. 503(b)(1) did not apply because Rule 503(a)(5) defines a confidential communication as one made in furtherance of the rendition of professional legal services, and defendant's statement to his interpreter was not made for the purpose of facilitating the rendition of professional legal services. Aviles v. State, 165 S.W.3d 437, 2005 Tex. App. LEXIS 3575 (Tex. App. Austin 2005).

54. Attorney-client privilege under Tex. R. Evid. 503(b)(1) does not apply when a criminal defendant makes a threat in the presence of his court-appointed interpreter because such a threat is not confidential under Rule 503(a)(5), which defines a confidential communication as one made in furtherance of the rendition of professional legal services. Aviles v. State, 165 S.W.3d 437, 2005 Tex. App. LEXIS 3575 (Tex. App. Austin 2005).

55. Attorney-client privilege protects confidential communications made for the purpose of facilitating the rendition of professional legal services to the client under Tex. R. Evid. 503; the burden of establishing the privilege is on the party asserting it. Harvey v. State, 97 S.W.3d 162, 2002 Tex. App. LEXIS 6934 (Tex. App. Houston 14th Dist. 2002).

Evidence : Privileges : Attorney-Client Privilege : General Overview

56. Trial court did not improperly require production of privileged communications in a motor vehicle collision case; an order stating that assertions of privilege had to be established by evidence, and via a privilege log if requested, comported with the governing law. In re Kristensen, 2014 Tex. App. LEXIS 8404, 2014 WL 3778903 (Tex. App. Houston 14th Dist. July 31 2014).

57. Upon entry of an agreed final divorce decree, the husband filed a motion for new trial in which he alleged his attorney lacked the authority to sign a settlement agreement on his behalf while he was in federal prison. The trial court did not abuse its discretion when it excluded certain exhibits consisting of emails about the settlement offer as they were privileged attorney-client communications and no basis for waiver of the attorney-client privilege had been argued. Phillips v. Phillips, 2013 Tex. App. LEXIS 15275, 2013 WL 6726819 (Tex. App. Houston 14th Dist.

Dec. 19 2013).

58. Relator was entitled to mandamus relief, because the cited rules of civil procedure did not extend to the witness's communications protected by the attorney-client privilege; the witness was retained to work for relator on the administration of the trust. In re Segner, 441 S.W.3d 409, 2013 Tex. App. LEXIS 14796 (Tex. App. Dallas Dec. 5 2013).

59. Court improperly admitted evidence of defendant's former trial counsel's work product through a witness's testimony about his telephone conversation with counsel because the telephone conversation in connection with representation of defendant constituted protected work product; the witness evaluated defendant and was retained to do so at counsel's request. However, the error was harmless because the State did not emphasize the witness's testimony regarding his conversation with counsel, nor did the State refer to that testimony during closing argument. Wright v. State, 374 S.W.3d 564, 2012 Tex. App. LEXIS 5046, 41 Media L. Rep. (BNA) 1533, 2012 WL 2389455 (Tex. App. Houston 14th Dist. June 26 2012).

60. During defendant's trial for bail jumping and failure to appear at trial for theft, his previous defense counsel in the theft case was not permitted to testify as to any communication he had with defendant because the trial court sustained defendant's objection on the basis of the attorney-client privilege under Tex. R. Evid. 503. Kay v. State, 340 S.W.3d 470, 2011 Tex. App. LEXIS 1392 (Tex. App. Texarkana Feb. 16 2011).

61. Conclusory statement that did not identify confidential communications was insufficient to invoke the Tex. R. Evid. 503(b) attorney-client privilege in a case of securities fraud and misapplication of fiduciary property. Head v. State, 299 S.W.3d 414, 2009 Tex. App. LEXIS 7628 (Tex. App. Houston 14th Dist. Sept. 30 2009).

62. Pursuant to Tex. R. Evid. 503(a)(5) and(b), production of Document # 25 would not be compelled because it facilitated obtaining legal advice. In-house counsel prepared the report at the request of a turbine manufacturer's highest officers and in-house counsel after a fire and the death of a worker. Suzlon Wind Energy Corp. v. Shippers Stevedoring Co., 662 F. Supp. 2d 623, 2009 U.S. Dist. LEXIS 5422, 78 Fed. R. Evid. Serv. (CBC) 650 (S.D. Tex. Jan. 27 2009).

63. One of the sanctions imposed against a former chief financial officer prohibited him from using any of the privileged documents, even if the documents were determined not to be protected from discovery by the attorney-client privilege on appeal, and he did not appeal the trial court's order imposing these sanctions and any complaint he might have had about that order was waived; as a result, even if the court concluded that certain documents were not privileged, the company waived the privilege, or the trial court erred when it ruled that the documents were not admissible, the officer was prohibited from using the documents, and thus the trial court did not need to decide the merits on the officer's claim of error in this regard. Knapp v. Wilson N. Jones Mem'l Hosp., 281 S.W.3d 163, 2009 Tex. App. LEXIS 1087 (Tex. App. Dallas Feb. 17 2009).

64. The State's query as to whether defendant had changed his defensive theory did not call for a disclosure of confidential communications. Saucedo v. State, 2008 Tex. App. LEXIS 3908 (Tex. App. Corpus Christi May 22 2008).

65. Parties did not discuss how they were harmed by the admission of evidence, testimony from a former attorney, or how its admission probably resulted in the rendition of an improper verdict, and a review of the record revealed that reversal was not warranted, given that (1) the statement had nothing to do with the pivotal question before the jury, (2) the attorney stated that he had no knowledge of what was intended regarding an agreement, (3) the parties did not assert a privilege objection to later testimony, and (4) there were several witnesses and other evidence that directly addressed the material issue. Boulle v. Boulle, 254 S.W.3d 701, 2008 Tex. App. LEXIS 3604 (Tex. App.

Dallas 2008).

66. Trial court abused its discretion in ordering an oral deposition of an attorney for a non-party fact witness on the subject matter of the underlying litigation without first requiring a showing that less intrusive discovery methods were unavailable to obtain the work-product information. In re Burroughs, 203 S.W.3d 858, 2006 Tex. App. LEXIS 8300 (Tex. App. Beaumont 2006).

67. Trial court did not abuse its discretion when it disqualified a husband's lawyer in a divorce case in accordance with Tex. Disciplinary R. Prof. Conduct 1.05(b)(3) and Tex. R. Evid. 503(a)(1) based on possible disclosure of confidential information when the wife consulted the lawyer. In re Englehardt, 2006 Tex. App. LEXIS 8170 (Tex. App. Houston 1st Dist. Sept. 11 2006).

68. Attorney-client privilege was not satisfied; in all its briefing, there was no mention of the attorney-client privilege with respect to five documents, and the only reason cited for asserting the privilege with respect to the 11 documents plaintiff obtained from its insurance broker was that defendant itself claimed privilege with respect to its own communications with the broker. Kimberly-Clark Corp. v. Cont'l Cas. Co., 2006 U.S. Dist. LEXIS 63576 (N.D. Tex. Aug. 18 2006).

69. In a bank's breach of contract suit against a bank member, the trial court's disqualification of the member's counsel was an abuse of discretion as the trial court found facts regarding counsel's alleged knowledge of the bank's confidential or proprietary information which were unsupported by probative evidence; while, pursuant to its commercial employment contract with a debt collection company (where the member's counsel previously worked as corporate counsel) a bank affiliate provided the company with certain confidential or proprietary information from a variety of sources, one being the bank, this contractual relinquishment of the bank's confidential or proprietary information to the company did not occur during any pending action and therefore could not concern a matter of common interest therein for purposes of Tex. R. Evid. 503(b)(1)(C); further, the bank and its affiliate were never clients of the member's counsel, and the bank presented no evidence that either it or its affiliate were ever a codefendant with the company in which shared confidences were exchanged in furtherance of a joint defense. In re Dalco, 186 S.W.3d 660, 2006 Tex. App. LEXIS 1709 (Tex. App. Beaumont 2006).

70. Trial court erred by granting crusher manufacturer's motion to compel discovery because relators established that the disputed documents were protected by the attorney-client, joint defense, and work product privileges under Tex. R. Evid. 503 and Tex. R. Civ. P. 192.5, and the manufacturer did not establish a prima facie case of contemplated fraud or that the crime-fraud exception provided in Tex. R. Evid. 503(d)(1) was applicable. In re Seigel, 198 S.W.3d 21, 2006 Tex. App. LEXIS 1332 (Tex. App. El Paso 2006).

71. Defendant's claim that a trial court erred by refusing to allow his former attorney to testify absent a complete waiver of the attorney-client privilege was not preserved for review where the proffered testimony did not implicate a confidential communication between defendant and the former attorney which would be covered under Tex. R. Evid. 503(b)(1)(A), but instead implicated the work product of the former attorney and was covered by Tex. R. Evid. 503(b)(2), which was expressly designated as a special rule of privilege in criminal cases. According to the record, the trial judge and both attorneys focused their contentions and analysis on the attorney-client communication privilege, but the work-product privilege was not addressed by either attorney or the judge because defendant did not contend that the evidence was admissible under the special provision covering attorney work-product privilege or inform the trial court that the attorney-client privilege was not applicable, and, regarding the waiver of his privilege, defendant's final statement was that he declined to waive his privilege. Cameron v. State, 2006 Tex. App. LEXIS 1018 (Tex. App. Amarillo Feb. 8 2006).

72. Where documents filed by a borrower with a trial court under seal, which a lender sought to have released, did not contain or refer to any communications between the borrower and his attorneys, and where the borrower's attorneys were not acting in a legal capacity in the instances, the attorney-client privilege was not implicated because the communications at issue did not involve the rendition of professional legal services pursuant to Tex. R. Evid. 503(b)(1). Kelly v. Gaines, 181 S.W.3d 394, 2005 Tex. App. LEXIS 7969 (Tex. App. Waco 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 9628 (Tex. App. Waco Nov. 16, 2005).

73. Plaintiff insurer argued that the district court abused its discretion in allowing the insurer's former counsel to testify that during the policy period he, on behalf of the insurer, communicated to defendant insureds that the insurer considered the Environmental Protection Agency's (EPA) placement of the insureds' site on the Superfund List as a claim against the insureds under an environmental impairment liability policy. The attorney's testimony described the communications between himself and the attorneys and agents of the insureds and his independent inference and conclusion based upon them. The attorney testified that he, as the insurer's representative, and his counterparts representing the insureds treated the inclusion of the site as a claim by EPA against the insureds. Such testimony did not disclose any "confidential communications" between the insurer and him as its attorney under Tex. R. Evid. 503(b). Int'l Ins. Co. v. RSR Corp., 426 F.3d 281, 2005 U.S. App. LEXIS 20225, 35 Envtl. L. Rep. 20192 (5th Cir. Tex. 2005).

74. Plaintiff insurer argued that the district court abused its discretion in allowing the insurer's former counsel to testify that during the policy period he, on behalf of the insurer, communicated to defendant insureds that the insurer considered the Environmental Protection Agency's (EPA) placement of the insureds' site on the Superfund List as a claim against the insureds under an environmental impairment liability policy. The attorney's testimony described the communications between himself and the attorneys and agents of the insureds and his independent inference and conclusion based upon them. The attorney testified that he, as the insurer's representative, and his counterparts representing the insureds treated the inclusion of the site as a claim by EPA against the insureds. Such testimony did not disclose any "confidential communications" between the insurer and him as its attorney under Tex. R. Evid. 503(b). Int'l Ins. Co. v. RSR Corp., 426 F.3d 281, 2005 U.S. App. LEXIS 20225, 35 Envtl. L. Rep. 20192 (5th Cir. Tex. 2005).

75. Defendant's conviction for murder was proper pursuant to Tex. R. Evid. 503(b)(1) because her attorney-client privilege was not violated. The court was unable to find any authority to support the proposition that the State could not inquire whether, how often, how long, and how recently defendant had met with her attorneys. Pierce v. State, 2005 Tex. App. LEXIS 6229 (Tex. App. Austin Aug. 3 2005).

76. Trial court erred by allowing a consumer to withhold certain documents from disclosure because the documents did not contain confidential attorney-client communications and because the consumer's attorneys were not acting in a legal capacity in those instances; the attorney-client privilege was not implicated because the communications did not involve the rendition of professional legal services for purposes of Tex. R. Evid. 503(b)(1). Kelly v. Gaines, 2005 Tex. App. LEXIS 5554 (Tex. App. Waco July 13 2005), opinion withdrawn by 2005 Tex. App. LEXIS 7966 (Tex. App. Waco Sept. 28, 2005), substituted opinion at 181 S.W.3d 394, 2005 Tex. App. LEXIS 7969 (Tex. App. Waco 2005).

77. Although a family counselor was an employee of the same entity that contracted with an attorney to provide legal services to a mother in a termination of parental rights case, she did not fall within the definition of a "representative of the lawyer" under Tex. R. Evid. 504(a)(4)(A); the counselor testified about the mother's counseling and the services provided by the entity, including food, clothing, transportation for job applications, housing, and legal services. In re K.C.P., 142 S.W.3d 574, 2004 Tex. App. LEXIS 7102 (Tex. App. Texarkana 2004).

78. In a contract case involving a fraud counterclaim, the trial court did not err by excluding a letter to an attorney that tended to suggest fraud; the inadvertent production of the letter did not waive the attorney-client privilege under Tex. R. Civ. P. 193.3(d), and the fraud exception of Tex. R. Evid. 503 did not apply because there was no evidence of an ongoing or contemplated fraud when the letter was written. Warrantech Corp. v. Computer Adapters Servs., 134 S.W.3d 516, 2004 Tex. App. LEXIS 3212 (Tex. App. Fort Worth 2004).

79. Former employees' motion to compel production of documents related to investigation of the corporation's employees, and the documents related to the corporation's investigation of the "surreptitious backups" allegedly made by the former employees, should have been granted with the exception of the redactions of three documents, which contained purely legal advice, because the corporation failed to show that the documents were confidential communications made for the purpose of facilitating the rendition of professional legal services to the corporation; the mere fact that the corporation may have been contemplating litigation did not establish that the communications to and from its outside counsel were made for the purpose of facilitating the rendition of legal advice, and the documents were not exempt from discovery under the work product doctrine because the corporation's primary motivation in preparing the investigatory documents was the protection of its confidential information, and not to aid in possible future litigation. Navigant Consulting, Inc. v. Wilkinson, 220 F.R.D. 467, 2004 U.S. Dist. LEXIS 5439 (N.D. Tex. 2004).

80. Motion for protection that was sought to prevent disclosure of communications between an attorney and a client that were allegedly privileged under Tex. R. Evid. 511 was improperly denied under Tex. R. Evid. 503 because there was no evidence of a voluntary disclosure or a consent to disclosure in an assignment of a "Stowers" claim against an insurer in a personal injury matter. In re Cooper, 47 S.W.3d 206, 2001 Tex. App. LEXIS 3624 (Tex. App. Beaumont 2001).

81. Pursuant to Tex. R. Evid. 503(b) the buyers could not depose the builders attorney because the attorney's advice to his clients were as protected as the builders' communication to their client; thus, the trial court did not err in issuing a protective order. Boales v. Brighton Builders, Inc., 29 S.W.3d 159, 2000 Tex. App. LEXIS 4472 (Tex. App. Houston 14th Dist. 2000).

Evidence : Privileges : Attorney-Client Privilege : Elements

82. Chapter 7 trustee was correct when he claimed that some documents he was ordered to produce in an adversary proceeding were privileged under Tex. R. Evid. 503 irrespective of the common interest privilege, and did not have to be produced. However, the court rejected the trustee's argument that the applicable date for applying the common interest privilege was the date the debtor declared bankruptcy and not the date the trustee filed his adversary proceeding; Rule 503(b)(1)(C) had a "pending action" requirement, and the date the trustee filed his action was the date that requirement arose. Schmidt v. Rodriguez (in re Rodriguez), 2012 Bankr. LEXIS 4233 (Bankr. S.D. Tex. Sept. 12 2012).

83. Trial court did not abuse its discretion by impliedly finding that the privileged information sought did not go to the very heart of the affirmative relief sought or that this information, if believed by the fact finder, in all probability would not be outcome determinative of the claim asserted. Lesikar v. Moon, 2012 Tex. App. LEXIS 7311, 2012 WL 3776365 (Tex. App. Houston 14th Dist. Aug. 30 2012).

84. Court sustained a Chapter 7 trustee's objection to certain documents sought in an adversary proceeding on the grounds that they were privileged under Tex. R. Evid. 503(b)(1)(C) where the documents related to communications that occurred after the date an adversary complaint was filed and where the alleged common interest between the trustee and petitioning creditors was an indemnity cause of action against a lessee for the benefit of the debtor's estate. The fact that the trustee and the petitioning creditors were on opposite sides of the adversary proceeding did not prevent the trustee from invoking the privilege where the two sides shared a common

interest. Schmidt v. Rodriguez (in re Rodriguez), 2012 Bankr. LEXIS 3620 (Bankr. S.D. Tex. Aug. 7 2012).

85. Documents listed in a privilege log were subject to the attorney-client privilege under Tex. R. Evid. 503(b) because they dealt with subject matter that called for an attorney's consideration and legal advice, were made for the purpose of facilitating the rendition of legal advice, or summarized legal advice. Privilege was not waived under the offensive use doctrine because none of the documents were outcome determinative. Balestri v. Hallwood Group Inc. (in re Hallwood Energy, L.P.), 2010 Bankr. LEXIS 2717 (Bankr. N.D. Tex. Aug. 10 2010).

86. Trial court did not err by admitting the statement defendant made to the offense advocate during the prison's disciplinary process in violation of Tex. R. Evid. 503(a)(3) because the record contained no evidence that the advocate was an attorney or whether defendant held the reasonable belief that she was. It was also unclear whether the statement was made in confidence or was an oral statement defendant gave during the hearing; defendant's alleged disclosure of the same statement to a sergeant prior to his statement at the hearing suggested that he did not intend the communication to be confidential. Sanchez v. State, 2009 Tex. App. LEXIS 2432, 2009 WL 838223 (Tex. App. Houston 14th Dist. Mar. 31 2009).

Evidence : Privileges : Attorney-Client Privilege : Exceptions

87. Trial court abused its discretion by not conducting an in camera inspection before ordering production because a bank established a prima facie case for the work product and attorney-client privileges by presenting affidavits of bank officers and an attorney, while a borrower did not make a prima facie showing of the crime-fraud exception absent evidence to rebut the presumption a third party's payment was a purchase of the loan. In re Park Cities Bank, 409 S.W.3d 859, 2013 Tex. App. LEXIS 10254 (Tex. App. Tyler Aug. 15 2013).

88. Employee's version of her conversation with the employer's counsel failed to establish any acts by counsel that rose to the level of suborning perjury; the trial court abused its discretion to the extent it concluded that the employee established the crime-fraud exception, Tex. R. Evid. 503(d). In re United States Waste Mgmt. Res., L.L.C., 387 S.W.3d 92, 2012 Tex. App. LEXIS 9152 (Tex. App. Houston 14th Dist. Nov. 2 2012).

89. Probate court did not abuse its discretion by admitting redacted billing statements and excluding unredacted statements in a dispute over attorney's fees and expenses because the rule of optional completeness under Tex. R. Evid. 106, 107 was not an exception to the attorney-client privilege, and it did not mandate a waiver of the privilege. Even if the rule of optional completeness was found to apply, an administrator did not show that unredacted statements were necessary for the probate court to understand the attorney's fees recoverable from an estate; significant information was provided to the court in the redacted billing statements, and, when combined with the testimony of the guardian's attorneys, further information was not necessary for the court to understand the matter. In the Estate of Johnston, 2012 Tex. App. LEXIS 4255, 2012 WL 1940656 (Tex. App. San Antonio May 30 2012).

90. Appellants did not challenge the ruling that a prima facie case for fraud under Tex. R. Evid. 503(d)(1) had been established by writ of mandamus, and even if the evidence was part of a motion in limine discussion, a ruling on such a motion preserved nothing for review; furthermore, when documents were offered at trial, counsel said he had no objection, the subject matter of the documents was also discussed without objection, and appellants failed to preserve their complaint for review under Tex. R. App. P. 33.1(a) and the issue was waived. Rancho La Valencia, Inc. v. Aquaplex, Inc., 357 S.W.3d 137, 2011 Tex. App. LEXIS 8935 (Tex. App. Amarillo Nov. 9 2011).

91. Attorneys presented uncontroverted evidence that there was no aggregate settlement and all negotiations were individual, that the clients were not joint clients, and that there was no sharing of clients' medical records, and thus the trial court did not abuse its discretion in finding the joint client exception did not apply. In re Hernandez,

2011 Tex. App. LEXIS 7981, 2011 WL 4600706 (Tex. App. Houston 14th Dist. Oct. 6 2011).

92. Court abused its discretion in issuing the sanction order, because there was no evidence to support the finding that the company's attorney accused counsel for the petitioner in open court of knowingly suborning perjury; the argument the attorney made that the crime-fraud exception applied did not, by itself, implicate any wrongdoing, and the attorney specifically clarified that the company was seeking to apply the exception based only on the conduct of the party to the suit and he did not mean to "cast aspersions" on counsel. Rodriguez v. Mumbojumbo, L.L.C., 347 S.W.3d 924, 2011 Tex. App. LEXIS 6809 (Tex. App. Dallas Aug. 25 2011).

93. During defendant's trial for bail jumping and failure to appear at trial for a theft charge, his previous defense counsel was permitted to testify that defendant left the courthouse during a break after he was convicted for theft. Because anyone present in the courtroom that day was able to observe this, the attorney-client privilege under Tex. R. Evid. 503(b)(2) did not apply to his attorney's personal observations. Kay v. State, 340 S.W.3d 470, 2011 Tex. App. LEXIS 1392 (Tex. App. Texarkana Feb. 16 2011).

94. Texas Court of Criminal Appeals has held Tex. R. Evid. 503(b)(2) includes the work-product privilege and, therefore, the court holds the exceptions of Rule 503(d) also apply to the work-product privilege in the proper circumstances. Woodruff v. State, 330 S.W.3d 709, 2010 Tex. App. LEXIS 9569 (Tex. App. Texarkana Dec. 3 2010), *cert. denied,*132 S. Ct. 502, 181 L. Ed. 2d 347, 2011 U.S. LEXIS 7788 (2011).

95. Appellant failed to show the crime-fraud exception applied to the facts of this case because he did not show the attorney's services were sought or obtained to enable or aid in the commission of a crime. Woodruff v. State, 330 S.W.3d 709, 2010 Tex. App. LEXIS 9569 (Tex. App. Texarkana Dec. 3 2010), *cert. denied,*132 S. Ct. 502, 181 L. Ed. 2d 347, 2011 U.S. LEXIS 7788 (2011).

96. In an oil and gas lease dispute, court erred in compelling relator to produce a memorandum because the crime-fraud exception did not apply; the "evidence" demonstrating that relator engaged its attorney for fraudulent purposes was the opposing party's own allegations of fraud, which served as the basis of its lawsuit. In re Small, 346 S.W.3d 657, 2009 Tex. App. LEXIS 4114 (Tex. App. El Paso June 10 2009).

97. Tex. R. Evid. 503(d)(5) and a common interest theory did not apply because plaintiff insured's counsel in an underlying third party's suit represented only the insured, not defendant insurer, and counsel had even noted a conflict with the insurer as to coverage issues and had stated it would not share its legal opinions with the insurer. Fugro-Mcclelland Marine Geosciences, Inc. v. Steadfast Ins. Co., 2008 U.S. Dist. LEXIS 102997 (S.D. Tex. Dec. 19 2008).

98. During defendant's murder trial, the court did not err by allowing a legal assistant to testify that he and defendant were friends, that he contacted defendant when he learned defendant's wife was killed, and defendant told him that he had "messed up" and "was in real trouble this time;" the evidence did not establish an attorney-client relationship. Volrie v. State, 2007 Tex. App. LEXIS 6574 (Tex. App. Corpus Christi Aug. 16 2007).

99. Trial court did not abuse its discretion by holding that the documents the church sought from the law firm in its breach of fiduciary duty action, namely documents from the firm's representation of the building's co-owner in 2003, were protected by the attorney-client privilege and that the church had failed to make a prima facie showing that the discovery sought was relevant to an issue so as to be excepted from the privilege; because the church failed to raise a fact issue as to whether it had actually disclosed specific confidential information to appellees, any error regarding the church's discovery of information would be harmless; the scope of discovery relevant to breach of duty would necessarily reflect that substantive standard of proof, which, under the church's theory of the case, was that breach could be proven merely by establishing a substantial relationship between appellees' prior and

subsequent representations, a theory that the court rejected. Capital City Church of Christ v. Novak, 2007 Tex. App. LEXIS 4148 (Tex. App. Austin May 23 2007).

100. Crime/fraud exception to the attorney-client privilege under Tex. R. Evid. 503(d)(1) did not apply to a judgment creditor's claim of fraudulent transfer because there was no concealment. In re General Agents Ins. Co. of Am., Inc., 224 S.W.3d 806, 2007 Tex. App. LEXIS 3690 (Tex. App. Houston 14th Dist. 2007).

101. Trial court did not err in finding that documents were discoverable and the crime-fraud exception under Tex. R. Evid. 503(d)(1) did not apply, thus making requested mandamus relief inappropriate; the company's general assertions did not specify the nexus between each of the documents it sought to compel and its claims of fraud. In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 2006 Tex. App. LEXIS 11087 (Tex. App. Dallas 2006).

102. In an auto accident case, the appellate court rejected the decedent's parents' claims that the trial court abused its discretion in overruling their objections to the auto insurer's claim that documents about the insurer's investigations regarding who was driving at the time of the accident were privileged under the attorney-client privilege in Tex. R. Evid. 503 and the work-product privilege in Tex. R. Civ. P. 192.5 because Tex. R. Civ. P. 193.4 specifically allows affidavits as evidence to support a privilege; the crime/fraud exception to the attorney-client privilege in Tex. R. Evid. 503(d)(1) did not apply merely because the parents' cause of action involved fraudulent conduct; rather the parents were required to show the alleged fraud occurred at or during the time the document was prepared and in order to perpetrate the fraud. Coats v. Ruiz, 198 S.W.3d 863, 2006 Tex. App. LEXIS 7108 (Tex. App. Dallas 2006).

Evidence : Privileges : Attorney-Client Privilege : Scope

103. Defendant did not divulge any confidential communications given to defense counsel or provided him by counsel, and the court did not find that the testimony was inadmissible. Williams v. State, 417 S.W.3d 162, 2013 Tex. App. LEXIS 13978, 2013 WL 6028845 (Tex. App. Houston 1st Dist. Nov. 14 2013).

104. Prima facie showing was made that the common interest privilege applied to documents pertaining to a pending action within the relevant time periods, but not as to other documents outside the time periods or not shown to relate to the pending action. In re Park Cities Bank, 409 S.W.3d 859, 2013 Tex. App. LEXIS 10254 (Tex. App. Tyler Aug. 15 2013).

105. Employer's writ of mandamus was conditionally granted and the trial court was directed to vacate her order denying the employer's motion for protection of the July 14, 2010 conversation between the former employee and employer's counsel and enter an order granting the motion; under Tex. R. Evid. 503, the trial court abused its discretion in determining that the employer failed to prove attorney-client privilege applied to a conversation between the employee and employer's counsel, and that communication was confidential. In re United States Waste Mgmt. Res., L.L.C., 387 S.W.3d 92, 2012 Tex. App. LEXIS 9152 (Tex. App. Houston 14th Dist. Nov. 2 2012).

106. Court sustained a Chapter 7 trustee's objection to certain documents sought in an adversary proceeding on the grounds that they were privileged under Tex. R. Evid. 503(b)(1)(C) where the documents related to communications that occurred after the date an adversary complaint was filed and where the alleged common interest between the trustee and petitioning creditors was an indemnity cause of action against a lessee for the benefit of the debtor's estate. The fact that the trustee and the petitioning creditors were on opposite sides of the adversary proceeding did not prevent the trustee from invoking the privilege where the two sides shared a common interest. Schmidt v. Rodriguez (in re Rodriguez), 2012 Bankr. LEXIS 3620 (Bankr. S.D. Tex. Aug. 7 2012).

107. Although certain documents were not protected by Tex. R. Evid. 503(b)(1)(C) because the communications were made prior to the date an adversary complaint was filed, they were protected from discovery by Fed. R. Civ. P. 26(b)(3) and (b)(4). Schmidt v. Rodriguez (in re Rodriguez), 2012 Bankr. LEXIS 3620 (Bankr. S.D. Tex. Aug. 7 2012).

108. Attorney-client privilege, Tex. R. Evid. 503, did not apply to protect communications between the insurer's lawyer and the employer during the underlying administrative proceedings where the insurer failed to show that the communications were privileged and the allied litigant doctrine was inapplicable; the insurer and employer were not joint clients. In re Xl Specialty INS. Co., 373 S.W.3d 46, 2012 Tex. LEXIS 568, 55 Tex. Sup. Ct. J. 1081 (Tex. 2012).

109. Court concludes the distinction between core work product and other work product applies in criminal cases; any facts divulged to the assistant district attorney would be other work product and would be discoverable upon a showing of substantial need and the inability to obtain its substantial equivalent by other means without undue hardship. Woodruff v. State, 330 S.W.3d 709, 2010 Tex. App. LEXIS 9569 (Tex. App. Texarkana Dec. 3 2010), *cert. denied,*132 S. Ct. 502, 181 L. Ed. 2d 347, 2011 U.S. LEXIS 7788 (2011).

110. Trial court did not err in denying examination of the assistant district attorney, who reviewed taped recordings of appellant's conversations with counsel; while substantial need might have been demonstrated if the recordings contained useful information, the recordings did not contain any useful information, and there was no substantial need to question the assistant district attorney. Woodruff v. State, 330 S.W.3d 709, 2010 Tex. App. LEXIS 9569 (Tex. App. Texarkana Dec. 3 2010), *cert. denied,*132 S. Ct. 502, 181 L. Ed. 2d 347, 2011 U.S. LEXIS 7788 (2011).

111. Because the person holding defendant's durable power of attorney was not a licensed attorney and could not act on defendant's behalf in his criminal prosecution, defendant could not invoke the attorney-client privilege to exclude a recording of his phone conversation with his attorney in fact under Tex. R. Evid. 503. Mcdonald v. State, 2010 Tex. App. LEXIS 7977, 2010 WL 3910424 (Tex. App. El Paso Sept. 30 2010).

112. Defendant's claim that a trial court erred in allowing the testimony of an attorney for defendant's son was not preserved for review because defendant did not object to the State calling the attorney as a witness under the rule; in any event, defendant's standing to invoke the son's lawyer-client privilege was not supported by the rule. Brumbalow v. State, 2010 Tex. App. LEXIS 5333, 2010 WL 2696712 (Tex. App. Eastland July 8 2010).

113. Insurer was entitled to mandamus relief because a trial court erred in ordering the production of documents in a suit against the insurer for fraud; the documents, which included memoranda, claims and damages summaries, and case evaluations, met the requirements of the attorney-client privilege in Tex. R. Evid. 503(b) or the work product privilege in Tex. R. Civ. P. 192.5(a). In re Harco Nat'l Ins. Co., 2010 Tex. App. LEXIS 4899, 2010 WL 2555629 (Tex. App. Fort Worth June 24 2010).

114. In a defamation action, the trial court did not abuse its discretion by denying a motion to disqualify defense counsel; although there was evidence of a joint defense agreement that existed in prior litigation, defense counsel was not shown to have had access to any confidential information to which the joint defense privilege applied. Peeler v. Baylor Univ., 2009 Tex. App. LEXIS 7283, 38 Media L. Rep. (BNA) 1411 (Tex. App. Waco Sept. 16 2009).

115. In an attorney disciplinary matter, the trial court did not abuse its discretion by having the attorney's trust account records considered with regard to the charge that he commingled his personal funds with his client trust account funds as there exists no right to privacy of financial documentation that has been shared with a third party, such as a bank, and they were not protected by the attorney-client privilege as they were properly obtained by the Commission for Lawyer Discipline via subpoena. Whether the Commission failed to provide notice of the subpoena

to the attorney or not, the attorney failed to challenge the subpoena in response to the Commission's motion to compel the trust account records. Neely v. Comm'n for Lawyer Discipline, 302 S.W.3d 331, 2009 Tex. App. LEXIS 7253 (Tex. App. Houston 14th Dist. Sept. 10 2009).

116. In an oil and gas lease dispute, court abused its discretion by ordering emails to be disclosed because the emails were not disclosed to any party other than those individuals involved in the furtherance of the attorney's representation of relators. Therefore, there was no waiver by disclosure, and the trial court abused its discretion by ordering the emails to be disclosed on that ground. In re Small, 346 S.W.3d 657, 2009 Tex. App. LEXIS 4114 (Tex. App. El Paso June 10 2009).

117. Tex. R. Evid. 503(d)(5) and a common interest theory did not apply because plaintiff insured's counsel in an underlying third party's suit represented only the insured, not defendant insurer, and counsel had even noted a conflict with the insurer as to coverage issues and had stated it would not share its legal opinions with the insurer. Fugro-Mcclelland Marine Geosciences, Inc. v. Steadfast Ins. Co., 2008 U.S. Dist. LEXIS 102997 (S.D. Tex. Dec. 19 2008).

118. The attorney-client privilege protected confidential communications between the client and attorney and the indictment that a grand jury returns is not a confidential communication between the client and the attorney, nor is a copy thereof. Dotson v. State, 2008 Tex. App. LEXIS 5355 (Tex. App. Fort Worth July 17 2008).

119. Documentary evidence was not be privileged where the bankruptcy trustee failed to carry the burden of showing that they would disclose confidential communications made for the purpose of facilitating the rendition of professional legal services to the debtor. Meralex, L.P. v. In re Heritage Org., L.L.L. (In re Heritage Org., L.L.C.), 2007 Bankr. LEXIS 3843, 49 Bankr. Ct. Dec. (LRP) 33 (Bankr. N.D. Tex. Nov. 15 2007).

120. Court of appeals erred in construing Tex. R. Evid. 503 when it held that the attorney-client privilege did not exist in defendant's murder trial because the attorney who testified had declined to represent defendant at the end of their consultation; a question remained, however, whether the crime-fraud exception applied in defendant's case; once the attorney started to elicit from defendant such incriminating information that a person would feel free to share only with his attorney, the attorney was bound by the same duties of confidentiality that an attorney owed a client that he agreed to represent even though the attorney eventually decided not to represent defendant. Mixon v. State, 224 S.W.3d 206, 2007 Tex. Crim. App. LEXIS 654 (Tex. Crim. App. 2007).

121. Attorney-client privilege under Tex. R. Evid. 503 applies in cases where the record shows that the defendant consulted a lawyer with a view to obtaining legal services from him, even though the lawyer ultimately declined to represent the client. Mixon v. State, 224 S.W.3d 206, 2007 Tex. Crim. App. LEXIS 654 (Tex. Crim. App. 2007).

122. Trial court did not err in determining that a city did not waive, pursuant to the offensive-use doctrine, the ability to assert privilege, as the company did not point the court to any evidence supporting the third element of the offensive-use doctrine establishing the evidence was not available from other sources; mandamus relief was not appropriate. In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 2006 Tex. App. LEXIS 11087 (Tex. App. Dallas 2006).

123. For purposes of Tex. R. Evid. 503 and Tex. R. Civ. P. 192, the court found certain documents privileged, given that they contained information regarding strategy, one document was a part of a string of emails that were privileged, and the documents contained confidential information and discussed research and negotiations; the trial court abused its discretion by granting a motion to compel as to these documents and mandamus relief was conditionally granted. In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 2006 Tex. App. LEXIS 11087 (Tex.

App. Dallas 2006).

124. For purposes of Tex. R. Evid. 503 and Tex. R. Civ. P. 192, certain documents were not privileged, given that they did not address anything confidential; thus, for mandamus purposes, the trial court did not abuse its discretion in granting a motion to compel as to these documents. In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 2006 Tex. App. LEXIS 11087 (Tex. App. Dallas 2006).

125. Emails inquired about an alleged discrepancy between documents produced, and a company did not show that the city intended to waive the privilege; while the city failed to diligently screen the documents, and while the court did not condone such conduct, the court did not find that the conduct alone in this case waived of claim of privilege, for purposes of Tex. R. Evid.193, and the company did not prove, for mandamus purposes, that the trial court abused its discretion when it found that the city did not waive by undue delay, the ability to assert privilege. In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 2006 Tex. App. LEXIS 11087 (Tex. App. Dallas 2006).

126. For purposes of Tex. R. Evid. 503(b), the evidence showed that a city and a development corporation were both represented by attorneys and they shared a common interest, the company pointed to no authority for the claim that the common interest privilege was separate from the attorney client privilege and case law suggested to the contrary, and the company did not point to any authority to support the claim that the pending action provision of Tex. R. Evid. 503(b)(1)(C) applied to entities who shared a common interest and were represented by the same counsel; for mandamus purposes, the trial court did not abuse its discretion when it found that a city did not waive, under Tex. R. Evid. 511(1), by disclosure to the development corporation, the ability to assert privilege. In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 2006 Tex. App. LEXIS 11087 (Tex. App. Dallas 2006).

127. Presentation was not privileged because in camera review of the presentation slides did not show that the communication was to facilitate obtaining legal advice; only one of 13 bullet points referred to lawyers; phrase "Bury them with lawyers," appeared with following items: "Encourage attrition," "Pick at margins," and "No more service transfer." Clover Staffing, LLC v. Johnson Controls World Servs., 238 F.R.D. 576, 2006 U.S. Dist. LEXIS 88238 (S.D. Tex. 2006).

128. Emails sent at the suggestion of defendant's legal department to gather information that could be used in negotiating with plaintiff to attempt to resolve contract issues were privileged. Clover Staffing, LLC v. Johnson Controls World Servs., 238 F.R.D. 576, 2006 U.S. Dist. LEXIS 88238 (S.D. Tex. 2006).

129. Documents, described as financial analyses performed to provide the legal department with the information it requested, so that the legal department could assist business people in negotiating with plaintiff, were privileged; the evidence showed that these documents were communications made to facilitate the rendition of legal advice to the client. Clover Staffing, LLC v. Johnson Controls World Servs., 238 F.R.D. 576, 2006 U.S. Dist. LEXIS 88238 (S.D. Tex. 2006).

130. Law firm had to be disqualified from representing an environmental services company in a licensing dispute with a corporate executive because the joint defense privilege of Tex. R. Evid. 503(b)(1)(C) protected confidential communications made by the executive to one of the firm's lawyers in a prior case involving similar issues at another company. In re Sharplin, 2006 Tex. App. LEXIS 6834 (Tex. App. Fort Worth Aug. 3 2006).

Evidence : Privileges : Attorney-Client Privilege : Waiver

131. Relator was not entitled to mandamus relief because the trial court did not abuse its discretion by compelling counsel for the driver of a vehicle insured by a policy issued by relator to produce his complete defense file to the driver's estate representative in subsequent litigation between relator and the assignees of the insureds' claims.

The trial court did not disregard established rules and principles when it declined to recognize the insurance company's assertion of privilege in the face of the insured's assignment of the claim and the right to waive attorney-client and work product privileges. In re Mid Century Ins. Co., 2014 Tex. App. LEXIS 2804, 2014 WL 989726 (Tex. App. Beaumont Mar. 13 2014).

132. Attorney-client privilege was waived as to the allegations contained in the creditors' proofs of claim and the factual basis for the proofs of claim because the creditors' attorney signed the proofs of claim, and this made the attorney a fact witness as to the allegations contained in the proofs of claim. Schmidt v. Rodriguez (in re Rodriguez), 2013 Bankr. LEXIS 5048, 2013 WL 2450925 (Bankr. S.D. Tex. June 5 2013).

133. Elements for the doctrine of waiver by offensive use were satisfied because the creditors sought affirmative relief, the factual assertions contained in the proofs of claim were outcome determinative, and the only means by which the objecting party-in-interest could have obtained the evidence initially used by the creditors in support of their proofs of claim was by making inquiry of the attorney who signed the proofs of claim. Schmidt v. Rodriguez (in re Rodriguez), 2013 Bankr. LEXIS 5048, 2013 WL 2450925 (Bankr. S.D. Tex. June 5 2013).

134. Trial court did not abuse its discretion by impliedly finding that the privileged information sought did not go to the very heart of the affirmative relief sought or that this information, if believed by the fact finder, in all probability would not be outcome determinative of the claim asserted. Lesikar v. Moon, 2012 Tex. App. LEXIS 7311, 2012 WL 3776365 (Tex. App. Houston 14th Dist. Aug. 30 2012).

135. In defendant's trial for possession of a controlled substance and endangering a child, the trial court did not err in admitting a polygraph examiner's testimony about defendant's pre-test statements which defendant claimed contained confidential information under both the attorney-client and work-product privileges under Tex. R. Evid. 503(b). The totality of the circumstances supported a finding of waiver, because defense counsel disclosed defendant's pre-test statements to the State. Herbert v. State, 2012 Tex. App. LEXIS 3126, 2012 WL 1366576 (Tex. App. Waco Apr. 18 2012).

136. Documents listed in a privilege log were subject to the attorney-client privilege under Tex. R. Evid. 503(b) because they dealt with subject matter that called for an attorney's consideration and legal advice, were made for the purpose of facilitating the rendition of legal advice, or summarized legal advice. Privilege was not waived under the offensive use doctrine because none of the documents were outcome determinative. Balestri v. Hallwood Group Inc. (in re Hallwood Energy, L.P.), 2010 Bankr. LEXIS 2717 (Bankr. N.D. Tex. Aug. 10 2010).

137. In a mandamus proceeding involving a discovery dispute in a case against an insurer for violations of the insurance code, breach of contract, and breach of Stowers duty in a related personal injury case, the waiver of the attorney-client privilege by one of the insurer's insureds did not operate to waive the other insured's privilege as well, as the underlying litigation in the case was not a suit between trial counsel's two joint clients. No authority has been found to support an argument that one client may waive the attorney-client privilege on behalf of another client. In re Unitrin County Mut. Ins. Co., 2010 Tex. App. LEXIS 5797, 2010 WL 2867326 (Tex. App. Austin July 22 2010).

138. Where defendant attorney placed documents in his former business partner's computer while defendant was working as a network administrator for the company, he took steps to protect confidentiality by setting up the network such that only he had access to the documents; after he was locked out of the office and no longer working for the company, he understood that someone else had gained access over network permissions but failed to notify the third party or anyone else about the confidential material on the hard drive and failed to ask for it to be deleted or returned. In a dispute concerning the administration of a trust, the issue of whether defendant waived the right to claim the attorney-client privilege and work-product protection as to the documents was not governed by Tex. R.

Evid. 503 because the disclosure did not occur in discovery in a court proceeding; applying the common law waiver rule, the district court held that defendant waived the privilege because he failed to take reasonable steps to protect confidentiality. Alpert v. Riley, 267 F.R.D. 202, 2010 U.S. Dist. LEXIS 38331, 76 Fed. R. Serv. 3d (Callaghan) 542, 82 Fed. R. Evid. Serv. (CBC) 484 (S.D. Tex. Apr. 19 2010).

139. By assigning his rights and claims to a bankruptcy trustee, an insured did not assign the right to waive the attorney-client privilege, under Tex. R. Evid. 503 and Tex. R. Evid. 511, because the assignment language in the bankruptcy order did not specifically waive the attorney-client privilege, and the cooperation language did not impliedly waive the attorney-client privilege, especially in light of the insured's intent not to waive the privilege. In re Hicks, 252 S.W.3d 790, 2008 Tex. App. LEXIS 2990 (Tex. App. Houston 14th Dist. 2008).

140. By executing an authorization for release of an insurer's file, the insured did not waive attorney-client privilege, under Tex. R. Evid. 503 and Tex. R. Evid. 511, with regard to an attorney's litigation file because the record did not reflect that the insured consented to disclosure of privileged material in the attorney's litigation file. In re Hicks, 252 S.W.3d 790, 2008 Tex. App. LEXIS 2990 (Tex. App. Houston 14th Dist. 2008).

141. In a drug case, defendant did not have to waive his attorney-client privilege to obtain testimony from a former attorney regarding the attorney's notes on conflicting information in the police report; no waiver was required under the work product privilege of Tex. R. Evid. 503, and a discussion regarding the admissibility of the evidence, combined with defendant's offer of proof, sufficed to preserve error under Tex. R. App. P. 33.1 and Tex. R. Evid. 103 as to the exclusion of the evidence. Cameron v. State, 241 S.W.3d 15, 2007 Tex. Crim. App. LEXIS 1120 (Tex. Crim. App. 2007).

142. In a suit brought against an insurer by an insured's judgment creditor, the insurer could not assert the attorney-client privilege of Tex. R. Evid. 503 or the work product privilege of Tex. R. Civ. P. 192 on behalf of the insured with regard to a claims file because the insured's assignment of its rights to its judgment creditor waived the attorney-client privilege under Tex. R. Evid. 511; however, the insurer's Tex. R. Civ. P. 193 privilege log established that some communications between counsel and the insurer were covered by the insurer's own attorney-client privilege. In re General Agents Ins. Co. of Am., Inc., 224 S.W.3d 806, 2007 Tex. App. LEXIS 3690 (Tex. App. Houston 14th Dist. 2007).

143. Chemical company was entitled to conditional mandamus relief when a trial court ordered the company to produce a confidential research memorandum prepared by an attorney from a law firm that had represented the company in a failed real estate transaction; although a limited partnership claimed that the trial court had discretion to order production of a writing used to refresh memory for the purpose of testifying and Tex. R. Evid. 612 generally dealt with writings used to refresh recollection, the memorandum also was privileged, and Tex. R. Evid. 503 rather than Tex. R. Evid. 612 described the circumstances under which a document subject to the attorney-client privilege was subject to disclosure; the company did not waive the privilege on the ground that the memorandum established that the company possessed a certain document on an earlier date than admitted by the company through its witnesses and in the company's discovery responses because the witness testified that he did not recall whether he had a copy of the document when he helped draft a certain document and the company amended the relevant discovery response to reflect that its counsel possessed the document in question ten days before the date of an initial research memorandum; thus, the memorandum was consistent with the discovery responses. In re Chevron Phillips Chem. Co. LP, 2006 Tex. App. LEXIS 9186 (Tex. App. Beaumont Oct. 25 2006).

144. Chemical company was entitled to conditional mandamus relief when a trial court ordered the company to produce a confidential research memorandum prepared by an attorney from a law firm that had represented the company in a failed real estate transaction because the memorandum was privileged under Tex. R. Evid. 503 and the company did not waive that privilege under Tex. R. Evid. 511 through voluntary disclosure of a significant part of the memorandum in a second memorandum that counsel distributed to a third party, as the company did not

voluntarily disclose any part of the memorandum; a limited partnership (LP) seeking disclosure of the memorandum argued that because the disclosed memorandum was based upon the privileged memorandum, the company waived its privilege; however, the LP failed to distinguish between using core attorney work product to prepare a document for dissemination to third parties and disclosing the privileged document itself. In re Chevron Phillips Chem. Co. LP, 2006 Tex. App. LEXIS 9186 (Tex. App. Beaumont Oct. 25 2006).

145. Chemical company was entitled to conditional mandamus relief when a trial court ordered the company to produce a confidential research memorandum prepared by an attorney from a law firm that had represented the company in a failed real estate transaction because the memorandum was privileged under Tex. R. Evid. 503 and the company did not waive that privilege through offensive use of the memorandum because its production was not the only means through which a limited partnership might obtain the evidence it claimed was outcome determinative of the company's claims. In re Chevron Phillips Chem. Co. LP, 2006 Tex. App. LEXIS 9186 (Tex. App. Beaumont Oct. 25 2006).

Evidence : Privileges : Government Privileges : Waiver

146. Defendant's claim that a trial court erred by refusing to allow his former attorney to testify absent a complete waiver of the attorney-client privilege was not preserved for review where the proffered testimony did not implicate a confidential communication between defendant and the former attorney which would be covered under Tex. R. Evid. 503(b)(1)(A), but instead implicated the work product of the former attorney and was covered by Tex. R. Evid. 503(b)(2), which was expressly designated as a special rule of privilege in criminal cases. According to the record, the trial judge and both attorneys focused their contentions and analysis on the attorney-client communication privilege, but the work-product privilege was not addressed by either attorney or the judge because defendant did not contend that the evidence was admissible under the special provision covering attorney work-product privilege or inform the trial court that the attorney-client privilege was not applicable, and, regarding the waiver of his privilege, defendant's final statement was that he declined to waive his privilege. Cameron v. State, 2006 Tex. App. LEXIS 1018 (Tex. App. Amarillo Feb. 8 2006).

Evidence : Privileges : Psychotherapist-Patient Privilege

147. Trial counsel was not ineffective for failing to move to quash the State's subpoena for medical records containing information about defendant's prior bad acts and extraneous offenses or for allowing defendant to testify to prior bad acts and extraneous offenses during defendant's aggravated sexual assault of a child trial where the defense's primary strategy was to confess to prior wrongs and offenses, to demonstrate defendant's honesty, to show the jury that defendant was sincerely penitent about his prior bad acts and recognized the errors in his prior thoughts, and to show that he was actively and successfully changing his ways through therapy. An integral part of the strategy was for defendant to show that he was in therapy and making progress, and, given counsel's evident strategy, he might well have determined that it was better to allow the State to access therapy records revealing prior bad acts, and to open his witness to the State's examination concerning those acts, than to forego the strategy of defendant's testifying fully to matters showing his remorse, honesty, and improvement through therapy. Berg v. State, 2005 Tex. App. LEXIS 1315 (Tex. App. Houston 1st Dist. Feb. 17 2005).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

148. Trial counsel was not ineffective for failing to move to quash the State's subpoena for medical records containing information about defendant's prior bad acts and extraneous offenses or for allowing defendant to testify to prior bad acts and extraneous offenses during defendant's aggravated sexual assault of a child trial where the defense's primary strategy was to confess to prior wrongs and offenses, to demonstrate defendant's honesty, to show the jury that defendant was sincerely penitent about his prior bad acts and recognized the errors in his prior thoughts, and to show that he was actively and successfully changing his ways through therapy. An integral part of the strategy was for defendant to show that he was in therapy and making progress, and, given counsel's evident

strategy, he might well have determined that it was better to allow the State to access therapy records revealing prior bad acts, and to open his witness to the State's examination concerning those acts, than to forego the strategy of defendant's testifying fully to matters showing his remorse, honesty, and improvement through therapy. Berg v. State, 2005 Tex. App. LEXIS 1315 (Tex. App. Houston 1st Dist. Feb. 17 2005).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

149. In a case in which a mother's parental rights were terminated, the trial court did not err in refusing to allow the mother to call the amicus attorney as a witness; the amicus attorney served as counsel of record representing the best interest of the child by questioning witnesses and introducing evidence, and she did not testify as to attorney fees or any other matter. In the Interest of J.K.F., 345 S.W.3d 706, 2011 Tex. App. LEXIS 5382 (Tex. App. Dallas July 14 2011).

Insurance Law : Motor Vehicle Insurance : Obligations : Disclosure

150. Motion for protection that was sought to prevent disclosure of communications between an attorney and a client that were allegedly privileged under Tex. R. Evid. 511 was improperly denied under Tex. R. Evid. 503 because there was no evidence of a voluntary disclosure or a consent to disclosure in an assignment of a "Stowers" claim against an insurer in a personal injury matter. In re Cooper, 47 S.W.3d 206, 2001 Tex. App. LEXIS 3624 (Tex. App. Beaumont 2001).

Legal Ethics : Client Relations : Client Funds

151. In an attorney disciplinary matter, the trial court did not abuse its discretion by having the attorney's trust account records considered with regard to the charge that he commingled his personal funds with his client trust account funds as there exists no right to privacy of financial documentation that has been shared with a third party, such as a bank, and they were not protected by the attorney-client privilege as they were properly obtained by the Commission for Lawyer Discipline via subpoena. Whether the Commission failed to provide notice of the subpoena to the attorney or not, the attorney failed to challenge the subpoena in response to the Commission's motion to compel the trust account records. Neely v. Comm'n for Lawyer Discipline, 302 S.W.3d 331, 2009 Tex. App. LEXIS 7253 (Tex. App. Houston 14th Dist. Sept. 10 2009).

Legal Ethics : Client Relations : Confidentiality of Information

152. Court of appeals erred in construing Tex. R. Evid. 503 when it held that the attorney-client privilege did not exist in defendant's murder trial because the attorney who testified had declined to represent defendant at the end of their consultation; a question remained, however, whether the crime-fraud exception applied in defendant's case; once the attorney started to elicit from defendant such incriminating information that a person would feel free to share only with his attorney, the attorney was bound by the same duties of confidentiality that an attorney owed a client that he agreed to represent even though the attorney eventually decided not to represent defendant. Mixon v. State, 224 S.W.3d 206, 2007 Tex. Crim. App. LEXIS 654 (Tex. Crim. App. 2007).

153. Trial court erred by granting crusher manufacturer's motion to compel discovery because relators established that the disputed documents were protected by the attorney-client, joint defense, and work product privileges under Tex. R. Evid. 503 and Tex. R. Civ. P. 192.5, and the manufacturer did not establish a prima facie case of contemplated fraud or that the crime-fraud exception provided in Tex. R. Evid. 503(d)(1) was applicable. In re Seigel, 198 S.W.3d 21, 2006 Tex. App. LEXIS 1332 (Tex. App. El Paso 2006).

154. Plaintiff insurer argued that the district court abused its discretion in allowing the insurer's former counsel to testify that during the policy period he, on behalf of the insurer, communicated to defendant insureds that the

insurer considered the Environmental Protection Agency's (EPA) placement of the insureds' site on the Superfund List as a claim against the insureds under an environmental impairment liability policy. The attorney's testimony described the communications between himself and the attorneys and agents of the insureds and his independent inference and conclusion based upon them. The attorney testified that he, as the insurer's representative, and his counterparts representing the insureds treated the inclusion of the site as a claim by EPA against the insureds. Such testimony did not disclose any "confidential communications" between the insurer and him as its attorney under Tex. R. Evid. 503(b). Int'l Ins. Co. v. RSR Corp., 426 F.3d 281, 2005 U.S. App. LEXIS 20225, 35 Envtl. L. Rep. 20192 (5th Cir. Tex. 2005).

155. Plaintiff insurer argued that the district court abused its discretion in allowing the insurer's former counsel to testify that during the policy period he, on behalf of the insurer, communicated to defendant insureds that the insurer considered the Environmental Protection Agency's (EPA) placement of the insureds' site on the Superfund List as a claim against the insureds under an environmental impairment liability policy. The attorney's testimony described the communications between himself and the attorneys and agents of the insureds and his independent inference and conclusion based upon them. The attorney testified that he, as the insurer's representative, and his counterparts representing the insureds treated the inclusion of the site as a claim by EPA against the insureds. Such testimony did not disclose any "confidential communications" between the insurer and him as its attorney under Tex. R. Evid. 503(b). Int'l Ins. Co. v. RSR Corp., 426 F.3d 281, 2005 U.S. App. LEXIS 20225, 35 Envtl. L. Rep. 20192 (5th Cir. Tex. 2005).

Legal Ethics : Client Relations : Conflicts of Interest

156. In a divorce action, the trial court properly denied the husband's motion to substitute counsel on the ground of disqualification under Tex. Disciplinary R. Prof. Conduct 1.09(a)(3), because the wife had consulted an attorney from the same firm; the trial court reasonably could have concluded that the wife, who was a client as defined in Tex. R. Evid. 503(a)(1), divulged confidential information, within the meaning of Tex. Disc. R. Prof. Conduct 1.05(a), during her meeting with the attorney. In re Gerry, 173 S.W.3d 901, 2005 Tex. App. LEXIS 8637 (Tex. App. Tyler 2005).

Legal Ethics : Client Relations : Perjury

157. Court abused its discretion in issuing the sanction order, because there was no evidence to support the finding that the company's attorney accused counsel for the petitioner in open court of knowingly suborning perjury; the argument the attorney made that the crime-fraud exception applied did not, by itself, implicate any wrongdoing, and the attorney specifically clarified that the company was seeking to apply the exception based only on the conduct of the party to the suit and he did not mean to "cast aspersions" on counsel. Rodriguez v. Mumbojumbo, L.L.C., 347 S.W.3d 924, 2011 Tex. App. LEXIS 6809 (Tex. App. Dallas Aug. 25 2011).

Legal Ethics : Sanctions : Suspensions

158. Where defendant's cell mate was a former attorney who surrendered his license to practice law in lieu of disciplinary proceedings, he was not a "lawyer" as defined in Tex. R. Evid. 503(a)(1). The cell mate was permitted to testify that defendant had confessed to him; the attorney-client privilege did not apply. Salatini v. State, 2005 Tex. App. LEXIS 10664 (Tex. App. Dallas Dec. 28, 2005).

Torts : Intentional Torts : Breach of Fiduciary Duty : General Overview

159. Trial court did not abuse its discretion by holding that the documents the church sought from the law firm in its breach of fiduciary duty action, namely documents from the firm's representation of the building's co-owner in 2003, were protected by the attorney-client privilege and that the church had failed to make a prima facie showing that the

discovery sought was relevant to an issue so as to be excepted from the privilege; because the church failed to raise a fact issue as to whether it had actually disclosed specific confidential information to appellees, any error regarding the church's discovery of information would be harmless; the scope of discovery relevant to breach of duty would necessarily reflect that substantive standard of proof, which, under the church's theory of the case, was that breach could be proven merely by establishing a substantial relationship between appellees' prior and subsequent representations, a theory that the court rejected. Capital City Church of Christ v. Novak, 2007 Tex. App. LEXIS 4148 (Tex. App. Austin May 23 2007).

End of Document

Tex. Evid. R. 504

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 504 Spousal Privileges

(a) ***Confidential Communication Privilege.***

(1) ***Definition.***--A communication is "confidential" if a person makes it privately to the person's spouse and does not intend its disclosure to any other person.

(2) ***General Rule.***--A person has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made to the person's spouse while they were married. This privilege survives termination of the marriage.

(3) ***Who May Claim.***--The privilege may be claimed by:

(A)the communicating spouse;

(B)the guardian of a communicating spouse who is incompetent; or

(C)the personal representative of a communicating spouse who is deceased.

The other spouse may claim the privilege on the communicating spouse's behalf - and is presumed to have authority to do so.

(4) ***Exceptions.***--This privilege does not apply:

(A) ***Furtherance of Crime or Fraud.***--If the communication is made - wholly or partially - to enable or aid anyone to commit or plan to commit a crime or fraud.

(B) ***Proceeding Between Spouse and Other Spouse or Claimant Through Deceased Spouse.***--In a civil proceeding:

(i)brought by or on behalf of one spouse against the other; or

(ii)between a surviving spouse and a person claiming through the deceased spouse.

(C) ***Crime Against Family, Spouse, Household Member, or Minor Child.***--In a:

(i)proceeding in which a party is accused of conduct that, if proved, is a crime against the person of the other spouse, any member of the household of either spouse, or any minor child; or

(ii)criminal proceeding involving a charge of bigamy under Section 25.01 of the Penal Code.

(D) ***Commitment or Similar Proceeding.***--In a proceeding to commit either spouse or otherwise to place the spouse or the spouse's property under another's control because of a mental or physical condition.

(E) ***Proceeding to Establish Competence.***--In a proceeding brought by or on behalf of either spouse to establish competence.

(b) ***Privilege Not to Testify in Criminal Case.***

(1) ***General Rule.***--In a criminal case, an accused's spouse has a privilege not to be called to testify for the state. But this rule neither prohibits a spouse from testifying voluntarily for the state nor gives a spouse a privilege to refuse to be called to testify for the accused.

(2) ***Failure to Call Spouse.***--If other evidence indicates that the accused's spouse could testify to relevant matters, an accused's failure to call the spouse to testify is a proper subject of comment by counsel.

(3) ***Who May Claim.***--The privilege not to testify may be claimed by the accused's spouse or the spouse's guardian or representative, but not by the accused.

(4) ***Exceptions.***--This privilege does not apply:

(A) ***Certain Criminal Proceedings.***--In a criminal proceeding in which a spouse is charged with:

(i)a crime against the other spouse, any member of the household of either spouse, or any minor child; or

(ii)bigamy under Section 25.01 of the Penal Code.

(B) ***Matters That Occurred Before the Marriage.***--If the spouse is called to testify about matters that occurred before the marriage.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*.

Comment to 1998 change The rule eliminates the spousal testimonial privilege for prosecutions in which the testifying spouse is the alleged victim of a crime by the accused. This is intended to be consistent with Code of Criminal Procedure article 38.10, effective September 1, 1995.

Comment to 2015 Restyling: Previously, Rule 504(b)(1) provided that, "A spouse who testifies on behalf of an accused is subject to cross-examination as provided in Rule 611(b)." That sentence was included in the original version of Rule 504 when the Texas Rules of Criminal Evidence were promulgated in 1986 and changed the rule to a testimonial privilege held by the witness spouse. Until then, a spouse was deemed incompetent to testify against his or her defendant spouse, and when a spouse testified on behalf of a defendant spouse, the state was limited to cross-examining the spouse about matters relating to the spouse's direct testimony. The quoted sentence from the original Criminal Rule 504(b) was designed to overturn this limitation and allow the state to crossexamine a testifying spouse in the same manner as any other witness. More than twenty-five years later, it is clear that a spouse who testifies either for or against a defendant spouse may be crossexamined in the same manner as any other witness. Therefore, the continued inclusion in the rule of a provision that refers only to the cross-examination of a spouse who testifies on behalf of the accused is more confusing than helpful. Its deletion is designed to clarify the rule and does not change existing law.

Case Notes

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Juries & Jurors : General Overview
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Ineffective Assistance
Evidence : Hearsay : Exceptions : Statements Against Interest
Evidence : Privileges : Marital Privileges : General Overview
Evidence : Privileges : Marital Privileges : Adverse Spousal Testimony : General Overview
Evidence : Privileges : Marital Privileges : Adverse Spousal Testimony : Exceptions
Evidence : Privileges : Marital Privileges : Adverse Spousal Testimony : Scope
Evidence : Privileges : Marital Privileges : Adverse Spousal Testimony : Waiver
Evidence : Privileges : Marital Privileges : Confidential Communications : General Overview
Evidence : Privileges : Marital Privileges : Confidential Communications : Criminal Proceedings
Evidence : Privileges : Marital Privileges : Confidential Communications : Elements
Evidence : Privileges : Marital Privileges : Confidential Communications : Exceptions
Evidence : Privileges : Marital Privileges : Confidential Communications : Scope
Evidence : Privileges : Marital Privileges : Confidential Communications : Waiver
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Existence of Privileges
Family Law : Marriage : Proof : Common Law Marriages : Elements : General Repute

LexisNexis (R) Notes

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

1. Trial court did not err by ordering defendant's wife to testify after she claimed her spousal privilege because there was an exception to the spousal privilege under Tex. Code Crim. Proc. Ann. art. 38.10 and Tex. R. Evid. 504(b)(4)(A) that eliminated the spousal testimonial privilege for prosecutions in which the testifying spouse was the alleged victim of the crime by the accused. Defendant was charged with a criminal trespass of his wife's residence, which he had never inhabited, following a heated altercation between them, therefore his offense came within both the language of Rule 504(b)(4)(A) and the policy it sought to promote. Jackson v. State, 2005 Tex. App. LEXIS 3631 (Tex. App. Houston 14th Dist. May 5 2005).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

2. Under Tex. R. Evid. 504, the prosecutor in a murder case was properly permitted to comment on the failure of defendant's spouse to testify because there was other evidence indicating that the spouse could have testified to relevant matters, including that the spouse was present during the search of their apartment when investigators found a bullet. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

Criminal Law & Procedure : Juries & Jurors : General Overview

3. There was no error in the State calling defendant's wife to invoke her spousal privilege in the jury's presence because the jury did not hear the wife specifically say that she was asserting her spousal privilege, defense counsel mentioned the privilege in front of the jury when he objected, and the jury had already heard the wife provide testimony detrimental to defendant, namely, that defendant had been drinking beer on the night of the offense. Chavez v. State, 2011 Tex. App. LEXIS 4927, 2011 WL 2624006 (Tex. App. Houston 1st Dist. June 30 2011).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

4. Co-arrestee's statements to his girlfriend, later his common-law wife, regarding a large amount of methamphetamine that went undiscovered by officers during a traffic stop were non-testimonial for purposes of the Confrontation Clause and were statements against penal interest and admissible under Tex. R. Evid. 803(24). Because the speaker and his girlfriend were not married at the time of the statements, the marital privilege of Tex. R. Evid. 504 did not apply. Walker v. State, 406 S.W.3d 590, 2013 Tex. App. LEXIS 3046, 2013 WL 1154209 (Tex. App. Eastland Mar. 21 2013).

Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Ineffective Assistance

5. Although trial counsel performed objectively unreasonably by failing to interview the husband to determine if he could or would assert a marital privilege that omission did not prejudice the inmate's defense; the husband's testimony provided nuance to the case but did not alter the entire evidentiary picture. The evidence of the inmate's guilt was overwhelming, even absent the husband's testimony, and his testimony, in most regards, only corroborated other sources. Carty v. Thaler, 583 F.3d 244, 2009 U.S. App. LEXIS 20803 (5th Cir. Tex. 2009).

Evidence : Hearsay : Exceptions : Statements Against Interest

6. Co-arrestee's statements to his girlfriend, later his common-law wife, regarding a large amount of methamphetamine that went undiscovered by officers during a traffic stop were non-testimonial for purposes of the Confrontation Clause and were statements against penal interest and admissible under Tex. R. Evid. 803(24). Because the speaker and his girlfriend were not married at the time of the statements, the marital privilege of Tex. R. Evid. 504 did not apply. Walker v. State, 406 S.W.3d 590, 2013 Tex. App. LEXIS 3046, 2013 WL 1154209 (Tex. App. Eastland Mar. 21 2013).

Evidence : Privileges : Marital Privileges : General Overview

7. There was no error in the State calling defendant's wife to invoke her spousal privilege in the jury's presence because the jury did not hear the wife specifically say that she was asserting her spousal privilege, defense counsel mentioned the privilege in front of the jury when he objected, and the jury had already heard the wife provide testimony detrimental to defendant, namely, that defendant had been drinking beer on the night of the offense. Chavez v. State, 2011 Tex. App. LEXIS 4927, 2011 WL 2624006 (Tex. App. Houston 1st Dist. June 30 2011).

8. Even if the trial court erred under Tex. Code Crim. Proc. Ann. art. 28.01, § 1 and Tex. Code Crim. Proc. Ann. art. 33.03 in conducting a pretrial hearing in appellant's absence, appellant was not harmed, given that (1) counsel waived appellant's right to be present, (2) even if appellant was present to claim that he knew his wife intended to invoke the spousal privilege, the legal questions for the trial court would not have changed and appellant could not claim the privilege under Tex. R. Evid. 504(b)(3) on his wife's behalf, (3) nothing showed that a fair hearing was thwarted by his absence, (4) appellant's absence could not have contributed to his conviction or punishment, and (5) any error resulting from appellant's absence did not amount to reversible error under Tex. R. App. P. 44.2. Williams v. State, 2011 Tex. App. LEXIS 3799, 2011 WL 1888258 (Tex. App. Dallas May 19 2011).

9. In defendant's drug case, the trial court did not abuse its discretion by allowing defendant's purported wife to testify because there had not been a ceremonial marriage at the time of the alleged offenses, they did not file a joint tax return, and the purposted wife did not take defendant's name. Kennedy v. State, 2008 Tex. App. LEXIS 4607 (Tex. App. Fort Worth June 19 2008).

10. Court properly allowed the testimony of a witness whom defendant claimed was his common law wife because the evidence suggested that defendant and the witness were not common law husband and wife, the witness

repeatedly denied that defendant participated in the drug transaction, and there was other competent evidence supporting defendant's participation. Kennedy v. State, 2008 Tex. App. LEXIS 3424 (Tex. App. Fort Worth May 8 2008).

11. Trial court did not err by ordering defendant's wife to testify after she claimed her spousal privilege because there was an exception to the spousal privilege under Tex. Code Crim. Proc. Ann. art. 38.10 and Tex. R. Evid. 504(b)(4)(A) that eliminated the spousal testimonial privilege for prosecutions in which the testifying spouse was the alleged victim of the crime by the accused. Defendant was charged with a criminal trespass of his wife's residence, which he had never inhabited, following a heated altercation between them, therefore his offense came within both the language of Rule 504(b)(4)(A) and the policy it sought to promote. Jackson v. State, 2005 Tex. App. LEXIS 3631 (Tex. App. Houston 14th Dist. May 5 2005).

Evidence : Privileges : Marital Privileges : Adverse Spousal Testimony : General Overview

12. Although defendant argued that his trial counsel rendered ineffective assistance during the guilt-innocence phrase of his murder trial by calling defendant's wife as a witness, thus allowing the State to cross-examine her, rather than claiming a spousal privilege, this point of error was overruled. Given the overwhelming weight of the evidence presented to the jury, defendant did not demonstrate that a different verdict would have been returned had his wife not testified as she did. Jones v. State, 2011 Tex. App. LEXIS 7960, 2011 WL 4610057 (Tex. App. Houston 1st Dist. Oct. 6 2011).

13. Although trial counsel performed objectively unreasonably by failing to interview the husband to determine if he could or would assert a marital privilege that omission did not prejudice the inmate's defense; the husband's testimony provided nuance to the case but did not alter the entire evidentiary picture. The evidence of the inmate's guilt was overwhelming, even absent the husband's testimony, and his testimony, in most regards, only corroborated other sources. Carty v. Thaler, 583 F.3d 244, 2009 U.S. App. LEXIS 20803 (5th Cir. Tex. 2009).

Evidence : Privileges : Marital Privileges : Adverse Spousal Testimony : Exceptions

14. Trial court did not err in admitting defendant's wife to testimony because, in the absence of an agreement to be married and of holding out, defendant failed to establish a sufficient foundation to invoke the spousal privilege; the privilege would not prevent the wife from testifying voluntarily for the State, even over defendant's objection, Tex. R. Evid. 504(b)(1). Gonzalez v. State, 2012 Tex. App. LEXIS 5215, 2012 WL 2509693 (Tex. App. Dallas June 28 2012).

15. Trial court did not erroneously permit the State to question defendant's wife as a witness during defendant's capital murder trial; the spousal privilege was inapplicable under Tex. R. Evid. 504(b)(4)(A) because defendant was charged with the murder of a 14-year-old minor. Rodriguez v. State, 2008 Tex. App. LEXIS 1162 (Tex. App. Houston 14th Dist. Feb. 19 2008).

16. Because defendant stipulated to the admission of letters he wrote to his wife after he was arrested for the victim's murder, he waived the marital privilege. Because his wife testified voluntarily about the letters' contents, Tex. R. Evid. 504 did not prevent her from testifying about the letters' contents. Cavazos v. State, 2007 Tex. App. LEXIS 2049 (Tex. App. Corpus Christi Mar. 15 2007).

17. Trial court did not err in overruling defendant's wife's invocation of her testimonial privilege where the State proved that the victim was a minor at the time that defendant shot him; since defendant was charged with a crime against a minor, the trial court did not err. Hernandez v. State, 205 S.W.3d 555, 2006 Tex. App. LEXIS 4426 (Tex. App. Amarillo 2006).

Evidence : Privileges : Marital Privileges : Adverse Spousal Testimony : Scope

18. In a trust dispute, a trial court did not err in refusing to strike testimony as privileged under Tex. R. Evid. 504(a) because the communication at issue took place before a third party, and corroboration of the presence of a third party was not required. Cooper v. Cochran, 288 S.W.3d 522, 2009 Tex. App. LEXIS 2522 (Tex. App. Dallas Apr. 9 2009).

19. In a trust dispute, a trial court did not err in refusing to strike testimony as privileged under Tex. R. Evid. 504(a) because the communication at issue took place before a third party, and corroboration of the presence of a third party was not required.

20. Defendant failed with his claim that a trial court's compelling testimony from his alleged wife violated the spousal privilege where the third element of an informal marriage was not established under Tex. Fam. Code Ann. § 2.401(a)(2); no testimony or other evidence established that defendant and his alleged wife had represented before the date of the offense that they were husband and wife. Only the alleged wife testified regarding whether she and defendant had an informal marriage, and her comments regarding the informal marriage were inconsistent. Davis v. State, 2006 Tex. App. LEXIS 5903 (Tex. App. Tyler June 30 2006).

Evidence : Privileges : Marital Privileges : Adverse Spousal Testimony : Waiver

21. Court did not abuse its discretion nor violate the husband-wife privilege that existed between defendant and his wife when it allowed an officer to testify concerning the wife's statement to her during the initial discovery and investigation of the incident because the two statements made by defendant were similar enough to result in a waiver of the husband-wife privilege concerning defendant's statement to the wife that he killed a woman. The "significant part" of defendant's statement, which he also disclosed to his mother, was the admission that he killed a person and that the person's body was in his apartment; therefore, he waived application of the husband wife privilege. Davis v. State, 2005 Tex. App. LEXIS 712 (Tex. App. Fort Worth Jan. 27 2005).

Evidence : Privileges : Marital Privileges : Confidential Communications : General Overview

22. Defendant's wife's response to a question was that no communication took place with defendant on a certain subject, and thus the court had no basis to find error in the trial court's ruling that overruled defendant's objection; even assuming error, it was harmless because beyond the challenged testimony, there was other evidence establishing that defendant violated the terms of his community supervision as alleged, and there was no abuse of discretion in the decision to revoke. Washington v. State, 2014 Tex. App. LEXIS 3698, 2014 WL 1379643 (Tex. App. Texarkana Apr. 8 2014).

23. Defendant candidly acknowledges that the violation of an evidentiary rule, such as under the husband-wife privilege, is not constitutional error; when dealing with such an error, it was to be disregarded as harmless if it did not affect defendant's substantial rights. Washington v. State, 2014 Tex. App. LEXIS 3698, 2014 WL 1379643 (Tex. App. Texarkana Apr. 8 2014).

Evidence : Privileges : Marital Privileges : Confidential Communications : Criminal Proceedings

24. Confidential-communication privilege did not apply under Tex. R. Evid. 504(a)(4)(C) because defendant was charged with a crime against a person who was a member of his household under Tex. Fam. Code Ann. §§ 71.005 and 71.006. Welch v. State, 2013 Tex. App. LEXIS 5114 (Tex. App. Houston 14th Dist. Apr. 25 2013).

25. Defendant's murder conviction was proper pursuant to Tex. R. Evid. 504 because the calls between himself and his current wife were not privileged since defendant did not have the requisite expectation of privacy; the calls were made while he was in jail and he conceded that, while in one jail, he signed a statement acknowledging that the telephone calls might be monitored by the sheriff; in regard to time spent in the other jail, defendant testified that he knew that all of his telephone calls were being recorded. Capps v. State, 244 S.W.3d 520, 2007 Tex. App. LEXIS 9602 (Tex. App. Fort Worth 2007).

26. In a murder trial, there was no error in allowing into evidence recorded admissions that defendant made in phone calls from jail; although some calls were with defendant's spouse, the calls were not privileged because defendant did not have the requisite expectation of privacy under Tex. R. Evid. 504. Capps v. State, 244 S.W.3d 520, 2007 Tex. App. LEXIS 9602 (Tex. App. Fort Worth 2007), (Tex. App. -- Fort Worth, pet. ref'd).

27. Trial court did not err by ordering defendant's wife to testify after she claimed her spousal privilege because there was an exception to the spousal privilege under Tex. Code Crim. Proc. Ann. art. 38.10 and Tex. R. Evid. 504(b)(4)(A) that eliminated the spousal testimonial privilege for prosecutions in which the testifying spouse was the alleged victim of the crime by the accused. Defendant was charged with a criminal trespass of his wife's residence, which he had never inhabited, following a heated altercation between them, therefore his offense came within both the language of Rule 504(b)(4)(A) and the policy it sought to promote. Jackson v. State, 2005 Tex. App. LEXIS 3631 (Tex. App. Houston 14th Dist. May 5 2005).

28. Court did not abuse its discretion nor violate the husband-wife privilege that existed between defendant and his wife when it allowed an officer to testify concerning the wife's statement to her during the initial discovery and investigation of the incident because the two statements made by defendant were similar enough to result in a waiver of the husband-wife privilege concerning defendant's statement to the wife that he killed a woman. The "significant part" of defendant's statement, which he also disclosed to his mother, was the admission that he killed a person and that the person's body was in his apartment; therefore, he waived application of the husband wife privilege. Davis v. State, 2005 Tex. App. LEXIS 712 (Tex. App. Fort Worth Jan. 27 2005).

Evidence : Privileges : Marital Privileges : Confidential Communications : Elements

29. Trial court did not abuse its discretion in holding that defendant did not carry his burden of proof in establishing that a common-law marriage existed, for purposes of invoking the spousal privilege under Tex. R. Evid. 504; defendant had to show that he and the woman agreed to be married, were living together as husband and wife, and represented themselves to others as such, but the evidence was inconsistent with an informal marriage agreement, as the woman referred to defendant as her boyfriend and never referred to him as her husband, and the trial court had to resolve the conflicting evidence. Freeman v. State, 230 S.W.3d 392, 2007 Tex. App. LEXIS 3965 (Tex. App. Eastland 2007).

Evidence : Privileges : Marital Privileges : Confidential Communications : Exceptions

30. Tape recording was identified as a conversation between defendant, his wife, and her boyfriend, and there was no indication whether or not the boyfriend overhead the conversation between defendant and his wife; thus, the record did not show that the admission of the tape recording would have been prohibited by Tex. R. Evid. 504, there might have been strategic reasons for counsel not objecting, and the court could not find ineffective assistance as claimed in light of the silent record. Dodson v. State, 2006 Tex. App. LEXIS 5530 (Tex. App. Houston 14th Dist. June 29 2006).

Evidence : Privileges : Marital Privileges : Confidential Communications : Scope

31. Because there was no reasonable expectation of privacy in the back seat of a police car, the conversation between defendant and his wife was not protected by spousal privilege under Tex. R. Evid. 504(a)(1). Hernandez v. State, 2009 Tex. App. LEXIS 6356, 2009 WL 2476523 (Tex. App. Houston 14th Dist. Aug. 13 2009).

Evidence : Privileges : Marital Privileges : Confidential Communications : Waiver

32. Petition for writ of mandamus directing a trial court to vacate its order denying relators' motion to compel was denied because relators did not cite any authority holding that the offensive use waiver applied to the spousal communications privilege under Tex. R. Evid. 504(a). In re Corcoran, 2012 Tex. App. LEXIS 1410, 2012 WL 590813 (Tex. App. Houston 14th Dist. Feb. 23 2012).

33. Because defendant stipulated to the admission of letters he wrote to his wife after he was arrested for the victim's murder, he waived the marital privilege. Because his wife testified voluntarily about the letters' contents, Tex. R. Evid. 504 did not prevent her from testifying about the letters' contents. Cavazos v. State, 2007 Tex. App. LEXIS 2049 (Tex. App. Corpus Christi Mar. 15 2007).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Existence of Privileges

34. In defendant's drug case, the trial court did not abuse its discretion by allowing defendant's purported wife to testify because there had not been a ceremonial marriage at the time of the alleged offenses, they did not file a joint tax return, and the purposted wife did not take defendant's name. Kennedy v. State, 2008 Tex. App. LEXIS 4607 (Tex. App. Fort Worth June 19 2008).

Family Law : Marriage : Proof : Common Law Marriages : Elements : General Repute

35. Trial court did not err in admitting defendant's wife to testimony because, in the absence of an agreement to be married and of holding out, defendant failed to establish a sufficient foundation to invoke the spousal privilege; the privilege would not prevent the wife from testifying voluntarily for the State, even over defendant's objection, Tex. R. Evid. 504(b)(1). Gonzalez v. State, 2012 Tex. App. LEXIS 5215, 2012 WL 2509693 (Tex. App. Dallas June 28 2012).

36. Defendant failed with his claim that a trial court's compelling testimony from his alleged wife violated the spousal privilege where the third element of an informal marriage was not established under Tex. Fam. Code Ann. § 2.401(a)(2); no testimony or other evidence established that defendant and his alleged wife had represented before the date of the offense that they were husband and wife. Only the alleged wife testified regarding whether she and defendant had an informal marriage, and her comments regarding the informal marriage were inconsistent. Davis v. State, 2006 Tex. App. LEXIS 5903 (Tex. App. Tyler June 30 2006).

Tex. Evid. R. 505

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 505 Privilege For Communications to a Clergy Member

(a) ***Definitions.***--In this rule:

(1)A "clergy member" is a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or someone whom a communicant reasonably believes is a clergy member.

(2)A "communicant" is a person who consults a clergy member in the clergy member's professional capacity as a spiritual adviser.

(3)A communication is "confidential" if made privately and not intended for further disclosure except to other persons present to further the purpose of the communication.

(b) ***General Rule.***--A communicant has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication by the communicant to a clergy member in the clergy member's professional capacity as spiritual adviser.

(c) ***Who May Claim.***--The privilege may be claimed by:

(1)the communicant;

(2)the communicant's guardian or conservator; or

(3)a deceased communicant's personal representative.

The clergy member to whom the communication was made may claim the privilege on the communicant's behalf - and is presumed to have authority to do so.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*.

Case Notes

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Privileges : Clergy Communications
Evidence : Privileges : Clergy Communications : General Overview
Evidence : Privileges : Clergy Communications : Exceptions
Evidence : Privileges : Clergy Communications : Waiver
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Child Abuse

LexisNexis (R) Notes

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

1. In a trial for child sexual assault, it was reasonable to conclude that defendant's communication to his priest was not made to the priest as a spiritual advisor and thus was not privileged under Tex. R. Evid. 505 because the priest called defendant to put him on notice that he was aware of the sexual assault allegations against defendant. Gutierrez v. State, 2010 Tex. App. LEXIS 8952, 2010 WL 4484350 (Tex. App. Houston 1st Dist. Nov. 10 2010).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

2. Denial of defendant's motion to suppress statements he made to his church elders confessing to a murder under Tex. R. Evid. 505 was proper as he never told the elders he wanted his communication to be kept private, and his parents testified that defendant knew the matter was no longer going to be confidential once he confessed. Leach v. State, 2008 Tex. App. LEXIS 6684 (Tex. App. Houston 1st Dist. Sept. 4, 2008).

Criminal Law & Procedure : Witnesses : Credibility

3. In a trial for attempted sexual assault, there was no error in excluding evidence that defendant's spouse told the pastor at church that the spouse was having an affair, evidence that defendant sought to show the spouse's motive to testify for the State; what the spouse told the pastor was covered by the privilege in Tex. R. Evid. 505, and, although there was evidence of a voluntary disclosure to defendant, defendant did not urge waiver under Tex. R. Evid. 511 either at trial or on appeal. Campbell v. State, 2008 Tex. App. LEXIS 1707 (Tex. App. Eastland Mar. 6 2008).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

4. In a juvenile defendant's murder case, a court properly admitted testimony of a hospital chaplain who visited with defendant because defendant's conduct in making similar inculpatory statements to the nurses and security guards supported the trial court's finding that defendant did not make the statements to the chaplain with a reasonable expectation of confidentiality. In addition, any error was harmless; four other witnesses testified to similar statements defendant made while in the hospital that implicated him in the shooting death of the victim. In re E.C.D., 2007 Tex. App. LEXIS 1270 (Tex. App. San Antonio Feb. 21 2007).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

5. In a prosecution for indecency with a child, the clergymen privilege did not apply to statements of child abuse made by defendant to an elder in the church. Almendarez v. State, 153 S.W.3d 727, 2005 Tex. App. LEXIS 449 (Tex. App. Dallas 2005).

6. Texas Code of Criminal Procedure has no provision for a clergyman privilege; thus, Tex. Fam. Code Ann. § 261.202 takes precedence over Tex. R. Evid. 505. Almendarez v. State, 153 S.W.3d 727, 2005 Tex. App. LEXIS 449 (Tex. App. Dallas 2005).

Evidence : Privileges : Clergy Communications

7. In a prosecution for indecency with a child, the clergymen privilege did not apply to statements of child abuse made by defendant to an elder in the church. Almendarez v. State, 153 S.W.3d 727, 2005 Tex. App. LEXIS 449 (Tex. App. Dallas 2005).

8. Texas Code of Criminal Procedure has no provision for a clergyman privilege; thus, Tex. Fam. Code Ann. § 261.202 takes precedence over Tex. R. Evid. 505. Almendarez v. State, 153 S.W.3d 727, 2005 Tex. App. LEXIS 449 (Tex. App. Dallas 2005).

9. Defendant's motion to exclude information on the basis that the information was confidentially communicated to a clergyman was properly denied under Tex. R. Evid. 505(a)(1) and (b) because the information was communicated during meetings with a bishop that were administrative in nature, because the bishop did not communicate with defendant in the bishop's professional character as a spiritual adviser, and because the communication was thus not privileged. Maldonado v. State, 59 S.W.3d 251, 2001 Tex. App. LEXIS 5819 (Tex. App. Corpus Christi 2001).

Evidence : Privileges : Clergy Communications : General Overview

10. In a juvenile defendant's murder case, a court properly admitted testimony of a hospital chaplain who visited with defendant because defendant's conduct in making similar inculpatory statements to the nurses and security guards supported the trial court's finding that defendant did not make the statements to the chaplain with a reasonable expectation of confidentiality. In addition, any error was harmless; four other witnesses testified to similar statements defendant made while in the hospital that implicated him in the shooting death of the victim. In re E.C.D., 2007 Tex. App. LEXIS 1270 (Tex. App. San Antonio Feb. 21 2007).

Evidence : Privileges : Clergy Communications : Exceptions

11. Trial court did not err by admitting the father's communications with a clergyman because this was a proceeding regarding the abuse or neglect of a child and therefore the father was not entitled to invoke the clergy privilege. In the Interest of W.B.W., 2012 Tex. App. LEXIS 5562, 2012 WL 2856067 (Tex. App. Eastland July 12 2012).

Evidence : Privileges : Clergy Communications : Waiver

12. Denial of defendant's motion to suppress statements he made to his church elders confessing to a murder under Tex. R. Evid. 505 was proper as he never told the elders he wanted his communication to be kept private, and his parents testified that defendant knew the matter was no longer going to be confidential once he confessed. Leach v. State, 2008 Tex. App. LEXIS 6684 (Tex. App. Houston 1st Dist. Sept. 4, 2008).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

13. In a prosecution for indecency with a child, the clergymen privilege did not apply to statements of child abuse made by defendant to an elder in the church. Almendarez v. State, 153 S.W.3d 727, 2005 Tex. App. LEXIS 449 (Tex. App. Dallas 2005).

14. Texas Code of Criminal Procedure has no provision for a clergyman privilege; thus, Tex. Fam. Code Ann. § 261.202 takes precedence over Tex. R. Evid. 505. Almendarez v. State, 153 S.W.3d 727, 2005 Tex. App. LEXIS 449 (Tex. App. Dallas 2005).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Child Abuse

15. Trial court did not err by admitting the father's communications with a clergyman because this was a proceeding regarding the abuse or neglect of a child and therefore the father was not entitled to invoke the clergy privilege. In the Interest of W.B.W., 2012 Tex. App. LEXIS 5562, 2012 WL 2856067 (Tex. App. Eastland July 12 2012).

End of Document

Tex. Evid. R. 506

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 506 Political Vote Privilege

A person has a privilege to refuse to disclose the person's vote at a political election conducted by secret ballot unless the vote was cast illegally.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 97, *Resisting Discovery*.

Tex. Evid. R. 507

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 507 Trade Secrets Privilege

(a) ***General Rule.***--A person has a privilege to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, unless the court finds that nondisclosure will tend to conceal fraud or otherwise work injustice.

(b) ***Who May Claim.***--The privilege may be claimed by the person who owns the trade secret or the person's agent or employee.

(c) ***Protective Measure.***--If a court orders a person to disclose a trade secret, it must take any protective measure required by the interests of the privilege holder and the parties and to further justice.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*.

Case Notes

Civil Procedure : Judicial Officers : Magistrates : Standards of Review
Civil Procedure : Discovery : Methods : Requests for Production & Inspection
Civil Procedure : Discovery : Privileged Matters : General Overview
Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus
Evidence : Privileges : Trade Secrets : General Overview
Evidence : Privileges : Trade Secrets : Elements
Evidence : Privileges : Trade Secrets : Scope
Evidence : Privileges : Trade Secrets : Waiver
Evidence : Procedural Considerations : Burdens of Proof : General Overview
Tax Law : State & Local Taxes : Real Property Tax : Assessment & Valuation : Assessment Methods & Timing
Trade Secrets Law : Civil Actions : Discovery
Trade Secrets Law : Factors : General Overview

LexisNexis (R) Notes

Civil Procedure : Judicial Officers : Magistrates : Standards of Review

1. Under Texas law, the trade secret privilege was not absolute, and a magistrate judge clearly erred in denying a motion to compel in its entirety based on trade secret privilege where the documents provided for in camera review did not represent the full range of discovery sought, and plaintiffs' assertion of the privilege was overly broad. Given the relevance of the information, it was necessary for the judge to weigh the specific, particularized injury that disclosure would cause plaintiffs against defendant's need for the information. Orthoflex, Inc. v. Thermotek, Inc., 990 F. Supp. 2d 675, 2013 U.S. Dist. LEXIS 182853, 2013 WL 6980482 (N.D. Tex. Dec. 10 2013).

Civil Procedure : Discovery : Methods : Requests for Production & Inspection

2. In an assessment appeal, a ruling that the appraisal district's requests for production were overbroad meant that the taxpayers' claim of trade secret privilege could not be considered until after the appraisal district served document requests that complied with the Texas Rules of Civil Procedure. In re Premcor Ref. Group, Inc., 2009 Tex. App. LEXIS 5850, 2009 WL 2253290 (Tex. App. Beaumont July 30 2009).

Civil Procedure : Discovery : Privileged Matters : General Overview

3. Relators, who sought a writ of mandamus, could not assert a trade secret privilege in response to a motion to compel a stock register because the relators failed to present the claim of privilege before the trial court. In re Union Energy, Inc., 2008 Tex. App. LEXIS 8486 (Tex. App. Tyler Oct. 31, 2008).

Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus

4. Corporation president was entitled to mandamus relief, Tex. R. App. P. 52, because the items requested by the LLC were trade secrets and not discoverable as privileged information pursuant to Tex. R. Evid. 507; the president met his burden of showing that the corporation's list of suppliers was trade secret and the LLC did not show that disclosure was necessary. In re Rockafellow, 2011 Tex. App. LEXIS 5495, 2011 WL 2848638 (Tex. App. Amarillo July 19 2011).

5. In an antitrust case, mandamus relief was conditionally granted because a competitor failed to show that a disclosure of disputed trade secret information was necessary to the fair adjudication of its claims; therefore, the trial court erred by ordering the disclosure. In re Waste Mgmt. of Tex., Inc., 286 S.W.3d 615, 2009 Tex. App. LEXIS 3671 (Tex. App. Texarkana May 28 2009).

Evidence : Privileges : Trade Secrets : General Overview

6. Although a party resisting presuit discovery submitted only a conclusory affidavit and thus failed to prove that the information sought would require disclosure of information protected by the trade secret privilege, the trial court abused its discretion when it ordered the discovery without making the required finding that the likely benefit of allowing a deposition to be taken to investigate a potential claim outweighed the burden or expense. In re Cauley, 437 S.W.3d 650, 2014 Tex. App. LEXIS 7933, 2014 WL 3615786 (Tex. App. Tyler July 23 2014).

7. Diversion company that sold hair care products outside of their authorized distribution channels showed that its supplier list was a carefully guarded trade secret that was essential to its business under Tex. R. Evid. 507; the products' manufacturer failed to show necessity for the information because it had not pursued other avenues of

discovery. In re Rockafellow, 2013 Tex. App. LEXIS 5421, 2013 WL 1836451 (Tex. App. Amarillo Apr. 30 2013).

8. In an assessment appeal, a ruling that the appraisal district's requests for production were overbroad meant that the taxpayers' claim of trade secret privilege could not be considered until after the appraisal district served document requests that complied with the Texas Rules of Civil Procedure. In re Premcor Ref. Group, Inc., 2009 Tex. App. LEXIS 5850, 2009 WL 2253290 (Tex. App. Beaumont July 30 2009).

9. In an antitrust case, mandamus relief was conditionally granted because a competitor failed to show that a disclosure of disputed trade secret information was necessary to the fair adjudication of its claims; therefore, the trial court erred by ordering the disclosure. In re Waste Mgmt. of Tex., Inc., 286 S.W.3d 615, 2009 Tex. App. LEXIS 3671 (Tex. App. Texarkana May 28 2009).

10. Relators, who sought a writ of mandamus, could not assert a trade secret privilege in response to a motion to compel a stock register because the relators failed to present the claim of privilege before the trial court. In re Union Energy, Inc., 2008 Tex. App. LEXIS 8486 (Tex. App. Tyler Oct. 31, 2008).

11. Writ of mandamus was conditionally granted in favor of the company because the company established that the data requested by the claimant in the breach of contract action were trade secrets, and the claimant failed to show that disclosure of the information was necessary to prevent fraud or injustice; while some of the underlying data was publicly available, the forecasts and conclusions of the company and its consultants were not, and the data was carefully guarded and was obtainable only by company personnel on a need-to-know basis. In re XTO Res. I, LP, 248 S.W.3d 898, 2008 Tex. App. LEXIS 2237 (Tex. App. Fort Worth 2008).

12. In an action alleging breach of a partnership agreement, the trial court could reasonably order production of purported trade secrets because information about finances and the partnership's largest customers was necessary to an adjudication of the value of an interest in the partnership. In re West Tex. Positron, Ltd., 2005 Tex. App. LEXIS 496 (Tex. App. Amarillo Jan. 20 2005).

13. Without evidence establishing any of the conventional trade secret factors with regard to the company's database used to "trend" accident and injury claims, the company failed to demonstrate that the trial court erred in overruling its trade secret objection to providing deposition testimony on the creation and use of the database; the company cited no authority that a conclusory opinion that information was a trade secret or was not used industry-wide, or a mere desire to avoid disclosing information to others, was sufficient to establish the privilege. In re Lowe's Cos., 134 S.W.3d 876, 2004 Tex. App. LEXIS 4432 (Tex. App. Houston 14th Dist. 2004).

14. Tire manufacturer successfully resisted discovery of its chemical formula for its "skim stock," a rubber compound used in tire manufacturing, in a products liability action against it because it had been conceded by the party seeking discovery that the formula was a trade secret under Tex. R. Evid. 507, and that party failed to demonstrate that the information was necessary for a fair trial. In re Continental Gen. Tire, 979 S.W.2d 609, 1998 Tex. LEXIS 149, 42 Tex. Sup. Ct. J. 141 (Tex. 1998).

Evidence : Privileges : Trade Secrets : Elements

15. Trial court's grant of a brokerage firm's petition for presuit discovery from former employees and their company under Tex. R. Civ. P. 202 was an abuse of discretion because the information sought, details regarding a risk-management program developed by the employees, constituted trade secret information protected under Tex. R. Evid. 507. In re Prairiesmarts Llc, 421 S.W.3d 296, 2014 Tex. App. LEXIS 791, 2014 WL 252092 (Tex. App. Fort Worth Jan. 23 2014).

16. Trial court's grant of a brokerage firm's petition for presuit discovery from former employees and their company under Tex. R. Civ. P. 202 was an abuse of discretion because the information sought, details regarding a risk-management program developed by the employees, constituted trade secret information protected under Tex. R. Evid. 507. In re Prairiesmarts Llc, 421 S.W.3d 296, 2014 Tex. App. LEXIS 791, 2014 WL 252092 (Tex. App. Fort Worth Jan. 23 2014).

17. Corporation president was entitled to mandamus relief, Tex. R. App. P. 52, because the items requested by the LLC were trade secrets and not discoverable as privileged information pursuant to Tex. R. Evid. 507; the president met his burden of showing that the corporation's list of suppliers was trade secret and the LLC did not show that disclosure was necessary. In re Rockafellow, 2011 Tex. App. LEXIS 5495, 2011 WL 2848638 (Tex. App. Amarillo July 19 2011).

18. Tire manufacturer was entitled to mandamus relief directing a trial court to vacate its order compelling the production of documents in a wife's product liability action because the manufacturer established six of the six factors to determine whether a trade secret existed; in her motion to compel, the wife did not discuss her heightened burden for obtaining trade secret information. In re Goodyear Tire & Rubber Co., 392 S.W.3d 687, 2010 Tex. App. LEXIS 4690 (Tex. App. Dallas June 23 2010).

19. Company manager testified that the requested documentation regarding tire testing would reveal testing techniques, and the company closely guarded the data obtained from its testing because such would have given valuable information to competitors; the court agreed that the company's testing techniques, protocols, and results were trade secrets, for purposes of Tex. R. Evid. 507, and the burden shifted to plaintiffs to show that the information was necessary for a fair adjudication of their claims. Schmidt v. Goodyear Tire & Rubber Co., 2002 U.S. Dist. LEXIS 28596 (E.D. Tex. July 31 2002).

20. Although plaintiffs claimed that the information requested, which the company claimed was a trade secret, was relevant, they had to show more; a plaintiff must also show the information is necessary for a fair adjudication of their claims. Schmidt v. Goodyear Tire & Rubber Co., 2002 U.S. Dist. LEXIS 28596 (E.D. Tex. July 31 2002).

21. Plaintiffs adequately showed the necessity of testing information regarding certain tires that were the subject of this lawsuit, and the court found the necessity outweighed the risk of potential harm of disclosure to the company, but the court limited the production to substantially similar tires for a certain period. Schmidt v. Goodyear Tire & Rubber Co., 2002 U.S. Dist. LEXIS 28596 (E.D. Tex. July 31 2002).

22. As for certain tires, plaintiffs did not carry their burden under Tex. R. Evid. 507 of showing that the testing information was sufficiently necessary to their case to outweigh the harm that disclosure might have on the company; plaintiffs' claims centered on a different kind of tire, and thus the information as to other tires was not shown to be necessary to the claim. Schmidt v. Goodyear Tire & Rubber Co., 2002 U.S. Dist. LEXIS 28596 (E.D. Tex. July 31 2002).

Evidence : Privileges : Trade Secrets : Scope

23. Under Texas law, the trade secret privilege was not absolute, and a magistrate judge clearly erred in denying a motion to compel in its entirety based on trade secret privilege where the documents provided for in camera review did not represent the full range of discovery sought, and plaintiffs' assertion of the privilege was overly broad. Given the relevance of the information, it was necessary for the judge to weigh the specific, particularized injury that disclosure would cause plaintiffs against defendant's need for the information. Orthoflex, Inc. v. Thermotek, Inc., 990 F. Supp. 2d 675, 2013 U.S. Dist. LEXIS 182853, 2013 WL 6980482 (N.D. Tex. Dec. 10 2013).

24. Galveston Central Appraisal District (GCAD) failed to adequately demonstrate its need for the requested information,because alternative methods of appraisal were available and it presented no evidence that those methods would not produce competent evidence of the market value of the refinery, two other valid methods of appraisal were available, and GCAD did not show that these methods would not provide a competent appraisal and evidence of the market value of the property. In re Refining-Texas, Lp, 415 S.W.3d 567, 2013 Tex. App. LEXIS 12962 (Tex. App. Houston 1st Dist. Oct. 17 2013).

25. Tire manufacturer was entitled to mandamus relief directing a trial court to vacate its order compelling the production of documents in a wife's product liability action because the manufacturer established six of the six factors to determine whether a trade secret existed; in her motion to compel, the wife did not discuss her heightened burden for obtaining trade secret information. In re Goodyear Tire & Rubber Co., 392 S.W.3d 687, 2010 Tex. App. LEXIS 4690 (Tex. App. Dallas June 23 2010).

Evidence : Privileges : Trade Secrets : Waiver

26. Trial court's rulings granting and overruling trade secret objections were inconsistent and the trial court erred in compelling production of trade secret information with no showing that the disclosure was necessary; the trial court did not make a necessity determination and even if disclosure was necessary, the trial court had not signed a protective order to prevent disclosure beyond what was necessary. Conditional mandamus relief was warranted. In re Universal Coin & Bullion, Ltd., 218 S.W.3d 828, 2007 Tex. App. LEXIS 1987 (Tex. App. Beaumont 2007).

27. Company proved its customer list and contact information were trade secrets the company protected, and once the company established the privilege, the burden shifted to the reporter to show the information was necessary, but the trial court's order compelled production while deferring such a determination and the reporter did not show why the trade secret information was necessary to defend the claim against him. In re Universal Coin & Bullion, Ltd., 218 S.W.3d 828, 2007 Tex. App. LEXIS 1987 (Tex. App. Beaumont 2007).

Evidence : Procedural Considerations : Burdens of Proof : General Overview

28. Tire manufacturer successfully resisted discovery of its chemical formula for its "skim stock," a rubber compound used in tire manufacturing, in a products liability action against it because it had been conceded by the party seeking discovery that the formula was a trade secret under Tex. R. Evid. 507, and that party failed to demonstrate that the information was necessary for a fair trial. In re Continental Gen. Tire, 979 S.W.2d 609, 1998 Tex. LEXIS 149, 42 Tex. Sup. Ct. J. 141 (Tex. 1998).

Tax Law : State & Local Taxes : Real Property Tax : Assessment & Valuation : Assessment Methods & Timing

29. Galveston Central Appraisal District (GCAD) failed to adequately demonstrate its need for the requested information,because alternative methods of appraisal were available and it presented no evidence that those methods would not produce competent evidence of the market value of the refinery, two other valid methods of appraisal were available, and GCAD did not show that these methods would not provide a competent appraisal and evidence of the market value of the property. In re Refining-Texas, Lp, 415 S.W.3d 567, 2013 Tex. App. LEXIS 12962 (Tex. App. Houston 1st Dist. Oct. 17 2013).

Trade Secrets Law : Civil Actions : Discovery

30. Although a party resisting presuit discovery submitted only a conclusory affidavit and thus failed to prove that the information sought would require disclosure of information protected by the trade secret privilege, the trial court abused its discretion when it ordered the discovery without making the required finding that the likely benefit of

allowing a deposition to be taken to investigate a potential claim outweighed the burden or expense. In re Cauley, 437 S.W.3d 650, 2014 Tex. App. LEXIS 7933, 2014 WL 3615786 (Tex. App. Tyler July 23 2014).

31. Trial court's grant of a brokerage firm's petition for presuit discovery from former employees and their company under Tex. R. Civ. P. 202 was an abuse of discretion because the information sought, details regarding a risk-management program developed by the employees, constituted trade secret information protected under Tex. R. Evid. 507. In re Prairiesmarts Llc, 421 S.W.3d 296, 2014 Tex. App. LEXIS 791, 2014 WL 252092 (Tex. App. Fort Worth Jan. 23 2014).

32. Trial court's grant of a brokerage firm's petition for presuit discovery from former employees and their company under Tex. R. Civ. P. 202 was an abuse of discretion because the information sought, details regarding a risk-management program developed by the employees, constituted trade secret information protected under Tex. R. Evid. 507. In re Prairiesmarts Llc, 421 S.W.3d 296, 2014 Tex. App. LEXIS 791, 2014 WL 252092 (Tex. App. Fort Worth Jan. 23 2014).

33. Diversion company that sold hair care products outside of their authorized distribution channels showed that its supplier list was a carefully guarded trade secret that was essential to its business under Tex. R. Evid. 507; the products' manufacturer failed to show necessity for the information because it had not pursued other avenues of discovery. In re Rockafellow, 2013 Tex. App. LEXIS 5421, 2013 WL 1836451 (Tex. App. Amarillo Apr. 30 2013).

34. Trade secret privilege protected documents from disclosure in a products liability suit because secrecy, competitive advantage, and other trade secret factors were established and there were other documents already produced describing the design feature at issue. In re Cooper Tire & Rubber Co., 306 S.W.3d 875, 2010 Tex. App. LEXIS 709 (Tex. App. Houston 14th Dist. Feb. 2 2010).

35. Writ of mandamus was conditionally granted in favor of the company because the company established that the data requested by the claimant in the breach of contract action were trade secrets, and the claimant failed to show that disclosure of the information was necessary to prevent fraud or injustice; while some of the underlying data was publicly available, the forecasts and conclusions of the company and its consultants were not, and the data was carefully guarded and was obtainable only by company personnel on a need-to-know basis. In re XTO Res. I, LP, 248 S.W.3d 898, 2008 Tex. App. LEXIS 2237 (Tex. App. Fort Worth 2008).

Trade Secrets Law : Factors : General Overview

36. Trade secret privilege protected documents from disclosure in a products liability suit because secrecy, competitive advantage, and other trade secret factors were established and there were other documents already produced describing the design feature at issue. In re Cooper Tire & Rubber Co., 306 S.W.3d 875, 2010 Tex. App. LEXIS 709 (Tex. App. Houston 14th Dist. Feb. 2 2010).

End of Document

Tex. Evid. R. 508

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 508 Informer's Identity Privilege

(a) ***General Rule.***--The United States, a state, or a subdivision of either has a privilege to refuse to disclose a person's identity if:

(1)the person has furnished information to a law enforcement officer or a member of a legislative committee or its staff conducting an investigation of a possible violation of law; and

(2)the information relates to or assists in the investigation.

(b) ***Who May Claim.***--The privilege may be claimed by an appropriate representative of the public entity to which the informer furnished the information. The court in a criminal case must reject the privilege claim if the state objects.

(c) ***Exceptions.***

(1) ***Voluntary Disclosure; Informer a Witness.***--This privilege does not apply if:

(A)the informer's identity or the informer's interest in the communication's subject matter has been disclosed - by a privilege holder or the informer's own action - to a person who would have cause to resent the communication; or

(B)the informer appears as a witness for the public entity.

(2) ***Testimony About the Merits.***

(A) ***Criminal Case.***--In a criminal case, this privilege does not apply if the court finds a reasonable probability exists that the informer can give testimony necessary to a fair determination of guilt or innocence. If the court so finds and the public entity elects not to disclose the informer's identity:

(i)on the defendant's motion, the court must dismiss the charges to which the testimony would relate; or

(ii)on its own motion, the court may dismiss the charges to which the testimony would relate.

(B) ***Certain Civil Cases.***--In a civil case in which the public entity is a party, this privilege does not apply if the court finds a reasonable probability exists that the informer can give testimony necessary to a fair determination of a material issue on the merits. If the court so finds and the public entity elects not to disclose the informer's identity, the court may make any order that justice requires.

(C) ***Procedures.***

(i) If it appears that an informer may be able to give the testimony required to invoke this exception and the public entity claims the privilege, the court must give the public entity an opportunity to show in camera facts relevant to determining whether this exception is met. The showing should ordinarily be made by affidavits, but the court may take testimony if it finds the matter cannot be satisfactorily resolved by affidavits.

(ii) No counsel or party may attend the in camera showing.

(iii) The court must seal and preserve for appeal evidence submitted under this subparagraph (2)(C). The evidence must not otherwise be revealed without the public entity's consent.

(3) ***Legality of Obtaining Evidence.***

(A) ***Court May Order Disclosure.***--The court may order the public entity to disclose an informer's identity if:

(i)information from an informer is relied on to establish the legality of the means by which evidence was obtained; and

(ii)the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible.

(B) ***Procedures.***

(i) On the public entity's request, the court must order the disclosure be made in camera.

(ii) No counsel or party may attend the in camera disclosure.

(iii) If the informer's identity is disclosed in camera, the court must seal and preserve for appeal the record of the in camera proceeding. The record of the in camera proceeding must not otherwise be revealed without the public entity's consent.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*.

Case Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview
Criminal Law & Procedure : Search & Seizure : Search Warrants : Affirmations & Oaths : General Overview
Criminal Law & Procedure : Search & Seizure : Search Warrants : Confidential Informants : General Overview
Criminal Law & Procedure : Search & Seizure : Search Warrants : Confidential Informants : Identity of Informant
Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Informants : General Overview
Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Informants
Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Informants : Privilege
Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Informants : Scope

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Judicial Discretion
Criminal Law & Procedure : Witnesses : Presentation
Criminal Law & Procedure : Defenses : Entrapment
Criminal Law & Procedure : Appeals : Standards of Review : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Witnesses
Evidence : Privileges : General Overview
Evidence : Privileges : Government Privileges : General Overview
Evidence : Privileges : Government Privileges : Official Information Privilege : Informer Privilege
Evidence : Privileges : Government Privileges : Waiver
Evidence : Relevance : Sex Offenses : Rape Shield Laws
Governments : Courts : Clerks of Court

LexisNexis (R) Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

1. In finding that the rape shield statute, Tex. R. Evid. 412, requires an adversarial hearing, the reviewing court rejected the State's argument, based on Tex. R. Evid. 508, that including the parties required explicit direction in the Texas rules; the procedure in Tex. R. Evid. 508 was referred to as "disclosure," while the in camera procedure in Tex. R. Evid. 412 was referred to as a "hearing," and hearings were ordinarily adversarial. LaPointe v. State, 225 S.W.3d 513, 2007 Tex. Crim. App. LEXIS 505 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1015, 128 S. Ct. 544, 169 L. Ed. 2d 381 (2007).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale

2. In defendant's trial for possession with intent to deliver a controlled substance, cocaine, under Tex. Health & Safety Code Ann. § 481.112(c), defense counsel's failure to pursue the identity of an informant and have it sealed for appellate review under Tex. R. Evid. 508(c)(2) did not constitute ineffective assistance because although defendant's motion to discover the informant's identity alleged that the informant was present during times concerning the transaction upon which the charges against him were based, the record did not reflect that the informant participated in the offense nor does it reflect that the informant was present when the offense was committed or at the time of arrest. Also, defendant failed to establish that the informant would have been a material witness. Charlot v. State, 1999 Tex. App. LEXIS 5736 (Tex. App. Amarillo July 30 1999).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview

3. Where confidential informant (CI) only supplied information which established probable cause necessary for the issuance of a search warrant for methamphetamine and the CI did not supply the information upon which the State relied for a conviction on manufacturing methamphetamine, but rather the detective supplied that particular information, the testimony elicited at the hearing did not satisfy defendant's initial burden to show that the CI might be able to give testimony necessary to a fair determination of his guilt or innocence on manufacturing methamphetamine and did not trigger the procedural requirements of Tex. R. Evid. 508(c)(2) requiring the State to disclose the identity of the CI. Long v. State, 137 S.W.3d 726, 2004 Tex. App. LEXIS 3940 (Tex. App. Waco 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

4. Trial court did not abuse discretion in denying a defendant's motion to disclose the identity of a confidential informant, pursuant to Tex. R. Evid. 508(c), where defendant did not satisfy his burden to show that informant's testimony was necessary to a fair determination of guilt or innocence of violating Tex. Health & Safety Code Ann. § 481.112(d); the informant was not present during raid of defendant's home during which cocaine was found. Herrera v. State, 2006 Tex. App. LEXIS 1353 (Tex. App. Austin Feb. 16 2006).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview

5. In a juvenile defendant's challenge to his adjudication as a delinquent upon a finding that he violated his community supervision conditions by possessing marijuana within 1,000 feet of property owned by a school, the trial court did not abuse its discretion in not ordering the State to divulge the name of the confidential informant who implicated defendant as defendant did not demonstrate that the informant would have been able to give any testimony necessary to a fair determination of defendant's guilt or innocence; the informant provided information to the investigating officer that was proven to be accurate and reliable in this case, and the informant was not present at the scene at the time of the search. In re J.M.A.B., 2006 Tex. App. LEXIS 10341 (Tex. App. Eastland Nov. 30 2006).

Criminal Law & Procedure : Search & Seizure : Search Warrants : Affirmations & Oaths : General Overview

6. Where confidential informant (CI) only supplied information which established probable cause necessary for the issuance of a search warrant for methamphetamine and the CI did not supply the information upon which the State relied for a conviction on manufacturing methamphetamine, but rather the detective supplied that particular information, the testimony elicited at the hearing did not satisfy defendant's initial burden to show that the CI might be able to give testimony necessary to a fair determination of his guilt or innocence on manufacturing methamphetamine and did not trigger the procedural requirements of Tex. R. Evid. 508(c)(2) requiring the State to disclose the identity of the CI. Long v. State, 137 S.W.3d 726, 2004 Tex. App. LEXIS 3940 (Tex. App. Waco 2004).

Criminal Law & Procedure : Search & Seizure : Search Warrants : Confidential Informants : General Overview

7. While the information of a confidential informant formed the probable cause basis for the search warrant, but the informant was not present when the warrant was executed, the informant's testimony might have been relevant to the issue of probable cause, but not to the actual offense. The defendant did not show that the testimony would significantly aid in the determination of guilt or innocence, and the trial court did not abuse its discretion by denying defendant's motion to compel disclosure of the confidential informant. Parks v. State, 2006 Tex. App. LEXIS 2112 (Tex. App. Fort Worth Mar. 16 2006).

8. Court did not err by failing to order the State to reveal the identity of a confidential informant where defendant sought the informant's identity to explore the justification for the "no knock" search warrant, and that was not a material issue relating to a fair determination of an issue of guilt or innocence and thus was not the purpose for which disclosure of the informant's identity was permitted. The argument that the informant could have identified other occupants who "could have been responsible for the contraband" was nothing more than mere conjecture or supposition unsupported by any evidence. Patterson v. State, 138 S.W.3d 643, 2004 Tex. App. LEXIS 6082 (Tex. App. Dallas 2004).

9. Where confidential informant (CI) only supplied information which established probable cause necessary for the issuance of a search warrant for methamphetamine and the CI did not supply the information upon which the State relied for a conviction on manufacturing methamphetamine, but rather the detective supplied that particular information, the testimony elicited at the hearing did not satisfy defendant's initial burden to show that the CI might

be able to give testimony necessary to a fair determination of his guilt or innocence on manufacturing methamphetamine and did not trigger the procedural requirements of Tex. R. Evid. 508(c)(2) requiring the State to disclose the identity of the CI. Long v. State, 137 S.W.3d 726, 2004 Tex. App. LEXIS 3940 (Tex. App. Waco 2004).

10. Because the trial court properly ruled that the State was not required to disclose the identity of the confidential informant (CI) pursuant to Tex. R. Evid. 508, defendant's trial counsel was not ineffective for failing to subpoena the CI because trial counsel did not know the identity of the CI. Long v. State, 137 S.W.3d 726, 2004 Tex. App. LEXIS 3940 (Tex. App. Waco 2004).

Criminal Law & Procedure : Search & Seizure : Search Warrants : Confidential Informants : Identity of Informant

11. Denial of defendant's motion for disclosure of the confidential informant's identity was not outside of the zone of reasonable disagreement because the confidential informant was not an eyewitness to the offense for which defendant was charged. The informant made a controlled buy at some point within forty-eight hours before the execution of the search warrant but defendant was not charged with any alleged criminal activity that occurred during the controlled buy. Phillips v. State, 2013 Tex. App. LEXIS 8741 (Tex. App. Houston 1st Dist. July 16 2013).

12. Trial court did to err by failing to order the disclosure of a confidential informant's identity or by failing to conduct an in camera hearing because defendant failed to met the threshold burden of showing that the informant's testimony was necessary to a fair determination of guilt or innocence, as the informant's information was not used to establish defendant's identity or his connection to the home and there was no evidence that the informant participated in the charged offenses. Haggerty v. State, 429 S.W.3d 1, 2013 Tex. App. LEXIS 8465 (Tex. App. Houston 14th Dist. July 11 2013).

13. Where the failure of a search warrant affidavit to establish a first informant's reliability or credibility did not affect the legality of the search warrant, a trial court committed no error in refusing to direct the disclosure of the first confidential informant's identity under Tex. R. Evid. 508(c)(3); a second confidential informant had supplied the same information to the police, i.e., that defendant was selling crack cocaine. Jones v. State, 338 S.W.3d 725, 2011 Tex. App. LEXIS 2924 (Tex. App. Houston 1st Dist. Apr. 14 2011).

14. Trial court did not err by refusing to identify the first confidential informant under Tex. R. Evid. 508(c)(3) because the second confidential informant provided the same information to the police, namely that defendant was selling crack cocaine. Jones v. State, 2011 Tex. App. LEXIS 820 (Tex. App. Houston 1st Dist. Jan. 31 2011).

15. Appellant failed to preserve error as to whether he was entitled to either the disclosure of a confidential informant's identity under Tex. R. Evid. 508 or an in camera examination of the informant, given that (1) appellant never asked that the trial court direct the State to disclose the informant's identify, and (2) at trial, appellant argued that he was entitled to ask an officer certain questions about the informant to determine if the person was credible and reliable; appellant's claims at trial did not comport with his claims on appeal. Butler v. State, 2010 Tex. App. LEXIS 9825, 2010 WL 5132557 (Tex. App. Houston 14th Dist. Dec. 14 2010).

16. Tex. R. Evid. 508(c)(3) applied, as the informant participated in the transactions that resulted in probable cause to search appellant's residence. Butler v. State, 2010 Tex. App. LEXIS 9825, 2010 WL 5132557 (Tex. App. Houston 14th Dist. Dec. 14 2010).

17. Trial court's rulings reflected the finding that the trial court judge was satisfied that the information upon which the warrant was based was received from an informant reasonably believed to be credible or reliable for purposes of Tex. R. Evid. 508; appellant pointed to no evidence to the contrary and he failed to show that the trial court

abused its discretion in denying his motion to suppress. Butler v. State, 2010 Tex. App. LEXIS 9825, 2010 WL 5132557 (Tex. App. Houston 14th Dist. Dec. 14 2010).

18. Trial court did not abuse its discretion by refusing to grant defendant's motion to disclose the identity of a confidential informant because the informant was neither a participant nor a material witness to the commission of the charged offense, as the indicted offense occurred 24 hours after the informant's second drug purchase when the police executed the search warrant at the apartment, and the charges were based on the drug evidence found during the search. Pierce v. State, 2010 Tex. App. LEXIS 8825, 2010 WL 4352710 (Tex. App. Dallas Nov. 4 2010).

19. Defendant failed to show that the trial court erred by refusing to grant his motion to disclose the identity of a confidential informant, because the informant's testimony related only to the officer's formation of whether probable cause could have existed during the investigation of whether defendant was selling narcotics, and the evidence did not establish that the informant's testimony would have significantly aided the jury in determining defendant's guilt or innocence; the evidence upon which defendant's conviction was based was gained from a search of his person and not from the testimony or presence of an informant at the scene. Sanchez v. State, 2010 Tex. App. LEXIS 3429, 2010 WL 1840238 (Tex. App. Houston 1st Dist. May 6 2010).

20. In defendant's drug case, the identity informants was not material to the case and the testimony was not necessary to aid the jury because defendant was not charged in the instant case with the murder that the informants provided information on. The informants were not involved in the execution of the search warrant; they only provided names for the detective to investigate. Padilla v. State, 2010 Tex. App. LEXIS 674, 2010 WL 337673 (Tex. App. El Paso Jan. 29 2010).

21. Court properly denied defendant's motion to disclose the identity of a confidential informant because the informant's testimony that the cocaine sold to the informant came from the kitchen cabinet would not have absolved defendant from criminal responsibility for the cocaine in the cabinet. Defendant had access to the apartment as shown by his possession of a key to the apartment and his entry into the apartment with the key, and he also had a receipt for payment of rent on the apartment. Granville v. State, 2009 Tex. App. LEXIS 650, 2009 WL 225390 (Tex. App. Dallas Feb. 2 2009).

22. For purposes of Tex. R. Evid. 508, the trial court did not err in denying defendant's motion to disclose a confidential informant because the informant was not a fact witness, but merely provided probable cause for the issuance of the search warrant; the informant was not present when the search warrant was executed, whether defendant possessed or sold drugs to the informant at other times had no bearing upon whether he possessed cocaine with intent to deliver at the time of the search, and defendant did not show that the informant was a material witness or that the informant's testimony was needed to determine guilt or innocence. Gipson v. State, 2007 Tex. App. LEXIS 3919 (Tex. App. Dallas May 22 2007).

23. Defendant was charged with a separate offense while he was outside the house; the person described in the search warrant affidavit as being in control of the house did not match defendant's description. Furthermore, there was no indication that the confidential informant was present when defendant committed the offense; thus, defendant did not demonstrate that the informant's testimony was necessary to a fair determination of guilt or innocence, and the trial court properly overruled defendant's motion to disclose the informant's identity and refused to hold an in camera hearing. Williams v. State, 2007 Tex. App. LEXIS 3588 (Tex. App. El Paso May 10 2007).

24. Although the trial court might not have articulated the proper standard in refusing to order the disclosure of an informant for purposes of Tex. R. Evid. 508(a), the court agreed that disclosure was not required; the officer testified to the informant's reliability and the court was unable to say that the informant's testimony would have been necessary or the trial court's decision was unreasonable, and the trial court was entitled to believe the officer, such

that the trial court's order was not an abuse of discretion. Nash v. State, 2006 Tex. App. LEXIS 8144 (Tex. App. Waco Sept. 13 2006).

25. Trial court did not err in refusing to allow defense counsel to question an investigator as to when drug buys at defendant's home occurred because the timing would reveal the identity of the confidential informant, contrary to Tex. R. Evid. 508, and the identity was not necessary to a determination of guilt because defendant had pleaded guilty. Further, this issue was not preserved for review because counsel moved on without objection. Rios v. State, 2014 Tex. App. LEXIS 5627 (Tex. App. Amarillo May 23 2014).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Informants : General Overview

26. Trial court did not err by refusing to allow defendant to cross-examine an officer about the reliability and identity of the confidential informant because defendant did not carry his burden under Tex. R. Evid. 508 to show that the informant was a material witness or that the informant's testimony was necessary to fairly determine defendant's guilt or innocence; defendant was not arrested and charged with the possession offense witnessed by the informant, but rather was arrested and charged for possessing with intent to deliver the cocaine discovered during the later search of the house; there was no evidence that the informant was present when the search warrant was executed, and whether defendant possessed and sold drugs to the informant or others had no bearing on whether he possessed cocaine with the intent to deliver at the time of the search. Jenkins v. State, 2008 Tex. App. LEXIS 3266 (Tex. App. Dallas May 7 2008).

27. Because an informant was present at the drug deal and defendant's arrest, he was an eyewitness to the charged offense, thus triggering the procedural requirements of Tex. R. Evid. 508. Guijon v. State, 2007 Tex. App. LEXIS 9207 (Tex. App. Houston 14th Dist. Nov. 20 2007).

28. Court rejected defendant's claim of ineffective assistance of counsel, as counsel testified to the ramifications under Tex. R. Evid. 508 of the State's failure to disclose a confidential informant, counsel testified that he did not pursue disclosure because he already had access to the information, the court deferred to the trial court's determination, the failure to file a motion to disclose was a strategic decision, and he had no need to file a motion to disclose what he already knew, plus it was possible counsel consulted with the inmate and found that production of the informant would not have provided any favorable evidence; the inmate failed to show that counsel performed deficiently or that the inmate would not have pleaded guilty, plus speculation about what the State might have done did not show that counsel's conduct had a prejudicial effect on the outcome of the proceeding. Guijon v. State, 2007 Tex. App. LEXIS 9207 (Tex. App. Houston 14th Dist. Nov. 20 2007).

29. Because an inmate failed to show that counsel's failure to file a motion to disclose an informant's identity under Tex. R. Evid. 508 was ineffective assistance, or that the inmate's plea was involuntary, the trial court did not err in denying the inmate's application for a writ of habeas corpus on this issue. Guijon v. State, 2007 Tex. App. LEXIS 9207 (Tex. App. Houston 14th Dist. Nov. 20 2007).

30. In a drug case, defendant did not receive ineffective assistance of counsel based on counsel's failure to attempt to identify a confidential informant (CI) under Tex. R. Evid. 508 because there was nothing in the record suggesting that the trial court did not believe that the CI was reliable or credible; moreover, defense counsel argued that the issue at the suppression hearing was not guilt or innocence, but the legality of the search. McNickles v. State, 230 S.W.3d 816, 2007 Tex. App. LEXIS 5395 (Tex. App. Houston 14th Dist. 2007).

31. Defendant was charged with a separate offense while he was outside the house; the person described in the search warrant affidavit as being in control of the house did not match defendant's description. Furthermore, there

was no indication that the confidential informant was present when defendant committed the offense; thus, defendant did not demonstrate that the informant's testimony was necessary to a fair determination of guilt or innocence, and the trial court properly overruled defendant's motion to disclose the informant's identity and refused to hold an in camera hearing. Williams v. State, 2007 Tex. App. LEXIS 3588 (Tex. App. El Paso May 10 2007).

32. In a case of possession of a firearm by a felon, defendant was not entitled to disclosure of an informant's identity under Tex. R. Evid. 508(a) because it would not significantly aid him; defendant admitted that he had been convicted of a felony and that he had been carrying a firearm, and the informant's testimony would not have shown otherwise. Clark v. State, 2006 Tex. App. LEXIS 6958 (Tex. App. Dallas Aug. 7 2006).

33. While the information of a confidential informant formed the probable cause basis for the search warrant, but the informant was not present when the warrant was executed, the informant's testimony might have been relevant to the issue of probable cause, but not to the actual offense. The defendant did not show that the testimony would significantly aid in the determination of guilt or innocence, and the trial court did not abuse its discretion by denying defendant's motion to compel disclosure of the confidential informant. Parks v. State, 2006 Tex. App. LEXIS 2112 (Tex. App. Fort Worth Mar. 16 2006).

34. Where defendant pleaded guilty to possession with intent to deliver a controlled substance, he failed to show that the confidential informer induced him to commit the offense. The court properly denied his motion to compel disclosure of the informer's identity pursuant to Tex. R. Evid. 508(c), because he was unable to pursue an entrapment defense. Brice v. State, 2005 Tex. App. LEXIS 7971 (Tex. App. Corpus Christi Sept. 26 2005).

35. In a trial for possession of marijuana, the trial court properly allowed the State not to disclose the identity of an informant, despite defendant's argument that the informant could have provided information about how drugs were distributed, because the method by which narcotics were being distributed was not necessary for determining guilt for the charged offense. Defendant also did not provide supporting argument as to why information about the house where the arrest occurred was necessary for a fair determination of guilt or innocence. Olivarez v. State, 171 S.W.3d 283, 2005 Tex. App. LEXIS 4210 (Tex. App. Houston 14th Dist. 2005).

36. There was no error in denying defendant's motion for discovery of the identity of the confidential informant because defendant's argument that the informant "might have been able" to provide exculpatory information was nothing more than conjecture or supposition unsupported by any evidence; defendant failed to carry the threshold burden of making a plausible showing of how the informant's information could be important. Dickson v. State, 2005 Tex. App. LEXIS 4151 (Tex. App. Dallas May 27 2005).

37. Court concluded that assertions made by defendants implicated Tex. R. Evid. 508(c)(2); the trial court's ordering the disclosure of an informant's identity under Rule 508(c)(2) was an abuse of discretion because the evidence failed to show that the informant might have been able to provide testimony that was needed in order to determine guilt or innocence. State v. Sotelo, 164 S.W.3d 759, 2005 Tex. App. LEXIS 3664 (Tex. App. Corpus Christi 2005).

38. Trial court did not abuse its discretion in determining that disclosure of an informant's identity was not necessary where the affiant testified that he had used the informant in the past and that the informant had proven credible. Selph v. State, 2005 Tex. App. LEXIS 2854 (Tex. App. Houston 14th Dist. Apr. 14 2005).

39. Where the trial court did not abuse its discretion in not requiring disclosure of an informant's identity, an in camera hearing was not required under Tex. R. Evid. 508(c)(3) to determine the informant's identity and to preserve the trial court's determination of the informant's credibility for appellate review. Selph v. State, 2005 Tex. App.

LEXIS 2854 (Tex. App. Houston 14th Dist. Apr. 14 2005).

40. Pursuant to Tex. R. Evid. 508(c)(2), a defendant had the threshold burden to show that an informant's identity had to be disclosed and that the informant's potential testimony would significantly aid him; the trial court conducted an in camera interview with the informant in which the informant stated that he was not present during the drug transaction, such that, based upon the evidence developed during in camera review, there was not a reasonable probability that the informant could have provided testimony necessary to the determination of defendant's guilt. Cannady v. State, 2004 Tex. App. LEXIS 4584 (Tex. App. Houston 1st Dist. May 20 2004).

41. Pursuant to Tex. R. Evid. 508(c)(2), a defendant had the threshold burden to show that an informant's identity had to be disclosed and that the informant's potential testimony would significantly aid him; the trial court conducted an in camera interview with the informant in which the informant stated that he was not present during the drug transaction, such that, based upon the evidence developed during in camera review, there was not a reasonable probability that the informant could have provided testimony necessary to the determination of defendant's guilt. Cannady v. State, 2004 Tex. App. LEXIS 4584 (Tex. App. Houston 1st Dist. May 20 2004).

42. In defendant's trial for possession with intent to deliver a controlled substance, cocaine, under Tex. Health & Safety Code Ann. § 481.112(c), defense counsel's failure to pursue the identity of an informant and have it sealed for appellate review under Tex. R. Evid. 508(c)(2) did not constitute ineffective assistance because although defendant's motion to discover the informant's identity alleged that the informant was present during times concerning the transaction upon which the charges against him were based, the record did not reflect that the informant participated in the offense nor does it reflect that the informant was present when the offense was committed or at the time of arrest. Also, defendant failed to establish that the informant would have been a material witness. Charlot v. State, 1999 Tex. App. LEXIS 5736 (Tex. App. Amarillo July 30 1999).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Informants

43. Trial court did not abuse its discretion by denying defendant's motion to disclose the confidential informant's identity or by declining to conduct an in camera inspection under Tex. R. Evid. 508(c)(2) because defendant did not make a plausible showing of how the informant's testimony may have been relevant to his guilt or innocence. The evidence showed that the informant's tip was used only to establish surveillance of the vehicle and for starting an investigation of the possible possession of narcotics, and no evidence was presented that the informant was a participant in the charged offense or present when the agents conducted the search of the vehicle; the informant's information was not used to establish defendant's identity or to establish that he possessed the marijuana. Sanchez v. State, 2011 Tex. App. LEXIS 9230, 2011 WL 5844518 (Tex. App. Corpus Christi Nov. 22 2011).

44. In a prosecution of defendant for possession of a controlled substance, the trial court's determination that defendant did not show that disclosure of a confidential informant's identity was necessary to a fair determination of guilt was not outside the zone of reasonable disagreement. Therefore, the trial court did not abuse its discretion when it denied defendant's motion to compel disclosure of the informant. Johnson v. State, 2010 Tex. App. LEXIS 2062, 2010 WL 1077419 (Tex. App. Tyler Mar. 24 2010).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Informants : Privilege

45. Court did not abuse its discretion by refusing to conduct an in camera hearing to determine whether to compel the identity of the confidential informant, because there was no evidence in the record showing that the informant's testimony would significantly aid the jury in determining guilt or innocence; there was no plausible showing of how the testimony could be important, and defendant merely speculated that the informant might provide relevant information. Morin v. State, 2010 Tex. App. LEXIS 7554, 2010 WL 3582382 (Tex. App. San Antonio Sept. 15 2010).

46. Trial court did not err by denying defendant's request for disclosure of the identity of the State's confidential informant because defendant's assertion that the informant could have given testimony implicating someone else for the cocaine and marijuana found inside his place of business was based on mere conjecture. Horn v. State, 2014 Tex. App. LEXIS 5819, 2014 WL 2505587 (Tex. App. Tyler May 30 2014).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Informants : Scope

47. Trial court did not abuse its discretion by denying defendant's motion to disclose the confidential informant's identity or by declining to conduct an in camera inspection under Tex. R. Evid. 508(c)(2) because defendant did not make a plausible showing of how the informant's testimony may have been relevant to his guilt or innocence. The evidence showed that the informant's tip was used only to establish surveillance of the vehicle and for starting an investigation of the possible possession of narcotics, and no evidence was presented that the informant was a participant in the charged offense or present when the agents conducted the search of the vehicle; the informant's information was not used to establish defendant's identity or to establish that he possessed the marijuana. Sanchez v. State, 2011 Tex. App. LEXIS 9230, 2011 WL 5844518 (Tex. App. Corpus Christi Nov. 22 2011).

48. Defendant who pleaded guilty to possession of methamphetamine failed to demonstrate that the trial court should have ordered the State to reveal a confidential informant's identity pursuant to Tex. R. Evid. 508(c)(2), because defendant offered no evidence that the informant's testimony was necessary to determine any material issue, and there was no evidence that the informant participated in the offense or witnessed the offense or the arrest. Morrell v. State, 2009 Tex. App. LEXIS 2573, 2009 WL 1011114 (Tex. App. Amarillo Apr. 15 2009).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

49. Disclosure of an informant's identity was not required for purposes of a motion to suppress because the trial court implicitly found, by denying the motion to suppress without requiring disclosure, that the informant was reliable. Bland v. State, 2012 Tex. App. LEXIS 6744 (Tex. App. Houston 14th Dist. Aug. 14 2012).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

50. In a drug case, defendant did not receive ineffective assistance of counsel based on counsel's failure to attempt to identify a confidential informant (CI) under Tex. R. Evid. 508 because there was nothing in the record suggesting that the trial court did not believe that the CI was reliable or credible; moreover, defense counsel argued that the issue at the suppression hearing was not guilt or innocence, but the legality of the search. McNickles v. State, 230 S.W.3d 816, 2007 Tex. App. LEXIS 5395 (Tex. App. Houston 14th Dist. 2007).

51. Ineffective assistance of counsel claim was not supported by a failure to file a motion to disclose the identity of a confidential informant pursuant to Tex. R. Evid. 508 because trial counsel appeared to be accurate in the assessment that the defense could not meet its burden. Sanchez v. State, 243 S.W.3d 57, 2007 Tex. App. LEXIS 4264 (Tex. App. Houston 1st Dist. 2007).

52. Because the trial court properly ruled that the State was not required to disclose the identity of the confidential informant (CI) pursuant to Tex. R. Evid. 508, defendant's trial counsel was not ineffective for failing to subpoena the CI because trial counsel did not know the identity of the CI. Long v. State, 137 S.W.3d 726, 2004 Tex. App. LEXIS 3940 (Tex. App. Waco 2004).

53. In defendant's trial for possession with intent to deliver a controlled substance, cocaine, under Tex. Health & Safety Code Ann. § 481.112(c), defense counsel's failure to pursue the identity of an informant and have it sealed for appellate review under Tex. R. Evid. 508(c)(2) did not constitute ineffective assistance because although

defendant's motion to discover the informant's identity alleged that the informant was present during times concerning the transaction upon which the charges against him were based, the record did not reflect that the informant participated in the offense nor does it reflect that the informant was present when the offense was committed or at the time of arrest. Also, defendant failed to establish that the informant would have been a material witness. Charlot v. State, 1999 Tex. App. LEXIS 5736 (Tex. App. Amarillo July 30 1999).

Criminal Law & Procedure : Trials : Judicial Discretion

54. Under Tex. R. Evid. 508(c)(3), trial court did not abuse its discretion in conducting an in camera hearing regarding evidence that could have revealed the identity of a confidential informant where the State requested the in camera hearing and, even if the State did not request the hearing, the rule in question did not preclude the trial court from conducting an in camera hearing sua sponte in proper circumstances. Hackleman v. State, 919 S.W.2d 440, 1996 Tex. App. LEXIS 649 (Tex. App. Austin 1996).

Criminal Law & Procedure : Witnesses : Presentation

55. Under Tex. R. Evid. 508(c)(3), trial court did not abuse its discretion in conducting an in camera hearing regarding evidence that could have revealed the identity of a confidential informant where the State requested the in camera hearing and, even if the State did not request the hearing, the rule in question did not preclude the trial court from conducting an in camera hearing sua sponte in proper circumstances. Hackleman v. State, 919 S.W.2d 440, 1996 Tex. App. LEXIS 649 (Tex. App. Austin 1996).

Criminal Law & Procedure : Defenses : Entrapment

56. Exception to the State's informer privilege under Tex. R. Evid. 508 was not established because an alleged informant did not witness a traffic stop or search where drugs were found; moreover, the entrapment defense was not shown where the alleged informant merely made repeated phone calls to defendant about buying drugs. Avalos v. State, 2008 Tex. App. LEXIS 3539 (Tex. App. Houston 14th Dist. May 15 2008).

57. Where defendant pleaded guilty to possession with intent to deliver a controlled substance, he failed to show that the confidential informer induced him to commit the offense. The court properly denied his motion to compel disclosure of the informer's identity pursuant to Tex. R. Evid. 508(c), because he was unable to pursue an entrapment defense. Brice v. State, 2005 Tex. App. LEXIS 7971 (Tex. App. Corpus Christi Sept. 26 2005).

Criminal Law & Procedure : Appeals : Standards of Review : General Overview

58. Considering all of the circumstances of the case, the trial court's denial of defendant's motion to reveal the informant was proper and not an abuse of discretion as the record showed that: (1) the trial court ruled that defendant had made a plausible showing of need for the informant's identity; (2) the State invoked the privilege not to disclose pursuant to Tex. R. Evid. 508; and (3) the State asked to present affidavits for in camera examination by the trial court to refute defendant's showing of need. The record showed that the affidavits were presented to the trial court prior to its final ruling, and defendant's silence acted as acquiescence to the State's request to have the affidavit included in the record and the trial court's granting of said request. Johnson v. State, 2010 Tex. App. LEXIS 5807, 2010 WL 2853598 (Tex. App. Amarillo July 21 2010).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

59. Under Tex. R. Evid. 508(c)(3), trial court did not abuse its discretion in conducting an in camera hearing regarding evidence that could have revealed the identity of a confidential informant where the State requested the in camera hearing and, even if the State did not request the hearing, the rule in question did not preclude the trial

court from conducting an in camera hearing sua sponte in proper circumstances. Hackleman v. State, 919 S.W.2d 440, 1996 Tex. App. LEXIS 649 (Tex. App. Austin 1996).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

60. Trial court did not abuse its discretion by denying defendant's motions to discover the identity of the State's confidential informant under Tex. R. Evid. 508(c)(2) because while it was possible that the informant could have testified that defendant was not the person who sold the informant drugs, the testimony would likely not have significantly aided defendant because his guilt for the two crimes, possessing cocaine while intending to deliver it and unlawful possession of a firearm, were not dependent upon his being the seller or on his participation in any of the drug purchases made by the informant. Harris v. State, 2012 Tex. App. LEXIS 732, 2012 WL 254086 (Tex. App. Fort Worth Jan. 26 2012).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Witnesses

61. Trial court did not err by refusing to allow defendant to cross-examine an officer about the reliability and identity of the confidential informant because defendant did not carry his burden under Tex. R. Evid. 508 to show that the informant was a material witness or that the informant's testimony was necessary to fairly determine defendant's guilt or innocence; defendant was not arrested and charged with the possession offense witnessed by the informant, but rather was arrested and charged for possessing with intent to deliver the cocaine discovered during the later search of the house; there was no evidence that the informant was present when the search warrant was executed, and whether defendant possessed and sold drugs to the informant or others had no bearing on whether he possessed cocaine with the intent to deliver at the time of the search. Jenkins v. State, 2008 Tex. App. LEXIS 3266 (Tex. App. Dallas May 7 2008).

Evidence : Privileges : General Overview

62. Appellant's issues did not provide him with greater relief than the court's current disposition to reverse and remand for a new trial, given that (1) harmful error from the denial of a motion to suppress required reversal and remand, (2) assuming appellant was free to have the confidential informant disclosed, the State would have had the option to disclose the informant or dismiss the charges as to which the testimony would relate, for purposes of Tex. R. Evid. 508(c)(2), and (3) as the State did not have to make an election much less chose to not disclose an informant's identity, the court did not have authority to dismiss any charges; because review of other issues would not result in greater relief than the current disposition, the court did not need to reach those issues. Farias v. State, 426 S.W.3d 198, 2012 Tex. App. LEXIS 9325 (Tex. App. Houston 1st Dist. Nov. 1 2012).

63. For purposes of Tex. R. Evid. 508, the trial court did not err in denying defendant's motion to disclose a confidential informant because the informant was not a fact witness, but merely provided probable cause for the issuance of the search warrant; the informant was not present when the search warrant was executed, whether defendant possessed or sold drugs to the informant at other times had no bearing upon whether he possessed cocaine with intent to deliver at the time of the search, and defendant did not show that the informant was a material witness or that the informant's testimony was needed to determine guilt or innocence. Gipson v. State, 2007 Tex. App. LEXIS 3919 (Tex. App. Dallas May 22 2007).

Evidence : Privileges : Government Privileges : General Overview

64. Although the record showed that the State did not timely disclose an informer's identity, the record did not show that the State invoked a privilege under Tex. R. Evid. 508 by refusing to disclose the identity, and thus the trial court erred in dismissing, under Rule 508, indictments against defendant for possession of at least 400 grams of cocaine and investing funds to further the commission of the offense of possession of at least 400 grams of a

controlled substance. State v. Sustaita, 186 S.W.3d 1, 2004 Tex. App. LEXIS 8073 (Tex. App. Houston 1st Dist. 2004).

Evidence : Privileges : Government Privileges : Official Information Privilege : Informer Privilege

65. During defendant's trial for delivery of methamphetamine, the court did not err when it ruled that it was satisfied that information was received from an informer reasonably believed to be reliable or credible; the "Legality of Obtaining Evidence" exception in Tex. R. Evid. 508(c) did not apply because an officer testified that he had used the informant in the past and the information had proven to be true. Rust v. State, 2014 Tex. App. LEXIS 8532 (Tex. App. Tyler Aug. 6 2014).

66. Defendant did not testify personally, nor did he submit evidence suggesting that the drugs he possessed were not his, that the informant could know to whom the drugs actually belonged, or that defendant was an unwilling participant in the transaction with the officer; defendant did not make a plausible showing the informant could give necessary testimony. Thomas v. State, 417 S.W.3d 89, 2013 Tex. App. LEXIS 13614, 2013 WL 6019528 (Tex. App. Amarillo Nov. 4 2013).

67. When the State voluntarily discloses a confidential informant's identity for the first time at trial, the defendant must either object or request a continuance in order to preserve a rule violation for appellate review; because defendant did neither in this case, this claim was waived. Perez v. State, 414 S.W.3d 784, 2013 Tex. App. LEXIS 10588 (Tex. App. Houston 1st Dist. Aug. 22 2013).

68. Trial court found that the informant was reliable and credible, that the informant was not present when the search warrant was executed, the informant did not see anybody else at the residence, and the informant's testimony would not be helpful; the trial court did not err in denying defendant's request for disclosure of the informant's identity. Brock v. State, 2013 Tex. App. LEXIS 10649 (Tex. App. Eastland Aug. 22 2013).

69. Although defendant, who claimed that his right of confrontation was violated when a witness was allowed to testify using a pseudonym, contended his trial counsel rendered ineffective assistance because trial counsel did not request a dismissal of the charges under Tex. R. Evid. 508, the trial court would not have been compelled to dismiss the charges had trial counsel requested it. Defendant made no showing that he was harmed in any way by the trial court's refusal to require the State to reveal the witness's name. Smith v. State, 392 S.W.3d 190, 2012 Tex. App. LEXIS 9716, 2012 WL 5986460 (Tex. App. San Antonio Nov. 28 2012).

70. Where defendant was convicted of possession of methamphetamine after a confidential informant told police that a man driving a vehicle matching the description of defendant's vehicle would be carrying a half-pound of methamphetamine, the trial court did not abuse its discretion in denying his motion to compel disclosure of the informant's identity in light of the qualified privilege set forth in Tex. R. Evid. 508. Defendant failed to make a plausible showing that the informant could give testimony necessary to a fair determination of his guilt or innocence. Aumock v. State, 2012 Tex. App. LEXIS 1011, 2012 WL 390818 (Tex. App. El Paso Feb. 8 2012).

71. Trial court did not abuse its discretion by denying defendant's motions to discover the identity of the State's confidential informant under Tex. R. Evid. 508(c)(2) because while it was possible that the informant could have testified that defendant was not the person who sold the informant drugs, the testimony would likely not have significantly aided defendant because his guilt for the two crimes, possessing cocaine while intending to deliver it and unlawful possession of a firearm, were not dependent upon his being the seller or on his participation in any of the drug purchases made by the informant. Harris v. State, 2012 Tex. App. LEXIS 732, 2012 WL 254086 (Tex. App. Fort Worth Jan. 26 2012).

72. Because the informant was not present when officers executed a warrant and found contraband, the informant would not have been expected to be able to provide testimony on guilt or innocence, for purposes of Tex. R. Evid. 508(c)(2), and thus the court's focus was under Rule 508(c)(3). Camp v. State, 2011 Tex. App. LEXIS 10060, 2011 WL 6774042 (Tex. App. Texarkana Dec. 22 2011).

73. Appellant did not show that the Tex. R. Evid. 508(c)(2) exception applied, given that (1) the conclusion that the informant would be necessary in determining appellant's innocence or guilt was not based on any evidence presented, (2) there was no indication that the informant participated in the offense or was shown to be a material witness, and (3) the basis of the charge against appellant was the cocaine seized during a search, not the information the informant related. Camp v. State, 2011 Tex. App. LEXIS 10060, 2011 WL 6774042 (Tex. App. Texarkana Dec. 22 2011).

74. Defense counsel argued that it was not known whether the informant was credible, but the issue was not whether the parties or the trial court might now believe or disbelieve the informant, but whether the trial court found the informant was reasonably believed to be credible when the search warrant was applied for. Camp v. State, 2011 Tex. App. LEXIS 10060, 2011 WL 6774042 (Tex. App. Texarkana Dec. 22 2011).

75. Defense counsel said there were many discrepancies in what the affiant said versus what was found, but the issue was whether the trial court was satisfied that the informant was reasonably found to be reliable when the warrant was applied for; the affiant averred belief that the informant's information was reliable given past dealings and the basis for this belief was cited, and thus appellant's claim questioning the informant's reliability was based only on speculation. Camp v. State, 2011 Tex. App. LEXIS 10060, 2011 WL 6774042 (Tex. App. Texarkana Dec. 22 2011).

76. Because appellant did not challenge the issuance of the warrant or argue that the affidavit did not show probable cause, she failed to develop evidence to subvert the finding that the informant was reasonably believed, and thus the exception under Tex. R. Evid. 508(c)(3) had not been triggered; with nothing indicating that the officer, when making out the affidavit, did not believe the informant to be reliable, even a direct challenge to the warrant would not have required a disclosure of the informant's identity, and nothing undermined the trial court's apparent finding of the reliability of the informant. Camp v. State, 2011 Tex. App. LEXIS 10060, 2011 WL 6774042 (Tex. App. Texarkana Dec. 22 2011).

77. Tex. R. Evid. 508(c)(3) exception involves where the informant's information is relied on to justify getting the evidence, that is, issuing the search warrant. Camp v. State, 2011 Tex. App. LEXIS 10060, 2011 WL 6774042 (Tex. App. Texarkana Dec. 22 2011).

78. Appellant did not raise any potential defenses except that the confidential informer might have had information about whether appellant was involved in the delivery of the substances, but even if both informants testified that appellant was not involved in the delivery or possession on the day of the controlled buys, that did not mean that he did not possess with intent to deliver on another day; the trial court did not err in refusing to hold an in camera hearing on the identify of the informants under Tex. R. Evid. 508, and even if the trial court did err, there was no harm because the jury convicted appellant of the lesser-included offense of possession. Griffin v. State, 2011 Tex. App. LEXIS 1594, 2011 WL 754349 (Tex. App. Fort Worth Mar. 3 2011).

79. Trial court did not abuse its discretion by refusing to grant defendant's motion to disclose the identity of a confidential informant because the informant was neither a participant nor a material witness to the commission of the charged offense, as the indicted offense occurred 24 hours after the informant's second drug purchase when the police executed the search warrant at the apartment, and the charges were based on the drug evidence found

during the search. Pierce v. State, 2010 Tex. App. LEXIS 8825, 2010 WL 4352710 (Tex. App. Dallas Nov. 4 2010).

80. Considering all of the circumstances of the case, the trial court's denial of defendant's motion to reveal the informant was proper and not an abuse of discretion as the record showed that: (1) the trial court ruled that defendant had made a plausible showing of need for the informant's identity; (2) the State invoked the privilege not to disclose pursuant to Tex. R. Evid. 508; and (3) the State asked to present affidavits for in camera examination by the trial court to refute defendant's showing of need. The record showed that the affidavits were presented to the trial court prior to its final ruling, and defendant's silence acted as acquiescence to the State's request to have the affidavit included in the record and the trial court's granting of said request. Johnson v. State, 2010 Tex. App. LEXIS 5807, 2010 WL 2853598 (Tex. App. Amarillo July 21 2010).

81. There was no abuse of discretion in refusing to require the State to disclose the identity of its confidential informant, because the record did not reflect that the informant was present when defendant was arrested, nor did it show that the informant participated in the offense for which defendant was arrested. Richie v. State, 2010 Tex. App. LEXIS 1772, 2010 WL 878729 (Tex. App. Corpus Christi Mar. 11 2010).

82. Defendant who pleaded guilty to possession of methamphetamine failed to demonstrate that the trial court should have ordered the State to reveal a confidential informant's identity pursuant to Tex. R. Evid. 508(c)(2), because defendant offered no evidence that the informant's testimony was necessary to determine any material issue, and there was no evidence that the informant participated in the offense or witnessed the offense or the arrest. Morrell v. State, 2009 Tex. App. LEXIS 2573, 2009 WL 1011114 (Tex. App. Amarillo Apr. 15 2009).

83. Court properly denied defendant's motion to disclose the identity of a confidential informant because the informant's testimony that the cocaine sold to the informant came from the kitchen cabinet would not have absolved defendant from criminal responsibility for the cocaine in the cabinet. Defendant had access to the apartment as shown by his possession of a key to the apartment and his entry into the apartment with the key, and he also had a receipt for payment of rent on the apartment. Granville v. State, 2009 Tex. App. LEXIS 650, 2009 WL 225390 (Tex. App. Dallas Feb. 2 2009).

84. Where a confidential informant (CI) led police to defendant who was driving a car with an expired registration, the police conducted a traffic stop and saw one kilo of cocaine in plain view; defendant failed to show that disclosure of the CI's identity under Tex. R. Evid. 508(c)(2) was necessary to a fair determination of his guilt of the offense of possession with intent to deliver cocaine. The trial court did not err in overruling his motion to disclose the informant's identity, because the CI was not at the scene and there was never an actual hand-to-hand delivery made. Reed v. State, 2008 Tex. App. LEXIS 9823 (Tex. App. Houston 1st Dist. Dec. 4 2008).

85. Exception to the State's informer privilege under Tex. R. Evid. 508 was not established because an alleged informant did not witness a traffic stop or search where drugs were found; moreover, the entrapment defense was not shown where the alleged informant merely made repeated phone calls to defendant about buying drugs. Avalos v. State, 2008 Tex. App. LEXIS 3539 (Tex. App. Houston 14th Dist. May 15 2008).

86. In a drug case, an affidavit offered by defendant in support of his request for the identity of an alleged informant was not deficient because it was a statement in writing, signed by defendant, sworn before a deputy district clerk, and certified by the deputy district clerk under a county seal. Avalos v. State, 2008 Tex. App. LEXIS 3539 (Tex. App. Houston 14th Dist. May 15 2008).

87. Informant could offer no testimony about the actual offense and there was no evidence that the informant participated in the offense for which defendant was charged, nor was there evidence that the informant was an eyewitness to the search, for purposes of Tex. R. Evid. 508; the informant's testimony would only have been

relevant to the issue of probable cause, thus making it unnecessary for the identity of the informant to be disclosed, and thus the trial court did not abuse its discretion in refusing to hold an in-camera hearing or to disclose the identity of the informant. Johnson v. State, 2008 Tex. App. LEXIS 3494 (Tex. App. Waco May 14 2008).

88. In a juvenile defendant's challenge to his adjudication as a delinquent upon a finding that he violated his community supervision conditions by possessing marijuana within 1,000 feet of property owned by a school, the trial court did not abuse its discretion in not ordering the State to divulge the name of the confidential informant who implicated defendant as defendant did not demonstrate that the informant would have been able to give any testimony necessary to a fair determination of defendant's guilt or innocence; the informant provided information to the investigating officer that was proven to be accurate and reliable in this case, and the informant was not present at the scene at the time of the search. In re J.M.A.B., 2006 Tex. App. LEXIS 10341 (Tex. App. Eastland Nov. 30 2006).

89. Trial court did not err in refusing to allow defense counsel to question an investigator as to when drug buys at defendant's home occurred because the timing would reveal the identity of the confidential informant, contrary to Tex. R. Evid. 508, and the identity was not necessary to a determination of guilt because defendant had pleaded guilty. Further, this issue was not preserved for review because counsel moved on without objection. Rios v. State, 2014 Tex. App. LEXIS 5627 (Tex. App. Amarillo May 23 2014).

Evidence : Privileges : Government Privileges : Waiver

90. During defendant's trial for delivery of methamphetamine, the court did not err when it ruled that it was satisfied that information was received from an informer reasonably believed to be reliable or credible; the "Legality of Obtaining Evidence" exception in Tex. R. Evid. 508(c) did not apply because an officer testified that he had used the informant in the past and the information had proven to be true. Rust v. State, 2014 Tex. App. LEXIS 8532 (Tex. App. Tyler Aug. 6 2014).

Evidence : Relevance : Sex Offenses : Rape Shield Laws

91. In finding that the rape shield statute, Tex. R. Evid. 412, requires an adversarial hearing, the reviewing court rejected the State's argument, based on Tex. R. Evid. 508, that including the parties required explicit direction in the Texas rules; the procedure in Tex. R. Evid. 508 was referred to as "disclosure," while the in camera procedure in Tex. R. Evid. 412 was referred to as a "hearing," and hearings were ordinarily adversarial. LaPointe v. State, 225 S.W.3d 513, 2007 Tex. Crim. App. LEXIS 505 (Tex. Crim. App. 2007), *cert. denied*, 552 U.S. 1015, 128 S. Ct. 544, 169 L. Ed. 2d 381 (2007).

Governments : Courts : Clerks of Court

92. In a drug case, an affidavit offered by defendant in support of his request for the identity of an alleged informant was not deficient because it was a statement in writing, signed by defendant, sworn before a deputy district clerk, and certified by the deputy district clerk under a county seal. Avalos v. State, 2008 Tex. App. LEXIS 3539 (Tex. App. Houston 14th Dist. May 15 2008).

Tex. Evid. R. 509

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 509 Physician-Patient Privilege

(a) ***Definitions.***--In this rule:

(1)A "patient" is a person who consults or is seen by a physician for medical care.

(2)A "physician" is a person licensed, or who the patient reasonably believes is licensed, to practice medicine in any state or nation.

(3)A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A)present to further the patient's interest in the consultation, examination, or interview;

(B)reasonably necessary to transmit the communication; or

(C)participating in the diagnosis and treatment under the physician's direction, including members of the patient's family.

(b) ***Limited Privilege in a Criminal Case.***--There is no physician-patient privilege in a criminal case. But a confidential communication is not admissible in a criminal case if made:

(1)to a person involved in the treatment of or examination for alcohol or drug abuse; and

(2)by a person being treated voluntarily or being examined for admission to treatment for alcohol or drug abuse.

(c) ***General Rule in a Civil Case.***--In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(1)a confidential communication between a physician and the patient that relates to or was made in connection with any professional services the physician rendered the patient; and

(2)a record of the patient's identity, diagnosis, evaluation, or treatment created or maintained by a physician.

(d) ***Who May Claim in a Civil Case.***--The privilege may be claimed by:

(1)the patient; or

(2)the patient's representative on the patient's behalf.

The physician may claim the privilege on the patient's behalf - and is presumed to have authority to do so.

(e) ***Exceptions in a Civil Case.***--This privilege does not apply:

(1) ***Proceeding Against Physician.***--If the communication or record is relevant to a claim or defense in:

(A)a proceeding the patient brings against a physician; or

(B)a license revocation proceeding in which the patient is a complaining witness.

(2) ***Consent.***--If the patient or a person authorized to act on the patient's behalf consents in writing to the release of any privileged information, as provided in subdivision (f).

(3) ***Action to Collect.***--In an action to collect a claim for medical services rendered to the patient.

(4) ***Party Relies on Patient's Condition.***--If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(5) ***Disciplinary Investigation or Proceeding.***--In a disciplinary investigation of or proceeding against a physician under the Medical Practice Act, Tex. Occ. Code § 164.001 et seq., or a registered nurse under Tex. Occ. Code § 301.451 et seq. But the board conducting the investigation or proceeding must protect the identity of any patient whose medical records are examined unless:

(A)the patient's records would be subject to disclosure under paragraph (e)(1); or

(B)the patient has consented in writing to the release of medical records, as provided in subdivision (f).

(6) ***Involuntary Civil Commitment or Similar Proceeding.***--In a proceeding for involuntary civil commitment or court-ordered treatment, or a probable cause hearing under Tex. Health & Safety Code:

(A)chapter 462 (Treatment of Persons With Chemical Dependencies);

(B)title 7, subtitle C (Texas Mental Health Code); or

(C)title 7, subtitle D (Persons With an Intellectual Disability Act).

(7) ***Abuse or Neglect of "Institution" Resident.***--In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code § 242.002.

(f) ***Consent For Release of Privileged Information.***

(1) Consent for the release of privileged information must be in writing and signed by:

(A)the patient;

(B)a parent or legal guardian if the patient is a minor;

(C)a legal guardian if the patient has been adjudicated incompetent to manage personal affairs;

(D)an attorney appointed for the patient under Tex. Health & Safety Code title 7, subtitles C and D;

(E)an attorney ad litem appointed for the patient under Tex. Estates Code title 3, subtitle C;

(F)an attorney ad litem or guardian ad litem appointed for a minor under Tex. Fam. Code chapter 107, subchapter B; or

(G)a personal representative if the patient is deceased.

(2) The consent must specify:

(A)the information or medical records covered by the release;

(B)the reasons or purposes for the release; and

(C)the person to whom the information is to be released.

(3) The patient, or other person authorized to consent, may withdraw consent to the release of any information. But a withdrawal of consent does not affect any information disclosed before the patient or authorized person gave written notice of the withdrawal.

(4) Any person who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes specified in the consent.

History

Amended by Texas Supreme Court, Misc. Docket No. 16-9094, effective June 14, 2016.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*.

Comment to 1998 change This comment is intended to inform the construction and application of this rule. Prior Criminal Rules of Evidence 509 and 510 are now in subparagraph (b) of this Rule. This rule governs disclosures of patient-physician communications only in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by Tex. Rev. Civ. Stat. Ann. art. 4495b, § 5.08. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (e)(4) of the new rule (formerly subparagraph (d)(4)), as construed in R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (e) of the new rule does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

Comment to 2015 Restyling: The physician-patient privilege in a civil case was first enacted in Texas in 1981 as part of the Medical Practice Act, formerly codified in Tex. Rev. Civ. Stat. art. 4495b. That statute provided that the privilege applied even if a patient had received a physician's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

The former rule's reference to "confidentiality or" and "administrative proceedings" in subdivision (e) [Exceptions in a Civil Case] has been deleted. First, this rule is a privilege rule only. Tex. Occ. Code § 159.004 sets forth exceptions to a physician's duty to maintain confidentiality of patient information outside court and administrative proceedings. Second, by their own terms the rules of evidence govern only proceedings in Texas courts. See Rule 101(b). To the extent the rules apply in administrative proceedings, it is because the Administrative Procedure Act mandates their applicability. Tex. Gov't Code § 2001.083 provides that "[i]n a contested case, a state agency shall give effect to the rules of privilege recognized by law." Section 2001.091 excludes privileged material from discovery in contested administrative cases.

Statutory references in the former rule that are no longer up-to-date have been revised. Finally, reconciling the provisions of Rule 509 with the parts of Tex. Occ. Code ch. 159 that address a physician-patient privilege applicable to court proceedings is beyond the scope of the restyling project.

Pre-March 1, 1998 Comment This rule only governs disclosures of patient-physician communications in judicial or administrative proceedings. Whether a physician may or must disclose such communications in other circumstances is governed by *Tex. Rev. Civ. Stat. Ann.* , art. 4495b, Sec. 5.08.

Pre-March 1, 1998 comment on subdivision (d)(4). The entire subdivision is rewritten.

Case Notes

Civil Procedure : Discovery : Privileged Matters : General Overview
Civil Procedure : Discovery : Protective Orders
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Evidence : Inferences & Presumptions : General Overview
Evidence : Privileges : Doctor-Patient Privilege
Evidence : Privileges : Doctor-Patient Privilege : General Overview
Evidence : Privileges : Doctor-Patient Privilege : Elements
Evidence : Privileges : Doctor-Patient Privilege : Exceptions
Evidence : Privileges : Doctor-Patient Privilege : Scope
Evidence : Privileges : Government Privileges : Waiver
Evidence : Privileges : Psychotherapist-Patient Privilege : General Overview
Evidence : Privileges : Psychotherapist-Patient Privilege : Exceptions
Evidence : Procedural Considerations : Burdens of Proof : General Overview
Family Law : Child Custody : Awards : Physical Custody : General Overview
Family Law : Family Protection & Welfare : Involuntary Commitment
Family Law : Guardians : General Overview
Healthcare Law : Business Administration & Organization : Patient Confidentiality : General Overview
Healthcare Law : Business Administration & Organization : Patient Confidentiality
Public Health & Welfare Law : Healthcare : Mental Health Services : Treatment
Torts : Malpractice & Professional Liability : Healthcare Providers

LexisNexis (R) Notes

Civil Procedure : Discovery : Privileged Matters : General Overview

1. In a medical negligence case arising from treatment of the patient's ankle, the patient was entitled to conditional mandamus relief from the order compelling production of medical records relating to her pregnancies in convention of the physician-patient privilege under Tex. R. Evid. 509 as the records were not relevant to the doctor's defense. In re Drews, 2012 Tex. App. LEXIS 8587, 2012 WL 4854716 (Tex. App. Texarkana Oct. 12 2012).

2. In the petitioner's suit for damages against the driver arising from their car accident, denial of the petitioner's motion to quash the driver's request for the petitioner's medical records under Tex. R. Evid. 509 was proper as the petitioner failed to present any evidence that the medical clinic possessed information not relevant to the suit. In re Cynthia Kethley, 2009 Tex. App. LEXIS 4956 (Tex. App. Tyler June 30 2009).

Civil Procedure : Discovery : Protective Orders

3. Mandamus relief was conditionally granted to a doctor in a case where a protective order was entered prohibiting ex parte contacts with a patient's non-party treating physicians after a release was signed under Tex. Civ. Prac. & Rem. Code Ann. § 74.052 because there was no privilege under Tex. R. Evid. 509, the patient and her husband failed to show the necessary harm, there was no preemption by the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.S. §§ 1320d to 1320d-8, and there was no adequate remedy at law. In re Collins, 286 S.W.3d 911, 2009 Tex. LEXIS 318, 52 Tex. Sup. Ct. J. 813 (Tex. 2009).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

4. Trial court did not err by refusing to suppress evidence of confessions defendant allegedly made during the course of substance abuse treatment because defendant was not being treated voluntarily when he was under court order. Absalon v. State, 478 S.W.3d 1, 2014 Tex. App. LEXIS 1583 (Tex. App. Corpus Christi Feb. 13 2014).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

5. Counsel was not ineffective for failing to object to the admission of statements defendant made to various mental health professionals and to the reports those professionals made to the trial court because they were not privileged under Tex. R. Evid. 509, as defendant was undergoing court-ordered counseling rather than voluntary counseling and the primary purpose of the counseling was not centered on treatment for abuse of alcohol by defendant but rather to address defendant's sexual problems. Weeks v. State, 2013 Tex. App. LEXIS 1428, 2013 WL 557015 (Tex. App. Texarkana Feb. 14 2013).

Evidence : Inferences & Presumptions : General Overview

6. Mental health history of a patient who died of internal bleeding following gall bladder surgery was not a "part" of the defense for purposes of the patient-litigant exception to the physician privilege. The defensive theory that the patient's alcohol use caused the bleeding was in the nature of an inferential rebuttal and thus was not an ultimate issue of fact that alone had legal significance. In re Nance, 143 S.W.3d 506, 2004 Tex. App. LEXIS 7318 (Tex. App. Austin 2004).

Evidence : Privileges : Doctor-Patient Privilege

7. Communications made by defendant to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder in an involuntary civil commitment proceeding do not fall within the doctor-patient privilege pursuant to Tex. R. Evid. 509(d) and Tex. R. Evid. 510(d)(4). Dudley v. State, 730 S.W.2d 51, 1987 Tex. App. LEXIS 6922 (Tex. App. Houston 14th Dist. 1987).

Evidence : Privileges : Doctor-Patient Privilege : General Overview

8. Physician-patient privilege did not preclude ordering a truck driver who had been involved in a collision to provide a medical records release authorization, absent a prima facie showing that the physician-patient privilege applied to the records, and the driver's medical certifications did not render the information irrelevant because it was possible that the driver might have had an undisclosed medical condition. In re Kristensen, 2014 Tex. App. LEXIS 8404, 2014 WL 3778903 (Tex. App. Houston 14th Dist. July 31 2014).

9. In a medical negligence case arising from treatment of the patient's ankle, the patient was entitled to conditional mandamus relief from the order compelling production of medical records relating to her pregnancies in convention of the physician-patient privilege under Tex. R. Evid. 509 as the records were not relevant to the doctor's defense. In re Drews, 2012 Tex. App. LEXIS 8587, 2012 WL 4854716 (Tex. App. Texarkana Oct. 12 2012).

10. In a proceeding to appoint a guardian, the ward failed to preserve for review his argument that a certificate of medical examination was rendered inadmissible by the fact that he did not waive physician-patient privilege in writing; the ward did not object, as required by Tex. R. App. P. 33.1, when the guardian offered the certificate. Robinson v. Willingham, 2006 Tex. App. LEXIS 2788 (Tex. App. Austin Apr. 6 2006).

11. In a medical malpractice suit, the district court judge abused his discretion by granting the estate's motion to compel production of documents protected by the privileges set forth in Tex. R. Evid. 509 and Tex. Occ. Code Ann. § 159.002; the redaction of identifying patient information from the records did not defeat the medical records privilege. In re Tenet Healthcare, Ltd., 2006 Tex. App. LEXIS 2640 (Tex. App. Tyler Mar. 31 2006).

12. Plaintiff's claim under the Federal Tort Claims Act that the Secretary of the Department of Air Force violated the physician-patient privilege under Tex. R. Evid. § 509 when he disclosed plaintiff's medical records to the Assistant United States Attorney handling plaintiff's medical malpractice case failed to state a cause of action because plaintiff waived the privilege to his medical records when he filed the medical malpractice action against the Air Force. Aldridge v. Sec'y, 2005 U.S. Dist. LEXIS 24598 (N.D. Tex. Oct. 24 2005).

13. Mandamus relief was conditionally granted against the trial court's order directing the hospital to provide the medical records of ER patients because the evidence did not show whether the medical conditions were an "ultimate" issue in the plaintiffs' negligence action against the hospital, which was the test to determine whether the records fell within the litigation exception, Tex. R. Evid. 509(e)(4) to the physician-patient privilege under Tex. R. Evid. 509. Because the plaintiffs did not argue, and nothing in the record suggested, that the other patients' conditions were a part of their claim, the trial court was required to determine whether the other patients' conditions were merely an evidentiary issue or were an ultimate issue in the action. In re Christus Health Southeast Tex., 167 S.W.3d 596, 2005 Tex. App. LEXIS 5013 (Tex. App. Beaumont 2005).

14. Trial court did not abuse its discretion in determining that defendant's statements made to a social worker in group therapy sessions were not privileged communications under Tex. R. Evid. 509(b) because he was not treated for depression and alcohol abuse. Licea v. State, 2004 Tex. App. LEXIS 9464 (Tex. App. Corpus Christi Oct. 28 2004).

15. Petition for a writ of mandamus was granted in a negligence case where a trial court denied a motion to compel and limited discovery because the information sought fell within the abuse-and-neglect exceptions to the physician-patient privilege and the mental health information privilege; the complaint alleged that a patient was injured by several falls at a nursing home, and the patient was sexually assaulted by another resident, who was receiving mental health treatment. In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

16. Abuse-and-neglect exceptions to Tex. R. Evid. 509 and Tex. R. Evid. 510 do not apply only to proceedings brought by appropriate law enforcement agencies because they apply to "any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an institution." In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

17. Tex. Health & Safety Code Ann. § 241.153, Tex. Hum. Res. Code Ann. § 102.003(j), Tex. Health & Safety Code Ann. § 242.501(a)(8), 40 Tex. Admin. Code § 19.407, Tex. Health & Safety Code Ann. § 611.002, and Tex. Occ. Code Ann. § 159.002(a) do not prevent disclosure of information that falls under the abuse-and-neglect exceptions to Tex. R. Evid. 509 and Tex. R. Evid. 510. In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

18. Tex. Occ. Code Ann. § 151.002(a)(12) defines a physician as a person licensed to practice medicine in Texas, and Tex. R. Evid. 509(a)(2) defines a physician as a person licensed to practice medicine in any state or nation, or reasonably believed by the patient so to be. In re Fort Worth Children's Hosp., 100 S.W.3d 582, 2003 Tex. App. LEXIS 1820, CCH Prod. Liab. Rep. P16545 (Tex. App. Fort Worth 2003).

19. Where relator hospital sought mandamus relief from the trial court's orders requiring it to produce (a) the names and face sheets of all infants who received the vitamin supplement E-Ferol while patients at the hospital in 1984, and (b) the names of those patients' parents, in an underlying medical malpractice action against the hospital, and the trial court appointed a guardian ad litem for nonparty patients ordering the hospital to turn over the discovery materials to the guardian ad litem, the writ of mandamus was conditionally granted because: (1) the hospital records were not privileged under Tex. Health & Safety Code Ann. § 241.152, and § 241.152(19) provided an exception for documents disclosed subject to a trial court order, (2) the hospital failed to prove that the records were created or maintained by a physician, thus, they were not subject to the physician-patient privilege under either Tex. R. Evid. 509 or Tex. Occ. Code Ann. § 159.002, and the hospital had no standing to assert the privilege on behalf of the nonparty patients, (3) the hospital records were relevant to any issue in the underlying lawsuit under Tex. R. Civ. P. 192.3(a), not just a party's physical, mental, or emotional condition because the records were not privileged, and (4) the trial court abused its discretion in appointing a guardian ad litem under Tex. R. Civ. P. 173 for the nonparty patients who were not minors where there was no evidence that any of the nonparty patients were incompetent. In re Fort Worth Children's Hosp., 100 S.W.3d 582, 2003 Tex. App. LEXIS 1820, CCH Prod. Liab. Rep. P16545 (Tex. App. Fort Worth 2003).

Evidence : Privileges : Doctor-Patient Privilege : Elements

20. Counsel was not ineffective for failing to object to the admission of statements defendant made to various mental health professionals and to the reports those professionals made to the trial court because they were not privileged under Tex. R. Evid. 509, as defendant was undergoing court-ordered counseling rather than voluntary counseling and the primary purpose of the counseling was not centered on treatment for abuse of alcohol by defendant but rather to address defendant's sexual problems. Weeks v. State, 2013 Tex. App. LEXIS 1428, 2013 WL 557015 (Tex. App. Texarkana Feb. 14 2013).

Evidence : Privileges : Doctor-Patient Privilege : Exceptions

21. Billing records for procedures unrelated to the patient's hand injury were protected by the physician-patient privilege and were not discoverable under the exceptions to that privilege raised by the neighbor; the trial court clearly abused its discretion by ordering their production in response to items 1 and 2 of the January deposition notice and items 4 through 9 of the November deposition notice. In re Jarvis, 431 S.W.3d 129, 2013 Tex. App. LEXIS 11281, 2013 WL 4759648 (Tex. App. Houston 14th Dist. Aug. 30 2013).

22. Court did not err during defendant's trial for possession of child pornography, indecency with a child, and aggravated sexual assault of a child in denying defendant's motion to suppress because records from a healing center were not privileged under Tex. R. Evid. 509(b); the records established that defendant sought treatment for sexual issues, not alcohol or drug abuse. Murray v. State, 392 S.W.3d 702, 2010 Tex. App. LEXIS 9597, 2010 WL 4924913 (Tex. App. Dallas Dec. 6 2010).

23. In the petitioner's suit for damages against the driver arising from their car accident, denial of the petitioner's motion to quash the driver's request for the petitioner's medical records under Tex. R. Evid. 509 was proper as the petitioner failed to present any evidence that the medical clinic possessed information not relevant to the suit. In re Cynthia Kethley, 2009 Tex. App. LEXIS 4956 (Tex. App. Tyler June 30 2009).

24. Information relevant to a claim for damages arising from a doctor's alleged failure to timely diagnose a patient's cancer clearly was not subject to the privilege under Tex. R. Evid. 509 where the patient had signed a release of information under Tex. Civ. Prac. & Rem. Code Ann. § 74.052. In re Collins, 286 S.W.3d 911, 2009 Tex. LEXIS 318, 52 Tex. Sup. Ct. J. 813 (Tex. 2009).

25. Tex. Civ. Prac. & Rem. Code Ann. § 74.052 does not change existing law and therefore does not prohibit a defendant from communicating ex parte with a claimant's treating physicians and health care providers; however, because Tex. Civ. Prac. & Rem. Code Ann. § 74.052 does not prohibit the issuance of a protective order to protect privileged information that is irrelevant to a health care liability claim, it must be concluded that the legislature did not intend to overrule or modify Mutter v. Wood, 744 S.W.2d 600 (Tex. 1988) or Durst v. Hill Country Mem'l Hosp., 70 S.W.3d 233 (Tex. App.-San Antonio 2001, no pet.). In re Collins, 224 S.W.3d 798, 2007 Tex. App. LEXIS 3644 (Tex. App. Tyler 2007), *mand. granted,* 286 S.W.3d 911, 2009 Tex. LEXIS 318 (Tex. 2009).

26. Trial court did not abuse its discretion by prohibiting ex parte communications with a health care liability claimant's nonparty treating physicians when the claimant had signed a statutorily required authorization for release of health information and filed a medical malpractice suit against a treating physician because the trial court's order prohibited postsuit ex parte communications between the physician and the claimant's nonparty treating physicians and thus did not prevent the physician from obtaining the claimant's health information, but only excluded ex parte communications as a means for obtaining the information; the trial court reasonably could have determined that the prohibition of ex parte communications was necessary to protect the claimant's privileged information. In re Collins, 224 S.W.3d 798, 2007 Tex. App. LEXIS 3644 (Tex. App. Tyler 2007), *mand. granted,* 286 S.W.3d 911, 2009 Tex. LEXIS 318 (Tex. 2009).

27. In a divorce case, a petition for a writ of mandamus based on an order to produce substance abuse records was granted in part because the information was to be used in best interest of the child analysis, so good cause was shown; moreover, the information was subject to disclosure under Tex. R. Evid. 509, and Tex. R. Civ. P. 192; however, records containing what a father told his caregivers or references to third parties were not subject to disclosure. In re A., 2006 Tex. App. LEXIS 11108 (Tex. App. Beaumont Dec. 28 2006).

28. In a divorce and child custody matter, the court did not err in admitting the mother's medical and mental health records because the jury was asked to determine who should be appointed managing conservator of the children and therefore, the mother's medical condition relating to her personality and bipolar disorders was relevant to the issue of whether appointing her sole managing conservator was in her children's best interests. Garza v. Garza, 217 S.W.3d 538, 2006 Tex. App. LEXIS 8746 (Tex. App. San Antonio 2006).

Evidence : Privileges : Doctor-Patient Privilege : Scope

29. During defendant's trial for possession of child pornography and sexual assault of a child, the court did not err under Tex. R. Evid. 509(b) in refusing to exclude his records from a treatment center because his treatment plan focused on his sexual issues, not drug or alcohol problems. Murray v. State, 2014 Tex. App. LEXIS 959, 2014 WL 316604 (Tex. App. Dallas Jan. 29 2014).

30. Billing records for procedures unrelated to the patient's hand injury were protected by the physician-patient privilege and were not discoverable under the exceptions to that privilege raised by the neighbor; the trial court clearly abused its discretion by ordering their production in response to items 1 and 2 of the January deposition notice and items 4 through 9 of the November deposition notice. In re Jarvis, 431 S.W.3d 129, 2013 Tex. App. LEXIS 11281, 2013 WL 4759648 (Tex. App. Houston 14th Dist. Aug. 30 2013).

31. Peer review reports of nonparties that contained the identity, diagnosis, evaluation, or treatment of a patient by a physician and were created or maintained by a physician were protected by disclosure from Tex. R. Evid. 509(c)(2) and Tex. Occ. Code Ann. § 159.002(b), and redaction of identifying information was not sufficient to protect the nonparties. Mandamus was therefore granted to cause a trial court to vacate its order compelling production of insurers' peer review reports for non-parties. In re Netherlands Ins. Co., 2009 Tex. App. LEXIS 2340 (Tex. App. San Antonio Apr. 8 2009).

32. Allegation that one of the minors suffered emotional shock in an automobile collision was not a sufficient basis to make his mental or emotional condition an issue on which the jury would be required to make a factual determination, and thus the minor's communications with the psychiatrist were protected by the physician-patient privilege under Tex. R. Evid. 509(c)(2). In re Toyota Motor Corp., 191 S.W.3d 498, 2006 Tex. App. LEXIS 4669 (Tex. App. Waco 2006).

Evidence : Privileges : Government Privileges : Waiver

33. Plaintiff's claim under the Federal Tort Claims Act that the Secretary of the Department of Air Force violated the physician-patient privilege under Tex. R. Evid. § 509 when he disclosed plaintiff's medical records to the Assistant United States Attorney handling plaintiff's medical malpractice case failed to state a cause of action because plaintiff waived the privilege to his medical records when he filed the medical malpractice action against the Air Force. Aldridge v. Sec'y, 2005 U.S. Dist. LEXIS 24598 (N.D. Tex. Oct. 24 2005).

34. Davis test for waiving a privilege by offensive use was not satisfied where there was no indication that the mental health records of a patient who died from internal bleeding after an operation were the only source from which defendants could obtain information about the deceased's drinking habits. In re Nance, 143 S.W.3d 506, 2004 Tex. App. LEXIS 7318 (Tex. App. Austin 2004).

Evidence : Privileges : Psychotherapist-Patient Privilege : General Overview

35. Petition for a writ of mandamus was granted in a negligence case where a trial court denied a motion to compel and limited discovery because the information sought fell within the abuse-and-neglect exceptions to the physician-patient privilege and the mental health information privilege; the complaint alleged that a patient was injured by several falls at a nursing home, and the patient was sexually assaulted by another resident, who was receiving mental health treatment. In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

36. Abuse-and-neglect exceptions to Tex. R. Evid. 509 and Tex. R. Evid. 510 do not apply only to proceedings brought by appropriate law enforcement agencies because they apply to "any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an institution." In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

37. Tex. Health & Safety Code Ann. § 241.153, Tex. Hum. Res. Code Ann. § 102.003(j), Tex. Health & Safety Code Ann. § 242.501(a)(8), 40 Tex. Admin. Code § 19.407, Tex. Health & Safety Code Ann. § 611.002, and Tex. Occ. Code Ann. § 159.002(a) do not prevent disclosure of information that falls under the abuse-and-neglect exceptions to Tex. R. Evid. 509 and Tex. R. Evid. 510. In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

Evidence : Privileges : Psychotherapist-Patient Privilege : Exceptions

38. In a personal injury case, mandamus relief was conditionally granted in favor of an injured party because there was no exception to privilege for mental health records under Tex. R. Evid. 509 and Tex. R. Evid. 510 based on the defensive assertion that injuries and mental anguish were caused by a pre-existing condition. In re Pennington, 2008 Tex. App. LEXIS 5359 (Tex. App. Fort Worth July 16 2008).

Evidence : Procedural Considerations : Burdens of Proof : General Overview

39. Mandamus relief was conditionally granted against the trial court's order directing the hospital to provide the medical records of ER patients because the evidence did not show whether the medical conditions were an "ultimate" issue in the plaintiffs' negligence action against the hospital, which was the test to determine whether the records fell within the litigation exception, Tex. R. Evid. 509(e)(4) to the physician-patient privilege under Tex. R. Evid. 509. Because the plaintiffs did not argue, and nothing in the record suggested, that the other patients' conditions were a part of their claim, the trial court was required to determine whether the other patients' conditions were merely an evidentiary issue or were an ultimate issue in the action. In re Christus Health Southeast Tex., 167 S.W.3d 596, 2005 Tex. App. LEXIS 5013 (Tex. App. Beaumont 2005).

Family Law : Child Custody : Awards : Physical Custody : General Overview

40. In a divorce and child custody matter, the court did not err in admitting the mother's medical and mental health records because the jury was asked to determine who should be appointed managing conservator of the children and therefore, the mother's medical condition relating to her personality and bipolar disorders was relevant to the issue of whether appointing her sole managing conservator was in her children's best interests. Garza v. Garza, 217 S.W.3d 538, 2006 Tex. App. LEXIS 8746 (Tex. App. San Antonio 2006).

Family Law : Family Protection & Welfare : Involuntary Commitment

41. Communications made by defendant to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder in an involuntary civil commitment proceeding do not fall within the doctor-patient privilege pursuant to Tex. R. Evid. 509(d) and Tex. R. Evid. 510(d)(4). Dudley v. State, 730 S.W.2d 51, 1987 Tex. App. LEXIS 6922 (Tex. App. Houston 14th Dist. 1987).

Family Law : Guardians : General Overview

42. In a proceeding to appoint a guardian, the ward failed to preserve for review his argument that a certificate of medical examination was rendered inadmissible by the fact that he did not waive physician-patient privilege in writing; the ward did not object, as required by Tex. R. App. P. 33.1, when the guardian offered the certificate. Robinson v. Willingham, 2006 Tex. App. LEXIS 2788 (Tex. App. Austin Apr. 6 2006).

Healthcare Law : Business Administration & Organization : Patient Confidentiality : General Overview

43. Peer review reports of nonparties that contained the identity, diagnosis, evaluation, or treatment of a patient by a physician and were created or maintained by a physician were protected by disclosure from Tex. R. Evid. 509(c)(2) and Tex. Occ. Code Ann. § 159.002(b), and redaction of identifying information was not sufficient to protect the nonparties. Mandamus was therefore granted to cause a trial court to vacate its order compelling production of insurers' peer review reports for non-parties. In re Netherlands Ins. Co., 2009 Tex. App. LEXIS 2340 (Tex. App. San Antonio Apr. 8 2009).

Healthcare Law : Business Administration & Organization : Patient Confidentiality

44. Mandamus relief was conditionally granted to a doctor in a case where a protective order was entered prohibiting ex parte contacts with a patient's non-party treating physicians after a release was signed under Tex. Civ. Prac. & Rem. Code Ann. § 74.052 because there was no privilege under Tex. R. Evid. 509, the patient and her husband failed to show the necessary harm, there was no preemption by the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.S. §§ 1320d to 1320d-8, and there was no adequate remedy at law. In re Collins, 286 S.W.3d 911, 2009 Tex. LEXIS 318, 52 Tex. Sup. Ct. J. 813 (Tex. 2009).

Public Health & Welfare Law : Healthcare : Mental Health Services : Treatment

45. In a divorce case, a petition for a writ of mandamus based on an order to produce substance abuse records was granted in part because the information was to be used in best interest of the child analysis, so good cause was shown; moreover, the information was subject to disclosure under Tex. R. Evid. 509, and Tex. R. Civ. P. 192; however, records containing what a father told his caregivers or references to third parties were not subject to disclosure. In re A., 2006 Tex. App. LEXIS 11108 (Tex. App. Beaumont Dec. 28 2006).

Torts : Malpractice & Professional Liability : Healthcare Providers

46. Information relevant to a claim for damages arising from a doctor's alleged failure to timely diagnose a patient's cancer clearly was not subject to the privilege under Tex. R. Evid. 509 where the patient had signed a release of information under Tex. Civ. Prac. & Rem. Code Ann. § 74.052. In re Collins, 286 S.W.3d 911, 2009 Tex. LEXIS 318, 52 Tex. Sup. Ct. J. 813 (Tex. 2009).

47. Tex. Civ. Prac. & Rem. Code Ann. § 74.052 does not change existing law and therefore does not prohibit a defendant from communicating ex parte with a claimant's treating physicians and health care providers; however, because Tex. Civ. Prac. & Rem. Code Ann. § 74.052 does not prohibit the issuance of a protective order to protect privileged information that is irrelevant to a health care liability claim, it must be concluded that the legislature did not intend to overrule or modify Mutter v. Wood, 744 S.W.2d 600 (Tex. 1988) or Durst v. Hill Country Mem'l Hosp., 70 S.W.3d 233 (Tex. App.-San Antonio 2001, no pet.). In re Collins, 224 S.W.3d 798, 2007 Tex. App. LEXIS 3644 (Tex. App. Tyler 2007), *mand. granted,* 286 S.W.3d 911, 2009 Tex. LEXIS 318 (Tex. 2009).

48. Trial court did not abuse its discretion by prohibiting ex parte communications with a health care liability claimant's nonparty treating physicians when the claimant had signed a statutorily required authorization for release of health information and filed a medical malpractice suit against a treating physician because the trial court's order prohibited postsuit ex parte communications between the physician and the claimant's nonparty treating physicians and thus did not prevent the physician from obtaining the claimant's health information, but only excluded ex parte communications as a means for obtaining the information; the trial court reasonably could have determined that the prohibition of ex parte communications was necessary to protect the claimant's privileged information. In re Collins, 224 S.W.3d 798, 2007 Tex. App. LEXIS 3644 (Tex. App. Tyler 2007), *mand. granted,* 286 S.W.3d 911, 2009 Tex. LEXIS 318 (Tex. 2009).

49. Plaintiff's claim under the Federal Tort Claims Act that the Secretary of the Department of Air Force violated the physician-patient privilege under Tex. R. Evid. § 509 when he disclosed plaintiff's medical records to the Assistant United States Attorney handling plaintiff's medical malpractice case failed to state a cause of action because plaintiff waived the privilege to his medical records when he filed the medical malpractice action against the Air Force. Aldridge v. Sec'y, 2005 U.S. Dist. LEXIS 24598 (N.D. Tex. Oct. 24 2005).

Tex. Evid. R. 510

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS RULES OF EVIDENCE > ARTICLE V. PRIVILEGES

Rule 510 Mental Health Information Privilege in Civil Cases

(a) ***Definitions.***--In this rule:

(1)A "professional" is a person:

(A)authorized to practice medicine in any state or nation;

(B)licensed or certified by the State of Texas in the diagnosis, evaluation, or treatment of any mental or emotional disorder;

(C)involved in the treatment or examination of drug abusers; or

(D)who the patient reasonably believes to be a professional under this rule.

(2)A "patient" is a person who:

(A)consults, or is interviewed by, a professional for purposes of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism and drug addiction; or

(B)is being treated voluntarily or being examined for admission to voluntary treatment for drug abuse.

(3)A "patient's representative" is:

(A)any person who has the patient's written consent;

(B)the parent of a minor patient;

(C)the guardian of a patient who has been adjudicated incompetent to manage personal affairs; or

(D)the personal representative of a deceased patient.

(4)A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A)present to further the patient's interest in the diagnosis, examination, evaluation, or treatment;

(B)reasonably necessary to transmit the communication; or

(C)participating in the diagnosis, examination, evaluation, or treatment under the professional's direction, including members of the patient's family.

(b) ***General Rule; Disclosure.***

(1) In a civil case, a patient has a privilege to refuse to disclose and to prevent any other person from disclosing:

(A)a confidential communication between the patient and a professional; and

(B)a record of the patient's identity, diagnosis, evaluation, or treatment that is created or maintained by a professional.

(2) In a civil case, any person-other than a patient's representative acting on the patient's behalf-who receives information privileged under this rule may disclose the information only to the extent consistent with the purposes for which it was obtained.

(c) ***Who May Claim.***--The privilege may be claimed by:

(1) the patient; or

(2) the patient's representative on the patient's behalf.

The professional may claim the privilege on the patient's behalf-and is presumed to have authority to do so.

(d) ***Exceptions.***--This privilege does not apply:

(1) ***Proceeding Against Professional.***--If the communication or record is relevant to a claim or defense in:

(A) a proceeding the patient brings against a professional; or

(B) a license revocation proceeding in which the patient is a complaining witness.

(2) ***Written Waiver.***--If the patient or a person authorized to act on the patient's behalf waives the privilege in writing.

(3) ***Action to Collect.***--In an action to collect a claim for mental or emotional health services rendered to the patient.

(4) ***Communication Made in Court-Ordered Examination.***--To a communication the patient made to a professional during a court-ordered examination relating to the patient's mental or emotional condition or disorder if:

(A) the patient made the communication after being informed that it would not be privileged;

(B) the communication is offered to prove an issue involving the patient's mental or emotional health; and

(C) the court imposes appropriate safeguards against unauthorized disclosure.

(5) ***Party Relies on Patient's Condition.***--If any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense and the communication or record is relevant to that condition.

(6) ***Abuse or Neglect of "Institution" Resident.***--In a proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of a resident of an "institution" as defined in Tex. Health & Safety Code § 242.002.

History

Amended by Texas Supreme Court, Misc. Docket No. 16-9094, effective June 14, 2016.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*.

Comment to 1998 change This comment is intended to inform the construction and application of this rule. This rule governs disclosures of patient-professional communications only in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by Tex. Health & Safety Code §§ 611.001 -- 611.008. Former subparagraph (d)(6) of the Civil Evidence Rules, regarding disclosures in a suit affecting the parent-child relationship, is omitted, not because there should be no exception to the privilege in suits affecting the parent-child relationship, but because the exception in such suits is properly considered under subparagraph (d)(5), as construed in R.K. v. Ramirez, 887 S.W.2d 836 (Tex. 1994). In determining the proper application of an exception in such suits, the trial court must ensure that the precise need for the information is not outweighed by legitimate privacy interests protected by the privilege. Subparagraph (d) does not except from the privilege information relating to a nonparty patient who is or may be a consulting or testifying expert in the suit.

Pre-March 1, 1998 Comment This rule only governs disclosures of patient/professional communications in judicial or administrative proceedings. Whether a professional may or must disclose such communications in other circumstances is governed by Tex. Rev. Civ. Stat. Ann. art. 5561h.

Comment to 2015 Restyling: The mental-health-information privilege in civil cases was enacted in Texas in 1979. Tex. Rev. Civ. Stat. art. 5561h (later codified at Tex. Health & Safety Code § 611.001 et seq.) provided that the privilege applied even if the patient had received the professional's services before the statute's enactment. Because more than thirty years have now passed, it is no longer necessary to burden the text of the rule with a statement regarding the privilege's retroactive application. But deleting this statement from the rule's text is not intended as a substantive change in the law.

Tex. Health & Safety Code ch. 611 addresses confidentiality rules for communications between a patient and a mental-health professional and for the professional's treatment records. Many of these provisions apply in contexts other than court proceedings. Reconciling the provisions of Rule 510 with the parts of chapter 611 that address a mental-health-information privilege applicable to court proceedings is beyond the scope of the restyling project.

Case Notes

Civil Procedure : Remedies : Damages : Compensatory Damages
Evidence : Inferences & Presumptions : General Overview
Evidence : Privileges : Doctor-Patient Privilege
Evidence : Privileges : Doctor-Patient Privilege : General Overview
Evidence : Privileges : Doctor-Patient Privilege : Exceptions
Evidence : Privileges : Psychotherapist-Patient Privilege : General Overview
Evidence : Privileges : Psychotherapist-Patient Privilege : Exceptions
Family Law : Child Custody : Awards : Physical Custody : General Overview
Family Law : Family Protection & Welfare : Involuntary Commitment
Family Law : Guardians : General Overview
Public Health & Welfare Law : Healthcare : Mental Health Services : Treatment
Real Property Law : Landlord & Tenant : Landlord's Remedies & Rights : Eviction Actions
Torts : Damages : Compensatory Damages : Pain & Suffering : Emotional & Mental Distress : Evidence

LexisNexis (R) Notes

Civil Procedure : Remedies : Damages : Compensatory Damages

1. In an action alleging breach of contract and other tort causes of action, mandamus relief was appropriate because a trial court erred by allowing the continuation of a therapist's deposition without limitation where communication between the therapist and an agent did not fall under the patient-litigant exception to Tex. R. Evid. 510. The agent did not allege a mental injury that exceeded the common emotional reaction to an injury or loss. In re Whipple, 373 S.W.3d 119, 2012 Tex. App. LEXIS 1248, 2012 WL 556313 (Tex. App. San Antonio Feb. 16 2012).

Evidence : Inferences & Presumptions : General Overview

2. Mental health history of a patient who died of internal bleeding following gall bladder surgery was not a "part" of the defense for purposes of the patient-litigant exception to the physician privilege; the defensive theory that the patient's alcohol use caused the bleeding was in the nature of an inferential rebuttal and thus was not an ultimate issue of fact that alone had legal significance. The physician-patient privilege applied, although plaintiffs' had waived their mental health information privilege claim by failing to assert it specifically in the trial court. In re Nance, 143 S.W.3d 506, 2004 Tex. App. LEXIS 7318 (Tex. App. Austin 2004).

Evidence : Privileges : Doctor-Patient Privilege

3. Communications made by a defendant to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder in an involuntary civil commitment proceeding do not fall within the doctor-patient privilege pursuant to Tex. R. Evid. 509(d) and Tex. R. Evid. 510(d)(4). Dudley v. State, 730 S.W.2d 51, 1987 Tex. App. LEXIS 6922 (Tex. App. Houston 14th Dist. 1987).

Evidence : Privileges : Doctor-Patient Privilege : General Overview

4. In a proceeding to appoint a guardian, the ward failed to preserve for review his argument that a certificate of medical examination was rendered inadmissible by the fact that he did not waive physician-patient privilege in writing; the ward did not object, as required by Tex. R. App. P. 33.1, when the guardian offered the certificate. Robinson v. Willingham, 2006 Tex. App. LEXIS 2788 (Tex. App. Austin Apr. 6 2006).

5. Petition for a writ of mandamus was granted in a negligence case where a trial court denied a motion to compel and limited discovery because the information sought fell within the abuse-and-neglect exceptions to the physician-patient privilege and the mental health information privilege; the complaint alleged that a patient was injured by several falls at a nursing home, and the patient was sexually assaulted by another resident, who was receiving mental health treatment. In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

6. Abuse-and-neglect exceptions to Tex. R. Evid. 509 and Tex. R. Evid. 510 do not apply only to proceedings brought by appropriate law enforcement agencies because they apply to "any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an institution." In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

7. Tex. Health & Safety Code Ann. § 241.153, Tex. Hum. Res. Code Ann. § 102.003(j), Tex. Health & Safety Code Ann. § 242.501(a)(8), 40 Tex. Admin. Code § 19.407, Tex. Health & Safety Code Ann. § 611.002, and Tex. Occ. Code Ann. § 159.002(a) do not prevent disclosure of information that falls under the abuse-and-neglect exceptions to Tex. R. Evid. 509 and Tex. R. Evid. 510. In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

Evidence : Privileges : Doctor-Patient Privilege : Exceptions

8. In a divorce case, a petition for a writ of mandamus based on an order to produce substance abuse records was granted in part because the information was to be used in best interest of the child analysis, so good cause was shown; moreover, the information was subject to disclosure under Tex. R. Evid. 510, and Tex. R. Civ. P. 192; however, records containing what a father told his caregivers or references to third parties were not subject to disclosure. In re A., 2006 Tex. App. LEXIS 11108 (Tex. App. Beaumont Dec. 28 2006).

9. In a divorce and child custody matter, the court did not err in admitting the mother's medical and mental health records because the jury was asked to determine who should be appointed managing conservator of the children and therefore, the mother's medical condition relating to her personality and bipolar disorders was relevant to the issue of whether appointing her sole managing conservator was in her children's best interests. Garza v. Garza, 217 S.W.3d 538, 2006 Tex. App. LEXIS 8746 (Tex. App. San Antonio 2006).

Evidence : Privileges : Psychotherapist-Patient Privilege : General Overview

10. Petition for a writ of mandamus was granted in a negligence case where a trial court denied a motion to compel and limited discovery because the information sought fell within the abuse-and-neglect exceptions to the physician-patient privilege and the mental health information privilege; the complaint alleged that a patient was injured by several falls at a nursing home, and the patient was sexually assaulted by another resident, who was receiving mental health treatment. In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

11. Abuse-and-neglect exceptions to Tex. R. Evid. 509 and Tex. R. Evid. 510 do not apply only to proceedings brought by appropriate law enforcement agencies because they apply to "any proceeding regarding the abuse or neglect, or the cause of any abuse or neglect, of the resident of an institution." In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

12. Tex. Health & Safety Code Ann. § 241.153, Tex. Hum. Res. Code Ann. § 102.003(j), Tex. Health & Safety Code Ann. § 242.501(a)(8), 40 Tex. Admin. Code § 19.407, Tex. Health & Safety Code Ann. § 611.002, and Tex. Occ. Code Ann. § 159.002(a) do not prevent disclosure of information that falls under the abuse-and-neglect exceptions to Tex. R. Evid. 509 and Tex. R. Evid. 510. In re Arriola, 159 S.W.3d 670, 2004 Tex. App. LEXIS 5038 (Tex. App. Corpus Christi 2004).

Evidence : Privileges : Psychotherapist-Patient Privilege : Exceptions

13. In an action alleging breach of contract and other tort causes of action, mandamus relief was appropriate because a trial court erred by allowing the continuation of a therapist's deposition without limitation where communication between the therapist and an agent did not fall under the patient-litigant exception to Tex. R. Evid. 510. The agent did not allege a mental injury that exceeded the common emotional reaction to an injury or loss. In re Whipple, 373 S.W.3d 119, 2012 Tex. App. LEXIS 1248, 2012 WL 556313 (Tex. App. San Antonio Feb. 16 2012).

14. Son's past mental problems were distinct from the mental anguish associated with the death of his mother from allegedly negligent treatment by medical providers. His claim for mental anguish or emotional distress did not, standing alone, make a his mental or emotional condition a part of his claim; therefore, the patient-litigation exception of Tex. R. Evid. 510(d)(5) did not apply. In re Williams, 2009 Tex. App. LEXIS 1561, 2009 WL 540961 (Tex. App. Waco Mar. 4 2009).

15. In a personal injury case, mandamus relief was conditionally granted in favor of an injured party because there was no exception to privilege for mental health records under Tex. R. Evid. 509 and Tex. R. Evid. 510 based on the

defensive assertion that injuries and mental anguish were caused by a pre-existing condition. In re Pennington, 2008 Tex. App. LEXIS 5359 (Tex. App. Fort Worth July 16 2008).

Family Law : Child Custody : Awards : Physical Custody : General Overview

16. In a divorce and child custody matter, the court did not err in admitting the mother's medical and mental health records because the jury was asked to determine who should be appointed managing conservator of the children and therefore, the mother's medical condition relating to her personality and bipolar disorders was relevant to the issue of whether appointing her sole managing conservator was in her children's best interests. Garza v. Garza, 217 S.W.3d 538, 2006 Tex. App. LEXIS 8746 (Tex. App. San Antonio 2006).

Family Law : Family Protection & Welfare : Involuntary Commitment

17. Communications made by a defendant to a professional in the course of a court-ordered examination relating to the patient's mental or emotional condition or disorder in an involuntary civil commitment proceeding do not fall within the doctor-patient privilege pursuant to Tex. R. Evid. 509(d) and Tex. R. Evid. 510(d)(4). Dudley v. State, 730 S.W.2d 51, 1987 Tex. App. LEXIS 6922 (Tex. App. Houston 14th Dist. 1987).

Family Law : Guardians : General Overview

18. In a proceeding to appoint a guardian, the ward failed to preserve for review his argument that a certificate of medical examination was rendered inadmissible by the fact that he did not waive physician-patient privilege in writing; the ward did not object, as required by Tex. R. App. P. 33.1, when the guardian offered the certificate. Robinson v. Willingham, 2006 Tex. App. LEXIS 2788 (Tex. App. Austin Apr. 6 2006).

Public Health & Welfare Law : Healthcare : Mental Health Services : Treatment

19. In a divorce case, a petition for a writ of mandamus based on an order to produce substance abuse records was granted in part because the information was to be used in best interest of the child analysis, so good cause was shown; moreover, the information was subject to disclosure under Tex. R. Evid. 510, and Tex. R. Civ. P. 192; however, records containing what a father told his caregivers or references to third parties were not subject to disclosure. In re A., 2006 Tex. App. LEXIS 11108 (Tex. App. Beaumont Dec. 28 2006).

Real Property Law : Landlord & Tenant : Landlord's Remedies & Rights : Eviction Actions

20. Trial court did not err by granting possession of the property to the bank in the forcible-detainer action because the evidence was sufficient to establish that the bank had a superior right to immediate possession of the property since the notices to the former homeowners informed them that their tenancy was being terminated and that they were required to vacate the property. Wilder v. Citicorp Trust Bank, F.S.B., 2014 Tex. App. LEXIS 2941, 2014 WL 1207979 (Tex. App. Austin Mar. 18 2014).

21. Justice and county courts had authority to adjudicate the forcible-detainer action because the landlord-tenant provision in the deed of trust created a landlord-tenant relationship between the bank and the former homeowners and provided an independent basis to award immediate possession to the bank without the need to resolve any title dispute. Wilder v. Citicorp Trust Bank, F.S.B., 2014 Tex. App. LEXIS 2941, 2014 WL 1207979 (Tex. App. Austin Mar. 18 2014).

Torts : Damages : Compensatory Damages : Pain & Suffering : Emotional & Mental Distress : Evidence

22. Son's past mental problems were distinct from the mental anguish associated with the death of his mother from allegedly negligent treatment by medical providers. His claim for mental anguish or emotional distress did not, standing alone, make a his mental or emotional condition a part of his claim; therefore, the patient-litigation exception of Tex. R. Evid. 510(d)(5) did not apply. In re Williams, 2009 Tex. App. LEXIS 1561, 2009 WL 540961 (Tex. App. Waco Mar. 4 2009).

End of Document

Tex. Evid. R. 511

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 511 Waiver by Voluntary Disclosure

(a) ***General Rule.***A person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1)the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2)the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

(b) ***Lawyer-Client Privilege and Work Product; Limitations on Waiver.***Notwithstanding paragraph (a), the following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the lawyer-client privilege or work-product protection.

(1) ***Disclosure Made in a Federal or State Proceeding or to a Federal or State Office or Agency; Scope of a Waiver.***--When the disclosure is made in a federal proceeding or state proceeding of any state or to a federal office or agency or state office or agency of any state and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(A)the waiver is intentional;

(B)the disclosed and undisclosed communications or information concern the same subject matter; and

(C)they ought in fairness to be considered together.

(2) ***Inadvertent Disclosure in State Civil Proceedings.***--When made in a Texas state proceeding, an inadvertent disclosure does not operate as a waiver if the holder followed the procedures of Rule of Civil Procedure 193.3 (d).

(3) ***Controlling Effect of a Court Order.***--A disclosure made in litigation pending before a federal court or a state court of any state that has entered an order that the privilege or protection is not waived by disclosure connected with the litigation pending before that court is also not a waiver in a Texas state proceeding.

(4) ***Controlling Effect of a Party Agreement.***--An agreement on the effect of disclosure in a state proceeding of any state is binding only on the parties to the agreement, unless it is incorporated into a court order.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*.

Comment to 2015 Restyling: The amendments to Rule 511 are designed to align Texas law with federal law on waiver of privilege by voluntary disclosure. Subsection (a) sets forth the general rule. Subsection (b) incorporates the provisions of Federal Rule of Evidence 502. Like the federal rule, subsection (b) only addresses disclosure of communications or information covered by the lawyer-client privilege or work-product protection. These amendments do not affect the law governing waiver of other privileges or protections.

Case Notes

Civil Procedure : Discovery : Privileged Matters : General Overview
Civil Procedure : Discovery : Privileged Matters : Attorney-Client Privilege
Civil Procedure : Discovery : Privileged Matters : Work Product : Waivers
Criminal Law & Procedure : Witnesses : Credibility
Evidence : Competency : Judges
Evidence : Privileges : Attorney-Client Privilege : General Overview
Evidence : Privileges : Attorney-Client Privilege : Waiver
Evidence : Privileges : Government Privileges : Waiver
Evidence : Privileges : Marital Privileges : Adverse Spousal Testimony : Waiver
Evidence : Privileges : Marital Privileges : Confidential Communications : Criminal Proceedings
Insurance Law : Motor Vehicle Insurance : Obligations : Disclosure

LexisNexis (R) Notes

Civil Procedure : Discovery : Privileged Matters : General Overview

1. In a mandamus proceeding involving a discovery dispute in a case against an insurer for violations of the insurance code, breach of contract, and breach of Stowers duty in a related personal injury case, the waiver of the attorney-client privilege by one of the insurer's insureds did not operate to waive the other insured's privilege as well, as the underlying litigation in the case was not a suit between trial counsel's two joint clients. No authority has been found to support an argument that one client may waive the attorney-client privilege on behalf of another client. In re Unitrin County Mut. Ins. Co., 2010 Tex. App. LEXIS 5797, 2010 WL 2867326 (Tex. App. Austin July 22 2010).

2. Documents were deemed confidential under the parties' protective order and the inadvertent disclosure of those documents by other persons, including a clerk of court in another state, did not render the documents public, and the manufacturer and company took sufficient action to maintain the confidentiality of the documents such that they warranted confidential treatment under the order's plain terms and mandamus relief under Tex. Gov't Code Ann. § 22.002(a) was appropriate; the court further noted that the disclosure of the documents was not voluntary for purposes of Tex. R. Evid. 511(1). In re Ford Motor Co., 211 S.W.3d 295, 2006 Tex. LEXIS 1297, 50 Tex. Sup. Ct. J. 291, CCH Prod. Liab. Rep. P17664 (Tex. 2006).

3. No matter how many people eventually saw the materials, disclosures by a third-party, whether mistaken or malevolent, do not waive the privileged nature of the information; this principle should apply with particular force when documents are entrusted to a court. In re Ford Motor Co., 211 S.W.3d 295, 2006 Tex. LEXIS 1297, 50 Tex. Sup. Ct. J. 291, CCH Prod. Liab. Rep. P17664 (Tex. 2006).

Civil Procedure : Discovery : Privileged Matters : Attorney-Client Privilege

4. In a suit brought against an insurer by an insured's judgment creditor, the insurer could not assert the attorney-client privilege of Tex. R. Evid. 503 or the work product privilege of Tex. R. Civ. P. 192 on behalf of the insured with regard to a claims file because the insured's assignment of its rights to its judgment creditor waived the attorney-client privilege under Tex. R. Evid. 511; however, the insurer's Tex. R. Civ. P. 193 privilege log established that some communications between counsel and the insurer were covered by the insurer's own attorney-client privilege. In re General Agents Ins. Co. of Am., Inc., 224 S.W.3d 806, 2007 Tex. App. LEXIS 3690 (Tex. App. Houston 14th Dist. 2007).

5. Chemical company was entitled to conditional mandamus relief when a trial court ordered the company to produce a confidential research memorandum prepared by an attorney from a law firm that had represented the company in a failed real estate transaction because the memorandum was privileged under Tex. R. Evid. 503 and the company did not waive that privilege under Tex. R. Evid. 511 through voluntary disclosure of a significant part of the memorandum in a second memorandum that counsel distributed to a third party, as the company did not voluntarily disclose any part of the memorandum; a limited partnership (LP) seeking disclosure of the memorandum argued that because the disclosed memorandum was based upon the privileged memorandum, the company waived its privilege; however, the LP failed to distinguish between using core attorney work product to prepare a document for dissemination to third parties and disclosing the privileged document itself. In re Chevron Phillips Chem. Co. LP, 2006 Tex. App. LEXIS 9186 (Tex. App. Beaumont Oct. 25 2006).

Civil Procedure : Discovery : Privileged Matters : Work Product : Waivers

6. Work-product privilege protected prosecutors from testifying in a malicious prosecution suit when they had already released the prosecution file to the real party in interest; the Supreme Court of Texas held that the district attorney's office did not waive its work-product privilege against testifying by producing the prosecution file. In re Bexar County Crim. Dist. Attorney's Office, 224 S.W.3d 182, 2007 Tex. LEXIS 431, 50 Tex. Sup. Ct. J. 733 (Tex. 2007).

Criminal Law & Procedure : Witnesses : Credibility

7. In a trial for attempted sexual assault, there was no error in excluding evidence that defendant's spouse told the pastor at church that the spouse was having an affair, evidence that defendant sought to show the spouse's motive to testify for the State; what the spouse told the pastor was covered by the privilege in Tex. R. Evid. 505, and, although there was evidence of a voluntary disclosure to defendant, defendant did not urge waiver under Tex. R. Evid. 511 either at trial or on appeal. Campbell v. State, 2008 Tex. App. LEXIS 1707 (Tex. App. Eastland Mar. 6 2008).

Evidence : Competency : Judges

8. In a bankruptcy action, the debtor could not claim that juror statements he used to support a motion to amend a judgment entered in his employment discrimination case were privileged and could not be used by bankruptcy trustee to show that jury did not intent to award future wages as damages because he disclosed them to a third party and Fed. R. Evid. 606(b) did not apply because the jurors' statements were used to determine the harms for

which the jury intended to compensate the debtor, not to determine whether the verdict was valid. Pequeno v. Schmidt (In re Pequeno), 126 Fed. Appx. 158, 2005 U.S. App. LEXIS 3721 (5th Cir. Tex. 2005).

Evidence : Privileges : Attorney-Client Privilege : General Overview

9. Trial court did not abuse its discretion in finding that defendant waived the attorney-client privilege under Tex. R. Evid. 511 when defendant asserted that the letter defendant wrote to defense counsel supported the defenses and defendant was surprised the State did not have it. Jones v. State, 181 S.W.3d 875, 2006 Tex. App. LEXIS 139 (Tex. App. Dallas 2006).

10. Because the State sought to benefit from the purported waiver under Tex. R. Evid. 511 of defendant's attorney-client privilege, the State bore the burden of going forward with evidence that supported a finding of waiver. Jones v. State, 181 S.W.3d 875, 2006 Tex. App. LEXIS 139 (Tex. App. Dallas 2006).

11. Contrary to defendant's argument, being cognizant of the full ramifications of the attorney-client privilege or knowingly and voluntarily relinquishing the protections afforded by the privilege is not the standard under which the appellate court reviews a potential waiver of an evidentiary privilege; on the contrary, such a privilege is waived by voluntary disclosure of the substantive privileged matter, under Tex. R. Evid. 511(1). Jones v. State, 181 S.W.3d 875, 2006 Tex. App. LEXIS 139 (Tex. App. Dallas 2006).

12. Motion for protection that was sought to prevent disclosure of communications between an attorney and a client that were allegedly privileged under Tex. R. Evid. 511 was improperly denied under Tex. R. Evid. 503 because there was no evidence of a voluntary disclosure or a consent to disclosure in an assignment of a "Stowers" claim against an insurer in a personal injury matter. In re Cooper, 47 S.W.3d 206, 2001 Tex. App. LEXIS 3624 (Tex. App. Beaumont 2001).

Evidence : Privileges : Attorney-Client Privilege : Waiver

13. Bankruptcy court properly ordered the Chapter 7 trustee to turn over to the police cassette tapes of conversations between appellant and the decedent attorney, a former member of the debtor firm, because appellant waived his attorney-client privilege when the tapes were sold to a third party for use in a published book; appellant executed a written waiver of attorney-client privilege with respect to the tapes, and the tapes were disclosed to a third party for the purpose of writing a book about appellant life. Appellant also clearly stated that he had no objection to the police listening to the contents of the cassette tapes, and such statement alone constituted a waiver of the attorney/client privilege. Watson v. Payne (in re Veigel), 2013 U.S. Dist. LEXIS 40865 (E.D. Tex. Mar. 24 2013).

14. In a mandamus proceeding involving a discovery dispute in a case against an insurer for violations of the insurance code, breach of contract, and breach of Stowers duty in a related personal injury case, the waiver of the attorney-client privilege by one of the insurer's insureds did not operate to waive the other insured's privilege as well, as the underlying litigation in the case was not a suit between trial counsel's two joint clients. No authority has been found to support an argument that one client may waive the attorney-client privilege on behalf of another client. In re Unitrin County Mut. Ins. Co., 2010 Tex. App. LEXIS 5797, 2010 WL 2867326 (Tex. App. Austin July 22 2010).

15. By assigning his rights and claims to a bankruptcy trustee, an insured did not assign the right to waive the attorney-client privilege, under Tex. R. Evid. 503 and Tex. R. Evid. 511, because the assignment language in the bankruptcy order did not specifically waive the attorney-client privilege, and the cooperation language did not impliedly waive the attorney-client privilege, especially in light of the insured's intent not to waive the privilege. In re

Hicks, 252 S.W.3d 790, 2008 Tex. App. LEXIS 2990 (Tex. App. Houston 14th Dist. 2008).

16. By executing an authorization for release of an insurer's file, the insured did not waive attorney-client privilege, under Tex. R. Evid. 503 and Tex. R. Evid. 511, with regard to an attorney's litigation file because the record did not reflect that the insured consented to disclosure of privileged material in the attorney's litigation file. In re Hicks, 252 S.W.3d 790, 2008 Tex. App. LEXIS 2990 (Tex. App. Houston 14th Dist. 2008).

17. In a suit brought against an insurer by an insured's judgment creditor, the insurer could not assert the attorney-client privilege of Tex. R. Evid. 503 or the work product privilege of Tex. R. Civ. P. 192 on behalf of the insured with regard to a claims file because the insured's assignment of its rights to its judgment creditor waived the attorney-client privilege under Tex. R. Evid. 511; however, the insurer's Tex. R. Civ. P. 193 privilege log established that some communications between counsel and the insurer were covered by the insurer's own attorney-client privilege. In re General Agents Ins. Co. of Am., Inc., 224 S.W.3d 806, 2007 Tex. App. LEXIS 3690 (Tex. App. Houston 14th Dist. 2007).

18. For purposes of Tex. R. Evid. 503(b), the evidence showed that a city and a development corporation were both represented by attorneys and they shared a common interest, the company pointed to no authority for the claim that the common interest privilege was separate from the attorney client privilege and case law suggested to the contrary, and the company did not point to any authority to support the claim that the pending action provision of Tex. R. Evid. 503(b)(1)(C) applied to entities who shared a common interest and were represented by the same counsel; for mandamus purposes, the trial court did not abuse its discretion when it found that a city did not waive, under Tex. R. Evid. 511(1), by disclosure to the development corporation, the ability to assert privilege. In re JDN Real Estate-McKinney L.P., 211 S.W.3d 907, 2006 Tex. App. LEXIS 11087 (Tex. App. Dallas 2006).

19. Chemical company was entitled to conditional mandamus relief when a trial court ordered the company to produce a confidential research memorandum prepared by an attorney from a law firm that had represented the company in a failed real estate transaction because the memorandum was privileged under Tex. R. Evid. 503 and the company did not waive that privilege under Tex. R. Evid. 511 through voluntary disclosure of a significant part of the memorandum in a second memorandum that counsel distributed to a third party, as the company did not voluntarily disclose any part of the memorandum; a limited partnership (LP) seeking disclosure of the memorandum argued that because the disclosed memorandum was based upon the privileged memorandum, the company waived its privilege; however, the LP failed to distinguish between using core attorney work product to prepare a document for dissemination to third parties and disclosing the privileged document itself. In re Chevron Phillips Chem. Co. LP, 2006 Tex. App. LEXIS 9186 (Tex. App. Beaumont Oct. 25 2006).

Evidence : Privileges : Government Privileges : Waiver

20. In a bankruptcy action, the debtor could not claim that juror statements he used to support a motion to amend a judgment entered in his employment discrimination case were privileged and could not be used by bankruptcy trustee to show that jury did not intent to award future wages as damages because he disclosed them to a third party and Fed. R. Evid. 606(b) did not apply because the jurors' statements were used to determine the harms for which the jury intended to compensate the debtor, not to determine whether the verdict was valid. Pequeno v. Schmidt (In re Pequeno), 126 Fed. Appx. 158, 2005 U.S. App. LEXIS 3721 (5th Cir. Tex. 2005).

Evidence : Privileges : Marital Privileges : Adverse Spousal Testimony : Waiver

21. Court did not abuse its discretion nor violate the husband-wife privilege that existed between defendant and his wife when it allowed an officer to testify concerning the wife's statement to her during the initial discovery and investigation of the incident because the two statements made by defendant were similar enough to result in a waiver of the husband-wife privilege concerning defendant's statement to the wife that he killed a woman. The

"significant part" of defendant's statement, which he also disclosed to his mother, was the admission that he killed a person and that the person's body was in his apartment; therefore, he waived application of the husband wife privilege. Davis v. State, 2005 Tex. App. LEXIS 712 (Tex. App. Fort Worth Jan. 27 2005).

Evidence : Privileges : Marital Privileges : Confidential Communications : Criminal Proceedings

22. Court did not abuse its discretion nor violate the husband-wife privilege that existed between defendant and his wife when it allowed an officer to testify concerning the wife's statement to her during the initial discovery and investigation of the incident because the two statements made by defendant were similar enough to result in a waiver of the husband-wife privilege concerning defendant's statement to the wife that he killed a woman. The "significant part" of defendant's statement, which he also disclosed to his mother, was the admission that he killed a person and that the person's body was in his apartment; therefore, he waived application of the husband wife privilege. Davis v. State, 2005 Tex. App. LEXIS 712 (Tex. App. Fort Worth Jan. 27 2005).

Insurance Law : Motor Vehicle Insurance : Obligations : Disclosure

23. Motion for protection that was sought to prevent disclosure of communications between an attorney and a client that were allegedly privileged under Tex. R. Evid. 511 was improperly denied under Tex. R. Evid. 503 because there was no evidence of a voluntary disclosure or a consent to disclosure in an assignment of a "Stowers" claim against an insurer in a personal injury matter. In re Cooper, 47 S.W.3d 206, 2001 Tex. App. LEXIS 3624 (Tex. App. Beaumont 2001).

Tex. Evid. R. 512

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 512 Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege

A privilege claim is not defeated by a disclosure that was:

(a)compelled erroneously; or

(b)made without opportunity to claim the privilege.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*.

Tex. Evid. R. 513

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 513 Comment On or Inference From a Privilege Claim; Instruction

(a) ***Comment or Inference Not Permitted.***--Except as permitted in Rule 504(b)(2), neither the court nor counsel may comment on a privilege claim-whether made in the present proceeding or previously-and the factfinder may not draw an inference from the claim.

(b) ***Claiming Privilege Without the Jury's Knowledge.***--To the extent practicable, the court must conduct a jury trial so that the making of a privilege claim is not suggested to the jury by any means.

(c) ***Claim of Privilege Against Self-Incrimination in a Civil Case.***--Subdivisions (a) and (b) do not apply to a party's claim, in the present civil case, of the privilege against self-incrimination.

(d) ***Jury Instruction.***--When this rule forbids a jury from drawing an inference from a privilege claim, the court must, on request of a party against whom the jury might draw the inference, instruct the jury accordingly.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 50, *Privileges*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*; Ch. 97, *Resisting Discovery*; Ch. 114, *Motions in Limine*.

Comment to 1998 change Subdivision (d) regarding a party's entitlement to a jury instruction about a claim of privilege is made applicable to civil cases.

Case Notes

Civil Procedure : Discovery : Privileged Matters : General Overview
Civil Procedure : Discovery : Protective Orders
Civil Procedure : Appeals : Standards of Review : Substantial Evidence : Sufficiency of Evidence
Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Self-Incrimination Privilege
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Juries & Jurors : General Overview

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Adverse Inference
Criminal Law & Procedure : Appeals : Prosecutorial Misconduct : Prohibitions Against Improper Statements
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Evidence : Inferences & Presumptions : General Overview
Evidence : Inferences & Presumptions : Inferences
Evidence : Privileges : Government Privileges : Official Information Privilege : Reports Privilege
Evidence : Privileges : Marital Privileges : General Overview
Evidence : Privileges : Self-Incrimination Privilege : General Overview
Evidence : Privileges : Self-Incrimination Privilege : Scope
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Testimony : Credibility : General Overview
Family Law : Marital Termination & Spousal Support : Dissolution & Divorce : Procedures
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure
Healthcare Law : Business Administration & Organization : Hospital Privileges : General Overview
Insurance Law : Business Insurance : Directors & Officers Liability Insurance : Obligations : Defense
Torts : Negligence : General Overview

LexisNexis (R) Notes

Civil Procedure : Discovery : Privileged Matters : General Overview

1. In appellants' civil misrepresentation action against appellee bank to recover losses sustained from a factoring client, who was recommended by appellee bank's president, an adverse inference could be drawn pursuant to Tex. R. Evid. 513(c) from the fact that appellants' agent invoked his self-incrimination privilege where the agent/witness was so closely related to appellants that his statement could be deemed an admission under Tex. R. Evid. 801(e)(2), especially where the questions related to the bank's defense regarding the cause of the losses. Wil-Roye Inv. Co. II v. Wash. Mut. Bank, F.A., 142 S.W.3d 393, 2004 Tex. App. LEXIS 4982 (Tex. App. El Paso 2004).

Civil Procedure : Discovery : Protective Orders

2. In a contract case, the trial court's indefinite postponement of discovery without a specific assertion of the Fifth Amendment, U.S. Const. amend. V, self-incrimination privilege in response to a discovery inquiry, and without any showing of the nature and scope of an alleged investigation, was an abuse of discretion for which mandamus relief was appropriate. Pursuant to Tex. R. Civ. P. 192.6 and Tex. R. Evid. 513(c), it is improper to file a motion for protection solely to avoid the assertion of the Fifth Amendment privilege, and the resulting adverse inference, in a civil case. In re Edge Capital Group, Inc., 161 S.W.3d 764, 2005 Tex. App. LEXIS 2377 (Tex. App. Beaumont 2005).

Civil Procedure : Appeals : Standards of Review : Substantial Evidence : Sufficiency of Evidence

3. In a divorce proceeding in which the wife alleged that the husband had intentionally and knowingly assaulted her, causing bodily injury, there was factually sufficient evidence to prove the assault based on the wife's testimony and the inference that might reasonably be drawn by the trier of fact under Tex. R. Evid. 513(c) by the husband's invocation of his Fifth Amendment right when asked about the incident. In re Marriage of Loggins, 2006 Tex. App. LEXIS 6507 (Tex. App. Texarkana July 25 2006).

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Self-Incrimination Privilege

4. In a termination of parental rights case where the father was in jail awaiting the resolution of pending criminal charges, the trier of fact was free to draw negative inferences from the father's invocation of his Fifth Amendment rights in response to numerous questions about the events that occurred when he was arrested. In the Interest of K.L.E.C., 2013 Tex. App. LEXIS 13977, 2013 WL 6050850 (Tex. App. Eastland Nov. 14 2013).

5. In appellants' civil misrepresentation action against appellee bank to recover losses sustained from a factoring client, who was recommended by appellee bank's president, an adverse inference could be drawn pursuant to Tex. R. Evid. 513(c) from the fact that appellants' agent invoked his self-incrimination privilege where the agent/witness was so closely related to appellants that his statement could be deemed an admission under Tex. R. Evid. 801(e)(2), especially where the questions related to the bank's defense regarding the cause of the losses. Wil-Roye Inv. Co. II v. Wash. Mut. Bank, F.A., 142 S.W.3d 393, 2004 Tex. App. LEXIS 4982 (Tex. App. El Paso 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

6. In a drug case, a court erred by refusing defendant's requested adverse inference instruction after a co-defendant exercised his right to remain silent because defendant was charged as a party to the co-defendant's offense, and an adverse inference could have tended to incriminate defendant. In addition, the only evidence that directly linked defendant to the cocaine came from the State's paid confidential informant, and the jury had a difficult time reaching a verdict; therefore, the trial court's refusal to give the instruction caused "some harm" to defendant. Torres v. State, 137 S.W.3d 191, 2004 Tex. App. LEXIS 2939 (Tex. App. Houston 1st Dist. 2004).

Criminal Law & Procedure : Juries & Jurors : General Overview

7. There was no error in the State calling defendant's wife to invoke her spousal privilege in the jury's presence because the jury did not hear the wife specifically say that she was asserting her spousal privilege, defense counsel mentioned the privilege in front of the jury when he objected, and the jury had already heard the wife provide testimony detrimental to defendant, namely, that defendant had been drinking beer on the night of the offense. Chavez v. State, 2011 Tex. App. LEXIS 4927, 2011 WL 2624006 (Tex. App. Houston 1st Dist. June 30 2011).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Adverse Inference

8. In a drug case, a court erred by refusing defendant's requested adverse inference instruction after a co-defendant exercised his right to remain silent because defendant was charged as a party to the co-defendant's offense, and an adverse inference could have tended to incriminate defendant. In addition, the only evidence that directly linked defendant to the cocaine came from the State's paid confidential informant, and the jury had a difficult time reaching a verdict; therefore, the trial court's refusal to give the instruction caused "some harm" to defendant. Torres v. State, 137 S.W.3d 191, 2004 Tex. App. LEXIS 2939 (Tex. App. Houston 1st Dist. 2004).

Criminal Law & Procedure : Appeals : Prosecutorial Misconduct : Prohibitions Against Improper Statements

9. Although defendant claimed that a trial court violated Tex. R. Evid. 513 by allowing a prosecutor to ask a witness if she would waive her attorney-client privilege, because defendant's first objection did not comport with the complaint on appeal, existing case law required the reviewing court to hold that the objection did not preserve defendant's complaint. Moreover, although defendant's second objection comported with his point on appeal, by the time counsel articulated it at trial, it was too late to preserve defendant's complaint pursuant to Tex. R. App. P. 33.1(a)(1)(A) because it was not presented until after the prosecutor asked numerous times whether the witness would waive her privilege and even explained the privilege to her. Lucio v. State, 2010 Tex. App. LEXIS 3241 (Tex. App. Fort Worth Apr. 29 2010).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

10. In a drug case, a court erred by refusing defendant's requested adverse inference instruction after a co-defendant exercised his right to remain silent because defendant was charged as a party to the co-defendant's offense, and an adverse inference could have tended to incriminate defendant. In addition, the only evidence that directly linked defendant to the cocaine came from the State's paid confidential informant, and the jury had a difficult time reaching a verdict; therefore, the trial court's refusal to give the instruction caused "some harm" to defendant. Torres v. State, 137 S.W.3d 191, 2004 Tex. App. LEXIS 2939 (Tex. App. Houston 1st Dist. 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

11. Although defendant claimed that a trial court violated Tex. R. Evid. 513 by allowing a prosecutor to ask a witness if she would waive her attorney-client privilege, because defendant's first objection did not comport with the complaint on appeal, existing case law required the reviewing court to hold that the objection did not preserve defendant's complaint. Moreover, although defendant's second objection comported with his point on appeal, by the time counsel articulated it at trial, it was too late to preserve defendant's complaint pursuant to Tex. R. App. P. 33.1(a)(1)(A) because it was not presented until after the prosecutor asked numerous times whether the witness would waive her privilege and even explained the privilege to her. Lucio v. State, 2010 Tex. App. LEXIS 3241 (Tex. App. Fort Worth Apr. 29 2010).

Evidence : Inferences & Presumptions : General Overview

12. Since Tex. R. Evid. 513(a) prohibits drawing any inference from a claim of privilege in a civil case, such as a hospital's confidentiality privilege as to credentialing and peer review, the injured patient was required to show that the hospital acted maliciously in credentialing the surgeon without access to evidence of what happened, or did not happen, in the credentialing process. However, the patient failed to show that the hospital had actual knowledge that the surgeon still had a drug problem or knowledge of prior incidents of incompetency at another medical facility or that the hospital acted with conscious disregard of the risks posed to patients due to the surgeon's drug problem or incompetence. Romero v. KPH Consol., Inc., 166 S.W.3d 212, 2005 Tex. LEXIS 427, 48 Tex. Sup. Ct. J. 752 (Tex. 2005).

13. In a contract case, the trial court's indefinite postponement of discovery without a specific assertion of the Fifth Amendment, U.S. Const. amend. V, self-incrimination privilege in response to a discovery inquiry, and without any showing of the nature and scope of an alleged investigation, was an abuse of discretion for which mandamus relief was appropriate. Pursuant to Tex. R. Civ. P. 192.6 and Tex. R. Evid. 513(c), it is improper to file a motion for protection solely to avoid the assertion of the Fifth Amendment privilege, and the resulting adverse inference, in a civil case. In re Edge Capital Group, Inc., 161 S.W.3d 764, 2005 Tex. App. LEXIS 2377 (Tex. App. Beaumont 2005).

14. In appellants' civil misrepresentation action against appellee bank to recover losses sustained from a factoring client, who was recommended by appellee bank's president, an adverse inference could be drawn pursuant to Tex. R. Evid. 513(c) from the fact that appellants' agent invoked his self-incrimination privilege where the agent/witness was so closely related to appellants that his statement could be deemed an admission under Tex. R. Evid. 801(e)(2), especially where the questions related to the bank's defense regarding the cause of the losses. Wil-Roye Inv. Co. II v. Wash. Mut. Bank, F.A., 142 S.W.3d 393, 2004 Tex. App. LEXIS 4982 (Tex. App. El Paso 2004).

Evidence : Inferences & Presumptions : Inferences

15. At a termination of parental rights hearing where the father refused to answer questions about whether he was addicted to methamphetamine and sold drugs, the trier of fact was permitted to draw negative inferences from his invocation of the Fifth Amendment. In the Interest of J.A.L., 2013 Tex. App. LEXIS 15294, 2013 WL 7083191 (Tex.

App. Eastland Dec. 19 2013).

16. In a termination of parental rights case where the father was in jail awaiting the resolution of pending criminal charges, the trier of fact was free to draw negative inferences from the father's invocation of his Fifth Amendment rights in response to numerous questions about the events that occurred when he was arrested. In the Interest of K.L.E.C., 2013 Tex. App. LEXIS 13977, 2013 WL 6050850 (Tex. App. Eastland Nov. 14 2013).

17. On a wife's petition for a protective order against her former husband, the trial court, as the factfinder, was free under Tex. R. Evid. 513(c) to draw negative inferences from the husband's invocation of his self-incrimination privilege. Houchin v. Houchin, 2013 Tex. App. LEXIS 6762 (Tex. App. Amarillo May 31 2013).

18. Insureds under a directors and officers policy were entitled to a preliminary injunction under Fed. R. Civ. P. 65 requiring the insurer to advance defense costs in underlying Securities and Exchange Commission civil and criminal actions; in applying the eight corners rule and declining to draw an adverse inference under Fed. R. Evid. 501 and Tex. R. Evid. 513 from the insureds' refusal to testify in support of their application for a preliminary injunction, the district court found that the insureds demonstrated a substantial likelihood of succeeding on their claim that the money laundering exclusion did not work to deny coverage. Pendergest-holt v. Certain Under Writers at Lloyd's of London, 681 F. Supp. 2d 816, 2010 U.S. Dist. LEXIS 5912 (S.D. Tex. Jan. 26 2010).

19. In a personal injury case, although a jury could have drawn a negative inference from an employee's repeated invocations of the Fifth Amendment privilege, it did not rise to the level of evidence of gross negligence under the clear and convincing evidence standard since there was no direct or circumstantial evidence that the employee had actual awareness of the extreme risk created by his act of taking his eyes off the road to pick up a pack of crackers while driving to satisfy the subjective element of gross negligence; moreover, no reasonable factfinder could have formed a firm belief or conviction that, from the prospective viewpoint of the employee, there was an extreme degree of risk of serious injury to motorists following behind him when his action did not involve a collision of his vehicle with another vehicle or force another vehicle off the roadway. Therefore, there was insufficient evidence to support a finding of gross negligence. Matbon, Inc. v. Gries, 288 S.W.3d 471, 2009 Tex. App. LEXIS 268 (Tex. App. Eastland Jan. 15 2009).

20. Evidence was legally and factually sufficient to support that the father demonstrated an inability to provide the child with a safe environment under Tex. Fam. Code Ann. § 161.001(1)(N)(iii), given that (1) the father testified that he was homeless and unemployed prior to being incarcerated, (2) he invoked the Fifth Amendment when questioned concerning the current criminal charges against him, and under Tex. R. Evid. 513(c), a jury in a civil case could draw negative inferences from repeated invocations of the Fifth Amendment, (3) an undercover police officer testified that he purchased crack cocaine from the father, and (4) the guardian ad litem testified that the father was unable to provide a safe environment for the child; although the father testified that he planned to provide the child with a safe environment, a reasonable jury could have formed a firm belief that he showed an inability to provide that environment. White v. Tex. Dep't of Family & Protective Servs., 2008 Tex. App. LEXIS 9508 (Tex. App. Austin Dec. 19 2008).

21. In a guardian's action against her ex-husband and his second wife (respondents) for conversion, breach of fiduciary duty, and constructive fraud for allegedly using funds from a personal injury settlement belonging to the guardian and ex-husband's son to purchase a farm for respondents, respondents failed to conclusively prove that they used their personal funds for the down payment and monthly payments for the farm as required by Tex. R. Civ. P. 279 because the jury was free to draw negative inferences from respondents' repeated invocations of their rights under U.S. Const. amend. V pursuant to Tex. R. Evid. 513(c), and to disregard the ex-husband's deposition testimony as not credible. Wilz v. Flournoy, 228 S.W.3d 674, 2007 Tex. LEXIS 602, 50 Tex. Sup. Ct. J. 975 (Tex. 2007).

Evidence : Privileges : Government Privileges : Official Information Privilege : Reports Privilege

22. Since Tex. R. Evid. 513(a) prohibits drawing any inference from a claim of privilege in a civil case, such as a hospital's confidentiality privilege as to credentialing and peer review, the injured patient was required to show that the hospital acted maliciously in credentialing the surgeon without access to evidence of what happened, or did not happen, in the credentialing process. However, the patient failed to show that the hospital had actual knowledge that the surgeon still had a drug problem or knowledge of prior incidents of incompetency at another medical facility or that the hospital acted with conscious disregard of the risks posed to patients due to the surgeon's drug problem or incompetence. Romero v. KPH Consol., Inc., 166 S.W.3d 212, 2005 Tex. LEXIS 427, 48 Tex. Sup. Ct. J. 752 (Tex. 2005).

Evidence : Privileges : Marital Privileges : General Overview

23. There was no error in the State calling defendant's wife to invoke her spousal privilege in the jury's presence because the jury did not hear the wife specifically say that she was asserting her spousal privilege, defense counsel mentioned the privilege in front of the jury when he objected, and the jury had already heard the wife provide testimony detrimental to defendant, namely, that defendant had been drinking beer on the night of the offense. Chavez v. State, 2011 Tex. App. LEXIS 4927, 2011 WL 2624006 (Tex. App. Houston 1st Dist. June 30 2011).

Evidence : Privileges : Self-Incrimination Privilege : General Overview

24. At a termination of parental rights hearing where the father refused to answer questions about whether he was addicted to methamphetamine and sold drugs, the trier of fact was permitted to draw negative inferences from his invocation of the Fifth Amendment. In the Interest of J.A.L., 2013 Tex. App. LEXIS 15294, 2013 WL 7083191 (Tex. App. Eastland Dec. 19 2013).

25. Reasonable fact finder could infer that management company owner misrepresented and withheld material information about the projects in order to induce the investors to make their original investment; there was evidence the owner admitted making misrepresentations, which constituted probative evidence of the elements of their claim, and the trial court was also free to draw negative inferences from the owner's invocation of the privilege against self-incrimination. Brauss v. Triple M Holding Gmbh, 411 S.W.3d 614, 2013 Tex. App. LEXIS 10128 (Tex. App. Dallas Aug. 13 2013).

26. Evidence was legally and factually sufficient to support that the father demonstrated an inability to provide the child with a safe environment under Tex. Fam. Code Ann. § 161.001(1)(N)(iii), given that (1) the father testified that he was homeless and unemployed prior to being incarcerated, (2) he invoked the Fifth Amendment when questioned concerning the current criminal charges against him, and under Tex. R. Evid. 513(c), a jury in a civil case could draw negative inferences from repeated invocations of the Fifth Amendment, (3) an undercover police officer testified that he purchased crack cocaine from the father, and (4) the guardian ad litem testified that the father was unable to provide a safe environment for the child; although the father testified that he planned to provide the child with a safe environment, a reasonable jury could have formed a firm belief that he showed an inability to provide that environment. White v. Tex. Dep't of Family & Protective Servs., 2008 Tex. App. LEXIS 9508 (Tex. App. Austin Dec. 19 2008).

27. In a divorce proceeding in which the wife alleged that the husband had intentionally and knowingly assaulted her, causing bodily injury, there was factually sufficient evidence to prove the assault based on the wife's testimony and the inference that might reasonably be drawn by the trier of fact under Tex. R. Evid. 513(c) by the husband's invocation of his Fifth Amendment right when asked about the incident. In re Marriage of Loggins, 2006 Tex. App. LEXIS 6507 (Tex. App. Texarkana July 25 2006).

28. In a burglary and aggravated assault case, the trial court did not abuse its discretion during the punishment phase of the trial by not allowing defendant's attorney to question the victims regarding their alleged involvement in drug activities as the testimony, whether relevant or not, could have been properly excluded under Tex. R. Evid. 513 because it was offered to allow the jury to consider their assertions of their Fifth Amendment rights and refusal to testify. McKaine v. State, 170 S.W.3d 285, 2005 Tex. App. LEXIS 7147 (Tex. App. Corpus Christi 2005).

29. In a contract case, the trial court's indefinite postponement of discovery without a specific assertion of the Fifth Amendment, U.S. Const. amend. V, self-incrimination privilege in response to a discovery inquiry, and without any showing of the nature and scope of an alleged investigation, was an abuse of discretion for which mandamus relief was appropriate. Pursuant to Tex. R. Civ. P. 192.6 and Tex. R. Evid. 513(c), it is improper to file a motion for protection solely to avoid the assertion of the Fifth Amendment privilege, and the resulting adverse inference, in a civil case. In re Edge Capital Group, Inc., 161 S.W.3d 764, 2005 Tex. App. LEXIS 2377 (Tex. App. Beaumont 2005).

Evidence : Privileges : Self-Incrimination Privilege : Scope

30. In a parental rights termination case, the court was free to draw a negative inference from the father's assertion of his Fifth Amendment privilege against self-incrimination when asked about his methamphetamine use while he cared for his children, ages 2 and 3. In the Interest of V.J.G., 2013 Tex. App. LEXIS 3493, 2013 WL 1224897 (Tex. App. Amarillo Mar. 26 2013).

31. Under Tex. R. Evid. 105(a) and 513(d), it was error to deny defendant a limiting instruction that the jury draw no inference against defendant from a co-defendant's invocation of the Fifth Amendment privilege against self-incrimination. Hudnall v. State, 2008 Tex. App. LEXIS 5877 (Tex. App. Houston 1st Dist. July 31, 2008).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

32. In a burglary and aggravated assault case, the trial court did not abuse its discretion during the punishment phase of the trial by not allowing defendant's attorney to question the victims regarding their alleged involvement in drug activities as the testimony, whether relevant or not, could have been properly excluded under Tex. R. Evid. 513 because it was offered to allow the jury to consider their assertions of their Fifth Amendment rights and refusal to testify. McKaine v. State, 170 S.W.3d 285, 2005 Tex. App. LEXIS 7147 (Tex. App. Corpus Christi 2005).

Evidence : Procedural Considerations : Rulings on Evidence

33. On a wife's petition for a protective order against her former husband, the trial court, as the factfinder, was free under Tex. R. Evid. 513(c) to draw negative inferences from the husband's invocation of his self-incrimination privilege. Houchin v. Houchin, 2013 Tex. App. LEXIS 6762 (Tex. App. Amarillo May 31 2013).

Evidence : Testimony : Credibility : General Overview

34. In a guardian's action against her ex-husband and his second wife (respondents) for conversion, breach of fiduciary duty, and constructive fraud for allegedly using funds from a personal injury settlement belonging to the guardian and ex-husband's son to purchase a farm for respondents, respondents failed to conclusively prove that they used their personal funds for the down payment and monthly payments for the farm as required by Tex. R. Civ. P. 279 because the jury was free to draw negative inferences from respondents' repeated invocations of their rights under U.S. Const. amend. V pursuant to Tex. R. Evid. 513(c), and to disregard the ex-husband's deposition testimony as not credible. Wilz v. Flournoy, 228 S.W.3d 674, 2007 Tex. LEXIS 602, 50 Tex. Sup. Ct. J. 975 (Tex. 2007).

Family Law : Marital Termination & Spousal Support : Dissolution & Divorce : Procedures

35. In a divorce proceeding in which the wife alleged that the husband had intentionally and knowingly assaulted her, causing bodily injury, there was factually sufficient evidence to prove the assault based on the wife's testimony and the inference that might reasonably be drawn by the trier of fact under Tex. R. Evid. 513(c) by the husband's invocation of his Fifth Amendment right when asked about the incident. In re Marriage of Loggins, 2006 Tex. App. LEXIS 6507 (Tex. App. Texarkana July 25 2006).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

36. In a parental rights termination case, the court was free to draw a negative inference from the father's assertion of his Fifth Amendment privilege against self-incrimination when asked about his methamphetamine use while he cared for his children, ages 2 and 3. In the Interest of V.J.G., 2013 Tex. App. LEXIS 3493, 2013 WL 1224897 (Tex. App. Amarillo Mar. 26 2013).

Healthcare Law : Business Administration & Organization : Hospital Privileges : General Overview

37. Since Tex. R. Evid. 513(a) prohibits drawing any inference from a claim of privilege in a civil case, such as a hospital's confidentiality privilege as to credentialing and peer review, the injured patient was required to show that the hospital acted maliciously in credentialing the surgeon without access to evidence of what happened, or did not happen, in the credentialing process. However, the patient failed to show that the hospital had actual knowledge that the surgeon still had a drug problem or knowledge of prior incidents of incompetency at another medical facility or that the hospital acted with conscious disregard of the risks posed to patients due to the surgeon's drug problem or incompetence. Romero v. KPH Consol., Inc., 166 S.W.3d 212, 2005 Tex. LEXIS 427, 48 Tex. Sup. Ct. J. 752 (Tex. 2005).

Insurance Law : Business Insurance : Directors & Officers Liability Insurance : Obligations : Defense

38. Insureds under a directors and officers policy were entitled to a preliminary injunction under Fed. R. Civ. P. 65 requiring the insurer to advance defense costs in underlying Securities and Exchange Commission civil and criminal actions; in applying the eight corners rule and declining to draw an adverse inference under Fed. R. Evid. 501 and Tex. R. Evid. 513 from the insureds' refusal to testify in support of their application for a preliminary injunction, the district court found that the insureds demonstrated a substantial likelihood of succeeding on their claim that the money laundering exclusion did not work to deny coverage. Pendergest-holt v. Certain Under Writers at Lloyd's of London, 681 F. Supp. 2d 816, 2010 U.S. Dist. LEXIS 5912 (S.D. Tex. Jan. 26 2010).

Torts : Negligence : General Overview

39. In a personal injury case, although a jury could have drawn a negative inference from an employee's repeated invocations of the Fifth Amendment privilege, it did not rise to the level of evidence of gross negligence under the clear and convincing evidence standard since there was no direct or circumstantial evidence that the employee had actual awareness of the extreme risk created by his act of taking his eyes off the road to pick up a pack of crackers while driving to satisfy the subjective element of gross negligence; moreover, no reasonable factfinder could have formed a firm belief or conviction that, from the prospective viewpoint of the employee, there was an extreme degree of risk of serious injury to motorists following behind him when his action did not involve a collision of his vehicle with another vehicle or force another vehicle off the roadway. Therefore, there was insufficient evidence to support a finding of gross negligence. Matbon, Inc. v. Gries, 288 S.W.3d 471, 2009 Tex. App. LEXIS 268 (Tex. App. Eastland Jan. 15 2009).

End of Document

Tex. Evid. R. 601

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 601 Competency to Testify in General; "Dead Man's Rule"

(a) ***In General.***--Every person is competent to be a witness unless these rules provide otherwise. The following witnesses are incompetent:

(1) ***Insane Persons.***--A person who is now insane or was insane at the time of the events about which the person is called to testify.

(2) ***Persons Lacking Sufficient Intellect.***--A child - or any other person - whom the court examines and finds lacks sufficient intellect to testify concerning the matters in issue.

(b) *The "Dead Man's Rule."*

(1) ***Applicability.***--The "Dead Man's Rule" applies only in a civil case:

(A)by or against a party in the party's capacity as an executor, administrator, or guardian; or

(B)by or against a decedent's heirs or legal representatives and based in whole or in part on the decedent's oral statement.

(2) ***General Rule.***--In cases described in subparagraph (b)(1)(A), a party may not testify against another party about an oral statement by the testator, intestate, or ward. In cases described in subparagraph (b)(1)(B), a party may not testify against another party about an oral statement by the decedent.

(3) ***Exceptions.***--A party may testify against another party about an oral statement by the testator, intestate, ward, or decedent if:

(A)the party's testimony about the statement is corroborated; or

(B)the opposing party calls the party to testify at the trial about the statement.

(4) ***Instructions.***--If a court excludes evidence under paragraph (b)(2), the court must instruct the jury that the law prohibits a party from testifying about an oral statement by the testator, intestate, ward, or decedent unless the oral statement is corroborated or the opposing party calls the party to testify at the trial about the statement.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 22, *Rules Affecting Admissibility* ; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*.

Comment to 2015 Restyling: The text of the "Dead Man's Rule" has been streamlined to clarify its meaning without making any substantive changes. The text of former Rule 601(b) (as well as its statutory predecessor, Vernon's Ann. Civ. St. art. 3716) prohibits only a "party" from testifying about the dead man's statements. Despite this, the last sentence of former Rule 601(b) requires the court to instruct the jury when the rule "prohibits an interested party or witness" from testifying. Because the rule prohibits only a "party" from testifying, restyled Rule 601(b)(4) references only "a party," and not "an interested party or witness." To be sure, courts have indicated that the rule (or its statutory predecessor) may be applicable to a witness who is not nominally a party and inapplicable to a witness who is only nominally a party. *See, e.g., Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801, 809 (1956); *Ragsdale v. Ragsdale*, 142 Tex. 476, 179 S.W.2d 291, 295 (1944). But these decisions are based on an interpretation of the meaning of "party." Therefore, limiting the court's instruction under restyled Rule 601(b)(4) to "a party" does not change Texas practice. In addition, restyled Rule 601(b) deletes the sentence in former Rule 601(b) that states "[e]xcept for the foregoing, a witness is not precluded from giving evidence ...because the witness is a party to the action ..." This sentence is surplusage. Rule 601(b) is a rule of exclusion. If the testimony falls outside the rule of exclusion, its admissibility will be determined by other applicable rules of evidence.

Case Notes

Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Summary Judgment : Supporting Materials : Affidavits
Civil Procedure : Appeals : Reviewability : Preservation for Review
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Contracts Law : Contract Interpretation : Parol Evidence : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Counsel : Right to Counsel : Critical Stage
Criminal Law & Procedure : Trials : Examination of Witnesses : Child Witnesses
Criminal Law & Procedure : Witnesses : General Overview
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Witnesses : Presentation
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Mistrial
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Witnesses
Criminal Law & Procedure : Appeals : Standards of Review : De Novo Review : Motions to Suppress
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Definitions
Estate, Gift & Trust Law : Nonprobate Transfers : Jointly Held Property : Bank Accounts
Estate, Gift & Trust Law : Will Contests : General Overview
Evidence : Competency : General Overview
Evidence : Competency : Dead Man's Acts : General Overview
Evidence : Competency : Dead Man's Acts : Scope
Evidence : Competency : Dead Man's Acts : Waiver
Evidence : Competency : Disability : General Overview
Evidence : Competency : Disability : Children
Evidence : Competency : Disability : Mental Incapacity
Evidence : Hearsay : Exceptions : Statements of Child Abuse

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Witness Qualifications
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Testimony : General Overview
Family Law : Guardians : General Overview
Public Health & Welfare Law : Healthcare : Services for Disabled & Elderly Persons

LexisNexis (R) Notes

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

1. Upon review of a summary judgment motion, the appellant failed to preserve for review objections to deposition testimony of a deceased witness that may have been inadmissible under Tex. R. Evid. 601(b), and the trial court failed to rule on the objections as required by Tex. R. App. P. 33.1 Allen v. Albin, 97 S.W.3d 655, 2002 Tex. App. LEXIS 9291 (Tex. App. Waco 2002).

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits

2. Affidavit of a 12-year-old minor that there was no cautioning sign in a grocery store, submitted in support of his father's slip and fall action against the store, was competent under Tex. R. Evid. 601(a)(2) in the absence of any examination of the child by the trial court. Pipkin v. Kroger Texas, L.P., 383 S.W.3d 655, 2012 Tex. App. LEXIS 7627, 2012 WL 3860582 (Tex. App. Houston 14th Dist. Sept. 6 2012).

Civil Procedure : Appeals : Reviewability : Preservation for Review

3. Upon review of a summary judgment motion, the appellant failed to preserve for review objections to deposition testimony of a deceased witness that may have been inadmissible under Tex. R. Evid. 601(b), and the trial court failed to rule on the objections as required by Tex. R. App. P. 33.1 Allen v. Albin, 97 S.W.3d 655, 2002 Tex. App. LEXIS 9291 (Tex. App. Waco 2002).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

4. Trial court's in camera competency hearing with a six-year-old child victim without defendant or attorneys present complied with Tex. R. Evid. 601 and did not violate defendant's right to confrontation under U.S. Const. amend. VI, because the hearing did not pertain to the facts and he was able to fully cross-examine the child at trial. Gilley v. State, 383 S.W.3d 301, 2012 Tex. App. LEXIS 8517, 2012 WL 4815533 (Tex. App. Fort Worth Oct. 11 2012).

Contracts Law : Contract Interpretation : Parol Evidence : General Overview

5. Claimants were not allowed to introduce parol evidence to establish survivorship interests in alleged joint accounts because there was no fraud nor mistake pled, nor any claim that certificate of deposit (CD) agreements were incomplete or ambiguous; relying on Tex. Prob. Code Ann. § 439, the Deadman's Statute under Tex. R. Evid. 601, the parol evidence rule, the "four corners of the document" rule, hearsay under Tex. R. Evid. 801, and double hearsay, an estate was correct in asserting that the claimants could not use extrinsic evidence in an attempt to get around the four corners of the CDs. Clark v. Wells Fargo Bank, N.A., 2008 Tex. App. LEXIS 2211 (Tex. App. Houston 1st Dist. Mar. 27 2008).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

6. Where the child victim testified that defendant did something "nasty" to her three times, her testimony was sufficient to prove that defendant intended to arouse or gratify a sexual desire. The victim was a competent witness under Tex. R. Evid. 601. Ashton v. State, 2005 Tex. App. LEXIS 2005 (Tex. App. Eastland Mar. 17 2005).

7. Permitting a child witness to testify without a determination of her competency was proper where the child, a sexual assault victim, was 13 at the time of the offense and 15 when she testified at trial, and the trial court had heard her testify outside the presence of the jury and before the jury and had an opportunity to see her, and to observe her demeanor, her manner in answering questions, and her apparent possession or lack of intelligence. Barfield v. State, 2004 Tex. App. LEXIS 6858 (Tex. App. Corpus Christi July 29 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

8. Child sexual assault victim was not incompetent to testify because a review of the child's testimony demonstrated her ability to observe intelligently the sexual assault by defendant, recall the event, and narrate it. Therefore, the record did not establish, on its face, that the child was incompetent to testify. Turley v. State, 2010 Tex. App. LEXIS 7198, 2010 WL 3420800 (Tex. App. Texarkana Sept. 1 2010).

9. Under Tex. R. Evid. 601(a), the reviewing court declined to disregard the testimony of a child complainant in a trial for sexual abuse, notwithstanding defendant's argument that as the youngest of three sisters, the complainant might desire only to be involved with her sisters, who were also complainants, and the events that were circling around them. Palmer v. State, 2010 Tex. App. LEXIS 3156 (Tex. App. Houston 1st Dist. Apr. 29 2010).

Criminal Law & Procedure : Counsel : Right to Counsel : Critical Stage

10. Defendant was not denied his Sixth Amendment, U.S. Const. amend. VI, right to counsel when the trial court conducted its pretrial competency examination of the child victim in camera with the court reporter in attendance but in the absence of defendant and the attorneys because it was not a critical stage of the proceedings, given defense counsel's later opportunities to challenge the child victim's deficiencies during the trial itself. Gilley v. State, 418 S.W.3d 114, 2014 Tex. Crim. App. LEXIS 3 (Tex. Crim. App. Jan. 15 2014).

Criminal Law & Procedure : Trials : Examination of Witnesses : Child Witnesses

11. In defendant's assault trial, counsel was not ineffective in failing to object to the child victim's competency as a witness under Tex. R. Evid. 601, as nothing in the record suggested that he was not competent to testify. Kakembo v. State, 2014 Tex. App. LEXIS 4383, 2014 WL 1663324 (Tex. App. Beaumont Apr. 23 2014).

12. Trial court's in camera competency hearing with a six-year-old child victim without defendant or attorneys present complied with Tex. R. Evid. 601 and did not violate defendant's right to confrontation under U.S. Const. amend. VI, because the hearing did not pertain to the facts and he was able to fully cross-examine the child at trial. Gilley v. State, 383 S.W.3d 301, 2012 Tex. App. LEXIS 8517, 2012 WL 4815533 (Tex. App. Fort Worth Oct. 11 2012).

13. Four-year-old child victim's testimony against her 11-year-old brother was properly admitted under Tex. R. Evid. 601(a)(2) because although she had a short attention span and did not always want to answer questions, she showed that she knew the difference between a lie and the truth and answered the questions asked of her. In re K.H., 2009 Tex. App. LEXIS 2343, 2009 WL 962469 (Tex. App. San Antonio Apr. 8 2009).

14. In an aggravated sexual assault of a child case, the trial judge could have properly found the victim competent to testify as she was 14 years old at the time of trial, the judge made sure the victim understood that she could not discuss her testimony with other witnesses or be in the courtroom while another witness was testifying, and the victim indicated several times that she understood the judge's instructions. Castillo v. State, 2007 Tex. App. LEXIS 4745 (Tex. App. San Antonio June 20 2007).

Criminal Law & Procedure : Witnesses : General Overview

15. Murder victims' neighbor was competent to testify because she testified that she saw a small black vehicle parked on the street in front of the home on the day of the shooting. Furthermore, she identified a picture of a vehicle as being the same model as the vehicle she observed; any inconsistencies or inabilities to recall certain facts did not render the neighbor incompetent to testify, but went to the credibility of her testimony -- an issue for the jury. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

Criminal Law & Procedure : Witnesses : Credibility

16. Nothing in the record reflected an abuse of discretion by a trial court in permitting a witness who defendant claimed was intoxicated to testify because the possibility that the witness was intoxicated at the time of trial was a factor that the jury could have considered in evaluating her credibility. Therefore, the trial court did not abuse its discretion by denying defendant's motion to strike her testimony. Horace v. State, 2012 Tex. App. LEXIS 2208, 2012 WL 983337 (Tex. App. Beaumont Mar. 21 2012).

17. During a criminal trial for aggravated sexual assault of a child and indecency with a child by contact, the twelve-year-old victim's responses to the prosecutor's questions and her testimony indicated she had the ability to intelligently recall and narrate the events, understood the difference between the truth and a lie, and understood that she had a responsibility to testify truthfully; therefore, her competence to testify was established under Tex. R. Evid. 601(a)(2). Any inconsistencies the victim's version of events did not render her incompetent to testify, but went to the credibility of her testimony -- an issue to be resolved by the jury. Leal v. State, 2011 Tex. App. LEXIS 1663, 2011 WL 807476 (Tex. App. San Antonio Mar. 9 2011).

Criminal Law & Procedure : Witnesses : Presentation

18. Child was competent to testify, because he testified to knowing the difference between the truth and a lie, and testified in detail about the first time defendant sexually assaulted him. Rodas-Rivera v. State, 2014 Tex. App. LEXIS 79, 2014 WL 50809 (Tex. App. Houston 1st Dist. Jan. 7 2014).

19. In an aggravated sexual assault case, defendant waived, under Tex. R. App. P. 33.1, a challenge to the victim's competency by failing to object in the trial court, and the victim's demeanor indicated that he was competent to testify within the meaning of Tex. R. Evid. 601. Castrejon v. State, 2005 Tex. App. LEXIS 6775 (Tex. App. Corpus Christi Aug. 22 2005).

20. Where the child victim testified that defendant did something "nasty" to her three times, her testimony was sufficient to prove that defendant intended to arouse or gratify a sexual desire. The victim was a competent witness under Tex. R. Evid. 601. Ashton v. State, 2005 Tex. App. LEXIS 2005 (Tex. App. Eastland Mar. 17 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

21. Trial court did not abuse its discretion by failing to sua sponte conduct a hearing to determine a child sexual assault victim's mental competency or in overruling defendant's motion for a mistrial where defendant's own question to the State's expert of whether the victim's story appeared to be realistic induced the response that, in the witness's opinion, the victim was telling the truth. Furthermore, defendant had not preserved error because although he was aware before trial that the victim had mental problems, at no time did he object to the victim's testimony on the ground that she was not mentally competent to testify. Fox v. State, 175 S.W.3d 475, 2005 Tex. App. LEXIS 7071 (Tex. App. Texarkana 2005).

22. In an aggravated sexual assault case, defendant waived, under Tex. R. App. P. 33.1, a challenge to the victim's competency by failing to object in the trial court, and the victim's demeanor indicated that he was competent to testify within the meaning of Tex. R. Evid. 601. Castrejon v. State, 2005 Tex. App. LEXIS 6775 (Tex. App. Corpus Christi Aug. 22 2005).

23. At his trial for aggravated sexual assault of a child, defendant did not object to the substance or the manner of the trial court's determination that the child was competent to testify and he did not object to the admission of her testimony. Consequently, he did not preserve the competency issue for review. Turley v. State, 2004 Tex. App. LEXIS 4876 (Tex. App. Tyler May 28 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

24. Where the defendant was convicted of aggravated assault with a deadly weapon, he failed to preserve his objection to the competency of a child witness whose testimony may have suggested she did not understand her obligation to be truthful; the defendant did not make an objection on the record. Rodriguez v. State, 2006 Tex. App. LEXIS 6108 (Tex. App. Houston 14th Dist. July 13 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

25. In a sexual assault of a child case, defendant failed to preserve his complaint of the child's competency to testify because the trial court found the child competent to testify, and defendant did not object, nor did he object when the trial court made its finding of competency. Furthermore, defendant did not make any objections when the child testified in the presence of the jury. Martin v. State, 2008 Tex. App. LEXIS 8437 (Tex. App. Fort Worth Nov. 6, 2008).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

26. Trial court did not abuse its discretion by determining that the younger of the two victims, who was three years old at the time of the offense and five years old at the time of trial, was competent to testify under Tex. R. Evid. 601 because although the victim's responses showed some conflict and confusion, her testimony overall indicated sufficient accuracy in her recollection in that she was able to recall and narrate details of the event by giving specific testimony about the location, timing, and details. Wagner v. State, 2009 Tex. App. LEXIS 2423 (Tex. App. Houston 14th Dist. Mar. 31 2009).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Mistrial

27. Trial court did not abuse its discretion in determining a witness to be a competent witness; as such, it could not be concluded that the trial court abused its discretion by denying defendant's motion for mistrial. Utley v. State, 2014 Tex. App. LEXIS 268, 2014 WL 97303 (Tex. App. Waco Jan. 9 2014).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Witnesses

28. Trial court did not abuse its discretion by finding the moderately mentally retarded complainant competent to testify because her testimony showed she possessed the ability to observe the alleged sexual assault at the time of the occurrence, was capable of recollecting the events, and was capable of narrating the events. Her mental status did not automatically render her incompetent to testify but it affect her credibility and the weight of her testimony. Hogan v. State, 440 S.W.3d 211, 2013 Tex. App. LEXIS 13092 (Tex. App. Houston 14th Dist. Oct. 22 2013).

29. In an aggravated sexual assult case where defendant sexually assaulted his two stepdaughters, both the trial court and the prosecutor used abstract questioning as well as concrete examples to inquire into and establish each child's capacity to narrate the events, understanding of the difference between the truth and a lie, and understanding of her obligation to tell the truth; the children's responses indicated that they each had the ability to intelligently recall and narrate the events, understood the difference between the truth and a lie, and understood their moral responsibility to tell the truth; based on the children's answers to the qualification questions and their testimony as a whole, which was coherent and offered specific testimony about the location, timing, and details of the offenses, pursuant to Tex. R. Evid. 601, the children were competent to testify; thus, the trial court did not abuse its discretion in finding that the children were competent to testify. De Los Santos v. State, 219 S.W.3d 71, 2006 Tex. App. LEXIS 10076 (Tex. App. San Antonio 2006).

Criminal Law & Procedure : Appeals : Standards of Review : De Novo Review : Motions to Suppress

30. In a hearing on a motion to suppress, an officer's purported lack of independent knowledge of events surrounding an investigative stop did not make the officer incompetent as a witness under Tex. R. Evid. 601 in part because the rules of evidence (except for those rules concerning privileges) did not apply to suppression hearings. Belcher v. State, 244 S.W.3d 531, 2007 Tex. App. LEXIS 9883 (Tex. App. Fort Worth 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Definitions

31. In defendant's aggravated sexual assault on a child case, although the court erred by finding the child victim competent to testify because he was unable to demonstrate that he had the capacity to recollect and narrate events relating to the transaction at issue, the error was harmless. The victim's testimony provided nothing the jury could use to determine guilt or innocence, and the outcry witness's testimony was sufficient to sustain defendant's conviction. Morrison v. State, 2007 Tex. App. LEXIS 1529 (Tex. App. Fort Worth Mar. 1 2007).

Estate, Gift & Trust Law : Nonprobate Transfers : Jointly Held Property : Bank Accounts

32. Claimants were not allowed to introduce parol evidence to establish survivorship interests in alleged joint accounts because there was no fraud nor mistake pled, nor any claim that certificate of deposit (CD) agreements were incomplete or ambiguous; relying on Tex. Prob. Code Ann. § 439, the Deadman's Statute under Tex. R. Evid. 601, the parol evidence rule, the "four corners of the document" rule, hearsay under Tex. R. Evid. 801, and double hearsay, an estate was correct in asserting that the claimants could not use extrinsic evidence in an attempt to get around the four corners of the CDs. Clark v. Wells Fargo Bank, N.A., 2008 Tex. App. LEXIS 2211 (Tex. App. Houston 1st Dist. Mar. 27 2008).

Estate, Gift & Trust Law : Will Contests : General Overview

33. In a will contest, the trial court should have ordered disclosure of an Adult Protective Services (APS) file regarding the decedent and should have allowed the deposition of the APS case worker, in part because the case worker was able to corroborate, as required by Tex. R. Evid. 601(b), a phone call with the decedent's daughter that was part of the investigation. In re Chesses, 388 S.W.3d 330, 2012 Tex. App. LEXIS 4270, 2012 WL 1943764 (Tex. App. El Paso May 30 2012).

Evidence : Competency : General Overview

34. Defendant was not entitled to a Crawford analysis, because the child was physically present in the courtroom for the duration of the trial, defendant had ample opportunity to call her for cross-examination and place her competency to testify at issue, and by failing to call her to the stand defendant invited the constitutional error; defendant did not request that the trial court assess and rule on the child's competency as a witness, meaning that the appellate court must presume she would have been a competent witness. Trevizo v. State, 2014 Tex. App. LEXIS 652, 2014 WL 260591 (Tex. App. El Paso Jan. 22 2014).

35. Defendant was not entitled to a Crawford analysis, because the child was physically present in the courtroom for the duration of the trial, defendant had ample opportunity to call her for cross-examination and place her competency to testify at issue, and by failing to call her to the stand defendant invited the constitutional error; defendant did not request that the trial court assess and rule on the child's competency as a witness, meaning that the appellate court must presume she would have been a competent witness. Trevizo v. State, 2014 Tex. App. LEXIS 652, 2014 WL 260591 (Tex. App. El Paso Jan. 22 2014).

36. Child was competent to testify, because he testified to knowing the difference between the truth and a lie, and testified in detail about the first time defendant sexually assaulted him. Rodas-Rivera v. State, 2014 Tex. App. LEXIS 79, 2014 WL 50809 (Tex. App. Houston 1st Dist. Jan. 7 2014).

37. At the punishment phase of defendant's trial for unlawful possession of a firearm by a felon, the trial court did not abuse its discretion by admitting testimony from defendant's sister about her removal from her home to foster care after she wrote a letter describing defendant's sexual abuse. Defendant did not challenge his sister's competency at trial under Tex. R. Evid. 601 and there was nothing in the record indicating she was not able to relate the occurrences, notwithstanding her discomfort with the situation. Ajvazi v. State, 2012 Tex. App. LEXIS 8900, 2012 WL 5293346 (Tex. App. Texarkana Oct. 26 2012).

38. Record showed that appellee's lost profits for a mowing cycle was a certain amount, and appellee, as owner of his business, was competent to testify as to his profit margin. Park v. Payne, 381 S.W.3d 615, 2012 Tex. App. LEXIS 6351 (Tex. App. Eastland Aug. 2 2012).

39. Nothing in the record reflected an abuse of discretion by a trial court in permitting a witness who defendant claimed was intoxicated to testify because the possibility that the witness was intoxicated at the time of trial was a factor that the jury could have considered in evaluating her credibility. Therefore, the trial court did not abuse its discretion by denying defendant's motion to strike her testimony. Horace v. State, 2012 Tex. App. LEXIS 2208, 2012 WL 983337 (Tex. App. Beaumont Mar. 21 2012).

40. Murder victims' neighbor was competent to testify because she testified that she saw a small black vehicle parked on the street in front of the home on the day of the shooting. Furthermore, she identified a picture of a vehicle as being the same model as the vehicle she observed; any inconsistencies or inabilities to recall certain facts did not render the neighbor incompetent to testify, but went to the credibility of her testimony -- an issue for the jury. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

41. Appellant did not object to testimony on a competency basis at trial, so it would not serve as grounds for reversal unless it constituted fundamental error under Tex. R. Evid. 103(d). Ates v. State, 2010 Tex. App. LEXIS 9777 (Tex. App. Austin Dec. 10 2010).

42. In an aggravated sexual assault of a child case, the trial judge could have properly found the victim competent to testify as she was 14 years old at the time of trial, the judge made sure the victim understood that she could not discuss her testimony with other witnesses or be in the courtroom while another witness was testifying, and the victim indicated several times that she understood the judge's instructions. Castillo v. State, 2007 Tex. App. LEXIS 4745 (Tex. App. San Antonio June 20 2007).

43. Despite some inconsistencies, there was evidence that a witness, who was mentally retarded, possessed the capability to observe intelligently at the time of defendant's attack on her, as well as the capacity to recollect and narrate, and thus the trial court did not err in finding that the witness had the capacity to testify pursuant to Tex. R. Evid. 601 and in admitting the testimony. Lewis v. State, 2007 Tex. App. LEXIS 2741 (Tex. App. Dallas Apr. 10 2007).

44. Defendant failed to raise complaints at trial, such that defendant was not entitled to raise the issue of competency of child witnesses for the first time on appeal, pursuant to Tex. R. App. P. 33.1(a). Guillory v. State, 2007 Tex. App. LEXIS 649 (Tex. App. San Antonio Jan. 31 2007).

45. Trial court did not abuse its discretion under Tex. R. Evid. 601 by ruling that a seven-year-old complainant was competent to testify and by permitting her to testify about events that occurred when she was four; the complainant's responses during both the competency hearing and the trial were never inconsistent, and were direct, clear, and forthright; despite her references to the possibility that she dreamed the sexual assaults, she attributed that possibility to the length of time that had elapsed since they had occurred, and she denied fabricating her story. Hunter v. State, 2006 Tex. App. LEXIS 1783 (Tex. App. Houston 1st Dist. Mar. 9 2006).

46. Trial court did not abuse its discretion by failing to sua sponte conduct a hearing to determine a child sexual assault victim's mental competency or in overruling defendant's motion for a mistrial where defendant's own question to the State's expert of whether the victim's story appeared to be realistic induced the response that, in the witness's opinion, the victim was telling the truth. Furthermore, defendant had not preserved error because although he was aware before trial that the victim had mental problems, at no time did he object to the victim's testimony on the ground that she was not mentally competent to testify. Fox v. State, 175 S.W.3d 475, 2005 Tex. App. LEXIS 7071 (Tex. App. Texarkana 2005).

47. In an aggravated sexual assault case, defendant waived, under Tex. R. App. P. 33.1, a challenge to the victim's competency by failing to object in the trial court, and the victim's demeanor indicated that he was competent to testify within the meaning of Tex. R. Evid. 601. Castrejon v. State, 2005 Tex. App. LEXIS 6775 (Tex. App. Corpus Christi Aug. 22 2005).

48. Where the child victim testified that defendant did something "nasty" to her three times, her testimony was sufficient to prove that defendant intended to arouse or gratify a sexual desire. The victim was a competent witness under Tex. R. Evid. 601. Ashton v. State, 2005 Tex. App. LEXIS 2005 (Tex. App. Eastland Mar. 17 2005).

49. In a drug case, an eight-year-old child was competent to testify about drug manufacturing by defendant, a mother, because the child was able to answer questions outside of the jury's presence regarding name, age, school, and the difference between a lie and the truth. The child was not incompetent based on a failure to properly identify the color of the judge's robe. Frizzell v. State, 2004 Tex. App. LEXIS 9669 (Tex. App. Tyler Oct. 29 2004).

50. In a white male job candidate's discrimination action against a college based on the college's selection of a younger black female for the position of psychology instructor, the trial court erred in striking the deposition testimony of the director of the liberal arts department because it raised a question of material fact as to whether race and age were motivating factors, there was no separate hearing on the director's competency, and the

existence of a guardianship did not automatically render the director incompetent as a witness under Tex. R. Evid. 601(a). Kokes v. Angelina College, 148 S.W.3d 384, 2004 Tex. App. LEXIS 8182 (Tex. App. Beaumont 2004).

51. Trial court did not err in admitting the testimony of the complainant when defendant objected on the basis of her being a child witness not competent to testify, despite the child's confusing and inconsistent responses as the role of the trial court was to make the initial determination of competency, not to assess the credibility or weight to be given the testimony. In re A.W., 147 S.W.3d 632, 2004 Tex. App. LEXIS 8153 (Tex. App. San Antonio 2004).

52. Under Tex. R. Evid. 601, every person was competent to be a witness except as otherwise provided in these rules; an Intoxilyzer instrument was a computer, not a person, and by definition, therefore, the Intoxilyzer was not a declarant. Torres v. State, 109 S.W.3d 602, 2003 Tex. App. LEXIS 4773 (Tex. App. Fort Worth 2003).

Evidence : Competency : Dead Man's Acts : General Overview

53. Party made several conclusory statements regarding Tex. R. Evid. 601(b) in its brief on the merits, but cited no authority in support of its position, and thus any complaint regarding the admissibility of this testimony was therefore waived. Mustang Amusements, Inc. v. Sinclair, 2009 Tex. App. LEXIS 8338, 2009 WL 3487796 (Tex. App. Waco Oct. 28 2009).

54. Because a witness was not a party to the lawsuit and the wife failed to contend that the witness had an interest in the claims being litigated, this was fatal to the wife's complaints because Tex. R. Evid. 601(b) applied to testimony of a party or one having an interest in the matter. Pasley v. Pasley, 2005 Tex. App. LEXIS 6680 (Tex. App. Amarillo Aug. 18 2005).

55. Trial court did not err in excluding, under Tex. R. Evid. 601(b), the surviving partner's testimony on an issue because there was insufficient corroboration. Coleman v. Coleman, 170 S.W.3d 231, 2005 Tex. App. LEXIS 6557 (Tex. App. Dallas 2005).

56. Dead Man's Rule did not apply to exclude plaintiff's testimony about decedent's gift of a pracel of land in an action to quiet title because plaintiff was not suing in her capacity as an heir of the decedent's estate, and defendant was sued in his individual capacity, not in his capacity as an heir, executor, administrator, guardian, or legal representative of decedent's estate. Conner v. Johnson, 2004 Tex. App. LEXIS 9633 (Tex. App. Fort Worth Oct. 28 2004).

57. Upon review of a summary judgment motion, the appellant failed to preserve for review objections to deposition testimony of a deceased witness that may have been inadmissible under Tex. R. Evid. 601(b), and the trial court failed to rule on the objections as required by Tex. R. App. P. 33.1 Allen v. Albin, 97 S.W.3d 655, 2002 Tex. App. LEXIS 9291 (Tex. App. Waco 2002).

Evidence : Competency : Dead Man's Acts : Scope

58. Texas Dead Man's Rule, Tex. R. Evid. 601(b), did not apply to a federal estate tax dispute. Although Fed. R. Evid. 601 provided that in civil cases where state law supplies the "rule of decision" concerning a claim or defense, state law was used to determine a witness's competency, the rule of decision in federal question cases was federal law. Keller v. United States, 2009 U.S. Dist. LEXIS 73789, 104 A.F.T.R.2d (RIA) 2009-6015, 2009-2 U.S. Tax Cas. (CCH) P60579 (S.D. Tex. Aug. 20 2009).

Evidence : Competency : Dead Man's Acts : Waiver

59. Where decedent's wife testified as to their agreement to be married, the trial court construed decedent's will as if a common law marriage existed; on appeal, decedent's children argued that the wife's testimony did not meet the requirements of the Dead Man's Statute under Tex. R. Evid. 601 because it was not corroborated by other evidence. The Court of Appeals of Texas would not address the argument, because no objection was made at trial as required by Tex. R. Evid. 103(a)(1). In the Estate of Landers, 2010 Tex. App. LEXIS 7196, 2010 WL 3420905 (Tex. App. Texarkana Sept. 1 2010).

Evidence : Competency : Disability : General Overview

60. To the extent appellant relied on instances of confusing or contradictory statements of the victim, such responses were credibility matters for the jury, not matters of competence. Luria v. State, 2012 Tex. App. LEXIS 8646, 2012 WL 4900908 (Tex. App. San Antonio Oct. 17 2012).

Evidence : Competency : Disability : Children

61. In defendant's assault trial, counsel was not ineffective in failing to object to the child victim's competency as a witness under Tex. R. Evid. 601, as nothing in the record suggested that he was not competent to testify. Kakembo v. State, 2014 Tex. App. LEXIS 4383, 2014 WL 1663324 (Tex. App. Beaumont Apr. 23 2014).

62. Defendant was not denied his Sixth Amendment, U.S. Const. amend. VI, right to counsel when the trial court conducted its pretrial competency examination of the child victim in camera with the court reporter in attendance but in the absence of defendant and the attorneys because it was not a critical stage of the proceedings, given defense counsel's later opportunities to challenge the child victim's deficiencies during the trial itself. Gilley v. State, 418 S.W.3d 114, 2014 Tex. Crim. App. LEXIS 3 (Tex. Crim. App. Jan. 15 2014).

63. Although the trial court's examination may have been short, the complainant promised to tell the truth and showed she knew the duty to be truthful; the record did not reflect that she testified to events she did not remember, and while her responses showed some confusion, overall, her testimony indicated sufficient accuracy in her recollection, and any inconsistent testimony about a specific event might affect her credibility, but not her competency. Torres v. State, 424 S.W.3d 245, 2014 Tex. App. LEXIS 1900, 2014 WL 685844 (Tex. App. Houston 14th Dist. Feb. 20 2014).

64. Although the complainant had difficulty recalling some collateral matters, a child's inability to testify to collateral matters did not affect the child's competency, and the record showed she possessed the ability to observe events and was capable of recollecting them. Torres v. State, 424 S.W.3d 245, 2014 Tex. App. LEXIS 1900, 2014 WL 685844 (Tex. App. Houston 14th Dist. Feb. 20 2014).

65. Trial court did not abuse its discretion by finding that the child victim was competent to testify because defendant did not point to any testimony in the record that he claimed demonstrated a lack of the ability to relate the events that occurred, Medellin v. State, 2013 Tex. App. LEXIS 12913, 2013 WL 5676224 (Tex. App. Eastland Oct. 17 2013).

66. Affidavit of a 12-year-old minor that there was no cautioning sign in a grocery store, submitted in support of his father's slip and fall action against the store, was competent under Tex. R. Evid. 601(a)(2) in the absence of any examination of the child by the trial court. Pipkin v. Kroger Texas, L.P., 383 S.W.3d 655, 2012 Tex. App. LEXIS 7627, 2012 WL 3860582 (Tex. App. Houston 14th Dist. Sept. 6 2012).

67. During a criminal trial for aggravated sexual assault of a child and indecency with a child by contact, the twelve-year-old victim's responses to the prosecutor's questions and her testimony indicated she had the ability to

intelligently recall and narrate the events, understood the difference between the truth and a lie, and understood that she had a responsibility to testify truthfully; therefore, her competence to testify was established under Tex. R. Evid. 601(a)(2). Any inconsistencies the victim's version of events did not render her incompetent to testify, but went to the credibility of her testimony -- an issue to be resolved by the jury. Leal v. State, 2011 Tex. App. LEXIS 1663, 2011 WL 807476 (Tex. App. San Antonio Mar. 9 2011).

68. In a child sexual abuse case, the trial court did not abuse its discretion under Tex. R. Evid. 601(a)(2) by treating as competent a child witness who testified to events he had seen at age two. The witness coherently described what he had seen and gave consistent answers on cross-examination. Ates v. State, 2011 Tex. App. LEXIS 860 (Tex. App. Austin Feb. 4 2011).

69. Trial court did not abuse its discretion during defendant's trial for aggravated sexual assault of a child by not conducting a further inquiry into the ten-year-old complainant's competency as a witness where, after the complainant was sworn in, and before she began her direct testimony, the trial court had sua sponte asked her if she knew what it meant to tell the truth and if she knew she was sworn to tell the truth, and she answered affirmatively to both questions. The trial court then asked her if she understood that it was a "bad thing" if she did not tell the truth, and she said "yes." Rodriguez v. State, 345 S.W.3d 504, 2011 Tex. App. LEXIS 834 (Tex. App. Waco Feb. 2 2011).

70. Admitting a child's testimony was not fundamental error under Tex. R. Evid. 103(d), given that (1) the child successfully answered a series of questions about his age and interests, and nothing suggested that he was unable to intelligently observe what he witnessed, for purposes of Tex. R. Evid. 601(a)(2), (2) his testimony was not essential to appellant's conviction under Tex. Penal Code Ann. §§ 21.11, 22.021, as the victim's testimony did not require corroboration under Tex. Code Crim. Proc. Ann. art. 38.07(a), (b)(1), and (3) the State did not elect to seek a conviction on the basis of the episode about which the witness testified. Ates v. State, 2010 Tex. App. LEXIS 9777 (Tex. App. Austin Dec. 10 2010).

71. Child sexual assault victim was not incompetent to testify because a review of the child's testimony demonstrated her ability to observe intelligently the sexual assault by defendant, recall the event, and narrate it. Therefore, the record did not establish, on its face, that the child was incompetent to testify. Turley v. State, 2010 Tex. App. LEXIS 7198, 2010 WL 3420800 (Tex. App. Texarkana Sept. 1 2010).

72. During defendant's trial for aggravated sexual assault of his four-year-old daughter, the trial court did not err in finding the victim competent to testify under Tex. R. Evid. 601(a)(2); the record of the victim's entire testimony showed that she demonstrated her knowledge of facts by identifying her family and colors and counting from one to ten. Ramos v. State, 2010 Tex. App. LEXIS 3698, 2010 WL 1965886 (Tex. App. Dallas May 6 2010).

73. Defendant argued that the trial court erred in finding that the child victim was competent to testify under Tex. R. Evid. 601(a)(2), but he did not object to her testimony until the conclusion of his cross-examination, plus the trial court did not rule on the objection, but permitted the State to proceed with redirect examination, after which defendant conducted additional cross examination and did not assert any further objections; under Tex. R. App. P. 33.1, defendant did not preserve for review the issue he raised. Caudill v. State, 2010 Tex. App. LEXIS 3310, 2010 WL 1784031 (Tex. App. Tyler May 5 2010).

74. Even if defendant had preserved the claim that the child victim was incompetent to testify under Tex. R. Evid. 601(a)(2), the issue was without merit; the child's testimony contained conflicts as to where the assault occurred, but these issues did not make her an incompetent witness, and only after the child acknowledged the necessity of responding to questions truthfully did the trial court permit her to testify, and the trial court did not abuse its discretion in allowing her testimony. Caudill v. State, 2010 Tex. App. LEXIS 3310, 2010 WL 1784031 (Tex. App.

Tyler May 5 2010).

75. In defendant's indecency case, even if the trial court erred in determining that the victim was competent to testify, the court would still consider her testimony in reviewing the sufficiency of the evidence. Garcia v. State, 2010 Tex. App. LEXIS 948, 2010 WL 457131 (Tex. App. Eastland Feb. 11 2010).

76. Victim's responses to the qualification questions from counsel and the trial court regarding her ability to testify truthfully were equivocal regarding her competency to testify, for purposes of Tex. R. Evid. 601(a)(2), but the court had to review the child's entire testimony in determining if there was an abuse of discretion. Garcia v. State, 2010 Tex. App. LEXIS 948, 2010 WL 457131 (Tex. App. Eastland Feb. 11 2010).

77. Victim was able to observe the events of her encounter with defendant, recollect those events, and narrate them at trial, and considering her testimony as a whole, the court found that her testimony was admissible for purposes of Tex. R. Evid. 601(a)(2), and thus the failure of trial counsel to object to the admissible testimony did not support a claim of ineffective assistance of counsel. Garcia v. State, 2010 Tex. App. LEXIS 948, 2010 WL 457131 (Tex. App. Eastland Feb. 11 2010).

78. Considering the child victim's responses to the prosecutor's qualification questions as well as her testimony as a whole, the trial court did not abuse its discretion by finding the child competent to testify under Tex. R. Evid. 601(a)(2); the child successfully answered questions concerning her name, birthday, and current age, she said she knew the difference between telling the truth and telling a lie, she promised to tell the truth, plus her testimony demonstrated that she was able to understand questions asked of her and intelligently frame answers to those questions, and while she could not recall all the details of the sexual assaults, she could recall and relate that defendant improperly touched her and where she was touched, for purposes of defendant's trial under Tex. Penal Code Ann. §§ 22.021, 21.11. Debbs v. State, 2009 Tex. App. LEXIS 6103, 2009 WL 2397112 (Tex. App. Waco Aug. 5 2009).

79. Four-year-old child victim's testimony against her 11-year-old brother was properly admitted under Tex. R. Evid. 601(a)(2) because although she had a short attention span and did not always want to answer questions, she showed that she knew the difference between a lie and the truth and answered the questions asked of her. In re K.H., 2009 Tex. App. LEXIS 2343, 2009 WL 962469 (Tex. App. San Antonio Apr. 8 2009).

80. Trial court did not abuse its discretion by determining that the younger of the two victims, who was three years old at the time of the offense and five years old at the time of trial, was competent to testify under Tex. R. Evid. 601 because although the victim's responses showed some conflict and confusion, her testimony overall indicated sufficient accuracy in her recollection in that she was able to recall and narrate details of the event by giving specific testimony about the location, timing, and details. Wagner v. State, 2009 Tex. App. LEXIS 2423 (Tex. App. Houston 14th Dist. Mar. 31 2009).

81. In a sexual assault of a child case, defendant failed to preserve his complaint of the child's competency to testify because the trial court found the child competent to testify, and defendant did not object, nor did he object when the trial court made its finding of competency. Furthermore, defendant did not make any objections when the child testified in the presence of the jury. Martin v. State, 2008 Tex. App. LEXIS 8437 (Tex. App. Fort Worth Nov. 6, 2008).

82. Defendant cited no authority, and the court found none, requiring the trial court to question a child on the child's understanding of the punishment that will be inflicted should he or she lie and thus the court was unable to say that the trial court's failure to so question the child rendered the decision to permit her to testify an abuse of discretion; the court reviewed the body of the child's testimony and it demonstrated that the child was able to

intelligently observe the events on the night of her mother's death, and could, for the most part, recollect those events and narrate them, and considering the child's responses to the trial court's qualification questions as well as her testimony as a whole, the trial court did not abuse its discretion by finding the child competent to testify in defendant's murder trial, for purposes of Tex. R. Evid. 601(a)(2). Davis v. State, 268 S.W.3d 683, 2008 Tex. App. LEXIS 6566 (Tex. App. Fort Worth 2008).

83. By overruling defendant's objections to the child's competency and permitting her to testify, the trial court implicitly found the child competent to testify, and for purposes of Tex. R. App. P. 33.1(a)(2)(A), nothing more was required. Davis v. State, 268 S.W.3d 683, 2008 Tex. App. LEXIS 6566 (Tex. App. Fort Worth 2008).

84. In defendant's trial for aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021, defendant did not object to the child's testimony for purposes of Tex. R. Evid. 601(a)(2) and thus the claim was not preserved for review under Tex. R. App. P. 33.1; even if preserved, the court found no error because although the child's testimony contained conflicting answers, that did not alone make the child an incompetent witness, and the child consistently testified to defendant's assaults and the location of the crime, such that the trial court did not abuse its discretion in finding that the child had the capacity to observe, recollect, and truthfully describe the events that were the basis of her testimony. Quam v. State, 2007 Tex. App. LEXIS 3133 (Tex. App. Tyler Apr. 25 2007).

85. In defendant's aggravated sexual assault on a child case, although the court erred by finding the child victim competent to testify because he was unable to demonstrate that he had the capacity to recollect and narrate events relating to the transaction at issue, the error was harmless. The victim's testimony provided nothing the jury could use to determine guilt or innocence, and the outcry witness's testimony was sufficient to sustain defendant's conviction. Morrison v. State, 2007 Tex. App. LEXIS 1529 (Tex. App. Fort Worth Mar. 1 2007).

86. In an aggravated sexual assult case where defendant sexually assaulted his two stepdaughters, both the trial court and the prosecutor used abstract questioning as well as concrete examples to inquire into and establish each child's capacity to narrate the events, understanding of the difference between the truth and a lie, and understanding of her obligation to tell the truth; the children's responses indicated that they each had the ability to intelligently recall and narrate the events, understood the difference between the truth and a lie, and understood their moral responsibility to tell the truth; based on the children's answers to the qualification questions and their testimony as a whole, which was coherent and offered specific testimony about the location, timing, and details of the offenses, pursuant to Tex. R. Evid. 601, the children were competent to testify; thus, the trial court did not abuse its discretion in finding that the children were competent to testify. De Los Santos v. State, 219 S.W.3d 71, 2006 Tex. App. LEXIS 10076 (Tex. App. San Antonio 2006).

87. Assuming without deciding that defendant preserved error, pursuant to Tex. R. App. P. 33.1, as to complaints on appeal related to the competency of the child witness under Tex. R. Evid. 601(a)(2) in defendant's trial for aggravated assault of a child in violation of Tex. Penal Code Ann. § 22.021(a)(1)(B)(i), and assuming that error occurred, the court found that reversible error was not shown for purposes of Tex. R. App. P. 44.2; by the time of trial, the child was undergoing speech therapy, answered questions articulately, and understood them, and the court had no doubt that the child demonstrated the competency to intelligently observe the events in question, such that defendant presented no prejudice. Ozuna v. State, 199 S.W.3d 601, 2006 Tex. App. LEXIS 7134 (Tex. App. Corpus Christi 2006).

88. In defendant's trial for aggravated sexual assault of a child, the trial court did not err in allowing the minor child to testify, for purposes of Tex. R. Evid. 601, given that the trial court asked the child questions to determine if the child knew the difference between a truth and a lie, the child was able to articulate events in his life and his age at the time the events occurred, and the child was able to perceive the events of the alleged crime and relate the evidence to the jury. Castillo v. State, 2006 Tex. App. LEXIS 6839 (Tex. App. Eastland Aug. 3 2006).

89. Case law identifies factors for the court to consider in determining a witness's competency, and the trial court is not required to make a finding on the record concerning these factors; thus, the court rejected defendant's claim to the contrary in defendant's trial for aggravated sexual assault of a child. Castillo v. State, 2006 Tex. App. LEXIS 6839 (Tex. App. Eastland Aug. 3 2006).

90. Where the defendant was convicted of aggravated assault with a deadly weapon, he failed to preserve his objection to the competency of a child witness whose testimony may have suggested she did not understand her obligation to be truthful; the defendant did not make an objection on the record. Rodriguez v. State, 2006 Tex. App. LEXIS 6108 (Tex. App. Houston 14th Dist. July 13 2006).

91. In a termination of parental rights proceeding, the trial court admitted evidence from the court-appointed special advocate regarding outcry statements of abuse from the children without showing that the children were competent witnesses under Tex. R. Evid. 601; any error was harmless, because the same evidence was introduced elsewhere during trial without objection. In re K.R.C., 2006 Tex. App. LEXIS 5819 (Tex. App. Fort Worth July 6 2006).

Evidence : Competency : Disability : Mental Incapacity

92. Trial court did not abuse its discretion by finding the moderately mentally retarded complainant competent to testify because her testimony showed she possessed the ability to observe the alleged sexual assault at the time of the occurrence, was capable of recollecting the events, and was capable of narrating the events. Her mental status did not automatically render her incompetent to testify but it affect her credibility and the weight of her testimony. Hogan v. State, 440 S.W.3d 211, 2013 Tex. App. LEXIS 13092 (Tex. App. Houston 14th Dist. Oct. 22 2013).

93. Appellant, in claiming the victim, a 19-year-old mentally disabled woman, was incompetent, requested a hearing under Tex. R. Evid. 601(a)(2), and the trial court found the victim competent, and during cross-examination, defense counsel re-urged the competency objection; appellant's motion did not only seek a hearing, but exclusion of the victim's testimony, and this was a timely request stating grounds for exclusion, which was pursued to an adverse ruling for purposes of Tex. R. App. P. 33.1(a), and thus appellant preserved this issue for review by obtaining an adverse ruling on the evidence's admissibility outside of the jury's presence, for purposes of Tex. R. Evid. 103(a)(1). Luria v. State, 2012 Tex. App. LEXIS 8646, 2012 WL 4900908 (Tex. App. San Antonio Oct. 17 2012).

94. Victim, a 19-year-old mentally disabled woman, showed that she possessed the ability to intelligently perceive events, recall them, and convey them using dolls and words; the court deferred to the trial judge, and held that the trial court did not abuse its discretion in finding the victim competent to testify in appellant's trial for aggravated sexual assault of a disabled person. Luria v. State, 2012 Tex. App. LEXIS 8646, 2012 WL 4900908 (Tex. App. San Antonio Oct. 17 2012).

95. Because appellant failed to request a hearing on the victim's alleged incompetence or object to her testimony, appellant did not preserve his complaint regarding her competence; in any event, her testimony provided sufficient evidence supporting a finding that she was competent under Tex. R. Evid. 601(a), given that (1) she testified that she had not suffered blackouts since 2008, she did not have visions or hear voices, and she was able to work and maintain her house, (2) she remembered the details of the assault, she did not suffer a blackout on that day, and none of her other personalities were present that day, (3) she had the ability to understand questions and frame answers, and (4) although she definitely suffered from a mental disability, she was competent to observe the events in question and had the capacity to recollect those events and recount them in a narrative format. Lewis v. State, 2012 Tex. App. LEXIS 100, 2012 WL 29326 (Tex. App. Corpus Christi Jan. 5 2012).

96. Record was silent regarding trial counsel's reason for not requesting a competency hearing of the victim, and thus appellant failed to overcome the strong presumption that trial counsel rendered effective assistance; because the court found no reason to reject the victim's testimony, prejudice to appellant was not shown. Lewis v. State, 2012 Tex. App. LEXIS 100, 2012 WL 29326 (Tex. App. Corpus Christi Jan. 5 2012).

97. Although the father was incompetent to testify at trial, because the father did not demonstrate, argue, or even contend that the admission of his testimony resulted in an improper judgment, his Tex. R. Evid. 601 argument had to fail. In the Interest of R.M.T., 352 S.W.3d 12, 2011 Tex. App. LEXIS 8070 (Tex. App. Texarkana Oct. 5 2011).

98. Court properly found a drug informant competent to testify -- despite being bipolar -- because she was able to function in everyday life, she had a college degree in English, and nothing indicated that the informant was unable to observe intelligently the events surrounding her phone conversations with defendant. In short, the record demonstrated that the trial court reasonably could have found that the informant was competent to testify. Kennedy v. State, 2009 Tex. App. LEXIS 3583 (Tex. App. Fort Worth May 21 2009).

99. Despite some inconsistencies, there was evidence that a witness, who was mentally retarded, possessed the capability to observe intelligently at the time of defendant's attack on her, as well as the capacity to recollect and narrate, and thus the trial court did not err in finding that the witness had the capacity to testify pursuant to Tex. R. Evid. 601 and in admitting the testimony. Lewis v. State, 2007 Tex. App. LEXIS 2741 (Tex. App. Dallas Apr. 10 2007).

100. Trial court did not err in ruling that a 17-year-old sexual assault victim was not incompetent to testify under Tex. R. Evid. 601 by reason of mental retardation; the victim was able to state her name, age, and school, she knew defendant and related the general act he committed upon her, and she knew the difference between truths and lies. Harper v. State, 2006 Tex. App. LEXIS 8069 (Tex. App. Amarillo Sept. 11 2006).

101. Evidence was factually sufficient to support defendant's conviction of the kidnapping and sexual assault of a disabled adult woman, as she testified that defendant took her to his apartment three times against her will, defendant sexually assaulted her there, and she identified defendant's apartment, the bed where the assault took place, and the bedspread that was on the bed at the time, which defendant had later washed; defendant did not challenge the victim's mental capacity to testify at trial, for purposes of Tex. R. Evid. 601, to the extent that the victim's mental capacity could have been a factor in assessing her truthfulness and credibility, the court deferred to the jury, and the court found that the jury was rationally justified in finding guilt beyond a reasonable doubt. Oliver v. State, 2006 Tex. App. LEXIS 4547 (Tex. App. Fort Worth May 25 2006).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

102. In a termination of parental rights proceeding, the trial court admitted evidence from the court-appointed special advocate regarding outcry statements of abuse from the children without showing that the children were competent witnesses under Tex. R. Evid. 601; any error was harmless, because the same evidence was introduced elsewhere during trial without objection. In re K.R.C., 2006 Tex. App. LEXIS 5819 (Tex. App. Fort Worth July 6 2006).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

103. Trial court did not abuse its discretion by failing to sua sponte conduct a hearing to determine a child sexual assault victim's mental competency or in overruling defendant's motion for a mistrial where defendant's own question to the State's expert of whether the victim's story appeared to be realistic induced the response that, in the witness's opinion, the victim was telling the truth. Furthermore, defendant had not preserved error because although

he was aware before trial that the victim had mental problems, at no time did he object to the victim's testimony on the ground that she was not mentally competent to testify. Fox v. State, 175 S.W.3d 475, 2005 Tex. App. LEXIS 7071 (Tex. App. Texarkana 2005).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

104. Where decedent's wife testified as to their agreement to be married, the trial court construed decedent's will as if a common law marriage existed; on appeal, decedent's children argued that the wife's testimony did not meet the requirements of the Dead Man's Statute under Tex. R. Evid. 601 because it was not corroborated by other evidence. The Court of Appeals of Texas would not address the argument, because no objection was made at trial as required by Tex. R. Evid. 103(a)(1). In the Estate of Landers, 2010 Tex. App. LEXIS 7196, 2010 WL 3420905 (Tex. App. Texarkana Sept. 1 2010).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Witness Qualifications

105. In a hearing on a motion to suppress, an officer's purported lack of independent knowledge of events surrounding an investigative stop did not make the officer incompetent as a witness under Tex. R. Evid. 601 in part because the rules of evidence (except for those rules concerning privileges) did not apply to suppression hearings. Belcher v. State, 244 S.W.3d 531, 2007 Tex. App. LEXIS 9883 (Tex. App. Fort Worth 2007).

Evidence : Procedural Considerations : Rulings on Evidence

106. In a termination of parental rights proceeding, the trial court admitted evidence from the court-appointed special advocate regarding outcry statements of abuse from the children without showing that the children were competent witnesses under Tex. R. Evid. 601; any error was harmless, because the same evidence was introduced elsewhere during trial without objection. In re K.R.C., 2006 Tex. App. LEXIS 5819 (Tex. App. Fort Worth July 6 2006).

Evidence : Testimony : General Overview

107. Even if appellant adequately briefed her points, there was no abuse of discretion in the trial court's evidentiary rulings, for purposes of Tex. R. Evid. 402, 601, 802 and Tex. R. App. P. 44.1. Pool v. Diana, 2010 Tex. App. LEXIS 2208 (Tex. App. Austin Mar. 24 2010).

108. Defendant failed to raise complaints at trial, such that defendant was not entitled to raise the issue of competency of child witnesses for the first time on appeal, pursuant to Tex. R. App. P. 33.1(a). Guillory v. State, 2007 Tex. App. LEXIS 649 (Tex. App. San Antonio Jan. 31 2007).

Family Law : Guardians : General Overview

109. In a white male job candidate's discrimination action against a college based on the college's selection of a younger black female for the position of psychology instructor, the trial court erred in striking the deposition testimony of the director of the liberal arts department because it raised a question of material fact as to whether race and age were motivating factors, there was no separate hearing on the director's competency, and the existence of a guardianship did not automatically render the director incompetent as a witness under Tex. R. Evid. 601(a). Kokes v. Angelina College, 148 S.W.3d 384, 2004 Tex. App. LEXIS 8182 (Tex. App. Beaumont 2004).

Public Health & Welfare Law : Healthcare : Services for Disabled & Elderly Persons

110. In a will contest, the trial court should have ordered disclosure of an Adult Protective Services (APS) file regarding the decedent and should have allowed the deposition of the APS case worker, in part because the case worker was able to corroborate, as required by Tex. R. Evid. 601(b), a phone call with the decedent's daughter that was part of the investigation. In re Chesses, 388 S.W.3d 330, 2012 Tex. App. LEXIS 4270, 2012 WL 1943764 (Tex. App. El Paso May 30 2012).

Tex. Evid. R. 602

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 602 Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 22, *Rules Affecting Admissibility* ; Unit 60, *Opinion Testimony*.

Case Notes

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits
Civil Procedure : Appeals : Standards of Review : Substantial Evidence : Sufficiency of Evidence
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : Elements
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Destruction of Property : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Documentary Evidence : Affidavits
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Lay Witnesses : General Overview
Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions
Evidence : Testimony : Lay Witnesses : Personal Knowledge
Real Property Law : Landlord & Tenant : Landlord's Remedies & Rights : Eviction Actions
Real Property Law : Landlord & Tenant : Landlord's Remedies & Rights : Rent Recovery
Real Property Law : Purchase & Sale : Contracts of Sale : Enforceability : Fraud & Misrepresentation
Torts : Business Torts : Commercial Interference : Contracts : General Overview
Workers' Compensation & SSDI : Compensability : Injuries : Intoxication

LexisNexis (R) Notes

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits

1. In an investor's suit alleging that a securities brokerage firm had negligently failed to supervise its employee in the sale of a portion of the employee's outside businesses to the investor, a manager's summary-judgment affidavit showed that she had personal knowledge regarding the firm's lack of notice of the transaction, which the manager obtained both in the course of her job duties and from conversations she had with an attorney. Fernea v. Merrill Lynch Pierce Fenner & Smith, Inc., 2011 Tex. App. LEXIS 172 (Tex. App. Austin Jan. 7 2011).

Civil Procedure : Appeals : Standards of Review : Substantial Evidence : Sufficiency of Evidence

2. In an alimony dispute, the evidence was legally insufficient to sustain the award because the only evidence presented as to the husband's income was testimony from the wife that he had not provided any information establishing that 25% of his gross monthly income would be less than 5 million; that did not provide any actual evidence that the husband had a total gross income of $ 20 million dollars or more from January 1, 2002 to September 21, 2006. The wife acknowledged on appeal that she was "not privy to the husband's personal income information," and admitted that she failed to come forward with information regarding the husband's gross income. Sembritzky v. Shanks, 2008 Tex. App. LEXIS 9754 (Tex. App. Houston 1st Dist. Jan. 8 2008).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

3. In a cocaine possession trial, there was no error in admitting an officer's testimony that defendant passenger jointly possessed cocaine or in admitting the officer's testimony explaining how he believed the bag of cocaine became positioned behind the driver's seat. The testimony was rationally based on the circumstances the officer perceived in the course of arresting defendant and investigating the case. Salazar v. State, 2014 Tex. App. LEXIS 3983, 2014 WL 1408121 (Tex. App. Houston 1st Dist. Apr. 10 2014).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : Elements

4. Testimony of witness regarding the victim's kidnapping was not speculative and he was qualified to testify that the victim could not leave the vehicle because the witness had personal knowledge of a number of key facts, and he was present at material times. Saenz v. State, 2009 Tex. App. LEXIS 2254 (Tex. App. Corpus Christi Apr. 2 2009).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

5. In defendant's capital murder case, a court did not err by permitting a witness to speculate that defendant's accomplice could not have taken the money from the cash register where the witness based his testimony on his observations. He could see where both robbers were located in relationship to the complainant and the cash drawer, and based on those observations, the witness drew an inference that only defendant was in a position to reach the cash drawer and take the money. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Destruction of Property : Elements

6. Where defendant used a car jack to strike the hood of the complainant's SUV, Tex. R. Evid. 602 permitted the arresting officer to testify that $1500 was the estimated cost of repairing the damage based on his years of experience with criminal mischief cases; the officer was also permitted to testify that the body shop's repair estimate was $ 1,530.01. Barnes v. State, 248 S.W.3d 217, 2007 Tex. App. LEXIS 4261 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

7. In a trial for indecency with a child, it was proper to exclude evidence of conduct by the complainant's mother, such as extramarital affairs and involvement in pornography and drug abuse; the reviewing court noted that much of the testimony probably also constituted objectionable speculation or hearsay, at least from the witnesses through whom defendant sought to introduce it. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements

8. In a driving while intoxicated trial, there was no error under Tex. R. Evid. 701, 602, in admitting lay opinion testimony concerning whether anyone else could have exited a burning vehicle, other than defendant. Taking into account that the witnesses were the only people present for the accident, other than the defendant, their rationally based perceptions put them in the best position to judge how likely the presence or non-presence of a second occupant would be. O'donoghue v. State, 2010 Tex. App. LEXIS 5532 (Tex. App. Corpus Christi July 15 2010).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

9. Defendant's counsel was not ineffective during the punishment phase of defendant's aggravated assault trial for failing to object to a county case worker supervisor's opinion about defendant's character where the case worker's testimony was in compliance with Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and Tex. R. Evid. 602 because it was rationally based on her perception and was helpful to a determination of a fact in issue-defendant's punishment. Ramirez v. State, 2009 Tex. App. LEXIS 368, 2009 WL 1567340 (Tex. App. Corpus Christi Jan. 22 2009).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

10. Defendant's counsel was not ineffective during the punishment phase of defendant's aggravated assault trial for failing to object to a county case worker supervisor's opinion about defendant's character where the case worker's testimony was in compliance with Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and Tex. R. Evid. 602 because it was rationally based on her perception and was helpful to a determination of a fact in issue-defendant's punishment. Ramirez v. State, 2009 Tex. App. LEXIS 368, 2009 WL 1567340 (Tex. App. Corpus Christi Jan. 22 2009).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

11. In a trial for indecency with a child under the age of 17 years, defendant objected, during a psychiatric witness's voir dire, to testimony regarding the complainant's statements about one incident; the separate objections under Tex. R. Evid. 403, 404(b), 602, 803(1) and 803(4), were overruled and appellant was not required to later repeat the individual objections before the jury. However, defendant argued on appeal that it was error to admit the hearsay statements for the purpose of medical diagnosis when the child did not have personal knowledge of the incident, in that the child was not sure whether he was touched by a penis or a finger; this argument appeared to be a unique blend of Tex. R. Evid. 602 and 803(4), which was not presented to the trial court with sufficient specificity to preserve the objection and which was also contrary to the law because defendant was not challenging the lack of personal knowledge by the witnesses. Ramirez v. State, 2004 Tex. App. LEXIS 1063 (Tex. App. Austin Feb. 5 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

12. By failing to object to trial counsel's affidavit on the grounds raised on appeal, namely that it was incompetent under Tex. R. Evid. 602, appellant failed to preserve his complaint for review. Ex Parte Gandara, 2011 Tex. App. LEXIS 9395, 2011 WL 5995428 (Tex. App. El Paso Nov. 30 2011).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

13. By failing to object to trial counsel's affidavit on the grounds raised on appeal, namely that it was incompetent under Tex. R. Evid. 602, appellant failed to preserve his complaint for review. Ex Parte Gandara, 2011 Tex. App. LEXIS 9395, 2011 WL 5995428 (Tex. App. El Paso Nov. 30 2011).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

14. In a robbery/murder trial, any error was harmless in admitting an investigator's arguably speculative testimony that defendant's fellow gang members did not testify due to their fear of retaliation. Vallejo v. State, 2013 Tex. App. LEXIS 6952 (Tex. App. Corpus Christi June 6 2013).

Evidence : Demonstrative Evidence : Admissibility

15. State was properly allowed to demonstrate its version of defendant's murder of her husband in order to illustrate the state's theory that the multiple stabbing was planned rather than defensive, and Tex. R. Evid. 602 did not bar the demonstration because the state's witness who participated, a detective who viewed both the body and the scene, had personal knowledge of many of the details about which he testified, and he could reasonably deduce the remaining details from those details he personally knew. The court noted that case law, not Rule 602, was the primary guidepost for determining if a demonstration was appropriately admitted. Wright v. State, 178 S.W.3d 905, 2005 Tex. App. LEXIS 9609 (Tex. App. Houston 14th Dist. 2005).

Evidence : Demonstrative Evidence : Visual Formats

16. Even though the trial court erred by admitting into evidence an animation that purportedly reconstructed the events surrounding the shooting, because nothing in the record supported many of the details contained in the animation and the details were provided by nothing more than pure speculation on the creator's part, the error was harmless. The crux of the case against defendant was linking him to the conspiracy to get the informant, and two witness testified that defendant entered into an agreement with others to retaliate against an informant for giving police information that led to a friend's arrest; the animation did little to answer that question. Derrick v. State, 2013 Tex. App. LEXIS 4843 (Tex. App. Amarillo Apr. 17 2013).

Evidence : Documentary Evidence : Affidavits

17. Certificate of marriage was not evidence that appellee entered into a valid marriage because the affiant did not make the certification based on personal knowledge as required by Tex. R. Evid. 602; the affiant admitted she did not know who the groom was at the ceremony. Nguyen v. Nguyen, 355 S.W.3d 82, 2011 Tex. App. LEXIS 3221 (Tex. App. Houston 1st Dist. Feb. 24 2011).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

18. In a wrongful death case, a court properly excluded expert deposition testimony on hearsay grounds where the expert was not an employee of defendant pharmacy, and there was no evidence that an agency relationship existed. When the family non-suited their claims against the doctor, the subject matter over which the expert was asked to give his opinion became moot; subsequently, he was not called at trial, and, therefore, the trial court excluded his testimony on hearsay grounds. McCluskey v. Randall's Food Mkts., Inc., 2004 Tex. App. LEXIS 9178 (Tex. App. Houston 14th Dist. Oct. 19 2004).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

19. In a murder case, the prosecutor's affidavit regarding trial strategy was relevant and admissible under Tex. R. Evid. 401and Tex. R. Evid. 602 at a new trial hearing because it addressed the issue of effective assistance and included some statements made from personal knowledge; defendant did not seek to limit the scope of the affidavit pursuant to Tex. R. Evid. 105(a). Shanklin v. State, 190 S.W.3d 154, 2005 Tex. App. LEXIS 10675 (Tex. App. Houston 1st Dist. 2005).

Evidence : Procedural Considerations : Limited Admissibility

20. In a murder case, the prosecutor's affidavit regarding trial strategy was relevant and admissible under Tex. R. Evid. 401and Tex. R. Evid. 602 at a new trial hearing because it addressed the issue of effective assistance and included some statements made from personal knowledge; defendant did not seek to limit the scope of the affidavit pursuant to Tex. R. Evid. 105(a). Shanklin v. State, 190 S.W.3d 154, 2005 Tex. App. LEXIS 10675 (Tex. App. Houston 1st Dist. 2005).

Evidence : Procedural Considerations : Rulings on Evidence

21. In defendant's trial for indecency with a child by contact, the trial court did not err by sustaining the State's objections to defense counsel's questions posed to the victim's friend regarding whether her brother's girlfriend was aware of any of the abuse allegations. Any awareness that the girlfriend had of the abuse allegations was beyond the personal knowledge of the witness under Tex. R. Evid. 602. Taylor v. State, 2012 Tex. App. LEXIS 1663, 2012 WL 662373 (Tex. App. Fort Worth Mar. 1 2012).

22. In a case in which a jury found that defendant juvenile engaged in delinquent conduct by committing the offenses of aggravated sexual assault and indecency with a child, the trial court did not err in excluding certain

testimony of various witnesses and did not prevent defendant from fully presenting his defensive theory where: (1) the proffered testimony of the victim's mother as set forth in defendant's bill of exceptions was properly excluded as speculative pursuant to Tex. R. Evid. 602; (2) the victim's mother was not shown to be qualified as an expert to testify under Tex. R. Evid. 702; (3) at trial, defendant was allowed to question the victim and her sister regarding the meeting they allegedly had with their grandparents during the time period after the victim's outcry but prior to the Monday morning interview with a deputy; and (4) the only testimony excluded by the trial court during defense counsel's examination of the victim and her sister was testimony regarding statements made by their grandparents during the alleged meeting, which was properly excluded on hearsay grounds pursuant to Tex. R. Evid. 802. Although defendant's bill of exceptions set forth the testimony that he asserted that the victim would have offered regarding what she told her grandparents during the alleged meeting, defense counsel did not question the victim regarding what she told her grandparents during that meeting, and, additionally, defense counsel did not argue that the trial court improperly sustained the State's hearsay objections to statements of the grandparents. In re J.R.N., 2010 Tex. App. LEXIS 2280, 2009 WL 6312273 (Tex. App. Beaumont Apr. 1 2010).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

23. Even if defendant had timely objected to a similar crime's victim's testimony that defendant "cut this girl," to the extent the testimony implied that the witness had personal knowledge of the incident, Tex. R. Evid. 602, defense counsel later made it clear that the witness had no personal knowledge Tovar v. State, 2013 Tex. App. LEXIS 10404 (Tex. App. Austin Aug. 20 2013).

Evidence : Relevance : Relevant Evidence

24. Trial court did not err by excluding an agent's testimony concerning the identity of the tipster because the agent stated he did not know but only had ideas as to who the tipster was. Ivie v. State, 407 S.W.3d 305, 2013 Tex. App. LEXIS 4876 (Tex. App. Eastland Apr. 18 2013).

25. In defendant's evading arrest case, the court properly excluded a defense witness's testimony because the proffered testimony that it was "standard operating procedure" for law enforcement agencies in general to routinely make video and audio recordings of police pursuits was not germane. The witness did not have personal knowledge as to the standard procedures of the Corpus Christi Police Department regarding recordings of police pursuits. Gomez v. State, 2009 Tex. App. LEXIS 1700 (Tex. App. Corpus Christi Mar. 5 2009).

Evidence : Testimony : Experts : General Overview

26. In a wrongful death case, a court properly excluded expert deposition testimony on hearsay grounds where the expert was not an employee of defendant pharmacy, and there was no evidence that an agency relationship existed. When the family non-suited their claims against the doctor, the subject matter over which the expert was asked to give his opinion became moot; subsequently, he was not called at trial, and, therefore, the trial court excluded his testimony on hearsay grounds. McCluskey v. Randall's Food Mkts., Inc., 2004 Tex. App. LEXIS 9178 (Tex. App. Houston 14th Dist. Oct. 19 2004).

Evidence : Testimony : Experts : Criminal Trials

27. Where defendant was charged with aggravated sexual assault of a child and indecency with a child, defendant objected to testimony from an expert witness concerning whether the victim exhibited behaviors that were consistent which sexual abuse; the trial court overruled defendant's objection based on Tex. R. Evid. 602 for lack of personal knowledge; the expert spoke in generalities and never claimed that child complainants in sexual abuse cases always tell the truth. Ficarro v. State, 2007 Tex. App. LEXIS 3166 (Tex. App. Corpus Christi Apr. 26 2007).

Evidence : Testimony : Lay Witnesses : General Overview

28. On appeal from his conviction for failing to stop at a clearly marked stop line while facing a red light, the appellate court determined that the municipal court did not err in overruling defendant's objections to questions that he claimed called for a conclusion of law or ultimate issue for the jury. The police officers testified based on their observations and experience in patrolling the same area where defendant was cited. Hassan v. State, 440 S.W.3d 684, 2012 Tex. App. LEXIS 8853, 2012 WL 5288353 (Tex. App. Houston 14th Dist. Oct. 25 2012).

29. Where a habitual marijuana user fell from a steel structure while working, he was permitted to give his lay opinion testimony that he had normal use of his mental and physical faculties at the time of his injury. The jury was entitled to believe the employee's testimony, together with the testimony about the work activities the employee successfully completed prior to his fall. Am. Interstate Ins. Co. v. Hinson, 172 S.W.3d 108, 2005 Tex. App. LEXIS 6350 (Tex. App. Beaumont 2005).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions

30. At defendant's trial for possession of cocaine with intent to deliver, a detective testified that defendant and two other people had responsibility for and possession of cocaine found in the hotel room; counsel was not ineffective for failure to object because the testimony was admissible as a lay opinion. The detective's personal knowledge of the matter formed the basis of his objective perception of events and his lay opinion testimony regarding the people in the motel room. Fletcher v. State, 2014 Tex. App. LEXIS 940, 2014 WL 354508 (Tex. App. Corpus Christi Jan. 30 2014).

31. Witness's testimony that he assumed he was in jail because of a shooting committed by defendant was within his personal knowledge, rationally based on his perception of events and experiences, including questioning of him by police about a firearm, was helpful to a clear understanding of his testimony. His testimony was therefore admissible under Tex. R. Evid. 602 and Tex. R. Evid. 701. Williams v. State, 402 S.W.3d 425, 2013 Tex. App. LEXIS 7031 (Tex. App. Houston 14th Dist. June 11 2013).

32. In a driving while intoxicated case, testimony from defendant's mother on the issue of whether defendant was intoxicated was not admissible under Tex. R. Evid. 701 because the mother did not personally observe a traffic stop or defendant's interaction with an arresting officer; the mother did not acquire personal knowledge at the time of the event. Because the testimony was not relevant, defendant's argument that her due process right to present a complete defense was violated was not addressed. Hartin v. State, 2009 Tex. App. LEXIS 2765, 2009 WL 1076799 (Tex. App. Beaumont Apr. 22 2009).

33. In a driving while intoxicated case, there was no error in excluding testimony from defendant's mother regarding why defendant refused to cooperate with an arresting officer due to the mother's lack of personal knowledge. Even though the mother had knowledge of some past events concerning defendant that might have explained defendant's behavior, the mother was not present for the arrest. Hartin v. State, 2009 Tex. App. LEXIS 2765, 2009 WL 1076799 (Tex. App. Beaumont Apr. 22 2009).

34. Officer was properly allowed to testify about the purpose of altering a shotgun to create a sawed-off shotgun because she had dealt with sawed-off shotguns on the firing range and in the field when investigating crimes, and because of her personal observations on the firing range and in the field, she was qualified to offer a lay opinion on the result of altering a shotgun. The question sought an explanation of what would be accomplished by sawing off the barrel of a shotgun, and the question was specifically limited to the officer's experience. Shelton v. State, 2009 Tex. App. LEXIS 1802, 2009 WL 672011 (Tex. App. Fort Worth Mar. 12 2009).

35. Where defendant used a car jack to strike the hood of the complainant's SUV, Tex. R. Evid. 602 permitted the arresting officer to testify that $1500 was the estimated cost of repairing the damage based on his years of experience with criminal mischief cases; the officer was also permitted to testify that the body shop's repair estimate was $ 1,530.01. Barnes v. State, 248 S.W.3d 217, 2007 Tex. App. LEXIS 4261 (Tex. App. Houston 1st Dist. 2007).

36. In a possession of a prohibited substance in a correctional facility case, defendant alleged that he gave false testimony at his cell mate's trial because he was coerced by gang members, but his cell mate did not testify that he had personal knowledge of the gang members at the correctional facility actually following the gang's rules to protect other gang members from prosecution; therefore, the cell mate's opinion testimony was not based on his perceptions; rather, the cell mate's opinion testimony was based on his speculative conclusions regarding what the gang members would have done to protect him from prosecution; accordingly, Tex. R. Evid. 701 was not met by the cell mate's testimony, and the trial court did not abuse its discretion in sustaining the State's objection to that testimony. Haggerty v. State, 2007 Tex. App. LEXIS 2130 (Tex. App. Houston 14th Dist. Mar. 20 2007).

Evidence : Testimony : Lay Witnesses : Personal Knowledge

37. Petitioner failed to show the court erred in admitting speculative testimony, because the court could determine that the psychologist testifying about the process of evaluating sex offenders for behavioral abnormality and explaining how certain statistical studies correlated to risk of recidivism possessed sufficient knowledge to answer the question whether sex offenses were often under-reported or not reported at all. In re Commitment of Puckett, 2014 Tex. App. LEXIS 6438, 2014 WL 2616915 (Tex. App. Beaumont June 12 2014).

38. Officer's testimony about inconsistencies in defendant's narrative was properly admitted, even though he did not personally hear what defendant told other officers in a 1982 interview, because the testifying officer had personal knowledge of what defendant said in a 2011 interview and reviewed the written record of the 1982 interview. Pena v. State, 441 S.W.3d 635, 2014 Tex. App. LEXIS 5932 (Tex. App. Houston 1st Dist. June 3 2014).

39. At defendant's trial for possession of cocaine with intent to deliver, a detective testified that defendant and two other people had responsibility for and possession of cocaine found in the hotel room; counsel was not ineffective for failure to object because the testimony was admissible as a lay opinion. The detective's personal knowledge of the matter formed the basis of his objective perception of events and his lay opinion testimony regarding the people in the motel room. Fletcher v. State, 2014 Tex. App. LEXIS 940, 2014 WL 354508 (Tex. App. Corpus Christi Jan. 30 2014).

40. Even if defendant had timely objected to a similar crime's victim's testimony that defendant "cut this girl," to the extent the testimony implied that the witness had personal knowledge of the incident, Tex. R. Evid. 602, defense counsel later made it clear that the witness had no personal knowledge Tovar v. State, 2013 Tex. App. LEXIS 10404 (Tex. App. Austin Aug. 20 2013).

41. Advisor's "understanding" did not equate to personal knowledge and the court affirmed the ruling that struck portions of his affidavit. Vsr Fin. Servs. v. McLendon, 409 S.W.3d 817, 2013 Tex. App. LEXIS 10187 (Tex. App. Dallas Aug. 14 2013).

42. Court presumed the trial court understood the basis for appellant's objection was a lack of personal knowledge because the trial court told the witness to answer if she knew, and thus appellant preserved error. Contreras v. State, 2013 Tex. App. LEXIS 9459 (Tex. App. Dallas July 30 2013).

43. Community supervision officer demonstrated her personal knowledge and her testimony was properly admitted, given that she identified appellant in open court and testified he was placed on community supervision in

2011, and she answered the question on court costs after being told she could answer if she knew. Contreras v. State, 2013 Tex. App. LEXIS 9459 (Tex. App. Dallas July 30 2013).

44. Trial court did not abuse its discretion in refusing to allow witnesses to be impeached by proof: (1) showing a bias or interest on the part of some other witness or information source, and (2) about which the witness had no personal knowledge. Estate of Muniz v. Ford Motor Co., 2013 Tex. App. LEXIS 7158 (Tex. App. San Antonio June 12 2013).

45. Witness's testimony that he assumed he was in jail because of a shooting committed by defendant was within his personal knowledge, rationally based on his perception of events and experiences, including questioning of him by police about a firearm, was helpful to a clear understanding of his testimony. His testimony was therefore admissible under Tex. R. Evid. 602 and Tex. R. Evid. 701. Williams v. State, 402 S.W.3d 425, 2013 Tex. App. LEXIS 7031 (Tex. App. Houston 14th Dist. June 11 2013).

46. Witness testified as a lay person that by using crime scene measurements, photographs, statements, and an accident reconstruction software program, he created the animation, but nothing supported many of the details in the animation, which were provided by no more than pure speculation, and thus the trial court erred in admitting the animation, for purposes of Tex. R. Evid. 602, 701. Lewis v. State, 402 S.W.3d 852, 2013 Tex. App. LEXIS 6923 (Tex. App. Amarillo May 29 2013).

47. Finding error in the admission of computer generated animation under Tex. R. Evid. 602, 701 did not end the court's inquiry, as the court had to consider whether to disregard the error under Tex. R. App. P. 44.2(b); the court found that appellant's substantial rights were not affected and the error was harmless, given that the animation did little to answer whether appellant agreed to retaliate against someone, and there was testimony to that effect. Lewis v. State, 402 S.W.3d 852, 2013 Tex. App. LEXIS 6923 (Tex. App. Amarillo May 29 2013).

48. Trial court did not err by excluding an agent's testimony concerning the identity of the tipster because the agent stated he did not know but only had ideas as to who the tipster was. Ivie v. State, 407 S.W.3d 305, 2013 Tex. App. LEXIS 4876 (Tex. App. Eastland Apr. 18 2013).

49. Even though the trial court erred by admitting into evidence an animation that purportedly reconstructed the events surrounding the shooting, because nothing in the record supported many of the details contained in the animation and the details were provided by nothing more than pure speculation on the creator's part, the error was harmless. The crux of the case against defendant was linking him to the conspiracy to get the informant, and two witness testified that defendant entered into an agreement with others to retaliate against an informant for giving police information that led to a friend's arrest; the animation did little to answer that question. Derrick v. State, 2013 Tex. App. LEXIS 4843 (Tex. App. Amarillo Apr. 17 2013).

50. Unsworn verification did not meet the requirements of Tex. R. Civ. P. 165a(3) and did not establish that it was based on personal knowledge as required by Tex. R. Evid. 602; thus, the trial court erred in reinstating the case after a dismissal for want of prosecution. Counsel's signature providing a certification under Tex. R. Civ. P. 13 could not substitute for a verification, and an affidavit later filed more than 30 days after the date of dismissal was untimely under Rule 165a and could not cure the defective verification. In re Valliance Bank, 422 S.W.3d 722, 2012 Tex. App. LEXIS 9491, 2012 WL 5512455 (Tex. App. Fort Worth Nov. 15 2012).

51. In a negligence suit, it was an abuse of discretion to admit testimony of the contents of public records concerning the inspection results of fourteen hundred trucks in Canada and the braking and other problems allegedly found, when the actual reports were not themselves produced. The testifying witness was not present for the inspection of the many trucks inspected, and he had no personal knowledge of those inspections; he based his

testimony on the government reports or studies that presumably contained the information. U-Haul Int'l, Inc. v. Waldrip, 380 S.W.3d 118, 2012 Tex. LEXIS 737, 55 Tex. Sup. Ct. J. 1345 (Tex. 2012).

52. Witness's testimony and statements were conclusory and not shown to be based on any personal knowledge of the witness, and thus the testimony was inadmissible under Tex. R. Evid. 602. In re Estate of Snow, 2012 Tex. App. LEXIS 7450 (Tex. App. Tyler Aug. 30 2012).

53. Nothing explained the factual basis for one statement, and it was not shown to be within the witness's personal knowledge and was conclusory; it was inadmissible under Tex. R. Evid. 602. In re Estate of Snow, 2012 Tex. App. LEXIS 7450 (Tex. App. Tyler Aug. 30 2012).

54. Heirs did not show that a witness had personal knowledge that a widow was unable to balance her checkbook, and thus the statement was not admissible under Tex. R. Evid. 602. In re Estate of Snow, 2012 Tex. App. LEXIS 7450 (Tex. App. Tyler Aug. 30 2012).

55. At the punishment phase of a criminal mischief trial, it was proper to admit testimony from the new husband of defendant's ex-wife regarding defendant's attempt to hit his ex-wife with his car because, contrary to defendant's argument, there was evidence that the new husband had personal knowledge of the incident. Moreno v. State, 2012 Tex. App. LEXIS 6018, 2012 WL 3025932 (Tex. App. El Paso July 25 2012).

56. In a murder trial, a witness was not allowed to speculate as to whether defendant and the complainant were arguing because she stated that she saw and heard the two arguing about whether defendant was supposed to give the complainant some money for her daughter. The witness's uncertainty seemed to have been about whether defendant actually owed the money, not whether they were arguing about the debt. Benard v. State, 2012 Tex. App. LEXIS 3928, 2012 WL 1795131 (Tex. App. Beaumont May 16 2012).

57. Exclusion of testimony did not result in reversible error, as there was no evidence that the witness had any first-hand knowledge, for purposes of Tex. R. Evid. 602, of appellant's health condition and the trial court did not err in sustaining the hearsay objection; although some of the proffered testimony was not hearsay and consisted of the witness's observations and inferences, for purposes of Tex. R. Evid. 701, even that was cumulative, and thus the excluded testimony could not have added anything to the admitted evidence. Frangias v. State, 367 S.W.3d 806, 2012 Tex. App. LEXIS 3065, 2012 WL 1356704 (Tex. App. Houston 14th Dist. Apr. 19 2012).

58. In defendant's trial for indecency with a child by contact, the trial court did not err by sustaining the State's objections to defense counsel's questions posed to the victim's friend regarding whether her brother's girlfriend was aware of any of the abuse allegations. Any awareness that the girlfriend had of the abuse allegations was beyond the personal knowledge of the witness under Tex. R. Evid. 602. Taylor v. State, 2012 Tex. App. LEXIS 1663, 2012 WL 662373 (Tex. App. Fort Worth Mar. 1 2012).

59. In a dispute concerning whether a workers' compensation claimant who was injured while driving home had been paid for driving other employees, the trial court reasonably could have excluded deposition testimony from two company executives based on relevance under Tex. R. Evid. 401, 402 and/or personal knowledge under Tex. R. Evid. 602. The executives did not know the claimant and were not present when he was hired, and testimony regarding the tax treatment of the payments was not material to whether the per diem payments were for driving. Tex. Prop. & Cas. Ins. Guar. Ass'n v. Brooks, 2011 Tex. App. LEXIS 7269, 2011 WL 3890405 (Tex. App. Austin Aug. 31 2011).

60. Certificate of marriage was not evidence that appellee entered into a valid marriage because the affiant did not make the certification based on personal knowledge as required by Tex. R. Evid. 602; the affiant admitted she did not know who the groom was at the ceremony. Nguyen v. Nguyen, 355 S.W.3d 82, 2011 Tex. App. LEXIS 3221 (Tex. App. Houston 1st Dist. Feb. 24 2011).

61. In an action arising from breach of an agreement to purchase a residence, and in which the buyers' then attorney filed a lis pendens on the residence, the seller failed to show as a matter of law that the constructive lien language in a letter by the buyers' then attorney was a cause in fact of a third party's termination of its contract with the seller, where the testimonies of the seller and his real estate agent could not serve as basis for the seller's tortious interference with contract cause of action against the buyers because both the seller and his real estate agent testified that they had no personal knowledge of the reason the third party cancelled its contract with the seller. The third party's termination letter conclusively established that it cancelled the contract because the seller failed to remove the lis pendens, and the third party's actions were a natural and logical result of a lis pendens filing. Glenn v. Pack, 2011 Tex. App. LEXIS 390, 2011 WL 167254 (Tex. App. Fort Worth Jan. 13 2011).

62. With respect to the case underlying a legal malpractice action, former clients failed to prove that a real estate agent made any misrepresentation or omission in connection with the sale of a home as required by Tex. Bus. & Com. Code. Ann. § 27.01(1) as the seller's disclosure notice was not admitted into evidence and was not completed by the agent, the attorney had no personal knowledge of the facts necessary to prove the clients' claims, and a statement by one of the clients that she felt the agent made a false representation to her was merely conclusory. Webb v. Stockford, 331 S.W.3d 169, 2011 Tex. App. LEXIS 109 (Tex. App. Dallas Jan. 10 2011).

63. In an investor's suit alleging that a securities brokerage firm had negligently failed to supervise its employee in the sale of a portion of the employee's outside businesses to the investor, a manager's summary-judgment affidavit showed that she had personal knowledge regarding the firm's lack of notice of the transaction, which the manager obtained both in the course of her job duties and from conversations she had with an attorney. Fernea v. Merrill Lynch Pierce Fenner & Smith, Inc., 2011 Tex. App. LEXIS 172 (Tex. App. Austin Jan. 7 2011).

64. In a forcible detainer suit brought by a lender that purchased the property at a foreclosure sale, a paralegal employed by an affiliated service provider of the lender's counsel was a qualified witness with personal knowledge under Tex. R. Evid. 602, 803(6), 902(10) of business records regarding the foreclosure proceedings. Rodriguez v. Citimortgage, Inc., 2011 Tex. App. LEXIS 171, 2011 WL 182122 (Tex. App. Austin Jan. 6 2011).

65. Two witnesses were not present at the time of the accident and were not competent to testify as a fact witness regarding the speed of the drum at the time of the accident, for purposes of Tex. R. Evid. 602. Blaine v. National-oilwell, L.P., 2010 Tex. App. LEXIS 9614, 2010 WL 4951779 (Tex. App. Houston 14th Dist. Dec. 7 2010).

66. Expert's opinion that the speed of the sand line drum caused a worker's death was conclusory and unsupported by the facts, plus he improperly relied on witnesses who lacked personal knowledge under Tex. R. Evid. 602. Blaine v. National-oilwell, L.P., 2010 Tex. App. LEXIS 9614, 2010 WL 4951779 (Tex. App. Houston 14th Dist. Dec. 7 2010).

67. Trial court did not err in denying a hospital patient's motion for a grace period to file an expert report in a health care liability action; because the patient's second lawyer had no personal knowledge of the first lawyer's intent, and the first lawyer did not provide an affidavit, there was no evidence of mistake or accident and thus no basis for the requested grace period. Marks v. St. Luke's Episcopal Hosp., 319 S.W.3d 658, 2010 Tex. LEXIS 614, 53 Tex. Sup. Ct. J. 1077 (Tex. 2010).

68. In an equipment supplier's breach of contract action against an electrical subcontractor, the court did not err in admitting testimony from the supplier's vice president about a change-order request and an agreed modification to a training requirement in the contract; the vice president's testimony was based on personal knowledge because the vice president testified only about matters that the vice president perceived firsthand. Austin Traffic Signal Constr. Co., L.P. v. Transdyn Controls, Inc., 2010 Tex. App. LEXIS 7059, 2010 WL 3370292 (Tex. App. Austin Aug. 24 2010).

69. In a case in which a jury found that defendant juvenile engaged in delinquent conduct by committing the offenses of aggravated sexual assault and indecency with a child, the trial court did not err in excluding certain testimony of various witnesses and did not prevent defendant from fully presenting his defensive theory where: (1) the proffered testimony of the victim's mother as set forth in defendant's bill of exceptions was properly excluded as speculative pursuant to Tex. R. Evid. 602; (2) the victim's mother was not shown to be qualified as an expert to testify under Tex. R. Evid. 702; (3) at trial, defendant was allowed to question the victim and her sister regarding the meeting they allegedly had with their grandparents during the time period after the victim's outcry but prior to the Monday morning interview with a deputy; and (4) the only testimony excluded by the trial court during defense counsel's examination of the victim and her sister was testimony regarding statements made by their grandparents during the alleged meeting, which was properly excluded on hearsay grounds pursuant to Tex. R. Evid. 802. Although defendant's bill of exceptions set forth the testimony that he asserted that the victim would have offered regarding what she told her grandparents during the alleged meeting, defense counsel did not question the victim regarding what she told her grandparents during that meeting, and, additionally, defense counsel did not argue that the trial court improperly sustained the State's hearsay objections to statements of the grandparents. In re J.R.N., 2010 Tex. App. LEXIS 2280, 2009 WL 6312273 (Tex. App. Beaumont Apr. 1 2010).

70. Creditor employee was qualified to testify to the accuracy of the business record documents, given that he stated that he had personal knowledge of the record, which he said were originals or exact duplicates of the records for the debtor's account. Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist. Dec. 10 2009).

71. In a driving while intoxicated case, testimony from defendant's mother on the issue of whether defendant was intoxicated was not admissible under Tex. R. Evid. 701 because the mother did not personally observe a traffic stop or defendant's interaction with an arresting officer; the mother did not acquire personal knowledge at the time of the event. Because the testimony was not relevant, defendant's argument that her due process right to present a complete defense was violated was not addressed. Hartin v. State, 2009 Tex. App. LEXIS 2765, 2009 WL 1076799 (Tex. App. Beaumont Apr. 22 2009).

72. In a driving while intoxicated case, there was no error in excluding testimony from defendant's mother regarding why defendant refused to cooperate with an arresting officer due to the mother's lack of personal knowledge. Even though the mother had knowledge of some past events concerning defendant that might have explained defendant's behavior, the mother was not present for the arrest. Hartin v. State, 2009 Tex. App. LEXIS 2765, 2009 WL 1076799 (Tex. App. Beaumont Apr. 22 2009).

73. Testimony of witness regarding the victim's kidnapping was not speculative and he was qualified to testify that the victim could not leave the vehicle because the witness had personal knowledge of a number of key facts, and he was present at material times. Saenz v. State, 2009 Tex. App. LEXIS 2254 (Tex. App. Corpus Christi Apr. 2 2009).

74. Officer was properly allowed to testify about the purpose of altering a shotgun to create a sawed-off shotgun because she had dealt with sawed-off shotguns on the firing range and in the field when investigating crimes, and because of her personal observations on the firing range and in the field, she was qualified to offer a lay opinion on the result of altering a shotgun. The question sought an explanation of what would be accomplished by sawing off

the barrel of a shotgun, and the question was specifically limited to the officer's experience. Shelton v. State, 2009 Tex. App. LEXIS 1802, 2009 WL 672011 (Tex. App. Fort Worth Mar. 12 2009).

75. In defendant's evading arrest case, the court properly excluded a defense witness's testimony because the proffered testimony that it was "standard operating procedure" for law enforcement agencies in general to routinely make video and audio recordings of police pursuits was not germane. The witness did not have personal knowledge as to the standard procedures of the Corpus Christi Police Department regarding recordings of police pursuits. Gomez v. State, 2009 Tex. App. LEXIS 1700 (Tex. App. Corpus Christi Mar. 5 2009).

76. Court properly excluded defendant's father's testimony regarding whether defendant had ever received felony probation because there was uncontroverted evidence that defendant had not resided with his father his entire life, and, in fact, had been to Alaska for several months. Mansfield v. State, 2008 Tex. App. LEXIS 5615 (Tex. App. Houston 14th Dist. July 29 2008).

77. Attorney testified without objection as an expert witness on attorney fees, and an expert was not required to have personal knowledge on the matters about which he testified, for purposes of Tex. R. Evid. 602, 703; the attorney testified that he reviewed the former attorney's file, level of experience, and the work performed and opined that the former attorney's fees were reasonable and necessary, plus the attorney testified about his own representation, and this testimony supported the jury's award of fees. Arthur J. Gallagher & Co. v. Dieterich, 2008 Tex. App. LEXIS 5639 (Tex. App. Dallas July 29 2008).

78. In defendant's murder case, the trial court did not abridge her right to present a complete defense by excluding the State's notice of extraneous offenses and the testimony of two State's witnesses because defendant's evidence was excluded because the witnesses did not have personal knowledge of the extraneous offenses; therefore, their testimony would have been unreliable; moreover, the trial court permitted defendant to testify that she knew one witness had been accused of committing several armed robberies and that he had assaulted his girlfriend. Williams v. State, 2008 Tex. App. LEXIS 2874 (Tex. App. Houston 14th Dist. Apr. 22 2008).

79. In a cocaine possession case, a police officer's testimony that drug dealers often rented cars in other people's names and that they might accept unemployment checks and credit cards as payment for narcotics was not expert opinion testimony because it was based on his personal experience as an officer and did not require significant expertise. Hayes v. State, 2008 Tex. App. LEXIS 745 (Tex. App. Texarkana Feb. 1 2008).

80. In an alimony dispute, the evidence was legally insufficient to sustain the award because the only evidence presented as to the husband's income was testimony from the wife that he had not provided any information establishing that 25% of his gross monthly income would be less than 5 million; that did not provide any actual evidence that the husband had a total gross income of $ 20 million dollars or more from January 1, 2002 to September 21, 2006. The wife acknowledged on appeal that she was "not privy to the husband's personal income information," and admitted that she failed to come forward with information regarding the husband's gross income. Sembritzky v. Shanks, 2008 Tex. App. LEXIS 9754 (Tex. App. Houston 1st Dist. Jan. 8 2008).

81. Trial court erred in overruling the company's objections to the affidavit of the owners' attorney and to the attached exhibits; the attorney was a witness in this regard and his testimony did not fall within any of the five exceptions enumerated in Tex. Disciplinary R. Prof. Conduct 3.08, the attorney was an inappropriate person to present any facts as to the question at issue, but even if the trial court found that one of the Rule 3.08 exceptions applied to the attorney, the affidavit still failed because it contained hearsay and conclusory remarks and failed to prove his personal knowledge. Southtex 66 Pipeline Co. v. Spoor, 238 S.W.3d 538, 2007 Tex. App. LEXIS 8352, 168 Oil & Gas Rep. 68 (Tex. App. Houston 14th Dist. 2007).

82. Attorney's affidavit concerning the status of a pipeline company with the Railroad Commission contained inadmissible hearsay, was conclusory, and failed to prove the attorney's personal knowledge; nothing in the affidavit showed that the attorney was qualified to explain the contents of a Railroad Commission document, for purposes of Tex. R. Evid. 602 and the attorney's reference to unnamed employees did not correct the fatal flaws in the affidavit and was inadmissible as hearsay under Tex. R. Evid. 801. Southtex 66 Pipeline Co. v. Spoor, 238 S.W.3d 538, 2007 Tex. App. LEXIS 8352, 168 Oil & Gas Rep. 68 (Tex. App. Houston 14th Dist. 2007).

83. In a juvenile delinquency proceeding arising from assaults committed against a former girlfriend, the trial court did not abuse its discretion in excluding testimony regarding the former girlfriend's alleged assaults on specific individuals and her reputation for violence; moreover, Tex. R. Evid. 602 barred testimony from a witness who lacked personal knowledge of the former girlfriend's conduct. In re C.R.G., 2007 Tex. App. LEXIS 7572 (Tex. App. Houston 14th Dist. Sept. 20 2007).

84. Evidence was sufficient to show that a rungu was a club and prohibited weapon for purposes of Tex. Penal Code Ann. § 46.01(1) and thus the court affirmed defendant's conviction under Tex. Penal Code Ann. § 46.02; the State presented testimony showing that the rungu was a throwing instrument used for hunting and killing and rendering animals unconscious, and from this, the trial court could have reasonably found that the rungu functioned as a weapon or club and was specially designed, made, or adapted for the purpose of inflicting serious injury; that the testimony showed that the rungu was used in Africa for hunting and killing animals and not humans was of no consequence because the trial court could have inferred that the 18-inch throwing rungu that could kill or injure animals was one also specially designed for the purpose of injuring or killing a person, and the court rejected defendant's claim that the witness's testimony on the rungu was insufficient because it was based on hearsay and not personal knowledge, as the court considered all evidence in its sufficiency review. Warr v. State, 2007 Tex. App. LEXIS 5675 (Tex. App. Dallas July 19 2007).

85. Other than citing generally to case law concerning the standard for reviewing rulings on the admissibility of evidence and Tex. R. Evid. 602 and Tex. R. Evid. 802 concerning lack of personal knowledge and hearsay, defendant, for purposes of Tex. R. App. P. 38.1(h), provided no substantive legal analysis, argument, or authority to support his contention that the trial court erred in overruling his objections, and thus the point was inadequately briefed and presented nothing for review. Warr v. State, 2007 Tex. App. LEXIS 5675 (Tex. App. Dallas July 19 2007).

86. Where defendant was charged with aggravated sexual assault of a child and indecency with a child, defendant objected to testimony from an expert witness concerning whether the victim exhibited behaviors that were consistent which sexual abuse; the trial court overruled defendant's objection based on Tex. R. Evid. 602 for lack of personal knowledge; the expert spoke in generalities and never claimed that child complainants in sexual abuse cases always tell the truth. Ficarro v. State, 2007 Tex. App. LEXIS 3166 (Tex. App. Corpus Christi Apr. 26 2007).

87. Nurse failed to satisfy the personal knowledge requirement under Tex. R. Evid. 602 in defendant's trial for aggravated sexual assault of a child younger than 14 years of age, in violation of Tex. Penal Code Ann. § 22.021; the nurse had no personal knowledge of the facts of the case, she did not personally observe any events involving the trial, she was not present during an examination of the trial, and she did not offer any opinions specifically related to the child, and thus the nurse's testimony was not admissible as a lay opinion under Tex. R. Evid. 701. Flores v. State, 2007 Tex. App. LEXIS 2818 (Tex. App. Eastland Apr. 12 2007).

88. Court overruled defendant's claim that a witness was not competent for purposes of Tex. R. Evid. 602, when the witness was asked what he thought defendant meant by the statement to "keep quiet;" the witness observed defendant's anger toward the victim and heard defendant state he had a gun, and the witness received many phone calls from defendant around the time of the murder, and thus the witness's opinion was rationally based on familiarity with defendant and the witness's perception of events, for purposes of Tex. R. Evid. 701; the witness's

opinion also met the second prong of Tex. R. Evid. 701 in that it was helpful to the jury's determination of a central fact at issue, whether defendant was guilty of murder, and even if the trial court erred in admitting this testimony, it was harmless under Tex. R. App. P. 44.2 because the record contained substantial evidence inculpating defendant in the murder. Jones v. State, 2007 Tex. App. LEXIS 2853 (Tex. App. Houston 14th Dist. Apr. 12 2007).

89. In a father's termination case, the mother and father had a relationship and the mother had the requisite personal knowledge under Tex. R. Evid. 602 to testify as to whether the father was complying with his service plan; the issue was relevant, for purposes of Tex. R. Evid. 401, as to whether his parental rights were to be terminated and the admission of the mother's testimony was not error. In re G.C.F., 2007 Tex. App. LEXIS 2680 (Tex. App. Fort Worth Apr. 5 2007).

90. In a possession of a prohibited substance in a correctional facility case, defendant alleged that he gave false testimony at his cell mate's trial because he was coerced by gang members, but his cell mate did not testify that he had personal knowledge of the gang members at the correctional facility actually following the gang's rules to protect other gang members from prosecution; therefore, the cell mate's opinion testimony was not based on his perceptions; rather, the cell mate's opinion testimony was based on his speculative conclusions regarding what the gang members would have done to protect him from prosecution; accordingly, Tex. R. Evid. 701 was not met by the cell mate's testimony, and the trial court did not abuse its discretion in sustaining the State's objection to that testimony. Haggerty v. State, 2007 Tex. App. LEXIS 2130 (Tex. App. Houston 14th Dist. Mar. 20 2007).

91. In temporary injunction proceedings in a trade secrets case, evidence supporting an unclean hands affirmative defense was properly excluded because the witness lacked personal knowledge of bribery. Sharma v. Vinmar Int'l, Ltd., 231 S.W.3d 405, 2007 Tex. App. LEXIS 8027 (Tex. App. Houston 14th Dist. 2007).

92. For purposes of Tex. R. Evid. 602, the State established that a witness learned of defendant's previous conviction from a detective, the witness did not testify to facts that were not within her personal knowledge, and while the witness stated that she was "thinking" she knew who the victim was, the witness did not state that she knew that fact; the witness's testimony about the details of the offense was admissible under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a), and trial counsel did not render ineffective assistance by failing to object. McMullin v. State, 2006 Tex. App. LEXIS 11077 (Tex. App. Houston 14th Dist. Dec. 28 2006).

93. Except for the assertions that trust and estate assets had been commingled and that assets had not been safeguarded, the remaining assertions and conclusions in a sister's affidavit were not supported by underlying facts, for purposes of Tex. R. Civ. P. 166a and Tex. R. Evid. 602, and the record did not contain any documents, based on personal knowledge, that would have allowed the court to infer that certain transfers were in furtherance of a conspiracy against the sister; although the evidence indicated that two transactions occurred almost 10 months after the mother died, the court found no authority permitting the court to elevate the situation to an intentional breach of fiduciary duty in furtherance of a conspiracy, and the brother's evidence showed that his actions involving the trusts were ministerial acts undertaken upon instruction from the co-executors in their discretionary authority as such under Tex. Prop. Code Ann. § 112.052. Wilcox v. Wilcox, 2006 Tex. App. LEXIS 11106 (Tex. App. Beaumont Dec. 28 2006).

94. In a trial for driving while intoxicated, a trooper demonstrated that he had personal knowledge of the statements to which he testified, as required by Tex. R. Evid. 602, even though he could not remember the exact words in his conversation with defendant because he recalled overhearing defendant tell another trooper where she was coming from and he recalled having a conversation with defendant. Farmer v. State, 2006 Tex. App. LEXIS 11132 (Tex. App. Fort Worth Dec. 28 2006).

95. Customer's subjective beliefs about a puddle's origin and its temporal longevity were not supported by any evidence and amounted to nothing more than speculation, insufficient to negate the summary judgment motion the restaurant filed; the court noted that under Tex. R. Evid. 602, personal knowledge was required for witness testimony. Sova v. Bill Miller Bar-B-Q Enters., 2006 Tex. App. LEXIS 5673 (Tex. App. Austin June 30 2006).

96. For purposes of Tex. R. Evid. 602, regarding evidence of estimates of future medical care, a doctor based an opinion on information supplied by a person in the office, and this statement addressed the reasonable reliance requirement of Tex. R. Evid. 703 for the doctor's expert opinion on the cost of services for future surgeries; to the extent the admission of the evidence might have been error, because it was cumulative, it was harmless, for purposes of Tex. R. App. P. 44.1. Nat'l Freight, Inc. v. Snyder, 191 S.W.3d 416, 2006 Tex. App. LEXIS 2833 (Tex. App. Eastland 2006).

97. Defendant's convictions for aggravated assault with a deadly weapon, possession of cocaine in an amount of less than one gram, and robbery, were appropriate because a police officer's testimony was admissible as the officer's opinion or inferences on impressions derived from perceptions with his contact with defendant; it was evident that the officer's testimony was his opinions or inferences based on impressions and conclusions derived from perceptions of what he saw, heard, and observed during his encounter with defendant. Williams v. State, 191 S.W.3d 242, 2006 Tex. App. LEXIS 1687 (Tex. App. Austin 2006).

98. In a murder case, the prosecutor's affidavit regarding trial strategy was relevant and admissible under Tex. R. Evid. 401and Tex. R. Evid. 602 at a new trial hearing because it addressed the issue of effective assistance and included some statements made from personal knowledge; defendant did not seek to limit the scope of the affidavit pursuant to Tex. R. Evid. 105(a). Shanklin v. State, 190 S.W.3d 154, 2005 Tex. App. LEXIS 10675 (Tex. App. Houston 1st Dist. 2005).

99. Where a habitual marijuana user fell from a steel structure while working, he was permitted to give his lay opinion testimony that he had normal use of his mental and physical faculties at the time of his injury. The jury was entitled to believe the employee's testimony, together with the testimony about the work activities the employee successfully completed prior to his fall. Am. Interstate Ins. Co. v. Hinson, 172 S.W.3d 108, 2005 Tex. App. LEXIS 6350 (Tex. App. Beaumont 2005).

100. Given one witness's many years of experience as a probation officer working with sex offenders, the trial court did not abuse its discretion in determining that the witness, for purposes of Tex. R. Evid. 602, had sufficient personal knowledge of what was necessary to ensure that sex offenders generally did not re-offend; thus, the trial court did not err in admitting the witness's testimony, as contended by defendant on appeal from an indecency with a child conviction. Arizmendis v. State, 2004 Tex. App. LEXIS 10567 (Tex. App. Dallas Nov. 22 2004).

101. In defendant's capital murder case, a court did not err by permitting a witness to speculate that defendant's accomplice could not have taken the money from the cash register where the witness based his testimony on his observations. He could see where both robbers were located in relationship to the complainant and the cash drawer, and based on those observations, the witness drew an inference that only defendant was in a position to reach the cash drawer and take the money. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

102. Pursuant to Tex. R. Evid. 602, where a witness had no personal knowledge of debtors' motives with reference to a property transfer, a trial court did not err by excluding the witness testimony representing the debtors' motives. Nat'l Loan Investors, L.P. v. Robinson, 98 S.W.3d 781, 2003 Tex. App. LEXIS 1648 (Tex. App. Amarillo 2003).

103. Pursuant to Tex. R. Evid. 602, a witness may not testify to a matter unless he has personal knowledge of it. Nat'l Loan Investors, L.P. v. Robinson, 98 S.W.3d 781, 2003 Tex. App. LEXIS 1648 (Tex. App. Amarillo 2003).

104. As appellant's issue did not comport with his trial objection, error, if any, was not properly preserved; from the context of appellant's objection, one could have found that he was complaining of a Tex. R. Evid. 602 violation, instead of Tex. R. Evid. 701 as argued on appeal. Boyd v. State, 2001 Tex. App. LEXIS 8661 (Tex. App. Tyler Aug. 22 2001).

105. Court did not err in admitting the alleged victim's testimony that when she came home from work, defendant was hyper like he had used drugs, because the alleged victim had personal knowledge of the matter, both from her senses and her experience. Lewis v. State, 2014 Tex. App. LEXIS 1837, 2014 WL 644812 (Tex. App. El Paso Feb. 19 2014).

Real Property Law : Landlord & Tenant : Landlord's Remedies & Rights : Eviction Actions

106. County court erred by awarding lost rents to a premises owner under Tex. R. Civ. P. 752 in its two forcible detainer suits against the owner of two businesses where the evidence was legally insufficient to prove that the business owner occupied the premises during the pendency of his justice court appeal because: (1) the premises owner's proof that the business owner was sent, and signed for, letters at the premises before suit was filed in the justice court was insufficient, without more, to establish his occupation of the premises after judgment was rendered in the justice court; (2) an assertion by the premises owner's representative that the business owner did not vacate the premises was nothing but a bare conclusion without any factual basis and did not prove occupation, as the representative did not know whether either business had been open or whether anybody occupied the premises; and (3) statements made by the business owner's counsel during trial were not so clear and unequivocal as to constitute judicial admissions of occupancy, and the statements did not relieve the premises owner of its burden to prove occupancy to recover lost rents. Salaymeh v. Plaza Centro, LLC, 264 S.W.3d 431, 2008 Tex. App. LEXIS 7174 (Tex. App. Houston 14th Dist. 2008).

Real Property Law : Landlord & Tenant : Landlord's Remedies & Rights : Rent Recovery

107. County court erred by awarding lost rents to a premises owner under Tex. R. Civ. P. 752 in its two forcible detainer suits against the owner of two businesses where the evidence was legally insufficient to prove that the business owner occupied the premises during the pendency of his justice court appeal because: (1) the premises owner's proof that the business owner was sent, and signed for, letters at the premises before suit was filed in the justice court was insufficient, without more, to establish his occupation of the premises after judgment was rendered in the justice court; (2) an assertion by the premises owner's representative that the business owner did not vacate the premises was nothing but a bare conclusion without any factual basis and did not prove occupation, as the representative did not know whether either business had been open or whether anybody occupied the premises; and (3) statements made by the business owner's counsel during trial were not so clear and unequivocal as to constitute judicial admissions of occupancy, and the statements did not relieve the premises owner of its burden to prove occupancy to recover lost rents. Salaymeh v. Plaza Centro, LLC, 264 S.W.3d 431, 2008 Tex. App. LEXIS 7174 (Tex. App. Houston 14th Dist. 2008).

Real Property Law : Purchase & Sale : Contracts of Sale : Enforceability : Fraud & Misrepresentation

108. With respect to the case underlying a legal malpractice action, former clients failed to prove that a real estate agent made any misrepresentation or omission in connection with the sale of a home as required by Tex. Bus. & Com. Code. Ann. § 27.01(1) as the seller's disclosure notice was not admitted into evidence and was not completed by the agent, the attorney had no personal knowledge of the facts necessary to prove the clients' claims, and a

statement by one of the clients that she felt the agent made a false representation to her was merely conclusory. Webb v. Stockford, 331 S.W.3d 169, 2011 Tex. App. LEXIS 109 (Tex. App. Dallas Jan. 10 2011).

Torts : Business Torts : Commercial Interference : Contracts : General Overview

109. In an action arising from breach of an agreement to purchase a residence, and in which the buyers' then attorney filed a lis pendens on the residence, the seller failed to show as a matter of law that the constructive lien language in a letter by the buyers' then attorney was a cause in fact of a third party's termination of its contract with the seller, where the testimonies of the seller and his real estate agent could not serve as basis for the seller's tortious interference with contract cause of action against the buyers because both the seller and his real estate agent testified that they had no personal knowledge of the reason the third party cancelled its contract with the seller. The third party's termination letter conclusively established that it cancelled the contract because the seller failed to remove the lis pendens, and the third party's actions were a natural and logical result of a lis pendens filing. Glenn v. Pack, 2011 Tex. App. LEXIS 390, 2011 WL 167254 (Tex. App. Fort Worth Jan. 13 2011).

Workers' Compensation & SSDI : Compensability : Injuries : Intoxication

110. Where a habitual marijuana user fell from a steel structure while working, he was permitted to give his lay opinion testimony that he had normal use of his mental and physical faculties at the time of his injury. The jury was entitled to believe the employee's testimony, together with the testimony about the work activities the employee successfully completed prior to his fall. Am. Interstate Ins. Co. v. Hinson, 172 S.W.3d 108, 2005 Tex. App. LEXIS 6350 (Tex. App. Beaumont 2005).

End of Document

Tex. Evid. R. 603

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 603 Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 22, *Rules Affecting Admissibility* .

Case Notes

Civil Procedure : Discovery : Methods : Oral Depositions
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Evidence : Competency : Affirmations & Oaths
Evidence : Competency : Disability : Children
Evidence : Competency : Interpreters

LexisNexis (R) Notes

Civil Procedure : Discovery : Methods : Oral Depositions

1. Trial court did not abuse its discretion by failing to exclude the patient's depositions under Tex. R. Evid. 603 because appellants attached the entirety of the two depositions and each reflected that the patient was sworn prior to testifying. Stone v. Coronado, 2012 Tex. App. LEXIS 4573, 2012 WL 2076831 (Tex. App. Austin June 6 2012).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

2. Petitioner waived his complaints about the alleged unsworn testimony when he did not object during the hearing, because the record did not reflect that the witnesses were sworn prior to the hearing, and a party waived the right to have a witness sworn when he failed to object to unsworn testimony before the close of the trial. Dellatorre v. State, 2012 Tex. App. LEXIS 1823, 2012 WL 759051 (Tex. App. Beaumont Mar. 7 2012).

Evidence : Competency : Affirmations & Oaths

3. In a custody modification proceeding, the court did not err in excluding the child's recorded statement because the transcription of the statement reflected that the father's attorney began questioning the child without any oath or admonishments being given; nothing in the transcription demonstrated that any of the attorneys impressed upon the child the duty to be truthful. Nichol v. Nichol, 2014 Tex. App. LEXIS 492, 2014 WL 199652 (Tex. App. Amarillo Jan. 15 2014).

4. Trial court did not err by admitting the testimony of a witness because, although he expressed confusion and stated he was not prepared to tell the truth when he was sworn in, after speaking to appointed counsel the witness affirmatively stated that he would tell the truth to the best of his knowledge and throughout his testimony expressed concern about the consequences of lying, Nash v. State, 2013 Tex. App. LEXIS 10452 (Tex. App. Houston 1st Dist. Aug. 20 2013).

5. Complainant understood the oath because it was signed to her through the interpreter and was administered in a form calculated to awaken her conscience and impress her mind with the duty to do so, Tex. R. Evid. 603, and the trial court did not abuse its discretion in determining that complainant was properly sworn in, in accordance with Tex. R. Evid. 603; prior to any actual testimony by the complainant, the interpreter received an oath in accordance with Tex. Code Crim. Proc. Ann. art. 38.31(e) and Tex. R. Evid. 604. Martinez v. State, 2012 Tex. App. LEXIS 5974, 2012 WL 3025858 (Tex. App. San Antonio July 25 2012).

6. Petitioner waived his complaints about the alleged unsworn testimony when he did not object during the hearing, because the record did not reflect that the witnesses were sworn prior to the hearing, and a party waived the right to have a witness sworn when he failed to object to unsworn testimony before the close of the trial. Dellatorre v. State, 2012 Tex. App. LEXIS 1823, 2012 WL 759051 (Tex. App. Beaumont Mar. 7 2012).

7. Defendant failed to raise complaints at trial, such that defendant was not entitled to raise the issue of competency of child witnesses for the first time on appeal, pursuant to Tex. R. App. P. 33.1(a). Guillory v. State, 2007 Tex. App. LEXIS 649 (Tex. App. San Antonio Jan. 31 2007).

Evidence : Competency : Disability : Children

8. In a custody modification proceeding, the court did not err in excluding the child's recorded statement because the transcription of the statement reflected that the father's attorney began questioning the child without any oath or admonishments being given; nothing in the transcription demonstrated that any of the attorneys impressed upon the child the duty to be truthful. Nichol v. Nichol, 2014 Tex. App. LEXIS 492, 2014 WL 199652 (Tex. App. Amarillo Jan. 15 2014).

Evidence : Competency : Interpreters

9. Complainant understood the oath because it was signed to her through the interpreter and was administered in a form calculated to awaken her conscience and impress her mind with the duty to do so, Tex. R. Evid. 603, and the trial court did not abuse its discretion in determining that complainant was properly sworn in, in accordance with Tex. R. Evid. 603; prior to any actual testimony by the complainant, the interpreter received an oath in accordance

with Tex. Code Crim. Proc. Ann. art. 38.31(e) and Tex. R. Evid. 604. Martinez v. State, 2012 Tex. App. LEXIS 5974, 2012 WL 3025858 (Tex. App. San Antonio July 25 2012).

End of Document

Tex. Evid. R. 604

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 604 Interpreter

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Annotations

Commentary

COMMENT

Pre-March 1, 1998 Comment See Rule 183, Texas Rules of Civil Procedure, regarding appointment and compensation of interpreters.

Case Notes

Evidence : Competency : Affirmations & Oaths
Evidence : Competency : Interpreters

LexisNexis (R) Notes

Evidence : Competency : Affirmations & Oaths

1. Trial judge used his discretion to determine that the deaf complainant's response to the oath, given in her own voice, was adequate and did not require administration of another oath given using sign language. Martinez v. State, 2012 Tex. App. LEXIS 5974, 2012 WL 3025858 (Tex. App. San Antonio July 25 2012).

Evidence : Competency : Interpreters

2. Trial judge used his discretion to determine that the deaf complainant's response to the oath, given in her own voice, was adequate and did not require administration of another oath given using sign language. Martinez v.

State, 2012 Tex. App. LEXIS 5974, 2012 WL 3025858 (Tex. App. San Antonio July 25 2012).

3. Trial court did not err in admitting defendant's translated statement to the nurse, given that (1) it could be inferred from the record that defendant acquiesced to the interpreter acting as such and defendant did not dispute that there was no evidence of any motive the interpreter might have had to mislead the nurse or distort what was being said, (2) while the interpreter might not have been certified, he was qualified to translate the particular information at issue, as he frequently translated for others and was able to effectively communicate with defendant, (3) the evidence showed that the interpreter possessed enough fluency in Spanish to carry on conversation with defendant, (4) the interpreter was present at trial and subject to cross-examination, and (5) whether the interpreter remembered the specific substance of the translation at trial was not determinative of the statement's admissibility. Ramirez v. State, 2007 Tex. App. LEXIS 8349 (Tex. App. Houston 14th Dist. Oct. 23 2007).

Tex. Evid. R. 605

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 605 Judge's Competency as a Witness

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 22, *Rules Affecting Admissibility* .

Case Notes

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial
Criminal Law & Procedure : Appeals : Procedures : Briefs
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Competency : Judges
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Testimony : General Overview
Evidence : Testimony : Examination : Judicial Interrogation
Family Law : Child Custody : Procedures
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure
Legal Ethics : Judicial Conduct

LexisNexis (R) Notes

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

1. New trial could not be granted based on the trial court's recollection of an informal postverdict chat with jurors. The reviewing court was not prepared to hold that Tex. R. Evid. 605 barred a trial judge from testifying at a subsequent new trial hearing but observed without deciding that an attempt to tender a trial judge's affidavit or testimony at a new trial hearing could result in the State raising any number of objections, including violation of Tex. R. Evid. 605. State v. Krueger, 179 S.W.3d 663, 2005 Tex. App. LEXIS 8899 (Tex. App. Beaumont 2005).

Criminal Law & Procedure : Appeals : Procedures : Briefs

2. Under Tex. R. App. P. 38.1(h), defendant waived a complaint that the trial court testified as a witness in violation of Tex. R. Evid. 605; although defendant cited the rule, defendant failed to identify a specific statement of fact and to show how it was the functional equivalent of witness testimony. Mudili v. State, 2007 Tex. App. LEXIS 6514 (Tex. App. Dallas Aug. 13 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

3. Even though the trial court erred by admitting into evidence a temporary injunction the trial court judge had signed during defendant's civil trial, the error was harmless because the evidence against defendant was overwhelming and no mention was made that the judge had signed the indictment or was any way involved in the civil trial; there was nothing in the record to indicate that the injunction was published to the jury or that it was taken into the jury room during deliberations. Marriott v. State, 2010 Tex. App. LEXIS 5804, 2010 WL 2869781 (Tex. App. Waco July 21 2010).

Evidence : Competency : Judges

4. Trial court did not err in admitting testimony that the court had temporarily modified a divorce decree to give a father custody because, inter alia, admitting the testimony was not tantamount to admitting the temporary orders, and the jury's finding that the father should have permanent custody did not turn on any evidence indicating the trial court had temporarily modified custody prior to trial. In the Interest of A.D., 474 S.W.3d 715, 2014 Tex. App. LEXIS 4860, 2014 WL 1800082 (Tex. App. Houston 14th Dist. May 6 2014).

5. Trial court did not violate Tex. R. Evid. 605 by instructing the jury that there would be no alternatives other than termination of parental rights before the jury as the statement did not convey factual information not in evidence or seek to rebut any evidence adduced at trial. Nor did the statement violate Tex. R. Civ. P. 277 as it did not indicate the judge's opinion concerning a matter to be determined by the jury and it did not tell the jurors that they were required to terminate but rather that termination was the only alternative that was being tried. In the Interest of C.C.K., 2013 Tex. App. LEXIS 1240, 2013 WL 452163 (Tex. App. Fort Worth Feb. 7 2013).

6. Even if a trial court erred in a termination of parental rights proceeding in admitting the trial court's previous emergency order for protection, the error was harmless; the record contained sufficient evidence from which the jury could have found endangerment by the parents to support the termination findings. In re S.J.T.B., 2012 Tex. App. LEXIS 9445, 2012 WL 5519208 (Tex. App. Beaumont Nov. 15 2012).

7. Admission of a court order with specific negative findings towards the mother from the trial judge did not constitute testimony of the judge as a witness in violation of Tex. R. Evid. 605 because the mother failed to show that she was prejudiced by the admission of the order, as the jury's findings were supported by other ample evidence in the record, the Department of Family and Protective Services did not point out the findings to the jury, and it did not base any of its arguments on the trial court's findings. In re A.T.K., 2012 Tex. App. LEXIS 8162, 2012 WL 4450361 (Tex. App. Fort Worth Sept. 27 2012).

8. Trial judge did not improperly testify in support of the authenticity of a compact disc during defendant's sentencing hearing because the judge merely recounted what the judge had heard on the recording without injecting any new facts into the proceeding. Lawrence v. State, 2011 Tex. App. LEXIS 2971, 2011 WL 1494035 (Tex. App. Dallas Apr. 20 2011).

9. Under Tex. R. Evid. 605, the trial court correctly sustained the State's objection to the judge testifying during the trial with regard to his prior representation of a defendant in a case involving the same victim. Teczar v. State, 2011 Tex. App. LEXIS 2919, 2011 WL 1743756 (Tex. App. Eastland Apr. 15 2011).

10. There is a significant distinction between a trial judge testifying as a fact witness during a trial and a trial judge recalling, at a motion for new trial hearing, his own internal thought processes; under the circumstances in this case, the court did not construe the trial judge's remarks at the new trial hearing to be testimony prohibited by Tex. R. Evid. 605, given that the remarks did not seek to rebut any evidence adduced at the hearing by the State and the accuracy of the judge's account of how he had arrived at the initial punishment decision was undisputed. State v. Stewart, 282 S.W.3d 729, 2009 Tex. App. LEXIS 2597 (Tex. App. Austin Apr. 15 2009).

11. In an aggravated sexual assault of a child and indecency with a child case, the trial judge did not violate Tex. R. Evid. 605 when he questioned the child as the complained-of questioning served a judicial function in that it allowed the trial court to determine the competency of the child and it was not a situation where the judge stepped down to testify. Bradshaw v. State, 2006 Tex. App. LEXIS 7879 (Tex. App. El Paso Aug. 31 2006).

12. Tex. R. Evid. 605 was not violated because a party's application for turnover of interpleaded funds and an unsigned order prepared by the party for the trial judge's signature were not the functional equivalent of testimony by the judge. Triumph Trucking, Inc. v. Southern Corporate Ins. Managers, Inc., 226 S.W.3d 466, 2006 Tex. App. LEXIS 7033 (Tex. App. Houston 1st Dist. 2006).

13. The language in trial court orders and the admission thereof, which the mother claimed violated Tex. R. Evid. 605, did not amount to harmful error requiring reversal under Tex. R. App. P. 44.1(a); the jury found that the mother's rights were to be terminated under Tex. Fam. Code Ann. § 161.001, and that the foster family was to be appointed permanent managing conservator, the findings in the exhibits were supported by other evidence and were not pointed out to the jury, and the court found that the error did not result in an improper judgment. In re P.D.A., 2006 Tex. App. LEXIS 2179 (Tex. App. Eastland Mar. 23 2006).

14. Trial judge did not violate Tex. R. Evid. 605 in the mother's child custody modification proceeding because the judge did not testify as a witness at the trial. The mother failed to preserve her claims of error as she did not object at trial as required by Tex. R. App. P. 33.1 and Tex. R. Evid. 103, and asking witnesses questions directly from the bench is appropriate, especially in family law cases and bench trials. Kogel v. Robertson, 2005 Tex. App. LEXIS 6684 (Tex. App. Austin Aug. 19 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 10028 (Tex. App. Austin Dec. 2, 2005).

15. No violation of Tex. R. Evid. 605 or Tex. Const. art. V, § 11, was shown because defendant did not contend that the trial judge had any personal interest in his case, that he was related to any of the parties or attorneys in the case, or that he had previously served as counsel in the case, and the trial judge did not "step down from the bench" and testify from the witness stand. Roberts v. State, 2005 Tex. App. LEXIS 107 (Tex. App. Waco Jan. 5 2005).

16. Because defendant did not contend at trial that the admission of the judgment violated Tex. Code Crim. Proc. Ann. art. 38.05, he had not preserved the issue for appellate review; however, defendant's claims under Tex. R. Evid. 605 and Tex. Const. art. V, § 11 were reviewed on appeal because they could be raised for the first time on

appeal. Roberts v. State, 2005 Tex. App. LEXIS 107 (Tex. App. Waco Jan. 5 2005).

17. Trial court properly denied an inmate habeas corpus relief; subsequent orders were intended to supplement, not supersede, the first order extending community supervision under Tex. Code Crim. Proc. Ann. art. 42.12, and the court rejected the inmate's claim that the trial court violated Tex. R. Evid. 605 because the trial court was entitled to take judicial notice of its own orders in the case and thus the trial court's statements were not improper. Ex parte Streater, 154 S.W.3d 216, 2004 Tex. App. LEXIS 11373 (Tex. App. Fort Worth 2004).

18. It was error for a trial court to admit his factual findings that children were in physical danger in a later hearing to terminate parental rights to the children. The factual findings should have been redacted so that the jury could draw its own conclusions. In re M.S., 115 S.W.3d 534, 2003 Tex. LEXIS 108, 46 Tex. Sup. Ct. J. 999 (Tex. 2003).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

19. Under Tex. R. Evid. 605, a judge's testimony from a recusal hearing should not have been admitted into evidence, but defendant could not complain on appeal regarding its admission because defendant not only failed to object to the testimony but also requested its admission twice. Franks v. State, 90 S.W.3d 771, 2002 Tex. App. LEXIS 5119 (Tex. App. Fort Worth 2002).

Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges

20. Defendant's brief cited no authority to support the claim that the failure to include an instruction that a person was a party/co-conspirator or an accomplice was a comment on the weight of the evidence, and it is not apparent how a trial court's failure to submit an instruction can express anything to the jury, let alone an opinion on the weight of the evidence, and thus this issue afforded no basis for relief. Burton v. State, 2007 Tex. App. LEXIS 5000 (Tex. App. Houston 14th Dist. June 28 2007).

Evidence : Procedural Considerations : Weight & Sufficiency

21. Trial court did not violate Tex. R. Evid. 605 by instructing the jury that there would be no alternatives other than termination of parental rights before the jury as the statement did not convey factual information not in evidence or seek to rebut any evidence adduced at trial. Nor did the statement violate Tex. R. Civ. P. 277 as it did not indicate the judge's opinion concerning a matter to be determined by the jury and it did not tell the jurors that they were required to terminate but rather that termination was the only alternative that was being tried. In the Interest of C.C.K., 2013 Tex. App. LEXIS 1240, 2013 WL 452163 (Tex. App. Fort Worth Feb. 7 2013).

Evidence : Testimony : General Overview

22. Trial judge's statement was not testimony because he did not testify as to disputed facts but rather commented on the mother's behavior during the trial. In re A.L.W., 2012 Tex. App. LEXIS 9290 (Tex. App. Fort Worth Nov. 8 2012).

Evidence : Testimony : Examination : Judicial Interrogation

23. In child custody and support enforcement proceedings, the mother's failure to object to the trial court's questioning waived the issue under Tex. R. App. P. 33.1 and Tex. R. Evid. 103; also, the questioning did not deny the mother her federal or state constitutional rights to a fair trial or violate Tex. R. Evid. 605 because the judge did not testify as a witness at the trial and the questions were reasonable and fact-based. Kogel v. Robertson, 2005

Tex. App. LEXIS 10028 (Tex. App. Austin Dec. 2 2005).

24. Trial judge did not violate Tex. R. Evid. 605 in the mother's child custody modification proceeding because the judge did not testify as a witness at the trial. The mother failed to preserve her claims of error as she did not object at trial as required by Tex. R. App. P. 33.1 and Tex. R. Evid. 103, and asking witnesses questions directly from the bench is appropriate, especially in family law cases and bench trials. Kogel v. Robertson, 2005 Tex. App. LEXIS 6684 (Tex. App. Austin Aug. 19 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 10028 (Tex. App. Austin Dec. 2, 2005).

Family Law : Child Custody : Procedures

25. Trial court did not err in admitting testimony that the court had temporarily modified a divorce decree to give a father custody because, inter alia, admitting the testimony was not tantamount to admitting the temporary orders, and the jury's finding that the father should have permanent custody did not turn on any evidence indicating the trial court had temporarily modified custody prior to trial. In the Interest of A.D., 474 S.W.3d 715, 2014 Tex. App. LEXIS 4860, 2014 WL 1800082 (Tex. App. Houston 14th Dist. May 6 2014).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

26. Admission of a court order with specific negative findings towards the mother from the trial judge did not constitute testimony of the judge as a witness in violation of Tex. R. Evid. 605 because the mother failed to show that she was prejudiced by the admission of the order, as the jury's findings were supported by other ample evidence in the record, the Department of Family and Protective Services did not point out the findings to the jury, and it did not base any of its arguments on the trial court's findings. In re A.T.K., 2012 Tex. App. LEXIS 8162, 2012 WL 4450361 (Tex. App. Fort Worth Sept. 27 2012).

Legal Ethics : Judicial Conduct

27. Trial judge's statement was not testimony because he did not testify as to disputed facts but rather commented on the mother's behavior during the trial. In re A.L.W., 2012 Tex. App. LEXIS 9290 (Tex. App. Fort Worth Nov. 8 2012).

Tex. Evid. R. 606

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 606 Juror's Competency as a Witness

(a) ***At the Trial.***--A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) ***During an Inquiry into the Validity of a Verdict or Indictment.***

(1) ***Prohibited Testimony or Other Evidence.***--During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) ***Exceptions.***--A juror may testify:

(A)about whether an outside influence was improperly brought to bear on any juror; or

(B)to rebut a claim that the juror was not qualified to serve.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 22, *Rules Affecting Admissibility* .

Case Notes

Civil Procedure : Discovery : Relevance
Civil Procedure : Trials : Jury Trials : Jurors : Misconduct
Civil Procedure : Trials : Jury Trials : Jury Deliberations
Civil Procedure : Trials : Jury Trials : Jury Instructions : General Overview
Civil Procedure : Trials : Jury Trials : Polling of Jury
Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials
Civil Procedure : Appeals : Reviewability : Preservation for Review

Civil Procedure : Appeals : Standards of Review : General Overview
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Constitutional Law : Congressional Duties & Powers : Ex Post Facto Clause & Bills of Attainder
Constitutional Law : The Judiciary : Case or Controversy : Constitutionality of Legislation : General Overview
Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : General Overview
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Jury Trial
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Discovery & Inspection : Subpoenas : General Overview
Criminal Law & Procedure : Juries & Jurors : General Overview
Criminal Law & Procedure : Juries & Jurors : Disqualification & Removal of Jurors : General Overview
Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : General Overview
Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : Alternates
Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : Juror Misconduct
Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : Materials Allowed in Jury Room
Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : Outside Influences
Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : Privacy of Deliberations
Criminal Law & Procedure : Juries & Jurors : Voir Dire : Questions to Venire Panel
Criminal Law & Procedure : Trials : Closing Arguments : Inflammatory Statements
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Fair Trial
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Verdicts : Impeachment of Verdicts
Criminal Law & Procedure : Sentencing : Corrections, Modifications & Reductions : General Overview
Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial
Criminal Law & Procedure : Appeals : Procedures : Records on Appeal
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Jury Instructions
Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Sentences
Criminal Law & Procedure : Habeas Corpus : Review : Standards of Review : General Overview
Evidence : Competency : Judges
Evidence : Competency : Jurors : General Overview
Evidence : Competency : Jurors : Deliberations
Evidence : Competency : Jurors : External Influences
Evidence : Competency : Jurors : Verdict Accuracy

LexisNexis (R) Notes

Civil Procedure : Discovery : Relevance

1. Trial court abused its discretion by entirely depriving a manufacturer the opportunity to conduct discovery on an injured party's claim for breach of a settlement agreement where the manufacturer contended that jurors were subjected to outside influence; discovery should be conformed to involve only those matters permitted by Tex. R. Civ. P. 327 and Tex. R. Evid. 606. Ford Motor Co. v. Castillo, 279 S.W.3d 656, 2009 Tex. LEXIS 121, 52 Tex. Sup. Ct. J. 570 (Tex. 2009).

Civil Procedure : Trials : Jury Trials : Jurors : Misconduct

2. Debtor failed to present competent, admissible evidence of jury misconduct where the appellate court could not conclude that the juror's alleged analysis of the debtor's properly admitted credit report, based on the juror's own experience or expertise, was misconduct resulting from an outside influence. Barnes v. Univ. Fed. Credit Union, 2013 Tex. App. LEXIS 4871, 80 U.C.C. Rep. Serv. 2d (CBC) 636 (Tex. App. Austin Apr. 18 2013).

3. Competent, admissible evidence of jury misconduct was not provided by affidavits from two dissenting jurors, stating that (1) a juror switched her vote to conclude deliberations more quickly after being informed of a death in the family; (2) another juror admitted that he read on the internet the appellate decision concerning a previous trial in the same matter; and (3) a third juror stated that he knew a party had a lot of money. These matters could be viewed as describing only matters on the minds of the individual jurors during deliberations. Editorial Caballero, S.A. de C.V. v. Playboy Enters., 359 S.W.3d 318, 2012 Tex. App. LEXIS 298 (Tex. App. Corpus Christi Jan. 12 2012).

4. No evidentiary hearing was required where affidavits from dissenting jurors did not aver admissible evidence of jury misconduct. Editorial Caballero, S.A. de C.V. v. Playboy Enters., 359 S.W.3d 318, 2012 Tex. App. LEXIS 298 (Tex. App. Corpus Christi Jan. 12 2012).

5. Juror's affidavit filed in a case where the juvenile was found delinquent for committing an aggravated assault could not support the juvenile's motion for a new trial based on juror misconduct and, thus, the trial court was not required to hold a hearing on that motion. The affidavit involved matters that occurred during jury deliberations and did not involve the required allegation of outside influence or a juror's qualification, which meant that the affidavit was not competent to support a motion for a new trial under Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b). In re A.C., 2011 Tex. App. LEXIS 7340, 2011 WL 3925516 (Tex. App. Eastland Sept. 8 2011).

6. Evidence presented in a medical malpractice action about discussions by certain jurors prior to formal deliberations did not establish jury misconduct under Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b) where, ultimately, the trial court found that the evidence failed to establish that, if any misconduct occurred, (1) it had any material effect on the jury verdict and (2) it resulted in injury to plaintiffs; because the trial court did not make a specific finding that jury misconduct occurred prior to deliberations, the appellate court assumed that the trial court made an implied finding in that regard, and while there was conflicting testimony, there was ample evidence of record to support the trial court's findings, both express and implied. Knight v. E. Tex. Med. Ctr., 2007 Tex. App. LEXIS 981 (Tex. App. Tyler Feb. 9 2007).

Civil Procedure : Trials : Jury Trials : Jury Deliberations

7. Where the juror affidavits stated that the trial judge entered the jurors' room right after lunch before they had restarted deliberations and again in the afternoon, stopping their deliberations, the trial court's communications to the jury did not occur during deliberations, and a reviewing court could consider the jurors' testimony on the trial court's statements at those times. In re Taylor Morrison of Tex., Inc., 2014 Tex. App. LEXIS 1416 (Tex. App. Fort Worth Feb. 6 2014).

8. Trial court's judgment granting a partial mistrial was a clear abuse of discretion because there was no jury verdict on any claims, as the communications from the trial judge that the jury should skip a question and the communications stopping their deliberations before they had concluded resulted in an incomplete verdict; the instruction to skip the question did not conform to the jury charge instructions, and the harm was that the jurors did not complete their deliberations, vote on some questions, or render a verdict on all questions. In re Taylor Morrison of Tex., Inc., 2014 Tex. App. LEXIS 1416 (Tex. App. Fort Worth Feb. 6 2014).

9. Finding that the individual should take nothing in her action against the company alleging that the company caused her injuries from chemical exposure was appropriate where she failed to prove the existence of actual "outside influence" in regard to the jury as required by Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b). House v. Ethyl Corp., 2005 Tex. App. LEXIS 3859 (Tex. App. Houston 1st Dist. May 19 2005).

10. In a manufacturing defect case brought against a tire company, the court rejected the tire company's contention that it was entitled to a new trial because of material jury misconduct and that the trial court erred in

sustaining the plaintiffs' objection to juror affidavits concerning a juror who consulted a dictionary to define negligence; the juror's conduct of copying a dictionary definition and sharing it with other jurors did not constitute an outside influence. While the tire company characterized the juror's act of copying the definition as occurring outside formal jury deliberations, the alleged jury misconduct was in reality the act of sharing that definition with other jurors and its consideration during the course of their deliberations; therefore, the proffered affidavits clearly involved juror statements about matters occurring during their deliberations, which was precluded under Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b). Cooper Tire & Rubber Co. v. Mendez, 155 S.W.3d 382, 2004 Tex. App. LEXIS 9112 (Tex. App. El Paso 2004), *rev'd on other grounds*, 204 S.W.3d 797, 2006 Tex. LEXIS 555 (Tex. 2006).

Civil Procedure : Trials : Jury Trials : Jury Instructions : General Overview

11. Trial court did not misdirect a jury as a matter of law and did not commit a material error calculated to injure defendant's rights by failing to give a defensive jury instruction. State v. Garcia, 2000 Tex. App. LEXIS 5750 (Tex. App. Corpus Christi Aug. 24 2000).

12. Trial court's grant of defendant's motion for a new trial on the grounds that a jury rendered its verdict by a manner other than the fair expression of the jurors was vacated because the State's appeal to the community, that merely encouraged moral responsibility to consider the evidence, was not improper. State v. Garcia, 2000 Tex. App. LEXIS 5750 (Tex. App. Corpus Christi Aug. 24 2000).

Civil Procedure : Trials : Jury Trials : Polling of Jury

13. No abuse of discretion occurred when the trial court sent the jury back to the jury room after it had reached a verdict that was signed by the jury foreman only but, during polling, two of the jurors answered, "No," when asked whether the verdict was theirs. There was no merit to the argument under Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b) that the trial court should have granted a new trial based on evidence obtained after the verdict was received and accepted; the argument was that the jury was confused during deliberations, not that there was any outside influence. Lincoln v. Clark Freight Lines, Inc., 285 S.W.3d 79, 2009 Tex. App. LEXIS 1037 (Tex. App. Houston 1st Dist. Feb. 12 2009).

Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials

14. Juror's affidavit filed in a case where the juvenile was found delinquent for committing an aggravated assault could not support the juvenile's motion for a new trial based on juror misconduct and, thus, the trial court was not required to hold a hearing on that motion. The affidavit involved matters that occurred during jury deliberations and did not involve the required allegation of outside influence or a juror's qualification, which meant that the affidavit was not competent to support a motion for a new trial under Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b). In re A.C., 2011 Tex. App. LEXIS 7340, 2011 WL 3925516 (Tex. App. Eastland Sept. 8 2011).

15. Trial court's grant of defendant's motion for a new trial on the grounds that a jury rendered its verdict by a manner other than the fair expression of the jurors was vacated because the State's appeal to the community, that merely encouraged moral responsibility to consider the evidence, was not improper. State v. Garcia, 2000 Tex. App. LEXIS 5750 (Tex. App. Corpus Christi Aug. 24 2000).

Civil Procedure : Appeals : Reviewability : Preservation for Review

16. In a case where a mother was seeking to regain property from her daughter, a claim that Tex. R. Civ. P. 327b and Tex. R. Evid. 606 violated due process and equal protection due to a limitation on juror questioning was waived because it was not presented to a trial court. Delahoussaye v. Kana, 2008 Tex. App. LEXIS 8561 (Tex. App. Houston 1st Dist. Nov. 13 2008).

Civil Procedure : Appeals : Standards of Review : General Overview

17. Evidence presented in a medical malpractice action about discussions by certain jurors prior to formal deliberations did not establish jury misconduct under Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b) where, ultimately, the trial court found that the evidence failed to establish that, if any misconduct occurred, (1) it had any material effect on the jury verdict and (2) it resulted in injury to plaintiffs; because the trial court did not make a specific finding that jury misconduct occurred prior to deliberations, the appellate court assumed that the trial court made an implied finding in that regard, and while there was conflicting testimony, there was ample evidence of record to support the trial court's findings, both express and implied. Knight v. E. Tex. Med. Ctr., 2007 Tex. App. LEXIS 981 (Tex. App. Tyler Feb. 9 2007).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

18. Trial court abused its discretion by entirely depriving a manufacturer the opportunity to conduct discovery on an injured party's claim for breach of a settlement agreement where the manufacturer contended that jurors were subjected to outside influence; discovery should be conformed to involve only those matters permitted by Tex. R. Civ. P. 327 and Tex. R. Evid. 606. Ford Motor Co. v. Castillo, 279 S.W.3d 656, 2009 Tex. LEXIS 121, 52 Tex. Sup. Ct. J. 570 (Tex. 2009).

Constitutional Law : Congressional Duties & Powers : Ex Post Facto Clause & Bills of Attainder

19. In denying defendant's motion for a new murder trial based on a juror's affidavit indicating he was bothered by defendant's failure to testify, the trial court did not violate the Ex Post Facto Clause of Tex. Const. art. I, § 16 because it applied the current version of Tex. R. Evid. 606(b) which precluded the juror's testimony about deliberations. Procedural rules controlled pending litigation from their effective date, and defendant did not have a vested right to a new trial based on former Tex. R. Crim. Evid. 606(b), which allowed a juror to testify about internal and external influences on the verdict. Deleon v. State, 2013 Tex. App. LEXIS 6105 (Tex. App. Fort Worth May 16 2013).

Constitutional Law : The Judiciary : Case or Controversy : Constitutionality of Legislation : General Overview

20. Tex. R. Evid. 606(b) was not unconstitutional as applied to defendant because although she was prohibited from using juror affidavits to show significant harm as the result of the alleged failure of jurors to disclose bias, she was entitled to use non-juror testimony to show misconduct; therefore, defendant was not prevented from presenting evidence that might otherwise have shown she suffered significant harm as the result of the service of the suspect jurors. White v. State, 181 S.W.3d 514, 2005 Tex. App. LEXIS 10449 (Tex. App. Texarkana 2005), *aff'd,* 225 S.W.3d 571, 2007 Tex. Crim. App. LEXIS 693 (Tex. Crim. App. 2007).

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : General Overview

21. In a case where a mother was seeking to regain property from her daughter, a claim that Tex. R. Civ. P. 327b and Tex. R. Evid. 606 violated due process and equal protection due to a limitation on juror questioning was waived because it was not presented to a trial court. Delahoussaye v. Kana, 2008 Tex. App. LEXIS 8561 (Tex. App. Houston 1st Dist. Nov. 13 2008).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Jury Trial

22. Tex. R. Evid. 606(b), which limits juror testimony in post-trial proceedings, is constitutional under both the state and federal constitutions guaranteeing a fair and impartial trial. Rule 606(b) strikes an appropriate balance and is intended to encourage open discussion among jurors during deliberations and to promote the finality of judgments while protecting jurors from harassment by unhappy litigants seeking grounds for a new trial. Hicks v. State, 15 S.W.3d 626, 2000 Tex. App. LEXIS 2245 (Tex. App. Houston 14th Dist. 2000).

23. Juror's affidavit attached to defendant's motion for new trial that attacked jury deliberations and stated that she still had reasonable doubt as to defendant's guilt was properly ruled inadmissible under Tex. R. Evid. 606(b). While Rule 606(b) makes proving jury misconduct in criminal trials more difficult, it does not conflict or otherwise deprive an appellant of a substantive right under Tex. R. App. P. 21.3(f), (g), which allows proof of jury misdirection and jury misconduct as grounds for a new trial. Hicks v. State, 15 S.W.3d 626, 2000 Tex. App. LEXIS 2245 (Tex. App. Houston 14th Dist. 2000).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

24. Following a trial for driving while intoxicated, defendant was not entitled to a new trial under Tex. R. App. P. 21, even though there was a discussion during jury deliberations in which one juror, a bartender, described the contents of a "Long Island Ice Tea"; there was no evidence that defendant drank a "Long Island Ice Tea," and it appeared that the jurors were curious about the drink and that the juror-bartender's statement was a passing remark; although a juror did briefly testify that the remark was persuasive with regard to the guilty verdict, that testimony was inadmissible under Tex. R. Evid. 606. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

Criminal Law & Procedure : Discovery & Inspection : Subpoenas : General Overview

25. Trial court did not err in refusing defendant's request to present jurors as live witnesses at a hearing on his motion for new trial, and thus did not deny him an adequate record on appeal, because the trial court recognized defendant's right to have a hearing on his motion for new trial, but determined the issue could be decided by affidavits pursuant to Tex. R. App. P. 21.7. Because the trial court began a second hearing on defendant's motion for new trial by asking if defense counsel had subpoenaed the jurors, whom defendant claimed had been prejudiced and had been uncooperative with defense counsel's investigation, it appeared that defense counsel missed an opportunity to present jurors as witnesses if any could support defendant's claims, and it also appeared that counsel did nothing further in the 10 days that the trial court gave him to secure further evidence supporting his motion for rehearing. Young v. State, 177 S.W.3d 136, 2005 Tex. App. LEXIS 660 (Tex. App. Houston 1st Dist. 2005).

Criminal Law & Procedure : Juries & Jurors : General Overview

26. Juror was prohibited by Tex. R. Evid. 606(b) from providing any evidence on the impact of the trial court's Allen charge on the juror's deliberation; it did not constitute evidence of an outside influence because the charge occurred during a normal courtroom proceeding and was part of the jury's deliberative process. Franks v. State, 90 S.W.3d 771, 2002 Tex. App. LEXIS 5119 (Tex. App. Fort Worth 2002).

Criminal Law & Procedure : Juries & Jurors : Disqualification & Removal of Jurors : General Overview

27. Trial court did not abuse its discretion by denying defendant's motion for a new trial on the ground that an unqualified juror served on his jury, as she had pleaded guilty to tampering with physical evidence and was on deferred adjudication community supervision in violation of Tex. Code Crim. Proc. Ann. art. 35.16(a)(3), because defendant presented no evidence that he suffered significant harm directly attributable to the juror's service on the

jury and her presence did not constitute an outside influence under Tex. R. Evid. 606(b). Sanchez v. State, 2010 Tex. App. LEXIS 9984 (Tex. App. Corpus Christi Dec. 16 2010).

Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : General Overview

28. Tex. R. Evid. 606(b) was not unconstitutional as applied to defendant because although she was prohibited from using juror affidavits to show significant harm as the result of the alleged failure of jurors to disclose bias, she was entitled to use non-juror testimony to show misconduct; therefore, defendant was not prevented from presenting evidence that might otherwise have shown she suffered significant harm as the result of the service of the suspect jurors. White v. State, 181 S.W.3d 514, 2005 Tex. App. LEXIS 10449 (Tex. App. Texarkana 2005), *aff'd,* 225 S.W.3d 571, 2007 Tex. Crim. App. LEXIS 693 (Tex. Crim. App. 2007).

29. While failure to disclose bias is a form of juror misconduct that justifies a new trial under the appropriate circumstances, Tex. R. Evid. 606(b) required that proof of a juror's failure to disclose bias must come from some source other than a fellow juror's testimony about deliberations. White v. State, 181 S.W.3d 514, 2005 Tex. App. LEXIS 10449 (Tex. App. Texarkana 2005), *aff'd,* 225 S.W.3d 571, 2007 Tex. Crim. App. LEXIS 693 (Tex. Crim. App. 2007).

30. State habeas court's application of Tex. R. Evid. 606(b) to bar testimony by the jurors concerning their internal discussion of parole law during deliberations was not contrary to, or an unreasonable application of, clearly established federal law, and therefore the inmate was properly denied habeas corpus relief under 28 U.S.C.S. § 2254, because no clearly established United States Supreme Court authority held that a defendant was entitled to a new trial when one juror misstates the law of parole to other jurors during deliberations, nor did any Court precedent obligate a state court to admit testimony from jurors concerning their internal discussions about parole law during deliberations. In fact, the existing clearly established Court case law suggested the opposite. Salazar v. Dretke, 419 F.3d 384, 2005 U.S. App. LEXIS 15610 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1467, 164 L. Ed. 2d 252, 2006 U.S. LEXIS 2081, 74 U.S.L.W. 3503 (U.S. 2006).

31. State habeas trial court effectively adjudicated an inmate's federal claim on the merits for federal habeas corpus purposes when it concluded that the state's invocation of Tex. R. Evid. 606(b) left the inmate with no admissible evidence to support his due process claim and that the application of Rule 606(b) was constitutional under United States Supreme Court precedent. Salazar v. Dretke, 419 F.3d 384, 2005 U.S. App. LEXIS 15610 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1467, 164 L. Ed. 2d 252, 2006 U.S. LEXIS 2081, 74 U.S.L.W. 3503 (U.S. 2006).

32. In a case in which there was no Tex. R. Evid. 606(b) objection, defendant was not entitled to a new trial because the jury did not improperly consider how the parole law would apply to defendant's situation. The jury discussed parole during deliberations of punishment. Two jurors' affidavits did not reveal any outside influence that was improperly brought to bear on any juror, and did not establish a misstatement of the law that was asserted as a fact by one professing to know the law that was relied upon by other jurors, who for that reason changed a vote to a harsher punishment. Further, defendant did not rebut the presumption that jurors followed the trial court's instructions on parole, and the charge given to the jury substantially followed the language in Tex. Code Crim. Proc. Ann. art. 37.07, § 4. Mata v. State, 2005 Tex. App. LEXIS 3679 (Tex. App. Corpus Christi May 12 2005).

33. Even if defendant had properly presented his motion for a new trial to the trial court, the motion was properly denied as defendant had included a juror affidavit in the motion that went to the issue of jury's deliberation that was prohibited by Tex. R. Evid. 606(b). Kerr v. State, 2005 Tex. App. LEXIS 1081 (Tex. App. Tyler Feb. 10 2005).

34. Bailiff made a statement to jurors during their deliberations explaining some of the laws involved in defendant's case in violation of Tex. Code Crim. Proc. Ann. art. 36.22, but the jurors testified either that they had not heard the bailiff's statements or that his statements did not influence them in reaching their verdict. In considering the juror's testimony, which was permissible because defendant failed to object to the admission of their testimony pursuant to Tex. R. Evid. 606(b), the trial court did not abuse its discretion in denying defendant's motion for new trial because the presumption of harm and injury to defendant was rebutted. Robinson v. State, 2005 Tex. App. LEXIS 759 (Tex. App. Dallas Jan. 31 2005).

35. Trial court properly quashed a juror affidavit and denied a criminal defendant's motion for a new trial, where the affidavit asserted that some of the jurors convicted defendant for reasons other than guilt. The affidavit addressed only matters which the juror learned during jury deliberations; these matters clearly came from the other jurors and, as such, did not constitute the outside influences required for a motion under Tex. R. Evid. 606. Tinker v. State, 148 S.W.3d 666, 2004 Tex. App. LEXIS 9406 (Tex. App. Houston 14th Dist. 2004).

36. Tex. R. Evid. 606(b) does not conflict with Tex. R. App. P. 21.3(f); public policy demands that jury deliberations be kept private. Garcia v. State, 2004 Tex. App. LEXIS 7610 (Tex. App. El Paso Aug. 25 2004).

37. Trial court did not abuse its discretion by overruling defendant's motion for new trial under Tex. R. App. P. 21.3(f) because the affidavits and live testimony indicated that an "outside influence" was not brought to bear upon the jury under Tex. R. Evid. 606(b). Even if a juror's explanation of anoxic brain injury had an impact on three other jurors in a capital murder trial, a juror's injection of his own personal experiences, knowledge, or expertise emanates from inside the jury. Garcia v. State, 2004 Tex. App. LEXIS 7610 (Tex. App. El Paso Aug. 25 2004).

38. Determining the juror's full effect on the outcome of the trial was precluded by Tex. R. Evid. 606(b), which prohibited jurors from testifying as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict. State v. Garza, 143 S.W.3d 144, 2004 Tex. App. LEXIS 4892 (Tex. App. San Antonio 2004).

39. To constitute outside influence under Tex. R. Evid. 606, the influence must emanate from outside the jury and its deliberation; the coercive influence of one juror upon the rest of the panel does not constitute outside influence. Franks v. State, 90 S.W.3d 771, 2002 Tex. App. LEXIS 5119 (Tex. App. Fort Worth 2002).

40. Tex. R. Evid. 606(b), which limits juror testimony in post-trial proceedings, is constitutional under both the state and federal constitutions guaranteeing a fair and impartial trial. Rule 606(b) strikes an appropriate balance and is intended to encourage open discussion among jurors during deliberations and to promote the finality of judgments while protecting jurors from harassment by unhappy litigants seeking grounds for a new trial. Hicks v. State, 15 S.W.3d 626, 2000 Tex. App. LEXIS 2245 (Tex. App. Houston 14th Dist. 2000).

41. Juror's affidavit attached to defendant's motion for new trial that attacked jury deliberations and stated that she still had reasonable doubt as to defendant's guilt was properly ruled inadmissible under Tex. R. Evid. 606(b). While Rule 606(b) makes proving jury misconduct in criminal trials more difficult, it does not conflict or otherwise deprive an appellant of a substantive right under Tex. R. App. P. 21.3(f), (g), which allows proof of jury misdirection and jury misconduct as grounds for a new trial. Hicks v. State, 15 S.W.3d 626, 2000 Tex. App. LEXIS 2245 (Tex. App. Houston 14th Dist. 2000).

Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : Alternates

42. Although defendant argued that a trial court erred by permitting the two alternate jurors in his case to be present during deliberations, no violation of Tex. Const. art. V, § 13 or Tex. Code Crim. Proc. Ann. art. 33.01(a) could be found because there was no indication in the record that the alternate jurors voted on the verdict. Moreover, even if the trial court's practice could be found to have violated Tex. Code Crim. Proc. Ann. art. 36.22, defendant failed to show that he was harmed by the violation, and, contrary to his suggestion, requiring him to obtain information from jurors regarding whether the alternates participated in deliberations did not violate Tex. R. Evid. 606(b)'s prohibition against inquiring into jurors' mental processes during deliberations. Castillo v. State, 319 S.W.3d 966, 2010 Tex. App. LEXIS 7473 (Tex. App. Austin Sept. 10 2010).

Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : Juror Misconduct

43. There was no jury misconduct when during voir dire a juror searched a website and found defendant's previous conviction for aggravated rape because the record did not contain any evidence or allegation that the juror's knowledge affected the jury's decision;the juror, who was the foreman, was not on the jury at the time he conducted the Internet search but was still a member of the venire; Tate v. State, 414 S.W.3d 260, 2013 Tex. App. LEXIS 9603 (Tex. App. Houston 1st Dist. Aug. 1 2013).

44. Defendant was not entitled to have juror affidavits considered as evidence of juror misconduct under Tex. R. Evid. 606(b) because the affidavits provided no evidence that the juror asking another how to vote asked anyone other than a fellow juror, and therefore, the trial court did not err by failing to consider them as evidence. Cox v. State, 2009 Tex. App. LEXIS 1858, 2009 WL 692606 (Tex. App. Tyler Mar. 18 2009).

45. Trial court correctly denied defendant's motion for new trial under Tex. R. App. P. 21, alleging juror misconduct, because the trial court followed the provisions of Tex. R. Evid. 606; there was no conflict between those two provisions. Sirois v. State, 2008 Tex. App. LEXIS 3053 (Tex. App. Eastland Apr. 24 2008).

46. In an aggravated assault of a peace officer case, the trial court did not abuse its discretion in denying defendant's motion for new trial as defendant presented no admissible evidence to support his allegation of juror misconduct during deliberations; defendant's affidavit in support of his motion in which a juror discussed the deliberations was exactly the type of information that was excluded by Tex. R. Evid. 606(b). Dunklin v. State, 194 S.W.3d 14, 2006 Tex. App. LEXIS 3596 (Tex. App. Tyler 2006).

Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : Materials Allowed in Jury Room

47. It was unnecessary to decide whether a jury foreman's Bible reading was an outside influence under Tex. R. Evid. 606 because the record presented no reasonable grounds that the Bible reading affected the jury's verdict; the brief reading of Biblical scripture, which was essentially an admonishment to follow the law, occurred near the beginning of jury deliberations, and the jurors' affidavits clearly indicated that the scripture had no effect on their verdict rendered some hours later. Lucero v. State, 246 S.W.3d 86, 2008 Tex. Crim. App. LEXIS 219 (Tex. Crim. App. 2008).

Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : Outside Influences

48. There was no jury misconduct when during voir dire a juror searched a website and found defendant's previous conviction for aggravated rape because the record did not contain any evidence or allegation that the juror's knowledge affected the jury's decision;the juror, who was the foreman, was not on the jury at the time he conducted the Internet search but was still a member of the venire; Tate v. State, 414 S.W.3d 260, 2013 Tex. App. LEXIS 9603 (Tex. App. Houston 1st Dist. Aug. 1 2013).

49. Trial court abused its discretion by denying defendant's motion for new trial where the jury foreman in defendant's trial testified without objection, with no cross-examination, and against no controverting evidence that outside influences caused him to change his verdict to guilty despite his belief that the State had not proven its case beyond a reasonable doubt, in order to allow him to leave the jury room immediately. The jury foreman's testimony established without dispute that an outside influence caused him to vote differently than he otherwise would have, and the record showed that once he changed his vote, the verdict was unanimous, which raised a reasonable inference that he was the lone holdout for acquittal. Colyer v. State, 395 S.W.3d 277, 2013 Tex. App. LEXIS 436, 2013 WL 173772 (Tex. App. Fort Worth Jan. 17 2013).

50. Court did not abuse its discretion by failing to hold a hearing on the motion for new trial based upon newly discovered evidence or allegations of jury misconduct, because the motion did not establish that the failure to discover the evidence was not owing to a want of due diligence by defendant juvenile, and the juror's affidavit involved matters that occurred during jury deliberations and did not involve an outside influence or a juror's qualification to serve. In re A.C., 2011 Tex. App. LEXIS 2580, 2011 WL 1326275 (Tex. App. Eastland Apr. 7 2011).

51. Trial court did not abuse its discretion in denying defendant's request for a hearing on his motion for new trial due to juror misconduct, because defendant's argument that he be afforded the opportunity to discover admissible evidence to impeach a jury verdict was a fishing expedition and an improper purpose of a new trial hearing, when the juror's affidavit or testimony would have been inadmissible at a new trial hearing since such evidence did not show an outside influence. Lee v. State, 2010 Tex. App. LEXIS 3526 (Tex. App. Tyler May 12 2010).

52. Where defendant was convicted of aggravated sexual assault of a child, he was not entitled to a mistrial because defense counsel overheard one of the jurors talking on a cell phone in the men's restroom; the Court of Appeals of Texas erred by reversing his conviction. Both the court of appeals and defendant misinterpret the State's burden to rebut, specifically with regard to the issue of juror questioning; the Court of Criminal Appeals of Texas held that the party alleging juror misconduct, not the State nor the court, should initiate juror questioning under Tex. R. Evid. 606. Ocon v. State, 284 S.W.3d 880, 2009 Tex. Crim. App. LEXIS 732 (Tex. Crim. App. 2009).

53. Defendant presented evidence that the jury did consider the application of parole law, and while ordinarily a juror's testimony was inadmissible under Tex. R. Evid. 606(b) because this did not amount to an outside influence, the State did not object to the admission of this evidence, making it admitted for all purposes; because there was evidence that the jury was inaccurately informed and misled by the charge that omitted Tex. Code Crim. Proc. Ann. art. 37.07, 4(a), the error caused some harm. Loun v. State, 273 S.W.3d 406, 2008 Tex. App. LEXIS 8748 (Tex. App. Texarkana 2008).

54. Manslaughter defendant was not entitled to a new trial after a juror volunteered that the jurors experimented with the gun in evidence and tested the gun's operation, resulting in one juror's change of mind; the juror's statement was permissible under Tex. R. Evid. 606, but, as relayed by defense counsel, it was too vague to demonstrate that any outside influence affected the juror or that the jurors did anything more than examine an admitted exhibit more closely so as to apply information learned at trial. Gahagan v. State, 242 S.W.3d 80, 2007 Tex. App. LEXIS 7842 (Tex. App. Houston 1st Dist. 2007).

55. In a trial for aggravated sexual assault of a child, defendant waived any error regarding an assault by a bystander because he failed to request from the trial court an instruction for the jury to disregard the assault; there was no evidence that the jury's verdict was influenced by the assault; defendant did not present any juror's affidavit as to how the incident may have affected the verdict, as would have been admissible under Tex. R. Evid. 606. Alfaro v. State, 224 S.W.3d 426, 2006 Tex. App. LEXIS 10463 (Tex. App. Houston 1st Dist. 2006).

56. Trial court did not err in overruling defendant's motion for new trial without a hearing where the affidavit signed by defendant's counsel was insufficient to raise the issue of jury misconduct under Tex. R. App. P. 21 because it did not contain averments constituting outside influence; furthermore, because the source of any allegedly improper information was a juror, the trial court could have determined there were no reasonable grounds to believe outside influence was improperly brought to bear upon the jury under Tex. R. Evid. 606. Lawrence v. State, 2006 Tex. App. LEXIS 9344 (Tex. App. Houston 14th Dist. Oct. 26 2006).

57. Following a trial for driving while intoxicated, defendant was not entitled to a new trial under Tex. R. App. P. 21, even though there was a discussion during jury deliberations in which one juror, a bartender, described the contents of a "Long Island Ice Tea"; there was no evidence that defendant drank a "Long Island Ice Tea," and it appeared that the jurors were curious about the drink and that the juror-bartender's statement was a passing remark; although a juror did briefly testify that the remark was persuasive with regard to the guilty verdict, that testimony was inadmissible under Tex. R. Evid. 606. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

58. Trial court did not err in denying defendant's motion for a new trial on his claim that a juror brought with her into the jury room materials that constituted an improper "outside influence" under Tex. R. Evid. 606(b) where defendant failed to show that "other evidence" was "received" by the jury because the jurors who testified agreed that none of the jurors looked at or considered any printed material allegedly offered by the juror at issue; furthermore, defendant had not cited any evidence from the record to make the showing required by Tex. R. App. P. 21 that other testimony or other evidence was actually received by the jury, and even had the jury received the printed material from the juror and considered it, the information would not constitute an outside influence under Tex. R. Evid. 606(b) because it was gathered and shared by a juror. Mathis v. State, 2006 Tex. App. LEXIS 4645 (Tex. App. Dallas May 31 2006).

Criminal Law & Procedure : Juries & Jurors : Jury Deliberations : Privacy of Deliberations

59. Juror's affidavit that another juror stated during deliberations in defendant's sexual assault of a child punishment trial that she was a victim of child sexual assault by her father was not admissible to show that counsel was ineffective in failing to uncover this fact during voir dire. Ex Parte Parra, 420 S.W.3d 821, 2013 Tex. Crim. App. LEXIS 1316 (Tex. Crim. App. Sept. 18 2013).

60. Court did not abuse its discretion by failing to hold a hearing on the motion for new trial based upon newly discovered evidence or allegations of jury misconduct, because the motion did not establish that the failure to discover the evidence was not owing to a want of due diligence by defendant juvenile, and the juror's affidavit involved matters that occurred during jury deliberations and did not involve an outside influence or a juror's qualification to serve. In re A.C., 2011 Tex. App. LEXIS 2580, 2011 WL 1326275 (Tex. App. Eastland Apr. 7 2011).

61. Although defendant argued that a trial court erred by permitting the two alternate jurors in his case to be present during deliberations, no violation of Tex. Const. art. V, § 13 or Tex. Code Crim. Proc. Ann. art. 33.01(a) could be found because there was no indication in the record that the alternate jurors voted on the verdict. Moreover, even if the trial court's practice could be found to have violated Tex. Code Crim. Proc. Ann. art. 36.22, defendant failed to show that he was harmed by the violation, and, contrary to his suggestion, requiring him to obtain information from jurors regarding whether the alternates participated in deliberations did not violate Tex. R. Evid. 606(b)'s prohibition against inquiring into jurors' mental processes during deliberations. Castillo v. State, 319 S.W.3d 966, 2010 Tex. App. LEXIS 7473 (Tex. App. Austin Sept. 10 2010).

62. State death row inmate's Sixth and Fourteenth Amendment rights were not violated when the jury considered evidence that he might be paroled during sentencing deliberations, even though an investigator hired during state postconviction proceedings interviewed jury members and found that some jurors' erroneous belief that he might be paroled after a short period of time and be a danger to the community influenced their death verdict; state habeas

court's refusal to consider this evidence and its conclusion that Tex. R. of Evid. 606 prohibited it from considering juror testimony except to show an improper outside influence did not violate clearly established federal law or deny the inmate a fair trial and, therefore, federal habeas corpus relief was properly denied. Parr v. Quarterman, 472 F.3d 245, 2006 U.S. App. LEXIS 29998 (5th Cir. Tex. 2006).

63. Testimony from jurors could be considered under Tex. R. Evid. 606(b) because the State failed to raise an objection in the trial court that a juror could not testify about deliberations. Latham v. State, 2006 Tex. App. LEXIS 6521 (Tex. App. Tyler July 26 2006).

Criminal Law & Procedure : Juries & Jurors : Voir Dire : Questions to Venire Panel

64. Defendant was not entitled to a new trial under Tex. R. App. P. 21, even though she presented affidavits showing that a juror's son and the victim's half-brother were friends and that defendant did not know of the relationship; defense counsel did not ask whether the juror knew the half-brother, and therefore the juror did not fail to disclose that information. Marks v. State, 2006 Tex. App. LEXIS 10007 (Tex. App. Beaumont Nov. 15 2006).

Criminal Law & Procedure : Trials : Closing Arguments : Inflammatory Statements

65. On a defendant's claim regarding a prosecutor's improper closing argument, the court considered testimony provided by a juror and referred to by defendant regarding the effect, if any, the prosecutor's comment had upon her mental processes since no one argued that the court could not consider it. Vasquez v. State, 2004 Tex. App. LEXIS 5164 (Tex. App. Amarillo June 10 2004).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Fair Trial

66. In a case of indecency with a child, defendant's right to a fair trial under Tex. R. App. P. 21.3(g) and the state and federal constitutions was not violated by a ruling that, under Tex. R. Evid. 606(b), a juror could not testify about alleged misconduct in jury deliberations. McGehee v. State, 2004 Tex. App. LEXIS 10127 (Tex. App. Waco Nov. 10 2004).

67. Tex. R. Evid. 606(b), which limits juror testimony in post-trial proceedings, is constitutional under both the state and federal constitutions guaranteeing a fair and impartial trial. Rule 606(b) strikes an appropriate balance and is intended to encourage open discussion among jurors during deliberations and to promote the finality of judgments while protecting jurors from harassment by unhappy litigants seeking grounds for a new trial. Hicks v. State, 15 S.W.3d 626, 2000 Tex. App. LEXIS 2245 (Tex. App. Houston 14th Dist. 2000).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

68. In a trial for aggravated sexual assault of a child, defendant waived any error regarding an assault by a bystander because he failed to request from the trial court an instruction for the jury to disregard the assault; there was no evidence that the jury's verdict was influenced by the assault; defendant did not present any juror's affidavit as to how the incident may have affected the verdict, as would have been admissible under Tex. R. Evid. 606. Alfaro v. State, 224 S.W.3d 426, 2006 Tex. App. LEXIS 10463 (Tex. App. Houston 1st Dist. 2006).

Criminal Law & Procedure : Verdicts : Impeachment of Verdicts

69. In defendant's capital murder case, a juror's affidavit failed to establish that an outside influence was improperly brought to bear upon any juror or that a juror was not qualified to serve; as such, the juror was barred from testifying about what happened during jury deliberations; the affidavit stated only that the juror felt "pressured"

by other jurors to change her vote to guilty. Villegas v. State, 2008 Tex. App. LEXIS 1899 (Tex. App. Corpus Christi Mar. 13 2008).

70. In a case of indecency with a child, defendant's right to a fair trial under Tex. R. App. P. 21.3(g) and the state and federal constitutions was not violated by a ruling that, under Tex. R. Evid. 606(b), a juror could not testify about alleged misconduct in jury deliberations. McGehee v. State, 2004 Tex. App. LEXIS 10127 (Tex. App. Waco Nov. 10 2004).

71. Defendant could not challenge the validity of a guilty verdict with the affidavit of a juror that she voted not guilty and never changed her vote to guilty; a juror generally could not impeach her own verdict, and the content of the affidavit did not fall within either exception to Tex. R. Evid. 606(b) regarding matters of outside influence or claims that a juror was not qualified to serve. Washington v. State, 2004 Tex. App. LEXIS 1082 (Tex. App. Eastland Feb. 5 2004).

72. Defendant was convicted of murder; a juror's comments could not serve to impeach the verdict under Tex. R. Evid. 606, and the trial court had not improperly communicated with the juror in violation of Tex. Code Crim. Proc. Ann. art. 36.27. Wood v. State, 87 S.W.3d 735, 2002 Tex. App. LEXIS 6091 (Tex. App. Texarkana 2002).

Criminal Law & Procedure : Sentencing : Corrections, Modifications & Reductions : General Overview

73. In a trial for child sexual assault, a probated sentence imposed by the jury was not subject to reform, even though 11 jurors averred that their intent was to impose a prison term followed by probation; the court declined to apply authority for changing a verdict where the expressed verdict was not the jury's agreed upon verdict, in part because the prior case was decided before the 1998 revision to Tex. R. Evid. 606; following revision, the rule prohibited inquiry into any matter or statement occurring during deliberations. State v. Dudley, 223 S.W.3d 717, 2007 Tex. App. LEXIS 3328 (Tex. App. Tyler 2007).

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

74. Court did not err by denying a new trial due to a juror's exit from the jury room and "agitated" outburst about supposed bullying because the jurors could not be queried about any matter or exchange that gave rise to the emotional outburst of the juror or the alleged misconduct during the jury's deliberations. Uballe v. State, 439 S.W.3d 380, 2014 Tex. App. LEXIS 4874, 2014 WL 1829849 (Tex. App. Amarillo May 6 2014).

75. Trial court abused its discretion by denying defendant's motion for new trial where the jury foreman in defendant's trial testified without objection, with no cross-examination, and against no controverting evidence that outside influences caused him to change his verdict to guilty despite his belief that the State had not proven its case beyond a reasonable doubt, in order to allow him to leave the jury room immediately. The jury foreman's testimony established without dispute that an outside influence caused him to vote differently than he otherwise would have, and the record showed that once he changed his vote, the verdict was unanimous, which raised a reasonable inference that he was the lone holdout for acquittal. Colyer v. State, 395 S.W.3d 277, 2013 Tex. App. LEXIS 436, 2013 WL 173772 (Tex. App. Fort Worth Jan. 17 2013).

76. Trial court did not abuse its discretion by denying defendant's motion for a new trial because he presented no evidence to establish proof of a juror's failure to disclose bias from a source other than a fellow juror's testimony and therefore he could not prove that misconduct occurred. The only evidence presented was an affidavit and a letter, neither of which identified which juror failed to disclose material information. Mcmorris v. State, 2012 Tex. App. LEXIS 10545, 2012 WL 6629770 (Tex. App. El Paso Dec. 19 2012).

77. Trial court correctly denied defendant's motion for new trial under Tex. R. App. P. 21, alleging juror misconduct, because the trial court followed the provisions of Tex. R. Evid. 606; there was no conflict between those two provisions. Sirois v. State, 2008 Tex. App. LEXIS 3053 (Tex. App. Eastland Apr. 24 2008).

78. Defendant was not entitled to a new trial based on a juror's affidavit stating that the jury considered defendant's failure to testify and the effect of parole on defendant's sentence; because the affidavit presented no evidence of any outside influence, the trial court could have properly disregarded it without an oral hearing under Tex. R. Evid. 606. Clark v. State, 2008 Tex. App. LEXIS 1430 (Tex. App. Beaumont Feb. 27 2008).

79. Manslaughter defendant was not entitled to a new trial after a juror volunteered that the jurors experimented with the gun in evidence and tested the gun's operation, resulting in one juror's change of mind; the juror's statement was permissible under Tex. R. Evid. 606, but, as relayed by defense counsel, it was too vague to demonstrate that any outside influence affected the juror or that the jurors did anything more than examine an admitted exhibit more closely so as to apply information learned at trial. Gahagan v. State, 242 S.W.3d 80, 2007 Tex. App. LEXIS 7842 (Tex. App. Houston 1st Dist. 2007).

80. Trial court properly denied defendant's motion for a new trial on the ground of jury misconduct because none of the statements in the juror's affidavit regarding the jury's deliberations fell within the exceptions of Tex. R. Evid. 606(b). The affidavit did not assert that information came from a source outside the jury or that a juror lacked the qualifications to serve; thus, the affidavit offered no competent evidence for the trial court's consideration. Boone v. State, 2007 Tex. App. LEXIS 4424 (Tex. App. Beaumont June 6 2007).

81. Under Tex. R. Evid. 606(b), the trial court properly excluded juror affidavits from a hearing on a new trial motion. The affidavits, stating that the jurors agreed to change their votes from not guilty to guilty in exchange for a promise that defendant would be sentenced to probation, were not a proper basis for proof of juror misconduct because the testimony related solely to matters occurring during deliberations and did not fall within either of the rule's exceptions. Britt v. State, 2007 Tex. App. LEXIS 3148 (Tex. App. Houston 14th Dist. Apr. 26 2007).

82. Trial court properly denied defendant's motion for a new trial; because the affidavit upon which defendant relied contained testimony related to the jury's deliberations, jurors' mental processes, and jurors' assent to or dissent from the verdict, and such evidence was prohibited under Tex. R. Evid. 606(b). East v. State, 2007 Tex. App. LEXIS 502 (Tex. App. Beaumont Jan. 24 2007).

83. Trial court did not err by entering judgment on the jury's verdict because defendant did not and could not prove that jury misconduct via outside influence occurred; a juror's discussion of the jury's deliberations and their negotiation of a guilty verdict established the same type of juror conduct that was at issue in the Dunklin case, which could not be proved by affidavit, and therefore defendant could not have presented evidence in support of his claim, as the type of conduct at issue was not admissible as evidence of misconduct. Bailey v. State, 2007 Tex. App. LEXIS 208 (Tex. App. Fort Worth Jan. 11 2007).

84. Trial court did not err in overruling defendant's motion for new trial without a hearing where the affidavit signed by defendant's counsel was insufficient to raise the issue of jury misconduct under Tex. R. App. P. 21 because it did not contain averments constituting outside influence; furthermore, because the source of any allegedly improper information was a juror, the trial court could have determined there were no reasonable grounds to believe outside influence was improperly brought to bear upon the jury under Tex. R. Evid. 606. Lawrence v. State, 2006 Tex. App. LEXIS 9344 (Tex. App. Houston 14th Dist. Oct. 26 2006).

85. Trial court did not err in denying defendant's motion for a new trial on his claim that a juror brought with her into the jury room materials that constituted an improper "outside influence" under Tex. R. Evid. 606(b) where

defendant failed to show that "other evidence" was "received" by the jury because the jurors who testified agreed that none of the jurors looked at or considered any printed material allegedly offered by the juror at issue; furthermore, defendant had not cited any evidence from the record to make the showing required by Tex. R. App. P. 21 that other testimony or other evidence was actually received by the jury, and even had the jury received the printed material from the juror and considered it, the information would not constitute an outside influence under Tex. R. Evid. 606(b) because it was gathered and shared by a juror. Mathis v. State, 2006 Tex. App. LEXIS 4645 (Tex. App. Dallas May 31 2006).

86. Trial court did not err when it failed to hold an evidentiary hearing as requested in defendant's motion for new trial because, under Tex. R. Evid. 606(b), the validity of a verdict could not be disputed based on a juror's testimony or affidavit about matters occurring in deliberation or the juror's mental processes which influenced any of the juror's decisions regarding the verdict. Therefore, the affidavit by a private investigator hired by defendant provided no reasonable grounds for the requested relief. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

87. New trial could not be granted based on the trial court's recollection of an informal postverdict chat in which two jurors commented that they might have gone outside the properly introduced evidence in reaching their verdict. That evidence was not competent under Tex. R. Evid. 606(b). State v. Krueger, 179 S.W.3d 663, 2005 Tex. App. LEXIS 8899 (Tex. App. Beaumont 2005).

88. Where defendant's allegation that parole information influenced the jurors' decision about his punishment was based upon indirect testimony from jurors, Tex. R. Evid. 606(b) prohibited a juror from testifying about any matter or statement occurring during the jury's deliberations; thus, the evidence offered by defendant was incompetent to support the granting of a motion for new trial. Easly v. State, 163 S.W.3d 839, 2005 Tex. App. LEXIS 4144 (Tex. App. Dallas 2005).

89. In a case in which there was no Tex. R. Evid. 606(b) objection, defendant was not entitled to a new trial because the jury did not improperly consider how the parole law would apply to defendant's situation. The jury discussed parole during deliberations of punishment. Two jurors' affidavits did not reveal any outside influence that was improperly brought to bear on any juror, and did not establish a misstatement of the law that was asserted as a fact by one professing to know the law that was relied upon by other jurors, who for that reason changed a vote to a harsher punishment. Further, defendant did not rebut the presumption that jurors followed the trial court's instructions on parole, and the charge given to the jury substantially followed the language in Tex. Code Crim. Proc. Ann. art. 37.07, § 4. Mata v. State, 2005 Tex. App. LEXIS 3679 (Tex. App. Corpus Christi May 12 2005).

90. Even if defendant had properly presented his motion for a new trial to the trial court, the motion was properly denied as defendant had included a juror affidavit in the motion that went to the issue of jury's deliberation that was prohibited by Tex. R. Evid. 606(b). Kerr v. State, 2005 Tex. App. LEXIS 1081 (Tex. App. Tyler Feb. 10 2005).

91. Bailiff made a statement to jurors during their deliberations explaining some of the laws involved in defendant's case in violation of Tex. Code Crim. Proc. Ann. art. 36.22, but the jurors testified either that they had not heard the bailiff's statements or that his statements did not influence them in reaching their verdict. In considering the juror's testimony, which was permissible because defendant failed to object to the admission of their testimony pursuant to Tex. R. Evid. 606(b), the trial court did not abuse its discretion in denying defendant's motion for new trial because the presumption of harm and injury to defendant was rebutted. Robinson v. State, 2005 Tex. App. LEXIS 759 (Tex. App. Dallas Jan. 31 2005).

92. Trial court did not err in refusing defendant's request to present jurors as live witnesses at a hearing on his motion for new trial, and thus did not deny him an adequate record on appeal, because the trial court recognized

defendant's right to have a hearing on his motion for new trial, but determined the issue could be decided by affidavits pursuant to Tex. R. App. P. 21.7. Because the trial court began a second hearing on defendant's motion for new trial by asking if defense counsel had subpoenaed the jurors, whom defendant claimed had been prejudiced and had been uncooperative with defense counsel's investigation, it appeared that defense counsel missed an opportunity to present jurors as witnesses if any could support defendant's claims, and it also appeared that counsel did nothing further in the 10 days that the trial court gave him to secure further evidence supporting his motion for rehearing. Young v. State, 177 S.W.3d 136, 2005 Tex. App. LEXIS 660 (Tex. App. Houston 1st Dist. 2005).

93. Tex. R. Evid. 606(b) does not conflict with Tex. R. App. P. 21.3(f); public policy demands that jury deliberations be kept private. Garcia v. State, 2004 Tex. App. LEXIS 7610 (Tex. App. El Paso Aug. 25 2004).

94. Trial court did not abuse its discretion by overruling defendant's motion for new trial under Tex. R. App. P. 21.3(f) because the affidavits and live testimony indicated that an "outside influence" was not brought to bear upon the jury under Tex. R. Evid. 606(b). Even if a juror's explanation of anoxic brain injury had an impact on three other jurors in a capital murder trial, a juror's injection of his own personal experiences, knowledge, or expertise emanates from inside the jury. Garcia v. State, 2004 Tex. App. LEXIS 7610 (Tex. App. El Paso Aug. 25 2004).

95. In support of defendant's motion for a new trial on the basis for jury misconduct, an affidavit merely stating that a juror had discussed misconduct with defense counsel after the trial, failed to demonstrate personal knowledge; thus, the affidavit was prohibited under Tex. R. Evid. 606(b). Enriquez v. State, 2004 Tex. App. LEXIS 6480 (Tex. App. El Paso July 21 2004).

96. Juror's affidavit attached to defendant's motion for new trial that attacked jury deliberations and stated that she still had reasonable doubt as to defendant's guilt was properly ruled inadmissible under Tex. R. Evid. 606(b). While Rule 606(b) makes proving jury misconduct in criminal trials more difficult, it does not conflict or otherwise deprive an appellant of a substantive right under Tex. R. App. P. 21.3(f), (g), which allows proof of jury misdirection and jury misconduct as grounds for a new trial. Hicks v. State, 15 S.W.3d 626, 2000 Tex. App. LEXIS 2245 (Tex. App. Houston 14th Dist. 2000).

Criminal Law & Procedure : Appeals : Procedures : Records on Appeal

97. In the State's appeal relating to a criminal sentence, juror affidavits as to the intended sentence were properly within the appellate record under Tex. R. App. P. 34 because they were filed along with a postjudgment motion; the court therefore rejected the argument that they should be struck from the record as mental processes of jurors under Tex. R. Evid. 606. State v. Dudley, 223 S.W.3d 717, 2007 Tex. App. LEXIS 3328 (Tex. App. Tyler 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial

98. Trial court did not abuse its discretion by denying defendant's motion for a new trial, and therefore the appellate court erred by reversing its decision, because the juror's testimony about bad weather and a telephone call from a doctor about his child's illness were not improper outside influences as they were unrelated to any factual or legal issue during defendant's driving while intoxicated trial, and therefore the trial court correctly refused to consider the juror's testimony or affidavit because they were inadmissible under this rule. Colyer v. State, 428 S.W.3d 117, 2014 Tex. Crim. App. LEXIS 636 (Tex. Crim. App. Apr. 30 2014).

99. Trial court did not abuse its discretion by denying defendant's motion for new trial based on jury misconduct because the only documents supporting defendant's claim that the verdict was not unanimous concerned jury deliberations and were inadmissible under this rule. Adair v. State, 2013 Tex. App. LEXIS 14923, 2013 WL

6665033 (Tex. App. Austin Dec. 12 2013).

100. Trial court did not abuse its discretion by denying defendant's motion for a new trial because neither the juror's affidavit, nor any in-court testimony, established the requisite outside influence to support a claim of juror misconduct, and therefore defendant's complaint did not fall within the exception to Tex. R. Evid. 606(b), because the statements about the jurors' concerns that defendant might be paroled or released from prison early were statements made by jurors to fellow jurors during deliberations, and all of the events and processes described in the affidavit emanated from inside the jury. Cervera v. State, 2012 Tex. App. LEXIS 8460, 2012 WL 4810318 (Tex. App. San Antonio Oct. 10 2012).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Jury Instructions

101. Tex. R. Evid. 606(b) makes it uncertain whether a defendant could, as suggested in prior case law, prove harm from the trial court's failure to read the jury charge aloud by proving at the hearing on a motion for new trial that the jury did not in fact read the charge after they retired. However, the inability to demonstrated harm does not render the error, a fortiori, egregiously harmful. Casanova v. State, 383 S.W.3d 530, 2012 Tex. Crim. App. LEXIS 1602 (Tex. Crim. App. 2012).

Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Sentences

102. State death row inmate's Sixth and Fourteenth Amendment rights were not violated when the jury considered evidence that he might be paroled during sentencing deliberations, even though an investigator hired during state postconviction proceedings interviewed jury members and found that some jurors' erroneous belief that he might be paroled after a short period of time and be a danger to the community influenced their death verdict; state habeas court's refusal to consider this evidence and its conclusion that Tex. R. of Evid. 606 prohibited it from considering juror testimony except to show an improper outside influence did not violate clearly established federal law or deny the inmate a fair trial and, therefore, federal habeas corpus relief was properly denied. Parr v. Quarterman, 472 F.3d 245, 2006 U.S. App. LEXIS 29998 (5th Cir. Tex. 2006).

Criminal Law & Procedure : Habeas Corpus : Review : Standards of Review : General Overview

103. State habeas court's application of Tex. R. Evid. 606(b) to bar testimony by the jurors concerning their internal discussion of parole law during deliberations was not contrary to, or an unreasonable application of, clearly established federal law, and therefore the inmate was properly denied habeas corpus relief under 28 U.S.C.S. § 2254, because no clearly established United States Supreme Court authority held that a defendant was entitled to a new trial when one juror misstates the law of parole to other jurors during deliberations, nor did any Court precedent obligate a state court to admit testimony from jurors concerning their internal discussions about parole law during deliberations. In fact, the existing clearly established Court case law suggested the opposite. Salazar v. Dretke, 419 F.3d 384, 2005 U.S. App. LEXIS 15610 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1467, 164 L. Ed. 2d 252, 2006 U.S. LEXIS 2081, 74 U.S.L.W. 3503 (U.S. 2006).

104. State habeas trial court effectively adjudicated an inmate's federal claim on the merits for federal habeas corpus purposes when it concluded that the state's invocation of Tex. R. Evid. 606(b) left the inmate with no admissible evidence to support his due process claim and that the application of Rule 606(b) was constitutional under United States Supreme Court precedent. Salazar v. Dretke, 419 F.3d 384, 2005 U.S. App. LEXIS 15610 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1467, 164 L. Ed. 2d 252, 2006 U.S. LEXIS 2081, 74 U.S.L.W. 3503 (U.S. 2006).

Evidence : Competency : Judges

105. Trial court did not err when it failed to hold an evidentiary hearing as requested in defendant's motion for new trial because, under Tex. R. Evid. 606(b), the validity of a verdict could not be disputed based on a juror's testimony or affidavit about matters occurring in deliberation or the juror's mental processes which influenced any of the juror's decisions regarding the verdict. Therefore, the affidavit by a private investigator hired by defendant provided no reasonable grounds for the requested relief. Moody v. State, 2006 Tex. App. LEXIS 1762 (Tex. App. San Antonio Mar. 8 2006).

106. There was no evidence that the jurors heard the judge's allegedly improper comments against the corporation's counsel, and in light of this, the court refused to hold that the comments merited a new trial; contrary to the corporation's assertion, nothing in Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b) would have prohibited a juror from testifying that he heard the comments, which came about halfway through the trial and not during deliberations. Exxon Mobil Corp. v. Kinder Morgan Operating L.P., 192 S.W.3d 120, 2006 Tex. App. LEXIS 1404 (Tex. App. Houston 14th Dist. 2006).

107. Tex. R. Evid. 606(b) was not unconstitutional as applied to defendant because although she was prohibited from using juror affidavits to show significant harm as the result of the alleged failure of jurors to disclose bias, she was entitled to use non-juror testimony to show misconduct; therefore, defendant was not prevented from presenting evidence that might otherwise have shown she suffered significant harm as the result of the service of the suspect jurors. White v. State, 181 S.W.3d 514, 2005 Tex. App. LEXIS 10449 (Tex. App. Texarkana 2005), *aff'd,* 225 S.W.3d 571, 2007 Tex. Crim. App. LEXIS 693 (Tex. Crim. App. 2007).

108. While failure to disclose bias is a form of juror misconduct that justifies a new trial under the appropriate circumstances, Tex. R. Evid. 606(b) required that proof of a juror's failure to disclose bias must come from some source other than a fellow juror's testimony about deliberations. White v. State, 181 S.W.3d 514, 2005 Tex. App. LEXIS 10449 (Tex. App. Texarkana 2005), *aff'd,* 225 S.W.3d 571, 2007 Tex. Crim. App. LEXIS 693 (Tex. Crim. App. 2007).

109. Defense counsel introduced a personal affidavit and another lawyer's affidavit into evidence at the motion for a new trial hearing without objection and thus, the applicability of Tex. R. Evid. 606(b) was not raised before the trial court, even though the trial court apparently based its ruling on the rule. Perez v. State, 2005 Tex. App. LEXIS 7097 (Tex. App. Corpus Christi Aug. 30 2005).

110. State habeas court's application of Tex. R. Evid. 606(b) to bar testimony by the jurors concerning their internal discussion of parole law during deliberations was not contrary to, or an unreasonable application of, clearly established federal law, and therefore the inmate was properly denied habeas corpus relief under 28 U.S.C.S. § 2254, because no clearly established United States Supreme Court authority held that a defendant was entitled to a new trial when one juror misstates the law of parole to other jurors during deliberations, nor did any Court precedent obligate a state court to admit testimony from jurors concerning their internal discussions about parole law during deliberations. In fact, the existing clearly established Court case law suggested the opposite. Salazar v. Dretke, 419 F.3d 384, 2005 U.S. App. LEXIS 15610 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1467, 164 L. Ed. 2d 252, 2006 U.S. LEXIS 2081, 74 U.S.L.W. 3503 (U.S. 2006).

111. State habeas trial court effectively adjudicated an inmate's federal claim on the merits for federal habeas corpus purposes when it concluded that the state's invocation of Tex. R. Evid. 606(b) left the inmate with no admissible evidence to support his due process claim and that the application of Rule 606(b) was constitutional under United States Supreme Court precedent. Salazar v. Dretke, 419 F.3d 384, 2005 U.S. App. LEXIS 15610 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 1467, 164 L. Ed. 2d 252, 2006 U.S. LEXIS 2081, 74 U.S.L.W. 3503 (U.S. 2006).

112. Where defendant's allegation that parole information influenced the jurors' decision about his punishment was based upon indirect testimony from jurors, Tex. R. Evid. 606(b) prohibited a juror from testifying about any matter or statement occurring during the jury's deliberations; thus, the evidence offered by defendant was incompetent to support the granting of a motion for new trial. Easly v. State, 163 S.W.3d 839, 2005 Tex. App. LEXIS 4144 (Tex. App. Dallas 2005).

113. Finding that the individual should take nothing in her action against the company alleging that the company caused her injuries from chemical exposure was appropriate where she failed to prove the existence of actual "outside influence" in regard to the jury as required by Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b). House v. Ethyl Corp., 2005 Tex. App. LEXIS 3859 (Tex. App. Houston 1st Dist. May 19 2005).

114. In a case in which there was no Tex. R. Evid. 606(b) objection, defendant was not entitled to a new trial because the jury did not improperly consider how the parole law would apply to defendant's situation. The jury discussed parole during deliberations of punishment. Two jurors' affidavits did not reveal any outside influence that was improperly brought to bear on any juror, and did not establish a misstatement of the law that was asserted as a fact by one professing to know the law that was relied upon by other jurors, who for that reason changed a vote to a harsher punishment. Further, defendant did not rebut the presumption that jurors followed the trial court's instructions on parole, and the charge given to the jury substantially followed the language in Tex. Code Crim. Proc. Ann. art. 37.07, § 4. Mata v. State, 2005 Tex. App. LEXIS 3679 (Tex. App. Corpus Christi May 12 2005).

115. Bailiff made a statement to jurors during their deliberations explaining some of the laws involved in defendant's case in violation of Tex. Code Crim. Proc. Ann. art. 36.22, but the jurors testified either that they had not heard the bailiff's statements or that his statements did not influence them in reaching their verdict. In considering the juror's testimony, which was permissible because defendant failed to object to the admission of their testimony pursuant to Tex. R. Evid. 606(b), the trial court did not abuse its discretion in denying defendant's motion for new trial because the presumption of harm and injury to defendant was rebutted. Robinson v. State, 2005 Tex. App. LEXIS 759 (Tex. App. Dallas Jan. 31 2005).

116. Trial court did not err in refusing defendant's request to present jurors as live witnesses at a hearing on his motion for new trial, and thus did not deny him an adequate record on appeal, because the trial court recognized defendant's right to have a hearing on his motion for new trial, but determined the issue could be decided by affidavits pursuant to Tex. R. App. P. 21.7. Because the trial court began a second hearing on defendant's motion for new trial by asking if defense counsel had subpoenaed the jurors, whom defendant claimed had been prejudiced and had been uncooperative with defense counsel's investigation, it appeared that defense counsel missed an opportunity to present jurors as witnesses if any could support defendant's claims, and it also appeared that counsel did nothing further in the 10 days that the trial court gave him to secure further evidence supporting his motion for rehearing. Young v. State, 177 S.W.3d 136, 2005 Tex. App. LEXIS 660 (Tex. App. Houston 1st Dist. 2005).

117. In an aggravated theft case, the trial court's order granting defendant's motion for new trial was reversed as testimony and evidence of a juror who considered defendant's failure to testify was improperly considered. State v. Ordonez, 156 S.W.3d 850, 2005 Tex. App. LEXIS 298 (Tex. App. El Paso 2005).

118. Neither the record nor the bill of exceptions indicated that an outside influence was improperly brought to bear upon a juror or that a juror was not qualified to serve, and thus, Tex. R. Evid. 606(b) precluded juror testimony and the trial court did not err in refusing to hear the evidence of jury misconduct in connection with defendant's murder trial. The court agreed with other case law that Rule 606(b) was constitutional. Rivera v. State, 2004 Tex. App. LEXIS 8400 (Tex. App. San Antonio Sept. 22 2004).

119. In support of defendant's motion for a new trial on the basis for jury misconduct, an affidavit merely stating that a juror had discussed misconduct with defense counsel after the trial, failed to demonstrate personal knowledge; thus, the affidavit was prohibited under Tex. R. Evid. 606(b). Enriquez v. State, 2004 Tex. App. LEXIS 6480 (Tex. App. El Paso July 21 2004).

120. Determining the juror's full effect on the outcome of the trial was precluded by Tex. R. Evid. 606(b), which prohibited jurors from testifying as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict. State v. Garza, 143 S.W.3d 144, 2004 Tex. App. LEXIS 4892 (Tex. App. San Antonio 2004).

121. Defendant's argument that he should have been granted a new trial because of jury misconduct was overruled because the testimony did not reveal any outside influence that was improperly brought to bear on any juror, and the statements were all made during deliberations and emanated from inside the jury; the evidence was that one juror thought maybe another unnamed juror was influenced by the other juror's prior experiences, and that the juror expressed an opinion that rehabilitation was not possible. Graham v. State, 2004 Tex. App. LEXIS 3449 (Tex. App. Texarkana Apr. 16 2004).

122. Because there was no evidence of any outside influence on the jury, just an attorney's affidavit opining that the jurors discussed and considered parole, which Tex. Evid. R. 606(b) prohibited a juror from testifying about, the trial court could not have appropriately granted defendant's motion for a new trial on the ground of jury misconduct. State v. Lewis, 151 S.W.3d 213, 2004 Tex. App. LEXIS 2858 (Tex. App. Tyler 2004).

Evidence : Competency : Jurors : General Overview

123. Court did not err during defendant's trial for sexual assault in denying defendant's motion for a new trial on the basis that a juror conducted independent research on date rape drugs during an overnight recess and conveyed that information to the other jurors during deliberations the following morning; the trial court properly declined to consider the jurors' affidavits based on the fact that they did not fall within any exception listed in Tex. R. Evid. 606(b). Mcquarrie v. State, 2011 Tex. App. LEXIS 2859, 2011 WL 1442335 (Tex. App. Corpus Christi Apr. 14 2011).

124. Defendant was not entitled to have juror affidavits considered as evidence of juror misconduct under Tex. R. Evid. 606(b) because the affidavits provided no evidence that the juror asking another how to vote asked anyone other than a fellow juror, and therefore, the trial court did not err by failing to consider them as evidence. Cox v. State, 2009 Tex. App. LEXIS 1858, 2009 WL 692606 (Tex. App. Tyler Mar. 18 2009).

125. Because Tex. R. Evid. 606(b) detailed when a juror could testify regarding the validity of a verdict or indictment, and the statements in question were not made with regard to the indictment or verdict, the rule was irrelevant in connection with defendant's claim of error due to the denial of a motion for a mistrial. Jones v. State, 2007 Tex. App. LEXIS 394 (Tex. App. Houston 14th Dist. Jan. 23 2007).

Evidence : Competency : Jurors : Deliberations

126. Court did not err by denying a new trial due to a juror's exit from the jury room and "agitated" outburst about supposed bullying because the jurors could not be queried about any matter or exchange that gave rise to the emotional outburst of the juror or the alleged misconduct during the jury's deliberations. Uballe v. State, 439 S.W.3d 380, 2014 Tex. App. LEXIS 4874, 2014 WL 1829849 (Tex. App. Amarillo May 6 2014).

127. Where the juror affidavits stated that the trial judge entered the jurors' room right after lunch before they had restarted deliberations and again in the afternoon, stopping their deliberations, the trial court's communications to the jury did not occur during deliberations, and a reviewing court could consider the jurors' testimony on the trial court's statements at those times. In re Taylor Morrison of Tex., Inc., 2014 Tex. App. LEXIS 1416 (Tex. App. Fort Worth Feb. 6 2014).

128. Trial court's judgment granting a partial mistrial was a clear abuse of discretion because there was no jury verdict on any claims, as the communications from the trial judge that the jury should skip a question and the communications stopping their deliberations before they had concluded resulted in an incomplete verdict; the instruction to skip the question did not conform to the jury charge instructions, and the harm was that the jurors did not complete their deliberations, vote on some questions, or render a verdict on all questions. In re Taylor Morrison of Tex., Inc., 2014 Tex. App. LEXIS 1416 (Tex. App. Fort Worth Feb. 6 2014).

129. Trial court did not abuse its discretion by denying defendant's motion for new trial based on jury misconduct because the only documents supporting defendant's claim that the verdict was not unanimous concerned jury deliberations and were inadmissible under this rule. Adair v. State, 2013 Tex. App. LEXIS 14923, 2013 WL 6665033 (Tex. App. Austin Dec. 12 2013).

130. Juror's affidavit that another juror stated during deliberations in defendant's sexual assault of a child punishment trial that she was a victim of child sexual assault by her father was not admissible to show that counsel was ineffective in failing to uncover this fact during voir dire. Ex Parte Parra, 420 S.W.3d 821, 2013 Tex. Crim. App. LEXIS 1316 (Tex. Crim. App. Sept. 18 2013).

131. Because a juror's alleged statements concerned the jury's deliberations and her own mental processes and did not show that an outside influence was improperly brought to bear on any juror, the statements were inadmissible under this rule. Mcmaster v. State, 2013 Tex. App. LEXIS 10541 (Tex. App. El Paso Aug. 21 2013).

132. Because a juror's alleged statements concerned the jury's deliberations and her own mental processes and did not show that an outside influence was improperly brought to bear on any juror, the statements were inadmissible under this rule. Mcmaster v. State, 2013 Tex. App. LEXIS 10538, 2013 WL 4506403 (Tex. App. El Paso Aug. 21 2013).

133. In denying defendant's motion for a new murder trial based on a juror's affidavit indicating he was bothered by defendant's failure to testify, the trial court did not violate the Ex Post Facto Clause of Tex. Const. art. I, § 16 because it applied the current version of Tex. R. Evid. 606(b) which precluded the juror's testimony about deliberations. Procedural rules controlled pending litigation from their effective date, and defendant did not have a vested right to a new trial based on former Tex. R. Crim. Evid. 606(b), which allowed a juror to testify about internal and external influences on the verdict. Deleon v. State, 2013 Tex. App. LEXIS 6105 (Tex. App. Fort Worth May 16 2013).

134. Appellant's allegation that during deliberations a juror was intimidated to a point that she became stressed out was insufficient to show good cause in order to unseal personal juror information under Tex. Code Crim. Proc. Ann. art. 35.29; appellant did not point to anything showing a firm foundation that there was misconduct, and even assuming other jurors intimidated the juror in question based on her vote, the testimony appellant sought did not meet admissibility requirements under Tex. R. Evid. 606(b) because it concerned statements taking place during deliberations and their effect on the juror instead of an outside influence. Romero v. State, 396 S.W.3d 136, 2013 Tex. App. LEXIS 715, 2013 WL 266248 (Tex. App. Houston 14th Dist. Jan. 24 2013).

135. Trial court's denial of appellant's request to unseal juror records to be used to get information about jury deliberations did not violate due process as appellant claimed. Romero v. State, 396 S.W.3d 136, 2013 Tex. App. LEXIS 715, 2013 WL 266248 (Tex. App. Houston 14th Dist. Jan. 24 2013).

136. Trial court did not abuse its discretion by denying defendant's motion for a new trial because he presented no evidence to establish proof of a juror's failure to disclose bias from a source other than a fellow juror's testimony and therefore he could not prove that misconduct occurred. The only evidence presented was an affidavit and a letter, neither of which identified which juror failed to disclose material information. Mcmorris v. State, 2012 Tex. App. LEXIS 10545, 2012 WL 6629770 (Tex. App. El Paso Dec. 19 2012).

137. Trial court abused its discretion in excluding, pursuant to Tex. R. Evid. 606(b), the jurors' testimony and affidavits offered by defendant at the hearing on his motion for new trial, and the court of appeals erred to hold otherwise; the internet research conducted by a juror about the effects of date rape drugs constituted an "outside influence." Mcquarrie v. State, 380 S.W.3d 145, 2012 Tex. Crim. App. LEXIS 1328 (Tex. Crim. App. Oct. 10 2012).

138. Juror's testimony and affidavit did not establish the required outside influence to support a juror misconduct claim, for purposes of Tex. R. Evid. 606(b), as the statements were made by jurors to fellow jurors during deliberations, and the events the juror described came from inside the jury; thus, the trial court did not abuse its discretion in denying appellant's new trial motion under Tex. R. App. P. 21.3(g). Mcburnett v. State, 2012 Tex. App. LEXIS 5300, 2012 WL 2583407 (Tex. App. San Antonio July 5 2012).

139. In a design defect and negligence suit, jurors' testimony that they traded answers was not evidence of an outside influence; thus, Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b) prohibited the trial court from receiving juror affidavits or other juror testimony concerning alleged traded answers. Moreover, these rules did not violate due process under the Fourteenth Amendment, U.S. Const. amend. XIV, or the due process, jury trial, and open courts provisions of the Texas Constitution set forth in Tex. Const. art. I, §§ 13, 15, 19. De Damian v. Bell Helicopter Textron, Inc., 352 S.W.3d 124, 2011 Tex. App. LEXIS 7316 (Tex. App. Fort Worth Aug. 31 2011).

140. Although the affidavit upon which appellant based his motion for new trial raised issues outside the record, the evidence attempted to explore the impact of certain things on jurors' minds, which influenced them in reaching a verdict; this was not competent evidence, barred by Tex. R. Evid. 606, and the trial court was within its discretion to deny a hearing on the motion. Rogers v. State, 2011 Tex. App. LEXIS 6565, 2011 WL 3612248 (Tex. App. Texarkana Aug. 18 2011).

141. Discussion of parole law under Tex. Code Crim. Proc. Ann. art. 37.07, § 4(a) did not constitute an outside influence, and appellant did not argue any other outside influence; Tex. R. Evid. 606(b) precluded the trial court's consideration of a juror's affidavit, and because appellant did not present other proof, the trial court did not err in denying his new trial motion. Mccall v. State, 2011 Tex. App. LEXIS 3986, 2011 WL 2119740 (Tex. App. Beaumont May 25 2011).

142. When defendant was convicted of aggravated robbery, the trial court granted a mistrial as to punishment. When defendant filed a motion for new trial, the trial court refused to permit testimony of alleged juror misconduct during the deliberations under Tex. R. Evid. 606(b). George v. State, 2011 Tex. App. LEXIS 3231, 2011 WL 1529670 (Tex. App. Houston 1st Dist. Feb. 24 2011).

143. Trial court did not err by quashing the jurors' subpoenas because defendant intended to show through affidavits and juror testimony the effect of the State's argument had on the applicable of the parole laws during their deliberations and jury deliberations considering the effects of parole were not an outside influence and therefore any testimony was inadmissible under Tex. R. Evid. 606(b). Somers v. State, 333 S.W.3d 747, 2010 Tex. App.

LEXIS 9384 (Tex. App. Waco Nov. 24 2010).

144. Evidence relied upon by defendant to support his assertion that he was entitled to a new trial, other than the clearly inadmissible testimony of the juror, was the affidavit and testimony of his attorney; however, that evidence, though admitted by the trial court at the hearing, was nothing more than the attorney's restatement of statements by jurors as to what went on during deliberations. Neither the attorney's affidavit nor her testimony provided any evidence of an outside influence that resulted in an improper verdict; because such evidence was clearly improper under Tex. R. Evid. 606(b), it did not compel the trial court to grant a new trial under Tex. R. App. P. 21.3. Orozco v. State, 2010 Tex. App. LEXIS 7885, 2010 WL 3782198 (Tex. App. San Antonio Sept. 29 2010).

145. Denial of defendant's motion for a new trial based on newly discovered evidence was proper, because the juror's affidavit that the cell phone records would have led her and two other jurors to have decided the case differently was inadmissible under Tex. R. Evid. 606(b), and defendant presented no evidence in his motion for new trial that the evidence was unknown to him at the time of trial or that the failure to discover the new evidence was not due to his lack of due diligence. Kelly v. State, 2010 Tex. App. LEXIS 7439, 2010 WL 3503884 (Tex. App. Waco Sept. 8 2010).

146. Court noted that certain case law regarding when a jury's discussion of parole constituted reversible error was no longer viable in light of Tex. R. Evid. 606(b). Melvin v. State, 2010 Tex. App. LEXIS 2973, 2010 WL 1611072 (Tex. App. Waco Apr. 21 2010).

147. Because defendant had not shown that any outside influence was improperly brought to bear upon any juror, the trial court did not abuse its discretion by excluding the juror's testimony and denying his motion for new trial; even if case law remained viable, defendant's claim failed because he had not shown that there was a misstatement of the law asserted as a fact by one professing to know the law. Melvin v. State, 2010 Tex. App. LEXIS 2973, 2010 WL 1611072 (Tex. App. Waco Apr. 21 2010).

148. Texas case law does not establish juror questioning as a mandatory remedy for jury misconduct, nor do the Texas Rules of Evidence. If jurors are questioned under Tex. R. Evid. 606(b), it should be at the behest of the movant; it is incumbent upon the party moving for a mistrial to request an inquiry of the jurors. Ocon v. State, 284 S.W.3d 880, 2009 Tex. Crim. App. LEXIS 732 (Tex. Crim. App. 2009).

149. Defendant presented evidence that the jury did consider the application of parole law, and while ordinarily a juror's testimony was inadmissible under Tex. R. Evid. 606(b) because this did not amount to an outside influence, the State did not object to the admission of this evidence, making it admitted for all purposes; because there was evidence that the jury was inaccurately informed and misled by the charge that omitted Tex. Code Crim. Proc. Ann. art. 37.07, 4(a), the error caused some harm. Loun v. State, 273 S.W.3d 406, 2008 Tex. App. LEXIS 8748 (Tex. App. Texarkana 2008).

150. Trial court did not err in denying defendant's motion for a new trial on the ground that the jury violated the trial court's mandatory instructions not to consider how parole might apply to defendant and that during the jury's deliberations, a juror discussed personal knowledge of the parole process where the juror's answers to defense counsel's questionnaire clearly related to the jury's deliberation and not to any outside influence, as defined in Tex. R. Evid. 606. Fenoglio v. State, 252 S.W.3d 468, 2008 Tex. App. LEXIS 1335 (Tex. App. Fort Worth 2008).

151. Tex. R. Evid. 606 did not bar juror testimony from defendant's parent about a conversation by jurors during a trial break. Noland v. State, 264 S.W.3d 144, 2007 Tex. App. LEXIS 10049 (Tex. App. Houston 1st Dist. 2007).

152. Trial court properly denied defendant's motion for a new trial on the ground of jury misconduct because none of the statements in the juror's affidavit regarding the jury's deliberations fell within the exceptions of Tex. R. Evid. 606(b). The affidavit did not assert that information came from a source outside the jury or that a juror lacked the qualifications to serve; thus, the affidavit offered no competent evidence for the trial court's consideration. Boone v. State, 2007 Tex. App. LEXIS 4424 (Tex. App. Beaumont June 6 2007).

153. As the United States Supreme Court had held that while juror testimony was barred under Fed. R. Evid. 606(b), a party could seek to impeach the verdict by non-juror evidence of misconduct, likewise, Tex. R. Evid. 606(b) does not prevent an appellant from demonstrating "significant harm" by use of non-juror evidence. White v. State, 225 S.W.3d 571, 2007 Tex. Crim. App. LEXIS 693 (Tex. Crim. App. 2007).

154. Court overruled the issue that the trial court erred in failing to hold a hearing on defendant's motions for a new trial and to arrest judgment; Tex. R. Evid. 606(b) barred the trial court from considering the contents of the affidavit because the affiant described the collective thought of the jurors in deliberations, and without those contents, nothing remained in the affidavit to support the allegation of the pending motions. Bjorgaard v. State, 220 S.W.3d 555, 2007 Tex. App. LEXIS 2514 (Tex. App. Amarillo 2007).

155. Describing the collective thought of the jurors is nothing more than imparting their deliberative processes. Bjorgaard v. State, 220 S.W.3d 555, 2007 Tex. App. LEXIS 2514 (Tex. App. Amarillo 2007).

156. In a product liability case, a father's motion for a new trial based on juror misconduct under Tex. R. Civ. P. 327 was properly denied since some statements were inadmissible under Tex. R. Civ. P. 327 and Tex. R. Evid. 606(b), lunch discussions and juror conversations did not affect the decision, the jury was not affected by outside influences, and supplemental jury instructions after a deadlock did not constitute an outside influence as a matter of law. Hutton v. AER Mfg. II, Inc., 224 S.W.3d 459, 2007 Tex. App. LEXIS 627 (Tex. App. Dallas 2007).

157. Trial court did not err by entering judgment on the jury's verdict because defendant did not and could not prove that jury misconduct via outside influence occurred; a juror's discussion of the jury's deliberations and their negotiation of a guilty verdict established the same type of juror conduct that was at issue in the Dunklin case, which could not be proved by affidavit, and therefore defendant could not have presented evidence in support of his claim, as the type of conduct at issue was not admissible as evidence of misconduct. Bailey v. State, 2007 Tex. App. LEXIS 208 (Tex. App. Fort Worth Jan. 11 2007).

158. Affidavit in support of a new trial motion contained two levels of hearsay, it did not state who heard certain juror statements or how counsel learned of the statements, and no one had personal knowledge of any jury misconduct; furthermore, a juror would have been unable to testify to the content of jury deliberations under Tex. R. Evid. 606, and thus the trial court was not required to hold a hearing on the motion and the trial court did not abuse its discretion when it overruled the motion by operation of law under Tex. R. App. P. 21. Lingo-Perkins v. State, 2006 Tex. App. LEXIS 4877 (Tex. App. Tyler June 7 2006).

159. Trial court did not err in denying defendant's motion for a new trial on his claim that a juror brought with her into the jury room materials that constituted an improper "outside influence" under Tex. R. Evid. 606(b) where defendant failed to show that "other evidence" was "received" by the jury because the jurors who testified agreed that none of the jurors looked at or considered any printed material allegedly offered by the juror at issue; furthermore, defendant had not cited any evidence from the record to make the showing required by Tex. R. App. P. 21 that other testimony or other evidence was actually received by the jury, and even had the jury received the printed material from the juror and considered it, the information would not constitute an outside influence under Tex. R. Evid. 606(b) because it was gathered and shared by a juror. Mathis v. State, 2006 Tex. App. LEXIS 4645

(Tex. App. Dallas May 31 2006).

160. In an aggravated assault of a peace officer case, the trial court did not abuse its discretion in denying defendant's motion for new trial as defendant presented no admissible evidence to support his allegation of juror misconduct during deliberations; defendant's affidavit in support of his motion in which a juror discussed the deliberations was exactly the type of information that was excluded by Tex. R. Evid. 606(b). Dunklin v. State, 194 S.W.3d 14, 2006 Tex. App. LEXIS 3596 (Tex. App. Tyler 2006).

Evidence : Competency : Jurors : External Influences

161. Trial court did not abuse its discretion by denying defendant's motion for a new trial, and therefore the appellate court erred by reversing its decision, because the juror's testimony about bad weather and a telephone call from a doctor about his child's illness were not improper outside influences as they were unrelated to any factual or legal issue during defendant's driving while intoxicated trial, and therefore the trial court correctly refused to consider the juror's testimony or affidavit because they were inadmissible under this rule. Colyer v. State, 428 S.W.3d 117, 2014 Tex. Crim. App. LEXIS 636 (Tex. Crim. App. Apr. 30 2014).

162. Debtor failed to present competent, admissible evidence of jury misconduct where the appellate court could not conclude that the juror's alleged analysis of the debtor's properly admitted credit report, based on the juror's own experience or expertise, was misconduct resulting from an outside influence. Barnes v. Univ. Fed. Credit Union, 2013 Tex. App. LEXIS 4871, 80 U.C.C. Rep. Serv. 2d (CBC) 636 (Tex. App. Austin Apr. 18 2013).

163. Trial court did not abuse its discretion by denying defendant's motion for a new trial because neither the juror's affidavit, nor any in-court testimony, established the requisite outside influence to support a claim of juror misconduct, and therefore defendant's complaint did not fall within the exception to Tex. R. Evid. 606(b), because the statements about the jurors' concerns that defendant might be paroled or released from prison early were statements made by jurors to fellow jurors during deliberations, and all of the events and processes described in the affidavit emanated from inside the jury. Cervera v. State, 2012 Tex. App. LEXIS 8460, 2012 WL 4810318 (Tex. App. San Antonio Oct. 10 2012).

164. Trial court abused its discretion in excluding, pursuant to Tex. R. Evid. 606(b), the jurors' testimony and affidavits offered by defendant at the hearing on his motion for new trial, and the court of appeals erred to hold otherwise; the internet research conducted by a juror about the effects of date rape drugs constituted an "outside influence." Mcquarrie v. State, 380 S.W.3d 145, 2012 Tex. Crim. App. LEXIS 1328 (Tex. Crim. App. Oct. 10 2012).

165. Where defendant was convicted by a jury of manslaughter and aggravated assault by a public servant, he was not permitted to admit affidavits from jurors to support his motion for new trial because the affidavits were inadmissible under Tex. R. Evid. 606(b) as defendant did not bring forth evidence of an outside influence. Seaton v. State, 385 S.W.3d 85, 2012 Tex. App. LEXIS 6775 (Tex. App. San Antonio Aug. 15 2012).

166. In a design defect and negligence suit, jurors' testimony that they traded answers was not evidence of an outside influence; thus, Tex. R. Civ. P. 327(b) and Tex. R. Evid. 606(b) prohibited the trial court from receiving juror affidavits or other juror testimony concerning alleged traded answers. Moreover, these rules did not violate due process under the Fourteenth Amendment, U.S. Const. amend. XIV, or the due process, jury trial, and open courts provisions of the Texas Constitution set forth in Tex. Const. art. I, §§ 13, 15, 19. De Damian v. Bell Helicopter Textron, Inc., 352 S.W.3d 124, 2011 Tex. App. LEXIS 7316 (Tex. App. Fort Worth Aug. 31 2011).

167. Discussion of parole law under Tex. Code Crim. Proc. Ann. art. 37.07, § 4(a) did not constitute an outside influence, and appellant did not argue any other outside influence; Tex. R. Evid. 606(b) precluded the trial court's

consideration of a juror's affidavit, and because appellant did not present other proof, the trial court did not err in denying his new trial motion. Mccall v. State, 2011 Tex. App. LEXIS 3986, 2011 WL 2119740 (Tex. App. Beaumont May 25 2011).

168. Trial court did not abuse its discretion by denying defendant's motion for a new trial on the ground that an unqualified juror served on his jury, as she had pleaded guilty to tampering with physical evidence and was on deferred adjudication community supervision in violation of Tex. Code Crim. Proc. Ann. art. 35.16(a)(3), because defendant presented no evidence that he suffered significant harm directly attributable to the juror's service on the jury and her presence did not constitute an outside influence under Tex. R. Evid. 606(b). Sanchez v. State, 2010 Tex. App. LEXIS 9984 (Tex. App. Corpus Christi Dec. 16 2010).

169. Trial court did not err in overruling appellant's motion for a new trial under Tex. R. App. P. 21.3(f) based on juror misconduct, given that (1) appellant did not attach the required affidavits from the jurors he claimed had information regarding the alleged misconduct, and (2) appellant did not allege any outside influence, for purposes of Tex. R. Evid. 606(b), that was improperly brought to bear upon the jurors, and instead, he appeared to complain that the jurors reached erroneous conclusions from the evidence. Salazar v. State, 2010 Tex. App. LEXIS 9405, 2010 WL 4840491 (Tex. App. San Antonio Nov. 24 2010).

170. Trial court did not err by quashing the jurors' subpoenas because defendant intended to show through affidavits and juror testimony the effect of the State's argument had on the applicable of the parole laws during their deliberations and jury deliberations considering the effects of parole were not an outside influence and therefore any testimony was inadmissible under Tex. R. Evid. 606(b). Somers v. State, 333 S.W.3d 747, 2010 Tex. App. LEXIS 9384 (Tex. App. Waco Nov. 24 2010).

171. Trial court did not abuse its discretion in denying defendant's request for a hearing on his motion for new trial due to juror misconduct, because defendant's argument that he be afforded the opportunity to discover admissible evidence to impeach a jury verdict was a fishing expedition and an improper purpose of a new trial hearing, when the juror's affidavit or testimony would have been inadmissible at a new trial hearing since such evidence did not show an outside influence. Lee v. State, 2010 Tex. App. LEXIS 3526 (Tex. App. Tyler May 12 2010).

172. It had been held that the plain language of Tex. R. Evid. 606(b) indicated that an outside influence was something outside of both the jury room and the juror; the court declines to depart from the plain language of this rule. Melvin v. State, 2010 Tex. App. LEXIS 2973, 2010 WL 1611072 (Tex. App. Waco Apr. 21 2010).

173. Because defendant had not shown that any outside influence was improperly brought to bear upon any juror, the trial court did not abuse its discretion by excluding the juror's testimony and denying his motion for new trial; even if case law remained viable, defendant's claim failed because he had not shown that there was a misstatement of the law asserted as a fact by one professing to know the law. Melvin v. State, 2010 Tex. App. LEXIS 2973, 2010 WL 1611072 (Tex. App. Waco Apr. 21 2010).

174. In defendant's indecency with a child case, no outside influence was brought to bear upon the jury because, under questioning by the attorneys and the trial court, the juror said she could remain impartial and decide defendant's case on the evidence adduced and set aside her personal history. There was nothing in the record to conclusively establish that the juror who addressed the court following voir dire was the same one referred to in the affidavit. Orange v. State, 2009 Tex. App. LEXIS 8934, 2009 WL 3851068 (Tex. App. Texarkana Nov. 19 2009).

175. Where defendant was convicted of aggravated sexual assault of a child, he was not entitled to a mistrial because defense counsel overheard one of the jurors talking on a cell phone in the men's restroom; the Court of Appeals of Texas erred by reversing his conviction. Both the court of appeals and defendant misinterpret the State's

burden to rebut, specifically with regard to the issue of juror questioning; the Court of Criminal Appeals of Texas held that the party alleging juror misconduct, not the State nor the court, should initiate juror questioning under Tex. R. Evid. 606. Ocon v. State, 284 S.W.3d 880, 2009 Tex. Crim. App. LEXIS 732 (Tex. Crim. App. 2009).

176. Trial court did not err in denying defendant's motion for a new trial on the ground that the jury violated the trial court's mandatory instructions not to consider how parole might apply to defendant and that during the jury's deliberations, a juror discussed personal knowledge of the parole process where the juror's answers to defense counsel's questionnaire clearly related to the jury's deliberation and not to any outside influence, as defined in Tex. R. Evid. 606. Fenoglio v. State, 252 S.W.3d 468, 2008 Tex. App. LEXIS 1335 (Tex. App. Fort Worth 2008).

177. Affidavits concerning the jurors' use of the notes they had taken during defendant's trial for harassment of a hunter were inadmissible under Tex. R. Evid. 606 at the hearing on defendant's motion for new trial because an outside influence is something outside of both the jury room and the juror. Morris v. State, 2007 Tex. App. LEXIS 6980 (Tex. App. Waco Aug. 29 2007).

178. Plain language of Tex. R. Evid. 606 indicates that an outside influence is something outside of both the jury room and the juror. White v. State, 225 S.W.3d 571, 2007 Tex. Crim. App. LEXIS 693 (Tex. Crim. App. 2007).

179. Defendant claimed that two jurors were "absolutely disqualified" under Tex. Code Crim. Proc. Ann. art. 35.19 by virtue of Tex. Code Crim. Proc. Ann. art. 35.16, and defendant argued that the participation of these jurors in deliberations amounted to an outside influence for purposes of Tex. R. Evid. 606(b), but the court did not agree, as the plain language of Tex. R. Evid. 606(b) indicated that an outside influence was something outside of both the jury room and the juror. White v. State, 225 S.W.3d 571, 2007 Tex. Crim. App. LEXIS 693 (Tex. Crim. App. 2007).

180. Court disagreed with defendant's assertion that the mere presence of certain jurors, claimed as absolutely disqualified under Tex. Code Crim. Proc. Ann. art. 35.19 by virtue of Tex. Code Crim. Proc. Ann. art. 35.16, amounted to significant harm; Tex. R. Evid. 606(b) did not prevent defendant from demonstrating such "significant harm" by use of non-juror evidence, and defendant failed to carry her burden under Tex. Code Crim. Proc. Ann. art. 44.46(2). White v. State, 225 S.W.3d 571, 2007 Tex. Crim. App. LEXIS 693 (Tex. Crim. App. 2007).

181. In a product liability case, a father's motion for a new trial based on juror misconduct under Tex. R. Civ. P. 327 was properly denied since some statements were inadmissible under Tex. R. Civ. P. 327 and Tex. R. Evid. 606(b), lunch discussions and juror conversations did not affect the decision, the jury was not affected by outside influences, and supplemental jury instructions after a deadlock did not constitute an outside influence as a matter of law. Hutton v. AER Mfg. II, Inc., 224 S.W.3d 459, 2007 Tex. App. LEXIS 627 (Tex. App. Dallas 2007).

Evidence : Competency : Jurors : Verdict Accuracy

182. In defendant's capital murder case, a juror's affidavit failed to establish that an outside influence was improperly brought to bear upon any juror or that a juror was not qualified to serve; as such, the juror was barred from testifying about what happened during jury deliberations; the affidavit stated only that the juror felt "pressured" by other jurors to change her vote to guilty. Villegas v. State, 2008 Tex. App. LEXIS 1899 (Tex. App. Corpus Christi Mar. 13 2008).

183. Trial court properly denied defendant's motion for a new trial; because the affidavit upon which defendant relied contained testimony related to the jury's deliberations, jurors' mental processes, and jurors' assent to or dissent from the verdict, and such evidence was prohibited under Tex. R. Evid. 606(b). East v. State, 2007 Tex. App. LEXIS 502 (Tex. App. Beaumont Jan. 24 2007).

End of Document

Tex. Evid. R. 607

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 607 Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Case Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Evidence : Hearsay : General Overview
Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Inconsistent Statements
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

Evidence : Relevance : Character Evidence
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview
Evidence : Testimony : Credibility : Impeachment : Prior Conduct
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements
Evidence : Testimony : Credibility : One's Own Witnesses : General Overview
Evidence : Testimony : Credibility : One's Own Witnesses : Application : General Overview
Evidence : Testimony : Credibility : One's Own Witnesses : Application : Hostility
Evidence : Testimony : Credibility : One's Own Witnesses : Limitations
Evidence : Testimony : Examination : Leading Questions

LexisNexis (R) Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

1. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified; even if the State called the complainants to testify so that otherwise inadmissible prior inconsistent statements could be admitted, there was no harm committed. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

2. In an aggravated robbery case, defendant was properly denied the opportunity to impeach a victim regarding the amount of her paycheck because it was not relevant to the offense charged. Moore v. State, 2009 Tex. App. LEXIS 4982, 2009 WL 1886450 (Tex. App. Waco July 1 2009).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

3. Defendant was entitled to a new trial on two counts of aggravated sexual abuse of a child where the trial court reversibly erred by admitting the testimony of the officer and a child protective services investigator regarding the victim's prior statements because it was inadmissible impeachment evidence of the victim's trial testimony, during which she recanted her allegations against defendant; the error was not harmless because without the investigator's testimony, the State would not have proven penetration. Klein v. State, 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

4. In trial for a grandfather's indecent touching of his granddaughter, the State was properly allowed to impeach the grandmother, who testified at trial that child complained of touching on her leg, with a caseworker's testimony about the grandmother's prior statement. Green v. State, 2004 Tex. App. LEXIS 8523 (Tex. App. Eastland Sept. 23 2004).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements

5. Under Tex. R. Evid. 107, the State was properly allowed to present testimony of a driving while intoxicated defendant's videotaped statements about his drinking, even though the trial court had previously suppressed the audio portion of the tape because of its poor quality, because defendant attempted to impeach the officer's

credibility as to the basis for his opinion that defendant had been drinking, as permitted by Tex. R. Evid 607. Cadena v. State, 2006 Tex. App. LEXIS 8622 (Tex. App. El Paso Oct. 5 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

6. Defense counsel's failure to object to the prosecutor's questions to a reluctant child witness did not constitute ineffective assistance in defendant's trial for aggravated assault of the child in violation of Tex. Penal Code Ann. § 22.021; questions regarding previous accusations elicited cumulative evidence that included defendant's videotaped confession, and the State was permitted to ask leading questions and to impeach the child with a prior inconsistent statement under Tex. R. Evid. 611(c) and 607. Brambila v. State, 2009 Tex. App. LEXIS 5959, 2009 WL 2356674 (Tex. App. Houston 14th Dist. July 28 2009).

7. In a murder case, counsel was not ineffective for failing to object under Tex. R. Evid. 403 to a witness' impeachment with a prior inconsistent statement under Tex. R. Evid. 607 because defendant did not show that the State called the witness with the primary intent of placing inadmissible substantive evidence in front of the jury. Torres v. State, 2006 Tex. App. LEXIS 10181 (Tex. App. Dallas Nov. 29 2006).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

8. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified; even if the State called the complainants to testify so that otherwise inadmissible prior inconsistent statements could be admitted, there was no harm committed. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

Criminal Law & Procedure : Witnesses : Credibility

9. Trial judge did not err by permitting a witness to testify about a prior consistent statement because the testimony of the prior consistent statement was not offered for impeachment purposes; rather the testimony was offered to show that he initially lied out of fear but later "came clean" and ultimately told the truth. Taylor v. State, 190 S.W.3d 758, 2006 Tex. App. LEXIS 684 (Tex. App. Corpus Christi 2006).

10. Where a State's witness surprised the State by testifying at defendant's murder trial that the witness had lied when inculpating defendant in two prior statements, under Tex. R. Evid. 607, the State was entitled to attack the witness's credibility. Salto v. State, 2004 Tex. App. LEXIS 2306 (Tex. App. Houston 1st Dist. Mar. 11 2004).

Criminal Law & Procedure : Witnesses : Impeachment

11. In defendant's trial for arson under Tex. Penal Code Ann. § 28.02, no reversible error occurred in the admission of impeachment evidence of prior inconsistent statements of a State rebuttal witness because under Tex. R. Evid. 607 and 403 the witness had made two prior sworn statements that were consistent and the State did not have knowledge that her testimony at trial would be inconsistent with those statements that defendant returned to the house after leaving on the night of the fire; defendant's substantial rights were not harmed under Tex. R. App. P. 44.2(b) because other evidence supported the State's theory and the jury was provided a limiting instruction as to the impeachment evidence. Rodriguez v. State, 2010 Tex. App. LEXIS 4854, 2010 WL 2540667 (Tex. App. Austin June 23 2010).

12. In defendant's retaliation case, the error in sustaining the State's objection to defendant's impeachment of the State's character witness was harmless; three defense witnesses testified that the victim had a poor character for

truthfulness and defendant further impeached the victim with a prior inconsistent statement, but the victim's testimony regarding the elements of the offense was corroborated by several other witnesses, and was contradicted only by defendant's bald denials. Moore v. State, 2004 Tex. App. LEXIS 3017 (Tex. App. Waco Mar. 31 2004), opinion withdrawn by 2004 Tex. App. LEXIS 6584 (Tex. App. Waco July 21, 2004), substituted opinion at 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

13. Where a State's witness surprised the State by testifying at defendant's murder trial that the witness had lied when inculpating defendant in two prior statements, under Tex. R. Evid. 607, the State was entitled to attack the witness's credibility. Salto v. State, 2004 Tex. App. LEXIS 2306 (Tex. App. Houston 1st Dist. Mar. 11 2004).

14. Tex. R. Evid. 607 permits the credibility of a witness to be attacked by any party, including the party calling the witness. The rule abandons the traditional "voucher" rule, which prohibited a party from impeaching its own witness. The plain language of Rule 607 also dispenses with the surprise and injury exception to the "voucher" rule which served as a prerequisite to impeaching one's own witness. Hughes v. State, 4 S.W.3d 1, 1999 Tex. Crim. App. LEXIS 82 (Tex. Crim. App. 1999).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

15. In a murder case, a court did not err in admitting four photographs depicting gang-related graffiti on defendant's bedroom walls where the photos were primarily offered not as prior acts evidence, but to impeach a witness's credibility because her testimony at trial conflicted with her prior statements to the police. In addition, because the gang symbols depicted in the photos were also before the jury through other evidence of defendant's gang affiliation, which was admitted without objection, any error in admitting the photos for purposes of showing gang affiliation and intent or motive was not reversible. Garza v. State, 2005 Tex. App. LEXIS 6843 (Tex. App. San Antonio Aug. 24 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

16. In a trial for indecency with and sexual assault of a child, defendant failed to preserve an argument under Tex. R. Evid. 403, 607 to the State's calling a witness who the State knew would testify adversely to its case, solely so that it could impeach its own witness with defendant's extraneous offense. Defendant raised only a general objection under Tex. R. Evid. 403 and 404 and thus was not specific, as required by Tex. R. App. P. 33.1. Starnes v. State, 2007 Tex. App. LEXIS 3144 (Tex. App. Texarkana Apr. 26 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

17. Defendant was entitled to a new trial on two counts of aggravated sexual abuse of a child where the trial court reversibly erred by admitting the testimony of the officer and a child protective services investigator regarding the victim's prior statements because it was inadmissible impeachment evidence of the victim's trial testimony, during which she recanted her allegations against defendant; the error was not harmless because without the investigator's testimony, the State would not have proven penetration. Klein v. State, 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

18. In defendant's retaliation case, the error in sustaining the State's objection to defendant's impeachment of the State's character witness was harmless; three defense witnesses testified that the victim had a poor character for truthfulness and defendant further impeached the victim with a prior inconsistent statement, but the victim's testimony regarding the elements of the offense was corroborated by several other witnesses, and was contradicted only by defendant's bald denials. Moore v. State, 2004 Tex. App. LEXIS 3017 (Tex. App. Waco Mar. 31 2004), opinion withdrawn by 2004 Tex. App. LEXIS 6584 (Tex. App. Waco July 21, 2004), substituted opinion at 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

Evidence : Hearsay : General Overview

19. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified; even if the State called the complainants to testify so that otherwise inadmissible prior inconsistent statements could be admitted, there was no harm committed. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials

20. In an aggravated assault case, a trial court erred by allowing the admission of a statement because the State merely wanted to impeach a witness with otherwise inadmissible hearsay since it was shown that the State had learned that the witness did not remember making the statement, and the witness was not going to give favorable testimony for the state; moreover, the statement was not admissible as a past recorded recollection under Tex. R. Evid. 803(5) because the witness did not vouch for the accuracy of the statement. However, the error was harmless because evidence that defendant shot a victim was admitted through other sources. Aguilar v. State, 2008 Tex. App. LEXIS 8921 (Tex. App. Houston 14th Dist. Dec. 2 2008).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview

21. In a child sexual abuse case, the admission of the testimony of an investigator and a police officer regarding the complainant's prior statements was reversible error because any legitimate probative value under Tex. R. Evid. 607 was substantially outweighed by the prejudicial effect under Tex. R. Evid. 403; the State had ample notice that the complainant would recant, and conflicting evidence alone did not trigger Tex. R. Evid. 801(e)(1)(B). Klein v. State, 2006 Tex. App. LEXIS 950 (Tex. App. Fort Worth Feb. 2 2006), opinion withdrawn by, substituted opinion at, modified by 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

22. Trial judge did not err by permitting a witness to testify about a prior consistent statement because the testimony of the prior consistent statement was not offered for impeachment purposes; rather the testimony was offered to show that he initially lied out of fear but later "came clean" and ultimately told the truth. Taylor v. State, 190 S.W.3d 758, 2006 Tex. App. LEXIS 684 (Tex. App. Corpus Christi 2006).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Inconsistent Statements

23. In a murder case, counsel was not ineffective for failing to object under Tex. R. Evid. 403 to a witness' impeachment with a prior inconsistent statement under Tex. R. Evid. 607 because defendant did not show that the State called the witness with the primary intent of placing inadmissible substantive evidence in front of the jury. Torres v. State, 2006 Tex. App. LEXIS 10181 (Tex. App. Dallas Nov. 29 2006).

Evidence : Procedural Considerations : Curative Admissibility

24. In a case alleging aggravated assault with a deadly weapon, defendant was not allowed to question witnesses regarding a previous child abuse complaint against the same child since it was not relevant or material to the offense, and a mother could not have been questioned about specific instances of conduct; moreover, the mother's testimony during direct examination did not leave a misleading impression with the jury which needed clarification under Tex. R. Evid. 107; the focus of the prior investigation was a grandmother, who was not a witness in the case. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

25. Under Tex. R. Evid. 107, the State was properly allowed to present testimony of a driving while intoxicated defendant's videotaped statements about his drinking, even though the trial court had previously suppressed the audio portion of the tape because of its poor quality, because defendant attempted to impeach the officer's credibility as to the basis for his opinion that defendant had been drinking, as permitted by Tex. R. Evid 607. Cadena v. State, 2006 Tex. App. LEXIS 8622 (Tex. App. El Paso Oct. 5 2006).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

26. Defense counsel's failure to object to the prosecutor's questions to a reluctant child witness did not constitute ineffective assistance in defendant's trial for aggravated assault of the child in violation of Tex. Penal Code Ann. § 22.021; questions regarding previous accusations elicited cumulative evidence that included defendant's videotaped confession, and the State was permitted to ask leading questions and to impeach the child with a prior inconsistent statement under Tex. R. Evid. 611(c) and 607. Brambila v. State, 2009 Tex. App. LEXIS 5959, 2009 WL 2356674 (Tex. App. Houston 14th Dist. July 28 2009).

Evidence : Relevance : Character Evidence

27. In defendant's retaliation case, the error in sustaining the State's objection to defendant's impeachment of the State's character witness was harmless; three defense witnesses testified that the victim had a poor character for truthfulness and defendant further impeached the victim with a prior inconsistent statement, but the victim's testimony regarding the elements of the offense was corroborated by several other witnesses, and was contradicted only by defendant's bald denials. Moore v. State, 2004 Tex. App. LEXIS 3017 (Tex. App. Waco Mar. 31 2004), opinion withdrawn by 2004 Tex. App. LEXIS 6584 (Tex. App. Waco July 21, 2004), substituted opinion at 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

28. Appellate court found that it would not be outside the zone of reasonable disagreement for the trial court to resolve the Tex. R. Evid. 403 analysis in favor of allowing the State to elicit the prior inconsistent statements, because the witness was one of the two alleged victims in the case, the issue of the witness's credibility was crucial to both the State and defendant, the State was surprised by the witness's unfavorable testimony, and the elicited favorable testimony, although limited, would support a finding that the State did not call the witness for the primary purpose of eliciting otherwise inadmissible evidence. Polston v. State, 2011 Tex. App. LEXIS 6126, 2011 WL 3435389 (Tex. App. Austin Aug. 5 2011).

29. Evidence of defendant's membership in the same gang as a witness was admissible to show that the witness was biased to testify in favor of defendant. The probative value of the impeachment evidence was high because the State wanted to show why the witness testified that he had lied to police about the statements defendant had made to him. Mccuin v. State, 2011 Tex. App. LEXIS 5031, 2011 WL 2611234 (Tex. App. Fort Worth June 30 2011).

30. In a case in which defendant was convicted of theft from a person, there was no merit in defendant's claim that the trial court did not require the State to follow the proper procedure in admitting his accomplice's prior inconsistent statement for impeachment purposes where the trial court did not permit the predicate requirements of Tex. R. Evid. 613(a) to be violated because extrinsic evidence of the accomplice's statement to a detective was not offered before the jury, and, furthermore, the trial court took the extra step of instructing the jury that it could only consider the prior statements for impeachment purposes. The trial court did not abuse its discretion in overruling defendant's objection under Tex. R. Evid. 403 because the accomplice's version of the events was critical to defendant's prosecution, because the probative value of impeaching the accomplice's potentially untrue testimony was not substantially outweighed by the potential misuse by the jury of his previous statement to the detective, and because the trial court expressly determined that there was no evidence that the State anticipated that the accomplice's trial

testimony would be inconsistent with his statements to the detective or that the State called the accomplice as a witness in bad faith. Cervantes v. State, 2010 Tex. App. LEXIS 1149, 2010 WL 548503 (Tex. App. Eastland Feb. 18 2010).

31. In a child abandonment case, defendant failed to preserve for review her allegation that the State improperly called her child for the primary purpose of eliciting otherwise inadmissible evidence because, when the State began questioning the child about the statements she made to a detective, defendant objected based on hearsay and relevance, but she lodged only a hearsay objection, rather than an objection based on Tex. R. Evid. 403, when the detective testified about the prior inconsistent statements; the objection did not preserve a complaint that the State called the child as a subterfuge for eliciting otherwise inadmissible evidence. Castillo v. State, 2006 Tex. App. LEXIS 5342 (Tex. App. El Paso June 22 2006).

32. In a child sexual abuse case, the admission of the testimony of an investigator and a police officer regarding the complainant's prior statements was reversible error because any legitimate probative value under Tex. R. Evid. 607 was substantially outweighed by the prejudicial effect under Tex. R. Evid. 403; the State had ample notice that the complainant would recant, and conflicting evidence alone did not trigger Tex. R. Evid. 801(e)(1)(B). Klein v. State, 2006 Tex. App. LEXIS 950 (Tex. App. Fort Worth Feb. 2 2006), opinion withdrawn by, substituted opinion at, modified by 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

33. Analyzing lack of surprise or injury in terms of Tex. R. Evid. 403 is preferable to the traditional "voucher" rule, which prohibited a party from impeaching its own witness, because it comports with the plain language of Tex. R. Evid. 607 and because it will lead to the conclusion that a trial court abuses its discretion under Rule 403 when it allows the State to admit impeachment evidence for the primary purpose of placing evidence before the jury that was otherwise inadmissible. Hughes v. State, 4 S.W.3d 1, 1999 Tex. Crim. App. LEXIS 82 (Tex. Crim. App. 1999).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

34. Evidence of defendant's membership in the same gang as a witness was admissible to show that the witness was biased to testify in favor of defendant. The probative value of the impeachment evidence was high because the State wanted to show why the witness testified that he had lied to police about the statements defendant had made to him. Mccuin v. State, 2011 Tex. App. LEXIS 5031, 2011 WL 2611234 (Tex. App. Fort Worth June 30 2011).

35. In a trial for indecency with and sexual assault of a child, defendant failed to preserve an argument under Tex. R. Evid. 403, 607 to the State's calling a witness who the State knew would testify adversely to its case, solely so that it could impeach its own witness with defendant's extraneous offense. Defendant raised only a general objection under Tex. R. Evid. 403 and 404 and thus was not specific, as required by Tex. R. App. P. 33.1. Starnes v. State, 2007 Tex. App. LEXIS 3144 (Tex. App. Texarkana Apr. 26 2007).

Evidence : Relevance : Relevant Evidence

36. In an aggravated robbery case, defendant was properly denied the opportunity to impeach a victim regarding the amount of her paycheck because it was not relevant to the offense charged. Moore v. State, 2009 Tex. App. LEXIS 4982, 2009 WL 1886450 (Tex. App. Waco July 1 2009).

37. In a case alleging aggravated assault with a deadly weapon, defendant was not allowed to question witnesses regarding a previous child abuse complaint against the same child since it was not relevant or material to the offense, and a mother could not have been questioned about specific instances of conduct; moreover, the mother's testimony during direct examination did not leave a misleading impression with the jury which needed clarification

under Tex. R. Evid. 107; the focus of the prior investigation was a grandmother, who was not a witness in the case. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

Evidence : Testimony : Credibility : General Overview

38. Award of damages to the son in his action against his parents after he fell and broke his elbow at their home was proper because his argument that the trial court should have granted him a new trial since defense counsel improperly argued during closing argument that the jury could disbelieve the father's testimony was without merit. Defense counsel's comments were proper statements of the law, and at worst, assuming for the sake of argument only that the comments were improper, any harm was curable. Perez v. Perez, 2013 Tex. App. LEXIS 962, 2013 WL 398932 (Tex. App. Corpus Christi Jan. 31 2013).

39. Debtor testified without objection that statements shown to him were his statements, and he answered questions about the documents before his counsel objected; the objection was not timely for purposes of Tex. R. Evid. 103 and Tex. R. App. P. 33.1(a), plus the records were offered to refresh the debtor's recollection and impeach his credibility for purposes of Tex. R. Evid. 612, credibility could be attacked by any party under Tex. R. Evid. 607, and the trial court did not abuse its discretion in admitting the debtor's testimony in this regard. Ainsworth v. Cach, Llc, 2012 Tex. App. LEXIS 2798 (Tex. App. Houston 14th Dist. Apr. 10 2012).

40. Defendant was entitled to a new trial on two counts of aggravated sexual abuse of a child where the trial court reversibly erred by admitting the testimony of the officer and a child protective services investigator regarding the victim's prior statements because it was inadmissible impeachment evidence of the victim's trial testimony, during which she recanted her allegations against defendant; the error was not harmless because without the investigator's testimony, the State would not have proven penetration. Klein v. State, 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

41. In a child sexual abuse case, the admission of the testimony of an investigator and a police officer regarding the complainant's prior statements was reversible error because any legitimate probative value under Tex. R. Evid. 607 was substantially outweighed by the prejudicial effect under Tex. R. Evid. 403; the State had ample notice that the complainant would recant, and conflicting evidence alone did not trigger Tex. R. Evid. 801(e)(1)(B). Klein v. State, 2006 Tex. App. LEXIS 950 (Tex. App. Fort Worth Feb. 2 2006), opinion withdrawn by, substituted opinion at, modified by 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

42. State's cross-examination of defendant could have been construed two ways, and the record supported the state's assertion that the line of questioning was an attempt to connect defendant to the handgun used in the crime, which represented an appropriate line of inquiry relevant to the issue of whether the handgun belonged to defendant, which was relevant to the issue of whether her husband first threatened her with the handgun and whether she was the first to employ deadly force. Johnson v. State, 181 S.W.3d 760, 2005 Tex. App. LEXIS 9441 (Tex. App. Waco 2005).

43. Evidence of subsequent remedial measures should not have been admitted to impeach the maintenance supervisor for the Texas Department of Transportation since the survivors tendered his testimony, however, the error in admitting other evidence of the subsequent remedial measures was rendered harmless because the survivors' exhibits, both in evidence after the Department's utterance of "no objection" to them, showed the trees, their location, and the sight lines before and after the trees were cut. While the two exhibits did not explicitly demonstrate that the Department cut the trees, a logical deduction was, and the jury could have properly concluded that, the trees, on the Department right-of-way, had been removed by the Department, and any error was rendered harmless if the objecting party subsequently permitted the same or similar evidence to be introduced without objection. Tex. DOT v. Pate, 170 S.W.3d 840, 2005 Tex. App. LEXIS 6484 (Tex. App. Texarkana 2005).

44. Party is permitted to question a witness on collateral matters in order to impeach the witnesses's credibility by contradicting the substance of his testimony; however, a witness may not be impeached through cross-examination on a collateral matter raised by that cross-examination. Hernandez v. State, 2004 Tex. App. LEXIS 8448 (Tex. App. Austin Sept. 23 2004).

45. In a murder case, as the prosecutor's comment was an argument about the evidence and the relationship between defendant and his father, not about extraneous offenses involving the father, the State was properly allowed to impeach the father based on his inconsistent statements regarding the extraneous offenses. Brasher v. State, 139 S.W.3d 369, 2004 Tex. App. LEXIS 4460 (Tex. App. San Antonio 2004).

46. Analyzing lack of surprise or injury in terms of Tex. R. Evid. 403 is preferable to the traditional "voucher" rule, which prohibited a party from impeaching its own witness, because it comports with the plain language of Tex. R. Evid. 607 and because it will lead to the conclusion that a trial court abuses its discretion under Rule 403 when it allows the State to admit impeachment evidence for the primary purpose of placing evidence before the jury that was otherwise inadmissible. Hughes v. State, 4 S.W.3d 1, 1999 Tex. Crim. App. LEXIS 82 (Tex. Crim. App. 1999).

47. Tex. R. Evid. 607 permits the credibility of a witness to be attacked by any party, including the party calling the witness. The rule abandons the traditional "voucher" rule, which prohibited a party from impeaching its own witness. The plain language of Rule 607 also dispenses with the surprise and injury exception to the "voucher" rule which served as a prerequisite to impeaching one's own witness. Hughes v. State, 4 S.W.3d 1, 1999 Tex. Crim. App. LEXIS 82 (Tex. Crim. App. 1999).

Evidence : Testimony : Credibility : Impeachment : General Overview

48. Court read the State's cross-examination about the lack of corroborating evidence as an attack on defendant's credibility, for purposes of Tex. R. Evid. 607, not as an attempt to shift the burden of proof at trial; defendant admitted that his credibility was critical to his defense and the State's questioning was not improper, for purposes of Tex. R. Evid. 607, 611(b). Rogers v. State, 2008 Tex. App. LEXIS 6571 (Tex. App. Texarkana Aug. 28, 2008).

49. Trial court's decision denying defendant's request to impeach the victim, his wife, with evidence of a remote assault by her of her former husband was not an abuse of discretion; the trial court could have found that the probative value of the evidence was mostly outweighed by the danger of unfair prejudice under Tex. R. Evid. 403, and whether the court would have reached a different conclusion than the trial court was not the standard of appellate review. Winegarner v. State, 235 S.W.3d 787, 2007 Tex. Crim. App. LEXIS 1383 (Tex. Crim. App. 2007).

50. Because defendant did not argue at trial that a certain statement opened the door to impeachment evidence, that argument was not preserved for appellate review and the court of appeals erred in considering it, under Tex. R. App. P. 33. Winegarner v. State, 235 S.W.3d 787, 2007 Tex. Crim. App. LEXIS 1383 (Tex. Crim. App. 2007).

51. Defendant's complaint on appeal regarding a witness did not comport with the trial court objection, for purposes of Tex. R. App. P. 33.1(a); furthermore, defendant's objection regarding impeachment with a prior inconsistent statement and then a later general objection of improper impeachment was not specific enough within the context to have informed the trial court that defendant was actually objecting to the State's failure to lay a proper predicate, such that the issue was not preserved for review. Douglas v. State, 2006 Tex. App. LEXIS 10903 (Tex. App. Dallas Dec. 21 2006).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview

52. Given that the victim's narration of the assault was corroborated, counsel could have found that trying to impeach the victim's credibility by her deferred adjudication for theft would not have been effective, plus counsel said he did not discuss this matter because of appellant's own criminal record and because there was a risk of alienating the jury; thus, the trial court could have found that counsel's actions amounted to reasonable trial strategy, and the trial court did not abuse its discretion in denying appellant's motion for a new trial. Sims v. State, 2012 Tex. App. LEXIS 5912, 2012 WL 2989252 (Tex. App. Austin July 18 2012).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

53. On a charge of unlawful possession of a firearm, the trial court properly did not allow defendant to impeach the State's witness by explaining that the witness testified to the same effect in an earlier trial arising from the same events and that the prior jury found that defendant did assault the witness. Macias v. State, 136 S.W.3d 702, 2004 Tex. App. LEXIS 4193 (Tex. App. Texarkana 2004).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

54. In an arson of a habitation case, counsel's failure to object to the witnesses' prior inconsistent statements under Tex. R. Evid. 607 did not constitute ineffective assistance of counsel because there was no reasonable probability that the trial's result would have been any different as there was sufficient circumstantial evidence that defendant started the fire. Thompson v. State, 2012 Tex. App. LEXIS 3374, 2012 WL 1514776 (Tex. App. Tyler Apr. 30 2012).

55. Because it was apparent that the State's primary purpose, if not its only purpose, in calling the two witnesses they knew to be hostile was to introduce the two prior inconsistent statements in evidence under Tex. R. Evid. 607, trial counsel should have requested a jury instruction limiting the jury's consideration of the impeachment evidence. Thompson v. State, 2012 Tex. App. LEXIS 3374, 2012 WL 1514776 (Tex. App. Tyler Apr. 30 2012).

56. State acted within its prerogative to choose its witnesses when it called the victim to testify, and the trial court did not abuse its discretion in admitting evidence, specifically State's Exhibit 8, that impeached the victim's testimony concerning her relationship with defendant. Taylor v. State, 2011 Tex. App. LEXIS 9993 (Tex. App. Dallas Dec. 20 2011).

57. Appellate court found that it would not be outside the zone of reasonable disagreement for the trial court to resolve the Tex. R. Evid. 403 analysis in favor of allowing the State to elicit the prior inconsistent statements, because the witness was one of the two alleged victims in the case, the issue of the witness's credibility was crucial to both the State and defendant, the State was surprised by the witness's unfavorable testimony, and the elicited favorable testimony, although limited, would support a finding that the State did not call the witness for the primary purpose of eliciting otherwise inadmissible evidence. Polston v. State, 2011 Tex. App. LEXIS 6126, 2011 WL 3435389 (Tex. App. Austin Aug. 5 2011).

58. In defendant's trial for arson under Tex. Penal Code Ann. § 28.02, no reversible error occurred in the admission of impeachment evidence of prior inconsistent statements of a State rebuttal witness because under Tex. R. Evid. 607 and 403 the witness had made two prior sworn statements that were consistent and the State did not have knowledge that her testimony at trial would be inconsistent with those statements that defendant returned to the house after leaving on the night of the fire; defendant's substantial rights were not harmed under Tex. R. App. P. 44.2(b) because other evidence supported the State's theory and the jury was provided a limiting instruction as to the impeachment evidence. Rodriguez v. State, 2010 Tex. App. LEXIS 4854, 2010 WL 2540667 (Tex. App. Austin June 23 2010).

59. In a case in which defendant was convicted of theft from a person, there was no merit in defendant's claim that the trial court did not require the State to follow the proper procedure in admitting his accomplice's prior inconsistent statement for impeachment purposes where the trial court did not permit the predicate requirements of Tex. R. Evid. 613(a) to be violated because extrinsic evidence of the accomplice's statement to a detective was not offered before the jury, and, furthermore, the trial court took the extra step of instructing the jury that it could only consider the prior statements for impeachment purposes. The trial court did not abuse its discretion in overruling defendant's objection under Tex. R. Evid. 403 because the accomplice's version of the events was critical to defendant's prosecution, because the probative value of impeaching the accomplice's potentially untrue testimony was not substantially outweighed by the potential misuse by the jury of his previous statement to the detective, and because the trial court expressly determined that there was no evidence that the State anticipated that the accomplice's trial testimony would be inconsistent with his statements to the detective or that the State called the accomplice as a witness in bad faith. Cervantes v. State, 2010 Tex. App. LEXIS 1149, 2010 WL 548503 (Tex. App. Eastland Feb. 18 2010).

60. Court did not abuse its discretion by admitting an audiotape of a State's witness's conversation into evidence because, even though the prosecutor did not specifically ask the witness if she had made the contradictory statement at a certain place and time, she denied having made the statement, and she equivocated about making the prior inconsistent statement. Perez v. State, 2009 Tex. App. LEXIS 1437, 2009 WL 1607811 (Tex. App. Corpus Christi Feb. 26 2009).

61. In an aggravated assault case, a trial court erred by allowing the admission of a statement because the State merely wanted to impeach a witness with otherwise inadmissible hearsay since it was shown that the State had learned that the witness did not remember making the statement, and the witness was not going to give favorable testimony for the state; moreover, the statement was not admissible as a past recorded recollection under Tex. R. Evid. 803(5) because the witness did not vouch for the accuracy of the statement. However, the error was harmless because evidence that defendant shot a victim was admitted through other sources. Aguilar v. State, 2008 Tex. App. LEXIS 8921 (Tex. App. Houston 14th Dist. Dec. 2 2008).

62. In a criminal prosecution for aggravated robbery, Tex. R. Evid. 607 permitted the State to impeach its own witness with his prior sworn testimony when he made a last-minute recantation. The prosecutor was entitled to confront him with that statement that formed the basis of his own guilty plea so the jury could evaluate the witness's truthfulness. Baird v. State, 2007 Tex. App. LEXIS 4945 (Tex. App. Dallas June 26 2007).

63. Record did not reflect that defendant objected at any time that the State had called a witness to testify for the sole purpose of impeachment under Tex. R. Evid. 607, as defendant contended on appeal, and thus defendant failed to preserve error under Tex. R. App. P. 33.1; even if the court found that error was preserved, defendant's complaint was without merit, as the State had reasons for calling the witness, who provided important testimony that went beyond the prior statement to police, and furthermore, the witness's stated reluctance to testify at the beginning of direct examination did not, as defendant argued, indicate that the witness planned to recant the prior police statement. Scott v. State, 2007 Tex. App. LEXIS 2896 (Tex. App. Houston 1st Dist. Apr. 12 2007).

64. Under Tex. R. Evid. 607, no showing of surprise or injury was required before impeaching witnesses with their out-of-court statements. Blanton v. State, 2004 Tex. Crim. App. LEXIS 2210 (Tex. Crim. App. June 30, 2004).

Evidence : Testimony : Credibility : One's Own Witnesses : General Overview

65. Trial court did not err in allowing the State to call a witness and impeach her testimony that she did not hear anyone yell "police" because, although the State knew that the witness would testify unfavorably regarding whether she had heard the officers announce their presence, she was the only civilian witness to the events other than defendant, and also provided substantial evidence regarding defendant's links to narcotics, firearms, and the

sequence of events once the complainants entered the apartment. Flores v. State, 2013 Tex. App. LEXIS 1809 (Tex. App. Dallas Feb. 26 2013).

66. Court did not abuse its discretion by admitting an audiotape of a State's witness's conversation into evidence because, even though the prosecutor did not specifically ask the witness if she had made the contradictory statement at a certain place and time, she denied having made the statement, and she equivocated about making the prior inconsistent statement. Perez v. State, 2009 Tex. App. LEXIS 1437, 2009 WL 1607811 (Tex. App. Corpus Christi Feb. 26 2009).

67. In a child abandonment case, defendant failed to preserve for review her allegation that the State improperly called her child for the primary purpose of eliciting otherwise inadmissible evidence because, when the State began questioning the child about the statements she made to a detective, defendant objected based on hearsay and relevance, but she lodged only a hearsay objection, rather than an objection based on Tex. R. Evid. 403, when the detective testified about the prior inconsistent statements; the objection did not preserve a complaint that the State called the child as a subterfuge for eliciting otherwise inadmissible evidence. Castillo v. State, 2006 Tex. App. LEXIS 5342 (Tex. App. El Paso June 22 2006).

Evidence : Testimony : Credibility : One's Own Witnesses : Application : General Overview

68. Record was silent as to trial counsel's reasons for not objecting to the State's request to treat a witness as a hostile witness under Tex. R. Evid. 611(a), (c), but counsel might have had reasons for not doing so, and any of these reasons might explain a strategic motive behind this claimed instance of ineffective assistance and the court could not sustain defendant's point of error on this issue; to the extent that defendant's complaint might have encompassed a claim that counsel was ineffective by not objection to the State's attempt to impeach its own witness under Tex. R. Evid. 607, such was expressly permitted under the Rules and would not support a finding of ineffectiveness. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

69. Defendant complained that trial counsel failed to request a limiting instruction regarding the admission of an exhibit, admitted under Tex. R. Evid. 607, but because the court could imagine a reasonable, strategic reason to explain the complained-of conduct, the record did not support defendant's contention of ineffective assistance. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

70. Court evaluated defendant's claim of error regarding the admission of testimony of prior bad acts under case law addressing the State's misuse of its ability under Tex. R. Evid. 607 to impeach its own witness, and defendant's trial objection under Tex. R. Evid. 403 provided the proper framework for analysis of any error in the trial court's ruling permitting the line of questioning, and the trial court did not err in permitting the State to question the victim, defendant's mother, about her prior statements to police; there was little risk of prejudice, as the dispute was over the use of a firearm, and none of the extraneous offenses involved a firearm, and the line of questioning sought to serve the State's case by providing the jury with a reason to discount the victim's testimonial effort to mitigate her son's offense, not by giving the jury evidence of guilt that was not otherwise admissible. Mendoza v. State, 2007 Tex. App. LEXIS 7679 (Tex. App. Amarillo Sept. 24 2007).

71. Defendant's wife's statements were made when she was still dominated by her emotions and fear, for purposes of Tex. R. Evid. 803(2), and thus the trial court did not err in admitting the statements as excited utterances and the State's purpose in calling the witness was not solely to introduce into evidence otherwise inadmissible hearsay, for purposes of Tex. R. Evid. 607; the statements had been previously admitted. White v. State, 201 S.W.3d 233, 2006 Tex. App. LEXIS 7057 (Tex. App. Fort Worth 2006).

Evidence : Testimony : Credibility : One's Own Witnesses : Application : Hostility

72. Trial court did not err in permitting the State to treat a witness in punishment as hostile, ask him leading questions, and impeach him with a prior statement because: (1) under Tex. R. Evid. 607, a witness's credibility could be attacked by any party; (2) Tex. R. Evid. 611 allowed a hostile witness to be interrogated by leading questions; and (3) there was no showing that the primary purpose of the use of the prior statement was to admit evidence otherwise inadmissible, or that the trial court misused the evidence in assessing punishment. Huggins v. State, 2007 Tex. App. LEXIS 9550 (Tex. App. Beaumont Dec. 5 2007).

73. Where the State's witness, who had previously worked for defendant and who testified under a grant of immunity, expressed difficulty recalling relevant facts and answered several questions with gestures rather than spoken responses, the trial court did not err in allowing the State to attack the credibility of its witness because under Tex. R. Evid. 607, the witness could be attacked by any party, including the party calling the witness; also, because the witness was a hostile witness, under Tex. R. Evid. 611(c), the trial court properly allowed the State to interrogate the witness using leading questions. Huggins v. State, 2007 Tex. App. LEXIS 7495 (Tex. App. Beaumont Sept. 12 2007).

Evidence : Testimony : Credibility : One's Own Witnesses : Limitations

74. In an arson of a habitation case, counsel's failure to object to the witnesses' prior inconsistent statements under Tex. R. Evid. 607 did not constitute ineffective assistance of counsel because there was no reasonable probability that the trial's result would have been any different as there was sufficient circumstantial evidence that defendant started the fire. Thompson v. State, 2012 Tex. App. LEXIS 3374, 2012 WL 1514776 (Tex. App. Tyler Apr. 30 2012).

75. Because it was apparent that the State's primary purpose, if not its only purpose, in calling the two witnesses they knew to be hostile was to introduce the two prior inconsistent statements in evidence under Tex. R. Evid. 607, trial counsel should have requested a jury instruction limiting the jury's consideration of the impeachment evidence. Thompson v. State, 2012 Tex. App. LEXIS 3374, 2012 WL 1514776 (Tex. App. Tyler Apr. 30 2012).

Evidence : Testimony : Examination : Leading Questions

76. Trial court did not err in permitting the State to treat a witness in punishment as hostile, ask him leading questions, and impeach him with a prior statement because: (1) under Tex. R. Evid. 607, a witness's credibility could be attacked by any party; (2) Tex. R. Evid. 611 allowed a hostile witness to be interrogated by leading questions; and (3) there was no showing that the primary purpose of the use of the prior statement was to admit evidence otherwise inadmissible, or that the trial court misused the evidence in assessing punishment. Huggins v. State, 2007 Tex. App. LEXIS 9550 (Tex. App. Beaumont Dec. 5 2007).

77. Where the State's witness, who had previously worked for defendant and who testified under a grant of immunity, expressed difficulty recalling relevant facts and answered several questions with gestures rather than spoken responses, the trial court did not err in allowing the State to attack the credibility of its witness because under Tex. R. Evid. 607, the witness could be attacked by any party, including the party calling the witness; also, because the witness was a hostile witness, under Tex. R. Evid. 611(c), the trial court properly allowed the State to interrogate the witness using leading questions. Huggins v. State, 2007 Tex. App. LEXIS 7495 (Tex. App. Beaumont Sept. 12 2007).

End of Document

Tex. Evid. R. 608

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 608 A Witness's Character for Truthfulness or Untruthfulness

(a) ***Reputation or Opinion Evidence.***--A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) ***Specific Instances of Conduct.***--Except for a criminal conviction under Rule 609, a party may not inquire into or offer extrinsic evidence to prove specific instances of the witness's conduct in order to attack or support the witness's character for truthfulness.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; Unit 40, *Hearsay*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*.

Case Notes

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Civil Rights Law : Section 1983 Actions : Law Enforcement Officials : Excessive Force
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Indecent Exposure : General Overview

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview
Criminal Law & Procedure : Discovery & Inspection : Brady Materials : General Overview
Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Compulsory Process
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Examination of Witnesses : Child Witnesses
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Standards of Review : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Habeas Corpus : Appeals : Standards of Review : General Overview
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Relevance : Character Evidence
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : General Overview
Evidence : Relevance : Sex Offenses : Rape Shield Laws
Evidence : Relevance : Sex Offenses : Similar Acts
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Opinion & Reputation
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances
Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice
Evidence : Testimony : Credibility : Impeachment : Contradiction
Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview
Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility
Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility
Evidence : Testimony : Credibility : Impeachment : Mental Incapacity
Evidence : Testimony : Credibility : Impeachment : Prior Conduct
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements
Evidence : Testimony : Credibility : Rehabilitation
Evidence : Testimony : Examination : Cross-Examination : Scope
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Criminal Trials
Governments : Local Governments : Employees & Officials
Immigration Law : Duties & Rights of Aliens : Discrimination
Torts : Transportation Torts : General Overview

LexisNexis (R) Notes

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

1. In a personal injury case arising from an auto-pedestrian accident, any error under Tex. R. Evid. 608(b), 107 in excluding evidence of a driver's subsequent automobile accidents was harmless because it was unlikely that, if the jury heard that evidence, it would apportioned more fault to the driver, given the admitted evidence that he consumed a pint of vodka on the day in question, was arrested for driving while intoxicated at the scene of the accident, and failed a breathalyzer test with a blood alcohol content that was nearly twice the legal limit. Muhs v. Whataburger, Inc., 2010 Tex. App. LEXIS 9229, 2010 WL 4657955 (Tex. App. Corpus Christi Nov. 18 2010).

Civil Rights Law : Section 1983 Actions : Law Enforcement Officials : Excessive Force

2. In an action alleging excessive force by police officers, any error was harmless when the trial court admitted evidence of plaintiff arrestee's prior drug use for impeachment purposes under Tex. R. Evid. 608. It was unlikely that plaintiff was harmed by the impeachment because the findings on liability did not hinge on plaintiff's credibility. Aguilera v. Nava, 2010 Tex. App. LEXIS 5722, 2010 WL 2842900 (Tex. App. San Antonio July 21 2010).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

3. In defendant's trial for two counts of aggravated assault on a public servant, the trial court did not violate defendant's right of confrontation under U.S. Const. amend. VI and Tex. Const. art. I, § 10 when the trial court refused to allow defendant to impeach the credibility of a State's witness by cross-examining the witness about a violent poem the witness had written to show that the inmate had contemplated shooting at other people contrary to the witness' answer to defendant's question. Defendant's use of the poem as a specific instance of conduct to attack the witness' credibility was barred by Tex. R. Evid. 608(b). Hole v. State, 2007 Tex. App. LEXIS 5107 (Tex. App. Tyler June 29 2007).

4. In a trial for delivery of marihuana, the trial court properly excluded, under Tex. R. Evid. 608, impeachment evidence that an undercover officer was fired for lying to his superiors about his involvement in a high speed chase and that he incorrectly identified two other defendants. The Confrontation Clause did not require the admission because that evidence was not probative of a misidentification of defendant. Iglehart v. State, 2005 Tex. App. LEXIS 4273 (Tex. App. El Paso June 2 2005).

5. In an insurance fraud case, the trial court did not violate defendant's right to confront witnesses when it limited cross-examination of a State's witness about whether she lied to the State when she told the State that she had no criminal record during its preparation of the case as the witness's testimony did not show that she directly lied to the State concerning her criminal record, but rather showed her mistaken belief about the status of that record. Further, this evidence was not permissible to attack the witness's credibility because Tex. R. Evid. 608(b) bared impeachment of the witness's general character for truthfulness through specific acts of conduct other than evidence of conviction of a crime. Wycough v. State, 2004 Tex. App. LEXIS 4608 (Tex. App. El Paso May 20 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : General Overview

6. In a drug trial, there was no error under Tex. R. Evid. 403, 404(b), Rule 608(a) in excluding evidence, offered to show bias, that an officer was investigated for planting drugs on a defendant in an unrelated case because the allegations were determined to be unfounded. Brown v. State, 2010 Tex. App. LEXIS 5432, 2010 WL 2772488 (Tex. App. San Antonio July 14 2010).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale

7. In a trial for delivery of crack cocaine, evidence that a confidential informant was arrested for impersonating a peace officer was properly excluded under Tex. R. Evid. 608, 609. There was no evidence that the informant was convicted. Garrett v. State, 2011 Tex. App. LEXIS 340, 2011 WL 193476 (Tex. App. Tyler Jan. 19 2011).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

8. In a case in which defendant was convicted of aggravated assault with a deadly weapon, the trial court did not abuse its discretion by limiting the cross-examination of the victim as to the irrelevant and potentially prejudicial matter of her alleged drug use after the assault because Tex. R. Evid. 608 barred defendant from cross-examining the victim regarding her drug use for the purpose of attacking her credibility, and testimony regarding her drug use after the assault was not relevant to prove any other material issue in the case related to the convicted offense. Defendant was not entitled to rely on evidence of the victim's drug use after the assault to rebut the State's claim that defendant's use or intended use of the weapon threatened deadly force or serious bodily injury. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview

9. In a trial for injury to a child, it did not violate Tex. R. Evid. 608, or the Confrontation Clause to exclude evidence related to the victim's prior accusation; there was no proof in the record that the prior accusation was false or that it was similar in nature to the offenses for which defendant was charged, and the excluded evidence did not involve a pending criminal charge against the victim. Fierro v. State, 2007 Tex. App. LEXIS 2160 (Tex. App. Austin Mar. 22 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview

10. In a case charging that defendant kidnapped a car salesperson to collect a debt, defendant should have been permitted to introduce testimony from five business associates that defendant was an honest, non-violent businessperson, whom they trusted; the court rejected the State's argument under Tex. R. Evid. 608, which the court noted was an impeachment rule; defendant was not seeking to admit the testimony in response to being impeached but to show that, in light of his character for truthfulness, honesty, and non-violence, it was unlikely that defendant committed the charged offense. Melgar v. State, 236 S.W.3d 302, 2007 Tex. App. LEXIS 2207 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview

11. In a retaliation case, a court properly refused to permit defendant to present witnesses to testify about his character for truthfulness where the State's cross-examination did nothing more than illuminate the inconsistencies between defendant's version of the events and the State's, and this did not constitute an attack on defendant's character for truthfulness. Moore v. State, 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

12. It would have been proper for defense counsel in a murder trial to object under Tex. R. Evid. 702, 608(a)(1) when an officer opined that defendant was deceptive and lying, but failing to object did not render counsel ineffective because defendant did not show prejudice, given that the case did not hinge on a single witness's credibility. Salinas v. State, 368 S.W.3d 550, 2011 Tex. App. LEXIS 1923 (Tex. App. Houston 14th Dist. Mar. 17 2011).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Indecent Exposure : General Overview

13. In an indecency with a child by contact and indecency with a child by exposure case, because the child-complainant's character for truthfulness was attacked in defendant's opening statements, Tex. R. Evid. 608(a)(2) allowed rebuttal evidence of the witness's good character. Conti v. State, 2011 Tex. App. LEXIS 8758, 2011 WL 5248348 (Tex. App. Houston 14th Dist. Nov. 3 2011).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

14. Because defendant's cross-examination asked the foster mother to testify with respect to the child complainant's truthfulness to the specific allegations of aggravated sexual abuse and invited the State to remedy any misconception it might have caused to the jury, the trial court did not err by allowing the foster mother's testimony into evidence pursuant to Tex. R. Evid. 608. Gomez v. State, 2011 Tex. App. LEXIS 9593, 2011 WL 6142735 (Tex. App. Corpus Christi Dec. 8 2011).

15. In a trial for aggravated sexual assault of a child, defendant was not entitled to cross-examine a witness, the complainant's sister, about a similar outcry she made years before her outcry against defendant. There was no showing that the prior allegation of abuse was a false accusation, such evidence was inadmissible under Tex. R. Evid. 608(b) for the purpose of attacking the witness's general credibility, and the exclusion did not violate the Confrontation Clause. Palmer v. State, 2010 Tex. App. LEXIS 3156 (Tex. App. Houston 1st Dist. Apr. 29 2010).

16. In a trial for sexual assault of a child, defendant was entitled under Tex. R. Evid. 608, 613(b) to impeach the complainant by presenting evidence that the complainant threatened to falsely accuse neighbors of molestation, even though the threats occurred after the charged offense. The complainant testified to becoming angry when defendant took back a gift, and, the very next day, the complainant accused defendant of molestation. Billodeau v. State, 277 S.W.3d 34, 2009 Tex. Crim. App. LEXIS 232 (Tex. Crim. App. 2009).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements

17. In a trial for child sexual assault, there was no error under Tex. R. Evid. 608(b) in precluding defendant from questioning the complainant about prior false allegations of sexual abuse because that evidence was of negligible probative value, given that defendant admitted to every element of the aggravated sexual assault offense but the complainant's age. Moreover, the prejudicial effect of the evidence against the complainant could have been extreme, portraying the complainant as a troubled girl with more sexual sophistication than even the charged offense revealed. Pintor v. State, 2009 Tex. App. LEXIS 267, 2009 WL 92443 (Tex. App. Dallas Jan. 15 2009).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

18. In a trial for defendant's aggravated assault of a former romantic partner, the trial court properly excluded evidence of the victim's prior inconsistent statement regarding a pending driving while intoxicated charge because specific instances of a witness's conduct could not be used to bolster or attack their credibility under Tex. R. Evid. 608. Padilla v. State, 254 S.W.3d 585, 2008 Tex. App. LEXIS 2719 (Tex. App. Eastland 2008).

Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview

19. At defendant's trial for aggravated robbery, the trial court did not abuse its discretion when it refused to allow the defense to cross examine a witness regarding his criminal history and his violation of Tex. Penal Code Ann. § 46.04. Under Tex. R. Evid. 608 and 609, the details of a conviction were generally inadmissible for the purpose of impeachment; because there was no evidence that the witness was convicted of the firearms offense under Tex. Penal Code Ann. § 46.04, it was not admissible under Tex. R. Evid. 609. Henson v. State, 2013 Tex. App. LEXIS 974, 2013 WL 396015 (Tex. App. Houston 14th Dist. Jan. 31 2013).

Criminal Law & Procedure : Discovery & Inspection : Brady Materials : General Overview

20. In a driving while intoxicated prosecution, a new trial should not have been granted on the basis that the State failed to disclose that at the time of trial, there was an ongoing investigation by the Texas Attorney General into a detaining officer's alleged possession and promotion of child pornography; the existence of the investigation was not impeachment evidence, absent any basis for inferring that the officer was aware of the investigation. State v. Moore, 240 S.W.3d 324, 2007 Tex. App. LEXIS 6153 (Tex. App. Austin 2007).

Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims

21. Defendant was not entitled to attack the arresting officer's credibility by showing that he was under investigation for violating the Occupations Code, a specific instance of misconduct, and therefore the trial court did not abuse its discretion by determining that defendant did not establish a Brady violation. Smith v. State, 2013 Tex. App. LEXIS 9194 (Tex. App. Houston 1st Dist. July 25 2013).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

22. Defendant failed to prove that counsel was deficient in failing to object to the detective's opinion regarding the child victim's truthfulness because her character for truthfulness was attacked in defendant's opening statements, and therefore Tex. R. Evid. 608 allowed for rebuttal evidence of her good character. Because the record was silent, the court presumed that this logic drove counsel's failure to object. Aranda v. State, 2013 Tex. App. LEXIS 1882 (Tex. App. Austin Feb. 28 2013).

23. Defendant did not show that counsel was ineffective in failing to object when a detective testified, in a singular question and response, regarding the truthfulness of the complainant, in violation of Tex. R. Evid. 702, 608(a), because there was nothing in the record to indicate why counsel did not object. McGuire v. State, 2010 Tex. App. LEXIS 673, 2010 WL 322988 (Tex. App. Texarkana Jan. 29 2010).

24. In defendant's indecency with a child case, counsel was not ineffective for failing to object to the rebuttal testimony regarding the victim's reputation for truthfulness, as well as testimony specifically rebutting the defensive theory that the victim was coached because it appeared that the defensive strategy was to suggest that the victim was coached by adults to fabricate and lie about an incident that did not occur. A reasonable juror might have interpreted defense counsel's questioning and comments as attacks on the victim's credibility. Alberts v. State, 302 S.W.3d 495, 2009 Tex. App. LEXIS 9427 (Tex. App. Texarkana Dec. 11 2009).

25. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the

admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

26. In a plea case, defense counsel was not rendered ineffective by failing to object under Tex. R. Evid. 608 to the State's questions about a specific instance of misconduct--a marijuana lab in defendant's home--because unadjudicated extraneous offenses and prior bad acts were admissible in punishment under Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a)(1). Barry v. State, 2009 Tex. App. LEXIS 1151, 2009 WL 400641 (Tex. App. Dallas Feb. 19 2009).

27. Trial court did not abuse its discretion in denying defendant's application for writ of habeas corpus where counsel's reliance on an investigator and failure to discover and present suggested impeachment evidence was not unreasonable or falling below an objective standard of reasonableness because trial counsel relied exclusively on the investigator to discover evidence for only one factual aspect of his case--impeachment evidence--and otherwise demonstrated adequate knowledge of the facts, and because counsel attempted to impeach the complainant during trial in various ways and gave strategic reasons for not calling two of defendant's suggested witnesses; moreover, defendant had not established prejudice because counsel's actions or omissions did not preclude defendant's only viable defense, and, because most of the suggested evidence was inadmissible under Tex. R. Evid. 608, defendant failed to show that such evidence would have benefitted his defense. Cano v. State, 2007 Tex. App. LEXIS 7881 (Tex. App. Houston 14th Dist. Oct. 4 2007).

28. Defense counsel was not ineffective for failing to object to inadmissible impeachment evidence consisting of defendant's prior convictions because on direct examination, defendant preemptively admitted to numerous prior convictions in an attempt to minimize any damage. Andrews v. State, 2007 Tex. App. LEXIS 7217 (Tex. App. Texarkana Sept. 5 2007).

29. Appellant's application for a writ of habeas corpus was properly denied because trial counsel was not ineffective for failing to object, under Tex. R. Evid. 608(b), to evidence of appellant's dismissal from the police for filing a false report, because, even though counsel offered no strategic reason for failing to object, the record showed that the State did not thereafter significantly pursue the evidence and counsel gave appellant the opportunity on redirect to explain the false report. Cano v. State, 2007 Tex. App. LEXIS 5538 (Tex. App. Houston 14th Dist. July 17 2007).

30. In a trial for child sexual abuse, counsel was rendered ineffective by not objecting to the State's bolstering of the complainant's truthfulness and credibility through both experts and lay witnesses; testimony from the child's teacher and a parent was inadmissible under Tex. R. Evid. 608 to the extent that it went to the complainant's truthfulness in the particular allegations and was admitted before the complainant's credibility was attacked. Fuller v. State, 224 S.W.3d 823, 2007 Tex. App. LEXIS 3686 (Tex. App. Texarkana 2007).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Compulsory Process

31. Trial court did not abuse its discretion in concluding that releasing a sergeant from further testimony did not violate defendant's right to compulsory process because evidence that the sergeant believed the arresting police officer was untruthful during a prior unrelated incident was inadmissible under this rule. Freeman v. State, 413 S.W.3d 198, 2013 Tex. App. LEXIS 11959, 2013 WL 5324000 (Tex. App. Houston 14th Dist. Sept. 24 2013).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

32. Trial court did not abuse its discretion in limiting defendant's cross-examination of a child sexual assault complainant regarding his threats to falsely accuse a neighbor and her adult son of molestation where the trial court could have reasonably concluded that the evidence was inadmissible under Tex. R. Evid. 608 and that the Confrontation Clause did not mandate its admission because the alleged threats, which the complainant denied having made, took place over a year after the instant offense by defendant, there was no evidence at trial that the complainant had a propensity to lie or a vengeful temper toward adults prior to or upon the complainant's allegation toward defendant, and the complainant's threats against the neighbor and her son were not identical, as defendant urged, to the complainant's accusation against defendant. Billodeau v. State, 263 S.W.3d 318, 2007 Tex. App. LEXIS 6404 (Tex. App. Houston 1st Dist. 2007).

33. Trial court did not abuse its discretion by limiting defendant's cross-examination of the child victim by prohibiting questions about prior molestation accusations and threats made by the victim to impeach his credibility because the trial court could have reasonably concluded that the evidence was inadmissible under Tex. R. Evid. 608 and that the Confrontation Clause did not mandate its admission; the alleged false accusations the victim made towards others occurred over a year after the instant offense by defendant, there was no evidence at trial that the victim had a propensity to lie, and the victim denied making any threats or accusations; the victim's testimony concerning false accusations was likely to unduly prejudice and confuse the jury because the record indicated that his threats were not identical to his accusation against defendant. Billodeau v. State, 2007 Tex. App. LEXIS 4462 (Tex. App. Houston 1st Dist. June 7 2007).

34. In a drug case, the trial court's exclusion of evidence that defendant sought to admit for the purpose of attacking the truthfulness of a police officer did not violate defendant's right to confrontation because the evidence was inadmissible under Tex. R. Evid. 608. Sandoval v. State, 2006 Tex. App. LEXIS 10208 (Tex. App. Houston 14th Dist. Nov. 30 2006).

35. Defendant's right to confrontation was not violated where the record in an aggravated sexual assault of a child case did not support defendant's contention that he offered conclusive proof that an allegation the victim made against her brother was false. This allegation was reported by the victim after the incident with defendant, and without conclusive proof that it was false, it had little probative value, but a high risk of undue prejudice under Tex. R. Evid. 608(b). Macias v. State, 2005 Tex. App. LEXIS 1856 (Tex. App. El Paso Mar. 10 2005).

Criminal Law & Procedure : Trials : Examination of Witnesses : Child Witnesses

36. Defendant was not entitled to impeach a sexual assault victim's credibility by asking questions about specific conduct regarding a prior allegation of sexual assault against another man, where there was no evidence to support that the prior allegation was false. Valdez v. State, 2004 Tex. App. LEXIS 7208 (Tex. App. Corpus Christi Aug. 12 2004).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

37. Trial court did not abuse its discretion by refusing to allow him to cross-examine the officer about specific acts of misconduct allegedly showing he was violent and not credible with citizens in the community because no charges were brought against the officer for any of the alleged misconduct and it was not shown that those events were connected to the officer defendant was tried for, namely shooting the officer. Castillo v. State, 2013 Tex. App. LEXIS 2034, 2013 WL 781776 (Tex. App. San Antonio Mar. 1 2013).

38. Trial court did not abuse its discretion by denying defendant the right to cross-examine the victim regarding her plan to deceive her parents as to where she would be on the night in question because it was primarily an attack on her general credibility and was not relevant as proof of bias, prejudice, or ulterior motive for her to accuse defendant of sexually assaulting her. Clay v. State, 390 S.W.3d 1, 2012 Tex. App. LEXIS 10757, 2012 WL 6721012 (Tex. App.

Texarkana Dec. 28 2012).

39. In a driving while intoxicated case, even if defendant should have been allowed to ask the arresting officer about his own driving record, refusing to allow the question was harmless because defendant had already successfully cross-examined the officer about some of the details of his two prior traffic accidents. Bridges v. State, 2011 Tex. App. LEXIS 9104, 2011 WL 5557534 (Tex. App. Dallas Nov. 16 2011).

40. Trial court did not abuse its discretion under Tex. R. Evid. 404(a)(3), 608(a), 613 by denying defendant the opportunity to cross-examine a witness about whether the witness was untruthful to the judge that presided over the witness's guilty plea to an assault charge. Reyes v. State, 2010 Tex. App. LEXIS 2359, 2010 WL 1254543 (Tex. App. Corpus Christi Apr. 1 2010).

41. Trial court did not abuse its discretion in limiting defendant's cross-examination of a child sexual assault complainant regarding his threats to falsely accuse a neighbor and her adult son of molestation where the trial court could have reasonably concluded that the evidence was inadmissible under Tex. R. Evid. 608 and that the Confrontation Clause did not mandate its admission because the alleged threats, which the complainant denied having made, took place over a year after the instant offense by defendant, there was no evidence at trial that the complainant had a propensity to lie or a vengeful temper toward adults prior to or upon the complainant's allegation toward defendant, and the complainant's threats against the neighbor and her son were not identical, as defendant urged, to the complainant's accusation against defendant. Billodeau v. State, 263 S.W.3d 318, 2007 Tex. App. LEXIS 6404 (Tex. App. Houston 1st Dist. 2007).

42. Trial court did not abuse its discretion by limiting defendant's cross-examination of the child victim by prohibiting questions about prior molestation accusations and threats made by the victim to impeach his credibility because the trial court could have reasonably concluded that the evidence was inadmissible under Tex. R. Evid. 608 and that the Confrontation Clause did not mandate its admission; the alleged false accusations the victim made towards others occurred over a year after the instant offense by defendant, there was no evidence at trial that the victim had a propensity to lie, and the victim denied making any threats or accusations; the victim's testimony concerning false accusations was likely to unduly prejudice and confuse the jury because the record indicated that his threats were not identical to his accusation against defendant. Billodeau v. State, 2007 Tex. App. LEXIS 4462 (Tex. App. Houston 1st Dist. June 7 2007).

43. In an indecency with a child case, a court properly restricted defendant's cross-examination of the victim's mother regarding benefits from a crime victims' compensation fund intended to show that she sought financial gain as a consequence of the incident because the proffered evidence was only marginally probative on the issue of bias or motive, and the mother was effectively impeached because she was incarcerated at the time of trial serving a sentence for forgery and had given custody of her children to a relative. Hoover v. State, 2007 Tex. App. LEXIS 1549 (Tex. App. Austin Feb. 27 2007).

44. In a criminal trial for driving while intoxicated, the court did not err by refusing to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias. The specific instances of conduct defendant sought to explore had no relevance to the defense theory that the officer tended to act hasty or jump to conclusions at the crime scene. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

45. In a criminal trial for driving while intoxicated, the court did not err by refusing to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias. The specific instances of conduct defendant sought to explore had no relevance to the defense theory that the officer tended to act hastily or jump to conclusions at the crime scene. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24

2006).

46. During defendant's trial for indecent exposure, the trial court properly excluded evidence that the victim called the police regarding various disturbances at her residence on several occasions following the report of exposure because the decision was within the zone of reasonable disagreement; the trial court maintained broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative and collateral evidence, and, under Tex. R. Evid. 608(b), specific instances of conduct, other than conviction of a crime, when offered to attack the witness's credibility could not be explored on cross-examination. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

47. In a criminal prosecution for capital murder, the trial court did not err by limiting cross-examination of the state's witnesses as to an extraneous robbery offense; naked allegations about the witnesses were insufficient to raise an inference that they had a motive to testify falsely for the state concerning the capital murder defense, and after the witnesses denied the allegations, Tex. R. Evid. 608 precluded counsel from introducing extrinsic evidence of the offense. Crenshaw v. State, 125 S.W.3d 651, 2003 Tex. App. LEXIS 10196 (Tex. App. Houston 1st Dist. 2003).

Criminal Law & Procedure : Witnesses : Credibility

48. Court acted within its discretion in concluding that the complainant's alleged prior use of alcohol with her mom was not relevant to whether the complainant could accurately recollect events that took place when she was not staying in her mother's home, because such testimony would not be relevant to the complainant's ability to recollect the events of the crimes alleged, which occurred when the complainant was staying with defendant, not her mother, during spring break. Vega v. State, 2011 Tex. App. LEXIS 1852, 2011 WL 882329 (Tex. App. Houston 14th Dist. Mar. 15 2011).

49. In defendant's sexual assault case, evidence was improperly excluded because it was admissible to impeach the complainant's credibility. The evidence in the records not only addressed the complainant's mental state but directly addressed her inability to separate fantasy from reality; the therapist's notes raised the possibility that the complainant had not been abused by defendant but had created the event in her mind or confused an actual event with fantasy. State v. Moreno, 297 S.W.3d 512, 2009 Tex. App. LEXIS 7642 (Tex. App. Houston 14th Dist. Oct. 1 2009).

50. Court properly limited cross-examination of a witness because defendant's attempt to use an instance during an officer's career in which he wrote "phantom" warning citations was nothing more than an instance of wrongdoing in his life and was not shown to bear on his general reputation for truthfulness. There was nothing which revealed that the act of wrongdoing created a bias on the part of the officer against defendant or caused the officer to have a motive to testify untruthfully. McMillon v. State, 294 S.W.3d 198, 2009 Tex. App. LEXIS 6238 (Tex. App. Texarkana Aug. 12 2009).

51. Where defendant was charged with sexual assault of a child based on statements by the 14-year-old victim that she had a sexual relationship with defendant, the trial court did not abuse its discretion by prohibiting defendant from cross-examining the victim concerning an alleged mental impairment under Tex. R. Evid. 608; defendant's voir dire examination of the victim failed to show any condition that altered her perception of the offense; the testimony reflected nothing to show bias, prejudice, motive, or any factors which would tend to affect the victim's credibility. Rivera v. State, 2008 Tex. App. LEXIS 2992 (Tex. App. Houston 1st Dist. Apr. 24 2008).

52. In a trial for aggravated assault with a deadly weapon, the court properly excluded testimony from the victim's daughter tendered to show that the victim had a tendency to exaggerate and was not being truthful. The daughter's statements during voir dire did not show that she could qualify that the victim's general reputation for truthfulness was bad. Licon v. State, 2005 Tex. App. LEXIS 1402 (Tex. App. Amarillo Feb. 18 2005).

Criminal Law & Procedure : Witnesses : Impeachment

53. In a case in which defendant was convicted of aggravated assault with a deadly weapon, the trial court did not abuse its discretion by limiting the cross-examination of the victim as to the irrelevant and potentially prejudicial matter of her alleged drug use after the assault because Tex. R. Evid. 608 barred defendant from cross-examining the victim regarding her drug use for the purpose of attacking her credibility, and testimony regarding her drug use after the assault was not relevant to prove any other material issue in the case related to the convicted offense. Defendant was not entitled to rely on evidence of the victim's drug use after the assault to rebut the State's claim that defendant's use or intended use of the weapon threatened deadly force or serious bodily injury. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

54. Where defendant was charged with sexual assault of a child based on statements by the 14-year-old victim that she had a sexual relationship with defendant, the trial court did not abuse its discretion by prohibiting defendant from cross-examining the victim concerning an alleged mental impairment under Tex. R. Evid. 608; defendant's voir dire examination of the victim failed to show any condition that altered her perception of the offense; the testimony reflected nothing to show bias, prejudice, motive, or any factors which would tend to affect the victim's credibility. Rivera v. State, 2008 Tex. App. LEXIS 2992 (Tex. App. Houston 1st Dist. Apr. 24 2008).

55. Trial court did not abuse its discretion in denying defendant's application for writ of habeas corpus where counsel's reliance on an investigator and failure to discover and present suggested impeachment evidence was not unreasonable or falling below an objective standard of reasonableness because trial counsel relied exclusively on the investigator to discover evidence for only one factual aspect of his case--impeachment evidence--and otherwise demonstrated adequate knowledge of the facts, and because counsel attempted to impeach the complainant during trial in various ways and gave strategic reasons for not calling two of defendant's suggested witnesses; moreover, defendant had not established prejudice because counsel's actions or omissions did not preclude defendant's only viable defense, and, because most of the suggested evidence was inadmissible under Tex. R. Evid. 608, defendant failed to show that such evidence would have benefitted his defense. Cano v. State, 2007 Tex. App. LEXIS 7881 (Tex. App. Houston 14th Dist. Oct. 4 2007).

56. Because a witness's testimony was admissible only to rebut defendant's statement of good conduct with minors, a court should have given an instruction to use the testimony only in assessing defendant's credibility, not as proof that he committed the offense or as proof of a plan to have a sexual relationship with the victim. Daggett v. State, 187 S.W.3d 444, 2005 Tex. Crim. App. LEXIS 2127 (Tex. Crim. App. 2005).

57. Tex. R. Evid. 608 did not require that a murder defendant be allowed to impeach the State's eyewitness with testimony that an eyewitness's house was known in the neighborhood as a "bootleg" because defendant elicited the alleged false impression from the witness on cross-examination. Olivarez v. State, 2005 Tex. App. LEXIS 3716 (Tex. App. Dallas May 16 2005).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

58. In a criminal prosecution for indecency with a child and aggravated sexual assault where the 12-year-old-victim testified against defendant, the trial court committed reversible error by excluding testimony from the child's fifth grade teacher that the victim was not an honest child. Sanchez v. State, 2004 Tex. App. LEXIS 6314 (Tex. App. Corpus Christi July 15 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

59. When defendant's wife testified for him at the sentencing phase of his trial, the trial court erred in allowing the State to question her with regard to her drug use. The error was not preserved for review, however, because defendant failed to object to each question regarding the wife's drug use. Holden v. State, 2004 Tex. App. LEXIS 9875 (Tex. App. Fort Worth Nov. 4 2004).

60. Where defendant failed to object to the admission of his statement to authorities regarding the credibility of his victim that he claimed violated Tex. R. Evid. 608(a) by admitting his statement because it bolstered the complainant's credibility when the complainant's credibility had not been impeached, he failed to preserve the issue for appellate review since none of the fundamental error categories included the admission or exclusion of evidence. Apolinar v. State, 2004 Tex. App. LEXIS 6025 (Tex. App. San Antonio July 7 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

61. Defendant failed to preserve for review his claim that the trial court abused its discretion by admitting the covers of commercial pornography video recording that were found in his home because the argument that the covers were more prejudicial than probative was preserved at trial, it was not argued on appeal. Although the argument that the covers improperly impeached the witness with other acts was argued on appeal, it was not preserved for review. Fletcher v. State, 2012 Tex. App. LEXIS 5429, 2012 WL 2783298 (Tex. App. Texarkana July 10 2012).

62. Defendant preserved the issue of the denial of his right to test the credibility of a witness based on Tex. R. Evid. 608 by proffering the cross-examination of the witness for the purpose of testing the witness's credibility and by discussing that rule in argument to the trial court, which based its decision to exclude the testimony on the conclusion that it violated Tex. R. Evid. 608(b). Perry v. State, 236 S.W.3d 859, 2007 Tex. App. LEXIS 7942 (Tex. App. Texarkana 2007).

63. Defendant failed to preserve for review his claims that he was denied a fair trial and due process by the prosecutor's repeated elicitation of inadmissible lay opinion testimony from two witnesses that one victim was truthful and that the witnesses believed that defendant had assaulted the victim because he failed to timely object to the admission of the witnesses' testimony and failed to raise prosecutorial misconduct or due process claims with the trial court. Lopez v. State, 2007 Tex. App. LEXIS 6174 (Tex. App. Austin Aug. 1 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

64. Even if error were properly preserved, Tex. R. Evid. 608(b) prohibited the purpose for which defendant now purported to have attempted to elicit the testimony from the victim's mother; because defendant did not contend that Rule 608(b), as applied in this case, violated his Sixth and Fourteenth Amendment rights to confrontation and cross-examination, he waived these rights with regard to impeaching the mother for bias by failing to preserve error. Quiroz v. State, 2010 Tex. App. LEXIS 8939, 2010 WL 4492939 (Tex. App. San Antonio Nov. 10 2010).

65. In a sexual assault case, defendant's bolstering argument under Tex. R. Evid. 608(a) based on an officer's testimony that a victim seemed truthful and believable was not preserved for review because no objection was made before a trial court. Zuniga v. State, 2008 Tex. App. LEXIS 6905 (Tex. App. San Antonio Sept. 10 2008).

Criminal Law & Procedure : Appeals : Standards of Review : General Overview

66. Trial court abused its discretion under Tex. R. Evid. 608(a) and 702 by allowing a detective to testify to the victim's truthfulness in defendant's sexual assault trial where the detective's comment regarding the victim's truthfulness came when defendant had not attacked the victim's truthfulness, but the error was harmless under Tex. R. App. P. 44.2(b). McDonald v. State, 2004 Tex. App. LEXIS 1988 (Tex. App. San Antonio Mar. 3 2004).

67. Trial court abused its discretion under Tex. R. Evid. 608(a) and 702 by allowing a detective to testify to the victim's truthfulness in defendant's sexual assault trial where the detective's comment regarding the victim's truthfulness came when defendant had not attacked the victim's truthfulness, but the error was harmless under Tex. R. App. P. 44.2(b). McDonald v. State, 2004 Tex. App. LEXIS 1988 (Tex. App. San Antonio Mar. 3 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

68. Trial court's decision to deny defendant the opportunity to cross-examine witnesses about the victim's accusation of sexual assault against another person was not an abuse of discretion because specific instances could not be inquired into under this rule, defendant never made a showing that the victim's allegation was false, and defendant was allowed to cross-examine witnesses regarding the victim's recantation of her accusation against her brother. Odom v. State, 2014 Tex. App. LEXIS 5009, 2014 WL 1882754 (Tex. App. Waco May 8 2014).

69. Trial court did not abuse its discretion by excluding impeachment evidence consisting of a photograph of one of the co-defendant's aiming a handgun because the co-defendant's negative response to the question of whether he ever held a gun in his hand and pointed it at someone was not untruthful. Herrera v. State, 2012 Tex. App. LEXIS 5594, 2012 WL 2861673 (Tex. App. Corpus Christi July 12 2012).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial

70. In a driving while intoxicated prosecution, a new trial should not have been granted on the basis that the State failed to disclose that at the time of trial, there was an ongoing investigation by the Texas Attorney General into a detaining officer's alleged possession and promotion of child pornography; the existence of the investigation was not impeachment evidence, absent any basis for inferring that the officer was aware of the investigation. State v. Moore, 240 S.W.3d 324, 2007 Tex. App. LEXIS 6153 (Tex. App. Austin 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

71. In a trial for defendant's sexual assault of his daughter, any error was harmless when the trial court excluded testimony from the complainant's mother regarding disciplinary problems defendant had with the complainant, through which defendant sought to show the complainant's motive for the allegation. Any such motive was established by the complainant's testimony on cross-examination. Pruitt v. State, 2006 Tex. App. LEXIS 1669 (Tex. App. Fort Worth Mar. 2 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

72. Where defendant was convicted of DWI, he was not harmed by the trial court's refusal to allow him to impeach an officer with a specific act of dishonesty or his reputation for truthfulness. Evidence that the officer intentionally withheld testimony about his failing to report a weapon discharge would not have achieved defendant's specific goal of proving that the officer lied about defendant's reckless driving; a video of defendant's stop strongly supported a finding that he was intoxicated. Tollett v. State, 422 S.W.3d 886, 2014 Tex. App. LEXIS 1216, 2014 WL 462275 (Tex. App. Houston 14th Dist. Feb. 4 2014).

73. In a driving while intoxicated case, even if defendant should have been allowed to ask the arresting officer about his own driving record, refusing to allow the question was harmless because defendant had already successfully cross-examined the officer about some of the details of his two prior traffic accidents. Bridges v. State, 2011 Tex. App. LEXIS 9104, 2011 WL 5557534 (Tex. App. Dallas Nov. 16 2011).

74. Because a witness testified about the mother's motive to fabricate the story that defendant sexually assaulted his child, the exclusion of another witness's testimony about the mother's truthfulness under Tex. R. Evid. 608 was not erroneous and, even if erroneous, it was harmless under Tex. R. App. P. 44.2(b). Stoker v. State, 2011 Tex. App. LEXIS 7698, 2011 WL 4414605 (Tex. App. Fort Worth Sept. 22 2011).

75. Victim's uncle's testimony about the victim's truthfulness was properly admitted, Tex. R. Evid. 608(a), as it had no more than a slight influence or effect on the jury; any error was harmless, Tex. R. App. P. 44.2(b). Diaz-gomez v. State, 2011 Tex. App. LEXIS 4399, 2011 WL 2279185 (Tex. App. Dallas June 10 2011).

76. Under Tex. R. Evid. 608(b) a murder defendant should have been allowed to cross-examine a witness, who was also a co-defendant, regarding the witness's history of visions and hallucinations; however, excluding the cross-examination was harmless error. Perry v. State, 236 S.W.3d 859, 2007 Tex. App. LEXIS 7942 (Tex. App. Texarkana 2007).

77. Where a witness had already been asked about the reputation of a seven-year-old sexual assault complainant for telling the truth, it was permissible under Tex. R. Evid. 608 to ask whether "it" was such that the complainant should be believed under oath because "it" referred to the complainant's reputation and did not require the witness to opine as to whether the complainant lied under oath; however, error in excluding the testimony was harmless under Tex. R. App. P. 44.2(b) because there was other testimony that the complainant had a bad reputation for truthfulness and significant evidence that the incident occurred as described by the complainant. Scott v. State, 2007 Tex. App. LEXIS 473 (Tex. App. Houston 14th Dist. Jan. 25 2007).

Criminal Law & Procedure : Habeas Corpus : Appeals : Standards of Review : General Overview

78. Appellant's application for a writ of habeas corpus was properly denied because trial counsel was not ineffective for failing to object, under Tex. R. Evid. 608(b), to evidence of appellant's dismissal from the police for filing a false report, because, even though counsel offered no strategic reason for failing to object, the record showed that the State did not thereafter significantly pursue the evidence and counsel gave appellant the opportunity on redirect to explain the false report. Cano v. State, 2007 Tex. App. LEXIS 5538 (Tex. App. Houston 14th Dist. July 17 2007).

Evidence : Procedural Considerations : Curative Admissibility

79. In a trial for serious bodily injury under Tex. Penal Code Ann. § 22.02, a 30-year-old prior assault conviction was properly admitted to impeach defendant's claim not to be a violent person because defendant opened the door for impeachment for purposes of exceptions to both Tex. R. Evid. 609 and Tex. R. Evid. 608. Grant v. State, 247 S.W.3d 360, 2008 Tex. App. LEXIS 1135 (Tex. App. Austin 2008).

80. In a case alleging aggravated assault with a deadly weapon, defendant was not allowed to question witnesses regarding a previous child abuse complaint against the same child since it was not relevant or material to the offense, and a mother could not have been questioned about specific instances of conduct; moreover, the mother's testimony during direct examination did not leave a misleading impression with the jury which needed clarification under Tex. R. Evid. 107; the focus of the prior investigation was a grandmother, who was not a witness in the case. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

Evidence : Relevance : Character Evidence

81. In appellant's prosecution for indecency with a child, the trial court did not abuse its discretion in excluding evidence that an outcry witness's parental rights to her three children had been terminated as she had admitted to two felony convictions and to not having custody of her children; any false impression that might have been created was thus corrected. Tippett v. State, 2010 Tex. App. LEXIS 6256, 2010 WL 3036480 (Tex. App. Waco Aug. 4 2010).

82. During defendant's trial for indecency with a child, the trial court abused its discretion in preventing defendant from cross-examining the complainant about her previous false allegations of sexual assault. The evidence barred by Tex. R. Evid. 608(b) was admissible under Tex. R. Evid. 404(b) to show the complainant's bias against defendant and her possible motive to testify falsely against him. Hammer v. State, 296 S.W.3d 555, 2009 Tex. Crim. App. LEXIS 513 (Tex. Crim. App. 2009).

83. In an action against the owner of a corporation for breach of an employment contract and breach of a stock option agreement, a trial court did not abuse its discretion by admitting testimony as to the owner's dishonest character because the owner himself was a witness and thus his credibility was at issue. Simplified Dev. Corp. v. Garfield, 2007 Tex. App. LEXIS 8840 (Tex. App. Houston 14th Dist. Nov. 6 2007).

84. Because defendant testified to now knowing who was breaking into his car, the victim's prior criminal history and general reputation would have had no bearing on the reasonableness of defendant's actions, in defendant's murder trial, and thus the trial court did not abuse its discretion by not admitting this evidence; in any event, given that defendant was allowed to testify that the victim was a drug addict and had tried to sell him stolen car stereos, the exclusion of this evidence would have been harmless in any event. Freeman v. State, 230 S.W.3d 392, 2007 Tex. App. LEXIS 3965 (Tex. App. Eastland 2007).

85. In a case charging that defendant kidnapped a car salesperson to collect a debt, defendant should have been permitted to introduce testimony from five business associates that defendant was an honest, non-violent businessperson, whom they trusted; the court rejected the State's argument under Tex. R. Evid. 608, which the court noted was an impeachment rule; defendant was not seeking to admit the testimony in response to being impeached but to show that, in light of his character for truthfulness, honesty, and non-violence, it was unlikely that defendant committed the charged offense. Melgar v. State, 236 S.W.3d 302, 2007 Tex. App. LEXIS 2207 (Tex. App. Houston 1st Dist. 2007).

86. The State's objections to defendant's offer of evidence of his good character for being truthful were properly sustained where the cross-examination of defendant was unexceptional, and not particularly vigorous, while the State pointed out contradictions within defendant's testimony and between his testimony and that of other witnesses, and the State did not directly attack defendant's character for truthfulness. Moore v. State, 2004 Tex. App. LEXIS 3017 (Tex. App. Waco Mar. 31 2004), opinion withdrawn by 2004 Tex. App. LEXIS 6584 (Tex. App. Waco July 21, 2004), substituted opinion at 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

87. Trial court did not abuse its discretion by denying him permission to cross-examine the complainant on the reasons for her 1991 military discharge because there was no authority explaining how a suicide attempt 20 years ago would affect the complainant's credibility during trial. Duff v. State, 2013 Tex. App. LEXIS 4662 (Tex. App. Fort Worth Apr. 11 2013).

88. Defendant failed to preserve for review his claim that the trial court abused its discretion by admitting the covers of commercial pornography video recording that were found in his home because the argument that the covers were more prejudicial than probative was preserved at trial, it was not argued on appeal. Although the argument that the covers improperly impeached the witness with other acts was argued on appeal, it was not preserved for review. Fletcher v. State, 2012 Tex. App. LEXIS 5429, 2012 WL 2783298 (Tex. App. Texarkana July 10 2012).

89. Under Tex. R. Evid. 608 and 609, the trial court did not abuse its discretion in allowing the State to ask defendant about his prior arrests after he opened the door with his testimony or in determining that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

90. In a child sexual abuse case, the trial court did not err when it excluded evidence of the complainant's prior bad conduct as too remote; such evidence is subject to exclusion under Tex. R. Evid. 608, and although remoteness in time is not a concept generally considered under Tex. R. Evid. 608, it was pertinent to a Tex. R. Evid. 403 analysis. Blanchard v. State, 2007 Tex. App. LEXIS 8403 (Tex. App. Texarkana Oct. 25 2007).

91. Because a witness's testimony was admissible only to rebut defendant's statement of good conduct with minors, a court should have given an instruction to use the testimony only in assessing defendant's credibility, not as proof that he committed the offense or as proof of a plan to have a sexual relationship with the victim. Daggett v. State, 187 S.W.3d 444, 2005 Tex. Crim. App. LEXIS 2127 (Tex. Crim. App. 2005).

92. In a drug possession trial, the trial court abused its discretion in allowing the admission of evidence that defendant possessed fictitious driver's licenses and credit cards. The error was harmless, however, because the State did not spend much time during the guilt-innocence phase of the trial developing testimony concerning defendant's possession of the fictitious credit cards and driver's licenses. Moreover, the record contained ample evidence supporting defendant's guilt. Owen v. State, 2004 Tex. App. LEXIS 4144 (Tex. App. Fort Worth May 6 2004).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

93. Defendant did not establish a basis in the trial court for admission of this evidence as an exception to the rules by relating his attorney's past bar grievance history as relevant in a way that might overcome the precepts of Tex. R. Evid. 404(b)-like motive, intent, plan, or pattern; in addition, defendant did not present any evidence that knowing his attorney's history with other clients would have factored into his decision to take a plea, where he made no inquiry into the attorney's history prior to taking the plea, and pointed to no affirmative misrepresentation by the attorney made in connection with the information relevant to the plea. Thus, the trial court did not abuse its discretion in excluding such evidence from defendant's motion for a new trial hearing. Starz v. State, 309 S.W.3d 110, 2009 Tex. App. LEXIS 7711 (Tex. App. Houston 1st Dist. Sept. 30 2009).

94. Court did not err by not allowing defendant to cross-examine the victim about her prior sexual experience because the evidence that defendant sought to introduce through the declarant relating to the victim's sexual activity with her boyfriend did not relate to the charged sexual contact offenses, but was offered to impeach the victim's credibility relating to her accusation two years later that defendant also sexually assaulted her. The declarant's forensic interview contained inadmissible hearsay and, as the trial court noted, the victim's conduct discussed in that interview was not at all similar to the charged offenses. Fugate v. State, 2008 Tex. App. LEXIS 6266 (Tex. App. Dallas Aug. 18, 2008).

95. Because a witness's testimony was admissible only to rebut defendant's statement of good conduct with minors, a court should have given an instruction to use the testimony only in assessing defendant's credibility, not as proof that he committed the offense or as proof of a plan to have a sexual relationship with the victim. Daggett v. State, 187 S.W.3d 444, 2005 Tex. Crim. App. LEXIS 2127 (Tex. Crim. App. 2005).

96. In a drug possession trial, the trial court abused its discretion in allowing the admission of evidence that defendant possessed fictitious driver's licenses and credit cards. The error was harmless, however, because the State did not spend much time during the guilt-innocence phase of the trial developing testimony concerning defendant's possession of the fictitious credit cards and driver's licenses. Moreover, the record contained ample evidence supporting defendant's guilt. Owen v. State, 2004 Tex. App. LEXIS 4144 (Tex. App. Fort Worth May 6 2004).

Evidence : Relevance : Relevant Evidence

97. Defendant did not point to any evidence that the victim's mother hit the victim order to get the victim to lie about being sexually assaulted; evidence that the mother had allegedly hit the victim, without more, was irrelevant to the mother's veracity. Coleman v. State, 2014 Tex. App. LEXIS 6691, 2014 WL 2809064 (Tex. App. Fort Worth June 19 2014).

98. Trial court did not abuse its discretion by excluding the testimony of two witnesses concerning the victim's prior sexual history because it did not make it more or less probable that defendant touched the victim's breast and therefore was not relevant under Tex. R. Evid. 401. In addition, the evidence was properly excluded because it was an attempt to impeach the victim through the inquiry of specific instance of conduct, which was improper under Tex. R. Evid. 608(b). Gonzalez v. State, 2012 Tex. App. LEXIS 8246, 2012 WL 4497999 (Tex. App. Tyler Sept. 28 2012).

99. Trial court did not abuse its discretion during defendant's trial for the Class A misdemeanor offense of assault causing bodily injury in refusing to allow defendant to cross-examine the complainant regarding past accusations of spousal abuse where the complainant's character for truthfulness was not attacked by opinion or reputation evidence or otherwise as required by Tex. R. Evid. 608; instead, during cross-examination, defendant attempted to inquire into prior accusations of abuse that the complainant made against her ex-husband for the purpose of attacking the complainant's credibility, and, pursuant to Tex. R. Evid. 401, Tex. R. Evid. 402, Tex. R. Evid. 608, the probative value of the evidence sought to be admitted was extremely low, particularly because defense counsel admitted during trial that he had no evidence that the complainant lied about the abuse and that the accusations occurred a long time ago. Sullivan v. State, 2008 Tex. App. LEXIS 1394 (Tex. App. San Antonio Feb. 27 2008).

100. In a case alleging aggravated assault with a deadly weapon, defendant was not allowed to question witnesses regarding a previous child abuse complaint against the same child since it was not relevant or material to the offense, and a mother could not have been questioned about specific instances of conduct; moreover, the mother's testimony during direct examination did not leave a misleading impression with the jury which needed clarification under Tex. R. Evid. 107; the focus of the prior investigation was a grandmother, who was not a witness in the case. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

101. In defendant's trial on charges of aggravated sexual assault of a child, the trial court did not err in excluding evidence concerning the victim's emotional stability because although defendant sought to introduce evidence for the stated purpose of showing that the victim was a troubled teen falsifying the charge to get attention from her mother, the evidence was not relevant in that it did not show a motive to lie, or show bias or prejudice; further, Tex. R. Evid. 608 prohibited inquiring into a witness' past behavior, other than behavior based on which there has been a criminal conviction, to attack or support a witness' credibility. Baker v. State, 2006 Tex. App. LEXIS 4308 (Tex. App. Texarkana May 18 2006).

Evidence : Relevance : Sex Offenses : General Overview

102. During defendant's trial for aggravated sexual assault and solicitation of a minor, the trial court did not err in refusing to admit evidence showing that the complainant had knowledge of sexual matters before these alleged events occurred because the evidence was hearsay and subject to exclusion under Tex. R. Evid. 608, 609 and 613. Landers v. State, 2011 Tex. App. LEXIS 2982, 2011 WL 1496154 (Tex. App. Amarillo Apr. 19 2011).

Evidence : Relevance : Sex Offenses : Rape Shield Laws

103. Trial court did not abuse its discretion by refusing to allow defendant to bring up the victim's purported statement to her friend about an alleged rape by defendant based on Tex. R. Evid. 608(b) because it had substantial discretion to limit cross-examination and avoid allowing the proceeding to devolve into a trial of multiple sub-issues on collateral matters and there were other allegedly inconsistent or incredible statements by the victim that were before the jury that militated against her credibility. Gentry v. State, 2008 Tex. App. LEXIS 9404 (Tex. App. Texarkana Dec. 18 2008).

Evidence : Relevance : Sex Offenses : Similar Acts

104. During defendant's trial for indecency with a child, the trial court abused its discretion in preventing defendant from cross-examining the complainant about her previous false allegations of sexual assault. The evidence barred by Tex. R. Evid. 608(b) was admissible under Tex. R. Evid. 404(b) to show the complainant's bias against defendant and her possible motive to testify falsely against him. Hammer v. State, 296 S.W.3d 555, 2009 Tex. Crim. App. LEXIS 513 (Tex. Crim. App. 2009).

Evidence : Testimony : Credibility : General Overview

105. In an indecency with a child by contact and indecency with a child by exposure case, because the child-complainant's character for truthfulness was attacked in defendant's opening statements, Tex. R. Evid. 608(a)(2) allowed rebuttal evidence of the witness's good character. Conti v. State, 2011 Tex. App. LEXIS 8758, 2011 WL 5248348 (Tex. App. Houston 14th Dist. Nov. 3 2011).

106. Court acted within its discretion in concluding that the complainant's alleged prior use of alcohol with her mom was not relevant to whether the complainant could accurately recollect events that took place when she was not staying in her mother's home, because such testimony would not be relevant to the complainant's ability to recollect the events of the crimes alleged, which occurred when the complainant was staying with defendant, not her mother, during spring break. Vega v. State, 2011 Tex. App. LEXIS 1852, 2011 WL 882329 (Tex. App. Houston 14th Dist. Mar. 15 2011).

107. In defendant's trial for aggravated sexual assault on a child, a witness could give her opinion as to a complainant's truthfulness, and she could also testify as to whether the complainant had a reputation for truthfulness; the trial court erred in ruling otherwise, but the error did not adversely affect the jury. Scott v. State, 222 S.W.3d 820, 2007 Tex. App. LEXIS 2848 (Tex. App. Houston 14th Dist. 2007).

108. In an action in which appellant appealed from his convictions of three counts of indecency with a child and one count of aggravated sexual assault of a child, the case was remanded to the trial court for a new trial where the exclusion of the psychologist's testimony regarding false memories had a substantial and injurious effect or influence on the jury's verdict and affected a substantial right of appellant's; the psychologist's false-memory testimony was general evidence that directly attacked the complainants' credibility and was, therefore, relevant and

admissible during appellant's case-in-chief. Delong v. State, 2006 Tex. App. LEXIS 10031 (Tex. App. Fort Worth Nov. 16 2006).

109. No specific connection existed between the witness' testimony and the animus alleged that disclosed an actual bias or motive; accordingly, the trial court did not err in refusing to admit the testimony. Whitmill v. State, 2004 Tex. App. LEXIS 4610 (Tex. App. Beaumont May 19 2004).

Evidence : Testimony : Credibility : Impeachment : General Overview

110. Trial court did not abuse its discretion by excluding evidence concerning the victim's alleged recantation because due to the dissimilarity of the sexual abuse and the physical abuse that she allegedly recanted, the evidence could be deemed a collateral matter which was not permitted to be used to impeach and defendant failed to show an exception to that rule. Hosey v. State, 2014 Tex. App. LEXIS 7876, 2014 WL 3621796 (Tex. App. Texarkana July 23 2014).

111. In appellant's prosecution for indecency with a child, the trial court did not abuse its discretion in excluding evidence that an outcry witness's parental rights to her three children had been terminated as she had admitted to two felony convictions and to not having custody of her children; any false impression that might have been created was thus corrected. Tippett v. State, 2010 Tex. App. LEXIS 6256, 2010 WL 3036480 (Tex. App. Waco Aug. 4 2010).

112. Testimony did not address even the victim's general capacity of disposition to tell the truth, such that defendant's reliance on cases addressing Tex. R. Evid. 608(a) was misplaced. Verdun v. State, 2010 Tex. App. LEXIS 360, 2010 WL 183523 (Tex. App. Houston 14th Dist. Jan. 21 2010).

113. Crime at issue was aggravated assault, and possession of or conviction of possession of a controlled substance by the victim was a collateral issue, and the simple fact that the victim had been convicted of, and was still on probation for, a felony bore on his credibility such that the specifics of any particular crime were duplicative and irrelevant; evidence of items seized under a 1998 search warrant had little, if any, bearing on the victim's credibility, and thus was inadmissible and the court overruled defendant's claim that the trial court erred in not applying the Confrontation clause exception to Tex. R. Evid. 608(b). Aguilar v. State, 2009 Tex. App. LEXIS 6369, 2009 WL 2476628 (Tex. App. Austin Aug. 14 2009).

114. In a sexual assault case, defendant's bolstering argument under Tex. R. Evid. 608(a) based on an officer's testimony that a victim seemed truthful and believable was not preserved for review because no objection was made before a trial court. Zuniga v. State, 2008 Tex. App. LEXIS 6905 (Tex. App. San Antonio Sept. 10 2008).

115. Tex. R. Evid. 608 and Tex. R. Evid. 609 prohibit inquiry by the prosecution into witness' pending criminal charges. Tenny v. Cockrell, 420 F. Supp. 2d 617, 2004 U.S. Dist. LEXIS 29750 (W.D. Tex. 2004), *aff'd* 416 F.3d 404, 2005 U.S. App. LEXIS 13470 (5th Cir. Tex. 2005).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview

116. No err by admitting the State's exhibit, which was a redacted plea of guilty and judicial confession for giving a false and fictitious name to police, because lying to a police officer involved moral turpitude (dishonesty); defendant did not object to the judicial confession, but only the other plea papers, the jury heard, without objection, that defendant had confessed to committing an offense. Harris v. State, 2012 Tex. App. LEXIS 10620, 2012 WL 6674479 (Tex. App. Texarkana Dec. 21 2012).

117. Given that the victim's narration of the assault was corroborated, counsel could have found that trying to impeach the victim's credibility by her deferred adjudication for theft would not have been effective, plus counsel said he did not discuss this matter because of appellant's own criminal record and because there was a risk of alienating the jury; thus, the trial court could have found that counsel's actions amounted to reasonable trial strategy, and the trial court did not abuse its discretion in denying appellant's motion for a new trial. Sims v. State, 2012 Tex. App. LEXIS 5912, 2012 WL 2989252 (Tex. App. Austin July 18 2012).

118. Appellant claimed that the victim was lying in his case, and the previous crimes did not increase the victim's credibility, and it was not evidence that rehabilitated her truthfulness character under Tex. R. Evid. 608(b); the extraneous offenses did not rebut any defensive theory. Castle v. State, 2012 Tex. App. LEXIS 5570, 2012 WL 2862270 (Tex. App. Eastland July 12 2012).

119. Because a witness testified about the mother's motive to fabricate the story that defendant sexually assaulted his child, the exclusion of another witness's testimony about the mother's truthfulness under Tex. R. Evid. 608 was not erroneous and, even if erroneous, it was harmless under Tex. R. App. P. 44.2(b). Stoker v. State, 2011 Tex. App. LEXIS 7698, 2011 WL 4414605 (Tex. App. Fort Worth Sept. 22 2011).

120. Complaint on appeal was not preserved because appellant did not make a contemporaneous objection based on Tex. R. Evid. 608(b). Munsinger v. State, 2011 Tex. App. LEXIS 7318, 2011 WL 3915671 (Tex. App. Tyler Sept. 7 2011).

121. In defendant's indecency with a child case, counsel was not ineffective for failing to object to the rebuttal testimony regarding the victim's reputation for truthfulness, as well as testimony specifically rebutting the defensive theory that the victim was coached because it appeared that the defensive strategy was to suggest that the victim was coached by adults to fabricate and lie about an incident that did not occur. A reasonable juror might have interpreted defense counsel's questioning and comments as attacks on the victim's credibility. Alberts v. State, 302 S.W.3d 495, 2009 Tex. App. LEXIS 9427 (Tex. App. Texarkana Dec. 11 2009).

122. In defendant's sexual assault case, evidence was improperly excluded because it was admissible to impeach the complainant's credibility. The evidence in the records not only addressed the complainant's mental state but directly addressed her inability to separate fantasy from reality; the therapist's notes raised the possibility that the complainant had not been abused by defendant but had created the event in her mind or confused an actual event with fantasy. State v. Moreno, 297 S.W.3d 512, 2009 Tex. App. LEXIS 7642 (Tex. App. Houston 14th Dist. Oct. 1 2009).

123. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

124. Court properly limited cross-examination of a witness because defendant's attempt to use an instance during an officer's career in which he wrote "phantom" warning citations was nothing more than an instance of wrongdoing in his life and was not shown to bear on his general reputation for truthfulness. There was nothing which revealed that the act of wrongdoing created a bias on the part of the officer against defendant or caused the officer to have a motive to testify untruthfully. McMillon v. State, 294 S.W.3d 198, 2009 Tex. App. LEXIS 6238 (Tex. App. Texarkana Aug. 12 2009).

125. Defendant's only objection was on the basis of relevance, plus he failed to object to certain questions and testimony on recross-examination, such that defendant, under Tex. R. App. P. 33.1(a)(1)(A), failed to preserve error on his claim that the State improperly impeached defendant's witness under Tex. R. Evid. 608(a), (b), 609(f). Scott v. State, 2009 Tex. App. LEXIS 131, 2009 WL 51035 (Tex. App. Fort Worth Jan. 8 2009).

126. Because the only predicate established for the testimony of a reputation witness in a case of aggravated assault with a deadly weapon consisted of two specific acts by the complainant and the personal knowledge of the reputation witness, the trial court did not abuse its discretion in excluding the testimony. Lopez v. State, 2008 Tex. App. LEXIS 2303 (Tex. App. San Antonio Apr. 2 2008).

127. In a domestic assault case arising in 2004, a trial court did not err by limiting the cross-examination of a victim regarding a pending assault against her from 2006 because there was no showing of bias due to that prosecution since the victim's story regarding the 2004 incident had not changed, and it was corroborated by an officer at the scene; moreover, it was improper to show the victim's bad character for untruthfulness under Tex. R. Evid. 609. McCrory v. State, 2007 Tex. App. LEXIS 4200 (Tex. App. Dallas May 30 2007).

128. Although defendant contended that three instances taken together constituted ineffective representation, (1) defendant did not show that counsel failed to make a sustainable objection to certain evidence, (2) an email was not in the record and defendant did not contend that another course of action by counsel would have rendered the evidence admissible, and (3) defendant did not contend that an evidentiary ruling on improper character evidence was erroneous or how counsel could have successfully introduced this evidence. Stepp v. State, 2007 Tex. App. LEXIS 1439 (Tex. App. Houston 14th Dist. Mar. 1 2007).

129. In an indecency with a child case, a court properly restricted defendant's cross-examination of the victim's mother regarding benefits from a crime victims' compensation fund intended to show that she sought financial gain as a consequence of the incident because the proffered evidence was only marginally probative on the issue of bias or motive, and the mother was effectively impeached because she was incarcerated at the time of trial serving a sentence for forgery and had given custody of her children to a relative. Hoover v. State, 2007 Tex. App. LEXIS 1549 (Tex. App. Austin Feb. 27 2007).

130. Trial court did not abuse its discretion in allowing the child victim's mother's testimony about the child's character for truthfulness, for purposes of Tex. R. Evid. 608(a), given that defense counsel impeached the child's testimony with prior inconsistent statements and accused her of lying. Cervantes v. State, 2006 Tex. App. LEXIS 3164 (Tex. App. Waco Apr. 19 2006).

131. Trial court did not abuse its discretion in allowing the child victim's mother's testimony about the child's character for truthfulness, for purposes of Tex. R. Evid. 608(a), given that defense counsel impeached the child's testimony with prior inconsistent statements and accused her of lying. Cervantes v. State, 2006 Tex. App. LEXIS 3164 (Tex. App. Waco Apr. 19 2006).

132. In connection with defendant's capital murder trial under Tex. Penal Code Ann. § 19.03, the trial court judge ruled the evidence of possible homosexual favors as admissible on the basis of impeachment, and even if that was

not a correct ruling, the evidence could have come in to show the relationship between defendant and the victim, pursuant to Tex. Code Crim. Proc. Ann. art. 38.36(a). Whitmire v. State, 2005 Tex. App. LEXIS 9593 (Tex. App. Houston 14th Dist. Nov. 17 2005), opinion withdrawn by, substituted opinion at 183 S.W.3d 522, 2006 Tex. App. LEXIS 170 (Tex. App. Houston 14th Dist. 2006).

133. Defendant's conviction for murder was proper pursuant to Tex. R. App. P. 33.1(a)(1) where the district court did not err by admitting evidence of specific instances of conduct regarding defendant's character for truthfulness because she did not complain at trial that the evidence was inadmissible under Tex. R. Evid. 608. Pierce v. State, 2005 Tex. App. LEXIS 6229 (Tex. App. Austin Aug. 3 2005).

134. Trial court did not err in refusing inquiry into defendant's reputation for truthfulness because the prosecutor's cross-examination of defendant did not constitute an attack on defendant's truthful character under Tex. R. Evid. 608(a)(2). In fact, it did not elicit any disagreement from defendant, and the cross-examination did not reveal any discrepancies between the State's evidence and defendant's testimony Jaurrieta v. State, 2005 Tex. App. LEXIS 4634 (Tex. App. El Paso June 16 2005).

135. In a murder case, the trial court did not reversibly err by denying defendant the opportunity to introduce evidence that his codefendant, the State's primary witness, was not a truth teller capable of belief under oath as the witness in question had no reasonable basis upon which to form an opinion as to the codefendant's truthfulness or upon which to testify as to his reputation. The witness's testimony was based solely on specific instances of misconduct that were of such a nature that they could not form the basis of an opinion that the codefendant was not worthy of belief because he generally did not tell the truth nor the basis of testimony as to the codefendant's poor reputation in the community for telling the truth. Dennis v. State, 2004 Tex. App. LEXIS 10377 (Tex. App. El Paso Nov. 18 2004).

136. In a retaliation case, a court properly refused to permit defendant to present witnesses to testify about his character for truthfulness where the State's cross-examination did nothing more than illuminate the inconsistencies between defendant's version of the events and the State's, and this did not constitute an attack on defendant's character for truthfulness. Moore v. State, 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

137. In a criminal prosecution for indecency with a child and aggravated sexual assault where the 12-year-old-victim testified against defendant, the trial court committed reversible error by excluding testimony from the child's fifth grade teacher that the victim was not an honest child. Sanchez v. State, 2004 Tex. App. LEXIS 6314 (Tex. App. Corpus Christi July 15 2004).

138. In a trial for sexual assault of a child, limiting defendant's cross-examination of the complainant's mother, who testified as the outcry witness, and the complainant's best friend, who testified that defendant had touched her inappropriately, was not an abuse of discretion. Defendant sought to impeach the credibility of the complainant and her friend by introducing evidence of a specific instance of conduct, the false accusation of a third party, which was exactly what Tex. R. Evid. 608(b) proscribed. Kirk v. State, 2004 Tex. App. LEXIS 710 (Tex. App. Dallas Jan. 26 2004).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Opinion & Reputation

139. Because defendant's voir dire and cross-examination would cause a reasonable juror to believe a sexual assault complainant's character for truthfulness had been attacked, a trial court did not err in admitting the testimony of character witnesses. Wall v. State, 2014 Tex. App. LEXIS 8784, 2014 WL 4180233 (Tex. App. Dallas Aug. 11 2014).

140. Defendant failed to prove that counsel was deficient in failing to object to the detective's opinion regarding the child victim's truthfulness because her character for truthfulness was attacked in defendant's opening statements, and therefore Tex. R. Evid. 608 allowed for rebuttal evidence of her good character. Because the record was silent, the court presumed that this logic drove counsel's failure to object. Aranda v. State, 2013 Tex. App. LEXIS 1882 (Tex. App. Austin Feb. 28 2013).

141. Appellant did not say what bolstering theory was asserted at trial, and the court found the complainant's essay was not introduced as reputation evidence, such that appellant's objection did not appear to implicate Tex. R. Evid. 608(a) restrictions; the objection appeared to invoke Tex. R. Evid. 613(c), but that would not have excluded the essay either. Conteh v. State, 2012 Tex. App. LEXIS 8440, 2012 WL 4788386 (Tex. App. Houston 14th Dist. Oct. 9 2012).

142. Even if defendant had preserved his claim that a trial court erred in allowing a child sexual assault victim's mother to testify that she believed her daughter and that her daughter would not lie, the trial court's decision to admit the evidence under Tex. R. Evid. 608(a)(2) was supported by the record because the defense had attacked the victim's character for truthfulness. Fitzgerald v. State, 2012 Tex. App. LEXIS 1570, 2012 WL 683400 (Tex. App. Eastland Feb. 29 2012).

143. Trial court did not abuse its discretion by permitting the State to ask defendant's wife "did you know" questions under Tex. R. Evid. 608 because defendant's theory was that the victim had falsely accused defendant. Johnson v. State, 2011 Tex. App. LEXIS 7151, 2011 WL 3848985 (Tex. App. El Paso Aug. 31 2011).

144. Court did not abuse its discretion by excluding the Internet social site exhibit, because the exhibit did not come within the parameters of Tex. R. Evid. 608(a) concerning opinion and reputation evidence, and it fell within the prohibition of Tex. R. Evid. 608(b). Edwards v. State, 2011 Tex. App. LEXIS 6908, 2011 WL 3795696 (Tex. App. Dallas Aug. 29 2011).

145. Victim's uncle's testimony about the victim's truthfulness was properly admitted, Tex. R. Evid. 608(a), as it had no more than a slight influence or effect on the jury; any error was harmless, Tex. R. App. P. 44.2(b). Diaz-gomez v. State, 2011 Tex. App. LEXIS 4399, 2011 WL 2279185 (Tex. App. Dallas June 10 2011).

146. During defendant's trial for attempted murder and burglary of a habitation, the court did not abuse its discretion in refusing to allow a witness to testify as a reputation witness for the defense under Tex. R. Evid. 608(a) because the witness denied being familiar with the victim's reputation in the community for truthfulness and admitted to never hearing anyone say that the victim was untruthful. Covarrubias v. State, 2010 Tex. App. LEXIS 1472, 2010 WL 705929 (Tex. App. El Paso Mar. 2 2010).

147. Certain testimony specifically impeached the accuracy of the victim's testimony, and to the extent that a witness's testimony presented evidence of the child victim's veracity, for purposes of Tex. R. Evid. 608(a), the court agreed with the State that the testimony did not constitute hearsay; however, much of the witness's testimony seemed to go beyond merely rehabilitating the child's character for truthfulness, and therefore arguably constituted hearsay, but even if failing to object to hearsay was not a viable trial strategy, defendant failed to meet the second prong of the test for ineffective assistance, as the testimony was cumulative and its introduction arguably harmless and defendant failed to show prejudice. Mitchell v. State, 2009 Tex. App. LEXIS 4137, 2009 WL 1623422 (Tex. App. Corpus Christi June 11 2009).

148. While petitioner state inmate argued his counsel was ineffective for not presenting additional witnesses to show the 9-year-old victim of his sexual assault was motivated to lie in retaliation for the inmate having disciplined the victim, nothing showed such testimony would have been admissible since, consistent with Tex. R. Evid. 608(b)

and a pre-trial order, defense counsel and defense witnesses were precluded from mentioning, directly or indirectly, any specific instance of conduct by the victim without first approaching the bench; under Tex. R. Evid. 613(b), specific instances of conduct could be used to establish that a witness had specific bias, self-interest, or motive for testifying, and under Tex. R. Evid. 404(b), specific acts of misconduct could also be used to establish a person's motive for performing an act, such as making a false allegation, but where credibility was concerned, a witness's general character for truthfulness could be shown only through reputation or opinion testimony under Rule 608(a). Mendez v. Quarterman, 625 F. Supp. 2d 415, 2009 U.S. Dist. LEXIS 47543 (S.D. Tex. June 4 2009).

149. In a case involving assault against a public servant, the State did not err in recalling a deputy to the stand because defendant made no bolstering objection under Tex. R. Evid. 608(a) or Tex. R. Evid. 613(c); moreover, there was no violation of Tex. Code Crim. Proc. Ann. art. 36.02. At any rate, the deputy's testimony on recall did not duplicate that which was previously given. Reaves v. State, 2008 Tex. App. LEXIS 6866 (Tex. App. Corpus Christi Aug. 28 2008).

150. Although an employer and owner claimed that testimony of the owner's character for untruthfulness violated Tex. R. Evid. 404, they ignored the plain language of Tex. R. Evid. 404; the court looked to Tex. R. Evid. 608 to determine if the opinion testimony complied with the Rules of Evidence, and the court found that the owner was a witness in the trial and thus his credibility was at issue and was subject to attack in the form of an opinion regarding his character for truthfulness or untruthfulness, and thus the trial court did not err in admitting this testimony. Simplified Dev. Corp. v. Garfield, 2008 Tex. App. LEXIS 1127 (Tex. App. Houston 14th Dist. Feb. 14 2008).

151. Defense counsel failed to establish that the witness's opinion of the victim was based on more than his personal knowledge; the witness did not testify that he was familiar with her reputation in the community or that his opinion was based upon observations and discussions; thus, under Tex. R. Evid. 608, the trial court acted within its discretion in denying defendant the opportunity to impeach the victim's testimony through evidence of her untruthfulness. Clark v. State, 2007 Tex. App. LEXIS 9452 (Tex. App. Dallas Dec. 4 2007).

152. Tex. R. Evid. 608 provides that, subject to some limitations, the credibility of a witness may be attacked by evidence in the form of an opinion or reputation. Garcia v. State, 2007 Tex. App. LEXIS 8373 (Tex. App. San Antonio Oct. 24 2007).

153. For purposes of Tex. R. Evid. 608, witness testimony was neither an opinion nor evidence of reputation, and thus the trial court did not err in excluding the testimony. Garcia v. State, 2007 Tex. App. LEXIS 8373 (Tex. App. San Antonio Oct. 24 2007).

154. Trial court did not abuse its discretion in failing to grant defendant's motion for a mistrial, raised when the victim's mother was permitted to give her personal opinion about the victim's character for being truthful; any error from the testimony occurred only one time, the jury was specifically instructed to disregard the testimony, which did not contribute to the mother's prior testimony, and the court did not perceive the testimony to be highly prejudicial and incurable. Montgomery v. State, 2007 Tex. App. LEXIS 5682 (Tex. App. Dallas July 19 2007).

155. Trial court did not err in admitting expert testimony in defendant's trial for attempted sexual assault; the expert was asked to describe in general, hypothetical terms behaviors that might be exhibited by a child who had been subjected to sexual abuse trauma, and the fact that the jury could have drawn a comparison between the expert's hypothetical child and the victim did not mean that the expert's testimony amounted to a direct comment on the victim's credibility; the expert's testimony was circumstantial evidence that something traumatic happened to the victim, and the fact that the evidence in some measure corroborated the victim's testimony did not make it any less relevant. Sanchez v. State, 2007 Tex. App. LEXIS 5691 (Tex. App. Austin July 19 2007).

156. Defendant's complaint regarding opinion testimony under Tex. R. Evid. 608 was waived under Tex. R. App. P. 33 for failure to make a contemporaneous objection in the trial court. Denby v. State, 2007 Tex. App. LEXIS 5200 (Tex. App. Tyler June 29 2007).

157. In defendant's trial for aggravated sexual assault on a child, a witness could give her opinion as to a complainant's truthfulness, and she could also testify as to whether the complainant had a reputation for truthfulness; the trial court erred in ruling otherwise, but the error did not adversely affect the jury. Scott v. State, 222 S.W.3d 820, 2007 Tex. App. LEXIS 2848 (Tex. App. Houston 14th Dist. 2007).

158. Without deciding whether it was error for the trial court to have excluded opinion testimony about the victim's bad reputation for being peaceful, the court held that the exclusion was harmless because similar evidence was admitted through various witnesses, and any error in the exclusion was cured by later testimony. Alvarez v. State, 2007 Tex. App. LEXIS 386 (Tex. App. Fort Worth Jan. 18 2007).

159. In a murder trial court, it was error to exclude a defense witness's opinion of a State witness's truthfulness because the opinion was admissible under Tex. R. Evid. 608(a), regardless of whether the defense witness was familiar with the reputation of the State witness or with the underlying facts or information upon which the opinion was based; the error was not reversible under Tex. R. App. P. 44.2(b), however, because the testimony that the State witness had bad reputation for truthfulness, rather than that the State witness did not tell the truth, did not affect defendant's substantial rights. Peterson v. State, 2006 Tex. App. LEXIS 10431 (Tex. App. Houston 14th Dist. Dec. 7 2006).

160. Court had a silent record as to counsel's reasons, but it was plausible that counsel could have sought to avoid drawing any further attention to certain alleged extraneous offenses, and the lay witness testimony concerning the victim's veracity would have been admissible under Tex. R. Evid. 608(a) and the expert testimony complained of was elicited by defendant on cross-examination, such that defendant failed to show ineffective assistance of counsel. Najar v. State, 2006 Tex. App. LEXIS 8499 (Tex. App. El Paso Sept. 28 2006).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances

161. Defendant did not point to any evidence that the victim's mother hit the victim order to get the victim to lie about being sexually assaulted; evidence that the mother had allegedly hit the victim, without more, was irrelevant to the mother's veracity. Coleman v. State, 2014 Tex. App. LEXIS 6691, 2014 WL 2809064 (Tex. App. Fort Worth June 19 2014).

162. During defendant's trial for sexual assault of a child, the court did not err in excluding evidence of the victim's prior hospitalizations and her mental state because defendant did not explain how her mental health issues affected her ability to recall events or were relevant to impeach her credibility. Cowell v. State, 2014 Tex. App. LEXIS 6278, 2014 WL 2583675 (Tex. App. Dallas June 10 2014).

163. Trial court's decision to deny defendant the opportunity to cross-examine witnesses about the victim's accusation of sexual assault against another person was not an abuse of discretion because specific instances could not be inquired into under this rule, defendant never made a showing that the victim's allegation was false, and defendant was allowed to cross-examine witnesses regarding the victim's recantation of her accusation against her brother. Odom v. State, 2014 Tex. App. LEXIS 5009, 2014 WL 1882754 (Tex. App. Waco May 8 2014).

164. Where defendant was convicted of DWI, he was not harmed by the trial court's refusal to allow him to impeach an officer with a specific act of dishonesty or his reputation for truthfulness. Evidence that the officer intentionally withheld testimony about his failing to report a weapon discharge would not have achieved defendant's

specific goal of proving that the officer lied about defendant's reckless driving; a video of defendant's stop strongly supported a finding that he was intoxicated. Tollett v. State, 422 S.W.3d 886, 2014 Tex. App. LEXIS 1216, 2014 WL 462275 (Tex. App. Houston 14th Dist. Feb. 4 2014).

165. Trial court did not abuse its discretion in concluding that releasing a sergeant from further testimony did not violate defendant's right to compulsory process because evidence that the sergeant believed the arresting police officer was untruthful during a prior unrelated incident was inadmissible under this rule. Freeman v. State, 413 S.W.3d 198, 2013 Tex. App. LEXIS 11959, 2013 WL 5324000 (Tex. App. Houston 14th Dist. Sept. 24 2013).

166. For purposes of Tex. R. Evid. 608(b), the trial court did not abuse its discretion in excluding proffered testimony by a witness of the victim's alcohol use, given that (1) the witness testified she did not see or talk to the victim on the night in question, (2) the witness had no knowledge that the victim was impaired at the time of the offense, and (3) the alleged misrepresentation made by the victim was made during her cross-examination, not her direct examination. Carrion v. State, 2013 Tex. App. LEXIS 5673 (Tex. App. Eastland May 9 2013).

167. Where defendant was convicted of indecency with a child and aggravated sexual assault of a child, he failed to prove that the trial court erred by ruling that a question concerning the witness' prior false allegation of abuse was improper under Tex. R. Evid. 608(b); the record failed to establish what the child victim alleged that was false or that her allegation would demonstrate bias. Pierson v. State, 398 S.W.3d 406, 2013 Tex. App. LEXIS 4868 (Tex. App. Texarkana Apr. 19 2013).

168. Trial court did not abuse its discretion by refusing to allow him to cross-examine the officer about specific acts of misconduct allegedly showing he was violent and not credible with citizens in the community because no charges were brought against the officer for any of the alleged misconduct and it was not shown that those events were connected to the officer defendant was tried for, namely shooting the officer. Castillo v. State, 2013 Tex. App. LEXIS 2034, 2013 WL 781776 (Tex. App. San Antonio Mar. 1 2013).

169. Court did not find a Brady violation in this case, given that the record did not show that an officer's disciplinary report was withheld from appellant, and in any event, evidence of the disciplinary proceeding was not admissible for impeachment purposes under Tex. R. Evid. 608(b), and the prosecution did not have a duty to turn the report over; as (1) the officer had probable cause to stop appellant for driving without lights at night, and (2) there was evidence of appellant's intoxication, appellant could not show how impeaching the officer would have produced a different outcome, and he had no grounds on which to demand a new trial in his driving while intoxicated case. Baldez v. State, 386 S.W.3d 324, 2012 Tex. App. LEXIS 5466, 2012 WL 2834043 (Tex. App. San Antonio July 11 2012).

170. Appellant sought to introduce a disciplinary report to show an officer's lack of credibility, but appellant did not argue that the officer was untrustworthy based on bias, for purposes of Tex. R. Evid. 613(b), and Tex. R. Evid. 608(b) expressly prohibits the introduction of specific instances of conduct to attack a witness's credibility; given that appellant tried to impeach the officer's credibility with the report, the trial court did not err in limiting the cross-examination, and even though the trial court limited cross-examination because the report was not a public record, the court could affirm if the ruling was correct on any applicable theory. Baldez v. State, 386 S.W.3d 324, 2012 Tex. App. LEXIS 5466, 2012 WL 2834043 (Tex. App. San Antonio July 11 2012).

171. Sergeant's administrative adjudication of guilt for giving false testimony and information was more than 10 years old and unrelated to the assault at issue; the court could not find any exception to the general prohibition of this type of evidence under Tex. R. Evid. 608(b) should apply. Guillory v. State, 2012 Tex. App. LEXIS 241, 2012 WL 113073 (Tex. App. Houston 14th Dist. Jan. 12 2012).

172. Prior unrelated acts of lying generally are inadmissible under Tex. R. Evid. 608(b). Guillory v. State, 2012 Tex. App. LEXIS 241, 2012 WL 113073 (Tex. App. Houston 14th Dist. Jan. 12 2012).

173. Because defendant's cross-examination asked the foster mother to testify with respect to the child complainant's truthfulness to the specific allegations of aggravated sexual abuse and invited the State to remedy any misconception it might have caused to the jury, the trial court did not err by allowing the foster mother's testimony into evidence pursuant to Tex. R. Evid. 608. Gomez v. State, 2011 Tex. App. LEXIS 9593, 2011 WL 6142735 (Tex. App. Corpus Christi Dec. 8 2011).

174. It was proper for the trial court to exclude evidence because under Tex. R. Evid. 608, a witness's credibility could not be attacked by offering extrinsic evidence concerning specific prior instances of conduct, other than a conviction under Tex. R. Evid. 609, which was not applicable, and thus there was no abuse of discretion. Gonzales v. State, 2010 Tex. App. LEXIS 4783, 2010 WL 2543908 (Tex. App. Corpus Christi June 24 2010).

175. Defendant's conviction for engaging in organized criminal activity, with the two predicate offenses being aggravated sexual assault of a child, was improper because the State's argument that allegations were inadmissible under Tex. R. Evid. 608(b) were without merit. Defendant was not attempting to attack or impeach the children's foster parent with information that he had been accused of sexually molesting foster children under his care in the past; he was attempting to establish his defense that if the children were abused, the foster parent was responsible and the foster parents coached the children into making the allegations to cast the blame on others and divert attention from the California allegations. Kelly v. State, 321 S.W.3d 583, 2010 Tex. App. LEXIS 4506 (Tex. App. Houston 14th Dist. June 17 2010).

176. Defendant sought to impeach the credibility of the victim and another by introducing evidence of specific instances in which they had engaged in improper conduct, but Tex. R. Evid. 608(b) prohibited such inquiry. Hiatt v. State, 319 S.W.3d 115, 2010 Tex. App. LEXIS 3076 (Tex. App. San Antonio Apr. 28 2010).

177. Witness's testimony did not rebut any affirmative misrepresentation made by defendant, for purposes of Tex. R. Evid. 608(b). Schoff v. State, 2010 Tex. App. LEXIS 1350, 2010 WL 668904 (Tex. App. Austin Feb. 23 2010).

178. Under Tex. R. Evid. 608(b), the trial court correctly sustained the State's objection to testimony regarding a specific instance of the victim's untruthfulness. Love v. State, 2009 Tex. App. LEXIS 8952, 2009 WL 3930900 (Tex. App. Houston 1st Dist. Nov. 19 2009).

179. State did not request a limiting instruction after its objection to certain testimony under Tex. R. Evid. 608(b) and the trial court sustained no objection to another's testimony about the victim's truthfulness, such that defendant failed to present any error for the court's review as to certain witnesses. Love v. State, 2009 Tex. App. LEXIS 8952, 2009 WL 3930900 (Tex. App. Houston 1st Dist. Nov. 19 2009).

180. Although the State was correct in that a witness could be cross-examined on any matter relevant to any issue in the case, for purposes of Tex. R. Evid. 611(b), defendant's possession of cocaine was a specific act and was inadmissible for the purpose of impeachment under Tex. R. Evid. 608(b) and the trial court erred by admitting this evidence; at the time of trial, defendant had not been convicted of any crime arising out of his possession of cocaine, and therefore Tex. R. Evid. 609 did not apply. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

181. Introduction of evidence contrary to Tex. R. Evid. 608(b) did not rise to the level of constitutional error for purposes of Tex. R. App. P. 44. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston

14th Dist. Sept. 15 2009).

182. Because the court found error in the trial court admitting evidence that was inadmissible under Tex. R. Evid. 608(b), the court had to assess whether the error was harmful under Tex. R. App. P. 44.2(b). Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

183. Chief concern of improperly admitted evidence under Tex. R. Evid. 608(b) was the potential of the evidence to cause the jury to convict defendant for character conformity, but the overwhelming evidence of guilt, regardless of the improperly admitted evidence, would have resulted in a guilty verdict, and thus the error was harmless under Tex. R. App. P. 44.2(b). Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

184. While petitioner state inmate argued his counsel was ineffective for not presenting additional witnesses to show the 9-year-old victim of his sexual assault was motivated to lie in retaliation for the inmate having disciplined the victim, nothing showed such testimony would have been admissible since, consistent with Tex. R. Evid. 608(b) and a pre trial order, defense counsel and defense witnesses were precluded from mentioning, directly or indirectly, any specific instance of conduct by the victim without first approaching the bench; under Tex. R. Evid. 613(b), specific instances of conduct could be used to establish that a witness had specific bias, self-interest, or motive for testifying, and under Tex. R. Evid. 404(b), specific acts of misconduct could also be used to establish a person's motive for performing an act, such as making a false allegation, but where credibility was concerned, a witness's general character for truthfulness could be shown only through reputation or opinion testimony under Rule 608(a). Mendez v. Quarterman, 625 F. Supp. 2d 415, 2009 U.S. Dist. LEXIS 47543 (S.D. Tex. June 4 2009).

185. Defendant failed to show compliance with any part of the three-part test necessary to show that the prosecutor's conduct violated due process under U.S. Const. amend. XIV and Tex. Const. art. I, § 19, given that (1) there was no showing that the State failed to disclose evidence, (2) the State had no knowledge of certain accusations until after defendant's trial, (3) if the allegation that defendant and his roommate had sexually assaulted the accuser was true, defendant obviously knew of the crime before the State, (4) the accuser's bare accusations could not have been used to impeach the roommate, as Tex. R. Evid. 608(b) limited the introduction of character evidence, (5) even if the evidence was allowed, it was difficult to imagine how an allegation that defendant participated in other sexual assaults could have helped him, and (6) even if the evidence of the accusations had been discovered, disclosed, and admissible, it would not have altered the outcome of defendant's sexual assault of a child trial, as the victim identified defendant as her attacker and DNA evidence confirmed the assault. Thus, the State did not violate defendant's right to due process. Parchman v. State, 2009 Tex. App. LEXIS 3745, 2009 WL 998683 (Tex. App. Tyler Apr. 15 2009).

186. Defendant acknowledged that she intended to cross-examine the victim regarding specific instances of conduct in an attempt to attack the victim's credibility, which was precisely what Tex. R. Evid. 608(b) prohibited; even if the exception in Rule 608(b) applied, defendant provided no evidence that any allegations the victim made against a third party were false, other than defense counsel's argument, and thus the trial court did not err in denying defendant's request to cross-examine the victim regarding the allegations. Jones v. State, 2008 Tex. App. LEXIS 5819 (Tex. App. Austin July 30, 2008).

187. Trial court did not abuse its discretion during defendant's trial for the Class A misdemeanor offense of assault causing bodily injury in refusing to allow defendant to cross-examine the complainant regarding past accusations of spousal abuse where the complainant's character for truthfulness was not attacked by opinion or reputation evidence or otherwise as required by Tex. R. Evid. 608; instead, during cross-examination, defendant attempted to inquire into prior accusations of abuse that the complainant made against her ex-husband for the purpose of attacking the complainant's credibility, and, pursuant to Tex. R. Evid. 401, Tex. R. Evid. 402, Tex. R. Evid. 608, the probative value of the evidence sought to be admitted was extremely low, particularly because defense counsel

admitted during trial that he had no evidence that the complainant lied about the abuse and that the accusations occurred a long time ago. Sullivan v. State, 2008 Tex. App. LEXIS 1394 (Tex. App. San Antonio Feb. 27 2008).

188. Trial court did not err during defendant's trial for the Class A misdemeanor offense of assault causing bodily injury in excluding evidence of a prior criminal mischief charge against the complainant at a hearing on a motion in limine where defendant's attorney admitted not only that the criminal mischief case against the complainant was "obviously quite old," but also that the case had been dismissed. Sullivan v. State, 2008 Tex. App. LEXIS 1394 (Tex. App. San Antonio Feb. 27 2008).

189. Defendant failed to preserve for review his claims that he was denied a fair trial and due process by the prosecutor's repeated elicitation of inadmissible lay opinion testimony from two witnesses that one victim was truthful and that the witnesses believed that defendant had assaulted the victim because he failed to timely object to the admission of the witnesses' testimony and failed to raise prosecutorial misconduct or due process claims with the trial court. Lopez v. State, 2007 Tex. App. LEXIS 6174 (Tex. App. Austin Aug. 1 2007).

190. In a sexual assault case, when defendant offered expert testimony as an offer of proof regarding the victim's alleged bipolar disease, he did not demonstrate how the mental illness affected her perception of the pertinent events, and therefore, the specific instance of conduct was inadmissible to attack the victim's credibility as a witness. Silva v. State, 2006 Tex. App. LEXIS 10594 (Tex. App. San Antonio Dec. 13 2006).

191. In a murder trial court, it was error to exclude a defense witness's opinion of a State witness's truthfulness because the opinion was admissible under Tex. R. Evid. 608(a), regardless of whether the defense witness was familiar with the reputation of the State witness or with the underlying facts or information upon which the opinion was based; the error was not reversible under Tex. R. App. P. 44.2(b), however, because the testimony that the State witness had bad reputation for truthfulness, rather than that the State witness did not tell the truth, did not affect defendant's substantial rights. Peterson v. State, 2006 Tex. App. LEXIS 10431 (Tex. App. Houston 14th Dist. Dec. 7 2006).

192. In a drug case, the trial court's exclusion of evidence that defendant sought to admit for the purpose of attacking the truthfulness of a police officer did not violate defendant's right to confrontation because the evidence was inadmissible under Tex. R. Evid. 608. Sandoval v. State, 2006 Tex. App. LEXIS 10208 (Tex. App. Houston 14th Dist. Nov. 30 2006).

193. In a criminal trial for driving while intoxicated, the court did not err by refusing to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias. The specific instances of conduct defendant sought to explore had no relevance to the defense theory that the officer tended to act hasty or jump to conclusions at the crime scene. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

194. In a criminal trial for driving while intoxicated, the court did not err by refusing to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias. The specific instances of conduct defendant sought to explore had no relevance to the defense theory that the officer tended to act hastily or jump to conclusions at the crime scene. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

195. While the trial court's ruling accurately reflected the general limits placed on impeachment, the court found that defendant's wife, the victim, opened the door to impeachment evidence concerning her earlier plea in a domestic violence case because her testimony left a false impression concerning her past criminal history, and thus, the trial court's reliance on the general rule concerning remote evidence was misplaced in this case, and the

trial court abused its discretion; the wife's denial was directly relevant to the offense charged of family violence and the defense raised to that charge, and the State was free to offer extrinsic evidence rebutting her statement. Winegarner v. State, 188 S.W.3d 379, 2006 Tex. App. LEXIS 2163 (Tex. App. Dallas 2006).

196. Defendant's conviction for murder was proper pursuant to Tex. R. App. P. 33.1(a)(1) where the district court did not err by admitting evidence of specific instances of conduct regarding defendant's character for truthfulness because she did not complain at trial that the evidence was inadmissible under Tex. R. Evid. 608. Pierce v. State, 2005 Tex. App. LEXIS 6229 (Tex. App. Austin Aug. 3 2005).

197. Defendant's cross-examination of the victim by use of prior inconsistent statements aimed at impeaching her testimony amounted to an attack on her character for truthfulness under the "otherwise" provision of Tex. R. Evid. 608(a)(2), opening the door for rebuttal evidence as to the victim's character for truthfulness because where a witness was placed in the position of testifying differently from that which she previously testified, evidence of her veracity character was admissible in rebuttal. Michael v. State, 173 S.W.3d 829, 2005 Tex. App. LEXIS 5548 (Tex. App. Fort Worth 2005).

198. Court disagreed with defendant's characterization of a witness as an expert for purposes of Tex. R. Evid. 702 because the State called the witness as a lay witness to testify about the victim's statements about the alleged sexual abuse; defendant had previously impeached the victim with prior inconsistent statements, and thus the State properly sought to rehabilitate the victim with testimony regarding the victim's character for truthfulness under Tex. R. Evid. 608(a)(2). Bronaugh v. State, 2005 Tex. App. LEXIS 4455 (Tex. App. Waco June 8 2005).

199. Counselor who treated the victim properly testified that the victim exhibited characteristics similar to those of children who had been sexually abused; the counselor's testimony of not observing any behavior that would have caused the witness to question the victim's truthfulness was not a direct comment on the victim's truthfulness for purposes of Tex. R. Evid. 608(a)(2). Bronaugh v. State, 2005 Tex. App. LEXIS 4455 (Tex. App. Waco June 8 2005).

200. In a trial for aggravated assault with a deadly weapon, the court properly excluded testimony from the victim's daughter tendered to show that the victim had a tendency to exaggerate and was not being truthful. The daughter's statements during voir dire did not show that she could qualify that the victim's general reputation for truthfulness was bad. Licon v. State, 2005 Tex. App. LEXIS 1402 (Tex. App. Amarillo Feb. 18 2005).

201. Where defendant failed to object to the admission of his statement to authorities regarding the credibility of his victim that he claimed violated Tex. R. Evid. 608(a) by admitting his statement because it bolstered the complainant's credibility when the complainant's credibility had not been impeached, he failed to preserve the issue for appellate review since none of the fundamental error categories included the admission or exclusion of evidence. Apolinar v. State, 2004 Tex. App. LEXIS 6025 (Tex. App. San Antonio July 7 2004).

202. In an insurance fraud case, the trial court did not err in limiting cross-examination of a State's witness about whether she lied to the State when she told the State that she had no criminal record during its preparation of the case as the witness's testimony did not show that she directly lied to the State concerning her criminal record, but rather showed her mistaken belief about the status of that record. Further, this evidence was not permissible to attack the witness's credibility because Tex. R. Evid. 608(b) bared impeachment of the witness's general character for truthfulness through specific acts of conduct other than evidence of conviction of a crime. Wycough v. State, 2004 Tex. App. LEXIS 4608 (Tex. App. El Paso May 20 2004).

203. In an insurance fraud case, the trial court did not violate defendant's right to confront witnesses when it limited cross-examination of a State's witness about whether she lied to the State when she told the State that she

had no criminal record during its preparation of the case as the witness's testimony did not show that she directly lied to the State concerning her criminal record, but rather showed her mistaken belief about the status of that record. Further, this evidence was not permissible to attack the witness's credibility because Tex. R. Evid. 608(b) bared impeachment of the witness's general character for truthfulness through specific acts of conduct other than evidence of conviction of a crime. Wycough v. State, 2004 Tex. App. LEXIS 4608 (Tex. App. El Paso May 20 2004).

204. Trial court abused its discretion under Tex. R. Evid. 608(a) and 702 by allowing a detective to testify to the victim's truthfulness in defendant's sexual assault trial where the detective's comment regarding the victim's truthfulness came when defendant had not attacked the victim's truthfulness, but the error was harmless under Tex. R. App. P. 44.2(b). McDonald v. State, 2004 Tex. App. LEXIS 1988 (Tex. App. San Antonio Mar. 3 2004).

205. Trial court abused its discretion under Tex. R. Evid. 608(a) and 702 by allowing a detective to testify to the victim's truthfulness in defendant's sexual assault trial where the detective's comment regarding the victim's truthfulness came when defendant had not attacked the victim's truthfulness, but the error was harmless under Tex. R. App. P. 44.2(b). McDonald v. State, 2004 Tex. App. LEXIS 1988 (Tex. App. San Antonio Mar. 3 2004).

206. In a sexual assault case, the trial court did not err by refusing to admit entries from the victim's diary to show that the victim's character for truth-telling was poor because the diary entry involved a specific instance of conduct, i.e., writing false things in a diary; it was therefore not admissible to impeach the victim's credibility or truthfulness. West v. State, 121 S.W.3d 95, 2003 Tex. App. LEXIS 8506 (Tex. App. Fort Worth 2003).

Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice

207. At defendant's trial for aggravated robbery, he was not harmed by the trial court's exclusion of evidence of the victim's prior drug use or debt owed to his accomplice; as defendant did not explain how the victim's drug use translated into ill will, bias, or animus toward defendant, it was improper impeachment evidence. Richardson v. State, 2014 Tex. App. LEXIS 1723, 2014 WL 645801 (Tex. App. Eastland Feb. 14 2014).

208. Where defendant was convicted of indecency with a child and aggravated sexual assault of a child, he failed to prove that the trial court erred by ruling that a question concerning the witness' prior false allegation of abuse was improper under Tex. R. Evid. 608(b); the record failed to establish what the child victim alleged that was false or that her allegation would demonstrate bias. Pierson v. State, 398 S.W.3d 406, 2013 Tex. App. LEXIS 4868 (Tex. App. Texarkana Apr. 19 2013).

209. Evidence was properly excluded that a State witness was subject to influence by his arrest for family violence because defendant failed to show the required relationship between the family violence charge and the testimony. The witness testified on voir dire that the prosecutors on the two cases were not the same and that he did not have a deal with the State to give favorable testimony. Turner v. State, 413 S.W.3d 442, 2012 Tex. App. LEXIS 6619 (Tex. App. Fort Worth Aug. 9 2012).

210. Trial court did not err under Tex. R. Evid. 608(b) in overruling defendant's objection to evidence that defendant was on parole at the time of trial for a prior felony conviction; in eliciting the testimony, the State sought to show that defendant was biased as a witness and had a motive to testify falsely to avoid being convicted for a parole violation. Mcgough v. State, 2012 Tex. App. LEXIS 776, 2012 WL 273885 (Tex. App. Houston 14th Dist. Jan. 31 2012).

211. Pursuant to Tex. R. Evid. 608(b) and 613, the trial court did not err in limiting defendant's cross-examination of the witness because defendant did not make a connection between defendant's pending felony case and status as a probationer that would have prompted the witness to falsely identify defendant in a photographic line-up. Oliva

v. State, 2011 Tex. App. LEXIS 8940, 2011 WL 5428965 (Tex. App. Houston 1st Dist. Nov. 10 2011).

212. No violation of Tex. R. Evid. 613(b), 608(b) occurred where defense counsel was not prevented from impeaching a witness by use of extrinsic evidence to show bias or interest and counsel was allowed to cross-examine the witness concerning whether she entered into a plea agreement in exchange for her testimony. Reyna v. State, 2011 Tex. App. LEXIS 6062, 2011 WL 3366383 (Tex. App. Corpus Christi Aug. 4 2011).

213. In defendant's trial for four counts of sexual assault of a child, the trial court did not err by refusing to admit evidence of specific instances of conduct under Tex. R. Evid. 608(b) to show that the victim had previously lied and committed theft. Defendant failed to show how this conduct showed a bias or interest on the part of the witness against defendant; also, two witnesses testified that the victim was not an honest person. Harris v. State, 2010 Tex. App. LEXIS 9999 (Tex. App. Eastland Dec. 16 2010).

214. In defendant's trial for four counts of sexual assault of a child, the trial court did not err by refusing to admit evidence of specific instances of conduct under Tex. R. Evid. 608(b) to show that the victim's father had also been indicted for aggravated sexual assault of a child. Defendant failed to show how the offense made more probable the existence of any motive, bias, or interest on the part of the witness; in fact, the evidence posed a risk of confusing or misleading the jury. Harris v. State, 2010 Tex. App. LEXIS 9999 (Tex. App. Eastland Dec. 16 2010).

215. Trial court did not err by admitting evidence of defendant's prior dismissed theft charge and his mother's involvement in obtaining that dismissal because the State did not offer the testimony as extraneous offense evidence to impeach defendant's testimony under Tex. R. Evid. 608(b), but rather to show the mother's own bias in favor defendant under Tex. R. Evid. 613. Mares v. State, 2010 Tex. App. LEXIS 6844, 2010 WL 3294244 (Tex. App. Houston 1st Dist. Aug. 19 2010).

216. Defendant failed to preserve for review his assertion that the trial court erred by not allowing evidence that the complainant had alleged, and testified about, virtually identical sexual abuse committed by her previous step-father, because defendant's arguments on appeal did not comport with his arguments at trial, and the alleged error did not have a substantial and injurious effect or influence in determining the jury's verdict; defendant testified regarding his defensive theory that his disputes with the complainant's mother influenced the complainant to fabricate the allegations against him. Bullock v. State, 2009 Tex. App. LEXIS 8872, 2009 WL 3838861 (Tex. App. Dallas Nov. 18 2009).

217. No due process or confrontation violation was shown when defendant was not allowed to question a witness regarding his citizenship status, because defendant did not show and did not allege that the witness had been convicted of entering the United States unlawfully, the assertion that the witness's immigration status gave him a motive to testify falsely was not raised below and was not supported by the record, and counsel did not take the witness on voir dire or otherwise make a record as to whether the witness was or was not in the country lawfully. Shrader v. State, 2009 Tex. App. LEXIS 8777, 2009 WL 3806147 (Tex. App. Austin Nov. 10 2009).

218. In a trial for sexual assault of a child, defendant was entitled under Tex. R. Evid. 608, 613(b) to impeach the complainant by presenting evidence that the complainant threatened to falsely accuse neighbors of molestation, even though the threats occurred after the charged offense. The complainant testified to becoming angry when defendant took back a gift, and, the very next day, the complainant accused defendant of molestation. Billodeau v. State, 277 S.W.3d 34, 2009 Tex. Crim. App. LEXIS 232 (Tex. Crim. App. 2009).

219. Defendant acknowledged that she intended to cross-examine the victim regarding specific instances of conduct in an attempt to attack the victim's credibility, which was precisely what Tex. R. Evid. 608(b) prohibited; even if the exception in Rule 608(b) applied, defendant provided no evidence that any allegations the victim made

against a third party were false, other than defense counsel's argument, and thus the trial court did not err in denying defendant's request to cross-examine the victim regarding the allegations. Jones v. State, 2008 Tex. App. LEXIS 5819 (Tex. App. Austin July 30, 2008).

220. In a domestic assault case arising in 2004, a trial court did not err by limiting the cross-examination of a victim regarding a pending assault against her from 2006 because there was no showing of bias due to that prosecution since the victim's story regarding the 2004 incident had not changed, and it was corroborated by an officer at the scene; moreover, it was improper to show the victim's bad character for untruthfulness under Tex. R. Evid. 609. McCrory v. State, 2007 Tex. App. LEXIS 4200 (Tex. App. Dallas May 30 2007).

221. In an aggravated sexual assault of a child case, the trial court did not abuse its discretion in refusing to allow defendant to cross-examine the victim regarding a totally separate allegation of sexual abuse that the victim had made against his stepfather as it would not have explained any animus, bias, or ill motive on the part of the victim to fabricate the details of his assault. Lopez v. State, 2006 Tex. App. LEXIS 7510 (Tex. App. Corpus Christi Aug. 24 2006).

222. In a criminal trial for driving while intoxicated, the court did not err by refusing to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias. The specific instances of conduct defendant sought to explore had no relevance to the defense theory that the officer tended to act hasty or jump to conclusions at the crime scene. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

223. In a criminal trial for driving while intoxicated, the court did not err by refusing to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias. The specific instances of conduct defendant sought to explore had no relevance to the defense theory that the officer tended to act hastily or jump to conclusions at the crime scene. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

224. In a criminal prosecution for capital murder, the trial court did not err by limiting cross-examination of the state's witnesses as to an extraneous robbery offense; naked allegations about the witnesses were insufficient to raise an inference that they had a motive to testify falsely for the state concerning the capital murder defense, and after the witnesses denied the allegations, Tex. R. Evid. 608 precluded counsel from introducing extrinsic evidence of the offense. Crenshaw v. State, 125 S.W.3d 651, 2003 Tex. App. LEXIS 10196 (Tex. App. Houston 1st Dist. 2003).

Evidence : Testimony : Credibility : Impeachment : Contradiction

225. Trial court did not abuse its discretion by preventing a defense witness from testifying regarding the victim's prior cocaine use and her prior visits to the alleged crime scene because the victim's statement of good conduct dealt with her unfamiliarity with cocaine lines which was not directly relevant to the charged offense of sexual assault, and therefore defendant was not entitled to correct the alleged false impression by calling other witnesses or offering extrinsic evidence. Clay v. State, 390 S.W.3d 1, 2012 Tex. App. LEXIS 10757, 2012 WL 6721012 (Tex. App. Texarkana Dec. 28 2012).

Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview

226. It was proper not to admit a complainant's indictment for impeachment purposes because only evidence of the conviction itself is admissible under this rule to impeach a witness; the details of the conviction are generally inadmissible for the purpose of impeachment. Pena v. State, 2014 Tex. App. LEXIS 6487 (Tex. App. Houston 14th

Dist. June 17 2014).

227. During defendant's trial for indecent exposure, the trial court properly excluded evidence that the victim called the police regarding various disturbances at her residence on several occasions following the report of exposure because the decision was within the zone of reasonable disagreement; the trial court maintained broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues, endangering the witness, and the injection of cumulative and collateral evidence, and, under Tex. R. Evid. 608(b), specific instances of conduct, other than conviction of a crime, when offered to attack the witness's credibility could not be explored on cross-examination. Tennison v. State, 2006 Tex. App. LEXIS 2120 (Tex. App. Amarillo Mar. 16 2006).

228. Trial court did not abuse its discretion by disallowing, as irrelevant, defendant's stepdaughter's testimony that she was abused by another man some seven years before defendant began abusing her in an attempt to challenge her credibility and motive on the basis that her sexual acts with defendant were consensual, and defendant made no argument how the excluded testimony was relevant to or affected the sexual offenses involving his biological daughter. Regalado v. State, 2005 Tex. App. LEXIS 2322 (Tex. App. Dallas Mar. 28 2005).

229. When the trial court sustained the State's objection that certain punishment evidence was inadmissible under Tex. R. Evid. 608(b), defendant did not inform the trial court of any alternative theories of admissibility; because defendant did not expressly offer the evidence for its limited admissible purpose pursuant to Tex. R. Evid. 105(b), defendant was not free to complain of its exclusion on appeal and defendant failed to preserve error. Hatcher v. State, 2005 Tex. App. LEXIS 884 (Tex. App. Fort Worth Feb. 3 2005).

230. In an indecency with a child by contact case, the trial court did not improperly grant the State's motion in limine and required defense counsel to approach the bench before asking the victim whether she had ever lied to a police officer or school officer as whether the child victim had ever been in trouble for marijuana possession was the type of evidence which was not allowed by the evidentiary rules. Dinsmore v. State, 2004 Tex. App. LEXIS 11624 (Tex. App. Fort Worth Dec. 23 2004).

231. Trial court did not err in allowing prosecution to cross examine murder suspect at the guilt/innocence phase with specific instances of his unadjudicated misconduct for impeachment purposes because defendant opened the door to it with his prior testimony that "most of his problems were concentration type problems related to his psychiatric disorders, and defendant did not object to this cross examination. Perry v. State, 158 S.W.3d 438, 2004 Tex. Crim. App. LEXIS 2147 (Tex. Crim. App. 2004), writ of certiorari denied by 126 S. Ct. 416, 163 L. Ed. 2d 317, 2005 U.S. LEXIS 7289, 74 U.S.L.W. 3228 (U.S. 2005).

232. There was no abuse of discretion in excluding evidence that the victim threatened to falsely accuse her uncle because, given the corroborating evidence, the instant case did not involve a "heightened need" to impeach the victim's credibility with her threat to falsely accuse the uncle, and it was not entirely clear from the uncle's testimony that the victim threatened to accuse him of sexual assault as opposed to some other allegation; even if the trial court erred by not admitting the evidence, any error was harmless beyond a reasonable doubt because the uncle's testimony would have been cumulative of the evidence rejected by the jury, as its exclusion did not move the jury from a state of non-persuasion to one of persuasion on the issue of the victim's credibility. Hamrick v. State, 2004 Tex. App. LEXIS 4418 (Tex. App. El Paso May 13 2004).

233. Tex. R. Evid. 608 permits general credibility impeachment of a witness; a specific instance, in this case a single statement, meant to show animus on the victim's part toward the defendant, was not admissible under this rule. Felan v. State, 44 S.W.3d 249, 2001 Tex. App. LEXIS 2406 (Tex. App. Fort Worth 2001).

Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility

234. Court did not err by admitting only the judgment and sentence against a witness and not allowing defendant to question him on the details of a theft conviction because the jury heard testimony to rebut the witness's testimony that the theft conviction "was a business deal gone bad," and defendant did not show how the additional information was necessary to correct any false impression. Smith v. State, 436 S.W.3d 353, 2014 Tex. App. LEXIS 5717 (Tex. App. Houston 14th Dist. May 29 2014).

235. No err by admitting the State's exhibit, which was a redacted plea of guilty and judicial confession for giving a false and fictitious name to police, because lying to a police officer involved moral turpitude (dishonesty); defendant did not object to the judicial confession, but only the other plea papers, the jury heard, without objection, that defendant had confessed to committing an offense. Harris v. State, 2012 Tex. App. LEXIS 10620, 2012 WL 6674479 (Tex. App. Texarkana Dec. 21 2012).

Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility

236. At defendant's trial for aggravated robbery, the trial court did not abuse its discretion when it refused to allow the defense to cross examine a witness regarding his criminal history and his violation of Tex. Penal Code Ann. § 46.04. Under Tex. R. Evid. 608 and 609, the details of a conviction were generally inadmissible for the purpose of impeachment; because there was no evidence that the witness was convicted of the firearms offense under Tex. Penal Code Ann. § 46.04, it was not admissible under Tex. R. Evid. 609. Henson v. State, 2013 Tex. App. LEXIS 974, 2013 WL 396015 (Tex. App. Houston 14th Dist. Jan. 31 2013).

237. Defendant was not prevented from showing that the victim and other family members were biased and had a motive to testify against him because there was animosity between the victim's family and defendant, but, under Tex. R. Evid. 608(b) and 609, the trial court did not err in not admitting evidence indicating that the victim's mother had been arrested for possession of marihuana and had been placed on deferred adjudication community supervision. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

238. Trial court did not err during defendant's trial for the Class A misdemeanor offense of assault causing bodily injury in excluding evidence of a prior criminal mischief charge against the complainant at a hearing on a motion in limine where defendant's attorney admitted not only that the criminal mischief case against the complainant was "obviously quite old," but also that the case had been dismissed. Sullivan v. State, 2008 Tex. App. LEXIS 1394 (Tex. App. San Antonio Feb. 27 2008).

239. In a murder trial, defendant was not entitled to impeach a witness by asking whether the witness signed certain checks drawn on defendant's checking account; the evidence was not admissible as impeachment for a crime under Tex. R. Evid. 608, because there was no evidence that the witness had ever been convicted or even arrested for an offense involving the checks. Perry v. State, 236 S.W.3d 859, 2007 Tex. App. LEXIS 7942 (Tex. App. Texarkana 2007).

240. Defense counsel was not ineffective for failing to object to inadmissible impeachment evidence consisting of defendant's prior convictions because on direct examination, defendant preemptively admitted to numerous prior convictions in an attempt to minimize any damage. Andrews v. State, 2007 Tex. App. LEXIS 7217 (Tex. App. Texarkana Sept. 5 2007).

Evidence : Testimony : Credibility : Impeachment : Mental Incapacity

241. Under Tex. R. Evid. 608(b) a murder defendant should have been allowed to cross-examine a witness, who was also a co-defendant, regarding the witness's history of visions and hallucinations; however, excluding the

cross-examination was harmless error. Perry v. State, 236 S.W.3d 859, 2007 Tex. App. LEXIS 7942 (Tex. App. Texarkana 2007).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

242. Trial court did not abuse its discretion during defendant's trial for attempted sexual performance by a child in excluding testimony regarding the complainant's alleged character trait of lying to law enforcement where defendant had explained to the court that he sought to introduce the testimony because it showed again in the instant case that the complainant acted in conformity with that pertinent character trait and again made a false report to law enforcement about alleged law violations, which was precisely the inferential chain of logic barred by this rule. Clark v. State, 2014 Tex. App. LEXIS 1765, 2014 WL 708910 (Tex. App. Austin Feb. 19 2014).

243. At defendant's trial for aggravated robbery, he was not harmed by the trial court's exclusion of evidence of the victim's prior drug use or debt owed to his accomplice; as defendant did not explain how the victim's drug use translated into ill will, bias, or animus toward defendant, it was improper impeachment evidence. Richardson v. State, 2014 Tex. App. LEXIS 1723, 2014 WL 645801 (Tex. App. Eastland Feb. 14 2014).

244. Defendant was not entitled to attack the arresting officer's credibility by showing that he was under investigation for violating the Occupations Code, a specific instance of misconduct, and therefore the trial court did not abuse its discretion by determining that defendant did not establish a Brady violation. Smith v. State, 2013 Tex. App. LEXIS 9194 (Tex. App. Houston 1st Dist. July 25 2013).

245. Trial court did not err by refusing to allow defendant to cross-examine an accomplice on whether he committed offenses and did so as a member of a gang with defendant and the co-defendant because the accomplice was not charged with the offenses and there was no evidence presented to create a nexus between the other offenses and the accomplice's testimony. Hernandez v. State, 2013 Tex. App. LEXIS 9291 (Tex. App. Waco July 25 2013).

246. Trial court did not err by refusing to allow defendant to question the complainant about fleeing or not appearing in court or about her profile on a social media website because specific instances of her conduct to attack her credibility was not admissible. Duckworth v. State, 2013 Tex. App. LEXIS 9062 (Tex. App. San Antonio July 24 2013).

247. Trial court did not abuse its discretion by denying him permission to cross-examine the complainant on the reasons for her 1991 military discharge because there was no authority explaining how a suicide attempt 20 years ago would affect the complainant's credibility during trial. Duff v. State, 2013 Tex. App. LEXIS 4662 (Tex. App. Fort Worth Apr. 11 2013).

248. Trial court did not abuse its discretion by denying defendant the right to cross-examine the victim regarding her plan to deceive her parents as to where she would be on the night in question because it was primarily an attack on her general credibility and was not relevant as proof of bias, prejudice, or ulterior motive for her to accuse defendant of sexually assaulting her. Clay v. State, 390 S.W.3d 1, 2012 Tex. App. LEXIS 10757, 2012 WL 6721012 (Tex. App. Texarkana Dec. 28 2012).

249. Trial court did not abuse its discretion by preventing a defense witness from testifying regarding the victim's prior cocaine use and her prior visits to the alleged crime scene because the victim's statement of good conduct dealt with her unfamiliarity with cocaine lines which was not directly relevant to the charged offense of sexual assault, and therefore defendant was not entitled to correct the alleged false impression by calling other witnesses or offering extrinsic evidence. Clay v. State, 390 S.W.3d 1, 2012 Tex. App. LEXIS 10757, 2012 WL 6721012 (Tex.

App. Texarkana Dec. 28 2012).

250. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because the trial court did not abuse its discretion in excluding the evidence of the victim's mother's purported prior false accusations of sexual abuse, Tex. R. Evid. 613(b), 608(b). Contrary to defendant's assertion, the proffered testimony did not show a bias against him or a motive to falsely accuse him; rather, it constituted an impermissible attack on the mother's credibility using specific instances of conduct. Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

251. Trial court did not abuse its discretion by excluding the testimony of two witnesses concerning the victim's prior sexual history because it did not make it more or less probable that defendant touched the victim's breast and therefore was not relevant under Tex. R. Evid. 401. In addition, the evidence was properly excluded because it was an attempt to impeach the victim through the inquiry of specific instance of conduct, which was improper under Tex. R. Evid. 608(b). Gonzalez v. State, 2012 Tex. App. LEXIS 8246, 2012 WL 4497999 (Tex. App. Tyler Sept. 28 2012).

252. Trial court did not abuse its discretion by excluding impeachment evidence consisting of a photograph of one of the co-defendant's aiming a handgun because the co-defendant's negative response to the question of whether he ever held a gun in his hand and pointed it at someone was not untruthful. Herrera v. State, 2012 Tex. App. LEXIS 5594, 2012 WL 2861673 (Tex. App. Corpus Christi July 12 2012).

253. Trial court did not err under Tex. R. Evid. 608(b) in overruling defendant's objection to evidence that defendant was on parole at the time of trial for a prior felony conviction; in eliciting the testimony, the State sought to show that defendant was biased as a witness and had a motive to testify falsely to avoid being convicted for a parole violation. Mcgough v. State, 2012 Tex. App. LEXIS 776, 2012 WL 273885 (Tex. App. Houston 14th Dist. Jan. 31 2012).

254. Pursuant to Tex. R. Evid. 608(b) and 613, the trial court did not err in limiting defendant's cross-examination of the witness because defendant did not make a connection between defendant's pending felony case and status as a probationer that would have prompted the witness to falsely identify defendant in a photographic line-up. Oliva v. State, 2011 Tex. App. LEXIS 8940, 2011 WL 5428965 (Tex. App. Houston 1st Dist. Nov. 10 2011).

255. Court did not abuse its discretion by excluding the Internet social site exhibit, because the exhibit did not come within the parameters of Tex. R. Evid. 608(a) concerning opinion and reputation evidence, and it fell within the prohibition of Tex. R. Evid. 608(b). Edwards v. State, 2011 Tex. App. LEXIS 6908, 2011 WL 3795696 (Tex. App. Dallas Aug. 29 2011).

256. Defendant was not prevented from showing that the victim and other family members were biased and had a motive to testify against him because there was animosity between the victim's family and defendant, but, under Tex. R. Evid. 608(b) and 609, the trial court did not err in not admitting evidence indicating that the victim's mother had been arrested for possession of marihuana and had been placed on deferred adjudication community supervision. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

257. Under Tex. R. Evid. 608 and 609, the trial court did not abuse its discretion in allowing the State to ask defendant about his prior arrests after he opened the door with his testimony or in determining that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

258. During defendant's trial for capital murder, the court did not err under Tex. R. Evid. 608(b) in admitting a photograph of defendant and a third person holding guns pointed at the head of another individual because on direct examination, defendant stated that defendant had never pointed a gun at someone. Lemon v. State, 2011 Tex. App. LEXIS 3473, 2011 WL 1837680 (Tex. App. Houston 14th Dist. May 10 2011).

259. During defendant's trial for aggravated sexual assault and solicitation of a minor, the trial court did not err in refusing to admit evidence showing that the complainant had knowledge of sexual matters before these alleged events occurred because the evidence was hearsay and subject to exclusion under Tex. R. Evid. 608, 609 and 613. Landers v. State, 2011 Tex. App. LEXIS 2982, 2011 WL 1496154 (Tex. App. Amarillo Apr. 19 2011).

260. Evidence of a worker's prior use of pain medication was inadmissible under Tex. R. Evid. 608(b) for general impeachment purposes, the insurer did not raise intoxication as a defense under Tex. Lab. Code Ann. § 406.032(a)(1) in the worker's compensation administrative proceeding, and the insurer's suggestion that the worker might have fabricated his claim to obtain prescription drugs was speculative. Thus, the evidence was properly excluded as prejudicial under Tex. R. Evid. 403. Commerce & Indus. Ins. Co. v. Ferguson-Stewart, 339 S.W.3d 744, 2011 Tex. App. LEXIS 2446 (Tex. App. Houston 1st Dist. Mar. 31 2011).

261. In defendant's trial for four counts of sexual assault of a child, the trial court did not err by refusing to admit evidence of specific instances of conduct under Tex. R. Evid. 608(b) to show that the victim had previously lied and committed theft. Defendant failed to show how this conduct showed a bias or interest on the part of the witness against defendant; also, two witnesses testified that the victim was not an honest person. Harris v. State, 2010 Tex. App. LEXIS 9999 (Tex. App. Eastland Dec. 16 2010).

262. In defendant's trial for four counts of sexual assault of a child, the trial court did not err by refusing to admit evidence of specific instances of conduct under Tex. R. Evid. 608(b) to show that the victim's father had also been indicted for aggravated sexual assault of a child. Defendant failed to show how the offense made more probable the existence of any motive, bias, or interest on the part of the witness; in fact, the evidence posed a risk of confusing or misleading the jury. Harris v. State, 2010 Tex. App. LEXIS 9999 (Tex. App. Eastland Dec. 16 2010).

263. Even if error were properly preserved, Tex. R. Evid. 608(b) prohibited the purpose for which defendant now purported to have attempted to elicit the testimony from the victim's mother; because defendant did not contend that Rule 608(b), as applied in this case, violated his Sixth and Fourteenth Amendment rights to confrontation and cross-examination, he waived these rights with regard to impeaching the mother for bias by failing to preserve error. Quiroz v. State, 2010 Tex. App. LEXIS 8939, 2010 WL 4492939 (Tex. App. San Antonio Nov. 10 2010).

264. Trial court did not abuse its discretion by excluding the testimony of an officer that during a fight with his brother, the victim used extreme profanity towards his parents and threatened to kill his brother, because it was an impermissible attempt to cast an unfavorable light on the victim under Tex. R. Evid. 608(b). The officer did not have a basis of fact to testify as to the victim's character for truthfulness. Soto v. State, 2010 Tex. App. LEXIS 8709, 2010 WL 4273173 (Tex. App. San Antonio Oct. 29 2010).

265. During a civil commitment hearing, the trial court did not err in sustaining the State's objection to a question to a psychiatrist concerning whether the psychiatrist's expert testimony had been "stricken" by appellate courts at least three times; under Tex. R. Evid. 608(b), specific instances of conduct of a witness could not be inquired into on cross-examination for the purpose of attacking the witness's credibility. In re Commitment of Robertson, 2010 Tex. App. LEXIS 7421 (Tex. App. Beaumont Sept. 9 2010).

266. Trial court did not err by admitting evidence of defendant's prior dismissed theft charge and his mother's involvement in obtaining that dismissal because the State did not offer the testimony as extraneous offense

evidence to impeach defendant's testimony under Tex. R. Evid. 608(b), but rather to show the mother's own bias in favor defendant under Tex. R. Evid. 613. Mares v. State, 2010 Tex. App. LEXIS 6844, 2010 WL 3294244 (Tex. App. Houston 1st Dist. Aug. 19 2010).

267. Defendant's conviction for indecency with a child by contact was proper because, although the record indicated that defendant sought to question the State's expert on two Child Protective Services' reports involving physical abuse of the complainant, a prior report of physical abuse was not sufficiently similar to an allegation of sexual abuse to have any probative value, particularly given the risk that such evidence would unduly prejudice and confuse the jury, Tex. R. Evid. 608(b). Furthermore, the record contained no evidence of the circumstances surrounding the making of the reports, including whether they were made by the complainant or someone else; because defendant made no offer of proof regarding the reports, there was nothing for the appellate court to review, Tex. R. Evid. 103(a)(2) Sosa v. State, 2010 Tex. App. LEXIS 4428, 2010 WL 2330304 (Tex. App. Austin June 10 2010).

268. Defendant failed to preserve for review his assertion that the trial court erred by not allowing evidence that the complainant had alleged, and testified about, virtually identical sexual abuse committed by her previous step-father, because defendant's arguments on appeal did not comport with his arguments at trial, and the alleged error did not have a substantial and injurious effect or influence in determining the jury's verdict; defendant testified regarding his defensive theory that his disputes with the complainant's mother influenced the complainant to fabricate the allegations against him. Bullock v. State, 2009 Tex. App. LEXIS 8872, 2009 WL 3838861 (Tex. App. Dallas Nov. 18 2009).

269. Defendant did not establish a basis in the trial court for admission of this evidence as an exception to the rules by relating his attorney's past bar grievance history as relevant in a way that might overcome the precepts of Tex. R. Evid. 404(b)-like motive, intent, plan, or pattern; in addition, defendant did not present any evidence that knowing his attorney's history with other clients would have factored into his decision to take a plea, where he made no inquiry into the attorney's history prior to taking the plea, and pointed to no affirmative misrepresentation by the attorney made in connection with the information relevant to the plea. Thus, the trial court did not abuse its discretion in excluding such evidence from defendant's motion for a new trial hearing. Starz v. State, 309 S.W.3d 110, 2009 Tex. App. LEXIS 7711 (Tex. App. Houston 1st Dist. Sept. 30 2009).

270. Court did not err by not allowing defendant to cross-examine the victim about her prior sexual experience because the evidence that defendant sought to introduce through the declarant relating to the victim's sexual activity with her boyfriend did not relate to the charged sexual contact offenses, but was offered to impeach the victim's credibility relating to her accusation two years later that defendant also sexually assaulted her. The declarant's forensic interview contained inadmissible hearsay and, as the trial court noted, the victim's conduct discussed in that interview was not at all similar to the charged offenses. Fugate v. State, 2008 Tex. App. LEXIS 6266 (Tex. App. Dallas Aug. 18, 2008).

271. Evidence that the complainant in a child sexual abuse case previously had made accusations of unwanted sexual contact against other persons was inadmissible under Tex. R. Evid. 608. Hammer v. State, 256 S.W.3d 391, 2008 Tex. App. LEXIS 1381 (Tex. App. San Antonio 2008).

272. Because defendant's recordings of his estranged wife's conversations involved adults, not children, the vicarious consent doctrine was inapplicable, and there was no interspousal consent exception; thus, the court rejected defendant's argument that the rationale and holding in case law presented a defensive theory or an exception to Tex. R. Evid. 608, in defendant's trial for unlawful interception, use, and disclosure of a wire communication. Green v. State, 2008 Tex. App. LEXIS 1193 (Tex. App. San Antonio Feb. 20 2008).

273. Court disagreed that the cross-examination of defendant's estranged wife about her extramarital affair would have been proper to impeach her credibility under Tex. R. Evid. 608; as to her motive to lie in an effort to gain custody of the minor child, this was at best only relevant to a collateral matter, and whether the wife had sexual relations while the child was in an adjacent room or asleep was relevant neither to the crime for which defendant was indicted -- unlawful interception, use, and disclosure of a wire communication -- nor to any defense, and thus the trial court did not err in limiting defendant's cross-examination of the wife. Green v. State, 2008 Tex. App. LEXIS 1193 (Tex. App. San Antonio Feb. 20 2008).

274. In a child sexual abuse case, the trial court did not err when it excluded evidence of the complainant's prior bad conduct as too remote; such evidence is subject to exclusion under Tex. R. Evid. 608, and although remoteness in time is not a concept generally considered under Tex. R. Evid. 608, it was pertinent to a Tex. R. Evid. 403 analysis. Blanchard v. State, 2007 Tex. App. LEXIS 8403 (Tex. App. Texarkana Oct. 25 2007).

275. In a juvenile delinquency proceeding arising from assaults committed against a former girlfriend, the trial court did not abuse its discretion in excluding testimony regarding the former girlfriend's alleged assaults on specific individuals and her reputation for violence; moreover, Tex. R. Evid. 602 barred testimony from a witness who lacked personal knowledge of the former girlfriend's conduct. In re C.R.G., 2007 Tex. App. LEXIS 7572 (Tex. App. Houston 14th Dist. Sept. 20 2007).

276. To the extent that defendant's desired line of punishment-phase cross-examination of a witness was an effort to establish that she purportedly had affairs with married men, that line of questioning was prohibited under Tex. R. Evid. 608. Brazelton v. State, 2007 Tex. App. LEXIS 5687 (Tex. App. Fort Worth July 12 2007).

277. In defendant's trial for two counts of aggravated assault on a public servant, the trial court did not violate defendant's right of confrontation under U.S. Const. amend. VI and Tex. Const. art. I, § 10 when the trial court refused to allow defendant to impeach the credibility of a State's witness by cross-examining the witness about a violent poem the witness had written to show that the inmate had contemplated shooting at other people contrary to the witness' answer to defendant's question. Defendant's use of the poem as a specific instance of conduct to attack the witness' credibility was barred by Tex. R. Evid. 608(b). Hole v. State, 2007 Tex. App. LEXIS 5107 (Tex. App. Tyler June 29 2007).

278. In defendant's trial for aggravated sexual assault of a child younger than 14 years of age, in violation of Tex. Penal Code Ann. § 22.021, for purposes of Tex. R. Evid. 613, defendant did not show that a prior statement was inconsistent with anything the witness testified to at trial, and defendant sought to use the prior statement as a means of introducing evidence of specific instances of misconduct, including drug possession and lying, and that evidence was inadmissible under Tex. R. Evid. 608 for purposes of attacking the witness's credibility; even if error was committed, defendant suffered no harm under Tex. R. App. P. 44.2(b) because defendant attacked the witness's credibility through extensive cross-examination and the State did not depend on the witness or her credibility, as the case depended on the child victim's testimony. Wagner v. State, 2007 Tex. App. LEXIS 4480 (Tex. App. Eastland June 7 2007).

279. In defendant's trial for possession of more than 200 grams but less than 400 grams of a prohibited substance, methamphetamine, no objection was lodged to extraneous evidence concerning a prior search of defendant's home and error was thus waived, for purposes of Tex. R. App. P. 33.1; even if an objection had been made, there was ample reason to permit the testimony because the State was free to rebut by impeachment defendant's claim of not knowing how to manufacture methamphetamine. Duck v. State, 2007 Tex. App. LEXIS 2587 (Tex. App. Texarkana Apr. 3 2007).

280. In defendant's trial on charges of aggravated sexual assault of a child, the trial court did not err in excluding evidence concerning the victim's emotional stability because although defendant sought to introduce evidence for the stated purpose of showing that the victim was a troubled teen falsifying the charge to get attention from her mother, the evidence was not relevant in that it did not show a motive to lie, or show bias or prejudice; further, Tex. R. Evid. 608 prohibited inquiring into a witness' past behavior, other than behavior based on which there has been a criminal conviction, to attack or support a witness' credibility. Baker v. State, 2006 Tex. App. LEXIS 4308 (Tex. App. Texarkana May 18 2006).

281. In a murder case, the false statements exception to Tex. R. Evid. 608(b) did not apply because a witness' assertion that he was "doing great" referred to his successful drug rehabilitation and did not create a false impression that he had no criminal history; hence, the trial court did not err in excluding impeachment evidence of an uncharged allegation of a sex offense. Parchman v. State, 2006 Tex. App. LEXIS 3161 (Tex. App. Corpus Christi Apr. 20 2006).

282. In a murder case, the false statements exception to Tex. R. Evid. 608(b) did not apply because a witness' assertion that he was "doing great" referred to his successful drug rehabilitation and did not create a false impression that he had no criminal history; hence, the trial court did not err in excluding impeachment evidence of an uncharged allegation of a sex offense. Parchman v. State, 2006 Tex. App. LEXIS 3161 (Tex. App. Corpus Christi Apr. 20 2006).

283. In a trial for delivery of marihuana, the trial court properly excluded, under Tex. R. Evid. 608, impeachment evidence that an undercover officer was fired for lying to his superiors about his involvement in a high speed chase and that he incorrectly identified two other defendants. The Confrontation Clause did not require the admission because that evidence was not probative of a misidentification of defendant. Iglehart v. State, 2005 Tex. App. LEXIS 4273 (Tex. App. El Paso June 2 2005).

284. In a driving while intoxicated case, the trial court did not err in preventing defendant from questioning the arresting officer about the officer's dismissal for misconduct because Tex. R. Evid. 608(b) precludes the use of specific instances of conduct to attack the credibility of a witness, other than conviction of a crime. Vargas v. State, 2005 Tex. App. LEXIS 4173 (Tex. App. San Antonio June 1 2005).

285. Trial court's error in permitting the State to ask defendant whether he had been arrested more than twenty times was harmless because it did not have a substantial or injurious effect on the jury's verdict and did not affect defendant's substantial rights, as the State reminded the jury that defendant had a prior conviction for felony driving while intoxicated and theft, but it did not address defendant's other prior arrests, and the jury was instructed that all persons were presumed to be innocent and the fact that defendant had been arrested, confined, or indicted for or otherwise charged gave rise to no inference of guilt. West v. State, 169 S.W.3d 275, 2005 Tex. App. LEXIS 4114 (Tex. App. Fort Worth 2005).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

286. Trial court did not abuse its discretion by refusing to allow defendant to bring up the victim's purported statement to her friend about an alleged rape by defendant based on Tex. R. Evid. 608(b) because it had substantial discretion to limit cross-examination and avoid allowing the proceeding to devolve into a trial of multiple sub-issues on collateral matters and there were other allegedly inconsistent or incredible statements by the victim that were before the jury that militated against her credibility. Gentry v. State, 2008 Tex. App. LEXIS 9404 (Tex. App. Texarkana Dec. 18 2008).

287. On appeal from a conviction for aggravated sexual assault and indecency with a child, it was error to find that the State could bolster the credibility of the complainant after the admission of prior inconsistent statements based on the reasoning that impeachment of a witness with prior inconsistent statements was always an attack on the character of the witness; the question for the trial judge in determining whether rehabilitation is warranted under Tex. R. Evid. 608 is whether a reasonable juror would believe that the witness's character for truthfulness has been attacked by cross-examination, evidence from other witnesses, or statements of counsel (e.g., during voir dire or opening statements). Michael v. State, 235 S.W.3d 723, 2007 Tex. Crim. App. LEXIS 1267 (Tex. Crim. App. 2007).

Evidence : Testimony : Credibility : Rehabilitation

288. Court did not abuse its discretion in excluding witness testimony as to defendant's reputation for truthfulness, because these instances referred to by defendant did not constitute attacks on his general character for truthfulness; two instances constituted testimony by other witnesses as to the charges and as to direct or implied attacks concerning that testimony, and the third instance constituted impeachment of defendant's theory of the case by another witness. De La Garza v. State, 2011 Tex. App. LEXIS 1617, 2011 WL 768872 (Tex. App. Dallas Mar. 7 2011).

289. Defendant failed to show that defense counsel rendered ineffective assistance by failing to object to bolstering of the store owner's testimony by the investigating officer, because a witness could testify as to the truthfulness of another witness after the latter's credibility has been attacked, and the appellate court was unable to find that defense counsel's failure to object to the testimony was outrageous or unreasonable. Elliott v. State, 2010 Tex. App. LEXIS 984 (Tex. App. Houston 1st Dist. Feb. 11 2010).

290. In a case involving assault against a public servant, the State did not err in recalling a deputy to the stand because defendant made no bolstering objection under Tex. R. Evid. 608(a) or Tex. R. Evid. 613(c); moreover, there was no violation of Tex. Code Crim. Proc. Ann. art. 36.02. At any rate, the deputy's testimony on recall did not duplicate that which was previously given. Reaves v. State, 2008 Tex. App. LEXIS 6866 (Tex. App. Corpus Christi Aug. 28 2008).

291. In a trial for child sexual abuse, counsel was rendered ineffective by not objecting to the State's bolstering of the complainant's truthfulness and credibility through both experts and lay witnesses; testimony from the child's teacher and a parent was inadmissible under Tex. R. Evid. 608 to the extent that it went to the complainant's truthfulness in the particular allegations and was admitted before the complainant's credibility was attacked. Fuller v. State, 224 S.W.3d 823, 2007 Tex. App. LEXIS 3686 (Tex. App. Texarkana 2007).

292. Although defendant objected to the prosecutor's question concerning a school counselor's familiarity with the child sexual assault complainant's character for truthfulness, the trial court did not err in overruling defendant's objection because the question occurred only after defendant attacked the complainant's credibility; if a witness's credibility was attacked, opinion or reputation testimony regarding the witness's character for truthfulness was admissible under Tex. R. Evid. 608. Romero v. State, 2006 Tex. App. LEXIS 9835 (Tex. App. Dallas Nov. 14 2006).

Evidence : Testimony : Examination : Cross-Examination : Scope

293. In a drug trial, there was no error under Tex. R. Evid. 608 in limiting defendant's cross-examination of a detective as to (1) payments made to an informant who was admittedly in the country illegally, (2) whether or not those payments were reported to the Internal Revenue Service, and (3) whether or not the detective sought or received permission from federal authorities to have the informant in the country working as an agent of law enforcement. Perez-gonzalez v. State, 2010 Tex. App. LEXIS 3045, 2010 WL 1645062 (Tex. App. Dallas Apr. 26 2010).

294. In a murder case, the trial court did not err in limiting defendant's cross-examination of a prosecution witness; although defendant complained that he was not allowed to question the witness about what could be characterized as the physical symptoms of the witness's mental illness, defendant was allowed to question the witness about the extent of his mental illness and its effect on the witness's ability to perceive reality. Treybig v. State, 2007 Tex. App. LEXIS 7180 (Tex. App. Corpus Christi Aug. 29 2007).

Evidence : Testimony : Experts : General Overview

295. Trial court abused its discretion under Tex. R. Evid. 608(a) and 702 by allowing a detective to testify to the victim's truthfulness in defendant's sexual assault trial where the detective's comment regarding the victim's truthfulness came when defendant had not attacked the victim's truthfulness, but the error was harmless under Tex. R. App. P. 44.2(b). McDonald v. State, 2004 Tex. App. LEXIS 1988 (Tex. App. San Antonio Mar. 3 2004).

296. Trial court abused its discretion under Tex. R. Evid. 608(a) and 702 by allowing a detective to testify to the victim's truthfulness in defendant's sexual assault trial where the detective's comment regarding the victim's truthfulness came when defendant had not attacked the victim's truthfulness, but the error was harmless under Tex. R. App. P. 44.2(b). McDonald v. State, 2004 Tex. App. LEXIS 1988 (Tex. App. San Antonio Mar. 3 2004).

Evidence : Testimony : Experts : Criminal Trials

297. In an action in which appellant appealed from his convictions of three counts of indecency with a child and one count of aggravated sexual assault of a child, the case was remanded to the trial court for a new trial where the exclusion of the psychologist's testimony regarding false memories had a substantial and injurious effect or influence on the jury's verdict and affected a substantial right of appellant's; the psychologist's false-memory testimony was general evidence that directly attacked the complainants' credibility and was, therefore, relevant and admissible during appellant's case-in-chief. Delong v. State, 2006 Tex. App. LEXIS 10031 (Tex. App. Fort Worth Nov. 16 2006).

Governments : Local Governments : Employees & Officials

298. In a drug trial, there was no error under Tex. R. Evid. 403, 404(b), Rule 608(a) in excluding evidence, offered to show bias, that an officer was investigated for planting drugs on a defendant in an unrelated case because the allegations were determined to be unfounded. Brown v. State, 2010 Tex. App. LEXIS 5432, 2010 WL 2772488 (Tex. App. San Antonio July 14 2010).

Immigration Law : Duties & Rights of Aliens : Discrimination

299. Illegal immigrant status of defendant driver should not have been admitted, under Tex. R. Evid. 608(b), 404, in a wrongful death and survival action stemming from a multi-fatality vehicular accident. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

Torts : Transportation Torts : General Overview

300. In a personal injury case arising from an auto-pedestrian accident, any error under Tex. R. Evid. 608(b), 107 in excluding evidence of a driver's subsequent automobile accidents was harmless because it was unlikely that, if the jury heard that evidence, it would apportioned more fault to the driver, given the admitted evidence that he consumed a pint of vodka on the day in question, was arrested for driving while intoxicated at the scene of the accident, and failed a breathalyzer test with a blood alcohol content that was nearly twice the legal limit. Muhs v. Whataburger, Inc., 2010 Tex. App. LEXIS 9229, 2010 WL 4657955 (Tex. App. Corpus Christi Nov. 18 2010).

301. Illegal immigrant status of defendant driver should not have been admitted, under Tex. R. Evid. 608(b), 404, in a wrongful death and survival action stemming from a multi-fatality vehicular accident. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

End of Document

Tex. Evid. R. 609

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 609 Impeachment by Evidence of a Criminal Conviction

(a) ***In General.***--Evidence of a criminal conviction offered to attack a witness's character for truthfulness must be admitted if:

(1)the crime was a felony or involved moral turpitude, regardless of punishment;

(2)the probative value of the evidence outweighs its prejudicial effect to a party; and

(3)it is elicited from the witness or established by public record.

(b) ***Limit on Using the Evidence After 10 Years.***--This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

(c) ***Effect of a Pardon, Annulment, or Certificate of Rehabilitation.***--Evidence of a conviction is not admissible if:

(1)the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime that was classified as a felony or involved moral turpitude, regardless of punishment;

(2)probation has been satisfactorily completed for the conviction, and the person has not been convicted of a later crime that was classified as a felony or involved moral turpitude, regardless of punishment; or

(3)the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) ***Juvenile Adjudications.***--Evidence of a juvenile adjudication is admissible under this rule only if:

(1)the witness is a party in a proceeding conducted under title 3 of the Texas Family Code; or

(2)the United States or Texas Constitution requires that it be admitted.

(e) ***Pendency of an Appeal.***--A conviction for which an appeal is pending is not admissible under this rule.

(f) ***Notice.***--Evidence of a witness's conviction is not admissible under this rule if, after receiving from the adverse party a timely written request specifying the witness, the proponent of the conviction fails to provide sufficient written notice of intent to use the conviction. Notice is sufficient if it provides a fair opportunity to contest the use of such evidence.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; Unit 40, *Hearsay*; Unit 70, *Cross-Examination*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Case Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Jury Trial
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : Elements
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Voluntary Manslaughter : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Obstruction of Justice : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Resisting Arrest : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Obscenity : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview
Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : Records
Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims
Criminal Law & Procedure : Discovery & Inspection : Witness Lists : Government Witnesses
Criminal Law & Procedure : Preliminary Proceedings : Preliminary Hearings : Evidence
Criminal Law & Procedure : Preliminary Proceedings : Pretrial Diversion : General Overview
Criminal Law & Procedure : Pretrial Motions & Procedures : Motions in Limine
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Tests
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Juries & Jurors : Voir Dire : General Overview

Criminal Law & Procedure : Juries & Jurors : Voir Dire : Questions to Venire Panel
Criminal Law & Procedure : Trials : Closing Arguments : Fair Comment & Fair Response
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Due Process
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Testify
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Judicial Discretion
Criminal Law & Procedure : Trials : Motions for Mistrial
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Witnesses : Criminal Records
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Jury Instructions : Curative Instructions
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History : Prior Felonies
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Registration
Criminal Law & Procedure : Appeals : Reversible Errors : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Witnesses
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview
Criminal Law & Procedure : Habeas Corpus : Review : Specific Claims : Evidentiary Errors
Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence
Evidence : Hearsay : Rule Components
Evidence : Inferences & Presumptions : Presumptions : Rebuttal of Presumptions
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : General Overview
Evidence : Relevance : Sex Offenses : Rape Shield Laws
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances
Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice
Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview
Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility
Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility
Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview
Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility
Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility

Evidence : Testimony : Credibility : Impeachment : Juvenile Adjudications
Evidence : Testimony : Credibility : Impeachment : Prior Conduct
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview
Immigration Law : Duties & Rights of Aliens : Discrimination
Torts : Transportation Torts : General Overview

LexisNexis (R) Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

1. In a sexual assault case, the court did not violate defendant's rights under the Confrontation Clause by denying his request to cross-examine the juvenile victim regarding his status on deferred adjudication probation because there was no indication that a motion to revoke the victim's probation was pending either when he made the allegations against defendant or at the time of trial; thus, defendant did not show that the victim's deferred adjudication status placed him in a "vulnerable relationship" with the State. Irby v. State, 2008 Tex. App. LEXIS 4544 (Tex. App. Dallas June 20 2008).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Jury Trial

2. Comments or questions by prospective jurors, made in the presence of the entire panel, may be harmful to the defendant, and to be prejudicial, the remark must be reasonably calculated to prejudice other members of the panel. Making a jury panel--and thus, the jury selected from that panel--aware of a defendant's prior criminal record is inherently prejudicial because of the jury's natural inclination to infer guilt of the charged offense from that record. Russell v. State, 146 S.W.3d 705, 2004 Tex. App. LEXIS 8038 (Tex. App. Texarkana 2004).

3. Defendant's claim that the trial court erred by denying his motion to exclude evidence of his prior lengthy criminal history lacked merit, as he suggested no reason that such cross-examination would have been improper under Tex. R. Evid. 609, and his argument that allowing such impeachment deprived him of a fair and impartial trial pursuant to Tex. Const. art. I, § 10 also was not supported. Cochran v. State, 2004 Tex. App. LEXIS 1916 (Tex. App. Texarkana Feb. 27 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale

4. In a trial for delivery of crack cocaine, evidence that a confidential informant was arrested for impersonating a peace officer was properly excluded under Tex. R. Evid. 608, 609. There was no evidence that the informant was convicted. Garrett v. State, 2011 Tex. App. LEXIS 340, 2011 WL 193476 (Tex. App. Tyler Jan. 19 2011).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

5. It was proper, based in part on the reasons underlying Tex. R. Evid. 609, to exclude from a drug possession trial evidence tending to show that a detective did not immediately file charges against defendant for all of the drugs found in his possession during an earlier search. Defendant argued that the evidence should be admitted to show illegal police conduct as well as bias and lack of credibility. Perez v. State, 2010 Tex. App. LEXIS 3407, 2010 WL 1818944 (Tex. App. Austin May 5 2010).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : Elements

6. In defendant's trial on for possession of methamphetamine in the amount of one gram or more but less than four grams under Tex. Health & Safety Code Ann. §§ 481.102(6) and 481.115(a), the trial court committed reversible error in allowing the State to introduce evidence of defendant's prior drug offense convictions because the convictions occurred more than 10 years earlier and were remote under Tex. R. Evid. 609(b) and because the State failed to prove that the probative value of the evidence substantially outweighed its prejudicial effect; further, the error affected defendant's substantial rights. Because the convictions were almost identical to defendant's present charge, a clear danger existed that the improper admission of similar offenses led the jury to convict based on past conduct rather than the facts of the charged offense; in addition, the jury received no limiting instructions regarding the evidence, and rather than instructing the jury on this evidence under Tex. R. Evid. 609, the trial court erroneously instructed the jury on prior crimes evidence under Tex. R. Evid. 404(b). Thus, the jury was never properly instructed on how to use the evidence of defendant's prior convictions. Roberts v. State, 2011 Tex. App. LEXIS 5517, 2011 WL 2860106 (Tex. App. Dallas July 20 2011).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

7. Evidence was legally and factually sufficient to support defendant's conviction for harassment of a public servant in violation of Tex. Penal Code Ann. § 22.11(a)(2) where the jury could rationally have believed the police officer truthfully stated that defendant spit directly in his face and could rationally have inferred from defendant's belligerence that he intended to cause his saliva to come into contact with the officer, and where the jury could rationally have rejected the contrary testimony, none of which proved that the incident could not have happened the way the officers testified it did. Moreover, in addition to having a relationship with defendant, defendant's girlfriend had a felony conviction for assault on a public servant and had also previously been arrested for assault with family violence, and the jury could have taken her felony conviction into account in assessing her credibility, and the jury also could have given more weight to the officers' testimony after determining that the girlfriend and a neighbor were not in as good a position to notice defendant if he did spit. Smith v. State, 2010 Tex. App. LEXIS 2287, 2010 WL 1236410 (Tex. App. Beaumont Mar. 31 2010).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

8. Aggravated assault that occurred five years before defendant's burglary trial was admissible for impeachment purposes. The offenses were not similar, and defendant's credibility was vital because his testimony conflicted with that of the only witness to the crime, with regard to whether they had a prior relationship. Livingston v. State, 2011 Tex. App. LEXIS 9054, 2011 WL 5535332 (Tex. App. Texarkana Nov. 15 2011).

9. In an aggravated assault trial, there was no error in admitting, for impeachment purposes under Tex. R. Evid. 609, defendant's prior convictions for theft, burglary, and unauthorized use of a motor vehicle, in part because the State's need to impeach defendant was great, given that he was the only person testifying that he was not the aggressor. Luna v. State, 2010 Tex. App. LEXIS 3316, 2010 WL 1782237 (Tex. App. Dallas May 5 2010).

10. During defendant's trial for aggravated assault under Tex. Penal Code Ann. § 22.02, the trial court did not err in denying his Theus motion and admitting evidence of his prior convictions pursuant to Tex. R. Evid. 609 where the specific facts and circumstances supported a finding that the probative value of defendant's prior convictions substantially outweighed their prejudicial effect; all of the Theus factors favored admission of defendant's theft convictions, and, in regard to his robbery convictions, the first Theus factor regarding the impeachment value of the prior crime was the only factor that might have favored exclusion, but defendant had testified that he was not a violent man, and his robbery convictions might have been probative not simply to assess his credibility but also to respond to his testimony. Davis v. State, 259 S.W.3d 778, 2007 Tex. App. LEXIS 8749 (Tex. App. Houston 1st Dist. 2007).

11. During defendant's trial for aggravated assault under Tex. Penal Code Ann. § 22.02, the State's argument that the jury could consider defendant's prior convictions in assessing his credibility was permissible argument because the State did not ask the jurors to consider defendant's prior convictions in determining his guilt, but, rather, it simply urged them to use those convictions in evaluating defendant's credibility. Davis v. State, 259 S.W.3d 778, 2007 Tex. App. LEXIS 8749 (Tex. App. Houston 1st Dist. 2007).

12. After defendant testified on direct examination that although he had previously been convicted of three charges of aggravated assault, he had "never pulled a gun in his life" when, in fact, he had been convicted of three gun-related offenses, the trial court properly allowed the State to impeach him with the underlying facts of previous convictions. Campos v. State, 2006 Tex. App. LEXIS 4627 (Tex. App. Dallas May 30 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Children : General Overview

13. In a trial for injury to a child, it did not violate Tex. R. Evid. 609, or the Confrontation Clause to exclude evidence related to the victim's prior accusation; there was no proof in the record that the prior accusation was false or that it was similar in nature to the offenses for which defendant was charged, and the excluded evidence did not involve a pending criminal charge against the victim. Fierro v. State, 2007 Tex. App. LEXIS 2160 (Tex. App. Austin Mar. 22 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview

14. In a kidnapping trial, the court properly determined that the impeachment value under Tex. R. Evid. 609 of remote driving while intoxicated (DWI) convictions did not outweigh their potential prejudice because DWI was not a crime of deception and the complainant admitted she had a drinking problem that included a long history of DWI convictions. Further, the importance of the complainant's testimony and credibility were mitigated because another defendant's girlfriend corroborated her testimony. Celis v. State, 369 S.W.3d 691, 2012 Tex. App. LEXIS 4187, 2012 WL 1868627 (Tex. App. Fort Worth May 24 2012).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

15. Court did not abuse its discretion in excluding evidence of the witness's prior theft convictions because the convictions occurred twenty-one and nineteen years prior to trial and the witness's credibility was not critical. Enriquez v. State, 2014 Tex. App. LEXIS 2898, 2014 WL 1010174 (Tex. App. Dallas Mar. 13 2014).

16. Trial court did not abuse its discretion by admitting defendant's prior robbery conviction during his robbery trial because: (1) although the conviction was several years old, it was not remote and demonstrated a propensity for running afoul of the law; and (2) defendant's testimony and credibility were of enormous significance, as his entire defense that he was an innocent bystander to the robbery depended on his testimony. Medina v. State, 367 S.W.3d 470, 2012 Tex. App. LEXIS 2932, 2012 WL 1293035 (Tex. App. Texarkana Apr. 17 2012).

17. In a robbery trial, the admission of prior robbery convictions for impeachment under Tex. R. Evid. 609 fell within the zone of reasonable disagreement; although the similarity of the past and current crimes weighed against admission, the prior convictions were less than ten years old and the State had a significant need to impeach defendant's testimony, given that credibility was important to his defense. Berry v. State, 2006 Tex. App. LEXIS 2863 (Tex. App. Houston 14th Dist. Apr. 11 2006).

18. In a robbery trial, the court did not have to admit evidence of the complainant's prior conviction for misdemeanor assault against defendant's nephew; contrary to defendant's argument, the two-year-old conviction

was not relevant to show that the complainant ran from his apartment because he feared a physical confrontation. The court noted that the evidence would properly have been excluded for impeachment purposes because it was not a felony or a crime involving moral turpitude. Allison v. State, 2005 Tex. App. LEXIS 4055 (Tex. App. Houston 14th Dist. May 24 2005).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview

19. In a retaliation case, a court properly refused to allow impeachment of the victim with his prior theft convictions where they were more than 10 years old, the victim had no further diffculties with the law, and the probative value did not outweigh the danger of prejudice. Moore v. State, 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

20. Two citations for petty theft 13 or 14 years before trial, viewed alone, without any intervening convictions, had little bearing on the victim's present credibility; moreover, at least five other witnesses testified to defendant's threats against the victim, and thus, the trial court did not abuse its discretion in finding that the danger of unfair prejudice outweighed the probative value of the convictions. Moore v. State, 2004 Tex. App. LEXIS 3017 (Tex. App. Waco Mar. 31 2004), opinion withdrawn by 2004 Tex. App. LEXIS 6584 (Tex. App. Waco July 21, 2004), substituted opinion at 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

21. Pursuant to Tex. Penal Code Ann. § 19.02(c), defendant was convicted of murdering the victim, defendant's infant son, and trial counsel's decision to elicit testimony regarding defendant's prior juvenile adjudication could not be considered reasonable trial strategy, as it was otherwise inadmissible as impeachment evidence under Tex. R. Evid. 609 and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(i), and constituted deficient representation; however, because defendant failed to affirmatively show that the jury's consideration of a juvenile drug possession charge led the jury to assess the maximum punishment under Tex. Penal Code Ann. § 12.32(a), in defendant's murder case, defendant could not establish that defendant was prejudiced, and thus, trial counsel's representation was not ineffective. Chapa v. State, 2003 Tex. App. LEXIS 2091 (Tex. App. San Antonio Mar. 12 2003).

Criminal Law & Procedure : Criminal Offenses : Homicide : Voluntary Manslaughter : General Overview

22. In defendant's murder case, a court abused its discretion by admitting evidence of defendant's prior voluntary manslaughter conviction under Tex. R. Evid. 609 because voluntary manslaughter was an offense involving violence, and did not involve deception, the prior offense and the charged offense were similar, defendant's testimony was critical to his claim of self-defense, and the State also had impeachment evidence of a prior conviction of forgery, which was a crime involving deception and moral turpitude and was better suited for impeachment purposes. High v. State, 2006 Tex. App. LEXIS 877 (Tex. App. Houston 1st Dist. Feb. 2 2006).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : General Overview

23. Trial court did not err by excluding impeachment evidence that the victim had been convicted of the misdemeanor offense of interference with an emergency telephone call under Tex. Penal Code Ann. § 42.062 because it did not represent a crime of moral turpitude as required by Tex. R. Evid. 609(a). Urtado v. State, 333 S.W.3d 418, 2011 Tex. App. LEXIS 1251 (Tex. App. Austin Feb. 16 2011).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Obstruction of Justice : General Overview

24. Trial court did not abuse its discretion in allowing the prosecuting attorney to impeach defendant with a prior conviction for failing to identify by giving false or fictitious information where the record reflected that, when cross-examined, defendant admitted to having the prior conviction. Defendant argued that the trial court erred in allowing examination regarding the conviction because he explained on re-direct that he was simply slow in providing his identification, but defendant's explanation did not change the nature of his conviction. Mozeke v. State, 2013 Tex. App. LEXIS 7986, 2013 WL 3326828 (Tex. App. Dallas June 27 2013).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Resisting Arrest : General Overview

25. In a resisting arrest case, although defendant's previous conviction for interference with the duties of a public servant was neither a felony nor a crime of moral turpitude and was thus not admissible under Tex. R. Evid. 609(a), a court properly admitted the conviction to correct a false impression left by defendant where defendant's self-serving remarks about respect for police placed his attitude toward public servants into issue and were thus properly subject to impeachment to refute that false representation with contrary evidence. Paita v. State, 125 S.W.3d 708, 2003 Tex. App. LEXIS 10432 (Tex. App. Houston 1st Dist. 2003).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary

26. Trial court did not abuse its discretion by admitting defendant's prior burglary convictions into evidence under Tex. R. Evid. 609(b) because: (1) burglary had been found to be a crime of deception; (2) although the record did not establish what year the first two convictions occurred, the third burglary conviction occurred on August 20, 2008; and (3) defendant's testimony and credibility were of significance, as his entire defense that he was an innocent bystander to the robbery depended on his testimony. Medina v. State, 367 S.W.3d 470, 2012 Tex. App. LEXIS 2932, 2012 WL 1293035 (Tex. App. Texarkana Apr. 17 2012).

27. Aggravated assault that occurred five years before defendant's burglary trial was admissible for impeachment purposes. The offenses were not similar, and defendant's credibility was vital because his testimony conflicted with that of the only witness to the crime, with regard to whether they had a prior relationship. Livingston v. State, 2011 Tex. App. LEXIS 9054, 2011 WL 5535332 (Tex. App. Texarkana Nov. 15 2011).

28. In a case involving burglary of a building, a trial court did not abuse its discretion by admitting convictions for unauthorized use of a motor vehicle, burglary of a building, and credit card abuse for impeachment purposes where the burglary conviction satisfied four of the five elements in a test to determine admissibility, and the other convictions satisfied all five elements; inter alia, the convictions were for deception or moral turpitude offenses, they were within the 10-year period, defendant was the only witness to testify on his behalf, and one of the offenses was similar. Mixon v. State, 2007 Tex. App. LEXIS 4310 (Tex. App. El Paso May 31 2007).

29. Despite an initial misidentification of a driver who fled the scene of a residential burglary, there was sufficient evidence to convict defendant of burglary of a habitation where an officer later positively identified defendant due to a tattoo, an owner stated that he loaned defendant a truck, and the truck was later abandoned with items inside; moreover, the trial court was not permitted to consider the fact that the owner, the first person mistakenly identified, had previous convictions for burglary of a habitation. Britt v. State, 2006 Tex. App. LEXIS 4982 (Tex. App. Fort Worth June 8 2006).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview

30. In a trial for aggravated robbery, it was proper for the State to cross-examine defendant during the guilt-innocence phase of trial with evidence of three felony theft convictions that were more than ten years old because the convictions had a high impeachment value and defendant's credibility was important, as he was the only

defense witness. Meadows v. State, 2014 Tex. App. LEXIS 289, 2014 WL 84207 (Tex. App. Fort Worth Jan. 9 2014).

31. Contention of defendant upon being convicted of felony theft, that the trial court erred in allowing the State to impeach him with proof of prior convictions when he had not been given notice pursuant to Tex. R. Evid. 609(f), could not be entered on appeal, because defendant failed to object when the prosecutor inquired into his prior convictions and, thus, he failed to preserve error as required by Tex. R. App. P. 33.1. Geuder v. State, 76 S.W.3d 133, 2002 Tex. App. LEXIS 2312 (Tex. App. Houston 14th Dist. 2002), vacated by 115 S.W.3d 11, 2003 Tex. Crim. App. LEXIS 305 (Tex. Crim. App. 2003).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Obscenity : Elements

32. Because the conduct underlying defendant's public lewdness conviction, deviate sexual intercourse, violated accepted social behavior and offended society at large, public lewdness, as defined by the Texas Penal Code, constituted a crime of moral turpitude and could be used to impeach defendant's credibility. Escobedo v. State, 202 S.W.3d 844, 2006 Tex. App. LEXIS 6535 (Tex. App. Waco 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

33. In a sexual assault case, a court properly allowed evidence of defendant's prior convictions to impeach his out-of-court statement that he was not responsible for the crime where, during the recross-examination of an officer, defense counsel elicited, without objection, defendant's out-of-court statement that he was not responsible for what he was being accused. By eliciting the statement during his cross-examination of a State's witness, defendant opened the door to the issue of his credibility. Flores v. State, 2004 Tex. App. LEXIS 7207 (Tex. App. Corpus Christi Aug. 12 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

34. Trial court did not abuse its discretion in admitting evidence of appellant's two prior felony convictions under Tex. R. Evid. 609 because there was no similarity between convictions for possession of a controlled substance and aggravated sexual assault of a child, and because the State had an escalated need to impeach appellant's credibility as he was the only witness capable of denying the allegations of sexual assault. Mireles v. State, 413 S.W.3d 98, 2013 Tex. App. LEXIS 3730 (Tex. App. San Antonio Mar. 27 2013).

35. In a trial for sexual assault of a child, the State was properly allowed to impeach defendant with a conviction for felony driving while intoxicated with a child passenger. Pearson v. State, 2012 Tex. App. LEXIS 5690, 2012 WL 2899766 (Tex. App. Houston 14th Dist. July 17 2012).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : General Overview

36. Trial court did not abuse its discretion by admitting defendant's prior unauthorized use of a motor vehicle conviction during his robbery trial because: (1) the unauthorized use of a motor vehicle had been found to be a crime of deception; (2) although the prior conviction was several years old, it was not too remote to be considered and demonstrated a propensity for running afoul of the law; and (3) defendant's testimony and the credibility of that testimony were of significance, as his entire defense that he was an innocent bystander to the robbery depended on his testimony. Medina v. State, 367 S.W.3d 470, 2012 Tex. App. LEXIS 2932, 2012 WL 1293035 (Tex. App. Texarkana Apr. 17 2012).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

37. In a kidnapping trial, the court properly determined that the impeachment value under Tex. R. Evid. 609 of remote driving while intoxicated (DWI) convictions did not outweigh their potential prejudice because DWI was not a crime of deception and the complainant admitted she had a drinking problem that included a long history of DWI convictions. Further, the importance of the complainant's testimony and credibility were mitigated because another defendant's girlfriend corroborated her testimony. Celis v. State, 369 S.W.3d 691, 2012 Tex. App. LEXIS 4187, 2012 WL 1868627 (Tex. App. Fort Worth May 24 2012).

38. In a trial for defendant's aggravated assault of a former romantic partner, the trial court properly excluded evidence of the victim's prior inconsistent statement regarding a pending driving while intoxicated charge because it was not a final conviction as required by Tex. R. Evid. 609. Padilla v. State, 254 S.W.3d 585, 2008 Tex. App. LEXIS 2719 (Tex. App. Eastland 2008).

39. Theft convictions were properly admitted under Tex. R. Evid. 609 because four out of the five factors enumerated in the case of Theus v. State, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992), were satisfied; the theft convictions were crimes of moral turpitude, they were dissimilar to the charged offense of driving while intoxicated, and defendant's credibility was important since he was the only defense witness. Roach v. State, 2007 Tex. App. LEXIS 6764 (Tex. App. Corpus Christi Aug. 23 2007).

40. Where defendant objected to the admission of the prior DWI convictions alleged in the indictment for felony driving while intoxicated, because they occurred more than 10 years before the instant offense, Tex. Penal Code Ann. § 49.04 and Tex. Penal Code Ann. § 49.09 together defined the offense of felony driving while intoxicated; a prior intoxication-related conviction used to raise the offense to a felony under Tex. Penal Code Ann. § 49.09, is not an element of that offense, as Tex. Penal Code Ann § 49.09 does not describe the forbidden conduct, the required culpability, any required result, nor does it create an exception to the offense, as described in Tex. Penal Code § 1.07; Tex. Penal Code Ann. § 49.09 is more akin to a rule of admissibility, pursuant to Tex. R. Evid. 609(b), as opposed to an element of the offense. Weaver v. State, 87 S.W.3d 557, 2002 Tex. Crim. App. LEXIS 151 (Tex. Crim. App. 2002), *cert denied,* 538 U.S. 911, 123 S. Ct. 1491, 155 L. Ed. 2d 234, 2003 U.S. LEXIS 2056 (2003).

Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview

41. In a murder trial, it was error to admit evidence of defendant's prior misdemeanor conviction for weapons possession. The error was harmless because it was clear from other properly admitted evidence that defendant was familiar with handguns and had handled them in the past. Hines v. State, 2012 Tex. App. LEXIS 9262, 2012 WL 5458424 (Tex. App. Houston 1st Dist. Nov. 8 2012).

Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : Records

42. Where defendant did not challenge the trial court's ruling that the probative value of evidence of witness's juvenile adjudication of attempted capital murder was substantially outweighed by the danger of undue prejudice under Tex. R. Evid. 403, the court upheld the trial court's ruling excluding the evidence on that ground. Marsh v. State, 343 S.W.3d 158, 2011 Tex. App. LEXIS 4390 (Tex. App. Texarkana June 10 2011).

Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims

43. Defendant was not entitled to attack the arresting officer's credibility by showing that he was under investigation for violating the Occupations Code, a specific instance of misconduct, and therefore the trial court did

not abuse its discretion by determining that defendant did not establish a Brady violation. Smith v. State, 2013 Tex. App. LEXIS 9194 (Tex. App. Houston 1st Dist. July 25 2013).

Criminal Law & Procedure : Discovery & Inspection : Witness Lists : Government Witnesses

44. Defendant was not entitled to a new trial on the basis that the State failed to disclose that its witness had been arrested for felony deadly conduct and misdemeanor assault causing bodily injury-family violence. The evidence would not have been admissible for impeachment because the witness did not create a false impression that he had no other arrests than that involved in his old felony conviction. Caldwell v. State, 356 S.W.3d 42, 2011 Tex. App. LEXIS 8437 (Tex. App. Texarkana Oct. 21 2011).

Criminal Law & Procedure : Preliminary Proceedings : Preliminary Hearings : Evidence

45. Tex. R. Evid. 609(a) requires that the trial court determine whether the probative value of admitting evidence of prior convictions outweighs its prejudicial effect to a party, and Tex. R. Evid. 609(f) requires timely notice of the State's intended use of evidence of prior convictions to provide the defendant a fair opportunity to contest the use of such evidence, but the phrase "fair opportunity" does not specify at what point in the proceedings the decision as to admissibility is to be made; there is not authority holding that a "fair opportunity" means an opportunity exclusively during a pretrial hearing and not during a hearing outside the presence of the jury during a trial on the merits; thus, the trial court's denial of defendant's motion for a pretrial hearing on his Tex. R. Evid. 609 motion was neither an abuse of discretion nor reversible error. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

Criminal Law & Procedure : Preliminary Proceedings : Pretrial Diversion : General Overview

46. Denying defendant the right to impeach a witness at his trial for the unauthorized use of a motor vehicle with a remote and successfully completed deferred adjudication probation did not deny defendant his right of confrontation, because the witness's testimony did not create a false impression and he was not convicted of any offense to allow for impeachment under Tex. R. Evid. 609(a). Parker v. State, 2012 Tex. App. LEXIS 7992, 2012 WL 4121133 (Tex. App. Fort Worth Sept. 20 2012).

Criminal Law & Procedure : Pretrial Motions & Procedures : Motions in Limine

47. No error was preserved for review where defendant complained that a question regarding a prior conviction violated a ruling on a motion in limine, rather that that the admission of the evidence violated Tex. R. Evid. 609. Smith v. State, 2010 Tex. App. LEXIS 8182, 2010 WL 3928485 (Tex. App. Houston 1st Dist. Oct. 7 2010).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

48. Where defendant plead guilty to forgery and was sentenced to 19 years incarceration, the trial court had not acted improperly in considering convictions more than 10 years old to enhance his punishment where Tex. Pen. Code Ann. § 12.42 (Vernon 2003) did not impose a time limit on the use of prior convictions for the purpose of enhancing a defendant's punishment and counsel was not ineffective for having failed to object to the use of the prior convictions for enhancement purposes. Austin v. State, 2004 Tex. App. LEXIS 8114 (Tex. App. Amarillo Sept. 2 2004).

Criminal Law & Procedure : Counsel : Effective Assistance : Tests

49. Even if trial counsel's failure to raise a more specific objection under Tex. R. Evid. 609 was deficient performance, defendant did not establish that but for trial counsel's failure to raise such an objection, the result of

the proceeding would have been different; given the overwhelming evidence supporting defendant's guilt, the trial court did not abuse its discretion in denying the motion for new trial. Hargrove v. State, 2011 Tex. App. LEXIS 2517 (Tex. App. San Antonio Apr. 6 2011).

50. Trial counsel was not rendered ineffective even though, during examination of defendant concerning prior convictions, counsel included misdemeanors that did not involve moral turpitude and that were inadmissible under Tex. R. Evid. 609 because defendant failed to show prejudice. Robinson v. State, 2007 Tex. App. LEXIS 9809 (Tex. App. Houston 1st Dist. Dec. 13 2007).

51. Appellate court affirmed defendant's conviction possession of a controlled substance, namely cocaine, weighing more than four grams and less than 200 grams, with intent to deliver as defendant failed to show that prior convictions used to impeach him that his attorney failed to object to would have been inadmissible due to remoteness. Pittman v. State, 2005 Tex. App. LEXIS 653 (Tex. App. Houston 1st Dist. Jan. 27 2005).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

52. Defendant did not show that counsel was ineffective in failing to request a hearing to exclude evidence of prior convictions because defendant was the proponent of the prior conviction. Mars v. State, 2014 Tex. App. LEXIS 7342 (Tex. App. San Antonio July 9 2014).

53. Even if counsel's performance was deficient in opening the door to evidence of defendant's remote prior convictions, there was no prejudice because the trial court would still have had the discretion to allow such evidence to be introduced by the State for impeachment purposes and the evidence of guilty was substantial. Howard v. State, 2014 Tex. App. LEXIS 3051, 2014 WL 2619087 (Tex. App. Corpus Christi Mar. 20 2014).

54. Because defendant presented no evidence that the victim's prior conviction involved deception, he did not show that his trial counsel erred in the objection he offered to the trial court regarding impeachment. Charles v. State, 2013 Tex. App. LEXIS 10545 (Tex. App. Houston 1st Dist. Aug. 22 2013).

55. Defendant's counsel was ineffective for opening the door to allow the State to introduce evidence of his prior convictions of sexual assault and sexual assault of a child by asking defendant's ex-girlfriend whether defendant was a violent person and she responded that he was not; therefore, on cross-examination the State was permitted to ask the ex-girlfriend whether she knew that defendant had pleaded guilty to two prior sexual assaults, allowing prejudicial and otherwise inadmissible evidence to be presented before the jury, which could not be considered sound trial strategy. The court held that defendant was prejudiced because the credibility of defendant's testimony was a key component of his defense strategy, given that he claimed he was trying to get away from the victim and had no intention of hurting anyone; although the trial court gave the jury a limiting instruction as to how it could consider the prior convictions, the instruction specifically allowed the jury to consider the convictions for the sole purpose of determining defendant's character for violence. Hernandez v. State, 2013 Tex. App. LEXIS 6365, 2013 WL 2301989 (Tex. App. Eastland May 23 2013).

56. Defendant's forgery conviction was a felony conviction admissible for impeachment purposes under Tex. R. Evid. 609(a), and he conceded the admissibility of his four prior convictions for burglary of a vehicle; therefore trial counsel was not ineffective for introducing those convictions to the jury in an effort to appear open. Rahe v. State, 2013 Tex. App. LEXIS 1025, 2013 WL 440557 (Tex. App. Houston 14th Dist. Feb. 5 2013).

57. Counsel was constitutionally deficient in eliciting from defendant during his testimony four prior misdemeanor convictions--for possession of marijuana, carrying a deadly weapon, and two for driving with a suspended license--that were inadmissible under Tex. R. Evid. 609. Chavis v. State, 2012 Tex. App. LEXIS 9975 (Tex. App. Houston

14th Dist. Dec. 4 2012).

58. Because defendant's two prior felony convictions were inadmissible under Tex. R. Evid. 609, but defense counsel opened the door for the State to cross-examine defendant's about those convictions by questioning defendant about his convictions, defense counsel was ineffective under U.S. Const. amend. VI; Tex. Const. art. I, § 10. Vasquez v. State, 2012 Tex. App. LEXIS 8496, 2012 WL 4826966 (Tex. App. Eastland Oct. 11 2012).

59. Record was silent as to the reasons behind trial counsel's strategy for not obtaining a ruling on the motion to permit defendant to testify free from impeachment by prior criminal convictions; defendant did not meet his burden of demonstrating that his counsel was deficient. West v. State, 2012 Tex. App. LEXIS 3612, 2012 WL 1606239 (Tex. App. Houston 14th Dist. May 8 2012).

60. Trial counsel was not ineffective for failing to object to the State's use defendant's prior convictions for impeachment purposes under Tex. R. Evid. 609 because the convictions were listed in the county jail book-in, book-out record that defendant introduced into evidence while acting as his own counsel, and therefore he opened the door to an inquiry by the State. Matlock v. State, 2012 Tex. App. LEXIS 1120, 2012 WL 426613 (Tex. App. Tyler Feb. 8 2012).

61. Defendant failed to prove that defense counsel was ineffective during a trial for robbery by eliciting testimony about his prior theft case, because the trial court would have acted within its discretion to admit the prior conviction for purposes of impeachment under Tex. R. Evid. 609. Theft was a crime of moral turpitude involving elements of deception; therefore, it had a high impeachment value and it fell within the ten-year restriction of Tex. R. Evid. 609. Huerta v. State, 359 S.W.3d 887, 2012 Tex. App. LEXIS 852, 2012 WL 311677 (Tex. App. Houston 14th Dist. Feb. 2 2012).

62. Defendant did not show that counsel rendered ineffective assistance of counsel when he did not object to the admission of his prior convictions used for impeachment where trial counsel was not ineffective for not making a meritless objection and he failed to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Matlock v. State, 2011 Tex. App. LEXIS 8496, 2011 WL 5115877 (Tex. App. Tyler Oct. 26 2011).

63. In a case where defendant was convicted of two counts of aggravated sexual assault, based on the trial strategy of arguing that the sex was consensual, counsel was not ineffective for failing to object to the evidence of extraneous offenses during the State's case and in eliciting testimony from defendant regarding previous convictions for burglary of a habitation under Tex. Penal Code Ann. § 30.02, delivery of a simulated drug under Tex. Health & Safety Code Ann. § 482.002, failure to identify to a police officer, and assaults causing bodily injury upon female victims because that evidence would have been brought out during cross-examination of defendant. Douglas v. State, 2010 Tex. App. LEXIS 9086, 2010 WL 4638778 (Tex. App. San Antonio Nov. 17 2010).

64. Appellant failed to establish ineffective assistance of counsel based on his trial counsel's questioning of appellant about prior convictions for possession of a controlled substance and for theft because the State would not have been precluded from introducing the convictions into evidence under Tex. R. Evid. 609 as, inter alia, the theft conviction involved a crime of moral turpitude and the past crimes were recently committed. Scope v. State, 2010 Tex. App. LEXIS 6824, 2010 WL 3220627 (Tex. App. Houston 1st Dist. Aug. 12 2010).

65. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the

witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

66. Defendant failed to preserve a complaint that impeachment with a prior burglary conviction violated Tex. R. Evid. 609 because defendant did not timely object and did not object on the grounds urged appeal, as required by Tex. R. App. P. 33; counsel was not ineffective in failing to object because the record was not clear as to whether defendant satisfactorily completed probation or even what type of punishment was actually assessed. Campbell v. State, 2008 Tex. App. LEXIS 1707 (Tex. App. Eastland Mar. 6 2008).

67. Counsel was not ineffective for permitting the jury to hear evidence of defendant's prior convictions that were inadmissible under Theus because defendant's prior theft convictions, prior felony drug convictions, and his conviction for lying to the police were likely admissible; because it also appeared that defendant's candor before the jury concerning his prior convictions was a strategic attempt to appear open and honest, and to lessen the impact of any impeachment on the issue, it could not be concluded that counsel provided ineffective assistance with regard to the introduction of those convictions. Martin v. State, 265 S.W.3d 435, 2007 Tex. App. LEXIS 7652 (Tex. App. Houston 1st Dist. 2007).

68. Defense counsel was not ineffective for failing to object to inadmissible impeachment evidence consisting of defendant's prior convictions because on direct examination, defendant preemptively admitted to numerous prior convictions in an attempt to minimize any damage. Andrews v. State, 2007 Tex. App. LEXIS 7217 (Tex. App. Texarkana Sept. 5 2007).

69. Trial counsel was not ineffective for introducing defendant's four remote felony convictions and one remote misdemeanor convictions into evidence during his sexual assault trial; in introducing the prior convictions counsel may have been attempting to convince the jury that, despite defendant's criminal history, he had never been convicted of a crime that was sexual in nature or involved a child. Smith v. State, 2007 Tex. App. LEXIS 254 (Tex. App. Houston 1st Dist. Jan. 11 2007).

70. Defendant did not establish that that he received ineffective assistance of counsel when his attorney elicited testimony from him about an assault after the prosecutor failed to raise the assault during cross-examination; there was no record establishing whether defendant was convicted; therefore, the court could not determine if his counsel opened the door to evidence that would have been inadmissible under Tex. R. Evid. 609. Williams v. State, 2006 Tex. App. LEXIS 1797 (Tex. App. Houston 14th Dist. Mar. 2 2006).

71. In a resisting arrest case, counsel was ineffective where, inter alia, counsel failed to investigate or interview defendant in detail about his criminal history or his prior contacts with the arresting officer; failed to seek discovery from the State; failed to file and obtain rulings on a motion in limine to require the State to raise extraneous matters outside the presence of the jury; failed to prepare defendant to testify; failed to object to evidence of inadmissible extraneous matters during the guilt phase; invited evidence of unadjudicated arrests during the punishment phase; and failed to object to failure of the punishment-phase charge to include a reasonable doubt instruction. Walker v. State, 195 S.W.3d 250, 2006 Tex. App. LEXIS 1381 (Tex. App. San Antonio 2006).

72. In an aggravated robbery case, defendant failed to show that his trial counsel was ineffective in eliciting testimony from him concerning extraneous offenses; defendant was unable to rebut the presumption that counsel made a reasonable strategic decision, the extraneous offenses were arguably admissible under Tex. R. Evid. 609, and defendant did not show a reasonable probability that the result would otherwise have been different. Perez v. State, 2005 Tex. App. LEXIS 1918 (Tex. App. Dallas Mar. 14 2005).

73. In an aggravated assault case, defense counsel was not ineffective for eliciting testimony from defendant regarding two non-final prior convictions, evidence of which would have been inadmissible under Tex. R. Evid. 609(e), because counsel could reasonably have thought the testimony would make a self-defense claim more believable. Robertson v. State, 2004 Tex. App. LEXIS 10130 (Tex. App. Waco Nov. 10 2004), reversed by 187 S.W.3d 475, 2006 Tex. Crim. App. LEXIS 576 (Tex. Crim. App. 2006).

74. In an aggravated robbery case, defense counsel was not ineffective in failing to object to the state's use of defendant's juvenile record for impeachment; although Tex. R. Evid. 609(d) provides that evidence of a juvenile adjudication generally is not admissible to impeach a witness, defendant opened the door to the admission of such evidence when he volunteered during cross-examination that he had never been in trouble before. Andrews v. State, 2003 Tex. App. LEXIS 9955 (Tex. App. Eastland Nov. 20 2003).

75. Pursuant to Tex. Penal Code Ann. § 19.02(c), defendant was convicted of murdering the victim, defendant's infant son, and trial counsel's decision to elicit testimony regarding defendant's prior juvenile adjudication could not be considered reasonable trial strategy, as it was otherwise inadmissible as impeachment evidence under Tex. R. Evid. 609 and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(i), and constituted deficient representation; however, because defendant failed to affirmatively show that the jury's consideration of a juvenile drug possession charge led the jury to assess the maximum punishment under Tex. Penal Code Ann. § 12.32(a), in defendant's murder case, defendant could not establish that defendant was prejudiced, and thus, trial counsel's representation was not ineffective. Chapa v. State, 2003 Tex. App. LEXIS 2091 (Tex. App. San Antonio Mar. 12 2003).

Criminal Law & Procedure : Juries & Jurors : Voir Dire : General Overview

76. During voir dire in defendant's trial for possession of methamphetamine enhanced by two prior felonies, the court abused its discretion by prohibiting defense counsel from asking a potential juror if he would automatically disbelieve a convicted felon; counsel's question was a proper commitment question; under the rules of evidence, a juror has a right to disbelieve a convicted felon. Tijerina v. State, 202 S.W.3d 299, 2006 Tex. App. LEXIS 6073 (Tex. App. Fort Worth 2006).

77. If a potential juror states that he would automatically disbelieve a witness who has not yet testified based solely on the witness's status as a felon, that potential juror cannot impartially judge the credibility of the convicted felon witness just as a potential juror who would automatically believe a police officer cannot impartially judge the credibility of a police officer. Tijerina v. State, 2006 Tex. App. LEXIS 853 (Tex. App. Fort Worth Feb. 2 2006), *opinion withdrawn by, substituted opinion at*202 S.W.3d 299, 2006 Tex. App. LEXIS 6073 (Tex. App. Fort Worth July 13, 2006).

Criminal Law & Procedure : Juries & Jurors : Voir Dire : Questions to Venire Panel

78. Reversible error occurred when criminal defense counsel was prevented from asking a proper commitment question as to whether jurors would automatically disbelieve a witness with a prior felony conviction. Although a juror could disbelieve any witness once the witness testified, a potential juror could not impartially judge the credibility of a convicted felon witness if the potential juror stated that he or she would automatically disbelieve a witness who had not yet testified, based solely on the witness's status as a felon. Vann v. State, 216 S.W.3d 881, 2007 Tex. App. LEXIS 1001 (Tex. App. Fort Worth 2007).

Criminal Law & Procedure : Trials : Closing Arguments : Fair Comment & Fair Response

79. During defendant's trial for aggravated assault under Tex. Penal Code Ann. § 22.02, the State's argument that the jury could consider defendant's prior convictions in assessing his credibility was permissible argument because the State did not ask the jurors to consider defendant's prior convictions in determining his guilt, but, rather, it simply urged them to use those convictions in evaluating defendant's credibility. Davis v. State, 259 S.W.3d 778, 2007 Tex. App. LEXIS 8749 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance

80. Although defense counsel's introduction of impeaching testimony ahead of the State might have supported defendant's claim of ineffective assistance of counsel where impeachment by the State would have been improper under Tex. R. Evid. 609(a) and (b), it was possible that it was important for the jury to know that the witness did not otherwise have a criminal record of any sort, that her single arrest was more than 11 years ago, and that the arrest was for possession of an item her then-boyfriend had in their house. Counsel therefore had a valid tactical reason for introducing the impeaching evidence, thereby defeating the ineffective assistance of counsel claim. Owen v. State, 2004 Tex. App. LEXIS 1556 (Tex. App. Texarkana Feb. 18 2004).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Due Process

81. At defendant's trial for aggravated assault on a public servant and evading arrest with a motor vehicle, the trial court's refusal to guarantee that he could testify free from impeachment of prior convictions did not deprive him of his rights to due process and to present a complete defense as he did not have a constitutional right to testify free from impeachment. Since defendant never testified and was never impeached, a conclusion of harmful error was speculative. Aguilar v. State, 2013 Tex. App. LEXIS 10897 (Tex. App. El Paso Aug. 28 2013).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Testify

82. Counsel's advise that defendant not testify was reasonable trial strategy, in part because defendant had prior convictions. Although they were generally inadmissible under Tex. R. Evid. 609(b), it would have been possible for defendant to open the door to their admission through his testimony. Henriquez v. State, 2010 Tex. App. LEXIS 1759 (Tex. App. Austin Mar. 10 2010).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

83. There was no abuse of discretion in a trial court's keeping defendant from cross-examining one of the State's witnesses about the circumstances of the crime that resulted in her being placed on community supervision because while defendant was permitted to establish that the witness had been convicted of a felony offense, he could not inquire as to the circumstances surrounding the offense. The trial court did not abuse its discretion in precluding defendant from pursuing inadmissible evidence. Griffith v. State, 2013 Tex. App. LEXIS 8942 (Tex. App. Texarkana July 19 2013).

84. Trial court did not abuse its discretion by refusing to allow him to cross-examine the officer about specific acts of misconduct allegedly showing he was violent and not credible with citizens in the community because no charges were brought against the officer for any of the alleged misconduct and it was not shown that those events were connected to the officer defendant was tried for, namely shooting the officer. Castillo v. State, 2013 Tex. App. LEXIS 2034, 2013 WL 781776 (Tex. App. San Antonio Mar. 1 2013).

85. There was no error in denying defendant the opportunity to cross-examine a witness about whether the witness was untruthful to the judge that presided over the witness's guilty plea to an assault charge. Tex. R. Evid. 609 did not apply because nothing in the appellate record showed that the witness had either been charged with or convicted of any crime. Reyes v. State, 2010 Tex. App. LEXIS 2359, 2010 WL 1254543 (Tex. App. Corpus Christi Apr. 1 2010).

86. During defendant's trial for indecency with a child, the trial court abused its discretion in preventing defendant from cross-examining the complainant under Tex. R. Evid. 609 about her previous false allegations of sexual assault. The evidence was admissible under Tex. R. Evid. 404(b) to show the complainant's bias against defendant and her possible motive to testify falsely against him. Hammer v. State, 296 S.W.3d 555, 2009 Tex. Crim. App. LEXIS 513 (Tex. Crim. App. 2009).

87. In an indecency with a child case, a court properly restricted defendant's cross-examination of the victim's mother regarding benefits from a crime victims' compensation fund intended to show that she sought financial gain as a consequence of the incident because the proffered evidence was only marginally probative on the issue of bias or motive, and the mother was effectively impeached because she was incarcerated at the time of trial serving a sentence for forgery and had given custody of her children to a relative. Hoover v. State, 2007 Tex. App. LEXIS 1549 (Tex. App. Austin Feb. 27 2007).

88. Pursuant to Tex. R. Evid. 609(a), the State was entitled to cross-examine defendant on his prior arrests and convictions for impeachment purposes because he opened the door to his criminal history when he gave misleading responses to his counsel's inquiry into his problems with the law in that he implied that his criminal history consisted only of minor traffic offenses and a justifiable assault on an animal control officer. The trial court could have reasonably concluded that defendant left a false impression with the jury with respect to the extent of his trouble with the law. Martinez v. State, 2005 Tex. App. LEXIS 7748 (Tex. App. El Paso Sept. 22 2005).

Criminal Law & Procedure : Trials : Judicial Discretion

89. Whether or not to admit remote convictions is within the trial courts' discretion and depends on the facts and circumstances of each case. Woodall v. State, 77 S.W.3d 388, 2002 Tex. App. LEXIS 3087 (Tex. App. Fort Worth 2002).

Criminal Law & Procedure : Trials : Motions for Mistrial

90. Court did not err in denying a mistrial where the State inquired into defendant's mother's criminal history where the trial court issued a definitive instruction to disregard both the question and the answer, and also advised the jury that the charge had been dismissed in 1986. In addition, given that the improper question arose during the punishment phase, the question was not so inflammatory or so likely to prejudice the jury's view of the defendant that the jury would have been unable to follow the trial court's instruction to disregard. Garza v. State, 2005 Tex. App. LEXIS 6843 (Tex. App. San Antonio Aug. 24 2005).

Criminal Law & Procedure : Witnesses : Credibility

91. In defendant's sexual assault case, evidence was improperly excluded because it was admissible to impeach the complainant's credibility. The evidence in the records not only addressed the complainant's mental state but directly addressed her inability to separate fantasy from reality; the therapist's notes raised the possibility that the complainant had not been abused by defendant but had created the event in her mind or confused an actual event with fantasy. State v. Moreno, 297 S.W.3d 512, 2009 Tex. App. LEXIS 7642 (Tex. App. Houston 14th Dist. Oct. 1 2009).

92. Court properly limited cross-examination of a witness because defendant's attempt to use an instance during an officer's career in which he wrote "phantom" warning citations was nothing more than an instance of wrongdoing in his life and was not shown to bear on his general reputation for truthfulness. There was nothing which revealed that the act of wrongdoing created a bias on the part of the officer against defendant or caused the officer to have a motive to testify untruthfully. McMillon v. State, 294 S.W.3d 198, 2009 Tex. App. LEXIS 6238 (Tex. App. Texarkana Aug. 12 2009).

93. During voir dire in defendant's trial for possession of methamphetamine enhanced by two prior felonies, the court abused its discretion by prohibiting defense counsel from asking a potential juror if he would automatically disbelieve a convicted felon; counsel's question was a proper commitment question; under the rules of evidence, a juror has a right to disbelieve a convicted felon. Tijerina v. State, 202 S.W.3d 299, 2006 Tex. App. LEXIS 6073 (Tex. App. Fort Worth 2006).

94. If a potential juror states that he would automatically disbelieve a witness who has not yet testified based solely on the witness's status as a felon, that potential juror cannot impartially judge the credibility of the convicted felon witness just as a potential juror who would automatically believe a police officer cannot impartially judge the credibility of a police officer. Tijerina v. State, 2006 Tex. App. LEXIS 853 (Tex. App. Fort Worth Feb. 2 2006), *opinion withdrawn by, substituted opinion at*202 S.W.3d 299, 2006 Tex. App. LEXIS 6073 (Tex. App. Fort Worth July 13, 2006).

Criminal Law & Procedure : Witnesses : Criminal Records

95. Court did not err by prohibiting defense counsel from asking a witness about his earlier convictions because the witness responded truthfully and responsively, and in accordance with the parties' prior agreement, to the State's questioning regarding his prior criminal history; the witness followed the court's explicit instructions to answer questions only about the three specified prior convictions. Turner v. State, 443 S.W.3d 328, 2014 Tex. App. LEXIS 8641 (Tex. App. Houston 1st Dist. Aug. 7 2014).

96. Trial court did not err in allowing the State of Texas to impeach defendant, who was being tried for robbery and evading arrest, evidence of defendant's nearly 30-year-old prior convictions for robbery pursuant to Tex. R. Evid. 609, as three of the five factors for determining the admissibility of the evidence weighed in favor of admissibility. Therefore, the court's decision did not lie outside the zone of reasonable disagreement. Bradden v. State, 2004 Tex. App. LEXIS 11142 (Tex. App. Waco Dec. 8 2004).

97. Trial court abused its discretion in allowing the State to impeach defendant, who was charged with murder, with his 16-year-old convictions for aggravated rape and a crime against nature because crimes of violence had a higher prejudicial potential than impeachment value, defendant's testimony was critical to his claim of self-defense, the State's ability to use defendant's recent theft convictions to impeach him drastically lessened its need to use the aggravated rape and crime against nature convictions and defendant did not open the door to the admission of these convictions by claiming that he had not been in trouble before. Jackson v. State, 11 S.W.3d 336, 1999 Tex. App. LEXIS 9471 (Tex. App. Houston 1st Dist. 1999).

Criminal Law & Procedure : Witnesses : Impeachment

98. Court erred by admitting defendant's prior felony conviction for possession of MDMA because it was for possession of cocaine, which had little impeachment value, and it happened 9 years before the instant case. However, the error was harmless because defendant admitted to knowingly possessing steroids for personal use and MDMA with the intent to deliver it. Flores v. State, 2013 Tex. App. LEXIS 1809 (Tex. App. Dallas Feb. 26 2013).

99. Court did not abuse its discretion in excluding the evidence concerning the officer's prior drug arrest because, at no time during direct examination did the officer make any statements concerning his past conduct that suggested he had never been arrested, charged, or convicted of any offense nor did he create a false impression of law abiding behavior. Sheppard v. State, 2012 Tex. App. LEXIS 10638, 2012 WL 6698963 (Tex. App. Austin Dec. 21 2012).

100. In a case in which defendant was convicted of two counts of theft less than $ 1,500, the trial court had not abused its discretion in permitting the State to impeach defendant with nine prior convictions pursuant to Tex. R. Evid. 609(a) where: (1) defendant's five prior convictions for unauthorized use of a motor vehicle, two prior theft convictions, and one prior burglary of a motor vehicle conviction all had strong impeachment value because they were crimes that involved deception; (2) although only one of defendant's prior convictions was relatively recent, the number of prior convictions demonstrated his propensity for lawlessness; and (3) defendant was the only witness in his defense, and because of his testimony, the State needed the opportunity to impeach his credibility. Parker v. State, 2011 Tex. App. LEXIS 9612, 2011 WL 6091248 (Tex. App. Waco Dec. 7 2011).

101. In a murder trial, defendant was properly precluded from inquiring about a witness's juvenile probation because there was not a causal connection between the probation and the allegations against defendant. Patterson v. State, 2006 Tex. App. LEXIS 6141 (Tex. App. Dallas July 18 2006).

102. Court did not err in denying a mistrial where the State inquired into defendant's mother's criminal history where the trial court issued a definitive instruction to disregard both the question and the answer, and also advised the jury that the charge had been dismissed in 1986. In addition, given that the improper question arose during the punishment phase, the question was not so inflammatory or so likely to prejudice the jury's view of the defendant that the jury would have been unable to follow the trial court's instruction to disregard. Garza v. State, 2005 Tex. App. LEXIS 6843 (Tex. App. San Antonio Aug. 24 2005).

103. In a sexual assault case, a court properly allowed evidence of defendant's prior convictions to impeach his out-of-court statement that he was not responsible for the crime where, during the recross-examination of an officer, defense counsel elicited, without objection, defendant's out-of-court statement that he was not responsible for what he was being accused. By eliciting the statement during his cross-examination of a State's witness, defendant opened the door to the issue of his credibility. Flores v. State, 2004 Tex. App. LEXIS 7207 (Tex. App. Corpus Christi Aug. 12 2004).

Criminal Law & Procedure : Jury Instructions : Curative Instructions

104. Although it was error under Tex. R. Evid. 609 for the prosecution to ask whether a defense witness was on deferred adjudication for indecency with a child at the time of the charged assault, the error was rendered harmless by an instruction to disregard the unanswered question. Dotson v. State, 2011 Tex. App. LEXIS 5255, 2011 WL 2714058 (Tex. App. San Antonio July 13 2011).

105. Court did not err in denying a mistrial where the State inquired into defendant's mother's criminal history where the trial court issued a definitive instruction to disregard both the question and the answer, and also advised the jury that the charge had been dismissed in 1986. In addition, given that the improper question arose during the punishment phase, the question was not so inflammatory or so likely to prejudice the jury's view of the defendant that the jury would have been unable to follow the trial court's instruction to disregard. Garza v. State, 2005 Tex. App. LEXIS 6843 (Tex. App. San Antonio Aug. 24 2005).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

106. At defendant's trial for burglary of a habitation, the trial court was not required to give an instruction in the jury charge limiting the use of defendant's prior convictions for impeachment purposes only because defendant never requested a limiting instruction at the time the evidence was introduced. Reyes v. State, 422 S.W.3d 18, 2013 Tex. App. LEXIS 13573, 2013 WL 5872738 (Tex. App. Waco Oct. 31 2013).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History

107. Defendant's objections to the admission of his juvenile adjudications based on the lack of a judicial signature, the reliability of the adjudications, and their remoteness, based on Tex. R. Evid. 609, were misplaced because Rule 609 only applied to convictions admitted for impeachment, not convictions admitted during the punishment phase of a trial. His juvenile adjudications were properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07. Avendano v. State, 2008 Tex. App. LEXIS 5832 (Tex. App. El Paso July 31, 2008).

108. For there to be a conviction, there must ordinarily be a judgment of guilt for the crime in question; therefore, a trial court should not have allowed the State to impeach defendant under Tex. R. Evid. 609 with offenses that had been dismissed after being admitted and applied during sentencing in a prior case, pursuant to Tex. Penal Code Ann. § 12.45. Lopez v. State, 253 S.W.3d 680, 2008 Tex. Crim. App. LEXIS 642 (Tex. Crim. App. 2008).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History : Prior Felonies

109. In a case involving possession of heroin, a trial court did not err by overruling objections made to prior felony convictions from 1978 and 1988 because prior convictions introduced during the punishment phase of a trial were not subject to the remoteness limitation in Tex. R. Evid. 609(b). Therefore, defendant's sentence was properly enhanced, and a sentence of 16 years and 7 months was proper. Eisenmenger v. State, 2009 Tex. App. LEXIS 4042, 2009 WL 988658 (Tex. App. Dallas Apr. 14 2009).

110. Where defendant plead guilty to forgery and was sentenced to 19 years incarceration, the trial court had not acted improperly in considering convictions more than 10 years old to enhance his punishment where Tex. Pen. Code Ann. § 12.42 (Vernon 2003) did not impose a time limit on the use of prior convictions for the purpose of enhancing a defendant's punishment and counsel was not ineffective for having failed to object to the use of the prior convictions for enhancement purposes. Austin v. State, 2004 Tex. App. LEXIS 8114 (Tex. App. Amarillo Sept. 2 2004).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

111. Trial court did not err by admitting evidence during sentencing of defendant's nonadjudicated conduct under this rule. Winstead v. State, 2014 Tex. App. LEXIS 8577 (Tex. App. Corpus Christi Aug. 7 2014).

112. In a trial for defendant's sexual assault of his 12-year-old daughter, evidence that the victim had been previously assaulted by another relative was properly excluded in the punishment phase after the victim described the impact of the assault, including three attempted suicides, in part because the prior assault did not fit into any of the exceptions under Tex. R. Evid. 412; it was irrelevant under Tex. R. Evid. 609. Delapaz v. State, 297 S.W.3d 824, 2009 Tex. App. LEXIS 7510 (Tex. App. Eastland Sept. 24 2009).

113. In a criminal prosecution for possession of cocaine, the trial court abused its discretion during the punishment phase of trial by allowing the State to prove defendant's previous convictions through judgments and a fingerprint expert; defendant was aware of the previous convictions, due to notices filed by the State pursuant Tex. Code Crim.

Proc. Ann. art. 37.07 and Tex. R. Evid. 404. Lewis v. State, 2007 Tex. App. LEXIS 8218 (Tex. App. Dallas Oct. 17 2007).

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

114. Defendant failed to preserve for appellate review his claim that the trial court rendered his decision to testify involuntary by misstating the law concerning the admissibility of his prior convictions because he did not raise the complaint in the trial court; even if defendant had preserved error, he failed to show that the trial court's alleged misstatement rendered his decision not to testify involuntary because the record indicated that his counsel had already counseled him as to the issues involved in deciding whether to testify and that defendant had further discussions with his counsel after the trial court's alleged misstatements. Stokes v. State, 221 S.W.3d 101, 2006 Tex. App. LEXIS 11341 (Tex. App. Houston 14th Dist. 2006).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Registration

115. In defendant's indecent exposure case, trial court was within its discretion in admitting defendant's 2005 conviction for failure to register as a sex offender because defendant contradicted the only other witness called to the stand with direct knowledge of the incident -- the complainant; those circumstances heightened the State's need to impeach defendant's credibility. The State did not go into any detail about the underlying crime, and the trial court instructed the jury not to consider the evidence for purposes other than impeachment. Tristan v. State, 393 S.W.3d 806, 2012 Tex. App. LEXIS 8895, 2012 WL 5285673 (Tex. App. Houston 1st Dist. Oct. 25 2012).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

116. Trial court erred by admitting impeachment evidence of prior possession offenses that defendant had pleaded guilty to under Tex. Penal Code Ann. § 12.45 because he was not convicted of the two possession offenses, as neither the indictment nor the plea bargain was part of the record, and the judgment referred only to defendant's conviction of illegal investment; the trial court also failed to determine whether the probative value of admitting the two possession offenses as impeachment evidence outweighed its prejudicial effect to defendant as required under Tex. R. Evid. 609; defendant was harmed by the error under Tex. R. App. P. 44 because: (1) during cross-examination, defendant admitted to the two possession offenses as part of his plea bargain; (2) defendant's credibility was crucial to his defense that the sergeant was mistaken as to the identity of the seller; and (3) in closing arguments the State emphasized the impeachment evidence. Lopez v. State, 230 S.W.3d 875, 2007 Tex. App. LEXIS 5695 (Tex. App. Eastland 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

117. Defendant did not preserve error as to a probative/prejudicial argument under Tex. R. Evid. 609 because during the evidentiary hearing, he did not address that issue. Yanez v. State, 187 S.W.3d 724, 2006 Tex. App. LEXIS 1289 (Tex. App. Corpus Christi 2006).

118. In a criminal trial for aggravated sexual assault, the State gave notice of its intention to use evidence of extraneous offenses committed by defendant and the trial court admitted the evidence. Because defendant did not object on the ground that the State's notice was untimely, the issue was not preserved for review. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

119. Contention of defendant upon being convicted of felony theft, that the trial court erred in allowing the State to impeach him with proof of prior convictions when he had not been given notice pursuant to Tex. R. Evid. 609(f), could not be entered on appeal, because defendant failed to object when the prosecutor inquired into his prior convictions and, thus, he failed to preserve error as required by Tex. R. App. P. 33.1. Geuder v. State, 76 S.W.3d

133, 2002 Tex. App. LEXIS 2312 (Tex. App. Houston 14th Dist. 2002), vacated by 115 S.W.3d 11, 2003 Tex. Crim. App. LEXIS 305 (Tex. Crim. App. 2003).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

120. Defendant failed to preserve his objections to the admission of his prior convictions that occurred in 1999 because he specifically objected only to a 1981 conviction, he did not obtain a running objection, and he did not request a hearing outside the jury's presence. Blount v. State, 2012 Tex. App. LEXIS 4534 (Tex. App. Waco June 6 2012).

121. Even if the trial court erred by admitting defendant's 1981 convictions under Tex. R. Evid. 609, the error was harmless because the State offered evidence of defendant's lengthy and varied criminal history by questioning him about his prior convictions that occurred in 1999, 2000, 2002, 2004, and 2005. Blount v. State, 2012 Tex. App. LEXIS 4534 (Tex. App. Waco June 6 2012).

122. Where defendant did not testify or provide evidence of what his testimony would have been, he did not preserve an argument under Tex. R. Evid. 609 that the trial court erroneously held he would be subject to impeachment with prior felony convictions if he chose to testify. Thompson v. State, 2011 Tex. App. LEXIS 6459, 2011 WL 3585978 (Tex. App. Houston 14th Dist. Aug. 16 2011).

123. Defendant failed to preserve error under Tex. R. App. P. 33.1(a) as to evidence of prior convictions that were more than 10 years old because his motion in limine objecting under Tex. R. Evid. 609(b) preserved no error, he did not obtain an adverse ruling on the remoteness issue, he did not object at trial, and he opened the door to the evidence by mentioning his criminal history. Nobles v. State, 2010 Tex. App. LEXIS 2605, 2010 WL 1491858 (Tex. App. San Antonio Apr. 14 2010).

124. In a driving while intoxicated case, defendant preserved the issue of whether theft convictions were admissible under Tex. R. Evid. 609 when he objected upon their introduction; however, he failed to preserve the issue in relation to an aggravated assault conviction since no objection was made when the evidence was introduced. Roach v. State, 2007 Tex. App. LEXIS 6764 (Tex. App. Corpus Christi Aug. 23 2007).

125. Defendant's argument that the trial court erred by admitting a prior burglary conviction into evidence under Tex. R. Evid. 609(b) was rejected because defendant failed to preserve the argument for appellate review, as he did not present his argument to the trial court. Rule 609(b) did not apply because the prior conviction was admitted to show intent, not to impeach defendant's testimony; defendant did not testify. Boone v. State, 2007 Tex. App. LEXIS 4424 (Tex. App. Beaumont June 6 2007).

126. In a case of aggravated sexual assault of a child, defendant could not challenge the propriety of the trial court's ruling that the State could impeach him with prior convictions because he did not testify. Hector v. State, 2006 Tex. App. LEXIS 3653 (Tex. App. Houston 14th Dist. May 2 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

127. Defendant failed to preserve his argument that dismissed offenses under Tex. Penal Code Ann. § 12.45 should not have been used to impeach him because they were not final convictions as required by Tex. R. Evid. 609 because defendant did not make a timely objection thereto as required by Tex. R. App. P. 33. Lopez v. State, 2007 Tex. App. LEXIS 4036 (Tex. App. Eastland May 24 2007).

128. In a case involving assault-family violence, an error under Tex. R. Evid. 609 was not preserved for appellate review where defendant did not offer evidence of a prior conviction of a witness, nor did he argue that Tex. R. Evid. 609 violated his constitutional rights. Atkinson v. State, 2007 Tex. App. LEXIS 1348 (Tex. App. Fort Worth Feb. 22 2007).

129. During defendant's murder trial, the State questioned him about two extraneous offenses and defense counsel did not object under Tex. R. Evid. 403, Tex. R. Evid. 404, or Tex. R. Evid. 609 regarding either offense; in accordance with Tex. R. App. P. 33.1, defendant could not raise these issues on appeal. Cotton v. State, 2006 Tex. App. LEXIS 5445 (Tex. App. Houston 14th Dist. June 27 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

130. Defendant waived a complaint under Tex. R. Evid. 609 regarding the admission of prior crimes impeachment evidence because it did not comport with his objection at trial under Tex. R. Evid. 404. Pearson v. State, 2012 Tex. App. LEXIS 5690, 2012 WL 2899766 (Tex. App. Houston 14th Dist. July 17 2012).

131. Pursuant to Tex. R. Evid. 609(a), because defendant did not testify during the guilt phase of the trial, he failed to preserve any error regarding the trial court's ruling on his pretrial motion to testify free from impeachment in that phase of the trial. Nkrumah Lamumba Valier v. State, 2011 Tex. App. LEXIS 8947, 2011 WL 5428861 (Tex. App. Houston 1st Dist. Nov. 10 2011).

132. Defendant failed to preserve a complaint that impeachment with a prior burglary conviction violated Tex. R. Evid. 609 because defendant did not timely object and did not object on the grounds urged appeal, as required by Tex. R. App. P. 33; counsel was not ineffective in failing to object because the record was not clear as to whether defendant satisfactorily completed probation or even what type of punishment was actually assessed. Campbell v. State, 2008 Tex. App. LEXIS 1707 (Tex. App. Eastland Mar. 6 2008).

133. Defendant's objection to the admissibility of a remote conviction under Tex. R. Evid. 609 was properly preserved for review under Tex. R. App. P. 33 because defendant's objection was timely and stated the specific ground of objection; under Tex. R. Evid 103 defendant was not required to object to the admission of the evidence at the time that evidence was offered before the jury during cross-examination because the trial court ruled on the objection outside the presence of the jury. Grant v. State, 247 S.W.3d 360, 2008 Tex. App. LEXIS 1135 (Tex. App. Austin 2008).

134. In a case involving an objection to the admission of theft convictions introduced under Tex. R. Evid. 609, although defendant's argument on appeal used the more specific balancing language, it comported with his general remoteness objection before the trial court; therefore, it was subject to appellate review. Roach v. State, 2007 Tex. App. LEXIS 6764 (Tex. App. Corpus Christi Aug. 23 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

135. Trial court did not abuse its discretion by allowing the State to introduce testimony about defendant's criminal record during the guilt-innocence phase of his trial because the State was authorized under Tex. R. Evid. 806 to impeach defendant's hearsay testimony; the two witnesses' testimony was hearsay, as they were statements of defendant made out of court to prove that defendant had purchased the laptop from a friend. The Theus factors also weighed in favor of admission, as all of defendant's prior convictions but one involved crimes of moral turpitude or theft, defendant's otherwise remote convictions were followed by additional convictions, and had the jury believed the witnesses' hearsay statements it likely would have acquitted defendant. Schmidt v. State, 373 S.W.3d

856, 2012 Tex. App. LEXIS 5657, 2012 WL 2888213 (Tex. App. Amarillo July 16 2012).

136. Trial court did not abuse its discretion by refusing to allow defendant to impeach a confidential informant under Tex. R. Evid. 609(b) with his remote prior conviction for misdemeanor forgery because the Theus factors weighed against admission, and therefore defendant did not establish that the probative value of the conviction substantially outweighed the prejudicial effect of the conviction. The court found that: (1) the past crime was not recent and the informant did not show a propensity for running afoul of the law, as he had no intervening convictions after his forgery conviction; (2) the informant was not the only witness who testified regarding the attempted drug transaction and his testimony was corroborated by that of two police officers; and (3) defendant's only witness did not contradict the informant's account of events. Duarte v. State, 2012 Tex. App. LEXIS 599, 2012 WL 252142 (Tex. App. Houston 1st Dist. Jan. 26 2012).

137. Trial court did not abuse its discretion by refusing to permit defendant to question the victim and the eyewitness about whether they were under the influence of marijuana or alcohol at the time of the offense under Tex. R. Evid. 609 because both testified that they were not drunk or impaired during the robbery and defendant did not present any contradictory evidence. Woodard v. State, 2009 Tex. App. LEXIS 2897, 2009 WL 1124385 (Tex. App. Houston 14th Dist. Apr. 28 2009).

138. Trial court did not abuse its discretion by admitting defendant's prior conviction for forgery pursuant to Tex. R. Evid. 609 because (1) the crime of forgery involved deception which was a factor that weighed in favor of admissibility; (2) the forgery offense was within the 10-year time limit in the rule and showed defendant's propensity to run afoul of the law; (3) defendant's prior forgery conviction was dissimilar to the aggravated assault offense for which defendant was on trial, which was a factor that favored admissibility; and (4) the State needed the opportunity to impeach defendant's credibility since defendant's credibility was important. Clark v. State, 2007 Tex. App. LEXIS 6498 (Tex. App. Waco Aug. 15 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Witnesses

139. Because more than 10 years had passed since a complaining witness's release from confinement and defendant did not point to evidence of any specific facts and circumstances that would merit admitting her convictions, the trial court did not abuse its discretion in deciding not to admit her prior criminal history for impeachment purposes. Kirvin v. State, 394 S.W.3d 550, 2011 Tex. App. LEXIS 3661, 2011 WL 1818420 (Tex. App. Dallas May 13 2011).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

140. Record did not establish harm under Tex. R. App. P. 44.2 and Tex. R. Evid. 103(d) from the trial court's failure to conduct a pretrial hearing to determine the admissibility of impeachment evidence because defendant elected not to testify; the jury, therefore, was not exposed to the allegedly prejudicial evidence; any possible harm flowing from the refusal to conduct a hearing was wholly speculative. Yanez v. State, 187 S.W.3d 724, 2006 Tex. App. LEXIS 1289 (Tex. App. Corpus Christi 2006).

141. In a felony aggregate theft case, the State's failure to give defendant timely notice of its intent to use his prior convictions to impeach him did not affect his substantial rights; admission was harmless considering the overwhelming evidence, and that defendant was aware that the State planned to impeach him with his prior convictions when he took the stand. Geuder v. State, 142 S.W.3d 372, 2004 Tex. App. LEXIS 3546 (Tex. App. Houston 14th Dist. 2004).

142. Where defendant was charged with unlawful possession of illegal drugs, and the evidence of defendant's prior conviction, introduced by the State, established not only the earlier charges against defendant, but also confirmed on its face that she satisfactorily completed probation, the admission of defendant's prior conviction for impeachment purposes over her objection was harmful error in violation of Tex. R. Evid. 609(c)(2); neither defendant, nor her character witnesses, directly or indirectly presented a false picture that defendant had no prior charges or convictions where the State's case against defendant consisted of circumstantial evidence in attempting to establish her knowledge of the drugs, and the evidence that she had previously been convicted of virtually the same offense for which she was on trial was highly prejudicial. James v. State, 102 S.W.3d 162, 2003 Tex. App. LEXIS 181 (Tex. App. Fort Worth 2003).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

143. Even if it was error to admit defendant's assault-family violence misdemeanor conviction in an aggravated robbery trial, the error was harmless because the issue on the charged offense was whether the item defendant brandished was a deadly weapon, and the prior offense did not involve the use of a per se deadly weapon. Meadows v. State, 2014 Tex. App. LEXIS 289, 2014 WL 84207 (Tex. App. Fort Worth Jan. 9 2014).

144. Although the appellate court assumed without deciding that defendant's complaints about the admission of three 1981 convictions were preserved and that the trial court erred in admitting the evidence, the appellate court overruled the issue because it had a fair assurance that the admission of the convictions did not influence the jury or had but a slight effect. Blount v. State, 2012 Tex. App. LEXIS 1648, 2012 WL 662306 (Tex. App. Waco Feb. 29 2012).

145. Trial court erred under Tex. R. Evid. 609(c)(2) by admitting evidence of defendant's prior domestic violence conviction; however, the error was harmless beyond a reasonable doubt, Tex. R. App. P. 44.2, as the record contained sufficient evidence of guilt of the offense in this case, the jury charge contained a proper limiting instruction regarding the jury's consideration of extraneous offenses, the State spent very little time on the improper evidence and did not delve into its details, and finally, the trial court probated defendant's sentence. Turney v. State, 2011 Tex. App. LEXIS 6419 (Tex. App. Fort Worth Aug. 11 2011).

146. Even though the trial court erred by admitting evidence of defendant's three prior drug convictions that occurred 12 years before the instant crime under Tex. R. Evid. 609, the error was harmless because: (1) the State did not emphasize defendant's criminal history during closing arguments; (2) the drug convictions lacked similarity to the instant aggravated assault charge; (3) the trial court instructed the jury that they were only to consider the prior convictions when determining the weight to give defendant's testimony; and (4) there was strong physical evidence supporting defendant's conviction and testimony of three eyewitnesses. Mares v. State, 2010 Tex. App. LEXIS 6844, 2010 WL 3294244 (Tex. App. Houston 1st Dist. Aug. 19 2010).

147. In defendant's drug case, assuming the trial court abused its discretion by allowing the State to ask a witness questions concerning whether defendant paid for the motel room and questions about defendant's prior convictions, any harm arising from the error was cured when defendant later testified that he paid for the motel room--the very same conclusion implicit in the witness's testimony--and when evidence of defendant's convictions was admitted without objection during his testimony. Davis v. State, 2010 Tex. App. LEXIS 450 (Tex. App. Amarillo Jan. 26 2010).

148. Even if the trial court erred in admitting evidence of appellant's prior convictions in his drug possession trial, the error was harmless because appellant presented no evidence bearing on the question of his guilt or innocence, and the State presented the testimony of the two officers who chased appellant when he fled, and the officer who, when appellant was apprehended, found the small can containing methamphetamine in appellant's back pocket. Greenlee v. State, 2007 Tex. App. LEXIS 3951 (Tex. App. Tyler May 23 2007).

149. Under Tex. R. Evid. 609(b), a 17-year-old felony conviction for credit card abuse should not have been admitted in a drug trial to impeach defendant because the prior conviction, with no intervening convictions, happened so long ago that it had little, if any, probative value on the issue of defendant's current credibility. The admission was prejudicial under Tex. R. App. P. 44.2(b) because credibility was critical to the defense that defendant did not intentionally or knowingly possess the drugs and because the prosecutor emphasized the prior conviction during closing argument. Battles v. State, 2006 Tex. App. LEXIS 3117 (Tex. App. Eastland Apr. 20 2006).

150. Under Tex. R. Evid. 609, a 17-year-old felony conviction for credit card abuse should not have been admitted in a drug trial to impeach defendant because the prior conviction, with no intervening convictions, happened so long ago that it had little, if any, probative value on the issue of defendant's current credibility; the admission was prejudicial under Tex. R. App. P. 44 because credibility was critical to the defense that defendant did not intentionally or knowingly possess the drugs and because the prosecutor emphasized the prior conviction during closing argument. Battles v. State, 2006 Tex. App. LEXIS 3117 (Tex. App. Eastland Apr. 20 2006).

151. Because defendant did not testify, the impact any erroneous impeachment might have had in light of the record as a whole was not affirmatively demonstrated in the appellate record; thus, any possible harm flowing from the trial court's refusal to conduct a pretrial hearing on impeachment by a prior conviction under Tex. R. Evid. 609 was wholly speculative. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview

152. Despite an initial misidentification of a driver who fled the scene of a residential burglary, there was sufficient evidence to convict defendant of burglary of a habitation where an officer later positively identified defendant due to a tattoo, an owner stated that he loaned defendant a truck, and the truck was later abandoned with items inside; moreover, the trial court was not permitted to consider the fact that the owner, the first person mistakenly identified, had previous convictions for burglary of a habitation. Britt v. State, 2006 Tex. App. LEXIS 4982 (Tex. App. Fort Worth June 8 2006).

Criminal Law & Procedure : Habeas Corpus : Review : Specific Claims : Evidentiary Errors

153. Texas prisoner who was convicted of robbery under Tex. Penal Code Ann. § 29.02 was not entitled to habeas relief under 28 U.S.C.S. § 2254 on his claim that the trial court committed reversible error by allowing the prosecutor to question him about a prior felony conviction during the guilt-innocence portion of the proceeding; the prisoner's trial was not rendered fundamentally unfair because the evidence was properly admitted under Tex. R. Evid. 609. Caldwell v. Thaler, 770 F. Supp. 2d 849, 2011 U.S. Dist. LEXIS 9117 (S.D. Tex. Jan. 31 2011).

Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence

154. Trial court did not abuse its discretion by admitting evidence that defendant had previously been convicted of failure to register as a sex offender under Tex. R. Evid. 609 and 806 during his trial on charges of sexual assault and aggravated sexual assault because: (1) the prior crime involved deception since defendant, by failing to register, concealed the address at which he resided; (2) one of the charged offenses occurred only five years after the past crime; (3) the admission of the prior conviction informed the jury that defendant had been determined to be a sex offender so there was some potential for the jury to perceive a pattern of past conduct; and (4) defendant's testimony and credibility were critical to his defense because no other witnesses could dispute the detective's account of his interview of defendant and the meaning of a drawing admitted into evidence. Theragood v. State, 2011 Tex. App. LEXIS 7141, 2011 WL 3848840 (Tex. App. El Paso Aug. 31 2011).

155. In an intoxication manslaughter case, the trial court did not abuse its discretion in refusing to allow evidence that another occupant of defendant's watercraft, who defendant claimed was driving at the time of the accident, had a previous conviction for manslaughter; because there was no evidence regarding the date on which the other occupant was released from confinement, and because his manslaughter conviction was more than 10 years old, the trial judge could properly exclude it under Tex. R. Evid. 609(b). Morris v. State, 214 S.W.3d 159, 2007 Tex. App. LEXIS 278 (Tex. App. Beaumont 2007).

Evidence : Hearsay : Rule Components

156. Where defendant was convicted of intoxication manslaughter and intoxication assault, the trial court abused its discretion by allowing defendant's prior felony convictions to be introduced to impeach his credibility, pursuant to Tex. R. Evid. 609, where the convictions were improperly admitted as hearsay, pursuant to Tex. R. Evid. 806, when they were not in fact hearsay as defined by Tex. R. Evid. 801(d). Enriquez v. State, 56 S.W.3d 596, 2001 Tex. App. LEXIS 5450 (Tex. App. Corpus Christi 2001).

Evidence : Inferences & Presumptions : Presumptions : Rebuttal of Presumptions

157. Defendant failed to rebut the presumption that his trial counsel's conduct was strategic in not requesting a Theus analysis or jury instruction about the legality of the initial traffic stop. The record was silent regarding these matters and provided no explanation of the motivation behind counsel's actions. Mcchristian v. State, 2010 Tex. App. LEXIS 9256, 2010 WL 4677774 (Tex. App. Houston 1st Dist. Nov. 18 2010).

Evidence : Procedural Considerations : Curative Admissibility

158. Defendant opened the door to his prior theft-by-check conviction because he testified that he was not a thief; that left a false impression with the jury, and the State was allowed to correct the false impression. Martinez v. State, 2014 Tex. App. LEXIS 8655 (Tex. App. Eastland Aug. 7 2014).

159. District court did not abuse its discretion in finding that defendant had opened the door to details of his prior convictions when he testified that it was "character assassination" to suggest that he had used a knife on the victim and placed a pillow over her head. Based on that and other testimony, it would not have been outside the zone of reasonable disagreement for the district court to find that defendant was attempting to establish himself as a law-abiding citizen who did not use weapons on people. Marshall v. State, 2014 Tex. App. LEXIS 3553, 2014 WL 1365659 (Tex. App. Austin Apr. 3 2014).

160. Trial court did not abuse its discretion by allowing the State to impeach defendant because defendant opened the door to the State's questions about the prior assault allegation, as he made the blanket statement on direct examination that he had never been arrested before, that he did not get into trouble, and that the instant case was the first problem he had had, implying that he had never had any interactions with the police before. Lopez v. State, 2013 Tex. App. LEXIS 13623, 2013 WL 5948124 (Tex. App. Houston 14th Dist. Nov. 5 2013).

161. At defendant's trial for aggravated robbery, the trial court did not abuse its discretion by admitting his misdemeanors during cross-examination. Defendant had volunteered information about his prior criminal record and left a false impression about his misdemeanors by making them sound like traffic tickets instead of convictions for drug possession and unlawful carrying of a weapon. Wash. v. State, 2013 Tex. App. LEXIS 9198 (Tex. App. Fort Worth July 25 2013).

162. In a trial for serious bodily injury under Tex. Penal Code Ann. § 22.02, a 30-year-old prior assault conviction was properly admitted to impeach defendant's claim not to be a violent person because defendant opened the door

for impeachment for purposes of exceptions to both Tex. R. Evid. 609 and Tex. R. Evid. 608. Grant v. State, 247 S.W.3d 360, 2008 Tex. App. LEXIS 1135 (Tex. App. Austin 2008).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

163. Where defendant was charged with unlawful possession of illegal drugs, and the evidence of defendant's prior conviction, introduced by the State, established not only the earlier charges against defendant, but also confirmed on its face that she satisfactorily completed probation, the admission of defendant's prior conviction for impeachment purposes over her objection was harmful error in violation of Tex. R. Evid. 609(c)(2); neither defendant, nor her character witnesses, directly or indirectly presented a false picture that defendant had no prior charges or convictions where the State's case against defendant consisted of circumstantial evidence in attempting to establish her knowledge of the drugs, and the evidence that she had previously been convicted of virtually the same offense for which she was on trial was highly prejudicial. James v. State, 102 S.W.3d 162, 2003 Tex. App. LEXIS 181 (Tex. App. Fort Worth 2003).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

164. In a criminal trial for aggravated sexual assault, the State gave notice of its intention to use evidence of extraneous offenses committed by defendant and the trial court admitted the evidence. Because defendant did not object on the ground that the State's notice was untimely, the issue was not preserved for review. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

Evidence : Procedural Considerations : Weight & Sufficiency

165. Evidence was legally and factually sufficient to support defendant's conviction for harassment of a public servant in violation of Tex. Penal Code Ann. § 22.11(a)(2) where the jury could rationally have believed the police officer truthfully stated that defendant spit directly in his face and could rationally have inferred from defendant's belligerence that he intended to cause his saliva to come into contact with the officer, and where the jury could rationally have rejected the contrary testimony, none of which proved that the incident could not have happened the way the officers testified it did. Moreover, in addition to having a relationship with defendant, defendant's girlfriend had a felony conviction for assault on a public servant and had also previously been arrested for assault with family violence, and the jury could have taken her felony conviction into account in assessing her credibility, and the jury also could have given more weight to the officers' testimony after determining that the girlfriend and a neighbor were not in as good a position to notice defendant if he did spit. Smith v. State, 2010 Tex. App. LEXIS 2287, 2010 WL 1236410 (Tex. App. Beaumont Mar. 31 2010).

166. Sole evidence before the trial court was that a victim was released from prison on the most recent felony offense in 1990 and successfully completed his 10-year parole term; thus, the evidence established that more than 10 years had elapsed since the victim's release from the confinement imposed for his convictions and either the date of the offense or the date of trial; therefore, the trial court did not abuse its discretion on grounds that the victim's convictions were inadmissible to impeach his credibility as (1) the convictions were too remote in time under Tex. R. Evid. 609(b); and (2) defendant did not present sufficient proof that the nature of the victim's prior felonies (two burglaries and one aggravated assault) were relevant to the facts or credibility of the witness; however, even if the evidence of the victim's prior convictions were introduced and his credibility compromised, sufficient other evidence existed such that reasonable minds could convict defendant. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

167. Defendant convicted of aggravated sexual assault and indecency with a child failed to preserve appellate review of his objection to the admissibility of his prior conviction for failure to register as a sex offender as impeachment evidence, because he did not testify and it was impossible to determine whether the probative value of his testimony would have exceeded its prejudicial effect. Marett v. State, 415 S.W.3d 514, 2013 Tex. App. LEXIS 12592, 2013 WL 5583601 (Tex. App. Houston 1st Dist. Oct. 10 2013).

168. At defendant's trial for aggravated robbery, the trial court did not abuse its discretion when it refused to allow the defense to cross examine a witness regarding his criminal history; more than 10 years had elapsed since his conviction for aggravated assault involving a firearm. Because defendant failed to show that the probative value of the conviction substantially outweighed its prejudicial effect, the evidence of the conviction was inadmissible under Tex. R. Evid. 609(b). Henson v. State, 2013 Tex. App. LEXIS 974, 2013 WL 396015 (Tex. App. Houston 14th Dist. Jan. 31 2013).

169. Where defendant did not challenge the trial court's ruling that the probative value of evidence of witness's juvenile adjudication of attempted capital murder was substantially outweighed by the danger of undue prejudice under Tex. R. Evid. 403, the court upheld the trial court's ruling excluding the evidence on that ground. Marsh v. State, 343 S.W.3d 158, 2011 Tex. App. LEXIS 4390 (Tex. App. Texarkana June 10 2011).

170. Under Tex. R. Evid. 608 and 609, the trial court did not abuse its discretion in allowing the State to ask defendant about his prior arrests after he opened the door with his testimony or in determining that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

171. In defendant's assault on a public servant case, the court properly admitted evidence of his prior arrests because the extraneous-arrest evidence was probative of both how well a character witness knew defendant and the foundation for her characterization of him, the trial court gave a limiting instruction, the extraneous arrests took up only four pages in the 564-page record, the question of whether defendant was threatening the officers was directly related to his intent, and the State did not have other evidence with which to rebut the witness's characterization of defendant's character. Morales v. State, 293 S.W.3d 901, 2009 Tex. App. LEXIS 6241 (Tex. App. Texarkana Aug. 12 2009).

172. In defendant's trial for aggravated assault, when the State elicited evidence of defendant's prior conviction for aggravated assault, a proper objection should have been made under Tex. R. Evid. 404 and Tex. R. Evid. 403, not Tex. R. Evid. 609 because the evidence was not elicited from defendant, but from another witness. Moore v. State, 2007 Tex. App. LEXIS 6354 (Tex. App. Austin Aug. 9 2007).

173. In an aggravated robbery trial, defendant failed to demonstrate that the probative value of the complainant's previous eight misdemeanor prostitution convictions outweighed the prejudicial effect of the excluded evidence under Tex. R. Evid. 609(a). The trial court had ruled that the complainant's felony conviction for possession of a controlled substance and her most recent misdemeanor conviction for prostitution were admissible. Hill v. State, 2005 Tex. App. LEXIS 8263 (Tex. App. Houston 14th Dist. Oct. 6 2005).

174. In a dispute over conservatorship of a child after termination of parental rights, Tex. R. Evid. 609 did not preclude the admission of evidence regarding the grandmother's history of drug convictions because the evidence was not offered for purposes of impeachment, and the grandmother's evidence of improved behavior did not render the admission of her convictions unfairly prejudicial relative to their probative value under Tex. R. Evid. 403. Taylor v. Texas Dept of Protective & Regulatory Servs., 2005 Tex. App. LEXIS 1967 (Mar. 10, 2005).

175. In an assault case, a victim's alleged unreported assaults against defendant were not admissible under Tex. R. Evid. 609 because there were no felony convictions or crimes of moral turpitude; moreover, the evidence was properly excluded under Tex. R. Evid. 403 because, even if the evidence had some bearing on the victim's motivation to fabricate, the danger was high that it would have confused the jury. Mumphrey v. State, 155 S.W.3d 651, 2005 Tex. App. LEXIS 370 (Tex. App. Texarkana 2005).

176. In an aggravated assault case, the trial court improperly permitted the State to elicit testimony about the details of defendant's prior conviction and his strategy of self-defense as the State's delving into the details of the prior shooting was prejudicial because it forced defendant to defend himself against charges that were not the subject of the present suit, implied that he was a violent man, and suggested that the current offense was in conformity with that character. Further, there was little, if any, probative value gained from the admission of the evidence. Arebalo v. State, 143 S.W.3d 402, 2004 Tex. App. LEXIS 7157 (Tex. App. Austin 2004).

177. In a drug possession trial, the trial court abused its discretion in allowing the admission of evidence that defendant possessed fictitious driver's licenses and credit cards. The error was harmless, however, because the State did not spend much time during the guilt-innocence phase of the trial developing testimony concerning defendant's possession of the fictitious credit cards and driver's licenses. Moreover, the record contained ample evidence supporting defendant's guilt. Owen v. State, 2004 Tex. App. LEXIS 4144 (Tex. App. Fort Worth May 6 2004).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

178. Trial court did not err by admitting evidence during sentencing of defendant's nonadjudicated conduct under this rule. Winstead v. State, 2014 Tex. App. LEXIS 8577 (Tex. App. Corpus Christi Aug. 7 2014).

179. Defendant's counsel was ineffective for opening the door to allow the State to introduce evidence of his prior convictions of sexual assault and sexual assault of a child by asking defendant's ex-girlfriend whether defendant was a violent person and she responded that he was not; therefore, on cross-examination the State was permitted to ask the ex-girlfriend whether she knew that defendant had pleaded guilty to two prior sexual assaults, allowing prejudicial and otherwise inadmissible evidence to be presented before the jury, which could not be considered sound trial strategy. The court held that defendant was prejudiced because the credibility of defendant's testimony was a key component of his defense strategy, given that he claimed he was trying to get away from the victim and had no intention of hurting anyone; although the trial court gave the jury a limiting instruction as to how it could consider the prior convictions, the instruction specifically allowed the jury to consider the convictions for the sole purpose of determining defendant's character for violence. Hernandez v. State, 2013 Tex. App. LEXIS 6365, 2013 WL 2301989 (Tex. App. Eastland May 23 2013).

180. Defendant failed to preserve his objections to the admission of his prior convictions that occurred in 1999 because he specifically objected only to a 1981 conviction, he did not obtain a running objection, and he did not request a hearing outside the jury's presence. Blount v. State, 2012 Tex. App. LEXIS 4534 (Tex. App. Waco June 6 2012).

181. Even if the trial court erred by admitting defendant's 1981 convictions under Tex. R. Evid. 609, the error was harmless because the State offered evidence of defendant's lengthy and varied criminal history by questioning him about his prior convictions that occurred in 1999, 2000, 2002, 2004, and 2005. Blount v. State, 2012 Tex. App. LEXIS 4534 (Tex. App. Waco June 6 2012).

182. In defendant's trial on for possession of methamphetamine in the amount of one gram or more but less than four grams under Tex. Health & Safety Code Ann. §§ 481.102(6) and 481.115(a), the trial court committed

reversible error in allowing the State to introduce evidence of defendant's prior drug offense convictions because the convictions occurred more than 10 years earlier and were remote under Tex. R. Evid. 609(b) and because the State failed to prove that the probative value of the evidence substantially outweighed its prejudicial effect; further, the error affected defendant's substantial rights. Because the convictions were almost identical to defendant's present charge, a clear danger existed that the improper admission of similar offenses led the jury to convict based on past conduct rather than the facts of the charged offense; in addition, the jury received no limiting instructions regarding the evidence, and rather than instructing the jury on this evidence under Tex. R. Evid. 609, the trial court erroneously instructed the jury on prior crimes evidence under Tex. R. Evid. 404(b). Thus, the jury was never properly instructed on how to use the evidence of defendant's prior convictions. Roberts v. State, 2011 Tex. App. LEXIS 5517, 2011 WL 2860106 (Tex. App. Dallas July 20 2011).

183. Evidence of prior crimes was not improperly admitted as impeachment evidence under Tex. R. Evid. 609 where defendant did not testify. Hernandez v. State, 2010 Tex. App. LEXIS 851, 2010 WL 391850 (Tex. App. Austin Feb. 5 2010).

184. During defendant's trial for indecency with a child, the trial court abused its discretion in preventing defendant from cross-examining the complainant under Tex. R. Evid. 609 about her previous false allegations of sexual assault. The evidence was admissible under Tex. R. Evid. 404(b) to show the complainant's bias against defendant and her possible motive to testify falsely against him. Hammer v. State, 296 S.W.3d 555, 2009 Tex. Crim. App. LEXIS 513 (Tex. Crim. App. 2009).

185. Court did not err by not allowing defendant to cross-examine the victim about her prior sexual experience because the evidence that defendant sought to introduce through the declarant relating to the victim's sexual activity with her boyfriend did not relate to the charged sexual contact offenses, but was offered to impeach the victim's credibility relating to her accusation two years later that defendant also sexually assaulted her. The declarant's forensic interview contained inadmissible hearsay and, as the trial court noted, the victim's conduct discussed in that interview was not at all similar to the charged offenses. Fugate v. State, 2008 Tex. App. LEXIS 6266 (Tex. App. Dallas Aug. 18, 2008).

186. In defendant's trial for aggravated assault, when the State elicited evidence of defendant's prior conviction for aggravated assault, a proper objection should have been made under Tex. R. Evid. 404 and Tex. R. Evid. 403, not Tex. R. Evid. 609 because the evidence was not elicited from defendant, but from another witness. Moore v. State, 2007 Tex. App. LEXIS 6354 (Tex. App. Austin Aug. 9 2007).

187. Defendant failed to preserve his argument that dismissed offenses under Tex. Penal Code Ann. § 12.45 should not have been used to impeach him because they were not final convictions as required by Tex. R. Evid. 609 because defendant did not make a timely objection thereto as required by Tex. R. App. P. 33. Lopez v. State, 2007 Tex. App. LEXIS 4036 (Tex. App. Eastland May 24 2007).

188. Evidence of defendant's prior conviction was not offered to attack his credibility pursuant to Tex. R. Evid. 609, but to rebut his testimony that the complainant's injuries resulted from accidental causes rather than an assault, Tex. R. Evid. 404; because defendant did not demonstrate that the prior conviction was not relevant for that purpose, the complaint that the conviction was more than 10 years old presented nothing for the appellate court's review. Carranza v. State, 2006 Tex. App. LEXIS 10137 (Tex. App. Houston 14th Dist. Nov. 28 2006).

189. In a murder trial, defendant was properly precluded from inquiring about a witness's juvenile probation because there was not a causal connection between the probation and the allegations against defendant. Patterson v. State, 2006 Tex. App. LEXIS 6141 (Tex. App. Dallas July 18 2006).

190. During defendant's murder trial, the State questioned him about two extraneous offenses and defense counsel did not object under Tex. R. Evid. 403, Tex. R. Evid. 404, or Tex. R. Evid. 609 regarding either offense; in accordance with Tex. R. App. P. 33.1, defendant could not raise these issues on appeal. Cotton v. State, 2006 Tex. App. LEXIS 5445 (Tex. App. Houston 14th Dist. June 27 2006).

191. In a resisting arrest case, counsel was ineffective where, inter alia, counsel failed to investigate or interview defendant in detail about his criminal history or his prior contacts with the arresting officer; failed to seek discovery from the State; failed to file and obtain rulings on a motion in limine to require the State to raise extraneous matters outside the presence of the jury; failed to prepare defendant to testify; failed to object to evidence of inadmissible extraneous matters during the guilt phase; invited evidence of unadjudicated arrests during the punishment phase; and failed to object to failure of the punishment-phase charge to include a reasonable doubt instruction. Walker v. State, 195 S.W.3d 250, 2006 Tex. App. LEXIS 1381 (Tex. App. San Antonio 2006).

192. In an aggravated assault case, the trial court did not err by allowing defendant's own testimony to be admitted regarding a prior conviction as none of defendant's testimony was false, and the trial court's decision to admit this testimony for impeachment purposes was reasonable. The evidence showed that the prior conviction was well within the 10-year period provided by Tex. R. Evid. 609(b), the instant offense and the prior offense were the same, and defendant's testimony and his credibility as a witness were very important as he and the complainant were the only witnesses. Berry v. State, 179 S.W.3d 175, 2005 Tex. App. LEXIS 8732 (Tex. App. Texarkana 2005).

193. In a criminal trial for aggravated sexual assault, the State gave notice of its intention to use evidence of extraneous offenses committed by defendant and the trial court admitted the evidence. Because defendant did not object on the ground that the State's notice was untimely, the issue was not preserved for review. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

194. Trial court did not err by admitting evidence of an extraneous offense during the guilt/innocence phase without advance notice from the State because the record did not show that advance notice was required under Tex. R. Evid. 404(b) and 609(f) and Tex. Code Crim. Proc. Ann. art. 37.07. Although defendant's motion asserted that he requested notice from the State, there was no evidence of that request. Arp v. State, 2005 Tex. App. LEXIS 4535 (Tex. App. Texarkana June 15 2005).

195. Defendant alleged the trial court erred in admitting a written confession to a prior charge of sexual assault that had allegedly taken place years before, as this confession was more prejudicial than it was probative. Nevertheless, the remoteness concerns of Tex. R. Evid. 609 did not apply to evidence of extraneous crimes or bad acts introduced at the punishment phase under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a). Green v. State, 2004 Tex. App. LEXIS 9787 (Tex. App. Houston 14th Dist. Nov. 4 2004).

196. In a drug possession trial, the trial court abused its discretion in allowing the admission of evidence that defendant possessed fictitious driver's licenses and credit cards. The error was harmless, however, because the State did not spend much time during the guilt-innocence phase of the trial developing testimony concerning defendant's possession of the fictitious credit cards and driver's licenses. Moreover, the record contained ample evidence supporting defendant's guilt. Owen v. State, 2004 Tex. App. LEXIS 4144 (Tex. App. Fort Worth May 6 2004).

197. Trial court abused its discretion in allowing the State to impeach defendant, who was charged with murder, with his 16-year-old convictions for aggravated rape and a crime against nature because crimes of violence had a higher prejudicial potential than impeachment value, defendant's testimony was critical to his claim of self-defense, the State's ability to use defendant's recent theft convictions to impeach him drastically lessened its need to use the aggravated rape and crime against nature convictions and defendant did not open the door to the admission of

these convictions by claiming that he had not been in trouble before. Jackson v. State, 11 S.W.3d 336, 1999 Tex. App. LEXIS 9471 (Tex. App. Houston 1st Dist. 1999).

Evidence : Relevance : Relevant Evidence

198. Because defendant presented no evidence showing the relevance of the witness's prior misdemeanor conviction or the circumstances surrounding his alleged dismissal from the sheriff's department, the trial court did not err by limiting her cross-examination of him. Sheffield v. State, 2013 Tex. App. LEXIS 12789, 2013 WL 5638878 (Tex. App. Houston 1st Dist. Oct. 15 2013).

199. In a robbery trial, the court did not have to admit evidence of the complainant's prior conviction for misdemeanor assault against defendant's nephew; contrary to defendant's argument, the two-year-old conviction was not relevant to show that the complainant ran from his apartment because he feared a physical confrontation. The court noted that the evidence would properly have been excluded for impeachment purposes because it was not a felony or a crime involving moral turpitude. Allison v. State, 2005 Tex. App. LEXIS 4055 (Tex. App. Houston 14th Dist. May 24 2005).

Evidence : Relevance : Sex Offenses : General Overview

200. During defendant's trial for aggravated sexual assault and solicitation of a minor, the trial court did not err in refusing to admit evidence showing that the complainant had knowledge of sexual matters before these alleged events occurred because the evidence was hearsay and subject to exclusion under Tex. R. Evid. 608, 609 and 613. Landers v. State, 2011 Tex. App. LEXIS 2982, 2011 WL 1496154 (Tex. App. Amarillo Apr. 19 2011).

Evidence : Relevance : Sex Offenses : Rape Shield Laws

201. In a trial for defendant's sexual assault of his 12-year-old daughter, evidence that the victim had been previously assaulted by another relative was properly excluded in the punishment phase after the victim described the impact of the assault, including three attempted suicides, in part because the prior assault did not fit into any of the exceptions under Tex. R. Evid. 412; it was irrelevant under Tex. R. Evid. 609. Delapaz v. State, 297 S.W.3d 824, 2009 Tex. App. LEXIS 7510 (Tex. App. Eastland Sept. 24 2009).

Evidence : Testimony : Credibility : General Overview

202. Introduction of affidavit by a police investigator that referred to defendant's prior violations of a protective order did not violate Tex. R. Evid. 609 because the evidence was not offered to impeach defendant's, or any witness's, credibility. Moreover, defendant failed to preserve his argument for appellate review. Sadarangani v. State, 2006 Tex. App. LEXIS 3198 (Tex. App. Fort Worth Apr. 20 2006), substituted opinion at, opinion withdrawn by, modified by 2006 Tex. App. LEXIS 5367 (Tex. App. Fort Worth June 21, 2006).

203. Introduction of affidavit by a police investigator that referred to defendant's prior violations of a protective order did not violate Tex. R. Evid. 609 because the evidence was not offered to impeach defendant's, or any witness's, credibility. Sadarangani v. State, 2006 Tex. App. LEXIS 3198 (Tex. App. Fort Worth Apr. 20 2006), substituted opinion at, opinion withdrawn by, modified by 2006 Tex. App. LEXIS 5367 (Tex. App. Fort Worth June 21, 2006).

204. In a dispute over conservatorship of a child after termination of parental rights, Tex. R. Evid. 609 did not preclude the admission of evidence regarding the grandmother's history of drug convictions because the evidence was not offered for purposes of impeachment, and the grandmother's evidence of improved behavior did not render

the admission of her convictions unfairly prejudicial relative to their probative value under Tex. R. Evid. 403. Taylor v. Texas Dept of Protective & Regulatory Servs., 2005 Tex. App. LEXIS 1967 (Mar. 10, 2005).

Evidence : Testimony : Credibility : Impeachment : General Overview

205. Because defendant's trial objection, that evidence was irrelevant and prejudicial under Tex. R. Evid. 401, 403, was different from defendant's appeal objection, that evidence was being used to improperly impeach a witness under Tex. R. Evid. 609, defendant waived error. Bedwell v. State, 2006 Tex. App. LEXIS 3248 (Tex. App. Houston 14th Dist. Apr. 13 2006).

206. Because defendant's trial objection, that evidence was irrelevant and prejudicial under Tex. R. Evid. 401, was different from defendant's appeal objection, that evidence was being used to improperly impeach a witness under Tex. R. Evid. 609, defendant waived error. Bedwell v. State, 2006 Tex. App. LEXIS 3248 (Tex. App. Houston 14th Dist. Apr. 13 2006).

207. Tex. R. Evid. 608 and Tex. R. Evid. 609 prohibit inquiry by the prosecution into witness' pending criminal charges. Tenny v. Cockrell, 420 F. Supp. 2d 617, 2004 U.S. Dist. LEXIS 29750 (W.D. Tex. 2004), *aff'd* 416 F.3d 404, 2005 U.S. App. LEXIS 13470 (5th Cir. Tex. 2005).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview

208. No err by admitting the State's exhibit, which was a redacted plea of guilty and judicial confession for giving a false and fictitious name to police, because lying to a police officer involved moral turpitude (dishonesty); defendant did not object to the judicial confession, but only the other plea papers, the jury heard, without objection, that defendant had confessed to committing an offense. Harris v. State, 2012 Tex. App. LEXIS 10620, 2012 WL 6674479 (Tex. App. Texarkana Dec. 21 2012).

209. In defendant's sexual assault case, evidence was improperly excluded because it was admissible to impeach the complainant's credibility. The evidence in the records not only addressed the complainant's mental state but directly addressed her inability to separate fantasy from reality; the therapist's notes raised the possibility that the complainant had not been abused by defendant but had created the event in her mind or confused an actual event with fantasy. State v. Moreno, 297 S.W.3d 512, 2009 Tex. App. LEXIS 7642 (Tex. App. Houston 14th Dist. Oct. 1 2009).

210. Court properly limited cross-examination of a witness because defendant's attempt to use an instance during an officer's career in which he wrote "phantom" warning citations was nothing more than an instance of wrongdoing in his life and was not shown to bear on his general reputation for truthfulness. There was nothing which revealed that the act of wrongdoing created a bias on the part of the officer against defendant or caused the officer to have a motive to testify untruthfully. McMillon v. State, 294 S.W.3d 198, 2009 Tex. App. LEXIS 6238 (Tex. App. Texarkana Aug. 12 2009).

211. In a domestic assault case arising in 2004, a trial court did not err by limiting the cross-examination of a victim regarding a pending assault against her from 2006 because there was no showing of bias due to that prosecution since the victim's story regarding the 2004 incident had not changed, and it was corroborated by an officer at the scene; moreover, it was improper to show the victim's bad character for untruthfulness under Tex. R. Evid. 609. McCrory v. State, 2007 Tex. App. LEXIS 4200 (Tex. App. Dallas May 30 2007).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances

212. Trial court did not abuse its discretion by refusing to allow him to cross-examine the officer about specific acts of misconduct allegedly showing he was violent and not credible with citizens in the community because no charges were brought against the officer for any of the alleged misconduct and it was not shown that those events were connected to the officer defendant was tried for, namely shooting the officer. Castillo v. State, 2013 Tex. App. LEXIS 2034, 2013 WL 781776 (Tex. App. San Antonio Mar. 1 2013).

213. Trial court did not err during defendant's trial for the Class A misdemeanor offense of assault causing bodily injury in excluding evidence of a prior criminal mischief charge against the complainant at a hearing on a motion in limine where defendant's attorney admitted not only that the criminal mischief case against the complainant was "obviously quite old," but also that the case had been dismissed. Sullivan v. State, 2008 Tex. App. LEXIS 1394 (Tex. App. San Antonio Feb. 27 2008).

Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice

214. In a murder case, the trial court did not abuse its discretion by excluding evidence about several criminal matters involving the State's witness because there was no deal between the State and the witness that could influence her testimony. There was no evidence to suggest that her decision to testify against defendant was implicated by the State's decision to seek the minimal punishment she received for resisting arrest, and the witness testified that she did not know about a theft charge filed against her until defendant raised the matter at his trial. Dial v. State, 2012 Tex. App. LEXIS 8288, 2012 WL 4511311 (Tex. App. Amarillo Oct. 2 2012).

215. Evidence was properly excluded that a State witness was subject to influence by his arrest for family violence because defendant failed to show the required relationship between the family violence charge and the testimony. The witness testified on voir dire that the prosecutors on the two cases were not the same and that he did not have a deal with the State to give favorable testimony. Turner v. State, 413 S.W.3d 442, 2012 Tex. App. LEXIS 6619 (Tex. App. Fort Worth Aug. 9 2012).

216. In a domestic assault case arising in 2004, a trial court did not err by limiting the cross-examination of a victim regarding a pending assault against her from 2006 because there was no showing of bias due to that prosecution since the victim's story regarding the 2004 incident had not changed, and it was corroborated by an officer at the scene; moreover, it was improper to show the victim's bad character for untruthfulness under Tex. R. Evid. 609. McCrory v. State, 2007 Tex. App. LEXIS 4200 (Tex. App. Dallas May 30 2007).

217. An exception applies to Tex. R. Evid. 609 when a witness makes statements concerning his criminal past which created a false impression with the jury as to the extent of either his prior (1) arrests, (2) convictions, (3) charges or (4) "trouble" with the police. Anaya v. State, 988 S.W.2d 823, 1999 Tex. App. LEXIS 988 (Tex. App. Amarillo 1999).

Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview

218. Defendant opened the door to his prior theft-by-check conviction because he testified that he was not a thief; that left a false impression with the jury, and the State was allowed to correct the false impression. Martinez v. State, 2014 Tex. App. LEXIS 8655 (Tex. App. Eastland Aug. 7 2014).

219. It was proper not to admit a complainant's indictment for impeachment purposes because only evidence of the conviction itself is admissible under this rule to impeach a witness; the details of the conviction are generally inadmissible for the purpose of impeachment. Pena v. State, 2014 Tex. App. LEXIS 6487 (Tex. App. Houston 14th Dist. June 17 2014).

220. At defendant's trial for aggravated assault on a public servant and evading arrest with a motor vehicle, the trial court's refusal to guarantee that he could testify free from impeachment of prior convictions did not deprive him of his rights to due process and to present a complete defense as he did not have a constitutional right to testify free from impeachment. Since defendant never testified and was never impeached, a conclusion of harmful error was speculative. Aguilar v. State, 2013 Tex. App. LEXIS 10897 (Tex. App. El Paso Aug. 28 2013).

221. Because defendant presented no evidence that the victim's prior conviction involved deception, he did not show that his trial counsel erred in the objection he offered to the trial court regarding impeachment. Charles v. State, 2013 Tex. App. LEXIS 10545 (Tex. App. Houston 1st Dist. Aug. 22 2013).

222. Appellant claimed the trial court erred in not permitting him to impeach the victim with her juvenile criminal convictions, but in light of counsel's statement that he would not inquire about the conviction, the court agreed that appellant waived the issue. Johnson v. State, 2012 Tex. App. LEXIS 7721 (Tex. App. Houston 1st Dist. Aug. 30 2012).

223. Even if a court erred during defendant's trial for sexual assault of a child in admitting evidence of his prior DWI conviction pursuant to Tex. R. Evid. 609(a), the error was harmless because the State's questioning of defendant about the prior DWI conviction comprised less than two full pages of the reporter's record, which contained nine volumes of testimony. Pearson v. State, 2012 Tex. App. LEXIS 6467, 2012 WL 3765000 (Tex. App. Houston 14th Dist. Aug. 7 2012).

224. Tex. R. Evid. 609(b) did not apply, as the specific instance of misconduct at issue was not that of the witness, but of appellant, the person for whose reputation he vouched. Ethridge v. State, 2012 Tex. App. LEXIS 3110, 2012 WL 1379648 (Tex. App. Tyler Apr. 18 2012).

225. Tex. R. Evid. 609 governs attempts to prove actual convictions of the witness testifying at the time, and not specific instances of conduct of the defendant asked as have you heard questions to rebut an attempt to bolster the defendant's character through a third-party witness. Ethridge v. State, 2012 Tex. App. LEXIS 3110, 2012 WL 1379648 (Tex. App. Tyler Apr. 18 2012).

226. Victim referred to herself as a "bitch/whore" on her MySpace page, and this statement did not fall within any of the exceptions listed in Tex. R. Evid. 412(b); the admission was not necessary to rebut or explain evidence, the statement did not concern the history between the victim and appellant, the statement did not go to the issue of consent, the statement was not constitutionally required to be admitted, and the statement was not admissible under Tex. R. Evid. 609 because it did not concern anything about the victim being convicted of a crime, and as the court did not see how the statement was necessary to show bias or motive, the trial court's decision to exclude the statement was not outside the zone of reasonable disagreement. Dale v. State, 2012 Tex. App. LEXIS 3127, 2012 WL 1382446 (Tex. App. Waco Apr. 18 2012).

227. In an assault case, defendant testified he was on parole and had been to prison numerous times; the jury could discredit his testimony that he did not strike the victim, because it was impeached by his prior convictions under Tex. R. Evid. 609(a). King v. State, 2012 Tex. App. LEXIS 1910, 2012 WL 745424 (Tex. App. Fort Worth Mar. 8 2012).

228. Trial court did not err in overruling defendant's objection to evidence that defendant was on parole at the time of trial for a prior felony conviction; in eliciting the testimony, the State sought to show that defendant was biased as a witness and had a motive to testify falsely to avoid being convicted for a parole violation. Mcgough v. State, 2012 Tex. App. LEXIS 776, 2012 WL 273885 (Tex. App. Houston 14th Dist. Jan. 31 2012).

229. Pursuant to Tex. R. Evid. 609(a), because defendant did not testify during the guilt phase of the trial, he failed to preserve any error regarding the trial court's ruling on his pretrial motion to testify free from impeachment in that phase of the trial. Nkrumah Lamumba Valier v. State, 2011 Tex. App. LEXIS 8947, 2011 WL 5428861 (Tex. App. Houston 1st Dist. Nov. 10 2011).

230. Tex. R. Evid. 609 was not mentioned at trial as a basis for excluding evidence, and this ground was not preserved for review. Nichols v. State, 349 S.W.3d 612, 2011 Tex. App. LEXIS 7253 (Tex. App. Texarkana Sept. 6 2011).

231. Court was to presume that the test under Tex. R. Evid. 609(b) was performed, and to the extent that appellant suggested the trial court erred in failing to inform the parties that it undertook the test, he was mistaken. Chitwood v. State, 350 S.W.3d 746, 2011 Tex. App. LEXIS 7301 (Tex. App. Amarillo Sept. 6 2011).

232. Even assuming counsel was deficient for failing to adequately impeach, for purposes of Tex. R. Evid. 609, 613, two witnesses, appellant did not show that counsel's alleged deficiency so compromised the proper functioning of the process. Garcia v. State, 2011 Tex. App. LEXIS 4663, 2011 WL 2463049 (Tex. App. Corpus Christi June 16 2011).

233. Because appellant failed to object to the reliability of an expert's methodology by requesting a hearing under Tex. R. Evid. 609, plus appellant did not object to the admissibility of the testimony when it was proffered, appellant did not preserve the issue for appeal under Tex. R. App. P. 33.1(a). Jones v. State, 2010 Tex. App. LEXIS 7357, 2010 WL 3448010 (Tex. App. Houston 1st Dist. Aug. 31 2010).

234. Cross-examiner must still show the relevance of the vulnerable status or other alleged source of bias to the witness's testimony and it is not enough to say that all witnesses who may, coincidentally, be on probation, have pending charges, be in the country illegally, or have some other vulnerable status are automatically subject to cross-examination with that status regardless of its lack of relevance to the testimony of that witness; thus, to the extent that Maxwell v. State, 48 S.W.3d 196 (Tex. Crim. App. 2001), is inconsistent with Carpenter v. State, 979 S.W.2d 633 (Tex. Crim. App. 1998), the court overrules it. Irby v. State, 327 S.W.3d 138, 2010 Tex. Crim. App. LEXIS 725 (Tex. Crim. App. 2010).

235. Probationary status, pending charges, unadjudicated crimes, or other bad acts may be admissible to show motive or bias if the proponent makes a logical connection between the base fact and the witness's testimony; otherwise, it is irrelevant. Irby v. State, 327 S.W.3d 138, 2010 Tex. Crim. App. LEXIS 725 (Tex. Crim. App. 2010).

236. Texas has an important interest in protecting the anonymity of juvenile offenders and under Tex. R. Evid. 609(d), Tex. Fam. Code Ann. § 51.13(b), that anonymity is explicitly protected, and to hold that any juvenile who happens to be on probation at the time that he also is the victim of a crime or a witness in a criminal proceeding automatically loses that privacy protection is not required by the constitution or by common sense; Davis v. Alaska, 415 U.S. 308 (1974), is not a blunderbuss that decimates all other evidentiary statutes, rules, and relevance requirements in matters of witness impeachment, and it is a rapier that targets only a specific mode of impeachment--bias and motive--when the cross-examiner can show a logical connection between the evidence suggesting bias or motive and the witness's testimony. The court therefore rejects the absolutist position that a probationer, particularly a probationer whose guilt has not yet been adjudicated, is always in a vulnerable relationship with the State and that mere status is always automatically relevant to show a witness's possible bias and motive to testify favorably for the State as inconsistent with Texas and United States Supreme Court precedent. Irby v. State, 327 S.W.3d 138, 2010 Tex. Crim. App. LEXIS 725 (Tex. Crim. App. 2010).

237. Any evidence showing that the juvenile victim had a motive to make up this story was relevant and admissible for impeachment purposes, but the court agreed with the trial court and court of appeals that appellant failed to make a logical connection between the victim's testimony concerning his sexual encounters with appellant and his entirely separate probationary status, such that the trial court did not abuse its discretion in excluding this impeachment evidence because it was irrelevant. Irby v. State, 327 S.W.3d 138, 2010 Tex. Crim. App. LEXIS 725 (Tex. Crim. App. 2010).

Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility

238. In a prosecution of defendant for aggravated sexual assault of a child less than 14 years old, the trial court reasonably could have concluded that the probative value of admitting evidence that defendant was previously convicted of indecent exposure outweighed its prejudicial effect. Therefore, the trial court did not err by admitting evidence of the prior conviction pursuant to this rule. Smith v. State, 439 S.W.3d 451, 2014 Tex. App. LEXIS 7108 (Tex. App. Houston 1st Dist. June 30 2014).

239. Court did not err by admitting only the judgment and sentence against a witness and not allowing defendant to question him on the details of a theft conviction because the jury heard testimony to rebut the witness's testimony that the theft conviction "was a business deal gone bad," and defendant did not show how the additional information was necessary to correct any false impression. Smith v. State, 436 S.W.3d 353, 2014 Tex. App. LEXIS 5717 (Tex. App. Houston 14th Dist. May 29 2014).

240. District court did not abuse its discretion in finding that defendant had opened the door to details of his prior convictions when he testified that it was "character assassination" to suggest that he had used a knife on the victim and placed a pillow over her head. Based on that and other testimony, it would not have been outside the zone of reasonable disagreement for the district court to find that defendant was attempting to establish himself as a law-abiding citizen who did not use weapons on people. Marshall v. State, 2014 Tex. App. LEXIS 3553, 2014 WL 1365659 (Tex. App. Austin Apr. 3 2014).

241. Record did not establish that trial court would have excluded defendant's prior conviction of aggravated assault if requested to weigh the Theus factors because it was a crime of violence, defendant was convicted only three years before committing the present offense, there was no risk of the jury convicting defendant of aggravated sexual assault of a child based on any pattern of committing the same or similar offense and defendant was the only witness who directly refuted the State's evidence. Medrano v. State, 2014 Tex. App. LEXIS 241, 2014 WL 259819 (Tex. App. Houston 14th Dist. Jan. 9 2014).

242. Failing to register as a sex offender bears on the defendant's character for truthfulness, as to register, a defendant has to disclose statutorily required information. Vasquez v. State, 417 S.W.3d 728, 2013 Tex. App. LEXIS 14137, 2013 WL 6070495 (Tex. App. Houston 14th Dist. Nov. 19 2013).

243. By failing to register, defendant concealed information to the public, and thus this factor favored admission. Vasquez v. State, 417 S.W.3d 728, 2013 Tex. App. LEXIS 14137, 2013 WL 6070495 (Tex. App. Houston 14th Dist. Nov. 19 2013).

244. Defendant was convicted of failing to comply as a sex offender in 2001 and 2005, and the trial in this case took place in 2012, such that the relative recency of the 2005 favored admission. Vasquez v. State, 417 S.W.3d 728, 2013 Tex. App. LEXIS 14137, 2013 WL 6070495 (Tex. App. Houston 14th Dist. Nov. 19 2013).

245. Because the crimes at issue were identical, this factor favored admission. Vasquez v. State, 417 S.W.3d 728, 2013 Tex. App. LEXIS 14137, 2013 WL 6070495 (Tex. App. Houston 14th Dist. Nov. 19 2013).

246. Defendant was the sole witness in his defense and thus his credibility was an important issue in the case, and thus factors four and five favored admission. Vasquez v. State, 417 S.W.3d 728, 2013 Tex. App. LEXIS 14137, 2013 WL 6070495 (Tex. App. Houston 14th Dist. Nov. 19 2013).

247. Had counsel objected, it would not have been an abuse of discretion for the trial court to have ruled that defendant's 2005 conviction of failing to register as a sex offender was admissible. Vasquez v. State, 417 S.W.3d 728, 2013 Tex. App. LEXIS 14137, 2013 WL 6070495 (Tex. App. Houston 14th Dist. Nov. 19 2013).

248. Prior conviction was admissible for impeachment purposes, and the same evidence was also admissible as substantive evidence rebutting defendant's theory of defense, as he testified that he was unaware that he was required to register, and the State would have been able to rebut his theory with evidence of his prior convictions for the same offense. Vasquez v. State, 417 S.W.3d 728, 2013 Tex. App. LEXIS 14137, 2013 WL 6070495 (Tex. App. Houston 14th Dist. Nov. 19 2013).

249. At defendant's trial for burglary of a habitation, the trial court was not required to give an instruction in the jury charge limiting the use of defendant's prior convictions for impeachment purposes only because defendant never requested a limiting instruction at the time the evidence was introduced. Reyes v. State, 422 S.W.3d 18, 2013 Tex. App. LEXIS 13573, 2013 WL 5872738 (Tex. App. Waco Oct. 31 2013).

250. Defendant convicted of aggravated sexual assault and indecency with a child failed to preserve appellate review of his objection to the admissibility of his prior conviction for failure to register as a sex offender as impeachment evidence, because he did not testify and it was impossible to determine whether the probative value of his testimony would have exceeded its prejudicial effect. Marett v. State, 415 S.W.3d 514, 2013 Tex. App. LEXIS 12592, 2013 WL 5583601 (Tex. App. Houston 1st Dist. Oct. 10 2013).

251. Trial court did not err in refusing defendant's request to offer impeachment evidence during cross-examination of a police detective regarding the criminal history of one of the State's witnesses because the detective's answer to the prosecutor's question did not suggest that the witness's 2008 arrest was his first, or that the witness was a law abiding citizen, and the trial court could have reasonably concluded that the detective's testimony did not open the door to cross-examination about the witness's entire criminal history. Randle v. State, 2013 Tex. App. LEXIS 12325, 2013 WL 5522003 (Tex. App. Houston 1st Dist. Oct. 3 2013).

252. At defendant's trial for aggravated robbery, the trial court did not abuse its discretion by admitting his misdemeanors during cross-examination. Defendant had volunteered information about his prior criminal record and left a false impression about his misdemeanors by making them sound like traffic tickets instead of convictions for drug possession and unlawful carrying of a weapon. Wash. v. State, 2013 Tex. App. LEXIS 9198 (Tex. App. Fort Worth July 25 2013).

253. There was no abuse of discretion in a trial court's keeping defendant from cross-examining one of the State's witnesses about the circumstances of the crime that resulted in her being placed on community supervision because while defendant was permitted to establish that the witness had been convicted of a felony offense, he could not inquire as to the circumstances surrounding the offense. The trial court did not abuse its discretion in precluding defendant from pursuing inadmissible evidence. Griffith v. State, 2013 Tex. App. LEXIS 8942 (Tex. App. Texarkana July 19 2013).

254. Appellant was released from prison for a murder conviction in 2008, and therefore his prior conviction fell well within the 10-year range. Wise v. State, 2013 Tex. App. LEXIS 8446 (Tex. App. Eastland July 11 2013).

255. Appellant's testimony left the false impression that a person passed away, when in fact appellant had murdered him, and evidence of the conviction removed that false impression and was relevant to the determination of appellant's insanity defense and his credibility; thus, the probative value of the evidence outweighed its prejudicial effect and the evidence was admissible. Wise v. State, 2013 Tex. App. LEXIS 8446 (Tex. App. Eastland July 11 2013).

256. Trial court did not abuse its discretion in allowing the prosecuting attorney to impeach defendant with a prior conviction for failing to identify by giving false or fictitious information where the record reflected that, when cross-examined, defendant admitted to having the prior conviction. Defendant argued that the trial court erred in allowing examination regarding the conviction because he explained on re-direct that he was simply slow in providing his identification, but defendant's explanation did not change the nature of his conviction. Mozeke v. State, 2013 Tex. App. LEXIS 7986, 2013 WL 3326828 (Tex. App. Dallas June 27 2013).

257. Court did not err in prohibiting defendant from cross-examining two State witnesses regarding criminal charges that were pending against them when they testified; defendant failed to show how identifying their pending charges would have tended to show that their testimony might be biased in an unrelated prosecution of defendant for murder. Johnson v. State, 2013 Tex. App. LEXIS 4467 (Tex. App. Houston 1st Dist. Apr. 9 2013).

258. Trial court did not abuse its discretion in admitting evidence of appellant's two prior felony convictions under Tex. R. Evid. 609 because there was no similarity between convictions for possession of a controlled substance and aggravated sexual assault of a child, and because the State had an escalated need to impeach appellant's credibility as he was the only witness capable of denying the allegations of sexual assault. Mireles v. State, 413 S.W.3d 98, 2013 Tex. App. LEXIS 3730 (Tex. App. San Antonio Mar. 27 2013).

259. Appellant claimed the trial court erred in admitting evidence of extraneous offenses, for purposes of Tex. R. Evid. 404(b), but by testifying on direct that none of the allegations against him were true and that he was not investigated or convicted of prostitution, being a terrorist, or theft, other than a certain conviction, appellant created a false impression abut his criminal history, and thus under Tex. R. Evid. 609(a), the State was entitled to impeach appellant with the complained-of evidence. Rowshan v. State, 445 S.W.3d 294, 2013 Tex. App. LEXIS 2987, 2013 WL 1164404 (Tex. App. Houston 1st Dist. Mar. 21 2013).

260. Once appellant took the stand, he was subject to the same rules as other witnesses, the record did not show that appellant was forced to testify, and his claim that he would not have been exposed to the State's cross-examination but for counsel's deficiencies was unsupported, given that (1) he made the ultimate decision to testify, and (2) when he took the stand, he opened the door to impeachment by prior convictions under Tex. R. Evid. 609; the court could not say that it was counsel's deficiencies that exposed appellant to cross-examination concerning his prior convictions, and the court did not find an abuse of discretion on the trial court's part in denying his motion for a new trial. Sincere v. State, 2013 Tex. App. LEXIS 2341 (Tex. App. Eastland Mar. 7 2013).

261. Prior convictions were four felony convictions involving crimes of moral turpitude, and appellant testified he was still on parole, even thought he conviction dates were over 10 years ago; as the record was silent as to appellant's release, the court assumed the trial court found the time limit of Rule 609 satisfied, and the probative value of the evidence outweighed the prejudice, and thus his prior convictions were admissible for impeachment purposes. Sincere v. State, 2013 Tex. App. LEXIS 2341 (Tex. App. Eastland Mar. 7 2013).

262. Court erred by admitting defendant's prior felony conviction for possession of MDMA because it was for possession of cocaine, which had little impeachment value, and it happened 9 years before the instant case. However, the error was harmless because defendant admitted to knowingly possessing steroids for personal use and MDMA with the intent to deliver it. Flores v. State, 2013 Tex. App. LEXIS 1809 (Tex. App. Dallas Feb. 26 2013).

263. Trial court could have found that appellant's volunteered statement that he did not do things "like that" and that he was a professional truck driver gave the jury the impression that, because of potential consequences to his livelihood, he would not have left the scene of an accident, and with his claims of law-abiding behavior, he opened the door to later cross-examination, for purposes of Tex. R. Evid. 609, concerning his three misdemeanor convictions for failing to comply with the duty to stop and provide information after hitting or damaging an unattended vehicle under Tex. Transp. Code Ann. § 550.024. Jenkins v. State, 2013 Tex. App. LEXIS 1432, 2013 WL 530973 (Tex. App. Amarillo Feb. 13 2013).

264. Court agreed that the prosecutor's follow-up questions were not maneuvering or prompting for an assertion that could be used as an avenue for impeachment, and the prosecutor did not exceed the scope of the invitation to clarify appellant's volunteered statement, for purposes of Tex. R. Evid. 609. Jenkins v. State, 2013 Tex. App. LEXIS 1432, 2013 WL 530973 (Tex. App. Amarillo Feb. 13 2013).

265. Defendant's forgery conviction was a felony conviction admissible for impeachment purposes under Tex. R. Evid. 609(a), and he conceded the admissibility of his four prior convictions for burglary of a vehicle; therefore trial counsel was not ineffective for introducing those convictions to the jury in an effort to appear open. Rahe v. State, 2013 Tex. App. LEXIS 1025, 2013 WL 440557 (Tex. App. Houston 14th Dist. Feb. 5 2013).

266. Court did not abuse its discretion in excluding the evidence concerning the officer's prior drug arrest because, at no time during direct examination did the officer make any statements concerning his past conduct that suggested he had never been arrested, charged, or convicted of any offense nor did he create a false impression of law abiding behavior. Sheppard v. State, 2012 Tex. App. LEXIS 10638, 2012 WL 6698963 (Tex. App. Austin Dec. 21 2012).

267. No err by admitting the State's exhibit, which was a redacted plea of guilty and judicial confession for giving a false and fictitious name to police, because lying to a police officer involved moral turpitude (dishonesty); defendant did not object to the judicial confession, but only the other plea papers, the jury heard, without objection, that defendant had confessed to committing an offense. Harris v. State, 2012 Tex. App. LEXIS 10620, 2012 WL 6674479 (Tex. App. Texarkana Dec. 21 2012).

268. Given the impression appellant gave the jury, the trial court did not abuse its discretion by allowing the State to impeach his testimony by asking him questions concerning having tested positive for methamphetamine and by calling a certain rebuttal witness. Blaylock v. State, 2012 Tex. App. LEXIS 9086 (Tex. App. Fort Worth Nov. 1 2012).

269. In defendant's indecent exposure case, trial court was within its discretion in admitting defendant's 2005 conviction for failure to register as a sex offender because defendant contradicted the only other witness called to the stand with direct knowledge of the incident -- the complainant; those circumstances heightened the State's need to impeach defendant's credibility. The State did not go into any detail about the underlying crime, and the trial court instructed the jury not to consider the evidence for purposes other than impeachment. Tristan v. State, 393 S.W.3d 806, 2012 Tex. App. LEXIS 8895, 2012 WL 5285673 (Tex. App. Houston 1st Dist. Oct. 25 2012).

270. Appellant failed to meet his burden of proof as to ineffective assistance of counsel, given that (1) there was not testimony from counsel concerning his strategy, (2) had a limiting instruction been given, it would have kept the jury from considering previous offenses for non-credibility issues, but the lack of a statement from counsel lessened the effectiveness of the State's theory in this regard, (3) while an error affecting a single aspect of a trial might undermine the entire result, it was not clear that was what happened here, (4) counsel filed relevant motions and examined witnesses, and (5) appellant did not show that counsel's failure to permit or obtain a limiting instruction rendered his representation ineffective. Simmons v. State, 2012 Tex. App. LEXIS 7178, 2012 WL 3629864 (Tex. App. Austin Aug. 22 2012).

271. Even if appellant met the first prong of the ineffective assistance test, appellant did not show the absence of a limiting instruction affected the trial's outcome, given that (1) the key to the trial was witness credibility, (2) the jury still could have considered appellant's prior offenses to impeach his credibility, even had a limiting instruction been given, (3) the absence of the instruction permitted the jury to consider those offenses for any purpose, but the court did not see how that changed the outcome in any harmful way, and (4) the prior offenses did not show character conformity, and thus the absence of the limiting instruction did not have a discernible effect on the trial's outcome. Simmons v. State, 2012 Tex. App. LEXIS 7178, 2012 WL 3629864 (Tex. App. Austin Aug. 22 2012).

272. With regard to defendant's 2003 felony theft conviction, all of the Theus factors favored admission of this conviction for impeachment purposes, and the trial court did not abuse its discretion in admitting evidence of his 2003 conviction. Horton v. State, 2014 Tex. App. LEXIS 1973, 2014 WL 689732 (Tex. App. Houston 1st Dist. Feb. 20 2014).

Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility

273. Court acted within its discretion by excluding the victim's remote felony drug convictions, because most of the previous convictions were over twenty-five years old and an intervening gap of approximately twenty years occurred between the four earliest convictions and the three latest convictions, and the information that defendant sought to introduce pertaining to the victim's remote drug convictions was cumulative of information presented to the jury. Jones-Jackson v. State, 443 S.W.3d 400, 2014 Tex. App. LEXIS 9249 (Tex. App. Eastland Aug. 21 2014).

274. Court did not abuse its discretion in overruling defendant's contention that the State had opened the door to making the victim's remote drug convictions admissible, because neither the prosecutor's questioning nor the victim's answers conveyed that the two convictions were the only offenses committed by the victim since they did not speak to offenses committed prior to 2003. Jones-Jackson v. State, 443 S.W.3d 400, 2014 Tex. App. LEXIS 9249 (Tex. App. Eastland Aug. 21 2014).

275. Counsel's failure to investigate the criminal background of a child sexual assault victim's mother did not render his performance deficient; the evidence of the mother's theft conviction would likely have been inadmissible under Tex. R. Evid. 609(b) due to the fact that it occurred more than 10 years before the start of defendant's trial. Sonnier v. State, 2014 Tex. App. LEXIS 8987 (Tex. App. Houston 14th Dist. Aug. 14 2014).

276. Court did not err by prohibiting defense counsel from asking a witness about his earlier convictions because the witness responded truthfully and responsively, and in accordance with the parties' prior agreement, to the State's questioning regarding his prior criminal history; the witness followed the court's explicit instructions to answer questions only about the three specified prior convictions. Turner v. State, 443 S.W.3d 328, 2014 Tex. App. LEXIS 8641 (Tex. App. Houston 1st Dist. Aug. 7 2014).

277. Record did not show that defendant objected in the trial court that evidence should not have been admitted because the convictions were too remote, and instead she raised this argument for the first time on appeal;

because defendant's trial court objection did not comport with her argument on appeal, nothing was preserved for review. Harris v. State, 2014 Tex. App. LEXIS 5282 (Tex. App. Waco May 15 2014).

278. There was no indication that the trial court understood defendant's general objection to constitute a challenge to the remoteness of her convictions, and thus her objection was not apparent from context, and nothing was preserved for review. Harris v. State, 2014 Tex. App. LEXIS 5282 (Tex. App. Waco May 15 2014).

279. Court did not abuse its discretion in excluding evidence of the witness's prior theft convictions because the convictions occurred twenty-one and nineteen years prior to trial and the witness's credibility was not critical. Enriquez v. State, 2014 Tex. App. LEXIS 2898, 2014 WL 1010174 (Tex. App. Dallas Mar. 13 2014).

280. Because defendant presented no evidence showing the relevance of the witness's prior misdemeanor conviction or the circumstances surrounding his alleged dismissal from the sheriff's department, the trial court did not err by limiting her cross-examination of him. Sheffield v. State, 2013 Tex. App. LEXIS 12789, 2013 WL 5638878 (Tex. App. Houston 1st Dist. Oct. 15 2013).

281. Trial court erred under Tex. R. Evid. 609(b) in admitting defendant's prior conviction for DUI during his trial for murder; the record suggested that the DUI conviction was not a felony offense and DUI was not a crime involving moral turpitude. Leyba v. State, 416 S.W.3d 563, 2013 Tex. App. LEXIS 10067, 2013 WL 4070770 (Tex. App. Houston 14th Dist. Aug. 13 2013).

282. Assuming without deciding that appellant was released when paroled, nothing showed the date of this, and thus he could not show that the prior conviction was prima facie inadmissible under Tex. R. Evid. 609. Garcia v. State, 2013 Tex. App. LEXIS 2868, 2013 WL 1149288 (Tex. App. San Antonio Mar. 20 2013).

283. Appellant claimed counsel was deficient for bringing up prior convictions on direct examination, because had counsel waited, the State would have been limited under Tex. R. Evid. 609 to routine impeachment evidence, but absent an explanation in the record regarding counsel's reasons for inquiring about the prior convictions on direct examination, the court presumed that counsel exercised reasonable judgment. Garcia v. State, 2013 Tex. App. LEXIS 2868, 2013 WL 1149288 (Tex. App. San Antonio Mar. 20 2013).

284. At defendant's trial for aggravated robbery, the trial court did not abuse its discretion when it refused to allow the defense to cross examine a witness regarding his criminal history; more than 10 years had elapsed since his conviction for aggravated assault involving a firearm. Because defendant failed to show that the probative value of the conviction substantially outweighed its prejudicial effect, the evidence of the conviction was inadmissible under Tex. R. Evid. 609(b). Henson v. State, 2013 Tex. App. LEXIS 974, 2013 WL 396015 (Tex. App. Houston 14th Dist. Jan. 31 2013).

285. Because defendant's two prior felony convictions were inadmissible under Tex. R. Evid. 609, but defense counsel opened the door for the State to cross-examine defendant's about those convictions by questioning defendant about his convictions, defense counsel was ineffective under U.S. Const. amend. VI; Tex. Const. art. I, § 10. Vasquez v. State, 2012 Tex. App. LEXIS 8496, 2012 WL 4826966 (Tex. App. Eastland Oct. 11 2012).

286. In a murder case, the trial court did not abuse its discretion by excluding evidence about several criminal matters involving the State's witness because there was no deal between the State and the witness that could influence her testimony. There was no evidence to suggest that her decision to testify against defendant was implicated by the State's decision to seek the minimal punishment she received for resisting arrest, and the witness testified that she did not know about a theft charge filed against her until defendant raised the matter at his trial. Dial

v. State, 2012 Tex. App. LEXIS 8288, 2012 WL 4511311 (Tex. App. Amarillo Oct. 2 2012).

287. Denying defendant the right to impeach a witness at his trial for the unauthorized use of a motor vehicle with a remote and successfully completed deferred adjudication probation did not deny defendant his right of confrontation, because the witness's testimony did not create a false impression and he was not convicted of any offense to allow for impeachment under Tex. R. Evid. 609(a). Parker v. State, 2012 Tex. App. LEXIS 7992, 2012 WL 4121133 (Tex. App. Fort Worth Sept. 20 2012).

288. Appellant had the burden to establish that the trial court abused its discretion and thus he had to show that the probative value of the evidence did not substantially outweigh its prejudicial effect, but he did not attempt to do so, and thus it did not matter whether or not the conviction fell outside the 10-year window, for purposes of Tex. R. Evid. 609(b). Chitwood v. State, 350 S.W.3d 746, 2011 Tex. App. LEXIS 7301 (Tex. App. Amarillo Sept. 6 2011).

Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview

289. Defendant never testified and thus the court did not need to address the merits of his claim that the trial court erred in denying his motion to testify without being subject to impeachment under Tex. R. Evid. 609(a). Jones v. State, 2010 Tex. App. LEXIS 3926, 2010 WL 2089659 (Tex. App. Dallas May 26 2010).

290. Reliance on Tex. R. Evid. 609(a) was misplaced because defendant did not claim that the witness he sought to impeach had been convicted of any crime arising out of the alleged conduct of using a fictitious name to receive government benefits. Hernandez v. State, 2010 Tex. App. LEXIS 3012, 2010 WL 1632627 (Tex. App. Austin Apr. 23 2010).

291. In defendant's drug case, assuming the trial court abused its discretion by allowing the State to ask a witness questions concerning whether defendant paid for the motel room and questions about defendant's prior convictions, any harm arising from the error was cured when defendant later testified that he paid for the motel room--the very same conclusion implicit in the witness's testimony--and when evidence of defendant's convictions was admitted without objection during his testimony. Davis v. State, 2010 Tex. App. LEXIS 450 (Tex. App. Amarillo Jan. 26 2010).

292. Defendant did not object to impeachment testimony for purposes of Tex. R. Evid. 609 or the prosecutor's argument regarding that evidence, such that he did not preserve these complaints for review under Tex. R. App. P. 33.1(a). Hudson v. State, 2009 Tex. App. LEXIS 8108, 2009 WL 3347466 (Tex. App. Houston 14th Dist. Oct. 20 2009).

293. Even if the court assumed that defendant's counsel might have successfully objected under Tex. R. Evid. 609(c), the court did not have a record of counsel's reasons for not having done so, plus the challenged conduct was not of such a nature that the court could find that no competent attorney would have engaged in it; counsel might have decided not to emphasize the testimony by objecting before the jury and due to the lack of evidence reflecting counsel's reasons, the court could not find counsel's performance deficient. Hudson v. State, 2009 Tex. App. LEXIS 8108, 2009 WL 3347466 (Tex. App. Houston 14th Dist. Oct. 20 2009).

294. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was

clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

295. Although the State was correct in that a witness could be cross-examined on any matter relevant to any issue in the case, for purposes of Tex. R. Evid. 611(b), defendant's possession of cocaine was a specific act and was inadmissible for the purpose of impeachment under Tex. R. Evid. 608(b) and the trial court erred by admitting this evidence; at the time of trial, defendant had not been convicted of any crime arising out of his possession of cocaine, and therefore Tex. R. Evid. 609 did not apply. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

296. In defendant's assault on a public servant case, the court properly admitted evidence of his prior arrests because the extraneous-arrest evidence was probative of both how well a character witness knew defendant and the foundation for her characterization of him, the trial court gave a limiting instruction, the extraneous arrests took up only four pages in the 564-page record, the question of whether defendant was threatening the officers was directly related to his intent, and the State did not have other evidence with which to rebut the witness's characterization of defendant's character. Morales v. State, 293 S.W.3d 901, 2009 Tex. App. LEXIS 6241 (Tex. App. Texarkana Aug. 12 2009).

297. In a case involving possession of heroin, a trial court did not err by overruling objections made to prior felony convictions from 1978 and 1988 because prior convictions introduced during the punishment phase of a trial were not subject to the remoteness limitation in Tex. R. Evid. 609(b). Therefore, defendant's sentence was properly enhanced, and a sentence of 16 years and 7 months was proper. Eisenmenger v. State, 2009 Tex. App. LEXIS 4042, 2009 WL 988658 (Tex. App. Dallas Apr. 14 2009).

298. Defendant's only objection was on the basis of relevance, plus he failed to object to certain questions and testimony on recross-examination, such that defendant, under Tex. R. App. P. 33.1(a)(1)(A), failed to preserve error on his claim that the State improperly impeached defendant's witness under Tex. R. Evid. 608(a), (b), 609(f). Scott v. State, 2009 Tex. App. LEXIS 131, 2009 WL 51035 (Tex. App. Fort Worth Jan. 8 2009).

299. In a civil case adopted daughters brought against their adoptive father and mother for damages related to sexual abuse, the father and mother argued that the trial court should not have admitted evidence of the father's conviction, but the court did not address this argument because error has not been properly preserved for review, given that (1) the trial court's ruling on their motion in limine did not preserve the error for review, (2) the mother and father's failure to object on the record, for purposes of Tex. R. Evid. 103(a), and obtain an adverse ruling waived the error, and (3) although they moved for a mistrial, because there was no timely objection made on the record and no request for the jury to disregard, error was not preserved for appeal; when the father and mother objected to the use of the conviction to impeach the father's testimony, it had already been admitted into evidence without objection, and because they failed to pursue an adverse ruling after evidence of the conviction was initially admitted, they waived any complaint regarding the admission of the evidence and preserved nothing for appellate review. K.H. v. Doe, 2008 Tex. App. LEXIS 8636 (Tex. App. Houston 14th Dist. Nov. 18 2008).

300. For purposes of Tex. R. Evid. 609, defendant contended that trial counsel provided ineffective assistance by having her admit to her deferred-adjudication probation at the guilt/innocence stage of trial, but the State claimed that counsel's actions might have been in support of an application for probation; however, the court was left to speculate given that there was no record indicating counsel's reasoning and the court was not able to determine whether defendant prove ineffective assistance. Ramos v. State, 2008 Tex. App. LEXIS 6942 (Tex. App. El Paso

Sept. 11 2008).

301. In a trial for child sexual assault, evidence of a 1982 drug conviction was properly admitted under Tex. R. Evid. 609 because probative force of the evidence relating to the prior conviction substantially outweighed its prejudicial effect. Sirois v. State, 2008 Tex. App. LEXIS 3053 (Tex. App. Eastland Apr. 24 2008).

302. In an aggravated robbery case, the trial court did not err in excluding evidence of the victim's prior convictions under Tex. R. Evid. 609, because the victim testified that she was uncertain of whether she was convicted of domestic assault, there was no documentary evidence, and two other convictions to which she admitted were too remote. Medley v. State, 2008 Tex. App. LEXIS 2460 (Tex. App. Houston 1st Dist. Apr. 3 2008).

303. Defendant failed to preserve error regarding his pretrial motion to testify free from impeachment under Tex. R. Evid. 609 because he did not testify at trial. Long v. State, 245 S.W.3d 563, 2007 Tex. App. LEXIS 7896 (Tex. App. Houston 1st Dist. 2007).

304. Defendant's argument that the trial court erred by admitting a prior burglary conviction into evidence under Tex. R. Evid. 609(b) was rejected because defendant failed to preserve the argument for appellate review, as he did not present his argument to the trial court. Rule 609(b) did not apply because the prior conviction was admitted to show intent, not to impeach defendant's testimony; defendant did not testify. Boone v. State, 2007 Tex. App. LEXIS 4424 (Tex. App. Beaumont June 6 2007).

305. Although defendant argued that the trial court abused its discretion when it refused to allow defendant to testify free from impeachment with prior convictions, the court did not need to address the point because defendant never testified, and thus error was not preserved. Clark v. State, 2007 Tex. App. LEXIS 1676 (Tex. App. Dallas Mar. 6 2007).

306. In an indecency with a child case, a court properly restricted defendant's cross-examination of the victim's mother regarding benefits from a crime victims' compensation fund intended to show that she sought financial gain as a consequence of the incident because the proffered evidence was only marginally probative on the issue of bias or motive, and the mother was effectively impeached because she was incarcerated at the time of trial serving a sentence for forgery and had given custody of her children to a relative. Hoover v. State, 2007 Tex. App. LEXIS 1549 (Tex. App. Austin Feb. 27 2007).

307. In a case involving assault-family violence, an error under Tex. R. Evid. 609 was not preserved for appellate review where defendant did not offer evidence of a prior conviction of a witness, nor did he argue that Tex. R. Evid. 609 violated his constitutional rights. Atkinson v. State, 2007 Tex. App. LEXIS 1348 (Tex. App. Fort Worth Feb. 22 2007).

308. State conceded that the impeachment value of defendant's conviction under a Michigan assault law was less than had the crime been one of deception and that the similarity between the assault and the current charge of robbery under Tex. Penal Code Ann. § 29.02 weighed in defendant's favor, but defendant conceded that the importance of defendant's testimony was crucial to the case, and defendant did not testify; the court found no abuse of discretion in the trial court's overruling defendant's motion to testify free from impeachment by prior conviction. Herrera v. State, 2007 Tex. App. LEXIS 910 (Tex. App. Waco Feb. 7 2007).

309. Because the conduct underlying defendant's public lewdness conviction, deviate sexual intercourse, violated accepted social behavior and offended society at large, public lewdness, as defined by the Texas Penal Code, constituted a crime of moral turpitude and could be used to impeach defendant's credibility. Escobedo v. State, 202

S.W.3d 844, 2006 Tex. App. LEXIS 6535 (Tex. App. Waco 2006).

310. During voir dire in defendant's trial for possession of methamphetamine enhanced by two prior felonies, the court abused its discretion by prohibiting defense counsel from asking a potential juror if he would automatically disbelieve a convicted felon; counsel's question was a proper commitment question; under the rules of evidence, a juror has a right to disbelieve a convicted felon. Tijerina v. State, 202 S.W.3d 299, 2006 Tex. App. LEXIS 6073 (Tex. App. Fort Worth 2006).

311. Because defendant did not testify, and nothing showed that the decision not to testify was motivated by the trial court's preliminary ruling, defendant waived any complaint about the trial court's in limine rulings regarding the use of defendant's prior probated felony conviction for impeachment purposes under Tex. R. Evid. 609; because defendant did not testify, the prior conviction was never offered, and thus any possible harm from the rulings would have been speculative. Leal v. State, 2006 Tex. App. LEXIS 4088 (Tex. App. Houston 1st Dist. May 11 2006).

312. In defendant's drug case, the court properly admitted his prior conviction for possession of drugs for impeachment purposes where the prior offense occurred six years earlier, the fact that defendant's probation for the prior conviction was revoked because he failed a urinanalysis demonstrated that defendant had a propensity for running afoul of the law, and defendant's credibility was a critical issue in that his testimony at trial differed greatly from the officer's testimony at trial. Miller v. State, 196 S.W.3d 256, 2006 Tex. App. LEXIS 3818 (Tex. App. Fort Worth 2006).

313. In a case of aggravated sexual assault of a child, defendant could not challenge the propriety of the trial court's ruling that the State could impeach him with prior convictions because he did not testify. Hector v. State, 2006 Tex. App. LEXIS 3653 (Tex. App. Houston 14th Dist. May 2 2006).

314. Even if a witness's testimony that the victim was "very nice" could have been considered a false impression regarding the victim's criminal history, the witness's testimony did not invoke exceptions to Tex. R. Evid. 609, and the trial court did not err in excluding evidence regarding the victim's criminal history. Reyes v. State, 2006 Tex. App. LEXIS 3649 (Tex. App. Houston 14th Dist. Apr. 27 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 4160 (Tex. App. Houston 14th Dist. May 16, 2006).

315. Court rejected defendant's claim of ineffective assistance of counsel, given that (1) trial counsel presented the most viable defense available concerning misidentification and by impeaching credibility, (2) the jury was free to believe the State's identification of defendant as the seller of the drugs in question, (3) it was reasonable trial strategy for defendant not to have testified because at least one of defendant's prior felony convictions would have been used by the State under Tex. R. Evid. 609 to impeach defendant's testimony, and (4) the court was not free to speculate as to the reasons for and possible harm from the various acts alleged; the court noted that defendant was free to file a petition for discretionary review under Tex. R. App. P. 66 raising error by the court in a direct appeal. Barnes v. State, 2006 Tex. App. LEXIS 3702 (Tex. App. Beaumont Apr. 26 2006).

316. Because the victim's prior conviction was not a felony, the court had to determine, under Tex. R. Evid. 609(a), whether the conviction for violating a protective order was a crime of moral turpitude and if so, if the probative value of the evidence outweighed its prejudicial effect. Rincon v. State, 2006 Tex. App. LEXIS 2758 (Tex. App. San Antonio Apr. 5 2006).

317. Trial court did not err in refusing to allow defendant to impeach the victim under Tex. R. Evid. 609(a); the record was unclear as to the underlying act to support the victim's conviction of violation of a protective order, and thus defendant failed to establish the proper predicate under Tex. R. Evid. 609, and defendant also failed to meet the burden under the rule because defendant did not argue at trial how the probative value of the victim's conviction

outweighed its prejudicial effect. Rincon v. State, 2006 Tex. App. LEXIS 2758 (Tex. App. San Antonio Apr. 5 2006).

318. While the trial court's ruling accurately reflected the general limits placed on impeachment, the court found that defendant's wife, the victim, opened the door to impeachment evidence concerning her earlier plea in a domestic violence case because her testimony left a false impression concerning her past criminal history, and thus, the trial court's reliance on the general rule concerning remote evidence was misplaced in this case, and the trial court abused its discretion; the wife's denial was directly relevant to the offense charged of family violence and the defense raised to that charge, and the State was free to offer extrinsic evidence rebutting her statement. Winegarner v. State, 188 S.W.3d 379, 2006 Tex. App. LEXIS 2163 (Tex. App. Dallas 2006).

319. It is clear that forgery and debit card abuse are crimes involving deception, for purposes of impeachment under Tex. R. Evid. 609, and these offenses go to one's truthfulness and credibility. Denman v. State, 193 S.W.3d 129, 2006 Tex. App. LEXIS 2003 (Tex. App. Houston 1st Dist. 2006).

320. Delivery of cocaine is not a crime of violence, but that is not to say that drug trafficking holds no impeachment value for purposes of impeachment under Tex. R. Evid. 609; while the court declined to decide whether the delivery of drugs is a crime of moral turpitude, it found that it certainly implicates one's credibility and candor on the witness stand. Denman v. State, 193 S.W.3d 129, 2006 Tex. App. LEXIS 2003 (Tex. App. Houston 1st Dist. 2006).

321. Court rejected defendant's claim of ineffective assistance of counsel based on the claim that counsel admitted into evidence defendant's prior felony convictions, because the trial court would have admitted the convictions under the test for determining under Tex. R. Evid. 609 whether a prior conviction's probative value outweighed its prejudicial effect; all factors favored admissibility regarding defendant's conviction of debit card abuse and forgery, and four out of five factors favored admissibility regarding defendant's conviction of delivery of cocaine. Denman v. State, 193 S.W.3d 129, 2006 Tex. App. LEXIS 2003 (Tex. App. Houston 1st Dist. 2006).

322. In defendant's murder case, a court abused its discretion by admitting evidence of defendant's prior voluntary manslaughter conviction under Tex. R. Evid. 609 because voluntary manslaughter was an offense involving violence, and did not involve deception, the prior offense and the charged offense were similar, defendant's testimony was critical to his claim of self-defense, and the State also had impeachment evidence of a prior conviction of forgery, which was a crime involving deception and moral turpitude and was better suited for impeachment purposes. High v. State, 2006 Tex. App. LEXIS 877 (Tex. App. Houston 1st Dist. Feb. 2 2006).

323. In an aggravated robbery trial, defendant failed to demonstrate that the probative value of the complainant's previous eight misdemeanor prostitution convictions outweighed the prejudicial effect of the excluded evidence under Tex. R. Evid. 609(a). The trial court had ruled that the complainant's felony conviction for possession of a controlled substance and her most recent misdemeanor conviction for prostitution were admissible. Hill v. State, 2005 Tex. App. LEXIS 8263 (Tex. App. Houston 14th Dist. Oct. 6 2005).

324. Pursuant to Tex. R. Evid. 609(a), the State was entitled to cross-examine defendant on his prior arrests and convictions for impeachment purposes because he opened the door to his criminal history when he gave misleading responses to his counsel's inquiry into his problems with the law in that he implied that his criminal history consisted only of minor traffic offenses and a justifiable assault on an animal control officer. The trial court could have reasonably concluded that defendant left a false impression with the jury with respect to the extent of his trouble with the law. Martinez v. State, 2005 Tex. App. LEXIS 7748 (Tex. App. El Paso Sept. 22 2005).

325. In connection with defendant's trial for indecency with a child, because defense counsel's questions to defendant's mother inquired about his character for moral and safe relations with small children and young girls, not his general character, the State's questions related to defendant's prior robbery conviction were not relevant for

purposes of Tex. R. Evid. 405(a) and were not proper impeachment questions. However, any error was harmless under Tex. R. App. P. 44.2(b) because evidence of the robbery conviction was properly admitted later during defendant's testimony and on cross-examination, it did not appear that defendant was forced to take the stand to explain the robbery conviction, and once defendant took the stand, the State could have impeached defendant's testimony under Tex. R. Evid. 609(a) by introducing evidence of the robbery conviction. Reeders v. State, 2005 Tex. App. LEXIS 7682 (Tex. App. Austin Sept. 14 2005).

326. Trial court erred in admitting the 1989 drug conviction into evidence because the appellate court could not find facts or circumstances suggesting that the probative value of the prior conviction substantially outweighed its prejudicial effect, nor could the appellate court conclude that it was "within the zone of reasonableness" to find that the importance of impeaching defendant substantially outweighed the prejudicial effect of the evidence, however, the erroneous admission of the 1989 conviction was harmless, because considering the nature of the evidence supporting the verdict, the two brief references to the 1989 conviction could not have caused more than a slight influence on the jury in light of the other, more prejudicial evidence against defendant. Hankins v. State, 180 S.W.3d 177, 2005 Tex. App. LEXIS 6465 (Tex. App. Austin 2005).

327. Trial court did not err in permitting the State to impeach, under Tex. R. Evid. 609(b), defendant's testimony with felony convictions that were over 10 years old for credit card abuse under Tex. Penal Code Ann. § 32.31 and burglary; defendant acknowledged more recent convictions of theft, a crime of moral turpitude, and thus there was evidence of a lack of reformation, which made the inquiry under Rule 609(a) proper, and the older convictions were crimes of deception and the factors weighed in favor of admission for impeachment purposes. LaHood v. State, 171 S.W.3d 613, 2005 Tex. App. LEXIS 6258 (Tex. App. Houston 14th Dist. 2005).

328. Defendant did not object to the lack of notice or adequacy of notice, pursuant to Tex. R. Evid. 404(b), Tex. R. Evid. 609(f), Tex. Code Crim. Proc. art. 38.37, § 3, and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(g), when the evidence in question was offered, pursuant to Tex. R. Evid. 103(a)(1); thus, defendant did not preserve this aspect of defendant's first issue for appellate review. Bronaugh v. State, 2005 Tex. App. LEXIS 4455 (Tex. App. Waco June 8 2005).

329. Trial court did not err in permitting the State to cross-examine defendant regarding a prior conviction for misdemeanor assault on defendant's wife because the conviction was a crime of moral turpitude under Tex. R. Evid. 609(a); although certain factors favored admission and others favored exclusion, because the admission fell within the zone of reasonable disagreement, the trial court did not abuse its discretion in admitting the evidence, and even if there was error, it was harmless under Tex. R. App. P. 44.2(b) because the admission of the prior conviction had at most only a slight influence on the jury's verdict, given the overwhelming evidence of defendant's guilt of the current crime of murder under Tex. Penal Code Ann. § 19.02(b). Mendez v. State, 2005 Tex. App. LEXIS 3521 (Tex. App. Houston 14th Dist. May 10 2005).

330. Mere age of a grandmother's convictions did not render the convictions unfairly prejudicial under Tex. R. Evid. 403, and the trial court did not abuse its discretion in permitting the state family department to impeach the grandmother with her inconsistent prior testimony, pursuant to Tex. R. Evid. 609, claiming that she had successfully completed probation; the grandmother's involvement with drugs and her criminal convictions were relevant to several of the factors used to evaluate the best interests of the child pursuant to Tex. Fam. Code Ann. § 103.002, and requiring the grandmother to read prior testimony line-by-line was harmless error under Tex. R. App. P. 44.1 in the face of other evidence regarding the child's best interests. Taylor v. Tex. Dep't of Protective & Regulatory Servs., 160 S.W.3d 641, 2005 Tex. App. LEXIS 1793 (Tex. App. Austin 2005).

331. Tex. R. Evid. 609 is not a categorical limitation on the introduction of convictions for any purpose; rather, it applies only to convictions offered for purposes of impeachment. Taylor v. Tex. Dep't of Protective & Regulatory

Servs., 160 S.W.3d 641, 2005 Tex. App. LEXIS 1793 (Tex. App. Austin 2005).

332. Court denied the State of Texas's motion for rehearing after overturning defendant's conviction on the ground that he received ineffective assistance of counsel because there was no sound trial strategy by defense counsel for failing to object to evidence of defendant's prior arrests for unadjudicated offenses. Defendant did not create a false impression pursuant to Tex. R. Evid. 609(a) by any of his testimony on direct examination or by any volunteered statement on cross-examination. Hall v. State, 161 S.W.3d 142, 2005 Tex. App. LEXIS 1742 (Tex. App. Texarkana 2005).

333. When a defendant voluntarily testifies as to his prior criminal record without any prompting or maneuvering on the part of the State's attorney and in so doing he leaves a false impression with the jury, the State is allowed to correct that false impression by introducing evidence of the defendant's prior criminal record. Hall v. State, 161 S.W.3d 142, 2005 Tex. App. LEXIS 1742 (Tex. App. Texarkana 2005).

334. In an assault case, a victim's alleged unreported assaults against defendant were not admissible under Tex. R. Evid. 609 because there were no felony convictions or crimes of moral turpitude; moreover, the evidence was properly excluded under Tex. R. Evid. 403 because, even if the evidence had some bearing on the victim's motivation to fabricate, the danger was high that it would have confused the jury. Mumphrey v. State, 155 S.W.3d 651, 2005 Tex. App. LEXIS 370 (Tex. App. Texarkana 2005).

335. In an indecency with a child by contact case, the trial court did not improperly grant the State's motion in limine and required defense counsel to approach the bench before asking the victim whether she had ever lied to a police officer or school officer as whether the child victim had ever been in trouble for marijuana possession was the type of evidence which was not allowed by the evidentiary rules. Dinsmore v. State, 2004 Tex. App. LEXIS 11624 (Tex. App. Fort Worth Dec. 23 2004).

336. Trial court did not err by denying defendant the right to impeach a witness, from whom defendant had borrowed a truck used in a robbery and murder, with a felony conviction from Mexico under Tex. R. Evid. 609(a) because defendant never offered any documents or testimony establishing the existence of a felony conviction, nor did he request a continuance to obtain proof. Sierra v. State, 157 S.W.3d 52, 2004 Tex. App. LEXIS 11374 (Tex. App. Fort Worth 2004).

337. Trial court did not err in admitting evidence of a prior conviction of defendant's under Tex. R. Evid. 609(a) in connection with defendant's trial for aggravated assault in violation of Tex. Penal Code Ann. § 22.02(b)(2); the trial court analyzed the admissibility of the prior conviction in light of the relevant factors and thus there was no abuse of discretion. Brown v. State, 2004 Tex. App. LEXIS 9479 (Tex. App. Eastland Oct. 28 2004).

338. Where defendant plead guilty to forgery and was sentenced to 19 years incarceration, the trial court had not acted improperly in considering convictions more than 10 years old to enhance his punishment where Tex. Pen. Code Ann. § 12.42 (Vernon 2003) did not impose a time limit on the use of prior convictions for the purpose of enhancing a defendant's punishment and counsel was not ineffective for having failed to object to the use of the prior convictions for enhancement purposes. Austin v. State, 2004 Tex. App. LEXIS 8114 (Tex. App. Amarillo Sept. 2 2004).

339. Defendant's convictions were reversed and remanded because defendant received ineffective assistance of counsel when trial counsel introduced two prior convictions to the jury that were inadmissible under Tex. R. Evid. 609, there was no sound trial strategy for introducing the prior convictions to the jury, and it was reasonable to conclude that trial counsel's error undermined confidence in the outcome; defendant's trial counsel introduced both convictions to the jury, despite the fact that more than 10-years had elapsed since the date of each conviction, trial

counsel admitted rendering ineffective assistance in representing defendant, and acknowledged that he should have objected to the admission of evidence regarding the prior convictions and that he should have moved to suppress defendant's oral statements to the police investigator regarding the convictions. Elliott v. State, 2004 Tex. App. LEXIS 7710 (Tex. App. Corpus Christi Aug. 26 2004).

340. Defendant's conviction for robbery was proper where, although the questioning and testimony regarding defendant's juvenile record was clearly inadmissible under Tex. R. Evid. 609(d), the evidence indicated that allowing the testimony was part of his counsel's sound trial strategy. Bufford v. State, 2004 Tex. App. LEXIS 7801 (Tex. App. El Paso Aug. 26 2004).

341. In an aggravated assault case, the trial court improperly permitted the State to elicit testimony about the details of defendant's prior conviction and his strategy of self-defense as the State's delving into the details of the prior shooting was prejudicial because it forced defendant to defend himself against charges that were not the subject of the present suit, implied that he was a violent man, and suggested that the current offense was in conformity with that character. Further, there was little, if any, probative value gained from the admission of the evidence. Arebalo v. State, 143 S.W.3d 402, 2004 Tex. App. LEXIS 7157 (Tex. App. Austin 2004).

342. Borrower's bank fraud conviction was admissible because his credibility as a witness was at issue in his action against a holder of a note; the borrower alleged that the holder charged him usurious interest based upon a conversation he had regarding a demand letter, thus placing his credibility squarely at issue. Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc., 176 S.W.3d 307, 2004 Tex. App. LEXIS 7269 (Tex. App. Houston 1st Dist. 2004).

343. Trial court's decision to admit defendant's records of prior theft convictions was not an abuse of discretion because the State was free to introduce evidence of the convictions under Tex. R. Evid. 609, as defendant's prior theft convictions involved moral turpitude, and although defendant admitted to the prior convictions, she opened the door to further exposure when she maintained she did not commit the thefts. Ramirez v. State, 2004 Tex. App. LEXIS 5977 (Tex. App. Tyler June 30 2004).

344. Trial court did not abuse its discretion in considering a NCIC report to determine whether defendant's prior conviction was admissible under Tex. R. Evid. 609, and although the prior conviction and the charged offense were not similar, defendant's testimony and his credibility were both important to the case, and from the record it was apparent that the trial court engaged in the balancing test required under Tex. R. Evid. 609(a) and properly allowed the impeachment testimony. Gay v. State, 2004 Tex. App. LEXIS 5448 (Tex. App. Dallas June 18 2004).

345. Habeas corpus petitioner, who was convicted of capital murder, failed to establish that trial counsel rendered ineffective assistance by refusing to object to the State's impeachment by use of three misdemeanor convictions, in violation of Tex. R. Evid. 609(a), because substantial impeachment evidence had already been admitted and the petitioner had opened the door to the use of his misdemeanor convictions. Morrow v. Dretke, 99 Fed. Appx. 505, 2004 U.S. App. LEXIS 10009 (5th Cir. Tex. 2004), writ of certiorari denied by 543 U.S. 944, 125 S. Ct. 359, 160 L. Ed. 2d 257, 2004 U.S. LEXIS 6989, 73 U.S.L.W. 3246 (2004).

346. In a felony aggregate theft case, the State's failure to give defendant timely notice of its intent to use his prior convictions to impeach him did not affect his substantial rights; admission was harmless considering the overwhelming evidence, and that defendant was aware that the State planned to impeach him with his prior convictions when he took the stand. Geuder v. State, 142 S.W.3d 372, 2004 Tex. App. LEXIS 3546 (Tex. App. Houston 14th Dist. 2004).

347. Issue on appeal concerned whether the trial court erred in allowing into evidence defendant's prior juvenile delinquency adjudications; the State argued that evidence of an assault and reckless injury to an elderly individual

was admissible to correct the false impression left by defendant's direct testimony that he had never been in a violent altercation before this incident. The appellate court held he did not open the door by having left a false impression because the question concerned his relationship with others involved in this altercation. Carter v. State, 2004 Tex. App. LEXIS 3073 (Tex. App. Texarkana Apr. 6, 2004).

348. Convictions for sexual assault and forgery more than 10 years old were subject to the standard of Tex. R. Evid. 609(a) and were not automatically unusable to impeach even though they were more than 10 years old, because the witness had a subsequent conviction for indecent exposure that was considered a crime of moral turpitude that vitiated the remoteness of the two other convictions. Woodall v. State, 77 S.W.3d 388, 2002 Tex. App. LEXIS 3087 (Tex. App. Fort Worth 2002).

349. Whether or not to admit remote convictions is within the trial courts' discretion and depends on the facts and circumstances of each case. Woodall v. State, 77 S.W.3d 388, 2002 Tex. App. LEXIS 3087 (Tex. App. Fort Worth 2002).

350. Under Tex. R. Evid. 609(b), where more than 10 years have elapsed, a prior conviction will not be remote where the witness' lack of reformation is shown by evidence of an intervening conviction for a felony or a misdemeanor crime of moral turpitude. Woodall v. State, 77 S.W.3d 388, 2002 Tex. App. LEXIS 3087 (Tex. App. Fort Worth 2002).

351. Evidence of lack of reformation of witnesses by subsequent felony and certain misdemeanor convictions can cause prior convictions to fall outside the general rule of Tex. R. Evid. 609(b), and make them not subject to the objection of remoteness. Woodall v. State, 77 S.W.3d 388, 2002 Tex. App. LEXIS 3087 (Tex. App. Fort Worth 2002).

352. Moral turpitude is defined as including acts that are base, vile, or depraved. Woodall v. State, 77 S.W.3d 388, 2002 Tex. App. LEXIS 3087 (Tex. App. Fort Worth 2002).

353. Tex. R. Evid. 609(b) is not applicable to impeach a complainant's conviction where she was discharged from probation less than 10 years before defendant's trial. Craig v. State, 82 S.W.3d 451, 2002 Tex. App. LEXIS 2542 (Tex. App. Austin 2002).

354. Contention of defendant upon being convicted of felony theft, that the trial court erred in allowing the State to impeach him with proof of prior convictions when he had not been given notice pursuant to Tex. R. Evid. 609(f), could not be entered on appeal, because defendant failed to object when the prosecutor inquired into his prior convictions and, thus, he failed to preserve error as required by Tex. R. App. P. 33.1. Geuder v. State, 76 S.W.3d 133, 2002 Tex. App. LEXIS 2312 (Tex. App. Houston 14th Dist. 2002), vacated by 115 S.W.3d 11, 2003 Tex. Crim. App. LEXIS 305 (Tex. Crim. App. 2003).

355. An exception applies to Tex. R. Evid. 609 when a witness makes statements concerning his criminal past which created a false impression with the jury as to the extent of either his prior (1) arrests, (2) convictions, (3) charges or (4) "trouble" with the police. Anaya v. State, 988 S.W.2d 823, 1999 Tex. App. LEXIS 988 (Tex. App. Amarillo 1999).

Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility

356. Trial court did not abuse its discretion by allowing the State to introduce testimony about defendant's criminal record during the guilt-innocence phase of his trial because the State was authorized under Tex. R. Evid. 806 to

impeach defendant's hearsay testimony; the two witnesses' testimony was hearsay, as they were statements of defendant made out of court to prove that defendant had purchased the laptop from a friend. The Theus factors also weighed in favor of admission, as all of defendant's prior convictions but one involved crimes of moral turpitude or theft, defendant's otherwise remote convictions were followed by additional convictions, and had the jury believed the witnesses' hearsay statements it likely would have acquitted defendant. Schmidt v. State, 373 S.W.3d 856, 2012 Tex. App. LEXIS 5657, 2012 WL 2888213 (Tex. App. Amarillo July 16 2012).

357. It was possible that counsel employed a strategy to introduce testimony of appellant's prior convictions to lessen the impact, given the State's notice of its intent to impeach appellant and the trial court's ruling that denied appellant's motions in limine on the subject; given the silent record, appellant did not rebut the presumption of reasonable representation. Miles v. State, 2012 Tex. App. LEXIS 4929, 2012 WL 2356478 (Tex. App. Houston 14th Dist. June 21 2012).

358. Record was silent as to the reasons behind trial counsel's strategy for not obtaining a ruling on the motion to permit defendant to testify free from impeachment by prior criminal convictions; defendant did not meet his burden of demonstrating that his counsel was deficient. West v. State, 2012 Tex. App. LEXIS 3612, 2012 WL 1606239 (Tex. App. Houston 14th Dist. May 8 2012).

359. For purposes of Tex. R. Evid. 403, although evidence of appellant's prior convictions might have had a tenancy to suggest an outcome on a basis that was improper based on the convictions' prejudicial nature, that was true of all evidence of appellant's prior convictions; Tex. R. Evid. 609 explicitly provides for impeachment with prior convictions for felonies and crimes of moral turpitude, the court presumed that the jury following the instruction to consider the prior convictions only for purposes of impeachment, nothing showed these instructions were disregarded, and the trial court did try to mitigate any improper influence. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

360. Appellant claimed that evidence was unnecessarily cumulative as the State could have used only certain convictions and not others; however, Tex. R. Evid. 609 places no restriction on the number of previous convictions that may be used to impeach a witness's credibility, and arguably, the number of previous convictions corresponds to the level of impeachment of the witness's credibility: the more previous convictions, the greater the impeachment. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

361. Counsel objected to evidence under Tex. R. Evid. 403 and counsel said he was not objecting under Tex. R. Evid. 609; thus, appellant did not preserve for review his Rule 609 issue, the case law factors that guided the balancing test under Rule 609 were not applicable, and the court only considered the Tex. R. Evid. 403 issue based on the factors that had to be considered in a Rule 403 balancing test. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

362. Appellant's convictions for possession of a controlled substance were felony offense convictions, and a misdemeanor family violence assault conviction was a crime of moral turpitude, for purposes of Tex. R. Evid. 609(a), plus burglary of a motor vehicle was a crime of deception; the trial court could have found, for purposes of Tex. R. Evid. 403, that these convictions were probative of credibility of appellant. Johnson v. State, 2012 Tex. App. LEXIS 3592, 2012 WL 1582236 (Tex. App. Austin May 4 2012).

363. Driver had been convicted in 2003 of theft, a crime that involved moral turpitude, and evading arrest, but the issue of the driver's use of ordinary care concerning a 2009 car accident and his possible dishonesty concerning what vehicle he saw pass him were not similar to the 2003 offenses, and this case was not a "he said, she said" type of case; the trial court performed a balancing test under Tex. R. Evid. 609(a), and the court found no abuse of discretion by the trial court in its action of finding the evidence more prejudicial than probative and in excluding this

evidence. Cortez v. Wyche, 2012 Tex. App. LEXIS 3565, 2012 WL 1555909 (Tex. App. Fort Worth May 3 2012).

364. Given that appellant would have been trying to impeach the informant with evidence of a prior conviction of a felony, appellant had the burden to show that a conviction existed and meet other requirements under Tex. R. Evid. 609. Moffett v. State, 2012 Tex. App. LEXIS 3242 (Tex. App. Amarillo Apr. 25 2012).

365. Trial court did not abuse its discretion by admitting defendant's prior burglary convictions into evidence under Tex. R. Evid. 609(b) because: (1) burglary had been found to be a crime of deception; (2) although the record did not establish what year the first two convictions occurred, the third burglary conviction occurred on August 20, 2008; and (3) defendant's testimony and credibility were of significance, as his entire defense that he was an innocent bystander to the robbery depended on his testimony. Medina v. State, 367 S.W.3d 470, 2012 Tex. App. LEXIS 2932, 2012 WL 1293035 (Tex. App. Texarkana Apr. 17 2012).

366. Trial court did not abuse its discretion by admitting defendant's prior unauthorized use of a motor vehicle conviction during his robbery trial because: (1) the unauthorized use of a motor vehicle had been found to be a crime of deception; (2) although the prior conviction was several years old, it was not too remote to be considered and demonstrated a propensity for running afoul of the law; and (3) defendant's testimony and the credibility of that testimony were of significance, as his entire defense that he was an innocent bystander to the robbery depended on his testimony. Medina v. State, 367 S.W.3d 470, 2012 Tex. App. LEXIS 2932, 2012 WL 1293035 (Tex. App. Texarkana Apr. 17 2012).

367. Trial court did not abuse its discretion by admitting defendant's prior robbery conviction during his robbery trial because: (1) although the conviction was several years old, it was not remote and demonstrated a propensity for running afoul of the law; and (2) defendant's testimony and credibility were of enormous significance, as his entire defense that he was an innocent bystander to the robbery depended on his testimony. Medina v. State, 367 S.W.3d 470, 2012 Tex. App. LEXIS 2932, 2012 WL 1293035 (Tex. App. Texarkana Apr. 17 2012).

368. In an inmate's personal injury suit against the county, the trial court did not abuse its discretion by admitting into evidence exhibits reflecting his prior felony convictions for robbery under Tex. R. Evid. 609 because the inmate's credibility was at issue and he had been released from confinement for the robbery convictions less than ten years before the trial in the personal injury case. Howard v. Tarrant County, 2012 Tex. App. LEXIS 2063, 2012 WL 858590 (Tex. App. Fort Worth Mar. 15 2012).

369. Trial counsel was not ineffective for failing to object to the State's use defendant's prior convictions for impeachment purposes under Tex. R. Evid. 609 because the convictions were listed in the county jail book-in, book-out record that defendant introduced into evidence while acting as his own counsel, and therefore he opened the door to an inquiry by the State. Matlock v. State, 2012 Tex. App. LEXIS 1120, 2012 WL 426613 (Tex. App. Tyler Feb. 8 2012).

370. Defendant failed to prove that defense counsel was ineffective during a trial for robbery by eliciting testimony about his prior theft case, because the trial court would have acted within its discretion to admit the prior conviction for purposes of impeachment under Tex. R. Evid. 609. Theft was a crime of moral turpitude involving elements of deception; therefore, it had a high impeachment value and it fell within the ten-year restriction of Tex. R. Evid. 609. Huerta v. State, 359 S.W.3d 887, 2012 Tex. App. LEXIS 852, 2012 WL 311677 (Tex. App. Houston 14th Dist. Feb. 2 2012).

371. In a case in which defendant was convicted of two counts of theft less than $ 1,500, the trial court had not abused its discretion in permitting the State to impeach defendant with nine prior convictions pursuant to Tex. R. Evid. 609(a) where: (1) defendant's five prior convictions for unauthorized use of a motor vehicle, two prior theft

convictions, and one prior burglary of a motor vehicle conviction all had strong impeachment value because they were crimes that involved deception; (2) although only one of defendant's prior convictions was relatively recent, the number of prior convictions demonstrated his propensity for lawlessness; and (3) defendant was the only witness in his defense, and because of his testimony, the State needed the opportunity to impeach his credibility. Parker v. State, 2011 Tex. App. LEXIS 9612, 2011 WL 6091248 (Tex. App. Waco Dec. 7 2011).

372. Appellant had the burden to show that a witness had been convicted of a felony or a crime involving moral turpitude, either through her or by establishing the convictions by public record, under Tex. R. Evid. 609(a). Woodard v. State, 2011 Tex. App. LEXIS 8836, 2011 WL 5319907 (Tex. App. Houston 1st Dist. Nov. 3 2011).

373. Appellant objected to the exclusion of the misdemeanor convictions on the grounds that they were crimes of moral turpitude, and he did not object on Confrontation Clause grounds, and thus that argument was waived. Woodard v. State, 2011 Tex. App. LEXIS 8836, 2011 WL 5319907 (Tex. App. Houston 1st Dist. Nov. 3 2011).

374. Trial court did not err in admitting evidence of the witness's 1997 conviction under Tex. R. Evid. 609 because the witness's 2010 felony conviction for possession of a controlled substance removed the taint of remoteness from the witness's 1997 conviction and, inter alia, the State had a need to impeach the witness's credibility in order to rehabilitate the officers' credibility. Nelson v. State, 2011 Tex. App. LEXIS 8512, 2011 WL 5116467 (Tex. App. Houston 1st Dist. Oct. 27 2011).

375. Trial court did not err in admitting evidence of defendant's prior convictions under Tex. R. Evid. 609 because the convictions were felonies or crimes of moral turpitude for which defendant was convicted within the last 10 years, and he did not identify what the prejudicial effect of his prior convictions was or how it outweighed their probative value. Than v. State, 2011 Tex. App. LEXIS 8515, 2011 WL 5116469 (Tex. App. Houston 1st Dist. Oct. 27 2011).

376. Defendant did not show that counsel rendered ineffective assistance of counsel when he did not object to the admission of his prior convictions used for impeachment where trial counsel was not ineffective for not making a meritless objection and he failed to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Matlock v. State, 2011 Tex. App. LEXIS 8496, 2011 WL 5115877 (Tex. App. Tyler Oct. 26 2011).

377. Trial court did not abuse its discretion by admitting evidence that defendant had previously been convicted of failure to register as a sex offender under Tex. R. Evid. 609 and 806 during his trial on charges of sexual assault and aggravated sexual assault because: (1) the prior crime involved deception since defendant, by failing to register, concealed the address at which he resided; (2) one of the charged offenses occurred only five years after the past crime; (3) the admission of the prior conviction informed the jury that defendant had been determined to be a sex offender so there was some potential for the jury to perceive a pattern of past conduct; and (4) defendant's testimony and credibility were critical to his defense because no other witnesses could dispute the detective's account of his interview of defendant and the meaning of a drawing admitted into evidence. Theragood v. State, 2011 Tex. App. LEXIS 7141, 2011 WL 3848840 (Tex. App. El Paso Aug. 31 2011).

378. Trial court did not abuse its discretion by failing to rule--in advance of defendant's taking the stand--that defendant would be allowed to testify free from impeachment with his prior felony conviction; defendant conceded that his testimony was important and his credibility was likewise important. Byrd v. State, 2011 Tex. App. LEXIS 6994, 2011 WL 3925565 (Tex. App. Beaumont Aug. 24 2011).

379. Witnesses' prior convictions did not render their testimony inadmissible under Tex. R. Evid. 609(a) where defense counsel was not prevented from impeaching their credibility with the convictions. Reyna v. State, 2011 Tex.

App. LEXIS 6062, 2011 WL 3366383 (Tex. App. Corpus Christi Aug. 4 2011).

380. Defendant's prior offense was admissible under Tex. R. Evid. 609 because it was a felony; for forgery, which was a crime of deception and of relatively high impeachment value; approximately five years had passed since the offense; the previous conviction and the current case were not similar; and the credibility of defendant's testimony was critical to his current case. Phelps v. State, 2011 Tex. App. LEXIS 4983, 2011 WL 2582810 (Tex. App. Amarillo June 29 2011).

381. Appellant's prior convictions were for theft, which was a crime of deception, and thus this weighed in favor of admission of appellant's convictions under Tex. R. Evid. 609(a). Hayes v. State, 2011 Tex. App. LEXIS 2987, 2011 WL 1581409 (Tex. App. Houston 14th Dist. Apr. 21 2011).

382. Appellant's theft convictions in 2001 and 2007 were recent, and his criminal record showed that he has a propensity for, and a history of, running afoul of the law, such that this favored admission of appellant's prior convictions under Tex. R. Evid. 609(a). Hayes v. State, 2011 Tex. App. LEXIS 2987, 2011 WL 1581409 (Tex. App. Houston 14th Dist. Apr. 21 2011).

383. Appellant's prior convictions were for theft and the present offense was robbery, and although theft was necessarily included in the alleged elements of the greater offense of robbery, the indictment alleged "in the course of committing theft," and thus the robbery offense required an additional element of bodily injury or the threat of imminent bodily injury or death; for purposes of Tex. R. Evid. 609(a), this factor was neutral and weighed neither in favor of nor against admission of appellant's prior convictions. Hayes v. State, 2011 Tex. App. LEXIS 2987, 2011 WL 1581409 (Tex. App. Houston 14th Dist. Apr. 21 2011).

384. Appellant's testimony and his credibility were important because his theory pitted his testimony and the lack of certain evidence against the complainant's testimony; this weighed in favor of admission of appellant's prior convictions. Hayes v. State, 2011 Tex. App. LEXIS 2987, 2011 WL 1581409 (Tex. App. Houston 14th Dist. Apr. 21 2011).

385. Damage to a witness's credibility that appellant wanted, for purposes of Tex. R. Evid. 609(a), was inflicted by the witness's own testimony, and jail records were cumulative on the issue of whether she had been jailed; the trial court did not err in excluding jail records and the custodian's testimony for purposes of Tex. R. Evid. 403. Calvin v. State, 2011 Tex. App. LEXIS 3091, 2011 WL 1562138 (Tex. App. Austin Apr. 21 2011).

386. Even if the court found that purported discrepancy in the number of jailings of a witness made evidence non-cumulative under Tex. R. Evid. 403 and justified admitting the records evidence to impeach the witness under Tex. R. Evid. 609(a), its exclusion was harmless under Tex. R. App. P. 44.2 because there was no showing that appellant's constitutional rights were denied, and the exclusion of the records did not influence the jury or had more than a slight effect. Calvin v. State, 2011 Tex. App. LEXIS 3091, 2011 WL 1562138 (Tex. App. Austin Apr. 21 2011).

387. Even if trial counsel's failure to raise a more specific objection under Tex. R. Evid. 609 was deficient performance, defendant did not establish that but for trial counsel's failure to raise such an objection, the result of the proceeding would have been different; given the overwhelming evidence supporting defendant's guilt, the trial court did not abuse its discretion in denying the motion for new trial. Hargrove v. State, 2011 Tex. App. LEXIS 2517 (Tex. App. San Antonio Apr. 6 2011).

388. Although defendant's refusal of a breath or blood test was properly admitted pursuant to Tex. Transp. Code Ann. § 724.061, an instruction that the jury could consider the refusal as evidence was an improper comment on the weight of evidence in violation of Tex. Code Crim. Proc. Ann. §§ 36.14, 38.04, 38.05. The trial court's error was harmless because there was other substantial evidence that defendant had been driving while intoxicated, and under Tex. R. Evid. 609, two prior convictions negatively impacted his claim that he was not intoxicated. Huckabay v. State, 2011 Tex. App. LEXIS 1918, 2011 WL 915083 (Tex. App. Beaumont Mar. 16 2011).

389. Texas prisoner who was convicted of robbery under Tex. Penal Code Ann. § 29.02 was not entitled to habeas relief under 28 U.S.C.S. § 2254 on his claim that the trial court committed reversible error by allowing the prosecutor to question him about a prior felony conviction during the guilt-innocence portion of the proceeding; the prisoner's trial was not rendered fundamentally unfair because the evidence was properly admitted under Tex. R. Evid. 609. Caldwell v. Thaler, 770 F. Supp. 2d 849, 2011 U.S. Dist. LEXIS 9117 (S.D. Tex. Jan. 31 2011).

390. Because misdemeanor assault of a spouse was a crime of moral turpitude and less than 10 years have elapsed since appellant's conviction, such evidence was admissible under Tex. R. Evid. 609(a) and counsel was not required to object. Zamora v. State, 2010 Tex. App. LEXIS 10246, 2010 WL 5541706 (Tex. App. Corpus Christi Dec. 30 2010).

391. In a case where defendant was convicted of two counts of aggravated sexual assault, based on the trial strategy of arguing that the sex was consensual, counsel was not ineffective for failing to object to the evidence of extraneous offenses during the State's case and in eliciting testimony from defendant regarding previous convictions for burglary of a habitation under Tex. Penal Code Ann. § 30.02, delivery of a simulated drug under Tex. Health & Safety Code Ann. § 482.002, failure to identify to a police officer, and assaults causing bodily injury upon female victims because that evidence would have been brought out during cross-examination of defendant. Douglas v. State, 2010 Tex. App. LEXIS 9086, 2010 WL 4638778 (Tex. App. San Antonio Nov. 17 2010).

392. Even though the trial court erred by admitting evidence of defendant's three prior drug convictions that occurred 12 years before the instant crime under Tex. R. Evid. 609, the error was harmless because: (1) the State did not emphasize defendant's criminal history during closing arguments; (2) the drug convictions lacked similarity to the instant aggravated assault charge; (3) the trial court instructed the jury that they were only to consider the prior convictions when determining the weight to give defendant's testimony; and (4) there was strong physical evidence supporting defendant's conviction and testimony of three eyewitnesses. Mares v. State, 2010 Tex. App. LEXIS 6844, 2010 WL 3294244 (Tex. App. Houston 1st Dist. Aug. 19 2010).

393. Appellant failed to establish ineffective assistance of counsel based on his trial counsel's questioning of appellant about prior convictions for possession of a controlled substance and for theft because the State would not have been precluded from introducing the convictions into evidence under Tex. R. Evid. 609 as, inter alia, the theft conviction involved a crime of moral turpitude and the past crimes were recently committed. Scope v. State, 2010 Tex. App. LEXIS 6824, 2010 WL 3220627 (Tex. App. Houston 1st Dist. Aug. 12 2010).

394. It was proper for the trial court to exclude evidence because under Tex. R. Evid. 608, a witness's credibility could not be attacked by offering extrinsic evidence concerning specific prior instances of conduct, other than a conviction under Tex. R. Evid. 609, which was not applicable, and thus there was no abuse of discretion. Gonzales v. State, 2010 Tex. App. LEXIS 4783, 2010 WL 2543908 (Tex. App. Corpus Christi June 24 2010).

395. More than 10 years had elapsed from the date of each of the State's witness's prior criminal convictions and it was reasonable for the trial court to find that more than 10 years had also elapsed from the date of the witness's release from the confinements that had been imposed; therefore, those convictions, if admissible, were admissible only under Tex. R. Evid. 609(b). Walker v. State, 2010 Tex. App. LEXIS 4766, 2010 WL 2533774 (Tex. App.

Beaumont June 23 2010).

396. Even if the court found that the trial court erred in excluding the prior convictions of a State's witness under Tex. R. Evid. 609(b), appellant did not show harm for purposes of Tex. R. App. P. 44.2(b); a deputy's testimony in appellant's felony driving while intoxicated trial was consistent with the witness's account of what he saw, plus appellant admitted that he had been driving and he stipulated that his intoxilyzer test showed a blood alcohol level of 0.123. Walker v. State, 2010 Tex. App. LEXIS 4766, 2010 WL 2533774 (Tex. App. Beaumont June 23 2010).

397. Appellant claimed that the trial court did not conduct the required balancing test under Tex. R. Evid. 609(b), but a record of such a test was not necessary, as the court could presume that the trial court conducted the test. Walker v. State, 2010 Tex. App. LEXIS 4766, 2010 WL 2533774 (Tex. App. Beaumont June 23 2010).

398. Trial court's refusal to allow the evidence of the State's witness's prior criminal convictions implied that the trial court rejected the interest of justice exception in Tex. R. Evid. 609(b). Walker v. State, 2010 Tex. App. LEXIS 4766, 2010 WL 2533774 (Tex. App. Beaumont June 23 2010).

399. Other than the fact that the State's witness's burglary convictions were crimes of moral turpitude, appellant did not show that the convictions would be probative regarding the witness's testimony about what he had seen in an incident involving an intoxicated driver, plus there was strong evidence from other witnesses that corroborated the witness's account; given the remoteness of the witness's prior convictions and the corroborating evidence in this felony driving while intoxicated case, appellant failed to show that the probative value of admitting the convictions substantially outweighed the prejudicial effect of doing so under Tex. R. Evid. 609(b), and the trial court did not abuse its discretion. Walker v. State, 2010 Tex. App. LEXIS 4766, 2010 WL 2533774 (Tex. App. Beaumont June 23 2010).

400. Although evidence of a witness's prior convictions was admissible for impeachment purposes, the fact that he had prior convictions did not render his testimony inherently unreliable and legally insufficient to support defendant's conviction for aggravated assault; the trial court could have considered the convictions and still found the witness's testimony credible, and given that a reasonable trier of fact could have found that defendant assaulted the victim with a deadly weapon, the evidence was legally sufficient to support defendant's conviction. Keyo Kershun Kingsley v. State, 2010 Tex. App. LEXIS 2309, 2010 WL 1241310 (Tex. App. Houston 1st Dist. Mar. 25 2010).

401. Court had no record explaining counsel's thought processes and trial strategy in not objecting under Tex. R. Evid. 609(a) to the admission of testimony about defendant's father's prior convictions, and it was defendant's burden to overcome the presumption that the challenged action might have been considered sound strategy; because the record did not show deficient performance, defendant failed to meet the first prong of the test for ineffective assistance. Victor v. State, 2010 Tex. App. LEXIS 2060, 2010 WL 1077292 (Tex. App. Tyler Mar. 24 2010).

402. Court properly allowed impeachment of defendant with the offense of unauthorized use of a motor vehicle and the life sentence imposed for that conviction because evidence was presented that defendant was convicted of the offense of delivery of cocaine in 2005 and burglary of a building with intent to commit theft in 1992. Those two intervening felonies removed the taint of remoteness from the 1982 conviction; the State's need to impeach defendant's credibility was great because his testimony contradicted much of the police officers's testimony. Thomas v. State, 312 S.W.3d 732, 2009 Tex. App. LEXIS 8056 (Tex. App. Houston 1st Dist. Oct. 15 2009).

403. Defense made no objection as to two felonies, the State offered evidence of these convictions, and defendant did not object or raise a Tex. R. Evid. 403 complaint; thus, he had not preserved that complaint for appellate review, and to the extent that his remoteness objection encompassed these two felonies, they were less

than 10 years old and admissible under Tex. R. Evid. 609. John v. State, 2009 Tex. App. LEXIS 4853, 2009 WL 1815650 (Tex. App. Fort Worth June 25 2009).

404. Trial court's ruling implicitly suggested a probative/prejudicial determination and defendant's 1999 and 2003 felony convictions were sufficient to insulate 1993 offenses from a remoteness objection; applying the proper test, the could held that the evidence of defendant's 1993 convictions was admissible under Tex. R. Evid. 609. John v. State, 2009 Tex. App. LEXIS 4853, 2009 WL 1815650 (Tex. App. Fort Worth June 25 2009).

405. Defendant admitted that he had been previously convicted of criminal conduct, including two felony convictions for which he had served two years' imprisonment; the court noted that one could impeach witness credibility with evidence of a conviction for felony or crime of moral turpitude under Tex. R. Evid. 609(a). Walker v. State, 291 S.W.3d 114, 2009 Tex. App. LEXIS 4863 (Tex. App. Texarkana June 23 2009).

406. In a felony assault case, the court properly allowed use of defendant's prior unauthorized use of a motor vehicle convictions for impeachment because they were crimes involving deception, the evidence showed a lack of reformation, and defendant's testimony and credibility were not as critical as they would have been if he had been the only defense witness. Gore v. State, 2009 Tex. App. LEXIS 4518, 2009 WL 1688196 (Tex. App. Houston 1st Dist. June 18 2009).

407. In defendant's aggravated robbery case, the court properly admitted evidence of defendant's prior convictions for aggravated assault and possession of cocaine because the State was limited to asking about the date and nature of the convictions, the trial court instructed the jury to consider only the convictions for the purpose of weighing defendant's credibility, thereby reducing any prejudicial effect, and the credibility of the complainants and defendant were critical issues. Voss v. State, 2009 Tex. App. LEXIS 4200, 2009 WL 1635208 (Tex. App. Houston 1st Dist. June 11 2009).

408. Of the five factors, only one weighed against admissibility; thus, the court could not find that the trial court's ruling that a prior sexual assault conviction was admissible was outside the zone of reasonable disagreement so as to have been a clear abuse of discretion. Gonzalez v. State, 2009 Tex. App. LEXIS 879, 2009 WL 311448 (Tex. App. Dallas Feb. 10 2009).

409. For purposes of Tex. R. Evid. 609(a), sexual assault of a child is not a crime that would ordinarily bear heavily against a witness's veracity; in this case, the first factor, impeachment value, weighs against admissibility because assault is not a crime of deception. Gonzalez v. State, 2009 Tex. App. LEXIS 879, 2009 WL 311448 (Tex. App. Dallas Feb. 10 2009).

410. Texas Court of Criminal Appeals has stated only that the impeachment value of crimes involving deception was higher than crimes that involve violence; it did not hold that the impeachment value of offenses involving moral turpitude was greater than that of a violent crime. Gonzalez v. State, 2009 Tex. App. LEXIS 879, 2009 WL 311448 (Tex. App. Dallas Feb. 10 2009).

411. For purposes of Tex. R. Evid. 609(a), defendant committed the charged offense less than a year after completing his two-year prison term for the prior conviction and he showed a propensity for running afoul of the law, and thus this factor weighed in favor of admission of a prior conviction. Gonzalez v. State, 2009 Tex. App. LEXIS 879, 2009 WL 311448 (Tex. App. Dallas Feb. 10 2009).

412. For purposes of admissibility of a prior conviction under Tex. R. Evid. 609(a), the third factor, similarity between the past crimes and current offense, weighed slightly in favor of admission; although both the past and

current crimes involve sexual offenses, the prior offense involved a female closer to defendant's age at the time, and conversely, this case involved defendant's 10-year-old daughter; the factual differences in the offenses would have created little danger that the jury would misuse the information to convict defendant based on a past pattern of behavior rather than the facts of the charged offense. Gonzalez v. State, 2009 Tex. App. LEXIS 879, 2009 WL 311448 (Tex. App. Dallas Feb. 10 2009).

413. For purposes of admissibility of a prior conviction under Tex. R. Evid. 609(a), the fourth and fifth factors, the importance of the defendant's testimony and his credibility, favored admissibility; defendant claimed he did not commit the offenses and his daughter fabricated the allegations against him because she was angry at him, and under these circumstances, his credibility was a crucial factor in the case for aggravated sexual assault and the State's need to impeach his testimony was great. Gonzalez v. State, 2009 Tex. App. LEXIS 879, 2009 WL 311448 (Tex. App. Dallas Feb. 10 2009).

414. In a kidnapping case, defendant's 1992 convictions for burglary and robbery were properly admitted for impeachment purposes because the offenses of burglary and robbery were deceptive in nature, and because the prior offenses were relatively dissimilar to the instant charge, there was a reduced tendency on the part of the jury to associate those offenses with a propensity to commit the instant offense. Furthermore, because defendant was the only defense witness who could testify to certain aspects of the incident at the ballpark and the believability of his version was critically important to whether he committed the offense, the State's need for the impeachment evidence was significant. Evans v. State, 2009 Tex. App. LEXIS 150, 2009 WL 57036 (Tex. App. Amarillo Jan. 9 2009).

415. In defendant's murder case, the court properly excluded evidence of the victim's mother's additional assault charges because the State did not ask if it was the mother's only assault, but instead asked if it was the assault for which she was on probation. By accurately answering the specific question by the State, the mother did not create a false impression for the jury, and did not "open the door" for the defense to ask about the other assaults. Contreras v. State, 2009 Tex. App. LEXIS 91, 2009 WL 50601 (Tex. App. El Paso Jan. 8 2009).

416. Although defendant complained that the trial court erred in allowing the State to question defendant on arrests of which the State had knowledge but did not notify defendant pursuant to a properly filed request, defendant opened the door to the questions by the State in this area when he testified that he had no other brushes with the law. Lucas v. State, 2008 Tex. App. LEXIS 8976 (Tex. App. Dallas Dec. 3 2008).

417. State conceded that the details of a California offense were not admissible for the purpose of impeachment under Tex. R. Evid. 609, but while the State argued that the details were admissible under Tex. R. Evid. 404(b) to prove identity, the court disagreed, because under the Rule 404(b) analysis, the State adduced no evidence that the details of the California offenses were so similar to the instant case as to have indicated a modus operandi, and thus, it was error to admit the detail to show conformity of character; however, the error, for purposes of Tex. R. App. P. 44.2(b), did not have a substantial or injurious effect in determining the verdict, given that (1) the trial court properly admitted the convictions themselves under Tex. R. Evid. 609, (2) the improperly admitted evidence was the detail that the victims of defendant's prior rapes in California were Hispanic, but other evidence at trial indicated that defendant targeted Hispanic women, (3) the evidence that the prior rapes involved Hispanic women was not important to the State's case, and (4) the State presented DNA evidence placing defendant at the victim's apartment where the rape occurred, and thus ample other evidence existed on which the jury could have found defendant guilty of aggravated sexual assault. Jabari v. State, 273 S.W.3d 745, 2008 Tex. App. LEXIS 8814 (Tex. App. Houston 1st Dist. 2008).

418. Defendant's objections to the admission of his juvenile adjudications based on the lack of a judicial signature, the reliability of the adjudications, and their remoteness, based on Tex. R. Evid. 609, were misplaced because Rule 609 only applied to convictions admitted for impeachment, not convictions admitted during the punishment phase of

a trial. His juvenile adjudications were properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07. Avendano v. State, 2008 Tex. App. LEXIS 5832 (Tex. App. El Paso July 31, 2008).

419. For there to be a conviction, there must ordinarily be a judgment of guilt for the crime in question; therefore, a trial court should not have allowed the State to impeach defendant under Tex. R. Evid. 609 with offenses that had been dismissed after being admitted and applied during sentencing in a prior case, pursuant to Tex. Penal Code Ann. § 12.45. Lopez v. State, 253 S.W.3d 680, 2008 Tex. Crim. App. LEXIS 642 (Tex. Crim. App. 2008).

420. Even if the trial court had erred in admitting impeachment evidence of a 30-year-old assault conviction for impeachment purposes under Tex. R. Evid. 609, the record did not establish harm because the jury, which found defendant not guilty on a charge of aggravated assault with a deadly weapon but guilty of serious bodily injury, was not likely influenced by the evidence regarding a 1976 stabbing incident; the evidence was uncontroverted that defendant hit the complainant, who suffered a broken jaw. Grant v. State, 247 S.W.3d 360, 2008 Tex. App. LEXIS 1135 (Tex. App. Austin 2008).

421. During defendant's trial for aggravated assault under Tex. Penal Code Ann. § 22.02, the trial court did not err in denying his Theus motion and admitting evidence of his prior convictions pursuant to Tex. R. Evid. 609 where the specific facts and circumstances supported a finding that the probative value of defendant's prior convictions substantially outweighed their prejudicial effect; all of the Theus factors favored admission of defendant's theft convictions, and, in regard to his robbery convictions, the first Theus factor regarding the impeachment value of the prior crime was the only factor that might have favored exclusion, but defendant had testified that he was not a violent man, and his robbery convictions might have been probative not simply to assess his credibility but also to respond to his testimony. Davis v. State, 259 S.W.3d 778, 2007 Tex. App. LEXIS 8749 (Tex. App. Houston 1st Dist. 2007).

422. In a criminal prosecution for possession of cocaine, the trial court abused its discretion during the punishment phase of trial by allowing the State to prove defendant's previous convictions through judgments and a fingerprint expert; defendant was aware of the previous convictions, due to notices filed by the State pursuant Tex. Code Crim. Proc. Ann. art. 37.07 and Tex. R. Evid. 404. Lewis v. State, 2007 Tex. App. LEXIS 8218 (Tex. App. Dallas Oct. 17 2007).

423. Counsel was not ineffective for permitting the jury to hear evidence of defendant's prior convictions that were inadmissible under Theus because defendant's prior theft convictions, prior felony drug convictions, and his conviction for lying to the police were likely admissible; because it also appeared that defendant's candor before the jury concerning his prior convictions was a strategic attempt to appear open and honest, and to lessen the impact of any impeachment on the issue, it could not be concluded that counsel provided ineffective assistance with regard to the introduction of those convictions. Martin v. State, 265 S.W.3d 435, 2007 Tex. App. LEXIS 7652 (Tex. App. Houston 1st Dist. 2007).

424. Theft convictions were properly admitted under Tex. R. Evid. 609 because four out of the five factors enumerated in the case of Theus v. State, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992), were satisfied; the theft convictions were crimes of moral turpitude, they were dissimilar to the charged offense of driving while intoxicated, and defendant's credibility was important since he was the only defense witness. Roach v. State, 2007 Tex. App. LEXIS 6764 (Tex. App. Corpus Christi Aug. 23 2007).

425. In a driving while intoxicated case, defendant preserved the issue of whether theft convictions were admissible under Tex. R. Evid. 609 when he objected upon their introduction; however, he failed to preserve the issue in relation to an aggravated assault conviction since no objection was made when the evidence was

introduced. Roach v. State, 2007 Tex. App. LEXIS 6764 (Tex. App. Corpus Christi Aug. 23 2007).

426. In a case involving an objection to the admission of theft convictions introduced under Tex. R. Evid. 609, although defendant's argument on appeal used the more specific balancing language, it comported with his general remoteness objection before the trial court; therefore, it was subject to appellate review. Roach v. State, 2007 Tex. App. LEXIS 6764 (Tex. App. Corpus Christi Aug. 23 2007).

427. Trial court properly permitted the State to impeach an offender with his prior convictions for drug-related offenses, robbery, and manslaughter under Tex. R. Evid. 609; although some of the convictions were more than 10 years old, the offender's intervening 1999 conviction for possession of a controlled substance was not remote, and it indicated that the offender had not reformed his conduct and had a propensity for running afoul of the law; the prior convictions were dissimilar to instant sexual assault charge and thus raised little chance of prejudice; moreover, the offender's testimony and credibility were crucial elements at trial since he was the only witness during his case-in-chief. Adkins v. State, 2007 Tex. App. LEXIS 6589 (Tex. App. Houston 14th Dist. Aug. 16 2007).

428. Trial court did not abuse its discretion by admitting defendant's prior conviction for forgery pursuant to Tex. R. Evid. 609 because (1) the crime of forgery involved deception which was a factor that weighed in favor of admissibility; (2) the forgery offense was within the 10-year time limit in the rule and showed defendant's propensity to run afoul of the law; (3) defendant's prior forgery conviction was dissimilar to the aggravated assault offense for which defendant was on trial, which was a factor that favored admissibility; and (4) the State needed the opportunity to impeach defendant's credibility since defendant's credibility was important. Clark v. State, 2007 Tex. App. LEXIS 6498 (Tex. App. Waco Aug. 15 2007).

429. Although evidence of a husband's convictions were inadmissible in divorce proceedings, pursuant to Tex. R. Evid. 609, the husband waived the alleged errors, and the error was harmless, because the trial court was already aware of the prior convictions, for which the husband was serving time in prison. Malekzadeh v. Malekzadeh, 2007 Tex. App. LEXIS 5178 (Tex. App. Houston 14th Dist. July 3 2007).

430. Where defendant was charged with assault with injury and family violence, the trial court did not err in weighing the Moore factors and excluding the evidence of the complaining witness's criminal history under Tex. R. Evid. 609; while the complainant's prior convictions for forgery and theft by check were crimes involving moral turpitude that had impeachment value, the complainant's credibility was not dispositive of defendant's claim of self-defense or challenge to his identification. Thompson v. State, 2007 Tex. App. LEXIS 4498 (Tex. App. Austin June 8 2007).

431. In a case involving burglary of a building, a trial court did not abuse its discretion by admitting convictions for unauthorized use of a motor vehicle, burglary of a building, and credit card abuse for impeachment purposes where the burglary conviction satisfied four of the five elements in a test to determine admissibility, and the other convictions satisfied all five elements; inter alia, the convictions were for deception or moral turpitude offenses, they were within the 10-year period, defendant was the only witness to testify on his behalf, and one of the offenses was similar. Mixon v. State, 2007 Tex. App. LEXIS 4310 (Tex. App. El Paso May 31 2007).

432. Although defendant's sentences in 18 of the 20 cases were completed more than 10 years before his trial for the instant offense and under Tex. R. Evid. 609(b) were too remote, even a conviction too remote under Tex. R. Evid. 609(b) could be admitted if the court determined, in the interest of justice, that its probative value substantially outweighed its prejudicial effect. Greenlee v. State, 2007 Tex. App. LEXIS 3951 (Tex. App. Tyler May 23 2007).

433. Where defendant was accused in a probation revocation hearing of sexually assaulting his five-year-old daughter, and defendant's expert psychologist testified, after examining defendant and studying his file, that he

could find no psychological explanation for why defendant would commit indecency with a child, the State did not use its cross-examination of the psychologist to improperly impeach defendant with prior offenses in violation of Tex. R. Evid. 609 because the defendant's criminal history was directly relevant to challenging several of the psychologist's underlying findings leading to his ultimate conclusion. Galindo v. State, 2007 Tex. App. LEXIS 3903 (Tex. App. Houston 14th Dist. May 22 2007).

434. For purposes of Tex. R. App. P. 33.1, defendant did not preserve for review the claim that the trial court erred in admitting evidence of a prior conviction for the purpose of impeachment; defendant did not make a timely and specific objection at the time the evidence was offered, and although there was a hearing outside the presence of the jury on defendant's pretrial motion to testify free from impeachment with prior convictions, that motion did not argue that the State was to be precluded from impeaching defendant with this particular past conviction. Timms v. State, 2007 Tex. App. LEXIS 3400 (Tex. App. Dallas May 3 2007).

435. In a father's termination case, evidence of father's prior sexual assault was admissible under Tex. R. Evid. 609 and the 1998 conviction fell within the 10-year provision under the Rule; the father testified the victim was 14 years old and such inappropriate behaivor was entitled to be considered in determining endangering conduct under Tex. Fam. Code Ann. § 161.001(1). In re G.C.F., 2007 Tex. App. LEXIS 2680 (Tex. App. Fort Worth Apr. 5 2007).

436. Evidence of an expunged record may not be elicited from the witness or any other witness, for purposes of Tex. Code Crim. Proc. Ann. art. 55.03(1) and Tex. R. Evid. 609(a); the evidence concerning an expunged record may not be established by public record under Tex. R. Evid. 609(a). Aguirre v. State, 2007 Tex. App. LEXIS 354 (Tex. App. Austin Jan. 19 2007).

437. For evidence to be admissible for purposes of impeachment, Tex. R. Evid. 609(a) requires evidence of a conviction; pendency of an appeal renders evidence of a conviction inadmissible. Aguirre v. State, 2007 Tex. App. LEXIS 354 (Tex. App. Austin Jan. 19 2007).

438. Trial court did not err in refusing to allow defendant to impeach a jailhouse informant under Tex. R. Evid. 609(a) because the evidence of the informant's prior conviction was inadmissible given that it had been expunged and Tex. Code Crim. Proc. Ann. art. 55.03(1) prohibited the use of expunged records for any purpose, and the evidence could not be elicited from anyone, nor could the evidence be established by public record, for purposes of Tex. Code Crim. Proc. Ann. art. 55.04(1), and thus the evidence could not be adduced from any competent source; moreover, Tex. R. Evid. 609(a) required a conviction, and because the conviction was expunged, the circumstances of the conviction were unknown and defendant failed to establish its admissibility, and even if the exclusion of the evidence was error, it was harmless under Tex. R. App. P. 44.2 because of the other evidence with which the trial court permitted defendant to impeach the informant. Aguirre v. State, 2007 Tex. App. LEXIS 354 (Tex. App. Austin Jan. 19 2007).

439. Trial counsel was not ineffective for introducing defendant's four remote felony convictions and one remote misdemeanor convictions into evidence during his sexual assault trial; in introducing the prior convictions counsel may have been attempting to convince the jury that, despite defendant's criminal history, he had never been convicted of a crime that was sexual in nature or involved a child. Smith v. State, 2007 Tex. App. LEXIS 254 (Tex. App. Houston 1st Dist. Jan. 11 2007).

440. In a criminal prosecution for attempted burglary of a habitation, the State was permitted to impeach defendant with a prior theft conviction under Tex. R. Evid. 609; considering the fact that defendant's credibility was at issue, all but one of the Theus factors weighed in favor of admissiblity; the similarity between the past crime and the offense being prosecuted was the only factor that leaned against admission of the prior theft conviction. Burks v. State,

2006 Tex. App. LEXIS 10371 (Tex. App. Houston 1st Dist. Dec. 1 2006).

441. Trial court did not err when it allowed the State to impeach defendant's testimony, under Tex. R. Evid. 609, with evidence that defendant was convicted of possession of a deadly weapon in a penal institution; the court found that (1) the root of the prior offense was not dishonesty, so that factor was weighed neutrally, (2) the prior conviction was not fresh or ancient, so that factor was also weighed neutrally, (3) the similarity of the prior conviction and the present offense of murder under Tex. Penal Code Ann. § 19.02(b)(2) weighed against admission, if slightly, but (4) the importance of defendant's testimony and credibility weighed in favor of admission, given that no other evidence established defendant's self-defense claim or lack of intent, and thus the trial court's decision was not outside the zone of reasonable disagreement. Tamez v. State, 205 S.W.3d 32, 2006 Tex. App. LEXIS 7961 (Tex. App. Tyler 2006), *aff'd,* 344 Fed. Appx. 897, 2009 U.S. App. LEXIS 20231 (5th Cir. 2009), *cert. denied,* 130 S. Ct. 1523, 176 L. Ed. 2d 127, 2010 U.S. LEXIS 1489 (U.S. 2010).

442. Appellate court rejected defendant's claim that his Sixth Amendment right to counsel was violated based on his claim that his counsel was ineffective in allowing evidence of his prior convictions to be admitted because defendant did not allege ineffective assistance of counsel in his motion for new trial and there was no record reflecting his attorney's trial strategy with regard to his prior convictions; therefore the appellate court could not conclude that counsel's performance fell below an objective standard of reasonableness. Coleman v. State, 2006 Tex. App. LEXIS 6689 (Tex. App. Austin July 28 2006).

443. At defendant's criminal trial for DWI with a child passenger, counsel was not ineffective for asking the defendant about a prior forgery conviction on direct examination; defendant's prior conviction was less than ten years old, and thus admissible under Tex. R. Evid. 609. Cossio v. State, 2006 Tex. App. LEXIS 6608 (Tex. App. Houston 14th Dist. July 27 2006).

444. Possession of marijuana and possession of a prohibited weapon are neither crimes of deception, nor crimes of violence, for purposes of impeachment under Tex. R. Evid. 609. Castro v. State, 2006 Tex. App. LEXIS 5890 (Tex. App. Houston 1st Dist. July 6 2006).

445. Trial court did not err, in defendant's trial for sexual assault of a child and aggravated sexual assault of a child, in admitting prior convictions of possession of marijuana and possession of a prohibited weapon under Tex. R. Evid. 609(a) because the factors regarding whether the value of the evidence outweighed the prejudicial effect favored admission; the court found that (1) the prior crimes were not crimes of violence, (2) given the three prior convictions, defendant had shown a propensity for running afoul of the law, (3) the charged crimes were not similar to the prior convictions, and (4) the credibility of the minor victims and defendant's credibility were critical issues in the case because there was no physical evidence that tied defendant to the crimes. Castro v. State, 2006 Tex. App. LEXIS 5890 (Tex. App. Houston 1st Dist. July 6 2006).

446. Defendant was convicted in 1992 of possession of a prohibited weapon, in 1998 of possession of marijuana, and in 1999 for unlawfully carrying a weapon, and the last two convictions were evidence of defendant's lack of reformation, such that the court analyzed the introduction of the 1992 and 1998 convictions under Tex. R. Evid. 609(a)'s "outweighs" test, not Tex. R. Evid. 609(b)'s "substantially outweighs" test, for purposes of impeachment in defendant's trial for sexual assault of a child and aggravated sexual assault of a child. Castro v. State, 2006 Tex. App. LEXIS 5890 (Tex. App. Houston 1st Dist. July 6 2006).

447. During defendant's murder trial, the State questioned him about two extraneous offenses and defense counsel did not object under Tex. R. Evid. 403, Tex. R. Evid. 404, or Tex. R. Evid. 609 regarding either offense; in accordance with Tex. R. App. P. 33.1, defendant could not raise these issues on appeal. Cotton v. State, 2006 Tex.

App. LEXIS 5445 (Tex. App. Houston 14th Dist. June 27 2006).

448. Trial court properly permitted the State to impeach defendant with a prior felony conviction for robbery under Tex. R. Evid. 609(a) because: (1) defendant was released from confinement for the robbery conviction only a short time before his arrests on the possession offenses; (2) the crimes of robbery and possession of cocaine were dissimilar; and (3) defendant relied on his own testimony to support his defense and his credibility was important to the case. Thomas v. State, 2006 Tex. App. LEXIS 5032 (Tex. App. Dallas June 13 2006).

449. Defendant's objection to the prior convictions contained in his "pen packet," which included burglary of a building, burglary of a vehicle, and an unauthorized use of a motor vehicle, lacked merit because unauthorized use of a motor vehicle is a crime involving deception, and the impeachment value of crimes of deception was higher than crimes that involved violence, the latter of which had a higher potential for prejudice, and because the issue of the importance of defendant's testimony and credibility were critical by the very nature of the defense that was placed before the jury; as to the temporal proximity factor, all of the offenses listed in the pen packet fell within the 10 year period proscribed by Tex. R. Evid. 609 making them, therefore, admissible. Baca v. State, 223 S.W.3d 478, 2006 Tex. App. LEXIS 4424 (Tex. App. Amarillo 2006).

450. In a robbery trial, the admission of prior robbery convictions for impeachment under Tex. R. Evid. 609 fell within the zone of reasonable disagreement; although the similarity of the past and current crimes weighed against admission, the prior convictions were less than ten years old and the State had a significant need to impeach defendant's testimony, given that credibility was important to his defense. Berry v. State, 2006 Tex. App. LEXIS 2863 (Tex. App. Houston 14th Dist. Apr. 11 2006).

451. Tex. R. Evid. 609(a) requires that the trial court determine whether the probative value of admitting evidence of prior convictions outweighs its prejudicial effect to a party, and Tex. R. Evid. 609(f) requires timely notice of the State's intended use of evidence of prior convictions to provide the defendant a fair opportunity to contest the use of such evidence, but the phrase "fair opportunity" does not specify at what point in the proceedings the decision as to admissibility is to be made; there is not authority holding that a "fair opportunity" means an opportunity exclusively during a pretrial hearing and not during a hearing outside the presence of the jury during a trial on the merits; thus, the trial court's denial of defendant's motion for a pretrial hearing on his Tex. R. Evid. 609 motion was neither an abuse of discretion nor reversible error. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

452. Because defendant did not testify, the impact any erroneous impeachment might have had in light of the record as a whole was not affirmatively demonstrated in the appellate record; thus, any possible harm flowing from the trial court's refusal to conduct a pretrial hearing on impeachment by a prior conviction under Tex. R. Evid. 609 was wholly speculative. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

Evidence : Testimony : Credibility : Impeachment : Convictions : Inadmissibility

453. Counsel did not claim to want to cross-examine a witness about a potential bias, no offer of proof was made, plus counsel's complaint was different than the one made on appeal, as counsel asked to visit the witness's criminal matters, and the trial court denied the request because convictions were not involved, for purposes of Tex. R. Evid. 609(a), and thus appellant waived complaints under Tex. R. Evid. 611 and the Sixth Amendment concerning the limitations on the cross-examination of the witness, for purposes of Tex. R. App. P. 33.1(a)(1)(A); even absent waiver, the court would have overruled the claims, given that (1) there was no causal connection between the witness's deferred adjudication and his testimony, and (2) nothing showed the existence or expectation of a deal in the deferred adjudication case. Mcburnett v. State, 2012 Tex. App. LEXIS 5300, 2012 WL 2583407 (Tex. App. San

Antonio July 5 2012).

454. Trial court did not abuse its discretion by refusing to allow defendant to impeach a confidential informant under Tex. R. Evid. 609(b) with his remote prior conviction for misdemeanor forgery because the Theus factors weighed against admission, and therefore defendant did not establish that the probative value of the conviction substantially outweighed the prejudicial effect of the conviction. The court found that: (1) the past crime was not recent and the informant did not show a propensity for running afoul of the law, as he had no intervening convictions after his forgery conviction; (2) the informant was not the only witness who testified regarding the attempted drug transaction and his testimony was corroborated by that of two police officers; and (3) defendant's only witness did not contradict the informant's account of events. Duarte v. State, 2012 Tex. App. LEXIS 599, 2012 WL 252142 (Tex. App. Houston 1st Dist. Jan. 26 2012).

455. Witness's 1996 offense of indecent exposure was a crime of moral turpitude because of the intent to arouse or gratify sexual desire. Woodard v. State, 2011 Tex. App. LEXIS 8836, 2011 WL 5319907 (Tex. App. Houston 1st Dist. Nov. 3 2011).

456. Even assuming a witness's 1998 offense of illegal operation of a sexually-oriented business also amounted to a crime of moral turpitude, nothing indicated that the witness's prior convictions, including one for indecent exposure, would have had much impeachment value, and the trial court could have found that their probative value was outweighed by any prejudicial effect under Tex. R. Evid. 609(a), and thus the trial court did not err in excluding those convictions; appellant did not impeach the witness with a felony conviction, even though the trial court ruled it admissible, and he failed to show how the misdemeanor convictions established bias as claimed. Woodard v. State, 2011 Tex. App. LEXIS 8836, 2011 WL 5319907 (Tex. App. Houston 1st Dist. Nov. 3 2011).

457. Trial court erred under Tex. R. Evid. 609(c)(2) by admitting evidence of defendant's prior domestic violence conviction; however, the error was harmless beyond a reasonable doubt, Tex. R. App. P. 44.2, as the record contained sufficient evidence of guilt of the offense in this case, the jury charge contained a proper limiting instruction regarding the jury's consideration of extraneous offenses, the State spent very little time on the improper evidence and did not delve into its details, and finally, the trial court probated defendant's sentence. Turney v. State, 2011 Tex. App. LEXIS 6419 (Tex. App. Fort Worth Aug. 11 2011).

458. Defendant was not prevented from showing that the victim and other family members were biased and had a motive to testify against him because there was animosity between the victim's family and defendant, but, under Tex. R. Evid. 608(b) and 609, the trial court did not err in not admitting evidence indicating that the victim's mother had been arrested for possession of marihuana and had been placed on deferred adjudication community supervision. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

459. Because more than 10 years had passed since a complaining witness's release from confinement and defendant did not point to evidence of any specific facts and circumstances that would merit admitting her convictions, the trial court did not abuse its discretion in deciding not to admit her prior criminal history for impeachment purposes. Kirvin v. State, 394 S.W.3d 550, 2011 Tex. App. LEXIS 3661, 2011 WL 1818420 (Tex. App. Dallas May 13 2011).

460. Court did not err in prohibiting defendant from cross-examining the complainant about a conviction for misdemeanor assault involving dating violence, because the evidence was inadmissible under Tex. R. Evid. 609(a), when the conviction was for a misdemeanor, and defendant had not cited a case in which a misdemeanor assault against a man was held to be a crime of moral turpitude. Chambliss v. State, 2011 Tex. App. LEXIS 1354, 2011 WL 665323 (Tex. App. Houston 14th Dist. Feb. 24 2011).

461. Trial court did not err by excluding impeachment evidence that the victim had been convicted of the misdemeanor offense of interference with an emergency telephone call under Tex. Penal Code Ann. § 42.062 because it did not represent a crime of moral turpitude as required by Tex. R. Evid. 609(a). Urtado v. State, 333 S.W.3d 418, 2011 Tex. App. LEXIS 1251 (Tex. App. Austin Feb. 16 2011).

462. Defendant received ineffective assistance of counsel, because defense counsel introduced inadmissible prior felony convictions during defendant's direct examination, and since the record did not indicate that the State sought to introduce defendant's prior convictions during the guilt/innocence phase of the trial, there was no possible benefit to have been gained by defense counsel "fronting" this issue to the jury at that stage of the trial. Lemons v. State, 2011 Tex. App. LEXIS 1393, 2011 WL 908275 (Tex. App. Texarkana Feb. 16 2011).

463. Under Tex. R. Evid. 609, the trial court did not err by excluding the witness's prior sexual assault conviction as it was remote, had little bearing on his credibility, and was highly prejudicial. Mitchell v. State, 2011 Tex. App. LEXIS 160, 2011 WL 192650 (Tex. App. San Antonio Jan. 12 2011).

464. Appellant never argued to the trial court that a prior conviction was inadmissible for purposes of impeachment because the conviction occurred over 10 years earlier, and his general impeachment objection was insufficient to inform the trial court that he was objecting on grounds of remoteness, plus the trial court never considered this issue when it ruled on appellant's objection; thus, this issue was not preserved for review. Jones v. State, 2010 Tex. App. LEXIS 7357, 2010 WL 3448010 (Tex. App. Houston 1st Dist. Aug. 31 2010).

465. In an assault on a member of his household enhanced by a previous family violence assault conviction case, although two prior drug convictions were more than 10 years old, the trial court did not abuse its discretion in admitting them into evidence under Tex. R. Evid. 609(b) because the impeachment value of the remote drug offenses was not high, especially in light of his other previous convictions and the strength of the State's evidence against him, and defendant could not have been substantially harmed by the prosecutor's questioning him about those prior drug convictions. Mckinney v. State, 2010 Tex. App. LEXIS 5992, 2010 WL 2952083 (Tex. App. Dallas July 29 2010).

466. Defendant failed to preserve error under Tex. R. App. P. 33.1(a) as to evidence of prior convictions that were more than 10 years old because his motion in limine objecting under Tex. R. Evid. 609(b) preserved no error, he did not obtain an adverse ruling on the remoteness issue, he did not object at trial, and he opened the door to the evidence by mentioning his criminal history. Nobles v. State, 2010 Tex. App. LEXIS 2605, 2010 WL 1491858 (Tex. App. San Antonio Apr. 14 2010).

467. Trial court erroneously admitted a 1993 judgment convicting defendant of misdemeanor assault where the judgment was not admissible under Tex. R. Evid. 404(b) because it had no relevance apart from proof of character conformity. Moreover, evidence of the conviction was not available for impeachment under Tex. R. Evid. 609 because the record contained no evidence that the victim of the assault was female, and there was thus no proof that it was a misdemeanor involving moral turpitude. Tello v. State, 2009 Tex. App. LEXIS 8401, 2009 WL 3518006 (Tex. App. Amarillo Oct. 30 2009).

468. Regardless of whether a crime involved moral turpitude, it was not admissible to impeach a witness's credibility because it was not a conviction under Tex. R. Evid. 609. Nelson v. State, 2009 Tex. App. LEXIS 7796, 2009 WL 3191909 (Tex. App. Dallas Oct. 7 2009).

469. Victim's previous sexual assault did not fit within any of the enumerated exceptions under Tex. R. Evid. 412, given that (1) the prior assault was not necessary to rebut evidence offered by the State, (2) the prior assault did not involve defendant and he failed to show in what way the previous assault showed the victim's bias, if any, (3) the

previous assault was not admissible under Tex. R. Evid. 609 nor constitutionally required to be admitted, and (4) because the previous assault was not probative, that value, if any, was substantially outweighed by its prejudicial effect under Tex. R. Evid. 412(b)(3), such that the victim's previous sexual assault and counseling was inadmissible under Rule 412. Woods v. State, 301 S.W.3d 327, 2009 Tex. App. LEXIS 7252 (Tex. App. Houston 14th Dist. Sept. 10 2009).

470. Defendant's juvenile adjudication might not have been admissible, given that Tex. R. Evid. 609 provided that such adjudications were inadmissible, no one claimed that the adjudication was admissible under the Texas Family Code or the Texas Juvenile Justice Code or that it was required to be admitted under the constitution, plus an order of adjudication was not a conviction of a crime under Tex. Fam. Code Ann. § 51.13(a) and an adjudication that a child engaged in conduct that constituted a felony offense was a final felony conviction only for the purpose of penalizing repeat and habitual felony offenders under § 51.13(d); however, the record did not contain evidence from counsel's perspective as to why she did not object and the court had to presume that counsel proceeded deliberately as part of sound trial strategy, and thus defendant did not prove ineffective assistance of counsel based on counsel's failure to object when the State impeached defendant with a juvenile adjudication. Adair v. State, 2008 Tex. App. LEXIS 3286 (Tex. App. Tyler May 7 2008).

471. Trial court did not err during defendant's trial for the Class A misdemeanor offense of assault causing bodily injury in excluding evidence of a prior criminal mischief charge against the complainant at a hearing on a motion in limine where defendant's attorney admitted not only that the criminal mischief case against the complainant was "obviously quite old," but also that the case had been dismissed. Sullivan v. State, 2008 Tex. App. LEXIS 1394 (Tex. App. San Antonio Feb. 27 2008).

472. In a murder trial, defendant was not entitled to impeach a witness by asking whether the witness signed certain checks drawn on defendant's checking account. The evidence was not admissible as impeachment for a crime under Tex. R. Evid. 609 because there was no evidence that the witness had ever been convicted or even arrested for an offense involving the checks. Perry v. State, 236 S.W.3d 859, 2007 Tex. App. LEXIS 7942 (Tex. App. Texarkana 2007).

473. Defense counsel was not ineffective for failing to object to inadmissible impeachment evidence consisting of defendant's prior convictions because on direct examination, defendant preemptively admitted to numerous prior convictions in an attempt to minimize any damage. Andrews v. State, 2007 Tex. App. LEXIS 7217 (Tex. App. Texarkana Sept. 5 2007).

474. Trial court erred by admitting impeachment evidence of prior possession offenses that defendant had pleaded guilty to under Tex. Penal Code Ann. § 12.45 because he was not convicted of the two possession offenses, as neither the indictment nor the plea bargain was part of the record, and the judgment referred only to defendant's conviction of illegal investment; the trial court also failed to determine whether the probative value of admitting the two possession offenses as impeachment evidence outweighed its prejudicial effect to defendant as required under Tex. R. Evid. 609; defendant was harmed by the error under Tex. R. App. P. 44 because: (1) during cross-examination, defendant admitted to the two possession offenses as part of his plea bargain; (2) defendant's credibility was crucial to his defense that the sergeant was mistaken as to the identity of the seller; and (3) in closing arguments the State emphasized the impeachment evidence. Lopez v. State, 230 S.W.3d 875, 2007 Tex. App. LEXIS 5695 (Tex. App. Eastland 2007).

475. For evidence to be admissible for purposes of impeachment, Tex. R. Evid. 609(a) requires evidence of a conviction; pendency of an appeal renders evidence of a conviction inadmissible. Aguirre v. State, 2007 Tex. App. LEXIS 354 (Tex. App. Austin Jan. 19 2007).

476. In an intoxication manslaughter case, the trial court did not abuse its discretion in refusing to allow evidence that another occupant of defendant's watercraft, who defendant claimed was driving at the time of the accident, had a previous conviction for manslaughter; because there was no evidence regarding the date on which the other occupant was released from confinement, and because his manslaughter conviction was more than 10 years old, the trial judge could properly exclude it under Tex. R. Evid. 609(b). Morris v. State, 214 S.W.3d 159, 2007 Tex. App. LEXIS 278 (Tex. App. Beaumont 2007).

477. Evidence of defendant's prior conviction was not offered to attack his credibility pursuant to Tex. R. Evid. 609, but to rebut his testimony that the complainant's injuries resulted from accidental causes rather than an assault, Tex. R. Evid. 404; because defendant did not demonstrate that the prior conviction was not relevant for that purpose, the complaint that the conviction was more than 10 years old presented nothing for the appellate court's review. Carranza v. State, 2006 Tex. App. LEXIS 10137 (Tex. App. Houston 14th Dist. Nov. 28 2006).

478. Despite an initial misidentification of a driver who fled the scene of a residential burglary, there was sufficient evidence to convict defendant of burglary of a habitation where an officer later positively identified defendant due to a tattoo, an owner stated that he loaned defendant a truck, and the truck was later abandoned with items inside; moreover, the trial court was not permitted to consider the fact that the owner, the first person mistakenly identified, had previous convictions for burglary of a habitation. Britt v. State, 2006 Tex. App. LEXIS 4982 (Tex. App. Fort Worth June 8 2006).

479. Under Tex. R. Evid. 609(b), a 17-year-old felony conviction for credit card abuse should not have been admitted in a drug trial to impeach defendant because the prior conviction, with no intervening convictions, happened so long ago that it had little, if any, probative value on the issue of defendant's current credibility. The admission was prejudicial under Tex. R. App. P. 44.2(b) because credibility was critical to the defense that defendant did not intentionally or knowingly possess the drugs and because the prosecutor emphasized the prior conviction during closing argument. Battles v. State, 2006 Tex. App. LEXIS 3117 (Tex. App. Eastland Apr. 20 2006).

480. Because an employee's request for relief from a contempt order based on an injunction was still pending before an appellate court at the time of trial, the contempt judgment against the employee was not final and therefore was inadmissible against the employee under Tex. R. Evid. 609(e); ultimately, the appellate court had determined that the trial court's injunction order was not clear and the court rejected appellees' attempt to parse the contempt proceedings and circumvent the final disposition of the contempt judgment, and therefore the trial court erred in admitting such evidence of contempt and the employee's resulting incarceration, as this information was not relevant under Tex. R. Evid. 401, and this error probably resulted in an improper judgment under Tex. R. App. P. 44.1(a) and was prejudicial under Tex. R. Evid. 403 because evidence of the contempt proceeding presented the jury with a clear indication of the judge's opinion, and it was too great of a risk that the evidence irreparably influenced the jury's decision. Houston v. Millennium Ins. Agency, Inc., 2006 Tex. App. LEXIS 3156 (Tex. App. Corpus Christi Apr. 20 2006).

481. Introduction of affidavit by a police investigator that referred to defendant's prior violations of a protective order did not violate Tex. R. Evid. 609 because the evidence was not offered to impeach defendant's, or any witness's, credibility. Moreover, defendant failed to preserve his argument for appellate review. Sadarangani v. State, 2006 Tex. App. LEXIS 3198 (Tex. App. Fort Worth Apr. 20 2006), substituted opinion at, opinion withdrawn by, modified by 2006 Tex. App. LEXIS 5367 (Tex. App. Fort Worth June 21, 2006).

482. Under Tex. R. Evid. 609, a 17-year-old felony conviction for credit card abuse should not have been admitted in a drug trial to impeach defendant because the prior conviction, with no intervening convictions, happened so long ago that it had little, if any, probative value on the issue of defendant's current credibility; the admission was prejudicial under Tex. R. App. P. 44 because credibility was critical to the defense that defendant did not

intentionally or knowingly possess the drugs and because the prosecutor emphasized the prior conviction during closing argument. Battles v. State, 2006 Tex. App. LEXIS 3117 (Tex. App. Eastland Apr. 20 2006).

483. Because an employee's request for relief from a contempt order based on an injunction was still pending before an appellate court at the time of trial, the contempt judgment against the employee was not final and therefore was inadmissible against the employee under Tex. R. Evid. 609. Houston v. Millennium Ins. Agency, Inc., 2006 Tex. App. LEXIS 3156 (Tex. App. Corpus Christi Apr. 20 2006).

484. Introduction of affidavit by a police investigator that referred to defendant's prior violations of a protective order did not violate Tex. R. Evid. 609 because the evidence was not offered to impeach defendant's, or any witness's, credibility. Sadarangani v. State, 2006 Tex. App. LEXIS 3198 (Tex. App. Fort Worth Apr. 20 2006), substituted opinion at, opinion withdrawn by, modified by 2006 Tex. App. LEXIS 5367 (Tex. App. Fort Worth June 21, 2006).

485. Sole evidence before the trial court was that a victim was released from prison on the most recent felony offense in 1990 and successfully completed his 10-year parole term; thus, the evidence established that more than 10 years had elapsed since the victim's release from the confinement imposed for his convictions and either the date of the offense or the date of trial; therefore, the trial court did not abuse its discretion on grounds that the victim's convictions were inadmissible to impeach his credibility as (1) the convictions were too remote in time under Tex. R. Evid. 609(b); and (2) defendant did not present sufficient proof that the nature of the victim's prior felonies (two burglaries and one aggravated assault) were relevant to the facts or credibility of the witness; however, even if the evidence of the victim's prior convictions were introduced and his credibility compromised, sufficient other evidence existed such that reasonable minds could convict defendant. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

Evidence : Testimony : Credibility : Impeachment : Juvenile Adjudications

486. In a trial for improper sexual activity with a minor in the custody of the Texas Youth Commission, defendant was not entitled to cross-examine the victim regarding his juvenile record. The prosecution was not a juvenile proceeding, the victim was not a party, and the use of the juvenile record for general impeachment of the minor's credibility was not constitutionally required. Brookins v. State, 2011 Tex. App. LEXIS 9765, 2011 WL 6357786 (Tex. App. El Paso Dec. 14 2011).

487. In a trial for improper sexual activity with a minor in the custody of the Texas Youth Commission, defendant was not entitled to cross-examine the victim regarding his juvenile record. The prosecution was not a juvenile proceeding, the victim was not a party, and the use of the juvenile record for general impeachment of the minor's credibility was not constitutionally required. Brookins v. State, 2011 Tex. App. LEXIS 9764, 2011 WL 6382531 (Tex. App. El Paso Dec. 14 2011).

488. Texas has an important interest in protecting the anonymity of juvenile offenders and under Tex. R. Evid. 609(d), Tex. Fam. Code Ann. § 51.13(b), that anonymity is explicitly protected, and to hold that any juvenile who happens to be on probation at the time that he also is the victim of a crime or a witness in a criminal proceeding automatically loses that privacy protection is not required by the constitution or by common sense; Davis v. Alaska, 415 U.S. 308 (1974), is not a blunderbuss that decimates all other evidentiary statutes, rules, and relevance requirements in matters of witness impeachment, and it is a rapier that targets only a specific mode of impeachment--bias and motive--when the cross-examiner can show a logical connection between the evidence suggesting bias or motive and the witness's testimony. The court therefore rejects the absolutist position that a probationer, particularly a probationer whose guilt has not yet been adjudicated, is always in a vulnerable relationship with the State and that mere status is always automatically relevant to show a witness's possible bias and motive to testify favorably for the State as inconsistent with Texas and United States Supreme Court precedent.

Irby v. State, 327 S.W.3d 138, 2010 Tex. Crim. App. LEXIS 725 (Tex. Crim. App. 2010).

489. Any evidence showing that the juvenile victim had a motive to make up this story was relevant and admissible for impeachment purposes, but the court agreed with the trial court and court of appeals that appellant failed to make a logical connection between the victim's testimony concerning his sexual encounters with appellant and his entirely separate probationary status, such that the trial court did not abuse its discretion in excluding this impeachment evidence because it was irrelevant. Irby v. State, 327 S.W.3d 138, 2010 Tex. Crim. App. LEXIS 725 (Tex. Crim. App. 2010).

490. In a sexual assault case, the court did not violate defendant's rights under the Confrontation Clause by denying his request to cross-examine the juvenile victim regarding his status on deferred adjudication probation because there was no indication that a motion to revoke the victim's probation was pending either when he made the allegations against defendant or at the time of trial; thus, defendant did not show that the victim's deferred adjudication status placed him in a "vulnerable relationship" with the State. Irby v. State, 2008 Tex. App. LEXIS 4544 (Tex. App. Dallas June 20 2008).

491. In defendant's sexual assault on a child case, because the victims were juveniles, if they had committed theft, shoplifting, or truancy as defendant alleged, those offenses would have resulted in juvenile adjudications inadmissible under Tex. R. Evid. 609; therefore, the district court did not abuse its discretion in refusing to allow defendant to ask questions related to those offenses. Hatter v. State, 2006 Tex. App. LEXIS 4516 (Tex. App. Austin May 26 2006).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

492. Trial court did not abuse its discretion by allowing the State to impeach defendant because defendant opened the door to the State's questions about the prior assault allegation, as he made the blanket statement on direct examination that he had never been arrested before, that he did not get into trouble, and that the instant case was the first problem he had had, implying that he had never had any interactions with the police before. Lopez v. State, 2013 Tex. App. LEXIS 13623, 2013 WL 5948124 (Tex. App. Houston 14th Dist. Nov. 5 2013).

493. Defendant was not entitled to attack the arresting officer's credibility by showing that he was under investigation for violating the Occupations Code, a specific instance of misconduct, and therefore the trial court did not abuse its discretion by determining that defendant did not establish a Brady violation. Smith v. State, 2013 Tex. App. LEXIS 9194 (Tex. App. Houston 1st Dist. July 25 2013).

494. Defendant was not prevented from showing that the victim and other family members were biased and had a motive to testify against him because there was animosity between the victim's family and defendant, but, under Tex. R. Evid. 608(b) and 609, the trial court did not err in not admitting evidence indicating that the victim's mother had been arrested for possession of marihuana and had been placed on deferred adjudication community supervision. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

495. Under Tex. R. Evid. 608 and 609, the trial court did not abuse its discretion in allowing the State to ask defendant about his prior arrests after he opened the door with his testimony or in determining that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Roberts v. State, 2011 Tex. App. LEXIS 4042, 2011 WL 2112809 (Tex. App. Eastland May 27 2011).

496. During defendant's trial for aggravated sexual assault and solicitation of a minor, the trial court did not err in refusing to admit evidence showing that the complainant had knowledge of sexual matters before these alleged events occurred because the evidence was hearsay and subject to exclusion under Tex. R. Evid. 608, 609 and 613.

Landers v. State, 2011 Tex. App. LEXIS 2982, 2011 WL 1496154 (Tex. App. Amarillo Apr. 19 2011).

497. Trial court did not abuse its discretion by refusing to permit defendant to question the victim and the eyewitness about whether they were under the influence of marijuana or alcohol at the time of the offense under Tex. R. Evid. 609 because both testified that they were not drunk or impaired during the robbery and defendant did not present any contradictory evidence. Woodard v. State, 2009 Tex. App. LEXIS 2897, 2009 WL 1124385 (Tex. App. Houston 14th Dist. Apr. 28 2009).

498. Court did not err by not allowing defendant to cross-examine the victim about her prior sexual experience because the evidence that defendant sought to introduce through the declarant relating to the victim's sexual activity with her boyfriend did not relate to the charged sexual contact offenses, but was offered to impeach the victim's credibility relating to her accusation two years later that defendant also sexually assaulted her. The declarant's forensic interview contained inadmissible hearsay and, as the trial court noted, the victim's conduct discussed in that interview was not at all similar to the charged offenses. Fugate v. State, 2008 Tex. App. LEXIS 6266 (Tex. App. Dallas Aug. 18, 2008).

499. In a case of driving while intoxicated, the trial court did not err in allowing the State to cross-examine a defense witness regarding a conviction for a crime of moral turpitude that occurred more than ten years earlier; an exception to Tex. R. Evid. 609(b) was applicable because the State presented evidence that the witness had not reformed. Alvarado v. State, 2006 Tex. App. LEXIS 8696 (Tex. App. Amarillo Oct. 9 2006).

500. In a criminal trial for drug possession, defendant was not entitled to a mistrial for after a State's witness testified regarding an extraneous offense; the trial court's instruction to disregard cured any prejudice to defendant. Coleman v. State, 2006 Tex. App. LEXIS 8133 (Tex. App. Fort Worth Sept. 14 2006).

501. In a resisting arrest case, counsel was ineffective where, inter alia, counsel failed to investigate or interview defendant in detail about his criminal history or his prior contacts with the arresting officer; failed to seek discovery from the State; failed to file and obtain rulings on a motion in limine to require the State to raise extraneous matters outside the presence of the jury; failed to prepare defendant to testify; failed to object to evidence of inadmissible extraneous matters during the guilt phase; invited evidence of unadjudicated arrests during the punishment phase; and failed to object to failure of the punishment-phase charge to include a reasonable doubt instruction. Walker v. State, 195 S.W.3d 250, 2006 Tex. App. LEXIS 1381 (Tex. App. San Antonio 2006).

502. Trial court did not abuse its discretion in failing to conduct a pretrial hearing to determine the admissibility of impeachment evidence. Yanez v. State, 187 S.W.3d 724, 2006 Tex. App. LEXIS 1289 (Tex. App. Corpus Christi 2006).

503. Record did not establish harm under Tex. R. App. P. 44.2 and Tex. R. Evid. 103(d) from the trial court's failure to conduct a pretrial hearing to determine the admissibility of impeachment evidence because defendant elected not to testify; the jury, therefore, was not exposed to the allegedly prejudicial evidence; any possible harm flowing from the refusal to conduct a hearing was wholly speculative. Yanez v. State, 187 S.W.3d 724, 2006 Tex. App. LEXIS 1289 (Tex. App. Corpus Christi 2006).

504. Trial court did not err by disallowing defendant's impeachment of an attempted-murder victim through the victim's prior felony convictions because more than 10 years had elapsed since the victim's release from the confinement imposed for his convictions. Yanez v. State, 187 S.W.3d 724, 2006 Tex. App. LEXIS 1289 (Tex. App. Corpus Christi 2006).

505. Defendant did not preserve error as to a probative/prejudicial argument under Tex. R. Evid. 609 because during the evidentiary hearing, he did not address that issue. Yanez v. State, 187 S.W.3d 724, 2006 Tex. App. LEXIS 1289 (Tex. App. Corpus Christi 2006).

506. In a criminal prosecution for aggravated robbery, the trial court did not err in admitting evidence regarding defendant's prior conviction; defendant testified he had spent thirteen years in prison; therefore, he opened the door to the evidence regarding the length of the sentence he received for the previous conviction. Simon v. State, 2006 Tex. App. LEXIS 1209 (Tex. App. Dallas Feb. 15 2006).

507. Because defendant did not object at trial that a conviction was inadmissible under Tex. R. Evid. 609, nothing was preserved for review. Adams v. State, 2006 Tex. App. LEXIS 1020 (Tex. App. Houston 14th Dist. Feb. 9 2006).

508. Prior convictions that formed the basis for defendant's objections were the subject matter of the State's questions, and thus defendant's ground for objection of improper character impeachment was apparent from those questions; however, defendant waited to object until after the witness answered both questions, and the failure to make a timely objection at trial waived any error for review. Adams v. State, 2006 Tex. App. LEXIS 1020 (Tex. App. Houston 14th Dist. Feb. 9 2006).

509. In an aggravated assault case, the trial court did not err by allowing defendant's own testimony to be admitted regarding a prior conviction as none of defendant's testimony was false, and the trial court's decision to admit this testimony for impeachment purposes was reasonable. The evidence showed that the prior conviction was well within the 10-year period provided by Tex. R. Evid. 609(b), the instant offense and the prior offense were the same, and defendant's testimony and his credibility as a witness were very important as he and the complainant were the only witnesses. Berry v. State, 179 S.W.3d 175, 2005 Tex. App. LEXIS 8732 (Tex. App. Texarkana 2005).

510. Trial court's error in permitting the State to ask defendant whether he had been arrested more than twenty times was harmless because it did not have a substantial or injurious effect on the jury's verdict and did not affect defendant's substantial rights, as the State reminded the jury that defendant had a prior conviction for felony driving while intoxicated and theft, but it did not address defendant's other prior arrests, and the jury was instructed that all persons were presumed to be innocent and the fact that defendant had been arrested, confined, or indicted for or otherwise charged gave rise to no inference of guilt. West v. State, 169 S.W.3d 275, 2005 Tex. App. LEXIS 4114 (Tex. App. Fort Worth 2005).

511. In a robbery trial, the court did not have to admit evidence of the complainant's prior conviction for misdemeanor assault against defendant's nephew; contrary to defendant's argument, the two-year-old conviction was not relevant to show that the complainant ran from his apartment because he feared a physical confrontation. The court noted that the evidence would properly have been excluded for impeachment purposes because it was not a felony or a crime involving moral turpitude. Allison v. State, 2005 Tex. App. LEXIS 4055 (Tex. App. Houston 14th Dist. May 24 2005).

512. In an aggravated robbery case, defendant failed to show that his trial counsel was ineffective in eliciting testimony from him concerning extraneous offenses; defendant was unable to rebut the presumption that counsel made a reasonable strategic decision, the extraneous offenses were arguably admissible under Tex. R. Evid. 609, and defendant did not show a reasonable probability that the result would otherwise have been different. Perez v. State, 2005 Tex. App. LEXIS 1918 (Tex. App. Dallas Mar. 14 2005).

513. Trial court did not abuse its discretion in prohibiting defendant from impeaching the victim's credibility with a misdemeanor as the victim had already admitted under oath that he had had trouble with the police in the past. Kerr

v. State, 2005 Tex. App. LEXIS 1081 (Tex. App. Tyler Feb. 10 2005).

514. Appellate court affirmed defendant's conviction possession of a controlled substance, namely cocaine, weighing more than four grams and less than 200 grams, with intent to deliver as defendant failed to show that prior convictions used to impeach him that his attorney failed to object to would have been inadmissible due to remoteness. Pittman v. State, 2005 Tex. App. LEXIS 653 (Tex. App. Houston 1st Dist. Jan. 27 2005).

515. In a trial for possession of cocaine, two prior felony cocaine convictions were properly admitted for impeachment purposes. The evidence was more probative than prejudicial because 10 years had not elapsed since defendant's release and he was the only witness. Gage v. State, 2005 Tex. App. LEXIS 531 (Tex. App. San Antonio Jan. 26 2005).

516. Court denied the State of Texas's motion for rehearing after overturning defendant's conviction on the ground that he received ineffective assistance of counsel because there was no sound trial strategy by defense counsel for failing to object to evidence of defendant's prior arrests for unadjudicated offenses. Defendant did not create a false impression pursuant to Tex. R. Evid. 609(a) by any of his testimony on direct examination or by any volunteered statement on cross-examination. Hall v. State, 161 S.W.3d 142, 2005 Tex. App. LEXIS 1742 (Tex. App. Texarkana 2005).

517. When a defendant voluntarily testifies as to his prior criminal record without any prompting or maneuvering on the part of the State's attorney and in so doing he leaves a false impression with the jury, the State is allowed to correct that false impression by introducing evidence of the defendant's prior criminal record. Hall v. State, 161 S.W.3d 142, 2005 Tex. App. LEXIS 1742 (Tex. App. Texarkana 2005).

518. Court did not err in sustaining the State's objection to the impeachment of its witness with convictions for a prior theft from 1987, a prior driving while intoxicated from 1990, and a failure to identify in 1990. Because the witness had completed deferred adjudication for the theft, it was not a conviction for purposes of impeachment, and the other convictions were more than 10 years old. Pendley v. State, 2004 Tex. App. LEXIS 10526 (Tex. App. Fort Worth Nov. 24 2004).

519. In an aggravated assault case, defense counsel was not ineffective for eliciting testimony from defendant regarding two non-final prior convictions, evidence of which would have been inadmissible under Tex. R. Evid. 609(e), because counsel could reasonably have thought the testimony would make a self-defense claim more believable. Robertson v. State, 2004 Tex. App. LEXIS 10130 (Tex. App. Waco Nov. 10 2004), reversed by 187 S.W.3d 475, 2006 Tex. Crim. App. LEXIS 576 (Tex. Crim. App. 2006).

520. In a retaliation case, a court properly refused to allow impeachment of the victim with his prior theft convictions where they were more than 10 years old, the victim had no further diffculties with the law, and the probative value did not outweigh the danger of prejudice. Moore v. State, 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

521. Although no limiting instruction or an instruction regarding the burden of proof for extraneous acts was given or requested, the record on direct appeal did not establish that trial counsel's failure to request such instruction constituted ineffective assistance of counsel. Woods v. State, 2004 Tex. App. LEXIS 5564 (Tex. App. Eastland June 24 2004).

522. Habeas corpus petitioner, who was convicted of capital murder, failed to establish that trial counsel rendered ineffective assistance by refusing to object to the State's impeachment by use of three misdemeanor convictions, in

violation of Tex. R. Evid. 609(a), because substantial impeachment evidence had already been admitted and the petitioner had opened the door to the use of his misdemeanor convictions. Morrow v. Dretke, 99 Fed. Appx. 505, 2004 U.S. App. LEXIS 10009 (5th Cir. Tex. 2004), writ of certiorari denied by 543 U.S. 944, 125 S. Ct. 359, 160 L. Ed. 2d 257, 2004 U.S. LEXIS 6989, 73 U.S.L.W. 3246 (2004).

523. On a charge of unlawful possession of a firearm, the trial court properly did not allow defendant to impeach the State's witness by explaining that the witness testified to the same effect in an earlier trial arising from the same events and that the prior jury found that defendant did assault the witness. The testimony was consistent, did not show bias, and did not involve the witness's own prior crime. Macias v. State, 136 S.W.3d 702, 2004 Tex. App. LEXIS 4193 (Tex. App. Texarkana 2004).

524. In a case involving drug possession, evidence of defendant's two prior drug convictions were properly admitted under Tex. R. Evid. 609 because the theory of the defense rested entirely on defendant's credibility, despite the fact that the crimes occurred eight or nine years prior to the charged offense, and the offenses did not involve deception. Wooten v. State, 2004 Tex. App. LEXIS 4147 (Tex. App. Dallas May 6 2004).

525. Two citations for petty theft 13 or 14 years before trial, viewed alone, without any intervening convictions, had little bearing on the victim's present credibility; moreover, at least five other witnesses testified to defendant's threats against the victim, and thus, the trial court did not abuse its discretion in finding that the danger of unfair prejudice outweighed the probative value of the convictions. Moore v. State, 2004 Tex. App. LEXIS 3017 (Tex. App. Waco Mar. 31 2004), opinion withdrawn by 2004 Tex. App. LEXIS 6584 (Tex. App. Waco July 21, 2004), substituted opinion at 143 S.W.3d 305, 2004 Tex. App. LEXIS 6612 (Tex. App. Waco 2004).

526. In a criminal prosecution for possession of marijuana, the trial court did not err in denying defendant's motion in limine regarding the admission of his prior felony conviction of possession and distribution of cocaine. The prior felony conviction was admissible under Tex. R. Evid. 609, because the 10-year limit had not expired. Swaggerty v. State, 2004 Tex. App. LEXIS 2010 (Tex. App. San Antonio Mar. 3 2004).

527. Defendant's claim that the trial court erred by denying his motion to exclude evidence of his prior lengthy criminal history lacked merit, as he suggested no reason that such cross-examination would have been improper under Tex. R. Evid. 609, and his argument that allowing such impeachment deprived him of a fair and impartial trial pursuant to Tex. Const. art. I, § 10 also was not supported. Cochran v. State, 2004 Tex. App. LEXIS 1916 (Tex. App. Texarkana Feb. 27 2004).

528. Although defense counsel's introduction of impeaching testimony ahead of the State might have supported defendant's claim of ineffective assistance of counsel where impeachment by the State would have been improper under Tex. R. Evid. 609(a) and (b), it was possible that it was important for the jury to know that the witness did not otherwise have a criminal record of any sort, that her single arrest was more than 11 years ago, and that the arrest was for possession of an item her then-boyfriend had in their house. Counsel therefore had a valid tactical reason for introducing the impeaching evidence, thereby defeating the ineffective assistance of counsel claim. Owen v. State, 2004 Tex. App. LEXIS 1556 (Tex. App. Texarkana Feb. 18 2004).

529. In a resisting arrest case, although defendant's previous conviction for interference with the duties of a public servant was neither a felony nor a crime of moral turpitude and was thus not admissible under Tex. R. Evid. 609(a), a court properly admitted the conviction to correct a false impression left by defendant where defendant's self-serving remarks about respect for police placed his attitude toward public servants into issue and were thus properly subject to impeachment to refute that false representation with contrary evidence. Paita v. State, 125 S.W.3d 708, 2003 Tex. App. LEXIS 10432 (Tex. App. Houston 1st Dist. 2003).

530. In an aggravated robbery case, defense counsel was not ineffective in failing to object to the state's use of defendant's juvenile record for impeachment; although Tex. R. Evid. 609(d) provides that evidence of a juvenile adjudication generally is not admissible to impeach a witness, defendant opened the door to the admission of such evidence when he volunteered during cross-examination that he had never been in trouble before. Andrews v. State, 2003 Tex. App. LEXIS 9955 (Tex. App. Eastland Nov. 20 2003).

531. Pursuant to Tex. Penal Code Ann. § 19.02(c), defendant was convicted of murdering the victim, defendant's infant son, and trial counsel's decision to elicit testimony regarding defendant's prior juvenile adjudication could not be considered reasonable trial strategy, as it was otherwise inadmissible as impeachment evidence under Tex. R. Evid. 609 and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(i), and constituted deficient representation; however, because defendant failed to affirmatively show that the jury's consideration of a juvenile drug possession charge led the jury to assess the maximum punishment under Tex. Penal Code Ann. § 12.32(a), in defendant's murder case, defendant could not establish that defendant was prejudiced, and thus, trial counsel's representation was not ineffective. Chapa v. State, 2003 Tex. App. LEXIS 2091 (Tex. App. San Antonio Mar. 12 2003).

532. Where defendant objected to the admission of the prior DWI convictions alleged in the indictment for felony driving while intoxicated, because they occurred more than 10 years before the instant offense, Tex. Penal Code Ann. § 49.04 and Tex. Penal Code Ann. § 49.09 together defined the offense of felony driving while intoxicated; a prior intoxication-related conviction used to raise the offense to a felony under Tex. Penal Code Ann. § 49.09, is not an element of that offense, as Tex. Penal Code Ann § 49.09 does not describe the forbidden conduct, the required culpability, any required result, nor does it create an exception to the offense, as described in Tex. Penal Code § 1.07; Tex. Penal Code Ann. § 49.09 is more akin to a rule of admissibility, pursuant to Tex. R. Evid. 609(b), as opposed to an element of the offense. Weaver v. State, 87 S.W.3d 557, 2002 Tex. Crim. App. LEXIS 151 (Tex. Crim. App. 2002), *cert denied,* 538 U.S. 911, 123 S. Ct. 1491, 155 L. Ed. 2d 234, 2003 U.S. LEXIS 2056 (2003).

533. Convictions for sexual assault and forgery more than 10 years old were subject to the standard of Tex. R. Evid. 609(a) and were not automatically unusable to impeach even though they were more than 10 years old, because the witness had a subsequent conviction for indecent exposure that was considered a crime of moral turpitude that vitiated the remoteness of the two other convictions. Woodall v. State, 77 S.W.3d 388, 2002 Tex. App. LEXIS 3087 (Tex. App. Fort Worth 2002).

534. Under Tex. R. Evid. 609(b), where more than 10 years have elapsed, a prior conviction will not be remote where the witness' lack of reformation is shown by evidence of an intervening conviction for a felony or a misdemeanor crime of moral turpitude. Woodall v. State, 77 S.W.3d 388, 2002 Tex. App. LEXIS 3087 (Tex. App. Fort Worth 2002).

535. Evidence of lack of reformation of witnesses by subsequent felony and certain misdemeanor convictions can cause prior convictions to fall outside the general rule of Tex. R. Evid. 609(b), and make them not subject to the objection of remoteness. Woodall v. State, 77 S.W.3d 388, 2002 Tex. App. LEXIS 3087 (Tex. App. Fort Worth 2002).

536. Moral turpitude is defined as including acts that are base, vile, or depraved. Woodall v. State, 77 S.W.3d 388, 2002 Tex. App. LEXIS 3087 (Tex. App. Fort Worth 2002).

537. Tex. R. Evid. 609(b) is not applicable to impeach a complainant's conviction where she was discharged from probation less than 10 years before defendant's trial. Craig v. State, 82 S.W.3d 451, 2002 Tex. App. LEXIS 2542 (Tex. App. Austin 2002).

538. Where defendant was convicted of intoxication manslaughter and intoxication assault, the trial court abused its discretion by allowing defendant's prior felony convictions to be introduced to impeach his credibility, pursuant to Tex. R. Evid. 609, where the convictions were improperly admitted as hearsay, pursuant to Tex. R. Evid. 806, when they were not in fact hearsay as defined by Tex. R. Evid. 801(d). Enriquez v. State, 56 S.W.3d 596, 2001 Tex. App. LEXIS 5450 (Tex. App. Corpus Christi 2001).

539. An exception applies to Tex. R. Evid. 609 when a witness makes statements concerning his criminal past which created a false impression with the jury as to the extent of either his prior (1) arrests, (2) convictions, (3) charges or (4) "trouble" with the police. Anaya v. State, 988 S.W.2d 823, 1999 Tex. App. LEXIS 988 (Tex. App. Amarillo 1999).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

540. Because defendant testified to now knowing who was breaking into his car, the victim's prior criminal history and general reputation would have had no bearing on the reasonableness of defendant's actions, in defendant's murder trial, and thus the trial court did not abuse its discretion by not admitting this evidence; in any event, given that defendant was allowed to testify that the victim was a drug addict and had tried to sell him stolen car stereos, the exclusion of this evidence would have been harmless in any event. Freeman v. State, 230 S.W.3d 392, 2007 Tex. App. LEXIS 3965 (Tex. App. Eastland 2007).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview

541. In a termination of parental rights proceeding arising from the death of a sibling, there was no error under Tex. R. Evid. 609 when the trial court admitted evidence of the parent's prior criminal convictions, some of which were more than 10 years old. Murray v. Tex. Dep't of Family & Protective Servs., 294 S.W.3d 360, 2009 Tex. App. LEXIS 6372 (Tex. App. Austin Aug. 13 2009).

Immigration Law : Duties & Rights of Aliens : Discrimination

542. Illegal immigrant status of defendant driver should not have been admitted in a wrongful death and survival action stemming from a multi-fatality vehicular accident. The driver's immigration conviction did not meet the criteria of Tex. R. Evid. 609(a). TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

Torts : Transportation Torts : General Overview

543. Illegal immigrant status of defendant driver should not have been admitted in a wrongful death and survival action stemming from a multi-fatality vehicular accident. The driver's immigration conviction did not meet the criteria of Tex. R. Evid. 609(a). TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

Tex. Evid. R. 610

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 610 Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 23, *Policies Excluding Evidence*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Comment to 1998 change This is prior Rule of Criminal Evidence 615.

Pre-March 1, 1998 Comment This is a new rule, thus causing renumbering of former Rule 610 to 611.

While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule.

Tex. Evid. R. 611

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS RULES OF EVIDENCE > ARTICLE VI. WITNESSES

Rule 611 Mode and Order of Examining Witnesses and Presenting Evidence

(a) ***Control by the Court; Purposes.***--The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1)make those procedures effective for determining the truth;

(2)avoid wasting time; and

(3)protect witnesses from harassment or undue embarrassment.

(b) ***Scope of Cross-Examination.***--A witness may be cross-examined on any relevant matter, including credibility.

(c) ***Leading Questions.***--Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1)on cross-examination; and

(2)when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 20, *Presentation of Evidence*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Pre-March 1, 1998 Comment This is former Rule 610; the number has been changed and the rule amended to permit leading questions in order to develop the testimony of the witness.

The purpose of the amendment is to permit, in the court's discretion, the use of leading questions on preliminary or introductory matters, refreshing memory, questions to ignorant or illiterate persons or children, all as permitted by prior Texas practice and the common law.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

Case Notes

Administrative Law : Agency Adjudication : Hearings : Right to Hearing : Due Process
Civil Procedure : Discovery : Disclosures : Sanctions
Civil Procedure : Trials : Bench Trials
Civil Procedure : Judgments : Preclusion & Effect of Judgments : Estoppel : Collateral Estoppel
Civil Procedure : Remedies : Damages : Compensatory Damages
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Reversible Errors
Civil Rights Law : Prisoner Rights : Access to Courts
Constitutional Law : Bill of Rights : Fundamental Freedoms : Freedom of Religion : General Overview
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Fair Trial
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Testify
Criminal Law & Procedure : Trials : Examination of Witnesses : General Overview
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Judicial Discretion
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : General Overview
Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : Limitations
Evidence : Procedural Considerations : Judicial Intervention in Trials : Interrogation of Witnesses
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof
Evidence : Relevance : Relevant Evidence
Evidence : Scientific Evidence : Sobriety Tests
Evidence : Testimony : Credibility : Impeachment : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances
Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice
Evidence : Testimony : Credibility : Impeachment : Mental Incapacity
Evidence : Testimony : Credibility : One's Own Witnesses : Application : Hostility

Evidence : Testimony : Examination : General Overview
Evidence : Testimony : Examination : Cross-Examination : General Overview
Evidence : Testimony : Examination : Cross-Examination : Scope
Evidence : Testimony : Examination : Direct Examination
Evidence : Testimony : Examination : Leading Questions
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility
Evidence : Testimony : Lay Witnesses : General Overview
Evidence : Testimony : Presentation of Evidence
Family Law : Child Custody : Procedures
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview
Governments : Courts : Authority to Adjudicate

LexisNexis (R) Notes

Administrative Law : Agency Adjudication : Hearings : Right to Hearing : Due Process

1. Where a sexually oriented business operator's request for a location exemption was denied, the operator was deprived of procedural due process during a hearing because an administrative law judge refused to allow the operator to re-examine witnesses after the board members had asked questions of those witnesses. City of Arlington v. Centerfolds, Inc., 232 S.W.3d 238, 2007 Tex. App. LEXIS 4705 (Tex. App. Fort Worth 2007).

Civil Procedure : Discovery : Disclosures : Sanctions

2. Trial court did not err by refusing to allow damage evidence in a condemnation case under Tex. R. Civ. P. 193 because the evidence in question was not disclosed under Tex. R. Civ. P. 194; there was no good cause shown due to counsel's inadvertence, and an owner would have been prejudiced thereby; moreover, cross-examination on this issue was properly excluded since it was not relevant to the case. Harris County v. Inter Nos, Ltd., 199 S.W.3d 363, 2006 Tex. App. LEXIS 3849 (Tex. App. Houston 1st Dist. 2006).

Civil Procedure : Trials : Bench Trials

3. On appeal of the final decree of divorce, the former wife claimed that the trial court improperly limited her cross-examination of her husband; she asserted that the trial court should have compelled him to respond to her questions regarding her contribution of funds to improve his separate property. The Court of Appeals of Texas found no error, because Tex. R. Evid. 611(a) permitted the trial court to exercise reasonable control over the mode and order of interrogating witnesses; the manner and scope of cross-examination was within the sound discretion of the trial court. Jackson v. Jackson, 2009 Tex. App. LEXIS 2896 (Tex. App. Houston 14th Dist. Apr. 28 2009).

Civil Procedure : Judgments : Preclusion & Effect of Judgments : Estoppel : Collateral Estoppel

4. In a civil commitment proceeding, defense counsel's cross-examination of the subject inmate was not improperly limited because the inmate sought to collaterally attack the inmate's prior criminal convictions. In re Ramirez, 2013 Tex. App. LEXIS 12917, 2013 WL 5658597 (Tex. App. Beaumont Oct. 17 2013).

Civil Procedure : Remedies : Damages : Compensatory Damages

5. Trial court did not err by refusing to allow damage evidence in a condemnation case under Tex. R. Civ. P. 193 because the evidence in question was not disclosed under Tex. R. Civ. P. 194; there was no good cause shown due to counsel's inadvertence, and an owner would have been prejudiced thereby; moreover, cross-examination on

this issue was properly excluded since it was not relevant to the case. Harris County v. Inter Nos, Ltd., 199 S.W.3d 363, 2006 Tex. App. LEXIS 3849 (Tex. App. Houston 1st Dist. 2006).

Civil Procedure : Appeals : Reviewability : Preservation for Review

6. In an easement dispute, a fee segregation issue and a challenge to limits on cross-examination under Tex. R. Evid. 611 were not preserved for review under Tex. R. App. P. 33.1 because they were not raised below; moreover, the record showed that thorough cross-examination had been permitted. Ferrara v. Moore, 318 S.W.3d 487, 2010 Tex. App. LEXIS 5929 (Tex. App. Texarkana July 28 2010).

Civil Procedure : Appeals : Standards of Review : Reversible Errors

7. There was no reversible error under Tex. R. App. P. 44.1 by a trial court's admission of evidence of appellate attorney's fees through an expert or re-direct and cross-examination because under Tex. R. Evid. 611, the trial court had control of the court and the scope of cross-examination and the direct examination included evidence of the expert's qualifications so that it was not totally unrelated. Tricon Tool & Supply, Inc. v. Thumann, 226 S.W.3d 494, 2006 Tex. App. LEXIS 9953 (Tex. App. Houston 1st Dist. 2006).

Civil Rights Law : Prisoner Rights : Access to Courts

8. In a termination of parental rights, the court did not abuse its discretion under Tex. R. Evid. 611 by conducting the hearing with the incarcerated father appearing by telephone. In the Interest of D.S., 333 S.W.3d 379, 2011 Tex. App. LEXIS 495 (Tex. App. Amarillo Jan. 25 2011).

Constitutional Law : Bill of Rights : Fundamental Freedoms : Freedom of Religion : General Overview

9. In a delivery of a controlled substance case, the trial court did not abuse its discretion in directing defendant to move his Bible to a place less visible than on top of counsel table because, by doing so, the trial court was acting within its inherent authority to conduct orderly, impartial trial proceedings under Tex. R. Evid. 611(a). Because the record did not demonstrate how the trial court's order interfered with defendant's free exercise of religion at all, much less "substantially," his complaint failed. Alexander v. State, 282 S.W.3d 143, 2009 Tex. App. LEXIS 1712 (Tex. App. Texarkana Mar. 11 2009).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

10. Although a driver had the right under U.S. Const. amend. XIV, § 1 and Tex. Const. art. I, § 19 to cross-examine the officer who arrested him for driving while intoxicated after he was involved in an auto accident, the administrative law judge (ALJ) who suspended his driver's license was within her discretion to limit questioning on relevancy grounds pursuant to Tex. R. Evid. 401 because the record showed that when the officer was asked by the ALJ if he had taken the driver's driving and possible culpability in causing the accident into consideration for probable cause to arrest him, the officer responded negatively. Because the officer did not take the fault of the accident into consideration in determining probable cause for intoxication, the issue was irrelevant. Tex. Dep't of Pub. Safety v. Burrer, 2005 Tex. App. LEXIS 3534 (Tex. App. San Antonio May 11 2005).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

11. In defendant's sexual assault case, a court did not err by explaining to the State how to present rebuttal evidence where the comments about the admissibility of the State's rebuttal witness were made outside the presence of the jury, and they did not indicate that any assistance was given to the State; the judge was presented with an admissibility question under Tex. R. Evid. 613 and made a decision which left defendant with the choice of

returning to the stand to preclude the testimony of the State's witness or remaining silent and relying on his original statement. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

12. Trial court did not impermissibly limit defendant's right to cross-examine witnesses as to alternative theories of how a child-sexual-assault complainant might have been injured because cross-examination was not limited regarding personal hygiene or tight-fitting clothes, but only as to buying or wearing revealing clothes. Cordero v. State, 2012 Tex. App. LEXIS 2834, 2012 WL 1248064 (Tex. App. El Paso Apr. 11 2012).

13. Under Tex. R. Evid. 611, the trial court did not abuse its discretion in allowing the State to lead the victim, a minor with certain special education needs, on particular aspects of her testimony regarding the offense of aggravated sexual assault. Lopez v. State, 2012 Tex. App. LEXIS 676, 2012 WL 256103 (Tex. App. Corpus Christi Jan. 26 2012).

14. In a criminal prosecution for aggravated sexual assault of a child, the child's testimony regarding penetration was elicited by leading questions under Tex. R. Evid. 611(c). The rule against leading questions is somewhat relaxed in cases dealing with child witnesses. Acevedo v. State, 2006 Tex. App. LEXIS 10586 (Tex. App. San Antonio Dec. 13 2006).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

15. Assistance of counsel was not rendered ineffective by a failure to object to hearsay and leading questions at a suppression hearing. The Texas Rules of Evidence, with the exception of privileges, did not apply to suppression hearings. Piper v. State, 2004 Tex. App. LEXIS 7601 (Tex. App. Texarkana Aug. 25 2004).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

16. Counsel was not rendered ineffective by failing to 41 object to leading questions where defendant did not specifically identify any of the questions. Lopez v. State, 2013 Tex. App. LEXIS 2064, 2013 WL 765711 (Tex. App. Waco Feb. 28 2013).

17. Defense counsel's failure to object to the prosecutor's questions to a reluctant child witness did not constitute ineffective assistance in defendant's trial for aggravated assault of the child in violation of Tex. Penal Code Ann. § 22.021; questions regarding previous accusations elicited cumulative evidence that included defendant's videotaped confession, and the State was permitted to ask leading questions and to impeach the child with a prior inconsistent statement under Tex. R. Evid. 611(c) and 607. Brambila v. State, 2009 Tex. App. LEXIS 5959, 2009 WL 2356674 (Tex. App. Houston 14th Dist. July 28 2009).

18. Failure to object to leading questions was not ineffective assistance of counsel because even if the questions were improper under Tex. R. Evid. 611, counsel may have had a reasonable, strategic decision for not objecting. Carey v. State, 2007 Tex. App. LEXIS 9052 (Tex. App. Texarkana Nov. 16 2007).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

19. Trial court did not violate the Confrontation Clauses in discontinuing defendant's initial cross-examination of his mother during his murder trial because, after at least four hours in one day, the 73-year-old witness was tired,

shaky, and not feeling well, and the trial court allowed defendant to resume the cross-examination when his mother returned five days later. Williams v. State, 2006 Tex. App. LEXIS 4251 (Tex. App. Houston 14th Dist. May 11 2006).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Fair Trial

20. Defendant failed to preserve for review, as required under Tex. R. App. P. 33, his claims that the trial court abandoned its role as a neutral arbiter and thereby denied defendant his right to a fair trial, as he failed to show that he was prejudiced and that the fundamental error doctrine applied under Tex. R. Evid. 103; the trial court was permitted to question a witness to clarify defendant's misstatement of the witness's testimony, it was permitted to intervene under Tex. R. Evid. 611 by asking the State for objections to defendant's questioning; the trial court's insistence that defendant ask a witness relevant questions did not translate into an indication of the judge's views about defendant's guilt or innocence. Bogany v. State, 2007 Tex. App. LEXIS 10074 (Tex. App. Houston 1st Dist. Dec. 20 2007).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Testify

21. Court did not deny defendant the right to testify by improperly cutting short defendant's testimony because the trial court made multiple attempts to ensure that defendant acted in a nondisruptive fashion and in accordance with the procedural and evidentiary requirements of the forum; defendant ultimately proved that he would not do so, and (after fair warning and after holding him in contempt) the court ended his testimony. Allen v. State, 232 S.W.3d 776, 2007 Tex. App. LEXIS 6098 (Tex. App. Texarkana 2007).

Criminal Law & Procedure : Trials : Examination of Witnesses : General Overview

22. Trial court did not abuse its discretion by allowing a detective to testify in a narrative form because the testimony served to explain why he had reached the conclusion that the child victim's account of the sexual abuse was plausible, and defendant lodged no objection concerning the detective's qualifications to provide his opinion on the topic, nor did he object that the detective's opinion on the question was irrelevant. Romero v. State, 2010 Tex. App. LEXIS 5735, 2010 WL 2854307 (Tex. App. Beaumont July 21 2010).

23. In defendant's sexual assault case, a court did not err by explaining to the State how to present rebuttal evidence where the comments about the admissibility of the State's rebuttal witness were made outside the presence of the jury, and they did not indicate that any assistance was given to the State; the judge was presented with an admissibility question under Tex. R. Evid. 613 and made a decision which left defendant with the choice of returning to the stand to preclude the testimony of the State's witness or remaining silent and relying on his original statement. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

24. Where defendant was convicted of DWI, he was not harmed by the trial court's refusal to allow him to cross-examine an officer about a specific act of dishonesty. Evidence that the officer intentionally withheld testimony about his failing to report a weapon discharge would not have achieved defendant's specific goal of proving that the officer lied about defendant's reckless driving; a video of defendant's stop strongly supported a finding that he was intoxicated. Tollett v. State, 422 S.W.3d 886, 2014 Tex. App. LEXIS 1216, 2014 WL 462275 (Tex. App. Houston 14th Dist. Feb. 4 2014).

25. Trial court did not impermissibly restrict appellant's right to cross-examine the State's psychologist about his rate of error during proceedings to commit him as a sexually violent predator because it could have reasonably concluded that the jury would have been confused. In re Alexander, 2013 Tex. App. LEXIS 12077, 2013 WL

5425557 (Tex. App. Beaumont Sept. 26 2013).

26. Trial court did not err by refusing to allow defendant to cross-examine an officer about the confidential informant because the disallowed questions were not relevant to the issue of defendant's guilt or innocence, as the State did not rely on events related to obtaining the search warrant in proving defendant's guilt. Nwaogu v. State, 2013 Tex. App. LEXIS 4588, 2013 WL 1490489 (Tex. App. Houston 1st Dist. Apr. 11 2013).

27. Even though the trial court erred by limiting defendant's cross-examination of a detective, the error was harmless because she was able to establish that the confidential informant (CI) was compensated for his services with the police department, and her cross-examination revealed that detectives failed to search the inside of his shoes and underwear. The recordings failed to indicate that the CI obtained controlled substances from his shoes, his underwear, or any source other than defendant. Bussey v. State, 2012 Tex. App. LEXIS 5 (Tex. App. Houston 14th Dist. Jan. 3 2012).

28. In a driving while intoxicated case, even if defendant should have been allowed to ask the arresting officer about his own driving record, refusing to allow the question was harmless because defendant had already successfully cross-examined the officer about some of the details of his two prior traffic accidents. Bridges v. State, 2011 Tex. App. LEXIS 9104, 2011 WL 5557534 (Tex. App. Dallas Nov. 16 2011).

29. In a driving while intoxicated case, a court did not abuse its discretion in excluding evidence from a safety manual that the horizontal gaze nystagmus test was only 77% accurate in predicting intoxication because the court expressed concern about opening the door for the percentages of all tests, how different studies resulted in different statistics, and whether the manual defendant had was the same edition the officer used in training. The trial court was properly concerned with the effective presentation of the evidence, confusion of the issues, and undue delay, so it restricted defendant's cross-examination into the specific statistics. Sedeno v. State, 2008 Tex. App. LEXIS 8984 (Tex. App. Houston 14th Dist. Nov. 25 2008).

30. Trial court did not violate the Confrontation Clauses in discontinuing defendant's initial cross-examination of his mother during his murder trial because, after at least four hours in one day, the 73-year-old witness was tired, shaky, and not feeling well, and the trial court allowed defendant to resume the cross-examination when his mother returned five days later. Williams v. State, 2006 Tex. App. LEXIS 4251 (Tex. App. Houston 14th Dist. May 11 2006).

Criminal Law & Procedure : Trials : Judicial Discretion

31. In a delivery of a controlled substance case, the trial court did not abuse its discretion in directing defendant to move his Bible to a place less visible than on top of counsel table because, by doing so, the trial court was acting within its inherent authority to conduct orderly, impartial trial proceedings under Tex. R. Evid. 611(a). Because the record did not demonstrate how the trial court's order interfered with defendant's free exercise of religion at all, much less "substantially," his complaint failed. Alexander v. State, 282 S.W.3d 143, 2009 Tex. App. LEXIS 1712 (Tex. App. Texarkana Mar. 11 2009).

Criminal Law & Procedure : Witnesses : Credibility

32. Court properly limited cross-examination of a witness because defendant's attempt to use an instance during an officer's career in which he wrote "phantom" warning citations was nothing more than an instance of wrongdoing in his life and was not shown to bear on his general reputation for truthfulness. There was nothing which revealed that the act of wrongdoing created a bias on the part of the officer against defendant or caused the officer to have a motive to testify untruthfully. McMillon v. State, 294 S.W.3d 198, 2009 Tex. App. LEXIS 6238 (Tex. App. Texarkana Aug. 12 2009).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview

33. In a drug case, questions posed to defendant regarding the amount of money found in his house did not exceed the scope of Tex. R. Evid. 611(b); the line of questioning tested defendant's credibility concerning the amount of money he made dealing drugs, and it bore on his suitability for community supervision. Quiroz v. State, 2008 Tex. App. LEXIS 5995 (Tex. App. Corpus Christi Aug. 7 2008).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

34. Trial court had the discretion to allow the prosecutor to read portions of an admitted exhibit into evidence at the punishment phase of trial. Bustamante v. State, 2012 Tex. App. LEXIS 10002 (Tex. App. Dallas Dec. 4 2012).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

35. In a civil commitment proceeding, defense counsel's cross-examination of the subject inmate was not improperly limited because the inmate sought to collaterally attack the inmate's prior criminal convictions. In re Ramirez, 2013 Tex. App. LEXIS 12917, 2013 WL 5658597 (Tex. App. Beaumont Oct. 17 2013).

36. In a civil commitment proceeding, defense counsel's cross-examination of an expert was not improperly limited because counsel sought to elicit information that did not make the existence of any fact of consequence to the determination of whether an inmate was a sexually violent predator more or less probable. In re Ramirez, 2013 Tex. App. LEXIS 12917, 2013 WL 5658597 (Tex. App. Beaumont Oct. 17 2013).

37. Trial court did not impermissibly restrict appellant's right to cross-examine the State's psychologist about his rate of error during proceedings to commit him as a sexually violent predator because it could have reasonably concluded that the jury would have been confused. In re Alexander, 2013 Tex. App. LEXIS 12077, 2013 WL 5425557 (Tex. App. Beaumont Sept. 26 2013).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

38. Defendant failed to preserve error for review where counsel cited Tex. R. Evid. 403 and 611 as the basis for the objection to the testimony of the victim's parents at sentencing. It was unclear from the record which part of Rule 611 was the basis of the objection, and the issue on appeal was different from the objection at trial. Foust v. State, 2005 Tex. App. LEXIS 12 (Tex. App. Dallas Jan. 4 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

39. Defendant failed to preserve for appellate review his contention that the trial court erred by refusing to allow defense counsel to impeach the victim regarding his social networking history pursuant to Tex. R. Evid. 611(b) because defendant's offer of proof did not include a summary of the proposed testimony. Barnett v. State, 2012 Tex. App. LEXIS 5516, 2012 WL 2832557 (Tex. App. El Paso July 11 2012).

40. Defendant failed to preserve for review his contention that the trial court erred when it allegedly failed to issue a ruling on the admissibility of impeachment evidence pertaining to the medical examiner who conducted the victim's autopsy because defendant failed to point out where in the record: (1) he asked the trial court to rule on the issue; (2) the trial court refused to rule on the request; and (3) defendant subsequently lodged an objection to that failure to rule. Coe v. State, 2012 Tex. App. LEXIS 4169, 2012 WL 1899179 (Tex. App. Houston 14th Dist. May 24

2012).

41. By failing to object and obtain an adverse ruling each time a prosecutor asked a leading question during a motion to suppress hearing, defendant failed, under Tex. R. App. P. 33.1(a) to preserve for review his issue under Tex. R. Evid. 611(c). Wise v. State, 223 S.W.3d 548, 2007 Tex. App. LEXIS 345 (Tex. App. Amarillo 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

42. Because defendant failed to object to the relevance of his jailhouse tattoos, as opposed to an alleged gang affiliation, and failed to object to the State's continued questioning about his tattoos, testimony concerning his tattoos was admitted into evidence without objection. While defendant failed to obtain an adverse ruling in the first place, even if he had, he would have waived the objection by failing to either interpose it each time the evidence in question was offered or seek a running objection. Shipley v. State, 2014 Tex. App. LEXIS 2868, 2014 WL 1004498 (Tex. App. Texarkana Mar. 14 2014).

43. Allegation that a trial court erred in a theft case by allowing rebuttal testimony was not preserved for review because no objection was made before the trial court. Hopkins v. State, 2008 Tex. App. LEXIS 2861 (Tex. App. Texarkana Apr. 9 2008).

44. Defendant failed to preserve for review, as required under Tex. R. App. P. 33, his claims that the trial court abandoned its role as a neutral arbiter and thereby denied defendant his right to a fair trial, as he failed to show that he was prejudiced and that the fundamental error doctrine applied under Tex. R. Evid. 103; the trial court was permitted to question a witness to clarify defendant's misstatement of the witness's testimony, it was permitted to intervene under Tex. R. Evid. 611 by asking the State for objections to defendant's questioning; the trial court's insistence that defendant ask a witness relevant questions did not translate into an indication of the judge's views about defendant's guilt or innocence. Bogany v. State, 2007 Tex. App. LEXIS 10074 (Tex. App. Houston 1st Dist. Dec. 20 2007).

45. Although the State asked a six-year-old sexual assault complainant numerous leading questions, defendant's trial counsel had objected only once, and because the one question objected to was not a leading question, the trial court did not err in overruling the objection; by not objecting to each leading question, defendant had not preserved his complaint for appellate review in accordance with Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a). Embree v. State, 2006 Tex. App. LEXIS 7772 (Tex. App. Waco Aug. 30 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

46. Trial court did not abuse its discretion by overruling defendant's argumentative objection to the State's questions concerning defendant's failure to subpoena two witnesses because reasonable persons could disagree concerning whether the objection was a comment on the evidence. Pardee v. State, 2012 Tex. App. LEXIS 6823, 2012 WL 3516485 (Tex. App. Texarkana Aug. 16 2012).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

47. No harm resulted, even if the prosecution was improperly permitted to treat witnesses as hostile, because defendant did not identify any leading questions that allegedly constituted testimony or improper impeachment. Howard v. State, 2014 Tex. App. LEXIS 3051, 2014 WL 2619087 (Tex. App. Corpus Christi Mar. 20 2014).

48. In a driving while intoxicated case, even if defendant should have been allowed to ask the arresting officer about his own driving record, refusing to allow the question was harmless because defendant had already

successfully cross-examined the officer about some of the details of his two prior traffic accidents. Bridges v. State, 2011 Tex. App. LEXIS 9104, 2011 WL 5557534 (Tex. App. Dallas Nov. 16 2011).

49. In defendant's assault case, although the trial court should have allowed defendant to ask a witness leading questions, the error was harmless. Defendant was not prevented from making inquiry into any of the areas he asserted that he wanted to explore, and he was able to establish through a detective that inconsistencies existed between the victim's testimony at trial and statements she made to officers. Weiss v. State, 2009 Tex. App. LEXIS 9453, 2009 WL 4757379 (Tex. App. Fort Worth Dec. 10 2009).

50. Any error arising from the officer's initial answers to leading questions by the prosecutor was harmless because the prosecutor later elicited, without objection, similar responses from the officer. Cooley v. State, 2009 Tex. App. LEXIS 1625, 2009 WL 566466 (Tex. App. Houston 1st Dist. Mar. 5 2009).

51. Officer was called by the State to establish its case-in-chief as the State's lead investigator because (1) he served as the evidence custodian at the scene of the crime through whom the State admitted most of the physical evidence; (2) he obtained the warrants; (3) he arrested defendant; (4) he assisted in the collection of defendant's blood for DNA testing; and (5) he interrogated defendant and obtained his confession; thus, the officer was identified with the State and was hostile to defendant, but defendant failed to show how any particular subject matter of questioning was denied him through other means of examination than through leading questions; furthermore, under Tex. R. App. P. 44.2, any error in failing to allow defendant to question the officer (or indeed a second officer) using leading questions pursuant to Tex. R. Evid. 611(c) was harmless beyond a reasonable doubt because (1) defendant could have used other means to question the officer; and (2) the State's case against defendant was strong, even with the damaging potential of the use of leading questions, because a glove was found at the crime scene with the victim's blood on the outside and defendant's DNA on the inside. Davis v. State, 2007 Tex. App. LEXIS 2269 (Tex. App. Texarkana Mar. 23 2007).

Evidence : Demonstrative Evidence : Visual Formats

52. In a driving while intoxicated case, the trial court abused its discretion under Tex. R. Evid. 611 by prohibiting the publication of videotape evidence to the jury in a timely manner, a decision preordained by the trial court's policy without reference to the facts and circumstances of the case. Packer v. State, 442 S.W.3d 375, 2011 Tex. App. LEXIS 6210, 2011 WL 3484804 (Tex. App. Dallas Aug. 10 2011).

Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : General Overview

53. Trial court's conduct did not express to the jury an opinion on the weight of the evidence because both sides objected frequently to the other's questions, the trial court had to specifically admonish both sides to refrain from making side bar comments, the trial court sustained a number of defendant's objections, and it appeared that the trial court was attempting to control two aggressive lawyers. Hall v. State, 2009 Tex. App. LEXIS 4954, 2009 WL 1871681 (Tex. App. Tyler June 30 2009).

54. In defendant's sexual assault case, a court did not err by explaining to the State how to present rebuttal evidence where the comments about the admissibility of the State's rebuttal witness were made outside the presence of the jury, and they did not indicate that any assistance was given to the State; the judge was presented with an admissibility question under Tex. R. Evid. 613 and made a decision which left defendant with the choice of returning to the stand to preclude the testimony of the State's witness or remaining silent and relying on his original statement. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : Limitations

55. Trial court's comments to defendant in a jury's presence, if erroneous, did not constitute fundamental error because (1) the trial court warned defendant repeatedly to conform to a question and answer format instead of responding to questions in a narrative, story-telling manner; (2) the trial court's remarks were not a comment on the weight of defendant's evidence or testimony, under Tex. Code Crim. Proc. Ann. art. 38.05, because the trial court made no reference, either directly or indirectly, to defendant's guilt or innocence; and (3) the trial court was attempting to expedite and maintain control over the trial, and exercise reasonable control over the mode and order of defendant's testimony and the presentation of evidence, under Tex. R. Evid. 611(a). Stribling v. State, 2007 Tex. App. LEXIS 5610 (Tex. App. Tyler July 18 2007).

Evidence : Procedural Considerations : Judicial Intervention in Trials : Interrogation of Witnesses

56. Trial court's comments during a bench trial of a contract case, which included stating that certain matters were not relevant, did not reflect judicial bias and were a proper exercise of discretion under Tex. R. Evid. 611(a) to maintain control over and expedite the trial proceedings; moreover, no harm was shown under Tex. R. App. P. 44.1(a). Allstar Nat'l Ins. Agency v. Johnson, 2010 Tex. App. LEXIS 6132, 2010 WL 2991058 (Tex. App. Houston 1st Dist. July 29 2010).

57. Trial court's comments that defense counsel was repetitious and had gone beyond the scope of permitted questioning in a sexual assault case did not deny defendant a fair trial by an impartial jury and constituted a reasonable exercise of control over interrogating witnesses and presenting evidence to avoid needless consumption of time under Tex. R. Evid. 611(a)(2). Lorenzo v. State, 2010 Tex. App. LEXIS 5555, 2010 WL 2788757 (Tex. App. Austin July 14 2010).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

58. Defendant failed to preserve error for review where counsel cited Tex. R. Evid. 403 and 611 as the basis for the objection to the testimony of the victim's parents at sentencing. It was unclear from the record which part of Rule 611 was the basis of the objection, and the issue on appeal was different from the objection at trial. Foust v. State, 2005 Tex. App. LEXIS 12 (Tex. App. Dallas Jan. 4 2005).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

59. Trial court granted defendant a running objection as to hearsay and he did not specifically object on the basis that the repeated details of the offenses were cumulative of other evidence, or unduly repetitive, and he has waived that objection, Tex. R. Evid. 103(a)(1); Tex. R. App. P. 33.1(a); there was no abuse of discretion under the circumstances in the trial court's exercise of control over the manner in which the trial was conducted, Tex. R. Evid. 611(a). In re Adame, 2013 Tex. App. LEXIS 4847, 2013 WL 3853386 (Tex. App. Beaumont Apr. 18 2013).

60. Trial court did not abuse its discretion by overruling defendant's argumentative objection to the State's questions concerning defendant's failure to subpoena two witnesses because reasonable persons could disagree concerning whether the objection was a comment on the evidence. Pardee v. State, 2012 Tex. App. LEXIS 6823, 2012 WL 3516485 (Tex. App. Texarkana Aug. 16 2012).

61. Defense counsel's failure to object to the prosecutor's questions to a reluctant child witness did not constitute ineffective assistance in defendant's trial for aggravated assault of the child in violation of Tex. Penal Code Ann. § 22.021; questions regarding previous accusations elicited cumulative evidence that included defendant's videotaped confession, and the State was permitted to ask leading questions and to impeach the child with a prior

inconsistent statement under Tex. R. Evid. 611(c) and 607. Brambila v. State, 2009 Tex. App. LEXIS 5959, 2009 WL 2356674 (Tex. App. Houston 14th Dist. July 28 2009).

Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof

62. Defendant failed to preserve for appellate review his contention that the trial court erred by refusing to allow defense counsel to impeach the victim regarding his social networking history pursuant to Tex. R. Evid. 611(b) because defendant's offer of proof did not include a summary of the proposed testimony. Barnett v. State, 2012 Tex. App. LEXIS 5516, 2012 WL 2832557 (Tex. App. El Paso July 11 2012).

Evidence : Relevance : Relevant Evidence

63. In a civil commitment proceeding, defense counsel's cross-examination of an expert was not improperly limited because counsel sought to elicit information that did not make the existence of any fact of consequence to the determination of whether an inmate was a sexually violent predator more or less probable. In re Ramirez, 2013 Tex. App. LEXIS 12917, 2013 WL 5658597 (Tex. App. Beaumont Oct. 17 2013).

64. Trial court did not err by refusing to allow defendant to cross-examine an officer about the confidential informant because the disallowed questions were not relevant to the issue of defendant's guilt or innocence, as the State did not rely on events related to obtaining the search warrant in proving defendant's guilt. Nwaogu v. State, 2013 Tex. App. LEXIS 4588, 2013 WL 1490489 (Tex. App. Houston 1st Dist. Apr. 11 2013).

65. Although a driver had the right under U.S. Const. amend. XIV, § 1 and Tex. Const. art. I, § 19 to cross-examine the officer who arrested him for driving while intoxicated after he was involved in an auto accident, the administrative law judge (ALJ) who suspended his driver's license was within her discretion to limit questioning on relevancy grounds pursuant to Tex. R. Evid. 401 because the record showed that when the officer was asked by the ALJ if he had taken the driver's driving and possible culpability in causing the accident into consideration for probable cause to arrest him, the officer responded negatively. Because the officer did not take the fault of the accident into consideration in determining probable cause for intoxication, the issue was irrelevant. Tex. Dep't of Pub. Safety v. Burrer, 2005 Tex. App. LEXIS 3534 (Tex. App. San Antonio May 11 2005).

Evidence : Scientific Evidence : Sobriety Tests

66. In a trial for driving while intoxicated, defendant's right to present a defense was violated by a pretrial ruling that prohibited cross-examination of State experts on the general topic of the possible fallibility of the particular breath testing machine; the accuracy and reliability of the machine was clearly a matter relevant to an issue in the case under Tex. R. Evid. 611(b). Woodall v. State, 216 S.W.3d 530, 2007 Tex. App. LEXIS 1304 (Tex. App. Texarkana 2007).

Evidence : Testimony : Credibility : Impeachment : General Overview

67. Defendant failed to preserve for review his contention that the trial court erred when it allegedly failed to issue a ruling on the admissibility of impeachment evidence pertaining to the medical examiner who conducted the victim's autopsy because defendant failed to point out where in the record: (1) he asked the trial court to rule on the issue; (2) the trial court refused to rule on the request; and (3) defendant subsequently lodged an objection to that failure to rule. Coe v. State, 2012 Tex. App. LEXIS 4169, 2012 WL 1899179 (Tex. App. Houston 14th Dist. May 24 2012).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview

68. Court properly limited cross-examination of a witness because defendant's attempt to use an instance during an officer's career in which he wrote "phantom" warning citations was nothing more than an instance of wrongdoing in his life and was not shown to bear on his general reputation for truthfulness. There was nothing which revealed that the act of wrongdoing created a bias on the part of the officer against defendant or caused the officer to have a motive to testify untruthfully. McMillon v. State, 294 S.W.3d 198, 2009 Tex. App. LEXIS 6238 (Tex. App. Texarkana Aug. 12 2009).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances

69. Where defendant was convicted of DWI, he was not harmed by the trial court's refusal to allow him to cross-examine an officer about a specific act of dishonesty. Evidence that the officer intentionally withheld testimony about his failing to report a weapon discharge would not have achieved defendant's specific goal of proving that the officer lied about defendant's reckless driving; a video of defendant's stop strongly supported a finding that he was intoxicated. Tollett v. State, 422 S.W.3d 886, 2014 Tex. App. LEXIS 1216, 2014 WL 462275 (Tex. App. Houston 14th Dist. Feb. 4 2014).

Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice

70. After defendant was convicted of injury to a child, the trial court did not err in allowing the State's cross-examination of an expert witness during the punishment hearing because the State's cross-examination was an obvious attempt to show the witness's bias and impeach the witness's credibility under Tex. R. Evid. 611(b). Mauldin v. State, 2010 Tex. App. LEXIS 2620, 2010 WL 1486959 (Tex. App. Houston 14th Dist. Apr. 15 2010).

Evidence : Testimony : Credibility : Impeachment : Mental Incapacity

71. Absent some history of memory or perception problems such as delusions or some evidence of the potential side effects of a medication or the disabilities associated with a mental health condition that reflect on a witness's memory or perception, a trial court abuses its discretion by admitting mental health information for impeachment purposes. Torres v. Danny's Serv. Co., 266 S.W.3d 485, 2008 Tex. App. LEXIS 5271 (Tex. App. Eastland 2008).

Evidence : Testimony : Credibility : One's Own Witnesses : Application : Hostility

72. Record was silent as to trial counsel's reasons for not objecting to the State's request to treat a witness as a hostile witness under Tex. R. Evid. 611(a), (c), but counsel might have had reasons for not doing so, and any of these reasons might explain a strategic motive behind this claimed instance of ineffective assistance and the court could not sustain defendant's point of error on this issue; to the extent that defendant's complaint might have encompassed a claim that counsel was ineffective by not objection to the State's attempt to impeach its own witness under Tex. R. Evid. 607, such was expressly permitted under the Rules and would not support a finding of ineffectiveness. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

73. Trial court did not err in permitting the State to treat a witness in punishment as hostile, ask him leading questions, and impeach him with a prior statement because: (1) under Tex. R. Evid. 607, a witness's credibility could be attacked by any party; (2) Tex. R. Evid. 611 allowed a hostile witness to be interrogated by leading questions; and (3) there was no showing that the primary purpose of the use of the prior statement was to admit evidence otherwise inadmissible, or that the trial court misused the evidence in assessing punishment. Huggins v. State, 2007 Tex. App. LEXIS 9550 (Tex. App. Beaumont Dec. 5 2007).

74. Where the State's witness, who had previously worked for defendant and who testified under a grant of immunity, expressed difficulty recalling relevant facts and answered several questions with gestures rather than spoken responses, the trial court did not err in allowing the State to attack the credibility of its witness because

under Tex. R. Evid. 607, the witness could be attacked by any party, including the party calling the witness; also, because the witness was a hostile witness, under Tex. R. Evid. 611(c), the trial court properly allowed the State to interrogate the witness using leading questions. Huggins v. State, 2007 Tex. App. LEXIS 7495 (Tex. App. Beaumont Sept. 12 2007).

Evidence : Testimony : Examination : General Overview

75. In a termination of parental rights case, appellant mother failed to show that the trial court abused its discretion when it orally stated time limits for each side's expert witness examinations under Tex. R. Evid. 611(a) but did not enforce any limit against her. Appellant never objected to the time limits during the expert examinations, and she never advised the trial court that she was unable to present any specific expert witness testimony due to the time limits. In re Z.C.J., 2012 Tex. App. LEXIS 6937 (Tex. App. San Antonio Aug. 22 2012).

76. Appellant claimed that the trial court's statements were comments to the jury that the witness was not believable, but the record showed that the questions were designed to clarify what the witness was saying, and at worst, the trial court used its authority to try to meet Tex. R. Evid. 611, and the court viewed the trial court's actions as making the witness's interrogation more effective; the trial court did not convey its opinion to the jury of any fact issue, and the court overruled appellant's claim of a violation of Tex. Code Crim. Proc. Ann. art. 38.05. Thomas v. State, 2012 Tex. App. LEXIS 809, 2012 WL 280578 (Tex. App. Amarillo Jan. 31 2012).

77. Trial court's conduct did not express to the jury an opinion on the weight of the evidence because both sides objected frequently to the other's questions, the trial court had to specifically admonish both sides to refrain from making side bar comments, the trial court sustained a number of defendant's objections, and it appeared that the trial court was attempting to control two aggressive lawyers. Hall v. State, 2009 Tex. App. LEXIS 4954, 2009 WL 1871681 (Tex. App. Tyler June 30 2009).

78. Defendant argued that by allowing defendant's counsel to conduct the direct examination in a hearing to replace him, the trial court abdicated its responsibility under Tex. R. Evid. 611, but the court found that despite a tone of exasperation and possibly hostility in counsel's direct examination of defendant, it gave defendant a fair opportunity to tell the trial court why he thought he was entitled to new counsel, and the conflict defendant described arose from a conflict between defendant and counsel over trial strategy, not from counsel's representation of an adverse interest; if personality conflicts and disagreements over strategy and tactics warranted appointment of new counsel, a trial court's granting of a motion to replace counsel would be almost automatic, inevitably causing delay and obstructing orderly procedure, there was no authority for defendant's argument that the trial court should have appointed special counsel for the limited purpose of assisting him in showing cause for a change of counsel, and defendant's Sixth Amendment rights were not violated. Bates v. State, 2008 Tex. App. LEXIS 3118 (Tex. App. Tyler Apr. 30 2008).

79. Court did not deny defendant the right to testify by improperly cutting short defendant's testimony because the trial court made multiple attempts to ensure that defendant acted in a nondisruptive fashion and in accordance with the procedural and evidentiary requirements of the forum; defendant ultimately proved that he would not do so, and (after fair warning and after holding him in contempt) the court ended his testimony. Allen v. State, 232 S.W.3d 776, 2007 Tex. App. LEXIS 6098 (Tex. App. Texarkana 2007).

80. In a divorce proceeding, the husband's argument that the trial judge acted as an advocate for the wife and conspired with counsel to give custody of the children to the wife was rejected because it was found that the exchanges between the trial judge, counsel for the wife, and the husband were an attempt to manage what was apparently a contentious interchange. Thomas v. Robert, 2007 Tex. App. LEXIS 1149 (Tex. App. Corpus Christi Feb. 15 2007).

81. Court acknowledged the trial court's concern that conducting a hearing under Tex. R. Evid. 412 did not alleviate the emotional impact on the victim of answering questions from the accused regarding her past sexual conduct; however, Tex. R. Evid. 412 acts primarily as an evidentiary shield, preventing the defendant from shifting the focus of trial from his conduct to the character of the victim, and to the extent it is shown that a witness is uniquely vulnerable or needs protection from specific acts of intimidation, the trial court has discretion to fashion a remedy that both protects the witness and ensures adequate confrontation, pursuant to Tex. R. Evid. 611(a). LaPointe v. State, 196 S.W.3d 831, 2006 Tex. App. LEXIS 4736 (Tex. App. Austin 2006).

82. Trial court's restrictions on a witness's testimony were within its discretion where the court was avoiding needless consumption of time because defendant was asking questions about what the witness did not consider to be a violation of the restrictive covenants at issue in the case, whether the witness had protested the value assigned to his own property for property tax purposes, and whether individuals could enforce deed restrictions; those lines of questioning were either irrelevant to the legal question of whether defendant had violated the applicable deed restrictions or improperly called for a legal conclusion. Daniels v. Balcones Woods Club, Inc., 2006 Tex. App. LEXIS 957 (Tex. App. Austin Feb. 2 2006).

83. Because the prosecutor's question to a witness in no way suggested a particular answer, the court rejected defendant's claim that the trial court erred in allowing a leading question by the State during direct examination. Alexander v. State, 2005 Tex. App. LEXIS 10298 (Tex. App. Beaumont Dec. 7, 2005).

84. Appellant did not establish that the trial court abused its discretion in permitting leading questions under Tex. R. Evid. 611(c). Watson v. Michael Haskins Photography, Inc., 2005 Tex. App. LEXIS 9838 (Tex. App. Waco Nov. 23 2005).

85. Defense counsel's initial objection under Tex. R. Evid. 611(c) was sustained and the trial court cautioned the State regarding leading questions; it was not an abuse of discretion to allow relaxed questioning of a child witness, who was emotionally distraught during questioning. Hernandez v. State, 2005 Tex. App. LEXIS 6021 (Tex. App. Corpus Christi July 28 2005).

86. Although a driver had the right under U.S. Const. amend. XIV, § 1 and Tex. Const. art. I, § 19 to cross-examine the officer who arrested him for driving while intoxicated after he was involved in an auto accident, the administrative law judge (ALJ) who suspended his driver's license was within her discretion to limit questioning on relevancy grounds pursuant to Tex. R. Evid. 401 because the record showed that when the officer was asked by the ALJ if he had taken the driver's driving and possible culpability in causing the accident into consideration for probable cause to arrest him, the officer responded negatively. Because the officer did not take the fault of the accident into consideration in determining probable cause for intoxication, the issue was irrelevant. Tex. Dep't of Pub. Safety v. Burrer, 2005 Tex. App. LEXIS 3534 (Tex. App. San Antonio May 11 2005).

87. Defendant's conviction for felony securities fraud was proper where his assertion that the State attempted to shift the burden of proof was unfounded pursuant to Tex. R. Evid. 611(b). The State's questions on cross-examination were relevant to defendant's credibility, specifically, his testimony refuting that of the State's witnesses. Caron v. State, 162 S.W.3d 614, 2005 Tex. App. LEXIS 1030 (Tex. App. Houston 14th Dist. 2005).

88. Trial court's decision to exclude the complainant's videotaped statements was proper under Tex. R. Evid. 403 and 611 where the complainant admitted unequivocally that her prior accusations of sexual abuse by her uncles were false. The trial court has sole discretion regarding the admissibility of evidence. McMillin v. State, 2005 Tex. App. LEXIS 438 (Tex. App. Austin Jan. 21 2005).

89. Defendant failed to preserve error for review where counsel cited Tex. R. Evid. 403 and 611 as the basis for the objection to the testimony of the victim's parents at sentencing. It was unclear from the record which part of Rule 611 was the basis of the objection, and the issue on appeal was different from the objection at trial. Foust v. State, 2005 Tex. App. LEXIS 12 (Tex. App. Dallas Jan. 4 2005).

90. Witness was called by defendant, and it was clear that the State was permitted to ask leading questions pursuant to Tex. R. Evid. 611(b), not Tex. R. Evid. 611(c); defendant presented no authority nor any relevant case law to support her implicit contention that the witness's status as an "adverse witness" necessarily prohibited the trial court from permitting the State to ask leading questions under Rule 611(b), and defendant elicited the same substantive testimony from the witness during her direct and redirect examination of the witness that she complained was introduced by the State through improper questioning, such that defendant failed to show how she was unduly prejudiced by the State's leading questions. Baltazar v. State, 2004 Tex. App. LEXIS 4421 (Tex. App. El Paso May 13 2004).

91. Although defendant argued that the trial court's erroneous interpretation of Tex. R. Evid. 611(c) crippled her attempt to impeach a witness through police officer testimony, defendant did not call one detective as an adverse or hostile witness, nothing in his testimony indicated that he should have been treated as such, and defendant was not unduly prejudiced by the trial court's rulings concerning his testimony; there was no abuse of discretion in denying defendant's request to treat another detective as an adverse witness where by rephrasing the objected-to questions, defendant introduced the evidence she sought to elicit from the detective's testimony, including testimony concerning inconsistencies between a witness's testimony and her statement as read into the record, such that defendant failed to show any harm or that she was unduly prejudiced by the trial court's rulings concerning leading questions posed to the officers or the detectives. Baltazar v. State, 2004 Tex. App. LEXIS 4421 (Tex. App. El Paso May 13 2004).

Evidence : Testimony : Examination : Cross-Examination : General Overview

92. Court did not abuse its discretion by not allowing the patient's counsel to pose certain questions, because counsel provided an extensive cross-examination of the doctor concerning his opinion that the patient had a behavioral abnormality that made him likely to commit a predatory act of sexual violence, and courts were allowed discretion to control testimony to avoid confusing the jury. In re Romo, 2013 Tex. App. LEXIS 13495 (Tex. App. Beaumont Oct. 31 2013).

93. Appellant did not preserve for review his claim regarding the limitation on an expert's testimony and the cross-examination of the victim, given that he did not make an offer of proof as to what questions he would have asked and the testimony he would have elicited, he did not summarize what the evidence would have shown, and counsel's comments of inconsistencies indicating the victim was not able to hold a memory did not amount to a formal offer of proof or an informal bill, as they did not reveal the substance of the evidence; the court could not conduct a proper harm analysis. Covarrubias v. State, 2013 Tex. App. LEXIS 1434, 2013 WL 557177 (Tex. App. El Paso Feb. 13 2013).

94. Ex-husband did not argue and the record did not show that the trial court abused its discretion in exercising its function regarding testimony under Tex. R. Evid. 611(a). Goad v. State, 2010 Tex. App. LEXIS 6349 (Tex. App. Austin Aug. 6 2010).

95. In an easement dispute, a fee segregation issue and a challenge to limits on cross-examination under Tex. R. Evid. 611 were not preserved for review under Tex. R. App. P. 33.1 because they were not raised below; moreover, the record showed that thorough cross-examination had been permitted. Ferrara v. Moore, 318 S.W.3d 487, 2010 Tex. App. LEXIS 5929 (Tex. App. Texarkana July 28 2010).

96. Although the State was correct in that a witness could be cross-examined on any matter relevant to any issue in the case, for purposes of Tex. R. Evid. 611(b), defendant's possession of cocaine was a specific act and was inadmissible for the purpose of impeachment under Tex. R. Evid. 608(b) and the trial court erred by admitting this evidence; at the time of trial, defendant had not been convicted of any crime arising out of his possession of cocaine, and therefore Tex. R. Evid. 609 did not apply. Teal v. State, 2009 Tex. App. LEXIS 7247, 2009 WL 2933723 (Tex. App. Houston 14th Dist. Sept. 15 2009).

97. On appeal of the final decree of divorce, the former wife claimed that the trial court improperly limited her cross-examination of her husband; she asserted that the trial court should have compelled him to respond to her questions regarding her contribution of funds to improve his separate property. The Court of Appeals of Texas found no error, because Tex. R. Evid. 611(a) permitted the trial court to exercise reasonable control over the mode and order of interrogating witnesses; the manner and scope of cross-examination was within the sound discretion of the trial court. Jackson v. Jackson, 2009 Tex. App. LEXIS 2896 (Tex. App. Houston 14th Dist. Apr. 28 2009).

98. In a driving while intoxicated case, a court did not abuse its discretion in excluding evidence from a safety manual that the horizontal gaze nystagmus test was only 77% accurate in predicting intoxication because the court expressed concern about opening the door for the percentages of all tests, how different studies resulted in different statistics, and whether the manual defendant had was the same edition the officer used in training. The trial court was properly concerned with the effective presentation of the evidence, confusion of the issues, and undue delay, so it restricted defendant's cross-examination into the specific statistics. Sedeno v. State, 2008 Tex. App. LEXIS 8984 (Tex. App. Houston 14th Dist. Nov. 25 2008).

99. Court read the State's cross-examination about the lack of corroborating evidence as an attack on defendant's credibility, for purposes of Tex. R. Evid. 607, not as an attempt to shift the burden of proof at trial; defendant admitted that his credibility was critical to his defense and the State's questioning was not improper, for purposes of Tex. R. Evid. 607, 611(b). Rogers v. State, 2008 Tex. App. LEXIS 6571 (Tex. App. Texarkana Aug. 28, 2008).

100. Where a sexually oriented business operator's request for a location exemption was denied, the operator was deprived of procedural due process during a hearing because an administrative law judge refused to allow the operator to re-examine witnesses after the board members had asked questions of those witnesses. City of Arlington v. Centerfolds, Inc., 232 S.W.3d 238, 2007 Tex. App. LEXIS 4705 (Tex. App. Fort Worth 2007).

Evidence : Testimony : Examination : Cross-Examination : Scope

101. Because defendant failed to object to the relevance of his jailhouse tattoos, as opposed to an alleged gang affiliation, and failed to object to the State's continued questioning about his tattoos, testimony concerning his tattoos was admitted into evidence without objection. While defendant failed to obtain an adverse ruling in the first place, even if he had, he would have waived the objection by failing to either interpose it each time the evidence in question was offered or seek a running objection. Shipley v. State, 2014 Tex. App. LEXIS 2868, 2014 WL 1004498 (Tex. App. Texarkana Mar. 14 2014).

102. Because information that revealed that the bias or interest of the State's medical expert was before the jury and the excluded information would not have added significantly to the inmate's ability to impeach his credibility, the trial court's ruling did not unduly restrict the inmate's cross-examination of the State's expert. In re Smith, 422 S.W.3d 802, 2014 Tex. App. LEXIS 667, 2014 WL 333374 (Tex. App. Beaumont Jan. 23 2014).

103. Because information that revealed that the bias or interest of the State's medical expert was before the jury and the excluded information would not have added significantly to the inmate's ability to impeach his credibility, the trial court's ruling did not unduly restrict the inmate's cross-examination of the State's expert. In re Smith, 422

S.W.3d 802, 2014 Tex. App. LEXIS 667, 2014 WL 333374 (Tex. App. Beaumont Jan. 23 2014).

104. Question about which defendant complained was relevant to show his credibility, and the State was free to try to discredit his testimony by showing it was untrue, and thus the trial court did not abuse its discretion by overruling defendant's objection. Stroner v. State, 2014 Tex. App. LEXIS 41, 2014 WL 31218 (Tex. App. Dallas Jan. 3 2014).

105. In a case in which defendant was convicted of indecency with a child, the trial court did not abuse its discretion by limiting defendant's cross-examination of the victim's mother. Evidence that a male friend died of a drug overdose while in the mother's home was irrelevant to whether the mother had any ill feeling, bias, motive, interest, or animus that would lead her to fabricate allegations against defendant. Utkov v. State, 2012 Tex. App. LEXIS 8147, 2012 WL 4470910 (Tex. App. Beaumont Sept. 26 2012).

106. Trial court did not abuse its discretion in a sexually violent predator commitment proceeding by restricting the sex offender's cross-examination of one of the State's expert witnesses where the expert provided an extensive psychological analysis that fully explained the basis for his opinion that the sex offender had a behavioral abnormality that made him likely to commit a predatory act of sexual violence because the offer of proof demonstrated that the expert had a valid explanation for giving more consideration to some data in the records over other, contradictory data. Moreover, at the conclusion of the offer of proof, the trial court advised the sex offender's counsel that counsel would be allowed to ask why the expert had rejected the sex offender's assertion that he had not committed the prior crimes, but counsel chose not to do so. In re Commitment of Hinchey, 2012 Tex. App. LEXIS 7582, 2012 WL 3853186 (Tex. App. Beaumont Sept. 6 2012).

107. Any error in limiting the cross-examination of an accomplice on a forfeiture issue was rendered harmless by his later admission that his property had been taken by the State, plus the jury had many reasons to doubt his credibility, including that the jury was aware the accomplice might have had an interest in testifying for the State. Lopez v. State, 2012 Tex. App. LEXIS 7231, 2012 WL 3731731 (Tex. App. San Antonio Aug. 29 2012).

108. Counsel did not claim to want to cross-examine a witness about a potential bias, no offer of proof was made, plus counsel's complaint was different than the one made on appeal, as counsel asked to visit the witness's criminal matters, and the trial court denied the request because convictions were not involved, for purposes of Tex. R. Evid. 609(a), and thus appellant waived complaints under Tex. R. Evid. 611 and the Sixth Amendment concerning the limitations on the cross-examination of the witness, for purposes of Tex. R. App. P. 33.1(a)(1)(A); even absent waiver, the court would have overruled the claims, given that (1) there was no causal connection between the witness's deferred adjudication and his testimony, and (2) nothing showed the existence or expectation of a deal in the deferred adjudication case. Mcburnett v. State, 2012 Tex. App. LEXIS 5300, 2012 WL 2583407 (Tex. App. San Antonio July 5 2012).

109. Trial court permitted defendant's counsel to conduct a thorough cross-examination of the State's expert at trial; considering the extensive cross-examination regarding matters relating to defendant's records, and the discretion allowed trial courts to control the testimony, the trial court did not abuse its discretion by limiting further development to include the subject of shoplifting, Tex. R. Evid. 611. In re Campbell, 2012 Tex. App. LEXIS 5125, 2012 WL 2451620 (Tex. App. Beaumont June 28 2012).

110. Even though the trial court erred by limiting defendant's cross-examination of a detective, the error was harmless because she was able to establish that the confidential informant (CI) was compensated for his services with the police department, and her cross-examination revealed that detectives failed to search the inside of his shoes and underwear. The recordings failed to indicate that the CI obtained controlled substances from his shoes, his underwear, or any source other than defendant. Bussey v. State, 2012 Tex. App. LEXIS 5 (Tex. App. Houston

14th Dist. Jan. 3 2012).

111. Defense counsel pursued a subject in a backdoor effort to introduce evidence of appellant's acquittal, and thus the trial court did not abuse its discretion by restricting the cross-examination under Tex. R. Evid. 611(b); appellant did not present anything other than her acquittal that would have raised double jeopardy issues, and thus testimony concerning her acquittal was not relevant. Bussey v. State, 2012 Tex. App. LEXIS 1505, 2012 WL 626316 (Tex. App. Houston 14th Dist. Jan. 3 2012).

112. Fact that no cocaine was found on appellant or in her house would have been relevant to assessing whether she possessed cocaine on an earlier point in time, but although the court found that matters concerning the search and arrest warrant were relevant, limiting the scope of cross-examination of a detective, while error, did not contribute to appellant's conviction or punishment, given that (1) the detective's testimony was cumulative to a certain extent, (2) much of his testimony was corroborated by recordings that were admitted into evidence, (3) appellant did not introduce evidence that contradicted the detective's testimony, (4) appellant was allowed to fully cross-examine the detective, except for search warrant testimony, and (5) the State presented a strong case. Bussey v. State, 2012 Tex. App. LEXIS 1505, 2012 WL 626316 (Tex. App. Houston 14th Dist. Jan. 3 2012).

113. Even if defendant's civil suit against the police might have raised an inference of bias that would make it the subject of cross-examination in a criminal trial under Tex. R. Evid. 611(b), defendant failed to show that the exclusion of the evidence about the pending civil case affected defendant's substantial rights. Van Goffney v. State, 2011 Tex. App. LEXIS 5334, 2011 WL 2731850 (Tex. App. Beaumont July 13 2011).

114. In a drug trial, there was no error under Tex. R. Evid. 611(b) in limiting defendant's cross-examination of a detective as to (1) payments made to an informant who was admittedly in the country illegally, (2) whether or not those payments were reported to the Internal Revenue Service, and (3) whether or not the detective sought or received permission from federal authorities to have the informant in the country working as an agent of law enforcement. Perez-gonzalez v. State, 2010 Tex. App. LEXIS 3045, 2010 WL 1645062 (Tex. App. Dallas Apr. 26 2010).

115. After defendant was convicted of injury to a child, the trial court did not err in allowing the State's cross-examination of an expert witness during the punishment hearing because the State's cross-examination was an obvious attempt to show the witness's bias and impeach the witness's credibility under Tex. R. Evid. 611(b). Mauldin v. State, 2010 Tex. App. LEXIS 2620, 2010 WL 1486959 (Tex. App. Houston 14th Dist. Apr. 15 2010).

116. In a drug case, questions posed to defendant regarding the amount of money found in his house did not exceed the scope of Tex. R. Evid. 611(b); the line of questioning tested defendant's credibility concerning the amount of money he made dealing drugs, and it bore on his suitability for community supervision. Quiroz v. State, 2008 Tex. App. LEXIS 5995 (Tex. App. Corpus Christi Aug. 7 2008).

117. Absent some history of memory or perception problems such as delusions or some evidence of the potential side effects of a medication or the disabilities associated with a mental health condition that reflect on a witness's memory or perception, a trial court abuses its discretion by admitting mental health information for impeachment purposes. Torres v. Danny's Serv. Co., 266 S.W.3d 485, 2008 Tex. App. LEXIS 5271 (Tex. App. Eastland 2008).

118. Although defendant claimed that counsel was ineffective for failing to object to extraneous offense evidence elicited by the State from defendant's wife, the testimony in question was elicited on redirect examination after defense counsel questioned the wife on cross-examination as to whether she had called police with allegations of assault by defendant, and the court noted that, for purposes of Tex. R. Evid. 611(b), the evidence elicited likely was admissible, and failure to object to admissible testimony did not constitute ineffective assistance; counsel's actions

were part of a reasonable trial strategy to show that defendant's wife was biased, that a strategy did not work did not mean counsel was ineffective, and because the record was silent as to why counsel failed to object, the court had to presume that counsel's actions were reasonably based on sound trial strategy. Mathews v. State, 2007 Tex. App. LEXIS 5349 (Tex. App. Corpus Christi July 5 2007).

119. In a divorce proceeding, where a husband alleged that counsel was not allowed sufficient time to cross examine the wife in order to rebut false testimony regarding the issue of passports and the wife's travel to India, a fair reading of the record did not disclose the denial of the vital right of cross examination. Thomas v. Robert, 2007 Tex. App. LEXIS 1149 (Tex. App. Corpus Christi Feb. 15 2007).

120. Because a county attorney served as a charged individual's attorney in a prior case being used by the State to enhance the individual's potential punishment, pursuant to Tex. Penal Code Ann. § 12.42(d), for driving while intoxicated, and the attorney possessed confidential information as a result of the prior representation, the court granted mandamus relief and found that disqualification of the attorney was proper; if the individual chose to testify, the attorney was free to cross-examine the individual about alcohol use and abuse under Tex. R. Evid. 611(b), the individual's due process rights would have been violated if there was no disqualification, and mandamus relief under Tex. Gov't Code Ann. § 22.221(b) was appropriate as an appeal was not an adequate remedy, given that (1) if convicted and given a sentence enhancement or a sentence over nine years in jail, the individual would have been ineligible for release on bond under Tex. Code Crim. Proc. Ann. art. 44.04(b), and (2) the individual was not entitled to bond pending the determination of a post-conviction application for habeas corpus relief under Tex. Code Crim. Proc. Ann. art. 11.07, § 5. In re Goodman, 210 S.W.3d 805, 2006 Tex. App. LEXIS 10815 (Tex. App. Texarkana 2006).

121. Trial court did not err by refusing to allow damage evidence in a condemnation case under Tex. R. Civ. P. 193 because the evidence in question was not disclosed under Tex. R. Civ. P. 194; there was no good cause shown due to counsel's inadvertence, and an owner would have been prejudiced thereby; moreover, cross-examination on this issue was properly excluded since it was not relevant to the case. Harris County v. Inter Nos, Ltd., 199 S.W.3d 363, 2006 Tex. App. LEXIS 3849 (Tex. App. Houston 1st Dist. 2006).

Evidence : Testimony : Examination : Direct Examination

122. Attorney's testimony during redirect examination about his legal assistant's qualifications was not unrelated to the matters testified about on direct and cross-examination, plus the lenders had the chance to cross-examine the attorney on the qualifications of the legal assistant, but did not do so; the trial court did not abuse its discretion in permitting the attorney's testimony, for purposes of Tex. R. Evid. 611(b), in connection with the issue of attorney fees under the Uniform Declaratory Judgment Act. Jarvis v. K&e re One, Llc, 390 S.W.3d 631, 2012 Tex. App. LEXIS 9927, 2012 WL 5987385 (Tex. App. Dallas Nov. 30 2012).

Evidence : Testimony : Examination : Leading Questions

123. Record did not suggest that the State's leading questions supplied the child complainant with a false memory, in connection with defendant's trial for aggravated sexual assault. Torres v. State, 424 S.W.3d 245, 2014 Tex. App. LEXIS 1900, 2014 WL 685844 (Tex. App. Houston 14th Dist. Feb. 20 2014).

124. Defendant's aggravated robbery with a deadly weapon conviction was appropriate, in part because the prosecutor's question was not a leading question under Tex. R. Evid. 611(c). The prosecutor did not suggest the desired answer, instruct the witness how to answer, or put words into her mouth. Hernandez v. State, 2012 Tex. App. LEXIS 9499, 2012 WL 5520422 (Tex. App. Dallas Nov. 15 2012).

125. At the punishment phase of defendant's trial for unlawful possession of a firearm by a felon, the trial court did not abuse its discretion by admitting testimony from defendant's sister about her removal from her home to foster care after she wrote a letter describing defendant's sexual abuse. While the State did ask the witness some leading questions, her answer regarding the identity of her attacker was not in response to a leading question; therefore, the trial court did not abuse its discretion by allowing some leading questions under Tex. R. Evid. 611(c). Ajvazi v. State, 2012 Tex. App. LEXIS 8900, 2012 WL 5293346 (Tex. App. Texarkana Oct. 26 2012).

126. As to certain complaints of leading questions, although the court did not consider the rulings to be outside the zone of reasonable disagreement given the fact that a child witness was involved, even if the court found that the questions were impermissibly leading, the errors were not harmful, as one question did not relate directly to any element of the offenses, and the victim did not follow the lead of the prosecutor. Johnson v. State, 2012 Tex. App. LEXIS 7721 (Tex. App. Houston 1st Dist. Aug. 30 2012).

127. Appellant could not have been harmed by any of the other testimony that was elicited by questions challenged on appeal as leading, and the cross-examination of the child victim mooted most of the objections; under the circumstances of examining the victim about the subjects of compelling prostitution and sexual abuse, the court did not find that the rulings overruling leading question objections were an abuse of discretion, and even if the trial court had erred, appellant was not harmed because the same information was introduced either through cross-examination or without objection. Johnson v. State, 2012 Tex. App. LEXIS 7721 (Tex. App. Houston 1st Dist. Aug. 30 2012).

128. Under Tex. R. Evid. 611, the trial court did not abuse its discretion in allowing the State to lead the victim, a minor with certain special education needs, on particular aspects of her testimony regarding the offense of aggravated sexual assault. Lopez v. State, 2012 Tex. App. LEXIS 676, 2012 WL 256103 (Tex. App. Corpus Christi Jan. 26 2012).

129. In defendant's murder trial after he shot an unarmed man following a drunken argument at a strip club, the prosecutor did not ask impermissible leading questions of its witnesses because leading questions were those that suggested the answer to the witness and asking a witness how much larger defendant was than the victim was not a question that suggested how the witness was to answer. Vasquez v. State, 2011 Tex. App. LEXIS 3227, 2011 WL 1640244 (Tex. App. El Paso Apr. 28 2011).

130. In defendant's assault case, although the trial court should have allowed defendant to ask a witness leading questions, the error was harmless. Defendant was not prevented from making inquiry into any of the areas he asserted that he wanted to explore, and he was able to establish through a detective that inconsistencies existed between the victim's testimony at trial and statements she made to officers. Weiss v. State, 2009 Tex. App. LEXIS 9453, 2009 WL 4757379 (Tex. App. Fort Worth Dec. 10 2009).

131. In a case where a witness was with defendant and the others when the victim was murder, the State's question about whether the witness killed the victim was not a leading question because, although it only required a "yes" or "no" answer, it did not suggest an answer. Saenz v. State, 2009 Tex. App. LEXIS 2254 (Tex. App. Corpus Christi Apr. 2 2009).

132. Any error arising from the officer's initial answers to leading questions by the prosecutor was harmless because the prosecutor later elicited, without objection, similar responses from the officer. Cooley v. State, 2009 Tex. App. LEXIS 1625, 2009 WL 566466 (Tex. App. Houston 1st Dist. Mar. 5 2009).

133. In defendant's sexual assault of a child case, the court did not err by permitting the State to ask leading questions during its direct examination of the nine-year-old victim because the victim had to be reminded more than

once to speak louder, she appeared to be very reluctant to testify about the events in front of a courtroom full of people, she was having trouble remembering the events that had occurred over a year before trial, and she was eventually overcome with emotion during direct examination. Defendant was able to cross-examine her and much the same testimony was elicited again during that cross-examination. Padilla v. State, 278 S.W.3d 98, 2009 Tex. App. LEXIS 722 (Tex. App. Texarkana Feb. 5 2009).

134. In a sexual assault case, defendant was not entitled to relief regarding the prosecutor's use of leading questions of the child victim because the only complained-of question was never answered, and there was no request for a jury instruction to disregard the question. Defendant obtained all the relief requested. Mendoza v. State, 2008 Tex. App. LEXIS 9006 (Tex. App. Austin Dec. 4 2008).

135. Trial court did not err in permitting the State to treat a witness in punishment as hostile, ask him leading questions, and impeach him with a prior statement because: (1) under Tex. R. Evid. 607, a witness's credibility could be attacked by any party; (2) Tex. R. Evid. 611 allowed a hostile witness to be interrogated by leading questions; and (3) there was no showing that the primary purpose of the use of the prior statement was to admit evidence otherwise inadmissible, or that the trial court misused the evidence in assessing punishment. Huggins v. State, 2007 Tex. App. LEXIS 9550 (Tex. App. Beaumont Dec. 5 2007).

136. Where the State's witness, who had previously worked for defendant and who testified under a grant of immunity, expressed difficulty recalling relevant facts and answered several questions with gestures rather than spoken responses, the trial court did not err in allowing the State to attack the credibility of its witness because under Tex. R. Evid. 607, the witness could be attacked by any party, including the party calling the witness; also, because the witness was a hostile witness, under Tex. R. Evid. 611(c), the trial court properly allowed the State to interrogate the witness using leading questions. Huggins v. State, 2007 Tex. App. LEXIS 7495 (Tex. App. Beaumont Sept. 12 2007).

137. Officer was called by the State to establish its case-in-chief as the State's lead investigator because (1) he served as the evidence custodian at the scene of the crime through whom the State admitted most of the physical evidence; (2) he obtained the warrants; (3) he arrested defendant; (4) he assisted in the collection of defendant's blood for DNA testing; and (5) he interrogated defendant and obtained his confession; thus, the officer was identified with the State and was hostile to defendant, but defendant failed to show how any particular subject matter of questioning was denied him through other means of examination than through leading questions; furthermore, under Tex. R. App. P. 44.2, any error in failing to allow defendant to question the officer (or indeed a second officer) using leading questions pursuant to Tex. R. Evid. 611(c) was harmless beyond a reasonable doubt because (1) defendant could have used other means to question the officer; and (2) the State's case against defendant was strong, even with the damaging potential of the use of leading questions, because a glove was found at the crime scene with the victim's blood on the outside and defendant's DNA on the inside. Davis v. State, 2007 Tex. App. LEXIS 2269 (Tex. App. Texarkana Mar. 23 2007).

138. In a failure to stop case, the court did not prevent defendant from explaining the statements she made to police after her arrest by repeatedly sustaining the prosecutor's objections to leading questions because each question that was disallowed by the court required defendant to confirm or deny statements of her lawyer; the court did not prevent the questions from being asked; the court instructed counsel to rephrase the question. Martinez v. State, 2007 Tex. App. LEXIS 927 (Tex. App. El Paso Feb. 8 2007).

139. In a criminal prosecution for aggravated sexual assault of a child, the child's testimony regarding penetration was elicited by leading questions under Tex. R. Evid. 611(c). The rule against leading questions is somewhat relaxed in cases dealing with child witnesses. Acevedo v. State, 2006 Tex. App. LEXIS 10586 (Tex. App. San Antonio Dec. 13 2006).

140. Although the State asked a six-year-old sexual assault complainant numerous leading questions, defendant's trial counsel had objected only once, and because the one question objected to was not a leading question, the trial court did not err in overruling the objection; by not objecting to each leading question, defendant had not preserved his complaint for appellate review in accordance with Tex. R. Evid. 103(a)(1) and Tex. R. App. P. 33.1(a). Embree v. State, 2006 Tex. App. LEXIS 7772 (Tex. App. Waco Aug. 30 2006).

141. Assuming without deciding that the trial court erred in overruling defendant's leading question objection, the error was cured when the prosecutor elicited the same testimony without objection, for purposes of Tex. R. App. P. 33.1(a)(1), a moment later. Caudle v. State, 2006 Tex. App. LEXIS 3199 (Tex. App. Fort Worth Apr. 20 2006).

Evidence : Testimony : Experts : General Overview

142. Trial court did not abuse its discretion in a sexually violent predator commitment proceeding by restricting the sex offender's cross-examination of one of the State's expert witnesses where the expert provided an extensive psychological analysis that fully explained the basis for his opinion that the sex offender had a behavioral abnormality that made him likely to commit a predatory act of sexual violence because the offer of proof demonstrated that the expert had a valid explanation for giving more consideration to some data in the records over other, contradictory data. Moreover, at the conclusion of the offer of proof, the trial court advised the sex offender's counsel that counsel would be allowed to ask why the expert had rejected the sex offender's assertion that he had not committed the prior crimes, but counsel chose not to do so. In re Commitment of Hinchey, 2012 Tex. App. LEXIS 7582, 2012 WL 3853186 (Tex. App. Beaumont Sept. 6 2012).

143. In a condemnation action, the trial court was permitted to limit each side to one expert witness in accordance with its authority under Tex. R. Evid. 611 to control the presentation of evidence. The trial court did not abuse its discretion by excluding additional testimony from two more expert witnesses offered by the state on the issue of compensation due the landowner for the condemned property. State v. Gaylor Inv. Trust P'ship, 322 S.W.3d 814, 2010 Tex. App. LEXIS 7114 (Tex. App. Houston 14th Dist. Aug. 31 2010).

Evidence : Testimony : Experts : Admissibility

144. Trial court did not abuse its discretion by allowing a detective to testify in a narrative form because the testimony served to explain why he had reached the conclusion that the child victim's account of the sexual abuse was plausible, and defendant lodged no objection concerning the detective's qualifications to provide his opinion on the topic, nor did he object that the detective's opinion on the question was irrelevant. Romero v. State, 2010 Tex. App. LEXIS 5735, 2010 WL 2854307 (Tex. App. Beaumont July 21 2010).

Evidence : Testimony : Lay Witnesses : General Overview

145. Trial court's restrictions on a witness's testimony were within its discretion where the court was avoiding needless consumption of time because defendant was asking questions about what the witness did not consider to be a violation of the restrictive covenants at issue in the case, whether the witness had protested the value assigned to his own property for property tax purposes, and whether individuals could enforce deed restrictions; those lines of questioning were either irrelevant to the legal question of whether defendant had violated the applicable deed restrictions or improperly called for a legal conclusion. Daniels v. Balcones Woods Club, Inc., 2006 Tex. App. LEXIS 957 (Tex. App. Austin Feb. 2 2006).

Evidence : Testimony : Presentation of Evidence

146. Because information that revealed that the bias or interest of the State's medical expert was before the jury and the excluded information would not have added significantly to the inmate's ability to impeach his credibility, the

trial court's ruling did not unduly restrict the inmate's cross-examination of the State's expert. In re Smith, 422 S.W.3d 802, 2014 Tex. App. LEXIS 667, 2014 WL 333374 (Tex. App. Beaumont Jan. 23 2014).

147. Defendant, who was deaf, had no basis for his contention that the denial of his motion to control the pace of the questions and answers of the witnesses at trial constituted a denial of his right to counsel. The trial court exercised reasonable control over the mode and order of interrogation of the witnesses and the presentation of the evidence at trial. In re Chappell, 2014 Tex. App. LEXIS 668, 2014 WL 346090 (Tex. App. Beaumont Jan. 23 2014).

148. Because information that revealed that the bias or interest of the State's medical expert was before the jury and the excluded information would not have added significantly to the inmate's ability to impeach his credibility, the trial court's ruling did not unduly restrict the inmate's cross-examination of the State's expert. In re Smith, 422 S.W.3d 802, 2014 Tex. App. LEXIS 667, 2014 WL 333374 (Tex. App. Beaumont Jan. 23 2014).

149. Defendant, who was deaf, had no basis for his contention that the denial of his motion to control the pace of the questions and answers of the witnesses at trial constituted a denial of his right to counsel. The trial court exercised reasonable control over the mode and order of interrogation of the witnesses and the presentation of the evidence at trial. In re Chappell, 2014 Tex. App. LEXIS 668, 2014 WL 346090 (Tex. App. Beaumont Jan. 23 2014).

150. Trial court granted defendant a running objection as to hearsay and he did not specifically object on the basis that the repeated details of the offenses were cumulative of other evidence, or unduly repetitive, and he has waived that objection, Tex. R. Evid. 103(a)(1); Tex. R. App. P. 33.1(a); there was no abuse of discretion under the circumstances in the trial court's exercise of control over the manner in which the trial was conducted, Tex. R. Evid. 611(a). In re Adame, 2013 Tex. App. LEXIS 4847, 2013 WL 3853386 (Tex. App. Beaumont Apr. 18 2013).

151. Court did not err by not allowing defendant further direct examination of a witness because the record showed the jury heard testimony that the witness evaluated defendant and provided a competency report. Additionally, the witness testified that her testing of defendant pertained to "neurocognitive abilities or deficits" and she testified that another witness did not have the same training that she had respecting testing. Smith v. State, 2012 Tex. App. LEXIS 8848, 2012 WL 5238280 (Tex. App. Dallas Oct. 24 2012).

152. In a termination of parental rights case, appellant mother failed to show that the trial court abused its discretion when it orally stated time limits for each side's expert witness examinations under Tex. R. Evid. 611(a) but did not enforce any limit against her. Appellant never objected to the time limits during the expert examinations, and she never advised the trial court that she was unable to present any specific expert witness testimony due to the time limits. In re Z.C.J., 2012 Tex. App. LEXIS 6937 (Tex. App. San Antonio Aug. 22 2012).

153. Trial court's comments during a bench trial of a contract case, which included stating that certain matters were not relevant, did not reflect judicial bias and were a proper exercise of discretion under Tex. R. Evid. 611(a) to maintain control over and expedite the trial proceedings; moreover, no harm was shown under Tex. R. App. P. 44.1(a). Allstar Nat'l Ins. Agency v. Johnson, 2010 Tex. App. LEXIS 6132, 2010 WL 2991058 (Tex. App. Houston 1st Dist. July 29 2010).

154. Trial court's comments that defense counsel was repetitious and had gone beyond the scope of permitted questioning in a sexual assault case did not deny defendant a fair trial by an impartial jury and constituted a reasonable exercise of control over interrogating witnesses and presenting evidence to avoid needless consumption of time under Tex. R. Evid. 611(a)(2). Lorenzo v. State, 2010 Tex. App. LEXIS 5555, 2010 WL 2788757 (Tex. App. Austin July 14 2010).

155. Trial court judge's comment to the victim after he testified, that he was "pretty brave" and that he could go sit with his parents if he wanted to, was part of a larger effort to make the child, who was in elementary school, comfortable in the courtroom, and the court could not find that the comment was implied approval of the State's argument or indicated disbelief in the defense's position; the trial judge's conversation with the child before and after his testimony was meant to assist him and ease his apprehensions, the trial judge maintained an impartial attitude and did not abandon his role as neutral adjudicator, for purposes of Tex. R. Evid. 611(a), and the statement was not improper under Tex. Code Crim. Proc. Ann. art. 38.05. Villarreal v. State, 2010 Tex. App. LEXIS 2947, 2010 WL 1618649 (Tex. App. Corpus Christi Apr. 22 2010).

156. Comment made by the trial judge to a child witness following her testimony was not indicative of bias and did not otherwise taint defendant's presumption of innocence, and he was required to object; his failure to do so precluded review of the issue on appeal under Tex. R. App. P. 33.1(a), but even if preserved, the court still found no error because the trial judge was trying to ease the child's apprehensions and did not abandon his role as neutral adjudicator for purposes of Tex. R. Evid. 611(a). Villarreal v. State, 2010 Tex. App. LEXIS 2947, 2010 WL 1618649 (Tex. App. Corpus Christi Apr. 22 2010).

157. Allegation that a trial court erred in a theft case by allowing rebuttal testimony was not preserved for review because no objection was made before the trial court. Hopkins v. State, 2008 Tex. App. LEXIS 2861 (Tex. App. Texarkana Apr. 9 2008).

158. Trial court did not abuse its discretion in endeavoring to confine the pro se litigants to the relevant issues and to maintain civility in the courtroom. Chambers v. Pruitt, 241 S.W.3d 679, 2007 Tex. App. LEXIS 9631 (Tex. App. Dallas 2007).

159. Pursuant to Tex. R. Evid. 611, a trial court did not abuse its discretion in setting a time limitation on a mother's testimony in a proceeding in which a father sought to be appointed sole managing conservator of the parties' child where the trial court allowed the mother over two-and-one-half hours to present her testimony even though she had requested one-half of a day; because the mother represented herself, she testified by narration as opposed to question and answer format, and the trial court noted that two-and-one-half hours of narrative monolog was essentially equivalent to one-half day of question and answer testimony. In re M.A.S., 233 S.W.3d 915, 2007 Tex. App. LEXIS 7540 (Tex. App. Dallas 2007).

160. Trial court's comments to defendant in a jury's presence, if erroneous, did not constitute fundamental error because (1) the trial court warned defendant repeatedly to conform to a question and answer format instead of responding to questions in a narrative, story-telling manner; (2) the trial court's remarks were not a comment on the weight of defendant's evidence or testimony, under Tex. Code Crim. Proc. Ann. art. 38.05, because the trial court made no reference, either directly or indirectly, to defendant's guilt or innocence; and (3) the trial court was attempting to expedite and maintain control over the trial, and exercise reasonable control over the mode and order of defendant's testimony and the presentation of evidence, under Tex. R. Evid. 611(a). Stribling v. State, 2007 Tex. App. LEXIS 5610 (Tex. App. Tyler July 18 2007).

161. Trial court did not abuse its discretion in a child custody modification hearing by limiting a mother's testimony to two and one-half hours, presented as narrative monologue rather than question-and-answer testimony, since the two were essentially equivalent. In re M.A.S., 222 S.W.3d 854, 2007 Tex. App. LEXIS 2937 (Tex. App. Dallas 2007).

162. There was no reversible error under Tex. R. App. P. 44.1 by a trial court's admission of evidence of appellate attorney's fees through an expert or re-direct and cross-examination because under Tex. R. Evid. 611, the trial court had control of the court and the scope of cross-examination and the direct examination included evidence of

the expert's qualifications so that it was not totally unrelated. Tricon Tool & Supply, Inc. v. Thumann, 226 S.W.3d 494, 2006 Tex. App. LEXIS 9953 (Tex. App. Houston 1st Dist. 2006).

Family Law : Child Custody : Procedures

163. Pursuant to Tex. R. Evid. 611, a trial court did not abuse its discretion in setting a time limitation on a mother's testimony in a proceeding in which a father sought to be appointed sole managing conservator of the parties' child where the trial court allowed the mother over two-and-one-half hours to present her testimony even though she had requested one-half of a day; because the mother represented herself, she testified by narration as opposed to question and answer format, and the trial court noted that two-and-one-half hours of narrative monolog was essentially equivalent to one-half day of question and answer testimony. In re M.A.S., 233 S.W.3d 915, 2007 Tex. App. LEXIS 7540 (Tex. App. Dallas 2007).

164. Trial court did not abuse its discretion in a child custody modification hearing by limiting a mother's testimony to two and one-half hours, presented as narrative monologue rather than question-and-answer testimony, since the two were essentially equivalent. In re M.A.S., 222 S.W.3d 854, 2007 Tex. App. LEXIS 2937 (Tex. App. Dallas 2007).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview

165. In a termination of parental rights, the court did not abuse its discretion under Tex. R. Evid. 611 by conducting the hearing with the incarcerated father appearing by telephone. In the Interest of D.S., 333 S.W.3d 379, 2011 Tex. App. LEXIS 495 (Tex. App. Amarillo Jan. 25 2011).

Governments : Courts : Authority to Adjudicate

166. In a condemnation action, the trial court was permitted to limit each side to one expert witness in accordance with its authority under Tex. R. Evid. 611 to control the presentation of evidence. The trial court did not abuse its discretion by excluding additional testimony from two more expert witnesses offered by the state on the issue of compensation due the landowner for the condemned property. State v. Gaylor Inv. Trust P'ship, 322 S.W.3d 814, 2010 Tex. App. LEXIS 7114 (Tex. App. Houston 14th Dist. Aug. 31 2010).

End of Document

Tex. Evid. R. 612

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 612 Writing Used to Refresh a Witness's Memory

(a) ***Scope.***--This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1)while testifying;

(2)before testifying, in civil cases, if the court decides that justice requires the party to have those options; or

(3)before testifying, in criminal cases.

(b) ***Adverse Party's Options; Deleting Unrelated Matter.***--An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) ***Failure to Produce or Deliver the Writing.***--If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or - if justice so requires - declare a mistrial.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 20, *Presentation of Evidence*; Unit 40, *Hearsay*; *Texas Litigation Guide*, Ch. 90, *Discovery: Scope and Limitations*.

Case Notes

Civil Procedure : Discovery : Privileged Matters : Attorney-Client Privilege
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Documentary Evidence : Writings : General Overview
Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials
Evidence : Hearsay : Exceptions : Recorded Recollection : Recollection Refreshed
Evidence : Privileges : Attorney-Client Privilege : Scope
Evidence : Privileges : Attorney-Client Privilege : Waiver
Evidence : Testimony : Credibility : Impeachment : Contradiction
Evidence : Testimony : Refreshing Recollection : General Overview
Evidence : Testimony : Refreshing Recollection : Memory Aids : Writings
Evidence : Testimony : Refreshing Recollection : Refreshing Before Testimony
Evidence : Testimony : Refreshing Recollection : Refreshing During Testimony
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure
Transportation Law : Private Vehicles : Traffic Regulation : Speed Limits : Drag Racing

LexisNexis (R) Notes

Civil Procedure : Discovery : Privileged Matters : Attorney-Client Privilege

1. Chemical company was entitled to conditional mandamus relief when a trial court ordered the company to produce a confidential research memorandum prepared by an attorney from a law firm that had represented the company in a failed real estate transaction; although a limited partnership claimed that the trial court had discretion to order production of a writing used to refresh memory for the purpose of testifying and Tex. R. Evid. 612 generally dealt with writings used to refresh recollection, the memorandum also was privileged, and Tex. R. Evid. 503 rather than Tex. R. Evid. 612 described the circumstances under which a document subject to the attorney-client privilege was subject to disclosure; the company did not waive the privilege on the ground that the memorandum established that the company possessed a certain document on an earlier date than admitted by the company through its witnesses and in the company's discovery responses because the witness testified that he did not recall whether he had a copy of the document when he helped draft a certain document and the company amended the relevant discovery response to reflect that its counsel possessed the document in question ten days before the date of an initial research memorandum; thus, the memorandum was consistent with the discovery responses. In re Chevron Phillips Chem. Co. LP, 2006 Tex. App. LEXIS 9186 (Tex. App. Beaumont Oct. 25 2006).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

2. While the trial court erred by failing to allow defense counsel to inspect the report used by a testifying officer during the pretrial suppression hearing to refresh her memory under Tex. R. Evid. 612, and while the order sealing the report was also error, those errors were harmless because the document contained nothing that defendant could have used at trial to impeach the officer or the State's case. Davis v. State, 93 S.W.3d 664, 2002 Tex. App. LEXIS 8652 (Tex. App. Texarkana 2002).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

3. Where defendant claimed that the trial court violated Tex. R. Evid. 612 during his murder trial by denying him the opportunity to inspect a report that a detective used in preparation for his testimony, it was unclear what right he was denied by not having access to the full report; defendant failed to object to any problem associated with receiving the outline instead of the full report; as a result, defendant waived any error. Lane v. State, 2006 Tex. App. LEXIS 8912 (Tex. App. Houston 14th Dist. Oct. 17 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

4. Trial court did not abuse its discretion by refusing to admit into evidence a standardized field sobriety test scoring sheet because the officer testified that, although the document was in his possession while testifying, he did not use it to refresh his testimony. Thomas v. State, 336 S.W.3d 703, 2010 Tex. App. LEXIS 9558 (Tex. App. Houston 1st Dist. Nov. 30 2010).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

5. Although defendant should have been permitted to refresh a witness' memory with phone records as to the time of a call, the trial court's exclusion of her testimony was harmless error because the time of the call was not pertinent. Sibley v. State, 2009 Tex. App. LEXIS 6266, 2009 WL 2461273 (Tex. App. El Paso Aug. 12 2009).

Evidence : Documentary Evidence : Writings : General Overview

6. Trial court did not err by denying defendant's request to review the contents of the file of the police department's sex-offender registrar under Tex. R. Evid. 612 because no one asked the witness if or when she used the entire file in order to refresh her memory. Mata v. State, 2013 Tex. App. LEXIS 6939, 2013 WL 2639190 (Tex. App. Waco June 6 2013).

Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials

7. During a criminal trial, defendant requested that the State produce the witness's written statement prior to cross-examining the witness; the trial court denied defendant's request because the witness testified that he did not use the statement to refresh his memory in accordance with Tex. R. Evid. 612; however, the statement should have been made available to defendant under Tex. R. Evid. 615 for impeachment purposes. Patterson v. State, 2008 Tex. App. LEXIS 943 (Tex. App. Houston 1st Dist. Feb. 7 2008).

Evidence : Hearsay : Exceptions : Recorded Recollection : Recollection Refreshed

8. In a mother's termination of parental rights case, the court properly denied her motion to review a therapist's notes because the testimony of other witnesses was consistent with the testimony of the therapist, the court noted that because the therapist reviewed her notes before testifying, it had the discretion to deny access to them, and the notes were cumulative of testimony that had already been presented. In the Interest of H.L.B., 2013 Tex. App. LEXIS 9004 (Tex. App. Houston 1st Dist. July 23 2013).

9. Trial court did not err by denying defendant's request to review the contents of the file of the police department's sex-offender registrar under Tex. R. Evid. 612 because no one asked the witness if or when she used the entire file in order to refresh her memory. Mata v. State, 2013 Tex. App. LEXIS 6939, 2013 WL 2639190 (Tex. App. Waco June 6 2013).

10. Because there was no evidence to establish that a witness used a list to refresh his memory during or before his testimony, the trial court did not err in refusing to admit the list under Tex. R. Evid. 612. Mcfatridge v. State, 2011 Tex. App. LEXIS 2620 (Tex. App. Waco Apr. 6 2011).

11. Although defendant should have been permitted to refresh a witness' memory with phone records as to the time of a call, the trial court's exclusion of her testimony was harmless error because the time of the call was not pertinent. Sibley v. State, 2009 Tex. App. LEXIS 6266, 2009 WL 2461273 (Tex. App. El Paso Aug. 12 2009).

12. In defendant's assault case, the court properly allowed an officer to testify about the incident because the officer did not say that his testimony was based on another officer's report, nor did he quote or read from that

officer's report or testify to any conclusions made by the other officer; rather, the officer refreshed his memory about his personal observations by reviewing the other officer's report, then testified from his own memory of those observations. Thrower v. State, 2008 Tex. App. LEXIS 2590 (Tex. App. Dallas Apr. 10 2008).

13. Where defendant claimed that the trial court violated Tex. R. Evid. 612 during his murder trial by denying him the opportunity to inspect a report that a detective used in preparation for his testimony, it was unclear what right he was denied by not having access to the full report; defendant failed to object to any problem associated with receiving the outline instead of the full report; as a result, defendant waived any error. Lane v. State, 2006 Tex. App. LEXIS 8912 (Tex. App. Houston 14th Dist. Oct. 17 2006).

Evidence : Privileges : Attorney-Client Privilege : Scope

14. Mandamus relief was granted to an attorney in a discovery dispute; since unredacted billing invoices and testimony revealing an attorney's first bankruptcy consultation delved into the substance of the communications between the attorney and the corporation on a specific topic, it was privileged from disclosure under Fla. Stat. § 90.502 and Fla. R. Bar 4-1.6(a). Tex. R. Evid. 612 did not operate to waive the attorney-client privilege under Florida law, and the attorney was unable to unilaterally waive the privilege by reviewing an invoice during a break at a deposition; moreover, the privilege could not have been used offensively because the attorney, the corporation, and its successor were parties to an underlying suit, and they were not seeking affirmative relief from the party seeking the documents. In re McIntyre, 2012 Tex. App. LEXIS 7524, 2012 WL 3793159 (Tex. App. Austin Aug. 31 2012).

Evidence : Privileges : Attorney-Client Privilege : Waiver

15. Mandamus relief was granted to an attorney in a discovery dispute; since unredacted billing invoices and testimony revealing an attorney's first bankruptcy consultation delved into the substance of the communications between the attorney and the corporation on a specific topic, it was privileged from disclosure under Fla. Stat. § 90.502 and Fla. R. Bar 4-1.6(a). Tex. R. Evid. 612 did not operate to waive the attorney-client privilege under Florida law, and the attorney was unable to unilaterally waive the privilege by reviewing an invoice during a break at a deposition; moreover, the privilege could not have been used offensively because the attorney, the corporation, and its successor were parties to an underlying suit, and they were not seeking affirmative relief from the party seeking the documents. In re McIntyre, 2012 Tex. App. LEXIS 7524, 2012 WL 3793159 (Tex. App. Austin Aug. 31 2012).

16. Chemical company was entitled to conditional mandamus relief when a trial court ordered the company to produce a confidential research memorandum prepared by an attorney from a law firm that had represented the company in a failed real estate transaction; although a limited partnership claimed that the trial court had discretion to order production of a writing used to refresh memory for the purpose of testifying and Tex. R. Evid. 612 generally dealt with writings used to refresh recollection, the memorandum also was privileged, and Tex. R. Evid. 503 rather than Tex. R. Evid. 612 described the circumstances under which a document subject to the attorney-client privilege was subject to disclosure; the company did not waive the privilege on the ground that the memorandum established that the company possessed a certain document on an earlier date than admitted by the company through its witnesses and in the company's discovery responses because the witness testified that he did not recall whether he had a copy of the document when he helped draft a certain document and the company amended the relevant discovery response to reflect that its counsel possessed the document in question ten days before the date of an initial research memorandum; thus, the memorandum was consistent with the discovery responses. In re Chevron Phillips Chem. Co. LP, 2006 Tex. App. LEXIS 9186 (Tex. App. Beaumont Oct. 25 2006).

Evidence : Testimony : Credibility : Impeachment : Contradiction

17. During a criminal trial, defendant requested that the State produce the witness's written statement prior to cross-examining the witness; the trial court denied defendant's request because the witness testified that he did not use the statement to refresh his memory in accordance with Tex. R. Evid. 612; however, the statement should have been made available to defendant under Tex. R. Evid. 615 for impeachment purposes. Patterson v. State, 2008 Tex. App. LEXIS 943 (Tex. App. Houston 1st Dist. Feb. 7 2008).

Evidence : Testimony : Refreshing Recollection : General Overview

18. Debtor testified without objection that statements shown to him were his statements, and he answered questions about the documents before his counsel objected; the objection was not timely for purposes of Tex. R. Evid. 103 and Tex. R. App. P. 33.1(a), plus the records were offered to refresh the debtor's recollection and impeach his credibility for purposes of Tex. R. Evid. 612, credibility could be attacked by any party under Tex. R. Evid. 607, and the trial court did not abuse its discretion in admitting the debtor's testimony in this regard. Ainsworth v. Cach, Llc, 2012 Tex. App. LEXIS 2798 (Tex. App. Houston 14th Dist. Apr. 10 2012).

19. Court rejected defendant's claim of ineffective assistance of counsel based on counsel's failure to refresh the memory of a defense witness under Tex. R. Evid. 612; although defendant argued that the witness gave a written statement to police and that the statement would have refreshed the witness's memory, no such statement was in evidence and there was no evidence that such a statement would have refreshed the witness's memory, and the record did not give counsel's reason for not attempting to refresh the witness's memory, such that defendant failed to establish ineffective assistance of counsel. James v. State, 2007 Tex. App. LEXIS 298 (Tex. App. Waco Jan. 17 2007).

20. Trial court did not abuse its discretion by permitting the mother in a paternity and support action to testify about her health care expenses or by permitting her to refer to summaries of medical expenses to refresh her memory during her testimony. In re J.C.K., 143 S.W.3d 131, 2004 Tex. App. LEXIS 4338 (Tex. App. Waco 2004).

21. While the trial court erred by failing to allow defense counsel to inspect the report used by a testifying officer during the pretrial suppression hearing to refresh her memory under Tex. R. Evid. 612, and while the order sealing the report was also error, those errors were harmless because the document contained nothing that defendant could have used at trial to impeach the officer or the State's case. Davis v. State, 93 S.W.3d 664, 2002 Tex. App. LEXIS 8652 (Tex. App. Texarkana 2002).

Evidence : Testimony : Refreshing Recollection : Memory Aids : Writings

22. Appellant testified that he had reviewed his statement many times in the years before trial and as recently as one week prior to trial, and thus the trial court did not abuse its discretion in finding that appellant used the statement, for purposes of Tex. R. Evid. 612, in order to refresh his memory before he testified. Arrellano v. State, 2012 Tex. App. LEXIS 8653, 2012 WL 4903044 (Tex. App. San Antonio Oct. 17 2012).

23. Key distinction between Tex. R. Evid. 612 and Tex. R. Evid. 615 is that Tex. R. Evid. 612 requires the production of any writing used to refresh a witness's memory, while Tex. R. Evid. 615 requires only the production of "statements" as defined in Rule 615, and a writing used to refresh a witness's memory may not meet the definition of statement contained in Rule 615, yet Tex. R. Evid. 612 still requires the writing to be produced because of the witness's use of it; similarly, a witness may not use a statement to refresh his or her memory before testifying, however, Tex. R. Evid. 615 still requires that the statement be produced, and accordingly, although the general purpose for both rules is to provide material which may be used to impeach a witness, the rules are applicable to different types of materials. Arrellano v. State, 2012 Tex. App. LEXIS 8653, 2012 WL 4903044 (Tex. App. San Antonio Oct. 17 2012).

24. Based on the testimony, the trial court could have found that appellant used his statement to refresh his memory before trial, and thus the trial court did not abuse its discretion in ordering the production of the statement under Tex. R. Evid. 612. Arrellano v. State, 2012 Tex. App. LEXIS 8653, 2012 WL 4903044 (Tex. App. San Antonio Oct. 17 2012).

25. Although defendant, who was convicted of felony driving while intoxicated, contended he was denied his right of confrontation because the trial court failed to require the State to provide a copy of a writing a witness used to refresh his recollection, this issue was overruled. The trial court could reasonably determine that the witness did not use the printout for the purpose of refreshing his recollection about the facts of the case. Goains v. State, 2011 Tex. App. LEXIS 7875, 2011 WL 4537892 (Tex. App. Beaumont Sept. 28 2011).

26. Trial court did not abuse its discretion by refusing to admit into evidence a standardized field sobriety test scoring sheet because the officer testified that, although the document was in his possession while testifying, he did not use it to refresh his testimony. Thomas v. State, 336 S.W.3d 703, 2010 Tex. App. LEXIS 9558 (Tex. App. Houston 1st Dist. Nov. 30 2010).

27. Exclusion of the investigator's report did not contribute to defendant's punishment and was harmless, because the trial court disclosed the investigator's handwritten notes to defendant that the investigator used to aid in her testimony for trial, the investigative report was sealed upon declaring it to be inadmissible, and the investigative report had no impeachment value, when the evidence in the investigative report was consistent with and did not contradict the investigator's trial testimony. Rocha v. State, 2010 Tex. App. LEXIS 5963, 2010 WL 2949967 (Tex. App. El Paso July 28 2010).

28. Evidence was sufficient to support defendant's conviction of racing under Tex. Transp. Code Ann. § 545.420(b)(2)(A) because the officer testified that defendant, driving a van, and another vehicle were traveling at approximately one hundred miles per hour, one behind the other, and maintaining close proximity to one another; based on his experience and his observations, the officer concluded the two vehicles were trying to outdistance or outgain one another; that is, they were racing. Tex. R. Evid. 612 permitted the officer to use his report to refresh his memory in testifying to the events surrounding defendant's apprehension and arrest. Perez v. State, 2009 Tex. App. LEXIS 2556, 2009 WL 1017706 (Tex. App. San Antonio Apr. 15 2009).

29. Attorney used a summary to refresh his recollection about the total amount of attorney fees, for purposes of Tex. R. Evid. 612; the attorney did not testify about any matter contained in the document other than the actual calculation of the total fees and the court did not find that the trial court erred in allowing the use of this document, plus the employer did not show how the error resulted in the rendition of an improper verdict because the jury could have used the attorney's testimony about the number of hours worked and the billing rate to make its own calculation. Arthur J. Gallagher & Co. v. Dieterich, 2008 Tex. App. LEXIS 5639 (Tex. App. Dallas July 29 2008).

30. Because Tex. R. Evid. 612 encompasses only those portions of a document relating to a witness' testimony, the trial court did not err by excluding an article written by a defense expert, which was used by the expert at trial to refresh his memory, in the absence of a showing that the article was relevant in its entirety. Allen v. Scott, 2008 Tex. App. LEXIS 572 (Tex. App. Amarillo Jan. 25 2008).

31. For purposes of Tex. R. App. P. 33.1(a), an ex-husband did not object to the trial court's statement that offering bank records as evidence to corroborate the ex-wife's testimony as to the amount of proceeds received from selling inherited property in Louisiana, which was separate property under Tex. Const. art. XVI, § 15, and Tex. Fam. Code Ann. § 3.001(2), was not necessary, and the record showed that the ex-husband had a copy of the records under Tex. R. Evid. 612; he argued for the first time on appeal that the trial court erred in stating that it had no need for the records, and because the ex-husband did not preserve any other objection at trial, the court

understood this argument to be a challenge to the sufficiency of the evidence, which in a non-jury case could be made for the first time on appeal under Tex. R. App. P. 33. Huval v. Huval, 2007 Tex. App. LEXIS 4903 (Tex. App. Beaumont June 21 2007).

32. Although a trial court erred by failing to admit a mother's written, sworn statement to police after she used it to refresh her recollection under Tex. R. Evid. 612, the error was harmless based on the mother's admission regarding her inconsistent statements, the corroborating evidence, and the nature of sexual assault disclosures by children. Donnell v. State, 191 S.W.3d 864, 2006 Tex. App. LEXIS 2970 (Tex. App. Waco 2006).

Evidence : Testimony : Refreshing Recollection : Refreshing Before Testimony

33. Because a detective did not refer to the recorded statement of the victim's boyfriend during trial, and never indicated he utilized the statement to refresh his memory before testifying, Tex. R. Evid. 612 was not applicable, and defendant was not entitled to invoke its benefits to inspect and admit the statement into evidence. Golston v. State, 2012 Tex. App. LEXIS 5251, 2012 WL 2479591 (Tex. App. Texarkana June 29 2012).

34. Exclusion of the investigator's report did not contribute to defendant's punishment and was harmless, because the trial court disclosed the investigator's handwritten notes to defendant that the investigator used to aid in her testimony for trial, the investigative report was sealed upon declaring it to be inadmissible, and the investigative report had no impeachment value, when the evidence in the investigative report was consistent with and did not contradict the investigator's trial testimony. Rocha v. State, 2010 Tex. App. LEXIS 5963, 2010 WL 2949967 (Tex. App. El Paso July 28 2010).

35. Although a witness said that she reviewed a document prior to trial, there was no evidence of specifically when she reviewed it or whether she used it to refresh her memory under Tex. R. Evid. 612 and defense counsel did not ask if the witness relied on the evidence to form her opinions under Tex. R. Evid. 705, such that the trial court did not abuse its discretion in denying defense counsel's request for the document or in failing to require the State to produce the document for in camera inspection. Love v. State, 2009 Tex. App. LEXIS 8952, 2009 WL 3930900 (Tex. App. Houston 1st Dist. Nov. 19 2009).

36. Although defendant's argument based on Tex. R. Evid. 612 ultimately failed because defendant never established that a witness used the document to refresh her memory, defendant also failed to make an offer of proof concerning the document, and without the inclusion of the document in the record, the court could not determine whether the trial court committed harmful error by refusing to allow the defense to review the document. Love v. State, 2009 Tex. App. LEXIS 8952, 2009 WL 3930900 (Tex. App. Houston 1st Dist. Nov. 19 2009).

37. Even if the transcript given to a witness fell under the protection of the work product privilege, privileged documents had to be produced for inspection when used by a witness on the stand to refresh her memory under Tex. R. Evid. 612. Love v. State, 2009 Tex. App. LEXIS 8952, 2009 WL 3930900 (Tex. App. Houston 1st Dist. Nov. 19 2009).

38. Even assuming the trial court abused its discretion by excluding the written statements of a witness that defendant apparently sought to introduce as prior inconsistent statements under Tex. R. Evid. 613(a), defendant was not harmed by the error under Tex. R. App. P. 44.2(b); under Tex. R. Evid. 612, the court found that (1) the witness's testimony was crucial to the prosecution and was not cumulative, (2) defendant's own testimony directly contradicted the witness's testimony, (3) defendant was permitted to cross-examine the witness about the discrepancies between the statements and the trial testimony, and (5) defendant highlighted those discrepancies during closing argument. Mooring v. State, 2007 Tex. App. LEXIS 3601 (Tex. App. Waco May 9 2007).

Evidence : Testimony : Refreshing Recollection : Refreshing During Testimony

39. Because a detective did not refer to the recorded statement of the victim's boyfriend during trial, and never indicated he utilized the statement to refresh his memory before testifying, Tex. R. Evid. 612 was not applicable, and defendant was not entitled to invoke its benefits to inspect and admit the statement into evidence. Golston v. State, 2012 Tex. App. LEXIS 5251, 2012 WL 2479591 (Tex. App. Texarkana June 29 2012).

40. In defendant's assault case, the court properly allowed an officer to testify about the incident because the officer did not say that his testimony was based on another officer's report, nor did he quote or read from that officer's report or testify to any conclusions made by the other officer; rather, the officer refreshed his memory about his personal observations by reviewing the other officer's report, then testified from his own memory of those observations. Thrower v. State, 2008 Tex. App. LEXIS 2590 (Tex. App. Dallas Apr. 10 2008).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

41. In a mother's termination of parental rights case, the court properly denied her motion to review a therapist's notes because the testimony of other witnesses was consistent with the testimony of the therapist, the court noted that because the therapist reviewed her notes before testifying, it had the discretion to deny access to them, and the notes were cumulative of testimony that had already been presented. In the Interest of H.L.B., 2013 Tex. App. LEXIS 9004 (Tex. App. Houston 1st Dist. July 23 2013).

Transportation Law : Private Vehicles : Traffic Regulation : Speed Limits : Drag Racing

42. Evidence was sufficient to support defendant's conviction of racing under Tex. Transp. Code Ann. § 545.420(b)(2)(A) because the officer testified that defendant, driving a van, and another vehicle were traveling at approximately one hundred miles per hour, one behind the other, and maintaining close proximity to one another; based on his experience and his observations, the officer concluded the two vehicles were trying to outdistance or outgain one another; that is, they were racing. Tex. R. Evid. 612 permitted the officer to use his report to refresh his memory in testifying to the events surrounding defendant's apprehension and arrest. Perez v. State, 2009 Tex. App. LEXIS 2556, 2009 WL 1017706 (Tex. App. San Antonio Apr. 15 2009).

Tex. Evid. R. 613

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 613 Witness's Prior Statement and Bias or Interest

(a) ***Witness's Prior Inconsistent Statement.***

(1) ***Foundation Requirement.***--When examining a witness about the witness's prior inconsistent statement - whether oral or written - a party must first tell the witness:

(A)the contents of the statement;

(B)the time and place of the statement; and

(C)the person to whom the witness made the statement.

(2) ***Need Not Show Written Statement.***--If the witness's prior inconsistent statement is written, a party need not show it to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) ***Opportunity to Explain or Deny.***--A witness must be given the opportunity to explain or deny the prior inconsistent statement.

(4) ***Extrinsic Evidence.***--Extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement.

(5) ***Opposing Party's Statement.***--This subdivision (a) does not apply to an opposing party's statement under Rule 801(e)(2).

(b) ***Witness's Bias or Interest.***

(1) ***Witness's Bias or Interest.***--When examining a witness about the witness's bias or interest, a party must first tell the witness the circumstances or statements that tend to show the witness's bias or interest. If examining a witness about a statement - whether oral or written - to prove the witness's bias or interest, a party must tell the witness:

(A)the contents of the statement;

(B)the time and place of the statement; and

(C)the person to whom the statement was made.

(2) ***Need Not Show Written Statement.***--If a party uses a written statement to prove the witness's bias or interest, a party need not show the statement to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) ***Opportunity to Explain or Deny.***--A witness must be given the opportunity to explain or deny the circumstances or statements that tend to show the witness's bias or interest. And the witness's proponent may present evidence to rebut the charge of bias or interest.

(4) ***Extrinsic Evidence.***--Extrinsic evidence of a witness's bias or interest is not admissible unless the witness is first examined about the bias or interest and fails to unequivocally admit it.

(c) ***Witness's Prior Consistent Statement.***--Unless Rule 801(e)(1)(B) provides otherwise, a witness's prior consistent statement is not admissible if offered solely to enhance the witness's credibility.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 40, *Hearsay*; Unit 70, *Cross-Examination*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Pre-March 1, 1998 Comment This is former Rule 612; the number has changed and the comma after "interest" in subdivision (b) has been deleted.

Comment to 2015 Restyling: The amended rule retains the requirement that a witness be given an opportunity to explain or deny (a) a prior inconsistent statement or (b) the circumstances or a statement showing the witness's bias or interest, but this requirement is not imposed on the examining attorney. A witness may have to wait until redirect examination to explain a prior inconsistent statement or the circumstances or a statement that shows bias. But the impeaching attorney still is not permitted to introduce extrinsic evidence of the witness's prior inconsistent statement or bias unless the witness has first been examined about the statement or bias and has failed to unequivocally admit it. All other changes to the rule are intended to be stylistic only.

Case Notes

Civil Procedure : Discovery : Methods : Expert Witness Discovery
Civil Procedure : Discovery : Relevance
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Witness Tampering
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Discovery & Inspection : Brady Materials : General Overview
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Examination of Witnesses : General Overview
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Examination of Witnesses : Videotaped Testimony
Criminal Law & Procedure : Witnesses : Impeachment

Criminal Law & Procedure : Jury Instructions : Curative Instructions
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Registration
Criminal Law & Procedure : Appeals : Procedures : Briefs
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Jury Instructions
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Ineffective Assistance
Evidence : Demonstrative Evidence : Recordings
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Documentary Evidence : Completeness
Evidence : Hearsay : Credibility of Declarants : General Overview
Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence
Evidence : Hearsay : Exceptions : General Overview
Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Inconsistent Statements
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Hearsay : Hearsay Within Hearsay
Evidence : Hearsay : Rule Components
Evidence : Hearsay : Rule Components : Truth of Matter Asserted
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : General Overview
Evidence : Relevance : Sex Offenses : Rape Shield Laws
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Opinion & Reputation
Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances
Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice
Evidence : Testimony : Credibility : Impeachment : Prior Conduct
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements
Evidence : Testimony : Credibility : One's Own Witnesses : General Overview
Evidence : Testimony : Credibility : One's Own Witnesses : Limitations
Evidence : Testimony : Credibility : Rehabilitation
Evidence : Testimony : Examination : General Overview
Evidence : Testimony : Examination : Cross-Examination : General Overview

Evidence : Testimony : Examination : Cross-Examination : Scope
Evidence : Testimony : Sequestration
Family Law : Family Protection & Welfare : Cohabitants & Spouses : Abuse, Endangerment & Neglect
Torts : Malpractice & Professional Liability : Healthcare Providers

LexisNexis (R) Notes

Civil Procedure : Discovery : Methods : Expert Witness Discovery

1. Trial court abused its discretion in ordering discovery of a nonparty expert witness's personal financial documents, and expert reports and correspondence from other unrelated cases, without first requiring some evidence of the witness's bias; although plaintiffs argued that they showed the expert's potential for bias through his denial of any bias in favor of defendants and his deposition testimony in which he admitted deriving a significant portion of his income from medical consulting work for litigation, the appellate court concluded that, at most, the expert's deposition testimony showed that he received a significant amount of income from litigation consultation and that the suggestion that the expert had a particular bias in favor of defendants was raised by counsel's questions and argument, not by any evidence. In re Makris, 217 S.W.3d 521, 2006 Tex. App. LEXIS 8561 (Tex. App. San Antonio 2006).

2. Simple denial of bias cannot logically equate to evidence of bias under Tex. R. Evid. 613(b); if that were true, essentially all experts, except those who frankly concede a bias, would be subjected to discovery of their personal documents in a fishing expedition to search for evidence of bias. In re Makris, 217 S.W.3d 521, 2006 Tex. App. LEXIS 8561 (Tex. App. San Antonio 2006).

Civil Procedure : Discovery : Relevance

3. Writ of mandamus was granted because ordering the expert witness to give deposition testimony regarding his litigation-related income for the years 2002, 2003 and 2004, and the percentage of the total income that was litigation-related would not materially benefit the dispute resolution process in the case in view of the information already available to the parties and the trial court concerning the expert, Tex. R. Civ. P. 192.4; the expert had disclosed his hourly rate, his time spent working on the case, and the fact he testified almost exclusively for defendants, and since the information sought to be protected would be disclosed before any appeal would be available, relators lacked an adequate legal remedy. In re Weir, 166 S.W.3d 861, 2005 Tex. App. LEXIS 4689 (Tex. App. Beaumont 2005).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

4. Although the trial court excluded the email from evidence, the error, if any, did not restrict the mother from cross-examining and impeaching the father with the inconsistent statement he made in the email, nor did the trial court prohibit the mother from offering her own testimony about the frequency of her telephone calls to the children and the limits or restrictions the father placed on those communications; the mother could not establish that the error, if any, caused the rendition of an improper judgment. In the Interest of C.B. & J., 2012 Tex. App. LEXIS 6396, 2012 WL 3139866 (Tex. App. Corpus Christi Aug. 2 2012).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

5. In an intoxication manslaughter case, the trial court did not err by prohibiting cross-examination of an officer on the scene regarding the internal investigation against him because other witnesses identified defendant as the driver, two other officers testified that they smelled alcohol on defendant's breath, and other evidence introduced at trial showed that defendant was intoxicated that night. Mole v. State, 2009 Tex. App. LEXIS 2838, 2009 WL

1099433 (Tex. App. Fort Worth Apr. 23 2009).

6. In a murder trial, there was no violation of the Confrontation Clause when the State introduced an accomplice's out-of-court statement incriminating defendant because it was offered to impeach other out-of-court statements by the accomplice, introduced in the defense's case in chief, which tended to exonerate defendant; the introduction of the exonerating statements triggered Tex. R. Evid. 806; the State was then allowed to use Tex. R. Evid. 806, together with Tex. R. Evid. 613, to impeach the accomplice. Hernandez v. State, 219 S.W.3d 6, 2006 Tex. App. LEXIS 11300 (Tex. App. San Antonio 2006).

7. In a capital murder case, defendant's right to cross-examination under the Sixth Amendment, U.S. Const. amend. VI, and Tex. R. Evid. 613 was not violated by the exclusion of evidence on the conduct of the victim's friends toward a witness because defendant did not show that the victim's friends had attempted to influence the witness's testimony. Toluao v. State, 2005 Tex. App. LEXIS 6751 (Tex. App. Fort Worth Aug. 18 2005).

8. Where a videotape was allowed into evidence for the purposes of impeachment only and was redacted to show only those portions of the interview that contradicted the victim's trial testimony, and both defendants were allowed to cross examine defendant when she testified at trial, there was no confrontation clause violation. Moreno v. State, 2005 Tex. App. LEXIS 4091 (Tex. App. Corpus Christi May 26 2005).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault

9. In a trial for family assault, there was no error under Tex. R. Evid. 613(b) in excluding evidence that the complainant, defendant's wife, opened and used a checking account for a year before the assault because defendant failed to demonstrate a nexus or logical connection between the separate checking account and the complainant's alleged plan to divorce him and her potential motive to testify against him Smith v. State, 352 S.W.3d 55, 2011 Tex. App. LEXIS 4624 (Tex. App. Fort Worth June 16 2011).

10. In a domestic violence case under Tex. Penal Code Ann. § 22.01, defendant should have been permitted to introduce testimony from a witness that the complainant said that the assault was an accident, in order to impeach the complainant's out-of-court accusations; however, the error in excluding that evidence was harmless under Tex. R. App. P. 44 because the excluded testimony was repetitious of the version of the incident testified to by defendant and defendant's parent, and it was inconsistent with the physical evidence. Sohail v. State, 264 S.W.3d 251, 2008 Tex. App. LEXIS 1236 (Tex. App. Houston 1st Dist. 2008).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

11. Defendant was entitled to a new trial for the murder of her stepfather because of new evidence, specifically, information from defendant's former boyfriend about her outcry 30 years earlier regarding sexual abuse by the stepfather; the outcry evidence rebutted the State's claim of recent fabrication. Carsner v. State, 415 S.W.3d 507, 2013 Tex. App. LEXIS 12563, 2013 WL 5561653 (Tex. App. El Paso Oct. 9 2013).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Witness Tampering

12. Evidence of defendant's alleged witness tampering--phone calls offering the witness money not to testify--was properly admitted under Tex. R. Evid. 613(b) in a trial for burglary. Defendant's complaint about the reliability of the evidence went to weight, not admissibility, and extrinsic evidence of the alleged telephone calls was not admitted until after defendant denied making them. Livingston v. State, 2011 Tex. App. LEXIS 9054, 2011 WL 5535332 (Tex. App. Texarkana Nov. 15 2011).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

13. In trial for a grandfather's indecent touching of his granddaughter, the State was properly allowed to impeach the grandmother, who testified at trial that child complained of touching on her leg, with a caseworker's testimony about the grandmother's prior statement. Green v. State, 2004 Tex. App. LEXIS 8523 (Tex. App. Eastland Sept. 23 2004).

14. In defendant's sexual assault case, a court did not err by explaining to the State how to present rebuttal evidence where the comments about the admissibility of the State's rebuttal witness were made outside the presence of the jury, and they did not indicate that any assistance was given to the State; the judge was presented with an admissibility question under Tex. R. Evid. 613 and made a decision which left defendant with the choice of returning to the stand to preclude the testimony of the State's witness or remaining silent and relying on his original statement. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

15. In defendant's sexual assault case, a witness's testimony regarding defendant's statement to him was properly admitted where it was clearly not hearsay and thus its admission, even though erroneously described by the trial judge as occurring under Tex. R. Evid 613, was proper under Tex. R. Evid. 801(e)(2)(A) and did not violate defendant's constitutional rights. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements

16. In a trial for defendant's sexual assault of his wife, who recanted in her trial testimony, there was no error under Tex. R. Evid. 404(b) in allowing the State to impeach the victim with a prior inconsistent statement about how she broke her nose six months before the charged assault; the statements were offered as prior inconsistent statements to challenge the victim's credibility, as permitted by Tex. R. Evid. 613. Davis v. State, 2007 Tex. App. LEXIS 352 (Tex. App. Dallas Jan. 18 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

17. In a trial for aggravated sexual assault of a child, defendant's right to confront his accuser was not violated by preventing defendant from cross-examining a witness, the complainant's older sister, about a similar outcry she made years before her outcry against defendant. To the extent defendant suggested on appeal that he intended to use the excluded evidence in an attempt to establish that the mother coached her children to say defendant had sexually molested them, a purpose that arguably could have been permissible under Tex. R. Evid. 613(b) to establish motive or bias, defendant's argument did not comport with the objection at trial and accordingly was waived under Tex. R. App. P. 33.1(a). Palmer v. State, 2010 Tex. App. LEXIS 3156 (Tex. App. Houston 1st Dist. Apr. 29 2010).

18. In a trial for sexual assault of a child, defendant was entitled under Tex. R. Evid. 608, 613(b) to impeach the complainant by presenting evidence that the complainant threatened to falsely accuse neighbors of molestation, even though the threats occurred after the charged offense. The complainant testified to becoming angry when defendant took back a gift, and, the very next day, the complainant accused defendant of molestation. Billodeau v. State, 277 S.W.3d 34, 2009 Tex. Crim. App. LEXIS 232 (Tex. Crim. App. 2009).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

19. In a trial for defendant's aggravated assault of a former romantic partner, the trial court properly excluded evidence under Tex. R. Evid. 613, of the victim's prior inconsistent statement regarding a pending driving while intoxicated charge because defendant did not point to any inconsistent trial testimony. Padilla v. State, 254 S.W.3d 585, 2008 Tex. App. LEXIS 2719 (Tex. App. Eastland 2008).

Criminal Law & Procedure : Discovery & Inspection : Brady Materials : General Overview

20. In a driving while intoxicated prosecution, a new trial should not have been granted on the basis that the State failed to disclose that at the time of trial, there was an ongoing investigation by the Texas Attorney General into a detaining officer's alleged possession and promotion of child pornography; the existence of the investigation was not impeachment evidence, absent any basis for inferring that the officer was aware of the investigation. State v. Moore, 240 S.W.3d 324, 2007 Tex. App. LEXIS 6153 (Tex. App. Austin 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

21. Defendant failed to show that his trial counsel was ineffective during sentencing because counsel properly withdrew an objection to the prosecutor's playing recordings of defendant's jailhouse conversations as the recordings were admissible under Tex. R. Evid. 613(a), because the recordings were played after defendant denied, disputed, or equivocated about making a prior inconsistent statement. Gallegos v. State, 2009 Tex. App. LEXIS 2111 (Tex. App. Houston 1st Dist. Mar. 26 2009).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

22. Trial counsel was not rendered ineffective by failing to request limiting instructions regarding impeachment by defendant's prior inconsistent statement because the statement was admissible under Tex. R. Evid. 801(e)(2)(A); Tex. R. Evid. 613(a) did not apply. Peace v. State, 2005 Tex. App. LEXIS 7700 (Tex. App. Houston 14th Dist. Sept. 20 2005).

23. Because defendant did not point to evidence in the record showing that counsel's failure to object to not laying a proper predicate for impeachment evidence under Tex. R. Evid. 613(a) and failure to request a limiting instruction regarding all the impeachment testimony of two officers were not part of a legitimate trial strategy, including not bringing further attention to prior statements regarding defendant's hitting the victim, he did not rebut the presumption that counsel acted reasonably. Therefore, defendant's ineffective assistance of counsel claim failed because he failed to show that counsel's performance was deficient. Watkins v. State, 2005 Tex. App. LEXIS 6188 (Tex. App. Fort Worth Aug. 4 2005).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

24. Where the defendant was charged with indecency with a child by contact and aggravated sexual assault of a child, the trial court did not violate his confrontation rights by limiting cross-examination of the child's father concerning domestic assault and a protective order; the same evidence was admitted through other witnesses; defendant had an ample opportunity to develop his defensive theory that the father was the true perpetrator. Rodriguez v. State, 2006 Tex. App. LEXIS 6933 (Tex. App. Austin Aug. 4 2006).

25. Trial court's exclusion of evidence regarding a child sexual assault victim's relationships with two different boys and her actions and comments involving two cousins did not deprive defendant of his constitutional right to a fair trial where the trial court could have determined, based on the chronology of the events, that they did not explain the State's medical evidence regarding the time of the penetration of the victim's hymen, and, although the trial court excluded the equivocal testimony of the victim's mother about the victim's veracity, the victim's aunt was allowed to testify that she had a bad reputation for being untruthful, and the victim herself admitted lying to

defendant, her father, about her report card. Accordingly, the trial court reasonably could have concluded that the matters had, at best, marginal relevance to the victim's alleged motive to testify falsely against defendant, that they would have unduly harassed the victim and confused the issues, and that the danger of unfair prejudice from the evidence would have outweighed its probative value. Pogue v. State, 2005 Tex. App. LEXIS 7819 (Tex. App. Fort Worth Sept. 22 2005).

Criminal Law & Procedure : Trials : Examination of Witnesses : General Overview

26. In defendant's sexual assault case, a court did not err by explaining to the State how to present rebuttal evidence where the comments about the admissibility of the State's rebuttal witness were made outside the presence of the jury, and they did not indicate that any assistance was given to the State; the judge was presented with an admissibility question under Tex. R. Evid. 613 and made a decision which left defendant with the choice of returning to the stand to preclude the testimony of the State's witness or remaining silent and relying on his original statement. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

27. In an armed robbery case, the trial court properly refused to recall the store manager for cross-examination because his testimony that he was mad when defendant hit him, but did not hold a grudge, was not inconsistent with his testimony during the bill of exception that he chased after defendant in spite of store policy because he was mad; further, evidence of any bias was already before the jury. Ramos v. State, 2014 Tex. App. LEXIS 113, 2014 WL 50812 (Tex. App. Houston 1st Dist. Jan. 7 2014).

28. Trial court did not abuse its discretion during defendant's aggravated assault trial when it refused to allow defense counsel to cross-examine the complainant regarding her alleged dislike of defendant's mother, which defendant claimed would have revealed her bias against him, because defendant failed to establish the logical nexus between the complainant's testimony and her potential motive to testify against him. Reynolds v. State, 371 S.W.3d 511, 2012 Tex. App. LEXIS 4144, 2012 WL 1881410 (Tex. App. Houston 1st Dist. May 24 2012).

29. Trial court did not abuse its discretion under Tex. R. Evid. 404(a)(3), 608(a), 613 by denying defendant the opportunity to cross-examine a witness about whether the witness was untruthful to the judge that presided over the witness's guilty plea to an assault charge. Reyes v. State, 2010 Tex. App. LEXIS 2359, 2010 WL 1254543 (Tex. App. Corpus Christi Apr. 1 2010).

30. In defendant's attempted capital murder case, the court's decision to limit the cross-examination of an officer was proper because whether the officer might have invoked his Garrity rights was only a marginally relevant issue and did not necessarily indicate that he had a reason to provide false testimony. Walker v. State, 300 S.W.3d 836, 2009 Tex. App. LEXIS 7763 (Tex. App. Fort Worth Oct. 1 2009).

31. In an indecency with a child case, a court properly restricted defendant's cross-examination of the victim's mother regarding benefits from a crime victims' compensation fund intended to show that she sought financial gain as a consequence of the incident because the proffered evidence was only marginally probative on the issue of bias or motive, and the mother was effectively impeached because she was incarcerated at the time of trial serving a sentence for forgery and had given custody of her children to a relative. Hoover v. State, 2007 Tex. App. LEXIS 1549 (Tex. App. Austin Feb. 27 2007).

32. In a criminal trial for driving while intoxicated, the court did not err by refusing to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias under Tex. R. Evid. 613(b). The issues defendant sought to explore had no relevance to the defense theory that the officer tended to act hasty or

jump to conclusions at the crime scene. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

33. In a criminal trial for driving while intoxicated, the court properly refused to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias under Tex. R. Evid. 613(b). The issues defendant sought to explore had no relevance to the defense theory that the officer tended to act hastily or jump to conclusions at the crime scene. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

34. In a capital murder case, defendant's right to cross-examination under the Sixth Amendment, U.S. Const. amend. VI, and Tex. R. Evid. 613 was not violated by the exclusion of evidence on the conduct of the victim's friends toward a witness because defendant did not show that the victim's friends had attempted to influence the witness's testimony. Toluao v. State, 2005 Tex. App. LEXIS 6751 (Tex. App. Fort Worth Aug. 18 2005).

Criminal Law & Procedure : Trials : Examination of Witnesses : Videotaped Testimony

35. Where a videotape was allowed into evidence for the purposes of impeachment only and was redacted to show only those portions of the interview that contradicted the victim's trial testimony, and both defendants were allowed to cross examine defendant when she testified at trial, there was no confrontation clause violation. Moreno v. State, 2005 Tex. App. LEXIS 4091 (Tex. App. Corpus Christi May 26 2005).

Criminal Law & Procedure : Witnesses : Impeachment

36. Detective's testimony regarding the inmate's cousin's original statement was not admissible as substantive evidence, but was admissible as non-hearsay offered as extrinsic evidence for impeachment purposes; however, there was no prejudice sufficient to meet Strickland because there was not a reasonable probability that a limiting instruction would have changed the outcome of the case. There was ample evidence of the inmate's guilt as she repeatedly changed her story and offered inconsistent explanations of how the victim's injuries transpired, the victim's injuries did not appear to be a result of an accident and could not have been caused by a bump on the table, and there was evidence that the inmate was the only adult present in the apartment when the injury occurred. Bridges v. Thaler, 419 Fed. Appx. 511, 2011 U.S. App. LEXIS 5973 (5th Cir. Tex. Mar. 23 2011).

37. During a capital murder trial, the State admitted an unauthenticated letter, written by a third party and sent to defendant at the county jail for the purpose of impeaching defendant's trial court testimony that she never had sex with another woman; the letter was not relevant to anything at issue, was not proper impeachment, and the trial court erred in admitting the letter. Abdygapparova v. State, 243 S.W.3d 191, 2007 Tex. App. LEXIS 8205 (Tex. App. San Antonio 2007).

38. Trial counsel was not rendered ineffective by failing to request limiting instructions regarding impeachment by defendant's prior inconsistent statement because the statement was admissible under Tex. R. Evid. 801(e)(2)(A); Tex. R. Evid. 613(a) did not apply. Peace v. State, 2005 Tex. App. LEXIS 7700 (Tex. App. Houston 14th Dist. Sept. 20 2005).

39. In a capital murder case, defendant's right to cross-examination under the Sixth Amendment, U.S. Const. amend. VI, and Tex. R. Evid. 613 was not violated by the exclusion of evidence on the conduct of the victim's friends toward a witness because defendant did not show that the victim's friends had attempted to influence the witness's testimony. Toluao v. State, 2005 Tex. App. LEXIS 6751 (Tex. App. Fort Worth Aug. 18 2005).

40. Because defendant did not point to evidence in the record showing that counsel's failure to object to not laying a proper predicate for impeachment evidence under Tex. R. Evid. 613(a) and failure to request a limiting instruction

regarding all the impeachment testimony of two officers were not part of a legitimate trial strategy, including not bringing further attention to prior statements regarding defendant's hitting the victim, he did not rebut the presumption that counsel acted reasonably. Therefore, defendant's ineffective assistance of counsel claim failed because he failed to show that counsel's performance was deficient. Watkins v. State, 2005 Tex. App. LEXIS 6188 (Tex. App. Fort Worth Aug. 4 2005).

41. Where the State had already established on direct examination that the complainant was serving a deferred adjudication probation during one point in her relationship with defendant, any further inquiry would not have made the existence of any fact of consequence to the determination of defendant's alleged offense more or less probable than it was without the evidence, and such testimony was not relevant to any bias, motive, or interest to help the State, making it an impermissible method of impeachment; accordingly, the trial court was within its discretion to limit the question posed by defendant's counsel on cross-examination. Crook v. State, 2005 Tex. App. LEXIS 3485 (Tex. App. Dallas May 6 2005).

42. In an assault case, a court did not err in refusing to admit a handwritten document as impeachment evidence because the trial court reasonably could have determined that defendant was offering the entire statement as a prior inconsistent statement, but only the victim's prior inconsistent statements could be used to impeach her, and several of the statements did not have any tendency to show the victim's bias or motive. Oveal v. State, 2005 Tex. App. LEXIS 1837 (Tex. App. Houston 14th Dist. Mar. 10 2005), opinion withdrawn by, substituted opinion at 164 S.W.3d 735, 2005 Tex. App. LEXIS 3517 (Tex. App. Houston 14th Dist. 2005).

43. In an assault case, a trial court's refusal to replay a videotape regarding a statement made by a victim was not an abuse of discretion because the requirements of Tex. R. Evid. 613 were not satisfied; because the officer on the stand at the time did not make any statement on the tape regarding witnesses to the assault, there was no prior inconsistent statement. Mumphrey v. State, 155 S.W.3d 651, 2005 Tex. App. LEXIS 370 (Tex. App. Texarkana 2005).

44. In a murder case, the trial court did not err by disallowing defendant's attempt to impeach her step-daughter (who was in the vehicle with her at the time of the crime) with prior inconsistent statements as defendant had not laid the proper predicate to a question by asking the step-daughter if she had told a witness that the attorneys had given her an instruction to get her story straight. Therefore, the question was an improper attempt to impeach step-daughter. Harris v. State, 152 S.W.3d 786, 2004 Tex. App. LEXIS 11298 (Tex. App. Houston 1st Dist. 2004).

45. In an aggravated sexual assault of a child case, a court did not err in excluding a hearsay conversation with social services for impeachment purposes where defendant did not present the victim with or give her the opportunity to explain the statement on the tape. Further, the tape itself did not contain a statement by the victim or even a statement by someone who had herself talked to the victim, but by an unknown caller reporting a statement by the caller's child. Holmes v. State, 2004 Tex. App. LEXIS 10661 (Tex. App. Dallas Nov. 30 2004).

46. Trial court did not err in admitting defendant's girlfiend's out-of-court statement to a police officer as a prior inconsistent statement where the officer testified that the girlfriend had told him that she had not seen defendant for the few days surrounding the offense but at trial, she testified that he had been with her at the time of the robbery. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22 2004).

47. During the punishment phase of a criminal prosecution for possession of a controlled substance with intent to deliver or manufacture, the trial court did not err by allowing testimony from a witness about an alleged plot by defendant to kill police officers, and where defendant denied the existence of any such plan, the State was permitted to impeach defendant by using a rebuttal witness to testify to his prior oral inconsistent statement. Revill

v. State, 2004 Tex. App. LEXIS 5654 (Tex. App. Tyler June 23 2004).

48. Tex. R. Evid. 613(a) permits impeachment by a prior inconsistent statement provided that the witness has not already "unequivocally admitted" the inconsistencies between the prior statement and his trial testimony; therefore, a habeas corpus petitioner, who was convicted of capital murder, was not denied effective assistance of counsel by his counsel's failure to object to the State's use of a tape-recorded conversation, which was used to demonstrate inconsistencies between the petitioner's trial testimony and his prior statements to law enforcement officials. Morrow v. Dretke, 99 Fed. Appx. 505, 2004 U.S. App. LEXIS 10009 (5th Cir. Tex. 2004), writ of certiorari denied by 543 U.S. 944, 125 S. Ct. 359, 160 L. Ed. 2d 257, 2004 U.S. LEXIS 6989, 73 U.S.L.W. 3246 (2004).

49. In a criminal appeal, the court would not review defendant's argument that a witness was called by the State solely for the purpose of impeachment; defendant's objection at trial, that the proper foundation for impeachment was not laid under Tex. R. Evid. 613(a), did not comport with his argument on appeal. Medina v. State, 2004 Tex. App. LEXIS 3717 (Tex. App. Houston 14th Dist. Apr. 29 2004).

Criminal Law & Procedure : Jury Instructions : Curative Instructions

50. In a driving while intoxicated case, defendant did not preserve for review under Tex. R. App. P. 33.1(a) a claim of improper bolstering of a witness in violation of Tex. R. Evid. 613(c)because the trial court admonished the prosecutor in response to defense counsel's objection, defendant did not request an instruction to disregard, and such an instruction would have cured any error. Pruitt v. State, 2005 Tex. App. LEXIS 3314 (Tex. App. Tyler Apr. 29 2005).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

51. Prior statements of two of the State's witnesses were not prior inconsistent statements within the meaning of Tex. R. Evid. 613(a) but rather were used merely to refresh the witnesses' memories. Defendant was not entitled to a limiting instruction. Cantu v. State, 2012 Tex. App. LEXIS 1639, 2012 WL 664939 (Tex. App. Corpus Christi Mar. 1 2012).

52. Although the trial court erred by denying a limiting instruction because the witnesses' prior statements did not fall within any hearsay exception and so were admissible for impeachment purposes only, the error was harmless. Absent from the inconsistent statements, the record contained other evidence from which the jury could have inferred that defendant did not act in self-defense, and the trial court's charge instructed the jury that a witness's prior inconsistent statement could only be considered for impeachment purposes to asses the witness's credibility. Arnold v. State, 2008 Tex. App. LEXIS 9768 (Tex. App. Waco Dec. 31 2008).

53. In an assault on a public servant case, after defendant blamed a correctional officer for a bump on her head, the trial court did not abuse its discretion by admitting a trooper's testimony regarding defendant's initial arrest, including a high-speed pursuit and the fact that she was placed on the ground because (1) it was contradictory to statements made by defendant; (2) it showed a bias against law enforcement officials because it illustrated a pattern of false accusations; and (3) it was prefaced with a specific limiting instruction that the evidence was being offered solely for passing upon defendant's credibility. Long v. State, 2007 Tex. App. LEXIS 2250 (Tex. App. Eastland Mar. 22 2007).

54. Because defendant did not point to evidence in the record showing that counsel's failure to object to not laying a proper predicate for impeachment evidence under Tex. R. Evid. 613(a) and failure to request a limiting instruction regarding all the impeachment testimony of two officers were not part of a legitimate trial strategy, including not bringing further attention to prior statements regarding defendant's hitting the victim, he did not rebut the

presumption that counsel acted reasonably. Therefore, defendant's ineffective assistance of counsel claim failed because he failed to show that counsel's performance was deficient. Watkins v. State, 2005 Tex. App. LEXIS 6188 (Tex. App. Fort Worth Aug. 4 2005).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Registration

55. Trial court did not abuse its discretion in excluding testimony that a police officer did not return a witness's call in order to impeach testimony that the department was willing to work with sex offenders and do whatever it took to get them registered, because the officer admitted that once or twice she did not return the witness's calls. Kelley v. State, 429 S.W.3d 865, 2014 Tex. App. LEXIS 4458, 2014 WL 1632253 (Tex. App. Houston 14th Dist. Apr. 24 2014).

Criminal Law & Procedure : Appeals : Procedures : Briefs

56. Because defendant did not object in the trial court to the exclusion of the victim's prior inconsistent statements based on Tex. R. Evid. 613, he did not preserve the error for appellate review; he also failed to provide any argument or authority concerning his constitutional claims regarding the point, and therefore the issue was inadequately briefed. Billodeau v. State, 2007 Tex. App. LEXIS 4462 (Tex. App. Houston 1st Dist. June 7 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

57. In a driving while intoxicated case, defendant did not preserve for review under Tex. R. App. P. 33.1(a) a claim of improper bolstering of a witness in violation of Tex. R. Evid. 613(c)because the trial court admonished the prosecutor in response to defense counsel's objection, defendant did not request an instruction to disregard, and such an instruction would have cured any error. Pruitt v. State, 2005 Tex. App. LEXIS 3314 (Tex. App. Tyler Apr. 29 2005).

58. Because the trial court sustained both of defendant's Tex. R. Evid. 613(a) objections, nothing was preserved for review under Tex. R. App. P. 33.1(a). Defendant received the relief he requested--a limiting instruction--on his first objection to the testimony and requested no relief after the trial court sustained his running objection. Coleman v. State, 2005 Tex. App. LEXIS 2855 (Tex. App. Houston 14th Dist. Apr. 14 2005).

59. Defendant argued that the trial court improperly restricted his attempts to impeach a witness's testimony with a prior statement in which he said he saw the victim in the hallway with a shotgun just before he heard the fatal shot. The State properly responded that the witness's prior written statement was not in the record, and thus defendant had failed to preserve his complaint by making an offer of proof. Lindsey v. State, 2004 Tex. App. LEXIS 11139 (Tex. App. Waco Dec. 8 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

60. Because defendant failed to explain to the trial court that evidence was admissible as inconsistent statements, he failed to preserve error regarding inconsistent statements or this rule. Pena v. State, 2014 Tex. App. LEXIS 6487 (Tex. App. Houston 14th Dist. June 17 2014).

61. Defendant failed to preserve for appellate review his claim that the trial court abused its discretion by excluding the victim's diary because defense counsel failed to make any suggestion that the diary was admissible as impeachment evidence under Tex. R. Evid. 613, as a general assertion that the diary was not hearsay was insufficient to make the trial court aware of a Rule 613 argument. Fletcher v. State, 2012 Tex. App. LEXIS 5429,

2012 WL 2783298 (Tex. App. Texarkana July 10 2012).

62. Defendant's contention that the trial court erred by limiting the scope of cross-examination of the child victim and refusing to admit into evidence two affidavits signed by the victim was not preserved for appellate review because defendant failed to make either a formal bill of exceptions or request permission to make an informal offer of proof and therefore the court had no idea what the victim would have testified to and whether she would have denied making the statements in the affidavits. Duke v. State, 365 S.W.3d 722, 2012 Tex. App. LEXIS 2376, 2012 WL 1005069 (Tex. App. Texarkana Mar. 27 2012).

63. During defendant's murder trial, he objected to a police officer's videotaped interview with a witness on Confrontation Clause grounds; on appeal, he claimed the trial court violated Tex. R. Evid. 613 by admitting the recording; because the objection at trial did not comport with the complaint on appeal, the error was not preserved for review under Tex. R. App. P. 33. Brandon v. State, 2007 Tex. App. LEXIS 8903 (Tex. App. Houston 1st Dist. Nov. 8 2007).

64. Because defendant did not object in the trial court to the exclusion of the victim's prior inconsistent statements based on Tex. R. Evid. 613, he did not preserve the error for appellate review; he also failed to provide any argument or authority concerning his constitutional claims regarding the point, and therefore the issue was inadequately briefed. Billodeau v. State, 2007 Tex. App. LEXIS 4462 (Tex. App. Houston 1st Dist. June 7 2007).

65. Court properly denied the defense the opportunity to question the complaining witness regarding a possible motive for her claims of sexual abuse where defendant had not argued that he was relying on Tex. R. Evid. 613(b) as a basis for eliciting testimony from the complainant that her sister had made allegations of sexual abuse and that, as a result of those allegations, the sisters went to live with their father. Melchor v. State, 2006 Tex. App. LEXIS 2958 (Tex. App. Houston 1st Dist. Apr. 13 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

66. In a child sexual assault case, a defendant failed to preserve for review his contention that interruption of his cross-examination of the victim regarding another "young person" with whom she had been involved violated his right to confrontation under U.S. Const. amend. VI and Tex. R. Evid. 613. Nor did he make an offer of proof or obtain a ruling from the trial court on his objection. Watson v. State, 2012 Tex. App. LEXIS 4202, 2012 WL 1871626 (Tex. App. Waco May 23 2012).

67. Where a hearsay statement under Tex. R. Evid. 802 was admitted for impeachment under Tex. R. Evid. 613, the reviewing court did not address defendant's arguments that it was error under Tex. R. Evid. 403 to allow the State to impeach its own witness and that the error was compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds and did not request a limiting instruction. Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

68. Where a hearsay statement under Tex. R. Evid. 802 was admitted for impeachment under Tex. R. Evid. 613, it was not error under Tex. R. Evid. 403 to allow the State to impeach its own witness and the error was not compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds and did not request a limiting instruction. Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Jury Instructions

69. Where a hearsay statement under Tex. R. Evid. 802 was admitted for impeachment under Tex. R. Evid. 613, the reviewing court did not address defendant's arguments that it was error under Tex. R. Evid. 403 to allow the State to impeach its own witness and that the error was compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds and did not request a limiting instruction. Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

70. Where a hearsay statement under Tex. R. Evid. 802 was admitted for impeachment under Tex. R. Evid. 613, it was not error under Tex. R. Evid. 403 to allow the State to impeach its own witness and the error was not compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds and did not request a limiting instruction. Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

71. Defendant's contention that the trial court erred by limiting the scope of cross-examination of the child victim and refusing to admit into evidence two affidavits signed by the victim was not preserved for appellate review because defendant failed to make either a formal bill of exceptions or request permission to make an informal offer of proof and therefore the court had no idea what the victim would have testified to and whether she would have denied making the statements in the affidavits. Duke v. State, 365 S.W.3d 722, 2012 Tex. App. LEXIS 2376, 2012 WL 1005069 (Tex. App. Texarkana Mar. 27 2012).

72. In a trial for aggravated sexual assault of a child, defendant's right to confront his accuser was not violated by preventing defendant from cross-examining a witness, the complainant's older sister, about a similar outcry she made years before her outcry against defendant. To the extent defendant suggested on appeal that he intended to use the excluded evidence in an attempt to establish that the mother coached her children to say defendant had sexually molested them, a purpose that arguably could have been permissible under Tex. R. Evid. 613(b) to establish motive or bias, defendant's argument did not comport with the objection at trial and accordingly was waived under Tex. R. App. P. 33.1(a). Palmer v. State, 2010 Tex. App. LEXIS 3156 (Tex. App. Houston 1st Dist. Apr. 29 2010).

73. In a case alleging aggravated assault with a deadly weapon, a challenge based on Tex. R. Evid. 613 was not heard on appeal because this issue was not raised before the trial court. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

74. In a trial for aggravated sexual assault of a child, defendant preserved error under Tex. R. App. P. 33.1 regarding the admission of a videotaped interview of complainant because defense counsel objected at trial to the State's proffer of the videotape as a prior consistent statement. Tovar v. State, 221 S.W.3d 185, 2006 Tex. App. LEXIS 6440 (Tex. App. Houston 1st Dist. 2006).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

75. In a criminal appeal, the court would not review defendant's argument that a witness was called by the State solely for the purpose of impeachment; defendant's objection at trial, that the proper foundation for impeachment was not laid under Tex. R. Evid. 613(a), did not comport with his argument on appeal. Medina v. State, 2004 Tex. App. LEXIS 3717 (Tex. App. Houston 14th Dist. Apr. 29 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

76. Trial court did not abuse its discretion by excluding a statement the child victim made to her grandmother as not inconsistent with the victim's trial testimony because it was not unreasonable for the trial court to conclude that making a "mistake" could have meant one thing to the victim during cross-examination but meant an entirely different thing when she was speaking with her grandmother. Trevino v. State, 2013 Tex. App. LEXIS 9981 (Tex. App. Austin Aug. 9 2013).

77. Trial court did not abuse its discretion by excluding the testimony of two witnesses concerning the child victim's prior sexual history because the victim's statement, when read in context, referred only to digital penetration of her vagina, and therefore neither of the witnesses' testimony would have contradicted the victim's statement about defendant's digital penetration. Gonzalez v. State, 2012 Tex. App. LEXIS 8246, 2012 WL 4497999 (Tex. App. Tyler Sept. 28 2012).

78. Trial court did not abuse its discretion by denying defendant's request to admit a forensic interviewer's testimony regarding her January 2005 interview with one of the victims under Tex. R. Evid. 613 because her testimony that the victim had stated that her brother had touched her inappropriately was not inconsistent with the victim's statements in October 2005 and at trial that defendant touched her sexually. Wagner v. State, 2009 Tex. App. LEXIS 2423 (Tex. App. Houston 14th Dist. Mar. 31 2009).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial

79. In a driving while intoxicated prosecution, a new trial should not have been granted on the basis that the State failed to disclose that at the time of trial, there was an ongoing investigation by the Texas Attorney General into a detaining officer's alleged possession and promotion of child pornography; the existence of the investigation was not impeachment evidence, absent any basis for inferring that the officer was aware of the investigation. State v. Moore, 240 S.W.3d 324, 2007 Tex. App. LEXIS 6153 (Tex. App. Austin 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

80. In a case where defendant was convicted of unauthorized use of a motor vehicle under Tex. Penal Code Ann. § 31.07(a), assuming arguendo that the trial court erred by admitting extrinsic evidence of the complainant's prior inconsistent statement under Tex. R. Evid. 613, any error in its admission was harmless because the same evidence was properly admitted when an officer testified that the complainant reported to him that defendant had taken the truck without permission on the day in question. Cration v. State, 2003 Tex. App. LEXIS 10344 (Tex. App. Houston 14th Dist. Dec. 11 2003).

81. Defendant's assignment of error, concerning his attempt to impeach an accomplice witness with a prior inconsistent statement under Tex. R. Evid. 613, was overruled because defendant did show how he was harmed when the appellate court was convinced beyond a reasonable doubt that no impeachment using the accomplice's statement would have altered the outcome of the trial, and defense counsel made no offer of proof detailing the questions he wanted to ask or the specific inconsistent statements he wanted to use for impeachment pursuant to Tex. R. Evid. 103 and Tex. R. App. P. 33.2. Ferguson v. State, 2002 Tex. App. LEXIS 9005 (Tex. App. Houston 14th Dist. Dec. 19 2002).

82. Defendant's assignment of error, concerning his attempt to impeach an accomplice witness with a prior inconsistent statement under Tex. R. Evid. 613, was overruled because defendant did show how he was harmed when the appellate court was convinced beyond a reasonable doubt that no impeachment using the accomplice's statement would have altered the outcome of the trial, and defense counsel made no offer of proof detailing the questions he wanted to ask or the specific inconsistent statements he wanted to use for impeachment pursuant to Tex. R. Evid. 103 and Tex. R. App. P. 33.2. Ferguson v. State, 2002 Tex. App. LEXIS 9005 (Tex. App. Houston 14th Dist. Dec. 19 2002).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

83. Defendant's conviction for driving while intoxicated was proper. Moreover, even if the 911 call was inadmissible defendant was not harmed by its admission; there was ample evidence in the record other than the 911 call tending to show that defendant was driving while intoxicated, including the detailed testimony of the arresting officer who had observed numerous signs that defendant was intoxicated. Condarco v. State, 2013 Tex. App. LEXIS 10741 (Tex. App. Austin Aug. 27 2013).

84. Even assuming that defendant had preserved for appellate review his claim that the trial court erred by allowing the State to question him about testimony he gave in a prior trial, the error was was not of constitutional dimension. During the State's questioning, defendant explained to the jury that he misunderstood a question asked during his previous testimony and that he had not intended to lie under oath when he answered it; on re-direct examination, defendant again explained that he had not intended to lie under oath but that he had simply misunderstood the question; in light of the evidence explaining his prior incorrect answer, the error, if any, of allowing the State to impeach defendant's credibility had but a slight effect, and was therefore harmless. Garcia v. State, 2010 Tex. App. LEXIS 6738, 2010 WL 3279386 (Tex. App. Corpus Christi Aug. 19 2010).

85. In a domestic violence case under Tex. Penal Code Ann. § 22.01, defendant should have been permitted to introduce testimony from a witness that the complainant said that the assault was an accident, in order to impeach the complainant's out-of-court accusations; however, the error in excluding that evidence was harmless under Tex. R. App. P. 44 because the excluded testimony was repetitious of the version of the incident testified to by defendant and defendant's parent, and it was inconsistent with the physical evidence. Sohail v. State, 264 S.W.3d 251, 2008 Tex. App. LEXIS 1236 (Tex. App. Houston 1st Dist. 2008).

Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Ineffective Assistance

86. Detective's testimony regarding the inmate's cousin's original statement was not admissible as substantive evidence, but was admissible as non-hearsay offered as extrinsic evidence for impeachment purposes; however, there was no prejudice sufficient to meet Strickland because there was not a reasonable probability that a limiting instruction would have changed the outcome of the case. There was ample evidence of the inmate's guilt as she repeatedly changed her story and offered inconsistent explanations of how the victim's injuries transpired, the victim's injuries did not appear to be a result of an accident and could not have been caused by a bump on the table, and there was evidence that the inmate was the only adult present in the apartment when the injury occurred. Bridges v. Thaler, 419 Fed. Appx. 511, 2011 U.S. App. LEXIS 5973 (5th Cir. Tex. Mar. 23 2011).

Evidence : Demonstrative Evidence : Recordings

87. At defendant's trial for kidnapping and murder, the trial court did not abuse its discretion by excluding a video-recorded witness statement. Because no attempt was made to introduce any inconsistent statement from the video recording, defendant failed to lay the proper predicate to admit the statement into evidence under Tex. R. Evid. 613. Gamez v. State, 2012 Tex. App. LEXIS 6774, 2012 WL 3329200 (Tex. App. San Antonio Aug. 15 2012).

Evidence : Demonstrative Evidence : Visual Formats

88. In a trial for aggravated sexual assault of a child, defendant preserved error under Tex. R. App. P. 33.1 regarding the admission of a videotaped interview of complainant because defense counsel objected at trial to the State's proffer of the videotape as a prior consistent statement. Tovar v. State, 221 S.W.3d 185, 2006 Tex. App. LEXIS 6440 (Tex. App. Houston 1st Dist. 2006).

Evidence : Documentary Evidence : Completeness

89. There was no error under Tex. R. Evid. 613 when the trial court admitted the transcript of a witness's grand jury testimony under the rule of optional completeness, Tex. R. Evid. 107, even though the witness unequivocally admitted to making the prior inconsistent statements raised by defendant during cross-examination. The witness's illiteracy necessitated that both attorneys read the prior testimony aloud to the witness, which could have caused confusion for the jury concerning the substance of the prior testimony. Green v. State, 2009 Tex. App. LEXIS 651, 2009 WL 223366 (Tex. App. Tyler Jan. 30 2009).

Evidence : Hearsay : Credibility of Declarants : General Overview

90. Defendant tried to admit a statement by the complainant, who did not testify during defendant's trial for assult, to impeach the complainant's credibility; however, defendant did not specifiy under what rule he sought to have the statement admitted. The trial court determined that defendant was seeking to have the entire testimony admitted, but that statements attributed to a third party were inadmissible, making the entire document inadmissible. Oveal v. State, 164 S.W.3d 735, 2005 Tex. App. LEXIS 3517 (Tex. App. Houston 14th Dist. 2005), writ of certiorari denied by 126 S. Ct. 1917, 164 L. Ed. 2d 671, 2006 U.S. LEXIS 3612, 74 U.S.L.W. 3617 (U.S. 2006).

Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence

91. Modification of a divorce decree concerning the father's parental rights and duties was proper pursuant to Tex. R. Evid. 613(a) where the father's due process rights were not violated when the district court refused to permit the father to impeach the mother because the father did not lay a proper predicate to impeach the mother with the alleged prior inconsistent testimony. In re Z.A.T., 193 S.W.3d 197, 2006 Tex. App. LEXIS 2783 (Tex. App. Waco 2006).

Evidence : Hearsay : Exceptions : General Overview

92. In an aggravated robbery case, although a foundation was lacking for admission of an accomplice's statement as a prior inconsistent statement under this rule or as an exception to the hearsay rule under Tex. R. Evid. 803, its admission into evidence did not constitute reversible error because a detective had already testified in detail regarding the contents of the statement. Romero v. State, 2004 Tex. App. LEXIS 2999 (Tex. App. Eastland Apr. 1 2004).

Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials

93. Where a videotape was allowed into evidence for the purposes of impeachment only and was redacted to show only those portions of the interview that contradicted the victim's trial testimony, and both defendants were allowed to cross examine defendant when she testified at trial, there was no confrontation clause violation. Moreno v. State, 2005 Tex. App. LEXIS 4091 (Tex. App. Corpus Christi May 26 2005).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

94. In a case involving sexual assault of a child, a trial court did not err by excluding a police officer's testimony about what the victim told her father; even if the outcry exception exempted the statement the victim made to her father, there was an additional level of hearsay since the testimony at trial was from a police officer; the evidence could not have been used for impeachment under Tex. R. Evid. 613(a) unless defendant first confronted the victim and her father with the alleged inconsistent statements and afforded them an opportunity to admit or deny the statements. Carter v. State, 2008 Tex. App. LEXIS 5394 (Tex. App. Dallas July 22 2008).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview

95. During defendant's murder trial, he objected to a police officer's videotaped interview with a witness on Confrontation Clause grounds; on appeal, he claimed the trial court violated Tex. R. Evid. 613 by admitting the recording; because the objection at trial did not comport with the complaint on appeal, the error was not preserved for review under Tex. R. App. P. 33. Brandon v. State, 2007 Tex. App. LEXIS 8903 (Tex. App. Houston 1st Dist. Nov. 8 2007).

96. Trial court did not abuse its discretion in requiring defendant to first establish a prior inconsistent statement for purposes of Tex. R. Evid. 613(a) before attempting to introduce audio taped statements of the victim in an attempt to impeach the victim; defendant failed to cite any authority to support the claim that audio recordings of a witness prior to trial could be used to impeach a different witness at trial. Rincon v. State, 2006 Tex. App. LEXIS 2758 (Tex. App. San Antonio Apr. 5 2006).

97. When the State has statements and prior sworn testimony of a sequence of events, even in light of its suspicion that the witness might testify differently, it may still assume that the witness will testify truthfully and that prior sworn testimony was also truthful, and the State is then entitled to determine the final content of the witness's testimony, and if necessary, to impeach such a witness with previous testimony and statements made by that witness to police. Parson v. State, 193 S.W.3d 116, 2006 Tex. App. LEXIS 1901 (Tex. App. Texarkana 2006).

98. Court rejected defendant's contention that the State committed error by pursuing questioning of defendant's wife, the victim, concerning her prior statements, after she was advised of her Fifth Amendment rights; the wife did not invoke that right, it was not shown in the record that the State's sole motivation in calling the wife was for impeachment, and error was not shown. Parson v. State, 193 S.W.3d 116, 2006 Tex. App. LEXIS 1901 (Tex. App. Texarkana 2006).

99. Trial court properly denied the admission of a statement claimed to be a prior inconsistent statement of a witness under Tex. R. Evid. 613(a) because defendant had questioned the witness about prior statements she gave to police, and she acknowledged that she made the statements. Because she admitted making the statements, extrinsic evidence of the statements was not admissible. Batteas v. State, 2006 Tex. App. LEXIS 1333 (Tex. App. Fort Worth Feb. 16 2006).

100. Trial court properly exluded testimony concerning a prior demeanor of a witness in defendant's first trial that ended in a mistrial because the plain language of Tex. R. Evid. 613(a) allows the presentation of a prior inconsistent statement, whether oral or written, and the witness's prior demeanor was not a prior statement. Batteas v. State, 2006 Tex. App. LEXIS 1333 (Tex. App. Fort Worth Feb. 16 2006).

101. Testimony by a physician of what the child victim said was admissible under Tex. R. Evid. 613, and although prior consistent statements were generally not admissible unless they fell under Tex. R. Evid. 801(e)(1)(B), the physician's testimony fell within that exception because it was consistent with the child's testimony and was offered to rebut an implied charge of recent fabrication or improper influence or motive; furthermore, any error in the admission of the evidence was harmless under Tex. R. App. P. 44.2(b) because the child testified to the abuse and other witnesses testified about the child's change in behavior. Patterson v. State, 2005 Tex. App. LEXIS 5260 (Tex. App. Austin July 8 2005).

102. Because the trial court sustained both of defendant's Tex. R. Evid. 613(a) objections, nothing was preserved for review under Tex. R. App. P. 33.1(a). Defendant received the relief he requested--a limiting instruction--on his first objection to the testimony and requested no relief after the trial court sustained his running objection. Coleman v. State, 2005 Tex. App. LEXIS 2855 (Tex. App. Houston 14th Dist. Apr. 14 2005).

103. Trial court's decision to exclude videotaped statements by the complainant was proper because the complainant unequivocally admitted that her prior accusations were false. Extrinsic evidence of her prior inconsistent statement was thus inadmissible. McMillin v. State, 2005 Tex. App. LEXIS 438 (Tex. App. Austin Jan. 21 2005).

104. Trial court did not err in admitting defendant's girlfiend's out-of-court statement to a police officer as a prior inconsistent statement where the officer testified that the girlfriend had told him that she had not seen defendant for the few days surrounding the offense but at trial, she testified that he had been with her at the time of the robbery. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22 2004).

105. In defendant's sexual assault case, a witness's testimony regarding defendant's statement to him was properly admitted where it was clearly not hearsay and thus its admission, even though erroneously described by the trial judge as occurring under Tex. R. Evid 613, was proper under Tex. R. Evid. 801(e)(2)(A) and did not violate defendant's constitutional rights. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

106. In an aggravated robbery case, although a foundation was lacking for admission of an accomplice's statement as a prior inconsistent statement under this rule or as an exception to the hearsay rule under Tex. R. Evid. 803, its admission into evidence did not constitute reversible error because a detective had already testified in detail regarding the contents of the statement. Romero v. State, 2004 Tex. App. LEXIS 2999 (Tex. App. Eastland Apr. 1 2004).

107. Tex. R. Evid. 613(a) prohibits extrinsic evidence of an inconsistent statement unless denied by a witness. Ferguson v. State, 97 S.W.3d 293, 2003 Tex. App. LEXIS 148 (Tex. App. Houston 14th Dist. 2003).

108. Defendant's assignment of error, concerning his attempt to impeach an accomplice witness with a prior inconsistent statement under Tex. R. Evid. 613, was overruled because defendant did show how he was harmed when the appellate court was convinced beyond a reasonable doubt that no impeachment using the accomplice's statement would have altered the outcome of the trial, and defense counsel made no offer of proof detailing the questions he wanted to ask or the specific inconsistent statements he wanted to use for impeachment pursuant to Tex. R. Evid. 103 and Tex. R. App. P. 33.2. Ferguson v. State, 2002 Tex. App. LEXIS 9005 (Tex. App. Houston 14th Dist. Dec. 19 2002).

109. Defendant's assignment of error, concerning his attempt to impeach an accomplice witness with a prior inconsistent statement under Tex. R. Evid. 613, was overruled because defendant did show how he was harmed when the appellate court was convinced beyond a reasonable doubt that no impeachment using the accomplice's statement would have altered the outcome of the trial, and defense counsel made no offer of proof detailing the questions he wanted to ask or the specific inconsistent statements he wanted to use for impeachment pursuant to Tex. R. Evid. 103 and Tex. R. App. P. 33.2. Ferguson v. State, 2002 Tex. App. LEXIS 9005 (Tex. App. Houston 14th Dist. Dec. 19 2002).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements

110. Defendant was entitled to a new trial for the murder of her stepfather because of new evidence, specifically, information from defendant's former boyfriend about her outcry 30 years earlier regarding sexual abuse by the stepfather; the outcry evidence rebutted the State's claim of recent fabrication. Carsner v. State, 415 S.W.3d 507, 2013 Tex. App. LEXIS 12563, 2013 WL 5561653 (Tex. App. El Paso Oct. 9 2013).

111. For purposes of Tex. R. Evid. 613(c), a bolstering objection is appropriately made to a prior consistent statement introduced after the witness's in-court trial testimony. West v. State, 2008 Tex. App. LEXIS 5354 (Tex. App. Austin July 18 2008).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Inconsistent Statements

112. Record supported the trial court's conclusion that the victim's prior statements were not admissible under this rule because it could have reasonably determined that defendant offered the victim's testimony for the primary purpose of eliciting her recorded conversation with the officer, which was otherwise inadmissible hearsay. Mury v. State, 2013 Tex. App. LEXIS 12662, 2013 WL 5856337 (Tex. App. Austin Oct. 11 2013).

113. Although the trial court erred by denying a limiting instruction because the witnesses' prior statements did not fall within any hearsay exception and so were admissible for impeachment purposes only, the error was harmless. Absent from the inconsistent statements, the record contained other evidence from which the jury could have inferred that defendant did not act in self-defense, and the trial court's charge instructed the jury that a witness's prior inconsistent statement could only be considered for impeachment purposes to asses the witness's credibility. Arnold v. State, 2008 Tex. App. LEXIS 9768 (Tex. App. Waco Dec. 31 2008).

114. In defendant's drug case, the court did not err by admitting a videotape of a witness's interrogation by police because it was introduced to "rebut the witness's claims that the police threatened and coerced her into falsely stating that defendant was at the parking lot in order to conduct the drug deal." Kennedy v. State, 2008 Tex. App. LEXIS 3424 (Tex. App. Fort Worth May 8 2008).

115. In a child sexual abuse case, defendant could not question the investigating officer about prior inconsistent statements that the victim allegedly had made to the officer who initially took her statement and to a caseworker; this multiple hearsay was not admissible under Tex. R. Evid. 805 because even if the victim's statements had been admissible under the prior inconsistent statement rule, which would have passed the first level of hearsay, defendant offered no explanation of how the contents of a report by the officer who initially took the victim's statement or the investigating officer's testimony based on that report fell within any hearsay exception. Segura v. State, 2008 Tex. App. LEXIS 1303 (Tex. App. Fort Worth Feb. 21 2008).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

116. Trial court did not err by admitting the witness's testimony that defendant urged her to say that the victim assaulted her so that defendant could assert the affirmative defense of defense of a third person because the statements were made by defendant and offered against him. Thus, they constituted an admission of a party opponent and did not implicate the prior inconsistent statement rule. Stairhime v. State, 439 S.W.3d 499, 2014 Tex. App. LEXIS 7905 (Tex. App. Houston 1st Dist. July 22 2014).

117. In defendant's sexual assault case, a witness's testimony regarding defendant's statement to him was properly admitted where it was clearly not hearsay and thus its admission, even though erroneously described by the trial judge as occurring under Tex. R. Evid 613, was proper under Tex. R. Evid. 801(e)(2)(A) and did not violate defendant's constitutional rights. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

Evidence : Hearsay : Hearsay Within Hearsay

118. In a child sexual abuse case, defendant could not question the investigating officer about prior inconsistent statements that the victim allegedly had made to the officer who initially took her statement and to a caseworker;

this multiple hearsay was not admissible under Tex. R. Evid. 805 because even if the victim's statements had been admissible under the prior inconsistent statement rule, which would have passed the first level of hearsay, defendant offered no explanation of how the contents of a report by the officer who initially took the victim's statement or the investigating officer's testimony based on that report fell within any hearsay exception. Segura v. State, 2008 Tex. App. LEXIS 1303 (Tex. App. Fort Worth Feb. 21 2008).

119. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court did not err in refusing to admit the complainant's handwritten statement as impeachment evidence where the document was double hearsay not within any exception. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

Evidence : Hearsay : Rule Components

120. In an aggravated sexual assault of a child case, a court did not err in excluding a hearsay conversation with social services for impeachment purposes where defendant did not present the victim with or give her the opportunity to explain the statement on the tape. Further, the tape itself did not contain a statement by the victim or even a statement by someone who had herself talked to the victim, but by an unknown caller reporting a statement by the caller's child. Holmes v. State, 2004 Tex. App. LEXIS 10661 (Tex. App. Dallas Nov. 30 2004).

121. IIn a murder case, a court properly allowed the State to impeach a witness with his prior inconsistent grand jury statement where he was shown a copy of his grand jury testimony and he acknowledged that he had previously testified that, during a telephone conversation, defendant told him that "they are here." The State used the brother's prior statements for the limited purpose of attacking his credibility because of his inconsistent statements, and not to prove the truth of the matter asserted. Bolton v. State, 2004 Tex. App. LEXIS 5584 (Tex. App. Houston 1st Dist. June 24 2004).

Evidence : Hearsay : Rule Components : Truth of Matter Asserted

122. Any error by the court in considering an officer's testimony concerning statements made to him by a witness was harmless because, assuming that the trial court considered the complained-of testimony for the truth of the matter asserted, there was overwhelming evidence of defendant's guilt that was properly introduced. Three eyewitnesses identified defendant as the gunman, and a vehicle matching the description of the vehicle driven by the gunman was found in close proximity of defendant's residence. In re E.S., 2009 Tex. App. LEXIS 6690, 2009 WL 2623352 (Tex. App. Corpus Christi Aug. 26 2009).

123. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive and the trial court had to admonish her during her testimony for offering explanations rather than answers. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

124. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and

defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

125. In a driving while intoxicated case, defendant did not preserve for review under Tex. R. App. P. 33.1(a) a claim of improper bolstering of a witness in violation of Tex. R. Evid. 613(c)because the trial court admonished the prosecutor in response to defense counsel's objection, defendant did not request an instruction to disregard, and such an instruction would have cured any error. Pruitt v. State, 2005 Tex. App. LEXIS 3314 (Tex. App. Tyler Apr. 29 2005).

126. Trial court did not err in admitting defendant's girlfiend's out-of-court statement to a police officer as a prior inconsistent statement where the officer testified that the girlfriend had told him that she had not seen defendant for the few days surrounding the offense but at trial, she testified that he had been with her at the time of the robbery. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22 2004).

127. In a case where defendant was convicted of unauthorized use of a motor vehicle under Tex. Penal Code Ann. § 31.07(a), assuming arguendo that the trial court erred by admitting extrinsic evidence of the complainant's prior inconsistent statement under Tex. R. Evid. 613, any error in its admission was harmless because the same evidence was properly admitted when an officer testified that the complainant reported to him that defendant had taken the truck without permission on the day in question. Cration v. State, 2003 Tex. App. LEXIS 10344 (Tex. App. Houston 14th Dist. Dec. 11 2003).

Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : General Overview

128. In defendant's sexual assault case, a court did not err by explaining to the State how to present rebuttal evidence where the comments about the admissibility of the State's rebuttal witness were made outside the presence of the jury, and they did not indicate that any assistance was given to the State; the judge was presented with an admissibility question under Tex. R. Evid. 613 and made a decision which left defendant with the choice of returning to the stand to preclude the testimony of the State's witness or remaining silent and relying on his original statement. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

129. Even if the appellate court assumed that defendant's reliance on Tex. R. Evid. 613(b) was sufficient to preserve his constitutional claim, because he did not object on the basis of USCS Const. Amend. 6 at trial, he did not preserve the issue for review under Tex. R. App. P. 33.1, but the evidence in question did not demonstrate that the complainant had a bias or motive to testify against him. Rice v. State, 2005 Tex. App. LEXIS 10033 (Tex. App. Austin Dec. 1 2005).

130. Because the trial court sustained both of defendant's Tex. R. Evid. 613(a) objections, nothing was preserved for review under Tex. R. App. P. 33.1(a). Defendant received the relief he requested--a limiting instruction--on his first objection to the testimony and requested no relief after the trial court sustained his running objection. Coleman v. State, 2005 Tex. App. LEXIS 2855 (Tex. App. Houston 14th Dist. Apr. 14 2005).

131. Defendant argued that the trial court improperly restricted his attempts to impeach a witness's testimony with a prior statement in which he said he saw the victim in the hallway with a shotgun just before he heard the fatal shot. The State properly responded that the witness's prior written statement was not in the record, and thus

defendant had failed to preserve his complaint by making an offer of proof. Lindsey v. State, 2004 Tex. App. LEXIS 11139 (Tex. App. Waco Dec. 8 2004).

132. In a criminal trial, where defendant claimed that the trial court erred in excluding a handwritten note allegedly written by an assistant district attorney, defendant failed to preserve his argument that the note was admissible as impeachment evidence where defendant did not offer the note as evidence at trial. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

133. In a criminal appeal, the court would not review defendant's argument that a witness was called by the State solely for the purpose of impeachment; defendant's objection at trial, that the proper foundation for impeachment was not laid under Tex. R. Evid. 613(a), did not comport with his argument on appeal. Medina v. State, 2004 Tex. App. LEXIS 3717 (Tex. App. Houston 14th Dist. Apr. 29 2004).

Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof

134. In a child sexual assault case, a defendant failed to preserve for review his contention that interruption of his cross-examination of the victim regarding another "young person" with whom she had been involved violated his right to confrontation under U.S. Const. amend. VI and Tex. R. Evid. 613. Nor did he make an offer of proof or obtain a ruling from the trial court on his objection. Watson v. State, 2012 Tex. App. LEXIS 4202, 2012 WL 1871626 (Tex. App. Waco May 23 2012).

Evidence : Procedural Considerations : Rulings on Evidence

135. Where a murder victim's best friend unequivocally admitted to writing checks to herself out of a trust account set up for the victim's family during the time that the victim was missing, and defendant offered no explanation about how the physical checks would have shown more interest or bias than that to which the best friend had already admitted, the trial court did not abuse its discretion in refusing to admit into evidence a defense exhibit consisting of several of the checks. White v. State, 2006 Tex. App. LEXIS 2224 (Tex. App. Houston 1st Dist. Mar. 23 2006).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

136. Appellate court found that it would not be outside the zone of reasonable disagreement for the trial court to resolve the Tex. R. Evid. 403 analysis in favor of allowing the State to elicit the prior inconsistent statements, because the witness was one of the two alleged victims in the case, the issue of the witness's credibility was crucial to both the State and defendant, the State was surprised by the witness's unfavorable testimony, and the elicited favorable testimony, although limited, would support a finding that the State did not call the witness for the primary purpose of eliciting otherwise inadmissible evidence. Polston v. State, 2011 Tex. App. LEXIS 6126, 2011 WL 3435389 (Tex. App. Austin Aug. 5 2011).

137. Trial court did not abuse its discretion by excluding text messages and voicemail messages offered for impeachment of the child victim's mother because the probative value of the evidence was minimal, as it did not directly refute any element of the charged offense, which was established by the victim's testimony, and none of the messages concerned the sexual abuse. The evidence was also cumulative of other evidence admitted at trial, as defense counsel cross-examined the victim's mother regarding her marriage to defendant, and the testimony of the victim and her brother corroborated the turbulent nature of the mother's marriage to defendant. Smith v. State, 340 S.W.3d 41, 2011 Tex. App. LEXIS 1739 (Tex. App. Houston 1st Dist. Mar. 10 2011).

138. Pursuant to Tex. R. Evid. 613 and the balancing test in Tex. R. Evid. 403, the State had proper reasons to call defendant's father as a witness in a murder case and to point out that the account he gave to the police and to another witness were diametrically opposed. Westbrook v. State, 2011 Tex. App. LEXIS 1443, 2011 WL 686396 (Tex. App. Tyler Feb. 28 2011).

139. In a case in which defendant was convicted of theft from a person, there was no merit in defendant's claim that the trial court did not require the State to follow the proper procedure in admitting his accomplice's prior inconsistent statement for impeachment purposes where the trial court did not permit the predicate requirements of Tex. R. Evid. 613(a) to be violated because extrinsic evidence of the accomplice's statement to a detective was not offered before the jury, and, furthermore, the trial court took the extra step of instructing the jury that it could only consider the prior statements for impeachment purposes. The trial court did not abuse its discretion in overruling defendant's objection under Tex. R. Evid. 403 because the accomplice's version of the events was critical to defendant's prosecution, because the probative value of impeaching the accomplice's potentially untrue testimony was not substantially outweighed by the potential misuse by the jury of his previous statement to the detective, and because the trial court expressly determined that there was no evidence that the State anticipated that the accomplice's trial testimony would be inconsistent with his statements to the detective or that the State called the accomplice as a witness in bad faith. Cervantes v. State, 2010 Tex. App. LEXIS 1149, 2010 WL 548503 (Tex. App. Eastland Feb. 18 2010).

140. In defendant's felony murder case, the court properly excluded evidence that the trooper used the word "psychotic" in his accident report to impeach his trial testimony because the trooper could not properly testify as an expert or lay witness that defendant was psychotic, and therefore, the label had no probative value as primary evidence. Additionally, there was a strong tendency of the evidence to suggest decision on an improper basis, the tendency of the evidence to confuse or distract the jury from the main issues, and the tendency of the evidence to be given undue weight by the jury. Fisher-Riza v. State, 2009 Tex. App. LEXIS 9769, 2009 WL 4358622 (Tex. App. Houston 1st Dist. Dec. 3 2009).

141. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive and the trial court had to admonish her during her testimony for offering explanations rather than answers. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

142. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

143. Trial court's exclusion of evidence regarding a child sexual assault victim's relationships with two different boys and her actions and comments involving two cousins did not deprive defendant of his constitutional right to a fair trial where the trial court could have determined, based on the chronology of the events, that they did not explain the State's medical evidence regarding the time of the penetration of the victim's hymen, and, although the trial court excluded the equivocal testimony of the victim's mother about the victim's veracity, the victim's aunt was allowed to testify that she had a bad reputation for being untruthful, and the victim herself admitted lying to

defendant, her father, about her report card. Accordingly, the trial court reasonably could have concluded that the matters had, at best, marginal relevance to the victim's alleged motive to testify falsely against defendant, that they would have unduly harassed the victim and confused the issues, and that the danger of unfair prejudice from the evidence would have outweighed its probative value. Pogue v. State, 2005 Tex. App. LEXIS 7819 (Tex. App. Fort Worth Sept. 22 2005).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

144. During defendant's trial for indecency with a child, the trial court abused its discretion in preventing defendant from cross-examining the complainant about her previous false allegations of sexual assault. The evidence was relevant under Tex. R. Evid. 613(b) to show the complainant's bias against defendant and her possible motive to testify falsely against him. Hammer v. State, 296 S.W.3d 555, 2009 Tex. Crim. App. LEXIS 513 (Tex. Crim. App. 2009).

145. During the punishment phase of a criminal prosecution for possession of a controlled substance with intent to deliver or manufacture, the trial court did not err by allowing testimony from a witness about an alleged plot by defendant to kill police officers, and where defendant denied the existence of any such plan, the State was permitted to impeach defendant by using a rebuttal witness to testify to his prior oral inconsistent statement. Revill v. State, 2004 Tex. App. LEXIS 5654 (Tex. App. Tyler June 23 2004).

Evidence : Relevance : Relevant Evidence

146. During a capital murder trial, the State admitted an unauthenticated letter, written by a third party and sent to defendant at the county jail for the purpose of impeaching defendant's trial court testimony that she never had sex with another woman; the letter was not relevant to anything at issue, was not proper impeachment, and the trial court erred in admitting the letter. Abdygapparova v. State, 243 S.W.3d 191, 2007 Tex. App. LEXIS 8205 (Tex. App. San Antonio 2007).

147. Trial court erred by admitting into evidence a letter that was written to her while she was in jail because the letter was not relevant to defendant's capital murder trial, as the letter, sent to defendant by a man, living in another state and whom she had never met, outlining his sexual desires and fantasies with defendant and other women, did not tend to make anything as to defendant, much less her sexual orientation or whether she committed sexual assault, any more or less probable; in addition, because the statement was not defendant's own statement, the trial court erred by admitting it under Tex. R. Evid. 613. Abdygapparova v. State, 2007 Tex. App. LEXIS 5806 (Tex. App. San Antonio July 25 2007).

148. Where the State had already established on direct examination that the complainant was serving a deferred adjudication probation during one point in her relationship with defendant, any further inquiry would not have made the existence of any fact of consequence to the determination of defendant's alleged offense more or less probable than it was without the evidence, and such testimony was not relevant to any bias, motive, or interest to help the State, making it an impermissible method of impeachment; accordingly, the trial court was within its discretion to limit the question posed by defendant's counsel on cross-examination. Crook v. State, 2005 Tex. App. LEXIS 3485 (Tex. App. Dallas May 6 2005).

Evidence : Relevance : Sex Offenses : General Overview

149. During defendant's trial for aggravated sexual assault and solicitation of a minor, the trial court did not err in refusing to admit evidence of a conversation showing that the complainant had knowledge of sexual matters before these alleged events occurred because the evidence was hearsay and subject to exclusion under Tex. R. Evid.

608, 609 and 613. Landers v. State, 2011 Tex. App. LEXIS 2982, 2011 WL 1496154 (Tex. App. Amarillo Apr. 19 2011).

Evidence : Relevance : Sex Offenses : Rape Shield Laws

150. Trial court's exclusion of evidence regarding a child sexual assault victim's relationships with two different boys and her actions and comments involving two cousins did not deprive defendant of his constitutional right to a fair trial where the trial court could have determined, based on the chronology of the events, that they did not explain the State's medical evidence regarding the time of the penetration of the victim's hymen, and, although the trial court excluded the equivocal testimony of the victim's mother about the victim's veracity, the victim's aunt was allowed to testify that she had a bad reputation for being untruthful, and the victim herself admitted lying to defendant, her father, about her report card. Accordingly, the trial court reasonably could have concluded that the matters had, at best, marginal relevance to the victim's alleged motive to testify falsely against defendant, that they would have unduly harassed the victim and confused the issues, and that the danger of unfair prejudice from the evidence would have outweighed its probative value. Pogue v. State, 2005 Tex. App. LEXIS 7819 (Tex. App. Fort Worth Sept. 22 2005).

Evidence : Testimony : Credibility : General Overview

151. Trial court did not abuse its discretion in requiring defendant to first establish a prior inconsistent statement for purposes of Tex. R. Evid. 613(a) before attempting to introduce audio taped statements of the victim in an attempt to impeach the victim; defendant failed to cite any authority to support the claim that audio recordings of a witness prior to trial could be used to impeach a different witness at trial. Rincon v. State, 2006 Tex. App. LEXIS 2758 (Tex. App. San Antonio Apr. 5 2006).

152. Modification of a divorce decree concerning the father's parental rights and duties was proper pursuant to Tex. R. Evid. 613(a) where the father's due process rights were not violated when the district court refused to permit the father to impeach the mother because the father did not lay a proper predicate to impeach the mother with the alleged prior inconsistent testimony. In re Z.A.T., 193 S.W.3d 197, 2006 Tex. App. LEXIS 2783 (Tex. App. Waco 2006).

153. Where a murder victim's best friend unequivocally admitted to writing checks to herself out of a trust account set up for the victim's family during the time that the victim was missing, and defendant offered no explanation about how the physical checks would have shown more interest or bias than that to which the best friend had already admitted, the trial court did not abuse its discretion in refusing to admit into evidence a defense exhibit consisting of several of the checks. White v. State, 2006 Tex. App. LEXIS 2224 (Tex. App. Houston 1st Dist. Mar. 23 2006).

154. Where the prosecutor provided defendant's daughter with a copy of her prior statement and asked her if she had made the statement about the victim's disappearance and only after she denied any recollection of the entire statement did the prosecutor call an investigator to prove its content; therefore, the prosecution laid the proper predicate under Tex. R. Evid. 613 for the admission of the statement. Voisin v. State, 2005 Tex. App. LEXIS 5104 (Tex. App. Tyler June 30 2005).

155. Writ of mandamus was granted because ordering the expert witness to give deposition testimony regarding his litigation-related income for the years 2002, 2003 and 2004, and the percentage of the total income that was litigation-related would not materially benefit the dispute resolution process in the case in view of the information already available to the parties and the trial court concerning the expert, Tex. R. Civ. P. 192.4; the expert had disclosed his hourly rate, his time spent working on the case, and the fact he testified almost exclusively for defendants, and since the information sought to be protected would be disclosed before any appeal would be

available, relators lacked an adequate legal remedy. In re Weir, 166 S.W.3d 861, 2005 Tex. App. LEXIS 4689 (Tex. App. Beaumont 2005).

156. Trial court did not err under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) in refusing to allow defendant to offer certain testimony at the punishment phase; the testimony was not proper impeachment testimony under Tex. R. Evid. 613(a) because the victim was not questioned about a particular statement during the guilt/innocence phase and did not testify during the punishment phase, and furthermore, the testimony was not relevant because evidence that the victim might have been abused by someone other than defendant was not helpful to the jury in determining an appropriate sentence for defendant. Alvarez v. State, 2005 Tex. App. LEXIS 4075 (Tex. App. Dallas May 26 2005).

157. Trial court did not err in excluding two exhibits, and although defendant claimed that the exclusion of the exhibits impaired defendant's right to cross-examine the victim, defendant did not explain how this was true in that the trial court allowed defendant to fully question the victim regarding the exhibits; defendant cited no portions of the exhibits that referred to any facts in the case, supported a conspiratorial fabrication regarding the victim's allegations, or could not have been brought to the jury's attention through questions addressed to the victim, and defendant's predicate for introducing the exhibits failed to establish either that they had any relevance to issues in the case or were otherwise admissible, for example, under Tex. R. Evid. 613. Ford v. State, 2005 Tex. App. LEXIS 4046 (Tex. App. Houston 14th Dist. May 24 2005).

158. Witness told counsel that defendant did not consent to a search, but the witness later said at trial that the witness did not remember; the trial court could have found that the witness's lack of memory was real so there was nothing to impeach under Tex. R. Evid. 613(a), and the trial court could have concluded, under Tex. R. Evid. 403, that the danger of misuse of counsel's testimony for substantive purposes outweighed the impeachment value of the testimony, and even if the trial court erred in excluding counsel's testimony, such error did not affect defendant's substantial rights under Tex. R. App. P. 44.2(b) because defendant's questioning raised the possibility of the witness's credibility and the testimony would have simply bolstered evidence already in front of the jury. Sanchez v. State, 2005 Tex. App. LEXIS 2176 (Tex. App. Austin Mar. 24 2005).

159. Defendant did not obtain an adverse ruling on an objection to using alleged bad acts to impeach, and thus defendant failed to preserve error; even had error been preserved, the trial court did not abuse its discretion by allowing the questions on the grounds that it was an attempt to show the witness's bias towards defendant pursuant to Tex. R. Evid. 613(b). Martinez v. State, 2005 Tex. App. LEXIS 1822 (Tex. App. Austin Mar. 10 2005).

160. In an assault case, a trial court's refusal to replay a videotape regarding a statement made by a victim was not an abuse of discretion because the requirements of Tex. R. Evid. 613 were not satisfied; because the officer on the stand at the time did not make any statement on the tape regarding witnesses to the assault, there was no prior inconsistent statement. Mumphrey v. State, 155 S.W.3d 651, 2005 Tex. App. LEXIS 370 (Tex. App. Texarkana 2005).

161. Defendant preserved for review, under Tex. R. App. P. 33.1(a), an evidentiary issue under Tex. R. Evid. 613(b) because defendant's counsel raised the issue of bias before the trial court. Means v. State, 2004 Tex. App. LEXIS 11728 (Tex. App. Houston 14th Dist. Dec. 30 2004).

162. Trial court did not err in preventing defendant's cross-examination of a State's witness, which defendant claimed was proper under Tex. R. Evid. 613(b); cross-examination of a child protective services report was properly prevented because nothing ever showed that the allegations therein were untrue, and facts did not support the contention that the allegations could have related to bias or motive by the witness to testify untruthfully against

defendant. Means v. State, 2004 Tex. App. LEXIS 11728 (Tex. App. Houston 14th Dist. Dec. 30 2004).

163. In a manufacturing defect case brought against a tire company, the court rejected the tire company's argument that plaintiffs were improperly permitted to elicit testimony about other incidents and lawsuits from several defense witnesses; under the well-established law governing cross-examination, an expert witness may be cross-examined regarding the number of times he has testified in lawsuits, payments for such testifying, and related questions. The complained-of questioning was clearly for impeachment purposes to show interest or bias in the litigation; under Tex. R. Evid. 613(b), such questioning was permissible. Cooper Tire & Rubber Co. v. Mendez, 155 S.W.3d 382, 2004 Tex. App. LEXIS 9112 (Tex. App. El Paso 2004), *rev'd on other grounds*, 204 S.W.3d 797, 2006 Tex. LEXIS 555 (Tex. 2006).

164. In a criminal trial, where defendant claimed that the trial court erred in excluding a handwritten note allegedly written by an assistant district attorney, defendant failed to preserve his argument that the note was admissible as impeachment evidence where defendant did not offer the note as evidence at trial. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

165. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court did not err in refusing to admit the complainant's handwritten statement as impeachment evidence where the document was double hearsay not within any exception. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

166. No specific connection existed between the witness' testimony and the animus alleged that disclosed an actual bias or motive; accordingly, the trial court did not err in refusing to admit the testimony. Whitmill v. State, 2004 Tex. App. LEXIS 4610 (Tex. App. Beaumont May 19 2004).

167. Tex. R. Evid. 613(a) permits impeachment by a prior inconsistent statement provided that the witness has not already "unequivocally admitted" the inconsistencies between the prior statement and his trial testimony; therefore, a habeas corpus petitioner, who was convicted of capital murder, was not denied effective assistance of counsel by his counsel's failure to object to the State's use of a tape-recorded conversation, which was used to demonstrate inconsistencies between the petitioner's trial testimony and his prior statements to law enforcement officials. Morrow v. Dretke, 99 Fed. Appx. 505, 2004 U.S. App. LEXIS 10009 (5th Cir. Tex. 2004), writ of certiorari denied by 543 U.S. 944, 125 S. Ct. 359, 160 L. Ed. 2d 257, 2004 U.S. LEXIS 6989, 73 U.S.L.W. 3246 (2004).

168. In a case where defendant was convicted of unauthorized use of a motor vehicle under Tex. Penal Code Ann. § 31.07(a), assuming arguendo that the trial court erred by admitting extrinsic evidence of the complainant's prior inconsistent statement under Tex. R. Evid. 613, any error in its admission was harmless because the same evidence was properly admitted when an officer testified that the complainant reported to him that defendant had taken the truck without permission on the day in question. Cration v. State, 2003 Tex. App. LEXIS 10344 (Tex. App. Houston 14th Dist. Dec. 11 2003).

169. Tex. R. Evid. 613(a) prohibits extrinsic evidence of an inconsistent statement unless denied by a witness. Ferguson v. State, 97 S.W.3d 293, 2003 Tex. App. LEXIS 148 (Tex. App. Houston 14th Dist. 2003).

Evidence : Testimony : Credibility : Impeachment : General Overview

170. Defendant's conviction for driving while intoxicated was proper. Moreover, even if the 911 call was inadmissible defendant was not harmed by its admission; there was ample evidence in the record other than the

911 call tending to show that defendant was driving while intoxicated, including the detailed testimony of the arresting officer who had observed numerous signs that defendant was intoxicated. Condarco v. State, 2013 Tex. App. LEXIS 10741 (Tex. App. Austin Aug. 27 2013).

171. Defendant failed to preserve for appellate review his claim that the trial court abused its discretion by excluding the victim's diary because defense counsel failed to make any suggestion that the diary was admissible as impeachment evidence under Tex. R. Evid. 613, as a general assertion that the diary was not hearsay was insufficient to make the trial court aware of a Rule 613 argument. Fletcher v. State, 2012 Tex. App. LEXIS 5429, 2012 WL 2783298 (Tex. App. Texarkana July 10 2012).

172. In defendant's felony murder case, the court properly excluded evidence that the trooper used the word "psychotic" in his accident report to impeach his trial testimony because the trooper could not properly testify as an expert or lay witness that defendant was psychotic, and therefore, the label had no probative value as primary evidence. Additionally, there was a strong tendency of the evidence to suggest decision on an improper basis, the tendency of the evidence to confuse or distract the jury from the main issues, and the tendency of the evidence to be given undue weight by the jury. Fisher-Riza v. State, 2009 Tex. App. LEXIS 9769, 2009 WL 4358622 (Tex. App. Houston 1st Dist. Dec. 3 2009).

173. No due process or confrontation violation was shown when defendant was not allowed to question a witness regarding his citizenship status, because defendant did not show and did not allege that the witness had been convicted of entering the United States unlawfully, the assertion that the witness's immigration status gave him a motive to testify falsely was not raised below and was not supported by the record, and counsel did not take the witness on voir dire or otherwise make a record as to whether the witness was or was not in the country lawfully. Shrader v. State, 2009 Tex. App. LEXIS 8777, 2009 WL 3806147 (Tex. App. Austin Nov. 10 2009).

174. If the court construed defendant's complaint as arguing that the admission of the victim's medical records improperly bolstered her in-court testimony, the record did not indicate the State introduced the medical records for the sole purpose of enhancing the victim's credibility or the credibility of other evidence, and thus the trial court did not abuse its discretion in overruling defendant's bolstering objection. West v. State, 2008 Tex. App. LEXIS 8599 (Tex. App. Austin Nov. 14 2008).

175. Defendant contended at trial that the victim voluntarily performed oral sex on him, that there was no penetration, and that the victim lied about having been assaulted; because appellant attacked the victim's credibility, the trial court did not err in determining that her prior consistent statement to a nurse was admissible, for purposes of Tex. R. Evid. 613(c), 801(e)(1)(B). West v. State, 2008 Tex. App. LEXIS 8599 (Tex. App. Austin Nov. 14 2008).

176. Tex. R. Evid. 613(c) objection only applies to a witness's prior statement, not to in-court testimony, and a bolstering objection is appropriately made to a prior consistent statement introduced after the witness's in-court testimony; in this case, defendant complained that the victim's in-court testimony bolstered her earlier admitted hearing statements in a physical examination, but the court found no abuse of discretion in the admission of the testimony. West v. State, 2008 Tex. App. LEXIS 8599 (Tex. App. Austin Nov. 14 2008).

177. In a murder trial, the State was permitted to question the credibility of a witness based on the inconsistency between the testimony of that witness and the defendant; Tex. R. Evid. 613(a) did not prohibit such an inquiry. Cantu v. State, 2006 Tex. App. LEXIS 8738 (Tex. App. San Antonio Oct. 11 2006).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : General Overview

178. Appellant sought to introduce a disciplinary report to show an officer's lack of credibility, but appellant did not argue that the officer was untrustworthy based on bias, for purposes of Tex. R. Evid. 613(b), and Tex. R. Evid. 608(b) expressly prohibits the introduction of specific instances of conduct to attack a witness's credibility; given that appellant tried to impeach the officer's credibility with the report, the trial court did not err in limiting the cross-examination, and even though the trial court limited cross-examination because the report was not a public record, the court could affirm if the ruling was correct on any applicable theory. Baldez v. State, 386 S.W.3d 324, 2012 Tex. App. LEXIS 5466, 2012 WL 2834043 (Tex. App. San Antonio July 11 2012).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Opinion & Reputation

179. While petitioner state inmate argued his counsel was ineffective for not presenting additional witnesses to show the 9-year-old victim of his sexual assault was motivated to lie in retaliation for the inmate having disciplined the victim, nothing showed such testimony would have been admissible since, consistent with Tex. R. Evid. 608(b) and a pre-trial order, defense counsel and defense witnesses were precluded from mentioning, directly or indirectly, any specific instance of conduct by the victim without first approaching the bench; under Tex. R. Evid. 613(b), specific instances of conduct could be used to establish that a witness had specific bias, self-interest, or motive for testifying, and under Tex. R. Evid. 404(b), specific acts of misconduct could also be used to establish a person's motive for performing an act, such as making a false allegation, but where credibility was concerned, a witness's general character for truthfulness could be shown only through reputation or opinion testimony under Rule 608(a). Mendez v. Quarterman, 625 F. Supp. 2d 415, 2009 U.S. Dist. LEXIS 47543 (S.D. Tex. June 4 2009).

180. In a case involving assault against a public servant, the State did not err in recalling a deputy to the stand because defendant made no bolstering objection under Tex. R. Evid. 608(a) or Tex. R. Evid. 613(c); moreover, there was no violation of Tex. Code Crim. Proc. Ann. art. 36.02. At any rate, the deputy's testimony on recall did not duplicate that which was previously given. Reaves v. State, 2008 Tex. App. LEXIS 6866 (Tex. App. Corpus Christi Aug. 28 2008).

Evidence : Testimony : Credibility : Impeachment : Bad Character for Truthfulness : Specific Instances

181. Where defendant was convicted of DWI, he was not harmed by the trial court's refusal to allow him to impeach an officer with a specific act of dishonesty. Evidence that the officer intentionally withheld testimony about his failing to report a weapon discharge would not have proved that the officer lied about defendant's reckless driving; defendant did not explain how the excluded evidence would show that the officer had a motive or bias to falsely testify that defendant drove erratically. Tollett v. State, 422 S.W.3d 886, 2014 Tex. App. LEXIS 1216, 2014 WL 462275 (Tex. App. Houston 14th Dist. Feb. 4 2014).

182. Where defendant was convicted of indecency with a child and aggravated sexual assault of a child, he failed to prove that the trial court erred by ruling that a question concerning the witness' prior false allegation of abuse was improper under Tex. R. Evid. 608(b); the record failed to establish what the child victim alleged that was false or that her allegation would demonstrate bias for purposes of showing admissibility under Tex. R. Evid. 613. Pierson v. State, 398 S.W.3d 406, 2013 Tex. App. LEXIS 4868 (Tex. App. Texarkana Apr. 19 2013).

183. While petitioner state inmate argued his counsel was ineffective for not presenting additional witnesses to show the 9-year-old victim of his sexual assault was motivated to lie in retaliation for the inmate having disciplined the victim, nothing showed such testimony would have been admissible since, consistent with Tex. R. Evid. 608(b) and a pre trial order, defense counsel and defense witnesses were precluded from mentioning, directly or indirectly, any specific instance of conduct by the victim without first approaching the bench; under Tex. R. Evid. 613(b), specific instances of conduct could be used to establish that a witness had specific bias, self-interest, or motive for testifying, and under Tex. R. Evid. 404(b), specific acts of misconduct could also be used to establish a person's motive for performing an act, such as making a false allegation, but where credibility was concerned, a witness's

general character for truthfulness could be shown only through reputation or opinion testimony under Rule 608(a). Mendez v. Quarterman, 625 F. Supp. 2d 415, 2009 U.S. Dist. LEXIS 47543 (S.D. Tex. June 4 2009).

Evidence : Testimony : Credibility : Impeachment : Bias, Motive & Prejudice

184. At defendant's trial for aggravated robbery, he was not harmed by the trial court's exclusion of evidence of the victim's prior drug use or debt owed to his accomplice; as defendant did not explain how the victim's drug use translated into ill will, bias, or animus toward defendant, it was improper impeachment evidence. Richardson v. State, 2014 Tex. App. LEXIS 1723, 2014 WL 645801 (Tex. App. Eastland Feb. 14 2014).

185. Where defendant was convicted of DWI, he was not harmed by the trial court's refusal to allow him to impeach an officer with a specific act of dishonesty. Evidence that the officer intentionally withheld testimony about his failing to report a weapon discharge would not have proved that the officer lied about defendant's reckless driving; defendant did not explain how the excluded evidence would show that the officer had a motive or bias to falsely testify that defendant drove erratically. Tollett v. State, 422 S.W.3d 886, 2014 Tex. App. LEXIS 1216, 2014 WL 462275 (Tex. App. Houston 14th Dist. Feb. 4 2014).

186. Because information that revealed that the bias or interest of the State's medical expert was before the jury and the excluded information would not have added significantly to the inmate's ability to impeach his credibility, the trial court's ruling did not unduly restrict the inmate's cross-examination of the State's expert. In re Smith, 422 S.W.3d 802, 2014 Tex. App. LEXIS 667, 2014 WL 333374 (Tex. App. Beaumont Jan. 23 2014).

187. Because information that revealed that the bias or interest of the State's medical expert was before the jury and the excluded information would not have added significantly to the inmate's ability to impeach his credibility, the trial court's ruling did not unduly restrict the inmate's cross-examination of the State's expert. In re Smith, 422 S.W.3d 802, 2014 Tex. App. LEXIS 667, 2014 WL 333374 (Tex. App. Beaumont Jan. 23 2014).

188. In an armed robbery case, the trial court properly refused to recall the store manager for cross-examination because his testimony that he was mad when defendant hit him, but did not hold a grudge, was not inconsistent with his testimony during the bill of exception that he chased after defendant in spite of store policy because he was mad; further, evidence of any bias was already before the jury. Ramos v. State, 2014 Tex. App. LEXIS 113, 2014 WL 50812 (Tex. App. Houston 1st Dist. Jan. 7 2014).

189. Trial court did not abuse its discretion in refusing to allow witnesses to be impeached by proof: (1) showing a bias or interest on the part of some other witness or information source, and (2) about which the witness had no personal knowledge. Estate of Muniz v. Ford Motor Co., 2013 Tex. App. LEXIS 7158 (Tex. App. San Antonio June 12 2013).

190. At defendant's trial for assault on a family member, Tex. R. Evid. 613(b) permitted the admission of proof showing bias on the part of defendant's wife because they were involved in divorce proceedings in which she had a pecuniary interest; the trial court did not err in refusing to permit further cross-examination about the divorce. Baker v. State, 2013 Tex. App. LEXIS 6084 (Tex. App. Houston 1st Dist. May 16 2013).

191. Where defendant was convicted of indecency with a child and aggravated sexual assault of a child, he failed to prove that the trial court erred by ruling that a question concerning the witness' prior false allegation of abuse was improper under Tex. R. Evid. 608(b); the record failed to establish what the child victim alleged that was false or that her allegation would demonstrate bias for purposes of showing admissibility under Tex. R. Evid. 613. Pierson v. State, 398 S.W.3d 406, 2013 Tex. App. LEXIS 4868 (Tex. App. Texarkana Apr. 19 2013).

192. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because the trial court did not abuse its discretion in excluding the evidence of the victim's mother's purported prior false accusations of sexual abuse, Tex. R. Evid. 613(b). Contrary to defendant's assertion, the proffered testimony did not show a bias against him or a motive to falsely accuse him; rather, it constituted an impermissible attack on the mother's credibility using specific instances of conduct. Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

193. Pursuant to Tex. R. Evid. 608(b) and 613, the trial court did not err in limiting defendant's cross-examination of the witness because defendant did not make a connection between defendant's pending felony case and status as a probationer that would have prompted the witness to falsely identify defendant in a photographic line-up. Oliva v. State, 2011 Tex. App. LEXIS 8940, 2011 WL 5428965 (Tex. App. Houston 1st Dist. Nov. 10 2011).

194. Court did not abuse its discretion in excluding the evidence of bias, because the grandmother was not a witness at trial and Tex. R. Evid. 613(b) did not allow defendant to question the mother about the grandmother's actions in an attempt to show the grandmother's bias, interest or motive, and to the extent defendant argued the evidence of the mother's abuse when she was five years old was relevant to show bias or motive, he did not establish either ground through mother's testimony outside the jury's presence. Sturgeon v. State, 2011 Tex. App. LEXIS 8467, 2011 WL 5042087 (Tex. App. Dallas Oct. 25 2011).

195. Although appellant juvenile claimed that his Sixth Amendment rights were violated, as well as Tex. R. Evid. 613(b), when the trial court refused to allow appellant to question the victim about her sexual orientation, the issue was not preserved for review; appellant failed to make a record as to the questions he wanted to ask the victim and what her answers would have been or what appellant expected them to be. In re O.O.A., 358 S.W.3d 352, 2011 Tex. App. LEXIS 7416 (Tex. App. Houston 14th Dist. Sept. 13 2011).

196. During defendant's trial for murder, the court did not err under Tex. R. Evid. 613(b) in limiting defendant's cross-examination of a witness because the line of cross-examination sought by defendant did not demonstrate any bias or prejudice by the witness against defendant; the testimony elicited concerned a debt owed not to defendant, but to a co-defendant who had already pled guilty to murder. Requeno-portillo v. State, 2011 Tex. App. LEXIS 6898, 2011 WL 3820747 (Tex. App. Houston 1st Dist. Aug. 25 2011).

197. No violation of Tex. R. Evid. 613(b), 608(b) occurred where defense counsel was not prevented from impeaching a witness by use of extrinsic evidence to show bias or interest and counsel was allowed to cross-examine the witness concerning whether she entered into a plea agreement in exchange for her testimony. Reyna v. State, 2011 Tex. App. LEXIS 6062, 2011 WL 3366383 (Tex. App. Corpus Christi Aug. 4 2011).

198. Defendant was not harmed by exclusion of certain evidence concerning a State witness, Tex. R. Evid. 613(b), as she had pursued opportunity to discredit the witness. Mitchell v. State, 2011 Tex. App. LEXIS 5682, 2011 WL 3047474 (Tex. App. Amarillo July 25 2011).

199. Trial court did not abuse its discretion by excluding text messages and voicemail messages offered for impeachment of the child victim's mother because the probative value of the evidence was minimal, as it did not directly refute any element of the charged offense, which was established by the victim's testimony, and none of the messages concerned the sexual abuse. The evidence was also cumulative of other evidence admitted at trial, as defense counsel cross-examined the victim's mother regarding her marriage to defendant, and the testimony of the victim and her brother corroborated the turbulent nature of the mother's marriage to defendant. Smith v. State, 340 S.W.3d 41, 2011 Tex. App. LEXIS 1739 (Tex. App. Houston 1st Dist. Mar. 10 2011).

200. In a health care liability action, while appellants claimed that the first physician was not qualified to render a reliable expert opinion under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(C) because he served as a member of the Medical Board in the surgeon's termination request and was thus biased, any bias went to first physician's credibility under Tex. R. Evid. 613(b) and did not disqualify him from rendering an expert opinion. Beaumont Spine Pain & Sports Med. Clinic, Inc. v. Swan, 2011 Tex. App. LEXIS 768, 2011 WL 379168 (Tex. App. Beaumont Feb. 3 2011).

201. In defendant's trial for four counts of sexual assault of a child, the trial court did not err by refusing to admit evidence of specific instances of conduct under Tex. R. Evid. 608(b) to show that the victim's father had also been indicted for aggravated sexual assault of a child. Defendant failed to show how the offense made more probable the existence of any motive, bias, or interest on the part of the witness for purposes of admissibility under Tex. R. Evid. 613(b); in fact, the evidence posed a risk of confusing or misleading the jury. Harris v. State, 2010 Tex. App. LEXIS 9999 (Tex. App. Eastland Dec. 16 2010).

202. Defendant failed to preserve for review his claim that a child sexual assault victim had bias or motive to lie under Tex. R. Evid. 613(b) because he did not introduce at a hearing that occurred outside the presence of the jury the victim's prior outcry statement that she had made against another man. Littlepage v. State, 2010 Tex. App. LEXIS 9968 (Tex. App. Fort Worth Dec. 16 2010).

203. Trial court did not err by admitting evidence of defendant's prior dismissed theft charge and his mother's involvement in obtaining that dismissal because the State did not offer the testimony as extraneous offense evidence to impeach defendant's testimony under Tex. R. Evid. 608(b), but rather to show the mother's own bias in favor defendant under Tex. R. Evid. 613. Mares v. State, 2010 Tex. App. LEXIS 6844, 2010 WL 3294244 (Tex. App. Houston 1st Dist. Aug. 19 2010).

204. Trial court did not err by refusing to permit defendant to impeach the deputy based on pending criminal charges that had been filed against the deputy because defendant failed to establish a causal connection between the pending charges and the deputy's testimony at trial. At trial, defendant argued, because the deputy's presentence investigation report had not been completed, the deputy had a motive to be biased toward the State; the argument was the equivalent of the mere existence of federal charges and failed to establish a nexus or causal connection indicating bias. Gilmore v. State, 323 S.W.3d 250, 2010 Tex. App. LEXIS 6571 (Tex. App. Texarkana Aug. 12 2010).

205. Defendant failed to preserve for review his assertion that the trial court erred by not allowing evidence that the complainant had alleged, and testified about, virtually identical sexual abuse committed by her previous step-father, because defendant's arguments on appeal did not comport with his arguments at trial, and the alleged error did not have a substantial and injurious effect or influence in determining the jury's verdict; defendant testified regarding his defensive theory that his disputes with the complainant's mother influenced the complainant to fabricate the allegations against him. Bullock v. State, 2009 Tex. App. LEXIS 8872, 2009 WL 3838861 (Tex. App. Dallas Nov. 18 2009).

206. Court was unable to say that the possible bias and motive of the victim, defendant's common law wife, as a result of an ongoing custody dispute was clear to the jury in defendant's assault trial or that defense counsel was afforded an opportunity for a thorough cross-examination of the victim, such that the trial court erred in limiting the cross-examination, for purposes of U.S. Const. amend. VI. Ryan v. State, 2009 Tex. App. LEXIS 5412 (Tex. App. San Antonio July 15 2009).

207. Defendant's assault case was based on the testimony of the victim, his common law wife, and the officer to whom the victim related the events and precluding defendant from showing the bias and motive of the only witness

linking him to the offense hampered his defense; the excluded cross-examination was not cumulative, there was no other witness to the events to corroborate the victim's testimony, and defense counsel was not otherwise afforded an opportunity for a thorough and effective cross-examination, and because the victim's motive to lie or exaggerate in order to gain sole custody of their children was a critical issue for the defense, the court could not find that the trial court's error did not contribute to defendant's conviction, for purposes of Tex. R. App. P. 44.2(a). Ryan v. State, 2009 Tex. App. LEXIS 5412 (Tex. App. San Antonio July 15 2009).

208. In an intoxication manslaughter case, the trial court did not err by prohibiting cross-examination of an officer on the scene regarding the internal investigation against him because other witnesses identified defendant as the driver, two other officers testified that they smelled alcohol on defendant's breath, and other evidence introduced at trial showed that defendant was intoxicated that night. Mole v. State, 2009 Tex. App. LEXIS 2838, 2009 WL 1099433 (Tex. App. Fort Worth Apr. 23 2009).

209. During defendant's trial for indecency with a child, the trial court abused its discretion in preventing defendant from cross-examining the complainant about her previous false allegations of sexual assault. The evidence was relevant under Tex. R. Evid. 613(b) to show the complainant's bias against defendant and her possible motive to testify falsely against him. Hammer v. State, 296 S.W.3d 555, 2009 Tex. Crim. App. LEXIS 513 (Tex. Crim. App. 2009).

210. In a trial for sexual assault of a child, defendant was entitled under Tex. R. Evid. 608, 613(b) to impeach the complainant by presenting evidence that the complainant threatened to falsely accuse neighbors of molestation, even though the threats occurred after the charged offense. The complainant testified to becoming angry when defendant took back a gift, and, the very next day, the complainant accused defendant of molestation. Billodeau v. State, 277 S.W.3d 34, 2009 Tex. Crim. App. LEXIS 232 (Tex. Crim. App. 2009).

211. Defendant did not comply with Tex. R. Evid. 613 and thus it was not error for the trial court to have excluded the evidence as per the rule; defendant first attempted to elicit the evidence through witnesses other than the victim before the victim even testified. Hudson v. State, 2007 Tex. App. LEXIS 2965 (Tex. App. Houston 14th Dist. Apr. 19 2007).

212. In an indecency with a child case, a court properly restricted defendant's cross-examination of the victim's mother regarding benefits from a crime victims' compensation fund intended to show that she sought financial gain as a consequence of the incident because the proffered evidence was only marginally probative on the issue of bias or motive, and the mother was effectively impeached because she was incarcerated at the time of trial serving a sentence for forgery and had given custody of her children to a relative. Hoover v. State, 2007 Tex. App. LEXIS 1549 (Tex. App. Austin Feb. 27 2007).

213. Where defendant complained of the trial court's exclusion of evidence that would show bais on the part of the detective in his murder case, the record showed that defendant cross-examined the detective extensively about the areas covered by the excluded testimony; defendant did not point to a bias or motive on the detective's part to lie on the stand; therefore, the excluded evidence did not limit his defense. White v. State, 2006 Tex. App. LEXIS 10117 (Tex. App. Fort Worth Nov. 22 2006).

214. Trial court abused its discretion in ordering discovery of a nonparty expert witness's personal financial documents, and expert reports and correspondence from other unrelated cases, without first requiring some evidence of the witness's bias; although plaintiffs argued that they showed the expert's potential for bias through his denial of any bias in favor of defendants and his deposition testimony in which he admitted deriving a significant portion of his income from medical consulting work for litigation, the appellate court concluded that, at most, the expert's deposition testimony showed that he received a significant amount of income from litigation consultation

and that the suggestion that the expert had a particular bias in favor of defendants was raised by counsel's questions and argument, not by any evidence. In re Makris, 217 S.W.3d 521, 2006 Tex. App. LEXIS 8561 (Tex. App. San Antonio 2006).

215. Simple denial of bias cannot logically equate to evidence of bias under Tex. R. Evid. 613(b); if that were true, essentially all experts, except those who frankly concede a bias, would be subjected to discovery of their personal documents in a fishing expedition to search for evidence of bias. In re Makris, 217 S.W.3d 521, 2006 Tex. App. LEXIS 8561 (Tex. App. San Antonio 2006).

216. Where the defendant was charged with indecency with a child by contact and aggravated sexual assault of a child, the trial court did not violate his confrontation rights by limiting cross-examination of the child's father concerning domestic assault and a protective order; the same evidence was admitted through other witnesses; defendant had an ample opportunity to develop his defensive theory that the father was the true perpetrator. Rodriguez v. State, 2006 Tex. App. LEXIS 6933 (Tex. App. Austin Aug. 4 2006).

217. In a criminal trial for driving while intoxicated, the court did not err by refusing to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias under Tex. R. Evid. 613(b). The issues defendant sought to explore had no relevance to the defense theory that the officer tended to act hasty or jump to conclusions at the crime scene. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

218. In a criminal trial for driving while intoxicated, the court properly refused to allow defendant to cross-examine the officer with his prior employment and disciplinary record to show bias under Tex. R. Evid. 613(b). The issues defendant sought to explore had no relevance to the defense theory that the officer tended to act hastily or jump to conclusions at the crime scene. DeLeon v. State, 2006 Tex. App. LEXIS 3215 (Tex. App. Dallas Apr. 24 2006).

219. Because another crime was not related to the instant crime, and because the commission of that offense had no bearing on the plea agreement reached with one person, testimony about the the other crime was not relevant to defendant's trial, and the trial court's ruling did not violate defendant's federal confrontation rights and the trial court did not abuse its discretion when it prohibited this testimony. Gongora v. State, 2006 Tex. Crim. App. LEXIS 2531 (Tex. Crim. App. Feb. 1 2006).

220. For purposes of U.S. Const. amend. VI and Tex. R. Evid. 613(b), the trial court did not abuse its discretion in refusing to allow defendant to question a witness about another charge because the testimony established that that crime was unrelated to the instant offense and the trial court's ruling did not prevent defendant from pursuing all relevant avenues of cross-examination with the witness; an unrelated offense for which there was no evidence demonstrating the witness's involvement was not relevant. Gongora v. State, 2006 Tex. Crim. App. LEXIS 2531 (Tex. Crim. App. Feb. 1 2006).

221. Even if the trial court abused its discretion when it refused to allow defendant to cross-examine a witness regarding certain statements, defendant was not harmed by this error for purposes of Tex. R. App. P. 44.2; allowing defendant to cross-examine the witness on one point would not have exposed any further motive, bias, or interest on another person's part. Gongora v. State, 2006 Tex. Crim. App. LEXIS 2531 (Tex. Crim. App. Feb. 1 2006).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

222. At defendant's trial for aggravated robbery, he was not harmed by the trial court's exclusion of evidence of the victim's prior drug use or debt owed to his accomplice; as defendant did not explain how the victim's drug use translated into ill will, bias, or animus toward defendant, it was improper impeachment evidence. Richardson v.

State, 2014 Tex. App. LEXIS 1723, 2014 WL 645801 (Tex. App. Eastland Feb. 14 2014).

223. Trial court did not err by refusing to allow defendant to cross-examine an accomplice on whether he committed offenses and did so as a member of a gang with defendant and the co-defendant because the accomplice was not charged with the offenses and there was no evidence presented to create a nexus between the other offenses and the accomplice's testimony. Hernandez v. State, 2013 Tex. App. LEXIS 9291 (Tex. App. Waco July 25 2013).

224. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because the trial court did not abuse its discretion in excluding the evidence of the victim's mother's purported prior false accusations of sexual abuse, Tex. R. Evid. 613(b). Contrary to defendant's assertion, the proffered testimony did not show a bias against him or a motive to falsely accuse him; rather, it constituted an impermissible attack on the mother's credibility using specific instances of conduct. Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

225. Pursuant to Tex. R. Evid. 608(b) and 613, the trial court did not err in limiting defendant's cross-examination of the witness because defendant did not make a connection between defendant's pending felony case and status as a probationer that would have prompted the witness to falsely identify defendant in a photographic line-up. Oliva v. State, 2011 Tex. App. LEXIS 8940, 2011 WL 5428965 (Tex. App. Houston 1st Dist. Nov. 10 2011).

226. In defendant's trial for four counts of sexual assault of a child, the trial court did not err by refusing to admit evidence of specific instances of conduct under Tex. R. Evid. 608(b) to show that the victim's father had also been indicted for aggravated sexual assault of a child. Defendant failed to show how the offense made more probable the existence of any motive, bias, or interest on the part of the witness for purposes of admissibility under Tex. R. Evid. 613(b); in fact, the evidence posed a risk of confusing or misleading the jury. Harris v. State, 2010 Tex. App. LEXIS 9999 (Tex. App. Eastland Dec. 16 2010).

227. Trial court did not err by admitting evidence of defendant's prior dismissed theft charge and his mother's involvement in obtaining that dismissal because the State did not offer the testimony as extraneous offense evidence to impeach defendant's testimony under Tex. R. Evid. 608(b), but rather to show the mother's own bias in favor defendant under Tex. R. Evid. 613. Mares v. State, 2010 Tex. App. LEXIS 6844, 2010 WL 3294244 (Tex. App. Houston 1st Dist. Aug. 19 2010).

228. Defendant failed to preserve for review his assertion that the trial court erred by not allowing evidence that the complainant had alleged, and testified about, virtually identical sexual abuse committed by her previous step-father, because defendant's arguments on appeal did not comport with his arguments at trial, and the alleged error did not have a substantial and injurious effect or influence in determining the jury's verdict; defendant testified regarding his defensive theory that his disputes with the complainant's mother influenced the complainant to fabricate the allegations against him. Bullock v. State, 2009 Tex. App. LEXIS 8872, 2009 WL 3838861 (Tex. App. Dallas Nov. 18 2009).

229. IIn a murder case, a court properly allowed the State to impeach a witness with his prior inconsistent grand jury statement where he was shown a copy of his grand jury testimony and he acknowledged that he had previously testified that, during a telephone conversation, defendant told him that "they are here." The State used the brother's prior statements for the limited purpose of attacking his credibility because of his inconsistent statements, and not to prove the truth of the matter asserted. Bolton v. State, 2004 Tex. App. LEXIS 5584 (Tex. App. Houston 1st Dist. June 24 2004).

230. On a charge of unlawful possession of a firearm, the trial court properly did not allow defendant to impeach the State's witness by explaining that the witness testified to the same effect in an earlier trial arising from the same events and that the prior jury found that defendant did assault the witness. The testimony was consistent, did not show bias, and did not involve the witness's own prior crime. Macias v. State, 136 S.W.3d 702, 2004 Tex. App. LEXIS 4193 (Tex. App. Texarkana 2004).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

231. Trial court did not err by admitting the witness's testimony that defendant urged her to say that the victim assaulted her so that defendant could assert the affirmative defense of defense of a third person because the statements were made by defendant and offered against him. Thus, they constituted an admission of a party opponent and did not implicate the prior inconsistent statement rule. Stairhime v. State, 439 S.W.3d 499, 2014 Tex. App. LEXIS 7905 (Tex. App. Houston 1st Dist. July 22 2014).

232. There was no inconsistency between the witness's statements that she had done drugs the night of the incident and that she had not done drugs prior to trial and her alleged social media post announcing an intention to be completely sober for thirty days. Accordingly, it was not admissible as a prior inconsistent statement. Stairhime v. State, 439 S.W.3d 499, 2014 Tex. App. LEXIS 7905 (Tex. App. Houston 1st Dist. July 22 2014).

233. Defendant failed to lay the proper foundation for a prior inconsistent statement because he failed to inform the witness of the identity of the person to whom she had allegedly made the statement. Flowers v. State, 438 S.W.3d 96, 2014 Tex. App. LEXIS 5899, 2014 WL 3953988 (Tex. App. Texarkana June 3 2014).

234. Court did not abuse its discretion in admitting the witness's prior inconsistent statements coupled with the limiting instruction to the jury, because the court gave the witness several opportunities to explain herself. Trevizo v. State, 2014 Tex. App. LEXIS 652, 2014 WL 260591 (Tex. App. El Paso Jan. 22 2014).

235. Court did not abuse its discretion in admitting the witness's prior inconsistent statements coupled with the limiting instruction to the jury, because the court gave the witness several opportunities to explain herself. Trevizo v. State, 2014 Tex. App. LEXIS 652, 2014 WL 260591 (Tex. App. El Paso Jan. 22 2014).

236. Trial court did not abuse its discretion by excluding a statement the child victim made to her grandmother as not inconsistent with the victim's trial testimony because it was not unreasonable for the trial court to conclude that making a "mistake" could have meant one thing to the victim during cross-examination but meant an entirely different thing when she was speaking with her grandmother. Trevino v. State, 2013 Tex. App. LEXIS 9981 (Tex. App. Austin Aug. 9 2013).

237. For the victim's testimony in her forensic interview to be admitted as a prior inconsistent statement under Tex. R. Evid. 613(a), appellant had to establish that the victim's prior statements were inconsistent with her testimony at trial, but he failed to do so; appellant did not specifically identify parts of the interview testimony that was inconsistent with trial testimony, the proffer of inconsistencies in the interview was insufficient to establish that the statements on the tape were inconsistent with the trial testimony, and thus the trial court properly found that Rule 613 did not authorize admitting the videotape of the interview. Covarrubias v. State, 2013 Tex. App. LEXIS 1434, 2013 WL 557177 (Tex. App. El Paso Feb. 13 2013).

238. Trial court did not err under Tex. R. Evid. 613(a) in not allowing the defense to impeach an assault victim's brother with police gang information cards; nothing in the cards reflected that the brother stated he was a member of a gang in 2009, or that he had been a gang member more recently than he testified at trial. Williams v. State,

2013 Tex. App. LEXIS 839, 2013 WL 341900 (Tex. App. Dallas Jan. 30 2013).

239. Assuming without deciding that appellant preserved the issue for review, the court found his claim that a witness were not confronted with inconsistent statements to be without merit; the witness's admissions at trial concerning the prior statements were qualified and partial, and thus the trial court did not abuse its discretion in admitting his recorded statement. Garza v. State, 2012 Tex. App. LEXIS 10333 (Tex. App. Corpus Christi Dec. 13 2012).

240. Assuming without deciding that appellant preserved the issue for review, the court addressed the merits of appellant's claim that a recorded statement was not admissible because the witness did not unequivocally admit to having given a prior inconsistent statement; the court found that the witness's admissions at trial concerning his prior statements were qualified and partial, and the trial court did not abuse its discretion in admitting his recorded statement. Garza v. State, 2012 Tex. App. LEXIS 10333 (Tex. App. Corpus Christi Dec. 13 2012).

241. Court did not err when it admitted into evidence defendant's "jail book-in card" signed by defendant because the record showed that prior to the admission of the jail record into evidence, defendant was told the contents of the alleged inconsistent statement in the jail record, the person to whom it was made, and the time and place it was made. The record showed the inconsistent statement in question was being used to impeach defendant's denial that she failed to tell jail medical personnel about her seizures, and not "as primary evidence to prove guilt." Smith v. State, 2012 Tex. App. LEXIS 8848, 2012 WL 5238280 (Tex. App. Dallas Oct. 24 2012).

242. Even though the complainant's essay did have some prior consistent statements, appellant did not demonstrate that the essay was admitted for the sole purpose of bolstering the testimony of the complainant; the record supported the explanation that the essay was offered to describe how appellant became a suspect, and the trial court could have found this purpose and concluded that the essay was not offered just to enhance the credibility of the complainant, such that the decision to admit the essay was not an abuse of discretion on the trial court's part. Conteh v. State, 2012 Tex. App. LEXIS 8440, 2012 WL 4788386 (Tex. App. Houston 14th Dist. Oct. 9 2012).

243. Appellant did not say what bolstering theory was asserted at trial, and the court found the complainant's essay was not introduced as reputation evidence, such that appellant's objection did not appear to implicate Tex. R. Evid. 608(a) restrictions; the objection appeared to invoke Tex. R. Evid. 613(c), but that would not have excluded the essay either. Conteh v. State, 2012 Tex. App. LEXIS 8440, 2012 WL 4788386 (Tex. App. Houston 14th Dist. Oct. 9 2012).

244. Tex. R. Evid. 613(c) did not operate to exclude the complainant's essay, given that (1) the essay was not entirely consistent with the complainant's testimony at trial, (2) she affirmed in the essay that she had her mother's support, but at trial, she said otherwise, and (3) she disclaimed the essay statements, saying she forged new facts, and thus to the extent the essay contained any prior inconsistent statements, the bolstering objection would not apply. Conteh v. State, 2012 Tex. App. LEXIS 8440, 2012 WL 4788386 (Tex. App. Houston 14th Dist. Oct. 9 2012).

245. Trial court did not abuse its discretion by excluding the testimony of two witnesses concerning the child victim's prior sexual history because the victim's statement, when read in context, referred only to digital penetration of her vagina, and therefore neither of the witnesses' testimony would have contradicted the victim's statement about defendant's digital penetration. Gonzalez v. State, 2012 Tex. App. LEXIS 8246, 2012 WL 4497999 (Tex. App. Tyler Sept. 28 2012).

246. In a products liability case, a witness could not be impeached under Tex. R. Evid. 613(a) with an inconsistent document not prepared by him. Tidwell v. Terex Corp., 2012 Tex. App. LEXIS 7724 (Tex. App. Houston 1st Dist.

Aug. 30 2012).

247. At defendant's trial for kidnapping and murder, the trial court did not abuse its discretion by excluding a video-recorded witness statement. Because no attempt was made to introduce any inconsistent statement from the video recording, defendant failed to lay the proper predicate to admit the statement into evidence under Tex. R. Evid. 613. Gamez v. State, 2012 Tex. App. LEXIS 6774, 2012 WL 3329200 (Tex. App. San Antonio Aug. 15 2012).

248. Court did not need to consider a contention regarding application of "the rule" because there was one unmentioned ground that warranted the exclusion of a witness's testimony; appellant sought to impeach the victim's girlfriend's credibility with a prior inconsistent statement, but before extrinsic evidence of such was permissible, a witness had to be informed of the contents of the statement, to whom it was made and the time and place, and given the chance to deny or explain, under Tex. R. Evid. 613(a), and this was not satisfied here, such that the trial court did not err in excluding the attempts to impeach in this manner. Arellano v. State, 2012 Tex. App. LEXIS 6885, 2012 WL 3536763 (Tex. App. Amarillo Aug. 15 2012).

249. Although the trial court excluded the email from evidence, the error, if any, did not restrict the mother from cross-examining and impeaching the father with the inconsistent statement he made in the email, nor did the trial court prohibit the mother from offering her own testimony about the frequency of her telephone calls to the children and the limits or restrictions the father placed on those communications; the mother could not establish that the error, if any, caused the rendition of an improper judgment. In the Interest of C.B. & J., 2012 Tex. App. LEXIS 6396, 2012 WL 3139866 (Tex. App. Corpus Christi Aug. 2 2012).

250. Requirements of Tex. R. Evid. 613(a) were met, given that the victim identified the statement, was allowed to read it, and she denied or did not recall parts of the statement that incriminated appellant. Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

251. Trial court abused its discretion in admitting a statement for all purposes, for purposes of Tex. R. Evid. 613(a), but this did not equate with a harmful error finding under Tex. R. App. P. 44.2(b), as the error had a slight effect, if any, on the jury; the testimony established the same major facts as those in the statement, and thus the error was harmless. Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

252. State did not meet the predicate for admissibility as a recorded recollection because the victim did not vouch for the statement's accuracy and did not remember much of what was in the statement, plus parts were not in her handwriting, and thus a limiting instruction, advising the jury to consider the statement for testing the victim's credibility only for purposes of Tex. R. Evid. 613(a), should have been granted. Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

253. Witness made two prior inconsistent statements before trial, equivocated at trial to some extent and was somewhat inconsistent in her present recollection of past events went to the weight and credibility of her testimony, issues which, the appellate court may not re-evaluate. Taylor v. State, 2011 Tex. App. LEXIS 9943, 2011 WL 6304132 (Tex. App. Amarillo Dec. 16 2011).

254. Defendant, as the proponent of the impeachment evidence, failed to establish any casual connection or logical relationship between the State witness's 1997 charge and his testimony at trial; the trial court did not abuse its discretion by excluding testimony regarding the witness's outstanding warrant. Bonner v. State, 2011 Tex. App. LEXIS 6862, 2011 WL 3795245 (Tex. App. Fort Worth Aug. 25 2011).

255. Complainant conceded that at the time of her statement, she was uncertain as to the authenticity of the weapon, and this was not evidence showing that the weapon was a toy gun, and even if the court considered the 911 call a prior inconsistent statement, the evidence was still insufficient to show that a deadly weapon was not used; no toy guns were ever recovered, and because the record did not show affirmative evidence that a deadly weapon was not used, the trial court did not abuse its discretion in refusing to submit a charge on robbery in this aggravated robbery case. Penaloza v. State, 349 S.W.3d 709, 2011 Tex. App. LEXIS 6463 (Tex. App. Houston 14th Dist. Aug. 16 2011).

256. Appellate court found that it would not be outside the zone of reasonable disagreement for the trial court to resolve the Tex. R. Evid. 403 analysis in favor of allowing the State to elicit the prior inconsistent statements, because the witness was one of the two alleged victims in the case, the issue of the witness's credibility was crucial to both the State and defendant, the State was surprised by the witness's unfavorable testimony, and the elicited favorable testimony, although limited, would support a finding that the State did not call the witness for the primary purpose of eliciting otherwise inadmissible evidence. Polston v. State, 2011 Tex. App. LEXIS 6126, 2011 WL 3435389 (Tex. App. Austin Aug. 5 2011).

257. Recording of an interview with the victim appeared to have been introduced by the State in an attempt to impeach the victim's trial testimony under Tex. R. Evid. 613, but in general, if the only evidence of an essential fact was a prior inconsistent statement, the case failed for lack of proof; given the specificity of appellant's issue on appeal, the court did not address these issues under Tex. R. App. P. 47.1. Lamas v. State, 2011 Tex. App. LEXIS 6071, 2011 WL 3366399 (Tex. App. Corpus Christi Aug. 4 2011).

258. Even assuming counsel was deficient for failing to adequately impeach, for purposes of Tex. R. Evid. 609, 613, two witnesses, appellant did not show that counsel's alleged deficiency so compromised the proper functioning of the process. Garcia v. State, 2011 Tex. App. LEXIS 4663, 2011 WL 2463049 (Tex. App. Corpus Christi June 16 2011).

259. During defendant's trial for aggravated sexual assault and solicitation of a minor, the trial court did not err in refusing to admit evidence of a conversation showing that the complainant had knowledge of sexual matters before these alleged events occurred because the evidence was hearsay and subject to exclusion under Tex. R. Evid. 608, 609 and 613. Landers v. State, 2011 Tex. App. LEXIS 2982, 2011 WL 1496154 (Tex. App. Amarillo Apr. 19 2011).

260. In a divorce proceeding, the trial court's finding that no informal marriage existed between the parties due to the impediment of appellee husband's prior marriage was not supported by sufficient evidence. After appellee testified that he obtained a marriage license before his prior marriage, appellant wife's counsel impeached his testimony under Tex. R. Evid. 613 by presenting excerpts from his earlier deposition in which he stated that he did not obtain a license. Nguyen v. Nguyen, 355 S.W.3d 82, 2011 Tex. App. LEXIS 3221 (Tex. App. Houston 1st Dist. Feb. 24 2011).

261. Even assuming that defendant had preserved for appellate review his claim that the trial court erred by allowing the State to question him about testimony he gave in a prior trial, the error was was not of constitutional dimension. During the State's questioning, defendant explained to the jury that he misunderstood a question asked during his previous testimony and that he had not intended to lie under oath when he answered it; on re-direct examination, defendant again explained that he had not intended to lie under oath but that he had simply misunderstood the question; in light of the evidence explaining his prior incorrect answer, the error, if any, of allowing the State to impeach defendant's credibility had but a slight effect, and was therefore harmless. Garcia v. State, 2010 Tex. App. LEXIS 6738, 2010 WL 3279386 (Tex. App. Corpus Christi Aug. 19 2010).

262. Stepdaughter's records from a mental health treatment facility were not prior inconsistent statements of the stepdaughter concerning prior sexual abuse by her biological father under Tex. R. Evid. 613(a) because the records did not show that the records reflected statements by the stepdaughter, as both she and her mother gave information at intake, and it was unclear from the records who made the statements. Gonzalez v. State, 2010 Tex. App. LEXIS 5663, 2010 WL 2817243 (Tex. App. Dallas July 20 2010).

263. Court could assume without deciding that defendant was correct that a videotape was not admissible as a prior consistent statement or prior inconsistent statement, for purposes of Tex. R. Evid. 613(a), 801(e)(1)(B), even though he failed to raise the latter objection at trial and raised the former with insufficient specificity because the videotape was still admissible (1) to rebut the suggestion that the police fed the witness his answers to their questions, and (2) to show that the witness was not parroting what the police told him; defendant did not object or seek a limiting instruction under Tex. R. Evid. 105(a), such that the jury was free to consider the tape's contents for any purposes, plus the videotape was admissible to clarify what the witness actually said, for purposes of Tex. R. Evid. 107. Franks v. State, 2010 Tex. App. LEXIS 3224, 2010 WL 1730032 (Tex. App. Austin Apr. 28 2010).

264. In a case in which defendant was convicted of theft from a person, there was no merit in defendant's claim that the trial court did not require the State to follow the proper procedure in admitting his accomplice's prior inconsistent statement for impeachment purposes where the trial court did not permit the predicate requirements of Tex. R. Evid. 613(a) to be violated because extrinsic evidence of the accomplice's statement to a detective was not offered before the jury, and, furthermore, the trial court took the extra step of instructing the jury that it could only consider the prior statements for impeachment purposes. The trial court did not abuse its discretion in overruling defendant's objection under Tex. R. Evid. 403 because the accomplice's version of the events was critical to defendant's prosecution, because the probative value of impeaching the accomplice's potentially untrue testimony was not substantially outweighed by the potential misuse by the jury of his previous statement to the detective, and because the trial court expressly determined that there was no evidence that the State anticipated that the accomplice's trial testimony would be inconsistent with his statements to the detective or that the State called the accomplice as a witness in bad faith. Cervantes v. State, 2010 Tex. App. LEXIS 1149, 2010 WL 548503 (Tex. App. Eastland Feb. 18 2010).

265. There was no error in finding that a investigator's document was not a statement by defendant's son that could be used to impeach the son. Although Tex. R. Evid. 613 allowed impeachment with a prior inconsistent oral statement, defendant presented no evidence that his son had made one. Ward v. State, 2010 Tex. App. LEXIS 590, 2010 WL 337139 (Tex. App. Eastland Jan. 29 2010).

266. In defendant's assault case, the court did not err by excluding the officer's report during cross-examination of the victim because the record showed that defendant failed to lay the proper predicate for impeachment with prior inconsistent statements. Weiss v. State, 2009 Tex. App. LEXIS 9453, 2009 WL 4757379 (Tex. App. Fort Worth Dec. 10 2009).

267. Witness testimony was properly admitted because, although the complainant finally recalled telling the witness that defendant's assault caused her pain, it was not before providing a set of evasive responses; the complainant was repeatedly given the opportunity to admit having made the prior statement but chose to provide equivocal responses instead. Babb v. State, 2009 Tex. App. LEXIS 9079, 2009 WL 4062299 (Tex. App. Beaumont Nov. 25 2009).

268. Any error by the court in considering an officer's testimony concerning statements made to him by a witness was harmless because, assuming that the trial court considered the complained-of testimony for the truth of the matter asserted, there was overwhelming evidence of defendant's guilt that was properly introduced. Three eyewitnesses identified defendant as the gunman, and a vehicle matching the description of the vehicle driven by the gunman was found in close proximity of defendant's residence. In re E.S., 2009 Tex. App. LEXIS 6690, 2009

WL 2623352 (Tex. App. Corpus Christi Aug. 26 2009).

269. Although defendant argued that a written statement and grand jury testimony were admissible only under Tex. R. Evid. 613 and not under Tex. R. Evid. 803(5), the court disagreed; the witness had firsthand knowledge of the event, his statement was dated two weeks after the event, and the record supported a finding that the witness lacked a present recollection of the event at trial and his grand jury testimony was made close in time to the event, such that the trial court did not err in permitting the statement and grand jury testimony to be read into evidence under Rule 803(5), and because the statements were not offered for purposes of impeachment, the trial court did not err in failing to instruct the jury to consider the statements as such. Brown v. State, 333 S.W.3d 606, 2009 Tex. App. LEXIS 2936 (Tex. App. Dallas Apr. 30 2009).

270. Trial court did not abuse its discretion by denying defendant's request to admit a forensic interviewer's testimony regarding her January 2005 interview with one of the victims under Tex. R. Evid. 613 because her testimony that the victim had stated that her brother had touched her inappropriately was not inconsistent with the victim's statements in October 2005 and at trial that defendant touched her sexually. Wagner v. State, 2009 Tex. App. LEXIS 2423 (Tex. App. Houston 14th Dist. Mar. 31 2009).

271. Defendant failed to show that his trial counsel was ineffective during sentencing because counsel properly withdrew an objection to the prosecutor's playing recordings of defendant's jailhouse conversations as the recordings were admissible under Tex. R. Evid. 613(a), because the recordings were played after defendant denied, disputed, or equivocated about making a prior inconsistent statement. Gallegos v. State, 2009 Tex. App. LEXIS 2111 (Tex. App. Houston 1st Dist. Mar. 26 2009).

272. Court did not abuse its discretion by admitting an audiotape of a State's witness's conversation into evidence because, even though the prosecutor did not specifically ask the witness if she had made the contradictory statement at a certain place and time, she denied having made the statement, and she equivocated about making the prior inconsistent statement. Perez v. State, 2009 Tex. App. LEXIS 1437, 2009 WL 1607811 (Tex. App. Corpus Christi Feb. 26 2009).

273. Because defendant failed to respond to the State's relevance objection and because there was nothing in the record to show that a witness actually made any prior inconsistent statements, for purposes of Tex. R. Evid. 801(e)(1)(A), to which Scott's hearsay exceptions under Tex. R. Evid. 613(a), 803(8) would apply, the court could not say that the trial court abused its discretion by not allowing defendant to impeach the witness. Scott v. State, 2009 Tex. App. LEXIS 131, 2009 WL 51035 (Tex. App. Fort Worth Jan. 8 2009).

274. Trial court was required to exclude defendant's statements to a detective unless the value of the statements as an explanation or support for the detective's expert opinion outweighed the danger that defendant's statements would be used for a purpose other than as an explanation of or support for the opinion, for purposes of Tex. R. Evid. 705(d); presuming that a citation to nothing more specific than "Chapter 6" was sufficient to meet the briefing requirements of Tex. R. App. P. 38.1(h), the court did not agree that defendant's statements had any value to impeach the detective, and defendant admitted that the value of the statements was not as an explanation or support for the detective's opinion, but rather as substantive evidence to advance his own self-defense claim, a purpose Rule 705(d) aimed to prevent, and thus the trial court did not abuse its discretion by ruling defendant's hearsay statements inadmissible under Rule 705 or as impeachment evidence. Davis v. State, 268 S.W.3d 683, 2008 Tex. App. LEXIS 6566 (Tex. App. Fort Worth 2008).

275. To the extent that defendant's proffer of testimony could have been construed as an offer of a prior inconsistent statement by the victim under Tex. R. Evid. 613, defendant did not lay the proper predicate to the admission of the testimony under Rule 613(a); by not confronting the victim first with her prior inconsistent

statement, defendant did not give her an opportunity to explain the prior inconsistency and the vague and broad questions that defendant asked did not give the victim enough information to explain, deny, or admit her prior statement Poplin v. State, 2008 Tex. App. LEXIS 5451 (Tex. App. Dallas July 24 2008).

276. Defendant gave adequate notice of which statement was going to be used to impeach the complainant, as required by Tex. R. Evid. 613, where defense counsel described a prior inconsistent statement that the complainant had made in an application for a protective order sworn to in December of 2004, stating under oath that the complainant's child was defendant's biological child; defendant was not permitted to ask whether the complainant denied making the inconsistent statement because the trial court erroneously concluded that the question was improper impeachment on a collateral issue. Judge v. State, 2008 Tex. App. LEXIS 1810 (Tex. App. Houston 1st Dist. Mar. 13 2008).

277. Trial court did not err under Tex. R. Evid. 613(a) in permitting the State to impeach a codefendant with prior inconsistent statements regarding the nature of defendant's participation in a murder where the codefendant equivocated during cross-examination about a prior statement that described defendant's role in the murder far differently from the description offered on direct examination. Rodriguez v. State, 2008 Tex. App. LEXIS 1162 (Tex. App. Houston 14th Dist. Feb. 19 2008).

278. Inmate did not show that one witness was available to testify or that her testimony would have been favorable,and because the statement allegedly provided by this witness was not sworn or signed, it could not be said that she made the statement, but even if the court assumed the statement was so made, she did not state that she was available to testify at trial and the statement contained no information that would have established that defendant had been talking with a particular person; in any event, any such testimony would have been admissible only for purposes of impeachment if that person had testified to identifying the inmate as the perpetrator, and ineffective assistance had not been shown. Ex parte Ramirez, 280 S.W.3d 848, 2007 Tex. Crim. App. LEXIS 1750 (Tex. Crim. App. 2007).

279. Because the court had no idea what a videotape recorded, the inmate failed to show that the videotape would have enabled him to impeach a witness and thus the inmate failed to show that he was prejudiced by counsel's failure to review the videotape or offer it into evidence. Ex parte Ramirez, 280 S.W.3d 848, 2007 Tex. Crim. App. LEXIS 1750 (Tex. Crim. App. 2007).

280. Defendant's objection did not make reference to Tex. R. Evid. 613; the court was unable to say that the ground objection asserted on appeal was apparent from context, for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103, and thus the court overruled the issue and noted that it was uncertain that the exhibit was viewed by either counsel purely as impeachment evidence, and no mention was made of an instruction limiting its use by the jury to that purpose. Mendoza v. State, 2007 Tex. App. LEXIS 7679 (Tex. App. Amarillo Sept. 24 2007).

281. In a case alleging aggravated assault with a deadly weapon, a challenge based on Tex. R. Evid. 613 was not heard on appeal because this issue was not raised before the trial court. Hernandez v. State, 2007 Tex. App. LEXIS 6815 (Tex. App. Amarillo Aug. 23 2007).

282. Trial court erred by admitting into evidence a letter that was written to her while she was in jail because the letter was not relevant to defendant's capital murder trial, as the letter, sent to defendant by a man, living in another state and whom she had never met, outlining his sexual desires and fantasies with defendant and other women, did not tend to make anything as to defendant, much less her sexual orientation or whether she committed sexual assault, any more or less probable; in addition, because the statement was not defendant's own statement, the trial court erred by admitting it under Tex. R. Evid. 613. Abdygapparova v. State, 2007 Tex. App. LEXIS 5806 (Tex. App.

San Antonio July 25 2007).

283. Assuming without deciding that the trial court erred in admitting the prior inconsistent statements of two witnesses, one of whom was defendant's sister, for purposes of Tex. R. Evid. 613, defendant did not show harm under Tex. R. App. P. 44.2; whether or not one witness saw a man getting into a particular car, the State had already presented evidence that one of the accomplices had possession of that car on the day of the offense, and whether or not defendant admitted to his sister that he stole a credit card he gave her to use, the evidence showed that the card belonged to one of the victims in this aggravated robbery, and defendant gave his sister the card shortly thereafter. Kimble v. State, 2007 Tex. App. LEXIS 5092 (Tex. App. Dallas June 29 2007).

284. In defendant's trial for aggravated sexual assault of a child younger than 14 years of age, in violation of Tex. Penal Code Ann. § 22.021, for purposes of Tex. R. Evid. 613(a), defendant did not show that a prior statement was inconsistent with anything the witness testified to at trial, and defendant sought to use the prior statement as a means of introducing evidence of specific instances of misconduct, including drug possession and lying, and that evidence was inadmissible under Tex. R. Evid. 608(b) for purposes of attacking the witness's credibility; even if error was committed, defendant suffered no harm under Tex. R. App. P. 44.2(b) because defendant attacked the witness's credibility through extensive cross-examination and the State did not depend on the witness or her credibility, as the case depended on the child victim's testimony. Wagner v. State, 2007 Tex. App. LEXIS 4480 (Tex. App. Eastland June 7 2007).

285. Trial court did not abuse its discretion in admitting a witness's statement for impeachment purposes because the testimony was equivocal and the record showed no harm. Freeman v. State, 230 S.W.3d 392, 2007 Tex. App. LEXIS 3965 (Tex. App. Eastland 2007).

286. Even assuming the trial court abused its discretion by excluding the written statements of a witness that defendant apparently sought to introduce as prior inconsistent statements under Tex. R. Evid. 613(a), defendant was not harmed by the error under Tex. R. App. P. 44.2(b); under Tex. R. Evid. 612, the court found that (1) the witness's testimony was crucial to the prosecution and was not cumulative, (2) defendant's own testimony directly contradicted the witness's testimony, (3) defendant was permitted to cross-examine the witness about the discrepancies between the statements and the trial testimony, and (5) defendant highlighted those discrepancies during closing argument. Mooring v. State, 2007 Tex. App. LEXIS 3601 (Tex. App. Waco May 9 2007).

287. Trial court did not abuse its discretion by denying defendant's motion for a new trial based on newly discovered evidence under Tex. Code Crim. Proc. Ann. art. 40.001; the main purpose of the evidence was to impeach the testimony of defendant's stepdaughter's grandmother under Tex. R. Evid. 613(b) and the evidence was cumulative because defendant was able to present the theory that the grandmother coached his stepdaughter to falsely accuse him of indecency with a child and aggravated sexual assault, and given the jury's rejection of the significance of the impeachment evidence and the defensive theory during the trial, there was no basis for finding that a second jury would have probably reached a different result considering additional evidence with the same impeachment value. Diaz v. State, 2007 Tex. App. LEXIS 3425 (Tex. App. Fort Worth May 3 2007).

288. Trial court did not err in excluding a witness's testimony because the witness was not the declarant; defendant failed to establish the proper predicate for impeachment and attempted to characterize the testimony as evidence of identification for purposes of Tex. R. Evid. 801, but the court was not persuaded. Chapman v. State, 2007 Tex. App. LEXIS 3184 (Tex. App. Waco Apr. 25 2007).

289. To the extent that defendant argued that a videotape was admissible to impeach the child victim's credibility, the argument was not asserted at trial and thus waived under Tex. R. App. P. 33.1. Shanta v. State, 2007 Tex. App.

LEXIS 2887 (Tex. App. Houston 1st Dist. Apr. 12 2007).

290. In an assault on a public servant case, after defendant blamed a correctional officer for a bump on her head, the trial court did not abuse its discretion by admitting a trooper's testimony regarding defendant's initial arrest, including a high-speed pursuit and the fact that she was placed on the ground because (1) it was contradictory to statements made by defendant; (2) it showed a bias against law enforcement officials because it illustrated a pattern of false accusations; and (3) it was prefaced with a specific limiting instruction that the evidence was being offered solely for passing upon defendant's credibility. Long v. State, 2007 Tex. App. LEXIS 2250 (Tex. App. Eastland Mar. 22 2007).

291. Appellate court overruled defendant's assertion that the district court erred in admitting evidence that he had previously hit one of the State's witnesses, because the witness's statement to the police that she ran away from the fight because defendant had already hit her once before was admitted for the purpose of impeaching the witness's trial testimony with a prior inconsistent statement. Carrillo v. State, 2007 Tex. App. LEXIS 1374 (Tex. App. Austin Feb. 23 2007).

292. There was no reasonable probability that the jury's verdict would have been different if defense counsel had laid a proper predicate under Tex. R. Evid. 613(a), and thus defendant did not meet the burden of establishing ineffective assistance of counsel. Guillory v. State, 2007 Tex. App. LEXIS 649 (Tex. App. San Antonio Jan. 31 2007).

293. In a sexual abuse case, a trial court did not err by denying defendant's bolstering objection under Tex. R. Evid. 613(c) because the testimony of a victim's friend did not amount to such since it corroborated the victim's story; moreover, the testimony was not offered as a prior consistent statement, but to show why the victim took certain actions. Luna v. State, 2007 Tex. App. LEXIS 617 (Tex. App. Dallas Jan. 30 2007).

294. Court rejected defendant's claim of ineffective assistance of counsel; the court assumed a strategic motive of counsel given the silent record, defendant failed to show that counsel's alleged failures to object were unreasonable and (1) it was reasonable for counsel to have found that certain evidence was admissible under Tex. R. Evid. 803(2), given that defendant's wife was extremely upset and nervous when talking to an officer about the incident, (2) counsel could have found that protective orders and testimony concerning defendant's wife's applying for the orders were not proof of extraneous offenses under Tex. R. Evid. 404(b), given that they were issued in response to the same conduct that defendant was on trial for, (3) counsel could have found that defendant's wife's father's testimony opened the door to cross-examination regarding defendant's character by referencing specific examples of defendant's conduct for purposes of Tex. R. Evid. 405, and (4) counsel might have believed that the wife's inconsistent statements were admissible to impeach her testimony under Tex. R. Evid. 613. Romero v. State, 2006 Tex. App. LEXIS 10723 (Tex. App. Austin Dec. 15 2006).

295. Trial court did not err in refusing to admit allegedly prior inconsistent statements of one of the victims; the victim's prior statements were not necessarily inconsistent, for purposes of Tex. R. Evid. 613(a), with the victim's trial testimony and the victim admitted and explained that the prior statements might have omitted some details, such that the trial court did not err in excluding the testimony of the person to whom the victim first spoke. Walker v. State, 2006 Tex. App. LEXIS 10554 (Tex. App. Waco Dec. 6 2006).

296. Defendant preserved an evidentiary complaint concerning Tex. R. Evid. 613(a) with a bill of exceptions. Walker v. State, 2006 Tex. App. LEXIS 10554 (Tex. App. Waco Dec. 6 2006).

297. In an aggravated sexual assault of a child case, a witness's proposed testimony concerning the victim's prior allegations that she was sexually assaulted was properly excluded because defendant failed to inquire of the victim

as to when she might have previously reported that she was sexually assaulted, where she made such a statement, or to whom she made such a statement. Miller v. State, 2006 Tex. App. LEXIS 9932 (Tex. App. Tyler Nov. 15 2006).

298. Evidence was factually sufficient to support defendant's conviction of capital murder, and although defendant claimed an accomplice lied and witness credibility was undermined when inconsistent statements were shown, it was not the court's province to substitute its assessment of witness credibility for the jury's assessment; defendant confessed to planning and participating in the underlying robbery and under the law of parties under Tex. Penal Code Ann. § 7.02(b), defendant was guilty of the crime. Hatley v. State, 206 S.W.3d 710, 2006 Tex. App. LEXIS 7573 (Tex. App. Texarkana 2006).

299. It was not an abuse of discretion for the trial court to exclude a witness statement, which defendant alleged was a prior inconsistent statement, because the witness admitted making the statement, and therefore its admission would have been improper under Tex. R. Evid. 613(a). De Los Santos v. State, 2006 Tex. App. LEXIS 7185 (Tex. App. San Antonio Aug. 16 2006).

300. In an aggravated assault case, a court properly denied defendant's request to call a witness to impeach the victim with a prior inconsistent statement because he did not comply with Tex. R. Evid. 613 as he did not confront the victim with the prior inconsistent statement, nor did he summarize the contents of the prior inconsistent statements that she allegedly made. Madry v. State, 200 S.W.3d 766, 2006 Tex. App. LEXIS 9204 (Tex. App. Houston 14th Dist. 2006).

301. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive and the trial court had to admonish her during her testimony for offering explanations rather than answers. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

302. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

303. Witnesses' prior inconsistent statements were properly admitted for impeachment purposes under Tex. R. Evid. 613 because, contrary to defendant's argument, the prosecutor did not read the statements to the jury but rather questioned the witnesses about them. Blanton v. State, 2004 Tex. Crim. App. LEXIS 2210 (Tex. Crim. App. June 30, 2004).

Evidence : Testimony : Credibility : One's Own Witnesses : General Overview

304. Court did not abuse its discretion by admitting an audiotape of a State's witness's conversation into evidence because, even though the prosecutor did not specifically ask the witness if she had made the contradictory statement at a certain place and time, she denied having made the statement, and she equivocated about making

the prior inconsistent statement. Perez v. State, 2009 Tex. App. LEXIS 1437, 2009 WL 1607811 (Tex. App. Corpus Christi Feb. 26 2009).

Evidence : Testimony : Credibility : One's Own Witnesses : Limitations

305. Pursuant to Tex. R. Evid. 613 and the balancing test in Tex. R. Evid. 403, the State had proper reasons to call defendant's father as a witness in a murder case and to point out that the account he gave to the police and to another witness were diametrically opposed. Westbrook v. State, 2011 Tex. App. LEXIS 1443, 2011 WL 686396 (Tex. App. Tyler Feb. 28 2011).

Evidence : Testimony : Credibility : Rehabilitation

306. If the court construed defendant's complaint as arguing that the admission of the victim's medical records improperly bolstered her in-court testimony, the record did not indicate the State introduced the medical records for the sole purpose of enhancing the victim's credibility or the credibility of other evidence, and thus the trial court did not abuse its discretion in overruling defendant's bolstering objection. West v. State, 2008 Tex. App. LEXIS 8599 (Tex. App. Austin Nov. 14 2008).

307. Defendant contended at trial that the victim voluntarily performed oral sex on him, that there was no penetration, and that the victim lied about having been assaulted; because appellant attacked the victim's credibility, the trial court did not err in determining that her prior consistent statement to a nurse was admissible, for purposes of Tex. R. Evid. 613(c), 801(e)(1)(B). West v. State, 2008 Tex. App. LEXIS 8599 (Tex. App. Austin Nov. 14 2008).

308. Tex. R. Evid. 613(c) objection only applies to a witness's prior statement, not to in-court testimony, and a bolstering objection is appropriately made to a prior consistent statement introduced after the witness's in-court testimony; in this case, defendant complained that the victim's in-court testimony bolstered her earlier admitted hearing statements in a physical examination, but the court found no abuse of discretion in the admission of the testimony. West v. State, 2008 Tex. App. LEXIS 8599 (Tex. App. Austin Nov. 14 2008).

309. In a case involving assault against a public servant, the State did not err in recalling a deputy to the stand because defendant made no bolstering objection under Tex. R. Evid. 608(a) or Tex. R. Evid. 613(c); moreover, there was no violation of Tex. Code Crim. Proc. Ann. art. 36.02. At any rate, the deputy's testimony on recall did not duplicate that which was previously given. Reaves v. State, 2008 Tex. App. LEXIS 6866 (Tex. App. Corpus Christi Aug. 28 2008).

310. Court did not need to decide whether certain questions were improper bolstering because even if the court assumed that the trial court erred in admitting the testimony, the error was harmless under Tex. R. App. P. 44.2(b); the record showed significant evidence of defendant's guilt, including his signed confession, and defendant's girlfriend's testimony as to what parts of her statements were truthful did no more than reinforce her claim that those portions were true, and she was extensively cross-examined. Hobday v. State, 2007 Tex. App. LEXIS 109 (Tex. App. San Antonio Jan. 10 2007).

Evidence : Testimony : Examination : General Overview

311. Tex. R. Evid. 613 did not apply to exclude evidence of a videotaped discussion between the victim and a child abuse specialist. The evidence was admissible as a prior inconsistent statement and because it was a statement of the complaining witness herself, the predicate requirement did not apply. Willover v. State, 38 S.W.3d

672, 2000 Tex. App. LEXIS 8199 (Tex. App. Houston 1st Dist. 2000), *rev'd on other grounds by* 70 S.W.3d 841, 2002 Tex. Crim. App. LEXIS 46 (Tex. Crim. App. 2002).

Evidence : Testimony : Examination : Cross-Examination : General Overview

312. In defendant's attempted capital murder case, the court's decision to limit the cross-examination of an officer was proper because whether the officer might have invoked his Garrity rights was only a marginally relevant issue and did not necessarily indicate that he had a reason to provide false testimony. Walker v. State, 300 S.W.3d 836, 2009 Tex. App. LEXIS 7763 (Tex. App. Fort Worth Oct. 1 2009).

Evidence : Testimony : Examination : Cross-Examination : Scope

313. Because information that revealed that the bias or interest of the State's medical expert was before the jury and the excluded information would not have added significantly to the inmate's ability to impeach his credibility, the trial court's ruling did not unduly restrict the inmate's cross-examination of the State's expert. In re Smith, 422 S.W.3d 802, 2014 Tex. App. LEXIS 667, 2014 WL 333374 (Tex. App. Beaumont Jan. 23 2014).

314. Because information that revealed that the bias or interest of the State's medical expert was before the jury and the excluded information would not have added significantly to the inmate's ability to impeach his credibility, the trial court's ruling did not unduly restrict the inmate's cross-examination of the State's expert. In re Smith, 422 S.W.3d 802, 2014 Tex. App. LEXIS 667, 2014 WL 333374 (Tex. App. Beaumont Jan. 23 2014).

315. During defendant's trial for murder, the court did not err under Tex. R. Evid. 613(b) in limiting defendant's cross-examination of a witness because the line of cross-examination sought by defendant did not demonstrate any bias or prejudice by the witness against defendant; the testimony elicited concerned a debt owed not to defendant, but to a co-defendant who had already pled guilty to murder. Requeno-portillo v. State, 2011 Tex. App. LEXIS 6898, 2011 WL 3820747 (Tex. App. Houston 1st Dist. Aug. 25 2011).

316. Where defense counsel laid the proper predicate for the use of defendant's wife's testimony to impeach a police officer's testimony regarding the description of the suspect, and the police officer did not unequivocally admit having made the prior statement, extrinsic evidence of his statement was admissible and it was error for the trial court to exclude defendant's wife's testimony on that point. Baldree v. State, 248 S.W.3d 224, 2007 Tex. App. LEXIS 5057 (Tex. App. Houston 1st Dist. 2007).

Evidence : Testimony : Sequestration

317. When appellant seaman tried his Jones Act and other maritime claims to a jury under 46 U.S.C.S. § 688, the key defense witness admitted on cross-examination that he had discussions about prior court testimony with defense counsel and the corporate representative; the trial judge addressed the situation to ascertain whether the letter and spirit of Tex. R. Civ. P. 267 had been adhered to. Because appellant failed to show that the witness's trial testimony differed from his deposition testimony, the trial court did not abuse its discretion by allowing the defense witness to testify notwithstanding the violation of the sequestration rule, Tex. R. Evid. 613. Gonzalez v. Great Lakes Dredge & Dock Co., 2010 Tex. App. LEXIS 4777, 2010 WL 2543895 (Tex. App. Corpus Christi June 24 2010).

318. Even if counsel was deficient for failing to invoke Tex. R. Evid. 613, the court was unable to find that defendant was prejudice to such a degree that he was denied a fair trial; defendant failed to show that one witness's testimony coincided with the testimony of any later witnesses or that defendant was otherwise prejudiced. Agu v. State, 2008 Tex. App. LEXIS 1882 (Tex. App. Houston 14th Dist. Mar. 11 2008).

Family Law : Family Protection & Welfare : Cohabitants & Spouses : Abuse, Endangerment & Neglect

319. In a trial for defendant's sexual assault of his wife, who recanted in her trial testimony, there was no error under Tex. R. Evid. 404(b) in allowing the State to impeach the victim with a prior inconsistent statement about how she broke her nose six months before the charged assault; the statements were offered as prior inconsistent statements to challenge the victim's credibility, as permitted by Tex. R. Evid. 613. Davis v. State, 2007 Tex. App. LEXIS 352 (Tex. App. Dallas Jan. 18 2007).

Torts : Malpractice & Professional Liability : Healthcare Providers

320. In a health care liability action, while appellants claimed that the first physician was not qualified to render a reliable expert opinion under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(C) because he served as a member of the Medical Board in the surgeon's termination request and was thus biased, any bias went to first physician's credibility under Tex. R. Evid. 613(b) and did not disqualify him from rendering an expert opinion. Beaumont Spine Pain & Sports Med. Clinic, Inc. v. Swan, 2011 Tex. App. LEXIS 768, 2011 WL 379168 (Tex. App. Beaumont Feb. 3 2011).

End of Document

Tex. Evid. R. 614

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 614 Excluding Witnesses

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person and, in civil cases, that person's spouse;

(b) after being designated as the party's representative by its attorney:

(1) in a civil case, an officer or employee of a party that is not a natural person; or

(2) in a criminal case, a defendant that is not a natural person;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) the victim in a criminal case, unless the court determines that the victim's testimony would be materially affected by hearing other testimony at the trial.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 20, *Presentation of Evidence*.

Case Notes

Civil Procedure : Trials : Closing Arguments : Improper Remarks
Civil Procedure : Appeals : Standards of Review : Reversible Errors
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements
Criminal Law & Procedure : Counsel : Effective Assistance : General Overview
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Judicial Discretion

Criminal Law & Procedure : Trials : Opening Statements
Criminal Law & Procedure : Trials : Pretrial Publicity
Criminal Law & Procedure : Witnesses : Presentation
Criminal Law & Procedure : Witnesses : Sequestration
Criminal Law & Procedure : Sentencing : Imposition : Victim Statements
Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview
Criminal Law & Procedure : Appeals : Reversible Errors : Prosecutorial Misconduct
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Mistrial
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Witnesses
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Hearsay : Rule Components : General Overview
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : Credibility of Witnesses
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Testimony : Examination : General Overview
Evidence : Testimony : Examination : Judicial Interrogation
Evidence : Testimony : Presentation of Evidence
Evidence : Testimony : Sequestration
Family Law : Guardians : General Overview
Governments : Courts : Judges
Legal Ethics : Client Relations : Effective Representation

LexisNexis (R) Notes

Civil Procedure : Trials : Closing Arguments : Improper Remarks

1. In a medical malpractice survivor action, defendant invoked Tex. R. Evid. 614 to keep family members out of the courtroom; during rebuttal arguments, plaintiff's counsel make an improper implication by arguing that defendant's invocation of Tex. R. Evid. 614 would keep a family member from being called to testify as a witness; however, the brief statement was harmless.

Civil Procedure : Appeals : Standards of Review : Reversible Errors

2. Trial judge erred in refusing to exclude certain witnesses on the basis that they were court employees; however, absent a showing of harm by the mother, the judge's refusal to exclude certain witnesses was not reversible. In the Interest of H.M.S., 349 S.W.3d 250, 2011 Tex. App. LEXIS 7321 (Tex. App. Dallas Sept. 7 2011).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

3. At defendant's trial for aggravated sexual assault of a child, the trial court did not err in allowing a doctor to testify in violation of a rule which provided for the exclusion of witnesses; the State explained that the doctor was designated as an expert witness and his presence was necessary during the testimony of the victim's mother so that he could explain why she did nothing after learning about the allegations. Robles v. State, 2013 Tex. App. LEXIS 13790, 2013 WL 5952141 (Tex. App. Waco Nov. 7 2013).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements

4. In a trial for indecency with a child by contact, there was no error in allowing the victim's father to testify at punishment, even though he sat in the courtroom during the guilt/innocence phase of the trial, in violation of Tex. R. Evid. 614, because his victim-impact testimony was based on his personal observations and defendant did not claim that he was influenced by testimony from the witnesses during guilt/innocence. Tran v. State, 2011 Tex. App. LEXIS 1050, 2011 WL 532137 (Tex. App. Texarkana Feb. 15 2011).

Criminal Law & Procedure : Counsel : Effective Assistance : General Overview

5. Where the record was silent as to the reasons for counsel's actions, defendant could not show that he was denied effective assistance of counsel at the revocation hearing because his trial counsel did not request exclusion of witnesses from the proceeding by invoking Tex. R. Evid. 614. Counsel could have intentionally exposed defense witnesses to the testimony of State's witnesses to assist in the presentation of defendant's response to the State's case. Hill v. State, 2010 Tex. App. LEXIS 10043, 2010 WL 5140488 (Tex. App. Amarillo Dec. 17 2010).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

6. Because there was no evidence that counsel told defendant's parent that it was acceptable to listen to jury arguments at the guilt stage, in violation of Tex. R. Evid. 614, or that counsel knew that the parent had entered the courtroom, counsel was not ineffective in that regard. Casey v. State, 2007 Tex. App. LEXIS 7940 (Tex. App. Austin Oct. 5 2007).

7. Trial counsel was not rendered ineffective by acceding to the wishes of defendant's family to remain in the courtroom and therefore withdrawing a request that witnesses be placed under a Tex. Evid. R. 614 exclusion. Wooten v. State, 2004 Tex. App. LEXIS 4296 (Tex. App. Austin May 13 2004).

Criminal Law & Procedure : Trials : Judicial Discretion

8. Although the trial court is obligated to exclude witnesses from the courtroom during the testimony of other witnesses, the trial court's decision concerning a witness who has violated Tex. R. Evid. 614 is discretionary. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

9. If Tex. R. Evid. 614 is violated, the trial court may, taking into consideration all of the circumstances, allow the testimony of the potential witness, exclude the testimony, or hold the violator in contempt. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

Criminal Law & Procedure : Trials : Opening Statements

10. Tex. R. Evid. 614 provides that at the request of a party, the trial court shall order witnesses excluded so that they cannot hear the testimony of other witnesses; however, the rule does not apply to the exclusion of witnesses during voir dire, opening statements, or before there has been any testimony. Thus, the presence of an officer, who

was also a witness in defendant's case, in the courtroom during opening statements prior to the commencement of any testimony did not violate Rule 614. Additionally, the content of the opening statements could not have influenced the officer's testimony and, thus, the trial court did not abuse its discretion in allowing the officer to testify. Hudson v. State, 2005 Tex. App. LEXIS 164 (Tex. App. Houston 14th Dist. Jan. 6 2005).

Criminal Law & Procedure : Trials : Pretrial Publicity

11. At a pretrial hearing in a criminal prosecution for capital murder, appellant stated that he wanted to restrict the media's coverage of pretrial hearings so that witnesses who would later be placed under Tex. R. Evid. 614 would not have access to certain testimony via news reports on pretrial hearings. However, when appellant stated that he was willing to accept an alternative solution to his complaint about media reports on pretrial hearings, he waived the complaint for appellate review. Salinas v. State, 163 S.W.3d 734, 2005 Tex. Crim. App. LEXIS 741 (Tex. Crim. App. 2005).

Criminal Law & Procedure : Witnesses : Presentation

12. Defendant's mother was properly disqualified from testifying based on her violation of the Rule because defendant told her about the events of the trial, even though she had been admonished under the Rule, and it had been explained to her that she could not discuss matters that occurred in the court proceedings with anyone. The mother's testimony was not crucial to the defense because the testimony of defendant's stepfather provided the same information to the jury. Bell v. State, 2013 Tex. App. LEXIS 12086, 2013 WL 5522245 (Tex. App. Eastland Sept. 26 2013).

13. Trial court did not abuse its discretion by allowing a bailiff who served for the jury to testify during the punishment phase of trial after Tex. R. Evid. 614 had been invoked. There was no evidence in the record that the bailiff's testimony was affected by having heard appellant's testimony. Young v. State, 2004 Tex. App. LEXIS 1615 (Tex. App. Houston 1st Dist. Feb. 19 2004), vacated by, opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 4591 (Tex. App. Houston 1st Dist. May 20, 2004).

14. Trial court did not abuse its discretion by allowing testimony from a witness who violated Tex. R. Evid. 614 if the person was not anticipated to be called as a witness; the witness lacked personal knowledge regarding the offense and had no connection to either the state's case-in-chief or the defendant's case-in-chief. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

15. Trial court did not err in allowing a witness to testify who had not been sequestered; there was no reason to believe he would be a witness at the time Tex. R. Evid. 614 was invoked. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

Criminal Law & Procedure : Witnesses : Sequestration

16. Even assuming that defendant preserved error when the judge excused the officer from the Rule, he did not object when the State called the officer to testify. Defendant did not preserve the error for review. Wasserman v. State, 2014 Tex. App. LEXIS 8914 (Tex. App. Corpus Christi Aug. 14 2014).

17. Court did not err in excluding a witness's testimony because the testimony was not crucial to the defense; the testimony showed that defendant was involved in a kidnapping and injury in some manner; even if her involvement was not until 2011 when the child was eight years old and not enrolled in school. Tanner v. State, 2014 Tex. App. LEXIS 8297 (Tex. App. Tyler July 31 2014).

18. Court erred by failing to sequester a witness because, while the State's proffered reason demonstrated the witness's potential role as an expert, it failed to demonstrate that the expert opinion necessitated her presence in the courtroom. Additionally, the witness was a fact-witness-she formed no additional expert opinions based on the child's trial testimony. Allen v. State, 436 S.W.3d 815, 2014 Tex. App. LEXIS 6465, 2014 WL 2619438 (Tex. App. Texarkana June 13 2014).

19. Trial court's error in exempting a witness from the witness sequestration rule was harmless because the witness merely recalled the statements that the victim made during the interview, and the victim's trial testimony clearly established the elements of the offense, and was consistent, strong, and unwavering, even in the face of cross-examination. Allen v. State, 2014 Tex. App. LEXIS 6416, 2014 WL 2631979 (Tex. App. Texarkana June 13 2014).

20. Trial court's error in allowing the interviewer to remain in the courtroom in violation of this rule was harmless because her testimony was limited to the victim's statements during the interview and therefore the court could not say that she was influenced in her testimony by the testimony she heard. Allen v. State, 436 S.W.3d 827, 2014 Tex. App. LEXIS 6462, 2014 WL 2619439 (Tex. App. Texarkana June 13 2014).

21. Trial court's error in allowing the interviewer to remain in the courtroom in violation of this rule was harmless because the court could not say that her testimony was influenced. Allen v. State, 2014 Tex. App. LEXIS 6460, 2014 WL 2632059 (Tex. App. Texarkana June 13 2014).

22. Trial court could have concluded that the brief holdover cell conversation did not influence witnesses' trial testimony, and defendant was not harmed by the violation of this section. Murray v. State, 2014 Tex. App. LEXIS 6201 (Tex. App. Dallas June 9 2014).

23. At defendant's trial for aggravated sexual assault of a child, the trial court did not err in allowing a doctor to testify in violation of a rule which provided for the exclusion of witnesses; the State explained that the doctor was designated as an expert witness and his presence was necessary during the testimony of the victim's mother so that he could explain why she did nothing after learning about the allegations. Robles v. State, 2013 Tex. App. LEXIS 13790, 2013 WL 5952141 (Tex. App. Waco Nov. 7 2013).

24. Trial court did not abuse its discretion by denying defendant's motion for a mistrial based on a violation of Tex. R. Evid. 614 because given the nature of the witnesses' testimony, concerning the records they were the custodians of, the prosecutor speaking to them in front of each other could not have influenced their testimony. Collazo v. State, 2013 Tex. App. LEXIS 7775, 2013 WL 3279268 (Tex. App. San Antonio June 26 2013).

25. Court did not err by allowing a witness (the employer) who listened to trial testimony to testify in the State's rebuttal case because nothing in the record including the brief testimony of the employer gave any indication that the employer had any connection to the case-in-chief presented by either the State or the defense. Indeed, the scope of his relevant knowledge was limited to the substance of his testimony, and his testimony did not directly contradict that of the notary. Johnson v. State, 2013 Tex. App. LEXIS 6268 (Tex. App. Amarillo May 21 2013).

26. Trial court did not abuse its discretion by admitting the testimony of two State witnesses because during the questioning to determine whether Tex. R. Evid. 614 had been violated the defense did not produce any evidence that the witnesses conferred about each other's testimony during a court break, nor was there any evidence that their testimony contradicted the testimony of a defense witness or that it corroborated each other's testimony. Derrick v. State, 2013 Tex. App. LEXIS 4843 (Tex. App. Amarillo Apr. 17 2013).

27. Victim services coordinator should not have been permitted to testify, after she heard the testimony from other witnesses, about whether one of defendant's witnesses intended to testify. Despite the coordinator's presence in the courtroom, the State opted to question defendant about her witness's willingness to testify, and the coordinator's later testimony contradicted the testimony of both defendant and her witness. Mescher v. State, 2012 Tex. App. LEXIS 5706, 2012 WL 2981104 (Tex. App. Austin July 12 2012).

28. Trial court did not abuse its discretion by refusing to exclude the child sexual assault victim from the courtroom under Tex. R. Evid. 614 because defendant gave the court no basis for concluding that the testimony of the victim would be materially affected if she heard other testimony. Soria v. State, 2012 Tex. App. LEXIS 3345, 2012 WL 1570969 (Tex. App. Amarillo Apr. 27 2012).

29. Defendant's objection under Tex. R. Evid. 403 to the presence of the complainants at the punishment phase of trial did not comport with his appellate argument under Tex. Code Crim. Proc. Ann. arts. 36.06, 36.03 and Tex. R. Evid. 614, as required to preserve the issue. Reed v. State, 2012 Tex. App. LEXIS 1650, 2012 WL 662327 (Tex. App. Waco Feb. 29 2012).

30. State contended a DVD contained essentially the same evidence about which appellant complained concerning a witness's testimony with regard to Tex. R. Evid. 614, but for purposes of this appeal, the court assumed without deciding that waiver did not occur. Townes v. State, 2012 Tex. App. LEXIS 1244, 2012 WL 566000 (Tex. App. San Antonio Feb. 15 2012).

31. Witness's mother was the only one of the two sworn in who heard the instructions concerning Tex. R. Evid. 614 before the conversation, and the court found Rule 614 was violated because the witness and her mother talked to each other about the case without permission from the trial court; thus, the first prong of the harm test was met, as the parties conferred after the rule was invoked as to one of them. Townes v. State, 2012 Tex. App. LEXIS 1244, 2012 WL 566000 (Tex. App. San Antonio Feb. 15 2012).

32. Under the second prong under Tex. R. Evid. 614, while the testimonies of a witness and her mother corroborated each other, their testimonies never changed from prior statements or statements made during the trial before the rule was violated; it did not appear that the short conversation that took place between the two influenced the other's testimony because the similarities existed prior to the violation, and thus the second prong was not met, and the trial court did not err in admitting the testimony because there was no evidence of harm or prejudice to appellant. Townes v. State, 2012 Tex. App. LEXIS 1244, 2012 WL 566000 (Tex. App. San Antonio Feb. 15 2012).

33. Trial court's error in allowing the State's investigator to remain in the courtroom despite defendant's invocation of Tex. R. Evid. 614 did not affect defendant's substantial rights because the testimony the investigator offered after he was recalled as a witness was supported by recordings and documents. Norris v. State, 2012 Tex. App. LEXIS 108, 2012 WL 34453 (Tex. App. Beaumont Jan. 4 2012).

34. Trial court did not err by disqualifying a defense witness for violating Tex. R. Evid. 614 because the record did not indicate that the defense consented to, procured, or otherwise had knowledge of the witness's presence in the courtroom, and the witness's testimony was not highly probative of the question of defendant's guilt, as the record did not indicate that his testimony was probative of whether defendant traveled to a particular city on a particular date to effectuate a drug sale or did so on other occasions. Sherber v. State, 2011 Tex. App. LEXIS 7648, 2011 WL 4389614 (Tex. App. Beaumont Sept. 21 2011).

35. Trial court did not abuse its discretion by denying defendant's motion for a mistrial based on an alleged violation of the witness sequestration rule because the record did not establish that the rule had been violated, as the only person to claim that witnesses were violating the rule was defense counsel's assistant, who never

personally identified the witnesses to the trial court, nor did he testified as to the specific subject of their discussion. Counsel never asked to question the witnesses to see if the rule had been violated. Milton v. State, 2011 Tex. App. LEXIS 7592, 2011 WL 4361482 (Tex. App. Houston 14th Dist. Sept. 20 2011).

36. Instruction to the jury that two defense witnesses violated the witness rule in Tex. R. Evid. 614 was not fundamental error under Tex. R. Evid. 103(d) because the comment on the evidence under Tex. Code Crim. Proc. Ann. art. 38.05 only suggested that the witnesses might be untrustworthy rather than that defendant might be guilty. Powell v. State, 2011 Tex. App. LEXIS 2888, 2011 WL 1466876 (Tex. App. Austin Apr. 15 2011).

37. In a case in which a trial court ordered the witnesses excluded from the courtroom pursuant to Tex. R. Evid. 614, the trial court did not abuse its discretion in allowing an investigator with the district attorney's office to testify where the investigator testified that although he had been in the courtroom listening to the testimony, the prosecutor had told him to leave the courtroom about the time defendant began to question the deputy medical examiner about a photograph of the investigator pointing to a spot on a tree, and where the investigator also testified that he did not hear the testimony. Moreover, no witness, other than the investigator, testified about the defect in the tree, and thus the investigator's testimony did not directly contradict or corroborate any other witness's testimony. Acevedo v. State, 2011 Tex. App. LEXIS 2047, 2011 WL 1044402 (Tex. App. San Antonio Mar. 23 2011).

38. Testimony of defendant's brother about the sexual relations he had with the victim's mother did not include any sexual acts like the acts defendant performed on the victim, and the brother's testimony would not explain the victim's knowledge of those acts; thus, the trial court did not err in excluding the brother as a witness at trial because he was present in the courtroom for most of the trial, in violation of Tex. R. Evid. 614, and the excluded testimony was not crucial to the defense. Kalla v. State, 2011 Tex. App. LEXIS 1030, 2011 WL 489929 (Tex. App. Dallas Feb. 14 2011).

39. Court did not abuse its discretion in allowing a witness to remain in the courtroom because neither party re-called the witness during the guilt phase of the trial nor did they call him during the punishment phase. The witness did not testify as to the events and had no personal knowledge of the details of the collision; therefore, defendant failed to show that the witness's testimony contradicted the testimony of a witness from the opposing side or corroborated testimony of a witness he had conferred with or heard. Lester v. State, 2011 Tex. App. LEXIS 315, 2011 WL 148118 (Tex. App. Houston 1st Dist. Jan. 13 2011).

40. Record contained no evidence that an investigator and a witness conferred about each other's testimony in any way that violated Tex. R. Evid. 614 and Tex. Code Crim. Proc. Ann. art. 36.06 because the witness's testimony about a knife that defendant brought to her apartment was given before she went with the investigator to the sheriff's department so that she could attempt to locate a similar knife that could be offered as demonstrative evidence and because the witness's testimony that she located a similar knife did not corroborate any of the investigator's testimony. Andrews v. State, 2010 Tex. App. LEXIS 10192, 2010 WL 5541696 (Tex. App. Eastland Dec. 23 2010).

41. Trial court did not abuse its discretion by allowing the victim's mother to testify during the punishment phase of defendant's trial because it could have found no violation of Tex. R. Evid. 614 or that any violation failed to injure defendant. Because the evidence was conflicting, it was unclear if an actual violation occurred, as an attorney testified he overhead the mother speaking with the victim about what she had testified about, but the mother denied doing so; although the mother's testimony about the family moving was the same as the victim's testimony, the attorney had testified that he heard a discussion about someone being thrown out of a house. Soto v. State, 2010 Tex. App. LEXIS 8709, 2010 WL 4273173 (Tex. App. San Antonio Oct. 29 2010).

42. Trial court did not err by failing to strike or disallow certain testimony due to alleged violations of Tex. R. Evid. 614 because there was no evidence that the store owner, an investigator, and another witness actually heard the testimony of any other witnesses, and the store owner specifically stated that she did not discuss her own testimony with the witness or the investigator. Assuming that the store owner conferred with the witness and the investigator, the court concluded that neither the store owner's nor the investigator's testimony corroborated or contradicted the testimony of witnesses they actually heard. Urbina v. State, 2010 Tex. App. LEXIS 6728, 2010 WL 3279390 (Tex. App. Corpus Christi Aug. 19 2010).

43. Counsel was not ineffective for untimely invocation of "the Rule" because the record revealed that as an officer stepped down from the witness stand, she was asked to wait during an eighteen-minute break in the proceedings; however, there was no evidence that she and the next witness discussed either the case or the officer's testimony during the break. Molina v. State, 2009 Tex. App. LEXIS 6698, 2009 WL 2623364 (Tex. App. El Paso Aug. 26 2009).

44. Court properly disqualified a witness from testifying because the witness and defendant were aware of the witness's obligations under Tex. R. Evid. 614 as evidenced by the witness's acknowledgment of Rule 614 during her conversation with defendant; despite knowing Rule 614 precluded the witness and defendant from speaking about the trial, they discussed it anyway. Jimenez v. State, 307 S.W.3d 325, 2009 Tex. App. LEXIS 4701 (Tex. App. San Antonio June 24 2009).

45. Trial court abused its discretion in granting defendant's motion for new trial, which alleged that she was entitled to a new trial in the interest of justice on the ground that the prosecutor had knowingly violated Tex. R. Evid. 614, known as "the Rule," because defendant failed to demonstrate that the Rule was violated or that her trial was not in accordance with the law. Although the public defender testified that, at some point during the trial of the case, she was in a work room waiting to talk to another prosecutor when the lead prosecutor in the case entered the work room and started talking to the toxicologist, a State's witness, in the presence of yet another State's witness, a nurse: (1) the record did not establish the substantive content of the conversation between the prosecutor and the toxicologist; (2) defendant had not shown that the prosecutor disclosed the name of a witness who testified about refrigeration-related issues or that she disclosed the names of any witnesses; (3) defendant failed to establish what, if anything, the nurse-witness who was present in the work room actually heard of the conversation between the prosecutor and the toxicologist; (4) it was undisputed that the nurse testified before the events in question and was not recalled to the stand, so her trial testimony could hardly have been influenced by the conversation between the prosecutor and the toxicologist, regardless of its content; and (5) the trial court's repeated explanations of the Rule expressly permitted witnesses to talk with the attorneys, and the Rule was not violated simply because the prosecutor spoke to the toxicologist. State v. Saylor, 319 S.W.3d 704, 2009 Tex. App. LEXIS 2892 (Tex. App. Dallas Apr. 28 2009).

46. Trial court abused its discretion by granting defendant's motion because defendant failed to show that Rule 614 was violated or that her trial was not in accordance with the law, as neither the prosecutor nor the public defender who overheard the conversation could recall the conversation with any precision, but only that the prosecutor spoke with the toxicologist about whether defendant's blood sample could have been compromised by faulty refrigeration. The record did not establish the substantive content of the conversation, defendant did not establish that the prosecutor disclosed the name of the witness who testified about the refrigeration-related issues, and it was undisputed that the nurse testified before the events in question and was not recalled to the stand, so her trial testimony could not have been influenced by the conversation; Rule 614 was not violated simply because the prosecutor talked to the toxicologist. State v. Saylor, 2009 Tex. App. LEXIS 2113 (Tex. App. Dallas Mar. 27 2009).

47. Court properly granted the State's request to sequeter a defense witness because the witness's proferred testimony was that defendant had passed out for an unknown reason while performing yard work over 18 months after the alleged offense occurred. Defendant contended that that testimony would have bolstered his claim that he

suffered from a debilitating attack at the time of the alleged offense which prevented him from being aware that he was being pursued by police; even if that testimony was relevant to an issue before the jury, it was not "extraordinary" so as to be "crucial to the defense." Gomez v. State, 2009 Tex. App. LEXIS 1700 (Tex. App. Corpus Christi Mar. 5 2009).

48. Trial court did not err by permitting a witness to testify allegedly in violation of Tex. R. Evid. 614 because the witness's testimony did not corroborate the testimony he overheard; the witness did not testify with regard to the crime scene because he did not enter the victim's house but rather about him providing defendant a gun and his giving defendant and another man a ride to the victim's home. Mayfield v. State, 2008 Tex. App. LEXIS 9349 (Tex. App. Tyler Dec. 17 2008).

49. In defendant's murder case, the court's sequestration order was not violated by the presence of a State's witness during the testimony of another State's witness, a custodian of records, because the witness's testimony did not corroborate the custodian's testimony because the testimonies were unrelated; the custodian's testimony consisted of providing the admissibility foundation for the 911 call made by defendant, and the witness's testimony concerned his relationship with defendant and her plan to kill the victim. Cooper v. State, 2006 Tex. App. LEXIS 9010 (Tex. App. Houston 1st Dist. Oct. 19 2006).

50. Trial court properly admitted the testimony of two witnesses, the victim and his sister, who defendant claimed violated "the Rule," Tex. R. Evid. 614, where there was conflicting evidence, and what little testimony adduced at the hearing was inconsistent with the sister's. The two witnesses testified that they did not discuss the case, and the trial court evidently chose to believe them over defendant's witnesses who testified about what they thought they had overheard. Davis v. State, 2006 Tex. App. LEXIS 5903 (Tex. App. Tyler June 30 2006).

51. In a case of aggravated sexual assault of a child, because a witness who was present in the courtroom during the testimony of some of the other witnesses did not hear the testimony of two witnesses whose testimony she contradicted, the trial court did not abuse its discretion in allowing her testimony. Hector v. State, 2006 Tex. App. LEXIS 3653 (Tex. App. Houston 14th Dist. May 2 2006).

52. Testimony of defendant's court-appointed investigator was properly excluded after the investigator repeatedly violated the rule of sequestration of witness, Tex. R. Evid. 614, because the evidence showed that defendant or his counsel consented, procured, or otherwise had knowledge of the investigator's presence in the courtroom, and it was apparent from the record that defendant intended to call the investigator as a witness all along. Emenhiser v. State, 2006 Tex. App. LEXIS 2780 (Tex. App. Fort Worth Apr. 6 2006), substituted opinion at, opinion withdrawn by 2006 Tex. App. LEXIS 6627 (Tex. App. Fort Worth July 27, 2006).

53. Trial court did not abuse its discretion in excluding the proffered rebuttal testimony of defendant's father that a private conversation between the father and the victim of the charged sexual assault of a child never took place, as the victim claimed. Defendant could have reasonably expected to call his father to testify regarding some aspect of the confrontation between the victim and his family; in addition, the excluded testimony was not crucial to the defense as there were other participants in the confrontation who could have addressed the issue of whether the victim and defendant's family spoke together in private. Taylor v. State, 173 S.W.3d 851, 2005 Tex. App. LEXIS 7440 (Tex. App. Texarkana 2005).

54. Trial court properly granted exemption from the sequestration rule because the prosecution showed that the presence of the police officer who led the investigation of the case and assisted the prosecution in preparing the case was essential to the presentation of the State's case. Moreover, defendant failed to show harm from any error because the officer's testimony did not contradict or corroborate the testimony of the other witnesses; thus, the officer's hearing the preceding testimony did not materially affect his own testimony. Elizondo v. State, 2005 Tex.

App. LEXIS 3680 (Tex. App. Corpus Christi May 12 2005).

55. Trial court did not abuse its discretion in allowing a second police officer to testify because there was no evidence of harm or prejudice from an alleged Tex. R. Evid. 614 violation. Although the officers met together with the prosecutor before the second day of trial, only portions of their testimony corroborated each other, and these portions were largely corroborated by the testimony of a defense witness. Mitchell v. State, 2005 Tex. App. LEXIS 3050 (Tex. App. Houston 14th Dist. Apr. 21 2005).

56. State's designating a witness as a "case agent" does not make a witness one whom the trial court may not exclude from the courtroom under Tex. R. Evid. 614; the government's designation of a "case agent" in the trial of a criminal case is permitted in federal courts by the federal counterpart of Rule 614, Fed. R. Evid. 615, but it is not permitted in the courts of the State of Texas. Neither the State nor a defendant who is a natural person may take away the court's authority to exclude one of its witnesses by simply designating the witness. Russell v. State, 155 S.W.3d 176, 2005 Tex. Crim. App. LEXIS 150 (Tex. Crim. App. 2005).

57. State's designating a witness, a police officer, as a "case agent" did not make the officer one whom the trial court may not exclude from the courtroom under Tex. R. Evid. 614; because the State did not meet its burden to show that the officer was a witness whose exclusion from the courtroom was not authorized by Rule 614, the trial court erred in permitting the officer to remain in the courtroom during the trial. However, the trial court's error did not affect defendant's substantial rights because there was no likelihood that the officer's denials that he told defendant that making a statement could help him and that he told defendant that the victim was an informant were influenced by his hearing the testimony of another officer and defendant. Russell v. State, 155 S.W.3d 176, 2005 Tex. Crim. App. LEXIS 150 (Tex. Crim. App. 2005).

58. In an assault on a public servant case, Tex. Penal Code Ann. § 22.01(a)(1), (b)(1), no particular or extraordinary circumstances existed to warrant the defense witness's disqualification for violating the sequestration rule, Tex. R. Evid. 614; any nexus between defendant's defense that he did not know that he was running from the police or that he assaulted an officer and evidence of defendant's address at the time of the offense, which the witness would have testified to, was too tenuous for such evidence to be considered crucial. Johnson v. State, 2004 Tex. App. LEXIS 256 (Tex. App. Houston 1st Dist. Jan. 8 2004).

59. Although the trial court is obligated to exclude witnesses from the courtroom during the testimony of other witnesses, the trial court's decision concerning a witness who has violated Tex. R. Evid. 614 is discretionary. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

60. If Tex. R. Evid. 614 is violated, the trial court may, taking into consideration all of the circumstances, allow the testimony of the potential witness, exclude the testimony, or hold the violator in contempt. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

61. Appellate court performs a two-step analysis to ascertain whether a trial court has abused its discretion in allowing testimony by a witness who has violated Tex. R. Evid. 614; the first step of the analysis requires the trial court to determine what kind of witness was involved: a person who was not intended to be called to testify and who was not connected to the case-in-chief but who has, due to events during trial, become a necessary witness, or a person who had been sworn or listed as a witness in the case and either heard or discussed another's testimony. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

62. Trial court did not abuse its discretion by allowing testimony from a witness who violated Tex. R. Evid. 614 if the person was not anticipated to be called as a witness; the witness lacked personal knowledge regarding the offense and had no connection to either the state's case-in-chief or the defendant's case-in-chief. Harris v. State,

122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

63. Trial court did not err in allowing a witness to testify who had not been sequestered; there was no reason to believe he would be a witness at the time Tex. R. Evid. 614 was invoked. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

64. Trial court erred in determining that Tex. R. Evid. 614 did not apply to family members of the victim during defendant's murder trial; however, when these witnesses testified, there were no objections that the rule of sequestration had been violated. Hutchins v. State, 2002 Tex. App. LEXIS 8808 (Tex. App. Austin Dec. 12 2002).

65. Party seeking an exemption under Tex R. Evid. 614 has the burden of showing that one of the enumerated sections is met; the Rule contains no express exception for investigators. Therefore, it was defendant's burden, as the party seeking exemption from the rule, to make a showing that the investigator fell under one of the express exceptions to the rule; trial counsel's argument fell under the third exception. Peters v. State, 997 S.W.2d 377, 1999 Tex. App. LEXIS 5950 (Tex. App. Beaumont 1999).

Criminal Law & Procedure : Sentencing : Imposition : Victim Statements

66. In a trial for indecency with a child by contact, there was no error in allowing the victim's father to testify at punishment, even though he sat in the courtroom during the guilt/innocence phase of the trial, in violation of Tex. R. Evid. 614, because his victim-impact testimony was based on his personal observations and defendant did not claim that he was influenced by testimony from the witnesses during guilt/innocence. Tran v. State, 2011 Tex. App. LEXIS 1050, 2011 WL 532137 (Tex. App. Texarkana Feb. 15 2011).

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

67. In a case involving the hindering of a secured creditor, appellant's motion for a new trial was sufficient to preserve an error alleging a violation of Tex. R. Evid. 614, in the absence of evidence that appellant was aware of the violation of the rule at the time of the questionable testimony. However, a new trial was not appropriate because appellant's substantial rights were not affected; the witness testified during the punishment phase, and the testimony did not contradict or corroborate any other evidence. Thomison v. State, 2012 Tex. App. LEXIS 9789 (Tex. App. Eastland Nov. 29 2012).

68. Trial court abused its discretion in granting defendant's motion for new trial, which alleged that she was entitled to a new trial in the interest of justice on the ground that the prosecutor had knowingly violated Tex. R. Evid. 614, known as "the Rule," because defendant failed to demonstrate that the Rule was violated or that her trial was not in accordance with the law. Although the public defender testified that, at some point during the trial of the case, she was in a work room waiting to talk to another prosecutor when the lead prosecutor in the case entered the work room and started talking to the toxicologist, a State's witness, in the presence of yet another State's witness, a nurse: (1) the record did not establish the substantive content of the conversation between the prosecutor and the toxicologist; (2) defendant had not shown that the prosecutor disclosed the name of a witness who testified about refrigeration-related issues or that she disclosed the names of any witnesses; (3) defendant failed to establish what, if anything, the nurse-witness who was present in the work room actually heard of the conversation between the prosecutor and the toxicologist; (4) it was undisputed that the nurse testified before the events in question and was not recalled to the stand, so her trial testimony could hardly have been influenced by the conversation between the prosecutor and the toxicologist, regardless of its content; and (5) the trial court's repeated explanations of the Rule expressly permitted witnesses to talk with the attorneys, and the Rule was not violated simply because the prosecutor spoke to the toxicologist. State v. Saylor, 319 S.W.3d 704, 2009 Tex. App. LEXIS 2892 (Tex. App. Dallas Apr. 28 2009).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

69. State's designating a witness, a police officer, as a "case agent" did not make the officer one whom the trial court may not exclude from the courtroom under Tex. R. Evid. 614; because the State did not meet its burden to show that the officer was a witness whose exclusion from the courtroom was not authorized by Rule 614, the trial court erred in permitting the officer to remain in the courtroom during the trial. However, the trial court's error did not affect defendant's substantial rights because there was no likelihood that the officer's denials that he told defendant that making a statement could help him and that he told defendant that the victim was an informant were influenced by his hearing the testimony of another officer and defendant. Russell v. State, 155 S.W.3d 176, 2005 Tex. Crim. App. LEXIS 150 (Tex. Crim. App. 2005).

70. Violation of Tex. R. Evid. 614 may not be relied upon for reversal of the case unless it is shown that the trial court abused its discretion in allowing the violative testimony. Young v. State, 2004 Tex. App. LEXIS 1615 (Tex. App. Houston 1st Dist. Feb. 19 2004), vacated by, opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 4591 (Tex. App. Houston 1st Dist. May 20, 2004).

Criminal Law & Procedure : Appeals : Reversible Errors : Prosecutorial Misconduct

71. Murder defendant was not denied due process by the prosecutor's allegedly snide and unprofessional comments, including questioning a defense investigator on cross-examination about the investigator's presence in the courtroom during the testimony of other witnesses, in violation of the Tex. R. Evid. 614. Jimenez v. State, 240 S.W.3d 384, 2007 Tex. App. LEXIS 7372 (Tex. App. Austin 2007), *cert. denied*, Olvera Jimenez v. Texas, 555 U.S. 892, 129 S. Ct. 213, 172 L. Ed. 2d 159, 2008 U.S. LEXIS 5766 (2008).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

72. Tex. R. App. P. 33.1(a) required a specific objection and a ruling from the trial judge to preserve error for appellate purposes; thus, by failing to object at the time the trial judge excluded all spectators from the courtroom on allegations that defendant's sister, who was not a witness and had been allowed to remain in the courtroom during the proceedings, relayed information about witness testimony to excluded witnesses outside the courtroom, defendant forfeited his right to present such a complaint on appeal. Rodriguez v. State, 2005 Tex. App. LEXIS 2959 (Tex. App. San Antonio Apr. 20 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

73. In a case involving the hindering of a secured creditor, appellant's motion for a new trial was sufficient to preserve an error alleging a violation of Tex. R. Evid. 614, in the absence of evidence that appellant was aware of the violation of the rule at the time of the questionable testimony. However, a new trial was not appropriate because appellant's substantial rights were not affected; the witness testified during the punishment phase, and the testimony did not contradict or corroborate any other evidence. Thomison v. State, 2012 Tex. App. LEXIS 9789 (Tex. App. Eastland Nov. 29 2012).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

74. Even assuming that defendant preserved error when the judge excused the officer from the Rule, he did not object when the State called the officer to testify. Defendant did not preserve the error for review. Wasserman v. State, 2014 Tex. App. LEXIS 8914 (Tex. App. Corpus Christi Aug. 14 2014).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

75. Defendant's objection under Tex. R. Evid. 403 to the presence of the complainants at the punishment phase of trial did not comport with his appellate argument under Tex. Code Crim. Proc. Ann. arts. 36.06, 36.03 and Tex. R. Evid. 614, as required to preserve the issue. Reed v. State, 2012 Tex. App. LEXIS 1650, 2012 WL 662327 (Tex. App. Waco Feb. 29 2012).

76. In an assault case, defendant failed to preserve an issue relating to Tex. R. Evid. 614. Specifically, defendant did not make an objection based on Rule 614 until a witness had been dismissed, and this was untimely. Kelsey v. State, 2008 Tex. App. LEXIS 5741 (Tex. App. Dallas July 31 2008).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

77. At a pretrial hearing in a criminal prosecution for capital murder, appellant stated that he wanted to restrict the media's coverage of pretrial hearings so that witnesses who would later be placed under Tex. R. Evid. 614 would not have access to certain testimony via news reports on pretrial hearings. However, when appellant stated that he was willing to accept an alternative solution to his complaint about media reports on pretrial hearings, he waived the complaint for appellate review. Salinas v. State, 163 S.W.3d 734, 2005 Tex. Crim. App. LEXIS 741 (Tex. Crim. App. 2005).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

78. Where the court invoked Tex. R. Evid. 614 at the outset of defendant's trial for two counts of aggravated sexual assault, the trial court did not abuse its discretion when it disqualified a defense witness who, when called to the stand during the punishment phase of the trial, admitted to the court that she had been present during the guilt-innocence phase. Longoria v. State, 148 S.W.3d 657, 2004 Tex. App. LEXIS 9179 (Tex. App. Houston 14th Dist. 2004).

79. Although the complainant in a burglary case testified at the punishment phase after hearing the testimony of the two prior witnesses from the sheriff's department, those witnesses did not testify regarding any of the same facts as the complainant. Because his testimony did not corroborate that of either of the other witnesses, the trial court did not abuse its discretion in admitting the complainant's testimony during the punishment phase. Johnson v. State, 2004 Tex. App. LEXIS 3410 (Tex. App. Houston 14th Dist. Apr. 15 2004).

80. Trial court did not abuse its discretion by allowing a bailiff who served for the jury to testify during the punishment phase of trial after Tex. R. Evid. 614 had been invoked. There was no evidence in the record that the bailiff's testimony was affected by having heard appellant's testimony. Young v. State, 2004 Tex. App. LEXIS 1615 (Tex. App. Houston 1st Dist. Feb. 19 2004), vacated by, opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 4591 (Tex. App. Houston 1st Dist. May 20, 2004).

81. Violation of Tex. R. Evid. 614 may not be relied upon for reversal of the case unless it is shown that the trial court abused its discretion in allowing the violative testimony. Young v. State, 2004 Tex. App. LEXIS 1615 (Tex. App. Houston 1st Dist. Feb. 19 2004), vacated by, opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 4591 (Tex. App. Houston 1st Dist. May 20, 2004).

82. In an assault on a public servant case, Tex. Penal Code Ann. § 22.01(a)(1), (b)(1), no particular or extraordinary circumstances existed to warrant the defense witness's disqualification for violating the sequestration rule, Tex. R. Evid. 614; any nexus between defendant's defense that he did not know that he was running from the police or that he assaulted an officer and evidence of defendant's address at the time of the offense, which the witness would have testified to, was too tenuous for such evidence to be considered crucial. Johnson v. State, 2004

Tex. App. LEXIS 256 (Tex. App. Houston 1st Dist. Jan. 8 2004).

83. Appellate court performs a two-step analysis to ascertain whether a trial court has abused its discretion in allowing testimony by a witness who has violated Tex. R. Evid. 614; the first step of the analysis requires the trial court to determine what kind of witness was involved: a person who was not intended to be called to testify and who was not connected to the case-in-chief but who has, due to events during trial, become a necessary witness, or a person who had been sworn or listed as a witness in the case and either heard or discussed another's testimony. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

84. Trial court did not abuse its discretion by allowing testimony from a witness who violated Tex. R. Evid. 614 if the person was not anticipated to be called as a witness; the witness lacked personal knowledge regarding the offense and had no connection to either the state's case-in-chief or the defendant's case-in-chief. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

85. Trial court did not err in allowing a witness to testify who had not been sequestered; there was no reason to believe he would be a witness at the time Tex. R. Evid. 614 was invoked. Harris v. State, 122 S.W.3d 871, 2003 Tex. App. LEXIS 9910 (Tex. App. Fort Worth 2003).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

86. Trial court did not abuse its discretion by admitting the testimony of two State witnesses because during the questioning to determine whether Tex. R. Evid. 614 had been violated the defense did not produce any evidence that the witnesses conferred about each other's testimony during a court break, nor was there any evidence that their testimony contradicted the testimony of a defense witness or that it corroborated each other's testimony. Derrick v. State, 2013 Tex. App. LEXIS 4843 (Tex. App. Amarillo Apr. 17 2013).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Mistrial

87. Trial court did not abuse its discretion in failing to exclude a witness's testimony or grant defendant's motion for mistrial. Although the witness violated Tex. R. Evid. 614 by telling her sister about questions asked of her at trial, because the witness's sister did not testify, and because the record did not support defendant's assertion that he intended to call the sister to testify at trial, defendant was not harmed by the witness's violation of the rule. Utley v. State, 2014 Tex. App. LEXIS 268, 2014 WL 97303 (Tex. App. Waco Jan. 9 2014).

88. Trial court did not abuse its discretion by denying defendant's motion for a mistrial based on a violation of Tex. R. Evid. 614 because given the nature of the witnesses' testimony, concerning the records they were the custodians of, the prosecutor speaking to them in front of each other could not have influenced their testimony. Collazo v. State, 2013 Tex. App. LEXIS 7775, 2013 WL 3279268 (Tex. App. San Antonio June 26 2013).

89. Trial court did not abuse its discretion by denying defendant's motion for a mistrial based on an alleged violation of the witness sequestration rule because the record did not establish that the rule had been violated, as the only person to claim that witnesses were violating the rule was defense counsel's assistant, who never personally identified the witnesses to the trial court, nor did he testified as to the specific subject of their discussion. Counsel never asked to question the witnesses to see if the rule had been violated. Milton v. State, 2011 Tex. App. LEXIS 7592, 2011 WL 4361482 (Tex. App. Houston 14th Dist. Sept. 20 2011).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial

90. Trial court abused its discretion by granting defendant's motion because defendant failed to show that Rule 614 was violated or that her trial was not in accordance with the law, as neither the prosecutor nor the public defender who overheard the conversation could recall the conversation with any precision, but only that the prosecutor spoke with the toxicologist about whether defendant's blood sample could have been compromised by faulty refrigeration. The record did not establish the substantive content of the conversation, defendant did not establish that the prosecutor disclosed the name of the witness who testified about the refrigeration-related issues, and it was undisputed that the nurse testified before the events in question and was not recalled to the stand, so her trial testimony could not have been influenced by the conversation; Rule 614 was not violated simply because the prosecutor talked to the toxicologist. State v. Saylor, 2009 Tex. App. LEXIS 2113 (Tex. App. Dallas Mar. 27 2009).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Witnesses

91. Trial court did not abuse its discretion by refusing to exclude the child sexual assault victim from the courtroom under Tex. R. Evid. 614 because defendant gave the court no basis for concluding that the testimony of the victim would be materially affected if she heard other testimony. Soria v. State, 2012 Tex. App. LEXIS 3345, 2012 WL 1570969 (Tex. App. Amarillo Apr. 27 2012).

92. Trial court did not err by disqualifying a defense witness for violating Tex. R. Evid. 614 because the record did not indicate that the defense consented to, procured, or otherwise had knowledge of the witness's presence in the courtroom, and the witness's testimony was not highly probative of the question of defendant's guilt, as the record did not indicate that his testimony was probative of whether defendant traveled to a particular city on a particular date to effectuate a drug sale or did so on other occasions. Sherber v. State, 2011 Tex. App. LEXIS 7648, 2011 WL 4389614 (Tex. App. Beaumont Sept. 21 2011).

93. Trial court did not abuse its discretion by allowing the victim's mother to testify during the punishment phase of defendant's trial because it could have found no violation of Tex. R. Evid. 614 or that any violation failed to injure defendant. Because the evidence was conflicting, it was unclear if an actual violation occurred, as an attorney testified he overhead the mother speaking with the victim about what she had testified about, but the mother denied doing so; although the mother's testimony about the family moving was the same as the victim's testimony, the attorney had testified that he heard a discussion about someone being thrown out of a house. Soto v. State, 2010 Tex. App. LEXIS 8709, 2010 WL 4273173 (Tex. App. San Antonio Oct. 29 2010).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

94. Trial court properly granted exemption from the sequestration rule because the prosecution showed that the presence of the police officer who led the investigation of the case and assisted the prosecution in preparing the case was essential to the presentation of the State's case. Moreover, defendant failed to show harm from any error because the officer's testimony did not contradict or corroborate the testimony of the other witnesses; thus, the officer's hearing the preceding testimony did not materially affect his own testimony. Elizondo v. State, 2005 Tex. App. LEXIS 3680 (Tex. App. Corpus Christi May 12 2005).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

95. Trial court's error in exempting a witness from the witness sequestration rule was harmless because the witness merely recalled the statements that the victim made during the interview, and the victim's trial testimony clearly established the elements of the offense, and was consistent, strong, and unwavering, even in the face of cross-examination. Allen v. State, 2014 Tex. App. LEXIS 6416, 2014 WL 2631979 (Tex. App. Texarkana June 13 2014).

96. Trial court's error in allowing the interviewer to remain in the courtroom in violation of this rule was harmless because her testimony was limited to the victim's statements during the interview and therefore the court could not say that she was influenced in her testimony by the testimony she heard. Allen v. State, 436 S.W.3d 827, 2014 Tex. App. LEXIS 6462, 2014 WL 2619439 (Tex. App. Texarkana June 13 2014).

97. Trial court's error in allowing the interviewer to remain in the courtroom in violation of this rule was harmless because the court could not say that her testimony was influenced. Allen v. State, 2014 Tex. App. LEXIS 6460, 2014 WL 2632059 (Tex. App. Texarkana June 13 2014).

98. Even if the court erred in allowing the witness to testify, the error, if any, did not have a substantial and injurious effect or influence in determining the jury's verdict, because the record did not show that the witness was influenced by any testimony she may have heard from the State's other witnesses. Reed v. State, 2013 Tex. App. LEXIS 7131 (Tex. App. Beaumont June 12 2013).

99. Trial court's error in allowing the State's investigator to remain in the courtroom despite defendant's invocation of Tex. R. Evid. 614 did not affect defendant's substantial rights because the testimony the investigator offered after he was recalled as a witness was supported by recordings and documents. Norris v. State, 2012 Tex. App. LEXIS 108, 2012 WL 34453 (Tex. App. Beaumont Jan. 4 2012).

100. During defendant's trial for indecency with a child, the State's investigator was allowed to remain in the courtroom during trial after the State invoked Tex. R. Evid. 614; defendant could not complain of the error on appeal, because defendant called the State's investigator as an adverse witness; defendant invited the error. Sharp v. State, 210 S.W.3d 835, 2006 Tex. App. LEXIS 11033 (Tex. App. Amarillo 2006).

Evidence : Hearsay : Rule Components : General Overview

101. It was not an abuse of discretion for the trial court to exclude a witness's testimony who had violated Tex. R. Evid. 614 because his testimony was not crucial to the defense: (1) the witness's testimony and photographs about the mobile homes had little or no probative value as to the distance between the homes at the time of the offense because the witness was unable to testify about the appearance and location of the homes at the time of the offense, and no other witnesses offered such testimony; (2) the distance between homes had marginal evidentiary value because there was no evidence that the victim screamed or did anything else that would have alerted nearby neighbors; (3) photographs of defendant's scars and protruding stomach had little or no probative value as to his appearance at the time of the offense; and (4) the witness's testimony about an email he received from a camera manufacturer and his discussion with a retail store's employees was inadmissible hearsay to which no hearsay exception applied. Emenhiser v. State, 196 S.W.3d 915, 2006 Tex. App. LEXIS 6627 (Tex. App. Fort Worth 2006).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

102. Tex. R. Evid. 614 provides that at the request of a party, the trial court shall order witnesses excluded so that they cannot hear the testimony of other witnesses; however, the rule does not apply to the exclusion of witnesses during voir dire, opening statements, or before there has been any testimony. Thus, the presence of an officer, who was also a witness in defendant's case, in the courtroom during opening statements prior to the commencement of any testimony did not violate Rule 614. Additionally, the content of the opening statements could not have influenced the officer's testimony and, thus, the trial court did not abuse its discretion in allowing the officer to testify. Hudson v. State, 2005 Tex. App. LEXIS 164 (Tex. App. Houston 14th Dist. Jan. 6 2005).

103. In an assault on a public servant case, Tex. Penal Code Ann. § 22.01(a)(1), (b)(1), no particular or extraordinary circumstances existed to warrant the defense witness's disqualification for violating the sequestration

rule, Tex. R. Evid. 614; any nexus between defendant's defense that he did not know that he was running from the police or that he assaulted an officer and evidence of defendant's address at the time of the offense, which the witness would have testified to, was too tenuous for such evidence to be considered crucial. Johnson v. State, 2004 Tex. App. LEXIS 256 (Tex. App. Houston 1st Dist. Jan. 8 2004).

Evidence : Procedural Considerations : Judicial Intervention in Trials : Comments by Judges : Credibility of Witnesses

104. Instruction to the jury that two defense witnesses violated the witness rule in Tex. R. Evid. 614 was not fundamental error under Tex. R. Evid. 103(d) because the comment on the evidence under Tex. Code Crim. Proc. Ann. art. 38.05 only suggested that the witnesses might be untrustworthy rather than that defendant might be guilty. Powell v. State, 2011 Tex. App. LEXIS 2888, 2011 WL 1466876 (Tex. App. Austin Apr. 15 2011).

Evidence : Procedural Considerations : Rulings on Evidence

105. Trial court properly admitted the testimony of two witnesses, the victim and his sister, who defendant claimed violated "the Rule," Tex. R. Evid. 614, where there was conflicting evidence, and what little testimony adduced at the hearing was inconsistent with the sister's. The two witnesses testified that they did not discuss the case, and the trial court evidently chose to believe them over defendant's witnesses who testified about what they thought they had overheard. Davis v. State, 2006 Tex. App. LEXIS 5903 (Tex. App. Tyler June 30 2006).

106. There was no error in allowing a witness to remain in the courtroom after the witness exclusion rule had been invoked during defendant's trial for sexual assault on a child. Hearing the alleged victim-child testify via closed-circuit television did not affect the witness's testimony. Barnes v. State, 165 S.W.3d 75, 2005 Tex. App. LEXIS 2603 (Tex. App. Austin 2005).

Evidence : Testimony : Examination : General Overview

107. Even if the court erred in allowing the witness to testify, the error, if any, did not have a substantial and injurious effect or influence in determining the jury's verdict, because the record did not show that the witness was influenced by any testimony she may have heard from the State's other witnesses. Reed v. State, 2013 Tex. App. LEXIS 7131 (Tex. App. Beaumont June 12 2013).

Evidence : Testimony : Examination : Judicial Interrogation

108. Trial judge erred in refusing to exclude certain witnesses on the basis that they were court employees; however, absent a showing of harm by the mother, the judge's refusal to exclude certain witnesses was not reversible. In the Interest of H.M.S., 349 S.W.3d 250, 2011 Tex. App. LEXIS 7321 (Tex. App. Dallas Sept. 7 2011).

109. Defendant's conviction for felony securities fraud was proper where the trial court did not err by exempting the State's expert witness from "the Rule," Tex. R. Evid. 614, because no fact-specific testimony was admitted. Even if the trial court had erred, any error was waived. Caron v. State, 162 S.W.3d 614, 2005 Tex. App. LEXIS 1030 (Tex. App. Houston 14th Dist. 2005).

110. Where defendant did not object to the deputy's testimony based on Tex. Code Crim. Proc. Ann. art. 36.24, but rather his objection was that he was unduly surprised by the deputy's testimony because he was not on the witness list, and where despite defendant having invoked Tex. R. Evid. 614, the deputy had been sitting in the courtroom during trial, defendant presented nothing for review in this point of error. Young v. State, 2004 Tex. App. LEXIS 4591 (Tex. App. Houston 1st Dist. May 20 2004).

Evidence : Testimony : Presentation of Evidence

111. No certificate of appealability was warranted on petitioner death row inmate's claim of ineffective assistance of counsel for not invoking Tex. R. Evid. 614 as to the murder victim's daughter being present in the courtroom, because it was not clear the daughter could have been excluded if a motion had been made, and, the state courts were not unreasonable in determining it was a reasonable strategical choice for defense counsel to forego attempting to exclude her in exchange for ensuring defendant's family could also remain, and further, it was not necessarily unreasonable to have assumed the daughter would not lose her composure, as she had attended all prior proceedings without incident. Mccarthy v. Thaler, 482 Fed. Appx. 898, 2012 U.S. App. LEXIS 14138 (5th Cir. Tex. 2012).

112. Mother could not show that trial counsel was ineffective for allowing a witness to remain in the courtroom after Tex. R. Evid. 614 had been invoked because the mother made conclusory that her attorney did not adequately review the witness's home study and there was no evidence in the record explaining counsel's reasons for allowing the witness to remain in the courtroom. The mother also failed to show that she was prejudiced, as she failed to allege how the outcome of the termination of parental rights trial would have been different if her counsel had required the witness to remain outside the courtroom during other witnesses' testimony. In re Z.D., 2008 Tex. App. LEXIS 7161 (Tex. App. Fort Worth Sept. 25, 2008).

Evidence : Testimony : Sequestration

113. Defendant failed to show the court erred by allowing the investigator to testify at the punishment phase in violation of the rule, because the investigator was a category one witness; the investigator had no personal knowledge of the offense for which defendant was charged and his testimony was unnecessary to the State's case-in-chief. Pompa v. State, 2014 Tex. App. LEXIS 9079, 2014 WL 4049880 (Tex. App. Corpus Christi Aug. 14 2014).

114. Assuming without deciding that the trial court abused its discretion in violation of the rule regarding exclusion of witnesses, defendants' substantial rights were not affected, as the jury had information concerning the photographs that were the subject of the testimony in question, and the photographs themselves were admitted into evidence, and thus the witness's testimony did not have a substantial effect on the assessment of punishment. Oliphant-Alston v. State, 2013 Tex. App. LEXIS 14562, 2013 WL 6198844 (Tex. App. Fort Worth Nov. 27 2013).

115. Court assumed without deciding that the two-part Webb v. State analysis applies to violations of the rule other than a witness's unauthorized presence in the courtroom during trial. Sponsler v. State, 2013 Tex. App. LEXIS 13812, 2013 WL 6002763 (Tex. App. Austin Nov. 8 2013).

116. Witness violated the rule by speaking with another about the trial and her testimony, and as the trial court disqualified the witness based solely on the fact that the rule was violated, the court had to decide if the excluded testimony was crucial to the defense. Sponsler v. State, 2013 Tex. App. LEXIS 13812, 2013 WL 6002763 (Tex. App. Austin Nov. 8 2013).

117. Witness's testimony was not highly probative of the question of defendant's guilt and thus the court did not find it was crucial to the defense, and the exclusion of his testimony for violating the rule was not an abuse of discretion. Sponsler v. State, 2013 Tex. App. LEXIS 13812, 2013 WL 6002763 (Tex. App. Austin Nov. 8 2013).

118. During questioning to determine if Tex. R. Evid. 614 had been violated, the defense did not produce evidence that witnesses conferred about each other's testimony, and there was no evidence their testimony contradicted defense witnesses' testimony or that their testimony corroborated each other's, such that a violation of Rule 614

was not shown and the trial court did not abuse its discretion in admitting the testimony. Lewis v. State, 402 S.W.3d 852, 2013 Tex. App. LEXIS 6923 (Tex. App. Amarillo May 29 2013).

119. Charitable organization's representative was not subject to Tex. R. Civ. P. 267(b) and Tex. R. Evid. 614 excluding her from the courtroom during the termination of parental rights trial because she was serving as the guardian ad litem and a guardian ad litem was entitled to appear at all hearings under Tex. Fam. Code Ann. §§ 107.002, 107.031(a). In the Interest of H.D.B.-M., 2013 Tex. App. LEXIS 2057, 2013 WL 765699 (Tex. App. Waco Feb. 28 2013).

120. No certificate of appealability was warranted on petitioner death row inmate's claim of ineffective assistance of counsel for not invoking Tex. R. Evid. 614 as to the murder victim's daughter being present in the courtroom, because it was not clear the daughter could have been excluded if a motion had been made, and, the state courts were not unreasonable in determining it was a reasonable strategical choice for defense counsel to forego attempting to exclude her in exchange for ensuring defendant's family could also remain, and further, it was not necessarily unreasonable to have assumed the daughter would not lose her composure, as she had attended all prior proceedings without incident. Mccarthy v. Thaler, 482 Fed. Appx. 898, 2012 U.S. App. LEXIS 14138 (5th Cir. Tex. 2012).

121. State contended a DVD contained essentially the same evidence about which appellant complained concerning a witness's testimony with regard to Tex. R. Evid. 614, but for purposes of this appeal, the court assumed without deciding that waiver did not occur. Townes v. State, 2012 Tex. App. LEXIS 1244, 2012 WL 566000 (Tex. App. San Antonio Feb. 15 2012).

122. Witness's mother was the only one of the two sworn in who heard the instructions concerning Tex. R. Evid. 614 before the conversation, and the court found Rule 614 was violated because the witness and her mother talked to each other about the case without permission from the trial court; thus, the first prong of the harm test was met, as the parties conferred after the rule was invoked as to one of them. Townes v. State, 2012 Tex. App. LEXIS 1244, 2012 WL 566000 (Tex. App. San Antonio Feb. 15 2012).

123. Under the second prong under Tex. R. Evid. 614, while the testimonies of a witness and her mother corroborated each other, their testimonies never changed from prior statements or statements made during the trial before the rule was violated; it did not appear that the short conversation that took place between the two influenced the other's testimony because the similarities existed prior to the violation, and thus the second prong was not met, and the trial court did not err in admitting the testimony because there was no evidence of harm or prejudice to appellant. Townes v. State, 2012 Tex. App. LEXIS 1244, 2012 WL 566000 (Tex. App. San Antonio Feb. 15 2012).

124. Testimony of defendant's brother about the sexual relations he had with the victim's mother did not include any sexual acts like the acts defendant performed on the victim, and the brother's testimony would not explain the victim's knowledge of those acts; thus, the trial court did not err in excluding the brother as a witness at trial because he was present in the courtroom for most of the trial, in violation of Tex. R. Evid. 614, and the excluded testimony was not crucial to the defense. Kalla v. State, 2011 Tex. App. LEXIS 1030, 2011 WL 489929 (Tex. App. Dallas Feb. 14 2011).

125. Trial court did not abuse its discretion by declining to excluded the victim's testimony based on the allegation that her conversation with the witness violated the rule against sequestration of witnesses, because the only issues to which both testified concerned defendant's nickname and the location of the Social Security cards that the victim took from the house where she was assaulted, and these facts did not bear upon defendant's guilt or innocence for the offenses of aggravated kidnapping and aggravated sexual assault. Ryan v. State, 2011 Tex. App. LEXIS 676

(Tex. App. Houston 1st Dist. Jan. 27 2011).

126. Where the record was silent as to the reasons for counsel's actions, defendant could not show that he was denied effective assistance of counsel at the revocation hearing because his trial counsel did not request exclusion of witnesses from the proceeding by invoking Tex. R. Evid. 614. Counsel could have intentionally exposed defense witnesses to the testimony of State's witnesses to assist in the presentation of defendant's response to the State's case. Hill v. State, 2010 Tex. App. LEXIS 10043, 2010 WL 5140488 (Tex. App. Amarillo Dec. 17 2010).

127. Although defense counsel stated that he thought the State violated Rule 614, counsel did not obtain a ruling from the trial court, nor did counsel object to the trial court's failure to rule, for purposes of Tex. R. App. P. 33.1(a)(2), and thus defendant's complaint was not properly preserved for appellate review; even if the issue had been preserved, the trial court did not err in admitting an officer's testimony because an explanation could have reasonably allowed the trial court to find that the officer did not confer with other witnesses on an issue that was relevant to defendant's guilt or innocence, and thus there was no violation of the rule. Grigsby v. State, 2009 Tex. App. LEXIS 7042, 2009 WL 2837641 (Tex. App. Austin Aug. 31 2009).

128. For purposes of Tex. R. App. P. 44.2(b), defendant's substantial rights were not affected because no violation of Tex. R. Evid. 614 occurred. Grigsby v. State, 2009 Tex. App. LEXIS 7042, 2009 WL 2837641 (Tex. App. Austin Aug. 31 2009).

129. Defendant delayed making any claim of error regarding sequestration under Tex. R. Evid. 614 until after both sides had fully rested and closed their evidentiary cases, and this was too late to preserve error under Tex. R. App. P. 33.1; however, even if defendant had timely objected, there was no direct evidence to show that a witness was present in the courtroom and hearing the testimony given by other witnesses, plus the trial court's statement suggested that the trial court had not personally observed the witness in question in the audience during the testimony, and thus defendant was unable on the record to satisfy his burden under the first prong of the test. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

130. If the trial court concluded that a witness was in the procedural posture of a person not expected to testify, the ruling under Tex. R. Evid. 614 could be upheld on that basis as within the trial court's discretion, and if the witness had to be considered a listed or sworn witness, the court was unable to conclude that defendant's substantial rights were affected under Tex. R. App. P. 44.2(b); the witness testified regarding an air conditioner not being hooked up, but this issue was not central to the issues in defendant's capital murder trial, as the jury was instructed to find defendant guilty of such if he murdered the victim during the course of a robbery, not an arson, whether defendant committed an arson was a collateral matter, and the issue of whether defendant committed arson was not an important part of the trial. Horton v. State, 2009 Tex. App. LEXIS 643, 2009 WL 223104 (Tex. App. Tyler Jan. 30 2009).

131. Court did not err by permitting the victim to remain in the courtroom after her case-in-chief testimony and during defendant's testimony because she testified on rebuttal that she tried to push defendant out of the bed but did not kick him, and that testimony was in keeping with the victim's case-in-chief testimony and thus was not materially affected by having heard defendant testify. Scott v. State, 2008 Tex. App. LEXIS 9142 (Tex. App. Houston 14th Dist. Dec. 4 2008).

132. Trial court did not abuse its discretion in allowing an investigator to testify because he had no connection with either party's case-in-chief and had no personal knowledge of the offense, and thus the court overruled defendant's claim that the trial court erred in allowing the investigator to testify as a rebuttal witness in violation of Tex. R. Evid. 614; the investigator testified as a rebuttal witness only as to what transpired during a witness's meeting with prosecutors and the State was not made aware that it was going to call the investigator until after the witness's

testimony claiming that he did not remember making the statement. Moffett v. State, 2008 Tex. App. LEXIS 6460 (Tex. App. Fort Worth Aug. 21, 2008), *cert. denied,* 130 S. Ct. 403, 175 L. Ed. 2d 276, 2009 U.S. LEXIS 7432 (2009).

133. Because the court determined that an investigator did not have personal knowledge of the offense, the court did not need to determine whether defendant was harmed under the second step of the analysis regarding whether the trial court erred in allowing a violation of Tex. R. Evid. 614. Moffett v. State, 2008 Tex. App. LEXIS 6460 (Tex. App. Fort Worth Aug. 21, 2008), *cert. denied,* 130 S. Ct. 403, 175 L. Ed. 2d 276, 2009 U.S. LEXIS 7432 (2009).

134. In an assault case, defendant failed to preserve an issue relating to Tex. R. Evid. 614. Specifically, defendant did not make an objection based on Rule 614 until a witness had been dismissed, and this was untimely. Kelsey v. State, 2008 Tex. App. LEXIS 5741 (Tex. App. Dallas July 31 2008).

135. Defendant argued that a witness's violation of Tex. R. Evid. 614 should not have prevented her from testifying and she should have been qualified to testify as an expert under Tex. R. Evid. 702, but the court overruled these points of error because the witness was not qualified to provide a professional opinion about the victim's wound and whether or not it appeared to be self-inflicted; although the witness had a degree in nursing, she had no specific training for looking at wounds or determining whether they were self-inflicted, and there was nothing establishing that the witness was qualified as an expert on self-inflicted wounds by her knowledge, skill, experience, training, or education, such that it was not error for the trial court to exclude her testimony as an expert witness. Jones v. State, 2008 Tex. App. LEXIS 5819 (Tex. App. Austin July 30, 2008).

136. In a theft case, even though witnesses remained in the courtroom, in violation of Tex. R. Evid. 614, the evidence did not support a conclusion that these witnesses' presence during the presentation of other testimony resulted in an injury to defendant; two other witnesses testified about defendant leaving the store with the items, and no testimony was changed or influenced by hearing other witnesses. Hopkins v. State, 2008 Tex. App. LEXIS 2861 (Tex. App. Texarkana Apr. 9 2008).

137. Tex. R. Evid. 614 did not apply to the exclusion of witnesses during voir dire and before any testimony had begun; therefore, a witness's presence in the courtroom during voir dire prior to the commencement of any testimony did not violate the rule. Cockburn v. State, 2008 Tex. App. LEXIS 196 (Tex. App. Fort Worth Jan. 10 2008).

138. In a dispute concerning a promissory note, the trial court properly admonished the witnesses under Tex. R. Evid. 614 and Tex. R. Civ. P. 267 not to discuss the case while they were waiting to be called into the courtroom. Hayes v. Wells Fargo Bank, N.A., 2007 Tex. App. LEXIS 8321 (Tex. App. Houston 1st Dist. Oct. 18 2007).

139. In a medical malpractice survivor action, defendant invoked Tex. R. Evid. 614 to keep family members out of the courtroom; during rebuttal arguments, plaintiff's counsel make an improper implication by arguing that defendant's invocation of Tex. R. Evid. 614 would keep a family member from being called to testify as a witness; however, the brief statement was harmless.

140. In defendant's capital murder case, the court properly allowed the deceased victim's adult sister, who was a witness in the case, to remain in the courtroom because defendant did not account for the rights given to close relatives of a deceased victim under Tex. Code Crim. Proc. Ann. art. 36.03. Furthermore, defendant did not demonstrate how, if at all, the witness was influenced in her testimony by the testimony she heard. Rivas v. State, 2007 Tex. App. LEXIS 5623 (Tex. App. Corpus Christi July 12 2007).

141. Exclusion of testimony under Tex. R. Evid. 614 was proper because a witness was in the courtroom after the Rule was invoked, and the testimony in question was not crucial to the defense; the witness was going to testify that other people resided in a residence where a sexual assault occurred on a child, but this fact was undisputed. Delapaz v. State, 229 S.W.3d 795, 2007 Tex. App. LEXIS 4614 (Tex. App. Eastland 2007).

142. Court rejected an inmate's claim in a petition for writ of habeas corpus that trial counsel was ineffective for failing to preserve testimony of a corroborating witness who was precluded from testifying after violating Tex. R. Evid. 614; the court found that (1) counsel failed to preserve the witness's testimony and thus, for purposes of Tex. R. Evid. 103, the failure to make an offer of proof prevented the inmate from arguing on direct appeal that the trial court erred in precluding the witness from testifying, but (2) regardless of whether the failure resulted in deficient representation, the failure was not prejudicial because the trial court acted within its discretion in precluding the witness from testifying; although certain actions of the witness did not justify exclusion, the witness violated Tex. R. Evid. 614 when she spoke to the inmate on two separate occasions and the inmate necessarily had knowledge of the violations, and thus the inmate failed to prove prejudice in the ineffective assistance claim. David v. State, 2007 Tex. App. LEXIS 3440 (Tex. App. Houston 1st Dist. May 3 2007).

143. Violations including the witness sitting in the courtroom during other testimony and asking another what happened were insufficient grounds to exclude the witness's testimony under Tex. R. Evid. 614 because nothing suggested that the inmate or counsel consented, procured, or had knowledge of the violations. David v. State, 2007 Tex. App. LEXIS 3440 (Tex. App. Houston 1st Dist. May 3 2007).

144. Because the trial court acted within its discretion in excluding a witness's testimony under Tex. R. Evid. 614, the trial court could not have violated an inmate's right to call witnesses and the right to a fair trial when the trial court excluded the witness's testimony. David v. State, 2007 Tex. App. LEXIS 3440 (Tex. App. Houston 1st Dist. May 3 2007).

145. Although the child victim went to lunch with her mother and an officer, her testimony could not have been influenced by the testimony of either of those witnesses because when the child was recalled, she again was unable to answer any questions about the circumstances of the offense; the court failed to see how the child's videotaped testimony, given two years earlier, could have been influenced by any violation of Tex. R. Evid. 614 at trial. Mitchell v. State, 238 S.W.3d 405, 2006 Tex. App. LEXIS 11090 (Tex. App. Houston 1st Dist. 2006).

146. During defendant's trial for indecency with a child, the State's investigator was allowed to remain in the courtroom during trial after the State invoked Tex. R. Evid. 614; defendant could not complain of the error on appeal, because defendant called the State's investigator as an adverse witness; defendant invited the error. Sharp v. State, 210 S.W.3d 835, 2006 Tex. App. LEXIS 11033 (Tex. App. Amarillo 2006).

147. It was not an abuse of discretion for the trial court to exclude a witness's testimony who had violated Tex. R. Evid. 614 because his testimony was not crucial to the defense: (1) the witness's testimony and photographs about the mobile homes had little or no probative value as to the distance between the homes at the time of the offense because the witness was unable to testify about the appearance and location of the homes at the time of the offense, and no other witnesses offered such testimony; (2) the distance between homes had marginal evidentiary value because there was no evidence that the victim screamed or did anything else that would have alerted nearby neighbors; (3) photographs of defendant's scars and protruding stomach had little or no probative value as to his appearance at the time of the offense; and (4) the witness's testimony about an email he received from a camera manufacturer and his discussion with a retail store's employees was inadmissible hearsay to which no hearsay exception applied. Emenhiser v. State, 196 S.W.3d 915, 2006 Tex. App. LEXIS 6627 (Tex. App. Fort Worth 2006).

148. Defendant argued that the complaining witness remained in the courtroom after testifying and, after hearing other testimony, answered the trial court's questions, but defendant admitted that the witness was never placed under the "rule," Tex. R. Evid. 614; because the trial court was never asked to exclude the witness, no error was shown pursuant to Tex. R. App. P. 33. Thomas v. State, 2006 Tex. App. LEXIS 4641 (Tex. App. Dallas May 31 2006).

149. Record failed to show, for defendant's ineffective assistance claim, that but for counsel's failure to invoke the "rule," Tex. R. Evid. 614, the outcome of the proceeding would have been different; the witness's response to the trial court's direct question was consistent with the witness's prior testimony, the record was silent as to counsel's strategy for the argument to the trial court or failure to invoke the rule, and the court refused to speculate and did not find the challenged conduct so outrageous that no competent attorney would have engaged in it. Thomas v. State, 2006 Tex. App. LEXIS 4641 (Tex. App. Dallas May 31 2006).

150. Trial court did not abuse its discretion during defendant's trial in allowing a detective to testify even though he had violated the witness sequestration rule by talking to another witness about that witness's testimony where the witnesses had not been admonished. Cortez v. State, 2006 Tex. App. LEXIS 4265 (Tex. App. Eastland May 18 2006).

151. Trial court did not err in admitting the testimony of two key witnesses because, even if they violated the trial court's order, issued pursuant to Tex. Code Crim. Proc. Ann. art. 36.06 after Tex. R. Evid. 614 had been invoked, by talking to one another, there was no evidence that defendant was harmed by the violation; there was no evidence that either witness's testimony was influenced by the other and they had very few details in common that would have raised doubts as to their truthfulness. Martinez v. State, 186 S.W.3d 59, 2005 Tex. App. LEXIS 8678 (Tex. App. Houston 1st Dist. 2005).

152. In an aggravated assault case, Tex. R. Evid. 614 was not violated when a victim was allowed to rebut the testimony of a defense witness regarding a statement made after the incident, despite being present in the courtroom. The testimony of the victim was limited to rebuttal, the victim was required to hear the substance of the testimony before rebuttal was effective, and the testimony did not bear on defendant's guilt or innocence. Percival v. State, 2005 Tex. App. LEXIS 4363 (Tex. App. Tyler June 8 2005).

153. In an aggravated assault case, Tex. R. Evid. 614 was not violated when a rebuttal witness was allowed to testify about defendant's reputation for truth, veracity, and peacefulness because the witness had no connection with either party's case-in-chief; moreover, defendant failed to object to the testimony in a timely manner. Percival v. State, 2005 Tex. App. LEXIS 4363 (Tex. App. Tyler June 8 2005).

154. At a pretrial hearing in a criminal prosecution for capital murder, appellant stated that he wanted to restrict the media's coverage of pretrial hearings so that witnesses who would later be placed under Tex. R. Evid. 614 would not have access to certain testimony via news reports on pretrial hearings. However, when appellant stated that he was willing to accept an alternative solution to his complaint about media reports on pretrial hearings, he waived the complaint for appellate review. Salinas v. State, 163 S.W.3d 734, 2005 Tex. Crim. App. LEXIS 741 (Tex. Crim. App. 2005).

155. Tex. R. App. P. 33.1(a) required a specific objection and a ruling from the trial judge to preserve error for appellate purposes; thus, by failing to object at the time the trial judge excluded all spectators from the courtroom on allegations that defendant's sister, who was not a witness and had been allowed to remain in the courtroom during the proceedings, relayed information about witness testimony to excluded witnesses outside the courtroom, defendant forfeited his right to present such a complaint on appeal. Rodriguez v. State, 2005 Tex. App. LEXIS 2959

(Tex. App. San Antonio Apr. 20 2005).

156. There was no error in allowing a witness to remain in the courtroom after the witness exclusion rule had been invoked during defendant's trial for sexual assault on a child. Hearing the alleged victim-child testify via closed-circuit television did not affect the witness's testimony. Barnes v. State, 165 S.W.3d 75, 2005 Tex. App. LEXIS 2603 (Tex. App. Austin 2005).

157. State's designating a witness as a "case agent" does not make a witness one whom the trial court may not exclude from the courtroom under Tex. R. Evid. 614; the government's designation of a "case agent" in the trial of a criminal case is permitted in federal courts by the federal counterpart of Rule 614, Fed. R. Evid. 615, but it is not permitted in the courts of the State of Texas. Neither the State nor a defendant who is a natural person may take away the court's authority to exclude one of its witnesses by simply designating the witness. Russell v. State, 155 S.W.3d 176, 2005 Tex. Crim. App. LEXIS 150 (Tex. Crim. App. 2005).

158. State's designating a witness, a police officer, as a "case agent" did not make the officer one whom the trial court may not exclude from the courtroom under Tex. R. Evid. 614; because the State did not meet its burden to show that the officer was a witness whose exclusion from the courtroom was not authorized by Rule 614, the trial court erred in permitting the officer to remain in the courtroom during the trial. However, the trial court's error did not affect defendant's substantial rights because there was no likelihood that the officer's denials that he told defendant that making a statement could help him and that he told defendant that the victim was an informant were influenced by his hearing the testimony of another officer and defendant. Russell v. State, 155 S.W.3d 176, 2005 Tex. Crim. App. LEXIS 150 (Tex. Crim. App. 2005).

159. Tex. R. Evid. 614 provides that at the request of a party, the trial court shall order witnesses excluded so that they cannot hear the testimony of other witnesses; however, the rule does not apply to the exclusion of witnesses during voir dire, opening statements, or before there has been any testimony. Thus, the presence of an officer, who was also a witness in defendant's case, in the courtroom during opening statements prior to the commencement of any testimony did not violate Rule 614. Additionally, the content of the opening statements could not have influenced the officer's testimony and, thus, the trial court did not abuse its discretion in allowing the officer to testify. Hudson v. State, 2005 Tex. App. LEXIS 164 (Tex. App. Houston 14th Dist. Jan. 6 2005).

160. Where the court invoked Tex. R. Evid. 614 at the outset of defendant's trial for two counts of aggravated sexual assault, the trial court did not abuse its discretion when it disqualified a defense witness who, when called to the stand during the punishment phase of the trial, admitted to the court that she had been present during the guilt-innocence phase. Longoria v. State, 148 S.W.3d 657, 2004 Tex. App. LEXIS 9179 (Tex. App. Houston 14th Dist. 2004).

161. Trial court did not err by abiding by Tex. Fam. Code Ann. § 107.002(c)(4), (6) and allowing the guardian ad litem to be present during the course of a trial in an action to terminate a mother's parental rights. Under Tex. Gov't Code Ann. §311.026, the more specific provision of the Texas Family Code prevailed over the more general language of Tex. R. Evid. 614. In re K.C.P., 142 S.W.3d 574, 2004 Tex. App. LEXIS 7102 (Tex. App. Texarkana 2004).

162. Trial court did not abuse its discretion in allowing a foster parent to testify even after she discussed her testimony with her daughter; Tex. R. Evid. 614 and Tex. R. Civ. P. 267 were not violated because it appeared that the trial court could have reasonably believed that the daughter only relayed to the foster parent the daughter's emotional response to questioning. In re C.J.B., 137 S.W.3d 814, 2004 Tex. App. LEXIS 4365 (Tex. App. Waco 2004).

163. Violation of Tex. R. Evid. 614 may not be relied upon for reversal of the case unless it is shown that the trial court abused its discretion in allowing the violative testimony. Young v. State, 2004 Tex. App. LEXIS 1615 (Tex. App. Houston 1st Dist. Feb. 19 2004), vacated by, opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 4591 (Tex. App. Houston 1st Dist. May 20, 2004).

164. In a case involving 13 counts of aggravated sexual assault and aggravated assault where witnesses were instructed not to discuss the case or their testimonies with others, a violation of Tex. R. Evid. 614 did not occur as defense counsel did not argue against the State's explanation that a witness did not hear any trial testimony when she was in the courtroom. Whisenant v. State, 2003 Tex. App. LEXIS 2203 (Tex. App. Waco Mar. 12 2003).

165. Where defending well-drilling businesses in a personal injury action invoked the sequestration rule under Tex. R. Evid. 614 and Tex. R. Civ. P. 267, but failed to insure that their witnesses either complied with the sequestration rule or were exempted from it, the trial court did not abuse its discretion when it disqualified the expert's testimony of a witness for the businesses, despite the fact that the trial court had not given an admonishment to the witnesses placed under the rule that they were not to converse with each other or with any other person about the case other than the attorneys and that they are not to read any report of or comment upon the testimony in the case, as required by Tex. R. Civ. P. 267(d). Drilex Sys. v. Flores, 1 S.W.3d 112, 1999 Tex. LEXIS 103, 42 Tex. Sup. Ct. J. 1121 (Tex. 1999).

Family Law : Guardians : General Overview

166. Charitable organization's representative was not subject to Tex. R. Civ. P. 267(b) and Tex. R. Evid. 614 excluding her from the courtroom during the termination of parental rights trial because she was serving as the guardian ad litem and a guardian ad litem was entitled to appear at all hearings under Tex. Fam. Code Ann. §§ 107.002, 107.031(a). In the Interest of H.D.B.-M., 2013 Tex. App. LEXIS 2057, 2013 WL 765699 (Tex. App. Waco Feb. 28 2013).

Governments : Courts : Judges

167. Trial court did not abuse its discretion by allowing a bailiff who served for the jury to testify during the punishment phase of trial after Tex. R. Evid. 614 had been invoked. There was no evidence in the record that the bailiff's testimony was affected by having heard appellant's testimony. Young v. State, 2004 Tex. App. LEXIS 1615 (Tex. App. Houston 1st Dist. Feb. 19 2004), vacated by, opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 4591 (Tex. App. Houston 1st Dist. May 20, 2004).

Legal Ethics : Client Relations : Effective Representation

168. Mother could not show that trial counsel was ineffective for allowing a witness to remain in the courtroom after Tex. R. Evid. 614 had been invoked because the mother made conclusory that her attorney did not adequately review the witness's home study and there was no evidence in the record explaining counsel's reasons for allowing the witness to remain in the courtroom. The mother also failed to show that she was prejudiced, as she failed to allege how the outcome of the termination of parental rights trial would have been different if her counsel had required the witness to remain outside the courtroom during other witnesses' testimony. In re Z.D., 2008 Tex. App. LEXIS 7161 (Tex. App. Fort Worth Sept. 25, 2008).

End of Document

Tex. Evid. R. 615

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 615 Producing a Witness's Statement in Criminal Cases

(a) ***Motion to Produce.***--After a witness other than the defendant testifies on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the state Page 2 or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that:

(1)is in their possession;

(2)relates to the subject matter of the witness's testimony; and

(3)has not previously been produced.

(b) ***Producing the Entire Statement.***--If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.

(c) ***Producing a Redacted Statement.***--If the party who called the witness claims that the statement contains information that does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any unrelated portions, the court must order delivery of the redacted statement to the moving party. If a party objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.

(d) ***Recess to Examine a Statement.***--If the court orders production of a witness's statement, the court, on request, must recess the proceedings to allow the moving party time to examine the statement and prepare for its use.

(e) ***Sanction for Failure to Produce or Deliver a Statement.***--If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the state disobeys the order, the court must declare a mistrial if justice so requires.

(f) ***"Statement" Defined.***--As used in this rule, a witness's "statement" means:

(1)a written statement that the witness makes and signs, or otherwise adopts or approves;

(2)a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or

(3)the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

History

Amended by Texas Court of Criminal Appeals, Misc. Docket No. 15-006, and Texas Supreme Court, Misc. Docket No. 16-9012, effective January 1, 2016.

Annotations

Commentary

COMMENT

Comment to 1998 change This is prior Texas Rule of Criminal Evidence 614.

Comment to 2015 Amendment The Michael Morton Act, codified at Texas Code of Criminal Procedure art. 39.14, affords defendants substantial pre-trial discovery, requiring the state, upon request from the defendant, to produce and permit the defendant to inspect and copy various items, including witness statements. In many instances, therefore, art. 39.14 eliminates the need, after the witness testifies on direct examination, for a defendant to request, and the court to order, production of a witness's statement.

But art. 39.14 does not entirely eliminate the need for in-trial discovery of witness statements. Art. 39.14 does not extend equivalent discovery rights to the prosecution, and so prosecutors will still need to use Rule 615 to obtain witness statements of defense witnesses. Moreover, some defendants may fail to exercise their discovery rights under art. 39.14 and so may wish to obtain a witness statement under Rule 615. In addition, the Michael Morton Act applies only to the prosecution of offenses committed after December 31, 2013. Defendants on trial for offenses committed before then have no right to pre-trial discovery of the witness statements of prosecution witnesses.

Consequently, Rule 615(a) has been amended to account for the changed pre-trial discovery regime introduced by the Michael Morton Act. If a party's adversary has already produced a witness's statement - whether through formal discovery under art. 39.14 or through more informal means - Rule 615(a) no longer gives a party the right to obtain, after the witness testifies on direct examination, a court order for production of the witness's statement. But if a party's adversary has not already produced a witness's statement, the party may still use Rule 615(a) to request and obtain a court order requiring production of the witness's statement after the witness finishes testifying on direct examination.

Case Notes

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : General Overview
Criminal Law & Procedure : Discovery & Inspection : Discovery by Government : Witness Statements
Criminal Law & Procedure : Counsel : Effective Assistance : Tests
Criminal Law & Procedure : Witnesses : General Overview
Criminal Law & Procedure : Witnesses : Presentation
Criminal Law & Procedure : Appeals : Procedures : Briefs
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Testimony : Credibility : Impeachment : Contradiction
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

LexisNexis (R) Notes

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : General Overview

1. Trial court did not err by refusing to strike the testimony of two witnesses and grant a mistrial on the ground that the State failed to produce the witnesses' written statements after their direct examinations as required by Tex. R.

Evid. 615 because the evidence showed that at the time of trial the statements were not in the State's possession. Dancer v. State, 253 S.W.3d 368, 2008 Tex. App. LEXIS 2406 (Tex. App. Fort Worth 2008).

2. As to certain witness testimony, the trial court noted that the State tendered more discovery material before trial than was required or requested, and pursuant to Tex. R. Evid. 615, the State was not required to provide defendant with the witness's statement until after her testimony on direct. Freeman v. State, 230 S.W.3d 392, 2007 Tex. App. LEXIS 3965 (Tex. App. Eastland 2007).

3. In a murder trial, defendant was not prejudiced by the State's untimely disclosure of the statement of a cellmate who claimed that defendant confessed to the murders. Because the cellmate's statement was material to a matter involved in the action, it was producible after the witness testified. Mendez v. State, 2004 Tex. App. LEXIS 11216 (Tex. App. Austin Dec. 16 2004), writ of certiorari denied by 126 S. Ct. 553, 163 L. Ed. 2d 467, 2005 U.S. LEXIS 7926, 74 U.S.L.W. 3273 (U.S. 2005).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Government : Witness Statements

4. As the recording of a 911 call was not in the State's possession and the prosecutor stated that attempts to find the recording were not successful, for purposes of Tex. R. Evid. 615, the trial court did not err in denying appellant's mistrial motion. Smartt v. State, 2013 Tex. App. LEXIS 6834 (Tex. App. San Antonio June 5 2013).

Criminal Law & Procedure : Counsel : Effective Assistance : Tests

5. Defendant contended that he received ineffective assistance at trial because his trial counsel failed to file a motion for production of a victim's written statement to police; however, the record showed that defendant went to the police station after the robbery and spoke with a detective, but there was no evidence that he provided a written statement, and the record was silent as to why trial counsel did not request any written statements. Therefore, defendant failed to rebut the presumption that this decision was reasonable. Tucker v. State, 2008 Tex. App. LEXIS 8670 (Tex. App. Fort Worth Nov. 13 2008).

Criminal Law & Procedure : Witnesses : General Overview

6. Trial court was not required to disclose a prosecutor's notes relating to interviews with appellant's husband under Tex. R. Evid. 615 because the notes were not signed, adopted, or approved by the husband. Wilkerson v. State, 2012 Tex. App. LEXIS 4252, 2012 WL 1940650 (Tex. App. San Antonio May 30 2012).

7. In a murder case, the State did not have the duty to provide a statement made by a witness to an employer because the State did not have the statement in question in its possession. Jones v. State, 2005 Tex. App. LEXIS 4136 (Tex. App. Houston 1st Dist. May 26 2005).

8. In a murder case, an appellate court was unable to review whether or not a trial court erred by failing to order the production of a statement given to police by several witnesses under Tex. R. Evid. 615(f)(1) because the report was not provided in the appellate record; the court was unable to determine if the report contained "statements" under the definition in Rule 615. Jones v. State, 2005 Tex. App. LEXIS 4136 (Tex. App. Houston 1st Dist. May 26 2005).

Criminal Law & Procedure : Witnesses : Presentation

9. In a murder trial, defendant was not prejudiced by the State's untimely disclosure of the statement of a cellmate who claimed that defendant confessed to the murders. Because the cellmate's statement was material to a matter

involved in the action, it was producible after the witness testified. Mendez v. State, 2004 Tex. App. LEXIS 11216 (Tex. App. Austin Dec. 16 2004), writ of certiorari denied by 126 S. Ct. 553, 163 L. Ed. 2d 467, 2005 U.S. LEXIS 7926, 74 U.S.L.W. 3273 (U.S. 2005).

Criminal Law & Procedure : Appeals : Procedures : Briefs

10. Given the uncertain state of the record, appellant, who was making an evidentiary challenge to the punishment phase of his capital murder trial, failed to support his claim that the trial court erred when it ordered the defense to turn over its investigator's notes to the prosecution, first because appellant did not make appropriate citations to the record in support of his argument if, indeed, the notes were in the record, Tex. R. App. P. 38.1(h); otherwise, he procedurally defaulted error; in any event, the trial court's action might have been proper under Tex. R. Evid. 615, but the appellate court could not know whether the notes contained matters outside the scope of Tex. R. Evid. 615 without having the notes available to review; the absence of the notes also impeded the appellate court's ability to conduct an accurate harm analysis. Roberts v. State, 220 S.W.3d 521, 2007 Tex. Crim. App. LEXIS 429 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

11. Given the uncertain state of the record, appellant, who was making an evidentiary challenge to the punishment phase of his capital murder trial, failed to support his claim that the trial court erred when it ordered the defense to turn over its investigator's notes to the prosecution, first because appellant did not make appropriate citations to the record in support of his argument if, indeed, the notes were in the record, Tex. R. App. P. 38.1(h); otherwise, he procedurally defaulted error; in any event, the trial court's action might have been proper under Tex. R. Evid. 615, but the appellate court could not know whether the notes contained matters outside the scope of Tex. R. Evid. 615 without having the notes available to review; the absence of the notes also impeded the appellate court's ability to conduct an accurate harm analysis. Roberts v. State, 220 S.W.3d 521, 2007 Tex. Crim. App. LEXIS 429 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

12. Time allotted for a self-representing defendant to review witness statements was not an abuse of discretion under Tex. R. Evid. 615; the trial judge gave defendant time to review the documents and defendant then cross-examined witnesses. Grant v. State, 255 S.W.3d 642, 2007 Tex. App. LEXIS 8444 (Tex. App. Beaumont 2007).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

13. As the recording of a 911 call was not in the State's possession and the prosecutor stated that attempts to find the recording were not successful, for purposes of Tex. R. Evid. 615, the trial court did not err in denying appellant's mistrial motion. Smartt v. State, 2013 Tex. App. LEXIS 6834 (Tex. App. San Antonio June 5 2013).

14. Trial court was not required to disclose a prosecutor's notes relating to interviews with appellant's husband under Tex. R. Evid. 615 because the notes were not signed, adopted, or approved by the husband. Wilkerson v. State, 2012 Tex. App. LEXIS 4252, 2012 WL 1940650 (Tex. App. San Antonio May 30 2012).

15. In a murder case, the State did not have the duty to provide a statement made by a witness to an employer because the State did not have the statement in question in its possession. Jones v. State, 2005 Tex. App. LEXIS 4136 (Tex. App. Houston 1st Dist. May 26 2005).

16. In a murder case, an appellate court was unable to review whether or not a trial court erred by failing to order the production of a statement given to police by several witnesses under Tex. R. Evid. 615(f)(1) because the report was not provided in the appellate record; the court was unable to determine if the report contained "statements" under the definition in Rule 615. Jones v. State, 2005 Tex. App. LEXIS 4136 (Tex. App. Houston 1st Dist. May 26 2005).

Evidence : Testimony : Credibility : Impeachment : Contradiction

17. During a criminal trial, defendant requested that the State produce the witness's written statement prior to cross-examining the witness; the trial court denied defendant's request because the witness testified that he did not use the statement to refresh his memory in accordance with Tex. R. Evid. 612; however, the statement should have been made available to defendant under Tex. R. Evid. 615 for impeachment purposes. Patterson v. State, 2008 Tex. App. LEXIS 943 (Tex. App. Houston 1st Dist. Feb. 7 2008).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

18. Key distinction between Tex. R. Evid. 612 and Tex. R. Evid. 615 is that Tex. R. Evid. 612 requires the production of any writing used to refresh a witness's memory, while Tex. R. Evid. 615 requires only the production of "statements" as defined in Rule 615, and a writing used to refresh a witness's memory may not meet the definition of statement contained in Rule 615, yet Tex. R. Evid. 612 still requires the writing to be produced because of the witness's use of it; similarly, a witness may not use a statement to refresh his or her memory before testifying, however, Tex. R. Evid. 615 still requires that the statement be produced, and accordingly, although the general purpose for both rules is to provide material which may be used to impeach a witness, the rules are applicable to different types of materials. Arrellano v. State, 2012 Tex. App. LEXIS 8653, 2012 WL 4903044 (Tex. App. San Antonio Oct. 17 2012).

19. Defendant contended that he received ineffective assistance at trial because his trial counsel failed to file a motion for production of a victim's written statement to police; however, the record showed that defendant went to the police station after the robbery and spoke with a detective, but there was no evidence that he provided a written statement, and the record was silent as to why trial counsel did not request any written statements. Therefore, defendant failed to rebut the presumption that this decision was reasonable. Tucker v. State, 2008 Tex. App. LEXIS 8670 (Tex. App. Fort Worth Nov. 13 2008).

Tex. Evid. R. 701

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 701 Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; and

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 60, *Opinion Testimony*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Comment to 2015 Restyling: All references to an "inference" have been deleted because this makes the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Case Notes

Antitrust & Trade Law : Consumer Protection : Deceptive Acts & Practices : State Regulation
Civil Procedure : Summary Judgment : Evidence
Civil Procedure : Summary Judgment : Supporting Materials : Affidavits
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : Elements
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Custodial Interference
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : Elements
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Elements
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Money Laundering : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Destruction of Property : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Indecent Exposure : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements
Criminal Law & Procedure : Arrests : Warrantless Arrest
Criminal Law & Procedure : Search & Seizure : Warrantless Searches : Investigative Stops
Criminal Law & Procedure : Interrogation : General Overview
Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Expert Testimony : General Overview
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury : Credibility of Witnesses
Criminal Law & Procedure : Witnesses : General Overview
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Defenses : Self-Defense
Criminal Law & Procedure : Scienter : Specific Intent
Criminal Law & Procedure : Sentencing : Alternatives : Probation : Eligibility
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Sentencing : Imposition : Victim Statements
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Estate, Gift & Trust Law : Will Contests : Fraud
Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Hearsay : Exceptions : Present Sense Impression : General Overview
Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Relevance : Prior Acts, Crimes & Wrongs

Evidence : Relevance : Relevant Evidence
Evidence : Scientific Evidence : Blood Alcohol
Evidence : Scientific Evidence : Sobriety Tests
Evidence : Testimony : Examination : General Overview
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility
Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Experts : Helpfulness
Evidence : Testimony : Experts : Qualifications
Evidence : Testimony : Lay Witnesses : General Overview
Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview
Evidence : Testimony : Lay Witnesses : Opinion Testimony : Helpfulness
Evidence : Testimony : Lay Witnesses : Opinion Testimony : Nonspecialized Knowledge
Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions
Evidence : Testimony : Lay Witnesses : Opinion Testimony : Rational Basis
Evidence : Testimony : Lay Witnesses : Personal Knowledge
Evidence : Testimony : Lay Witnesses : Ultimate Issue
Family Law : Parental Duties & Rights : Termination of Rights : General Overview
Pensions & Benefits Law : Governmental Employees : State Pensions
Real Property Law : Financing : Mortgages & Other Security Instruments : Foreclosures : Deficiency Judgments
Real Property Law : Property Valuation
Real Property Law : Water Rights : General Overview
Real Property Law : Water Rights : Nonconsumptive Uses : Tests for Navigability
Workers' Compensation & SSDI : Administrative Proceedings : Costs & Attorney Fees
Workers' Compensation & SSDI : Compensability : Injuries : Intoxication

LexisNexis (R) Notes

Antitrust & Trade Law : Consumer Protection : Deceptive Acts & Practices : State Regulation

1. Lay testimony from skilled witnesses with personal knowledge was sufficient under Tex. R. Evid. 701 to prove causation under Tex. Bus. & Com. Code Ann. § 17.50(a)(2) in a construction defect case involving water damage and mold because these were not matters beyond the common understanding of laypersons. Horak v. Newman, 2009 Tex. App. LEXIS 5629 (Tex. App. Austin July 21 2009).

Civil Procedure : Summary Judgment : Evidence

2. Statements in a proof of loss form relating to the date of hail damage were competent summary judgment evidence because they constituted admissions under Tex. R. Evid. 801(e)(2). Even if the statements in the proof of loss form were not binding or conclusive, they were considered prima facie evidence of the facts stated therein; moreover, expert testimony was not required on the issue of whether hail occurred on a certain date and caused property damage. United States Fire Ins. Co. v. Lynd Co., 2012 Tex. App. LEXIS 3206, 2012 WL 1430541 (Tex. App. San Antonio Apr. 25 2012).

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits

3. In a will contest alleging lack of testamentary capacity, affidavits of several doctors regarding a testatrix's soundness of mind were considered in granting summary judgment because mental soundness was within common knowledge and did not require proof by expert testimony. In re Estate of Mask, 2008 Tex. App. LEXIS 5439 (Tex. App. San Antonio July 23 2008).

4. Nurse's affidavit describing a comatose person's condition was sufficient, with other summary judgment evidence, to raise a fact issue concerning incapacity; even assuming that the nurse was not qualified as an expert, she could offer testimony of her personal observations. Yancy v. United Surgical Ptnrs. Int'l, Inc., 236 S.W.3d 778, 2007 Tex. LEXIS 990, 51 Tex. Sup. Ct. J. 63 (Tex. 2007).

Civil Procedure : Appeals : Reviewability : Preservation for Review

5. Employer failed to preserve his claims of error for appeal regarding the trial court's admission of the employee's opinion testimony in the employee's age discrimination action because the employer failed to make a timely, specific objection at trial to the employee's testimony on the ground that it was speculation; even if the employer had raised a timely and proper objection, Tex. R. Evid. 701 provided that the opinion of a lay witness was admissible if based on his perceptions, and the comment in issue was rationally based on the employee's perception. Quality Dialysis, Inc. v. Adams, 2006 Tex. App. LEXIS 4921 (Tex. App. Corpus Christi June 8 2006).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

6. Even though the trial court erred by admitting the testimony of a trooper concerning the causation of the accident, as his testimony contained opinions and he did not qualify as an expert under Tex. R. Evid. 702, the error was harmless because his conclusion that the bus driver was not at fault was cumulative of other evidence. The driver's other expert witness provided testimony consistent with the trooper's conclusions, testified in much greater detail, length, and depth than the trooper, and explained the methods he used and the calculations he made. Lopez-juarez v. Kelly, 348 S.W.3d 10, 2011 Tex. App. LEXIS 6446 (Tex. App. Texarkana Aug. 16 2011).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview

7. In a drug trial, counsel was not rendered ineffective by failing to object under Tex. R. Evid. 701 to an officer's opinion that people discovered inside a methamphetamine lab were generally involved in the manufacture of methamphetamine; the opinion was helpful to the jury in determining whether defendant was merely present or was a criminally responsible party. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

8. In a trial for manufacture of methamphetamine, counsel was not rendered ineffective by failing to object to an officer's testimony in connection with photographs showing defendant's burned and soiled hands; the officer's experience gave him the capability to testify that manufacturing methamphetamine often caused blisters and discoloration on the manufacturers' hands; it was not necessary to qualify the officer under Tex. R. Evid. 702, and, because the testimony was based on personal observations and was helpful to the jury, it was admissible under Tex. R. Evid. 701. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

9. In a drug trial, counsel was not rendered ineffective by failing to object under Tex. R. Evid. 701 to an officer's conclusion, based on odors emanating from a building, that methamphetamine was being produced; contrary to defendant's argument, the fact that a rational person could have reached that opinion did not make the opinion unhelpful to the jury. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements

10. Narcotics detective was qualified to testify that defendant possessed the cocaine with intent to distribute because he had been a narcotics officer for almost eight years, worked undercover with confidential informants, had purchased narcotics many times, had attended a 40-hour class, annual continuing education, drug recognition schools, drug testing classes, drug buying classes and a few classes on courtroom testimony; the detective

described cocaine, its packaging, amounts and prices, and described the cocaine found in the case and testified that a person in possession of a 100 grams of cocaine would be in possession with intent to distribute. Brooks v. State, 2006 Tex. App. LEXIS 6973 (Tex. App. Dallas Aug. 8 2006).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : Elements

11. Testimony of two officers that a State exhibit was marijuana and was not cush (a then-legal synthetic substance) was properly offered as lay opinion because the testimony did not require significant expertise to interpret and was based on their perceptions. In re Z.R., 2013 Tex. App. LEXIS 11097, 2013 WL 4680241 (Tex. App. Houston 1st Dist. Aug. 29 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

12. In defendant's aggravated assault case, a court properly allowed a store manager to testify that he did not believe the collision was an accident where the manager saw how upset defendant became after being told he would have to pay to replace the tire, he witnessed the heated exchange between defendant and the other drivers, he knew that defendant quickly returned to the store even after being told his tire would not be ready until the next day, and heard no braking as defendant's truck came into the store at a high rate of speed. The opinion that the collision was not an accident was rationally based on those experiences. to be an expert on such matters. Chatham v. State, 2004 Tex. App. LEXIS 8327 (Tex. App. Houston 14th Dist. Sept. 16 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Custodial Interference

13. In an interference with child custody case, although a court erred by overruling defendant's objection to an officer's testimony regarding her guilt or innocence, the error was harmless because the evidence against defendant established that she violated the child custody modification order; defendant's own testimony established that her taking possession of the child on October 24 was contrary to the terms of the modification order. Lovell v. State, 2006 Tex. App. LEXIS 6062 (Tex. App. Tyler July 12 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview

14. Pursuant to Tex. R. Evid. 701, a police officer's testimony that a 14-year old girl did not fit the profile of a prostitute was admissible in an inmate's trial on charges of kidnapping where (1) the officer had extensive experience in the child exploitation unit; and (2) the inmate's attorney made an issue of whether the girl was a prostitute, thereby entitling the state to ask the officer's opinion on the issue, in light of his training, experience, and knowledge of the girl. Jordan v. Dretke, 2006 U.S. Dist. LEXIS 31950 (N.D. Tex. May 22 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview

15. In defendant's aggravated robbery case, the court properly allowed an officer to testify about whether a rock or similar object was capable of causing serious bodily injury or death because, although the officer did not have any personal knowledge of the specific object that was used in the commission of the crime, he testified that he had been a police officer for approximately five-and-a-half years, and the officer saw the victim's wounds before they were treated. In re B. P. S., 2008 Tex. App. LEXIS 6028 (Tex. App. Austin Aug. 6 2008).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : Elements

16. In an aggravated robbery case, where the victim testified that as a marine veteran, he had extensive experience with weapons and that defendant's pistol looked like a 9 millimeter, because defendant did not object to the testimony as impermissible expert testimony, he failed to preserve this issue for appeal under Tex. R. App. P. 33.1; furthermore, under Tex. R. Evid. 701, the victim was properly allowed to testify regarding defendant's gun. Pintor v. State, 2006 Tex. App. LEXIS 9607 (Tex. App. Houston 14th Dist. Nov. 7 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Stalking : General Overview

17. In defendant's retaliation case, court erred by admitting an officer's testimony that he had no doubt that a threat was made to a witness by defendant because the officer stated a legal conclusion from the facts and thus expressed impermissible opinions on a mixed question of fact and law. Martin v. State, 2004 Tex. App. LEXIS 7142 (Tex. App. Texarkana Aug. 11 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

18. In a murder trial, the testimony of a forensic anthropologist regarding the science of toolmark analysis was reliable, within the meaning of Tex. R. Evid. 705(c) and relevant under Tex. R. Evid. 401; the expert opined that toolmarks on bone fragments found in defendant's yard were consistent with being made by either a hunting knife or a saw, that the bone fragments had characteristics consistent with being human, and that they showed no signs of healing, indicating that the cuts occurred at or near the time of death. Shepherd v. State, 2011 Tex. App. LEXIS 133, 2011 WL 166893 (Tex. App. Houston 14th Dist. Jan. 11 2011).

19. In a trial for a "shaken-baby" murder, any error arising from the admission of an investigator's opinion on guilt was harmless. Although defendant objected to the testimony under Tex. R. Evid. 701 during the prosecution's re-direct, the same question and answer had come in without objection during the defense's prior cross-examination. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

20. In a murder case, court did not err in allowing the investigating homicide officer to give his direct opinion that the State's two witnesses were telling the truth where defendant's trial counsel posed questions asking the officer if he thought the witnesses were credible witnesses based on their criminal contacts and asked if the officer thought that one was a credible witness because of her lies in her statement, counsel opened the door to the State's questions that directly commented on whether the officer believed the witnesses were truthful and credible witnesses. Williams v. State, 2004 Tex. App. LEXIS 7777 (Tex. App. Houston 1st Dist. Aug. 26 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

21. In defendant's capital murder case, a court did not err by permitting a witness to speculate that defendant's accomplice could not have taken the money from the cash register where the witness based his testimony on his observations. He could see where both robbers were located in relationship to the complainant and the cash drawer, and based on those observations, the witness drew an inference that only defendant was in a position to reach the cash drawer and take the money. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Elements

22. In a trial for evading arrest, counsel was not rendered ineffective by failing to object to an officer's opinion that defendant intended to flee. The reviewing court noted that opinion testimony regarding the mental state of an

accused was not inadmissible per se, that rulings on the admissibility of lay opinion testimony were within the discretion of the trial court under Tex. R. Evid. 701, 704, and that counsel may have made a strategic decision not to object. Britt v. State, 2007 Tex. App. LEXIS 3148 (Tex. App. Houston 14th Dist. Apr. 26 2007).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Money Laundering : General Overview

23. Police testimony was proper under Tex. R. Evid. 701 and was not expert testimony because the officer testified about reasons for suspecting defendant and for arresting defendant on a charge of money laundering. Barrios v. State, 2007 Tex. App. LEXIS 9054 (Tex. App. Texarkana Nov. 16 2007).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary : Elements

24. Burglary conviction was supported by lay testimony from officers that muddy footprints led from the victim's home to the apartment where defendant was discovered. The lay testimony was proper under Tex. R. Evid. 701. Price v. State, 2011 Tex. App. LEXIS 4234, 2011 WL 2175196 (Tex. App. Corpus Christi June 2 2011).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Destruction of Property : Elements

25. Where defendant used a car jack to strike the hood of the complainant's SUV, Tex. R. Evid. 701 permitted the arresting officer to testify that $1500 was the estimated cost of repairing the damage based on his years of experience with criminal mischief cases. Barnes v. State, 248 S.W.3d 217, 2007 Tex. App. LEXIS 4261 (Tex. App. Houston 1st Dist. 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : Elements

26. Officer was properly permitted to testify regarding the age of female subjects in printed images. The State did not offer the officer as an expert, and it appeared from the record that he was offering a lay opinion. Whiddon v. State, 2013 Tex. App. LEXIS 2074 (Tex. App. El Paso Feb. 27 2013).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Indecent Exposure : Elements

27. In a trial for indecency with a child by exposure, defendant failed to preserve any error in allowing a witness to testify that she thought defendant was trying to arouse himself because an objection below to speculation did not comport with the argument on appeal under Tex. R. Evid. 701. Joseph v. State, 2011 Tex. App. LEXIS 9, 2011 WL 9802 (Tex. App. Dallas Jan. 4 2011).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : General Overview

28. In a trial for unauthorized use of a motor vehicle, counsel was not rendered ineffective by failing to object to an officer's testimony that he believed defendant was in possession of the missing vehicle, in part because that evidence might have been admissible under Tex. R. Evid. 701, 704. Seat v. State, 2011 Tex. App. LEXIS 4322, 2011 WL 2306249 (Tex. App. Texarkana June 8 2011).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

29. In a trial for driving while intoxicated, walk-and-turn and one-leg tests were properly admitted, despite testimony that they were improperly performed. Testimony by the arresting officer concerning both tests was lay

witness testimony governed by Tex. R. Evid 701 rather than Tex. R. Evid 702. Plouff v. State, 2005 Tex. App. LEXIS 8546 (Tex. App. Houston 14th Dist. Oct. 18 2005), substituted opinion at, opinion withdrawn by 192 S.W.3d 213, 2006 Tex. App. LEXIS 2546 (Tex. App. Houston 14th Dist. 2006).

30. In a driving while impaired case, evidence of an officer's observations in a one-leg stand field sobriety test was governed by Tex. R. Evid. 701 as opinion testimony, but evidence concerning the guidelines and certification of the test were based on Tex. R. Evid. 702; further, a trial court's error in admitting the Rule 702 evidence was harmless because the officer admitted that there was a failure to follow the applicable guidelines. McRae v. State, 2004 Tex. App. LEXIS 5933 (Tex. App. Houston 1st Dist. July 1 2004), opinion withdrawn by, substituted opinion at 152 S.W.3d 739, 2004 Tex. App. LEXIS 10805 (Tex. App. Houston 1st Dist. 2004).

31. In a prosecution for DWI, the arresting officer was properly allowed to testify that, in his opinion, defendant was intoxicated based on defendant's inability to perform the walk and turn test and the one leg stand test. A lay witness may give an opinion as to whether another person is intoxicated, and although a police officer may have specialized training, that does not preclude the officer from providing such lay opinion testimony. Oropeza v. State, 2004 Tex. App. LEXIS 2588 (Tex. App. Dallas Mar. 24 2004).

32. Lay witness may give an opinion as to whether another person is intoxicated. Oropeza v. State, 2004 Tex. App. LEXIS 2588 (Tex. App. Dallas Mar. 24 2004).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

33. Sufficient evidence demonstrated that defendant was intoxicated because an officer observed his erratic driving and pulled him over; initially, defendant refused to stop and then tried to flee; and defendant was agitated, had bloodshot eyes, and had a strong odor of alcohol on his breath; the reviewing court noted that even if the deputy was not qualified to testify as an expert, his statements were admissible as lay witness testimony. Jaritas v. State, 2006 Tex. App. LEXIS 6864 (Tex. App. Houston 14th Dist. Aug. 3 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

34. In a driving while intoxicated case, police officer testimony pertaining to the administration of the one-leg-stand and walk-and-turn tests was properly admitted as lay testimony because the officer did not use words that gave the testimony an aura of scientific validity that would subject it to the Kelly requirements; instead, the testimony consisted of the officer demonstrating the test for jurors and relaying an assessment of defendant's mental faculties and physical coordination. Gutierrez v. State, 2014 Tex. App. LEXIS 7087, 2014 WL 2993787 (Tex. App. El Paso June 30 2014).

35. During defendant's trial for driving while intoxicated (DWI) in violation of Tex. Penal Code Ann. § 49.04, the testimony of an officer with the police department's DWI enforcement unit might have been improper under Tex. R. Evid. 701, 702 because, by repeatedly testifying that the walk-and-turn and one-leg stand sobriety tests provided "validated" or "scientifically validated" clues of impairment, the officer gave those tests an imprimatur of scientific accuracy that they had not been shown to possess and that, in any event, he was not shown qualified to confer. However, reversible error was not presented because the issue was not preserved for appeal, and because defendant's substantial rights were not affected, as there was substantial evidence of defendant's intoxication, including his admission that he had consumed four shots of tequila and the testimony of four witnesses describing his reckless driving, odor of alcoholic beverage, bloodshot eyes, slurred speech, and lack of balance. McIntosh v. State, 2010 Tex. App. LEXIS 849 (Tex. App. Austin Feb. 4 2010).

36. In a trial for driving while intoxicated, an officer was properly allowed to testify as to the administration of a one-leg stand test because the evidence related to nonscientific evidence and was admissible as lay opinion under Tex. R. Evid. 701; the testimony was not subject to the criteria of Tex. R. Evid. 702. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

37. In a driving while intoxicated case, the court did not err by allowing the officer to testify that defendant failed the field sobriety tests because the officer's use of the word "failed" did not give his testimony an "aura of scientific reliability" or cloak it with unearned credibility; the majority of the officer's testimony consisted of a straightforward narrative of each field sobriety test, followed by a particular description of how defendant performed each test. The officer's observations were based on common knowledge and observations and did not, under the circumstances convert his lay witness testimony into expert testimony. Meier v. State, 2009 Tex. App. LEXIS 2051, 2009 WL 765490 (Tex. App. Dallas Mar. 25 2009).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements

38. Even if an officer was qualified as an expert in field sobriety testing, such expertise did not prevent him from testifying to his own "lay" observations of defendant's demeanor. Mccormick v. State, 2014 Tex. App. LEXIS 2654, 2014 WL 1022450 (Tex. App. Dallas Mar. 6 2014).

39. In a driving while intoxicated trial, there was no error under Tex. R. Evid. 701, 602, in admitting lay opinion testimony concerning whether anyone else could have exited a burning vehicle, other than defendant. Taking into account that the witnesses were the only people present for the accident, other than the defendant, their rationally based perceptions put them in the best position to judge how likely the presence or non-presence of a second occupant would be. O'donoghue v. State, 2010 Tex. App. LEXIS 5532 (Tex. App. Corpus Christi July 15 2010).

40. In a driving while intoxicated case under Tex. Penal Code Ann. § 49.04, the evidence was sufficient to sustain the conviction because the State proved that defendant was intoxicated through the lay opinion of a police officer, defendant's refusal to take a blood test, the results of a horizontal gaze nystagmus, and the fact that defendant did not have a brain injury or drug impairment issue; moreover, the presence of visual distractions was only relevant to tests given at night; defendant's test was given during daylight hours. Maldonado v. State, 2008 Tex. App. LEXIS 2910 (Tex. App. Dallas Apr. 23 2008).

Criminal Law & Procedure : Arrests : Warrantless Arrest

41. Motion to suppress was properly denied under U.S. Const. amend. IV and the Texas Constitution because the trial court could have reasonably concluded that defendant voluntarily consented to a search of his person and the officer was legally authorized to make a warrantless arrest for defendant's illegal possession of marijuana under Tex. Health & Safety Code Ann. § 481.121 that occurred within the officer's presence under Tex. Code Crim. Proc. Ann. art. 1401. The officer was entitled to give testimony as a lay person under Tex. R. Evid. 701 as to his recognition that the substance was marijuana. Gossett v. State, 2009 Tex. App. LEXIS 5823, 2009 WL 4251169 (Tex. App. Corpus Christi July 30 2009).

Criminal Law & Procedure : Search & Seizure : Warrantless Searches : Investigative Stops

42. In a driving while intoxicated case under Tex. Penal Code Ann. § 49.04, the evidence was sufficient to sustain the conviction because the State proved that defendant was intoxicated through the lay opinion of a police officer, defendant's refusal to take a blood test, the results of a horizontal gaze nystagmus, and the fact that defendant did not have a brain injury or drug impairment issue; moreover, the presence of visual distractions was only relevant to

tests given at night; defendant's test was given during daylight hours. Maldonado v. State, 2008 Tex. App. LEXIS 2910 (Tex. App. Dallas Apr. 23 2008).

Criminal Law & Procedure : Interrogation : General Overview

43. Trial court did not err by admitting testimony from a detective that defendant showed signs of a guilty conscience during a police interrogation because, taking into account that the detective was asked what defendant's "blacking" or "blanking" comment meant to him as an investigator, and not what defendant was thinking when she said that she had "blanked" or "blacked" out, the detective's disputed testimony was not a speculative opinion, but it went instead to his rationally based perception of the interrogation, which provided a clearer understanding of the facts in issue. Brown v. State, 2011 Tex. App. LEXIS 882, 2011 WL 382634 (Tex. App. Dallas Feb. 8 2011).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Expert Testimony : General Overview

44. In a possession of a controlled substance with intent to deliver case, as the substance of an officer's testimony related to opinions, beliefs, or inferences drawn from his own experiences and observation, and as the testimony was admissible under Tex. R. Evid. 701, the State was not required to disclose the officer as an expert under Tex. Code Crim. Proc. Ann. art. 39.14(b); as such, the trial court did not err by admitting the officer's testimony that had not been disclosed in response to a discovery request. Cortez v. State, 2006 Tex. App. LEXIS 4998 (Tex. App. Fort Worth June 8 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

45. Defendant's counsel was not ineffective during the punishment phase of defendant's aggravated assault trial for failing to object to a county case worker supervisor's opinion about defendant's character where the case worker's testimony was in compliance with Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and Tex. R. Evid. 602 because it was rationally based on her perception and was helpful to a determination of a fact in issue-defendant's punishment. Ramirez v. State, 2009 Tex. App. LEXIS 368, 2009 WL 1567340 (Tex. App. Corpus Christi Jan. 22 2009).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

46. Defendant failed to show that his counsel was ineffective for failing to object to the victim's testimony that he thought defendant shoved him so he could not get his cell phone out of his pocket and that he though defendant would cut him with his pocket knife because the victim could testify about his opinion under Tex. R. Evid. 701 and counsel may have believed that the victim's opinion would have been helpful to the determination of whether the victim felt threatened by defendant's actions. Barnett v. State, 344 S.W.3d 6, 2011 Tex. App. LEXIS 4456 (Tex. App. Texarkana June 14 2011).

47. In a trial for unauthorized use of a motor vehicle, counsel was not rendered ineffective by failing to object to an officer's testimony that he believed defendant was in possession of the missing vehicle, in part because that evidence might have been admissible under Tex. R. Evid. 701, 704. Seat v. State, 2011 Tex. App. LEXIS 4322, 2011 WL 2306249 (Tex. App. Texarkana June 8 2011).

48. Although defendant argued that his counsel permitted a witness to testify as to his guilt without objection, given the fact that one such objection was overruled by the trial court, counsel could have chosen not to emphasize the matter further to the jury by additional objections, and, accordingly, it could not be said that the trial court abused its discretion in finding that defendant failed to prove by credible evidence that counsel's performance was deficient.

Moreover, the witness was a fact witness, and defendant did not argue that the testimony was not based on the perception of the witness and/or was not helpful to an understanding of a fact in issue. Ex Parte Eggert, 2010 Tex. App. LEXIS 858, 2010 WL 396321 (Tex. App. Amarillo Feb. 4 2010).

49. Even though testimony concerning a child's truthfulness was not admissible in a sexual assault case either through lay or expert testimony, no ineffectiveness of counsel was shown based on a failure to object because there was only one witness from whom the State elicited an opinion about the child's truthfulness, and the State did not emphasize the testimony in its closing statement. Defendant did not show that, but for such omission, there was a reasonable probability that the result of the trial would have been different. Arcement v. State, 2009 Tex. App. LEXIS 1096, 2009 WL 383398 (Tex. App. Texarkana Feb. 18 2009).

50. In a cocaine possession case, defendant's failure to object to an officer's testimony that drug dealers often carried many small bills waived the issue under Tex. R. App. P. 33, and counsel was not ineffective for failing to challenge the testimony as Tex. R. Evid. 702 expert testimony because it was admissible as Tex. R. Evid. 701 opinion testimony. Hayes v. State, 2008 Tex. App. LEXIS 747 (Tex. App. Texarkana Feb. 1 2008).

51. In a sexual assault case, defendant was unable to show that he received ineffective assistance of counsel based on counsel's failure to object to the testimony of a social worker as unqualified expert testimony; the social worker could have testified about giving a victim information about a sexual assault examination as either a lay or expert witness. Benjamin v. State, 2007 Tex. App. LEXIS 7010 (Tex. App. Houston 1st Dist. Aug. 30 2007).

52. In a drug trial, counsel was not rendered ineffective by failing to object under Tex. R. Evid. 701 to an officer's opinion that people discovered inside a methamphetamine lab were generally involved in the manufacture of methamphetamine; the opinion was helpful to the jury in determining whether defendant was merely present or was a criminally responsible party. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

53. In a trial for manufacture of methamphetamine, counsel was not rendered ineffective by failing to object to an officer's testimony in connection with photographs showing defendant's burned and soiled hands; the officer's experience gave him the capability to testify that manufacturing methamphetamine often caused blisters and discoloration on the manufacturers' hands; it was not necessary to qualify the officer under Tex. R. Evid. 702, and, because the testimony was based on personal observations and was helpful to the jury, it was admissible under Tex. R. Evid. 701. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

54. In a drug trial, counsel was not rendered ineffective by failing to object under Tex. R. Evid. 701 to an officer's conclusion, based on odors emanating from a building, that methamphetamine was being produced; contrary to defendant's argument, the fact that a rational person could have reached that opinion did not make the opinion unhelpful to the jury. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

55. Counsel was not rendered ineffective by failing to object, under Tex. R. Evid. 701, to opinion testimony regarding an officer's statement relating to whether he believed that defendant was telling to the truth; an objection to the testimony would properly have been overruled, given the context in which it was offered. Adelaja v. State, 2006 Tex. App. LEXIS 10379 (Tex. App. Houston 14th Dist. Dec. 5 2006).

56. Court rejected defendant's contention that his trial counsel fell below an objective standard of reasonable competence for failing to object to an officer's testimony that he did not believe defendant's version of events; under Tex. R. Evid. 704, a lay witness could offer an opinion on an ultimate issue. Adelaja v. State, 2006 Tex. App. LEXIS 4596 (Tex. App. Houston 14th Dist. May 25 2006).

57. In a criminal trial for murder and aggravated assault, defense counsel were not deficient in failing to object to lay opinion testimony. The testimony that defendant intentionally ran over the victims with his truck was admissible under Tex. R. Evid. 701 because the lay witness's opinion was rationally based on his own perception and was helpful in the determination of a fact in issue. Ex parte White, 160 S.W.3d 46, 2004 Tex. Crim. App. LEXIS 1612 (Tex. Crim. App. 2004), dismissed by 2006 U.S. Dist. LEXIS 53075 (S.D. Tex. July 31, 2006).

Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury : Credibility of Witnesses

58. Evidence was sufficient to convict defendant of illumination of aircraft by intense light, in violation of Tex. Penal Code Ann. § 42.14, because being unable to see at night due to a bright light spotlighted on the aircraft certainly could impair a pilot's ability to control his aircraft, and the jury was free to believe or disbelieve the testimony regarding whether the pilot's ability to control the aircraft was impaired. Amspacher v. State, 311 S.W.3d 564, 2009 Tex. App. LEXIS 9819 (Tex. App. Waco Dec. 30 2009).

Criminal Law & Procedure : Witnesses : General Overview

59. Pursuant to Tex. R. Evid. 701, a police officer's testimony that a 14-year old girl did not fit the profile of a prostitute was admissible in an inmate's trial on charges of kidnapping where (1) the officer had extensive experience in the child exploitation unit; and (2) the inmate's attorney made an issue of whether the girl was a prostitute, thereby entitling the state to ask the officer's opinion on the issue, in light of his training, experience, and knowledge of the girl. Jordan v. Dretke, 2006 U.S. Dist. LEXIS 31950 (N.D. Tex. May 22 2006).

Criminal Law & Procedure : Witnesses : Credibility

60. In an indecency with a child case, a court did not err in excluding the proposed testimony of a school psychologist that, in her opinion, the victim's videotaped statement was not truthful because no expert or lay witness was allowed to give an opinion that another witness was telling the truth. Workman v. State, 2008 Tex. App. LEXIS 2149 (Tex. App. Dallas Mar. 26 2008).

61. In an indecency with a child case, a court did not err in excluding the proposed testimony of a school psychologist that, in her opinion, the victim used language that seemed unnatural for her because the point of that testimony was to suggest to the jury that the victim was not trustworthy because she either: (a) had been coached; or (b) rehearsed the videotaped statement; the testimony indirectly commented on the victim's truthfulness. Workman v. State, 2008 Tex. App. LEXIS 2149 (Tex. App. Dallas Mar. 26 2008).

Criminal Law & Procedure : Defenses : Self-Defense

62. Under Tex. R. Evid. 701, the State's lay witness was properly allowed to offer opinion testimony regarding whether it was necessary for defendant to use deadly force to protect his brother because the witness personally observed the fight and defendant's use of deadly force, and the testimony was helpful to the jury in determining a fact in issue. Garcia v. State, 2005 Tex. App. LEXIS 4424 (Tex. App. Corpus Christi June 9 2005).

63. In a prosecution for aggravated assault in which defendant claimed self-defense, the arresting officer was permitted to give opinion testimony that defendant had not been attacked. Ex parte Nailor, 149 S.W.3d 125, 2004 Tex. Crim. App. LEXIS 518 (Tex. Crim. App. 2004).

Criminal Law & Procedure : Scienter : Specific Intent

64. In a murder trial, counsel was not ineffective in failing to object under Tex. R. Evid. 701, 704, to allegedly improper witness testimony concerning defendant's mental state because defendant did not establish that the trial court would have erred in overruling an objection to testimony from two eyewitnesses that defendant intentionally hit the victim with his van. Harris v. State, 2012 Tex. App. LEXIS 2143, 2012 WL 952248 (Tex. App. Houston 14th Dist. Mar. 20 2012).

65. In a trial for evading arrest, counsel was not rendered ineffective by failing to object to an officer's opinion that defendant intended to flee. The reviewing court noted that opinion testimony regarding the mental state of an accused was not inadmissible per se, that rulings on the admissibility of lay opinion testimony were within the discretion of the trial court under Tex. R. Evid. 701, 704, and that counsel may have made a strategic decision not to object. Britt v. State, 2007 Tex. App. LEXIS 3148 (Tex. App. Houston 14th Dist. Apr. 26 2007).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : Eligibility

66. Under Tex. R. Evid. 701, a probation officer was qualified to give her opinion on defendant's suitability for probation; the probation officer interviewed defendant and the 13-year-old sexual assault victim while preparing her presentence investigation report; she therefore based her testimony not only on her general professional knowledge and experience but also on her personal knowledge and perceptions. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

67. Defendant's counsel was not ineffective during the punishment phase of defendant's aggravated assault trial for failing to object to a county case worker supervisor's opinion about defendant's character where the case worker's testimony was in compliance with Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and Tex. R. Evid. 602 because it was rationally based on her perception and was helpful to a determination of a fact in issue-defendant's punishment. Ramirez v. State, 2009 Tex. App. LEXIS 368, 2009 WL 1567340 (Tex. App. Corpus Christi Jan. 22 2009).

68. Under Tex. R. Evid. 701, a probation officer was qualified to give her opinion on defendant's suitability for probation; the probation officer interviewed defendant and the 13-year-old sexual assault victim while preparing her presentence investigation report; she therefore based her testimony not only on her general professional knowledge and experience but also on her personal knowledge and perceptions. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

69. In defendant's sexual assault case, because a witness did not recommend a specific punishment, but merely stated that she felt defendant should be punished, the trial court did not abuse its discretion in allowing the testimony. Flores v. State, 2004 Tex. App. LEXIS 7207 (Tex. App. Corpus Christi Aug. 12 2004).

70. Where a trial court allowed the victim's mother and former counselor to each testify as to whether the proper punishment for defendant was probation or imprisonment, such issue was not preserved with respect to the testimony by the mother, as defendant failed to object thereto pursuant to Tex. R. App. P. 33.1(a); although Tex. Evid. R. 701 prohibits a witness from recommending a particular punishment to the jury, in the instant matter that sentencing phase was conducted by a trial judge, so the purpose of the rule to avoid jury confusion was not relevant, and the court found that any impact of the error was mitigated by effective cross-examination of the counselor, whereupon she indicated that she never thought probation was suitable for a sex offender and accordingly, her opinion was unrelated to the facts of the case. Rodriguez v. State, 2004 Tex. App. LEXIS 3174 (Tex. App. Corpus Christi Apr. 8 2004).

Criminal Law & Procedure : Sentencing : Imposition : Victim Statements

71. During the punishment phase of defendant's trial for aggravated assault with a deadly weapon, Tex. R. Evid. 701 permitted the victim to briefly testify as to the impact the attack had on her life, including that she had been diagnosed with post-traumatic stress disorder and had moved out of state; the jury chose a mid-range sentence of ten years; the challenged testimony did not have a substantial effect on the sentencing determination. Leroy v. State, 2006 Tex. App. LEXIS 3626 (Tex. App. Dallas May 1 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

72. Defendant waived appellate review regarding an officer's testimony on the psychological and physiological effects of ecstasy, cocaine, and marijuana because at trial he objected on confrontation grounds, not on the basis put forward on appeal, that the State failed to establish the admissibility of the complained-of testimony pursuant to Tex. R. Evid. 701, 702, or 703. Nelson v. State, 2005 Tex. App. LEXIS 6710 (Tex. App. El Paso Aug. 18 2005).

73. Defendant argued that trial court erred in allowing an investigator to opine that the State had narrowed its suspects down in a murder to two people--defendant and the accomplice witness; however, defendant waived this issue for appellate review because a hearsay objection was raised at trial, and defense counsel failed to raise the specific objection of opinion testimony. Palacios v. State, 2004 Tex. App. LEXIS 9912 (Tex. App. San Antonio Nov. 10 2004).

74. Where a trial court allowed the victim's mother and former counselor to each testify as to whether the proper punishment for defendant was probation or imprisonment, such issue was not preserved with respect to the testimony by the mother, as defendant failed to object thereto pursuant to Tex. R. App. P. 33.1(a); although Tex. Evid. R. 701 prohibits a witness from recommending a particular punishment to the jury, in the instant matter that sentencing phase was conducted by a trial judge, so the purpose of the rule to avoid jury confusion was not relevant, and the court found that any impact of the error was mitigated by effective cross-examination of the counselor, whereupon she indicated that she never thought probation was suitable for a sex offender and accordingly, her opinion was unrelated to the facts of the case. Rodriguez v. State, 2004 Tex. App. LEXIS 3174 (Tex. App. Corpus Christi Apr. 8 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

75. Defendant failed to preserve an argument that opinion testimony was speculative because similar testimony was admitted without objection. Moreno v. State, 2012 Tex. App. LEXIS 6018, 2012 WL 3025932 (Tex. App. El Paso July 25 2012).

76. To the extent that defendant claimed that testimony violated Tex. R. Evid 701, defendant failed to object at trial on that basis; therefore, the issue was not preserved for appeal. Boone v. State, 2008 Tex. App. LEXIS 8665 (Tex. App. Dallas Nov. 19 2008).

77. Defendant waived his contention that the trial court erred by admitting the officer's testimony that, in his opinion, defendant intentionally or knowingly possessed marijuana because his objection "calls for speculation" could not have informed the trial court that defendant was challenging the admissibility of the testimony under Tex. R. Evid. 701. Thomas v. State, 2006 Tex. App. LEXIS 6303 (Tex. App. Dallas July 20 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

78. Defendant waived his contention that the trial court erred by admitting the officer's testimony that, in his opinion, defendant intentionally or knowingly possessed marijuana because his objection "calls for speculation"

could not have informed the trial court that defendant was challenging the admissibility of the testimony under Tex. R. Evid. 701. Thomas v. State, 2006 Tex. App. LEXIS 6303 (Tex. App. Dallas July 20 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

79. In a murder trial, defendant waived any argument under Tex. R. Evid. 503, 701, 704 to allowing a State's witness to speculate regarding what defendant told his trial counsel. There were no objections on grounds relating to those rules, as required to preserve error under Tex. R. App. P. 33.1(a). Young v. State, 2009 Tex. App. LEXIS 8022, 2009 WL 3295763 (Tex. App. Beaumont Oct. 14 2009).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

80. In a capital murder trial for the shooting death of a store clerk, the trial court erred by permitting an expert witness to provide a narrative interpretation of the videotaped recording of the incident. However, the testimony that defendant's waving to the gunman was consistent with his saying "come this way," did not have a substantial or injurious effect on the jury's verdict and did not affect his substantial rights; therefore, the error was harmless under Tex. R. App. P 44.2. Gonzales v. State, 2006 Tex. App. LEXIS 2518 (Tex. App. Fort Worth Mar. 30 2006).

81. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

82. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

83. Even if defendant's objections to the testimony at sentencing of the victim's parents raised proper grounds or were sufficiently specific under Tex. R. Evid. 701, defendant failed to show harm where the facts reflected significant bad acts by defendant. Defendant told a police officer that the victim was hanging onto her car as she backed up, she told the victim to get off the car, she quickly accelerated, and she swerved the car to knock the victim off the car. Moreover, a sentence of 30 years was well beyond the range of years where probation could be considered under Tex. Code Crim. Proc. Ann. art. 42.12, § 4(d)(1). Foust v. State, 2005 Tex. App. LEXIS 12 (Tex. App. Dallas Jan. 4 2005).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

84. Trial court erred in allowing the detective in charge of defendant's murder and aggravated assault case to give her opinion on defendant's mental state in response to a question of why she obtained a warrant where the detective's interpretation and opinion regarding defendant's mental state were not an interpretation of her objective perception of events because she was not present at the scene at the time of the incident and had no personal knowledge concerning the event and the veracity of any witness. However, the trial court's error did not influence the jury or had but a slight effect because the detective stated what was obvious to the jury from all the testimony, which was that the shooting was not accidental or unintentional, and, setting aside the detective's testimony, there was compelling evidence of defendant's guilt. Saldana v. State, 2011 Tex. App. LEXIS 1709, 2011 WL 846095

(Tex. App. Eastland Mar. 10 2011).

85. In defendant's murder case, any error in allowing a police officer to testify regarding defendant's credibility was harmless because evidence of defendant's guilt was pervasive throughout the record. While defendant contended that the victim's death was a suicide, the State presented evidence that the victim was pregnant, she wanted to have her baby, and there was evidence that defendant had asked the victim to get an abortion and that she refused. Clark v. State, 305 S.W.3d 351, 2010 Tex. App. LEXIS 478 (Tex. App. Houston 14th Dist. Jan. 26 2010).

86. Regarding testimony by a jail employee that the wording and tone of voice used by defendant in his telephone conversation with his wife was "annoying," defendant failed to state an objection until after the question had already been answered; in light of the whole of the employee's testimony, the testimony that the wife was annoyed did not have a substantial and injurious effect or influence in determining the jury's verdict. Conner v. State, 2008 Tex. App. LEXIS 1510 (Tex. App. Tyler Feb. 29 2008).

87. In an interference with child custody case, although a court erred by overruling defendant's objection to an officer's testimony regarding her guilt or innocence, the error was harmless because the evidence against defendant established that she violated the child custody modification order; defendant's own testimony established that her taking possession of the child on October 24 was contrary to the terms of the modification order. Lovell v. State, 2006 Tex. App. LEXIS 6062 (Tex. App. Tyler July 12 2006).

88. During the punishment phase of defendant's trial for aggravated assault with a deadly weapon, Tex. R. Evid. 701 permitted the victim to briefly testify as to the impact the attack had on her life, including that she had been diagnosed with post-traumatic stress disorder and had moved out of state; the jury chose a mid-range sentence of ten years; the challenged testimony did not have a substantial effect on the sentencing determination. Leroy v. State, 2006 Tex. App. LEXIS 3626 (Tex. App. Dallas May 1 2006).

Estate, Gift & Trust Law : Will Contests : Fraud

89. Niece's deposition testimony stating that signatures on a will "looked different" merely amounted to a conclusory assertion since it did not establish her familiarity with her aunt's signature; therefore, her testimony was not rationally based on her perception under Tex. R. Evid. 701; as such, there was not a scintilla of evidence of a forgery based on this evidence in a case where a will was prima facie valid under Tex. Prob. Code Ann. § 84(a). In re Estate of Price, 2006 Tex. App. LEXIS 11043 (Tex. App. San Antonio Dec. 20 2006).

Evidence : Demonstrative Evidence : Admissibility

90. In a driving while intoxicated case, there was no error under Tex. R. Evid. 403, 701, in admitting a CD to assist the arresting officer in explaining the effects of alcohol on a person's eyes with and without increased nystagmus. The exhibit was not offered as substantive evidence of intoxication but rather as a tool to help the arresting police officer explain the horizontal gaze nystagmus test. Redfearn v. State, 2010 Tex. App. LEXIS 7018, 2010 WL 3377796 (Tex. App. Fort Worth Aug. 26 2010).

91. State was properly allowed to demonstrate its version of defendant's murder of her husband in order to illustrate the state's theory that the multiple stabbing was planned rather than defensive; Tex. R. Evid. 701 did not bar the demonstration because the state's witness who participated, a detective who viewed both the body and the scene, had personal knowledge of a great many of the details about which he testified, and he could reasonably infer the remaining details from those details he personally knew. Wright v. State, 178 S.W.3d 905, 2005 Tex. App. LEXIS 9609 (Tex. App. Houston 14th Dist. 2005).

Evidence : Demonstrative Evidence : Visual Formats

92. Even though the trial court erred by admitting into evidence an animation that purportedly reconstructed the events surrounding the shooting, because nothing in the record supported many of the details contained in the animation and the details were provided by nothing more than pure speculation on the creator's part, the error was harmless. The crux of the case against defendant was linking him to the conspiracy to get the informant, and two witness testified that defendant entered into an agreement with others to retaliate against an informant for giving police information that led to a friend's arrest; the animation did little to answer that question. Derrick v. State, 2013 Tex. App. LEXIS 4843 (Tex. App. Amarillo Apr. 17 2013).

Evidence : Hearsay : Exceptions : Present Sense Impression : General Overview

93. In a prosecution for driving while intoxicated, a law enforcement officer's observations of defendant, dictated on videotape, were not admissible because they were the functional equivalent of a police or offense report under Tex. R. Evid. 803(8)(B). The court noted that statements of opinion, whether of a lay witness or an expert, were not present sense impressions. Fischer v. State, 207 S.W.3d 846, 2006 Tex. App. LEXIS 9432 (Tex. App. Houston 14th Dist. 2006).

Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports

94. In a prosecution for driving while intoxicated, a law enforcement officer's observations of defendant, dictated on videotape, were not admissible because they were the functional equivalent of a police or offense report under Tex. R. Evid. 803(8)(B). The court noted that statements of opinion, whether of a lay witness or an expert, were not present sense impressions. Fischer v. State, 207 S.W.3d 846, 2006 Tex. App. LEXIS 9432 (Tex. App. Houston 14th Dist. 2006).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

95. Statements in a proof of loss form relating to the date of hail damage were competent summary judgment evidence because they constituted admissions under Tex. R. Evid. 801(e)(2). Even if the statements in the proof of loss form were not binding or conclusive, they were considered prima facie evidence of the facts stated therein; moreover, expert testimony was not required on the issue of whether hail occurred on a certain date and caused property damage. United States Fire Ins. Co. v. Lynd Co., 2012 Tex. App. LEXIS 3206, 2012 WL 1430541 (Tex. App. San Antonio Apr. 25 2012).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

96. In defendant's trial for possession with intent to deliver cocaine, one arresting officer had 10 years experience, two years of which the officer was on a neighborhood narcotics enforcement team where the officer had many encounters with drug dealers and users; the officer's testimony about aspects of drug dealing, combined the officer's actual knowledge and lay opinion about facts in issue, did not fall under expert testimony rule (Tex. R. Evid. 702), and was properly admitted under Tex. R. Evid. 701. King v. State, 129 S.W.3d 680, 2004 Tex. App. LEXIS 697 (Tex. App. Waco 2004).

97. In defendant's trial for possession with intent to deliver cocaine, one arresting officer had 10 years experience, two years of which the officer was on a neighborhood narcotics enforcement team where the officer had many encounters with drug dealers and users; the officer's testimony combined the officer's actual knowledge, as well as the officer's lay opinion about facts in issue, did not fall under Tex. R. Evid. 702, and was properly admitted under Tex. R. Evid. 701, governing opinion testimony by lay witnesses. King v. State, 129 S.W.3d 680, 2004 Tex. App. LEXIS 697 (Tex. App. Waco 2004).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

98. In a criminal trial for murder and aggravated assault, defense counsel were not deficient in failing to object to lay opinion testimony. The testimony that defendant intentionally ran over the victims with his truck was admissible under Tex. R. Evid. 701 because the lay witness's opinion was rationally based on his own perception and was helpful in the determination of a fact in issue. Ex parte White, 160 S.W.3d 46, 2004 Tex. Crim. App. LEXIS 1612 (Tex. Crim. App. 2004), dismissed by 2006 U.S. Dist. LEXIS 53075 (S.D. Tex. July 31, 2006).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

99. Even though testimony concerning a child's truthfulness was not admissible in a sexual assault case either through lay or expert testimony, no ineffectiveness of counsel was shown based on a failure to object because there was only one witness from whom the State elicited an opinion about the child's truthfulness, and the State did not emphasize the testimony in its closing statement. Defendant did not show that, but for such omission, there was a reasonable probability that the result of the trial would have been different. Arcement v. State, 2009 Tex. App. LEXIS 1096, 2009 WL 383398 (Tex. App. Texarkana Feb. 18 2009).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

100. In a driving while intoxicated case, a trial court did not err by allowing a police officer to give an opinion about appellant's intent to fight at the time of his arrest; the officer was not speculating about appellant's inner thoughts, rather, the officer was drawing an inference from her own observations. The information was relevant, it did not describe an extraneous offense or bad act, the inclusion of the information was not so prejudicial that it should have been excluded on that ground, and it was presented alongside copious evidence that appellant was driving while intoxicated and attempting to flee from police. Link v. State, 2012 Tex. App. LEXIS 3350, 2012 WL 1495182 (Tex. App. Eastland Apr. 30 2012).

Evidence : Relevance : Relevant Evidence

101. In a driving while intoxicated case, a trial court did not err by allowing a police officer to give an opinion about appellant's intent to fight at the time of his arrest; the officer was not speculating about appellant's inner thoughts, rather, the officer was drawing an inference from her own observations. The information was relevant, it did not describe an extraneous offense or bad act, the inclusion of the information was not so prejudicial that it should have been excluded on that ground, and it was presented alongside copious evidence that appellant was driving while intoxicated and attempting to flee from police. Link v. State, 2012 Tex. App. LEXIS 3350, 2012 WL 1495182 (Tex. App. Eastland Apr. 30 2012).

102. Trial court did not err by allowing a lieutenant to testify about the decedent's wife's intent to steal the gun owner's gun from his desk at work because his statements were based on his investigation of the incident, which included the consideration of the totality of the circumstances. Richardson v. Crawford, 2011 Tex. App. LEXIS 8150 (Tex. App. Waco Oct. 12 2011).

103. Police officer was properly permitted to testify as to the number of intoxicated people he had encountered during his career as it was relevant under Tex. R. Evid. 401 to establish the basis for his opinion that appellant was intoxicated and was based on his personal perceptions as required by Tex. R. Evid. 701. Schmidt v. State, 2010 Tex. App. LEXIS 8795, 2010 WL 4354027 (Tex. App. Beaumont Nov. 3 2010).

104. Trial court did not err by refusing to allow defendant to further question two of the State's witnesses about defendant's duty or authority as a peace officer because he had already established that neither witness had any law enforcement training or education, and therefore the questions failed to meet the requirements of Tex. R. Evid.

701 (personal perception or knowledge) and Tex. R. Evid. 401 (relevance requiring both materiality and probativeness). King v. State, 2007 Tex. App. LEXIS 8766 (Tex. App. Beaumont Oct. 31 2007).

Evidence : Scientific Evidence : Blood Alcohol

105. In a personal injury suit stemming from a collision between a motorist and a bicyclist, evidence of the bicyclist's intoxication was rebuttably presumed to be admissible because the bicyclist's vigilance, judgment, and reactions were at issue; no expert evidence was required as to causation; assessing the reliability of scientific methods was not a precondition to the admission of factual evidence of alcohol consumption, business records showing blood-alcohol levels, or non-expert opinions regarding intoxication. Ticknor v. Doolan, 2006 Tex. App. LEXIS 6717 (Tex. App. Houston 14th Dist. July 27 2006).

Evidence : Scientific Evidence : Sobriety Tests

106. In a driving while intoxicated case, there was no error under Tex. R. Evid. 403, 701, in admitting a CD to assist the arresting officer in explaining the effects of alcohol on a person's eyes with and without increased nystagmus. The exhibit was not offered as substantive evidence of intoxication but rather as a tool to help the arresting police officer explain the horizontal gaze nystagmus test. Redfearn v. State, 2010 Tex. App. LEXIS 7018, 2010 WL 3377796 (Tex. App. Fort Worth Aug. 26 2010).

107. During defendant's trial for driving while intoxicated (DWI) in violation of Tex. Penal Code Ann. § 49.04, the testimony of an officer with the police department's DWI enforcement unit might have been improper under Tex. R. Evid. 701, 702 because, by repeatedly testifying that the walk-and-turn and one-leg stand sobriety tests provided "validated" or "scientifically validated" clues of impairment, the officer gave those tests an imprimatur of scientific accuracy that they had not been shown to possess and that, in any event, he was not shown qualified to confer. However, reversible error was not presented because the issue was not preserved for appeal, and because defendant's substantial rights were not affected, as there was substantial evidence of defendant's intoxication, including his admission that he had consumed four shots of tequila and the testimony of four witnesses describing his reckless driving, odor of alcoholic beverage, bloodshot eyes, slurred speech, and lack of balance. McIntosh v. State, 2010 Tex. App. LEXIS 849 (Tex. App. Austin Feb. 4 2010).

108. In defendant's driving while intoxicated case, the court properly allowed the arresting officer to testify regarding defendant's performance on the walk-and-turn and one-legged stand sobriety tests because the tests were grounded in the common knowledge that excessive alcohol consumption could cause problems with coordination, balance, and mental agility. Plouff v. State, 192 S.W.3d 213, 2006 Tex. App. LEXIS 2546 (Tex. App. Houston 14th Dist. 2006).

109. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

110. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744

(Tex. App. Amarillo Nov. 22 2005).

111. In a prosecution for DWI, the arresting officer was properly allowed to testify that, in his opinion, defendant was intoxicated based on defendant's inability to perform the walk and turn test and the one leg stand test. A lay witness may give an opinion as to whether another person is intoxicated, and although a police officer may have specialized training, that does not preclude the officer from providing such lay opinion testimony. Oropeza v. State, 2004 Tex. App. LEXIS 2588 (Tex. App. Dallas Mar. 24 2004).

112. Where there was no indication in an officer's sworn report that his opinion of a driver's intoxication was based on his training and experience, his qualifications did not have to be established under Tex. R. Evid. 702; further, the walk-and-turn and one-leg stand tests were not based on a novel scientific theory and, under Tex. R. Evid. 701, a police officer was not required to be an expert to express an opinion as to whether the person he observed was intoxicated. Tex. Dep't of Pub. Safety v. Struve, 79 S.W.3d 796, 2002 Tex. App. LEXIS 4433 (Tex. App. Corpus Christi 2002).

Evidence : Testimony : Examination : General Overview

113. Trial court's restrictions on a witness's testimony were within its discretion where the court was avoiding needless consumption of time because defendant was asking questions about what the witness did not consider to be a violation of the restrictive covenants at issue in the case, whether the witness had protested the value assigned to his own property for property tax purposes, and whether individuals could enforce deed restrictions; those lines of questioning were either irrelevant to the legal question of whether defendant had violated the applicable deed restrictions or improperly called for a legal conclusion. Daniels v. Balcones Woods Club, Inc., 2006 Tex. App. LEXIS 957 (Tex. App. Austin Feb. 2 2006).

Evidence : Testimony : Experts : General Overview

114. Father and brother of an incapacitated adult testified in detail about the adult's cerebral palsy, his inability to feed or dress himself, and other limitations, and thus the father and brother were not required to provide expert testimony to establish that a person with these limitations required additional, basic care. Christus Health & Christus Health Gulf Coast v. Dorriety, 345 S.W.3d 104, 2011 Tex. App. LEXIS 3755 (Tex. App. Houston 14th Dist. May 19 2011).

115. In condemnation proceedings, an affidavit of the vice president of the corporate general partner of a limited partnership was properly excluded under Tex. R. Evid. 701 regarding the valuation of the property to be take for a water line easement because his opinion was based on his expertise rather than his personal familiarity with the property and he was not timely disclosed as an expert. Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd., 337 S.W.3d 846, 2011 Tex. LEXIS 190, 54 Tex. Sup. Ct. J. 658 (Tex. 2011).

116. Exchange between the parties did not relieve the client of the burden to show causation via expert testimony in response to a summary judgment motion in the client's professional negligence lawsuit; to avoid summary judgment, the client had to submit competent causation evidence regardless of whether appellees requested discovery or an expert report, and none of the exhibits contained evidence of causation on the negligence claim. Mcinnis v. Mallia, 2011 Tex. App. LEXIS 1634, 2011 WL 782229 (Tex. App. Houston 14th Dist. Mar. 8 2011).

117. Because a client proffered no expert testimony to establish that she would have prevailed in her underlying suit but for the asserted negligence, she provided no evidence to establish a causal link between the asserted negligence and her claimed injury, and appellees were properly granted summary judgment. Mcinnis v. Mallia, 2011

Tex. App. LEXIS 1634, 2011 WL 782229 (Tex. App. Houston 14th Dist. Mar. 8 2011).

118. To prove the reasonableness and necessity of medical services, a plaintiff had to either submit an affidavit or provide expert testimony; there was no evidence of appellee's medical expenses and the damage award was reversed. Tucker v. Tucker, 2010 Tex. App. LEXIS 9272, 2010 WL 4705588 (Tex. App. Dallas Nov. 22 2010).

119. In defendant's drug case, the trial court did not err in allowing a witness to testify as to what tanks were used for because the witness had worked for the business for 16 years at the time of the trial, and the witness testified that the tanks were used to store and move fertilizer and anhydrous ammonia. That was not scientific, technical, or specialized knowledge that was being offered to assist the trier of fact. Meier v. State, 2009 Tex. App. LEXIS 8078, 2009 WL 3335282 (Tex. App. Amarillo Oct. 16 2009).

120. In a will contest alleging lack of testamentary capacity, affidavits of several doctors regarding a testatrix's soundness of mind were considered in granting summary judgment because mental soundness was within common knowledge and did not require proof by expert testimony. In re Estate of Mask, 2008 Tex. App. LEXIS 5439 (Tex. App. San Antonio July 23 2008).

121. Trial court did not abuse its discretion by denying defendant's motion for a Tex. R. Evid. 705 hearing concerning a special agent's testimony because the trial court properly admitted the agent's testimony under Tex. R. Evid. 701; the State presented the agent as a lay witness to testify about the pimp subculture and to address the issue of cause, as placed into issue by defendant's cross-examination of the complainant; the questions contemplated drew directly from the agent's personal experience and familiarity with the pimping subculture, including its terms, many of which the complainant had used in her testimony, which the agent gained from interviewing both pimps and prostitutes; questioning the agent about what he learned from his experience assisted the fact-finder in determining a fact in issue, specifically defendant's utilizing the complainant as a prostitute for his personal profit. Richardson v. State, 2007 Tex. App. LEXIS 4281 (Tex. App. Houston 1st Dist. May 31 2007).

122. In a trial for child sexual assault, a licensed clinical psychologist was properly allowed to testify as a lay witness where her name was not on the expert list, despite defendant's argument that the psychologist testified in an expert manner under Tex. R. Evid. 702; the testimony that children did not talk about things that troubled them unless they felt safe was that of a lay witness because it satisfied the requirements of Tex. R. Evid. 701 in part because the opinion was not based on a scientific theory and did not require significant expertise to interpret. Scott v. State, 2007 Tex. App. LEXIS 473 (Tex. App. Houston 14th Dist. Jan. 25 2007).

123. In a dispute between insureds under a homeowners policy and their insurer concerning mold in the insureds' home, the insureds' claims failed on summary judgment because the insureds did not timely designate any expert to testify as to causation and lay testimony was insufficient. While the general causal relationship between water and mold might have been common knowledge, the causation issue in the instant case was not within the general experience and common sense of a lay person. Qualls v. State Farm Lloyds, 226 F.R.D. 551, 2005 U.S. Dist. LEXIS 5049 (N.D. Tex. 2005).

124. In a proceeding to terminate parental rights, a caseworker was properly permitted to testify as a fact witness. Contrary to the father's assertion that she expressed the "collective opinion" of the agency, she did not voice an opinion, when asked, about what was in the best interest of the children. Rogers v. Dep't of Family & Protective Servs., 175 S.W.3d 370, 2005 Tex. App. LEXIS 1327 (Tex. App. Houston 1st Dist. 2005).

125. In defendant's trial for possession with intent to deliver cocaine, one arresting officer had 10 years experience, two years of which the officer was on a neighborhood narcotics enforcement team where the officer had many encounters with drug dealers and users; the officer's testimony about aspects of drug dealing, combined

the officer's actual knowledge and lay opinion about facts in issue, did not fall under expert testimony rule (Tex. R. Evid. 702), and was properly admitted under Tex. R. Evid. 701. King v. State, 129 S.W.3d 680, 2004 Tex. App. LEXIS 697 (Tex. App. Waco 2004).

126. In defendant's trial for possession with intent to deliver cocaine, one arresting officer had 10 years experience, two years of which the officer was on a neighborhood narcotics enforcement team where the officer had many encounters with drug dealers and users; the officer's testimony combined the officer's actual knowledge, as well as the officer's lay opinion about facts in issue, did not fall under Tex. R. Evid. 702, and was properly admitted under Tex. R. Evid. 701, governing opinion testimony by lay witnesses. King v. State, 129 S.W.3d 680, 2004 Tex. App. LEXIS 697 (Tex. App. Waco 2004).

127. Police officer with relevant training or experience may qualify under Tex. R. Evid. 701 and 702 to give opinion testimony. Thrailkille v. State, 2002 Tex. App. LEXIS 8972 (Tex. App. Beaumont Dec. 18 2002).

128. Where there was no indication in an officer's sworn report that his opinion of a driver's intoxication was based on his training and experience, his qualifications did not have to be established under Tex. R. Evid. 702; further, the walk-and-turn and one-leg stand tests were not based on a novel scientific theory and, under Tex. R. Evid. 701, a police officer was not required to be an expert to express an opinion as to whether the person he observed was intoxicated. Tex. Dep't of Pub. Safety v. Struve, 79 S.W.3d 796, 2002 Tex. App. LEXIS 4433 (Tex. App. Corpus Christi 2002).

Evidence : Testimony : Experts : Admissibility

129. Finding that respondent was a sexually violent predator was proper because it was not entirely clear from a fingerprint analyst's testimony or the offer of proof whether he personally perceived the events forming the basis of his opinions, or whether he obtained information regarding the events second hand; what was clear was that his testimony did not relate specifically to the prisons in which respondent. Therefore, the testimony did not meet the requirements of Tex. R. Evid. 701; moreover, the same testimony defense counsel sought to elicit from the analyst regarding the prison conditions, defense counsel was able to ask without objection of a doctor and therefore, any error would be harmless. See Tex. R. App. P. 44.1(a). In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

130. Even though the trial court erred by admitting the testimony of a trooper concerning the causation of the accident, as his testimony contained opinions and he did not qualify as an expert under Tex. R. Evid. 702, the error was harmless because his conclusion that the bus driver was not at fault was cumulative of other evidence. The driver's other expert witness provided testimony consistent with the trooper's conclusions, testified in much greater detail, length, and depth than the trooper, and explained the methods he used and the calculations he made. Lopez-juarez v. Kelly, 348 S.W.3d 10, 2011 Tex. App. LEXIS 6446 (Tex. App. Texarkana Aug. 16 2011).

131. Party objected several times to witnesses giving non-expert opinions; the court noted that non-expert opinions are not per se inadmissible under Tex. R. Evid. 701. In re B.N., 2010 Tex. App. LEXIS 7275, 2010 WL 3434214 (Tex. App. Waco Sept. 1 2010).

Evidence : Testimony : Experts : Criminal Trials

132. Trial court did not abuse its discretion by admitting the testimony of the victim's primary case physician as a lay witness, and therefore he did not have to be qualified as an expert to render an opinion about whether the victim was disabled, because the physician's testimony was based on his perception of the victim and his opinion was helpful to the jury in determining the factual issue of the victim's status as a disabled individual and did not require

significant expertise to interpret. Edwards v. State, 2014 Tex. App. LEXIS 5677 (Tex. App. Austin May 29 2014).

133. In a sexual assault case, defendant was unable to show that he received ineffective assistance of counsel based on counsel's failure to object to the testimony of a social worker as unqualified expert testimony; the social worker could have testified about giving a victim information about a sexual assault examination as either a lay or expert witness. Benjamin v. State, 2007 Tex. App. LEXIS 7010 (Tex. App. Houston 1st Dist. Aug. 30 2007).

134. In a capital murder trial for the shooting death of a store clerk, the trial court erred by permitting an expert witness to provide a narrative interpretation of the videotaped recording of the incident. However, the testimony that defendant's waving to the gunman was consistent with his saying "come this way," did not have a substantial or injurious effect on the jury's verdict and did not affect his substantial rights; therefore, the error was harmless under Tex. R. App. P 44.2. Gonzales v. State, 2006 Tex. App. LEXIS 2518 (Tex. App. Fort Worth Mar. 30 2006).

135. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

136. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

Evidence : Testimony : Experts : Helpfulness

137. Companies complained that a postal worker had not designated a liability expert to establish foreseeability in this premises liability case, but while such testimony might be helpful, it was not required when a layperson's common understanding and experience allowed him to determine the causal relationship, and the deposition testimony constituted some evidence of causation. Farrar v. Sabine Mgmt. Corp., 362 S.W.3d 694, 2011 Tex. App. LEXIS 6276, 2011 WL 3524204 (Tex. App. Houston 1st Dist. Aug. 11 2011).

Evidence : Testimony : Experts : Qualifications

138. Deputy's testimony that the presence and degree of lividity indicated death had occurred over an hour before he first observed the victim's body was admissible under Tex. R. Evid. 701 because it was based on first-hand knowledge and under Tex. R. Evid. 702 based on his training and experience, which included his 11 years as a crime-scene investigator, during which he had amassed extensive training and experience; the classes conducted by physicians in the county medical examiner's office in which instruction was provided on the approximate times for lividity and rigor mortis to set in on a corpse; medical conferences he attended regularly in which information was provided on lividity as a beginning stage of decomposition; and the fact that he had seen hundreds of homicide victims. Thompson v. State, 2011 Tex. App. LEXIS 1633, 2011 WL 782051 (Tex. App. Houston 14th Dist. Mar. 8 2011).

139. The burden of proving that a testifying expert possesses special knowledge as to the very matter upon which he proposes to give an opinion rests on the party offering the testimony. S & J Invs. v. Am. Star Energy & Minerals

Corp., 2008 Tex. App. LEXIS 5078 (Tex. App. Amarillo July 8, 2008).

140. Narcotics detective was qualified to testify that defendant possessed the cocaine with intent to distribute because he had been a narcotics officer for almost eight years, worked undercover with confidential informants, had purchased narcotics many times, had attended a 40-hour class, annual continuing education, drug recognition schools, drug testing classes, drug buying classes and a few classes on courtroom testimony; the detective described cocaine, its packaging, amounts and prices, and described the cocaine found in the case and testified that a person in possession of a 100 grams of cocaine would be in possession with intent to distribute. Brooks v. State, 2006 Tex. App. LEXIS 6973 (Tex. App. Dallas Aug. 8 2006).

Evidence : Testimony : Lay Witnesses : General Overview

141. Expert testimony was not necessary to establish causation in this case, and evidence of temporal proximity, along with other evidence tending to exclude other potential causes, could have established that the business's trucks caused the damage to the car wash concrete; the causal relationship between the occurrence (delivery trucks driving over the pavement) and the condition (damage to the pavement) could in principle be determined by a layman in this case. Raul Flores, Inc. v. Rodriguez, 2014 Tex. App. LEXIS 3561, 2014 WL 1370344 (Tex. App. Corpus Christi Apr. 3 2014).

142. While lay testimony could theoretically have established causation in this case, the actual testimony adduced at trial did not do so. Raul Flores, Inc. v. Rodriguez, 2014 Tex. App. LEXIS 3561, 2014 WL 1370344 (Tex. App. Corpus Christi Apr. 3 2014).

143. Court found no reversible error with respect to the exclusion of a witness's lay opinion testimony regarding causation; assuming that the causation opinion was admissible, there was no reversible error because the testimony would not constitute more than a scintilla of evidence supporting causation. Raul Flores, Inc. v. Rodriguez, 2014 Tex. App. LEXIS 3561, 2014 WL 1370344 (Tex. App. Corpus Christi Apr. 3 2014).

144. President of a debt collector company had the required management position relating to the profits of the business in order to testify as an owner. Hht Ltd. v. Nationwide Recovery Sys., 2013 Tex. App. LEXIS 6717 (Tex. App. Dallas May 31 2013).

145. Appellants complained that one of the debt collector's witnesses, a vice president and 25-year employee of the collector, was not an expert about lost profits, but the witness was qualified to testify about profits, and in any event, the president was qualified to testify even though he was not an expert. Hht Ltd. v. Nationwide Recovery Sys., 2013 Tex. App. LEXIS 6717 (Tex. App. Dallas May 31 2013).

146. Relatives assumed that a witness testified as an expert under Tex. R. Evid. 702, and the lessor stood on its waiver argument only; nothing indicated that the witness testified as a lay witness under Tex. R. Evid. 701, and thus the court addressed the issue as presented. Qui Phloc Ho v. Macarthur Ranch, Llc, 395 S.W.3d 325, 2013 Tex. App. LEXIS 1199, 2013 WL 458323 (Tex. App. Dallas Feb. 7 2013).

147. To the extent the trial court found that expert testimony was necessary in this breach of contract case, this was error; the record indicated that the cost of repairing the pool in question could be shown via bids and the homeowners' lay opinion based on estimates. Seasha Pools, Inc. v. Hardister, 391 S.W.3d 635, 2012 Tex. App. LEXIS 10765, 2012 WL 6761528 (Tex. App. Austin Dec. 28 2012).

148. Homeowner introduced written bids he obtained regarding replastering his pool and repairing a light fixture, and he testified he felt the bids were reasonable; the bids and the homeowner's lay testimony were competent evidence from which a factfinder could determine the cost of repairing the light fixture and pool. Seasha Pools, Inc. v. Hardister, 391 S.W.3d 635, 2012 Tex. App. LEXIS 10765, 2012 WL 6761528 (Tex. App. Austin Dec. 28 2012).

149. On appeal from his conviction for failing to stop at a clearly marked stop line while facing a red light, the appellate court determined that the municipal court did not err in overruling defendant's objections to questions that he claimed called for a conclusion of law or ultimate issue for the jury. The police officers testified based on their observations and experience in patrolling the same area where defendant was cited. Hassan v. State, 440 S.W.3d 684, 2012 Tex. App. LEXIS 8853, 2012 WL 5288353 (Tex. App. Houston 14th Dist. Oct. 25 2012).

150. Meaning of "semipermanently" in a restrictive covenant was a legal question, for construction purposes either under the common law or under Tex. Prop. Code Ann. §§ 202.002, 202.003, and was not ordinarily an appropriate subject for the testimony of lay witnesses; still, a landowner's witness underscored the court's concerns with the construction of this word, as he testified that the covenant had no definite time frame for compliance. Wiese v. Heathlake Cmty. Ass'n, 384 S.W.3d 395, 2012 Tex. App. LEXIS 2371, 2012 WL 1009531 (Tex. App. Houston 14th Dist. Mar. 27 2012).

151. Appellant's testimony, as lay testimony, that he believed he was partners with appellee was not evidence of a legal partnership by itself; although appellant raised other bases for his conclusion, the court could not consider evidence of other partnership factors in determining if the parties expressed their intent to be partners. Brown v. Keel, 2012 Tex. App. LEXIS 1854, 2012 WL 760933 (Tex. App. Houston 1st Dist. Mar. 8 2012).

152. Appellant did not object to the evidence offered by witnesses in valuing an automated teller machine, front-end loader, or cost of repairs in his trial for theft and criminal mischief, and thus any objection related to hearsay and lay and expert opinions was waived under Tex. R. App. P. 33.1(a). Lee v. State, 2012 Tex. App. LEXIS 1441, 2012 WL 592192 (Tex. App. Amarillo Feb. 23 2012).

153. Court believes that a juror, applying commonsense understanding, can tie the relationship of the vibrations of the earth caused by seismic testing with reasonable probability to the concurrent abrupt sanding of a water well; hence, although expert testimony is often helpful to the understanding of the effects of seismic testing and is often advised, when there has been convincing lay witness evidence presented, as in this case, it is not absolutely mandatory. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 783, 2012 Tex. App. LEXIS 1446, 175 Oil & Gas Rep. 775 (Tex. App. Texarkana Feb. 24 2012).

154. Court believes that a juror, applying commonsense understanding, can tie the relationship of the vibrations of the earth caused by seismic testing with reasonable probability to the concurrent abrupt sanding of a water well; hence, although expert testimony is often helpful to the understanding of the effects of seismic testing and is often advised, when there has been convincing lay witness evidence presented, it is not absolutely mandatory. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 782, 2012 Tex. App. LEXIS 347, 2012 WL 129766 (Tex. App. Texarkana Jan. 18 2012).

155. Court did not need to decide whether appellant's objection preserved his Tex. R. Evid. 701 objection because even assuming the trial court erred in allowing the victim's mother's testimony, admission was harmless under Tex. R. App. P. 44.2(b); although appellant objected to the mother's description of appellant, a few moments later she testified without objection that she believed the victim's allegations, and it was for the jury to judge witness credibility, and the mother's testimony about how appellant looked had little if any effect on how the jury judged witness credibility, and the court had fair assurance that the evidence did not influence the jury or had only but a slight effect. Cavazos v. State, 2011 Tex. App. LEXIS 10185, 2011 WL 6917580 (Tex. App. Corpus Christi Dec. 29

2011).

156. Trial court did not err by allowing a lieutenant to testify about the decedent's wife's intent to steal the gun owner's gun from his desk at work because his statements were based on his investigation of the incident, which included the consideration of the totality of the circumstances. Richardson v. Crawford, 2011 Tex. App. LEXIS 8150 (Tex. App. Waco Oct. 12 2011).

157. Subject of how water traveled after being absorbed by the ground and how such affected the water table were subjects beyond the general understanding and common knowledge of lay witnesses, and the homeowners' evidence did not show a close connection between the filling of the pond and the problems the homeowners experienced on their lot; for purposes of their claims, including under Tex. Water Code Ann. § 11.086, the homeowners were required to present expert testimony to show that a fact issue existed regarding whether the construction of the pond was the cause in fact of the excessive water on their lot, and as they did not, summary judgment was proper for the developer. Palma v. Chribran Co., L.L.C., 327 S.W.3d 866, 2010 Tex. App. LEXIS 8921 (Tex. App. Beaumont Nov. 10 2010).

158. While laypersons certainly know that water flows downhill, whether water continues flowing downhill after being absorbed into the ground is not a matter that is apparent or within the common experience of laypersons, nor does a layperson's general experience and common knowledge extend to determining how water travels beneath the ground over the distance that is involved here, and finally, laypersons do not possess a general understanding of where the water tables are located under property nor how adding water to one end of the table might affect areas elsewhere; a homeowner's opinion on the causation of his water problems was not properly supported. Palma v. Chribran Co., L.L.C., 327 S.W.3d 866, 2010 Tex. App. LEXIS 8921 (Tex. App. Beaumont Nov. 10 2010).

159. Assuming, without deciding, that it was error to admit an officer's testimony under either Tex. R. Evid. 701 or 702, his testimony had a slight effect, if any, on the jury's verdict, and thus any error was harmless under Tex. R. App. P. 44.2(b); the purpose of the officer's testimony was to show the dangerous nature of the events that took place, and from photographs admitted, the jury could have inferred that the incident was extremely dangerous. The primary issue was whether appellant committed the offenses of criminal mischief, attempted escape, and resisting arrest, and the evidence from other sources showing appellant committed these offenses was overwhelming. Mccutchen v. State, 2010 Tex. App. LEXIS 7760, 2010 WL 3699987 (Tex. App. San Antonio Sept. 22 2010).

160. Trial court did not err in failing to hold a Kelly-Daubert hearing regarding the admissibility of the standard, physical field sobriety tests that defendant performed because an officer's testimony regarding the walk-and-turn test and the one-leg stand test was lay testimony, not expert scientific or technical evidence. Johnson v. State, 2010 Tex. App. LEXIS 5603, 2010 WL 2803015 (Tex. App. Eastland July 15 2010).

161. Corporation's employees who testified against appellant, a terminated employee, regarding allegedly improper financial conduct by appellant were fact witnesses under Tex. R. Evid. 701 rather than expert witnesses under Tex. R. Evid. 702, such that non-produced documents, which the testifying employees referred to, were not subject to exclusion under Tex. R. Civ. P. 193.6(a). Marin v. IESI TX Corp., 317 S.W.3d 314, 2010 Tex. App. LEXIS 981 (Tex. App. Houston 1st Dist. Feb. 11 2010).

162. Case law discussing Tex. R. Evid. 701 did not apply because defendant had not brought an issue under Rule 701 or pointed to anywhere in the record where he preserved this issue for appeal by making a Rule 701 objection. Martinez v. State, 2009 Tex. App. LEXIS 8712, 2009 WL 3789880 (Tex. App. San Antonio Nov. 11 2009).

163. After the investigating detective testified that defendant had worked at his relationship with the victim in a process called grooming, defendant agreed that he was grooming the victim; even if the trial court abused its

discretion in admitting this evidence under Tex. R. Evid. 701, 702, the admission of the evidence did not affect defendant's substantial rights in view of his acknowledgment that he was grooming the victim. Worthy v. State, 295 S.W.3d 685, 2009 Tex. App. LEXIS 3672 (Tex. App. Eastland May 28 2009).

164. In this negligence/premises liability action, there was lay testimony providing direct evidence of the prompt onset of symptoms following electrocution, and under Tex. R. App. P. 38.1, the court accepted as true the contractor's assertion in his statement of facts that emergency personnel informed the contractor that he had suffered a heart attack, as this statement was not contradicted by the homeowners. Choice v. Gibbs, 222 S.W.3d 832, 2007 Tex. App. LEXIS 2852 (Tex. App. Houston 14th Dist. 2007).

165. In defendant's driving while intoxicated case, the court properly allowed the arresting officer to testify regarding defendant's performance on the walk-and-turn and one-legged stand sobriety tests because the tests were grounded in the common knowledge that excessive alcohol consumption could cause problems with coordination, balance, and mental agility. Plouff v. State, 192 S.W.3d 213, 2006 Tex. App. LEXIS 2546 (Tex. App. Houston 14th Dist. 2006).

166. Objection was made to opinion testimony as calling for a legal conclusion, and the trial court ruled on that objection; although the objection on appeal was somewhat different in that defendant claimed the testimony was a conclusion that should have been reached by the jury, the court found the objection not so different as to have precluded the court's consideration of the issue for purposes of Tex. R. App. P. 33.1, and the court further found that error was not forfeited by defense counsel's mere restatement of the objectionable testimony. Lovell v. State, 2006 Tex. App. LEXIS 2280 (Tex. App. Tyler Mar. 22 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 6062 (Tex. App. Tyler July 12, 2006).

167. Witness was asked whether, based on the investigation, defendant violated the law of interference with child custody under Tex. Penal Code Ann. § 25.03(a)(1), to which the witness agreed; because this was in substance, an opinion that defendant was guilty, the trial court should have sustained defendant's objection; however, the error did not affect defendant's substantial rights under Tex. R. App. P. 44, given that defendant and her ex-husband had a custody arrangement regarding their child and defendant deliberately took the child on a weekend that was not hers. Lovell v. State, 2006 Tex. App. LEXIS 2280 (Tex. App. Tyler Mar. 22 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 6062 (Tex. App. Tyler July 12, 2006).

168. Trial court's restrictions on a witness's testimony were within its discretion where the court was avoiding needless consumption of time because defendant was asking questions about what the witness did not consider to be a violation of the restrictive covenants at issue in the case, whether the witness had protested the value assigned to his own property for property tax purposes, and whether individuals could enforce deed restrictions; those lines of questioning were either irrelevant to the legal question of whether defendant had violated the applicable deed restrictions or improperly called for a legal conclusion. Daniels v. Balcones Woods Club, Inc., 2006 Tex. App. LEXIS 957 (Tex. App. Austin Feb. 2 2006).

169. Reasonable minds could have differed as to the causal nexus, whether the evidence proved the father's mental pain and anguish damages, and whether the daughter proved the amounts, reasonableness, and necessity of the father's past medical expenses, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 18.001(b), and thus the trial court erred in granting a judgment notwithstanding the verdict. Ferrer v. Guevara, 192 S.W.3d 39, 2005 Tex. App. LEXIS 10010 (Tex. App. El Paso 2005).

170. In the fire and police retiree heath care fund's actuarial malpractice suit against its consulting firm after funding rate's for health care costs were increased, the trial court did not abuse its discretion in sustaining the firm's objections to the affidavit testimony of the two witnesses (the firefighters union president and its chief collective

bargaining negotiator) offered by the fund to establish causation as it was based on their speculative conclusions regarding what the city's negotiators, the city council, and the union members would have done if the firm had recommended a higher pre-funding rate. Bd. of Trs. of the Fire & Police Retiree Health Fund v. Towers, Perrin, Forster & Crosby, Inc., 191 S.W.3d 185, 2005 Tex. App. LEXIS 9786 (Tex. App. San Antonio 2005).

171. Police officer's perception of defendant's wife as a victim of family violence was admissible under Tex. R. Evid. 701 and was not testimony of scientific or technical knowledge for purposes of Tex. R. Evid. 702; the statement was based on the officer's personal observations and experience as an officer working in the family violence division, the testimony suggested that the State was asking the officer to elaborate on events leading up to and executing the warrant for defendant's arrest, and in light of the overwhelming evidence of guilt, as well as the admission of similar testimony without objection, error, if any, was harmless under Tex. R. App. P. 44.2(b). Horta v. State, 2005 Tex. App. LEXIS 7151 (Tex. App. Corpus Christi Aug. 31 2005).

172. For purposes of defendant's conviction under Tex. Health & Safety Code Ann. § 481.124(a)(2), there was sufficient evidence affirmatively linking defendant to the red phosphorous and iodine, judicially noted to be precursors as defined in Tex. Health & Safety Code Ann. § 481.002(22), and the State provided sufficient evidence to prove that the substances found were in fact red phosphorous and iodine, given that (1) items used in the manufacture of drugs were found during a search, (2) the house had a pungent smell, (3) defendant had stained fingertips common to such manufacturing, (4) testimony of a drug analyst, admissible under Tex. R. Evid. 701, discussed the precursors, although the analyst did not test for them, and (5) officers testified that based on their experiences, they believed the chemicals to be red phosphorous and iodine. Miramontes v. State, 225 S.W.3d 132, 2005 Tex. App. LEXIS 7160 (Tex. App. El Paso 2005).

173. Because a detective based opinion testimony on personal observations made while investigating, and the testimony was helpful to a determination of a fact in question, the detective's testimony was admissible as a lay opinion under Tex. R. Evid. 701. Ortiz v. State, 2005 Tex. App. LEXIS 6721 (Tex. App. Fort Worth Aug. 18 2005).

174. Where a habitual marijuana user fell from a steel structure while working, he was permitted to give his lay opinion testimony at trial that he had normal use of his mental and physical faculties at the time of his injury. The jury was entitled to believe the employee's testimony, together with the testimony about the work activities the employee successfully completed prior to his fall. Am. Interstate Ins. Co. v. Hinson, 172 S.W.3d 108, 2005 Tex. App. LEXIS 6350 (Tex. App. Beaumont 2005).

175. Trial court properly granted a directed verdict in favor of an investment company in a wife's action to recover 30 percent of her deceased husband's IRA account because uncontradicted evidence in the form of testimony from the decedent's personal representative at the company established that the decedent filled out a new beneficiary designation form because the representative could not be sure that the decedent's daughters were in fact the beneficiaries of the IRA account. In re Estate of Falls, 2005 Tex. App. LEXIS 6157 (Tex. App. Corpus Christi Aug. 4 2005).

176. In a capital case, the trial court did not abuse its discretion by prohibiting defendant from asking an arresting officer whether he thought defendant was upset because he did not intend for the accomplice to shoot the complainant as another officer had already told the jury what defendant said immediately after his arrest. The jury was just as capable of interpreting those statements as the arresting officer, rendering the utility of any opinion of his as to their meaning of slight or no usefulness. Ramirez v. State, 2005 Tex. App. LEXIS 5631 (Tex. App. Houston 14th Dist. July 21 2005).

177. Trial court properly admitted lay testimony under Tex. R. Evid. 701 to establish that the worth of a decedent's household furnishings because the record evidence established a basis for personal knowledge of the witnesses

and a rational connection of that knowledge with the opinion. The decedent's fiance testified she was a frequent visitor in his home, was familiar with the furnishings, and that she owned comparable furnishings, and she estimated their worth based on an earlier professional evaluation of her own furniture and the quantity and quality of the decedent's furnishings. Sierad v. Barnett, 164 S.W.3d 471, 2005 Tex. App. LEXIS 4161 (Tex. App. Dallas 2005).

178. In a dispute between insureds under a homeowners policy and their insurer concerning mold in the insureds' home, the insureds' claims failed on summary judgment because the insureds did not timely designate any expert to testify as to causation and lay testimony was insufficient. While the general causal relationship between water and mold might have been common knowledge, the causation issue in the instant case was not within the general experience and common sense of a lay person. Qualls v. State Farm Lloyds, 226 F.R.D. 551, 2005 U.S. Dist. LEXIS 5049 (N.D. Tex. 2005).

179. Defendant opened the door to the question of why the child victim did not testify, and a detective's testimony regarding the competency of child witnesses was appropriate to clarify the issue pursuant to Tex. R. Evid. 107; in addition, the testimony was admissible under Tex. R. Evid. 701 because (1) the detective had personal experience with child witnesses and their ability or inability to testify, (2) the detective's testimony was based on inferences made as a result of the detective's personal experience and observations, and (3) common sense also dictated that a three-year-old child might not be fit to testify. Martinez v. State, 2005 Tex. App. LEXIS 1822 (Tex. App. Austin Mar. 10 2005).

180. Because the one-leg-stand and walk-and-turn field sobriety tests (FSTs) are grounded in the common knowledge that excessive alcohol consumption can cause problems with coordination, balance, and mental agility, a law enforcement officer's testimony about a defendant's coordination, balance, and mental agility problems during these FSTs is considered lay witness opinion testimony under Tex. R. Evid. 701. McClain v. State, 2005 Tex. App. LEXIS 760 (Tex. App. Dallas Feb. 1 2005).

181. Even if defendant's objections to the testimony at sentencing of the victim's parents raised proper grounds or were sufficiently specific under Tex. R. Evid. 701, defendant failed to show harm where the facts reflected significant bad acts by defendant. Defendant told a police officer that the victim was hanging onto her car as she backed up, she told the victim to get off the car, she quickly accelerated, and she swerved the car to knock the victim off the car. Moreover, a sentence of 30 years was well beyond the range of years where probation could be considered under Tex. Code Crim. Proc. Ann. art. 42.12, § 4(d)(1). Foust v. State, 2005 Tex. App. LEXIS 12 (Tex. App. Dallas Jan. 4 2005).

182. Defendant argued that trial court erred in allowing an investigator to opine that the State had narrowed its suspects down in a murder to two people--defendant and the accomplice witness; however, defendant waived this issue for appellate review because a hearsay objection was raised at trial, and defense counsel failed to raise the specific objection of opinion testimony. Palacios v. State, 2004 Tex. App. LEXIS 9912 (Tex. App. San Antonio Nov. 10 2004).

183. In defendant's aggravated assault case, a court properly allowed a store manager to testify that he did not believe the collision was an accident where the manager saw how upset defendant became after being told he would have to pay to replace the tire, he witnessed the heated exchange between defendant and the other drivers, he knew that defendant quickly returned to the store even after being told his tire would not be ready until the next day, and heard no braking as defendant's truck came into the store at a high rate of speed. The opinion that the collision was not an accident was rationally based on those experiences. to be an expert on such matters. Chatham v. State, 2004 Tex. App. LEXIS 8327 (Tex. App. Houston 14th Dist. Sept. 16 2004).

184. In a murder case, court did not err in allowing the investigating homicide officer to give his direct opinion that the State's two witnesses were telling the truth where defendant's trial counsel posed questions asking the officer if he thought the witnesses were credible witnesses based on their criminal contacts and asked if the officer thought that one was a credible witness because of her lies in her statement, counsel opened the door to the State's questions that directly commented on whether the officer believed the witnesses were truthful and credible witnesses. Williams v. State, 2004 Tex. App. LEXIS 7777 (Tex. App. Houston 1st Dist. Aug. 26 2004).

185. In defendant's sexual assault case, because a witness did not recommend a specific punishment, but merely stated that she felt defendant should be punished, the trial court did not abuse its discretion in allowing the testimony. Flores v. State, 2004 Tex. App. LEXIS 7207 (Tex. App. Corpus Christi Aug. 12 2004).

186. In defendant's retaliation case, court erred by admitting an officer's testimony that he had no doubt that a threat was made to a witness by defendant because the officer stated a legal conclusion from the facts and thus expressed impermissible opinions on a mixed question of fact and law. Martin v. State, 2004 Tex. App. LEXIS 7142 (Tex. App. Texarkana Aug. 11 2004).

187. In a criminal prosecution for the charge of driving while intoxicated, Tex. R. Evid. 701 permitted the trial court to admit lay opinion testimony from an eyewitness on the scene who saw defendant behaving as though he were intoxicated, and although the eyewitness did have law enforcement training, his opinion was not offered as expert testimony. Sloane v. State, 2004 Tex. App. LEXIS 6903 (Tex. App. Waco July 28 2004).

188. In a case involving the termination of parental rights, a licensed professional counselor was permitted to testify about the relationship of the parents as a lay witness where the permissible testimony included evidence that the parents' behavior was "childlike, argumentative, and verbally abusive," and that the parents used "humiliating words" toward each other. In re T.N., 142 S.W.3d 522, 2004 Tex. App. LEXIS 6710 (Tex. App. Fort Worth 2004).

189. In a driver's suit for injuries sustained in a car accident with a company's employee, while the investigating officer was not an expert on accident reconstruction, his testimony was admissible as it was lay opinion based on his own observations and experiences as a police officer. Pilgrim's Pride Corp. v. Smoak, 134 S.W.3d 880, 2004 Tex. App. LEXIS 4468 (Tex. App. Texarkana 2004).

190. In defendant's capital murder case, a court did not err by permitting a witness to speculate that defendant's accomplice could not have taken the money from the cash register where the witness based his testimony on his observations. He could see where both robbers were located in relationship to the complainant and the cash drawer, and based on those observations, the witness drew an inference that only defendant was in a position to reach the cash drawer and take the money. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

191. In a prosecution for aggravated assault in which defendant claimed self-defense, the arresting officer was permitted to give opinion testimony that defendant had not been attacked. Ex parte Nailor, 149 S.W.3d 125, 2004 Tex. Crim. App. LEXIS 518 (Tex. Crim. App. 2004).

192. In a prosecution for DWI, the arresting officer was properly allowed to testify that, in his opinion, defendant was intoxicated based on defendant's inability to perform the walk and turn test and the one leg stand test. A lay witness may give an opinion as to whether another person is intoxicated, and although a police officer may have specialized training, that does not preclude the officer from providing such lay opinion testimony. Oropeza v. State, 2004 Tex. App. LEXIS 2588 (Tex. App. Dallas Mar. 24 2004).

193. Lay witness may give an opinion as to whether another person is intoxicated. Oropeza v. State, 2004 Tex. App. LEXIS 2588 (Tex. App. Dallas Mar. 24 2004).

194. In defendant's trial for possession with intent to deliver cocaine, one arresting officer had 10 years experience, two years of which the officer was on a neighborhood narcotics enforcement team where the officer had many encounters with drug dealers and users; the officer's testimony about aspects of drug dealing, combined the officer's actual knowledge and lay opinion about facts in issue, did not fall under expert testimony rule (Tex. R. Evid. 702), and was properly admitted under Tex. R. Evid. 701. King v. State, 129 S.W.3d 680, 2004 Tex. App. LEXIS 697 (Tex. App. Waco 2004).

195. In defendant's trial for possession with intent to deliver cocaine, one arresting officer had 10 years experience, two years of which the officer was on a neighborhood narcotics enforcement team where the officer had many encounters with drug dealers and users; the officer's testimony combined the officer's actual knowledge, as well as the officer's lay opinion about facts in issue, did not fall under Tex. R. Evid. 702, and was properly admitted under Tex. R. Evid. 701, governing opinion testimony by lay witnesses. King v. State, 129 S.W.3d 680, 2004 Tex. App. LEXIS 697 (Tex. App. Waco 2004).

196. Where there was no indication in an officer's sworn report that his opinion of a driver's intoxication was based on his training and experience, his qualifications did not have to be established under Tex. R. Evid. 702; further, the walk-and-turn and one-leg stand tests were not based on a novel scientific theory and, under Tex. R. Evid. 701, a police officer was not required to be an expert to express an opinion as to whether the person he observed was intoxicated. Tex. Dep't of Pub. Safety v. Struve, 79 S.W.3d 796, 2002 Tex. App. LEXIS 4433 (Tex. App. Corpus Christi 2002).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview

197. Where homeowners alleged that neighbors and company owners caused rain water to flood their house, the evidence was legally sufficient to support the jury's verdict on the homeowners' Texas Water Code claims because the homeowners did not establish as a matter of law that any impounding of diffuse surface water created as a result of the neighbors' changes to their property caused the harm the homeowners suffered; there was testimony from multiple witnesses about what actually did happen with the diffuse surface water and floodwater. Michaelski v. Wright, 2014 Tex. App. LEXIS 6864 (Tex. App. Houston 1st Dist. June 26 2014).

198. Where homeowners alleged that neighbors and company owners caused rain water to flood their house, the evidence was legally sufficient to support the jury's verdict on the homeowners' Texas Water Code claims because the homeowners did not establish as a matter of law that any impounding of diffuse surface water created as a result of the neighbors' changes to their property caused the harm the homeowners suffered; there was testimony from multiple witnesses about what actually did happen with the diffuse surface water and floodwater. Michaelski v. Wright, 2014 Tex. App. LEXIS 6864 (Tex. App. Houston 1st Dist. June 26 2014).

199. Trial court did not abuse its discretion by admitting the testimony of the victim's primary case physician as a lay witness, and therefore he did not have to be qualified as an expert to render an opinion about whether the victim was disabled, because the physician's testimony was based on his perception of the victim and his opinion was helpful to the jury in determining the factual issue of the victim's status as a disabled individual and did not require significant expertise to interpret. Edwards v. State, 2014 Tex. App. LEXIS 5677 (Tex. App. Austin May 29 2014).

200. Record was silent as to why counsel did not object to handwriting testimony, but counsel might have believed that the State could have overcome an objection, given the rule, and thus an objection would have been futile, and an attorney was not ineffective for failing to make futile objections. Cantrell v. State, 2013 Tex. App. LEXIS 14332,

2013 WL 6178576 (Tex. App. Eastland Nov. 21 2013).

201. Appellant did not object to a question on the ground that it was improper opinion testimony, such that this issue was not preserved for review. Irving v. State, 2013 Tex. App. LEXIS 6443, 2013 WL 2297075 (Tex. App. Dallas May 23 2013).

202. Even if defendant's objection during the punishment phase was timely, and an investigator's opinion that defendant's child would be at further risk if around defendant was inadmissible, similar evidence was introduced during the guilt-innocence phase of the trial without objection; hence, defendant was not harmed by the admission of the investigator's opinion. Lomax v. State, 2013 Tex. App. LEXIS 5306 (Tex. App. Tyler Apr. 30 2013).

203. Appellant complained that the trial court erred in admitting lay witness testimony over his Tex. R. Evid. 701 objection, but the State claimed the issue was not preserved, and the issue was whether the objection was specific enough to have made the trial court aware of the complaint, unless grounds were apparent from context, for purposes of Tex. R. App. P. 33.1(a)(1)(A); although the grounds were not apparent from appellant's final objection, his prior objections concerning invading the jury's province were coupled with arguments as to the form of the question and calling for an opinion and conclusion, and even if these were specific enough to preserve error, they failed to comport with the complaint on appeal that the testimony was based on hearsay and was not helpful, and thus that complaint was waived. Hurst v. State, 406 S.W.3d 617, 2013 Tex. App. LEXIS 4282 (Tex. App. Eastland Apr. 4 2013).

204. Even if the court assumed error was preserved and it was error to admit the investigator's opinion, the error would have been harmless because the jury had the information from another source. Hurst v. State, 406 S.W.3d 617, 2013 Tex. App. LEXIS 4282 (Tex. App. Eastland Apr. 4 2013).

205. Under Tex. Fam. Code Ann. § 107.002, a case worker supervisor's testimony was admissible opinion testimony that was not subject to a Daubert hearing; she testified that she interviewed the child, formed an opinion as to his best interest, found that it was in the child's best interests to terminate the parents' rights, and the child said he wanted to stay with his foster parents. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

206. In this nuisance case, although some homeowners discussed a nearby sale, that only reflected their property value after the nuisance, instead of how much the value had changed, and the homeowners' bare conclusions did not provide evidence of the damage caused.

207. In this nuisance case, although one homeowner provided the most detail, his testimony was insufficient because he did not explain the factual basis behind his finding of a decrease in value.

208. In case law, the court stated that market value could be shown by asking a witness if he was familiar with the value of his property, and the court never before explained the interplay between that case and another opinion, in connection with the property owner rule; because the landowners might have relied on that case in presenting their evidence on diminution in property value, a remand was appropriate, and because liability was contested, the court remanded for a new trial on liability and damages.

209. Court agrees that Coastal Transp. Co. v. Crown Cent. Petroleum Corp. provides the appropriate standard for judging the adequacy of testimony offered under the Property Owner Rule, and because property owner testimony is the functional equivalent of expert testimony, it must be judged by the same standards, and thus, as with expert testimony, property valuations may not be based solely on a property owner's ipse dixit; an owner may not simply

echo the phrase market value and state a number to substantiate his diminished value claim, he must provide the factual basis on which his opinion rests, and this burden is not onerous, particularly in light of the resources available today: evidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim, but the valuation must be substantiated, and a naked assertion of "market value" is not enough. Of course, the owner's testimony may be challenged on cross-examination or refuted with independent evidence, but even if unchallenged, the testimony must support a verdict, and conclusory or speculative statements do not.

210. In this nuisance case, none of the testimony provided evidence of diminished market value, and certain testimony was speculative and amounted to only a guess as to diminution in value, and such speculation would not support a judgment.

211. At defendant's trial for aggravated sexual assault of a child, the trial court did not abuse its discretion by allowing a detective to express his belief about how individuals who abuse children target their victims. The witness had extensive practical experience and personal knowledge as a child abuse detective working on hundreds of cases; therefore, his lay opinion testimony was admissible under Tex. R. Evid. 701. Guerrero v. State, 2012 Tex. App. LEXIS 8879, 2012 WL 5258700 (Tex. App. Fort Worth Oct. 25 2012).

212. During a juvenile's trial for indecency with a child, any error under the rule in admitting a detective's testimony did not have a substantial and injurious effect or influence in determining the jury's verdict because the testimony was limited to providing a brief explanation for why the victim had difficulty testifying in court. In re L. M. M., 2012 Tex. App. LEXIS 5717 (Tex. App. Austin July 11 2012).

213. In a suit for breach of an agreement to sell a business, the buyer was not required to present expert testimony on lost profits because the seller's deposition testimony, in which he stated the annual amount that a purchaser could expect to earn from operating the business, sufficiently supported the award under the property owner rule. Sharifi v. Steen Auto., Llc, 370 S.W.3d 126, 2012 Tex. App. LEXIS 4775, 2012 WL 2149921 (Tex. App. Dallas June 14 2012).

214. Testimony was properly admitted on the diminished value of damaged steel coils. The steel company's owner could testify to value as a property owner under Tex. R. Evid. 701, and an expert marine surveyor's testimony on representative sampling was reliable under Tex. R. Evid. 702; further, the expert marine surveyor was not required under Tex. R. Evid. 703 to personally inspect every damaged coil. Custom Transit, L.P. v. Flatrolled Steel, Inc., 375 S.W.3d 337, 2012 Tex. App. LEXIS 4739 (Tex. App. Houston 14th Dist. June 14 2012).

215. Defendant's conviction for capital murder was proper because the detective's testimony was rationally based on events that he perceived during his investigation of the case, including his interrogation of defendant; the testimony was relevant to whether defendant committed the offense, and it did not expressly question defendant's or another witness's truthfulness or credibility. Because the detective's testimony was properly admitted under Tex. R. Evid. 701, the trial court did not abuse its discretion. Cleary v. State, 2012 Tex. App. LEXIS 2348 (Tex. App. Dallas Mar. 26 2012).

216. Had counsel objected that a witness was not qualified, the trial court could have considered if the victim's involvement put her in the position to express a helpful opinion to the jury, but the objection was not sufficiently specific and the issue was not preserved for review under Tex. R. App. P. 33.1(a)(1)(A). Vallair v. State, 2011 Tex. App. LEXIS 7055, 2011 WL 3847418 (Tex. App. Beaumont Aug. 31 2011).

217. For purposes of Tex. Lab. Code Ann. § 401.013(a)(2), the trial court could have found that a lay witness was competent to testify regarding the employee's physical and mental faculties during his shift and the minutes

preceding his death, her testimony was relevant on the issue of whether he was intoxicated, and her testimony was not rendered irrelevant because she did not observe the employee at the exact minute of his death; the witness's testimony supported the findings that the employee was alert and possessed the normal use of his faculties at the time of his death. Dallas Nat'l Ins. Co. v. Lewis, 2011 Tex. App. LEXIS 4564, 2011 WL 2436505 (Tex. App. Houston 1st Dist. June 16 2011).

218. Seller testified that he would not opine about the amount of retained accounts because he was not an accountant, and without more detail, the jury could not based damages on a demand letter, as opinion testimony on damages had to be supported by objective facts. U.S. Renal Care, Inc. v. Jaafar, 345 S.W.3d 600, 2011 Tex. App. LEXIS 2282 (Tex. App. San Antonio Mar. 30 2011).

219. Business owner was permitted to testify about the fair market value of the business if there is a basis for the knowledge, and the trial court did not abuse its discretion by permitting the owner's testimony in this circumstance. Tyre v. Yawn, 2011 Tex. App. LEXIS 1219, 2011 WL 662957 (Tex. App. Houston 1st Dist. Feb. 17 2011).

220. Trial court did not err by admitting testimony from a detective that defendant showed signs of a guilty conscience during a police interrogation because, taking into account that the detective was asked what defendant's "blacking" or "blanking" comment meant to him as an investigator, and not what defendant was thinking when she said that she had "blanked" or "blacked" out, the detective's disputed testimony was not a speculative opinion, but it went instead to his rationally based perception of the interrogation, which provided a clearer understanding of the facts in issue. Brown v. State, 2011 Tex. App. LEXIS 882, 2011 WL 382634 (Tex. App. Dallas Feb. 8 2011).

221. Trial court did not err in admitting into evidence a statement to a trooper as to the speed that defendant believed he had been going at the time of a single car rollover accident. Given that defendant admitted several times he was driving the vehicle, the trial court reasonably could have inferred that he had a factual basis from which to estimate his speed at the time of the accident. Curran v. State, 2011 Tex. App. LEXIS 935, 2011 WL 446191 (Tex. App. Amarillo Feb. 8 2011).

222. In a case in which defendant was convicted of indecency with a child, although the testimony of a sheriff's office investigator that he saw no signs the complainant was dreaming or hallucinating could have been admissible as expert testimony, it was also admissible as lay testimony where the record demonstrated that the investigator had observed the complainant's forensic interview and could testify, based on life experience, that he had not seen any signs that the complainant was dreaming or hallucinating, because he had thus perceived the events of the interview and had formed an opinion that a reasonable person could draw from the facts. Furthermore, the testimony was helpful to demonstrate the complainant's forensic interview had been subjected to investigation and evaluation, and, consequently, the trial court did not abuse its discretion in admitting the investigator's lay testimony that he saw no signs that the complainant was dreaming or hallucinating. Gonzalez v. State, 2011 Tex. App. LEXIS 107, 2011 WL 47169 (Tex. App. Dallas Jan. 7 2011).

223. Witness's testimony amounted to no more than conjecture, contrary to Tex. R. Evid. 701. Blaine v. National-oilwell, L.P., 2010 Tex. App. LEXIS 9614, 2010 WL 4951779 (Tex. App. Houston 14th Dist. Dec. 7 2010).

224. Walk-and-turn and one-leg-stand tests were not scientific evidence; the officer's testimony was lay witness testimony governed by Tex. R. Evid. 701, and while she described the tests and indicated what clues meant a person was intoxicated and how many clues appellant indicated, such did not cross the line into expert testimony, and the trial court did not err in allowing this testimony in appellant's driving while intoxicated trial. Horton v. State, 2010 Tex. App. LEXIS 7296, 2010 WL 3433776 (Tex. App. Fort Worth Aug. 31 2010).

225. Because an officer's testimony was lay witness testimony, and therefore the expert standard did apply, the trial court did not wrongfully place the burden of proof on appellant to show her weight at the time of her arrest for driving while intoxicated. Horton v. State, 2010 Tex. App. LEXIS 7296, 2010 WL 3433776 (Tex. App. Fort Worth Aug. 31 2010).

226. Trial court did not err in determining that causation in this negligence case could stand on the lay testimony of the injured motorist, who testified as to his dental problems, including lost teeth, suffered after the accident with the driver. Figueroa v. Davis, 318 S.W.3d 53, 2010 Tex. App. LEXIS 2574 (Tex. App. Houston 1st Dist. Apr. 8 2010).

227. Although a driver claimed that the motorist's lay testimony fell short of proving causation, the court disagreed; the fact that the dental injury was not recorded until his second set of medical records in contrast to his testimony that his injury was immediate upon impact went to the weight of his testimony and the evidence was not insufficient because of it. Figueroa v. Davis, 318 S.W.3d 53, 2010 Tex. App. LEXIS 2574 (Tex. App. Houston 1st Dist. Apr. 8 2010).

228. Witness's opinion was based on what he observed at the crime scene, and he also had specialized knowledge as a homicide detective; the evidence was admissible as opinion testimony by a lay witness and as expert testimony, under Tex. R. Evid. 701 & 702. Lowery v. State, 2010 Tex. App. LEXIS 1230, 2010 WL 610915 (Tex. App. Dallas Feb. 23 2010).

229. Although defendant argued that his counsel permitted a witness to testify as to his guilt without objection, given the fact that one such objection was overruled by the trial court, counsel could have chosen not to emphasize the matter further to the jury by additional objections, and, accordingly, it could not be said that the trial court abused its discretion in finding that defendant failed to prove by credible evidence that counsel's performance was deficient. Moreover, the witness was a fact witness, and defendant did not argue that the testimony was not based on the perception of the witness and/or was not helpful to an understanding of a fact in issue. Ex Parte Eggert, 2010 Tex. App. LEXIS 858, 2010 WL 396321 (Tex. App. Amarillo Feb. 4 2010).

230. In defendant's murder case, any error in allowing a police officer to testify regarding defendant's credibility was harmless because evidence of defendant's guilt was pervasive throughout the record. While defendant contended that the victim's death was a suicide, the State presented evidence that the victim was pregnant, she wanted to have her baby, and there was evidence that defendant had asked the victim to get an abortion and that she refused. Clark v. State, 305 S.W.3d 351, 2010 Tex. App. LEXIS 478 (Tex. App. Houston 14th Dist. Jan. 26 2010).

231. In a personal injury case, with regard to the two medical record affidavits and the unsworn statements of one doctor, it had long been the rule of Texas that opinion testimony did not establish any material fact as a matter of law. Luna v. Torres, 2009 Tex. App. LEXIS 6972, 2009 WL 2914395 (Tex. App. Corpus Christi Aug. 31 2009).

232. Layperson could reasonably determine that there was a causal link between the slick pool deck surface and the guest's fall and the jury finding was supported by legally sufficient evidence. Towers of Town Lake Condo. Ass'n v. Rouhani, 296 S.W.3d 290, 2009 Tex. App. LEXIS 7033 (Tex. App. Austin Aug. 31 2009).

233. Motion to suppress was properly denied under U.S. Const. amend. IV and the Texas Constitution because the trial court could have reasonably concluded that defendant voluntarily consented to a search of his person and the officer was legally authorized to make a warrantless arrest for defendant's illegal possession of marijuana under Tex. Health & Safety Code Ann. § 481.121 that occurred within the officer's presence under Tex. Code Crim. Proc. Ann. art. 1401. The officer was entitled to give testimony as a lay person under Tex. R. Evid. 701 as to his recognition that the substance was marijuana. Gossett v. State, 2009 Tex. App. LEXIS 5823, 2009 WL 4251169

(Tex. App. Corpus Christi July 30 2009).

234. In an action for a deficiency judgment by a lender against a borrower in which the trial court found an offset, a new trial was required because the trial court erred in valuing the property as of the time of trial rather than as of the time of the foreclosure as required by Tex. Prop. Code Ann. § 51.003(b), (c), and also in admitting the testimony of the borrower's majority shareholder on the issue of valuation under Tex. R. Evid. 701. Cabot Capital Corp. v. USDR, Inc., 346 S.W.3d 634, 2009 Tex. App. LEXIS 2957 (Tex. App. El Paso Apr. 30 2009).

235. Affidavits of a resident and his wife failed to give rise to the requisite issue of material fact that the owner should have foreseen that the resident would be robbed and stabbed on the premises; they did not establish the necessary expertise to qualify as experts, and as statements of opinion by lay, interested witnesses, their opinions were neither readily controvertible nor competent, for summary judgment purposes. Xiao Yu Zhong v. Sunblossom Gardens, LLC, 2009 Tex. App. LEXIS 3010, 2009 WL 1162213 (Tex. App. Houston 1st Dist. Apr. 30 2009).

236. In a driving while intoxicated case, the court did not err by allowing the officer to testify that defendant failed the field sobriety tests because the officer's use of the word "failed" did not give his testimony an "aura of scientific reliability" or cloak it with unearned credibility; the majority of the officer's testimony consisted of a straightforward narrative of each field sobriety test, followed by a particular description of how defendant performed each test. The officer's observations were based on common knowledge and observations and did not, under the circumstances convert his lay witness testimony into expert testimony. Meier v. State, 2009 Tex. App. LEXIS 2051, 2009 WL 765490 (Tex. App. Dallas Mar. 25 2009).

237. In defendant's murder case, an officer did not give improper opinion testimony because he testified that he personally spoke with the witness at the scene and interviewed; he stated that another witness's statement was consistent with that of the witness at the scene. The officer's testimony was based upon his personal observation and reasonable inferences from that observation, and was helpful in determining the events surrounding the complainant's death. Neal v. State, 2009 Tex. App. LEXIS 1726, 2009 WL 585965 (Tex. App. Houston 14th Dist. Mar. 10 2009).

238. In proper instances, lay witnesses may express opinion testimony. Hawkins v. State, 2009 Tex. App. LEXIS 16, 2009 WL 30255 (Tex. App. Texarkana Jan. 7 2009).

239. Distinct line cannot be drawn between lay opinion and expert testimony because all perceptions are evaluated based on experiences, but as a general rule, observations which do not require significant expertise to interpret and which are not based on a scientific theory can be admitted as lay opinions if the requirements of Tex. R. Evid. 701 are met, and this is true even when the witness has experience or training; additionally, even events not normally encountered by most people in everyday life do not necessarily require the testimony of an expert. Hawkins v. State, 2009 Tex. App. LEXIS 16, 2009 WL 30255 (Tex. App. Texarkana Jan. 7 2009).

240. Witness testified that the wounds on the victim were consistent with other defensive wounds he had observed, and the court found that this observation did not require significant expertise to interpret, did not rely on a scientific theory, and was admissible under Tex. R. Evid. 701 as lay opinion testimony even though the witness had some technical training. Hawkins v. State, 2009 Tex. App. LEXIS 16, 2009 WL 30255 (Tex. App. Texarkana Jan. 7 2009).

241. Even if evidence admitted under Tex. R. Evid. 701 was inadmissible, it did not constitute reversible error for purposes of Tex. R. App. P. 44.2(b) because there was a qualified expert testifying that lacerations might have been defensive wounds and the witness testifying similarly that they were consistent with defensive wounds, and thus the court did not find that the addition of the testimony by the witness would have affected a substantial right of

defendant. Hawkins v. State, 2009 Tex. App. LEXIS 16, 2009 WL 30255 (Tex. App. Texarkana Jan. 7 2009).

242. To the extent that defendant claimed that testimony violated Tex. R. Evid 701, defendant failed to object at trial on that basis; therefore, the issue was not preserved for appeal. Boone v. State, 2008 Tex. App. LEXIS 8665 (Tex. App. Dallas Nov. 19 2008).

243. Given the testimony regarding the size and shape of the knife and the manner in which defendant's friend used it, the evidence was sufficient to show that the knife was capable of causing death or serious bodily injury and was a deadly weapon under Tex. Penal Code Ann. § 1.07(a)(17)(B), for purposes of defendant's aggravated robbery conviction; while the knife was not introduced into evidence, there was no expert or lay opinion testimony, and there was no testimony concerning sharpness, the victim testified as to the size and shape of the knife, that defendant's friend stuck the knife to the back of the victim's neck, demanded his laptop, and asked whether it was worth the victim's life when he refused to surrender it, and the victim claimed he was scared to death and received a small scratch from the knife, although the victim did not believe he was intentionally cut. Williams v. State, 2008 Tex. App. LEXIS 8540 (Tex. App. Dallas Nov. 13 2008).

244. In an indecency with a child case, a court did not err in excluding the proposed testimony of a school psychologist that the victim gave a "rehearsed" statement because the psychologist admitted that she was not trained to look at a videotaped statement and determine whether a child was telling the truth. Workman v. State, 2008 Tex. App. LEXIS 2149 (Tex. App. Dallas Mar. 26 2008).

245. In an indecency with a child case, a court did not err in excluding the proposed testimony of a school psychologist that, in her opinion, the victim's videotaped statement was not truthful because no expert or lay witness was allowed to give an opinion that another witness was telling the truth. Workman v. State, 2008 Tex. App. LEXIS 2149 (Tex. App. Dallas Mar. 26 2008).

246. In an indecency with a child case, a court did not err in excluding the proposed testimony of a school psychologist that, in her opinion, the victim used language that seemed unnatural for her because the point of that testimony was to suggest to the jury that the victim was not trustworthy because she either: (a) had been coached; or (b) rehearsed the videotaped statement; the testimony indirectly commented on the victim's truthfulness. Workman v. State, 2008 Tex. App. LEXIS 2149 (Tex. App. Dallas Mar. 26 2008).

247. In determining that the father had the right to determine the child's primary residence under Tex. Fam. Code Ann. § 101.016, the jurors, as the sole judges of the credibility of witnesses, was free to accept lay testimony over that of experts, when confronted with the conflicting evidence in this case; notwithstanding the testimony that the mother was better suited to determine the child's residence, there was sufficient evidence to support the jury's finding in the father's favor, as there were a number of witnesses who testified that the father was a loving and devoted parent, the jury also heard testimony that the father regretted not trying harder to stay in touch with his other children, that he recently made contact with them, and that he took a 10-week parenting course to improve his parenting skills, and the minor child was able to depend on the father for her physical and moral needs. Garcia v. Garcia, 2007 Tex. App. LEXIS 5801 (Tex. App. San Antonio July 25 2007).

248. Trial court did not abuse its discretion by denying defendant's motion for a Tex. R. Evid. 705 hearing concerning a special agent's testimony because the trial court properly admitted the agent's testimony under Tex. R. Evid. 701; the State presented the agent as a lay witness to testify about the pimp subculture and to address the issue of cause, as placed into issue by defendant's cross-examination of the complainant; the questions contemplated drew directly from the agent's personal experience and familiarity with the pimping subculture, including its terms, many of which the complainant had used in her testimony, which the agent gained from interviewing both pimps and prostitutes; questioning the agent about what he learned from his experience assisted

the fact-finder in determining a fact in issue, specifically defendant's utilizing the complainant as a prostitute for his personal profit. Richardson v. State, 2007 Tex. App. LEXIS 4281 (Tex. App. Houston 1st Dist. May 31 2007).

249. Psychologist, who testified during defendant's trial for aggravated sexual assault on a child, testified as a lay witness because the psychologist's opinions were rationally based on the perception of the witness; a reasonable person could have the opinions expressed by spending a significant amount of time around children, and the psychologist's opinion was not based on scientific theory, but it was helpful and did not require significant expertise to interpret. Scott v. State, 222 S.W.3d 820, 2007 Tex. App. LEXIS 2848 (Tex. App. Houston 14th Dist. 2007).

250. Pursuant to Tex. R. Evid. 104, the trial court was entitled to admit a witness's lay opinion testimony at the preliminary hearing without the predicate of Tex. R. Evid. 701 being met. Denton v. State, 2007 Tex. App. LEXIS 1706 (Tex. App. Tyler Mar. 7 2007).

251. In neighbors' action against a landowner seeking a declaration that they had a right to access a creek and a newly-formed lake on the landowner's property after a dam was built, the trial court did not err in admitting the affidavit testimony of a survey technician as his testimony about the average width of the creek was appropriate lay witness opinion evidence; it also was clear, positive, direct, otherwise credible and consistent, and it could have been readily controverted by the landowner. Hix v. Robertson, 2006 Tex. App. LEXIS 9378 (Tex. App. Waco Oct. 18 2006).

252. It was not an abuse of discretion to allow a probation officer to testify during the punishment phase of a trial that petitioner was not a "suitable" candidate for community supervision because suitability was a matter "relevant to sentencing" under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) when petitioner sought placement on community supervision under Tex. Code Crim. Proc. Ann. art. 42.12, § 4; the probation officer not only based her testimony on her general professional knowledge and experience but also on her personal knowledge and perceptions of petitioner and the complainant during their interviews. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

253. When a witness who is capable of being qualified as an expert testifies regarding events which he or she personally perceived, the evidence may be admissible as both Tex. R. Evid. 701 opinion testimony and Tex. R. Evid. 702 expert testimony. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

254. Defendant waived his contention that the trial court erred by admitting the officer's testimony that, in his opinion, defendant intentionally or knowingly possessed marijuana because his objection "calls for speculation" could not have informed the trial court that defendant was challenging the admissibility of the testimony under Tex. R. Evid. 701. Thomas v. State, 2006 Tex. App. LEXIS 6303 (Tex. App. Dallas July 20 2006).

255. During the punishment phase of defendant's trial for aggravated assault with a deadly weapon, Tex. R. Evid. 701 permitted the victim to briefly testify as to the impact the attack had on her life, including that she had been diagnosed with post-traumatic stress disorder and had moved out of state; the jury chose a mid-range sentence of ten years; the challenged testimony did not have a substantial effect on the sentencing determination. Leroy v. State, 2006 Tex. App. LEXIS 3626 (Tex. App. Dallas May 1 2006).

256. Defendant's convictions for aggravated assault with a deadly weapon, possession of cocaine in an amount of less than one gram, and robbery, were appropriate because a police officer's testimony was admissible under Tex. R. Evid. 701 as the officer's opinion or inferences on impressions derived from his contact with defendant. Williams v. State, 191 S.W.3d 242, 2006 Tex. App. LEXIS 1687 (Tex. App. Austin 2006).

257. In a trial for driving while intoxicated, walk-and-turn and one-leg tests were properly admitted, despite testimony that they were improperly performed. Testimony by the arresting officer concerning both tests was lay witness testimony governed by Tex. R. Evid 701 rather than Tex. R. Evid 702. Plouff v. State, 2005 Tex. App. LEXIS 8546 (Tex. App. Houston 14th Dist. Oct. 18 2005), substituted opinion at, opinion withdrawn by 192 S.W.3d 213, 2006 Tex. App. LEXIS 2546 (Tex. App. Houston 14th Dist. 2006).

258. In a trial for a "shaken-baby" murder, any error arising from the admission of an investigator's opinion on guilt was harmless. Although defendant objected to the testimony under Tex. R. Evid. 701 during the prosecution's re-direct, the same question and answer had come in without objection during the defense's prior cross-examination. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

259. Defendant waived appellate review regarding an officer's testimony on the psychological and physiological effects of ecstasy, cocaine, and marijuana because at trial he objected on confrontation grounds, not on the basis put forward on appeal, that the State failed to establish the admissibility of the complained-of testimony pursuant to Tex. R. Evid. 701, 702, or 703. Nelson v. State, 2005 Tex. App. LEXIS 6710 (Tex. App. El Paso Aug. 18 2005).

260. Under Tex. R. Evid. 701, the State's lay witness was properly allowed to offer opinion testimony regarding whether it was necessary for defendant to use deadly force to protect his brother because the witness personally observed the fight and defendant's use of deadly force, and the testimony was helpful to the jury in determining a fact in issue. Garcia v. State, 2005 Tex. App. LEXIS 4424 (Tex. App. Corpus Christi June 9 2005).

261. In a criminal trial for murder and aggravated assault, defense counsel were not deficient in failing to object to lay opinion testimony. The testimony that defendant intentionally ran over the victims with his truck was admissible under Tex. R. Evid. 701 because the lay witness's opinion was rationally based on his own perception and was helpful in the determination of a fact in issue. Ex parte White, 160 S.W.3d 46, 2004 Tex. Crim. App. LEXIS 1612 (Tex. Crim. App. 2004), dismissed by 2006 U.S. Dist. LEXIS 53075 (S.D. Tex. July 31, 2006).

262. In a driving while impaired case, evidence of an officer's observations in a one-leg stand field sobriety test was governed by Tex. R. Evid. 701 as opinion testimony, but evidence concerning the guidelines and certification of the test were based on Tex. R. Evid. 702; further, a trial court's error in admitting the Rule 702 evidence was harmless because the officer admitted that there was a failure to follow the applicable guidelines. McRae v. State, 2004 Tex. App. LEXIS 5933 (Tex. App. Houston 1st Dist. July 1 2004), opinion withdrawn by, substituted opinion at 152 S.W.3d 739, 2004 Tex. App. LEXIS 10805 (Tex. App. Houston 1st Dist. 2004).

263. As appellant's issue did not comport with his trial objection, error, if any, was not properly preserved; from the context of appellant's objection, one could have found that he was complaining of a Tex. R. Evid. 602 violation, instead of Tex. R. Evid. 701 as argued on appeal. Boyd v. State, 2001 Tex. App. LEXIS 8661 (Tex. App. Tyler Aug. 22 2001).

264. Appellant did not properly preserve a bolstering issue, but did properly preserve the issues of a violation of Tex. R. Evid. 701 and hearsay for review, but the court did not reach the issues because evidence that appellant was in the area on the night of the murders came in through many witnesses without objection. Boyd v. State, 2001 Tex. App. LEXIS 8661 (Tex. App. Tyler Aug. 22 2001).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : Helpfulness

265. During defendant's trial for DWI, the court did not err by allowing a bar manager to render an opinion that defendant was intoxicated; the manager based his opinion on matters he observed and the substance of the opinion, if believed by the jury, was helpful to a determination of whether defendant was intoxicated. Cook v. State,

2013 Tex. App. LEXIS 13189, 2013 WL 5782915 (Tex. App. Amarillo Oct. 23 2013).

266. Counsel could not be deemed ineffective for failing to object to a witness's testimony as impermissible expert testimony or for not requesting a Daubert hearing, given that her testimony did not involve a scientific theory and she did not need significant expertise to determine from officers' actions that they believed what they seized from the house were drugs, plus the testimony was helpful to the jury in determining a fact issue, under Tex. R. Evid. 701(b), and thus it was within the trial court's discretion to consider the witness as a lay witness. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

267. Trial court did not abuse its discretion by admitting a forensic interviewer's testimony as lay testimony because she testified that she had experience interviewing more than 5,000 children and her opinion was not based on a scientific theory but rather was helpful to the jury and did not require significant expertise to interpret. Guardado v. State, 2012 Tex. App. LEXIS 5514, 2012 WL 2832561 (Tex. App. El Paso July 11 2012).

268. Trial court did not abuse its discretion by allowing a witness for the State, who worked for the mental health and retardation rehabilitation center where the victim attended classes and received services, to testify under Tex. R. Evid. 701 that it was her opinion that the victim was incapable of fabricating the sexual acts she alleged defendant to have perpetrated on her, as the witness's testimony was based on her personal knowledge and experience with the victim. Based on the witness's experience with the victim, her opinion could have been helpful to the jury. Ashley v. State, 2012 Tex. App. LEXIS 5020, 2012 WL 2369346 (Tex. App. Texarkana June 25 2012).

269. In a criminal solicitation of a minor for sexual assault case, the trial court did not err in admitting a police detective's testimony under Tex. R. Evid. 701 because he participated in the conversations and created the chat logs comprising the State's exhibit, his opinion could aid the jury in determining the veracity of the State's and defendant's chat log exhibits, and the detective did not testify as an expert witness. Pudasaini v. State, 2011 Tex. App. LEXIS 5582, 2011 WL 2905592 (Tex. App. Dallas July 21 2011).

270. Defendant failed to show that his counsel was ineffective for failing to object to the victim's testimony that he thought defendant shoved him so he could not get his cell phone out of his pocket and that he though defendant would cut him with his pocket knife because the victim could testify about his opinion under Tex. R. Evid. 701 and counsel may have believed that the victim's opinion would have been helpful to the determination of whether the victim felt threatened by defendant's actions. Barnett v. State, 344 S.W.3d 6, 2011 Tex. App. LEXIS 4456 (Tex. App. Texarkana June 14 2011).

271. Trial court did not err by allowing the State to elicit testimony that defendant, by implication, was a drug dealer because the officers' testimony regarding whether the amount of crack cocaine found on defendant could have been for sale was admissible as lay opinion under Tex. R. Evid. 701, as both officers participated in the discovery of the crack cocaine found on defendant, and therefore their opinion was based on what they perceived at the scene of the traffic stop. In addition, their experience in narcotics gave them the capability to testify regarding whether the amount the crack cocaine found could have been for defendant's personal use or for sale; this observation did not require significant expertise to interpret, was not based on scientific theory, and could be readily understood by the jury. Smith v. State, 2010 Tex. App. LEXIS 8773, 2010 WL 4348300 (Tex. App. Tyler Nov. 3 2010).

272. In a case in which defendant was convicted of sexual assault of a child, the trial court did not err in allowing a community supervision officer to express an opinion that defendant was a continuing threat to society. Officer's conclusion was rational and helpful to the jury's determination of defendant's punishment. Segler v. State, 2010 Tex. App. LEXIS 1727, 2010 WL 864396 (Tex. App. Eastland Mar. 11 2010).

273. Officer testified as to what he observed upon entering the apartment that led him to conclude that the victim was performing oral sex on defendant, and such testimony was helpful to the jury's determination of a fact issue in defendant's aggravated sexual assault trial and was therefore admissible; even if the court assumed the complained-of response was inadmissible, the officer had previously given the same testimony without objection. Nelson v. State, 2009 Tex. App. LEXIS 7796, 2009 WL 3191909 (Tex. App. Dallas Oct. 7 2009).

274. Testimony offered by an employee and his co-worker at trial was based on their personal experiences as drivers of both 18-wheelers and standard vehicles, and their opinions were based on their observations of road and riding conditions; because of their personal experiences, their testimony helped the trial court to better understand the facts in issue, such that the trial court properly admitted the testimony. Old Republic Ins. Co. v. Weeks, 2009 Tex. App. LEXIS 4139, 2009 WL 1740820 (Tex. App. Corpus Christi June 11 2009).

275. Regarding testimony by a jail employee that the wording and tone of voice used by defendant in his telephone conversation with his wife was "annoying," defendant failed to state an objection until after the question had already been answered; in light of the whole of the employee's testimony, the testimony that the wife was annoyed did not have a substantial and injurious effect or influence in determining the jury's verdict. Conner v. State, 2008 Tex. App. LEXIS 1510 (Tex. App. Tyler Feb. 29 2008).

276. Firefighter's opinion testimony that an ordinary person would probably not have known that a cliff side could have given way was admissible lay opinion testimony under Tex. R. Evid. 701 because the testimony was based on his personal observations and training, the testimony assisted the trier of fact in determining whether the condition alleged was open and obvious, which was the ultimate issue in the case, and it could not be said that the testimony was mere speculation. Kirwan v. City of Waco, 249 S.W.3d 544, 2008 Tex. App. LEXIS 152 (Tex. App. Waco 2008).

277. Lay testimony on the value of furniture was admissible in a suit on a sworn account because the witness' statements were rationally based on his perceptions and helpful to a clear understanding of his testimony. Hartis v. Century Furniture Indus., 230 S.W.3d 723, 2007 Tex. App. LEXIS 4997, 63 U.C.C. Rep. Serv. 2d (CBC) 282 (Tex. App. Houston 14th Dist. 2007).

278. Court overruled defendant's claim that a witness was not competent for purposes of Tex. R. Evid. 602, when the witness was asked what he thought defendant meant by the statement to "keep quiet;" the witness observed defendant's anger toward the victim and heard defendant state he had a gun, and the witness received many phone calls from defendant around the time of the murder, and thus the witness's opinion was rationally based on familiarity with defendant and the witness's perception of events, for purposes of Tex. R. Evid. 701; the witness's opinion also met the second prong of Tex. R. Evid. 701 in that it was helpful to the jury's determination of a central fact at issue, whether defendant was guilty of murder, and even if the trial court erred in admitting this testimony, it was harmless under Tex. R. App. P. 44.2 because the record contained substantial evidence inculpating defendant in the murder. Jones v. State, 2007 Tex. App. LEXIS 2853 (Tex. App. Houston 14th Dist. Apr. 12 2007).

279. Defendant's contention that the trial court erred by admitting the officer's testimony that, in his opinion, defendant intentionally or knowingly possessed marijuana was rejected because the trial court could have concluded that the State satisfied the perception requirement of Tex. R. Evid. 701 because the officer had personal knowledge of the events that formed the basis of his opinion, as he was the investigating and arresting officer; the trial court also could have properly found that the officer's opinion was helpful because the issue to be determined was whether the marijuana belonged to defendant or the driver, as neither admitted ownership. Thomas v. State, 2006 Tex. App. LEXIS 6303 (Tex. App. Dallas July 20 2006).

280. During defendant's trial for DWI, any error in excluding the lay-opinion testimony of defendant's stepfather was harmless; a video recording of defendant at the accident scene did not depict any particular condition or trait of his that the stepfather's testimony could have been helpful in explaining was his normal behavior rather than the result of intoxication. Brewer v. State, 2014 Tex. App. LEXIS 1992, 2014 WL 709549 (Tex. App. Austin Feb. 21 2014).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : Nonspecialized Knowledge

281. Counsel could not be deemed ineffective for failing to object to a witness's testimony as impermissible expert testimony or for not requesting a Daubert hearing, given that her testimony did not involve a scientific theory and she did not need significant expertise to determine from officers' actions that they believed what they seized from the house were drugs, plus the testimony was helpful to the jury in determining a fact issue, under Tex. R. Evid. 701(b), and thus it was within the trial court's discretion to consider the witness as a lay witness. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

282. Property Owner Rule did not require the property owner to qualify as an expert; as the sole member of the LLC, the court could presume the partner as owner of the property was familiar with the property and its value. Corniello v. State Bank & Trust, 344 S.W.3d 601, 2011 Tex. App. LEXIS 5023 (Tex. App. Dallas June 30 2011).

283. Although case law uses broken bones and lacerations as examples of injuries that logically result from car accidents and can be supported solely by lay testimony, the court believes that back and neck pain can also be within the experience and knowledge of laypersons as being caused by car accidents. Tex. DOT v. Banda, 2010 Tex. App. LEXIS 10316, 2010 WL 5463857 (Tex. App. Austin Dec. 22 2010).

284. Passenger's testimony about a car accident, the treatment received, and the incapacity and pain he had thereafter was legally sufficient to prove that the injuries he complained of were caused by the accident; his testimony supported at least part of the jury's award of past medical treatment, pain and suffering, and physical impairment. Tex. DOT v. Banda, 2010 Tex. App. LEXIS 10316, 2010 WL 5463857 (Tex. App. Austin Dec. 22 2010).

285. Probable duration of a passenger's injuries was not within the general experience and common knowledge of laypersons, and while a layperson's knowledge could link the passenger's injuries to the accident, a layperson could only speculate about how long a neck or back strain, bruised ribs, and a fractured toe took to heal or whether they were likely to heal at all; absent the required expert testimony, the jury lacked legally sufficient evidence on which to base its damage award, and because the court was unable to suggest an appropriate amount for a remittitur, the court remanded for a new trial on all issues, under Tex. R. App. P. 44.1(b). Tex. DOT v. Banda, 2010 Tex. App. LEXIS 10316, 2010 WL 5463857 (Tex. App. Austin Dec. 22 2010).

286. Trial court did not err in finding that a detective's testimony was admissible as a lay opinion under Tex. R. Evid. 701, given that he did not purport to possess any specialized knowledge or to be an expert in wound determination regarding fatal injuries to a cat, he testified based on his first-hand impressions, which were not based on scientific theory, and his testimony helped to provide a clearer understanding of what took place contemporaneously to the offense. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

287. Lay testimony from skilled witnesses with personal knowledge was sufficient under Tex. R. Evid. 701 to prove causation under Tex. Bus. & Com. Code Ann. § 17.50(a)(2) in a construction defect case involving water damage and mold because these were not matters beyond the common understanding of laypersons. Horak v. Newman, 2009 Tex. App. LEXIS 5629 (Tex. App. Austin July 21 2009).

288. In an aggravated robbery case, where the victim testified that as a marine veteran, he had extensive experience with weapons and that defendant's pistol looked like a 9 millimeter, because defendant did not object to the testimony as impermissible expert testimony, he failed to preserve this issue for appeal under Tex. R. App. P. 33.1; furthermore, under Tex. R. Evid. 701, the victim was properly allowed to testify regarding defendant's gun. Pintor v. State, 2006 Tex. App. LEXIS 9607 (Tex. App. Houston 14th Dist. Nov. 7 2006).

289. At the time of the deed transfers, the father was suffering from mental and physical problems; the court found the evidence supported a determination that the father was unduly influenced and that he lacked the mental capacity, for which expert testimony was not required and for which lay testimony was sufficient, to transfer title to the property in question. Decker v. Decker, 192 S.W.3d 648, 2006 Tex. App. LEXIS 3023 (Tex. App. Fort Worth 2006).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions

290. District court did not err by striking as conclusory the affidavit of a witness who had not seen an alleged puddle on the floor of a store before a customer slipped and fell but stated that streak marks from a mop showed it was large and dirty, which provided no evidence of how long the puddle had been there. Saenz v. Heb Grocery Co., L.P., 2014 Tex. App. LEXIS 8901 (Tex. App. Corpus Christi Aug. 14 2014).

291. At defendant's trial for possession of cocaine with intent to deliver, a detective testified that defendant and two other people had responsibility for and possession of cocaine found in the hotel room; counsel was not ineffective for failure to object because the testimony was admissible as a lay opinion. The detective's personal knowledge of the matter formed the basis of his objective perception of events and his lay opinion testimony regarding the people in the motel room. Fletcher v. State, 2014 Tex. App. LEXIS 940, 2014 WL 354508 (Tex. App. Corpus Christi Jan. 30 2014).

292. Witness's testimony did not violate Tex. R. Evid. 701 because he did not testify as to defendant's mental state but instead expressed his perception of what was going to happen when defendant threatened him, and there was nothing speculative in the witness's testifying about his own belief, formed at the time of the crime, that defendant would shoot him, and this opinion was based on first-hand observations upon which the opinion could be rationally drawn. Higgs v. State, 2013 Tex. App. LEXIS 14550, 2013 WL 6198842 (Tex. App. Fort Worth Nov. 27 2013).

293. Officer testified regarding his inspection of the scene, and counsel could have found that the officer's testimony was admissible as a lay opinion regarding the scene, considering that defendant had not yet claimed self-defense, and counsel was not ineffective on the ground that he failed to object to this testimony. Williams v. State, 417 S.W.3d 162, 2013 Tex. App. LEXIS 13978, 2013 WL 6028845 (Tex. App. Houston 1st Dist. Nov. 14 2013).

294. During defendant's trial for DWI, the court did not err by allowing a bar manager to render an opinion that defendant was intoxicated; the manager based his opinion on matters he observed and the substance of the opinion, if believed by the jury, was helpful to a determination of whether defendant was intoxicated. Cook v. State, 2013 Tex. App. LEXIS 13189, 2013 WL 5782915 (Tex. App. Amarillo Oct. 23 2013).

295. Witness's testimony that he assumed he was in jail because of a shooting committed by defendant was within his personal knowledge, rationally based on his perception of events and experiences, including questioning of him by police about a firearm, was helpful to a clear understanding of his testimony. His testimony was therefore admissible under Tex. R. Evid. 602 and Tex. R. Evid. 701. Williams v. State, 402 S.W.3d 425, 2013 Tex. App. LEXIS 7031 (Tex. App. Houston 14th Dist. June 11 2013).

296. Regardless of the questions asked of the officer, he did not give answers that required medical expertise, and his answers related to circumstances such as having to fight an accused or vials being damaged, which amounted to testimony of a lay witness concerning what he observed; defendant was not harmed because the officer did not give expert testimony, regardless of whether the trial court erred in overruling the objection. Eckiss v. State, 2013 Tex. App. LEXIS 7371 (Tex. App. Dallas June 11 2013).

297. Witness testified as a lay person that by using crime scene measurements, photographs, statements, and an accident reconstruction software program, he created the animation, but nothing supported many of the details in the animation, which were provided by no more than pure speculation, and thus the trial court erred in admitting the animation, for purposes of Tex. R. Evid. 602, 701. Lewis v. State, 402 S.W.3d 852, 2013 Tex. App. LEXIS 6923 (Tex. App. Amarillo May 29 2013).

298. Finding error in the admission of computer generated animation under Tex. R. Evid. 602, 701 did not end the court's inquiry, as the court had to consider whether to disregard the error under Tex. R. App. P. 44.2(b); the court found that appellant's substantial rights were not affected and the error was harmless, given that the animation did little to answer whether appellant agreed to retaliate against someone, and there was testimony to that effect. Lewis v. State, 402 S.W.3d 852, 2013 Tex. App. LEXIS 6923 (Tex. App. Amarillo May 29 2013).

299. During defendant's trial for possession of a controlled substance with intent to deliver, the court did not err in admitting testimony from a police officer that 42 rocks of crack cocaine indicated that defendant was attempting to sell it for profit because the officer's testimony was admissible as opinion testimony; the officer's testimony was based on the officer's perception at the scene and from the lack of indicia that the crack cocaine was for personal use. Crawford v. State, 2013 Tex. App. LEXIS 243, 2013 WL 150283 (Tex. App. Amarillo Jan. 14 2013).

300. Question of whether hail fell on a particular location on a particular day, and whether it caused property damage, is not a matter solely within the scope of an expert's knowledge, and thus is not a matter that requires expert testimony; to the contrary, it is a matter of personal observation and common sense that is within the scope of lay testimony. United States Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 2012 Tex. App. LEXIS 6770 (Tex. App. San Antonio Aug. 15 2012).

301. Lay witness is competent to state based on personal observation and common sense whether hail fell on a particular location on a particular date, and to make a logical connection between the hail event and the property damage existing after the storm; while it may require an expert using scientific data to predict or plot the track of a hail storm or to estimate the dollar value of the property damage, it does not require expert knowledge to say, based on one's personal observation and recollection, whether a hail storm in fact damaged a particular property during a particular time period, and no authority is cited establishing that this type of causation issue must be guided solely by expert evidence. United States Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 2012 Tex. App. LEXIS 6770 (Tex. App. San Antonio Aug. 15 2012).

302. Issue was whether apartment complexes were damages by one hail storm or another, and this was a causation issue within the common knowledge and experience of a lay person. United States Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 2012 Tex. App. LEXIS 6770 (Tex. App. San Antonio Aug. 15 2012).

303. Although appellant claimed appellee's testimony was insufficient to support a finding of proximate cause because she was not an expert, the court disagreed; appellee's testimony was proper lay opinion testimony and was based on her experience and observations, for purposes of Tex. R. Evid. 701. Marin v. Herron, 2012 Tex. App. LEXIS 6484, 2012 WL 3205427 (Tex. App. San Antonio Aug. 8 2012).

304. Court did not need to determine if a witness expressed an opinion on the ultimate issue because even if she did, appellant was not able to show deficient performance; the witness's testimony was based on her observations while investigating the family, and even if the witness's statement amounted to an opinion, the testimony was admissible under Tex. R. Evid. 701, 704, and counsel's decision not to object was not error or deficient performance. Noland v. State, 2012 Tex. App. LEXIS 5911, 2012 WL 2989256 (Tex. App. Austin July 20 2012).

305. Trial court did not abuse its discretion by admitting a forensic interviewer's testimony as lay testimony because she testified that she had experience interviewing more than 5,000 children and her opinion was not based on a scientific theory but rather was helpful to the jury and did not require significant expertise to interpret. Guardado v. State, 2012 Tex. App. LEXIS 5514, 2012 WL 2832561 (Tex. App. El Paso July 11 2012).

306. Trial court did not abuse its discretion by allowing a witness for the State, who worked for the mental health and retardation rehabilitation center where the victim attended classes and received services, to testify under Tex. R. Evid. 701 that it was her opinion that the victim was incapable of fabricating the sexual acts she alleged defendant to have perpetrated on her, as the witness's testimony was based on her personal knowledge and experience with the victim. Based on the witness's experience with the victim, her opinion could have been helpful to the jury. Ashley v. State, 2012 Tex. App. LEXIS 5020, 2012 WL 2369346 (Tex. App. Texarkana June 25 2012).

307. Exclusion of testimony did not result in reversible error, as there was no evidence that the witness had any first-hand knowledge, for purposes of Tex. R. Evid. 602, of appellant's health condition and the trial court did not err in sustaining the hearsay objection; although some of the proffered testimony was not hearsay and consisted of the witness's observations and inferences, for purposes of Tex. R. Evid. 701, even that was cumulative, and thus the excluded testimony could not have added anything to the admitted evidence. Frangias v. State, 367 S.W.3d 806, 2012 Tex. App. LEXIS 3065, 2012 WL 1356704 (Tex. App. Houston 14th Dist. Apr. 19 2012).

308. Victim's opinion was rationally based on her own perception, which was helpful for determining a fact in issue, for purposes of Tex. R. Evid. 701, and thus counsel was not deficient for failing to object. Darnell v. State, 2012 Tex. App. LEXIS 1512, 2012 WL 626318 (Tex. App. Houston 14th Dist. Feb. 28 2012).

309. There was no error under Tex. R. Evid. 401, 701 in allowing the State to ask defendant's wife, on cross-examination, whether she believed the complainants had someone else shoot them, just to get her husband in trouble. The trial court could have found that the question was grounded in the wife's objective perceptions and not on speculation about the complainants' state of mind and that this opinion was helpful to eliminate a possible alternative theory of the crime. Harris v. State, 2011 Tex. App. LEXIS 6794, 2011 WL 3717046 (Tex. App. Houston 14th Dist. Aug. 25 2011).

310. Trooper's opinion testimony did not qualify as lay opinion testimony under Tex. R. Evid. 701 because it was not solely based on his perceptions of the accident scene . Lopez-juarez v. Kelly, 348 S.W.3d 10, 2011 Tex. App. LEXIS 6446 (Tex. App. Texarkana Aug. 16 2011).

311. While an emergency medical technician (EMT) could testify as a lay witness as to what he observed at the scene of the accident, he could not testify as an expert as to causation; although in some cases a witness could be considered an expert as to medical causation based on special experience, this did not apply here given the EMT's limited experience with automobile accidents involving fatalities. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

312. In a criminal solicitation of a minor for sexual assault case, the trial court did not err in admitting a police detective's testimony under Tex. R. Evid. 701 because he participated in the conversations and created the chat logs comprising the State's exhibit, his opinion could aid the jury in determining the veracity of the State's and

defendant's chat log exhibits, and the detective did not testify as an expert witness. Pudasaini v. State, 2011 Tex. App. LEXIS 5582, 2011 WL 2905592 (Tex. App. Dallas July 21 2011).

313. In a child sexual abuse case, the trial court did not abuse its discretion under Tex. R. Evid. 104(a) in finding that a forensic interviewer who videotaped an interview with the victim testified as a lay witness under Tex. R. Evid. 701 by describing the events she personally observed. Because the witness did not testify as an expert under Tex. R. Evid. 702, notice was not required under Tex. Code Crim. Proc. Ann. art. 39.14(b), and there was no need to lay an expert predicate. Flood v. State, 2011 Tex. App. LEXIS 5409, 2011 WL 2732608 (Tex. App. Corpus Christi July 14 2011).

314. Trial court could reasonably conclude that the detective's impression that the victim had been beaten was rationally based on his personal observation of the body, and that this impression was helpful both to explain the officer's testimony regarding the subsequent course of the investigation and to assist the trier of fact in determining whether the child's injuries were the result of criminal conduct or an accident. Murray v. State, 2011 Tex. App. LEXIS 4201, 2011 WL 2162864 (Tex. App. Austin June 1 2011).

315. Trial court did not abuse its discretion by admitting an officer's testimony because she was offered as both an expert and a lay witness with personal knowledge under Tex. R. Evid. 701, the trial court may have permitted her to testify as a lay witness, and appellants did not challenge the officer's testimony as a lay witness until they filed their reply brief. Kilgore Mech., Llc v. Shafiee, 2011 Tex. App. LEXIS 3530, 2011 WL 1849095 (Tex. App. Houston 14th Dist. May 12 2011).

316. In a product liability action, the trial court was within its discretion in admitting testimony from a tire manufacturer's timely designated witness; the trial court could have decided that any lay person could have answered the question "looking at these two tires, from your own personal observation, would you put them on your car," based on perceptions of sight and touch without the benefit of any specialized knowledge. Hathcock v. Hankook Tire Am. Corp., 330 S.W.3d 733, 2010 Tex. App. LEXIS 10032 (Tex. App. Texarkana Dec. 17 2010).

317. Trial court did not err in admitting an office's testimony regarding the field sobriety tests he performed on appellant; regarding the one-leg stand test and the walk-and-turn test, the officer's testimony was admissible as lay testimony under Tex. R. Evid. 701 and he was not required to be qualified as an expert witness under Tex. R. Evid. 702. Salazar v. State, 2010 Tex. App. LEXIS 9405, 2010 WL 4840491 (Tex. App. San Antonio Nov. 24 2010).

318. Trial court did not err by allowing the State to elicit testimony that defendant, by implication, was a drug dealer because the officers' testimony regarding whether the amount of crack cocaine found on defendant could have been for sale was admissible as lay opinion under Tex. R. Evid. 701, as both officers participated in the discovery of the crack cocaine found on defendant, and therefore their opinion was based on what they perceived at the scene of the traffic stop. In addition, their experience in narcotics gave them the capability to testify regarding whether the amount the crack cocaine found could have been for defendant's personal use or for sale; this observation did not require significant expertise to interpret, was not based on scientific theory, and could be readily understood by the jury. Smith v. State, 2010 Tex. App. LEXIS 8773, 2010 WL 4348300 (Tex. App. Tyler Nov. 3 2010).

319. Police officer was properly permitted to testify as to the number of intoxicated people he had encountered during his career as it was relevant under Tex. R. Evid. 401 to establish the basis for his opinion that appellant was intoxicated and was based on his personal perceptions as required by Tex. R. Evid. 701. Schmidt v. State, 2010 Tex. App. LEXIS 8795, 2010 WL 4354027 (Tex. App. Beaumont Nov. 3 2010).

320. Defense counsel did not object on the basis of qualifications or reliability and he did not ask to voir dire the witness or have the trial court conduct a Daubert/Kelly hearing, and thus appellant preserved no error for review under Tex. R. App. P. 33.1; the court noted that a lay opinion could be offered under Tex. R. Evid. 701 if the opinion was rationally based on his perceptions and helpful to the understanding of the testimony. Livingston v. State, 2010 Tex. App. LEXIS 5512, 2010 WL 2783911 (Tex. App. Corpus Christi July 15 2010).

321. Trial court did not abuse its discretion in allowing a detective to testify that the mark he saw on the victim's neck was consistent with and could have been caused by the barrel of a rifle; that testimony, for purposes of Tex. R. Evid. 701, was rationally based on his perception and was helpful to an understanding of a fact in issue, whether a firearm was used in the aggravated robbery offense. Garcia v. State, 2010 Tex. App. LEXIS 3126, 2010 WL 1713026 (Tex. App. Eastland Apr. 29 2010).

322. That a witness might have expressed an opinion regarding the purpose or nature of the victim's brother's conversation with the victim was of no moment; although the witness could not possess personal knowledge of the mental state of the brother, she had personal knowledge of facts from which an opinion regarding the purpose of his conversation could be drawn. Cockrell v. State, 2010 Tex. App. LEXIS 3208, 2010 WL 1705538 (Tex. App. Amarillo Apr. 28 2010).

323. Witness overheard a conversation between the child victim and her brother; given the circumstances, the trial court could have found that the witness's opinion regarding the emotional undercurrent of the conversation was rationally based on her hearing perception, and the witness's opinion was relevant to help the jury's credibility determination regarding prior testimony by the brother. Cockrell v. State, 2010 Tex. App. LEXIS 3208, 2010 WL 1705538 (Tex. App. Amarillo Apr. 28 2010).

324. Officer's testimony was properly admitted under Tex. R. Evid. 701 because he saw the victim lying by a pool of blood and the scene appeared staged; the officer spent several minutes describing the crime scene, including the blood spatter, and at the time of the objection, the officer's testimony was limited to his observations of crime scene. Quain v. State, 2009 Tex. App. LEXIS 9247, 2009 WL 4356239 (Tex. App. Dallas Dec. 3 2009).

325. Court did not err in determining that a trooper's description of defendant as "psychotic" was inadmissible as evidence of defendant's mental state because the trooper testified outside the presence of the jury that he used the word "psychotic" not due to personal knowledge about defendant's mental state, but instead based on "interviews with other people." Because the record showed that the trooper lacked firsthand knowledge, he was not qualified as a lay witness to testify that defendant was psychotic. Fisher-Riza v. State, 2009 Tex. App. LEXIS 9769, 2009 WL 4358622 (Tex. App. Houston 1st Dist. Dec. 3 2009).

326. In defendant's drug case, the trial court did not err in allowing a witness to testify as to what tanks were used for because the witness had worked for the business for 16 years at the time of the trial, and the witness testified that the tanks were used to store and move fertilizer and anhydrous ammonia. That was not scientific, technical, or specialized knowledge that was being offered to assist the trier of fact. Meier v. State, 2009 Tex. App. LEXIS 8078, 2009 WL 3335282 (Tex. App. Amarillo Oct. 16 2009).

327. In defendant's drug case, evidence was admissible as a lay opinion because the record reflected that the witness actually withdrew the liquid from the tank and, based upon his previous experience and his own sense of sight and smell, knew the liquid to be anhydrous ammonia. Meier v. State, 2009 Tex. App. LEXIS 8078, 2009 WL 3335282 (Tex. App. Amarillo Oct. 16 2009).

328. Court properly allowed a witness to testify as to the "sense" she had that a weapon was in the vehicle occupied by defendant on the evening prior to the robbery because the testimony was nothing more than the

witness's opinion as to whether a weapon was present, rationally based upon her auditory perception. Davey Enriquez v. State, 2009 Tex. App. LEXIS 5183 (Tex. App. Amarillo July 7 2009).

329. In a products liability case, portions of a husband's affidavit relating to the structural integrity of a portable picnic table were properly excluded under Tex. R. Evid. 701 because he did not observe an accident that occurred; however, other portions of the affidavit were rationally based on his observations and experiences. Lyon v. Atico Int'l USA, Inc., 2009 Tex. App. LEXIS 4823, 2009 WL 1800820 (Tex. App. Waco June 24 2009).

330. Testimony offered by an employee and his co-worker at trial was based on their personal experiences as drivers of both 18-wheelers and standard vehicles, and their opinions were based on their observations of road and riding conditions; because of their personal experiences, their testimony helped the trial court to better understand the facts in issue, such that the trial court properly admitted the testimony. Old Republic Ins. Co. v. Weeks, 2009 Tex. App. LEXIS 4139, 2009 WL 1740820 (Tex. App. Corpus Christi June 11 2009).

331. In a driving while intoxicated case, testimony from defendant's mother on the issue of whether defendant was intoxicated was not admissible under Tex. R. Evid. 701 because the mother did not personally observe a traffic stop or defendant's interaction with an arresting officer; the mother did not acquire personal knowledge at the time of the event. Because the testimony was not relevant, defendant's argument that her due process right to present a complete defense was violated was not addressed. Hartin v. State, 2009 Tex. App. LEXIS 2765, 2009 WL 1076799 (Tex. App. Beaumont Apr. 22 2009).

332. In a driving while intoxicated case, there was no error in excluding testimony from defendant's mother regarding why defendant refused to cooperate with an arresting officer due to the mother's lack of personal knowledge. Even though the mother had knowledge of some past events concerning defendant that might have explained defendant's behavior, the mother was not present for the arrest. Hartin v. State, 2009 Tex. App. LEXIS 2765, 2009 WL 1076799 (Tex. App. Beaumont Apr. 22 2009).

333. Trial court did not abuse its discretion by admitting a police officer's testimony concerning the automobile accident into evidence because his testimony was rationally based on his perception of the scene of the wreck and was helpful to a clear understanding of his limited testimony; his opinion testimony was based on the premise that the skid marks, damage to the roadway, and debris field would all be arrayed in a consistent or predictable way around the situs of the wreck. To the extent that the officer's testimony may have crossed over into giving an opinion based on his specialized knowledge and therefore was expert testimony, any error was harmless, as he did not profess to have more training and experience than he had and his conclusions were reiterated by two experts. Brown v. State, 303 S.W.3d 310, 2009 Tex. App. LEXIS 2166 (Tex. App. Tyler Mar. 31 2009).

334. Officer was properly allowed to testify about the purpose of altering a shotgun to create a sawed-off shotgun because she had dealt with sawed-off shotguns on the firing range and in the field when investigating crimes, and because of her personal observations on the firing range and in the field, she was qualified to offer a lay opinion on the result of altering a shotgun. The question sought an explanation of what would be accomplished by sawing off the barrel of a shotgun, and the question was specifically limited to the officer's experience. Shelton v. State, 2009 Tex. App. LEXIS 1802, 2009 WL 672011 (Tex. App. Fort Worth Mar. 12 2009).

335. Trial court did not err in overruling defendant's objection to a police detective's testimony that he believed defendant was guilty of the offense; the detective looked at a video of the offense, still footage of the video, and blown up photos of the video, and interviewed the victim and defendant to support his opinion that he was convinced defendant was the person in the video, identity was an issue in the case and the detective's testimony was helpful for a determination of that issue, and the testimony clarified earlier testimony on cross examination that sometimes false confessions were made. Swinnie v. State, 2008 Tex. App. LEXIS 1262 (Tex. App. Waco Feb. 20

2008).

336. In a cocaine possession case, defendant's failure to object to an officer's testimony that drug dealers often carried many small bills waived the issue under Tex. R. App. P. 33, and counsel was not ineffective for failing to challenge the testimony as Tex. R. Evid. 702 expert testimony because it was admissible as Tex. R. Evid. 701 opinion testimony. Hayes v. State, 2008 Tex. App. LEXIS 747 (Tex. App. Texarkana Feb. 1 2008).

337. Firefighter's opinion testimony that an ordinary person would probably not have known that a cliff side could have given way was admissible lay opinion testimony under Tex. R. Evid. 701 because the testimony was based on his personal observations and training, the testimony assisted the trier of fact in determining whether the condition alleged was open and obvious, which was the ultimate issue in the case, and it could not be said that the testimony was mere speculation. Kirwan v. City of Waco, 249 S.W.3d 544, 2008 Tex. App. LEXIS 152 (Tex. App. Waco 2008).

338. Trial court did not err by refusing to allow defendant to further question two of the State's witnesses about defendant's duty or authority as a peace officer because he had already established that neither witness had any law enforcement training or education, and therefore the questions failed to meet the requirements of Tex. R. Evid. 701 (personal perception or knowledge) and Tex. R. Evid. 401 (relevance requiring both materiality and probativeness). King v. State, 2007 Tex. App. LEXIS 8766 (Tex. App. Beaumont Oct. 31 2007).

339. Nurse's affidavit describing a comatose person's condition was sufficient, with other summary judgment evidence, to raise a fact issue concerning incapacity; even assuming that the nurse was not qualified as an expert, she could offer testimony of her personal observations. Yancy v. United Surgical Ptnrs. Int'l, Inc., 236 S.W.3d 778, 2007 Tex. LEXIS 990, 51 Tex. Sup. Ct. J. 63 (Tex. 2007).

340. Where defendant used a car jack to strike the hood of the complainant's SUV, Tex. R. Evid. 701 permitted the arresting officer to testify that $1500 was the estimated cost of repairing the damage based on his years of experience with criminal mischief cases. Barnes v. State, 248 S.W.3d 217, 2007 Tex. App. LEXIS 4261 (Tex. App. Houston 1st Dist. 2007).

341. Workers' compensation claimant's attorney testified that her time estimates about the work she performed on the claimant's case were based on her notes and her past experience in performing similar work; accordingly, pursuant to Tex. R. Evid. 701, the record contained a basis for the attorney's personal knowledge and a rational connection of that knowledge with her estimates, which allowed her to testify regarding the amount of time she spent on the claimant's case. Also, any alleged mistake made by the attorney in her calculations did not create an impermissible analytical gap between the data and the conclusions; thus, the evidence was legally sufficient to support the award of attorney's fees. Twin City Fire Ins. Co. v. Vega-Garcia, 223 S.W.3d 762, 2007 Tex. App. LEXIS 3568 (Tex. App. Dallas 2007).

342. Nurse failed to satisfy the personal knowledge requirement under Tex. R. Evid. 602 in defendant's trial for aggravated sexual assault of a child younger than 14 years of age, in violation of Tex. Penal Code Ann. § 22.021; the nurse had no personal knowledge of the facts of the case, she did not personally observe any events involving the trial, she was not present during an examination of the trial, and she did not offer any opinions specifically related to the child, and thus the nurse's testimony was not admissible as a lay opinion under Tex. R. Evid. 701. Flores v. State, 2007 Tex. App. LEXIS 2818 (Tex. App. Eastland Apr. 12 2007).

343. Court overruled defendant's claim that a witness was not competent for purposes of Tex. R. Evid. 602, when the witness was asked what he thought defendant meant by the statement to "keep quiet;" the witness observed defendant's anger toward the victim and heard defendant state he had a gun, and the witness received many phone

calls from defendant around the time of the murder, and thus the witness's opinion was rationally based on familiarity with defendant and the witness's perception of events, for purposes of Tex. R. Evid. 701; the witness's opinion also met the second prong of Tex. R. Evid. 701 in that it was helpful to the jury's determination of a central fact at issue, whether defendant was guilty of murder, and even if the trial court erred in admitting this testimony, it was harmless under Tex. R. App. P. 44.2 because the record contained substantial evidence inculpating defendant in the murder. Jones v. State, 2007 Tex. App. LEXIS 2853 (Tex. App. Houston 14th Dist. Apr. 12 2007).

344. In a possession of a prohibited substance in a correctional facility case, defendant alleged that he gave false testimony at his cell mate's trial because he was coerced by gang members, but his cell mate did not testify that he had personal knowledge of the gang members at the correctional facility actually following the gang's rules to protect other gang members from prosecution; therefore, the cell mate's opinion testimony was not based on his perceptions; rather, the cell mate's opinion testimony was based on his speculative conclusions regarding what the gang members would have done to protect him from prosecution; accordingly, Tex. R. Evid. 701 was not met by the cell mate's testimony, and the trial court did not abuse its discretion in sustaining the State's objection to that testimony. Haggerty v. State, 2007 Tex. App. LEXIS 2130 (Tex. App. Houston 14th Dist. Mar. 20 2007).

345. Niece's deposition testimony stating that signatures on a will "looked different" merely amounted to a conclusory assertion since it did not establish her familiarity with her aunt's signature; therefore, her testimony was not rationally based on her perception under Tex. R. Evid. 701; as such, there was not a scintilla of evidence of a forgery based on this evidence in a case where a will was prima facie valid under Tex. Prob. Code Ann. § 84(a). In re Estate of Price, 2006 Tex. App. LEXIS 11043 (Tex. App. San Antonio Dec. 20 2006).

346. Defendant's contention that the trial court erred by admitting the officer's testimony that, in his opinion, defendant intentionally or knowingly possessed marijuana was rejected because the trial court could have concluded that the State satisfied the perception requirement of Tex. R. Evid. 701 because the officer had personal knowledge of the events that formed the basis of his opinion, as he was the investigating and arresting officer; the trial court also could have properly found that the officer's opinion was helpful because the issue to be determined was whether the marijuana belonged to defendant or the driver, as neither admitted ownership. Thomas v. State, 2006 Tex. App. LEXIS 6303 (Tex. App. Dallas July 20 2006).

347. Employer failed to preserve his claims of error for appeal regarding the trial court's admission of the employee's opinion testimony in the employee's age discrimination action because the employer failed to make a timely, specific objection at trial to the employee's testimony on the ground that it was speculation; even if the employer had raised a timely and proper objection, Tex. R. Evid. 701 provided that the opinion of a lay witness was admissible if based on his perceptions, and the comment in issue was rationally based on the employee's perception. Quality Dialysis, Inc. v. Adams, 2006 Tex. App. LEXIS 4921 (Tex. App. Corpus Christi June 8 2006).

348. In a possession of a controlled substance with intent to deliver case, as the substance of an officer's testimony related to opinions, beliefs, or inferences drawn from his own experiences and observation, and as the testimony was admissible under Tex. R. Evid. 701, the State was not required to disclose the officer as an expert under Tex. Code Crim. Proc. Ann. art. 39.14(b); as such, the trial court did not err by admitting the officer's testimony that had not been disclosed in response to a discovery request. Cortez v. State, 2006 Tex. App. LEXIS 4998 (Tex. App. Fort Worth June 8 2006).

349. Pursuant to Tex. R. Evid. 701, a police officer's testimony that a 14-year old girl did not fit the profile of a prostitute was admissible in an inmate's trial on charges of kidnapping where (1) the officer had extensive experience in the child exploitation unit; and (2) the inmate's attorney made an issue of whether the girl was a prostitute, thereby entitling the state to ask the officer's opinion on the issue, in light of his training, experience, and knowledge of the girl. Jordan v. Dretke, 2006 U.S. Dist. LEXIS 31950 (N.D. Tex. May 22 2006).

350. Court rejected defendant's claim that a witness's testimony expressed an opinion of defendant's state of mind as to whether defendant deliberately drove into the officer, in defendant's murder trial, as the witness was not asked whether defendant intended to strike the officer, but whether the swerve appeared to be a deliberate action, which called for a response based on the witness's observation of the vehicle's movements, and the trial court could have found the question was not an attempt to communicate defendant's actual mental state. Davis v. State, 223 S.W.3d 466, 2006 Tex. App. LEXIS 3882 (Tex. App. Amarillo 2006).

351. In a theft case, a court properly admitted the testimony of loss prevention officers regarding whether defendant intended to deprive the store of its property because they both saw defendant's actions in the store before, during, and after she exchanged the store's property for a gift card. Hines v. State, 2006 Tex. App. LEXIS 3256 (Tex. App. Houston 14th Dist. Apr. 13 2006).

352. In a theft case, a court properly admitted the testimony of loss prevention officers regarding whether defendant intended to deprive the store of its property because they both saw defendant's actions in the store before, during, and after she exchanged the store's property for a gift card. Hines v. State, 2006 Tex. App. LEXIS 3256 (Tex. App. Houston 14th Dist. Apr. 13 2006).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : Rational Basis

353. Non-expert witness may offer opinion testimony when it was rationally based on his perception and helpful to a clear understanding of his testimony or the determination of a fact issue. City of San Antonio Bd. of Adjustment v. Reilly, 429 S.W.3d 707, 2014 Tex. App. LEXIS 2988 (Tex. App. San Antonio Mar. 19 2014).

354. In the course of an investigation, a supervisor reviewed documents, and her testimony in that regard was rationally based on the search she performed during her investigation, for purposes of Tex. R. Evid. 701(a); as a reasonable person could have drawn the same conclusions and the testimony helped the jury in determining a fact in issue, the trial court had discretion to consider the witness as a lay witness as to the documents she had reviewed, and counsel was not deemed ineffective. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

355. Exclusion of testimony did not result in reversible error, as there was no evidence that the witness had any first-hand knowledge, for purposes of Tex. R. Evid. 602, of appellant's health condition and the trial court did not err in sustaining the hearsay objection; although some of the proffered testimony was not hearsay and consisted of the witness's observations and inferences, for purposes of Tex. R. Evid. 701, even that was cumulative, and thus the excluded testimony could not have added anything to the admitted evidence. Frangias v. State, 367 S.W.3d 806, 2012 Tex. App. LEXIS 3065, 2012 WL 1356704 (Tex. App. Houston 14th Dist. Apr. 19 2012).

356. Portion of police officer's testimony that the complainant "had just had the crap beaten out of her" was admissible as a lay opinion under Tex. R. Evid. 701 and, therefore, the trial court did not abuse its discretion by admitting this objected-to testimony. James v. State, 335 S.W.3d 719, 2011 Tex. App. LEXIS 1004 (Tex. App. Fort Worth Feb. 10 2011).

357. Defense counsel did not object on the basis of qualifications or reliability and he did not ask to voir dire the witness or have the trial court conduct a Daubert/Kelly hearing, and thus appellant preserved no error for review under Tex. R. App. P. 33.1; the court noted that a lay opinion could be offered under Tex. R. Evid. 701 if the opinion was rationally based on his perceptions and helpful to the understanding of the testimony. Livingston v. State, 2010 Tex. App. LEXIS 5512, 2010 WL 2783911 (Tex. App. Corpus Christi July 15 2010).

358. Trial court did not abuse its discretion in allowing a detective to testify that the mark he saw on the victim's neck was consistent with and could have been caused by the barrel of a rifle; that testimony, for purposes of Tex. R. Evid. 701, was rationally based on his perception and was helpful to an understanding of a fact in issue, whether a firearm was used in the aggravated robbery offense. Garcia v. State, 2010 Tex. App. LEXIS 3126, 2010 WL 1713026 (Tex. App. Eastland Apr. 29 2010).

359. That a witness might have expressed an opinion regarding the purpose or nature of the victim's brother's conversation with the victim was of no moment; although the witness could not possess personal knowledge of the mental state of the brother, she had personal knowledge of facts from which an opinion regarding the purpose of his conversation could be drawn. Cockrell v. State, 2010 Tex. App. LEXIS 3208, 2010 WL 1705538 (Tex. App. Amarillo Apr. 28 2010).

360. Witness overheard a conversation between the child victim and her brother; given the circumstances, the trial court could have found that the witness's opinion regarding the emotional undercurrent of the conversation was rationally based on her hearing perception, and the witness's opinion was relevant to help the jury's credibility determination regarding prior testimony by the brother. Cockrell v. State, 2010 Tex. App. LEXIS 3208, 2010 WL 1705538 (Tex. App. Amarillo Apr. 28 2010).

361. Court did not err in determining that a trooper's description of defendant as "psychotic" was inadmissible as evidence of defendant's mental state because the trooper testified outside the presence of the jury that he used the word "psychotic" not due to personal knowledge about defendant's mental state, but instead based on "interviews with other people." Because the record showed that the trooper lacked firsthand knowledge, he was not qualified as a lay witness to testify that defendant was psychotic. Fisher-Riza v. State, 2009 Tex. App. LEXIS 9769, 2009 WL 4358622 (Tex. App. Houston 1st Dist. Dec. 3 2009).

362. In defendant's drug case, evidence was admissible as a lay opinion because the record reflected that the witness actually withdrew the liquid from the tank and, based upon his previous experience and his own sense of sight and smell, knew the liquid to be anhydrous ammonia. Meier v. State, 2009 Tex. App. LEXIS 8078, 2009 WL 3335282 (Tex. App. Amarillo Oct. 16 2009).

363. Trial court did not abuse its discretion in admitting testimony under Tex. R. Evid. 701 in defendant's trial under Tex. Penal Code Ann. § 22.11(a)(2); an officer made it clear that he was not testifying as an expert and he explained what he had learned about his chances of developing HIV or AIDS in the years following defendant's spitting in his face. Campbell v. State, 2009 Tex. App. LEXIS 5369, 2009 WL 2025344 (Tex. App. Dallas July 14 2009).

364. Court properly allowed a witness to testify as to the "sense" she had that a weapon was in the vehicle occupied by defendant on the evening prior to the robbery because the testimony was nothing more than the witness's opinion as to whether a weapon was present, rationally based upon her auditory perception. Davey Enriquez v. State, 2009 Tex. App. LEXIS 5183 (Tex. App. Amarillo July 7 2009).

365. In a products liability case, portions of a husband's affidavit relating to the structural integrity of a portable picnic table were properly excluded under Tex. R. Evid. 701 because he did not observe an accident that occurred; however, other portions of the affidavit were rationally based on his observations and experiences. Lyon v. Atico Int'l USA, Inc., 2009 Tex. App. LEXIS 4823, 2009 WL 1800820 (Tex. App. Waco June 24 2009).

366. Trial court did not abuse its discretion by admitting a police officer's testimony concerning the automobile accident into evidence because his testimony was rationally based on his perception of the scene of the wreck and was helpful to a clear understanding of his limited testimony; his opinion testimony was based on the premise that

the skid marks, damage to the roadway, and debris field would all be arrayed in a consistent or predictable way around the situs of the wreck. To the extent that the officer's testimony may have crossed over into giving an opinion based on his specialized knowledge and therefore was expert testimony, any error was harmless, as he did not profess to have more training and experience than he had and his conclusions were reiterated by two experts. Brown v. State, 303 S.W.3d 310, 2009 Tex. App. LEXIS 2166 (Tex. App. Tyler Mar. 31 2009).

367. Lay testimony on the value of furniture was admissible in a suit on a sworn account because the witness' statements were rationally based on his perceptions and helpful to a clear understanding of his testimony. Hartis v. Century Furniture Indus., 230 S.W.3d 723, 2007 Tex. App. LEXIS 4997, 63 U.C.C. Rep. Serv. 2d (CBC) 282 (Tex. App. Houston 14th Dist. 2007).

Evidence : Testimony : Lay Witnesses : Personal Knowledge

368. At defendant's trial for possession of cocaine with intent to deliver, a detective testified that defendant and two other people had responsibility for and possession of cocaine found in the hotel room; counsel was not ineffective for failure to object because the testimony was admissible as a lay opinion. The detective's personal knowledge of the matter formed the basis of his objective perception of events and his lay opinion testimony regarding the people in the motel room. Fletcher v. State, 2014 Tex. App. LEXIS 940, 2014 WL 354508 (Tex. App. Corpus Christi Jan. 30 2014).

369. In a case in which a trial court found that a mineral lienholder's decision to pump the contents of its rented frac tank back down the well that was the subject of the lien did not result in damages, although the lienholder and the contractor that had requested its services testified as lay witnesses, their testimony was admissible to establish the physical characteristics of the contents of the frac tank. Seven N. Holdings, L.P. v. Mathis & Sons, Inc., 2014 Tex. App. LEXIS 835, 2014 WL 272462 (Tex. App. Eastland Jan. 24 2014).

370. In a case in which a trial court found that a mineral lienholder's decision to pump the contents of its rented frac tank back down the well that was the subject of the lien did not result in damages, although the lienholder and the contractor that had requested its services testified as lay witnesses, their testimony was admissible to establish the physical characteristics of the contents of the frac tank. Seven N. Holdings, L.P. v. Mathis & Sons, Inc., 2014 Tex. App. LEXIS 835, 2014 WL 272462 (Tex. App. Eastland Jan. 24 2014).

371. Witness's testimony that he assumed he was in jail because of a shooting committed by defendant was within his personal knowledge, rationally based on his perception of events and experiences, including questioning of him by police about a firearm, was helpful to a clear understanding of his testimony. His testimony was therefore admissible under Tex. R. Evid. 602 and Tex. R. Evid. 701. Williams v. State, 402 S.W.3d 425, 2013 Tex. App. LEXIS 7031 (Tex. App. Houston 14th Dist. June 11 2013).

372. Even though the trial court erred by admitting into evidence an animation that purportedly reconstructed the events surrounding the shooting, because nothing in the record supported many of the details contained in the animation and the details were provided by nothing more than pure speculation on the creator's part, the error was harmless. The crux of the case against defendant was linking him to the conspiracy to get the informant, and two witness testified that defendant entered into an agreement with others to retaliate against an informant for giving police information that led to a friend's arrest; the animation did little to answer that question. Derrick v. State, 2013 Tex. App. LEXIS 4843 (Tex. App. Amarillo Apr. 17 2013).

373. At defendant's trial for aggravated sexual assault of a child, the trial court did not abuse its discretion by allowing a detective to express his belief about how individuals who abuse children target their victims. The witness had extensive practical experience and personal knowledge as a child abuse detective working on hundreds of

cases; therefore, his lay opinion testimony was admissible under Tex. R. Evid. 701. Guerrero v. State, 2012 Tex. App. LEXIS 8879, 2012 WL 5258700 (Tex. App. Fort Worth Oct. 25 2012).

374. At the punishment phase of a criminal mischief trial, it was proper to admit testimony from the new husband of defendant's ex-wife regarding defendant's attempt to hit his ex-wife with his car because, contrary to defendant's argument, there was evidence that the new husband had personal knowledge of the incident. Moreno v. State, 2012 Tex. App. LEXIS 6018, 2012 WL 3025932 (Tex. App. El Paso July 25 2012).

375. In a murder trial, a witness was not allowed to speculate as to whether defendant and the complainant were arguing because she stated that she saw and heard the two arguing about whether defendant was supposed to give the complainant some money for her daughter. The witness's uncertainty seemed to have been about whether defendant actually owed the money, not whether they were arguing about the debt. Benard v. State, 2012 Tex. App. LEXIS 3928, 2012 WL 1795131 (Tex. App. Beaumont May 16 2012).

376. Lender's officer was not qualified to testify as to the value of the property because he was not an expert, and he did not qualify under the Property Owner Rule because his opinion was based on sources of information other than his own personal knowledge and familiarity, which were required under Tex. R. Evid. 701. Preston Reserve, L.L.C. v. Compass Bank, 373 S.W.3d 652, 2012 Tex. App. LEXIS 3151, 2012 WL 1564014 (Tex. App. Houston 14th Dist. Apr. 24 2012).

377. Trial court did not err in excluding the testimony of a tenant's general partner; the tenant's counsel, in his offer of proof, gave no explanation for the basis of the partner's opinions and whether he had personal knowledge on the cost of damages or repairs, nothing in the bill of exception indicated such personal knowledge, and the partner agreed several times that he lacked personal knowledge about the work done at the leased property. Lone Starr Multi-Theatres, Ltd. v. Max Interests, Ltd., 365 S.W.3d 688, 2011 Tex. App. LEXIS 10210, 2011 WL 6938527 (Tex. App. Houston 1st Dist. Dec. 29 2011).

378. In condemnation proceedings, an affidavit of the vice president of the corporate general partner of a limited partnership was properly excluded under Tex. R. Evid. 701 regarding the valuation of the property to be take for a water line easement because his opinion was based on his expertise rather than his personal familiarity with the property and he was not timely disclosed as an expert. Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd., 337 S.W.3d 846, 2011 Tex. LEXIS 190, 54 Tex. Sup. Ct. J. 658 (Tex. 2011).

379. Deputy's testimony that the presence and degree of lividity indicated death had occurred over an hour before he first observed the victim's body was admissible under Tex. R. Evid. 701 because it was based on first-hand knowledge and under Tex. R. Evid. 702 based on his training and experience, which included his 11 years as a crime-scene investigator, during which he had amassed extensive training and experience; the classes conducted by physicians in the county medical examiner's office in which instruction was provided on the approximate times for lividity and rigor mortis to set in on a corpse; medical conferences he attended regularly in which information was provided on lividity as a beginning stage of decomposition; and the fact that he had seen hundreds of homicide victims. Thompson v. State, 2011 Tex. App. LEXIS 1633, 2011 WL 782051 (Tex. App. Houston 14th Dist. Mar. 8 2011).

380. Portion of police officer's testimony that the complainant "had just had the crap beaten out of her" was admissible as a lay opinion under Tex. R. Evid. 701 and, therefore, the trial court did not abuse its discretion by admitting this objected-to testimony. James v. State, 335 S.W.3d 719, 2011 Tex. App. LEXIS 1004 (Tex. App. Fort Worth Feb. 10 2011).

381. Trial court properly overruled defendant's objection to a witness's testimony that he believed the victim would be killed or at least taken to a place where he would not be found, for purposes of Tex. R. Evid. 701. Kirven v. State, 293 S.W.3d 233, 2009 Tex. App. LEXIS 3338 (Tex. App. Waco May 13 2009).

382. In a driving while intoxicated case, testimony from defendant's mother on the issue of whether defendant was intoxicated was not admissible under Tex. R. Evid. 701 because the mother did not personally observe a traffic stop or defendant's interaction with an arresting officer; the mother did not acquire personal knowledge at the time of the event. Because the testimony was not relevant, defendant's argument that her due process right to present a complete defense was violated was not addressed. Hartin v. State, 2009 Tex. App. LEXIS 2765, 2009 WL 1076799 (Tex. App. Beaumont Apr. 22 2009).

383. In a driving while intoxicated case, there was no error in excluding testimony from defendant's mother regarding why defendant refused to cooperate with an arresting officer due to the mother's lack of personal knowledge. Even though the mother had knowledge of some past events concerning defendant that might have explained defendant's behavior, the mother was not present for the arrest. Hartin v. State, 2009 Tex. App. LEXIS 2765, 2009 WL 1076799 (Tex. App. Beaumont Apr. 22 2009).

384. Officer was properly allowed to testify about the purpose of altering a shotgun to create a sawed-off shotgun because she had dealt with sawed-off shotguns on the firing range and in the field when investigating crimes, and because of her personal observations on the firing range and in the field, she was qualified to offer a lay opinion on the result of altering a shotgun. The question sought an explanation of what would be accomplished by sawing off the barrel of a shotgun, and the question was specifically limited to the officer's experience. Shelton v. State, 2009 Tex. App. LEXIS 1802, 2009 WL 672011 (Tex. App. Fort Worth Mar. 12 2009).

385. In defendant's aggravated robbery case, the court properly allowed an officer to testify about whether a rock or similar object was capable of causing serious bodily injury or death because, although the officer did not have any personal knowledge of the specific object that was used in the commission of the crime, he testified that he had been a police officer for approximately five-and-a-half years, and the officer saw the victim's wounds before they were treated. In re B. P. S., 2008 Tex. App. LEXIS 6028 (Tex. App. Austin Aug. 6 2008).

386. In a possession of a prohibited substance in a correctional facility case, defendant alleged that he gave false testimony at his cell mate's trial because he was coerced by gang members, but his cell mate did not testify that he had personal knowledge of the gang members at the correctional facility actually following the gang's rules to protect other gang members from prosecution; therefore, the cell mate's opinion testimony was not based on his perceptions; rather, the cell mate's opinion testimony was based on his speculative conclusions regarding what the gang members would have done to protect him from prosecution; accordingly, Tex. R. Evid. 701 was not met by the cell mate's testimony, and the trial court did not abuse its discretion in sustaining the State's objection to that testimony. Haggerty v. State, 2007 Tex. App. LEXIS 2130 (Tex. App. Houston 14th Dist. Mar. 20 2007).

387. In a trial for driving while intoxicated, an officer was properly allowed to testify as to the administration of a one-leg stand test because the evidence related to nonscientific evidence and was admissible as lay opinion under Tex. R. Evid. 701; the testimony was not subject to the criteria of Tex. R. Evid. 702. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

Evidence : Testimony : Lay Witnesses : Ultimate Issue

388. Trial court erred in allowing the detective in charge of defendant's murder and aggravated assault case to give her opinion on defendant's mental state in response to a question of why she obtained a warrant where the detective's interpretation and opinion regarding defendant's mental state were not an interpretation of her objective

perception of events because she was not present at the scene at the time of the incident and had no personal knowledge concerning the event and the veracity of any witness. However, the trial court's error did not influence the jury or had but a slight effect because the detective stated what was obvious to the jury from all the testimony, which was that the shooting was not accidental or unintentional, and, setting aside the detective's testimony, there was compelling evidence of defendant's guilt. Saldana v. State, 2011 Tex. App. LEXIS 1709, 2011 WL 846095 (Tex. App. Eastland Mar. 10 2011).

389. In a murder case involving a sudden passion defense, there was no error under Tex. R. Evid. 701, in allowing lay testimony that the witness had not seen anything that justified defendant pulling a gun on the victim; contrary to defendant's argument, the witness gave no opinion as to defendant's state of mind at the time that defendant fired several shots. Miller v. State, 2007 Tex. App. LEXIS 6511 (Tex. App. Dallas Aug. 10 2007).

390. In an interference with child custody case, although a court erred by overruling defendant's objection to an officer's testimony regarding her guilt or innocence, the error was harmless because the evidence against defendant established that she violated the child custody modification order; defendant's own testimony established that her taking possession of the child on October 24 was contrary to the terms of the modification order. Lovell v. State, 2006 Tex. App. LEXIS 6062 (Tex. App. Tyler July 12 2006).

391. In a prosecution for aggravated assault in which defendant claimed self-defense, the arresting officer was permitted to give opinion testimony that defendant had not been attacked. Ex parte Nailor, 149 S.W.3d 125, 2004 Tex. Crim. App. LEXIS 518 (Tex. Crim. App. 2004).

Family Law : Parental Duties & Rights : Termination of Rights : General Overview

392. In a proceeding to terminate parental rights, a caseworker was properly permitted to testify as a fact witness. Contrary to the father's assertion that she expressed the "collective opinion" of the agency, she did not voice an opinion, when asked, about what was in the best interest of the children. Rogers v. Dep't of Family & Protective Servs., 175 S.W.3d 370, 2005 Tex. App. LEXIS 1327 (Tex. App. Houston 1st Dist. 2005).

393. In a case involving the termination of parental rights, a licensed professional counselor was permitted to testify about the relationship of the parents as a lay witness where the permissible testimony included evidence that the parents' behavior was "childlike, argumentative, and verbally abusive," and that the parents used "humiliating words" toward each other. In re T.N., 142 S.W.3d 522, 2004 Tex. App. LEXIS 6710 (Tex. App. Fort Worth 2004).

Pensions & Benefits Law : Governmental Employees : State Pensions

394. In the fire and police retiree heath care fund's actuarial malpractice suit against its consulting firm after funding rate's for health care costs were increased, the trial court did not abuse its discretion in sustaining the firm's objections to the affidavit testimony of the two witnesses (the firefighters union president and its chief collective bargaining negotiator) offered by the fund to establish causation as it was based on their speculative conclusions regarding what the city's negotiators, the city council, and the union members would have done if the firm had recommended a higher pre-funding rate. Bd. of Trs. of the Fire & Police Retiree Health Fund v. Towers, Perrin, Forster & Crosby, Inc., 191 S.W.3d 185, 2005 Tex. App. LEXIS 9786 (Tex. App. San Antonio 2005).

Real Property Law : Financing : Mortgages & Other Security Instruments : Foreclosures : Deficiency Judgments

395. Lender's officer was not qualified to testify as to the value of the property because he was not an expert, and he did not qualify under the Property Owner Rule because his opinion was based on sources of information other

than his own personal knowledge and familiarity, which were required under Tex. R. Evid. 701. Preston Reserve, L.L.C. v. Compass Bank, 373 S.W.3d 652, 2012 Tex. App. LEXIS 3151, 2012 WL 1564014 (Tex. App. Houston 14th Dist. Apr. 24 2012).

Real Property Law : Property Valuation

396. In an action for a deficiency judgment by a lender against a borrower in which the trial court found an offset, a new trial was required because the trial court erred in valuing the property as of the time of trial rather than as of the time of the foreclosure as required by Tex. Prop. Code Ann. § 51.003(b), (c), and also in admitting the testimony of the borrower's majority shareholder on the issue of valuation under Tex. R. Evid. 701. Cabot Capital Corp. v. USDR, Inc., 346 S.W.3d 634, 2009 Tex. App. LEXIS 2957 (Tex. App. El Paso Apr. 30 2009).

Real Property Law : Water Rights : General Overview

397. Where homeowners alleged that neighbors and company owners caused rain water to flood their house, the evidence was legally sufficient to support the jury's verdict on the homeowners' Texas Water Code claims because the homeowners did not establish as a matter of law that any impounding of diffuse surface water created as a result of the neighbors' changes to their property caused the harm the homeowners suffered; there was testimony from multiple witnesses about what actually did happen with the diffuse surface water and floodwater. Michaelski v. Wright, 2014 Tex. App. LEXIS 6864 (Tex. App. Houston 1st Dist. June 26 2014).

398. Where homeowners alleged that neighbors and company owners caused rain water to flood their house, the evidence was legally sufficient to support the jury's verdict on the homeowners' Texas Water Code claims because the homeowners did not establish as a matter of law that any impounding of diffuse surface water created as a result of the neighbors' changes to their property caused the harm the homeowners suffered; there was testimony from multiple witnesses about what actually did happen with the diffuse surface water and floodwater. Michaelski v. Wright, 2014 Tex. App. LEXIS 6864 (Tex. App. Houston 1st Dist. June 26 2014).

Real Property Law : Water Rights : Nonconsumptive Uses : Tests for Navigability

399. In neighbors' action against a landowner seeking a declaration that they had a right to access a creek and a newly-formed lake on the landowner's property after a dam was built, the trial court did not err in admitting the affidavit testimony of a survey technician as his testimony about the average width of the creek was appropriate lay witness opinion evidence; it also was clear, positive, direct, otherwise credible and consistent, and it could have been readily controverted by the landowner. Hix v. Robertson, 2006 Tex. App. LEXIS 9378 (Tex. App. Waco Oct. 18 2006).

Workers' Compensation & SSDI : Administrative Proceedings : Costs & Attorney Fees

400. Workers' compensation claimant's attorney testified that her time estimates about the work she performed on the claimant's case were based on her notes and her past experience in performing similar work; accordingly, pursuant to Tex. R. Evid. 701, the record contained a basis for the attorney's personal knowledge and a rational connection of that knowledge with her estimates, which allowed her to testify regarding the amount of time she spent on the claimant's case. Also, any alleged mistake made by the attorney in her calculations did not create an impermissible analytical gap between the data and the conclusions; thus, the evidence was legally sufficient to support the award of attorney's fees. Twin City Fire Ins. Co. v. Vega-Garcia, 223 S.W.3d 762, 2007 Tex. App. LEXIS 3568 (Tex. App. Dallas 2007).

Workers' Compensation & SSDI : Compensability : Injuries : Intoxication

401. Where a habitual marijuana user fell from a steel structure while working, he was permitted to give his lay opinion testimony at trial that he had normal use of his mental and physical faculties at the time of his injury. The jury was entitled to believe the employee's testimony, together with the testimony about the work activities the employee successfully completed prior to his fall. Am. Interstate Ins. Co. v. Hinson, 172 S.W.3d 108, 2005 Tex. App. LEXIS 6350 (Tex. App. Beaumont 2005).

Tex. Evid. R. 702

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 702 Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 60, *Opinion Testimony*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Case Notes

Business & Corporate Law : General Partnerships : Dissolution & Winding Up : Dissolution : Withdrawal
Civil Procedure : Judicial Officers : Judges : Discretion
Civil Procedure : Discovery : Disclosures : Mandatory Disclosures
Civil Procedure : Discovery : Methods : Expert Witness Discovery
Civil Procedure : Discovery : Methods : Oral Depositions
Civil Procedure : Discovery : Privileged Matters : Work Product : Scope
Civil Procedure : Summary Judgment : Appellate Review : Standards of Review
Civil Procedure : Summary Judgment : Burdens of Production & Proof : General Overview
Civil Procedure : Summary Judgment : Evidence
Civil Procedure : Summary Judgment : Motions for Summary Judgment : General Overview
Civil Procedure : Summary Judgment : Opposition : Supporting Materials
Civil Procedure : Summary Judgment : Standards : General Overview
Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Summary Judgment : Supporting Materials : Affidavits
Civil Procedure : Trials : Judgment as Matter of Law : Judgments Notwithstanding Verdicts

Civil Procedure : Trials : Jury Trials : Province of Court & Jury
Civil Procedure : Remedies : Costs & Attorney Fees : Attorney Expenses & Fees : General Overview
Civil Procedure : Remedies : Damages : General Overview
Civil Procedure : Remedies : Damages : Compensatory Damages
Civil Procedure : Remedies : Writs : General Overview
Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
Civil Procedure : Appeals : Standards of Review : De Novo Review
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Civil Procedure : Appeals : Standards of Review : Reversible Errors
Civil Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview
Civil Procedure : Eminent Domain Proceedings : Experts
Commercial Law (UCC) : Sales (Article 2) : Form, Formation & Readjustment : General Overview
Commercial Law (UCC) : Sales (Article 2) : Remedies : General Overview
Commercial Law (UCC) : Sales (Article 2) : Warranties : Express Warranties
Communications Law : Telephone Services : Cellular Services
Communications Law : Telephone Services : Wireless Services
Constitutional Law : Bill of Rights : Fundamental Rights : Eminent Domain & Takings
Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Scope of Protection
Contracts Law : Breach : Causes of Action : General Overview
Contracts Law : Breach : Causes of Action : Breach of Warranty
Contracts Law : Remedies : Foreseeable Damages : Lost Profits
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : Elements
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : Elements
Criminal Law & Procedure : Criminal Offenses : Homicide : Voluntary Manslaughter : Elements
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Speeding : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Vehicular Homicide : General Overview
Criminal Law & Procedure : Criminal Offenses : Weapons : Definitions
Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : Appeals
Criminal Law & Procedure : Search & Seizure : Warrantless Searches : Dog Sniff Searches
Criminal Law & Procedure : Interrogation : Voluntariness
Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Expert Testimony

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Expert Testimony : Indigents
Criminal Law & Procedure : Discovery & Inspection : Witness Lists : General Overview
Criminal Law & Procedure : Preliminary Proceedings : Withdrawal of Charges : Expungement of Records
Criminal Law & Procedure : Eyewitness Identification : General Overview
Criminal Law & Procedure : Eyewitness Identification : Fair Identification Requirement
Criminal Law & Procedure : Pretrial Motions & Procedures : Competency to Stand Trial
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury : Credibility of Witnesses
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance
Criminal Law & Procedure : Trials : Examination of Witnesses : General Overview
Criminal Law & Procedure : Trials : Examination of Witnesses : Child Witnesses
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Witnesses : General Overview
Criminal Law & Procedure : Witnesses : Credibility
Criminal Law & Procedure : Defenses : Diminished Capacity
Criminal Law & Procedure : Defenses : Insanity : Insanity Defense
Criminal Law & Procedure : Defenses : Justification
Criminal Law & Procedure : Scienter : Specific Intent
Criminal Law & Procedure : Jury Instructions : Curative Instructions
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Classification
Criminal Law & Procedure : Appeals : Procedures : Briefs
Criminal Law & Procedure : Appeals : Reversible Errors : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Constitutional Issues
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence
Criminal Law & Procedure : Appeals : Standards of Review : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Witnesses
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : General Overview
Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Ineffective Assistance
Environmental Law : Litigation & Administrative Proceedings : Toxic Torts
Evidence : Hearsay : Exceptions : General Overview
Evidence : Hearsay : Exceptions : Business Records : General Overview
Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials
Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment
Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Judicial Notice

Evidence : Judicial Notice : Scientific & Technical Facts
Evidence : Procedural Considerations : Burdens of Proof : General Overview
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof
Evidence : Procedural Considerations : Preliminary Questions : General Overview
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Witness Qualifications
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Scientific Evidence : General Overview
Evidence : Scientific Evidence : Autopsies
Evidence : Scientific Evidence : Ballistics
Evidence : Scientific Evidence : Battered Child Syndrome
Evidence : Scientific Evidence : Blood Alcohol
Evidence : Scientific Evidence : Blood & Bodily Fluids
Evidence : Scientific Evidence : Crime Scene
Evidence : Scientific Evidence : Daubert Standard
Evidence : Scientific Evidence : DNA
Evidence : Scientific Evidence : Fingerprints & Footprints
Evidence : Scientific Evidence : Hairs & Fibers
Evidence : Scientific Evidence : Handwriting
Evidence : Scientific Evidence : Polygraphs
Evidence : Scientific Evidence : Psychiatric & Psychological Evidence
Evidence : Scientific Evidence : Sobriety Tests
Evidence : Scientific Evidence : Toxicology
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Rehabilitation
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility
Evidence : Testimony : Experts : Court-Appointed Experts : General Overview
Evidence : Testimony : Experts : Court-Appointed Experts : Appointments
Evidence : Testimony : Experts : Court-Appointed Experts : Compensation
Evidence : Testimony : Experts : Credibility
Evidence : Testimony : Experts : Credibility : General Overview
Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Experts : Daubert Standard
Evidence : Testimony : Experts : Helpfulness
Evidence : Testimony : Experts : Kelly-Frye Process
Evidence : Testimony : Experts : Qualifications
Evidence : Testimony : Experts : Ultimate Issue
Evidence : Testimony : Lay Witnesses : General Overview
Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview
Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions
Evidence : Testimony : Lay Witnesses : Personal Knowledge
Evidence : Testimony : Lay Witnesses : Ultimate Issue
Family Law : Child Custody : Awards : Standards : Best Interests of Child
Family Law : Child Custody : Visitation : Awards : Third Parties : Grandparents

Family Law : Guardians : General Overview
Family Law : Marital Termination & Spousal Support : Dissolution & Divorce : Property Distribution
Family Law : Parental Duties & Rights : Termination of Rights : General Overview
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview
Governments : Local Governments : Elections
Governments : State & Territorial Governments : Licenses
Healthcare Law : Actions Against Facilities : Standards of Care : Expert Testimony
Healthcare Law : Actions Against Healthcare Workers : Doctors & Physicians
Healthcare Law : Actions Against Healthcare Workers : Surgeons
Healthcare Law : Treatment : Failures to Disclose & Warn : Prescription Medications
Healthcare Law : Treatment : Incompetent, Minor & Mentally Disabled Patients : General Overview
Legal Ethics : Client Relations : General Overview
Public Health & Welfare Law : Healthcare : Mental Health Services : Commitment : Involuntary Commitment of Adults
Real Property Law : Eminent Domain Proceedings : Procedure
Real Property Law : Eminent Domain Proceedings : Valuation
Real Property Law : Homestead Exemptions
Real Property Law : Inverse Condemnation : Procedure
Real Property Law : Property Valuation
Real Property Law : Zoning & Land Use : Historic Preservation
Tax Law : State & Local Taxes : Natural Resources Tax : Imposition of Tax
Tax Law : State & Local Taxes : Personal Property Tax : Tangible Property : General Overview
Tax Law : State & Local Taxes : Real Property Tax : General Overview
Tax Law : State & Local Taxes : Real Property Tax : Assessment & Valuation : General Overview
Tax Law : State & Local Taxes : Real Property Tax : Assessment & Valuation : Valuation
Torts : Damages : Compensatory Damages : Medical Expenses
Torts : Damages : Compensatory Damages : Pain & Suffering : General Overview
Torts : Intentional Torts : Assault & Battery : General Overview
Torts : Intentional Torts : False Imprisonment : General Overview
Torts : Malpractice & Professional Liability : Attorneys
Torts : Malpractice & Professional Liability : Healthcare Providers
Torts : Negligence : General Overview
Torts : Negligence : Causation : General Overview
Torts : Negligence : Causation : Cause in Fact
Torts : Negligence : Causation : Proximate Cause : General Overview
Torts : Negligence : Proof : Evidence : Expert Testimony
Torts : Negligence : Standards of Care : Reasonable Care : General Overview
Torts : Premises Liability & Property : General Premises Liability : Dangerous Conditions : General Overview
Torts : Products Liability : General Overview
Torts : Products Liability : Design Defects
Torts : Products Liability : Manufacturing Defects
Torts : Products Liability : Negligence
Torts : Products Liability : Strict Liability
Torts : Public Entity Liability : Immunity : Qualified Immunity
Torts : Transportation Torts : General Overview
Torts : Transportation Torts : Motor Vehicles
Torts : Transportation Torts : Motor Vehicles : Personal Vehicles
Torts : Transportation Torts : Rail Transportation : Federal Employers' Liability Act
Torts : Wrongful Death & Survival Actions : Causation
Trade Secrets Law : Civil Actions : Remedies : Damages : General Overview
Transportation Law : Private Vehicles : Safety Standards : Seat Belts
Workers' Compensation & SSDI : Administrative Proceedings : Evidence : General Overview
Workers' Compensation & SSDI : Administrative Proceedings : Evidence : Medical Evidence

Workers' Compensation & SSDI : Administrative Proceedings : Evidence : Witnesses
Workers' Compensation & SSDI : Administrative Proceedings : Judicial Review : Standards of Review
Workers' Compensation & SSDI : Benefit Determinations : Death Benefits
Workers' Compensation & SSDI : Benefit Determinations : Permanent Partial Disabilities
Workers' Compensation & SSDI : Compensability : Injuries : General Overview

LexisNexis (R) Notes

Business & Corporate Law : General Partnerships : Dissolution & Winding Up : Dissolution : Withdrawal

1. In a partnership dispute, a trial court did not err by awarding withdrawal damages because expert testimony was not required; the only two assets at the time of a partner's death were his capital contribution and two properties, and former Tex. Rev. Civ. Stat. Ann. art. 6132b-8.06 did not apply. Moreover, the jury could have reasonably relied upon testimony by a partner regarding the value of the properties. Sewing v. Bowman, 371 S.W.3d 321, 2012 Tex. App. LEXIS 2438, 2012 WL 1065876 (Tex. App. Houston 1st Dist. Mar. 29 2012).

Civil Procedure : Judicial Officers : Judges : Discretion

2. Admission of expert testimony pursuant to Tex. R. Evid. 702 lies within the sound discretion of a trial court and will not be set aside absent a showing of abuse of that discretion. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

Civil Procedure : Discovery : Disclosures : Mandatory Disclosures

3. Expert report submitted by a patient in his medical malpractice action arising out of a surgery that he claimed was performed on the wrong party of his body did not comply with Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) where the patient had failed to establish that his expert was qualified to testify regarding the standard of care applicable to the condition involved in the underlying claim because: (1) information regarding the expert's peer review committee and director positions did not provide sufficient detail from which it could be determined that his experience on the committee and as a director was relevant to the standard of care applicable to hospital personnel in a surgical setting; (2) the expert's general reference to a three year internship/residency in surgery was not sufficient to establish that he had sufficient training and experience with regard to the procedures hospital personnel were required to follow during a surgical procedure eight years after his internship/residency ended; and (3) the patient had failed to show that the preoperative procedures hospital personnel were required to follow in a surgical setting were substantially developed in the expert's field of emergency room medicine; expert testimony was required because the nature of the patient's medical procedure and whether it resulted in the wrong part of the body being operated on were not within the common knowledge of a layperson, and, even under the doctrine of res ipsa loquitur, the patient was required to establish that the expert was qualified to testify regarding causation. Methodist Health Care Sys. of San Antonio, Ltd. v. Rangel, 2005 Tex. App. LEXIS 10858 (Tex. App. San Antonio Dec. 14 2005).

Civil Procedure : Discovery : Methods : Expert Witness Discovery

4. In an action alleging nuisance, a trial court did not err by striking an untimely motion to designate an expert witness; the attempted designation was over a year after the original deadline and over two years after the filing of the suit. Moreover, there was no showing of good cause. Paselk v. Rabun, 293 S.W.3d 600, 2009 Tex. App. LEXIS 4266 (Tex. App. Texarkana June 16 2009).

5. In a case involving a dispute over the termination of an oil and gas lease, expert testimony regarding damages was not excluded under Tex. R. Civ. P. 193.6 because a good faith reason was given for a delay; the expert's calculations could not have been provided any earlier because those numbers derived from deposition testimony,

and the calculations were merely updates of previously disclosed information. Even if there was an error in admitting the expert's testimony, it was not reversible error because there was other evidence to support the damage award. BP Am. Prod. Co. v. Marshall, 288 S.W.3d 430, 2008 Tex. App. LEXIS 9778, 172 Oil & Gas Rep. 376 (Tex. App. San Antonio 2008).

6. Medical malpractice action was dismissed because an expert report filed by a plastic surgeon was insufficient since he was not able to testify about the standard of care for a pulmonologist in relation to the treatment of a burn patient; the expert report never stated that the area of pulmonology was substantially developed in the field of plastic and reconstructive surgery or that the expert had practical knowledge of what was usually done by a pulmonologist who also treated burn patients. Garcia v. Rodriguez, 2007 Tex. App. LEXIS 7193 (Tex. App. Corpus Christi Aug. 30 2007).

7. Tex. R. Civ. P. 192 prevails over Tex. R. Civ. P. 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production; that is, once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced. In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 2007 Tex. LEXIS 362, 50 Tex. Sup. Ct. J. 682 (Tex. 2007).

8. In a medical malpractice suit against two doctors, an internist and a cardiologist, the trial court abused its discretion in preventing a deceased patient's family from calling the internist's expert witness during their case in chief because: (1) the family should not have been prohibited from calling the internist's expert as a witness solely on the basis that he was the internist's expert; (2) the family's cross-designation of the expert was not deficient under Tex. R. Civ. P. 193 or Tex. R. Civ. P. 195, as the cross-designations were reasonably prompt and included the information available to the family at the time; and (3) due to differences in qualifications and the potential for perceived bias involving testimony on controlling issues, the expert's testimony would have added substantial weight to the family's case and thus was not cumulative. Hooper v. Chittaluru, 2006 Tex. App. LEXIS 2334 (Tex. App. Houston 14th Dist. Mar. 28 2006), substituted opinion at, opinion withdrawn by 2006 Tex. App. LEXIS 5532 (Tex. App. Houston 14th Dist. June 29, 2006).

Civil Procedure : Discovery : Methods : Oral Depositions

9. In a disciplinary matter, where the Texas Commission for Lawyer Discipline properly designated an expert, and a lawyer was afforded several opportunities to depose the expert, the admission of his testimony was proper because the lawyer failed to notice the expert in a timely manner. Therefore, subjecting the Commission to sanctions in light of the untimely notice would not have been just. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 351 (Tex. App. Houston 14th Dist. Jan. 20 2009).

Civil Procedure : Discovery : Privileged Matters : Work Product : Scope

10. Tex. R. Civ. P. 192 prevails over Tex. R. Civ. P. 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production; that is, once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced. In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 2007 Tex. LEXIS 362, 50 Tex. Sup. Ct. J. 682 (Tex. 2007).

Civil Procedure : Summary Judgment : Appellate Review : Standards of Review

11. Trial court properly granted manufacturers, suppliers, contractors, premises owners, and former employers' no-evidence summary judgment motion, Tex. R. Civ. P. 166a(i), because (1) although the former employees claimed that paints and other coating substances used in the construction of the power plants contained asbestos

or silica, which was released into the air when the product was sprayed or when it was sanded or ground off the surface to which it had been applied, there was no expert testimony under Tex. R. Evid. 702 and 705(c) that spraying, sanding, or grinding a liquid paint or coating produced friable asbestos fibers likely to cause asbestosis; and (2) although the type of silica that caused silicosis was crystalline silica, the evidence showed that the products in the employees' case contained amorphous silica and there was no evidence that amorphous silica caused silicosis or that grinding and sanding the paint and coatings released a form of silica that was capable of causing injury; thus, the employees never proved an exposure to a form of asbestos or silica that would cause injury and the employees failed to meet their initial burden of showing that they were exposed to asbestos and/or silica in a form that was capable of causing injury from manufacturers, suppliers, contractors, premises owners, and former employers' products. In re ROC Pretrial, 131 S.W.3d 129, 2004 Tex. App. LEXIS 315 (Tex. App. San Antonio 2004).

Civil Procedure : Summary Judgment : Burdens of Production & Proof : General Overview

12. Trial court did not err in excluding an insured's sole damages expert, and then granting insurers' no-evidence motion, where the expert's opinion was not based upon a reliable foundation and was irrelevant; in part, certain forecasts used by the expert as his basis for calculating business income loss were significantly flawed and the expert did not consider any causes, such as the economy, other than the September 11, 2001, terrorist attacks. Wyndham Int'l, Inc. v. Ace Am. Ins. Co., 186 S.W.3d 682, 2006 Tex. App. LEXIS 1921 (Tex. App. Dallas 2006).

13. Where the patient failed to establish causation testimony through expert testimony that linked his full thickness skin loss with the therapist's application of moist heat packs during physical therapy, the trial court did not err by granting the therapist summary judgment on both traditional and no evidence grounds. Reyes v. Jebo's, Inc., 2005 Tex. App. LEXIS 3344 (Tex. App. San Antonio May 4 2005).

Civil Procedure : Summary Judgment : Evidence

14. Statements in a proof of loss form relating to the date of hail damage were competent summary judgment evidence because they constituted admissions under Tex. R. Evid. 801(e)(2). Even if the statements in the proof of loss form were not binding or conclusive, they were considered prima facie evidence of the facts stated therein; moreover, expert testimony was not required on the issue of whether hail occurred on a certain date and caused property damage. United States Fire Ins. Co. v. Lynd Co., 2012 Tex. App. LEXIS 3206, 2012 WL 1430541 (Tex. App. San Antonio Apr. 25 2012).

15. In a toxic tort case filed by several apartment complex residents, summary judgment was properly granted on the issue of personal injury because the expert testimony of two doctors did not sufficiently show causation; one doctor ultimately opined only that there was "a possibility" of a causal connection between the contaminant exposure alleged and the residents' claimed symptoms, and he conceded he had drawn no further conclusions because he had not evaluated the residents. A second doctor also stated during a deposition that he had not examined any of the residents subject to the trial court's summary judgment, and he was unable to file an affidavit to contradict deposition testimony merely to raise a fact issue for purposes of summary judgment; even if the affidavit was considered, it did no more than provide evidence that the type of mold found at the apartment complex was generally capable of causing health problems, it was not evidence of cause-in-fact of any specific resident's health complaints, and it was conclusory. Plunkett v. Conn. Gen. Life Ins. Co., 285 S.W.3d 106, 2009 Tex. App. LEXIS 1405 (Tex. App. Dallas Feb. 27 2009).

16. Equipment maintenance company's no-evidence motion for summary judgment was properly granted pursuant to Tex. R. Civ. P. 166a on the TrackMobile equipment operator's negligence clam because the operator failed to present the required expert testimony about the proper inspection and maintenance of the TrackMobile and if the company's conduct met that standard of care; expert testimony was required as provided in Tex. R. Evid. 702

because a maintenance company's practices and procedures and industry standards with respect to the inspection and maintenance of a TrackMobile or other rail-car mover engine were not matters within a lay person's general knowledge. Simmons v. Briggs Equip. Trust, 221 S.W.3d 109, 2006 Tex. App. LEXIS 5647 (Tex. App. Houston 1st Dist. 2006).

Civil Procedure : Summary Judgment : Motions for Summary Judgment : General Overview

17. There is no authority to support an argument that normal expert reliability standards do not apply in a summary judgment proceeding. Therefore, an appellate court looked to these standards in assessing whether or not summary judgment should have been granted in a toxic tort case on the issues of property damage and personal injury. Plunkett v. Conn. Gen. Life Ins. Co., 285 S.W.3d 106, 2009 Tex. App. LEXIS 1405 (Tex. App. Dallas Feb. 27 2009).

Civil Procedure : Summary Judgment : Opposition : Supporting Materials

18. On a no-evidence motion for summary judgment, an expert affidavit stating that a tenant's injury was caused by a particular dangerous condition of which the landlord knew or should have known should not have been stricken as conclusory because its conclusions were supported by scientific observations. Gillenwater v. Fort Brown Villas, III, 2007 Tex. App. LEXIS 7145 (Tex. App. Corpus Christi Aug. 31 2007).

19. In a legal malpractice case, an expert affidavit was not found to be admissible where it failed to meet the requirements of Tex. R. Civ. P. 166a because it was not based on personal knowledge, it was unsworn, and it only indicated competency by allusion to another unsworn document. Twist v. Garcia, 2007 Tex. App. LEXIS 7187 (Tex. App. Corpus Christi Aug. 30 2007).

Civil Procedure : Summary Judgment : Standards : General Overview

20. In a case alleging improper ventilation of a building, summary judgment was properly granted in favor of a company, its owners, and its managers because the medical evidence offered by an injured party was stricken based on a failure to show causation; there was insufficient epidemiological data to support causation of neurotoxicity under the six applicable reliability factors analyzed by the trial court, and the evidence showed an "analytical gap" because the experts' experience and training, the diagnostic tests, and the medical literature that served as a basis for their medical opinions did not provide any evidence of causation. Feria v. Dynagraphics Co., 2004 Tex. App. LEXIS 2366 (Tex. App. El Paso Mar. 15 2004).

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

21. Trial court did not err in granting summary judgment to doctors in a medical malpractice suit where the court sustained the objections to the patient's expert's affidavit at the hearing because the expert's affidavit failed to state any knowledge that she possessed on the standard of care applicable to hospitals in cancer diagnosis. Shelton v. Sargent, 144 S.W.3d 113, 2004 Tex. App. LEXIS 6116 (Tex. App. Fort Worth 2004).

22. Trial court did not err in granting summary judgment to doctors in a medical malpractice suit where the court sustained the objections to the patient's expert's affidavit at the hearing because while the affidavit opined that the radiologist should have retaken x-ray films of the hook wire localization and should have followed up with the other medical care providers on the negative pathology report, the record was devoid of any indication that the expert possessed any expertise or training in the field of radiology that would have qualified her to make those opinions. Shelton v. Sargent, 144 S.W.3d 113, 2004 Tex. App. LEXIS 6116 (Tex. App. Fort Worth 2004).

23. Trial court did not err in granting summary judgment to doctors in a medical malpractice suit where the court had sustained the objections to the patient's expert's affidavit at the hearing where the expert failed to state facts or studies to support her conclusion that the patient would have avoided a mastectomy with a follow-up mammogram; thus, the affidavit lacked foundation and was conclusory. Shelton v. Sargent, 144 S.W.3d 113, 2004 Tex. App. LEXIS 6116 (Tex. App. Fort Worth 2004).

24. Affidavits of expert witnesses offered in support of homeowners' motion against summary judgment in an action seeking losses for a house fire failed to meet the requirements of Tex. R. Evid. 401, 403, 702, and 703, as the testimony was a pyramid of inferences lacking probative force because it was based on assumed facts that varied from the actual undisputed facts. Rayon v. Energy Specialties, Inc., 121 S.W.3d 7, 2002 Tex. App. LEXIS 9160 (Tex. App. Fort Worth 2002).

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits

25. In a personal injury action in which appellee truck driver pleaded a claim for negligent hiring against appellant foreign corporation by alleging that it hired a Texas corporation to deliver products to Texas when appellant retained control over the Texas corporation and knew or should have known that the Texas corporation employed an incompetent driver, the trial court did not abuse its discretion in overruling appellant's objection to an affidavit and expert report drafted by a transportation expert for appellee where appellant had neither assailed the expert's scientific, technical, or other specialized knowledge nor challenged whether his testimony was relevant and based on a reliable foundation. Furthermore, although appellant pointed the reviewing court to authority pertaining to affidavits in a summary judgment context, it did not explain why expert reports tendered at a special appearance hearing should have been held to the same standard as an affidavit presented at a summary judgment hearing. Ltd. Logistics Servs. v. Villegas, 268 S.W.3d 141, 2008 Tex. App. LEXIS 6536 (Tex. App. Corpus Christi 2008).

26. Mental soundness was within common knowledge and did not require proof by expert testimony. In re Estate of Mask, 2008 Tex. App. LEXIS 5439 (Tex. App. San Antonio July 23 2008).

27. Objection to an affidavit in support of summary judgment was properly overruled in a case involving business disparagement, tortious interference, and false advertising between competitors because the affiant was qualified to testify as an expert regarding the quality of materials used by one of the parties to manufacture utility bodies since he had been in the industry at issue for 36 years, and the average person was unfamiliar with the types and quality of such materials. A v. B, 2007 Tex. App. LEXIS 3311 (Tex. App. 2007).

Civil Procedure : Trials : Judgment as Matter of Law : Judgments Notwithstanding Verdicts

28. In a valuation dispute relating to the taxation of furniture, fixtures, and equipment under Tex. Tax Code Ann. § 1.04(7), even if the testimony of an expert regarding market value was considered, a jury's findings were not supported by the evidence because they were outside of the range given by the experts; therefore, a judgment notwithstanding the verdict (JNOV) should have been granted; moreover, a no-evidence issue was preserved for review by the filing of a JNOV request. Harris County Appraisal Dist. v. Sigmor Corp., 2008 Tex. App. LEXIS 2456 (Tex. App. Houston 1st Dist. Apr. 3 2008).

Civil Procedure : Trials : Jury Trials : Province of Court & Jury

29. In a case alleging fraud in relation to the sale of certain assets, an appellate court did not have to decide the evidentiary value of the actual sales price because other evidence in the record was sufficient to sustain the jury's verdict. The jury was free to accept a former husband's expert, who testified about value and criticized the underpinnings of another expert's opinions; a former wife and a company did not satisfy their burden of showing

that the assets were worth more than a one million dollar sales price. Coates v. Coates, 2009 Tex. App. LEXIS 1790, 2009 WL 679592 (Tex. App. Dallas Mar. 17 2009).

Civil Procedure : Remedies : Costs & Attorney Fees : Attorney Expenses & Fees : General Overview

30. In an action for breach of a maintenance contract, the evidence was sufficient to support an attorney fee award because the contractor's expert on fees demonstrated that he was qualified by knowledge, skill, experience, training, and education to provide specialized testimony to assist the jury in understanding the evidence regarding attorney fees. United Plaza-Midland, L.L.C. v. First Serv. Air Conditioning Contractors, Inc., 2007 Tex. App. LEXIS 10027 (Tex. App. Eastland Dec. 20 2007).

Civil Procedure : Remedies : Damages : General Overview

31. Take nothing judgment was properly entered against a contractor because, even if a trial court incorrectly determined that the contractor was unable to assert his breach-of-implied-warranty cause of action, there was no evidence of damages since the contractor had not paid to replace a defective floor and did not show that he would do so in the future; moreover, he was unable to show that the cost of an expert witness was recoverable. Even if the contractor had attached evidence of payment to his motion or supporting brief, he did not present the evidence before judgment was rendered; moreover, he did not request the trial court to reopen the evidence, or grant a new trial based on newly discovered evidence. Hammer v. Wood, 2009 Tex. App. LEXIS 6632, 2009 WL 2589432 (Tex. App. Houston 14th Dist. Aug. 25 2009).

32. Court erred by admitting an expert's report on damages to a home caused by water because the damage estimate wholly relied on another expert's report that should not have been admitted, and the expert had not checked to see if the prices he quoted in his report were usual and customary for Johnson County. State Farm Lloyds v. Blacklock, 2005 Tex. App. LEXIS 7433 (Tex. App. Waco Sept. 7 2005).

Civil Procedure : Remedies : Damages : Compensatory Damages

33. Trial court did not abuse its discretion by admitting into evidence the testimony of the contractor's expert witness because his testimony did not include the criticized "as-release method" for calculating damages, but rather was limited to the valuation of the work the contractor performed; the expert's testimony regarding the calculation of the reasonable value of the work performed by the contractor was objectively verifiable and was based on unit pricing and quantities and utilized standard estimating techniques. Formosa Plastics Corp., USA v. Kajima Int'l, Inc., 216 S.W.3d 436, 2006 Tex. App. LEXIS 11098 (Tex. App. Corpus Christi 2006).

Civil Procedure : Remedies : Writs : General Overview

34. Motorists were not entitled to mandamus relief after the trial court limited testimony of their expert witness in a personal injury action brought against the motorists for damages arising from a collision between a motor vehicle and a motorcycle. The trial court's order circumscribed the expert's testimony but did not prevent the expert from testifying or prevent the motorists from presenting other evidence or testimony concerning the accident. In re Pena, 2005 Tex. App. LEXIS 3663 (Tex. App. Corpus Christi May 12 2005).

Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus

35. In a suit for personal injury and underinsured motorist coverage, the trial court excluded the testimony of a defense expert based on a determination that the expert's report did not meet the reliability requirements of this rule; because the insurance company had an adequate remedy by appeal, mandamus review was not available. In

re Farmers Tex. County Mut. Ins. Co., 2013 Tex. App. LEXIS 15350, 2013 WL 6730094 (Tex. App. San Antonio Dec. 20 2013).

Civil Procedure : Appeals : Reviewability : Preservation for Review

36. At the proceeding to commit appellant as a sexually violent predator, his counsel did not object that an expert's testimony was inadmissible under Tex. R. Evid. 02 because it commented on appellant's credibility; therefore, the alleged error was not preserved for review under Tex. R. App. P. 33.1. In re Commitment of Petrus, 2012 Tex. App. LEXIS 4686, 2012 WL 2150336 (Tex. App. Beaumont June 14 2012).

37. Decedent's wife failed to preserve any error on the admission of the deputy's testimony because she affirmatively stated that she had no other objection to the report, and thereby waived her objection to the deputy's point-of-impact opinion in the police report based on Tex. R. Evid. 702; the deputy's testimony became cumulative of other evidence in the case. Austin v. Weems, 337 S.W.3d 415, 2011 Tex. App. LEXIS 4166 (Tex. App. Houston 1st Dist. Feb. 24 2011).

38. In a dispute over the valuation of oil and gas interests, an objector preserved a complaint for review about the testimony of a professional appraiser because the argument was that the testimony was conclusory on its face. In this circumstance, the objector was challenging the legal sufficiency of the evidence, even in the absence of any objection to its admissibility. Averitt v. Caudle, 2009 Tex. App. LEXIS 2284, 2009 WL 891034 (Tex. App. Eastland Apr. 2 2009).

39. In a products liability case, where a retailer failed to raise a scientific reliability challenge to an expert's testimony before a trial court, it was waived on review. However, a challenge that the testimony was speculative and conclusory could have been raised for the first time on appeal. Merrell v. Wal-Mart Stores, Inc., 276 S.W.3d 117, 2009 Tex. App. LEXIS 414 (Tex. App. Texarkana Jan. 23 2009).

40. In a divorce case, a former husband did not preserve an error relating to the admissibility of expert testimony because the record reflected that the husband lodged no admissibility objections to the testimony assessing the value of the estates, characterizing community assets and separate property, and assessing a former wife's reimbursement claims. As to his complaint about the weight given to the testimony, this was for the trier of fact to decide. Sharma v. Routh, 2008 Tex. App. LEXIS 9737 (Tex. App. Houston 14th Dist. Dec. 31 2008).

41. In a case alleging breach of fiduciary duty, negligence, and negligence misrepresentation, a jury did not err in its calculation of the comparative responsibility of various underwriters because an expert's testimony was not speculative on the face of the record with regards to what would have been discussed had the underwriters contacted an insurance agency regarding a discrepancy in an insurance application, even though the testimony could have been clearer; preservation of this error was not an issue because no objection in the trial court was required to assert such an error. Moreover, to the extent that a few of the expert's statements indicated that he was not testifying as to what a person of ordinary prudence would do or not do under the same or similar circumstances as existed with respect to the underwriters, the jury, as factfinder, was free to disregard these statements. Underwriters at Lloyds Subscribing to Policy Nos. MDJ03/L075 & MDJ03/Z0165 v. Edmond & Stephens Ins. Agency, Inc., 2008 Tex. App. LEXIS 9730 (Tex. App. Houston 14th Dist. Dec. 30 2008).

42. In a case alleging breach of fiduciary duty, negligence, and negligence misrepresentation, various underwriters preserved an error relating to an expert's qualifications by raising an objection in the trial court; however, the expert was not required to have experience underwriting under certain manuals and contracts. As to another error based on the expert's methodology, it was not preserved because no objection was made before the trial court. Underwriters at Lloyds Subscribing to Policy Nos. MDJ03/L075 & MDJ03/Z0165 v. Edmond & Stephens Ins.

Agency, Inc., 2008 Tex. App. LEXIS 9730 (Tex. App. Houston 14th Dist. Dec. 30 2008).

43. In a case where a mother was seeking to regain property from her daughter, although the mother did not entirely waive her request for sanctions for failure to have a hearing or obtain a ruling, she waived any complaint concerning the designation of experts for failure to timely raise the issue before a trial court. Delahoussaye v. Kana, 2008 Tex. App. LEXIS 8561 (Tex. App. Houston 1st Dist. Nov. 13 2008).

44. In a child custody proceeding, a father's complaint about an expert's testimony was not preserved for review because the father failed to object to the expert's testimony until after she testified on direct examination, and she had been cross-examined. In re D.C.M., 2008 Tex. App. LEXIS 6774 (Tex. App. Houston 14th Dist. Sept. 9, 2008), *overld in part*, Tucker v. Thomas, 405 S.W.3d 694, 2011 Tex. App. LEXIS 9991 (Tex. App.--Houston [14th Dist.] 2011, pet. granted).

45. In a case where an insurer was seeking to recover damages to a car, a driver failed to preserve error relating to a contention that unqualified expert testimony was presented in an attachment to an affidavit; no objection was lodged, and the filing of motions for judgment notwithstanding the verdict and a directed verdict did not preserve error either because the objection should have been lodged when the exhibit was offered into evidence. Adams v. State Farm Mut. Auto. Ins. Co., 264 S.W.3d 424, 2008 Tex. App. LEXIS 6486 (Tex. App. Dallas 2008).

46. Objection based on the qualifications of an expert witness and the foundation for such testimony was not made at trial; therefore, the issue was not preserved for appellate review. Halverson v. Podlewski, 2006 Tex. App. LEXIS 8814 (Tex. App. Waco Oct. 11 2006).

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

47. In a wrongful death and survival action filed by the decedent's daughters against the healthcare providers, the daughters' expert's opinions as to the negligence of the nursing home, because it failed to give an antibiotic that had been prescribed for a urinary tract infection, to maintain accurate information in nursing home records, and to communicate that information to hospital personnel upon transfer of a patient to the hospital, was based on the expert's experience as a director of a nursing home and additionally, in regards to the decedent's cause of death, the expert relied on the expert's medical training and general experience treating patients; thus, there was nothing to indicate that the expert's opinions required an expertise peculiar to the fields of cardiology or urology and the trial court did not abuse its discretion in allowing the expert to testify pursuant to Tex. R. Evid. 702. Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 2003 Tex. App. LEXIS 1187 (Tex. App. Amarillo 2003).

48. Admission of expert testimony pursuant to Tex. R. Evid. 702 lies within the sound discretion of a trial court and will not be set aside absent a showing of abuse of that discretion. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

Civil Procedure : Appeals : Standards of Review : De Novo Review

49. Trial court's determination regarding whether expert testimony is necessary to establish negligence should be reviewed de novo. FFE Transp. Servs. v. Fulgham, 154 S.W.3d 84, 2004 Tex. LEXIS 1422, 48 Tex. Sup. Ct. J. 267, CCH Prod. Liab. Rep. P17246 (Tex. 2004).

50. In determining whether expert testimony is reliable and, therefore, some evidence supporting the judgment, the appellate court must employ an almost de novo-like review and, like the trial court, look beyond the expert's bare testimony to determine the reliability of the theory underlying it. The court does not focus on the correctness of

the expert's opinion, but on the reliability of the analysis the expert used in reaching his or her conclusions. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

51. In a medical negligence action, any error in excluding an expert's testimony as to when a patient developed a tumor was harmless under Tex. R. App. P. 44.1(a) because the excluded evidence would not have been sufficient to prove that the alleged failure to diagnose prevented the patient from considering treatment options other than radical mastectomy. Reyna v. Maldonado, 2005 Tex. App. LEXIS 8694 (Tex. App. Corpus Christi Oct. 20 2005).

52. In a product liability action against the manufacturer of a rifle barrel that exploded, the trial court did not abuse its discretion in determining that testimony by a metallurgy expert, who also described himself as an "amateur gunsmith," was reliable as to opinions on gun design. Testimony as to defects in the steel was not proper from an engineering expert, but that testimony was cumulative and therefore the error was harmless. Olympic Arms, Inc. v. Green, 176 S.W.3d 567, 2004 Tex. App. LEXIS 11825, CCH Prod. Liab. Rep. P17247, 55 U.C.C. Rep. Serv. 2d (CBC) 575 (Tex. App. Houston 1st Dist. 2004).

53. Appellant waived his right to appeal issues raised by the qualifications and testimony of an expert witness because the appellant elicited the testimony at issue. Gill v. Slovak, 2004 Tex. App. LEXIS 11544 (Tex. App. Corpus Christi Dec. 22 2004), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 8876 (Tex. App. Corpus Christi Oct. 27, 2005).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

54. Any error by determining the drug test results were admissible was harmless, because the father's testimony was admitted without objection, when the content of the testimony was cumulative of the drug test results the father argued were inappropriately admitted. D.O.H. v. Tex. Dep't of Family & Protective Servs., 2011 Tex. App. LEXIS 6685, 2011 WL 3684568 (Tex. App. Houston 14th Dist. Aug. 23 2011).

55. Even though the trial court erred by admitting the testimony of a trooper concerning the causation of the accident, as his testimony contained opinions and he did not qualify as an expert under Tex. R. Evid. 702, the error was harmless because his conclusion that the bus driver was not at fault was cumulative of other evidence. The driver's other expert witness provided testimony consistent with the trooper's conclusions, testified in much greater detail, length, and depth than the trooper, and explained the methods he used and the calculations he made. Lopez-juarez v. Kelly, 348 S.W.3d 10, 2011 Tex. App. LEXIS 6446 (Tex. App. Texarkana Aug. 16 2011).

56. Expert's testimony about duties that an attorney might owe to an opposing party was admissible under Tex. R. Evid. 702 because an attorney's duties were not within the jurors' understanding as laypersons; moreover, any error was harmless under Tex. R. App. P. 44.1(a)(1) because the jury was asked to decide whether the attorney had notice that he was paid from converted funds, not whether he had a duty to the rightful owner of the funds. Great Western Drilling, Ltd. v. Alexander, 305 S.W.3d 688, 2009 Tex. App. LEXIS 7853 (Tex. App. Eastland Oct. 8 2009).

57. In a negligence case arising from a fire at a condominium complex, speculative testimony regarding the adequacy of plumbing work was irrelevant and inadmissible and no showing of expert qualifications was made under Tex. R. Evid. 702; however, the trial court's error in admitting the testimony was harmless under Tex. R. App. P. 44. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 2007 Tex. App. LEXIS 5977 (Tex. App. Fort Worth July 26 2007).

Civil Procedure : Appeals : Standards of Review : Reversible Errors

58. In a case involving a dispute over the termination of an oil and gas lease, expert testimony regarding damages was not excluded under Tex. R. Civ. P. 193.6 because a good faith reason was given for a delay; the expert's calculations could not have been provided any earlier because those numbers derived from deposition testimony, and the calculations were merely updates of previously disclosed information. Even if there was an error in admitting the expert's testimony, it was not reversible error because there was other evidence to support the damage award. BP Am. Prod. Co. v. Marshall, 288 S.W.3d 430, 2008 Tex. App. LEXIS 9778, 172 Oil & Gas Rep. 376 (Tex. App. San Antonio 2008).

Civil Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview

59. When a challenge to an expert's testimony is restricted to the face of the record, and is not a challenge that requires a court to evaluate the underlying methodology, technique, or foundational data used by the expert, a legal sufficiency challenge can be lodged in the absence of any objection to the evidence. Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 2004 Tex. LEXIS 441, 47 Tex. Sup. Ct. J. 559 (Tex. 2004).

Civil Procedure : Eminent Domain Proceedings : Experts

60. Trial court did not err in a condemnation case in which the jury found the fair value of the property owner's land to be $250,000 in admitting the testimony of the State's expert appraiser where there were no gaps in the testimony of the appraiser or misapplication of legal rules such that her testimony could have been found to have been unreliable because the appraiser had formed her opinion by comparing the difference between the results of two methods of valuing the property: the cost approach, giving a value of $217,000, and the improved sales comparison approach that gave a value of $205,000. The property owner had not shown that the appraiser could not make valid comparisons for size, and the evidence permitted the conclusion that the owner's entire property was devoted to single-family use and that the applicable zoning ordinance would have allowed the existing use to continue. Williams v. State, 406 S.W.3d 273, 2013 Tex. App. LEXIS 7405 (Tex. App. San Antonio June 19 2013).

61. Engineer's testimony about restrictions on construction across a pipeline easement and difficulties that the restrictions could cause in developing the remainder property was admissible because it was not based on speculative or hypothetical uses and did not focus on impaired vehicle access. Moreover, the owners' damages theory and the engineer's testimony did not focus on impaired vehicle access to the property, which would not have been compensable in a condemnation proceeding. Crosstex Dc Gathering Co., J.V. v. Button, 2013 Tex. App. LEXIS 683 (Tex. App. Fort Worth Jan. 24 2013).

62. In an eminent domain proceeding in which a land planner designated as an expert by the owner testified that the owner could not achieve full compliance with the town's zoning ordinances after the State's condemnation and that the owner would be required to demolish all of its buildings, the trial court abused its discretion by admitting the land planner's opinion about the allegedly required demolition of the owner's buildings because his opinion was impermissibly speculative and conjectural. Reversal was required because there was a reasonable probability that the inadmissible evidence that characterized the demolition of the owner's buildings as a certainty, rather than a market-affecting factor, improperly influenced the jury's verdict on remainder damages. State v. Little Elm Plaza, Ltd., 2012 Tex. App. LEXIS 8880 (Tex. App. Fort Worth Oct. 25 2012).

63. Trial court did not abuse its discretion in an inverse condemnation proceeding by allowing testimony from a billboard owner's expert regarding the income method of valuation for the billboards at issue because the income method was not an impermissible method of valuation, and the expert's income method was not improperly based on advertising revenue. Because the trial court did not abuse its discretion by allowing the expert's testimony regarding the income method, the State's argument that the evidence was legally insufficient without both the income method and the sales comparison method necessarily failed. State v. Clear Channel Outdoor, 462 S.W.3d

68, 2012 Tex. App. LEXIS 8111, 2012 WL 4465338 (Tex. App. Houston 1st Dist. Sept. 27 2012).

64. Expert's testimony in a condemnation case, opining that the damage to the remainder property was the loss of the entire income-producing value of two buildings, was reliable because it was based on a proper measure of damages in stating that a buyer would place no value on two buildings because their close proximity to the highway after the taking meant that they would be nonconforming under a city zoning ordinance if annexed. State v. Ledrec, Inc., 366 S.W.3d 305, 2012 Tex. App. LEXIS 2895 (Tex. App. Fort Worth Apr. 12 2012).

65. In a condemnation case, the landowner's appraisal expert provided competent evidence of the diminution in value to the remainder by considering comparable sales from two counties. He was not required to determine whether the parties to comparable sales subjectively believed that a pipeline easement affected the sales price, and any gap between the comparable sales data and his conclusions went to the weight of his testimony rather than its reliability. Lasalle Pipeline, Lp v. Donnell Lands, L.P., 336 S.W.3d 306, 2010 Tex. App. LEXIS 9892 (Tex. App. San Antonio 2010).

66. In an action arising from the State's partial taking of owners' property for use in a highway project, the trial court did not abuse its discretion in denying the State's pretrial motion to exclude the expert testimony of the owners' designated real estate appraiser where his testimony was relevant because the market value of the whole property prior to the taking was a fact of consequence to the determination of the disputed element of the measure of damages. Moreover, the owners met their burden to show that the appraiser's expert testimony was reliable because he provided data of comparable sales with a variety of possible uses for the property and also testified that he performed a feasibility study on the possible uses for the property considering such factors as the impervious cover limitations, and although the State's experts provided conflicting testimony of the property's highest and best use as an office building and the property's market value based on four different land sales with a different unit of comparison, it was for the jury to resolve the conflicting evidence of the experts to determine the market value of the whole property prior to the taking. State v. Petropoulos, 346 S.W.3d 619, 2009 Tex. App. LEXIS 3021 (Tex. App. Austin Apr. 28 2009).

Commercial Law (UCC) : Sales (Article 2) : Form, Formation & Readjustment : General Overview

67. In a breach of contract action arising from the sale of large machine tools, the buyer's general manager was properly allowed to testify as an expert witness on damages because he had specialized knowledge that would assist a jury in understanding that issue. Toshiba Mach. Co. v. SPM Flow Control, Inc., 180 S.W.3d 761, 2005 Tex. App. LEXIS 9478 (Tex. App. Fort Worth 2005).

Commercial Law (UCC) : Sales (Article 2) : Remedies : General Overview

68. In a breach of contract action arising from the sale of large machine tools, the buyer's general manager was properly allowed to testify as an expert witness on damages because he had specialized knowledge that would assist a jury in understanding that issue. Toshiba Mach. Co. v. SPM Flow Control, Inc., 180 S.W.3d 761, 2005 Tex. App. LEXIS 9478 (Tex. App. Fort Worth 2005).

Commercial Law (UCC) : Sales (Article 2) : Warranties : Express Warranties

69. In a trial for breach of a warranty on roofing materials, plaintiff's expert was qualified, under Tex. R. Evid. 702, to testify as to the cost of the installation of the foam roof, even if he had never prepared specifications for a new roof or a re-roof or monitored the installation of a foam roof; those qualifications related to installation, not cost. Carlisle Corp. v. Medical City Dallas, Ltd., 196 S.W.3d 855, 2006 Tex. App. LEXIS 5476 (Tex. App. Dallas 2006).

Communications Law : Telephone Services : Cellular Services

70. In a murder trial, expert testimony was properly admitted regarding the interpretation of mobile phone records, to show that defendant's phone was near the murder scene until the time of the shooting. The possibility that the communications could have originated miles away from the antennas did not necessarily render the testimony unhelpful. Thompson v. State, 425 S.W.3d 480, 2012 Tex. App. LEXIS 1579 (Tex. App. Houston 1st Dist. Mar. 1 2012).

71. Officer was qualified as an expert to interpret mobile phone records, given the relative simplicity of the technique used and the officer's 40 hours of training in that regard. Thompson v. State, 425 S.W.3d 480, 2012 Tex. App. LEXIS 1579 (Tex. App. Houston 1st Dist. Mar. 1 2012).

Communications Law : Telephone Services : Wireless Services

72. Where defendant was charged with murder, the employee of a cellular phone company was permitted to provide her expert testimony as to defendant's cell phone records and how they reflected his movements during the relevant time. Wilson v. State, 195 S.W.3d 193, 2006 Tex. App. LEXIS 815 (Tex. App. San Antonio 2006).

Constitutional Law : Bill of Rights : Fundamental Rights : Eminent Domain & Takings

73. In a condemnation case, expert testimony from a lessor under Tex. R. Evid. 702 was improperly admitted because it violated the value-to-the-taker rule by impermissibly focusing on the benefit in avoiding the cost of removing a gas processing facility under a lease agreement. However, the trial court did not abuse its discretion in excluding a lessee's expert testimony because it did not explain why the existing use of the property was not the highest and best use, did not offer fair market value of the land based on its condition at the time of condemnation, and did not account for all relevant factors affecting valuation. Enbridge Pipelines (e. Tex.) L.P. v. Avinger Timber, Llc, 386 S.W.3d 256, 2012 Tex. LEXIS 745, 55 Tex. Sup. Ct. J. 1387, 178 Oil & Gas Rep. 475 (Tex. 2012).

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Scope of Protection

74. Petitioner state death row inmate argued that a probation officer who had taken courses in sexual deviancy was not qualified to provide expert testimony because she did not have a professional license as a psychologist, psychiatrist, or counselor, and claimed that allowing her to testify violated his rights to the due process of law and to a fair trial; however, court found that the claim that the requirements of education and expertise necessary to qualify as an expert under Tex. R. Evid. 702 were too low to meet the requirements of the due process had not been clearly established in federal law; therefore, because the state court's adjudication of the claim was neither contrary to nor the result of an unreasonable application of clearly established federal law, habeas relief was denied. Wyatt v. Dretke, 2003 U.S. Dist. LEXIS 26997 (E.D. Tex. Dec. 3 2003).

Contracts Law : Breach : Causes of Action : General Overview

75. In a breach of contract case, a court properly admitted plaintiff's expert testimony where the expert testified that when money was missing from a parking garage, if records were not computerized, he looked for revenue trend changes and ticket trend changes, familiarized himself with the facility, and he testified that actually reviewing the tickets would not have aided him in his audit because when someone was stealing, there were no tickets. The expert considered several factors in his audit including frequency of building occupancy, the possibility of an increase in daily parkers versus contract parkers, parking validation, marketing, and higher parking rates; therefore, the testimony was reliable. Republic Parking Sys. of Tex., Inc. v. Medical Towers, Ltd., 2004 Tex. App. LEXIS 9287 (Tex. App. Houston 14th Dist. Oct. 21 2004).

Contracts Law : Breach : Causes of Action : Breach of Warranty

76. Take nothing judgment was properly entered against a contractor because, even if a trial court incorrectly determined that the contractor was unable to assert his breach-of-implied-warranty cause of action, there was no evidence of damages since the contractor had not paid to replace a defective floor and did not show that he would do so in the future; moreover, he was unable to show that the cost of an expert witness was recoverable. Even if the contractor had attached evidence of payment to his motion or supporting brief, he did not present the evidence before judgment was rendered; moreover, he did not request the trial court to reopen the evidence, or grant a new trial based on newly discovered evidence. Hammer v. Wood, 2009 Tex. App. LEXIS 6632, 2009 WL 2589432 (Tex. App. Houston 14th Dist. Aug. 25 2009).

Contracts Law : Remedies : Foreseeable Damages : Lost Profits

77. In a suit for breach of a noncompete agreement, an expert's use of historical sales data before and after the competitor's entry into the market was an acceptable method for calculating lost profits. Heritage Operating, L.P. v. Rhine Bros., Llc, 2012 Tex. App. LEXIS 4939, 2012 WL 2344864 (Tex. App. Fort Worth June 21 2012).

78. In a breach of contract case, a trial court did not err by allowing testimony from experts regarding the lost profits of a dealership that was delayed in opening; the testimony was not unreliable based upon the use of a yardstick method, and, even though issues relating to planning potential, a comparable dealership, or the applicable time period were hotly disputed, the actual damages awarded were within the range of a manufacturer's own estimate of net profits and a dealer's witnesses. Even if there was an error in the admission of expert testimony, it was harmless. Daimlerchrysler Motors Co., Llc v. Manuel, 362 S.W.3d 160, 2012 Tex. App. LEXIS 1489 (Tex. App. Fort Worth Feb. 24 2012).

79. Expert witness who lacked an accounting background was not qualified to testify on lost profits in a suit for breach of a credit card processing contract. Spin Doctor Golf, Inc. v. Paymentech, L.P., 296 S.W.3d 354, 2009 Tex. App. LEXIS 7349 (Tex. App. Dallas Sept. 18 2009).

80. In an action for breach of contract arising from an agreement to finance and develop a casino, Tex. R. Evid. 702 permitted the financial representative for the developer to testify as to damages; the fact that he could not have personal knowledge concerning the admitted, actual revenues of the finance company did not prevent him from using the company's financial data as a basis for determining the developer's lost profits. Am. Heritage, Inc. v. Nev. Gold & Casino, Inc., 259 S.W.3d 816, 2008 Tex. App. LEXIS 942 (Tex. App. Houston 1st Dist. 2008).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale

81. In a criminal trial for unlawful possession with intent to deliver cocaine, a detective properly testified that in his expert opinion an individual possessing 70.6 grams of cocaine intended to sell the cocaine. The testimony was helpful to the jury in determining defendant's intent to deliver the cocaine. Walker v. State, 2004 Tex. App. LEXIS 10414 (Tex. App. Eastland Nov. 18 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview

82. In a trial for manufacture of methamphetamine, counsel was not rendered ineffective by failing to object to an officer's testimony in connection with photographs showing defendant's burned and soiled hands; the officer's experience gave him the capability to testify that manufacturing methamphetamine often caused blisters and discoloration on the manufacturers' hands; it was not necessary to qualify the officer under Tex. R. Evid. 702, and, because the testimony was based on personal observations and was helpful to the jury, it was admissible under Tex. R. Evid. 701. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

83. In a cocaine possession trial, there was no error in admitting an officer's testimony that defendant passenger jointly possessed cocaine or in admitting the officer's testimony explaining how he believed the bag of cocaine became positioned behind the driver's seat. The testimony was rationally based on the circumstances the officer perceived in the course of arresting defendant and investigating the case. Salazar v. State, 2014 Tex. App. LEXIS 3983, 2014 WL 1408121 (Tex. App. Houston 1st Dist. Apr. 10 2014).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

84. In an aggravated assault case, an expert was qualified to testify regarding blood spatter analysis where he had been an officer for 13 years, he participated in 45-50 hours of instruction, and he had applied his knowledge at other crime scenes. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

85. Conviction for aggravated assault under Tex. Penal Code Ann. § 22.02(a)(2) was appropriate where a victim suffered a wound that went all the way through her arm and a stab wound to her neck. A police officer could have been an expert witness with regards to whether a deadly weapon under Tex. Penal Code Ann. § 1.07(a)(17)(B) had been used. Tucker v. State, 274 S.W.3d 688, 2008 Tex. Crim. App. LEXIS 1443 (Tex. Crim. App. 2008).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Kidnapping : General Overview

86. Pursuant to Tex. R. Evid. 702, a police officer's testimony that a 14-year old girl did not fit the profile of a prostitute was admissible in an inmate's trial on charges of kidnapping where (1) the officer had extensive experience in the child exploitation unit; and (2) the inmate's attorney made an issue of whether the girl was a prostitute, thereby entitling the state to ask the officer's opinion on the issue, in light of his training, experience, and knowledge of the girl. Jordan v. Dretke, 2006 U.S. Dist. LEXIS 31950 (N.D. Tex. May 22 2006).

Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : General Overview

87. In a manslaughter case, a court properly admitted an expert's testimony because the expert directed a program training individuals in the effects of alcohol and drugs on driving, he published medical and scientific literature in the area of toxicology, and he did not speculate how the methamphetamine affected defendant, what phase of the drug defendant was in at the time of the accident, or whether defendant fell asleep at the wheel. Haley v. State, 396 S.W.3d 756, 2013 Tex. App. LEXIS 3974, 2013 WL 1286650 (Tex. App. Houston 14th Dist. Mar. 28 2013).

Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : Elements

88. In the homicide trial of a doctor who occluded a patient's breathing tube, a physician who testified that the patient was alive at the time of the occlusion did not base her opinions on conjecture because the expert testified that her opinions were based on information that included the patient's medical records and affidavits from hospital employees, as well as her education, training, and expertise. Grotti v. State, 2006 Tex. App. LEXIS 8153 (Tex. App. Fort Worth Sept. 14 2006).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

89. It would have been proper for defense counsel in a murder trial to object under Tex. R. Evid. 702, 608(a)(1) when an officer opined that defendant was deceptive and lying, but failing to object did not render counsel ineffective because defendant did not show prejudice, given that the case did not hinge on a single witness's credibility. Salinas v. State, 368 S.W.3d 550, 2011 Tex. App. LEXIS 1923 (Tex. App. Houston 14th Dist. Mar. 17 2011).

90. In a murder trial, there was no error under Tex. R. Evid. 702 in admitting the testimony of a forensic anthropologist regarding the science of toolmark analysis; the expert opined that toolmarks on bone fragments found in defendant's yard were consistent with being made by either a hunting knife or a saw, that the bone fragments had characteristics consistent with being human, and that they showed no signs of healing, indicating that the cuts occurred at or near the time of death. Shepherd v. State, 2011 Tex. App. LEXIS 133, 2011 WL 166893 (Tex. App. Houston 14th Dist. Jan. 11 2011).

91. In a murder trial, an expert should not have been allowed to testify hypothetically on the possible impact of methamphetamine on defendant because the unsubstantiated testimony was both unreliable and irrelevant under Tex. R. Evid. 702; the expert possessed no information regarding how much, or precisely what, defendant ingested; defendant's individual characteristics at the time of the incident; defendant's previous drug use and tolerance for methamphetamine; or what defendant may have eaten during the previous 24 hours. Acevedo v. State, 255 S.W.3d 162, 2008 Tex. App. LEXIS 613 (Tex. App. San Antonio 2008).

92. Where defendant was charged with murder, the employee of a cellular phone company was permitted to provide her expert testimony as to defendant's cell phone records and how they reflected his movements during the relevant time. Wilson v. State, 195 S.W.3d 193, 2006 Tex. App. LEXIS 815 (Tex. App. San Antonio 2006).

93. In a trial for a "shaken-baby" murder, any error arising from the admission of an investigator's opinion on guilt was harmless. Although defendant objected to the testimony under Tex. R. Evid. 702 during the prosecution's re-direct, the same question and answer had come in without objection during the defense's prior cross-examination. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : Elements

94. In defendant's capital murder case, the evidence was legally sufficient as to the issue of causation because the record reflected that a microscopic examination was conducted of the baby's skull, the expert's findings helped establish the date of the injury, and defendant did not dispute the method by which the expert conducted the microscopic examination. Villegas v. State, 2008 Tex. App. LEXIS 1899 (Tex. App. Corpus Christi Mar. 13 2008).

Criminal Law & Procedure : Criminal Offenses : Homicide : Voluntary Manslaughter : Elements

95. Trial court did not err by excluding expert testimony on whether defendant was a man of ordinary temper under Tex. Penal Code Ann. § 19.02(d) because it was not relevant, as the issue was not whether defendant was a man of ordinary temper, but rather how the objectively reasonable man would react if placed in defendant's situation. Mcghee v. State, 2010 Tex. App. LEXIS 5561 (Tex. App. Houston 1st Dist. July 15 2010).

96. Trial court did not err by excluding expert testimony on whether defendant snapped before shooting his ex-wife to death because defendant's questions attempted to have the expert testify about defendant's state of mind at the time of the incident. Mcghee v. State, 2010 Tex. App. LEXIS 5561 (Tex. App. Houston 1st Dist. July 15 2010).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly

97. Court did not err by allowing officers to testify regarding gangs where one witness testified about the activities of the Mexican Mafia as well as the organization's constitution and bylaws, and she identified photographs and information received from a confidential informant, both connecting defendant to membership in the Mexican Mafia; the other witness had also received specialized training in gang identification and investigation, specifically including the Mexican Mafia, and had conducted numerous investigations involving gangs; both testified that, in addition to their course work and investigations, their knowledge was gained by discussions with gang officers, interviews of informants and gang members, and monitoring of websites. Hernandez v. State, 2006 Tex. App. LEXIS 722 (Tex. App. Austin Jan. 26 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Child Pornography : General Overview

98. Admission of expert testimony regarding the connection between a photograph of a child and sexual arousal did not affect defendant's substantial rights because there was evidence of images of children on various devices owned by defendant, one of the devices contained a video of defendant with the victim, and the images were purposefully placed on defendant's devices. Hoard v. State, 2013 Tex. App. LEXIS 11760 (Tex. App. Beaumont Sept. 18 2013).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

99. During defendant's trial for the aggravated sexual assault of a child, the trial court did not err in allowing the testimony of a sheriff department's investigator where the testimony did not involve expert testimony, but, rather, concerned only factual matters that she had personally observed because the trial court limited the testimony to what the investigator had seen in her own experience, and the actual question asked of her was simply whether delayed outcry was normal in her experience; because the investigator had several years of experience as a forensic interviewer at a children's advocacy center, she had some basis on which to answer that, in her experience, it was normal for children to delay reporting the crime of sexual assault. Escamilla v. State, 2006 Tex. App. LEXIS 762 (Tex. App. Texarkana Jan. 31 2006).

100. During defendant's trial for the aggravated sexual assault of a child, no witness testified concerning a psychiatrist's theory of Child Abuse Accommodation Syndrome because a registered nurse's testimony did not describe the findings of a psychiatrist or attempt to describe a syndrome, but explained her role as a sexual assault nurse examiner, the physical findings she encountered, and that her training and experience made her aware that some children delay reporting this crime for several reasons. Escamilla v. State, 2006 Tex. App. LEXIS 762 (Tex. App. Texarkana Jan. 31 2006).

101. During defendant's trial for the aggravated sexual assault of a child, a registered nurse's testimony was within the scope of her field of expertise where she was the sexual assault nurse examiner certified by the Texas Office of the Attorney General and had to undergo 96 hours of clinical training to become certified; with her 11 years of experience with child sexual assault victims, the nurse had abundant personal observation and experience of common characteristics of sexually assaulted children, and she did not attempt to describe a medical or psychiatric syndrome, but presented evidence to allow the conclusion that her training and experience provided an explanation for the reasons children delayed reporting sexual assaults. Escamilla v. State, 2006 Tex. App. LEXIS 762 (Tex. App. Texarkana Jan. 31 2006).

102. Where defendant was charged with aggravated sexual assault of a child, the State's expert witnesses were permitted to give their opinion testimony concerning the reluctance of child victims to talk about sexual abuse by a family member. The witnesses had equal or substantially similar education, training, and experience to other experts in the field. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

103. Where defendant was charged with aggravated sexual assault of a child, the State's expert witness was permitted to give a legal definition of penetration. The expert's testimony was consistent with the court's definition of penetration. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

104. Where defendant was charged with indecency with a child and aggravated sexual assault of a child, a counselor with years of training and experience was permitted to testify as an expert on child sexual abuse. The counselor held a Bachelor's Degree in social work with a minor in psychology, and a Master's Degree in counseling. Johnson v. State, 2005 Tex. App. LEXIS 7412 (Tex. App. Tyler Sept. 7 2005).

105. Trial court did not abuse its discretion in permitting a sexual assault nurse examiner to testify about why some sexual assault victims did not remember the details of the assault; defendant's objection as to speculation lacked merit because the nurse's expert opinion was not speculation. Villarreal v. State, 2005 Tex. App. LEXIS 6720 (Tex. App. Fort Worth Aug. 18 2005).

106. In a trial for sexual assault of a child, an expert witness was qualified under Tex. R. Evid. 702 to testify about sex offenders and the effects of sexual abuse on victims because, contrary to defendant's contentions, the expert testified that he had experience in sex offender treatment and in identifying the emotional effects of sexual abuse. The training, experience, research, seminars, materials, periodicals, and treatises about which the expert testified and upon which he based his opinions qualified him under Tex. R. Evid. 702 to testify as an expert witness. Lively v. State, 2005 Tex. App. LEXIS 4703 (Tex. App. Dallas June 17 2005).

107. In a criminal prosecution for aggravated sexual assault of a child, the trial court did not abuse its discretion by admitting the testimony of a doctor who never examined the victim and had no personal knowledge of her. The doctor indicated that withdrawal from family and friends may occur after sexual abuse and that a sexually abused child may experience shame, guilt, and ambivalence toward the perpetrator; her testimony was tied to the facts of the case. Comeaux v. State, 2005 Tex. App. LEXIS 3748 (Tex. App. Houston 14th Dist. May 17 2005).

108. Examining physician in a child sexual assault trial was properly allowed to testify about a colposcope, even though he lacked experience using the device, which magnified the genital area. The trial court limited the testimony to what a colposcope was and what it did, two areas that the doctor had learned about during his training; thus, the court properly tailored the testimony to the actual qualifications. Croft v. State, 148 S.W.3d 533, 2004 Tex. App. LEXIS 8398 (Tex. App. Houston 14th Dist. 2004).

109. Where defendant was charged with aggravated sexual assault of a child after an eight-year-old complainant made an "outcry" during therapy that defendant forced him to engage in oral sex, the trial court did not abuse its discretion in excluding an expert's opinion that therapists could implant memories. Ard v. State, 2004 Tex. App. LEXIS 7339 (Tex. App. Dallas Aug. 16 2004).

110. In a sexual assault case, a court erred by failing to allow defendant's expert to testify where the subject of the expert's opinion was relevant, just as the State's expert was permitted to testify that the lack of genital injuries did not indicate that the complainant had not been sexually assaulted, defendant's expert should have been permitted to testify that no sexual assault occurred. One party could not proffer expert testimony and subsequently argue successfully that the testimony was not relevant when the opposing party sought to offer expert testimony on the same subject which reached a different conclusion; in addition, the error was not harmless. Vela v. State, 159 S.W.3d 172, 2004 Tex. App. LEXIS 7257 (Tex. App. Corpus Christi 2004).

111. Trial court did not err by admitting evidence of a sexual assault diagnosis made by a physician's assistant, who explained that a statement made by defendant's girlfriend was considered, but not relied upon, in making the

diagnosis. Scott v. State, 2004 Tex. App. LEXIS 4949 (Tex. App. Houston 14th Dist. June 3 2004).

112. In a case involving child indecency, a trial court did not err by allowing an expert to testify regarding defendant's future dangerousness, despite the fact that the expert never met defendant because such contact was not required under Tex. R. Evid. 703; moreover, the expert was qualified to give an opinion based on the expert's training, education, and vast experience with sexual offenders. Rodriguez v. State, 2004 Tex. App. LEXIS 3457 (Tex. App. Fort Worth Apr. 15 2004).

113. In a sexual assault case, a court properly allowed an expert to testify regarding sexual abuse where, although the State did not tie the testimony to the facts of the case, the testimony was relevant, it had a relatively close association with the evidence, and it was better for the expert not to tie his or her testimony too tightly to the particular child victim, but instead, to limit the import of such testimony to general characteristics and empirically obtained data, so that the jury could draw its own conclusions. Carey v. State, 2004 Tex. App. LEXIS 3188 (Tex. App. Texarkana Apr. 8, 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

114. Trial court did not abuse its discretion in admitting the testimony of a clinical supervisor at the Dallas Children's Advocacy Center as expert testimony because she was qualified as she had a bachelor's degree in psychology, a master's degree in counseling and development, and had been licensed in Texas as a professional counselor for over seven years, and she was familiar with, and kept current on, the literature and research in the field of child sexual abuse; and her testimony was specialized and scientific and would assist the jury to understand the evidence or to determine the facts at issue as she testified regarding delayed outcry and the wide range of symptoms and behavioral changes in children who had been abused. Cabrera v. State, 2014 Tex. App. LEXIS 7033 (Tex. App. Dallas June 27 2014).

115. Expert testimony of a sexual assault nurse examiner was properly admitted because foundation as to reliability included that the nurse had conducted more than 2,000 forensic examinations on children. Further, defendant's objections were better reserved for cross-examination rather an admissibility challenge. Kaizer v. State, 2013 Tex. App. LEXIS 7271 (Tex. App. Corpus Christi June 13 2013).

116. Trial court did not abuse its discretion by allowing a licensed psychologist to testify because his testimony about his examination and evaluation of the victim was within the scope of his expertise as a psychologist specializing in child sexual abuse. He also testified that his methodology followed principles recognized by his peers in child sexual abuse psychology. Vergara v. State, 2013 Tex. App. LEXIS 1837, 2013 WL 749774 (Tex. App. San Antonio Feb. 27 2013).

117. In a child sexual assault case, a child forensic interviewer was qualified, by virtue of her training and significant experience with child sex abuse cases, to testify regarding "grooming" and "Child Abuse Accommodation Syndrome," even though she was not expert in the field of psychology. Applewhite v. State, 2012 Tex. App. LEXIS 8101, 2012 WL 4447592 (Tex. App. El Paso Sept. 26 2012).

118. Trial court did not err by admitting the testimony of a detective during defendant's trial for aggravated sexual assault of a child because defendant failed to point to any testimony from the detective that constituted an opinion about whether the victim was telling the truth, but rather testified that the grooming process could lead to memory lapses and result in a delayed outcry in many child sexual abuse cases. The detective also opined that the victim's behavior was consistent with that of children who had been groomed and that her lack of recall was typical. Ambriati

v. State, 2012 Tex. App. LEXIS 7594, 2012 WL 3860642 (Tex. App. Beaumont Sept. 5 2012).

119. "Grooming" of children for sexual molestation is a legitimate subject of expert testimony. Morris v. State, 361 S.W.3d 649, 2011 Tex. Crim. App. LEXIS 1664 (Tex. Crim. App. Dec. 7 2011).

120. Law enforcement-official with a significant amount of experience with child sex abuse cases may be qualified to talk about grooming of children for sexual molestation. Morris v. State, 361 S.W.3d 649, 2011 Tex. Crim. App. LEXIS 1664 (Tex. Crim. App. Dec. 7 2011).

121. Expert testimony on grooming of children for sexual molestation is useful to the jury. Morris v. State, 361 S.W.3d 649, 2011 Tex. Crim. App. LEXIS 1664 (Tex. Crim. App. Dec. 7 2011).

122. In a trial for indecency with a child, a ranger was properly permitted to testify that grooming was an attempt by the offender to create a compliant victim, involved an escalation of conduct, could involve spending intimate time alone with the child, was designed to desensitize the child, often began with innocuous touches, and could involve supplying the child with alcohol or pornography, giving gifts, giving back rubs, engaging in horseplay, or talking about the offender's sexual experiences. Morris v. State, 361 S.W.3d 649, 2011 Tex. Crim. App. LEXIS 1664 (Tex. Crim. App. Dec. 7 2011).

123. In a trial for aggravated-sexual assault of a child, it was proper to admit testimony from a forensic interviewer regarding her referral of the case to law enforcement officers. The testimony was not an opinion regarding the truthfulness of the child; the examiner did not say she believed the child, but rather that it was the practice to refer a child's allegation, regardless of her opinion as to veracity. Burke v. State, 371 S.W.3d 252, 2011 Tex. App. LEXIS 8368, 2011 WL 5023008 (Tex. App. Houston 1st Dist. Oct. 20 2011).

124. In a trial for child sexual assault, there was no error under Tex. R. Evid. 401, 702 in admitting testimony from a pediatrician with expertise in child abuse cases, who examined the complainant after she made her outcry, (nine years after the offense occurred) and who was unable to medically confirm or refute the allegations of abuse. Alejo v. State, 2011 Tex. App. LEXIS 6652, 2011 WL 3659309 (Tex. App. Austin Aug. 19 2011).

125. In a criminal prosecution for indecency with a child, a child forensic interviewer's testimony about behavioral characteristics of child sexual abuse victims was permitted under Tex. R. Evid. 702 because it was relevant to assessing the victim's behavior and testimony, and to determining the ultimate issue of whether defendant was guilty of the charged offense. The expert did not offer a direct opinion that the victim was truthful. Dison v. State, 2011 Tex. App. LEXIS 2809, 2011 WL 1435201 (Tex. App. Eastland Apr. 14 2011).

126. In an aggravated sexual assault of a child younger than 14 years old case, where a doctor's testimony and opinions were based on his experience and training as a physician at the child advocacy center, his educational and professional background was relevant to prove his expertise in the evaluation and treatment of child victims and to lay the predicate for his testimony; thus, without a showing of harm, evidence, like the doctor's curriculum vitae, was properly admitted to assist the jury in making its determination as it served a relevant purpose beyond solely bolstering the witness and any extraneous information included on the curriculum vitae had only slight effect. Walker v. State, 2010 Tex. App. LEXIS 8452 (Tex. App. Houston 1st Dist. Oct. 21 2010).

127. In an aggravated sexual assault of a child case, an expert witness never expressed an opinion that he believed the victim had been coached; instead, his testimony imparted scientific, technical, or specialized knowledge that related to his general experience with victims who had been sexually abused. Thus, under Tex. R. Evid. 702, his testimony was admissible as it did not convey whether he had an opinion regarding the victim's

truthfulness. Cook v. State, 2010 Tex. App. LEXIS 8095, 2010 WL 3910585 (Tex. App. Beaumont Oct. 6 2010).

128. In a trial for child sexual assault, no prejudice resulted from any error under Tex. R. Evid. 702 in admitting testimony from an officer that he would not necessarily expect to see physical trauma to the female sexual organ of a child who had been penetrated by an adult male. A sexual assault nurse examiner gave substantially similar testimony in more detailed form without objection. Starnes v. State, 2010 Tex. App. LEXIS 3715 (Tex. App. Dallas May 19 2010).

129. In a case in which defendant was convicted of aggravated sexual assault under Tex. Penal Code Ann. § 22.021 and indecency with a child under Tex. Penal Code Ann. § 21.11, although defendant complained that the trial court erred by allowing a psychologist to express an implied opinion that the victim was truthful in her report of sexual abuse, the psychologist, in the complained-of portion of his testimony, did no more than express his expert opinion concerning the coping means employed by victims of sexual assault. Because the psychologist's testimony, if believed, would assist the jury's evaluation of the testimony of the victim, there was no abuse of discretion by the trial court in admitting the psychologist's statement. Drake v. State, 2010 Tex. App. LEXIS 716, 2010 WL 348365 (Tex. App. Amarillo Jan. 31 2010).

130. In a case involving sexual assault of a child, a trial court did not err by admitting expert testimony; even though there was no explicit ruling made on a doctor's qualifications, an implicit ruling was made since defendant's predicate objection was overruled. The trial court did not err by finding that the doctor was qualified based on her knowledge, training, skill, experience, and education; inter alia, the doctor testified that she had performed about 8,500 sexual abuse examinations. Little v. State, 2009 Tex. App. LEXIS 7091, 2009 WL 2882932 (Tex. App. San Antonio Sept. 9 2009).

131. In defendant's trial for aggravated sexual assault of a child under the age of fourteen in violation of Tex. Penal Code Ann. § 22.021, the trial court did not abuse its discretion in admitting the rebuttal testimony of the State's expert who testified that the complainant's "normal" behavior would not necessarily negate sexual abuse; the expert was qualified to provide testimony under Tex. R. Evid. 702 and 703 based on his educational and professional background and experience, and the expert's academic and professional background focusing on the treatment and observation of child victims of sexual abuse appropriately matched the subject matter of his testimony focusing on the behavioral patterns of child victims of sexual abuse. Briones v. State, 2009 Tex. App. LEXIS 5944, 2009 WL 2356626 (Tex. App. Houston 14th Dist. July 30 2009).

132. In defendant's trial for aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021, the trial court did not abuse its discretion in finding that a pediatrician was qualified to testify as an expert under Tex. R. Evid. 702 on the issue of whether a victim of sexual abuse as a child had a higher chance of becoming a perpetrator of sexual abuse; although the pediatrician admitted that he was not an expert in that particular field of study, he qualified as an expert witness by virtue of his knowledge, experience, training, and education. Clemons v. State, 2009 Tex. App. LEXIS 6003, 2009 WL 2372927 (Tex. App. Eastland July 30 2009).

133. In a case involving aggravated sexual assault of a child, a trial court did not abuse its discretion in allowing a counselor to testify as an expert under Tex. R. Evid. 702 about how offenders groomed children for abuse based on her nine years of experience, specialized training, and treatment of sex offenders; the counselor had a master's degree, as well as state-issued licenses in counseling and treating sex offenders, and she completed a 2,000-hour internship. Even if there was an error, defendant made no effort to show how this affected his substantial rights since other testimony about grooming came into evidence through the victim's therapist. Mitchell v. State, 2008 Tex. App. LEXIS 8594 (Tex. App. Austin Nov. 14 2008).

134. Evidence was sufficient to support an adjudication of delinquency for aggravated sexual assault and indecency with a child under Tex. Penal Code Ann. §§ 22.021, 21.011 because it was up to the jury to determine the credibility of the child and the conflicting experts, defendant, a juvenile, admitted to the conduct in a voluntary and noncustodial statement, and the child made an outcry statement. In re Q.D.M.T., 2008 Tex. App. LEXIS 8634 (Tex. App. Houston 14th Dist. Nov. 13 2008).

135. In a trial for child sexual assault, a State medical expert did not testify that the victim was truthful or that sexual abuse victims, as a class, were truthful. To the contrary, the expert properly testified, under Tex. R. Evid. 401, 702, that, although not definitive, the complainant's physical condition was consistent with the abuse later described. Reyes v. State, 274 S.W.3d 724, 2008 Tex. App. LEXIS 5921 (Tex. App. San Antonio 2008).

136. In a trial for sexual assault of a child and indecency with a child, defendant failed to preserve an argument, as required by Tex. R. App. P. 33, regarding testimony that the Texas Department of Family and Protective Services (DFPS) had "reason to believe" the allegations; the appellate argument under Tex. R. Evid. 702 was not presented in the court below through an objection under Tex. R. Evid. 402. Todd v. State, 242 S.W.3d 126, 2007 Tex. App. LEXIS 9053 (Tex. App. Texarkana 2007).

137. In the punishment phase of a trial for indecency with a child, the trial court did not unduly limit the testimony of defendant's psychological expert; following a hearing under Tex. R. Evid. 705, the trial court admitted all of the testimony that the court understood the witness to have given and defendant did not indicate that he re-urged the matter to the trial court with evidence that would contradict the court's recollection of the witness's testimony. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

138. In defendant's sexual assault of a child case, the court properly admitted expert testimony regarding sadism because the alleged abuse was sadistic in nature, the expert's testimony regarding sadism shed light on such relevant issues as how the abuse might have injured and psychologically affected the victims, how the victims might have been threatened and placed in fear, and whether any behavior the victims engaged in with each other might have been coerced. Hatter v. State, 2006 Tex. App. LEXIS 4516 (Tex. App. Austin May 26 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

139. In a driving while intoxicated case, pursuant to Tex. R. Evid. 702, the trial court did not abuse its discretion by finding that an officer was an expert on the effects of alcohol and tolerance to alcohol because (1) the effects alcohol had on a human body and whether an individual could develop a tolerance to alcohol were not complex subjects; (2) homeostasis could potentially involve complex areas of inquiry, but the officer did little more than define the term; (3) the officer did not render any conclusive opinions but provided only general information; (4) the officer's area of expertise was not central to the resolution of the suit as the focus of the trial was on another officer's observations and defendant's intoxilyzer test results; and (5) the officer did not opine that defendant was intoxicated or express any opinion on the other officer's testimony. Sims v. State, 2010 Tex. App. LEXIS 8464, 2010 WL 4148372 (Tex. App. Eastland Oct. 21 2010).

140. In a trial for driving while intoxicated, evidence of a horizontal gaze nystagmus (HGN) test was properly admitted under Tex. R. Evid. 702, despite expert testimony that the test was performed in a non-standardized manner, because the arresting officer testified that he administered the test properly. The court deferred to the trial court's resolution of the conflict. Plouff v. State, 2005 Tex. App. LEXIS 8546 (Tex. App. Houston 14th Dist. Oct. 18 2005), substituted opinion at, opinion withdrawn by 192 S.W.3d 213, 2006 Tex. App. LEXIS 2546 (Tex. App. Houston 14th Dist. 2006).

141. In a trial for driving while intoxicated, walk-and-turn and one-leg tests were properly admitted, despite testimony that they were improperly performed. Testimony by the arresting officer concerning both tests was lay witness testimony governed by Tex. R. Evid 701 rather than Tex. R. Evid 702. Plouff v. State, 2005 Tex. App. LEXIS 8546 (Tex. App. Houston 14th Dist. Oct. 18 2005), substituted opinion at, opinion withdrawn by 192 S.W.3d 213, 2006 Tex. App. LEXIS 2546 (Tex. App. Houston 14th Dist. 2006).

142. Defendant's conviction for driving while intoxicated (DWI) under Tex. Penal Code Ann. § 49.04(a) was proper because the trial court did not err in admitting a police officer's testimony regarding the results of the horizontal-gaze nystagmus tests (HGN) test where the officer testified that he attended a standardized field sobriety testing class, that he was certified, and that he had conducted such tests. The theory underlying the HGN test and the technique employed in administering it have both been found sufficiently reliable to allow the test to be admissible under Tex. R. Evid. 702, and even though the officer who testified at trial was not the officer that administered the test to defendant, the officer testified about how the HGN test was administered and described the steps the other officer took to administer the tests as a videotape of the incident was shown to the jury. Barrineau v. State, 2005 Tex. App. LEXIS 903 (Tex. App. Fort Worth Feb. 3 2005).

143. Where an officer improperly administered a Horizontal Gaze Nystagmus test in a driving while impaired case, a trial court erred in admitting the test under Tex. R. Evid. 702, but the error was harmless based on other evidence since the other evidence showed that defendant committed several traffic offenses, smelled of alcohol, had bloodshot eyes, had a slow response time, performed poorly on other field sobriety tests, admitted to drinking, and had a high concentration of alcohol in two intoxilyzer samples. McRae v. State, 2004 Tex. App. LEXIS 5933 (Tex. App. Houston 1st Dist. July 1 2004), opinion withdrawn by, substituted opinion at 152 S.W.3d 739, 2004 Tex. App. LEXIS 10805 (Tex. App. Houston 1st Dist. 2004).

144. Where the trial court did not engage in a determination of the vertical gaze nystagmus test's scientific reliability, admission of officer's testimony regarding the VGN test, and regarding defendant's impairment, was an abuse of discretion; because almost 40 percent of the entire trial was devoted to the VGN's unproven results, defendant's conviction for felony driving while intoxicated as an habitual offender had to be reversed because the error was not harmless. Stovall v. State, 140 S.W.3d 712, 2004 Tex. App. LEXIS 4026 (Tex. App. Tyler 2004).

145. In an intoxicated assault case, Tex. Penal Code Ann. § 49.07(a)(1), the State's witness's testimony was objectionable because he was not shown to be qualified as an expert under Tex. R. Evid. 702 on retrograde extrapolation for purposes of blood alcohol tests, nor was his testimony shown to be reliable and, thus, pursuant to Tex. R. Evid. 704, the witness's testimony on whether defendant was intoxicated beyond a reasonable doubt, an ultimate issue in the case, was also objectionable; therefore, counsel's representation fell below an objective standard of reasonableness as he failed to object to the witness testimony. However, counsel's failure to object to the admission of the witness's testimony did not prejudice defendant because there was substantial other evidence of defendant's intoxication at the time of the accident, including testimony that defendant smelled of alcohol and appeared intoxicated, that the inside of defendant's vehicle smelled of the metabolized odor of alcohol, and that defendant had been drinking that day. Blumenstetter v. State, 135 S.W.3d 234, 2004 Tex. App. LEXIS 3074 (Tex. App. Texarkana 2004).

146. In a prosecution for DWI, the trial court was not required to suppress evidence of defendant's horizontal gaze nystagmus (HGN) tests. The underlying scientific theory and the technique applying the theory of the HGN testing were both sufficiently reliable to meet the requirements of Tex. R. Evid. 702. Oropeza v. State, 2004 Tex. App. LEXIS 2588 (Tex. App. Dallas Mar. 24 2004).

147. Inasmuch as the scientific reliability of the horizontal gaze nystagmus test has already been established, evidence of its reliability is not required before results may be admitted. Oropeza v. State, 2004 Tex. App. LEXIS

2588 (Tex. App. Dallas Mar. 24 2004).

148. In a driving while intoxicated prosecution under Tex. Penal Code Ann. § 49.04(b), where defendant sought to admit an expert witness to testify as to whether the factors of intoxication were identifiable from the videotape but, pursuant to Tex. R. Evid. 702, the trial court properly excluded the expert witness's testimony because its substance was not outside the knowledge and experience of the average juror, and the expert's testimony did not meet the Daubert standard for expert testimony as (1) the expert's testimony did not establish that a rate of error could be assigned where a determination of intoxication was made from viewing a videotape and no field sobriety tests were conducted; (2) the expert could not cite any scientific theory supporting a conclusion that intoxication could be determined solely from viewing a videotape nor could he refer the court to any literature supporting or rejecting that conclusion; and (3) the expert presented no publications or peer-reviewed data relating to a determination of intoxication without field sobriety test data nor did he establish that his method was generally accepted in the relevant community. Platten v. State, 2004 Tex. App. LEXIS 588 (Tex. App. Tyler Jan. 21, 2004).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

149. Defendant's motion to suppress his breath test results was properly denied; even if the State's expert had insufficient information at trial on which to base an expert opinion regarding defendant's likely blood alcohol level at the time he was last seen driving, that was no basis for excluding the breath test results. Kercho v. State, 2007 Tex. App. LEXIS 4369 (Tex. App. Houston 14th Dist. May 31 2007).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

150. Sufficient evidence demonstrated that defendant was intoxicated because an officer observed his erratic driving and pulled him over; initially, defendant refused to stop and then tried to flee; and defendant was agitated, had bloodshot eyes, and had a strong odor of alcohol on his breath; the reviewing court noted that even if the deputy was not qualified to testify as an expert, his statements were admissible as lay witness testimony. Jaritas v. State, 2006 Tex. App. LEXIS 6864 (Tex. App. Houston 14th Dist. Aug. 3 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

151. In a driving while intoxicated case, police officer testimony pertaining to the administration of the one-leg-stand and walk-and-turn tests was properly admitted as lay testimony because the officer did not use words that gave the testimony an aura of scientific validity that would subject it to the Kelly requirements; instead, the testimony consisted of the officer demonstrating the test for jurors and relaying an assessment of defendant's mental faculties and physical coordination. Gutierrez v. State, 2014 Tex. App. LEXIS 7087, 2014 WL 2993787 (Tex. App. El Paso June 30 2014).

152. In a driving while intoxicated trial, no prejudice was shown from counsel's failure to request a hearing under Tex. R. Evid. 702 before an officer testified about the administration of a horizontal gaze nystagmus (HGN) test because the testimony was limited to the implication of the HGN test results to the presence of alcohol or other substances in defendant's system, and there was overwhelming evidence that defendant had alcohol or other substances in his system. Lopez v. State, 2013 Tex. App. LEXIS 2064, 2013 WL 765711 (Tex. App. Waco Feb. 28 2013).

153. To the extent there was any error in the trial court's admission of retrograde extrapolation testimony as proof of defendant's blood-alcohol level, the error was harmless given other evidence of his intoxication, including his high test results, his failure of field sobriety tests, and a videotape of his traffic stop. Young v. State, 2012 Tex. App. LEXIS 6053, 2012 WL 3043000 (Tex. App. Houston 1st Dist. July 26 2012).

154. In a trial for driving while intoxicated, it was permissible under Tex. R. Evid. 702 to allow a chemist to testify regarding the application of retrograde extrapolation to a hypothetical situation. All facts in the hypothetical were tied to characteristics of defendant, and any assumptions in the hypothetical as to whether all alcohol had been absorbed were appropriate, as the State's theory was that defendant was in the elimination phase. Garner v. State, 2011 Tex. App. LEXIS 5991, 2011 WL 3278533 (Tex. App. Dallas Aug. 2 2011).

155. Merely referring to Tex. R. Evid. 702 was insufficient to give the trial court notice of an objection to the reliability of retrograde extrapolation evidence. Garner v. State, 2011 Tex. App. LEXIS 5991, 2011 WL 3278533 (Tex. App. Dallas Aug. 2 2011).

156. State satisfied the Kelly reliability test, and therefore the trial court did not abuse its discretion by admitting the breath test results because the record showed that the officer was certified by the Texas Department of Public Safety and he testified that he complied with the required 15 minute observation period when administering the test. The officer was not required to demonstrate any personal familiarity with the underlying science and technology. Bolen v. State, 321 S.W.3d 819, 2010 Tex. App. LEXIS 6924 (Tex. App. Amarillo Aug. 24 2010).

157. During defendant's trial for driving while intoxicated (DWI) in violation of Tex. Penal Code Ann. § 49.04, the testimony of an officer with the police department's DWI enforcement unit might have been improper under Tex. R. Evid. 701, 702 because, by repeatedly testifying that the walk-and-turn and one-leg stand sobriety tests provided "validated" or "scientifically validated" clues of impairment, the officer gave those tests an imprimatur of scientific accuracy that they had not been shown to possess and that, in any event, he was not shown qualified to confer. However, reversible error was not presented because the issue was not preserved for appeal, and because defendant's substantial rights were not affected, as there was substantial evidence of defendant's intoxication, including his admission that he had consumed four shots of tequila and the testimony of four witnesses describing his reckless driving, odor of alcoholic beverage, bloodshot eyes, slurred speech, and lack of balance. McIntosh v. State, 2010 Tex. App. LEXIS 849 (Tex. App. Austin Feb. 4 2010).

158. In defendant's trial for driving while intoxicated in violation of Tex. Penal Code Ann. § 49.04, the trial court erred in allowing evidence of retrograde extrapolation before the jury because the testimony of the State's expert was unreliable, irrelevant, and prejudicial under Tex. R. Evid. 702 and 403; the error, however, did not affect defendant's substantial rights for purposes of Tex. R. App. P. 44.2(b) because the State did not emphasize the witness's status as an expert nor subscribe special credibility to his testimony and there was other persuasive evidence supporting the verdict. Burns v. State, 298 S.W.3d 697, 2009 Tex. App. LEXIS 6018 (Tex. App. San Antonio Aug. 5 2009).

159. Motion to suppress evidence was properly denied in a driving while intoxicated case because a failure to videotape a horizontal gaze nystagmus test did not bar the admission of such evidence under Tex. R. Evid. 702. An agent testified that he was unable to tape the test since his patrol car was not equipped to do so, and the jail's camera was not functioning. Hays v. State, 2009 Tex. App. LEXIS 4801, 2009 WL 1794784 (Tex. App. Beaumont June 24 2009).

160. In a trial for driving while intoxicated (DWI) under Tex. Penal Code Ann. § 49.04(a), there was no error under Tex. R. Evid. 702 arising from the fact that a walk-and-turn test was administered by a deputy sheriff who was not certified to administer the test because the deputy testified to being very familiar with how to administer the standardized test through extensive training and years of experience. Kirby v. State, 2008 Tex. App. LEXIS 5776 (Tex. App. Houston 1st Dist. July 31 2008).

161. Retrograde extrapolation evidence was properly admitted as reliable scientific evidence in a felony murder case based on the underlying felony of driving while intoxicated with a child passenger; the expert clearly explained

how he converted the serum-blood result to a whole-blood result, consistently testified without contradicting himself, and testified as to his years of experience with retrograde extrapolation and the underlying theory of the science and its methodologies. Bigon v. State, 252 S.W.3d 360, 2008 Tex. Crim. App. LEXIS 1 (Tex. Crim. App. 2008).

162. In a driving while intoxicated trial, defendant failed to preserve error under Tex. R. Evid. 702 as to testimony relating to the horizontal gaze nystagmus and field sobriety tests because there was no objection raised at trial to the complained of testimony, as required by Tex. R. App. P. 33; a motion in limine did not preserve any error. Ramirez v. State, 2007 Tex. App. LEXIS 8563 (Tex. App. San Antonio July 11 2007).

163. In an intoxication manslaughter case, testimony regarding blood alcohol testing was sufficiently reliable; the imprecision of the test did not affect the outcome because defendant's blood alcohol level was significantly above the legal limit, and a substantial amount of data supported a retrograde extrapolation estimate. Morris v. State, 214 S.W.3d 159, 2007 Tex. App. LEXIS 278 (Tex. App. Beaumont 2007).

164. Court affirmed court of appeals judgment upholding defendant's conviction of driving while intoxicated; as long as the breath test operator knew the protocol involved in administering the test and could testify that he followed it on the occasion in question, he did not have to also demonstrate any personal familiarity with the underlying science. Reynolds v. State, 204 S.W.3d 386, 2006 Tex. Crim. App. LEXIS 2038 (Tex. Crim. App. 2006).

165. In a felony murder trial arising from a fatal automobile accident, a chemist was properly allowed to testify concerning defendant's blood-alcohol concentration because the chemist knew the results of two tests taken a reasonable time after the accident and knew several of defendant's relevant characteristics. Bigon v. State, 2006 Tex. App. LEXIS 8756 (Tex. App. Austin Oct. 4 2006).

166. In defendant's driving while intoxicated trial, the trial court properly admitted evidence of a horizontal gaze nystagmus test for purposes of Tex. R. Evid. 702; the officer testified that the prolonged test administered when defendant refused to follow instructions would not have caused fatigue nystagmus. Fernandez v. State, 2006 Tex. App. LEXIS 8248 (Tex. App. Houston 1st Dist. Sept. 21 2006).

167. Appellant's issue was overruled and his driving while intoxicated conviction and sentence pursuant to Tex. Penal Code Ann. § 49.04 were affirmed because an officer had sufficient training and experience to be qualified as an expert under Tex. R. Evid. 702 to testify regarding the administration of the horizontal gaze nystagmus test. Price v. State, 2006 Tex. App. LEXIS 5349 (Tex. App. Austin June 23 2006).

168. Defendant in a driving while intoxicated case could not complain on appeal about the absence of sufficient evidence concerning the qualifications of an officer as an expert on the horizontal gaze nystagmus test because she waived the issue at a suppression hearing when the trial court, upon the request of the State, took "judicial notice" of the officer's qualifications as an expert witness from a previous suppression hearing. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

169. Trial court did not abuse its discretion in finding two officers qualified as experts to testify as to the administration and technique of the horizontal gaze nystagmus (HGN) test, even though the record did not make clear that the officers had received practitioner's certificates, because an expert witness did not have to be certified by the State of Texas before his testimony on the subject of the HGN test was admissible. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

170. In a trial for driving while intoxicated, an officer was properly allowed to testify as to the administration of a one-leg stand test because the evidence related to nonscientific evidence and was admissible as lay opinion under

Tex. R. Evid. 701; the testimony was not subject to the criteria of Tex. R. Evid. 702. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

171. In a driving while intoxicated case, an officer's testimony that he was certified to perform field sobriety testing, coupled with his testimony that defendant did not have the normal use of his physical and mental faculties, was permissible under Tex. R. Evid. 702. Cates v. State, 2006 Tex. App. LEXIS 4238 (Tex. App. Dallas May 17 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

172. Trial court did not abuse its discretion by excluding the testimony of a former military police officer because it was irrelevant and would not have assisted the jury in deciding the case. Allowing the testimony would have suggested to the jury the existence of a legal duty that was not recognized in Texas, i.e., asking a driving while intoxicated suspect if he had physical injuries before administering the field sobriety tests. Oliva v. State, 2014 Tex. App. LEXIS 3523, 2014 WL 1319308 (Tex. App. San Antonio Apr. 2 2014).

173. Police officer who stopped defendant for driving while intoxicated, in violation of Tex. Penal Code Ann. § 49.04, was properly qualified to testify as an expert pursuant to Tex. R. Evid. 702 on the administration of the horizonal gaze nystagmus test based on his training and experience, despite the lapse of his National Highway Traffic Safety Administration certification under 37 Tex. Admin. Code § 221.9. Liles v. State, 2009 Tex. App. LEXIS 7744, 2009 WL 3152174 (Tex. App. Houston 1st Dist. Oct. 1 2009).

174. In a driving while intoxicated case, the court did not err by allowing the officer to testify that defendant failed the field sobriety tests because the officer's use of the word "failed" did not give his testimony an "aura of scientific reliability" or cloak it with unearned credibility; the majority of the officer's testimony consisted of a straightforward narrative of each field sobriety test, followed by a particular description of how defendant performed each test. The officer's observations were based on common knowledge and observations and did not, under the circumstances convert his lay witness testimony into expert testimony. Meier v. State, 2009 Tex. App. LEXIS 2051, 2009 WL 765490 (Tex. App. Dallas Mar. 25 2009).

175. Court properly admitted an officer's testimony regarding horizontal gaze nystagmus because, although holding the stimulus for less time than required, the officer testified that he stopped at the thirty-five degree mark because he saw the onset of nystagmus; additionally, defendant pointed to no authority and nothing in the record suggesting that doing the tests in a "backwards" way would invalidate the results. Soto v. State, 2009 Tex. App. LEXIS 1904 (Tex. App. Austin Mar. 19 2009).

176. In a driving while intoxicated case, defendant failed to preserve error relating to the testimony of a technical supervisor about an intoxliyzer machine because, despite originally objecting, defense counsel did not object to answers given during cross-examination or to testimony that the supervisor did not doubt the accuracy and validity of the test; nothing in the record suggested that defendant invoked the exception to the general rule regarding preservation when defense counsel also treated the witness as an expert. The appellate court was unable to simply affirm the general verdict based on the alternate theory of proof of intoxication. Taylor v. State, 264 S.W.3d 914, 2008 Tex. App. LEXIS 6255 (Tex. App. Fort Worth 2008).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements

177. Even if an officer was qualified as an expert in field sobriety testing, such expertise did not prevent him from testifying to his own "lay" observations of defendant's demeanor. Mccormick v. State, 2014 Tex. App. LEXIS 2654, 2014 WL 1022450 (Tex. App. Dallas Mar. 6 2014).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Speeding : Elements

178. Officer's testimony was a sufficient predicate to support the admission of radar evidence in defendant's driving while intoxicated case and to establish the radar unit validly applied the underlying scientific principles of radar and the officer's technique was properly applied on the date in question, such that the trial court did not abuse its discretion in admitting the officer's testimony; although defendant complained of the State's failure to introduce evidence that the officer's training, experience, and duties qualified him to decide whether defendant was speeding, an officer's testimony that he had been trained to operate a radar set and test it for accuracy, as in this case, was a sufficient predicate to support admission of radar evidence and it was not necessary to call an expert witness to establish the accuracy of the radar. Maki v. State, 2008 Tex. App. LEXIS 5145 (Tex. App. Dallas July 10 2008).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Vehicular Homicide : General Overview

179. In defendant's intoxication manslaughter case, the trial court did not err by allowing the State's drug recognition expert to testify, over objection, regarding defendant's intoxication even though the expert had performed none of the tests required in order to form his expert opinion because he was testifying based on the documents in the file including the blood test, as well as his knowledge of how cocaine affected the human body; the witness told the court that the knowledge and experience he had gained in face-to-face interviews could be applied to subjects he had not observed firsthand. Bumgarner v. State, 2006 Tex. App. LEXIS 6066 (Tex. App. Tyler July 12 2006).

Criminal Law & Procedure : Criminal Offenses : Weapons : Definitions

180. In a case involving unlawful possession of a firearm by a felon, expert testimony was not required on the issue of what constituted a "firearm." This was a subject well within the knowledge and experience of ordinary persons; there was no "specialized knowledge" needed to assist the trier of fact. Jackson v. State, 2009 Tex. App. LEXIS 7251, 2009 WL 3365880 (Tex. App. Houston 14th Dist. Sept. 10 2009).

181. Conviction for aggravated assault under Tex. Penal Code Ann. § 22.02(a)(2) was appropriate where a victim suffered a wound that went all the way through her arm and a stab wound to her neck. A police officer could have been an expert witness with regards to whether a deadly weapon under Tex. Penal Code Ann. § 1.07(a)(17)(B) had been used. Tucker v. State, 274 S.W.3d 688, 2008 Tex. Crim. App. LEXIS 1443 (Tex. Crim. App. 2008).

Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : Appeals

182. Evidence was sufficient to support an adjudication of delinquency for aggravated sexual assault and indecency with a child under Tex. Penal Code Ann. §§ 22.021, 21.011 because it was up to the jury to determine the credibility of the child and the conflicting experts, defendant, a juvenile, admitted to the conduct in a voluntary and noncustodial statement, and the child made an outcry statement. In re Q.D.M.T., 2008 Tex. App. LEXIS 8634 (Tex. App. Houston 14th Dist. Nov. 13 2008).

Criminal Law & Procedure : Search & Seizure : Warrantless Searches : Dog Sniff Searches

183. Trial court did not abuse its discretion by excluding the deputy's testimony concerning the dog-scent lineup identification evidence under Tex. R. Evid. 702 because, even if the court was to presume that the field was a legitimate area of expertise, the State failed to carry its burden in establishing the reliability and relevancy of the deputy's testimony; the State offered only the deputy's testimony, and although the deputy claimed that his dogs were reliable and accurate in identifying scents, he failed to produce or cite any evidence supporting his claims. The deputy had no records of success rates to verify the reliability of his testimony, nor did he have records of his procedures or order of the dogs in the lineup at issue; the record also showed that the deputy testified that he used multiple dogs and ran multiple tests, which was contrary to expert recommendations and accepted methods. State

v. Smith, 335 S.W.3d 706, 2011 Tex. App. LEXIS 934 (Tex. App. Houston 14th Dist. Feb. 10 2011).

184. Trial court did not err by admitting evidence of a deputy's canine scent lineup tests because defendant gave the court no reason to reach a different result in the instant case than in a previous case where the deputy's tests had been held to be reliable and admissible. Pate v. State, 2010 Tex. App. LEXIS 6980, 2010 WL 3341853 (Tex. App. Corpus Christi Aug. 25 2010).

Criminal Law & Procedure : Interrogation : Voluntariness

185. Expert testimony regarding the voluntariness of a confession was properly excluded where the expert had diagnosed defendant with a bipolar disorder that affected defendant's ability to reason and think clearly, but the expert (1) would not give an opinion as to whether the disorder affected voluntariness; (2) would not give an opinion as to whether defendant understood her statutory warnings; (3) would only state that anybody coming before a court of law would say whatever they thought the court would want to hear; and (4) could not refer to any documented studies in the field. Beller v. State, 192 S.W.3d 1, 2004 Tex. App. LEXIS 8343 (Tex. App. Waco 2004), opinion withdrawn by 2004 Tex. App. LEXIS 10354 (Tex. App. Waco Nov. 17, 2004), reinstated by 191 S.W.3d 718, 2005 Tex. Crim. App. LEXIS 603 (Tex. Crim. App. 2005).

186. Rebuttal testimony by a psychological expert was properly admitted, with regard to defendant's intellectual level and the voluntariness of his confession, where the expert relied on intelligence test scores, school records, a mental status examination, and an interview with defendant. Sanchez v. State, 2004 Tex. App. LEXIS 7073 (Tex. App. Fort Worth Aug. 5 2004).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Expert Testimony

187. In a case involving indecency with a child and sexual assault, defendant's argument on appeal that the State did not disclose the name of an expert witness was rejected because a trial court did not order the State to disclose such information. Flores v. State, 2009 Tex. App. LEXIS 6808, 2009 WL 2914982 (Tex. App. Corpus Christi Aug. 27 2009).

Criminal Law & Procedure : Discovery & Inspection : Discovery by Defendant : Expert Testimony : Indigents

188. Trial court did not abuse its discretion when it denied the motion for the appointment of a mental health expert because defendant did not attach any affidavits or provide any factual evidence to show how his request for a psychiatrist or a mental health expert aided his defense. Sennett v. State, 406 S.W.3d 661, 2013 Tex. App. LEXIS 5148 (Tex. App. Eastland Apr. 25 2013).

Criminal Law & Procedure : Discovery & Inspection : Witness Lists : General Overview

189. In defendant's drug case, the court properly allowed a State witness to testify where, although she was not designated as an expert, the police report made available to defendant indicated that she was the chemist who performed the tests and analyses of cocaine; thus, although the State did not produce a piece of paper with the witness's name followed by "expert," neither was her identity and function concealed. Shepard v. State, 2006 Tex. App. LEXIS 2793 (Tex. App. Austin Apr. 6 2006).

190. In defendant's theft case, a court properly allowed the testimony of a fraud examiner who had not been disclosed to appellant prior to trial because the witness testified to the summaries of information that the trial court had admitted, the summaries were of bank and credit card records admitted into evidence, the witness did not offer

opinion testimony on the source of the money or the responsible party, and therefore, the witness testified as a lay witness and his testimony did not exceed the limits placed on the testimony of lay witnesses. Reuter v. State, 2006 Tex. App. LEXIS 1314 (Tex. App. Houston 1st Dist. Feb. 16 2006).

Criminal Law & Procedure : Preliminary Proceedings : Withdrawal of Charges : Expungement of Records

191. In a case seeking expunction of arrest records and deoxyribonucleic acid testing, an accused did not preserve a complaint for review relating to a trial court's denial of a request for the appointment of an expert because the accused failed to provide any argument, citations to the record, or legal analysis supporting his complaint. Ex parte Brewer, 2009 Tex. App. LEXIS 4809, 2009 WL 1801037 (Tex. App. Dallas June 25 2009).

Criminal Law & Procedure : Eyewitness Identification : General Overview

192. Finding that expert testimony regarding "weapon focus effect" in an aggravated robbery case was not relevant was inappropriate given the content of the expert testimony, the context in which it was offered, and, most pertinently, the paucity of other evidence to establish defendant's identity as the assailant. Blasdell v. State, 384 S.W.3d 824, 2012 Tex. Crim. App. LEXIS 1604 (Tex. Crim. App. 2012).

193. There was no abuse of discretion under Tex. R. Evid. 702 in refusing to allow an expert to to testify as to eyewitness identification because the evidence showed that the expert's background may not have been sufficiently tailored to the area of eyewitness identification; eyewitness identification was a small part of the expert's wide-ranging practice: the expert had not performed any research or published on the topic in a peer-reviewed publication, had read only approximately .0025 percent of all published articles on eyewitness identification, and in a 16 year career had received only 10 days of seminar education on the topic. Garcia v. State, 2007 Tex. App. LEXIS 10059 (Tex. App. Houston 14th Dist. Dec. 6 2007).

194. Under Tex. R. Evid. 702, the court properly admitted expert testimony in a burglary trial that described defendant's identification by trained police dogs based on his scent; the foundational requirements established in the record complied with the Nenno test. Robinson v. State, 2006 Tex. App. LEXIS 10220 (Tex. App. Beaumont Nov. 29 2006).

195. In a criminal trial for murder, the trial court did not err by excluding expert testimony of his eyewitness and cross-racial identification on the ground that he did not adequately establish his qualifications as an expert in that field as required by Tex. R. Evid. 702. Silva v. State, 2006 Tex. App. LEXIS 9599 (Tex. App. Houston 14th Dist. Oct. 24 2006).

Criminal Law & Procedure : Eyewitness Identification : Fair Identification Requirement

196. Defense counsel's failure to prepare an expert to testify about the unreliability of cross-racial eyewitness identification, which was admissible under Tex. R. Evid. 702, prevented a federal habeas corpus petitioner convicted of robbery from presenting testimony that would have called into question the only direct evidence against him; thus, petitioner demonstrated a reasonable probability that the result of his trial would have been different if counsel had performed in an objectively reasonable manner, and he was entitled to federal habeas relief under 28 U.S.C.S. § 2254. Sturgeon v. Quarterman, 615 F. Supp. 2d 546, 2009 U.S. Dist. LEXIS 40382 (S.D. Tex. May 12 2009).

Criminal Law & Procedure : Pretrial Motions & Procedures : Competency to Stand Trial

197. In a competency trial, opinions from medical experts were admissible under Tex. R. Evid. 702-705 regarding the specific facts and factors set out in Tex. Code Crim. Proc. Ann. art. 46B.024, but the legal definition and standard by which competency was measured was a question of law, not defined by medical experts. Morris v. State, 301 S.W.3d 281, 2009 Tex. Crim. App. LEXIS 1615 (Tex. Crim. App. 2009).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

198. When, on the State's appeal of a trial court's order granting defendant's motion to suppress, defendant raised, for the first time, as an alternate basis for affirming the trial court's ruling, a claim that breath test results were inadmissible under Tex. R. Evid. 702, defendant's claim was not "law applicable to the case" available to justify the trial court's erroneous ruling because, even though defendant was the appellee, the State had no notice of a need to establish the results' admissibility. State v. Esparza, 413 S.W.3d 81, 2013 Tex. Crim. App. LEXIS 1599 (Tex. Crim. App. Oct. 30 2013).

199. In a driving while intoxicated case, because Tex. R. Evid. 702 did not apply to suppression hearings, a trial judge, in ruling on the admissibility of Light Detection and Ranging technology, was not required to hold a Rule 702 Kelly gatekeeping hearing to determine the reliability of that technology. Hall v. State, 297 S.W.3d 294, 2009 Tex. Crim. App. LEXIS 1205 (Tex. Crim. App. 2009).

200. Motion to suppress evidence was properly denied in a driving while intoxicated case because a failure to videotape a horizontal gaze nystagmus test did not bar the admission of such evidence under Tex. R. Evid. 702. An agent testified that he was unable to tape the test since his patrol car was not equipped to do so, and the jail's camera was not functioning. Hays v. State, 2009 Tex. App. LEXIS 4801, 2009 WL 1794784 (Tex. App. Beaumont June 24 2009).

201. In a prosecution for DWI, the trial court was not required to suppress evidence of defendant's horizontal gaze nystagmus (HGN) tests. The underlying scientific theory and the technique applying the theory of the HGN testing were both sufficiently reliable to meet the requirements of Tex. R. Evid. 702. Oropeza v. State, 2004 Tex. App. LEXIS 2588 (Tex. App. Dallas Mar. 24 2004).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

202. In a case in which a jury had convicted a habeas corpus applicant of possession of a controlled substance, methamphetamine, in the amount of 200 grams or more, but less than 400 grams, applicant demonstrated that trial counsel was deficient at the punishment stage of trial because counsel failed to: (1) object to a DEA agent's testimony on the dangers and societal costs caused by methamphetamine constituted deficient performance; (2) request pre-trial notice of the State's experts; (3) determine that a DEA agent would testify about methamphetamine addiction; (4) properly object to the agent's testimony about addiction and the number of people who could get high from the methamphetamine that applicant possessed; and (5) call an expert in rebuttal. During the punishment stage of trial, the prosecutors asked for a life sentence, relying heavily on the objectionable testimony that was introduced during both phases of trial, and because applicant had received a life sentence, the maximum sentence available for her offense, she had shown that there was a reasonable probability--one sufficient to undermine confidence in the result--that the outcome at the punishment stage would have been different but for her counsel's deficient performance. Ex Parte Lane, 303 S.W.3d 702, 2009 Tex. Crim. App. LEXIS 1750 (Tex. Crim. App. 2009).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

203. Counsel was not ineffective for failing to object to testimony of the State's expert relating to the characteristics of child victims of sexual abuse because the testimony was admissible under this rule and counsel may have had a strategic reason for not objecting to the testimony, as counsel conducted an extensive and thorough cross-

examination of the expert. Adair v. State, 2013 Tex. App. LEXIS 14923, 2013 WL 6665033 (Tex. App. Austin Dec. 12 2013).

204. In a case in which defendant was convicted of trafficking of persons, aggravated sexual assault, aggravated kidnapping, and compelling prostitution, defendant failed to establish that his trial counsel rendered ineffective assistance by failing to object to a witness's testimony where it could not be said that the trial court would have abused its discretion by allowing the witness's testimony had trial counsel objected. The trial court could have concluded that the witness's testimony about delayed outcries, how victims responded to sexual abuse, and how the abuse was reported was the special knowledge or additional insight that could be helpful to the jury. Moreno v. State, 2012 Tex. App. LEXIS 4077, 2012 WL 1864490 (Tex. App. San Antonio May 23 2012).

205. Defendant did not show that counsel was ineffective in failing to object when a detective testified, in a singular question and response, regarding the truthfulness of the complainant, in violation of Tex. R. Evid. 702, 608(a), because there was nothing in the record to indicate why counsel did not object. McGuire v. State, 2010 Tex. App. LEXIS 673, 2010 WL 322988 (Tex. App. Texarkana Jan. 29 2010).

206. In a case in which defendant claimed that his trial counsel improperly failed to object to the admission of expert testimony regarding the results of a scent lineup, which defendant contended produced the sole evidence that resulted in his being charged with burglary of a habitation, defendant had failed to satisfy the first prong of Strickland because it could not be said that his trial counsel was ineffective in failing to object to the legitimacy of dog-scent evidence that had been held admissible by two Texas courts of appeal in similar cases and that no Texas court had ruled inadmissible. Because another trial court's ruling to admit evidence from a pad lineup, performed similarly to the pad lineup in defendant's case, had been upheld on appeal, defendant failed to carry his burden of showing the dog scent evidence admitted was inadmissible, and, at most, he had shown weaknesses in the testimony that provided a basis for cross-examination, but he had not shown that its admission was outside the zone of reasonable disagreement. Perkins v. State, 2009 Tex. App. LEXIS 7069 (Tex. App. Houston 1st Dist. Aug. 28 2009).

207. In defendant's trial for burglary of a habitation in violation of Tex. Penal Code Ann. § 30.02, trial counsel was not ineffective in failing to object to the admission of expert testimony regarding the results of a scent lineup in which bloodhounds alerted to defendant's scent; trial counsel's performance was within the bounds of professional competence because any objection under Tex. R. Evid. 702 was unlikely to succeed. Perkins v. State, 2009 Tex. App. LEXIS 5555 (Tex. App. Houston 1st Dist. July 16 2009).

208. Counsel was not ineffective by failing to object to an expert's improperly offered direct opinion as to another witness's veracity because counsel's questioning of the expert, in which counsel posited that a hypothetical child, with a description nearly identical to the complainant's, fabricated his report of sexual abuse, opened the door to the expert's otherwise objectionable testimony. Herrera v. State, 2009 Tex. App. LEXIS 4893, 2009 WL 1813093 (Tex. App. Houston 1st Dist. June 25 2009).

209. Even though testimony concerning a child's truthfulness was not admissible in a sexual assault case either through lay or expert testimony, no ineffectiveness of counsel was shown based on a failure to object because there was only one witness from whom the State elicited an opinion about the child's truthfulness, and the State did not emphasize the testimony in its closing statement. Defendant did not show that, but for such omission, there was a reasonable probability that the result of the trial would have been different. Arcement v. State, 2009 Tex. App. LEXIS 1096, 2009 WL 383398 (Tex. App. Texarkana Feb. 18 2009).

210. In a direct appeal, defendant did not show that he received ineffective assistance of counsel under the United States Constitution in a case involving aggravated sexual assault of a child and indecency with a child because

there was no direct expert testimony that a minor victim was being truthful; since defendant conceded that sexual offenses had occurred, he was not harmed by the indirect bolstering of a victim that occurred when it was shown that her conduct was consistent with the conduct of one that had been sexually abused. Moreover, there was no reasoning in the record showing why trial counsel failed to object. Bustamante v. State, 2009 Tex. App. LEXIS 385, 2009 WL 144138 (Tex. App. Dallas Jan. 22 2009).

211. In a case involving indecency with a child, defendant failed to show that he received ineffective assistance of counsel due to a failure to subpoena an expert witness; trial counsel was not given the opportunity to explain her decision, evidence regarding defendant's mental condition and sanity at other times was introduced, and a jury instruction on insanity was obtained. Edwards v. State, 280 S.W.3d 441, 2009 Tex. App. LEXIS 320 (Tex. App. Fort Worth Jan. 15 2009).

212. In a cocaine possession case, defendant's failure to object to an officer's testimony that drug dealers often carried many small bills waived the issue under Tex. R. App. P. 33, and counsel was not ineffective for failing to challenge the testimony as Tex. R. Evid. 702 expert testimony because it was admissible as Tex. R. Evid. 701 opinion testimony. Hayes v. State, 2008 Tex. App. LEXIS 747 (Tex. App. Texarkana Feb. 1 2008).

213. In a trial for driving while intoxicated, it was not ineffective assistance when counsel failed to object to the State's questions directed at a forensic toxicologist concerning the addictiveness and side effects of certain prescription medication because the trial court would not have abused its discretion by overruling an objection under Tex. R. Evid. 702, given that there was nothing to suggest that the toxicologist was not qualified to testify on the therapeutic levels of the medication at issue. Carey v. State, 2007 Tex. App. LEXIS 9052 (Tex. App. Texarkana Nov. 16 2007).

214. In a sexual assault case, defendant was unable to show that he received ineffective assistance of counsel based on counsel's failure to object to the testimony of a social worker as unqualified expert testimony; the social worker could have testified about giving a victim information about a sexual assault examination as either a lay or expert witness. Benjamin v. State, 2007 Tex. App. LEXIS 7010 (Tex. App. Houston 1st Dist. Aug. 30 2007).

215. In a trial for child sexual abuse, counsel was rendered ineffective by not objecting to the State's bolstering of the complainant's truthfulness and credibility through both experts and lay witnesses; testimony from a forensic interviewer and an expert in child sexual assault investigations was inadmissible under Tex. R. Evid. 702 to the extent that it went to truthfulness rather than methodology. Fuller v. State, 224 S.W.3d 823, 2007 Tex. App. LEXIS 3686 (Tex. App. Texarkana 2007).

216. In a trial for manufacture of methamphetamine, counsel was not rendered ineffective by failing to object to an officer's testimony in connection with photographs showing defendant's burned and soiled hands; the officer's experience gave him the capability to testify that manufacturing methamphetamine often caused blisters and discoloration on the manufacturers' hands; it was not necessary to qualify the officer under Tex. R. Evid. 702, and, because the testimony was based on personal observations and was helpful to the jury, it was admissible under Tex. R. Evid. 701. Hollis v. State, 219 S.W.3d 446, 2007 Tex. App. LEXIS 1207 (Tex. App. Austin 2007).

217. Counsel was not rendered ineffective by failing to object, under Tex. R. Evid. 702, to opinion testimony regarding an officer's statement relating to whether he believed that defendant was telling to the truth; an objection to the testimony would properly have been overruled, given the context in which it was offered. Adelaja v. State, 2006 Tex. App. LEXIS 10379 (Tex. App. Houston 14th Dist. Dec. 5 2006).

218. In an aggravated sexual assault and indecency with a child case, defendant's trial counsel was not ineffective because (1) although the complainant's hearsay statements to her mother and sister did not satisfy the outcry

exception to the hearsay rule under Tex. Code Crim. Proc. Ann. art. 38.072, the same testimony had been previously admitted without objection and thus any harmful testimony was merely cumulative; and (2) defendant's counsel was not ineffective in failing to object to a police officer's testimony because the officer's testimony was admissible under the expert witness rule, Tex. R. Evid. 702, based on her three months of training and approximately 100 hours of classes in child abuse investigation, sexual abuse investigation, suspect interrogation, and interviewing. Castillo v. State, 2006 Tex. App. LEXIS 8790 (Tex. App. Houston 14th Dist. Oct. 12 2006).

219. Court rejected defendant's contention that his trial counsel fell below an objective standard of reasonable competence for failing to object to an officer's testimony that he did not believe defendant's version of events; under Tex. R. Evid. 704, a lay witness could offer an opinion on an ultimate issue. Adelaja v. State, 2006 Tex. App. LEXIS 4596 (Tex. App. Houston 14th Dist. May 25 2006).

Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury : Credibility of Witnesses

220. Although defendant argued that the trial court erred in admitting into evidence the buccal swab that was used to take a DNA sample from defendant's mouth, the authorities cited had no application to physical evidence such as a buccal swab and defendant neither complained on appeal regarding any expert testimony, nor made any other arguments against the swab's admission. Gonzalez v. State, 2008 Tex. App. LEXIS 3371 (Tex. App. Houston 14th Dist. May 8 2008).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

221. There was no merit to a murder defendant's argument that his right to confront witnesses was violated when the trial court limited his cross examination of an officer, who defendant claimed was an expert witness, regarding the officer's underlying report, which contained an exculpatory statement from a deceased witness. The officer did not express an opinion or conclusion that would have opened the door to examination on the witness's statement and did not express in his report an opinion or conclusion based upon his special knowledge. Hartless v. State, 2006 Tex. App. LEXIS 5066 (Tex. App. Tyler June 14 2006).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance

222. In an intoxicated assault case, Tex. Penal Code Ann. § 49.07(a)(1), the State's witness's testimony was objectionable because he was not shown to be qualified as an expert under Tex. R. Evid. 702 on retrograde extrapolation for purposes of blood alcohol tests, nor was his testimony shown to be reliable and, thus, pursuant to Tex. R. Evid. 704, the witness's testimony on whether defendant was intoxicated beyond a reasonable doubt, an ultimate issue in the case, was also objectionable; therefore, counsel's representation fell below an objective standard of reasonableness as he failed to object to the witness testimony. However, counsel's failure to object to the admission of the witness's testimony did not prejudice defendant because there was substantial other evidence of defendant's intoxication at the time of the accident, including testimony that defendant smelled of alcohol and appeared intoxicated, that the inside of defendant's vehicle smelled of the metabolized odor of alcohol, and that defendant had been drinking that day. Blumenstetter v. State, 135 S.W.3d 234, 2004 Tex. App. LEXIS 3074 (Tex. App. Texarkana 2004).

Criminal Law & Procedure : Trials : Examination of Witnesses : General Overview

223. Trial court did not abuse its discretion by allowing a detective to testify in a narrative form because the testimony served to explain why he had reached the conclusion that the child victim's account of the sexual abuse was plausible, and defendant lodged no objection concerning the detective's qualifications to provide his opinion on the topic, nor did he object that the detective's opinion on the question was irrelevant. Romero v. State, 2010 Tex. App. LEXIS 5735, 2010 WL 2854307 (Tex. App. Beaumont July 21 2010).

Criminal Law & Procedure : Trials : Examination of Witnesses : Child Witnesses

224. In a trial for sexual assault on a child, a psychological expert's testimony did not cross the line between assisting the jury and attempting to replace the jury as trier of fact with respect to the complainant's credibility when the doctor described the general approach in verifying the truthfulness of a child's allegations by providing fake symptoms to check the reaction and by disagreeing to find flaws in the story. Aguilera v. State, 2007 Tex. App. LEXIS 340 (Tex. App. San Antonio Jan. 19 2007).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

225. Even if the trial court erred by limiting defendant's cross-examination of the sexual assault nurse examiner, the error was harmless because the same or similar testimony was admitted without objection at another point in the trial; before the State's objection, the nurse testified that she accepted the victims' oral history as true, that the notches in one victim's hymen could be consistent with consensual sexual activity, and that there was no way of knowing when the notches happened. Young v. State, 382 S.W.3d 414, 2012 Tex. App. LEXIS 8627, 2012 WL 4874628 (Tex. App. Texarkana Oct. 16 2012).

226. There was no merit to a murder defendant's argument that his right to confront witnesses was violated when the trial court limited his cross examination of an officer, who defendant claimed was an expert witness, regarding the officer's underlying report, which contained an exculpatory statement from a deceased witness. The officer did not express an opinion or conclusion that would have opened the door to examination on the witness's statement and did not express in his report an opinion or conclusion based upon his special knowledge. Hartless v. State, 2006 Tex. App. LEXIS 5066 (Tex. App. Tyler June 14 2006).

227. Expert's testimony regarding a child sexual assault victim did not constitute an improper opinion where it was defendant who elicited the very testimony of which he complained on appeal because, on his cross-examination of the expert, he went through each of the factors that the expert considered in determining the truthfulness of a child. Because defendant's question in concluding the cross-examination of whether the victim's story appeared to be realistic induced the response that, in the expert's opinion, the victim was telling the truth, defendant had invited the response. Fox v. State, 175 S.W.3d 475, 2005 Tex. App. LEXIS 7071 (Tex. App. Texarkana 2005).

Criminal Law & Procedure : Witnesses : General Overview

228. Pursuant to Tex. R. Evid. 702, a police officer's testimony that a 14-year old girl did not fit the profile of a prostitute was admissible in an inmate's trial on charges of kidnapping where (1) the officer had extensive experience in the child exploitation unit; and (2) the inmate's attorney made an issue of whether the girl was a prostitute, thereby entitling the state to ask the officer's opinion on the issue, in light of his training, experience, and knowledge of the girl. Jordan v. Dretke, 2006 U.S. Dist. LEXIS 31950 (N.D. Tex. May 22 2006).

Criminal Law & Procedure : Witnesses : Credibility

229. In a sexual assault of a child case, the trial court erred in admitting an expert's opinion on the complainant's credibility because the expert did not base his belief on evidence provided to him before he met the complainant; the expert testified that he believed that the complainant was sexually assaulted "because of how he described that he felt pain or soreness in his butt." The only time the complainant offered such a description was during an interview at a children's advocacy center, which the expert observed first-hand. Lopez v. State, 288 S.W.3d 148, 2009 Tex. App. LEXIS 2050 (Tex. App. Corpus Christi Mar. 26 2009).

230. In defendant's indecency with a child case, the trial court properly excluded the testimony of his expert witness who was going to testify as to the reliability of child-victim testimony because, when the State asked the expert what he intended to state as his ultimate opinion, he answered "at this stage of the outcry it will be very difficult for jurors to evaluate credibility or reliability because there have been too many times this child has been interviewed." The expert's testimony directly addressed the victim's credibility and truthfulness. Pinales v. State, 2009 Tex. App. LEXIS 32, 2009 WL 26886 (Tex. App. Dallas Jan. 6 2009).

Criminal Law & Procedure : Defenses : Diminished Capacity

231. Defendant was not entitled under Tex. Code Crim. Proc. Ann. art. 38.36(a) to offer evidence of diminished capacity because his experts' reports, which did not address the standard for recklessness under Tex. Penal Code Ann. § 6.03(c) or knowledge under § 6.03(a), could not support a claim that defendant was guilty only of manslaughter under Tex. Penal Code Ann. § 19.04(a), rather than murder under Tex. Penal Code Ann. § 19.02. Thus, the experts' testimony was irrelevant under Tex. R. Evid. 401 and was properly excluded under Tex. R. Evid. 702. Quick v. State, 2011 Tex. App. LEXIS 680, 2011 WL 286155 (Tex. App. Houston 1st Dist. Jan. 27 2011).

Criminal Law & Procedure : Defenses : Insanity : Insanity Defense

232. In a case involving indecency with a child, defendant failed to show that he received ineffective assistance of counsel due to a failure to subpoena an expert witness; trial counsel was not given the opportunity to explain her decision, evidence regarding defendant's mental condition and sanity at other times was introduced, and a jury instruction on insanity was obtained. Edwards v. State, 280 S.W.3d 441, 2009 Tex. App. LEXIS 320 (Tex. App. Fort Worth Jan. 15 2009).

Criminal Law & Procedure : Defenses : Justification

233. In a juvenile defendant's homicide case, the court erred by excluding an expert's testimony regarding defendant's belief that he would suffer imminent harm at the hands of the victim because the expert's methodology was sound, and the expert testified that his analysis was based on his more than twenty years' experience in psychology and his meticulous examination of defendant's records. Lay people, especially adults, who had not experienced abuse for most of their lives did not have a frame of reference to fully understand why a child in defendant's position might have felt that deadly force was immediately necessary to avoid imminent harm. In re E.C.L., 2008 Tex. App. LEXIS 9292 (Tex. App. Houston 14th Dist. Dec. 11 2008).

Criminal Law & Procedure : Scienter : Specific Intent

234. In a criminal trial for unlawful possession with intent to deliver cocaine, a detective properly testified that in his expert opinion an individual possessing 70.6 grams of cocaine intended to sell the cocaine. The testimony was helpful to the jury in determining defendant's intent to deliver the cocaine. Walker v. State, 2004 Tex. App. LEXIS 10414 (Tex. App. Eastland Nov. 18 2004).

Criminal Law & Procedure : Jury Instructions : Curative Instructions

235. Although the record reflected that a therapist originally offered a direct opinion on the child-complainant's truthfulness in violation of Tex. R. Evid. 702, defendant objected to that testimony, and received a favorable ruling from the trial court and an instruction to the jury to disregard the testimony; thus, there was no error and no harm from the therapist's testimony. Conti v. State, 2011 Tex. App. LEXIS 8758, 2011 WL 5248348 (Tex. App. Houston 14th Dist. Nov. 3 2011).

236. Because a police officer's statement that he found a child to be credible constituted a direct opinion on the truthfulness of the child-complainant's allegations, under Tex. R. Evid. 702, the trial court properly excluded the officer's statement and instructed the jury to disregard the testimony. Santamaria v. State, 2011 Tex. App. LEXIS 541, 2011 WL 2165153 (Tex. App. Houston 1st Dist. Jan. 20 2011).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

237. Trial court had ruled that the psychotherapist was not qualified to testify as an expert, but the State could have her testify as a fact witness. Furthermore, the trial court instructed the jury to disregard any testimony from the psychotherapist concerning her "diagnosis" of the complainant, such that there was no error in the admission of her testimony. Taylor v. State, 2004 Tex. App. LEXIS 8546 (Tex. App. Houston 1st Dist. Sept. 23 2004).

Criminal Law & Procedure : Sentencing : Capital Punishment : Aggravating Circumstances

238. Even though the trial court by admitting a forensic psychiatrist's expert testimony about future dangerous, as there was no objective source material to substantiate his methodology as one that was appropriate in the practice of forensic psychiatry, the error was harmless, because there was ample evidence that there was a probability that defendant would commit future acts of violence apart from the psychiatrist's testimony; that evidence included the following a psychiatric interview and evaluation done more than 20 years before the murders and 40 years before sentencing that found reached the same basic conclusions about defendant as the instant psychiatrist did. In addition, the prosecution did not rely heavily on the psychiatrist's testimony during its closing arguments. Coble v. State, 330 S.W.3d 253, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. 2010).

239. In the penalty phase of a capital murder trial, there was no error in allowing testimony about Texas prison conditions in general and that violence could occur within the Texas prison system; an issue for the jury's determination was future dangerousness; therefore, the testimony was relevant to whether defendant would have opportunities to commit violent acts in prison. Lucero v. State, 246 S.W.3d 86, 2008 Tex. Crim. App. LEXIS 219 (Tex. Crim. App. 2008).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

240. Trial court did not err by admitting an investigator's testimony about the prison classification system and violence in prisons during sentencing because it was admissible as rebuttal educator-expert evidence. Coble v. State, 330 S.W.3d 253, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. 2010).

241. After defendant pled guilty to murder, the trial court erred at the sentencing proceedings in excluding testimony of a psychologist who sought to testify as to testing results that he opined demonstrated that defendant was an appropriate candidate for probation, because the psychologist was qualified as an expert and because the tests were accepted as valid within the scientific community. Muhammad v. State, 46 S.W.3d 493, 2001 Tex. App. LEXIS 3366 (Tex. App. El Paso 2001).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview

242. In a case where a patient was committed as a sexually violent predator under Tex. Health & Safety Code Ann. § 841.003(a), the evidence was sufficient with regards to experts' testimony because they had all reviewed the patient's records, interviewed him, and scored him on assessment tests; their opinions, while differing, all had support. A rational jury could have found beyond a reasonable doubt that the patient suffered from a behavioral abnormality that predisposed him to commit a predatory act of sexual violence. In re Diaz, 2009 Tex. App. LEXIS 6930, 2009 WL 2749958 (Tex. App. Beaumont Aug. 31 2009).

243. In a case where a patient was committed as a sexually violent predator under Tex. Health & Safety Code Ann. § 841.003(a), the patient was permitted to raise the issue of the sufficiency of expert testimony for the first time on appeal; the patient did not make objections at trial that the testimony was speculative or conclusory. In re Diaz, 2009 Tex. App. LEXIS 6930, 2009 WL 2749958 (Tex. App. Beaumont Aug. 31 2009).

244. Challenge to expert testimony was rejected in a case involving a civil commitment for a sexually violent predator under Tex. Health & Safety Code Ann. §§ 841.001-841.150, because a forensic psychologist based his testimony on sufficient facts and data and on a reliable method used in his field of expertise for forming an opinion, and he applied that method reliably to the facts in this case. There was no analytical gap in the testimony and no abuse of discretion by the trial court in admitting the testimony. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

245. Challenge to expert testimony alleging that it was speculative or conclusory was rejected in a case involving a civil commitment for a sexually violent predator under Tex. Health & Safety Code Ann. §§ 841.001-841.150, where three experts reviewed documents, interviewed the patient, and administered actuarials before testifying that the patient suffered from a behavioral abnormality that predisposed him to commit future acts of sexual violence; the experts also explained his risk factors for re-offending. Therefore, the evidence was legally sufficient to support the commitment. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

246. In a case involving the commitment of a sexually violent predator, a request for a gatekeeper hearing was untimely where it was made after the substance of an expert's opinion had already been given. In re Commitment of Marks, 230 S.W.3d 241, 2007 Tex. App. LEXIS 5424 (Tex. App. Beaumont 2007).

247. In a civil commitment proceeding wherein appellant was found to be a sexually violent predator, the testimony of the State's expert witness, a board-certified psychiatrist, was not improperly admitted because she too narrowly defined "sexually violent offenses;" despite the fact that her definition was narrower than that found in Tex. Health & Safety Code Ann. § 841.002(8), it fell within the ambit of those offenses specified therein, and her use of a more narrow definition went to the weight that a jury might choose to give her testimony; further, appellant's pen packet proved that he, on more than one prior occasion, had been convicted of sexually violent offenses; thus, he had not demonstrated that the expert's testimony was unreliable, and her opinion remained of assistance, pursuant to Tex. R. Evid. 702, to the jury in determining a fact in issue. In re Commitment of Gollihar, 224 S.W.3d 843, 2007 Tex. App. LEXIS 3786 (Tex. App. Beaumont 2007).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

248. In a trial of inmate's civil commitment as a sexually violent predator under Tex. Health & Safety Code Ann. § 841.062, the trial court properly excluded the inmate's expert's testimony that one of the victims had recanted pursuant to Tex. R. Evid. 401, 402, and 702, because such evidence represented a collateral attack on the underlying convictions, which had not been set aside. In re Barron, 2013 Tex. App. LEXIS 8495, 2013 WL 3487385 (Tex. App. Beaumont July 11 2013).

249. Person is not disqualified from testifying as an expert in an sexually violent predator commitment proceeding merely because the person is not licensed as a physician or psychologist; therefore, in a civil commitment case under the Texas Civil Commitment of Sexually Violent Predators Act, a trial court abused its discretion by determining that a counselor was not qualified to testify because she was not a physician or psychologist. The general rule under Tex. R. Evid. 702 was applied because the Act did not prescribe the qualifications that an expert had to have to opine on whether a person was a sexually violent predator. In re Bohannan, 388 S.W.3d 296, 2012 Tex. LEXIS 734, 55 Tex. Sup. Ct. J. 1337 (Tex. 2012).

250. Trial court erred by excluding defendant's sole expert witness, a forensic psychiatrist, from testifying at trial concerning his commitment to outpatient treatment under Tex. Health & Safety Code Ann. § 841.081 on the basis of his supposed disbelief in the existence of "behavioral abnormality" because the psychiatrist's opinion was based on his methodology, which he explained and applied to the particular facts of the case, including the commission of repeated sexual assault against elderly nursing home patients; the improperly excluded testimony related to a critical issue that was submitted to the jury, namely whether defendant suffered from a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence. The error was not harmless under Tex. R. App. P. 44.1 because the psychiatrist's testimony was the only evidence defendant had favoring a finding that he would not likely reoffend, and defendant's risk of reoffending was one of the central disputed issues. In re Commitment of Winkle, 362 S.W.3d 241, 2012 Tex. App. LEXIS 1820, 2012 WL 746298 (Tex. App. Beaumont Mar. 8 2012).

251. Under Tex. R. Evid. 702, the experts' testimony was not speculative or conclusory as to be lacking in probative value and both experts concluded that the patient was a sexually violent predator (SVP); the jury could conclude that the patient was an SVP, Tex. Health & Safety Code Ann. § 841.062. In re Conley, 2011 Tex. App. LEXIS 7877, 2011 WL 4537938 (Tex. App. Beaumont Sept. 29 2011).

252. During appellant's civil commitment trial, the trial court erred by excluding the testimony of appellant's expert witness, based on its conclusion that the expert's testimony would confuse the jury under Tex. R. Evid. 403, because the trial court acknowledged that he qualified as an expert under Tex. R. Evid. 702, and, despite the trial court's belief that the expert would testify that behavioral abnormality did not exist, the offer of proof established that the expert would have told the jury that the ultimate issue in the case, whether appellant suffered from a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence, could not be determined by scientific method alone. The error was not harmless because without the expert's testimony, the State's experts' testimony regarding their diagnoses of personality disorder and their scoring of the actuarial instruments went unchallenged by any expert in the field of psychiatry or psychology. In re Commitment of Hinkle, 2011 Tex. App. LEXIS 4504 (Tex. App. Beaumont June 16 2011).

253. In a hearing to determine whether an individual was a sexually violent predator, it was error to exclude testimony from the individual's only expert, who was qualified under Tex. R. Evid. 702, even though she was not a psychiatrist or a psychologist, because she possessed special skills in administering actuarial tests relevant to assessing an individual's risk of reoffending. In re Bohannan, 379 S.W.3d 293, 2010 Tex. App. LEXIS 5737, 2010 WL 2854254 (Tex. App. Beaumont July 22 2010).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Classification

254. The patient did not show that any error in excluding his expert as an expert witness probably caused the rendition of an improper judgment, Tex. R. Evid. 702, where the trial court could conclude that the expert's testimony confused the issue and would not assist the jury with its assigned task under Tex. Health & Safety Code Ann. § 841.002. In re Bernard, 2012 Tex. App. LEXIS 4681, 2012 WL 2150328 (Tex. App. Beaumont June 14 2012).

Criminal Law & Procedure : Appeals : Procedures : Briefs

255. In a case seeking expunction of arrest records and deoxyribonucleic acid testing, an accused did not preserve a complaint for review relating to a trial court's denial of a request for the appointment of an expert because the accused failed to provide any argument, citations to the record, or legal analysis supporting his complaint. Ex parte Brewer, 2009 Tex. App. LEXIS 4809, 2009 WL 1801037 (Tex. App. Dallas June 25 2009).

256. In a case involving the sexual assault of a child, an alleged error relating to expert testimony was adequately briefed under Tex. R. App. P. 38.1 where defendant cited to the record in his statement of facts, there was a review

of only about 15 pages of testimony, and there was a citation to Tex. R. Evid. 702. Even though defendant's application of the law to the facts was cursory, his argument that it was error to allow an expert to testify that a complaining witness was telling the truth was sufficient to raise the issue for appellate consideration, given the liberal construction of the appellate rules under Tex. R. App. P. 38.9. Long v. State, 2009 Tex. App. LEXIS 1090, 2009 WL 387018 (Tex. App. Tyler Feb. 18 2009).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

257. Trial court erred by excluding defendant's sole expert witness, a forensic psychiatrist, from testifying at trial concerning his commitment to outpatient treatment under Tex. Health & Safety Code Ann. § 841.081 on the basis of his supposed disbelief in the existence of "behavioral abnormality" because the psychiatrist's opinion was based on his methodology, which he explained and applied to the particular facts of the case, including the commission of repeated sexual assault against elderly nursing home patients; the improperly excluded testimony related to a critical issue that was submitted to the jury, namely whether defendant suffered from a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence. The error was not harmless under Tex. R. App. P. 44.1 because the psychiatrist's testimony was the only evidence defendant had favoring a finding that he would not likely reoffend, and defendant's risk of reoffending was one of the central disputed issues. In re Commitment of Winkle, 362 S.W.3d 241, 2012 Tex. App. LEXIS 1820, 2012 WL 746298 (Tex. App. Beaumont Mar. 8 2012).

258. Trial court abused its discretion by allowing the arresting officer to testify regarding his opinion on defendant's prescription medications in conjunction with his ultimate opinion on defendant's intoxication because the officer's testimony was neither relevant nor reliable and the officer was not qualified to offer such detailed testimony as required by Tex. R. Evid. 702;.the officer conceded that he was not certified by the police department as a drug-recognition expert, he did not conduct the standard 12-step examination that would have been conducted by a drug-recognition expert, he did not contact such an expert after defendant refused a breath test, and the officer's testimony did not reveal that he had expert knowledge about the medications that defendant had taken or their effects. The error was not harmless because the officer's extensive testimony about defendant's prescription medications was unreliable and the testimony was constituted a substantial part of the State's case. Delane v. State, 369 S.W.3d 412, 2012 Tex. App. LEXIS 905, 2012 WL 340234 (Tex. App. Houston 1st Dist. Feb. 2 2012).

259. Trial court did not commit reversible error by overruling defendant's objection to the State's expert concerning the psychological effects of the prescription drug carisoprodol because substantially the same evidence was admitted without objection. Massey v. State, 2011 Tex. App. LEXIS 4453, 2011 WL 2418482 (Tex. App. Texarkana June 14 2011).

260. In an indecency with a child case, assuming the challenged testimony regarding the children's accounts of sexual abuse should not have been admitted under Tex. R. Evid. 702, the admission of the evidence was not reversible error as other testimony relevant to the truthfulness of the children was admitted, without objection, through the same expert witnesses. Nabors v. State, 2007 Tex. App. LEXIS 2538 (Tex. App. Beaumont Mar. 28 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

261. Defendant waived appellate review regarding an officer's testimony on the psychological and physiological effects of ecstasy, cocaine, and marijuana because at trial he objected on confrontation grounds, not on the basis put forward on appeal, that the State failed to establish the admissibility of the complained-of testimony pursuant to Tex. R. Evid. 701, 702, or 703. Nelson v. State, 2005 Tex. App. LEXIS 6710 (Tex. App. El Paso Aug. 18 2005).

262. Appellate court did not review an argument that a police officer's testimony regarding whether an assault occurred constituted improper expert testimony because the issue was not preserved for review by a bolstering

objection; the objection did not comport with the argument raised on appellate review. Mumphrey v. State, 155 S.W.3d 651, 2005 Tex. App. LEXIS 370 (Tex. App. Texarkana 2005).

263. In a driving while intoxicated case, the State's intoxilyzer expert miscalculated defendant's blood alcohol level under the retrograde extrapolation method; however, defendant failed to object to the expert's testimony on the basis that she made an erroneous calculation and thus, defendant did not preserve error regarding the expert's miscalculations. Smothers v. State, 2004 Tex. App. LEXIS 6399 (Tex. App. Fort Worth July 15 2004).

264. Where defendant claimed on appeal that the State's expert witness was not properly qualified as an expert witness but at trial defense counsel did not object to the witness's qualifications until after the witness provided an expert opinion, under Tex. R. App. P. 33.1(a) defendant failed to preserve for review any objection to the witness's qualifications Tello v. State, 138 S.W.3d 487, 2004 Tex. App. LEXIS 4653 (Tex. App. Houston 14th Dist. 2004), affirmed by 180 S.W.3d 150, 2005 Tex. Crim. App. LEXIS 2039 (Tex. Crim. App. 2005).

265. Where defendant did not object each time the State's expert witness's opinion about the victim's credibility was offered, defendant's complaint about the trial court's admission of her testimony was waived. Allam v. State, 2004 Tex. App. LEXIS 4177 (Tex. App. Fort Worth May 6 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Constitutional Issues

266. In an aggravated robbery case, defendant failed to preserve a constitutional error as to whether a scent-identification procedure was improperly suggestive because he did not cite a state or federal constitutional provision, and he did not cite to any case law. Moreover, similar testimony was found to be admissible under Tex. R. Evid. 702, and, even if the issue was preserved for review, any error was harmless beyond a reasonable doubt under Tex. R. App. P. 44.2(a). Jennings v. State, 2009 Tex. App. LEXIS 4361, 2009 WL 1677858 (Tex. App. Houston 14th Dist. June 4 2009).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

267. Defendant failed to preserve an argument that opinion testimony was speculative because similar testimony was admitted without objection. Moreno v. State, 2012 Tex. App. LEXIS 6018, 2012 WL 3025932 (Tex. App. El Paso July 25 2012).

268. Merely referring to Tex. R. Evid. 702 was insufficient to give the trial court notice of an objection to the reliability of retrograde extrapolation evidence. Garner v. State, 2011 Tex. App. LEXIS 5991, 2011 WL 3278533 (Tex. App. Dallas Aug. 2 2011).

269. Defendant waived his argument that the trial court erred in admitting the DNA test results to the extent the argument was based on failure to show, under Tex. R. Evid. 702, that the instrument used was reliable because the trial objection and ruling did not pertain to the reliability of the instrument. Parker v. State, 2010 Tex. App. LEXIS 5508, 2010 WL 2784428 (Tex. App. Houston 14th Dist. July 15 2010).

270. Although defendant asserted on appeal that a trial court erred in admitting the testimony of the State's expert, at no time did defendant raise an objection that the expert's testimony was unreliable because it was not tied to the particular facts of the complainant's case, which was his current argument on appeal, and, accordingly, the trial court never had notice of that alleged defect. Because the complaint defendant raised on appeal was different from his objection in the trial court, he failed to preserve the issue for appellate review, pursuant to Tex. R. App. P. 33.1(a)(1). Vogel v. State, 2010 Tex. App. LEXIS 2606, 2010 WL 1491848 (Tex. App. San Antonio Apr. 14 2010).

271. In a trial for sexual assault of a child and indecency with a child, defendant failed to preserve an argument, as required by Tex. R. App. P. 33, regarding testimony that the Texas Department of Family and Protective Services (DFPS) had "reason to believe" the allegations; the appellate argument under Tex. R. Evid. 702 was not presented in the court below through an objection under Tex. R. Evid. 402. Todd v. State, 242 S.W.3d 126, 2007 Tex. App. LEXIS 9053 (Tex. App. Texarkana 2007).

272. Defendant asserted that the trial court erred in admitting an expert's testimony because he was not qualified to testify as an expert and because his "backdoor opinion" that sex offenders were not capable of being cured violated Tex. R. Evid. 702; that argument was rejected, however, because defendant did not properly object and, therefore, failed to preserve the alleged error as required by Tex. R. Evid. 103 and Tex. R. App. P. 33. Ghahremani v. State, 2007 Tex. App. LEXIS 8584 (Tex. App. Houston 14th Dist. Oct. 30 2007).

273. In a driving while intoxicated trial, defendant failed to preserve error under Tex. R. Evid. 702 as to testimony relating to the horizontal gaze nystagmus and field sobriety tests because there was no objection raised at trial to the complained of testimony, as required by Tex. R. App. P. 33; a motion in limine did not preserve any error. Ramirez v. State, 2007 Tex. App. LEXIS 8563 (Tex. App. San Antonio July 11 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

274. On appeal of defendant's conviction for driving while intoxicated, he claimed the trial court should have excluded the blood serum test results from evidence because the State failed to establish reliability of the results under Tex. R. Evid. 702. While defendant objected to the admission of a blood vial into evidence, he failed to object to the medical technologist's testimony concerning the test results; therefore, defendant's evidentiary challenge was not preserved for review. Kuciemba v. State, 2011 Tex. App. LEXIS 4901 (Tex. App. Houston 14th Dist. June 30 2011).

275. In an aggravated sexual assault case, defendant failed to preserve error relating to the qualifications of an expert witness because no objections to such were made before the trial court. Defendant did not object in the trial court to the expert's testimony on the ground that the State had not properly qualified her as an expert witness, nor did defendant make a request to take the expert on voir dire outside the presence of the jury to contest her qualifications. Robledo v. State, 2009 Tex. App. LEXIS 6416, 2009 WL 2525412 (Tex. App. San Antonio Aug. 19 2009).

276. In a driving while intoxicated case, defendant failed to preserve error relating to the testimony of a technical supervisor about an intoxliyzer machine because, despite originally objecting, defense counsel did not object to answers given during cross-examination or to testimony that the supervisor did not doubt the accuracy and validity of the test; nothing in the record suggested that defendant invoked the exception to the general rule regarding preservation when defense counsel also treated the witness as an expert. The appellate court was unable to simply affirm the general verdict based on the alternate theory of proof of intoxication. Taylor v. State, 264 S.W.3d 914, 2008 Tex. App. LEXIS 6255 (Tex. App. Fort Worth 2008).

277. In a case involving the civil commitment of a patient found to be a sexually violent predator, the patient failed to object at the first opportunity to an expert's opinion regarding truthfulness; therefore, the alleged error was not preserved for appellate review. In re Commitment of Eeds, 254 S.W.3d 555, 2008 Tex. App. LEXIS 3337 (Tex. App. Beaumont 2008).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

278. When, on the State's appeal of a trial court's order granting defendant's motion to suppress, defendant raised, for the first time, as an alternate basis for affirming the trial court's ruling, a claim that breath test results were inadmissible under Tex. R. Evid. 702, defendant's claim was not "law applicable to the case" available to justify the trial court's erroneous ruling because, even though defendant was the appellee, the State had no notice of a need to establish the results' admissibility. State v. Esparza, 413 S.W.3d 81, 2013 Tex. Crim. App. LEXIS 1599 (Tex. Crim. App. Oct. 30 2013).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

279. At defendant's trial for assault of a family member, the trial court did not err by admitting expert testimony regarding the "cycle of violence" because it consisted of specialized information valuable to assist the jury in understanding why the complainant recanted her previous statement. Because defendant did not object to the expert testimony as bolstering or to the testimony that the complainant was "minimizing," these arguments were waived on appeal/ Pritchard v. State, 2014 Tex. App. LEXIS 365, 2014 WL 119003 (Tex. App. Houston 14th Dist. Jan. 14 2014).

280. On appeal of defendant's conviction for murder, he challenged whether the DNA sample test results were the product of contamination; while the issue of contamination was relevant to reliability, he failed to raise the issue at trial; therefore, the claim was waived for review. Lane v. State, 2006 Tex. App. LEXIS 8912 (Tex. App. Houston 14th Dist. Oct. 17 2006).

Criminal Law & Procedure : Appeals : Standards of Review : General Overview

281. Motion to strike an expert witness's testimony based on his lack of qualifications, which is made after the witness has testified, can serve as a renewed objection to the trial court's earlier ruling that the witness was qualified; in these circumstances, an appellate court reviews the trial court's ruling based upon all of the evidence before the court at the time of the motion to strike. Rodgers v. State, 205 S.W.3d 525, 2006 Tex. Crim. App. LEXIS 852 (Tex. Crim. App. 2006).

282. Where the trial court did not engage in a determination of the vertical gaze nystagmus test's scientific reliability, admission of officer's testimony regarding the VGN test, and regarding defendant's impairment, was an abuse of discretion; because almost 40 percent of the entire trial was devoted to the VGN's unproven results, defendant's conviction for felony driving while intoxicated as an habitual offender had to be reversed because the error was not harmless. Stovall v. State, 140 S.W.3d 712, 2004 Tex. App. LEXIS 4026 (Tex. App. Tyler 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

283. At trial, an expert witness testified that fingerprint analysis was recognized and accepted as valid in the scientific community, that there was a procedure used in analyzing fingerprints, and that he had followed the technique in this case. Given the fact that fingerprint evidence was accepted as a matter of common knowledge, and given the expert's testimony regarding the fingerprint analysis in defendant's case, the trial court did not abuse its discretion in admitting the fingerprint testimony. Salazar v. State, 2005 Tex. App. LEXIS 7187 (Tex. App. Austin Aug. 31 2005).

284. It is an abuse of discretion if the trial court's decision to exclude expert testimony is outside the zone of reasonable disagreement. Ard v. State, 2004 Tex. App. LEXIS 7339 (Tex. App. Dallas Aug. 16 2004).

285. Court will not reverse a trial court's decision about the admissibility of expert testimony unless the trial court abuses its discretion. Rogers v. State, 1999 Tex. App. LEXIS 1241 (Tex. App. Houston 14th Dist. Feb. 25 1999).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

286. Trial court did not abuse its discretion by excluding defendant's expert's testimony because: (1) the expert did not know defendant's blood-breath ratio; (2) the expert provided no data, scientific theory, or documentary evidence to support his position that intoxication could be determined from viewing a videotape without evidence of field sobriety tests; (3) the expert made no attempt to establish that his method was generally accepted in the relevant community; and (4) the jury did not need the expert's testimony in order to evaluate defendant's appearance on the jail tape. Freeman v. State, 276 S.W.3d 630, 2008 Tex. App. LEXIS 9383 (Tex. App. Waco 2008).

287. Under Tex. R. Evid. 702, the trial court did not abuse its discretion in determining that the evidence regarding the cadaver dogs was reliable and admissible because (1) the trainers were qualified to handle the cadaver dogs; (2) the dogs had been trained and certified as cadaver dogs; (3) the testimony of the witnesses established that the dogs had never falsely indicated human remains and that the dogs could consistently distinguish human remains from other scents; (4) each dog performed its search independently from the handlers, working off-lead; and (5) the dogs alerted to the same location that defendant had indicated the victim's body had been placed. Trejos v. State, 243 S.W.3d 30, 2007 Tex. App. LEXIS 4045 (Tex. App. Houston 1st Dist. 2007).

288. Trial court did not err by allowing the State to introduce an expert's testimony regarding post-traumatic stress disorder (PTSD) and eye movement desensitization and reprocessing (EMDR) under Tex. R. Evid. 702 because based on the expert's testimony, the trial court could have found that he was qualified to testify; the expert demonstrated that he was familiar with PTSD and EMDR and that he had worked with victims of extended sexual abuse; the evidence demonstrated that PTSD was an accepted diagnosis in the medical community and that EMDR treatment was used and recognized in the fields of social work, psychiatry, and psychology. Bailey v. State, 2007 Tex. App. LEXIS 208 (Tex. App. Fort Worth Jan. 11 2007).

289. Even though the appellate court erred by limiting the scope of its review to those questions asked of the expert initially during voir dire and excluding testimony developed during defendant's subsequent cross-examination of the expert, it correctly determined that the trial court did not abuse its discretion in admitting the expert's testimony, as testimony concerning shoe and tire print comparisons had long been admissible by either lay or expert witnesses, the jury heard descriptions of the physical comparisons upon which the expert based his conclusions, and the exhibits the expert relied on for his physical comparisons were admitted into evidence and were available to the jury during its deliberations; the jury could make its own comparisons. Rodgers v. State, 205 S.W.3d 525, 2006 Tex. Crim. App. LEXIS 852 (Tex. Crim. App. 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Witnesses

290. Trial court did not abuse its discretion by admitting a forensic chemist's testimony because from the evidence before it, the trial court reasonably conclude that the scientific theory underlying gun shot residue (GSR) testing was valid, that the technique applying the theory was valid, and that the technique was properly applied by the chemist. the chemists specifically testified that most labs allowed the reporting of one particle of GSR. Burks v. State, 2014 Tex. App. LEXIS 3243, 2014 WL 1285731 (Tex. App. Austin Mar. 26 2014).

291. Trial court did not abuse its discretion by ruling that defendant's expert could not testify as to his opinion that defendant fit the profile of someone who would be susceptible to giving a false confession because there was a lack of evidence showing that the expert's testimony properly relied on or utilized the principles involved in the field. Coleman v. State, 440 S.W.3d 218, 2013 Tex. App. LEXIS 13205, 2013 WL 5758084 (Tex. App. Houston 14th Dist. Oct. 24 2013).

292. Trial court did not abuse its discretion by determining that a child forensic interviewer was qualified to express her opinion about "rolling disclosures" because she had a bachelor's degree in and was licensed as a social worker, she had conducted 1,000 forensic interviews of children, and she obtained her knowledge of rolling disclosures through training, seminars, and education. Lair v. State, 2013 Tex. App. LEXIS 9906 (Tex. App. Fort Worth Aug. 8 2013).

293. Trial court did not abuse its discretion when it found the police sergeant qualified to testify as an expert on the Mexican Mafia because the sergeant testified that he had amassed the majority of his experience and training on the topic through his work in the field, namely by interviewing between 50 to 100 current and former members of the Mexican Mafia and by speaking with at least 1,000 other law enforcement officers who had investigated cases and crimes committed by the organization. Hernandez v. State, 2013 Tex. App. LEXIS 5228 (Tex. App. Houston 1st Dist. Apr. 30 2013).

294. Trial court did not abuse its discretion by admitting the police sergeant's expert testimony over defendant's reliability objections because: (1) the sergeant's field of expertise, gang behavior and the Mexican Mafia, was generally accepted as a legitimate field of expertise; (2) the sergeant's testimony regarding the purpose, history, hierarchical structure, and the rules and regulations that purportedly govern the organization and conduct of its members, as well as the type of distinctive tattoos that its members use to signify their membership in the organization, clearly fit within the scope of that field; and (3) the sergeant's testimony was derived from his field interviews with current and former Mexican Mafia members and collaboration with other law enforcement officials familiar with the organization. Hernandez v. State, 2013 Tex. App. LEXIS 5228 (Tex. App. Houston 1st Dist. Apr. 30 2013).

295. Trial court did not abuse its discretion by allowing a doctor to testify regarding matters related to neurology and endocrinology because the State established that the doctor specialized in forensic pathology and that by virtue of his education, training, and experience he was knowledgeable about diabetes, low blood sugar, and diseases such as epilepsy and had treated patients suffering from those conditions. Brown v. State, 2013 Tex. App. LEXIS 868 (Tex. App. Corpus Christi Jan. 31 2013).

296. Trial court did not abuse its discretion in allowing the State to elicit testimony from two witnesses, a forensic interviewer and a therapist because their testimony did not suggest that the victims' allegations of sexual abuse were truthful. Rather, both experts' testimony dealt with general behavioral characteristics and traits shown by sexually abused children. Pawlak v. State, 2012 Tex. App. LEXIS 7109, 2012 WL 3612493 (Tex. App. Corpus Christi Aug. 23 2012).

297. Trial court did not err by admitting an investigator's testimony regarding grooming of a prospective child victim of sexual assault because he investigator was qualified under Tex. R. Evid. 702, as: (1) the field of the investigator's expertise was not particularly complex; (2) the testimony was not conclusive of anything, but rather provided background information; and (3) the testimony was not particularly central to determining defendant's guilt or innocence, but rather provided some explanation of the significance of the numerous telephone calls between defendant and the victim and how they may have empowered defendant to take advantage of her. Bryant v. State, 340 S.W.3d 1, 2010 Tex. App. LEXIS 6614 (Tex. App. Houston 1st Dist. Aug. 12 2010).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

298. In a capital murder trial for the shooting death of a store clerk, the trial court erred by permitting an expert witness to provide a narrative interpretation of the videotaped recording of the incident. However, the testimony that defendant's waving to the gunman was consistent with his saying "come this way," did not have a substantial or injurious effect on the jury's verdict and did not affect his substantial rights; therefore, the error was harmless under

Tex. R. App. P 44.2. Gonzales v. State, 2006 Tex. App. LEXIS 2518 (Tex. App. Fort Worth Mar. 30 2006).

299. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

300. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

301. Trial court abused its discretion under Tex. R. Evid. 702 by admitting evidence of Horizontal Gaze Nystagus test without requiring proof from the State that the test was administered properly. The error was harmless under Tex. R. App. P. 44.2(b), however, because defendant drove erratically as he left the scene of an accident, had a strong odor of alcohol on his breath, admitted to drinking beer and smoking marijuana, had two empty beer cans in his car, and performed poorly on three other sobriety tests. Tillinghast v. State, 2005 Tex. App. LEXIS 7818 (Tex. App. Fort Worth Sept. 22 2005).

302. Although the court erred by allowing an expert to testify that a sexual assault occurred, the error was harmless where the child victim told her caregivers and the jury that defendant put his "private" in her "private" on numerous occasions. The victim also provided detailed descriptions of the sexual abuse in age-appropriate language. Smith v. State, 2005 Tex. App. LEXIS 4203 (Tex. App. El Paso May 31 2005).

303. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, the trial court erred by allowing a detective to testify as to the boyfriend's truthfulness; however, the error was harmless, because the trial court instructed the jury that it had to decide the credibility of the witnesses testifying from the stand. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

304. Even if admission of the presumptive test for blood performed on defendant's shoes and vehicle was in error, the error was harmless because an additional test confirmed the presumptive test results. Dean v. State, 2013 Tex. App. LEXIS 11011 (Tex. App. Tyler Aug. 29 2013).

305. Trial court's instruction to disregard was sufficient to cure any alleged error in the admission of the trooper's testimony, Tex. R. Evid. 702, on defendant's eye tremors, and defendant suffered no harm, Tex. R. App. P. 44.2. Maldonado v. State, 2013 Tex. App. LEXIS 5978 (Tex. App. San Antonio May 15 2013).

306. Defendant failed to show that the trial court abused its discretion by permitting the State's expert to testify because defendant stipulated that he was a qualified expert witness, and the questions asked of the expert were proper because they asked him to opine on whether the facts and circumstances revealed by his investigation measured up to a standard of legal culpability. Even if the trial court erred by admitting the evidence, the error would have been harmless given the other evidence against defendant, including evidence that in the hours before the fatal accident, defendant had been drinking beer and whiskey and smoking marijuana. Blanchard v. State, 2013

Tex. App. LEXIS 5140 (Tex. App. Fort Worth Apr. 25 2013).

307. Even if the trial court erred by limiting defendant's cross-examination of the sexual assault nurse examiner, the error was harmless because the same or similar testimony was admitted without objection at another point in the trial; before the State's objection, the nurse testified that she accepted the victims' oral history as true, that the notches in one victim's hymen could be consistent with consensual sexual activity, and that there was no way of knowing when the notches happened. Young v. State, 382 S.W.3d 414, 2012 Tex. App. LEXIS 8627, 2012 WL 4874628 (Tex. App. Texarkana Oct. 16 2012).

308. To the extent there was any error in the trial court's admission of retrograde extrapolation testimony as proof of defendant's blood-alcohol level, the error was harmless given other evidence of his intoxication, including his high test results, his failure of field sobriety tests, and a videotape of his traffic stop. Young v. State, 2012 Tex. App. LEXIS 6053, 2012 WL 3043000 (Tex. App. Houston 1st Dist. July 26 2012).

309. Trial court erred by allowing an officer to testify as an expert concerning a test he performed on defendant's jacket and pockets to test for the presence of cocaine because: (1) the State made no effort to prove the officer's qualifications; (2) the officer testified concerning chemical identification, a field of complex expertise; (3) the officer did not qualify the identification with any mention of the accuracy of the test; and (4) whether sufficient affirmative links to the contraband existed was the sole disputed issue. However, the error was harmless because defendant was in close proximity to the drugs, he possessed $ 1,414, had a tobacco wrapper in his hand, and later admitted to being a crack cocaine dealer. Gill v. State, 2012 Tex. App. LEXIS 4662, 2012 WL 2127504 (Tex. App. Texarkana June 13 2012).

310. On appeal of defendant's conviction for indecency with a child by contact, defendant claimed the trial court erred by permitting a detective to testify that he had no concerns that the case was made up, because Tex. R. Evid. 702 did not permit an expert to give an opinion that the complainant was truthful. The Court of Appeals of Texas found nothing to show that this testimony affected defendant's substantive rights under Tex. R. App. P. 44.2(b). Taylor v. State, 2012 Tex. App. LEXIS 1663, 2012 WL 662373 (Tex. App. Fort Worth Mar. 1 2012).

311. Court of appeals properly found the trial court abused its discretion by overruling defendant's objection and admitting inadmissible expert testimony, Tex. R. Evid. 702; however, the court of appeals erred in holding that the error was harmful as additional evidence should have been considered in the court of appeals' harm analysis, Tex. R. App. P. 44. 2. Barshaw v. State, 342 S.W.3d 91, 2011 Tex. Crim. App. LEXIS 914 (Tex. Crim. App. 2011).

312. In a trial for child sexual assault, no prejudice resulted from any error under Tex. R. Evid. 702 in admitting testimony from an officer that he would not necessarily expect to see physical trauma to the female sexual organ of a child who had been penetrated by an adult male. A sexual assault nurse examiner gave substantially similar testimony in more detailed form without objection. Starnes v. State, 2010 Tex. App. LEXIS 3715 (Tex. App. Dallas May 19 2010).

313. Detective's testimony was improperly admitted because it decided the ultimate fact for the jury; whether the undisputed fact that defendant broke into the house and killed the victim constituted capital murder, and it was not designed to enable the jurors to better comprehend the full significance of the evidence. However, the error was harmless because entering a building or habitation without the effective consent of the owner and killing a person therein constituted capital murder because it was murder in the course of committing burglary. Jones v. State, 2009 Tex. App. LEXIS 8122, 2009 WL 3366559 (Tex. App. Dallas Oct. 21 2009).

314. In defendant's trial for driving while intoxicated in violation of Tex. Penal Code Ann. § 49.04, the trial court erred in allowing evidence of retrograde extrapolation before the jury because the testimony of the State's expert

was unreliable, irrelevant, and prejudicial under Tex. R. Evid. 702 and 403; the error, however, did not affect defendant's substantial rights for purposes of Tex. R. App. P. 44.2(b) because the State did not emphasize the witness's status as an expert nor subscribe special credibility to his testimony and there was other persuasive evidence supporting the verdict. Burns v. State, 298 S.W.3d 697, 2009 Tex. App. LEXIS 6018 (Tex. App. San Antonio Aug. 5 2009).

315. In an aggravated robbery case, defendant failed to preserve a constitutional error as to whether a scent-identification procedure was improperly suggestive because he did not cite a state or federal constitutional provision, and he did not cite to any case law. Moreover, similar testimony was found to be admissible under Tex. R. Evid. 702, and, even if the issue was preserved for review, any error was harmless beyond a reasonable doubt under Tex. R. App. P. 44.2(a). Jennings v. State, 2009 Tex. App. LEXIS 4361, 2009 WL 1677858 (Tex. App. Houston 14th Dist. June 4 2009).

316. In a trial for child sexual assault, it was error under Tex. R. Evid. 702 to admit testimony from a clinical social worker regarding the child-complainant's veracity, but the error was harmless under Tex. R. App. P. 44.2(b) because defense counsel elicited nearly identical testimony on cross-examination. Nasrollah Hanjani Alizadeh v. State, 2009 Tex. App. LEXIS 1423 (Tex. App. Houston 1st Dist. Feb. 26 2009).

Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : General Overview

317. Petitioner state death row inmate argued that a probation officer who had taken courses in sexual deviancy was not qualified to provide expert testimony because she did not have a professional license as a psychologist, psychiatrist, or counselor, and claimed that allowing her to testify violated his rights to the due process of law and to a fair trial; however, court found that the claim that the requirements of education and expertise necessary to qualify as an expert under Tex. R. Evid. 702 were too low to meet the requirements of the due process had not been clearly established in federal law; therefore, because the state court's adjudication of the claim was neither contrary to nor the result of an unreasonable application of clearly established federal law, habeas relief was denied. Wyatt v. Dretke, 2003 U.S. Dist. LEXIS 26997 (E.D. Tex. Dec. 3 2003).

Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Ineffective Assistance

318. Defense counsel's failure to prepare an expert to testify about the unreliability of cross-racial eyewitness identification, which was admissible under Tex. R. Evid. 702, prevented a federal habeas corpus petitioner convicted of robbery from presenting testimony that would have called into question the only direct evidence against him; thus, petitioner demonstrated a reasonable probability that the result of his trial would have been different if counsel had performed in an objectively reasonable manner, and he was entitled to federal habeas relief under 28 U.S.C.S. § 2254. Sturgeon v. Quarterman, 615 F. Supp. 2d 546, 2009 U.S. Dist. LEXIS 40382 (S.D. Tex. May 12 2009).

Environmental Law : Litigation & Administrative Proceedings : Toxic Torts

319. In a toxic tort case, there was no error under Tex. R. Civ. P. 277 from a specific causation instruction stating that plausible causes of plaintiff's gastric cancer, other than chemicals from defendant's wood treatment facility, had to be excluded with reasonable certainty. There was evidence that the cancer could have been caused by H. pylori or cigarette smoking, and the burden to exclude those other plausible causes of injury did not relate solely to the trial court's reliability inquiry under Tex. R. Evid. 702; thus the trial court's gatekeeper function was not improperly shifted to the jury. Faust v. Bnsf Ry. Co., 337 S.W.3d 325, 2011 Tex. App. LEXIS 644 (Tex. App. Fort Worth Jan. 27 2011).

320. In a toxic tort case filed by several apartment complex residents, summary judgment was properly granted on the issue of property damage because an expert provided no empirical evidence or methodology that explained the validity of his extrapolation that observations pertaining to the mold exposure of one resident's property were also applicable to all the other residents' property. Plunkett v. Conn. Gen. Life Ins. Co., 285 S.W.3d 106, 2009 Tex. App. LEXIS 1405 (Tex. App. Dallas Feb. 27 2009).

321. Trial court did not abuse its discretion by excluding an expert's testimony on causation of symptoms by insecticide exposure as unreliable; the expert did not analyze exposure levels, did not seek to negate other plausible causes, did not know the concentration used, and did not offer foundational data or epidemiological studies. City of Dallas v. Furgason, 2007 Tex. App. LEXIS 7539 (Tex. App. Dallas Sept. 18 2007).

322. Although there is not a precise fit between science and legal burdens of proof, properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case, and there is a rational basis for relating the requirement that there be more than a doubling of the risk to the no evidence standard of review and to the more likely than not burden of proof. Mobil Oil Corp. v. Bailey, 187 S.W.3d 265, 2006 Tex. App. LEXIS 1880 (Tex. App. Beaumont 2006).

Evidence : Hearsay : Exceptions : General Overview

323. In a criminal trial for unlawful possession with intent to deliver cocaine, a detective properly testified that in his expert opinion an individual possessing 70.6 grams of cocaine intended to sell the cocaine. The testimony was helpful to the jury in determining defendant's intent to deliver the cocaine. Walker v. State, 2004 Tex. App. LEXIS 10414 (Tex. App. Eastland Nov. 18 2004).

Evidence : Hearsay : Exceptions : Business Records : General Overview

324. Testimony of a trucking company's safety administrative coordinator was properly admitted because her purpose was to explain how global positioning systems (GPS) data, which another witness's testimony showed was reliable, became a business record of the trucking company. Furthermore, her testimony established her understanding of the many systems the company used to track its drivers and showed that the system of transmitting and receiving the GPS data was automatic. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

325. Trial court acted within its discretion during defendant's trial for aggravated assault with a deadly weapon in admitting the victim's medical records without expert testimony because Tex. R. Evid. 803(6) plainly authorized the admission of the medical records without any witness, and while the State might have offered expert testimony to explain the medical records to the jury, Tex. R. Evid. 702 did not require such testimony. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment

326. Nurse practitioner who performed the sexual assault exam on the victim was allowed to testify regarding the victim's medical history as told to her by the victim; also, pursuant to Tex. R. Evid. 702, it was also permissible for the nurse practitioner to testify and give her expert opinion that her findings were consistent with the medical history given by the victim. Dickson v. State, 2004 Tex. App. LEXIS 1087 (Tex. App. Eastland Feb. 5 2004).

Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports

327. In a subrogation action, a trial court did not err by admitting a police report into evidence under Tex. R. Evid. 803(8) because there was nothing to indicate that the report lacked trustworthiness. Moreover, because a large part of the report was admissible non-opinion evidence and a driver did not specifically object to the opinion statements, the trial court properly overruled an alleged driver's objection regarding expert opinion. Lawrence v. Geico Gen. Ins. Co., 2009 Tex. App. LEXIS 5082, 2009 WL 1886177 (Tex. App. Houston 1st Dist. July 2 2009).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

328. Where defendant was charged with multiple counts of indecency with a child by contact, the court properly excluded expert testimony that the complainants' allegations were the result of manipulation, peer pressure, and improper interview techniques. The court was not convinced that the study in question was reliable, and the probative value of the study was substantially outweighed by the danger of unfair prejudice. Music v. State, 2005 Tex. App. LEXIS 7789 (Tex. App. Austin Sept. 22 2005).

329. Trial court did not abuse its discretion in allowing the expert testimony regarding child sexual abuse victims' delayed outcry because the testimony regarding delayed outcry was specialized knowledge that was helpful to the jury in understanding the delay by the child in reporting the first instance of sexual abuse, and this type of evidence has been held relevant in child sexual abuse cases. Perez v. State, 2005 Tex. App. LEXIS 2408 (Tex. App. Houston 1st Dist. Mar. 31 2005).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

330. Statements in a proof of loss form relating to the date of hail damage were competent summary judgment evidence because they constituted admissions under Tex. R. Evid. 801(e)(2). Even if the statements in the proof of loss form were not binding or conclusive, they were considered prima facie evidence of the facts stated therein; moreover, expert testimony was not required on the issue of whether hail occurred on a certain date and caused property damage. United States Fire Ins. Co. v. Lynd Co., 2012 Tex. App. LEXIS 3206, 2012 WL 1430541 (Tex. App. San Antonio Apr. 25 2012).

331. In a wrongful death case, a court properly excluded expert deposition testimony on hearsay grounds where the expert was not an employee of defendant pharmacy, and there was no evidence that an agency relationship existed. When the family non-suited their claims against the doctor, the subject matter over which the expert was asked to give his opinion became moot; subsequently, he was not called at trial, and, therefore, the trial court excluded his testimony on hearsay grounds. McCluskey v. Randall's Food Mkts., Inc., 2004 Tex. App. LEXIS 9178 (Tex. App. Houston 14th Dist. Oct. 19 2004).

Evidence : Judicial Notice

332. In an aggravated assault case, because blood spatter analysis was subject to judicial notice and the State proved the proper application of blood spatter analysis, the trial court did not err in admitting the State's testimony on the issue of blood spatter analysis. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

333. Texas takes judicial notice of the validity of blood spatter analysis; the State is not required to produce evidence on the first two criteria of Kelly. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

Evidence : Judicial Notice : Scientific & Technical Facts

334. In a felony driving while intoxicated case, the trial court did not err in taking judicial notice of the reliability of the theory underlying the horizontal gaze nystagmus test and its technique without conducting a gatekeeper hearing. Goains v. State, 2011 Tex. App. LEXIS 7875, 2011 WL 4537892 (Tex. App. Beaumont Sept. 28 2011).

Evidence : Procedural Considerations : Burdens of Proof : General Overview

335. Although there is not a precise fit between science and legal burdens of proof, properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case, and there is a rational basis for relating the requirement that there be more than a doubling of the risk to the no evidence standard of review and to the more likely than not burden of proof. Mobil Oil Corp. v. Bailey, 187 S.W.3d 265, 2006 Tex. App. LEXIS 1880 (Tex. App. Beaumont 2006).

336. Former legal client, who claimed that bad legal advice given to his father had prevented him from pursuing product liability claims against a car manufacturer, could not recover against the law firm that gave the advice because he could not show that he would have recovered in the products liability suit, if he had brought it. The client claimed that the seat belts in his father's car were defective, but he could not prove his product liability claims without expert scientific and/or technical expert testimony, and he had not presented any expert testimony to support his claims. Rangel v. Lapin, 177 S.W.3d 17, 2005 Tex. App. LEXIS 318 (Tex. App. Houston 1st Dist. 2005).

337. Where defendant flunked all three field sobriety tests, defendant's conviction of misdemeanor driving while intoxicated in violation of Tex. Penal Code Ann. § 49.04 was affirmed because: (1) admission of the evidence regarding the horizontal gaze nystagmus test under Texas R. Evid. 702 was proper in that the officer was qualified as an expert in the administration and the officer performed the screening properly on the occasion in question, and (2) the trial court erred in admitting evidence of vertical gaze nystagmus (VGN) and resting nystagmus tests under Tex. R. Evid. 702 because the State failed to show that evidence of VGN and resting nystagmus testing was reliable and relevant to assist the trier of fact, but admission of the evidence was harmless error under Tex. R. App. P. 44.2(b) because it did not affect defendant's substantial rights in that the jury instruction did not require the jury to determine what substance caused defendant's intoxication. Quinney v. State, 99 S.W.3d 853, 2003 Tex. App. LEXIS 1695, 117 A.L.R.5th 803 (Tex. App. Houston 14th Dist. 2003).

338. Party offering an expert's testimony bears the burden of proving that the witness is qualified under Tex. R. Evid. 702 by establishing that the expert has knowledge, skill, experience, training or education regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject; the word "knowledge" connotes more than subjective belief or unsupported speculation. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

Evidence : Procedural Considerations : Curative Admissibility

339. Counsel was not ineffective by failing to object to an expert's improperly offered direct opinion as to another witness's veracity because counsel's questioning of the expert, in which counsel posited that a hypothetical child, with a description nearly identical to the complainant's, fabricated his report of sexual abuse, opened the door to the expert's otherwise objectionable testimony. Herrera v. State, 2009 Tex. App. LEXIS 4893, 2009 WL 1813093 (Tex. App. Houston 1st Dist. June 25 2009).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

340. Where defendant was charged with stealing property, the trial court did not err by refusing to admit the testimony of an expert witness in commercial trucking regulation; while the complainant was a commercial truck driver, the testimony was irrelevant. Edrington v. State, 2005 Tex. App. LEXIS 10637 (Tex. App. Austin Dec. 21

2005).

341. Where defendant was charged with multiple counts of indecency with a child by contact, the court properly excluded expert testimony that the complainants' allegations were the result of manipulation, peer pressure, and improper interview techniques. The court was not convinced that the study in question was reliable, and the probative value of the study was substantially outweighed by the danger of unfair prejudice. Music v. State, 2005 Tex. App. LEXIS 7789 (Tex. App. Austin Sept. 22 2005).

342. In a criminal prosecution for aggravated sexual assault of a child, the trial court did not abuse its discretion by admitting the testimony of a doctor who never examined the victim and had no personal knowledge of her. The doctor indicated that withdrawal from family and friends may occur after sexual abuse and that a sexually abused child may experience shame, guilt, and ambivalence toward the perpetrator; her testimony was tied to the facts of the case. Comeaux v. State, 2005 Tex. App. LEXIS 3748 (Tex. App. Houston 14th Dist. May 17 2005).

343. Trial court was capable of reviewing the evidence, without the benefit of expert testimony, to determine whether the State met its burden of showing computer images depicting "actual" children necessary for conviction under the child pornography statute as opposed to "virtual" children, and, thus, the trial court properly denied defendant's motion for a determination about the admissibility of computer images in his case involving the felony possession of child pornography. Porath v. State, 148 S.W.3d 402, 2004 Tex. App. LEXIS 6767 (Tex. App. Houston 14th Dist. 2004).

344. In a driving while intoxicated case, because the police officer admitted that in administering the horizontal gaze nystagmus test (HGN) on defendant that he failed to complete the minimum number of 14 passes across defendant's eyes, as required by the National Highway Traffic Safety Administration, the HGN test results did not meet the requirements for admissibility into evidence, and the trial court abused its discretion by admitting the officer's testimony regarding the HGN test results. Smothers v. State, 2004 Tex. App. LEXIS 6399 (Tex. App. Fort Worth July 15 2004).

345. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, the trial court erred by allowing a detective to testify as to the boyfriend's truthfulness; however, the error was harmless, because the trial court instructed the jury that it had to decide the credibility of the witnesses testifying from the stand. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

Evidence : Procedural Considerations : General Overview

346. In addressing the admissibility of forensic analysis of physical evidence, Tex. Code Crim. Proc. Ann. art. 38.35(d)(1) prevails over Tex. R. Evid. 702 to the extent of a conflict. Op. Tex. Att'y Gen. No. KP-0127 (2017).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

347. When a challenge to an expert's testimony is restricted to the face of the record, and is not a challenge that requires a court to evaluate the underlying methodology, technique, or foundational data used by the expert, a legal sufficiency challenge can be lodged in the absence of any objection to the evidence. Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 2004 Tex. LEXIS 441, 47 Tex. Sup. Ct. J. 559 (Tex. 2004).

348. Where defendant did not object each time the State's expert witness's opinion about the victim's credibility was offered, defendant's complaint about the trial court's admission of her testimony was waived. Allam v. State, 2004 Tex. App. LEXIS 4177 (Tex. App. Fort Worth May 6 2004).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

349. Because the district court found that defendant insured had suffered no damage that was covered under the policy issued by plaintiff insurer, the appraisal by the insurer's expert and the corresponding activation of an underinsurance clause therefore did not affect the insured's claim because the reduced coverage percentage would have been zero anyway, the argument that it was error to have admitted the expert's report was moot and no error affecting the insured's substantial rights was shown under Fed. R. Evid. 103(a)(1); while the insured argued error under Tex. R. Evid. 702, the federal court, sitting in diversity, had to apply the Federal Rules of Evidence in matters relating to expert testimony. Certain Underwriters at Lloyds London v. Corporate Pines Realty Corp, 355 Fed. Appx. 778, 2009 U.S. App. LEXIS 21882 (5th Cir. Tex. 2009).

350. In a subrogation action, a trial court did not err by admitting a police report into evidence under Tex. R. Evid. 803(8) because there was nothing to indicate that the report lacked trustworthiness. Moreover, because a large part of the report was admissible non-opinion evidence and a driver did not specifically object to the opinion statements, the trial court properly overruled an alleged driver's objection regarding expert opinion. Lawrence v. Geico Gen. Ins. Co., 2009 Tex. App. LEXIS 5082, 2009 WL 1886177 (Tex. App. Houston 1st Dist. July 2 2009).

351. Even though testimony concerning a child's truthfulness was not admissible in a sexual assault case either through lay or expert testimony, no ineffectiveness of counsel was shown based on a failure to object because there was only one witness from whom the State elicited an opinion about the child's truthfulness, and the State did not emphasize the testimony in its closing statement. Defendant did not show that, but for such omission, there was a reasonable probability that the result of the trial would have been different. Arcement v. State, 2009 Tex. App. LEXIS 1096, 2009 WL 383398 (Tex. App. Texarkana Feb. 18 2009).

352. In a direct appeal, defendant did not show that he received ineffective assistance of counsel under the United States Constitution in a case involving aggravated sexual assault of a child and indecency with a child because there was no direct expert testimony that a minor victim was being truthful; since defendant conceded that sexual offenses had occurred, he was not harmed by the indirect bolstering of a victim that occurred when it was shown that her conduct was consistent with the conduct of one that had been sexually abused. Moreover, there was no reasoning in the record showing why trial counsel failed to object. Bustamante v. State, 2009 Tex. App. LEXIS 385, 2009 WL 144138 (Tex. App. Dallas Jan. 22 2009).

353. In a case involving the civil commitment of a patient found to be a sexually violent predator, the patient failed to object at the first opportunity to an expert's opinion regarding truthfulness; therefore, the alleged error was not preserved for appellate review. In re Commitment of Eeds, 254 S.W.3d 555, 2008 Tex. App. LEXIS 3337 (Tex. App. Beaumont 2008).

354. Defendant asserted that the trial court erred in admitting an expert's testimony because he was not qualified to testify as an expert and because his "backdoor opinion" that sex offenders were not capable of being cured violated Tex. R. Evid. 702; that argument was rejected, however, because defendant did not properly object and, therefore, failed to preserve the alleged error as required by Tex. R. Evid. 103 and Tex. R. App. P. 33. Ghahremani v. State, 2007 Tex. App. LEXIS 8584 (Tex. App. Houston 14th Dist. Oct. 30 2007).

Evidence : Procedural Considerations : Objections & Offers of Proof : Offers of Proof

355. Appellate court could not consider an expert's testimony from the bill of exceptions in determining whether the trial court erred in excluding his causation testimony because it did not first determine, pursuant to properly assigned error, that the trial court erred in refusing to admit the testimony. Mack Trucks v. Tamez, 206 S.W.3d 572, 2006 Tex. LEXIS 1074, 50 Tex. Sup. Ct. J. 80 (Tex. 2006).

Evidence : Procedural Considerations : Preliminary Questions : General Overview

356. In a dispute regarding open-space valuation of real property, there was no error in the trial court's decision to qualify the taxpayers' expert witness pursuant to Tex. R. Evid. 104(a), 702; although the expert did not have training specific to ad valorem taxation, he had substantial experience and expertise in agricultural use of land and prudent land management. Calhoun County Appraisal Review Bd. v. Stofer L.P., 2005 Tex. App. LEXIS 6629 (Tex. App. Corpus Christi Aug. 18 2005).

357. Horse owner was properly permitted to testify in rebuttal that a veterinarian who testified that the horse owner's filly did not die because of any actions taken by the horse farm owners, with whom the horse owner left his filly, had told the horse owner that the filly died because the horse farm owners failed to get the filly to the veterinary clinic sooner. Even if the veterinarian's statements to horse owner did not qualify as expert testimony, such statements included a factual basis and had probative value. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : Witness Qualifications

358. Evidence was insufficient to defeat no-evidence motion for summary judgment, because the expert's opinions were not reliable, were conclusory and speculative, and the expert was not qualified to render such opinions; the expert's opinions relied extensively on one published article, which did nothing more than conclude that darker shoes would become hotter than lighter shoes when exposed to sun light, and the expert failed to provide testimony regarding the temperature at which to expect blisters to form on the claimant's feet. Davis v. Aetrex Worldwide, Inc., 392 S.W.3d 213, 2012 Tex. App. LEXIS 9845, CCH Prod. Liab. Rep. P18967, 2012 WL 5969621 (Tex. App. Amarillo Nov. 29 2012).

359. In a criminal prosecution for aggravated sexual assault, the trial court did not abuse its discretion by admitting opinion testimony from a pediatrician; the testimony the witness gave regarding her qualifications, experience, and education all went to her status as an expert for purposes of Tex. R. Evid. 702; no express words were required to offer the expert; the defense never objected that she was unqualified or that the subject matter of her testimony was inappropriate for expert testimony. Degollado v. State, 2007 Tex. App. LEXIS 6032 (Tex. App. San Antonio Aug. 1 2007).

Evidence : Procedural Considerations : Rulings on Evidence

360. Any error by determining the drug test results were admissible was harmless, because the father's testimony was admitted without objection, when the content of the testimony was cumulative of the drug test results the father argued were inappropriately admitted. D.O.H. v. Tex. Dep't of Family & Protective Servs., 2011 Tex. App. LEXIS 6685, 2011 WL 3684568 (Tex. App. Houston 14th Dist. Aug. 23 2011).

361. In a case in which a jury found that defendant juvenile engaged in delinquent conduct by committing the offenses of aggravated sexual assault and indecency with a child, the trial court did not err in excluding certain testimony of various witnesses and did not prevent defendant from fully presenting his defensive theory where: (1) the proffered testimony of the victim's mother as set forth in defendant's bill of exceptions was properly excluded as speculative pursuant to Tex. R. Evid. 602; (2) the victim's mother was not shown to be qualified as an expert to testify under Tex. R. Evid. 702; (3) at trial, defendant was allowed to question the victim and her sister regarding the meeting they allegedly had with their grandparents during the time period after the victim's outcry but prior to the Monday morning interview with a deputy; and (4) the only testimony excluded by the trial court during defense counsel's examination of the victim and her sister was testimony regarding statements made by their grandparents during the alleged meeting, which was properly excluded on hearsay grounds pursuant to Tex. R. Evid. 802. Although defendant's bill of exceptions set forth the testimony that he asserted that the victim would have offered

regarding what she told her grandparents during the alleged meeting, defense counsel did not question the victim regarding what she told her grandparents during that meeting, and, additionally, defense counsel did not argue that the trial court improperly sustained the State's hearsay objections to statements of the grandparents. In re J.R.N., 2010 Tex. App. LEXIS 2280, 2009 WL 6312273 (Tex. App. Beaumont Apr. 1 2010).

362. During defendant's trial for delivering more than one gram but less than four grams of cocaine, in violation of Tex. Health & Safety Code Ann. § 481.112, the trial court did not err in permitting a police officer to testify in general terms about the practices employed in cocaine trafficking because, as a veteran narcotics detective with the police department, he could have been properly admitted as an expert to provide testimony regarding the manufacture and sale of crack cocaine in the area; the trial court could have reasonably determined that such expert testimony would have assisted the jury by providing it with information regarding the nuances of the illegal narcotics trade. Henderson v. State, 2007 Tex. App. LEXIS 9843 (Tex. App. Texarkana Dec. 20 2007).

363. In a medical malpractice suit against two doctors, an internist and a cardiologist, the trial court abused its discretion in preventing a deceased patient's family from calling the internist's expert witness during their case in chief because: (1) the family should not have been prohibited from calling the internist's expert as a witness solely on the basis that he was the internist's expert; (2) the family's cross-designation of the expert was not deficient under Tex. R. Civ. P. 193 or Tex. R. Civ. P. 195, as the cross-designations were reasonably prompt and included the information available to the family at the time; and (3) due to differences in qualifications and the potential for perceived bias involving testimony on controlling issues, the expert's testimony would have added substantial weight to the family's case and thus was not cumulative. Hooper v. Chittaluru, 2006 Tex. App. LEXIS 2334 (Tex. App. Houston 14th Dist. Mar. 28 2006), substituted opinion at, opinion withdrawn by 2006 Tex. App. LEXIS 5532 (Tex. App. Houston 14th Dist. June 29, 2006).

364. Trial court did not err in precluding defendant's proffered expert witness testimony when the expert did not demonstrate familiarity with the facts of the case, and the expert's field of expertise in the subject of memories of eyewitnesses, who provide an identification, was called into question. Sturgeon v. State, 2005 Tex. App. LEXIS 10904 (Tex. App. Houston 14th Dist. Aug. 23 2005).

365. Error in admitting expert testimony regarding the results of parents' drug tests in a proceeding to terminate their parental rights probably caused the rendition of an improper judgment under Tex. R. App. P. 44.1 because the expert did not have expertise concerning the actual subject about which he offered his expert opinion, and because the results of the tests were not shown to be reliable under Tex. R. Evid. 702. The expert's "opinion" that the samples tested positive for cocaine was beyond the scope of his expertise and based entirely on a written report he received from a laboratory, and even though the scientific theory of testing hair samples for illegal drugs using immunoassay and gas chromatography mass spectrometry or gas chromatography mass spectrometry mass spectrometry might be reliable, there was no showing of the reliable application of that theory in the case because the expert merely speculated that the lab had to have followed protocol or it would have lost its license. In re S.E.W., 168 S.W.3d 875, 2005 Tex. App. LEXIS 3809 (Tex. App. Dallas 2005).

366. Trial court must make an initial determination of whether the expert's testimony is relevant and reliable so as to be admissible. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

367. Even when challenged expert testimony is admitted by the trial court, a party may later complain on appeal that the expert testimony is legally insufficient to support the judgment because it is unreliable. Unreliable expert testimony is not evidence. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

368. In determining whether expert testimony is reliable and, therefore, some evidence supporting the judgment, the appellate court must employ an almost de novo-like review and, like the trial court, look beyond the expert's bare testimony to determine the reliability of the theory underlying it. The court does not focus on the correctness of the expert's opinion, but on the reliability of the analysis the expert used in reaching his or her conclusions. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

369. Trial court did not abuse its discretion in sustaining objections to challenged paragraphs of an expert witness's affidavit because the witness was never designated as an expert. Tara Capital Partners I, L.P. v. Deloitte & Touche, L.L.P., 2004 Tex. App. LEXIS 4577 (Tex. App. Dallas May 20 2004).

Evidence : Procedural Considerations : Weight & Sufficiency

370. Evidence was insufficient to prove breach of an implied duty to market under an oil and gas lease providing that royalties were to be determined based on net proceeds because the royalty owners' expert based his testimony on a hypothetical gas that was free from impurities, rather than the actual gas produced at the well. Thus, his opinion on this issue amounted to no evidence. Occidental Permian Ltd. v. French, 391 S.W.3d 215, 2012 Tex. App. LEXIS 8996, 181 Oil & Gas Rep. 647, 2012 WL 5351131 (Tex. App. Eastland Oct. 31 2012).

371. Finding against the property owner in his inverse condemnation counterclaim against the city was appropriate because the engineer's testimony constituted legally sufficient evidence from which the trial court could have concluded that the construction had not negatively impacted drainage from the tract. Martini v. City of Pearland, 2012 Tex. App. LEXIS 2972, 2012 WL 1345744 (Tex. App. Houston 14th Dist. Apr. 17 2012).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

372. Trial court did not err by allowing a physician to testify as an expert witness and testify generally as to the patterns of sexual offenders and how those offenders typically victimized children because the trial court could have concluded that the testimony would be helpful to the jury in its deliberations of the evidence and defendant failed to explain how the testimony about statistical correlations in families with sex offenders or the vulnerability of a child born into such a family carried with it unfair prejudice or how there was a clear disparity between its probative value and its degree of prejudice. Beltran v. State, 2012 Tex. App. LEXIS 10639 (Tex. App. Austin Dec. 21 2012).

373. In defendant's sexual assault of a child case, the court properly admitted expert testimony regarding sadism because the alleged abuse was sadistic in nature, the expert's testimony regarding sadism shed light on such relevant issues as how the abuse might have injured and psychologically affected the victims, how the victims might have been threatened and placed in fear, and whether any behavior the victims engaged in with each other might have been coerced. Hatter v. State, 2006 Tex. App. LEXIS 4516 (Tex. App. Austin May 26 2006).

374. Trial court did not abuse its discretion under Tex. R. Evid. 403 and 702 by concluding that defendant failed to demonstrate by clear and convincing evidence that excluded testimony was reliable and would assist the trier of fact to determine a fact in issue. The trial court effectively recognized the legitimacy of the study of interrogation techniques and false confessions by ruling that most of the expert's proffered testimony was admissible; the trial court did not abuse its discretion by excluding the expert's proffered testimony regarding the categories of false confessions, and particularly persuaded false confessions. Scott v. State, 165 S.W.3d 27, 2005 Tex. App. LEXIS 2168 (Tex. App. Austin 2005).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

375. Trial court did not err by allowing a physician to testify as an expert witness and testify generally as to the patterns of sexual offenders and how those offenders typically victimized children because the trial court could have concluded that the testimony would be helpful to the jury in its deliberations of the evidence and defendant failed to explain how the testimony about statistical correlations in families with sex offenders or the vulnerability of a child born into such a family carried with it unfair prejudice or how there was a clear disparity between its probative value and its degree of prejudice. Beltran v. State, 2012 Tex. App. LEXIS 10639 (Tex. App. Austin Dec. 21 2012).

Evidence : Relevance : Relevant Evidence

376. Court did not abuse its discretion by excluding the testimony of defendant's expert as irrelevant as to whether the trooper was lawfully discharging an official duty when defendant drove at him because the expert's opinion regarding the justification for the use of force was not based on any information regarding the trooper's encounter with defendant. Ramos v. State, 2014 Tex. App. LEXIS 6818 (Tex. App. Austin June 26 2014).

377. Defendant was not was denied the right to present a full defense when the trial court refused to allow his DNA expert to testify regarding lab bias because the expert's proposed testimony was not relevant to the issues before the jury; absent any evidence of lab bias, the substance of the proposed testimony-that context could influence experts and that all human beings had bias-was more appropriate for cross-examination than for expert testimony. Millage v. State, 2014 Tex. App. LEXIS 3801, 2014 WL 1407331 (Tex. App. Dallas Apr. 8 2014).

378. At defendant's trial for indecency with a child and aggravated sexual assault of a child, the trial court did not err in admitting the expert testimony of the nurse who performed the examination of the child, even though she was not certified at the time. Because the facts of the hypothetical matched the facts of this case, the relevancy fit requirement was met. Pierson v. State, 398 S.W.3d 406, 2013 Tex. App. LEXIS 4868 (Tex. App. Texarkana Apr. 19 2013).

379. Trial court did not abuse its discretion by admitting the testimony of the sexual assault nurse examiner who examined the child victim during the course of the State's investigation because she was deemed an expert in sexual abuse examinations, so her expert testimony could be helpful to the jury, including to explain why physical evidence would not necessarily be present on the body of a sexual assault complainant. The nurse merely reported the events of the examination and her clinical findings, and she did not offer an opinion as to whether the victim had been sexually assaulted and did not comment on the victim's veracity. Owens v. State, 381 S.W.3d 696, 2012 Tex. App. LEXIS 7922, 2012 WL 4098990 (Tex. App. Texarkana Sept. 19 2012).

380. There was no abuse of discretion in allowing the witness's testimony concerning the behavior of child sexual assault victims, because the crux of the witness's testimony was that children who had been the victims of abuse could make a delayed outcry since they didn't know what to do with the abuse, and the witness did not testify concerning the complainant's truthfulness; expert testimony that a child exhibited behavioral characteristics that had been empirically shown to be common among children who had been abused was relevant and admissible as substantive evidence under Tex. R. Evid. 702. Hassell v. State, 2012 Tex. App. LEXIS 4972, 2012 WL 2353713 (Tex. App. Dallas June 21 2012).

381. Grant of summary judgment in favor of the company men and others in the employee's defamation action was proper because expert testimony about bankruptcy was not relevant to any element of the defamation claims, nor was the bankruptcy testimony relevant to any element of the employee's other pleaded claims. Thus, the expert was property struck as an expert witness. Bell v. Bennett, 2012 Tex. App. LEXIS 2097, 2012 WL 858603 (Tex. App. Fort Worth Mar. 15 2012).

382. Court properly allowed an expert witness to testify about the similarity of physical evidence recovered from the crime scene because the tapes from the crime scene and defendant's home were offered to show that because the tapes were similar, it was more likely that they came from a common source, and if they came from a common source, it was more likely that the tape in defendant's home came from the packaging for the marijuana in the murder victim's home. The testimony showed the similarities of the tapes and was therefore relevant to show that defendant was at the crime scene and had a motive for shooting the victims. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

383. Property owners' expert's testimony was properly admitted because the expert's opinion was that the owners' property flooded because of an increase in elevation of the development relative to the owners' property; that testimony was neither speculative nor otherwise unreliable. The expert specifically testified the increase in elevation altered historical surface water drainage patterns, and his testimony was based on his own visual inspection of the property where he noted diversions from the historical drainage patterns due to increases in elevation, as well as a drainage area map used by the company that constructed the development. Marin Real Estate Partners., L.P. v. Vogt, 373 S.W.3d 57, 2011 Tex. App. LEXIS 9259, 2011 WL 5869520 (Tex. App. San Antonio Nov. 23 2011).

384. Property owners' appraiser's testimony was properly admitted because the appraiser specifically stated he developed his estimate based on the one-acre tract as a property independent from the nineteen-acre tract. To develop his estimate, he researched comparable sales in an attempt to find the best comparison possible and he also prepared his appraisal using the "highest and best use" analysis, which required the appraiser to consider what was the potential best use for the property being appraised. Marin Real Estate Partners., L.P. v. Vogt, 373 S.W.3d 57, 2011 Tex. App. LEXIS 9259, 2011 WL 5869520 (Tex. App. San Antonio Nov. 23 2011).

385. In a case involving the civil commitment of a sexually violent predator, to the extent that a patient complained about the foundational data used by experts in reaching their opinions, the complaint was not preserved for appellate review because no objection was made to the use of records or actuarial tests. To the extent that the patient challenged the expert opinions as baseless and not relevant, the testimony of the experts was not conclusory or speculative; the experts testified that they based their opinions on the facts and date gathered from the records they reviewed, their interviews with the patient, the risk assessment conducted, and the actuarial tests administered. In re Mason, 2011 Tex. App. LEXIS 8531 (Tex. App. Beaumont Oct. 27 2011).

386. During appellant's civil commitment trial, the trial court did not err by excluding an expert's testimony that appellant did not commit the crimes for which he had been convicted because the issue of whether appellant had been wrongfully convicted was not at issue. In re Commitment of Hinkle, 2011 Tex. App. LEXIS 4504 (Tex. App. Beaumont June 16 2011).

387. Relevancy objection was properly overruled pursuant to Tex. R. Evid. 401 and 702 in a case involving sexual abuse of a child because defense counsel had previously cross-examined the nurse practitioner about her experience with false allegations of sexual abuse and circumstances involving the absence of physical findings; thus, the redirect of the nurse practitioner regarding statistics of confirmed cases of sexual abuse where there were no physical findings was relevant. Cortez v. State, 2010 Tex. App. LEXIS 5854, 2010 WL 2889670 (Tex. App. Fort Worth July 22 2010).

388. Because forgery was not pleaded as an affirmative defense under Tex. R. Civ. P. 94 in a suit for a constructive trust, handwriting evidence was not helpful and thus was irrelevant under Tex. R. Evid. 401, 402, 702. Estate of Wallis, 2010 Tex. App. LEXIS 3710, 2010 WL 1987514 (Tex. App. Tyler May 19 2010).

389. Expert's opinions in a products liability case on how a fire started were subjective and conclusory because they were unsupported by testing; thus, they were not relevant under Tex. R. Evid. 401, were not based on a

reliable foundation under Tex. R. Evid. 702, and constituted no evidence that an alleged design defect in a dryer caused the fire. Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 2009 Tex. LEXIS 1041, 53 Tex. Sup. Ct. J. 179 (Tex. 2009).

390. In a driving while intoxicated case, evidence of defendant's use of prescription medications was not relevant because there was no evidence as to the dosage, the exact times of ingestion, or the half-life of the drug; a lay juror was not in a position to determine whether the drugs, taken more than 12 hours before arrest, would have any effect on defendant's intoxication. Without expert testimony to provide the foundation required to admit scientific evidence, the testimony regarding defendant's use of prescription medications was not relevant. Layton v. State, 280 S.W.3d 235, 2009 Tex. Crim. App. LEXIS 149 (Tex. Crim. App. 2009).

391. In an aggravated assault case where insanity was an issue, a trial court did not err by excluding the testimony of a psychiatrist regarding defendant's mental condition in 2007 as irrelevant because the psychiatrist did not have any information regarding defendant's mental state in 2005 when the crime was committed. Likewise, records of defendant's visit to an emergency room in 2007 where he saw the psychiatrist were properly excluded for the same reason. Wiley v. State, 2009 Tex. App. LEXIS 225, 2008 WL 5501149 (Tex. App. Beaumont Jan. 14 2009).

392. Although a medical study referred to by a doctor in his testimony at defendant's trial for aggravated sexual assault of a child under the age of 14 involved females older than the complainant and under different circumstances, the evidence was relevant because the doctor was in the best position to explain to the jury why the genitalia of sexually abused victims often exhibited no physical signs of penetration, and he tied the study to his earlier conclusion that he was not surprised about the lack of physical evidence of penetration in the complainant's genital examination, which assisted the trier of fact to understand the lack of physical evidence; the testimony showed that the farther away in time the examination was from the abuse, the less likely there would be physical evidence of penetration, and, accordingly, the trial court properly admitted the testimony. Whitfield v. State, 2006 Tex. App. LEXIS 9726 (Tex. App. Dallas Nov. 9 2006).

393. Before novel scientific evidence may be admitted under Tex. R. Evid. 702, the proponent must persuade the trial court, by clear and convincing evidence, that the evidence is reliable and therefore relevant. Atkinson v. State, 2004 Tex. App. LEXIS 1173 (Tex. App. Dallas Feb. 6 2004).

394. When offered evidence is the testimony of an expert witness, the court must apply the principles set forth in the rules governing expert testimony under Tex. R. Evid. 702-705; a two-part test governs whether expert testimony is admissible: (1) the expert must be qualified and (2) the testimony must be relevant and based on a reliable foundation. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

Evidence : Scientific Evidence : General Overview

395. There was no abuse of discretion by excluding the expert's testimony regarding alleged marketing or design defects in the automatic external defibrillator or its battery, because the expert did not test the actual device or battery involved and did not express specific expertise regarding automatic external defibrillators and batteries. Schronk v. Laerdal Med. Corp., 2013 Tex. App. LEXIS 9916 (Tex. App. Waco Aug. 8 2013).

396. Finding that defendant did not properly preserve his issue for appeal under Tex. R. App. P. 33.1 was improper because the appellate court's parsing of his objections was the kind of hyper-technical analysis that had been repeatedly rejected. It erred by distinguishing between admitting scientific evidence and admitting expert testimony under Tex. R. Evid. 702; and erred in distinguishing between admissibility based on relevance and admissibility based on reliability. Everitt v. State, 407 S.W.3d 259, 2013 Tex. Crim. App. LEXIS 255 (Tex. Crim.

App. Feb. 6 2013).

397. Trial court did not err by admitting evidence of a deputy's canine scent lineup tests because another appellate court had previously considered and determined that they were admissible under Tex. R. Evid. 702. Pate v. State, 2010 Tex. App. LEXIS 8151, 2010 WL 3921177 (Tex. App. Corpus Christi Oct. 7 2010).

398. Trial court did not err by allowing the State's expert to testify that defendant's burns were consistent with someone reaching down with the right arm near where an accelerant had been poured because the expert was a medical examiner who had conducted numerous autopsies on burn victims. The testimony was not highly technical or beyond the realm of general medical knowledge based upon observation and some basic principles pertaining to burns to the skin. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

399. Trial court did not err by allowing the State's expert to testify that one of the children killed in the house fire set by defendant had been sexually abused because: (1) the expert's opinion was not based upon an area of medical science that was highly technical or theoretical; (2) he drew his conclusions from the nature of the physical injuries presented and the circumstances surrounding the patient; (3) as a medical doctor, he was qualified to do the physical examination of the child and make a diagnosis, and he explained with clarity the basis for his opinion; and (4) although he was not an expert in sexual assault cases, his opinion was confirmed by another medical professional who was. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

400. Trial court did not abuse its discretion in excluding expert testimony regarding contact marks on defendant's vehicle on the basis that the underlying theory was unreliable where Tex. R. Evid. 702 required that a three-part reliability test for the admission of scientific evidence must be satisfied: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. Sheehy v. State, 2004 Tex. App. LEXIS 6870 (Tex. App. Corpus Christi July 29 2004).

401. Before novel scientific evidence may be admitted under Tex. R. Evid. 702, the proponent must persuade the trial court, by clear and convincing evidence, that the evidence is reliable and therefore relevant. Atkinson v. State, 2004 Tex. App. LEXIS 1173 (Tex. App. Dallas Feb. 6 2004).

Evidence : Scientific Evidence : Autopsies

402. Trial court did not abuse its discretion in admitting the medical examiner's testimony and autopsy report under Tex. R. Evid. 702 because the evidence was relevant in that it helped the trial court determine whether the decedent had suffered serious bodily injury and it was free to give whatever mitigating or aggravating weight it deemed appropriate. Compton v. State, 2010 Tex. App. LEXIS 5375, 2010 WL 2698775 (Tex. App. Dallas July 9 2010).

Evidence : Scientific Evidence : Ballistics

403. In a civil action arising from a shooting death, there was no error under Tex. R. Evid. 702 in admitting testimony from an independent forensic firearms consultant regarding the orientation of the gun against the victim's head when it was fired; with regard to foundation, the expert testified that the opinion was based upon the expert's experience and knowledge of recoil and muzzle imprint and a review of the autopsy report describing the wound. Peek v. Rudik, 2008 Tex. App. LEXIS 1527 (Tex. App. Eastland Feb. 28 2008).

Evidence : Scientific Evidence : Battered Child Syndrome

404. In a trial for sexual assault on a child, a psychological expert's testimony did not amount to an opinion that the complainant was being truthful, in violation of Tex. R. Evid. 702, when the expert testified that the complainant's symptoms were consistent with those of children who had been sexually abused. Aguilera v. State, 2007 Tex. App. LEXIS 340 (Tex. App. San Antonio Jan. 19 2007).

Evidence : Scientific Evidence : Blood Alcohol

405. This rule did not provide a basis to exclude the results of a blood test when the nurse who drew the blood was unavailable because the toxicologist was available to testify regarding the reliability of the tests performed and had not yet been given the opportunity to do so. State v. Guzman, 439 S.W.3d 482, 2014 Tex. App. LEXIS 7347 (Tex. App. San Antonio July 9 2014).

406. Court erroneously concluded defendant's blood-alcohol test results were scientifically unreliable or irrelevant; scientific unreliability or irrelevance was not a theory of law applicable to the case for purposes of excluding the medical records because State did not seek to use a blood test obtained hours after an accident that was below the legal limit of intoxication and, through retrograde extrapolation, attempt to show defendant's blood-alcohol level exceeded the legal limit at the time of the accident. State v. Huse, 2014 Tex. App. LEXIS 2657 (Tex. App. Amarillo Mar. 6 2014).

407. Trial court did not err by admitting the testimony of the nurse that drew defendant's blood because she testified concerning the procedure she normally used for drawing blood and that her signature was on defendant's tube, she was not asked for specific opinions based on scientific, technical, or other specialized knowledge, and her testimony was relevant. Halbirt v. State, 2013 Tex. App. LEXIS 12823, 2013 WL 5658371 (Tex. App. Beaumont Oct. 16 2013).

408. In a felony DWI case, the trial court erred by allowing a forensic scientist to estimate defendant's blood-alcohol level based on a blood test taken several hours after his arrest; the scientist did not have sufficient facts regarding defendant's characteristics to conduct a proper retrograde extrapolation analysis. The error was harmless, because the other evidence in the case was sufficient to prove that defendant was intoxicated. Hazlip v. State, 2012 Tex. App. LEXIS 8141 (Tex. App. Beaumont Sept. 26 2012).

409. State satisfied the Kelly reliability test, and therefore the trial court did not abuse its discretion by admitting the breath test results because the record showed that the officer was certified by the Texas Department of Public Safety and he testified that he complied with the required 15 minute observation period when administering the test. The officer was not required to demonstrate any personal familiarity with the underlying science and technology. Bolen v. State, 321 S.W.3d 819, 2010 Tex. App. LEXIS 6924 (Tex. App. Amarillo Aug. 24 2010).

410. In a case involving intoxication manslaughter, a trial court did not abuse its discretion in allowing defendant's Dade Dimension RXL blood-alcohol results or expert-witness testimony regarding appellant's blood-test results to be presented to the jury; the trial court was satisfied with expert testimony as to the underlying scientific theory involving photomatic readings of the absorbent matter created from an enzymatic reaction caused by mixing a reagent with blood serum. It was within the zone of reasonable disagreement for the trial court to conclude the State met the three factors under Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992), by clear and convincing evidence regarding the Dade Dimension RXL. Wooten v. State, 267 S.W.3d 289, 2008 Tex. App. LEXIS 5497 (Tex. App. Houston 14th Dist. 2008).

411. Retrograde extrapolation evidence was properly admitted as reliable scientific evidence in a felony murder case based on the underlying felony of driving while intoxicated with a child passenger; the expert clearly explained how he converted the serum-blood result to a whole-blood result, consistently testified without contradicting himself,

and testified as to his years of experience with retrograde extrapolation and the underlying theory of the science and its methodologies. Bigon v. State, 252 S.W.3d 360, 2008 Tex. Crim. App. LEXIS 1 (Tex. Crim. App. 2008).

412. In a personal injury suit stemming from a collision between a motorist and a bicyclist, evidence of the bicyclist's intoxication should have been admitted because the bicyclist's vigilance, judgment, and reactions were at issue; the absence of evidence that causally connected alcohol consumption or intoxication to the cause of that collision did not require the exclusion of expert testimony under Tex. R. Evid. 702. Ticknor v. Doolan, 2006 Tex. App. LEXIS 6717 (Tex. App. Houston 14th Dist. July 27 2006).

413. Given that the expert knew the results of one test of defendant's blood alcohol concentration a reasonable time from defendant's driving and knew several of defendant's relevant characteristics, the trial court did not abuse its discretion in overruling defendant's objection to retrograde extrapolation evidence regarding his blood alcohol level. Lomax v. State, 2006 Tex. App. LEXIS 2527 (Tex. App. Waco Mar. 29 2006).

414. Court properly suppressed retrograde extrapolation testimony where the expert had not been provided with facts justifying the assumption that defendant was in the post-absorptive phase at the time of the accident, and he admitted that if a hypothetical individual consumed a meal and alcohol with that meal, the presence of food in his stomach would affect the absorptive phase to the point that peak blood-alcohol level could be reached some time much later than when the incident occurred. State v. Franco, 180 S.W.3d 219, 2005 Tex. App. LEXIS 10823 (Tex. App. San Antonio 2005).

415. In a driving while intoxicated case, the trial court did not err in admitting expert testimony using retrograde extrapolation to establish defendant's blood alcohol concentration because the expert was qualified and the science was reliable. Peden v. State, 2004 Tex. App. LEXIS 9954 (Tex. App. Houston 1st Dist. Nov. 10 2004).

416. In a driving while intoxicated case, the State's intoxilyzer expert's testimony regarding retrograde extrapolation of defendant's blood alcohol content, which estimated defendant's blood-alcohol level when he was driving based on a test result from some later time, was admissible because: (1) the intoxilyzer tests were given within a reasonable amount of time after he was driving; (2) more than three of defendant's personal characteristics -- such as weight, gender, typical drinking pattern, tolerance for alcohol, amount of alcohol consumed, what the person ingested, the duration of the drinking spree, the time of the last drink, and how much and what the person had to eat either before, during, or after the drinking -- were known by the expert; and (3) the expert used the accepted average rate for elimination of alcohol at 0.015 grams per hour, instead of calculating a specific elimination rate for defendant. Smothers v. State, 2004 Tex. App. LEXIS 6399 (Tex. App. Fort Worth July 15 2004).

417. In a driving while intoxicated case, the trial court abused its discretion by admitting the State's expert's testimony on retrograde extrapolation based on defendant's intoxilyzer results as the State was unable to show that the expert's testimony was reliable; the expert did not explain the science of retrograde extrapolation and did not know many relevant, important personal characteristics of defendant. Owens v. State, 135 S.W.3d 302, 2004 Tex. App. LEXIS 3536 (Tex. App. Houston 14th Dist. 2004).

Evidence : Scientific Evidence : Blood & Bodily Fluids

418. Trial court did not err by admitting expert testimony because the underlying scientific theory, that the 3-chlorotyrosine detected in the victims' blood came from a bleach injection, was valid and could be clearly explained, the use of a gas chromatography mass spectrometer to apply the theory to humans was valid, the theory was accepted by the relevant scientific community, the theory had been applied in testing on human blood plasma, and literature existed that supported the underlying theory. Saenz v. State, 421 S.W.3d 725, 2014 Tex. App. LEXIS 591,

2014 WL 223220 (Tex. App. San Antonio Jan. 22 2014).

419. Trial court did not err by admitting expert testimony because the underlying scientific theory, that the 3-chlorotyrosine detected in the victims' blood came from a bleach injection, was valid and could be clearly explained, the use of a gas chromatography mass spectrometer to apply the theory to humans was valid, the theory was accepted by the relevant scientific community, the theory had been applied in testing on human blood plasma, and literature existed that supported the underlying theory. Saenz v. State, 421 S.W.3d 725, 2014 Tex. App. LEXIS 591, 2014 WL 223220 (Tex. App. San Antonio Jan. 22 2014).

420. Even if admission of the presumptive test for blood performed on defendant's shoes and vehicle was in error, the error was harmless because an additional test confirmed the presumptive test results. Dean v. State, 2013 Tex. App. LEXIS 11011 (Tex. App. Tyler Aug. 29 2013).

421. In a criminal prosecution for murder, the trial court did not err in permitting a detective to testify as a blood spatter expert. The detective was qualified, because he received training in the area of blood stains and blood spatter patterns, he had taught classes on intermediate crime scene investigations, and he served as an expert witness in other cases. De Leon v. State, 2006 Tex. App. LEXIS 813 (Tex. App. San Antonio Feb. 1 2006).

422. In a child sexual assault trial, testimony was properly admitted regarding whether there would be bleeding during a female's first sexual intercourse and regarding a physician's ability to detect semen on clothing versus skin. Based on the expert's extensive background, experience, and expertise in the area of pediatrics and child sexual abuse, the testimony was sufficiently reliable. Croft v. State, 148 S.W.3d 533, 2004 Tex. App. LEXIS 8398 (Tex. App. Houston 14th Dist. 2004).

423. In an aggravated assault case, an expert was qualified to testify regarding blood spatter analysis where he had been an officer for 13 years, he participated in 45-50 hours of instruction, and he had applied his knowledge at other crime scenes. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

424. In an aggravated assault case, because blood spatter analysis was subject to judicial notice and the State proved the proper application of blood spatter analysis, the trial court did not err in admitting the State's testimony on the issue of blood spatter analysis. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

425. Texas takes judicial notice of the validity of blood spatter analysis; the State is not required to produce evidence on the first two criteria of Kelly. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

Evidence : Scientific Evidence : Crime Scene

426. Trial court did not err by allowing the State's expert to testify that the probability that the fire was ignited by an electrical spark in the air conditioner or refrigerator was extremely low because the matters defendant complained of went to the weight of the expert's testimony and not its admissibility. The expert was clearly qualified and explained his conclusion about the probability of ignition sources in scientific terms, based on known principles of movement, distribution, and concentration of gas vapors. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

427. Trial court did not abuse its discretion in concluding that the State's expert's testimony had a reliable scientific basis because the expert's testimony addressed nearly all of the seven considerations for the trial court,

demonstrating that the technique for determining what started the fire was well-accepted as valid, explaining the theory and technique with clarity and focus, showing evidence of his experience and training, and explaining how he applied those to his investigation of the instant case. Common sense dictated that some speculation was involved in attempting to reconstruct a scene that was destroyed by fire or in assessing a burn injury based on numerous variables, but this went to the weight of the evidence, rather than its admissibility. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

Evidence : Scientific Evidence : Daubert Standard

428. In an aggravated robbery case, defendant provided the trial court with insufficient information to allow the trial court to determine that the psychologist's testimony regarding the weapon focus effect was reliable under Tex. R. Evid. 702. Consequently, the trial court did not abuse its discretion in excluding the psychologist's proffered testimony about the weapon focus effect. Blasdell v. State, 420 S.W.3d 406, 2014 Tex. App. LEXIS 167, 2014 WL 68801 (Tex. App. Beaumont Jan. 8 2014).

429. In a case in which defendant claimed that his trial counsel improperly failed to object to the admission of expert testimony regarding the results of a scent lineup, which defendant contended produced the sole evidence that resulted in his being charged with burglary of a habitation, defendant had failed to satisfy the first prong of Strickland because it could not be said that his trial counsel was ineffective in failing to object to the legitimacy of dog-scent evidence that had been held admissible by two Texas courts of appeal in similar cases and that no Texas court had ruled inadmissible. Because another trial court's ruling to admit evidence from a pad lineup, performed similarly to the pad lineup in defendant's case, had been upheld on appeal, defendant failed to carry his burden of showing the dog scent evidence admitted was inadmissible, and, at most, he had shown weaknesses in the testimony that provided a basis for cross-examination, but he had not shown that its admission was outside the zone of reasonable disagreement. Perkins v. State, 2009 Tex. App. LEXIS 7069 (Tex. App. Houston 1st Dist. Aug. 28 2009).

430. Where defendant was charged with possession of cocaine with intent to deliver, Tex. R. Evid. 702 allowed the trial court to admit the expert testimony of the canine handler whose drug-sniff dog alerted on defendant; the canine handler had twelve years of experience and the dog had participated in 74 lineups without misidentifying anyone; while defendant was the only African-American and the only person handcuffed, the lineup consisting of defendant and five police officers was sufficiently objective to be reliable. Risher v. State, 227 S.W.3d 133, 2006 Tex. App. LEXIS 10462 (Tex. App. Houston 1st Dist. 2006).

431. Trial court abused its discretion under Tex. R. Evid. 702 by admitting evidence of Horizontal Gaze Nystagus test without requiring proof from the State that the test was administered properly. The error was harmless under Tex. R. App. P. 44.2(b), however, because defendant drove erratically as he left the scene of an accident, had a strong odor of alcohol on his breath, admitted to drinking beer and smoking marijuana, had two empty beer cans in his car, and performed poorly on three other sobriety tests. Tillinghast v. State, 2005 Tex. App. LEXIS 7818 (Tex. App. Fort Worth Sept. 22 2005).

432. Trial court did not abuse its discretion by denying defendant's objection to the reliability of the testimony of crime lab scientist who tested the heroin evidence because the scientist's testimony addressed the methods he used in testing the heroin and the acceptance of the tests he performed within the scientific community as valid methods for determining the composition of suspected controlled substances as required by Tex. R. Evid. 702. Lopez v. State, 2005 Tex. App. LEXIS 4625 (Tex. App. Eastland June 16 2005).

433. Trial court did not abuse its discretion by denying defendant's objection to the reliability of the testimony of crime lab scientist who tested the heroin evidence because the scientist's testimony addressed the methods he used in testing the heroin and the acceptance of the tests he performed within the scientific community as valid

methods for determining the composition of suspected controlled substances as required by Tex. R. Evid. 702. Lopez v. State, 2005 Tex. App. LEXIS 4610 (Tex. App. Eastland June 16 2005).

434. Testimony of a witness for the State regarding how the global positioning system (GPS) worked and its reliability was properly admitted where the witness testified that he had a bachelor's degree in geography, and where his testimony demonstrated a knowledge of how GPS worked and its reliability. The trial court could decide that a geographer who used GPS daily in his job was qualified to testify about the reliability of GPS technology, and the witness's testimony demonstrated that GPS-figured coordinates were accepted as reliable in his field just as arithmetical sums on an electronic calculator were commonly accepted as reliable. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

435. Testimony of a trucking company's safety administrative coordinator was properly admitted because her purpose was to explain how global positioning systems (GPS) data, which another witness's testimony showed was reliable, became a business record of the trucking company. Furthermore, her testimony established her understanding of the many systems the company used to track its drivers and showed that the system of transmitting and receiving the GPS data was automatic. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

436. Defendant failed to show that a trial court abused its discretion in overruling his objection to a DNA analyst's testimony and report on the population frequency statistic of the DNA she tested because the analyst was a highly qualified expert on all aspects of DNA analysis, including statistical interpretation of the DNA profile, and testified that multiplication was the standard way of calculating genotype frequencies. Furthermore, she explained that multiplication of the frequencies for each allele was a permitted method of determining the overall statistical likelihood of a person having all the alleles because they were unrelated. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

437. Reliability of a DNA analyst's population frequency calculation was shown by clear and convincing evidence because her testimony showed that the scientific theory and technique that she applied in making her population frequency calculation was accepted as valid in the scientific community. She also testified to the existence of documentation (i.e., literature) supporting the underlying scientific theory, and there was an absence of any contrary expert testimony. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

438. Clear and convincing evidence supported a trial court's decision to admit a DNA analyst's population frequency statistics where defendant never questioned the analyst concerning the independence of the loci tested, and where the analyst's testimony about the wide acceptance of the Federal Bureau of Investigation's population statistics that she used was sufficient to establish their reliability. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

439. Where the trial court did not engage in a determination of the vertical gaze nystagmus test's scientific reliability, admission of officer's testimony regarding the VGN test, and regarding defendant's impairment, was an abuse of discretion; because almost 40 percent of the entire trial was devoted to the VGN's unproven results, defendant's conviction for felony driving while intoxicated as an habitual offender had to be reversed because the error was not harmless. Stovall v. State, 140 S.W.3d 712, 2004 Tex. App. LEXIS 4026 (Tex. App. Tyler 2004).

440. In a driving while intoxicated prosecution under Tex. Penal Code Ann. § 49.04(b), where defendant sought to admit an expert witness to testify as to whether the factors of intoxication were identifiable from the videotape but, pursuant to Tex. R. Evid. 702, the trial court properly excluded the expert witness's testimony because its substance was not outside the knowledge and experience of the average juror, and the expert's testimony did not meet the Daubert standard for expert testimony as (1) the expert's testimony did not establish that a rate of error

could be assigned where a determination of intoxication was made from viewing a videotape and no field sobriety tests were conducted; (2) the expert could not cite any scientific theory supporting a conclusion that intoxication could be determined solely from viewing a videotape nor could he refer the court to any literature supporting or rejecting that conclusion; and (3) the expert presented no publications or peer-reviewed data relating to a determination of intoxication without field sobriety test data nor did he establish that his method was generally accepted in the relevant community. Platten v. State, 2004 Tex. App. LEXIS 588 (Tex. App. Tyler Jan. 21, 2004).

Evidence : Scientific Evidence : DNA

441. Trial court did not abuse its discretion in overruling defendant's challenge to the reliability of a DNA analyst's expert testimony under Tex. R. Evid. 702 because 1) the DNA analyst testified that the lab technicians performed all of the lab work, but that she made all the DNA comparisons; that everyone followed the same training program; that all of the lab work was subject to an internal validation process; that the lab took steps to ensure that contamination did not occur during the DNA testing process; and that she was able to ascertain that the DNA was properly extracted; and 2) there was no testimony to suggest that the technicians who performed the lab work deviated from proper protocols or procedures. Dreyer v. State, 2011 Tex. App. LEXIS 353, 2011 WL 193494 (Tex. App. Beaumont Jan. 19 2011).

442. Defendant waived his argument that the trial court erred in admitting the DNA test results to the extent the argument was based on failure to show, under Tex. R. Evid. 702, that the instrument used was reliable because the trial objection and ruling did not pertain to the reliability of the instrument. Parker v. State, 2010 Tex. App. LEXIS 5508, 2010 WL 2784428 (Tex. App. Houston 14th Dist. July 15 2010).

443. In a trial for child sexual assault, there was no error under Tex. R. Evid. 702, in admitting DNA test results, despite the analyst's failure to observe all 28 cycles of the instrument. Parker v. State, 2010 Tex. App. LEXIS 5508, 2010 WL 2784428 (Tex. App. Houston 14th Dist. July 15 2010).

444. In defendant's injury to a child case, the court did not err in admitting opinion testimony concerning a DNA test because the expert duly limited her testimony concerning the sample to show it was human skin, consistent with the child's skin, and that the child could not be excluded as the donor. The question raised by defendant concerned more the weight of the testimony rather that its reliability; the expert did not testify that the skin belonged to the child as defendant identified in his trial objection. Smith v. State, 2009 Tex. App. LEXIS 401, 2009 WL 1941999 (Tex. App. Corpus Christi Jan. 22 2009).

445. On appeal of defendant's conviction for murder, he challenged whether the DNA sample test results were the product of contamination; while the issue of contamination was relevant to reliability, he failed to raise the issue at trial; therefore, the claim was waived for review. Lane v. State, 2006 Tex. App. LEXIS 8912 (Tex. App. Houston 14th Dist. Oct. 17 2006).

446. Expert testimony was properly admitted regarding semen evidence obtained from the victim in defendant's aggravated sexual assault case, because the expert testified that the underlying scientific theory for DNA was valid and had been accepted by the scientific community, that literature existed supporting the scientific theory, that the techniques used to apply the theory were valid, and that the valid techniques were applied in this case. Although she stated that she was unfamiliar with the error rate of DNA testing, she testified that she used quality measures and positive and negative controls to insure accuracy during DNA testing. Ford v. State, 2005 Tex. App. LEXIS 3151 (Tex. App. Dallas Apr. 27 2005).

Evidence : Scientific Evidence : Fingerprints & Footprints

447. Court properly admitted expert testimony regarding fingerprint evidence because the officers' testimony was limited to the types of surfaces that were not conducive to lifting fingerprints; as officers trained and experienced in lifting fingerprints, their area of expertise included what made certain surfaces less suitable to lift fingerprints. Brown v. State, 2014 Tex. App. LEXIS 8405 (Tex. App. Eastland July 31 2014).

448. Trial court properly admitted the State's fingerprint expert's opinion because the expert testified as to the technique she employed when comparing fingerprints, that the technique she employed had been used and accepted by the scientific community, and that she used the technique properly. Shorter v. State, 2013 Tex. App. LEXIS 9250 (Tex. App. Corpus Christi July 25 2013).

449. Trial court did not err by overruling defendant's objection to the State's expert being allowed to testify as an expert witness on the subject of fingerprint comparison because the evidence showed that the expert was qualified, as he testified that he had been a forensic investigator for 18 years, he had training in fingerprint comparison, he had been certified to examine fingerprints, and had been doing fingerprint comparison for the police department for 17 years. The court also held that the evidence was reliable because the uniqueness of fingerprints was common knowledge upon which the court could take judicial notice. Lightner v. State, 2013 Tex. App. LEXIS 5365 (Tex. App. Dallas Apr. 30 2013).

450. In defendant's theft case, a witness's shoe print identification testimony was properly admitted because the witness testified that he applied the appropriate technique in reaching his opinions. Noting accidentals common to defendant's shoes and the impressions, the witness opined that no shoe but defendant's could have made the impression on three of the decals and the paper from the getaway vehicle; conversely, the other decal sampled did not contain an accidental and therefore could have been produced by any shoe of like size and brand as defendant's. Castellon v. State, 302 S.W.3d 568, 2009 Tex. App. LEXIS 9681 (Tex. App. Amarillo Dec. 21 2009).

451. Court properly admitted a latent fingerprint report because the officer had fifteen years experience, he testified regarding the numerous courses he had taken in fingerprint examination, and after reprinting defendant, the officer located fourteen characteristics between the print from the duct tape and defendant's print. Montez v. State, 2008 Tex. App. LEXIS 7033 (Tex. App. San Antonio Sept. 24, 2008).

452. At trial, an expert witness testified that fingerprint analysis was recognized and accepted as valid in the scientific community, that there was a procedure used in analyzing fingerprints, and that he had followed the technique in this case. Given the fact that fingerprint evidence was accepted as a matter of common knowledge, and given the expert's testimony regarding the fingerprint analysis in defendant's case, the trial court did not abuse its discretion in admitting the fingerprint testimony. Salazar v. State, 2005 Tex. App. LEXIS 7187 (Tex. App. Austin Aug. 31 2005).

Evidence : Scientific Evidence : Hairs & Fibers

453. In defendant's capital murder case, the trial court properly denied defendant's motion to suppress hair-comparison analysis because the expert had to complete police training in forensic-hair comparison and work on various hair-comparison cases under direct supervision, he explained how he tested the hair found in defendant's vehicle to the hair taken from the victim's head, and the expert testified that hair-comparison analysis was considered an accepted science within the scientific community and that there was literature on the topic. Arciba v. State, 2009 Tex. App. LEXIS 9815, 2009 WL 5155532 (Tex. App. Waco Dec. 30 2009).

Evidence : Scientific Evidence : Handwriting

454. Defendant's convictions for aggravated robbery and unlawful possession of a firearm were proper because a detective's testimony regarding handwriting by comparison was well within the scope of the field and the detective relied upon and utilized the principles involved in the field. Carter v. State, 2009 Tex. App. LEXIS 5918, 2009 WL 2343725 (Tex. App. El Paso July 31 2009).

Evidence : Scientific Evidence : Polygraphs

455. Revocation of defendant's deferred-adjudication community supervision based on the results of polygraph examinations was inappropriate because, while the psychotherapist did make the conclusory statement that those in his field reasonably relied on polygraph results, the sole basis of his opinion was the results of a test that had been held inadmissible because it was not reliable. Total reliance on inadmissible and untrustworthy facts could not be reasonable, nor would such an opinion achieve the minimum level of reliability necessary for admission under Tex. R. Evid. 702. Leonard v. State, 385 S.W.3d 570, 2012 Tex. Crim. App. LEXIS 1598 (Tex. Crim. App. Nov. 21 2012).

Evidence : Scientific Evidence : Psychiatric & Psychological Evidence

456. In a case in which appellant juvenile was charged with engaging in delinquent conduct for fatally shooting his father, the trial court erred in excluding the expert testimony of a psychiatrist as to appellant's belief that force was immediately necessary and that a reasonable person in his circumstances could not retreat where the testimony was relevant to appellant's state of mind, which had been profoundly affected by the sum of his violent experiences with his father, and would aid the jury in understanding his fear at the time of the offense. At the beginning of the hearing on its reliability, the parties agreed the psychiatrist was an expert, and the State did not challenge the fact that psychology was a recognized health-care field, and because the psychiatrist testified that his analysis was based on his more than 20 years' experience in psychology and his meticulous examination of appellant's records, his methodology was sound. In re E.C.L., 278 S.W.3d 510, 2009 Tex. App. LEXIS 995 (Tex. App. Houston 14th Dist. 2009).

457. In a trial for sexual assault on a child, a psychological expert's testimony was properly admitted under Tex. R. Evid. 702, even though the expert did not employ any standardized psychological tests in the evaluation and diagnosis of the complainant; the fact that another psychologist might have chosen to use one or more standardized tests went to the weight, not the admissibility, of the testimony and did not make the expert's scientifically accepted methodology unreliable. Aguilera v. State, 2007 Tex. App. LEXIS 340 (Tex. App. San Antonio Jan. 19 2007).

458. Trial court did not err by allowing the State's expert to testify that it was more likely than not that defendant would commit future acts of criminal violence because: (1) as a board certified psychiatrist with years of experience and specializing in forensic psychology, the expert was shown to be qualified; (2) while making predications about future behavior was controversial among psychiatrists, forensic psychiatry was a legitimate and recognized field by the American Psychiatric Association; and (3) the expert testified that his method of assessing future-dangerousness was considered valid. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

459. Where defendant was charged with indecency with a child and aggravated sexual assault of a child, a counselor with years of training and experience was permitted to testify as an expert on child sexual abuse. The counselor held a Bachelor's Degree in social work with a minor in psychology, and a Master's Degree in counseling. Johnson v. State, 2005 Tex. App. LEXIS 7412 (Tex. App. Tyler Sept. 7 2005).

Evidence : Scientific Evidence : Sobriety Tests

460. Smooth pursuit portion of a horizontal gaze nystagmus test was properly admitted, even though the officer was unable to determine the length of time he spent conducting it, because he also testified that he administered the test correctly and the videotape supported a conclusion that, contrary to defendant's argument, the officer spent approximately 16 seconds in administering the challenged portion of the procedure. Tullos v. State, 2011 Tex. App. LEXIS 6993, 2011 WL 3925586 (Tex. App. Beaumont Aug. 24 2011).

461. In a driving while intoxicated case, an officer was qualified under Tex. R. Evid. 702 to testify to the results of a horizontal gaze nystagmus test (HGN), even though he was not currently certified at the time of the stop, because he had obtained his certificate originally in 1999, took a refresher course in 2003 and another in 2009, after the stop in question, and testified he had performed the HGN test hundreds of times. Patton v. State, 2011 Tex. App. LEXIS 1069, 2011 WL 541481 (Tex. App. San Antonio Feb. 16 2011).

462. During defendant's trial for driving while intoxicated (DWI) in violation of Tex. Penal Code Ann. § 49.04, the testimony of an officer with the police department's DWI enforcement unit might have been improper under Tex. R. Evid. 701, 702 because, by repeatedly testifying that the walk-and-turn and one-leg stand sobriety tests provided "validated" or "scientifically validated" clues of impairment, the officer gave those tests an imprimatur of scientific accuracy that they had not been shown to possess and that, in any event, he was not shown qualified to confer. However, reversible error was not presented because the issue was not preserved for appeal, and because defendant's substantial rights were not affected, as there was substantial evidence of defendant's intoxication, including his admission that he had consumed four shots of tequila and the testimony of four witnesses describing his reckless driving, odor of alcoholic beverage, bloodshot eyes, slurred speech, and lack of balance. McIntosh v. State, 2010 Tex. App. LEXIS 849 (Tex. App. Austin Feb. 4 2010).

463. Court properly admitted an officer's testimony regarding horizontal gaze nystagmus because, although holding the stimulus for less time than required, the officer testified that he stopped at the thirty-five degree mark because he saw the onset of nystagmus; additionally, defendant pointed to no authority and nothing in the record suggesting that doing the tests in a "backwards" way would invalidate the results. Soto v. State, 2009 Tex. App. LEXIS 1904 (Tex. App. Austin Mar. 19 2009).

464. In a driving while intoxicated trial, exclusion of horizontal gaze nystagmus (HGN) test evidence was within the trial court's discretion under Tex. R. Evid. 702, even though a trooper testified to administering the HGN test in accordance with recommended procedures, because the trial court found the officer's credibility to be lacking, given the failure to have defendant perform the HGN test on video. State v. Rudd, 255 S.W.3d 293, 2008 Tex. App. LEXIS 2360 (Tex. App. Waco 2008).

465. Under Tex. R. Evid. 702, the State made an adequate showing that an officer was qualified to provide expert testimony on a horizontal gaze nystagmus (HGN) test because the officer testified that the officer was certified and had performed the HGN test on 35 test subjects in the police academy in order to receive practitioner certification. Smith v. State, 2007 Tex. App. LEXIS 1783 (Tex. App. Austin Mar. 7 2007).

466. In a driving while intoxicated prosecution, the arresting officer was properly permitted to render an expert opinion as to the validity of the horizontal gaze nystagmus (HGN) test, even though he testified he held the stimulus 6 to 8 inches from the eye rather than 12 to 15 inches, because there was no evidence that the distance invalidated the test. Bordelon v. State, 2007 Tex. App. LEXIS 275 (Tex. App. Beaumont Jan. 17 2007).

467. In a criminal prosecution for DWI, the trial court did not abuse its discretion by granting the defendant's motion in limine to prohibit expert testimony relating to the HGN test; the officer deviated from the National Highway Traffic Safety Administration standards by flicking his finger on the pen during the test; therefore, the results were not reliable pursuant to Tex. R. Evid. 702. State v. Trinidad, 2006 Tex. App. LEXIS 8180 (Tex. App. San Antonio

Sept. 13 2006).

468. Appellant's issue was overruled and his driving while intoxicated conviction and sentence pursuant to Tex. Penal Code Ann. § 49.04 were affirmed because an officer had sufficient training and experience to be qualified as an expert under Tex. R. Evid. 702 to testify regarding the administration of the horizontal gaze nystagmus test. Price v. State, 2006 Tex. App. LEXIS 5349 (Tex. App. Austin June 23 2006).

469. In defendant's driving while intoxicated case, the court properly allowed the arresting officer to testify regarding defendant's performance on the walk-and-turn and one-legged stand sobriety tests because the tests were grounded in the common knowledge that excessive alcohol consumption could cause problems with coordination, balance, and mental agility. Plouff v. State, 192 S.W.3d 213, 2006 Tex. App. LEXIS 2546 (Tex. App. Houston 14th Dist. 2006).

470. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

471. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

472. Trial court abused its discretion under Tex. R. Evid. 702 by admitting evidence of Horizontal Gaze Nystagus test without requiring proof from the State that the test was administered properly. The error was harmless under Tex. R. App. P. 44.2(b), however, because defendant drove erratically as he left the scene of an accident, had a strong odor of alcohol on his breath, admitted to drinking beer and smoking marijuana, had two empty beer cans in his car, and performed poorly on three other sobriety tests. Tillinghast v. State, 2005 Tex. App. LEXIS 7818 (Tex. App. Fort Worth Sept. 22 2005).

473. Defendant's conviction for driving while intoxicated (DWI) under Tex. Penal Code Ann. § 49.04(a) was proper because the trial court did not err in admitting a police officer's testimony regarding the results of the horizontal-gaze nystagmus tests (HGN) test where the officer testified that he attended a standardized field sobriety testing class, that he was certified, and that he had conducted such tests. The theory underlying the HGN test and the technique employed in administering it have both been found sufficiently reliable to allow the test to be admissible under Tex. R. Evid. 702, and even though the officer who testified at trial was not the officer that administered the test to defendant, the officer testified about how the HGN test was administered and described the steps the other officer took to administer the tests as a videotape of the incident was shown to the jury. Barrineau v. State, 2005 Tex. App. LEXIS 903 (Tex. App. Fort Worth Feb. 3 2005).

474. Because an officer had completed the necessary training to be considered an expert on the Horizontal Gaze Nystagmus test, the trial court did not abuse its discretion by allowing the officer to testify concerning the test even though he had not yet received his certification at the time he performed the test on defendant. Barton v. State, 2004 Tex. App. LEXIS 8863 (Tex. App. Houston 14th Dist. Oct. 5 2004).

475. Sufficient evidence supported a DWI conviction where an officer testified as to his experience, his credentials to give field sobriety tests and as to the specifics on which his opinion was based. Even if a proper predicate was not established, any error was harmless. McDonald v. State, 2004 Tex. App. LEXIS 7319 (Tex. App. Dallas Aug. 13 2004).

476. In a driving while intoxicated case, because the police officer admitted that in administering the horizontal gaze nystagmus test (HGN) on defendant that he failed to complete the minimum number of 14 passes across defendant's eyes, as required by the National Highway Traffic Safety Administration, the HGN test results did not meet the requirements for admissibility into evidence, and the trial court abused its discretion by admitting the officer's testimony regarding the HGN test results. Smothers v. State, 2004 Tex. App. LEXIS 6399 (Tex. App. Fort Worth July 15 2004).

477. Police officer was qualified as an expert on the HGN test where the requirement was satisfied by proof that the officer had received certification by the State of Texas to administer the HGN, and the officer testified and provided supporting documentation that he had become duly certified to administer the HGN test. Rodriguez v. State, 2004 Tex. App. LEXIS 5697 (Tex. App. Houston 14th Dist. June 29 2004).

478. In a prosecution for DWI, the trial court was not required to suppress evidence of defendant's horizontal gaze nystagmus (HGN) tests. The underlying scientific theory and the technique applying the theory of the HGN testing were both sufficiently reliable to meet the requirements of Tex. R. Evid. 702. Oropeza v. State, 2004 Tex. App. LEXIS 2588 (Tex. App. Dallas Mar. 24 2004).

479. Inasmuch as the scientific reliability of the horizontal gaze nystagmus test has already been established, evidence of its reliability is not required before results may be admitted. Oropeza v. State, 2004 Tex. App. LEXIS 2588 (Tex. App. Dallas Mar. 24 2004).

480. Where defendant flunked all three field sobriety tests, defendant's conviction of misdemeanor driving while intoxicated in violation of Tex. Penal Code Ann. § 49.04 was affirmed because: (1) admission of the evidence regarding the horizontal gaze nystagmus test under Texas R. Evid. 702 was proper in that the officer was qualified as an expert in the administration and the officer performed the screening properly on the occasion in question, and (2) the trial court erred in admitting evidence of vertical gaze nystagmus (VGN) and resting nystagmus tests under Tex. R. Evid. 702 because the State failed to show that evidence of VGN and resting nystagmus testing was reliable and relevant to assist the trier of fact, but admission of the evidence was harmless error under Tex. R. App. P. 44.2(b) because it did not affect defendant's substantial rights in that the jury instruction did not require the jury to determine what substance caused defendant's intoxication. Quinney v. State, 99 S.W.3d 853, 2003 Tex. App. LEXIS 1695, 117 A.L.R.5th 803 (Tex. App. Houston 14th Dist. 2003).

481. Where there was no indication in an officer's sworn report that his opinion of a driver's intoxication was based on his training and experience, his qualifications did not have to be established under Tex. R. Evid. 702; further, the walk-and-turn and one-leg stand tests were not based on a novel scientific theory and, under Tex. R. Evid. 701, a police officer was not required to be an expert to express an opinion as to whether the person he observed was intoxicated. Tex. Dep't of Pub. Safety v. Struve, 79 S.W.3d 796, 2002 Tex. App. LEXIS 4433 (Tex. App. Corpus Christi 2002).

Evidence : Scientific Evidence : Toxicology

482. In a manslaughter case, a court properly admitted an expert's testimony because the expert directed a program training individuals in the effects of alcohol and drugs on driving, he published medical and scientific literature in the area of toxicology, and he did not speculate how the methamphetamine affected defendant, what

phase of the drug defendant was in at the time of the accident, or whether defendant fell asleep at the wheel. Haley v. State, 396 S.W.3d 756, 2013 Tex. App. LEXIS 3974, 2013 WL 1286650 (Tex. App. Houston 14th Dist. Mar. 28 2013).

483. Record contained sufficient evidence showing that enzyme-multiplied immunoassay technique (EMIT), with or without a confirmation test, was reliable scientific evidence under Tex. R. Evid. 702, and therefore the appellate court erred by holding that EMIT tests were unreliable without a confirmation test; the court concluded that the reliability of even a single, unconfirmed EMIT test had been sufficiently established that it met the first two Kelly prongs. The record showed that: (1) the expert witnesses testified that the underlying scientific theory and technique of the EMIT test were accepted as valid by the accredited Texas Department of Public Safety laboratory and the greater forensic toxicology community in Texas; (2) an expert testified that there was literature supporting EMIT as a reliable screening test; (3) from the experts' testimony, the trial court understood that EMIT was a screening test based on enzyme reactions; (4) the expert testimony suggested that the potential error rate in EMIT was very low; (5) the experts testified as to the validity and reliability of the EMIT test and were subject to cross-examination by the State, and many of the courts in the cases cited relied upon expert evaluations of the EMIT technique from their records; and (6) the qualifications of defendant's experts were such that the court believed it could confidently rely upon their testimony. Somers v. State, 368 S.W.3d 528, 2012 Tex. Crim. App. LEXIS 753 (Tex. Crim. App. 2012).

484. Trial court did not abuse its discretion by admitting blood test results because a police officer, who was a drug recognition expert, was qualified under Tex. R. Evid. 702 to offer expert testimony as to the effects of a controlled substance on an individual. Through his experience, education, and training, the officer established that he possessed knowledge beyond that of the average person determining if the prescription drug defendant took caused intoxication. Armstrong v. State, 2012 Tex. App. LEXIS 2041, 2012 WL 864778 (Tex. App. Dallas Mar. 15 2012).

485. Trial court did not abuse its discretion by admitting blood test results because a forensic scientist in toxicology were qualified under Tex. R. Evid. 702 to offer expert testimony as to the effects of a controlled substance on an individual. The forensic scientist received her bachelors and doctorate degrees in chemistry, both with an emphasis in forensic science, she attended a training program with DPS, and that testing for central nervous system depressants was her specialty. Armstrong v. State, 2012 Tex. App. LEXIS 2041, 2012 WL 864778 (Tex. App. Dallas Mar. 15 2012).

486. Where defendant was charged with intoxication manslaughter and aggravated assault following a vehicular accident, the State's chemist was permitted to give expert testimony concerning the presence of a cocaine metabolite in defendant's blood; defendant presented no challenge to the reliability of the expert's testimony. Bannister v. State, 2006 Tex. App. LEXIS 8522 (Tex. App. Amarillo Sept. 29 2006).

Evidence : Testimony : Credibility : General Overview

487. At defendant's trial for two counts of continuous sexual abuse of a young child and one count of aggravated sexual assault, the trial court abused its discretion by admitting opinion testimony from an investigator about the truthfulness of the fifteen-year-old victim. Such testimony was inadmissible under Tex. R. Evid. 702. Lewis v. State, 2012 Tex. App. LEXIS 2052, 2012 WL 858601 (Tex. App. Fort Worth Mar. 15 2012).

488. In a trial for child sexual assault, it was error under Tex. R. Evid. 702 to admit testimony from a clinical social worker regarding the child-complainant's veracity, but the error was harmless under Tex. R. App. P. 44.2(b) because defense counsel elicited nearly identical testimony on cross-examination. Nasrollah Hanjani Alizadeh v. State, 2009 Tex. App. LEXIS 1423 (Tex. App. Houston 1st Dist. Feb. 26 2009).

489. In an action in which appellant appealed from his convictions of three counts of indecency with a child and one count of aggravated sexual assault of a child, the case was remanded to the trial court for a new trial where the exclusion of the psychologist's testimony regarding false memories had a substantial and injurious effect or influence on the jury's verdict and affected a substantial right of appellant's; the psychologist's false-memory testimony was general evidence that directly attacked the complainants' credibility and was, therefore, relevant and admissible during appellant's case-in-chief. Delong v. State, 2006 Tex. App. LEXIS 10031 (Tex. App. Fort Worth Nov. 16 2006).

490. Horse owner was properly permitted to testify in rebuttal that a veterinarian who testified that the horse owner's filly did not die because of any actions taken by the horse farm owners, with whom the horse owner left his filly, had told the horse owner that the filly died because the horse farm owners failed to get the filly to the veterinary clinic sooner. Even if the veterinarian's statements to horse owner did not qualify as expert testimony, such statements included a factual basis and had probative value. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

Evidence : Testimony : Credibility : Rehabilitation

491. Trial court did not abuse its discretion by admitting the testimony of a counselor who worked with victims of family violence because it was not improper bolstering testimony, as the victim, defendant's girlfriend, was vigorously cross-examined and impeached. The testimony also helped explain why the victim refused to report the abuse and why she recanted her affidavit of non- prosecution. Zavala v. State, 2011 Tex. App. LEXIS 9565, 2011 WL 6089935 (Tex. App. San Antonio Dec. 7 2011).

492. In a trial for child sexual abuse, counsel was rendered ineffective by not objecting to the State's bolstering of the complainant's truthfulness and credibility through both experts and lay witnesses; testimony from a forensic interviewer and an expert in child sexual assault investigations was inadmissible under Tex. R. Evid. 702 to the extent that it went to truthfulness rather than methodology. Fuller v. State, 224 S.W.3d 823, 2007 Tex. App. LEXIS 3686 (Tex. App. Texarkana 2007).

Evidence : Testimony : Experts : General Overview

493. Court properly admitted a psychologist's expert testimony because it was relevant to the jury's understanding of the underage prostitution victim's interactions with defendant, the consequences, and the reasons she remained in an abusive situation. Kentish v. State, 2014 Tex. App. LEXIS 8978 (Tex. App. Houston 14th Dist. Aug. 14 2014).

494. During the punishment phase of defendant's trial for aggravated assault of a family member, the trial court erred in admitting testimony from a State witness as an expert on lethality assessment because she did not offer any specifics to support her assertion, and she did not cite any books, articles, journals, or other clinical social workers who practiced in the area. Petriciolet v. State, 442 S.W.3d 643, 2014 Tex. App. LEXIS 8414 (Tex. App. Houston 1st Dist. July 31 2014).

495. Court properly admitted a lab report and allowed a witness to testify as an expert to the results because he testified that the machine went through the validation process when it arrived at the lab, and defendant did not ask the witness to explain how the software program worked. Brown v. State, 2014 Tex. App. LEXIS 8405 (Tex. App. Eastland July 31 2014).

496. Court properly admitted expert testimony regarding fingerprint evidence because the officers' testimony was limited to the types of surfaces that were not conducive to lifting fingerprints; as officers trained and experienced in lifting fingerprints, their area of expertise included what made certain surfaces less suitable to lift fingerprints. Brown

v. State, 2014 Tex. App. LEXIS 8405 (Tex. App. Eastland July 31 2014).

497. Trial court did not commit error in allowing the detective's testimony where the detective did not give an expert opinion about the latent prints he lifted and he did did he testify about the science of fingerprint analysis. Ridge v. State, 2014 Tex. App. LEXIS 7829 (Tex. App. Amarillo July 18 2014).

498. Court did not abuse its discretion by excluding the testimony of defendant's expert as irrelevant as to whether the trooper was lawfully discharging an official duty when defendant drove at him because the expert's opinion regarding the justification for the use of force was not based on any information regarding the trooper's encounter with defendant. Ramos v. State, 2014 Tex. App. LEXIS 6818 (Tex. App. Austin June 26 2014).

499. Expert is not obligated to have a license to testify under the Texas Supreme Court's own rules of evidence if the person is otherwise qualified under Tex. R. Evid. 702. Tyson Fresh Meats, Inc. v. Abdi, 2014 Tex. App. LEXIS 5693 (Tex. App. Amarillo May 28 2014).

500. In a negligence action under the Federal Employers Liability Act, an ergonomist expert was found to be reliable, as the expert was very knowledgeable of the locomotives and seats a railroad employee encountered because the expert had personally evaluated a large number of a railroad company's locomotives and cab seats over the course of his career. BNSF Ry. Co. v. Phillips, 434 S.W.3d 675, 2014 Tex. App. LEXIS 5533 (Tex. App. Fort Worth May 22 2014).

501. Expert testimony was not necessary to establish causation in this case, and evidence of temporal proximity, along with other evidence tending to exclude other potential causes, could have established that the business's trucks caused the damage to the car wash concrete; the causal relationship between the occurrence (delivery trucks driving over the pavement) and the condition (damage to the pavement) could in principle be determined by a layman in this case. Raul Flores, Inc. v. Rodriguez, 2014 Tex. App. LEXIS 3561, 2014 WL 1370344 (Tex. App. Corpus Christi Apr. 3 2014).

502. Regardless of the questions asked of the officer, he did not give answers that required medical expertise, and his answers related to circumstances such as having to fight an accused or vials being damaged, which amounted to testimony of a lay witness concerning what he observed; defendant was not harmed because the officer did not give expert testimony, regardless of whether the trial court erred in overruling the objection. Eckiss v. State, 2013 Tex. App. LEXIS 7371 (Tex. App. Dallas June 11 2013).

503. Although the motorist's expert calculated the diminution of value to the motorist's vehicle at a certain amount, the jury was free to not believe him, and despite the motorist's arguments, the law is clear an expert is not required to testify as to diminution of value, and because the subject is not one for experts alone, the jury could have disbelieved the expert's uncontroverted testimony, and the court reversed the grant of judgment notwithstanding the verdict to the motorist. Culwell v. Diaz, 2013 Tex. App. LEXIS 7016 (Tex. App. Dallas June 7 2013).

504. Appellant did not object to testimony on expert witness grounds, and that issue was not preserved under Tex. R. App. P. 33.1(a). Irving v. State, 2013 Tex. App. LEXIS 6443, 2013 WL 2297075 (Tex. App. Dallas May 23 2013).

505. Given that the proper operation of a sour gas well was not a matter within laypersons' experience, in order for a jury to find the owner liable on the business's negligence claim, the business had to present expert testimony on the standard of care and that the owner violated this. Fairways Offshore Exploration, Inc. v. Patterson Servs., 2013 Tex. App. LEXIS 891 (Tex. App. Houston 1st Dist. Jan. 31 2013).

506. Business did not present to the jury expert testimony on the standard of care owed by an owner and operator of a well or that the owner breached any such standard; thus, the business did not provide evidence that the owner failed to exercise the care a well operator would have exercised under the circumstances. Fairways Offshore Exploration, Inc. v. Patterson Servs., 2013 Tex. App. LEXIS 891 (Tex. App. Houston 1st Dist. Jan. 31 2013).

507. To the extent the trial court found that expert testimony was necessary in this breach of contract case, this was error; the record indicated that the cost of repairing the pool in question could be shown via bids and the homeowners' lay opinion based on estimates. Seasha Pools, Inc. v. Hardister, 391 S.W.3d 635, 2012 Tex. App. LEXIS 10765, 2012 WL 6761528 (Tex. App. Austin Dec. 28 2012).

508. Court agrees that Coastal Transp. Co. v. Crown Cent. Petroleum Corp. provides the appropriate standard for judging the adequacy of testimony offered under the Property Owner Rule, and because property owner testimony is the functional equivalent of expert testimony, it must be judged by the same standards, and thus, as with expert testimony, property valuations may not be based solely on a property owner's ipse dixit; an owner may not simply echo the phrase market value and state a number to substantiate his diminished value claim, he must provide the factual basis on which his opinion rests, and this burden is not onerous, particularly in light of the resources available today: evidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim, but the valuation must be substantiated, and a naked assertion of "market value" is not enough. Of course, the owner's testimony may be challenged on cross-examination or refuted with independent evidence, but even if unchallenged, the testimony must support a verdict, and conclusory or speculative statements do not.

509. Evidence was insufficient to prove breach of an implied duty to market under an oil and gas lease providing that royalties were to be determined based on net proceeds because the royalty owners' expert based his testimony on a hypothetical gas that was free from impurities, rather than the actual gas produced at the well. Thus, his opinion on this issue amounted to no evidence. Occidental Permian Ltd. v. French, 391 S.W.3d 215, 2012 Tex. App. LEXIS 8996, 181 Oil & Gas Rep. 647, 2012 WL 5351131 (Tex. App. Eastland Oct. 31 2012).

510. Evidence was factually sufficient to support the verdict concerning the citizen's future medical expenses; the jury heard from various experts, including the motorist's treating urologist, and his statements were directed at his inability to predict what future treatment and technology would be available, and his statements were not to imply that the motorist would not have any future medical expenses, and other experts detailed the motorist's diagnoses, medication, and anticipated future medical expenses. Saeco Elec. & Util., Ltd. v. Gonzales, 392 S.W.3d 803, 2012 Tex. App. LEXIS 8647 (Tex. App. San Antonio Oct. 17 2012).

511. Question of whether hail fell on a particular location on a particular day, and whether it caused property damage, is not a matter solely within the scope of an expert's knowledge, and thus is not a matter that requires expert testimony; to the contrary, it is a matter of personal observation and common sense that is within the scope of lay testimony. United States Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 2012 Tex. App. LEXIS 6770 (Tex. App. San Antonio Aug. 15 2012).

512. Lay witness is competent to state based on personal observation and common sense whether hail fell on a particular location on a particular date, and to make a logical connection between the hail event and the property damage existing after the storm; while it may require an expert using scientific data to predict or plot the track of a hail storm or to estimate the dollar value of the property damage, it does not require expert knowledge to say, based on one's personal observation and recollection, whether a hail storm in fact damaged a particular property during a particular time period, and no authority is cited establishing that this type of causation issue must be guided solely by expert evidence. United States Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 2012 Tex. App. LEXIS 6770 (Tex. App. San Antonio Aug. 15 2012).

513. Insured cited case law stating that expert testimony was required in a hail damage case, but that case was distinguishable because the court found only that expert testimony was required to establish the necessity of a replacement of a roof, plus the costs thereof, based on a negligent roof repair. United States Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 2012 Tex. App. LEXIS 6770 (Tex. App. San Antonio Aug. 15 2012).

514. Expert evidence presented did not conclusively establish the fact that one storm caused the damage; summary judgment on the issue was improper. United States Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 2012 Tex. App. LEXIS 6770 (Tex. App. San Antonio Aug. 15 2012).

515. Billing attorney was permitted to testify on the process of document production, which included the volume of documents produced by each side and the process of review, and the trial court did not abuse its discretion in ruling that this testimony was not expert testimony. Port of Houston Auth. v. Zachry Constr. Corp., 377 S.W.3d 841, 2012 Tex. App. LEXIS 6591 (Tex. App. Houston 14th Dist. Aug. 9 2012).

516. Counsel objected to a billing attorney's testimony in light of the trial court's expert opinion ruling, the trial court agreed that the attorney would be offering an opinion if she talked about certain things, and appellant agreed to ask the attorney not to add certain information, such that the trial court did not make an adverse ruling or deny appellee relief. Port of Houston Auth. v. Zachry Constr. Corp., 377 S.W.3d 841, 2012 Tex. App. LEXIS 6591 (Tex. App. Houston 14th Dist. Aug. 9 2012).

517. Court finds no authority that holds that failure to challenge a fee expert's methodology waives a factual sufficiency complaint on appeal. Port of Houston Auth. v. Zachry Constr. Corp., 377 S.W.3d 841, 2012 Tex. App. LEXIS 6591 (Tex. App. Houston 14th Dist. Aug. 9 2012).

518. Expert's testimony was sufficient to support the findings on attorney fees. Port of Houston Auth. v. Zachry Constr. Corp., 377 S.W.3d 841, 2012 Tex. App. LEXIS 6591 (Tex. App. Houston 14th Dist. Aug. 9 2012).

519. Witnesses were considered experts because their testimony was based on their diagnoses and treatment of appellants; the main substance of the witnesses' testimony was based on an application of their specialized scientific, technical, or specialized knowledge. Ibarra v. City of Laredo, 2012 Tex. App. LEXIS 5741, 2012 WL 2914216 (Tex. App. San Antonio July 18 2012).

520. Because the insurer did not object to expert opinion testimony, on appeal the insurer could only challenge whether the expert's testimony was conclusory and amounted to no evidence. Charter Oak Fire INS. Co. v. Swanigan, 2012 Tex. App. LEXIS 3312 (Tex. App. Fort Worth Apr. 26 2012).

521. Insurer did not object to an expert's testimony, and thus the insurer's analytical gap complaint regarding the expert's testimony was not preserved for review. Charter Oak Fire INS. Co. v. Swanigan, 2012 Tex. App. LEXIS 3312 (Tex. App. Fort Worth Apr. 26 2012).

522. Finding in favor of the taxpayer in a property tax dispute was inappropriate because the testimony of the taxpayer's appraiser was legally insufficient to support the jury's findings. Although there was some evidence of the apartment complex's market value, the evidence did not conclusively establish the market value under Tex. Tax Code Ann. § 23.01(b). Cent. Appraisal Dist. v. Western Ah 406, Ltd., 372 S.W.3d 672, 2012 Tex. App. LEXIS 3299, 2012 WL 1438454 (Tex. App. Eastland Apr. 26 2012).

523. Customers claimed a representative for the bank was not designated as an expert, and thus it appeared they believed the representative's affidavit should not have been allowed, but the court did not find an abuse of

discretion; the representative was designated as a representative of the bank, and the objection to his affidavit was in a response to the bank's summary judgment motion, which did not seek relief regarding the affidavit and did not specify what parts of the affidavit required expert testimony. All Am. Siding & Windows, Inc. v. Bank of Am., N.A., 367 S.W.3d 490, 2012 Tex. App. LEXIS 3118, 77 U.C.C. Rep. Serv. 2d (CBC) 388, 2012 WL 1366568 (Tex. App. Texarkana Apr. 20 2012).

524. To show that an attorney's breach caused damages, the client had to prove a suit within a suit, and based on the nature of his breach of fiduciary duty claim, expert testimony was required to prove causation and the client did not proffer any evidence to that effect, making summary judgment for the attorney proper. Smith v. Aldridge, 2012 Tex. App. LEXIS 2499, 2012 WL 1071246 (Tex. App. Houston 14th Dist. Mar. 29 2012).

525. Client sought the appointment of a special master so he could get help in finding an expert to testify on his behalf, but that was not an exceptional reason that warranted such an appointment. Smith v. Aldridge, 2012 Tex. App. LEXIS 2499, 2012 WL 1071246 (Tex. App. Houston 14th Dist. Mar. 29 2012).

526. Client claimed he was harmed because the attorney unreasonably engaged in settlement talks, and expert testimony was needed to prove the claim because the wisdom of engaging in such talks was tactical and not within most jurors' common understanding. Smith v. Aldridge, 2012 Tex. App. LEXIS 2499, 2012 WL 1071246 (Tex. App. Houston 14th Dist. Mar. 29 2012).

527. Client claimed the attorney did not marshal evidence to defeat summary judgment in the underlying case; lay jurors are not familiar with summary judgment standards and thus expert testimony would be necessary to show that any evidence produced would be enough to preclude summary judgment. Smith v. Aldridge, 2012 Tex. App. LEXIS 2499, 2012 WL 1071246 (Tex. App. Houston 14th Dist. Mar. 29 2012).

528. Expert testimony was necessary to prove the client's claim that he would have prevailed but for the attorney's failure to give him pleadings and other documents, and because he proffered no expert testimony to establish this and other issues that required expert testimony, the trial court did not err in granting the attorney no-evidence summary judgment as to the client's negligence claim. Smith v. Aldridge, 2012 Tex. App. LEXIS 2499, 2012 WL 1071246 (Tex. App. Houston 14th Dist. Mar. 29 2012).

529. Client's request for counsel did not relieve him of his summary judgment burden to submit evidence of causation in his action against his attorney, which required expert testimony. Smith v. Aldridge, 2012 Tex. App. LEXIS 2499, 2012 WL 1071246 (Tex. App. Houston 14th Dist. Mar. 29 2012).

530. In a partnership dispute, a trial court did not err by awarding withdrawal damages because expert testimony was not required; the only two assets at the time of a partner's death were his capital contribution and two properties, and former Tex. Rev. Civ. Stat. Ann. art. 6132b-8.06 did not apply. Moreover, the jury could have reasonably relied upon testimony by a partner regarding the value of the properties. Sewing v. Bowman, 371 S.W.3d 321, 2012 Tex. App. LEXIS 2438, 2012 WL 1065876 (Tex. App. Houston 1st Dist. Mar. 29 2012).

531. Appellant did not object to the evidence offered by witnesses in valuing an automated teller machine, front-end loader, or cost of repairs in his trial for theft and criminal mischief, and thus any objection related to hearsay and lay and expert opinions was waived under Tex. R. App. P. 33.1(a). Lee v. State, 2012 Tex. App. LEXIS 1441, 2012 WL 592192 (Tex. App. Amarillo Feb. 23 2012).

532. Attorney's expert conclusions on causation, which were offered without explanation of how a jury would have more likely than not returned a verdict favorable to a corporation after hearing certain evidence, did not amount to

evidence of causation, and thus there was no evidence of asserted breaches of duty by a law firm. Burnwood, Inc. v. Craig, Terrill Hale & Grantham, L.L.P., 2012 Tex. App. LEXIS 1212, 2012 WL 512648 (Tex. App. Amarillo Feb. 16 2012).

533. Jury's award of $ 66.5 million in damages was not rendered insufficient simply because it exceeded the range of values suggested by an expert. Carlton Energy Group, LLC v. Phillips, 369 S.W.3d 433, 2012 Tex. App. LEXIS 1299, 2012 WL 555980 (Tex. App. Houston 1st Dist. Feb. 14 2012).

534. Court was not compelled to affirm the trial court's remittitur just because a limited liability company's counsel suggested that the jury award actual damages of $ 31.16 million; the court's duty was to determine whether the evidence, including but not limited to the expert opinion testimony, was sufficient to support the jury's higher award. Carlton Energy Group, LLC v. Phillips, 369 S.W.3d 433, 2012 Tex. App. LEXIS 1299, 2012 WL 555980 (Tex. App. Houston 1st Dist. Feb. 14 2012).

535. In calculating the fair market value of the limited liability company's interest in a project at the time of the tortious interference and awarding $ 66.5 million, the jury had the expert's opinions and methodologies, and a business and corporation did not present the jury with any contradictory evidence in connection with attacking the expert evidence, nor did they present their own expert testimony to suggest a lesser fair market value; although nothing directly set forth how the jury arrived at its damage award, the award was sufficiently supported by expert testimony and other detailed information. Carlton Energy Group, LLC v. Phillips, 369 S.W.3d 433, 2012 Tex. App. LEXIS 1299, 2012 WL 555980 (Tex. App. Houston 1st Dist. Feb. 14 2012).

536. In this legal malpractice case, both sides presented expert witnesses, and the jury was free to give each expert's testimony the weight it felt was appropriate; the jury was free to believe one expert over another and the finding that law firm two was not negligent was not against the great weight of the evidence. Parsons v. Greenberg, 2012 Tex. App. LEXIS 888, 2012 WL 310505 (Tex. App. Fort Worth Feb. 2 2012).

537. Statement in case law did not support the position that the sole means of proof in cases involving seismic testing was by way of expert testimony. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 782, 2012 Tex. App. LEXIS 347, 2012 WL 129766 (Tex. App. Texarkana Jan. 18 2012).

538. Court is not persuaded that expert testimony about the connection between the blasting and the injury is necessary in every case, and will not state such a bright-line rule, and a claimant is required, however, to show a causal connection between the event and the injury; in an appeal where the review is under a "no evidence" standard, the evidence would not need to be great, but only more than a scintilla or a suspicion, and in making such a determination, however, the court still must determine what sort of evidence must have been presented, and what evidence actually was presented. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 782, 2012 Tex. App. LEXIS 347, 2012 WL 129766 (Tex. App. Texarkana Jan. 18 2012).

539. Court believes that a juror, applying commonsense understanding, can tie the relationship of the vibrations of the earth caused by seismic testing with reasonable probability to the concurrent abrupt sanding of a water well; hence, although expert testimony is often helpful to the understanding of the effects of seismic testing and is often advised, when there has been convincing lay witness evidence presented, it is not absolutely mandatory. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 782, 2012 Tex. App. LEXIS 347, 2012 WL 129766 (Tex. App. Texarkana Jan. 18 2012).

540. Common sense could allow a jury to conclude that when explosives strong enough to bounce waves off various geologic strata are used to shake the ground, the shaking could open previously tight formations to allow sand to filter through the gravel pack into the wellbore, and the jury issue as framed in this case required no

particularized expertise; for the analysis, in the context of the situation in this case, expert testimony was not necessary, and there was some evidence to connect the actions of the company in its on-site seismic testing and the damage occasioned to the water well. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 782, 2012 Tex. App. LEXIS 347, 2012 WL 129766 (Tex. App. Texarkana Jan. 18 2012).

541. Given the evidence that the insurer provided coverage even before the house was built and damage manifested in May 2000, actual damages had to have happened during the insurer's coverage; thus, the insurer's duty to indemnify was triggered, and expert testimony showing the exact injury date was not required in order to trigger this duty. Vines-Herrin Custom Homes, Llc v. Great Am. Lloyds INS. Co., 357 S.W.3d 166, 2011 Tex. App. LEXIS 10027 (Tex. App. Dallas Dec. 21 2011).

542. To defeat summary judgment on their negligence, warranty, and Deceptive Trade Practices Act claims, appellants had to produce expert testimony that appellees' acts or omissions were not merely a possible cause of the vehicle fire, but were the probable cause, but the evidence offered fell short of this; appellants produced no expert testimony and they failed to designate a testifying expert on causation. Santos v. I Lone Star Auto Parts, Ltd., 2011 Tex. App. LEXIS 9424, 2011 WL 6157031 (Tex. App. Houston 14th Dist. Dec. 1 2011).

543. Assuming arguendo that the trial court erroneously allowed a witness's alleged expert testimony, prior to the witness testifying, another witness testified to similar evidence without objection, and thus error, if any, was harmless. Basic Energy Serv. v. D-S-B Props., 367 S.W.3d 254, 2011 Tex. App. LEXIS 9286, 2011 WL 6187113 (Tex. App. Tyler Nov. 23 2011).

544. Homeowners produced no admissible expert testimony on causation relating to their property damage claims, and thus summary judgment on the claims for property damage was proper. Baker v. Energy Transfer Co., 2011 Tex. App. LEXIS 8304, 2011 WL 4978287 (Tex. App. Waco Oct. 19 2011).

545. This case, concerning toxic exposure, required expert testimony, and because homeowners' experts were stricken, they had no causation evidence from an expert, and the grant of summary judgment to the companies on the homeowners' negligence and negligence per se claims was thus proper. Baker v. Energy Transfer Co., 2011 Tex. App. LEXIS 8304, 2011 WL 4978287 (Tex. App. Waco Oct. 19 2011).

546. Homeowners did not file competent expert testimony that companies caused harm to them, and thus the trial court did not err in granting summary judgment on the nuisance claim. Baker v. Energy Transfer Co., 2011 Tex. App. LEXIS 8304, 2011 WL 4978287 (Tex. App. Waco Oct. 19 2011).

547. Homeowners did not file competent expert testimony that companies caused chemicals to enter onto the homeowners' land, and thus summary judgment on their trespass claim was proper. Baker v. Energy Transfer Co., 2011 Tex. App. LEXIS 8304, 2011 WL 4978287 (Tex. App. Waco Oct. 19 2011).

548. Doctors testified to the patient's mental illness, but expert testimony confirming such, alone, would not support an involuntary commitment. State Ex Rel. C.B., 2011 Tex. App. LEXIS 7324, 2011 WL 3918686 (Tex. App. Tyler Sept. 7 2011).

549. Whether complications arose from surgical procedures performed on a patient and whether excess skin was a complication required expert testimony, plus this testimony was necessary to establish the meaning of complication, as defined within the medical community and also within the parties' settlement agreement. Contreras v. Clint Indep. Sch. Dist., 347 S.W.3d 413, 2011 Tex. App. LEXIS 6231 (Tex. App. El Paso Aug. 10 2011).

550. Rational juror, based on the plain language of Tex. Civ. Prac. & Rem. Code Ann. § 82.001(4) and the evidence, could have concluded that a company was a manufacturer under the statute; witnesses testified that the company designed, assembled, and installed underground storage tanks, and created design plans, and to the extent an expert testified, an expert witness could state an opinion on mixed questions of law and fact, as in this instance. Petroleum Solutions, Inc. v. Head, 454 S.W.3d 518, 2011 Tex. App. LEXIS 3289 (Tex. App. Corpus Christi Apr. 29 2011).

551. Because property owners did not designate themselves or qualify as experts on the issues concerning attorney fees, the trial court properly restricted their testimony concerning the reasonableness and necessity of attorney fees. Ogu v. C.I.A. Servs., 2011 Tex. App. LEXIS 1979, 2011 WL 947008 (Tex. App. Houston 1st Dist. Mar. 17 2011).

552. In condemnation proceedings, an affidavit of the vice president of the corporate general partner of a limited partnership was properly excluded under Tex. R. Evid. 701 regarding the valuation of the property to be take for a water line easement because his opinion was based on his expertise rather than his personal familiarity with the property and he was not timely disclosed as an expert. Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd., 337 S.W.3d 846, 2011 Tex. LEXIS 190, 54 Tex. Sup. Ct. J. 658 (Tex. 2011).

553. Expert testimony was legally sufficient to support damages awarded to a motorist for future physical pain; one doctor testified that the motorist would never be pain free, and another doctor testified that the motorist would likely have continuous pain for at least 15 to 20 years. City of Waco v. Fuentes, 2011 Tex. App. LEXIS 1707, 2011 WL 817418 (Tex. App. Waco Mar. 9 2011).

554. Although the city argued insufficient evidence supported the amount awarded because there was no expert testimony that the conditions treated and the expenses were caused by the accident, the court found that legally sufficient evidence existed from which the jury could have inferred that the damages claimed in certain bills resulted from the accident, given that (1) a doctor testified that everything he ordered was reasonable and directed at the motorist's complaints, and (2) the x-rays and MRIs ordered by another doctor were necessary for diagnosing the motorist's injuries suffered in the accident. City of Waco v. Fuentes, 2011 Tex. App. LEXIS 1707, 2011 WL 817418 (Tex. App. Waco Mar. 9 2011).

555. Decedent's wife failed to preserve any error on the admission of the deputy's testimony because she affirmatively stated that she had no other objection to the report, and thereby waived her objection to the deputy's point-of-impact opinion in the police report based on Tex. R. Evid. 702; the deputy's testimony became cumulative of other evidence in the case. Austin v. Weems, 337 S.W.3d 415, 2011 Tex. App. LEXIS 4166 (Tex. App. Houston 1st Dist. Feb. 24 2011).

556. Worker's family argued that the trial court, under Tex. R. Civ. P. 278, properly refused to submit questions in the charge on the worker's negligence because there was no expert testimony submitted requiring such, but the court disagreed; the evidence that supported submission of the questions was that when the worker first struck the iron sponge on the tank, the vibration started knocking things down, and it would have been within the common knowledge of laymen that hitting the iron sponge again might have caused further sponge portions to fall. Gsf Energy, Llc v. Padron, 2011 Tex. App. LEXIS 948 (Tex. App. Houston 1st Dist. Feb. 10 2011).

557. Probable duration of a passenger's injuries was not within the general experience and common knowledge of laypersons, and while a layperson's knowledge could link the passenger's injuries to the accident, a layperson could only speculate about how long a neck or back strain, bruised ribs, and a fractured toe took to heal or whether they were likely to heal at all; absent the required expert testimony, the jury lacked legally sufficient evidence on which to base its damage award, and because the court was unable to suggest an appropriate amount for a remittitur, the

court remanded for a new trial on all issues, under Tex. R. App. P. 44.1(b). Tex. DOT v. Banda, 2010 Tex. App. LEXIS 10316, 2010 WL 5463857 (Tex. App. Austin Dec. 22 2010).

558. Mother did not object to the reliability of a doctor's testimony at trial, and thus waived this complaint for appellate review under Tex. R. App. P. 33.1. In the Interest of S.R., 2010 Tex. App. LEXIS 9681, 2010 WL 4983484 (Tex. App. Waco Dec. 8 2010).

559. Experts' testimony identifying numerous potential causes of the worker's accident without excluding any of them constituted no evidence that these factors caused the accident. Blaine v. National-oilwell, L.P., 2010 Tex. App. LEXIS 9614, 2010 WL 4951779 (Tex. App. Houston 14th Dist. Dec. 7 2010).

560. Expert's opinion that the speed of the sand line drum caused a worker's death was conclusory and unsupported by the facts, plus he improperly relied on witnesses who lacked personal knowledge under Tex. R. Evid. 602. Blaine v. National-oilwell, L.P., 2010 Tex. App. LEXIS 9614, 2010 WL 4951779 (Tex. App. Houston 14th Dist. Dec. 7 2010).

561. In the absence of any underlying facts to support the opinion that a guard gate was a producing cause of the accident, an expert's statements were just conclusory and insufficient to defeat summary judgment. Blaine v. National-oilwell, L.P., 2010 Tex. App. LEXIS 9614, 2010 WL 4951779 (Tex. App. Houston 14th Dist. Dec. 7 2010).

562. Two experts' opinions failed to provide an adequate factual basis to support the conclusion that an allegedly unsecured floor plate contributed to an accident and was insufficient to defeat summary judgment. Blaine v. National-oilwell, L.P., 2010 Tex. App. LEXIS 9614, 2010 WL 4951779 (Tex. App. Houston 14th Dist. Dec. 7 2010).

563. Expert's opinion that the speed of the drum caused the accident was not supported by any actual evidence, and his opinion also did not provide any underlying facts to support his conclusion that a lower guard gate contributed to the accident; he offered nothing showing that a higher gate had any probability of preventing the accident or lessening the worker's injuries, such that the expert's opinion was conclusory and was no evidence of causation. Blaine v. National-oilwell, L.P., 2010 Tex. App. LEXIS 9614, 2010 WL 4951779 (Tex. App. Houston 14th Dist. Dec. 7 2010).

564. Subject of how water traveled after being absorbed by the ground and how such affected the water table were subjects beyond the general understanding and common knowledge of lay witnesses, and the homeowners' evidence did not show a close connection between the filling of the pond and the problems the homeowners experienced on their lot; for purposes of their claims, including under Tex. Water Code Ann. § 11.086, the homeowners were required to present expert testimony to show that a fact issue existed regarding whether the construction of the pond was the cause in fact of the excessive water on their lot, and as they did not, summary judgment was proper for the developer. Palma v. Chribran Co., L.L.C., 327 S.W.3d 866, 2010 Tex. App. LEXIS 8921 (Tex. App. Beaumont Nov. 10 2010).

565. Assuming that the client's allegations constituted a breach of the standard of care, the causal link between the client's allegations and any damages was not sufficiently obvious so as to have rendered expert testimony unnecessary; such testimony was necessary to determine whether (1) the client would have prevailed at trial if there was no filing delay or a change of venue, (2) the client would have prevailed had the attorney not withdrawn, (3) the trial court would have granted certain requests that would have altered the outcome of the underlying litigation, and (4) the client would have prevailed on a foregone malpractice claim. Finley v. Fargason, 2010 Tex. App. LEXIS 8324, 2010 WL 4053711 (Tex. App. Austin Oct. 15 2010).

566. Without the benefit of expert testimony, it was beyond a fact-finder's common understanding how the attorney's failure to notify the client's ex-wife of a deposition caused the client to give up an owelty lien; the client presented no evidence, expert or otherwise, that a reasonable attorney should have foreseen dangers allegedly created by this notification failure. Finley v. Fargason, 2010 Tex. App. LEXIS 8324, 2010 WL 4053711 (Tex. App. Austin Oct. 15 2010).

567. Objection that an expert's affidavit was conclusory was a substantive defect that could be raised for the first time on appeal, as here. Pakideh v. Pope, 2010 Tex. App. LEXIS 7988, 2010 WL 3820899 (Tex. App. Corpus Christi Sept. 30 2010).

568. Attorney's expert statements were nothing more than categorical denials of the clients' allegations; the challenged statements were conclusory and the traditional summary judgment was improper to the extent it was based on this evidence. Pakideh v. Pope, 2010 Tex. App. LEXIS 7988, 2010 WL 3820899 (Tex. App. Corpus Christi Sept. 30 2010).

569. Assuming, without deciding, that it was error to admit an officer's testimony under either Tex. R. Evid. 701 or 702, his testimony had a slight effect, if any, on the jury's verdict, and thus any error was harmless under Tex. R. App. P. 44.2(b); the purpose of the officer's testimony was to show the dangerous nature of the events that took place, and from photographs admitted, the jury could have inferred that the incident was extremely dangerous. The primary issue was whether appellant committed the offenses of criminal mischief, attempted escape, and resisting arrest, and the evidence from other sources showing appellant committed these offenses was overwhelming. Mccutchen v. State, 2010 Tex. App. LEXIS 7760, 2010 WL 3699987 (Tex. App. San Antonio Sept. 22 2010).

570. Court had no doubt that the diagnosis of hypoglycemia was more complicated than merely comparing the test results to the ranges preprinted on a test result form; the court was not a medical doctor and it was not the court's role to determine whether the doctor's diagnosis was correct, plus the State did not present any expert testimony that the doctor's analysis was incorrect. Smarr v. State, 2010 Tex. App. LEXIS 7478, 2010 WL 3518746 (Tex. App. Texarkana Sept. 10 2010).

571. Although defendant claimed that counsel was ineffective for failing to object to the admission of one of the victim's videotaped statement, which defendant claimed was inadmissible pursuant to Tex. Code Crim. Proc. Ann. art. 38.071, § 5(a) because a police officer was present when the statement was made, for failing to object to the testimony of a nurse who examined one of the victims, and for failing to object to testimony regarding extraneous offenses, the court found that: (1) the detective was not "present" for the victim's interview as that term was used in Tex. Code Crim. Proc. Ann. art. 38.071, § 5(a) since it was a common practice for officers to contemporaneously observe the child's interview in an adjacent room; (2) assuming without deciding that the testimony was improper, defendant was not harmed by its admission, and thus, the court could not say that the admission of the nurse's "diagnosis" prejudiced the defense; (3) pursuant to Tex. R. Evid. 702, the State used the hypothetical questions at issue to help the jury understand the absence of physical evidence and to know that that was not uncommon in cases of child sexual abuse, and thus, counsel was not ineffective for failing to object to that line of questions; and (4) much of the victim's testimony was directly relevant to the allegations in the indictment regarding defendant's sexual assaults on the other victim and to the extent, the testimony involved extraneous acts committed against the victim, the evidence was admissible as same transaction-contextual evidence. Bonner v. State, 2010 Tex. App. LEXIS 7440, 2010 WL 3503858 (Tex. App. Waco Sept. 8 2010).

572. Although the expert testimony did not specifically address the precise proportion of the injury attributable to each accident, the evidence showed that the first one started the injury; the jury could have found that the motorist's injuries were the result of a preexisting condition caused by the first accident, and there was more than a scintilla of evidence to support the jury's award. Benham v. Lynch, 2010 Tex. App. LEXIS 7086 (Tex. App. San Antonio Aug.

31 2010).

573. Appellees' expert could not opine that the worker would not have developed mesothelioma absent exposure to a company's asbestos-containing joint compound, and because a plaintiff had to prove that a defendant's conduct was a cause in fact of the harm, appellees' evidence did not satisfy the required substantial factor causation elements for maintaining their product liability and negligence suit. Ga.-pac. Corp. v. Bostic, 320 S.W.3d 588, 2010 Tex. App. LEXIS 7072 (Tex. App. Dallas Aug. 26 2010).

574. Court agreed with the company's assertion that appellees did not establish substantial factor causation to the extent they improperly based their showing of specific causation on their expert's testimony and the testimony of another doctor that each and every exposure to asbestos caused or contributed to the worker's mesothelioma. Ga.-pac. Corp. v. Bostic, 320 S.W.3d 588, 2010 Tex. App. LEXIS 7072 (Tex. App. Dallas Aug. 26 2010).

575. Expert doctor admitted his studies could not establish an exposure level or dose for a worker particularly because of the many variables in the circumstances, and thus his testimony regarding the results of his material practice simulation studies did not quantify the worker's exposure to asbestos fibers from the company's asbestos-containing joint compound. Ga.-pac. Corp. v. Bostic, 320 S.W.3d 588, 2010 Tex. App. LEXIS 7072 (Tex. App. Dallas Aug. 26 2010).

576. Appellees' evidence, including that from expert witnesses that had been found to be insufficient proof in other cases, was insufficient to provide quantitative evidence of a worker's exposure to asbestos fibers from a company's joint compound or to show that his exposure was in sufficient amounts to have increased his risk of developing mesothelioma; appellees failed to meet the substantial factor causation mandate. Ga.-pac. Corp. v. Bostic, 320 S.W.3d 588, 2010 Tex. App. LEXIS 7072 (Tex. App. Dallas Aug. 26 2010).

577. Issue of whether a provision in a divorce decree demonstrated a breach of the standard of care was not an issue that any layperson could understand and the client did not cite and the court did not find any legal authority that would support an extension of an exception to providing expert testimony in a legal malpractice matter to the situation in this case. Bagan v. Hays, 2010 Tex. App. LEXIS 6530, 2010 WL 3190525 (Tex. App. Austin Aug. 12 2010).

578. Because appellees disputed the existence of an agreement extending certain deadlines and the client did not provide evidence that the alleged agreement met the requirements of Tex. R. Civ. P. 11, the court rejected the argument that an agreement between the parties relieved the client of the requirement of providing expert testimony by the time the summary judgment motion was filed. Bagan v. Hays, 2010 Tex. App. LEXIS 6530, 2010 WL 3190525 (Tex. App. Austin Aug. 12 2010).

579. Relevancy objection was properly overruled pursuant to Tex. R. Evid. 401 and 702 in a case involving sexual abuse of a child because defense counsel had previously cross-examined the nurse practitioner about her experience with false allegations of sexual abuse and circumstances involving the absence of physical findings; thus, the redirect of the nurse practitioner regarding statistics of confirmed cases of sexual abuse where there were no physical findings was relevant. Cortez v. State, 2010 Tex. App. LEXIS 5854, 2010 WL 2889670 (Tex. App. Fort Worth July 22 2010).

580. Insurer was entitled to no-evidence summary judgment in an employee's action for breach of contract after the denial of continuous total disability benefits because the employee's physical symptoms could not be directly linked to his on-the-job injury without expert testimony; affidavits by the employee and his wife were insufficient as the employee had a prior back injury in 1980 that led to a spinal fusion and subsequent issues with obesity, high blood pressure, and diabetes. Humphrey v. Aig Life Ins. Co., 2010 Tex. App. LEXIS 4961, 2010 WL 2635643 (Tex.

App. Houston 14th Dist. July 1 2010).

581. Driver did not brief one expert testimony issue separately, and she did not advise where she preserved such a sufficiency challenge based on a lack of expert testimony and the court did not find it in her motion for a new trial, motion for directed verdict, or in her objections, and the court did not address the argument. Figueroa v. Davis, 318 S.W.3d 53, 2010 Tex. App. LEXIS 2574 (Tex. App. Houston 1st Dist. Apr. 8 2010).

582. Expert did not opine as to how much asbestos a worker had been exposed to or what a minimum exposure at which a person's risk of mesothelioma increases might be, such that the opinion went only to general causation. Smith v. Kelly-moore Paint Co., 307 S.W.3d 829, 2010 Tex. App. LEXIS 1367 (Tex. App. Fort Worth Feb. 25 2010).

583. Without scientific evidence of the minimum exposure level leading to an increased risk of development of mesothelioma from exposure to chrysotile-only asbestos, such as that contained in the company's joint compound, an expert's opinion lacked the factual and scientific foundation required by case law and was insufficient to raise a fact issue as to specific causation. Smith v. Kelly-moore Paint Co., 307 S.W.3d 829, 2010 Tex. App. LEXIS 1367 (Tex. App. Fort Worth Feb. 25 2010).

584. Corporation's employees who testified against appellant, a terminated employee, regarding allegedly improper financial conduct by appellant were fact witnesses under Tex. R. Evid. 701 rather than expert witnesses under Tex. R. Evid. 702, such that non-produced documents, which the testifying employees referred to, were not subject to exclusion under Tex. R. Civ. P. 193.6(a). Marin v. IESI TX Corp., 317 S.W.3d 314, 2010 Tex. App. LEXIS 981 (Tex. App. Houston 1st Dist. Feb. 11 2010).

585. Whether a construction-management firm's supervisory duties included more than ensuring that the approved plans were built according to specifications called for requires specialized knowledge in the construction-management firm industry, but there was never any evidence, interpretation, or determination of the standard of care for the jury to properly decide the negligence issue; even if the contract identified the applicable standard of care, competent expert testimony was required to establish that standard for construction-management firms, and the company's expert did not discuss this. 3D + Perspectiva v. Castner Palms, Ltd., 310 S.W.3d 27, 2010 Tex. App. LEXIS 936 (Tex. App. El Paso Feb. 10 2010).

586. Because no expert testimony, much less any evidence, was presented as to the applicable standard of care, the trial court erred by denying a joint venture's motion for an instructed verdict in this negligence action. 3D + Perspectiva v. Castner Palms, Ltd., 310 S.W.3d 27, 2010 Tex. App. LEXIS 936 (Tex. App. El Paso Feb. 10 2010).

587. Proper scope of discovery is a matter for the sound discretion of the trial court under Tex. R. Civ. P. 192.4, and these are not generally matters appropriate for expert testimony. Shanley v. First Horizon Home Loan Corp., 2009 Tex. App. LEXIS 9301 (Tex. App. Houston 14th Dist. Dec. 8 2009).

588. Expert's affidavit suggested that additional discovery was necessary to establish the duties owed, but the existence of a duty was a question of law and an expert was not competent to give an opinion on such, such that the trial court did not err in striking the expert's affidavit. Shanley v. First Horizon Home Loan Corp., 2009 Tex. App. LEXIS 9301 (Tex. App. Houston 14th Dist. Dec. 8 2009).

589. Court had to decide by clear and convincing evidence that because the parents were mentally deficient, they were unable to prevent exposing their oldest child to the person she accused of sexually abusing her and that this supported a finding that the parents were unable to provide for the needs of the other children, but this was difficult to prove because it first required proof that the exposure to sexual abuse of the older child was not mere negligence

or poor parenting, but that it happened because the parents were mentally deficient, and there also had to be evidence to support a finding that the parents' mental deficiencies kept them from now and in the future providing for the children; while the court is not holding that expert testimony is always essential in a termination case of this sort, the other evidence in this case consisted primarily of conclusory statements by lay witnesses. In re A.L.M., 300 S.W.3d 914, 2009 Tex. App. LEXIS 8991 (Tex. App. Texarkana Nov. 20 2009).

590. Court disagreed with an architecture firm that expert testimony as to whether the firm breached an architect's standard of care would serve any relevant purpose for the trial court prior to trial; the trial court was perfectly capable of determining whether the contract required the firm to apply the law in its design, whether the law prohibited the use of a septic system, and whether the design included a septic system, such that a certificate of merit would not be required for the trial court to determine if the claim had merit. Parker County Veterinary Clinic, Inc. v. Gsbs Batenhorst, Inc., 2009 Tex. App. LEXIS 8986, 2009 WL 3938051 (Tex. App. Fort Worth Nov. 19 2009).

591. There was no expert evidence showing the value of a client's claims in the coin company lawsuit and no evaluation of whether his claims would somehow have entitled him to greater recovery than that afforded by the settlement; the client had not produced more than a scintilla of evidence on the elements of proximate cause or damages in his professional negligence claim. Walker v. Morgan, 2009 Tex. App. LEXIS 8653, 2009 WL 3763779 (Tex. App. Beaumont Nov. 12 2009).

592. Company did not have the burden of proof and it was not required to prove there was no defect, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 82.005(a), and the company also was not required to prove an alternate theory for the fire; not having the burden of proof, the company did not need to present any expert testimony at all, such that the alleged unreliability of the company's expert testimony was immaterial, for holding otherwise would improperly shift the burden of proof to the company. Hunter v. Ford Motor Co., 305 S.W.3d 202, 2009 Tex. App. LEXIS 8682 (Tex. App. Waco Nov. 10 2009).

593. Even if the court was to disregard the company's expert testimony and to review only the family's expert testimony, in this case the jury could still properly determine that the family had not proved a defective design that was unreasonably dangerous; a reasonable jury could have disbelieved the family's experts' theory as to how the fire started and their proposed safer alternative designs, or the jury could have believed that the truck was not unreasonably dangerous based on the record. Hunter v. Ford Motor Co., 305 S.W.3d 202, 2009 Tex. App. LEXIS 8682 (Tex. App. Waco Nov. 10 2009).

594. While the family was required to present expert testimony on design defect, including safer alternative design and producing cause, that requirement did not translate into such expert testimony, even if uncontroverted, being conclusive and binding on the jury, which alone determined if the product was unreasonably dangerous and a producing cause. Hunter v. Ford Motor Co., 305 S.W.3d 202, 2009 Tex. App. LEXIS 8682 (Tex. App. Waco Nov. 10 2009).

595. Parties did not dispute and the court agreed that the deceased driver's family was required to prove their design-defect claim with expert testimony. Hunter v. Ford Motor Co., 305 S.W.3d 202, 2009 Tex. App. LEXIS 8682 (Tex. App. Waco Nov. 10 2009).

596. In defendant's drug case, the trial court did not err in allowing a witness to testify as to what tanks were used for because the witness had worked for the business for 16 years at the time of the trial, and the witness testified that the tanks were used to store and move fertilizer and anhydrous ammonia. That was not scientific, technical, or specialized knowledge that was being offered to assist the trier of fact. Meier v. State, 2009 Tex. App. LEXIS 8078, 2009 WL 3335282 (Tex. App. Amarillo Oct. 16 2009).

597. Existence of a duty was a question of law for the court to decide and thus the court's analysis was unaffected by an expert's affidavit; in addition, his conclusions, which were contrary to governing law, were based at least in part on assumptions that were contrary to the undisputed facts. Leigh v. Kuenstler, 2009 Tex. App. LEXIS 7633, 2009 WL 3126538 (Tex. App. Houston 14th Dist. Oct. 1 2009).

598. Erroneous admission of expert testimony was nonconstitutional error under Tex. R. App. P. 44.2(b). Lantrip v. State, 2009 Tex. App. LEXIS 7401, 2009 WL 3019699 (Tex. App. Tyler Sept. 23 2009).

599. Trooper's complained-of testimony regarding the correlation between defendant's performance during the one-leg stand test and blood alcohol concentration was significantly outweighed by other evidence of intoxication in defendant's driving while intoxicated trial; evidence of defendant's performance on three standardized field sobriety tests and testimony correlating performance on the other two field sobriety tests to a blood alcohol concentration level was powerful evidence having a similar nature and probative value as the complained-of expert testimony, and because the unchallenged trial evidence significantly outweighed any potential harm caused by the complained-of testimony, even though the court assumed error, defendant did not show the level of harm necessary under Tex. R. App. P. 44.2(b) to require reversal. Lantrip v. State, 2009 Tex. App. LEXIS 7401, 2009 WL 3019699 (Tex. App. Tyler Sept. 23 2009).

600. In a case where a patient was committed as a sexually violent predator under Tex. Health & Safety Code Ann. § 841.003(a), the evidence was sufficient with regards to experts' testimony because they had all reviewed the patient's records, interviewed him, and scored him on assessment tests; their opinions, while differing, all had support. A rational jury could have found beyond a reasonable doubt that the patient suffered from a behavioral abnormality that predisposed him to commit a predatory act of sexual violence. In re Diaz, 2009 Tex. App. LEXIS 6930, 2009 WL 2749958 (Tex. App. Beaumont Aug. 31 2009).

601. In a case where a patient was committed as a sexually violent predator under Tex. Health & Safety Code Ann. § 841.003(a), the patient was permitted to raise the issue of the sufficiency of expert testimony for the first time on appeal; the patient did not make objections at trial that the testimony was speculative or conclusory. In re Diaz, 2009 Tex. App. LEXIS 6930, 2009 WL 2749958 (Tex. App. Beaumont Aug. 31 2009).

602. Because causation was not an issue for experts alone, the jury could have disregarded an expert's conclusion as to causation and the jury was free to conclude that an employer failed to prove (1) that the negligence of others was a cause of the accident and (2) that a marketing or design defect was a cause of the accident; furthermore, evidence proving a safer alternative design was lacking. Rentech Steel, L.L.C. v. Teel, 299 S.W.3d 155, 2009 Tex. App. LEXIS 6323 (Tex. App. Eastland Aug. 13 2009).

603. In this case in which a minor employee sustained serious bilateral hand injuries, the amount of damages for medical expenses and lost earning capacity was supported by the experts' testimony. Rentech Steel, L.L.C. v. Teel, 299 S.W.3d 155, 2009 Tex. App. LEXIS 6323 (Tex. App. Eastland Aug. 13 2009).

604. Expert testimony did not support the damages awarded in this case; because both the income and market methods relied on speculative income forecasting and the cost method only supported an award of $ 2.2 million, the evidence was not legally sufficient to support an award of $ 3 million. M&A Tech., Inc. v. iValue Group, Inc., 295 S.W.3d 356, 2009 Tex. App. LEXIS 6264 (Tex. App. El Paso Aug. 12 2009).

605. Dentist did not move for directed verdict on the lack of expert testimony with respect to either the standard of care or any breach of the standard; therefore in the court's analysis, the court addressed only the evidence offered with respect to causation. Cooper v. Gulley, 2009 Tex. App. LEXIS 6129, 2009 WL 2397808 (Tex. App. Corpus

Christi Aug. 6 2009).

606. Patient argued that the trial court erred in granting a directed verdict on causation because there was probative evidence that the removal of the wrong tooth caused him to no longer be a candidate for a permanent bridge, and the court agreed; an expert's testimony regarding a permanent bridge was couched in terms of probability, not possibility, and considering the evidence proffered on the issue of causation under the standards for granting a directed verdict, the court sustained the patient's issue. Cooper v. Gulley, 2009 Tex. App. LEXIS 6129, 2009 WL 2397808 (Tex. App. Corpus Christi Aug. 6 2009).

607. Phrases such as "it's entirely probable" and "planned on using" go beyond conjecture, speculation, and mere possibility and indicate reasonable medical probability. Cooper v. Gulley, 2009 Tex. App. LEXIS 6129, 2009 WL 2397808 (Tex. App. Corpus Christi Aug. 6 2009).

608. In a products liability case, expert testimony was required because the evidence merely created a suspicion that a manufacturing defect caused a portable picnic table to collapse; in this case, causation was not within a layperson's general experience and common understanding. Further, there was no showing of a deviation from specifications or planned output, other possible causes had not been ruled out, and an injured party's pain could have been affected by the natural aging process and arthritis. Lyon v. Atico Int'l USA, Inc., 2009 Tex. App. LEXIS 4823, 2009 WL 1800820 (Tex. App. Waco June 24 2009).

609. In an action alleging nuisance, a trial court did not err by striking an untimely motion to designate an expert witness; the attempted designation was over a year after the original deadline and over two years after the filing of the suit. Moreover, there was no showing of good cause. Paselk v. Rabun, 293 S.W.3d 600, 2009 Tex. App. LEXIS 4266 (Tex. App. Texarkana June 16 2009).

610. Owner presented no expert testimony as to any of the theories of liability asserted in his live pleading; thus, the court had to analyze each of the owner's theories and the evidence presented as to each to determine whether a layperson would have been able to ascertain the applicable standard of care in the absence of expert testimony. Huffaker v. Wylie LP Gas, Inc., 2009 Tex. App. LEXIS 3741, 2009 WL 1506901 (Tex. App. Amarillo May 29 2009).

611. Testimony provided no insight into what the applicable standard of care would have been for a gas company and the court did not find the evidence sufficient to have allowed an ordinary layperson, in the absence of expert testimony, to find what the applicable standard of care was in regard to the company's storage of its propane tanks or that the company breached this standard. Huffaker v. Wylie LP Gas, Inc., 2009 Tex. App. LEXIS 3741, 2009 WL 1506901 (Tex. App. Amarillo May 29 2009).

612. While testimony established that a gas company's manager felt that there were times when proper inspections were not performed, because the basis for his opinion was not shown, the court was unable to conclude, without expert testimony, what the applicable standard of care was in regard to the company's maintenance, handling, and inspection of the tanks, nor did the evidence raise a genuine issue of fact about that standard having been breached. Huffaker v. Wylie LP Gas, Inc., 2009 Tex. App. LEXIS 3741, 2009 WL 1506901 (Tex. App. Amarillo May 29 2009).

613. In the absence of expert testimony, no evidence established that the applicable standard of care would be that no tanks ever be overfilled or that, if a tank was overfilled, that it should not be bled off, and because the filling of liquid propane gas tanks was beyond the experience of an ordinary layperson, a property owner provided no evidence of what the applicable standard of care was as it related to filling propane tanks and whether bleeding off the excess propane in an overfilled tank fell below the applicable standard of care. Huffaker v. Wylie LP Gas, Inc.,

2009 Tex. App. LEXIS 3741, 2009 WL 1506901 (Tex. App. Amarillo May 29 2009).

614. There was no evidence that a reasonable liquid propane dealer would conduct fire drills or that, had a gas company held fire drills, the fire would have been contained, plus there was no indication why employees needed to be supervised at all times or how the lack of supervision of these particular employees fell below the applicable standard of care; thus, there was no evidence presented that would have allowed a reasonable layperson, in the absence of expert testimony, to identify the applicable standard of care in relation to the gas company's safety procedures nor that the safety procedures fell below that standard. Huffaker v. Wylie LP Gas, Inc., 2009 Tex. App. LEXIS 3741, 2009 WL 1506901 (Tex. App. Amarillo May 29 2009).

615. Because there was no evidence offered of the proximity of the area where smoking occurred to propane tanks, the court would have had to speculate that it was an unsafe distance, and while the court believed that a layperson, without expert testimony, could conclude that smoking in close proximity to liquid propane gas tanks was a breach of the applicable standard of care, the property owner offered no evidence to raise a genuine issue of material fact as to how close to the propane tanks employees were smoking. Huffaker v. Wylie LP Gas, Inc., 2009 Tex. App. LEXIS 3741, 2009 WL 1506901 (Tex. App. Amarillo May 29 2009).

616. Because there was no expert evidence establishing the applicable standard of care owed by a gas company and a layperson would not have been able to determine the applicable standard of care regarding a property owner's theories of liability, the trial court properly granted the company summary judgment under Tex. R. Civ. P. 166a(i). Huffaker v. Wylie LP Gas, Inc., 2009 Tex. App. LEXIS 3741, 2009 WL 1506901 (Tex. App. Amarillo May 29 2009).

617. In a products-liability case arising from injuries sustained by a truck driver in attempting to unload a truck trailer, the trial court properly directed a verdict in favor of the trailer's manufacturer on the driver's design-defect claim where the driver had not produced evidence to show that his proposed alternatively designed trailer with a covered rear gutter would be a safer alternative design under Tex. Civ. Prac. & Rem. Code Ann. § 82.005(b); no evidence reflected that the use of dock plates, when used as intended and spaced evenly over the gutter, would reduce or eliminate the hazard of pallet-jack wheels "falling" into the gutter, and the record also contained no expert testimony that any of the proposed alternative designs satisfied both requirements of § 82.005(b) as a safer alternative design. Champion v. Great Dane L.P., 286 S.W.3d 533, 2009 Tex. App. LEXIS 3222, CCH Prod. Liab. Rep. P18223 (Tex. App. Houston 14th Dist. May 7 2009).

618. In a dispute over the valuation of oil and gas interests, testimony from a professional appraiser was not conclusory and insufficient because the appraiser testified without objection to his expertise and qualifications, he testified in great detail how he arrived at the appraisal values for the oil and gas interests, he explained that he valued the property using accepted appraisal methods, he testified at length regarding the methods and techniques he used to appraise the properties, he gave his appraisal values using Tex. Tax Code Ann. § 23.175, and he explained that these values exceeded market value. Moreover, an objector also conducted extensive cross-examination of the appraiser regarding his appraisal techniques. Averitt v. Caudle, 2009 Tex. App. LEXIS 2284, 2009 WL 891034 (Tex. App. Eastland Apr. 2 2009).

619. Client provided no expert testimony in his malpractice case regarding the appropriate standard of care and causation owed him by the attorney in a separate case, but expert testimony was unnecessary under these facts to prove that the attorney fell below the standard of care of a reasonably prudent attorney and that he was the proximate cause of the client's injury; because the client presented some evidence of breach and proximate cause, the standard of legal sufficiency was met. Okorafor v. Jeffreys, 2009 Tex. App. LEXIS 2099, 2009 WL 793750 (Tex. App. Houston 1st Dist. Mar. 26 2009).

620. Expert witness's statement showed that he worked for his own company and was not an agent or employee of contractors; thus, the expert's sworn statement was not a sworn statement by the contractors and the expert's statements in a separate lawsuit could not be used as the basis for the affirmative defense of judicial estoppel because they were not sworn statements by the contractors. Horizon Offshore Contrs., Inc. v. Aon Risk Servs. of Tex., 283 S.W.3d 53, 2009 Tex. App. LEXIS 1691 (Tex. App. Houston 14th Dist. Mar. 12 2009).

621. To avoid no-evidence summary judgment as to the causation element of a client's legal malpractice claim, it was the client's burden to produce summary judgment evidence, including expert testimony, that supported each element of his alleged medical malpractice claim against his treating physicians under Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13). Hackett v. Littlepage & Booth, 2009 Tex. App. LEXIS 1166 (Tex. App. Austin Feb. 20 2009).

622. In a fraud real estate case, although buyers pointed to their expert witness's testimony in which he stated that the property was located in a floodplain, his opinion was based solely on the fact that the property flooded and not on any official records or public documents, plus other evidence admitted at trial showed that the property was not located in any recorded floodplain. Sutton v. Ebby Halliday Real Estate, Inc., 279 S.W.3d 418, 2009 Tex. App. LEXIS 842 (Tex. App. Dallas Feb. 6 2009).

623. Even if a client's legal malpractice and breach of fiduciary suit was not barred by limitations, the trial court's grant of summary judgment to the attorneys was proper in light of the client's failure to provide expert testimony. Kastner v. Martin & Drought, Inc., 2009 Tex. App. LEXIS 701, 2009 WL 260601 (Tex. App. San Antonio Feb. 4 2009).

624. Client's allegations called for consideration of whether the attorneys' manner of preparing for and trying a proceeding amounted to professional negligence and whether, had the attorneys made decisions within the standard of care, the result would have been different; because the client's professional negligence claim required expert testimony and he presented none, summary judgment for the attorneys was proper. Kastner v. Martin & Drought, Inc., 2009 Tex. App. LEXIS 701, 2009 WL 260601 (Tex. App. San Antonio Feb. 4 2009).

625. Assuming a client could maintain a breach of fiduciary claim apart from his malpractice action, expert testimony was still necessary on the breach of duty and causation elements for this claim, just as in his professional negligence cause of action; because he had no expert testimony in this regard, summary judgment was proper. Kastner v. Martin & Drought, Inc., 2009 Tex. App. LEXIS 701, 2009 WL 260601 (Tex. App. San Antonio Feb. 4 2009).

626. In a driving while intoxicated case, evidence of defendant's use of prescription medications was not relevant because there was no evidence as to the dosage, the exact times of ingestion, or the half-life of the drug; a lay juror was not in a position to determine whether the drugs, taken more than 12 hours before arrest, would have any effect on defendant's intoxication. Without expert testimony to provide the foundation required to admit scientific evidence, the testimony regarding defendant's use of prescription medications was not relevant. Layton v. State, 280 S.W.3d 235, 2009 Tex. Crim. App. LEXIS 149 (Tex. Crim. App. 2009).

627. Property owner rule applies to corporate entities owning property, and a representative of the corporate owner who is familiar with the market value of the property in question may testify under this rule as to the market value of the property, without being designated as an expert witness. Therefore, a trial court erred by granting a utility district's motion for no-evidence summary judgment in a condemnation action because an affidavit from a vice president associated with a corporate property owner should have been allowed to show fair market value immediately before and immediately after the condemnation of a waterline easement. Speedy Stop Food Stores v. Reid Rd. Mun. Util., 282 S.W.3d 652, 2009 Tex. App. LEXIS 669 (Tex. App. Houston 14th Dist. Feb. 3 2009).

628. Expert testified that she diagnosed a child with a psychological condition that, within a reasonable degree of medical probability, had been caused by his experience in a day care worker's classroom, plus the expert described at length the objective testing process she used in reaching the diagnosis, and thus the child's parents presented more than a scintilla of evidence of the child's future mental anguish. Hyde Park Baptist Church v. Turner, 2009 Tex. App. LEXIS 586, 2009 WL 211586 (Tex. App. Austin Jan. 30 2009).

629. Day care failed to make a timely objection to a witness's designation as an expert witness and thus the day care waived its right to assert that the underlying methodology of her testimony was so unreliable as to constitute no evidence to support an award of future medical expenses. Hyde Park Baptist Church v. Turner, 2009 Tex. App. LEXIS 586, 2009 WL 211586 (Tex. App. Austin Jan. 30 2009).

630. Expert witness testified that the reasonable and necessary cost of a child's future medical care was a certain amount, based on her expert opinion regarding the child's need for future play therapy sessions, family therapy sessions, and another psychological evaluation at the age of six; in light of the day care's waiver of error regarding the witness's designation as an expert, her testimony constituted more than a scintilla of evidence to support the award of future medical expenses. Hyde Park Baptist Church v. Turner, 2009 Tex. App. LEXIS 586, 2009 WL 211586 (Tex. App. Austin Jan. 30 2009).

631. Day care did not object to a witness's designation as an expert witness during trial, and having failed to preserve the complaint about the reliability of the testimony, the day care could not assert that the testimony constituted no evidence on the issue of a child's future mental anguish. Hyde Park Baptist Church v. Turner, 2009 Tex. App. LEXIS 586, 2009 WL 211586 (Tex. App. Austin Jan. 30 2009).

632. Damages were properly awarded in a medical malpractice case for a mother's pain and mental anguish because the evidence was legally sufficient to show that she was conscious at the time that she was struggling to breathe, even though the testimony of an expert physician was ambiguous; further, taking agonal breaths indicated that one was suffering pain. The physician's testimony, coupled with the testimony of a nurse expert concerning the demeanor of one experiencing agonal breathing, was legally sufficient to support a jury's award of damages. Las Palmas Med. Ctr. & El Paso Healthcare Sys. v. Rodriguez, 279 S.W.3d 413, 2009 Tex. App. LEXIS 627 (Tex. App. El Paso Jan. 30 2009).

633. In a disciplinary matter, where the Texas Commission for Lawyer Discipline properly designated an expert, and a lawyer was afforded several opportunities to depose the expert, the admission of his testimony was proper because the lawyer failed to notice the expert in a timely manner. Therefore, subjecting the Commission to sanctions in light of the untimely notice would not have been just. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 351 (Tex. App. Houston 14th Dist. Jan. 20 2009).

634. In a case alleging breach of fiduciary duty, negligence, and negligence misrepresentation, a jury did not err in its calculation of the comparative responsibility of various underwriters because an expert's testimony was not speculative on the face of the record with regards to what would have been discussed had the underwriters contacted an insurance agency regarding a discrepancy in an insurance application, even though the testimony could have been clearer; preservation of this error was not an issue because no objection in the trial court was required to assert such an error. Moreover, to the extent that a few of the expert's statements indicated that he was not testifying as to what a person of ordinary prudence would do or not do under the same or similar circumstances as existed with respect to the underwriters, the jury, as factfinder, was free to disregard these statements. Underwriters at Lloyds Subscribing to Policy Nos. MDJ03/L075 & MDJ03/Z0165 v. Edmond & Stephens Ins. Agency, Inc., 2008 Tex. App. LEXIS 9730 (Tex. App. Houston 14th Dist. Dec. 30 2008).

635. Given the testimony regarding the size and shape of the knife and the manner in which defendant's friend used it, the evidence was sufficient to show that the knife was capable of causing death or serious bodily injury and was a deadly weapon under Tex. Penal Code Ann. § 1.07(a)(17)(B), for purposes of defendant's aggravated robbery conviction; while the knife was not introduced into evidence, there was no expert or lay opinion testimony, and there was no testimony concerning sharpness, the victim testified as to the size and shape of the knife, that defendant's friend stuck the knife to the back of the victim's neck, demanded his laptop, and asked whether it was worth the victim's life when he refused to surrender it, and the victim claimed he was scared to death and received a small scratch from the knife, although the victim did not believe he was intentionally cut. Williams v. State, 2008 Tex. App. LEXIS 8540 (Tex. App. Dallas Nov. 13 2008).

636. In a case where a mother was seeking to regain property from her daughter, although the mother did not entirely waive her request for sanctions for failure to have a hearing or obtain a ruling, she waived any complaint concerning the designation of experts for failure to timely raise the issue before a trial court. Delahoussaye v. Kana, 2008 Tex. App. LEXIS 8561 (Tex. App. Houston 1st Dist. Nov. 13 2008).

637. Appellate court erred in finding insufficient evidence of a compensable injury in the future, in connection with a case involving a child sexually abused by a camp counselor; the court had recognized the consensus among experts that child victims of sexual abuse frequently repressed and suppressed memories and emotions associated with the event until their adult years, the evidence of the child's emotional outbursts and phobic anxiety, along with the expert testimony, supported a reasonable inference that an enormous reaction was likely when the vault of the child's memory opened, and Texas law permitted jurors to make this determination and the trial court did not err in rendering judgment on their verdict, such that the court granted the child's parents' petition for review without hearing oral argument under Tex. R. App. P. 59.1, reversed the appellate court's judgment, and remanded the case for the consideration of the remaining issues. Adams v. YMCA, 265 S.W.3d 915, 2008 Tex. LEXIS 858, 51 Tex. Sup. Ct. J. 1443 (Tex. 2008).

638. Evidence was factually sufficient to support defendant's conviction of possession of a controlled substance with intent to deliver, given that (1) a bag containing six grams of methamphetamine was found on defendant's person, (2) there was expert testimony that a letter was in defendant's handwriting, (3) a police officer with 20 years experience in drug trafficking testified that the letter was typical of the type of ledger maintained by someone dealing in drugs, (4) a court citation in defendant's name was found in the motel room, (5) a substantial amount of drug paraphernalia was located in the motel room that defendant was observed leaving, and (6) defendant admitted that she had been staying in the motel room; the trial court was allowed to make reasonable inferences from the evidence produced at trial about who was in the control of the room and was present when or shortly before the contraband was discovered, and the expert testimony that defendant authored the letter, when considered with the officer's testimony about the amount of drugs found on defendant, made the inference of the intent to distribute drugs even stronger. Friar v. State, 2008 Tex. App. LEXIS 6809 (Tex. App. Amarillo Sept. 11, 2008).

639. Although a carrier contended that it reasonably disputed coverage because it believed the claimant's surgery was the result of a new and more severe injury in 2003, and not a 2000 injury, the carrier did not offer any evidence of a new injury or evidence that another injury necessitated surgery; the mere fact that the carrier offered expert testimony to support its position did not insulate the carrier from liability and other evidence enabled the jury to find no reasonable investigation by the carrier and reasonably clear liability for the claim. Tex. Mut. Ins. Co. v. Morris, 2008 Tex. App. LEXIS 9868 (Tex. App. Houston 14th Dist. Aug. 26 2008).

640. Widow's conclusory allegation that the area was widely known to be dangerous and that many crimes occurred in the general area was insufficient to survive a no-evidence summary judgment motion against the restaurant, as conclusory or speculative opinion testimony did not tend to make the existence of a material fact more or less probable and was not relevant under Tex. R. Evid. 401 nor competent, and thus an opinion that the widow's husband's murder was not foreseeable to the restaurant, as supported by the facts recited from

unchallenged police reports and crime statistics, was uncontroverted; the court recognized that, because the question of duty was a question of law for the court, an expert could not properly opine regarding the existence of a duty, and expert testimony alone was insufficient to raise a fact issue on foreseeability, but the widow failed to produce more than a scintilla of evidence showing that the restaurant had a duty to the husband and that it breached that duty, such that the trial court properly entered summary judgment in the restaurant's favor. Pouncy-Pittman v. Pappadeaux Seafood Kitchen, 2008 Tex. App. LEXIS 5780 (Tex. App. Houston 1st Dist. July 31 2008).

641. Mental soundness was within common knowledge and did not require proof by expert testimony. In re Estate of Mask, 2008 Tex. App. LEXIS 5439 (Tex. App. San Antonio July 23 2008).

642. Because the customer and her husband had no expert testimony, they needed to show, for purposes of their res ipsa loquitur argument in this premises liability action, that it was generally known that carpet adjacent to a hotel bathroom would not become wet in the absence of negligence; however, the court was not aware of such general knowledge and they did not show that proposition to be true, and thus the doctrine did not apply. Carlson v. Remington Hotel Corp., 2008 Tex. App. LEXIS 3841 (Tex. App. Houston 1st Dist. May 22 2008).

643. Expert testimony was required to establish that the employee's depression, anxiety, and post-traumatic stress disorder were causally related to her head injury and thus compensable. State Office of Risk Mgmt. v. Larkins, 258 S.W.3d 686, 2008 Tex. App. LEXIS 3717 (Tex. App. Waco 2008).

644. For a chiropractor's opinions to be considered expert testimony, the employee would have had to show that the chiropractor had medical expertise regarding psychological disorders caused by head injuries. State Office of Risk Mgmt. v. Larkins, 258 S.W.3d 686, 2008 Tex. App. LEXIS 3717 (Tex. App. Waco 2008).

645. Evidence presented to the trial court was insufficient to support an award of past medical expenses because it did not establish the reasonableness and necessity of the expenses; at the default judgment hearing under Tex. R. Civ. P. 243, the motorist did not provide expert testimony to establish the reasonableness and necessity of his past medical expenses or submit an affidavit under Tex. Civ. Prac. & Rem. Code Ann. § 18.001 for that purpose. Swinnea v. Flores, 2008 Tex. App. LEXIS 3038 (Tex. App. Amarillo Apr. 25 2008).

646. Defendant did not object to an officer's assertion that he was a gang expert, for purposes of defendant's conviction under Tex. Penal Code Ann. § 71.02; because defendant's contention on appeal was different from his trial objection, he failed to preserve any issue for the court's review. Mendoza v. State, 2008 Tex. App. LEXIS 2937 (Tex. App. Corpus Christi Apr. 24 2008).

647. Although the company claimed that expert testimony was required, case law refused to hold that expert medical testimony was required in every personal injury case, and in this case, the causal connection between the event and the pain in the landowner's shoulder was within a layperson's general experience and common sense. Southwestern Bell Tel., L.P. v. Valadez, 2008 Tex. App. LEXIS 1153 (Tex. App. Fort Worth Feb. 14 2008).

648. Assuming there was a duty to preserve the evidence, appellees preserved the scene as practicably as possible and the scene was initially altered not by appellees, but by the fire department in its suppression and investigation efforts; the manufacturer was able to marshal the services of several experts to rebut appellees' expert testimony and thus the trial court did not err by not dismissing the suit or including a spoliation instruction. Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 2008 Tex. App. LEXIS 356 (Tex. App. Corpus Christi 2008).

649. Trial court could have chosen to disbelieve the homeowners' expert regarding repairs. Dumler v. Quality Work By Davidson, 2008 Tex. App. LEXIS 127 (Tex. App. Houston 14th Dist. Jan. 10 2008).

650. Expert's opinion regarding an insured's state of mind amounted to no more than nonprobative speculation and testimony based on certain documents was mere speculation. United States Fire Ins. Co. v. Scottsdale Ins. Co., 264 S.W.3d 160, 2008 Tex. App. LEXIS 64 (Tex. App. Dallas 2008).

651. Finding in favor of the homeowner in his action against an company for damages to the homeowner's residence was improper because the trial court should not have admitted the homeowner's expert's testimony that the residence suffered a 20 percent reduction in market value since there was too great an analytical gap between the data that the expert might have used and his conclusion as to the percentage of the home's lost market value. Royce Homes, L.P. v. Humphrey, 244 S.W.3d 570, 2008 Tex. App. LEXIS 60 (Tex. App. Beaumont 2008).

652. In a marketing defect products liability case, a doctor testified that it was impossible to determine what caused the patient's staple line to dehisce and the patient's expert was unable to state this cause either, and thus, there was no evidence that the failure to warn of any specific or exact risk caused the patient's injury. Ethicon Endo-Surgery, Inc. v. Meyer, 249 S.W.3d 513, 2007 Tex. App. LEXIS 9892, CCH Prod. Liab. Rep. P17742 (Tex. App. Fort Worth 2007).

653. Because no one testified to the reasonable attorney fee factors under Tex. Disciplinary R. Prof. Conduct 1.04, and no expert testified that the fees actually incurred were reasonable and necessary, there was no evidence to support the jury's answer as to damages in this regard, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 38.001. Cunningham v. Williams, 2007 Tex. App. LEXIS 9894 (Tex. App. Fort Worth Dec. 20 2007).

654. Because the jury had no basis on which to evaluate roof repair estimates, the trial court did not err by granting the seller's judgment notwithstanding the verdict motion on breach of contract damages as to the roof repairs. Cunningham v. Williams, 2007 Tex. App. LEXIS 9894 (Tex. App. Fort Worth Dec. 20 2007).

655. In a case involving damage allegedly caused by the discharge of soot and black smoke from the central air-conditioning and heating system, to the extent that a witness testified as a non-expert, the combustion process of a heating furnace is a matter beyond a juror's common understanding and thus a determination of the causation in this case required expert testimony. Poteet v. Kaiser, 2007 Tex. App. LEXIS 9749 (Tex. App. Fort Worth Dec. 13 2007).

656. To the extent a witness testified as an expert on insureds' heating system, an issue not brought before the trial court, the witness's conclusions had to be based on more than a belief, as a bare expert opinion did not satisfy the scintilla test; the witness failed to establish the necessary links between the holes in the heat exchangers and the resulting process that allegedly caused the damages complained of by the insureds. Poteet v. Kaiser, 2007 Tex. App. LEXIS 9749 (Tex. App. Fort Worth Dec. 13 2007).

657. Because the combustion process of a heating furnace is a condition that involves matters beyond jurors' common understanding, expert testimony was required to determine causation in insureds' case, and thus circumstantial evidence from one insured was not enough to preclude summary judgment. Poteet v. Kaiser, 2007 Tex. App. LEXIS 9749 (Tex. App. Fort Worth Dec. 13 2007).

658. Because an expert conducted no tests to determine the cause of the soot, based his opinion on observations of another, and because he could not rule out other potential sources that he admitted probably caused the soot, his opinion as to the source of the soot was no evidence, and a clarification document supplementing the expert's

deposition did not help; the expert was precluded from stacking inference upon inference in forming his opinion on causation. Poteet v. Kaiser, 2007 Tex. App. LEXIS 9749 (Tex. App. Fort Worth Dec. 13 2007).

659. Court disagrees that proving a balance as reflected on an account statement requires expert testimony. Sikander Ghia v. Am. Express Travel Related Servs., 2007 Tex. App. LEXIS 8194 (Tex. App. Houston 14th Dist. Oct. 11 2007).

660. Because an expert witness did not render a direct and unequivocal conclusion that attorney fees sought by the company under Tex. Civ. Prac. & Rem. Code Ann. § 38.001 were unreasonable, the witness's affidavit did not raise an issue of material fact and thus another witness's affidavit was uncontroverted; however that witness's affidavit was inconsistent on whether the company was seeking fees for breach of contract or for the entire case, including tort claims, and thus this affidavit was unable to support the trial court's judgment awarding attorney fees. Anglo-Dutch Petroleum Int'l, Inc. v. Littlemill Ltd., 2007 Tex. App. LEXIS 7826 (Tex. App. Houston 14th Dist. Oct. 2 2007).

661. While an expert witness speculated that the neighbor's wife was probably aware that the neighbor had bathed the daughter, this speculation did not constitute evidence that the wife was aware of the conduct because it was not based on any personal knowledge. Madison v. Williamson, 241 S.W.3d 145, 2007 Tex. App. LEXIS 7844 (Tex. App. Houston 1st Dist. 2007).

662. Expert testimony was legally and factually sufficient to support the jury's findings regarding attorney fees; the party offered expert testimony on many of the facts set forth in case law regarding determining attorney fees, including the time and labor required, the novelty and difficulty of the questions involved, the fee customarily charged, the amount involved and results obtained, the experience, reputation, and ability of the lawyer, whether the representation precluded other employment, and whether the fee was fixed or contingent. Solar Soccer Club v. Prince of Peace Lutheran Church, 234 S.W.3d 814, 2007 Tex. App. LEXIS 7624 (Tex. App. Dallas 2007).

663. Expert testimony is required to prove the reasonableness and necessity of repairs. Legacy Motors, LLC v. Bonham, 2007 Tex. App. LEXIS 7530 (Tex. App. Fort Worth Sept. 13 2007).

664. Court found it unconvincing that a law firm complained about the opinion of an expert it sponsored in an underlying lawsuit, but the clients did not raise this complaint below or urge in on appeal, other than in response to the sufficiency of damages issue. Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 232 S.W.3d 883, 2007 Tex. App. LEXIS 6954 (Tex. App. Dallas 2007).

665. Law firm insisted that the evidence was insufficient to support the jury's award of damages for the fair market value of the stock a corporation was obligated to repurchase from the clients; although the firm's expert testified that he would have calculated the cash flow distribution differently, this did not make another expert's calculations unreliable, and while this expert mistakenly counted the undistributable cash flow twice, the court did not agree that this made his opinion unreliable, as an error in addition went to the weight of the opinion, not the reliability of the underlying data. Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 232 S.W.3d 883, 2007 Tex. App. LEXIS 6954 (Tex. App. Dallas 2007).

666. Expert's opinion on the value of stock was not unreliable because he used a tariff from a 1997 offering memorandum; whether the law firm's expert would have considered possible price changes did not impact the reliability of the other expert's calculations, which were based on an independent report from a third party, and a single article questioning whether the project would have been able to charge the contracted-for price did not affect the reliability of the underlying data prepared by an independent third party upon which this expert relied. Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 232 S.W.3d 883, 2007 Tex. App. LEXIS 6954

(Tex. App. Dallas 2007).

667. It was not necessary for the shareholder to qualify as an expert witness to testify about his opinion of his own personal property; although he did not use the words "market value," the court found that his testimony concerning the valuation of the stock was based on market value and thus this testimony was some evidence of the fair market value of the stock at the time of the breach. Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp., 232 S.W.3d 883, 2007 Tex. App. LEXIS 6954 (Tex. App. Dallas 2007).

668. Insurer argued that the homeowners, the insureds, were not entitled to fees under the Texas Deceptive Trade Practices Act and thus asserted a position adverse to the homeowners whom the insurer should have been protecting, which suggested that the equity was not to favor the insurer in a determination of subrogation rights; the insurer's expert testimony amounted to a judicial admission, but the insurer later tried to claim that the damages were limited, and this also supported the trial court's equitable decision to deny subrogation to the insurer, but given new case law, the issue of subrogation was remanded. Osborne v. Jauregui, Inc., 2007 Tex. App. LEXIS 7259 (Tex. App. Austin Aug. 29 2007).

669. Regarding attorney fees under the Fair Labor Standards Act, the court was not persuaded that the trial court was required to award the full amount of fees requested because the employer did not present contrary expert testimony. Vernon v. CAC Distribs., 2007 Tex. App. LEXIS 6294 (Tex. App. Houston 1st Dist. Aug. 9 2007).

670. In determining that the father had the right to determine the child's primary residence under Tex. Fam. Code Ann. § 101.016, the jurors, as the sole judges of the credibility of witnesses, was free to accept lay testimony over that of experts, when confronted with the conflicting evidence in this case; notwithstanding the testimony that the mother was better suited to determine the child's residence, there was sufficient evidence to support the jury's finding in the father's favor, as there were a number of witnesses who testified that the father was a loving and devoted parent, the jury also heard testimony that the father regretted not trying harder to stay in touch with his other children, that he recently made contact with them, and that he took a 10-week parenting course to improve his parenting skills, and the minor child was able to depend on the father for her physical and moral needs. Garcia v. Garcia, 2007 Tex. App. LEXIS 5801 (Tex. App. San Antonio July 25 2007).

671. Because defendant elicited an expert's testimony and failed to object on the basis of a non-responsive answer, defendant was precluded from complaining about the testimony on appeal; moreover, the complaint on appeal did not comport with the running relevancy objection at trial, such that the issue was not preserved for review under Tex. R. App. P. 33.1. Montgomery v. State, 2007 Tex. App. LEXIS 5682 (Tex. App. Dallas July 19 2007).

672. Although the mother raised "sufficiency" points regarding the termination of her parental rights, neither the mother nor the Texas Department of Family and Protective Services discussed in any significant detail the specific evidence presented at trial, and thus the court did not discuss in detail the sufficiency of the evidence, but instead discussed the specific arguments on appeal concerning the absence of testimony from the mother's expert witnesses, pursuant to Tex. R. App. P. 47.1. McKay v. Dep't of Family & Protective Servs., 2007 Tex. App. LEXIS 4833 (Tex. App. Houston 1st Dist. June 21 2007).

673. Evidence was not rendered legally and factually insufficient to support the termination of the mother's parental rights based on the absence of expert testimony from the mother's doctor and therapist and the trial court did not abuse its discretion by denying the mother the chance to present this testimony; for purposes of Tex. R. Civ. P. 251, although the mother claimed that the experts were properly subpoenaed, there was nothing in the record to substantiate that claim, no proper oral motion was made and no written motion was in the record and there was no explanation of the content of the expected testimony. McKay v. Dep't of Family & Protective Servs., 2007 Tex. App.

LEXIS 4833 (Tex. App. Houston 1st Dist. June 21 2007).

674. In a medical malpractice case, the burden was on the widow and other relatives to prove by expert testimony that based upon a reasonable medical probability the injuries suffered by the widow's husband were causally linked to the negligent acts of the doctor, and a defendant such as the doctor is not required to produce expert testimony in a medical malpractice case. Lalusin v. Subnani, 2007 Tex. App. LEXIS 4652 (Tex. App. Corpus Christi June 14 2007).

675. Trial court did not abuse its discretion by denying defendant's motion for a Tex. R. Evid. 705 hearing concerning a special agent's testimony because the trial court properly admitted the agent's testimony under Tex. R. Evid. 701; the State presented the agent as a lay witness to testify about the pimp subculture and to address the issue of cause, as placed into issue by defendant's cross-examination of the complainant; the questions contemplated drew directly from the agent's personal experience and familiarity with the pimping subculture, including its terms, many of which the complainant had used in her testimony, which the agent gained from interviewing both pimps and prostitutes; questioning the agent about what he learned from his experience assisted the fact-finder in determining a fact in issue, specifically defendant's utilizing the complainant as a prostitute for his personal profit; because Tex. R. Evid. 702 did not apply, the trial court did not err by overruling defendant's objections to the relevancy of the agent's testimony on the ground that the State did not establish how his opinion fit the facts of the case as required by Tex. R. Evid. 702. Richardson v. State, 2007 Tex. App. LEXIS 4281 (Tex. App. Houston 1st Dist. May 31 2007).

676. In a condemnation proceeding, the trial court did not err in admitting evidence of damages due to an impairment of access that the State contended was not material or substantial, because the case was not about the impairment of access that was material and substantial; the best use of the property was disputed and the experts testified that there was a change in the best use due to the taking and that the change damaged the value to the remainder. State v. Dawmar Ptnrs, Ltd., 268 S.W.3d 79, 2007 Tex. App. LEXIS 4245 (Tex. App. Waco 2007).

677. Record did not reveal or suggest more than one cause of the employee's injuries and thus medical expert testimony was not required to show a causal nexus in this case. Bowler v. Metro. Transit Auth., 2007 Tex. App. LEXIS 3451 (Tex. App. Houston 1st Dist. May 3 2007).

678. Charge asking whether a patient, who happened to be a doctor, exhibited ordinary prudence under the same or similar circumstances at least allowed jurors to consider his training, even if it did not instruct them to do so; jurors could hardly have overlooked the patient's special knowledge and the patient designated himself as a testifying expert, and having presented himself to jurors as a person with superior knowledge, he was not free to complain that jurors took him at his word. Jackson v. Axelrad, 221 S.W.3d 650, 2007 Tex. LEXIS 323, 50 Tex. Sup. Ct. J. 628 (Tex. 2007).

679. Although a patient argued that there was no evidence that any failure to report where the pain began proximately caused his injuries, the patient's expert testified otherwise and the jurors could have found a causal connection. Jackson v. Axelrad, 221 S.W.3d 650, 2007 Tex. LEXIS 323, 50 Tex. Sup. Ct. J. 628 (Tex. 2007).

680. Trial court did not err in refusing to allow a defense expert to testify in the punishment phase of appellant's capital murder trial that appellant's use of alcohol and cocaine caused him to commit the crime because, in excluding the evidence, the trial court properly determined that appellant did not make the requisite showing of reliability under Tex. R. Evid. 702; the expert was permitted to testify about the correlation between alcohol and cocaine usage and violence, but she was not permitted to take the extra step of opining whether alcohol and drug dependence was related to appellant's violent conduct. Roberts v. State, 220 S.W.3d 521, 2007 Tex. Crim. App.

LEXIS 429 (Tex. Crim. App. 2007).

681. Under binding precedent, a contractor in a negligence/premises liability case was not required to produce expert testimony that the electrocution caused his damages within a reasonable medical probability. Choice v. Gibbs, 222 S.W.3d 832, 2007 Tex. App. LEXIS 2852 (Tex. App. Houston 14th Dist. 2007).

682. Court was not able to address the alleged inadmissibility of a doctor's affidavit because the homeowners waived their evidentiary objections by failing to obtain a ruling from the trial court on their objections; the homeowners were free to assert that the affidavit was conclusory. Choice v. Gibbs, 222 S.W.3d 832, 2007 Tex. App. LEXIS 2852 (Tex. App. Houston 14th Dist. 2007).

683. In this negligence/premises liability case, a doctor's testimony that he believed an electrocution caused the contractor's heart attack, combined with the evidence of the prompt onset of heart-attack symptoms following the electrocution, raised a genuine fact issue, and although the homeowners claimed that the evidence did not raise a fact issue because there was no expert testimony based on a reasonable medical probability, such was unnecessary under these circumstances, and thus summary judgment was improperly granted to the homeowners. Choice v. Gibbs, 222 S.W.3d 832, 2007 Tex. App. LEXIS 2852 (Tex. App. Houston 14th Dist. 2007).

684. Client's claim against the attorney was predicated on circumstances involving questions of legal representation and fiduciary duties, such that a layman could not have been expected to ascertain, without expert witness guidance, whether the attorney breached a duty owed to the client; because the client was not able to provide summary judgment evidence on an issue requiring expert testimony, the trial court properly excluded the client's affidavit, and without expert testimony, the client failed to raise a scintilla of evidence as to whether any breach proximately caused harm. Kothmann v. Cook, 2007 Tex. App. LEXIS 2778 (Tex. App. Amarillo Apr. 11 2007).

685. Test for whether a representation is material is whether it actually induced the insurance company to assume the risk, and that test contains no requirement of expert testimony, much less that of an actuary, as an insured argued, and there is no particular expert testimony requirement on the issue of materiality; in any event, ample evidence supported the proposition that the insured's representations caused the insurer to provide insurance without further investigation and the doctor's testimony was not conclusory or subjective, but was based on the doctor's experience and training. Soto v. Int'l Med. Group, Inc., 2007 Tex. App. LEXIS 2577 (Tex. App. Houston 14th Dist. Apr. 3 2007).

686. Patient's claim that an expert's testimony concerning a radiologist's alleged mistreatment and misdiagnosis of patients other than the patient was not properly preserved for review, because although the patient included some evidence in this regard in an offer of proof, the patient failed to state why the evidence was improperly excluded or why it should have been admitted, and the patient failed to specify the purpose for which the evidence was offered; in any event, the trial court did not abuse its discretion in excluding this evidence given that the expert's testimony in one aspect amounted to pure speculation and the patient did not establish how the testimony was material to the radiologist's interpretation of certain scans, such that the trial court did not abuse its discretion in finding the testimony was not relevant under Tex. R. Evid. 401, or that even if relevant, its probative value was substantially outweighed by the danger of unfair prejudice under Tex. R. Evid. 403. Montgomery v. Varon, 2007 Tex. App. LEXIS 2582 (Tex. App. Houston 14th Dist. Apr. 3 2007).

687. Although a patient made an offer of proof, the patient failed to make any argument as to why evidence of a surgeon's reputation in the medical community and alleged mistreatment of other patients was improperly excluded or why it should have been admitted, and the patient failed to specify the purpose for which the evidence was offered; because both steps were required to avoid waiver, the patient failed to preserve certain issues for review.

Montgomery v. Varon, 2007 Tex. App. LEXIS 2582 (Tex. App. Houston 14th Dist. Apr. 3 2007).

688. Even if the court assumed error in the admission of a doctor's testimony, the employees and spouses failed to make the showing that the ruling probably caused the rendition of an improper judgment, as the company set forth various defenses and accepting any of them could have resulted in the jury's "no" answer to the question of whether the company's negligence proximately caused the occurrence in question. Barfield v. SST Trucking Co., L.L.C., 2007 Tex. App. LEXIS 2376 (Tex. App. Dallas Mar. 28 2007).

689. In defendant's trial under Tex. Penal Code Ann. § 49.04, although defendant argued that an synergistic effect of alcohol and a prescription drug instruction was improperly given because there was no expert testimony on the subject, defendant, contrary to Tex. R. App. P. 38.1(h), cited no authority for that proposition and thus waived on appeal any complaint about the lack of expert testimony; furthermore, the error regarding expert testimony was unpreserved, requiring reversal only if egregious harm was shown, which it was not. Robinson v. State, 2007 Tex. App. LEXIS 2316 (Tex. App. Dallas Mar. 26 2007).

690. Trial court did not err in excluding an expert's opinion linking permanent brain injury and cerebral palsy; the expert had to search the medical record for clinical indications that the child's pH was below seven at birth, and this goal-oriented reasoning was contrary to the foundation of the scientific method, and the trial court acted within its discretion in questioning the reliability of the expert's methodology without experience or authoritative literature to support it. Quiroz v. Covenant Health Sys., 234 S.W.3d 74, 2007 Tex. App. LEXIS 1771 (Tex. App. El Paso 2007).

691. In an insurance breach of contract case, because the insureds' expert failed to indicate the extent to which the covered peril damaged the home, the court was unable to conclude that a certain percentage of the damage was caused by plumbing leaks, the covered perils, and the expert's affidavit did not raise the issue of causation. Kelly v. Travelers Lloyds of Tex. Ins. Co., 2007 Tex. App. LEXIS 1320 (Tex. App. Houston 14th Dist. Feb. 22 2007).

692. Contrary to the ex-husband's claim, the trial court did not fail to order a just and right division of the community estate, for purposes of Tex. Fam. Code Ann. § 7.001; the trial court was faced with two proffered valuations and neither was supported by customary expert valuation evidence, and the trial court did not abuse its discretion by accepting the ex-wife's testimony over the ex-husband. Davis v. Davis, 2007 Tex. App. LEXIS 1297 (Tex. App. Austin Feb. 16 2007).

693. Where a contractor, who was installing a bath tub, sued homeowners for negligence after he was electrocuted by exposed live wires sticking out of a hole in the wall and suffered a heart attack, no-evidence summary judgment was improperly granted to the homeowners because, when the onset of a heart attack occurred immediately after an electrocution, it was not necessary for an expert to testify to a "reasonable medical probability" that the electrocution caused the damages, and there were genuine issues of material fact regarding cause in fact and foreseeability; although the homeowners alleged that a doctor's affidavit was conclusory, and unreliable under Tex. R. Evid. 702, and not based on a reasonable medical probability, a statement that an electrocution probably caused the contractor's heart attack was sufficient expert testimony to raise a fact issue as to cause in fact given that there was a fact issue as to whether the heart attack occurred shortly after the contractor was electrocuted. Choice v. Gibbs, 2007 Tex. App. LEXIS 1063 (Tex. App. Houston 14th Dist. Feb. 13 2007).

694. Trial court's commitment order under Tex. Health & Safety Code Ann. § 574.034(a) was error because there was no evidence of an overt act or continuing pattern of behavior that tended to confirm the deterioration of the patient's ability to function; although there was expert testimony that the patient was mentally ill, selectively mute, claimed to be blind, and at times was angry, agitated, and demanding, even assuming this constituted a pattern of behavior for purposes of the statute, none of the behaviors indicated an inability to function independently, and thus the evidence was legally insufficient and the court did not need to reach the patient's factual sufficiency complaint

under Tex. R. App. P. 47.1. State ex rel. L.T., 2007 Tex. App. LEXIS 975 (Tex. App. Tyler Feb. 9 2007).

695. Expert report is required under Tex. Civ. Prac. & Rem. Code Ann. § 74.351 for a patient's second cause of action, even where it was based on the theory of res ipsa loquitur; as a general rule, however, res ipsa loquitur did not apply in medical malpractice cases, as set forth in Tex. Civ. Prac. & Rem. Code Ann. § 74.201, and the cause of action here fell outside the narrow scope of operation currently recognized for the theory of res ipsa loquitur in health care liability claims. Valley Baptist Med. Ctr. v. Gonzales, 2007 Tex. App. LEXIS 996 (Tex. App. Corpus Christi Feb. 8 2007).

696. Even if the case could have been found to be governed by the rules concerning a lost or destroyed record under Tex. R. App. P. 34.6(f), the court disagreed that a new trial was required in this will contest action; the court reporter wholly failed to record anything as required by Tex. R. App. P. 13.1, one of the depositions was the testimony of an expert, which required an explanation of the background and qualifications of the witness and the testimony covered the mental capacity of the testator and was the primary issue in the case, and the record showed no objection for purposes of Tex. R. App. P. 33.1(a). In re Estate of Arrendell, 213 S.W.3d 496, 2006 Tex. App. LEXIS 10816 (Tex. App. Texarkana 2006), *reh'g overruled*, No. 06-05-00022-CV, 2007 Tex. App. LEXIS 388 (Tex. App.--Texarkana Jan. 23, 2007).

697. Customer was represented by counsel, presented a demand to the bank, and received no tender of payment, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 38.002, and expert testimony, given by the attorneys who were qualified to testify to the facts of their representation, established the reasonableness of the hourly fees charged by the attorneys, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 38.001, and thus the trial court abused its discretion by denying the customer attorney fees. Bank of Am., N.A. v. Hubler, 211 S.W.3d 859, 2006 Tex. App. LEXIS 10552 (Tex. App. Waco 2006).

698. Trial court's order of temporary inpatient mental health services under Tex. Health & Safety Code Ann. § 574.034(a) was proper; the State provided testimony that the patient was mentally ill, as such was defined in Tex. Health & Safety Code Ann. § 571.003(14), and that the patient had stopped taking his medication and threatened people in the community, and the record contained expert testimony of a recent overt act, staying awake for several days in a row, that tended to confirm the patient's distress and the deterioration of his ability to function, as shown by his inability to provide for his own basic needs, and the trial court could have disbelieved the patient's claims to the contrary. State ex rel. J.H., 2006 Tex. App. LEXIS 8566 (Tex. App. Tyler Oct. 4 2006).

699. In a products liability design defect action against a sport utility vehicle's (SUV) manufacturer in which it was alleged that a passenger's side airbag in the SUV should have deployed in an accident involving the SUV and an eighteen-wheeler, the causation testimony of the passenger's biomechanical engineering expert was reliable based on her qualifications and experience in the study of how human bodies moved and reacted when forces were applied to them; the expert did not fail to account for the passenger's left-side injuries, the inward forces applied to the B-pillar of the SUV, or the driver's unconsciousness at the scene, as the manufacturer contended. GMC v. Burry, 203 S.W.3d 514, 2006 Tex. App. LEXIS 8284 (Tex. App. Fort Worth 2006).

700. Although it might have been appropriate to offer testimony regarding defendant's mental condition and expert testimony regarding such behavioral characteristics, the focus of the basis for the admission of testimony was to attribute defendant's courtroom behavior to the lack of medication, and because defendant conceded that defendant was taken off medication, the trial court did not err in excluding the testimony. Reed v. State, 2006 Tex. App. LEXIS 8143 (Tex. App. Waco Sept. 13 2006).

701. It was not an abuse of discretion to allow a probation officer to testify during the punishment phase of a trial that petitioner was not a "suitable" candidate for community supervision because suitability was a matter "relevant

to sentencing" under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a) when petitioner sought placement on community supervision under Tex. Code Crim. Proc. Ann. art. 42.12, § 4; the probation officer not only based her testimony on her general professional knowledge and experience but also on her personal knowledge and perceptions of petitioner and the complainant during their interviews. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

702. When a witness who is capable of being qualified as an expert testifies regarding events which he or she personally perceived, the evidence may be admissible as both Tex. R. Evid. 701 opinion testimony and Tex. R. Evid. 702 expert testimony. Ellison v. State, 201 S.W.3d 714, 2006 Tex. Crim. App. LEXIS 1689 (Tex. Crim. App. 2006).

703. State had to prove that defendant penetrated his daughter's sexual organ with his sexual organ while she was younger than 14 years old, and the daughter testified to this, and the court found that the evidence was factually sufficient to support defendant's conviction of aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021; although the daughter was unable to place an exact time or age on each occurrence perfectly, that was not required. McQueen v. State, 2006 Tex. App. LEXIS 7956 (Tex. App. Houston 14th Dist. Sept. 5 2006).

704. Appellate court cannot now sit as the jury and decide to accept one expert's testimony over another's, and this is especially true when the jury seems to have adopted one expert's view over the other's; that is the jury's province. McQueen v. State, 2006 Tex. App. LEXIS 7956 (Tex. App. Houston 14th Dist. Sept. 5 2006).

705. In a medical negligence case, experts offered conflicting opinions on the applicable standard of care and causation, and the jury was authorized to find the testimony indicating negligence less credible than the evidence supporting the doctor; because there was evidence to support the jury's finding that the doctor was not negligent, the verdict was not against the great weight of the evidence. Miles v. Caraway, 2006 Tex. App. LEXIS 7682 (Tex. App. Houston 14th Dist. Aug. 29 2006).

706. Contractor testified as an expert regarding the market value of property to support a damage award; the evidence supported the range of damages and the jury awarded an amount in that range. Bowen v. Robinson, 227 S.W.3d 86, 2006 Tex. App. LEXIS 6921 (Tex. App. Houston 1st Dist. 2006).

707. Testimony supported the finding that sexual assault nursing was a legitimate field of expertise; the expert testified to being (1) a registered nurse for eight years, (2) certified as a sexual assault nurse examiner, and (3) a member of an association of forensic nurses, and the expert had training and peer reviews in the field. Denton v. State, 2006 Tex. App. LEXIS 6662 (Tex. App. Fort Worth July 27 2006).

708. In the punishment phase of a trial for indecency with a child, the trial court did not unduly limit the testimony of defendant's psychological expert; following a hearing under Tex. R. Evid. 705, the trial court admitted all of the testimony that the court understood the witness to have given and defendant did not indicate that he re-urged the matter to the trial court with evidence that would contradict the court's recollection of the witness's testimony. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

709. Record contained no evidence, expert or otherwise, that showed whether the attorney breached the standard of care, and thus summary judgment was properly granted on the ground that there was no evidence on an element of the clients' claim of legal malpractice in connection with the attorney advising them on approaching a victim of crime to suggest restitution in exchange for dropping criminal charges, after which criminal charges were filed against the clients for witness tampering. Evans v. Adamo, 2006 Tex. App. LEXIS 6441 (Tex. App. Houston 1st

Dist. July 20 2006).

710. Evidence was sufficient to support defendant's conviction of aggravated assault with a deadly weapon in violation of Tex. Penal Code Ann. § 22.02(a)(2) and the finding that defendant used a firearm for deadly weapon purposes under Tex. Penal Code Ann. § 1.07(a)(17), given that the record showed that defendant used or exhibited a firearm as alleged; there was eyewitness testimony that provided specific facts from which the jury was able to evaluate the reasonableness of their beliefs that the object was a firearm, and contrary to defendant's assertion, if, as here, a weapon was not recovered, corroboration of a victim's description of the weapon in the form of expert testimony was not required. Harris v. State, 2006 Tex. App. LEXIS 6054 (Tex. App. Fort Worth July 13 2006).

711. Expert testimony established only that it was a possibility that the minor might suffer from some form of mental anguish after being molested, which was no evidence that the minor would in reasonable probability suffer from mental anguish, such that the jury was left to speculate on the issue. YMCA v. Adams, 220 S.W.3d 1, 2006 Tex. App. LEXIS 5958 (Tex. App. San Antonio 2006).

712. In defendant's trial under Tex. Penal Code Ann. § 22.02, the State was not required to offer expert testimony to show that the knife defendant used to stab the victim was a deadly weapon under Tex. Penal Code Ann. § 1.07(a)(17)(B), and the testimony of the victim and a witness regarding the use of the knife was sufficient. Webster v. State, 2006 Tex. App. LEXIS 5941 (Tex. App. Houston 14th Dist. July 6 2006).

713. Court of Appeals found no authority to support proposition that it is inherently improper to call an opponent's expert adversely; court saw no reason why expert testimony should automatically be treated differently than any other evidence produced by opponents, such as documents, that unquestionably can be used against the producing party. Hooper v. Chittaluru, 222 S.W.3d 103, 2006 Tex. App. LEXIS 5532 (Tex. App. Houston 14th Dist. 2006).

714. Appellants' cross-designations of an expert were reasonably prompt and included the information that was available to appellants at the time; the court noted that the discovery rules did not require appellants to do the impossible, the exclusion of evidence for failure to timely disclose was not appropriate if there was no surprise to the opposing parties, for purposes of Tex. R. Civ. P. 193.6(a)(2), and to the extent appellants could have provided any of the cross-designation supplements earlier, the failure to do so did not justify exclusion because appellants had no information to disclose beyond that which appellants already received from the internist. Hooper v. Chittaluru, 222 S.W.3d 103, 2006 Tex. App. LEXIS 5532 (Tex. App. Houston 14th Dist. 2006).

715. For purposes of Tex. R. Evid. 403, cumulativeness was not a legitimate basis for upholding the trial court's decision to strike an expert's testimony, given that the testimony in question was non-cumulative. Hooper v. Chittaluru, 222 S.W.3d 103, 2006 Tex. App. LEXIS 5532 (Tex. App. Houston 14th Dist. 2006).

716. Hired experts risk being perceived by the jury as interested in providing testimony helpful to the party paying them and thus, damaging testimony against a party by its own expert (or even a co-defendant's expert) carries more weight than similar testimony from an expert paid by the other side. Hooper v. Chittaluru, 222 S.W.3d 103, 2006 Tex. App. LEXIS 5532 (Tex. App. Houston 14th Dist. 2006).

717. In a medical malpractice case, appellants should not have been prohibited from calling an expert as a witness solely on the basis that the witness was the internist's expert, and because there was no other legitimate basis for excluding the expert's testimony, reversal was required; the exclusion of the evidence was harmful, given that the expert's testimony implicated negligence and proximate cause and was central to a material issue dispositive to the case, and the court noted that the expert did not need to independently establish proximate cause as suggested by the internist and cardiologist. Hooper v. Chittaluru, 222 S.W.3d 103, 2006 Tex. App. LEXIS 5532 (Tex. App.

Houston 14th Dist. 2006).

718. Because appellants timely cross-designated an expert as to both the internist and the cardiologist, excluding the expert's testimony on this basis under Tex. R. Civ. P. 193.6(a) would have been an abuse of discretion; appellants timely designated their own experts and included a general cross-designation of the experts of the internist and cardiologist, but did not identify their witnesses because appellants did not have access to that information, for purposes of Tex. R. Civ. P. 195.1, and after the internist designated the witness, appellants supplemented the cross-designation to include the expert. Hooper v. Chittaluru, 222 S.W.3d 103, 2006 Tex. App. LEXIS 5532 (Tex. App. Houston 14th Dist. 2006).

719. There was no dispute that expert medical testimony was required to demonstrate the causal connection between the medical center's nursing staff's claimed negligence and the patient's injuries related to a nasogastric tube and its maintenance. Basinger v. Covenant Med. Ctr. Lakeside, 2006 Tex. App. LEXIS 5425 (Tex. App. Amarillo June 23 2006).

720. In a medical negligence action, the trial court properly granted a medical center summary judgment, as there was no expert medical opinion that the patient's illness was caused by a nasogastric tube that did not function properly, and there was no causal connection established between the patient's illness and her memory impairment; the court reviewed evidence from two doctors, but one statement did not constitute a medical diagnosis, and the other statement, if assumed to have been an opinion resting in reasonable medical probability, it was not reasonable to infer therefrom that the doctor was attributing the patient's probable aspiration to any particular cause. Basinger v. Covenant Med. Ctr. Lakeside, 2006 Tex. App. LEXIS 5425 (Tex. App. Amarillo June 23 2006).

721. Because defendant's objection at trial to a witness's testimony focused on Tex. Code Crim. Proc. Ann. art. 38.072, and on appeal the objection focused on Tex. R. Evid. 702, defendant preserved nothing for review under Tex. R. App. P. 33.1; even if error was preserved, any error was harmless because evidence that the victim's behavior was inconsistent with common behavioral patterns of sexually abused children, if anything, was helpful to the defense in defendant's trial for sexual assault on a child. Estes v. State, 2006 Tex. App. LEXIS 5028 (Tex. App. Houston 14th Dist. June 13 2006).

722. Trial court erred in denying defendants' motion for judgment notwithstanding the verdict because the evidence did not prove with reasonable certainty the profits plaintiffs claimed to have lost as a result of defendants' breaches of contract, given that plaintiffs' experts set forth conclusory and self-serving statements, and many times did not explain the basis for various determinations; because plaintiffs were not entitled to any lost profits, and because lost profits were the only damages awarded to them, plaintiffs were not entitled to recover any attorney fees. Ramco Oil & Gas Ltd. v. Anglo-Dutch (Tenge) L.L.C., 2006 Tex. App. LEXIS 4837 (Tex. App. Houston 14th Dist. June 6 2006), appeal dismissed by 2006 Tex. App. LEXIS 5543 (Tex. App. Houston 14th Dist. June 29, 2006).

723. Appellees offered testimony of a witness and an expert to explain specialized terms in the parties' contract, not to create an ambiguity or vary the terms of the contract, and the court noted that expert evidence was useful in general in explaining commonly understood industry terms. XCO Prod. Co. v. Jamison, 194 S.W.3d 622, 2006 Tex. App. LEXIS 3660, 163 Oil & Gas Rep. 605 (Tex. App. Houston 14th Dist. 2006).

724. Court agreed with the driver that expert testimony was required to establish that an automobile accident caused the motorist to suffer herniated disks when the motorist suffered from other preexisting conditions, but the driver did not object to the jury charge on the basis that the damage questions could have invited the jury to include damages for herniations, nor did the driver seek a separate jury question on causation, and without any separate findings on the elements, the court was unable to assess if the award contained an award for disk herniation; the

driver was limited to challenging the legal sufficiency of the evidence supporting the damages as a whole because the driver did not object to the broad form submission. Kemp v. Havens, 2006 Tex. App. LEXIS 3655 (Tex. App. Houston 14th Dist. Apr. 27 2006).

725. Expert testimony is required to establish that an automobile accident caused a person to suffer herniated disks when that person suffers from other preexisting conditions and injuries. Kemp v. Havens, 2006 Tex. App. LEXIS 3655 (Tex. App. Houston 14th Dist. Apr. 27 2006).

726. Police officer did not need to be qualified as an expert for the officer's opinions to be admissible and the trial court did not err in allowing the officer's report into evidence; the opinions in the report did not touch on causation or liability, and the officer merely reported factual observations. Ontiveroas v. Lozano, 2006 Tex. App. LEXIS 3669 (Tex. App. Houston 14th Dist. Apr. 27 2006).

727. In a case alleging breach of contract relating to an oral partnership agreement, testimony given by an expert witness on damages was supported by the evidence, and his opinions were not based on unfounded assumptions where the revenue information relied upon was provided by the opposing party. Deere v. Ingram, 198 S.W.3d 96, 2006 Tex. App. LEXIS 3391 (Tex. App. Dallas 2006).

728. At the time of the deed transfers, the father was suffering from mental and physical problems; the court found the evidence supported a determination that the father was unduly influenced and that he lacked the mental capacity, for which expert testimony was not required and for which lay testimony was sufficient, to transfer title to the property in question. Decker v. Decker, 192 S.W.3d 648, 2006 Tex. App. LEXIS 3023 (Tex. App. Fort Worth 2006).

729. Doctor's testimony that surgery was reasonable, coupled with evidence of how non-surgical treatment options had failed, constituted sufficient evidence of the need for the motorist to have surgery in the future; the expert opinion evidence of the estimated costs of future surgery was sufficient to support the award of future medical expenses. Nat'l Freight, Inc. v. Snyder, 191 S.W.3d 416, 2006 Tex. App. LEXIS 2833 (Tex. App. Eastland 2006).

730. Even assuming an officer's testimony as to what a ballistics report concluded was subject to Tex. R. Evid. 702, any resulting error was harmless and any error as a result of impermissible hearsay or on the basis of a Confrontation Clause violation was waived and not preserved under Tex. R. App. P. 33.1(a) because these claims were not asserted at trial; assuming the trial court committed error in overruling the objection, the court found no reversible error under Tex. R. App. P. 44.2(b) because the court had a fair assurance that the error did not influence the jury. Rincon v. State, 2006 Tex. App. LEXIS 2758 (Tex. App. San Antonio Apr. 5 2006).

731. Court found the evidence factually sufficient to support defendant's conviction of possession of cocaine with intent to deliver, in violation of Tex. Health & Safety Code Ann. § 481.112(c); nothing required expert testimony that a particular amount of drugs packaged in a particular number of units established an intent to deliver, and defendant's interpretations of the evidence did not provide sufficient contrary proof outweighing the jury's finding of guilt. Dearmon v. State, 2006 Tex. App. LEXIS 2514 (Tex. App. Houston 14th Dist. Mar. 30 2006).

732. Even if a police department chemist's chemistry training in college did not qualify her as an expert to testify about the chemical composition of a substance found in defendant's car, based on the evidence about her overall training and experience and the subject matter about which she offered an opinion, the trial court did not err in permitting her to testify about the substance's chemical composition because that was her primary responsibility for the police department, and she had testified as an expert in the area before. Norton v. State, 2006 Tex. App. LEXIS 2333 (Tex. App. Houston 14th Dist. Mar. 28 2006).

733. There is no reason why expert testimony should automatically be treated differently than any other evidence produced by opponents, such as documents, that unquestionably can be used against the producing party. Hooper v. Chittaluru, 2006 Tex. App. LEXIS 2334 (Tex. App. Houston 14th Dist. Mar. 28 2006), substituted opinion at, opinion withdrawn by 2006 Tex. App. LEXIS 5532 (Tex. App. Houston 14th Dist. June 29, 2006).

734. In a medical malpractice suit against two doctors, an internist and a cardiologist, the trial court abused its discretion in preventing a deceased patient's family from calling the internist's expert witness during their case in chief because: (1) the family should not have been prohibited from calling the internist's expert as a witness solely on the basis that he was the internist's expert; (2) the family's cross-designation of the expert was not deficient under Tex. R. Civ. P. 193 or Tex. R. Civ. P. 195, as the cross-designations were reasonably prompt and included the information available to the family at the time; and (3) due to differences in qualifications and the potential for perceived bias involving testimony on controlling issues, the expert's testimony would have added substantial weight to the family's case and thus was not cumulative. Hooper v. Chittaluru, 2006 Tex. App. LEXIS 2334 (Tex. App. Houston 14th Dist. Mar. 28 2006), substituted opinion at, opinion withdrawn by 2006 Tex. App. LEXIS 5532 (Tex. App. Houston 14th Dist. June 29, 2006).

735. Trial court did not abuse its discretion in concluding that expert testimony was not required before permitting a witness to testify about personal perceptions of the odors smelled on defendant's boat, which included "cigarettes, stale beer, and sweaty sex," in connection with defendant's trial for sexual assault of a child and aggravated sexual assault of a child. Livingston v. State, 2006 Tex. App. LEXIS 2234 (Tex. App. Houston 1st Dist. Mar. 23 2006).

736. Finding in favor of the patient and spouse in a negligence action against the hospital was proper where, given the substantial similarity between the probative value of the testimony of one physician and that of another, the court believed that any error in the trial court's admission of the first physician's testimony could not have led to the rendition of an improper judgment. Columbia Rio Grande Reg'l Healthcare, L.P. v. Hawley, 188 S.W.3d 838, 2006 Tex. App. LEXIS 2265 (Tex. App. Corpus Christi 2006).

737. Although the parents presented expert testimony in their action for medical malpractice and negligence, the experts did not raise a fact issue on causation; two experts only stated that the child's chances would have been better had antibiotics been administered, one expert was unable to place the chances of survival at more than 50 percent, and the third expert's testimony amounted to no evidence of causation because the opinion relied on mere possibility and speculation, as the expert was not able to identify any literature upon which the expert's empirical experience was based. Arredondo v. Rodriguez, 198 S.W.3d 236, 2006 Tex. App. LEXIS 2156 (Tex. App. San Antonio 2006).

738. Doctor raised several objections to an expert witness's testimony, but the doctor failed to obtain a ruling on the objections to the parents' summary judgment evidence; however, because an objection to the speculative nature of an expert's opinion was able to be raised for the first time on appeal, the court addressed only that specific complaint on appeal. Arredondo v. Rodriguez, 198 S.W.3d 236, 2006 Tex. App. LEXIS 2156 (Tex. App. San Antonio 2006).

739. In representatives' medical negligence action, the trial court erred in granting a doctor, healthcare specialist group, and a healthcare system summary judgment because the representatives' expert witness testified that the minor child had an untreated condition that ultimately led to the child's death and that if the pneumothorax had been treated in a timely fashion, the child would have recovered and lived a normal life span; thus raising an issue concerning proximate cause, which made summary judgment improper. Bryant v. Levy, 196 S.W.3d 166, 2006 Tex. App. LEXIS 2150 (Tex. App. Amarillo 2006).

740. For purposes of Tex. R. Evid. 702, an expert did not cross the line and directly address whether certain witnesses were testifying truthfully, and error was not shown. Parson v. State, 193 S.W.3d 116, 2006 Tex. App. LEXIS 1901 (Tex. App. Texarkana 2006).

741. Although there is not a precise fit between science and legal burdens of proof, properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case, and there is a rational basis for relating the requirement that there be more than a doubling of the risk to the no evidence standard of review and to the more likely than not burden of proof. Mobil Oil Corp. v. Bailey, 187 S.W.3d 265, 2006 Tex. App. LEXIS 1880 (Tex. App. Beaumont 2006).

742. Testimony from an expert witness concerning the recovery of child pornography from computers found in defendant's apartment was properly admitted, as was the evidence in the punishment phase for 10 counts of aggravated sexual assault of a child under the age of 14; the witness testified to the program used to retrieve the deleted files, which program was a field standard for forensic computer examination. Sanders v. State, 191 S.W.3d 272, 2006 Tex. App. LEXIS 1872 (Tex. App. Waco 2006).

743. Trial court did not act without reference to guiding principles or rules in excluding the claimants' expert, because generally in his practice, the claimants' expert was not asked to determine the cause of death, and the trial court could have found that the claimants' expert did not have the specialized knowledge necessary to establish the element of causation. Hensarling v. Covenant Health Sys., 2006 Tex. App. LEXIS 1700 (Tex. App. Amarillo Mar. 1 2006).

744. Even assuming that the expert's opinion based on personal experience was correct, the absence of medical literature and general knowledge in the medical community of the procedure recommended by the expert rendered a determination of the foreseeability element of proximate cause speculative, for purposes of Tex. R. Evid. 702. Brazil v. Khater, 223 S.W.3d 418, 2006 Tex. App. LEXIS 1539 (Tex. App. Amarillo 2006).

745. Factors considered in analyzing the admissibility of expert testimony do not constitute the legal equivalent of a litmus test, but instead, furnish guidelines for the trial court to use in determining the relevance and reliability requirements in discharging its duty as the gatekeeper. Brazil v. Khater, 223 S.W.3d 418, 2006 Tex. App. LEXIS 1539 (Tex. App. Amarillo 2006).

746. Although defendant claimed that expert testimony pertained to bolstering, defendant failed to show in the record where the errors allegedly occurred, for purposes of Tex. R. App. P. 38.1(h), and thus defendant waived the issue by failing to brief it, pursuant to Tex. R. App. P. 33.1(a); even had the issue been properly briefed, defendant failed to preserve error for appeal, given that defendant did not obtain an adverse ruling on objections made, nor did defendant move for a mistrial. Trevino v. State, 2006 Tex. App. LEXIS 1400 (Tex. App. San Antonio Feb. 22 2006).

747. Trial court's order provided that it excluded an expert's testimony based on all of appellees' objections; thus, the court was to affirm the trial court's ruling if any ground was meritorious. Dornberg v. Toyota Motor Sales USA, Inc., 2006 Tex. App. LEXIS 1291 (Tex. App. Corpus Christi Feb. 16 2006).

748. Trial court did not err in excluding the expert's testimony; for purposes of Tex. R. Evid. 702, the testimony was nothing more than subjective belief or unsupported speculation, and the expert failed to demonstrate how any of the material reviewed supported the expert's alleged conclusions. Dornberg v. Toyota Motor Sales USA, Inc., 2006 Tex. App. LEXIS 1291 (Tex. App. Corpus Christi Feb. 16 2006).

749. In defendant's theft case, a court properly allowed the testimony of a fraud examiner who had not been disclosed to appellant prior to trial because the witness testified to the summaries of information that the trial court had admitted, the summaries were of bank and credit card records admitted into evidence, the witness did not offer opinion testimony on the source of the money or the responsible party, and therefore, the witness testified as a lay witness and his testimony did not exceed the limits placed on the testimony of lay witnesses. Reuter v. State, 2006 Tex. App. LEXIS 1314 (Tex. App. Houston 1st Dist. Feb. 16 2006).

750. In a personal injury case, a court did not err by permitting defendants' hired police accident reconstructionist to testify as an expert where during his employment with the department he investigated more than 10,000 accidents, he attended accident reconstruction training courses, and he taught about twenty courses involving accident reconstruction at the police academy; therefore, he was sufficiently qualified as an expert witness. Shaw v. Triple J Mowers, Inc., 2006 Tex. App. LEXIS 1316 (Tex. App. Waco Feb. 15 2006).

751. In a personal injury case, a court did not err by permitting defendants' hired expert accident reconstructionist to testify as his opinion was reliable because the expert testified that he went to the scene of the collision and personally observed the gouge marks in question, he did not assume that gouge marks existed, he examined the combined length of the tractor and mower (29 feet), the distance between a culvert and the generally agreed point of impact (about 20 feet), and the turning radius of the tractor. Shaw v. Triple J Mowers, Inc., 2006 Tex. App. LEXIS 1316 (Tex. App. Waco Feb. 15 2006).

752. Difference between what constituted assault and terroristic threats involved issues of statutory interpretation, which were questions of law, and thus the trial court did not err in refusing to admit an officer's testimony on the subject, given that experts were not permitted to testify to an opinion on a pure question of law, for purposes of Tex. R. Evid. 702, and it was the trial court's duty to instruct the jury on the law pursuant to Tex. Code Crim. Proc. Ann. art. 36.14. Anderson v. State, 193 S.W.3d 34, 2006 Tex. App. LEXIS 1140 (Tex. App. Houston 1st Dist. 2006).

753. Trial court properly determined that an expert's opinions on the cost of waste removal were unreliable, given that the expert stated that more soil samples should have been taken and the expert admitted not being able to determine the cost of such removal and disposal with such limited data; because the jury relied on that evidence in awarding damages, the trial court properly disregarded that finding. Hall v. Hubco, Inc., 292 S.W.3d 22, 2006 Tex. App. LEXIS 1037 (Tex. App. Houston 14th Dist. 2006).

754. Court held that what a power company's practices and procedures should have been were not within one's general knowledge, and thus, the citizen was obligated to present expert testimony discussing the proper standard of care and whether the city public service board met that standard; because the citizen did not provide such testimony, there was no evidence of the standard of care or any breach of that standard. Schwartz v. City of San Antonio, 2006 Tex. App. LEXIS 995 (Tex. App. San Antonio Feb. 8 2006).

755. Police officer's testimony on specialized training, experience, and certified status was sufficient to establish that the officer was an expert for purposes of Tex. R. Evid. 702 on the administration and technique of the horizontal gaze nystagmus (HGN) test; thus, the trial court did not err in overruling defendant's objection to the officer's testimony concerning the HGN test and the results in defendant's trial for driving while intoxicated. Cooper v. State, 2006 Tex. App. LEXIS 942 (Tex. App. El Paso Feb. 2 2006).

756. Defendant's complaints, that the trial court erred in failing to take judicial notice of the reliability of a horizontal gaze nystagmus (HGN) test and in failing to make other inquiry under Tex. R. Evid. 702, were not raised in the trial court, for purposes of Tex. R. App. P. 33.1; however, HGN tests had previously been found to be scientifically reliable, and thus the State was not required to present evidence on the issue and the appellate court was free to take judicial notice of the reliability on appeal, and thus, even if preserved, no abuse of discretion existed on these

grounds. Cooper v. State, 2006 Tex. App. LEXIS 942 (Tex. App. El Paso Feb. 2 2006).

757. In a criminal prosecution for murder, the trial court did not err in permitting a detective to testify as a blood spatter expert. The detective was qualified, because he received training in the area of blood stains and blood spatter patterns, he had taught classes on intermediate crime scene investigations, and he served as an expert witness in other cases. De Leon v. State, 2006 Tex. App. LEXIS 813 (Tex. App. San Antonio Feb. 1 2006).

758. In a homeowner's breach of contract action against a contractor, the trial court did not err in admitting the testimony of the homeowner's expert witness because the witness's testimony, based on firsthand observations and accompanied by the knowledge and experience of his subcontractors and an outside expert, was reliable. Facundo v. Solis, 2006 Tex. App. LEXIS 318 (Tex. App. Austin Jan. 12 2006).

759. In contrast to the relevancy requirements for expert testimony, the reliability requirement of Tex. R. Evid. 702 focuses on the principles, research, and methodology underlying an expert's conclusions; under this requirement, expert testimony is unreliable if it is no more than subjective belief or unsupported speculation. Facundo v. Solis, 2006 Tex. App. LEXIS 318 (Tex. App. Austin Jan. 12 2006).

760. In a challenge to the tax liability of a shopping center, the underlying data used by the taxpayer's appraiser was reliable for purposes of Tex. R. Evid. 702 because the appraiser found properties in the surrounding area that had the same land use code and low-rent classification, and he restricted those results based on size, location, and age. The nine remaining properties represented a reasonable sample for the purposes of Tex. Tax Code § 42.26. Harris County Appraisal v. Hartman Reit Operating P'ship, L.P., 186 S.W.3d 155, 2006 Tex. App. LEXIS 103 (Tex. App. Houston 1st Dist. 2006).

761. In a suit challenging a real estate tax assessment, the trial court properly allowed expert testimony from the taxpayer's appraiser. The testimony was relevant, within the meaning of Tex. R. Evid. 401, 402, and 702 because the appraiser found a reasonable number of comparable properties, made appropriate adjustments, and compared the median appraisal value of those properties to the appraisal value applied to the property at issue, as required by Tex. Tax Code § 42.26. Harris County Appraisal v. Hartman Reit Operating P'ship, L.P., 186 S.W.3d 155, 2006 Tex. App. LEXIS 103 (Tex. App. Houston 1st Dist. 2006).

762. Expert testimony did not raise a fact issue on cause-in-fact in connection with a customer's action against a restaurant related to the customer's gastroenteritis; the expert did not express an ultimate opinion, in reasonable medical probability or otherwise, that the customer's gastroenteritis was caused by the food consumed at the restaurant. Smith v. Landry's Crab Shack, Inc., 183 S.W.3d 512, 2006 Tex. App. LEXIS 30 (Tex. App. Houston 14th Dist. 2006).

763. There was legally and factually sufficient evidence to support the trial court's order of commitment for temporary inpatient mental health services pursuant to Tex. Health & Safety Code Ann. § 574.034(a)(2)(A), given that (1) a doctor testified that the patient heard voices and had self-injurious behavior, and (2) the doctor's testimony was expert testimony of a continuing pattern of behavior that tended to confirm the likelihood that the patient was going to cause serious harm to himself; the patient did not deny hearing voices and the trial court was entitled to disbelieve the patient's other testimony and disregard evidence contrary to the State's position. In re C.M., 2005 Tex. App. LEXIS 10829 (Tex. App. Tyler Dec. 21 2005).

764. Court was unable to uphold a finding of negligence on any of a fire investigator's four theories of the cause of a fire because there were too many inferences that had to be stacked to show causation; expert opinions had to be supported by facts in evidence, not conjecture, and the investigator's opinions were premised on conjecture only. Chubb Lloyds Ins. Co. v. H.C.B. Mech., Inc., 190 S.W.3d 89, 2005 Tex. App. LEXIS 10244 (Tex. App. Houston 1st

Dist. 2005).

765. Reasonable minds could have differed as to the causal nexus, whether the evidence proved the father's mental pain and anguish damages, and whether the daughter proved the amounts, reasonableness, and necessity of the father's past medical expenses, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 18.001(b), and thus the trial court erred in granting a judgment notwithstanding the verdict. Ferrer v. Guevara, 192 S.W.3d 39, 2005 Tex. App. LEXIS 10010 (Tex. App. El Paso 2005).

766. Because appellant did not object on the basis of Tex. R. Evid. 702 at trial, appellant failed to preserve error pursuant to Tex. R. App. P. 33.1(a). Watson v. Michael Haskins Photography, Inc., 2005 Tex. App. LEXIS 9838 (Tex. App. Waco Nov. 23 2005).

767. Although the dissent concluded the jury could only have considered a physician's causation testimony in conjunction with the doctor's negligence, not in conjunction with the nurses' negligence, the court noted that a medical doctor was free to testify concerning causation from a breach of the nursing standard of care. Morrell v. Finke, 184 S.W.3d 257, 2005 Tex. App. LEXIS 9190 (Tex. App. Fort Worth 2005).

768. In a personal injury accident, an expert was permitted to testify that he conducted an injury causation analysis based on physics and biomechanics and concluded that forces involved in the accident could not have caused the condition that necessitated plaintiff's surgeries. The testimony was not incompetent under Havner, because the evidence failed to conclusively establish the opposite of the expert's conclusion. Gill v. Slovak, 2005 Tex. App. LEXIS 8876 (Tex. App. Corpus Christi Oct. 27 2005).

769. In a medical malpractice case, the trial court did not abuse its discretion by ruling that the patient's expert witness was not qualified to testify as an expert concerning pathology slides because his curriculum vitae did not contain specific information regarding pathology credentials. Daniels v. Yancey, 175 S.W.3d 889, 2005 Tex. App. LEXIS 8789 (Tex. App. Texarkana 2005).

770. In a medical negligence action, any error in excluding an expert's testimony as to when a patient developed a tumor was harmless under Tex. R. App. P. 44.1(a) because the excluded evidence would not have been sufficient to prove that the alleged failure to diagnose prevented the patient from considering treatment options other than radical mastectomy. Reyna v. Maldonado, 2005 Tex. App. LEXIS 8694 (Tex. App. Corpus Christi Oct. 20 2005).

771. In an action against the operator of a nursing home, the trial court did not abuse its discretion in determining that an estate administratrix failed to establish her expert witness's testimony was based on a reliable foundation. Although the expert was experienced in geriatrics, he had only slight experience regarding fire ant bites and no experience dealing with the possible complications from fire ant bites that he stated could have affected the decedent. Bartosh v. Gulf Health Care Center-Galveston, 178 S.W.3d 434, 2005 Tex. App. LEXIS 8431 (Tex. App. Houston 14th Dist. 2005).

772. Pursuant to Tex. R. App. P. 33.1, defendant's trial objection based only on Tex. R. Evid. 401, 403 waived any objection beyond those based on those rules, but even if the court considered defendant's argument as a Tex. R. Evid. 702 argument, there still was no error; the doctor testified that the findings of the physical examination were consistent with abuse allegations, that frequently there were no physical signs of abuse, and that the examination results did not prove that any abuse occurred at all, and the testimony was relevant to the issue of whether the victim was abused and thus the trial court did not err in finding that the testimony would have aided the jury and was not overly prejudicial under the circumstances. Segura v. State, 2005 Tex. App. LEXIS 7783 (Tex. App. Austin Sept. 23 2005).

773. Where defendant was charged with multiple counts of indecency with a child by contact, the court properly excluded expert testimony that the complainants' allegations were the result of manipulation, peer pressure, and improper interview techniques. The court was not convinced that the study in question was reliable, and the probative value of the study was substantially outweighed by the danger of unfair prejudice. Music v. State, 2005 Tex. App. LEXIS 7789 (Tex. App. Austin Sept. 22 2005).

774. In a suit by a 17-year-old church member, who alleged that other church members assaulted and falsely imprisoned her, the trial court properly admitted expert testimony on post-traumatic stress disorder (PTSD), even though the record showed that the methods and analyses relied upon in formulating the diagnoses involved some subjective interpretation. The record also showed that those methods and analyses had a rate of error generally accepted in the scientific community as reliable, had been accepted as valid in the scientific community for decades, had been subject to extensive peer review and publication, and had been widely used for nonjudicial purposes. Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388, 2005 Tex. App. LEXIS 7660 (Tex. App. Fort Worth 2005).

775. Court erred by admitting an expert's report on damages to a home caused by water because the damage estimate wholly relied on another expert's report that should not have been admitted, and the expert had not checked to see if the prices he quoted in his report were usual and customary for Johnson County. State Farm Lloyds v. Blacklock, 2005 Tex. App. LEXIS 7433 (Tex. App. Waco Sept. 7 2005).

776. Court erred by admitting an expert's report in a homeowner's case against their insurer where the expert's testimony was orchestrated for litigation purposes only, and his opinions regarding his repair plan were not sufficiently supported by authority or accepted as valid by the relevant scientific community. State Farm Lloyds v. Blacklock, 2005 Tex. App. LEXIS 7433 (Tex. App. Waco Sept. 7 2005).

777. Police officer's perception of defendant's wife as a victim of family violence was admissible under Tex. R. Evid. 701 and was not testimony of scientific or technical knowledge for purposes of Tex. R. Evid. 702; the statement was based on the officer's personal observations and experience as an officer working in the family violence division, the testimony suggested that the State was asking the officer to elaborate on events leading up to and executing the warrant for defendant's arrest, and in light of the overwhelming evidence of guilt, as well as the admission of similar testimony without objection, error, if any, was harmless under Tex. R. App. P. 44.2(b). Horta v. State, 2005 Tex. App. LEXIS 7151 (Tex. App. Corpus Christi Aug. 31 2005).

778. Intoxilyzer test results and the expert testimony were properly admitted because they were pieces in the evidentiary puzzle for the jury to consider in determining whether defendant was intoxicated at the time he drove. Gigliobianco v. State, 179 S.W.3d 136, 2005 Tex. App. LEXIS 7303 (Tex. App. San Antonio 2005).

779. Expert's testimony regarding a child sexual assault victim did not constitute an improper opinion where it was defendant who elicited the very testimony of which he complained on appeal because, on his cross-examination of the expert, he went through each of the factors that the expert considered in determining the truthfulness of a child. Because defendant's question in concluding the cross-examination of whether the victim's story appeared to be realistic induced the response that, in the expert's opinion, the victim was telling the truth, defendant had invited the response. Fox v. State, 175 S.W.3d 475, 2005 Tex. App. LEXIS 7071 (Tex. App. Texarkana 2005).

780. Court rejected an insurer's claims that the testimony of an expert witness was conclusory; the expert's opinion was based on personal knowledge, training, and experience as a structural engineer, personal observation of the insureds' home, and on data compiled by the insurer's engineer, and the evidence showed that the expert's opinion was supported in a published treatise relied on in the engineering community. United Servs. Auto. Ass'n v.

Croft, 175 S.W.3d 457, 2005 Tex. App. LEXIS 7032 (Tex. App. Dallas 2005).

781. Expert's testimony was not conclusory because the opinion was based on an independent evaluation of the insureds' home using personal knowledge and training in the foundation repair industry, and the expert's testimony was not an unsupported opinion. United Servs. Auto. Ass'n v. Croft, 175 S.W.3d 457, 2005 Tex. App. LEXIS 7032 (Tex. App. Dallas 2005).

782. Because an expert's testimony provided an explanation and factual support for the expert's conclusion, the testimony was not conclusory. United Servs. Auto. Ass'n v. Croft, 175 S.W.3d 457, 2005 Tex. App. LEXIS 7032 (Tex. App. Dallas 2005).

783. In a dispute regarding open-space valuation of real property, there was no error in the trial court's decision to qualify the taxpayers' expert witness pursuant to Tex. R. Evid. 104(a), 702; although the expert did not have training specific to ad valorem taxation, he had substantial experience and expertise in agricultural use of land and prudent land management. Calhoun County Appraisal Review Bd. v. Stofer L.P., 2005 Tex. App. LEXIS 6629 (Tex. App. Corpus Christi Aug. 18 2005).

784. Trial court did not err in granting a no-evidence summary judgment in favor of a law firm in a malpractice action because the client presented no expert evidence to show that any acts or omissions of the law firm fell below the applicable standard of care or caused the client any damages. Jennings v. Zimmerman, Axelrod, Meyer, Stern & Wise, P.C., 2005 Tex. App. LEXIS 6518 (Tex. App. San Antonio Aug. 17 2005).

785. Evidence was sufficient to support the amount of setoff and credits awarded the surviving partner against the redemption price under Tex. Rev. Civ. Stat. Ann. art. 6132b-7.01(a) of the Texas Revised Partnership Act; the evidence did not prove that the surviving partner was entitled to a credit more than was given by the trial court, the surviving partner did not challenge the qualifications of a witness who evaluated the interest as an expert, and the final valuation was supported by the evidence. Coleman v. Coleman, 170 S.W.3d 231, 2005 Tex. App. LEXIS 6557 (Tex. App. Dallas 2005).

786. Court agreed that one witness was not qualified to testify as an expert pursuant to Tex. R. Evid. 702 about the standard of care for a gastroenterologist such as a physician involved in a widow's medical malpractice action; the widow failed to show that the witness had the knowledge, skill, and experience regarding the applicable standard of care in this case. Eisner v. Bentch, 2005 Tex. App. LEXIS 6276 (Tex. App. San Antonio Aug. 10 2005).

787. Although a witness was a gastroenterologist like the physician in this medical malpractice action and thus was qualified under Tex. R. Evid. 702 to testify about the standard of care, the witness did not point to any scientific studies or published medical literature to support the opinion that the standard of care required the widow's husband to be reclassified as a high-risk patient by the physician; furthermore, the witness never had a patient who experienced the same complications as the husband, and thus the trial court did not err in excluding the witness's testimony. Eisner v. Bentch, 2005 Tex. App. LEXIS 6276 (Tex. App. San Antonio Aug. 10 2005).

788. Trial court did not err in finding that a witness was qualified as an expert to give an opinion regarding lost profits in a business venture; the witness was a certified public accountant, had performed many lost profits evaluations, and used standard accounting methodologies in reaching a conclusion, and the testimony was reliable. Bright v. Addison, 171 S.W.3d 588, 2005 Tex. App. LEXIS 6080 (Tex. App. Dallas 2005).

789. Trial court did not err in admitting expert testimony regarding the decedent's state of consciousness following a fatal accident; the expert explained that the decedent showed signs of unconsciousness that were age-

appropriate, and because other witnesses testified that the decedent was unconscious following the accident and the jury found no liability, appellants were not prejudiced by the expert testimony as to the decedent's pain and suffering. Garza v. Perez, 2005 Tex. App. LEXIS 5810 (Tex. App. San Antonio July 27 2005).

790. In a negligence action arising out of an automobile accident, the trial court did not err in refusing to permit a public safety department officer to testify as an expert witness concerning an employee's ability to avoid hitting a cow; the officer had credentials to be considered an expert witness, considering the officer's training and personal experience, but the record failed to demonstrate that the officer had adequate facts to have enabled the officer to form an opinion about whether the employee could have avoided hitting the cow. Tex. Elec. Coop. v. Dillard, 171 S.W.3d 201, 2005 Tex. App. LEXIS 5620 (Tex. App. Tyler 2005).

791. In a driver's product liability and negligence action against a trailer owner, the trial court properly excluded part of the testimony of the driver's expert witness because his testimony established that he was not qualified to testify regarding the industry standard of care for the inspection of fasteners in tractor-trailer rigs. The expert indicated that he did not know what the standard of care was, and his opinion based on his experience as an accident reconstructionist was not enough to establish the industry standard of care. Fulgham v. FFE Transp. Servs., 2005 Tex. App. LEXIS 5377 (Tex. App. Dallas July 12 2005).

792. Trial court did not abuse its discretion by denying defendant's objection to the reliability of the testimony of crime lab scientist who tested the heroin evidence because the scientist's testimony addressed the methods he used in testing the heroin and the acceptance of the tests he performed within the scientific community as valid methods for determining the composition of suspected controlled substances as required by Tex. R. Evid. 702. Lopez v. State, 2005 Tex. App. LEXIS 4625 (Tex. App. Eastland June 16 2005).

793. Trial court did not abuse its discretion by denying defendant's objection to the reliability of the testimony of crime lab scientist who tested the heroin evidence because the scientist's testimony addressed the methods he used in testing the heroin and the acceptance of the tests he performed within the scientific community as valid methods for determining the composition of suspected controlled substances as required by Tex. R. Evid. 702. Lopez v. State, 2005 Tex. App. LEXIS 4610 (Tex. App. Eastland June 16 2005).

794. Trial court did not abuse its discretion by concluding that the opinion testimony of a former church member's experts was reliable and therefore admissible in the member's action for assault and battery and false imprisonment because, although the methods and analyses that the experts relied upon in formulating their diagnoses of post-traumatic stress disorder and major depression involved some subjective interpretation, the methods and analyses had a rate of error generally accepted in the scientific community as reliable, had been accepted as valid in the scientific community for decades, had been subject to extensive peer review and publication, and had been widely used for nonjudicial purposes. Pleasant Glade Assembly of God v. Schubert, 2005 Tex. App. LEXIS 4457 (Tex. App. Fort Worth June 9 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 7771 (Tex. App. Fort Worth Sept. 15, 2005).

795. Only an expert's conclusory opinion was presented by a clothing store to establish causation in connection with the store's negligence claim, and thus the expert's affidavit was no evidence of proximate cause and the trial court's grant of summary judgment under Tex. R. Civ. P. 166a(i) to a plumbing company and property manager was proper; for purposes of Tex. R. Evid. 702, the expert never bridged the analytical gap between the evidence and the expert's opinion. Jos. A. Bank Clothiers, Inc. v. Cazzola Plumbing, Inc., 2005 Tex. App. LEXIS 4466 (Tex. App. Austin June 9 2005).

796. Excluded medical records consisted of forms with handwritten notations using symbols and medical terminology that would have been unfamiliar to laypersons, and the medical implications clearly could not have

been determined by laypersons; thus, the trial court did not err in excluding the medical records on the ground that they were not supported by medical testimony. Presswood v. Goehring, 2005 Tex. App. LEXIS 4467 (Tex. App. Houston 1st Dist. June 9 2005).

797. Court disagreed with defendant's characterization of a witness as an expert for purposes of Tex. R. Evid. 702 because the State called the witness as a lay witness to testify about the victim's statements about the alleged sexual abuse; defendant had previously impeached the victim with prior inconsistent statements, and thus the State properly sought to rehabilitate the victim with testimony regarding the victim's character for truthfulness under Tex. R. Evid. 608(a)(2). Bronaugh v. State, 2005 Tex. App. LEXIS 4455 (Tex. App. Waco June 8 2005).

798. Trial court did not err in excluding the testimony of the consumer's expert witnesses in his products-liability and negligence action against the manufacturers of a generator and a gas engine because the witnesses were not shown to be experts in the relevant field of internal-combustion engines, generators, product warnings or the origins and causes of fire, and because they failed to meet the requirement that their theories on causation had been or could be proven through other scientifically valid testing. Bush v. Coleman Powermate, Inc., 2005 Tex. App. LEXIS 4004 (Tex. App. Austin May 26 2005).

799. Although a corporation claimed that the trial court erred in barring the corporation's expert's testimony, the corporation failed to preserve the issue for appellate review, and even if the complaint was properly preserved, and if the court found that the exclusion was erroneous, the court was unable to perform a harm analysis in the absence of a complete record; the court had notified the corporation, under Tex. R. App. P. 37.3(c), that unless it made arrangements to pay for the record within 15 days, the court was going to consider and decide those issues that did not require a reporter's record, but the corporation did not respond, and in the absence of a reporter's record, the corporation was not able to establish any abuse of discretion on the trial court's part. Fletcher Aviation, Inc. v. Booher, 2005 Tex. App. LEXIS 4048 (Tex. App. Houston 14th Dist. May 26 2005).

800. Horse owner was properly permitted to testify in rebuttal that a veterinarian who testified that the horse owner's filly did not die because of any actions taken by the horse farm owners, with whom the horse owner left his filly, had told the horse owner that the filly died because the horse farm owners failed to get the filly to the veterinary clinic sooner. Even if the veterinarian's statements to horse owner did not qualify as expert testimony, such statements included a factual basis and had probative value. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

801. In a medical malpractice case, expert testimony regarding the standard of care under 1995 Tex. Gen. Laws 985 (repealed), (current version at Tex. Civ. Prac. & Rem. Code Ann. § 74.401(c)), was not admitted because the expert in question did not have knowledge, skill, experience, or training in the areas of general or orthopedic surgery. Gomez v. Valley Baptist Med. Ctr., 2005 Tex. App. LEXIS 4092 (Tex. App. Corpus Christi May 26 2005).

802. Testimony of a witness for the State regarding how the global positioning system (GPS) worked and its reliability was properly admitted where the witness testified that he had a bachelor's degree in geography, and where his testimony demonstrated a knowledge of how GPS worked and its reliability. The trial court could decide that a geographer who used GPS daily in his job was qualified to testify about the reliability of GPS technology, and the witness's testimony demonstrated that GPS-figured coordinates were accepted as reliable in his field just as arithmetical sums on an electronic calculator were commonly accepted as reliable. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

803. Testimony of a trucking company's safety administrative coordinator was properly admitted because her purpose was to explain how global positioning systems (GPS) data, which another witness's testimony showed was reliable, became a business record of the trucking company. Furthermore, her testimony established her

understanding of the many systems the company used to track its drivers and showed that the system of transmitting and receiving the GPS data was automatic. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

804. Defendant failed to show that a trial court abused its discretion in overruling his objection to a DNA analyst's testimony and report on the population frequency statistic of the DNA she tested because the analyst was a highly qualified expert on all aspects of DNA analysis, including statistical interpretation of the DNA profile, and testified that multiplication was the standard way of calculating genotype frequencies. Furthermore, she explained that multiplication of the frequencies for each allele was a permitted method of determining the overall statistical likelihood of a person having all the alleles because they were unrelated. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

805. Reliability of a DNA analyst's population frequency calculation was shown by clear and convincing evidence because her testimony showed that the scientific theory and technique that she applied in making her population frequency calculation was accepted as valid in the scientific community. She also testified to the existence of documentation (i.e., literature) supporting the underlying scientific theory, and there was an absence of any contrary expert testimony. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

806. Clear and convincing evidence supported a trial court's decision to admit a DNA analyst's population frequency statistics where defendant never questioned the analyst concerning the independence of the loci tested, and where the analyst's testimony about the wide acceptance of the Federal Bureau of Investigation's population statistics that she used was sufficient to establish their reliability. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

807. Error in admitting expert testimony regarding the results of parents' drug tests in a proceeding to terminate their parental rights probably caused the rendition of an improper judgment under Tex. R. App. P. 44.1 because the expert did not have expertise concerning the actual subject about which he offered his expert opinion, and because the results of the tests were not shown to be reliable under Tex. R. Evid. 702. The expert's "opinion" that the samples tested positive for cocaine was beyond the scope of his expertise and based entirely on a written report he received from a laboratory, and even though the scientific theory of testing hair samples for illegal drugs using immunoassay and gas chromatography mass spectrometry or gas chromatography mass spectrometry mass spectrometry might be reliable, there was no showing of the reliable application of that theory in the case because the expert merely speculated that the lab had to have followed protocol or it would have lost its license. In re S.E.W., 168 S.W.3d 875, 2005 Tex. App. LEXIS 3809 (Tex. App. Dallas 2005).

808. Motorists were not entitled to mandamus relief after the trial court limited testimony of their expert witness in a personal injury action brought against the motorists for damages arising from a collision between a motor vehicle and a motorcycle. The trial court's order circumscribed the expert's testimony but did not prevent the expert from testifying or prevent the motorists from presenting other evidence or testimony concerning the accident. In re Pena, 2005 Tex. App. LEXIS 3663 (Tex. App. Corpus Christi May 12 2005).

809. Appellate court did not reach the issue of whether an expert witness's affidavit was relevant because the threshold issues, whether he was qualified to opine concerning the cause of injury and whether his opinions were reliable, were waived due to inadequate briefing. Sanders v. Home Depot U.S.A., Inc., 2005 Tex. App. LEXIS 3651 (Tex. App. Fort Worth May 12 2005).

810. Court properly denied defendant's motion to suppress evidence of his horizontal gaze nystagmus test results because the evidence was sufficient to establish that the officer who administered the test was an expert at administering the test. In addition, the testimony of the officer was not offered to secure a conviction but rather to

enable the trial court to determine whether the factfinder would be allowed to hear it. Reynolds v. State, 163 S.W.3d 808, 2005 Tex. App. LEXIS 3516 (Tex. App. Amarillo 2005).

811. For an officer to testify as an expert on the administration of a horizontal gaze nystagmus test, it need only be shown that he received from the State of Texas a practitioner's certification to administer the test. Reynolds v. State, 163 S.W.3d 808, 2005 Tex. App. LEXIS 3516 (Tex. App. Amarillo 2005).

812. Trial court did not abuse its discretion by admitting the testimony of a truck owner's expert, who was a metallurgical and mechanical engineer, in the owner's action that claimed that a manufacturing defect in his truck caused his collision with two parked cars because the truck manufacturer's attacks on the expert's theory of why the nuts on the truck's u-bolt were not tightened sufficiently did not undermine his observation that the nuts on the u-bolt were insufficiently tightened in a way that allowed the u-bolt to fail. To prove a manufacturing defect, the owner did not need to prove that the manufacturing process was flawed, only that it produced a flawed product. Ford Motor Co. v. Ledesma, 173 S.W.3d 78, 2005 Tex. App. LEXIS 3377 (Tex. App. Austin 2005).

813. Trial court did not abuse its discretion by admitting the testimony of a truck owner's expert, who was a metallurgical and mechanical engineer, in the owner's action that claimed that a manufacturing defect in his truck caused his collision with two parked cars because the truck manufacturer had not shown an analytical gap sufficient to make the trial court's admission of the expert's testimony regarding the effect of the off-center flattening of the truck's u-bolt error. Evidence casting doubt on whether the expert's theory was realized in the case might affect the credibility of his opinion, but it did not demonstrate that the trial court abused its discretion by finding that his theory regarding the effect of an asymmetrically flattened u-bolt was reliable. Ford Motor Co. v. Ledesma, 173 S.W.3d 78, 2005 Tex. App. LEXIS 3377 (Tex. App. Austin 2005).

814. Trial court did not abuse its discretion by admitting the testimony of a truck owner's accident reconstruction expert in the owner's action that claimed that a manufacturing defect in his truck caused his collision with two parked cars because the manufacturer's criticisms went to the credibility, not the reliability of the expert's theories, and he was subject to vigorous cross-examination regarding the accuracy of his opinions. Ford Motor Co. v. Ledesma, 173 S.W.3d 78, 2005 Tex. App. LEXIS 3377 (Tex. App. Austin 2005).

815. Trial court properly excluded some of the testimony of a truck manufacturer's expert regarding a truck owner's collision with two parked cars, which the owner claimed was caused by a manufacturing defect in the truck's axle, because the expert undisputedly lacked training in accident reconstruction. The expert had some practical experience in his job with the manufacturer, but his testimony contained sufficient uncertainty to support the trial court's decision because he did not explain how the relatively minor external damage to both vehicles squared with his theory that the tire-to-tire collision caused the axle to displace, and he had no test data to know the likelihood that the collision could cause the axle to displace. Ford Motor Co. v. Ledesma, 173 S.W.3d 78, 2005 Tex. App. LEXIS 3377 (Tex. App. Austin 2005).

816. Where the patient failed to establish causation testimony through expert testimony that linked his full thickness skin loss with the therapist's application of moist heat packs during physical therapy, the trial court did not err by granting the therapist summary judgment on both traditional and no evidence grounds. Reyes v. Jebo's, Inc., 2005 Tex. App. LEXIS 3344 (Tex. App. San Antonio May 4 2005).

817. Trial court did not err in admitting, under Tex. R. Evid. 702, testimony by the State's expert on retrograde extrapolation in connection with defendant's trial for driving while intoxicated; the expert explained the use of retrograde extrapolation in a clear and understandable manner, and the expert had sufficient information available upon which to reliably extrapolate defendant's alcohol concentration at the time of the offense. Beckendorf v. State,

2005 Tex. App. LEXIS 3353 (Tex. App. San Antonio May 4 2005).

818. Considering a State expert's education, training, and experience, a trial court did not act arbitrarily or unreasonably in overruling an objection by defendant on trial for sexually abusing his 13-year-old daughter to her expert testimony on the basis of her qualifications. Because the expert had experience and education in the behavioral sciences in general and in the area of child abuse more specifically, she was in a position in which she would be able to evaluate, interpret, and incorporate research articles on topics of personality types with the tendency to commit incest, and, in preparation for her testimony, she reviewed several journal articles on the characteristics of incest offenders and narcissistic personality disorders. Malone v. State, 163 S.W.3d 785, 2005 Tex. App. LEXIS 3163 (Tex. App. Texarkana 2005).

819. Because an expert's testimony was based on sources reasonably relied upon by experts in the field, the trial court did not abuse its discretion by concluding that the expert's testimony fell within Tex. R. Evid. 702, 703. In re M.G., 2005 Tex. App. LEXIS 3253 (Tex. App. Fort Worth Apr. 28 2005).

820. Expert testimony was properly admitted regarding semen evidence obtained from the victim in defendant's aggravated sexual assault case, because the expert testified that the underlying scientific theory for DNA was valid and had been accepted by the scientific community, that literature existed supporting the scientific theory, that the techniques used to apply the theory were valid, and that the valid techniques were applied in this case. Although she stated that she was unfamiliar with the error rate of DNA testing, she testified that she used quality measures and positive and negative controls to insure accuracy during DNA testing. Ford v. State, 2005 Tex. App. LEXIS 3151 (Tex. App. Dallas Apr. 27 2005).

821. In a prosecution for aggravated sexual assault of a child, the trial court did not abuse its discretion under Tex. R. Evid. 702 in admitting a treating counselor's testimony regarding behavioral symptoms generally exhibited by sexually abused children and that the complainant had exhibited such symptoms. The subject matter was within the scope of the counselor's field as she had a master's degree in behavioral sciences and human services, with an emphasis on working with those who had been sexually abused, and she had counseled between 25 and 30 children who had been sexually abused. Mulvihill v. State, 177 S.W.3d 409, 2005 Tex. App. LEXIS 3047 (Tex. App. Houston 1st Dist. 2005).

822. Trial court did not abuse its discretion in admitting expert testimony in defendant's trial for aggravated sexual assault and prohibited sexual conduct. The State established the reliability of the testimony by showing that the study of sex offenders and their victims was a legitimate field of expertise, that grooming and victim outcries were within the scope of that field, and that the expert properly relied upon or utilized the principles involved in that field. Reid v. State, 2005 Tex. App. LEXIS 3072 (Tex. App. Fort Worth Apr. 21 2005).

823. Expert testimony was relevant because it connected the facts of the case to behavior typically associated with sex offenders and their victims. The expert's examples of grooming behaviors were identical to those described by the complainant, and his description of how young victims became aware that they were being abused and eventually disclosed the abuse mirrored the complainant's circumstances. Reid v. State, 2005 Tex. App. LEXIS 3072 (Tex. App. Fort Worth Apr. 21 2005).

824. Trial court did not err in allowing a witness for the State, a licensed clinical psychologist at the time of trial, to testify during the punishment phase of defendant's trial for aggravated sexual assault about facts that she learned from defendant during counseling sessions at a time that she was not licensed in Texas because licensure or certification in the particular discipline was not a per se requirement of Tex. R. Evid. 702. The witness's education and experience supported admitting her testimony because she had graduated from a doctoral psychology program, had completed an internship at a state hospital where she worked with patients who were not guilty by

reason of insanity for various crimes, had worked with sex offenders, and had worked with defendant in both a group therapy program and in individual therapy. Duran v. State, 163 S.W.3d 253, 2005 Tex. App. LEXIS 2868 (Tex. App. Fort Worth 2005).

825. Where defendant's probation officer had received a psychology degree with an emphasis on sex crimes and aggression, a degree in criminal justice, had supervised sex offenders as part of her duties as a probation officer, had special training involving sex crimes and supervising sex offenders, had attended seminars on violence, domestic violence, and sex crimes, and in the previous year had received 75 hours of specialized training, the trial court did not abuse its discretion in allowing her to testify as an expert under Tex. R. Evid. 702. Ellison v. State, 165 S.W.3d 774, 2005 Tex. App. LEXIS 2776 (Tex. App. San Antonio 2005).

826. In an action arising from a car fire, a verdict against a car manufacturer was reversed because there was no evidence that the fire and death were caused by a defect that allowed gas to siphon from the fuel system. The difficulty was that there were significant conflicts in and between testimony by plaintiff's two experts as to nature of the leak; experts could not be as ambivalent as those two were and establish the privilege of offering opinion testimony under Tex. R. Evid. 702. GMC v. Iracheta, 161 S.W.3d 462, 2005 Tex. LEXIS 304, 48 Tex. Sup. Ct. J. 529, CCH Prod. Liab. Rep. P17372 (Tex. 2005).

827. Bare opinion by an expert as to nature of a leak in a fuel system, without a basis, was not competent evidence. GMC v. Iracheta, 161 S.W.3d 462, 2005 Tex. LEXIS 304, 48 Tex. Sup. Ct. J. 529, CCH Prod. Liab. Rep. P17372 (Tex. 2005).

828. There was no error in allowing a physician, who examined a child that accused her father, defendant, of having sexually assaulted her to render an opinion. Foundation was sufficiently laid as to the physician's expertise and she was qualified to answer a question about the child's outcry statement. Barnes v. State, 165 S.W.3d 75, 2005 Tex. App. LEXIS 2603 (Tex. App. Austin 2005).

829. In a store owner's breach of contract suit against a security system company, the trial court erred in allowing the owner's witnesses to testify as experts as neither tested the owner's equipment and neither witness had any knowledge or experience with the particular type of security system that the company installed in the owner's store. Argus Sec. Sys. v. Owen, 2005 Tex. App. LEXIS 2451 (Tex. App. Corpus Christi Mar. 31 2005).

830. Trial court did not abuse its discretion in allowing the expert testimony regarding child sexual abuse victims' delayed outcry because the testimony regarding delayed outcry was specialized knowledge that was helpful to the jury in understanding the delay by the child in reporting the first instance of sexual abuse, and this type of evidence has been held relevant in child sexual abuse cases. Perez v. State, 2005 Tex. App. LEXIS 2408 (Tex. App. Houston 1st Dist. Mar. 31 2005).

831. In a dispute between insureds under a homeowners policy and their insurer concerning mold in the insureds' home, the insureds' claims failed on summary judgment because the insureds did not timely designate any expert to testify as to causation and lay testimony was insufficient. While the general causal relationship between water and mold might have been common knowledge, the causation issue in the instant case was not within the general experience and common sense of a lay person. Qualls v. State Farm Lloyds, 226 F.R.D. 551, 2005 U.S. Dist. LEXIS 5049 (N.D. Tex. 2005).

832. Trial court did not abuse its discretion in ruling on the qualifications of the State's tire and shoe expert witness in a murder trial based on the evidence before the trial court at the time of its ruling. Although defendant conducted a lengthy and detailed cross-examination of the expert, during which defendant made a strong challenge to the expert's general knowledge of tires and shoes, this testimony came after the expert had already expressed his

opinions before the jury. Rodgers v. State, 162 S.W.3d 698, 2005 Tex. App. LEXIS 2277 (Tex. App. Texarkana 2005), affirmed by 2006 Tex. Crim. App. LEXIS 852 (Tex. Crim. App. May 3, 2006).

833. Trial court did not abuse its discretion under Tex. R. Evid. 403 and 702 by concluding that defendant failed to demonstrate by clear and convincing evidence that excluded testimony was reliable and would assist the trier of fact to determine a fact in issue. The trial court effectively recognized the legitimacy of the study of interrogation techniques and false confessions by ruling that most of the expert's proffered testimony was admissible; the trial court did not abuse its discretion by excluding the expert's proffered testimony regarding the categories of false confessions, and particularly persuaded false confessions. Scott v. State, 165 S.W.3d 27, 2005 Tex. App. LEXIS 2168 (Tex. App. Austin 2005).

834. In a wrongful death and survival action, the trial court did not err in excluding the expert testimony of two accident reconstructionists because their opinions were conclusory and/or speculative. Reinicke v. Aeroground, Inc., 167 S.W.3d 385, 2005 Tex. App. LEXIS 2132 (Tex. App. Houston 14th Dist. 2005).

835. Trial court did not err in finding that a witness was qualified as an expert under Tex. R. Evid. 702 in connection with a negligence action involving nursing homes; the witness had the proper work experience, which included working as a staff nurse and as a supervisor of staff nurses. SunBridge Healthcare Corp. v. Penny, 160 S.W.3d 230, 2005 Tex. App. LEXIS 1887 (Tex. App. Texarkana 2005).

836. Expert testimony was required in a negligence case involving nursing homes because the issues involved those not within the common knowledge or experience of the jury. SunBridge Healthcare Corp. v. Penny, 160 S.W.3d 230, 2005 Tex. App. LEXIS 1887 (Tex. App. Texarkana 2005).

837. With regard to evaluating matters within the psychological or sociological sciences in parental termination cases under Tex. Fam. Code Ann. § 161.001, a certain case law framework regarding expert testimony under Tex. R. Evid. 702 should be employed, according to the Court of Appeals of Texas, Third District, Austin, to evaluate soft science testimony in civil cases, and that approach is as follows: when measuring the reliability of an expert's opinions in the fields within the soft sciences, courts should consider (1) the field of expertise is a legitimate one, (2) the subject matter of the expert's testimony is within the scope of that field, and (3) the expert's testimony properly relies upon the principles involved in that field of study; a Tex. Fam. Code Ann. § 107.051 social study does not lend itself to evaluation by other case law factors because it is an inherently subjective endeavor and is not susceptible to scientific replication or statistical or rate of error analysis. Taylor v. Tex. Dep't of Protective & Regulatory Servs., 160 S.W.3d 641, 2005 Tex. App. LEXIS 1793 (Tex. App. Austin 2005).

838. Trial court did not err in allowing into evidence a court-ordered home study of the grandmother's home prepared by a social worker pursuant to Tex. Fam. Code Ann. § 107.051(a), (b); considering the social worker's education, training, and experience, and that the social worker explained the findings and conclusions in depth, the trial court properly found that the social worker was qualified under Tex. R. Evid. 702 to testify. Taylor v. Tex. Dep't of Protective & Regulatory Servs., 160 S.W.3d 641, 2005 Tex. App. LEXIS 1793 (Tex. App. Austin 2005).

839. In a dispute over conservatorship of a child after termination of parental rights, the trial court did not err in ruling under Tex. R. Evid. 702 that a social worker, who was certified and had significant experience, was qualified to conduct a Tex. Fam. Code Ann. § 107.051 social study of the grandmother's home and to testify in support of her conclusions. Taylor v. Texas Dept of Protective & Regulatory Servs., 2005 Tex. App. LEXIS 1967 (Mar. 10, 2005).

840. Because an expert's opinion constituted no more than mere possibility, speculation, and surmise, the trial court properly struck the expert's report, pursuant to Tex. R. Evid. 702, 705. Emmett Props. v. Halliburton Energy

Servs., 167 S.W.3d 365, 2005 Tex. App. LEXIS 1624 (Tex. App. Houston 14th Dist. 2005).

841. Trial court erred in denying a builder's motion to exclude the testimony of the homeowners' expert witness under Tex. R. Evid. 702 and 703. Although the expert had sufficient experience in repairing and remodeling homes to give an expert opinion on reasonable and necessary repair costs, that experience alone was not enough to provide a substantial basis of reliability for his opinion where he relied upon visual inspection and significant experience to justify his conclusions. Royce Homes, L.P. v. Neel, 2005 Tex. App. LEXIS 1514 (Tex. App. Waco Feb. 23 2005).

842. In a proceeding to terminate parental rights, a caseworker was properly permitted to testify as a fact witness. Contrary to the father's assertion that she expressed the "collective opinion" of the agency, she did not voice an opinion, when asked, about what was in the best interest of the children. Rogers v. Dep't of Family & Protective Servs., 175 S.W.3d 370, 2005 Tex. App. LEXIS 1327 (Tex. App. Houston 1st Dist. 2005).

843. Trial court erred in allowing a licensed counselor to provide expert testimony concerning the suitability of each parent to be appointed sole or joint managing conservator. Because the counselor did not relate to any of the three prongs of inquiry necessary to establish the admissibility of her testimony. The counselor never stated that counseling was a legitimate field, that her testimony was within the scope of her field, or that her testimony properly relied upon or utilized principles involved in her field. In re K.L.R., 162 S.W.3d 291, 2005 Tex. App. LEXIS 1268 (Tex. App. Tyler 2005).

844. Because the one-leg-stand and walk-and-turn field sobriety tests (FSTs) are grounded in the common knowledge that excessive alcohol consumption can cause problems with coordination, balance, and mental agility, a law enforcement officer's testimony about a defendant's coordination, balance, and mental agility problems during these FSTs is considered lay witness opinion testimony under Tex. R. Evid. 701. McClain v. State, 2005 Tex. App. LEXIS 760 (Tex. App. Dallas Feb. 1 2005).

845. Trial court did not abuse its discretion in permitting the State's expert to testify through the use of hypothetical questions because he imparted specialized knowledge and did not state a direct opinion about the complainant's credibility but only general characteristics of child-abuse victims. McMillin v. State, 2005 Tex. App. LEXIS 438 (Tex. App. Austin Jan. 21 2005).

846. Former legal client, who claimed that bad legal advice given to his father had prevented him from pursuing product liability claims against a car manufacturer, could not recover against the law firm that gave the advice because he could not show that he would have recovered in the products liability suit, if he had brought it. The client claimed that the seat belts in his father's car were defective, but he could not prove his product liability claims without expert scientific and/or technical expert testimony, and he had not presented any expert testimony to support his claims. Rangel v. Lapin, 177 S.W.3d 17, 2005 Tex. App. LEXIS 318 (Tex. App. Houston 1st Dist. 2005).

847. In a products liability action arising from an auto accident, there was no evidence of causation; an expert witness' opinion was unreliable because it lacked objective scientific analysis and was unsupported by studies, publications, or peer review. Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 2004 Tex. LEXIS 1429, 48 Tex. Sup. Ct. J. 256, CCH Prod. Liab. Rep. P17242 (Tex. 2004).

848. Striking the patient's expert's evidence was an abuse of the trial court's discretion because the patient's expert had extensive experience and expertise in the procedure performed by the physician defendants, was actively practicing in the pertinent specialty when the treatment was provided and at the time he provided the affidavit, and satisfied the criteria expressed in Tex. R. Evid. 702 and former Tex. Rev. Civ. Stat. Ann. art. 4590i, § 14.01 (see Tex. Civ. Prac. & Rem. Code Ann. § 74.401). Downing v. Larson, 153 S.W.3d 248, 2004 Tex. App.

LEXIS 11502 (Tex. App. Beaumont 2004), reversed by 2006 Tex. LEXIS 524, 49 Tex. Sup. Ct. J. 715 (Tex. 2006).

849. Expert's testimony was relevant to the issues to be decided by the jury where he conducted an audit of the manufacturer's design process, determining whether the manufacturer acted as a reasonable manufacturer would have in designing the forklift and taking safety considerations into account; the expert also offered testimony regarding the operator's suggested alternative design, contradicting the testimony of the operator's experts by concluding the inclusion of a door in the forklift's design was not a safer alternative, and this testimony was sufficiently tied to the facts of the case to assist the jury in resolving a factual dispute. Costilla v. Crown Equip. Corp., 148 S.W.3d 736, 2004 Tex. App. LEXIS 10163 (Tex. App. Dallas 2004).

850. In a fraud case, the trial court erred by not disqualifying an expert witness who had switched sides during the litigation. It was reasonable to conclude that a confidential relationship existed, and confidential information was in fact disclosed. Formosa Plastics Corp., USA v. Kajima Int'l, Inc., 2004 Tex. App. LEXIS 9950 (Tex. App. Corpus Christi Nov. 10 2004).

851. Special knowledge which qualified a witness to give an expert opinion could be derived from specialized education, practical experience, a study of technical works, or a varying combination of those things. Thomas v. State, 2004 Tex. App. LEXIS 10221 (Tex. App. Dallas Nov. 8 2004).

852. Trial court did not err in denying the lessee's motion to exclude an expert's testimony under Tex. R. Evid. 702 regarding damages; the aspects of the expert's testimony concerned instances when the relevance and reliability of an expert's testimony were shown by the expert's skill and experience. Tesoro Marine Servs. v. Bagby, 2004 Tex. App. LEXIS 11914 (Tex. App. San Antonio Nov. 3 2004).

853. In a breach of contract case, a court properly admitted plaintiff's expert testimony where the expert testified that when money was missing from a parking garage, if records were not computerized, he looked for revenue trend changes and ticket trend changes, familiarized himself with the facility, and he testified that actually reviewing the tickets would not have aided him in his audit because when someone was stealing, there were no tickets. The expert considered several factors in his audit including frequency of building occupancy, the possibility of an increase in daily parkers versus contract parkers, parking validation, marketing, and higher parking rates; therefore, the testimony was reliable. Republic Parking Sys. of Tex., Inc. v. Medical Towers, Ltd., 2004 Tex. App. LEXIS 9287 (Tex. App. Houston 14th Dist. Oct. 21 2004).

854. In a wrongful death case, a court properly excluded expert deposition testimony on hearsay grounds where the expert was not an employee of defendant pharmacy, and there was no evidence that an agency relationship existed. When the family non-suited their claims against the doctor, the subject matter over which the expert was asked to give his opinion became moot; subsequently, he was not called at trial, and, therefore, the trial court excluded his testimony on hearsay grounds. McCluskey v. Randall's Food Mkts., Inc., 2004 Tex. App. LEXIS 9178 (Tex. App. Houston 14th Dist. Oct. 19 2004).

855. In a manufacturing defect case brought against a tire company, the trial court did not err in admitting testimony from plaintiffs' experts; the opinions of one expert, a tire failure analyst, were reliable pursuant to Cal. R. Evid. 702 because the expert provided thorough information concerning his methodology and it was clear that his expertise rested on his many years of experience in tire examination. Additionally, the court rejected the tire company's assertion that a report relied on by the expert was inadmissible hearsay; the expert testified that the company that issued the report was a firm of rubber specialists and chemists who used sophisticated techniques, were highly competent, and widely used by experts. Cooper Tire & Rubber Co. v. Mendez, 155 S.W.3d 382, 2004 Tex. App. LEXIS 9112 (Tex. App. El Paso 2004), *rev'd on other grounds*, 204 S.W.3d 797, 2006 Tex. LEXIS 555

(Tex. 2006).

856. In a manufacturing defect case brought against a tire company, the trial court did not err in admitting expert testimony on causation; review of one expert's testimony showed that he formed his opinions based on test data and physical evidence of the scene and on the vehicle. Additionally, after reviewing another expert's testimony, it was clear that he had at least the minimum requisite qualifications to render his opinion on deceleration; his testimony on the matter was based on testing that he believed was applicable despite the different cause of the deceleration in the case. Cooper Tire & Rubber Co. v. Mendez, 155 S.W.3d 382, 2004 Tex. App. LEXIS 9112 (Tex. App. El Paso 2004), *rev'd on other grounds*, 204 S.W.3d 797, 2006 Tex. LEXIS 555 (Tex. 2006).

857. In a manufacturing defect case brought against a tire company, the trial court did not err in finding the opinions of one of plaintiffs' experts to be based on a reliable foundation. The expert, a professional engineer who had specialized in failure analysis and accident investigation involving metallurgical, mechanical, automotive, and combustion engineering, provided great detail concerning his methodology and procedure in tire examination; he also applied his experiential knowledge in failure analysis in determining the cause of the tread separation and in eliminating other potential causes. Cooper Tire & Rubber Co. v. Mendez, 155 S.W.3d 382, 2004 Tex. App. LEXIS 9112 (Tex. App. El Paso 2004), *rev'd on other grounds*, 204 S.W.3d 797, 2006 Tex. LEXIS 555 (Tex. 2006).

858. In a manufacturing defect case brought against a tire company, the trial court did not err in admitting testimony from plaintiffs' experts. One expert, a researcher who was retained for the purpose of interpreting the results of a report, demonstrated that he had specialized knowledge in chemical analysis, identification of polymer materials, and was familiar with technologies used in related testing; additionally, the expert explained his methodology in analyzing data from the report and the research materials that informed his opinions in the case. Cooper Tire & Rubber Co. v. Mendez, 155 S.W.3d 382, 2004 Tex. App. LEXIS 9112 (Tex. App. El Paso 2004), *rev'd on other grounds*, 204 S.W.3d 797, 2006 Tex. LEXIS 555 (Tex. 2006).

859. In light of the court's conclusion that an insurance policy was ambiguous, it was not error for the trial court to permit an expert witness to testify as to an interpretation of the policy; the expert was qualified pursuant to Tex. R. Evid. 702, and the opinions were on mixed questions of law and fact and were proper pursuant to Tex. R. Evid. 704. Royal Maccabees Life Ins. Co. v. James, 146 S.W.3d 340, 2004 Tex. App. LEXIS 9025 (Tex. App. Dallas 2004).

860. Because an officer had completed the necessary training to be considered an expert on the Horizontal Gaze Nystagmus test, the trial court did not abuse its discretion by allowing the officer to testify concerning the test even though he had not yet received his certification at the time he performed the test on defendant. Barton v. State, 2004 Tex. App. LEXIS 8863 (Tex. App. Houston 14th Dist. Oct. 5 2004).

861. Trial court erred in allowing legal experts to testify on questions of law concerning fiduciary duties, attorneys' duties, and conspiracy. It is not the role of the expert witness to define the particular legal principles applicable to a case; that is the role of the trial court. Greenberg Traurig of N.Y., P.C. v. Moody, 161 S.W.3d 56, 2004 Tex. App. LEXIS 8744 (Tex. App. Houston 14th Dist. 2004).

862. Trial court erred in permitting a former judge to testify that the standard of care for attorneys was based on the Texas disciplinary rules when no such liability could be based on any violation of those rules. Greenberg Traurig of N.Y., P.C. v. Moody, 161 S.W.3d 56, 2004 Tex. App. LEXIS 8744 (Tex. App. Houston 14th Dist. 2004).

863. Former judge's testimony was not relevant and, therefore, did not assist the jury in any way that was germane to the matters in dispute in a securities fraud case. Because the investors had no claim, and indeed could maintain no claim, against a law firm for negligence or breach of fiduciary duty, and because the firm's attorneys were not subject to the Texas disciplinary rules, former judge's opinions should not have been admitted into

evidence. Greenberg Traurig of N.Y., P.C. v. Moody, 161 S.W.3d 56, 2004 Tex. App. LEXIS 8744 (Tex. App. Houston 14th Dist. 2004).

864. Trial court had ruled that the psychotherapist was not qualified to testify as an expert, but the State could have her testify as a fact witness. Furthermore, the trial court instructed the jury to disregard any testimony from the psychotherapist concerning her "diagnosis" of the complainant, such that there was no error in the admission of her testimony. Taylor v. State, 2004 Tex. App. LEXIS 8546 (Tex. App. Houston 1st Dist. Sept. 23 2004).

865. Because a company did not call the author of a report to testify or otherwise prove that the author was qualified to render opinions pursuant to Tex. R. Evid. 702, the trial court did not abuse its discretion by excluding the expert opinions in the report. Rebel Drilling Co., L.P. v. Nabors Drilling USA, Inc., 2004 Tex. App. LEXIS 8320 (Tex. App. Houston 14th Dist. Sept. 16 2004).

866. Robinson analysis may not apply to certain types of expert testimony. In these types of cases, there must still be a reliable basis for the expert's opinion. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

867. Trial court erred in rendering verdict for parents in their medical malpractice suit against doctors and a hospital for failure to treat and diagnose their twins for retinopathy of prematurity. Expert testimony that the twins' eyesight could have been successfully treated if their pediatrician had referred them for treatment when she first saw them was unreliable; the expert could not testify to any personal knowledge, experience, or any scientific data supporting his theory. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

868. Trial court must make an initial determination of whether the expert's testimony is relevant and reliable so as to be admissible. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

869. Even when challenged expert testimony is admitted by the trial court, a party may later complain on appeal that the expert testimony is legally insufficient to support the judgment because it is unreliable. Unreliable expert testimony is not evidence. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

870. In determining whether expert testimony is reliable and, therefore, some evidence supporting the judgment, the appellate court must employ an almost de novo-like review and, like the trial court, look beyond the expert's bare testimony to determine the reliability of the theory underlying it. The court does not focus on the correctness of the expert's opinion, but on the reliability of the analysis the expert used in reaching his or her conclusions. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

871. Expert must explain the basis of his statements to link his conclusions to the facts. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

872. Appellate courts should consider Robinson factors in determining whether scientific testimony is reliable: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses that have been made of the theory or technique. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

873. Experience alone may provide a sufficient basis for an expert's testimony, unless there is too great an analytical gap between the data and the opinion proffered. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

874. Doctor's self-serving statements that his methodology is generally accepted and reasonably relied upon by other experts in the field is insufficient to establish the reliability of the technique and theory underlying his opinion. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

875. Trial court did not abuse its discretion by admitting the testimony of the expert of the oil and gas well interest owners in their action against the well operators for fraud, breach of contract and conversion because the testimony of a petroleum accountant would have clearly assisted the trier of fact to understand the evidence presented in the case, and would have helped the jury to determine the fact issues posed by the parties. Cass v. Stephens, 156 S.W.3d 38, 2004 Tex. App. LEXIS 8010, 160 Oil & Gas Rep. 27 (Tex. App. El Paso 2004), *cert. denied,* 552 U.S. 819, 128 S. Ct. 115, 169 L. Ed. 2d 26, 2007 U.S. LEXIS 10460 (2007).

876. In a legal malpractice suit, the court of appeals erred in finding that expert testimony was not needed because the connection between the attorneys' negligence and the client's loss in an underlying suit in bankruptcy court was obvious and in reversing the trial court's take-nothing judgment; the jury was asked to decide a complicated and very subjective causation issue: whether, in reasonable probability, a bankruptcy judge would have decided the underlying adversary proceeding differently if the attorney had personally tried the case or if he or his associate had introduced other evidence. Alexander v. Turtur & Assocs., 146 S.W.3d 113, 2004 Tex. LEXIS 734, 47 Tex. Sup. Ct. J. 992 (Tex. 2004).

877. Defendant's conviction for driving while intoxicated in violation of Tex. Penal Code Ann. § 49.04(a) was proper where there was evidence supporting the trial court's finding that a co-worker's testimony established the time of defendant's last drink; thus, the court concluded that the expert had sufficient information available upon which to extrapolate defendant's alcohol concentration at the time of the offense. The expert's extrapolation was sufficiently reliable to be useful to the jury and, therefore, the trial court did not abuse its discretion in admitting the extrapolation evidence under Tex. R. Evid. 702. Fulenwider v. State, 176 S.W.3d 290, 2004 Tex. App. LEXIS 6352 (Tex. App. Houston 1st Dist. 2004).

878. Trial court did not abuse its discretion in concluding that a workplace safety expert did not have a reasonable basis for any of his opinions with respect to the legal duties owed by the hospital and how those duties were breached. Moore v. Mem'l Hermann Hosp. Sys., 140 S.W.3d 870, 2004 Tex. App. LEXIS 6067 (Tex. App. Houston 14th Dist. 2004).

879. Trial court did not err in granting summary judgment to doctors in a medical malpractice suit where the court sustained the objections to the patient's expert's affidavit at the hearing because the expert's affidavit failed to state any knowledge that she possessed on the standard of care applicable to hospitals in cancer diagnosis. Shelton v. Sargent, 144 S.W.3d 113, 2004 Tex. App. LEXIS 6116 (Tex. App. Fort Worth 2004).

880. Texas Supreme Court identifies the following factors as well as others to consider in determining whether scientific evidence is reliable and thus, admissible under Tex. R. Evid. 702: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. Loram Maint. of Way, Inc. v. Ianni, 141 S.W.3d 722, 2004 Tex. App. LEXIS 5857 (Tex. App. El Paso 2004), reversed by 2006 Tex. LEXIS

609, 49 Tex. Sup. Ct. J. 874 (Tex. 2006).

881. In a negligence lawsuit against an employer brought by a police officer who was shot by an employee strung out on drugs provided by the employer, a psychiatrist was qualified to testify as an expert on methamphetamine abuse where the psychiatrist had constant contact with amphetamine abuse and directing others how to treat the disorder, and his course work included teaching how other substances like alcohol, amphetamines, and cocaine can present psychiatric syndromes or disorders. Loram Maint. of Way, Inc. v. Ianni, 141 S.W.3d 722, 2004 Tex. App. LEXIS 5857 (Tex. App. El Paso 2004), reversed by 2006 Tex. LEXIS 609, 49 Tex. Sup. Ct. J. 874 (Tex. 2006).

882. In a medical malpractice case, a court properly found that an expert witness was qualified to testify where she was a board certified pathologist at Baylor University, she was a full professor and held an endowed chair, she had written several articles about gastrointestinal cytology, she was familiar with pathology of the gastrointestinal tract, and she testified that it was within a pathologist's area of expertise to estimate the age of a perforation based on examination of cells taken from a colon. Axelrad v. Jackson, 142 S.W.3d 418, 2004 Tex. App. LEXIS 5693 (Tex. App. Houston 14th Dist. 2004).

883. In a medical malpractice case, a court properly found that an expert witness's testimony was reliable where the witness observed acute inflammatory cells on specimen tissue taken from the patient's colon, and she also saw new blood vessels, histiocytes, chronic inflammatory cells, and fibroblasts. Based on her observations, she estimated a perforation that was one to two-and-a-half weeks old, and when questioned whether the patient might have suffered a microperforation, which partially healed, followed by a larger perforation in the same site after the enema, the witness discounted such a theory. Axelrad v. Jackson, 142 S.W.3d 418, 2004 Tex. App. LEXIS 5693 (Tex. App. Houston 14th Dist. 2004).

884. Police officer was qualified as an expert on the HGN test where the requirement was satisfied by proof that the officer had received certification by the State of Texas to administer the HGN, and the officer testified and provided supporting documentation that he had become duly certified to administer the HGN test. Rodriguez v. State, 2004 Tex. App. LEXIS 5697 (Tex. App. Houston 14th Dist. June 29 2004).

885. Trial court did not abuse its discretion in admitting expert's testimony as to why victims in general change their minds concerning prosecution of domestic abuse where the testimony was relevant to help the jury understand why the victim initially contacted the police about the assault and then later filed three affidavits of nonprosecution. Williams v. State, 2004 Tex. App. LEXIS 5548 (Tex. App. Eastland June 24 2004).

886. Nurse's report did not establish her qualifications to express an expert opinion on causation because her license precluded her from acts of medical diagnosis, and to give a medical opinion on the cause of someone's death demanded the ability to make a medical diagnosis where the doctor's mere assertion that the patient would have survived if appropriately triaged was conclusory and insufficient and failed to state how the hospital's failure to act was a substantial factor in bringing about the mother's death and without which her death would not have occurred. Costello v. Christus Santa Rosa Health Care Corp., 141 S.W.3d 245, 2004 Tex. App. LEXIS 5500 (Tex. App. San Antonio 2004).

887. Widow's expert's testimony presented no evidence as to the husband's cause of death, where in workers' compensation cases, expert medical testimony could enable a plaintiff to go to the jury if the evidence established reasonable probability of a causal connection between employment and the present injury, but if there were other plausible causes of the injury or condition that could be negated, the plaintiff had to offer evidence excluding those causes with reasonable certainty; the widow's expert was unable to prove that it was a reasonable probability that the husband contracted tetanus from the May 13th wound in light of the incubation period and in light of numerous other existing probable causes for the infection. Tex. Mut. Ins. Co. v. Lerma, 143 S.W.3d 172, 2004 Tex. App.

LEXIS 5235 (Tex. App. San Antonio 2004).

888. Trial court did not err in striking the affidavits because there was no indication that either the self-employed licensed counselor or the chiropractor were qualified to give an opinion as to whether the claimant was of unsound mind, and the claimant's own affidavit was correctly stricken by the trial court because she did not show she was qualified to testify. Chavez v. Davila, 143 S.W.3d 151, 2004 Tex. App. LEXIS 4902 (Tex. App. San Antonio 2004).

889. In a family's design defect and marketing defect case against a minivan manufacturer arising from injuries their child sustained when an airbag deployed during a car accident, the family's damages award was reversed as the testimony of the family's expert should not have been admitted on the issue of whether the alternative design would have prevented the child's injuries because his testimony was unreliable and unsupported by any meaningful analysis. DaimlerChrysler Corp. v. Hillhouse, 2004 Tex. App. LEXIS 4921, CCH Prod. Liab. Rep. P17018 (Tex. App. San Antonio June 2 2004), opinion withdrawn by, substituted opinion at 161 S.W.3d 541, 2004 Tex. App. LEXIS 11471 (Tex. App. San Antonio 2004).

890. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, the trial court erred by allowing a detective to testify as to the boyfriend's truthfulness; however, the error was harmless, because the trial court instructed the jury that it had to decide the credibility of the witnesses testifying from the stand. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

891. Estate's expert's report did not refer to any knowledge, skill, experience, training, or education regarding the standard of care applicable to urologists, such that the trial court did not abuse its discretion in concluding that the expert was not qualified to testify about the doctor's actions; the scheduling order did not designate a later date as a deadline to file expert reports but specified a date on which the estate was required to provide the name of expert witnesses expected to testify at trial, such that the trial court did not act prematurely in dismissing the estate's claims. Olveda v. Sepulveda, 141 S.W.3d 679, 2004 Tex. App. LEXIS 4698 (Tex. App. San Antonio 2004).

892. Where a group life insurance policy was ambiguous as a matter of law, a trial court did not err by permitting expert testimony as to the interpretation of the policy; the witness had 48 years' experience in the insurance industry, was a licensed claims adjuster and a licensed risk manager, had taught insurance courses at the college level, attended many seminars to maintain his licenses, and had handled numerous group health and life claims. Royal Maccabees Life Ins. Co. v. James, 134 S.W.3d 906, 2004 Tex. App. LEXIS 4638 (Tex. App. Dallas 2004), vacated by, opinion withdrawn by, substituted opinion at 146 S.W.3d 340, 2004 Tex. App. LEXIS 9025 (Tex. App. Dallas 2004).

893. When a challenge to an expert's testimony is restricted to the face of the record, and is not a challenge that requires a court to evaluate the underlying methodology, technique, or foundational data used by the expert, a legal sufficiency challenge can be lodged in the absence of any objection to the evidence. Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 2004 Tex. LEXIS 441, 47 Tex. Sup. Ct. J. 559 (Tex. 2004).

894. Employee's expert witness did not present a scientific foundation regarding general causation as he did not refer to a single epidemiological study or scientific article to prove that exposure to commercial cleaners could cause reactive airways dysfunction syndrome. The absence of any general-causation evidence, combined with the absence of reliable scientific literature, created a fatal evidentiary gap in the employee's claim against his employer; therefore, the jury's verdict in favor of the employee was reversed and a judgment that the employee take nothing was rendered. Brookshire Bros. v. Smith, 176 S.W.3d 30, 2004 Tex. App. LEXIS 4385 (Tex. App. Houston 1st Dist. 2004).

895. Trial court could have reasonably concluded that defendant failed to carry his burden of showing that proffered expert testimony on an eyewitness identification issues was scientifically reliable where the witness had done no research in the area, less than one-tenth of her practice involved eyewitness identification, and she did not discuss the specifics of the studies and research underlying the tenets on which she would have relied. Mims v. State, 2004 Tex. App. LEXIS 4019 (Tex. App. Tyler Apr. 30 2004).

896. Trial court could have reasonably concluded that defendant failed to carry his burden of showing that proffered expert testimony on eyewitness identification issues was relevant because the expert's opinions failed to take into account enough pertinent facts to be of assistance to the jury, such as the eyewitness's photo identification of defendant prior to a live lineup, and much of her testimony focused on matters that did not require expert testimony. Mims v. State, 2004 Tex. App. LEXIS 4019 (Tex. App. Tyler Apr. 30 2004).

897. Admission of expert testimony by a play therapist was proper under Tex. R. Evid. 702 and Tex. R. Evid. 703, as the trial court held a Daubert hearing and pursuant to the assessment of factors to assess reliability under Nenno, it was found that such was a legitimate field of expertise and the testimony itself was sufficiently reliable; the expert's testimony was based on her therapy and counseling sessions with a child, wherein he had indicated that his mother was abusive to him and his sister, and was admissible in the mother's parental rights termination proceeding. In re A.J.L., 136 S.W.3d 293, 2004 Tex. App. LEXIS 3825 (Tex. App. Fort Worth 2004).

898. Court declined to hold that expert medical testimony was mandatory in a suit seeking to terminate parental rights under Tex. Fam. Code Ann. § 161.001(1)(D) or (E); mother's rights were properly terminated without expert testimony, based in part on her boyfriend's abuse of the child. In re K.W., 138 S.W.3d 420, 2004 Tex. App. LEXIS 3467 (Tex. App. Fort Worth 2004).

899. Trial court did not abuse its discretion in striking the school district expert's testimony where there was too great an analytical gap between the expert's assumptions underlying his use of the 25 basis points and the opinion he offered on the issue of damages; therefore, his opinion on damages was not reliable and amounted to no evidence. Rio Grande City Consol. Indep. Sch. Dist. v. Stephens, Inc., 2004 Tex. App. LEXIS 3305 (Tex. App. San Antonio Apr. 14 2004).

900. Expert witness was qualified to testify on behalf of drilling company in a breach of contract suit against a contractor. The expert had received B.S. and M.S. degrees in civil engineering, and although he had never operated a system such as the one at the center of the dispute, he had consulted with others on the system; the trial court did not abuse its discretion in admitting the testimony. McLaughlin, Inc. v. Northstar Drilling Techs., Inc., 138 S.W.3d 24, 2004 Tex. App. LEXIS 3084 (Tex. App. San Antonio 2004).

901. In a personal injury case arising from an employee's fall through a skylight, scientific inquiries were not involved when experts testified as to safety measures, calculating the costs of medical care, lost earnings, and living assistance, and explaining the injuries. Therefore, the trial court was not required to analyze the specific factors from case law in determining that the experts were reliable. Taylor v. Am. Fabritech, Inc., 132 S.W.3d 613, 2004 Tex. App. LEXIS 2550 (Tex. App. Houston 14th Dist. 2004).

902. In a products liability suit arising from a fire which destroyed the buyers' apartment and was allegedly caused by an air conditioning unit, the trial court did not err in admitting the testimony of the expert put forward by the unit's manufacturer and seller, as the expert's work background, education, and knowledge and experience in fire investigation demonstrated that he had expertise concerning the actual subject about which he offered an opinion. Pugh v. Conn's Appliances, Inc., 2004 Tex. App. LEXIS 2443 (Tex. App. Beaumont Mar. 18 2004).

903. In a case alleging improper ventilation of a building, summary judgment was properly granted in favor of a company, its owners, and its managers because the medical evidence offered by an injured party was stricken based on a failure to show causation; there was insufficient epidemiological data to support causation of neurotoxicity under the six applicable reliability factors analyzed by the trial court, and the evidence showed an "analytical gap" because the experts' experience and training, the diagnostic tests, and the medical literature that served as a basis for their medical opinions did not provide any evidence of causation. Feria v. Dynagraphics Co., 2004 Tex. App. LEXIS 2366 (Tex. App. El Paso Mar. 15 2004).

904. Nurse practitioner who performed the sexual assault exam on the victim was allowed to testify regarding the victim's medical history as told to her by the victim; also, pursuant to Tex. R. Evid. 702, it was also permissible for the nurse practitioner to testify and give her expert opinion that her findings were consistent with the medical history given by the victim. Dickson v. State, 2004 Tex. App. LEXIS 1087 (Tex. App. Eastland Feb. 5 2004).

905. In a driving while intoxicated prosecution under Tex. Penal Code Ann. § 49.04(b), where defendant sought to admit an expert witness to testify as to whether the factors of intoxication were identifiable from the videotape but, pursuant to Tex. R. Evid. 702, the trial court properly excluded the expert witness's testimony because its substance was not outside the knowledge and experience of the average juror, and the expert's testimony did not meet the Daubert standard for expert testimony as (1) the expert's testimony did not establish that a rate of error could be assigned where a determination of intoxication was made from viewing a videotape and no field sobriety tests were conducted; (2) the expert could not cite any scientific theory supporting a conclusion that intoxication could be determined solely from viewing a videotape nor could he refer the court to any literature supporting or rejecting that conclusion; and (3) the expert presented no publications or peer-reviewed data relating to a determination of intoxication without field sobriety test data nor did he establish that his method was generally accepted in the relevant community. Platten v. State, 2004 Tex. App. LEXIS 588 (Tex. App. Tyler Jan. 21, 2004).

906. Pursuant to Tex. R. Evid. 702, the homeowner's expert was qualified to testify as an expert about home foundations based on his knowledge, experience, and training because he had practiced civil engineering in the Army for 20 years; after retiring from the Army, he worked with a home builder in analyzing and recommending changes to foundation plans and had investigated approximately 6,000 foundations. United Servs. Auto. Ass'n v. Pigott, 154 S.W.3d 625, 2003 Tex. App. LEXIS 10806 (Tex. App. San Antonio 2003), opinion withdrawn by, appeal dismissed by 2004 Tex. App. LEXIS 8017 (Tex. App. San Antonio Sept. 1, 2004).

907. Psychologist's expert testimony in child sexual abuse case that the complainant was truthful was inadmissible under Tex. R. Evid. 702; the psychologist's testimony that the child did not exhibit the traits of manipulation was not a direct comment on the truth of the child's allegations and thus was admissible. Burns v. State, 122 S.W.3d 434, 2003 Tex. App. LEXIS 10193 (Tex. App. Houston 1st Dist. 2003).

908. Petitioner state death row inmate argued that a probation officer who had taken courses in sexual deviancy was not qualified to provide expert testimony because she did not have a professional license as a psychologist, psychiatrist, or counselor, and claimed that allowing her to testify violated his rights to the due process of law and to a fair trial; however, court found that the claim that the requirements of education and expertise necessary to qualify as an expert under Tex. R. Evid. 702 were too low to meet the requirements of the due process had not been clearly established in federal law; therefore, because the state court's adjudication of the claim was neither contrary to nor the result of an unreasonable application of clearly established federal law, habeas relief was denied. Wyatt v. Dretke, 2003 U.S. Dist. LEXIS 26997 (E.D. Tex. Dec. 3 2003).

909. Expert testimony concerning drug testing methods was sufficiently reliable in an action brought by disqualified exhibitors against a livestock show; the expert possessed adequate knowledge to criticize the procedures used and did not offer some unproven scientific method as an alternative. Houston Livestock Show & Rodeo, Inc. v. Hamrick,

125 S.W.3d 555, 2003 Tex. App. LEXIS 6339 (Tex. App. Austin 2003).

910. Trial court did not err in admitting the consumer's expert's testimony pursuant to Tex. R. Evid. 702 in connection with a products liability case; the expert properly focused the examination on the finished product, and thus the analysis of the composition of the final product was sufficiently tied to the facts of the case so that it aided the jury in resolving the factual dispute and thus was relevant. Johnson Controls Battery Group, Inc. v. Runnels, 2003 Tex. App. LEXIS 10956 (Tex. App. Tyler May 21 2003).

911. Considering the criteria set forth in case law, the court found the expert testimony reliable in connection with a consumer's products liability action; even considering the fact that microprobe analysis was somewhat subjective in that the expert determined what areas to test, the record indicated that the expert tested various zones of the grid and stated that it was not necessary to conduct multiple tests in the same area as the results were not going to differ. Johnson Controls Battery Group, Inc. v. Runnels, 2003 Tex. App. LEXIS 10956 (Tex. App. Tyler May 21 2003).

912. Where defendant flunked all three field sobriety tests, defendant's conviction of misdemeanor driving while intoxicated in violation of Tex. Penal Code Ann. § 49.04 was affirmed because: (1) admission of the evidence regarding the horizontal gaze nystagmus test under Texas R. Evid. 702 was proper in that the officer was qualified as an expert in the administration and the officer performed the screening properly on the occasion in question, and (2) the trial court erred in admitting evidence of vertical gaze nystagmus (VGN) and resting nystagmus tests under Tex. R. Evid. 702 because the State failed to show that evidence of VGN and resting nystagmus testing was reliable and relevant to assist the trier of fact, but admission of the evidence was harmless error under Tex. R. App. P. 44.2(b) because it did not affect defendant's substantial rights in that the jury instruction did not require the jury to determine what substance caused defendant's intoxication. Quinney v. State, 99 S.W.3d 853, 2003 Tex. App. LEXIS 1695, 117 A.L.R.5th 803 (Tex. App. Houston 14th Dist. 2003).

913. Pursuant to Tex. R. Evid. 702, an expert qualified by knowledge, skill, experience, training, or education may testify as to scientific, technical, or other specialized knowledge if it will assist the trier of fact to understand the evidence or determine a fact in issue. Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 2003 Tex. App. LEXIS 1187 (Tex. App. Amarillo 2003).

914. Pursuant to Tex. R. Evid. 702, there was no abuse of discretion in allowing a doctor to testify as an expert witness for appellee decedent's daughters because there was nothing to indicate that the opinions offered required an expertise peculiar to the fields of cardiology or urology, and multiple doctors who were not pathologists offered opinions as to the cause of decedent's death. Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 2003 Tex. App. LEXIS 1187 (Tex. App. Amarillo 2003).

915. In a wrongful death and survival action filed by the decedent's daughters against the healthcare providers, the daughters' expert's opinions as to the negligence of the nursing home, because it failed to give an antibiotic that had been prescribed for a urinary tract infection, to maintain accurate information in nursing home records, and to communicate that information to hospital personnel upon transfer of a patient to the hospital, was based on the expert's experience as a director of a nursing home and additionally, in regards to the decedent's cause of death, the expert relied on the expert's medical training and general experience treating patients; thus, there was nothing to indicate that the expert's opinions required an expertise peculiar to the fields of cardiology or urology and the trial court did not abuse its discretion in allowing the expert to testify pursuant to Tex. R. Evid. 702. Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 2003 Tex. App. LEXIS 1187 (Tex. App. Amarillo 2003).

916. When offered evidence is the testimony of an expert witness, the court must apply the principles set forth in the rules governing expert testimony under Tex. R. Evid. 702-705; a two-part test governs whether expert testimony

is admissible: (1) the expert must be qualified and (2) the testimony must be relevant and based on a reliable foundation. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

917. Trial court did not err in permitting a witness to testify as an expert witness on the valuation of a divorcing couple's real property, pursuant to Tex. R. Evid. 702 because the witness was qualified with many years experience, continuing education courses, service on the county appraisal board, and the witness gave relevant testimony based on a reliable foundation. The witness' testimony as to the value of the couple's property was based on approved valuation methods and the value of their property was relevant to the trial court in determining a division of the property. In re Marriage of Rice, 96 S.W.3d 642, 2003 Tex. App. LEXIS 150 (Tex. App. Texarkana 2003).

918. Affidavits of expert witnesses offered in support of homeowners' motion against summary judgment in an action seeking losses for a house fire failed to meet the requirements of Tex. R. Evid. 401, 403, 702, and 703, as the testimony was a pyramid of inferences lacking probative force because it was based on assumed facts that varied from the actual undisputed facts. Rayon v. Energy Specialties, Inc., 121 S.W.3d 7, 2002 Tex. App. LEXIS 9160 (Tex. App. Fort Worth 2002).

919. Police officer with relevant training or experience may qualify under Tex. R. Evid. 701 and 702 to give opinion testimony. Thrailkille v. State, 2002 Tex. App. LEXIS 8972 (Tex. App. Beaumont Dec. 18 2002).

920. In a driver's action against an automobile company alleging chemicals released when her car's airbag deployed and caused her sinusitis and asthma, the trial court properly concluded that the driver's expert testimony was inadmissible or insufficient, although one of her experts, a doctor, had medical expertise greater than that of the general population, since the driver did not establish that expertise of the expert on the issue of cause in fact met the requisites of Tex. R. Evid. 702; similary, there was sound basis for the trial court to conclude that the driver's other expert, an independent consultant on automotive safety and design and vehicle crashworthiness, was not qualified to render an opinion on whether deployment of the air bag caused the driver's respiratory symptoms. Praytor v. Ford Motor Co., 2002 Tex. App. LEXIS 8572 (Tex. App. Houston 14th Dist. Dec. 5 2002), opinion withdrawn by, substituted opinion at 97 S.W.3d 237, 2002 Tex. App. LEXIS 9017 (Tex. App. Houston 14th Dist. 2002).

921. Because evidence of defendant's alcohol concentration was shown by the results of an Intoxilyzer test, taken at the request or order of a peace officer, during his trial for diving while intoxicated, the trial court was to determine whether the technique was properly applied, at a "gatekeeper" hearing, under Tex. R. Evid. 702, but the issues at the hearing were only those that were not resolved by the legislature's decisions on reliability. Beard v. State, 2002 Tex. Crim. App. LEXIS 183 (Tex. Crim. App. Sept. 25 2002), opinion withdrawn by 108 S.W.3d 304, 2003 Tex. Crim. App. LEXIS 108 (Tex. Crim. App. 2003).

922. Where there was no indication in an officer's sworn report that his opinion of a driver's intoxication was based on his training and experience, his qualifications did not have to be established under Tex. R. Evid. 702; further, the walk-and-turn and one-leg stand tests were not based on a novel scientific theory and, under Tex. R. Evid. 701, a police officer was not required to be an expert to express an opinion as to whether the person he observed was intoxicated. Tex. Dep't of Pub. Safety v. Struve, 79 S.W.3d 796, 2002 Tex. App. LEXIS 4433 (Tex. App. Corpus Christi 2002).

923. Tex. R. Evid. 702's reliability requirement focuses on the principles, research, and methodology underlying an expert's conclusions. Under this requirement, expert testimony is unreliable if it is not grounded in the methods and procedures of science and is no more than subjective belief or unsupported speculation; expert testimony is also unreliable if there is too great an analytical gap between the data the expert relies upon and the opinion offered.

Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 2002 Tex. LEXIS 59, 45 Tex. Sup. Ct. J. 691, 155 Oil & Gas Rep. 82 (Tex. 2002).

924. When an expert appraiser relied on the condemnation of a tract of land in establishing a separate economic unit and assigning a value to that unit, his testimony was irrelevant to determining the value of the land condemned and was therefore inadmissible. Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 2002 Tex. LEXIS 59, 45 Tex. Sup. Ct. J. 691, 155 Oil & Gas Rep. 82 (Tex. 2002).

925. Where scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue or both, a witness qualified as an expert by knowledge, skill, experience, training, or education can testify permissibly thereto in the form of opinion or otherwise. Volkswagen of Am., Inc. v. Ramirez, 79 S.W.3d 113, 2002 Tex. App. LEXIS 3358 (Tex. App. Corpus Christi 2002), *rev'd on other grounds*, 159 S.W.3d 897, 2004 Tex. LEXIS 1429 (Tex. 2004).

926. Registered nurse who had examined the child victim was properly allowed to testify as an expert witness in defendant's trial for indecent assault on a child where the evidence showed that she had been performing sexual assault examinations for more than four years on hundreds of children; the fact that she did not have a medical degree did not render her unqualified as an expert. Gregory v. State, 56 S.W.3d 164, 2001 Tex. App. LEXIS 4519 (Tex. App. Houston 14th Dist. 2001), writ of certiorari denied by 538 U.S. 978, 123 S. Ct. 1787, 155 L. Ed. 2d 667, 2003 U.S. LEXIS 2967, 71 U.S.L.W. 3666 (2003).

927. In farmers' action against a seed company, for damages arising out the failure of their crop allegedly due to defective seeds, the trial court properly allowed an expert to testify on behalf of the farmers where the expert's experience and background in plant science rendered him qualified to render and opinion and where his knowledge would aid the jury in understanding the evidence. Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 2001 Tex. LEXIS 38, 44 Tex. Sup. Ct. J. 675 (Tex. 2001).

928. When an expert is not qualified, his testimony has no probative worth and is not proper evidence. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

929. Testifying expert cannot establish medical standards of care by testifying as to what he would have done, but a defendant doctor can establish a medical standard by which his own conduct is to be judged. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

930. Admission of expert testimony pursuant to Tex. R. Evid. 702 lies within the sound discretion of a trial court and will not be set aside absent a showing of abuse of that discretion. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

931. Party offering an expert's testimony bears the burden of proving that the witness is qualified under Tex. R. Evid. 702 by establishing that the expert has knowledge, skill, experience, training or education regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject; the word "knowledge" connotes more than subjective belief or unsupported speculation. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

932. In a juvenile defendant's trial for murder, the trial court properly excluded defendant's expert witness, where the witness was a linguist who sought to testify that the words in defendant's statement were not defendant's own words and might have been influenced by the questions asked, where the trial court had much evidence regarding the expert's qualifications, skill, and experience, but where the trial court had little evidence about the extent to

which the theory or technique may have been accepted by the scientific community, the existence of literature supporting or rejecting the theory, the potential rate of error, and whether other experts were available to test the evidence or determine a fact issue. Rogers v. State, 1999 Tex. App. LEXIS 1241 (Tex. App. Houston 14th Dist. Feb. 25 1999).

933. Court will not reverse a trial court's decision about the admissibility of expert testimony unless the trial court abuses its discretion. Rogers v. State, 1999 Tex. App. LEXIS 1241 (Tex. App. Houston 14th Dist. Feb. 25 1999).

934. Trial court must determine whether the proffered scientific expert testimony is sufficiently reliable and relevant to help the jury in reaching accurate results. Rogers v. State, 1999 Tex. App. LEXIS 1241 (Tex. App. Houston 14th Dist. Feb. 25 1999).

935. to be considered reliable, evidence based on scientific theory must meet three criteria: (1) the underlying scientific theory must be valid, (2) the technique applying the theory must be valid, and (3) the technique must have been properly applied on the occasion in question. Rogers v. State, 1999 Tex. App. LEXIS 1241 (Tex. App. Houston 14th Dist. Feb. 25 1999).

936. In determining a theory's reliability, a trial court may look at some unexclusive factors including: (1) the extent to which the relevant scientific community accepts as valid the underlying scientific theory and technique; (2) the expert's qualifications; (3) whether literature exists that supports or rejects the underlying theory and technique; (4) the technique's potential rate of error; (5) whether other experts are available to test and evaluate the technique; (6) the clarity with which the expert and the proponent can explain to the trial court the underlying theory; and (7) the experience and skill of the expert who applied the technique on the occasion in question. Rogers v. State, 1999 Tex. App. LEXIS 1241 (Tex. App. Houston 14th Dist. Feb. 25 1999).

937. Defendant argued that his trial counsel was ineffective because he failed to object to an expert's testimony that the victim had competently answered age-appropriate questions during the interview, the expert's testimony that the victim competently answered age-appropriate questions did not directly comment on the victim's truthfulness. Sosa-Medrano v. State, 2014 Tex. App. LEXIS 5756 (Tex. App. Houston 1st Dist. May 29 2014).

Evidence : Testimony : Experts : Admissibility

938. Expert stated that the child was consistent throughout his story, but the expert did not offer an opinion concerning or otherwise discuss the truthfulness of the child's statements or allegations; the expert's statement did not constitute a comment on the child's credibility, but if it was, the error was harmless, as the testimony was not reviewed or revisited and was but a small portion of the evidence before the jury. Martinez v. State, 2014 Tex. App. LEXIS 8369, 2014 WL 3763649 (Tex. App. El Paso July 30 2014).

939. Trial court did not commit error in allowing the detective's testimony where the detective did not give an expert opinion about the latent prints he lifted and he did did he testify about the science of fingerprint analysis. Ridge v. State, 2014 Tex. App. LEXIS 7829 (Tex. App. Amarillo July 18 2014).

940. Trial court did not abuse its discretion in excluding the testimony of a witness related to cause of concrete damage because his conclusion was based only on a visual inspection and another's report, and he did not investigate other possible causes of the damage, such that his causation testimony was unreliable and was properly excluded. Raul Flores, Inc. v. Rodriguez, 2014 Tex. App. LEXIS 3561, 2014 WL 1370344 (Tex. App. Corpus Christi Apr. 3 2014).

941. Trial court did not abuse its discretion in excluding a witness's testimony regarding causation, as he did not take or analyze a core sample or subgrade sample for testing, the scope of his work was a visual inspection, and he did not investigate potential alternate causes of damage, such that his testimony was no more than subjective belief and was properly excluded as unreliable. Raul Flores, Inc. v. Rodriguez, 2014 Tex. App. LEXIS 3561, 2014 WL 1370344 (Tex. App. Corpus Christi Apr. 3 2014).

942. Trial court did not abuse its discretion by excluding the testimony of a former military police officer because it was irrelevant and would not have assisted the jury in deciding the case. Allowing the testimony would have suggested to the jury the existence of a legal duty that was not recognized in Texas, i.e., asking a driving while intoxicated suspect if he had physical injuries before administering the field sobriety tests. Oliva v. State, 2014 Tex. App. LEXIS 3523, 2014 WL 1319308 (Tex. App. San Antonio Apr. 2 2014).

943. Trial court did not abuse its discretion by admitting a forensic chemist's testimony because from the evidence before it, the trial court reasonably conclude that the scientific theory underlying gun shot residue (GSR) testing was valid, that the technique applying the theory was valid, and that the technique was properly applied by the chemist. the chemists specifically testified that most labs allowed the reporting of one particle of GSR. Burks v. State, 2014 Tex. App. LEXIS 3243, 2014 WL 1285731 (Tex. App. Austin Mar. 26 2014).

944. Defendant's conviction for driving while intoxicated was appropriate because testimony that defendant showed signs of impairment consistent with the use of hydrocodone supplied a logical connection between defendant's admitted use of hydrocodone and his driving. As such, that testimony was relevant; because the challenged evidence was relevant and reliable, the trial court did not abuse its discretion in admitting the videorecording of defendant's statement and the expert's testimony. Everitt v. State, 2014 Tex. App. LEXIS 1667, 2014 WL 586100 (Tex. App. Houston 1st Dist. Feb. 13 2014).

945. During defendant's trial for murdering her tenth husband, the court erred in admitting testimony from the State's expert, a licensed professional counselor, regarding borderline personality disorder because the testimony was merely speculative; however, the error was harmless given the strength of the evidence supporting the conviction. Maxwell v. State, 2014 Tex. App. LEXIS 1514, 2014 WL 556377 (Tex. App. Texarkana Feb. 12 2014).

946. Trial court did not err in allowing the State's appraisal expert to testify at trial that the condemned property most likely would not be developed for eight years while it was undergoing environmental remediation as the market survey results that the expert conducted supported his conclusion that the property most likely would not be developed until regulatory closure or a letter of no further action was obtained.

947. In an eminent domain proceeding, because appellant's contention that the State's appraisal expert's opinion under the comparable sales method was tainted by speculation and improper assumptions and appellant's argument that the expert's opinions were unreliable and thus inadmissible were rejeted, the trial court did not abuse its discretion by admitting the expert's appraisal opinions.

948. Appellant's argument that there was no support for the State's appraisal expert's use of a discount rate in appraising property was rejected because appellant cited no authority for its contention that a discount rate analysis was an improper methodology in condemnation practice; and the expert testified that performing a discounted cash flow analysis to determine the environmentally impaired property value was supported by Appraisal Institute literature.

949. Trial court did not err in denying a taxpayer's motion to exclude the testimony of an appraisal district's expert, a registered professional appraiser with close to 30 years of experience, because his calculations were based on quantitative foundational data and followed approved methodology. Key Energy Servs., Llc v. Shelby County

Appraisal Dist., 428 S.W.3d 133, 2014 Tex. App. LEXIS 439, 2014 WL 130547 (Tex. App. Tyler Jan. 15 2014).

950. Legally sufficient evidence supported the finding of $90,000 in enhanced market value caused by construction of a permanent improvement to the land because the expert's testimony established his thoroughness in appraising the land with and without improvements, his testimony was grounded in a sound evidentiary basis, was detailed and not conclusory. Mason v. Mason, 2014 Tex. App. LEXIS 413, 2014 WL 199649 (Tex. App. Amarillo Jan. 13 2014).

951. In a suit for personal injury and underinsured motorist coverage, the trial court excluded the testimony of a defense expert based on a determination that the expert's report did not meet the reliability requirements of this rule; because the insurance company had an adequate remedy by appeal, mandamus review was not available. In re Farmers Tex. County Mut. Ins. Co., 2013 Tex. App. LEXIS 15350, 2013 WL 6730094 (Tex. App. San Antonio Dec. 20 2013).

952. At defendant's DWI trial, the court did not deny his rights under the Sixth Amendment by limiting his cross-examination of the State's witness who was a former breath test technical advisor. Because the witness indicated at a Rule 702 hearing outside the presence of the jury that he no longer felt comfortable testifying as an expert in the field, the trial court properly excluded testimony that was not sufficiently reliable to assist the jury in reaching an accurate result. Balderama v. State, 421 S.W.3d 247, 2013 Tex. App. LEXIS 15133, 2013 WL 6637703 (Tex. App. San Antonio Dec. 18 2013).

953. Counsel was not ineffective for failing to object to testimony of the State's expert relating to the characteristics of child victims of sexual abuse because the testimony was admissible under this rule and counsel may have had a strategic reason for not objecting to the testimony, as counsel conducted an extensive and thorough cross-examination of the expert. Adair v. State, 2013 Tex. App. LEXIS 14923, 2013 WL 6665033 (Tex. App. Austin Dec. 12 2013).

954. Physician's deposition testimony and report were inadmissible because they were conclusory and unreliable, as corroborating data was not included in the report, his theory that the patient would have survived had the defibrillator administered a successful defibrillation was undermined by the American Medical Association's manual, and he admitted that admitting a patient in the instant patient's condition into the hospital was no assurance that the patient would eventually be discharged alive. Schronk v. Laerdal Med. Corp., 440 S.W.3d 250, 2013 Tex. App. LEXIS 15024, 2013 WL 6570907 (Tex. App. Waco Dec. 12 2013).

955. Court did not abuse its discretion in allowing the officer to testify as an expert on the HGN test, because the officer was certified at the time he administered the HGN test, and he further testified that he had extensive training in administering the test. Leigh v. State, 2013 Tex. App. LEXIS 13248, 2013 WL 5777852 (Tex. App. Waco Oct. 24 2013).

956. Expert testimony that an injured worker probably would have been promoted to a highly paid directional driller position was based on speculation and conjecture, given his limited experience in oil drilling and the cyclic nature of the industry; moreover, the erroneous admission of the experts' testimony was harmful because lost earning capacity was an integral part of the case. Chesapeake Operating, Inc. v. Hopel, 2013 Tex. App. LEXIS 13281, 2013 WL 5782916 (Tex. App. Amarillo Oct. 24 2013).

957. Trial court did not err by finding that the testimony of the expert presented by the building materials supplier constituted no evidence to support a finding that the manufacturer's decking rotted, decayed, split, checked, or splintered as a direct result of a manufacturing defect because the expert did not apply any scientific methodology or technique and merely gave his subjective opinion, and therefore his opinions were not based on a reliable

foundation. Bldg. Prods. Plus v. Tamko Bldg. Prods., 2013 Tex. App. LEXIS 12590, 2013 WL 5604738 (Tex. App. Houston 1st Dist. Oct. 10 2013).

958. No evidence supported an award based on a valuation provided by an expert witness who did not follow guidelines for valuing intangible assets or otherwise establish a reliable basis for stating that his valuation of a partnership interest attributed no value to goodwill; however, because the expert's testimony provided some evidence of the correct measure of damages based on book value, the trial court erred in rendering a take-nothing JNOV. Vega v. Fulcrum Energy, Llc, 415 S.W.3d 481, 2013 Tex. App. LEXIS 12323, 2013 WL 5490183 (Tex. App. Houston 1st Dist. Oct. 3 2013).

959. Expert's testimony regarding damages in a trade secrets action was properly admitted because it was not illogical for the expert to assign a value to each separate piece of the compilation, and it was not suggested how using the geologist's former partner's name as the hypothetical "willing buyer" changed the expert's calculations in any way. Bishop v. Miller, 412 S.W.3d 758, 2013 Tex. App. LEXIS 11614 (Tex. App. Houston 14th Dist. Sept. 12 2013).

960. Expert's testimony regarding damages in a trade secrets action was properly admitted because it was not illogical for the expert to assign a value to each separate piece of the compilation, and it was not suggested how using the geologist's former partner's name as the hypothetical "willing buyer" changed the expert's calculations in any way. Bishop v. Miller, 412 S.W.3d 758, 2013 Tex. App. LEXIS 11614 (Tex. App. Houston 14th Dist. Sept. 12 2013).

961. Where defendant was convicted of possession of one to four grams of a controlled substance based on methamphetamine found in the car during a traffic stop, an expert's opinion that the sergeant's failure to follow police procedure suggested that the drugs were planted in the car was inadmissible. Because the expert did not explain why the sergeant's acts were suspicious or why they led to the conclusion that the drugs were planted, there was not a sufficient basis for an expert opinion. Nickols v. State, 2013 Tex. App. LEXIS 11241 (Tex. App. Eastland Aug. 30 2013).

962. Although based on calculations from a reliable software program, an expert's testimony did not provide legally sufficient evidence of a contractor's lost profits for repairs the contractor had been prevented from performing under an insurance authorization form because the starting point for the calculations was the initial insurance claim amounts, rather than the appraisal award. Azad v. Mrco, Inc., 2013 Tex. App. LEXIS 10969 (Tex. App. Houston 14th Dist. Aug. 29 2013).

963. Trial court did not err in admitting expert testimony in a wrongful termination action because the employee's expert articulated a reliable and well-accepted method for evaluating back pay and front pay. Dell, Inc. v. Wise, 424 S.W.3d 100, 2013 Tex. App. LEXIS 10654 (Tex. App. Eastland Aug. 22 2013).

964. For purposes of Tex. R. Evid. 702, the testimony of a forensic interviewer could have been viewed as a description of what was said, as the interviewer did not testify that she believed the child was being truthful, and it would not have been outside the zone of disagreement for the trial court to have found that the testimony would assist the jury. Page v. State, 2013 Tex. App. LEXIS 10153 (Tex. App. Austin Aug. 15 2013).

965. Expert's deposition testimony and accompanying report did not constitute admissible evidence, because the deposition testimony and report were conclusory and lacked indicia of reliability. Schronk v. Laerdal Med. Corp., 2013 Tex. App. LEXIS 9916 (Tex. App. Waco Aug. 8 2013).

966. There was no abuse of discretion by excluding the expert's testimony regarding alleged marketing or design defects in the automatic external defibrillator or its battery, because the expert did not test the actual device or battery involved and did not express specific expertise regarding automatic external defibrillators and batteries. Schronk v. Laerdal Med. Corp., 2013 Tex. App. LEXIS 9916 (Tex. App. Waco Aug. 8 2013).

967. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

968. In a trial of inmate's civil commitment as a sexually violent predator under Tex. Health & Safety Code Ann. § 841.062, the trial court properly excluded the inmate's expert's testimony that one of the victims had recanted pursuant to Tex. R. Evid. 401, 402, and 702, because such evidence represented a collateral attack on the underlying convictions, which had not been set aside. In re Barron, 2013 Tex. App. LEXIS 8495, 2013 WL 3487385 (Tex. App. Beaumont July 11 2013).

969. In a customer's action against a vehicle dealership for breach of warranty and fraud, the trial court did not err in ruling that testimony by the customer's expert was inadmissible because the testimony was not demonstrated to be reliable; the expert could not explain why, in arriving at his opinion on damages, the "clean trade-in" value was used as a starting point instead of the "clean retail" value, the difference in which was nearly $ 4,000. Moore v. Jordan Ford, Ltd., 2013 Tex. App. LEXIS 8372 (Tex. App. San Antonio July 10 2013).

970. Trial court had discretion to exclude a misleading line of questions, and the fact that the trial court improperly disallowed the questioning on the recidivism rate among patients in appellant's offer of proof did not preclude him from properly presenting his appeal; even if the court assumed there had been no recidivism in the treated class of those committed to a program, it did not follow that expert testimony appellant would likely reoffend was incorrect. In re Weissinger, 2013 Tex. App. LEXIS 7819, 2013 WL 3355758 (Tex. App. Beaumont June 27 2013).

971. Proffered expert testimony, even if relevant, was not necessarily admissible, and assuming the trial court erred in limiting appellant's cross-examination of the expert, given his testimony on his credentials and that supporting his methodology, any error likely made no difference in the jury's verdict. In re Weissinger, 2013 Tex. App. LEXIS 7819, 2013 WL 3355758 (Tex. App. Beaumont June 27 2013).

972. Appellant claimed that the attorney fee testimony by the attorney, who testified as an expert, was conclusory as to an estimate, but the court disagreed, as it was permissible for an attorney to estimate the amount of time expended on claims for which fees were recoverable, and the attorney's testimony sufficiently linked his opinions to the facts of the case and his testimony was not conclusory. Ropa Exploration Corp. v. Barash Energy, 2013 Tex. App. LEXIS 7290 (Tex. App. Fort Worth June 13 2013).

973. Expert's testimony was speculative and conclusory, and should have been excluded in its entirety, because the expert never stated that the horses escaped due to the alleged inadequacies. Russell Equestrian Ctr., Inc. v. Miller, 406 S.W.3d 243, 2013 Tex. App. LEXIS 6826 (Tex. App. San Antonio June 5 2013).

974. Although neither expert read the contract before trial, each expert had years of experience in the area; the court could not find that the experts had no reasonable basis for their opinions concerning contractor one's duties under the contract, and the analysis each expert used was reliable and therefore admissible, and the trial court did not abuse its discretion in admitting this testimony. City of Alton v. Sharyland Water Supply Corp., 402 S.W.3d 867, 2013 Tex. App. LEXIS 6606 (Tex. App. Corpus Christi May 30 2013).

975. Expert based his opinions not on the reading of a particular contract, but on assumptions, and there was no evidence that the assumptions were unfounded. City of Alton v. Sharyland Water Supply Corp., 402 S.W.3d 867, 2013 Tex. App. LEXIS 6606 (Tex. App. Corpus Christi May 30 2013).

976. Company presented expert testimony on a repair estimate, and the expert testified as to his calculations and method and was cross-examined, and the jury was presented with evidence allowing the jury to assess the facts and accordingly award damages; the testimony revealed factors that were considered in order to ensure the reasonableness of the damages the jury awarded, and the evidence was sufficient for the jury to have found that the cost of future repairs awarded was reasonable. City of Alton v. Sharyland Water Supply Corp., 402 S.W.3d 867, 2013 Tex. App. LEXIS 6606 (Tex. App. Corpus Christi May 30 2013).

977. Trial court's instruction to disregard was sufficient to cure any alleged error in the admission of the trooper's testimony, Tex. R. Evid. 702, on defendant's eye tremors, and defendant suffered no harm, Tex. R. App. P. 44.2. Maldonado v. State, 2013 Tex. App. LEXIS 5978 (Tex. App. San Antonio May 15 2013).

978. Expert's testimony regarding the value of minority owners' interest in dissolved companies was unreliable and should have been excluded because the expert relied on internal projections that were overly optimistic and speculative; moreover, the expert did not fully account for the accrual of preferred return. Citrin Holdings, LLC v. Minnis, 2013 Tex. App. LEXIS 5723 (Tex. App. Houston 14th Dist. May 9 2013).

979. Trial court did not abuse its discretion by admitting the police sergeant's expert testimony over defendant's reliability objections because: (1) the sergeant's field of expertise, gang behavior and the Mexican Mafia, was generally accepted as a legitimate field of expertise; (2) the sergeant's testimony regarding the purpose, history, hierarchical structure, and the rules and regulations that purportedly govern the organization and conduct of its members, as well as the type of distinctive tattoos that its members use to signify their membership in the organization, clearly fit within the scope of that field; and (3) the sergeant's testimony was derived from his field interviews with current and former Mexican Mafia members and collaboration with other law enforcement officials familiar with the organization. Hernandez v. State, 2013 Tex. App. LEXIS 5228 (Tex. App. Houston 1st Dist. Apr. 30 2013).

980. Even if defendant's objection during the punishment phase was timely, and an investigator's expert opinion that defendant's child would be at further risk if around defendant was inadmissible, similar evidence was introduced during the guilt-innocence phase of the trial without objection; hence, defendant was not harmed by the admission of the investigator's opinion. Lomax v. State, 2013 Tex. App. LEXIS 5306 (Tex. App. Tyler Apr. 30 2013).

981. Trial court did not err by overruling defendant's objection to the State's expert being allowed to testify as an expert witness on the subject of fingerprint comparison because the evidence showed that the expert was qualified, as he testified that he had been a forensic investigator for 18 years, he had training in fingerprint comparison, he had been certified to examine fingerprints, and had been doing fingerprint comparison for the police department for 17 years. The court also held that the evidence was reliable because the uniqueness of fingerprints was common knowledge upon which the court could take judicial notice. Lightner v. State, 2013 Tex. App. LEXIS 5365 (Tex. App. Dallas Apr. 30 2013).

982. Defendant failed to show that the trial court abused its discretion by permitting the State's expert to testify because defendant stipulated that he was a qualified expert witness, and the questions asked of the expert were proper because they asked him to opine on whether the facts and circumstances revealed by his investigation measured up to a standard of legal culpability. Even if the trial court erred by admitting the evidence, the error would have been harmless given the other evidence against defendant, including evidence that in the hours before the fatal accident, defendant had been drinking beer and whiskey and smoking marijuana. Blanchard v. State, 2013

Tex. App. LEXIS 5140 (Tex. App. Fort Worth Apr. 25 2013).

983. Trial court correctly decided that defendant's computer expert could not testify regarding authenticating the e-mails between defendant and the alleged victim because he had no personal knowledge of the case and he was not shown to be qualified by his scientific, technical, or other specialized knowledge to give any opinions in the case. Sennett v. State, 406 S.W.3d 661, 2013 Tex. App. LEXIS 5148 (Tex. App. Eastland Apr. 25 2013).

984. At defendant's trial for indecency with a child and aggravated sexual assault of a child, the trial court did not err in admitting the expert testimony of the nurse who performed the examination of the child, even though she was not certified at the time. Because the facts of the hypothetical matched the facts of this case, the relevancy fit requirement was met. Pierson v. State, 398 S.W.3d 406, 2013 Tex. App. LEXIS 4868 (Tex. App. Texarkana Apr. 19 2013).

985. Court noted that the potential prejudicial effect of an attorney testifying as an expert was of greater significance that other experts, and even greater impact is likely when the testifying attorney describes qualifications that portray her as a trusted advisor to specific members of the Texas Supreme Court with respect to the disciplinary rules being discussed, as in this case. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist. Apr. 9 2013).

986. Attorney preserved his challenges to an expert's testimony by filing a motion to exclude under Tex. R. Evid. 702; he challenged admissibility on several grounds, discussed these objections with the trial court, and the trial court overruled the motion to exclude, and these steps preserved the attorney's appellate challenges. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist. Apr. 9 2013).

987. Expert must testify before the jury has received the jury charge and before it has been instructed on specific elements and standards concerning specific claims, and the expert must have some leeway to reference the controlling legal terms and related concepts while testifying, otherwise, a jury would not be able to make sense of the expert's testimony or measure it against the charge's requirements, and the sponsoring litigant could not meet a motion for directed verdict; it follows that the standards governing admission of expert testimony do not automatically foreclose every reference to legal terms or the disciplinary rules in the course of expert testimony addressing an attorney's alleged breaches of the duties owed to a client, and such an expert properly may include these references when the trial court sets appropriate limits, and the continuum of potentially relevant testimony from an expert likely will vary according to the specific facts and the specific legal standards being litigated in specific cases. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist. Apr. 9 2013).

988. Expert permissibly testified concerning general fiduciary duty concepts and her opinion that an attorney's handling of expenses violated those duties. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist. Apr. 9 2013).

989. Expert's testimony concerning an attorney's breach of fiduciary duty crossed the admissibility border when she tried to explain the application of specific rules of professional conduct, she opined that the attorney violated at least half a dozen specific rules, and she told the jury that violating the rules necessarily established a breach of fiduciary duty; this ran afoul of the reliability requirement and the prohibition against testimony regarding pure questions of law, plus a violation of a rule did not give rise to a private cause of action or create a presumption that a legal duty had been breached, for purposes of Tex. Disc. R. Prof. Conduct, pmbl., para. 15. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist.

Apr. 9 2013).

990. Trial court abused its discretion in admitting an expert's testimony because she equated disciplinary rule violations with per se breaches of fiduciary duties, which was unreliable; as the expert predicated her testimony on an asserted intertwining of the professional conduct rules and breach of fiduciary duty, the error impacted her entire testimony regarding the attorney's asserted breaches of duty. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist. Apr. 9 2013).

991. Attorney was entitled to counter an expert's testimony after it was admitted over objection, and to answer the question asked of him, as he was not required to give up at trial to preserve his complaint on appeal. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist. Apr. 9 2013).

992. Error arising from admission of an expert's testimony was harmful and probably caused the rendition of an improper judgment, under Tex. R. App. P. 44.1(a)(1), given that the expert opined that the disciplinary rules set forth the standard for civil liability for attorney misconduct, and the jury was permitted to draw the conclusion that the clients could recover for any rule violation, even though such did not alone give rise to civil liability, for purposes of Tex. Disc. R. Prof. Conduct, pmbl., para. 15, and the expert was the clients' only liability expert, plus the impact of the expert's testimony was underscored by closing arguments. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist. Apr. 9 2013).

993. Trial court did not abuse its discretion by admitting the State's expert's testimony because the subject matter of her testimony was within the field of expertise of providing psychotherapy to children and her testimony described how she utilized the principles in the field based on her significant experience and training. Cox v. State, 2013 Tex. App. LEXIS 4073, 2013 WL 1286676 (Tex. App. Waco Mar. 28 2013).

994. In defendant's aggravated assault case, the court properly excluded the testimony of defendant's expert witness, a pharmacist, regarding side effects of failure of defendant to take his anti-depressant because her opinion was based solely on the list of possible side effects provided by the manufacturer, and any of the side effects reported were less than one percent of all cases. There were no reported cases of violence that she knew of, and she could not say that the stoppage of an anti-depressant would directly cause violence. Randle v. State, 2013 Tex. App. LEXIS 3134, 2013 WL 1188647 (Tex. App. Waco Mar. 21 2013).

995. Detective referred to the consistency of the child's statements to police and others, but this testimony was given in the context of explaining how the investigation progressed and how the detective determined to seek charges against appellant, plus the detective did not offer an express opinion about whether the child was being truthful about the sexual assaults, and counsel might have found that the comments were not objectionable. Garcia v. State, 2013 Tex. App. LEXIS 2868, 2013 WL 1149288 (Tex. App. San Antonio Mar. 20 2013).

996. Even if a detective's testimony was an unqualified direct opinion about the child's truthfulness, counsel might have made the tactical decision not to object, and therefore appellant did not meet his burden of proving deficient conduct. Garcia v. State, 2013 Tex. App. LEXIS 2868, 2013 WL 1149288 (Tex. App. San Antonio Mar. 20 2013).

997. In a divorce, it was not error to admit the testimony of a wife's expert on play therapy or to exclude the husband's expert challenge to the testimony because the wife's witness testified to the witness's qualifications and to the general acceptance of play therapy. Howell v. Howell, 2013 Tex. App. LEXIS 1991, 2013 WL 784542 (Tex. App. Corpus Christi Feb. 28 2013).

998. Trial court abused its discretion by admitting an attorney's expert testimony that a lawyer who violated the disciplinary rules necessarily violated a fiduciary duty because that testimony was unreliable, as it contravened Texas law. The error was not harmless because it probably caused the rendition of an improper judgment, given the closing arguments and the jury's questions to the trial court. Fleming v. Kinney, 2013 Tex. App. LEXIS 1986 (Tex. App. Houston 14th Dist. Feb. 28 2013).

999. Trial court acted within its discretion in concluding that an attorney was qualified to testify as an expert with respect to compliance with the fiduciary duties that attorneys owe to clients in the context of charging litigation expenses as part of an aggregate settlement because: (1) she had a J.D. from a Texas university; (2) she had been licensed to practice law in Texas since 1989; (3) in private practice she worked on mass action litigation; (4) she had served since 2001 as a member of the committee of the State Bar of Texas that drafted and revised proposed language for the Texas Disciplinary Rules of Professional Conduct; and (5) in 2003 she began working as a consultant with a focus on attorney and judicial ethics. Fleming v. Kinney, 2013 Tex. App. LEXIS 1986 (Tex. App. Houston 14th Dist. Feb. 28 2013).

1000. Trial court did not abuse its discretion by allowing a licensed psychologist to testify because his testimony about his examination and evaluation of the victim was within the scope of his expertise as a psychologist specializing in child sexual abuse. He also testified that his methodology followed principles recognized by his peers in child sexual abuse psychology. Vergara v. State, 2013 Tex. App. LEXIS 1837, 2013 WL 749774 (Tex. App. San Antonio Feb. 27 2013).

1001. In a lawsuit concerning the breakup of a medical practice group that involved several related business entities in which a partner specifically alleged that the testimony of his former partners' valuation expert was both unreliable and irrelevant because it was based on an improper valuation methodology and an incorrect factual assumption that the partnership had dissolved, the premises of the partner's challenge to the expert's testimony were without merit where the expert did not actually testify that he used a disapproved book value methodology, but, instead, he specifically testified to the fair market value of the partner's interest. There was also evidence supporting the conclusion that the entity at issue had been dissolved, and whether it was properly dissolved or not, it was not a continuing enterprise. Bhatia v. Woodlands North Houston Heart Center, Pllc, 396 S.W.3d 658, 2013 Tex. App. LEXIS 1482, 2013 WL 554181 (Tex. App. Houston 14th Dist. Feb. 14 2013).

1002. Relatives assumed that a witness testified as an expert under Tex. R. Evid. 702, and the lessor stood on its waiver argument only; nothing indicated that the witness testified as a lay witness under Tex. R. Evid. 701, and thus the court addressed the issue as presented. Qui Phloc Ho v. Macarthur Ranch, Llc, 395 S.W.3d 325, 2013 Tex. App. LEXIS 1199, 2013 WL 458323 (Tex. App. Dallas Feb. 7 2013).

1003. Regarding a waiver argument, no objection was required at the time of admission of certain expert testimony for relatives to challenge the testimony as conclusory on its face. Qui Phloc Ho v. Macarthur Ranch, Llc, 395 S.W.3d 325, 2013 Tex. App. LEXIS 1199, 2013 WL 458323 (Tex. App. Dallas Feb. 7 2013).

1004. In this fraudulent transfer case, the unspecified appraised value without more provided nothing on which the trial court could rely and did not support a verdict, and thus the expert's testimony concerning the appraised value of certain properties was conclusory and speculative on its face and was thus not valid evidence; the witness also answered yes to counsel's leading questions concerning value and did not offer a basis for the number suggested, and the yes answer was conclusory. Qui Phloc Ho v. Macarthur Ranch, Llc, 395 S.W.3d 325, 2013 Tex. App. LEXIS 1199, 2013 WL 458323 (Tex. App. Dallas Feb. 7 2013).

1005. Testimony in case law was not judged under the case law rule that testimony that was conclusory would not support a judgment, and thus this case law did not change the trial court's finding that expert testimony was not

sufficient to support findings concerning the fair market value of properties in this fraudulent transfer case. Qui Phloc Ho v. Macarthur Ranch, Llc, 395 S.W.3d 325, 2013 Tex. App. LEXIS 1199, 2013 WL 458323 (Tex. App. Dallas Feb. 7 2013).

1006. Finding that defendant did not properly preserve his issue for appeal under Tex. R. App. P. 33.1 was improper because the appellate court's parsing of his objections was the kind of hyper-technical analysis that had been repeatedly rejected. It erred by distinguishing between admitting scientific evidence and admitting expert testimony under Tex. R. Evid. 702; and erred in distinguishing between admissibility based on relevance and admissibility based on reliability. Everitt v. State, 407 S.W.3d 259, 2013 Tex. Crim. App. LEXIS 255 (Tex. Crim. App. Feb. 6 2013).

1007. Engineer's testimony about restrictions on construction across a pipeline easement and difficulties that the restrictions could cause in developing the remainder property was admissible because it was not based on speculative or hypothetical uses and did not focus on impaired vehicle access. Moreover, the owners' damages theory and the engineer's testimony did not focus on impaired vehicle access to the property, which would not have been compensable in a condemnation proceeding. Crosstex Dc Gathering Co., J.V. v. Button, 2013 Tex. App. LEXIS 683 (Tex. App. Fort Worth Jan. 24 2013).

1008. Trial court did not err by admitting the testimony of the geographic information systems coordinator for county public works about whether the offense occurred within a drug-free zone because he was qualified to testify as an expert under Tex. R. Evid. 702, as the his familiarity with the mapping software and how drug-free zone maps were created using the software put context to the map of the area the State offered as an exhibit. The coordinator's training, education, and experience regarding mapmaking and analyzing GIS data qualified him to offer an opinion that defendant committed the drug offense within the drug-free zone. Procella v. State, 2013 Tex. App. LEXIS 487, 2013 WL 222274 (Tex. App. Dallas Jan. 17 2013).

1009. Trial court did not abuse its discretion during defendant's trial for aggravated assault and endangering a child in permitting a State witness to testify as an expert witness where the witness's expertise fit with the subject matter at issue, which was whether the damages to the victims' vehicles were consistent with their accounts of how the damage occurred. The witness had seventeen years of experience in the automotive industry and thirteen years of experience as an estimator for damaged vehicles, and his testimony did not involve a complex subject, but rather consisted of matching up paint transfer and damages to the victims' vehicles with damages to defendant's truck. Ibarra v. State, 2013 Tex. App. LEXIS 169, 2013 WL 123705 (Tex. App. Corpus Christi Jan. 10 2013).

1010. Court acted within its discretion in concluding that the psychologist was an expert with specialized knowledge and was qualified to render her opinions in the case, because the psychologist testified that she had a master's degree in counseling and was a licensed professional counselor, she was certified as an expert witness regarding children's issues, and had provided therapeutic counseling, consisting of approximately 30 sessions, for the child in the case. Mueller v. Bran, 2013 Tex. App. LEXIS 176, 2013 WL 123693 (Tex. App. Houston 1st Dist. Jan. 10 2013).

1011. Although the client argued that the trial court erred in not conducting a hearing to evaluate expert testimony, nothing indicated that she requested such, for purposes of Tex. R. App. P. 33.1(a)(1)(A), and instead the client argued that the attorney waived any objections by not requesting a hearing, but this was incorrect, as the attorney, as the party opposing the evidence, had the burden to object, and then the burden shifted to the client to show the evidence's admissibility; the attorney was not required to ask for a hearing on her objections for the burden to shift to the client, and the attorney did not waive her objections by not requesting a hearing, and instead it was the client's burden to ask for a hearing and present evidence supporting the admissibility of the expert testimony. Hearn v. Snapka, 2012 Tex. App. LEXIS 10788, 2012 WL 7283791 (Tex. App. Corpus Christi Dec. 28 2012).

1012. Attorney made 12 objections to the expert evidence, and at least four called into question the reliability of the expert's methodology and opinions, which shifted the burden to the client on the issue of admissibility, but instead of trying to meet this burden, the client relied on an argument of waiver, which was rejected by the court; as the client did not affirmatively establish that reliability of each opinion in her expert's affidavit, the trial court had discretion to strike it, and while this compelled the court to affirm the ruling, it was to be noted that the speculative nature of the expert's testimony provided additional support for the ruling. Hearn v. Snapka, 2012 Tex. App. LEXIS 10788, 2012 WL 7283791 (Tex. App. Corpus Christi Dec. 28 2012).

1013. In light of an expert's opinion that a major change in the relevant area of law eliminated the settlement value of the client's injury claims, the trial court could have found that her claims were like those where projecting the possibility of settlement was speculative, and thus the trial court did not abuse its discretion in striking the expert's affidavit. Hearn v. Snapka, 2012 Tex. App. LEXIS 10788, 2012 WL 7283791 (Tex. App. Corpus Christi Dec. 28 2012).

1014. Foundation of an expert's opinions conflicted with the Texas Supreme Court's holding that there was some safe asbestos exposure; the expert did not connect the client's well-differentiated papillary mesothelioma to any specific product or defendant, and thus was not evidence of causation, and thus the trial court did not abuse its discretion in striking the expert's affidavit. Hearn v. Snapka, 2012 Tex. App. LEXIS 10788, 2012 WL 7283791 (Tex. App. Corpus Christi Dec. 28 2012).

1015. Expert's testimony did not have any defendant-specific evidence regarding the approximate amount to which the client was exposed, and the expert's testimony was anecdotal evidence of some asbestos exposure, which was insufficient to prove causation, and thus the trial court did not abuse its discretion in striking the expert's affidavit. Hearn v. Snapka, 2012 Tex. App. LEXIS 10788, 2012 WL 7283791 (Tex. App. Corpus Christi Dec. 28 2012).

1016. Expert's opinions were based on the assumption that the standard used by the Texas Supreme Court in one case would not have applied to the underlying claims of the client because the supreme court case was still on appeal when the client's claims were litigated, but this was problematic because (1) it was pure speculation that the expert assumed an asbestos defendant in 2004-05 would not have made the same arguments as the defendant in the supreme court case, and (2) it was unreasonable to assume that in 2004-05, the client would not have been required to meet the same standards that the plaintiff in the supreme court case was expected to meet in 2002; the trial court did not abuse its discretion in excluding this expert's affidavit. Hearn v. Snapka, 2012 Tex. App. LEXIS 10788, 2012 WL 7283791 (Tex. App. Corpus Christi Dec. 28 2012).

1017. Mother failed to preserve error regarding her challenge to certain testimony, as she did not obtain a running objection or object when the witness took the stand; counsel acknowledged that she had to make another objection to the testimony to preserve error, but when the witness took the stand, there was no objection to the admissibility of the testimony or the witness's expert qualifications, and thus the mother waived her objection to the witness's testimony as an expert. In the Interest of A.C., 394 S.W.3d 633, 2012 Tex. App. LEXIS 10299, 2012 WL 6204285 (Tex. App. Houston 1st Dist. Dec. 13 2012).

1018. Assuming without deciding that the trial court abused its discretion in permitting expert witness testimony, the court could not find that appellant's substantial rights were affected, for purposes of Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b), given in part that (1) the jury heard evidence that appellant, while driving, weaved, struck a guardrail, failed to signal, and almost hit another car, (2) the jury saw a video recording showing appellant crossing into another lane and failing to signal, (3) the jury heard officer testimony that appellant smelled of alcohol, was wobbly and had slow speech and a cold beer can in his vehicle, and (4) appellant admitted to drinking and taking prescription medication; the defense reminded the jury that the expert was not a doctor, and the jury was advised that it could only find appellant guilty if it found so beyond a reasonable doubt, and thus even without the expert's

testimony, there was sufficient evidence from which the jury could have found appellant guilty of driving with a child passenger while intoxicated. Miller v. State, 2012 Tex. App. LEXIS 10264, 2012 WL 6213735 (Tex. App. Beaumont Dec. 12 2012).

1019. In a wife's suit to enforce the property division in the parties' divorce decree, the wife's experts could rely on invoices in forming their opinions about reasonable repair costs for property left in poor condition by the husband. In re Marriage of Bivins, 393 S.W.3d 893, 2012 Tex. App. LEXIS 10139, 2012 WL 6099066 (Tex. App. Waco Dec. 6 2012).

1020. Finding that expert testimony regarding "weapon focus effect" in an aggravated robbery case was not relevant was inappropriate given the content of the expert testimony, the context in which it was offered, and, most pertinently, the paucity of other evidence to establish defendant's identity as the assailant. Blasdell v. State, 384 S.W.3d 824, 2012 Tex. Crim. App. LEXIS 1604 (Tex. Crim. App. 2012).

1021. Revocation of defendant's deferred-adjudication community supervision based on the results of polygraph examinations was inappropriate because, while the psychotherapist did make the conclusory statement that those in his field reasonably relied on polygraph results, the sole basis of his opinion was the results of a test that had been held inadmissible because it was not reliable. Total reliance on inadmissible and untrustworthy facts could not be reasonable, nor would such an opinion achieve the minimum level of reliability necessary for admission under Tex. R. Evid. 702. Leonard v. State, 385 S.W.3d 570, 2012 Tex. Crim. App. LEXIS 1598 (Tex. Crim. App. Nov. 21 2012).

1022. Appellant was not suffering from mental illness or delusions that negated an element of the crime of attempted capital murder, and an expert's testimony did not truly negate the element of mens rea, but was an opinion that appellant did not want to hurt anyone; thus, the court rejected appellant's claim that the trial court erred in excluding the expert testimony. Garcia v. State, 2012 Tex. App. LEXIS 9880 (Tex. App. Waco Nov. 15 2012).

1023. Testimony of a property owner's valuation expert was reliable under Tex. R. Evid. 702 because he followed a methodology approved by Tex. Tax Code Ann. § 42.26(a)(3) for estimating an appraised value in accordance with Tex. Tax Code Ann. §§ 1.04(8), 23.01(a).

1024. Appellants did not object to an expert's testimony before trial or when the testimony was offered, and therefore whether the issue was preserved for review depended on whether appellants challenged the testimony as unreliable or conclusory. Church v. Exxon Mobil Corp., 2012 Tex. App. LEXIS 9321 (Tex. App. Houston 1st Dist. Nov. 1 2012).

1025. Appellants argued that an expert's experiments did not take into account all the pertinent factors, and to evaluate the merits, the court had to examine whether too great an analytical gap existed between the conditions that were present for the experiments and the conditions in the restroom on the day of the injury; this was the type of complaint that required a timely objection in the trial court, because appellants did not object prior to trial or when the testimony was offered, they did not preserve this issue for review. Church v. Exxon Mobil Corp., 2012 Tex. App. LEXIS 9321 (Tex. App. Houston 1st Dist. Nov. 1 2012).

1026. Appellant's objection to fingerprint analysis for expert witness purposes was made after the State rested its case, and thus the objection was not timely, and the objection was not preserved for appeal under Tex. R. App. P. 33.1. Stubblefield v. State, 2012 Tex. App. LEXIS 8846, 2012 WL 5258675 (Tex. App. Tyler Oct. 24 2012).

1027. Defendant's convictions for continuous sexual abuse of a young child and indecency with a child by exposure were proper because the admission of a licensed psychologist's testimony was appropriate. The testimony was reliable since the psychologist relied on and utilized the principles in the relevant area of psychology. Lubojasky v. State, 2012 Tex. App. LEXIS 8760, 2012 WL 5192919 (Tex. App. Austin Oct. 19 2012).

1028. Trial court did not abuse its discretion by admitting the member's expert's testimony where it could have reasonably concluded that the expert opinions were more than just ordinary, bare assertions based solely on the husband's valuations. Whitmire v. Nat'l Cutting Horse Ass'n, 2012 Tex. App. LEXIS 8518 (Tex. App. Fort Worth Oct. 11 2012).

1029. In a felony DWI case, the trial court erred by allowing a forensic scientist to estimate defendant's blood-alcohol level based on a blood test taken several hours after his arrest; the scientist did not have sufficient facts regarding defendant's characteristics to conduct a proper retrograde extrapolation analysis. The error was harmless, because the other evidence in the case was sufficient to prove that defendant was intoxicated. Hazlip v. State, 2012 Tex. App. LEXIS 8141 (Tex. App. Beaumont Sept. 26 2012).

1030. Trial court did not abuse its discretion by admitting the testimony of the sexual assault nurse examiner who examined the child victim during the course of the State's investigation because she was deemed an expert in sexual abuse examinations, so her expert testimony could be helpful to the jury, including to explain why physical evidence would not necessarily be present on the body of a sexual assault complainant. The nurse merely reported the events of the examination and her clinical findings, and she did not offer an opinion as to whether the victim had been sexually assaulted and did not comment on the victim's veracity. Owens v. State, 381 S.W.3d 696, 2012 Tex. App. LEXIS 7922, 2012 WL 4098990 (Tex. App. Texarkana Sept. 19 2012).

1031. Trial court could have found an expert's opinion unreliable or unfounded, given that one could not deduce from the fact that an employee had sleep issues that he was tired on the day of the accident, or that having sleep issues meant the employee had to have fallen asleep right before or during the accident. Schmieding v. Mission Petroleum Carriers, Inc., 2012 Tex. App. LEXIS 7907, 2012 WL 4092716 (Tex. App. Amarillo Sept. 18 2012).

1032. Trial court did not err by admitting the testimony of a detective during defendant's trial for aggravated sexual assault of a child because defendant failed to point to any testimony from the detective that constituted an opinion about whether the victim was telling the truth, but rather testified that the grooming process could lead to memory lapses and result in a delayed outcry in many child sexual abuse cases. The detective also opined that the victim's behavior was consistent with that of children who had been groomed and that her lack of recall was typical. Ambriati v. State, 2012 Tex. App. LEXIS 7594, 2012 WL 3860642 (Tex. App. Beaumont Sept. 5 2012).

1033. In a condemnation case, expert testimony from a lessor under Tex. R. Evid. 702 was improperly admitted because it violated the value-to-the-taker rule by impermissibly focusing on the benefit in avoiding the cost of removing a gas processing facility under a lease agreement. However, the trial court did not abuse its discretion in excluding a lessee's expert testimony because it did not explain why the existing use of the property was not the highest and best use, did not offer fair market value of the land based on its condition at the time of condemnation, and did not account for all relevant factors affecting valuation. Enbridge Pipelines (e. Tex.) L.P. v. Avinger Timber, Llc, 386 S.W.3d 256, 2012 Tex. LEXIS 745, 55 Tex. Sup. Ct. J. 1387, 178 Oil & Gas Rep. 475 (Tex. 2012).

1034. Court did not err during defendant's murder trial in allowing the State to present expert testimony that the victim was likely killed on the back patio of the victim's house; the expert had training in the area of conclusions to be drawn from blood loss. Burris v. State, 2012 Tex. App. LEXIS 7446, 2012 WL 3793268 (Tex. App. Tyler Aug. 30 2012).

1035. Trial court did not abuse its discretion in allowing the State to elicit testimony from two witnesses, a forensic interviewer and a therapist because their testimony did not suggest that the victims' allegations of sexual abuse were truthful. Rather, both experts' testimony dealt with general behavioral characteristics and traits shown by sexually abused children. Pawlak v. State, 2012 Tex. App. LEXIS 7109, 2012 WL 3612493 (Tex. App. Corpus Christi Aug. 23 2012).

1036. Trial court did not improperly limit the expert's testimony because, after hearing the expert's basis for her opinions, during which she admitted that she could not opine that the notches on the victim's hymen were not caused by sexual abuse, it restricted her from testifying that the notches described by a sexual assault nurse examiner on the victim were not caused by sexual abuse. Hernandez-Mora v. State, 2012 Tex. App. LEXIS 6997, 2012 WL 3631640 (Tex. App. Tyler Aug. 22 2012).

1037. In a product liability action, the trial court erred in deeming any of appellants' expert testimony to be unreliable because the experts provided sufficient evidence on the origin and cause of a fire in a manufacturing facility; appellants' experts established that they relied upon generally accepted scientific methodologies and completed all of the testing that was feasible for them to complete. Control Solutions, Inc. v. Gharda Usa, Inc., 394 S.W.3d 127, 2012 Tex. App. LEXIS 6793, 2012 WL 3525372 (Tex. App. Houston 1st Dist. Aug. 16 2012).

1038. Defendant's conviction for aggravated sexual assault of a child under the age of 14 was improper because admitting the statistical opinion on false allegations was error and the admission of the opinion likely affected defendant's substantial rights. An expert was not permitted to give an opinion as to whether a person, or a class of persons to which the complainant belonged, was truthful. Wiseman v. State, 394 S.W.3d 582, 2012 Tex. App. LEXIS 6255, 2012 WL 3125130 (Tex. App. Dallas July 31 2012).

1039. Testimony of a minority shareholder's valuation expert in a shareholder oppression case was not conclusory and did not assume facts contrary to the record. The expert gave detailed testimony about his opinions and the relevant facts regarding amounts paid by the majority shareholder to himself and his children, and the expert's discussion of the corporation's tax status did not assume an incorrect status. Cardiac Perfusion Servs. v. Hughes, 380 S.W.3d 198, 2012 Tex. App. LEXIS 6134, 2012 WL 3038504 (Tex. App. Dallas July 26 2012).

1040. Defendant's convictions for aggravated sexual assault of a child under the age of 14 was appropriate because a social worker's testimony was properly admitted since she was qualified to give her testimony; she did not need to have personal knowledge of all the facts on which she bases her opinion; and testimony abut the behavior of child sex abuse victims was admissible under Tex. R. Evid. 702. Brucia v. State, 2012 Tex. App. LEXIS 5844, 2012 WL 2926203 (Tex. App. Dallas July 19 2012).

1041. Trooper had 11 years of experience, was a certified field sobriety instructor, had made over 500 driving while intoxicated arrests, and his testimony met the criteria for nonscientific expert witness testimony; the accuracy of field sobriety tests was a proper area of testimony for this trooper, and his tesitmony was important for the jury in deciding the issue of intoxication in a driving while intoxicated case, such that the trial court did not abuse its discretion in admitting his testimony under Tex. R. Evid. 702. Stovall v. State, 2012 Tex. App. LEXIS 5571, 2012 WL 2862369 (Tex. App. Eastland July 12 2012).

1042. Trial court erred in a medical malpractice action in excluding testimony by appellants' experts because based upon their years of treating patients with renal insufficiency and the unequivocal autopsy and toxicology reports supporting their opinions that the patient died from an accidental overdose of Hydrocodone and Oxycontin, their causation opinions met the reliability requirements for admissibility. White v. Scaff, 2012 Tex. App. LEXIS 5346, 2012 WL 2608626 (Tex. App. Corpus Christi July 5 2012).

1043. In a suit for breach of a noncompete agreement, an expert's use of historical sales data before and after the competitor's entry into the market was an acceptable method for calculating lost profits. Heritage Operating, L.P. v. Rhine Bros., Llc, 2012 Tex. App. LEXIS 4939, 2012 WL 2344864 (Tex. App. Fort Worth June 21 2012).

1044. There was no abuse of discretion in allowing the witness's testimony concerning the behavior of child sexual assault victims, because the crux of the witness's testimony was that children who had been the victims of abuse could make a delayed outcry since they didn't know what to do with the abuse, and the witness did not testify concerning the complainant's truthfulness; expert testimony that a child exhibited behavioral characteristics that had been empirically shown to be common among children who had been abused was relevant and admissible as substantive evidence under Tex. R. Evid. 702. Hassell v. State, 2012 Tex. App. LEXIS 4972, 2012 WL 2353713 (Tex. App. Dallas June 21 2012).

1045. The patient did not show that any error in excluding his expert as an expert witness probably caused the rendition of an improper judgment, Tex. R. Evid. 702, where the trial court could conclude that the expert's testimony confused the issue and would not assist the jury with its assigned task under Tex. Health & Safety Code Ann. § 841.002. In re Bernard, 2012 Tex. App. LEXIS 4681, 2012 WL 2150328 (Tex. App. Beaumont June 14 2012).

1046. At the proceeding to commit appellant as a sexually violent predator, his counsel did not object that an expert's testimony was inadmissible under Tex. R. Evid. 02 because it commented on appellant's credibility; therefore, the alleged error was not preserved for review under Tex. R. App. P. 33.1. In re Commitment of Petrus, 2012 Tex. App. LEXIS 4686, 2012 WL 2150336 (Tex. App. Beaumont June 14 2012).

1047. During voir dire, a counselor said her testimony on the cycle of violence was standard and she gave the trial court reason to find that her testimony would use principles used in the field, plus case law and literature confirmed that her testimony was consistent with that testimony that had been ruled admissible in other cases; the court found no error in the admission of the testimony. Brewer v. State, 370 S.W.3d 471, 2012 Tex. App. LEXIS 4519, 2012 WL 2290871 (Tex. App. Amarillo June 7 2012).

1048. Counselor's inability to cite studies did not make her testimony unreliable, given the nature of her expertise field; the trial court properly limited the testimony to comport with the counsel's expertise, and the court found no abuse of discretion in admitting her testimony in order to help the jury understand why the victim delayed in calling the police in this aggravated assault case involving appellant, the victim's fiance. Brewer v. State, 370 S.W.3d 471, 2012 Tex. App. LEXIS 4519, 2012 WL 2290871 (Tex. App. Amarillo June 7 2012).

1049. Record contained sufficient evidence showing that enzyme-multiplied immunoassay technique (EMIT), with or without a confirmation test, was reliable scientific evidence under Tex. R. Evid. 702, and therefore the appellate court erred by holding that EMIT tests were unreliable without a confirmation test; the court concluded that the reliability of even a single, unconfirmed EMIT test had been sufficiently established that it met the first two Kelly prongs. The record showed that: (1) the expert witnesses testified that the underlying scientific theory and technique of the EMIT test were accepted as valid by the accredited Texas Department of Public Safety laboratory and the greater forensic toxicology community in Texas; (2) an expert testified that there was literature supporting EMIT as a reliable screening test; (3) from the experts' testimony, the trial court understood that EMIT was a screening test based on enzyme reactions; (4) the expert testimony suggested that the potential error rate in EMIT was very low; (5) the experts testified as to the validity and reliability of the EMIT test and were subject to cross-examination by the State, and many of the courts in the cases cited relied upon expert evaluations of the EMIT technique from their records; and (6) the qualifications of defendant's experts were such that the court believed it could confidently rely upon their testimony. Somers v. State, 368 S.W.3d 528, 2012 Tex. Crim. App. LEXIS 753 (Tex. Crim. App. 2012).

1050. Family therapist did not testify, for purposes of Tex. R. Evid. 702 in appellant's trial for aggravated sexual assault, that she believed the allegations, and she did not give a direct opinion that the child victim had been telling the truth; the therapist's testimony that the victim showed behavior that was consistent with abuse was not any comment on the child's truthfulness, and the trial court did not err in admitting the testimony. Lopez v. State, 2012 Tex. App. LEXIS 4533, 2012 WL 2053846 (Tex. App. Waco June 6 2012).

1051. Trial court properly followed the Nenno standards concerning the State's expert; although the trial court did not specifically state that the expert's information was relevant, it found the expert qualified under Tex. R. Evid. 702 which included a relevancy component. The expert testified that he specialized in the area of child sexual abuse; he testified about general principles in the field and that he used those principles in his work. Odom v. State, 2012 Tex. App. LEXIS 4316, 2012 WL 1964580 (Tex. App. Houston 14th Dist. May 31 2012).

1052. Grant of summary judgment in favor of the medical center in the spouse's action after the patient died was inappropriate because a physician's testimony offered more than merely his credentials and a subjective opinion. He had a sufficiently reliable foundation for his opinions on proximate cause to warrant admission of his testimony. Constancio v. Shannon Med. Ctr., 2012 Tex. App. LEXIS 4339 (Tex. App. Austin May 22 2012).

1053. Appraiser's testimony made clear that he followed a statutorily-approved methodology for estimating an appraised value, Tex. Tax Code Ann. § 42.26(a)(3), where he used the appraisal value of the comparable properties as listed in the tax rolls as his starting point, and when he adjusted the values of the comparable properties, he relied on generally accepted appraisal principles that were commonly used among professionals in his field; the appraiser testified that his methodology had been tested, was generally accepted as valid, and was mandated, to some extent, by statute, and the property owner met its burden to show the reliability of the appraiser's testimony, and the trial court did not abuse its discretion in admitting his testimony. Harris County Appraisal Dist. v. Houston 8th Wonder Prop., L.P., 2012 Tex. App. LEXIS 3889, 2012 WL 1757591 (Tex. App. Houston 1st Dist. May 17 2012).

1054. In a divorce proceeding, the trial court did not abuse its discretion in allowing an expert witness to testify regarding the net asset value of a business run by appellant former husband during the marriage because the expert had been a certified public accountant for twenty-five years and had experience using the net asset value method for valuing businesses. Mora v. Mora, 2012 Tex. App. LEXIS 3831, 2012 WL 1721540 (Tex. App. San Antonio May 16 2012).

1055. Doctor's testimony that the worker suffered from reflex sympathetic dystrophy/complex regional pain syndrome was not conclusory and was based on facts he documented during treating the worker for 14 months; the doctor relied on his training and experience in diagnosing the worker, and the criteria were the same as most of the clinical findings set forth in medical guides. Charter Oak Fire INS. Co. v. Swanigan, 2012 Tex. App. LEXIS 3312 (Tex. App. Fort Worth Apr. 26 2012).

1056. Doctor's testimony that a worker's injury was a producing cause of his reflex sympathetic dystrophy/complex regional pain syndrome was not conclusory, but was grounded in facts he documented concerning the worker's treatment and symptoms. Charter Oak Fire INS. Co. v. Swanigan, 2012 Tex. App. LEXIS 3312 (Tex. App. Fort Worth Apr. 26 2012).

1057. Defendant did not make a reliability argument to expert testimony in the trial court, and thus he failed to preserve error. Foley v. State, 2012 Tex. App. LEXIS 3416, 2012 WL 1499368 (Tex. App. Austin Apr. 25 2012).

1058. Even if error has been preserved, the court would still reject appellant's reliability argument because (1) the expert testified that literature existed that supported his methodology, (2) the court does not know of any authority

stating that an expert must name specific published works to establish the reliability of his methodology, (3) the expert gave the names of law enforcement agencies that employed his methodology, and (4) even if he did not cite specific works that were published, the expert gave many bases on which the trial court could have found that his methodology was reliable. Foley v. State, 2012 Tex. App. LEXIS 3416, 2012 WL 1499368 (Tex. App. Austin Apr. 25 2012).

1059. During defendant's trial for sexual assault of a child, the court did not err in admitting the testimony of the director of a trauma center, who was trained as a clinical psychologist with specialization in psychological trauma, because the director was qualified to opine about the impact of sexual assault, underage marriage, and polygamy on children. Jessop v. State, 368 S.W.3d 653, 2012 Tex. App. LEXIS 3176, 2012 WL 1402117 (Tex. App. Austin Apr. 19 2012).

1060. Finding against the property owner in his inverse condemnation counterclaim against the city was appropriate because the engineer's testimony constituted legally sufficient evidence from which the trial court could have concluded that the construction had not negatively impacted drainage from the tract. Martini v. City of Pearland, 2012 Tex. App. LEXIS 2972, 2012 WL 1345744 (Tex. App. Houston 14th Dist. Apr. 17 2012).

1061. Expert's testimony in a condemnation case, opining that the damage to the remainder property was the loss of the entire income-producing value of two buildings, was reliable because it was based on a proper measure of damages in stating that a buyer would place no value on two buildings because their close proximity to the highway after the taking meant that they would be nonconforming under a city zoning ordinance if annexed. State v. Ledrec, Inc., 366 S.W.3d 305, 2012 Tex. App. LEXIS 2895 (Tex. App. Fort Worth Apr. 12 2012).

1062. State claimed that the court should not consider an argument in its harm analysis because it was invited; while this might be persuasive if appellant was complaining about the argument, the issue was not whether the State's argument was proper or improper, but whether the error in the admission of expert evidence affected appellant's substantial rights, and in making this determination, the court reviewed the entire record, including counsels' arguments. Tran v. State, 2012 Tex. App. LEXIS 2831 (Tex. App. Dallas Apr. 11 2012).

1063. Appellant consistently denied assaulting the victim and argued that she made up the accusation so her mother would not tell her father that she had been kissing a boy in her room, and although the victim's friend's testimony supported the State's theory that there was no fabrication, the case remained completely about credibility; the expert's complained-of testimony, that 98 percent of accusers were telling the truth, struck at the heart of the defense, as the expert was allowed to testify that it had been scientifically proven that children told the truth except in few instances, and because the complained-of evidence supplanted the jury in its decision concerning whether the child's testimony was credible, the court was left with grave doubt as to whether the result of the trial for aggravated sexual assault of a child under 14 was free from the influence of the error, and the court reversed. Tran v. State, 2012 Tex. App. LEXIS 2831 (Tex. App. Dallas Apr. 11 2012).

1064. Trial court did not abuse its discretion in overruling appellant's objection to an expert's testimony about whether the information from the child victim in this indecency case came from the child or another source; the question asked for the same opinion the witness gave in another answer to an unobjected-to question, plus the trial court could have considered the question to ask about indications of coaching, which was permissible, instead of whether the witness thought the child was truthful, and the witness's answer did not convey her opinion of the truthfulness of the child, but only that the allegations came from the child instead of someone else telling the child what to say. Cantu v. State, 366 S.W.3d 771, 2012 Tex. App. LEXIS 2838 (Tex. App. Amarillo Apr. 11 2012).

1065. In a personal injury action arising from an accident in which appellee was injured when another driver's vehicle struck her vehicle, although a chiropractor was not appellee's treating chiropractor after the car accident, the

trial court did not err in allowing him to testify about causation and damages, in light of his qualifications and testimony. Among other things, the chiropractor stated that part of his training and duties as a chiropractor was to review hospital and medical records and to consult with other medical specialists to treat patients. Haddard v. Rios, 2012 Tex. App. LEXIS 2706 (Tex. App. Corpus Christi Apr. 5 2012).

1066. Appellant claimed the trial court erred in allowing victim impact testimony in violation of Tex. R. Evid. 702; the test for evaluating expert testimony regarding "soft sciences" was the applicable test in this case. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

1067. At defendant's trial for two counts of continuous sexual abuse of a young child and one count of aggravated sexual assault, the trial court abused its discretion by admitting opinion testimony from an investigator about the truthfulness of the fifteen-year-old victim. Such testimony was inadmissible under Tex. R. Evid. 702. Lewis v. State, 2012 Tex. App. LEXIS 2052, 2012 WL 858601 (Tex. App. Fort Worth Mar. 15 2012).

1068. Grant of summary judgment in favor of the company men and others in the employee's defamation action was proper because expert testimony about bankruptcy was not relevant to any element of the defamation claims, nor was the bankruptcy testimony relevant to any element of the employee's other pleaded claims. Thus, the expert was property struck as an expert witness. Bell v. Bennett, 2012 Tex. App. LEXIS 2097, 2012 WL 858603 (Tex. App. Fort Worth Mar. 15 2012).

1069. Trial court did not abuse its discretion in admitting the opinion of the children's treating psychologist for purposes of Tex. R. Evid. 702 and considering it alongside other evidence, and the court could not say his analysis regarding the children's best interests was inadmissible because he did not interview the birth parents; he found that the primary factor in promoting the children's best interests was stability, his opinion that termination of the father's rights was in the children's best interest was consistent with his emphasis on the stability of the children's placement with a couple, and any weaknesses of the psychologist's opinion, if any, went to the weight the trial court accorded to the opinion. Aguilar v. Foy, 2012 Tex. App. LEXIS 1685, 2012 WL 677497 (Tex. App. Austin Mar. 1 2012).

1070. Court did not abuse its discretion in determining that a deputy was qualified to testify as an expert regarding cell phone tracking because he had completed a course in reading cell phone records, identifying cell phone tower locations, and plotting and tracking cell phone activity. Additionally, the deputy described for the jury how he used the locations of the cell phone towers that relayed defendant's calls to track the location of defendant's phone to a particular geographic area. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

1071. Court properly allowed an expert witness to testify about the similarity of physical evidence recovered from the crime scene because the tapes from the crime scene and defendant's home were offered to show that because the tapes were similar, it was more likely that they came from a common source, and if they came from a common source, it was more likely that the tape in defendant's home came from the packaging for the marijuana in the murder victim's home. The testimony showed the similarities of the tapes and was therefore relevant to show that defendant was at the crime scene and had a motive for shooting the victims. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

1072. In a breach of contract case, a trial court did not err by allowing testimony from experts regarding the lost profits of a dealership that was delayed in opening; the testimony was not unreliable based upon the use of a yardstick method, and, even though issues relating to planning potential, a comparable dealership, or the applicable time period were hotly disputed, the actual damages awarded were within the range of a manufacturer's own estimate of net profits and a dealer's witnesses. Even if there was an error in the admission of expert testimony, it

was harmless. Daimlerchrysler Motors Co., Llc v. Manuel, 362 S.W.3d 160, 2012 Tex. App. LEXIS 1489 (Tex. App. Fort Worth Feb. 24 2012).

1073. Patient claimed the evidence was insufficient to prove that he suffered from a behavioral abnormality, for purposes of Tex. Health & Safety Code Ann. §§ 841.002(2), 841.003(a), but he did not object at trial or file post-judgment motions asking the trial court to direct a verdict for him based on the claim that no evidence had been admitted that showed he had a behavioral abnormality; even had the issue been properly preserved, the arguments were without merit because the patient did not object to the reliability of expert testimony, those experts' opinions were not conclusory, each expert performed an assessment in accordance with his training, and each expert stated that the patient suffered from a behavioral abnormality, such that there was legally sufficient evidence to support that finding. In re Macon, 2012 Tex. App. LEXIS 1182, 2012 WL 503678 (Tex. App. Beaumont Feb. 16 2012).

1074. In a condemnation proceeding in which plaintiff county acquired a portion of commercial property used for a car wash in order to widen a county roadway, the trial court did not abuse its discretion in excluding the county's appraisal expert because the expert's bald assurance that he used a widely accepted appraisal method was insufficient to establish reliability. His report, as well as the underlying data and methodology, did not reflect application of an accepted appraisal method to arrive at the fair market value of the remainder after the taking where he simply took the market value of the whole and assumed--without any basis--that a willing buyer and willing seller would agree to reduce the market value by one-fifth after the taking. Dallas County v. Crestview Corners Car Wash, 370 S.W.3d 25, 2012 Tex. App. LEXIS 1269 (Tex. App. Dallas Feb. 16 2012).

1075. Trial court abused its discretion by allowing the arresting officer to testify regarding his opinion on defendant's prescription medications in conjunction with his ultimate opinion on defendant's intoxication because the officer's testimony was neither relevant nor reliable and the officer was not qualified to offer such detailed testimony as required by Tex. R. Evid. 702;.the officer conceded that he was not certified by the police department as a drug-recognition expert, he did not conduct the standard 12-step examination that would have been conducted by a drug-recognition expert, he did not contact such an expert after defendant refused a breath test, and the officer's testimony did not reveal that he had expert knowledge about the medications that defendant had taken or their effects. The error was not harmless because the officer's extensive testimony about defendant's prescription medications was unreliable and the testimony was constituted a substantial part of the State's case. Delane v. State, 369 S.W.3d 412, 2012 Tex. App. LEXIS 905, 2012 WL 340234 (Tex. App. Houston 1st Dist. Feb. 2 2012).

1076. Assuming the trial court erred in excluding a doctor's expert testimony under Tex. R. Evid. 702, because appellant was able to present her theory through the testimony of other witnesses, and she emphasized the defense during closing argument, she was not effectively precluded from presenting a defense for Sixth Amendment purposes, and the court applied the harmless error standard of Tex. R. App. P. 44.2(b). Young v. State, 358 S.W.3d 790, 2012 Tex. App. LEXIS 158 (Tex. App. Houston 14th Dist. Jan. 10 2012).

1077. Because appellant's issue regarding a doctor's excluded expert testimony addressed only the failure to provide adequate protection, and the court found the evidence supporting all three theories including failure to provide adequate protection sufficient to support appellant's conviction of recklessly causing serious bodily injury to a child younger than 15, the trial court's error in excluding the doctor from testifying was harmless. Young v. State, 358 S.W.3d 790, 2012 Tex. App. LEXIS 158 (Tex. App. Houston 14th Dist. Jan. 10 2012).

1078. During a murder trial, the court did not err in refusing to permit defendant's expert witness to testify because how a trained Marine instinctively reacted to a perceived threat was not relevant to the issue of whether an ordinary and prudent man, viewing the circumstances from defendant's viewpoint, would have formed a reasonable belief that deadly force was immediately necessary to protect himself from the use or attempted use of unlawful deadly force. Echavarria v. State, 362 S.W.3d 148, 2011 Tex. App. LEXIS 10188 (Tex. App. San Antonio Dec. 30 2011).

1079. Expert reports cannot be conclusory to satisfy Tex. Civ. Prac. & Rem. Code Ann. § 74.351, and the rule that a conclusory opinion is not probative is not a mere procedural hurdle, as the factfinder typically lacks the expertise necessary to form an opinion without expert assistance, and this is why expert testimony is admitted in the first place under Tex. R. Evid. 702; it is the expert's explanation of how and why causation exists that allows the factfinder to weigh the credibility of the expert's opinion and, when expert opinions conflict, to decide which testimony to disregard. Shenoy v. Jean, 2011 Tex. App. LEXIS 10212, 2011 WL 6938538 (Tex. App. Houston 1st Dist. Dec. 29 2011).

1080. While the State failed to meet its burden that a pediatric hematologist was qualified to opine that a child's fatal injuries were consistent with shaken baby syndrome, the error was harmless under Tex. R. App. P. 44.2(b); the evidence of defendant's guilt was strong, particularly because four other experts had also reached the conclusion that the child's injuries were caused by shaking. Guerrero v. State, 2011 Tex. App. LEXIS 10080, 2011 WL 6808314 (Tex. App. Houston 14th Dist. Dec. 22 2011).

1081. Evidence was sufficient to establish that the seized substance contained cocaine, for purposes of appellant's conviction of possession of cocaine in the amount of four grams or more but less than 200 grams, given that (1) a forensic scientist testified that the substance contained based-form cocaine and weighed 19.31 grams, (2) this kind of expert testimony had been found to be reliance, (3) appellant did not object to the scientist's testimony, (4) an officer recognized two large rocks to be crack cocaine, and (5) during a field test, the substance tested positive for cocaine. Traylor v. State, 2011 Tex. App. LEXIS 9933, 2011 WL 6307835 (Tex. App. Eastland Dec. 15 2011).

1082. Regarding a sergeant's accident reconstruction expert evidence testimony, appellant offered no evidence that either the methodology the sergeant described or the way he applied it was unreliable; virtually all of the sergeant's testimony was cumulative of other eyewitness testimony that described the crash and the force of the impact, and thus any alleged error would have been harmless under Tex. R. App. P. 44.2(b). Howard v. State, 2011 Tex. App. LEXIS 9423 (Tex. App. Houston 14th Dist. Dec. 1 2011).

1083. Even if a trial court erred on a petition to commit appellant as a sexually violent predator in excluding the testimony of a consulting expert, the error was harmless under Tex. R. App. P. 44.1(a)(1); after the trial court struck the expert, in lieu of a continuance, the trial court helped appellant retain another expert to testify at trial. In re Hitt, 2011 Tex. App. LEXIS 9377 (Tex. App. Beaumont Dec. 1 2011).

1084. Property owners' expert's testimony was properly admitted because the expert's opinion was that the owners' property flooded because of an increase in elevation of the development relative to the owners' property; that testimony was neither speculative nor otherwise unreliable. The expert specifically testified the increase in elevation altered historical surface water drainage patterns, and his testimony was based on his own visual inspection of the property where he noted diversions from the historical drainage patterns due to increases in elevation, as well as a drainage area map used by the company that constructed the development. Marin Real Estate Partners., L.P. v. Vogt, 373 S.W.3d 57, 2011 Tex. App. LEXIS 9259, 2011 WL 5869520 (Tex. App. San Antonio Nov. 23 2011).

1085. Property owners' appraiser's testimony was properly admitted because the appraiser specifically stated he developed his estimate based on the one-acre tract as a property independent from the nineteen-acre tract. To develop his estimate, he researched comparable sales in an attempt to find the best comparison possible and he also prepared his appraisal using the "highest and best use" analysis, which required the appraiser to consider what was the potential best use for the property being appraised. Marin Real Estate Partners., L.P. v. Vogt, 373 S.W.3d 57, 2011 Tex. App. LEXIS 9259, 2011 WL 5869520 (Tex. App. San Antonio Nov. 23 2011).

1086. Expert's testimony was sufficiently tied to the facts of the case; the expert specifically referenced appellant's testimony and interviews he gave. Zavala v. State, 401 S.W.3d 171, 2011 Tex. App. LEXIS 8671, 2011 WL 5156843 (Tex. App. Houston 14th Dist. Nov. 1 2011).

1087. Although testimony by an expert that a witness displays malingering behavior might approach the line of commenting on the witness's truthfulness, appellant did not show how an expert's testimony caused harm for purposes of Tex. R. App. P. 44.2(b); she informed the jury that she could not express an ultimate opinion as to whether appellant suffered from dissociative amnesia without testing him, and at most, the expert's testimony was unhelpful. Zavala v. State, 401 S.W.3d 171, 2011 Tex. App. LEXIS 8671, 2011 WL 5156843 (Tex. App. Houston 14th Dist. Nov. 1 2011).

1088. In a case involving the civil commitment of a sexually violent predator, to the extent that a patient complained about the foundational data used by experts in reaching their opinions, the complaint was not preserved for appellate review because no objection was made to the use of records or actuarial tests. To the extent that the patient challenged the expert opinions as baseless and not relevant, the testimony of the experts was not conclusory or speculative; the experts testified that they based their opinions on the facts and date gathered from the records they reviewed, their interviews with the patient, the risk assessment conducted, and the actuarial tests administered. In re Mason, 2011 Tex. App. LEXIS 8531 (Tex. App. Beaumont Oct. 27 2011).

1089. Whether a psychiatrist's testimony was admissible was at least subject to reasonable disagreement, and thus the trial court did not abuse its discretion in excluding the expert's testimony regarding appellant's intent. Ernst v. State, 2011 Tex. App. LEXIS 8645, 2011 WL 5182599 (Tex. App. Corpus Christi Oct. 27 2011).

1090. During defendant's trial for capital murder, the court erred in holding that a defense expert on eyewitness identifications was not permitted to testify before the jury because the evidence, which was reliable and relevant, would have assisted the jury by increasing the jurors' awareness of biasing factors in eyewitness identification. Tillman v. State, 354 S.W.3d 425, 2011 Tex. Crim. App. LEXIS 1343 (Tex. Crim. App. Oct. 5 2011).

1091. Appellant argued that a corporal's testimony should have been excluded under Tex. R. Evid. 702 because he contradicted himself about how the dog alerted and the dog's reward; if two distinct rewards existed, appellant failed to put on conflicting testimony that multiple rewards for drug dogs was improper, and the trial court could have found that the use of multiple rewards was a proper principle in this canine-sniff testing field. Hamal v. State, 352 S.W.3d 835, 2011 Tex. App. LEXIS 7692 (Tex. App. Fort Worth Sept. 22 2011).

1092. Appellant did not offer expert testimony as to what constituted "cueing," and she did not explain how a corporal's actions qualified as cueing, and the trial court was within its discretion to find that a corporal did not cue the dog and utilized the principles of the field of canine-sniff testing. Hamal v. State, 352 S.W.3d 835, 2011 Tex. App. LEXIS 7692 (Tex. App. Fort Worth Sept. 22 2011).

1093. Expert did not explain how the conditions of a certain study compared to the circumstances concerning the accident's tire use and failure, and given the analytical gap, the expert's causation opinion rested on his subjective interpretation and was inadmissible under Tex. R. Evid. 702 and case law; the expert's causation opinion was predicated on speculation and the trial court was within its discretion in striking the challenged portions of the expert's testimony. Jones v. Pennzoil-quaker State Co., 2011 Tex. App. LEXIS 7423, 2011 WL 4031018 (Tex. App. Houston 14th Dist. Sept. 13 2011).

1094. In considering appellants' claim that testimony supported appellants' claims that the use of a company's product caused a tire to fail, the court did not consider the expert's properly excluded causation opinion. Jones v. Pennzoil-quaker State Co., 2011 Tex. App. LEXIS 7423, 2011 WL 4031018 (Tex. App. Houston 14th Dist. Sept. 13

2011).

1095. Central to appellants' claims of defective marketing, negligence, breach of express and implied warranties, and Texas Deceptive Trade Practices Act violations was the allegation that using the company's product in the manner marketed caused the tire in this case to fail; even assuming that appellants could rely on the testimony of an expert designated only by the tire manufacturer, the court agreed that the testimony did not include an opinion that the company's product caused the accident tire to fail in this case, and thus the company was entitled to summary judgment. Jones v. Pennzoil-quaker State Co., 2011 Tex. App. LEXIS 7423, 2011 WL 4031018 (Tex. App. Houston 14th Dist. Sept. 13 2011).

1096. Trial court did not abuse its discretion in denying a motion by a company and business for leave to supplement its expert disclosures, for purposes of Tex. R. Civ. P. 193.6; the court has found no case holding that the exclusion of an expert witness's opinion as unreliable under Tex. R. Evid. 702 can constitute good cause for late disclosure of new experts, inadvertence of counsel was not good cause for the designation of new experts, and this rule encompassed the argument by the company and business that it needed new experts based on the incompetence of the original expert. The trial court properly found that the inadmissibility of expert testimony on reliability grounds was not an impossible circumstance that rose to the level of good cause. Popcap Games, Inc. v. MumboJumbo, LLC, 350 S.W.3d 699, 2011 Tex. App. LEXIS 7122 (Tex. App. Dallas Aug. 31 2011).

1097. In a design defect suit arising from a helicopter crash that was caused by a bird strike, although expert testimony on an alternative windshield design and on the design of the door mounts was conclusory and insufficient under Tex. R. Evid. 702, another expert's testimony on an alternative seatbelt design was sufficient under Tex. Civ. Prac. & Rem. Code Ann. § 82.005(b). De Damian v. Bell Helicopter Textron, Inc., 352 S.W.3d 124, 2011 Tex. App. LEXIS 7316 (Tex. App. Fort Worth Aug. 31 2011).

1098. Fact that an insured's neck issues did not present themselves until three years after the accident alone did not render the opinions of two doctors either speculative or conjecture as a matter of law. Mid-continent Group v. Goode, 2011 Tex. App. LEXIS 6695, 2011 WL 3962502 (Tex. App. Amarillo Aug. 19 2011).

1099. Trooper was not qualified to testify as an expert witness in accident reconstruction because: (1) the case involved multiple vehicles, multiple collisions, and could only be reconstructed with knowledge and skills exceeding the experience of most police officers; (2) the trooper completed a Level II certification in accident reconstruction through the DPS in Austin; (3) the trooper had never testified concerning accident reconstruction; and (4) the trooper denied having any physics training or being an expert in physics. Lopez-juarez v. Kelly, 348 S.W.3d 10, 2011 Tex. App. LEXIS 6446 (Tex. App. Texarkana Aug. 16 2011).

1100. Even though the trial court erred by admitting the testimony of a trooper concerning the causation of the accident, as his testimony contained opinions and he did not qualify as an expert under Tex. R. Evid. 702, the error was harmless because his conclusion that the bus driver was not at fault was cumulative of other evidence. The driver's other expert witness provided testimony consistent with the trooper's conclusions, testified in much greater detail, length, and depth than the trooper, and explained the methods he used and the calculations he made. Lopez-juarez v. Kelly, 348 S.W.3d 10, 2011 Tex. App. LEXIS 6446 (Tex. App. Texarkana Aug. 16 2011).

1101. During defendant's trial for DWI, the court did not err in allowing a chemist to testify regarding the application of retrograde extrapolation to a hypothetical situation based on evidence already before the jury; the record showed no inconsistencies or error in the chemist's testimony. Sutton v. State, 2011 Tex. App. LEXIS 6388, 2011 WL 3528259 (Tex. App. Dallas Aug. 12 2011).

1102. Trial court did not err in excluding an expert's affidavit from consideration as summary judgment evidence, given that (1) there were several erroneous factual statements, (2) there were legal conclusions unsupported by a factual basis, and (3) the expert drew legal conclusions regarding the driver's liability in this personal injury case without supporting his conclusions with analysis or supporting evidence. Husain v. Petrucciani, 2011 Tex. App. LEXIS 6180, 2011 WL 3449497 (Tex. App. Houston 14th Dist. Aug. 9 2011).

1103. Record demonstrated that the ALJ allowed the doctors to offer their expert testimony after voir dire on the issue of their qualifications, and the ALJ heard extensive testimony about their qualifications as well as their methods, analyses, and the principles upon which they relied in reaching their opinions; there was no abuse of discretion in the ALJ's decision that the doctors were qualified as experts and their testimony should be admitted. Scally v. Tex. State Bd. of Med. Examiners, 351 S.W.3d 434, 2011 Tex. App. LEXIS 6117 (Tex. App. Austin Aug. 4 2011).

1104. Doctor opined that the decedent died of exsanguinations as a result of his collision with the driver, but these statements were no more than speculation as to the cause of death; given that the doctor was not able to rule out other plausible causes of death and because an autopsy was not conducted and the doctor failed to review the decedents' medical records, the trial court did not err in finding that the doctor's testimony was not reliable and would fail to be helpful to the jury under Tex. R. Evid. 702. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1105. Trial court did not abuse its discretion in striking a doctor's testimony on the basis that he was not qualified to opine on how an accident occurred, given that (1) the doctor had no experience with accident reconstruction, (2) the doctor admitted that he was unqualified to testify as to how the accident occurred, (3) articles did not appear to be a reliable foundation upon which the doctor could rely in forming his opinion, and (4) accident reconstruction was not within the general experience of laypersons. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1106. Emergency medical technician (EMT) was not qualified to opine medical causation or accident reconstruction, given that (1) there was no evidence showing that the EMT was qualified as an accident reconstructionist, (2) nothing showed that he was qualified to opine about the expert's injuries, and (3) the EMT did not provide any scientific studies to support his assertions that the impact with a driver's car was what caused the decedent's death. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1107. While an emergency medical technician (EMT) could testify as a lay witness as to what he observed at the scene of the accident, he could not testify as an expert as to causation; although in some cases a witness could be considered an expert as to medical causation based on special experience, this did not apply here given the EMT's limited experience with automobile accidents involving fatalities. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1108. Decedent sustained multiple major injuries as a result of multiple collisions with vehicles and other objects and appellants' experts could not agree on the specific impact and injury that caused the decedent's death; thus, this accident was not within the general experience and common sense of laypersons to determine causation without the aid of expert testimony. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1109. Even if an emergency medical technician was qualified to opine on causation and accident reconstruction matters, the bare opinion he gave in his deposition was premised upon his subjective interpretation of the facts, which rendered his opinion unreliable; the trial court did not err in striking this testimony. Dickerson v. State Farm

Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1110. Much of an expert's testimony was against the great weight of the evidence contained in the record, plus there existed too many analytical gaps between the expert's opinions and the facts, even though he had significant experience in accident reconstruction; the expert did not show that he was qualified to opine as to the causation of the decedent's injuries, such that the expert's opinions were unreliable and the trial court did not err in striking his testimony. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1111. Court did not abuse its discretion in admitting the officer's expert testimony that there was nothing the employee could have done to avoid colliding with the daughter's car after the daughter's car struck the third-party's tractor-trailer, because there was no analytical gap between the data the officer collected and relied on in his investigation and his opinion as to causation. Schultz v. Lester, 2011 Tex. App. LEXIS 5866, 2011 WL 3211271 (Tex. App. Dallas July 29 2011).

1112. Sexual abuse victim's counselor did not testify regarding the truthfulness of the victim; under Tex. R. Evid. 702, it was permissible for the counselor to testify regarding behavioral characteristics common among abused children and to give her expert opinion regarding the victim's delayed disclosure. Sharp v. State, 2011 Tex. App. LEXIS 5377, 2011 WL 2732518 (Tex. App. Eastland July 14 2011).

1113. In a brother's action against a sister to try title to real property, the court did not err in sustaining the sister's objection to the affidavit of the brother's handwriting expert because the expert's affidavit failed to adequately connect the underlying data with the offered conclusion. Gonzales v. Reyes, 2011 Tex. App. LEXIS 5183, 2011 WL 2652127 (Tex. App. Austin July 7 2011).

1114. On appeal of defendant's conviction for driving while intoxicated, he claimed the trial court should have excluded the blood serum test results from evidence because the State failed to establish reliability of the results under Tex. R. Evid. 702. While defendant objected to the admission of a blood vial into evidence, he failed to object to the medical technologist's testimony concerning the test results; therefore, defendant's evidentiary challenge was not preserved for review. Kuciemba v. State, 2011 Tex. App. LEXIS 4901 (Tex. App. Houston 14th Dist. June 30 2011).

1115. Court of appeals properly found the trial court abused its discretion by overruling defendant's objection and admitting inadmissible expert testimony, Tex. R. Evid. 702; however, the court of appeals erred in holding that the error was harmful as additional evidence should have been considered in the court of appeals' harm analysis, Tex. R. App. P. 44. 2. Barshaw v. State, 342 S.W.3d 91, 2011 Tex. Crim. App. LEXIS 914 (Tex. Crim. App. 2011).

1116. During appellant's civil commitment trial, the trial court erred by excluding the testimony of appellant's expert witness, based on its conclusion that the expert's testimony would confuse the jury under Tex. R. Evid. 403, because the trial court acknowledged that he qualified as an expert under Tex. R. Evid. 702, and, despite the trial court's belief that the expert would testify that behavioral abnormality did not exist, the offer of proof established that the expert would have told the jury that the ultimate issue in the case, whether appellant suffered from a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence, could not be determined by scientific method alone. The error was not harmless because without the expert's testimony, the State's experts' testimony regarding their diagnoses of personality disorder and their scoring of the actuarial instruments went unchallenged by any expert in the field of psychiatry or psychology. In re Commitment of Hinkle, 2011 Tex. App. LEXIS 4504 (Tex. App. Beaumont June 16 2011).

1117. During appellant's civil commitment trial, the trial court did not err by excluding an expert's testimony that appellant did not commit the crimes for which he had been convicted because the issue of whether appellant had been wrongfully convicted was not at issue. In re Commitment of Hinkle, 2011 Tex. App. LEXIS 4504 (Tex. App. Beaumont June 16 2011).

1118. Trial court did not commit reversible error by overruling defendant's objection to the State's expert concerning the psychological effects of the prescription drug carisoprodol because substantially the same evidence was admitted without objection. Massey v. State, 2011 Tex. App. LEXIS 4453, 2011 WL 2418482 (Tex. App. Texarkana June 14 2011).

1119. During defendant's trial for sexual assault of a child, the court did not err in concluding that a psychologist's testimony was admissible because the psychologist did not express an opinion as to the child complainant's truthfulness; the psychologist testified that children who were sexually abused typically exhibited problematic behaviors, such as performing poorly in school, stealing, or failing to follow directions. Johnson v. State, 2011 Tex. App. LEXIS 3143, 2011 WL 1631791 (Tex. App. Houston 14th Dist. Apr. 28 2011).

1120. Court did not abuse its discretion by finding the canine handler properly relied on or utilized the principles involved in the field and finding the lineup was objective, because defendant presented no challenge to the canine handler's expertise, and defendant cited no evidence of a requirement or recommendation that the officer who placed the samples should then abstain from any further participation in the process. Powell v. State, 2011 Tex. App. LEXIS 2986, 2011 WL 1579734 (Tex. App. Houston 14th Dist. Apr. 21 2011).

1121. Appellant's counsel conceded that witnesses were not testifying as experts, such that appellant's issues related to the admissibility of these witnesses' testimony as experts, under Tex. R. Evid. 702, 703, 705(b), were moot. Zuffante v. State, 2011 Tex. App. LEXIS 2332 (Tex. App. Dallas Mar. 31 2011).

1122. Burden was on the sellers to establish that their expert's testimony was admissible. U.S. Renal Care, Inc. v. Jaafar, 345 S.W.3d 600, 2011 Tex. App. LEXIS 2282 (Tex. App. San Antonio Mar. 30 2011).

1123. Expert's opinion was unreliable, given that his analysis of reports was subjective, his technique had no known rate of error, and his opinion had not been subjected to peer review, plus the expert's theory appeared to have been developed for the litigation in this case; the expert did not connect the data relied upon and his opinion, and there was too great an analytical gap, and thus the expert's testimony constituted no evidence to support the jury's damage award. U.S. Renal Care, Inc. v. Jaafar, 345 S.W.3d 600, 2011 Tex. App. LEXIS 2282 (Tex. App. San Antonio Mar. 30 2011).

1124. Adverse inference could not compensate for the deficiencies of sellers' demand letter or their witness's expert testimony. U.S. Renal Care, Inc. v. Jaafar, 345 S.W.3d 600, 2011 Tex. App. LEXIS 2282 (Tex. App. San Antonio Mar. 30 2011).

1125. Testimony of the insureds' expert in a dispute regarding property damage caused by hail was admissible under Tex. R. Evid. 702, 703, because he was not required to review or discuss the insurance policy and because he used his own professional judgment in discussing an inspector's report. Southland Lloyds Ins. Co. v. Cantu, 399 S.W.3d 558, 2011 Tex. App. LEXIS 2251, 2011 WL 1158244 (Tex. App. San Antonio Mar. 30 2011).

1126. Order civilly committing appellant as a sexually violent predator was proper because the opinions offered by the State's experts, a psychologist and a psychiatrist, were reliable and adequately tied to relevant facts; they diagnosed appellant with paraphilia, polysubstance dependence, and personality disorder with antisocial features.

In re Polk, 2011 Tex. App. LEXIS 1323, 2011 WL 662928 (Tex. App. Beaumont Feb. 24 2011).

1127. Detective's expert testimony was neither conclusive nor dispositive, and the trial court did not err in admitting such; he did not purport to identify appellant's precise whereabouts based on the phone records, he merely explained that the cell phone was in the vicinity of the crime scene, and there was other ample evidence tying appellant to the crime of murder and aggravated assault, including eyewitness testimony and other testimony. Saenz v. State, 2011 Tex. App. LEXIS 1156, 2011 WL 578757 (Tex. App. Corpus Christi Feb. 17 2011).

1128. Because the trial court did not err in admitting expert testimony, the court did not need to address, under Tex. R. App. P. 47.1, whether appellant's substantial rights were affected. Saenz v. State, 2011 Tex. App. LEXIS 1156, 2011 WL 578757 (Tex. App. Corpus Christi Feb. 17 2011).

1129. Trial court did not abuse its discretion by excluding the deputy's testimony concerning the dog-scent lineup identification evidence under Tex. R. Evid. 702 because, even if the court was to presume that the field was a legitimate area of expertise, the State failed to carry its burden in establishing the reliability and relevancy of the deputy's testimony; the State offered only the deputy's testimony, and although the deputy claimed that his dogs were reliable and accurate in identifying scents, he failed to produce or cite any evidence supporting his claims. The deputy had no records of success rates to verify the reliability of his testimony, nor did he have records of his procedures or order of the dogs in the lineup at issue; the record also showed that the deputy testified that he used multiple dogs and ran multiple tests, which was contrary to expert recommendations and accepted methods. State v. Smith, 335 S.W.3d 706, 2011 Tex. App. LEXIS 934 (Tex. App. Houston 14th Dist. Feb. 10 2011).

1130. Expert's study and testimony provided no evidence that an operator failed to pay royalties based on the market value of the gas in the field; the study did not resolve itself to a market value for the casinghead gas stated in dollars and cents. Occidental Permian Ltd. v. Helen Jones Found., 333 S.W.3d 392, 2011 Tex. App. LEXIS 701, 177 Oil & Gas Rep. 1072 (Tex. App. Amarillo Jan. 31 2011).

1131. Expert's testimony was unreliable because the casinghead gas sold under other contracts she compared was not comparable in quality to that produced from other market-value leases; the expert's intentional omission of the high CO2 content of the gas from her evaluation improperly injected a subjective factor into the search for what was described in Texas law as an objective calculation and represented an outcome-derived methodology that was condemned in case law. Occidental Permian Ltd. v. Helen Jones Found., 333 S.W.3d 392, 2011 Tex. App. LEXIS 701, 177 Oil & Gas Rep. 1072 (Tex. App. Amarillo Jan. 31 2011).

1132. Without a true comparison of hydrocarbon quality, too great an analytical gap stood between the data, if it was accurate, and an expert's market value opinion; the opinion, lacking reliability, was incompetent and amounted to no evidence the operator or former operators underpaid royalties on the market-value leases. Occidental Permian Ltd. v. Helen Jones Found., 333 S.W.3d 392, 2011 Tex. App. LEXIS 701, 177 Oil & Gas Rep. 1072 (Tex. App. Amarillo Jan. 31 2011).

1133. At the revocation hearing, a police officer was permitted to testify over objection that the results of a field test indicated the substance found on the two objects in defendant's possession contained methamphetamine; while defendant challenged the officer's qualifications to testify as an expert under Tex. R. Evid. 702, any error in the admission of the officer's testimony was harmless in light of the evidence supporting the revocation of defendant's community supervision. Defendant admitted he was using methamphetamine, and an officer found him in possession of drug paraphernalia in violation of the terms of his community supervision. Kessler v. State, 2011 Tex. App. LEXIS 606, 2011 WL 317673 (Tex. App. Texarkana Jan. 28 2011).

1134. Automotive fraud consultant who was an experienced odometer fraud investigator was qualified to testify on the buyers' behalf regarding odometer tampering on a used vehicle, which included his opinion that a dealer performing a reasonable inspection would have discovered the tampering, and the trial court did not err in finding the expert's opinions reliable. Mac Haik Chevrolet Ltd. v. Diaz, 2011 Tex. App. LEXIS 668, 2011 WL 286124 (Tex. App. Houston 1st Dist. Jan. 27 2011).

1135. Defendant was not entitled under Tex. Code Crim. Proc. Ann. art. 38.36(a) to offer evidence of diminished capacity because his experts' reports, which did not address the standard for recklessness under Tex. Penal Code Ann. § 6.03(c) or knowledge under § 6.03(a), could not support a claim that defendant was guilty only of manslaughter under Tex. Penal Code Ann. § 19.04(a), rather than murder under Tex. Penal Code Ann. § 19.02. Thus, the experts' testimony was irrelevant under Tex. R. Evid. 401 and was properly excluded under Tex. R. Evid. 702. Quick v. State, 2011 Tex. App. LEXIS 680, 2011 WL 286155 (Tex. App. Houston 1st Dist. Jan. 27 2011).

1136. Because a police officer's statement that he found a child to be credible constituted a direct opinion on the truthfulness of the child-complainant's allegations, under Tex. R. Evid. 702, the trial court properly excluded the officer's statement and instructed the jury to disregard the testimony. Santamaria v. State, 2011 Tex. App. LEXIS 541, 2011 WL 2165153 (Tex. App. Houston 1st Dist. Jan. 20 2011).

1137. Trial court did not abuse its discretion in overruling defendant's challenge to the reliability of a DNA analyst's expert testimony under Tex. R. Evid. 702 because 1) the DNA analyst testified that the lab technicians performed all of the lab work, but that she made all the DNA comparisons; that everyone followed the same training program; that all of the lab work was subject to an internal validation process; that the lab took steps to ensure that contamination did not occur during the DNA testing process; and that she was able to ascertain that the DNA was properly extracted; and 2) there was no testimony to suggest that the technicians who performed the lab work deviated from proper protocols or procedures. Dreyer v. State, 2011 Tex. App. LEXIS 353, 2011 WL 193494 (Tex. App. Beaumont Jan. 19 2011).

1138. Appellant did not argue that the trial court erred in finding that a witness was not an expert on certain issues or that his testimony would invade the jury's province, and appellant failed to cite any authority showing the trial court abused its discretion, contrary to Tex. R. App. P. 38.1(i), and thus appellant presented nothing for review and this complaint was waived. Wilson v. State, 2011 Tex. App. LEXIS 145, 2011 WL 166901 (Tex. App. Houston 14th Dist. Jan. 11 2011).

1139. In a condemnation case, the landowner's appraisal expert provided competent evidence of the diminution in value to the remainder by considering comparable sales from two counties. He was not required to determine whether the parties to comparable sales subjectively believed that a pipeline easement affected the sales price, and any gap between the comparable sales data and his conclusions went to the weight of his testimony rather than its reliability. Lasalle Pipeline, Lp v. Donnell Lands, L.P., 336 S.W.3d 306, 2010 Tex. App. LEXIS 9892 (Tex. App. San Antonio 2010).

1140. Expert's testimony regarding accounts receivable was unreliable because he made several unfounded assumptions regarding the balances owed, did not review any of the underlying documents upon which his reports were based, and did not take into consideration aging of the accounts receivable. U.S. Renal Care, Inc. v. Jaafar, 2010 Tex. App. LEXIS 9646, 2010 WL 4983398 (Tex. App. San Antonio Dec. 8 2010).

1141. Paternal grandmother testified that she was present at the birth of the children, that she had provided assistance to the children, and that the children enjoyed visiting with her and her other children, in addition to her extended family, but that evidence did not address the primary issue in a Tex. Fam. Code Ann. § 153.433 case, that eliminating contact with the grandmother would significantly impair the children's physical health or emotional well-

being; furthermore, the testimony of a school district counselor, who had not been trained as a counselor for children in family situations, did not have professional experience dealing with child-grandparent relationships, and had never treated or even seen any of the children involved in the litigation in a clinical setting, did not qualify as expert witness testimony under Tex. R. Evid. 702 and her opinion constituted nothing more than lay personal opinion. The mere opinion of the grandmother and an interested, nonexpert witness that the grandmother should be granted access to the children did not overcome the statutory presumption in Tex. Fam. Code Ann. § 153.433(2) that the mother acted in the best interest of the children. In the Interest of M.K.S., 2010 Tex. App. LEXIS 9138, 2010 WL 4644496 (Tex. App. Amarillo Nov. 17 2010).

1142. In a driving while intoxicated case, pursuant to Tex. R. Evid. 702, the trial court did not abuse its discretion by finding that an officer was an expert on the effects of alcohol and tolerance to alcohol because (1) the effects alcohol had on a human body and whether an individual could develop a tolerance to alcohol were not complex subjects; (2) homeostasis could potentially involve complex areas of inquiry, but the officer did little more than define the term; (3) the officer did not render any conclusive opinions but provided only general information; (4) the officer's area of expertise was not central to the resolution of the suit as the focus of the trial was on another officer's observations and defendant's intoxilyzer test results; and (5) the officer did not opine that defendant was intoxicated or express any opinion on the other officer's testimony. Sims v. State, 2010 Tex. App. LEXIS 8464, 2010 WL 4148372 (Tex. App. Eastland Oct. 21 2010).

1143. Trial court did not err by admitting evidence of a deputy's canine scent lineup tests because another appellate court had previously considered and determined that they were admissible under Tex. R. Evid. 702. Pate v. State, 2010 Tex. App. LEXIS 8151, 2010 WL 3921177 (Tex. App. Corpus Christi Oct. 7 2010).

1144. In an aggravated sexual assault of a child case, an expert witness never expressed an opinion that he believed the victim had been coached; instead, his testimony imparted scientific, technical, or specialized knowledge that related to his general experience with victims who had been sexually abused. Thus, under Tex. R. Evid. 702, his testimony was admissible as it did not convey whether he had an opinion regarding the victim's truthfulness. Cook v. State, 2010 Tex. App. LEXIS 8095, 2010 WL 3910585 (Tex. App. Beaumont Oct. 6 2010).

1145. Expert's testimony was properly excluded under Tex. R. Evid. 702 in appellant's prosecution for aggravated robbery because the expert did not commit to an opinion that the weapon focus effect had impacted the victim's identification of appellant and a juror could have just as easily concluded that the gun put in the victim's face possibly impacted the victim's ability to accurately identify the man who had robbed her without expert testimony. Blasdell v. State, 2010 Tex. App. LEXIS 8092 (Tex. App. Beaumont Oct. 6 2010).

1146. Dog scent-discrimination lineups, when used alone or as primary evidence, are legally insufficient to support a conviction, and the court believes that the dangers inherent in the use of dog tracking evidence can only be alleviated by the presence of corroborating evidence; to the extent that lower-court opinions suggest otherwise, the court overrules them and expressly holds that when inculpatory evidence is obtained from a dog-scent lineup, its role in the courtroom is merely supportive. Winfrey v. State, 323 S.W.3d 875, 2010 Tex. Crim. App. LEXIS 1167 (Tex. Crim. App. 2010).

1147. All three bloodhounds alerted to appellant's scent, but this was not proof positive that appellant came into contact with the victim, for purposes of appellant's murder conviction; the dog-scent lineup proved only that appellant's scent was on the victim's clothes, not that appellant had been in direct contact with the victim, as the appellate court decided. Winfrey v. State, 323 S.W.3d 875, 2010 Tex. Crim. App. LEXIS 1167 (Tex. Crim. App. 2010).

1148. Jury gave significant weight to the canine-scent evidence and asked if it was illegal to convict solely on the scent pad evidence, but no eyewitnesses put appellant at the crime scene, the State was unable to match appellant to the fingerprint or footprints found at the crime scene, appellant did not match the DNA profile obtained, none of the victim's belongings were found in appellant's possession, and none of 73 hairs collected from the scene were consistent with appellant's; at most, the evidence showed that appellant indicated that he believed he was the number one suspect in a murder investigation, he shared information with an inmate that appellant claimed to have heard about the murder, and appellant's scent was on the victim's clothes, and the court found that this evidence merely raised a suspicion of guilt and was legally insufficient to support a murder conviction beyond a reasonable doubt. Winfrey v. State, 323 S.W.3d 875, 2010 Tex. Crim. App. LEXIS 1167 (Tex. Crim. App. 2010).

1149. Issue was whether dog-scent lineup evidence alone could support a conviction beyond a reasonable doubt; while this evidence might have raised a strong suspicion of appellant's guilt, the court held that, standing alone, it was insufficient to establish guilt beyond a reasonable doubt, and the court reversed appellant's murder conviction. Winfrey v. State, 323 S.W.3d 875, 2010 Tex. Crim. App. LEXIS 1167 (Tex. Crim. App. 2010).

1150. Trial court erred in awarding judgment to the sellers of a dialysis company in their action against a buyer for breach of the sales agreement as it pertained to pre-sale receivables because the testimony and opinion of the sellers' expert witness was unreliable and thus inadmissible; the expert's assumptions regarding contract and noncontract patients were unsupported by the evidence and the failure to test those assumptions rendered the report unreliable. U.S. Renal Care, Inc. v. Jaafar, 2010 Tex. App. LEXIS 7085, 2010 WL 3405831 (Tex. App. San Antonio Aug. 31 2010).

1151. During defendant's trial for sexual assault of a 21-year old who was mentally retarded and functioned at approximately a 10-year-old level, the court erred in permitting a mental health-mental retardation psychologist to testify that mentally retarded persons, as a class, tended to be truthful. Barshaw v. State, 320 S.W.3d 625, 2010 Tex. App. LEXIS 7244 (Tex. App. Austin Aug. 31 2010).

1152. Because appellant failed to object to the reliability of an expert's methodology by requesting a hearing under Tex. R. Evid. 609, plus appellant did not object to the admissibility of the testimony when it was proffered, appellant did not preserve the issue for appeal under Tex. R. App. P. 33.1(a). Jones v. State, 2010 Tex. App. LEXIS 7357, 2010 WL 3448010 (Tex. App. Houston 1st Dist. Aug. 31 2010).

1153. Trial court did not err by admitting evidence of a deputy's canine scent lineup tests because defendant gave the court no reason to reach a different result in the instant case than in a previous case where the deputy's tests had been held to be reliable and admissible. Pate v. State, 2010 Tex. App. LEXIS 6980, 2010 WL 3341853 (Tex. App. Corpus Christi Aug. 25 2010).

1154. In a breach of contract action involving a broker's commissions based on a percentage of net profits from sales procured by the broker, an expert's testimony was admissible because his method of calculation of net profits was a reasonable approximation and was acceptable under the Daubert standard. Truman Arnold Cos. v. Hammond & Consultants Enters., 2010 Tex. App. LEXIS 6190, 2010 WL 2982912 (Tex. App. Tyler July 30 2010).

1155. Trial court did not abuse its discretion by allowing a detective to testify in a narrative form because the testimony served to explain why he had reached the conclusion that the child victim's account of the sexual abuse was plausible, and defendant lodged no objection concerning the detective's qualifications to provide his opinion on the topic, nor did he object that the detective's opinion on the question was irrelevant. Romero v. State, 2010 Tex. App. LEXIS 5735, 2010 WL 2854307 (Tex. App. Beaumont July 21 2010).

1156. Expert concluded that an employee suffered a pre-syncopal episode that led to confusion and the loss of control of his vehicle, and this opinion was based on a reasonable medical probability; the probative evidence supported the trial court's intervening cause finding. Neufeld v. Hudnall, 2010 Tex. App. LEXIS 5601 (Tex. App. Amarillo July 16 2010).

1157. Trial court did not err by excluding expert testimony on whether defendant was a man of ordinary temper under Tex. Penal Code Ann. § 19.02(d) because it was not relevant, as the issue was not whether defendant was a man of ordinary temper, but rather how the objectively reasonable man would react if placed in defendant's situation. Mcghee v. State, 2010 Tex. App. LEXIS 5561 (Tex. App. Houston 1st Dist. July 15 2010).

1158. Trial court did not err by excluding expert testimony on whether defendant snapped before shooting his ex-wife to death because defendant's questions attempted to have the expert testify about defendant's state of mind at the time of the incident. Mcghee v. State, 2010 Tex. App. LEXIS 5561 (Tex. App. Houston 1st Dist. July 15 2010).

1159. In a customer's slip-and-fall negligence action against a mall, the trial court properly struck the testimony of the customer's expert witness on the ground that the expert was not qualified; the expert conceded that the expert had never taken any courses regarding proper placement of kiosks within retail shopping environments. Downer v. Simon Prop. Group Tex., L.P., 2010 Tex. App. LEXIS 5386 (Tex. App. Fort Worth July 8 2010).

1160. Court did not need to consider whether the trial court's admission of the retrograde extrapolation testimony was erroneous because even if the trial court erred, the error did not affect appellant's substantial rights under Tex. R. App. P. 44.2(b), given that (1) there was no indication that jurors were predisposed to give the expert's testimony greater weight than the other evidence, (2) the State was not limited to proving appellant was intoxicated because his blood alcohol content was .08 or more, and intoxication could have been shown by proving appellant lacked the normal use of his faculties under Tex. Penal Code Ann. § 49.01 by reason of his introduction of alcohol in his body, (3) the expert's testimony was cumulative because there was other evidence of appellant's intoxication, (4) the breath test results showing appellant's blood alcohol content at .115 were indicative of whether he consumed alcohol, (5) even absent retrograde extrapolation testimony, breath tests were often highly probative to prove both per se and impairment intoxication, and field sobriety tests provided another indicator of impairment, (6) the prosecutor did not emphasize the retrograde extrapolation testimony or the expert's credentials, and (7) the jury was not exposed to a long discourse on the science of retrograde extrapolation. Sung Mo Hong v. State, 2010 Tex. App. LEXIS 4688, 2010 WL 2510333 (Tex. App. Dallas June 23 2010).

1161. Defendant's conviction for engaging in organized criminal activity, with the two predicate offenses being aggravated sexual assault of a child, was improper because the trial court abused its discretion in allowing a Department of Family and Protective Services worker to testify as an expert on the "grooming process" used by child predators. During cross-examination of the worker, defendant elicited the fact that the worker had not received any training in psychology beyond an associate's degree and the worker agreed that she was not a licensed professional counselor or psychologist, had not attended medical school, and was neither a nurse nor a sexual assault nurse examiner. Kelly v. State, 321 S.W.3d 583, 2010 Tex. App. LEXIS 4506 (Tex. App. Houston 14th Dist. June 17 2010).

1162. In an action in which a mother alleged that her baby suffered nerve injuries during birth due to her obstetrician's asserted negligence, the trial court acted within its discretion when it overruled the mother's motion to exclude expert testimony relied upon by the obstetrician regarding natural forces of labor as a potential cause of the child's brachial plexus injury; the mother's challenges predicated on reliance upon retrospective studies and the potential for ascertainment bias did not warrant exclusion of the disputed expert testimony regarding the cause of the child's brachial plexus injury. Taber v. Nguyen Roush, 316 S.W.3d 139, 2010 Tex. App. LEXIS 4508 (Tex. App. Houston 14th Dist. June 17 2010).

1163. In an action in which a mother alleged that her baby suffered nerve injuries during birth due to her obstetrician's asserted negligence, the mother wrongly attempted to invoke the "general acceptance" factor of the Robinson factors for gauging the admissibility of expert testimony to argue that the natural forces of labor theory had not been generally accepted as a potential cause of brachial plexus injuries during birth where labeling the natural forces of labor theory as a "hypothesis" was not dispositive because that characterization by itself did not answer the reliability question. Similarly, the reliability issue was not resolved by pointing to a characterization of the natural forces of labor theory as "not the most commonly accepted at all" by one of the child's treating physicians. Taber v. Nguyen Roush, 316 S.W.3d 139, 2010 Tex. App. LEXIS 4508 (Tex. App. Houston 14th Dist. June 17 2010).

1164. In an action in which a mother alleged that her baby suffered nerve injuries during birth due to her obstetrician's asserted negligence, the expert testimony relied upon by the obstetrician regarding natural forces of labor as a potential cause of the child's brachial plexus injury was admissible under the Robinson standard because, on the record presented, the trial court had a valid basis for concluding that the asserted analytical gap between non-specific brachial plexus injuries discussed in the medical literature and the particular avulsion injury that the child suffered had been bridged as between natural forces of labor as an explanation for brachial plexus injuries in general and the child's specific avulsion injury. The record warranted submission of testimony regarding a natural forces of labor explanation for the jury's consideration in deciding a causation issue that -- as the mother's expert noted -- unavoidably involved an element of speculation. Taber v. Nguyen Roush, 316 S.W.3d 139, 2010 Tex. App. LEXIS 4508 (Tex. App. Houston 14th Dist. June 17 2010).

1165. Tex. R. Evid. 702 covers more than just scientific evidence, and expertise can be acquired in numerous ways, including by training or experience. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1166. Appellant did not lodge an objection to the testimony of expert witnesses and counsel did not suggest that the witnesses were unqualified or the methodologies unreliable, nor did he present any evidence to that effect, such that appellant failed to show that he preserved error. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1167. Companies' expert witness did not criticize the agent's expert's witness's methodology used, but the data the agent's expert used to arrive at his projected lost profit opinion; thus, the companies' expert's objections went to the credibility or weight to be given to the evidence, and given that the experts calculated the agent's estimated damages in close proximity, the trial court did not abuse its discretion in allowing the agent's expert's testimony. Farmers Ins. Exch. v. Hudson, 2010 Tex. App. LEXIS 3351, 2010 WL 1806660 (Tex. App. Beaumont May 6 2010).

1168. Defendant failed to make any objection questioning the reliability of an expert's testimony, and whether the court made defendant's objection that the expert did not personally interview the victim as an objection of qualification or reliability was of no moment because there was no requirement that an expert witness personally interview the victim for his testimony to be admissible, for purposes of Tex. R. Evid. 703, 418; because defendant made no objection to the reliability of expert testimony, he did not preserve his point for review and the court assumed without deciding that the testimony on the subject was admissible. Cockrell v. State, 2010 Tex. App. LEXIS 3208, 2010 WL 1705538 (Tex. App. Amarillo Apr. 28 2010).

1169. Trial court committed reversible error in a sexually violent predator civil commitment proceeding in refusing to permit appellant's only expert witness, a professional counselor, to testify as to whether appellant had a behavioral abnormality, as defined in Tex. Health & Safety Code Ann. § 841.002(2), because the expert possessed the necessary qualifications to provide an opinion related to the assessment of the risk that appellant would commit a future act of sexual violence. In re Dodson, 311 S.W.3d 194, 2010 Tex. App. LEXIS 2931 (Tex. App. Beaumont

Apr. 22 2010).

1170. In a mother's medical malpractice action that attributed her son's nerve injuries to a physician's alleged negligence during the son's birth, the trial court acted within its discretion when it overruled the mother's motion to exclude expert testimony; the challenged testimony regarding natural forces of labor as a potential cause of the son's brachial plexus injury was admissible under the Robinson standard. Taber v. Roush, 2010 Tex. App. LEXIS 2827, 2010 WL 1540128 (Tex. App. Houston 14th Dist. Apr. 20 2010).

1171. In a suit alleging negligent operation of injection wells, prejudicial error occurred under Tex. R. App. P. 44.1(a)(1) as to the exclusion of a qualified expert's standard of care testimony, which was both relevant and required, and the admission of testimony from other experts that consisted of unsupported speculation. Discovery Operating, Inc. v. Bp Am. Prod. Co., 311 S.W.3d 140, 2010 Tex. App. LEXIS 2629, 173 Oil & Gas Rep. 697 (Tex. App. Eastland Apr. 15 2010).

1172. Ultimate determination of whether a drug manufacturer's conduct comported with that degree of care which a reasonably prudent drug manufacturer would use under the same or similar circumstances was well within the experience of persons of ordinary intelligence; hence, expert opinion evidence was not essential to a claim of negligence by a decedent's family regarding the manufacture of a prescription pain patch. Alza Corp. v. Thompson, 2010 Tex. App. LEXIS 2347, 2010 WL 1254610 (Tex. App. Corpus Christi Apr. 1 2010).

1173. Trial court properly admitted an expert's testimony under Tex. R. Evid. 702, given that there was no dispute that property management as a field or profession was a legitimate one, the issue of common area expenses fell within the bounds of the property management business, and there was no indication or argument that the expert's opinions depended on principles not generally applicable to entities involved in property management; the landlords' concerns were properly tested by cross-examination of the expert and the concerns were not the type that would have rendered the opinions unreliable and thus inadmissible. Five Star Int'l Holdings, Inc. v. Thomson, Inc., 324 S.W.3d 160, 2010 Tex. App. LEXIS 2399 (Tex. App. El Paso Mar. 31 2010).

1174. Because expert opinions provided the jury with a reasonable basis for its award for common area expense overcharges, a landlord's no evidence point failed, as did claims that the related jury instructions were improperly submitted. Five Star Int'l Holdings, Inc. v. Thomson, Inc., 324 S.W.3d 160, 2010 Tex. App. LEXIS 2399 (Tex. App. El Paso Mar. 31 2010).

1175. In a city resident's action against a mayor challenging a special election, expert testimony offered by the resident was not conclusory because the expert testified regarding the facts supporting the expert's opinion and explained how the expert reached that opinion; the expert stated that through discussions and correspondence with the resident and counsel, the expert had become familiar with the issues in the lawsuit, the three propositions involved, and the violations alleged. Duncan-hubert v. Mitchell, 310 S.W.3d 92, 2010 Tex. App. LEXIS 1889 (Tex. App. Dallas Mar. 18 2010).

1176. Trial court did not err in a health care liability action in denying a hospital's motion to dismiss because the trial court could have reasonably concluded that the patient's expert, a practicing physician with a significant history in surgery, was qualified to review the patient's medical records and determine that the fracture of the patient's leg in the course of a fall was caused by the inadequate assistance of the hospital staff. Clear Lake Rehab. Hosp. v. Karber, 2010 Tex. App. LEXIS 1932 (Tex. App. Houston 1st Dist. Mar. 18 2010).

1177. After noting the victim's symptoms of post-traumatic stress from defendant's repeated abuse, including being burned with a lighter on his genital area, a State expert testified, for purposes of Tex. Code Crim. Proc. Ann. art. 42.12, § 5(a), that it would be in the best interest of the eight-year-old victim for defendant to be denied

community supervision; defendant did not contest this evaluation, her expert was not involved with the victim and thus her testimony was not relevant to this finding, and even if the trial court erred in excluding defendant's expert's testimony, it did not affect defendant's substantial rights and had to be disregarded under Tex. R. App. P. 44.2(b). Hoselton v. State, 2010 Tex. App. LEXIS 2009 (Tex. App. Texarkana Mar. 18 2010).

1178. During defendant's trial for indecency with a child, the court did not err in admitting a Texas ranger's testimony about methodology and grooming; the ranger had participated in several hundred cases related to sexual offenses against children and had been the primary investigator or played a significant role in approximately 75 of those cases. Morris v. State, 2010 Tex. App. LEXIS 1293 (Tex. App. Eastland Feb. 25 2010).

1179. Witness's opinion was based on what he observed at the crime scene, and he also had specialized knowledge as a homicide detective; the evidence was admissible as opinion testimony by a lay witness and as expert testimony, under Tex. R. Evid. 701 & 702. Lowery v. State, 2010 Tex. App. LEXIS 1230, 2010 WL 610915 (Tex. App. Dallas Feb. 23 2010).

1180. The trial court did not abuse its discretion in excluding the residents' expert's testimony regarding the cause of the fire, given that the expert ultimately stated that he could not determine the cause of the fire, which acknowledged that his opinion in his affidavit was no more than speculation. Hemenas v. Caston, 2010 Tex. App. LEXIS 1023, 2010 WL 521116 (Tex. App. Austin Feb. 11 2010).

1181. Residents argue that, even if the exclusion of expert testimony regarding a fire's cause was improper, it was error to exclude his expert testimony regarding the fire's origin, but the court did not need not determine whether the exclusion of the testimony was error because the court found that even if it took such testimony into consideration, the court would affirm the ruling in the homeowners' favor. Hemenas v. Caston, 2010 Tex. App. LEXIS 1023, 2010 WL 521116 (Tex. App. Austin Feb. 11 2010).

1182. In defendant's capital murder case, the trial court properly denied defendant's motion to suppress hair-comparison analysis because the expert had to complete police training in forensic-hair comparison and work on various hair-comparison cases under direct supervision, he explained how he tested the hair found in defendant's vehicle to the hair taken from the victim's head, and the expert testified that hair-comparison analysis was considered an accepted science within the scientific community and that there was literature on the topic. Arciba v. State, 2009 Tex. App. LEXIS 9815, 2009 WL 5155532 (Tex. App. Waco Dec. 30 2009).

1183. In defendant's theft case, a witness's shoe print identification testimony was properly admitted because the witness testified that he applied the appropriate technique in reaching his opinions. Noting accidentals common to defendant's shoes and the impressions, the witness opined that no shoe but defendant's could have made the impression on three of the decals and the paper from the getaway vehicle; conversely, the other decal sampled did not contain an accidental and therefore could have been produced by any shoe of like size and brand as defendant's. Castellon v. State, 302 S.W.3d 568, 2009 Tex. App. LEXIS 9681 (Tex. App. Amarillo Dec. 21 2009).

1184. To the extent defendant made an expert challenge to an officer's testimony, defendant inadequately briefed the issue by failing to cite any portion of the record or any legal authority supporting her argument, contrary to Tex. R. App. P. 38.1(i). Brice v. State, 2009 Tex. App. LEXIS 9561, 2009 WL 4882849 (Tex. App. Corpus Christi Dec. 17 2009).

1185. Expert's opinions in a products liability case on how a fire started were subjective and conclusory because they were unsupported by testing; thus, they were not relevant under Tex. R. Evid. 401, were not based on a reliable foundation under Tex. R. Evid. 702, and constituted no evidence that an alleged design defect in a dryer caused the fire. Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 2009 Tex. LEXIS 1041, 53 Tex. Sup. Ct. J. 179

(Tex. 2009).

1186. Claimant failed to preserve for review her assertion that the county failed to establish what specific knowledge, skill, experience, training, or education qualified the technologist as an expert, because the claimant's counsel specifically stated that the claimant had no objection to the admission of the technologist's testimony. Pena v. Edwards County, 2009 Tex. App. LEXIS 9332, 2009 WL 4669300 (Tex. App. San Antonio Dec. 9 2009).

1187. Expert's concessions regarding the limitations of photographs did not affect the reliability of his observations, but were factors relevant to the weight the jury gave the expert's opinions based on his interpretation of vehicular damage in the photographs; it was the province of the jury to decide how much weight to afford the expert's opinion, and while reliable evidence supported the expert's opinion that the accident resulted from a lane-change maneuver, the expert's opinion that the motorist's vehicle entered the lane occupied by the driver was unsupported and the trial court abused its discretion in admitting the expert's conclusions that the motorist drove into a lane occupied by the driver's vehicle and that the accident most likely occurred where vehicular debris was found. Walker v. Rangel, 2009 Tex. App. LEXIS 9215, 2009 WL 4342505 (Tex. App. Houston 14th Dist. Dec. 3 2009).

1188. Despite an expert's properly-admitted testimony supporting a driver's version, the erroneously-admitted opinions of an officer and an expert were crucial to key issues of causation, and thus this probably resulted in rendition of an improper judgment under Tex. R. App. P. 44.1(a). Walker v. Rangel, 2009 Tex. App. LEXIS 9215, 2009 WL 4342505 (Tex. App. Houston 14th Dist. Dec. 3 2009).

1189. Court did not err in determining that a trooper's description of defendant as "psychotic" was inadmissible as evidence of defendant's mental state because, although he had specialized knowledge in reconstructing accidents, the trooper acknowledged he did not have specialized knowledge in mental illnesses, nor any qualifications to give an opinion that defendant was "psychotic." Fisher-Riza v. State, 2009 Tex. App. LEXIS 9769, 2009 WL 4358622 (Tex. App. Houston 1st Dist. Dec. 3 2009).

1190. In this condemnation action, the trial court erred in excluding the State's expert testimony because the expert applied an accepted methodology for valuing the condemned property; the expert appraised the fee simple value of the easement, which included the leasehold interest, and he assigned no separate value to the leasehold estate, the expert's appraisal did not overlook the value of the property as a billboard location, and the rent the leaseholder paid the easement holder also accounted for the value of the location. State v. Cent. Expressway Sign Assocs., 302 S.W.3d 866, 2009 Tex. LEXIS 967, 53 Tex. Sup. Ct. J. 134 (Tex. 2009).

1191. In this condemnation action, the exclusion of the State's expert's testimony was reversible because the testimony was directly related to the central issue in the case, which was the value of the condemned property; on remand, the trial court was not to allow evidence of valuation based on advertising income, but general estimates of what the property would sell for considering its possible use as a billboard site were acceptable. State v. Cent. Expressway Sign Assocs., 302 S.W.3d 866, 2009 Tex. LEXIS 967, 53 Tex. Sup. Ct. J. 134 (Tex. 2009).

1192. Undivided-fee rule merely ensures that the goal of an appraiser will always be to approximate what the entire property would sell for in a market transaction, which was precisely what the expert did in this case, and his testimony was admissible. State v. Cent. Expressway Sign Assocs., 302 S.W.3d 866, 2009 Tex. LEXIS 967, 53 Tex. Sup. Ct. J. 134 (Tex. 2009).

1193. Trial court did not abuse its discretion in excluding an expert opinion about the truthfulness of the child complainant's allegation. Love v. State, 2009 Tex. App. LEXIS 8952, 2009 WL 3930900 (Tex. App. Houston 1st

Dist. Nov. 19 2009).

1194. There was no abuse of discretion in allowing the testimony of the State's expert, a clinical supervisor and therapist, regarding the effects of sexual abuse on children, because the expert's generic testimony was connected to the facts of the case through the complainant's testimony, and the admission of the testimony, if erroneous, did not have a substantial and injurious effect or influence in determining the jury's verdict. Bullock v. State, 2009 Tex. App. LEXIS 8872, 2009 WL 3838861 (Tex. App. Dallas Nov. 18 2009).

1195. Court did not abuse its discretion in excluding the expert testimony that defendant's recent withdrawal from heroin affected his ability to converse with the police and give a written statement, because the expert's testimony was neither reliable nor relevant, and it was an impermissible opinion on the truthfulness of defendant's confession. Gonzalez v. State, 301 S.W.3d 393, 2009 Tex. App. LEXIS 8878 (Tex. App. El Paso Nov. 18 2009).

1196. In defendant's capital murder case, the court properly allowed an expert to testify on the cause of death because the expert was shown to have training in child abuse, sodium levels, sodium intoxication, other causes of elevated sodium levels, head injuries, "pica", and out-of-hospital cardiac arrest. The expert testified that he used standard practice and procedures, including the widely accepted method of differential diagnosis, to determine the cause of the child's illness. Overton v. State, 2009 Tex. App. LEXIS 8312, 2009 WL 3489844 (Tex. App. Corpus Christi Oct. 29 2009).

1197. In defendant's capital murder case, the court properly allowed an expert to testify on the cause of death because the expert stated that he had training and experience in the area of sodium poisoning during medical school; he attended "classes that covered material dealing with patients that had elevated sodium levels, and "treated patients with elevated sodium levels." Finally, the doctor testified that the methods that he employed were "standard operating procedure, standard medical examiner practice." Overton v. State, 2009 Tex. App. LEXIS 8312, 2009 WL 3489844 (Tex. App. Corpus Christi Oct. 29 2009).

1198. Employees of a business purchaser who testified in a trial against the owner of the sold business regarding allegedly improper financial conduct by the owner were fact witnesses pursuant to Tex. R. Evid. 701 rather than expert witnesses under Tex. R. Evid. 702, such that documents which the employees referred to were not subject to exclusion under Tex. R. Civ. P. 193.6(a) for not being disclosed in a timely manner pursuant to Tex. R. Civ. P. 194, as such disclosure only applied to expert witnesses.

1199. Corporation failed to explain which of an expert's particular statements violated the standards of scientific reliability as set forth in case law and cited evidentiary rules, including Tex. R. Evid. 702, 703, 705, plus the corporation failed to provide the court with any citations to the record to support this portion of its argument, which was waived. SCTW Health Care Ctr., Inc. v. AAR Inc., 2009 Tex. App. LEXIS 8071, 2009 WL 3321399 (Tex. App. Houston 1st Dist. Oct. 15 2009).

1200. Expert's testimony about duties that an attorney might owe to an opposing party was admissible under Tex. R. Evid. 702 because an attorney's duties were not within the jurors' understanding as laypersons; moreover, any error was harmless under Tex. R. App. P. 44.1(a)(1) because the jury was asked to decide whether the attorney had notice that he was paid from converted funds, not whether he had a duty to the rightful owner of the funds. Great Western Drilling, Ltd. v. Alexander, 305 S.W.3d 688, 2009 Tex. App. LEXIS 7853 (Tex. App. Eastland Oct. 8 2009).

1201. Because the district court found that defendant insured had suffered no damage that was covered under the policy issued by plaintiff insurer, the appraisal by the insurer's expert and the corresponding activation of an underinsurance clause therefore did not affect the insured's claim because the reduced coverage percentage would

have been zero anyway, the argument that it was error to have admitted the expert's report was moot and no error affecting the insured's substantial rights was shown under Fed. R. Evid. 103(a)(1); while the insured argued error under Tex. R. Evid. 702, the federal court, sitting in diversity, had to apply the Federal Rules of Evidence in matters relating to expert testimony. Certain Underwriters at Lloyds London v. Corporate Pines Realty Corp, 355 Fed. Appx. 778, 2009 U.S. App. LEXIS 21882 (5th Cir. Tex. 2009).

1202. In a driving while intoxicated case, because Tex. R. Evid. 702 did not apply to suppression hearings, a trial judge, in ruling on the admissibility of Light Detection and Ranging technology, was not required to hold a Rule 702 Kelly gatekeeping hearing to determine the reliability of that technology. Hall v. State, 297 S.W.3d 294, 2009 Tex. Crim. App. LEXIS 1205 (Tex. Crim. App. 2009).

1203. Expert's opinion that a pool deck's surface caused a guess to fall was not so speculative or conclusory that it could not support the jury finding; the expert based his opinion regarding the cause of the fall based both on an inspection of the pool deck where the guest fell and a review of the material used to coat the deck's surface and the expert's testimony provided legally sufficient evidence that the pool deck surface was slippery. Towers of Town Lake Condo. Ass'n v. Rouhani, 296 S.W.3d 290, 2009 Tex. App. LEXIS 7033 (Tex. App. Austin Aug. 31 2009).

1204. Expert's opinion regarding a guest's future earning capacity was supported by his review of the evidence combined with economic assumptions that he explained to the jury; the expert had experience valuing dental practices such as the guest's practice, the expert's assumption of future growth was not based on pure speculation, and while the condominium association's expert witness and the expert here made different assumptions regarding the future income projections, each expert's opinion was based on the application of economic assumptions to historical data and the expert's assumptions were not unreasonable and provided legally sufficient evidence to support the jury's finding regarding loss of future earning capacity. Towers of Town Lake Condo. Ass'n v. Rouhani, 296 S.W.3d 290, 2009 Tex. App. LEXIS 7033 (Tex. App. Austin Aug. 31 2009).

1205. Trial court did not abuse its discretion under Tex. R. Evid. 702, 703 in excluding an expert's opinions as unreliable in a suit for legal malpractice and breach of fiduciary duty involving a suit against a consulting company that had failed to obtain financing; the expert did not identify sources of financing or adequately discuss its availability. Ray D. Robertson, Inc. v. Morin, 2009 Tex. App. LEXIS 7170, 2009 WL 2902720 (Tex. App. Austin Aug. 27 2009).

1206. In a capital murder case, the trial court did not abuse its discretion in finding a doctor qualified to testify as to the cause of the child's death because the doctor had fifteen years of experience as a licensed physician, she had worked in a pediatric intensive care unit for eleven years, and she was certified in both pediatrics and pediatric critical care, specializing in critical care, where she treated many children with neurological injuries and illnesses. The doctor was also an associate professor at Baylor College of Medicine. Marin v. State, 2009 Tex. App. LEXIS 6477 (Tex. App. Houston 1st Dist. Aug. 20 2009).

1207. In defendant's capital murder case, the court properly denied defendant's witness's testimony relating to the field of false confessions because the witness's testimony could not have assisted the jury in understanding the evidence or in making a determination of a fact issue. He did not intend to offer an opinion as to the truth or falsity of defendant's confession, and during cross-examination defendant admitted the truth of the portions of his confession that he earlier claimed were inaccurate. Munoz v. State, 2009 Tex. App. LEXIS 6475, 2009 WL 2517664 (Tex. App. El Paso Aug. 19 2009).

1208. Golf club seller's expert was properly excluded under Tex. R. Evid. 702 because the individual's experience in evaluating business opportunities, executing marketing plans for businesses, and monitoring business results for golf club manufacturers did not amount to knowledge, skill, and experience so as to qualify him as an expert on the

issue of lost profits of the seller. Spin Doctor Golf, Inc. v. Paymentech, L.P., 2009 Tex. App. LEXIS 5991 (Tex. App. Dallas Aug. 3 2009).

1209. Pursuant to Tex. R. Evid. 702, a trial court did not abuse its discretion in determining that an expert's testimony that there must have been an oral agreement regarding the proceeds of title insurance for pending projects was reliable where he was familiar with the operations of a title company and what was involved when that type of business was sold, based on his experience, he testified that it was unusual that the written documents pertaining to the sale of a title company did not address accounts receivable, accounts payable, and work in progress, and he would have expected the parties to have an agreement pertaining to the outstanding obligations of the company being sold, to income that the seller expected to receive but which had not yet been received, and what value to place on transactions in progress that had not yet closed. Adams v. McFadden, 296 S.W.3d 743, 2009 Tex. App. LEXIS 5817 (Tex. App. El Paso July 29 2009).

1210. To determine whether the record supported the trial court's decision to exclude an expert witness's testimony under Tex. R. Evid. 702 regarding an assessment for sexual interest test, the court had to decide whether defendant showed by clear and convincing proof that the test was reliable under the three criteria set out in case law. Figueroa v. State, 2009 Tex. App. LEXIS 5604, 2009 WL 2183460 (Tex. App. San Antonio July 22 2009).

1211. Defendant did not demonstrate by clear and convincing evidence that an expert's evaluation of defendant under an assessment for sexual interest test was reliable for the purposes of characterizing defendant as being sexually uninterested in minors; it was within the trial court's discretion to weigh the expert's testimony regarding the test's significant potential for error and its inaccuracy in Hispanic subjects more heavily than the expert's testimony about the objectiveness of the test. The trial court did not act unreasonably and its decision to exclude the expert's testimony was not an abuse of discretion. Figueroa v. State, 2009 Tex. App. LEXIS 5604, 2009 WL 2183460 (Tex. App. San Antonio July 22 2009).

1212. Court expressed no opinion as to whether the an assessment for sexual interest test could be found reliable if different evidence had been presented; the court only held that the trial court did not abuse its discretion in determining that defendant did not demonstrate by clear and convincing evidence that the test was admissible based on the evidence in this case. Figueroa v. State, 2009 Tex. App. LEXIS 5604, 2009 WL 2183460 (Tex. App. San Antonio July 22 2009).

1213. Contrary to what was suggested by the easement holder and leaseholder, the State's expert did value the entire property, which was the easement because the State had already acquired the underlying fee, and the expert's appraisal did not overlook the value of the property as a billboard location because he valued the easement as put to its highest and best use; thus, the expert's testimony reflected an accepted and reliable method of appraising the condemned easement and should not have been excluded; the error was reversible because the expert's testimony was directly related to the central issue in the case concerning the value of the condemned property, and on remand, the trial court was not to allow evidence of valuation based on advertising income. State v. Cent. Expressway Sign Assocs., 302 S.W.3d 866, 2009 Tex. LEXIS 967, 53 Tex. Sup. Ct. J. 134 (Tex. 2009).

1214. Challenge to expert testimony was rejected in a case involving a civil commitment for a sexually violent predator under Tex. Health & Safety Code Ann. §§ 841.001-841.150, because a forensic psychologist based his testimony on sufficient facts and data and on a reliable method used in his field of expertise for forming an opinion, and he applied that method reliably to the facts in this case. There was no analytical gap in the testimony and no abuse of discretion by the trial court in admitting the testimony. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

1215. Challenge to expert testimony alleging that it was speculative or conclusory was rejected in a case involving a civil commitment for a sexually violent predator under Tex. Health & Safety Code Ann. §§ 841.001-841.150, where three experts reviewed documents, interviewed the patient, and administered actuarials before testifying that the patient suffered from a behavioral abnormality that predisposed him to commit future acts of sexual violence; the experts also explained his risk factors for re-offending. Therefore, the evidence was legally sufficient to support the commitment. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

1216. Appellants' expert opined that a company employee had actual knowledge of the dangers and conditions that resulted in the decedent's death, but considering the evidence relied upon by the expert, this was a conclusory statement that did nothing more than create a mere surmise or suspicion of fact; it was not evidence on which a reasonable jury could return a verdict in appellants' favor, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 95.003. Eisen v. Four Sevens Operating Co., 2009 Tex. App. LEXIS 4032, 2009 WL 1506916 (Tex. App. Fort Worth May 28 2009).

1217. In a wrongful death case, expert testimony that a driver was the cause of a fatal collision was properly admitted into evidence as reliable, even though no witnesses were interviewed; no witnesses came forward since the accident occurred in an unpopulated area. Further, the expert did not overlook the driver's contention that a decedent had been the one to cross over a median; rather, the driver's account was inconsistent with and contradicted the physical evidence at the scene of the accident. Thomas v. Uzoka, 290 S.W.3d 437, 2009 Tex. App. LEXIS 4354 (Tex. App. Houston 14th Dist. May 28 2009).

1218. In a wrongful death case, expert testimony regarding the speed of two vehicles at impact was properly admitted into evidence because the use of a roller wheel was generally accepted as a valid instrument used in taking measurements in the field of accident investigation, the loss of the expert's field notes did not render measurements unreliable since they could have been tested and independently verified, and there was no error in allowing conclusions to be drawn from the measurements listed in a scale diagram. Thomas v. Uzoka, 290 S.W.3d 437, 2009 Tex. App. LEXIS 4354 (Tex. App. Houston 14th Dist. May 28 2009).

1219. In a wrongful death case, expert testimony from an investigating officer was properly admitted because an opinion regarding vehicle speed was based on a reliable foundation where a computer program called WinCrash was used. The appellate court rejected the arguments that the officer was forced to guess at the total pre-collision weight of each vehicle, the speed calculations were generated using an incorrect impact-angle analysis, and the WinCrash report contained several errors that undermined any confidence in the program's computations. Thomas v. Uzoka, 290 S.W.3d 437, 2009 Tex. App. LEXIS 4354 (Tex. App. Houston 14th Dist. May 28 2009).

1220. Corporal properly testified to his rationale for charging defendant with possession of a controlled substance with intent to deliver because of the way the drugs were packaged, and even if error, similar evidence was introduced through the testimony of another witness concerning the manner of the drug's packaging and the number of packages. Tovar v. State, 2009 Tex. App. LEXIS 2739, 2009 WL 1066115 (Tex. App. Amarillo Apr. 21 2009).

1221. In a dispute over the valuation of oil and gas interests, an objector preserved a complaint for review about the testimony of a professional appraiser because the argument was that the testimony was conclusory on its face. In this circumstance, the objector was challenging the legal sufficiency of the evidence, even in the absence of any objection to its admissibility. Averitt v. Caudle, 2009 Tex. App. LEXIS 2284, 2009 WL 891034 (Tex. App. Eastland Apr. 2 2009).

1222. Trial court did not abuse its discretion by admitting the evidence of state trooper because he demonstrated that he was qualified to give the kind of opinion he gave, which was an opinion of how the wreck occurred based on

his observation of the scene of the wreck and subsequent investigation. Brown v. State, 303 S.W.3d 310, 2009 Tex. App. LEXIS 2166 (Tex. App. Tyler Mar. 31 2009).

1223. Trial court did not abuse its discretion by admitting the testimony of a Child Protective Services' supervisor because she did not vouch for the victim's truthfulness in their allegations or express her opinion as to whether sexual abuse had occurred. Rather, she testified that her agency's investigation resulted in a conclusion that, based on the victims' accounts, there was reason to believe that defendant had sexually abuse them; the testimony could assist a trier of fact in determining an issue for which the jury was not qualified to the best possible degree in deciding whether the alleged events occurred. Wagner v. State, 2009 Tex. App. LEXIS 2423 (Tex. App. Houston 14th Dist. Mar. 31 2009).

1224. Trial court did not abuse its discretion by admitting the testimony of two therapists who testified that the two child victims each offered consistent accounts of the charged offenses because the therapists did not attempt to suggest that the victims were truthful or that there allegations were true. Wagner v. State, 2009 Tex. App. LEXIS 2423 (Tex. App. Houston 14th Dist. Mar. 31 2009).

1225. In a sexual assault of a child case, the trial court erred in admitting an expert's opinion on the complainant's credibility because the expert did not base his belief on evidence provided to him before he met the complainant; the expert testified that he believed that the complainant was sexually assaulted "because of how he described that he felt pain or soreness in his butt." The only time the complainant offered such a description was during an interview at a children's advocacy center, which the expert observed first-hand. Lopez v. State, 288 S.W.3d 148, 2009 Tex. App. LEXIS 2050 (Tex. App. Corpus Christi Mar. 26 2009).

1226. In a driving while intoxicated case, the court did not err by allowing the officer to testify that defendant failed the field sobriety tests because the officer's use of the word "failed" did not give his testimony an "aura of scientific reliability" or cloak it with unearned credibility; the majority of the officer's testimony consisted of a straightforward narrative of each field sobriety test, followed by a particular description of how defendant performed each test. The officer's observations were based on common knowledge and observations and did not, under the circumstances convert his lay witness testimony into expert testimony. Meier v. State, 2009 Tex. App. LEXIS 2051, 2009 WL 765490 (Tex. App. Dallas Mar. 25 2009).

1227. In defendant's sexual assault of a child case, the trial court properly excluded defendant's proffered expert testimony regarding memory because the expert would have testified in general about memory and how it could be faulty or distorted, but he would not have tied that opinion to a material fact at issue in the case. He never met with the victim, and there was no showing that the types of tests used in the studies and articles he described were ever performed on the victim. Hales v. State, 2009 Tex. App. LEXIS 1589, 2009 WL 565713 (Tex. App. Dallas Mar. 6 2009).

1228. In a toxic tort case filed by several apartment complex residents, summary judgment was properly granted on the issue of personal injury because the expert testimony of two doctors did not sufficiently show causation; one doctor ultimately opined only that there was "a possibility" of a causal connection between the contaminant exposure alleged and the residents' claimed symptoms, and he conceded he had drawn no further conclusions because he had not evaluated the residents. A second doctor also stated during a deposition that he had not examined any of the residents subject to the trial court's summary judgment, and he was unable to file an affidavit to contradict deposition testimony merely to raise a fact issue for purposes of summary judgment; even if the affidavit was considered, it did no more than provide evidence that the type of mold found at the apartment complex was generally capable of causing health problems, it was not evidence of cause-in-fact of any specific resident's health complaints, and it was conclusory. Plunkett v. Conn. Gen. Life Ins. Co., 285 S.W.3d 106, 2009 Tex. App. LEXIS 1405 (Tex. App. Dallas Feb. 27 2009).

1229. In a toxic tort case filed by several apartment complex residents, summary judgment was properly granted on the issue of property damage because an expert provided no empirical evidence or methodology that explained the validity of his extrapolation that observations pertaining to the mold exposure of one resident's property were also applicable to all the other residents' property. Plunkett v. Conn. Gen. Life Ins. Co., 285 S.W.3d 106, 2009 Tex. App. LEXIS 1405 (Tex. App. Dallas Feb. 27 2009).

1230. There is no authority to support an argument that normal expert reliability standards do not apply in a summary judgment proceeding. Therefore, an appellate court looked to these standards in assessing whether or not summary judgment should have been granted in a toxic tort case on the issues of property damage and personal injury. Plunkett v. Conn. Gen. Life Ins. Co., 285 S.W.3d 106, 2009 Tex. App. LEXIS 1405 (Tex. App. Dallas Feb. 27 2009).

1231. For purposes of Tex. Bus. & Com. Code Ann. § 17.50(a)(1), (3), a client had the burden to produce evidence to raise a material fact issue on whether he had a viable medical malpractice claim under Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13) to preclude no evidence summary judgment on causation, and to the extent the trial court required a suit within a suit requirement as a component of causation, the trial court did not err; the client's affidavit did not address causation and the client could not indirectly rely on an excluded expert's opinions through another's affidavit to create a fact issue on causation, and without admissible testimony that raises a fact issue that the client's medical malpractice case was viable, there was no evidence that, but for the law firms' alleged conduct, the client would not have sustained injury. Hackett v. Littlepage & Booth, 2009 Tex. App. LEXIS 1166 (Tex. App. Austin Feb. 20 2009).

1232. Because it was dispositive, under Tex. R. App. P. 47.1, the court limited its review to the ground that an expert's testimony was not reliable for purposes of Tex. R. Evid. 702. Hackett v. Littlepage & Booth, 2009 Tex. App. LEXIS 1166 (Tex. App. Austin Feb. 20 2009).

1233. Trial court did not abuse its discretion in excluding an expert and sustaining objections to the expert's deposition testimony; for purposes of Tex. R. Evid. 702, the issue was whether the expert's testimony was scientifically reliable that a drug caused or worsened the client's renal condition, and to the extent the trial court relied on case law standards for excluding expert testimony, the trial court did not abuse its discretion, and in any event, the trial court could have found that the expert's conclusions, lacking foundational data linking the drug to the client's condition, amounted to no more than unsupported speculation. Hackett v. Littlepage & Booth, 2009 Tex. App. LEXIS 1166 (Tex. App. Austin Feb. 20 2009).

1234. Case law standards for the admission of epidemiology studies were not at issue here, as a client did not rely on an epidemiological study that linked a drug to his condition; when an expert relied on epidemiology studies, they had to meet certain criteria as outlined in case law. Hackett v. Littlepage & Booth, 2009 Tex. App. LEXIS 1166 (Tex. App. Austin Feb. 20 2009).

1235. In a products liability case, where a retailer failed to raise a scientific reliability challenge to an expert's testimony before a trial court, it was waived on review. However, a challenge that the testimony was speculative and conclusory could have been raised for the first time on appeal. Merrell v. Wal-Mart Stores, Inc., 276 S.W.3d 117, 2009 Tex. App. LEXIS 414 (Tex. App. Texarkana Jan. 23 2009).

1236. In a products liability case, an expert's testimony regarding a fire allegedly started by a lamp was not speculative or conclusory nor did it contain an impermissible analytical gap between the data and the conclusions; while the expert's analysis was not irrefutable, the expert did provide factual substantiation for his opinions. The expert's opinions were based on his knowledge, training and experience as an expert in fire science and fire investigation, his review of the pictures of the scene, the statements of the fact witnesses, and numerous published

articles. Merrell v. Wal-Mart Stores, Inc., 276 S.W.3d 117, 2009 Tex. App. LEXIS 414 (Tex. App. Texarkana Jan. 23 2009).

1237. In defendant's injury to a child case, the court did not err in admitting opinion testimony concerning a DNA test because the expert duly limited her testimony concerning the sample to show it was human skin, consistent with the child's skin, and that the child could not be excluded as the donor. The question raised by defendant concerned more the weight of the testimony rather that its reliability; the expert did not testify that the skin belonged to the child as defendant identified in his trial objection. Smith v. State, 2009 Tex. App. LEXIS 401, 2009 WL 1941999 (Tex. App. Corpus Christi Jan. 22 2009).

1238. Distinct line cannot be drawn between lay opinion and expert testimony because all perceptions are evaluated based on experiences, but as a general rule, observations which do not require significant expertise to interpret and which are not based on a scientific theory can be admitted as lay opinions if the requirements of Tex. R. Evid. 701 are met, and this is true even when the witness has experience or training; additionally, even events not normally encountered by most people in everyday life do not necessarily require the testimony of an expert. Hawkins v. State, 2009 Tex. App. LEXIS 16, 2009 WL 30255 (Tex. App. Texarkana Jan. 7 2009).

1239. In a divorce case, a former husband did not preserve an error relating to the admissibility of expert testimony because the record reflected that the husband lodged no admissibility objections to the testimony assessing the value of the estates, characterizing community assets and separate property, and assessing a former wife's reimbursement claims. As to his complaint about the weight given to the testimony, this was for the trier of fact to decide. Sharma v. Routh, 2008 Tex. App. LEXIS 9737 (Tex. App. Houston 14th Dist. Dec. 31 2008).

1240. Trial court did not abuse its discretion by excluding defendant's expert's testimony because: (1) the expert did not know defendant's blood-breath ratio; (2) the expert provided no data, scientific theory, or documentary evidence to support his position that intoxication could be determined from viewing a videotape without evidence of field sobriety tests; (3) the expert made no attempt to establish that his method was generally accepted in the relevant community; and (4) the jury did not need the expert's testimony in order to evaluate defendant's appearance on the jail tape. Freeman v. State, 276 S.W.3d 630, 2008 Tex. App. LEXIS 9383 (Tex. App. Waco 2008).

1241. In defendant's aggravated robbery case, the court properly allowed an expert to testify as to what direction the wounds had been inflicted because the expert was fully qualified to render his expert medical opinion as to how he believed the wound was inflicted. The expert was not required to have special forensic training to render his medical opinion on the direction of the cut. McClure v. State, 2008 Tex. App. LEXIS 9026 (Tex. App. Austin Dec. 4 2008).

1242. In defendant's sexual assault of a child trial, an expert witness did not directly testify that the child victim was telling the truth, but the expert's testimony did more than simply lay out the behavioral characteristics exhibited by victims of sexual assault or tell the jury what she had observed in treating the witness; some of the expert's testimony was of the kind permitted by the evidence rules, including her statement about the victim's emotionality and the difficulty witnesses have in recalling specific details, which appeared to be permissible, but the expert never offered any explanation for how it was that she was able to assess witness testimony and cross examination and there appeared to be no basis for her conclusion that the victim was as detailed as she could be or that her account was not diminished or exaggerated. The expert staked her professional reputation on her assessment of the case, which was essentially that the witness was telling the truth, and this application of whatever principles the expert used to assess the State's case and the testimony of the witness was for the jury to perform, such that the admission of the expert's testimony related to the truthfulness of the victim was error. Long v. State, 2008 Tex. App. LEXIS 8885 (Tex. App. Tyler Nov. 26 2008).

1243. Error of admitting expert testimony relating to the truthfulness of a witness, as the parties agreed in this case, is nonconstitutional error, and the appellate court reviews the entire record to see if the appellant's substantial rights were harmed, for purposes of Tex. R. App. P. 44.2(b), Tex. R. Evid. 103(a). Long v. State, 2008 Tex. App. LEXIS 8885 (Tex. App. Tyler Nov. 26 2008).

1244. While there was evidence of defendant's guilt of sexual assault of a child in violation of Tex. Penal Code Ann. § 22.011(a)(2)(A), this was not a case where a guilty verdict was the only likely outcome, and while the evidence was substantial, it was not overwhelming, and the court held that the error of admitting expert testimony related to the truthfulness of the victim harmed defendant's substantial rights under Tex. R. App. P. 44.2(b); whether the victim was telling the truth was the singular issue in the trial, the expert testified that the victim testified truthfully, it was likely that this testimony was powerful, there were no instructions sought or given to explain how the jury was to use the expert's testimony, the State emphasized the expert's opinion in closing arguments, and the expert's testimony invaded the province of the jury in a fundamental way by putting the weight of expert opinion behind the conclusion that the complaining witness was telling the truth, and the court was not convinced that defendant's substantial rights were not harmed. Long v. State, 2008 Tex. App. LEXIS 8885 (Tex. App. Tyler Nov. 26 2008).

1245. Court properly admitted a latent fingerprint report because the officer had fifteen years experience, he testified regarding the numerous courses he had taken in fingerprint examination, and after reprinting defendant, the officer located fourteen characteristics between the print from the duct tape and defendant's print. Montez v. State, 2008 Tex. App. LEXIS 7033 (Tex. App. San Antonio Sept. 24, 2008).

1246. Defendant argued that a deputy's employment of the horizontal gaze nystagmus test was not reliable for purposes of Tex. R. Evid. 705(c), and the testimony was not only not helpful to the jury, but was misleading and unfairly prejudicial, for purposes of Tex. R. Evid. 402, 403, 702, but defendant's objection, which referred broadly to the deputy's administration of the test, was not specific enough to have informed the trial court of the basis of the argument defendant now raised on appeal so as to have afforded the trial court the opportunity to rule on it, for purposes of Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103; thus, defendant waived error, if any. Gowin v. State, 2008 Tex. App. LEXIS 6873 (Tex. App. Tyler Sept. 17 2008).

1247. In a personal injury action in which appellee truck driver pleaded a claim for negligent hiring against appellant foreign corporation by alleging that it hired a Texas corporation to deliver products to Texas when appellant retained control over the Texas corporation and knew or should have known that the Texas corporation employed an incompetent driver, the trial court did not abuse its discretion in overruling appellant's objection to an affidavit and expert report drafted by a transportation expert for appellee where appellant had neither assailed the expert's scientific, technical, or other specialized knowledge nor challenged whether his testimony was relevant and based on a reliable foundation. Furthermore, although appellant pointed the reviewing court to authority pertaining to affidavits in a summary judgment context, it did not explain why expert reports tendered at a special appearance hearing should have been held to the same standard as an affidavit presented at a summary judgment hearing. Ltd. Logistics Servs. v. Villegas, 268 S.W.3d 141, 2008 Tex. App. LEXIS 6536 (Tex. App. Corpus Christi 2008).

1248. In defendant's sexual assault case, the court did not err by denying a hearing on expert testimony because the underlying facts and data supporting the expert's opinion -- her education, training, and experience, years of clinical treatment of victims of family sexual abuse, and knowledge of Hispanic culture -- were not inadmissible. Merlos v. State, 2008 Tex. App. LEXIS 6514 (Tex. App. Dallas Aug. 26, 2008).

1249. In defendant's sexual assault case, the court properly found an expert to be qualified and her opinion to be reliable because the expert was trained and licensed as a psychologist and therapist, many of her clients were Hispanic, and she worked with children who were not raised in the United States. The expert explained the complexity of sexual abuse, especially involving incest, how children internalized and blamed themselves for the

abuse, and that it took many years for a victim to work out the effects of sexual abuse. Merlos v. State, 2008 Tex. App. LEXIS 6514 (Tex. App. Dallas Aug. 26, 2008).

1250. Summary judgment was properly granted to health care providers in a medical malpractice case because an expert opinion relating to proximate causation was stricken; the expert offered no support for his opinion that the presence of two separate primary cancers resulted in a prognosis identical to the individual prognosis of the more serious cancer. Flores v. Eakin, 2008 Tex. App. LEXIS 6456 (Tex. App. Austin Aug. 22, 2008).

1251. Court did not abuse its discretion in allowing an expert to testify as to an opinion of defendant's mental state at the time of the offense because based on education and experience, the expert was qualified to testify as to what might or might not have contributed to defendant behavior at the time of the offenses. Additionally, the expert based the testimony upon the facts that defendant's story was inconsistent, he did not have a history of delusions, and his panic at being apprehended by police officers after the commission of the offenses was inconsistent with the delusion that one was God. Howard v. State, 2008 Tex. App. LEXIS 6431 (Tex. App. Houston 1st Dist. Aug. 21 2008).

1252. Defendant argued on appeal that a question to and an answer from a nurse examiner exceeded the scope of Tex. R. Evid. 702, 704 because they constituted improper opinion testimony regarding the victim's truthfulness, but because this objection did not comport with defendant's trial objection, he waived this complaint pursuant to Tex. R. App. P. 33.1, plus the nurse offered the same testimony on seven previous occasions and on one subsequent occasion without objection from defendant, and the improper admission of evidence did not constitute reversible error if the same facts were shown by other evidence that was not challenged; even if defendant preserved his complaint, the nurse's testimony was proper because it was limited to her expert opinion on the physical findings that she observed and the record did not contain any evidence that would have supported a finding that the trial court would have abused its discretion in allowing the nurse's testimony if it had been presented with a proper objection. Jernigan v. State, 2008 Tex. App. LEXIS 6310 (Tex. App. Eastland Aug. 14 2008).

1253. In an indecency with a child case, the court did not err by admitting expert testimony that none of the conduct prosecuted by the State involved "innocent" touching because the State's questions did not seek to provoke an opinion about the truthfulness of the victim, but to substantively establish that the touching was not innocent. Darling v. State, 262 S.W.3d 920, 2008 Tex. App. LEXIS 6106 (Tex. App. Texarkana 2008).

1254. Expert testimony was not relevant to the ultimate issue before the jury and thus the trial court properly excluded this testimony as not relevant for purposes of Tex. R. Evid. 402 to the issue of the parties' intent regarding their agreement. Boulle v. Boulle, 254 S.W.3d 701, 2008 Tex. App. LEXIS 3604 (Tex. App. Dallas 2008).

1255. Individual argued that the trial court erred in striking the individual's expert witness; however, there was nothing in the record showing an offer of proof, a bill of exception, or that the expert report was brought to the trial court's attention, and without an offer of proof, the individual failed to preserve the complaint for review. Bobbora v. Unitrin Ins. Servs., 255 S.W.3d 331, 2008 Tex. App. LEXIS 2928 (Tex. App. Dallas 2008).

1256. Because a party did not make objections at trial regarding expert testimony, the party did not preserve this complaint for review. In re R.A.K., 2008 Tex. App. LEXIS 2945 (Tex. App. Corpus Christi Apr. 24 2008).

1257. Court properly precluded defendant's expert witness from testifying in his attempted indecency with a child trial regarding defendant's belligerent and threatening behavior at the time of his arrest because defendant did not offer the doctor as an expert to explain why defendant behaved the way he did at the time of his arrest; instead, defendant's focus was on qualifying the doctor to testify as an expert on the characteristics of sexual predators and characteristics of sexual abuse victims following outcry. Bejarano v. State, 2008 Tex. App. LEXIS 2762 (Tex. App.

El Paso Apr. 17 2008).

1258. Contrary to Tex. R. App. P. 38, the intended purchaser cited no authority for the claim that the trial court was required to hear an expert's testimony before ruling on its admissibility and the purchaser provided no argument regarding the relevancy of the excluded evidence to particular elements of his various causes, and thus he waived this issue; even absent waiver, the court found no abuse of discretion in the trial court's ruling, as the subject areas excluded by the trial court involved matters inappropriate for expert testimony under Tex. R. Evid. 702, and the court found no merit in the challenge to the trial court's ruling limiting the testimony. Petras v. Criswell, 248 S.W.3d 471, 2008 Tex. App. LEXIS 2017 (Tex. App. Dallas 2008).

1259. In defendant's capital murder case, the evidence was legally sufficient as to the issue of causation because the record reflected that a microscopic examination was conducted of the baby's skull, the expert's findings helped establish the date of the injury, and defendant did not dispute the method by which the expert conducted the microscopic examination. Villegas v. State, 2008 Tex. App. LEXIS 1899 (Tex. App. Corpus Christi Mar. 13 2008).

1260. Because appellants did not object to the reliability of expert testimony in the trial court, the court's review of the evidence was limited to the face of the record. Hong v. Integrated Applications Eng'g, Inc., 2008 Tex. App. LEXIS 1905 (Tex. App. Houston 14th Dist. Mar. 11 2008).

1261. Expert testimony was conclusory because the expert's opinions were not supported by the evidence; although the expert testified that he conducted an extensive review of many documents in reaching his conclusions, no exhibits were introduced during his testimony to support the damages calculations that he reached, the documents the expert relied upon could not be ascertained with reasonable certainty from certain reports that were admitted into evidence, and the supporting information the expert referenced either failed to sufficiently identify the origin on the data used in the expert's calculations or failed to explain the facts relied upon by the expert in reaching his conclusions. Hong v. Integrated Applications Eng'g, Inc., 2008 Tex. App. LEXIS 1905 (Tex. App. Houston 14th Dist. Mar. 11 2008).

1262. Comments concerning appellees' beliefs did not constitute the type of objective facts or data required to support an expert's damages calculations. Hong v. Integrated Applications Eng'g, Inc., 2008 Tex. App. LEXIS 1905 (Tex. App. Houston 14th Dist. Mar. 11 2008).

1263. Expert testimony did not support the damages awarded and the rest of the record did not support the damages; thus, reversal was required and a new trial ordered. Hong v. Integrated Applications Eng'g, Inc., 2008 Tex. App. LEXIS 1905 (Tex. App. Houston 14th Dist. Mar. 11 2008).

1264. Appellate court could not conclude that the trial judge abused his discretion in excluding the testimony as expert witness testimony, because there was no showing that the witness's underlying scientific theory was valid, and the witness conceded as much when questioned by the State. Vela v. State, 251 S.W.3d 794, 2008 Tex. App. LEXIS 1287 (Tex. App. Corpus Christi 2008).

1265. In a cocaine possession case, defendant's failure to object to an officer's testimony that drug dealers often carried many small bills waived the issue under Tex. R. App. P. 33, and counsel was not ineffective for failing to challenge the testimony as Tex. R. Evid. 702 expert testimony because it was admissible as Tex. R. Evid. 701 opinion testimony. Hayes v. State, 2008 Tex. App. LEXIS 747 (Tex. App. Texarkana Feb. 1 2008).

1266. Although a manufacturer cited certain case law numerous times in its challenge to appellees' expert testimony, the manufacturer devoted just over two pages of its 50-page brief to those case law factors and instead

challenged the expert's testimony as allegedly resting on multiple untested assumptions; the court therefore found that the manufacturer's argument primarily relied on the analytical gap test, plus the court found that test to be the appropriate way to analyze the expert testimony because it was based on the experience of the testifying experts. Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 2008 Tex. App. LEXIS 356 (Tex. App. Corpus Christi 2008).

1267. Bulk of manufacturer's expert testimony challenge was lodged against one expert, but the manufacturer made a passing reference against the reliability of a second expert's testimony; out of an abundance of caution, the court discussed the reliability of the second expert's testimony where appropriate, for purposes of Tex. R. App. P. 38. Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 2008 Tex. App. LEXIS 356 (Tex. App. Corpus Christi 2008).

1268. In a products liability action, an expert's lint ignition testimony was based on an objective observation of lint build-up in the dryer cabinet, independent observations supported the expert's testimony regarding how an ember survived to ignite the clothes in the dryer and then spread from the dryer, and this expert and another expert relied on objective criteria in the record and their own experience to conclude that the dryer caused the fire; while the manufacturer might have disagreed with their conclusions, the experts explained the basis for their opinions and based those opinions on objective facts, and the trial court did not err in admitting this evidence, for purposes of Tex. R. Evid. 702. Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 2008 Tex. App. LEXIS 356 (Tex. App. Corpus Christi 2008).

1269. While a manufacturer's expert testimony might have been plausible, it was not conclusive, and appellees' expert's evidence contradicted the manufacturer's expert's testimony, and thus the manufacturer did not show that it conclusively disproved appellees' theories in its products liability case. Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 2008 Tex. App. LEXIS 356 (Tex. App. Corpus Christi 2008).

1270. Appellees' expert's testimony sufficiently linked his conclusions to the facts and there was at least some evidence, more than a scintilla, of the existence of a safer alternative design, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 82.005. Whirlpool Corp. v. Camacho, 251 S.W.3d 88, 2008 Tex. App. LEXIS 356 (Tex. App. Corpus Christi 2008).

1271. Expert testimony offered on behalf of a consumer was admissible in a manufacturing defect case relating to an accident allegedly caused by a part of a truck coming apart because it was reliable in nature; the issues raised by a manufacturer during cross-examination went to the weight of the testimony, but not its admissibility; the testimony did not present a case where there was simply too great an analytical gap between the data and the opinion proffered, or where the expert's testimony amounted to nothing more than a recitation of his credentials and a subjective opinion. Ford Motor Co. v. Ledesma, 242 S.W.3d 32, 2007 Tex. LEXIS 1130, 51 Tex. Sup. Ct. J. 250, CCH Prod. Liab. Rep. P17894 (Tex. 2007).

1272. Using the analytical-gap analysis in a wrongful death action by appellees, a surviving spouse and children, against a hospital, a trial court could have concluded that the medical experience and knowledge of appellees' expert, and his explanation of the basis for his opinions, demonstrated that his testimony that the patient died of acute opiate toxicity that could have been avoided by monitoring the patient was reliable under Tex. R. Evid. 702. McAllen Hosps., L.P. v. Muniz, 2007 Tex. App. LEXIS 9683 (Tex. App. Corpus Christi Dec. 13 2007).

1273. For purposes of Tex. R. App. P. 33, the court found that the "outside his range" objection was sufficient to have put the trial court on notice that defendant was challenging a doctor's credibility as an expert and the reliability of his testimony, especially given the trial court's response to the objection, and thus defendant lodged an adequate objection and presented the issue for review. Martin v. State, 246 S.W.3d 246, 2007 Tex. App. LEXIS 9698 (Tex. App. Houston 14th Dist. 2007).

1274. In defendant's trial for capital murder, a doctor was qualified to testify as an expert under Tex. R. Evid. 702 regarding a perpetrator's state of mind, given that (1) the doctor was an assistant professor of pediatrics, (2) he was triple board certified in pediatrics, pediatric emergency medicine, and pediatric infectious diseases, and (3) he experienced hundreds of injuries similar to the child's injuries and knew the injuries were generally consistent with child abuse; thus, he was qualified in regard to whether the injuries presented were intentional and not accidental injuries, such involved specialized knowledge and his testimony assisted the jury in understanding the evidence and determining the fact at issue, and under Tex. R. Evid. 704, the doctor was qualified to render his opinion on the ultimate issue of whether the child's injuries were intentionally inflicted. Martin v. State, 246 S.W.3d 246, 2007 Tex. App. LEXIS 9698 (Tex. App. Houston 14th Dist. 2007).

1275. Defendant's conviction for murder was proper because the trial court did not err by admitting an officer's testimony as a gang membership expert since the officer was qualified; the officer had been a certified peace officer for 11 years; he had over 3,000 hours of training directly involved with gang identification of prison and street gang members; and he had been a member of a gang investigators association for 12 years and had been with a gang task force for 13 years. Rivers v. State, 2007 Tex. App. LEXIS 8898 (Tex. App. Houston 1st Dist. Nov. 8 2007).

1276. On a no-evidence motion for summary judgment, an expert affidavit stating that a tenant's injury was caused by a particular dangerous condition of which the landlord knew or should have known should not have been stricken as conclusory because its conclusions were supported by scientific observations. Gillenwater v. Fort Brown Villas, III, 2007 Tex. App. LEXIS 7145 (Tex. App. Corpus Christi Aug. 31 2007).

1277. In a legal malpractice case, an expert affidavit was not found to be admissible where it failed to meet the requirements of Tex. R. Civ. P. 166a because it was not based on personal knowledge, it was unsworn, and it only indicated competency by allusion to another unsworn document. Twist v. Garcia, 2007 Tex. App. LEXIS 7187 (Tex. App. Corpus Christi Aug. 30 2007).

1278. Homeowners' expert's testimony was legally sufficient to support the homeowners' claims for damages because the expert's testimony was not conclusory. Sparks v. Booth, 232 S.W.3d 853, 2007 Tex. App. LEXIS 6909 (Tex. App. Dallas 2007).

1279. In defendant's sexual assault on a child case, the court properly allowed a nurse to testify as an expert regarding the risk of HIV transmission during unprotected sex because the State offered testimony to establish that the nurse was qualified to testify about the matter. She was a nurse practitioner who specialized in infectious diseases, she received extensive training and education related to HIV, and she indicated that she was familiar with several studies establishing that there was a high risk of HIV transmission during unprotected sex. Henry v. State, 2007 Tex. App. LEXIS 6791 (Tex. App. El Paso Aug. 23 2007).

1280. In defendant's aggravated sexual assault of a child case, the court properly allowed expert testimony by a nurse concerning her finding no trauma to the child's genitals in her examination because she was qualified by her knowledge, skill, experience, training, and education as an expert witness in the field of child sexual abuse; she testified that she relied on a study in reaching her opinion, and therefore, the trial court did not abuse its discretion by allowing the nurse to testify about the results of the study. Archer v. State, 2007 Tex. App. LEXIS 6612 (Tex. App. Austin Aug. 17 2007).

1281. Without having to determine whether the business records exception to the hearsay rule predicate was even necessary, so long as the document itself was not offered into evidence, the court found that testimony served as a sufficient predicate for admission of the evidence regarding the chemist's test; while one chemist did test the cocaine in question, no report was offered into evidence and it was proper for him to base his opinion on another

chemist's test results. Alexander v. State, 2007 Tex. App. LEXIS 6260 (Tex. App. Texarkana Aug. 9 2007).

1282. Grant of summary judgment in favor of the corporation in the homeowners' action for property damage from seismic surveys conducted by the corporation was appropriate because no evidence revealed the qualifications of three experts and the fourth lacked expertise in the areas most critical to establishing causation in the case; because of that, the appellate court was unable to say that the trial court would have abused its discretion had it excluded all four of the homeowners' witnesses based on the failure to prove the qualifications of their expert witnesses. Adair v. Veritas DGC Land, Inc., 2007 Tex. App. LEXIS 6338 (Tex. App. Houston 14th Dist. Aug. 9 2007).

1283. In a criminal prosecution for aggravated sexual assault, the trial court did not abuse its discretion by admitting opinion testimony from a pediatrician; the testimony the witness gave regarding her qualifications, experience, and education all went to her status as an expert for purposes of Tex. R. Evid. 702; no express words were required to offer the expert; the defense never objected that she was unqualified or that the subject matter of her testimony was inappropriate for expert testimony. Degollado v. State, 2007 Tex. App. LEXIS 6032 (Tex. App. San Antonio Aug. 1 2007).

1284. Even if the parishioner's theory of limited unsound mind was valid, the parishioner's expert did not demonstrate any objective evidence or data that would support the conclusion that the parishioner was of unsound mind from 1985 until 2004; thus, the trial court abused its discretion in excluding the expert's testimony as unreliable. Ramirez v. Mansour, 2007 Tex. App. LEXIS 6035 (Tex. App. San Antonio Aug. 1 2007).

1285. Psychiatrist who had several years of experience working with sexually violent offenders and evaluating them for civil commitment was qualified as an expert in the field of psychiatry and qualified to testify that an individual had a behavioral abnormality that made him likely to engage in a predatory act of sexual violence; moreover, no analytical gap was shown in the psychiatrist's methodology. In re Zamora, 2007 Tex. App. LEXIS 5852 (Tex. App. Beaumont July 26 2007).

1286. Trial court properly sustained the objection to the admission of a chemist report prepared by the expert's employee and relied upon by the expert, but the trial court properly admitted the expert's testimony because it was not hearsay and was not required to be based on personal knowledge; even if the expert's testimony did improperly reveal underlying facts or data that were inadmissible, for which Tex. R. Evid. 705 would have required the trial court to give a limiting instruction upon request, no such instruction was requested and thus the trial court did not err in admitting the expert's testimony. Collins v. State, 2007 Tex. App. LEXIS 6116 (Tex. App. Fort Worth July 26 2007).

1287. In a condemnation proceeding, admission of appellee's expert testimony regarding temporary damages was not an abuse of discretion. Appellant State's analysis that a hotel needed only 75 percent of the total parking spaces was overly simplistic, as the hotel had on average 75 percent occupancy; according to the expert, on certain nights, the hotel might have 100 percent occupancy. State v. Bristol Hotel Asset Co., 293 S.W.3d 211, 2007 Tex. App. LEXIS 5565 (Tex. App. San Antonio 2007).

1288. In a condemnation proceeding as to hotel property, admission of appellee's expert testimony regarding permanent damages was not an abuse of discretion. According to appellant State, a civil engineer disputed the expert's testimony, testifying that reconfigured driveways were not safety concerns, and, as such, the State argued that there was no support for the expert's conclusion that the property diminished five percent; however, in reviewing the record, the court concluded that the engineer did not dispute the expert's assertion that the new drive would create a safety issue that did not exist before condemnation. State v. Bristol Hotel Asset Co., 293 S.W.3d

211, 2007 Tex. App. LEXIS 5565 (Tex. App. San Antonio 2007).

1289. In a case involving the commitment of a sexually violent predator, a request for a gatekeeper hearing was untimely where it was made after the substance of an expert's opinion had already been given. In re Commitment of Marks, 230 S.W.3d 241, 2007 Tex. App. LEXIS 5424 (Tex. App. Beaumont 2007).

1290. In a dispute involving a homestead exemption, experts were properly allowed to testify about the establishment, assertion, and abandonment of homestead protections in Texas, and there was no misstatements of the law made regarding homesteads. Wilcox v. Marriott, 230 S.W.3d 266, 2007 Tex. App. LEXIS 5440 (Tex. App. Beaumont 2007).

1291. Trial court could have reasonably found that an agent's testimony established both a computer program's reliability and the agent's qualifications to testify to that reliability, and thus the trial court properly admitted the agent's testimony in defendant's child pornography trial regarding the evidence obtained from defendant's computers; the agent had a college degree with majors in management information systems, he was certified in hardware and operating systems and Internet processing, he had worked for the Federal Bureau of Investigation for seven years and had received 200 hours of specialized training to become a certified forensic examiner, and his training including programs like the one in question. Krause v. State, 243 S.W.3d 95, 2007 Tex. App. LEXIS 5461, 40 A.L.R.6th 711 (Tex. App. Houston 1st Dist. 2007), *aff'd,* Krause v. Leonard, 352 Fed. Appx. 933, 2009 U.S. App. LEXIS 24387 (5th Cir. Tex. 2009).

1292. Trial court did not abuse its discretion in a fraud action in permitting one of a home health business's accountants to testify as an expert on the business members' alleged damages because his education, training, and experience in accounting and auditing in the field of Medicare-funded home-health agencies, as well as his exposure to business valuation in that specialized field qualified him to testify as an expert on damages pursuant to Tex. R. Evid. 702. Furthermore, the accountant's experience, coupled with his thorough testimony about the methodology he employed, demonstrated that the opinions he drew from the underlying data were reliable, and his damage models comported with the jury instruction concerning damages. Rogers v. Alexander, 244 S.W.3d 370, 2007 Tex. App. LEXIS 5103 (Tex. App. Dallas 2007).

1293. Trial court did not abuse its discretion by excluding the testimony of defendant's expert on eyewitness identification because the expert's testimony was offered purely as educational material for the jury, which was insufficient to demonstrate that the scientific principles would assist the trier of fact in the case or were sufficiently tied to the pertinent facts of the case. Baldree v. State, 248 S.W.3d 224, 2007 Tex. App. LEXIS 5057 (Tex. App. Houston 1st Dist. 2007).

1294. Trial court did not err by allowing the program director of a child advocacy center to testify as an expert because: (1) the field of expertise of characteristics and dynamics of sexually abused children was a legitimate one; (2) it was within the program director's scope of expertise to testify that she did not observe in the child victim's demeanor anything to indicate that she had been coached in her allegation against defendant and to discuss a phenomenon called delayed disclosure by victims of sexual assault; and (3) the program director listed journals and articles on which she relied for her opinions and testified that she participated in a peer review committee. Reynolds v. State, 227 S.W.3d 355, 2007 Tex. App. LEXIS 4250 (Tex. App. Texarkana 2007).

1295. Under Tex. R. Evid. 702, the trial court did not abuse its discretion in determining that the evidence regarding the cadaver dogs was reliable and admissible because (1) the trainers were qualified to handle the cadaver dogs; (2) the dogs had been trained and certified as cadaver dogs; (3) the testimony of the witnesses established that the dogs had never falsely indicated human remains and that the dogs could consistently distinguish human remains from other scents; (4) each dog performed its search independently from the handlers,

working off-lead; and (5) the dogs alerted to the same location that defendant had indicated the victim's body had been placed. Trejos v. State, 243 S.W.3d 30, 2007 Tex. App. LEXIS 4045 (Tex. App. Houston 1st Dist. 2007).

1296. In a products liability and negligence lawsuit alleging that defective cellulose insulation caused a house fire, the deposition testimony and affidavit of the homeowners' expert witness were properly excluded because they were contradictory, contained conclusory allegations, and failed to rule out alternative causes of the fire; hence, there was no evidence of causation under either the proximate cause standard of negligence or the producing cause standard of Tex. Civ. Prac. & Rem. Code Ann. § 82.005(a)(2). Jacob v. Int'l Cellulose Corp., 2007 Tex. App. LEXIS 3314 (Tex. App. Austin Apr. 27 2007).

1297. Trial court did not err in refusing to allow a defense expert to testify in the punishment phase of appellant's capital murder trial that appellant's use of alcohol and cocaine caused him to commit the crime because, in excluding the evidence, the trial court properly determined that appellant did not make the requisite showing of reliability under Tex. R. Evid. 702; the expert was permitted to testify about the correlation between alcohol and cocaine usage and violence, but she was not permitted to take the extra step of opining whether alcohol and drug dependence was related to appellant's violent conduct. Roberts v. State, 220 S.W.3d 521, 2007 Tex. Crim. App. LEXIS 429 (Tex. Crim. App. 2007).

1298. In this personal injury lawsuit, even if the court assumed that the trial court erred in admitting certain expert testimony, the employees and their spouses failed to show that the ruling probably caused the rendition of an improper judgment; accepting any of the manufacturer's propositions could have resulted in the jury's "no" answer to the question of whether the manufacturer's negligence proximately caused the occurrence in question, and the verdict did not turn on the expert's testimony. Barfield v. SST Truck Co., L.L.C., 220 S.W.3d 206, 2007 Tex. App. LEXIS 2908 (Tex. App. Dallas 2007).

1299. In an indecency with a child case, assuming the challenged testimony regarding the children's accounts of sexual abuse should not have been admitted under Tex. R. Evid. 702, the admission of the evidence was not reversible error as other testimony relevant to the truthfulness of the children was admitted, without objection, through the same expert witnesses. Nabors v. State, 2007 Tex. App. LEXIS 2538 (Tex. App. Beaumont Mar. 28 2007).

1300. Family was required to proffer the testimony of an expert witness as to whether a reasonable firefighter could have believed that he was justified in entering the intersection as the fireman did after weighing the risk of an accident against the need to respond to the alarm. Fireman was entitled to official immunity under Tex. Civ. Prac. & Rem. Code Ann. § 108.002 because the fireman made an adequate showing that he acted in good faith; he activated his emergency lights and siren, slowed down as he approached the intersection, activated his air horn and looked in the direction of approaching traffic, and drove slowly through the intersection. Green v. Alford, 2007 Tex. App. LEXIS 2342 (Tex. App. Houston 14th Dist. Mar. 27 2007).

1301. In a legal malpractice lawsuit, the trial court did not abuse its discretion under Tex. R. Evid. 702 in excluding the testimony of an expert witness as conclusory because of a lack of legal support for the expert's asserted opinion that the order of the questions in the jury charge in the underlying negligence case should have been different. Juarez v. Elizondo, 2007 Tex. App. LEXIS 2133 (Tex. App. San Antonio Mar. 21 2007).

1302. Court did not abuse its discretion by excluding defendant's witness's testimony because the court was within its discretion to conclude that the witness was in fact being called as an expert in accident reconstruction, and although the witness's testimony revealed that he had significant experience investigating traffic accidents, he had no formal training in the field in nearly thirty years. Brown v. State, 2007 Tex. App. LEXIS 1483 (Tex. App. Waco

Feb. 21 2007).

1303. Defendant objected on the basis of improper predicate and that a legal conclusion was asked for by the State, and although defendant did not use trigger words like "expert," "qualifications," and "relevance," the actual objection was specific enough to make the trial court aware of the complaint under Tex. R. Evid. 702, for purposes of Tex. R. App. P. 33.1(a). McKee v. State, 2007 Tex. App. LEXIS 831 (Tex. App. Fort Worth Feb. 1 2007).

1304. Even though defendant properly made the trial court aware of the complaint, defendant did not provide specific grounds regarding why an officer was unqualified to testify as an expert, such that defendant failed to preserve for review any specific complaint about the officer's testimony regarding whether defendant used a vehicle as a deadly weapon under Tex. Penal Code Ann. § 1.07(a)(17)(B). McKee v. State, 2007 Tex. App. LEXIS 831 (Tex. App. Fort Worth Feb. 1 2007).

1305. Defendant failed to note that his objection to a witness's testimony was largely sustained, and he failed to argue how any of the court-permitted questions elicited expert testimony; to the extent that the fact questions allowed did elicit expert testimony, such did not harm defendant, as the witness was listed as a regular witness and defendant had the chance to challenge him, plus defendant could have asked for a continuance to investigate, and thus the court overruled defendant's claim that the trial court erred in allowing expert testimony without first providing him proper notice. Sprouse v. State, 2007 Tex. Crim. App. LEXIS 1862 (Tex. Crim. App. Jan. 31 2007).

1306. Trial court did not err in admitting the testimony of a landowner's expert witness in this eminent domain case on the issue of fair market value of the fee area, for purposes of Tex. R. Evid. 702; the expert testified as to the highest and best use of the property, the expert used four comparable sales in the vicinity, and the court found that the testimony was relevant and reliable. City of Sugar Land v. Home & Hearth Sugarland, L.P., 215 S.W.3d 503, 2007 Tex. App. LEXIS 308 (Tex. App. Eastland 2007).

1307. Cost of a fence was admissible, not as a separate element of damage, but as information that could have been used by the jury to arrive at the diminished value of the remainder tract after the taking, if any; expert testimony regarding the value of the remainder before and after the taking was admissible and thus the trial court did not err in admitting it. City of Sugar Land v. Home & Hearth Sugarland, L.P., 215 S.W.3d 503, 2007 Tex. App. LEXIS 308 (Tex. App. Eastland 2007).

1308. Although the cost approach generally was less accurate the older a property was, in this case, less than one year had passed between the completion of construction and the date of the taking; the property was unique in character and not frequently exchanged in the market place, and the cost approach was a proper barometer for assessing market value of the tract before the taking, and thus the trial court did not err in admitting this expert testimony. City of Sugar Land v. Home & Hearth Sugarland, L.P., 215 S.W.3d 503, 2007 Tex. App. LEXIS 308 (Tex. App. Eastland 2007).

1309. In an eminent domain case, expert testimony as to safety and drainage issues was relevant and reliable under Tex. R. Evid. 702; the witness reviewed plans of the city's proposed regional detention pond, the existing pond on the landowner's property, depositions, and the manner in which other detention facilities were constructed. City of Sugar Land v. Home & Hearth Sugarland, L.P., 215 S.W.3d 503, 2007 Tex. App. LEXIS 308 (Tex. App. Eastland 2007).

1310. Party filed a pretrial motion to exclude certain expert testimony, and thus the issue was preserved for review. City of Sugar Land v. Home & Hearth Sugarland, L.P., 215 S.W.3d 503, 2007 Tex. App. LEXIS 308 (Tex. App. Eastland 2007).

1311. Trial court did not err by allowing the State to introduce an expert's testimony regarding post-traumatic stress disorder (PTSD) and eye movement desensitization and reprocessing (EMDR) under Tex. R. Evid. 702 because based on the expert's testimony, the trial court could have found that he was qualified to testify; the expert demonstrated that he was familiar with PTSD and EMDR and that he had worked with victims of extended sexual abuse; the evidence demonstrated that PTSD was an accepted diagnosis in the medical community and that EMDR treatment was used and recognized in the fields of social work, psychiatry, and psychology. Bailey v. State, 2007 Tex. App. LEXIS 208 (Tex. App. Fort Worth Jan. 11 2007).

1312. In defendant's trial for aggravated sexual assault of a child, the trial court did not err in admitting expert witness testimony because the expert limited the testimony to the general characteristics of child victims of sexual abuse and whether hypothetical fact situations were consistent with sexual abuse, and other courts had upheld the admissibility of such testimony; the expert never claimed that the hypothetical child accusers were telling the truth or that all child victims in such cases tell the truth. Gauna v. State, 2006 Tex. App. LEXIS 11128 (Tex. App. Austin Dec. 29 2006).

1313. Trial court abused its discretion by granting physician a directed verdict in medical malpractice action because the patient's expert stated during a deposition that the standard of care required the physician to administer a tissue plasminogen activator (TPA) within 15 minutes of his arrival at the hospital at 12:45 p.m. and that the physician breached the standard of care by failing to administer TPA to the patient until 2:25 p.m. The court further found that the expert's testimony also constituted some evidence of causation; the trial court did not abuse its discretion in admitting the expert's testimony under Tex. R. Evid. 702. Kelso v. Williamson, 2006 Tex. App. LEXIS 10949 (Tex. App. Corpus Christi Dec. 21 2006).

1314. Trial court did not err in denying defendant's motion for a continuance and by excluding the transcript of an expert's pretrial testimony because the expert's testimony was irrelevant to the knowledge of consent issue in defendant's trial for debit card abuse in violation of Tex. Penal Code Ann. § 32.31(b)(1)(A) and unauthorized use of a motor vehicle in violation of Tex. Penal Code Ann. § 31.07(a); what the expert suggested regarding defendant's manic episode was not relevant to whether defendant believed at the time of the offense that the victim consented to defendant's use of the ambulance and debit card, there is no analogy to Tex. Code Crim. Proc. Ann. art. 38.36(a) that makes mental illness evidence relevant to prosecutions for debit card abuse and unauthorized use of a motor vehicle, and the expert's testimony did not tend to negate the culpable mental state for the offense but provided an excuse or explanation for defendant's intentional acts. Fleece v. State, 2006 Tex. App. LEXIS 10631 (Tex. App. Fort Worth Dec. 14 2006).

1315. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

1316. Trial court did not err in excluding certain expert testimony because the witness admitted to lacking expertise in the matter about which the expert was to opine and thus the trial court could have inferred that the witness lacked experience and training in the field and was not qualified, or the trial court could have found that the reliability of the witness's experiment was suspect. Stringer v. Red River Commodities, Inc., 2006 Tex. App. LEXIS 10617 (Tex. App. Amarillo Dec. 13 2006).

1317. Trial court did not abuse its discretion by excluding the expert's testimony under Tex. R. Evid. 702, because the expert did not testify at the Robinson hearing to a methodology by which he reached his conclusion that the fire was caused by defects in the truck's fuel and battery systems; the expert's testimony did no more than set out

"factors" and "facts" that were consistent with his opinions and then conclude that the fire began with diesel fuel from the truck. Mack Trucks v. Tamez, 206 S.W.3d 572, 2006 Tex. LEXIS 1074, 50 Tex. Sup. Ct. J. 80 (Tex. 2006).

1318. Appellate court could not consider an expert's testimony from the bill of exceptions in determining whether the trial court erred in excluding his causation testimony because it did not first determine, pursuant to properly assigned error, that the trial court erred in refusing to admit the testimony. Mack Trucks v. Tamez, 206 S.W.3d 572, 2006 Tex. LEXIS 1074, 50 Tex. Sup. Ct. J. 80 (Tex. 2006).

1319. Court did not err in admitting a utility company's expert testimony as to the market value of the condemned property in which he did not factor in the improvements that were over 4000 feet from the power lines in assessing damages because, inter alia, the landowners' own expert relied upon several articles that specifically stated the negative impact of power lines to a property diminished with increased distance and disappeared beyond 500 feet. Utley v. LCRA Transmission Servs. Corp., 2006 Tex. App. LEXIS 9129 (Tex. App. San Antonio Oct. 25 2006).

1320. In an aggravated sexual assault and indecency with a child case, defendant's trial counsel was not ineffective because (1) although the complainant's hearsay statements to her mother and sister did not satisfy the outcry exception to the hearsay rule under Tex. Code Crim. Proc. Ann. art. 38.072, the same testimony had been previously admitted without objection and thus any harmful testimony was merely cumulative; and (2) defendant's counsel was not ineffective in failing to object to a police officer's testimony because the officer's testimony was admissible under the expert witness rule, Tex. R. Evid. 702, based on her three months of training and approximately 100 hours of classes in child abuse investigation, sexual abuse investigation, suspect interrogation, and interviewing. Castillo v. State, 2006 Tex. App. LEXIS 8790 (Tex. App. Houston 14th Dist. Oct. 12 2006).

1321. Court had a silent record as to counsel's reasons, but it was plausible that counsel could have sought to avoid drawing any further attention to certain alleged extraneous offenses, and the lay witness testimony concerning the victim's veracity would have been admissible under Tex. R. Evid. 608(a) and the expert testimony complained of was elicited by defendant on cross-examination, such that defendant failed to show ineffective assistance of counsel. Najar v. State, 2006 Tex. App. LEXIS 8499 (Tex. App. El Paso Sept. 28 2006).

1322. In a criminal prosecution for DWI, the trial court did not abuse its discretion by granting the defendant's motion in limine to prohibit expert testimony relating to the HGN test; the officer deviated from the National Highway Traffic Safety Administration standards by flicking his finger on the pen during the test; therefore, the results were not reliable pursuant to Tex. R. Evid. 702. State v. Trinidad, 2006 Tex. App. LEXIS 8180 (Tex. App. San Antonio Sept. 13 2006).

1323. In defendant's murder trial under Tex. Penal Code Ann. § 19.02, the trial court did not err in permitting a witness, an assistant warden, to testify that a fan motor wrapped in a sock was a deadly weapon as defined in Tex. Penal Code Ann. § 1.07 (a)(17)(A), (B); the court first noted that it was not immediately apparent that the testimony was expert testimony under Tex. R. Evid. 702, and assuming that the witness was an expert, the witness was entitled to offer an opinion on the matter, given that (1) the witness was qualified as an expert by virtue of the witness's knowledge and experience in the prison system, (2) the witness observed the weapon and the injuries inflicted and the witness's experience was related to the issue at hand, and (3) the witness's testimony was helpful to the jury. Tamez v. State, 205 S.W.3d 32, 2006 Tex. App. LEXIS 7961 (Tex. App. Tyler 2006), *aff'd,* 344 Fed. Appx. 897, 2009 U.S. App. LEXIS 20231 (5th Cir. 2009), *cert. denied,* 130 S. Ct. 1523, 176 L. Ed. 2d 127, 2010 U.S. LEXIS 1489 (U.S. 2010).

1324. In a medical malpractice action against a surgeon in which the patient claimed that the surgeon damaged his vocal chord nerve during thoracic surgery to remove the patient's thymus gland, the trial court did not commit reversible error in finding that there was not too great an analytical-gap between the expert's opinions and the basis

upon they were founded and in, therefore, admitting the expert's challenged testimony regarding the possibility that the patient's injury to his left vocal chord was caused during intubation not surgery. Halim v. Ramchandani, 203 S.W.3d 482, 2006 Tex. App. LEXIS 7815 (Tex. App. Houston 14th Dist. 2006).

1325. Where a domestic violence victim originally told police she was jumped by girls at a bar, then later testified that defendant, her fiancee, had assaulted her, the testimony of an expert witness regarding the typical behavior of domestic violence victims was proper because an average juror would not know how typical victims of domestic violence behave. Capello v. State, 2006 Tex. App. LEXIS 7551 (Tex. App. Austin Aug. 25 2006).

1326. Sufficient evidence supported defendant's conviction of the murder of his roommate under Tex. Penal Code Ann. § 19.02 where conflicting evidence was presented and the jury chose to reject defendant's testimony and credit the consistent testimony of two disinterested witnesses who stated they saw defendant repeatedly stab the victim and who were familiar with the roommates; also, expert testimony on eyewitness misidentification was properly excluded because even if the expert's testimony was reliable and relevant, the expert did not apply his abstract theories to the specific facts of the case; therefore the excluded expert testimony would have had little probative effect and was properly excluded under Tex. R. Evid. 403. Rodriguez v. State, 2006 Tex. App. LEXIS 6650 (Tex. App. Dallas July 27 2006).

1327. For purposes of Tex. R. Evid. 702, an expert's testimony was properly excluded because the opinion the expert wanted to give the jury was essentially that the victim's testimony was not credible. Denton v. State, 2006 Tex. App. LEXIS 6662 (Tex. App. Fort Worth July 27 2006).

1328. In defendant's intoxication manslaughter case, the trial court did not err by allowing the State's drug recognition expert to testify, over objection, regarding defendant's intoxication even though the expert had performed none of the tests required in order to form his expert opinion because he was testifying based on the documents in the file including the blood test, as well as his knowledge of how cocaine affected the human body; the witness told the court that the knowledge and experience he had gained in face-to-face interviews could be applied to subjects he had not observed firsthand. Bumgarner v. State, 2006 Tex. App. LEXIS 6066 (Tex. App. Tyler July 12 2006).

1329. In defendant's murder case, a court did not err by allowing a police officer to testify as to the inconsistencies between defendant's two videotaped statements because the officer's analysis contained some expertise that, based on his skill and training, could assist and guide the jury in its task. Brown v. State, 2006 Tex. App. LEXIS 5163 (Tex. App. Austin June 16 2006).

1330. Because defendant's brief did not explain how a witness was qualified as an expert on blood alcohol concentration or how the testing methodology was scientifically reliable and relevant based on its similarity to the facts in issue, given the jury charge of intoxication in defendant's driving while intoxicated trial, the court had no basis to find that the trial court abused its discretion in excluding the testimony for purposes of Tex. R. Evid. 702. Evans v. State, 2006 Tex. App. LEXIS 5027 (Tex. App. Houston 14th Dist. June 13 2006).

1331. In defendant's sexual abuse of a child trial, expert testimony was relevant to correct defendant's potentially misleading argument, the expert was not permitted to give an opinion that the victim was sexually abused, and the expert was limited to testifying about whether the physical examination ruled out the possibility of abuse; because there was no indication that the expert's testimony was unfairly prejudicial or confusing, the trial court did not err in admitting the evidence under Tex. R. Evid. 403. Estes v. State, 2006 Tex. App. LEXIS 5028 (Tex. App. Houston 14th Dist. June 13 2006).

1332. Defendant failed to preserve error regarding an expert's testimony pursuant to Tex. R. App. P. 33, given that (1) defendant's objection to any of the expert's testimony was overly broad and untimely, and (2) defendant's objection on appeal differed substantially from that raised at trial, and thus any error was waived; even if the error was properly preserved, the testimony was admissible under Tex. R. Evid. 803(4), and defendant did not object or identify any out-of-court statement that was made for purposes other than medical diagnosis and treatment, and thus the trial court did not err in overruling defendant's hearsay objection. Estes v. State, 2006 Tex. App. LEXIS 5028 (Tex. App. Houston 14th Dist. June 13 2006).

1333. In defendant's trial for sexual assault of a child, the State's expert testimony was relevant and admissible under Tex. R. Evid. 702 and Tex. R. Evid. 703; the expert's testimony was sufficiently tied to the facts of the case to assist the trier of fact in assessing the significance of the results of the victim's physical examination. Estes v. State, 2006 Tex. App. LEXIS 5028 (Tex. App. Houston 14th Dist. June 13 2006).

1334. Where an injured seaman brought suit to recover damages from a maritime company, a life care planner was qualified to testify as an expert witness on actual medical costs; he had thirty years of experience in health care management for people with disabilities and a masters degree in rehabilitation counseling; the expert testified regarding the specific basis and methodology for his opinion. SeaRiver Maritime, Inc. v. Pike, 2006 Tex. App. LEXIS 4905 (Tex. App. Corpus Christi June 8 2006).

1335. In a wrongful death action, based on a witness's qualifications, research, group studies, and analysis of the facts of the case, the witness opined that an employee's fatigue was the cause of an accident, and the witness's testimony regarding qualifications and research exceeded the level of speculation and subjective observation, such that the trial court did not err in admitting the witness's testimony under Tex. R. Evid. 702. Escoto v. Estate of Ambriz, 200 S.W.3d 716, 2006 Tex. App. LEXIS 4961 (Tex. App. Corpus Christi 2006), *rev'd on other grounds,* 288 S.W.3d 401, 2009 Tex. LEXIS 394 (2009).

1336. Trial court did not abuse its discretion in admitting landowners' expert's testimony, which valued the State's temporary access easement in this condemnation action; the improvements on the property existed and were producing income, the landowners introduced evidence establishing the income produced, the expert based his testimony on the evidence, such that the expert's testimony was not speculative, and the State had the chance to challenge the expert's methodology and submit its own evidence valuing the easement during its case-in-chief. Chitwood v. State, 2006 Tex. App. LEXIS 4545 (Tex. App. Fort Worth May 25 2006).

1337. In a murder trial, there was no error under Tex. R. Evid. 702 in the admission of a doctor's testimony that photographs of the crime scene suggested direct-flame contact on the bodies; the trial court reasonably found that: (1) because of his training and experience, the doctor qualified as an expert on burn injuries, (2) burn injuries and any attendant damage was an appropriate area for expert testimony because lay persons were typically not versed in the area, and (3) the doctor's specialized knowledge would assist the jury. Springsteen v. State, 2006 Tex. Crim. App. LEXIS 2340 (Tex. Crim. App. May 24 2006).

1338. Pursuant to Tex. R. Evid. 702, a police officer's testimony that a 14-year old girl did not fit the profile of a prostitute was admissible in an inmate's trial on charges of kidnapping where (1) the officer had extensive experience in the child exploitation unit; and (2) the inmate's attorney made an issue of whether the girl was a prostitute, thereby entitling the state to ask the officer's opinion on the issue, in light of his training, experience, and knowledge of the girl. Jordan v. Dretke, 2006 U.S. Dist. LEXIS 31950 (N.D. Tex. May 22 2006).

1339. In a driving while intoxicated case, an officer's testimony that he was certified to perform field sobriety testing, coupled with his testimony that defendant did not have the normal use of his physical and mental faculties, was permissible under Tex. R. Evid. 702. Cates v. State, 2006 Tex. App. LEXIS 4238 (Tex. App. Dallas May 17

2006).

1340. Motion to strike an expert witness's testimony based on his lack of qualifications, which is made after the witness has testified, can serve as a renewed objection to the trial court's earlier ruling that the witness was qualified; in these circumstances, an appellate court reviews the trial court's ruling based upon all of the evidence before the court at the time of the motion to strike. Rodgers v. State, 205 S.W.3d 525, 2006 Tex. Crim. App. LEXIS 852 (Tex. Crim. App. 2006).

1341. Even though the appellate court erred by limiting the scope of its review to those questions asked of the expert initially during voir dire and excluding testimony developed during defendant's subsequent cross-examination of the expert, it correctly determined that the trial court did not abuse its discretion in admitting the expert's testimony, as testimony concerning shoe and tire print comparisons had long been admissible by either lay or expert witnesses, the jury heard descriptions of the physical comparisons upon which the expert based his conclusions, and the exhibits the expert relied on for his physical comparisons were admitted into evidence and were available to the jury during its deliberations; the jury could make its own comparisons. Rodgers v. State, 205 S.W.3d 525, 2006 Tex. Crim. App. LEXIS 852 (Tex. Crim. App. 2006).

1342. Trial court did not err by allowing the State's expert to testify that the probability that the fire was ignited by an electrical spark in the air conditioner or refrigerator was extremely low because the matters defendant complained of went to the weight of the expert's testimony and not its admissibility. The expert was clearly qualified and explained his conclusion about the probability of ignition sources in scientific terms, based on known principles of movement, distribution, and concentration of gas vapors. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

1343. Trial court did not err by allowing the State's expert to testify that defendant's burns were consistent with someone reaching down with the right arm near where an accelerant had been poured because the expert was a medical examiner who had conducted numerous autopsies on burn victims. The testimony was not highly technical or beyond the realm of general medical knowledge based upon observation and some basic principles pertaining to burns to the skin. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

1344. Trial court did not err by allowing the State's expert to testify that one of the children killed in the house fire set by defendant had been sexually abused because: (1) the expert's opinion was not based upon an area of medical science that was highly technical or theoretical; (2) he drew his conclusions from the nature of the physical injuries presented and the circumstances surrounding the patient; (3) as a medical doctor, he was qualified to do the physical examination of the child and make a diagnosis, and he explained with clarity the basis for his opinion; and (4) although he was not an expert in sexual assault cases, his opinion was confirmed by another medical professional who was. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

1345. Trial court did not err by allowing the State's expert to testify that it was more likely than not that defendant would commit future acts of criminal violence because: (1) as a board certified psychiatrist with years of experience and specializing in forensic psychology, the expert was shown to be qualified; (2) while making predications about future behavior was controversial among psychiatrists, forensic psychiatry was a legitimate and recognized field by the American Psychiatric Association; and (3) the expert testified that his method of assessing future-dangerousness was considered valid. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

1346. Trial court did not abuse its discretion in concluding that the State's expert's testimony had a reliable scientific basis because the expert's testimony addressed nearly all of the seven considerations for the trial court, demonstrating that the technique for determining what started the fire was well-accepted as valid, explaining the

theory and technique with clarity and focus, showing evidence of his experience and training, and explaining how he applied those to his investigation of the instant case. Common sense dictated that some speculation was involved in attempting to reconstruct a scene that was destroyed by fire or in assessing a burn injury based on numerous variables, but this went to the weight of the evidence, rather than its admissibility. Holiday v. State, 2006 Tex. Crim. App. LEXIS 2544 (Tex. Crim. App. Feb. 8, 2006).

1347. Expert's affidavit, cover letter, and exhibit were the only evidence of an alleged defect in a lamp, and the court held that the expert did not provide the underlying facts to support the expert's conclusion; the expert stated that an electrical failure occurred at the socket base/switch assembly and that the fire resulted from a resistive heating failure, but the court found these statements to be conclusory and thus were not evidence. Gonzales v. Shing Wai Brass & Metal Wares Factory, Ltd., 190 S.W.3d 742, 2005 Tex. App. LEXIS 10848 (Tex. App. San Antonio 2005).

1348. Witness was a licensed advanced nurse practitioner, as defined in Tex. Occ. Code Ann. § 301.152(a), and the witness was governed by the Texas Nursing Practice Act, which prohibited the witness from acts of medical diagnosis; the witness was unqualified to give an opinion on the medical cause of a decedent's injuries in this case and thus the witness's testimony was properly excluded under Tex. R. Evid. 702. Estate of Mann v. Geriatric Servs., 2005 Tex. App. LEXIS 10856 (Tex. App. San Antonio Dec. 14 2005).

1349. Defendant's conviction for the felony offense of injury to a child younger than 15 years of age was appropriate because, although he contended that a physician's testimony about the typical types of injuries that resulted from child abuse was irrelevant, the court held that the information was likely to assist the jury in determining whether his son's injuries were the result of abuse, as permitted by Tex. R. Evid. 702. Valdez v. State, 2005 Tex. App. LEXIS 10217 (Tex. App. Houston 1st Dist. Dec. 8 2005).

1350. Court properly allowed an officer to testify regarding defendant's gang affiliation because he was a sergeant at the jail and a member of a gang unit, he verified gang affiliation by reading correspondence, checking visitation logs, and checking for tattoos, and he attended training regarding gang membership and identification. Booth v. State, 2014 Tex. App. LEXIS 2351, 2014 WL 887286 (Tex. App. Eastland Feb. 28 2014).

1351. Court properly allowed an officer to testify as to the rate of speed of the vehicles and traffic offenses committed by defendant because he relied on footage of the collision from a surveillance video, his personal observations of the scene, and measurements that he took from the scene. The officer also measured the skid marks created by the victim's vehicle and plugged those measurements into a formula published by a university in accident reconstruction manuals. Booth v. State, 2014 Tex. App. LEXIS 2351, 2014 WL 887286 (Tex. App. Eastland Feb. 28 2014).

1352. During defendant's trial for DWI, defendant's stepfather, an attorney, did not qualify as an expert witness because he conceded that his practice in administrative enforcement did not include DWIs or alcohol-related offenses. Brewer v. State, 2014 Tex. App. LEXIS 1992, 2014 WL 709549 (Tex. App. Austin Feb. 21 2014).

Evidence : Testimony : Experts : Court-Appointed Experts : General Overview

1353. There was evidence showing that counsel's decision not to seek appointment of an expert in the mother's termination case was based on trial strategy, and there was nothing showing that this decision was not sound; the mother did not argue how an expert could have helped her or that the result of the proceedings would have been different had an expert been appointed, and thus the mother's claim of ineffective assistance failed. Crowden v. Dep't of Family & Protective Servs., 2009 Tex. App. LEXIS 563, 2009 WL 214581 (Tex. App. Houston 1st Dist. Jan. 29 2009).

Evidence : Testimony : Experts : Court-Appointed Experts : Appointments

1354. Appellant's motion for appointment of an expert sought assistance on a narrow ground about proper extrapolation of appellant's blood alcohol concentration, but there was no indication that the State intended to offer extrapolation opinion testimony requiring expert rebuttal by appellant; thus, the trial court did not err in failing to appoint an expert on extrapolation. Mason v. State, 2011 Tex. App. LEXIS 2817, 2011 WL 1432194 (Tex. App. Amarillo Apr. 14 2011).

1355. Appellant presented no explanation of his theory of defense, how an expert would be useful to establish that theory, or a reason to question a State's expert, and thus appellant did not meet the threshold requirement for appointment of the requested expert. Mason v. State, 2011 Tex. App. LEXIS 2817, 2011 WL 1432194 (Tex. App. Amarillo Apr. 14 2011).

1356. Because the court found no abuse of discretion in the trial court's denial of a motion for a court-appointed expert, the court found that appellant did not suffer the complained-of constitutional harm regarding due process, due course of law, and equal protection. Mason v. State, 2011 Tex. App. LEXIS 2817, 2011 WL 1432194 (Tex. App. Amarillo Apr. 14 2011).

1357. Because appellant was not entitled to appointment of an expert, an analysis of another issue regarding ineffective assistance was unnecessary to the final disposition of this appeal under Tex. R. App. P. 47.1. Mason v. State, 2011 Tex. App. LEXIS 2817, 2011 WL 1432194 (Tex. App. Amarillo Apr. 14 2011).

1358. Trial court conducted a hearing and found that the reporter's record was accurate, and defendant was allowed to present testimony that the record was inaccurate, and the court was unable to say that the trial court abused its discretion by determining an expert was not necessary to present or explain this claim. Mata v. State, 2007 Tex. App. LEXIS 2319 (Tex. App. Dallas Mar. 26 2007).

Evidence : Testimony : Experts : Court-Appointed Experts : Compensation

1359. Given that the trial court ultimately granted defendant the requested funds to retain experts, defendant was clearly incorrect to the extent that he contended that he was denied the means to retain the experts. Guerrero v. State, 2008 Tex. App. LEXIS 1837 (Tex. App. Corpus Christi Mar. 13 2008).

Evidence : Testimony : Experts : Credibility

1360. In a case alleging fraud in relation to the sale of certain assets, an appellate court did not have to decide the evidentiary value of the actual sales price because other evidence in the record was sufficient to sustain the jury's verdict. The jury was free to accept a former husband's expert, who testified about value and criticized the underpinnings of another expert's opinions; a former wife and a company did not satisfy their burden of showing that the assets were worth more than a one million dollar sales price. Coates v. Coates, 2009 Tex. App. LEXIS 1790, 2009 WL 679592 (Tex. App. Dallas Mar. 17 2009).

Evidence : Testimony : Experts : Credibility : General Overview

1361. Legally sufficient evidence supported the finding of $90,000 in enhanced market value caused by construction of a permanent improvement to the land because the expert's testimony established his thoroughness in appraising the land with and without improvements, his testimony was grounded in a sound evidentiary basis, was detailed and not conclusory. Mason v. Mason, 2014 Tex. App. LEXIS 413, 2014 WL 199649 (Tex. App.

Amarillo Jan. 13 2014).

1362. In a child custody proceeding, a father's complaint about an expert's testimony was not preserved for review because the father failed to object to the expert's testimony until after she testified on direct examination, and she had been cross-examined. In re D.C.M., 2008 Tex. App. LEXIS 6774 (Tex. App. Houston 14th Dist. Sept. 9, 2008), *overld in part*, Tucker v. Thomas, 405 S.W.3d 694, 2011 Tex. App. LEXIS 9991 (Tex. App.--Houston [14th Dist.] 2011, pet. granted).

1363. In an election contest under Tex. Elec. Code Ann. § 221.003(a), a trial court was not required to accept the opinion of an expert concerning the unreliability of electronic voting devices where he admitted that he had not examined or tested any machines used in the county; his conclusions were unsupported by any analysis or reasoning, and a county elections administrator testified to the contrary by pointing to the fact that signature rosters almost perfectly matched the number of paper votes. The trial court found that the election day count was valid; even if a court-supervised recount was accurate, the benefit to the incumbent was insufficient to affect the outcome of the election. Flores v. Cuellar, 269 S.W.3d 657, 2008 Tex. App. LEXIS 6610 (Tex. App. San Antonio 2008).

1364. Given that a jury was deadlocked for hours over an issue of witness credibility, the trial court did not err in discharging the jury under Tex. Code Crim. Proc. Ann. art. 36.31 and declaring a mistrial, and because there was a manifest necessity for the mistrial, a retrial would not constitute double jeopardy under Tex. Const. art. I, § 14 and the trial court properly denied the individual's motion for habeas corpus relief; the case against the individual of operating a watercraft while intoxicated did not require the jury to analyze the expert testimony regarding the intoxication tests, but merely to decide the relative credibility of the witnesses, the time spent adducing evidence regarding the identity of the boat's operator and other matters approximately equaled the time the jury spent deliberating, and given the time spent deliberating the one issue of witness credibility, over six hours, and considering that notes indicated that the jury remained deadlocked even after receiving an Allen charge, the trial court did not err in declaring a mistrial. Ex parte Underwood, 2008 Tex. App. LEXIS 3380 (Tex. App. Austin May 8 2008).

Evidence : Testimony : Experts : Criminal Trials

1365. Trial court did not abuse its discretion in admitting the testimony of a clinical supervisor at the Dallas Children's Advocacy Center as expert testimony because she was qualified as she had a bachelor's degree in psychology, a master's degree in counseling and development, and had been licensed in Texas as a professional counselor for over seven years, and she was familiar with, and kept current on, the literature and research in the field of child sexual abuse; and her testimony was specialized and scientific and would assist the jury to understand the evidence or to determine the facts at issue as she testified regarding delayed outcry and the wide range of symptoms and behavioral changes in children who had been abused. Cabrera v. State, 2014 Tex. App. LEXIS 7033 (Tex. App. Dallas June 27 2014).

1366. Trial court did not abuse its discretion by admitting the testimony of the victim's primary case physician as a lay witness, and therefore he did not have to be qualified as an expert to render an opinion about whether the victim was disabled, because the physician's testimony was based on his perception of the victim and his opinion was helpful to the jury in determining the factual issue of the victim's status as a disabled individual and did not require significant expertise to interpret. Edwards v. State, 2014 Tex. App. LEXIS 5677 (Tex. App. Austin May 29 2014).

1367. Defendant was not was denied the right to present a full defense when the trial court refused to allow his DNA expert to testify regarding lab bias because the expert's proposed testimony was not relevant to the issues before the jury; absent any evidence of lab bias, the substance of the proposed testimony-that context could influence experts and that all human beings had bias-was more appropriate for cross-examination than for expert

testimony. Millage v. State, 2014 Tex. App. LEXIS 3801, 2014 WL 1407331 (Tex. App. Dallas Apr. 8 2014).

1368. At defendant's trial for aggravated sexual assault of a child, the trial court did not err in overruling his objection to a police detective's qualifications as an expert. The detective testified that she had investigated sex crimes against children for four and a half years; she had 4,000 hours of training and education in the area of child sexual abuse; and she had taken 20 classroom hours at the world's largest conference about crimes against children. Washington v. State, 2014 Tex. App. LEXIS 933 (Tex. App. Austin Jan. 30 2014).

1369. At defendant's trial for assault of a family member, the trial court did not err by admitting expert testimony regarding the "cycle of violence" because it consisted of specialized information valuable to assist the jury in understanding why the complainant recanted her previous statement. Because defendant did not object to the expert testimony as bolstering or to the testimony that the complainant was "minimizing," these arguments were waived on appeal/ Pritchard v. State, 2014 Tex. App. LEXIS 365, 2014 WL 119003 (Tex. App. Houston 14th Dist. Jan. 14 2014).

1370. Expert testimony on victim recantation was properly admitted during defendant's trial for injuring his elderly father where the expert witness, a caseworker in the family criminal law division of the district attorney's office, was qualified to testify as an expert because she detailed her experience working with victims of domestic violence and dealing with their tendency to minimize or recant allegations of abuse; the expert's testimony was relevant to understanding why the complainant might have changed his account of the incident that led to defendant's prosecution. Salinas v. State, 2013 Tex. App. LEXIS 14761, 2013 WL 6328863 (Tex. App. Houston 14th Dist. Dec. 5 2013).

1371. Trial court properly allowed a crime laboratory chemist to testify as to the pharmacological effects of a particular prescription drug on the human body because the field of expertise necessary was not particularly complex, and because the chemist stated that she was familiar with the drug and had taken courses on the toxicological effects of drugs on the body; moreover, the information the chemist provided was not conclusive on a material issue and was not central in determining defendant's guilt or innocence. Ruiz v. State, 2013 Tex. App. LEXIS 14013, 2013 WL 6047030 (Tex. App. Houston 14th Dist. Nov. 14 2013).

1372. Admission of expert testimony regarding the connection between a photograph of a child and sexual arousal did not affect defendant's substantial rights because there was evidence of images of children on various devices owned by defendant, one of the devices contained a video of defendant with the victim, and the images were purposefully placed on defendant's devices. Hoard v. State, 2013 Tex. App. LEXIS 11760 (Tex. App. Beaumont Sept. 18 2013).

1373. Where defendant was convicted of possession of one to four grams of a controlled substance based on methamphetamine found in the car during a traffic stop, an expert's opinion that the sergeant's failure to follow police procedure suggested that the drugs were planted in the car was inadmissible. Because the expert did not explain why the sergeant's acts were suspicious or why they led to the conclusion that the drugs were planted, there was not a sufficient basis for an expert opinion. Nickols v. State, 2013 Tex. App. LEXIS 11241 (Tex. App. Eastland Aug. 30 2013).

1374. In defendant's aggravated assault case, the court properly excluded the testimony of defendant's expert witness, a pharmacist, regarding side effects of failure of defendant to take his anti-depressant because her opinion was based solely on the list of possible side effects provided by the manufacturer, and any of the side effects reported were less than one percent of all cases. There were no reported cases of violence that she knew of, and she could not say that the stoppage of an anti-depressant would directly cause violence. Randle v. State, 2013 Tex.

App. LEXIS 3134, 2013 WL 1188647 (Tex. App. Waco Mar. 21 2013).

1375. Trial court acted within its discretion during defendant's trial for aggravated assault with a deadly weapon in admitting the victim's medical records without expert testimony because Tex. R. Evid. 803(6) plainly authorized the admission of the medical records without any witness, and while the State might have offered expert testimony to explain the medical records to the jury, Tex. R. Evid. 702 did not require such testimony. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

1376. Where defendant was convicted of four counts of aggravated sexual assault of a child, the trial court did not err by permitting his probation officer to give expert testimony under Tex. R. Evid. 702 about defendant's suitability for probation. The probation officer had worked for the county for 12 years, had supervised sex offenders for 5 years, was supervising about 40 probationers, met with his probationers and did field visits. Alcala v. State, 2013 Tex. App. LEXIS 285 (Tex. App. Austin Jan. 11 2013).

1377. Trial court did not abuse its discretion during defendant's trial for aggravated assault and endangering a child in permitting a State witness to testify as an expert witness where the witness's expertise fit with the subject matter at issue, which was whether the damages to the victims' vehicles were consistent with their accounts of how the damage occurred. The witness had seventeen years of experience in the automotive industry and thirteen years of experience as an estimator for damaged vehicles, and his testimony did not involve a complex subject, but rather consisted of matching up paint transfer and damages to the victims' vehicles with damages to defendant's truck. Ibarra v. State, 2013 Tex. App. LEXIS 169, 2013 WL 123705 (Tex. App. Corpus Christi Jan. 10 2013).

1378. In a prosecution for injury to a child, it was proper to admit bite-mark evidence, despite a report that found inherent weaknesses involved in bite mark comparison, because the evidence was used for a purpose the report deemed reliable--to exclude suspects in a closed population. Coronado v. State, 384 S.W.3d 919, 2012 Tex. App. LEXIS 9405 (Tex. App. Dallas Nov. 14 2012).

1379. Although appellant claimed the evidence in his aggravated robbery trial was insufficient because there was a lack of expert testimony showing that the knife was a deadly weapon, under similar facts, the Texas Court of Criminal Appeals had held the evidence sufficient without the knife being introduced into evidence and minus expert testimony concerning the wounds; the court overruled appellant's issue on appeal. Almanza v. State, 2012 Tex. App. LEXIS 5004, 2012 WL 2378233 (Tex. App. Eastland June 21 2012).

1380. On appeal of defendant's conviction for indecency with a child by contact, defendant claimed the trial court erred by permitting a detective to testify that he had no concerns that the case was made up, because Tex. R. Evid. 702 did not permit an expert to give an opinion that the complainant was truthful. The Court of Appeals of Texas found nothing to show that this testimony affected defendant's substantive rights under Tex. R. App. P. 44.2(b). Taylor v. State, 2012 Tex. App. LEXIS 1663, 2012 WL 662373 (Tex. App. Fort Worth Mar. 1 2012).

1381. Appellant argued that excluded evidence would have been admissible had it been introduced through expert testimony, but appellant did not show that counsel's decision not to employ an expert was not part of sound trial strategy. Chalker v. State, 2011 Tex. App. LEXIS 8944, 2011 WL 5428970 (Tex. App. Houston 1st Dist. Nov. 10 2011).

1382. Court had to assume, absent contrary evidence, that counsel's decision not to hire an expert was propelled by sound trial strategy, and there was no claim that counsel's decision was an economic one; the expert did not discuss any potential exculpatory evidence or identify any testimony that would have supported the defense, appellant had not proven that counsel's level of consultation and investigation was unreasonable, and appellant failed to show that counsel's decision not to call an expert was not part of sound strategy, such that appellant's

ineffective assistance counsel claim failed. Chalker v. State, 2011 Tex. App. LEXIS 8944, 2011 WL 5428970 (Tex. App. Houston 1st Dist. Nov. 10 2011).

1383. Although the record reflected that a therapist originally offered a direct opinion on the child-complainant's truthfulness in violation of Tex. R. Evid. 702, defendant objected to that testimony, and received a favorable ruling from the trial court and an instruction to the jury to disregard the testimony; thus, there was no error and no harm from the therapist's testimony. Conti v. State, 2011 Tex. App. LEXIS 8758, 2011 WL 5248348 (Tex. App. Houston 14th Dist. Nov. 3 2011).

1384. Sexual abuse victim's counselor did not testify regarding the truthfulness of the victim; under Tex. R. Evid. 702, it was permissible for the counselor to testify regarding behavioral characteristics common among abused children and to give her expert opinion regarding the victim's delayed disclosure. Sharp v. State, 2011 Tex. App. LEXIS 5377, 2011 WL 2732518 (Tex. App. Eastland July 14 2011).

1385. Under Tex. R. Evid. 702, the trial court did not abuse its discretion in admitting the testimony of a Texas Child Protective Services (CPS) caseworker regarding the sexual abuse victim's sister's acting out based upon her experience as a CPS caseworker and because defendant failed to present any argument as to the caseworker's qualifications or her testimony being in violation of Rule 702. Sharp v. State, 2011 Tex. App. LEXIS 5377, 2011 WL 2732518 (Tex. App. Eastland July 14 2011).

1386. In a child sexual abuse case, the trial court did not abuse its discretion under Tex. R. Evid. 104(a) in finding that a forensic interviewer who videotaped an interview with the victim testified as a lay witness under Tex. R. Evid. 701 by describing the events she personally observed. Because the witness did not testify as an expert under Tex. R. Evid. 702, notice was not required under Tex. Code Crim. Proc. Ann. art. 39.14(b), and there was no need to lay an expert predicate. Flood v. State, 2011 Tex. App. LEXIS 5409, 2011 WL 2732608 (Tex. App. Corpus Christi July 14 2011).

1387. In a child sexual abuse case, there was no error under Tex. R. Evid. 702 in permitting expert testimony on grooming of child victims. Teczar v. State, 2011 Tex. App. LEXIS 2919, 2011 WL 1743756 (Tex. App. Eastland Apr. 15 2011).

1388. In a criminal prosecution for indecency with a child, a child forensic interviewer's testimony about behavioral characteristics of child sexual abuse victims was permitted under Tex. R. Evid. 702 because it was relevant to assessing the victim's behavior and testimony, and to determining the ultimate issue of whether defendant was guilty of the charged offense. The expert did not offer a direct opinion that the victim was truthful. Dison v. State, 2011 Tex. App. LEXIS 2809, 2011 WL 1435201 (Tex. App. Eastland Apr. 14 2011).

1389. Issue was whether the officer had probable cause to arrest appellant for driving under the influence based on the totality of the circumstances; thus, the court did not agree that the State was required to produce expert testimony on the effect of Xanax on appellant's condition. Sada v. State, 2011 Tex. App. LEXIS 743, 2011 WL 381739 (Tex. App. San Antonio Feb. 2 2011).

1390. At the revocation hearing, a police officer was permitted to testify over objection that the results of a field test indicated the substance found on the two objects in defendant's possession contained methamphetamine; while defendant challenged the officer's qualifications to testify as an expert under Tex. R. Evid. 702, any error in the admission of the officer's testimony was harmless in light of the evidence supporting the revocation of defendant's community supervision. Defendant admitted he was using methamphetamine, and an officer found him in possession of drug paraphernalia in violation of the terms of his community supervision. Kessler v. State, 2011

Tex. App. LEXIS 606, 2011 WL 317673 (Tex. App. Texarkana Jan. 28 2011).

1391. In a case involving fraudulent Medicare and Medicaid reimbursement for motorized wheelchairs, the trial court did not abuse its discretion under Tex. R. Evid. 702 in allowing two witnesses for the State to testify about whether recipients qualified for a wheelchair under Medicare guidelines where neither witness gave an opinion regarding the "medical necessity" of a wheelchair or a power wheelchair. Instead, based on their knowledge of, and experience interpreting, Medicare guidelines, they opined recipients did not qualify, or were not eligible, for wheelchairs. Nwosoucha v. State, 325 S.W.3d 816, 2010 Tex. App. LEXIS 8831, 79 A.L.R.6th 673 (Tex. App. Houston 14th Dist. Nov. 4 2010).

1392. Where the victim and her mother recanted their allegations against defendant during his trial for two counts of indecency with a child, an expert witness was permitted to testify under Tex. R. Evid. 702 that there was an eighty percent chance that a child complainant would recant. The expert testimony assisted the jury in assessing the victim's testimony. Chavez v. State, 324 S.W.3d 785, 2010 Tex. App. LEXIS 7325 (Tex. App. Eastland Sept. 2 2010).

1393. Walk-and-turn and one-leg-stand tests were not scientific evidence; the officer's testimony was lay witness testimony governed by Tex. R. Evid. 701, and while she described the tests and indicated what clues meant a person was intoxicated and how many clues appellant indicated, such did not cross the line into expert testimony, and the trial court did not err in allowing this testimony in appellant's driving while intoxicated trial. Horton v. State, 2010 Tex. App. LEXIS 7296, 2010 WL 3433776 (Tex. App. Fort Worth Aug. 31 2010).

1394. Because an officer's testimony was lay witness testimony, and therefore the expert standard did apply, the trial court did not wrongfully place the burden of proof on appellant to show her weight at the time of her arrest for driving while intoxicated. Horton v. State, 2010 Tex. App. LEXIS 7296, 2010 WL 3433776 (Tex. App. Fort Worth Aug. 31 2010).

1395. Trial court did not abuse its discretion when it allowed a therapist with the Children's Rape Crisis and Children's Advocacy Center to testify as an expert on the effects that sexual abuse could have on child victims where the State established that the therapist had the knowledge, skill, experience, training, and education that would qualify him to give an opinion on the particular subject before the trial court because, at the time of trial, the therapist had been employed by the Center for over five years and was a licensed professional counselor. In view of the therapist's background and the admissibility of such matters generally, the State had demonstrated the reliability underlying his testimony, which was based upon his practice and experience. Cottrell v. State, 2010 Tex. App. LEXIS 5890, 2010 WL 2862610 (Tex. App. Eastland July 22 2010).

1396. Diminished capacity at the time, mitigating factors that are now relevant in terms of the effects of drugs taken, remorse, and adjustment to incarceration are factors that could be taken into account in determining future dangerousness; appellant's attempt to draw a distinction between these topics and a State expert's opinion as to future dangerousness conflicted with the underlying rationale for the case law about a defendant waiving his Fifth Amendment right to refuse to submit to a State's psychiatric experts once the defendant had introduced testimony based on his own interview with his own expert. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1397. Trial court did not abuse its discretion during defendant's trial for aggravated assault with a deadly weapon and unlawful possession of a firearm by a felon by admitting expert testimony regarding gang activity where the expert's testimony in the Tex. R. Evid. 705 hearing described his years of professional experience and training, and he testified that his opinion that defendant is or was a gang member was based on his experience with gangs, defendant's admissions to unknown contact officers, photographs of defendant, and defendant's tattoo. In light of

the evidence at the time of the Tex. R. Evid. 702 ruling, the trial court did not abuse its discretion by determining that the expert was qualified to testify as an expert, and it therefore could not be concluded that the evidence that defendant was or is a gang member affected the jury in an irrational way. Burleson v. State, 2010 Tex. App. LEXIS 3250 (Tex. App. Fort Worth Apr. 29 2010).

1398. In defendant's capital murder trial, defendant's mental-illness evidence did not rebut the culpable mental state of intentional or knowing conduct or raise any legal justification or exoneration for the murders, plus defendant offered no evidence to suggest that he intended to shoot anyone other than the officers he killed, which would have rebutted the element that elevated murder to capital murder, and defendant offered no evidence to suggest that he did not intend to shoot a person, which would have rebutted the culpable mental element of either capital murder or murder; the trial judge was not required to admit any expert testimony concerning defendant's mental illness during the guilt stage because it did not directly rebut his culpable mens rea, defendant was not entitled to any jury instruction concerning that evidence, and having requested one, he had not shown harm when the trial court gave a correct, if unnecessary, instruction concerning the use of that evidence. Mays v. State, 318 S.W.3d 368, 2010 Tex. Crim. App. LEXIS 480 (Tex. Crim. App. 2010).

1399. In a case in which a jury found that defendant juvenile engaged in delinquent conduct by committing the offenses of aggravated sexual assault and indecency with a child, the trial court did not err in excluding certain testimony of various witnesses and did not prevent defendant from fully presenting his defensive theory where: (1) the proffered testimony of the victim's mother as set forth in defendant's bill of exceptions was properly excluded as speculative pursuant to Tex. R. Evid. 602; (2) the victim's mother was not shown to be qualified as an expert to testify under Tex. R. Evid. 702; (3) at trial, defendant was allowed to question the victim and her sister regarding the meeting they allegedly had with their grandparents during the time period after the victim's outcry but prior to the Monday morning interview with a deputy; and (4) the only testimony excluded by the trial court during defense counsel's examination of the victim and her sister was testimony regarding statements made by their grandparents during the alleged meeting, which was properly excluded on hearsay grounds pursuant to Tex. R. Evid. 802. Although defendant's bill of exceptions set forth the testimony that he asserted that the victim would have offered regarding what she told her grandparents during the alleged meeting, defense counsel did not question the victim regarding what she told her grandparents during that meeting, and, additionally, defense counsel did not argue that the trial court improperly sustained the State's hearsay objections to statements of the grandparents. In re J.R.N., 2010 Tex. App. LEXIS 2280, 2009 WL 6312273 (Tex. App. Beaumont Apr. 1 2010).

1400. Expert testimony by experienced law enforcement officers, as in this case, could be used to establish an accused's intent to deliver. Gamelin v. State, 2010 Tex. App. LEXIS 1998, 2010 WL 1037944 (Tex. App. Houston 14th Dist. Mar. 23 2010).

1401. Defendant claimed that the trial court erred in striking her expert's entire testimony and defendant cited to civil procedure rules and civil cases in arguing that striking the testimony was an excessive sanction; however, this was not a civil case and the civil procedure rules were not applicable, given Tex. R. Civ. P. 2. Hoselton v. State, 2010 Tex. App. LEXIS 2009 (Tex. App. Texarkana Mar. 18 2010).

1402. In a case in which defendant was convicted of aggravated sexual assault under Tex. Penal Code Ann. § 22.021 and indecency with a child under Tex. Penal Code Ann. § 21.11, although defendant complained that the trial court erred by allowing a psychologist to express an implied opinion that the victim was truthful in her report of sexual abuse, the psychologist, in the complained-of portion of his testimony, did no more than express his expert opinion concerning the coping means employed by victims of sexual assault. Because the psychologist's testimony, if believed, would assist the jury's evaluation of the testimony of the victim, there was no abuse of discretion by the trial court in admitting the psychologist's statement. Drake v. State, 2010 Tex. App. LEXIS 716, 2010 WL 348365 (Tex. App. Amarillo Jan. 31 2010).

1403. In a case in which a jury had convicted a habeas corpus applicant of possession of a controlled substance, methamphetamine, in the amount of 200 grams or more, but less than 400 grams, applicant demonstrated that trial counsel was deficient at the punishment stage of trial because counsel failed to: (1) object to a DEA agent's testimony on the dangers and societal costs caused by methamphetamine constituted deficient performance; (2) request pre-trial notice of the State's experts; (3) determine that a DEA agent would testify about methamphetamine addiction; (4) properly object to the agent's testimony about addiction and the number of people who could get high from the methamphetamine that applicant possessed; and (5) call an expert in rebuttal. During the punishment stage of trial, the prosecutors asked for a life sentence, relying heavily on the objectionable testimony that was introduced during both phases of trial, and because applicant had received a life sentence, the maximum sentence available for her offense, she had shown that there was a reasonable probability--one sufficient to undermine confidence in the result--that the outcome at the punishment stage would have been different but for her counsel's deficient performance. Ex Parte Lane, 303 S.W.3d 702, 2009 Tex. Crim. App. LEXIS 1750 (Tex. Crim. App. 2009).

1404. In a case in which defendant was convicted of aggravated sexual assault of a child, the trial court did not err by admitting a pediatrician's testimony where: (1) the pediatrician, a specialist in child maltreatment, had published research in the area of maltreatment, particularly in the area of child abuse; (2) the pediatrician had personally examined over one thousand children and was considered an expert in the area of sexual abuse; and (3) the pediatrician's ten-page curriculum vitae, which was admitted into evidence without objection, reflected her extensive training, skills, education, experience, and publications in the area of child sexual abuse. The prosecutor specifically requested the pediatrician's opinion based on her training and experience, as well as her examinations of children who had made a delayed outcry, for an opinion on why sexually abused children might delay outcry, which did not require a greater or more specific degree of expertise in the psychology or sociology of sexually abused children than possessed by the pediatrician, and the pediatrician's testimony would assist the jury in understanding why children might delay reporting sexual abuse. Salinas v. State, 2009 Tex. App. LEXIS 7828, 2009 WL 3210941 (Tex. App. Houston 14th Dist. Oct. 8 2009).

1405. In a case in which defendant was convicted of intentionally causing serious bodily injury to his stepson, causing his death, and intentionally or knowingly concealing the body, the trial court did not err by completely excluding the testimony of a defense expert pathologist who was board certified in both clinical and anatomical pathology, but was not a forensic pathologist, where the trial court could have reasonably concluded that the defense did not demonstrate that the pathologist was sufficiently qualified in the sub-speciality of forensic pathology and that his methodology, without accessing or viewing the corpse, was not scientifically reliable; defendant did not demonstrate to the trial court that the pathologist had any experience with strangulations or decomposed bodies. Crunk v. State, 2009 Tex. App. LEXIS 7329, 2009 WL 2973474 (Tex. App. Corpus Christi Sept. 17 2009).

1406. In a case involving unlawful possession of a firearm by a felon, expert testimony was not required on the issue of what constituted a "firearm." This was a subject well within the knowledge and experience of ordinary persons; there was no "specialized knowledge" needed to assist the trier of fact. Jackson v. State, 2009 Tex. App. LEXIS 7251, 2009 WL 3365880 (Tex. App. Houston 14th Dist. Sept. 10 2009).

1407. In a case involving indecency with a child by sexual contact,a trial court was within its discretion when it determined that an expert for the State possessed sufficient experience to offer her opinion; she was not testifying that the child was telling the truth or that child complainants as a class were truthful. The State established the witness's expertise as a forensic interviewer, and she testified she has conducted over fifteen hundred interviews with child victims. Metcalfe v. State, 2009 Tex. App. LEXIS 6720, 2009 WL 2617644 (Tex. App. Beaumont Aug. 26 2009).

1408. To determine whether the record supported the trial court's decision to exclude an expert witness's testimony under Tex. R. Evid. 702 regarding an assessment for sexual interest test, the court had to decide whether defendant showed by clear and convincing proof that the test was reliable under the three criteria set out in case

law. Figueroa v. State, 2009 Tex. App. LEXIS 5604, 2009 WL 2183460 (Tex. App. San Antonio July 22 2009).

1409. Defendant did not demonstrate by clear and convincing evidence that an expert's evaluation of defendant under an assessment for sexual interest test was reliable for the purposes of characterizing defendant as being sexually uninterested in minors; it was within the trial court's discretion to weigh the expert's testimony regarding the test's significant potential for error and its inaccuracy in Hispanic subjects more heavily than the expert's testimony about the objectiveness of the test. The trial court did not act unreasonably and its decision to exclude the expert's testimony was not an abuse of discretion. Figueroa v. State, 2009 Tex. App. LEXIS 5604, 2009 WL 2183460 (Tex. App. San Antonio July 22 2009).

1410. Court expressed no opinion as to whether the an assessment for sexual interest test could be found reliable if different evidence had been presented; the court only held that the trial court did not abuse its discretion in determining that defendant did not demonstrate by clear and convincing evidence that the test was admissible based on the evidence in this case. Figueroa v. State, 2009 Tex. App. LEXIS 5604, 2009 WL 2183460 (Tex. App. San Antonio July 22 2009).

1411. In defendant's trial for burglary of a habitation in violation of Tex. Penal Code Ann. § 30.02, trial counsel was not ineffective in failing to object to the admission of expert testimony regarding the results of a scent lineup in which bloodhounds alerted to defendant's scent; trial counsel's performance was within the bounds of professional competence because any objection under Tex. R. Evid. 702 was unlikely to succeed. Perkins v. State, 2009 Tex. App. LEXIS 5555 (Tex. App. Houston 1st Dist. July 16 2009).

1412. Court properly allowed a detective to testify as an expert about body language because she had been a police officer for 15 years and had investigated sexual assaults for three years, she was a fifteen year veteran officer, and she had a degree in criminal justice and was a certified special investigator of sex crimes. Brite v. State, 2009 Tex. App. LEXIS 4096, 2009 WL 1617741 (Tex. App. San Antonio June 10 2009).

1413. For purposes of defendant's injury to a child conviction, the evidence was sufficient to show that defendant caused the child's injuries, given that (1) although no one saw defendant shake or hit the child, her son, the child was alone with defendant during the time when his injuries occurred, (2) the expert medical testimony indicated that the child's injuries were so severe that they could not have been caused by a fall from a short distance as defendant claimed, and (3) the jury heard medical evidence that symptoms of those severe injuries would have immediately followed the injuries; the court gave appropriate deference to the jury's assessment of the evidence and resolution of evidentiary conflicts and the evidence did not contradict the verdict. Gutierrez v. State, 2009 Tex. App. LEXIS 3296, 2009 WL 1335154 (Tex. App. Dallas May 14 2009).

1414. Corporal properly testified to his rationale for charging defendant with possession of a controlled substance with intent to deliver because of the way the drugs were packaged, and even if error, similar evidence was introduced through the testimony of another witness concerning the manner of the drug's packaging and the number of packages. Tovar v. State, 2009 Tex. App. LEXIS 2739, 2009 WL 1066115 (Tex. App. Amarillo Apr. 21 2009).

1415. In a case involving the sexual assault of a child, an alleged error relating to expert testimony was adequately briefed under Tex. R. App. P. 38.1 where defendant cited to the record in his statement of facts, there was a review of only about 15 pages of testimony, and there was a citation to Tex. R. Evid. 702. Even though defendant's application of the law to the facts was cursory, his argument that it was error to allow an expert to testify that a complaining witness was telling the truth was sufficient to raise the issue for appellate consideration, given the liberal construction of the appellate rules under Tex. R. App. P. 38.9. Long v. State, 2009 Tex. App. LEXIS 1090,

2009 WL 387018 (Tex. App. Tyler Feb. 18 2009).

1416. In a case involving the sexual assault of a child, it was impermissible for an expert to testify that a complaining witness was telling the truth; such expert testimony did not assist the jury. The error was not harmless because the expert went beyond simply applying well understood standards to a given fact pattern; rather, she staked her reputation on her conclusion that there was nothing troubling about the testimony from the complaining witness and the State's case. Long v. State, 2009 Tex. App. LEXIS 1090, 2009 WL 387018 (Tex. App. Tyler Feb. 18 2009).

1417. In a case in which appellant juvenile was charged with engaging in delinquent conduct for fatally shooting his father, the trial court erred in excluding the expert testimony of a psychiatrist as to appellant's belief that force was immediately necessary and that a reasonable person in his circumstances could not retreat where the testimony was relevant to appellant's state of mind, which had been profoundly affected by the sum of his violent experiences with his father, and would aid the jury in understanding his fear at the time of the offense. At the beginning of the hearing on its reliability, the parties agreed the psychiatrist was an expert, and the State did not challenge the fact that psychology was a recognized health-care field, and because the psychiatrist testified that his analysis was based on his more than 20 years' experience in psychology and his meticulous examination of appellant's records, his methodology was sound. In re E.C.L., 278 S.W.3d 510, 2009 Tex. App. LEXIS 995 (Tex. App. Houston 14th Dist. 2009).

1418. In a juvenile defendant's homicide case, the court erred by excluding an expert's testimony regarding defendant's belief that he would suffer imminent harm at the hands of the victim because the expert's methodology was sound, and the expert testified that his analysis was based on his more than twenty years' experience in psychology and his meticulous examination of defendant's records. Lay people, especially adults, who had not experienced abuse for most of their lives did not have a frame of reference to fully understand why a child in defendant's position might have felt that deadly force was immediately necessary to avoid imminent harm. In re E.C.L., 2008 Tex. App. LEXIS 9292 (Tex. App. Houston 14th Dist. Dec. 11 2008).

1419. In defendant's sexual assault case, the court did not err by denying a hearing on expert testimony because the underlying facts and data supporting the expert's opinion -- her education, training, and experience, years of clinical treatment of victims of family sexual abuse, and knowledge of Hispanic culture -- were not inadmissible. Merlos v. State, 2008 Tex. App. LEXIS 6514 (Tex. App. Dallas Aug. 26, 2008).

1420. In defendant's sexual assault case, the court properly found an expert to be qualified and her opinion to be reliable because the expert was trained and licensed as a psychologist and therapist, many of her clients were Hispanic, and she worked with children who were not raised in the United States. The expert explained the complexity of sexual abuse, especially involving incest, how children internalized and blamed themselves for the abuse, and that it took many years for a victim to work out the effects of sexual abuse. Merlos v. State, 2008 Tex. App. LEXIS 6514 (Tex. App. Dallas Aug. 26, 2008).

1421. In an indecency with a child case, the court did not err by admitting expert testimony that none of the conduct prosecuted by the State involved "innocent" touching because the State's questions did not seek to provoke an opinion about the truthfulness of the victim, but to substantively establish that the touching was not innocent. Darling v. State, 262 S.W.3d 920, 2008 Tex. App. LEXIS 6106 (Tex. App. Texarkana 2008).

1422. Officer's testimony was a sufficient predicate to support the admission of radar evidence in defendant's driving while intoxicated case and to establish the radar unit validly applied the underlying scientific principles of radar and the officer's technique was properly applied on the date in question, such that the trial court did not abuse its discretion in admitting the officer's testimony; although defendant complained of the State's failure to introduce

evidence that the officer's training, experience, and duties qualified him to decide whether defendant was speeding, an officer's testimony that he had been trained to operate a radar set and test it for accuracy, as in this case, was a sufficient predicate to support admission of radar evidence and it was not necessary to call an expert witness to establish the accuracy of the radar. Maki v. State, 2008 Tex. App. LEXIS 5145 (Tex. App. Dallas July 10 2008).

1423. In the penalty phase of a capital murder trial, there was no error in allowing testimony about Texas prison conditions in general and that violence could occur within the Texas prison system; an issue for the jury's determination was future dangerousness; therefore, the testimony was relevant to whether defendant would have opportunities to commit violent acts in prison. Lucero v. State, 246 S.W.3d 86, 2008 Tex. Crim. App. LEXIS 219 (Tex. Crim. App. 2008).

1424. During defendant's trial for delivering more than one gram but less than four grams of cocaine, in violation of Tex. Health & Safety Code Ann. § 481.112, the trial court did not err in permitting a police officer to testify in general terms about the practices employed in cocaine trafficking because, as a veteran narcotics detective with the police department, he could have been properly admitted as an expert to provide testimony regarding the manufacture and sale of crack cocaine in the area; the trial court could have reasonably determined that such expert testimony would have assisted the jury by providing it with information regarding the nuances of the illegal narcotics trade. Henderson v. State, 2007 Tex. App. LEXIS 9843 (Tex. App. Texarkana Dec. 20 2007).

1425. In a child sexual abuse case, an expert's testimony, although not weighty, provided some basis to show that sometimes sex offenders behaved in ways similar to defendant's alleged behavior; thus, the trial court did not abuse its discretion in allowing the admission of this testimony and in allowing the jury to put the appropriate weight on the conclusions of the expert. Blanchard v. State, 2007 Tex. App. LEXIS 8403 (Tex. App. Texarkana Oct. 25 2007).

1426. Rational jury could have found that defendant intended to deliver the cocaine, for purposes of Tex. Health & Safety Code Ann. § 481.002(8) and his conviction under Tex. Health & Safety Code Ann. § 481.112, given that police officers testified, as they were able to do as expert witnesses, that the cocaine found was consistent with distribution rather than personal use, plus defendant matched the description of the man who sold cocaine from that address days before, plus defendant admitted to selling cocaine in the past. Williams v. State, 2007 Tex. App. LEXIS 8302 (Tex. App. Houston 1st Dist. Oct. 18 2007).

1427. Evidence was factually sufficient to support defendant's manslaughter conviction under Tex. Penal Code Ann. § 19.04; although defendant presented expert testimony and claimed to have had a seizure at the time of the accident, and thus defendant argued that the evidence failed to show that he acted recklessly under Tex. Penal Code Ann. § 6.03, the State presented expert testimony that defendant did not have a seizure disorder, and the trial court was the exclusive judge of the witnesses' credibility. Garretson v. State, 2007 Tex. App. LEXIS 7697 (Tex. App. Dallas Sept. 26 2007).

1428. Nurse examiner testified that the victim spoke easily to her, which according to the nurse demonstrated that she was open and gave one an idea if she was truthful or not; while this testimony was objectionable, as expert witnesses were not free to testify that a witness was truthful, the court was unable to say that counsel's failure to object was so serious that it prejudiced the defense, and thus defendant was not denied effective assistance of counsel. Ezell v. State, 2007 Tex. App. LEXIS 7712 (Tex. App. San Antonio Sept. 26 2007).

1429. In a capital murder case, expert testimony that dealt with the psychology of child murder was not shown to be sufficiently relevant and reliable to assist the jury. Gallo v. State, 239 S.W.3d 757, 2007 Tex. Crim. App. LEXIS 1234 (Tex. Crim. App. 2007).

1430. Videotape showing the route taken by defendant during a chase was not an experiment or a reconstruction that required expert explanation, but instead it was a videotape version of a print map showing defendant's efforts to avoid officers and was used to show the jury the route followed, and the jury was instructed that its consideration of the evidence was limited to that purpose; relevant to the issue of intent in defendant's trial for aggravated assault on a public servant with a deadly weapon finding, under Tex. Penal Code Ann. § 22.02, was the preceding flight and the court did not find that the admission of the evidence in question was error. Timmons v. State, 2007 Tex. App. LEXIS 7519 (Tex. App. Texarkana Sept. 17 2007).

1431. In a sexual assault case, defendant was unable to show that he received ineffective assistance of counsel based on counsel's failure to object to the testimony of a social worker as unqualified expert testimony; the social worker could have testified about giving a victim information about a sexual assault examination as either a lay or expert witness. Benjamin v. State, 2007 Tex. App. LEXIS 7010 (Tex. App. Houston 1st Dist. Aug. 30 2007).

1432. Although the State argued that defendant waived the issue related to expert testimony because he did not seek a running objection, defendant, the State, and the trial court discussed the admissibility of expert testimony at length outside the jury's presence; the court considered this complaint related to the expert's testimony, which was brought to the attention of and considered by the trial court, for purposes of Tex. R. App. P. 33. Sanchez v. State, 2007 Tex. App. LEXIS 5691 (Tex. App. Austin July 19 2007).

1433. Trial court did not err in admitting expert testimony in defendant's trial for attempted sexual assault; the expert was asked to describe in general, hypothetical terms behaviors that might be exhibited by a child who had been subjected to sexual abuse trauma, and the fact that the jury could have drawn a comparison between the expert's hypothetical child and the victim did not mean that the expert's testimony amounted to a direct comment on the victim's credibility; the expert's testimony was circumstantial evidence that something traumatic happened to the victim, and the fact that the evidence in some measure corroborated the victim's testimony did not make it any less relevant. Sanchez v. State, 2007 Tex. App. LEXIS 5691 (Tex. App. Austin July 19 2007).

1434. For purposes of defendant's conviction of unlawful possession with intent to deliver cocaine in a drug free zone, the evidence was sufficient to show that he possessed the cocaine with intent to deliver; defendant was found in possession of a large amount of drugs and cash, some of the drugs were individually packaged and the rest were in a single block, expert testimony was presented that drug dealers typically purchased cocaine in a block and the amount of drugs in this case was not consistent with personal consumption, a witness testified that defendant sold drugs, and while this witness admitted to lying about her drug use and that she hoped to better position herself with authorities, there were no pending charges against her and no "deal" for her testimony, and defendant's conviction was not based primarily on this witness's testimony. Lucas v. State, 2007 Tex. App. LEXIS 4485 (Tex. App. Dallas June 7 2007).

1435. There was sufficient evidence to support defendant's conviction of aggravated assault on a public servant in violation of Tex. Penal Code Ann. § 22.02(a)(2), given that (1) videotape showed defendant repeatedly hitting the officer with closed fists and slamming the officer into the hood of his car, (2) the officer said he experienced swelling and pain and had various bruises and lacerations, and (3) the medical examiner, testifying as an expert, said the defendant's fists qualified as deadly weapons under Tex. Penal Code Ann. § 1.07. Jones v. State, 2007 Tex. App. LEXIS 3308 (Tex. App. Dallas Apr. 27 2007).

1436. Where defendant was charged with aggravated sexual assault of a child and indecency with a child, the trial court did not abuse its discretion by admitting testimony from an expert witness on child abuse dynamics; the expert limited her testimony to the general characteristics of child victims of sexual abuse, and did not directly comment on the truthfulness of the victim's testimony. Ficarro v. State, 2007 Tex. App. LEXIS 3166 (Tex. App. Corpus Christi Apr. 26 2007).

1437. Court rejected defendant's claim of ineffective assistance of counsel; the record was silent as to why trial counsel chose not to present a DNA expert witness, defendant did not raise ineffective assistance in a motion for a new trial, nor did defendant present evidence in support of the claim to the trial court, and the record did not show that counsel's decision not to present such expert witness testimony was so outrageous that no attorney would have engaged in it, and thus, the record did not show that counsel's representation fell below an objective standard of reasonableness. Hale v. State, 220 S.W.3d 180, 2007 Tex. App. LEXIS 2257 (Tex. App. Eastland 2007).

1438. Defendant was allowed to introduce evidence, including expert testimony, regarding defendant's alleged mental retardation; contrary to defendant's claim, the trial court did not prevent defendant from presenting such evidence during the punishment hearing. Juarex v. State, 2007 Tex. App. LEXIS 1034 (Tex. App. Houston 1st Dist. Feb. 8 2007).

1439. Evidence was sufficient to support the finding that defendant had an intent to deliver a controlled substance given that (1) defendant was arrested in a trailer containing approximately 167 grams of crack cocaine, 17 grams of ecstasy, and other drugs, (2) the amount recovered exceeded the typical amount possessed for personal use, (3) paraphernalia used to consume narcotics was not found on defendant or in the home, (4) a significant amount of cash was seized, as well as guns, and (5) a police officer with 14 years experience testified that based on what was found, the officer believed that drugs were being sold out of the trailer, and such expert testimony was free to be used to establish intent to deliver, and the jury was free to disbelieve defendant's story. Benton v. State, 2007 Tex. App. LEXIS 472 (Tex. App. Houston 14th Dist. Jan. 25 2007).

1440. Where defendant was charged with possession of cocaine with intent to deliver, Tex. R. Evid. 702 allowed the trial court to admit the expert testimony of the canine handler whose drug-sniff dog alerted on defendant; the canine handler had twelve years of experience and the dog had participated in 74 lineups without misidentifying anyone; while defendant was the only African-American and the only person handcuffed, the lineup consisting of defendant and five police officers was sufficiently objective to be reliable. Risher v. State, 227 S.W.3d 133, 2006 Tex. App. LEXIS 10462 (Tex. App. Houston 1st Dist. 2006).

1441. In an action in which appellant appealed from his convictions of three counts of indecency with a child and one count of aggravated sexual assault of a child, the case was remanded to the trial court for a new trial where the exclusion of the psychologist's testimony regarding false memories had a substantial and injurious effect or influence on the jury's verdict and affected a substantial right of appellant's; the psychologist's false-memory testimony was general evidence that directly attacked the complainants' credibility and was, therefore, relevant and admissible during appellant's case-in-chief. Delong v. State, 2006 Tex. App. LEXIS 10031 (Tex. App. Fort Worth Nov. 16 2006).

1442. In a criminal trial for murder, the trial court did not err by excluding expert testimony of his eyewitness and cross-racial identification on the ground that he did not adequately establish his qualifications as an expert in that field as required by Tex. R. Evid. 702. Silva v. State, 2006 Tex. App. LEXIS 9599 (Tex. App. Houston 14th Dist. Oct. 24 2006).

1443. Where defendant was charged with intoxication manslaughter and aggravated assault following a vehicular accident, the State's chemist was permitted to give expert testimony concerning the presence of a cocaine metabolite in defendant's blood; defendant presented no challenge to the reliability of the expert's testimony. Bannister v. State, 2006 Tex. App. LEXIS 8522 (Tex. App. Amarillo Sept. 29 2006).

1444. In a case of aggravated sexual assault of a child, expert testimony given by a child forensic interviewer was admissible because she was qualified by education, training, and experience, her field of expertise was legitimate, and her testimony was in the scope of her field and properly relied on the principles involved in that field. Carpenter

v. State, 2006 Tex. App. LEXIS 6504 (Tex. App. Texarkana July 26 2006).

1445. Appellant's issue was overruled and his driving while intoxicated conviction and sentence pursuant to Tex. Penal Code Ann. § 49.04 were affirmed because an officer had sufficient training and experience to be qualified as an expert under Tex. R. Evid. 702 to testify regarding the administration of the horizontal gaze nystagmus test. Price v. State, 2006 Tex. App. LEXIS 5349 (Tex. App. Austin June 23 2006).

1446. In defendant's drug case, the court properly allowed a State witness to testify where, although she was not designated as an expert, the police report made available to defendant indicated that she was the chemist who performed the tests and analyses of cocaine; thus, although the State did not produce a piece of paper with the witness's name followed by "expert," neither was her identity and function concealed. Shepard v. State, 2006 Tex. App. LEXIS 2793 (Tex. App. Austin Apr. 6 2006).

1447. In a capital murder trial for the shooting death of a store clerk, the trial court erred by permitting an expert witness to provide a narrative interpretation of the videotaped recording of the incident. However, the testimony that defendant's waving to the gunman was consistent with his saying "come this way," did not have a substantial or injurious effect on the jury's verdict and did not affect his substantial rights; therefore, the error was harmless under Tex. R. App. P 44.2. Gonzales v. State, 2006 Tex. App. LEXIS 2518 (Tex. App. Fort Worth Mar. 30 2006).

1448. Given that the expert knew the results of one test of defendant's blood alcohol concentration a reasonable time from defendant's driving and knew several of defendant's relevant characteristics, the trial court did not abuse its discretion in overruling defendant's objection to retrograde extrapolation evidence regarding his blood alcohol level. Lomax v. State, 2006 Tex. App. LEXIS 2527 (Tex. App. Waco Mar. 29 2006).

1449. Where defendant was charged with murder, the employee of a cellular phone company was permitted to provide her expert testimony as to defendant's cell phone records and how they reflected his movements during the relevant time. Wilson v. State, 195 S.W.3d 193, 2006 Tex. App. LEXIS 815 (Tex. App. San Antonio 2006).

1450. During defendant's trial for the aggravated sexual assault of a child, the trial court did not err in allowing the testimony of a sheriff department's investigator where the testimony did not involve expert testimony, but, rather, concerned only factual matters that she had personally observed because the trial court limited the testimony to what the investigator had seen in her own experience, and the actual question asked of her was simply whether delayed outcry was normal in her experience; because the investigator had several years of experience as a forensic interviewer at a children's advocacy center, she had some basis on which to answer that, in her experience, it was normal for children to delay reporting the crime of sexual assault. Escamilla v. State, 2006 Tex. App. LEXIS 762 (Tex. App. Texarkana Jan. 31 2006).

1451. During defendant's trial for the aggravated sexual assault of a child, no witness testified concerning a psychiatrist's theory of Child Abuse Accommodation Syndrome because a registered nurse's testimony did not describe the findings of a psychiatrist or attempt to describe a syndrome, but explained her role as a sexual assault nurse examiner, the physical findings she encountered, and that her training and experience made her aware that some children delay reporting this crime for several reasons. Escamilla v. State, 2006 Tex. App. LEXIS 762 (Tex. App. Texarkana Jan. 31 2006).

1452. During defendant's trial for the aggravated sexual assault of a child, a registered nurse's testimony was within the scope of her field of expertise where she was the sexual assault nurse examiner certified by the Texas Office of the Attorney General and had to undergo 96 hours of clinical training to become certified; with her 11 years of experience with child sexual assault victims, the nurse had abundant personal observation and experience of common characteristics of sexually assaulted children, and she did not attempt to describe a medical or psychiatric

syndrome, but presented evidence to allow the conclusion that her training and experience provided an explanation for the reasons children delayed reporting sexual assaults. Escamilla v. State, 2006 Tex. App. LEXIS 762 (Tex. App. Texarkana Jan. 31 2006).

1453. Court did not err by allowing officers to testify regarding gangs where one witness testified about the activities of the Mexican Mafia as well as the organization's constitution and bylaws, and she identified photographs and information received from a confidential informant, both connecting defendant to membership in the Mexican Mafia; the other witness had also received specialized training in gang identification and investigation, specifically including the Mexican Mafia, and had conducted numerous investigations involving gangs; both testified that, in addition to their course work and investigations, their knowledge was gained by discussions with gang officers, interviews of informants and gang members, and monitoring of websites. Hernandez v. State, 2006 Tex. App. LEXIS 722 (Tex. App. Austin Jan. 26 2006).

1454. Where defendant was charged with stealing property, the trial court did not err by refusing to admit the testimony of an expert witness in commercial trucking regulation; while the complainant was a commercial truck driver, the testimony was irrelevant. Edrington v. State, 2005 Tex. App. LEXIS 10637 (Tex. App. Austin Dec. 21 2005).

1455. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

1456. In defendant's driving under the influence case, the admission of an officer's testimony regarding the reasonableness of the field sobriety tests given was improper because he was not qualified nor designated an expert witness and had no personal knowledge of the tests given. However, the error was harmless because another officer testified that he detected an odor of alcohol emanating from defendant's vehicle, defendant admitted he had consumed two to three beers, and he failed sobriety tests. Grimes v. State, 2005 Tex. App. LEXIS 9744 (Tex. App. Amarillo Nov. 22 2005).

1457. Where defendant was charged with aggravated sexual assault of a child, the State's expert witnesses were permitted to give their opinion testimony concerning the reluctance of child victims to talk about sexual abuse by a family member. The witnesses had equal or substantially similar education, training, and experience to other experts in the field. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

1458. Where defendant was charged with aggravated sexual assault of a child, the State's expert witness was permitted to give a legal definition of penetration. The expert's testimony was consistent with the court's definition of penetration. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

1459. Court properly suppressed retrograde extrapolation testimony where the expert had not been provided with facts justifying the assumption that defendant was in the post-absorptive phase at the time of the accident, and he admitted that if a hypothetical individual consumed a meal and alcohol with that meal, the presence of food in his stomach would affect the absorptive phase to the point that peak blood-alcohol level could be reached some time much later than when the incident occurred. State v. Franco, 180 S.W.3d 219, 2005 Tex. App. LEXIS 10823 (Tex. App. San Antonio 2005).

1460. Where defendant was charged with indecency with a child and aggravated sexual assault of a child, a counselor with years of training and experience was permitted to testify as an expert on child sexual abuse. The counselor held a Bachelor's Degree in social work with a minor in psychology, and a Master's Degree in counseling. Johnson v. State, 2005 Tex. App. LEXIS 7412 (Tex. App. Tyler Sept. 7 2005).

1461. In a trial for a "shaken-baby" murder, any error arising from the admission of an investigator's opinion on guilt was harmless. Although defendant objected to the testimony under Tex. R. Evid. 702 during the prosecution's re-direct, the same question and answer had come in without objection during the defense's prior cross-examination. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

1462. At trial, an expert witness testified that fingerprint analysis was recognized and accepted as valid in the scientific community, that there was a procedure used in analyzing fingerprints, and that he had followed the technique in this case. Given the fact that fingerprint evidence was accepted as a matter of common knowledge, and given the expert's testimony regarding the fingerprint analysis in defendant's case, the trial court did not abuse its discretion in admitting the fingerprint testimony. Salazar v. State, 2005 Tex. App. LEXIS 7187 (Tex. App. Austin Aug. 31 2005).

1463. Trial court did not abuse its discretion in permitting a sexual assault nurse examiner to testify about why some sexual assault victims did not remember the details of the assault; defendant's objection as to speculation lacked merit because the nurse's expert opinion was not speculation. Villarreal v. State, 2005 Tex. App. LEXIS 6720 (Tex. App. Fort Worth Aug. 18 2005).

1464. Trial court did not err in admitting the officer's testimony regarding "fist loading," because the record revealed that the officer had been a police officer for over 11 years, had a bachelor's degree in law enforcement, held a Master Peace Officer's certificate issued by the State of Texas, had specialized training in hand-to-hand or close combat, and had received specific training regarding the concept of "fist loading." Dean v. State, 2005 Tex. App. LEXIS 6681 (Tex. App. Amarillo Aug. 18 2005).

1465. In a murder case, the State demonstrated by clear and convincing evidence that the underlying scientific theory of gunshot residue analysis distance determination was valid; hence, expert testimony was properly admitted. Woodward v. State, 170 S.W.3d 726, 2005 Tex. App. LEXIS 5255 (Tex. App. Waco 2005).

1466. In defendant's murder case, a court properly allowed expert testimony on the issue of bullet lead where the evidence made it more probable than not that the expended bullets originated from the ammunition box found in defendant's residence, and defendant was free to challenge the expert's conclusions and point out the weaknesses of the analysis to the jury during cross-examination. Gonzales v. State, 2005 Tex. App. LEXIS 4874 (Tex. App. Corpus Christi June 23 2005).

1467. In a trial for sexual assault of a child, an expert witness was qualified under Tex. R. Evid. 702 to testify about sex offenders and the effects of sexual abuse on victims because, contrary to defendant's contentions, the expert testified that he had experience in sex offender treatment and in identifying the emotional effects of sexual abuse. The training, experience, research, seminars, materials, periodicals, and treatises about which the expert testified and upon which he based his opinions qualified him under Tex. R. Evid. 702 to testify as an expert witness. Lively v. State, 2005 Tex. App. LEXIS 4703 (Tex. App. Dallas June 17 2005).

1468. Although the court erred by allowing an expert to testify that a sexual assault occurred, the error was harmless where the child victim told her caregivers and the jury that defendant put his "private" in her "private" on numerous occasions. The victim also provided detailed descriptions of the sexual abuse in age-appropriate

language. Smith v. State, 2005 Tex. App. LEXIS 4203 (Tex. App. El Paso May 31 2005).

1469. In a criminal prosecution for aggravated sexual assault of a child, the trial court did not abuse its discretion by admitting the testimony of a doctor who never examined the victim and had no personal knowledge of her. The doctor indicated that withdrawal from family and friends may occur after sexual abuse and that a sexually abused child may experience shame, guilt, and ambivalence toward the perpetrator; her testimony was tied to the facts of the case. Comeaux v. State, 2005 Tex. App. LEXIS 3748 (Tex. App. Houston 14th Dist. May 17 2005).

1470. Court properly denied defendant's motion to suppress evidence of his horizontal gaze nystagmus test results because the evidence was sufficient to establish that the officer who administered the test was an expert at administering the test. In addition, the testimony of the officer was not offered to secure a conviction but rather to enable the trial court to determine whether the factfinder would be allowed to hear it. Reynolds v. State, 163 S.W.3d 808, 2005 Tex. App. LEXIS 3516 (Tex. App. Amarillo 2005).

1471. For an officer to testify as an expert on the administration of a horizontal gaze nystagmus test, it need only be shown that he received from the State of Texas a practitioner's certification to administer the test. Reynolds v. State, 163 S.W.3d 808, 2005 Tex. App. LEXIS 3516 (Tex. App. Amarillo 2005).

1472. Expert testimony was properly admitted regarding semen evidence obtained from the victim in defendant's aggravated sexual assault case, because the expert testified that the underlying scientific theory for DNA was valid and had been accepted by the scientific community, that literature existed supporting the scientific theory, that the techniques used to apply the theory were valid, and that the valid techniques were applied in this case. Although she stated that she was unfamiliar with the error rate of DNA testing, she testified that she used quality measures and positive and negative controls to insure accuracy during DNA testing. Ford v. State, 2005 Tex. App. LEXIS 3151 (Tex. App. Dallas Apr. 27 2005).

1473. Prisoner's trial counsel was not ineffective for failing to make a Daubert objection to a prosecution expert's testimony under Fed. R. Evid. 702 because the expert adequately established his expert credentials, which included prior testimony as to the future dangerousness of a perpetrator and there was no clearly established law that prevented a psychiatrist from basing his opinion on the records of the case and the psychiatric records of the perpetrator. Shields v. Dretke, 122 Fed. Appx. 133, 2005 U.S. App. LEXIS 2910 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 28, 162 L. Ed. 2d 928, 2005 U.S. LEXIS 5374, 74 U.S.L.W. 3129 (U.S. 2005).

1474. Trial court did not err in a murder trial by excluding expert testimony concerning the effects of combining Xanax, marijuana, and alcohol, because the witness was not an expert in the field of pharmacology, and therefore was not qualified to give expert advice concerning their effects. Smith v. State, 2005 Tex. App. LEXIS 1087 (Tex. App. San Antonio Feb. 9 2005).

1475. In a murder case, the trial court did not abuse its discretion in finding a psychologist and a psychiatrist, based on their experience, to be qualified to testify as experts. Lopez v. State, 2005 Tex. App. LEXIS 770 (Tex. App. San Antonio Feb. 2 2005).

1476. Appellate court did not review an argument that a police officer's testimony regarding whether an assault occurred constituted improper expert testimony because the issue was not preserved for review by a bolstering objection; the objection did not comport with the argument raised on appellate review. Mumphrey v. State, 155 S.W.3d 651, 2005 Tex. App. LEXIS 370 (Tex. App. Texarkana 2005).

1477. Once the identity of the defendant's expert was disclosed to the state, it was no longer privileged. Further, the work-product privilege did not apply to the expert's identity once it was provided to the state as part of discovery. Pope v. State, 161 S.W.3d 114, 2004 Tex. App. LEXIS 11529 (Tex. App. Fort Worth 2004).

1478. In a driving while intoxicated case, the trial court did not err in admitting expert testimony using retrograde extrapolation to establish defendant's blood alcohol concentration because the expert was qualified and the science was reliable. Peden v. State, 2004 Tex. App. LEXIS 9954 (Tex. App. Houston 1st Dist. Nov. 10 2004).

1479. In a murder case, the trial judge did not err by excluding the testimony of defendant's expert witness as the expert offered no criteria or data by which, even out of his own experience, he arrived at his broad conclusions about murderers on probation. Further, defendant offered no evidence that the expert's testimony properly relied on or utilized principles or studies from within his field of expertise. Stubbs v. State, 2004 Tex. App. LEXIS 8916 (Tex. App. Beaumont Oct. 6 2004).

1480. Because an officer had completed the necessary training to be considered an expert on the Horizontal Gaze Nystagmus test, the trial court did not abuse its discretion by allowing the officer to testify concerning the test even though he had not yet received his certification at the time he performed the test on defendant. Barton v. State, 2004 Tex. App. LEXIS 8863 (Tex. App. Houston 14th Dist. Oct. 5 2004).

1481. Where defendant was charged with aggravated sexual assault of a child after an eight-year-old complainant made an "outcry" during therapy that defendant forced him to engage in oral sex, the trial court did not abuse its discretion in excluding an expert's opinion that therapists could implant memories. Ard v. State, 2004 Tex. App. LEXIS 7339 (Tex. App. Dallas Aug. 16 2004).

1482. Reliability of "soft" science evidence may be established by showing: (1) the field of expertise involved is a legitimate one; (2) the subject matter of the expert's testimony is within the scope of that field; and (3) the expert's testimony properly relies upon or utilizes the principles involved in that field. Ard v. State, 2004 Tex. App. LEXIS 7339 (Tex. App. Dallas Aug. 16 2004).

1483. It is an abuse of discretion if the trial court's decision to exclude expert testimony is outside the zone of reasonable disagreement. Ard v. State, 2004 Tex. App. LEXIS 7339 (Tex. App. Dallas Aug. 16 2004).

1484. In a sexual assault case, a court erred by failing to allow defendant's expert to testify where the subject of the expert's opinion was relevant, just as the State's expert was permitted to testify that the lack of genital injuries did not indicate that the complainant had not been sexually assaulted, defendant's expert should have been permitted to testify that no sexual assault occurred. One party could not proffer expert testimony and subsequently argue successfully that the testimony was not relevant when the opposing party sought to offer expert testimony on the same subject which reached a different conclusion; in addition, the error was not harmless. Vela v. State, 159 S.W.3d 172, 2004 Tex. App. LEXIS 7257 (Tex. App. Corpus Christi 2004).

1485. Trial court did not abuse its discretion in excluding expert testimony regarding contact marks on defendant's vehicle on the basis that the underlying theory was unreliable where Tex. R. Evid. 702 required that a three-part reliability test for the admission of scientific evidence must be satisfied: (1) the underlying scientific theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. Sheehy v. State, 2004 Tex. App. LEXIS 6870 (Tex. App. Corpus Christi July 29 2004).

1486. Trial court was capable of reviewing the evidence, without the benefit of expert testimony, to determine whether the State met its burden of showing computer images depicting "actual" children necessary for conviction

under the child pornography statute as opposed to "virtual" children, and, thus, the trial court properly denied defendant's motion for a determination about the admissibility of computer images in his case involving the felony possession of child pornography. Porath v. State, 148 S.W.3d 402, 2004 Tex. App. LEXIS 6767 (Tex. App. Houston 14th Dist. 2004).

1487. Defendant's conviction for driving while intoxicated in violation of Tex. Penal Code Ann. § 49.04(a) was proper where there was evidence supporting the trial court's finding that a co-worker's testimony established the time of defendant's last drink; thus, the court concluded that the expert had sufficient information available upon which to extrapolate defendant's alcohol concentration at the time of the offense. The expert's extrapolation was sufficiently reliable to be useful to the jury and, therefore, the trial court did not abuse its discretion in admitting the extrapolation evidence under Tex. R. Evid. 702. Fulenwider v. State, 176 S.W.3d 290, 2004 Tex. App. LEXIS 6352 (Tex. App. Houston 1st Dist. 2004).

1488. In a driving while intoxicated case, the State's intoxilyzer expert's testimony regarding retrograde extrapolation of defendant's blood alcohol content, which estimated defendant's blood-alcohol level when he was driving based on a test result from some later time, was admissible because: (1) the intoxilyzer tests were given within a reasonable amount of time after he was driving; (2) more than three of defendant's personal characteristics -- such as weight, gender, typical drinking pattern, tolerance for alcohol, amount of alcohol consumed, what the person ingested, the duration of the drinking spree, the time of the last drink, and how much and what the person had to eat either before, during, or after the drinking -- were known by the expert; and (3) the expert used the accepted average rate for elimination of alcohol at 0.015 grams per hour, instead of calculating a specific elimination rate for defendant. Smothers v. State, 2004 Tex. App. LEXIS 6399 (Tex. App. Fort Worth July 15 2004).

1489. In a driving while intoxicated case, the State's intoxilyzer expert miscalculated defendant's blood alcohol level under the retrograde extrapolation method; however, defendant failed to object to the expert's testimony on the basis that she made an erroneous calculation and thus, defendant did not preserve error regarding the expert's miscalculations. Smothers v. State, 2004 Tex. App. LEXIS 6399 (Tex. App. Fort Worth July 15 2004).

1490. Where an officer improperly administered a Horizontal Gaze Nystagmus test in a driving while impaired case, a trial court erred in admitting the test under Tex. R. Evid. 702, but the error was harmless based on other evidence since the other evidence showed that defendant committed several traffic offenses, smelled of alcohol, had bloodshot eyes, had a slow response time, performed poorly on other field sobriety tests, admitted to drinking, and had a high concentration of alcohol in two intoxilyzer samples. McRae v. State, 2004 Tex. App. LEXIS 5933 (Tex. App. Houston 1st Dist. July 1 2004), opinion withdrawn by, substituted opinion at 152 S.W.3d 739, 2004 Tex. App. LEXIS 10805 (Tex. App. Houston 1st Dist. 2004).

1491. Trial court did not err by admitting evidence of a sexual assault diagnosis made by a physician's assistant, who explained that a statement made by defendant's girlfriend was considered, but not relied upon, in making the diagnosis. Scott v. State, 2004 Tex. App. LEXIS 4949 (Tex. App. Houston 14th Dist. June 3 2004).

1492. Where defendant claimed on appeal that the State's expert witness was not properly qualified as an expert witness but at trial defense counsel did not object to the witness's qualifications until after the witness provided an expert opinion, under Tex. R. App. P. 33.1(a) defendant failed to preserve for review any objection to the witness's qualifications Tello v. State, 138 S.W.3d 487, 2004 Tex. App. LEXIS 4653 (Tex. App. Houston 14th Dist. 2004), affirmed by 180 S.W.3d 150, 2005 Tex. Crim. App. LEXIS 2039 (Tex. Crim. App. 2005).

1493. Where defendant did not object each time the State's expert witness's opinion about the victim's credibility was offered, defendant's complaint about the trial court's admission of her testimony was waived. Allam v. State,

2004 Tex. App. LEXIS 4177 (Tex. App. Fort Worth May 6 2004).

1494. In a driving while intoxicated case, the trial court abused its discretion by admitting the State's expert's testimony on retrograde extrapolation based on defendant's intoxilyzer results as the State was unable to show that the expert's testimony was reliable; the expert did not explain the science of retrograde extrapolation and did not know many relevant, important personal characteristics of defendant. Owens v. State, 135 S.W.3d 302, 2004 Tex. App. LEXIS 3536 (Tex. App. Houston 14th Dist. 2004).

1495. In a case involving child indecency, a trial court did not err by allowing an expert to testify regarding defendant's future dangerousness, despite the fact that the expert never met defendant because such contact was not required under Tex. R. Evid. 703; moreover, the expert was qualified to give an opinion based on the expert's training, education, and vast experience with sexual offenders. Rodriguez v. State, 2004 Tex. App. LEXIS 3457 (Tex. App. Fort Worth Apr. 15 2004).

1496. In a sexual assault case, a court properly allowed an expert to testify regarding sexual abuse where, although the State did not tie the testimony to the facts of the case, the testimony was relevant, it had a relatively close association with the evidence, and it was better for the expert not to tie his or her testimony too tightly to the particular child victim, but instead, to limit the import of such testimony to general characteristics and empirically obtained data, so that the jury could draw its own conclusions. Carey v. State, 2004 Tex. App. LEXIS 3188 (Tex. App. Texarkana Apr. 8, 2004).

1497. In an intoxicated assault case, Tex. Penal Code Ann. § 49.07(a)(1), the State's witness's testimony was objectionable because he was not shown to be qualified as an expert under Tex. R. Evid. 702 on retrograde extrapolation for purposes of blood alcohol tests, nor was his testimony shown to be reliable and, thus, pursuant to Tex. R. Evid. 704, the witness's testimony on whether defendant was intoxicated beyond a reasonable doubt, an ultimate issue in the case, was also objectionable; therefore, counsel's representation fell below an objective standard of reasonableness as he failed to object to the witness testimony. However, counsel's failure to object to the admission of the witness's testimony did not prejudice defendant because there was substantial other evidence of defendant's intoxication at the time of the accident, including testimony that defendant smelled of alcohol and appeared intoxicated, that the inside of defendant's vehicle smelled of the metabolized odor of alcohol, and that defendant had been drinking that day. Blumenstetter v. State, 135 S.W.3d 234, 2004 Tex. App. LEXIS 3074 (Tex. App. Texarkana 2004).

1498. In an aggravated assault case, an expert was qualified to testify regarding blood spatter analysis where he had been an officer for 13 years, he participated in 45-50 hours of instruction, and he had applied his knowledge at other crime scenes. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

1499. In an aggravated assault case, because blood spatter analysis was subject to judicial notice and the State proved the proper application of blood spatter analysis, the trial court did not err in admitting the State's testimony on the issue of blood spatter analysis. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

1500. Texas takes judicial notice of the validity of blood spatter analysis; the State is not required to produce evidence on the first two criteria of Kelly. Holmes v. State, 135 S.W.3d 178, 2004 Tex. App. LEXIS 2690 (Tex. App. Waco 2004).

1501. Tex. R. Evid. 702 states if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Salazar v. State, 127

S.W.3d 355, 2004 Tex. App. LEXIS 1045 (Tex. App. Houston 14th Dist. 2004).

1502. Under Tex. R. Evid. 702, the proponent of scientific evidence must show, by clear and convincing proof, that the evidence is sufficiently reliable and relevant to assist the jury in understanding other evidence or in determining a fact issue. Salazar v. State, 127 S.W.3d 355, 2004 Tex. App. LEXIS 1045 (Tex. App. Houston 14th Dist. 2004).

1503. Under Tex. R. Evid. 702, defendant's expert witness exhibited no knowledge of the facts and did not attempt to relate or apply content-based criteria analysis to the particular facts. He did not offer an analysis of either the techniques used by the interviewers or the potential impact the techniques may have had on the children. Instead, defendant's expert's testimony was explicitly offered solely as educational material for the jury to use in assessing the complainants' credibility. Accordingly, the testimony was not sufficiently tied to the facts of the case and thus was not relevant. Salazar v. State, 127 S.W.3d 355, 2004 Tex. App. LEXIS 1045 (Tex. App. Houston 14th Dist. 2004).

1504. In an arson trial, an expert's opinion that a fire had started was admissible under Tex. R. Evid. 702 and Tex. R. Evid. 704. Drake v. State, 123 S.W.3d 596, 2003 Tex. App. LEXIS 9599 (Tex. App. Houston 14th Dist. 2003).

1505. Although the officer's testimony satisfied only the second and third Kelly prongs for admissibility, the underlying scientific principles of radar were indisputable and valid as a matter of law, and it was not error to admit the radar gun results. Mills v. State, 99 S.W.3d 200, 2002 Tex. App. LEXIS 9297 (Tex. App. Fort Worth 2002).

1506. After defendant pled guilty to murder, the trial court erred at the sentencing proceedings in excluding testimony of a psychologist who sought to testify as to testing results that he opined demonstrated that defendant was an appropriate candidate for probation, because the psychologist was qualified as an expert and because the tests were accepted as valid within the scientific community. Muhammad v. State, 46 S.W.3d 493, 2001 Tex. App. LEXIS 3366 (Tex. App. El Paso 2001).

Evidence : Testimony : Experts : Daubert Standard

1507. Trial court did not abuse its discretion in admitting an expert's testimony and his report, given that the trial court could have found that his methodology, tax accounting principles, comported with well-established professional standards, and the trial court was not required to find there was any analytical gap between the data and the expert's conclusions so as to have rendered his testimony and report unreliable. Bazan v. MuÃ»oz, 444 S.W.3d 110, 2014 Tex. App. LEXIS 8817 (Tex. App. San Antonio Aug. 13 2014).

1508. During the punishment phase of defendant's trial for aggravated assault of a family member, the trial court erred in admitting testimony from a State witness as an expert on lethality assessment because she did not offer any specifics to support her assertion, and she did not cite any books, articles, journals, or other clinical social workers who practiced in the area. Petriciolet v. State, 442 S.W.3d 643, 2014 Tex. App. LEXIS 8414 (Tex. App. Houston 1st Dist. July 31 2014).

1509. Trial court did not err in denying a taxpayer's motion to exclude the testimony of an appraisal district's expert, a registered professional appraiser with close to 30 years of experience, because his calculations were based on quantitative foundational data and followed approved methodology. Key Energy Servs., Llc v. Shelby County Appraisal Dist., 428 S.W.3d 133, 2014 Tex. App. LEXIS 439, 2014 WL 130547 (Tex. App. Tyler Jan. 15 2014).

1510. Given that the jury heard evidence about defendant having stumbled out of a bar and testimony about how poorly defendant performed on field sobriety tests, and the charge did not narrowly define intoxication solely on the synergistic effect theory but allowed the jury to find intoxication in other ways, the erroneous admission of expert evidence on the theory was harmless because defendant's substantial rights in his driving while intoxicated case were not affected. Parr v. State, 2014 Tex. App. LEXIS 183, 2014 WL 69567 (Tex. App. Corpus Christi Jan. 9 2014).

1511. State did not meet its burden to prove by clear and convincing evidence that the pharmacist's testimony was reliable scientific evidence given that the State did not show (1) the synergistic theory was accepted as valid by the scientific community, (2) the existence of literature supporting the theory, and (3) the potential rate of error applying the technique to this case, and the admission of the evidence was an abuse of discretion. Parr v. State, 2014 Tex. App. LEXIS 183, 2014 WL 69567 (Tex. App. Corpus Christi Jan. 9 2014).

1512. Physician's deposition testimony and report were inadmissible because they were conclusory and unreliable, as corroborating data was not included in the report, his theory that the patient would have survived had the defibrillator administered a successful defibrillation was undermined by the American Medical Association's manual, and he admitted that admitting a patient in the instant patient's condition into the hospital was no assurance that the patient would eventually be discharged alive. Schronk v. Laerdal Med. Corp., 440 S.W.3d 250, 2013 Tex. App. LEXIS 15024, 2013 WL 6570907 (Tex. App. Waco Dec. 12 2013).

1513. Trial court did not err in admitting expert testimony in a wrongful termination action because the employee's expert articulated a reliable and well-accepted method for evaluating back pay and front pay. Dell, Inc. v. Wise, 424 S.W.3d 100, 2013 Tex. App. LEXIS 10654 (Tex. App. Eastland Aug. 22 2013).

1514. No abuse of discretion in excluding defendant's expert's testimony, because the trial court could have reasonably concluded that defendant failed to carry his burden of showing that the psychiatrist's testimony was reliable in the area of dissociative identity disorder. Harris v. State, 424 S.W.3d 599, 2013 Tex. App. LEXIS 9481, 2013 WL 5570428 (Tex. App. Corpus Christi Aug. 1 2013).

1515. In a customer's action against a vehicle dealership for breach of warranty and fraud, the trial court did not err in ruling that testimony by the customer's expert was inadmissible because the testimony was not demonstrated to be reliable; the expert could not explain why, in arriving at his opinion on damages, the "clean trade-in" value was used as a starting point instead of the "clean retail" value, the difference in which was nearly $ 4,000. Moore v. Jordan Ford, Ltd., 2013 Tex. App. LEXIS 8372 (Tex. App. San Antonio July 10 2013).

1516. Ex-wife did not raise a Daubert objection or object to the ex-husband's tracing methodology, nor did the ex-wife appeal from the decision to admit the tracing evidence on any basis other than a discovery sanction; the court had to rely on the fact-finder, the trial court, and if the trial court found the ex-husband's testimony and tracing was credible, the trial court could have found that the assets were his separate property. Richard v. Towery, 2013 Tex. App. LEXIS 4813 (Tex. App. Houston 1st Dist. Apr. 18 2013).

1517. Counsel could not be deemed ineffective for failing to object to a witness's testimony as impermissible expert testimony or for not requesting a Daubert hearing, given that her testimony did not involve a scientific theory and she did not need significant expertise to determine from officers' actions that they believed what they seized from the house were drugs, plus the testimony was helpful to the jury in determining a fact issue, under Tex. R. Evid. 701(b), and thus it was within the trial court's discretion to consider the witness as a lay witness. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

1518. Evidence was admissible for determining the children's best interests, and the testimony was relevant to the best interest factors, such that it was not necessary for the mother's counsel to object to the testimony about extraneous offenses, counsel was not ineffective for failing to do so, and the court overruled appellant's issue related to a Daubert hearing. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

1519. Under Tex. Fam. Code Ann. § 107.002, a case worker supervisor's testimony was admissible opinion testimony that was not subject to a Daubert hearing; she testified that she interviewed the child, formed an opinion as to his best interest, found that it was in the child's best interests to terminate the parents' rights, and the child said he wanted to stay with his foster parents. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

1520. Appellant claimed that the officer moved the stimulus at a pace of four seconds instead of two, but such minor deviations from the manual did not render the horizontal gaze nystagmus test inadmissible, for purposes of Tex. R. Evid. 702. Stanley v. State, 2012 Tex. App. LEXIS 8442, 2012 WL 4848762 (Tex. App. Houston 14th Dist. Oct. 9 2012).

1521. Scientist testified that her method of homogenization was scientifically accepted, defense expert witness testimony stated that the technique was approved, and the record thus showed that the technique was scientifically reliable; the trial court did not err in admitting the evidence. Stanley v. State, 2012 Tex. App. LEXIS 8442, 2012 WL 4848762 (Tex. App. Houston 14th Dist. Oct. 9 2012).

1522. Appellant cited no authority for the claims that pouring blood into a beaker or unexplained clotting of blood would render the results inadmissible; if, as in this case, the procedure used had been validated as reliable, there was no abuse of discretion in admitting the evidence. Stanley v. State, 2012 Tex. App. LEXIS 8442, 2012 WL 4848762 (Tex. App. Houston 14th Dist. Oct. 9 2012).

1523. Appellant argued that an officer did not ask qualification questions screening for potential causes of nystagmus, but asking such questions was not necessary to screen persons for medical conditions; the officer checked for equal pupil size, tracking, and resting nystagmus to see if they were a candidate to perform the test, and thus the officer sufficiently screened appellant for medical conditions that might have interfered with the test. Stanley v. State, 2012 Tex. App. LEXIS 8442, 2012 WL 4848762 (Tex. App. Houston 14th Dist. Oct. 9 2012).

1524. Trial court did not find that flashing lights were problematic concerning the validity of a horizontal gaze nystagmus, and the court deferred to this finding, which was supported by the record. Stanley v. State, 2012 Tex. App. LEXIS 8442, 2012 WL 4848762 (Tex. App. Houston 14th Dist. Oct. 9 2012).

1525. For purposes of Tex. Transp. Code Ann. §§ 724.064, 724.017(a), the procedure used was sufficiently reliable to admit results of the blood test, given that (1) a scientist's testimony showed that she was a forensic scientist and supervisor with a master's degree and years of experience, (2) the laboratory procedure for analysis had been validated to plus or minus 10 percent accuracy, and (3) she testified that she followed the procedure. Stanley v. State, 2012 Tex. App. LEXIS 8442, 2012 WL 4848762 (Tex. App. Houston 14th Dist. Oct. 9 2012).

1526. In a product liability action, the trial court erred in deeming any of appellants' expert testimony to be unreliable because the experts provided sufficient evidence on the origin and cause of a fire in a manufacturing facility; appellants' experts established that they relied upon generally accepted scientific methodologies and completed all of the testing that was feasible for them to complete. Control Solutions, Inc. v. Gharda Usa, Inc., 394 S.W.3d 127, 2012 Tex. App. LEXIS 6793, 2012 WL 3525372 (Tex. App. Houston 1st Dist. Aug. 16 2012).

1527. Trial court erred in a medical malpractice action in excluding testimony by appellants' experts because based upon their years of treating patients with renal insufficiency and the unequivocal autopsy and toxicology reports supporting their opinions that the patient died from an accidental overdose of Hydrocodone and Oxycontin, their causation opinions met the reliability requirements for admissibility. White v. Scaff, 2012 Tex. App. LEXIS 5346, 2012 WL 2608626 (Tex. App. Corpus Christi July 5 2012).

1528. Testimony was properly admitted on the diminished value of damaged steel coils. The steel company's owner could testify to value as a property owner under Tex. R. Evid. 701, and an expert marine surveyor's testimony on representative sampling was reliable under Tex. R. Evid. 702; further, the expert marine surveyor was not required under Tex. R. Evid. 703 to personally inspect every damaged coil. Custom Transit, L.P. v. Flatrolled Steel, Inc., 375 S.W.3d 337, 2012 Tex. App. LEXIS 4739 (Tex. App. Houston 14th Dist. June 14 2012).

1529. Appellant did not preserve a Daubert claim for review, given his objection. Zavala v. State, 401 S.W.3d 171, 2011 Tex. App. LEXIS 8671, 2011 WL 5156843 (Tex. App. Houston 14th Dist. Nov. 1 2011).

1530. For purposes of Tex. R. Evid. 702, appellant did not argue and the record did not show that the blood test was novel; even assuming it was, the record provided no indication that a suppression hearing was held before or during trial regarding the tests, nor was it shown that the detailed reliability challenges were presented to the trial court before a witness testified about the test results, and the court could not find that the trial court abused its discretion by admitting this witness's unobjected-to testimony. Kuciemba v. State, 2011 Tex. App. LEXIS 8456 (Tex. App. Houston 14th Dist. Oct. 25 2011).

1531. In a brother's action against a sister to try title to real property, the court did not err in sustaining the sister's objection to the affidavit of the brother's handwriting expert because the expert's affidavit failed to adequately connect the underlying data with the offered conclusion. Gonzales v. Reyes, 2011 Tex. App. LEXIS 5183, 2011 WL 2652127 (Tex. App. Austin July 7 2011).

1532. Order civilly committing appellant as a sexually violent predator was proper because the opinions offered by the State's experts, a psychologist and a psychiatrist, were reliable and adequately tied to relevant facts; they diagnosed appellant with paraphilia, polysubstance dependence, and personality disorder with antisocial features. In re Polk, 2011 Tex. App. LEXIS 1323, 2011 WL 662928 (Tex. App. Beaumont Feb. 24 2011).

1533. Expert testimony valuing property on which a large natural gas processing plant had been built as vacant rural residential property was irrelevant under Tex. R. Evid. 401 and was unreliable under Tex. R. Evid. 702 because the expert failed to explain why the existing use of the property would not be presumed as the highest and best use, did not offer fair market value of the land based on its condition at the time of the condemnation, and did not account for all relevant factors affecting valuation. Enbridge Pipeline (east Texas) L.P. v. Avinger Timber, L.L.C., 326 S.W.3d 390, 2010 Tex. App. LEXIS 8629, 172 Oil & Gas Rep. 722 (Tex. App. Texarkana Oct. 27 2010).

1534. Even though the trial court by admitting a forensic psychiatrist's expert testimony about future dangerous, as there was no objective source material to substantiate his methodology as one that was appropriate in the practice of forensic psychiatry, the error was harmless, because there was ample evidence that there was a probability that defendant would commit future acts of violence apart from the psychiatrist's testimony; that evidence included the following a psychiatric interview and evaluation done more than 20 years before the murders and 40 years before sentencing that found reached the same basic conclusions about defendant as the instant psychiatrist did. In addition, the prosecution did not rely heavily on the psychiatrist's testimony during its closing arguments. Coble v. State, 330 S.W.3d 253, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. 2010).

1535. Trial court did not err by allowing the State's expert to testify about Satanism under Tex. R. Evid. 702 because he was qualified, as he testified that he had spent approximately 19 years studying that subject, and because the evidence was reliable, as the expert's testimony regarding Satanic philosophy relied directly on the numerous books and articles he had read on the subject. Davis v. State, 329 S.W.3d 798, 2010 Tex. Crim. App. LEXIS 1207 (Tex. Crim. App. 2010).

1536. Trial court erred in awarding judgment to the sellers of a dialysis company in their action against a buyer for breach of the sales agreement as it pertained to pre-sale receivables because the testimony and opinion of the sellers' expert witness was unreliable and thus inadmissible; the expert's assumptions regarding contract and noncontract patients were unsupported by the evidence and the failure to test those assumptions rendered the report unreliable. U.S. Renal Care, Inc. v. Jaafar, 2010 Tex. App. LEXIS 7085, 2010 WL 3405831 (Tex. App. San Antonio Aug. 31 2010).

1537. Walk-and-turn and one-leg-stand tests were not scientific evidence; the officer's testimony was lay witness testimony governed by Tex. R. Evid. 701, and while she described the tests and indicated what clues meant a person was intoxicated and how many clues appellant indicated, such did not cross the line into expert testimony, and the trial court did not err in allowing this testimony in appellant's driving while intoxicated trial. Horton v. State, 2010 Tex. App. LEXIS 7296, 2010 WL 3433776 (Tex. App. Fort Worth Aug. 31 2010).

1538. Because an officer's testimony was lay witness testimony, and therefore the expert standard did apply, the trial court did not wrongfully place the burden of proof on appellant to show her weight at the time of her arrest for driving while intoxicated. Horton v. State, 2010 Tex. App. LEXIS 7296, 2010 WL 3433776 (Tex. App. Fort Worth Aug. 31 2010).

1539. In a breach of contract action involving a broker's commissions based on a percentage of net profits from sales procured by the broker, an expert's testimony was admissible because his method of calculation of net profits was a reasonable approximation and was acceptable under the Daubert standard. Truman Arnold Cos. v. Hammond & Consultants Enters., 2010 Tex. App. LEXIS 6190, 2010 WL 2982912 (Tex. App. Tyler July 30 2010).

1540. Trial court did not err in failing to hold a Kelly-Daubert hearing regarding the admissibility of the standard, physical field sobriety tests that defendant performed because an officer's testimony regarding the walk-and-turn test and the one-leg stand test was lay testimony, not expert scientific or technical evidence. Johnson v. State, 2010 Tex. App. LEXIS 5603, 2010 WL 2803015 (Tex. App. Eastland July 15 2010).

1541. Defense counsel did not object on the basis of qualifications or reliability and he did not ask to voir dire the witness or have the trial court conduct a Daubert/Kelly hearing, and thus appellant preserved no error for review under Tex. R. App. P. 33.1; the court noted that a lay opinion could be offered under Tex. R. Evid. 701 if the opinion was rationally based on his perceptions and helpful to the understanding of the testimony. Livingston v. State, 2010 Tex. App. LEXIS 5512, 2010 WL 2783911 (Tex. App. Corpus Christi July 15 2010).

1542. In an action in which a mother alleged that her baby suffered nerve injuries during birth due to her obstetrician's asserted negligence, the trial court acted within its discretion when it overruled the mother's motion to exclude expert testimony relied upon by the obstetrician regarding natural forces of labor as a potential cause of the child's brachial plexus injury; the mother's challenges predicated on reliance upon retrospective studies and the potential for ascertainment bias did not warrant exclusion of the disputed expert testimony regarding the cause of the child's brachial plexus injury. Taber v. Nguyen Roush, 316 S.W.3d 139, 2010 Tex. App. LEXIS 4508 (Tex. App. Houston 14th Dist. June 17 2010).

1543. In an action in which a mother alleged that her baby suffered nerve injuries during birth due to her obstetrician's asserted negligence, the mother wrongly attempted to invoke the "general acceptance" factor of the Robinson factors for gauging the admissibility of expert testimony to argue that the natural forces of labor theory had not been generally accepted as a potential cause of brachial plexus injuries during birth where labeling the natural forces of labor theory as a "hypothesis" was not dispositive because that characterization by itself did not answer the reliability question. Similarly, the reliability issue was not resolved by pointing to a characterization of the natural forces of labor theory as "not the most commonly accepted at all" by one of the child's treating physicians. Taber v. Nguyen Roush, 316 S.W.3d 139, 2010 Tex. App. LEXIS 4508 (Tex. App. Houston 14th Dist. June 17 2010).

1544. In an action in which a mother alleged that her baby suffered nerve injuries during birth due to her obstetrician's asserted negligence, the expert testimony relied upon by the obstetrician regarding natural forces of labor as a potential cause of the child's brachial plexus injury was admissible under the Robinson standard because, on the record presented, the trial court had a valid basis for concluding that the asserted analytical gap between non-specific brachial plexus injuries discussed in the medical literature and the particular avulsion injury that the child suffered had been bridged as between natural forces of labor as an explanation for brachial plexus injuries in general and the child's specific avulsion injury. The record warranted submission of testimony regarding a natural forces of labor explanation for the jury's consideration in deciding a causation issue that -- as the mother's expert noted -- unavoidably involved an element of speculation. Taber v. Nguyen Roush, 316 S.W.3d 139, 2010 Tex. App. LEXIS 4508 (Tex. App. Houston 14th Dist. June 17 2010).

1545. Even if appellant had lodged a sufficient objection at trial, he failed to show any reason to find the expert testimony inadmissible; nothing showed the experts' lack of qualification or the unreliability of the methodologies employed, both the experts' qualifications, including their education and experience, provided the trial court with a more than adequate basis for admitting their testimony on future dangerousness under Tex. R. Evid. 702, plus the testimony appeared to meet the requirements that the evidence derived from a soft science such as psychology was sufficiently reliable. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1546. In a mother's medical malpractice action that attributed her son's nerve injuries to a physician's alleged negligence during the son's birth, the trial court acted within its discretion when it overruled the mother's motion to exclude expert testimony; the challenged testimony regarding natural forces of labor as a potential cause of the son's brachial plexus injury was admissible under the Robinson standard. Taber v. Roush, 2010 Tex. App. LEXIS 2827, 2010 WL 1540128 (Tex. App. Houston 14th Dist. Apr. 20 2010).

1547. In a patient's medical malpractice action that arose from an L2 inferior to S1 superior decompressive laminectomy performed by appellees, a doctor and a neurosurgery clinic, the trial court abused its discretion by sustaining appellees' objections to exclude the testimony of the patient's expert witness where the expert's testimony was reliable because his affidavit sufficiently stated the methodology he employed by listing the most likely causes of cauda equina syndrome and using the patient's postoperative radiographical studies to eliminate two of the potential causes, he stated that he reviewed the patient's medical records, and he formulated his opinion that over-manipulation of the cauda equina nerves caused the patient's injury by reviewing her postoperative radiographic studies. The patient met her burden of establishing that the expert utilized a scientifically reliable methodology. St. Clair v. Alexander, 2009 Tex. App. LEXIS 7682, 2009 WL 3135812 (Tex. App. Corpus Christi Sept. 30 2009).

1548. Condominium association did not object to an expert's testimony at trial and therefore waived any complaint regarding the methodology, technique, or foundational data the expert used in forming his opinion. Towers of Town Lake Condo. Ass'n v. Rouhani, 296 S.W.3d 290, 2009 Tex. App. LEXIS 7033 (Tex. App. Austin Aug. 31 2009).

1549. In a murder trial in which the state's theory was that the victim's head was struck against a cabinet door, the trial court abused its discretion by excluding testimony from defendant's expert that the door was not damaged in the manner that a door would be damaged from something hitting against the back of it with great force. Reliability was established under Tex. R. Evid. 702 because the expert's testimony established that the field of determining the cause of damage to cabinetry was a legitimate one because that determination was necessary to apportion liability for the cost of repair or replacement of damaged cabinetry; the proffered testimony was within the scope of that field; the opinion relied upon and utilized the principles involved in the field; and the expert testified about his years of experience building and installing cabinets and testing cabinets' ability to withstand stresses, and about his knowledge of the damage caused to cabinets by different types of stress or abuse. Cuadros-Fernandez v. State, 316 S.W.3d 645, 2009 Tex. App. LEXIS 6896 (Tex. App. Dallas Aug. 28 2009).

1550. Trial court did not abuse its discretion in admitting the expert testimony without holding a second Daubert hearing where the trial court could have reasonably concluded that nothing would be accomplished by holding one. Russeau v. State, 291 S.W.3d 426, 2009 Tex. Crim. App. LEXIS 878 (Tex. Crim. App. 2009).

1551. Trial court did not err in not allowing the result of a polygraph examination into evidence, given that (1) the authorities cited by defendant were not more compelling that the authorities found to be unpersuasive on this issue, (2) the witness testified that the theory beyond polygraph examinations was scientifically valid, but his testimony did not stand up to scrutiny, (3) the witness's testimony as to how well defendant did on the test and his experience in giving the test did not show that the theory behind the technique was valid, (4) nothing showed that the test was reliable or that the specific theory behind it was valid, and (5) defendant offered little evidence to support a conclusion that polygraph evidence was based on a valid underlying scientific theory or that the examiner's conclusions would be relevant. Cyphers v. State, 2009 Tex. App. LEXIS 1716, 2009 WL 606550 (Tex. App. Tyler Mar. 11 2009).

1552. To the extent the trial court relied on case law toxic tort standards for excluding expert testimony, the trial court did not abuse its discretion; in case law, the issue was whether there was scientifically reliable evidence to support the verdict that a particular drug caused a birth defect, and in this case, the issue was whether a doctor's testimony was scientifically reliable that a drug caused or worsened a patient's renal condition. Hackett v. Littlepage & Booth, 2009 Tex. App. LEXIS 313 (Tex. App. Austin Jan. 16 2009).

1553. Court reversed defendant's conviction for driving while intoxicated and the trial court erred in denying his motion to suppress, because for purposes of Tex. R. Evid. 702, the State failed to prove the reliability of a Light Detection and Ranging (LIDAR) device technology on which the officer relied in determining that defendant had been speeding; the officer testified that the reading on the LIDAR device was the sole basis for the stop and he did not offer any testimony suggesting that he independently observed defendant driving at a speed greater than reasonable and prudent under Tex. Transp. Code Ann. § 545.351(a). Hall v. State, 264 S.W.3d 346, 2008 Tex. App. LEXIS 5754 (Tex. App. Waco 2008).

1554. Light Detection and Ranging technology is novel scientific evidence which may be admissible only after its reliability has been judicially determined in a full-blown gatekeeping hearing; authorities cited by the State on appeal which supported the reliability of this technology might have been beneficial in resolving this issue, but they must be first presented to the trial court in a Kelly gatekeeping hearing. Hall v. State, 264 S.W.3d 346, 2008 Tex. App. LEXIS 5754 (Tex. App. Waco 2008).

1555. Using the analytical-gap analysis in a wrongful death action by appellees, a surviving spouse and children, against a hospital, a trial court could have concluded that the medical experience and knowledge of appellees' expert, and his explanation of the basis for his opinions, demonstrated that his testimony that the patient died of acute opiate toxicity that could have been avoided by monitoring the patient was reliable under Tex. R. Evid. 702.

McAllen Hosps., L.P. v. Muniz, 2007 Tex. App. LEXIS 9683 (Tex. App. Corpus Christi Dec. 13 2007).

1556. Trial court did not conduct a hearing outside the presence of the jury, for purposes of Tex. R. Evid. 702, to determine whether the State had established that an ignition interlock device met the requirements of case law, and the court did not find any authority establishing that any court had found the reliability of the ignition interlock device, and thus the trial court was not able to take judicial notice of the evidence; had the trial court previously conducted numerous gatekeeping hearings on this issue and repeatedly found evidence of the use of ignition interlock device scientifically reliable, then the trial court or the State could have put that in the record along with materials from those previous hearings. Brock v. State, 2007 Tex. App. LEXIS 8689 (Tex. App. Fort Worth Nov. 1 2007).

1557. Trial court erred in failing to hold a gatekeeper hearing because the ignition interlock evidence was scientific in nature, however, the error did not require reversal under Tex. R. App. P. 44.2(b) because (1) the evidence was merely cumulative, and (2) even without the evidence, defendant was still not a suitable candidate for community supervision as there was sufficient evidence to support her felony driving while intoxicated conviction and her eight-year prison term rather than community supervision, given that (1) she narrowly missed hitting someone, (2) her blood alcohol content was four times the legal limit, and (3) she refused to take responsibility for her repeated offenses. Brock v. State, 2007 Tex. App. LEXIS 8689 (Tex. App. Fort Worth Nov. 1 2007).

1558. Trial court did not abuse its discretion by excluding an expert's testimony on causation of symptoms by insecticide exposure as unreliable; the expert did not analyze exposure levels, did not seek to negate other plausible causes, did not know the concentration used, and did not offer foundational data or epidemiological studies. City of Dallas v. Furgason, 2007 Tex. App. LEXIS 7539 (Tex. App. Dallas Sept. 18 2007).

1559. In this negligence case related to illnesses allegedly caused by toxic mold, a company presented evidence of each of the factors used in determining the reliability of expert testimony involving scientific knowledge, and the trial court's order stated the factors it relied on in excluding the parents' expert's testimony; the court noted that the parents argued that research was still ongoing as to the causal connection between indoor exposure to mycotoxins and neurological illnesses, and while the court was not to foreclose the possibility that advances in science might require reevaluation of what "good science" was in future cases, the court was required to look to what was generally accepted in the current scientific community, and the trial court did not abuse its discretion in finding the expert's testimony unreliable and in excluding his testimony. Gaudette v. Conn Appliances, Inc., 2007 Tex. App. LEXIS 7315 (Tex. App. Beaumont Sept. 6 2007).

1560. Trial court did not err in admitting an expert's testimony addressing the distance between the gun and the victim when the gun was discharged; the expert was board certified and had performed around 10,000 autopsies, he had been trained in gunshot wounds, and his testimony was based on his expertise as a medical examiner and his examination and evaluation of the characteristics of the victim's wound, plus he identified his discharge distance as an estimate and explained how that distance could be more accurately determined; defendant did not produce a ballistics expert to provide a discharge distance that contradicted the expert's estimate and failed to show how the degree of imprecision in the estimate rendered it unreliable. Pollard v. State, 2007 Tex. App. LEXIS 7302 (Tex. App. Beaumont Sept. 5 2007).

1561. Reliability of "soft" science evidence, such as was offered in defendant's trial for indecency with a child, was capable of being established by showing that the field of expertise was legitimate, the subject matter of the testimony was within the scope of that field, and the expert's testimony properly relied on or utilized the principles involved in that field. Wright v. State, 2007 Tex. App. LEXIS 4700 (Tex. App. Fort Worth June 14 2007).

1562. In defendant's trial for indecency with a child, given that a forensic child interviewer testified that the protocol of RATAC, which stood for rapport, anatomy, identification, touch inquiry, abuse scenario, and closure, (1) was

developed by a child forensic training institute, (2) was backed by a research institute, (3) was generally accepted in the scientific community for conducting forensic interviews of children, and (4) that county workers were trained to use this protocol in interviewing children, it was established that the field of expertise involved was a legitimate one and that the subject matter of the interviewer's testimony was within the scope of that field. Wright v. State, 2007 Tex. App. LEXIS 4700 (Tex. App. Fort Worth June 14 2007).

1563. In defendant's trial for indecency with a child, a forensic child interviewer used the protocol of RATAC, which stood for rapport, anatomy, identification, touch inquiry, abuse scenario, and closure, to review the propriety of an interview of the victim and stated that her job was not to determine whether the victim was telling the truth in her allegations; the interviewer's testimony properly relied upon or utilized the principles involved in that field. Wright v. State, 2007 Tex. App. LEXIS 4700 (Tex. App. Fort Worth June 14 2007).

1564. In defendant's trial for indecency with a child, while there was conflicting evidence as to whether a certain protocol used in interviewing child witnesses was valid, the forensic child interviewer's testimony was sufficiently relevant and reliable such that its admission did not constitute an abuse of discretion under Tex. R. Evid. 702. Wright v. State, 2007 Tex. App. LEXIS 4700 (Tex. App. Fort Worth June 14 2007).

1565. Doctor was proffered as an expert witness in the field of psychology, which was a legitimate and recognized field of expertise, and the reliability of eyewitness identification was a legitimate subject matter within the psychology field; the proffered testimony was arrived at after proper utilization of the principles involved in the psychology field, such that the evidence was admissible and the trial court erred in excluding it. Stephenson v. State, 226 S.W.3d 622, 2007 Tex. App. LEXIS 3125 (Tex. App. Amarillo 2007).

1566. Given that the reliability of the eyewitness identification was a vital aspect of the case, the trial court's decision to exclude the expert testimony significantly impaired defendant's ability to present a defense and was of constitutional proportions for purposes of Tex. R. Evid. 702, and thus under Tex. R. App. P. 44.2(a), the court was unable to find that the error did not contribute to the conviction. Stephenson v. State, 226 S.W.3d 622, 2007 Tex. App. LEXIS 3125 (Tex. App. Amarillo 2007).

1567. When DNA evidence was offered properly in a hearing outside the jury's presence, the evidence and expert witness were established within the Daubert standard; the trial court could have found that the witness followed the current laboratory protocol upon discovering contamination, as a new extraction was made and the contamination, from uncleaned scissors, was not present in the second test. Stewart v. State, 2007 Tex. App. LEXIS 2029 (Tex. App. Houston 1st Dist. Mar. 15 2007).

1568. Trial court did not abuse its discretion by admitting into evidence the testimony of the contractor's expert witness because his testimony did not include the criticized "as-release method" for calculating damages, but rather was limited to the valuation of the work the contractor performed; the expert's testimony regarding the calculation of the reasonable value of the work performed by the contractor was objectively verifiable and was based on unit pricing and quantities and utilized standard estimating techniques. Formosa Plastics Corp., USA v. Kajima Int'l, Inc., 216 S.W.3d 436, 2006 Tex. App. LEXIS 11098 (Tex. App. Corpus Christi 2006).

1569. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

1570. Expert's testimony was more akin to a soft science because the testimony was based primarily upon experience and training as opposed to a scientific method, and the expert's testimony was within the scope of the field and relied upon and utilized the principles involved in sexual assault nursing, such that under Tex. R. Evid. 702, the trial court did not err in admitting this testimony. Denton v. State, 2006 Tex. App. LEXIS 6662 (Tex. App. Fort Worth July 27 2006).

1571. Expert's testimony as to how an automobile passenger's body and head moved during an accident was reliable in that the expert was a biomechanical engineer who had completed some medical school; further, she had developed scientific models to determine reasonably what happened to people and how their head injuries occurred that were used by engineers in the field. GMC v. Burry, 2006 Tex. App. LEXIS 5736, CCH Prod. Liab. Rep. P17487 (Tex. App. Fort Worth June 29 2006).

1572. With respect to vertical gaze nystagmus, the court has concluded that it was novel scientific evidence that had not yet been evaluated and found to be scientifically reliable; that conclusion has not changed, but neither has the contrary proposition been established, that vertical gaze nystagmus evidence may never be received. Cook v. State, 2006 Tex. App. LEXIS 5068 (Tex. App. Tyler June 14 2006).

1573. In a medical malpractice action, the trial court did not err in admitting testimony from the deceased patient's expert witnesses because the experts were all highly qualified and had extensive experience in their respective fields, and they based their opinions on the objective data contained in the medical records of the deceased patient as required under Tex. R. Evid. 702; the doctors did not challenge the experts' qualifications; rather the doctors' claims of unreliability went to the weight to be given the expert testimony, not its reliability. Brandt v. Surber, 194 S.W.3d 108, 2006 Tex. App. LEXIS 4962 (Tex. App. Corpus Christi 2006).

1574. Even though the appellate court erred by limiting the scope of its review to those questions asked of the expert initially during voir dire and excluding testimony developed during defendant's subsequent cross-examination of the expert, it correctly determined that the trial court did not abuse its discretion in admitting the expert's testimony, as testimony concerning shoe and tire print comparisons had long been admissible by either lay or expert witnesses, the jury heard descriptions of the physical comparisons upon which the expert based his conclusions, and the exhibits the expert relied on for his physical comparisons were admitted into evidence and were available to the jury during its deliberations; the jury could make its own comparisons. Rodgers v. State, 205 S.W.3d 525, 2006 Tex. Crim. App. LEXIS 852 (Tex. Crim. App. 2006).

Evidence : Testimony : Experts : Helpfulness

1575. Trial court did not abuse its discretion in disallowing the mother's expert's testimony because it would not have assisted the finder of fact. In the Interest of D.W.C., 2014 Tex. App. LEXIS 5166 (Tex. App. Texarkana May 15 2014).

1576. At defendant's DWI trial, the court did not deny his rights under the Sixth Amendment by limiting his cross-examination of the State's witness who was a former breath test technical advisor. Because the witness indicated at a Rule 702 hearing outside the presence of the jury that he no longer felt comfortable testifying as an expert in the field, the trial court properly excluded testimony that was not sufficiently reliable to assist the jury in reaching an accurate result. Balderama v. State, 421 S.W.3d 247, 2013 Tex. App. LEXIS 15133, 2013 WL 6637703 (Tex. App. San Antonio Dec. 18 2013).

1577. For purposes of Tex. R. Evid. 702, the testimony of a forensic interviewer could have been viewed as a description of what was said, as the interviewer did not testify that she believed the child was being truthful, and it would not have been outside the zone of disagreement for the trial court to have found that the testimony would

assist the jury. Page v. State, 2013 Tex. App. LEXIS 10153 (Tex. App. Austin Aug. 15 2013).

1578. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

1579. Under Tex. R. Evid. 702, the trial court's determination to allow the State's expert to testify to the level of cocaine found in defendant's blood sample, both at the time of blood draw and at the time of the incident, fell within the zone of reasonable disagreement, even though the expert identified trace levels of the drug that were below minimums set by the Department of Public Safety. Bekendam v. State, 398 S.W.3d 358, 2013 Tex. App. LEXIS 3064 (Tex. App. Fort Worth Mar. 21 2013).

1580. Trial court's conclusion the counselor's testimony would aid the jury in understanding the victim's actions and resolving the contradictions in her trial testimony was within the zone of reasonable disagreement. Hill v. State, 392 S.W.3d 850, 2013 Tex. App. LEXIS 453, 2013 WL 174062 (Tex. App. Amarillo Jan. 16 2013).

1581. Trial court did not abuse its discretion by admitting the member's expert's testimony where it could have reasonably concluded that the expert opinions were more than just ordinary, bare assertions based solely on the husband's valuations. Whitmire v. Nat'l Cutting Horse Ass'n, 2012 Tex. App. LEXIS 8518 (Tex. App. Fort Worth Oct. 11 2012).

1582. Defendant's conviction for aggravated sexual assault of a child under the age of 14 was improper because admitting the statistical opinion on false allegations was error and the admission of the opinion likely affected defendant's substantial rights. An expert was not permitted to give an opinion as to whether a person, or a class of persons to which the complainant belonged, was truthful. Wiseman v. State, 394 S.W.3d 582, 2012 Tex. App. LEXIS 6255, 2012 WL 3125130 (Tex. App. Dallas July 31 2012).

1583. During defendant's trial for sexual assault, the court did not err in admitting automatic vehicle locator (AVL) data showing the location of his patrol car on the dates and times the victim, a prostitute, was sexually assaulted; the testimony of an internal affairs police officer regarding interpretation of the AVL data was helpful to the jury. Demetrie Trevail Dixon v. State, 2012 Tex. App. LEXIS 5156, 2012 WL 2452842 (Tex. App. Houston 1st Dist. June 28 2012).

1584. In a case in which defendant was convicted of trafficking of persons, aggravated sexual assault, aggravated kidnapping, and compelling prostitution, defendant failed to establish that his trial counsel rendered ineffective assistance by failing to object to a witness's testimony where it could not be said that the trial court would have abused its discretion by allowing the witness's testimony had trial counsel objected. The trial court could have concluded that the witness's testimony about delayed outcries, how victims responded to sexual abuse, and how the abuse was reported was the special knowledge or additional insight that could be helpful to the jury. Moreno v. State, 2012 Tex. App. LEXIS 4077, 2012 WL 1864490 (Tex. App. San Antonio May 23 2012).

1585. During a murder trial, the court did not err in refusing to permit defendant's expert witness to testify because how a trained Marine instinctively reacted to a perceived threat was not relevant to the issue of whether an ordinary and prudent man, viewing the circumstances from defendant's viewpoint, would have formed a reasonable belief that deadly force was immediately necessary to protect himself from the use or attempted use of unlawful deadly force. Echavarria v. State, 362 S.W.3d 148, 2011 Tex. App. LEXIS 10188 (Tex. App. San Antonio Dec. 30 2011).

1586. Trial court did not abuse its discretion by excluding the testimony of the patron's expert, a safety engineer, because the trial court could have reasonably determined that the engineer's opinion would not assist a jury in determining if the condition of the walkway posed an unreasonable risk of harm. From photographs and testimony about prior falls and complaints, a jury would have been able to form its own conclusion about whether the walkway posed an unreasonable risk of harm.

1587. Expert testimony on grooming of children for sexual molestation is useful to the jury. Morris v. State, 361 S.W.3d 649, 2011 Tex. Crim. App. LEXIS 1664 (Tex. Crim. App. Dec. 7 2011).

1588. Trial court did not abuse its discretion by admitting the testimony of a counselor who worked with victims of family violence because it was not improper bolstering testimony, as the victim, defendant's girlfriend, was vigorously cross-examined and impeached. The testimony also helped explain why the victim refused to report the abuse and why she recanted her affidavit of non- prosecution. Zavala v. State, 2011 Tex. App. LEXIS 9565, 2011 WL 6089935 (Tex. App. San Antonio Dec. 7 2011).

1589. During defendant's trial for capital murder, the court erred in holding that a defense expert on eyewitness identifications was not permitted to testify before the jury because the evidence, which was reliable and relevant, would have assisted the jury by increasing the jurors' awareness of biasing factors in eyewitness identification. Tillman v. State, 354 S.W.3d 425, 2011 Tex. Crim. App. LEXIS 1343 (Tex. Crim. App. Oct. 5 2011).

1590. Expert testimony was not necessary in a premise defect suit against a county that had covered an oil spill on a road with dirt because it was common knowledge that an oily mixture on a road would be slick and could interfere with a driver's ability to stop. Pitts v. Winkler County, 351 S.W.3d 564, 2011 Tex. App. LEXIS 7643 (Tex. App. El Paso Sept. 21 2011).

1591. Doctor opined that the decedent died of exsanguinations as a result of his collision with the driver, but these statements were no more than speculation as to the cause of death; given that the doctor was not able to rule out other plausible causes of death and because an autopsy was not conducted and the doctor failed to review the decedents' medical records, the trial court did not err in finding that the doctor's testimony was not reliable and would fail to be helpful to the jury under Tex. R. Evid. 702. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1592. Trial court erred in awarding damages to appellee in a negligence action against a taxi cab company because appellee failed to present any expert testimony to prove the claim; the standard of care applicable to the placement of specialized equipment within a cab, which was necessary for its operation and was governed by industry standards, was not within a person's general knowledge. Greater San Antonio Transp. Co. v. Polito, 2011 Tex. App. LEXIS 5502, 2011 WL 2893080 (Tex. App. San Antonio July 20 2011).

1593. Court did not abuse its discretion by finding the canine handler properly relied on or utilized the principles involved in the field and finding the lineup was objective, because defendant presented no challenge to the canine handler's expertise, and defendant cited no evidence of a requirement or recommendation that the officer who placed the samples should then abstain from any further participation in the process. Powell v. State, 2011 Tex. App. LEXIS 2986, 2011 WL 1579734 (Tex. App. Houston 14th Dist. Apr. 21 2011).

1594. Plat records were susceptible to only one reasonable interpretation and thus presented purely legal questions, and thus the issue was not a matter for which expert opinion testimony would assist the trier of fact under Tex. R. Evid. 702; appellant did not show how the exclusion of the expert's affidavit probably caused the rendition of an improper judgment under Tex. R. App. P. 44.1, and any error was harmless. Infiniti Hotel Group, LLC

v. Patel, 2011 Tex. App. LEXIS 2655, 2011 WL 1344605 (Tex. App. Austin Apr. 8 2011).

1595. Court presumed without deciding that an objection to relevance preserved the alleged error that testimony did not assist the trier of fact for purposes of Tex. R. Evid. 702; the court did not need to decide this issue because appellant's argument failed on the merits. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

1596. Officer, based on her experience, testified that sexually abused children often cry out to multiple persons, making the child's similar actions appropriate, and this enhanced an inference drawn from the fact that the child cried out to multiple adults and made it more probable that she was sexually abused; the officer's testimony was about a child victim's behavior, not a direct opinion on whether the child was telling the truth, and thus the trial court did not abuse its discretion in admitting the officer's testimony, as it was relevant and assisted the trier of fact. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

1597. Trial court did not err by admitting an investigator's testimony about the prison classification system and violence in prisons during sentencing because it was admissible as rebuttal educator-expert evidence. Coble v. State, 330 S.W.3d 253, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. 2010).

1598. Trial court did not err by permitting a doctor to testify regarding patterns of disclosure of sexual abuse by children under Tex. R. Evid. 702 because the doctor was qualified by virtue of her education, knowledge, training, and experience, and because the testimony would aid the jury in understanding why the victim waited four years before telling her father about the sexual assault; the doctor testified that it was common for a child to delay making an outcry to an adult if the perpetrator had threatened to harm someone the child loved. Fletcher v. State, 2010 Tex. App. LEXIS 7915, 2010 WL 3783946 (Tex. App. El Paso Sept. 29 2010).

1599. Trial court did not abuse its discretion in admitting the medical examiner's testimony and autopsy report under Tex. R. Evid. 702 because the evidence was relevant in that it helped the trial court determine whether the decedent had suffered serious bodily injury and it was free to give whatever mitigating or aggravating weight it deemed appropriate. Compton v. State, 2010 Tex. App. LEXIS 5375, 2010 WL 2698775 (Tex. App. Dallas July 9 2010).

1600. Because forgery was not pleaded as an affirmative defense under Tex. R. Civ. P. 94 in a suit for a constructive trust, handwriting evidence was not helpful and thus was irrelevant under Tex. R. Evid. 401, 402, 702. Estate of Wallis, 2010 Tex. App. LEXIS 3710, 2010 WL 1987514 (Tex. App. Tyler May 19 2010).

1601. Defendant complained that a pediatrician's expert testimony would not assist the jury and that her testimony was unreliable; the court concluded that the trial court impliedly overruled these complaints by allowing the pediatrician's testimony, and given that defendant objected to the pediatrician's diagnostic impression testimony twice, the issue was preserved for review under Tex. R. App. P. 33.1(a). Casillas v. State, 2010 Tex. App. LEXIS 2888, 2010 WL 1609697 (Tex. App. San Antonio Apr. 21 2010).

1602. Defendant specifically objected to a pediatrician's expert testimony about studies because it would not help the jury decide what happened in this case, and the trial court overruled this objection; defendant's complaint was preserved for review. Casillas v. State, 2010 Tex. App. LEXIS 2888, 2010 WL 1609697 (Tex. App. San Antonio Apr. 21 2010).

1603. Pediatrician testified that her diagnostic impression would differ from a nurse's, and that her diagnostic impression would be sexual abuse; the trial court could have reasonably determined that the pediatrician's

testimony regarding her diagnostic impression was not merely an impermissible attempt to bolster the credibility of the complaining witness, but would assist the jury in understanding the evidence. Casillas v. State, 2010 Tex. App. LEXIS 2888, 2010 WL 1609697 (Tex. App. San Antonio Apr. 21 2010).

1604. Whether the child victim was penetrated by defendant was at issue in this case for aggravated sexual assault and indecency; the trial court could have reasonably determined that the pediatrician expert's testimony that children who are sexually abused by way of penetration might not show any physical injuries was relevant and assisted the jury in understanding the evidence in this case, such that the trial court did not err in admitting the expert's testimony. Casillas v. State, 2010 Tex. App. LEXIS 2888, 2010 WL 1609697 (Tex. App. San Antonio Apr. 21 2010).

1605. Ultimate determination of whether a drug manufacturer's conduct comported with that degree of care which a reasonably prudent drug manufacturer would use under the same or similar circumstances was well within the experience of persons of ordinary intelligence; hence, expert opinion evidence was not essential to a claim of negligence by a decedent's family regarding the manufacture of a prescription pain patch. Alza Corp. v. Thompson, 2010 Tex. App. LEXIS 2347, 2010 WL 1254610 (Tex. App. Corpus Christi Apr. 1 2010).

1606. Defendant did not specifically object to an expert's testimony based on her alleged failure to tie the facts of the case to scientific principles; however, even had defendant properly objected, the trial court could have overruled the objection, the expert reviewed numerous documents prior to forming her opinion and the expert's testimony showed a thorough understanding of the particular facts of the case, such that the trial court could have found that the expert had sufficient facts and data upon which to base her opinions. Saenz v. State, 2010 Tex. App. LEXIS 1519 (Tex. App. San Antonio Mar. 3 2010).

1607. During defendant's trial for indecency with a child, the court did not err in admitting a Texas ranger's testimony about methodology and grooming; the ranger had participated in several hundred cases related to sexual offenses against children and had been the primary investigator or played a significant role in approximately 75 of those cases. Morris v. State, 2010 Tex. App. LEXIS 1293 (Tex. App. Eastland Feb. 25 2010).

1608. Structural engineer's report was admissible under Tex. R. Evid. 702 because it was helpful to a zoning board in ruling on an application to demolish property in a historical area, and it provided substantive and probative evidence to justify the denial of a permit under regulations adopted pursuant to Tex. Loc. Gov't Code Ann. § 211.003(b). Christopher Columbus St. Mkt. Llc v. Zoning Bd. of Adjustments of Galveston, 302 S.W.3d 408, 2009 Tex. App. LEXIS 8763 (Tex. App. Houston 14th Dist. Nov. 13 2009).

1609. In defendant's capital murder case, the court properly denied defendant's witness's testimony relating to the field of false confessions because the witness's testimony could not have assisted the jury in understanding the evidence or in making a determination of a fact issue. He did not intend to offer an opinion as to the truth or falsity of defendant's confession, and during cross-examination defendant admitted the truth of the portions of his confession that he earlier claimed were inaccurate. Munoz v. State, 2009 Tex. App. LEXIS 6475, 2009 WL 2517664 (Tex. App. El Paso Aug. 19 2009).

1610. In a sexual assault case, an officer was properly allowed to testify regarding defendant's "grooming" the victim for sexual assaults because he had been a police officer for thirty years, he had investigated twenty sexual assault and child abuse cases per year, and he testified that it was his opinion based on his investigation that defendant had been "grooming" the victim prior to her outcry. He explained that sexual predators often developed a relationship with a victim to build trust, and then started committing small offenses to see if the victim made an outcry. Weatherly v. State, 283 S.W.3d 481, 2009 Tex. App. LEXIS 2435 (Tex. App. Beaumont Apr. 1 2009).

1611. Trial court did not abuse its discretion by admitting the testimony of a Child Protective Services' supervisor because she did not vouch for the victim's truthfulness in their allegations or express her opinion as to whether sexual abuse had occurred. Rather, she testified that her agency's investigation resulted in a conclusion that, based on the victims' accounts, there was reason to believe that defendant had sexually abuse them; the testimony could assist a trier of fact in determining an issue for which the jury was not qualified to the best possible degree in deciding whether the alleged events occurred. Wagner v. State, 2009 Tex. App. LEXIS 2423 (Tex. App. Houston 14th Dist. Mar. 31 2009).

1612. In defendant's sexual assault of a child case, the trial court properly excluded defendant's proffered expert testimony regarding memory because the expert would have testified in general about memory and how it could be faulty or distorted, but he would not have tied that opinion to a material fact at issue in the case. He never met with the victim, and there was no showing that the types of tests used in the studies and articles he described were ever performed on the victim. Hales v. State, 2009 Tex. App. LEXIS 1589, 2009 WL 565713 (Tex. App. Dallas Mar. 6 2009).

1613. In a condemnation case, the evidence was legally and factually sufficient to support the jury's finding of the condemned property's fair market value; the jury was presented with documentary evidence as well as expert testimony from which it could evaluate the property's fair market value, the jury was free to find certain testimony more persuasive, the jury's finding fell within the range of the evidence, and the court did not know and did not need to know how the jury arrived at its finding because the finding of market value was supported by more than a scintilla of the evidence. Waterways on the Intercoastal, Ltd. v. State, 283 S.W.3d 36, 2009 Tex. App. LEXIS 3799 (Tex. App. Houston 14th Dist. Feb. 26 2009).

1614. In a case involving the sexual assault of a child, it was impermissible for an expert to testify that a complaining witness was telling the truth; such expert testimony did not assist the jury. The error was not harmless because the expert went beyond simply applying well understood standards to a given fact pattern; rather, she staked her reputation on her conclusion that there was nothing troubling about the testimony from the complaining witness and the State's case. Long v. State, 2009 Tex. App. LEXIS 1090, 2009 WL 387018 (Tex. App. Tyler Feb. 18 2009).

1615. Because it was dispositive, under Tex. R. App. P. 47.1, the court limited its review to the ground that a witness's testimony was not reliable for purposes of Tex. R. Evid. 702. Hackett v. Littlepage & Booth, 2009 Tex. App. LEXIS 313 (Tex. App. Austin Jan. 16 2009).

1616. Doctor concluded that a drug adversely affected a client's renal condition and at best, his medical records did not foreclose the doctor's conclusions, but the doctor did not rule out other possible causes for the client's renal condition and the doctor was unable to provide case studies, peer review, or medical publications to support his conclusion that the drug caused the worsening of the client's condition; the trial court could have found that the doctor's conclusions amounted to not more than unsupported speculation and thus the trial court did not abuse its discretion by excluding the doctor and sustaining law firms' objections to the doctor's testimony under Tex. R. Evid. 702. Hackett v. Littlepage & Booth, 2009 Tex. App. LEXIS 313 (Tex. App. Austin Jan. 16 2009).

1617. In an aggravated assault case where insanity was an issue, a trial court did not err by excluding the testimony of a psychiatrist regarding defendant's mental condition in 2007 as irrelevant because the psychiatrist did not have any information regarding defendant's mental state in 2005 when the crime was committed. Likewise, records of defendant's visit to an emergency room in 2007 where he saw the psychiatrist were properly excluded for the same reason. Wiley v. State, 2009 Tex. App. LEXIS 225, 2008 WL 5501149 (Tex. App. Beaumont Jan. 14 2009).

1618. Court properly excluded expert testimony because the jury was equally competent to form an opinion about the ultimate fact issues, namely the voluntariness of defendant's statement. Because the expert's testimony impermissibly offered a direct opinion as to the truthfulness of defendant's statement, the court properly excluded it. Contreras v. State, 2009 Tex. App. LEXIS 91, 2009 WL 50601 (Tex. App. El Paso Jan. 8 2009).

1619. Experienced truck driver, also the plaintiff in a truck roll-over accident case, was qualified under Tex. R. Evid. 702 to give an expert opinion that the shipper had improperly loaded the cargo, beer, by stacking the pallets too high and not using void fillers to keep the load from shifting. Dewbre v. Anheuser-Busch, Inc., 2008 Tex. App. LEXIS 9046 (Tex. App. Waco Nov. 26 2008).

1620. In a trial for child sexual assault, a State medical expert did not testify that the victim was truthful or that sexual abuse victims, as a class, were truthful. To the contrary, the expert properly testified, under Tex. R. Evid. 401, 702, that, although not definitive, the complainant's physical condition was consistent with the abuse later described. Reyes v. State, 274 S.W.3d 724, 2008 Tex. App. LEXIS 5921 (Tex. App. San Antonio 2008).

1621. Court rejected defendant's claim of ineffective assistance of counsel, given that (1) counsel obtained pretrial competency and sanity evaluations of defendant, (2) counsel placed before the jury defendant's claim that his depression medication affected him by introducing evaluations into evidence and three family members who testified to his depressed condition, plus counsel argued that defendant's depression and self-medication were mitigating factors; counsel's decision not to call an expert at punishment was not an economical one, counsel made personal investigations into the effects of the drug defendant took and counsel determined that defendant knew right from wrong at the time of the offense, such that calling an expert at punishment might have compromised counsel's argument in mitigation, and defendant did not show how expert testimony could have benefitted him. Pool v. State, 2008 Tex. App. LEXIS 677 (Tex. App. Houston 1st Dist. Jan. 31 2008).

1622. In an aggravated assault prosecution, the trial court did not err in admitting a police officer's expert testimony concerning the propensity of family violence victims to return to the family members who abused them because he was qualified as an expert under Tex. R. Evid. 702 based on his knowledge, training, and experience; further, his testimony was an appropriate subject for expert testimony as it assisted the jury by helping it to understand the evidence regarding the complainant's post-assault behavior in returning to defendant. Dixon v. State, 244 S.W.3d 472, 2007 Tex. App. LEXIS 9292 (Tex. App. Houston 14th Dist. 2007).

1623. Effect of seismic testing on structures is a very technical area and necessitates expert testimony as to whether the testing caused the damage alleged in the case. Adair v. Veritas DGC Land, Inc., 2007 Tex. App. LEXIS 7744 (Tex. App. Houston 14th Dist. Sept. 27 2007).

1624. In a negligence case, expert testimony that a tank would have ruptured even if a relief valve had not been disabled was properly excluded because it was not probative of the cause in fact of the explosion or injuries under the actual circumstances; because there was no legally sufficient evidence of causation, other asserted errors were harmless under Tex. R. App. P. 44. Goss v. Kellogg Brown & Root, Inc., 232 S.W.3d 816, 2007 Tex. App. LEXIS 6621 (Tex. App. Houston 14th Dist. 2007).

1625. In a civil commitment proceeding wherein appellant was found to be a sexually violent predator, the testimony of the State's expert witness, a board-certified psychiatrist, was not improperly admitted because she too narrowly defined "sexually violent offenses;" despite the fact that her definition was narrower than that found in Tex. Health & Safety Code Ann. § 841.002(8), it fell within the ambit of those offenses specified therein, and her use of a more narrow definition went to the weight that a jury might choose to give her testimony; further, appellant's pen packet proved that he, on more than one prior occasion, had been convicted of sexually violent offenses; thus, he had not demonstrated that the expert's testimony was unreliable, and her opinion remained of assistance, pursuant

to Tex. R. Evid. 702, to the jury in determining a fact in issue. In re Commitment of Gollihar, 224 S.W.3d 843, 2007 Tex. App. LEXIS 3786 (Tex. App. Beaumont 2007).

1626. In a medical malpractice case, while a doctor admitted being unfamiliar with the disease process in question, the court agreed with the appellate court's detailed analysis that the doctor's opinions were reliable. Jackson v. Axelrad, 221 S.W.3d 650, 2007 Tex. LEXIS 323, 50 Tex. Sup. Ct. J. 628 (Tex. 2007).

1627. Objection to an affidavit in support of summary judgment was properly overruled in a case involving business disparagement, tortious interference, and false advertising between competitors because the affiant was qualified to testify as an expert regarding the quality of materials used by one of the parties to manufacture utility bodies since he had been in the industry at issue for 36 years, and the average person was unfamiliar with the types and quality of such materials. A v. B, 2007 Tex. App. LEXIS 3311 (Tex. App. 2007).

1628. Trial court did not err in excluding certain expert testimony because it would not have aided the jury in determining the ultimate fact issues. In re W.A.R., 2006 Tex. App. LEXIS 11001 (Tex. App. Waco Dec. 20 2006).

1629. Although a medical study referred to by a doctor in his testimony at defendant's trial for aggravated sexual assault of a child under the age of 14 involved females older than the complainant and under different circumstances, the evidence was relevant because the doctor was in the best position to explain to the jury why the genitalia of sexually abused victims often exhibited no physical signs of penetration, and he tied the study to his earlier conclusion that he was not surprised about the lack of physical evidence of penetration in the complainant's genital examination, which assisted the trier of fact to understand the lack of physical evidence; the testimony showed that the farther away in time the examination was from the abuse, the less likely there would be physical evidence of penetration, and, accordingly, the trial court properly admitted the testimony. Whitfield v. State, 2006 Tex. App. LEXIS 9726 (Tex. App. Dallas Nov. 9 2006).

1630. In the deceased accountant's employer's action seeking to impose a constructive trust on the accountant's life insurance policies that named his wife as beneficiary, the trial court did not err in determining that the deceased accountant's employer established the reliability of its expert testimony under the requirements of Daubert standard because the expert's use of the family expense method to determine whether the life insurance premiums were paid from the funds the accountant embezzled from the employer was reasonable and did not depend upon an analysis of the sequence in which deposits and withdrawals were made; also Tex. R. Evid. 702 contemplates a flexible inquiry and provides for the admission of expert testimony that actually assists the finder of fact. Paschal v. Great W. Drilling, Ltd., 215 S.W.3d 437, 2006 Tex. App. LEXIS 8998, 165 Oil & Gas Rep. 504 (Tex. App. Eastland 2006).

1631. Sufficient evidence supported defendant's conviction of the murder of his roommate under Tex. Penal Code Ann. § 19.02 where conflicting evidence was presented and the jury chose to reject defendant's testimony and credit the consistent testimony of two disinterested witnesses who stated they saw defendant repeatedly stab the victim and who were familiar with the roommates; also, expert testimony on eyewitness misidentification was properly excluded because even if the expert's testimony was reliable and relevant, the expert did not apply his abstract theories to the specific facts of the case; therefore the excluded expert testimony would have had little probative effect and was properly excluded under Tex. R. Evid. 403. Rodriguez v. State, 2006 Tex. App. LEXIS 6650 (Tex. App. Dallas July 27 2006).

1632. In defendant's sexual assault of a child case, the court properly admitted expert testimony regarding sadism because the alleged abuse was sadistic in nature, the expert's testimony regarding sadism shed light on such relevant issues as how the abuse might have injured and psychologically affected the victims, how the victims might have been threatened and placed in fear, and whether any behavior the victims engaged in with each other might

have been coerced. Hatter v. State, 2006 Tex. App. LEXIS 4516 (Tex. App. Austin May 26 2006).

1633. Defendant's conviction for the felony offense of injury to a child younger than 15 years of age was appropriate because, although he contended that a physician's testimony about the typical types of injuries that resulted from child abuse was irrelevant, the court held that the information was likely to assist the jury in determining whether his son's injuries were the result of abuse, as permitted by Tex. R. Evid. 702. Valdez v. State, 2005 Tex. App. LEXIS 10217 (Tex. App. Houston 1st Dist. Dec. 8 2005).

1634. Even if defense counsel had timely objected to the expert's statement regarding Hispanic households, the trial court did not abuse its discretion in overruling the objection because testimony that Hispanic children were taught to listen to their parents was not equivalent to opinion testimony stating that because the child complainant was Hispanic, she was telling the truth, and expert testimony that provided useful information to aid the jury in evaluating the testimony of another witness was admissible. Alfaro v. State, 2014 Tex. App. LEXIS 1851, 2014 WL 1017868 (Tex. App. Dallas Feb. 19 2014).

Evidence : Testimony : Experts : Kelly-Frye Process

1635. Trial court did not err by admitting expert testimony because the underlying scientific theory, that the 3-chlorotyrosine detected in the victims' blood came from a bleach injection, was valid and could be clearly explained, the use of a gas chromatography mass spectrometer to apply the theory to humans was valid, the theory was accepted by the relevant scientific community, the theory had been applied in testing on human blood plasma, and literature existed that supported the underlying theory. Saenz v. State, 421 S.W.3d 725, 2014 Tex. App. LEXIS 591, 2014 WL 223220 (Tex. App. San Antonio Jan. 22 2014).

1636. Trial court did not err by admitting expert testimony because the underlying scientific theory, that the 3-chlorotyrosine detected in the victims' blood came from a bleach injection, was valid and could be clearly explained, the use of a gas chromatography mass spectrometer to apply the theory to humans was valid, the theory was accepted by the relevant scientific community, the theory had been applied in testing on human blood plasma, and literature existed that supported the underlying theory. Saenz v. State, 421 S.W.3d 725, 2014 Tex. App. LEXIS 591, 2014 WL 223220 (Tex. App. San Antonio Jan. 22 2014).

1637. Trial court did not abuse its discretion by ruling that defendant's expert could not testify as to his opinion that defendant fit the profile of someone who would be susceptible to giving a false confession because there was a lack of evidence showing that the expert's testimony properly relied on or utilized the principles involved in the field. Coleman v. State, 440 S.W.3d 218, 2013 Tex. App. LEXIS 13205, 2013 WL 5758084 (Tex. App. Houston 14th Dist. Oct. 24 2013).

1638. Under Tex. R. Evid. 702, the trial court's determination to allow the State's expert to testify to the level of cocaine found in defendant's blood sample, both at the time of blood draw and at the time of the incident, fell within the zone of reasonable disagreement, even though the expert identified trace levels of the drug that were below minimums set by the Department of Public Safety. Bekendam v. State, 398 S.W.3d 358, 2013 Tex. App. LEXIS 3064 (Tex. App. Fort Worth Mar. 21 2013).

1639. Trooper's testimony was not novel scientific evidence, but was expert testimony from someone who gained his expertise through training and experience, and thus criteria in Kelly v. State was inapplicable to this situation. Stovall v. State, 2012 Tex. App. LEXIS 5571, 2012 WL 2862369 (Tex. App. Eastland July 12 2012).

1640. Defendant had filed a motion to preclude the State from offering horizontal gaze nystagmus (HGN) evidence, but because it had been previously held that HGN evidence was scientifically reliable, the State was not

required to present evidence on the first two factors of the reliability test in this case. Murphy v. State, 2010 Tex. App. LEXIS 3166, 2010 WL 1729341 (Tex. App. Dallas Apr. 29 2010).

1641. As to the third reliability factor, nothing in defendant's motion to exclude horizontal gaze nystagmus (HGN) evidence provided a basis for a hearing or a ruling, as defendant did not identify any specific problem with the manner in which the HGN test was administered; because the motion did not identify any issue requiring the trial court to rule, the trial court did not abuse its discretion in denying the motion without a hearing before trial. Murphy v. State, 2010 Tex. App. LEXIS 3166, 2010 WL 1729341 (Tex. App. Dallas Apr. 29 2010).

1642. Because defendant did not point out his specific expert testimony complaints to the trial court, he failed to preserve error concerning any horizontal gaze nystagmus testimony actually offered at trial. Murphy v. State, 2010 Tex. App. LEXIS 3166, 2010 WL 1729341 (Tex. App. Dallas Apr. 29 2010).

1643. Defendant argued that certain factors were to apply to the expert's testimony because his methodology involved more than just observation and involved starting from a question of whether the child had been sexually abused, but in reviewing the expert's testimony regarding his methodology, it was not an appropriate case for employing the Kelly v. State factors; the court instead believed that the methodology was the kind of soft science based primarily upon experience and training referred to by other case law, and thus the Kelly factors did not apply to the expert's testimony and the soft sciences standard should apply, for purposes of Tex. R. Evid. 702. Chavarria v. State, 307 S.W.3d 386, 2009 Tex. App. LEXIS 9059 (Tex. App. San Antonio Nov. 25 2009).

1644. Pursuant to case law and the soft sciences standard, in determining whether an expert's testimony was reliable, the trial court should have inquired about the following: (1) whether the field of expertise was a legitimate one, (2) whether the subject matter of the expert's testimony was within the scope of that field; and (3) whether the expert's testimony properly relied on or utilized the principles involved in the field. Chavarria v. State, 307 S.W.3d 386, 2009 Tex. App. LEXIS 9059 (Tex. App. San Antonio Nov. 25 2009).

1645. Given that (1) research concerning the behavioral characteristics of sexually abused children had been recognized as a legitimate field of expertise, (2) the expert specialized in child abuse, (3) his testimony relating to his examination of the child was within the scope of his expertise, and (4) he relied on texts accepted and used by others in the field and followed the protocols and procedures included in those texts, the trial court did not err in finding that the expert's testimony was reliable. Chavarria v. State, 307 S.W.3d 386, 2009 Tex. App. LEXIS 9059 (Tex. App. San Antonio Nov. 25 2009).

1646. Defendant's criticism of an expert for employing what defendant called a patchwork of techniques went to the weight, not the admissibility, of the expert's testimony. Chavarria v. State, 307 S.W.3d 386, 2009 Tex. App. LEXIS 9059 (Tex. App. San Antonio Nov. 25 2009).

1647. Employer's expert's proffered testimony was that the employee, although not high on cocaine at the time of the accident, was impaired by his prior cocaine use, and the trial court ruled that the opinion was scientifically unreliable and did not meet the predicate for admissibility required by Tex. R. Evid. 702; given the questions raised about the evidence, the trial court's ruling was within the zone of reasonable disagreement and was in the trial court's discretion, and no abuse of discretion was shown to support the employer's claim for mandamus relief. In re Pilgrim's Pride Corp., 2008 Tex. App. LEXIS 8619 (Tex. App. Texarkana Nov. 17 2008).

1648. Court found that the employer had an adequate remedy at law by way of appeal, if that was to prove necessary, regarding the trial court's ruling that expert testimony did not meet the requirements of Tex. R. Evid. 702, and this made mandamus relief improper; the court presumed that the transcript of the trial court's hearing on the admissibility of testimony would be available in a post-trial direct appeal, the employer had not been stripped of

its only viable defenses, and because this was a non-healthcare personal injury claim, the court did not find that case law mandated expanding the reach of extraordinary relief to this case. In re Pilgrim's Pride Corp., 2008 Tex. App. LEXIS 8619 (Tex. App. Texarkana Nov. 17 2008).

1649. In a case involving intoxication manslaughter, a trial court did not err in admitting expert testimony under Tex. R. Evid. 702 on the issues of accident reconstruction and drug detection because the experts were qualified due to training, education, and experience; moreover, the three criteria in Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992), were satisfied. The experts testified about effects of marijuana and alcohol in a person's body, as well as to defendant's speed at the time of a fatal accident. Wooten v. State, 267 S.W.3d 289, 2008 Tex. App. LEXIS 5497 (Tex. App. Houston 14th Dist. 2008).

1650. In a case involving intoxication manslaughter, a trial court did not abuse its discretion in allowing defendant's Dade Dimension RXL blood-alcohol results or expert-witness testimony regarding appellant's blood-test results to be presented to the jury; the trial court was satisfied with expert testimony as to the underlying scientific theory involving photomatic readings of the absorbent matter created from an enzymatic reaction caused by mixing a reagent with blood serum. It was within the zone of reasonable disagreement for the trial court to conclude the State met the three factors under Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992), by clear and convincing evidence regarding the Dade Dimension RXL. Wooten v. State, 267 S.W.3d 289, 2008 Tex. App. LEXIS 5497 (Tex. App. Houston 14th Dist. 2008).

1651. In defendant's driving while intoxicated trial, the trial court properly admitted evidence of a horizontal gaze nystagmus test for purposes of Tex. R. Evid. 702; the officer testified that the prolonged test administered when defendant refused to follow instructions would not have caused fatigue nystagmus. Fernandez v. State, 2006 Tex. App. LEXIS 8248 (Tex. App. Houston 1st Dist. Sept. 21 2006).

Evidence : Testimony : Experts : Qualifications

1652. Regarding their health care liability claim, the parents were required to establish that the expert was qualified on the basis of knowledge, skill, experience, training, or education to offer opinions concerning the causal link between the alleged breaches of the standard of care by the doctor and the injuries suffered by the parents' baby. Cornejo v. Hilgers, 446 S.W.3d 113, 2014 Tex. App. LEXIS 9019 (Tex. App. Houston 1st Dist. Aug. 14 2014).

1653. Expert's report demonstrated that he had specific expertise in the relevant areas of obstetrical complications in pregnancy, and the expert was qualified to opine as to the causal relationship between a newborn's injuries and the failure of a doctor to recognize complications in pregnancy and take appropriate actions; the expert did not have to be certified or treat newborns to be qualified to opine, and the trial court erred in granting motions to dismiss the parents' claims on the ground that the expert was not qualified to opine on the issue of causation. Cornejo v. Hilgers, 446 S.W.3d 113, 2014 Tex. App. LEXIS 9019 (Tex. App. Houston 1st Dist. Aug. 14 2014).

1654. Trial court did not err by allowing a physician's assistant to testify that the infant victim's injury presented a substantial risk of death from which he would have died without medical intervention because the assistant was qualified to do so under this rule 702 based on the evidence of his education and experience. Scott v. State, 2014 Tex. App. LEXIS 7793 (Tex. App. Fort Worth July 17 2014).

1655. Expert is not obligated to have a license to testify under the Texas Supreme Court's own rules of evidence if the person is otherwise qualified under Tex. R. Evid. 702. Tyson Fresh Meats, Inc. v. Abdi, 2014 Tex. App. LEXIS 5693 (Tex. App. Amarillo May 28 2014).

1656. It may well be that the witness was not qualified to testify about the design and implementation of safety systems, yet that was not the focus of his testimony. The injured party proffered him as a human factors and industrial safety expert, and his expertise dealt with analyzing the safety measures implemented in various industries via the application of, among other things, the American Society of Mechanical Engineers standards that the employer's expert reluctantly deemed relevant. Tyson Fresh Meats, Inc. v. Abdi, 2014 Tex. App. LEXIS 5693 (Tex. App. Amarillo May 28 2014).

1657. Licensed professional counselor was qualified to render a diagnosis that the victim suffered posttraumatic stress disorder (PTSD) as a result of the abuse because she was authorized to diagnose mental and emotional disorders under Tex. Occ. Code Ann. § 503.003(a)(2)-(4)and PTSD was a recognized mental disorder. Melder v. State, 2014 Tex. App. LEXIS 5130 (Tex. App. Tyler May 14 2014).

1658. At defendant's trial for aggravated sexual assault of a child, the trial court did not err in overruling his objection to a police detective's qualifications as an expert. The detective testified that she had investigated sex crimes against children for four and a half years; she had 4,000 hours of training and education in the area of child sexual abuse; and she had taken 20 classroom hours at the world's largest conference about crimes against children. Washington v. State, 2014 Tex. App. LEXIS 933 (Tex. App. Austin Jan. 30 2014).

1659. In an aggravated robbery case, a forensic psychologist demonstrated that he had knowledge about various confounding factors that may exist in a witness's ability to accurately recall, describe, and identify the perpetrator seen committing a crime. To the extent the trial court disallowed the psychologist's testimony based on his qualifications as an expert in the weapon focus effect, the trial court abused its discretion. Blasdell v. State, 420 S.W.3d 406, 2014 Tex. App. LEXIS 167, 2014 WL 68801 (Tex. App. Beaumont Jan. 8 2014).

1660. Expert was not qualified to opine regarding the alleged marketing or design defects in the defibrillator or its battery because he did not test the actual device involved in this case and he did not express specific expertise regarding defibrillators and batteries. Schronk v. Laerdal Med. Corp., 440 S.W.3d 250, 2013 Tex. App. LEXIS 15024, 2013 WL 6570907 (Tex. App. Waco Dec. 12 2013).

1661. Expert testimony on victim recantation was properly admitted during defendant's trial for injuring his elderly father where the expert witness, a caseworker in the family criminal law division of the district attorney's office, was qualified to testify as an expert because she detailed her experience working with victims of domestic violence and dealing with their tendency to minimize or recant allegations of abuse; the expert's testimony was relevant to understanding why the complainant might have changed his account of the incident that led to defendant's prosecution. Salinas v. State, 2013 Tex. App. LEXIS 14761, 2013 WL 6328863 (Tex. App. Houston 14th Dist. Dec. 5 2013).

1662. Trial court properly allowed a crime laboratory chemist to testify as to the pharmacological effects of a particular prescription drug on the human body because the field of expertise necessary was not particularly complex, and because the chemist stated that she was familiar with the drug and had taken courses on the toxicological effects of drugs on the body; moreover, the information the chemist provided was not conclusive on a material issue and was not central in determining defendant's guilt or innocence. Ruiz v. State, 2013 Tex. App. LEXIS 14013, 2013 WL 6047030 (Tex. App. Houston 14th Dist. Nov. 14 2013).

1663. Court did not abuse its discretion in allowing the officer to testify as an expert on the HGN test, because the officer was certified at the time he administered the HGN test, and he further testified that he had extensive training in administering the test. Leigh v. State, 2013 Tex. App. LEXIS 13248, 2013 WL 5777852 (Tex. App. Waco Oct. 24 2013).

1664. Because the chiropractor's education consisted of a three-and-a-half year program with rigorous courses on the musculoskeletal systems, as well as courses in neurology and radiology, and he had treated thousands of patients, approximately one-half of whom come to him having sustained physical injuries, appellee's chiropractor was qualified based on his knowledge, experience, education, and training to testify as an expert regarding appellee's injury and the reasonableness and necessity of his treatment. Treimee Corp. v. Garcia, 2013 Tex. App. LEXIS 11104 (Tex. App. Houston 1st Dist. Aug. 29 2013).

1665. Because appellee's chiropractor was qualified to testify as an expert witness on the reasonableness and necessity of appellee's treatment, and his testimony was reliable, there was sufficient evidence to support the jury's damage award for past medical expenses. Treimee Corp. v. Garcia, 2013 Tex. App. LEXIS 11104 (Tex. App. Houston 1st Dist. Aug. 29 2013).

1666. Trial court did not abuse its discretion by determining that a child forensic interviewer was qualified to express her opinion about "rolling disclosures" because she had a bachelor's degree in and was licensed as a social worker, she had conducted 1,000 forensic interviews of children, and she obtained her knowledge of rolling disclosures through training, seminars, and education. Lair v. State, 2013 Tex. App. LEXIS 9906 (Tex. App. Fort Worth Aug. 8 2013).

1667. Finding in favor of the employee in a workers' compensation action was appropriate because an expert witness was qualified to testify since he was a licensed cardiologist with a Ph.D. in biochemistry and he had also done research in cardiology both on animals and in clinical research. N.H. INS. Co. v. Allison, 414 S.W.3d 266, 2013 Tex. App. LEXIS 9604 (Tex. App. Houston 1st Dist. Aug. 1 2013).

1668. Defendant failed to show that trial counsel was ineffective during a sexual assault trial for failing to object to testimony by a nurse that she had examined over 1,100 subjects of sexual assault; the portion of the nurse's testimony that defendant found objectionable was given within the context of the State laying the foundation that she was qualified under the rule. Allen v. State, 2013 Tex. App. LEXIS 7273 (Tex. App. Corpus Christi June 13 2013).

1669. Expert physician was qualified to opine as to the standards of care for nurse practitioners in a health care liability action because the expert stated that the expert had trained and supervised nurse practitioners; the expert had experience with nurse practitioners in a hospital where nurse practitioners had been called upon to evaluate a patient who had complex medical issues. Children's Med. Ctr. of Dallas v. Durham, 402 S.W.3d 391, 2013 Tex. App. LEXIS 6747 (Tex. App. Dallas May 31 2013).

1670. Appellants complained that one of the debt collector's witnesses, a vice president and 25-year employee of the collector, was not an expert about lost profits, but the witness was qualified to testify about profits, and in any event, the president was qualified to testify even though he was not an expert. Hht Ltd. v. Nationwide Recovery Sys., 2013 Tex. App. LEXIS 6717 (Tex. App. Dallas May 31 2013).

1671. Appellant did not make an objection to the qualifications of a sexual assault nurse examiner or the reliability of her testimony, and thus appellant did not preserve this issue for review. Morgan v. State, 2013 Tex. App. LEXIS 5927 (Tex. App. Amarillo May 14 2013).

1672. Trial court did not abuse its discretion when it found the police sergeant qualified to testify as an expert on the Mexican Mafia because the sergeant testified that he had amassed the majority of his experience and training on the topic through his work in the field, namely by interviewing between 50 to 100 current and former members of the Mexican Mafia and by speaking with at least 1,000 other law enforcement officers who had investigated cases and crimes committed by the organization. Hernandez v. State, 2013 Tex. App. LEXIS 5228 (Tex. App. Houston 1st

Dist. Apr. 30 2013).

1673. Trial court correctly decided that defendant's computer expert could not testify regarding authenticating the e-mails between defendant and the alleged victim because he had no personal knowledge of the case and he was not shown to be qualified by his scientific, technical, or other specialized knowledge to give any opinions in the case. Sennett v. State, 406 S.W.3d 661, 2013 Tex. App. LEXIS 5148 (Tex. App. Eastland Apr. 25 2013).

1674. Trial court did not abuse its discretion by finding that the expert was qualified to testify as an expert witness, Tex. R. Evid. 702, where he demonstrated an understanding of the scientific theories involved with the device, how those theories were applied through operation of the Secure Continuous Remote Alcohol Monitor device, and proper interpretation of the data collected by the device; defendant tested the expert's knowledge about the device and interpretation of the data through pointed cross-examination and the expert provided clear and detailed answers to those questions. Alvarez v. State, 2013 Tex. App. LEXIS 5062 (Tex. App. El Paso Apr. 24 2013).

1675. Trial court did not err in concluding that an expert was qualified to render an opinion in a health care liability action because, as a practicing surgeon, the expert was clearly qualified to show how another surgeon's breaches of the standard of care resulted in a misleading report concerning the cause of a patient's death. Kim v. Hoyt, 399 S.W.3d 714, 2013 Tex. App. LEXIS 5102 (Tex. App. Dallas Apr. 24 2013).

1676. While the extent of practical experience may be a factor to be considered in assessing an expert's qualifications depending on the circumstances, this factor was not dispositive in this case. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist. Apr. 9 2013).

1677. Court rejected an attorney's challenge to an expert's qualifications and the trial court acted within its discretion in finding the expert was qualified to testify as an expert regarding compliance with fiduciary duties that attorneys owed to clients in the context of charging expenses as a part of an aggregate settlement; the expert had been licensed to practice law since 1989, she had worked on mass action litigation, and she had served since 2001 as a member of the committee that drafted and revised proposed language for the professional conduct rules. George Fleming & Fleming & Assocs., L.L.P. v. Kinney, 395 S.W.3d 917, 2013 Tex. App. LEXIS 4507 (Tex. App. Houston 14th Dist. Apr. 9 2013).

1678. When defendant pleaded guilty to the unauthorized use of a motor vehicle, the trial court did not abuse its discretion by determining that a fingerprint expert was qualified to testify at the punishment hearing. The expert was trained in fingerprint examination, he trained others, and had conducted fingerprint investigations for many years. Campbell v. State, 2013 Tex. App. LEXIS 4353 (Tex. App. Amarillo Apr. 3 2013).

1679. Trial court did not abuse its discretion by admitting the State's expert's testimony because the subject matter of her testimony was within the field of expertise of providing psychotherapy to children and her testimony described how she utilized the principles in the field based on her significant experience and training. Cox v. State, 2013 Tex. App. LEXIS 4073, 2013 WL 1286676 (Tex. App. Waco Mar. 28 2013).

1680. Doctor claimed the trial court erred in denying his motion to dismiss the health care liability claim because the expert, for purposes of Tex. Civ. Prac. & Rem. Code Ann. §§ 74.401(a), 74.403(a), lacked the expertise to provide opinions on the standard of care, breach, and causation, but the court disagreed; the expert had over 18 years of medical experience and he possessed specialized knowledge on the subject matter and the patient's treatment, including developing treatment plans, administering antibiotics, and writing home health discharge plans, such that the trial court could have found that the expert had knowledge of the accepted standards of care. Khan v.

Ramsey, 2013 Tex. App. LEXIS 2981, 2013 WL 1183276 (Tex. App. Houston 1st Dist. Mar. 21 2013).

1681. It was undisputed that an expert was currently licensed and practiced in family medicine, and he possessed specialized experience that was relevant to the claim, and thus the trial could have found that he established his qualifications to render opinions, for purposes Tex. Civ. Prac. & Rem. Code Ann. § 74.351, and thus the trial court did not err in denying the doctor's motion to dismiss on the ground the expert was not qualified. Khan v. Ramsey, 2013 Tex. App. LEXIS 2981, 2013 WL 1183276 (Tex. App. Houston 1st Dist. Mar. 21 2013).

1682. Appellant's complaint that an officer was not qualified to testify as an expert was not preserved for review; to the extent an argument could have been considered an objection to the testimony, it was insufficient to inform the trial court of a Tex. R. Evid. 702 complaint, as the argument was really that the evidence was insufficient to prove appellant's consumption of alcohol and did not make the trial court aware of the complaint that the officer lacked qualifications to identify the smell of alcohol, plus if the court interpreted the argument as an objection, it was not timely, as the argument was made after the parties rested and evidence had been closed. Gregorio-Ochoa v. State, 2013 Tex. App. LEXIS 1568, 2013 WL 624119 (Tex. App. Texarkana Feb. 20 2013).

1683. Trial court did not abuse its discretion by allowing a doctor to testify regarding matters related to neurology and endocrinology because the State established that the doctor specialized in forensic pathology and that by virtue of his education, training, and experience he was knowledgeable about diabetes, low blood sugar, and diseases such as epilepsy and had treated patients suffering from those conditions. Brown v. State, 2013 Tex. App. LEXIS 868 (Tex. App. Corpus Christi Jan. 31 2013).

1684. Trial court did not err by admitting the testimony of the geographic information systems coordinator for county public works about whether the offense occurred within a drug-free zone because he was qualified to testify as an expert under Tex. R. Evid. 702, as the his familiarity with the mapping software and how drug-free zone maps were created using the software put context to the map of the area the State offered as an exhibit. The coordinator's training, education, and experience regarding mapmaking and analyzing GIS data qualified him to offer an opinion that defendant committed the drug offense within the drug-free zone. Procella v. State, 2013 Tex. App. LEXIS 487, 2013 WL 222274 (Tex. App. Dallas Jan. 17 2013).

1685. Trial court's conclusion the counselor's testimony would aid the jury in understanding the victim's actions and resolving the contradictions in her trial testimony was within the zone of reasonable disagreement. Hill v. State, 392 S.W.3d 850, 2013 Tex. App. LEXIS 453, 2013 WL 174062 (Tex. App. Amarillo Jan. 16 2013).

1686. Where defendant was convicted of four counts of aggravated sexual assault of a child, the trial court did not err by permitting his probation officer to give expert testimony under Tex. R. Evid. 702 about defendant's suitability for probation. The probation officer had worked for the county for 12 years, had supervised sex offenders for 5 years, was supervising about 40 probationers, met with his probationers and did field visits. Alcala v. State, 2013 Tex. App. LEXIS 285 (Tex. App. Austin Jan. 11 2013).

1687. Court acted within its discretion in concluding that the psychologist was an expert with specialized knowledge and was qualified to render her opinions in the case, because the psychologist testified that she had a master's degree in counseling and was a licensed professional counselor, she was certified as an expert witness regarding children's issues, and had provided therapeutic counseling, consisting of approximately 30 sessions, for the child in the case. Mueller v. Bran, 2013 Tex. App. LEXIS 176, 2013 WL 123693 (Tex. App. Houston 1st Dist. Jan. 10 2013).

1688. Mother failed to preserve error regarding her challenge to certain testimony, as she did not obtain a running objection or object when the witness took the stand; counsel acknowledged that she had to make another objection

to the testimony to preserve error, but when the witness took the stand, there was no objection to the admissibility of the testimony or the witness's expert qualifications, and thus the mother waived her objection to the witness's testimony as an expert. In the Interest of A.C., 394 S.W.3d 633, 2012 Tex. App. LEXIS 10299, 2012 WL 6204285 (Tex. App. Houston 1st Dist. Dec. 13 2012).

1689. Contractors who served as expert witnesses for a wife in her suit to enforce the property division in a divorce decree did not need college degrees to be qualified to testify about reasonable repair costs for property left in poor condition by the husband. In re Marriage of Bivins, 393 S.W.3d 893, 2012 Tex. App. LEXIS 10139, 2012 WL 6099066 (Tex. App. Waco Dec. 6 2012).

1690. Expert report submitted in a medical malpractice claim arising out of an otolaryngologist's allegedly puncturing a patient's nostril with a hard plastic vacuum tool represented an objective good-faith effort as required by Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6) given that the expert set forth the standard of care applicable to an otolaryngologist, how it was breached during post-operative care following sinus surgery, and causation. Jassin v. Bennett, 2012 Tex. App. LEXIS 9854 (Tex. App. Waco Nov. 29 2012).

1691. Patient was not required to file an expert report concerning appellees' vicarious liability, which was a legal issue upon which a medical professional was not able to opine. Young v. Medical Imaging Diagnostic Assocs., 2012 Tex. App. LEXIS 9992 (Tex. App. Corpus Christi Nov. 29 2012).

1692. Evidence was insufficient to defeat no-evidence motion for summary judgment, because the expert's opinions were not reliable, were conclusory and speculative, and the expert was not qualified to render such opinions; the expert's opinions relied extensively on one published article, which did nothing more than conclude that darker shoes would become hotter than lighter shoes when exposed to sun light, and the expert failed to provide testimony regarding the temperature at which to expect blisters to form on the claimant's feet. Davis v. Aetrex Worldwide, Inc., 392 S.W.3d 213, 2012 Tex. App. LEXIS 9845, CCH Prod. Liab. Rep. P18967, 2012 WL 5969621 (Tex. App. Amarillo Nov. 29 2012).

1693. Trial court did not abuse its discretion in finding a witness to be qualified as an expert to testify that sexual abuse was the cause of a victim's substance abuse problems, given in part that (1) the witness was a substance abuse counselor and completed courses and over 6,000 hours of internship, (2) he had an associate's degree in child clinical psychology and counseled almost 400 patients, and (3) discovering the root cause of one's drug addiction was a needed step in treatment; the court noted that the cause of the victim's substance abuse was not central to the case's resolution. Solis v. State, 2012 Tex. App. LEXIS 7512, 2012 WL 3833036 (Tex. App. San Antonio Sept. 5 2012).

1694. Expert's curriculum vitae and report showed that he was a practicing doctor, knew of the accepted standards of care, and was qualified on the basis of experience and training to offer an expert opinion concerning the standards of care and the causal relationship concerning the failure to diagnose and treat the patient and the risk of death from pneumonia, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 74.401(a). Ortiz v. Patterson, 378 S.W.3d 667, 2012 Tex. App. LEXIS 7679 (Tex. App. Dallas Sept. 5 2012).

1695. This case concerned a patient who presented acute symptoms of severity, not a disease that was chronic, and an expert showed that he had the experience and training to offer an expert opinion on the standard of care in this situation and the tests available, plus the expert had been presented with similar factual situations and this showed that he and the doctor were family practice physicians; the court rejected the claim that the expert was not qualified to opine on primary care during an office visit, and the trial court abused its discretion in granting a motion to dismiss on grounds the expert was not qualified to offer an opinion on the standard of care. Ortiz v. Patterson,

378 S.W.3d 667, 2012 Tex. App. LEXIS 7679 (Tex. App. Dallas Sept. 5 2012).

1696. Having found that the trial court erred in granting a motion to dismiss as to an expert's qualifications, the court did not need to consider whether the case was subject to remand for consideration of an extension to cure the deficiency. Ortiz v. Patterson, 378 S.W.3d 667, 2012 Tex. App. LEXIS 7679 (Tex. App. Dallas Sept. 5 2012).

1697. Person is not disqualified from testifying as an expert in an sexually violent predator commitment proceeding merely because the person is not licensed as a physician or psychologist; therefore, in a civil commitment case under the Texas Civil Commitment of Sexually Violent Predators Act, a trial court abused its discretion by determining that a counselor was not qualified to testify because she was not a physician or psychologist. The general rule under Tex. R. Evid. 702 was applied because the Act did not prescribe the qualifications that an expert had to have to opine on whether a person was a sexually violent predator. In re Bohannan, 388 S.W.3d 296, 2012 Tex. LEXIS 734, 55 Tex. Sup. Ct. J. 1337 (Tex. 2012).

1698. Court did not err during defendant's murder trial in allowing the State to present expert testimony that the victim was likely killed on the back patio of the victim's house; the expert had training in the area of conclusions to be drawn from blood loss. Burris v. State, 2012 Tex. App. LEXIS 7446, 2012 WL 3793268 (Tex. App. Tyler Aug. 30 2012).

1699. Although an engineering expert was not licensed in Texas, his testimony was admissible under Tex. Occ. Code Ann. §§ 1001.003(c)(1), 1001.004(e)(2) and Tex. R. Evid. 702 in a products liability case. Tidwell v. Terex Corp., 2012 Tex. App. LEXIS 7724 (Tex. App. Houston 1st Dist. Aug. 30 2012).

1700. Physician, a pediatric otolaryngologist, was qualified to opine on causation where he had experience treating patients who had had their tracheostomy tubes dislodged and had suffered brain damage caused by lack of oxygen as a result. Rio Grande Reg'l Hosp. v. Ayala, 2012 Tex. App. LEXIS 7175, 2012 WL 3637368 (Tex. App. Corpus Christi Aug. 24 2012).

1701. Appellant stipulated to a report's admissibility, and although she could claim the report was not evidence of causation, she could not argue about the inspector's expert qualifications, as an objection to qualifications had to be raised in the trial court to preserve error. Marin v. Herron, 2012 Tex. App. LEXIS 6484, 2012 WL 3205427 (Tex. App. San Antonio Aug. 8 2012).

1702. Appellant did not qualify a witness as an expert or prove to the trial court that the purported testimony was relevant and reliable, and thus the testimony was inadmissible under Tex. R. Evid. 702 and the Sixth Amendment right to compulsory process was not violated. Clark v. State, 2012 Tex. App. LEXIS 5973, 2012 WL 3025685 (Tex. App. San Antonio July 25 2012).

1703. Defendant's convictions for aggravated sexual assault of a child under the age of 14 was appropriate because a social worker's testimony was properly admitted since she was qualified to give her testimony; she did not need to have personal knowledge of all the facts on which she bases her opinion; and testimony abut the behavior of child sex abuse victims was admissible under Tex. R. Evid. 702. Brucia v. State, 2012 Tex. App. LEXIS 5844, 2012 WL 2926203 (Tex. App. Dallas July 19 2012).

1704. Trooper had 11 years of experience, was a certified field sobriety instructor, had made over 500 driving while intoxicated arrests, and his testimony met the criteria for nonscientific expert witness testimony; the accuracy of field sobriety tests was a proper area of testimony for this trooper, and his tesitmony was important for the jury in deciding the issue of intoxication in a driving while intoxicated case, such that the trial court did not abuse its

discretion in admitting his testimony under Tex. R. Evid. 702. Stovall v. State, 2012 Tex. App. LEXIS 5571, 2012 WL 2862369 (Tex. App. Eastland July 12 2012).

1705. Trial court did not abuse its discretion in admitting the trooper's testimony as a collision investigator as he had five years' experience with Level II certification; the appellate court assumed the jury followed the trial court's jury instruction that the trooper had not been qualified an accident-reconstruction expert, but only as a Level II collision investigator. Balderas v. State, 2012 Tex. App. LEXIS 5198, 2012 WL 2469642 (Tex. App. Corpus Christi June 28 2012).

1706. Trial court erred by allowing an officer to testify as an expert concerning a test he performed on defendant's jacket and pockets to test for the presence of cocaine because: (1) the State made no effort to prove the officer's qualifications; (2) the officer testified concerning chemical identification, a field of complex expertise; (3) the officer did not qualify the identification with any mention of the accuracy of the test; and (4) whether sufficient affirmative links to the contraband existed was the sole disputed issue. However, the error was harmless because defendant was in close proximity to the drugs, he possessed $ 1,414, had a tobacco wrapper in his hand, and later admitted to being a crack cocaine dealer. Gill v. State, 2012 Tex. App. LEXIS 4662, 2012 WL 2127504 (Tex. App. Texarkana June 13 2012).

1707. During voir dire, a counselor said her testimony on the cycle of violence was standard and she gave the trial court reason to find that her testimony would use principles used in the field, plus case law and literature confirmed that her testimony was consistent with that testimony that had been ruled admissible in other cases; the court found no error in the admission of the testimony. Brewer v. State, 370 S.W.3d 471, 2012 Tex. App. LEXIS 4519, 2012 WL 2290871 (Tex. App. Amarillo June 7 2012).

1708. Counselor's inability to cite studies did not make her testimony unreliable, given the nature of her expertise field; the trial court properly limited the testimony to comport with the counsel's expertise, and the court found no abuse of discretion in admitting her testimony in order to help the jury understand why the victim delayed in calling the police in this aggravated assault case involving appellant, the victim's fiance. Brewer v. State, 370 S.W.3d 471, 2012 Tex. App. LEXIS 4519, 2012 WL 2290871 (Tex. App. Amarillo June 7 2012).

1709. Grant of summary judgment in favor of the medical center in the spouse's action after the patient died was inappropriate because a physician's testimony offered more than merely his credentials and a subjective opinion. He had a sufficiently reliable foundation for his opinions on proximate cause to warrant admission of his testimony. Constancio v. Shannon Med. Ctr., 2012 Tex. App. LEXIS 4339 (Tex. App. Austin May 22 2012).

1710. During defendant's trial for sexual assault of a child, the court did not err in admitting the testimony of the director of a trauma center, who was trained as a clinical psychologist with specialization in psychological trauma, because the director was qualified to opine about the impact of sexual assault, underage marriage, and polygamy on children. Jessop v. State, 368 S.W.3d 653, 2012 Tex. App. LEXIS 3176, 2012 WL 1402117 (Tex. App. Austin Apr. 19 2012).

1711. In a personal injury action arising from an accident in which appellee was injured when another driver's vehicle struck her vehicle, although a chiropractor was not appellee's treating chiropractor after the car accident, the trial court did not err in allowing him to testify about causation and damages, in light of his qualifications and testimony. Among other things, the chiropractor stated that part of his training and duties as a chiropractor was to review hospital and medical records and to consult with other medical specialists to treat patients. Haddard v. Rios, 2012 Tex. App. LEXIS 2706 (Tex. App. Corpus Christi Apr. 5 2012).

1712. For purposes of Tex. Fam. Code Ann. § 107.013(a)(1), although a mother claimed counsel was ineffective for not challenging a psychologist's qualifications, nothing indicated that she was not qualified, given that she was employed as a psychotherapist, practiced psychology for 16 years, and held a master of science in social work. Maxwell v. Tex. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 2339, 2012 WL 987787 (Tex. App. Austin Mar. 23 2012).

1713. Appellant objected to a witness's testimony under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), suggesting a relevancy complaint, but he did not object on expert qualification or reliability grounds or on Tex. R. Evid. 403 grounds; thus, the only issue preserved for review was the claim that the witness's testimony was inadmissible because it was not linked to appellant. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

1714. Appellant objected to a doctor's testimony, challenging his qualifications and claiming his testimony was irrelevant under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), but an objection to the reliability of the doctor's opinion was not raised in the trial court; thus, his reliability complaint was not preserved for review. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

1715. Appellant claimed he stood on objections made at a Tex. R. Evid. 702 hearing, but no actual objections were made, and the Texas Court of Criminal Appeals had held that a hearing alone did not preserve a complaint for review. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

1716. Doctor was qualified by education, training, and experience in psychology and psychological trauma and he was qualified to opine about the impact of underage marriage, sexual assault, and polygamy on children, and the trial court did not err in overruling appellant's objection; the doctor spent 21 years treating trauma victims, he showed familiarity with the church's practices and theology, and he had experience in behaviors associated with the victimization of children by abuse. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

1717. Trial court did not abuse its discretion by admitting blood test results because a police officer, who was a drug recognition expert, was qualified under Tex. R. Evid. 702 to offer expert testimony as to the effects of a controlled substance on an individual. Through his experience, education, and training, the officer established that he possessed knowledge beyond that of the average person determining if the prescription drug defendant took caused intoxication. Armstrong v. State, 2012 Tex. App. LEXIS 2041, 2012 WL 864778 (Tex. App. Dallas Mar. 15 2012).

1718. Trial court did not abuse its discretion by admitting blood test results because a forensic scientist in toxicology were qualified under Tex. R. Evid. 702 to offer expert testimony as to the effects of a controlled substance on an individual. The forensic scientist received her bachelors and doctorate degrees in chemistry, both with an emphasis in forensic science, she attended a training program with DPS, and that testing for central nervous system depressants was her specialty. Armstrong v. State, 2012 Tex. App. LEXIS 2041, 2012 WL 864778 (Tex. App. Dallas Mar. 15 2012).

1719. In a mother's health care liability lawsuit that alleged that defendants' negligence proximately caused her child's legal blindness, the trial court abused its discretion in overruling defendants' objections to the mother's expert report that was written by a neonatologist because nothing in the report indicated that the neonatologist had knowledge, skill, experience, training, or education in ophthalmology, pediatric ophthalmology, the way in which retinopathy of prematurity presented in newborns, or how that disease was treated in general and in the child's case. Accordingly, the trial court could not have reasonably concluded that the neonatologist had genuine expertise regarding the causal relationship between defendants' alleged breach of the applicable standard of care and the

child's injury. Caviglia v. Tate, 363 S.W.3d 298, 2012 Tex. App. LEXIS 2018, 2012 WL 899269 (Tex. App. El Paso Mar. 14 2012).

1720. Court did not abuse its discretion in determining that a deputy was qualified to testify as an expert regarding cell phone tracking because he had completed a course in reading cell phone records, identifying cell phone tower locations, and plotting and tracking cell phone activity. Additionally, the deputy described for the jury how he used the locations of the cell phone towers that relayed defendant's calls to track the location of defendant's phone to a particular geographic area. Robinson v. State, 368 S.W.3d 588, 2012 Tex. App. LEXIS 1483, 2012 WL 593558 (Tex. App. Austin Feb. 24 2012).

1721. In a medical malpractice case, read as a whole, the patient's expert's report and curriculum vitae established his qualifications to offer opinions on the standard of care relevant to defendant's decision to proceed to surgery, but they did not establish his qualifications to offer opinions on the standard of care relevant to defendant's care and treatment of the patient during and after the surgery. Nothing within the report's four corners disclosed or described the expert's training or experience performing, observing, or teaching other physicians about the surgical removal of an ovary and the patient's postoperative care. Cortez v. Tomas, 2012 Tex. App. LEXIS 1092, 2012 WL 407382 (Tex. App. Fort Worth Feb. 9 2012).

1722. Witness established his background as a professional engineer with a background in hydrology/hydraulics, plus as the city engineer, his department initiated the flood study in question; the witness provided the factual background to support his conclusions and thus his affidavit was proper summary judgment evidence. Strother v. City of Rockwall, 358 S.W.3d 462, 2012 Tex. App. LEXIS 715 (Tex. App. Dallas Jan. 27 2012).

1723. Whether appellant's statements were speculative or contained hearsay were objections to form, which had to be ruled on or they were waived, but an objection that an affidavit was conclusory could be raised on appeal, as was the claim that an affiant failed to establish her qualifications as an expert; thus, the court reviewed the city's objections to conclusory statements and whether appellant was qualified to give her opinion. Strother v. City of Rockwall, 358 S.W.3d 462, 2012 Tex. App. LEXIS 715 (Tex. App. Dallas Jan. 27 2012).

1724. In this inverse condemnation case, an owner did not show that she had any expertise in reading flood maps, studies, or that she had any independent expertise in hydrology, and lay witnesses were not competent to controvert an expert opinion. Strother v. City of Rockwall, 358 S.W.3d 462, 2012 Tex. App. LEXIS 715 (Tex. App. Dallas Jan. 27 2012).

1725. While the State failed to meet its burden that a pediatric hematologist was qualified to opine that a child's fatal injuries were consistent with shaken baby syndrome, the error was harmless under Tex. R. App. P. 44.2(b); the evidence of defendant's guilt was strong, particularly because four other experts had also reached the conclusion that the child's injuries were caused by shaking. Guerrero v. State, 2011 Tex. App. LEXIS 10080, 2011 WL 6808314 (Tex. App. Houston 14th Dist. Dec. 22 2011).

1726. Appellant did not object to a forensic scientist's qualifications or testimony, and thus appellant failed to preserve for review any complaint regarding the scientist's testimony. Traylor v. State, 2011 Tex. App. LEXIS 9933, 2011 WL 6307835 (Tex. App. Eastland Dec. 15 2011).

1727. Law enforcement-official with a significant amount of experience with child sex abuse cases may be qualified to talk about grooming of children for sexual molestation. Morris v. State, 361 S.W.3d 649, 2011 Tex. Crim. App. LEXIS 1664 (Tex. Crim. App. Dec. 7 2011).

1728. Trial court properly denied a hospital's motion to dismiss a patient's health care liability action because the patient's expert was qualified to opine as to the causation element; the expert had the training and experience regarding the standard of care for the treatment and/or prevention of pressure ulcers. Hillcrest Baptist Med. Ctr. v. Payne, 2011 Tex. App. LEXIS 9182, 2011 WL 5830469 (Tex. App. Waco Nov. 16 2011).

1729. Based on a neonatologist's experience in requesting ophthalmologic consultations to screen pre-term babies for retinopathy of prematurity (ROP) and familiarity with implementing policies and procedures to ensure proper care for babies at risk for ROP, the neonatologist was qualified to provide an expert opinion in a medical malpractice action brought on behalf of a premature child who developed blindness. Pediatrix Med. Group, Inc. v. Robinson, 352 S.W.3d 879, 2011 Tex. App. LEXIS 8622 (Tex. App. Dallas Oct. 31 2011).

1730. Trial court did not abuse its discretion in sustaining objections that homeowners were not qualified to give expert testimony. Baker v. Energy Transfer Co., 2011 Tex. App. LEXIS 8304, 2011 WL 4978287 (Tex. App. Waco Oct. 19 2011).

1731. Under Tex. R. Evid. 702, the experts' testimony was not speculative or conclusory as to be lacking in probative value and both experts concluded that the patient was a sexually violent predator (SVP); the jury could conclude that the patient was an SVP, Tex. Health & Safety Code Ann. § 841.062. In re Conley, 2011 Tex. App. LEXIS 7877, 2011 WL 4537938 (Tex. App. Beaumont Sept. 29 2011).

1732. In a felony drunk driving case, the trial court did not abuse its discretion in ruling that a police officer qualified as an expert on the horizontal gaze nystagmus test. At the time of trial, the officer had been a certified peace officer for 10 years, and the officer had attended a 32-hour standardized field sobriety test class. Goains v. State, 2011 Tex. App. LEXIS 7875, 2011 WL 4537892 (Tex. App. Beaumont Sept. 28 2011).

1733. For purposes of Tex. R. Evid. 702, a corporal's testimony supported the trial court's implied finding that he was qualified to testify as an expert witness in dog handling; although the corporal admitted that he was not an expert, he detailed his credentials and experience and noted that he was nationally certified in dog handling and was an expert in that particular field. Hamal v. State, 352 S.W.3d 835, 2011 Tex. App. LEXIS 7692 (Tex. App. Fort Worth Sept. 22 2011).

1734. Corporal testified about his credentials, expertise, and experience with the dog that alerted on appellant's car, and the corporal testified that the dog had detected drugs in vehicles before, such that the trial court could have found that the officer was qualified to testify about the dog's actions. Hamal v. State, 352 S.W.3d 835, 2011 Tex. App. LEXIS 7692 (Tex. App. Fort Worth Sept. 22 2011).

1735. In a medical malpractice case, the district court did not err in denying defendant doctor's motion to dismiss because, while the report of plaintiff patient's expert was far from perfect, the trial court did not err in finding it adequate. While the expert was not active in a hospital practice at the time at issue, he nevertheless was actively practicing orthopedic medicine and opined that the injury involved was of the type he treated in his practice; therefore, the trial court did not abuse its decision in finding that the expert was qualified to opine on the standard of care. Further, where the report indicated that the etiology of the patient's brachial plexus injury was most likely attributable to a traction injury resulting from positioning during surgery, the report was sufficient to establish a causal connection. Padilla v. Loweree, 354 S.W.3d 856, 2011 Tex. App. LEXIS 7147 (Tex. App. El Paso Aug. 31 2011).

1736. Trooper was not qualified to testify as an expert witness in accident reconstruction because: (1) the case involved multiple vehicles, multiple collisions, and could only be reconstructed with knowledge and skills exceeding the experience of most police officers; (2) the trooper completed a Level II certification in accident reconstruction

through the DPS in Austin; (3) the trooper had never testified concerning accident reconstruction; and (4) the trooper denied having any physics training or being an expert in physics. Lopez-juarez v. Kelly, 348 S.W.3d 10, 2011 Tex. App. LEXIS 6446 (Tex. App. Texarkana Aug. 16 2011).

1737. Employee merely provided his medical records and expected the jury to understand them, and laypersons did not have the knowledge to understand the intricacies involved in diagnosing a back injury without some guidance from a medical expert; accordingly, the employee failed to provide more than a scintilla of evidence to support his claim of a compensable injury. State Office of Risk Mgmt. v. Adkins, 347 S.W.3d 394, 2011 Tex. App. LEXIS 6187 (Tex. App. Dallas Aug. 9 2011).

1738. Record demonstrated that the ALJ allowed the doctors to offer their expert testimony after voir dire on the issue of their qualifications, and the ALJ heard extensive testimony about their qualifications as well as their methods, analyses, and the principles upon which they relied in reaching their opinions; there was no abuse of discretion in the ALJ's decision that the doctors were qualified as experts and their testimony should be admitted. Scally v. Tex. State Bd. of Med. Examiners, 351 S.W.3d 434, 2011 Tex. App. LEXIS 6117 (Tex. App. Austin Aug. 4 2011).

1739. Emergency medical technician (EMT) was not qualified to opine medical causation or accident reconstruction, given that (1) there was no evidence showing that the EMT was qualified as an accident reconstructionist, (2) nothing showed that he was qualified to opine about the expert's injuries, and (3) the EMT did not provide any scientific studies to support his assertions that the impact with a driver's car was what caused the decedent's death. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1740. While an emergency medical technician (EMT) could testify as a lay witness as to what he observed at the scene of the accident, he could not testify as an expert as to causation; although in some cases a witness could be considered an expert as to medical causation based on special experience, this did not apply here given the EMT's limited experience with automobile accidents involving fatalities. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1741. Even if an emergency medical technician was qualified to opine on causation and accident reconstruction matters, the bare opinion he gave in his deposition was premised upon his subjective interpretation of the facts, which rendered his opinion unreliable; the trial court did not err in striking this testimony. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1742. Much of an expert's testimony was against the great weight of the evidence contained in the record, plus there existed too many analytical gaps between the expert's opinions and the facts, even though he had significant experience in accident reconstruction; the expert did not show that he was qualified to opine as to the causation of the decedent's injuries, such that the expert's opinions were unreliable and the trial court did not err in striking his testimony. Dickerson v. State Farm Lloyd's Inc., 2011 Tex. App. LEXIS 6061, 2011 WL 3334964 (Tex. App. Waco Aug. 3 2011).

1743. Under Tex. R. Evid. 702, the trial court did not abuse its discretion in admitting the testimony of a Texas Child Protective Services (CPS) caseworker regarding the sexual abuse victim's sister's acting out based upon her experience as a CPS caseworker and because defendant failed to present any argument as to the caseworker's qualifications or her testimony being in violation of Rule 702. Sharp v. State, 2011 Tex. App. LEXIS 5377, 2011 WL 2732518 (Tex. App. Eastland July 14 2011).

1744. Record showed that the medical examiner was qualified by education, training, and experience in the field of forensic pathology and was qualified to opine about the impact of gunshot wounds on a deceased's body; the trial court did not abuse its discretion in overruling defendant's objection to the medical examiner's qualifications to testify that the complainants were shot from over two feet away. Dianas v. State, 2011 Tex. App. LEXIS 4932, 2011 WL 2623956 (Tex. App. Houston 1st Dist. June 30 2011).

1745. Trial court properly denied a physician's motion to dismiss a health care liability action because the reports from appellees' experts, along with their curriculum vitae, adequately established their expertise to state the standard of care applicable to the physician in relation to the care of a patient, who suffered a cerebral hemorrhage. Iqbal v. Rash, 346 S.W.3d 827, 2011 Tex. App. LEXIS 4943 (Tex. App. El Paso June 29 2011).

1746. Trial court did not err in finding that a patient's expert, an anesthesiologist, was qualified to testify as to the appropriate standard of care for a hospital's nurses in a medical malpractice action; the expert testified that the expert had been involved in between 500 and 1,000 spinal surgeries and that it was both the anesthesiologists' and the nurses' joint responsibility to ensure that a patient was repositioned during a lengthy procedure. Christus Health Sys. v. Harlien, 2011 Tex. App. LEXIS 4369, 2011 WL 2394614 (Tex. App. Corpus Christi June 9 2011).

1747. Salon argued that a witness was not qualified to testify under Tex. R. Evid. 702 because she was not a licensed cosmetologist and was only a licensed manicurist, but the court disagreed; given the fact that the salon, not the actual worker, was sued, the trial court did not abuse its discretion in allowing the witness to testify, as her testimony focused on salon management and safety issues instead of hair coloring or styling. J.C. Penney Corp. v. Gonzalez-alaniz, 2011 Tex. App. LEXIS 4057, 2011 WL 2090241 (Tex. App. Corpus Christi May 26 2011).

1748. Expert opined on all three required elements: standard of care, breach, and causation and the expert's amended report tied the alleged breach to the alleged injury; the doctor was the patient's treating physician and the report referred to the doctor's conduct, and the expert's amended report adequately described the causation element required under chapter 74, and the expert was qualified to opine on the cause of injuries that allegedly occurred as a result of the doctor's alleged negligence as the expert was an expert in discography. Whisenant v. Arnett, 339 S.W.3d 920, 2011 Tex. App. LEXIS 3386 (Tex. App. Dallas May 5 2011).

1749. Defense counsel was not required to challenge a probation officer's qualifications to opine that sex offenders could not be rehabilitated because the record was silent regarding whether the State could have easily proven the officer's qualifications had they been challenged at trial. Cueva v. State, 339 S.W.3d 839, 2011 Tex. App. LEXIS 3333 (Tex. App. Corpus Christi May 2 2011).

1750. To the extent that a party objected to an expert's qualifications on appeal, such arguments were waived, as the party did not object at trial. Petroleum Solutions, Inc. v. Head, 454 S.W.3d 518, 2011 Tex. App. LEXIS 3289 (Tex. App. Corpus Christi Apr. 29 2011).

1751. For purposes of Tex. R. Evid. 702, a witness's qualifications were based on specialized knowledge and experience, and the trial court did not err in allowing him to testify as an expert on damages, given that (1) he held degrees in business, (2) he had extensive experience in valuing businesses over 20 years, and (3) he was accredited as a credit senior appraiser and taught courses in this regard. U.S. Renal Care, Inc. v. Jaafar, 345 S.W.3d 600, 2011 Tex. App. LEXIS 2282 (Tex. App. San Antonio Mar. 30 2011).

1752. City's argument that a witness was not qualified under Tex. R. Evid. 702 to offer certain opinion testimony as an accident reconstruction expert was not presented to the trial court; thus, the city could not raise the issue on appeal and the issue was not preserved under Tex. R. App. P. 33.1. City of Waco v. Fuentes, 2011 Tex. App.

LEXIS 1707, 2011 WL 817418 (Tex. App. Waco Mar. 9 2011).

1753. Regarding a city's challenge to a witness's qualifications to offer opinion testimony that an accident caused the motorist's injury, the court could not determine if the trial court abused its discretion because the court did not have the evidence the trial court considering in making its ruling, and the court overruled the issue. City of Waco v. Fuentes, 2011 Tex. App. LEXIS 1707, 2011 WL 817418 (Tex. App. Waco Mar. 9 2011).

1754. Because the court found no abuse of discretion in the trial court's finding a witness qualified, his testimony was considered in the court's review of the causation evidence in this personal injury case, and the evidence supported the verdict in favor of the motorist. City of Waco v. Fuentes, 2011 Tex. App. LEXIS 1707, 2011 WL 817418 (Tex. App. Waco Mar. 9 2011).

1755. Deputy's testimony that the presence and degree of lividity indicated death had occurred over an hour before he first observed the victim's body was admissible under Tex. R. Evid. 701 because it was based on first-hand knowledge and under Tex. R. Evid. 702 based on his training and experience, which included his 11 years as a crime-scene investigator, during which he had amassed extensive training and experience; the classes conducted by physicians in the county medical examiner's office in which instruction was provided on the approximate times for lividity and rigor mortis to set in on a corpse; medical conferences he attended regularly in which information was provided on lividity as a beginning stage of decomposition; and the fact that he had seen hundreds of homicide victims. Thompson v. State, 2011 Tex. App. LEXIS 1633, 2011 WL 782051 (Tex. App. Houston 14th Dist. Mar. 8 2011).

1756. Detective's expert opinion under Tex. R. Evid. 702 was based on his analysis of records provided by a phone company and admitted into evidence without objection, and although the process involved in compiling the data was technically complex, the process involved in reading and analyzing the data was not; because an analysis of cell phone records is relatively simple, the required degree of education, training and experience was not extremely high, and the detective's qualification, including four years as an officer, a three-day course in cell phone call tracking, and 12 times in performing such, were sufficient to allow him to assist the trier of fact to understand the evidence. Saenz v. State, 2011 Tex. App. LEXIS 1156, 2011 WL 578757 (Tex. App. Corpus Christi Feb. 17 2011).

1757. In a health care liability action, while appellants claimed that the first physician was not qualified to render a reliable expert opinion under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(C) because he served as a member of the Medical Board in the surgeon's termination request and was thus biased, any bias went to first physician's credibility under Tex. R. Evid. 613(b) and did not disqualify him from rendering an expert opinion. Beaumont Spine Pain & Sports Med. Clinic, Inc. v. Swan, 2011 Tex. App. LEXIS 768, 2011 WL 379168 (Tex. App. Beaumont Feb. 3 2011).

1758. Automotive fraud consultant who was an experienced odometer fraud investigator was qualified to testify on the buyers' behalf regarding odometer tampering on a used vehicle, which included his opinion that a dealer performing a reasonable inspection would have discovered the tampering, and the trial court did not err in finding the expert's opinions reliable. Mac Haik Chevrolet Ltd. v. Diaz, 2011 Tex. App. LEXIS 668, 2011 WL 286124 (Tex. App. Houston 1st Dist. Jan. 27 2011).

1759. For purposes of Tex. R. Evid. 702, the trial court did not abuse its discretion in qualifying a witness as a fingerprint expert, given that (1) latent fingerprint analysis was not complex, (2) the witness testified that he was certified in fingerprint comparison, had been mentored by experts, and had been trained in all the equipment used for latent print collection and comparison, (3) there was no authority cited suggesting that such a background was insufficient to qualify the witness as a fingerprint expert, (4) the witness's opinion was conclusive, which was more

than offset because his testimony was not central to the resolution of the lawsuit and was effectively superfluous, and (5) the expert testimony was not the only evidence in the case, which reduced the centrality of the witness's testimony. Martin v. State, 2010 Tex. App. LEXIS 10042, 2010 WL 5129085 (Tex. App. Austin Dec. 15 2010).

1760. Expert who had degrees in finance and business, and who testified to extensive experience in valuing businesses, was qualified to testify regarding accounts receivable. U.S. Renal Care, Inc. v. Jaafar, 2010 Tex. App. LEXIS 9646, 2010 WL 4983398 (Tex. App. San Antonio Dec. 8 2010).

1761. For purposes of Tex. R. Evid. 702, an expert testified that psychology was an accepted field of practice, that she studied various methods and theories of psychology, and that she used such in her practice; the trial court did not err in admitting this testimony. In the Interest of S.R., 2010 Tex. App. LEXIS 9681, 2010 WL 4983484 (Tex. App. Waco Dec. 8 2010).

1762. Although the court harbored some doubt about a witness's qualifications to give an opinion on the value of real property for testimony in a condemnation proceeding, the court assumed that he was qualified to testify about the value of the easement. Trend Gathering & Treating, Lp v. Moore, 2010 Tex. App. LEXIS 9644, 2010 WL 4983488 (Tex. App. Waco Dec. 1 2010).

1763. In this condemnation proceeding, a witness did not show that it was reasonably probable that the land would be used for industrial purposes or as a subdivision, and his testimony did not rebut the presumption that the current use of irrigated cropland was the highest and best use; the witness's opinion on highest and best use was unsupported, conclusory, and unreliable. Trend Gathering & Treating, Lp v. Moore, 2010 Tex. App. LEXIS 9644, 2010 WL 4983488 (Tex. App. Waco Dec. 1 2010).

1764. Having found that a witness's testimony was unreliable because it was speculative and conclusory, the trial court erred in admitting the testimony in this condemnation case, the evidence did not support the verdict of damages, and the court suggested a remittitur in a certain amount, under Tex. R. App. P. 46.3. Trend Gathering & Treating, Lp v. Moore, 2010 Tex. App. LEXIS 9644, 2010 WL 4983488 (Tex. App. Waco Dec. 1 2010).

1765. Trial court did not err in admitting an office's testimony regarding the field sobriety tests he performed on appellant; regarding the one-leg stand test and the walk-and-turn test, the officer's testimony was admissible as lay testimony under Tex. R. Evid. 701 and he was not required to be qualified as an expert witness under Tex. R. Evid. 702. Salazar v. State, 2010 Tex. App. LEXIS 9405, 2010 WL 4840491 (Tex. App. San Antonio Nov. 24 2010).

1766. Regarding a horizontal nystagmus gaze (HGN) test, the officer was qualified under Tex. R. Evid. 702 by his extensive education and certification, as well as his years of administering the HGN test; his statements that he was not an eye doctor or doctor was insignificant because a witness need not be either in order to testify regarding the HGN test. Salazar v. State, 2010 Tex. App. LEXIS 9405, 2010 WL 4840491 (Tex. App. San Antonio Nov. 24 2010).

1767. Regardless of whether an officer was willing to label himself as an expert, which, in fact, is a legal determination to be made by the trial judge, his testimony showed sufficient experience and expert qualifications from which the trial court could have found he was qualified to testify regarding the horizontal nystagmus gaze (HGN) test; he never indicated he lacked the qualifications to testify regarding administering the HGN test, and the trial court did not abuse its discretion in allowing the officer to testify as an expert. Salazar v. State, 2010 Tex. App. LEXIS 9405, 2010 WL 4840491 (Tex. App. San Antonio Nov. 24 2010).

1768. Implied objection based on a witness's qualifications did not preserve error related to the reliability of the witness's testimony or the court's alleged failure to hold a Tex. R. Evid. 705(b) hearing. Shaw v. State, 329 S.W.3d

645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

1769. Doctor was qualified to opine about causation where: (1) the doctor was licensed to practice medicine in Texas; (2) he was board certified in internal medicine and geriatrics and was actively engaged in the practice of these specialties; (3) he regularly engaged in the diagnosis and treatment of patients with Alzheimer's disease; (4) he had had patients with violent behavior like the facility's resident's behavior and who represented a threat to others as well as themselves; (5) he had knowledge of the admission assessment process and the care needed for these patients; and (6) in his opinion, it was reasonably foreseeable that the facility could not meet the resident's needs and that the resident's behavior would likely result in injury to himself or others. Christian Care Ctrs., Inc. v. Golenko, 328 S.W.3d 637, 2010 Tex. App. LEXIS 8826 (Tex. App. Dallas Nov. 4 2010).

1770. In an aggravated sexual assault of a child younger than 14 years old case, where a doctor's testimony and opinions were based on his experience and training as a physician at the child advocacy center, his educational and professional background was relevant to prove his expertise in the evaluation and treatment of child victims and to lay the predicate for his testimony; thus, without a showing of harm, evidence, like the doctor's curriculum vitae, was properly admitted to assist the jury in making its determination as it served a relevant purpose beyond solely bolstering the witness and any extraneous information included on the curriculum vitae had only slight effect. Walker v. State, 2010 Tex. App. LEXIS 8452 (Tex. App. Houston 1st Dist. Oct. 21 2010).

1771. Patient's expert's report was sufficient to satisfy the elements of Tex. Civ. Prac. & Rem. Code Ann. § 74.351 concerning the patient's claim that the orthopedic surgeon failed to timely diagnose and treat her ankle fracture because: (1) the report explained that the standard of care required the surgeon to conduct full range of motion testing regarding the patient's injured leg, including the knee, ankle, and foot; (2) the report was not inadequate or conclusory on the statutory elements of standard of care, breach, and causation merely because it contained some collective statements concerning both the surgeon and another doctor; (3) the report satisfied the causation element as the expert stated that due to the surgeon's failure to correctly diagnose the patient's injury, her fracture went undetected for over seven months, and that as a result the patient was subjected to surgery, a prolonged period of disability, loss of foot movement, and chronic pain; and (4) the expert was qualified to offer his opinions, as his report and curriculum vitae established that he was practicing medicine at the time the patient was treated by the surgeon and when he provided the report, that he possessed knowledge of accepted standards of medical care for the diagnosis, care, or treatment of a person with a leg injury, and he had 18 years of experience. Otero v. Richardson, 326 S.W.3d 363, 2010 Tex. App. LEXIS 8018 (Tex. App. Fort Worth Sept. 30 2010).

1772. Expert qualified as an expert on the issue of the standard of care in the health care liability case and the expert report was sufficient, because the expert was a board certified thoracic surgeon who was currently practicing, the expert had an extensive background in cardiothoracic surgery, and the report put the doctor on notice that his use of the posterolateral thoracotomy, instead of the open procedure, delayed restoration of the blood supply to multiple organs, which subsequently failed and caused the decedent's death. Mettauer v. Noble, 326 S.W.3d 685, 2010 Tex. App. LEXIS 8027 (Tex. App. Houston 1st Dist. Sept. 30 2010).

1773. Trial court did not err by allowing the State's expert to testify about Satanism under Tex. R. Evid. 702 because he was qualified, as he testified that he had spent approximately 19 years studying that subject, and because the evidence was reliable, as the expert's testimony regarding Satanic philosophy relied directly on the numerous books and articles he had read on the subject. Davis v. State, 329 S.W.3d 798, 2010 Tex. Crim. App. LEXIS 1207 (Tex. Crim. App. 2010).

1774. Trial court did not err by permitting a doctor to testify regarding patterns of disclosure of sexual abuse by children under Tex. R. Evid. 702 because the doctor was qualified by virtue of her education, knowledge, training, and experience, and because the testimony would aid the jury in understanding why the victim waited four years before telling her father about the sexual assault; the doctor testified that it was common for a child to delay making

an outcry to an adult if the perpetrator had threatened to harm someone the child loved. Fletcher v. State, 2010 Tex. App. LEXIS 7915, 2010 WL 3783946 (Tex. App. El Paso Sept. 29 2010).

1775. Express ruling on a company's expert objections to the methodology, technique, or foundational data was required to exclude as unreliable the treating oncologist's causation opinion; considered with notice and opportunity-to-be-heard principles, the two proceedings, a challenge under Tex. R. Evid. 104(a) and a no-evidence motion for summary judgment, had to be separate under the circumstances of this case, and the court was not to consider the company's reliability objections as implicitly sustained by the trial court. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

1776. Process missing from the record and necessary in this case was a hearing under Tex. R. Evid. 104(a), and without an express ruling that the treating oncologist's causation opinion was unreliable, however, the treating oncologist's affidavit remained part of the summary judgment proof and provided some evidence to defeat the no-evidence motion on causation; if the trial court decided the affidavit had to be stricken because of unreliable data or for some other reason, the trial court might then decide whether to grant the no-evidence summary judgment, or order a continuance, and the court reversed the judgment against the company. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

1777. While the etiology of a disease is often significant to a clinician's care of a patient, as well as to public health issues, and while a clinician may have training and experience in the study of cancer and its etiology, the clinician may nevertheless lack the expertise necessary to present a causation opinion related to a toxic chemical exposure. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

1778. Company had not challenged the qualifications of the treating oncologist to express an opinion on the cause of the cancer; considering the evidence of his education, training, experience, and area of expertise, the court considered as true the assertion that the doctor had the expertise to determine whether the benzene exposure caused the cancer. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

1779. Company noted that a doctor's oral deposition was taken after the summary judgment hearing and was not part of the evidence, but established his lack of knowledge; however, generally, the court confined its view to the evidence considered by the trial court. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

1780. Treating oncologist's report referenced materials he consulted and the company did not complain about the lack of discovery responses from the widow, for purposes of Tex. R. Civ. P. 194.2(f)(4), 195; the implicit assertion was that the scientific literature reviewed supported the oncologist's opinion, for purposes of Tex. R. Evid. 705, the trial court made no ruling requiring disclosure of the literature and did not strike any of the evidence, and the oncologist's affidavit explained how he reached his opinion and he grounded his opinion under oath on reasonable medical probability, such that the court could not say that the opinion concerning etiology was conclusory. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

1781. Ruling sustaining a company's objections to the oncologist's causation opinion was not implicit in the trial court's ruling on the motion for summary judgment; a contrary conclusion, that the trial court implicitly sustained the company's objections and found the causation affidavit unreliable and inadmissible, would arguably require that two standards of review be applied, but without a record of the Tex. R. Evid. 104(a) determination, and the court applied the summary judgment standard in this appeal. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex.

App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

1782. If the trial court did not abuse its discretion in implicitly sustaining the expert evidence challenge, there would be no affidavit by the treating oncologist to consider and no causation evidence in response to the no-evidence motion, and practically this approach would reduce the summary judgment appellate review standard to an abuse of discretion standard whenever case-determinative objections, coupled with a no-evidence motion, were considered implicitly sustained by the granting of summary judgment; whether or not the trial court abused its discretion in sustaining the objections would be determinative on appeal of whether the summary judgment had to be reversed or affirmed. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

1783. Patient's expert was qualified under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(C) and Tex. R. Evid. 702 because his report and curriculum vitae reflected that he was a licensed physician in good standing in Pennsylvania and Missouri who had been practicing since 1977, that he was a board certified internist, and that he provided medical evaluation, care, and treatment to acute and chronically ill patients with urinary tract infections and urosepsis, and that he had experience assisting and supervising the transfer of such patients to long-term care facilities and had knowledge of the documentation required for such transfers. Tthr, L.P. v. Guyden, 326 S.W.3d 316, 2010 Tex. App. LEXIS 7348 (Tex. App. Houston 1st Dist. Aug. 31 2010).

1784. In a health care liability suit alleging misdiagnosis of cancer, the Tex. Civ. Prac. & Rem. Code Ann. § 74.351 report of an expert who was qualified under Tex. Civ. Prac. & Rem. Code Ann. § 74.401 with regard to a pathologist's standard of care and breach could also include a causation opinion under Tex. Civ. Prac. & Rem. Code Ann. § 74.403 and Tex. R. Evid. 702 as to unnecessary surgery because it was undisputed that no cancer was present. Somerville v. Lawrence, 2010 Tex. App. LEXIS 6583, 2010 WL 3168405 (Tex. App. Texarkana Aug. 12 2010).

1785. Trial court did not err by admitting an investigator's testimony regarding grooming of a prospective child victim of sexual assault because he investigator was qualified under Tex. R. Evid. 702, as: (1) the field of the investigator's expertise was not particularly complex; (2) the testimony was not conclusive of anything, but rather provided background information; and (3) the testimony was not particularly central to determining defendant's guilt or innocence, but rather provided some explanation of the significance of the numerous telephone calls between defendant and the victim and how they may have empowered defendant to take advantage of her. Bryant v. State, 340 S.W.3d 1, 2010 Tex. App. LEXIS 6614 (Tex. App. Houston 1st Dist. Aug. 12 2010).

1786. Because the physician's expert report did not set forth his qualifications for giving an expert opinion on causation of the patient's death after being placed on a restraint board, the trial court did not abuse its discretion by dismissing the health care liability claim filed by the patient mother. The physician's curriculum vitae showed only that he was currently practicing in the field of emergency medicine and that he had held several positions as an emergency medicine physician and a general and trauma surgeon. Salais v. Tex. Dep't of Aging & Disability Servs., 323 S.W.3d 527, 2010 Tex. App. LEXIS 6259 (Tex. App. Waco Aug. 4 2010).

1787. Appellant did not object to a fire chief's testimony on the ground that it was not relevant to sentencing for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), and instead she lodged only a speculation objection, but given the chief's credentials and experience, he was qualified to testify about the nature of one fire and the damages it could have caused and this testimony was certainly relevant to sentencing. Utley v. State, 2010 Tex. App. LEXIS 5775, 2010 WL 2873942 (Tex. App. Eastland July 22 2010).

1788. Defense counsel did not object on the basis of qualifications or reliability and he did not ask to voir dire the witness or have the trial court conduct a Daubert/Kelly hearing, and thus appellant preserved no error for review

under Tex. R. App. P. 33.1; the court noted that a lay opinion could be offered under Tex. R. Evid. 701 if the opinion was rationally based on his perceptions and helpful to the understanding of the testimony. Livingston v. State, 2010 Tex. App. LEXIS 5512, 2010 WL 2783911 (Tex. App. Corpus Christi July 15 2010).

1789. In a customer's slip-and-fall negligence action against a mall, the trial court properly struck the testimony of the customer's expert witness on the ground that the expert was not qualified; the expert conceded that the expert had never taken any courses regarding proper placement of kiosks within retail shopping environments. Downer v. Simon Prop. Group Tex., L.P., 2010 Tex. App. LEXIS 5386 (Tex. App. Fort Worth July 8 2010).

1790. Defendant's conviction for engaging in organized criminal activity, with the two predicate offenses being aggravated sexual assault of a child, was improper because the trial court abused its discretion in allowing a Department of Family and Protective Services worker to testify as an expert on the "grooming process" used by child predators. During cross-examination of the worker, defendant elicited the fact that the worker had not received any training in psychology beyond an associate's degree and the worker agreed that she was not a licensed professional counselor or psychologist, had not attended medical school, and was neither a nurse nor a sexual assault nurse examiner. Kelly v. State, 321 S.W.3d 583, 2010 Tex. App. LEXIS 4506 (Tex. App. Houston 14th Dist. June 17 2010).

1791. Tex. R. Evid. 702 covers more than just scientific evidence, and expertise can be acquired in numerous ways, including by training or experience. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1792. Trial court would not have abused its discretion if it had found that a detective possessed sufficient expertise to give an expert opinion, based on his experience as an officer and a homicide detective, regarding whether the wounds suffered by the victim's cat could have been inflicted by the same knife that killed the victim. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1793. Appellant did not lodge an objection to the testimony of expert witnesses and counsel did not suggest that the witnesses were unqualified or the methodologies unreliable, nor did he present any evidence to that effect, such that appellant failed to show that he preserved error. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1794. Even if appellant had lodged a sufficient objection at trial, he failed to show any reason to find the expert testimony inadmissible; nothing showed the experts' lack of qualification or the unreliability of the methodologies employed, both the experts' qualifications, including their education and experience, provided the trial court with a more than adequate basis for admitting their testimony on future dangerousness under Tex. R. Evid. 702, plus the testimony appeared to meet the requirements that the evidence derived from a soft science such as psychology was sufficiently reliable. Davis v. State, 313 S.W.3d 317, 2010 Tex. Crim. App. LEXIS 723 (Tex. Crim. App. 2010).

1795. Doctor's fourth expert report represented an objective, good faith effort to comply with the definition of an expert report provided in Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6), because the report affirmatively stated that a uniform standard of care applied to each physician and nurse, identified what the standard of care was, and there was no challenge to the doctor's qualifications as a vascular surgeon, nor was there a challenge that defendant did not know how to care for an individual in the patient's alleged condition. Hayes v. Carroll, 314 S.W.3d 494, 2010 Tex. App. LEXIS 3637 (Tex. App. Austin May 14 2010).

1796. Court did not find that, based on a doctor's qualifications, the trial court abused its discretion in allowing the doctor's testimony under Tex. R. Evid. 702; as for her qualifications to testify as to the cause of death of the child, the doctor (1) was a medical director for many years and board certified in pediatrics, (2) had extensive experience

in dealing with child abuse victims, (3) had seen many autopsies with similar injuries and was experienced in interpreting pictures and autopsy reports, and (4) had reviewed the autopsy report and photographs, as well as medical records for the child. Latimer v. State, 319 S.W.3d 128, 2010 Tex. App. LEXIS 3149 (Tex. App. Waco Apr. 28 2010).

1797. Under Tex. R. Evid. 702, the evidence of an expert's education, training, and experience provided a sufficient basis for the trial court to have found the expert qualified to testify on the behavior of sexually assaulted and abused children, including recantation, given that (1) she had a master's degree in clinical psychology and had been in practice for 37 years, (2) she attended 40 hours of continuing education annually, and (3) since 1994, she had been designated a registered sex offender treatment provider; the subject matter of the recantation testimony was an appropriate one for an expert witness and such testimony could assist the jury in determining how child victims of abuse typically behaved. Cockrell v. State, 2010 Tex. App. LEXIS 3208, 2010 WL 1705538 (Tex. App. Amarillo Apr. 28 2010).

1798. Whether an expert participated in clinical studies related to recantation by child sexual assault and abuse victims did not affect the admissibility of her testimony but only affected the weight her testimony. Cockrell v. State, 2010 Tex. App. LEXIS 3208, 2010 WL 1705538 (Tex. App. Amarillo Apr. 28 2010).

1799. Trial court committed reversible error in a sexually violent predator civil commitment proceeding in refusing to permit appellant's only expert witness, a professional counselor, to testify as to whether appellant had a behavioral abnormality, as defined in Tex. Health & Safety Code Ann. § 841.002(2), because the expert possessed the necessary qualifications to provide an opinion related to the assessment of the risk that appellant would commit a future act of sexual violence. In re Dodson, 311 S.W.3d 194, 2010 Tex. App. LEXIS 2931 (Tex. App. Beaumont Apr. 22 2010).

1800. Record showed no objections were made to a pediatrician's expert estimony about her own qualifications, and therefore this complaint was not preserved for review. Casillas v. State, 2010 Tex. App. LEXIS 2888, 2010 WL 1609697 (Tex. App. San Antonio Apr. 21 2010).

1801. In a nuisance suit, a property inspector was qualified as an expert witness to opine that construction activity had caused cracks in homes because he was an experienced inspector and master plumber, was familiar with heavy construction equipment and the area's geology, and previously had performed similar investigations. C. C. Carlton Indus. v. Blanchard, 311 S.W.3d 654, 2010 Tex. App. LEXIS 2530 (Tex. App. Austin Apr. 9 2010).

1802. Internal medicine specialist was qualified under Tex. Civ. Prac. & Rem. Code Ann. §§ 74.351(r)(5)(A), 74.401(a) and Tex. R. Evid. 702 to opine on the standard of care for supervising a patient who took a psychiatric drug because he was currently practicing medicine, treated patients who took the drug for the same diagnosis, and was board certified. Davisson v. Nicholson, 310 S.W.3d 543, 2010 Tex. App. LEXIS 2153 (Tex. App. Fort Worth Mar. 25 2010).

1803. Trial court did not err in a health care liability action in denying a hospital's motion to dismiss because the trial court could have reasonably concluded that the patient's expert, a practicing physician with a significant history in surgery, was qualified to review the patient's medical records and determine that the fracture of the patient's leg in the course of a fall was caused by the inadequate assistance of the hospital staff. Clear Lake Rehab. Hosp. v. Karber, 2010 Tex. App. LEXIS 1932 (Tex. App. Houston 1st Dist. Mar. 18 2010).

1804. There was no abuse of discretion by denying the physician's motion to dismiss the medical malpractice case, because the expert had the education, training and experience to assist the jury in determining whether the physician's misidentification of the ramus artery caused the patient's damages, and the expert provided sufficient

facts in his report and linked his causation opinions to those facts and the standard of care for identification of a ramus artery. Reardon v. Nelson, 2010 Tex. App. LEXIS 1824, 2010 WL 917573 (Tex. App. Houston 14th Dist. Mar. 16 2010).

1805. Contrary to Tex. R. App. P. 33.1(a)(1), defendant did not object to an expert's qualifications to provide testimony on delay outcry, and only objected to qualifications to provide testimony on recantation, but even had he defendant properly objected, the trial court could have properly allowed this testimony, given the expert's qualifications that included education and practical experience. Saenz v. State, 2010 Tex. App. LEXIS 1519 (Tex. App. San Antonio Mar. 3 2010).

1806. Trial court did not err in overruling defendant's objection to a doctor's testimony under Tex. R. Evid. 702; the doctor's specialized knowledge and experience in emergency medicine, including narcotics overdoses and the effects of narcotics on persons, sufficiently fit his testimony on the potential effects narcotics could have on children, in connection with defendant's endangerment trial. Butler v. State, 2010 Tex. App. LEXIS 1159, 2010 WL 547055 (Tex. App. Houston 14th Dist. Feb. 18 2010).

1807. Defendant did not object to a sergeant's qualifications as an expert; therefore, the court presumed, without deciding, that this witness was qualified as an expert. Verdun v. State, 2010 Tex. App. LEXIS 360, 2010 WL 183523 (Tex. App. Houston 14th Dist. Jan. 21 2010).

1808. Although defendant argued that a sergeant's testimony vouched for the victim's credibility contrary to Tex. R. Evid. 702, the sergeant offered no opinion as to the truthfulness of the victim's allegations, the testimony revealed only that the victim recounted the same facts to the investigator about what occurred, and the testimony did not supplant the jury's ability to determine witness credibility, plus the testimony could have assisted the jury in determining an issue for which the jury was not qualified to the best possible degree in deciding: whether the alleged events occurred; the testimony was not inadmissible, counsel was not ineffective for failing to object to admissible evidence, plus it was plausible that counsel chose not to object for strategic reasons, such that ineffective assistance was not shown. Verdun v. State, 2010 Tex. App. LEXIS 360, 2010 WL 183523 (Tex. App. Houston 14th Dist. Jan. 21 2010).

1809. Trial court did not err in allowing a witness's testimony, which was not about science or scientific causation, but rather was about actual practice and a general understanding in the oil and gas industry as to what constituted commencement of operations; the witness was qualified to testify about the practices in the industry with which he was familiar, despite the fact that he was not a driller, and because the issue of a nonoperator's compliance with the joint operating agreement's requirement of commencement of operations was submitted to the jury, this kind of evidence was relevant and appropriate. Valence Operating Co. v. Anadarko Petroleum Corp., 303 S.W.3d 435, 2010 Tex. App. LEXIS 300 (Tex. App. Texarkana Jan. 15 2010).

1810. Trial court abused its discretion by overruling defendant's qualification objection concerning an officer, for purposes of Tex. R. Evid. 702, given that the officer failed to explain how his experience gave him expertise in accident reconstruction, plus the officer admitted that he was not an accident reconstructive expert. Walker v. Rangel, 2009 Tex. App. LEXIS 9215, 2009 WL 4342505 (Tex. App. Houston 14th Dist. Dec. 3 2009).

1811. Court did not err in determining that a trooper's description of defendant as "psychotic" was inadmissible as evidence of defendant's mental state because, although he had specialized knowledge in reconstructing accidents, the trooper acknowledged he did not have specialized knowledge in mental illnesses, nor any qualifications to give an opinion that defendant was "psychotic." Fisher-Riza v. State, 2009 Tex. App. LEXIS 9769, 2009 WL 4358622 (Tex. App. Houston 1st Dist. Dec. 3 2009).

1812. Trial court did not abuse its discretion in allowing a witness to give an opinion regarding the fingerprints, for purposes of Tex. R. Evid. 702, given that the State contended that it established the witness's qualifications by the testimony of the witness's training and experience, plus the court only had a general objection to consider, even though defendant could have requested to take the witness on voir dire and pointed out specific deficiencies, for purposes of Tex. R. Evid. 705(b). Sepeda v. State, 2009 Tex. App. LEXIS 9235, 2009 WL 4348600 (Tex. App. Amarillo Nov. 30 2009).

1813. Case law cited by defendant did not show that a witness was not qualified. Sepeda v. State, 2009 Tex. App. LEXIS 9235, 2009 WL 4348600 (Tex. App. Amarillo Nov. 30 2009).

1814. In defendant's capital murder case, the court properly allowed an expert to testify on the cause of death because the expert was shown to have training in child abuse, sodium levels, sodium intoxication, other causes of elevated sodium levels, head injuries, "pica", and out-of-hospital cardiac arrest. The expert testified that he used standard practice and procedures, including the widely accepted method of differential diagnosis, to determine the cause of the child's illness. Overton v. State, 2009 Tex. App. LEXIS 8312, 2009 WL 3489844 (Tex. App. Corpus Christi Oct. 29 2009).

1815. In defendant's capital murder case, the court properly allowed an expert to testify on the cause of death because the expert stated that he had training and experience in the area of sodium poisoning during medical school; he attended "classes that covered material dealing with patients that had elevated sodium levels, and "treated patients with elevated sodium levels." Finally, the doctor testified that the methods that he employed were "standard operating procedure, standard medical examiner practice." Overton v. State, 2009 Tex. App. LEXIS 8312, 2009 WL 3489844 (Tex. App. Corpus Christi Oct. 29 2009).

1816. Expert's report established that he was qualified to opine on the issue of causation because he was qualified to render such an opinion under the rules of evidence, for purposes of Tex. Civ. Prac. & Rem. Code Ann. §§ 74.351(r)(5)(C), 74.401(a). Barber v. Dean, 303 S.W.3d 819, 2009 Tex. App. LEXIS 8383 (Tex. App. Fort Worth Oct. 29 2009).

1817. In a medical malpractice case, the court erred in granting the doctor's motion to dismiss on the basis that the expert was not a qualifying "expert" because he tied his education and training not only to his knowledge of anesthesia care during a cardiac procedure, but also to the medical and health standards of care for general surgeons like the doctor. Additionally, the padding and positioning of a patient during surgery was common to surgeries generally, and the expert made clear that he had knowledge, training, and experience regarding the medical and surgical management duties of the general surgeon during surgical procedures. Barber v. Mercer, 303 S.W.3d 786, 2009 Tex. App. LEXIS 8621 (Tex. App. Fort Worth Oct. 15 2009).

1818. Police officer who stopped defendant for driving while intoxicated, in violation of Tex. Penal Code Ann. § 49.04, was properly qualified to testify as an expert pursuant to Tex. R. Evid. 702 on the administration of the horizonal gaze nystagmus test based on his training and experience, despite the lapse of his National Highway Traffic Safety Administration certification under 37 Tex. Admin. Code § 221.9. Liles v. State, 2009 Tex. App. LEXIS 7744, 2009 WL 3152174 (Tex. App. Houston 1st Dist. Oct. 1 2009).

1819. In a patient's medical malpractice action that arose from an L2 inferior to S1 superior decompressive laminectomy performed by appellees, a doctor and a neurosurgery clinic, the trial court abused its discretion by finding the patient's expert witness unqualified to render expert testimony as to the standard of care involved in laminectomies because the expert continued to participate in lumbar laminectomy surgeries, and although he was presently unable to hold the title of "lead" surgeon due to an arm injury, he was nevertheless a surgeon who assisted in laminectomies preoperatively, operatively, and postoperatively. Therefore, at the time of the patient's

surgery, the patient's expert was practicing health care in a field of practice that involves the same type of care or treatment as that required of appellees, pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 74.402(b)(1). St. Clair v. Alexander, 2009 Tex. App. LEXIS 7682, 2009 WL 3135812 (Tex. App. Corpus Christi Sept. 30 2009).

1820. Expert witness who lacked an accounting background was not qualified to testify on lost profits in a suit for breach of a credit card processing contract. Spin Doctor Golf, Inc. v. Paymentech, L.P., 296 S.W.3d 354, 2009 Tex. App. LEXIS 7349 (Tex. App. Dallas Sept. 18 2009).

1821. Expert was qualified under Tex. Civ. Prac. & Rem. Code Ann. §§ 74.351(r)(5)(C), 74.403(a) and Tex. R. Evid. 702 because he was familiar with the issues involved in the health care liability claim, although he was not a specialist. Estorque v. Schafer, 302 S.W.3d 19, 2009 Tex. App. LEXIS 7343 (Tex. App. Fort Worth Sept. 17 2009).

1822. In a case involving sexual assault of a child, a trial court did not err by admitting expert testimony; even though there was no explicit ruling made on a doctor's qualifications, an implicit ruling was made since defendant's predicate objection was overruled. The trial court did not err by finding that the doctor was qualified based on her knowledge, training, skill, experience, and education; inter alia, the doctor testified that she had performed about 8,500 sexual abuse examinations. Little v. State, 2009 Tex. App. LEXIS 7091, 2009 WL 2882932 (Tex. App. San Antonio Sept. 9 2009).

1823. Expert was qualified under Tex. Civ. Prac. & Rem. Code Ann. § 74.401 to opine as to the standards of care, their breach by a doctor, and causation, even though the doctor was a family practitioner and the expert was an emergency room physician, as § 74.401 focused on the condition involved, which was appendicitis in a patient's case; the expert was licensed to practice medicine in Texas, had been practicing for 20 years, was practicing medicine when the claim arose, and was qualified to opine on causation under Tex. R. Evid. 702. Granbury Minor Emergency Clinic v. Thiel, 296 S.W.3d 261, 2009 Tex. App. LEXIS 6957 (Tex. App. Fort Worth Aug. 27 2009).

1824. In a case involving indecency with a child by sexual contact,a trial court was within its discretion when it determined that an expert for the State possessed sufficient experience to offer her opinion; she was not testifying that the child was telling the truth or that child complainants as a class were truthful. The State established the witness's expertise as a forensic interviewer, and she testified she has conducted over fifteen hundred interviews with child victims. Metcalfe v. State, 2009 Tex. App. LEXIS 6720, 2009 WL 2617644 (Tex. App. Beaumont Aug. 26 2009).

1825. Expert's report was inadequate because, besides summarily asserting "knowledge," the expert's report and curriculum vitae did not demonstrate how he gained the requisite experience or training to satisfy the requirement that he had substantial training or experience in total knee replacement surgery and the post-operative care of such a procedure. Carreras, M.D. v. Trevino, 298 S.W.3d 721, 2009 Tex. App. LEXIS 6644 (Tex. App. Corpus Christi Aug. 25 2009).

1826. In a capital murder case, the trial court did not abuse its discretion in finding a doctor qualified to testify as to the cause of the child's death because the doctor had fifteen years of experience as a licensed physician, she had worked in a pediatric intensive care unit for eleven years, and she was certified in both pediatrics and pediatric critical care, specializing in critical care, where she treated many children with neurological injuries and illnesses. The doctor was also an associate professor at Baylor College of Medicine. Marin v. State, 2009 Tex. App. LEXIS 6477 (Tex. App. Houston 1st Dist. Aug. 20 2009).

1827. In an aggravated sexual assault case, defendant failed to preserve error relating to the qualifications of an expert witness because no objections to such were made before the trial court. Defendant did not object in the trial court to the expert's testimony on the ground that the State had not properly qualified her as an expert witness, nor

did defendant make a request to take the expert on voir dire outside the presence of the jury to contest her qualifications. Robledo v. State, 2009 Tex. App. LEXIS 6416, 2009 WL 2525412 (Tex. App. San Antonio Aug. 19 2009).

1828. Appellants challenged an expert's qualifications, as well as the reliability of her testimony, but none of these objections were raised at trial and they were waived under Tex. R. App. P. 33.1. Tex. Specialty Trailers, Inc. v. Jackson & Simmen Drilling Co., 2009 Tex. App. LEXIS 6318 (Tex. App. Fort Worth Aug. 13 2009).

1829. Golf club seller's expert was properly excluded under Tex. R. Evid. 702 because the individual's experience in evaluating business opportunities, executing marketing plans for businesses, and monitoring business results for golf club manufacturers did not amount to knowledge, skill, and experience so as to qualify him as an expert on the issue of lost profits of the seller. Spin Doctor Golf, Inc. v. Paymentech, L.P., 2009 Tex. App. LEXIS 5991 (Tex. App. Dallas Aug. 3 2009).

1830. In defendant's trial for aggravated sexual assault of a child under the age of fourteen in violation of Tex. Penal Code Ann. § 22.021, the trial court did not abuse its discretion in admitting the rebuttal testimony of the State's expert who testified that the complainant's "normal" behavior would not necessarily negate sexual abuse; the expert was qualified to provide testimony under Tex. R. Evid. 702 and 703 based on his educational and professional background and experience, and the expert's academic and professional background focusing on the treatment and observation of child victims of sexual abuse appropriately matched the subject matter of his testimony focusing on the behavioral patterns of child victims of sexual abuse. Briones v. State, 2009 Tex. App. LEXIS 5944, 2009 WL 2356626 (Tex. App. Houston 14th Dist. July 30 2009).

1831. In defendant's trial for aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021, the trial court did not abuse its discretion in finding that a pediatrician was qualified to testify as an expert under Tex. R. Evid. 702 on the issue of whether a victim of sexual abuse as a child had a higher chance of becoming a perpetrator of sexual abuse; although the pediatrician admitted that he was not an expert in that particular field of study, he qualified as an expert witness by virtue of his knowledge, experience, training, and education. Clemons v. State, 2009 Tex. App. LEXIS 6003, 2009 WL 2372927 (Tex. App. Eastland July 30 2009).

1832. Doctor's expert report satisfied the requirements of Tex. Civ. Prac. & Rem. Code Ann. § 74.351 as well as the qualifications necessary under Tex. Civ. Prac. & Rem. Code Ann. §§ 74.402, 74.403 and Tex. R. Evid. 702 to opine on a patient's claim of negligent emergency room treatment of an ankle fracture and adequately linked his determinations regarding the alleged breach of care to the resulting damages. Stephanie M. Philipp, P.A. v. McCreedy, 298 S.W.3d 682, 2009 Tex. App. LEXIS 5786 (Tex. App. San Antonio July 29 2009).

1833. Defendant did not challenge the qualifications of an officer as an expert on horizontal gaze nystagmus (HGN) testing, but defendant did complain that the officer improperly administered the test; the officer deviated in the timing of the tests, and although the trial court opined that the deviations were somewhat significant, the courts had not held that timing errors alone justified exclusion of HGN testimony, and the court found no abuse of discretion. Sotelo v. State, 2009 Tex. App. LEXIS 5818, 2009 WL 2343134 (Tex. App. El Paso July 29 2009).

1834. Trial court did not err in finding that a witness possessed sufficient qualifications to assist the jury to understand domestic violence victims, given that (1) the witness's testimony was not conclusive on the issue of whether defendant assaulted the victim, and thus did not require a much higher degree of scientific expertise, and (2) the witness's testimony was not dispositive to the disputed issues, making the reliability of the expertise and the witness's qualifications less crucial. Booker v. State, 2009 Tex. App. LEXIS 5541, 2009 WL 2006428 (Tex. App. Dallas July 13 2009).

1835. Because defendant did not analyze his complaint the expert testimony was not relevant, defendant waived the issue, but even if the court addressed the issue, the testimony was admissible; defendant argued that the victim continued to see him, making her assault story unlikely, and in light of defendant's posture, the witness's testimony of how victims of domestic violence interact with their abusers and why the victims might lie was relevant to the case. Booker v. State, 2009 Tex. App. LEXIS 5541, 2009 WL 2006428 (Tex. App. Dallas July 13 2009).

1836. Because the evidence provided by a witness's testimony was within or close to the jury's common understanding, the witness's qualifications were less important than when the evidence was outside the jury's own experience, but regardless, she had social work undergraduate and masters degrees, had over three years job experience, had thousands of interactions with victims, had developed publications, and had done trainings and presentations on domestic violence, such that the witness had the knowledge, skill, experience, training, interaction, and education necessary to give opinions on issues relating to domestic violence victims. Booker v. State, 2009 Tex. App. LEXIS 5541, 2009 WL 2006428 (Tex. App. Dallas July 13 2009).

1837. In this condemnation case, it was not clear that the principals' testimony was based on advertising revenue, although they did mention it, but given that under Texas law, an owner of property was qualified to testify to the property's market value, on remand, the trial court was not to allow evidence of valuation based on advertising income, but general estimates of what the property would sell for considering its possible use as a billboard site were acceptable. State v. Cent. Expressway Sign Assocs., 302 S.W.3d 866, 2009 Tex. LEXIS 967, 53 Tex. Sup. Ct. J. 134 (Tex. 2009).

1838. Because there was no timely objection to an expert's qualifications, the complaint was not preserved, but even if the issue was preserved, the court found the expert qualified and had the necessary knowledge, education, skills, and experience to testify as an expert regarding causation and repetitive trauma injuries. Old Republic Ins. Co. v. Weeks, 2009 Tex. App. LEXIS 4139, 2009 WL 1740820 (Tex. App. Corpus Christi June 11 2009).

1839. Doctor's testimony established a reasonable medical probability that the employee's injuries were caused by repetitive trauma and an acute trauma and that the foundation of his expert opinion was sound; the doctor's physical exam of the employee demonstrated an appropriate methodology and his reliance on other's medical reports showed that his opinion was based on more than subjective speculation, plus the doctor's testimony showed that his opinions had a reliable foundation, such that the trial court did not err in admitting the doctor's testimony. Old Republic Ins. Co. v. Weeks, 2009 Tex. App. LEXIS 4139, 2009 WL 1740820 (Tex. App. Corpus Christi June 11 2009).

1840. Court properly allowed a detective to testify as an expert about body language because she had been a police officer for 15 years and had investigated sexual assaults for three years, she was a fifteen year veteran officer, and she had a degree in criminal justice and was a certified special investigator of sex crimes. Brite v. State, 2009 Tex. App. LEXIS 4096, 2009 WL 1617741 (Tex. App. San Antonio June 10 2009).

1841. Based on a trooper's training and experience in Horizontal Gaze Nystagmus (HGN) test administration, although he had no formal HGN certification, the trial court did not err in permitting him to testify that six out of six clues on the test indicated intoxication; given the trial court's broad discretion to decide whether a witness qualified as an expert, the court could not find that the trial court erred in defendant's trial for driving while intoxicated under Tex. Penal Code Ann. §§ 49.04(a), 49.09(a). Drew v. State, 2009 Tex. App. LEXIS 3994, 2009 WL 1491888 (Tex. App. Austin May 29 2009).

1842. Livestock dealer was qualified to render expert testimony on the cattle business, and opinions or estimates of lost profits might be competent evidence, if that opinion or estimate was based on objective facts, figures, or data from which the amount of lost profits might be ascertained, but the dealer failed to provide the trial court with any

objective evidence to substantiate his opinion. Penner Cattle, Inc. v. Cox, 287 S.W.3d 370, 2009 Tex. App. LEXIS 3546 (Tex. App. Eastland May 21 2009).

1843. Doctor disputed an expert's qualifications under Tex. Civ. Prac. & Rem. Code Ann. § 74.401(a), but the court believed the doctor characterized the issue in this case too narrowly and failed to focus on the standards of medical care for the diagnosis, care or treatment of the condition involved in the claim under § 74.401(a)(3). Leonard v. Glenn, 293 S.W.3d 669, 2009 Tex. App. LEXIS 3446 (Tex. App. San Antonio May 20 2009).

1844. Because an expert was qualified to opine on the standards of care applicable to the prescribing of Indomethacin to an individual with chronic kidney disease, the court affirmed the trial court's denial of the motion to dismiss pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 74.351. Leonard v. Glenn, 293 S.W.3d 669, 2009 Tex. App. LEXIS 3446 (Tex. App. San Antonio May 20 2009).

1845. Expert opined that the doctor and physician assistant should have avoided using a drug with a patient and the doctor did not need to have experience in supervising a physician assistant to render such an opinion. Leonard v. Glenn, 293 S.W.3d 669, 2009 Tex. App. LEXIS 3446 (Tex. App. San Antonio May 20 2009).

1846. Tex. Civ. Prac. & Rem. Code Ann. § 74.401(c)(2) did not require a medical expert to practice in the exact same field as the defendant physician and rather the expert only needed to be actively practicing medicine in rendering services relevant to the claim; the claim in this case was the alleged negligent treatment of a knee with a contraindicated drug, and the court had to determine if the expert's report reflected that he had the necessary qualifications to provide an opinion on the medical standard of care for prescribing Indomethacin for gout to an individual with renal disease. Leonard v. Glenn, 293 S.W.3d 669, 2009 Tex. App. LEXIS 3446 (Tex. App. San Antonio May 20 2009).

1847. Expert's reports and accompanying curriculum vitae established his extensive experience and current practice in the area of internal medicine, nephrology, and renal failure; the trial court did not abuse its discretion in accepting the expert's qualifications under Tex. Civ. Prac. & Rem. Code Ann. § 74.401 to render an opinion regarding the standard of care provided by a doctor. Leonard v. Glenn, 293 S.W.3d 669, 2009 Tex. App. LEXIS 3446 (Tex. App. San Antonio May 20 2009).

1848. For an expert to be qualified under Tex. Civ. Prac. & Rem. Code Ann. § 74.402, he had to be practicing health care and possess sufficient training and experience to offer expert opinions. Leonard v. Glenn, 293 S.W.3d 669, 2009 Tex. App. LEXIS 3446 (Tex. App. San Antonio May 20 2009).

1849. Physician assistant argued that an expert had to be qualified to render an opinion regarding the standard of care for a physician assistant in an acute care setting treating a patient complaining of knee pain, but based on the expert's petition and the expert reports, the relevant standard of care was the appropriate prescription of medication for a patient presenting with gout and a history of renal disease. Leonard v. Glenn, 293 S.W.3d 669, 2009 Tex. App. LEXIS 3446 (Tex. App. San Antonio May 20 2009).

1850. Expert had extensive experience in the field of nephrology and the effects of Indomethacin on patients suffering from renal failure and the expert's training and experience were comparable to those of experts that other appellate courts have held to be qualified to opine regarding health care providers, plus the expert report and attached curriculum vitae clearly substantiated that he had knowledge of accepted standards of care for health care providers for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim and that he was qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 74.402(b)(3); the expert's opinion was that the acceptable standard of care for treating gout in someone with the patient's medical history was that no one should

have prescribed Indomethacin and thus the expert was sufficiently qualified to opine that it should have been obvious to the physician assistant and the doctor should have been aware that the patient's past medical history and should have avoided the use of Indomethacin which caused the progression of his renal disease. The trial court did not err in finding that the expert was qualified. Leonard v. Glenn, 293 S.W.3d 669, 2009 Tex. App. LEXIS 3446 (Tex. App. San Antonio May 20 2009).

1851. In a products-liability case arising from injuries sustained by a truck driver in attempting to unload a truck trailer, the trial court did not abuse its discretion in excluding the testimony of the driver's expert witness regarding design defect where the witness was not qualified under Tex. R. Evid. 702 because although he might have demonstrated his experience in designing workplace products and in designing solutions for hazards in walking surfaces, he was not shown to have any training, experience, or special knowledge in the design or manufacture of refrigerated trailers or their relevant components. The witness demonstrated no specialized knowledge regarding the particular design of an uncovered gutter spanning the width of the trailer in the rear, and, accordingly, his testimony as to the driver's proposed alternative designs did not rise above mere speculation. Champion v. Great Dane L.P., 286 S.W.3d 533, 2009 Tex. App. LEXIS 3222, CCH Prod. Liab. Rep. P18223 (Tex. App. Houston 14th Dist. May 7 2009).

1852. Affidavits of a resident and his wife failed to give rise to the requisite issue of material fact that the owner should have foreseen that the resident would be robbed and stabbed on the premises; they did not establish the necessary expertise to qualify as experts, and as statements of opinion by lay, interested witnesses, their opinions were neither readily controvertible nor competent, for summary judgment purposes. Xiao Yu Zhong v. Sunblossom Gardens, LLC, 2009 Tex. App. LEXIS 3010, 2009 WL 1162213 (Tex. App. Houston 1st Dist. Apr. 30 2009).

1853. Father did not address the alleged error of the trial court regarding expert witnesses and other claims, but even if he had, defendant made no objections regarding witness qualification and he waived error in that regard under Tex. R. App. P. 33.1(a). In re A.H., 2009 Tex. App. LEXIS 2851, 2009 WL 1065205 (Tex. App. Eastland Apr. 16 2009).

1854. Defendant did not argue that counsel should have objected to either witnesses' qualifications as experts in their respective fields, or to any specific portion of their testimony, and thus the court's review related only to the procedural notice given regarding this testimony. Vasquez v. State, 2009 Tex. App. LEXIS 2412, 2009 WL 943868 (Tex. App. Houston 14th Dist. Apr. 9 2009).

1855. In a sexual assault case, an officer was properly allowed to testify regarding defendant's "grooming" the victim for sexual assaults because he had been a police officer for thirty years, he had investigated twenty sexual assault and child abuse cases per year, and he testified that it was his opinion based on his investigation that defendant had been "grooming" the victim prior to her outcry. He explained that sexual predators often developed a relationship with a victim to build trust, and then started committing small offenses to see if the victim made an outcry. Weatherly v. State, 283 S.W.3d 481, 2009 Tex. App. LEXIS 2435 (Tex. App. Beaumont Apr. 1 2009).

1856. In a case alleging that pain and swelling in a patient's left vulvar area was negligently diagnosed as cellulitis rather than Methicillin Resistant Staphylococcus Aureus (MRSA), an expert was qualified under Tex. Civ. Prac. & Rem. Code Ann. § 74.401 to render liability and causation opinions, despite being an infectious disease specialist rather than a gynecologist. Moheb v. Harvey, 2009 Tex. App. LEXIS 229, 2008 WL 5501166 (Tex. App. Beaumont Jan. 15 2009).

1857. Witness was properly qualified as a forensic and fingerprint expert in reviewing crime scenes and although the State suggested that his qualifications were sufficient to justify his testimony regarding the physical aspects of injuries sustained during the course of a crime, the court's review of his qualifications did not reveal special

credentials to speak as an expert about wound patterns, for purposes of Tex. R. Evid. 702. Hawkins v. State, 2009 Tex. App. LEXIS 16, 2009 WL 30255 (Tex. App. Texarkana Jan. 7 2009).

1858. Even if evidence admitted under Tex. R. Evid. 701 was inadmissible, it did not constitute reversible error for purposes of Tex. R. App. P. 44.2(b) because there was a qualified expert testifying that lacerations might have been defensive wounds and the witness testifying similarly that they were consistent with defensive wounds, and thus the court did not find that the addition of the testimony by the witness would have affected a substantial right of defendant. Hawkins v. State, 2009 Tex. App. LEXIS 16, 2009 WL 30255 (Tex. App. Texarkana Jan. 7 2009).

1859. In a case alleging breach of fiduciary duty, negligence, and negligence misrepresentation, various underwriters preserved an error relating to an expert's qualifications by raising an objection in the trial court; however, the expert was not required to have experience underwriting under certain manuals and contracts. As to another error based on the expert's methodology, it was not preserved because no objection was made before the trial court. Underwriters at Lloyds Subscribing to Policy Nos. MDJ03/L075 & MDJ03/Z0165 v. Edmond & Stephens Ins. Agency, Inc., 2008 Tex. App. LEXIS 9730 (Tex. App. Houston 14th Dist. Dec. 30 2008).

1860. In a workers' compensation case, a trial court did not err by allowing expert testimony under Tex. R. Evid. 702 because a doctor was qualified to give an opinion regarding causation; he had graduated from medical school, had been an orthopedic surgeon for 17 years, and was board certified in total joint replacement. Moreover, the expert's opinion that a benefit claimant's compensable injury included osteoarthritis and chondromalacia was based on a number of factors, and it was based on a reasonable medical probability, and not possibility, speculation, or surmise. Am. Cas. Co. of Reading v. Zachero, 2008 Tex. App. LEXIS 9263 (Tex. App. Eastland Dec. 11 2008).

1861. Experienced truck driver, also the plaintiff in a truck roll-over accident case, was qualified under Tex. R. Evid. 702 to give an expert opinion that the shipper had improperly loaded the cargo, beer, by stacking the pallets too high and not using void fillers to keep the load from shifting. Dewbre v. Anheuser-Busch, Inc., 2008 Tex. App. LEXIS 9046 (Tex. App. Waco Nov. 26 2008).

1862. In a case involving aggravated sexual assault of a child, a trial court did not abuse its discretion in allowing a counselor to testify as an expert under Tex. R. Evid. 702 about how offenders groomed children for abuse based on her nine years of experience, specialized training, and treatment of sex offenders; the counselor had a master's degree, as well as state-issued licenses in counseling and treating sex offenders, and she completed a 2,000-hour internship. Even if there was an error, defendant made no effort to show how this affected his substantial rights since other testimony about grooming came into evidence through the victim's therapist. Mitchell v. State, 2008 Tex. App. LEXIS 8594 (Tex. App. Austin Nov. 14 2008).

1863. Physician was qualified to render an opinion in a medical malpractice action where, despite appellants' claims that he was not a "physician" because his curriculum vitae did not state that he was licensed to practice medicine in Texas because the facts that he held staff privileges at two area hospitals and served as the medical director of a surgery center indicated that he was licensed to practice medicine in Texas. Azle Manor, Inc. v. Vaden, 2008 Tex. App. LEXIS 8414 (Tex. App. Fort Worth Nov. 6, 2008).

1864. In a product liability case, a trial court properly determined that an expert was qualified to give an opinion regarding seatbelts in buses because he was a structural engineer with a bachelor's and master's degree who had performed all of the structural analysis and design on a safety school bus project, including seat supports, which led to the development of a Federal Motor Vehicle Safety Standard, performed data analysis of bus-seat testing for the United States Department of Transportation, and designed computer modeling programs to simulate the performance of seatbelt and airbag systems. MCI Sales & Serv. v. Hinton, 272 S.W.3d 17, 2008 Tex. App. LEXIS 6951 (Tex. App. Waco 2008), *aff'd*, 329 S.W.3d 475, 2010 Tex. LEXIS 976, 54 Tex. Sup. Ct. J. 386 (Tex. 2010),

cert. denied, 131 S. Ct. 2903, 179 L. Ed. 2d 1246, 2011 U.S. LEXIS 3990 (U.S. 2011).

1865. In a case where an insurer was seeking to recover damages to a car, a driver failed to preserve error relating to a contention that unqualified expert testimony was presented in an attachment to an affidavit; no objection was lodged, and the filing of motions for judgment notwithstanding the verdict and a directed verdict did not preserve error either because the objection should have been lodged when the exhibit was offered into evidence. Adams v. State Farm Mut. Auto. Ins. Co., 264 S.W.3d 424, 2008 Tex. App. LEXIS 6486 (Tex. App. Dallas 2008).

1866. Court did not abuse its discretion in allowing an expert to testify as to an opinion of defendant's mental state at the time of the offense because based on education and experience, the expert was qualified to testify as to what might or might not have contributed to defendant behavior at the time of the offenses. Additionally, the expert based the testimony upon the facts that defendant's story was inconsistent, he did not have a history of delusions, and his panic at being apprehended by police officers after the commission of the offenses was inconsistent with the delusion that one was God. Howard v. State, 2008 Tex. App. LEXIS 6431 (Tex. App. Houston 1st Dist. Aug. 21 2008).

1867. Trial court properly denied a motion for summary judgment filed by an anesthesiologist and registered nurse anesthesiologist because a neurologist was qualified as an expert under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(A), as he had experience and academic work in blood flow to the brain, and the husband alleged that the anesthesiologist did not adequately monitor the patient's breathing after her surgery and the omission resulted in decreased blood flow to her brain and her current condition. Gelman v. Cuellar, 268 S.W.3d 123, 2008 Tex. App. LEXIS 6173 (Tex. App. Corpus Christi 2008).

1868. In a trial for driving while intoxicated (DWI) under Tex. Penal Code Ann. § 49.04(a), there was no error under Tex. R. Evid. 702 arising from the fact that a walk-and-turn test was administered by a deputy sheriff who was not certified to administer the test because the deputy testified to being very familiar with how to administer the standardized test through extensive training and years of experience. Kirby v. State, 2008 Tex. App. LEXIS 5776 (Tex. App. Houston 1st Dist. July 31 2008).

1869. Defendant argued that a witness's violation of Tex. R. Evid. 614 should not have prevented her from testifying and she should have been qualified to testify as an expert under Tex. R. Evid. 702, but the court overruled these points of error because the witness was not qualified to provide a professional opinion about the victim's wound and whether or not it appeared to be self-inflicted; although the witness had a degree in nursing, she had no specific training for looking at wounds or determining whether they were self-inflicted, and there was nothing establishing that the witness was qualified as an expert on self-inflicted wounds by her knowledge, skill, experience, training, or education, such that it was not error for the trial court to exclude her testimony as an expert witness. Jones v. State, 2008 Tex. App. LEXIS 5819 (Tex. App. Austin July 30, 2008).

1870. In an action involving medical negligence, although a doctor did not specialize and was not certified in infectious disease, his experience and training qualified him as an expert to testify regarding the cause of the patient's injuries. Jelinek v. Casas, 2008 Tex. App. LEXIS 5647 (Tex. App. Corpus Christi July 29 2008).

1871. In defendant's murder case, the trial court did not abuse its discretion in allowing a doctor to testify as an expert witness because the witness received his medical degree from the University of Matamoros in 1985, he had been practicing medicine for over twenty years, he was a certified coroner, a licensed forensic medical examiner, and, at the time of trial, had been employed by the Attorney General's Office for the State of Tamaulipas, Mexico for approximately twelve years. Manzanares v. State, 2008 Tex. App. LEXIS 5636 (Tex. App. Corpus Christi July 29

2008).

1872. Even if the court assumed, without deciding, that a witness offered an expert opinion and that she was not qualified to do so, defendant failed to establish that admission of the opinion testimony was reversible error for purposes of Tex. R. App. P. 44.2(b), given that (1) the evidence of defendant's guilt of aggravated robbery was overwhelming, (2) as to whether defendant was a good candidate for rehabilitation, the jury had ample evidence from which to draw its own conclusions even without the witness's opinion, and (3) defendant's guilt, combined with evidence of his long pattern of criminal conduct, adequately supported the jury's decision to assess a life sentence. Dickey v. State, 2008 Tex. App. LEXIS 5599 (Tex. App. Dallas July 25 2008).

1873. Witness had experience performing business valuations, had valued a partnership interest using the income approach, and had valued a contingency fee practice by relying on the same type of projections he used in this case, and although he had never used information from a patent case in valuing a law firm, the specific issue in this case was valuation of a partner's interest in a law firm, for which the witness had specialized knowledge, skill, experience, training, or education, and therefore the trial court did not abuse its discretion in allowing the witness to testify as an expert under Tex. R. Evid. 702 for purposes of determining how to divide marital property. Von Hohn v. Von Hohn, 260 S.W.3d 631, 2008 Tex. App. LEXIS 5416 (Tex. App. Tyler 2008).

1874. In a health care liability case where a patient suffered a fatal heart attack shortly after being treated by a gastroenterologist, a motion to dismiss under Tex. Civ. Prac. & Rem. Code Ann. § 74.351 was denied because an internist and a cardiologist were qualified to opine on the standard of care, breach, and causation, despite having differing specialties; they demonstrated sufficient qualifications to opine about the standards of care in connection with recognizing, investigating, and treating or ruling out cardiovascular disease in treating the patient. Moreover, their reports discussed the standard of care, breach, and causation with sufficient specificity to inform the gastroenterologist of the conduct that was alleged and to provide a basis for the trial court to conclude that the claims had merit. Pacha v. Casey, 2008 Tex. App. LEXIS 5490 (Tex. App. Houston 14th Dist. July 22 2008).

1875. In a case involving intoxication manslaughter, a trial court did not err in admitting expert testimony under Tex. R. Evid. 702 on the issues of accident reconstruction and drug detection because the experts were qualified due to training, education, and experience; moreover, the three criteria in Kelly v. State, 824 S.W.2d 568 (Tex. Crim. App. 1992), were satisfied. The experts testified about effects of marijuana and alcohol in a person's body, as well as to defendant's speed at the time of a fatal accident. Wooten v. State, 267 S.W.3d 289, 2008 Tex. App. LEXIS 5497 (Tex. App. Houston 14th Dist. 2008).

1876. In a case involving a dispute over charges owed to a lease operator, while evidence that wells were inactive for six months prior to the witness's inspection would have been relevant, his opinion regarding how long the wells had to have been inactive for rust to form also had to be shown to be reliable; given that (1) nothing in his testimony identified the basis for the witness's opinion that the rusted wells had been inactive for six months, and (2) the witness, although a pumper for 17 years, did not testify that he had any specialized knowledge relating to the formation of rust on inactive oil wells or that he had ever before observed rust, the trial court did not abuse its discretion in excluding the witness's opinion regarding the period that lease wells were inactive. S & J Invs. v. Am. Star Energy & Minerals Corp., 2008 Tex. App. LEXIS 5078 (Tex. App. Amarillo July 8, 2008).

1877. In a medical malpractice action, which claimed that one of a hospital's nurses improperly "triaged" a patient and that unreasonable delay in the patient's medical treatment caused the patient to suffer a ruptured appendix before surgery, the trial court properly denied the hospital's motion to dismiss where the reports by plaintiffs' expert established that the expert had experience in triage and emergency department management, as well as surgical management of abdominal pain, including appendicitis; hence, the expert was qualified. CHCA Mainland, L.P. v. Wheeler, 2008 Tex. App. LEXIS 2537 (Tex. App. Beaumont Apr. 10 2008).

1878. Pursuant to Tex. R. Evid. 702, the trial court did not err in excluding the client's expert's affidavit in her legal malpractice suit where the trial court could reasonably conclude that the analytical gaps in the expert's affidavit rendered his opinion too conclusory to be reliable. Childs v. Crutchfield, Decordova & Chauveaux, P.C., 2008 Tex. App. LEXIS 2540 (Tex. App. Beaumont Apr. 10 2008).

1879. Expert was qualified to opine on causation and therefore the doctor's motion to dismiss a medical malpractice action was properly denied, because he was a board certified internist, he had been an urgent care provider, he was currently an emergency medicine doctor at a hospital, and he had been the director of emergency medicine. Mosely v. Mundine, 249 S.W.3d 775, 2008 Tex. App. LEXIS 2411 (Tex. App. Dallas 2008).

1880. Trial court did not abuse its discretion in accepting an infectious disease specialist's qualifications as sufficient to allow him to offer an opinion concerning the potential that a decedent would benefit from heart surgery, under Tex. R. Evid. 702, because the specialist's qualifications reflected that he had prior experience in the diagnosis and treatment of persons with atrial myxomas. Reddy v. Seale, 2008 Tex. App. LEXIS 2000 (Tex. App. Beaumont Mar. 20 2008).

1881. Because a cardiologist's qualifications reflected his training and experience in the diagnosis and treatment of persons with atrial myxomas, a trial court did not abuse its discretion in accepting the cardiologist's qualifications as sufficient to allow him to identify the applicable standards of care and how breaches in those standards resulted in a decedent's alleged injury, under Tex. R. Evid. 702. Reddy v. Seale, 2008 Tex. App. LEXIS 2000 (Tex. App. Beaumont Mar. 20 2008).

1882. Officer was qualified to give expert testimony regarding blood spatter evidence because he testified that he had been a deputy for eight years, he had been a member of the crime scene unit for three years, and he testified that he had completed and was certified in level one training in blood spatter analysis. Turner v. State, 252 S.W.3d 571, 2008 Tex. App. LEXIS 2009 (Tex. App. Houston 14th Dist. 2008).

1883. Officer was qualified to give expert testimony on the street value of cocaine found in defendant's possession because of the officer's training and experience regarding narcotics. Overton v. State, 2008 Tex. App. LEXIS 1067 (Tex. App. Waco Feb. 13 2008).

1884. In an action involving a fire and who was the cause of it, a proper foundation had not been laid to qualify an expert to testify whether he had any criticism of the plumbing company's work and the admission of testimony that an individual was not seeking to recover anything from the plumbing company was irrelevant since none of it even remotely related to whether the plumbing company was liable for the fire; however, those errors were harmless since they did not cause the rendition of an improper verdict and therefore, a reversal was not required. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 245 S.W.3d 646, 2008 Tex. App. LEXIS 963 (Tex. App. Fort Worth 2008).

1885. In an action for breach of a maintenance contract, the evidence was sufficient to support an attorney fee award because the contractor's expert on fees demonstrated that he was qualified by knowledge, skill, experience, training, and education to provide specialized testimony to assist the jury in understanding the evidence regarding attorney fees. United Plaza-Midland, L.L.C. v. First Serv. Air Conditioning Contractors, Inc., 2007 Tex. App. LEXIS 10027 (Tex. App. Eastland Dec. 20 2007).

1886. In an aggravated assault prosecution, the trial court did not err in admitting a police officer's expert testimony concerning the propensity of family violence victims to return to the family members who abused them because he was qualified as an expert under Tex. R. Evid. 702 based on his knowledge, training, and experience; further, his testimony was an appropriate subject for expert testimony as it assisted the jury by helping it to

understand the evidence regarding the complainant's post-assault behavior in returning to defendant. Dixon v. State, 244 S.W.3d 472, 2007 Tex. App. LEXIS 9292 (Tex. App. Houston 14th Dist. 2007).

1887. In a health care liability action brought by a patient's guardian against a rehabilitation hospital, the purported expert reports filed by the guardian did not constitute a good faith effort to comply with the statutory requirements, and the trial court thus properly dismissed the suit pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 74.351, where the first report submitted by the guardian was that of a nurse, who was not qualified to testify as an expert witness on the issue of causation because she was not a physician; the second report submitted by the guardian was that of a doctor licensed to practice medicine in the state of Coahuila, Mexico, but because nothing in the record indicated that the doctor was licensed in Texas or any of the states of the United States, he did not meet the statutory definition of a "physician," and, therefore, was not qualified to testify on the issue of causation, and, accordingly, neither the nurse nor the doctor were qualified as an "expert" capable under the statute of opining on causation. Cuellar v. Warm Springs Rehab. Found., 2007 Tex. App. LEXIS 8974 (Tex. App. San Antonio Nov. 14 2007).

1888. Defendant's conviction for murder was proper because the trial court did not err by admitting an officer's testimony as a gang membership expert since the officer was qualified; the officer had been a certified peace officer for 11 years; he had over 3,000 hours of training directly involved with gang identification of prison and street gang members; and he had been a member of a gang investigators association for 12 years and had been with a gang task force for 13 years. Rivers v. State, 2007 Tex. App. LEXIS 8898 (Tex. App. Houston 1st Dist. Nov. 8 2007).

1889. Expert was qualified to provide an opinion on causation in a medical malpractice action, and therefore the physician's motion to dismiss under Tex. Civ. Prac. & Rem. Code Ann. § 74.351 was properly denied, because the report indicated that she was a physician who had knowledge and experience concerning the swallowing mechanism and in evaluating elderly patients. Palafox v. Silvey, 247 S.W.3d 310, 2007 Tex. App. LEXIS 10155 (Tex. App. El Paso 2007).

1890. In a health care liability action brought by a patient's parents against a dentist and his alleged employer, the expert report of the parent's expert represented an objective good faith effort to comply with the statutory requirements of a health care liability expert report where: (1) the expert's report focused on the patient's overdose of sedation medication, her monitoring after the procedure, her untimely discharge, and her resulting cerebral hypoxia; (2) his qualifications supported his expertise in the subjects on which he provided opinions in his report because he had been a board-certified anesthesiologist for over 30 years, currently practiced medicine, and was a tenured professor of anesthesiology with the state university; (3) according to the expert's report and curriculum vitae, he had extensive training and experience with the standards of anesthesia management and recovery from medications used in sedating patients; (4) the expert was one of the researchers in a multi-center study on one of the sedation reversal agents used during the patient's procedure; and (5) the report provided the link between the health care providers' breach (overdose of sedation medication, failure to properly reverse deep sedation, failure to monitor properly, untimely discharge, and the placement of the patient in the vehicle) and the expert's conclusion on causation that, if properly medicated or monitored, the patient would have avoided the obstruction of her airway that resulted in hypoxia and brain injury. Comstock v. Clark, 2007 Tex. App. LEXIS 8447 (Tex. App. Beaumont Oct. 25 2007).

1891. Affidavit of company's expert was competent summary judgment evidence because it was clear and free from inconsistency, and thus the burden fell on the homeowners to raise a fact issue by controverting expert testimony; because the company challenged the qualifications of the homeowners' expert witnesses, the homeowners also had the burden of establishing the admissibility of any controverting expert opinions. Adair v. Veritas DGC Land, Inc., 2007 Tex. App. LEXIS 7744 (Tex. App. Houston 14th Dist. Sept. 27 2007).

1892. Neither below nor on appeal did homeowners object to the expert's affidavit on the basis of qualifications, reliability or relevance, or otherwise claim it was deficient, so the court did not need to consider whether it satisfied all admissibility requirements. Adair v. Veritas DGC Land, Inc., 2007 Tex. App. LEXIS 7744 (Tex. App. Houston 14th Dist. Sept. 27 2007).

1893. Because no evidence revealed the qualifications of three experts and the fourth lacked expertise in the areas most critical to establishing causation in the case, the court was unable to say that the trial court would have abused its discretion had it excluded all four of these witnesses based on the failure to prove the qualifications of the witnesses. Adair v. Veritas DGC Land, Inc., 2007 Tex. App. LEXIS 7744 (Tex. App. Houston 14th Dist. Sept. 27 2007).

1894. In a capital murder trial, a trial court did not err in excluding an expert's testimony about identification because, while the expert could have been qualified on the topic, his area of expertise was not closely tailored to the area of eyewitness identification. Garcia v. State, 2007 Tex. App. LEXIS 7057 (Tex. App. Houston 14th Dist. Aug. 30 2007).

1895. Trial court permitted a witness to testify as an expert and gave a detailed and specific ruling allowing some areas and expertise and disallowing others; the trial court could have found that either the proffered testimony was beyond basic blood spatter opinions or that the expert lacked a sufficient background in this field for the degree of complexity of this case, and thus the court found no abuse of discretion in the partial exclusion of the expert's spatter testimony, and the court noted that it viewed the exclusion to be on the basis of expertise rather than reliability. Wilson v. State, 2007 Tex. App. LEXIS 7173 (Tex. App. Corpus Christi Aug. 30 2007).

1896. In defendant's sexual assault on a child case, the court properly allowed a nurse to testify as an expert regarding the risk of HIV transmission during unprotected sex because the State offered testimony to establish that the nurse was qualified to testify about the matter. She was a nurse practitioner who specialized in infectious diseases, she received extensive training and education related to HIV, and she indicated that she was familiar with several studies establishing that there was a high risk of HIV transmission during unprotected sex. Henry v. State, 2007 Tex. App. LEXIS 6791 (Tex. App. El Paso Aug. 23 2007).

1897. Trial court did not abuse its discretion in determining that the State's expert witness was qualified to testify about the symptoms of sexual abuse exhibited by the victim; the expert provided the court with a record of extensive experience in counseling sexually abused children and tied the symptoms that she observed in the victim with what she had observed in other sexually abused children. Jones v. State, 2007 Tex. App. LEXIS 6358 (Tex. App. Eastland Aug. 9 2007).

1898. Even if the parishioner's theory of limited unsound mind was valid, the parishioner's expert did not demonstrate any objective evidence or data that would support the conclusion that the parishioner was of unsound mind from 1985 until 2004; thus, the trial court abused its discretion in excluding the expert's testimony as unreliable. Ramirez v. Mansour, 2007 Tex. App. LEXIS 6035 (Tex. App. San Antonio Aug. 1 2007).

1899. Psychiatrist who had several years of experience working with sexually violent offenders and evaluating them for civil commitment was qualified as an expert in the field of psychiatry and qualified to testify that an individual had a behavioral abnormality that made him likely to engage in a predatory act of sexual violence; moreover, no analytical gap was shown in the psychiatrist's methodology. In re Zamora, 2007 Tex. App. LEXIS 5852 (Tex. App. Beaumont July 26 2007).

1900. In a negligence case arising from a fire at a condominium complex, speculative testimony regarding the adequacy of plumbing work was irrelevant and inadmissible and no showing of expert qualifications was made

under Tex. R. Evid. 702; however, the trial court's error in admitting the testimony was harmless under Tex. R. App. P. 44. Richmond Condos. v. Skipworth Commer. Plumbing, Inc., 2007 Tex. App. LEXIS 5977 (Tex. App. Fort Worth July 26 2007).

1901. Trial court did not abuse its discretion in a fraud action in permitting one of a home health business's accountants to testify as an expert on the business members' alleged damages because his education, training, and experience in accounting and auditing in the field of Medicare-funded home-health agencies, as well as his exposure to business valuation in that specialized field qualified him to testify as an expert on damages pursuant to Tex. R. Evid. 702. Furthermore, the accountant's experience, coupled with his thorough testimony about the methodology he employed, demonstrated that the opinions he drew from the underlying data were reliable, and his damage models comported with the jury instruction concerning damages. Rogers v. Alexander, 244 S.W.3d 370, 2007 Tex. App. LEXIS 5103 (Tex. App. Dallas 2007).

1902. Where a patient allegedly developed decubitus ulcers because of substandard care at a hospital, a doctor was qualified to render an expert opinion on the issue of causation because the doctor was board certified in internal medicine and occupational medicine and had 25 years of experience as a medical doctor, including direct experience in treating patients with decubitus ulcers and instructing nurses and other personnel in the proper techniques to prevent decubitus ulcers. Mem'l Hermann Healthcare Sys. v. Burrell, 230 S.W.3d 755, 2007 Tex. App. LEXIS 5015 (Tex. App. Houston 14th Dist. 2007).

1903. Forensic child interviewer was qualified to testify, in defendant's trial for indecency with a minor, as an expert, based on her knowledge, training, and experience, for purposes of Tex. R. Evid. 702; she had worked as an interviewer for six years, interviewed approximately 3,200 children, attended 500 hours of training on child abuse issues, taught classes on child abuse, and she had training and experience in the way a child disclosed abuse and the way of interviewing a child regarding that type of abuse. Wright v. State, 2007 Tex. App. LEXIS 4700 (Tex. App. Fort Worth June 14 2007).

1904. Factors the appellate court must examine to determine a cadaver dog's qualifications and reliability are whether the dog (1) is a breed or type that typically works well off-lead, (2) has been trained to discriminate between human scents and animal scents, and (3) has been found by experience to be reliable; those factors are not exclusive. Trejos v. State, 243 S.W.3d 30, 2007 Tex. App. LEXIS 4045 (Tex. App. Houston 1st Dist. 2007).

1905. Court agreed with the trial court that there was no evidence from a qualified expert, for purposes of Tex. R. Evid. 702, that any breach of the standard of care by the doctor proximately caused the amputation suffered by the patient; the patient submitted the testimony of a physician to support his claim, but the physician was an emergency room physician and his curriculum vitae indicated no specific surgical training, he did not have any experience in treating high pressure injection injuries such as the patient's, and upon deposition cross-examination, the physician was unable to say that the patient would not have required an equal amount of amputation even if he had been immediately referred to a surgeon. Bryan v. Sherick, 279 S.W.3d 731, 2007 Tex. App. LEXIS 3875 (Tex. App. Amarillo 2007).

1906. Evidence was sufficient to support defendant's conviction of criminal mischief in violation of Tex. Penal Code Ann. § 28.03(a)(1) and the amount of pecuniary loss for purposes of Tex. Penal Code Ann. § 28.06(b); the expert was formerly employed as a body shop manager and spent 80 percent of his time writing estimates and had 23 years of experience, and given that the expert estimated, during a recess and without using his software, that the repair cost to the cars at or over $ 2,500, there was sufficient evidence that the loss was more than $ 1,500. Retana v. State, 2007 Tex. App. LEXIS 2796 (Tex. App. El Paso Apr. 12 2007).

1907. In defendant's trial for aggravated sexual assault of a child younger than 14 years of age, in violation of Tex. Penal Code Ann. § 22.021, the record demonstrated that a doctor had extensive training and experience in examining child sexual assault victims and the record did not show that the doctor, who had been suspended after failing a drug test, had been under the influence of any type of drug when he examined the child or when he testified at trial; the record did not support defendant's claim that the doctor's testimony was unreliable. Flores v. State, 2007 Tex. App. LEXIS 2818 (Tex. App. Eastland Apr. 12 2007).

1908. Nurse's testimony demonstrated that she had minimal training and experience in the areas of sexual abuse and the causes of trauma to the hymen, and considering her lack of experience and training, the trial court properly found that the nurse was not qualified to testify as an expert witness in defendant's trial for aggravated sexual assault of a child younger than 14 years of age, in violation of Tex. Penal Code Ann. § 22.021. Flores v. State, 2007 Tex. App. LEXIS 2818 (Tex. App. Eastland Apr. 12 2007).

1909. In a false advertising suit, plaintiff's expert's testimony was properly considered in the summary judgment affidavit because the expert stated in his affidavit that he had been in the utility and service truck body industry for thirty-six years and had owned several companies that were in the business of manufacturing and selling fiberglass truck bodies; the expert further stated that he was the owner and vice president of plaintiff company, and thus, he was qualified by his skill and experience to testify as an expert regarding the quality of the materials the company and other companies used to manufacture utility bodies. Astoria Indus. of Iowa, Inc. v. SNF, Inc., 223 S.W.3d 616, 2007 Tex. App. LEXIS 2512 (Tex. App. Fort Worth 2007).

1910. In a health care liability action asserting a negligent failure to perform prompt and appropriate surgery for glaucoma, an expert who was both a biomedical engineer and a consulting ophthalmologist was qualified under Tex. R. Evid. 702 and Tex. Civ. Prac. & Rem. Code Ann. § 74.401 regarding standards of medical care and causation; hence, the trial court did not err in denying a Tex. Civ. Prac. & Rem. Code Ann. § 74.351 motion to dismiss. Evans v. Arambula, 2007 Tex. App. LEXIS 2117 (Tex. App. San Antonio Mar. 21 2007).

1911. In a medical malpractice case, a mother's expert was not a doctor and did not have medical training, and a qualified expert needed more than a general understanding that the lack of oxygen had the potential to cause brain damage; there was no evidence that the expert had any medical expertise in the subject or how the administrative failures he identified could have contributed to a brain injury such as the one suffered by the mother's child at birth, and the expert's opinion was mere speculation, the expert was not qualified, and the testimony was properly denied. Quiroz v. Covenant Health Sys., 234 S.W.3d 74, 2007 Tex. App. LEXIS 1771 (Tex. App. El Paso 2007).

1912. It is true that a hospital's liability can be independent of a physician's negligence; it does not necessarily follow, however, that an administrative expert without any medical training is qualified to testify that a permanent and debilitating brain injury was foreseeable. Quiroz v. Covenant Health Sys., 234 S.W.3d 74, 2007 Tex. App. LEXIS 1771 (Tex. App. El Paso 2007).

1913. Court did not abuse its discretion by excluding defendant's witness's testimony because the court was within its discretion to conclude that the witness was in fact being called as an expert in accident reconstruction, and although the witness's testimony revealed that he had significant experience investigating traffic accidents, he had no formal training in the field in nearly thirty years. Brown v. State, 2007 Tex. App. LEXIS 1483 (Tex. App. Waco Feb. 21 2007).

1914. Defendant argued that the trial court erred in admitting the testimony of a probation officer, but because defendant failed at first to object to the officer's expertise or lack thereof, the trial court did not have a chance to assess the complaint, and defendant's objections to a question and answer preserved only the asserted complaints of relevance and invading the jury's province, for purposes of Tex. R. App. P. 33, and there was no reason for a late

objection to the officer's lack of expertise; notwithstanding any preservation issues, the record showed no abuse of discretion by the trial court in admitting the officer's testimony under Tex. R. Evid. 702 because the trial court could have found that the officer was qualified, given the officer's experience, to testify on the subject matter. Merito v. State, 2007 Tex. App. LEXIS 827 (Tex. App. Fort Worth Feb. 1 2007).

1915. Defendant objected on the basis of improper predicate and that a legal conclusion was asked for by the State, and although defendant did not use trigger words like "expert," "qualifications," and "relevance," the actual objection was specific enough to make the trial court aware of the complaint under Tex. R. Evid. 702, for purposes of Tex. R. App. P. 33.1(a). McKee v. State, 2007 Tex. App. LEXIS 831 (Tex. App. Fort Worth Feb. 1 2007).

1916. Even though defendant properly made the trial court aware of the complaint, defendant did not provide specific grounds regarding why an officer was unqualified to testify as an expert, such that defendant failed to preserve for review any specific complaint about the officer's testimony regarding whether defendant used a vehicle as a deadly weapon under Tex. Penal Code Ann. § 1.07(a)(17)(B). McKee v. State, 2007 Tex. App. LEXIS 831 (Tex. App. Fort Worth Feb. 1 2007).

1917. In an eminent domain case, a witness qualified as an expert under Tex. R. Evid. 702, given that the witness was a land planner, president of a land planning firm, had 40 years experience in planning, and had dealt with detention and drainage issues as an expert advisor for 15 years; that the witness did not design detention ponds, had not written safety articles, and was not a licensed engineer did not mean the witness was not qualified to testify on safety and drainage issues. City of Sugar Land v. Home & Hearth Sugarland, L.P., 215 S.W.3d 503, 2007 Tex. App. LEXIS 308 (Tex. App. Eastland 2007).

1918. In a medical malpractice action against a cardiothoracic surgeon in which plaintiffs claimed that the surgeon was negligent in failing to provide proper and ordinary care to a patient, in failing to properly administer to the site where he placed a permanent arteriovenous access graft (AV graft) in the patient, and in failing to properly monitor the patient after diagnosis of infection, the trial court did not err by overruling the surgeon's objections to the qualifications of plaintiffs' expert witness, an infectious disease specialist, because the expert was not required to have experience in actually performing the surgical procedure to insert or extricate the graft, as appellees had not made any claims with regard to the surgical procedure itself. McKowen v. Ragston, 263 S.W.3d 157, 2007 Tex. App. LEXIS 245 (Tex. App. Houston 1st Dist. 2007).

1919. As a pathologist, a doctor, who was an expert witness for the State, could reliably base her opinion concerning bone fractures upon her examination, background, studies, and experience with the tensile strength of pediatric bones, particularly ribs, and the amount of force necessary to break a two and a half year old child's ribs; thus, there was no merit to the argument that a forensic pathologist needed to have a sub speciality in merry-go-round accidents or stair falls in order to testify to the pathological consequences of that type of a fall; accordingly, in a termination of parental rights case, the doctor's testimony regarding the deceased daughter's injuries was admissible. In re J.L., 2006 Tex. App. LEXIS 11102 (Tex. App. Corpus Christi Dec. 28 2006), (citation omitted).

1920. Trial court did not err in allowing testimony concerning a dog scent lineup; the officer worked as a canine handler for 12 years and had personal training, the officer taught canine scent trailing techniques and had been contacted by other agencies for education on the subject, the dog assisted 30 agencies in 74 scent lineups and never misidentified anyone, there was not evidence that the dog's abilities were affected by having to receive certain medication, and defendant provided nothing indicating that the objectivity of the lineup was compromised by certain actions and the officer took affirmative steps to administer the scent lineup objectively. Martinez v. State, 2006 Tex. App. LEXIS 10758 (Tex. App. Houston 14th Dist. Dec. 19 2006).

1921. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

1922. Trial court did not err in excluding certain expert testimony because the witness admitted to lacking expertise in the matter about which the expert was to opine and thus the trial court could have inferred that the witness lacked experience and training in the field and was not qualified, or the trial court could have found that the reliability of the witness's experiment was suspect. Stringer v. Red River Commodities, Inc., 2006 Tex. App. LEXIS 10617 (Tex. App. Amarillo Dec. 13 2006).

1923. In a murder trial, the trial court properly found that a doctor was qualified under Tex. R. Evid. 702 to render expert testimony on whether an individual could die from a stab wound in the buttock, as described in the autopsy report and shown in the crime scene photographs, even though he did not have any experience in pathology; his qualifications included experience as a trauma surgeon, responsible for the evaluation, diagnosis, and treatment of acutely injured patients. Bigler v. State, 2006 Tex. App. LEXIS 10490 (Tex. App. Fort Worth Dec. 7 2006).

1924. In a medical malpractice suit, the trial court did not abuse its discretion by concluding that an expert/doctor had knowledge, skill, experience, training, or education in the Burch bladder suspension procedure that would assist the jury; the record did not support the assertion that the expert did not use the Burch method and was not trained in it. Cairus v. Gomez, 2006 Tex. App. LEXIS 10479 (Tex. App. Austin Dec. 6 2006).

1925. Objection based on the qualifications of an expert witness and the foundation for such testimony was not made at trial; therefore, the issue was not preserved for appellate review. Halverson v. Podlewski, 2006 Tex. App. LEXIS 8814 (Tex. App. Waco Oct. 11 2006).

1926. Trial court did not abuse its discretion in determining that experts proffered by plaintiffs to testify about the design of a sport utility vehicle's side impact protection system were qualified to testify on the actual subject on which they offered an opinion where one of the experts, who testified that he had been involved in vehicle design for 57 years, was offered as an expert with knowledge of the consequences to and behavior of vehicles and occupants in crashes, including side impact crashes, and how to design vehicles to minimize the impact to occupants in vehicle crashes, including side impact crashes. GMC v. Burry, 203 S.W.3d 514, 2006 Tex. App. LEXIS 8284 (Tex. App. Fort Worth 2006).

1927. Anesthesiologist's expert report did not show that he was qualified, for purposes of Tex. R. Evid. 702, to express an expert opinion with respect to proximate cause of the injuries alleged, the patient's ischemic stroke; the fact that the anesthesiologist took part in the care of persons like the patient did not impart the necessary qualifications to state that the effect of the cessation of the patient's anticoagulant medication caused the patient's stroke, and the anesthesiologist failed to explain how his knowledge and skill qualified him to state that the cessation of the medication proximately caused the patient's stroke and thus, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 74.351, the expert report was deficient. Leland v. Brandal, 217 S.W.3d 60, 2006 Tex. App. LEXIS 11248 (Tex. App. San Antonio 2006), *aff'd,* 257 S.W.3d 204, 2008 Tex. LEXIS 574 (Tex. 2008).

1928. Inquiry is whether the trial court has any discretion to grant a 30-day extension under Tex. Civ. Prac. & Rem. Code Ann. § 74.351 and the court holds that it does; a patient and his wife submitted a report addressing all statutorily required elements, but it was deficient because the report failed to adequately articulate how the expert was qualified to render an opinion on proximate cause, and as such, the court disagreed with a dentist that the trial

court was without any discretion to allow a 30-day extension. Leland v. Brandal, 217 S.W.3d 60, 2006 Tex. App. LEXIS 11248 (Tex. App. San Antonio 2006), *aff'd,* 257 S.W.3d 204, 2008 Tex. LEXIS 574 (Tex. 2008).

1929. Trial court found that the YSTR methodology had been validated internally and externally and subjected to peer review, that it was generally accepted in the scientific community, and that the YSTR evidence was reliable and relevant; thus, the trial court did not abuse its discretion by determining that the YSTR evidence was reliable and relevant. Curtis v. State, 205 S.W.3d 656, 2006 Tex. App. LEXIS 7790 (Tex. App. Fort Worth 2006).

1930. It was not an abuse of discretion for the trial court to find that a forensic psychiatrist was qualified as an expert in the field of psychiatry and was qualified to testify to the opinions she expressed in a civil commitment case because: (1) the psychiatrist received her bachelor's degree in psychology from the University of Oklahoma; (2) she was a graduate of Emory Medical School; (3) she also completed a one-year internship at Emory Medical School; (4) she completed psychology and psychiatry residency training; (5) after receiving specialized training during her fellowship in forensic psychiatry, she was in private practice; (6) as part of her outpatient practice, she had treated inmates for about eight hours a week for eight years at a county Jail; (7) the psychiatrist had evaluated and treated juveniles, including sex offenders, committed to the Texas Youth Commission and at the state school in Gainesville; (8) at the time of her deposition she still evaluated defendants for the criminal courts in several counties. In re Martinez, 2006 Tex. App. LEXIS 7459 (Tex. App. Beaumont Aug. 24 2006).

1931. Equipment maintenance company's no-evidence motion for summary judgment was properly granted pursuant to Tex. R. Civ. P. 166a on the TrackMobile equipment operator's negligence clam because the operator failed to present the required expert testimony about the proper inspection and maintenance of the TrackMobile and if the company's conduct met that standard of care; expert testimony was required as provided in Tex. R. Evid. 702 because a maintenance company's practices and procedures and industry standards with respect to the inspection and maintenance of a TrackMobile or other rail-car mover engine were not matters within a lay person's general knowledge. Simmons v. Briggs Equip. Trust, 221 S.W.3d 109, 2006 Tex. App. LEXIS 5647 (Tex. App. Houston 1st Dist. 2006).

1932. Appellees' experts were qualified to testify as to the design of an automobile's side impact protection system because one was a previous automobile designer for appellant autmobile manufacturer, had been subsequently investigating accidents for 30 years, and had built and tested airbags; the other expert was an airbag sensor engineer who had previously worked for a company that designed airbags and airbag sensors for automotive companies including appellant. GMC v. Burry, 2006 Tex. App. LEXIS 5736, CCH Prod. Liab. Rep. P17487 (Tex. App. Fort Worth June 29 2006).

1933. In a trial for breach of a warranty on roofing materials, plaintiff's expert was qualified, under Tex. R. Evid. 702, to testify as to the cost of the installation of the foam roof, even if he had never prepared specifications for a new roof or a re-roof or monitored the installation of a foam roof; those qualifications related to installation, not cost. Carlisle Corp. v. Medical City Dallas, Ltd., 196 S.W.3d 855, 2006 Tex. App. LEXIS 5476 (Tex. App. Dallas 2006).

1934. Defendant in a driving while intoxicated case could not complain on appeal about the absence of sufficient evidence concerning the qualifications of an officer as an expert on the horizontal gaze nystagmus test because she waived the issue at a suppression hearing when the trial court, upon the request of the State, took "judicial notice" of the officer's qualifications as an expert witness from a previous suppression hearing. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

1935. Trial court did not abuse its discretion in finding two officers qualified as experts to testify as to the administration and technique of the horizontal gaze nystagmus (HGN) test, even though the record did not make clear that the officers had received practitioner's certificates, because an expert witness did not have to be certified

by the State of Texas before his testimony on the subject of the HGN test was admissible. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

1936. State's witness was qualified to testify as to sex offenders' process of "grooming" because she testified that she worked for the probation department for 15 years and that her job was to keep an eye on people on probation; of those 15 years, she spent five of them as a specialized sex offender caseload supervisor for the trial court, during which she participated in 80 hours of training each year on how to supervise sex offenders and attended sex offender treatment with the sex offenders who were on probation. Davenport v. State, 2006 Tex. App. LEXIS 5166 (Tex. App. Fort Worth June 15 2006).

1937. Where an injured seaman brought suit to recover damages from a maritime company, a life care planner was qualified to testify as an expert witness on actual medical costs; he had thirty years of experience in health care management for people with disabilities and a masters degree in rehabilitation counseling; the expert testified regarding the specific basis and methodology for his opinion. SeaRiver Maritime, Inc. v. Pike, 2006 Tex. App. LEXIS 4905 (Tex. App. Corpus Christi June 8 2006).

1938. In a medical malpractice action, the trial court did not err in admitting testimony from the deceased patient's expert witnesses because the experts were all highly qualified and had extensive experience in their respective fields, and they based their opinions on the objective data contained in the medical records of the deceased patient as required under Tex. R. Evid. 702; the doctors did not challenge the experts' qualifications; rather the doctors' claims of unreliability went to the weight to be given the expert testimony, not its reliability. Brandt v. Surber, 194 S.W.3d 108, 2006 Tex. App. LEXIS 4962 (Tex. App. Corpus Christi 2006).

1939. In an aggravated sexual assault case, pursuant to Tex. R. Evid. 702, the State failed to introduce sufficient evidence to establish that the nurse was an expert qualified to testify regarding the effects of HIV; while her job as a nurse almost certainly required some knowledge of HIV, there was nothing in the record establishing that the nurse was qualified as an expert by her knowledge, skill, experience, training, or education on the effects of HIV. Calvo v. State, 2006 Tex. App. LEXIS 3817 (Tex. App. Fort Worth May 4 2006).

1940. At a hearing, outside the presence of the jury, a doctor testified that he based his opinion on his practice in emergency medicine and what he saw in the emergency room while treating the victim, a 16-month old child; defendant contended that the doctor was not qualified to testify on what someone believed would happen if they saw an assault; however, the training, experience, research, seminars, and periodicals about which the doctor testified and upon which he based his medical opinion qualified him to testify as an expert witness; thus, the trial court did not abuse its discretion by allowing the doctor to testify as an expert witness. Montgomery v. State, 198 S.W.3d 67, 2006 Tex. App. LEXIS 3377 (Tex. App. Fort Worth 2006).

1941. Trial court erred in awarding damages to the surface right property owner due to the oil company's operations on the land because the property owner's expert's qualification and experience as an engineer in the oil and gas industry did not qualify him to testify regarding the value of timber removed by the oil company as required by Tex. R. Evid. 702; therefore, the expert's testimony as to valuation and the amount of damages owed by the oil company had no probative worth. Even if the expert were qualified, his testimony was flawed because it was based on the advice of a forester and an accountant, which was not shown to comply with applicable professional standards, and the expert made assumptions about the amount of land cleared by the oil company, which did not constitute a sufficient basis for his opinion as provided in Tex. R. Evid. 705(c). Classic Oil & Gas, Inc. v. Cook, 2006 Tex. App. LEXIS 2936 (Tex. App. Tyler Apr. 12 2006).

1942. Trial court erred in awarding damages to the surface right property owner due to the oil company's operations on the land because the property owner's expert's qualification and experience as an engineer in the oil

and gas industry did not qualify him to testify regarding the value of timber removed by the oil company as required by Tex. R. Evid. 702; therefore, the expert's testimony as to valuation and the amount of damages owed by the oil company had no probative worth. Classic Oil & Gas, Inc. v. Cook, 2006 Tex. App. LEXIS 2936 (Tex. App. Tyler Apr. 12 2006).

1943. Expert report submitted by a patient in his medical malpractice action arising out of a surgery that he claimed was performed on the wrong party of his body did not comply with Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) where the patient had failed to establish that his expert was qualified to testify regarding the standard of care applicable to the condition involved in the underlying claim because: (1) information regarding the expert's peer review committee and director positions did not provide sufficient detail from which it could be determined that his experience on the committee and as a director was relevant to the standard of care applicable to hospital personnel in a surgical setting; (2) the expert's general reference to a three year internship/residency in surgery was not sufficient to establish that he had sufficient training and experience with regard to the procedures hospital personnel were required to follow during a surgical procedure eight years after his internship/residency ended; and (3) the patient had failed to show that the preoperative procedures hospital personnel were required to follow in a surgical setting were substantially developed in the expert's field of emergency room medicine; expert testimony was required because the nature of the patient's medical procedure and whether it resulted in the wrong part of the body being operated on were not within the common knowledge of a layperson, and, even under the doctrine of res ipsa loquitur, the patient was required to establish that the expert was qualified to testify regarding causation. Methodist Health Care Sys. of San Antonio, Ltd. v. Rangel, 2005 Tex. App. LEXIS 10858 (Tex. App. San Antonio Dec. 14 2005).

1944. Trial court did not err in precluding defendant's proffered expert witness testimony when the expert did not demonstrate familiarity with the facts of the case, and the expert's field of expertise in the subject of memories of eyewitnesses, who provide an identification, was called into question. Sturgeon v. State, 2005 Tex. App. LEXIS 10904 (Tex. App. Houston 14th Dist. Aug. 23 2005).

1945. Trial court properly admitted expert testimony from a board-certified pediatrician under Tex. R. Evid. 702, although he was not a neurologist, as to the specific causes and effects of the child's injuries, based on his experience and study of pediatric neurological injuries. Roberts v. Williamson, 111 S.W.3d 113, 2003 Tex. LEXIS 110, 46 Tex. Sup. Ct. J. 944 (Tex. 2003).

Evidence : Testimony : Experts : Ultimate Issue

1946. Trial court did not err by allowing a forensic interviewer to bolster the victim's testimony because the interviewer essentially opined that the child victim did not exhibit signs of manipulation or coaching. Vasquez v. State, 2012 Tex. App. LEXIS 6403, 2012 WL 3125171 (Tex. App. Dallas Aug. 2 2012).

1947. Detective's testimony was improperly admitted because it decided the ultimate fact for the jury; whether the undisputed fact that defendant broke into the house and killed the victim constituted capital murder, and it was not designed to enable the jurors to better comprehend the full significance of the evidence. However, the error was harmless because entering a building or habitation without the effective consent of the owner and killing a person therein constituted capital murder because it was murder in the course of committing burglary. Jones v. State, 2009 Tex. App. LEXIS 8122, 2009 WL 3366559 (Tex. App. Dallas Oct. 21 2009).

1948. Nothing in the testimony was a comment on a doctor's opinion about the truth of the child victim's account of the aggravated sexual assault; the doctor testified that her findings were consistent with the history the victim reported, the doctor's testimony never suggested that the jury was to deduce that defendant was the individual who committed the act, and the doctor was permitted to testify that the findings of the victim's examination were consistent with the male sexual organ and penis entering the vagina. Thus, for purposes of Tex. R. Evid. 702, the

doctor's testimony did not amount to improper bolstering. Shell v. State, 2009 Tex. App. LEXIS 3384 (Tex. App. Austin May 15 2009).

1949. Court properly excluded expert testimony because the jury was equally competent to form an opinion about the ultimate fact issues, namely the voluntariness of defendant's statement. Because the expert's testimony impermissibly offered a direct opinion as to the truthfulness of defendant's statement, the court properly excluded it. Contreras v. State, 2009 Tex. App. LEXIS 91, 2009 WL 50601 (Tex. App. El Paso Jan. 8 2009).

1950. In defendant's indecency with a child case, the trial court properly excluded the testimony of his expert witness who was going to testify as to the reliability of child-victim testimony because, when the State asked the expert what he intended to state as his ultimate opinion, he answered "at this stage of the outcry it will be very difficult for jurors to evaluate credibility or reliability because there have been too many times this child has been interviewed." The expert's testimony directly addressed the victim's credibility and truthfulness. Pinales v. State, 2009 Tex. App. LEXIS 32, 2009 WL 26886 (Tex. App. Dallas Jan. 6 2009).

Evidence : Testimony : Lay Witnesses : General Overview

1951. After the investigating detective testified that defendant had worked at his relationship with the victim in a process called grooming, defendant agreed that he was grooming the victim; even if the trial court abused its discretion in admitting this evidence under Tex. R. Evid. 701, 702, the admission of the evidence did not affect defendant's substantial rights in view of his acknowledgment that he was grooming the victim. Worthy v. State, 295 S.W.3d 685, 2009 Tex. App. LEXIS 3672 (Tex. App. Eastland May 28 2009).

1952. In defendant's driving while intoxicated case, the court properly allowed the arresting officer to testify regarding defendant's performance on the walk-and-turn and one-legged stand sobriety tests because the tests were grounded in the common knowledge that excessive alcohol consumption could cause problems with coordination, balance, and mental agility. Plouff v. State, 192 S.W.3d 213, 2006 Tex. App. LEXIS 2546 (Tex. App. Houston 14th Dist. 2006).

1953. In defendant's theft case, a court properly allowed the testimony of a fraud examiner who had not been disclosed to appellant prior to trial because the witness testified to the summaries of information that the trial court had admitted, the summaries were of bank and credit card records admitted into evidence, the witness did not offer opinion testimony on the source of the money or the responsible party, and therefore, the witness testified as a lay witness and his testimony did not exceed the limits placed on the testimony of lay witnesses. Reuter v. State, 2006 Tex. App. LEXIS 1314 (Tex. App. Houston 1st Dist. Feb. 16 2006).

1954. In a dispute between insureds under a homeowners policy and their insurer concerning mold in the insureds' home, the insureds' claims failed on summary judgment because the insureds did not timely designate any expert to testify as to causation and lay testimony was insufficient. While the general causal relationship between water and mold might have been common knowledge, the causation issue in the instant case was not within the general experience and common sense of a lay person. Qualls v. State Farm Lloyds, 226 F.R.D. 551, 2005 U.S. Dist. LEXIS 5049 (N.D. Tex. 2005).

1955. Where there was no indication in an officer's sworn report that his opinion of a driver's intoxication was based on his training and experience, his qualifications did not have to be established under Tex. R. Evid. 702; further, the walk-and-turn and one-leg stand tests were not based on a novel scientific theory and, under Tex. R. Evid. 701, a police officer was not required to be an expert to express an opinion as to whether the person he observed was intoxicated. Tex. Dep't of Pub. Safety v. Struve, 79 S.W.3d 796, 2002 Tex. App. LEXIS 4433 (Tex. App. Corpus Christi 2002).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview

1956. Trial court did not abuse its discretion by admitting the testimony of the victim's primary case physician as a lay witness, and therefore he did not have to be qualified as an expert to render an opinion about whether the victim was disabled, because the physician's testimony was based on his perception of the victim and his opinion was helpful to the jury in determining the factual issue of the victim's status as a disabled individual and did not require significant expertise to interpret. Edwards v. State, 2014 Tex. App. LEXIS 5677 (Tex. App. Austin May 29 2014).

1957. Employees of a business purchaser who testified in a trial against the owner of the sold business regarding allegedly improper financial conduct by the owner were fact witnesses pursuant to Tex. R. Evid. 701 rather than expert witnesses under Tex. R. Evid. 702, such that documents which the employees referred to were not subject to exclusion under Tex. R. Civ. P. 193.6(a) for not being disclosed in a timely manner pursuant to Tex. R. Civ. P. 194, as such disclosure only applied to expert witnesses.

1958. Trial court did not abuse its discretion by denying defendant's motion for a Tex. R. Evid. 705 hearing concerning a special agent's testimony because the trial court properly admitted the agent's testimony under Tex. R. Evid. 701; the State presented the agent as a lay witness to testify about the pimp subculture and to address the issue of cause, as placed into issue by defendant's cross-examination of the complainant; the questions contemplated drew directly from the agent's personal experience and familiarity with the pimping subculture, including its terms, many of which the complainant had used in her testimony, which the agent gained from interviewing both pimps and prostitutes; questioning the agent about what he learned from his experience assisted the fact-finder in determining a fact in issue, specifically defendant's utilizing the complainant as a prostitute for his personal profit; because Tex. R. Evid. 702 did not apply, the trial court did not err by overruling defendant's objections to the relevancy of the agent's testimony on the ground that the State did not establish how his opinion fit the facts of the case as required by Tex. R. Evid. 702. Richardson v. State, 2007 Tex. App. LEXIS 4281 (Tex. App. Houston 1st Dist. May 31 2007).

1959. Psychologist, who testified during defendant's trial for aggravated sexual assault on a child, testified as a lay witness because the psychologist's opinions were rationally based on the perception of the witness; a reasonable person could have the opinions expressed by spending a significant amount of time around children, and the psychologist's opinion was not based on scientific theory, but it was helpful and did not require significant expertise to interpret. Scott v. State, 222 S.W.3d 820, 2007 Tex. App. LEXIS 2848 (Tex. App. Houston 14th Dist. 2007).

1960. In a trial for driving while intoxicated, walk-and-turn and one-leg tests were properly admitted, despite testimony that they were improperly performed. Testimony by the arresting officer concerning both tests was lay witness testimony governed by Tex. R. Evid 701 rather than Tex. R. Evid 702. Plouff v. State, 2005 Tex. App. LEXIS 8546 (Tex. App. Houston 14th Dist. Oct. 18 2005), substituted opinion at, opinion withdrawn by 192 S.W.3d 213, 2006 Tex. App. LEXIS 2546 (Tex. App. Houston 14th Dist. 2006).

1961. Defendant waived appellate review regarding an officer's testimony on the psychological and physiological effects of ecstasy, cocaine, and marijuana because at trial he objected on confrontation grounds, not on the basis put forward on appeal, that the State failed to establish the admissibility of the complained-of testimony pursuant to Tex. R. Evid. 701, 702, or 703. Nelson v. State, 2005 Tex. App. LEXIS 6710 (Tex. App. El Paso Aug. 18 2005).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions

1962. In defendant's drug case, the trial court did not err in allowing a witness to testify as to what tanks were used for because the witness had worked for the business for 16 years at the time of the trial, and the witness testified

that the tanks were used to store and move fertilizer and anhydrous ammonia. That was not scientific, technical, or specialized knowledge that was being offered to assist the trier of fact. Meier v. State, 2009 Tex. App. LEXIS 8078, 2009 WL 3335282 (Tex. App. Amarillo Oct. 16 2009).

1963. In a trial for child sexual assault, a licensed clinical psychologist was properly allowed to testify as a lay witness where her name was not on the expert list, despite defendant's argument that the psychologist testified in an expert manner under Tex. R. Evid. 702; the testimony that children did not talk about things that troubled them unless they felt safe was that of a lay witness because it satisfied the requirements of Tex. R. Evid. 701 in part because the opinion was not based on a scientific theory and did not require significant expertise to interpret. Scott v. State, 2007 Tex. App. LEXIS 473 (Tex. App. Houston 14th Dist. Jan. 25 2007).

Evidence : Testimony : Lay Witnesses : Personal Knowledge

1964. Trial court did not err by admitting the testimony of the nurse that drew defendant's blood because she testified concerning the procedure she normally used for drawing blood and that her signature was on defendant's tube, she was not asked for specific opinions based on scientific, technical, or other specialized knowledge, and her testimony was relevant. Halbirt v. State, 2013 Tex. App. LEXIS 12823, 2013 WL 5658371 (Tex. App. Beaumont Oct. 16 2013).

1965. In condemnation proceedings, an affidavit of the vice president of the corporate general partner of a limited partnership was properly excluded under Tex. R. Evid. 701 regarding the valuation of the property to be take for a water line easement because his opinion was based on his expertise rather than his personal familiarity with the property and he was not timely disclosed as an expert. Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd., 337 S.W.3d 846, 2011 Tex. LEXIS 190, 54 Tex. Sup. Ct. J. 658 (Tex. 2011).

1966. Deputy's testimony that the presence and degree of lividity indicated death had occurred over an hour before he first observed the victim's body was admissible under Tex. R. Evid. 701 because it was based on first-hand knowledge and under Tex. R. Evid. 702 based on his training and experience, which included his 11 years as a crime-scene investigator, during which he had amassed extensive training and experience; the classes conducted by physicians in the county medical examiner's office in which instruction was provided on the approximate times for lividity and rigor mortis to set in on a corpse; medical conferences he attended regularly in which information was provided on lividity as a beginning stage of decomposition; and the fact that he had seen hundreds of homicide victims. Thompson v. State, 2011 Tex. App. LEXIS 1633, 2011 WL 782051 (Tex. App. Houston 14th Dist. Mar. 8 2011).

1967. In an action for breach of contract arising from an agreement to finance and develop a casino, Tex. R. Evid. 702 permitted the financial representative for the developer to testify as to damages; the fact that he could not have personal knowledge concerning the admitted, actual revenues of the finance company did not prevent him from using the company's financial data as a basis for determining the developer's lost profits. Am. Heritage, Inc. v. Nev. Gold & Casino, Inc., 259 S.W.3d 816, 2008 Tex. App. LEXIS 942 (Tex. App. Houston 1st Dist. 2008).

1968. In a trial for driving while intoxicated, an officer was properly allowed to testify as to the administration of a one-leg stand test because the evidence related to nonscientific evidence and was admissible as lay opinion under Tex. R. Evid. 701; the testimony was not subject to the criteria of Tex. R. Evid. 702. Taylor v. State, 2006 Tex. App. LEXIS 5148 (Tex. App. Austin June 16 2006).

Evidence : Testimony : Lay Witnesses : Ultimate Issue

1969. Although the court erred by allowing an expert to testify that a sexual assault occurred, the error was harmless where the child victim told her caregivers and the jury that defendant put his "private" in her "private" on numerous occasions. The victim also provided detailed descriptions of the sexual abuse in age-appropriate language. Smith v. State, 2005 Tex. App. LEXIS 4203 (Tex. App. El Paso May 31 2005).

Family Law : Child Custody : Awards : Standards : Best Interests of Child

1970. In a child custody case, the child's licensed professional counselor was properly permitted to testify as an expert regarding what would be in the child's best interest. The court declined to rely on administrative rules against conflicting roles as a basis for the inadmissibility of the testimony. In the Interest of S.A.H., 420 S.W.3d 911, 2014 Tex. App. LEXIS 887, 2014 WL 294547 (Tex. App. Houston 14th Dist. Jan. 28 2014).

1971. In a child custody case, the child's licensed professional counselor was properly permitted to testify as an expert regarding what would be in the child's best interest. The court declined to rely on administrative rules against conflicting roles as a basis for the inadmissibility of the testimony. In the Interest of S.A.H., 420 S.W.3d 911, 2014 Tex. App. LEXIS 887, 2014 WL 294547 (Tex. App. Houston 14th Dist. Jan. 28 2014).

Family Law : Child Custody : Visitation : Awards : Third Parties : Grandparents

1972. Paternal grandmother testified that she was present at the birth of the children, that she had provided assistance to the children, and that the children enjoyed visiting with her and her other children, in addition to her extended family, but that evidence did not address the primary issue in a Tex. Fam. Code Ann. § 153.433 case, that eliminating contact with the grandmother would significantly impair the children's physical health or emotional well-being; furthermore, the testimony of a school district counselor, who had not been trained as a counselor for children in family situations, did not have professional experience dealing with child-grandparent relationships, and had never treated or even seen any of the children involved in the litigation in a clinical setting, did not qualify as expert witness testimony under Tex. R. Evid. 702 and her opinion constituted nothing more than lay personal opinion. The mere opinion of the grandmother and an interested, nonexpert witness that the grandmother should be granted access to the children did not overcome the statutory presumption in Tex. Fam. Code Ann. § 153.433(2) that the mother acted in the best interest of the children. In the Interest of M.K.S., 2010 Tex. App. LEXIS 9138, 2010 WL 4644496 (Tex. App. Amarillo Nov. 17 2010).

Family Law : Guardians : General Overview

1973. In a dispute over conservatorship of a child after termination of parental rights, the trial court did not err in ruling under Tex. R. Evid. 702 that a social worker, who was certified and had significant experience, was qualified to conduct a Tex. Fam. Code Ann. § 107.051 social study of the grandmother's home and to testify in support of her conclusions. Taylor v. Texas Dept of Protective & Regulatory Servs., 2005 Tex. App. LEXIS 1967 (Mar. 10, 2005).

Family Law : Marital Termination & Spousal Support : Dissolution & Divorce : Property Distribution

1974. In a divorce proceeding, the trial court did not abuse its discretion in allowing an expert witness to testify regarding the net asset value of a business run by appellant former husband during the marriage because the expert had been a certified public accountant for twenty-five years and had experience using the net asset value method for valuing businesses. Mora v. Mora, 2012 Tex. App. LEXIS 3831, 2012 WL 1721540 (Tex. App. San Antonio May 16 2012).

Family Law : Parental Duties & Rights : Termination of Rights : General Overview

1975. Error in admitting expert testimony regarding the results of parents' drug tests in a proceeding to terminate their parental rights probably caused the rendition of an improper judgment under Tex. R. App. P. 44.1 because the expert did not have expertise concerning the actual subject about which he offered his expert opinion, and because the results of the tests were not shown to be reliable under Tex. R. Evid. 702. The expert's "opinion" that the samples tested positive for cocaine was beyond the scope of his expertise and based entirely on a written report he received from a laboratory, and even though the scientific theory of testing hair samples for illegal drugs using immunoassay and gas chromatography mass spectrometry or gas chromatography mass spectrometry mass spectrometry might be reliable, there was no showing of the reliable application of that theory in the case because the expert merely speculated that the lab had to have followed protocol or it would have lost its license. In re S.E.W., 168 S.W.3d 875, 2005 Tex. App. LEXIS 3809 (Tex. App. Dallas 2005).

1976. In a proceeding to terminate parental rights, a caseworker was properly permitted to testify as a fact witness. Contrary to the father's assertion that she expressed the "collective opinion" of the agency, she did not voice an opinion, when asked, about what was in the best interest of the children. Rogers v. Dep't of Family & Protective Servs., 175 S.W.3d 370, 2005 Tex. App. LEXIS 1327 (Tex. App. Houston 1st Dist. 2005).

1977. Admission of expert testimony by a play therapist was proper under Tex. R. Evid. 702 and Tex. R. Evid. 703, as the trial court held a Daubert hearing and pursuant to the assessment of factors to assess reliability under Nenno, it was found that such was a legitimate field of expertise and the testimony itself was sufficiently reliable; the expert's testimony was based on her therapy and counseling sessions with a child, wherein he had indicated that his mother was abusive to him and his sister, and was admissible in the mother's parental rights termination proceeding. In re A.J.L., 136 S.W.3d 293, 2004 Tex. App. LEXIS 3825 (Tex. App. Fort Worth 2004).

1978. Court declined to hold that expert medical testimony was mandatory in a suit seeking to terminate parental rights under Tex. Fam. Code Ann. § 161.001(1)(D) or (E); mother's rights were properly terminated without expert testimony, based in part on her boyfriend's abuse of the child. In re K.W., 138 S.W.3d 420, 2004 Tex. App. LEXIS 3467 (Tex. App. Fort Worth 2004).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview

1979. As a pathologist, a doctor, who was an expert witness for the State, could reliably base her opinion concerning bone fractures upon her examination, background, studies, and experience with the tensile strength of pediatric bones, particularly ribs, and the amount of force necessary to break a two and a half year old child's ribs; thus, there was no merit to the argument that a forensic pathologist needed to have a sub speciality in merry-go-round accidents or stair falls in order to testify to the pathological consequences of that type of a fall; accordingly, in a termination of parental rights case, the doctor's testimony regarding the deceased daughter's injuries was admissible. In re J.L., 2006 Tex. App. LEXIS 11102 (Tex. App. Corpus Christi Dec. 28 2006), (citation omitted).

Governments : Local Governments : Elections

1980. In an election contest under Tex. Elec. Code Ann. § 221.003(a), a trial court was not required to accept the opinion of an expert concerning the unreliability of electronic voting devices where he admitted that he had not examined or tested any machines used in the county; his conclusions were unsupported by any analysis or reasoning, and a county elections administrator testified to the contrary by pointing to the fact that signature rosters almost perfectly matched the number of paper votes. The trial court found that the election day count was valid; even if a court-supervised recount was accurate, the benefit to the incumbent was insufficient to affect the outcome of the election. Flores v. Cuellar, 269 S.W.3d 657, 2008 Tex. App. LEXIS 6610 (Tex. App. San Antonio 2008).

Governments : State & Territorial Governments : Licenses

1981. Although an engineering expert was not licensed in Texas, his testimony was admissible under Tex. Occ. Code Ann. §§ 1001.003(c)(1), 1001.004(e)(2) and Tex. R. Evid. 702 in a products liability case. Tidwell v. Terex Corp., 2012 Tex. App. LEXIS 7724 (Tex. App. Houston 1st Dist. Aug. 30 2012).

Healthcare Law : Actions Against Facilities : Standards of Care : Expert Testimony

1982. In a medical malpractice case, read as a whole, the patient's expert's report and curriculum vitae established his qualifications to offer opinions on the standard of care relevant to defendant's decision to proceed to surgery, but they did not establish his qualifications to offer opinions on the standard of care relevant to defendant's care and treatment of the patient during and after the surgery. Nothing within the report's four corners disclosed or described the expert's training or experience performing, observing, or teaching other physicians about the surgical removal of an ovary and the patient's postoperative care. Cortez v. Tomas, 2012 Tex. App. LEXIS 1092, 2012 WL 407382 (Tex. App. Fort Worth Feb. 9 2012).

1983. In a medical malpractice case, the court erred in granting the doctor's motion to dismiss on the basis that the expert was not a qualifying "expert" because he tied his education and training not only to his knowledge of anesthesia care during a cardiac procedure, but also to the medical and health standards of care for general surgeons like the doctor. Additionally, the padding and positioning of a patient during surgery was common to surgeries generally, and the expert made clear that he had knowledge, training, and experience regarding the medical and surgical management duties of the general surgeon during surgical procedures. Barber v. Mercer, 303 S.W.3d 786, 2009 Tex. App. LEXIS 8621 (Tex. App. Fort Worth Oct. 15 2009).

1984. Expert's report was inadequate because, besides summarily asserting "knowledge," the expert's report and curriculum vitae did not demonstrate how he gained the requisite experience or training to satisfy the requirement that he had substantial training or experience in total knee replacement surgery and the post-operative care of such a procedure. Carreras, M.D. v. Trevino, 298 S.W.3d 721, 2009 Tex. App. LEXIS 6644 (Tex. App. Corpus Christi Aug. 25 2009).

Healthcare Law : Actions Against Healthcare Workers : Doctors & Physicians

1985. Trial court properly admitted expert testimony from a board-certified pediatrician under Tex. R. Evid. 702, although he was not a neurologist, as to the specific causes and effects of the child's injuries, based on his experience and study of pediatric neurological injuries. Roberts v. Williamson, 111 S.W.3d 113, 2003 Tex. LEXIS 110, 46 Tex. Sup. Ct. J. 944 (Tex. 2003).

Healthcare Law : Actions Against Healthcare Workers : Surgeons

1986. Expert report submitted in a medical malpractice claim arising out of an otolaryngologist's allegedly puncturing a patient's nostril with a hard plastic vacuum tool represented an objective good-faith effort as required by Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6) given that the expert set forth the standard of care applicable to an otolaryngologist, how it was breached during post-operative care following sinus surgery, and causation. Jassin v. Bennett, 2012 Tex. App. LEXIS 9854 (Tex. App. Waco Nov. 29 2012).

Healthcare Law : Treatment : Failures to Disclose & Warn : Prescription Medications

1987. In a negligent prescription case, plaintiff's expert did not adequately demonstrate qualifications, as required by Tex. Civ. Prac. & Rem. Code Ann. § 74.401 and Tex. R. Evid. 702 to submit an expert report on causation. While the doctor's curriculum vitae did establish a background in pharmaceutical matters, the report did not indicate any specific knowledge, experience, education, or training in assessing the causal relationship between the

prolonged use of the prescribed drug and the patient's condition. Collini v. Pustejovsky, 280 S.W.3d 456, 2009 Tex. App. LEXIS 1071 (Tex. App. Fort Worth Feb. 12 2009).

Healthcare Law : Treatment : Incompetent, Minor & Mentally Disabled Patients : General Overview

1988. Licensed professional counselor was qualified to render a diagnosis that the victim suffered posttraumatic stress disorder (PTSD) as a result of the abuse because she was authorized to diagnose mental and emotional disorders under Tex. Occ. Code Ann. § 503.003(a)(2)-(4)and PTSD was a recognized mental disorder. Melder v. State, 2014 Tex. App. LEXIS 5130 (Tex. App. Tyler May 14 2014).

Legal Ethics : Client Relations : General Overview

1989. Trial court abused its discretion by admitting an attorney's expert testimony that a lawyer who violated the disciplinary rules necessarily violated a fiduciary duty because that testimony was unreliable, as it contravened Texas law. The error was not harmless because it probably caused the rendition of an improper judgment, given the closing arguments and the jury's questions to the trial court. Fleming v. Kinney, 2013 Tex. App. LEXIS 1986 (Tex. App. Houston 14th Dist. Feb. 28 2013).

1990. Trial court acted within its discretion in concluding that an attorney was qualified to testify as an expert with respect to compliance with the fiduciary duties that attorneys owe to clients in the context of charging litigation expenses as part of an aggregate settlement because: (1) she had a J.D. from a Texas university; (2) she had been licensed to practice law in Texas since 1989; (3) in private practice she worked on mass action litigation; (4) she had served since 2001 as a member of the committee of the State Bar of Texas that drafted and revised proposed language for the Texas Disciplinary Rules of Professional Conduct; and (5) in 2003 she began working as a consultant with a focus on attorney and judicial ethics. Fleming v. Kinney, 2013 Tex. App. LEXIS 1986 (Tex. App. Houston 14th Dist. Feb. 28 2013).

Public Health & Welfare Law : Healthcare : Mental Health Services : Commitment : Involuntary Commitment of Adults

1991. It was not an abuse of discretion for the trial court to find that a forensic psychiatrist was qualified as an expert in the field of psychiatry and was qualified to testify to the opinions she expressed in a civil commitment case because: (1) the psychiatrist received her bachelor's degree in psychology from the University of Oklahoma; (2) she was a graduate of Emory Medical School; (3) she also completed a one-year internship at Emory Medical School; (4) she completed psychology and psychiatry residency training; (5) after receiving specialized training during her fellowship in forensic psychiatry, she was in private practice; (6) as part of her outpatient practice, she had treated inmates for about eight hours a week for eight years at a county Jail; (7) the psychiatrist had evaluated and treated juveniles, including sex offenders, committed to the Texas Youth Commission and at the state school in Gainesville; (8) at the time of her deposition she still evaluated defendants for the criminal courts in several counties. In re Martinez, 2006 Tex. App. LEXIS 7459 (Tex. App. Beaumont Aug. 24 2006).

Real Property Law : Eminent Domain Proceedings : Procedure

1992. In an eminent domain proceeding in which a land planner designated as an expert by the owner testified that the owner could not achieve full compliance with the town's zoning ordinances after the State's condemnation and that the owner would be required to demolish all of its buildings, the trial court abused its discretion by admitting the land planner's opinion about the allegedly required demolition of the owner's buildings because his opinion was impermissibly speculative and conjectural. Reversal was required because there was a reasonable probability that the inadmissible evidence that characterized the demolition of the owner's buildings as a certainty, rather than a

market-affecting factor, improperly influenced the jury's verdict on remainder damages. State v. Little Elm Plaza, Ltd., 2012 Tex. App. LEXIS 8880 (Tex. App. Fort Worth Oct. 25 2012).

Real Property Law : Eminent Domain Proceedings : Valuation

1993. Trial court did not err in allowing the State's appraisal expert to testify at trial that the condemned property most likely would not be developed for eight years while it was undergoing environmental remediation as the market survey results that the expert conducted supported his conclusion that the property most likely would not be developed until regulatory closure or a letter of no further action was obtained.

1994. In an eminent domain proceeding, because appellant's contention that the State's appraisal expert's opinion under the comparable sales method was tainted by speculation and improper assumptions and appellant's argument that the expert's opinions were unreliable and thus inadmissible were rejeted, the trial court did not abuse its discretion by admitting the expert's appraisal opinions.

1995. Appellant's argument that there was no support for the State's appraisal expert's use of a discount rate in appraising property was rejected because appellant cited no authority for its contention that a discount rate analysis was an improper methodology in condemnation practice; and the expert testified that performing a discounted cash flow analysis to determine the environmentally impaired property value was supported by Appraisal Institute literature.

1996. Expert testimony utilizing the sales comparison approach was improperly admitted as to the fair market value of property consisting of a lease for a small parcel of land and a billboard structure with a sign permit because the expert testified that buyers and sellers used valuation approaches based on advertising revenue; revenues from billboard advertising cannot be used as the basis for determining the fair market value of property taken in a condemnation proceeding. State v. Moore Outdoor Props., L.P., 416 S.W.3d 237, 2013 Tex. App. LEXIS 13907, 2013 WL 6002035 (Tex. App. El Paso Nov. 13 2013).

1997. Trial court did not err in a condemnation case in which the jury found the fair value of the property owner's land to be $250,000 in admitting the testimony of the State's expert appraiser where there were no gaps in the testimony of the appraiser or misapplication of legal rules such that her testimony could have been found to have been unreliable because the appraiser had formed her opinion by comparing the difference between the results of two methods of valuing the property: the cost approach, giving a value of $217,000, and the improved sales comparison approach that gave a value of $205,000. The property owner had not shown that the appraiser could not make valid comparisons for size, and the evidence permitted the conclusion that the owner's entire property was devoted to single-family use and that the applicable zoning ordinance would have allowed the existing use to continue. Williams v. State, 406 S.W.3d 273, 2013 Tex. App. LEXIS 7405 (Tex. App. San Antonio June 19 2013).

1998. In a condemnation proceeding in which plaintiff county acquired a portion of commercial property used for a car wash in order to widen a county roadway, the trial court did not abuse its discretion in excluding the county's appraisal expert because the expert's bald assurance that he used a widely accepted appraisal method was insufficient to establish reliability. His report, as well as the underlying data and methodology, did not reflect application of an accepted appraisal method to arrive at the fair market value of the remainder after the taking where he simply took the market value of the whole and assumed--without any basis--that a willing buyer and willing seller would agree to reduce the market value by one-fifth after the taking. Dallas County v. Crestview Corners Car Wash, 370 S.W.3d 25, 2012 Tex. App. LEXIS 1269 (Tex. App. Dallas Feb. 16 2012).

1999. Expert testimony valuing property on which a large natural gas processing plant had been built as vacant rural residential property was irrelevant under Tex. R. Evid. 401 and was unreliable under Tex. R. Evid. 702

because the expert failed to explain why the existing use of the property would not be presumed as the highest and best use, did not offer fair market value of the land based on its condition at the time of the condemnation, and did not account for all relevant factors affecting valuation. Enbridge Pipeline (east Texas) L.P. v. Avinger Timber, L.L.C., 326 S.W.3d 390, 2010 Tex. App. LEXIS 8629, 172 Oil & Gas Rep. 722 (Tex. App. Texarkana Oct. 27 2010).

2000. In a condemnation proceeding, admission of appellee's expert testimony regarding temporary damages was not an abuse of discretion. Appellant State's analysis that a hotel needed only 75 percent of the total parking spaces was overly simplistic, as the hotel had on average 75 percent occupancy; according to the expert, on certain nights, the hotel might have 100 percent occupancy. State v. Bristol Hotel Asset Co., 293 S.W.3d 211, 2007 Tex. App. LEXIS 5565 (Tex. App. San Antonio 2007).

2001. In a condemnation proceeding as to hotel property, admission of appellee's expert testimony regarding permanent damages was not an abuse of discretion. According to appellant State, a civil engineer disputed the expert's testimony, testifying that reconfigured driveways were not safety concerns, and, as such, the State argued that there was no support for the expert's conclusion that the property diminished five percent; however, in reviewing the record, the court concluded that the engineer did not dispute the expert's assertion that the new drive would create a safety issue that did not exist before condemnation. State v. Bristol Hotel Asset Co., 293 S.W.3d 211, 2007 Tex. App. LEXIS 5565 (Tex. App. San Antonio 2007).

2002. Court did not err in admitting a utility company's expert testimony as to the market value of the condemned property in which he did not factor in the improvements that were over 4000 feet from the power lines in assessing damages because, inter alia, the landowners' own expert relied upon several articles that specifically stated the negative impact of power lines to a property diminished with increased distance and disappeared beyond 500 feet. Utley v. LCRA Transmission Servs. Corp., 2006 Tex. App. LEXIS 9129 (Tex. App. San Antonio Oct. 25 2006).

Real Property Law : Homestead Exemptions

2003. In a dispute involving a homestead exemption, experts were properly allowed to testify about the establishment, assertion, and abandonment of homestead protections in Texas, and there was no misstatements of the law made regarding homesteads. Wilcox v. Marriott, 230 S.W.3d 266, 2007 Tex. App. LEXIS 5440 (Tex. App. Beaumont 2007).

Real Property Law : Inverse Condemnation : Procedure

2004. Trial court did not abuse its discretion in an inverse condemnation proceeding by allowing testimony from a billboard owner's expert regarding the income method of valuation for the billboards at issue because the income method was not an impermissible method of valuation, and the expert's income method was not improperly based on advertising revenue. Because the trial court did not abuse its discretion by allowing the expert's testimony regarding the income method, the State's argument that the evidence was legally insufficient without both the income method and the sales comparison method necessarily failed. State v. Clear Channel Outdoor, 462 S.W.3d 68, 2012 Tex. App. LEXIS 8111, 2012 WL 4465338 (Tex. App. Houston 1st Dist. Sept. 27 2012).

Real Property Law : Property Valuation

2005. Property owner rule applies to corporate entities owning property, and a representative of the corporate owner who is familiar with the market value of the property in question may testify under this rule as to the market value of the property, without being designated as an expert witness. Therefore, a trial court erred by granting a utility district's motion for no-evidence summary judgment in a condemnation action because an affidavit from a vice president associated with a corporate property owner should have been allowed to show fair market value

immediately before and immediately after the condemnation of a waterline easement. Speedy Stop Food Stores v. Reid Rd. Mun. Util., 282 S.W.3d 652, 2009 Tex. App. LEXIS 669 (Tex. App. Houston 14th Dist. Feb. 3 2009).

Real Property Law : Zoning & Land Use : Historic Preservation

2006. Structural engineer's report was admissible under Tex. R. Evid. 702 because it was helpful to a zoning board in ruling on an application to demolish property in a historical area, and it provided substantive and probative evidence to justify the denial of a permit under regulations adopted pursuant to Tex. Loc. Gov't Code Ann. § 211.003(b). Christopher Columbus St. Mkt. Llc v. Zoning Bd. of Adjustments of Galveston, 302 S.W.3d 408, 2009 Tex. App. LEXIS 8763 (Tex. App. Houston 14th Dist. Nov. 13 2009).

Tax Law : State & Local Taxes : Natural Resources Tax : Imposition of Tax

2007. In a dispute over the valuation of oil and gas interests, testimony from a professional appraiser was not conclusory and insufficient because the appraiser testified without objection to his expertise and qualifications, he testified in great detail how he arrived at the appraisal values for the oil and gas interests, he explained that he valued the property using accepted appraisal methods, he testified at length regarding the methods and techniques he used to appraise the properties, he gave his appraisal values using Tex. Tax Code Ann. § 23.175, and he explained that these values exceeded market value. Moreover, an objector also conducted extensive cross-examination of the appraiser regarding his appraisal techniques. Averitt v. Caudle, 2009 Tex. App. LEXIS 2284, 2009 WL 891034 (Tex. App. Eastland Apr. 2 2009).

Tax Law : State & Local Taxes : Personal Property Tax : Tangible Property : General Overview

2008. In a valuation dispute relating to the taxation of furniture, fixtures, and equipment under Tex. Tax Code Ann. § 1.04(7), even if the testimony of an expert regarding market value was considered, a jury's findings were not supported by the evidence because they were outside of the range given by the experts; therefore, a judgment notwithstanding the verdict (JNOV) should have been granted; moreover, a no-evidence issue was preserved for review by the filing of a JNOV request. Harris County Appraisal Dist. v. Sigmor Corp., 2008 Tex. App. LEXIS 2456 (Tex. App. Houston 1st Dist. Apr. 3 2008).

Tax Law : State & Local Taxes : Real Property Tax : General Overview

2009. In a challenge to the tax liability of a shopping center, the underlying data used by the taxpayer's appraiser was reliable for purposes of Tex. R. Evid. 702 because the appraiser found properties in the surrounding area that had the same land use code and low-rent classification, and he restricted those results based on size, location, and age. The nine remaining properties represented a reasonable sample for the purposes of Tex. Tax Code § 42.26. Harris County Appraisal v. Hartman Reit Operating P'ship, L.P., 186 S.W.3d 155, 2006 Tex. App. LEXIS 103 (Tex. App. Houston 1st Dist. 2006).

2010. In a suit challenging a real estate tax assessment, the trial court properly allowed expert testimony from the taxpayer's appraiser. The testimony was relevant, within the meaning of Tex. R. Evid. 401, 402, and 702 because the appraiser found a reasonable number of comparable properties, made appropriate adjustments, and compared the median appraisal value of those properties to the appraisal value applied to the property at issue, as required by Tex. Tax Code § 42.26. Harris County Appraisal v. Hartman Reit Operating P'ship, L.P., 186 S.W.3d 155, 2006 Tex. App. LEXIS 103 (Tex. App. Houston 1st Dist. 2006).

Tax Law : State & Local Taxes : Real Property Tax : Assessment & Valuation : General Overview

2011. In a dispute regarding open-space valuation of real property, there was no error in the trial court's decision to qualify the taxpayers' expert witness pursuant to Tex. R. Evid. 104(a), 702; although the expert did not have training specific to ad valorem taxation, he had substantial experience and expertise in agricultural use of land and prudent land management. Calhoun County Appraisal Review Bd. v. Stofer L.P., 2005 Tex. App. LEXIS 6629 (Tex. App. Corpus Christi Aug. 18 2005).

Tax Law : State & Local Taxes : Real Property Tax : Assessment & Valuation : Valuation

2012. Appraiser's testimony made clear that he followed a statutorily-approved methodology for estimating an appraised value, Tex. Tax Code Ann. § 42.26(a)(3), where he used the appraisal value of the comparable properties as listed in the tax rolls as his starting point, and when he adjusted the values of the comparable properties, he relied on generally accepted appraisal principles that were commonly used among professionals in his field; the appraiser testified that his methodology had been tested, was generally accepted as valid, and was mandated, to some extent, by statute, and the property owner met its burden to show the reliability of the appraiser's testimony, and the trial court did not abuse its discretion in admitting his testimony. Harris County Appraisal Dist. v. Houston 8th Wonder Prop., L.P., 2012 Tex. App. LEXIS 3889, 2012 WL 1757591 (Tex. App. Houston 1st Dist. May 17 2012).

2013. Finding in favor of the taxpayer in a property tax dispute was inappropriate because the testimony of the taxpayer's appraiser was legally insufficient to support the jury's findings. Although there was some evidence of the apartment complex's market value, the evidence did not conclusively establish the market value under Tex. Tax Code Ann. § 23.01(b). Cent. Appraisal Dist. v. Western Ah 406, Ltd., 372 S.W.3d 672, 2012 Tex. App. LEXIS 3299, 2012 WL 1438454 (Tex. App. Eastland Apr. 26 2012).

Torts : Damages : Compensatory Damages : Medical Expenses

2014. Because appellee's chiropractor was qualified to testify as an expert witness on the reasonableness and necessity of appellee's treatment, and his testimony was reliable, there was sufficient evidence to support the jury's damage award for past medical expenses. Treimee Corp. v. Garcia, 2013 Tex. App. LEXIS 11104 (Tex. App. Houston 1st Dist. Aug. 29 2013).

2015. In a personal injury suit, lay testimony was insufficient to support a finding that the car accident caused the $1.1 million in medical expenses awarded by the jury; the Supreme Court of Texas concluded that expert medical evidence was required to prove causation between the accident and the necessity of particular medical expenses. Guevara v. Ferrer, 247 S.W.3d 662, 2007 Tex. LEXIS 795, 50 Tex. Sup. Ct. J. 1182 (Tex. 2007).

2016. Where an injured seaman brought suit to recover damages from a maritime company, a life care planner was qualified to testify as an expert witness on actual medical costs; he had thirty years of experience in health care management for people with disabilities and a masters degree in rehabilitation counseling; the expert testified regarding the specific basis and methodology for his opinion. SeaRiver Maritime, Inc. v. Pike, 2006 Tex. App. LEXIS 4905 (Tex. App. Corpus Christi June 8 2006).

Torts : Damages : Compensatory Damages : Pain & Suffering : General Overview

2017. Damages were properly awarded in a medical malpractice case for a mother's pain and mental anguish because the evidence was legally sufficient to show that she was conscious at the time that she was struggling to breathe, even though the testimony of an expert physician was ambiguous; further, taking agonal breaths indicated that one was suffering pain. The physician's testimony, coupled with the testimony of a nurse expert concerning the demeanor of one experiencing agonal breathing, was legally sufficient to support a jury's award of damages. Las

Palmas Med. Ctr. & El Paso Healthcare Sys. v. Rodriguez, 279 S.W.3d 413, 2009 Tex. App. LEXIS 627 (Tex. App. El Paso Jan. 30 2009).

Torts : Intentional Torts : Assault & Battery : General Overview

2018. In a suit by a 17-year-old church member, who alleged that other church members assaulted and falsely imprisoned her, the trial court properly admitted expert testimony on post-traumatic stress disorder (PTSD), even though the record showed that the methods and analyses relied upon in formulating the diagnoses involved some subjective interpretation. The record also showed that those methods and analyses had a rate of error generally accepted in the scientific community as reliable, had been accepted as valid in the scientific community for decades, had been subject to extensive peer review and publication, and had been widely used for nonjudicial purposes. Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388, 2005 Tex. App. LEXIS 7660 (Tex. App. Fort Worth 2005).

Torts : Intentional Torts : False Imprisonment : General Overview

2019. In a suit by a 17-year-old church member, who alleged that other church members assaulted and falsely imprisoned her, the trial court properly admitted expert testimony on post-traumatic stress disorder (PTSD), even though the record showed that the methods and analyses relied upon in formulating the diagnoses involved some subjective interpretation. The record also showed that those methods and analyses had a rate of error generally accepted in the scientific community as reliable, had been accepted as valid in the scientific community for decades, had been subject to extensive peer review and publication, and had been widely used for nonjudicial purposes. Pleasant Glade Assembly of God v. Schubert, 174 S.W.3d 388, 2005 Tex. App. LEXIS 7660 (Tex. App. Fort Worth 2005).

Torts : Malpractice & Professional Liability : Attorneys

2020. In a legal malpractice case, summary judgment was properly granted to several former attorneys because a former client failed to produce any competent expert testimony on causation relating to either negligence or a violation of the Texas Deceptive Trade Practices Act; there were complex issues concerning the finality of an underlying bank case, appellate procedure, settlement, the effect of agreements, bankruptcy stays, and other related issues that could not have been determined by lay persons. Twist v. Garcia, 2007 Tex. App. LEXIS 7187 (Tex. App. Corpus Christi Aug. 30 2007).

2021. In a legal malpractice lawsuit, the trial court did not abuse its discretion under Tex. R. Evid. 702 in excluding the testimony of an expert witness as conclusory because of a lack of legal support for the expert's asserted opinion that the order of the questions in the jury charge in the underlying negligence case should have been different. Juarez v. Elizondo, 2007 Tex. App. LEXIS 2133 (Tex. App. San Antonio Mar. 21 2007).

2022. Trial court did not err in granting a no-evidence summary judgment in favor of a law firm in a malpractice action because the client presented no expert evidence to show that any acts or omissions of the law firm fell below the applicable standard of care or caused the client any damages. Jennings v. Zimmerman, Axelrod, Meyer, Stern & Wise, P.C., 2005 Tex. App. LEXIS 6518 (Tex. App. San Antonio Aug. 17 2005).

2023. In a legal malpractice suit, the court of appeals erred in finding that expert testimony was not needed because the connection between the attorneys' negligence and the client's loss in an underlying suit in bankruptcy court was obvious and in reversing the trial court's take-nothing judgment; the jury was asked to decide a complicated and very subjective causation issue: whether, in reasonable probability, a bankruptcy judge would have decided the underlying adversary proceeding differently if the attorney had personally tried the case or if he or his

associate had introduced other evidence. Alexander v. Turtur & Assocs., 146 S.W.3d 113, 2004 Tex. LEXIS 734, 47 Tex. Sup. Ct. J. 992 (Tex. 2004).

Torts : Malpractice & Professional Liability : Healthcare Providers

2024. Hand and upper extremity specialist who was board certified in orthopedic surgery was qualified to opine on the hospital's standard of care in an action by a patient whose ulnar nerve was severed during elbow surgery. Columbia North Hills v. Bowen, 2014 Tex. App. LEXIS 1092, 2014 WL 345658 (Tex. App. Fort Worth Jan. 30 2014).

2025. In a health care liability case arising from a hysterectomy during which the patient's bowel was pricked, it was proper to find that a board-certified obstetrician/gynecologist was not qualified to opine on the causation issues of whether a hypoxic event occurred and whether such an event caused symptoms more than a year later. Alonzo v. Lampkin, 2013 Tex. App. LEXIS 13932 (Tex. App. Amarillo Nov. 13 2013).

2026. Physician, a pediatric otolaryngologist, was qualified to opine on causation where he had experience treating patients who had had their tracheostomy tubes dislodged and had suffered brain damage caused by lack of oxygen as a result. Rio Grande Reg'l Hosp. v. Ayala, 2012 Tex. App. LEXIS 7175, 2012 WL 3637368 (Tex. App. Corpus Christi Aug. 24 2012).

2027. In a mother's health care liability lawsuit that alleged that defendants' negligence proximately caused her child's legal blindness, the trial court abused its discretion in overruling defendants' objections to the mother's expert report that was written by a neonatologist because nothing in the report indicated that the neonatologist had knowledge, skill, experience, training, or education in ophthalmology, pediatric ophthalmology, the way in which retinopathy of prematurity presented in newborns, or how that disease was treated in general and in the child's case. Accordingly, the trial court could not have reasonably concluded that the neonatologist had genuine expertise regarding the causal relationship between defendants' alleged breach of the applicable standard of care and the child's injury. Caviglia v. Tate, 363 S.W.3d 298, 2012 Tex. App. LEXIS 2018, 2012 WL 899269 (Tex. App. El Paso Mar. 14 2012).

2028. In a medical malpractice case, the district court did not err in denying defendant doctor's motion to dismiss because, while the report of plaintiff patient's expert was far from perfect, the trial court did not err in finding it adequate. While the expert was not active in a hospital practice at the time at issue, he nevertheless was actively practicing orthopedic medicine and opined that the injury involved was of the type he treated in his practice; therefore, the trial court did not abuse its decision in finding that the expert was qualified to opine on the standard of care. Further, where the report indicated that the etiology of the patient's brachial plexus injury was most likely attributable to a traction injury resulting from positioning during surgery, the report was sufficient to establish a causal connection. Padilla v. Loweree, 354 S.W.3d 856, 2011 Tex. App. LEXIS 7147 (Tex. App. El Paso Aug. 31 2011).

2029. In a health care liability claim, under Tex. Civ. Prac. & Rem. Code Ann. §§ 74.351 and 74.401(c)(2) and Tex. R. Evid. 702, the expert was not qualified to render a causation opinion as to the health care providers' conduct as the expert's last experience in perinatology was more than 20 years ago, and he last wrote in that area over 25 years ago. Tenet Hosps. Ltd. v. De La Riva, 351 S.W.3d 398, 2011 Tex. App. LEXIS 4944 (Tex. App. El Paso June 29 2011).

2030. In a health care liability action, while appellants claimed that the first physician was not qualified to render a reliable expert opinion under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(C) because he served as a member of the Medical Board in the surgeon's termination request and was thus biased, any bias went to first physician's credibility under Tex. R. Evid. 613(b) and did not disqualify him from rendering an expert opinion. Beaumont Spine

Pain & Sports Med. Clinic, Inc. v. Swan, 2011 Tex. App. LEXIS 768, 2011 WL 379168 (Tex. App. Beaumont Feb. 3 2011).

2031. Doctor was qualified to opine about causation where: (1) the doctor was licensed to practice medicine in Texas; (2) he was board certified in internal medicine and geriatrics and was actively engaged in the practice of these specialties; (3) he regularly engaged in the diagnosis and treatment of patients with Alzheimer's disease; (4) he had had patients with violent behavior like the facility's resident's behavior and who represented a threat to others as well as themselves; (5) he had knowledge of the admission assessment process and the care needed for these patients; and (6) in his opinion, it was reasonably foreseeable that the facility could not meet the resident's needs and that the resident's behavior would likely result in injury to himself or others. Christian Care Ctrs., Inc. v. Golenko, 328 S.W.3d 637, 2010 Tex. App. LEXIS 8826 (Tex. App. Dallas Nov. 4 2010).

2032. Patient's expert's report was sufficient to satisfy the elements of Tex. Civ. Prac. & Rem. Code Ann. § 74.351 concerning the patient's claim that the orthopedic surgeon failed to timely diagnose and treat her ankle fracture because: (1) the report explained that the standard of care required the surgeon to conduct full range of motion testing regarding the patient's injured leg, including the knee, ankle, and foot; (2) the report was not inadequate or conclusory on the statutory elements of standard of care, breach, and causation merely because it contained some collective statements concerning both the surgeon and another doctor; (3) the report satisfied the causation element as the expert stated that due to the surgeon's failure to correctly diagnose the patient's injury, her fracture went undetected for over seven months, and that as a result the patient was subjected to surgery, a prolonged period of disability, loss of foot movement, and chronic pain; and (4) the expert was qualified to offer his opinions, as his report and curriculum vitae established that he was practicing medicine at the time the patient was treated by the surgeon and when he provided the report, that he possessed knowledge of accepted standards of medical care for the diagnosis, care, or treatment of a person with a leg injury, and he had 18 years of experience. Otero v. Richardson, 326 S.W.3d 363, 2010 Tex. App. LEXIS 8018 (Tex. App. Fort Worth Sept. 30 2010).

2033. Patient's expert was qualified under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(C) and Tex. R. Evid. 702 because his report and curriculum vitae reflected that he was a licensed physician in good standing in Pennsylvania and Missouri who had been practicing since 1977, that he was a board certified internist, and that he provided medical evaluation, care, and treatment to acute and chronically ill patients with urinary tract infections and urosepsis, and that he had experience assisting and supervising the transfer of such patients to long-term care facilities and had knowledge of the documentation required for such transfers. Tthr, L.P. v. Guyden, 326 S.W.3d 316, 2010 Tex. App. LEXIS 7348 (Tex. App. Houston 1st Dist. Aug. 31 2010).

2034. In a health care liability suit alleging misdiagnosis of cancer, the Tex. Civ. Prac. & Rem. Code Ann. § 74.351 report of an expert who was qualified under Tex. Civ. Prac. & Rem. Code Ann. § 74.401 with regard to a pathologist's standard of care and breach could also include a causation opinion under Tex. Civ. Prac. & Rem. Code Ann. § 74.403 and Tex. R. Evid. 702 as to unnecessary surgery because it was undisputed that no cancer was present. Somerville v. Lawrence, 2010 Tex. App. LEXIS 6583, 2010 WL 3168405 (Tex. App. Texarkana Aug. 12 2010).

2035. Because the physician's expert report did not set forth his qualifications for giving an expert opinion on causation of the patient's death after being placed on a restraint board, the trial court did not abuse its discretion by dismissing the health care liability claim filed by the patient mother. The physician's curriculum vitae showed only that he was currently practicing in the field of emergency medicine and that he had held several positions as an emergency medicine physician and a general and trauma surgeon. Salais v. Tex. Dep't of Aging & Disability Servs., 323 S.W.3d 527, 2010 Tex. App. LEXIS 6259 (Tex. App. Waco Aug. 4 2010).

2036. Doctor's fourth expert report represented an objective, good faith effort to comply with the definition of an expert report provided in Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6), because the report affirmatively stated

that a uniform standard of care applied to each physician and nurse, identified what the standard of care was, and there was no challenge to the doctor's qualifications as a vascular surgeon, nor was there a challenge that defendant did not know how to care for an individual in the patient's alleged condition. Hayes v. Carroll, 314 S.W.3d 494, 2010 Tex. App. LEXIS 3637 (Tex. App. Austin May 14 2010).

2037. Internal medicine specialist was qualified under Tex. Civ. Prac. & Rem. Code Ann. §§ 74.351(r)(5)(A), 74.401(a) and Tex. R. Evid. 702 to opine on the standard of care for supervising a patient who took a psychiatric drug because he was currently practicing medicine, treated patients who took the drug for the same diagnosis, and was board certified. Davisson v. Nicholson, 310 S.W.3d 543, 2010 Tex. App. LEXIS 2153 (Tex. App. Fort Worth Mar. 25 2010).

2038. In a patient's medical malpractice action that arose from an L2 inferior to S1 superior decompressive laminectomy performed by appellees, a doctor and a neurosurgery clinic, the trial court abused its discretion by finding the patient's expert witness unqualified to render expert testimony as to the standard of care involved in laminectomies because the expert continued to participate in lumbar laminectomy surgeries, and although he was presently unable to hold the title of "lead" surgeon due to an arm injury, he was nevertheless a surgeon who assisted in laminectomies preoperatively, operatively, and postoperatively. Therefore, at the time of the patient's surgery, the patient's expert was practicing health care in a field of practice that involves the same type of care or treatment as that required of appellees, pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 74.402(b)(1). St. Clair v. Alexander, 2009 Tex. App. LEXIS 7682, 2009 WL 3135812 (Tex. App. Corpus Christi Sept. 30 2009).

2039. In a patient's medical malpractice action that arose from an L2 inferior to S1 superior decompressive laminectomy performed by appellees, a doctor and a neurosurgery clinic, the trial court abused its discretion by sustaining appellees' objections to exclude the testimony of the patient's expert witness where the expert's testimony was reliable because his affidavit sufficiently stated the methodology he employed by listing the most likely causes of cauda equina syndrome and using the patient's postoperative radiographical studies to eliminate two of the potential causes, he stated that he reviewed the patient's medical records, and he formulated his opinion that over-manipulation of the cauda equina nerves caused the patient's injury by reviewing her postoperative radiographic studies. The patient met her burden of establishing that the expert utilized a scientifically reliable methodology. St. Clair v. Alexander, 2009 Tex. App. LEXIS 7682, 2009 WL 3135812 (Tex. App. Corpus Christi Sept. 30 2009).

2040. Expert was qualified under Tex. Civ. Prac. & Rem. Code Ann. §§ 74.351(r)(5)(C), 74.403(a) and Tex. R. Evid. 702 because he was familiar with the issues involved in the health care liability claim, although he was not a specialist. Estorque v. Schafer, 302 S.W.3d 19, 2009 Tex. App. LEXIS 7343 (Tex. App. Fort Worth Sept. 17 2009).

2041. Expert was qualified under Tex. Civ. Prac. & Rem. Code Ann. § 74.401 to opine as to the standards of care, their breach by a doctor, and causation, even though the doctor was a family practitioner and the expert was an emergency room physician, as § 74.401 focused on the condition involved, which was appendicitis in a patient's case; the expert was licensed to practice medicine in Texas, had been practicing for 20 years, was practicing medicine when the claim arose, and was qualified to opine on causation under Tex. R. Evid. 702. Granbury Minor Emergency Clinic v. Thiel, 296 S.W.3d 261, 2009 Tex. App. LEXIS 6957 (Tex. App. Fort Worth Aug. 27 2009).

2042. Doctor's expert report satisfied the requirements of Tex. Civ. Prac. & Rem. Code Ann. § 74.351 as well as the qualifications necessary under Tex. Civ. Prac. & Rem. Code Ann. §§ 74.402, 74.403 and Tex. R. Evid. 702 to opine on a patient's claim of negligent emergency room treatment of an ankle fracture and adequately linked his determinations regarding the alleged breach of care to the resulting damages. Stephanie M. Philipp, P.A. v. McCreedy, 298 S.W.3d 682, 2009 Tex. App. LEXIS 5786 (Tex. App. San Antonio July 29 2009).

2043. In an action alleging that negligence caused neurological injuries to an infant during birth, an ob/gyn was qualified under Tex. R. Evid. 702 and Tex. Civ. Prac. & Rem. Code Ann. § 74.403(a) to provide and expert report under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)C) as to causation. The doctor was an expert in managing labor and delivery, and that expertise qualified the doctor to opine on the causal relationship between labor and delivery and the complications that could stem from labor and delivery, including a newborn's neurological injuries. Livingston v. Montgomery, 279 S.W.3d 868, 2009 Tex. App. LEXIS 1324 (Tex. App. Dallas Feb. 27 2009).

2044. In a healthcare liability claim involving a patient with embolisms from an undetermined origin, an internist was qualified under Tex. Civ. Prac. & Rem. Code Ann. § 74.401, Tex. R. Evid. 702 to render an expert report, where the expert had diagnosed and treated patients with conditions substantially similar to or identical with the patient's in both the hospital and office setting. Craig v. Dearbonne, 2009 Tex. App. LEXIS 1003, 2009 WL 349140 (Tex. App. Beaumont Feb. 12 2009).

2045. Summary judgment was properly granted to health care providers in a medical malpractice case because an expert opinion relating to proximate causation was stricken; the expert offered no support for his opinion that the presence of two separate primary cancers resulted in a prognosis identical to the individual prognosis of the more serious cancer. Flores v. Eakin, 2008 Tex. App. LEXIS 6456 (Tex. App. Austin Aug. 22, 2008).

2046. Trial court properly denied a motion for summary judgment filed by an anesthesiologist and registered nurse anesthesiologist because a neurologist was qualified as an expert under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(A), as he had experience and academic work in blood flow to the brain, and the husband alleged that the anesthesiologist did not adequately monitor the patient's breathing after her surgery and the omission resulted in decreased blood flow to her brain and her current condition. Gelman v. Cuellar, 268 S.W.3d 123, 2008 Tex. App. LEXIS 6173 (Tex. App. Corpus Christi 2008).

2047. In a health care liability case where a patient suffered a fatal heart attack shortly after being treated by a gastroenterologist, a motion to dismiss under Tex. Civ. Prac. & Rem. Code Ann. § 74.351 was denied because an internist and a cardiologist were qualified to opine on the standard of care, breach, and causation, despite having differing specialties; they demonstrated sufficient qualifications to opine about the standards of care in connection with recognizing, investigating, and treating or ruling out cardiovascular disease in treating the patient. Moreover, their reports discussed the standard of care, breach, and causation with sufficient specificity to inform the gastroenterologist of the conduct that was alleged and to provide a basis for the trial court to conclude that the claims had merit. Pacha v. Casey, 2008 Tex. App. LEXIS 5490 (Tex. App. Houston 14th Dist. July 22 2008).

2048. Expert was qualified to opine on causation and therefore the doctor's motion to dismiss a medical malpractice action was properly denied, because he was a board certified internist, he had been an urgent care provider, he was currently an emergency medicine doctor at a hospital, and he had been the director of emergency medicine. Mosely v. Mundine, 249 S.W.3d 775, 2008 Tex. App. LEXIS 2411 (Tex. App. Dallas 2008).

2049. In a health care liability action against an emergency room doctor and associated entities, there was no error under Tex. R. Evid. 702 when the trial court considered an expert report from a nonphysician expert in legal and corporate contracts with regard to the contractual and corporate interrelationships of the various defendants, in order to assist physician experts in presenting the applicable standards of care; the report did not provide opinions about issues of law that were the sole province of the court. Packard v. Guerra, 252 S.W.3d 511, 2008 Tex. App. LEXIS 1416 (Tex. App. Houston 14th Dist. 2008).

2050. In a health care liability action brought by a patient's guardian against a rehabilitation hospital, the purported expert reports filed by the guardian did not constitute a good faith effort to comply with the statutory requirements, and the trial court thus properly dismissed the suit pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 74.351, where

the first report submitted by the guardian was that of a nurse, who was not qualified to testify as an expert witness on the issue of causation because she was not a physician; the second report submitted by the guardian was that of a doctor licensed to practice medicine in the state of Coahuila, Mexico, but because nothing in the record indicated that the doctor was licensed in Texas or any of the states of the United States, he did not meet the statutory definition of a "physician," and, therefore, was not qualified to testify on the issue of causation, and, accordingly, neither the nurse nor the doctor were qualified as an "expert" capable under the statute of opining on causation. Cuellar v. Warm Springs Rehab. Found., 2007 Tex. App. LEXIS 8974 (Tex. App. San Antonio Nov. 14 2007).

2051. Expert was qualified to provide an opinion on causation in a medical malpractice action, and therefore the physician's motion to dismiss under Tex. Civ. Prac. & Rem. Code Ann. § 74.351 was properly denied, because the report indicated that she was a physician who had knowledge and experience concerning the swallowing mechanism and in evaluating elderly patients. Palafox v. Silvey, 247 S.W.3d 310, 2007 Tex. App. LEXIS 10155 (Tex. App. El Paso 2007).

2052. In a health care liability action brought by a patient's parents against a dentist and his alleged employer, the expert report of the parent's expert represented an objective good faith effort to comply with the statutory requirements of a health care liability expert report where: (1) the expert's report focused on the patient's overdose of sedation medication, her monitoring after the procedure, her untimely discharge, and her resulting cerebral hypoxia; (2) his qualifications supported his expertise in the subjects on which he provided opinions in his report because he had been a board-certified anesthesiologist for over 30 years, currently practiced medicine, and was a tenured professor of anesthesiology with the state university; (3) according to the expert's report and curriculum vitae, he had extensive training and experience with the standards of anesthesia management and recovery from medications used in sedating patients; (4) the expert was one of the researchers in a multi-center study on one of the sedation reversal agents used during the patient's procedure; and (5) the report provided the link between the health care providers' breach (overdose of sedation medication, failure to properly reverse deep sedation, failure to monitor properly, untimely discharge, and the placement of the patient in the vehicle) and the expert's conclusion on causation that, if properly medicated or monitored, the patient would have avoided the obstruction of her airway that resulted in hypoxia and brain injury. Comstock v. Clark, 2007 Tex. App. LEXIS 8447 (Tex. App. Beaumont Oct. 25 2007).

2053. Medical malpractice action was dismissed because an expert report filed by a plastic surgeon was insufficient since he was not able to testify about the standard of care for a pulmonologist in relation to the treatment of a burn patient; the expert report never stated that the area of pulmonology was substantially developed in the field of plastic and reconstructive surgery or that the expert had practical knowledge of what was usually done by a pulmonologist who also treated burn patients. Garcia v. Rodriguez, 2007 Tex. App. LEXIS 7193 (Tex. App. Corpus Christi Aug. 30 2007).

2054. Where a patient allegedly developed decubitus ulcers because of substandard care at a hospital, a doctor was qualified to render an expert opinion on the issue of causation because the doctor was board certified in internal medicine and occupational medicine and had 25 years of experience as a medical doctor, including direct experience in treating patients with decubitus ulcers and instructing nurses and other personnel in the proper techniques to prevent decubitus ulcers. Mem'l Hermann Healthcare Sys. v. Burrell, 230 S.W.3d 755, 2007 Tex. App. LEXIS 5015 (Tex. App. Houston 14th Dist. 2007).

2055. In a health care liability action asserting a negligent failure to perform prompt and appropriate surgery for glaucoma, an expert who was both a biomedical engineer and a consulting ophthalmologist was qualified under Tex. R. Evid. 702 and Tex. Civ. Prac. & Rem. Code Ann. § 74.401 regarding standards of medical care and causation; hence, the trial court did not err in denying a Tex. Civ. Prac. & Rem. Code Ann. § 74.351 motion to

dismiss. Evans v. Arambula, 2007 Tex. App. LEXIS 2117 (Tex. App. San Antonio Mar. 21 2007).

2056. In a medical malpractice action against a cardiothoracic surgeon in which plaintiffs claimed that the surgeon was negligent in failing to provide proper and ordinary care to a patient, in failing to properly administer to the site where he placed a permanent arteriovenous access graft (AV graft) in the patient, and in failing to properly monitor the patient after diagnosis of infection, the trial court did not err by overruling the surgeon's objections to the qualifications of plaintiffs' expert witness, an infectious disease specialist, because the expert was not required to have experience in actually performing the surgical procedure to insert or extricate the graft, as appellees had not made any claims with regard to the surgical procedure itself. McKowen v. Ragston, 263 S.W.3d 157, 2007 Tex. App. LEXIS 245 (Tex. App. Houston 1st Dist. 2007).

2057. Trial court abused its discretion by granting physician a directed verdict in medical malpractice action because the patient's expert stated during a deposition that the standard of care required the physician to administer a tissue plasminogen activator (TPA) within 15 minutes of his arrival at the hospital at 12:45 p.m. and that the physician breached the standard of care by failing to administer TPA to the patient until 2:25 p.m. The court further found that the expert's testimony also constituted some evidence of causation; the trial court did not abuse its discretion in admitting the expert's testimony under Tex. R. Evid. 702. Kelso v. Williamson, 2006 Tex. App. LEXIS 10949 (Tex. App. Corpus Christi Dec. 21 2006).

2058. In a medical malpractice suit, the trial court did not abuse its discretion by concluding that an expert/doctor had knowledge, skill, experience, training, or education in the Burch bladder suspension procedure that would assist the jury; the record did not support the assertion that the expert did not use the Burch method and was not trained in it. Cairus v. Gomez, 2006 Tex. App. LEXIS 10479 (Tex. App. Austin Dec. 6 2006).

2059. In a medical malpractice action against a surgeon in which the patient claimed that the surgeon damaged his vocal chord nerve during thoracic surgery to remove the patient's thymus gland, the trial court did not commit reversible error in finding that there was not too great an analytical-gap between the expert's opinions and the basis upon they were founded and in, therefore, admitting the expert's challenged testimony regarding the possibility that the patient's injury to his left vocal chord was caused during intubation not surgery. Halim v. Ramchandani, 203 S.W.3d 482, 2006 Tex. App. LEXIS 7815 (Tex. App. Houston 14th Dist. 2006).

2060. Expert report submitted by a patient in his medical malpractice action arising out of a surgery that he claimed was performed on the wrong party of his body did not comply with Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) where the patient had failed to establish that his expert was qualified to testify regarding the standard of care applicable to the condition involved in the underlying claim because: (1) information regarding the expert's peer review committee and director positions did not provide sufficient detail from which it could be determined that his experience on the committee and as a director was relevant to the standard of care applicable to hospital personnel in a surgical setting; (2) the expert's general reference to a three year internship/residency in surgery was not sufficient to establish that he had sufficient training and experience with regard to the procedures hospital personnel were required to follow during a surgical procedure eight years after his internship/residency ended; and (3) the patient had failed to show that the preoperative procedures hospital personnel were required to follow in a surgical setting were substantially developed in the expert's field of emergency room medicine; expert testimony was required because the nature of the patient's medical procedure and whether it resulted in the wrong part of the body being operated on were not within the common knowledge of a layperson, and, even under the doctrine of res ipsa loquitur, the patient was required to establish that the expert was qualified to testify regarding causation. Methodist Health Care Sys. of San Antonio, Ltd. v. Rangel, 2005 Tex. App. LEXIS 10858 (Tex. App. San Antonio Dec. 14 2005).

2061. Although the dissent concluded the jury could only have considered a physician's causation testimony in conjunction with the doctor's negligence, not in conjunction with the nurses' negligence, the court noted that a

medical doctor was free to testify concerning causation from a breach of the nursing standard of care. Morrell v. Finke, 184 S.W.3d 257, 2005 Tex. App. LEXIS 9190 (Tex. App. Fort Worth 2005).

2062. In a medical malpractice case, expert testimony regarding the standard of care under 1995 Tex. Gen. Laws 985 (repealed), (current version at Tex. Civ. Prac. & Rem. Code Ann. § 74.401(c)), was not admitted because the expert in question did not have knowledge, skill, experience, or training in the areas of general or orthopedic surgery. Gomez v. Valley Baptist Med. Ctr., 2005 Tex. App. LEXIS 4092 (Tex. App. Corpus Christi May 26 2005).

2063. Trial court erred in rendering verdict for parents in their medical malpractice suit against doctors and a hospital for failure to treat and diagnose their twins for retinopathy of prematurity. Expert testimony that the twins' eyesight could have been successfully treated if their pediatrician had referred them for treatment when she first saw them was unreliable; the expert could not testify to any personal knowledge, experience, or any scientific data supporting his theory. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

2064. Doctor's self-serving statements that his methodology is generally accepted and reasonably relied upon by other experts in the field is insufficient to establish the reliability of the technique and theory underlying his opinion. Gross v. Burt, 149 S.W.3d 213, 2004 Tex. App. LEXIS 8071 (Tex. App. Fort Worth 2004).

2065. Trial court did not err in granting summary judgment to doctors in a medical malpractice suit where the court sustained the objections to the patient's expert's affidavit at the hearing because while the affidavit opined that the radiologist should have retaken x-ray films of the hook wire localization and should have followed up with the other medical care providers on the negative pathology report, the record was devoid of any indication that the expert possessed any expertise or training in the field of radiology that would have qualified her to make those opinions. Shelton v. Sargent, 144 S.W.3d 113, 2004 Tex. App. LEXIS 6116 (Tex. App. Fort Worth 2004).

2066. Trial court did not err in granting summary judgment to doctors in a medical malpractice suit where the court had sustained the objections to the patient's expert's affidavit at the hearing where the expert failed to state facts or studies to support her conclusion that the patient would have avoided a mastectomy with a follow-up mammogram; thus, the affidavit lacked foundation and was conclusory. Shelton v. Sargent, 144 S.W.3d 113, 2004 Tex. App. LEXIS 6116 (Tex. App. Fort Worth 2004).

2067. In a medical malpractice case, a court properly found that an expert witness was qualified to testify where she was a board certified pathologist at Baylor University, she was a full professor and held an endowed chair, she had written several articles about gastrointestinal cytology, she was familiar with pathology of the gastrointestinal tract, and she testified that it was within a pathologist's area of expertise to estimate the age of a perforation based on examination of cells taken from a colon. Axelrad v. Jackson, 142 S.W.3d 418, 2004 Tex. App. LEXIS 5693 (Tex. App. Houston 14th Dist. 2004).

2068. In a medical malpractice case, a court properly found that an expert witness's testimony was reliable where the witness observed acute inflammatory cells on specimen tissue taken from the patient's colon, and she also saw new blood vessels, histiocytes, chronic inflammatory cells, and fibroblasts. Based on her observations, she estimated a perforation that was one to two-and-a-half weeks old, and when questioned whether the patient might have suffered a microperforation, which partially healed, followed by a larger perforation in the same site after the enema, the witness discounted such a theory. Axelrad v. Jackson, 142 S.W.3d 418, 2004 Tex. App. LEXIS 5693 (Tex. App. Houston 14th Dist. 2004).

2069. Nurse's report did not establish her qualifications to express an expert opinion on causation because her license precluded her from acts of medical diagnosis, and to give a medical opinion on the cause of someone's death demanded the ability to make a medical diagnosis where the doctor's mere assertion that the patient would

have survived if appropriately triaged was conclusory and insufficient and failed to state how the hospital's failure to act was a substantial factor in bringing about the mother's death and without which her death would not have occurred. Costello v. Christus Santa Rosa Health Care Corp., 141 S.W.3d 245, 2004 Tex. App. LEXIS 5500 (Tex. App. San Antonio 2004).

2070. Estate's expert's report did not refer to any knowledge, skill, experience, training, or education regarding the standard of care applicable to urologists, such that the trial court did not abuse its discretion in concluding that the expert was not qualified to testify about the doctor's actions; the scheduling order did not designate a later date as a deadline to file expert reports but specified a date on which the estate was required to provide the name of expert witnesses expected to testify at trial, such that the trial court did not act prematurely in dismissing the estate's claims. Olveda v. Sepulveda, 141 S.W.3d 679, 2004 Tex. App. LEXIS 4698 (Tex. App. San Antonio 2004).

2071. Testifying expert cannot establish medical standards of care by testifying as to what he would have done, but a defendant doctor can establish a medical standard by which his own conduct is to be judged. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

Torts : Negligence : General Overview

2072. Trial court's determination regarding whether expert testimony is necessary to establish negligence should be reviewed de novo. FFE Transp. Servs. v. Fulgham, 154 S.W.3d 84, 2004 Tex. LEXIS 1422, 48 Tex. Sup. Ct. J. 267, CCH Prod. Liab. Rep. P17246 (Tex. 2004).

2073. In a negligence action by a truck driver against a freight company arising from a tractor-trailer accident, expert testimony on the company's standard of care was necessary with regard to inspecting for a rusty bolt because the upper coupler assembly, kingpin, and base rail of a refrigerated trailer were specialized equipment. FFE Transp. Servs. v. Fulgham, 154 S.W.3d 84, 2004 Tex. LEXIS 1422, 48 Tex. Sup. Ct. J. 267, CCH Prod. Liab. Rep. P17246 (Tex. 2004).

Torts : Negligence : Causation : General Overview

2074. No-evidence summary judgment was appropriate in a negligence case because several injured parties failed to present expert testimony to establish a causal link between the exposure to noxious chemicals after a train collision and their symptoms. Carr v. Union Pac. R.R. Co., 2011 Tex. App. LEXIS 7794, 2011 WL 4489982 (Tex. App. Houston 14th Dist. Sept. 29 2011).

2075. In a health care liability claim, under Tex. Civ. Prac. & Rem. Code Ann. §§ 74.351 and 74.401(c)(2) and Tex. R. Evid. 702, the expert was not qualified to render a causation opinion as to the health care providers' conduct as the expert's last experience in perinatology was more than 20 years ago, and he last wrote in that area over 25 years ago. Tenet Hosps. Ltd. v. De La Riva, 351 S.W.3d 398, 2011 Tex. App. LEXIS 4944 (Tex. App. El Paso June 29 2011).

2076. In an action alleging that negligence caused neurological injuries to an infant during birth, an ob/gyn was qualified under Tex. R. Evid. 702 and Tex. Civ. Prac. & Rem. Code Ann. § 74.403(a) to provide and expert report under Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)C) as to causation. The doctor was an expert in managing labor and delivery, and that expertise qualified the doctor to opine on the causal relationship between labor and delivery and the complications that could stem from labor and delivery, including a newborn's neurological injuries. Livingston v. Montgomery, 279 S.W.3d 868, 2009 Tex. App. LEXIS 1324 (Tex. App. Dallas Feb. 27 2009).

Torts : Negligence : Causation : Cause in Fact

2077. Because a personal injury claimant could not recall the details of her fall on a stairway and had no factual evidence of how it occurred, an expert's conclusions that the fall was caused by the inadequate lighting and irregular dimensions of the stairway were based on speculation and conjecture, thus constituting no evidence on summary judgment. Hanson v. Greystar Dev. & Constr., Lp, 317 S.W.3d 850, 2010 Tex. App. LEXIS 5635 (Tex. App. Fort Worth July 15 2010).

2078. In a negligence case, expert testimony that a tank would have ruptured even if a relief valve had not been disabled was properly excluded because it was not probative of the cause in fact of the explosion or injuries under the actual circumstances; because there was no legally sufficient evidence of causation, other asserted errors were harmless under Tex. R. App. P. 44. Goss v. Kellogg Brown & Root, Inc., 232 S.W.3d 816, 2007 Tex. App. LEXIS 6621 (Tex. App. Houston 14th Dist. 2007).

2079. Where a contractor, who was installing a bath tub, sued homeowners for negligence after he was electrocuted by exposed live wires sticking out of a hole in the wall and suffered a heart attack, no-evidence summary judgment was improperly granted to the homeowners because, when the onset of a heart attack occurred immediately after an electrocution, it was not necessary for an expert to testify to a "reasonable medical probability" that the electrocution caused the damages, and there were genuine issues of material fact regarding cause in fact and foreseeability; although the homeowners alleged that a doctor's affidavit was conclusory, and unreliable under Tex. R. Evid. 702, and not based on a reasonable medical probability, a statement that an electrocution probably caused the contractor's heart attack was sufficient expert testimony to raise a fact issue as to cause in fact given that there was a fact issue as to whether the heart attack occurred shortly after the contractor was electrocuted. Choice v. Gibbs, 2007 Tex. App. LEXIS 1063 (Tex. App. Houston 14th Dist. Feb. 13 2007).

2080. In a personal injury accident, an expert was permitted to testify that he conducted an injury causation analysis based on physics and biomechanics and concluded that forces involved in the accident could not have caused the condition that necessitated plaintiff's surgeries. The testimony was not incompetent under Havner, because the evidence failed to conclusively establish the opposite of the expert's conclusion. Gill v. Slovak, 2005 Tex. App. LEXIS 8876 (Tex. App. Corpus Christi Oct. 27 2005).

2081. Trial court did not err in granting a no-evidence summary judgment in favor of a law firm in a malpractice action because the client presented no expert evidence to show that any acts or omissions of the law firm fell below the applicable standard of care or caused the client any damages. Jennings v. Zimmerman, Axelrod, Meyer, Stern & Wise, P.C., 2005 Tex. App. LEXIS 6518 (Tex. App. San Antonio Aug. 17 2005).

2082. Employee's expert witness did not present a scientific foundation regarding general causation as he did not refer to a single epidemiological study or scientific article to prove that exposure to commercial cleaners could cause reactive airways dysfunction syndrome. The absence of any general-causation evidence, combined with the absence of reliable scientific literature, created a fatal evidentiary gap in the employee's claim against his employer; therefore, the jury's verdict in favor of the employee was reversed and a judgment that the employee take nothing was rendered. Brookshire Bros. v. Smith, 176 S.W.3d 30, 2004 Tex. App. LEXIS 4385 (Tex. App. Houston 1st Dist. 2004).

2083. Trial court properly granted manufacturers, suppliers, contractors, premises owners, and former employers' no-evidence summary judgment motion, Tex. R. Civ. P. 166a(i), because (1) although the former employees claimed that paints and other coating substances used in the construction of the power plants contained asbestos or silica, which was released into the air when the product was sprayed or when it was sanded or ground off the surface to which it had been applied, there was no expert testimony under Tex. R. Evid. 702 and 705(c) that spraying, sanding, or grinding a liquid paint or coating produced friable asbestos fibers likely to cause asbestosis;

and (2) although the type of silica that caused silicosis was crystalline silica, the evidence showed that the products in the employees' case contained amorphous silica and there was no evidence that amorphous silica caused silicosis or that grinding and sanding the paint and coatings released a form of silica that was capable of causing injury; thus, the employees never proved an exposure to a form of asbestos or silica that would cause injury and the employees failed to meet their initial burden of showing that they were exposed to asbestos and/or silica in a form that was capable of causing injury from manufacturers, suppliers, contractors, premises owners, and former employers' products. In re ROC Pretrial, 131 S.W.3d 129, 2004 Tex. App. LEXIS 315 (Tex. App. San Antonio 2004).

Torts : Negligence : Causation : Proximate Cause : General Overview

2084. In a personal injury suit stemming from a collision between a motorist and a bicyclist, evidence of the bicyclist's intoxication should have been admitted because the bicyclist's vigilance, judgment, and reactions were at issue; the absence of evidence that causally connected alcohol consumption or intoxication to the cause of that collision did not require the exclusion of expert testimony under Tex. R. Evid. 702. Ticknor v. Doolan, 2006 Tex. App. LEXIS 6717 (Tex. App. Houston 14th Dist. July 27 2006).

Torts : Negligence : Proof : Evidence : Expert Testimony

2085. In a health care liability case arising from a hysterectomy during which the patient's bowel was pricked, it was proper to find that a board-certified obstetrician/gynecologist was not qualified to opine on the causation issues of whether a hypoxic event occurred and whether such an event caused symptoms more than a year later. Alonzo v. Lampkin, 2013 Tex. App. LEXIS 13932 (Tex. App. Amarillo Nov. 13 2013).

2086. Results of explosions causing the ground to vibrate are in some ways entirely clear, and the temporal proximity of the events, when combined with the anticipated general knowledge jurors would have of the result of shaking the earth, and the interaction between sand and gravel gave such evidence; in the context of the situation in this case, expert testimony was not necessary, and there was some evidence to connect the actions of the company in its seismic testing and the damage occasioned to the owners' water well. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 783, 2012 Tex. App. LEXIS 1446, 175 Oil & Gas Rep. 775 (Tex. App. Texarkana Feb. 24 2012).

2087. Where a standard of care must be met in a negligence case, it is reasonable that expert testimony would be required to show the limits of that standard. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 783, 2012 Tex. App. LEXIS 1446, 175 Oil & Gas Rep. 775 (Tex. App. Texarkana Feb. 24 2012).

2088. Court recognizes authority holding that a trier of fact may decide proximate cause in medical malpractice cases based upon (1) general experience and common sense, (2) scientific principles provided by expert testimony, or (3) a probable causal relationship as articulated by expert testimony, and as applied in the context of back injuries and causation, courts have reasoned that if multiple causes of the injury are shown, then expert testimony is necessary; these concepts would reasonably apply to this field of scientific endeavor as well. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 783, 2012 Tex. App. LEXIS 1446, 175 Oil & Gas Rep. 775 (Tex. App. Texarkana Feb. 24 2012).

2089. Court is not persuaded that expert testimony about the connection between the blasting and the injury is necessary in every case, and will not state such a bright-line rule, and a claimant is required, however, to show a causal connection between the event and the injury; further, in an appeal where the review is under a "no evidence" standard, the evidence would not need to be great, but only more than a scintilla or a suspicion, and in making such a determination, however, the court still must determine what sort of evidence must have been presented, and what evidence actually was presented. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 783, 2012 Tex. App. LEXIS 1446, 175

Oil & Gas Rep. 775 (Tex. App. Texarkana Feb. 24 2012).

2090. Court believes that a juror, applying commonsense understanding, can tie the relationship of the vibrations of the earth caused by seismic testing with reasonable probability to the concurrent abrupt sanding of a water well; hence, although expert testimony is often helpful to the understanding of the effects of seismic testing and is often advised, when there has been convincing lay witness evidence presented, as in this case, it is not absolutely mandatory. Seitel Data, Ltd. v. Simmons, 362 S.W.3d 783, 2012 Tex. App. LEXIS 1446, 175 Oil & Gas Rep. 775 (Tex. App. Texarkana Feb. 24 2012).

2091. No-evidence summary judgment was appropriate in a negligence case because several injured parties failed to present expert testimony to establish a causal link between the exposure to noxious chemicals after a train collision and their symptoms. Carr v. Union Pac. R.R. Co., 2011 Tex. App. LEXIS 7794, 2011 WL 4489982 (Tex. App. Houston 14th Dist. Sept. 29 2011).

2092. Expert opined on all three required elements: standard of care, breach, and causation and the expert's amended report tied the alleged breach to the alleged injury; the doctor was the patient's treating physician and the report referred to the doctor's conduct, and the expert's amended report adequately described the causation element required under chapter 74, and the expert was qualified to opine on the cause of injuries that allegedly occurred as a result of the doctor's alleged negligence as the expert was an expert in discography. Whisenant v. Arnett, 339 S.W.3d 920, 2011 Tex. App. LEXIS 3386 (Tex. App. Dallas May 5 2011).

2093. Because a personal injury claimant could not recall the details of her fall on a stairway and had no factual evidence of how it occurred, an expert's conclusions that the fall was caused by the inadequate lighting and irregular dimensions of the stairway were based on speculation and conjecture, thus constituting no evidence on summary judgment. Hanson v. Greystar Dev. & Constr., Lp, 317 S.W.3d 850, 2010 Tex. App. LEXIS 5635 (Tex. App. Fort Worth July 15 2010).

2094. In a suit alleging negligent operation of injection wells, prejudicial error occurred under Tex. R. App. P. 44.1(a)(1) as to the exclusion of a qualified expert's standard of care testimony, which was both relevant and required, and the admission of testimony from other experts that consisted of unsupported speculation. Discovery Operating, Inc. v. Bp Am. Prod. Co., 311 S.W.3d 140, 2010 Tex. App. LEXIS 2629, 173 Oil & Gas Rep. 697 (Tex. App. Eastland Apr. 15 2010).

2095. In a suit alleging that a dentist's cessation of Plavix and aspirin caused a patient's stroke, a report from an anesthesiologist was sufficient to establish that the anesthesiologist was qualified under Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (r)(5)(D) and Tex. R. Evid. 702 to opine on causation. The report stated that the expert had acquired knowledge about the effects of Plavix and aspirin through practical experience; that the expert attended classes on how anticoagulant therapies were processed and how the body responded when those drugs are discontinued; and that the expert had acquired knowledge, training, and experience about the specific issue through published works, consultations, and teaching medical residents. Leland v. Brandal, 2009 Tex. App. LEXIS 8453, 2009 WL 3645067 (Tex. App. San Antonio Nov. 4 2009).

2096. Cause of death was something that ordinarily required expert testimony; although appellants noted that decedent suffered from various maladies involving blood pressure, heart, and the circulatory system, this evidence failed to establish any causal connection between the event and the decedent's injuries. Herring v. Haydon, 2009 Tex. App. LEXIS 3374, 2009 WL 1361654 (Tex. App. Amarillo May 13 2009).

2097. In a case alleging that pain and swelling in a patient's left vulvar area was negligently diagnosed as cellulitis rather than Methicillin Resistant Staphylococcus Aureus (MRSA), an expert was qualified under Tex. Civ. Prac. &

Rem. Code Ann. § 74.401 to render liability and causation opinions, despite being an infectious disease specialist rather than a gynecologist. Moheb v. Harvey, 2009 Tex. App. LEXIS 229, 2008 WL 5501166 (Tex. App. Beaumont Jan. 15 2009).

2098. In a health care liability action against an emergency room doctor and associated entities, there was no error under Tex. R. Evid. 702 when the trial court considered an expert report from a nonphysician expert in legal and corporate contracts with regard to the contractual and corporate interrelationships of the various defendants, in order to assist physician experts in presenting the applicable standards of care; the report did not provide opinions about issues of law that were the sole province of the court. Packard v. Guerra, 252 S.W.3d 511, 2008 Tex. App. LEXIS 1416 (Tex. App. Houston 14th Dist. 2008).

2099. In a legal malpractice case, summary judgment was properly granted to several former attorneys because a former client failed to produce any competent expert testimony on causation relating to either negligence or a violation of the Texas Deceptive Trade Practices Act; there were complex issues concerning the finality of an underlying bank case, appellate procedure, settlement, the effect of agreements, bankruptcy stays, and other related issues that could not have been determined by lay persons. Twist v. Garcia, 2007 Tex. App. LEXIS 7187 (Tex. App. Corpus Christi Aug. 30 2007).

2100. In a personal injury suit, lay testimony was insufficient to support a finding that the car accident caused the $1.1 million in medical expenses awarded by the jury; the Supreme Court of Texas concluded that expert medical evidence was required to prove causation between the accident and the necessity of particular medical expenses. Guevara v. Ferrer, 247 S.W.3d 662, 2007 Tex. LEXIS 795, 50 Tex. Sup. Ct. J. 1182 (Tex. 2007).

Torts : Negligence : Standards of Care : Reasonable Care : General Overview

2101. Testifying expert cannot establish medical standards of care by testifying as to what he would have done, but a defendant doctor can establish a medical standard by which his own conduct is to be judged. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

Torts : Premises Liability & Property : General Premises Liability : Dangerous Conditions : General Overview

2102. Trial court did not abuse its discretion by excluding the testimony of the patron's expert, a safety engineer, because the trial court could have reasonably determined that the engineer's opinion would not assist a jury in determining if the condition of the walkway posed an unreasonable risk of harm. From photographs and testimony about prior falls and complaints, a jury would have been able to form its own conclusion about whether the walkway posed an unreasonable risk of harm.

Torts : Products Liability : General Overview

2103. In a products liability case, an expert's testimony regarding a fire allegedly started by a lamp was not speculative or conclusory nor did it contain an impermissible analytical gap between the data and the conclusions; while the expert's analysis was not irrefutable, the expert did provide factual substantiation for his opinions. The expert's opinions were based on his knowledge, training and experience as an expert in fire science and fire investigation, his review of the pictures of the scene, the statements of the fact witnesses, and numerous published articles. Merrell v. Wal-Mart Stores, Inc., 276 S.W.3d 117, 2009 Tex. App. LEXIS 414 (Tex. App. Texarkana Jan. 23 2009).

2104. Trial court did not abuse its discretion by admitting the testimony of a truck owner's expert, who was a metallurgical and mechanical engineer, in the owner's action that claimed that a manufacturing defect in his truck caused his collision with two parked cars because the truck manufacturer's attacks on the expert's theory of why the nuts on the truck's u-bolt were not tightened sufficiently did not undermine his observation that the nuts on the u-bolt were insufficiently tightened in a way that allowed the u-bolt to fail. To prove a manufacturing defect, the owner did not need to prove that the manufacturing process was flawed, only that it produced a flawed product. Ford Motor Co. v. Ledesma, 173 S.W.3d 78, 2005 Tex. App. LEXIS 3377 (Tex. App. Austin 2005).

2105. Trial court did not abuse its discretion by admitting the testimony of a truck owner's expert, who was a metallurgical and mechanical engineer, in the owner's action that claimed that a manufacturing defect in his truck caused his collision with two parked cars because the truck manufacturer had not shown an analytical gap sufficient to make the trial court's admission of the expert's testimony regarding the effect of the off-center flattening of the truck's u-bolt error. Evidence casting doubt on whether the expert's theory was realized in the case might affect the credibility of his opinion, but it did not demonstrate that the trial court abused its discretion by finding that his theory regarding the effect of an asymmetrically flattened u-bolt was reliable. Ford Motor Co. v. Ledesma, 173 S.W.3d 78, 2005 Tex. App. LEXIS 3377 (Tex. App. Austin 2005).

2106. Trial court did not abuse its discretion by admitting the testimony of a truck owner's accident reconstruction expert in the owner's action that claimed that a manufacturing defect in his truck caused his collision with two parked cars because the manufacturer's criticisms went to the credibility, not the reliability of the expert's theories, and he was subject to vigorous cross-examination regarding the accuracy of his opinions. Ford Motor Co. v. Ledesma, 173 S.W.3d 78, 2005 Tex. App. LEXIS 3377 (Tex. App. Austin 2005).

2107. Trial court properly excluded some of the testimony of a truck manufacturer's expert regarding a truck owner's collision with two parked cars, which the owner claimed was caused by a manufacturing defect in the truck's axle, because the expert undisputedly lacked training in accident reconstruction. The expert had some practical experience in his job with the manufacturer, but his testimony contained sufficient uncertainty to support the trial court's decision because he did not explain how the relatively minor external damage to both vehicles squared with his theory that the tire-to-tire collision caused the axle to displace, and he had no test data to know the likelihood that the collision could cause the axle to displace. Ford Motor Co. v. Ledesma, 173 S.W.3d 78, 2005 Tex. App. LEXIS 3377 (Tex. App. Austin 2005).

2108. In a products liability suit arising from a fire which destroyed the buyers' apartment and was allegedly caused by an air conditioning unit, the trial court did not err in admitting the testimony of the expert put forward by the unit's manufacturer and seller, as the expert's work background, education, and knowledge and experience in fire investigation demonstrated that he had expertise concerning the actual subject about which he offered an opinion. Pugh v. Conn's Appliances, Inc., 2004 Tex. App. LEXIS 2443 (Tex. App. Beaumont Mar. 18 2004).

2109. Trial court properly granted manufacturers, suppliers, contractors, premises owners, and former employers' no-evidence summary judgment motion, Tex. R. Civ. P. 166a(i), because (1) although the former employees claimed that paints and other coating substances used in the construction of the power plants contained asbestos or silica, which was released into the air when the product was sprayed or when it was sanded or ground off the surface to which it had been applied, there was no expert testimony under Tex. R. Evid. 702 and 705(c) that spraying, sanding, or grinding a liquid paint or coating produced friable asbestos fibers likely to cause asbestosis; and (2) although the type of silica that caused silicosis was crystalline silica, the evidence showed that the products in the employees' case contained amorphous silica and there was no evidence that amorphous silica caused silicosis or that grinding and sanding the paint and coatings released a form of silica that was capable of causing injury; thus, the employees never proved an exposure to a form of asbestos or silica that would cause injury and the employees failed to meet their initial burden of showing that they were exposed to asbestos and/or silica in a form that was capable of causing injury from manufacturers, suppliers, contractors, premises owners, and former

employers' products. In re ROC Pretrial, 131 S.W.3d 129, 2004 Tex. App. LEXIS 315 (Tex. App. San Antonio 2004).

Torts : Products Liability : Design Defects

2110. In a design defect suit arising from a helicopter crash that was caused by a bird strike, although expert testimony on an alternative windshield design and on the design of the door mounts was conclusory and insufficient under Tex. R. Evid. 702, another expert's testimony on an alternative seatbelt design was sufficient under Tex. Civ. Prac. & Rem. Code Ann. § 82.005(b). De Damian v. Bell Helicopter Textron, Inc., 352 S.W.3d 124, 2011 Tex. App. LEXIS 7316 (Tex. App. Fort Worth Aug. 31 2011).

2111. In a products-liability case arising from injuries sustained by a truck driver in attempting to unload a truck trailer, the trial court properly directed a verdict in favor of the trailer's manufacturer on the driver's design-defect claim where the driver had not produced evidence to show that his proposed alternatively designed trailer with a covered rear gutter would be a safer alternative design under Tex. Civ. Prac. & Rem. Code Ann. § 82.005(b); no evidence reflected that the use of dock plates, when used as intended and spaced evenly over the gutter, would reduce or eliminate the hazard of pallet-jack wheels "falling" into the gutter, and the record also contained no expert testimony that any of the proposed alternative designs satisfied both requirements of § 82.005(b) as a safer alternative design. Champion v. Great Dane L.P., 286 S.W.3d 533, 2009 Tex. App. LEXIS 3222, CCH Prod. Liab. Rep. P18223 (Tex. App. Houston 14th Dist. May 7 2009).

2112. In a products-liability case arising from injuries sustained by a truck driver in attempting to unload a truck trailer, the trial court did not abuse its discretion in excluding the testimony of the driver's expert witness regarding design defect where the witness was not qualified under Tex. R. Evid. 702 because although he might have demonstrated his experience in designing workplace products and in designing solutions for hazards in walking surfaces, he was not shown to have any training, experience, or special knowledge in the design or manufacture of refrigerated trailers or their relevant components. The witness demonstrated no specialized knowledge regarding the particular design of an uncovered gutter spanning the width of the trailer in the rear, and, accordingly, his testimony as to the driver's proposed alternative designs did not rise above mere speculation. Champion v. Great Dane L.P., 286 S.W.3d 533, 2009 Tex. App. LEXIS 3222, CCH Prod. Liab. Rep. P18223 (Tex. App. Houston 14th Dist. May 7 2009).

2113. In a products liability and negligence lawsuit alleging that defective cellulose insulation caused a house fire, the deposition testimony and affidavit of the homeowners' expert witness were properly excluded because they were contradictory, contained conclusory allegations, and failed to rule out alternative causes of the fire; hence, there was no evidence of causation under either the proximate cause standard of negligence or the producing cause standard of Tex. Civ. Prac. & Rem. Code Ann. § 82.005(a)(2). Jacob v. Int'l Cellulose Corp., 2007 Tex. App. LEXIS 3314 (Tex. App. Austin Apr. 27 2007).

2114. Trial court did not abuse its discretion in determining that experts proffered by plaintiffs to testify about the design of a sport utility vehicle's side impact protection system were qualified to testify on the actual subject on which they offered an opinion where one of the experts, who testified that he had been involved in vehicle design for 57 years, was offered as an expert with knowledge of the consequences to and behavior of vehicles and occupants in crashes, including side impact crashes, and how to design vehicles to minimize the impact to occupants in vehicle crashes, including side impact crashes. GMC v. Burry, 203 S.W.3d 514, 2006 Tex. App. LEXIS 8284 (Tex. App. Fort Worth 2006).

2115. In a products liability design defect action against a sport utility vehicle's (SUV) manufacturer in which it was alleged that a passenger's side airbag in the SUV should have deployed in an accident involving the SUV and an eighteen-wheeler, the causation testimony of the passenger's biomechanical engineering expert was reliable based

on her qualifications and experience in the study of how human bodies moved and reacted when forces were applied to them; the expert did not fail to account for the passenger's left-side injuries, the inward forces applied to the B-pillar of the SUV, or the driver's unconsciousness at the scene, as the manufacturer contended. GMC v. Burry, 203 S.W.3d 514, 2006 Tex. App. LEXIS 8284 (Tex. App. Fort Worth 2006).

Torts : Products Liability : Manufacturing Defects

2116. In a products liability case, expert testimony was required because the evidence merely created a suspicion that a manufacturing defect caused a portable picnic table to collapse; in this case, causation was not within a layperson's general experience and common understanding. Further, there was no showing of a deviation from specifications or planned output, other possible causes had not been ruled out, and an injured party's pain could have been affected by the natural aging process and arthritis. Lyon v. Atico Int'l USA, Inc., 2009 Tex. App. LEXIS 4823, 2009 WL 1800820 (Tex. App. Waco June 24 2009).

2117. Expert testimony offered on behalf of a consumer was admissible in a manufacturing defect case relating to an accident allegedly caused by a part of a truck coming apart because it was reliable in nature; the issues raised by a manufacturer during cross-examination went to the weight of the testimony, but not its admissibility; the testimony did not present a case where there was simply too great an analytical gap between the data and the opinion proffered, or where the expert's testimony amounted to nothing more than a recitation of his credentials and a subjective opinion. Ford Motor Co. v. Ledesma, 242 S.W.3d 32, 2007 Tex. LEXIS 1130, 51 Tex. Sup. Ct. J. 250, CCH Prod. Liab. Rep. P17894 (Tex. 2007).

2118. In a personal injury case alleging that a manufacturing defect caused the failure of a steel-belted radial tire, expert testimony was not reliable under Tex. R. Evid. 702 because the expert's novel explanation, that the "skim stock" was contaminated with hydrocarbon wax at the plant, was a naked hypothesis untested and unconfirmed by the methods of science. Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 2006 Tex. LEXIS 555, 49 Tex. Sup. Ct. J. 751 (Tex. 2006).

2119. Expert was not qualified to testify on the subject of wax migration and contamination in tires and their effect on tire adhesion, even though he had a degree in chemistry, because chemistry is an exceedingly vast science and tire chemistry and design and the adhesion properties of tire components was a highly specialized field. Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 2006 Tex. LEXIS 555, 49 Tex. Sup. Ct. J. 751 (Tex. 2006).

Torts : Products Liability : Negligence

2120. In an action arising from a car fire, a verdict against a car manufacturer was reversed because there was no evidence that the fire and death were caused by a defect that allowed gas to siphon from the fuel system. The difficulty was that there were significant conflicts in and between testimony by plaintiff's two experts as to nature of the leak; experts could not be as ambivalent as those two were and establish the privilege of offering opinion testimony under Tex. R. Evid. 702. GMC v. Iracheta, 161 S.W.3d 462, 2005 Tex. LEXIS 304, 48 Tex. Sup. Ct. J. 529, CCH Prod. Liab. Rep. P17372 (Tex. 2005).

2121. Bare opinion by an expert as to nature of a leak in a fuel system, without a basis, was not competent evidence. GMC v. Iracheta, 161 S.W.3d 462, 2005 Tex. LEXIS 304, 48 Tex. Sup. Ct. J. 529, CCH Prod. Liab. Rep. P17372 (Tex. 2005).

2122. Expert's testimony was relevant to the issues to be decided by the jury where he conducted an audit of the manufacturer's design process, determining whether the manufacturer acted as a reasonable manufacturer would have in designing the forklift and taking safety considerations into account; the expert also offered testimony

regarding the operator's suggested alternative design, contradicting the testimony of the operator's experts by concluding the inclusion of a door in the forklift's design was not a safer alternative, and this testimony was sufficiently tied to the facts of the case to assist the jury in resolving a factual dispute. Costilla v. Crown Equip. Corp., 148 S.W.3d 736, 2004 Tex. App. LEXIS 10163 (Tex. App. Dallas 2004).

Torts : Products Liability : Strict Liability

2123. Former legal client, who claimed that bad legal advice given to his father had prevented him from pursuing product liability claims against a car manufacturer, could not recover against the law firm that gave the advice because he could not show that he would have recovered in the products liability suit, if he had brought it. The client claimed that the seat belts in his father's car were defective, but he could not prove his product liability claims without expert scientific and/or technical expert testimony, and he had not presented any expert testimony to support his claims. Rangel v. Lapin, 177 S.W.3d 17, 2005 Tex. App. LEXIS 318 (Tex. App. Houston 1st Dist. 2005).

2124. In a product liability action against the manufacturer of a rifle barrel that exploded, the trial court did not abuse its discretion in determining that testimony by a metallurgy expert, who also described himself as an "amateur gunsmith," was reliable as to opinions on gun design. Testimony as to defects in the steel was not proper from an engineering expert, but that testimony was cumulative and therefore the error was harmless. Olympic Arms, Inc. v. Green, 176 S.W.3d 567, 2004 Tex. App. LEXIS 11825, CCH Prod. Liab. Rep. P17247, 55 U.C.C. Rep. Serv. 2d (CBC) 575 (Tex. App. Houston 1st Dist. 2004).

Torts : Public Entity Liability : Immunity : Qualified Immunity

2125. Family was required to proffer the testimony of an expert witness as to whether a reasonable firefighter could have believed that he was justified in entering the intersection as the fireman did after weighing the risk of an accident against the need to respond to the alarm. Fireman was entitled to official immunity under Tex. Civ. Prac. & Rem. Code Ann. § 108.002 because the fireman made an adequate showing that he acted in good faith; he activated his emergency lights and siren, slowed down as he approached the intersection, activated his air horn and looked in the direction of approaching traffic, and drove slowly through the intersection. Green v. Alford, 2007 Tex. App. LEXIS 2342 (Tex. App. Houston 14th Dist. Mar. 27 2007).

Torts : Transportation Torts : General Overview

2126. In a personal injury case arising from a auto-pedestrian accident, testimony and exhibits from the injured girls father relating to whether a truck sideswiped another truck before hitting his daughter were properly excluded because the father was being called as an expert in accident reconstruction but was concededly not qualified as an expert under Tex. R. Evid. 702. Muhs v. Whataburger, Inc., 2010 Tex. App. LEXIS 9229, 2010 WL 4657955 (Tex. App. Corpus Christi Nov. 18 2010).

2127. In a wrongful death and survival action stemming from a multi-fatality vehicular accident, an accident reconstruction expert's testimony was reliable under Tex. R. Evid. 702 and therefore legally sufficient to support a verdict for plaintiffs. The expert's observations, measurements, and calculations were tied to the physical evidence, which likewise provided support for his conclusions and theory. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

Torts : Transportation Torts : Motor Vehicles

2128. In a personal injury accident, an expert was permitted to testify that he conducted an injury causation analysis based on physics and biomechanics and concluded that forces involved in the accident could not have caused the condition that necessitated plaintiff's surgeries. The testimony was not incompetent under Havner,

because the evidence failed to conclusively establish the opposite of the expert's conclusion. Gill v. Slovak, 2005 Tex. App. LEXIS 8876 (Tex. App. Corpus Christi Oct. 27 2005).

Torts : Transportation Torts : Motor Vehicles : Personal Vehicles

2129. In a collision case, there was no error under Tex. R. Evid. 702 in allowing a reconstructionist to opine on who entered the intersection on a red light, even though a 2002 Camaro, not the 1989 Mustang involved in the accident, was used experimentally, because the expert explained why the differences did not matter in calculating the coefficient of friction. Lincoln v. Clark Freight Lines, Inc., 285 S.W.3d 79, 2009 Tex. App. LEXIS 1037 (Tex. App. Houston 1st Dist. Feb. 12 2009).

Torts : Transportation Torts : Rail Transportation : Federal Employers' Liability Act

2130. In a negligence action under the Federal Employers Liability Act, an ergonomist expert was found to be reliable, as the expert was very knowledgeable of the locomotives and seats a railroad employee encountered because the expert had personally evaluated a large number of a railroad company's locomotives and cab seats over the course of his career. BNSF Ry. Co. v. Phillips, 434 S.W.3d 675, 2014 Tex. App. LEXIS 5533 (Tex. App. Fort Worth May 22 2014).

Torts : Wrongful Death & Survival Actions : Causation

2131. In a wrongful death case, expert testimony that a driver was the cause of a fatal collision was properly admitted into evidence as reliable, even though no witnesses were interviewed; no witnesses came forward since the accident occurred in an unpopulated area. Further, the expert did not overlook the driver's contention that a decedent had been the one to cross over a median; rather, the driver's account was inconsistent with and contradicted the physical evidence at the scene of the accident. Thomas v. Uzoka, 290 S.W.3d 437, 2009 Tex. App. LEXIS 4354 (Tex. App. Houston 14th Dist. May 28 2009).

Trade Secrets Law : Civil Actions : Remedies : Damages : General Overview

2132. Expert's testimony regarding damages in a trade secrets action was properly admitted because it was not illogical for the expert to assign a value to each separate piece of the compilation, and it was not suggested how using the geologist's former partner's name as the hypothetical "willing buyer" changed the expert's calculations in any way. Bishop v. Miller, 412 S.W.3d 758, 2013 Tex. App. LEXIS 11614 (Tex. App. Houston 14th Dist. Sept. 12 2013).

2133. Expert's testimony regarding damages in a trade secrets action was properly admitted because it was not illogical for the expert to assign a value to each separate piece of the compilation, and it was not suggested how using the geologist's former partner's name as the hypothetical "willing buyer" changed the expert's calculations in any way. Bishop v. Miller, 412 S.W.3d 758, 2013 Tex. App. LEXIS 11614 (Tex. App. Houston 14th Dist. Sept. 12 2013).

Transportation Law : Private Vehicles : Safety Standards : Seat Belts

2134. In a product liability case, a trial court properly determined that an expert was qualified to give an opinion regarding seatbelts in buses because he was a structural engineer with a bachelor's and master's degree who had performed all of the structural analysis and design on a safety school bus project, including seat supports, which led to the development of a Federal Motor Vehicle Safety Standard, performed data analysis of bus-seat testing for the United States Department of Transportation, and designed computer modeling programs to simulate the performance of seatbelt and airbag systems. MCI Sales & Serv. v. Hinton, 272 S.W.3d 17, 2008 Tex. App. LEXIS

6951 (Tex. App. Waco 2008), *aff'd*, 329 S.W.3d 475, 2010 Tex. LEXIS 976, 54 Tex. Sup. Ct. J. 386 (Tex. 2010), *cert. denied*, 131 S. Ct. 2903, 179 L. Ed. 2d 1246, 2011 U.S. LEXIS 3990 (U.S. 2011).

Workers' Compensation & SSDI : Administrative Proceedings : Evidence : General Overview

2135. Widow's expert's testimony presented no evidence as to the husband's cause of death, where in workers' compensation cases, expert medical testimony could enable a plaintiff to go to the jury if the evidence established reasonable probability of a causal connection between employment and the present injury, but if there were other plausible causes of the injury or condition that could be negated, the plaintiff had to offer evidence excluding those causes with reasonable certainty; the widow's expert was unable to prove that it was a reasonable probability that the husband contracted tetanus from the May 13th wound in light of the incubation period and in light of numerous other existing probable causes for the infection. Tex. Mut. Ins. Co. v. Lerma, 143 S.W.3d 172, 2004 Tex. App. LEXIS 5235 (Tex. App. San Antonio 2004).

Workers' Compensation & SSDI : Administrative Proceedings : Evidence : Medical Evidence

2136. Finding in favor of the employee in a workers' compensation action was appropriate because an expert witness was qualified to testify since he was a licensed cardiologist with a Ph.D. in biochemistry and he had also done research in cardiology both on animals and in clinical research. N.H. INS. Co. v. Allison, 414 S.W.3d 266, 2013 Tex. App. LEXIS 9604 (Tex. App. Houston 1st Dist. Aug. 1 2013).

2137. Employee merely provided his medical records and expected the jury to understand them, and laypersons did not have the knowledge to understand the intricacies involved in diagnosing a back injury without some guidance from a medical expert; accordingly, the employee failed to provide more than a scintilla of evidence to support his claim of a compensable injury. State Office of Risk Mgmt. v. Adkins, 347 S.W.3d 394, 2011 Tex. App. LEXIS 6187 (Tex. App. Dallas Aug. 9 2011).

2138. Designated doctor's report stating the date of the worker's maximum medical improvement (June 27, 2000) and his impairment rating (22 percent) was not reliable under Tex. R. Evid. 702 and violated 28 Tex. Admin. Code § 130.1(c)(3) because the designated doctor's clarification letter admitted that he could not determine whether the second back surgery in December 2005 contributed to the worker's loss of motion. Because the designated doctor's opinion was unreliable it should not have been considered, and therefore the jury would have had no choice but to adopt the treating physician's clinical maximum medical improvement date (April 9, 1999) and impairment rating (eight percent). State Office of Risk Mgmt. v. Ramirez, 2010 Tex. App. LEXIS 4956 (Tex. App. San Antonio June 30 2010).

2139. In a workers' compensation case, a trial court did not err by allowing expert testimony under Tex. R. Evid. 702 because a doctor was qualified to give an opinion regarding causation; he had graduated from medical school, had been an orthopedic surgeon for 17 years, and was board certified in total joint replacement. Moreover, the expert's opinion that a benefit claimant's compensable injury included osteoarthritis and chondromalacia was based on a number of factors, and it was based on a reasonable medical probability, and not possibility, speculation, or surmise. Am. Cas. Co. of Reading v. Zachero, 2008 Tex. App. LEXIS 9263 (Tex. App. Eastland Dec. 11 2008).

2140. In a hospital's action against an employee that sought to reverse a determination by the Texas Workers' Compensation Commission, which had found that the employee sustained a compensable injury in the course and scope of her employment with the hospital, even assuming that the trial court's exclusion of the medical records of a doctor obtained by a deposition on written questions was error, the hospital failed to show that it was harmful because the excluded evidence was cumulative and did not affect the ability of the experts to explain their medical opinions; although the doctor's test results were excluded, substantially the same evidence was introduced through

one of the hospital's experts. Christus Health/St. Joseph Hosp. v. Price, 2007 Tex. App. LEXIS 754 (Tex. App. Houston 1st Dist. Feb. 1 2007).

Workers' Compensation & SSDI : Administrative Proceedings : Evidence : Witnesses

2141. Trial court did not abuse its discretion in admitting the testimony of a workers' compensation claimant's expert where the diagnoses and opinions expressed by the expert had a sufficient foundation to be admitted into evidence because: (1) the expert was qualified to give his expert opinion; (2) his testimony was not irrelevant, conclusory, or speculative; (3) his testimony was not based on an unreliable foundation; and (4) any analytical gap between the data and the opinion was not so great that it rendered the opinion inadmissible as evidence. Meadwestvaco Corp. v. Booker, 2010 Tex. App. LEXIS 10333, 2010 WL 5550665 (Tex. App. Beaumont Dec. 30 2010).

2142. Designated doctor's report stating the date of the worker's maximum medical improvement (June 27, 2000) and his impairment rating (22 percent) was not reliable under Tex. R. Evid. 702 and violated 28 Tex. Admin. Code § 130.1(c)(3) because the designated doctor's clarification letter admitted that he could not determine whether the second back surgery in December 2005 contributed to the worker's loss of motion. Because the designated doctor's opinion was unreliable it should not have been considered, and therefore the jury would have had no choice but to adopt the treating physician's clinical maximum medical improvement date (April 9, 1999) and impairment rating (eight percent). State Office of Risk Mgmt. v. Ramirez, 2010 Tex. App. LEXIS 4956 (Tex. App. San Antonio June 30 2010).

Workers' Compensation & SSDI : Administrative Proceedings : Judicial Review : Standards of Review

2143. In a hospital's action against an employee that sought to reverse a determination by the Texas Workers' Compensation Commission, which had found that the employee sustained a compensable injury in the course and scope of her employment with the hospital, even assuming that the trial court's exclusion of the medical records of a doctor obtained by a deposition on written questions was error, the hospital failed to show that it was harmful because the excluded evidence was cumulative and did not affect the ability of the experts to explain their medical opinions; although the doctor's test results were excluded, substantially the same evidence was introduced through one of the hospital's experts. Christus Health/St. Joseph Hosp. v. Price, 2007 Tex. App. LEXIS 754 (Tex. App. Houston 1st Dist. Feb. 1 2007).

Workers' Compensation & SSDI : Benefit Determinations : Death Benefits

2144. In a workers' compensation case, expert medical causation testimony from the deceased worker's treating physician, who relied on a differential diagnosis, was legally sufficient evidence to support the jury's finding that a workplace injury was the producing cause of death, even though the worker was on a lifelong regimen of immunosuppressant drug therapy related to a kidney transplant. Transcon. Ins. Co. v. Crump, 330 S.W.3d 211, 2010 Tex. LEXIS 616, 53 Tex. Sup. Ct. J. 1124 (Tex. 2010).

Workers' Compensation & SSDI : Benefit Determinations : Permanent Partial Disabilities

2145. In a workers' compensation action regarding an employee's impairment rating, the trial court properly admitted testimony from the physician appointed to evaluate the employee on behalf of the employer under Tex. R. Evid. 702; athough the doctor's orthopedic training was in Canada, the doctor was licensed and practiced in Texas, and had been approved as a designated doctor by the Texas Workers' Compensation Commission. Barrigan v. MHMR Servs., 2007 Tex. App. LEXIS 43 (Tex. App. Austin Jan. 4 2007).

Workers' Compensation & SSDI : Compensability : Injuries : General Overview

2146. Expert medical testimony is required in a worker's compensation case to establish the nature of an injury, whether it is temporary or permanent, and the extent of disability or incapacity resulting from the injury. Region Xix Serv. Ctr. v. Banda, 343 S.W.3d 480, 2011 Tex. App. LEXIS 905 (Tex. App. El Paso Feb. 9 2011).

2147. Given the substantial medical testimony presented under Tex. R. Evid. 702 regarding an employee's injuries, condition, and physical limitations, the ultimate issue--whether the employee's hands and foot possessed any substantial utility as members of the body--was not beyond the knowledge and experience of the jurors; similarly, the jurors did not require specialized training to determine whether the employee's condition was such that she could not get or keep employment requiring the use of her hands, or one hand and one foot. The employee therefore was not required to present expert testimony to establish total loss of use under Tex. Labor Code Ann. § 408.161. Region Xix Serv. Ctr. v. Banda, 343 S.W.3d 480, 2011 Tex. App. LEXIS 905 (Tex. App. El Paso Feb. 9 2011).

Tex. Evid. R. 703

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 703 Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 60, *Opinion Testimony*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Comment to 1998 change The former Civil Rule referred to facts or data "perceived by or reviewed by" the expert. The former Criminal Rule referred to facts or data "perceived by or made known to" the expert. The terminology is now conformed, but no change in meaning is intended.

Comment to 1990 change This amendment conforms this rule of evidence to the rules of discovery in utilizing the term "reviewed by the expert." *See also* Comment to T.R.C.P. Rule 166b.

Comment to 2015 Restyling: All references to an "inference" have been deleted because this makes the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Case Notes

Civil Procedure : Discovery : Methods : Expert Witness Discovery
Civil Procedure : Discovery : Privileged Matters : Work Product : Scope
Civil Procedure : Summary Judgment : Evidence
Civil Procedure : Summary Judgment : Supporting Materials : General Overview

Civil Procedure : Eminent Domain Proceedings : Experts
Civil Rights Law : Protection of Disabled Persons : General Overview
Commercial Law (UCC) : Sales (Article 2) : Form, Formation & Readjustment : General Overview
Commercial Law (UCC) : Sales (Article 2) : Remedies : General Overview
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Motions for Mistrial
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Discovery
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Habeas Corpus : Review : Specific Claims : Evidentiary Errors
Evidence : Competency : Affirmations & Oaths
Evidence : Hearsay : General Overview
Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Hearsay : Rule Components
Evidence : Hearsay : Rule Components : General Overview
Evidence : Inferences & Presumptions : Inferences
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Scientific Evidence : General Overview
Evidence : Scientific Evidence : Daubert Standard
Evidence : Scientific Evidence : Polygraphs
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility
Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Experts : Daubert Standard
Evidence : Testimony : Experts : Helpfulness
Evidence : Testimony : Experts : Qualifications
Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview
Family Law : Parental Duties & Rights : Termination of Rights : General Overview
Healthcare Law : Actions Against Facilities : Standards of Care : Expert Testimony
Healthcare Law : Treatment : Failures to Disclose & Warn : Prescription Medications
Public Health & Welfare Law : Healthcare : Mental Health Services : Commitment : Involuntary Commitment of Adults
Real Property Law : Eminent Domain Proceedings : Valuation
Tax Law : State & Local Taxes : Personal Property Tax : Tangible Property : General Overview
Torts : Damages : Compensatory Damages : Medical Expenses
Torts : Damages : Compensatory Damages : Property Damage : Loss of Use
Torts : Malpractice & Professional Liability : Attorneys
Torts : Malpractice & Professional Liability : Healthcare Providers

Workers' Compensation & SSDI : Administrative Proceedings : Burdens of Proof
Workers' Compensation & SSDI : Administrative Proceedings : Evidence : Medical Evidence

LexisNexis (R) Notes

Civil Procedure : Discovery : Methods : Expert Witness Discovery

1. Tex. R. Civ. P. 192 prevails over Tex. R. Civ. P. 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production; that is, once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced. In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 2007 Tex. LEXIS 362, 50 Tex. Sup. Ct. J. 682 (Tex. 2007).

Civil Procedure : Discovery : Privileged Matters : Work Product : Scope

2. Tex. R. Civ. P. 192 prevails over Tex. R. Civ. P. 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production; that is, once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced. In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 2007 Tex. LEXIS 362, 50 Tex. Sup. Ct. J. 682 (Tex. 2007).

Civil Procedure : Summary Judgment : Evidence

3. In a products liability case, because an affidavit from a neighbor that a lamp was still on prior to a fire was not sworn under Tex. Gov't Code Ann. § 312.011(1), it could not have been used for summary judgment evidence; however, it was admissible for the limited purpose of information reasonably relied upon by an expert under Tex. R. Evid. 703. The neighbor was not an unknown bystander, nor did the statement repeat a rumor; moreover, the veracity of the statement could have been verified, and a retailer could have presented contrary evidence if the statement was incorrect. Merrell v. Wal-Mart Stores, Inc., 276 S.W.3d 117, 2009 Tex. App. LEXIS 414 (Tex. App. Texarkana Jan. 23 2009).

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

4. In a pipeline company's action for negligent damage to a gasoline pipeline, causation was not shown as to claims against developers regarding the platting of the lot because there was no evidence of where digging would have occurred if the lot had been configured differently. An expert witness' assumption that digging would have occurred in a different place was not a reasonable inference from the evidence and did not constitute competent summary judgment evidence under Tex. R. Evid. 703, 705(c). Seaway Prods. Pipeline Co. v. Hanley, 153 S.W.3d 643, 2004 Tex. App. LEXIS 10900 (Tex. App. Fort Worth 2004).

5. Affidavits of expert witnesses offered in support of homeowners' motion against summary judgment in an action seeking losses for a house fire failed to meet the requirements of Tex. R. Evid. 401, 403, 702, and 703, as the testimony was a pyramid of inferences lacking probative force because it was based on assumed facts that varied from the actual undisputed facts. Rayon v. Energy Specialties, Inc., 121 S.W.3d 7, 2002 Tex. App. LEXIS 9160 (Tex. App. Fort Worth 2002).

Civil Procedure : Eminent Domain Proceedings : Experts

6. Trial court did not err in a condemnation case in which the jury found the fair value of the property owner's land to be $250,000 in admitting the testimony of the State's expert appraiser where there were no gaps in the testimony

of the appraiser or misapplication of legal rules such that her testimony could have been found to have been unreliable because the appraiser had formed her opinion by comparing the difference between the results of two methods of valuing the property: the cost approach, giving a value of $217,000, and the improved sales comparison approach that gave a value of $205,000. The property owner had not shown that the appraiser could not make valid comparisons for size, and the evidence permitted the conclusion that the owner's entire property was devoted to single-family use and that the applicable zoning ordinance would have allowed the existing use to continue. Williams v. State, 406 S.W.3d 273, 2013 Tex. App. LEXIS 7405 (Tex. App. San Antonio June 19 2013).

Civil Rights Law : Protection of Disabled Persons : General Overview

7. No abuse of discretion in excluding evidence regarding the Americans With disabilities Act and the Texas Accessibility Standards, because the evidence was not crucial to whether the clinic had actual or constructive knowledge of a dangerous condition on the premises that presented an unreasonable risk of harm and that the condition proximately caused the claimant's injuries. Craig v. Beeville Family Practice, L.L.P., 2012 Tex. App. LEXIS 4422, 2012 WL 1656492 (Tex. App. Corpus Christi May 10 2012).

Commercial Law (UCC) : Sales (Article 2) : Form, Formation & Readjustment : General Overview

8. In a breach of contract action arising from the sale of large machine tools, an expert witness on damages was properly allowed to testify that he personally contacted customers to ascertain why certain sales were lost or certain orders cancelled; under Tex. R. Evid. 703, he could rely on inadmissible evidence that was the type reasonably relied upon by experts in the particular field. Toshiba Mach. Co. v. SPM Flow Control, Inc., 180 S.W.3d 761, 2005 Tex. App. LEXIS 9478 (Tex. App. Fort Worth 2005).

9. Trial court did not abuse its discretion by admitting the testimony of a buyer's vice president of finance about lost sales. Although the witness testified that he personally contacted the buyer's customers to ascertain why certain sales were lost or certain orders cancelled, an expert could rely on inadmissible facts or data to form an opinion or inference if the facts or data were of a type reasonably relied upon by experts in the particular field. Toshiba Mach. Co., Am. v. SPM Flow Control, Inc., 2005 Tex. App. LEXIS 4218 (Tex. App. Fort Worth June 2 2005), superseded by 2005 Tex. App. LEXIS 9478 (Tex. App. Fort Worth Nov. 10, 2005).

Commercial Law (UCC) : Sales (Article 2) : Remedies : General Overview

10. In a breach of contract action arising from the sale of large machine tools, an expert witness on damages was properly allowed to testify that he personally contacted customers to ascertain why certain sales were lost or certain orders cancelled; under Tex. R. Evid. 703, he could rely on inadmissible evidence that was the type reasonably relied upon by experts in the particular field. Toshiba Mach. Co. v. SPM Flow Control, Inc., 180 S.W.3d 761, 2005 Tex. App. LEXIS 9478 (Tex. App. Fort Worth 2005).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

11. Confrontation Clause was violated when a testifying medical examiner disclosed out-of-court testimonial statements in an autopsy report that was prepared by a nontestifying medical examiner. Under Tex. R. Evid. 703, 705(d), the value of that information was outweighed by the danger that the inadmissible statements would be used to prove the truth of the matters stated. Wood v. State, 299 S.W.3d 200, 2009 Tex. App. LEXIS 7882 (Tex. App. Austin Oct. 7 2009).

12. In defendant's drug case, the court properly allowed an expert to testify that the substance deliverd by defendant was cocaine because the case did not involve one expert merely reading to the jury a report conducted by another; the testimony of the expert witness concerning the chemical analysis of the substance, determined by

applying his expertise to reliable scientific test data, was admissible as he was subject to cross-examination. Blaylock v. State, 259 S.W.3d 202, 2008 Tex. App. LEXIS 3449 (Tex. App. Texarkana 2008).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

13. In a trial for a "shaken-baby" murder, any error arising from the admission of an investigator's opinion on guilt was harmless. Although defendant objected to the testimony under Tex. R. Evid. 703 during the prosecution's re-direct, the same question and answer had come in without objection during the defense's prior cross-examination. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

14. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Riot, Rout & Unlawful Assembly

15. In an aggravated assault case, expert testimony regarding defendant's gang affiliation was proper because the expert testified that his group identified defendant as a gang member based on his name being on a list of gang members kept by another gang member, his correspondence with gang members about the internal activities of the Mexican Mafia, distinctive gang tattoos, and a letter stating that defendant had been cleared as a member; therefore, there was a substantial basis for the expert witness's conclusion that defendant was a gang member. Loredo v. State, 2007 Tex. App. LEXIS 6703 (Tex. App. Tyler Aug. 22 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

16. In a sexual assault case, a court erred by failing to allow defendant's expert to testify where the subject of the expert's opinion was relevant, just as the State's expert was permitted to testify that the lack of genital injuries did not indicate that the complainant had not been sexually assaulted, defendant's expert should have been permitted to testify that no sexual assault occurred. One party could not proffer expert testimony and subsequently argue successfully that the testimony was not relevant when the opposing party sought to offer expert testimony on the same subject which reached a different conclusion; in addition, the error was not harmless. Vela v. State, 159 S.W.3d 172, 2004 Tex. App. LEXIS 7257 (Tex. App. Corpus Christi 2004).

17. In a case involving child indecency, a trial court did not err by allowing an expert to testify regarding defendant's future dangerousness, despite the fact that the expert never met defendant because such contact was not required under Tex. R. Evid. 703; moreover, the expert was qualified to give an opinion based on the expert's training, education, and vast experience with sexual offenders. Rodriguez v. State, 2004 Tex. App. LEXIS 3457 (Tex. App. Fort Worth Apr. 15 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

18. In defendant's trial for aggravated sexual assault of a child under the age of fourteen in violation of Tex. Penal Code Ann. § 22.021, the trial court did not abuse its discretion in admitting the rebuttal testimony of the State's

expert who testified that the complainant's "normal" behavior would not necessarily negate sexual abuse; the expert was qualified to provide testimony under Tex. R. Evid. 702 and 703 based on his educational and professional background and experience, and the expert's academic and professional background focusing on the treatment and observation of child victims of sexual abuse appropriately matched the subject matter of his testimony focusing on the behavioral patterns of child victims of sexual abuse. Briones v. State, 2009 Tex. App. LEXIS 5944, 2009 WL 2356626 (Tex. App. Houston 14th Dist. July 30 2009).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

19. In a driving while intoxicated case, the court did not err by allowing the officer to testify that defendant failed the field sobriety tests because the officer's use of the word "failed" did not give his testimony an "aura of scientific reliability" or cloak it with unearned credibility; the majority of the officer's testimony consisted of a straightforward narrative of each field sobriety test, followed by a particular description of how defendant performed each test. The officer's observations were based on common knowledge and observations and did not, under the circumstances convert his lay witness testimony into expert testimony. Meier v. State, 2009 Tex. App. LEXIS 2051, 2009 WL 765490 (Tex. App. Dallas Mar. 25 2009).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

20. In a sexual assault on a child case, counsel was not ineffective for failing to object to an expert's reliance on a medical report in forming his conclusion that the non-specific red bumps he found in the victim's genital area were caused by the Herpes Simplex Virus (HSV) where, regardless of whether the report was properly admitted as part of the State's exhibit, the expert could have properly testified to the basis for his diagnosis even though part of the data he relied on was hearsay; the report was also cumulative of all the other evidence at trial showing that the victim had been infected with HSV. Coker v. State, 2004 Tex. App. LEXIS 4799 (Tex. App. El Paso May 27 2004).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

21. Because the medical examiner's colleague testified to his independent conclusion concerning the victim's cause of death and did not testify to any of the statements contained in the medical examiner's autopsy report, the colleague's testimony did not violate defendant's right of confrontation. Gilstrap v. State, 2011 Tex. App. LEXIS 181, 2011 WL 192688 (Tex. App. San Antonio Jan. 12 2011).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

22. Even if the trial court erred by limiting defendant's cross-examination of the sexual assault nurse examiner, the error was harmless because the same or similar testimony was admitted without objection at another point in the trial; before the State's objection, the nurse testified that she accepted the victims' oral history as true, that the notches in one victim's hymen could be consistent with consensual sexual activity, and that there was no way of knowing when the notches happened. Young v. State, 382 S.W.3d 414, 2012 Tex. App. LEXIS 8627, 2012 WL 4874628 (Tex. App. Texarkana Oct. 16 2012).

Criminal Law & Procedure : Trials : Motions for Mistrial

23. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

24. Following the entry of defendant's nolo contendere plea to aggravated robbery, the trial court properly considered under Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a)(1) evidence regarding the murder of defendant's wife at the punishment hearing because the evidence was sufficient to establish beyond a reasonable doubt that defendant murdered his wife five days before he committed the aggravated robbery offense; further, the medical examiner's hearsay statement that defendant admitted strangling his wife was admissible pursuant to Tex. R. Evid. 703, and defendant did not object under Tex. R. Evid. 705(d). Garza v. State, 2009 Tex. App. LEXIS 5026, 2009 WL 1424610 (Tex. App. El Paso May 20 2009).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

25. In a civil commitment proceeding alleging that defendant was a sexually violent predator, defendant did not object, and therefore failed to preserve error under Tex. R. Evid. 703, 705, regarding an expert's testimony about an unauthenticated letter that the Special Prosecution Unit asserted defendant wrote. In re Ortiz, 2010 Tex. App. LEXIS 5731, 2010 WL 2854249 (Tex. App. Beaumont July 22 2010).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

26. Defendant waived appellate review regarding an officer's testimony on the psychological and physiological effects of ecstasy, cocaine, and marijuana because at trial he objected on confrontation grounds, not on the basis put forward on appeal, that the State failed to establish the admissibility of the complained-of testimony pursuant to Tex. R. Evid. 701, 702, or 703. Nelson v. State, 2005 Tex. App. LEXIS 6710 (Tex. App. El Paso Aug. 18 2005).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Discovery

27. Even if Tex. R. Evid. 705 authorized the trial court to order the State to disclose the underlying facts and data relied upon by its experts, the order entered in this case went far beyond requiring disclosure of the facts and data as defined by Tex. R. Evid. 703. Therefore, the trial court abused its discretion by entering the discovery order in this case. In re State, 2013 Tex. App. LEXIS 5323, 2013 WL 1846680 (Tex. App. El Paso Apr. 30 2013).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

28. Defendant failed to show that the trial court abused its discretion by permitting the State's expert to testify because defendant stipulated that he was a qualified expert witness, and the questions asked of the expert were proper because they asked him to opine on whether the facts and circumstances revealed by his investigation measured up to a standard of legal culpability. Even if the trial court erred by admitting the evidence, the error would have been harmless given the other evidence against defendant, including evidence that in the hours before the fatal accident, defendant had been drinking beer and whiskey and smoking marijuana. Blanchard v. State, 2013 Tex. App. LEXIS 5140 (Tex. App. Fort Worth Apr. 25 2013).

29. Even if the trial court erred by limiting defendant's cross-examination of the sexual assault nurse examiner, the error was harmless because the same or similar testimony was admitted without objection at another point in the trial; before the State's objection, the nurse testified that she accepted the victims' oral history as true, that the notches in one victim's hymen could be consistent with consensual sexual activity, and that there was no way of knowing when the notches happened. Young v. State, 382 S.W.3d 414, 2012 Tex. App. LEXIS 8627, 2012 WL 4874628 (Tex. App. Texarkana Oct. 16 2012).

Criminal Law & Procedure : Habeas Corpus : Review : Specific Claims : Evidentiary Errors

30. State inmate convicted of raping a woman at knifepoint was not entitled to habeas relief under 28 U.S.C.S. § 2254. The requirements of Tex. R. Evid. 703 were met because the lab supervisor testified that she had personally overseen a lab technician's work in performing DNA tests and reviewed the results. Martin v. Thaler, 2009 U.S. Dist. LEXIS 103733 (W.D. Tex. Nov. 5 2009).

Evidence : Competency : Affirmations & Oaths

31. In a products liability case, because an affidavit from a neighbor that a lamp was still on prior to a fire was not sworn under Tex. Gov't Code Ann. § 312.011(1), it could not have been used for summary judgment evidence; however, it was admissible for the limited purpose of information reasonably relied upon by an expert under Tex. R. Evid. 703. The neighbor was not an unknown bystander, nor did the statement repeat a rumor; moreover, the veracity of the statement could have been verified, and a retailer could have presented contrary evidence if the statement was incorrect. Merrell v. Wal-Mart Stores, Inc., 276 S.W.3d 117, 2009 Tex. App. LEXIS 414 (Tex. App. Texarkana Jan. 23 2009).

Evidence : Hearsay : General Overview

32. In a murder trial where defendant claimed he acted in self-defense, the trial court did not err by excluding testimony from a psychologist regarding the victim's acts of violence because the psychologist's knowledge of any acts committed by the victim came entirely from his review of the medical records which were not admitted into evidence. While the psychologist could rely on the victim's records as a basis for his expert opinion under Tex. R. Evid. 703, his proffered testimony was hearsay for which no exception was offered. Mason v. State, 2012 Tex. App. LEXIS 2314, 2012 WL 1058792 (Tex. App. Eastland Mar. 22 2012).

Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment

33. Trial court did not err in admitting the transcription of the doctor's testimony into evidence as an expert witness may rely on records and information prepared by others in reaching his conclusions, Tex. R. Evid. 703, and medical and autopsy reports fell into an exception to the hearsay rule and were allowed into evidence without the preparing doctor appearing in court to explain them, Tex. R. Evid. 803(4), (8). Rodriguez v. Tex. Dep't of Family & Protective Servs., 2011 Tex. App. LEXIS 6131, 2011 WL 3435736 (Tex. App. Austin Aug. 4 2011).

34. In a sexual assault on a child case, counsel was not ineffective for failing to object to an expert's reliance on a medical report in forming his conclusion that the non-specific red bumps he found in the victim's genital area were caused by the Herpes Simplex Virus (HSV) where, regardless of whether the report was properly admitted as part of the State's exhibit, the expert could have properly testified to the basis for his diagnosis even though part of the data he relied on was hearsay; the report was also cumulative of all the other evidence at trial showing that the victim had been infected with HSV. Coker v. State, 2004 Tex. App. LEXIS 4799 (Tex. App. El Paso May 27 2004).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

35. In a wrongful death case, a court properly excluded expert deposition testimony on hearsay grounds where the expert was not an employee of defendant pharmacy, and there was no evidence that an agency relationship existed. When the family non-suited their claims against the doctor, the subject matter over which the expert was asked to give his opinion became moot; subsequently, he was not called at trial, and, therefore, the trial court excluded his testimony on hearsay grounds. McCluskey v. Randall's Food Mkts., Inc., 2004 Tex. App. LEXIS 9178 (Tex. App. Houston 14th Dist. Oct. 19 2004).

Evidence : Hearsay : Rule Components

36. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

37. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Evidence : Hearsay : Rule Components : General Overview

38. Trial court did not abuse its discretion in excluding the hearsay underlying the opinion of defendant's expert witness during the sentencing phase because although the witness could state that he had reviewed the jail classification as a basis for his expert testimony, the classification itself remained inadmissible and could not be used as a basis for determining defendant's dangerousness in the future. Prystash v. State, 3 S.W.3d 522, 1999 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 1999).

Evidence : Inferences & Presumptions : Inferences

39. Because the rules of evidence allowed an expert to draw inferences from the underlying facts or data, Tex. Civ. Prac. & Rem. Code Ann. § 74.351 did not prohibit experts from making inferences based on medical history, and the absence of an entry in the records of a regularly conducted activity was admissible to show the nonoccurence of the matter, the nurse's inferences, and the fact that she drew some of them from what was not in the patient's medical records, did not render her expert report defective. Azle Manor, Inc. v. Vaden, 2008 Tex. App. LEXIS 8414 (Tex. App. Fort Worth Nov. 6, 2008).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

40. Trial court did not err in overruling objections to the admission of prior offenses evidence because it could have reasonably concluded that the evidence was admissible and would not be unfairly prejudicial given the purpose for admitting the evidence and the limiting instructions to the jury; the trial court could have found that the disclosure of the details of the offenses would be helpful to the jury to understand how the State's expert formed his opinion and the basis for that opinion. In re King, 2014 Tex. App. LEXIS 724, 2014 WL 346109 (Tex. App. Beaumont Jan. 23 2014).

41. Trial court did not err in overruling objections to the admission of prior offenses evidence because it could have reasonably concluded that the evidence was admissible and would not be unfairly prejudicial given the purpose for admitting the evidence and the limiting instructions to the jury; the trial court could have found that the disclosure of the details of the offenses would be helpful to the jury to understand how the State's expert formed his opinion and the basis for that opinion. In re King, 2014 Tex. App. LEXIS 724, 2014 WL 346109 (Tex. App. Beaumont Jan. 23 2014).

Evidence : Relevance : Relevant Evidence

42. In a sexual assault case, the jury was to determine whether defendant penetrated the child's sexual organ and an expert properly relied on a case study to support his opinion that penetration of the child's sexual organ could have occurred even in the absence of physical evidence of penetration; therefore, the discussion of the study served to make the fact of penetration more probable in light of the expert's medical examination findings. Allen v. State, 436 S.W.3d 815, 2014 Tex. App. LEXIS 6465, 2014 WL 2619438 (Tex. App. Texarkana June 13 2014).

43. When offered evidence is the testimony of an expert witness, the court must apply the principles set forth in the rules governing expert testimony under Tex. R. Evid. 702-705; a two-part test governs whether expert testimony is admissible: (1) the expert must be qualified and (2) the testimony must be relevant and based on a reliable foundation. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

Evidence : Scientific Evidence : General Overview

44. Tex. R. Evid. 703 does not allow an expert to present opinion testimony based on scientifically unreliable facts or data. Leonard v. State, 385 S.W.3d 570, 2012 Tex. Crim. App. LEXIS 1598 (Tex. Crim. App. Nov. 21 2012).

Evidence : Scientific Evidence : Daubert Standard

45. State had sufficiently demonstrated the reliability of a psychotherapist's expert testimony during defendant's trial for sexually assaulting a minor, his teenage daughter, because the psychotherapist's opinions regarding the characteristics and dynamics of sexually abused children were based on her extensive experience working with, and learning about, abused children. Furthermore, the psychotherapist's opinions did not lack a sufficient basis because she personally met with the victim on several occasions, both before and after the sexual abuse, and an expert could base her opinions on facts made known to her as well as facts personally observed. Dennis v. State, 178 S.W.3d 172, 2005 Tex. App. LEXIS 5295 (Tex. App. Houston 1st Dist. 2005).

Evidence : Scientific Evidence : Polygraphs

46. Because polygraphs are untrustworthy, an expert cannot reasonably rely upon them as the exclusive basis for the expert's opinion. Mitchell v. State, 420 S.W.3d 448, 2014 Tex. App. LEXIS 346, 2014 WL 117148 (Tex. App. Houston 14th Dist. Jan. 14 2014).

47. Revocation of defendant's deferred-adjudication community supervision based on the results of polygraph examinations was inappropriate because, while the psychotherapist did make the conclusory statement that those in his field reasonably relied on polygraph results, the sole basis of his opinion was the results of a test that had been held inadmissible because it was not reliable. Total reliance on inadmissible and untrustworthy facts could not be reasonable, nor would such an opinion achieve the minimum level of reliability necessary for admission under Tex. R. Evid. 702. Leonard v. State, 385 S.W.3d 570, 2012 Tex. Crim. App. LEXIS 1598 (Tex. Crim. App. Nov. 21 2012).

48. Testimony of defendant's therapist, a licensed sex-offender treatment provider, that the polygraph results were one of the factors taken into consideration in his decision to discharge defendant from the treatment program was admissible under Tex. R. Evid. 703 and 705 Cruz v. State, 2012 Tex. App. LEXIS 3780, 2012 WL 1660611 (Tex. App. Austin May 10 2012).

49. Because adjudication hearings are administrative proceedings, in which there is no jury and the judge is not determining guilt of the original offense, the results of polygraph exams are admissible in revocation hearings if such evidence qualifies as the basis for an expert opinion under Tex. R. Evid. 703, 705(a). Leonard v. State, 2012

Tex. Crim. App. LEXIS 477 (Tex. Crim. App. Mar. 7 2012).

50. When defendant pleaded guilty to injury to a child and received five years' deferred adjudication, the conditions of his community supervision under Tex. Code Crim. Proc. Ann. art. 42.12, § 11(a) required that he submit to polygraph exams; defendant's polygraph results were admissible in his community supervision revocation hearing. Tex. R. Evid. 703 allowed the sex offender therapist who had been treating defendant to say, "I discharged the defendant because I felt that he was being dishonest." Leonard v. State, 2012 Tex. Crim. App. LEXIS 477 (Tex. Crim. App. Mar. 7 2012).

Evidence : Testimony : Experts : General Overview

51. In a sexual assault case, the jury was to determine whether defendant penetrated the child's sexual organ and an expert properly relied on a case study to support his opinion that penetration of the child's sexual organ could have occurred even in the absence of physical evidence of penetration; therefore, the discussion of the study served to make the fact of penetration more probable in light of the expert's medical examination findings. Allen v. State, 436 S.W.3d 815, 2014 Tex. App. LEXIS 6465, 2014 WL 2619438 (Tex. App. Texarkana June 13 2014).

52. Expert's affidavit did not raise a genuine issue of material fact sufficient to defeat summary judgment because the expert did not evaluate what the client's case would have yielded by way of a judgment if the case had gone to trial. On the contrary, he based his opinion on what the attorneys should have obtained in settlement. Elizondo v. Krist, 415 S.W.3d 259, 2013 Tex. LEXIS 677, 56 Tex. Sup. Ct. J. 1074 (Tex. 2013).

53. Because adjudication hearings are administrative proceedings, in which there is no jury and the judge is not determining guilt of the original offense, the results of polygraph exams are admissible in revocation hearings if such evidence qualifies as the basis for an expert opinion under Tex. R. Evid. 703, 705(a). Leonard v. State, 2012 Tex. Crim. App. LEXIS 477 (Tex. Crim. App. Mar. 7 2012).

54. Doctor testified that it was customary in her profession to rely on hospital records, including test results, to form a diagnosis, and this was not challenged, such that the doctor was entitled under Tex. R. Evid. 703 to rely on the results of laboratory testing for genital herpes in diagnosing the victim's condition; furthermore, the doctor also relied on her own experience, education, and training in reaching this diagnosis, which rendered her opinion reliable, and the trial court did not abuse its discretion in allowing the doctor to testify that the victim suffered from herpes and to testify regarding the basis of the diagnosis, for purposes of Tex. R. Evid. 705(a). Cozzens v. State, 2010 Tex. App. LEXIS 9336, 2010 WL 4813686 (Tex. App. Texarkana Nov. 24 2010).

55. In parents' medical malpractice action, a physician's expert report was not inadequate because the physician relied on the unsworn statement of the mother in formulating opinions; because the records were silent, the physician used the mother's statement regarding progression of the daughter's symptoms to fill in the gaps. Gannon v. Wyche, 321 S.W.3d 881, 2010 Tex. App. LEXIS 7102 (Tex. App. Houston 14th Dist. Aug. 31 2010).

56. Because polygraph test results were inadmissible, the trial court did not have the discretion to consider the test results under Tex. R. Evid. 703 in considering whether to revoke defendant's community supervision. Leonard v. State, 315 S.W.3d 578, 2010 Tex. App. LEXIS 2642 (Tex. App. Eastland Apr. 15 2010).

57. Because in certain instances a medical examiner did not disclose the testimonial hearsay upon which his expert opinion was based, for purposes of Tex. R. Evid. 703, the jury only heard the direct, in-court testimony of the examiner and defendant's confrontation rights were not violated. Martinez v. State, 311 S.W.3d 104, 2010 Tex. App. LEXIS 2124 (Tex. App. Amarillo Mar. 24 2010), pet. ref'd.

58. In a city resident's action against a mayor challenging a special election, expert testimony offered by the resident was not conclusory because the expert testified regarding the facts supporting the expert's opinion and explained how the expert reached that opinion; the expert stated that through discussions and correspondence with the resident and counsel, the expert had become familiar with the issues in the lawsuit, the three propositions involved, and the violations alleged. Duncan-hubert v. Mitchell, 310 S.W.3d 92, 2010 Tex. App. LEXIS 1889 (Tex. App. Dallas Mar. 18 2010).

59. Because the rules of evidence allowed an expert to draw inferences from the underlying facts or data, Tex. Civ. Prac. & Rem. Code Ann. § 74.351 did not prohibit experts from making inferences based on medical history, and the absence of an entry in the records of a regularly conducted activity was admissible to show the nonoccurence of the matter, the nurse's inferences, and the fact that she drew some of them from what was not in the patient's medical records, did not render her expert report defective. Azle Manor, Inc. v. Vaden, 2008 Tex. App. LEXIS 8414 (Tex. App. Fort Worth Nov. 6, 2008).

60. In a patient's action that raised health care liability claims against a doctor based on the patient's allegation that her left eye was permanently impaired as a result of a surgery performed by the doctor, the trial court did not abuse its discretion by determining that the report prepared by the patient's expert, a board certified ophthalmologist, complied with Tex. Civ. Prac. & Rem. Code Ann. § 74.351 where the expert's report informed the doctor of the specific conduct that the patient had called into question and provided a basis for the trial court to conclude the claims were meritorious. Tex. R. Evid. 703, 705 allowed an expert to draw inferences from the underlying facts or data, which was what the expert had done, and, moreover, the expert's report did not merely state his opinions and inferences because he explained the basis for his conclusions and linked them to the facts. Diaz-Rohena v. Melton, 2008 Tex. App. LEXIS 6633 (Tex. App. Fort Worth Aug. 29, 2008).

61. In a health care liability case, the nurses' reports, standing alone, could not meet the statutory report requirement on medical causation under Tex. Civ. Prac. & Rem. Code Ann. § 74.351; however, qualified physicians were permitted to rely on the nurses' reports in the formation of their expert opinions under Tex. R. Evid. 703. Kelly v. Rendon, 255 S.W.3d 665, 2008 Tex. App. LEXIS 2865 (Tex. App. Houston 14th Dist. 2008).

62. For purposes of Tex. R. Evid. 602, regarding evidence of estimates of future medical care, a doctor based an opinion on information supplied by a person in the office, and this statement addressed the reasonable reliance requirement of Tex. R. Evid. 703 for the doctor's expert opinion on the cost of services for future surgeries; to the extent the admission of the evidence might have been error, because it was cumulative, it was harmless, for purposes of Tex. R. App. P. 44.1. Nat'l Freight, Inc. v. Snyder, 191 S.W.3d 416, 2006 Tex. App. LEXIS 2833 (Tex. App. Eastland 2006).

63. The State properly cross-examined the sexually violent predator's expert witness regarding prior statements made by one of the individual's victims because, pursuant to Tex. R. Evid. 703 and 705(a), the State was entitled to cross-examine the doctor concerning records that he cited as the basis of his opinion and to attempt to use the records to discredit his testimony. In re Polk, 187 S.W.3d 550, 2006 Tex. App. LEXIS 2044 (Tex. App. Beaumont 2006).

64. In a driver's product liability and negligence action against a trailer owner, the trial court properly excluded part of the testimony of the driver's expert witness because his testimony established that he was not qualified to testify regarding the industry standard of care for the inspection of fasteners in tractor-trailer rigs. The expert indicated that he did not know what the standard of care was, and his opinion based on his experience as an accident reconstructionist was not enough to establish the industry standard of care. Fulgham v. FFE Transp. Servs., 2005 Tex. App. LEXIS 5377 (Tex. App. Dallas July 12 2005).

65. Because an expert's testimony was based on sources reasonably relied upon by experts in the field, the trial court did not abuse its discretion by concluding that the expert's testimony fell within Tex. R. Evid. 702, 703. In re M.G., 2005 Tex. App. LEXIS 3253 (Tex. App. Fort Worth Apr. 28 2005).

66. Trial court erred in denying a builder's motion to exclude the testimony of the homeowners' expert witness under Tex. R. Evid. 702 and 703. Although the expert had sufficient experience in repairing and remodeling homes to give an expert opinion on reasonable and necessary repair costs, that experience alone was not enough to provide a substantial basis of reliability for his opinion where he relied upon visual inspection and significant experience to justify his conclusions. Royce Homes, L.P. v. Neel, 2005 Tex. App. LEXIS 1514 (Tex. App. Waco Feb. 23 2005).

67. Because the one-leg-stand and walk-and-turn field sobriety tests (FSTs) are grounded in the common knowledge that excessive alcohol consumption can cause problems with coordination, balance, and mental agility, a law enforcement officer's testimony about a defendant's coordination, balance, and mental agility problems during these FSTs is considered lay witness opinion testimony under Tex. R. Evid. 701. McClain v. State, 2005 Tex. App. LEXIS 760 (Tex. App. Dallas Feb. 1 2005).

68. In a pipeline company's action for negligent damage to a gasoline pipeline, causation was not shown as to claims against developers regarding the platting of the lot because there was no evidence of where digging would have occurred if the lot had been configured differently. An expert witness' assumption that digging would have occurred in a different place was not a reasonable inference from the evidence and did not constitute competent summary judgment evidence under Tex. R. Evid. 703, 705(c). Seaway Prods. Pipeline Co. v. Hanley, 153 S.W.3d 643, 2004 Tex. App. LEXIS 10900 (Tex. App. Fort Worth 2004).

69. In a wrongful death case, a court properly excluded expert deposition testimony on hearsay grounds where the expert was not an employee of defendant pharmacy, and there was no evidence that an agency relationship existed. When the family non-suited their claims against the doctor, the subject matter over which the expert was asked to give his opinion became moot; subsequently, he was not called at trial, and, therefore, the trial court excluded his testimony on hearsay grounds. McCluskey v. Randall's Food Mkts., Inc., 2004 Tex. App. LEXIS 9178 (Tex. App. Houston 14th Dist. Oct. 19 2004).

70. In a manufacturing defect case brought against a tire company, the trial court did not err in admitting testimony from plaintiffs' experts; the opinions of one expert, a tire failure analyst, were reliable pursuant to Cal. R. Evid. 702 because the expert provided thorough information concerning his methodology and it was clear that his expertise rested on his many years of experience in tire examination. Additionally, the court rejected the tire company's assertion that a report relied on by the expert was inadmissible hearsay; the expert testified that the company that issued the report was a firm of rubber specialists and chemists who used sophisticated techniques, were highly competent, and widely used by experts. Cooper Tire & Rubber Co. v. Mendez, 155 S.W.3d 382, 2004 Tex. App. LEXIS 9112 (Tex. App. El Paso 2004), *rev'd on other grounds*, 204 S.W.3d 797, 2006 Tex. LEXIS 555 (Tex. 2006).

71. When an expert testifies about the facts or data relied upon to formulate the opinion or inference, and that information is inadmissible, the opponent should request a limiting instruction under Tex. R. Evid. 705(d). Depena v. State, 148 S.W.3d 461, 2004 Tex. App. LEXIS 7455 (Tex. App. Corpus Christi 2004).

72. Trial court did not abuse its discretion in concluding that a workplace safety expert did not have a reasonable basis for any of his opinions with respect to the legal duties owed by the hospital and how those duties were breached. Moore v. Mem'l Hermann Hosp. Sys., 140 S.W.3d 870, 2004 Tex. App. LEXIS 6067 (Tex. App. Houston

14th Dist. 2004).

73. Admission of expert testimony by a play therapist was proper under Tex. R. Evid. 702 and Tex. R. Evid. 703, as the trial court held a Daubert hearing and pursuant to the assessment of factors to assess reliability under Nenno, it was found that such was a legitimate field of expertise and the testimony itself was sufficiently reliable; the expert's testimony was based on her therapy and counseling sessions with a child, wherein he had indicated that his mother was abusive to him and his sister, and was admissible in the mother's parental rights termination proceeding. In re A.J.L., 136 S.W.3d 293, 2004 Tex. App. LEXIS 3825 (Tex. App. Fort Worth 2004).

74. When offered evidence is the testimony of an expert witness, the court must apply the principles set forth in the rules governing expert testimony under Tex. R. Evid. 702-705; a two-part test governs whether expert testimony is admissible: (1) the expert must be qualified and (2) the testimony must be relevant and based on a reliable foundation. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

75. Affidavits of expert witnesses offered in support of homeowners' motion against summary judgment in an action seeking losses for a house fire failed to meet the requirements of Tex. R. Evid. 401, 403, 702, and 703, as the testimony was a pyramid of inferences lacking probative force because it was based on assumed facts that varied from the actual undisputed facts. Rayon v. Energy Specialties, Inc., 121 S.W.3d 7, 2002 Tex. App. LEXIS 9160 (Tex. App. Fort Worth 2002).

Evidence : Testimony : Experts : Admissibility

76. Trial court did not err in overruling objections to the admission of prior offenses evidence because it could have reasonably concluded that the evidence was admissible and would not be unfairly prejudicial given the purpose for admitting the evidence and the limiting instructions to the jury; the trial court could have found that the disclosure of the details of the offenses would be helpful to the jury to understand how the State's expert formed his opinion and the basis for that opinion. In re King, 2014 Tex. App. LEXIS 724, 2014 WL 346109 (Tex. App. Beaumont Jan. 23 2014).

77. Trial court did not err in overruling objections to the admission of prior offenses evidence because it could have reasonably concluded that the evidence was admissible and would not be unfairly prejudicial given the purpose for admitting the evidence and the limiting instructions to the jury; the trial court could have found that the disclosure of the details of the offenses would be helpful to the jury to understand how the State's expert formed his opinion and the basis for that opinion. In re King, 2014 Tex. App. LEXIS 724, 2014 WL 346109 (Tex. App. Beaumont Jan. 23 2014).

78. Because polygraphs are untrustworthy, an expert cannot reasonably rely upon them as the exclusive basis for the expert's opinion. Mitchell v. State, 420 S.W.3d 448, 2014 Tex. App. LEXIS 346, 2014 WL 117148 (Tex. App. Houston 14th Dist. Jan. 14 2014).

79. Trial court properly admitted the forensic examiner's testimony because the facts of the hypothetical questions matched the facts of the case, and the relevancy requirement had been met. Eldred v. State, 431 S.W.3d 177, 2014 Tex. App. LEXIS 2460, 2014 WL 856636 (Tex. App. Texarkana Mar. 5 2014).

80. Where defendant was convicted of possession of one to four grams of a controlled substance based on methamphetamine found in the car during a traffic stop, an expert's opinion that the sergeant's failure to follow police procedure suggested that the drugs were planted in the car was inadmissible. Because the expert did not explain why the sergeant's acts were suspicious or why they led to the conclusion that the drugs were planted, there was not a sufficient basis for an expert opinion. Nickols v. State, 2013 Tex. App. LEXIS 11241 (Tex. App.

Eastland Aug. 30 2013).

81. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. The expert was permitted to tie the facts of the case to the principles of grooming through hypothetical questions. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

82. Expert testified about testing based on his review of a videotape of the testing, and the trial court did not abuse its discretion in admitting the expert's testimony given that (1) one witness's testimony provided a basis in fact to support appellee's theory of the accident, and (2) the expert could rely on another's testing in presenting the theory to the jury. Estate of Muniz v. Ford Motor Co., 2013 Tex. App. LEXIS 7158 (Tex. App. San Antonio June 12 2013).

83. Defendant failed to show that the trial court abused its discretion by permitting the State's expert to testify because defendant stipulated that he was a qualified expert witness, and the questions asked of the expert were proper because they asked him to opine on whether the facts and circumstances revealed by his investigation measured up to a standard of legal culpability. Even if the trial court erred by admitting the evidence, the error would have been harmless given the other evidence against defendant, including evidence that in the hours before the fatal accident, defendant had been drinking beer and whiskey and smoking marijuana. Blanchard v. State, 2013 Tex. App. LEXIS 5140 (Tex. App. Fort Worth Apr. 25 2013).

84. Defendant's commitment as a sexually violent predator was appropriate because the jury could have reasonably found beyond a reasonable doubt that he had a behavioral abnormality that made him likely to engage in a predatory act of sexual violence. Further, each expert explained the facts considered and how those facts affected that expert's evaluation; the evidence assisted the jury in weighing the testimony and the opinion each expert offered and the trial judge could have reasonably concluded that the experts' testimony was not unfairly prejudicial. In re Anderson, 392 S.W.3d 878, 2013 Tex. App. LEXIS 602 (Tex. App. Beaumont Jan. 24 2013).

85. Revocation of defendant's deferred-adjudication community supervision based on the results of polygraph examinations was inappropriate because, while the psychotherapist did make the conclusory statement that those in his field reasonably relied on polygraph results, the sole basis of his opinion was the results of a test that had been held inadmissible because it was not reliable. Total reliance on inadmissible and untrustworthy facts could not be reasonable, nor would such an opinion achieve the minimum level of reliability necessary for admission under Tex. R. Evid. 702. Leonard v. State, 385 S.W.3d 570, 2012 Tex. Crim. App. LEXIS 1598 (Tex. Crim. App. Nov. 21 2012).

86. Tex. R. Evid. 703 does not allow an expert to present opinion testimony based on scientifically unreliable facts or data. Leonard v. State, 385 S.W.3d 570, 2012 Tex. Crim. App. LEXIS 1598 (Tex. Crim. App. Nov. 21 2012).

87. Defendant's convictions for aggravated sexual assault of a child under the age of 14 was appropriate because a social worker's testimony was properly admitted since she was qualified to give her testimony; she did not need to have personal knowledge of all the facts on which she bases her opinion; and testimony abut the behavior of child sex abuse victims was admissible under Tex. R. Evid. 702. Brucia v. State, 2012 Tex. App. LEXIS 5844, 2012 WL 2926203 (Tex. App. Dallas July 19 2012).

88. Testimony was properly admitted on the diminished value of damaged steel coils. The steel company's owner could testify to value as a property owner under Tex. R. Evid. 701, and an expert marine surveyor's testimony on representative sampling was reliable under Tex. R. Evid. 702; further, the expert marine surveyor was not required under Tex. R. Evid. 703 to personally inspect every damaged coil. Custom Transit, L.P. v. Flatrolled Steel, Inc., 375

S.W.3d 337, 2012 Tex. App. LEXIS 4739 (Tex. App. Houston 14th Dist. June 14 2012).

89. Testimony of defendant's therapist, a licensed sex-offender treatment provider, that the polygraph results were one of the factors taken into consideration in his decision to discharge defendant from the treatment program was admissible under Tex. R. Evid. 703 and 705 Cruz v. State, 2012 Tex. App. LEXIS 3780, 2012 WL 1660611 (Tex. App. Austin May 10 2012).

90. No abuse of discretion in excluding evidence regarding the Americans With disabilities Act and the Texas Accessibility Standards, because the evidence was not crucial to whether the clinic had actual or constructive knowledge of a dangerous condition on the premises that presented an unreasonable risk of harm and that the condition proximately caused the claimant's injuries. Craig v. Beeville Family Practice, L.L.P., 2012 Tex. App. LEXIS 4422, 2012 WL 1656492 (Tex. App. Corpus Christi May 10 2012).

91. When defendant pleaded guilty to injury to a child and received five years' deferred adjudication, the conditions of his community supervision under Tex. Code Crim. Proc. Ann. art. 42.12, § 11(a) required that he submit to polygraph exams; defendant's polygraph results were admissible in his community supervision revocation hearing. Tex. R. Evid. 703 allowed the sex offender therapist who had been treating defendant to say, "I discharged the defendant because I felt that he was being dishonest." Leonard v. State, 2012 Tex. Crim. App. LEXIS 477 (Tex. Crim. App. Mar. 7 2012).

92. In a condemnation proceeding in which plaintiff county acquired a portion of commercial property used for a car wash in order to widen a county roadway, the trial court did not abuse its discretion in excluding the county's appraisal expert because the expert's bald assurance that he used a widely accepted appraisal method was insufficient to establish reliability. His report, as well as the underlying data and methodology, did not reflect application of an accepted appraisal method to arrive at the fair market value of the remainder after the taking where he simply took the market value of the whole and assumed--without any basis--that a willing buyer and willing seller would agree to reduce the market value by one-fifth after the taking. Dallas County v. Crestview Corners Car Wash, 370 S.W.3d 25, 2012 Tex. App. LEXIS 1269 (Tex. App. Dallas Feb. 16 2012).

93. Expert's testimony on lost profits resulting from the conversion of a leased item was unreliable absent any documentary evidence to support his conclusions regarding available leases and lease rates. Wells Fargo Bank Northwest, N.A. v. Rpk Capital Xvi, L.L.C., 360 S.W.3d 691, 2012 Tex. App. LEXIS 1265, 2012 WL 523925 (Tex. App. Dallas Feb. 16 2012).

94. During a murder trial, the trial court did not abuse its discretion in allowing the reading of the affidavits upon which the medical examiner relied in accordance with Tex. R. Evid. 703 in forming her opinion as to the victim's cause of death. Although the hearsay statements in the affidavits were prejudicial, disclosing the statements assisted the jury in evaluating the weight to give her opinions; therefore, the statements were admissible under Tex. R. Evid. 705. Moulton v. State, 360 S.W.3d 540, 2011 Tex. App. LEXIS 8266 (Tex. App. Texarkana Oct. 19 2011).

95. During defendant's trial for capital murder, the court erred in holding that a defense expert on eyewitness identifications was not permitted to testify before the jury because it was sufficient that the expert based the expert's opinion on facts learned during the expert's testimony; the expert responded to a series of hypotheticals, which exposed the expert to the pertinent facts of the case. Tillman v. State, 354 S.W.3d 425, 2011 Tex. Crim. App. LEXIS 1343 (Tex. Crim. App. Oct. 5 2011).

96. Trial court did not err in admitting the transcription of the doctor's testimony into evidence as an expert witness may rely on records and information prepared by others in reaching his conclusions, Tex. R. Evid. 703, and medical and autopsy reports fell into an exception to the hearsay rule and were allowed into evidence without the preparing

doctor appearing in court to explain them, Tex. R. Evid. 803(4), (8). Rodriguez v. Tex. Dep't of Family & Protective Servs., 2011 Tex. App. LEXIS 6131, 2011 WL 3435736 (Tex. App. Austin Aug. 4 2011).

97. Appellant's counsel conceded that witnesses were not testifying as experts, such that appellant's issues related to the admissibility of these witnesses' testimony as experts, under Tex. R. Evid. 702, 703, 705(b), were moot. Zuffante v. State, 2011 Tex. App. LEXIS 2332 (Tex. App. Dallas Mar. 31 2011).

98. Testimony of the insureds' expert in a dispute regarding property damage caused by hail was admissible under Tex. R. Evid. 702, 703, because he was not required to review or discuss the insurance policy and because he used his own professional judgment in discussing an inspector's report. Southland Lloyds Ins. Co. v. Cantu, 399 S.W.3d 558, 2011 Tex. App. LEXIS 2251, 2011 WL 1158244 (Tex. App. San Antonio Mar. 30 2011).

99. During a hearing to civilly commit appellant as a sexually violent predator, appellant's attorney was not ineffective for not objecting to expert testimony on unadjudicated extraneous offenses because the expert testified that the information contained in the records was of a type reasonably relied upon by experts in the field. In re Commitment of Grunsfeld, 2011 Tex. App. LEXIS 1337 (Tex. App. Beaumont Feb. 24 2011).

100. Because the medical examiner's colleague testified to his independent conclusion concerning the victim's cause of death and did not testify to any of the statements contained in the medical examiner's autopsy report, the colleague's testimony did not violate defendant's right of confrontation. Gilstrap v. State, 2011 Tex. App. LEXIS 181, 2011 WL 192688 (Tex. App. San Antonio Jan. 12 2011).

101. Defendant failed to make any objection questioning the reliability of an expert's testimony, and whether the court made defendant's objection that the expert did not personally interview the victim as an objection of qualification or reliability was of no moment because there was no requirement that an expert witness personally interview the victim for his testimony to be admissible, for purposes of Tex. R. Evid. 703, 418; because defendant made no objection to the reliability of expert testimony, he did not preserve his point for review and the court assumed without deciding that the testimony on the subject was admissible. Cockrell v. State, 2010 Tex. App. LEXIS 3208, 2010 WL 1705538 (Tex. App. Amarillo Apr. 28 2010).

102. Expert opinions constituted legally sufficient evidence to support the jury's verdict that the patient was a repeat sexually violent predator and had a behavioral abnormality that predisposed him to engage in a predatory act of sexual violence, because the record showed that the State's experts explained how they arrived at their respective opinions, and each expert considered the patient's underlying schizophrenia in the process of reaching an ultimate conclusion that they both shared, that the patient had a behavioral abnormality that predisposed him to a predatory act of sexual violence. In re Commitment of Moore, 2010 Tex. App. LEXIS 381, 2009 WL 5448789 (Tex. App. Beaumont Jan. 21 2010).

103. State inmate convicted of raping a woman at knifepoint was not entitled to habeas relief under 28 U.S.C.S. § 2254. The requirements of Tex. R. Evid. 703 were met because the lab supervisor testified that she had personally overseen a lab technician's work in performing DNA tests and reviewed the results. Martin v. Thaler, 2009 U.S. Dist. LEXIS 103733 (W.D. Tex. Nov. 5 2009).

104. In defendant's capital murder case, the court properly allowed an expert to testify on the cause of death because the expert stated that he had training and experience in the area of sodium poisoning during medical school; he attended "classes that covered material dealing with patients that had elevated sodium levels, and "treated patients with elevated sodium levels." Finally, the doctor testified that the methods that he employed were "standard operating procedure, standard medical examiner practice." Overton v. State, 2009 Tex. App. LEXIS 8312,

2009 WL 3489844 (Tex. App. Corpus Christi Oct. 29 2009).

105. In defendant's capital murder case, the court properly allowed an expert to testify on the cause of death because the expert was shown to have training in child abuse, sodium levels, sodium intoxication, other causes of elevated sodium levels, head injuries, "pica", and out-of-hospital cardiac arrest. The expert testified that he used standard practice and procedures, including the widely accepted method of differential diagnosis, to determine the cause of the child's illness. Overton v. State, 2009 Tex. App. LEXIS 8312, 2009 WL 3489844 (Tex. App. Corpus Christi Oct. 29 2009).

106. Corporation failed to explain which of an expert's particular statements violated the standards of scientific reliability as set forth in case law and cited evidentiary rules, including Tex. R. Evid. 702, 703, 705, plus the corporation failed to provide the court with any citations to the record to support this portion of its argument, which was waived. SCTW Health Care Ctr., Inc. v. AAR Inc., 2009 Tex. App. LEXIS 8071, 2009 WL 3321399 (Tex. App. Houston 1st Dist. Oct. 15 2009).

107. Trial court did not abuse its discretion under Tex. R. Evid. 702, 703 in excluding an expert's opinions as unreliable in a suit for legal malpractice and breach of fiduciary duty involving a suit against a consulting company that had failed to obtain financing; the expert did not identify sources of financing or adequately discuss its availability. Ray D. Robertson, Inc. v. Morin, 2009 Tex. App. LEXIS 7170, 2009 WL 2902720 (Tex. App. Austin Aug. 27 2009).

108. In a wrongful death action which arose after emergency medical technicians employed by a city were unable to resuscitate the decedent with an automatic external defibrillator (AED), the affidavit of the survivors' medical device expert was admissible under Fed. R. Evid. 703 because it provided sufficient factual substantiation for the expert opinion regarding whether the AED was defective. Schronk v. City of Burleson, 387 S.W.3d 692, 2009 Tex. App. LEXIS 5654 (Tex. App. Waco July 22 2009).

109. In a driving while intoxicated case, the court did not err by allowing the officer to testify that defendant failed the field sobriety tests because the officer's use of the word "failed" did not give his testimony an "aura of scientific reliability" or cloak it with unearned credibility; the majority of the officer's testimony consisted of a straightforward narrative of each field sobriety test, followed by a particular description of how defendant performed each test. The officer's observations were based on common knowledge and observations and did not, under the circumstances convert his lay witness testimony into expert testimony. Meier v. State, 2009 Tex. App. LEXIS 2051, 2009 WL 765490 (Tex. App. Dallas Mar. 25 2009).

110. Trial court did not err by admitting an expert's opinion in a products liability case because the expert could reasonably rely on a witness's unsworn affidavit under Tex. R. Evid. 703 as the witness was not an unknown bystander, the statement did not repeat a rumor, the veracity of the witness's statement could be verified, and the retail store could present contrary evidence if the statement was incorrect. Merrell v. Wal-Mart Stores, Inc., 2008 Tex. App. LEXIS 9278, CCH Prod. Liab. Rep. P18146 (Tex. App. Texarkana Dec. 16 2008).

111. From a sexually violent predator commitment hearing, an expert's testimony that determining whether the patient chose his victims as part of a revenge motive or whether they were strangers was important in assessing the risk that he would reoffend was properly admitted as it helped the jury in evaluating the weight of the expert's opinions; and in light of the limiting instructions, the trial court did not abuse its discretion in admitting the statements. Even if it was error to admit the testimony, such error was not reasonably calculated to cause and probably did not cause rendition of an improper judgment. In re Commitment of Salazar, 2008 Tex. App. LEXIS 8856 (Tex. App. Beaumont Nov. 26 2008).

112. Attorney testified without objection as an expert witness on attorney fees, and an expert was not required to have personal knowledge on the matters about which he testified, for purposes of Tex. R. Evid. 602, 703; the attorney testified that he reviewed the former attorney's file, level of experience, and the work performed and opined that the former attorney's fees were reasonable and necessary, plus the attorney testified about his own representation, and this testimony supported the jury's award of fees. Arthur J. Gallagher & Co. v. Dieterich, 2008 Tex. App. LEXIS 5639 (Tex. App. Dallas July 29 2008).

113. In defendant's drug case, the court properly allowed an expert to testify that the substance deliverd by defendant was cocaine because the case did not involve one expert merely reading to the jury a report conducted by another; the testimony of the expert witness concerning the chemical analysis of the substance, determined by applying his expertise to reliable scientific test data, was admissible as he was subject to cross-examination. Blaylock v. State, 259 S.W.3d 202, 2008 Tex. App. LEXIS 3449 (Tex. App. Texarkana 2008).

114. In a tax dispute regarding valuation, an expert's premise that an underground storage tank (UST), once installed, became salvage material was a faulty absolute and likely rendered his valuation of the USTs, which represented the largest deviation in the valuations, unreliable; unreliable testimony did not constitute evidence. Harris County Appraisal Dist. v. Sigmor Corp., 2008 Tex. App. LEXIS 2456 (Tex. App. Houston 1st Dist. Apr. 3 2008).

115. In a medical malpractice action, the trial court did not err in overruling defendants' objection to plaintiff's wife's affidavit, which was reviewed by plaintiff's experts before preparing their expert reports; defendants cited no authorities supporting the proposition that the wife's affidavit did not supply the type of facts or data reasonably relied upon by medical experts in preparing the reports. Hiner v. Gaspard, 2007 Tex. App. LEXIS 7314 (Tex. App. Beaumont Sept. 6 2007).

116. In an aggravated assault case, expert testimony regarding defendant's gang affiliation was proper because the expert testified that his group identified defendant as a gang member based on his name being on a list of gang members kept by another gang member, his correspondence with gang members about the internal activities of the Mexican Mafia, distinctive gang tattoos, and a letter stating that defendant had been cleared as a member; therefore, there was a substantial basis for the expert witness's conclusion that defendant was a gang member. Loredo v. State, 2007 Tex. App. LEXIS 6703 (Tex. App. Tyler Aug. 22 2007).

117. Award for past medical expenses in a medical malpractice case was proper because an expert, who properly relied upon summaries of the medical bills as permitted by Tex. R. Evid. 703, rather than reviewing of all of the actual medical bills, testified that the costs and expenses incurred were reasonable and necessary and were the result of a child's brain injury; further, the jury awarded less than the amount actually incurred by the child's parents. Christus Spohn Health Sys. Corp. v. De La Fuente, 2007 Tex. App. LEXIS 6542 (Tex. App. Corpus Christi Aug. 16 2007).

118. Because Tex. R. Evid. 703 permitted an expert to base his opinion testimony on facts or data made known to him during trial, the court did not conclude that defendant's expert's testimony was lacking because he failed to interview witnesses. Baldree v. State, 248 S.W.3d 224, 2007 Tex. App. LEXIS 5057 (Tex. App. Houston 1st Dist. 2007).

119. Trial court did not abuse its discretion by excluding the testimony of defendant's expert on eyewitness identification because the expert's testimony was offered purely as educational material for the jury, which was insufficient to demonstrate that the scientific principles would assist the trier of fact in the case or were sufficiently tied to the pertinent facts of the case. Baldree v. State, 248 S.W.3d 224, 2007 Tex. App. LEXIS 5057 (Tex. App.

Houston 1st Dist. 2007).

120. Although defendant complained that the trial court wrongly admitted expert testimony to determine the amount of pecuniary loss under Tex. Penal Code Ann. § 28.06(b) in defendant's criminal mischief trial, the court was to consider all evidence admitted at trial, including improperly admitted evidence; further, (1) after admitting the testimony, the trial court gave defendant the chance to ask for a continuance, promising that it was going to be granted, but defendant did not request one, (2) defendant did not object to the State's failure to qualify the expert witness, and (3) the expert's testimony was not inadmissible because it might have been based on estimates previously provided, for purposes of Tex. R. Evid. 703. Retana v. State, 2007 Tex. App. LEXIS 2796 (Tex. App. El Paso Apr. 12 2007).

121. Court did not err in admitting a utility company's expert testimony as to the market value of the condemned property in which he did not factor in the improvements that were over 4000 feet from the power lines in assessing damages because, inter alia, the landowners' own expert relied upon several articles that specifically stated the negative impact of power lines to a property diminished with increased distance and disappeared beyond 500 feet. Utley v. LCRA Transmission Servs. Corp., 2006 Tex. App. LEXIS 9129 (Tex. App. San Antonio Oct. 25 2006).

122. In defendant's trial for sexual assault of a child, the State's expert testimony was relevant and admissible under Tex. R. Evid. 702 and Tex. R. Evid. 703; the expert's testimony was sufficiently tied to the facts of the case to assist the trier of fact in assessing the significance of the results of the victim's physical examination. Estes v. State, 2006 Tex. App. LEXIS 5028 (Tex. App. Houston 14th Dist. June 13 2006).

Evidence : Testimony : Experts : Criminal Trials

123. Where defendant was convicted of possession of one to four grams of a controlled substance based on methamphetamine found in the car during a traffic stop, an expert's opinion that the sergeant's failure to follow police procedure suggested that the drugs were planted in the car was inadmissible. Because the expert did not explain why the sergeant's acts were suspicious or why they led to the conclusion that the drugs were planted, there was not a sufficient basis for an expert opinion. Nickols v. State, 2013 Tex. App. LEXIS 11241 (Tex. App. Eastland Aug. 30 2013).

124. In a murder trial where defendant claimed he acted in self-defense, the trial court did not err by excluding testimony from a psychologist regarding the victim's acts of violence because the psychologist's knowledge of any acts committed by the victim came entirely from his review of the medical records which were not admitted into evidence. While the psychologist could rely on the victim's records as a basis for his expert opinion under Tex. R. Evid. 703, his proffered testimony was hearsay for which no exception was offered. Mason v. State, 2012 Tex. App. LEXIS 2314, 2012 WL 1058792 (Tex. App. Eastland Mar. 22 2012).

125. During a murder trial, the trial court did not abuse its discretion in allowing the reading of the affidavits upon which the medical examiner relied in accordance with Tex. R. Evid. 703 in forming her opinion as to the victim's cause of death. Although the hearsay statements in the affidavits were prejudicial, disclosing the statements assisted the jury in evaluating the weight to give her opinions; therefore, the statements were admissible under Tex. R. Evid. 705. Moulton v. State, 360 S.W.3d 540, 2011 Tex. App. LEXIS 8266 (Tex. App. Texarkana Oct. 19 2011).

126. Following the entry of defendant's nolo contendere plea to aggravated robbery, the trial court properly considered under Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a)(1) evidence regarding the murder of defendant's wife at the punishment hearing because the evidence was sufficient to establish beyond a reasonable doubt that defendant murdered his wife five days before he committed the aggravated robbery offense; further, the medical examiner's hearsay statement that defendant admitted strangling his wife was admissible pursuant to Tex. R. Evid.

703, and defendant did not object under Tex. R. Evid. 705(d). Garza v. State, 2009 Tex. App. LEXIS 5026, 2009 WL 1424610 (Tex. App. El Paso May 20 2009).

127. Court properly allowed a board-certified neuropsychologist to testify about defendant's suitability for probation because the expert testified to her qualifications, which included testifying as an expert witness in numerous criminal and civil matters, and she also testified that the "facts and data" she gathered in her interviews and investigation were the type normally relied upon by experts in her field to form opinions. Farmer v. State, 2009 Tex. App. LEXIS 2723, 2009 WL 1081080 (Tex. App. San Antonio Apr. 22 2009).

128. In a trial for a "shaken-baby" murder, any error arising from the admission of an investigator's opinion on guilt was harmless. Although defendant objected to the testimony under Tex. R. Evid. 703 during the prosecution's re-direct, the same question and answer had come in without objection during the defense's prior cross-examination. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

129. State had sufficiently demonstrated the reliability of a psychotherapist's expert testimony during defendant's trial for sexually assaulting a minor, his teenage daughter, because the psychotherapist's opinions regarding the characteristics and dynamics of sexually abused children were based on her extensive experience working with, and learning about, abused children. Furthermore, the psychotherapist's opinions did not lack a sufficient basis because she personally met with the victim on several occasions, both before and after the sexual abuse, and an expert could base her opinions on facts made known to her as well as facts personally observed. Dennis v. State, 178 S.W.3d 172, 2005 Tex. App. LEXIS 5295 (Tex. App. Houston 1st Dist. 2005).

130. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

131. In a sexual assault case, a court erred by failing to allow defendant's expert to testify where the subject of the expert's opinion was relevant, just as the State's expert was permitted to testify that the lack of genital injuries did not indicate that the complainant had not been sexually assaulted, defendant's expert should have been permitted to testify that no sexual assault occurred. One party could not proffer expert testimony and subsequently argue successfully that the testimony was not relevant when the opposing party sought to offer expert testimony on the same subject which reached a different conclusion; in addition, the error was not harmless. Vela v. State, 159 S.W.3d 172, 2004 Tex. App. LEXIS 7257 (Tex. App. Corpus Christi 2004).

132. In a sexual assault on a child case, counsel was not ineffective for failing to object to an expert's reliance on a medical report in forming his conclusion that the non-specific red bumps he found in the victim's genital area were caused by the Herpes Simplex Virus (HSV) where, regardless of whether the report was properly admitted as part of the State's exhibit, the expert could have properly testified to the basis for his diagnosis even though part of the data he relied on was hearsay; the report was also cumulative of all the other evidence at trial showing that the victim had been infected with HSV. Coker v. State, 2004 Tex. App. LEXIS 4799 (Tex. App. El Paso May 27 2004).

133. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print

matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

134. In a case involving child indecency, a trial court did not err by allowing an expert to testify regarding defendant's future dangerousness, despite the fact that the expert never met defendant because such contact was not required under Tex. R. Evid. 703; moreover, the expert was qualified to give an opinion based on the expert's training, education, and vast experience with sexual offenders. Rodriguez v. State, 2004 Tex. App. LEXIS 3457 (Tex. App. Fort Worth Apr. 15 2004).

135. Trial court did not abuse its discretion in excluding the hearsay underlying the opinion of defendant's expert witness during the sentencing phase because although the witness could state that he had reviewed the jail classification as a basis for his expert testimony, the classification itself remained inadmissible and could not be used as a basis for determining defendant's dangerousness in the future. Prystash v. State, 3 S.W.3d 522, 1999 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 1999).

Evidence : Testimony : Experts : Daubert Standard

136. Trial court properly admitted the forensic examiner's testimony because the facts of the hypothetical questions matched the facts of the case, and the relevancy requirement had been met. Eldred v. State, 431 S.W.3d 177, 2014 Tex. App. LEXIS 2460, 2014 WL 856636 (Tex. App. Texarkana Mar. 5 2014).

Evidence : Testimony : Experts : Helpfulness

137. At defendant's trial for continuous sexual abuse of a child, the trial court did not abuse its discretion by admitting the testimony of a licensed professional counselor who treated sex offenders; the expert's testimony about grooming for a sexual offense was relevant to assist the jury in understanding defendant's behavior. The expert was permitted to tie the facts of the case to the principles of grooming through hypothetical questions. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

Evidence : Testimony : Experts : Qualifications

138. Trial court properly denied a doctor's motion to dismiss a patient's health care liability claim against him where, considered together in their entirety, a neurosurgeon's report and curriculum vitae served by the patient established the neurosurgeon's qualifications to render opinions as to the applicable standard of care and alleged breach of the standard of care by the doctor because they expressly provided that the neurosurgeon served as a Florida Worker's Compensation Certified Physician Expert Medical Advisor and that he had been licensed, board certified, and in the private practice of neurosurgery from 1976 to the present. As to whether the neurosurgeon was qualified to address the standard of care and alleged breach by the doctor, a radiologist, the neurosurgeon's report provided that he had been thoroughly exposed to neuroradiology through his years of practice and that the interpretation of an MRI scan like that involved in the patient's case was common to both neurosurgery and radiology. Brunson v. Johnston, 2013 Tex. App. LEXIS 442, 2013 WL 173743 (Tex. App. Fort Worth Jan. 17 2013).

139. Defendant's convictions for aggravated sexual assault of a child under the age of 14 was appropriate because a social worker's testimony was properly admitted since she was qualified to give her testimony; she did not need to have personal knowledge of all the facts on which she bases her opinion; and testimony abut the behavior of child sex abuse victims was admissible under Tex. R. Evid. 702. Brucia v. State, 2012 Tex. App. LEXIS 5844, 2012 WL 2926203 (Tex. App. Dallas July 19 2012).

140. In defendant's capital murder case, the court properly allowed an expert to testify on the cause of death because the expert stated that he had training and experience in the area of sodium poisoning during medical school; he attended "classes that covered material dealing with patients that had elevated sodium levels, and "treated patients with elevated sodium levels." Finally, the doctor testified that the methods that he employed were "standard operating procedure, standard medical examiner practice." Overton v. State, 2009 Tex. App. LEXIS 8312, 2009 WL 3489844 (Tex. App. Corpus Christi Oct. 29 2009).

141. In defendant's capital murder case, the court properly allowed an expert to testify on the cause of death because the expert was shown to have training in child abuse, sodium levels, sodium intoxication, other causes of elevated sodium levels, head injuries, "pica", and out-of-hospital cardiac arrest. The expert testified that he used standard practice and procedures, including the widely accepted method of differential diagnosis, to determine the cause of the child's illness. Overton v. State, 2009 Tex. App. LEXIS 8312, 2009 WL 3489844 (Tex. App. Corpus Christi Oct. 29 2009).

142. In defendant's trial for aggravated sexual assault of a child under the age of fourteen in violation of Tex. Penal Code Ann. § 22.021, the trial court did not abuse its discretion in admitting the rebuttal testimony of the State's expert who testified that the complainant's "normal" behavior would not necessarily negate sexual abuse; the expert was qualified to provide testimony under Tex. R. Evid. 702 and 703 based on his educational and professional background and experience, and the expert's academic and professional background focusing on the treatment and observation of child victims of sexual abuse appropriately matched the subject matter of his testimony focusing on the behavioral patterns of child victims of sexual abuse. Briones v. State, 2009 Tex. App. LEXIS 5944, 2009 WL 2356626 (Tex. App. Houston 14th Dist. July 30 2009).

143. Court properly allowed a board-certified neuropsychologist to testify about defendant's suitability for probation because the expert testified to her qualifications, which included testifying as an expert witness in numerous criminal and civil matters, and she also testified that the "facts and data" she gathered in her interviews and investigation were the type normally relied upon by experts in her field to form opinions. Farmer v. State, 2009 Tex. App. LEXIS 2723, 2009 WL 1081080 (Tex. App. San Antonio Apr. 22 2009).

144. In a murder trial, the trial court properly found that a doctor was qualified under Tex. R. Evid. 703 to render expert testimony on whether an individual could die from a stab wound in the buttock, as described in the autopsy report and shown in the crime scene photographs, even though he did not have any experience in pathology; his qualifications included experience as a trauma surgeon, responsible for the evaluation, diagnosis, and treatment of acutely injured patients. Bigler v. State, 2006 Tex. App. LEXIS 10490 (Tex. App. Fort Worth Dec. 7 2006).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview

145. Defendant waived appellate review regarding an officer's testimony on the psychological and physiological effects of ecstasy, cocaine, and marijuana because at trial he objected on confrontation grounds, not on the basis put forward on appeal, that the State failed to establish the admissibility of the complained-of testimony pursuant to Tex. R. Evid. 701, 702, or 703. Nelson v. State, 2005 Tex. App. LEXIS 6710 (Tex. App. El Paso Aug. 18 2005).

Family Law : Parental Duties & Rights : Termination of Rights : General Overview

146. Admission of expert testimony by a play therapist was proper under Tex. R. Evid. 702 and Tex. R. Evid. 703, as the trial court held a Daubert hearing and pursuant to the assessment of factors to assess reliability under Nenno, it was found that such was a legitimate field of expertise and the testimony itself was sufficiently reliable; the expert's testimony was based on her therapy and counseling sessions with a child, wherein he had indicated that his mother was abusive to him and his sister, and was admissible in the mother's parental rights termination proceeding. In re A.J.L., 136 S.W.3d 293, 2004 Tex. App. LEXIS 3825 (Tex. App. Fort Worth 2004).

Healthcare Law : Actions Against Facilities : Standards of Care : Expert Testimony

147. In a health care liability case, the nurses' reports, standing alone, could not meet the statutory report requirement on medical causation under Tex. Civ. Prac. & Rem. Code Ann. § 74.351; however, qualified physicians were permitted to rely on the nurses' reports in the formation of their expert opinions under Tex. R. Evid. 703. Kelly v. Rendon, 255 S.W.3d 665, 2008 Tex. App. LEXIS 2865 (Tex. App. Houston 14th Dist. 2008).

Healthcare Law : Treatment : Failures to Disclose & Warn : Prescription Medications

148. In a negligent prescription case, plaintiff's expert did not adequately demonstrate qualifications to submit an expert report on the issue of causation. Although the report detailed that three physicians diagnosed the patient with dyskinesia related to use of the prescribed drug, the report did not provide any background on the experience or training of those physicians that would have signaled to the trial court that those opinions were reliable, as required by Tex. R. Evid. 703. Collini v. Pustejovsky, 280 S.W.3d 456, 2009 Tex. App. LEXIS 1071 (Tex. App. Fort Worth Feb. 12 2009).

Public Health & Welfare Law : Healthcare : Mental Health Services : Commitment : Involuntary Commitment of Adults

149. From a sexually violent predator commitment hearing, an expert's testimony that determining whether the patient chose his victims as part of a revenge motive or whether they were strangers was important in assessing the risk that he would reoffend was properly admitted as it helped the jury in evaluating the weight of the expert's opinions; and in light of the limiting instructions, the trial court did not abuse its discretion in admitting the statements. Even if it was error to admit the testimony, such error was not reasonably calculated to cause and probably did not cause rendition of an improper judgment. In re Commitment of Salazar, 2008 Tex. App. LEXIS 8856 (Tex. App. Beaumont Nov. 26 2008).

Real Property Law : Eminent Domain Proceedings : Valuation

150. Trial court did not err in a condemnation case in which the jury found the fair value of the property owner's land to be $250,000 in admitting the testimony of the State's expert appraiser where there were no gaps in the testimony of the appraiser or misapplication of legal rules such that her testimony could have been found to have been unreliable because the appraiser had formed her opinion by comparing the difference between the results of two methods of valuing the property: the cost approach, giving a value of $217,000, and the improved sales comparison approach that gave a value of $205,000. The property owner had not shown that the appraiser could not make valid comparisons for size, and the evidence permitted the conclusion that the owner's entire property was devoted to single-family use and that the applicable zoning ordinance would have allowed the existing use to continue. Williams v. State, 406 S.W.3d 273, 2013 Tex. App. LEXIS 7405 (Tex. App. San Antonio June 19 2013).

151. In a condemnation proceeding in which plaintiff county acquired a portion of commercial property used for a car wash in order to widen a county roadway, the trial court did not abuse its discretion in excluding the county's appraisal expert because the expert's bald assurance that he used a widely accepted appraisal method was insufficient to establish reliability. His report, as well as the underlying data and methodology, did not reflect application of an accepted appraisal method to arrive at the fair market value of the remainder after the taking where he simply took the market value of the whole and assumed--without any basis--that a willing buyer and willing seller would agree to reduce the market value by one-fifth after the taking. Dallas County v. Crestview Corners Car Wash, 370 S.W.3d 25, 2012 Tex. App. LEXIS 1269 (Tex. App. Dallas Feb. 16 2012).

152. Court did not err in admitting a utility company's expert testimony as to the market value of the condemned property in which he did not factor in the improvements that were over 4000 feet from the power lines in assessing damages because, inter alia, the landowners' own expert relied upon several articles that specifically stated the negative impact of power lines to a property diminished with increased distance and disappeared beyond 500 feet. Utley v. LCRA Transmission Servs. Corp., 2006 Tex. App. LEXIS 9129 (Tex. App. San Antonio Oct. 25 2006).

Tax Law : State & Local Taxes : Personal Property Tax : Tangible Property : General Overview

153. In a tax dispute regarding valuation, an expert's premise that an underground storage tank (UST), once installed, became salvage material was a faulty absolute and likely rendered his valuation of the USTs, which represented the largest deviation in the valuations, unreliable; unreliable testimony did not constitute evidence. Harris County Appraisal Dist. v. Sigmor Corp., 2008 Tex. App. LEXIS 2456 (Tex. App. Houston 1st Dist. Apr. 3 2008).

Torts : Damages : Compensatory Damages : Medical Expenses

154. Award for past medical expenses in a medical malpractice case was proper because an expert, who properly relied upon summaries of the medical bills as permitted by Tex. R. Evid. 703, rather than reviewing of all of the actual medical bills, testified that the costs and expenses incurred were reasonable and necessary and were the result of a child's brain injury; further, the jury awarded less than the amount actually incurred by the child's parents. Christus Spohn Health Sys. Corp. v. De La Fuente, 2007 Tex. App. LEXIS 6542 (Tex. App. Corpus Christi Aug. 16 2007).

Torts : Damages : Compensatory Damages : Property Damage : Loss of Use

155. Expert's testimony on lost profits resulting from the conversion of a leased item was unreliable absent any documentary evidence to support his conclusions regarding available leases and lease rates. Wells Fargo Bank Northwest, N.A. v. Rpk Capital Xvi, L.L.C., 360 S.W.3d 691, 2012 Tex. App. LEXIS 1265, 2012 WL 523925 (Tex. App. Dallas Feb. 16 2012).

Torts : Malpractice & Professional Liability : Attorneys

156. Expert's affidavit did not raise a genuine issue of material fact sufficient to defeat summary judgment because the expert did not evaluate what the client's case would have yielded by way of a judgment if the case had gone to trial. On the contrary, he based his opinion on what the attorneys should have obtained in settlement. Elizondo v. Krist, 415 S.W.3d 259, 2013 Tex. LEXIS 677, 56 Tex. Sup. Ct. J. 1074 (Tex. 2013).

Torts : Malpractice & Professional Liability : Healthcare Providers

157. Trial court properly denied a doctor's motion to dismiss a patient's health care liability claim against him where, considered together in their entirety, a neurosurgeon's report and curriculum vitae served by the patient established the neurosurgeon's qualifications to render opinions as to the applicable standard of care and alleged breach of the standard of care by the doctor because they expressly provided that the neurosurgeon served as a Florida Worker's Compensation Certified Physician Expert Medical Advisor and that he had been licensed, board certified, and in the private practice of neurosurgery from 1976 to the present. As to whether the neurosurgeon was qualified to address the standard of care and alleged breach by the doctor, a radiologist, the neurosurgeon's report provided that he had been thoroughly exposed to neuroradiology through his years of practice and that the interpretation of an MRI scan like that involved in the patient's case was common to both neurosurgery and radiology. Brunson v. Johnston, 2013 Tex. App. LEXIS 442, 2013 WL 173743 (Tex. App. Fort Worth Jan. 17 2013).

158. In a health care liability suit alleging that an infant died from a doctor's failure to determine that a line was improperly placed, the expert report properly relied on the autopsy report and medical records, as permitted by Tex. R. Evid. 703. Anderson v. Gonzalez, 315 S.W.3d 582, 2010 Tex. App. LEXIS 2977 (Tex. App. Eastland Apr. 22 2010).

159. In a patient's action that raised health care liability claims against a doctor based on the patient's allegation that her left eye was permanently impaired as a result of a surgery performed by the doctor, the trial court did not abuse its discretion by determining that the report prepared by the patient's expert, a board certified ophthalmologist, complied with Tex. Civ. Prac. & Rem. Code Ann. § 74.351 where the expert's report informed the doctor of the specific conduct that the patient had called into question and provided a basis for the trial court to conclude the claims were meritorious. Tex. R. Evid. 703, 705 allowed an expert to draw inferences from the underlying facts or data, which was what the expert had done, and, moreover, the expert's report did not merely state his opinions and inferences because he explained the basis for his conclusions and linked them to the facts. Diaz-Rohena v. Melton, 2008 Tex. App. LEXIS 6633 (Tex. App. Fort Worth Aug. 29, 2008).

Workers' Compensation & SSDI : Administrative Proceedings : Burdens of Proof

160. In a hospital's action against an employee that sought to reverse the Texas Workers' Compensation Commission's finding that the employee sustained a compensable injury in the course and scope of her employment, which was based on the employee's claim that she contracted human immunodeficiency virus (HIV) from a needle stick while working for the hospital, the trial court did not err by allowing the employee's expert to offer her opinion of causation to the jury because the expert was a medical doctor with extensive experience treating patients HIV, including the employee, and her opinion was supported by peer-reviewed medical literature; even without the expert's testimony, the remaining testimony was sufficient to support the jury's verdict because the burden was on the hospital to persuade the jury that the needle stick did not cause the employee's HIV infection, not on the employee to establish that it did, and the record contained no evidence that anything other than the needle stick caused the employee's HIV, a method of transmission that the hospital's experts acknowledged as a common method of transmission of the virus. Christus Health/St. Joseph Hosp. v. Price, 2007 Tex. App. LEXIS 754 (Tex. App. Houston 1st Dist. Feb. 1 2007).

Workers' Compensation & SSDI : Administrative Proceedings : Evidence : Medical Evidence

161. In a hospital's action against an employee that sought to reverse the Texas Workers' Compensation Commission's finding that the employee sustained a compensable injury in the course and scope of her employment, which was based on the employee's claim that she contracted human immunodeficiency virus (HIV) from a needle stick while working for the hospital, the trial court did not err by allowing the employee's expert to offer her opinion of causation to the jury because the expert was a medical doctor with extensive experience treating patients HIV, including the employee, and her opinion was supported by peer-reviewed medical literature; even without the expert's testimony, the remaining testimony was sufficient to support the jury's verdict because the burden was on the hospital to persuade the jury that the needle stick did not cause the employee's HIV infection, not on the employee to establish that it did, and the record contained no evidence that anything other than the needle stick caused the employee's HIV, a method of transmission that the hospital's experts acknowledged as a common method of transmission of the virus. Christus Health/St. Joseph Hosp. v. Price, 2007 Tex. App. LEXIS 754 (Tex. App. Houston 1st Dist. Feb. 1 2007).

Tex. Evid. R. 704

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 704 Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 60, *Opinion Testimony*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Case Notes

Administrative Law : Agency Adjudication : Hearings : Evidence : Admissibility : General Overview
Civil Procedure : Discovery : Methods : Expert Witness Discovery
Civil Procedure : Discovery : Privileged Matters : Work Product : Scope
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Custodial Interference
Criminal Law & Procedure : Criminal Offenses : Fraud : Securities Fraud : Elements
Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : Elements
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance
Criminal Law & Procedure : Trials : Motions for Mistrial
Criminal Law & Procedure : Defenses : Self-Defense

Criminal Law & Procedure : Scienter : Specific Intent
Criminal Law & Procedure : Jury Instructions : Curative Instructions
Criminal Law & Procedure : Appeals : Reversible Errors : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Relevance : Relevant Evidence
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility
Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Experts : Qualifications
Evidence : Testimony : Experts : Ultimate Issue
Evidence : Testimony : Lay Witnesses : General Overview
Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview
Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions
Evidence : Testimony : Lay Witnesses : Ultimate Issue
Real Property Law : Adjoining Landowners : Boundaries
Torts : Negligence : Causation : Proximate Cause : General Overview

LexisNexis (R) Notes

Administrative Law : Agency Adjudication : Hearings : Evidence : Admissibility : General Overview

1. Administrative law judge did not abuse his discretion by allowing a witness to testify on whether a corporation's and a company owner's offering qualified as a security because the witness did not testify on a pure question of law. Tex. State Secs. Bd. v. Miller, 2009 Tex. App. LEXIS 5108, 2009 WL 1896075 (Tex. App. Austin July 1 2009).

Civil Procedure : Discovery : Methods : Expert Witness Discovery

2. Tex. R. Civ. P. 192 prevails over Tex. R. Civ. P. 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production; that is, once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced. In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 2007 Tex. LEXIS 362, 50 Tex. Sup. Ct. J. 682 (Tex. 2007).

Civil Procedure : Discovery : Privileged Matters : Work Product : Scope

3. Tex. R. Civ. P. 192 prevails over Tex. R. Civ. P. 193.3(d)'s snap-back provision so long as the expert intends to testify at trial despite the inadvertent document production; that is, once privileged documents are disclosed to a testifying expert, and the party who designated the expert continues to rely upon that designation for trial, the documents may not be retrieved even if they were inadvertently produced. In re Christus Spohn Hosp. Kleberg, 222 S.W.3d 434, 2007 Tex. LEXIS 362, 50 Tex. Sup. Ct. J. 682 (Tex. 2007).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

4. In a cocaine possession trial, there was no error in admitting an officer's testimony that defendant passenger jointly possessed cocaine or in admitting the officer's testimony explaining how he believed the bag of cocaine became positioned behind the driver's seat. The testimony was rationally based on the circumstances the officer

perceived in the course of arresting defendant and investigating the case. Salazar v. State, 2014 Tex. App. LEXIS 3983, 2014 WL 1408121 (Tex. App. Houston 1st Dist. Apr. 10 2014).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Custodial Interference

5. In an interference with child custody case, although a court erred by overruling defendant's objection to an officer's testimony regarding her guilt or innocence, the error was harmless because the evidence against defendant established that she violated the child custody modification order; defendant's own testimony established that her taking possession of the child on October 24 was contrary to the terms of the modification order. Lovell v. State, 2006 Tex. App. LEXIS 6062 (Tex. App. Tyler July 12 2006).

Criminal Law & Procedure : Criminal Offenses : Fraud : Securities Fraud : Elements

6. Director of the Enforcement Division of the Texas State Securities Board was properly permitted to testify as an expert that investor agreements between defendant's company and investors were contracts containing a promise to pay in the future for consideration presently received, and were therefore evidence of indebtedness and securities under Tex. Rev. Civ. Stat. Ann. art. 581-4(A), even though the expert's testimony went to the ultimate issue. Digges v. State, 2012 Tex. App. LEXIS 5195, 2012 WL 2444543 (Tex. App. Dallas June 28 2012).

Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : Elements

7. In the homicide trial of a doctor who occluded a patient's breathing tube, a physician was properly allowed to testify that the patient was alive at the time of the occlusion; testimony in the form of an opinion or inference otherwise admissible was not objectionable because it embraced an ultimate issue to be decided by the trier of fact. Grotti v. State, 2006 Tex. App. LEXIS 8153 (Tex. App. Fort Worth Sept. 14 2006).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

8. In a trial for a "shaken-baby" murder, any error arising from the admission of an investigator's opinion on guilt was harmless. Although defendant objected to the testimony under Tex. R. Evid. 704 during the prosecution's re-direct, the same question and answer had come in without objection during the defense's prior cross-examination. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Elements

9. In a trial for evading arrest, counsel was not rendered ineffective by failing to object to an officer's opinion that defendant intended to flee. The reviewing court noted that opinion testimony regarding the mental state of an accused was not inadmissible per se, that rulings on the admissibility of lay opinion testimony were within the discretion of the trial court under Tex. R. Evid. 701, 704, and that counsel may have made a strategic decision not to object. Britt v. State, 2007 Tex. App. LEXIS 3148 (Tex. App. Houston 14th Dist. Apr. 26 2007).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : General Overview

10. In a trial for unauthorized use of a motor vehicle, counsel was not rendered ineffective by failing to object to an officer's testimony that he believed defendant was in possession of the missing vehicle, in part because that evidence might have been admissible under Tex. R. Evid. 701, 704. Seat v. State, 2011 Tex. App. LEXIS 4322, 2011 WL 2306249 (Tex. App. Texarkana June 8 2011).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

11. In a driving while intoxicated trial, there was no error when officers stated their opinions regarding whether defendant was intoxicated; under Tex. R. Evid. 704, opinion testimony that was otherwise admissible was not objectionable solely because it embraced an ultimate issue to be decided by the trier of fact. Birhiray v. State, 2007 Tex. App. LEXIS 10075 (Tex. App. Houston 1st Dist. Dec. 20 2007).

12. In an intoxicated assault case, Tex. Penal Code Ann. § 49.07(a)(1), the State's witness's testimony was objectionable because he was not shown to be qualified as an expert under Tex. R. Evid. 702 on retrograde extrapolation for purposes of blood alcohol tests, nor was his testimony shown to be reliable and, thus, pursuant to Tex. R. Evid. 704, the witness's testimony on whether defendant was intoxicated beyond a reasonable doubt, an ultimate issue in the case, was also objectionable; therefore, counsel's representation fell below an objective standard of reasonableness as he failed to object to the witness testimony. However, counsel's failure to object to the admission of the witness's testimony did not prejudice defendant because there was other substantial evidence of defendant's intoxication at the time of the accident, including testimony that defendant smelled of alcohol and appeared intoxicated, that the inside of defendant's vehicle smelled of the metabolized odor of alcohol, and that defendant had been drinking that day. Blumenstetter v. State, 135 S.W.3d 234, 2004 Tex. App. LEXIS 3074 (Tex. App. Texarkana 2004).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

13. In a trial for unauthorized use of a motor vehicle, counsel was not rendered ineffective by failing to object to an officer's testimony that he believed defendant was in possession of the missing vehicle, in part because that evidence might have been admissible under Tex. R. Evid. 701, 704. Seat v. State, 2011 Tex. App. LEXIS 4322, 2011 WL 2306249 (Tex. App. Texarkana June 8 2011).

14. Although defendant argued that his counsel permitted a witness to testify as to his guilt without objection, given the fact that one such objection was overruled by the trial court, counsel could have chosen not to emphasize the matter further to the jury by additional objections, and, accordingly, it could not be said that the trial court abused its discretion in finding that defendant failed to prove by credible evidence that counsel's performance was deficient. Moreover, the witness was a fact witness, and defendant did not argue that the testimony was not based on the perception of the witness and/or was not helpful to an understanding of a fact in issue. Ex Parte Eggert, 2010 Tex. App. LEXIS 858, 2010 WL 396321 (Tex. App. Amarillo Feb. 4 2010).

15. Court rejected defendant's contention that his trial counsel fell below an objective standard of reasonable competence for failing to object to an officer's testimony that he did not believe defendant's version of events; under Tex. R. Evid. 704, a lay witness could offer an opinion on an ultimate issue. Adelaja v. State, 2006 Tex. App. LEXIS 4596 (Tex. App. Houston 14th Dist. May 25 2006).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

16. In an assault case, there was no reversible error based on hearsay, relevance, undue prejudice, improper opinion, and violations of the confrontation clause because the challenged evidence had come in during other portions of the trial without objection. Hecht v. State, 2009 Tex. App. LEXIS 521, 2009 WL 200979 (Tex. App. Dallas Jan. 29 2009).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Counsel : Effective Assistance

17. In an intoxicated assault case, Tex. Penal Code Ann. § 49.07(a)(1), the State's witness's testimony was objectionable because he was not shown to be qualified as an expert under Tex. R. Evid. 702 on retrograde extrapolation for purposes of blood alcohol tests, nor was his testimony shown to be reliable and, thus, pursuant to Tex. R. Evid. 704, the witness's testimony on whether defendant was intoxicated beyond a reasonable doubt, an ultimate issue in the case, was also objectionable; therefore, counsel's representation fell below an objective standard of reasonableness as he failed to object to the witness testimony. However, counsel's failure to object to the admission of the witness's testimony did not prejudice defendant because there was other substantial evidence of defendant's intoxication at the time of the accident, including testimony that defendant smelled of alcohol and appeared intoxicated, that the inside of defendant's vehicle smelled of the metabolized odor of alcohol, and that defendant had been drinking that day. Blumenstetter v. State, 135 S.W.3d 234, 2004 Tex. App. LEXIS 3074 (Tex. App. Texarkana 2004).

Criminal Law & Procedure : Trials : Motions for Mistrial

18. Trial court did not abuse its discretion by denying defendant's motions for a mistrial based on testimony of the victim's therapist because the trial court promptly instructed the jury to disregard the objected-to testimony both times when requested; the court could not conclude that the jury did not follow the trial court's instructions to disregard the therapist's references, and during the re-direct examination by the State, the therapist testified without objection that the victim did not appear to be malingering or lying about what she had told the therapist. King v. State, 2010 Tex. App. LEXIS 7282, 2010 WL 3434634 (Tex. App. Waco Sept. 1 2010).

Criminal Law & Procedure : Defenses : Self-Defense

19. Lay witness opinion testimony was properly allowed from a State's witness regarding whether it was necessary for defendant to use deadly force to protect his brother. The court noted that under Tex. R. Evid. 704, testimony in form of opinion is not objectionable because it embraced an ultimate issue to be decided by trier of fact. Garcia v. State, 2005 Tex. App. LEXIS 4424 (Tex. App. Corpus Christi June 9 2005).

20. In a prosecution for aggravated assault in which defendant claimed self-defense, the arresting officer was permitted to give opinion testimony that defendant had not been attacked. Ex parte Nailor, 149 S.W.3d 125, 2004 Tex. Crim. App. LEXIS 518 (Tex. Crim. App. 2004).

Criminal Law & Procedure : Scienter : Specific Intent

21. In a murder trial, counsel was not ineffective in failing to object under Tex. R. Evid. 701, 704, to allegedly improper witness testimony concerning defendant's mental state because defendant did not establish that the trial court would have erred in overruling an objection to testimony from two eyewitnesses that defendant intentionally hit the victim with his van. Harris v. State, 2012 Tex. App. LEXIS 2143, 2012 WL 952248 (Tex. App. Houston 14th Dist. Mar. 20 2012).

22. In a trial for evading arrest, counsel was not rendered ineffective by failing to object to an officer's opinion that defendant intended to flee. The reviewing court noted that opinion testimony regarding the mental state of an accused was not inadmissible per se, that rulings on the admissibility of lay opinion testimony were within the discretion of the trial court under Tex. R. Evid. 701, 704, and that counsel may have made a strategic decision not to object. Britt v. State, 2007 Tex. App. LEXIS 3148 (Tex. App. Houston 14th Dist. Apr. 26 2007).

Criminal Law & Procedure : Jury Instructions : Curative Instructions

23. Trial court did not abuse its discretion by denying defendant's motions for a mistrial based on testimony of the victim's therapist because the trial court promptly instructed the jury to disregard the objected-to testimony both

times when requested; the court could not conclude that the jury did not follow the trial court's instructions to disregard the therapist's references, and during the re-direct examination by the State, the therapist testified without objection that the victim did not appear to be malingering or lying about what she had told the therapist. King v. State, 2010 Tex. App. LEXIS 7282, 2010 WL 3434634 (Tex. App. Waco Sept. 1 2010).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

24. In an assault case, there was no reversible error based on hearsay, relevance, undue prejudice, improper opinion, and violations of the confrontation clause because the challenged evidence had come in during other portions of the trial without objection. Hecht v. State, 2009 Tex. App. LEXIS 521, 2009 WL 200979 (Tex. App. Dallas Jan. 29 2009).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

25. In a murder trial, defendant waived any argument under Tex. R. Evid. 503, 701, 704 to allowing a State's witness to speculate regarding what defendant told his trial counsel. There were no objections on grounds relating to those rules, as required to preserve error under Tex. R. App. P. 33.1(a). Young v. State, 2009 Tex. App. LEXIS 8022, 2009 WL 3295763 (Tex. App. Beaumont Oct. 14 2009).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

26. State asked the second detective, whether, based on that detective's professional opinion self-defense was involved, and defendant's objection was overruled. However, state had asked the first detective to give a professional opinion as to whether defendant acted in self-defense, to which the first detective stated it would have been unlikely, and defendant did not object; thus, defendant waived assertion that the opinion testimony on self-defense and the ultimate issue was improperly admitted. Rocha v. State, 2004 Tex. App. LEXIS 2410 (Tex. App. Dallas Mar. 17 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

27. Although the court erred by allowing an expert to testify that a sexual assault occurred, the error was harmless where the child victim told her caregivers and the jury that defendant put his "private" in her "private" on numerous occasions. The victim also provided detailed descriptions of the sexual abuse in age-appropriate language. Smith v. State, 2005 Tex. App. LEXIS 4203 (Tex. App. El Paso May 31 2005).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

28. In a case involving aggravated sexual assault committed by a juvenile, testimony from a school counselor regarding the fact that she thought defendant's behavior would have gotten worse without treatment was admissible during the punishment phase of the trial as lay opinion testimony; her testimony was rationally based on her perceptions and was helpful to the determination of the appropriateness of defendant's punishment. Even if there was an error in admitting this evidence, it was harmless because numerous witnesses testified about defendant's prior bad acts and the escalating nature of his behavior, which included stealing his father's vehicle, breaking into a convenience store, starting fires, acting out in a sexual manner toward other students, and aggravated sexual assault. McNichols v. State, 2009 Tex. App. LEXIS 510, 2009 WL 196066 (Tex. App. Houston 14th Dist. Jan. 29 2009).

29. In an interference with child custody case, although a court erred by overruling defendant's objection to an officer's testimony regarding her guilt or innocence, the error was harmless because the evidence against defendant established that she violated the child custody modification order; defendant's own testimony established

that her taking possession of the child on October 24 was contrary to the terms of the modification order. Lovell v. State, 2006 Tex. App. LEXIS 6062 (Tex. App. Tyler July 12 2006).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

30. State asked the second detective, whether, based on that detective's professional opinion self-defense was involved, and defendant's objection was overruled. However, state had asked the first detective to give a professional opinion as to whether defendant acted in self-defense, to which the first detective stated it would have been unlikely, and defendant did not object; thus, defendant waived assertion that the opinion testimony on self-defense and the ultimate issue was improperly admitted. Rocha v. State, 2004 Tex. App. LEXIS 2410 (Tex. App. Dallas Mar. 17 2004).

Evidence : Relevance : Relevant Evidence

31. When offered evidence is the testimony of an expert witness, the court must apply the principles set forth in the rules governing expert testimony under Tex. R. Evid. 702-705; a two-part test governs whether expert testimony is admissible: (1) the expert must be qualified and (2) the testimony must be relevant and based on a reliable foundation. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

Evidence : Testimony : Credibility : General Overview

32. It was error under Tex. R. Evid. 704 to allow the investigating detective in an assault trial to state his opinion about whether defendant was acting in defense of a third person or in self-defense when he stabbed the victim. However, the error did not require reversal because the State elicited the challenged testimony on redirect and did not ask for elaboration. Williams v. State, 2009 Tex. App. LEXIS 9190, 2009 WL 4377196 (Tex. App. Tyler Dec. 2 2009).

Evidence : Testimony : Experts : General Overview

33. Tex. R. Evid. 704 does not require a surveyor to testify as an expert as to the location of a boundary line in every case involving disputed boundary lines. Neal v. Machaud, 2006 Tex. App. LEXIS 10602 (Tex. App. San Antonio Dec. 13 2006).

34. Appellate court did not reach the issue of whether an expert witness's affidavit was relevant because the threshold issues, whether he was qualified to opine concerning the cause of injury and whether his opinions were reliable, were waived due to inadequate briefing. Sanders v. Home Depot U.S.A., Inc., 2005 Tex. App. LEXIS 3651 (Tex. App. Fort Worth May 12 2005).

35. Trial court properly allowed an expert to testify that the conduct of a life insurance company constituted bad faith, unfair dealing, and fraud and also that it violated various provisions of the Insurance Code and the Deceptive Trade Practices Act; these opinions on mixed questions of law and fact were proper. Royal Maccabees Life Ins. Co. v. James, 134 S.W.3d 906, 2004 Tex. App. LEXIS 4638 (Tex. App. Dallas 2004), vacated by, opinion withdrawn by, substituted opinion at 146 S.W.3d 340, 2004 Tex. App. LEXIS 9025 (Tex. App. Dallas 2004).

36. When offered evidence is the testimony of an expert witness, the court must apply the principles set forth in the rules governing expert testimony under Tex. R. Evid. 702-705; a two-part test governs whether expert testimony is admissible: (1) the expert must be qualified and (2) the testimony must be relevant and based on a reliable foundation. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

37. Testimony may be presented before the jury even if it embraces an ultimate issue to be decided by the trier of facts; accordingly, an expert may state an opinion on a mixed question of fact and law as long as the opinion is confined to the relevant issues and is based on proper legal concepts. Particularly, expert testimony on proximate cause is admissible so long as it is predicated on the proper legal concept. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

Evidence : Testimony : Experts : Admissibility

38. Trial court did not err by admitting the investigator's testimony that he concluded a sexual assault had occurred because he was not offering an opinion that the victim was telling the truth, but rather was testifying about what he relied upon to determine whether he should swear out an affidavit to obtain a warrant for defendant's arrest. Bryant v. State, 340 S.W.3d 1, 2010 Tex. App. LEXIS 6614 (Tex. App. Houston 1st Dist. Aug. 12 2010).

Evidence : Testimony : Experts : Criminal Trials

39. In a trial for a "shaken-baby" murder, any error arising from the admission of an investigator's opinion on guilt was harmless. Although defendant objected to the testimony under Tex. R. Evid. 704 during the prosecution's re-direct, the same question and answer had come in without objection during the defense's prior cross-examination. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

40. Although the court erred by allowing an expert to testify that a sexual assault occurred, the error was harmless where the child victim told her caregivers and the jury that defendant put his "private" in her "private" on numerous occasions. The victim also provided detailed descriptions of the sexual abuse in age-appropriate language. Smith v. State, 2005 Tex. App. LEXIS 4203 (Tex. App. El Paso May 31 2005).

41. In an intoxicated assault case, Tex. Penal Code Ann. § 49.07(a)(1), the State's witness's testimony was objectionable because he was not shown to be qualified as an expert under Tex. R. Evid. 702 on retrograde extrapolation for purposes of blood alcohol tests, nor was his testimony shown to be reliable and, thus, pursuant to Tex. R. Evid. 704, the witness's testimony on whether defendant was intoxicated beyond a reasonable doubt, an ultimate issue in the case, was also objectionable; therefore, counsel's representation fell below an objective standard of reasonableness as he failed to object to the witness testimony. However, counsel's failure to object to the admission of the witness's testimony did not prejudice defendant because there was other substantial evidence of defendant's intoxication at the time of the accident, including testimony that defendant smelled of alcohol and appeared intoxicated, that the inside of defendant's vehicle smelled of the metabolized odor of alcohol, and that defendant had been drinking that day. Blumenstetter v. State, 135 S.W.3d 234, 2004 Tex. App. LEXIS 3074 (Tex. App. Texarkana 2004).

42. In an arson trial, an expert's opinion that a fire had started was admissible under Tex. R. Evid. 702 and Tex. R. Evid. 704. Drake v. State, 123 S.W.3d 596, 2003 Tex. App. LEXIS 9599 (Tex. App. Houston 14th Dist. 2003).

Evidence : Testimony : Experts : Qualifications

43. At a hearing, outside the presence of the jury, a doctor testified that he based his opinion on his practice in emergency medicine and what he saw in the emergency room while treating the victim, a 16-month old child; defendant contended that the doctor was not qualified to testify on what someone believed would happen if they saw an assault; however, the training, experience, research, seminars, and periodicals about which the doctor testified and upon which he based his medical opinion qualified him to testify as an expert witness; thus, the trial court did not abuse its discretion by allowing the doctor to testify as an expert witness. Montgomery v. State, 198 S.W.3d 67, 2006 Tex. App. LEXIS 3377 (Tex. App. Fort Worth 2006).

Evidence : Testimony : Experts : Ultimate Issue

44. Defendant failed to show that trial counsel was ineffective during a sexual assault trial for failing to object to testimony by a nurse that she had examined over 1,100 subjects of sexual assault; even if the nurse's testimony had addressed an ultimate issue of fact to be determined by the jury, it was not objectionable solely for that reason. Allen v. State, 2013 Tex. App. LEXIS 7273 (Tex. App. Corpus Christi June 13 2013).

45. Because appellant's claim on appeal about the prosecutor eliciting testimony from a witness did not correspond with his objection at trial, the court overruled appellant's claim; even if the court found the argument matched the trial objection, an expert witness could testify as to an ultimate issue to be decided by the fact finder under Tex. R. Evid. 704. Leal v. State, 2013 Tex. App. LEXIS 3130, 2013 WL 1188033 (Tex. App. Corpus Christi Mar. 21 2013).

46. Director of the Enforcement Division of the Texas State Securities Board was properly permitted to testify as an expert that investor agreements between defendant's company and investors were contracts containing a promise to pay in the future for consideration presently received, and were therefore evidence of indebtedness and securities under Tex. Rev. Civ. Stat. Ann. art. 581-4(A), even though the expert's testimony went to the ultimate issue. Digges v. State, 2012 Tex. App. LEXIS 5195, 2012 WL 2444543 (Tex. App. Dallas June 28 2012).

47. Court's admission of the officer's testimony regarding whether defendant was intoxicated was not error simply because the officer testified that his observations persuaded him beyond a reasonable doubt that defendant was driving while intoxicated. Reyna v. State, 2011 Tex. App. LEXIS 5038, 2011 WL 2621314 (Tex. App. Austin July 1 2011).

48. Defendant's conviction for engaging in organized criminal activity, with the two predicate offenses being aggravated sexual assault of a child, was improper because it was error for the judge to overrule an objection to a question as to whether there was grooming in the case. Both of those questions asked the expert to give her opinion as to whether the testimony of the children was true; the doctor should not have been allowed to imply that the children were telling the truth by claiming that she would not have agreed to be a witness in the case if she saw evidence of deception. Kelly v. State, 321 S.W.3d 583, 2010 Tex. App. LEXIS 4506 (Tex. App. Houston 14th Dist. June 17 2010).

49. Administrative law judge did not abuse his discretion by allowing a witness to testify on whether a corporation's and a company owner's offering qualified as a security because the witness did not testify on a pure question of law. Tex. State Secs. Bd. v. Miller, 2009 Tex. App. LEXIS 5108, 2009 WL 1896075 (Tex. App. Austin July 1 2009).

50. Even if the court decided that a sexual assault nurse examiner's testimony was erroneously admitted, the admission of her testimony was harmless under Tex. R. App. P. 44.2(b) because the outcome was not substantially influenced by the admission of the complained-of testimony and the record contained ample evidence, apart from the nurse's opinion that the victim had been sexually assault, for purposes of Tex. R. Evid. 704, to permit the jury to find defendant guilty of sexual assault under Tex. Penal Code Ann. § 22.011(a)(1)(A), (b)(1). Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

51. Defendant argued on appeal that a question to and an answer from a nurse examiner exceeded the scope of Tex. R. Evid. 702, 704 because they constituted improper opinion testimony regarding the victim's truthfulness, but because this objection did not comport with defendant's trial objection, he waived this complaint pursuant to Tex. R. App. P. 33.1, plus the nurse offered the same testimony on seven previous occasions and on one subsequent occasion without objection from defendant, and the improper admission of evidence did not constitute reversible error if the same facts were shown by other evidence that was not challenged; even if defendant preserved his complaint, the nurse's testimony was proper because it was limited to her expert opinion on the physical findings

that she observed and the record did not contain any evidence that would have supported a finding that the trial court would have abused its discretion in allowing the nurse's testimony if it had been presented with a proper objection. Jernigan v. State, 2008 Tex. App. LEXIS 6310 (Tex. App. Eastland Aug. 14 2008).

52. In defendant's trial for capital murder, a doctor was qualified to testify as an expert under Tex. R. Evid. 702 regarding a perpetrator's state of mind, given that (1) the doctor was an assistant professor of pediatrics, (2) he was triple board certified in pediatrics, pediatric emergency medicine, and pediatric infectious diseases, and (3) he experienced hundreds of injuries similar to the child's injuries and knew the injuries were generally consistent with child abuse; thus, he was qualified in regard to whether the injuries presented were intentional and not accidental injuries, such involved specialized knowledge and his testimony assisted the jury in understanding the evidence and determining the fact at issue, and under Tex. R. Evid. 704, the doctor was qualified to render his opinion on the ultimate issue of whether the child's injuries were intentionally inflicted. Martin v. State, 246 S.W.3d 246, 2007 Tex. App. LEXIS 9698 (Tex. App. Houston 14th Dist. 2007).

53. In a suit by a royalty interest owner against operators of oil and gas properties, an expert's damages testimony was speculative, conclusory, and incompetent; although he examined facts and data that would be appropriate to consider, he failed to specifically identify them or explain how they affected his calculations. Paradigm Oil, Inc. v. Retamco Operating, Inc., 242 S.W.3d 67, 2007 Tex. App. LEXIS 6926, 167 Oil & Gas Rep. 236 (Tex. App. San Antonio 2007).

Evidence : Testimony : Lay Witnesses : General Overview

54. On appeal from his conviction for failing to stop at a clearly marked stop line while facing a red light, the appellate court determined that the municipal court did not err in overruling defendant's objections to questions that he claimed called for a conclusion of law or ultimate issue for the jury. The police officers testified based on their observations and experience in patrolling the same area where defendant was cited. Hassan v. State, 440 S.W.3d 684, 2012 Tex. App. LEXIS 8853, 2012 WL 5288353 (Tex. App. Houston 14th Dist. Oct. 25 2012).

55. In a prosecution for aggravated assault in which defendant claimed self-defense, the arresting officer was permitted to give opinion testimony that defendant had not been attacked. Ex parte Nailor, 149 S.W.3d 125, 2004 Tex. Crim. App. LEXIS 518 (Tex. Crim. App. 2004).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview

56. Trial court did not err by admitting the investigator's testimony that he concluded a sexual assault had occurred because he was not offering an opinion that the victim was telling the truth, but rather was testifying about what he relied upon to determine whether he should swear out an affidavit to obtain a warrant for defendant's arrest. Bryant v. State, 340 S.W.3d 1, 2010 Tex. App. LEXIS 6614 (Tex. App. Houston 1st Dist. Aug. 12 2010).

57. Although defendant argued that his counsel permitted a witness to testify as to his guilt without objection, given the fact that one such objection was overruled by the trial court, counsel could have chosen not to emphasize the matter further to the jury by additional objections, and, accordingly, it could not be said that the trial court abused its discretion in finding that defendant failed to prove by credible evidence that counsel's performance was deficient. Moreover, the witness was a fact witness, and defendant did not argue that the testimony was not based on the perception of the witness and/or was not helpful to an understanding of a fact in issue. Ex Parte Eggert, 2010 Tex. App. LEXIS 858, 2010 WL 396321 (Tex. App. Amarillo Feb. 4 2010).

58. Lay witness opinion testimony was properly allowed from a State's witness regarding whether it was necessary for defendant to use deadly force to protect his brother. The court noted that under Tex. R. Evid. 704, testimony in

form of opinion is not objectionable because it embraced an ultimate issue to be decided by trier of fact. Garcia v. State, 2005 Tex. App. LEXIS 4424 (Tex. App. Corpus Christi June 9 2005).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : Personal Perceptions

59. In a case involving aggravated sexual assault committed by a juvenile, testimony from a school counselor regarding the fact that she thought defendant's behavior would have gotten worse without treatment was admissible during the punishment phase of the trial as lay opinion testimony; her testimony was rationally based on her perceptions and was helpful to the determination of the appropriateness of defendant's punishment. Even if there was an error in admitting this evidence, it was harmless because numerous witnesses testified about defendant's prior bad acts and the escalating nature of his behavior, which included stealing his father's vehicle, breaking into a convenience store, starting fires, acting out in a sexual manner toward other students, and aggravated sexual assault. McNichols v. State, 2009 Tex. App. LEXIS 510, 2009 WL 196066 (Tex. App. Houston 14th Dist. Jan. 29 2009).

Evidence : Testimony : Lay Witnesses : Ultimate Issue

60. Trial court did not abuse its discretion by admitting a witness's testimony that it was wrong for defendant to shoot the victim because such testimony was expressly permitted under this rule. Lopez v. State, 2013 Tex. App. LEXIS 13623, 2013 WL 5948124 (Tex. App. Houston 14th Dist. Nov. 5 2013).

61. Court did not need to determine if a witness expressed an opinion on the ultimate issue because even if she did, appellant was not able to show deficient performance; the witness's testimony was based on her observations while investigating the family, and even if the witness's statement amounted to an opinion, the testimony was admissible under Tex. R. Evid. 701, 704, and counsel's decision not to object was not error or deficient performance. Noland v. State, 2012 Tex. App. LEXIS 5911, 2012 WL 2989256 (Tex. App. Austin July 20 2012).

62. Even if a trial court erred in admitting testimony of a child sexual assault victim's mother that she believed her daughter and that her daughter would not lie, the error was harmless because opinion testimony as to the ultimate issue of a case was expressly permitted by the rule; there was other overwhelming evidence to support defendant's conviction. Fitzgerald v. State, 2012 Tex. App. LEXIS 1570, 2012 WL 683400 (Tex. App. Eastland Feb. 29 2012).

63. Trial court did not err by overruling defendant's objections to witnesses' testimony concerning whether they believed that the complainant failed to exercise due care in driving her vehicle because such testimony was expressly permitted under Tex. R. Evid. 704. Ruiz-Angeles v. State, 346 S.W.3d 261, 2011 Tex. App. LEXIS 6176 (Tex. App. Houston 14th Dist. Aug. 9 2011).

64. Prosecutor's question to an officer regarding the officer's opinion as to whether defendant, a felon, was in possession of a firearm was not improper merely because it embraced an ultimate issue in the case. Young v. State, 2010 Tex. App. LEXIS 4974, 2010 WL 2638083 (Tex. App. Tyler June 30 2010).

65. In a murder case involving a sudden passion defense, there was no error under Tex. R. Evid. 704 in allowing lay testimony that the witness had not seen anything that justified defendant pulling a gun on the victim; contrary to defendant's argument, the witness gave no opinion as to defendant's state of mind at the time that defendant fired several shots. Miller v. State, 2007 Tex. App. LEXIS 6511 (Tex. App. Dallas Aug. 10 2007).

66. In an interference with child custody case, although a court erred by overruling defendant's objection to an officer's testimony regarding her guilt or innocence, the error was harmless because the evidence against defendant established that she violated the child custody modification order; defendant's own testimony established

that her taking possession of the child on October 24 was contrary to the terms of the modification order. Lovell v. State, 2006 Tex. App. LEXIS 6062 (Tex. App. Tyler July 12 2006).

67. Court rejected defendant's claim that a witness's testimony expressed an opinion of defendant's state of mind as to whether defendant deliberately drove into the officer, in defendant's murder trial, as the witness was not asked whether defendant intended to strike the officer, but whether the swerve appeared to be a deliberate action, which called for a response based on the witness's observation of the vehicle's movements, and the trial court could have found the question was not an attempt to communicate defendant's actual mental state, but asked for an opinion or inference drawn from the witness's objective perception of events. Davis v. State, 223 S.W.3d 466, 2006 Tex. App. LEXIS 3882 (Tex. App. Amarillo 2006).

68. Objection was made to opinion testimony as calling for a legal conclusion, and the trial court ruled on that objection; although the objection on appeal was somewhat different in that defendant claimed the testimony was a conclusion that should have been reached by the jury, the court found the objection not so different as to have precluded the court's consideration of the issue for purposes of Tex. R. App. P. 33.1, and the court further found that error was not forfeited by defense counsel's mere restatement of the objectionable testimony. Lovell v. State, 2006 Tex. App. LEXIS 2280 (Tex. App. Tyler Mar. 22 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 6062 (Tex. App. Tyler July 12, 2006).

69. Witness was asked whether, based on the investigation, defendant violated the law of interference with child custody under Tex. Penal Code Ann. § 25.03(a)(1), to which the witness agreed; because this was in substance, an opinion that defendant was guilty, the trial court should have sustained defendant's objection; however, the error did not affect defendant's substantial rights under Tex. R. App. P. 44, given that defendant and her ex-husband had a custody arrangement regarding their child and defendant deliberately took the child on a weekend that was not hers. Lovell v. State, 2006 Tex. App. LEXIS 2280 (Tex. App. Tyler Mar. 22 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 6062 (Tex. App. Tyler July 12, 2006).

70. Psychiatrist's comment during defendant's competency hearing that subsequent information shed doubt on defendant's statement that it was his father who killed his stepmother did not implicate Tex. Code Crim. Proc. Ann. art. 46.02, § 3(g) because it was merely an opinion based on evidence already in the record. Expert witness testimony in the form of an opinion that was otherwise admissible was not objectionable merely because it embraced an ultimate issue to be decided by the jury. Marthiljohni v. State, 2005 Tex. App. LEXIS 6194 (Tex. App. Corpus Christi Aug. 4 2005).

71. Although the court erred by allowing an expert to testify that a sexual assault occurred, the error was harmless where the child victim told her caregivers and the jury that defendant put his "private" in her "private" on numerous occasions. The victim also provided detailed descriptions of the sexual abuse in age-appropriate language. Smith v. State, 2005 Tex. App. LEXIS 4203 (Tex. App. El Paso May 31 2005).

72. Defense counsel's questioning of a witness about insurance fraud opened the door for the State to reference the reading of the definition of insurance fraud in defendant's insurance fraud case under Tex. Penal Code Ann. § 35.02(a); the testimony did not go to an ultimate issue because the witness neither made a legal conclusion about the definition of insurance fraud, nor offered an opinion about whether the case involved it or if defendant committed it, and the testimony was based on common knowledge and personal experience. Gutierrez v. State, 2005 Tex. App. LEXIS 1430 (Tex. App. San Antonio Feb. 23 2005).

73. In light of the court's conclusion that an insurance policy was ambiguous, it was not error for the trial court to permit an expert witness to testify as to an interpretation of the policy; the expert was qualified pursuant to Tex. R. Evid. 702, and the opinions were on mixed questions of law and fact and were proper pursuant to Tex. R. Evid. 704.

Royal Maccabees Life Ins. Co. v. James, 146 S.W.3d 340, 2004 Tex. App. LEXIS 9025 (Tex. App. Dallas 2004).

74. Trial court properly allowed an expert to testify that the conduct of a life insurance company constituted bad faith, unfair dealing, and fraud and also that it violated various provisions of the Insurance Code and the Deceptive Trade Practices Act; these opinions on mixed questions of law and fact were proper. Royal Maccabees Life Ins. Co. v. James, 134 S.W.3d 906, 2004 Tex. App. LEXIS 4638 (Tex. App. Dallas 2004), vacated by, opinion withdrawn by, substituted opinion at 146 S.W.3d 340, 2004 Tex. App. LEXIS 9025 (Tex. App. Dallas 2004).

75. In a prosecution for aggravated assault in which defendant claimed self-defense, the arresting officer was permitted to give opinion testimony that defendant had not been attacked. Ex parte Nailor, 149 S.W.3d 125, 2004 Tex. Crim. App. LEXIS 518 (Tex. Crim. App. 2004).

76. State asked the second detective, whether, based on that detective's professional opinion self-defense was involved, and defendant's objection was overruled. However, state had asked the first detective to give a professional opinion as to whether defendant acted in self-defense, to which the first detective stated it would have been unlikely, and defendant did not object; thus, defendant waived assertion that the opinion testimony on self-defense and the ultimate issue was improperly admitted. Rocha v. State, 2004 Tex. App. LEXIS 2410 (Tex. App. Dallas Mar. 17 2004).

77. In an arson trial, an expert's opinion that a fire had started was admissible under Tex. R. Evid. 702 and Tex. R. Evid. 704. Drake v. State, 123 S.W.3d 596, 2003 Tex. App. LEXIS 9599 (Tex. App. Houston 14th Dist. 2003).

Real Property Law : Adjoining Landowners : Boundaries

78. Tex. R. Evid. 704 does not require a surveyor to testify as an expert as to the location of a boundary line in every case involving disputed boundary lines. Neal v. Machaud, 2006 Tex. App. LEXIS 10602 (Tex. App. San Antonio Dec. 13 2006).

Torts : Negligence : Causation : Proximate Cause : General Overview

79. Testimony may be presented before the jury even if it embraces an ultimate issue to be decided by the trier of facts; accordingly, an expert may state an opinion on a mixed question of fact and law as long as the opinion is confined to the relevant issues and is based on proper legal concepts. Particularly, expert testimony on proximate cause is admissible so long as it is predicated on the proper legal concept. Dziedzic v. Stephanou, 1999 Tex. App. LEXIS 7458 (Tex. App. Houston 14th Dist. Oct. 7 1999).

End of Document

Tex. Evid. R. 705

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 705 Disclosing the Underlying Facts or Data and Examining an Expert About Them

(a) ***Stating an Opinion Without Disclosing the Underlying Facts or Data.***--Unless the court orders otherwise, an expert may state an opinion - and give the reasons for it - without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

(b) ***Voir Dire Examination of an Expert About the Underlying Facts or Data.***--Before an expert states an opinion or discloses the underlying facts or data, an adverse party in a civil case may-or in a criminal case must-be permitted to examine the expert about the underlying facts or data. This examination must take place outside the jury's hearing.

(c) ***Admissibility of Opinion.***--An expert's opinion is inadmissible if the underlying facts or data do not provide a sufficient basis for the opinion.

(d) ***When Otherwise Inadmissible Underlying Facts or Data May Be Disclosed; Instructing the Jury.***--If the underlying facts or data would otherwise be inadmissible, the proponent of the opinion may not disclose them to the jury if their probative value in helping the jury evaluate the opinion is outweighed by their prejudicial effect. If the court allows the proponent to disclose those facts or data the court must, upon timely request, restrict the evidence to its proper scope and instruct the jury accordingly.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 60, *Opinion Testimony*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*; Ch. 120A, *Presentation of Proof*.

Comment to 1998 change Paragraphs (b), (c), and (d) are based on the former Criminal Rule and are made applicable to civil cases. This rule does not preclude a party in any case from conducting a *voir dire* examination into the qualifications of an expert.

Comment to 2015 Restyling: All references to an "inference" have been deleted because this makes the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Case Notes

Civil Procedure : Pleading & Practice : Defenses, Demurrers & Objections : Motions to Strike : General Overview
Civil Procedure : Summary Judgment : Appellate Review : Standards of Review
Civil Procedure : Summary Judgment : Evidence
Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Trials : Jury Trials : Jury Instructions : General Overview
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Civil Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview
Civil Rights Law : Protection of Disabled Persons : General Overview
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : Penalties
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Weapons : Definitions
Criminal Law & Procedure : Pretrial Motions & Procedures : Competency to Stand Trial
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Counsel : Right to Counsel : Critical Stage
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Motions for Mistrial
Criminal Law & Procedure : Jury Instructions : Requests to Charge
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Discovery
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials
Evidence : Hearsay : Rule Components
Evidence : Hearsay : Rule Components : General Overview
Evidence : Inferences & Presumptions : Inferences
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Preliminary Questions : Hearings Out of Jury's Presence
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence

Evidence : Scientific Evidence : Fingerprints & Footprints
Evidence : Scientific Evidence : Polygraphs
Evidence : Testimony : Examination : Cross-Examination : Scope
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility
Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Experts : Daubert Standard
Evidence : Testimony : Experts : Helpfulness
Evidence : Testimony : Experts : Qualifications
Evidence : Testimony : Experts : Ultimate Issue
Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview
Governments : Courts : Authority to Adjudicate
Public Health & Welfare Law : Healthcare : Mental Health Services : Commitment : Involuntary Commitment of Adults
Real Property Law : Eminent Domain Proceedings : Valuation
Torts : Malpractice & Professional Liability : Healthcare Providers
Torts : Negligence : Causation : Cause in Fact
Torts : Products Liability : General Overview

LexisNexis (R) Notes

Civil Procedure : Pleading & Practice : Defenses, Demurrers & Objections : Motions to Strike : General Overview

1. Trial court did not err in granting a bar's motion to strike plaintiffs' expert witness pursuant to Tex. R. Evid. 705(c) in their dram shop case against the bar because the expert had no actual blood alcohol level of the drunk driver from which to extrapolate, which made his methodology admittedly less reliable. Furthermore, the expert based his calculations on facts not in evidence and on assumptions that were contrary to facts. Alaniz v. Rebello Food & Bev., L.L.C., 165 S.W.3d 7, 2005 Tex. App. LEXIS 1267 (Tex. App. Houston 14th Dist. 2005).

Civil Procedure : Summary Judgment : Appellate Review : Standards of Review

2. Trial court properly granted manufacturers, suppliers, contractors, premises owners, and former employers' no-evidence summary judgment motion, Tex. R. Civ. P. 166a(i), because (1) although the former employees claimed that paints and other coating substances used in the construction of the power plants contained asbestos or silica, which was released into the air when the product was sprayed or when it was sanded or ground off the surface to which it had been applied, there was no expert testimony under Tex. R. Evid. 702 and 705(c) that spraying, sanding, or grinding a liquid paint or coating produced friable asbestos fibers likely to cause asbestosis; and (2) although the type of silica that caused silicosis was crystalline silica, the evidence showed that the products in the employees' case contained amorphous silica and there was no evidence that amorphous silica caused silicosis or that grinding and sanding the paint and coatings released a form of silica that was capable of causing injury; thus, the employees never proved an exposure to a form of asbestos or silica that would cause injury and the employees failed to meet their initial burden of showing that they were exposed to asbestos and/or silica in a form that was capable of causing injury from manufacturers, suppliers, contractors, premises owners, and former employers' products. In re ROC Pretrial, 131 S.W.3d 129, 2004 Tex. App. LEXIS 315 (Tex. App. San Antonio 2004).

Civil Procedure : Summary Judgment : Evidence

3. Equipment maintenance company's no-evidence motion for summary judgment was properly granted pursuant to Tex. R. Civ. P. 166a on the TrackMobile equipment operator's negligence clam because the operator failed to present the required expert testimony about the proper inspection and maintenance of the TrackMobile and if the

company's conduct met that standard of care; expert testimony was required as provided in Tex. R. Evid. 705 because a maintenance company's practices and procedures and industry standards with respect to the inspection and maintenance of a TrackMobile or other rail-car mover engine were not matters within a lay person's general knowledge. Simmons v. Briggs Equip. Trust, 221 S.W.3d 109, 2006 Tex. App. LEXIS 5647 (Tex. App. Houston 1st Dist. 2006).

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

4. In a pipeline company's action for negligent damage to a gasoline pipeline, causation was not shown as to claims against developers regarding the platting of the lot because there was no evidence of where digging would have occurred if the lot had been configured differently. An expert witness' assumption that digging would have occurred in a different place was not a reasonable inference from the evidence and did not constitute competent summary judgment evidence under Tex. R. Evid. 703, 705(c). Seaway Prods. Pipeline Co. v. Hanley, 153 S.W.3d 643, 2004 Tex. App. LEXIS 10900 (Tex. App. Fort Worth 2004).

Civil Procedure : Trials : Jury Trials : Jury Instructions : General Overview

5. Appellant maintained that a limiting instruction was insufficient to cure the error of allowing an expert witness to read inflammatory, cumulative, and unnecessary hearsay statements to the jury; however, even though appellant objected to the hearsay, he failed to object to the limiting instruction, and he failed to request a different or additional instruction. In re Yaw, 2008 Tex. App. LEXIS 9023 (Tex. App. Beaumont Dec. 4 2008).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

6. Although defendant, who was convicted of felony driving while intoxicated, complained that the trial court denied his request to voir dire the State's fingerprint expert, defendant did not contend that the jury heard inadmissible evidence as a result of the trial court's ruling. The trial court's error was harmless. Goains v. State, 2011 Tex. App. LEXIS 7875, 2011 WL 4537892 (Tex. App. Beaumont Sept. 28 2011).

Civil Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview

7. In the absence of epidemiological studies showing a statistically significant doubling of the risk of childhood leukemia or other diseases from exposure to benzene, expert opinions did not constitute sufficient evidence to support jury awards in favor of individuals who alleged that they suffered injury from benzene in their drinking water. Exxon Corp. v. Makofski, 116 S.W.3d 176, 2003 Tex. App. LEXIS 6411, 59 Oil & Gas Rep. 84 (Tex. App. Houston 14th Dist. 2003).

Civil Rights Law : Protection of Disabled Persons : General Overview

8. No abuse of discretion in excluding evidence regarding the Americans With disabilities Act and the Texas Accessibility Standards, because the evidence was not crucial to whether the clinic had actual or constructive knowledge of a dangerous condition on the premises that presented an unreasonable risk of harm and that the condition proximately caused the claimant's injuries. Craig v. Beeville Family Practice, L.L.P., 2012 Tex. App. LEXIS 4422, 2012 WL 1656492 (Tex. App. Corpus Christi May 10 2012).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

9. At defendant's trial for causing serious bodily injury to a child, the trial court did not violate her right to confront witnesses when it allowed a doctor to testify as a substitute witness for the pathologist who performed the autopsy on the victim; the doctor used the autopsy report to explain the basis for her opinion. The doctor's independent

evaluation of the evidence collected during the autopsy did not violate the Confrontation Clause. Williams v. State, 2014 Tex. App. LEXIS 3020, 2014 WL 1102004 (Tex. App. Beaumont Mar. 19 2014).

10. Confrontation Clause was violated when a testifying medical examiner disclosed out-of-court testimonial statements in an autopsy report that was prepared by a nontestifying medical examiner. Under Tex. R. Evid. 703, 705(d), the value of that information was outweighed by the danger that the inadmissible statements would be used to prove the truth of the matters stated. Wood v. State, 299 S.W.3d 200, 2009 Tex. App. LEXIS 7882 (Tex. App. Austin Oct. 7 2009).

Criminal Law & Procedure : Criminal Offenses : Homicide : Involuntary Manslaughter : Penalties

11. In the penalty phase of a trial for intoxication manslaughter, there was no error under Tex. R. Evid. 705(d) in refusing to allow an expert witness to explain that a diagnosis of post-traumatic stress disorder was based, in part, on what defendant told him about his mental history, including what happened on the night of the accident. Bayas v. State, 2011 Tex. App. LEXIS 5306, 2011 WL 2714114 (Tex. App. El Paso July 13 2011).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

12. In a murder trial, the testimony of a forensic anthropologist regarding the science of toolmark analysis was reliable, within the meaning of Tex. R. Evid. 705(c) and relevant under Tex. R. Evid. 401; the expert opined that toolmarks on bone fragments found in defendant's yard were consistent with being made by either a hunting knife or a saw, that the bone fragments had characteristics consistent with being human, and that they showed no signs of healing, indicating that the cuts occurred at or near the time of death. Shepherd v. State, 2011 Tex. App. LEXIS 133, 2011 WL 166893 (Tex. App. Houston 14th Dist. Jan. 11 2011).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

13. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

14. In a sexual assault case, a court erred by failing to allow defendant's expert to testify where the subject of the expert's opinion was relevant, just as the State's expert was permitted to testify that the lack of genital injuries did not indicate that the complainant had not been sexually assaulted, defendant's expert should have been permitted to testify that no sexual assault occurred. One party could not proffer expert testimony and subsequently argue successfully that the testimony was not relevant when the opposing party sought to offer expert testimony on the same subject which reached a different conclusion; in addition, the error was not harmless. Vela v. State, 159 S.W.3d 172, 2004 Tex. App. LEXIS 7257 (Tex. App. Corpus Christi 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

15. Trial court did not abuse its discretion in admitting the testimony of a clinical supervisor at the Dallas Children's Advocacy Center as expert testimony because she was qualified as she had a bachelor's degree in psychology, a

master's degree in counseling and development, and had been licensed in Texas as a professional counselor for over seven years, and she was familiar with, and kept current on, the literature and research in the field of child sexual abuse; and her testimony was specialized and scientific and would assist the jury to understand the evidence or to determine the facts at issue as she testified regarding delayed outcry and the wide range of symptoms and behavioral changes in children who had been abused. Cabrera v. State, 2014 Tex. App. LEXIS 7033 (Tex. App. Dallas June 27 2014).

16. State did not carry its burden to establish some foundation for the reliability of a sexual assault nurse examiner's opinion because she could not elaborate on the extent to which the underlying scientific theory and technique were accepted as valid by the relevant scientific community; she could make only vague references to literature supporting her underlying scientific theory and technique; and she did not appear to understand the concept of the potential rate of error of the technique; thus, the trial court erred by allowing into evidence her opinion that the quick dilation of the child victim's anus was consistent with sexual abuse, but, in light of the child victim's testimony, her mother's testimony about the victim's outcry, a licensed psychologist's testimony, and the nurse's testimony about the tear close to the child's anus, the jury could have convicted defendant without the objectionable portion of the nurse's testimony. Therefore, the error did not have a substantial and injurious effect or influence in determining the jury's verdict. Escamilla v. State, 334 S.W.3d 263, 2010 Tex. App. LEXIS 8227 (Tex. App. San Antonio Oct. 13 2010).

17. In defendant's trial for aggravated sexual assault of a child under the age of fourteen in violation of Tex. Penal Code Ann. § 22.021, the trial court did not abuse its discretion in admitting the rebuttal testimony of the State's expert who testified that the complainant's "normal" behavior would not necessarily negate sexual abuse; the testimony was reliable under Tex. R. Evid. 705(c) because it was within the scope of the expert's field of expertise and because the expert properly relied upon the principles involved in his field of expertise which related to the behavior and treatment of child victims of sexual abuse. Briones v. State, 2009 Tex. App. LEXIS 5944, 2009 WL 2356626 (Tex. App. Houston 14th Dist. July 30 2009).

18. In the punishment phase of a trial for indecency with a child, the trial court did not unduly limit the testimony of defendant's psychological expert; following a hearing under Tex. R. Evid. 705, the trial court admitted all of the testimony that the court understood the witness to have given and defendant did not indicate that he re-urged the matter to the trial court with evidence that would contradict the court's recollection of the witness's testimony. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

19. Even if counsel was deficient in failing to challenge the admissibility of an horizontal gaze nystagmus test, no prejudice was shown because there was overwhelming evidence that defendant had alcohol or other substances in his system. Lopez v. State, 2013 Tex. App. LEXIS 2064, 2013 WL 765711 (Tex. App. Waco Feb. 28 2013).

Criminal Law & Procedure : Criminal Offenses : Weapons : Definitions

20. Error in denying voir dire of the State's expert under Tex. R. Evid. 705(b) was harmless because the expert was not the only witness to testify on the point at issue, whether the BB gun used in a robbery was a deadly weapon. The unobjected-to testimony of two victims regarding their fear of death or serious bodily injury from having the BB gun pointed at them was sufficient to support the deadly weapon finding. Blackburn v. State, 2010 Tex. App. LEXIS 5598, 2010 WL 2802186 (Tex. App. Amarillo July 16 2010).

Criminal Law & Procedure : Pretrial Motions & Procedures : Competency to Stand Trial

21. State's expert witness had sufficient facts and data with which to form his opinion that defendant was malingering and displayed elements of competency because he interviewed defendant twice, collected information from numerous collateral sources, and explained how each additional piece of evidence fit into his assessment. Miears v. State, 2013 Tex. App. LEXIS 5960 (Tex. App. San Antonio May 15 2013).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

22. In a drug trial, defense counsel was not rendered ineffective at the sentencing stage by failing to object to the State's questioning of a defense expert about testing administered to defendant for attention deficit hyperactivity disorder (ADHD) and about notes taken during an interview of defendant because the information was not a privileged communication under Tex. R. Evid. 503. Under Tex. R. Evid. 705(a), once defendant's witness offered an expert opinion, the State was entitled to examine the witness about the factual underpinning of that opinion. Weinn v. State, 281 S.W.3d 633, 2009 Tex. App. LEXIS 1015 (Tex. App. Amarillo Feb. 12 2009).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

23. In a drug case, the arresting officer's testimony that he was suspicious of defendant's claim that a large amount of cash found on his person was gas money for a road trip did not amount to an expert opinion; hence, counsel was not ineffective for failing to object to this testimony or to request an expert opinion hearing under Tex. R. Evid. 705, and counsel's failure to object waived the issue under Tex. R. App. P. 33. Hayes v. State, 2008 Tex. App. LEXIS 746 (Tex. App. Texarkana Feb. 1 2008).

24. Because a police officer's testimony in a cocaine possession case that drug dealers often rented cars in other people's names and that they might accept unemployment checks and credit cards as payment for narcotics did not amount to expert testimony, defendant's trial counsel was not ineffective for failing to request a hearing on expert testimony pursuant to Tex. R. Evid. 705. Hayes v. State, 2008 Tex. App. LEXIS 745 (Tex. App. Texarkana Feb. 1 2008).

Criminal Law & Procedure : Counsel : Right to Counsel : Critical Stage

25. Defendant was not denied his constitutional right to effective assistance of counsel when the trial court made a statement explaining its ruling not allowing counsel to voir dire the expert while counsel was not present because the statement was not made during a critical stage of trial. Even if counsel had been present and clarified that he wanted to voir dire the expert under Rule 705(b), counsel would not have been allowed to voir dire the expert because the State had already conducted its direct examination of the expert. Wooten v. State, 2013 Tex. App. LEXIS 5108 (Tex. App. Austin Apr. 24 2013).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

26. Even if the trial court erred by limiting defendant's cross-examination of the sexual assault nurse examiner, the error was harmless because the same or similar testimony was admitted without objection at another point in the trial; before the State's objection, the nurse testified that she accepted the victims' oral history as true, that the notches in one victim's hymen could be consistent with consensual sexual activity, and that there was no way of knowing when the notches happened. Young v. State, 382 S.W.3d 414, 2012 Tex. App. LEXIS 8627, 2012 WL 4874628 (Tex. App. Texarkana Oct. 16 2012).

Criminal Law & Procedure : Trials : Motions for Mistrial

27. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in

evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

Criminal Law & Procedure : Jury Instructions : Requests to Charge

28. Finding that respondent was a sexually violent predator was proper because the trial court did not abuse its discretion in denying his requested instruction and the alleged error did not cause the jury to reach an improper judgment, Tex. R. Evid. 705(d); Tex. R. App. P. 44.1(a). The record reflected that the trial court gave a limiting instruction in response to respondent's request during a psychologist's testimony; additionally, in the jury charge, the court instructed that hearsay information contained in records reviewed by the experts had been admitted only for showing the basis of the experts' opinions. In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

29. Trial court did not abuse its discretion in a sexually violent predator commitment proceeding in refusing the sex offender's requested instruction addressing the records that were reviewed by expert witnesses who testified during his trial where the proffered instruction was not substantially correct because it required the jury to disregard relevant and admissible evidence in the underlying records. In re Commitment of Bath, 2012 Tex. App. LEXIS 7586, 2012 WL 3860631 (Tex. App. Beaumont Sept. 6 2012).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

30. Following the entry of defendant's nolo contendere plea to aggravated robbery, the trial court properly considered under Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a)(1) evidence regarding the murder of defendant's wife at the punishment hearing because the evidence was sufficient to establish beyond a reasonable doubt that defendant murdered his wife five days before he committed the aggravated robbery offense; further, the medical examiner's hearsay statement that defendant admitted strangling his wife was admissible pursuant to Tex. R. Evid. 703, and defendant did not object under Tex. R. Evid. 705(d). Garza v. State, 2009 Tex. App. LEXIS 5026, 2009 WL 1424610 (Tex. App. El Paso May 20 2009).

31. At the punishment stage of defendant's trial for stealing property, the trial court did not err by excluding a doctor's report concerning defendant's personality disorder; the report largely restated the doctor's trial testimony. Edrington v. State, 2005 Tex. App. LEXIS 10637 (Tex. App. Austin Dec. 21 2005).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview

32. Challenge to expert testimony was rejected in a case involving a civil commitment for a sexually violent predator under Tex. Health & Safety Code Ann. §§ 841.001-841.150, because a forensic psychologist based his testimony on sufficient facts and data and on a reliable method used in his field of expertise for forming an opinion, and he applied that method reliably to the facts in this case. There was no analytical gap in the testimony and no abuse of discretion by the trial court in admitting the testimony. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

33. In a civil commitment case involving a sexually violent predator, a trial court acted within its discretion in concluding that the underlying facts or data used by experts were not unfairly prejudicial and that the danger of improper use did not outweigh the value of the facts or data as explanation or support for expert opinions. The trial court did not err in overruling an objection to alleged cumulative and repetitive testimony regarding a patient's sexual convictions, the details of his non-sexual convictions, juvenile convictions, alleged un-adjudicated crimes,

and his disciplinary history while incarcerated; moreover, a limiting instruction was not insufficient. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

34. In a sexually violent predator commitment case, a patient's underlying offenses were properly admitted because a trial court could have reasonably concluded that the facts and details would have been helpful to the jury to explain how an expert formed his opinion that the patient suffered from a behavioral abnormality. Given the purpose of admitting the evidence, its cumulative nature, and the trial court's limiting instructions, the conclusion that the evidence was not unfairly prejudicial was reasonable, and the testimony did not cause the rendition of an improper verdict. In re Commitment of Lemmons, 2014 Tex. App. LEXIS 3888, 2014 WL 1400671 (Tex. App. Beaumont Apr. 10 2014).

35. Trial court did not err during a sexually violent predator commitment proceeding in admitting testimony from the offender and the State's expert regarding the details of the offender's prior murder conviction because the offender personally testified as to the details of the conviction and the actions he took after the murder, which was not hearsay, and the State's expert testified to many of the same details that the offender related to the jury. Moreover, the trial court provided the jury with a limiting instruction, which it was presumed the jury followed. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

36. Details of a sex offender's 1975 murder conviction were property admitted during his sexually violent predator commitment proceeding because the State's expert explained the facts he considered in forming his opinions and how those facts affected his evaluation of the offender; the trial judge performed a balancing test and could have reasonably concluded the evidence assisted the jury in weighing the testimony and was not unfairly prejudicial, and it also gave the jury a limiting instruction explaining that the information reviewed by the experts was admitted only for the purpose of showing the basis of the expert's opinion. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

37. In a proceeding to civilly commit a sexually violent predator, it was within the trial court's discretion to admit the underlying facts or data on which the experts based their opinions to aid the jury in understanding how the experts formed their opinions regarding the offender's behavioral abnormality. In re Mitchell, 2013 Tex. App. LEXIS 12929, 2013 WL 5658425 (Tex. App. Beaumont Oct. 17 2013).

38. In a proceeding to civilly commit a sexually violent predator, the trial court did not err by allowing the State's experts to disclose various facts and data on which their respective opinions were based. The evidence was admissible under this rule and the jury was given a limiting instruction about the appropriate use of the information. In re Tesson, 413 S.W.3d 514, 2013 Tex. App. LEXIS 12919, 2013 WL 5651804 (Tex. App. Beaumont Oct. 17 2013).

39. Hearsay evidence regarding defendant's prior sexual offenses was admissible in a sexually violent predator commitment proceeding, Tex. Health & Safety Code Ann. §§ 841.001-.151, because it was relied on by the experts who testified for the State, Tex. R. Evid. 705, and the trial court gave limiting instructions to the jury. In re Hernandez, 2013 Tex. App. LEXIS 11787, 2013 WL 5302615 (Tex. App. Beaumont Sept. 19 2013).

40. In a sexually violent predator civil commitment case brought under Tex. Health & Safety Code Ann. § 841.003(a)(2), the trial court did not err in admitting hearsay evidence that was relied on by the State's experts in reaching their opinions, including the information regarding prior offenses, and the images and title logs from the videos found in his home, was admissible under Tex. R. Evid. 705. In re Chapman, 2013 Tex. App. LEXIS 11404,

2013 WL 4773231 (Tex. App. Beaumont Sept. 5 2013).

41. In a case involving the civil commitment of a sexually violent predator, because a patient did not object or request an instruction to disregard with respect to his complaints on appeal about hearsay or undue prejudice in relation to expert testimony, the error was not preserved for appellate review. The patient argued that the testimony from one expert exceeded the scope of a limiting instruction, and that another expert's testimony about the effect of his offenses on the victims had no probative value regarding the diagnosis of the patient's mental condition and was not related to a prediction of future dangerousness. In re Bocanegra, 2013 Tex. App. LEXIS 844 (Tex. App. Beaumont Jan. 31 2013).

42. In a case involving civil commitment after a determination that a patient was a sexually violent predator, a trial court did not err by allowing the disclosure of the alleged details of the sexual offenses at issue under Tex. R. Evid. 705(a); moreover, the details were not unfairly prejudicial, the danger of improper use did not outweigh the probative value of the facts or data as explanation or support for expert opinions, and the patient did not object to a limiting instruction that was used. The trial court did not err in overruling the objections, and the rulings did not result in an improper judgment. In re Commitment of Reed, 2012 Tex. App. LEXIS 2493, 2012 WL 1072255 (Tex. App. Beaumont Mar. 29 2012).

43. Trial court acted within its discretion in allowing the experts to discuss the details of the patient's offenses and other bad acts he committed that were contained in the records they reviewed in determining that the patient was a sexually violent predator because having each expert explain which facts were considered and how those facts influenced his evaluation assisted the jury in weighing each expert's testimony and the opinion each offered regarding the ultimate issue in the case. In re Day, 342 S.W.3d 193, 2011 Tex. App. LEXIS 3573 (Tex. App. Beaumont May 12 2011).

44. In a civil commitment proceeding alleging that defendant was a sexually violent predator, defendant did not object, and therefore failed to preserve error under Tex. R. Evid. 703, 705, regarding an expert's testimony about an unauthenticated letter that the Special Prosecution Unit asserted defendant wrote. In re Ortiz, 2010 Tex. App. LEXIS 5731, 2010 WL 2854249 (Tex. App. Beaumont July 22 2010).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

45. In a driving while intoxicated case, where counsel was objecting to the officer's qualifications and not to the underlying facts or data to support the officer's opinion, he was not requesting a Tex. R. Evid. 705(b) hearing to explore the underlying facts or data of the expert's opinion. Therefore, his appeal on that point was waived. Waltmon v. State, 2004 Tex. App. LEXIS 7285 (Tex. App. El Paso Aug. 12 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

46. In a murder trial, defendant preserved evidentiary error for review under Tex. R. App. P 33 by objecting following cross-examination to the reliability of expert testimony on the possible impact of methamphetamine on defendant; during the cross-examination, the expert testified to having no idea how much methamphetamine defendant took, to not seeing defendant, to being retained the evening before the testimony, and to testifying hypothetically; thus, under Tex. R. Evid. 705, the complete absence of underlying facts and data for the expert testimony on direct were only made known during cross-examination. Acevedo v. State, 255 S.W.3d 162, 2008 Tex. App. LEXIS 613 (Tex. App. San Antonio 2008).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

47. In a case involving the civil commitment of a sexually violent predator, because a patient did not object or request an instruction to disregard with respect to his complaints on appeal about hearsay or undue prejudice in relation to expert testimony, the error was not preserved for appellate review. The patient argued that the testimony from one expert exceeded the scope of a limiting instruction, and that another expert's testimony about the effect of his offenses on the victims had no probative value regarding the diagnosis of the patient's mental condition and was not related to a prediction of future dangerousness. In re Bocanegra, 2013 Tex. App. LEXIS 844 (Tex. App. Beaumont Jan. 31 2013).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

48. Defendant failed to preserve for appellate review his claim that the trial court erred by refusing to allow defense counsel to voir the State's expert outside the presence of the jury under Tex. R. Evid. 705(b) because counsel's statement that he requested voir dire "under the 700 series" was not enough to alert the trial court that counsel wanted to examine the underlying facts or data upon which the expert based his opinion specifically rather than the expert's qualifications generally. Wooten v. State, 2013 Tex. App. LEXIS 5108 (Tex. App. Austin Apr. 24 2013).

49. Defendant's argument on appeal that it was error under Tex. R. Evid. 705(a) to allow a detective to state an opinion did not comport with his trial objection that the testimony was speculation. Therefore, the error was not preserved under Tex. R. App. P. 33.1. Garcia v. State, 2010 Tex. App. LEXIS 9524, 2010 WL 4901389 (Tex. App. Corpus Christi Nov. 30 2010).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Discovery

50. Even if Tex. R. Evid. 705 authorized the trial court to order the State to disclose the underlying facts and data relied upon by its experts, the order entered in this case went far beyond requiring disclosure of the facts and data as defined by Tex. R. Evid. 703. Therefore, the trial court abused its discretion by entering the discovery order in this case. In re State, 2013 Tex. App. LEXIS 5323, 2013 WL 1846680 (Tex. App. El Paso Apr. 30 2013).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

51. Even if the trial court erred by limiting defendant's cross-examination of the sexual assault nurse examiner, the error was harmless because the same or similar testimony was admitted without objection at another point in the trial; before the State's objection, the nurse testified that she accepted the victims' oral history as true, that the notches in one victim's hymen could be consistent with consensual sexual activity, and that there was no way of knowing when the notches happened. Young v. State, 382 S.W.3d 414, 2012 Tex. App. LEXIS 8627, 2012 WL 4874628 (Tex. App. Texarkana Oct. 16 2012).

52. Error in denying voir dire of the State's expert under Tex. R. Evid. 705(b) was harmless because the expert was not the only witness to testify on the point at issue, whether the BB gun used in a robbery was a deadly weapon. The unobjected-to testimony of two victims regarding their fear of death or serious bodily injury from having the BB gun pointed at them was sufficient to support the deadly weapon finding. Blackburn v. State, 2010 Tex. App. LEXIS 5598, 2010 WL 2802186 (Tex. App. Amarillo July 16 2010).

53. Trial court did not err in denying defendant's request to conduct a voir dire examination of the State's expert under Tex. R. Evid. 705 as the expert never stated any opinion during his punishment-phase testimony; thus, Tex. R. Evid. 705, which applied only to expert opinions, was inapplicable; frther, any error was harmless under Tex. R. App. P. 44.2 as the failure to allow a Tex. R. Evid. 705 voir dire examination did not influence the jury or had but slight effect on the jury's punishment verdict. Ghahremani v. State, 2007 Tex. App. LEXIS 8584 (Tex. App. Houston 14th Dist. Oct. 30 2007).

54. In a trial for sexual assault on a child, any error was harmless when the trial court denied defendant's request under Tex. R. Evid. 705(b) to voir dire the State's expert, a psychologist; it was the second time the expert testified against defendant on the same allegations, and defense counsel was provided with the expert's notes from sessions with the complainant; there was no harm in not allowing defendant to discover matters which he already knew. Aguilera v. State, 2007 Tex. App. LEXIS 340 (Tex. App. San Antonio Jan. 19 2007).

Evidence : Demonstrative Evidence : Visual Formats

55. Video of a crash test was not admissible as facts or data underlying the automobile manufacturer's expert's opinion because he expressly disclaimed relying on the video in forming his opinion. Kia Motors Corp. v. Ruiz, 348 S.W.3d 465, 2011 Tex. App. LEXIS 6144, CCH Prod. Liab. Rep. P18719 (Tex. App. Dallas Aug. 5 2011).

Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

56. Trial court's admission of an aggravated assault victim's medical records, without an opportunity for defendant to first question the records' author on voir dire, did not violate defendant's rights under Tex. R. Evid. 705(b) because the language of Rule 705 contained no inference or even a suggestion that its provisions overrode the admissibility of a physician's observations, diagnoses, or opinions properly admitted as a business record. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

Evidence : Hearsay : Rule Components

57. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

58. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Evidence : Hearsay : Rule Components : General Overview

59. Trial court did not abuse its discretion in excluding the hearsay underlying the opinion of defendant's expert witness during the sentencing phase because although the witness could state, pursuant to Tex. R. Evid 705(a), that he had reviewed the jail classification as a basis for his expert testimony, the classification itself remained inadmissible and could not be used as a basis for the jury's determination of defendant's dangerousness in the future. Prystash v. State, 3 S.W.3d 522, 1999 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 1999).

Evidence : Inferences & Presumptions : Inferences

60. Because the rules of evidence allowed an expert to draw inferences from the underlying facts or data, Tex. Civ. Prac. & Rem. Code Ann. § 74.351 did not prohibit experts from making inferences based on medical history,

and the absence of an entry in the records of a regularly conducted activity was admissible to show the nonoccurence of the matter, the nurse's inferences, and the fact that she drew some of them from what was not in the patient's medical records, did not render her expert report defective. Azle Manor, Inc. v. Vaden, 2008 Tex. App. LEXIS 8414 (Tex. App. Fort Worth Nov. 6, 2008).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

61. At the punishment stage of defendant's trial for stealing property, the trial court did not err by excluding a doctor's report concerning defendant's personality disorder; the report largely restated the doctor's trial testimony. Edrington v. State, 2005 Tex. App. LEXIS 10637 (Tex. App. Austin Dec. 21 2005).

Evidence : Procedural Considerations : Limited Admissibility

62. In a proceeding to civilly commit a patient as a sexually violent predator, the trial court did not abuse its discretion in admitting the factual details of defendant's crimes; the experts testified regarding the facts they considered in forming their opinions and how those facts affected their determination of whether defendant suffered from a behavioral abnormality. The trial court gave the jury a limiting instruction about the use of the evidence. In re Commitment Jackson, 2013 Tex. App. LEXIS 13507, 2013 WL 5874446 (Tex. App. Beaumont Oct. 31 2013).

Evidence : Procedural Considerations : Preliminary Questions : Hearings Out of Jury's Presence

63. At defendant's trial for aggravated sexual assault of a child, the trial court did not abuse its discretion in denying defendant's request to conduct a voir dire examination of a forensic interviewer at the children's advocacy center; defendant's objected to the relevance of her testimony, he did not request a hearing outside the jury's presence to explore the underlying facts or data of the expert's opinion. Washington v. State, 2014 Tex. App. LEXIS 933 (Tex. App. Austin Jan. 30 2014).

64. During defendant's trial for driving while intoxicated, he waived his complaint regarding the officer's testimony about the horizontal gaze nystagmus field sobriety test by failing to object. Defendant made no request under Tex. R. Evid. 705 to conduct a voir dire examination of the officer prior to his testimony. Garcia v. State, 2011 Tex. App. LEXIS 2352, 2011 WL 1198922 (Tex. App. Tyler Mar. 31 2011).

65. Defendant's overruled request for a voir dire of an expert to establish whether the expert's testimony was related to defendant's guilt of the charged offense of indecency with a child failed to preserve his claim on appeal that he was seeking a hearing regarding an expert's underlying facts under Tex. R. Evid. 705(b). Elliff v. State, 2008 Tex. App. LEXIS 9160 (Tex. App. Dallas Dec. 10 2008).

Evidence : Procedural Considerations : Rulings on Evidence

66. In a sexually violent predator commitment proceeding in which the sex offender challenged the admission of testimony by one of the State's experts regarding the details of the sex offender's convictions, the trial court had not erred in allowing disclosure of the underlying facts or data, and its limiting instruction was insufficient to cure any possible prejudicial effect of the details of the offenses. It could not be concluded that the trial court's overruling of the sex offender's objections was in error or that such error probably caused the rendition of an improper judgment. In re Commitment of Allen, 2012 Tex. App. LEXIS 7583, 2012 WL 3860466 (Tex. App. Beaumont Sept. 6 2012).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

67. Court did not abuse its discretion by allowing the experts to testify about the non-testifying experts' opinions because the matters were reviewed by the experts to form opinions, the court gave a limiting instruction, and the court could reasonably conclude that the probative value of the testimony outweighed its capacity to prejudice the jury. In re Commitment of Garcia, 2013 Tex. App. LEXIS 14986 (Tex. App. Beaumont Dec. 12 2013).

68. Sex offender failed to show that a trial court erred in his sexually violent predator commitment proceeding in admitting testimony by one of the State's experts regarding the details of the sex offender's convictions where the sex offender did not object to the expert's testimony on the basis that the details of the underlying offenses and resulting convictions provided an insufficient basis for the expert's opinion, and, additionally, the details regarding the offenses provided by the expert during her testimony were minimal. The trial court acted within its discretion in concluding that the underlying facts or data were not unfairly prejudicial and that the danger of improper use did not outweigh their value as explanation or support for the expert's opinion. In re Commitment of Allen, 2012 Tex. App. LEXIS 7583, 2012 WL 3860466 (Tex. App. Beaumont Sept. 6 2012).

69. In a sex offender commitment proceeding, the trial court acted within its discretion in concluding that the underlying facts of the patient's convictions, and the fact that he had additional victims, were not unfairly prejudicial, and that the danger of improper use did not outweigh their value as explanation or support for the experts' opinions. Experts testified that the fact that the patient admitted to having victims in addition to those for which he was convicted was relevant to their assessment of whether he had a behavioral abnormality. In re Wilson, 2009 Tex. App. LEXIS 6714, 2009 WL 2616921 (Tex. App. Beaumont Aug. 27 2009).

70. In a civil commitment case involving a sexually violent predator, a trial court acted within its discretion in concluding that the underlying facts or data used by experts were not unfairly prejudicial and that the danger of improper use did not outweigh the value of the facts or data as explanation or support for expert opinions. The trial court did not err in overruling an objection to alleged cumulative and repetitive testimony regarding a patient's sexual convictions, the details of his non-sexual convictions, juvenile convictions, alleged un-adjudicated crimes, and his disciplinary history while incarcerated; moreover, a limiting instruction was not insufficient. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

71. Trial court did not err in overruling objections to the admission of prior offenses evidence because it could have reasonably concluded that the evidence was admissible and would not be unfairly prejudicial given the purpose for admitting the evidence and the limiting instructions to the jury; the trial court could have found that the disclosure of the details of the offenses would be helpful to the jury to understand how the State's expert formed his opinion and the basis for that opinion. In re King, 2014 Tex. App. LEXIS 724, 2014 WL 346109 (Tex. App. Beaumont Jan. 23 2014).

72. Trial court did not err in overruling objections to the admission of prior offenses evidence because it could have reasonably concluded that the evidence was admissible and would not be unfairly prejudicial given the purpose for admitting the evidence and the limiting instructions to the jury; the trial court could have found that the disclosure of the details of the offenses would be helpful to the jury to understand how the State's expert formed his opinion and the basis for that opinion. In re King, 2014 Tex. App. LEXIS 724, 2014 WL 346109 (Tex. App. Beaumont Jan. 23 2014).

73. Trial court acted within its discretion in allowing the experts to discuss the details of the patient's offenses and other bad acts he committed that were contained in the records they reviewed in determining that the patient was a sexually violent predator because having each expert explain which facts were considered and how those facts influenced his evaluation assisted the jury in weighing each expert's testimony and the opinion each offered

regarding the ultimate issue in the case. In re Day, 342 S.W.3d 193, 2011 Tex. App. LEXIS 3573 (Tex. App. Beaumont May 12 2011).

Evidence : Relevance : Relevant Evidence

74. When offered evidence is the testimony of an expert witness, the court must apply the principles set forth in the rules governing expert testimony under Tex. R. Evid. 702-705; a two-part test governs whether expert testimony is admissible: (1) the expert must be qualified and (2) the testimony must be relevant and based on a reliable foundation. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

Evidence : Scientific Evidence : Fingerprints & Footprints

75. Court properly allowed testimony by fingerprint experts where they provided sufficient testimony about their experience to qualify as experts. In addition to the fingerprint evidence, the uncontroverted evidence showed that defendant was in possession of the stolen property nine days after the burglary. Smith v. State, 2005 Tex. App. LEXIS 5302 (Tex. App. Dallas July 7 2005).

Evidence : Scientific Evidence : Polygraphs

76. Testimony of defendant's therapist, a licensed sex-offender treatment provider, that the polygraph results were one of the factors taken into consideration in his decision to discharge defendant from the treatment program was admissible under Tex. R. Evid. 703 and 705 Cruz v. State, 2012 Tex. App. LEXIS 3780, 2012 WL 1660611 (Tex. App. Austin May 10 2012).

77. Because adjudication hearings are administrative proceedings, in which there is no jury and the judge is not determining guilt of the original offense, the results of polygraph exams are admissible in revocation hearings if such evidence qualifies as the basis for an expert opinion under Tex. R. Evid. 703, 705(a). Leonard v. State, 2012 Tex. Crim. App. LEXIS 477 (Tex. Crim. App. Mar. 7 2012).

78. When defendant pleaded guilty to injury to a child and received five years' deferred adjudication, the conditions of his community supervision under Tex. Code Crim. Proc. Ann. art. 42.12, § 11(a) required that he submit to polygraph exams; defendant's polygraph results were admissible in his community supervision revocation hearing. Tex. R. Evid. 705(a) allowed the sex offender therapist who had been treating defendant to say, "I felt he was being dishonest because he failed the mandated polygraphs exams." Leonard v. State, 2012 Tex. Crim. App. LEXIS 477 (Tex. Crim. App. Mar. 7 2012).

Evidence : Testimony : Examination : Cross-Examination : Scope

79. Trial court did not abuse its discretion in a sexually violent predator commitment proceeding by restricting the sex offender's cross-examination of one of the State's expert witnesses where the expert provided an extensive psychological analysis that fully explained the basis for his opinion that the sex offender had a behavioral abnormality that made him likely to commit a predatory act of sexual violence because the offer of proof demonstrated that the expert had a valid explanation for giving more consideration to some data in the records over other, contradictory data. Moreover, at the conclusion of the offer of proof, the trial court advised the sex offender's counsel that counsel would be allowed to ask why the expert had rejected the sex offender's assertion that he had not committed the prior crimes, but counsel chose not to do so. In re Commitment of Hinchey, 2012 Tex. App. LEXIS 7582, 2012 WL 3853186 (Tex. App. Beaumont Sept. 6 2012).

Evidence : Testimony : Experts : General Overview

80. During defendant's trial for aggravated assault of a family member, the court erred under Tex. R. Evid. 705(c) in admitting testimony from a witness as an expert on lethality assessment because she did not offer any specifics to support her assertion, and she did not cite any books, articles, journals, or other clinical social workers who practiced in the area; the State did not show that "lethality assessment" was a legitimate field of expertise. Petriciolet v. State, 442 S.W.3d 643, 2014 Tex. App. LEXIS 8414 (Tex. App. Houston 1st Dist. July 31 2014).

81. Court did not abuse its discretion by allowing the experts to testify about the non-testifying experts' opinions because the matters were reviewed by the experts to form opinions, the court gave a limiting instruction, and the court could reasonably conclude that the probative value of the testimony outweighed its capacity to prejudice the jury. In re Commitment of Garcia, 2013 Tex. App. LEXIS 14986 (Tex. App. Beaumont Dec. 12 2013).

82. Civil commitment as a sexually violent predator was proper, because the court gave the jury a limiting instruction explaining that the information contained in the records reviewed by the experts was admitted only for the purpose of showing the basis of the expert's opinion, and properly allowed the expert witnesses to testify to the underlying facts and details of the offenses and properly precluded the petitioner from introducing evidence that involved a collateral attack on the attempted-sexual-assault convictions. In re McCarty, 2013 Tex. App. LEXIS 7855 (Tex. App. Beaumont June 27 2013).

83. Defendant failed to preserve for appellate review his claim that the trial court erred by refusing to allow defense counsel to voir the State's expert outside the presence of the jury under Tex. R. Evid. 705(b) because counsel's statement that he requested voir dire "under the 700 series" was not enough to alert the trial court that counsel wanted to examine the underlying facts or data upon which the expert based his opinion specifically rather than the expert's qualifications generally. Wooten v. State, 2013 Tex. App. LEXIS 5108 (Tex. App. Austin Apr. 24 2013).

84. Defendant was not denied his constitutional right to effective assistance of counsel when the trial court made a statement explaining its ruling not allowing counsel to voir dire the expert while counsel was not present because the statement was not made during a critical stage of trial. Even if counsel had been present and clarified that he wanted to voir dire the expert under Rule 705(b), counsel would not have been allowed to voir dire the expert because the State had already conducted its direct examination of the expert. Wooten v. State, 2013 Tex. App. LEXIS 5108 (Tex. App. Austin Apr. 24 2013).

85. Trial court did not abuse its discretion in a sexually violent predator commitment proceeding in refusing the sex offender's requested instruction addressing the records that were reviewed by expert witnesses who testified during his trial where the proffered instruction was not substantially correct because it required the jury to disregard relevant and admissible evidence in the underlying records. In re Commitment of Bath, 2012 Tex. App. LEXIS 7586, 2012 WL 3860631 (Tex. App. Beaumont Sept. 6 2012).

86. Trial court did not abuse its discretion in a sexually violent predator commitment proceeding by restricting the sex offender's cross-examination of one of the State's expert witnesses where the expert provided an extensive psychological analysis that fully explained the basis for his opinion that the sex offender had a behavioral abnormality that made him likely to commit a predatory act of sexual violence because the offer of proof demonstrated that the expert had a valid explanation for giving more consideration to some data in the records over other, contradictory data. Moreover, at the conclusion of the offer of proof, the trial court advised the sex offender's counsel that counsel would be allowed to ask why the expert had rejected the sex offender's assertion that he had not committed the prior crimes, but counsel chose not to do so. In re Commitment of Hinchey, 2012 Tex. App. LEXIS 7582, 2012 WL 3853186 (Tex. App. Beaumont Sept. 6 2012).

87. Because adjudication hearings are administrative proceedings, in which there is no jury and the judge is not determining guilt of the original offense, the results of polygraph exams are admissible in revocation hearings if

such evidence qualifies as the basis for an expert opinion under Tex. R. Evid. 703, 705(a). Leonard v. State, 2012 Tex. Crim. App. LEXIS 477 (Tex. Crim. App. Mar. 7 2012).

88. Doctor testified that it was customary in her profession to rely on hospital records, including test results, to form a diagnosis, and this was not challenged, such that the doctor was entitled under Tex. R. Evid. 703 to rely on the results of laboratory testing for genital herpes in diagnosing the victim's condition; furthermore, the doctor also relied on her own experience, education, and training in reaching this diagnosis, which rendered her opinion reliable, and the trial court did not abuse its discretion in allowing the doctor to testify that the victim suffered from herpes and to testify regarding the basis of the diagnosis, for purposes of Tex. R. Evid. 705(a). Cozzens v. State, 2010 Tex. App. LEXIS 9336, 2010 WL 4813686 (Tex. App. Texarkana Nov. 24 2010).

89. Underlying facts and data upon which a doctor based her opinion provided a sufficient basis for that opinion under Tex. R. Evid. 705(c) and the State carried its burden to establish some foundation for the reliability of the doctor's opinion. Cozzens v. State, 2010 Tex. App. LEXIS 9336, 2010 WL 4813686 (Tex. App. Texarkana Nov. 24 2010).

90. Trial court never denied appellant's request for a Tex. R. Evid. 705(b) hearing on the record, nor did the trial court limit the scope of this hearing, and if the trial court impermissibly limited the hearing's scope, it was appellant's duty to bring the issue to trial court's attention; the issue was not preserved. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

91. For purposes of Tex. R. Evid. 705(d), facts and data in an autopsy report explained and supported a medical examiner's opinions only if those facts and that data were deemed true; the disclosure of the out-of-court testimonial statements underlying the examiner's opinions, even if offered only for the purpose of explaining and supporting those opinions, constituted the use of testimonial statements to prove the truth of the matters asserted in violation of the Confrontation Clause. Martinez v. State, 311 S.W.3d 104, 2010 Tex. App. LEXIS 2124 (Tex. App. Amarillo Mar. 24 2010), pet. ref'd.

92. None of certain testimony was in violation of the Confrontation Clause because it constituted the opinions of the expert witness who was on the stand and subject to cross-examination, and although the witness told the jury that the medical examiner found the cause of death to be asphyxiation, the examiner's opinion was cumulative of other properly admitted evidence and thus harmless under Tex. R. App. P. 44.2(a); nothing in the expert's testimony refuted the defensive theory, the only testimonial hearsay evidence that was admitted that was not cumulative or irrelevant actually favored defendant, and the significant evidence was admitted that would corroborate the capital murder, even without considering the inadmissible testimony, was strong. Martinez v. State, 311 S.W.3d 104, 2010 Tex. App. LEXIS 2124 (Tex. App. Amarillo Mar. 24 2010), pet. ref'd.

93. In a city resident's action against a mayor challenging a special election, expert testimony offered by the resident was not conclusory because the expert testified regarding the facts supporting the expert's opinion and explained how the expert reached that opinion; the expert stated that through discussions and correspondence with the resident and counsel, the expert had become familiar with the issues in the lawsuit, the three propositions involved, and the violations alleged. Duncan-hubert v. Mitchell, 310 S.W.3d 92, 2010 Tex. App. LEXIS 1889 (Tex. App. Dallas Mar. 18 2010).

94. While it was proper to require an expert to disclose the facts or data underlying her opinion so that the trial court could determine if the data provided a basis for the opinion and was admissible, for purposes of Tex. R. Evid. 705, there was no general right by the State for pretrial discovery from the defendant; the court's opinion did not expressly or implicitly interpret Tex. Code Crim. Proc. Ann. art. 39.14 as requiring pretrial discovery of medical reports, records, and other such documentation, as the issue of the State's right to discovery was not presented on

appeal, and the court rejected defendant's claim that the civil procedure rules provided any basis for finding that the trial court erred. Hoselton v. State, 2010 Tex. App. LEXIS 2009 (Tex. App. Texarkana Mar. 18 2010).

95. Trial court did not abuse its discretion in allowing a witness to give an opinion regarding the fingerprints, for purposes of Tex. R. Evid. 702, given that the State contended that it established the witness's qualifications by the testimony of the witness's training and experience, plus the court only had a general objection to consider, even though defendant could have requested to take the witness on voir dire and pointed out specific deficiencies, for purposes of Tex. R. Evid. 705(b). Sepeda v. State, 2009 Tex. App. LEXIS 9235, 2009 WL 4348600 (Tex. App. Amarillo Nov. 30 2009).

96. Although a witness said that she reviewed a document prior to trial, there was no evidence of specifically when she reviewed it or whether she used it to refresh her memory under Tex. R. Evid. 612 and defense counsel did not ask if the witness relied on the evidence to form her opinions under Tex. R. Evid. 705, such that the trial court did not abuse its discretion in denying defense counsel's request for the document or in failing to require the State to produce the document for in camera inspection. Love v. State, 2009 Tex. App. LEXIS 8952, 2009 WL 3930900 (Tex. App. Houston 1st Dist. Nov. 19 2009).

97. Appellant maintained that a limiting instruction was insufficient to cure the error of allowing an expert witness to read inflammatory, cumulative, and unnecessary hearsay statements to the jury; however, even though appellant objected to the hearsay, he failed to object to the limiting instruction, and he failed to request a different or additional instruction. In re Yaw, 2008 Tex. App. LEXIS 9023 (Tex. App. Beaumont Dec. 4 2008).

98. Because the rules of evidence allowed an expert to draw inferences from the underlying facts or data, Tex. Civ. Prac. & Rem. Code Ann. § 74.351 did not prohibit experts from making inferences based on medical history, and the absence of an entry in the records of a regularly conducted activity was admissible to show the nonoccurence of the matter, the nurse's inferences, and the fact that she drew some of them from what was not in the patient's medical records, did not render her expert report defective. Azle Manor, Inc. v. Vaden, 2008 Tex. App. LEXIS 8414 (Tex. App. Fort Worth Nov. 6, 2008).

99. In a patient's action that raised health care liability claims against a doctor based on the patient's allegation that her left eye was permanently impaired as a result of a surgery performed by the doctor, the trial court did not abuse its discretion by determining that the report prepared by the patient's expert, a board certified ophthalmologist, complied with Tex. Civ. Prac. & Rem. Code Ann. § 74.351 where the expert's report informed the doctor of the specific conduct that the patient had called into question and provided a basis for the trial court to conclude the claims were meritorious. Tex. R. Evid. 703, 705 allowed an expert to draw inferences from the underlying facts or data, which was what the expert had done, and, moreover, the expert's report did not merely state his opinions and inferences because he explained the basis for his conclusions and linked them to the facts. Diaz-Rohena v. Melton, 2008 Tex. App. LEXIS 6633 (Tex. App. Fort Worth Aug. 29, 2008).

100. Trial court did not err in denying defendant's request to conduct a voir dire examination of the State's expert under Tex. R. Evid. 705 as the expert never stated any opinion during his punishment-phase testimony; thus, Tex. R. Evid. 705, which applied only to expert opinions, was inapplicable; frther, any error was harmless under Tex. R. App. P. 44.2 as the failure to allow a Tex. R. Evid. 705 voir dire examination did not influence the jury or had but slight effect on the jury's punishment verdict. Ghahremani v. State, 2007 Tex. App. LEXIS 8584 (Tex. App. Houston 14th Dist. Oct. 30 2007).

101. Trial court did not abuse its discretion by denying defendant's motion for a Tex. R. Evid. 705 hearing concerning a special agent's testimony because the trial court properly admitted the agent's testimony under Tex. R. Evid. 701; the State presented the agent as a lay witness to testify about the pimp subculture and to address the

issue of cause, as placed into issue by defendant's cross-examination of the complainant; the questions contemplated drew directly from the agent's personal experience and familiarity with the pimping subculture, including its terms, many of which the complainant had used in her testimony, which the agent gained from interviewing both pimps and prostitutes; questioning the agent about what he learned from his experience assisted the fact-finder in determining a fact in issue, specifically defendant's utilizing the complainant as a prostitute for his personal profit. Richardson v. State, 2007 Tex. App. LEXIS 4281 (Tex. App. Houston 1st Dist. May 31 2007).

102. In the punishment phase of a trial for indecency with a child, the trial court did not unduly limit the testimony of defendant's psychological expert; following a hearing under Tex. R. Evid. 705, the trial court admitted all of the testimony that the court understood the witness to have given and defendant did not indicate that he re-urged the matter to the trial court with evidence that would contradict the court's recollection of the witness's testimony. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

103. The State properly cross-examined the sexually violent predator's expert witness regarding prior statements made by one of the individual's victims because, pursuant to Tex. R. Evid. 703 and 705(a), the State was entitled to cross-examine the doctor concerning records that he cited as the basis of his opinion and to attempt to use the records to discredit his testimony. In re Polk, 187 S.W.3d 550, 2006 Tex. App. LEXIS 2044 (Tex. App. Beaumont 2006).

104. Although the husband claimed that expert testimony should have been excluded because it contained improper character evidence under Tex. R. Evid. 404(b), the husband opened the door during direct examination, and because the witness was offered as an expert witness, the wife was permitted, under Tex. R. Evid. 705(a) to disclose the underlying facts the witness used to form an opinion regarding the husband. Moyer v. Moyer, 2005 Tex. App. LEXIS 6966 (Tex. App. Austin Aug. 26 2005).

105. Will contestants' objection to an expert's testimony was untimely under Tex. R. Evid. 103(a)(1), and hence, the issue was waived under Tex. R. App. P. 33.1(a); however, the court noted that the contestants' request to voir dire the witness to delve into the expert's qualifications did not invoke Tex. R. Evid. 705(b), which pertained to inquiry into the underlying facts or data and was discretionary in any event. In re Estate of Trawick, 170 S.W.3d 871, 2005 Tex. App. LEXIS 6568 (Tex. App. Texarkana 2005).

106. Tex. R. Evid. 705(b) clearly makes certain voir dire on underlying facts or data discretionary in a civil case; the use of the word "may" creates discretionary authority in the trial court, pursuant to Tex. Gov't Code Ann. § 311.016(1). In re Estate of Trawick, 170 S.W.3d 871, 2005 Tex. App. LEXIS 6568 (Tex. App. Texarkana 2005).

107. Because an expert's opinion constituted no more than mere possibility, speculation, and surmise, the trial court properly struck the expert's report, pursuant to Tex. R. Evid. 702, 705. Emmett Props. v. Halliburton Energy Servs., 167 S.W.3d 365, 2005 Tex. App. LEXIS 1624 (Tex. App. Houston 14th Dist. 2005).

108. Trial court did not err in granting a bar's motion to strike plaintiffs' expert witness pursuant to Tex. R. Evid. 705(c) in their dram shop case against the bar because the expert had no actual blood alcohol level of the drunk driver from which to extrapolate, which made his methodology admittedly less reliable. Furthermore, the expert based his calculations on facts not in evidence and on assumptions that were contrary to facts. Alaniz v. Rebello Food & Bev., L.L.C., 165 S.W.3d 7, 2005 Tex. App. LEXIS 1267 (Tex. App. Houston 14th Dist. 2005).

109. In a pipeline company's action for negligent damage to a gasoline pipeline, causation was not shown as to claims against developers regarding the platting of the lot because there was no evidence of where digging would have occurred if the lot had been configured differently. An expert witness' assumption that digging would have occurred in a different place was not a reasonable inference from the evidence and did not constitute competent

summary judgment evidence under Tex. R. Evid. 703, 705(c). Seaway Prods. Pipeline Co. v. Hanley, 153 S.W.3d 643, 2004 Tex. App. LEXIS 10900 (Tex. App. Fort Worth 2004).

110. Because an expert had no actual blood alcohol level from which to extrapolate, the expert's methodology was admittedly less reliable, and the expert also based calculations on facts not in evidence and on assumptions contrary to the facts; thus, the trial court did not err in excluding the expert's testimony under Tex. R. Evid. 705 in connection with appellants' action under Tex. Alco. Bev. Code Ann. § 2.02(b)(1), (2) of the Dram Shop Act, Tex. Alco. Bev. Code Ann. §§ 2.01-.03, and the court did not consider the expert's evidence in its summary judgment analysis under Tex. R. Civ. P. 166a. Alaniz v. Rebello Food & Bev., L.L.C., 2004 Tex. App. LEXIS 8392 (Tex. App. Houston 14th Dist. Sept. 21 2004), opinion withdrawn by, substituted opinion at 165 S.W.3d 7, 2005 Tex. App. LEXIS 1267 (Tex. App. Houston 14th Dist. 2005).

111. When an expert testifies about the facts or data relied upon to formulate the opinion or inference, and that information is inadmissible, the opponent should request a limiting instruction under Tex. R. Evid. 705(d). Depena v. State, 148 S.W.3d 461, 2004 Tex. App. LEXIS 7455 (Tex. App. Corpus Christi 2004).

112. Trial court did not abuse its discretion in concluding that a workplace safety expert did not have a reasonable basis for any of his opinions with respect to the legal duties owed by the hospital and how those duties were breached. Moore v. Mem'l Hermann Hosp. Sys., 140 S.W.3d 870, 2004 Tex. App. LEXIS 6067 (Tex. App. Houston 14th Dist. 2004).

113. When offered evidence is the testimony of an expert witness, the court must apply the principles set forth in the rules governing expert testimony under Tex. R. Evid. 702-705; a two-part test governs whether expert testimony is admissible: (1) the expert must be qualified and (2) the testimony must be relevant and based on a reliable foundation. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

114. Where the defendant's request was not timely or relevant and was concerned with the expert's qualifications, rather than the underlying facts and data, the request was properly denied by the trial court, since Tex. R. Evid. 705(b) authorizes a voir dire examination of an expert witness on the underlying facts or data upon which the expert opinion is based, not the expert's qualifications. Finley v. State, 2002 Tex. App. LEXIS 7959 (Tex. App. Dallas Nov. 7 2002).

Evidence : Testimony : Experts : Admissibility

115. Admission of testimony was not an abuse of discretion and did not cause the rendition of an improper judgment, because the court could reasonably conclude that the facts and details related to the patient's underlying offenses would be helpful to the jury to explain how the psychologist and medical doctor formed their opinions that the patient suffered from a behavioral abnormality. In re Commitment of Cardenas, 2014 Tex. App. LEXIS 6441, 2014 WL 2616972 (Tex. App. Beaumont June 12 2014).

116. In a sexually violent predator commitment case, a patient's underlying offenses were properly admitted because a trial court could have reasonably concluded that the facts and details would have been helpful to the jury to explain how an expert formed his opinion that the patient suffered from a behavioral abnormality. Given the purpose of admitting the evidence, its cumulative nature, and the trial court's limiting instructions, the conclusion that the evidence was not unfairly prejudicial was reasonable, and the testimony did not cause the rendition of an improper verdict. In re Commitment of Lemmons, 2014 Tex. App. LEXIS 3888, 2014 WL 1400671 (Tex. App. Beaumont Apr. 10 2014).

117. Trial court did not err in overruling objections to the admission of prior offenses evidence because it could have reasonably concluded that the evidence was admissible and would not be unfairly prejudicial given the purpose for admitting the evidence and the limiting instructions to the jury; the trial court could have found that the disclosure of the details of the offenses would be helpful to the jury to understand how the State's expert formed his opinion and the basis for that opinion. In re King, 2014 Tex. App. LEXIS 724, 2014 WL 346109 (Tex. App. Beaumont Jan. 23 2014).

118. Trial court did not err in overruling objections to the admission of prior offenses evidence because it could have reasonably concluded that the evidence was admissible and would not be unfairly prejudicial given the purpose for admitting the evidence and the limiting instructions to the jury; the trial court could have found that the disclosure of the details of the offenses would be helpful to the jury to understand how the State's expert formed his opinion and the basis for that opinion. In re King, 2014 Tex. App. LEXIS 724, 2014 WL 346109 (Tex. App. Beaumont Jan. 23 2014).

119. Trial court did not abuse its discretion in admitting an expert's testimony regarding his estimate of the cost of an exploration permit, as he was an oil and gas executive with decades of experience, his opinion fell within his area of expertise, he took into consideration the lack of shale gas and overall size of the tract in formulating his estimate, and he was not unqualified merely because his opinion might be characterized as "subjective." Harkins v. North Shore Energy, L.L.C., 2013 Tex. App. LEXIS 14929, 2013 WL 6574245 (Tex. App. Corpus Christi Dec. 12 2013).

120. In a proceeding to civilly commit a patient as a sexually violent predator, the trial court did not abuse its discretion in admitting the factual details of defendant's crimes; the experts testified regarding the facts they considered in forming their opinions and how those facts affected their determination of whether defendant suffered from a behavioral abnormality. The trial court gave the jury a limiting instruction about the use of the evidence. In re Commitment Jackson, 2013 Tex. App. LEXIS 13507, 2013 WL 5874446 (Tex. App. Beaumont Oct. 31 2013).

121. Trial court did not err during a sexually violent predator commitment proceeding in admitting testimony from the offender and the State's expert regarding the details of the offender's prior murder conviction because the offender personally testified as to the details of the conviction and the actions he took after the murder, which was not hearsay, and the State's expert testified to many of the same details that the offender related to the jury. Moreover, the trial court provided the jury with a limiting instruction, which it was presumed the jury followed. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

122. Details of a sex offender's 1975 murder conviction were property admitted during his sexually violent predator commitment proceeding because the State's expert explained the facts he considered in forming his opinions and how those facts affected his evaluation of the offender; the trial judge performed a balancing test and could have reasonably concluded the evidence assisted the jury in weighing the testimony and was not unfairly prejudicial, and it also gave the jury a limiting instruction explaining that the information reviewed by the experts was admitted only for the purpose of showing the basis of the expert's opinion. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

123. Expert testimony that an injured worker probably would have been promoted to a highly paid directional driller position was based on speculation and conjecture, given his limited experience in oil drilling and the cyclic nature of the industry; moreover, the erroneous admission of the experts' testimony was harmful because lost earning capacity was an integral part of the case. Chesapeake Operating, Inc. v. Hopel, 2013 Tex. App. LEXIS 13281, 2013 WL 5782916 (Tex. App. Amarillo Oct. 24 2013).

124. In a proceeding to civilly commit a sexually violent predator, it was within the trial court's discretion to admit the underlying facts or data on which the experts based their opinions to aid the jury in understanding how the experts formed their opinions regarding the offender's behavioral abnormality. In re Mitchell, 2013 Tex. App. LEXIS 12929, 2013 WL 5658425 (Tex. App. Beaumont Oct. 17 2013).

125. In a proceeding to civilly commit a sexually violent predator, the trial court did not err by allowing the State's experts to disclose various facts and data on which their respective opinions were based. The evidence was admissible under this rule and the jury was given a limiting instruction about the appropriate use of the information. In re Tesson, 413 S.W.3d 514, 2013 Tex. App. LEXIS 12919, 2013 WL 5651804 (Tex. App. Beaumont Oct. 17 2013).

126. Trial court afforded defendant the opportunity to take the forensic technician on voir dire before admitting her testimony or allowing her to present evidence. Halbirt v. State, 2013 Tex. App. LEXIS 12823, 2013 WL 5658371 (Tex. App. Beaumont Oct. 16 2013).

127. Hearsay evidence regarding defendant's prior sexual offenses was admissible in a sexually violent predator commitment proceeding, Tex. Health & Safety Code Ann. §§ 841.001-.151, because it was relied on by the experts who testified for the State, Tex. R. Evid. 705, and the trial court gave limiting instructions to the jury. In re Hernandez, 2013 Tex. App. LEXIS 11787, 2013 WL 5302615 (Tex. App. Beaumont Sept. 19 2013).

128. In a sexually violent predator civil commitment case brought under Tex. Health & Safety Code Ann. § 841.003(a)(2), the trial court did not err in admitting hearsay evidence that was relied on by the State's experts in reaching their opinions, including the information regarding prior offenses, and the images and title logs from the videos found in his home, was admissible under Tex. R. Evid. 705. In re Chapman, 2013 Tex. App. LEXIS 11404, 2013 WL 4773231 (Tex. App. Beaumont Sept. 5 2013).

129. Where defendant was convicted of possession of one to four grams of a controlled substance based on methamphetamine found in the car during a traffic stop, an expert's opinion that the sergeant's failure to follow police procedure suggested that the drugs were planted in the car was inadmissible. Because the expert did not explain why the sergeant's acts were suspicious or why they led to the conclusion that the drugs were planted, there was not a sufficient basis for an expert opinion. Nickols v. State, 2013 Tex. App. LEXIS 11241 (Tex. App. Eastland Aug. 30 2013).

130. Patient did not object to the trial court's limiting instructions, nor did he request different or additional instructions at the time the limiting instructions were given, and he did not object to the limiting instruction contained in the jury charge; the trial court properly applied Tex. R. Evid. 705(d) by providing the jury with limiting instructions In re Washington, 2013 Tex. App. LEXIS 7211 (Tex. App. Beaumont June 13 2013).

131. In a sexually violent predator case, the trial court properly admitted details about appellant's prior sexual offenses. The trial court could have reasonably concluded that the evidence at issue would be helpful to the jury to explain how the State's experts had formed their respective opinions regarding appellant's behavioral abnormality. In re Camarillo, 2013 Tex. App. LEXIS 7212, 2013 WL 2732662 (Tex. App. Beaumont June 13 2013).

132. Trial court properly applied Tex. R. Evid. 705(d) by providing the jury with a limiting instruction and given the purpose for which the evidence was admitted, the trial judge could have concluded that the information the State's expert disclosed concerning the patient's prior sexual offenses was not unfairly prejudicial. In re Commitment Simmons, 2013 Tex. App. LEXIS 6319, 2013 WL 2285865 (Tex. App. Beaumont May 23 2013).

133. State's expert witness had sufficient facts and data with which to form his opinion that defendant was malingering and displayed elements of competency because he interviewed defendant twice, collected information from numerous collateral sources, and explained how each additional piece of evidence fit into his assessment. Miears v. State, 2013 Tex. App. LEXIS 5960 (Tex. App. San Antonio May 15 2013).

134. Under Tex. R. Evid. 705(d), the trial judge could conclude that the experts' evidence assisted the jury and was not unfairly prejudicial and the appellate court presumed that the jury followed the trial court's limiting instruction. In re Adame, 2013 Tex. App. LEXIS 4847, 2013 WL 3853386 (Tex. App. Beaumont Apr. 18 2013).

135. Finding that respondent was a sexually violent predator was proper because the trial court did not abuse its discretion in denying his requested instruction and the alleged error did not cause the jury to reach an improper judgment, Tex. R. Evid. 705(d); Tex. R. App. P. 44.1(a). The record reflected that the trial court gave a limiting instruction in response to respondent's request during a psychologist's testimony; additionally, in the jury charge, the court instructed that hearsay information contained in records reviewed by the experts had been admitted only for showing the basis of the experts' opinions. In re Hill, 2013 Tex. App. LEXIS 1881 (Tex. App. Beaumont Feb. 28 2013).

136. Defendant's commitment as a sexually violent predator was appropriate because the jury could have reasonably found beyond a reasonable doubt that he had a behavioral abnormality that made him likely to engage in a predatory act of sexual violence. Further, each expert explained the facts considered and how those facts affected that expert's evaluation; the evidence assisted the jury in weighing the testimony and the opinion each expert offered and the trial judge could have reasonably concluded that the experts' testimony was not unfairly prejudicial. In re Anderson, 392 S.W.3d 878, 2013 Tex. App. LEXIS 602 (Tex. App. Beaumont Jan. 24 2013).

137. In a manslaughter case, defendant's attorney argued that a toxicology report was admissible because the State's expert pathologist relied on it in formulating his opinion about whether the gunshot wound to defendant's chest had caused his death; although the attorney did not reference Tex. R. Evid. 705, the trial court would have understood that her counsel intended to reference Rule 705. The trial court ruled that it would allow the expert to say that he had relied on the toxicology report, but would not allow the expert to testify regarding the results of the report. Jones v. State, 2012 Tex. App. LEXIS 9752 (Tex. App. Beaumont Nov. 28 2012).

138. Sex offender failed to show that a trial court erred in his sexually violent predator commitment proceeding in admitting testimony by one of the State's experts regarding the details of the sex offender's convictions where the sex offender did not object to the expert's testimony on the basis that the details of the underlying offenses and resulting convictions provided an insufficient basis for the expert's opinion, and, additionally, the details regarding the offenses provided by the expert during her testimony were minimal. The trial court acted within its discretion in concluding that the underlying facts or data were not unfairly prejudicial and that the danger of improper use did not outweigh their value as explanation or support for the expert's opinion. In re Commitment of Allen, 2012 Tex. App. LEXIS 7583, 2012 WL 3860466 (Tex. App. Beaumont Sept. 6 2012).

139. In a sexually violent predator commitment proceeding in which the sex offender challenged the admission of testimony by one of the State's experts regarding the details of the sex offender's convictions, the trial court had not erred in allowing disclosure of the underlying facts or data, and its limiting instruction was insufficient to cure any possible prejudicial effect of the details of the offenses. It could not be concluded that the trial court's overruling of the sex offender's objections was in error or that such error probably caused the rendition of an improper judgment. In re Commitment of Allen, 2012 Tex. App. LEXIS 7583, 2012 WL 3860466 (Tex. App. Beaumont Sept. 6 2012).

140. Testimony of defendant's therapist, a licensed sex-offender treatment provider, that the polygraph results were one of the factors taken into consideration in his decision to discharge defendant from the treatment program

was admissible under Tex. R. Evid. 703 and 705 Cruz v. State, 2012 Tex. App. LEXIS 3780, 2012 WL 1660611 (Tex. App. Austin May 10 2012).

141. No abuse of discretion in excluding evidence regarding the Americans With disabilities Act and the Texas Accessibility Standards, because the evidence was not crucial to whether the clinic had actual or constructive knowledge of a dangerous condition on the premises that presented an unreasonable risk of harm and that the condition proximately caused the claimant's injuries. Craig v. Beeville Family Practice, L.L.P., 2012 Tex. App. LEXIS 4422, 2012 WL 1656492 (Tex. App. Corpus Christi May 10 2012).

142. During defendant's trial for sexual assault of a child, the court did not err under Tex. R. Evid. 705(c) in admitting the testimony of the director of a trauma center, who was trained as a clinical psychologist with specialization in psychological trauma, because all of the opinions offered by the director were within the scope of the field of psychology, a legitimate field of study. Jessop v. State, 368 S.W.3d 653, 2012 Tex. App. LEXIS 3176, 2012 WL 1402117 (Tex. App. Austin Apr. 19 2012).

143. In a case involving civil commitment after a determination that a patient was a sexually violent predator, a trial court did not err by allowing the disclosure of the alleged details of the sexual offenses at issue under Tex. R. Evid. 705(a); moreover, the details were not unfairly prejudicial, the danger of improper use did not outweigh the probative value of the facts or data as explanation or support for expert opinions, and the patient did not object to a limiting instruction that was used. The trial court did not err in overruling the objections, and the rulings did not result in an improper judgment. In re Commitment of Reed, 2012 Tex. App. LEXIS 2493, 2012 WL 1072255 (Tex. App. Beaumont Mar. 29 2012).

144. Appellant objected to a witness's testimony under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), suggesting a relevancy complaint, but he did not object on expert qualification or reliability grounds or on Tex. R. Evid. 403 grounds; thus, the only issue preserved for review was the claim that the witness's testimony was inadmissible because it was not linked to appellant. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

145. Appellant objected to a doctor's testimony, challenging his qualifications and claiming his testimony was irrelevant under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), but an objection to the reliability of the doctor's opinion was not raised in the trial court; thus, his reliability complaint was not preserved for review. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

146. When defendant pleaded guilty to injury to a child and received five years' deferred adjudication, the conditions of his community supervision under Tex. Code Crim. Proc. Ann. art. 42.12, § 11(a) required that he submit to polygraph exams; defendant's polygraph results were admissible in his community supervision revocation hearing. Tex. R. Evid. 705(a) allowed the sex offender therapist who had been treating defendant to say, "I felt he was being dishonest because he failed the mandated polygraphs exams." Leonard v. State, 2012 Tex. Crim. App. LEXIS 477 (Tex. Crim. App. Mar. 7 2012).

147. In a condemnation proceeding in which plaintiff county acquired a portion of commercial property used for a car wash in order to widen a county roadway, the trial court did not abuse its discretion in excluding the county's appraisal expert because the expert's bald assurance that he used a widely accepted appraisal method was insufficient to establish reliability. His report, as well as the underlying data and methodology, did not reflect application of an accepted appraisal method to arrive at the fair market value of the remainder after the taking where he simply took the market value of the whole and assumed--without any basis--that a willing buyer and willing seller would agree to reduce the market value by one-fifth after the taking. Dallas County v. Crestview

Corners Car Wash, 370 S.W.3d 25, 2012 Tex. App. LEXIS 1269 (Tex. App. Dallas Feb. 16 2012).

148. During a murder trial, the trial court did not abuse its discretion in allowing the reading of the statements upon which the medical examiner formed her opinion as to the cause of the victim's death. Although the statements were prejudicial, disclosing the statements the medical examiner relied upon in forming her opinion assisted the jury in evaluating the weight to give her opinions; therefore, the statements were admissible under Tex. R. Evid. 705. Moulton v. State, 360 S.W.3d 540, 2011 Tex. App. LEXIS 8266 (Tex. App. Texarkana Oct. 19 2011).

149. Video of a crash test was not admissible as facts or data underlying the automobile manufacturer's expert's opinion because he expressly disclaimed relying on the video in forming his opinion. Kia Motors Corp. v. Ruiz, 348 S.W.3d 465, 2011 Tex. App. LEXIS 6144, CCH Prod. Liab. Rep. P18719 (Tex. App. Dallas Aug. 5 2011).

150. Appellant's counsel conceded that witnesses were not testifying as experts, such that appellant's issues related to the admissibility of these witnesses' testimony as experts, under Tex. R. Evid. 702, 703, 705(b), were moot. Zuffante v. State, 2011 Tex. App. LEXIS 2332 (Tex. App. Dallas Mar. 31 2011).

151. Nowhere did the court see an objection to the reliability or relevance of the witness's testimony and the context did not suggest that appellant objected on either of these grounds, for preservation purposes; it might have been apparent from the context that appellant objection on qualifications grounds, but he did not argue this on appeal. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

152. Appellant never objected to the reliability of a witness's testimony, such that the State was not required to prove the reliability of the testimony, nor was the court required to hold the State to its burden of proof. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

153. Implied objection based on a witness's qualifications did not preserve error related to the reliability of the witness's testimony or the court's alleged failure to hold a Tex. R. Evid. 705(b) hearing. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

154. State did not carry its burden to establish some foundation for the reliability of a sexual assault nurse examiner's opinion because she could not elaborate on the extent to which the underlying scientific theory and technique were accepted as valid by the relevant scientific community; she could make only vague references to literature supporting her underlying scientific theory and technique; and she did not appear to understand the concept of the potential rate of error of the technique; thus, the trial court erred by allowing into evidence her opinion that the quick dilation of the child victim's anus was consistent with sexual abuse, but, in light of the child victim's testimony, her mother's testimony about the victim's outcry, a licensed psychologist's testimony, and the nurse's testimony about the tear close to the child's anus, the jury could have convicted defendant without the objectionable portion of the nurse's testimony. Therefore, the error did not have a substantial and injurious effect or influence in determining the jury's verdict. Escamilla v. State, 334 S.W.3d 263, 2010 Tex. App. LEXIS 8227 (Tex. App. San Antonio Oct. 13 2010).

155. Admission of the child support officer's testimony to explain the basis of her opinion for retroactive child support was not unfairly prejudicial, because other admissible testimony, consisting of the father's testimony about his income, supported the figure the trial court used to calculate the father's child support obligation. In re J.A.J., 2010 Tex. App. LEXIS 2930 (Tex. App. Beaumont Apr. 22 2010).

156. Patient failed to demonstrate that the trial court abused its discretion in denying his requested jury instruction, because the record reflected that the trial court gave a limiting instruction to the hearsay complaint that was lodged

by the patient during the expert's testimony, and the jury charge instructed that hearsay from records reviewed by the experts had been admitted only to show the basis of the expert's opinion, and in closing argument, the trial court allowed the patient's attorney to further explain how the jury should use hearsay in records that were reviewed by the State's experts. In re Commitment of Moore, 2010 Tex. App. LEXIS 381, 2009 WL 5448789 (Tex. App. Beaumont Jan. 21 2010).

157. Corporation failed to explain which of an expert's particular statements violated the standards of scientific reliability as set forth in case law and cited evidentiary rules, including Tex. R. Evid. 702, 703, 705, plus the corporation failed to provide the court with any citations to the record to support this portion of its argument, which was waived. SCTW Health Care Ctr., Inc. v. AAR Inc., 2009 Tex. App. LEXIS 8071, 2009 WL 3321399 (Tex. App. Houston 1st Dist. Oct. 15 2009).

158. In a sex offender commitment proceeding, the trial court acted within its discretion in concluding that the underlying facts of the patient's convictions, and the fact that he had additional victims, were not unfairly prejudicial, and that the danger of improper use did not outweigh their value as explanation or support for the experts' opinions. Experts testified that the fact that the patient admitted to having victims in addition to those for which he was convicted was relevant to their assessment of whether he had a behavioral abnormality. In re Wilson, 2009 Tex. App. LEXIS 6714, 2009 WL 2616921 (Tex. App. Beaumont Aug. 27 2009).

159. In defendant's trial for aggravated sexual assault of a child under the age of fourteen in violation of Tex. Penal Code Ann. § 22.021, the trial court did not abuse its discretion in admitting the rebuttal testimony of the State's expert who testified that the complainant's "normal" behavior would not necessarily negate sexual abuse; the testimony was reliable under Tex. R. Evid. 705(c) because it was within the scope of the expert's field of expertise and because the expert properly relied upon the principles involved in his field of expertise which related to the behavior and treatment of child victims of sexual abuse. Briones v. State, 2009 Tex. App. LEXIS 5944, 2009 WL 2356626 (Tex. App. Houston 14th Dist. July 30 2009).

160. Challenge to expert testimony was rejected in a case involving a civil commitment for a sexually violent predator under Tex. Health & Safety Code Ann. §§ 841.001-841.150, because a forensic psychologist based his testimony on sufficient facts and data and on a reliable method used in his field of expertise for forming an opinion, and he applied that method reliably to the facts in this case. There was no analytical gap in the testimony and no abuse of discretion by the trial court in admitting the testimony. In re Commitment of Tolleson, 2009 Tex. App. LEXIS 3660 (Tex. App. Beaumont May 28 2009).

161. Trial court did not err by allowing the State's expert to testify even though the State did not furnish defendant with any specific facts or data on which the expert would rely in her testimony because the expert did not testify as to any of defendant's medical records but only discussed the general medical implications of a radical prostatectomy and the trial court found that the State had substantially complied with the discovery order by furnishing defendant with a ranger's investigative report of the alleged crime. Gentry v. State, 2008 Tex. App. LEXIS 9404 (Tex. App. Texarkana Dec. 18 2008).

162. Defendant's overruled request for a voir dire of an expert to establish whether the expert's testimony was related to defendant's guilt of the charged offense of indecency with a child failed to preserve his claim on appeal that he was seeking a hearing regarding an expert's underlying facts under Tex. R. Evid. 705(b). Elliff v. State, 2008 Tex. App. LEXIS 9160 (Tex. App. Dallas Dec. 10 2008).

163. From a sexually violent predator commitment hearing, an expert's testimony that determining whether the patient chose his victims as part of a revenge motive or whether they were strangers was important in assessing the risk that he would reoffend was properly admitted as it helped the jury in evaluating the weight of the expert's

opinions; and in light of the limiting instructions, the trial court did not abuse its discretion in admitting the statements. Even if it was error to admit the testimony, such error was not reasonably calculated to cause and probably did not cause rendition of an improper judgment. In re Commitment of Salazar, 2008 Tex. App. LEXIS 8856 (Tex. App. Beaumont Nov. 26 2008).

164. Defendant argued that a deputy's employment of the horizontal gaze nystagmus test was not reliable for purposes of Tex. R. Evid. 705(c), and the testimony was not only not helpful to the jury, but was misleading and unfairly prejudicial, for purposes of Tex. R. Evid. 402, 403, 702, but defendant's objection, which referred broadly to the deputy's administration of the test, was not specific enough to have informed the trial court of the basis of the argument defendant now raised on appeal so as to have afforded the trial court the opportunity to rule on it, for purposes of Tex. R. App. P. 33.1(a) and Tex. R. Evid. 103; thus, defendant waived error, if any. Gowin v. State, 2008 Tex. App. LEXIS 6873 (Tex. App. Tyler Sept. 17 2008).

165. In defendant's sexual assault case, the court did not err by denying a hearing on expert testimony because the underlying facts and data supporting the expert's opinion -- her education, training, and experience, years of clinical treatment of victims of family sexual abuse, and knowledge of Hispanic culture -- were not inadmissible. Merlos v. State, 2008 Tex. App. LEXIS 6514 (Tex. App. Dallas Aug. 26, 2008).

166. Trial court was required to exclude defendant's statements to a detective unless the value of the statements as an explanation or support for the detective's expert opinion outweighed the danger that defendant's statements would be used for a purpose other than as an explanation of or support for the opinion, for purposes of Tex. R. Evid. 705(d); presuming that a citation to nothing more specific than "Chapter 6" was sufficient to meet the briefing requirements of Tex. R. App. P. 38.1(h), the court did not agree that defendant's statements had any value to impeach the detective, and defendant admitted that the value of the statements was not as an explanation or support for the detective's opinion, but rather as substantive evidence to advance his own self-defense claim, a purpose Rule 705(d) aimed to prevent, and thus the trial court did not abuse its discretion by ruling defendant's hearsay statements inadmissible under Rule 705 or as impeachment evidence. Davis v. State, 268 S.W.3d 683, 2008 Tex. App. LEXIS 6566 (Tex. App. Fort Worth 2008).

167. In a drug case, the arresting officer's testimony that he was suspicious of defendant's claim that a large amount of cash found on his person was gas money for a road trip did not amount to an expert opinion; hence, counsel was not ineffective for failing to object to this testimony or to request an expert opinion hearing under Tex. R. Evid. 705, and counsel's failure to object waived the issue under Tex. R. App. P. 33. Hayes v. State, 2008 Tex. App. LEXIS 746 (Tex. App. Texarkana Feb. 1 2008).

168. Because a police officer's testimony in a cocaine possession case that drug dealers often rented cars in other people's names and that they might accept unemployment checks and credit cards as payment for narcotics did not amount to expert testimony, defendant's trial counsel was not ineffective for failing to request a hearing on expert testimony pursuant to Tex. R. Evid. 705. Hayes v. State, 2008 Tex. App. LEXIS 745 (Tex. App. Texarkana Feb. 1 2008).

169. In defendant's aggravated sexual assault of a child case, the court properly allowed expert testimony by a nurse concerning her finding no trauma to the child's genitals in her examination because she was qualified by her knowledge, skill, experience, training, and education as an expert witness in the field of child sexual abuse; she testified that she relied on a study in reaching her opinion, and therefore, the trial court did not abuse its discretion by allowing the nurse to testify about the results of the study. Archer v. State, 2007 Tex. App. LEXIS 6612 (Tex. App. Austin Aug. 17 2007).

170. In permitting counsel to conduct a voir dire examination of a psychologist regarding his familiarity with the sexually violent predator commitment statutes, the trial court complied with Tex. R. Evid. 705 by providing an opportunity to test the reliability of the psychologist's opinion testimony without the jury being present. In re Zamora, 2007 Tex. App. LEXIS 5852 (Tex. App. Beaumont July 26 2007).

171. Trial court properly sustained the objection to the admission of a chemist report prepared by the expert's employee and relied upon by the expert, but the trial court properly admitted the expert's testimony because it was not hearsay and was not required to be based on personal knowledge; even if the expert's testimony did improperly reveal underlying facts or data that were inadmissible, for which Tex. R. Evid. 705 would have required the trial court to give a limiting instruction upon request, no such instruction was requested and thus the trial court did not err in admitting the expert's testimony. Collins v. State, 2007 Tex. App. LEXIS 6116 (Tex. App. Fort Worth July 26 2007).

172. Doctors testified that interviews with defendant's family members were important in the assessment of defendant and whether she had Munchausen Syndrome by Proxy, and most of defendant's father-in-law's statements directly supported the doctor's opinions, and disclosing this information assisted the jury; the risk of admitting the statements for prejudice purposes did not outweigh the statements' value, and thus the father-in-law's interview summary was admissible under Tex. R. Evid. 705, even if it was otherwise inadmissible; even if the evidence was improperly admitted, the error was harmless under Tex. R. App. P. 44.2(b), given the evidence supporting the verdict of felony injury to a child and the small role the statements played in the trial, and given the other stronger evidence that was admitted, the court did not find that the statements caused the jury to recommend a greater sentence than it would have otherwise. Austin v. State, 222 S.W.3d 801, 2007 Tex. App. LEXIS 2739 (Tex. App. Houston 14th Dist. 2007).

173. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

174. Court did not err in admitting a utility company's expert testimony as to the market value of the condemned property in which he did not factor in the improvements that were over 4000 feet from the power lines in assessing damages because, inter alia, the landowners' own expert relied upon several articles that specifically stated the negative impact of power lines to a property diminished with increased distance and disappeared beyond 500 feet. Utley v. LCRA Transmission Servs. Corp., 2006 Tex. App. LEXIS 9129 (Tex. App. San Antonio Oct. 25 2006).

175. Equipment maintenance company's no-evidence motion for summary judgment was properly granted pursuant to Tex. R. Civ. P. 166a on the TrackMobile equipment operator's negligence clam because the operator failed to present the required expert testimony about the proper inspection and maintenance of the TrackMobile and if the company's conduct met that standard of care; expert testimony was required as provided in Tex. R. Evid. 705 because a maintenance company's practices and procedures and industry standards with respect to the inspection and maintenance of a TrackMobile or other rail-car mover engine were not matters within a lay person's general knowledge. Simmons v. Briggs Equip. Trust, 221 S.W.3d 109, 2006 Tex. App. LEXIS 5647 (Tex. App. Houston 1st Dist. 2006).

Evidence : Testimony : Experts : Criminal Trials

176. Trial court did not abuse its discretion in admitting the testimony of a clinical supervisor at the Dallas Children's Advocacy Center as expert testimony because she was qualified as she had a bachelor's degree in

psychology, a master's degree in counseling and development, and had been licensed in Texas as a professional counselor for over seven years, and she was familiar with, and kept current on, the literature and research in the field of child sexual abuse; and her testimony was specialized and scientific and would assist the jury to understand the evidence or to determine the facts at issue as she testified regarding delayed outcry and the wide range of symptoms and behavioral changes in children who had been abused. Cabrera v. State, 2014 Tex. App. LEXIS 7033 (Tex. App. Dallas June 27 2014).

177. At defendant's trial for causing serious bodily injury to a child, the trial court did not violate her right to confront witnesses when it allowed a doctor to testify as a substitute witness for the pathologist who performed the autopsy on the victim; the doctor used the autopsy report to explain the basis for her opinion. The doctor's independent evaluation of the evidence collected during the autopsy did not violate the Confrontation Clause. Williams v. State, 2014 Tex. App. LEXIS 3020, 2014 WL 1102004 (Tex. App. Beaumont Mar. 19 2014).

178. At defendant's trial for aggravated sexual assault of a child, the trial court did not abuse its discretion in denying defendant's request to conduct a voir dire examination of a forensic interviewer at the children's advocacy center; defendant's objected to the relevance of her testimony, he did not request a hearing outside the jury's presence to explore the underlying facts or data of the expert's opinion. Washington v. State, 2014 Tex. App. LEXIS 933 (Tex. App. Austin Jan. 30 2014).

179. Where defendant was convicted of possession of one to four grams of a controlled substance based on methamphetamine found in the car during a traffic stop, an expert's opinion that the sergeant's failure to follow police procedure suggested that the drugs were planted in the car was inadmissible. Because the expert did not explain why the sergeant's acts were suspicious or why they led to the conclusion that the drugs were planted, there was not a sufficient basis for an expert opinion. Nickols v. State, 2013 Tex. App. LEXIS 11241 (Tex. App. Eastland Aug. 30 2013).

180. Trial court's admission of an aggravated assault victim's medical records, without an opportunity for defendant to first question the records' author on voir dire, did not violate defendant's rights under Tex. R. Evid. 705(b) because the language of Rule 705 contained no inference or even a suggestion that its provisions overrode the admissibility of a physician's observations, diagnoses, or opinions properly admitted as a business record. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

181. During a murder trial, the trial court did not abuse its discretion in allowing the reading of the statements upon which the medical examiner formed her opinion as to the cause of the victim's death. Although the statements were prejudicial, disclosing the statements the medical examiner relied upon in forming her opinion assisted the jury in evaluating the weight to give her opinions; therefore, the statements were admissible under Tex. R. Evid. 705. Moulton v. State, 360 S.W.3d 540, 2011 Tex. App. LEXIS 8266 (Tex. App. Texarkana Oct. 19 2011).

182. During defendant's trial for driving while intoxicated, he waived his complaint regarding the officer's testimony about the horizontal gaze nystagmus field sobriety test by failing to object. Defendant made no request under Tex. R. Evid. 705 to conduct a voir dire examination of the officer prior to his testimony. Garcia v. State, 2011 Tex. App. LEXIS 2352, 2011 WL 1198922 (Tex. App. Tyler Mar. 31 2011).

183. Defendant's request to voir the State's expert was timely under Tex. R. Evid. 705(b) with regard to a receipt for a BB gun purchased for testing; although the exhibit itself had already been admitted into evidence, neither the exhibit nor the specifics from the exhibit had been published to the jury when defendant objected to the exhibit. Blackburn v. State, 2010 Tex. App. LEXIS 5598, 2010 WL 2802186 (Tex. App. Amarillo July 16 2010).

184. Trial court did not abuse its discretion during defendant's trial for aggravated assault with a deadly weapon and unlawful possession of a firearm by a felon by admitting expert testimony regarding gang activity where the expert's testimony in the Tex. R. Evid. 705 hearing described his years of professional experience and training, and he testified that his opinion that defendant is or was a gang member was based on his experience with gangs, defendant's admissions to unknown contact officers, photographs of defendant, and defendant's tattoo. In light of the evidence at the time of the Tex. R. Evid. 702 ruling, the trial court did not abuse its discretion by determining that the expert was qualified to testify as an expert, and it therefore could not be concluded that the evidence that defendant was or is a gang member affected the jury in an irrational way. Burleson v. State, 2010 Tex. App. LEXIS 3250 (Tex. App. Fort Worth Apr. 29 2010).

185. Following the entry of defendant's nolo contendere plea to aggravated robbery, the trial court properly considered under Tex. Code Crim. Proc. Ann. art. 37.07 § 3(a)(1) evidence regarding the murder of defendant's wife at the punishment hearing because the evidence was sufficient to establish beyond a reasonable doubt that defendant murdered his wife five days before he committed the aggravated robbery offense; further, the medical examiner's hearsay statement that defendant admitted strangling his wife was admissible pursuant to Tex. R. Evid. 703, and defendant did not object under Tex. R. Evid. 705(d). Garza v. State, 2009 Tex. App. LEXIS 5026, 2009 WL 1424610 (Tex. App. El Paso May 20 2009).

186. In defendant's sexual assault case, the court did not err by denying a hearing on expert testimony because the underlying facts and data supporting the expert's opinion -- her education, training, and experience, years of clinical treatment of victims of family sexual abuse, and knowledge of Hispanic culture -- were not inadmissible. Merlos v. State, 2008 Tex. App. LEXIS 6514 (Tex. App. Dallas Aug. 26, 2008).

187. At the punishment stage of defendant's trial for stealing property, the trial court did not err by excluding a doctor's report concerning defendant's personality disorder; the report largely restated the doctor's trial testimony. Edrington v. State, 2005 Tex. App. LEXIS 10637 (Tex. App. Austin Dec. 21 2005).

188. In a driving while intoxicated case, the trial court properly prevented defense counsel from questioning the arresting officer regarding his expertise; such a request did not amount to a request for a Tex. R. Evid. 705(b) hearing to inquire into the underlying facts or data of an expert's opinion. Govea v. State, 2005 Tex. App. LEXIS 7910 (Tex. App. San Antonio Sept. 28 2005).

189. Court properly allowed testimony by fingerprint experts where they provided sufficient testimony about their experience to qualify as experts. In addition to the fingerprint evidence, the uncontroverted evidence showed that defendant was in possession of the stolen property nine days after the burglary. Smith v. State, 2005 Tex. App. LEXIS 5302 (Tex. App. Dallas July 7 2005).

190. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

191. Prisoner's trial counsel was not ineffective for failing to voir dire the prosecution's expert under Tex. R. Evid. 705(b) to determine the foundations of his opinions because it would have been futile to invoke Rule 705(b) where defense counsel knew of the basis of the expert's opinion. Shields v. Dretke, 122 Fed. Appx. 133, 2005 U.S. App. LEXIS 2910 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 28, 162 L. Ed. 2d 928, 2005 U.S. LEXIS

5374, 74 U.S.L.W. 3129 (U.S. 2005).

192. In a sexual assault case, a court erred by failing to allow defendant's expert to testify where the subject of the expert's opinion was relevant, just as the State's expert was permitted to testify that the lack of genital injuries did not indicate that the complainant had not been sexually assaulted, defendant's expert should have been permitted to testify that no sexual assault occurred. One party could not proffer expert testimony and subsequently argue successfully that the testimony was not relevant when the opposing party sought to offer expert testimony on the same subject which reached a different conclusion; in addition, the error was not harmless. Vela v. State, 159 S.W.3d 172, 2004 Tex. App. LEXIS 7257 (Tex. App. Corpus Christi 2004).

193. In a driving while intoxicated case, where counsel was objecting to the officer's qualifications and not to the underlying facts or data to support the officer's opinion, he was not requesting a Tex. R. Evid. 705(b) hearing to explore the underlying facts or data of the expert's opinion. Therefore, his appeal on that point was waived. Waltmon v. State, 2004 Tex. App. LEXIS 7285 (Tex. App. El Paso Aug. 12 2004).

194. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

195. Trial court did not abuse its discretion in excluding the hearsay underlying the opinion of defendant's expert witness during the sentencing phase because although the witness could state, pursuant to Tex. R. Evid 705(a), that he had reviewed the jail classification as a basis for his expert testimony, the classification itself remained inadmissible and could not be used as a basis for the jury's determination of defendant's dangerousness in the future. Prystash v. State, 3 S.W.3d 522, 1999 Tex. Crim. App. LEXIS 97 (Tex. Crim. App. 1999).

Evidence : Testimony : Experts : Daubert Standard

196. During defendant's trial for aggravated assault of a family member, the court erred under Tex. R. Evid. 705(c) in admitting testimony from a witness as an expert on lethality assessment because she did not offer any specifics to support her assertion, and she did not cite any books, articles, journals, or other clinical social workers who practiced in the area; the State did not show that "lethality assessment" was a legitimate field of expertise. Petriciolet v. State, 442 S.W.3d 643, 2014 Tex. App. LEXIS 8414 (Tex. App. Houston 1st Dist. July 31 2014).

197. During defendant's trial for sexual assault of a child, the court did not err under Tex. R. Evid. 705(c) in admitting the testimony of the director of a trauma center, who was trained as a clinical psychologist with specialization in psychological trauma, because all of the opinions offered by the director were within the scope of the field of psychology, a legitimate field of study. Jessop v. State, 368 S.W.3d 653, 2012 Tex. App. LEXIS 3176, 2012 WL 1402117 (Tex. App. Austin Apr. 19 2012).

198. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

Evidence : Testimony : Experts : Helpfulness

199. In a sexual assault case, an officer was properly allowed to testify regarding defendant's "grooming" the victim for sexual assaults because he had been a police officer for thirty years, he had investigated twenty sexual assault and child abuse cases per year, and he testified that it was his opinion based on his investigation that defendant had been "grooming" the victim prior to her outcry. He explained that sexual predators often developed a relationship with a victim to build trust, and then started committing small offenses to see if the victim made an outcry. Weatherly v. State, 283 S.W.3d 481, 2009 Tex. App. LEXIS 2435 (Tex. App. Beaumont Apr. 1 2009).

Evidence : Testimony : Experts : Qualifications

200. Trial court did not abuse its discretion in admitting an expert's testimony regarding his estimate of the cost of an exploration permit, as he was an oil and gas executive with decades of experience, his opinion fell within his area of expertise, he took into consideration the lack of shale gas and overall size of the tract in formulating his estimate, and he was not unqualified merely because his opinion might be characterized as "subjective." Harkins v. North Shore Energy, L.L.C., 2013 Tex. App. LEXIS 14929, 2013 WL 6574245 (Tex. App. Corpus Christi Dec. 12 2013).

201. Trial court properly denied a doctor's motion to dismiss a patient's health care liability claim against him where, considered together in their entirety, a neurosurgeon's report and curriculum vitae served by the patient established the neurosurgeon's qualifications to render opinions as to the applicable standard of care and alleged breach of the standard of care by the doctor because they expressly provided that the neurosurgeon served as a Florida Worker's Compensation Certified Physician Expert Medical Advisor and that he had been licensed, board certified, and in the private practice of neurosurgery from 1976 to the present. As to whether the neurosurgeon was qualified to address the standard of care and alleged breach by the doctor, a radiologist, the neurosurgeon's report provided that he had been thoroughly exposed to neuroradiology through his years of practice and that the interpretation of an MRI scan like that involved in the patient's case was common to both neurosurgery and radiology. Brunson v. Johnston, 2013 Tex. App. LEXIS 442, 2013 WL 173743 (Tex. App. Fort Worth Jan. 17 2013).

202. Nowhere did the court see an objection to the reliability or relevance of the witness's testimony and the context did not suggest that appellant objected on either of these grounds, for preservation purposes; it might have been apparent from the context that appellant objection on qualifications grounds, but he did not argue this on appeal. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

203. Implied objection based on a witness's qualifications did not preserve error related to the reliability of the witness's testimony or the court's alleged failure to hold a Tex. R. Evid. 705(b) hearing. Shaw v. State, 329 S.W.3d 645, 2010 Tex. App. LEXIS 8902 (Tex. App. Houston 14th Dist. Nov. 9 2010).

204. Treating oncologist's report referenced materials he consulted and the company did not complain about the lack of discovery responses from the widow, for purposes of Tex. R. Civ. P. 194.2(f)(4), 195; the implicit assertion was that the scientific literature reviewed supported the oncologist's opinion, for purposes of Tex. R. Evid. 705, the trial court made no ruling requiring disclosure of the literature and did not strike any of the evidence, and the oncologist's affidavit explained how he reached his opinion and he grounded his opinion under oath on reasonable medical probability, such that the court could not say that the opinion concerning etiology was conclusory. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

205. Fusion of review standards cannot be avoided simply by requiring an express ruling on the E.I. du Pont de Nemours & Co. v. Robinson challenge, along with a ruling on the no-evidence summary judgment motion, but an

express Tex. R. Evid. 104(a) determination does clarify the process followed in the trial court, and notifies the nonmovant that the expert's opinion is ruled inadmissible before summary judgment is granted; because Tex. R. Evid. 705(a) allows the expert to express an opinion without first introducing the underlying facts or data, unless the court requires the disclosure, an express ruling notifies the nonmovant of that ruling as well and permits an opportunity to comply with the ruling. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 2010 Tex. App. LEXIS 7461 (Tex. App. Beaumont Sept. 9 2010).

206. In a sexual assault case, an officer was properly allowed to testify regarding defendant's "grooming" the victim for sexual assaults because he had been a police officer for thirty years, he had investigated twenty sexual assault and child abuse cases per year, and he testified that it was his opinion based on his investigation that defendant had been "grooming" the victim prior to her outcry. He explained that sexual predators often developed a relationship with a victim to build trust, and then started committing small offenses to see if the victim made an outcry. Weatherly v. State, 283 S.W.3d 481, 2009 Tex. App. LEXIS 2435 (Tex. App. Beaumont Apr. 1 2009).

207. In permitting counsel to conduct a voir dire examination of a psychologist regarding his familiarity with the sexually violent predator commitment statutes, the trial court complied with Tex. R. Evid. 705 by providing an opportunity to test the reliability of the psychologist's opinion testimony without the jury being present. In re Zamora, 2007 Tex. App. LEXIS 5852 (Tex. App. Beaumont July 26 2007).

208. When the appellate court in a sexual assault trial improperly evaluated the qualifications of a proposed defense expert, a certified legal nurse consultant, under Tex. R. Evid. 104(a), 401, 402, and 702, and did not evaluate the reliability of the consultant's proposed testimony under Tex. R. Evid. 705(c), and did not give proper deference to the trial judge's decision not to allow her to testify as an expert, the appellate court's judgment was vacated, and case was remanded to allow the appellate court to conduct a proper analysis. Vela v. State, 209 S.W.3d 128, 2006 Tex. Crim. App. LEXIS 2384 (Tex. Crim. App. 2006).

209. Equipment maintenance company's no-evidence motion for summary judgment was properly granted pursuant to Tex. R. Civ. P. 166a on the TrackMobile equipment operator's negligence clam because the operator failed to present the required expert testimony about the proper inspection and maintenance of the TrackMobile and if the company's conduct met that standard of care; expert testimony was required as provided in Tex. R. Evid. 705 because a maintenance company's practices and procedures and industry standards with respect to the inspection and maintenance of a TrackMobile or other rail-car mover engine were not matters within a lay person's general knowledge. Simmons v. Briggs Equip. Trust, 221 S.W.3d 109, 2006 Tex. App. LEXIS 5647 (Tex. App. Houston 1st Dist. 2006).

210. At a hearing, outside the presence of the jury, a doctor testified that he based his opinion on his practice in emergency medicine and what he saw in the emergency room while treating the victim, a 16-month old child; defendant contended that the doctor was not qualified to testify on what someone believed would happen if they saw an assault; however, the training, experience, research, seminars, and periodicals about which the doctor testified and upon which he based his medical opinion qualified him to testify as an expert witness; thus, the trial court did not abuse its discretion by allowing the doctor to testify as an expert witness. Montgomery v. State, 198 S.W.3d 67, 2006 Tex. App. LEXIS 3377 (Tex. App. Fort Worth 2006).

211. Trial court erred in awarding damages to the surface right property owner due to the oil company's operations on the land because the property owner's expert's qualification and experience as an engineer in the oil and gas industry did not qualify him to testify regarding the value of timber removed by the oil company as required by Tex. R. Evid. 702; therefore, the expert's testimony as to valuation and the amount of damages owed by the oil company had no probative worth. Even if the expert were qualified, his testimony was flawed because it was based on the advice of a forester and an accountant, which was not shown to comply with applicable professional standards, and the expert made assumptions about the amount of land cleared by the oil company, which did not constitute a

sufficient basis for his opinion as provided in Tex. R. Evid. 705(c). Classic Oil & Gas, Inc. v. Cook, 2006 Tex. App. LEXIS 2936 (Tex. App. Tyler Apr. 12 2006).

212. Even if the expert was qualified, his testimony was flawed because it was based on the advice of a forester and an accountant, which was not shown to comply with applicable professional standards, and the expert made assumptions about the amount of land cleared by the oil company, which did not constitute a sufficient basis for his opinion as provided in Tex. R. Evid. 705. Classic Oil & Gas, Inc. v. Cook, 2006 Tex. App. LEXIS 2936 (Tex. App. Tyler Apr. 12 2006).

Evidence : Testimony : Experts : Ultimate Issue

213. In a suit by a royalty interest owner against operators of oil and gas properties, an expert's damages testimony was speculative, conclusory, and incompetent; although he examined facts and data that would be appropriate to consider, he failed to specifically identify them or explain how they affected his calculations. Paradigm Oil, Inc. v. Retamco Operating, Inc., 242 S.W.3d 67, 2007 Tex. App. LEXIS 6926, 167 Oil & Gas Rep. 236 (Tex. App. San Antonio 2007).

Evidence : Testimony : Lay Witnesses : Opinion Testimony : General Overview

214. Trial court did not abuse its discretion by denying defendant's motion for a Tex. R. Evid. 705 hearing concerning a special agent's testimony because the trial court properly admitted the agent's testimony under Tex. R. Evid. 701; the State presented the agent as a lay witness to testify about the pimp subculture and to address the issue of cause, as placed into issue by defendant's cross-examination of the complainant; the questions contemplated drew directly from the agent's personal experience and familiarity with the pimping subculture, including its terms, many of which the complainant had used in her testimony, which the agent gained from interviewing both pimps and prostitutes; questioning the agent about what he learned from his experience assisted the fact-finder in determining a fact in issue, specifically defendant's utilizing the complainant as a prostitute for his personal profit. Richardson v. State, 2007 Tex. App. LEXIS 4281 (Tex. App. Houston 1st Dist. May 31 2007).

Governments : Courts : Authority to Adjudicate

215. While the trial court is authorized to conduct a hearing outside of the presence of the jury under Tex. R. Evid. 705, the rule is not to be interpreted as permitting a trial court to enter a pretrial discovery order in criminal cases. In re State, 2013 Tex. App. LEXIS 5323, 2013 WL 1846680 (Tex. App. El Paso Apr. 30 2013).

Public Health & Welfare Law : Healthcare : Mental Health Services : Commitment : Involuntary Commitment of Adults

216. From a sexually violent predator commitment hearing, an expert's testimony that determining whether the patient chose his victims as part of a revenge motive or whether they were strangers was important in assessing the risk that he would reoffend was properly admitted as it helped the jury in evaluating the weight of the expert's opinions; and in light of the limiting instructions, the trial court did not abuse its discretion in admitting the statements. Even if it was error to admit the testimony, such error was not reasonably calculated to cause and probably did not cause rendition of an improper judgment. In re Commitment of Salazar, 2008 Tex. App. LEXIS 8856 (Tex. App. Beaumont Nov. 26 2008).

Real Property Law : Eminent Domain Proceedings : Valuation

217. In a condemnation proceeding in which plaintiff county acquired a portion of commercial property used for a car wash in order to widen a county roadway, the trial court did not abuse its discretion in excluding the county's

appraisal expert because the expert's bald assurance that he used a widely accepted appraisal method was insufficient to establish reliability. His report, as well as the underlying data and methodology, did not reflect application of an accepted appraisal method to arrive at the fair market value of the remainder after the taking where he simply took the market value of the whole and assumed--without any basis--that a willing buyer and willing seller would agree to reduce the market value by one-fifth after the taking. Dallas County v. Crestview Corners Car Wash, 370 S.W.3d 25, 2012 Tex. App. LEXIS 1269 (Tex. App. Dallas Feb. 16 2012).

218. Court did not err in admitting a utility company's expert testimony as to the market value of the condemned property in which he did not factor in the improvements that were over 4000 feet from the power lines in assessing damages because, inter alia, the landowners' own expert relied upon several articles that specifically stated the negative impact of power lines to a property diminished with increased distance and disappeared beyond 500 feet. Utley v. LCRA Transmission Servs. Corp., 2006 Tex. App. LEXIS 9129 (Tex. App. San Antonio Oct. 25 2006).

Torts : Malpractice & Professional Liability : Healthcare Providers

219. Trial court properly denied a doctor's motion to dismiss a patient's health care liability claim against him where, considered together in their entirety, a neurosurgeon's report and curriculum vitae served by the patient established the neurosurgeon's qualifications to render opinions as to the applicable standard of care and alleged breach of the standard of care by the doctor because they expressly provided that the neurosurgeon served as a Florida Worker's Compensation Certified Physician Expert Medical Advisor and that he had been licensed, board certified, and in the private practice of neurosurgery from 1976 to the present. As to whether the neurosurgeon was qualified to address the standard of care and alleged breach by the doctor, a radiologist, the neurosurgeon's report provided that he had been thoroughly exposed to neuroradiology through his years of practice and that the interpretation of an MRI scan like that involved in the patient's case was common to both neurosurgery and radiology. Brunson v. Johnston, 2013 Tex. App. LEXIS 442, 2013 WL 173743 (Tex. App. Fort Worth Jan. 17 2013).

220. In a patient's action that raised health care liability claims against a doctor based on the patient's allegation that her left eye was permanently impaired as a result of a surgery performed by the doctor, the trial court did not abuse its discretion by determining that the report prepared by the patient's expert, a board certified ophthalmologist, complied with Tex. Civ. Prac. & Rem. Code Ann. § 74.351 where the expert's report informed the doctor of the specific conduct that the patient had called into question and provided a basis for the trial court to conclude the claims were meritorious. Tex. R. Evid. 703, 705 allowed an expert to draw inferences from the underlying facts or data, which was what the expert had done, and, moreover, the expert's report did not merely state his opinions and inferences because he explained the basis for his conclusions and linked them to the facts. Diaz-Rohena v. Melton, 2008 Tex. App. LEXIS 6633 (Tex. App. Fort Worth Aug. 29, 2008).

Torts : Negligence : Causation : Cause in Fact

221. Trial court properly granted manufacturers, suppliers, contractors, premises owners, and former employers' no-evidence summary judgment motion, Tex. R. Civ. P. 166a(i), because (1) although the former employees claimed that paints and other coating substances used in the construction of the power plants contained asbestos or silica, which was released into the air when the product was sprayed or when it was sanded or ground off the surface to which it had been applied, there was no expert testimony under Tex. R. Evid. 702 and 705(c) that spraying, sanding, or grinding a liquid paint or coating produced friable asbestos fibers likely to cause asbestosis; and (2) although the type of silica that caused silicosis was crystalline silica, the evidence showed that the products in the employees' case contained amorphous silica and there was no evidence that amorphous silica caused silicosis or that grinding and sanding the paint and coatings released a form of silica that was capable of causing injury; thus, the employees never proved an exposure to a form of asbestos or silica that would cause injury and the employees failed to meet their initial burden of showing that they were exposed to asbestos and/or silica in a form that was capable of causing injury from manufacturers, suppliers, contractors, premises owners, and former

employers' products. In re ROC Pretrial, 131 S.W.3d 129, 2004 Tex. App. LEXIS 315 (Tex. App. San Antonio 2004).

Torts : Products Liability : General Overview

222. Trial court properly granted manufacturers, suppliers, contractors, premises owners, and former employers' no-evidence summary judgment motion, Tex. R. Civ. P. 166a(i), because (1) although the former employees claimed that paints and other coating substances used in the construction of the power plants contained asbestos or silica, which was released into the air when the product was sprayed or when it was sanded or ground off the surface to which it had been applied, there was no expert testimony under Tex. R. Evid. 702 and 705(c) that spraying, sanding, or grinding a liquid paint or coating produced friable asbestos fibers likely to cause asbestosis; and (2) although the type of silica that caused silicosis was crystalline silica, the evidence showed that the products in the employees' case contained amorphous silica and there was no evidence that amorphous silica caused silicosis or that grinding and sanding the paint and coatings released a form of silica that was capable of causing injury; thus, the employees never proved an exposure to a form of asbestos or silica that would cause injury and the employees failed to meet their initial burden of showing that they were exposed to asbestos and/or silica in a form that was capable of causing injury from manufacturers, suppliers, contractors, premises owners, and former employers' products. In re ROC Pretrial, 131 S.W.3d 129, 2004 Tex. App. LEXIS 315 (Tex. App. San Antonio 2004).

Tex. Evid. R. 706

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 706 Audit in Civil Cases

Notwithstanding any other evidence rule, the court must admit an auditor's verified report prepared under Rule of Civil Procedure 172 and offered by a party. If a party files exceptions to the report, a party may offer evidence supporting the exceptions to contradict the report.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 60, *Opinion Testimony*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Tex. Evid. R. 801

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 801 Definitions That Apply to This Article; Exclusions from Hearsay

(a) ***Statement.***--"Statement" means a person's oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.

(b) ***Declarant.***--"Declarant" means the person who made the statement.

(c) ***Matter Asserted.***--"Matter asserted" means:

(1)any matter a declarant explicitly asserts; and

(2)any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter.

(d) ***Hearsay.***--"Hearsay" means a statement that:

(1)the declarant does not make while testifying at the current trial or hearing; and

(2)a party offers in evidence to prove the truth of the matter asserted in the statement.

(e) ***Statements That are Not Hearsay.***--A statement that meets the following conditions is not hearsay:

(1) ***A Declarant-Witness's Prior Statement.***--The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A)is inconsistent with the declarant's testimony and:

(i)when offered in a civil case, was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(ii)when offered in a criminal case, was given under penalty of perjury at a trial, hearing, or other proceeding - except a grand jury proceeding - or in a deposition;

(B)is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C)identifies a person as someone the declarant perceived earlier.

(2) ***An Opposing Party's Statement.***--The statement is offered against an opposing party and:

(A)was made by the party in an individual or representative capacity;

(B)is one the party manifested that it adopted or believed to be true;

(C)was made by a person whom the party authorized to make a statement on the subject;

(D)was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E)was made by the party's coconspirator during and in furtherance of the conspiracy.

(3) ***A Deponent's Statement.***--In a civil case, the statement was made in a deposition taken in the same proceeding. "Same proceeding" is defined in Rule of Civil Procedure 203.6 (b). The deponent's unavailability as a witness is not a requirement for admissibility.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 40, *Hearsay*; *Texas Litigation Guide*, Ch. 114, *Motions in Limine*.

Pre-March 1, 1998 Comment The definitions in Rule 801(a), (b), (c) and (d) combined bring within the hearsay rule four categories of conduct. These are described and illustrated below.

(1) A verbal (oral or written) explicit assertion. Illustration: Witness testifies that declarant said "A shot B." Declarant's conduct is a statement because it is an oral expression. Because it is an explicit assertion, the matter asserted is that A shot B. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(2) A verbal (oral or written) explicit assertion, not offered to prove the matter explicitly asserted, but offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration: The only known remedy for X disease is medicine Y and the only known use of medicine Y is to cure X disease. To prove that Oglethorpe had X disease, witness testifies that declarant, a doctor, stated, "The best medicine for Oglethorpe is Y." The testimony is to a statement because it was a verbal expression. The matter asserted was that Oglethorpe had X disease because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(3) Non-assertive verbal conduct offered for the truth of a matter implied by the statement, the probative value of the statement flowing from declarant's belief as to the matter. Illustration: In a rape prosecution to prove that Richard, the defendant, was in the room at the time of the rape, W testifies that declarant knocked on the door to the room and shouted, "Open the door, Richard." The testimony is to a statement because it was a verbal expression. The matter asserted was that Richard was in the room because that matter is implied from the statement, the probative value of the statement as offered flowing from declarant's belief as to the matter. Finally, the statement is hearsay because it was not made while testifying at the trial and is offered to prove the truth of the matter asserted.

(4) Nonverbal assertive conduct intended as a substitute for verbal expression. Illustration: W testifies that A asked declarant "Which way did X go?" and declarant pointed north. This nonverbal conduct of declarant was intended by him as a substitute for verbal expression and so is a statement. The matter asserted is that X went north because that is implied from the statement and the probative value of the statement as offered flows from declarant's belief that X went north. Finally, the statement is hearsay because it was not made at trial and is offered to prove the truth of the matter asserted.

(4) Nonverbal assertive conduct intended as a substitute for verbal expression. Illustration: W testifies that A asked declarant "Which way did X go?" and declarant pointed north. This nonverbal conduct of declarant was intended by him as a substitute for verbal expression and so is a statement. The matter asserted is that X went north because that is implied from the statement and the probative value of the statement as offered flows from declarant's belief that X went north. Finally, the statement is hearsay because it was not made at trial and is offered to prove the truth of the matter asserted.

Comment to 2015 Restyling: Statements falling under the hearsay exclusion provided by Rule 801(e)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense-a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 803(24) exception for declarations against interest. No change in application of the exclusion is intended.

The deletion of former Rule 801(e)(1)(D), which cross-references Code of Criminal Procedure art. 38.071, is not intended as a substantive change. Including this cross-reference made sense when the Texas Rules of Criminal Evidence were first promulgated, but with subsequent changes to the statutory provision, its inclusion is no longer appropriate. The version of article 38.071 that was initially cross-referenced in the Rules of Criminal Evidence required the declarant-victim to be available to testify at the trial. That requirement has since been deleted from the statute, and the statute no longer requires either the availability or testimony of the declarant-victim. Thus, cross-referencing the statute in Rule 801(e)(1), which applies only when the declarant testifies at trial about the prior statement, no longer makes sense. Moreover, article 38.071 is but one of a number of statutes that mandate the admission of certain hearsay statements in particular circumstances. *See, e.g.*, Code of Criminal Procedure art. 38.072; Family Code §§ 54.031, 104.002, 104.006. These statutory provisions take precedence over the general rule excluding hearsay, see Rules 101(c) and 802, and there is no apparent justification for cross-referencing article 38.071 and not all other such provisions.

Case Notes

Business & Corporate Law : Agency Relationships : Authority to Act : Admissions by Agent
Civil Procedure : Jurisdiction : Personal Jurisdiction & In Rem Actions : In Personam Actions : General Overview
Civil Procedure : Jurisdiction : Personal Jurisdiction & In Rem Actions : In Personam Actions : Challenges
Civil Procedure : Pleading & Practice : Pleadings : Amended Pleadings : General Overview
Civil Procedure : Discovery : Methods : Oral Depositions
Civil Procedure : Discovery : Methods : Perpetuation of Testimony
Civil Procedure : Summary Judgment : Evidence
Civil Procedure : Summary Judgment : Standards : General Overview
Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Trials : Jury Trials : Jury Instructions : Requests for Instructions
Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials
Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus
Civil Procedure : Appeals : Briefs
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Constitutional Law : Bill of Rights : Fundamental Rights : Search & Seizure : Probable Cause
Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Self-Incrimination Privilege
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Assistance of Counsel
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Contracts Law : Contract Interpretation : Parol Evidence : General Overview
Contracts Law : Remedies : Specific Performance
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Penalties
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Unarmed Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Fraud : Fraud Against the Government : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Prostitution : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Traffic Regulation Violations : Elements
Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : General Overview
Criminal Law & Procedure : Search & Seizure : Warrantless Searches : Consent to Search : General Overview
Criminal Law & Procedure : Interrogation : Miranda Rights : Custodial Interrogation
Criminal Law & Procedure : Pretrial Motions & Procedures : Joinder & Severance : Severance of Defendants
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Tests
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Juries & Jurors : Challenges to Jury Venire : Equal Protection Challenges
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Examination of Witnesses : Admission of Codefendant Statements
Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination
Criminal Law & Procedure : Trials : Examination of Witnesses : Videotaped Testimony
Criminal Law & Procedure : Trials : Motions for Mistrial
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Defenses : Right to Present
Criminal Law & Procedure : Jury Instructions : Curative Instructions
Criminal Law & Procedure : Jury Instructions : Limiting Instructions
Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview
Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Proceedings
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview
Criminal Law & Procedure : Appeals : Reversible Errors : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Constitutional Issues
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial
Criminal Law & Procedure : Appeals : Standards of Review : Clearly Erroneous Review : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Cumulative Errors
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Habeas Corpus : Review : Standards of Review : Contrary & Unreasonable Standard
Estate, Gift & Trust Law : Nonprobate Transfers : Jointly Held Property : Bank Accounts
Evidence : General Overview
Evidence : Authentication : General Overview
Evidence : Authentication : Self-Authentication
Evidence : Authentication : Chain of Custody
Evidence : Competency : Affirmations & Oaths
Evidence : Competency : Interpreters
Evidence : Demonstrative Evidence : General Overview
Evidence : Demonstrative Evidence : Photographs
Evidence : Demonstrative Evidence : Recordings
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Documentary Evidence : Affidavits
Evidence : Documentary Evidence : Completeness
Evidence : Documentary Evidence : Writings : General Overview
Evidence : Documentary Evidence : Writings : Summaries
Evidence : Hearsay : General Overview
Evidence : Hearsay : Credibility of Declarants : General Overview
Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence
Evidence : Hearsay : Credibility of Declarants : Rehabilitation
Evidence : Hearsay : Exceptions : General Overview
Evidence : Hearsay : Exceptions : Business Records : General Overview
Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials
Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business
Evidence : Hearsay : Exceptions : Dying Declarations : General Overview
Evidence : Hearsay : Exceptions : Dying Declarations : Belief of Imminent Death
Evidence : Hearsay : Exceptions : Former Testimony of Unavailable Declarants
Evidence : Hearsay : Exceptions : Market Reports & Commercial Publications : General Overview
Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment
Evidence : Hearsay : Exceptions : Present Sense Impression : General Overview
Evidence : Hearsay : Exceptions : Present Sense Impression : Contemporaneous Statements
Evidence : Hearsay : Exceptions : Public Records : General Overview
Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports
Evidence : Hearsay : Exceptions : Recorded Recollection : Recollection Refreshed
Evidence : Hearsay : Exceptions : Residual Exceptions : Confrontation Clause Requirements
Evidence : Hearsay : Exceptions : Spontaneous Statements : General Overview
Evidence : Hearsay : Exceptions : Spontaneous Statements : Criminal Trials
Evidence : Hearsay : Exceptions : Spontaneous Statements : Elements
Evidence : Hearsay : Exceptions : Spontaneous Statements : Res Gestae
Evidence : Hearsay : Exceptions : State of Mind : General Overview
Evidence : Hearsay : Exceptions : State of Mind : Proof of Earlier Acts
Evidence : Hearsay : Exceptions : State of Mind : Proof of Later Acts
Evidence : Hearsay : Exceptions : Statements Against Interest
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Exemptions : General Overview
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Identifications
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Inconsistent Statements
Evidence : Hearsay : Exemptions : Statements by Coconspirators : General Overview
Evidence : Hearsay : Exemptions : Statements by Coconspirators : Members of Conspiracy
Evidence : Hearsay : Exemptions : Statements by Coconspirators : Statements During Conspiracy
Evidence : Hearsay : Exemptions : Statements by Coconspirators : Statements Furthering Conspiracy
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Hearsay : Exemptions : Statements by Party Opponents : Adopted Statements
Evidence : Hearsay : Exemptions : Statements by Party Opponents : Authorized Statements
Evidence : Hearsay : Exemptions : Statements by Party Opponents : Extrajudicial Statements
Evidence : Hearsay : Exemptions : Statements by Party Opponents : Vicarious Statements
Evidence : Hearsay : Hearsay Within Hearsay
Evidence : Hearsay : Rule Components
Evidence : Hearsay : Rule Components : General Overview
Evidence : Hearsay : Rule Components : Declarants
Evidence : Hearsay : Rule Components : Nonverbal Conduct
Evidence : Hearsay : Rule Components : Statements
Evidence : Hearsay : Rule Components : Truth of Matter Asserted
Evidence : Judicial Admissions : Pleadings
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Procedural Considerations : Preliminary Questions : General Overview
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview
Evidence : Procedural Considerations : Rule Application & Interpretation
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview
Evidence : Scientific Evidence : Autopsies
Evidence : Scientific Evidence : DNA
Evidence : Scientific Evidence : Sobriety Tests
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : General Overview
Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility
Evidence : Testimony : Credibility : Impeachment : Prior Conduct
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements
Evidence : Testimony : Credibility : Rehabilitation
Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Refreshing Recollection : Refreshing During Testimony
Family Law : Child Custody : Awards : General Overview
Family Law : Child Support : Obligations : Modification : General Overview
Family Law : Family Protection & Welfare : Cohabitants & Spouses : Abuse, Endangerment & Neglect
Family Law : Parental Duties & Rights : Termination of Rights : General Overview
Governments : Legislation : Statutes of Limitations : Time Limitations
Immigration Law : Duties & Rights of Aliens : Discrimination
Insurance Law : Motor Vehicle Insurance : Coverage : Compulsory Coverage : Certificates of Insurance
Labor & Employment Law : Disability & Unemployment Insurance : Unemployment Compensation : Review

Labor & Employment Law : Discrimination : Disparate Treatment : Proof : Burdens of Proof
Labor & Employment Law : Wage & Hour Laws : Statutes of Limitations
Legal Ethics : Sanctions : Disciplinary Proceedings : General Overview
Real Property Law : Adverse Possession : General Overview
Torts : Business Torts : Fraud & Misrepresentation : Actual Fraud : Elements
Torts : Damages : Compensatory Damages : Medical Expenses

LexisNexis (R) Notes

Business & Corporate Law : Agency Relationships : Authority to Act : Admissions by Agent

1. In a case in which a commercial tenant argued that the trial court erred in excluding a string of emails between its landlord's prior counsel and the tenant's counsel, dated prior to the filing of the underlying lawsuit, the emails were admissible because while the landlord's attorney's statement was in the nature of an opinion rather than a declaration of fact, as long as an agent's statement was made during the existence of the employment relationship and concerned a matter within the scope of that employment, it was admissible against the principal, even if the agent had no authority to speak for the principal, pursuant to Tex. R. Evid. 801(e)(2)(D). However, the exclusion of the email correspondence was harmless because the evidence was merely cumulative, and because the tenant did not reasonably show that the exclusion of the evidence probably caused the rendition of an improper judgment. Cleveland Reg'l Med. Ctr., L.P. v. Celtic Props., L.C., 323 S.W.3d 322, 2010 Tex. App. LEXIS 7942 (Tex. App. Beaumont Sept. 30 2010).

Civil Procedure : Jurisdiction : Personal Jurisdiction & In Rem Actions : In Personam Actions : General Overview

2. In an appeal from the denial of a special appearance, exhibits challenged by a foreign manufacturer were not hearsay because they were not offered to prove the truth of any matter asserted within the documents. The exhibits helped to establish minimum contacts for purposes of personal jurisdiction and included invoices and letters and emails about product pricing, testing, drawings, shipment, and inspection and about past due payments and letters of credit. Ho Wah Genting Kintron Sdn Bhd v. Leviton Mfg. Co., 163 S.W.3d 120, 2005 Tex. App. LEXIS 1414, CCH Prod. Liab. Rep. P17391 (Tex. App. San Antonio 2005).

Civil Procedure : Jurisdiction : Personal Jurisdiction & In Rem Actions : In Personam Actions : Challenges

3. Personal jurisdiction under Tex. Civ. Prac. & Rem. Code Ann. § 17.042 was lacking over California residents in an action for breach of a partnership agreement; evidence of ownership of Texas property and related travel did not establish personal jurisdiction, and affidavits that failed to set forth the place and terms of the alleged agreement and contained hearsay statements were properly excluded under Tex. R. Civ. P. 120a(3) and Tex. R. Evid. 801(d). Rattner v. Contos, 2009 Tex. App. LEXIS 894, 2009 WL 330966 (Tex. App. San Antonio Feb. 11 2009).

Civil Procedure : Pleading & Practice : Pleadings : Amended Pleadings : General Overview

4. Will contestant could properly seek discovery of a will proponent regarding her offer of a different will for probate, even though the proponent had amended her petition and offered an earlier will for probate, because under Tex. R. Evid. 801(e)(2), admissions of a party-opponent were admissible, and Rule 801(e)(2) included superseded pleadings. In re Willie, 2012 Tex. App. LEXIS 1159 (Tex. App. Houston 14th Dist. Feb. 14 2012).

Civil Procedure : Discovery : Methods : Oral Depositions

5. In a will contest, the trial court erred by granting summary judgment on the issue of testamentary capacity because testimony from witnesses that decedent was not in a state of mind to conduct financial affairs when he

signed his will was sufficient to show the existence of a material fact issue with respect to testamentary capacity. The court was permitted to consider the partial deposition testimony of several witnesses as statements which were not hearsay under Tex. R. Evid. 801(e)(3)'s provision for a deposition taken in the same civil proceeding. In re Estate of O'Neil, 2012 Tex. App. LEXIS 7376, 2012 WL 3776490 (Tex. App. San Antonio Aug. 31 2012).

Civil Procedure : Discovery : Methods : Perpetuation of Testimony

6. Mandamus relief was conditionally granted where a former employee sought to take a presuit deposition under Tex. R. Civ. P. 202 because the record contained no evidence; neither the employee's verified pleadings nor a letter from his counsel was admitted. Even if they had been, pleadings were not competent evidence, and letter contained hearsay within hearsay. In re Contractor's Supplies, Inc., 2009 Tex. App. LEXIS 6396, 2009 WL 2488374 (Tex. App. Tyler Aug. 17 2009).

Civil Procedure : Summary Judgment : Evidence

7. Statements in a proof of loss form relating to the date of hail damage were competent summary judgment evidence because they constituted admissions under Tex. R. Evid. 801(e)(2). Even if the statements in the proof of loss form were not binding or conclusive, they were considered prima facie evidence of the facts stated therein; moreover, expert testimony was not required on the issue of whether hail occurred on a certain date and caused property damage. United States Fire Ins. Co. v. Lynd Co., 2012 Tex. App. LEXIS 3206, 2012 WL 1430541 (Tex. App. San Antonio Apr. 25 2012).

Civil Procedure : Summary Judgment : Standards : General Overview

8. Trial court erred in overruling the couple's objections to the travel club's summary judgment evidence and in granting summary judgment, as the sworn affidavit by the club's customer service manager, and a series of documents attached to another affidavit, were not admissible because of his lack of personal knowledge and because the documents constituted hearsay, where the manager stated that he based his assertion of the fact that there had been a refund to the couple upon information that he obtained from a third party. Thus, the club failed to establish that the couple were not entitled to damages as a matter of law. Powell v. Vavro, McDonald, & Assocs., L.L.C., 136 S.W.3d 762, 2004 Tex. App. LEXIS 5260 (Tex. App. Dallas 2004).

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

9. In a case alleging breach of guaranty, an affidavit concerning a statement made by an alleged guarantor was not sufficient summary judgment evidence because it was hearsay. Roye Enters. v. Roper, 2005 Tex. App. LEXIS 5945 (Tex. App. Fort Worth July 28 2005).

10. Trial court erred in overruling the couple's objections to the travel club's summary judgment evidence and in granting summary judgment, as the sworn affidavit by the club's customer service manager, and a series of documents attached to another affidavit, were not admissible because of his lack of personal knowledge and because the documents constituted hearsay, where the manager stated that he based his assertion of the fact that there had been a refund to the couple upon information that he obtained from a third party. Thus, the club failed to establish that the couple were not entitled to damages as a matter of law. Powell v. Vavro, McDonald, & Assocs., L.L.C., 136 S.W.3d 762, 2004 Tex. App. LEXIS 5260 (Tex. App. Dallas 2004).

11. Hearsay cannot be made the basis of summary judgment. Koehler v. Sears, Roebuck & Co., 2001 Tex. App. LEXIS 3701 (Tex. App. Dallas June 6 2001).

12. Because the contractor's unsworn, handwritten statement was not made during any employment relationship between the department-store corporation and the contractor concerning repairs to the owner's house, the contractor's unsworn statement was not admissible under Tex. R. Evid. 801(e)(2)(D), which provided an exception to the hearsay rule. Koehler v. Sears, Roebuck & Co., 2001 Tex. App. LEXIS 3701 (Tex. App. Dallas June 6 2001).

Civil Procedure : Trials : Jury Trials : Jury Instructions : Requests for Instructions

13. Portion of the automobile manufacturer's spreadsheet reflecting the 67 code 56 claims concerning airbags was admissible as an admission by a party opponent under Tex. R. Evid. 801 because the spreadsheet was created by the manufacturer and produced in discovery, and a witness testified that the 67 open circuits reflected on the spreadsheet were all claims submitted to the manufacturer and paid because technicians confirmed the claims all involved defects. Because the manufacturer did not request a limiting instruction as to the statements from customers listed on the spreadsheet or the remainder of the warranty claims, the inclusion of the items was not ground for complaint on appeal. Kia Motors Corp. v. Ruiz, 348 S.W.3d 465, 2011 Tex. App. LEXIS 6144, CCH Prod. Liab. Rep. P18719 (Tex. App. Dallas Aug. 5 2011).

Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials

14. In a negligent misrepresentation case, the court properly denied a motion for new trial due to juror misconduct because appellant, in order to demonstrate jury misconduct, relied upon four juror affidavits containing remarks made by other jurors during trial breaks, and thus, the affidavits constituted hearsay. Innovative Truck Storage, Inc. v. Airshield Corp., 2007 Tex. App. LEXIS 4883 (Tex. App. Corpus Christi June 21 2007).

Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus

15. Mandamus relief was conditionally granted where a former employee sought to take a presuit deposition under Tex. R. Civ. P. 202 because the record contained no evidence; neither the employee's verified pleadings nor a letter from his counsel was admitted. Even if they had been, pleadings were not competent evidence, and letter contained hearsay within hearsay. In re Contractor's Supplies, Inc., 2009 Tex. App. LEXIS 6396, 2009 WL 2488374 (Tex. App. Tyler Aug. 17 2009).

Civil Procedure : Appeals : Briefs

16. In a case involving a repossession of a vehicle by a creditor, a debtor's claim that a trial court erred by failing to admit exhibits on hearsay grounds was inadequately briefed where the debtor did not explain whether the exhibits were not hearsay or whether they were hearsay, but nevertheless should have been admitted under some exception to the hearsay rule. Flores v. James Wood Fin. Llc, 2013 Tex. App. LEXIS 7488 (Tex. App. Fort Worth June 20 2013).

Civil Procedure : Appeals : Reviewability : Preservation for Review

17. Because the detective failed to address each document he objected to, identify which parts of the document contained hearsay and hearsay within hearsay, and explain why the documents were not admissible as a statement by a party opponent, his claim was rejected on appeal. Both at trial and on appeal, the detective made a blanket objection without identifying each part of each statement that contained hearsay with hearsay, and as such, his objection was not sufficiently specific to preserve error. Flores v. City of Liberty, 318 S.W.3d 551, 2010 Tex. App. LEXIS 6298 (Tex. App. Beaumont Aug. 5 2010).

18. State bar complaint was properly introduced into evidence during a disciplinary matter for several reasons; it did not constitute hearsay because it was merely introduced to show that it was used to launch an investigation.

Moreover, to the extent that the lawyer argued that a signature on the complaint was inadmissible as fraudulent, that matter was not preserved for appellate review since no such objection was raised before a trial court. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 351 (Tex. App. Houston 14th Dist. Jan. 20 2009).

19. In an appeal from a divorce judgment, the husband waived his arguments as to the exclusion of his evidence as hearsay where he cited no authority for an excluded statement, but merely argued that it was not presented for the truth of the matter asserted and listed Tex. R. Evid. 801, 802, and 803. Lorant v. Lorant, 2004 Tex. App. LEXIS 1641 (Tex. App. Dallas Feb. 19 2004).

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

20. Trial court did not abuse its discretion by excluding courtesy cards completed by bus passengers after the accident containing their witness statements because the statements written on the cards injected the possibility of calculated misstatements into the equation such that the trustworthiness of the witness accounts was called into doubt and they were given to an interested party. Via Metro. Transit Auth. v. Barraza, 2013 Tex. App. LEXIS 14609, 2013 WL 6255761 (Tex. App. San Antonio Dec. 4 2013).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

21. In an eviction action, the apartment manager's testimony that the police department received a disturbance call was inadmissible hearsay; its admission was harmless because she had already testified, without objection, that law enforcement had been called to respond to the disturbance. A police officer also testified that he was called to assist other officers on the scene and personally witnessed a disturbance. Black v. Countryside Vill. Apts., 2013 Tex. App. LEXIS 14853, 2013 WL 6506303 (Tex. App. Houston 1st Dist. Dec. 10 2013).

22. In a child abuse case, if there was error in admitting a doctor's affidavit regarding the child's cause of death over defendant's hearsay objection, it was cured and rendered harmless by the doctor's expansive testimony to these same matters; defendant lodged no objection to this trial testimony. Taylor v. State, 2007 Tex. App. LEXIS 6898 (Tex. App. Dallas Aug. 28 2007).

Constitutional Law : Bill of Rights : Fundamental Rights : Search & Seizure : Probable Cause

23. In defendant's criminal trial, testimony of arresting officer as to an out of court statement that defendant's car "had been possibly involved in a robbery three days earlier" was not hearsay under Tex. R. Evid. 801(d) where the testimony was not offered to prove the truth of the matter asserted; rather, it was offered to show probable cause for the detention of the defendant for traffic violations. Ellis v. State, 99 S.W.3d 783, 2003 Tex. App. LEXIS 1445 (Tex. App. Houston 1st Dist. 2003).

Constitutional Law : Bill of Rights : Fundamental Rights : Procedural Due Process : Self-Incrimination Privilege

24. Trial court did not violate defendant's constitutional privilege against self-incrimination by allowing the State to read into evidence a portion of the testimony he gave at the punishment phase of a previous trial on another charge because the testimony was given for a limited purpose in the prior proceeding in order to mitigate the punishment in that case and was not hearsay under Tex. R. Evid. 801(e)(2)(A). Lacey v. State, 2013 Tex. App. LEXIS 8017 (Tex. App. Dallas June 28 2013).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Assistance of Counsel

25. Defendant's claim that he was denied effective assistance of counsel in violation of U.S. Const. amend. VI and Tex. Const. art. I, § 10 solely because his attorney failed to object to certain testimony that was allegedly intended to elicit a hearsay statement, Tex. R. Crim. Evid. 801, 802, was without merit where the record was silent regarding counsel's trial strategy for not objecting immediately to the testimony and the court could not say that no reasonable counsel would not have objected to the testimony. As the record reflected that counsel filed pretrial motions, vigorously cross-examined witnesses, and objected to the admission of other evidence, defendant failed to prove by a preponderance of the evidence that, but for his counsel's failure to object to the particular testimony, a reasonable probability existed that a different outcome would have resulted. Payne v. State, 1998 Tex. App. LEXIS 2198 (Tex. App. Dallas Apr. 15 1998).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

26. Out-of-court statements were non-testimonial and did not violate the Confrontation Clause because the statements were non-hearsay statements made by a co-conspirator; moreover, the trial court did not abuse its discretion in finding the probative value of the evidence was not outweighed by the danger of unfair prejudice. Agyin v. State, 2013 Tex. App. LEXIS 13337 (Tex. App. San Antonio Oct. 30 2013).

27. Confrontation Clause did not require the admission of multi-level hearsay to impeach the complainant and her mother in defendant's trial for continuous sexual abuse of a child. The unnamed declarant's statement that someone made child-molestation allegations against defendant was inadmissible hearsay under Tex. R. Evid. 801, 802, because it was an out-of-court-statement offered for the truth of the matter asserted -- to show that someone made child-abuse allegations against defendant to child protective services. Shafer v. State, 2012 Tex. App. LEXIS 1902, 2012 WL 745422 (Tex. App. Fort Worth Mar. 8 2012).

28. Trial court did not violate defendant's Sixth Amendment right to confrontation in a community supervision revocation proceeding by admitting documentary evidence that defendant and the passenger of his truck were listed in police gang unit reports as self-admitted gang members. The challenged evidence was not testimonial hearsay under Tex. R. Evid. 801(e)(2)(A), because it was not offered for the truth of the matter asserted -- that defendant was a gang member -- but rather for the fact that he was listed in a report as having claimed gang membership. Cantu v. State, 339 S.W.3d 688, 2011 Tex. App. LEXIS 854 (Tex. App. Fort Worth Feb. 3 2011).

29. In defendant's capital murder case, the trial court did not err by overruling his objections to statements made by a detective in the video-taped interview wherein the detective challenged defendant's version of the events because the statements were not hearsay because they were offered solely to show their effect on defendant's demeanor, thus permitting the jury to evaluate his credibility. Additionally, because the complained-of statements were not offered for the truth of the matter asserted, the Confrontation Clause did not bar admission of the statements. Padilla v. State, 2009 Tex. App. LEXIS 6552, 2009 WL 5247434 (Tex. App. Corpus Christi Aug. 20 2009), *aff'd,*326 S.W.3d 195, 2010 Tex. Crim. App. LEXIS 1239 (Tex. Crim. App. 2010).

30. In a capital murder case, the statements of a coconspirator were not hearsay and were admissible under Tex. R. Evid. 801(e)(2)(E), since the non-testimonial statements were made in furtherance of the conspiracy. The coconspirator's admission of his involvement in the murder to his brother was not a testimonial confession, and so it was irrelevant that confessions by an accomplice that implicated another were not a firmly rooted exception to the hearsay rule, and if the conspiracy at issue was treated broadly as an agreement to commit a robbery and murder and to escape capture, the statements could be understood as being part of a conspiracy, given that they were made to impress upon the brother the importance of the flight of the conspirator and appellant. Arroyo v. State, 239 S.W.3d 282, 2007 Tex. App. LEXIS 5111 (Tex. App. Tyler 2007).

31. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause

because both complainants testified. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

32. Murder defendant's out-of-court statement that he knew the victim had stolen his boat motor and that he was going to take care of the victim was not hearsay, but an admission of a party-opponent under Tex. R. Evid. 801(e)(2)(A). Therefore, there was no violation of the confrontation clause when the statement was admitted. Hartless v. State, 2006 Tex. App. LEXIS 5066 (Tex. App. Tyler June 14 2006).

33. In a trial for attempted sexual performance by a child, there was no error in the admission, at the punishment phase, of evidence that the Army had found child pornography on defendant's service-issued laptop computer. Defendant's comments in a telephone conversation with his then-wife about the discovery were non-testimonial for purposes of the Confrontation Clause and were properly admitted as an admission by a party opponent under Tex. R. Evid. 101(c) and 801. Smith v. State, 2006 Tex. App. LEXIS 2062 (Tex. App. Austin Mar. 16 2006).

34. Drug defendant's confrontation rights were not violated by the admission of an informant's testimony that a declarant, who agreed to sell her drugs, said that defendant was his right hand man. The Crawford standard did not apply because the declarant's statements were not testimonial; under the Ohio v. Roberts standard, the admission was proper under the co-conspirator exception to the hearsay rule, Tex. R. Evid 801(e)(2)(E). Mancilla v. State, 2005 Tex. App. LEXIS 3334 (Tex. App. Dallas May 3 2005).

Contracts Law : Contract Interpretation : Parol Evidence : General Overview

35. Claimants were not allowed to introduce parol evidence to establish survivorship interests in alleged joint accounts because there was no fraud nor mistake pled, nor any claim that certificate of deposit (CD) agreements were incomplete or ambiguous; relying on Tex. Prob. Code Ann. § 439, the Deadman's Statute under Tex. R. Evid. 601, the parol evidence rule, the "four corners of the document" rule, hearsay under Tex. R. Evid. 801, and double hearsay, an estate was correct in asserting that the claimants could not use extrinsic evidence in an attempt to get around the four corners of the CDs. Clark v. Wells Fargo Bank, N.A., 2008 Tex. App. LEXIS 2211 (Tex. App. Houston 1st Dist. Mar. 27 2008).

Contracts Law : Remedies : Specific Performance

36. In a collection suit by a creditor that purchased the debt from a credit card company, it was proper to admit monthly statements from the credit card company as business records. The documents were not inadmissible hearsay under Tex. R. Evid. 801(d). Simien v. Unifund Ccr Partners, 2010 Tex. App. LEXIS 2687, 2010 WL 1492267 (Tex. App. Houston 1st Dist. Apr. 15 2010).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview

37. In a possession of pseudoephedrine with intent to manufacture methamphetamine case, the labeling on the cold medicine bottles constituted hearsay because it was an extrajudicial assertion offered to prove the truth of the matter asserted that the tablets contained pseudoephedrine; however, the labels were generally relied upon by the public, which suggested that the cold medication labels were accurate and trustworthy; thus, pursuant to Tex. R. Evid. 803, the labels were admissible as an exception to the hearsay rule. Shaffer v. State, 184 S.W.3d 353, 2006 Tex. App. LEXIS 410 (Tex. App. Fort Worth 2006).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

38. In a criminal prosecution for possession of marihuana, defense counsel was not ineffective for failing to object to the admission of the hearsay statement made by defendant to his father that he was holding the marihuana for someone else, that defendant owed someone $1,000.00, and that he had to get the marihuana back from his father so he could return it to that person. Under Tex. R. Evid. 801(e)(2)(A), the statement was an admission against interest, a hearsay exception. Esser v. State, 2004 Tex. App. LEXIS 3764 (Tex. App. Texarkana Apr. 29 2004).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements

39. In a case dealing with possession of a controlled substance, over 400 grams of cocaine, with intent to deliver that was found in defendant's truck, there was evidence offered through a videotape of the incident in which defendant responded to a question by an officer by stating that the truck was his; defendant affirmatively stated he had no objection to the admission of that videotape; accordingly, proof of ownership of the truck was adequately shown; thus, pursuant to Tex. R. Evid. 801, the erroneous admission of hearsay testimony regarding proof of ownership of the truck was harmless. Barnes v. State, 2006 Tex. App. LEXIS 4328 (Tex. App. Texarkana May 19 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

40. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : Aggravated Offenses

41. In a trial for aggravated assault with a deadly weapon under, the trial court did not err by excluding the hearsay recitals in an arrest warrant affidavit and complaint indicating the complainant had previously committed an assault on the defendant; defendant was not prevented from confronting the complainant; he was permitted to cross-examine the complainant concerning his previous conviction for aggravated assault. Bradshaw v. State, 2006 Tex. App. LEXIS 5891 (Tex. App. Houston 1st Dist. July 6 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

42. In a trial for family assault, testimony concerning the complainant's statements was properly admitted as excited utterance; the complainant was visibly shaken and highly upset and her intoxication did not negate her state of excitement. Hudson v. State, 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

43. In a trial for assault on a family member, the complainant's statement to officers and an emergency medical technician was properly admitted under the excited utterance exception to the hearsay rule. The complainant's intoxication did not call into question whether her mind was dominated by a state of excitement; the three witnesses testified that she was visibly shaken and highly upset when they arrived within five minutes of receiving the assault

call. Hudson v. State, 2005 Tex. App. LEXIS 7386 (Tex. App. Houston 14th Dist. Sept. 8 2005), opinion withdrawn by, substituted opinion at 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault

44. In a trial for assault involving family violence, the victim's nonverbal out-of-court statement (blinking to indicate "yes" in response to the question of whether defendant choked her) was properly admitted as an excited utterance because the officer observed that she was extremely frightened and she did not have sufficient time or composure to fabricate an answer. Miller v. State, 2013 Tex. App. LEXIS 7679 (Tex. App. Tyler June 25 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Penalties

45. In the punishment phase of a domestic assault trial, any error was harmless from admitting a recording of conversations between a 911 operator and a hospital employee who was responding to the complainant's injuries because the complainant plainly testified at trial that defendant had hit her with a closed fist in her eye. Sanders v. State, 422 S.W.3d 809, 2014 Tex. App. LEXIS 1090, 2014 WL 325028 (Tex. App. Fort Worth Jan. 30 2014).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

46. There was no hearsay error in admitting an officer's testimony that the owner of the vehicle used in a robbery told the officer that he lent his car to defendant in exchange for illegal drugs because the testimony explained how defendant became a suspect. Green v. State, 2012 Tex. App. LEXIS 3611, 2012 WL 1606238 (Tex. App. Houston 14th Dist. May 8 2012).

47. In a robbery trial, the state was properly permitted to read to the jury an audio-recorded statement defendant made in a telephone call to his wife while he was in jail because under Tex. R. Evid. 801(e)(2), defendant's statement was not hearsay and did not have to be against defendant's interest under Tex. R. Evid. 803(24). Robinson v. State, 2012 Tex. App. LEXIS 365, 2012 WL 130616 (Tex. App. Dallas Jan. 18 2012).

48. In a trial for an aggravated robbery that occurred in a motel, the trial court did not err in refusing to admit into evidence, as an admission by a party opponent, the complainant's civil pleading in his lawsuit against the motel. The complainant was not a party opponent. Davis v. State, 177 S.W.3d 355, 2005 Tex. App. LEXIS 2714 (Tex. App. Houston 1st Dist. 2005).

49. State, not the victim, is the party-opponent of the accused in a criminal proceeding. Therefore, a statement by a victim or complainant in a criminal case is not admissible under Tex. R. Evid. 801(e)(2) as an admission by a party opponent. Davis v. State, 177 S.W.3d 355, 2005 Tex. App. LEXIS 2714 (Tex. App. Houston 1st Dist. 2005).

50. Trial court did not err when it allowed a police officer to testify that defendant's girlfriend told the officer that defendant went by a certain name as his "street" name because the girlfiend herself testified that defendant went by that name and, further, the complainant and the other eyewitness both identified defendant and testified they knew him by his street name. Thus, the alleged hearsay was not the only evidence that defendant went by that street name. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Unarmed Robbery : General Overview

51. Trial court did not err in admitting hearsay evidence through a restaurant's assistant manager, that an employee loaned money to defendant and that defendant said he was going to repay him, because statement's relevancy did not hinge on the truth of the matters asserted but rather was used to establish that a conversation took place. Conley v. State, 2006 Tex. App. LEXIS 4619 (Tex. App. Dallas May 30 2006).

Criminal Law & Procedure : Criminal Offenses : Fraud : Fraud Against the Government : General Overview

52. In a criminal trial for presenting a false insurance card, in violation of Tex. Penal Code Ann. § 37.10(a)(5), the statement of the insurance company's computer to officers regarding the validity of the policy was hearsay under Tex. R. Evid. 801(d). However, defendant waived any error by failing to object, as required by Tex. R. App. P. 33.1. Fuller v. State, 2009 Tex. App. LEXIS 6978 (Tex. App. Corpus Christi Aug. 31 2009).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

53. Defendant was entitled to a new trial for the murder of her stepfather because of new evidence, specifically, information from defendant's former boyfriend about her outcry 30 years earlier regarding sexual abuse by the stepfather; the outcry evidence rebutted the State's claim of recent fabrication. Carsner v. State, 415 S.W.3d 507, 2013 Tex. App. LEXIS 12563, 2013 WL 5561653 (Tex. App. El Paso Oct. 9 2013).

54. In defendant's murder case, a witness's statement that "spending time with defendant that night was going to be the worst mistake he ever made" was erroneously admitted because the statement was hearsay, and it contained a dramatic piece of information not communicated in the earlier testimony. Martin v. State, 151 S.W.3d 236, 2004 Tex. App. LEXIS 9437 (Tex. App. Texarkana 2004).

55. In a murder case, a court did not err in allowing a witness to testify about another's hearsay statements implicating defendant as the murderer where he failed to object when the same evidence was presented again. Williams v. State, 2004 Tex. App. LEXIS 7777 (Tex. App. Houston 1st Dist. Aug. 26 2004).

56. Witness in murder trial was properly allowed to testify to an out-of-court statement made by defendant's brother. Both the witness and the brother were part of a conspiracy to hinder defendant's apprehension by assisting in disposing of the body and cleaning up the scene; the court therefore found the statement to be an admission by a party opponent under Tex. R. Evid. 801(e)(2). Byrd v. State, 2004 Tex. App. LEXIS 791 (Tex. App. Austin Jan. 29 2004), *aff'd*, 187 S.W.3d 436, 2005 Tex. Crim. App. LEXIS 2128 (Tex. Crim. App. 2005, no pet.).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

57. District court did not abuse its discretion in denying defendant's motion to sever her murder for remuneration trial from those of her two co-defendants because the vast majority of statements made by the co-defendants did not tend to implicate defendant in the offense; to the extent the co-defendants' statements could be perceived as prejudicial against defendant, such prejudice could be adequately addressed by lesser curative measures, such as limiting instructions. Even if defendant had been tried separately, one co-defendant's statements would have been admissible against defendant under Tex. R. Evid. 801(e)(2)(E). Briggs v. State, 2012 Tex. App. LEXIS 7131, 2012 WL 3629811 (Tex. App. Austin Aug. 24 2012).

58. In a murder trial, testimony that the witness telephoned and finally contacted the victim on the day of the murder and that the victim simply gave an explanation for a delay (without more) was not hearsay and thus was properly admitted. Russo v. State, 228 S.W.3d 779, 2007 Tex. App. LEXIS 4499 (Tex. App. Austin 2007).

59. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary

60. Officer's statement that a burglary victim named defendant as a possible suspect was not hearsay because it was not offered to prove the truth of the matter asserted but rather to explain why defendant became a suspect. Keith v. State, 384 S.W.3d 452, 2012 Tex. App. LEXIS 8860 (Tex. App. Eastland Oct. 25 2012).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview

61. In a criminal trial for theft of property where defendant was charged with financial exploitation based on undue influence, the trial court did not err by admitting hearsay evidence of the Kelly bluebook value of a Ford Explorer that the victims purchased and signed over to defendant; the evidence was admissible under Tex. R. Evid. 803, the hearsay exception for published compilations. Jacks v. State, 2006 Tex. App. LEXIS 1968 (Tex. App. Tyler Mar. 15 2006).

62. In defendant's motor vehicle theft case, a court did not err in admitting a statement where the witness's testimony about another's condition was not a statement offered in evidence to prove the truth of the matter asserted, and therefore, the testimony was not hearsay. Roy v. State, 161 S.W.3d 30, 2004 Tex. App. LEXIS 6712 (Tex. App. Houston 14th Dist. 2004).

63. In defendant's theft case, a court's error in excluding evidence that the declarant told defendant to move a trailer was harmless where defendant's sister testified that the employer told her defendant moved a trailer for the declarant, and through the testimony of the two witnesses, the jury heard essentially the same evidence the trial court initially excluded: that the declarant hired defendant to move a trailer. Gibson v. State, 2004 Tex. App. LEXIS 3198 (Tex. App. Beaumont Apr. 7 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Prostitution : General Overview

64. In a trial for promotion of prostitution, an agent's testimony was properly admitted because the statement was not hearsay to the extent that he was testifying to about defendant's statement when the agent inquired into the cost for sex, and statements by purported prostitutes to the agents were also not hearsay because they had legal significance in demonstrating the promotion of prostitution at a club in which defendant was a manager and were not used to prove the fact that the declarant was indeed available and that sex acts would be performed. Yo-Se Hsu v. State, 2004 Tex. App. LEXIS 5472 (Tex. App. Houston 14th Dist. June 22 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

65. Defendant was entitled to a new trial on two counts of aggravated sexual abuse of a child where the trial court reversibly erred by admitting the testimony of the officer and a child protective services investigator regarding the victim's prior statements because it was inadmissible impeachment evidence of the victim's trial testimony, during which she recanted her allegations against defendant; the error was not harmless because without the investigator's testimony, the State would not have proven penetration. Klein v. State, 191 S.W.3d 766, 2006 Tex.

App. LEXIS 2790 (Tex. App. Fort Worth 2006).

66. In a sexual assault trial, the complainant's statement to police was properly admitted under the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2). The complainant had run into a store crying, shaking, and screaming that she had just been raped at gunpoint by two men in a van and needed help; the police were called within three to four minutes and arrived approximately five minutes later, when she was still under the influence of the trauma she just experienced and appeared to be in shock. Ascencio v. State, 2005 Tex. App. LEXIS 1449 (Tex. App. Houston 14th Dist. Feb. 24 2005).

67. In defendant's sexual assault case, a witness's testimony regarding defendant's statement to him was properly admitted where it was clearly not hearsay and thus its admission, even though erroneously described by the trial judge as occurring under Tex. R. Evid 613, was proper under Tex. R. Evid. 801(e)(2)(A) and did not violate defendant's constitutional rights. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements

68. In a trial for defendant's sexual assault of his wife, who recanted in her trial testimony, the trial court properly admitted statements that the victim made shortly after the assault under the excited utterance exception to the hearsay rule of Tex. R. Evid. 801; it was reasonable to find that the victim was still dominated by the emotions, excitement, fear, or pain of being sexually assaulted, hit, and threatened with death, over the course of several hours. Davis v. State, 2007 Tex. App. LEXIS 352 (Tex. App. Dallas Jan. 18 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

69. In a sexual assault trial, it did not violate the hearsay rule to admit the complainant's account of what happened, as told to a sexual assault nurse examiner, because the complainant's statements regarding the incident were necessary for purposes of medical diagnosis and treatment and thus came under the medical treatment exception. Williams v. State, 2014 Tex. App. LEXIS 2618, 2014 WL 895506 (Tex. App. Waco Mar. 6 2014).

70. In defendant's sexual assault of a child case, the court properly allowed testimony under the excited utterance exception because the victim told a witness that defendant told her to open her mouth and that was going to stick his penis in her mouth. Although a quarter of an hour passed, the victim was shaking and crying. Ervin v. State, 2013 Tex. App. LEXIS 8213 (Tex. App. Dallas July 3 2013).

71. In defendant's trial on a charge of continuous sexual assault of a child less than 14 years of age in violation of Tex. Penal Code Ann. § 21.02, where defendant claimed that the victim, his stepdaughter, fabricated her allegations so that she could live with her biological father and his wife, the victim's prior consistent statement in the form of a videotaped out-of-court statement was admissible under Tex. R. Evid. 801(e)(1)(B) to rebut the allegation of recent fabrication. Castillo v. State, 2011 Tex. App. LEXIS 7182, 2011 WL 3853939 (Tex. App. Corpus Christi Aug. 31 2011).

72. In a sexual assault of a child case, the victim's mother's testimony regarding what the victim told her was admissible as an excited utterance because the time between when the grandmother witnessed the encounter and the victim made the declaration that defendant "put his private in her mouth" was 10 minutes and, throughout that period, the victim cried. Although the mother asked the victim what was wrong, the declaration was not the result of questioning and was a spontaneous declaration regarding the occurrence that caused the emotional state the victim was in at a time that the victim was still in that emotional state. In re A. W. B., 419 S.W.3d 351, 2010 Tex. App.

LEXIS 747 (Tex. App. Amarillo Feb. 2 2010).

73. In a case in which defendant was convicted of aggravated sexual assault under Tex. Penal Code Ann. § 22.021 and indecency with a child under Tex. Penal Code Ann. § 21.11, although defendant complained of the trial court's overruling of his hearsay objection to the State's question of what the victim told a professional about defendant's conduct, the admission of the testimony during the direct examination of the forensic interviewer was not harmful because it did no more than reiterate facts admitted elsewhere and even included testimony supportive of the defense. Moreover, even assuming, without deciding, that it was inadmissible hearsay, the substance of the complained-of testimony of the forensic interviewer was admitted elsewhere without limitation or an objection preserved on appeal, and, thus, the error, if any, of the trial court in admitting the statement of the forensic interviewer did not affect a substantial right of defendant and had to be disregarded. Drake v. State, 2010 Tex. App. LEXIS 716, 2010 WL 348365 (Tex. App. Amarillo Jan. 31 2010).

74. In a trial for child sexual assault, testimony from a clinical social worker about the complainant's statements was inadmissible hearsay under Tex. R. Evid. 801(d), 802. The testimony was not admissible under the medical-diagnosis-and-treatment exception of Tex. R. Evid. 803(4) because the record did not show that the child-complainant understood that the statements identifying defendant as the perpetrator were for the purpose of medical diagnosis or treatment. Nasrollah Hanjani Alizadeh v. State, 2009 Tex. App. LEXIS 1423 (Tex. App. Houston 1st Dist. Feb. 26 2009).

75. After defendant testified that a child assault victim had fabricated the story to bolster her mother's position to child services workers that she was a good mother, a video recording of a forensic interview of the victim was admissible as showing the child's prior consistent statements under Tex. R. Evid. 801(e)(1)(B). Werner v. State, 2008 Tex. App. LEXIS 8659 (Tex. App. Texarkana Nov. 19 2008).

76. In defendant's sexual assault trial, a trial court erred in permitting the hearsay testimony of a forensic interviewer as an outcry witness under Tex. Code Crim. Proc. Ann. art. 38.072, but the error was harmless because overwhelming evidence of defendant's guilt remained, especially the testimony of the child victim's counselor. Petrie v. State, 2008 Tex. App. LEXIS 5867 (Tex. App. Texarkana Aug. 6 2008).

77. In a case involving indecency with a child, a videotape that showed a forensic interview of a victim was admissible because defense counsel raised a suggestion that the victim consciously altered her testimony by alleging fabrication and undue influence; therefore, the videotape was a prior consistent statement under Tex. R. Evid. 801(e)(1)(B). Defendant's reliance on Tex. Code Crim. Proc. Ann. art. 38.071 and Long v. State, 742 S.W.2d 302 (Tex. Crim. App. 1987), was misplaced. Torris v. State, 2008 Tex. App. LEXIS 5749 (Tex. App. Dallas July 31 2008).

78. In a trial for sexual assault on a child, the complainant's prior consistent statements were properly admitted because defendant's implication of recent fabrication was clear from the closing argument, which stated that the complainant conspired with a civil attorney to fabricate dates that would support the claim that the complainant was under 17 years old at the time of the incidents for purposes of a civil lawsuit. Hammons v. State, 239 S.W.3d 798, 2007 Tex. Crim. App. LEXIS 1632 (Tex. Crim. App. 2007).

79. Any error in admitting a sexual assault nurse examiner's testimony, over defendant's hearsay objection, about a study conducted by another person explaining why a child victim of a sexual assault would not show evidence of trauma to her private parts was harmless given the overwhelming evidence of defendant's guilt that was introduced at trial. Garza v. State, 2007 Tex. App. LEXIS 7194 (Tex. App. Corpus Christi Aug. 28 2007).

80. In defendant's sexual assault on a child case, a court properly allowed outcry testimony from a psychotherapist who treated the victim because, although the witness's testimony concerning the victim's statement did not specify the manner or means of defendant's offenses, the victim's statement did clearly allege sexual abuse and clearly identified defendant as the abuser. Newton v. State, 2007 Tex. App. LEXIS 2477 (Tex. App. Waco Mar. 28 2007).

81. Although a trial court erred when it allowed a child's mother to testify that, shortly after a sexual assault was committed against the child, the child told her what happened during the offense, because the State did not qualify the statement as an outcry statement nor did it justify the admission of the statement as an exception to the hearsay rule, the error was waived when the same evidence was introduced at other points in the trial and defendant made no objection. Vargas v. State, 2006 Tex. App. LEXIS 4525 (Tex. App. Texarkana May 26 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements

82. In a trial for indecency with a child, the trial court properly sustained the state's objection to a question directed at the victim's grandmother about information she learned from the victim's teacher. Peace v. State, 2012 Tex. App. LEXIS 10631, 2012 WL 6634691 (Tex. App. Dallas Dec. 21 2012).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

83. In a driving while intoxicated (DWI) case, defendant was unable to object to testimony regarding the abilities of other individuals arrested for DWI on the basis of the Sixth Amendment, Tex. Const. art. I, § 10, Tex. R. Evid. 801, and Tex. Code Crim. Proc. Ann. art. 1.25 because the issues were not raised to the trial court; moreover, his preserved complaints relating to comparative evidence and relevance were waived because the evidence came in without objection during other parts of the trial. Taylor v. State, 264 S.W.3d 914, 2008 Tex. App. LEXIS 6255 (Tex. App. Fort Worth 2008).

84. Officer's questions or instructions to a driving while intoxicated suspect, recorded on video, were not statements offered to prove the truth of the matter asserted, and thus, were not inadmissible hearsay under Tex. R. Evid 801(d). Fischer v. State, 207 S.W.3d 846, 2006 Tex. App. LEXIS 9432 (Tex. App. Houston 14th Dist. 2006).

85. Because an officer did not testify, his narrative observations of a driving while intoxicated suspect were not admissible as a prior statement under Tex. R. Evid. 801(e)(1). Fischer v. State, 207 S.W.3d 846, 2006 Tex. App. LEXIS 9432 (Tex. App. Houston 14th Dist. 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Traffic Regulation Violations : Elements

86. In cases involving offenses such as failure to signal a lane change, a court can determine whether an officer's decision that a driver committed a traffic violation is objectively reasonable without being presented with a detailed account of the officer's observations, and the testimony of the officer who stops the car is not necessary where only an objective finding is required since hearsay information can be provided; therefore, a motion to suppress evidence found in a car stopped for failing to signal a lane change under Tex. Transp. Code Ann. § 545.104 was properly denied because the testimony of an officer who did not stop the car was sufficient to meet the burden of proving a reasonable suspicion for the stop. Castro v. State, 227 S.W.3d 737, 2007 Tex. Crim. App. LEXIS 863 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : General Overview

87. In an aggravated sexual assault case, the trial court did not err in permitting a Texas Youth Commission official to testify based on his report summarizing juvenile defendant's behavior while at the Commission as the trial court was not precluded from considering hearsay testimony at a transfer/release hearing. In re R.M., 2004 Tex. App. LEXIS 11908 (Tex. App. San Antonio Nov. 3 2004).

Criminal Law & Procedure : Search & Seizure : Warrantless Searches : Consent to Search : General Overview

88. Trial court did not abuse its discretion by permitting the officer to testify that the truck driver did not know defendant's last name because the testimony was not offered for the truth of the matter asserted but only to show why the officer was suspicious and asked for consent to search the vehicle. Dominguez v. State, 474 S.W.3d 688, 2013 Tex. App. LEXIS 4875, 2013 WL 1748810 (Tex. App. Eastland Apr. 18 2013).

Criminal Law & Procedure : Interrogation : Miranda Rights : Custodial Interrogation

89. Murder defendant's statement to police, while he was in custody, was not the product of interrogation because the record indicated he made unsolicited, spontaneous statements that he was just defending himself with a knife. Because he was not subjected to interrogation, the statements were not obtained in violation of federal or state law and, therefore, were admissible at trial as admissions by a party opponent under Tex. R. Evid 801(e)(2). Clark v. State, 2005 Tex. App. LEXIS 2282 (Tex. App. Houston 1st Dist. Mar. 24 2005).

Criminal Law & Procedure : Pretrial Motions & Procedures : Joinder & Severance : Severance of Defendants

90. District court did not abuse its discretion in denying defendant's motion to sever her murder for remuneration trial from those of her two co-defendants because the vast majority of statements made by the co-defendants did not tend to implicate defendant in the offense; to the extent the co-defendants' statements could be perceived as prejudicial against defendant, such prejudice could be adequately addressed by lesser curative measures, such as limiting instructions. Even if defendant had been tried separately, one co-defendant's statements would have been admissible against defendant under Tex. R. Evid. 801(e)(2)(E). Briggs v. State, 2012 Tex. App. LEXIS 7131, 2012 WL 3629811 (Tex. App. Austin Aug. 24 2012).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

91. In a suppression hearing, the trial court properly denied defendant's hearsay objection under Tex. R. Evid. 801 and 803 because the rules of evidence did not apply. Diaz v. State, 2010 Tex. App. LEXIS 3203, 2010 WL 1714001 (Tex. App. Dallas Apr. 28 2010).

92. In cases involving offenses such as failure to signal a lane change, a court can determine whether an officer's decision that a driver committed a traffic violation is objectively reasonable without being presented with a detailed account of the officer's observations, and the testimony of the officer who stops the car is not necessary where only an objective finding is required since hearsay information can be provided; therefore, a motion to suppress evidence found in a car stopped for failing to signal a lane change under Tex. Transp. Code Ann. § 545.104 was properly denied because the testimony of an officer who did not stop the car was sufficient to meet the burden of proving a reasonable suspicion for the stop. Castro v. State, 227 S.W.3d 737, 2007 Tex. Crim. App. LEXIS 863 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

93. Although an aggravated assault complainant's testimony with respect to his injury was based in large part on hearsay under Tex. R. Evid. 801(d), any error in the admission of his testimony during the punishment phase of defendant's trial was harmless because the same or similar evidence came in elsewhere without objection. Accordingly, because similar evidence, not based on hearsay was admitted without objection, defendant had failed to show that there was a reasonable probability that, but for counsel's failure to object, the result of his punishment trial would have been different. Ramirez v. State, 2009 Tex. App. LEXIS 368, 2009 WL 1567340 (Tex. App. Corpus Christi Jan. 22 2009).

94. In community supervision revocation proceedings, counsel was not ineffective for failing to make a hearsay objection to testimony about information in defendant's community supervision file; even if the business records predicate under Tex. R. Evid. 803 was not established, the record did not affirmatively demonstrate that the State could not have established it. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Tests

95. Failure to object under Tex. R. Evid. 801 was not ineffective assistance of counsel because the witness's testimony did not constitute hearsay. Robinson v. State, 2007 Tex. App. LEXIS 9809 (Tex. App. Houston 1st Dist. Dec. 13 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

96. Defense counsel was not ineffective for failing to object to the victim's affidavit of forgery because it was admissible as a prior inconsistent statement, as the victim's uncertain testimony at trial about whether defendant's boyfriend had permission to write the check in question was inconsistent with her affidavit. Pearce v. State, 2014 Tex. App. LEXIS 549, 2014 WL 942687 (Tex. App. Waco Jan. 16 2014).

97. Defense counsel was not ineffective for failing to object to testimony from a detective and a bank employee about the victim's identification of the check as forged because the testimony was not hearsay, as it was offered to explain the bank's procedures and how defendant became a suspect. Pearce v. State, 2014 Tex. App. LEXIS 549, 2014 WL 942687 (Tex. App. Waco Jan. 16 2014).

98. Defendant failed to prove that counsel was deficient for failing to object to a detective's hearsay statements because the detective did not testify as an outcry witness but rather detailed her investigation of the sexual assault and provided an explanation of the events and circumstances leading to defendant's arrest; because the statements were not offered to prove the truth of the matter asserted, they were not hearsay. Aranda v. State, 2013 Tex. App. LEXIS 1882 (Tex. App. Austin Feb. 28 2013).

99. In a driving while intoxicated case, appellant failed to show that he received ineffective assistance of counsel because it was within the realm of trial strategy for defense counsel to decide not to cross-examine a deputy, and a failure to raise a hearsay objection was assumed to be a matter of trial strategy as well; appellant did not argue that his own statements were inadmissible hearsay since they constituted nonhearsay admissions of a party opponent. Gentry v. State, 2012 Tex. App. LEXIS 5980, 2012 WL 3023169 (Tex. App. Texarkana July 25 2012).

100. Counsel's repeated failure to raise valid hearsay objections to evidence of unproven extraneous offenses undermined the proper functioning of the adversarial process; the prosecutor described defendant to the jury as not only a drug dealer, but as a violent, gun toting gangster. Defendant was probation eligible since none of the offenses had been proven in court, and therefore, counsel's representation was so deficient that the trial on punishment could not be relied upon as having produced a just result. Johnson v. State, 2011 Tex. App. LEXIS

3522, 2011 WL 1902066 (Tex. App. Tyler May 11 2011).

101. Defendant's counsel was not ineffective because 1) defense counsel's strategy in introducing letters that suggested that the allegations against defendant were concocted was reasonable; 2) the record was silent on why counsel did not object to certain testimony and did not elicit testimony about the victim's past sexual behavior, and, thus, the appellate court had to conclude that defendant had not overcome the presumption that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy; 3) counsel's failure to object to the cards/letters written by defendant was not ineffective as they were not hearsay, but rather, admissions by a party-opponent under Tex. R. Evid. 801(e)(2)(A); and 4) there was no evidence in the record that defendant was prejudiced by counsel's actions, including failure to timely request a directed verdict. Holbert v. State, 2011 Tex. App. LEXIS 3395, 2011 WL 1679722 (Tex. App. Waco May 4 2011).

102. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

103. In a case in which a jury convicted defendant of aggravated assault and intoxication assault while operating a vehicle and made an affirmative deadly weapon finding, there was no merit to defendant's claim that his trial counsel was ineffective in failing to object to a statement by the officer overseeing the collection of defendant's blood at a hospital because although the officer stated that other officers told him that defendant was intoxicated, there was no indication that the statement was offered for the truth of the matter asserted, pursuant to Tex. R. Evid. 801; in fact, the statement was elicited in the context of laying the predicate to establish reasonable grounds for the officer's belief that defendant was intoxicated as required before the officer could take a blood sample, pursuant to Tex. Transp. Code Ann. § 724.012, and there was nothing in the record that affirmatively demonstrated that counsel's conduct was not grounded in legitimate trial strategy. Whitmore v. State, 2007 Tex. App. LEXIS 8889 (Tex. App. Dallas Nov. 8 2007).

104. In a case involving child sexual assault, a statement given by the child's mother would have not been admissible as an outcry statement since the child had already told someone else over 18 about an alleged incident, and a videotaped interview of the victim three years later was also not admissible under Tex. Code Crim. Proc. Ann. art. 38.072; however, the failure to object to these hearsay items did not result in ineffective assistance of counsel because there was a reasonable trial strategy relating to the believability of the victim. Hankey v. State, 231 S.W.3d 54, 2007 Tex. App. LEXIS 4161 (Tex. App. Texarkana 2007).

105. During defendant's criminal trial for aggravated sexual assault of a child, counsel was not ineffective for failing to object to evidence of hearsay statements by the victim. Bishop v. State, 2006 Tex. App. LEXIS 4874 (Tex. App. Waco June 7 2006).

106. Where the only direct evidence of defendant's indecency with a child by exposure offense was the complainant's testimony, it was within the trial court's discretion to conclude that defense counsel's failure to object

to her hearsay statement, compounded by his failure to object to subsequent bolstering hearsay testimony of her friend, warranted the granting of a new trial in the interest of justice because, throughout the trial, the State emphasized the importance of the fact that the complainant had told others about the alleged offense; the statements at issue were not general, but specific testimony regarding out-of-court statements made by the declarants about the particulars of the alleged incident, and the State had not demonstrated that the complainant's out-of-court statements were admissible as prior consistent statements under Tex. R. Evid. 801. State v. Wolfe, 2006 Tex. App. LEXIS 3648 (Tex. App. Houston 14th Dist. Apr. 27 2006).

107. In a child sexual abuse case where the State's notice of intention to use a child-abuse victim's hearsay statement pursuant to Tex. Code Crim. Proc. Ann. art. 38.072 referenced three outcry witnesses, counsel was not ineffective for failing to request a hearing or object; because the victim changed her story, counsel reasonably could have concluded that the outcry statement was admissible under Tex. R. Evid. 801 as a prior consistent statement, and counsel's strategy relied on implying that one of the outcry witnesses had convinced the victim to change her story. Vega v. State, 2006 Tex. App. LEXIS 1513 (Tex. App. Houston 1st Dist. Feb. 23 2006).

108. Counsel was not rendered ineffective by a failure to pick up a file that contained an exculpatory affidavit because the affidavit was inadmissible hearsay under Tex. R. Evid. 801, 802. Coleman v. State, 188 S.W.3d 708, 2005 Tex. App. LEXIS 8143 (Tex. App. Tyler 2005).

109. Trial counsel was not rendered ineffective by failing to request limiting instructions regarding impeachment by defendant's prior inconsistent statement because the statement was admissible under Tex. R. Evid. 801(e)(2)(A); Tex. R. Evid. 613(a) did not apply. Peace v. State, 2005 Tex. App. LEXIS 7700 (Tex. App. Houston 14th Dist. Sept. 20 2005).

110. In the punishment phase of a trial for aggravated robbery, counsel was not rendered ineffective by the failure to object to hearsay testimony by a trial-court clerk. Given that defense counsel used the clerk's testimony, this was not one of those "rare cases" in which counsel's performance could be evaluated absent a record of his strategy. Curtis v. State, 2004 Tex. App. LEXIS 8543 (Tex. App. Houston 1st Dist. Sept. 23 2004).

111. In a criminal trial for aggravated assault, trial counsel did not err in failing to object to an investigating officer's testimony of a cohort's out-of-court statements regarding the incident where the same testimony was later received though the cohort's own testimony, a nonhearsay source. Mason v. State, 2004 Tex. App. LEXIS 6458 (Tex. App. Texarkana July 20 2004).

112. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

113. Defendant's claim that he was denied effective assistance of counsel in violation of U.S. Const. amend. VI and Tex. Const. art. I, § 10 solely because his attorney failed to object to certain testimony that was allegedly intended to elicit a hearsay statement, Tex. R. Crim. Evid. 801, 802, was without merit where the record was silent regarding counsel's trial strategy for not objecting immediately to the testimony and the court could not say that no reasonable counsel would not have objected to the testimony. As the record reflected that counsel filed pretrial

motions, vigorously cross-examined witnesses, and objected to the admission of other evidence, defendant failed to prove by a preponderance of the evidence that, but for his counsel's failure to object to the particular testimony, a reasonable probability existed that a different outcome would have resulted. Payne v. State, 1998 Tex. App. LEXIS 2198 (Tex. App. Dallas Apr. 15 1998).

Criminal Law & Procedure : Juries & Jurors : Challenges to Jury Venire : Equal Protection Challenges

114. Trial court did not abuse its discretion in admitting testimony of a police officer, who was told defendant had a gun at the time of the incident; the trial court could have found that the officer was merely stating how defendant became the primary suspect and thus the statement was not hearsay, and while it was true that the State referred to the statement in its closing argument as if it was evidence of the truth as to whether defendant had a gun, defendant did not object or request that the jury be properly instructed on the matter. Sanders v. State, 2006 Tex. App. LEXIS 3217 (Tex. App. Amarillo Apr. 24 2006).

115. Trial court did not abuse its discretion in admitting testimony of a police officer, who was told defendant had a gun at the time of the incident; the trial court could have found that the officer was merely stating how defendant became the primary suspect and thus the statement was not hearsay. Sanders v. State, 2006 Tex. App. LEXIS 3217 (Tex. App. Amarillo Apr. 24 2006).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

116. Because a silent videotape of an informant's drug buy from defendant was not intended as a substitute for verbal expression, Tex. R. Evid. 801(a)(2), it was not a statement and was not testimonial; therefore, admission of the tape did not violate the Confrontation Clause, U.S. Const. amend. IV. Watson v. State, 421 S.W.3d 186, 2013 Tex. App. LEXIS 14603, 2013 WL 6244135 (Tex. App. San Antonio Dec. 4 2013).

117. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

118. In a trial for aggravated assault with a deadly weapon under, the trial court did not err by excluding the hearsay recitals in an arrest warrant affidavit and complaint indicating the complainant had previously committed an assault on the defendant; defendant was not prevented from confronting the complainant; he was permitted to cross-examine the complainant concerning his previous conviction for aggravated assault. Bradshaw v. State, 2006 Tex. App. LEXIS 5891 (Tex. App. Houston 1st Dist. July 6 2006).

119. In a criminal trial for murder, a witness was permitted to testify that she heard defendant ask the co-conspirator to kill her husband so defendant and the co-conspirator "could be together," and that the co-conspirator later told the witness about the specifics of the murder. The co-conspirator's hearsay statements made in the furtherance of the conspiracy were nontestimonial; therefore, the admission of the statements was not barred by the Confrontation Clause. Wiggins v. State, 152 S.W.3d 656, 2004 Tex. App. LEXIS 10267 (Tex. App. Texarkana 2004).

Criminal Law & Procedure : Trials : Examination of Witnesses : Admission of Codefendant Statements

120. Trial court did not err in denying defendant's motion for a new trial based on defendant's claim that his trial counsel gave him incorrect advice regarding the admissibility of his co-defendant's confession because counsel's belief that the videotaped statement would probably be presented was reasonable where the record indicated the

co-defendant was going to testify at trial and the admission of the videotaped confession would not have violated Tex. R. Evid. 801(a) or the Confrontation Clause. Even if counsel had been wrong about the videotaped confession of the co-defendant, he was absolutely correct as to the State's ability to use the co-defendant as a witness because the State could have subpoenaed the co-defendant and compelled him to testify without violating the co-defendant's constitutional right against self-incrimination since the co-defendant already had pled guilty to his charge. Gonzalez v. State, 2005 Tex. App. LEXIS 7218 (Tex. App. Houston 14th Dist. Aug. 25 2005).

Criminal Law & Procedure : Trials : Examination of Witnesses : Cross-Examination

121. Court properly rejected defendant's "bolstering" argument because both witnesses testified at trial and were subject to cross-examination. In addition, the complained-of evidence pertained to the witnesses' identification of defendant as the perpetrator after perceiving him. Valencia v. State, 2011 Tex. App. LEXIS 3815, 2011 WL 1900180 (Tex. App. Corpus Christi May 19 2011).

Criminal Law & Procedure : Trials : Examination of Witnesses : Videotaped Testimony

122. Trial court did not err in denying defendant's motion for a new trial based on defendant's claim that his trial counsel gave him incorrect advice regarding the admissibility of his co-defendant's confession because counsel's belief that the videotaped statement would probably be presented was reasonable where the record indicated the co-defendant was going to testify at trial and the admission of the videotaped confession would not have violated Tex. R. Evid. 801(a) or the Confrontation Clause. Even if counsel had been wrong about the videotaped confession of the co-defendant, he was absolutely correct as to the State's ability to use the co-defendant as a witness because the State could have subpoenaed the co-defendant and compelled him to testify without violating the co-defendant's constitutional right against self-incrimination since the co-defendant already had pled guilty to his charge. Gonzalez v. State, 2005 Tex. App. LEXIS 7218 (Tex. App. Houston 14th Dist. Aug. 25 2005).

123. In a criminal prosecution for aggravated sexual assault of a child where the child was impeached on cross-examination, the child's videotaped statement was admissible as a prior consistent statement under Tex. R. Evid. 801. Graves v. State, 176 S.W.3d 422, 2004 Tex. App. LEXIS 9099 (Tex. App. Houston 1st Dist. 2004).

Criminal Law & Procedure : Trials : Motions for Mistrial

124. Court properly denied defendant's motion for mistrial after the prosecutor referenced inadmissible hearsay, because the prosecutor's statement was not the kind of extreme, prejudicial statement that could not have been cured by the court's instruction to disregard. Romero v. State, 2013 Tex. App. LEXIS 10442 (Tex. App. Houston 1st Dist. Aug. 20 2013).

125. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

Criminal Law & Procedure : Witnesses : Impeachment

126. Trial counsel was not rendered ineffective by failing to request limiting instructions regarding impeachment by defendant's prior inconsistent statement because the statement was admissible under Tex. R. Evid. 801(e)(2)(A); Tex. R. Evid. 613(a) did not apply. Peace v. State, 2005 Tex. App. LEXIS 7700 (Tex. App. Houston 14th Dist. Sept.

20 2005).

127. Notwithstanding the hearsay rule, the trial court did not err in admitting defendant's girlfiend's out-of-court statement to a police officer as a prior inconsistent statement where the officer testified that the girlfriend had told him that she had not seen defendant for the few days surrounding the offense but at trial, she testified that he had been with her at the time of the robbery. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22 2004).

Criminal Law & Procedure : Defenses : Right to Present

128. In an intoxication manslaughter case, the exclusion of hearsay did not thwart defendant's ability to present a defense because he presented evidence that the primary investigator conducted a shoddy investigation, was untrustworthy, and was no longer a state trooper. Defendant also presented evidence that he drank wine with dinner, and that he "seemed fine" when they left the restaurant. Mole v. State, 2009 Tex. App. LEXIS 2838, 2009 WL 1099433 (Tex. App. Fort Worth Apr. 23 2009).

Criminal Law & Procedure : Jury Instructions : Curative Instructions

129. Court properly denied defendant's motion for mistrial after the prosecutor referenced inadmissible hearsay, because the prosecutor's statement was not the kind of extreme, prejudicial statement that could not have been cured by the court's instruction to disregard. Romero v. State, 2013 Tex. App. LEXIS 10442 (Tex. App. Houston 1st Dist. Aug. 20 2013).

130. Defendant waived any error in the trial court's denial of a mistrial in his aggravated robbery trial. Defendant did not request a curative instruction after the trial court sustained his objection to hearsay testimony by the complainant that his employee identified defendant in a photo lineup and stated that the guy probably came back over to shoot the complainant. Gonzalez v. State, 2005 Tex. App. LEXIS 2147 (Tex. App. San Antonio Mar. 23 2005).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

131. Although the trial court erred by denying a limiting instruction because the witnesses' prior statements did not fall within any hearsay exception and so were admissible for impeachment purposes only, the error was harmless. Absent from the inconsistent statements, the record contained other evidence from which the jury could have inferred that defendant did not act in self-defense, and the trial court's charge instructed the jury that a witness's prior inconsistent statement could only be considered for impeachment purposes to asses the witness's credibility. Arnold v. State, 2008 Tex. App. LEXIS 9768 (Tex. App. Waco Dec. 31 2008).

132. Trial court did not err in admitting a letter the district attorney issued to defendant before her arrest because: (1) the letter was not hearsay under Tex. R. Evid. 801, as it was admitted to show that defendant had notice that her activities might have been illegal, rather than to prove that the letter's contents were true; (2) defendant failed to request a limiting instruction, and therefore she could not complain on appeal about the letter's admission for all purposes; and (3) defendant's due process rights were not violated, as the State did not expressly represent the letter as a correct statement of the law until its closing argument, after the trial court had instructed the jury as to the applicable law. Pardue v. State, 252 S.W.3d 690, 2008 Tex. App. LEXIS 2421 (Tex. App. Texarkana 2008).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview

133. In community supervision revocation proceedings, counsel was not ineffective for failing to make a hearsay objection to testimony about information in defendant's community supervision file; even if the business records predicate under Tex. R. Evid. 803 was not established, the record did not affirmatively demonstrate that the State could not have established it. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Proceedings

134. In defendant's community supervision revocation proceeding, the trial court did not err in admitting an exhibit containing his letters that were intercepted by the mail clerk of the correctional facility. The letters authored by defendant were not hearsay under Tex. R. Evid. 801(d)(e)(2)(A), which provided an exception for an admission by a party-opponent. Rivera v. State, 2012 Tex. App. LEXIS 8306, 2012 WL 4712902 (Tex. App. Beaumont Oct. 3 2012).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History

135. At a punishment trial, sufficient evidence of identity established that defendant was the same person identified in a prior conviction alleged in the enhancement paragraphs; the proof included evidence, admissible under Tex. R. Evid. 801, that defendant pleaded true to the same enhancement paragraph in an aggravated kidnapping jury trial one year earlier. Tomlinson v. State, 2006 Tex. App. LEXIS 5182 (Tex. App. Houston 1st Dist. June 15 2006).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

136. Although an aggravated assault complainant's testimony with respect to his injury was based in large part on hearsay under Tex. R. Evid. 801(d), any error in the admission of his testimony during the punishment phase of defendant's trial was harmless because the same or similar evidence came in elsewhere without objection. Accordingly, because similar evidence, not based on hearsay was admitted without objection, defendant had failed to show that there was a reasonable probability that, but for counsel's failure to object, the result of his punishment trial would have been different. Ramirez v. State, 2009 Tex. App. LEXIS 368, 2009 WL 1567340 (Tex. App. Corpus Christi Jan. 22 2009).

137. Defendant's many statements to officers who had been dispatched to incidents in which she had been involved did not constitute inadmissible hearsay, and therefore were properly admitted during sentencing, because they were properly admitted under Tex. R. Evid. 801, as the statements were defendant's own statements that were offered against her. Sims v. State, 2007 Tex. App. LEXIS 4282 (Tex. App. Houston 1st Dist. May 31 2007).

138. At a punishment trial, sufficient evidence of identity established that defendant was the same person identified in a prior conviction alleged in the enhancement paragraphs; the proof included evidence, admissible under Tex. R. Evid. 801, that defendant pleaded true to the same enhancement paragraph in an aggravated kidnapping jury trial one year earlier. Tomlinson v. State, 2006 Tex. App. LEXIS 5182 (Tex. App. Houston 1st Dist. June 15 2006).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

139. Trial court did not err during a sexually violent predator commitment proceeding in admitting testimony from the offender and the State's expert regarding the details of the offender's prior murder conviction because the offender personally testified as to the details of the conviction and the actions he took after the murder, which was not hearsay, and the State's expert testified to many of the same details that the offender related to the jury. Moreover, the trial court provided the jury with a limiting instruction, which it was presumed the jury followed. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

140. Trial court erred in allowing a detective to recount to the jury that defendant's statement concerning his role as a mere lookout in a robbery did not match any other statements from any other witnesses. Although the statement was indirect hearsay under Tex. R. Evid. 801(a) and (d), the error did not affect defendant's substantial rights under Tex. R. App. P. 44.2(b), in light of the evidence concerning defendant's role in the robbery. Wilson v. State, 2005 Tex. App. LEXIS 4234 (Tex. App. Fort Worth June 2 2005).

141. Even though a trial court failed to conduct a reliability hearing on a grandmother's testimony regarding a minor victim's outcry statement under Tex. Code Crim. Proc. Ann. art. 38.072, the admission of the evidence as an exception to hearsay was harmless because the statement that defendant had "done stuff" was so vague that it failed to corroborate the allegations of molestation; moreover, the trial court was also not required to conduct a reliability hearing on a police officer before allowing testimony regarding a conversation with the victim about defendant's alleged foot fetish where the officer was called as an expert regarding sexual predators, erotica, and deviant behavior. Leachman v. State, 2004 Tex. App. LEXIS 3283 (Tex. App. Houston 1st Dist. Apr. 8 2004).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

142. Defendant's convictions for aggravated kidnapping and aggravated sexual assault of a child were proper because, although the trial court erred in admitting into evidence a television news clip that contained hearsay, the error did not constitute reversible error under Tex. R. App. P. 22.2(b). The exhibit did not contain any information that was not otherwise before the jury; the reporter testified at trial and was available for cross-examination and his testimony in open court was more damaging than the short news clip. Billings v. State, 399 S.W.3d 581, 2013 Tex. App. LEXIS 1423, 2013 WL 607699 (Tex. App. Eastland Feb. 14 2013).

143. Court did not err in permitting the sexual assault nurse examiner to read a portion of the complainant's statement contained in the examination record, because substantially similar evidence was admitted, and the complainant's credibility had been attacked; the examiner never offered a diagnosis that reflected an opinion directly or indirectly on the credibility of the complainant, and the statement read by the examiner followed and was consistent with the evidence admitted through the complainant's lengthy testimony at trial, which was subjected to exhaustive cross-examination. Luttrell v. State, 2010 Tex. App. LEXIS 7496 (Tex. App. Dallas Sept. 9 2010).

144. Assuming that allowance of a mother's accusations toward defendant was improper hearsay, such allowance was not reversible error because the same facts were shown by unchallenged testimony of defendant's admissions to the accusations; under Tex. R. App. P. 44.2(b), nonconstitutional error that did not affect substantial rights was disregarded. Tucker v. State, 2009 Tex. App. LEXIS 7009, 2009 WL 2767304 (Tex. App. Tyler Sept. 2 2009).

145. Even if a trial court improperly admitted an exhibit that constituted hearsay in a drug case, a reversal was not warranted under Tex. R. App. P. 44.2(b) because defendant's substantial rights were not affected; the State relied on other evidence to show a confidential informant's identity. Bouldin v. State, 2007 Tex. App. LEXIS 5498 (Tex. App. Houston 1st Dist. July 12 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

146. Defendant did not preserve for review his hearsay argument regarding statements by a seven-year-old complainant in a sexual assault case, which were admitted through the testimony of her mother, a forensic investigator, and a physician, because the only basis on which defendant objected at trial was that complainant was

not competent to testify. Hunter v. State, 2006 Tex. App. LEXIS 1783 (Tex. App. Houston 1st Dist. Mar. 9 2006).

147. In a trial for a "shaken-baby" murder, admission of testimony from a Child Protective Services investigator, which included information she received from police officers and medical personnel, was not reversible error. Defendant's hearsay objections were waived because the same evidence was admitted through other witnesses without objection. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

148. In a criminal prosecution for aggravated sexual assault, defendant failed to preserve error in the trial court's decision to sustain the State's hearsay objections when he attempted to testify regarding statements the victim made to him. Defendant did not make a formal offer of proof concerning this proposed evidence, and therefore, he could not claim on appeal that the statements were outside the definition of hearsay. Butler v. State, 2004 Tex. App. LEXIS 6800 (Tex. App. Texarkana July 28 2004).

149. Evidence of a police transmission describing a robbery suspect was inadmissible in an aggravated robbery case because it constituted hearsay since the relevancy turned on the truthfulness or accuracy of the contents of the statement; defendant failed to preserve his argument that the transmission was admissible under Tex. R. Evid. 801(e)(1)(C) because it was not raised before the trial court. Johnson v. State, 2003 Tex. App. LEXIS 10949 (Tex. App. Houston 1st Dist. May 13 2003).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Constitutional Issues

150. Because defendant specifically objected to the 911 call as hearsay and on the basis that the caller was not in court to cross-examine under U.S. Const. amend. VI, defendant sufficiently preserved the error. However, defendant did not object if the 911 call was admitted as non-hearsay. West v. State, 406 S.W.3d 748, 2013 Tex. App. LEXIS 8036 (Tex. App. Houston 14th Dist. July 2 2013).

151. In a case involving assault on a public servant, defendant did not preserve a Sixth Amendment challenge based on the Confrontation Clause merely by raising a hearsay objection. Reaves v. State, 2008 Tex. App. LEXIS 6866 (Tex. App. Corpus Christi Aug. 28 2008).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

152. Even if the trial court erred by admitting hearsay evidence of a detective's testimony concerning what a DPS lab forensic scientist had told him, the error was cured by the subsequent admission of the same or similar evidence without objection. Clerkley v. State, 2013 Tex. App. LEXIS 7693 (Tex. App. Tyler June 25 2013).

153. Defendant failed to preserve for appellate review his claim that a witness's statements were nonhearsay because he never argued that contention before the trial court. Pittman v. State, 2012 Tex. App. LEXIS 9057 (Tex. App. Tyler Oct. 31 2012).

154. Defendant failed to preserve for appellate review his claim that the trial court abused its discretion by excluding the victim's diary because defense counsel failed to make any suggestion that the diary was admissible as impeachment evidence under Tex. R. Evid. 613, as a general assertion that the diary was not hearsay was insufficient to make the trial court aware of a Rule 613 argument. Fletcher v. State, 2012 Tex. App. LEXIS 5429, 2012 WL 2783298 (Tex. App. Texarkana July 10 2012).

155. Defendant failed to preserve hearsay error because counsel objected after the witness responded, rather than when the question calling for hearsay was asked. Counsel also did not renew his objection, did not obtain a running objection, and did not request a hearing outside the jury's presence. Salazar v. State, 2012 Tex. App. LEXIS 4983, 2012 WL 2357744 (Tex. App. Corpus Christi June 21 2012).

156. Objection under Tex. R. Evid. 403 did not preserve hearsay or confrontation objections to the admission of a letter that an accomplice received in jail. Green v. State, 2012 Tex. App. LEXIS 3611, 2012 WL 1606238 (Tex. App. Houston 14th Dist. May 8 2012).

157. In defendant's kidnapping trial, in which defendant was charged with kidnapping the victim on the orders of a higher-ranking gang member with whom the victim had ended a romantic relationship, evidence of statements made by the other gang member over the telephone ordering defendant to put the victim in the trunk of a car and other statements were admissible as co-conspirator statements under Tex. R. Evid. 801(e)(2)(E). Guffey v. State, 2012 Tex. App. LEXIS 3293, 2012 WL 1470185 (Tex. App. Eastland Apr. 26 2012).

158. In a case involving the revocation of deferred adjudication community supervision where the State sought to introduce a recipe for cooking methamphetamine, defendant preserved a hearsay objection because an identification of the exhibit as a "recipe for ice" was somewhat ambiguous and did not convey the document's actual contents; moreover, defendant objected to the document as hearsay almost immediately after a witness identified it. Leitao v. State, 2009 Tex. App. LEXIS 325, 2009 WL 112768 (Tex. App. Fort Worth Jan. 15 2009).

159. Hearsay objection under Tex. R. Evid. 801 was inadequate under Tex. R. App. P. 33 and Tex. R. Evid. 103 where counsel asserted a reiteration of a previous objection but had not previously objected on hearsay grounds, where counsel failed to obtain a ruling, and where the evidence was admitted without objection elsewhere. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

160. In a murder trial, defendant failed to preserve hearsay error with regard to a statement that the complainant made to a witness because defendant permitted the contents of the complainant's statement to come in without objection and therefore failed to comply with Tex. R. App. P. 33.1 and Tex. R. Evid. 103. Gay v. State, 2007 Tex. App. LEXIS 8753 (Tex. App. Houston 1st Dist. Nov. 1 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

161. Issue of whether the nurse's testimony should have been excluded as hearsay was not preserved for review, because defendant withdrew his objection and never gave the trial court a chance to consider whether the nurse's testimony was hearsay. Arcos v. State, 2011 Tex. App. LEXIS 5134, 2011 WL 2652262 (Tex. App. Houston 1st Dist. July 7 2011).

162. In a trial for driving while intoxicated, there was no error in the admission of a trooper's testimony that defendant advised another trooper that she was coming from Denton on her way home; under Tex. R. Evid. 801, defendant's admission was not hearsay, and the complained-of admission came in later without objection. Farmer v. State, 2006 Tex. App. LEXIS 11132 (Tex. App. Fort Worth Dec. 28 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

163. In a driving while intoxicated (DWI) case, defendant was unable to object to testimony regarding the abilities of other individuals arrested for DWI on the basis of the Sixth Amendment, Tex. Const. art. I, § 10, Tex. R. Evid. 801, and Tex. Code Crim. Proc. Ann. art. 1.25 because the issues were not raised to the trial court; moreover, his preserved complaints relating to comparative evidence and relevance were waived because the evidence came in

without objection during other parts of the trial. Taylor v. State, 264 S.W.3d 914, 2008 Tex. App. LEXIS 6255 (Tex. App. Fort Worth 2008).

164. In a trial for aggravated sexual assault of a child, defendant preserved error under Tex. R. App. P. 33.1 regarding the admission of a videotaped interview of complainant because defense counsel objected at trial to the State's proffer of the videotape as a prior consistent statement. Tovar v. State, 221 S.W.3d 185, 2006 Tex. App. LEXIS 6440 (Tex. App. Houston 1st Dist. 2006).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

165. At defendant's trial for causing serious bodily injury to a child, the trial court admitted the autopsy photographs as business records. Although a photograph or slide is not an out-of-court statement, defendant counsel had no objection at trial; therefore, defendant waived any error in the admission of these exhibits. Williams v. State, 2014 Tex. App. LEXIS 3020, 2014 WL 1102004 (Tex. App. Beaumont Mar. 19 2014).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

166. In a possession of pseudoephedrine with intent to manufacture methamphetamine case, the labeling on the cold medicine bottles constituted hearsay because it was an extrajudicial assertion offered to prove the truth of the matter asserted that the tablets contained pseudoephedrine; however, the labels were generally relied upon by the public, which suggested that the cold medication labels were accurate and trustworthy; thus, pursuant to Tex. R. Evid. 803, the labels were admissible as an exception to the hearsay rule. Shaffer v. State, 184 S.W.3d 353, 2006 Tex. App. LEXIS 410 (Tex. App. Fort Worth 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

167. Trial court did not abuse its discretion in admitting the game warden's police report into evidence because the report could have been admitted without condition to rebut even a subtle charge of recent fabrication. Stone v. State, 2013 Tex. App. LEXIS 14801, 2013 WL 6405485 (Tex. App. Dallas Dec. 5 2013).

168. Trial court did not err by excluding a defense witness's testimony as it related to defendant's neighbor's involvement both with illegal drugs and narcotics agents because it was properly excluded as hearsay, as defendant offered the neighbor's statement to prove the truth of the matter asserted, namely that the neighbor gave defendant to the narcotics agents. Ivie v. State, 407 S.W.3d 305, 2013 Tex. App. LEXIS 4876 (Tex. App. Eastland Apr. 18 2013).

169. Trial court did not abuse its discretion by sustaining the State's hearsay objection to a tape recording between defendant and another person because that person did not testify and defendant announced his intent in introducing the recording was to prove that he did not commit the crime of burglary of a habitation. Pardee v. State, 2012 Tex. App. LEXIS 6823, 2012 WL 3516485 (Tex. App. Texarkana Aug. 16 2012).

170. Trial court did not abuse its discretion by allowing the State to introduce testimony about defendant's criminal record during the guilt-innocence phase of his trial because the State was authorized under Tex. R. Evid. 806 to impeach defendant's hearsay testimony; the two witnesses' testimony was hearsay, as they were statements of defendant made out of court to prove that defendant had purchased the laptop from a friend. The Theus factors also weighed in favor of admission, as all of defendant's prior convictions but one involved crimes of moral turpitude or theft, defendant's otherwise remote convictions were followed by additional convictions, and had the jury believed the witnesses' hearsay statements it likely would have acquitted defendant. Schmidt v. State, 373 S.W.3d

856, 2012 Tex. App. LEXIS 5657, 2012 WL 2888213 (Tex. App. Amarillo July 16 2012).

171. Trial court did not abuse its discretion by excluding evidence of a prior consistent statement that he made to his mother on the night of the incident under Tex. R. Evid. 801(e)(1)(B) because defendant had a motive to lie about the incident as soon as he shot his gun at the victim's vehicle. Because defendant had the same motive to lie at the time of his statement to his mother as he did during his testimony at trial, his statement to his m other was not admissible to rebut a charge of recent fabrication. Marshall v. State, 2012 Tex. App. LEXIS 1083, 2012 WL 424918 (Tex. App. Eastland Feb. 9 2012).

172. Trial court did not abuse its discretion by admitting evidence of a tattoo of "187" on defendant's hand as a statement that defendant committed murder pursuant to Tex. R. Evid. 801(e)(2)(A) because the record showed that defendant did not have the tattoo on the night of the shooting, it was placed on him after he was in jail in connection with the underlying murder charge, and went to his state of mind at the time of the shooting and clarified the circumstances surrounding the shooting. It was clear from the placement of the tattoo on his hand that it was an open and obvious statement he wanted everyone to see and it directly contradicted his defensive theory that he acted in self defense. Salazar v. State, 2011 Tex. App. LEXIS 6835, 2011 WL 3770297 (Tex. App. Dallas Aug. 26 2011).

173. Trial court did not abuse its discretion by admitting hearsay evidence because most of the challenged testimony was an explanation of how defendant became the suspect. The officer took the jury step-by-step through the investigation to explain how all of the piece of evidence fit together to make defendant the suspect in the murder. Lacaze v. State, 346 S.W.3d 113, 2011 Tex. App. LEXIS 5095 (Tex. App. Houston 14th Dist. July 7 2011).

174. Trial court did not err by admitting defendant's statement to police officers over defendant's hearsay objection because the statement was not hearsay under Tex. R. Evid. 801(e)(2). Hart v. State, 2011 Tex. App. LEXIS 3996, 2011 WL 2028216 (Tex. App. Dallas May 25 2011).

175. In assessing whether the cross-examination of a witness makes an implied charge of recent fabrication or improper motive, a reviewing court should focus on the purpose of the impeaching party, the surrounding circumstances, and the interpretation put on them by the trial court, as well as clues from the voir dire, opening statements, and closing arguments; the question is whether from the totality of the questioning, giving deference to the trial judge's assessment of tone, tenor, and demeanor, a reasonable trial judge could conclude that the cross-examiner is mounting a charge of recent fabrication or improper motive; if so, it is not an abuse of discretion to admit a prior consistent statement that was made before any such motive to fabricate arose. Hammons v. State, 239 S.W.3d 798, 2007 Tex. Crim. App. LEXIS 1632 (Tex. Crim. App. 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : New Trial

176. Where the only direct evidence of defendant's indecency with a child by exposure offense was the complainant's testimony, it was within the trial court's discretion to conclude that defense counsel's failure to object to her hearsay statement, compounded by his failure to object to subsequent bolstering hearsay testimony of her friend, warranted the granting of a new trial in the interest of justice because, throughout the trial, the State emphasized the importance of the fact that the complainant had told others about the alleged offense; the statements at issue were not general, but specific testimony regarding out-of-court statements made by the declarants about the particulars of the alleged incident, and the State had not demonstrated that the complainant's out-of-court statements were admissible as prior consistent statements under Tex. R. Evid. 801. State v. Wolfe, 2006 Tex. App. LEXIS 3648 (Tex. App. Houston 14th Dist. Apr. 27 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Clearly Erroneous Review : General Overview

177. In a murder trial, a witness was properly allowed to testify as to a statement by a participant in the crime as to a discussion about whose gun was used because the statement was an adoptive admission. The statement was made in defendant's presence, defendant never expressed surprise or disagreement, and the statement was made in the context of the declarant relating all of the events that occurred in relation to the shooting of the victim, including the struggle that occurred over the gun. Rivera v. State, 2005 Tex. App. LEXIS 40 (Tex. App. San Antonio Jan. 5 2005), writ of certiorari denied by 126 S. Ct. 555, 163 L. Ed. 2d 468, 2005 U.S. LEXIS 7937, 74 U.S.L.W. 3273 (U.S. 2005).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

178. Defendant was entitled to a new trial on two counts of aggravated sexual abuse of a child where the trial court reversibly erred by admitting the testimony of the officer and a child protective services investigator regarding the victim's prior statements because it was inadmissible impeachment evidence of the victim's trial testimony, during which she recanted her allegations against defendant; the error was not harmless because without the investigator's testimony, the State would not have proven penetration. Klein v. State, 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

179. In defendant's drug case, any error in the denial of admission of the testimony of a police officer as an admission of a party-opponent was harmless where defendant did not attempt to call the other police officer as an impeachment witness, nor did he attempt to offer into evidence the original police report or the other officer's supplement with the varying statement. Shepard v. State, 2006 Tex. App. LEXIS 2793 (Tex. App. Austin Apr. 6 2006).

180. In a murder trial, the court improperly admitted draft affidavits relaying a history of domestic violence that were never signed, notarized, or introduced in any prior court proceeding; the admission of the hearsay evidence was harmless error under Tex. R. App. P. 44.2(b) because other similar evidence was before the jury, including prior applications for protective orders. Rogers v. State, 183 S.W.3d 853, 2005 Tex. App. LEXIS 10705 (Tex. App. Tyler 2005).

181. Although coconspirator's out-of-court statement rhetorically asking why did defendant have to hit the victim did not advance the objective of the conspiracy to hinder defendant's apprehension, and thus should not have been admitted at defendant's murder trial, the error in admitting the out-of-court statement pursuant to Tex. R. Evid. 801(e)(2)(E) was harmless; therefore, the error in admitting the coconspirator's out-of-court statement did not have a substantial and injurious effect or influence in determining the jury's verdict. Byrd v. State, 187 S.W.3d 436, 2005 Tex. Crim. App. LEXIS 2128 (Tex. Crim. App. 2005).

182. In a trial for a "shaken-baby" murder, admission of testimony from a Child Protective Services investigator, which included information she received from police officers and medical personnel, was not reversible error. Defendant's hearsay objections were waived because the same evidence was admitted through other witnesses without objection. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

183. Although a trial court abused its discretion in allowing the State to introduce a sexual assault complainant's diary into evidence because the disputed evidence did not qualify as non-hearsay under Tex. R. Evid. 801(e)(1), the error was harmless under Tex. R. App. P. 44.2(b) and did not have a substantial or injurious effect on the jury's verdict and did not affect defendant's substantial rights because the complainant testified in detail regarding her sexual encounters with defendant independent of the diary. Further, although on cross-examination the complainant admitted that one of the entries in her diary involving the second time she and defendant had engaged in sexual activity was not true, the record reflected that the jury had acquitted defendant on that count; thus, the trial court's error in admitting the hearsay might have actually served to benefit defendant. Dunbar v. State, 2005 Tex. App.

LEXIS 3676 (Tex. App. Fort Worth May 12 2005).

184. An officer's testimony was not hearsay because it was not offered for the truth of the matter asserted, but to explain the sequence of events leading to defendant's arrest, and even if the testimony was hearsay, any error was harmless because defendant admitted in his own testimony the underlying facts, that he was at a high school, near where a stolen car had been parked, before he encountered the police. Jones v. State, 2004 Tex. App. LEXIS 6966 (Tex. App. Dallas Aug. 2 2004).

185. In a criminal prosecution for aggravated sexual assault of a child under the age of 14, the State was improperly allowed to present evidence through the outcry witness that her mother had suspected that defendant was molesting the child even before she had made any outcry. However, the error was harmless since it was unlikely that the single recounting of hearsay about a witness' "suspicion," especially when strongly and directly denied by the declarant herself, had more than a slight influence on the verdict. May v. State, 139 S.W.3d 93, 2004 Tex. App. LEXIS 5560 (Tex. App. Texarkana 2004).

186. Although defendant argued that the trial court erred in admitting hearsay testimony of a witness to the murder, the admission of a statement that was hearsay was non-constitutional error subject to a harm analysis under Tex. R. App. P. 44.2(b), and that the impact of the witness's hearsay testimony that defendant was angry with the victim regarding a transmission was relatively insignificant when considered in connection with the other evidence supporting defendant's guilt, and did not have a substantial and injurious effect on the jury's verdict. Alvarado v. State, 2004 Tex. App. LEXIS 5019 (Tex. App. Houston 1st Dist. June 3 2004).

187. In a capital murder trial, the admission of a poem written to defendant by defendant's brother who assisted in the crime was hearsay and it was improperly admitted. However, the State provided ample evidence, including eyewitness testimony, establishing that defendant and defendant's brother shot and stabbed the victims; thus, the erroneous admission of the poem did not have a substantial and injurious effect or influence in determining the jury's verdict and the error was harmless. Windland v. State, 2004 Tex. App. LEXIS 4709 (Tex. App. Dallas May 26 2004).

188. In defendant's theft case, a court's error in excluding evidence that the declarant told defendant to move a trailer was harmless where defendant's sister testified that the employer told her defendant moved a trailer for the declarant, and through the testimony of the two witnesses, the jury heard essentially the same evidence the trial court initially excluded: that the declarant hired defendant to move a trailer. Gibson v. State, 2004 Tex. App. LEXIS 3198 (Tex. App. Beaumont Apr. 7 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Cumulative Errors

189. Court did not abuse its discretion in admitting the redacted jailhouse recording into evidence, because defendant's own statements implicated his guilt, and the redacted statements were not offered for the truth of the matter asserted, but offered for the purpose of placing in evidence defendant's own statements against interest. Howard v. State, 2014 Tex. App. LEXIS 9208, 2014 WL 4100690 (Tex. App. El Paso Aug. 20 2014).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

190. In a prosecution of defendant for aggravated robbery, any error in the admission of testimony relating to how the police established another person had an alibi was rendered harmless when substantially the same evidence was admitted elsewhere without objection. Benitez v. Tex., 2014 Tex. App. LEXIS 7651 (Tex. App. Dallas July 15 2014).

191. In the punishment phase of a domestic assault trial, any error was harmless from admitting a recording of conversations between a 911 operator and a hospital employee who was responding to the complainant's injuries because the complainant plainly testified at trial that defendant had hit her with a closed fist in her eye. Sanders v. State, 422 S.W.3d 809, 2014 Tex. App. LEXIS 1090, 2014 WL 325028 (Tex. App. Fort Worth Jan. 30 2014).

192. Defendant's conviction for possession of between 4 and 200 grams of cocaine with intent to deliver was appropriate because his failure to continue to object each time the allegedly inadmissible evidence was offered with regard to his W-2, he failed to preserve error. Moreover, even if the officer's testimony was improperly admitted as hearsay evidence, its admission did not harm defendant since the officer later testified without objection that the W-2 bore the same information connecting defendant to the subject property. Anderson v. State, 2013 Tex. App. LEXIS 12822, 2013 WL 5657445 (Tex. App. Tyler Oct. 16 2013).

193. Trial court could have reasonably found that the sergeant's statement that a confidential informant told him that the persons of interest were armed had a purpose other than the truth of the matter stated because it explained the aggressive behavior the officers exhibited at the scene. Even if the statement was hearsay, it was cumulative of other evidence that defendant and his accomplices had firearms with them in the hotel room. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

194. Trial court had the discretion to determine the sufficiency of the evidentiary predicate for the physical evidence submission form because the offense report served only to buttress the chain of custody of items of physical evidence used to establish the identity of the victims. Defendant did not contend the evidence was tampered with and the identity of one of the victims was corroborated by other evidence. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

195. Because the State's Exhibits 55-60 contained impermissible hearsay, the trial court abused its discretion by overruling defendant's objection to the exhibits; however, the error was harmless, Tex. R. App. P. 44.2(b), because the record showed there was substantial evidence to prove defendant matched the description of the robbery suspect independent of the hearsay evidence. Davis v. State, 2013 Tex. App. LEXIS 5357 (Tex. App. Dallas Apr. 30 2013).

196. Any error in the admission of the testimony was harmless because the same or similar evidence was admitted at another point in the trial without objection. Nelson v. State, 405 S.W.3d 113, 2013 Tex. App. LEXIS 377, 2013 WL 174502 (Tex. App. Houston 1st Dist. Jan. 17 2013).

197. Even though the trial court erred by admitting the audio portions of the tape that recorded the arresting officer's statements about defendant's conditions and his narrative about what he found in defendant's vehicle, as they were spoken offense reports that were inadmissible hearsay and did not qualify as present sense impressions under Tex. R. Evid. 803(1), the error was harmless because both officers testified at trial as to everything the arresting officer mentioned in the audio tape. The arresting officer testified about defendant's agitated attitude and appearance, stating that he smelled like alcohol and his face was red; the officer also testified that he asked defendant to perform field sobriety tests at least twice and he found multiple empty beer and wine bottles in the vehicle. Eggert v. State, 395 S.W.3d 240, 2012 Tex. App. LEXIS 9190, 2012 WL 5416202 (Tex. App. San Antonio Nov. 7 2012).

198. Even though the trial court erred by excluding from evidence videos of interviews with children using improper interview techniques on the ground that they were inadmissible hearsay, the error was harmless because defendant did not identify for the trial court areas on the recordings that were of particular importance or relevance and his expert witness was able to testify without reservation about what he observed on the videos and the jury saw examples of many of the techniques he said were improper. Pittman v. State, 2012 Tex. App. LEXIS 9057 (Tex.

App. Tyler Oct. 31 2012).

199. Defendant's conviction for possession of a controlled substance, namely cocaine, with intent to deliver in an amount of 4 grams or more but less than 200 grams was proper because the evidence admitted without objection was substantially the same as the officers' statements regarding the confidential informant objected to by defendant and thus, any error in admitting the confidential informant's hearsay statements was harmless, Tex. R. Evid. 801(d), 802. Even if defendant had objected each time the alleged inadmissible evidence was offered, any error in admitting the evidence would be nonconstitutional error. Thompson v. State, 2012 Tex. App. LEXIS 6310, 2012 WL 3104272 (Tex. App. Tyler July 31 2012).

200. Even if the trial court erred by admitting hearsay text messages from defendant's cell phone, the error was harmless because the methamphetamine itself was properly admitted, the fact that defendant possessed the cell phone was admissible, the fact that drug dealers used cell phones was admissible, and the "drug notes" indicating methamphetamine sales and defendant's identification, both found in defendant's laptop bag, sufficiently corroborated accomplice testimony. Black v. State, 358 S.W.3d 823, 2012 Tex. App. LEXIS 317 (Tex. App. Fort Worth Jan. 12 2012).

201. In a case in which defendant was convicted of aggravated sexual assault under Tex. Penal Code Ann. § 22.021 and indecency with a child under Tex. Penal Code Ann. § 21.11, although defendant complained of the trial court's overruling of his hearsay objection to the State's question of what the victim told a professional about defendant's conduct, the admission of the testimony during the direct examination of the forensic interviewer was not harmful because it did no more than reiterate facts admitted elsewhere and even included testimony supportive of the defense. Moreover, even assuming, without deciding, that it was inadmissible hearsay, the substance of the complained-of testimony of the forensic interviewer was admitted elsewhere without limitation or an objection preserved on appeal, and, thus, the error, if any, of the trial court in admitting the statement of the forensic interviewer did not affect a substantial right of defendant and had to be disregarded. Drake v. State, 2010 Tex. App. LEXIS 716, 2010 WL 348365 (Tex. App. Amarillo Jan. 31 2010).

202. In defendant's indecency with a child case, any error by the trial court in admitting a videotaped statement was harmless because the testimony included the same facts that were admitted into evidence without objection. Therefore, the trial court's error in admitting the videotape did not affect defendant's substantial rights. Jiminez v. State, 2009 Tex. App. LEXIS 7555, 2009 WL 3102010 (Tex. App. Amarillo Sept. 29 2009).

203. In a murder case, although the trial court erred in admitting the victim's hearsay statement regarding her plans to withhold all financial support from defendant, the error was harmless. The State provided evidence of the stolen rifle as the murder weapon, the victim's negative feelings toward defendant, defendant's inconsistent alibi, and the perpetrator's knowledge of where valuables were located in the victim's home. Fischer v. State, 2009 Tex. App. LEXIS 4092 (Tex. App. San Antonio June 10 2009).

204. Even though the trial court erred by excluding the accomplice's testimony that defendant appeared surprised when the accomplice exhibited the gun during the robbery, because defendant's surprised reaction was not hearsay, as it was not intended as a substitute for any verbal communication to the accomplice, the error was harmless because two eyewitnesses testified that defendant was the gunman. Woodard v. State, 2009 Tex. App. LEXIS 2897, 2009 WL 1124385 (Tex. App. Houston 14th Dist. Apr. 28 2009).

205. Even though the trial court erred by admitting the wife's testimony concerning a statement she had previously made to her daughter, because the statement was inadmissible hearsay under Tex. R. Evid. 801, the error was harmless because the wife did not testify about what she meant by telling her daughter "what was going on," and she had previously testified at length without objection about a prior incident with defendant. Edwards v. State, 2009

Tex. App. LEXIS 2873, 2009 WL 1140092 (Tex. App. Dallas Apr. 27 2009).

206. Court properly admitted an officer's testimony to explain how defendant became a suspect in the investigation and to establish the course of events and circumstances leading to defendant's arrest because this was harmless error because the same information was admitted without objection through other witnesses. Flores v. State, 2008 Tex. App. LEXIS 6491 (Tex. App. Corpus Christi Aug. 25, 2008).

207. In a burglary case, testimony that defendant had been kicked out of his father's house for the same offense was inadmissible hearsay; however, the error was not reversible since defendant's substantial rights were not affected. Defendant made several admissions, he had a previous conviction as a juvenile, and his father and stepmother stopped taking defendant's calls or attending his hearings. Craine v. State, 2008 Tex. App. LEXIS 6261 (Tex. App. Dallas Aug. 18 2008).

208. In a burglary case, there was no reversible error based on hearsay due to testimony that persons of defendant's age did not burglarize homes and terrorize their neighborhoods; moreover, defendant was not harmed by testimony that he cut the glass out of a victim's home because he admitted such. Moreover, defendant was not harmed by testimony about the condition that he left the burglarized homes in. Craine v. State, 2008 Tex. App. LEXIS 6261 (Tex. App. Dallas Aug. 18 2008).

209. In defendant's aggravated robbery case, the complainant's statement, "I'm siding with what the emergency people told me" was hearsay. However, the error was harmless because defendant ran over the complainant's ankle, there was substantial evidence to prove that fact independent of the hearsay testimony; the complainant testified that she fell off the moving vehicle, lost consciousness, and awoke in the same area with a crushed ankle. Davidson v. State, 2008 Tex. App. LEXIS 5459 (Tex. App. Dallas July 24 2008).

210. In defendant's aggravated robbery case, even if it was error for the court to admit an officer's hearsay testimony regarding the details of the police dispatch, the error was harmless; the same substantive evidence was introduced through another officer's testimony without objection when she testified regarding the type of car defendant was driving and the circumstance surrounding her interview of the robbery complainants. Carson v. State, 2008 Tex. App. LEXIS 3091 (Tex. App. Fort Worth Apr. 24 2008).

211. During the punishment phase of defendant's trial for aggravated sexual assault of a child, defendant stipulated to eight prior convictions, which included a felony conviction for endangering a child, and the State did not err in calling a police officer to testify regarding the circumstances of that offense, which initially was investigated and charged as an aggravated sexual assault of a child, where the officer's statement was not hearsay because he identified the charge that he personally filed and the persons that he arranged for the prior child victim to meet; although the officer's testimony about the prior child victim's precise age was based on hearsay and thus erroneously admitted, there was a fair assurance that the admission of the single piece of hearsay testimony was not harmful error because defendant stipulated to his conviction for endangering a child, and evidence of that prior conviction was properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07, and as an exception under Tex. R. Evid. 803 to the hearsay rule, and because the record as a whole included: (1) defendant's guilty plea to endangering a child; (2) the detailed evidence of the complainant's sexual abuse itself; (3) child pornography found on defendant's family computer; (4) the fact that the State did not emphasize the erroneously admitted evidence and concentrated on the "heinousness" of the offense; (5) defendant's cunning and violent character; (6) the effect of the abuse on the complainant for the rest of her life; and (7) defendant's eight prior convictions and numerous disciplinary infractions. Hunt v. State, 2008 Tex. App. LEXIS 2273 (Tex. App. Houston 14th Dist. Apr. 1 2008).

212. In a murder trial, hearsay was improperly admitted when a detective was permitted to testify that a suspect was eliminated based on the detective's conversation with the suspect's romantic partner, for the sole purpose of

proving that the suspect was somewhere other than the victim's home at the time of the killing; however, the error was harmless under Tex. R. App. P. 44 in light of the other evidence: defendant's DNA, fingerprint, and palm print were on a bloody fire extinguisher and on the coaxial cable with which the killer strangled the victim, and defendant did not dispute that none of the DNA or fingerprint evidence connected the other suspect to the crime scene. Russell v. State, 2008 Tex. App. LEXIS 1723 (Tex. App. Fort Worth Mar. 6 2008).

213. In a murder trial, any hearsay error under Tex. R. Evid. 801 was harmless when a detective was permitted to testify as to DNA test results as a basis for eliminating other suspects because the expert who performed the DNA analyses later testified that the tests ruled out the other suspects as contributors to the DNA collected at the crime scene, the very same conclusion that was implicit in the detective's testimony. Russell v. State, 2008 Tex. App. LEXIS 1723 (Tex. App. Fort Worth Mar. 6 2008).

214. In a case involving indecency and aggravated sexual assault, a trial court did not err by admitting certain evidence regarding recorded conversations between defendant and a minor child and the fact that a mother later pressured the child to change her story; even if they constituted hearsay under Tex. R. Evid. 801, the same or similar testimony was admitted elsewhere. Weaver v. State, 2007 Tex. App. LEXIS 9200 (Tex. App. Waco Nov. 21 2007).

215. In a murder trial, it was error under Tex. R. Evid. 801(d) to allow a detective to testify about a co-defendant's out-of-court statement regarding the co-defendant's intent, plan, and preparation to commit a robbery. However, the error was harmless under Tex. R. App. P. 44.2; other evidence implicated defendant as a suspect in the robbery, including eyewitness statements, defendant's seeking medical treatment for a gunshot wound, and defendant's confession to entering the crime scene to "get some change." Henry v. State, 2007 Tex. App. LEXIS 6794 (Tex. App. El Paso Aug. 23 2007).

216. Detective's answers to questions concerning whether a particular person was of interest in the murder investigation and whether defendant's wife received a phone call after talking to investigators did not relay out of court statements and therefore were not hearsay. Assuming that the detective's testimony concerning the victim's relationship with defendant's wife and where the victim was when he was shot relayed out of court statements, the detective's testimony did not constitute hearsay because it was admitted to explain how defendant became a suspect in the investigation and to establish the course of events and circumstances leading to defendant's arrest for the victim's murder. Garcia v. State, 2007 Tex. App. LEXIS 5080 (Tex. App. Corpus Christi June 28 2007).

217. During defendant's criminal trial for two counts of aggravated sexual assault of a child, defendant was not harmed by the trial court's admission of out of court testimony concerning the child's dream in which defendant was having sexual relations with her aunt; the evidence concerned a dream that was never asserted to be true; it concerned the child's state of mind, not defendant's state of mind or conduct. Phillips v. State, 2006 Tex. App. LEXIS 9509 (Tex. App. Dallas Nov. 2 2006).

218. In a driving while intoxicated case, a court erred by admitting witnesses' hearsay statements under the present sense impression exception because the evidence did not establish how much time elapsed between when one witness observed the incident and when she prepared her statement, and the other witness's written statement, made five days after the incident, clearly fell outside any reasonable argument that she made it immediately after the incident; however, the error was harmless; both witnesses testified at trial that they saw defendant weaving across the roadway prior to her leaving the highway, and a videotape of field sobriety tests supported that defendant did not have the normal use of her mental or physical faculties. Dalton v. State, 2006 Tex. App. LEXIS 9189 (Tex. App. Beaumont Oct. 25 2006).

219. In an injury to a child case, the court erred by allowing testimony by the child's mother that her parents needed to tell her something important that the police said regarding defendant's involvement in the crime because it constituted double hearsay; however, the error was harmless because defendant was indicted for the crime, and the police themselves testified during trial that they believed defendant committed the crime and why. Lopez v. State, 200 S.W.3d 246, 2006 Tex. App. LEXIS 9199 (Tex. App. Houston 14th Dist. 2006).

220. Documents seized from the vehicle of defendant's mother pursuant to a search warrant were admissible because they were not offered to prove the truth of the matters asserted but to show that defendant had access to the vehicle in which defendant fled the crime scene. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

221. Although a murder victim's written statement that was made by four months before her death and that described a physical altercation with defendant was erroneously admitted because it was objectionable hearsay, the error was harmless because there was substantial evidence of defendant's guilt, exclusive of the written statement, because reference to the statement was relatively limited, and because many of the facts mentioned in the statement were properly in the record through other testimony. Barrett v. State, 2014 Tex. App. LEXIS 2251, 2014 WL 792123 (Tex. App. Texarkana Feb. 27 2014).

Criminal Law & Procedure : Habeas Corpus : Review : Standards of Review : Contrary & Unreasonable Standard

222. District court denied a state inmate's petition under 28 U.S.C.S. § 2254, challenging his conviction and sentence for murder, because the inmate did not show he was denied effective assistance of counsel or that a state habeas court made findings that were contrary to clearly established federal law when it rejected the inmate's claims; although the inmate claimed that the trial court violated his Sixth Amendment right to confrontation when it admitted hearsay testimony, the district court found that the trial court properly admitted testimony under Tex. R. Evid. 803 as an excited utterance; even assuming arguendo that the trial court erred, the error was harmless in light of the other incriminating evidence the State introduced. Turnbow v. Quarterman, 2007 U.S. Dist. LEXIS 77098 (N.D. Tex. Oct. 17 2007).

Estate, Gift & Trust Law : Nonprobate Transfers : Jointly Held Property : Bank Accounts

223. Claimants were not allowed to introduce parol evidence to establish survivorship interests in alleged joint accounts because there was no fraud nor mistake pled, nor any claim that certificate of deposit (CD) agreements were incomplete or ambiguous; relying on Tex. Prob. Code Ann. § 439, the Deadman's Statute under Tex. R. Evid. 601, the parol evidence rule, the "four corners of the document" rule, hearsay under Tex. R. Evid. 801, and double hearsay, an estate was correct in asserting that the claimants could not use extrinsic evidence in an attempt to get around the four corners of the CDs. Clark v. Wells Fargo Bank, N.A., 2008 Tex. App. LEXIS 2211 (Tex. App. Houston 1st Dist. Mar. 27 2008).

Evidence : General Overview

224. Trial court did not abuse its discretion in excluding a 12-year-old boy's translation of his deaf aunt's statement to him that she communicated through sign language as hearsay because defendant failed to establish the nephew's competency, proficiency, and reliability as a translator of sign language. Moland v. State, 2012 Tex. App. LEXIS 1062, 2012 WL 403885 (Tex. App. Houston 1st Dist. Feb. 9 2012).

Evidence : Authentication : General Overview

225. Defendant's objection to a certified copy of a prior federal judgment convicting him of two felonies as unauthenticated had no merit because the Texas Rules of Evidence allowed the trial court to admit a certified copy of a public record as properly authenticated.. Rowell v. State, 2011 Tex. App. LEXIS 6596, 2011 WL 3612297 (Tex. App. Houston 1st Dist. Aug. 18 2011).

226. In defendant's murder case, the trial court did not abuse its discretion in excluding a letter from a witness because, at the conclusion of the witness's testimony, he was excused without any request that he be subject to recall, the witness could not be located when defendant offered the letter into evidence, and thus, the witness was no longer subject to cross-examination. Furthermore, the letter was not authenticated and there was no indication showing that the letter was written prior to the alleged improper influence by defendant's family and friends. Long v. State, 2009 Tex. App. LEXIS 6577, 2009 WL 2581286 (Tex. App. Eastland Aug. 20 2009).

227. In defendant's capital murder case, a court properly admitted an anonymous letter regarding defendant, addressed to a reporter, where in addition to being found on defendant's computer, the letter contained numerous intimate details of defendant's life, confirmed by other evidence, that collectively supported an inference that she was the author; given those circumstances, it was a reasonable exercise of the trial court's discretion to conclude that the letter was written by defendant, and because the letter was shown to be written by defendant, it was not hearsay when offered against her. Johnson v. State, 208 S.W.3d 478, 2006 Tex. App. LEXIS 2254 (Tex. App. Austin 2006).

Evidence : Authentication : Self-Authentication

228. Nothing in the worker's Social Security disability finding document indicated that the worker was cross-examined at his disability hearing as required by Tex. R. Evid. 801(e)(1)(B); it was not clear whether the disability finding was the worker's "statement" as it was a document issued by a federal agency and not the worker himself, and because the document was not certified, its authenticity was at issue, Tex. R. Evid. 902(4). Belmarez v. Formosa Plastics Corp., 2011 Tex. App. LEXIS 7945, 2011 WL 4696750 (Tex. App. Corpus Christi Sept. 30 2011).

Evidence : Authentication : Chain of Custody

229. Trial court had the discretion to determine the sufficiency of the evidentiary predicate for the physical evidence submission form because the offense report served only to buttress the chain of custody of items of physical evidence used to establish the identity of the victims. Defendant did not contend the evidence was tampered with and the identity of one of the victims was corroborated by other evidence. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

Evidence : Competency : Affirmations & Oaths

230. At defendant's trial for kidnapping and murder, the trial court did not abuse its discretion by excluding a video-recorded witness statement. Because the witness statement was not given under oath, it was not admissible under Tex. R. Evid. 801(e)(1)(A). Gamez v. State, 2012 Tex. App. LEXIS 6774, 2012 WL 3329200 (Tex. App. San Antonio Aug. 15 2012).

Evidence : Competency : Interpreters

231. If the proponent of an out-of-court translation of an out-of-court statement of a party can demonstrate to the satisfaction of the trial court that the party authorized the interpreter to speak for him on the particular occasion, or otherwise adopted the interpreter as his agent for purposes of translating the particular statement, then the out-of-court interpretation may properly be admitted under Tex. R. Evid. 801(d)(2)(C) or (D). If the trial court is not so

satisfied, it should sustain a hearsay objection to the out-of-court translation, under Tex. R. Evid. 802. Saavedra v. State, 297 S.W.3d 342, 2009 Tex. Crim. App. LEXIS 1560 (Tex. Crim. App. 2009).

Evidence : Demonstrative Evidence : General Overview

232. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court did not err in refusing to admit the complainant's handwritten statement as impeachment evidence where the document contained hearsay statements not within an exception. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

Evidence : Demonstrative Evidence : Photographs

233. There was no error when a medical examiner who was not present at an autopsy testified about photographs taken during the autopsy because the photographs were not an out-of-court statement under Tex. R. Evid. 801 and there was no question under Tex. R. Evid. 901(a) that they accurately depicted the appearance of the victim's body. Wood v. State, 299 S.W.3d 200, 2009 Tex. App. LEXIS 7882 (Tex. App. Austin Oct. 7 2009).

Evidence : Demonstrative Evidence : Recordings

234. In a murder case, the trial court did not err by admitting the recording of the call a cab driver made to 9-1-1. The statements overheard by the cab driver were made by defendant and offered against him; thus, the statements were admissible as admissions by a party-opponent under Tex. R. Evid. 801(e)(2)(A). Dayne Adenauer White v. State, 2012 Tex. App. LEXIS 8107 (Tex. App. Houston 1st Dist. Sept. 27 2012).

Evidence : Demonstrative Evidence : Visual Formats

235. In defendant's indecency with a child case, any error by the trial court in admitting a videotaped statement was harmless because the testimony included the same facts that were admitted into evidence without objection. Therefore, the trial court's error in admitting the videotape did not affect defendant's substantial rights. Jiminez v. State, 2009 Tex. App. LEXIS 7555, 2009 WL 3102010 (Tex. App. Amarillo Sept. 29 2009).

236. In a trial for aggravated sexual assault of a child, defendant preserved error under Tex. R. App. P. 33.1 regarding the admission of a videotaped interview of complainant because defense counsel objected at trial to the State's proffer of the videotape as a prior consistent statement. Tovar v. State, 221 S.W.3d 185, 2006 Tex. App. LEXIS 6440 (Tex. App. Houston 1st Dist. 2006).

Evidence : Documentary Evidence : Affidavits

237. In a breach of contract action brought by appellee, the assignee of a credit card company, against an account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent sufficiently showed that appellee incorporated the credit card company's records and kept them in the regular course of its business. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

Evidence : Documentary Evidence : Completeness

238. Statements in a letter relating to defendant's abusive conduct causing the victim's suicidal thoughts were admissible under the rule of optional completeness because those statements were from the same document and on the same subject as the statements used by defendant, and defendant's cross-examination of the victim could

have left a false impression with the jury that the victim's suicidal thoughts were due to issues other than defendant's conduct. Lofton v. State, 2011 Tex. App. LEXIS 9666 (Tex. App.--Dallas Dec. 9, 2011).

239. In a second trial for sexual abuse, it was error to admit the entirety of the complainant's testimony from the first trial even though the defense used part of the testimony for impeachment, because there was no showing that the entire prior testimony was either on the same subject or was necessary to correct a false or incorrect impression of the witness' testimony; the testimony was admissible because the complainant was not unavailable. Sneed v. State, 209 S.W.3d 782, 2006 Tex. App. LEXIS 10067 (Tex. App. Texarkana 2006).

Evidence : Documentary Evidence : Writings : General Overview

240. Upon summary judgment in a lessor's action for damages under an equipment lease agreement, the trial court was permitted to consider exhibits consisting of documents the lessee generated that reflected payments made under the lease because they were admissions by a party opponent and excluded from the hearsay rule. Choice Asset Mgmt., Inc. v. Cit Tech. Fin. Servs., 2013 Tex. App. LEXIS 11584 (Tex. App. Amarillo Sept. 11 2013).

Evidence : Documentary Evidence : Writings : Summaries

241. Where summaries of records were admitted of sales records in an action by an agency seeking recovery for commissions, and where the personal knowledge of those documents was established, there was no abuse of discretion by the trial court in admitting the summary exhibit pursuant to Tex. R. Evid. 1006, as it was shown that the records were voluminous, were made available to the customers for inspection, and the underlying records were admissible as non-hearsay admissions of a party-opponent under Tex. R. Evid. 801(e)(2). C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 2004 Tex. App. LEXIS 808 (Tex. App. Houston 1st Dist. 2004).

Evidence : Hearsay : General Overview

242. Court properly excluded testimony because the proffered testimony centered on what the victim told the witness regarding a boy wanting to have sexual intercourse with her, and that constituted hearsay. Vega v. State, 2014 Tex. App. LEXIS 7948 (Tex. App. Corpus Christi July 24 2014).

243. In an eviction action, the apartment manager's testimony that the police department received a disturbance call was inadmissible hearsay; its admission was harmless because she had already testified, without objection, that law enforcement had been called to respond to the disturbance. A police officer also testified that he was called to assist other officers on the scene and personally witnessed a disturbance. Black v. Countryside Vill. Apts., 2013 Tex. App. LEXIS 14853, 2013 WL 6506303 (Tex. App. Houston 1st Dist. Dec. 10 2013).

244. Defendant's conviction for possession of between 4 and 200 grams of cocaine with intent to deliver was appropriate because his failure to continue to object each time the allegedly inadmissible evidence was offered with regard to his W-2, he failed to preserve error. Moreover, even if the officer's testimony was improperly admitted as hearsay evidence, its admission did not harm defendant since the officer later testified without objection that the W-2 bore the same information connecting defendant to the subject property. Anderson v. State, 2013 Tex. App. LEXIS 12822, 2013 WL 5657445 (Tex. App. Tyler Oct. 16 2013).

245. Even if the trial court erred by admitting hearsay evidence of a detective's testimony concerning what a DPS lab forensic scientist had told him, the error was cured by the subsequent admission of the same or similar evidence without objection. Clerkley v. State, 2013 Tex. App. LEXIS 7693 (Tex. App. Tyler June 25 2013).

246. Appellant did not object at trial on Tex. R. Evid. 404(b) grounds or any grounds that would have put the trial court on notice that he was objecting to the introduction of such evidence, plus his hearsay, speculation, and relevancy objections did not preserve error under Rule 404(b), such that he failed to preserve this issue for review under Tex. R. App. P. 33.1(a). Hawkins v. State, 2013 Tex. App. LEXIS 2282 (Tex. App. Eastland Mar. 7 2013).

247. Even assuming the issue was preserved, a question did not relate to an extraneous offense, and the trial court sustained appellant's hearsay objection, after which appellant did not take any action, and as he obtained all the relief he requested, he could not complain on appeal. Hawkins v. State, 2013 Tex. App. LEXIS 2282 (Tex. App. Eastland Mar. 7 2013).

248. Defendant's convictions for aggravated kidnapping and aggravated sexual assault of a child were proper because, although the trial court erred in admitting into evidence a television news clip that contained hearsay, the error did not constitute reversible error under Tex. R. App. P. 22.2(b). The exhibit did not contain any information that was not otherwise before the jury; the reporter testified at trial and was available for cross-examination and his testimony in open court was more damaging than the short news clip. Billings v. State, 399 S.W.3d 581, 2013 Tex. App. LEXIS 1423, 2013 WL 607699 (Tex. App. Eastland Feb. 14 2013).

249. Defendant's convictions for aggravated kidnapping and aggravated sexual assault of a child were proper because statements were admissible as non-hearsay, Tex. R. Evid. 801(d). The victim's indication that she was okay was admissible pursuant to Tex. R. Evid. 803(3) as it was a statement of her then existing mental, emotional, or physical condition; the sheriff's indication that everything was okay constituted a present sense impression and was admissible under Rule 803(1); the victim's statement that "he is trying to get in the bathroom" could have been admitted either as a present sense impression under Rule 803(1) or an excited utterance under Rule 803(2); the trial court did not abuse it discretion in allowing the officer to testify that he heard a male voice saying, "Open the door" because that statement could have been admitted either as an admission by a party opponent or as a statement merely showing what was said rather than proving the truth of the matter asserted, Tex. R. Evid. 801(e)(2). Billings v. State, 399 S.W.3d 581, 2013 Tex. App. LEXIS 1423, 2013 WL 607699 (Tex. App. Eastland Feb. 14 2013).

250. Appellant did not raise a hearsay objection, and because his trial objection did not comport with his appellate issue, the issue was waived. Johnson v. State, 2012 Tex. App. LEXIS 7721 (Tex. App. Houston 1st Dist. Aug. 30 2012).

251. Defendant's conviction for possession of a controlled substance, namely cocaine, with intent to deliver in an amount of 4 grams or more but less than 200 grams was proper because the evidence admitted without objection was substantially the same as the officers' statements regarding the confidential informant objected to by defendant and thus, any error in admitting the confidential informant's hearsay statements was harmless, Tex. R. Evid. 801(d), 802. Even if defendant had objected each time the alleged inadmissible evidence was offered, any error in admitting the evidence would be nonconstitutional error. Thompson v. State, 2012 Tex. App. LEXIS 6310, 2012 WL 3104272 (Tex. App. Tyler July 31 2012).

252. In a murder trial where defendant claimed he acted in self-defense, the trial court did not err by excluding testimony from a psychologist regarding the victim's acts of violence; because the psychologist's knowledge of any acts committed by the victim came entirely from his review of the medical records, the psychologist's proffered testimony was hearsay for which no exception was offered under Tex. R. Evid. 801-804. Mason v. State, 2012 Tex. App. LEXIS 2314, 2012 WL 1058792 (Tex. App. Eastland Mar. 22 2012).

253. Even if the trial court erred by admitting hearsay text messages from defendant's cell phone, the error was harmless because the methamphetamine itself was properly admitted, the fact that defendant possessed the cell

phone was admissible, the fact that drug dealers used cell phones was admissible, and the "drug notes" indicating methamphetamine sales and defendant's identification, both found in defendant's laptop bag, sufficiently corroborated accomplice testimony. Black v. State, 358 S.W.3d 823, 2012 Tex. App. LEXIS 317 (Tex. App. Fort Worth Jan. 12 2012).

254. Statements in a letter relating to defendant's abusive conduct causing the victim's suicidal thoughts were admissible under the rule of optional completeness because those statements were from the same document and on the same subject as the statements used by defendant, and defendant's cross-examination of the victim could have left a false impression with the jury that the victim's suicidal thoughts were due to issues other than defendant's conduct. Lofton v. State, 2011 Tex. App. LEXIS 9666 (Tex. App.--Dallas Dec. 9, 2011).

255. Court properly rejected defendant's "bolstering" argument because both witnesses testified at trial and were subject to cross-examination. In addition, the complained-of evidence pertained to the witnesses' identification of defendant as the perpetrator after perceiving him. Valencia v. State, 2011 Tex. App. LEXIS 3815, 2011 WL 1900180 (Tex. App. Corpus Christi May 19 2011).

256. Counsel's repeated failure to raise valid hearsay objections to evidence of unproven extraneous offenses undermined the proper functioning of the adversarial process; the prosecutor described defendant to the jury as not only a drug dealer, but as a violent, gun toting gangster. Defendant was probation eligible since none of the offenses had been proven in court, and therefore, counsel's representation was so deficient that the trial on punishment could not be relied upon as having produced a just result. Johnson v. State, 2011 Tex. App. LEXIS 3522, 2011 WL 1902066 (Tex. App. Tyler May 11 2011).

257. Court did not abuse its discretion by admitting the testimony of the boyfriend of one of the victims (subsequently her husband), because at the time the boyfriend testified the victim had already testified in detail as to defendant's alleged conduct and the role of the victim's mother, the boyfriend did not mention any individual in connection with the molestation, and the record did not establish the inescapable conclusion that the State's sole purpose in eliciting the boyfriend's testimony was to prove that the victim had told him that she had been molested by defendant. De La Garza v. State, 2011 Tex. App. LEXIS 1617, 2011 WL 768872 (Tex. App. Dallas Mar. 7 2011).

258. In an aggravated sexual assault case, a court's decision to exclude evidence as hearsay was proper because the out of court statement made by defendant in the presence of the officers that the victim had lost her clothing in a game of cards did not possess the requisite level of reliability so as to remove it from the realm of contrivance and fabrication. The trial court could have reasonably concluded that, because the applicability of the excited utterance exception required it to first accept defendant's version of events as true, the statement was not sufficiently reliable to qualify as a hearsay exception. Langford v. State, 2010 Tex. App. LEXIS 567, 2010 WL 323081 (Tex. App. Austin Jan. 27 2010).

259. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009

Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

260. In an intoxication manslaughter case, the exclusion of hearsay did not thwart defendant's ability to present a defense because he presented evidence that the primary investigator conducted a shoddy investigation, was untrustworthy, and was no longer a state trooper. Defendant also presented evidence that he drank wine with dinner, and that he "seemed fine" when they left the restaurant. Mole v. State, 2009 Tex. App. LEXIS 2838, 2009 WL 1099433 (Tex. App. Fort Worth Apr. 23 2009).

261. In a case involving the revocation of deferred adjudication community supervision where the State sought to introduce a recipe for cooking methamphetamine, defendant preserved a hearsay objection because an identification of the exhibit as a "recipe for ice" was somewhat ambiguous and did not convey the document's actual contents; moreover, defendant objected to the document as hearsay almost immediately after a witness identified it. Leitao v. State, 2009 Tex. App. LEXIS 325, 2009 WL 112768 (Tex. App. Fort Worth Jan. 15 2009).

262. In a case involving assault on a public servant, defendant did not preserve a Sixth Amendment challenge based on the Confrontation Clause merely by raising a hearsay objection. Reaves v. State, 2008 Tex. App. LEXIS 6866 (Tex. App. Corpus Christi Aug. 28 2008).

263. In a burglary case, testimony that defendant had been kicked out of his father's house for the same offense was inadmissible hearsay; however, the error was not reversible since defendant's substantial rights were not affected. Defendant made several admissions, he had a previous conviction as a juvenile, and his father and stepmother stopped taking defendant's calls or attending his hearings. Craine v. State, 2008 Tex. App. LEXIS 6261 (Tex. App. Dallas Aug. 18 2008).

264. In a burglary case, there was no reversible error based on hearsay due to testimony that persons of defendant's age did not burglarize homes and terrorize their neighborhoods; moreover, defendant was not harmed by testimony that he cut the glass out of a victim's home because he admitted such. Moreover, defendant was not harmed by testimony about the condition that he left the burglarized homes in. Craine v. State, 2008 Tex. App. LEXIS 6261 (Tex. App. Dallas Aug. 18 2008).

265. In defendant's aggravated robbery case, the complainant's statement, "I'm siding with what the emergency people told me" was hearsay. However, the error was harmless because defendant ran over the complainant's ankle, there was substantial evidence to prove that fact independent of the hearsay testimony; the complainant testified that she fell off the moving vehicle, lost consciousness, and awoke in the same area with a crushed ankle. Davidson v. State, 2008 Tex. App. LEXIS 5459 (Tex. App. Dallas July 24 2008).

266. In a child abuse case, if there was error in admitting a doctor's affidavit regarding the child's cause of death over defendant's hearsay objection, it was cured and rendered harmless by the doctor's expansive testimony to these same matters; defendant lodged no objection to this trial testimony. Taylor v. State, 2007 Tex. App. LEXIS 6898 (Tex. App. Dallas Aug. 28 2007).

267. Any error in admitting a sexual assault nurse examiner's testimony, over defendant's hearsay objection, about a study conducted by another person explaining why a child victim of a sexual assault would not show evidence of trauma to her private parts was harmless given the overwhelming evidence of defendant's guilt that was introduced at trial. Garza v. State, 2007 Tex. App. LEXIS 7194 (Tex. App. Corpus Christi Aug. 28 2007).

268. Even if a trial court improperly admitted an exhibit that constituted hearsay in a drug case, a reversal was not warranted under Tex. R. App. P. 44.2(b) because defendant's substantial rights were not affected; the State relied

on other evidence to show a confidential informant's identity. Bouldin v. State, 2007 Tex. App. LEXIS 5498 (Tex. App. Houston 1st Dist. July 12 2007).

269. Trial court properly excluded a deposition because it had been taken in another lawsuit and, although appellant's opinion at the time would have been within the exception to the hearsay rule provided by Tex. R. Evid. 803(3), the deposition's contents were inadmissible hearsay because the statements contained within it pertained to the other party's statements and state of mind rather than to appellant's. Trantham v. Isaacks, 218 S.W.3d 750, 2007 Tex. App. LEXIS 501 (Tex. App. Fort Worth 2007), *cert. denied*, 552 U.S. 892, 128 S. Ct. 340, 169 L. Ed. 2d 155, 2007 U.S. LEXIS 10018 (2007).

270. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

271. In a criminal trial for sexual assault, the court did not err by excluding hearsay statements of a physician admitted through a police officer who spoke to the physican after he attended to the rape victim; the testimony was hearsay not within an exception. Smith v. State, 2006 Tex. App. LEXIS 6325 (Tex. App. Texarkana July 21 2006).

272. Defendant's conviction for assault causing bodily injury to a family member was appropriate because a reasonable person could have concluded that the victim made the statement at issue to the officer upon his arrival at the scene while under the excitement, fear, or pain of the event at the time she made the statement. Smith v. State, 2006 Tex. App. LEXIS 5173 (Tex. App. Fort Worth June 15 2006).

273. Defendant's conviction of felony murder under Tex. Penal Code Ann. § 19.02(b)(3) following the death of child for whom defendant was babysitting was affirmed; the trial court did not err in admitting a redacted version of defendant's videotaped deposition taken during prior wrongful death litigation because the testimony was not hearsay under Tex. R. Evid. 801(e)(2)(A). Kemmerer v. State, 113 S.W.3d 513, 2003 Tex. App. LEXIS 5895 (Tex. App. Houston 1st Dist. 2003).

Evidence : Hearsay : Credibility of Declarants : General Overview

274. Horse owner was properly permitted to testify in rebuttal that a veterinarian who testified that the horse owner's filly did not die because of any actions taken by the horse farm owners, with whom the horse owner left his filly, had told the horse owner that the filly died because the horse farm owners failed to get the filly to the veterinary clinic sooner. The testimony pertained to the same subject matter as did the veterinarian's testimony and was directly contrary to the veterinarian's testimony. Therefore, the evidence was clearly admissible for the limited purpose of impeaching the veterinarian's earlier testimony, and the trial court properly admitted it over the horse farm owners' hearsay objection. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence

275. In defendant's motion for a new trial, the court properly excluded four letters written by a witness who testified at trial because the letters did not tend to expose the witness to criminal liability, and even if they did, there was no corroborating evidence to clearly indicate the trustworthiness of the statement. In both letters, the witness expresses his anger at defendant, but the witness did not say, however, that he lied when he testified for the State. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

276. In a trial for defendant's murder of a stepchild, defendant was not entitled to introduce, as a prior inconsistent statement under Tex. R. Evid. 801, a statement by the child's other parent about hating children because defendant called the other parent to the stand for the primary purpose of placing before the jury the inadmissible hearsay statement as substantive evidence of the other parent's guilt; any probative value the impeachment evidence might have had was substantially outweighed by its prejudicial effect under Tex. R. Evid. 403. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

Evidence : Hearsay : Credibility of Declarants : Rehabilitation

277. Trial court properly admitted a written statement of a witness claiming that defendant told his girlfriend to run over a decedent with his truck, as the statement was admissible and not hearsay under the rule of optional completeness and the rule allowing the admission of a prior consistent statement after a claim of recent fabrication, pursuant to Tex. R. Evid. 801(e)(1)(B). Moore v. State, 2007 Tex. App. LEXIS 2774 (Tex. App. Dallas Apr. 11 2007).

Evidence : Hearsay : Exceptions : General Overview

278. At defendant's trial for three counts of aggravated sexual assault of a child and two counts of indecency with a child by contact, the trial court did not err by admitting the victim's hearsay statements into evidence under the rule of completeness. The State was allowed to question a detective about the victim's statements and the differences between the two police reports, because defense counsel opened the door by asking questions based on the discrepancies between the reports. Ramirez v. State, 2014 Tex. App. LEXIS 3955, 2014 WL 1410344 (Tex. App. Waco Apr. 10 2014).

279. In a criminal trial, defendant's testimony about the victim's statement that she was going to injure herself to support the assault charge and then hit herself in the face was not hearsay because it was offered to describe one person's observations about how another person acted. Corbin v. State, 2013 Tex. App. LEXIS 15300, 2013 WL 7083195 (Tex. App. Eastland Dec. 19 2013).

280. In a case involving a repossession of a vehicle by a creditor, a debtor's claim that a trial court erred by failing to admit exhibits on hearsay grounds was inadequately briefed where the debtor did not explain whether the exhibits were not hearsay or whether they were hearsay, but nevertheless should have been admitted under some exception to the hearsay rule. Flores v. James Wood Fin. Llc, 2013 Tex. App. LEXIS 7488 (Tex. App. Fort Worth June 20 2013).

281. In a will contest, the trial court erred by granting summary judgment on the issue of testamentary capacity because testimony from witnesses that decedent was not in a state of mind to conduct financial affairs when he signed his will was sufficient to show the existence of a material fact issue with respect to testamentary capacity. The court was permitted to consider the partial deposition testimony of several witnesses as statements which were not hearsay under Tex. R. Evid. 801(e)(3)'s provision for a deposition taken in the same civil proceeding. In re Estate of O'Neil, 2012 Tex. App. LEXIS 7376, 2012 WL 3776490 (Tex. App. San Antonio Aug. 31 2012).

282. Trial court did not abuse its discretion by admitting hearsay evidence because most of the challenged testimony was an explanation of how defendant became the suspect. The officer took the jury step-by-step through the investigation to explain how all of the piece of evidence fit together to make defendant the suspect in the murder. Lacaze v. State, 346 S.W.3d 113, 2011 Tex. App. LEXIS 5095 (Tex. App. Houston 14th Dist. July 7 2011).

283. Detective's answers to questions concerning a nightclub where defendant was seen on the night of a murder did not relay out of court statements and therefore were not hearsay. Assuming that the detective's testimony

concerning a witness to the murder relayed an out of court statement, the detective's testimony did not constitute hearsay because it was admitted to explain how defendant became a suspect in the investigation and to establish the course of events and circumstances leading to defendant's arrest for the victim's murder. Garcia v. State, 2007 Tex. App. LEXIS 5080 (Tex. App. Corpus Christi June 28 2007).

284. In defendant's burglary case, the court properly allowed an officer to testify that, as she could not come to a conclusion on the latent fingerprint, she asked other examiners to examine the print, because the trial court could have reasonably concluded that the testimony, when taken in context, did not lead to any inescapable conclusions as to the substance of the other examiner's conclusions about the print and was therefore, not hearsay; the only information imparted by the testimony was that others had examined the print and had reached a conclusion, and that their conclusions were the same. Smith v. State, 236 S.W.3d 282, 2007 Tex. App. LEXIS 2206 (Tex. App. Houston 1st Dist. 2007).

285. In a case of fleeing from arrest, a police officer's testimony regarding another officer's statement to defendant was not subject to exclusion as hearsay. Because defendant acquiesced in the other officer's statement, the statement was an adoptive admission and was admissible under Tex. R. Evid. 801(e)(2)(B). Gant v. State, 153 S.W.3d 294, 2004 Tex. App. LEXIS 11841 (Tex. App. Beaumont 2004), writ of certiorari denied by 126 S. Ct. 1574, 164 L. Ed. 2d 307, 2006 U.S. LEXIS 2315, 74 U.S.L.W. 3530 (U.S. 2006).

286. Victim's co-worker's testimony was not hearsay because it was not offered to prove the truth of the matter asserted; rather, her testimony was offered pursuant to Tex. Code Crim. proc. Ann. art. 38.36(a) to provide her perception of the relationship between the victim and defendant prior to the victim's death. Montgomery v. State, 2004 Tex. App. LEXIS 10546 (Tex. App. Houston 1st Dist. Nov. 24 2004).

287. Although defendant argued that the trial court erred in admitting hearsay testimony of a witness to the murder, the admission of a statement that was hearsay was non-constitutional error subject to a harm analysis under Tex. R. App. P. 44.2(b), and that the impact of the witness's hearsay testimony that defendant was angry with the victim regarding a transmission was relatively insignificant when considered in connection with the other evidence supporting defendant's guilt, and did not have a substantial and injurious effect on the jury's verdict. Alvarado v. State, 2004 Tex. App. LEXIS 5019 (Tex. App. Houston 1st Dist. June 3 2004).

288. Admission of a statement that is hearsay is nonconstitutional error subject to a harm analysis under Tex. R. App. P. 44.2(b); a nonconstitutional error must be disregarded unless it affected defendant's "substantial rights" by having a substantial and injurious effect or influence in determining the jury's verdict. Shaw v. State, 122 S.W.3d 358, 2003 Tex. App. LEXIS 9864 (Tex. App. Texarkana 2003).

289. Defendant's conviction of felony murder under Tex. Penal Code Ann. § 19.02(b)(3) following the death of child for whom defendant was babysitting was affirmed; the trial court did not err in admitting a redacted version of defendant's videotaped deposition taken during prior wrongful death litigation because the testimony was not hearsay under Tex. R. Evid. 801(e)(2)(A). Kemmerer v. State, 113 S.W.3d 513, 2003 Tex. App. LEXIS 5895 (Tex. App. Houston 1st Dist. 2003).

290. In defendant's criminal trial, testimony of arresting officer as to an out of court statement that defendant's car "had been possibly involved in a robbery three days earlier" was not hearsay under Tex. R. Evid. 801(d) where the testimony was not offered to prove the truth of the matter asserted; rather, it was offered to show probable cause for the detention of the defendant for traffic violations. Ellis v. State, 99 S.W.3d 783, 2003 Tex. App. LEXIS 1445 (Tex. App. Houston 1st Dist. 2003).

291. Defendant's claim that he was denied effective assistance of counsel in violation of U.S. Const. amend. VI and Tex. Const. art. I, § 10 solely because his attorney failed to object to certain testimony that was allegedly intended to elicit a hearsay statement, Tex. R. Crim. Evid. 801, 802, was without merit where the record was silent regarding counsel's trial strategy for not objecting immediately to the testimony and the court could not say that no reasonable counsel would not have objected to the testimony. As the record reflected that counsel filed pretrial motions, vigorously cross-examined witnesses, and objected to the admission of other evidence, defendant failed to prove by a preponderance of the evidence that, but for his counsel's failure to object to the particular testimony, a reasonable probability existed that a different outcome would have resulted. Payne v. State, 1998 Tex. App. LEXIS 2198 (Tex. App. Dallas Apr. 15 1998).

292. When a defendant's friend made a statement to police that they had just assaulted the victim, the statement was admissible as an adoptive admission within the meaning of Tex. R. Evid. 801; the defendant did not object to the statement when it was made, and actually confirmed it moments later. Bean v. State, 1998 Tex. App. LEXIS 2108 (Tex. App. Houston 14th Dist. Apr. 9 1998).

Evidence : Hearsay : Exceptions : Business Records : General Overview

293. Exhibit should not have been excluded on the basis of the hearsay objection, because the business records affidavit made by the custodian of records precisely tracked the requirements in Tex. R. Evid. 902(10). Cabot Oil & Gas Corp. v. Healey, L.P., 2013 Tex. App. LEXIS 3934 (Tex. App. Tyler Mar. 28 2013).

294. In a defamation action, a trial court did not err by admitting daily logs as business records for the limited purpose of whether a prudent investigation of complaints was conducted by an executive director of an independent living facility prior to banning a service provider; the trial court gave a limiting instruction to the jury, and the logs were relevant because the bore on the directors motivation and state of mine and a substantial truth defense. Collins v. Sunrise Senior Living Mgmt., 2012 Tex. App. LEXIS 2457, 2012 WL 1067953 (Tex. App. Houston 1st Dist. Mar. 29 2012).

295. In a creditor's suit to recover unpaid debt on a credit card account, the trial court erroneously excluded the billing statements and notices informing the debtor of changes in his credit card agreement where the creditor properly established the applicability of Tex. R. Evid. 803(6)'s business records hearsay exception because an employee of the company that provided administrative services for the creditor's credit card accounts testified that: (1) she had worked for the company for nearly seven years; (2) the company provided support for the creditor's credit card accounts; (3) her job responsibilities gave her the right to access the kind of information included in the monthly billing statements for the debtor's account; (4) she was the custodian of those records; (5) the statements in the debtor's billing statements were made at or near the time of the information recorded therein by a person with knowledge; and (6) the debtor's billing statements and other billing statements like it were made and kept in the regular course of the company's business. Moreover, the billing records could qualify for the business records hearsay exception even if they were business records of a third party to the lawsuit because the employee testified that the records were kept in the course of the company's business, that the company issued billing statements and provided collections and litigation support, and that she had no indication of any lack of trustworthiness in the way the documents were handled, generated, or kept. Citibank (s.D.), N.A. v. Tate, 2010 Tex. App. LEXIS 9959 (Tex. App. Houston 1st Dist. Dec. 16 2010).

296. Trial court erred in admitting the complained-of documents, because there was no indication that the business knew of the events recorded on the third-party documents, when the witness testified about the telemarketing application, he stated that the information was inputted by someone at the company, although he had no personal information about how the information was inputted or how the information was obtained, and the same observation could be made about the account statements and the cardholder agreement. Riddle v. Unifund Ccr

Patrns, 298 S.W.3d 780, 2009 Tex. App. LEXIS 7805 (Tex. App. El Paso Oct. 7 2009).

297. Trial court's exclusion of an affidavit as inadmissible hearsay was proper where it could not serve as an authentication to business records pursuant to Tex. R. Evid. 902(10) because it had not been on file for the requisite fourteen days before the subsequent trial; the affidavit had been signed only five days prior to the subsequent trial. Benchmark Ins. Co. v. Sullivan, 2009 Tex. App. LEXIS 2947, 2009 WL 1153385 (Tex. App. Tyler Apr. 30 2009).

298. In a murder case, an autopsy report was properly admitted as a public record and a business record because the report set forth matters observed pursuant to a duty imposed by law, including the location and the nature of the injuries; a doctor testified and was subject to cross-examination and he was also a signatory to the report. Terrazas v. State, 2006 Tex. App. LEXIS 6696 (Tex. App. Austin July 28 2006).

299. In a criminal prosecution for sexual assault, the defendant's proffer of evidence about the victim's written medical report included no affidavit or live testimonial sponsorship from a records custodian; therefore, the medical records were hearsay, and the trial court properly excluded their admission. Smith v. State, 2006 Tex. App. LEXIS 6325 (Tex. App. Texarkana July 21 2006).

300. In community supervision revocation proceedings, counsel was not ineffective for failing to make a hearsay objection to testimony about information in defendant's community supervision file; even if the business records predicate under Tex. R. Evid. 803 was not established, the record did not affirmatively demonstrate that the State could not have established it. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

301. In a proceeding to terminate a father's parental rights, it was reversible error under Tex. R. Evid. 801 to admit hearsay statements relating to purported sexual abuse by the father of a different child, including written statements by two adults relating to the child's reports of sexual abuse, a child abuse protocol from a physical examination, and an arrest warrant with an affidavit containing reports of the purported assault. Those documents were not admissible under either the business records or public records exceptions of Tex. R. Evid. 803 because the Department of Family and Protective Services failed to lay a proper predicate. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

302. In a breach of contract and fraudulent inducement case, a trial court properly refused to admit an exhibit because it was irrelevant to either claim; moreover, it did not fit within the business records exception to the hearsay rule. Case Corp. v. Hi-Class Bus. Sys. of Am., Inc., 184 S.W.3d 760, 2005 Tex. App. LEXIS 10549 (Tex. App. Dallas 2005).

303. Documents that a successor administrator of a decedent's estate used to establish the loss to the estate concerning the decedent's house, which occurred during the former administrator's administration, were not inadmissible hearsay in a breach of fiduciary duty action against the former administrator because the documents were business records under Tex. R. Evid. 803(6) that related to the mortgage on the house. A number of the documents concerning the house were duplicates of evidence duly admitted in related proceedings, and there was no evidence indicating that the documents were inadmissible hearsay in the related proceedings. Sierad v. Barnett, 164 S.W.3d 471, 2005 Tex. App. LEXIS 4161 (Tex. App. Dallas 2005).

304. In a personal injury case, letters written by a doctor to plaintiff's attorney were inadmissible because they admittedly were generated to facilitate settlement of a legal claim. The difficulty of lay persons reading and understanding medical records was inherent in the records themselves, especially when no explanatory expert testimony was presented, and for those reasons, the two excluded letters did not qualify under the business records exception to the hearsay rule. Grove v. Overby, 2004 Tex. App. LEXIS 6822 (Tex. App. Austin July 29 2004).

Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

305. At defendant's trial for causing serious bodily injury to a child, the trial court admitted the autopsy photographs as business records. Although a photograph or slide is not an out-of-court statement, defendant counsel had no objection at trial; therefore, defendant waived any error in the admission of these exhibits. Williams v. State, 2014 Tex. App. LEXIS 3020, 2014 WL 1102004 (Tex. App. Beaumont Mar. 19 2014).

306. At defendant's trial for theft of a plasma television, the State was permitted to admit a purchasing requisition form showing the cost of replacing the television under the business records exception to the hearsay rule set forth in Tex. R. Evid. 803; the authenticating witness testified that he was the head of the security, he made the form in the regular course of business near the time of the events in question, such forms were created to inform the finance department of the price of a needed item, and he was authorized to keep and control such forms; the trial court did not err in overruling defendant's hearsay objection under Tex. R. Evid. 801. Baker v. State, 2007 Tex. App. LEXIS 7886 (Tex. App. Houston 1st Dist. Oct. 4 2007).

Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business

307. In a breach of contract action brought by appellee, the assignee of a credit card company, against an account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent sufficiently showed that appellee incorporated the credit card company's records and kept them in the regular course of its business. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

Evidence : Hearsay : Exceptions : Dying Declarations : General Overview

308. In defendant's murder case, a witness was properly allowed to testify to the victim's statements made at the hospital because it was undisputed that his injuries were severe and his prognosis was grim. Given the extent of the victim's injuries, the witness's impression that the victim knew there was a possibility he would die after being removed from the ventilator, and the giving of last rites, the trial court did not abuse its discretion by admitting the testimony under the dying declarations exception to the hearsay rule. Sadler v. State, 2009 Tex. App. LEXIS 2962, 2009 WL 1163407 (Tex. App. Waco Apr. 29 2009).

Evidence : Hearsay : Exceptions : Dying Declarations : Belief of Imminent Death

309. In defendant's murder case, a witness was properly allowed to testify to the victim's statements made at the hospital because it was undisputed that his injuries were severe and his prognosis was grim. Given the extent of the victim's injuries, the witness's impression that the victim knew there was a possibility he would die after being removed from the ventilator, and the giving of last rites, the trial court did not abuse its discretion by admitting the testimony under the dying declarations exception to the hearsay rule. Sadler v. State, 2009 Tex. App. LEXIS 2962, 2009 WL 1163407 (Tex. App. Waco Apr. 29 2009).

Evidence : Hearsay : Exceptions : Former Testimony of Unavailable Declarants

310. At defendant's trial for murder, the trial court did not err by admitting the prior testimony from an accomplice witness that constituted hearsay under Tex. R Evid. 801(d); he was unavailable under the meaning of Tex. R. Evid. 804 because he invoked his Fifth Amendment privilege against self-incrimination. Lockridge v. State, 2013 Tex. App. LEXIS 6147 (Tex. App. Texarkana May 17 2013).

311. In a second trial for sexual abuse, it was error to admit the entirety of the complainant's testimony from the first trial even though the defense used part of the testimony for impeachment, because there was no showing that the entire prior testimony was either on the same subject or was necessary to correct a false or incorrect impression of the witness' testimony; the testimony was admissible because the complainant was not unavailable. Sneed v. State, 209 S.W.3d 782, 2006 Tex. App. LEXIS 10067 (Tex. App. Texarkana 2006).

Evidence : Hearsay : Exceptions : Market Reports & Commercial Publications : General Overview

312. In a criminal trial for theft of property where defendant was charged with financial exploitation based on undue influence, the trial court did not err by admitting hearsay evidence of the Kelly bluebook value of a Ford Explorer that the victims purchased and signed over to defendant; the evidence was admissible under Tex. R. Evid. 803, the hearsay exception for published compilations. Jacks v. State, 2006 Tex. App. LEXIS 1968 (Tex. App. Tyler Mar. 15 2006).

313. In a possession of pseudoephedrine with intent to manufacture methamphetamine case, the labeling on the cold medicine bottles constituted hearsay because it was an extrajudicial assertion offered to prove the truth of the matter asserted that the tablets contained pseudoephedrine; however, the labels were generally relied upon by the public, which suggested that the cold medication labels were accurate and trustworthy; thus, pursuant to Tex. R. Evid. 803, the labels were admissible as an exception to the hearsay rule. Shaffer v. State, 184 S.W.3d 353, 2006 Tex. App. LEXIS 410 (Tex. App. Fort Worth 2006).

Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment

314. In a sexual assault trial, it did not violate the hearsay rule to admit the complainant's account of what happened, as told to a sexual assault nurse examiner, because the complainant's statements regarding the incident were necessary for purposes of medical diagnosis and treatment and thus came under the medical treatment exception. Williams v. State, 2014 Tex. App. LEXIS 2618, 2014 WL 895506 (Tex. App. Waco Mar. 6 2014).

315. Defendant failed to show that the court erred in admitting the statements made to the nurse for purposes of medical diagnosis or treatment, because the qualifications of the person hearing the statements was not the important consideration, and the fact that the nurse could have been gathering information for a criminal prosecution did not lead to the conclusion that the statements were inadmissible. Beck v. State, 2013 Tex. App. LEXIS 13160, 2013 WL 5773573 (Tex. App. Tyler Oct. 23 2013).

316. In defendant's sexual abuse case, the victim's hearsay statements to a doctor were properly admitted because the doctor testified that she had specialized training in treating conditions related to sexual abuse, and that she always asked her patients for a thorough medical history prior to making any diagnosis. The doctor found that the victim had a "notch" on her hymen, which was a "suspicious" finding consistent with what the victim had told her about the abuse she suffered. Whitman v. State, 2012 Tex. App. LEXIS 936, 2012 WL 361740 (Tex. App. Corpus Christi Feb. 2 2012).

317. Defendant failed to carry his burden of establishing that a hearsay exception applied to make the clinical social worker's testimony admissible into evidence, because defendant did not establish that truth-telling was a vital component of the social worker's treatment of the niece or that the niece was aware that being truthful was essential to her therapy. Harrington v. State, 2010 Tex. App. LEXIS 2138, 2010 WL 1137046 (Tex. App. Fort Worth Mar. 25 2010).

318. In a trial for child sexual assault, testimony from a clinical social worker about the complainant's statements was inadmissible hearsay under Tex. R. Evid. 801(d), 802. The testimony was not admissible under the medical-

diagnosis-and-treatment exception of Tex. R. Evid. 803(4) because the record did not show that the child-complainant understood that the statements identifying defendant as the perpetrator were for the purpose of medical diagnosis or treatment. Nasrollah Hanjani Alizadeh v. State, 2009 Tex. App. LEXIS 1423 (Tex. App. Houston 1st Dist. Feb. 26 2009).

319. Where defendant was convicted of the aggravated sexual assault of his thirteen-year-old niece, the trial court erred by admitting the therapist's testimony that the child told her that family members were pressuring her and her mother to drop the charges; the State offered the therapist's statements to show how the child reacted to perceived pressures; the same testimony was admitted through other witnesses without objection. Arguelles v. State, 2007 Tex. App. LEXIS 602 (Tex. App. Dallas Jan. 29 2007).

320. In a personal injury suit, where appellee filed affidavits for the authentication of medical bills and appellant filed a chiropractor's controverting affidavit, the controverting affidavit and report were sufficient under Tex. Civ. Prac. & Rem. Code Ann. § 18.001(f) to controvert appellee's affidavit as to chiropractic expenses but appellant's chiropractor did not show that the chiropractor was qualified to controvert the reasonableness of the medical doctor's, radiologist's, or pharmacist's bills. Hong v. Bennett, 209 S.W.3d 795, 2006 Tex. App. LEXIS 10105 (Tex. App. Fort Worth 2006).

321. In a criminal prosecution for sexual assault, the defendant's proffer of evidence about the victim's written medical report included no affidavit or live testimonial sponsorship from a records custodian; therefore, the medical records were hearsay, and the trial court properly excluded their admission. Smith v. State, 2006 Tex. App. LEXIS 6325 (Tex. App. Texarkana July 21 2006).

Evidence : Hearsay : Exceptions : Present Sense Impression : General Overview

322. Even though the trial court erred by admitting the audio portions of the tape that recorded the arresting officer's statements about defendant's conditions and his narrative about what he found in defendant's vehicle, as they were spoken offense reports that were inadmissible hearsay and did not qualify as present sense impressions under Tex. R. Evid. 803(1), the error was harmless because both officers testified at trial as to everything the arresting officer mentioned in the audio tape. The arresting officer testified about defendant's agitated attitude and appearance, stating that he smelled like alcohol and his face was red; the officer also testified that he asked defendant to perform field sobriety tests at least twice and he found multiple empty beer and wine bottles in the vehicle. Eggert v. State, 395 S.W.3d 240, 2012 Tex. App. LEXIS 9190, 2012 WL 5416202 (Tex. App. San Antonio Nov. 7 2012).

323. Because an officer did not testify, his narrative observations of a driving while intoxicated suspect were not admissible as a prior statement under Tex. R. Evid. 801(e)(1). Fischer v. State, 207 S.W.3d 846, 2006 Tex. App. LEXIS 9432 (Tex. App. Houston 14th Dist. 2006).

324. In a medical malpractice case, the trial court did not err in excluding, as hearsay under Tex. R. Evid. 801(d), a statement by a witness who would have testified that the doctor was afraid that he had done something wrong; the statement was offered in evidence to prove the truth of the matter asserted, and the present sense impression rule of Tex. R. Evid. 803(1) did not apply because there was no evidence of contemporaneity. Daniels v. Yancey, 175 S.W.3d 889, 2005 Tex. App. LEXIS 8789 (Tex. App. Texarkana 2005).

Evidence : Hearsay : Exceptions : Present Sense Impression : Contemporaneous Statements

325. In defendant's murder case, the court properly excluded testimony of a witness regarding what the victim told the witness about altercations between the victim and defendant because the testimony concerning what the victim

said to the witness at least two days after the event in question was not a present sense impression, there was no evidence in the record that the victim was "in the instant grip of violent emotion, excitement or pain" immediately before or during his recounting of the events, and the victim's statements were not self-inculpatory. Eisenman v. State, 2008 Tex. App. LEXIS 282 (Tex. App. Corpus Christi Jan. 10 2008).

326. In a driving while intoxicated case, a court erred by admitting witnesses' hearsay statements under the present sense impression exception because the evidence did not establish how much time elapsed between when one witness observed the incident and when she prepared her statement, and the other witness's written statement, made five days after the incident, clearly fell outside any reasonable argument that she made it immediately after the incident; however, the error was harmless; both witnesses testified at trial that they saw defendant weaving across the roadway prior to her leaving the highway, and a videotape of field sobriety tests supported that defendant did not have the normal use of her mental or physical faculties. Dalton v. State, 2006 Tex. App. LEXIS 9189 (Tex. App. Beaumont Oct. 25 2006).

Evidence : Hearsay : Exceptions : Public Records : General Overview

327. Debtor argued that the certificate of title only stood as hearsay evidence, but that was not the law, plus the notation on the certificate of title is the only way for a lienholder to secure an automobile lien, for purposes of Tex. Transp. Code Ann. § 501.111(a). Wyatt v. Capital One Auto Fin., 2010 Tex. App. LEXIS 563, 71 U.C.C. Rep. Serv. 2d (CBC) 8 (Tex. App. Austin Jan. 29 2010).

328. In a murder case, an autopsy report was properly admitted as a public record and a business record because the report set forth matters observed pursuant to a duty imposed by law, including the location and the nature of the injuries; a doctor testified and was subject to cross-examination and he was also a signatory to the report. Terrazas v. State, 2006 Tex. App. LEXIS 6696 (Tex. App. Austin July 28 2006).

329. In a proceeding to terminate a father's parental rights, it was reversible error under Tex. R. Evid. 801 to admit hearsay statements relating to purported sexual abuse by the father of a different child, including written statements by two adults relating to the child's reports of sexual abuse, a child abuse protocol from a physical examination, and an arrest warrant with an affidavit containing reports of the purported assault. Those documents were not admissible under either the business records or public records exceptions of Tex. R. Evid. 803 because the Department of Family and Protective Services failed to lay a proper predicate. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports

330. Trial court did not err by excluding from evidence written witness statements attached to an officer's accident report because the statements were hearsay under Tex. R. Evid. 801(d) and they did not fall under the public records exception, as witness statements in an officer's file did not qualify. Sherbin v. Dean Word Co., 2010 Tex. App. LEXIS 5362, 2010 WL 2698761 (Tex. App. Austin July 9 2010).

Evidence : Hearsay : Exceptions : Recorded Recollection : Recollection Refreshed

331. In defendant's assault case, the court properly allowed an officer to testify about the incident because the officer did not say that his testimony was based on another officer's report, nor did he quote or read from that officer's report or testify to any conclusions made by the other officer; rather, the officer refreshed his memory about his personal observations by reviewing the other officer's report, then testified from his own memory of those observations. Thrower v. State, 2008 Tex. App. LEXIS 2590 (Tex. App. Dallas Apr. 10 2008).

Evidence : Hearsay : Exceptions : Residual Exceptions : Confrontation Clause Requirements

332. In defendant's trial for possession of four grams or more but less than 200 grams of methamphetamine in violation of Tex. Health & Safety Code § 481.115, defendant's rights under the Confrontation Clause were not violated by the admission of a chemist's testimony and related exhibits related to the laboratory results obtained by a nontestifying chemist; Crawford did not apply to the baggies of controlled substances admitted as exhibits because they were not "statements" under Tex. R. Evid. 801(a). Camacho v. State, 2009 Tex. App. LEXIS 5975, 2009 WL 2356885 (Tex. App. Fort Worth July 30 2009).

Evidence : Hearsay : Exceptions : Spontaneous Statements : General Overview

333. In defendant's sexual assault of a child case, the court properly allowed testimony under the excited utterance exception because the victim told a witness that defendant told her to open her mouth and that was going to stick his penis in her mouth. Although a quarter of an hour passed, the victim was shaking and crying. Ervin v. State, 2013 Tex. App. LEXIS 8213 (Tex. App. Dallas July 3 2013).

334. In a sexual assault of a child case, the victim's mother's testimony regarding what the victim told her was admissible as an excited utterance because the time between when the grandmother witnessed the encounter and the victim made the declaration that defendant "put his private in her mouth" was 10 minutes and, throughout that period, the victim cried. Although the mother asked the victim what was wrong, the declaration was not the result of questioning and was a spontaneous declaration regarding the occurrence that caused the emotional state the victim was in at a time that the victim was still in that emotional state. In re A. W. B., 419 S.W.3d 351, 2010 Tex. App. LEXIS 747 (Tex. App. Amarillo Feb. 2 2010).

335. In defendant's murder case, the court properly admitted the deaf victim's written statements under the excited utterance exception because the statements related to a startling event: she wrote that she was raped, hit, and threatened with a knife that evening, the deputy testified that the statements were made while the victim was scared and angry, and thus, it was reasonable for the trial court to infer that the victim was under the stress of excitement caused by the event or condition. Fuentes v. State, 2009 Tex. App. LEXIS 9779 (Tex. App. Houston 1st Dist. Dec. 3 2009).

336. Trial court did not abuse its discretion in admitting an officer testimony regarding the victim's statements because, given that the officer responded to the victim's emergency call within fifteen minutes of the incident and that he observed the victim to be "very upset, nervous, an shaking," it was clear that the victim was still dominated by the emotions, fear, and excitement attendant to the incident when she spoke to the officer. Nolen v. State, 2009 Tex. App. LEXIS 9054, 2009 WL 4051980 (Tex. App. Corpus Christi Nov. 24 2009).

337. In a failure to stop case, the court properly excluded testimony that defendant's husband told her that he had been involved in an accident because the traffic accident was not such a startling event that the husband was still dominated by the emotions, excitement, fear, or pain of the event or condition when the statement was made; the accident was not of a serious nature, the vehicle was still operable, the injuries were relatively minor, and the statements were made in response to a question and were untrue since the driver of the other car had not left the scene. Martinez v. State, 2007 Tex. App. LEXIS 927 (Tex. App. El Paso Feb. 8 2007).

338. Statements about sexual abuse by a complainant to a school counselor were improperly admitted under the excited utterance exception to the hearsay rule because the statements were made three years after the abuse by a 14-year-old complainant, after she had told her mother about the abuse. Neill v. State, 2006 Tex. App. LEXIS 8684 (Tex. App. Fort Worth Oct. 5 2006).

339. Court properly admitted a child's statements as excited utterances where the police officer testified that the child had appeared to be upset not only when he entered the room, but for some time afterward, as she continued to express fear and distress regarding the disappearance and, she believed, death of her mother. Lagunas v. State, 187 S.W.3d 503, 2005 Tex. App. LEXIS 6957 (Tex. App. Austin 2005).

Evidence : Hearsay : Exceptions : Spontaneous Statements : Criminal Trials

340. Police officer's testimony regarding the complainant's statements made shortly after the alleged assault occurred was properly admitted because the following circumstances supported application of the excited utterance hearsay exception: (1) the officer testified he arrived on the scene within six minutes of the 911 call; (2) the trial court reasonably could have concluded that no significant amount of time elapsed between the officer's arrival and his conversation with the complainant; (3) the officer described the complainant as being visibly shocked, dazed, and very upset and sad; and (4) the officer also observed that the complainant was bleeding from lacerations on his arm. Salinas v. State, 2013 Tex. App. LEXIS 14761, 2013 WL 6328863 (Tex. App. Houston 14th Dist. Dec. 5 2013).

341. In a trial for assault involving family violence, the victim's nonverbal out-of-court statement (blinking to indicate "yes" in response to the question of whether defendant choked her) was properly admitted as an excited utterance because the officer observed that she was extremely frightened and she did not have sufficient time or composure to fabricate an answer. Miller v. State, 2013 Tex. App. LEXIS 7679 (Tex. App. Tyler June 25 2013).

342. In a murder trial, there was no error under Tex. R. Evid. 801(d), 802, in admitting, as excited utterance under Tex. R. Evid. 803(2), testimony from a deceased witness's wife about his statements. It could not reasonably be disputed that the decedent's statement shortly after the murder related to a startling event, and the wife testified that the decedent was completely out of it, rambling, and really nervous and scared. Wells v. State, 319 S.W.3d 82, 2010 Tex. App. LEXIS 2595 (Tex. App. San Antonio Apr. 14 2010).

343. In an aggravated sexual assault case, a court's decision to exclude evidence as hearsay was proper because the out of court statement made by defendant in the presence of the officers that the victim had lost her clothing in a game of cards did not possess the requisite level of reliability so as to remove it from the realm of contrivance and fabrication. The trial court could have reasonably concluded that, because the applicability of the excited utterance exception required it to first accept defendant's version of events as true, the statement was not sufficiently reliable to qualify as a hearsay exception. Langford v. State, 2010 Tex. App. LEXIS 567, 2010 WL 323081 (Tex. App. Austin Jan. 27 2010).

344. In a domestic assault case, the court properly admitted the victim's statement as an excited utterance because the victim's answer to a standard form provided by the officer said she would feel danger after the officer left. Based on those facts, which indicated that the victim might still then have been dominated by emotions when making her statements, the trial judge's discretionary decision was not so clearly wrong as to lie outside that zone within which reasonable persons might disagree. James v. State, 2009 Tex. App. LEXIS 8494, 2009 WL 3643554 (Tex. App. Texarkana Nov. 5 2009).

345. Court properly allowed a police officer to testify because the testimony explained how defendant became a suspect in the case and the status of the investigation; therefore, the officer's testimony was not inadmissible hearsay. Moreover, given that the officer responded to the victim's emergency call within fifteen minutes of the incident and that he observed the victim to be "very upset, nervous, and shaking," it was clear that the victim was still dominated by the emotions, fear, and excitement attendant to the incident. Nolen v. State, 2009 Tex. App. LEXIS 6648 (Tex. App. Corpus Christi Aug. 25 2009).

346. In a trial for aggravated assault on a public servant, there was no error in admitting the statement of a 911 caller whom officers called back because the statement was properly found to be an excited utterance under Tex. R. Evid. 803; at the time of the statement, defendant had not been apprehended, and an officer testified that the caller sounded upset. Jarrell v. State, 2007 Tex. App. LEXIS 6357 (Tex. App. Austin Aug. 10 2007).

347. In a sexual assault trial, there was no error under Tex. R. Evid. 801, in admitting the complainant's out-of-court statement to the police as an excited utterance under Tex. R. Evid. 803 because the officer stated that the complainant was very excited, very nervous, almost to the point where the complainant's nervousness made the officer nervous; further, the trial court could have reasonably concluded that the sexual assault occurred within the past few hours, supporting the admission. Farmer v. State, 2007 Tex. App. LEXIS 6012 (Tex. App. Houston 14th Dist. July 31 2007).

348. In a sexual assault trial, there was no error in admitting the complainant's out-of-court statement to a relative as an excited utterance under Tex. R. Evid. 803; although the relative described the complainant's demeanor as absolutely flat and without emotion, the relative further explained that the complainant was beyond upset, just absolutely flat and in shock about what had just happened. Farmer v. State, 2007 Tex. App. LEXIS 6012 (Tex. App. Houston 14th Dist. July 31 2007).

349. Defendant's conviction for assault causing bodily injury to a family member was appropriate because a reasonable person could have concluded that the victim made the statement at issue to the officer upon his arrival at the scene while under the excitement, fear, or pain of the event at the time she made the statement. Smith v. State, 2006 Tex. App. LEXIS 5173 (Tex. App. Fort Worth June 15 2006).

350. In a trial for family assault, testimony concerning the complainant's statements was properly admitted as excited utterance; the complainant was visibly shaken and highly upset and her intoxication did not negate her state of excitement. Hudson v. State, 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

351. In a trial for assault on a family member, the complainant's statement to officers and an emergency medical technician was properly admitted under the excited utterance exception to the hearsay rule. The complainant's intoxication did not call into question whether her mind was dominated by a state of excitement; the three witnesses testified that she was visibly shaken and highly upset when they arrived within five minutes of receiving the assault call. Hudson v. State, 2005 Tex. App. LEXIS 7386 (Tex. App. Houston 14th Dist. Sept. 8 2005), opinion withdrawn by, substituted opinion at 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

352. In an assault trial, the victim's statement to police, which she made when they responded to a 911 call from a third person, was properly admitted under the excited utterance exception, Tex. R. Evid. 803(2) to the hearsay rule, Tex. R. Evid. 801(d), 802. The victim was extremely agitated when officers arrived at the scene and was so upset that officers initially could not understand her. Bufkin v. State, 2005 Tex. App. LEXIS 2745 (Tex. App. Houston 14th Dist. Apr. 12 2005), opinion withdrawn by, substituted opinion at 179 S.W.3d 166, 2005 Tex. App. LEXIS 8750 (Tex. App. Houston 14th Dist. 2005).

353. In a sexual assault trial, the complainant's statement to police was properly admitted under the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2). The complainant had run into a store crying, shaking, and screaming that she had just been raped at gunpoint by two men in a van and needed help; the police were called within three to four minutes and arrived approximately five minutes later, when she was still under the influence of the trauma she just experienced and appeared to be in shock. Ascencio v. State, 2005 Tex. App. LEXIS 1449 (Tex. App. Houston 14th Dist. Feb. 24 2005).

354. In a murder trial, the trial court properly admitted, under the excited utterance exception, a hearsay statement that the declarant could not believe defendant had shot someone. Even if the declarant's knowledge came from a third person, the only out-of-court statement offered into evidence was the declarant's. The State did not have to show that the third party's statement fell within a hearsay exception. Ross v. State, 154 S.W.3d 804, 2004 Tex. App. LEXIS 11407 (Tex. App. Houston 14th Dist. 2004).

355. Excited utterance exception to the hearsay rule justified the admission of testimony that the declarant, a murder victim, had told the witness that he was afraid of the defendant; the trial court did not abuse its discretion in concluding that the victim was under the influence of a startling event. Headley v. State, 2004 Tex. App. LEXIS 5104 (Tex. App. Houston 1st Dist. June 10 2004).

Evidence : Hearsay : Exceptions : Spontaneous Statements : Elements

356. Trial court did not err by excluding from evidence written witness statements attached to an officer's accident report because the construction workers' statements were hearsay under Tex. R. Evid. 801(d) and they did not fall under the excited utterance exception, as the record did not indicate how much time elapsed between the accident and the statements or demonstrate the demeanor of the workers at the time of the statements. Sherbin v. Dean Word Co., 2010 Tex. App. LEXIS 5362, 2010 WL 2698761 (Tex. App. Austin July 9 2010).

Evidence : Hearsay : Exceptions : Spontaneous Statements : Res Gestae

357. Appellant argued that the trial court erred in not allowing him to elicit testimony that appellant said he was made to do the crime, but nothing showed that the trial court abused its discretion by excluding the complained-of statement; the court could not say whether the spontaneity of appellant's statement existed to take such out of the realm of premeditation, given that the witness said he was unsure of the exact timing of the statement, plus he assumed it was made more than two minutes after appellant had been apprehended and the statement was made after the tension had ceased. Falade v. State, 2011 Tex. App. LEXIS 9408, 2011 WL 5984536 (Tex. App. Fort Worth Dec. 1 2011).

Evidence : Hearsay : Exceptions : State of Mind : General Overview

358. In an aggravated assault case, defendant should have been allowed to testify that the victim threatened to file a "false" assault charge against her because the statement was not offered to prove the truth of the matter asserted; instead, it was offered to show that the victim had an intent to lie. Corbin v. State, 2013 Tex. App. LEXIS 15300, 2013 WL 7083195 (Tex. App. Eastland Dec. 19 2013).

359. In defendant's capital murder trial for the killing of his wife and son, his wife's statement that defendant did not want her to have contact with her parents and that she wished to divorce appellation were expressions of her state of mind at the time they were made and were admissible as an exception to the hearsay rule. Payne v. State, 2011 Tex. App. LEXIS 3270, 2011 WL 1662856 (Tex. App. Tyler Apr. 29 2011).

360. In defendant's capital murder trial for the killing of his wife and son, his wife's statement begging her sister-in-law to avenge her death was not a statement of mind but a supposition that her husband would be responsible if she were killed. That kind of statement did not fit into the state of mind exception to the hearsay rule. Payne v. State, 2011 Tex. App. LEXIS 3270, 2011 WL 1662856 (Tex. App. Tyler Apr. 29 2011).

361. In defendant's trial for possession of four grams or more but less than 200 grams of methamphetamine in violation of Tex. Health & Safety Code § 481.115, the trial court properly admitted the recording of a telephone conversation between a confidential informant (CI) and the individual who purchased methamphetamine from

defendant; the recording was properly admitted as to the purchaser-coconspirator under Tex. R. Evid. 801(e)(2)(E) and was properly admitted as to the CI under Tex. R. Evid. 803(3) as a statement of the CI's then existing plan to provide the purchaser with transportation to a meeting place with defendant. Camacho v. State, 2009 Tex. App. LEXIS 5975, 2009 WL 2356885 (Tex. App. Fort Worth July 30 2009).

362. In a murder case, although the trial court erred in admitting the victim's hearsay statement regarding her plans to withhold all financial support from defendant, the error was harmless. The State provided evidence of the stolen rifle as the murder weapon, the victim's negative feelings toward defendant, defendant's inconsistent alibi, and the perpetrator's knowledge of where valuables were located in the victim's home. Fischer v. State, 2009 Tex. App. LEXIS 4092 (Tex. App. San Antonio June 10 2009).

363. In a murder case, because the victim's statement that defendant "gave her the creeps" was permissible hearsay, and went to the nature of the relationship between the victim and defendant, the court did not err in admitting the statement. Fischer v. State, 2009 Tex. App. LEXIS 4092 (Tex. App. San Antonio June 10 2009).

364. In defendant's trial for robbery and kidnapping, testimony about defendant's accomplice's statement was not hearsay because the testimony was elicited to show what effect the statement had on the victim's state of mind. Edwards v. State, 2008 Tex. App. LEXIS 2564 (Tex. App. Houston 1st Dist. Apr. 10 2008).

365. In the trial of an officer for lying in a warrant affidavit about the reliability of an informant, the trial court properly allowed testimony that the alleged informant was reluctant to deal with the subject of the warrant, while prohibiting more specific testimony that the informant was afraid because of the informant's belief that the subject had killed a man. The latter statement was properly excluded as hearsay under Tex. R. Evid. 801(d), 802 and did not fall within the hearsay exception of Tex. R. Evid. 803 because it was a statement of memory or belief offered to prove that the subject had killed a man. Delapaz v. State, 228 S.W.3d 183, 2007 Tex. App. LEXIS 2377 (Tex. App. Dallas 2007).

366. Trial court properly excluded a deposition because it had been taken in another lawsuit and, although appellant's opinion at the time would have been within the exception to the hearsay rule provided by Tex. R. Evid. 803(3), the deposition's contents were inadmissible hearsay because the statements contained within it pertained to the other party's statements and state of mind rather than to appellant's. Trantham v. Isaacks, 218 S.W.3d 750, 2007 Tex. App. LEXIS 501 (Tex. App. Fort Worth 2007), *cert. denied*, 552 U.S. 892, 128 S. Ct. 340, 169 L. Ed. 2d 155, 2007 U.S. LEXIS 10018 (2007).

367. During defendant's criminal trial for two counts of aggravated sexual assault of a child, defendant was not harmed by the trial court's admission of out of court testimony concerning the child's dream in which defendant was having sexual relations with her aunt; the evidence concerned a dream that was never asserted to be true; it concerned the child's state of mind, not defendant's state of mind or conduct. Phillips v. State, 2006 Tex. App. LEXIS 9509 (Tex. App. Dallas Nov. 2 2006).

368. Pursuant to Tex. R. Evid. 801 and 803(3), the statements made by a witness, that the victim told the witness that the defendant had been partying, tearing things up, and smoking pot in the victim's residence, amounted to the admission of inadmissible hearsay, and the trial court erred by admitting testimony regarding the events or existing conditions that were the cause of the victim's mental and emotional state. Skeen v. State, 96 S.W.3d 567, 2002 Tex. App. LEXIS 8181 (Tex. App. Texarkana 2002).

Evidence : Hearsay : Exceptions : State of Mind : Proof of Earlier Acts

369. In a negligence suit, the trial court properly sustained Tex. R. Evid. 801(d) hearsay objections to testimony from a police officer and to e-mails written in anticipation of litigation; the officer's testimony was not admissible under the Tex. R. Evid. 803(3) state of mind hearsay exception because the Tex. R. Evid. 103(a)(2) offer of proof did not make clear when the declarant spoke with the officer, and the e-mails also were not spontaneous statements and did not qualify as business records under Rule 803(6). Estate of Ronnie Wren v. Bastinelli, 2010 Tex. App. LEXIS 330 (Tex. App. Texarkana Jan. 20 2010).

Evidence : Hearsay : Exceptions : State of Mind : Proof of Later Acts

370. In an aggravated assault case, the trial court erred by sustaining the hearsay objection to the victim's statement that "she was gonna call the law" because it evinced a state of mind concerning her future conduct and was admissible. Corbin v. State, 2013 Tex. App. LEXIS 15300, 2013 WL 7083195 (Tex. App. Eastland Dec. 19 2013).

Evidence : Hearsay : Exceptions : Statements Against Interest

371. Court did not abuse its discretion in admitting the redacted jailhouse recording into evidence, because defendant's own statements implicated his guilt, and the redacted statements were not offered for the truth of the matter asserted, but offered for the purpose of placing in evidence defendant's own statements against interest. Howard v. State, 2014 Tex. App. LEXIS 9208, 2014 WL 4100690 (Tex. App. El Paso Aug. 20 2014).

372. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

373. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

374. Trial court did not err by allowing into evidence a statement by an accomplice that he found the gun in defendant's bedroom because the statement was not hearsay, nor was defendant's statement to a detective that he possessed the gun for approximately 10 minutes and accidently shot himself while trying to dislodge a bullet. Robertson v. State, 2013 Tex. App. LEXIS 9554 (Tex. App. Tyler July 31 2013).

375. In defendant's murder case, the trial court properly admitted a witness's testimony that defendant told her he had killed someone "in front of the bar" because the statement was an admission by a party; therefore, it was not hearsay. Additionally, defendant admitted to the trial court that the statement was a statement that exposed him to criminal liability and was probably a statement against interest. Walton v. State, 2009 Tex. App. LEXIS 8046, 2009 WL 3326759 (Tex. App. Eastland Oct. 15 2009), *cert. denied*, 131 S. Ct. 512, 178 L. Ed. 2d 379, 2010 U.S. LEXIS 8559 (U.S. 2010).

376. In defendant's robbery case, the court properly allowed testimony because the statement "It just didn't go as planned," inferentially tended to show that the coconspirator committed or attempted to commit the offense that was

the subject of the conspiracy, i.e., to obtain some money, in Pampa, by some method. Davey Enriquez v. State, 2009 Tex. App. LEXIS 5183 (Tex. App. Amarillo July 7 2009).

377. Court properly admitted evidence as a statement against interest because defendant's question to the witness -- "how she would feel towards him if the police said that he had killed the two ladies" -- was self-inculpatory, and the circumstances of the relationship between defendant and the witness tended to corroborate the trustworthiness of the statement. Juarez v. State, 2009 Tex. App. LEXIS 77, 2009 WL 41648 (Tex. App. Houston 1st Dist. Jan. 8 2009).

378. In defendant's motion for a new trial, the court properly excluded four letters written by a witness who testified at trial because the letters did not tend to expose the witness to criminal liability, and even if they did, there was no corroborating evidence to clearly indicate the trustworthiness of the statement. In both letters, the witness expresses his anger at defendant, but the witness did not say, however, that he lied when he testified for the State. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

379. In an action brought by a corporation's stockholders (a husband and wife) against a lawyer (the husband's brother) when he advised that they were legally prohibited from selling or trading their any of their shares, the trial court did not err by failing to admit under Tex. R. Evid. 801(e)(2)(D) a recording of a conversation with a nonlawyer that utilized the lawyer's office space and who reportedly provided contract labor for the lawyer as the stockholders failed to show that the statements by the nonlawyer related to matters within the scope of the nonlawyer's employment, if any, by the lawyer. Gordon v. Gordon, 2008 Tex. App. LEXIS 5696 (Tex. App. Beaumont July 31 2008).

380. In a trial for driving while intoxicated, there was no error in the admission of a trooper's testimony that defendant advised another trooper that she was coming from Denton on her way home; under Tex. R. Evid. 801, defendant's admission was not hearsay, and the complained-of admission came in later without objection. Farmer v. State, 2006 Tex. App. LEXIS 11132 (Tex. App. Fort Worth Dec. 28 2006).

381. Under Tex. R. Evid. 801(e)(2)(A), the State was permitted to cross-examine a murder defendant on statements alleged to have been made by him against his own interest. Peace v. State, 2005 Tex. App. LEXIS 7700 (Tex. App. Houston 14th Dist. Sept. 20 2005).

382. In a drug case, a court did not err by excluding an audiotape statement of a witness purportedly showing that he confessed to having exclusive possession of the cocaine because the witness's guilt was not inconsistent with defendant's because possession was not mutually exclusive, and the statement was given after being arrested and in the context of interrogation, at a time when motivation to curry favor with law enforcement existed. Minor v. State, 2005 Tex. App. LEXIS 5470 (Tex. App. Houston 1st Dist. July 14 2005).

383. Court erred in excluding inculpatory hearsay statements made by a possible perpetrator of a murder for which defendant was convicted where the corroborating evidence, even in light of evidence tending to undermine the trustworthiness of the possible perpetrator's statements, was sufficiently convincing to indicate trustworthiness. The statements, if believed, could have created a reasonable doubt as to defendant's guilt. Eby v. State, 165 S.W.3d 723, 2005 Tex. App. LEXIS 2580 (Tex. App. San Antonio 2005).

384. In a murder trial, testimony was properly admitted by two witnesses regarding hearsay statements by friends of defendant concerning their plans to commit a robbery with him. The hearsay statements were against penal interest, even if they would not, at the time they were made, have subjected the declarants to liability for capital murder, because the declarants could have been liable for criminal conspiracy. Lafitte v. State, 2004 Tex. App. LEXIS 10247 (Tex. App. Austin Nov. 18 2004), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS

1790 (Tex. App. Austin Mar. 10, 2005).

385. In a criminal prosecution for possession of marihuana, defense counsel was not ineffective for failing to object to the admission of the hearsay statement made by defendant to his father that he was holding the marihuana for someone else, that defendant owed someone $1,000.00, and that he had to get the marihuana back from his father so he could return it to that person. Under Tex. R. Evid. 801(e)(2)(A), the statement was an admission against interest, a hearsay exception. Esser v. State, 2004 Tex. App. LEXIS 3764 (Tex. App. Texarkana Apr. 29 2004).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

386. At defendant's trial for multiple sexual offenses involving child victims, the trial court did not err in overruling defense counsel's objection to the testimony of an alleged improper outcry witness because there was no hearsay statement as the witness did not testify about any statements made by the children. Perez v. State, 2014 Tex. App. LEXIS 640, 2014 WL 1260989 (Tex. App. Corpus Christi Jan. 23 2014).

387. At defendant's trial for multiple sexual offenses involving child victims, the trial court did not err in overruling defense counsel's objection to the testimony of an alleged improper outcry witness because there was no hearsay statement as the witness did not testify about any statements made by the children. Perez v. State, 2014 Tex. App. LEXIS 640, 2014 WL 1260989 (Tex. App. Corpus Christi Jan. 23 2014).

388. Even if it could be said that the child's statement in the video-recorded interview was entirely consistent with her trial testimony, the out-of-court statement was not made before the alleged improper influence or motive which defendant implied (through his cross-examination of State's witnesses) gave rise to the recitation of the incident; because the statement offered by the State was not made before the purported motive to fabricate or improper influence was brought to bear, the child's statement in the video did not qualify as a prior consistent statement. Bays v. State, 2011 Tex. App. LEXIS 9529 (Tex. App. Texarkana Dec. 7 2011).

389. Issue of whether the nurse's testimony should have been excluded as hearsay was not preserved for review, because defendant withdrew his objection and never gave the trial court a chance to consider whether the nurse's testimony was hearsay. Arcos v. State, 2011 Tex. App. LEXIS 5134, 2011 WL 2652262 (Tex. App. Houston 1st Dist. July 7 2011).

390. Court did not abuse its discretion by permitting the investigator to testify as a second outcry witness, because the investigator's statement could be classified as an outcry witness statement and was admissible under Tex. Code Crim. Proc. Ann. art. 38.072, § 2(a), since the complainant's outcry regarding the additional instances of sexual abuse did not occur until the investigator's interview. Hernandez v. State, 2010 Tex. App. LEXIS 3491, 2010 WL 1854150 (Tex. App. Fort Worth May 6 2010).

391. In defendant's sexual assault case, it was error to have permitted a witness to testify concerning the child's statements because the State failed to offer proof that the witness was the proper outcry witness whose testimony was an exception to the hearsay rule. It was error to fail to conduct the hearing once the hearsay objection was raised. Rawls v. State, 2009 Tex. App. LEXIS 8054, 2009 WL 3321006 (Tex. App. Texarkana Oct. 16 2009).

392. In defendant's sexual assault trial, a trial court erred in permitting the hearsay testimony of a forensic interviewer as an outcry witness under Tex. Code Crim. Proc. Ann. art. 38.072, but the error was harmless because overwhelming evidence of defendant's guilt remained, especially the testimony of the child victim's counselor. Petrie v. State, 2008 Tex. App. LEXIS 5867 (Tex. App. Texarkana Aug. 6 2008).

393. In a sexual assault of a child case, counsel was not ineffective for failing to request a determination of the proper outcry witness because, given that counsel could have concluded three witnesses all qualified as outcry witnesses and that a detective was not giving outcry testimony, there was no need to request a determination of the outcry witness; the detective's testimony was admissible because his testimony as to what the aunt said was offered to impeach the aunt and not for the truth of the matter asserted. Byars v. State, 2008 Tex. App. LEXIS 3363 (Tex. App. Houston 14th Dist. May 8 2008).

394. In a case involving child sexual assault, a statement given by the child's mother would have not been admissible as an outcry statement since the child had already told someone else over 18 about an alleged incident, and a videotaped interview of the victim three years later was also not admissible under Tex. Code Crim. Proc. Ann. art. 38.072; however, the failure to object to these hearsay items did not result in ineffective assistance of counsel because there was a reasonable trial strategy relating to the believability of the victim. Hankey v. State, 231 S.W.3d 54, 2007 Tex. App. LEXIS 4161 (Tex. App. Texarkana 2007).

395. In defendant's sexual assault on a child case, a court properly allowed outcry testimony from a psychotherapist who treated the victim because, although the witness's testimony concerning the victim's statement did not specify the manner or means of defendant's offenses, the victim's statement did clearly allege sexual abuse and clearly identified defendant as the abuser. Newton v. State, 2007 Tex. App. LEXIS 2477 (Tex. App. Waco Mar. 28 2007).

396. Statements about sexual abuse by a complainant to a school counselor were improperly admitted under the excited utterance exception to the hearsay rule because the statements were made three years after the abuse by a 14-year-old complainant, after she had told her mother about the abuse. Neill v. State, 2006 Tex. App. LEXIS 8684 (Tex. App. Fort Worth Oct. 5 2006).

397. During defendant's criminal trial for aggravated sexual assault of a child, counsel was not ineffective for failing to object to evidence of hearsay statements by the victim. Bishop v. State, 2006 Tex. App. LEXIS 4874 (Tex. App. Waco June 7 2006).

398. Defendant did not preserve for review his hearsay argument regarding statements by a seven-year-old complainant in a sexual assault case, which were admitted through the testimony of her mother, a forensic investigator, and a physician, because the only basis on which defendant objected at trial was that complainant was not competent to testify. Hunter v. State, 2006 Tex. App. LEXIS 1783 (Tex. App. Houston 1st Dist. Mar. 9 2006).

399. In a child sexual abuse case where the State's notice of intention to use a child-abuse victim's hearsay statement pursuant to Tex. Code Crim. Proc. Ann. art. 38.072 referenced three outcry witnesses, counsel was not ineffective for failing to request a hearing or object; because the victim changed her story, counsel reasonably could have concluded that the outcry statement was admissible under Tex. R. Evid. 801 as a prior consistent statement, and counsel's strategy relied on implying that one of the outcry witnesses had convinced the victim to change her story. Vega v. State, 2006 Tex. App. LEXIS 1513 (Tex. App. Houston 1st Dist. Feb. 23 2006).

400. At a trial for child sexual assault, testimony from a second outcry witness was not admissible as a prior consistent statement of the victim because the State did not confine its presentation of the testimony to consistent reports of the incident. The State presented the testimony to prove the truth of the matter asserted by the victim, that she was exposed to defendant's penis, and to present details not included in other testimony. Moreno v. State, 2005 Tex. App. LEXIS 1834 (Tex. App. Austin Mar. 10 2005).

401. In a criminal prosecution for aggravated sexual assault of a child under the age of 14, the State was improperly allowed to present evidence through the outcry witness that her mother had suspected that defendant

was molesting the child even before she had made any outcry. However, the error was harmless since it was unlikely that the single recounting of hearsay about a witness' "suspicion," especially when strongly and directly denied by the declarant herself, had more than a slight influence on the verdict. May v. State, 139 S.W.3d 93, 2004 Tex. App. LEXIS 5560 (Tex. App. Texarkana 2004).

402. Even though a trial court failed to conduct a reliability hearing on a grandmother's testimony regarding a minor victim's outcry statement under Tex. Code Crim. Proc. Ann. art. 38.072, the admission of the evidence as an exception to hearsay was harmless because the statement that defendant had "done stuff" was so vague that it failed to corroborate the allegations of molestation; moreover, the trial court was also not required to conduct a reliability hearing on a police officer before allowing testimony regarding a conversation with the victim about defendant's alleged foot fetish where the officer was called as an expert regarding sexual predators, erotica, and deviant behavior. Leachman v. State, 2004 Tex. App. LEXIS 3283 (Tex. App. Houston 1st Dist. Apr. 8 2004).

Evidence : Hearsay : Exemptions : General Overview

403. Defendant's statement about killing a dog was not hearsay. Alcala v. State, 476 S.W.3d 1, 2013 Tex. App. LEXIS 13924, 2013 WL 6053837 (Tex. App. Corpus Christi Nov. 14 2013).

404. In an illegal possession of a weapon case, audio portions of the patrol-car videotape were properly admitted because the conversation with the dispatcher was not hearsay; the substance of the conversation was not an issue during trial, and the conversation itself was not offered for any particular purpose other than to establish that an officer was conducting an investigation into the suspects' backgrounds. Gomez v. State, 2008 Tex. App. LEXIS 2966 (Tex. App. Austin Apr. 24 2008).

405. In a case in which a jury convicted defendant of aggravated assault and intoxication assault while operating a vehicle and made an affirmative deadly weapon finding, there was no merit to defendant's claim that his trial counsel was ineffective in failing to object to a statement by the officer overseeing the collection of defendant's blood at a hospital because although the officer stated that other officers told him that defendant was intoxicated, there was no indication that the statement was offered for the truth of the matter asserted, pursuant to Tex. R. Evid. 801; in fact, the statement was elicited in the context of laying the predicate to establish reasonable grounds for the officer's belief that defendant was intoxicated as required before the officer could take a blood sample, pursuant to Tex. Transp. Code Ann. § 724.012, and there was nothing in the record that affirmatively demonstrated that counsel's conduct was not grounded in legitimate trial strategy. Whitmore v. State, 2007 Tex. App. LEXIS 8889 (Tex. App. Dallas Nov. 8 2007).

406. In defendant's burglary case, the court properly allowed an officer to testify that, as she could not come to a conclusion on the latent fingerprint, she asked other examiners to examine the print, because the trial court could have reasonably concluded that the testimony, when taken in context, did not lead to any inescapable conclusions as to the substance of the other examiner's conclusions about the print and was therefore, not hearsay; the only information imparted by the testimony was that others had examined the print and had reached a conclusion, and that their conclusions were the same. Smith v. State, 236 S.W.3d 282, 2007 Tex. App. LEXIS 2206 (Tex. App. Houston 1st Dist. 2007).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview

407. Defendant's conviction for engaging in organized criminal activity, with the two predicate offenses being aggravated sexual assault of a child, was improper because the trial court clearly abused its discretion in overruling defendant's repeated hearsay objections, Tex. R. Evid. 801(e)(1)(B), (d). In so doing, those witnesses were permitted to repeat the children's allegations as facts, fill the gap left by the failure of the children's outcry witness, and describe the sordid details of the alleged child sex ring as if they were personally aware of it. Kelly v. State, 321

S.W.3d 583, 2010 Tex. App. LEXIS 4506 (Tex. App. Houston 14th Dist. June 17 2010).

408. Where the only direct evidence of defendant's indecency with a child by exposure offense was the complainant's testimony, it was within the trial court's discretion to conclude that defense counsel's failure to object to her hearsay statement, compounded by his failure to object to subsequent bolstering hearsay testimony of her friend, warranted the granting of a new trial in the interest of justice because, throughout the trial, the State emphasized the importance of the fact that the complainant had told others about the alleged offense; the statements at issue were not general, but specific testimony regarding out-of-court statements made by the declarants about the particulars of the alleged incident, and the State had not demonstrated that the complainant's out-of-court statements were admissible as prior consistent statements under Tex. R. Evid. 801. State v. Wolfe, 2006 Tex. App. LEXIS 3648 (Tex. App. Houston 14th Dist. Apr. 27 2006).

409. In a case of deadly conduct, the trial court did not err in overruling defendant's hearsay objection to a police officer's testimony as to the certainty of a trial witness's identification of defendant; pursuant to Tex. R. Evid. 801, the challenged statement was not hearsay because the witness was cross-examined about identification. Martinez v. State, 2006 Tex. App. LEXIS 1993 (Tex. App. Houston 1st Dist. Mar. 16 2006).

410. Trial court did not err in admitting into evidence a videotaped child assessment center interview with the victim because it was admissible as a prior consistent statement under Tex. R. Evid. 801(e)(1)(B); defense counsel had attempted to cast doubt on the victim's credibility and admitting the tape did not constitute improper bolstering. Perez-Del Rio v. State, 2006 Tex. App. LEXIS 1844 (Tex. App. Houston 14th Dist. Mar. 2 2006).

411. In a child sexual abuse case where the State's notice of intention to use a child-abuse victim's hearsay statement pursuant to Tex. Code Crim. Proc. Ann. art. 38.072 referenced three outcry witnesses, counsel was not ineffective for failing to request a hearing or object; because the victim changed her story, counsel reasonably could have concluded that the outcry statement was admissible under Tex. R. Evid. 801 as a prior consistent statement, and counsel's strategy relied on implying that one of the outcry witnesses had convinced the victim to change her story. Vega v. State, 2006 Tex. App. LEXIS 1513 (Tex. App. Houston 1st Dist. Feb. 23 2006).

412. In a child sexual abuse case, the admission of the testimony of an investigator and a police officer regarding the complainant's prior statements was reversible error because any legitimate probative value under Tex. R. Evid. 607 was substantially outweighed by the prejudicial effect under Tex. R. Evid. 403; the State had ample notice that the complainant would recant, and conflicting evidence alone did not trigger Tex. R. Evid. 801(e)(1)(B). Klein v. State, 2006 Tex. App. LEXIS 950 (Tex. App. Fort Worth Feb. 2 2006), opinion withdrawn by, substituted opinion at, modified by 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

413. Trial court did not err in admitting the videotaped interview of the child victim, and the admission of the videotape was not governed by Tex. Code Crim. Proc. Ann. art. 38.071 because the victim testified in court prior to the videotape's admission; the trial court did not err in admitting the videotape as a prior consistent statement under Tex. R. Evid. 801(e)(1)(B), given that defendant attacked the victim's credibility, and defendant was not free to complain that the videotape was too broad to be a prior consistent statement because the trial objection did not preserve error on this point. Monreal v. State, 2006 Tex. App. LEXIS 773 (Tex. App. Houston 14th Dist. Jan. 31 2006).

414. Trial court could have found that the interviewer's testimony as to the questions asked and how the answers were given was necessary to counter defendant's implied charge of improper influence under Tex. R. Evid. 801(e)(1)(B); thus, the trial court did not err in allowing the interviewer to testify, and the court noted that defendant did not object when other witnesses testified about what the interviewer asked and the victim said during their

interview. Segura v. State, 2005 Tex. App. LEXIS 7783 (Tex. App. Austin Sept. 23 2005).

415. Witness' statements were admissible as prior consistent statements where, although the statements at issue were taken after the witness was arrested on an outstanding probation violation warrant, he made the statements without any discussion with police of possible benefit to him and before entering into any negotiations with the prosecution. Davis v. State, 2005 Tex. App. LEXIS 7233 (Tex. App. Fort Worth Aug. 31 2005).

416. Trial court did not act unreasonably in accepting the State's argument that a videotape of the child victim's statements of abuse against defendant was admissible because it was a prior consistent statement under Tex. R. Evid. 801(e)(1), there were other motives, and that in order to satisfy the rule, it was not necessary that the prior consistent statement had been made before all motives to fabricate arose; the court noted that the only evidence regarding an existing motive came from defendant's closing argument. Franklin v. State, 2005 Tex. App. LEXIS 6620 (Tex. App. Corpus Christi Aug. 18 2005).

417. Testimony by a physician of what the child victim said was admissible under Tex. R. Evid. 613, and although prior consistent statements were generally not admissible unless they fell under Tex. R. Evid. 801(e)(1)(B), the physician's testimony fell within that exception because it was consistent with the child's testimony and was offered to rebut an implied charge of recent fabrication or improper influence or motive; furthermore, any error in the admission of the evidence was harmless under Tex. R. App. P. 44.2(b) because the child testified to the abuse and other witnesses testified about the child's change in behavior. Patterson v. State, 2005 Tex. App. LEXIS 5260 (Tex. App. Austin July 8 2005).

418. Although a trial court abused its discretion in allowing the State to introduce a sexual assault complainant's diary into evidence because the disputed evidence did not qualify as non-hearsay under Tex. R. Evid. 801(e)(1), the error was harmless under Tex. R. App. P. 44.2(b) and did not have a substantial or injurious effect on the jury's verdict and did not affect defendant's substantial rights because the complainant testified in detail regarding her sexual encounters with defendant independent of the diary. Further, although on cross-examination the complainant admitted that one of the entries in her diary involving the second time she and defendant had engaged in sexual activity was not true, the record reflected that the jury had acquitted defendant on that count; thus, the trial court's error in admitting the hearsay might have actually served to benefit defendant. Dunbar v. State, 2005 Tex. App. LEXIS 3676 (Tex. App. Fort Worth May 12 2005).

419. At a trial for child sexual assault, testimony from a second outcry witness was not admissible as a prior consistent statement of the victim because the State did not confine its presentation of the testimony to consistent reports of the incident. The State presented the testimony to prove the truth of the matter asserted by the victim, that she was exposed to defendant's penis, and to present details not included in other testimony. Moreno v. State, 2005 Tex. App. LEXIS 1834 (Tex. App. Austin Mar. 10 2005).

420. Victim's testimony was not hearsay because it satisfied the requirements of Tex. R. Evid. 801(e)(1)(C); the victim identified defendant as the person who robbed him and shot him and testified that his identification was not based solely on seeing defendant the day of the robbery. According to the victim, he had previously known defendant, and they had gone to a football game together with a group of people. Millican v. State, 2004 Tex. App. LEXIS 11617 (Tex. App. Tyler Dec. 22 2004).

421. Notwithstanding the hearsay rule, the trial court did not err in admitting defendant's girlfiend's out-of-court statement to a police officer as a prior inconsistent statement where the officer testified that the girlfriend had told him that she had not seen defendant for the few days surrounding the offense but at trial, she testified that he had been with her at the time of the robbery. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22

2004).

422. In a criminal prosecution for aggravated sexual assault of a child where the child was impeached on cross-examination, the child's videotaped statement was admissible as a prior consistent statement under Tex. R. Evid. 801. Graves v. State, 176 S.W.3d 422, 2004 Tex. App. LEXIS 9099 (Tex. App. Houston 1st Dist. 2004).

423. Trial court did not abuse its discretion by admitting only those portions of witnesses' statements that were consistent with their testimony. Under Tex. R. Evid. 801(e)(1)(B), the prior consistent statements were admissible to rebut the charge made by defendant that the witnesses' testimony were motivated or improperly influenced by the favorable treatment provided them by the State. Castillo v. State, 2004 Tex. App. LEXIS 8317 (Tex. App. El Paso Sept. 15 2004).

424. With respect to the victim's probation officer's testimony, defendant objected on the grounds that the officer was not properly identified as an outcry witness under Tex. Code Crim. Proc. Ann. art. 38.072, but the State did not offer the officer's testimony as such, and the court found no error in the admission of the officer's testimony in connection with defendant's trial for aggravated sexual assault of a child because where there were attempts to impeach the credibility of the victim, testimony from the officer would not have constituted hearsay because, pursuant to Tex. R. Evid. 801(e)(1)(B), it related a prior consistent statement made by the victim, who was subject to cross-examination and whose prior statement rebutted a charge of motive or recent fabrication; moreover, the content of the officer's testimony was admitted elsewhere through direct testimony from the victim, and even if the trial court erred in admitting the testimony, the error did not affect defendant's substantial rights, and, pursuant to Tex. R. Evid. 103(a), Tex. R. App. P. 44.2(b), error could not have been predicated on a ruling admitting evidence unless a substantial right of the party was affected. Sanchez v. State, 2004 Tex. App. LEXIS 7043 (Tex. App. Corpus Christi Aug. 5 2004).

425. Admitting a previously recorded statement of a State witness as a prior consistent statement was proper because defendant's cross-examination had raised an inference of recent fabrication improper influence. Wisdom v. State, 143 S.W.3d 276, 2004 Tex. App. LEXIS 6379 (Tex. App. Waco 2004).

426. Allowing an officer to testify that a witness at trial had identified defendant from a videotaped lineup was testimony involving identification and, thus, was not hearsay. Headley v. State, 2004 Tex. App. LEXIS 5104 (Tex. App. Houston 1st Dist. June 10 2004).

427. In defendant's sexual assault case, a witness's testimony regarding defendant's statement to him was properly admitted where it was clearly not hearsay and thus its admission, even though erroneously described by the trial judge as occurring under Tex. R. Evid 613, was proper under Tex. R. Evid. 801(e)(2)(A) and did not violate defendant's constitutional rights. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

428. The trial court properly admitted the victim's videotaped interview because the victim's consistent statements in her videotaped interview were admissible to rebut defendant's charge of recent fabrication and improper motive, Tex. R. Evid. 801(e)(1)(B). Defendant attempted to show the victim related facts that were inconsistent with her testimony at trial, and was motivated to lie because of her father's remarriage and her desire to see her parents reunited. Box v. State, 2004 Tex. App. LEXIS 4233 (Tex. App. Houston 14th Dist. May 11 2004).

429. Defendant's argument that the trial court erred in overruling his hearsay objection to the affidavit of the witness was without merit as the statement constituted admissible identification evidence, Tex. R. Evid. 801(e)(1)(C); the witness stated that the defendant signed an affidavit of non-interest in her presence and she verified defendant's identification by requiring that he present a valid driver's license. Bodmer v. State, 161 S.W.3d

9, 2004 Tex. App. LEXIS 2792 (Tex. App. Houston 14th Dist. 2004).

430. Trial court did not err by admitting the complainant's videotaped testimony under Tex. R. Evid. 801(e)(1)(B) where defendant attempted to show that the complainant's testimony at trial had been influenced by her mother, and that the videotape was offered by the State to rebut the charge of improper influence; because the conversation between complainant and her mother regarding the assault took place before the videotape was made, the trial court did not err in admitting the testimony. In re E.D., 2004 Tex. App. LEXIS 1043 (Tex. App. Houston 14th Dist. Feb. 5 2004).

431. Evidence of a police transmission describing a robbery suspect was inadmissible in an aggravated robbery case because it constituted hearsay since the relevancy turned on the truthfulness or accuracy of the contents of the statement; defendant failed to preserve his argument that the transmission was admissible under Tex. R. Evid. 801(e)(1)(C) because it was not raised before the trial court. Johnson v. State, 2003 Tex. App. LEXIS 10949 (Tex. App. Houston 1st Dist. May 13 2003).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Identifications

432. Complainant's told an officer he recognized appellant in the photo array as the shooter, and the officer's statement regarding the complainant's prior identification was non-hearsay because it fell within the exclusion under the rule, as the complainant testified at trial and was subject to cross-examination, plus the statement identified appellant after the complainant perceived his photograph. Cuevas v. State, 2013 Tex. App. LEXIS 9770 (Tex. App. Houston 14th Dist. Aug. 6 2013).

433. Even if the identification statement were hearsay, the admission of the statement would have been harmless error, given that the complainant testified at trial that he made a prior identification of appellant to police and there was no objection. Cuevas v. State, 2013 Tex. App. LEXIS 9770 (Tex. App. Houston 14th Dist. Aug. 6 2013).

434. Appellant claimed the statement was harmful because it aided the complainant's testimony and identification of appellant, but this argument fell short because bolstering was no longer a valid objection given the hearsay exclusion under the rule. Cuevas v. State, 2013 Tex. App. LEXIS 9770 (Tex. App. Houston 14th Dist. Aug. 6 2013).

435. Officer's testimony was admissible as an identification pursuant to Tex. R. Evid. 801(e)(1)(C) because, during the conversation, the victim identified defendant as her husband, indicated that defendant was the individual who assaulted her, defendant was responsible for the injuries, and the victim testified and was subject to cross-examination. Diaz v. State, 2011 Tex. App. LEXIS 9552, 2011 WL 6145120 (Tex. App. El Paso Dec. 7 2011).

436. Pursuant to Tex. R. Evid. 801(e)(1)(C), limiting admissible testimony under the identification exclusion to the hearsay rule solely to the declarant's naming of the identified individual and not allowing testimony regarding what the declarant identified the individual as doing is unduly restrictive. Delacerda v. State, 425 S.W.3d 367, 2011 Tex. App. LEXIS 5558 (Tex. App. Houston 1st Dist. July 21 2011).

437. Eyewitness's statement to an officer that he recognized the person he saw in the back of the truck, who was not the shooter and not defendant, when defendant's picture was in the same display, was an indispensable part of his statement of identification about which the officer could testify pursuant to Tex. R. Evid. 801(e)(1)(C). Delacerda v. State, 425 S.W.3d 367, 2011 Tex. App. LEXIS 5558 (Tex. App. Houston 1st Dist. July 21 2011).

438. Detective's comment about the victim's actual identification of defendant was not hearsay because of the victim's previous identification testimony, for purposes of Tex. R. Evid. 801(e)(1)(C). Garcia-sandoval v. State, 2010

Tex. App. LEXIS 2580, 2010 WL 1571207 (Tex. App. Houston 1st Dist. Apr. 8 2010).

439. Victim testified at trial and was cross-examined about her identification of defendant; thus, the photographic lineup and testimony about the photographic lineup and about the victim's identification did not constitute improper bolstering, for purposes of Tex. R. Evid. 801(e)(1)(C), and the trial court did not abuse its discretion by admitting the photographic lineup into evidence. Morgan v. State, 2010 Tex. App. LEXIS 2853, 2010 WL 1224318 (Tex. App. Dallas Mar. 31 2010).

440. Officer's testimony was admissible under Tex. R. Evid. 801(e)(1)(c); the victim testified about her identification of defendant at trial and was subject to cross-examination, and her statement was one of identification after perceiving a person, such that the officer's testimony was not improper bolstering. Thompson v. State, 2010 Tex. App. LEXIS 994 (Tex. App. Houston 1st Dist. Feb. 11, 2010).

441. Defendant complained that an officer's videotaped statement that two witnesses had implicated defendant as the shooter was inadmissible hearsay that was testimonial; the court noted that while the rules generally prohibited the admission of out of court statements offered to prove the truth of the matter asserted, a statement was not deemed hearsay if it involved identification of one perceived by the declarant, who later testified at trial and was available for cross-examination, under Tex. R. Evid. 801(e)(1)(C). York v. State, 2009 Tex. App. LEXIS 3827, 2009 WL 1493255 (Tex. App. Houston 1st Dist. May 28 2009).

442. Informant was present at trial, was recalled after an officer was recalled and was thus subject to cross-examination, the statement involved an identification of defendant, and the informant's testimony showed that she had ample opportunity to perceive defendant, such that this statement was one of identification for purposes of Tex. R. Evid. 801(e)(1)(C) and was not hearsay under Tex. R. Evid. 801(d); moreover, the officer merely reiterated the informant's identification recited in her previous testimony. Patterson v. State, 2009 Tex. App. LEXIS 3196 (Tex. App. Texarkana May 12 2009).

443. Witness testified during the trial that she was shown the photo spread containing defendant's photograph and that she identified him as the shooter and the witness also identified defendant in court as the shooter, and she was cross-examined by defense counsel; thus, an officer's statements relating to the witness's identification were not hearsay under Tex. R. Evid. 801(e)(1)(C). Chaney v. State, 2009 Tex. App. LEXIS 2799 (Tex. App. Houston 1st Dist. Apr. 23 2009).

444. Trial court did not abuse its discretion by allowing an officer to testify under Tex. R. Evid. 801(e)(1)(C) about two child victims' identification of defendant because the victims testified at trial and were subject to cross-examination concerning their identification. Jamon v. State, 2009 Tex. App. LEXIS 2289, 2009 WL 891864 (Tex. App. Eastland Apr. 2 2009).

445. In a murder trial, no hearsay error occurred under Tex. R. Evid. 801, 802 when a detective testified to a witness's out-of-court identification, which was translated from Cambodian by the complainant's offspring. Because the witness testified at trial, the out-of-court identification was not hearsay in itself, and the interpreter served as a mere language conduit for the witness. Driver v. State, 2009 Tex. App. LEXIS 778, 2009 WL 276539 (Tex. App. Houston 1st Dist. Feb. 5 2009).

446. Under Tex. R. Evid. 801, there was no error in allowing third-party testimony of an extrajudicial identification by a complainant in support of the complainant's own identification testimony; the complainant testified at trial and was extensively cross-examined by defense counsel. Rubio v. State, 2008 Tex. App. LEXIS 2439 (Tex. App. Dallas Apr. 7 2008).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements

447. Court did not err by overruling defendant's hearsay objection because the declarant testified at trial, the witness's testimony that the declarant told her defendant had shot at him was consistent with his testimony at trial, and the testimony was offered to rebut an express or implied charge against the declarant of recent fabrication. Whitley v. State, 2014 Tex. App. LEXIS 7856, 2014 WL 3611592 (Tex. App. San Antonio July 23 2014).

448. Defendant's claim that a trial court erred in admitting a written statement of a sexual assault victim over his hearsay objection was not preserved for review because defendant did not argue to the trial court that there was never any suggestion that the victim's fabrication of his complaint against defendant was recent; it was incumbent on defendant to alert the trial court to any elements of Tex. R. Evid. 801(e)(1)(B) that would require exclusion of the victim's statement. Dauben v. State, 2014 Tex. App. LEXIS 6040, 2014 WL 2566469 (Tex. App. Waco June 5 2014).

449. Because the minor victim's interview was consistent with his trial testimony, and it predated an alleged improper influence on his testimony, the trial court did not abuse its discretion in admitting the statement as a prior consistent statement exception to hearsay to rebut an allegation of recent fabrication. Because the victim's earlier statement did not differ in relevant substance with his in-court testimony, the statement was generally consistent and the victim's Tennessee interview predated at least one of the improper influences alleged by defendant's counsel. Dibello v. State, 432 S.W.3d 913, 2014 Tex. App. LEXIS 2812 (Tex. App. Houston 1st Dist. Mar. 13 2014).

450. In a prosecution of defendant for continuous sexual abuse of a young child, the trial court did not err in admitting a video tape of an interview wherein the victim discussed what had been done to her by defendant, notwithstanding defendant's contention the video was inadmissible under this rule. Given that the video memorialized statements made long before trial, there existed basis upon which the trial court could have reasonably determined that the comments preceded the prosecutor's supposed effort to influence the victim. Graves v. State, 2014 Tex. App. LEXIS 2532, 2014 WL 887355 (Tex. App. Amarillo Mar. 5 2014).

451. Trial court did not abuse its discretion in admitting the game warden's police report into evidence because the report could have been admitted without condition to rebut even a subtle charge of recent fabrication. Stone v. State, 2013 Tex. App. LEXIS 14801, 2013 WL 6405485 (Tex. App. Dallas Dec. 5 2013).

452. Defendant was entitled to a new trial for the murder of her stepfather because of new evidence, specifically, information from defendant's former boyfriend about her outcry 30 years earlier regarding sexual abuse by the stepfather; the outcry evidence rebutted the State's claim of recent fabrication. Carsner v. State, 415 S.W.3d 507, 2013 Tex. App. LEXIS 12563, 2013 WL 5561653 (Tex. App. El Paso Oct. 9 2013).

453. Defendant's conviction for driving while intoxicated was proper because the trial court did not abuse its discretion in admitting an audio recording of the motorist's 911 call. It was not outside the zone of reasonable disagreement for the district court to conclude that the relevant statements on the call were not inadmissible as hearsay, either because the statements on the call were not offered to prove the truth of the matter asserted, or because the statements fell under one of the recognized exceptions to the hearsay rule. Condarco v. State, 2013 Tex. App. LEXIS 10741 (Tex. App. Austin Aug. 27 2013).

454. Trial court did not abuse its discretion by admitting a witness' written statement as a prior consistent statement offered to rebut a claim of recent fabrication because at the time the State proffered the statement, the trial court had before it sufficient information from which it could conclude that defense counsel's questioning of the witness reasonably implied an intent by the witness to fabricate. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

455. Nothing supported the claim that the statements qualified under Tex. R. Evid. 801(e)(1)(B), and appellant did not assert this at trial or make an offer of proof. Carrion v. State, 2013 Tex. App. LEXIS 5673 (Tex. App. Eastland May 9 2013).

456. Trial court did not err by admitting the testimony of a detective and an investigator concerning the victim's prior consistent account of the incident under Tex. R. Evid. 801(e)(1)(B) because defendant engaged in several instances of cross-examination with numerous witnesses that the trial court could have reasonably concluded charged the victim with fabricating her story concerning the incident with defendant. Turcios v. State, 2013 Tex. App. LEXIS 5099 (Tex. App. Tyler Apr. 24 2013).

457. In defendant's sexual assault of a child case, the court erred by admitting a video of the victims' interviews at a child advocacy center as prior consistent statements because the younger victim told one of her friends "her secret" about defendant; that friend told her own mother, who went to the victim's teacher who called child services, who then arranged the interviews. Thus, the interviews occurred after both victims had made outcries, specifically about defendant, and accordingly, the court abused its discretion by admitting the part of the older victim's interview not related to her outcry and the entirety of the younger victim's interview. In re C.N., 2013 Tex. App. LEXIS 2256 (Tex. App. Fort Worth Mar. 7 2013).

458. Trial court did not abuse its discretion in admitting a witness's prior recorded statement to detectives where defense counsel had questioned the witness over and over about how he knew a revolver was used in the crime and whether he heard it from defendant's mouth. The questioning suggested that the witness was not being truthful in his trial testimony about the revolver, and, as a result, his prior statement was admissible to rebut the implied charge of recent fabrication. Bailey v. State, 2013 Tex. App. LEXIS 2108, 2013 WL 1282249 (Tex. App. Dallas Mar. 4 2013).

459. Detective's testimony was admissible under Tex. R. Evid. 801(e)(1)(C) where the victim testified at trial and was subject to cross-examination concerning her statement to the detective. Hill v. State, 392 S.W.3d 850, 2013 Tex. App. LEXIS 453, 2013 WL 174062 (Tex. App. Amarillo Jan. 16 2013).

460. Trial court did not abuse its discretion by allowing a friend of the victim to testify about journal entries allegedly written by the victim as prior consistent statements under Tex. R. Evid. 801(e)(1)(B) because the trial court reasonably could have found that defense counsel's cross-examination implicitly charged that the victim's direct examination testimony that defendant sexually assaulted her by forcing her to engage in oral sex was a recent fabrication, made during the trial, in light of her allegedly conflicting statement in a 2008 note. The trial court reasonably could have found that the victim's journal statements met the consistency requirements of Rule 801(e)(1)(B) because the journal statements concerned the exact same incidents of sexual abuse about which the victim testified at trial and the journal statements did not necessarily exclude acts of forcible contact and were generally consistent with the testimony at trial. Williams v. State, 2013 Tex. App. LEXIS 106, 2013 WL 84903 (Tex. App. Houston 14th Dist. Jan. 8 2013).

461. Trial court did not abuse its discretion when it overruled defendant's objections and admitted the witness's prior inconsistent statements to the victim's sister; the witness's other out-of-court statements implicating defendant were made to the victim's husband at the crime scene and to defendant's wife at the hospital. Murga v. State, 2012 Tex. App. LEXIS 1972, 2012 WL 807081 (Tex. App. Dallas Mar. 13 2012).

462. Trial court did not abuse its discretion by excluding evidence of a prior consistent statement that he made to his mother on the night of the incident under Tex. R. Evid. 801(e)(1)(B) because defendant had a motive to lie about the incident as soon as he shot his gun at the victim's vehicle. Because defendant had the same motive to lie at the time of his statement to his mother as he did during his testimony at trial, his statement to his m other was not

admissible to rebut a charge of recent fabrication. Marshall v. State, 2012 Tex. App. LEXIS 1083, 2012 WL 424918 (Tex. App. Eastland Feb. 9 2012).

463. Even if it could be said that the child's statement in the video-recorded interview was entirely consistent with her trial testimony, the out-of-court statement was not made before the alleged improper influence or motive which defendant implied (through his cross-examination of State's witnesses) gave rise to the recitation of the incident; because the statement offered by the State was not made before the purported motive to fabricate or improper influence was brought to bear, the child's statement in the video did not qualify as a prior consistent statement. Bays v. State, 2011 Tex. App. LEXIS 9529 (Tex. App. Texarkana Dec. 7 2011).

464. While a great-grandmother's description of a child sexual assault victim's statements allegedly describing the abuse by defendant was only a general allegation suggesting something in the realm of child abuse had occurred, and did not qualify under the outcry statute, Tex. Code Crim. Proc. Ann. art. 38.072, § 2(1)(B), the description was admissible as a prior consistent statement under Tex. R. Evid. 801(e)(1)(B). Bays v. State, 2011 Tex. App. LEXIS 9531 (Tex. App. Texarkana Dec. 7 2011).

465. Nothing in the worker's Social Security disability finding document indicated that the worker was cross-examined at his disability hearing as required by Tex. R. Evid. 801(e)(1)(B); it was not clear whether the disability finding was the worker's "statement" as it was a document issued by a federal agency and not the worker himself, and because the document was not certified, its authenticity was at issue, Tex. R. Evid. 902(4). Belmarez v. Formosa Plastics Corp., 2011 Tex. App. LEXIS 7945, 2011 WL 4696750 (Tex. App. Corpus Christi Sept. 30 2011).

466. During defendant's trial for indecency with a child, the court did not err in admitting a police officer's testimony about what the victim told him defendant did to her as a prior consistent statement under Tex. R. Evid. 801(e)(1)(B); the thrust of the defense was that the victim was motivated to lie about defendant because she disliked him and did not want him marrying her mother. Vollmer v. State, 2011 Tex. App. LEXIS 7110, 2011 WL 3833028 (Tex. App. Dallas Aug. 31 2011).

467. In defendant's trial on a charge of continuous sexual assault of a child less than 14 years of age in violation of Tex. Penal Code Ann. § 21.02, where defendant claimed that the victim, his stepdaughter, fabricated her allegations so that she could live with her biological father and his wife, the victim's prior consistent statement in the form of a videotaped out-of-court statement was admissible under Tex. R. Evid. 801(e)(1)(B) to rebut the allegation of recent fabrication. Castillo v. State, 2011 Tex. App. LEXIS 7182, 2011 WL 3853939 (Tex. App. Corpus Christi Aug. 31 2011).

468. Court did not err in permitting the sexual assault nurse examiner to read a portion of the complainant's statement contained in the examination record, because substantially similar evidence was admitted, and the complainant's credibility had been attacked; the examiner never offered a diagnosis that reflected an opinion directly or indirectly on the credibility of the complainant, and the statement read by the examiner followed and was consistent with the evidence admitted through the complainant's lengthy testimony at trial, which was subjected to exhaustive cross-examination. Luttrell v. State, 2010 Tex. App. LEXIS 7496 (Tex. App. Dallas Sept. 9 2010).

469. During defendant's trial for aggravated sexual assault of his 10-year-old granddaughter, a recorded interview between a social worker and the victim failed to qualify as a prior consistent statement under Tex. R. Evid. 801(e)(1)(B) because the victim had not yet testified at the time the recorded statement was introduced. Maloy v. State, 2010 Tex. App. LEXIS 5413, 2010 WL 2705161 (Tex. App. Texarkana July 9 2010).

470. During defendant's trial for aggravated sexual assault of his four-year-old daughter, the court did not err in admitting the State's offer of proof of the testimony of the victim's therapist; even though there were inconsistencies

between the victim's statement to the therapist and her trial testimony, the statements were largely consistent. The statement was not hearsay under Tex. R. Evid. 801(e)(1)(B). Ramos v. State, 2010 Tex. App. LEXIS 3698, 2010 WL 1965886 (Tex. App. Dallas May 6 2010).

471. Court could assume without deciding that defendant was correct that a videotape was not admissible as a prior consistent statement or prior inconsistent statement, for purposes of Tex. R. Evid. 613(a), 801(e)(1)(B), even though he failed to raise the latter objection at trial and raised the former with insufficient specificity because the videotape was still admissible (1) to rebut the suggestion that the police fed the witness his answers to their questions, and (2) to show that the witness was not parroting what the police told him; defendant did not object or seek a limiting instruction under Tex. R. Evid. 105(a), such that the jury was free to consider the tape's contents for any purposes, plus the videotape was admissible to clarify what the witness actually said, for purposes of Tex. R. Evid. 107. Franks v. State, 2010 Tex. App. LEXIS 3224, 2010 WL 1730032 (Tex. App. Austin Apr. 28 2010).

472. In defendant's aggravated sexual assault of a child case, the court properly admitted a witness's testimony as a prior consistent statement because defense counsel raised the defensive theory of a family feud over housing arrangements, and the record showed that during questioning, as well as opening statements and closing arguments, counsel made an implied charge that the child's allegations were the product of improper influence by the victim's mother and her family in retaliation against defendant's mother for the housing dispute. The trial court specifically noted that the basis was to rebut charges of coaching or fabrication due to a family feud over housing. In re A.C.T., 2010 Tex. App. LEXIS 726, 2010 WL 374392 (Tex. App. San Antonio Feb. 3 2010).

473. When the entire record was reviewed, the defensive theory in defendant's trial under Tex. Penal Code Ann. § 22.021(a)(2)(B) was fabrication or motivation for lying by the victim; thus, the trial court did not abuse its discretion in admitting a prior consistent statement before the jury under Tex. R. Evid. 801(e)(1)(B). Newsome v. State, 2009 Tex. App. LEXIS 9402, 2009 WL 4718866 (Tex. App. Amarillo Dec. 10 2009).

474. Implication of an attack on a witness was that his present memories about his mother's murder were recently fabricated and had been influenced by the family in the intervening years; his statements were consistent with his trial testimony and were made prior to the time that the supposed improper influence or motive to falsify arose, such that the statements were not hearsay and were admissible under Tex. R. Evid. 801(e)(1)(B). Woods v. State, 2009 Tex. App. LEXIS 8749 (Tex. App. El Paso Nov. 12 2009).

475. In defendant's aggravated sexual assault of a child case, the court did not err in admitting a prior consistent statement of the complainant because defendant's cross-examination of the complainant focused on her counseling and punishment for lying, her repeated denials to counselors and investigators that she had been sexually assaulted, and what defendant asserted were inconsistent statements in the earlier trial. The trial court could have determined that defense counsel was mounting a charge of recent fabrication. Hutson v. State, 2009 Tex. App. LEXIS 7873, 2009 WL 3210704 (Tex. App. Dallas Oct. 8 2009).

476. In defendant's murder case, the trial court did not abuse its discretion in excluding a letter from a witness because, at the conclusion of the witness's testimony, he was excused without any request that he be subject to recall, the witness could not be located when defendant offered the letter into evidence, and thus, the witness was no longer subject to cross-examination. Furthermore, the letter was not authenticated and there was no indication showing that the letter was written prior to the alleged improper influence by defendant's family and friends. Long v. State, 2009 Tex. App. LEXIS 6577, 2009 WL 2581286 (Tex. App. Eastland Aug. 20 2009).

477. Trial court did not abuse its discretion in excluding a letter by a defense witness, given that (1) the witness was no longer subject to cross-examination under Tex. R. Evid. 801(e)(1)(B), as he had been excused without any request that he be subject to recall and he could not be located when the letter was offered, plus (2) the letter was

not authenticated under Tex. R. Evid. 901, and there was no indication showing that the letter was written prior to the alleged improper influence by defendant's family and friends. Long v. State, 2009 Tex. App. LEXIS 4166, 2009 WL 1653056 (Tex. App. Eastland June 11 2009).

478. In defendant's sexual assault case, the trial court did not err in permitting the prosecutor to elicit testimony from a witness regarding prior consistent statements the victim made because defendant's wife testified that she believed the victim fabricated the sexual assault. The trial court could reasonably have concluded that the defense charged recent fabrication or improper motive, and that the prior statements were closer in time to the incident and made under circumstances and at a time where there was no "supposed motive to falsify." Weatherly v. State, 283 S.W.3d 481, 2009 Tex. App. LEXIS 2435 (Tex. App. Beaumont Apr. 1 2009).

479. In an aggravated sexual assault of a child case, the trial court did not err by allowing the State to introduce a DVD recording of the seven-year-old victim's forensic interview under Tex. R. Evid. 801(e)(1)(B) as her outcry alleging defendant's abuse and interview both occurred about a year and a half before trial, and the video statement was recorded before any action by the child protective services. Werner v. State, 2008 Tex. App. LEXIS 9448 (Tex. App. Texarkana Dec. 19 2008).

480. In a sexual assault case, statements made by the child to the sexual assault nurse were properly admitted because, in her testimony, the nurse read the "history," which she had taken from the victim and that was already in evidence without objection, and the statements were consistent with the victim's trial testimony. Mendoza v. State, 2008 Tex. App. LEXIS 9006 (Tex. App. Austin Dec. 4 2008).

481. After defendant testified that a child assault victim had fabricated the story to bolster her mother's position to child services workers that she was a good mother, a video recording of a forensic interview of the victim was admissible as showing the child's prior consistent statements under Tex. R. Evid. 801(e)(1)(B). Werner v. State, 2008 Tex. App. LEXIS 8659 (Tex. App. Texarkana Nov. 19 2008).

482. Defendant contended at trial that the victim voluntarily performed oral sex on him, that there was no penetration, and that the victim lied about having been assaulted; because appellant attacked the victim's credibility, the trial court did not err in determining that her prior consistent statement to a nurse was admissible, for purposes of Tex. R. Evid. 613(c), 801(e)(1)(B). West v. State, 2008 Tex. App. LEXIS 8599 (Tex. App. Austin Nov. 14 2008).

483. Recorded statement could not be admitted to refute the suggestion that one victim falsely accused defendant because the victim's alleged motive to lie arose before the statement was recorded, but the defense intimated that the victim had been coached in her testimony by the prosecutor, and although the questioning could have been characterized as merely challenging the victim's credibility, the court had to defer to the trial court; because Tex. R. Evid. 801(e)(1)(B) set forth a minimal foundation requirement of an implied or express charge of fabrication or improper motive, the trial court's decision to allow the evidence was not outside the zone of reasonable disagreement. Martinez v. State, 276 S.W.3d 75, 2008 Tex. App. LEXIS 7043 (Tex. App. San Antonio 2008).

484. In a case involving indecency with a child, a videotape that showed a forensic interview of a victim was admissible because defense counsel raised a suggestion that the victim consciously altered her testimony by alleging fabrication and undue influence; therefore, the videotape was a prior consistent statement under Tex. R. Evid. 801(e)(1)(B). Defendant's reliance on Tex. Code Crim. Proc. Ann. art. 38.071 and Long v. State, 742 S.W.2d 302 (Tex. Crim. App. 1987), was misplaced. Torris v. State, 2008 Tex. App. LEXIS 5749 (Tex. App. Dallas July 31 2008).

485. Court properly admitted a witness's statement to the police as a prior consistent statement because defendant accused the witness of having told a story to the police different from what he was telling at trial, and a reasonable trial judge could have concluded that defendant mounted a charge that the witness fabricated his testimony specifically because of the agreement with the prosecutor; evidence of the witness's prior statement rebutted that charge. Williams v. State, 2008 Tex. App. LEXIS 2874 (Tex. App. Houston 14th Dist. Apr. 22 2008).

486. Court properly admitted witnesses' statements as prior consistent statements because, before the statements were offered into evidence by the State, the defense cross-examined both men about whether they had talked to each other about the incident before trial; at the time the statements were offered into evidence, both witnesses were subject to recall and could have been cross-examined about the statements if the defense had chosen to do so. Stewart v. State, 2008 Tex. App. LEXIS 2747 (Tex. App. Dallas Apr. 17 2008).

487. Trial court did not abuse its discretion in admitting the complainant's prior consistent statement, because a reasonable trial court could conclude that defense counsel was mounting a charge of recent fabrication during cross-examination, when in admitting the statement the trial judge expressly stated that he considered the cross-examination as a challenge to the complainant's credibility. White v. State, 256 S.W.3d 380, 2008 Tex. App. LEXIS 1026 (Tex. App. San Antonio 2008).

488. In a trial for sexual assault on a child, the complainant's prior consistent statements were properly admitted because defendant's implication of recent fabrication was clear from the closing argument, which stated that the complainant conspired with a civil attorney to fabricate dates that would support the claim that the complainant was under 17 years old at the time of the incidents for purposes of a civil lawsuit. Hammons v. State, 239 S.W.3d 798, 2007 Tex. Crim. App. LEXIS 1632 (Tex. Crim. App. 2007).

489. Predicate for admission of a prior consistent statement is laid by the content, tone, and tenor of cross-examination, which either does or does not open the door to the admissibility of a prior consistent statement by an express or implied suggestion that the witness is fabricating testimony in some relevant respect; such an attack may not be immediately apparent from the specific wording of the questions asked, but may become obvious only during the attorney's final argument. Hammons v. State, 239 S.W.3d 798, 2007 Tex. Crim. App. LEXIS 1632 (Tex. Crim. App. 2007).

490. In assessing whether the cross-examination of a witness makes an implied charge of recent fabrication or improper motive, a reviewing court should focus on the purpose of the impeaching party, the surrounding circumstances, and the interpretation put on them by the trial court, as well as clues from the voir dire, opening statements, and closing arguments; the question is whether from the totality of the questioning, giving deference to the trial judge's assessment of tone, tenor, and demeanor, a reasonable trial judge could conclude that the cross-examiner is mounting a charge of recent fabrication or improper motive; if so, it is not an abuse of discretion to admit a prior consistent statement that was made before any such motive to fabricate arose. Hammons v. State, 239 S.W.3d 798, 2007 Tex. Crim. App. LEXIS 1632 (Tex. Crim. App. 2007).

491. In a trial for child sexual assault in which the complainant's age at the time of the sexual incidents was at issue, it was error under Tex. R. Evid. 801 to admit the complainant's prior consistent statements about the time of the incidents; defendant was entitled to cross-examine the complainant as to who told her what dates to allege because the complainant herself blamed her lawyer for inconsistencies in her deposition testimony; cross-examination that tested the memory of a witness did not rise to the level of a charge of recent fabrication or improper influence or motive. Hammons v. State, 221 S.W.3d 720, 2007 Tex. App. LEXIS 663 (Tex. App. San Antonio 2007), *rev'd on other grounds*, 239 S.W.3d 798, 2007 Tex. Crim. App. LEXIS 1632 (Tex. Crim. App. 2007, no pet).

492. Court rejected defendant's claim that the trial court erred in allowing certain testimony; although defendant argued that the statement did not qualify as a prior consistent statement, while there might have been discrepancies, there was still the consistent allegation of abuse, and defendant did not contest that there was an express or implied charge of recent fabrication, for purposes of Tex. R. Evid. 801. Johnson v. State, 2006 Tex. App. LEXIS 8147 (Tex. App. El Paso Sept. 14 2006).

493. In a juvenile delinquency adjudication, testimony from the complainant's friend concerning the alleged sexual assault was admissible to rebut appellant's charges against the complainant of recent fabrication and improper motive; under Tex. R. Evid. 801, the complainant's friend was permitted to testify to an out of court statement made to her by complainant about the alleged sexual assault. In re F.E.C., 2006 Tex. App. LEXIS 11244 (Tex. App. San Antonio Sept. 13 2006).

494. Trial court did not abuse its discretion in deciding to admit an incriminating videotaped interview of a complainant, under Tex. R. Evid. 801(e)(1)(B), to rebut defense counsel's inference of recent fabrication or improper influence because the defense counsel through his cross-examination of the complainant suggested her testimony was fabricated or the subject of improper influence, and the videotape included many statements consistent with the complainant's trial testimony and some inconsistent statements. Rodriguez v. State, 2006 Tex. App. LEXIS 4416 (Tex. App. Dallas May 24 2006).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Inconsistent Statements

495. Defense counsel was not ineffective for failing to object to the victim's affidavit of forgery because it was admissible as a prior inconsistent statement, as the victim's uncertain testimony at trial about whether defendant's boyfriend had permission to write the check in question was inconsistent with her affidavit. Pearce v. State, 2014 Tex. App. LEXIS 549, 2014 WL 942687 (Tex. App. Waco Jan. 16 2014).

496. At defendant's trial for kidnapping and murder, the trial court did not abuse its discretion by excluding a video-recorded witness statement. Because the witness statement was not given under oath, it was not admissible under Tex. R. Evid. 801(e)(1)(A). Gamez v. State, 2012 Tex. App. LEXIS 6774, 2012 WL 3329200 (Tex. App. San Antonio Aug. 15 2012).

497. Tex. R. Evid. 801(e)(1)(A) did not apply because the prior statement was not given under oath and subject to the penalty of perjury. Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

498. Inconsistent statement was not separately admissible as substantive evidence under Tex. R. Evid. 801(e)(1)(A) because it was not given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding. Spearman v. State, 307 S.W.3d 463, 2010 Tex. App. LEXIS 1026 (Tex. App. Beaumont Feb. 10 2010).

499. Because defendant failed to respond to the State's relevance objection and because there was nothing in the record to show that a witness actually made any prior inconsistent statements, for purposes of Tex. R. Evid. 801(e)(1)(A), to which Scott's hearsay exceptions under Tex. R. Evid. 613(a), 803(8) would apply, the court could not say that the trial court abused its discretion by not allowing defendant to impeach the witness. Scott v. State, 2009 Tex. App. LEXIS 131, 2009 WL 51035 (Tex. App. Fort Worth Jan. 8 2009).

500. Although the trial court erred by denying a limiting instruction because the witnesses' prior statements did not fall within any hearsay exception and so were admissible for impeachment purposes only, the error was harmless. Absent from the inconsistent statements, the record contained other evidence from which the jury could have inferred that defendant did not act in self-defense, and the trial court's charge instructed the jury that a witness's

prior inconsistent statement could only be considered for impeachment purposes to asses the witness's credibility. Arnold v. State, 2008 Tex. App. LEXIS 9768 (Tex. App. Waco Dec. 31 2008).

501. In defendant's indecency with a child case, the trial court properly allowed a forensic interviewer to testify to prior consistent statements made by the complainant in her videotaped interview because the court allowed the State to introduce the testimony that the complainant told her that defendant had touched her "middle part" underneath her clothing when they were both standing in the kitchen of defendant's apartment to counter a portion of the videotape reflecting that the complainant was in her mother's house when it happened. Hoover v. State, 2007 Tex. App. LEXIS 1549 (Tex. App. Austin Feb. 27 2007).

Evidence : Hearsay : Exemptions : Statements by Coconspirators : General Overview

502. Defendant never attempted to overcome the State's hearsay objections, plus the statements did not fit within the scope of the rule; the statements had to be offered against the State and had to have been made by a coconspirator of the State during the course and in furtherance of a conspiracy, but each statement was made by one of defendant's coconspirators, and there was no evidence or assertion that the State was a party to the conspiracy such that the statements would be excluded from the definition of hearsay. Alvarez v. State, 2014 Tex. App. LEXIS 1574, 2014 WL 585837 (Tex. App. Corpus Christi Feb. 13 2014).

503. Out-of-court statements were non-testimonial and did not violate the Confrontation Clause because the statements were non-hearsay statements made by a co-conspirator; moreover, the trial court did not abuse its discretion in finding the probative value of the evidence was not outweighed by the danger of unfair prejudice. Agyin v. State, 2013 Tex. App. LEXIS 13337 (Tex. App. San Antonio Oct. 30 2013).

504. Record supported a finding that appellant and co-defendant conspired to commit the murder, and the trial court thus would not have abused its discretion in finding that co-defendant's statements to a witness were admissible against co-defendant and appellant under Tex. R. Evid. 801(e)(2)(E); thus, the statements would have been admissible against appellant even if he was tried separately, such that the trial court would not have abused its discretion in determining that there was a lack prejudice in this regard and in denying appellant's motion to sever. Moesch v. State, 2012 Tex. App. LEXIS 7120, 2012 WL 3629847 (Tex. App. Austin Aug. 24 2012).

505. Owner was trying to use an alleged statement to show that a conspiracy existed, for purposes of Tex. R. Evid. 801(e)(2)(E), without other proof of the conspiracy, and the subcontractor objected to this type of testimony contained in an affidavit, such that the hearsay testimony was not proper summary judgment evidence. P. McGregor Enters. v. Hicks Constr. Group, Llc, 420 S.W.3d 45, 2012 Tex. App. LEXIS 87, 2012 WL 28538 (Tex. App. Amarillo Jan. 5 2012).

506. In defendant's trial for possession of four grams or more but less than 200 grams of methamphetamine in violation of Tex. Health & Safety Code § 481.115, the trial court properly admitted the recording of a telephone conversation between a confidential informant (CI) and the individual who purchased methamphetamine from defendant; the recording was properly admitted as to the purchaser-coconspirator under Tex. R. Evid. 801(e)(2)(E) and was properly admitted as to the CI under Tex. R. Evid. 803(3) as a statement of the CI's then existing plan to provide the purchaser with transportation to a meeting place with defendant. Camacho v. State, 2009 Tex. App. LEXIS 5975, 2009 WL 2356885 (Tex. App. Fort Worth July 30 2009).

507. In a murder trial, there was no error in the admission of a co-conspirator's statements made in the course of conversations about how the victim had purportedly died and about disposing of the body because the challenged statements fell were co-conspirator statements and adoptive admissions under Tex. R. Evid. 801(e)(2)(B), (E). King

v. State, 189 S.W.3d 347, 2006 Tex. App. LEXIS 2100 (Tex. App. Fort Worth 2006).

508. Although coconspirator's out-of-court statement rhetorically asking why did defendant have to hit the victim did not advance the objective of the conspiracy to hinder defendant's apprehension, and thus should not have been admitted at defendant's murder trial, the error in admitting the out-of-court statement pursuant to Tex. R. Evid. 801(e)(2)(E) was harmless; therefore, the error in admitting the coconspirator's out-of-court statement did not have a substantial and injurious effect or influence in determining the jury's verdict. Byrd v. State, 187 S.W.3d 436, 2005 Tex. Crim. App. LEXIS 2128 (Tex. Crim. App. 2005).

509. Trial court did not err in denying defendant's motion for a new trial based on defendant's claim that his trial counsel gave him incorrect advice regarding the admissibility of his co-defendant's confession because counsel's belief that the videotaped statement would probably be presented was reasonable where the record indicated the co-defendant was going to testify at trial and the admission of the videotaped confession would not have violated Tex. R. Evid. 801(a) or the Confrontation Clause. Even if counsel had been wrong about the videotaped confession of the co-defendant, he was absolutely correct as to the State's ability to use the co-defendant as a witness because the State could have subpoenaed the co-defendant and compelled him to testify without violating the co-defendant's constitutional right against self-incrimination since the co-defendant already had pled guilty to his charge. Gonzalez v. State, 2005 Tex. App. LEXIS 7218 (Tex. App. Houston 14th Dist. Aug. 25 2005).

510. While a witness in a capital murder case subsequently withdrew from the conspiracy, his testimony that he recommended defendant as someone who would be willing to participate in the offense was admissible as a statement made by a coconspirator during the course of, and in furtherance of, the conspiracy under Tex. R. Evid. 801(e)(2)(E). Pena v. State, 2005 Tex. App. LEXIS 5110 (Tex. App. Houston 1st Dist. June 30 2005).

511. In a trial for conspiracy to commit murder, a witness was properly allowed to testify regarding a conversation that she had with a gang member about defendant's order to shoot an ex-member. The statement of the planned shooter was made in furtherance of the conspiracy under Tex. R. Evid. 801(e)(2)(E) because he was explaining to the witness why she had to drive him to his girlfriend's house to get a car: he needed the car in order to comply with the shooting orders. Maynard v. State, 166 S.W.3d 403, 2005 Tex. App. LEXIS 4003 (Tex. App. Austin 2005).

512. Drug defendant's confrontation rights were not violated by the admission of an informant's testimony that a declarant, who agreed to sell her drugs, said that defendant was his right hand man. The Crawford standard did not apply because the declarant's statements were not testimonial; under the Ohio v. Roberts standard, the admission was proper under the co-conspirator exception to the hearsay rule, Tex. R. Evid 801(e)(2)(E). Mancilla v. State, 2005 Tex. App. LEXIS 3334 (Tex. App. Dallas May 3 2005).

513. In a criminal trial for murder, a witness was permitted to testify that she heard defendant ask the co-conspirator to kill her husband so defendant and the co-conspirator "could be together," and that the co-conspirator later told the witness about the specifics of the murder. The co-conspirator's hearsay statements made in the furtherance of the conspiracy were nontestimonial; therefore, the admission of the statements was not barred by the Confrontation Clause. Wiggins v. State, 152 S.W.3d 656, 2004 Tex. App. LEXIS 10267 (Tex. App. Texarkana 2004).

514. Detective's testimony that a witness had implicated defendant in his confession was admissible because of the co-conspirator exclusion of Tex. R. Evid. 801(e)(2)(E). Ballantine v. State, 2004 Tex. App. LEXIS 7551 (Tex. App. El Paso Aug. 20 2004).

515. When a defendant's friend made a statement to police that they had just assaulted the victim, the statement was admissible as an adoptive admission within the meaning of Tex. R. Evid. 801; the defendant did not object to

the statement when it was made, and actually confirmed it moments later. Bean v. State, 1998 Tex. App. LEXIS 2108 (Tex. App. Houston 14th Dist. Apr. 9 1998).

Evidence : Hearsay : Exemptions : Statements by Coconspirators : Members of Conspiracy

516. Trial court did not abuse its direction in overruling the corporation's hearsay objection because: (1) the trial court may have considered the corporation's administrator's deposition to be admissible as the corporation's statement in a representative capacity, that the administrator was authorized to make such statements, or that the administrator's deposition testimony concerned matters within the scope of the son's agency or employment, made during the existence of the relationship under Tex. R. Evid. 801(e)(2)(A), (C), (D); and (2) the trial court may have admitted the administrator's deposition testimony, and the exhibits thereto, as a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy under Tex. R. Evid. 801(e)(2)(E). Much of the content at issue was cumulative. San Pedro Impulsora De Inmuebles Especiales, S.A. De C.V. v. Villarreal, 330 S.W.3d 27, 2010 Tex. App. LEXIS 9174 (Tex. App. Corpus Christi Nov. 18 2010).

Evidence : Hearsay : Exemptions : Statements by Coconspirators : Statements During Conspiracy

517. Trial court did not err by admitting a witness's testimony into evidence because it was not inadmissible hearsay, as it was undisputed that the witness was a co-conspirator of defendant in the rape and murder and the challenged statements were made during the course of and in furtherance of their conspiring to assault the victim. TreviÃ»o v. State, 2013 Tex. App. LEXIS 5388, 2013 WL 1883080 (Tex. App. Corpus Christi May 2 2013).

518. In defendant's robbery case, the court properly allowed testimony because the statement "It just didn't go as planned," inferentially tended to show that the coconspirator committed or attempted to commit the offense that was the subject of the conspiracy, i.e., to obtain some money, in Pampa, by some method. Davey Enriquez v. State, 2009 Tex. App. LEXIS 5183 (Tex. App. Amarillo July 7 2009).

519. Any conspiracy that a person might have entered into with defendant did not exist until after the statements were made, and because the statements were not made during the conspiracy, the statements were not admissible under Tex. R. Evid. 801(e)(2)(E). Chaney v. State, 2009 Tex. App. LEXIS 2799 (Tex. App. Houston 1st Dist. Apr. 23 2009).

520. Defendant's argument that statements were not admissible as statements of a coconspirator because he was not part of a conspiracy at the time the statements were made was unpersuasive because coconspirator statements were admissible when the coconspirator was part of a conspiracy in which the defendant also participated or later joined; statements like the declarant's that were made to induce involvement in the conspiracy were statements made in furtherance thereof, and the State was also required to prove that the statements were made in the course of a conspiracy. Chaney v. State, 2009 Tex. App. LEXIS 2799 (Tex. App. Houston 1st Dist. Apr. 23 2009).

521. Victim testified that he was ordered by "pretty much" all three robbers to remove his possessions and relinquish them, and as to defendant, this statement was an admission by a party opponent and not hearsay for purposes of Tex. R. Evid. 801, and any such statements made by the other two robbers were statements made by coconspirators in the course of the conspiracy. Denton v. State, 2007 Tex. App. LEXIS 1706 (Tex. App. Tyler Mar. 7 2007).

Evidence : Hearsay : Exemptions : Statements by Coconspirators : Statements Furthering Conspiracy

522. Court's admission of a statement made by a co-defendant was proper because the co-defendant made the statement with an intent to induce the kidnapping victim to cooperate in the furthering of the crime by driving her

car, withdrawing cash, and using her credit card to get gas. Casaus v. State, 2014 Tex. App. LEXIS 8749 (Tex. App. El Paso Aug. 8 2014).

523. Trial court did not err by admitting a witness's testimony into evidence because it was not inadmissible hearsay, as it was undisputed that the witness was a co-conspirator of defendant in the rape and murder and the challenged statements were made during the course of and in furtherance of their conspiring to assault the victim. TreviÃ»o v. State, 2013 Tex. App. LEXIS 5388, 2013 WL 1883080 (Tex. App. Corpus Christi May 2 2013).

524. Co-conspirator's statements to a witness and in front of another after the murder were made in furtherance of the conspiracy in order to conceal the murder, such that the statements were not hearsay for purposes of Tex. R. Evid. 801(e)(2)(E), and the trial court did not abuse its discretion by admitting them over a hearsay objection. Orona v. State, 341 S.W.3d 452, 2011 Tex. App. LEXIS 1452 (Tex. App. Fort Worth Feb. 24 2011).

525. Defendant's statements to a co-defendant were made in furtherance of the conspiracy where defendant was attempting to induce the co-defendant to enter into a conspiracy to rob the store. Therefore, the challenged statements fell within the co-conspirator statements exception to the hearsay rule and were admissible under Tex. R. Evid. 801(e)(2)(E). Brown v. State, 334 S.W.3d 789, 2010 Tex. App. LEXIS 5483 (Tex. App. Tyler July 14 2010).

526. In defendant's aggravated robbery case, the court properly admitted a co-conspirator's statement because the officer's testimony about the statement "waste him, dog, waste him" and "shoot him, and get out of here," was not hearsay; the officer was attempting to arrest or detain the suspect while defendant was in a nearby car. The statement was not offered for the truth of the matter asserted but rather to provide the jury the context in which defendant was eventually arrested. Clifton v. State, 2009 Tex. App. LEXIS 6533, 2009 WL 2567946 (Tex. App. Austin Aug. 20 2009).

527. Defendant's argument that statements were not admissible as statements of a coconspirator because he was not part of a conspiracy at the time the statements were made was unpersuasive because coconspirator statements were admissible when the coconspirator was part of a conspiracy in which the defendant also participated or later joined; statements like the declarant's that were made to induce involvement in the conspiracy were statements made in furtherance thereof, and the State was also required to prove that the statements were made in the course of a conspiracy. Chaney v. State, 2009 Tex. App. LEXIS 2799 (Tex. App. Houston 1st Dist. Apr. 23 2009).

528. In defendant's murder case, a witness's out-of-court statements were admissible as statements in furtherance of the conspiracy because, according to the witness, the co-conspirator told her that defendant had given her his nine-millimeter gun; the victim was killed with a nine-millimeter gun. Thus, the co-conspirator's statement created an alibi for defendant by taking a nine-millimeter gun out of his possession, and the co-conspirator's statements affirmatively advanced the conspiracy to hinder defendant's apprehension. Guevara v. State, 297 S.W.3d 350, 2009 Tex. App. LEXIS 494 (Tex. App. San Antonio Jan. 28 2009).

529. District court denied a state inmate's petition under 28 U.S.C.S. § 2254, challenging his conviction and sentence for murder, because the inmate did not show he was denied effective assistance of counsel or that a state habeas court made findings that were contrary to clearly established federal law when it rejected the inmate's claims; although the inmate claimed that the trial court violated his Sixth Amendment right to confrontation when it admitted hearsay testimony, the district court found that the trial court properly admitted testimony under Tex. R. Evid. 803 as an excited utterance; even assuming arguendo that the trial court erred, the error was harmless in light of the other incriminating evidence the State introduced. Turnbow v. Quarterman, 2007 U.S. Dist. LEXIS 77098 (N.D. Tex. Oct. 17 2007).

530. In a capital murder case, the statements of a coconspirator were not hearsay and were admissible under Tex. R. Evid. 801(e)(2)(E), since the non-testimonial statements were made in furtherance of the conspiracy. The coconspirator's admission of his involvement in the murder to his brother was not a testimonial confession, and so it was irrelevant that confessions by an accomplice that implicated another were not a firmly rooted exception to the hearsay rule, and if the conspiracy at issue was treated broadly as an agreement to commit a robbery and murder and to escape capture, the statements could be understood as being part of a conspiracy, given that they were made to impress upon the brother the importance of the flight of the conspirator and appellant. Arroyo v. State, 239 S.W.3d 282, 2007 Tex. App. LEXIS 5111 (Tex. App. Tyler 2007).

531. Members of the reconstruction team were clearly agents of the Texas Department of Public Safety (DPS) and they were authorized by DPS to make statements like those contained in their report; the reconstruction team's report was an admission by the DPS, and it was admissible, and the trial court did not abuse its discretion in overruling DPS' objections to the report. Tex. Dep't of Pub. Safety v. Bonilla, 481 S.W.3d 646, 2014 Tex. App. LEXIS 5797 (Tex. App. El Paso May 30 2014).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

532. In defendant's murder trial, there was no error in the admission of testimony by a witness about statements defendant made in a telephone call because they were within the hearsay exemption for statements of a party-opponent. Van Exel v. State, 2014 Tex. App. LEXIS 8464 (Tex. App. Dallas Aug. 4 2014).

533. Trial court did not err by admitting the witness's testimony that defendant urged her to say that the victim assaulted her so that defendant could assert the affirmative defense of defense of a third person because the statements were made by defendant and offered against him. Thus, they constituted an admission of a party opponent and did not implicate the prior inconsistent statement rule. Stairhime v. State, 439 S.W.3d 499, 2014 Tex. App. LEXIS 7905 (Tex. App. Houston 1st Dist. July 22 2014).

534. Under this rule, defendant's testimony from his co-defendant's trial was not hearsay; consequently, the exception to the hearsay rule for statements against interest did not govern the admissibility of defendant's previous testimony and the statements were not barred by the hearsay rule. Jackson v. State, 2014 Tex. App. LEXIS 6346, 2014 WL 2611106 (Tex. App. Dallas June 11 2014).

535. Although the rule provided a hearsay exception for certain statements by a party's agent or servant, the page of an affidavit did not state who assured the affiant that reimbursements had been approved, and appellants did not otherwise cite any statements they contended constituted admissions by a party opponent. Berryman's South Fork, Inc. v. J. Baxter Brinkmann Int'l Corp., 418 S.W.3d 172, 2013 Tex. App. LEXIS 14226, 2013 WL 6097965 (Tex. App. Dallas Nov. 20 2013).

536. Upon summary judgment in a lessor's action for damages under an equipment lease agreement, the trial court was permitted to consider exhibits consisting of documents the lessee generated that reflected payments made under the lease because they were admissions by a party opponent and excluded from the hearsay rule. Choice Asset Mgmt., Inc. v. Cit Tech. Fin. Servs., 2013 Tex. App. LEXIS 11584 (Tex. App. Amarillo Sept. 11 2013).

537. At defendant's trial for aggravated robbery, the trial court did not abuse its discretion by allowing a detective to testify about the in-custody interrogation because what defendant told him was not hearsay. Sneed v. State, 2013 Tex. App. LEXIS 10702 (Tex. App. Fort Worth Aug. 22 2013).

538. Where defendant was convicted of continuous sexual abuse of a child, the trial court did not abuse its discretion in admitting his wife's testimony about defendant's out-of-court statements about the offense. Under this

rule, a criminal defendant's own statements, when being offered against him, are not hearsay. Cox v. State, 2013 Tex. App. LEXIS 8890 (Tex. App. Waco July 18 2013).

539. Trial court did not violate defendant's constitutional privilege against self-incrimination by allowing the State to read into evidence a portion of the testimony he gave at the punishment phase of a previous trial on another charge because the testimony was given for a limited purpose in the prior proceeding in order to mitigate the punishment in that case and was not hearsay under Tex. R. Evid. 801(e)(2)(A). Lacey v. State, 2013 Tex. App. LEXIS 8017 (Tex. App. Dallas June 28 2013).

540. Trial court did not abuse its discretion in admitting statements that defendant made to a jailer where the evidence was admissible as an admission by a party-opponent, as it was offered to prove that defendant admitted guilt in the instant case-he was being held for murder and said he would have to limit himself to one murder every two years. The jailer's testimony clarified the circumstances surrounding the victim's shooting, directly contradicted defendant's theory of the case that his accomplices were wrongly accusing him of firing the gun so that they would receive a favorable deal in their own cases, and was not likely to impress the jury in some irrational but nevertheless indelible way. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

541. Trial court did not abuse its discretion in admitting defendant's statement to a witness who had been in jail with him before the trial, that defendant was the "shooter," where the State did not offer the inmate's testimony as evidence of an extraneous offense separate and apart from the charged offense but, instead offered the evidence as proof that defendant fired the shots that killed the victim. The statement was an admission by a party-opponent, supported the allegation that defendant killed the victim, directly contradicted defendant's defensive theory that his accomplices only named him as the shooter to get a reduced sentence, and was not likely to impress the jury in some irrational but nevertheless indelible way. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

542. Texas Workforce Commission had the authority to determine that the all of an employee's unpaid salary was due to be paid on September 25 based on the parties' agreement, Tex. Lab. Code Ann. § 61.013, thus placing the entire amount within its jurisdiction to award under Tex. Lab. Code Ann. § 61.051(c). A company representative's testimony that he agreed to the September 25 date was not hearsay because it was an admission by a party-opponent. Jmj Acquisitions Mgmt. v. Peterson, 407 S.W.3d 371, 2013 Tex. App. LEXIS 7340 (Tex. App. Dallas June 13 2013).

543. Appellant claimed that testimony was admissible under Tex. R. Evid. 801(e)(2) as party admissions, but they did not provide any record citation to establish that they presented this to the trial court, and even if they did, Rule 801(e)(2) only excluded admissions of a party opponent from the definition of hearsay and did not address restrictions applicable to the admissibility of evidence of similar accidents as discussed in certain case law. Estate of Muniz v. Ford Motor Co., 2013 Tex. App. LEXIS 7158 (Tex. App. San Antonio June 12 2013).

544. Trial court properly ruled that a witness's testimony related to statements made by defendant that were reflected in the witness's written statement to investigators was inadmissible hearsay; the statements by defendant were not admissions by a party opponent because it was defendant who sought to elicit them; therefore, they were not offered against him as required under Tex. R. Evid. 801(e)(2). Williams v. State, 402 S.W.3d 425, 2013 Tex. App. LEXIS 7031 (Tex. App. Houston 14th Dist. June 11 2013).

545. On appeal of defendant's conviction for murder, he objected to the introduction of his testimony from his previous trial on the ground that it constituted hearsay. The trial court did not err by admitting the testimony, because a criminal defendant's own statements, when being offered against him, were not hearsay under Tex. R.

Evid. 801(e)(2). Lockridge v. State, 2013 Tex. App. LEXIS 6147 (Tex. App. Texarkana May 17 2013).

546. Because appellant's statements to a witness were not offered by the State against appellant, they did not amount to admissions by a party-opponent under Tex. R. Evid. 801(e)(2). Carrion v. State, 2013 Tex. App. LEXIS 5673 (Tex. App. Eastland May 9 2013).

547. Defendant's convictions for aggravated kidnapping and aggravated sexual assault of a child were proper because statements were admissible as non-hearsay, Tex. R. Evid. 801(d). The victim's indication that she was okay was admissible pursuant to Tex. R. Evid. 803(3) as it was a statement of her then existing mental, emotional, or physical condition; the sheriff's indication that everything was okay constituted a present sense impression and was admissible under Rule 803(1); the victim's statement that "he is trying to get in the bathroom" could have been admitted either as a present sense impression under Rule 803(1) or an excited utterance under Rule 803(2); the trial court did not abuse it discretion in allowing the officer to testify that he heard a male voice saying, "Open the door" because that statement could have been admitted either as an admission by a party opponent or as a statement merely showing what was said rather than proving the truth of the matter asserted, Tex. R. Evid. 801(e)(2). Billings v. State, 399 S.W.3d 581, 2013 Tex. App. LEXIS 1423, 2013 WL 607699 (Tex. App. Eastland Feb. 14 2013).

548. Trial court did not abuse its discretion by admitting a copy of defendant's resume into evidence because the State argued that the resume consisted of an admission by a party opponent as defendant prepared his own resume. Wood v. State, 2013 Tex. App. LEXIS 866 (Tex. App. Corpus Christi Jan. 31 2013).

549. Defendant's statement that he would hurt anyone who snitched was an admission by a party opponent and therefore was not hearsay. Keith v. State, 384 S.W.3d 452, 2012 Tex. App. LEXIS 8860 (Tex. App. Eastland Oct. 25 2012).

550. In defendant's community supervision revocation proceeding, the trial court did not err in admitting an exhibit containing his letters that were intercepted by the mail clerk of the correctional facility. The letters authored by defendant were not hearsay under Tex. R. Evid. 801(d)(e)(2)(A), which provided an exception for an admission by a party-opponent. Rivera v. State, 2012 Tex. App. LEXIS 8306, 2012 WL 4712902 (Tex. App. Beaumont Oct. 3 2012).

551. In a murder case, the trial court did not err by admitting the recording of the call a cab driver made to 9-1-1. The statements overheard by the cab driver were made by defendant and offered against him; thus, the statements were admissible as admissions by a party-opponent under Tex. R. Evid. 801(e)(2)(A). Dayne Adenauer White v. State, 2012 Tex. App. LEXIS 8107 (Tex. App. Houston 1st Dist. Sept. 27 2012).

552. Facts on proofs of loss amounted to admissions by the insured's principal and were competent evidence for purposes of summary judgment, and purposes of Tex. R. Evid. 801(e)(2). United States Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 2012 Tex. App. LEXIS 6770 (Tex. App. San Antonio Aug. 15 2012).

553. Trial court did not err in allowing evidence of an extraneous offense of terroristic threat where the statement was an admission by a party-opponent, supporting the allegation that defendant killed the victim in the instant case and the victim in another case. The testimony at issue was some evidence that defendant threatened to kill a fellow jail inmate, which constituted a threat to commit an offense involving violence, and that defendant made the threat in order to make that inmate and another inmate afraid of him and his ability and willingness to use violence. Mcgregor v. State, 394 S.W.3d 90, 2012 Tex. App. LEXIS 6552, 2012 WL 3244196 (Tex. App. Houston 1st Dist. Aug. 9 2012).

554. Defendant's statements on recordings of telephone conversations from jail were admissions by a party-opponent and, as such, were not hearsay under Tex. R. Evid. 801(e)(2)(A). Hernandez v. State, 2012 Tex. App. LEXIS 6508, 2012 WL 3194310 (Tex. App. Dallas Aug. 8 2012).

555. In a driving while intoxicated case, appellant failed to show that he received ineffective assistance of counsel because it was within the realm of trial strategy for defense counsel to decide not to cross-examine a deputy, and a failure to raise a hearsay objection was assumed to be a matter of trial strategy as well; appellant did not argue that his own statements were inadmissible hearsay since they constituted nonhearsay admissions of a party opponent. Gentry v. State, 2012 Tex. App. LEXIS 5980, 2012 WL 3023169 (Tex. App. Texarkana July 25 2012).

556. Statements in a proof of loss form relating to the date of hail damage were competent summary judgment evidence because they constituted admissions under Tex. R. Evid. 801(e)(2). Even if the statements in the proof of loss form were not binding or conclusive, they were considered prima facie evidence of the facts stated therein; moreover, expert testimony was not required on the issue of whether hail occurred on a certain date and caused property damage. United States Fire Ins. Co. v. Lynd Co., 2012 Tex. App. LEXIS 3206, 2012 WL 1430541 (Tex. App. San Antonio Apr. 25 2012).

557. Deposition testimony was not hearsay, because it was an admission by a party opponent, Tex. R. Evid. 801(e)(2); pleadings on file introduced by the non-movant were proper summary judgment evidence, and the trial court properly considered the deposition and the tenant's pleadings over the tenant's hearsay objection. Simi, Inc. v. Heb Grocery Co., Lp, 2012 Tex. App. LEXIS 2676, 2012 WL 3528977 (Tex. App. Houston 1st Dist. Apr. 5 2012).

558. In determining that a proposed acquisition of a utility was in the public interest, the Texas Public Utility Commission properly struck as hearsay under Tex. R. Evid. 801(d) portions of proposed testimony that discussed withdrawn testimony, including statements by an expert witness who was hired by the Commission's staff. The withdrawn testimony did not constitute admissions by party-opponents under Rule 801(e)(2) because it did not come from opposing parties, nor was it admissible under the public-record exception of Tex. R. Evid. 803(8)(C) because it was not admitted into the record or prepared under the supervision of a public official. Nucor Steel -- Tex. v. PUC, 363 S.W.3d 871, 2012 Tex. App. LEXIS 2108, 2012 WL 895994 (Tex. App. Austin Mar. 15 2012).

559. Will contestant could properly seek discovery of a will proponent regarding her offer of a different will for probate, even though the proponent had amended her petition and offered an earlier will for probate, because under Tex. R. Evid. 801(e)(2), admissions of a party-opponent were admissible, and Rule 801(e)(2) included superseded pleadings. In re Willie, 2012 Tex. App. LEXIS 1159 (Tex. App. Houston 14th Dist. Feb. 14 2012).

560. Court agreed with the State that a statement was not hearsay because it was an admission by a party-opponent under Tex. R. Evid. 801(e)(2)(A), and appellant's right to confrontation was not violated because he had the chance at trial to cross-examine and confront the witnesses against him. Perez-Peraza v. State, 2012 Tex. App. LEXIS 343, 2012 WL 135672 (Tex. App. San Antonio Jan. 18 2012).

561. Trial court did not err by admitting into evidence statements defendant made in a letter concerning the murder because the statements were not hearsay under Tex. R. Evid. 801, as they were admissible as admissions of a party opponent. The statements were relevant because in the letter defendant did not claim, as he did at trial, that the shooting was accidental, and they were not inadmissible under Tex. R. Evid. 403, as the statements supported the State's contention that defendant intentionally shot the victim, it related to defendant's state of mind which was a central issue at trial, and the letter was brief and not cumulative of other evidence. Benitez v. State, 2011 Tex. App. LEXIS 9871, 2011 WL 6306643 (Tex. App. Houston 1st Dist. Dec. 15 2011).

562. Appellant argued that the trial court erred in not allowing him to elicit testimony that appellant said he was made to do the crime, but nothing showed that the trial court abused its discretion by excluding the complained-of statement; the court could not say whether the spontaneity of appellant's statement existed to take such out of the realm of premeditation, given that the witness said he was unsure of the exact timing of the statement, plus he assumed it was made more than two minutes after appellant had been apprehended and the statement was made after the tension had ceased. Falade v. State, 2011 Tex. App. LEXIS 9408, 2011 WL 5984536 (Tex. App. Fort Worth Dec. 1 2011).

563. During a trial for failure to comply with sex offender registration requirements, defense counsel was not ineffective for failing to object to a data sheet that defendant filled out for a probation officer that gave defendant's address because the form was not hearsay under Tex. R. Evid. 801(e)(2)(A). Darnell v. State, 2011 Tex. App. LEXIS 9049, 2011 WL 5515470 (Tex. App. Fort Worth Nov. 10 2011).

564. Appellant claimed that the trial court erred in overruling his hearsay objection to a letter allegedly containing his signature, but the court found that the letter was not hearsay under Tex. R. Evid. 801(d) and was a party's own statements under Rule 801(e)(2)(A); the letter, addressed to the complaining witness, indicated what appellant did on the day in question, and the letter did not mention that he was with his brother most of that morning, and the brother was surprised the letter failed to mention him. Vallair v. State, 2011 Tex. App. LEXIS 7055, 2011 WL 3847418 (Tex. App. Beaumont Aug. 31 2011).

565. Trial court did not abuse its discretion by admitting evidence of a tattoo of "187" on defendant's hand as a statement that defendant committed murder pursuant to Tex. R. Evid. 801(e)(2)(A) because the record showed that defendant did not have the tattoo on the night of the shooting, it was placed on him after he was in jail in connection with the underlying murder charge, and went to his state of mind at the time of the shooting and clarified the circumstances surrounding the shooting. It was clear from the placement of the tattoo on his hand that it was an open and obvious statement he wanted everyone to see and it directly contradicted his defensive theory that he acted in self defense. Salazar v. State, 2011 Tex. App. LEXIS 6835, 2011 WL 3770297 (Tex. App. Dallas Aug. 26 2011).

566. Appellant claimed that the victim's testimony about what appellant had told her concerning a prior offense was inadmissible, but regardless of whether the victim's testimony qualified as a statement against interest under Tex. R. Evid. 803(24), the trial court would not have abused its discretion in admitting the evidence under Tex. R. Evid. 801(e)(2)(A) as an admission by a party opponent. Reyes v. State, 2011 Tex. App. LEXIS 4811, 2011 WL 2507002 (Tex. App. Austin June 24 2011).

567. Even if one assumed that statements were party-opponent admissions under Tex. R. Evid. 801(e)(2)(A) and relevant under Tex. R. Evid. 401, otherwise relevant evidence could be excluded under Tex. R. Evid. 403; in addition to possibly confusing the jury and unfairly prejudicing the State's case, admission of the statements would have been cumulative, and the trial court did not err in excluding these statements. Mcneal v. State, 2011 Tex. App. LEXIS 4629, 2011 WL 2420271 (Tex. App. Dallas June 17 2011).

568. Defendant's counsel was not ineffective because 1) defense counsel's strategy in introducing letters that suggested that the allegations against defendant were concocted was reasonable; 2) the record was silent on why counsel did not object to certain testimony and did not elicit testimony about the victim's past sexual behavior, and, thus, the appellate court had to conclude that defendant had not overcome the presumption that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy; 3) counsel's failure to object to the cards/letters written by defendant was not ineffective as they were not hearsay, but rather, admissions by a party-opponent under Tex. R. Evid. 801(e)(2)(A); and 4) there was no evidence in the record that defendant was prejudiced by counsel's actions, including failure to timely request a directed verdict. Holbert v. State, 2011 Tex.

App. LEXIS 3395, 2011 WL 1679722 (Tex. App. Waco May 4 2011).

569. Police testimony regarding appellant's dragging of his dog constituted an admission by a party opponent under Tex. R. Evid. 801(e)(2)(A) because appellant previously admitted to police that he had dragged the dog, but only for a short distance. Zamora v. State, 2010 Tex. App. LEXIS 10246, 2010 WL 5541706 (Tex. App. Corpus Christi Dec. 30 2010).

570. In defendant's prosecution for continuous sexual abuse of a young child, any statement by defendant to the victim's mother while the mother visited defendant in jail was not hearsay under Tex. R. Evid. 801(e)(2) as the statement was made by a party and offered against that party. Ramos v. State, 2010 Tex. App. LEXIS 10330, 2010 WL 5419000 (Tex. App. Waco Dec. 29 2010).

571. In appellant's prosecution for assault causing bodily injury against a family member, a friend's testimony about the coercion of appellant's girlfriend to write a letter retracting allegations of domestic abuse was not hearsay pursuant to Tex. R. Evid. 801(e)(2) because the testimony was about what appellant, a party, stated to the girlfriend after the assault and was, thus, an admission by a party opponent. Franklin v. State, 2010 Tex. App. LEXIS 5944, 2010 WL 2949959 (Tex. App. El Paso July 28 2010).

572. Trial court did not abuse its discretion by admitting into evidence the victim's mother's testimony that defendant told her that he used condoms because he had a sexually transmitted disease and did not want to give it to his wife because the statement, as defendant's own statement, was not hearsay under Tex. R. Evid. 801(e)(2)(A). For the same reason, the trial court did not abuse its discretion by admitting a document that purported to be a portion of a love note from defendant to the victim. Battle v. State, 2010 Tex. App. LEXIS 5088, 2010 WL 2698294 (Tex. App. Dallas July 6 2010).

573. Investigator testified that he did not ask defendant any questions, and thus the trial court could have found that these voluntary statements made were admissions by a party opponent under Tex. R. Evid. 801(e)(2), plus his statements were cumulative of evidence already admitted without objection, and thus the trial court did not err in admitting these statements. Anderson v. State, 2010 Tex. App. LEXIS 3440, 2010 WL 1839945 (Tex. App. Houston 1st Dist. May 6 2010).

574. Statements by an investigator to defendant, made during a videotaped interview, indicating that defendant's friend had implicated defendant did not fall under any of the provisions of Tex. R. Evid. 801(e)(2) and the statements were not admissions by a party opponent, such that the trial court erred in admitting this. Garcia v. State, 2010 Tex. App. LEXIS 2186 (Tex. App. Houston 1st Dist. Mar. 11 2010).

575. Although the trial court erred in admitting certain testimony, which did not fall under Tex. R. Evid. 801(e)(2), the same facts at issue were later placed before the jury and to which defendant did not object, and he was not harmed under Tex. R. App. P. 44.2(b). Garcia v. State, 2010 Tex. App. LEXIS 2186 (Tex. App. Houston 1st Dist. Mar. 11 2010).

576. Victim's testimony regarding what defendant said to her was not hearsay under Tex. R. Evid. 801(e)(2). Norman v. State, 2009 Tex. App. LEXIS 8796, 2009 WL 3805830 (Tex. App. Houston 1st Dist. Nov. 12 2009).

577. In defendant's murder case, the trial court properly admitted a witness's testimony that defendant told her he had killed someone "in front of the bar" because the statement was an admission by a party; therefore, it was not hearsay. Additionally, defendant admitted to the trial court that the statement was a statement that exposed him to criminal liability and was probably a statement against interest. Walton v. State, 2009 Tex. App. LEXIS 8046, 2009

WL 3326759 (Tex. App. Eastland Oct. 15 2009), *cert. denied*, 131 S. Ct. 512, 178 L. Ed. 2d 379, 2010 U.S. LEXIS 8559 (U.S. 2010).

578. Trial court did not abuse its discretion in admitting defendant's testimony regarding her examination under oath conducted to settle a civil claim for insurance proceeds in her criminal trial for arson, because the statements under oath were admissions by defendant; since defendant's examination under oath was not hearsay when offered against her, no hearsay exception was needed to admit the statements. Montgomery v. State, 2009 Tex. App. LEXIS 7223, 2009 WL 2933749 (Tex. App. Dallas Sept. 15 2009).

579. Threat by defendant while he was in the process of the offense was a res gestae statement that was admissible under Tex. R. Evid. 801(e)(2)(A) and because failure to object to admissible evidence did not constitute ineffective assistance, counsel could not be found ineffective on these grounds; defendant failed to show that counsel's performance fell below an objective standard of reasonableness. Green v. State, 2009 Tex. App. LEXIS 1432, 2009 WL 469553 (Tex. App. Houston 1st Dist. Feb. 26 2009).

580. Testimony reflected out-of-court statements made by defendant that were personally heard by the witness, and thus the witness's testimony concerning defendant's out-of-court statements was admissible as admissions by a party opponent under Tex. R. Evid. 801(e)(2)(A), and the trial court did not abuse its discretion by overruling defendant's hearsay objections to this testimony. Davis v. State, 268 S.W.3d 683, 2008 Tex. App. LEXIS 6566 (Tex. App. Fort Worth 2008).

581. In an action for breach of contract arising from a licensing agreement, the trial court committed error by refusing to admit into evidence defendants' superseded pleading in which they admitted that manufacturing income was subject to the agreement. The Court of Appeals of Texas held that a superseded pleading from a party-opponent is not hearsay under Tex. R. Evid. 801(e)(2). Quick v. Plastic Solutions of Tex., Inc., 2008 Tex. App. LEXIS 9821 (Tex. App. El Paso June 27 2008).

582. In a medical malpractice case, the probative value of statements from superseded pleadings regarding two nonsuited doctors was not outweighed by the danger of unfair prejudice because counsel, representing the parents of an injured child, first alluded to the doctor's party status, thus opening the door to rebuttal, and the statements, which were made by the parents, constituted admissions by party-opponents under Tex. R. Evid. 801, and were not hearsay. Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231, 2007 Tex. LEXIS 527, 50 Tex. Sup. Ct. J. 866 (Tex. 2007).

583. Defendant's many statements to officers who had been dispatched to incidents in which she had been involved did not constitute inadmissible hearsay, and therefore were properly admitted during sentencing, because they were properly admitted under Tex. R. Evid. 801, as the statements were defendant's own statements that were offered against her. Sims v. State, 2007 Tex. App. LEXIS 4282 (Tex. App. Houston 1st Dist. May 31 2007).

584. Regarding appellants' argument that two investors could not recover for fraud because they were unable to testify at trial, it was immaterial that a direct relationship did not exist between those two investors and appellants because privity was not required, and the third investor could properly testify to appellants' representations under Tex. R. Evid. 801. Matis v. Golden, 228 S.W.3d 301, 2007 Tex. App. LEXIS 3796 (Tex. App. Waco 2007).

585. Borrower on a promissory note, which was assigned by a bank to a company, could testify as to the content of letters because letters of acceleration sent by the bank were also statements of the party opponent, the company, due to the assignation; as a result, the borrower's testimony was not hearsay. Cadle Co. v. Salazar, 2007 Tex. App. LEXIS 2876 (Tex. App. Houston 14th Dist. Apr. 17 2007).

586. Victim testified that he was ordered by "pretty much" all three robbers to remove his possessions and relinquish them, and as to defendant, this statement was an admission by a party opponent and not hearsay for purposes of Tex. R. Evid. 801, and any such statements made by the other two robbers were statements made by coconspirators in the course of the conspiracy. Denton v. State, 2007 Tex. App. LEXIS 1706 (Tex. App. Tyler Mar. 7 2007).

587. In a criminal prosecution for aggravated robbery, defendant's statements that he possessed a knife and was going to take the victim's money or kill him qualified as admissions under Tex. R. Evid. 801; the statements were not hearsay and were admissible as substantive evidence. Herring v. State, 202 S.W.3d 764, 2006 Tex. Crim. App. LEXIS 1878 (Tex. Crim. App. 2006).

588. In defendant's drug case, any error in the denial of admission of the testimony of a police officer as an admission of a party-opponent was harmless where defendant did not attempt to call the other police officer as an impeachment witness, nor did he attempt to offer into evidence the original police report or the other officer's supplement with the varying statement. Shepard v. State, 2006 Tex. App. LEXIS 2793 (Tex. App. Austin Apr. 6 2006).

589. In defendant's capital murder case, a court properly admitted an anonymous letter regarding defendant, addressed to a reporter, where in addition to being found on defendant's computer, the letter contained numerous intimate details of defendant's life, confirmed by other evidence, that collectively supported an inference that she was the author; given those circumstances, it was a reasonable exercise of the trial court's discretion to conclude that the letter was written by defendant, and because the letter was shown to be written by defendant, it was not hearsay when offered against her. Johnson v. State, 208 S.W.3d 478, 2006 Tex. App. LEXIS 2254 (Tex. App. Austin 2006).

590. In a trial for attempted sexual performance by a child, there was no error in the admission, at the punishment phase, of evidence that the Army had found child pornography on defendant's service-issued laptop computer. Defendant's comments in a telephone conversation with his then-wife about the discovery were non-testimonial for purposes of the Confrontation Clause and were properly admitted as an admission by a party opponent under Tex. R. Evid. 101(c) and 801. Smith v. State, 2006 Tex. App. LEXIS 2062 (Tex. App. Austin Mar. 16 2006).

591. Courth found that the question "Are uncontroverted unobjected to statements of counsel about occurrences in the courtroom evidence of those occurrences which can be considered on appeal?" may be some evidence that the event occurred and may, under some circumstances, establish that the event occurred, and this is comparable to the principle whereby silence can be accepted as an adoptive admission, as under Tex. R. Evid. 801(e)(2)(B). Thieleman v. State, 187 S.W.3d 455, 2005 Tex. Crim. App. LEXIS 2110 (Tex. Crim. App. 2005).

592. Uncontroverted assertion by counsel about an event may be taken as true only if: (1) the event could not have happened without being noticed; and (2), the assertion is of the sort that would provoke a denial by opposing counsel if it were not true; if these two conditions are met, the opposing party may be held to have adoptively admitted the assertion, as in Tex. R. Evid. 801(e)(2)(B), and the assertion will be accepted as both true and sufficient to preserve an issue for appellate review. Thieleman v. State, 187 S.W.3d 455, 2005 Tex. Crim. App. LEXIS 2110 (Tex. Crim. App. 2005).

593. Behavior of a testifying witness will probably be a focus of attention, while a sleeping juror will not be, unless the attention of the court is drawn to the objectionable behavior at the time it occurs, and failure to contradict an assertion in such circumstances may raise the issue of adoptive admission, as in Tex. R. Evid. 801(e)(2)(B); disagreement as to what occurred may be addressed by proffer of a bill of exception under Tex. R. App. P.

33.2(c)(3). Thieleman v. State, 187 S.W.3d 455, 2005 Tex. Crim. App. LEXIS 2110 (Tex. Crim. App. 2005).

594. Although a hospital and administrator objected to allegedly hearsay statements by a person that were repeated by a doctor in the doctor's deposition, the person was chief of medical records at the hospital, and thus the person's statements were not hearsay under Tex. R. Evid. 801(e)(2)(D). Titus Reg'l Med. Ctr. v. Tretta, 180 S.W.3d 271, 2005 Tex. App. LEXIS 9717 (Tex. App. Texarkana 2005).

595. There was no merit to defendants' contention that the State could not use a child victim's prior videotaped complaint in trial because after she recanted her statements, she became the State's party opponent. Party opponents in a criminal proceeding are the State and the defendants, not the victim. Moreno v. State, 2005 Tex. App. LEXIS 4091 (Tex. App. Corpus Christi May 26 2005).

596. In a child support modification case, the trial court did not err in admitting copies of bank statements from a father's concessions business bank account where he acknowledged at the modification hearing that he had produced the bank statements to the mother in response to discovery requests. Therefore, the bank statements were not hearsay pursuant to Tex. R. Evid. 801(e)(2)(B) because they were admissible as admissions by a party opponent. In re A.J.J., 2005 Tex. App. LEXIS 3058 (Tex. App. Fort Worth Apr. 21 2005).

597. Murder defendant's statement to police, while he was in custody, was not the product of interrogation because the record indicated he made unsolicited, spontaneous statements that he was just defending himself with a knife. Because he was not subjected to interrogation, the statements were not obtained in violation of federal or state law and, therefore, were admissible at trial as admissions by a party opponent under Tex. R. Evid 801(e)(2). Clark v. State, 2005 Tex. App. LEXIS 2282 (Tex. App. Houston 1st Dist. Mar. 24 2005).

598. In a murder trial, a witness was properly allowed to testify as to a statement by a participant in the crime as to a discussion about whose gun was used because the statement was an adoptive admission. The statement was made in defendant's presence, defendant never expressed surprise or disagreement, and the statement was made in the context of the declarant relating all of the events that occurred in relation to the shooting of the victim, including the struggle that occurred over the gun. Rivera v. State, 2005 Tex. App. LEXIS 40 (Tex. App. San Antonio Jan. 5 2005), writ of certiorari denied by 126 S. Ct. 555, 163 L. Ed. 2d 468, 2005 U.S. LEXIS 7937, 74 U.S.L.W. 3273 (U.S. 2005).

599. In a case of fleeing from arrest, a police officer's testimony regarding another officer's statement to defendant was not subject to exclusion as hearsay. Because defendant acquiesced in the other officer's statement, the statement was an adoptive admission and was admissible under Tex. R. Evid. 801(e)(2)(B). Gant v. State, 153 S.W.3d 294, 2004 Tex. App. LEXIS 11841 (Tex. App. Beaumont 2004), writ of certiorari denied by 126 S. Ct. 1574, 164 L. Ed. 2d 307, 2006 U.S. LEXIS 2315, 74 U.S.L.W. 3530 (U.S. 2006).

600. Where defendant was charged with injury to a child, the trial court did not abuse its discretion by allowing defendant's brother to testify that their mother told the brother that defendant had beaten his baby and that he needed psychiatric help. The trial court implicitly concluded that defendant's response that he "f----ed up" constituted an adoption by silent acquiescence of the mother's statement under Tex. R. Evid. 801(e)(2)(B). Lynch v. State, 2004 Tex. App. LEXIS 11312 (Tex. App. Waco Dec. 15 2004).

601. Admission of defendant's letter to his girlfriend implying that he would commit suicide to keep himself from hurting anyone was not abuse of discretion because, although he never admitted to the specific assault, whether the letter admitted facts which tended to show the guilt of the accused under Tex. R. Evid. 801(e)(2)(A) fell within the zone of reasonable disagreement. Lewis v. State, 2004 Tex. App. LEXIS 10217 (Tex. App. Texarkana Nov. 16

2004).

602. Trial court properly admitted defendant's statement that when he found the victim he was going to kill her because it was an admission by a party-opponent under Tex. R. Evid. 801(e)(2)(A) and was not offered for the purpose of proving action in conformity therewith on a particular occasion, but was offered to show defendant's intent and knowledge as provided in Tex. R. Evid. 404(b) because the State sought to show that defendant's statement conflicted with his defensive theory that the group members were merely going to beat up the victim and not kill her. Ponce-Duron v. State, 2004 Tex. App. LEXIS 10149 (Tex. App. Fort Worth Nov. 12 2004).

603. In a wrongful death case, a court properly excluded expert deposition testimony on hearsay grounds where the expert was not an employee of defendant pharmacy, and there was no evidence that an agency relationship existed. When the family non-suited their claims against the doctor, the subject matter over which the expert was asked to give his opinion became moot; subsequently, he was not called at trial, and, therefore, the trial court excluded his testimony on hearsay grounds. McCluskey v. Randall's Food Mkts., Inc., 2004 Tex. App. LEXIS 9178 (Tex. App. Houston 14th Dist. Oct. 19 2004).

604. In a criminal prosecution for arson, the trial court correctly overruled defendant's hearsay objection to evidence of her out-of-court admission. Adams v. State, 2004 Tex. App. LEXIS 8725 (Tex. App. Waco Sept. 29 2004).

605. In a personal injury action against an employer, the trial court properly admitted into evidence as non-hearsay an employee's statements that he was transporting merchandise and picking up deposits for his employer at the time of a motor vehicle accident. Although the employee's shift had not yet begun, the statements concerned matters within the scope of his employment; independent corroboration that the employee was acting in the scope of his employment was not required under Tex. R. Evid. 801(e)(2)(D). Tucker's Bevs., Inc. v. Fopay, 145 S.W.3d 765, 2004 Tex. App. LEXIS 8119 (Tex. App. Texarkana 2004).

606. Borrower's former trial testimony was not hearsay, but was an admission by a party opponent under Tex. R. Evid. 801(e)(2); as such, the Texas Rules of Evidence did not require the trial court to have found the borrower unavailable under Tex. R. Evid. 804(b)(1) as a preliminary condition to admitting his testimony. Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc., 176 S.W.3d 307, 2004 Tex. App. LEXIS 7269 (Tex. App. Houston 1st Dist. 2004).

607. Although the State argued that defendant's acknowledgment had to be considered an adoptive admission of the detective's accusation that she had stolen the jewelry under Tex. R. Evid. 801(e)(2)(B), defendant's statement, "I'll be back," could not be construed as an acknowledgment or admission that defendant stole the jewelry as this alone could not give rise to a reasonable inference of possession, and even assuming her response could be interpreted as an acknowledgment or admission of any kind, at best defendant merely indicated that she may have known the location of the jewelry, and such knowledge did not equate to possession or appropriation. Cantu v. State, 2004 Tex. App. LEXIS 6313 (Tex. App. Corpus Christi July 15 2004).

608. There was no error in a trial court's admission of statements by a doctor's nurse regarding a conversation that the doctor had with his patient as to the communication that took place between them the day before, as such statements were not hearsay but rather, were an admission by a party-opponent under Tex. R. Evid. 801(e)(2); the patient sued the doctor for negligence, alleging that it was medical malpractice for the doctor not to have seen the patient on a particular date, and the communication regarded the symptoms that the patient had indicated he had, which did not indicate the presence of an infection and which, if made by the patient would have been an admission, and if made by the doctor and not opposed by the patient would have been an adoptive admission. Ramsey v. Cravey, 2004 Tex. App. LEXIS 5724 (Tex. App. San Antonio June 30 2004).

609. In defendant's sexual assault case, a witness's testimony regarding defendant's statement to him was properly admitted where it was clearly not hearsay and thus its admission, even though erroneously described by the trial judge as occurring under Tex. R. Evid 613, was proper under Tex. R. Evid. 801(e)(2)(A) and did not violate defendant's constitutional rights. Strong v. State, 138 S.W.3d 546, 2004 Tex. App. LEXIS 5107 (Tex. App. Corpus Christi 2004).

610. In an action alleging an alter ego theory, letters and asset purchase agreement of an individual defendant were not hearsay because they were admissions by a party-opponent. Carone v. Retamco Operating, Inc., 138 S.W.3d 1, 2004 Tex. App. LEXIS 2557 (Tex. App. San Antonio 2004).

611. In an action alleging an alter ego theory, letters and asset purchase agreement of an individual defendant were not hearsay because they were admissions by a party-opponent. Carone v. Retamco Operating, Inc., 138 S.W.3d 1, 2004 Tex. App. LEXIS 2557 (Tex. App. San Antonio 2004).

612. Witness in murder trial was properly allowed to testify to an out-of-court statement made by defendant's brother. Both the witness and the brother were part of a conspiracy to hinder defendant's apprehension by assisting in disposing of the body and cleaning up the scene; the court therefore found the statement to be an admission by a party opponent under Tex. R. Evid. 801(e)(2). Byrd v. State, 2004 Tex. App. LEXIS 791 (Tex. App. Austin Jan. 29 2004), *aff'd*, 187 S.W.3d 436, 2005 Tex. Crim. App. LEXIS 2128 (Tex. Crim. App. 2005, no pet.).

613. Where summaries of records were admitted of sales records in an action by an agency seeking recovery for commissions, and where the personal knowledge of those documents was established, there was no abuse of discretion by the trial court in admitting the summary exhibit pursuant to Tex. R. Evid. 1006, as it was shown that the records were voluminous, were made available to the customers for inspection, and the underlying records were admissible as non-hearsay admissions of a party-opponent under Tex. R. Evid. 801(e)(2). C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 2004 Tex. App. LEXIS 808 (Tex. App. Houston 1st Dist. 2004).

614. Where a defendant listened to a witness's description of the murders and surrounding events without disputing them, and pointed out that the witness should have been there because he would have had some fund, he manifested his agreement with and adoption of the statements within the meaning of Tex. R. Evid. 801(e)(2)(B), and the witness's statements were admissible. Paredes v. State, 129 S.W.3d 530, 2004 Tex. Crim. App. LEXIS 1 (Tex. Crim. App. 2004).

615. Undercover officer's testimony that after he purchased cocaine from defendant's partner and the arrest team entered the house and defendant's partner yelled "flush the dope" as she was running towards the back of the apartment, was admissible under Tex. R. Evid. 803 as an excited utterance because the statement was made as defendant's partner ran towards the back of the house in an attempt to destroy evidence before the arrest team could seize it, while she was under the stress and excitement caused by the approaching arrest team. Wilkerson v. State, 933 S.W.2d 276, 1996 Tex. App. LEXIS 4504 (Tex. App. Houston 1st Dist. 1996).

616. Members of the reconstruction team were clearly agents of the Texas Department of Public Safety (DPS) and they were authorized by DPS to make statements like those contained in their report; the reconstruction team's report was an admission by the DPS, and it was admissible, and the trial court did not abuse its discretion in overruling DPS' objections to the report. Tex. Dep't of Pub. Safety v. Bonilla, 481 S.W.3d 646, 2014 Tex. App. LEXIS 5797 (Tex. App. El Paso May 30 2014).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : Adopted Statements

617. Portion of the automobile manufacturer's spreadsheet reflecting the 67 code 56 claims concerning airbags was admissible as an admission by a party opponent under Tex. R. Evid. 801 because the spreadsheet was created by the manufacturer and produced in discovery, and a witness testified that the 67 open circuits reflected on the spreadsheet were all claims submitted to the manufacturer and paid because technicians confirmed the claims all involved defects. Because the manufacturer did not request a limiting instruction as to the statements from customers listed on the spreadsheet or the remainder of the warranty claims, the inclusion of the items was not ground for complaint on appeal. Kia Motors Corp. v. Ruiz, 348 S.W.3d 465, 2011 Tex. App. LEXIS 6144, CCH Prod. Liab. Rep. P18719 (Tex. App. Dallas Aug. 5 2011).

618. In condemnation proceedings, a trial court improperly excluded a state-certified appraiser's testimony as it constituted an admission under Tex. R. Evid. 801(e)(2)(B) by adoption as a municipal water district called the appraiser as a witness to testify at the special commissioners' hearing regarding the valuation of property to be taken for a water line easement. Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd., 337 S.W.3d 846, 2011 Tex. LEXIS 190, 54 Tex. Sup. Ct. J. 658 (Tex. 2011).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : Authorized Statements

619. Hearsay objection was irrelevant, because the witness's recorded testimony from the prior suit, the judgment from which the claimant sought to enforce in the instant action, was properly admitted under Tex. R. Evid. 801(e)(2)(D) as the admission of a party-opponent. Tryco Enters. v. Robinson, 390 S.W.3d 497, 2012 Tex. App. LEXIS 7810, 2012 WL 4021126 (Tex. App. Houston 1st Dist. Sept. 13 2012).

620. Trial court did not abuse its direction in overruling the corporation's hearsay objection because: (1) the trial court may have considered the corporation's administrator's deposition to be admissible as the corporation's statement in a representative capacity, that the administrator was authorized to make such statements, or that the administrator's deposition testimony concerned matters within the scope of the son's agency or employment, made during the existence of the relationship under Tex. R. Evid. 801(e)(2)(A), (C), (D); and (2) the trial court may have admitted the administrator's deposition testimony, and the exhibits thereto, as a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy under Tex. R. Evid. 801(e)(2)(E). Much of the content at issue was cumulative. San Pedro Impulsora De Inmuebles Especiales, S.A. De C.V. v. Villarreal, 330 S.W.3d 27, 2010 Tex. App. LEXIS 9174 (Tex. App. Corpus Christi Nov. 18 2010).

621. Court abused its discretion in admitting the officer's testimony and the error was not harmless, because the State failed to satisfy its burden that the interpreter acted as defendant's language conduit, and the officer's testimony of what defendant said to the interpreter was not properly admitted as a hearsay exception under Tex. R. Evid. 801(e)(2)(C) or Tex. R. Evid. 801(e)(2)(D). Saavedra v. State, 2010 Tex. App. LEXIS 3878 (Tex. App. Dallas May 24 2010).

622. If the proponent of an out-of-court translation of an out-of-court statement of a party can demonstrate to the satisfaction of the trial court that the party authorized the interpreter to speak for him on the particular occasion, or otherwise adopted the interpreter as his agent for purposes of translating the particular statement, then the out-of-court interpretation may properly be admitted under Tex. R. Evid. 801(d)(2)(C) or (D). If the trial court is not so satisfied, it should sustain a hearsay objection to the out-of-court translation, under Tex. R. Evid. 802. Saavedra v. State, 297 S.W.3d 342, 2009 Tex. Crim. App. LEXIS 1560 (Tex. Crim. App. 2009).

623. Court did not err in overruling defendant's hearsay objections to statements admitted at trial because the interpreter-victim was apparently able to translate accurately because the fact that a witness complied with demands for his money, his wallet, putting his hands down, and getting out of the car demonstrated the reliability of the victim as a language conduit for defendant. Pitts v. State, 2008 Tex. App. LEXIS 2796 (Tex. App. Houston 1st Dist. Apr. 17 2008).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : Extrajudicial Statements

624. Because a text message offered against defendant contained his own statement in his individual capacity, the text message was not hearsay; rather, because it constituted his own statement, it was properly admitted into evidence under Tex. R. Evid. 801(e)(2)(A). Aekins v. State, 2013 Tex. App. LEXIS 13694, 2013 WL 5948188 (Tex. App. San Antonio Nov. 6 2013).

625. Trial court did not err by admitting defendant's statement to police officers over defendant's hearsay objection because the statement was not hearsay under Tex. R. Evid. 801(e)(2). Hart v. State, 2011 Tex. App. LEXIS 3996, 2011 WL 2028216 (Tex. App. Dallas May 25 2011).

626. Text messages that defendant authored were not hearsay; rather, they constituted an admission by a party under Tex. R. Evid. 801 and were properly admitted into evidence. Lozano v. State, 2007 Tex. App. LEXIS 9430 (Tex. App. Fort Worth Nov. 29 2007).

627. Murder defendant's out-of-court statement that he knew the victim had stolen his boat motor and that he was going to take care of the victim was not hearsay, but an admission of a party-opponent under Tex. R. Evid. 801(e)(2)(A). Therefore, there was no violation of the confrontation clause when the statement was admitted. Hartless v. State, 2006 Tex. App. LEXIS 5066 (Tex. App. Tyler June 14 2006).

628. In a trial for possession of marihuana, the court should have admitted a codefendant's statement taking responsibility for some of the drugs under Tex. R. Evid 803; however, the error in excluding the statement was harmless because defendant was able to present a defense and to argue effectively that the drugs belonged to the codefendant and because the State consistently argued that both parties were guilty of the offense. Bradley v. State, 2006 Tex. App. LEXIS 4425 (Tex. App. Tyler May 24 2006).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : Vicarious Statements

629. Trial court did not err by allowing evidence concerning the employer's internal accident review board to be presented to the jury because it was excluded from the hearsay rule as an admission by a party-opponent under Tex. R. Evid. 801(e)(2)(D), as the board was composed of agents or employees of the employer and the board's findings were made in the scope of its members' agency or employment. Pilgrim's Pride Corp. v. Burnett, 2012 Tex. App. LEXIS 964, 2012 WL 381714 (Tex. App. Tyler Feb. 3 2012).

630. In a construction dispute, statements by the contractors' employees were admissible as vicarious admissions under Tex. R. Evid. 801(e)(2)(D). Walker & Assocs. Surveying v. Roberts, 306 S.W.3d 839, 2010 Tex. App. LEXIS 1369 (Tex. App. Texarkana Feb. 26 2010).

631. In this medical malpractice case, the trial court did not err in refusing to admit evidence under Tex. R. Evid. 801(e)(2)(D) because the witness did not know the identity of the woman she talked to at a hospital, the witness never saw whether the woman was wearing a badge, and the witness could not testify as to the indicia of control or agency relationship necessary to impute any actions of this unidentified woman to the hospital; even if the trial court erred, the error would have been harmless under Tex. R. App. P. 44.1(a)(1) in light of the evidence that the hospital's admission forms disclaimed any agency relationship between the hospital, its parent company, and the doctors who performed services at the hospital. Farlow v. Harris Methodist Fort Worth Hosp., 284 S.W.3d 903, 2008 Tex. App. LEXIS 9836, 64 A.L.R.6th 741 (Tex. App. Fort Worth 2008).

632. In a premises liability suit arising from a slip and fall, plaintiff offered hearsay testimony allegedly made by defendant's employee to show defendant's knowledge of the hazardous condition; the testimony was not admissible as an admission by a party opponent under Tex. R. Evid. 801, because plaintiff offered no evidence to show that the declarant was defendant's employee or servant. Stensrud v. Leading Edge Aviation Servs. of Amarillo, Inc., 214 S.W.3d 98, 2006 Tex. App. LEXIS 10748 (Tex. App. Amarillo 2006).

Evidence : Hearsay : Hearsay Within Hearsay

633. Appellant's double hearsay arguments were not preserved under Tex. R. App. P. 33.1(a)(1)(A), as his double hearsay complaint was not made during an argument regarding the admissibility of an affidavit; his objections indicated a complaint to the admission of the affidavit, not a complaint about double hearsay in the affidavit, and although a similar double hearsay argument was raised in a motion in limine, the matter was not explicitly ruled upon, plus a ruling on a motion in limine would not suffice for a trial objection. Richard v. State, 2012 Tex. App. LEXIS 5872, 2012 WL 2945970 (Tex. App. Texarkana July 20 2012).

634. Appellant's claim that the admission of a hearsay document was error had to be looked at within the confines of the limiting instruction given that precluded use of the affidavit to prove the truth of the matter asserted, and appellant did not object to the limiting instruction; the contents of the affidavit were not inadmissible on hearsay grounds and appellant's claim could not be sustained. Richard v. State, 2012 Tex. App. LEXIS 5872, 2012 WL 2945970 (Tex. App. Texarkana July 20 2012).

635. Because the detective failed to address each document he objected to, identify which parts of the document contained hearsay and hearsay within hearsay, and explain why the documents were not admissible as a statement by a party opponent, his claim was rejected on appeal. Both at trial and on appeal, the detective made a blanket objection without identifying each part of each statement that contained hearsay with hearsay, and as such, his objection was not sufficiently specific to preserve error. Flores v. City of Liberty, 318 S.W.3d 551, 2010 Tex. App. LEXIS 6298 (Tex. App. Beaumont Aug. 5 2010).

636. In a child sexual abuse case, defendant could not question the investigating officer about prior inconsistent statements that the victim allegedly had made to the officer who initially took her statement and to a caseworker; this multiple hearsay was not admissible under Tex. R. Evid. 805 because even if the victim's statements had been admissible under the prior inconsistent statement rule, which would have passed the first level of hearsay, defendant offered no explanation of how the contents of a report by the officer who initially took the victim's statement or the investigating officer's testimony based on that report fell within any hearsay exception. Segura v. State, 2008 Tex. App. LEXIS 1303 (Tex. App. Fort Worth Feb. 21 2008).

637. In an injury to a child case, the court erred by allowing testimony by the child's mother that her parents needed to tell her something important that the police said regarding defendant's involvement in the crime because it constituted double hearsay; however, the error was harmless because defendant was indicted for the crime, and the police themselves testified during trial that they believed defendant committed the crime and why. Lopez v. State, 200 S.W.3d 246, 2006 Tex. App. LEXIS 9199 (Tex. App. Houston 14th Dist. 2006).

638. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court did not err in refusing to admit the complainant's handwritten statement as impeachment evidence where the document contained hearsay statements not within an exception. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

639. Even absent waiver, any error by a trial court in admitting double hearsay did not have a substantial and injurious effect or influence on the jury's verdict. The evidence before the jury included defendant's written confession, an eyewitness's identifications of defendant, and testimony that defendant gave the detectives a false alibi and hid when law enforcement wanted to question him about the murder. Mims v. State, 2004 Tex. App. LEXIS 4019 (Tex. App. Tyler Apr. 30 2004).

Evidence : Hearsay : Rule Components

640. Detective's testimony that his investigation centered on defendant after taking witness's statements was admissible to show how defendant became a suspect and was not inadmissible as backdoor hearsay. Peace v. State, 2005 Tex. App. LEXIS 7700 (Tex. App. Houston 14th Dist. Sept. 20 2005).

641. In a trial for a "shaken-baby" murder, admission of testimony from a Child Protective Services investigator, which included information she received from police officers and medical personnel, was not reversible error. Defendant's hearsay objections were waived because the same evidence was admitted through other witnesses without objection. San Martin Adriano v. State, 2005 Tex. App. LEXIS 7140 (Tex. App. Corpus Christi Aug. 31 2005).

642. In a firearm possession case, a bystander's statement to police that defendant was in possession of a gun was not hearsay under Tex. R. Evid. 801(d) because it was not offered to prove the truth of the matter asserted, and a statement made to defendant by another person was not hearsay either. The statements were offered to show why the officer approached defendant and that defendant was aware that the officer was following him. Sanders v. State, 2005 Tex. App. LEXIS 5937 (Tex. App. Fort Worth July 28 2005).

643. In a murder case, videotapes were not hearsay under Tex. R. Evid. 801(d) because they were offered to prove that conversations had taken place, and in addition, the tapes were admissible under Tex. R. Evid. 107 because defendant opened the door by suggesting that the conversations had not occurred. Williams v. State, 2005 Tex. App. LEXIS 5351 (Tex. App. Houston 14th Dist. July 12 2005).

644. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

645. Appellate court overruled defendant's argument that the trial court erred in admitting testimony by an undercover detective that drug trafficking had occurred in the apartment prior to the search because the detective responded that he was given the complaint, without stating the contents of the complaint, and when the detective began to testify about the contents of the complaint, the trial court sustained defense counsel's hearsay objection; the question asked the detective to explain what prompted his investigation of the activities in the apartment, not whether drugs were actually being sold from that apartment. Dickson v. State, 2005 Tex. App. LEXIS 4151 (Tex. App. Dallas May 27 2005).

646. In defendant's appeal of the revocation of his community supervision for failure to report to the county as ordered, the trial court did not err in overruling his hearsay objection to the community supervision officer's testimony about letters from the post office, which asserted that it had no forwarding address for defendant because the officer's testimony that the letters were sent and returned was not hearsay as defined in Tex. R. Evid. 801(d).

The officer's lack of personal knowledge of the statements contained in the letters was irrelevant because the letters were not introduced for the statements contained therein, but to prove the State actually sent the letters attempting to contact defendant. Wheat v. State, 165 S.W.3d 802, 2005 Tex. App. LEXIS 3548 (Tex. App. Texarkana 2005).

647. In a trial for an aggravated robbery that occurred in a motel, the trial court did not err in refusing to admit into evidence, as an admission by a party opponent, the complainant's civil pleading in his lawsuit against the motel. The complainant was not a party opponent. Davis v. State, 177 S.W.3d 355, 2005 Tex. App. LEXIS 2714 (Tex. App. Houston 1st Dist. 2005).

648. State, not the victim, is the party-opponent of the accused in a criminal proceeding. Therefore, a statement by a victim or complainant in a criminal case is not admissible under Tex. R. Evid. 801(e)(2) as an admission by a party opponent. Davis v. State, 177 S.W.3d 355, 2005 Tex. App. LEXIS 2714 (Tex. App. Houston 1st Dist. 2005).

649. In an aggravated robbery case, a submission form that accompanied evidence to be tested by the laboratory was not hearsay under Tex. R. Evid. 801(d) because there was nothing on the form that was offered for the truth of the matter asserted. Raby v. State, 2005 Tex. App. LEXIS 2380 (Tex. App. Beaumont Mar. 30 2005).

650. In an evading arrest and aggravated assault of a public servant case, the trial court did not abuse its discretion in admitting the officer's statements at trial when he offered the dispatcher's report, an out-of-court statement, as the statement was not offered to prove the truth of the matter asserted; instead, the statement was offered to establish why the police initiated their pursuit of defendant as they did. Hogues v. State, 2005 Tex. App. LEXIS 1524 (Tex. App. Dallas Feb. 25 2005).

651. In a murder trial, the trial court properly admitted, under the excited utterance exception, a hearsay statement that the declarant could not believe defendant had shot someone. Even if the declarant's knowledge came from a third person, the only out-of-court statement offered into evidence was the declarant's. The State did not have to show that the third party's statement fell within a hearsay exception. Ross v. State, 154 S.W.3d 804, 2004 Tex. App. LEXIS 11407 (Tex. App. Houston 14th Dist. 2004).

652. In an aggravated sexual assault of a child case, even if the victim's alleged statement itself was admissible, it was shrouded by additional layers of hearsay not falling under any exception. The tape consisted of an out-of-court statement by an anonymous caller reporting her daughter's out-of-court statement that the victim told her, in an out-of-court statement, that her father sexually assaulted her (rather than defendant). Because the tape contained layers of inadmissible hearsay, the trial court properly excluded it. Holmes v. State, 2004 Tex. App. LEXIS 10661 (Tex. App. Dallas Nov. 30 2004).

653. In an aggravated sexual assault case, the trial court did not err in permitting a Texas Youth Commission official to testify based on his report summarizing juvenile defendant's behavior while at the Commission as the trial court was not precluded from considering hearsay testimony at a transfer/release hearing. In re R.M., 2004 Tex. App. LEXIS 11908 (Tex. App. San Antonio Nov. 3 2004).

654. In defendant's murder case, a witness's statement that "spending time with defendant that night was going to be the worst mistake he ever made" was erroneously admitted because the statement was hearsay, and it contained a dramatic piece of information not communicated in the earlier testimony. Martin v. State, 151 S.W.3d 236, 2004 Tex. App. LEXIS 9437 (Tex. App. Texarkana 2004).

655. In a criminal prosecution for evading arrest in a vehicle, hearsay statements that the officer relied on as a basis for the arrest warrant were admissible as nonhearsay. The officer was permitted to testify that he overheard a cell phone caller ask "Did Little Mike get away, or did the police get him?" "Little Mike" was defendant's nickname. Powell v. State, 151 S.W.3d 646, 2004 Tex. App. LEXIS 9368 (Tex. App. Waco 2004), reversed by 189 S.W.3d 285, 2006 Tex. Crim. App. LEXIS 681 (Tex. Crim. App. 2006).

656. In a murder case, a court did not err in allowing a witness to testify about another's hearsay statements implicating defendant as the murderer where he failed to object when the same evidence was presented again. Williams v. State, 2004 Tex. App. LEXIS 7777 (Tex. App. Houston 1st Dist. Aug. 26 2004).

657. Trial court erred in admitting the victim's mother's testimony concerning the grandmother's statement because it was hearsay under Tex. R. Evid. 801(c), which included any matter explicitly asserted and any matter implied by a statement, and the grandmother's statement was offered for the implication that she knew her husband and granddaughter were alone together and that the granddaughter was being sexually assaulted. The error was deemed harmless in light of the fact that there was ample evidence of the step-grandfather's guilt, including the testimony from the victim, the outcry testimony of the victim's mother, and the medical evidence. Mosley v. State, 141 S.W.3d 816, 2004 Tex. App. LEXIS 6923 (Tex. App. Texarkana 2004).

658. In defendant's motor vehicle theft case, a court did not err in admitting a statement where the witness's testimony about another's condition was not a statement offered in evidence to prove the truth of the matter asserted, and therefore, the testimony was not hearsay. Roy v. State, 161 S.W.3d 30, 2004 Tex. App. LEXIS 6712 (Tex. App. Houston 14th Dist. 2004).

659. In a murder case, a court properly allowed the State to impeach a witness with his prior inconsistent grand jury statement where he was shown a copy of his grand jury testimony and he acknowledged that he had previously testified that, during a telephone conversation, defendant told him that "they are here." The State used the brother's prior statements for the limited purpose of attacking his credibility because of his inconsistent statements, and not to prove the truth of the matter asserted. Bolton v. State, 2004 Tex. App. LEXIS 5584 (Tex. App. Houston 1st Dist. June 24 2004).

660. Where defendant complained on appeal of a letter that was admitted over his objection that was accompanied by a limiting instruction, since it was not admitted to prove the truth of the matter asserted, but rather to prove that it was received by the witness, the hearsay rule did not prevent its admittance. Valencia v. State, 2004 Tex. App. LEXIS 5591 (Tex. App. Corpus Christi June 24 2004).

661. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

662. In defendant's theft case, a court's error in excluding evidence that the declarant told defendant to move a trailer was harmless where defendant's sister testified that the employer told her defendant moved a trailer for the declarant, and through the testimony of the two witnesses, the jury heard essentially the same evidence the trial court initially excluded: that the declarant hired defendant to move a trailer. Gibson v. State, 2004 Tex. App. LEXIS 3198 (Tex. App. Beaumont Apr. 7 2004).

663. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

664. In a prosecution for unauthorized use of a motor vehicle, the trial court correctly sustained a hearsay objection regarding an offer by the vehicle's owner to drop all charges against defendant if he paid her restitution, as defense counsel was soliciting an answer which would have constituted a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Kirksey v. State, 132 S.W.3d 49, 2004 Tex. App. LEXIS 2448 (Tex. App. Beaumont 2004).

665. Because defendant did not request notice of the State's intent to use evidence of crimes committed by third persons under Tex. R. Evid. 404(b), no notice was required of the intent to use evidence that a grandmother attempted to bribe a child to remain quiet about sexual abuse; moreover, the evidence was not hearsay under Tex. R. Evid. 801(d) because it was merely offered to show that the child maintained the allegations despite the bribe. Franco v. State, 2004 Tex. App. LEXIS 1655 (Tex. App. Dallas Feb. 19 2004).

666. Admission of a statement that is hearsay is nonconstitutional error subject to a harm analysis under Tex. R. App. P. 44.2(b); a nonconstitutional error must be disregarded unless it affected defendant's "substantial rights" by having a substantial and injurious effect or influence in determining the jury's verdict. Shaw v. State, 122 S.W.3d 358, 2003 Tex. App. LEXIS 9864 (Tex. App. Texarkana 2003).

667. Where defendant was convicted of intoxication manslaughter and intoxication assault, the trial court abused its discretion by allowing defendant's prior felony convictions to be introduced to impeach his credibility, pursuant to Tex. R. Evid. 609, where the convictions were improperly admitted as hearsay, pursuant to Tex. R. Evid. 806, when they were not in fact hearsay as defined by Tex. R. Evid. 801(d). Enriquez v. State, 56 S.W.3d 596, 2001 Tex. App. LEXIS 5450 (Tex. App. Corpus Christi 2001).

Evidence : Hearsay : Rule Components : General Overview

668. Defense counsel performed adequately during defendant's trial for failure to comply with sex offender registration requirements by not objecting to hearsay in a parole officer's statement about a renter staying in defendant's Texas home because the officer's testimony did not indicate a hearsay source; the statement appeared to be based on the officer's personal observations. Dunbar v. State, 2014 Tex. App. LEXIS 6413, 2014 WL 2741237 (Tex. App. Austin June 13 2014).

669. Prior to calling a detective, a witness heard defendant say that he had strangled a woman, after which he demonstrated how, and thus the record reasonably showed that the witness was still dominated by the emotions, fear, and excitement of the event when she spoke to the detective, for excited utterance purposes, and the trial court did not abuse its discretion by overruling defendant's hearsay objection. Owens v. State, 2014 Tex. App. LEXIS 6214, 2014 WL 2568483 (Tex. App. Dallas June 9 2014).

670. Even if the trial court erred by overruling defendant's hearsay objection, the error, if any, was harmless because the objected-to evidence was cumulative of other properly admitted evidence. Owens v. State, 2014 Tex.

App. LEXIS 6214, 2014 WL 2568483 (Tex. App. Dallas June 9 2014).

671. State used an investigator to sponsor statements and drawings made by the child to prove that defendant stomped on the child's brother, and these statements and drawings were unquestionably hearsay, but fell under the excited utterance exception because the statements and drawings were made by the child immediately or shortly after being told his brother was dead and thus made out of impulse rather than through reason. Almaguer v. State, 2014 Tex. App. LEXIS 3842, 2014 WL 1415182 (Tex. App. Corpus Christi Apr. 10 2014).

672. Assuming arguendo that the excited utterance exception did not apply and statements and drawings were testimonial hearsay, any Confrontation Clause error was harmless, given defendant's admission to hitting the child and the doctor's testimony that the child died as a result of blunt force abdominal trauma, plus defendant's flight to Mexico could be taken as consciousness of guilt. Almaguer v. State, 2014 Tex. App. LEXIS 3842, 2014 WL 1415182 (Tex. App. Corpus Christi Apr. 10 2014).

673. Any error in the admission of the child's mother's out-of-court hearsay statements regarding defendant's drug use, employment, and housing was harmless because evidence similar to the testimony was admitted at trial without objection and it was cumulative of other evidence. In the Interest of R.T.M., 2014 Tex. App. LEXIS 3683, 2014 WL 1357242 (Tex. App. Eastland Apr. 3 2014).

674. Court properly admitted testimony about information relayed to a police officer by a 911 dispatcher because the officer's testimony was not offered to prove that a bus driver had been attacked. Rather, the statement was admitted to explain how the officer came to investigate the offense, which was an acceptable, non-hearsay purpose for admitting an out-of-court statement. Walls v. State, 2014 Tex. App. LEXIS 3159, 2014 WL 1208017 (Tex. App. Austin Mar. 20 2014).

675. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

676. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

677. Although defendant contended that the unidentified declarant's report of a driving while intoxicated case was hearsay, the trial court did not abuse its discretion in admitting this testimony because the trial court could have found that the officer's testimony about the report helped explain how defendant became a suspect. Lyle v. State, 418 S.W.3d 901, 2013 Tex. App. LEXIS 15243, 2013 WL 6689387 (Tex. App. Houston 14th Dist. Dec. 19 2013).

678. Trial court did not abuse its discretion by excluding courtesy cards completed by bus passengers after the accident containing their witness statements because the statements written on the cards injected the possibility of calculated misstatements into the equation such that the trustworthiness of the witness accounts was called into doubt and they were given to an interested party. Via Metro. Transit Auth. v. Barraza, 2013 Tex. App. LEXIS 14609,

2013 WL 6255761 (Tex. App. San Antonio Dec. 4 2013).

679. Defendant failed to show that the court erred in admitting the statements made to the nurse for purposes of medical diagnosis or treatment, because the qualifications of the person hearing the statements was not the important consideration, and the fact that the nurse could have been gathering information for a criminal prosecution did not lead to the conclusion that the statements were inadmissible. Beck v. State, 2013 Tex. App. LEXIS 13160, 2013 WL 5773573 (Tex. App. Tyler Oct. 23 2013).

680. Victim's statement to an investigator was hearsay. Mares v. State, 2013 Tex. App. LEXIS 11983, 2013 WL 5433321 (Tex. App. Tyler Sept. 25 2013).

681. At best, the victim's hearsay statements were inconclusive as they related to the shooter's identity, and it did not form such a vital portion of the case that defendant was effectively precluded from presenting a defense, such that the trial court did not abuse its discretion in excluding the statement. Mares v. State, 2013 Tex. App. LEXIS 11983, 2013 WL 5433321 (Tex. App. Tyler Sept. 25 2013).

682. State's ability to object to the admissibility of the victim's statement did not make the trial unfair, and even if the State had introduced the victim's statement, defendant would have been entitled to impeach the evidence, and thus he was not deprived of a fair trial because of the State's hearsay objection. Mares v. State, 2013 Tex. App. LEXIS 11983, 2013 WL 5433321 (Tex. App. Tyler Sept. 25 2013).

683. Because defendant specifically objected to the 911 call as hearsay and on the basis that the caller was not in court to cross-examine under U.S. Const. amend. VI, defendant sufficiently preserved the error. However, defendant did not object if the 911 call was admitted as non-hearsay. West v. State, 406 S.W.3d 748, 2013 Tex. App. LEXIS 8036 (Tex. App. Houston 14th Dist. July 2 2013).

684. Testimony by indecency with a child victim's mother that the victim stated that she felt uncomfortable when she could feel defendant in the pool was inadmissible hearsay; the victim's statement described an emotion, but was not admissible as a then-existing state of mind. Linney v. State, 401 S.W.3d 764, 2013 Tex. App. LEXIS 5560 (Tex. App. Houston 14th Dist. May 7 2013).

685. Even assuming that a witness's statements were hearsay under Tex. R. Evid. 801(d), a trial court did not err in excluding another witness's immunity agreement to impeach the hearsay statements; the statements did not reach the "formal" level that would raise them to the level of "testimonial" statements, such that they would implicate the Confrontation Clause of the U.S. Constitution. Marmolejo v. State, 2013 Tex. App. LEXIS 5316 (Tex. App. El Paso Apr. 30 2013).

686. Appellant appeared to challenge a declaration on confrontation grounds, but this argument did not comport with his trial objection that was based on hearsay, and thus the issue was not preserved for review under Tex. R. App. P. 33.1; even if the matter were preserved, the argument lacked merit because a dying declaration was admissible at common law even though one who stood accused was not given a chance to confront. Bundick v. State, 2013 Tex. App. LEXIS 4350 (Tex. App. Houston 14th Dist. Apr. 4 2013).

687. Exhibit should not have been excluded on the basis of the hearsay objection, because the business records affidavit made by the custodian of records precisely tracked the requirements in Tex. R. Evid. 902(10). Cabot Oil & Gas Corp. v. Healey, L.P., 2013 Tex. App. LEXIS 3934 (Tex. App. Tyler Mar. 28 2013).

688. Court did not need to consider if certain testimony was hearsay because even assuming it was, any error in the admission of the testimony was harmless because the father did not object to any of certain testimony that was cumulative of and substantially similar to the challenged testimony. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

689. To prevail on his ineffective assistance claims, the father had to show that counsel's performance fell below an objective standard of reasonableness based on the failure to make hearsay objections and seek limiting instructions, and then the father had to show that but for these errors, the results of the proceedings would have been different; as the father failed to meet the second prong, given that his conclusory allegation did not meet the prejudice requirement, the court did not need to address the first prong, and the court overruled this issue. In re R.L.A., 2013 Tex. App. LEXIS 2745, 2013 WL 1092210 (Tex. App. Tyler Mar. 15 2013).

690. Business record affidavit had 21 pages of documents attached, including certain affidavits, and although they were notarized and therefore self-authenticating, they could still be inadmissible if they were hearsay. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

691. Having found there was no basis upon which the overruling of a debtor's hearsay objection could have been supported, the court had to decide if the error resulted in an improper judgment. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

692. Without the challenged paragraphs, there would have been insufficient evidence to prove the assignment of the debtor's account to the company and therefore insufficient evidence upon which a judgment could have been rendered in the company's favor; the affidavits in question did not fall under the business records exception, and thus the judgment turned on improperly admitted evidence, to which a hearsay objection should have been sustained, and the court reversed. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

693. Trial court did not err in allowing state troopers to testify, over defendant's hearsay objection, regarding information they had received from an anonymous tipster where the information was used at trial to show how and why defendant came to the attention of the troopers and, in that sense, was admissible to prove that the troopers detained defendant after they acquired specific information concerning a drug-smuggling operation involving a tractor-trailer whose description matched the appearance of defendant's tractor-trailer. Because defendant had challenged the conduct of the troopers on the grounds that they lacked reasonable suspicion for the traffic stop and probable cause for his arrest, the details of the out-of-court statements by the anonymous tipster were admissible to show the reasonableness of the troopers' conduct. Iglesias v. State, 2013 Tex. App. LEXIS 433 (Tex. App. Corpus Christi Jan. 17 2013).

694. Any error in the admission of the testimony was harmless because the same or similar evidence was admitted at another point in the trial without objection. Nelson v. State, 405 S.W.3d 113, 2013 Tex. App. LEXIS 377, 2013 WL 174502 (Tex. App. Houston 1st Dist. Jan. 17 2013).

695. Financial history should have been excluded from evidence in light of the company's hearsay objection; no testimony was offered, either live or by affidavit, that could have proved the "financial history" was not hearsay, was a business record, or otherwise satisfied an exception to the hearsay rule. Shamrock Foods Co. v. Munn & Assocs., Ltd., 392 S.W.3d 839, 2013 Tex. App. LEXIS 244, 2013 WL 150810 (Tex. App. Texarkana Jan. 15 2013).

696. Even assuming witness testimony as to the radio's serial number was hearsay, the serial number was documented in other evidence that was admitted at trial, including business records containing the number, and

although the witness did not personally obtain the number, his testimony connected the records to the radio through his personal knowledge of and involvement in the investigation; in the absence of a challenge to the sufficiency of the business records affidavit, the court could not find that the trial court abused its discretion in admitting the business records that contained the serial number over appellant's hearsay objection. Infante v. State, 404 S.W.3d 656, 2012 Tex. App. LEXIS 10800, 2012 WL 6754834 (Tex. App. Houston 1st Dist. Dec. 28 2012).

697. As the trial court did not abuse its discretion in admitting business records containing a radio's serial number, testimony as to that number was duplicative of evidence that was properly admitted, and even assuming the testimony was inadmissible hearsay, any error did not harm appellant; as there was no harm, the court could not reverse the judgment on this basis even if the testimony was inadmissible hearsay. Infante v. State, 404 S.W.3d 656, 2012 Tex. App. LEXIS 10800, 2012 WL 6754834 (Tex. App. Houston 1st Dist. Dec. 28 2012).

698. Even had the debtor raised one certain complaint about an affidavit, he did not object to it before or during the hearing, and while he referred the court to a part of his rehearing motion in which he claimed he objected to incompetent hearsay in the affidavit, his actual objection was that the note was presented with an affidavit and the affiant not present for questioning, and it was just hearsay, and the debtor did not appeal the denial of his motion for reconsideration. Wilner v. Deutsche Bank Nat'l Trust Co., 2012 Tex. App. LEXIS 10595, 2012 WL 6632508 (Tex. App. Fort Worth Dec. 21 2012).

699. Determination of companies' challenge to that the summary judgment ruling on an aider claim was intertwined with the determination of the evidentiary issue of whether a regulation was not hearsay, and thus it was necessary for the court to consider the issue that challenged the exclusion of the regulation. Highland Capital Mgmt., L.P. v. Ryder Scott Co., 402 S.W.3d 719, 2012 Tex. App. LEXIS 10120, 2012 WL 6082713 (Tex. App. Houston 1st Dist. Dec. 6 2012).

700. Court concludes that Regulation S-X of the Securities Exchange Act of 1934, 17 C.F.R. § 210.4-10(a)(2), is not hearsay. Highland Capital Mgmt., L.P. v. Ryder Scott Co., 402 S.W.3d 719, 2012 Tex. App. LEXIS 10120, 2012 WL 6082713 (Tex. App. Houston 1st Dist. Dec. 6 2012).

701. In a forcible detainer action, a business records affidavit that authenticated the notice to vacate was not inadmissible hearsay under Tex. R. Evid. 801(d) because it substantially complied with the requirements of Tex. R. Evid. 803(6), 902(10), although it did not precisely track the language of Rule 902(10). Although the affidavit was prepared by a third party, the foreclosure purchaser's law firm, the trial court could have concluded that the purchaser reasonably relied on the accuracy of the records in the ordinary course of its business and that they were trustworthy. Baty v. Morequity, Inc., 2012 Tex. App. LEXIS 9876 (Tex. App. Houston 1st Dist. Nov. 29 2012).

702. Assuming that the trial court erred in admitting a detective's hearsay testimony, such an error would have been non-constitutional error, and the court had to disregard it unless appellant's substantial rights were affected. Gladney v. State, 2012 Tex. App. LEXIS 9806, 2012 WL 5949473 (Tex. App. Dallas Nov. 28 2012).

703. Other evidence showing appellant's guilt of murder was overwhelming and made the State's inability to produce the murder weapon trivial, and given the insignificance of the evidence about an anonymous phone call concerning the weapon as compared to the weight of the evidence that was admitted showing appellant was the shooter, the hearsay evidence had either no effect or only a slight effect on the jury's finding, and thus appellant's substantial rights were not affected for purposes of Tex. R. App. P. 44.2. Gladney v. State, 2012 Tex. App. LEXIS 9806, 2012 WL 5949473 (Tex. App. Dallas Nov. 28 2012).

704. Court did not find that gaps and hearsay statements triggered the Sixth Amendment right to confront witnesses against appellant; he did not show how the admission of hearsay statements or notations required

reversal. Grimaldo v. State, 2012 Tex. App. LEXIS 9647, 2012 WL 5869603 (Tex. App. Fort Worth Nov. 21 2012).

705. Defendant failed to preserve for appellate review his claim that a witness's statements were nonhearsay because he never argued that contention before the trial court. Pittman v. State, 2012 Tex. App. LEXIS 9057 (Tex. App. Tyler Oct. 31 2012).

706. Parties stipulated that an owner did not sign an exhibit, and he testified that he had not seen the document, plus counsel was able to cross-examine the contractor and examine the owner concerning the document, which neutralized his claimed basis for a hearsay objection; the trial court did not err in admitting the exhibit because the hearsay objection was properly overruled, and even if it was error, it was harmless because other similar evidence was introduced without objection. Aguilar v. Hernandez, 2012 Tex. App. LEXIS 8755, 2012 WL 5187923 (Tex. App. Corpus Christi Oct. 18 2012).

707. For purposes of Tex. R. Evid. 803(2), the record reasonably showed that the statement was made by the complainant shortly after she had been sexually assaulted and she was still dominated by the fear, emotions, and/or pain of the incident when she spoke, such that the trial court did not abuse its discretion in overruling appellant's hearsay objection. Herrera v. State, 2012 Tex. App. LEXIS 8411, 2012 WL 4748203 (Tex. App. Dallas Oct. 5 2012).

708. Trial court did not erroneously admit evidence of admonishments given prior to a photo lineup because the admonishments were not hearsay under Tex. R. Evid. 801(d); the extrajudicial statements were offered for the purpose of showing what was said. Hendershot v. State, 2012 Tex. App. LEXIS 6632 (Tex. App. Corpus Christi Aug. 9 2012).

709. Appellant did not dispute that the proffered evidence was hearsay, and it was his responsibility to specify the exception on which he relied, but he failed to cite one; even if the court found the evidence was admissible under Tex. R. Evid. 403, on which appellant focused, appellant did not address the hearsay issue, and thus the trial court did not abuse its discretion in excluding the testimony on inadmissible hearsay grounds. Quevedo v. State, 2012 Tex. App. LEXIS 6178, 2012 WL 3055470 (Tex. App. Dallas July 27 2012).

710. Court found that any error in admitting certain exhibits was harmless under the standard of Tex. R. App. P. 44.2(a); any error in admitting the exhibits over a hearsay objection did not require reversal of the judgment under Rule 44.2(b). Peluso v. State, 2012 Tex. App. LEXIS 5122, 2012 WL 2450818 (Tex. App. Beaumont June 27 2012).

711. Chief medical examiner did not testify as to what a doctor found to be the cause of death, and the State did not offer into evidence the autopsy report the doctor prepared, and thus the examiner's testimony did not violate appellant's right to confrontation under the Sixth Amendment, given that it was not testimonial hearsay; the examiner testified concerning his opinion on the cause of death and he was subject to cross-examination in this regard. Hutcherson v. State, 373 S.W.3d 179, 2012 Tex. App. LEXIS 5042, 2012 WL 2377196 (Tex. App. Amarillo June 25 2012).

712. Counsel raised an objection on grounds of hearsay and the right to cross-examine, and although the objection did not expressly note the Confrontation Clause, such a violation denied one the right to cross-examine witnesses; the objections were made with enough specificity to have made the trial court aware of appellant's complaint, for purposes of Tex. R. App. P. 33.1(a)(1)(A). Thompson v. State, 2012 Tex. App. LEXIS 4597, 2012 WL 2106549 (Tex. App. Houston 1st Dist. June 7 2012).

713. Appellant's specific objections, along with adverse rulings, preserved his hearsay and Confrontation Clause issues for review and he did not waive such regarding testimony on direct examination. Thompson v. State, 2012 Tex. App. LEXIS 4597, 2012 WL 2106549 (Tex. App. Houston 1st Dist. June 7 2012).

714. Appellant did not obtain a ruling on his renewed objections when the State sought to question a witness on rebuttal, and no objection was made during that questioning, such that the issues raised regarding hearsay and the Confrontation Clause were not preserved as to that testimony; the court noted that under Tex. R. Evid. 802, inadmissible hearsay admitted without an objection was not denied value just given that it was hearsay. Thompson v. State, 2012 Tex. App. LEXIS 4597, 2012 WL 2106549 (Tex. App. Houston 1st Dist. June 7 2012).

715. Assuming the trial court erred in admitting an officer's testimony for purposes of appellant's hearsay and Confrontation Clause objections, the errors were subject to a harm analysis under Tex. R. App. P. 44.2. Thompson v. State, 2012 Tex. App. LEXIS 4597, 2012 WL 2106549 (Tex. App. Houston 1st Dist. June 7 2012).

716. Preserved error was that an officer provided backdoor hearsay, which violated appellant's confrontation rights, but the officer's re-direct testimony established the same fact, and any possible error in the admission of this testimony was not preserved for review; the court found there was no likelihood that the alleged claim of error of admitting almost the same testimony materially affected the deliberations and outcome, and assuming the trial court erred, any error was harmless under Tex. R. App. P. 44.2(a). Thompson v. State, 2012 Tex. App. LEXIS 4597, 2012 WL 2106549 (Tex. App. Houston 1st Dist. June 7 2012).

717. Exclusion of testimony did not result in reversible error, as there was no evidence that the witness had any first-hand knowledge, for purposes of Tex. R. Evid. 602, of appellant's health condition and the trial court did not err in sustaining the hearsay objection; although some of the proffered testimony was not hearsay and consisted of the witness's observations and inferences, for purposes of Tex. R. Evid. 701, even that was cumulative, and thus the excluded testimony could not have added anything to the admitted evidence. Frangias v. State, 367 S.W.3d 806, 2012 Tex. App. LEXIS 3065, 2012 WL 1356704 (Tex. App. Houston 14th Dist. Apr. 19 2012).

718. Appellant objected on grounds of hearsay and relevancy and he claimed the evidence was more prejudicial than probative, but he did not raise an objection on confrontation or insufficiency grounds at trial and thus he did not preserve those arguments for review. Mclamore v. State, 2012 Tex. App. LEXIS 2909 (Tex. App. Fort Worth Apr. 12 2012).

719. Court had held that several exceptions could be relied upon to allow proof of the value of stolen property, including the business-records exception, the exception for records of documents affecting an interest in property, and the exception for market reports and such, and thus the trial court did not abuse its discretion in permitting a witness's testimony in this regard over appellant's hearsay objection; in the alternative, any error was harmless because (1) appellant's community supervision was conditioned on him not committing any offense, (2) although it was alleged that appellant committed theft of property worth at least $ 1,500, proof of a lesser included offense would have sufficed to render judgment adjudicating his guilt, (3) theft of property valued at less than $ 50 was a lesser-included offense of theft of property of a higher amount, and (4) even if there was no properly admitted evidence of the value of the wheels and tires, the court could presume they had some value because the witness had not replaced them for months after the theft. Calixto v. State, 2012 Tex. App. LEXIS 2643, 2012 WL 1138726 (Tex. App. Dallas Apr. 4 2012).

720. In determining that a proposed acquisition of a utility was in the public interest, the Texas Public Utility Commission properly struck as hearsay under Tex. R. Evid. 801(d) portions of proposed testimony that discussed withdrawn testimony, including statements by an expert witness who was hired by the Commission's staff. The withdrawn testimony did not constitute admissions by party-opponents under Rule 801(e)(2) because it did not

come from opposing parties, nor was it admissible under the public-record exception of Tex. R. Evid. 803(8)(C) because it was not admitted into the record or prepared under the supervision of a public official. Nucor Steel -- Tex. v. PUC, 363 S.W.3d 871, 2012 Tex. App. LEXIS 2108, 2012 WL 895994 (Tex. App. Austin Mar. 15 2012).

721. Because appellant did not obtain a ruling on hearsay, authentication, and Tex. R. Civ. P. 194 objections, which were objections to the form of evidence, they could not be considered on appeal. Petro-Hunt, L.L.C. v. Wapiti Energy, L.L.C., 2012 Tex. App. LEXIS 1860, 2012 WL 761144 (Tex. App. Houston 1st Dist. Mar. 8 2012).

722. Appellant did not timely object on the basis of hearsay when a witness made two statements and did not request a running objection; thus, appellant did not preserve any error based on those statements for appeal. Glover v. State, 2012 Tex. App. LEXIS 1491, 2012 WL 604026 (Tex. App. Dallas Feb. 27 2012).

723. Appellant did not object to the evidence offered by witnesses in valuing an automated teller machine, front-end loader, or cost of repairs in his trial for theft and criminal mischief, and thus any objection related to hearsay and lay and expert opinions was waived under Tex. R. App. P. 33.1(a). Lee v. State, 2012 Tex. App. LEXIS 1441, 2012 WL 592192 (Tex. App. Amarillo Feb. 23 2012).

724. Appellant based her objection at trial upon an exhibit's alleged hearsay status because of the exhibit's purported failure to qualify as a business record, but she did not object on constitutional grounds, and an objection concerning hearsay rules did not preserve an argument concerning one's right of confrontation; because appellant failed to urge an objection regarding her right of confrontation under U.S. Const. amend. VI, XIV at trial, she forfeited her issue on appeal, under Tex. R. App. P. 33.1(a). Buckner v. State, 2012 Tex. App. LEXIS 1258, 2012 WL 503522 (Tex. App. Fort Worth Feb. 16 2012).

725. Motorist did not bring a hearsay objection to the trial court's attention, and merely complained the testimony was speculative; thus, this issue was not preserved for review. Carter v. Johnson, 2012 Tex. App. LEXIS 1239, 2012 WL 566089 (Tex. App. San Antonio Feb. 15 2012).

726. Whether appellant's statements were speculative or contained hearsay were objections to form, which had to be ruled on or they were waived, but an objection that an affidavit was conclusory could be raised on appeal, as was the claim that an affiant failed to establish her qualifications as an expert; thus, the court reviewed the city's objections to conclusory statements and whether appellant was qualified to give her opinion. Strother v. City of Rockwall, 358 S.W.3d 462, 2012 Tex. App. LEXIS 715 (Tex. App. Dallas Jan. 27 2012).

727. Appellant's attempt to impeach a doctor's credibility was not covered under Tex. R. Evid. 806, and when applicable, the rule allowed the declarant's credibility to be challenged; the declarant's credibility was not an issue at trial, and a witness's testimony regarding information he received from the declarant was relevant only if the jury found the declarant's statement was accurate and truthful, and because the declarant's statement was offered to prove the truth of the matter asserted, it was inadmissible and the trial court properly excluded it. Lozano v. State, 359 S.W.3d 790, 2012 Tex. App. LEXIS 718 (Tex. App. Fort Worth Jan. 26 2012).

728. Appellant failed to preserve error on his specific complaint on appeal, and thus he forfeited the hearsay and confrontation complaints. Lozano v. State, 359 S.W.3d 790, 2012 Tex. App. LEXIS 718 (Tex. App. Fort Worth Jan. 26 2012).

729. To the extent appellant's complaint could be construed to include certain testimony to which appellant raised hearsay and Confrontation Clause objections, the trial court did not abuse its discretion by overruling the objections because the same or similar evidence had been previously received without objection. Lozano v. State, 359 S.W.3d

790, 2012 Tex. App. LEXIS 718 (Tex. App. Fort Worth Jan. 26 2012).

730. Appellant claimed that his medical records were admissible under Tex. R. Evid. 803(4), (6), but this was not presented at trial as a ground for overruling the State's hearsay objection under Tex. R. Evid. 801(d), and although the records were included in the bill of exceptions, such was not made on the predicate for admission under either hearsay exception appellant raised for the first time on appeal; even if the court assumed that the trial court understood the bill of exceptions to be a proffer of admission, the records did not establish that appellant suffered from a medical condition that was relevant to his prosecution for driving while intoxicated, the patient history did not show that he had a condition that mimicked the symptoms of intoxication, and no other potential relevance for the records was shown, such that exclusion of the records did not affect a substantial right under Tex. R. App. P. 44.2(b). Bradley v. State, 2012 Tex. App. LEXIS 410, 2012 WL 150969 (Tex. App. Beaumont Jan. 18 2012).

731. Program director's affidavit did not explain how she learned of the purported publication of allegedly defamatory information to another student employee, and to the extent one had to suppose that the director learned about the alleged publication from the employee, her recounting of the information amounted to hearsay that was inadmissible under Tex. R. Evid. 801(d); even if the affidavit statements were not hearsay, it appeared as if the statements purportedly made by the medical center to the other student employee would have been protected, given that they had a shared interest in the information. Gonzalez v. Methodist Charlton Med. Ctr., 2011 Tex. App. LEXIS 9613, 2011 WL 6091255 (Tex. App. Waco Dec. 7 2011).

732. Trial court erred in sustaining appellees' objections to letters attached to a summary judgment affidavit by a testator's cousin; the letters were not included as summary judgment evidence to prove the truth stated in the letters under Tex. R. Evid. 801(d), but to provide some evidence as to when a controversy arose between the parties on the issue of the testator's intent. Estate of Denman, 362 S.W.3d 134, 2011 Tex. App. LEXIS 9262, 2011 WL 5869479 (Tex. App. San Antonio Nov. 23 2011).

733. Defense counsel did not make any argument to the trial court as to why the evidence was admissible, either because it was not hearsay or because an exception applied, and thus these arguments were not preserved for appeal. Chalker v. State, 2011 Tex. App. LEXIS 8944, 2011 WL 5428970 (Tex. App. Houston 1st Dist. Nov. 10 2011).

734. Allowing the prosecutor to testify about an email regarding another out-of-court statement allegedly made by a detective would have involved violations of the hearsay rules, including Tex. R. Evid. 801, 805, and appellant did not identify any exception, for purposes of Tex. R. Evid. 802; appellant did not show that the trial court erred in refusing to allow the prosecutor to testify about the email. Zavala v. State, 401 S.W.3d 171, 2011 Tex. App. LEXIS 8671, 2011 WL 5156843 (Tex. App. Houston 14th Dist. Nov. 1 2011).

735. Because a tenant did not object, she did not preserve for review any error from the trial court's admission of hearsay testimony. White v. Fritz, 2011 Tex. App. LEXIS 8502, 2011 WL 5067698 (Tex. App. Dallas Oct. 26 2011).

736. During defendant's trial for aggravated sexual assault, aggravated kidnapping, and unlawful possession of a firearm, the court did not err in admitting a docket sheet from one of defendant's prior convictions; while the docket sheet was hearsay under Tex. R. Evid. 801(d), it was admissible under the public records exception in Tex. R. Evid. 803(8). Brown v. State, 2011 Tex. App. LEXIS 7319, 2011 WL 3915663 (Tex. App. Tyler Sept. 7 2011).

737. Appellant claimed that the trial court erred in overruling his hearsay objection to a letter allegedly containing his signature, but the court found that the letter was not hearsay under Tex. R. Evid. 801(d) and was a party's own statements under Rule 801(e)(2)(A); the letter, addressed to the complaining witness, indicated what appellant did on the day in question, and the letter did not mention that he was with his brother most of that morning, and the

brother was surprised the letter failed to mention him. Vallair v. State, 2011 Tex. App. LEXIS 7055, 2011 WL 3847418 (Tex. App. Beaumont Aug. 31 2011).

738. While a trial court erred under Tex. R. Evid. 801(d) in admitting hearsay testimony by appellee's friend recounting appellant's statements to appellee, the error was harmless as the testimony was merely cumulative of other properly admitted evidence. Jasik v. Mauricio, 2011 Tex. App. LEXIS 7078, 2011 WL 3849473 (Tex. App. San Antonio Aug. 31 2011).

739. Trial court did not err under Tex. R. Evid. 801(d) in overruling defendant's hearsay objection to an officer's testimony because evidence that the officer's attention was directed to defendant was not admitted to show defendant was guilty of a robbery; rather, it was admitted to show what the police did and why they searched defendant's person and vehicle. Melvin v. State, 2011 Tex. App. LEXIS 5432, 2011 WL 3329207 (Tex. App. Tyler July 13 2011).

740. Appellant objected immediately after witnesses answered questions, and this was when alleged grounds for an objection became apparent because neither question was phrased so as to have elicited a hearsay response, and the objections were timely for purposes of Tex. R. App. P. 33.1 and Tex. R. Evid. 103(a)(1). Briscoe v. State, 2011 Tex. App. LEXIS 4632, 2011 WL 2420367 (Tex. App. Dallas June 17 2011).

741. Even assuming that counsel was deficient for failing to make hearsay objections, the hearsay did not directly implicate appellant, and other non-hearsay testimony linked appellant to the offenses, and his claim of ineffective assistance failed. Garcia v. State, 2011 Tex. App. LEXIS 4663, 2011 WL 2463049 (Tex. App. Corpus Christi June 16 2011).

742. Appellant's failure to adequately brief an issue waived the complaint on appeal; appellant did not explain why each objection was error or how the evidence offered was not hearsay. Goodenberger v. Ellis, 343 S.W.3d 536, 2011 Tex. App. LEXIS 4062 (Tex. App. Dallas May 26 2011).

743. Although hearsay was a frequent objection to summary judgment evidence, other grounds included that the statements were irrelevant, defectively vague, and violated of the Statute of Frauds and the Statute of Conveyances; because the trial court may have granted the objections for reasons other than hearsay and those grounds were not challenged, appellant waived his complaint regarding objections that were sustained. Goodenberger v. Ellis, 343 S.W.3d 536, 2011 Tex. App. LEXIS 4062 (Tex. App. Dallas May 26 2011).

744. In a breach of contract action, a trial court did not err in considering an assignment by a predecessor to a leasing company and a business records affidavit by the predecessor's president; because the affidavit met the requirements of Tex. R. Evid. 902(10), the assignment, which was hearsay under Tex. R. Evid. 801(d), was admissible under the hearsay exception in Tex. R. Evid. 803(6). Game Sys. v. Forbes Hutton Leasing, Inc., 2011 Tex. App. LEXIS 4098, 2011 WL 2119672 (Tex. App. Fort Worth May 26 2011).

745. To convict appellant of delivery of a simulated controlled substance, the State was required to prove that appellant sold two rocks in a manner to lead a reasonable person to believe he purchased a controlled substance, under Tex. Health & Safety Code Ann. § 482.002, and the State did not have to prove that an undercover officer paid for the rocks with marked $ 20 bills; it was clear that counsel sought to show that the officer could not have reasonably believed that the two rocks were cocaine, counsel stressed that there was no testimony directly linking appellant to the $ 20 bill, and it was reasonable that counsel chose to overlook the assumed hearsay testimony in an attempt to not call attention to potentially damaging evidence, and thus appellant failed to show ineffective assistance. Evans v. State, 2011 Tex. App. LEXIS 3835, 2011 WL 2089692 (Tex. App. Houston 1st Dist. May 19

2011).

746. Assuming that the trial court would have erred in overruling a hearsay objection to a witness's testimony, the court could not determine that counsel was deficient in not objecting; because the record was silent as to counsel's reasons for not objecting, the court could not speculate to deem his performance deficient, plus appellant testified to the crimes, and where hearsay evidence was improperly admitted, but the same facts were otherwise proven by admissible evidence, there was no reversible error. Stroble v. State, 2011 Tex. App. LEXIS 3205 (Tex. App. Houston 1st Dist. Apr. 28 2011).

747. Appellant argued that counsel was ineffective for not objecting on hearsay grounds to testimony, which appellant claimed violated her right to confrontation, but a hearsay objection would not have preserved the Confrontation Clause argument appellant sought to raise on appeal. Mcfatridge v. State, 2011 Tex. App. LEXIS 2620 (Tex. App. Waco Apr. 6 2011).

748. Appellant's confrontation issue was not preserved because she only made a hearsay objection, which did not preserve error on Confrontation Clause grounds, plus the objection was sustained and appellant did not pursue the matter to an adverse ruling. Mcfatridge v. State, 2011 Tex. App. LEXIS 2620 (Tex. App. Waco Apr. 6 2011).

749. Appellant had not shown that a witness's testimony would have been admissible at trial, and much of the witness's proposed testimony appeared to be inadmissible hearsay; ineffective assistance was not shown. Biggers v. State, 2011 Tex. App. LEXIS 2137 (Tex. App. Eastland Mar. 24 2011).

750. Trial court did not abuse its discretion by admitting an exhibit, a pen packet, over appellant's hearsay objection under Tex. R. Evid. 801(d); the pen packet relating to appellant's prior felony conviction fell within the exceptions of Tex. R. Evid. 803(8), (22), and nothing indicated that the documents lacked trustworthiness. Price v. State, 2011 Tex. App. LEXIS 2020, 2011 WL 946978 (Tex. App. Fort Worth Mar. 17 2011).

751. Under Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1), the State had to prove extraneous offenses to the jury; if counsel had objected, the State could have chosen to subpoena appellant's victims, and it was possible that counsel made the strategic decision not to object to hearsay because it would have been more damaging to appellant's case to have the victims testify, and the court presumed that counsel performed at a level of prevailing professional norms. Basey v. State, 2011 Tex. App. LEXIS 1695, 2011 WL 825014 (Tex. App. Houston 14th Dist. Mar. 10 2011).

752. Under Tex. R. Evid. 901, the production of a decedent's medical records during discovery might have authenticated them but did not render them admissible in a will contest. The medical records were hearsay and inadmissible as business records under Tex. R. Evid. 801(d), 803(6) because no custodian established the requirements of the exception. In the Estate of Vackar, 345 S.W.3d 588, 2011 Tex. App. LEXIS 1684 (Tex. App. San Antonio Mar. 9 2011).

753. To the extent that a witness's testimony that the co-conspirator pointed toward the garage while referring to "the dog" constituted inadmissible hearsay, its admission was harmless because the fact that the victim was in the garage was admitted into evidence through other testimony. Orona v. State, 341 S.W.3d 452, 2011 Tex. App. LEXIS 1452 (Tex. App. Fort Worth Feb. 24 2011).

754. Any error in admitting a witness's hearsay testimony about the victim asking appellant not to take her car was harmless; the record made clear that the victim did not want appellant to take her car and told him so, and any additional testimony about this fact did not affect appellant's substantial rights under Tex. R. App. P. 44.2(b). Smith

v. State, 2011 Tex. App. LEXIS 1021, 2011 WL 477917 (Tex. App. Dallas Feb. 11 2011).

755. Officer's testimony amounted to an explanation from police as to how appellant became a suspect in the case, and the questions prompting the responses were not designed to elicit hearsay testimony, and thus the testimony was admissible; also, the testimony was cumulative of other testimony, such that any harm was harmless. Zamora v. State, 2010 Tex. App. LEXIS 10246, 2010 WL 5541706 (Tex. App. Corpus Christi Dec. 30 2010).

756. Because a creditor's trial exhibit satisfied the requirements for the admission of third-party business records and because the challenged affidavits satisfied the requirements of Tex. R. Evid. 902(10), the trial court did not abuse its discretion in overruling hearsay objections. Wood v. Pharia L.L.C., 2010 Tex. App. LEXIS 9819, 2010 WL 5060621 (Tex. App. Houston 1st Dist. Dec. 9 2010).

757. Appellant never raised a hearsay objection to admission of the recordings themselves and therefore failed to preserve error under Tex. R. App. P. 33.1(a), and even had appellant preserved a valid hearsay objection, any error was harmless under Tex. R. App. P. 44.2(b) because certain exhibits were the same as the testimony. Dial v. State, 2010 Tex. App. LEXIS 9273, 2010 WL 4705529 (Tex. App. Dallas Nov. 22 2010).

758. Defendant did not preserve for review under Tex. R. App. P. 33.1(a)(1)(A) a hearsay issue regarding the admission of the complainant's testimony about a statement made by defendant because the complainant previously had mentioned defendant's statement without objection; moreover, a criminal defendant's own statements are not hearsay under Tex. R. Evid. 801(e)(2). Sierra v. State, 2010 Tex. App. LEXIS 8039, 2010 WL 3866270 (Tex. App. Houston 14th Dist. Oct. 5 2010).

759. To the extent appellant claimed testimony should have been excluded because it was hearsay and violated Tex. R. Evid. 403, nothing was presented for review; appellant cited no authority and made only a cursory argument that the admission of testimony violated Rule 403. Mccutchen v. State, 2010 Tex. App. LEXIS 7760, 2010 WL 3699987 (Tex. App. San Antonio Sept. 22 2010).

760. Trial court did not err in a divorce action in permitting the mother to offer testimony concerning one child's opinion of the father, the child's viewpoint of the father's parenting skills, and the child's viewpoint of the father as a role model; the testimony was offered to show the child's state of mind while the father was caring for the child. Therefore, it was not hearsay under Tex. R. Evid. 801(d). Koenig v. Koenig, 2010 Tex. App. LEXIS 7423, 2010 WL 3518232 (Tex. App. Beaumont Sept. 9 2010).

761. During grandparents' trial for the murder of one granddaughter and serious bodily injury to another granddaughter, defense counsel did not render ineffective assistance when certain hearsay statements, as defined in Tex. R. Evid. 801(d), were admitted without objection; all of the unobjected-to testimony was cumulative of other testimony given at trial. Ramirez v. State, 2010 Tex. App. LEXIS 7169 (Tex. App. Corpus Christi Aug. 31 2010).

762. First level of hearsay in a statement identified declarants as "other individuals," but no hearsay exception was offered that was applicable to them, such that the trial court did not err in sustaining a hearsay objection to this statement. Montalvo v. County of Refugio, 2010 Tex. App. LEXIS 3120, 2010 WL 1731651 (Tex. App. Corpus Christi Apr. 29 2010).

763. For purposes of Tex. R. Evid. 805, without knowing the identity of the declarant, the court could not say that the first part of a statement qualified as any exception to the hearsay rule; because not all levels of hearsay contained within the statement satisfied an exception to the hearsay rule, the trial court did not err in sustaining a

hearsay objection to this statement. Montalvo v. County of Refugio, 2010 Tex. App. LEXIS 3120, 2010 WL 1731651 (Tex. App. Corpus Christi Apr. 29 2010).

764. Statements of the victim's friend were not admissible under Tex. R. Evid. 804, because none of the exceptions in Tex. R. Evid. 804(b)(1)-(3) applied, and Tex. R. Evid. 804(a) was not a hearsay exception and only provided guidance as to who was an unavailable witness. Kresse v. State, 2010 Tex. App. LEXIS 3031, 2010 WL 1633383 (Tex. App. Fort Worth Apr. 22 2010).

765. Testimony by an investigator about our of court statements from a witness was properly admitted under Tex. R. Evid. 801(d) because the evidence--a description of the suspect and a license plate number--explained how defendant became a suspect; the license plate number yielded the name of a woman, and a deputy recognized the woman's name and recalled she had an associate fitting defendant's description. Pruitt v. State, 2010 Tex. App. LEXIS 2596, 2010 WL 1490083 (Tex. App. San Antonio Apr. 14 2010).

766. Court agreed that seller waived any hearsay complaint with an affidavit by failing to object and obtain a ruling below. Sprayberry v. Siesta Mhc Income Ptnrs., L.P., 2010 Tex. App. LEXIS 2517, 2010 WL 1404598 (Tex. App. Austin Apr. 8 2010).

767. Any error in the trial court's admission of contested testimony was harmless because appellant later allowed similar evidence to be introduced without objection, and the contested evidence was merely cumulative of properly admitted evidence; the error, if any, in admitting the hearsay testimony did not probably cause the rendition of an improper judgment. Astoria Indus. of Iowa v. Brand Fx Body Co., 2010 Tex. App. LEXIS 2539 (Tex. App. Fort Worth Apr. 8 2010).

768. Even if the court presumed that the assistant district attorney's testimony amounted to inadmissible hearsay evidence, defendant failed to preserve this complaint for review under Tex. R. App. P. 33.1(a) because he did not subsequently object when the State elicited substantially similar testimony from the attorney and he did not procure a running objection or request a hearing outside of the jury's presence. Dreyer v. State, 309 S.W.3d 751, 2010 Tex. App. LEXIS 2222 (Tex. App. Houston 14th Dist. Mar. 30 2010).

769. Although defendant asserted harm from inadmissible hearsay, the improper admission of evidence was not reversible error when, as here, the same or similar evidence was admitted without objection at another point in the trial. Dreyer v. State, 309 S.W.3d 751, 2010 Tex. App. LEXIS 2222 (Tex. App. Houston 14th Dist. Mar. 30 2010).

770. Defendant did not make a request or objection with sufficient specificity to apprise the trial court of his complaint asserting a violation of the Confrontation Clause, for purposes of Tex. R. App. P. 33.1(a), and an objection based on hearsay grounds, as defendant made, did not preserve error on Confrontation Clause grounds. Dreyer v. State, 309 S.W.3d 751, 2010 Tex. App. LEXIS 2222 (Tex. App. Houston 14th Dist. Mar. 30 2010).

771. Assuming arguendo that reports were inadmissible hearsay, the court found their admission to be harmless because like evidence was admitted elsewhere without objection. In re L.T., 2010 Tex. App. LEXIS 2250, 2010 WL 1222052 (Tex. App. Amarillo Mar. 30 2010).

772. Trial court did not rule on a company's objections to an attorney fee affidavit, such that the objections as to the form of the affidavit were waived; moreover, general objections of hearsay and that the affidavit was without foundation would be too general to present an issue for review, even if it had been preserved through an adverse ruling, under Tex. R. App. P. 33.1(a)(1)(a). Petroleum Analyzer Co. Lp v. Olstowski, 2010 Tex. App. LEXIS 1558

(Tex. App. Houston 1st Dist. Mar. 4 2010).

773. Defendant merely concluded that 19 objectionable statements constituted hearsay, but did not explain why, and thus the matter was inadequately briefed under Tex. R. App. P. 38.1(h) and the court declined to address it. Thompson v. State, 2010 Tex. App. LEXIS 994 (Tex. App. Houston 1st Dist. Feb. 11, 2010).

774. Court recognized that one resident testified that an insurance representative informed him that the fire was caused by the homeowner's cigarette, but the court did not consider this testimony to create more than a scintilla of evidence as to this issue because the homeowners objected to the testimony as hearsay and the residents did not allege any applicable hearsay exception, plus the insurance documents provided no support for the representative's alleged statement, and the residents' own expert testified that a claims adjuster was not qualified to determine the cause of a fire. Hemenas v. Caston, 2010 Tex. App. LEXIS 1023, 2010 WL 521116 (Tex. App. Austin Feb. 11 2010).

775. Because the trial court excluded the patient's expert report on a ground that had not been challenged on appeal, the court presumed that the trial court properly sustained the hearsay objection; thus, the court overruled the patient's issue without considering whether her offensive use of the report waived the statutory restrictions on her subsequent use of the report over objection. Fowler v. Samuel, 2010 Tex. App. LEXIS 787, 2009 WL 5710146 (Tex. App. Beaumont Feb. 4 2010).

776. Assuming without deciding that the trial court erred in admitting certain statements, the erroneous admission of hearsay evidence was non-constitutional error for purposes of Tex. R. App. P. 44.2(b) and the court had fair assurance that the error, if any, in admitting the evidence was harmless; the jury had sufficient evidence from which to find defendant's guilt of theft notwithstanding whether the jury believed defendant was associated with another person. Barwari v. State, 2010 Tex. App. LEXIS 686, 2010 WL 338198 (Tex. App. Dallas Feb. 1 2010).

777. Because a sergeant's statement was neither hearsay nor testimonial, the fact that it might have been employed in the creation of the photo array was immaterial, defendant had not identified any authority supporting his claim that a photo array was inadmissible because officers identified a suspect through out-of-court conversations, plus defendant did not object to the array on this basis in any event, and thus he had not preserved this issue for review. Stafford v. State, 2010 Tex. App. LEXIS 475, 2010 WL 318231 (Tex. App. Houston 14th Dist. Jan. 28 2010).

778. Contrary to a company's claims, questions complained of did not call for hearsay nor did the witness respond with hearsay testimony; even if the trial court erred, the company was required to show reversible error for purposes of Tex. R. App. P. 44.1(a)(1), and the company failed to demonstrate that error in the admission of testimony led to the rendition of an improper judgment. Weeks Marine, Inc. v. Barrera, 2010 Tex. App. LEXIS 438, 2010 WL 307878 (Tex. App. San Antonio Jan. 27 2010).

779. In defendant's online solicitation case, the trial court did not err by admitting the chat logs between defendant and the officer posing as a teenager because the investigation traced the IP address used by defendant to defendant's apartment, and defendant admitted he used to have the particular screen name at issue. The officer asked defendant if they could "safely assume" it was defendant on the chats with the "teenager," and defendant answered, "Yes, sir." Bailey v. State, 2009 Tex. App. LEXIS 9440, 2009 WL 4725348 (Tex. App. Dallas Dec. 11 2009), *cert. denied*, 131 S. Ct. 475, 178 L. Ed. 2d 301, 2010 U.S. LEXIS 7971 (U.S. 2010).

780. State's question was improper because it assumed facts not in evidence, but the State was not offering testimony and thus the question did not amount to hearsay. Butler v. State, 300 S.W.3d 474, 2009 Tex. App. LEXIS

8651 (Tex. App. Texarkana Nov. 12 2009).

781. Admission of the first part of a hearsay statement was harmless under Tex. R. App. P. 44.2(b) because other witnesses testified that to the same fact. Woods v. State, 2009 Tex. App. LEXIS 8749 (Tex. App. El Paso Nov. 12 2009).

782. Second portion of a hearsay statement indicated one possible motive for the murder of the victim; the State did not refer to the inadmissible hearsay testimony in final argument and given the strength of the evidence of murder, the court did not find that this hearsay statement had a substantial effect on the jury's verdict, for purposes of Tex. R. App. P. 44.2(b). Woods v. State, 2009 Tex. App. LEXIS 8749 (Tex. App. El Paso Nov. 12 2009).

783. On appeal, defendant argued that testimony was inadmissible under extraneous evidence grounds, but defendant's hearsay objection did not preserve the issue for appellate review on a different theory. Norman v. State, 2009 Tex. App. LEXIS 8796, 2009 WL 3805830 (Tex. App. Houston 1st Dist. Nov. 12 2009).

784. Court noted that much of an investigator's testimony was hearsay and no objection was made; such hearsay might have been excluded on request, but once admitted, the evidence enjoyed a status equal to that of all other admissible evidence. Clayton v. State, 2009 Tex. App. LEXIS 7705, 2009 WL 3151207 (Tex. App. Texarkana Oct. 2 2009).

785. Several instances did not involve hearsay under Tex. R. Evid. 801(d) and defendant had not explained how the trial court would have erred in overruling any such objections, such that the court rejected his claim of ineffective assistance in this regard. McEuen v. State, 2009 Tex. App. LEXIS 6361, 2009 WL 2476540 (Tex. App. Houston 14th Dist. Aug. 13 2009).

786. Content of defendant's statement could not be inferred from testimony showing that he voluntarily met with a detective and was not hearsay; because the trial court abused its discretion by excluding this testimony, the court had to determine if defendant suffered harm under Tex. R. App. P. 44.2(b). Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

787. For purposes of Tex. R. App. P. 44.2(b), the court was unable to say that defendant's substantial rights were affected by exclusion of a detective's testimony, which was not hearsay, because the record contained other evidence from which the jury could have concluded that defendant's actions were consistent with innocence. Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

788. Although defendant noted on appeal that the State's introduction of hearsay evidence violated his right to confront the witnesses against him, he did not make that objection at trial, and that argument was waived. Vasquez v. State, 2009 Tex. App. LEXIS 6117, 2009 WL 5915945 (Tex. App. Corpus Christi Aug. 6 2009).

789. Although defendant objected to the evidence as hearsay, he did not obtain an express ruling on that objection under Tex. R. App. P. 33.1(a)(1)(A) and while the State conceded the objection was implicitly overruled, defendant did not cite authority supporting an argument that the trial court erred in overruling his objection; he merely argued that the evidence was insufficient because it was hearsay and the result was the same as if he had failed to object in the trial court, and because the admissibility of the evidence was not challenged on appeal, the evidence was before the court for all purposes under Tex. R. Evid. 802, in connection with defendant's challenge to a restitution order. Vasquez v. State, 2009 Tex. App. LEXIS 6117, 2009 WL 5915945 (Tex. App. Corpus Christi Aug. 6 2009).

790. To the extent testimony was objectionable as hearsay, no such objection was made at trial, for purposes of Tex. R. App. P. 33.1(a). Campbell v. State, 2009 Tex. App. LEXIS 5369, 2009 WL 2025344 (Tex. App. Dallas July 14 2009).

791. Defendant did not object to a hearsay statement, for purposes of Tex. R. Evid. 801(a), 802; the jury was therefore permitted to consider this hearsay evidence for any purpose. Walker v. State, 291 S.W.3d 114, 2009 Tex. App. LEXIS 4863 (Tex. App. Texarkana June 23 2009).

792. Certain testimony specifically impeached the accuracy of the victim's testimony, and to the extent that a witness's testimony presented evidence of the child victim's veracity, for purposes of Tex. R. Evid. 608(a), the court agreed with the State that the testimony did not constitute hearsay; however, much of the witness's testimony seemed to go beyond merely rehabilitating the child's character for truthfulness, and therefore arguably constituted hearsay, but even if failing to object to hearsay was not a viable trial strategy, defendant failed to meet the second prong of the test for ineffective assistance, as the testimony was cumulative and its introduction arguably harmless and defendant failed to show prejudice. Mitchell v. State, 2009 Tex. App. LEXIS 4137, 2009 WL 1623422 (Tex. App. Corpus Christi June 11 2009).

793. Defendant complained that an officer's videotaped statement that two witnesses had implicated defendant as the shooter was inadmissible hearsay that was testimonial; the court noted that while the rules generally prohibited the admission of out of court statements offered to prove the truth of the matter asserted, a statement was not deemed hearsay if it involved identification of one perceived by the declarant, who later testified at trial and was available for cross-examination, under Tex. R. Evid. 801(e)(1)(C). York v. State, 2009 Tex. App. LEXIS 3827, 2009 WL 1493255 (Tex. App. Houston 1st Dist. May 28 2009).

794. Defendant argued testimony was inadmissible hearsay, but made no argument for the contentions made, plus the record was silent as to counsel's strategy in not objecting; defendant did not argue that exclusion of the testimony would have probably resulted in a different outcome and defendant therefore failed to meet his burden to show ineffective assistance. Ruiz v. State, 293 S.W.3d 685, 2009 Tex. App. LEXIS 3632 (Tex. App. San Antonio May 27 2009).

795. Any error in overruling defendant's hearsay objection was harmless under Tex. R. App. P. 44.2(d), Tex. R. Evid. 103(a); other evidence was admitted of defendant's improper jail conduct and prior criminal history and the error did not affect defendant's substantial rights. Henley v. State, 2009 Tex. App. LEXIS 3653, 2009 WL 1464247 (Tex. App. Dallas May 27 2009).

796. Court agreed that a statement was hearsay, but defendant failed to object and thus failed to preserve this issue for review under Tex. R. App. P. 33.1. Patterson v. State, 2009 Tex. App. LEXIS 3196 (Tex. App. Texarkana May 12 2009).

797. Resident and his wife offered nothing in support of the 911 records to satisfy the requirements of self-authentication established by Tex. R. Evid. 902; without the required certification by a records custodian or other person authorized to certify them, the 911 records had no probative value and were incompetent summary-judgment evidence properly excluded as hearsay. Xiao Yu Zhong v. Sunblossom Gardens, LLC, 2009 Tex. App. LEXIS 3010, 2009 WL 1162213 (Tex. App. Houston 1st Dist. Apr. 30 2009).

798. Even though the trial court erred by excluding the accomplice's testimony that defendant appeared surprised when the accomplice exhibited the gun during the robbery, because defendant's surprised reaction was not hearsay, as it was not intended as a substitute for any verbal communication to the accomplice, the error was harmless because two eyewitnesses testified that defendant was the gunman. Woodard v. State, 2009 Tex. App.

LEXIS 2897, 2009 WL 1124385 (Tex. App. Houston 14th Dist. Apr. 28 2009).

799. Even though the trial court erred by admitting the wife's testimony concerning a statement she had previously made to her daughter, because the statement was inadmissible hearsay under Tex. R. Evid. 801, the error was harmless because the wife did not testify about what she meant by telling her daughter "what was going on," and she had previously testified at length without objection about a prior incident with defendant. Edwards v. State, 2009 Tex. App. LEXIS 2873, 2009 WL 1140092 (Tex. App. Dallas Apr. 27 2009).

800. Argument was not preserved for appeal because the trial court never ruled on the admissibility of a witness's testimony regarding any prior crimes a person told him he committed and counsel did not object when the testimony was presented in court; even if counsel's general objection to hearsay testimony preserved this complaint, there was no harm. Chaney v. State, 2009 Tex. App. LEXIS 2799 (Tex. App. Houston 1st Dist. Apr. 23 2009).

801. None of the testimony that was given at trial constituted hearsay and the court rejected defendant's claim of ineffective assistance of counsel in this regard. Chaney v. State, 2009 Tex. App. LEXIS 2799 (Tex. App. Houston 1st Dist. Apr. 23 2009).

802. While the State conceded that a question called for a hearsay response, the State argued that defendant's objection was untimely and preserved nothing for review under Tex. R. App. P. 33.1(a)(1), and the court agreed; defendant offered no legitimate reason to justify waiting to object until after the question was answered and nothing in the record justified defendant's waiting to object until after the witness answered the question, and thus the untimely objection failed to preserve error. Mendez v. State, 2009 Tex. App. LEXIS 1066, 2009 WL 385020 (Tex. App. Fort Worth Feb. 12 2009).

803. Personal jurisdiction under Tex. Civ. Prac. & Rem. Code Ann. § 17.042 was lacking over California residents in an action for breach of a partnership agreement; evidence of ownership of Texas property and related travel did not establish personal jurisdiction, and affidavits that failed to set forth the place and terms of the alleged agreement and contained hearsay statements were properly excluded under Tex. R. Civ. P. 120a(3) and Tex. R. Evid. 801(d). Rattner v. Contos, 2009 Tex. App. LEXIS 894, 2009 WL 330966 (Tex. App. San Antonio Feb. 11 2009).

804. Alleged hearsay testimony was offered to explain how defendant became a suspect and not for the truth of the matter asserted, and was therefore not hearsay under Tex. R. Evid. 801(d). Henderson v. State, 2009 Tex. App. LEXIS 677, 2009 WL 237473 (Tex. App. Houston 14th Dist. Feb. 3 2009).

805. Two of defendant's hearsay objections were waived on appeal because the same evidence was introduced from another source without objection from defendant. Henderson v. State, 2009 Tex. App. LEXIS 677, 2009 WL 237473 (Tex. App. Houston 14th Dist. Feb. 3 2009).

806. Defendant contended that without allegedly improper hearsay testimony, the evidence was insufficient to uphold the verdict of guilt of aggravated kidnapping; even if the trial court erred in admitting the alleged hearsay testimony, the court had to consider the testimony in assessing the sufficiency of the evidence. Henderson v. State, 2009 Tex. App. LEXIS 677, 2009 WL 237473 (Tex. App. Houston 14th Dist. Feb. 3 2009).

807. Because the trial court sustained a hearsay objection regarding testimony and a party did not argue on appeal under Tex. R. App. P. 38.1(h) that this ruling was erroneous, this argument was waived. Moe v. Option One Mortg. Corp., 2009 Tex. App. LEXIS 350, 2009 WL 136892 (Tex. App. Houston 14th Dist. Jan. 20 2009).

808. Defendant's conviction for arson of a habitation was appropriate because, in light of an investigator's status as a law enforcement official, the plain language of Tex. R. Evid. 801(d) and 803(8)(B), and defendant's failure to provide any argument on appeal refuting the trial court's classification of the statements offered from the DA packet as inadmissible hearsay under the rules, the appellate court was unable to say that the trial court abused its discretion in excluding those portions of the DA packet in which another individual was designated as a co-defendant. Charles v. State, 2008 Tex. App. LEXIS 9368 (Tex. App. Houston 14th Dist. Dec. 18 2008).

809. None of the objections at trial were based on hearsay and therefore any hearsay objection made for the first time on appeal was waived. Musgrove v. State, 2008 Tex. App. LEXIS 9484 (Tex. App. Fort Worth Dec. 18 2008).

810. Statement conveyed events as the witness perceived them, and thus the statement fell under the present sense impression exception to the hearsay rule under Tex. R. Evid. 803(1); the witness testified that the woman in question made the statement in response to the argument she was observing between defendant, another, and the victim, plus testimony tending to show that defendant was a suspect and explained the circumstances leading up to a murder was admissible, and thus the trial court did not err in admitting this statement over defendant's hearsay objection in his murder trial. Brown v. State, 2008 Tex. App. LEXIS 9063 (Tex. App. Houston 1st Dist. Dec. 4 2008).

811. Testimony was offered to show how defendant became a suspect and did not leave the jury with the inescapable conclusion that a witness was testifying through a detective, and thus the court rejected defendant's claim of backdoor hearsay. Lucas v. State, 2008 Tex. App. LEXIS 8976 (Tex. App. Dallas Dec. 3 2008).

812. Although defendant objected to testimony at one point during the witness's testimony, defendant failed to object to the testimony the first time it was raised at trial; under Tex. R. Evid. 802, the responsibility fell upon defendant and his counsel to object to the admission of the hearsay, and having failed to object, defendant had to be prepared to accept the consequences that hearsay could be considered by the trier of fact as probative evidence to be considered with other evidence admitted at trial. Lucas v. State, 2008 Tex. App. LEXIS 8976 (Tex. App. Dallas Dec. 3 2008).

813. When the State sought to admit a pen packet, defense counsel objected to it as hearsay, but did not object to authentication; this was not an improper objection because if the record was actually not authenticated, then it would have been subject to a hearsay objection, but the court agreed that counsel should make a more specific objection to preserve the issue of authentication. Fox v. State, 2008 Tex. App. LEXIS 8527 (Tex. App. Texarkana Nov. 13 2008).

814. Defendant objected to an exhibit on hearsay grounds and claimed on appeal that the evidence was not admissible under Tex. R. Evid. 803(4), but the State established the admissibility of the documents as a record of regularly conducted activity under Tex. R. Evid. 803(6), and the fact that defendant might have been correct about the applicability of the medical diagnosis exception was not conclusive of the issue; the trial court was correct in admitting the evidence as a record of regularly conducted activity and there was no abuse of discretion. Matthews v. State, 2008 Tex. App. LEXIS 8544 (Tex. App. Amarillo Nov. 13 2008).

815. In a personal injury action in which appellee truck driver pleaded a claim for negligent hiring against appellant foreign corporation by alleging that it hired a Texas corporation to deliver products to Texas when appellant retained control over the Texas corporation and knew or should have known that the Texas corporation employed an incompetent driver, appellee had offered a carrier agreement to demonstrate the existence of a legal relationship between appellant and the Texas corporation, and because the carrier agreement appeared to be signed by the director of appellant, and appellant did not properly challenge the agreement's authenticity, the trial court did not err in overruling appellant's hearsay objection. Ltd. Logistics Servs. v. Villegas, 268 S.W.3d 141, 2008 Tex. App. LEXIS

6536 (Tex. App. Corpus Christi 2008).

816. Trial court did not act outside the zone of reasonable disagreement by overruling defendant's hearsay objection to an officer recitation of the victim's hearsay statement that defendant had gotten angry and pushed her into a wall and by admitting it as an excited utterance under Tex. R. Evid. 803(2); when the officer responded to the victim's 911 case, he found her clearly upset and it was a reasonable inference that 911 response time was fairly quick. Davis v. State, 268 S.W.3d 683, 2008 Tex. App. LEXIS 6566 (Tex. App. Fort Worth 2008).

817. Trial court erred by overruling defendant's federal Confrontation Clause objection to an officer's testimony about the victim's statements to him, and thus the court analyzed the matter for harm under Tex. R. App. P. 44.2(a); given that (1) the hearsay was not important to the State's case, (2) the hearsay was similar in nature to testimony offered by another witness, (3) the inferences the jury was likely to draw from the victim's statements were the exact same inferences the jury likely drew from other testimony that was admitted, and (4) the case was very strong against defendant, given the eyewitness testimony that defendant stabbed the victim to death, the error did not contribute to defendant's conviction or punishment. Davis v. State, 268 S.W.3d 683, 2008 Tex. App. LEXIS 6566 (Tex. App. Fort Worth 2008).

818. Concerning defendant's hearsay objections to a witness's certain testimony, assuming the trial court abused its discretion by admitting the testimony, the court proceeded to a harm analysis, and because error in admitting a statement in violation of the hearsay rules of evidence was non-constitutional, the court applied Tex. R. App. P. 44.2(b); given the evidence of defendant's guilt, any error in permitting this testimony did not influence the jury's verdict and the error was harmless. Davis v. State, 268 S.W.3d 683, 2008 Tex. App. LEXIS 6566 (Tex. App. Fort Worth 2008).

819. Defendant did not raise the issue of relevancy on appeal and those objections did not support defendant's present complaint of hearsay or the denial of his right to confrontation; as to his final hearsay objection and denial of the right to confront certain witnesses, defendant did not show a legitimate reason for the delay in raising these complaints until after the publication of the audio recordings to the jury, and thus the final objection raising these issues was untimely and these issues were not preserved for review. Bates v. State, 2008 Tex. App. LEXIS 6130 (Tex. App. Amarillo Aug. 13, 2008).

820. Widow had to object and secure a ruling on her objection that an affidavit contained hearsay, and because she failed to do so, the complaints were overruled as not preserved; the court had adopted the majority position among the Texas courts of appeals, which refused to presume that objections were overruled when a trial court granted a motion for summary judgment. Pouncy-Pittman v. Pappadeaux Seafood Kitchen, 2008 Tex. App. LEXIS 5780 (Tex. App. Houston 1st Dist. July 31 2008).

821. Statements of what a juror told defense counsel were hearsay and did not constitute admissible evidence in a hearing on a motion for a new trial. Saucedo v. State, 2008 Tex. App. LEXIS 3908 (Tex. App. Corpus Christi May 22 2008).

822. Trial court did not err in refusing to allow defendant to introduce into evidence an audio/video recording that was made during defendant's transport to jail; the State objected on hearsay grounds and that it was cumulative, and the trial court's ruling that the evidence was inadmissible was correct and within the zone of reasonable disagreement. Ramirez v. State, 2008 Tex. App. LEXIS 3275 (Tex. App. Eastland May 8 2008).

823. Defendant argued that the failure of the State to introduce the contraband into evidence, for purposes of defendant's conviction under Tex. Health & Safety Code Ann. § 481.117, violated his state due process rights under Tex. Const. art. I, § 19, but at trial, defendant based his objection on hearsay and federal constitutional grounds, not

state constitutional grounds, and thus defendant's complaint on appeal was not preserved for review. Ray v. State, 2008 Tex. App. LEXIS 3295 (Tex. App. Dallas May 8 2008).

824. There was no motion for a new trial and the court did not have a record that reveals counsel's reasoning for not objecting to hearsay statements, and thus the court had to presume that counsel had a valid reason for not objecting; the court was unable to conclude that there was no plausible reason for opting not to object to that testimony and the court would not speculate to find counsel's performance deficient in light of the silent record. Hayes v. State, 2008 Tex. App. LEXIS 3163 (Tex. App. Houston 1st Dist. May 1 2008).

825. Testimony in a murder trial did not constitute indirect hearsay in violation of Tex. R. Evid. 801 and Tex. R. Evid. 802 because at most, the jury might have deduced that the declarant told the investigators something that led them to acquire a warrant; the trial court could have reasonably determined that that inferential leap did not provide the requisite degree of certainty that the State's sole intent in pursuing the line of questioning was to convey the contents of the out-of-court statement. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

826. In an illegal possession of a weapon case, audio portions of the patrol-car videotape were properly admitted because the conversation with the dispatcher was not hearsay; the substance of the conversation was not an issue during trial, and the conversation itself was not offered for any particular purpose other than to establish that an officer was conducting an investigation into the suspects' backgrounds. Gomez v. State, 2008 Tex. App. LEXIS 2966 (Tex. App. Austin Apr. 24 2008).

827. In defendant's aggravated robbery case, even if it was error for the court to admit an officer's hearsay testimony regarding the details of the police dispatch, the error was harmless; the same substantive evidence was introduced through another officer's testimony without objection when she testified regarding the type of car defendant was driving and the circumstance surrounding her interview of the robbery complainants. Carson v. State, 2008 Tex. App. LEXIS 3091 (Tex. App. Fort Worth Apr. 24 2008).

828. Statement was not hearsay under Tex. R. Evid. 801 because the affiant was not repeating an out-of-court statement of another; she was giving a statement as to her own belief based on her personal knowledge. Winn v. Spectrum Primary Care, Inc., 2008 Tex. App. LEXIS 3094 (Tex. App. Fort Worth Apr. 24 2008).

829. Affiant did not aver that another person's statement was based upon communication that she understood that the person had with someone else; the affiant stated that it was her understanding that when the person made a representation, he spoke on behalf of a company, and thus the court rejected the claim of triple hearsay. Winn v. Spectrum Primary Care, Inc., 2008 Tex. App. LEXIS 3094 (Tex. App. Fort Worth Apr. 24 2008).

830. Portion of a sentence indicating that an employee no longer had the approval of a prime contractor to provide services was hearsay under Tex. R. Evid. 801, but the rest of the statement, stating what action the affiant took and that the action was based on a statement made by another, was not hearsay. Winn v. Spectrum Primary Care, Inc., 2008 Tex. App. LEXIS 3094 (Tex. App. Fort Worth Apr. 24 2008).

831. In a summary judgment proceeding, the trial court erred in failing to exclude hearsay statements in affidavits. Winn v. Spectrum Primary Care, Inc., 2008 Tex. App. LEXIS 3094 (Tex. App. Fort Worth Apr. 24 2008).

832. Without certain hearsay statements, the employer failed to establish that it terminated the employee for cause, making summary judgment on the issue improper. Winn v. Spectrum Primary Care, Inc., 2008 Tex. App.

LEXIS 3094 (Tex. App. Fort Worth Apr. 24 2008).

833. Given that Tex. R. Evid. 803 created an exception to the hearsay rule for public records and reports and judgments of previous convictions, to the extent that defendant's complaint was that pen packets were hearsay, the trial court did not abuse its discretion by overruling the hearsay objection. Smith v. State, 2008 Tex. App. LEXIS 2849 (Tex. App. Fort Worth Apr. 17 2008).

834. Because defendant did not assert in the trial court that certain records constituted inadmissible character evidence, defendant forfeited that complaint under Tex. R. App. P. 33; furthermore, when making objections, defendant agreed that the records were business records, but appeared to argue that they contained double hearsay, but defendant failed to specify or identify the objectionable part of the exhibit, and thus the objections were insufficiently specific to have preserved the hearsay complaint defendant also made on appeal. Starn v. State, 2008 Tex. App. LEXIS 2402 (Tex. App. Fort Worth Apr. 3 2008).

835. Defendant was required under Tex. R. App. P. 33 to make an objection with sufficient specificity that the trial court could be aware of what defendant was complaining about, and because the initial hearsay objection was to the entirety of medical records, the objection was too general and insufficient and the court was unable to say that the inadmissible material that formed the basis of the objection was apparent from the context, and thus error was not preserved; even assuming that the hearsay objection was sufficient to preserve error, the statements in question were made by medical personnel for the purpose of diagnosis and treatment under Tex. R. Evid. 803, although defendant complained of certain injuries, his actions were inconsistent with any desire for treatment, and that defendant was escorted to a police car following his return to the emergency room was consistent with admission of the evidence for diagnosis and treatment and defendant did not show that the probative value of the evidence was outweighed by its prejudicial nature. Cline v. State, 2008 Tex. App. LEXIS 2242 (Tex. App. Austin Mar. 26 2008).

836. As a certified copy of a public record, the State's exhibit of defendant's driving record was well within Tex. R. Evid. 803 and its admission did not constitute inadmissible hearsay. Cline v. State, 2008 Tex. App. LEXIS 2242 (Tex. App. Austin Mar. 26 2008).

837. Because all of certain documents were admitted into evidence, the court was unable to say that the trial court erred in allowing a fingerprint expert to testify, comparing the various identified prints with defendant's known prints at the time of booking to determine his identity, and thus the court rejected defendant's hearsay complaint. Cline v. State, 2008 Tex. App. LEXIS 2242 (Tex. App. Austin Mar. 26 2008).

838. Trial court was not considering documents as hearsay and admitting them under an exception, but was viewing the evidence as a buyer's attempt to itemize the property the seller converted and place a value thereon; the seller did not attempt to show on appeal why the evidence, when viewed in that context, was inadmissible, nor did the seller reassert the objections uttered below, and thus the dispute was waived. Birkenfeld v. Metro Gen. Mgmt., 2008 Tex. App. LEXIS 1913 (Tex. App. Amarillo Mar. 14 2008).

839. Defendant argued that the exclusion of certain witness statements denied him his due process right to support his defensive theory, but the evidence concerned hearsay, not someone who was actually present at the time of the crime and the testimony consisted of mere general statements; thus, the court disagreed with defendant's argument. Guerrero v. State, 2008 Tex. App. LEXIS 1837 (Tex. App. Corpus Christi Mar. 13 2008).

840. In a child sexual abuse case, defendant could not question the investigating officer about prior inconsistent statements that the victim allegedly had made to the officer who initially took her statement and to a caseworker; this multiple hearsay was not admissible under Tex. R. Evid. 805 because even if the victim's statements had been

admissible under the prior inconsistent statement rule, which would have passed the first level of hearsay, defendant offered no explanation of how the contents of a report by the officer who initially took the victim's statement or the investigating officer's testimony based on that report fell within any hearsay exception. Segura v. State, 2008 Tex. App. LEXIS 1303 (Tex. App. Fort Worth Feb. 21 2008).

841. Because an affidavit consisted entirely of hearsay, the trial court did not abuse its discretion in excluding the affidavit. Corona v. Pilgrim's Pride Corp., 245 S.W.3d 75, 2008 Tex. App. LEXIS 492 (Tex. App. Texarkana 2008).

842. Without a court order sustaining a hearsay objection, an investigation log was proper summary judgment evidence. Poteet v. Kaiser, 2007 Tex. App. LEXIS 9749 (Tex. App. Fort Worth Dec. 13 2007).

843. During defendant's trial for aggravated robbery, the trial court did not err in allowing the testimony of a police officer and a detective where their testimony was offered to establish the course of the detective's investigation and to show how defendant became the robbery suspect; thus, the testimony did not constitute backdoor hearsay. Hurd v. State, 2007 Tex. App. LEXIS 9363 (Tex. App. Houston 1st Dist. Nov. 29 2007).

844. In a case involving indecency and aggravated sexual assault, a trial court did not err by admitting certain evidence regarding recorded conversations between defendant and a minor child and the fact that a mother later pressured the child to change her story; even if they constituted hearsay under Tex. R. Evid. 801, the same or similar testimony was admitted elsewhere. Weaver v. State, 2007 Tex. App. LEXIS 9200 (Tex. App. Waco Nov. 21 2007).

845. Defendant failed to preserve for review the complaint that the trial court admitted hearsay testimony because he did not object to the admission of the same or similar testimony from other witnesses. Wild v. State, 2007 Tex. App. LEXIS 8536 (Tex. App. Texarkana Oct. 26 2007).

846. Trial court erred in overruling the company's objections to the affidavit of the owners' attorney and to the attached exhibits; the attorney was a witness in this regard and his testimony did not fall within any of the five exceptions enumerated in Tex. Disciplinary R. Prof. Conduct 3.08, the attorney was an inappropriate person to present any facts as to the question at issue, but even if the trial court found that one of the Rule 3.08 exceptions applied to the attorney, the affidavit still failed because it contained hearsay and conclusory remarks and failed to prove his personal knowledge. Southtex 66 Pipeline Co. v. Spoor, 238 S.W.3d 538, 2007 Tex. App. LEXIS 8352, 168 Oil & Gas Rep. 68 (Tex. App. Houston 14th Dist. 2007).

847. Attorney's affidavit concerning the status of a pipeline company with the Railroad Commission contained inadmissible hearsay, was conclusory, and failed to prove the attorney's personal knowledge; nothing in the affidavit showed that the attorney was qualified to explain the contents of a Railroad Commission document, for purposes of Tex. R. Evid. 602 and the attorney's reference to unnamed employees did not correct the fatal flaws in the affidavit and was inadmissible as hearsay under Tex. R. Evid. 801. Southtex 66 Pipeline Co. v. Spoor, 238 S.W.3d 538, 2007 Tex. App. LEXIS 8352, 168 Oil & Gas Rep. 68 (Tex. App. Houston 14th Dist. 2007).

848. Court did not address the hearsay objection under Tex. R. Evid. 801 as to certain exhibits because they were not relevant under Tex. R. Evid. 401 to the resolution of the issues before the court, even if they fell under a hearsay exception; another exhibit contained an affidavit from an attorney in another case and contained the same information found in that case and had no bearing on the issues before the court. Southtex 66 Pipeline Co. v. Spoor, 238 S.W.3d 538, 2007 Tex. App. LEXIS 8352, 168 Oil & Gas Rep. 68 (Tex. App. Houston 14th Dist. 2007).

849. In order to invoke the rule of optional completeness under Tex. R. Evid. 107, defendant had to show that the portion of the statement he sought to admit was part of the same statement previously admitted by the opposing party, but his statement to a detective was not part of his statement to a nurse, as the statement given to the nurse was for medical assessment and the statement given to the detective was for criminal investigation purposes. Ramirez v. State, 2007 Tex. App. LEXIS 8349 (Tex. App. Houston 14th Dist. Oct. 23 2007).

850. Trial court did not err in overruling defendant's motion for a mistrial; the victim's father's hearsay statement, not given in an emotional tone, that the victim admitted to having had sex with defendant was moderately prejudicial to defendant, but a curative instruction was requested and given, and the court had to presume that it was effective because the comment, while mildly prejudicial, was not so prejudicial that the expenditure of further time and expense would have been wasteful; furthermore, defendant's convictions of sexual assault and indecency with a child remained certain even absent the improper hearsay statement, given that the victim recounted in detail three sexual encounters with defendant. Ladesic v. State, 2007 Tex. App. LEXIS 8106 (Tex. App. Fort Worth Oct. 11 2007).

851. Although a debtor argued that account statements were hearsay, the record custodian properly authenticated them under Tex. R. Evid. 902 as business records under Tex. R. Evid. 803 and the debtor presented no supporting argument that the statements lacked trustworthiness. Sikander Ghia v. Am. Express Travel Related Servs., 2007 Tex. App. LEXIS 8194 (Tex. App. Houston 14th Dist. Oct. 11 2007).

852. Defendant did not adequately explain, for purposes of Tex. R. App. P. 38.1(h), how testimony was hearsay or how it violated the Confrontation Clause, and thus the court found these issues inadequately briefed. Garcia v. State, 246 S.W.3d 121, 2007 Tex. App. LEXIS 8051 (Tex. App. San Antonio 2007), *cert. denied*, 555 U.S. 949, 129 S. Ct. 404, 172 L. Ed. 2d 295, 2008 U.S. LEXIS 7457 (2008).

853. At defendant's trial for theft of a plasma television, the State was permitted to admit a purchasing requisition form showing the cost of replacing the television under the business records exception to the hearsay rule set forth in Tex. R. Evid. 803; the authenticating witness testified that he was the head of the security, he made the form in the regular course of business near the time of the events in question, such forms were created to inform the finance department of the price of a needed item, and he was authorized to keep and control such forms; the trial court did not err in overruling defendant's hearsay objection under Tex. R. Evid. 801. Baker v. State, 2007 Tex. App. LEXIS 7886 (Tex. App. Houston 1st Dist. Oct. 4 2007).

854. Assuming without deciding that witnesses' statements regarding the relationship between defendant and the victim were inadmissible hearsay statements and that the trial court erred in admitting them, the court had to conduct a harm analysis of this nonconstitutional error under Tex. R. App. P. 44.2 to determine whether the error called for reversal, and the court found that any error the trial court committed did not have a substantial effect on the jury's verdict and did not affect defendant's substantial rights; the statements related to defendant's relationship with the victim, and the jury heard evidence that the victim died from a gunshot wound to the back of the head, that guns were found in defendant's hotel room, and that she confessed in many notes to the shooting, but claimed it was an accident. Miller v. State, 2007 Tex. App. LEXIS 7528 (Tex. App. Fort Worth Sept. 13 2007).

855. Business record exception under Tex. R. Evid. 803 is an exception to the general rule prohibiting hearsay and Tex. R. Evid. 1006 is more properly viewed as an exception to the best evidence rule. Forkert v. State, 2007 Tex. App. LEXIS 7586 (Tex. App. El Paso Sept. 13 2007).

856. For purposes of Tex. R. Evid. 803, the record was devoid of any evidence that defendant's young daughter understood why she was in therapy or that she needed to be truthful in her statements that her mother stomped on the child victim's stomach, and thus the trial court abused its discretion by admitting the daughter's hearsay

statement as within the medical diagnosis exception; however, the error was harmless under Tex. R. App. P. 44 because the daughter herself testified to seeing defendant step on the child's stomach, and thus fair assurance existed that the less powerful, cumulative testimony of the other witness concerning this fact did not influence the jury or had but a slight effect. Stevens v. State, 234 S.W.3d 748, 2007 Tex. App. LEXIS 6845 (Tex. App. Fort Worth 2007).

857. Court rejected defendant's claim of ineffective assistance of counsel related to counsel's failure to object to testimony offered during the punishment phase, given that (1) the challenged evidence, including defendant's juvenile and adult criminal records, were admissible under Tex. Code Crim. Proc. Ann. art. 37.07, § 3 and were properly admitted under Tex. R. Evid. 803 as public records, (2) defendant's reliance on certain case law regarding his confrontation argument was distinguishable, as that case dealt with incident and disciplinary reports, and defendant's case dealt with certified court documents of the criminal records, and (3) even if the court found that the exhibits violated Tex. Code Crim. Proc. Ann. art. 37.07 or were hearsay, counsel's reasons for his actions did not appear in the record, and because his conduct could have been part of a reasonable trial strategy, without more, the court had to defer to counsel's decisions not to object to the evidence and deny relief. Garza v. State, 2007 Tex. App. LEXIS 6301 (Tex. App. Corpus Christi Aug. 9 2007).

858. Court overruled defendant's claim that he was denied his right to confront witnesses because defendant failed to raise this ground at trial; he mentioned hearsay, but such was not sufficient to preserve error based on the Confrontation Clause. Gilaelamadrid-Hock v. State, 2007 Tex. App. LEXIS 5991 (Tex. App. Amarillo July 26 2007).

859. Trial court properly sustained the objection to the admission of a chemist report prepared by the expert's employee and relied upon by the expert, but the trial court properly admitted the expert's testimony because it was not hearsay and was not required to be based on personal knowledge; even if the expert's testimony did improperly reveal underlying facts or data that were inadmissible, for which Tex. R. Evid. 705 would have required the trial court to give a limiting instruction upon request, no such instruction was requested and thus the trial court did not err in admitting the expert's testimony. Collins v. State, 2007 Tex. App. LEXIS 6116 (Tex. App. Fort Worth July 26 2007).

860. Trial court did not err in allowing the jury to hear defendant's videotaped statement in his murder trial; defendant in his own words, not the words of the detective, admitted killing his ex-wife with scissors, and thus the trial court did not err in overruling defendant's hearsay objection. Chon Ki Yi v. State, 2007 Tex. App. LEXIS 5648 (Tex. App. Houston 1st Dist. July 19 2007).

861. Court rejected defendant's claim of ineffective assistance of counsel because he failed to show a reasonable probability that, but for the admission of his videotaped statement admitting to the murder, the result of the case would have been different; his sons testified that defendant went upstairs where his ex-wife was shortly before the murder, he left later and never returned, and the boys then found their mother's body, covered in stab wounds, and there was ample evidence in addition to the inaudible portions of the videotaped statement to support the finding that defendant murdered his ex-wife; thus, defendant was unable to show that, had counsel objected to the videotaped statement on hearsay grounds, the result of the case would have been different, and because the court found that the trial court did not err in overruling the hearsay objection, defendant also failed to meet the first prong of the test for ineffective assistance. Chon Ki Yi v. State, 2007 Tex. App. LEXIS 5648 (Tex. App. Houston 1st Dist. July 19 2007).

862. In defendant's trial for aggravated sexual assault of a child and indecency with a child, the fact of the victim's discussion with her sister might well have been admitted to clarify certain matters as to how the information came to light in her family, rather than to prove an implied statement to the sister that defendant molested the victim, and given the relevance of the evidence for other purposes, the trial court did not abuse its discretion in admitting it, and the court overruled defendant's claim that the trial court erred in admitting hearsay evidence under Tex. R. Evid.

801. Montgomery v. State, 2007 Tex. App. LEXIS 5682 (Tex. App. Dallas July 19 2007).

863. Trial court would not have committed error in overruling, for purposes of Tex. R. Evid. 802, an objection to the victim's statement to an officer on the basis of hearsay under Tex. R. Evid. 801(d); the trial court could have found that the victim was dominated by the emotions and fear of the event at the time she gave the statement and thus it was admissible as an excited utterance under Tex. R. Evid. 803(2), and defendant failed to show ineffective assistance of counsel under the Sixth Amendment. Smith v. State, 2007 Tex. App. LEXIS 5693 (Tex. App. Austin July 18 2007).

864. Detective's answers to questions concerning a nightclub where defendant was seen on the night of a murder did not relay out of court statements and therefore were not hearsay. Assuming that the detective's testimony concerning a witness to the murder relayed an out of court statement, the detective's testimony did not constitute hearsay because it was admitted to explain how defendant became a suspect in the investigation and to establish the course of events and circumstances leading to defendant's arrest for the victim's murder. Garcia v. State, 2007 Tex. App. LEXIS 5080 (Tex. App. Corpus Christi June 28 2007).

865. Detective's answers to questions concerning whether a particular person was of interest in the murder investigation and whether defendant's wife received a phone call after talking to investigators did not relay out of court statements and therefore were not hearsay. Assuming that the detective's testimony concerning the victim's relationship with defendant's wife and where the victim was when he was shot relayed out of court statements, the detective's testimony did not constitute hearsay because it was admitted to explain how defendant became a suspect in the investigation and to establish the course of events and circumstances leading to defendant's arrest for the victim's murder. Garcia v. State, 2007 Tex. App. LEXIS 5080 (Tex. App. Corpus Christi June 28 2007).

866. Witness did not relay out of court statements when testifying regarding what he decided to do after seeing on the news that someone had been killed at a nightclub and his testimony did not constitute hearsay. Garcia v. State, 2007 Tex. App. LEXIS 5080 (Tex. App. Corpus Christi June 28 2007).

867. Defendant raised the subject of the victim's letters and inquired into specific portions of their content, which entitled the State to introduce, under Tex. R. Evid. 107, those portions of the letters addressing the same subject, but the State was not entitled to introduce the letters in their entirety, and the letters were thus reviewed by both sides to determine what portions to redact; by creating false impressions of the relationship between defendant and the victim, defendant invited a reply from the State to fully explain the content of the letters, and hearsay was admissible when it went to clarify other hearsay evidence elicited by the opposition, such that the court found no error in the admission of the letters. Rios v. State, 230 S.W.3d 252, 2007 Tex. App. LEXIS 5123 (Tex. App. Waco 2007).

868. In a negligent misrepresentation case, the court properly denied a motion for new trial due to juror misconduct because appellant, in order to demonstrate jury misconduct, relied upon four juror affidavits containing remarks made by other jurors during trial breaks, and thus, the affidavits constituted hearsay. Innovative Truck Storage, Inc. v. Airshield Corp., 2007 Tex. App. LEXIS 4883 (Tex. App. Corpus Christi June 21 2007).

869. Defendant initially objected to a witness's statement as containing hearsay and as having been disavowed by the witness, and defendant then objected because the statement denied his constitutional rights, but neither objection preserved a double hearsay issue. Freeman v. State, 230 S.W.3d 392, 2007 Tex. App. LEXIS 3965 (Tex. App. Eastland 2007).

870. Employer objected to statements on hearsay grounds, but did not obtain a ruling, and the employer further argued that statements in affidavits were conclusory; the hearsay objections were waived for failure to obtain a

ruling, but the conclusory objections were not. Atchison v. Spawmaxwell Co., L.P., 2007 Tex. App. LEXIS 4054 (Tex. App. Houston 1st Dist. May 24 2007).

871. Volunteer offered an affidavit and statement from a person whom the volunteer claimed showed the nursing home was aware of a premises defect, but even if the affidavit and statement were not hearsay, their admission would not have changed the outcome of the case for purposes of Tex. R. App. P. 44.1 because the volunteer provided no evidence concerning the person's employee status and the volunteer's conclusory statement was insufficient to raise a fact issue; the affidavit contained no admissible evidence sufficient to have imputed knowledge of the alleged defect to the nursing home. Griggs v. Amarillo Nursing Ctr., Inc., 2007 Tex. App. LEXIS 3876 (Tex. App. Amarillo May 17 2007).

872. Trial court erred in admitting a document because it contained several instances of hearsay under Tex. R. Evid. 801, and thus it should not have been admitted for all purposes, and because the offer was not limited, it was an offer for all purposes, including the truth of the matter asserted; the State's claim that the hearsay objection was forfeited by wrongdoing had no basis in Texas evidence law; however, error was not harmful under Tex. R. App. P. 44.2 because the jury never heard the hearsay contained in the document. Sapp v. State, 2007 Tex. App. LEXIS 2875 (Tex. App. Houston 14th Dist. Apr. 17 2007).

873. Texas Rules of Evidence contain no such provision as Fed. R. Evid. 804(b)(6); in the absence of application of the doctrine of equitable forfeiture by wrongdoing to hearsay by the Texas Court of Criminal Appeals or the Texas Rules of Evidence, the court holds that the doctrine, under current Texas jurisprudence, operates only to bar Confrontation claims and is irrelevant to a hearsay objection. Sapp v. State, 2007 Tex. App. LEXIS 2875 (Tex. App. Houston 14th Dist. Apr. 17 2007).

874. Witness's prior out of court statement to police, if offered to prove the truth of the matters asserted, likely constituted inadmissible hearsay, and thus the statements were subject to a limiting instruction under Tex. R. Evid. 105, and because counsel did not request the instruction at the first opportunity, the evidence was admitted for all purposes; the record was undeveloped as to counsel's reasons for not requesting the instruction, no new trial motion was filed to create such a record, and thus defendant did not overcome the presumption of reasonable assistance; even if the court found counsel's performance was not within the range of professional assistance, defendant failed to show that there was a reasonable probability that the result of the proceeding would have been different had counsel sought to limit the use of the witness's statements sooner than in the jury charge, as this testimony was not the only evidence that could have defeated defendant's self-defense theory in the murder trial. Scott v. State, 2007 Tex. App. LEXIS 2896 (Tex. App. Houston 1st Dist. Apr. 12 2007).

875. Although defendant objected to one exhibit on hearsay grounds, defendant's objection to another exhibit did not adequately apprise the trial court of the complaint that the document contained hearsay, and thus error, if any, was waived under Tex. R. App. P. 33.1. Cude v. State, 2007 Tex. App. LEXIS 2765 (Tex. App. Tyler Apr. 11 2007).

876. Defendant did not preserve error on a Confrontation Clause complaint; defense counsel briefly mentioned cross-examination only in the context of making a hearsay objection and even if such could have been construed to include a Confrontation Clause objection, it was not specific to preserve error on that ground. Austin v. State, 222 S.W.3d 801, 2007 Tex. App. LEXIS 2739 (Tex. App. Houston 14th Dist. 2007).

877. Because a witness's alleged hearsay statements were not admitted through another's testimony, the trial court did not abuse its discretion by denying defendant's request to introduce evidence to impeach the witness under Tex. R. Evid. 806. Francis v. State, 2007 Tex. App. LEXIS 2090 (Tex. App. Fort Worth Mar. 15 2007).

878. Trial court did not err in denying defendant's mistrial motion based on hearsay objections; as to one witness's testimony, the court found that (1) although certain testimony was hearsay, it merely provided background information about events that occurred before the offenses in question, and the testimony was not prejudicial because it did not relate to defendant's guilt or innocence, such that any error resulting from the jury's hearing of the witness's answer was harmless and an instruction to disregard was adequate, (2) by the time certain testimony was elicited, other testimony had been admitted into evidence without objection, such that any error was harmless, (3) certain of the witness's testimony was beneficial to defendant and thus any error was harmless, (4) the witness said the victim told the witness how much money the victim lost in the robbery, and later the victim testified to the same amount, such that any error was harmless, and (5) testimony was already in the record that the victims were requested to hand over their belongings, and thus any error the resulted from the jury's hearing of a witness's same testimony was harmless. Denton v. State, 2007 Tex. App. LEXIS 1706 (Tex. App. Tyler Mar. 7 2007).

879. Court rejected defendant's claim that the victim's failure to identify the actual declarants by name rendered the testimony inadmissible hearsay, as such only affected the weight and credibility of the testimony, not its admissibility, and thus defendant's hearsay objection was not valid, and a mistrial was not warranted. Denton v. State, 2007 Tex. App. LEXIS 1706 (Tex. App. Tyler Mar. 7 2007).

880. Testimony was objected to as hearsay under Tex. R. Evid. 801 and the trial court properly sustained the objection, and as such, it was not considered in the court's analysis; the statement was one made out of court and was inadmissible for purposes of Tex. R. Evid. 802, and no hearsay exception applied to render the statement admissible. Mark III Sys. v. Sysco Corp., 2007 Tex. App. LEXIS 1339 (Tex. App. Houston 1st Dist. Feb. 22 2007).

881. Particular exhibit was a series of purchase orders made by a construction company that documented its purchase of materials; the company offered testimony from one who was able to verify the method by which the records were made, such that the exhibit met the business records exception to the hearsay rule under Tex. R. Evid. 801. Royce Homes, L.P. v. Espinosa, 2007 Tex. App. LEXIS 1029 (Tex. App. Houston 1st Dist. Feb. 8 2007).

882. In a termination proceeding, the court was unable to conclude that without certain testimony, the Texas Department of Protective and Regulatory Services would not have established that the mother was not suitable, and the court was unable to find that the admission probably caused the rendition of an improper judgment or probably prevented the mother from properly presenting the case to the court on appeal, for purposes of Tex. R. App. P. 44. In re V.A., 2007 Tex. App. LEXIS 805 (Tex. App. Corpus Christi Feb. 1 2007).

883. Court disagreed that the other three extraneous acts referred to in defendant's confession to aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021(a)(1)(B) were not proven beyond a reasonable doubt; defendant's own witnesses confirmed that defendant acknowledged guilt, a detective testified that the victim told the detective about the incidents, and even inadmissible hearsay testimony admitted without objection was entitled to probative value, and defendant's theory at trial was that he took responsibility for his acts and that he was a good candidate for rehabilitation. Pollone v. State, 2007 Tex. App. LEXIS 174 (Tex. App. Eastland Jan. 11 2007).

884. Descendants appeared to argue that appellees' summary judgment evidence constituted inadmissible hearsay under Tex. R. Evid. 801, and the court assumed without deciding that the issue was preserved for review under Tex. R. App. P. 33.1(a); the judgment recited that the trial court considered the descendants' response to the motion and descendants' objections, but the trial court did not expressly rule on descendants' motion or objections. Walton v. Watchtower Bible & Tract Soc'y of Pa., 2007 Tex. App. LEXIS 180 (Tex. App. Waco Jan. 10 2007).

885. In defendant's trial for aggravated sexual assault of a child, witnesses' testimony did not lead to an inescapable conclusion regarding what the child told them, and each testified that the investigation continued, and a

wide range of statements by the child could have caused this; neither witness's testimony allowed the jury to infer the details of what the child said in court and thus the court rejected defendant's claim of a violation of the hearsay rule. Gauna v. State, 2006 Tex. App. LEXIS 11128 (Tex. App. Austin Dec. 29 2006).

886. Defendant's hearsay objection did not preserve error on defendant's Confrontation Clause and due process claims under Tex. R. App. P. 33.1, and to the extent certain points of error were based on those provisions, they were waived. Mitchell v. State, 238 S.W.3d 405, 2006 Tex. App. LEXIS 11090 (Tex. App. Houston 1st Dist. 2006).

887. In defendant's trial on charges of sexual assault, the trial court did not err by admitting letters from the files of the Amarillo Diocese concerning defendant's relationship with the Catholic Church during the period before and after the assault because two of these letters were written by defendant and thus, by definition, not hearsay as provided in Tex. R. Evid. 801; the third letter was written to defendant from the Amarillo Diocese and was apparently admitted as a business record, and any error in the admission of the third letter was harmless. Salazar v. State, 2006 Tex. App. LEXIS 9839 (Tex. App. Dallas Nov. 14 2006).

888. Given that Tex. Code Crim. Proc. Ann. art. 64.03 did not require an evidentiary hearing to determine whether DNA evidence existed, the court rejected an inmate's claim that the trial court erred in considering certain affidavits claimed to be hearsay. Fontenot v. State, 2006 Tex. App. LEXIS 7469 (Tex. App. Houston 1st Dist. Aug. 24 2006).

889. Court rejected defendant's claim of ineffective assistance of counsel because the record contained no explanation as to why counsel failed to object to hearsay testimony, to request a necessity defense, and object to improper argument; ineffective assistance was not raised in defendant's new trial motion and the alleged errors did not rise to a level such that no reasonable attorney would have made those decisions. Forney v. State, 2006 Tex. App. LEXIS 7482 (Tex. App. Houston 14th Dist. Aug. 24 2006).

890. Trial court did not err by admitting a document created by Pontiac showing the GTO's serial number and a note from the seller to the buyer stating the GTO was no longer for sale because the documents were not admitted for the truth of the matter asserted but to show the ongoing series of communications and faxes between the buyer and the seller concerning the buyer's purchase of the GTO. Marten v. Silva, 200 S.W.3d 297, 2006 Tex. App. LEXIS 7260 (Tex. App. Dallas 2006).

891. Absent compliance with the timeliness Tex. Civ. Prac. & Rem. Code Ann. § 18.001(d), affidavits are hearsay and must qualify under an exception to the hearsay rule to be admissible, pursuant to Tex. R. Evid. 801-804. Nye v. Buntin, 2006 Tex. App. LEXIS 7067 (Tex. App. Austin Aug. 11 2006).

892. Ordinarily, the statements a child made to three individuals would have been inadmissible hearsay at trial, but an outcry statement was an exception to the hearsay rule for the first report of sexual abuse that the victimized child made to an adult, pursuant to Tex. Code Crim. Proc. Ann. art. 38.072, § 2(a). Ozuna v. State, 199 S.W.3d 601, 2006 Tex. App. LEXIS 7134 (Tex. App. Corpus Christi 2006).

893. For purposes of defendant's conviction of the felony offense of assault, family violence, the evidence was insufficient to prove that the trial court made an affirmative finding of family violence pursuant to Tex. Fam. Code Ann. § 71.004 and Tex. Code Crim. Proc. Ann. art. 42.013 or that the assault involved family violence, and the appropriate remedy was to remand the case for defendant to be punished for a Class A misdemeanor; the State was required to prove either that there had been an affirmative finding of family violence for a 1996 conviction or that the prior victim was a member of defendant's family or household, for purposes of Tex. Fam. Code Ann. § 71.005, but the evidence was insufficient to show either; the criminal docket might have suggested that the case involved family violence, but the court was not able to determine who made the assertion, and the court noted that defendant did not object to the admission of this document and the court was free to consider hearsay in its

sufficiency review, and the court rejected the State's argument that defendant's failure to offer evidence that the victim was not a member of his family or household was evidence that she was, given that, under Tex. Const. art. I, § 10 and Tex. Penal Code Ann. § 2.01, a defendant was not to be compelled to give evidence against himself and the State had the burden of proof. Crawford v. State, 2006 Tex. App. LEXIS 6520 (Tex. App. Tyler July 26 2006).

894. By not obtaining a written ruling, an individual did not preserve objections to an affidavit based on hearsay. Clarendon Nat'l Ins. Co. v. Thompson, 199 S.W.3d 482, 2006 Tex. App. LEXIS 6420 (Tex. App. Houston 1st Dist. 2006).

895. Although defendant claimed ineffective assistance via counsel's failure to object to hearsay testimony, the court noted that there might have been strategic reasons for not objecting to the testimony, but the court was not able to speculate in the face of a silent record, and the court thus rejected defendant's claim of ineffective assistance of counsel. Dodson v. State, 2006 Tex. App. LEXIS 5530 (Tex. App. Houston 14th Dist. June 29 2006).

896. Defendant's conviction for assault causing bodily injury to a family member was appropriate because a reasonable person could have concluded that the victim made the statement at issue to the officer upon his arrival at the scene while under the excitement, fear, or pain of the event at the time she made the statement. Smith v. State, 2006 Tex. App. LEXIS 5173 (Tex. App. Fort Worth June 15 2006).

897. Defendant failed to preserve error regarding an expert's testimony pursuant to Tex. R. App. P. 33, given that (1) defendant's objection to any of the expert's testimony was overly broad and untimely, and (2) defendant's objection on appeal differed substantially from that raised at trial, and thus any error was waived; even if the error was properly preserved, the testimony was admissible under Tex. R. Evid. 803(4), and defendant did not object or identify any out-of-court statement that was made for purposes other than medical diagnosis and treatment, and thus the trial court did not err in overruling defendant's hearsay objection. Estes v. State, 2006 Tex. App. LEXIS 5028 (Tex. App. Houston 14th Dist. June 13 2006).

898. Although defendant argued that the trial court erred in allowing hearsay testimony, the issue was inadequately briefed under Tex. R. App. P. 38.1(h) because defendant failed to present the court with a clear or concise argument in support of the contention and failed to present appropriate references to authorities, and thus the court overruled the issue. Alvarez v. State, 2006 Tex. App. LEXIS 4904 (Tex. App. Corpus Christi June 8 2006).

899. Because a party did not raise a hearsay complaint in the trial court, the court did not consider that issue for the first time on appeal. Bradley v. Mid-Century Ins. Co., 2006 Tex. App. LEXIS 4847 (Tex. App. Dallas June 7 2006).

900. Affidavit in support of a new trial motion contained two levels of hearsay, it did not state who heard certain juror statements or how counsel learned of the statements, and no one had personal knowledge of any jury misconduct; furthermore, a juror would have been unable to testify to the content of jury deliberations under Tex. R. Evid. 606, and thus the trial court was not required to hold a hearing on the motion and the trial court did not abuse its discretion when it overruled the motion by operation of law under Tex. R. App. P. 21. Lingo-Perkins v. State, 2006 Tex. App. LEXIS 4877 (Tex. App. Tyler June 7 2006).

901. Although defendant argued that the admission of a hearsay statement denied defendant the right to confrontation, defendant did not object at trial on Confrontation Clause grounds, and because defendant's point on appeal did not comport with the objection made at trial, defendant forfeited the point under Tex. R. App. P. 33. Clay v. State, 2006 Tex. App. LEXIS 3819 (Tex. App. Fort Worth May 4 2006).

902. Counsel was not ineffective for not lodging certain hearsay objections; counsel could have concluded that a statement would have been admitted as an excited utterance or a present sense impression, and counsel could have found that the State could have obtained the same testimony by recalling a witness to clarify the statements, and furthermore, counsel was not ineffective for not objecting to another question, given that the State meant to ask the witness if, at the time of defendant's arrest, the witness identified defendant as the person the witness, not another, saw lighting the fire in question. Ortiz v. State, 2006 Tex. App. LEXIS 3893 (Tex. App. Houston 1st Dist. May 4 2006).

903. Evidence was sufficient to support defendant's conviction of arson of open-space land under Tex. Penal Code Ann. § 28.02; an eyewitness saw defendant squatted down beside a tree with something smoldering, and although defendant claimed that these statements were hearsay, the court noted that hearsay admitted without objection had probative value and defendant's conviction could be based on the testimony of one eyewitness, and there was additional evidence implicating defendant in the crime, including defendant's possession of a lighter. Ortiz v. State, 2006 Tex. App. LEXIS 3893 (Tex. App. Houston 1st Dist. May 4 2006).

904. Even if the court assumed that the trial court erred on hearsay grounds in allowing an officer to testify about the out-of-court statements made by an eyewitness, the record failed to show that the error required reversal, for purposes of Tex. R. App. P. 44; the jury heard the eyewitness testify in person, without objection, to the same matter the officer testified about, and thus the trial court's error, if error, was harmless. Benitez v. State, 2006 Tex. App. LEXIS 3679 (Tex. App. San Antonio May 3 2006).

905. Because defendant failed to object on the basis that testimony violated defendant's constitutional right to confrontation, defendant waived the complaint under Tex. R. App. P. 33.1; defendant's hearsay objection did not preserve error on the confrontation claim. Benitez v. State, 2006 Tex. App. LEXIS 3679 (Tex. App. San Antonio May 3 2006).

906. Court rejected defendant's claim of ineffective assistance of counsel, given that (1) other than generally stating that testimony violated the Confrontation Clause, defendant offered no argument or authority to show it violated the clause, and defendant thus did not show that counsel was ineffective for failing to object to the testimony, (2) even if testimony was hearsay, the record was silent regarding the reasons for counsel's failure to object and defendant failed to overcome the presumption that counsel acted within the range of reasonable behavior, and (3) even if counsel was deficient, defendant failed to show that but for the deficiency, the result of the proceeding would have been different, given that the jury could have rationally inferred that defendant planned to murder the victim. Reyes v. State, 2006 Tex. App. LEXIS 3649 (Tex. App. Houston 14th Dist. Apr. 27 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 4160 (Tex. App. Houston 14th Dist. May 16, 2006).

907. Defendant's claim that the trial court violated defendant's right to confrontation by admitting testimony from a witness regarding a statement by defendant's former girlfriend was not preserved for review, given that defendant did not timely object each time the witness was asked the question; even if an earlier objection could have been construed as timely, defendant still failed to preserve error because the hearsay objection did not comport with the complaint on appeal, and defendant's hearsay objection did not preserve error on defendant's Confrontation Clause complaint. Reyes v. State, 2006 Tex. App. LEXIS 3649 (Tex. App. Houston 14th Dist. Apr. 27 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 4160 (Tex. App. Houston 14th Dist. May 16, 2006).

908. Court overruled defendant's claim of ineffective assistance of counsel based on the fact that counsel did not object to hearsay testimony by a doctor who examined the child victim over two years after the alleged incident; without a record that revealed the reason for the challenged conduct, the court was unable to speculate whether counsel was effective. Cervantes v. State, 2006 Tex. App. LEXIS 3164 (Tex. App. Waco Apr. 19 2006).

909. Court overruled defendant's claim of ineffective assistance of counsel based on the fact that counsel did not object to hearsay testimony by a doctor who examined the child victim more than two years after the alleged incident; without a record that revealed the reason for the challenged conduct, the court was unable to speculate whether counsel was effective. Cervantes v. State, 2006 Tex. App. LEXIS 3164 (Tex. App. Waco Apr. 19 2006).

910. Defendant's prior objections regarding certain testimony were sufficient to preserve error and the trial court did not err in admitting an officer's testimony because it was not hearsay under Tex. R. Evid. 801(d); the officer did not testify to the statements by the child victim's mother and their substance, but merely that her statements were not consistent, and the officer testified regarding the acts between the mother and defendant, but not what was said between them, and even if the trial court erred, it was harmless error for purposes of Tex. R. App. P. 44.2(b), given the overwhelming evidence against defendant for aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021. Rachell v. State, 2006 Tex. App. LEXIS 3264 (Tex. App. Houston 14th Dist. Apr. 13 2006).

911. Defendant's prior objections regarding certain testimony were sufficient to preserve error and the trial court did not err in admitting an officer's testimony because it was not hearsay under Tex. R. Evid. 801(d); the officer did not testify to the statements by the child victim's mother and their substance, but merely that her statements were not consistent, and the officer testified regarding the acts between the mother and defendant, but not what was said between them; even if the trial court erred, it was harmless error for purposes of Tex. R. App. P. 44, given the overwhelming evidence against defendant for aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021. Rachell v. State, 2006 Tex. App. LEXIS 3264 (Tex. App. Houston 14th Dist. Apr. 13 2006).

912. Trial court did not err in overruling defendant's hearsay objection under Tex. R. Evid. 801 and in allowing an officer to testify about the information received from a confidential informant; the nonhearsay aspect was to inform the jury how defendant became a suspect, and the hearsay aspect suggested that defendant possessed cocaine, however, the evidence already showed defendant possessed cocaine and without the officer's testimony, the jury would have been deprived of an understanding of the events leading up to defendant's arrest. Parker v. State, 192 S.W.3d 801, 2006 Tex. App. LEXIS 2750 (Tex. App. Houston 1st Dist. 2006).

913. Even assuming an officer's testimony as to what a ballistics report concluded was subject to Tex. R. Evid. 702, any resulting error was harmless and any error as a result of impermissible hearsay or on the basis of a Confrontation Clause violation was waived and not preserved under Tex. R. App. P. 33.1(a) because these claims were not asserted at trial; assuming the trial court committed error in overruling the objection, the court found no reversible error under Tex. R. App. P. 44.2(b) because the court had a fair assurance that the error did not influence the jury. Rincon v. State, 2006 Tex. App. LEXIS 2758 (Tex. App. San Antonio Apr. 5 2006).

914. Messages retrieved from a murder victim's voicemail were not hearsay under Tex. R. Evid. 801 and were relevant under Tex. R. Evid. 401 because they were not offered to prove the truth of the matters asserted therein and they assisted the jury in establishing the time of the victim's death. White v. State, 2006 Tex. App. LEXIS 2224 (Tex. App. Houston 1st Dist. Mar. 23 2006).

915. Defendant objected at trial to the admission of his wife's statement on the grounds of hearsay, not on an alleged violation of the Confrontation Clause, and thus the matter was not preserved under Tex. R. App. P. 33.1, given that the hearsay objection did not preserve error on the Confrontation Clause claim. Eustis v. State, 2006 Tex. App. LEXIS 1552 (Tex. App. Houston 14th Dist. Feb. 28 2006), opinion withdrawn by, substituted opinion at 2006 Tex. App. LEXIS 3250 (Tex. App. Houston 14th Dist. Apr. 13, 2006).

916. In a trial for murder and attempted murder, there was no error in the admission of documents found in a search of defendant's car, including hotel receipts, a church bulletin, and handwritten notes, because the trial court could have reasonably concluded that the documents were not offered for the truth of the matters asserted but to

show the circumstances surrounding the investigation and leading to defendant's arrest. Yanez v. State, 187 S.W.3d 724, 2006 Tex. App. LEXIS 1289 (Tex. App. Corpus Christi 2006).

917. Trial court admitted the evidence conditionally under Tex. R. Evid. 104(b), and appellant did not renew a hearsay objection under Tex. R. Evid. 801and Tex. R. Evid. 802, and thus this issue was waived under Tex. R. App. P. 33.1(a). Watson v. Michael Haskins Photography, Inc., 2005 Tex. App. LEXIS 9838 (Tex. App. Waco Nov. 23 2005).

918. Defendant's hearsay objection at trial was insufficient to preserve error on the issue under the Confrontation Clause, for purposes of Tex. R. App. P. 33.1. Rios v. State, 263 S.W.3d 1, 2005 Tex. App. LEXIS 9602 (Tex. App. Houston 1st Dist. 2005).

919. In a medical malpractice case, the trial court did not err in excluding, as hearsay under Tex. R. Evid. 801(d), a statement by a witness who would have testified that the doctor was afraid that he had done something wrong; the statement was offered in evidence to prove the truth of the matter asserted, and the present sense impression rule of Tex. R. Evid. 803(1) did not apply because there was no evidence of contemporaneity. Daniels v. Yancey, 175 S.W.3d 889, 2005 Tex. App. LEXIS 8789 (Tex. App. Texarkana 2005).

920. "Crime stoppers" tip that defendant murdered the victim was offered to show how a police officer began to suspect defendant, not prove that defendant was guilty; thus, the officer's testimony was not hearsay, as defined in Tex. R. Evid. 801(d), and the trial court did not err in admitting the testimony. Martinez v. State, 186 S.W.3d 59, 2005 Tex. App. LEXIS 8678 (Tex. App. Houston 1st Dist. 2005).

921. Court was unable to say that the trial court denied a mother the due process right to a fair trial in the termination of her parental rights under Tex. Fam. Code Ann. § 161.001(1); even if the trial court erred in admitting hearsay evidence, there was no demonstration of harmful error. In re C.J.P., 2005 Tex. App. LEXIS 10788 (Tex. App. San Antonio Oct. 12 2005).

922. Trial court did not err in limiting a witness's testimony concerning an alleged incident; it would have been hearsay under Tex. R. Evid. 801(d) because the witness did not see the alleged incident personally, and the trial court could have determination that the hearsay testimony was about an incident not sufficiently similar to the abuse alleged by the victim in this case. Segura v. State, 2005 Tex. App. LEXIS 7783 (Tex. App. Austin Sept. 23 2005).

923. Defendant did not make an offer of proof, under Tex. R. Evid. 103, to demonstrate what testimony would have been if allowed, and thus defendant did not preserve error; however, to the extent the court was able to glean the substance of the evidence that was excluded, the questions called for hearsay responses, as defined in Tex. R. Evid. 801(d), because a witness was asked to testify about a statement made by a third person, and the testimony defendant claimed was erroneously excluded was actually admitted elsewhere and defendant failed to show harm. Jones v. State, 2005 Tex. App. LEXIS 7049 (Tex. App. Dallas Aug. 29 2005).

924. Defendant only objected to certain testimony on "hearsay" grounds, which did not preserve error for review, and because defendant did not request a hearing, defendant waived any complaint regarding the lack of a hearing under Tex. Code Crim. Proc. Ann. art. 38.072(2)(b)(2). Garcia v. State, 228 S.W.3d 703, 2005 Tex. App. LEXIS 7200 (Tex. App. Houston 14th Dist. 2005).

925. Trial court did not abuse its discretion in admitting the victim's videotaped testimony because the State provided defendant with the notice called for in Tex. Code Crim. Proc. Ann. art. 38.072, § 2(b)(1), including a written summary of the child victim's outcry statement to forensic interviewer, the trial court addressed the admissibility of

the outcry statement to the interviewer during defendant's pretrial motion-in-limine hearing, at the hearing the State played the tape for the trial court, and the trial court found that the interviewer was the proper outcry witness. Chavez v. State, 2005 Tex. App. LEXIS 6660 (Tex. App. Corpus Christi Aug. 18 2005).

926. In a case alleging breach of guaranty, an affidavit concerning a statement made by an alleged guarantor was not sufficient summary judgment evidence because it was hearsay. Roye Enters. v. Roper, 2005 Tex. App. LEXIS 5945 (Tex. App. Fort Worth July 28 2005).

927. Trial court acted within its discretion in admitting the wife's statement under the excited utterance exception to the hearsay rule because the officer noticed that the wife was visibly upset, shaking, trembling and crying, and that her cheek was red, and the trial court could have reasonably concluded that the wife was still under the emotion, excitement, fear, or pain of the alleged assault when she told the officer that defendant slapped her. Solorzano v. State, 2005 Tex. App. LEXIS 5694 (Tex. App. Austin July 21 2005).

928. Even if the court assumed that certain testimony was hearsay under Tex. R. Evid. 801(d), not subject to any exception pursuant to Tex. R. Evid. 802, any error in admitting such testimony was not harmful to have warranted reversal pursuant to Tex. R. App. P. 44.1(a); the testimony had no bearing on the jury's finding that neither the general contractor nor the business had a right to control the injury-causing activity and/or the defect-producing work on the premises. Collins v. J.E. Kingham Constr., 2005 Tex. App. LEXIS 5630 (Tex. App. Tyler July 20 2005).

929. In a murder case, videotapes were not hearsay under Tex. R. Evid. 801(d) because they were offered to prove that conversations had taken place, and in addition, the tapes were admissible under Tex. R. Evid. 107 because defendant opened the door by suggesting that the conversations had not occurred. Williams v. State, 2005 Tex. App. LEXIS 5351 (Tex. App. Houston 14th Dist. July 12 2005).

930. Trial court did not err in overruling defendant's objection to testimony of a witness who said what an injured officer said on hearsay grounds under Tex. R. Evid. 801, nor did the trial court err in admitting the statement under Tex. R. Evid. 803(2); the statement was in response to a general question of what happened and the statement was made immediately after the officer was shot, and thus the officer was still dominated by the emotions of the event, for purposes of Rule 803(2), and furthermore, the officer's statement was consistent with defendant's plea of guilty to the charge that defendant shot the officer, in violation of Tex. Penal Code Ann. § 22.02(a), (b)(2). Jones v. State, 2005 Tex. App. LEXIS 5093 (Tex. App. Tyler June 30 2005).

931. Defendant objected at trial to certain testimony solely on hearsay grounds, but on appeal, defendant claimed that the admission of the testimony denied defendant the right to confrontation under the federal and state constitutions; because a hearsay objection was not the same as an objection to a violation of confrontation rights, and because defendant's complaint on appeal did not comport with the objection at trial, any alleged error was forfeited. Cantrell v. State, 2005 Tex. App. LEXIS 5143 (Tex. App. Fort Worth June 30 2005).

932. Trial court did not abuse its discretion in allowing a police officer to testify that police received several anonymous tips identifying defendant as the perpetrator in an armed robbery. The evidence indicated that the State elicited the testimony for the purpose of establishing how defendant was developed as a suspect; the evidence was thus not hearsay under Tex. R. Evid. 801(d). Davis v. State, 169 S.W.3d 673, 2005 Tex. App. LEXIS 4229 (Tex. App. Fort Worth 2005).

933. Trial court erred in allowing a detective to recount to the jury that defendant's statement concerning his role as a mere lookout in a robbery did not match any other statements from any other witnesses. Although the statement was indirect hearsay under Tex. R. Evid. 801(a) and (d), the error did not affect defendant's substantial rights under Tex. R. App. P. 44.2(b), in light of the evidence concerning defendant's role in the robbery. Wilson v.

State, 2005 Tex. App. LEXIS 4234 (Tex. App. Fort Worth June 2 2005).

934. Documents that a successor administrator of a decedent's estate used to establish the loss to the estate concerning the decedent's house, which occurred during the former administrator's administration, were not inadmissible hearsay in a breach of fiduciary duty action against the former administrator because the documents were business records under Tex. R. Evid. 803(6) that related to the mortgage on the house. A number of the documents concerning the house were duplicates of evidence duly admitted in related proceedings, and there was no evidence indicating that the documents were inadmissible hearsay in the related proceedings. Sierad v. Barnett, 164 S.W.3d 471, 2005 Tex. App. LEXIS 4161 (Tex. App. Dallas 2005).

935. Appellate court overruled defendant's argument that the trial court erred in admitting testimony by an undercover detective that drug trafficking had occurred in the apartment prior to the search because the detective responded that he was given the complaint, without stating the contents of the complaint, and when the detective began to testify about the contents of the complaint, the trial court sustained defense counsel's hearsay objection; the question asked the detective to explain what prompted his investigation of the activities in the apartment, not whether drugs were actually being sold from that apartment. Dickson v. State, 2005 Tex. App. LEXIS 4151 (Tex. App. Dallas May 27 2005).

936. Father's statements did not constitute impermissible hearsay because they were not offered to prove the truth of the matter asserted under Tex. R. Evid. 801(d); instead, they were offered to show what precipitated defendant juvenile's assault. In re R.M., 2005 Tex. App. LEXIS 3759 (Tex. App. San Antonio May 18 2005).

937. In defendant's appeal of the revocation of his community supervision for failure to report to the county as ordered, the trial court did not err in overruling his hearsay objection to the community supervision officer's testimony about letters from the post office, which asserted that it had no forwarding address for defendant because the officer's testimony that the letters were sent and returned was not hearsay as defined in Tex. R. Evid. 801(d). The officer's lack of personal knowledge of the statements contained in the letters was irrelevant because the letters were not introduced for the statements contained therein, but to prove the State actually sent the letters attempting to contact defendant. Wheat v. State, 165 S.W.3d 802, 2005 Tex. App. LEXIS 3548 (Tex. App. Texarkana 2005).

938. In a child support modification case, the trial court did not err in admitting copies of bank statements from a father's concessions business bank account where he acknowledged at the modification hearing that he had produced the bank statements to the mother in response to discovery requests. Therefore, the bank statements were not hearsay pursuant to Tex. R. Evid. 801(e)(2)(B) because they were admissible as admissions by a party opponent. In re A.J.J., 2005 Tex. App. LEXIS 3058 (Tex. App. Fort Worth Apr. 21 2005).

939. In a products liability action arising from an auto accident, an unidentified witness' videotaped account of the accident, which included a statement that "the tire blew up," was inadmissible hearsay under Tex. R. Evid. 801(d) because it was offered to support a theory of a defective wheel assembly. Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 2004 Tex. LEXIS 1429, 48 Tex. Sup. Ct. J. 256, CCH Prod. Liab. Rep. P17242 (Tex. 2004).

940. Officer's answer to the State's question seeking to determine whether or not the officer discovered through an investigation if defendant's son witnessed the offense was not inadmissible backdoor hearsay evidence under Tex. R. Evid. 801(d). No hearsay evidence was admitted because what the son had revealed to the officer was never introduced into evidence. Hajjar v. State, 176 S.W.3d 554, 2004 Tex. App. LEXIS 11824 (Tex. App. Houston 1st Dist. 2004).

941. Because there was never a response from a witness to the State's question regarding whether the witness recalled defendant's son acknowledging that the son witnessed the offense, there was no statement of a witness as defined in Tex. R. Evid. 801(a). Hajjar v. State, 176 S.W.3d 554, 2004 Tex. App. LEXIS 11824 (Tex. App. Houston 1st Dist. 2004).

942. Nothing showed that the victim's facial expressions were intended as a substitute for verbal expression, and thus the trial court did not err in overruling defendant's hearsay objection under Tex. R. Evid. 801(d) in connection with defendant's appeal from an indecency with a child conviction. Arizmendis v. State, 2004 Tex. App. LEXIS 10567 (Tex. App. Dallas Nov. 22 2004).

943. Trial court did not err when it allowed a police officer to testify that defendant's girlfriend told the officer that defendant went by a certain name as his "street" name because the girlfiend herself testified that defendant went by that name and, further, the complainant and the other eyewitness both identified defendant and testified they knew him by his street name. Thus, the alleged hearsay was not the only evidence that defendant went by that street name. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22 2004).

944. Trial court did not err in admitting defendant's girlfiend's out-of-court statements where her threat to an eyewitness was offered to show the threat was made, not to prove any "matter asserted" therein. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22 2004).

945. Notwithstanding the hearsay rule, the trial court did not err in admitting defendant's girlfiend's out-of-court statement to a police officer as a prior inconsistent statement where the officer testified that the girlfriend had told him that she had not seen defendant for the few days surrounding the offense but at trial, she testified that he had been with her at the time of the robbery. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22 2004).

946. Refusal to admit an audiotape of defendant's interview by a representative of the police was affirmed because while the audiotape was not hearsay, the trial court could have reasonably determined that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, considerations of undue delay, or needless presentation of cumulative evidence. The audiotape was not offered into evidence to prove the matter asserted but to prove the nature of defendant's speech impediment at the time of his arrest in order to show that he was not exaggerating his speech deformity at trial, defendant testified at trial, and there was nothing to suggest that defendant's speech deformity was greater at trial than it had been at the time of his arrest, nor was any suggestion made that he was faking it. Rachell v. State, 2004 Tex. App. LEXIS 8638 (Tex. App. Eastland Sept. 30 2004).

947. Any error by the trial court in admitting hearsay testimony from a complainant's mother was harmless under Tex. R. Evid. 801(d) and Tex. R. App. P. 44.2(b) because the complained-of testimony was admitted elsewhere without objection. The jury had already heard the complainant testify that defendant had propositioned her on the day in question. Cunningham v. State, 2004 Tex. App. LEXIS 8370 (Tex. App. Texarkana Sept. 17 2004).

948. Trial court committed reversible error in admitting a manufacturer's database of consumer complaints, the testimony of four witnesses, and several narrative reports regarding other incidents of unintended acceleration by the manufacturer's vehicles. The evidence of other incidents was far more than cumulative: it was emphasized at every opportunity; it was used to prove a defect when the actual evidence had been destroyed; and it was calculated to show the manufacturer was malicious rather than mistaken in suggesting the accident was the consumer's fault. Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 2004 Tex. LEXIS 737, 47 Tex. Sup. Ct. J. 955, CCH Prod. Liab. Rep. P17123 (Tex. 2004).

949. Trial court erred in admitting the victim's mother's testimony concerning the grandmother's statement because it was hearsay under Tex. R. Evid. 801(c), which included any matter explicitly asserted and any matter implied by a statement, and the grandmother's statement was offered for the implication that she knew her husband and granddaughter were alone together and that the granddaughter was being sexually assaulted. The error was deemed harmless in light of the fact that there was ample evidence of the step-grandfather's guilt, including the testimony from the victim, the outcry testimony of the victim's mother, and the medical evidence. Mosley v. State, 141 S.W.3d 816, 2004 Tex. App. LEXIS 6923 (Tex. App. Texarkana 2004).

950. In a criminal prosecution for aggravated sexual assault, defendant failed to preserve error in the trial court's decision to sustain the State's hearsay objections when he attempted to testify regarding statements the victim made to him. Defendant did not make a formal offer of proof concerning this proposed evidence, and therefore, he could not claim on appeal that the statements were outside the definition of hearsay. Butler v. State, 2004 Tex. App. LEXIS 6800 (Tex. App. Texarkana July 28 2004).

951. Testimony from defendant's friend and business associate, in defendant's trial for theft, to the effect that defendant had asked the friend to pay the bank money he owed defendant and thereby satisfy defendant's overdraft, was not hearsay because it was not offered to show the truth of anything in defendant's utterance, but to show the directive to pay the bank rather than defendant, and it was not primarily an assertion of a fact, but a directive or request of the friend, offered to show that defendant made an effort to pay the bank and thereby show that he did not intend to deprive the bank of the $ 6,444 outstanding from the overdraft of his account. Kubecka v. State, 2004 Tex. App. LEXIS 6769 (Tex. App. Texarkana July 27 2004).

952. Where defendant argued that the officer's testimony that the officer ran defendant's nickname in the computer led to the inescapable conclusion that the complainant had identified defendant as the assailant and was "backdoor hearsay," the testimony was offered not to "prove the truth of the matter asserted," (here, that defendant committed an aggravated assault), but rather to explain how defendant became a suspect and the testimony was not hearsay. Terry v. State, 2004 Tex. App. LEXIS 5899 (Tex. App. Houston 14th Dist. July 1 2004).

953. Trial court erred in overruling the couple's objections to the travel club's summary judgment evidence and in granting summary judgment, as the sworn affidavit by the club's customer service manager, and a series of documents attached to another affidavit, were not admissible because of his lack of personal knowledge and because the documents constituted hearsay, where the manager stated that he based his assertion of the fact that there had been a refund to the couple upon information that he obtained from a third party. Thus, the club failed to establish that the couple were not entitled to damages as a matter of law. Powell v. Vavro, McDonald, & Assocs., L.L.C., 136 S.W.3d 762, 2004 Tex. App. LEXIS 5260 (Tex. App. Dallas 2004).

954. Pursuant to Tex. R. Evid. 801(d), the documents at issue from police computers were not hearsay because they were not used to establish that a warrant for defendant was active, but merely to show that the steps that the detectives took to investigate defendant were reasonable; thus, the exhibits were offered to show what they said, and not for their truth. Davis v. State, 2004 Tex. App. LEXIS 4748 (Tex. App. Houston 1st Dist. May 27 2004).

955. In a capital murder trial, the admission of a poem written to defendant by defendant's brother who assisted in the crime was hearsay and it was improperly admitted. However, the State provided ample evidence, including eyewitness testimony, establishing that defendant and defendant's brother shot and stabbed the victims; thus, the erroneous admission of the poem did not have a substantial and injurious effect or influence in determining the jury's verdict and the error was harmless. Windland v. State, 2004 Tex. App. LEXIS 4709 (Tex. App. Dallas May 26 2004).

956. Trial court did not abuse its discretion in overruling defendant's hearsay objection because the tape containing hearsay statements concerning defendant's alleged involvement in the murder was not offered for the truth of the matter asserted, but to show why the investigation focused on defendant. Clark v. State, 2004 Tex. App. LEXIS 4488 (Tex. App. Tyler May 5 2004).

957. Trial court did not abuse its discretion in overruling defendant's hearsay objection because the tape containing hearsay statements concerning defendant's alleged involvement in the murder was not offered for the truth of the matter asserted, but to show why the investigation focused on defendant. Clark v. State, 2004 Tex. App. LEXIS 4488 (Tex. App. Tyler May 5 2004).

958. Although defendant asserted that the trial court abused its discretion in excluding proffered evidence, where the mother's testimony that her brother tried to sexually assault their sister was based on statements her own mother had made to her, because the proffered statements were hearsay, the trial court did not err in excluding them. Martinez v. State, 2004 Tex. App. LEXIS 3716 (Tex. App. Dallas Apr. 28 2004).

959. Even though a trial court failed to conduct a reliability hearing on a grandmother's testimony regarding a minor victim's outcry statement under Tex. Code Crim. Proc. Ann. art. 38.072, the admission of the evidence as an exception to hearsay was harmless because the statement that defendant had "done stuff" was so vague that it failed to corroborate the allegations of molestation; moreover, the trial court was also not required to conduct a reliability hearing on a police officer before allowing testimony regarding a conversation with the victim about defendant's alleged foot fetish where the officer was called as an expert regarding sexual predators, erotica, and deviant behavior. Leachman v. State, 2004 Tex. App. LEXIS 3283 (Tex. App. Houston 1st Dist. Apr. 8 2004).

960. Although defendant contended that the trial court abused its discretion in granting the state's motion in limine excluding his mother's testimony about threats that defendant allegedly received on the phone from the victim, the state took the witness on voir dire and established that she did not hear any threats on the phone herself, but rather was informed of these threats by defendant, her son, such that any further testimony by the mother about the phone calls would have been based on inadmissible hearsay under Tex. R. Evid. 801(d) and 802; it was proper for the trial court to grant the state's motion in limine and exclude the mother's testimony about the alleged threats. Burgett v. State, 2003 Tex. App. LEXIS 10212 (Tex. App. Fort Worth Dec. 4 2003).

961. Evidence of a police transmission describing a robbery suspect was inadmissible in an aggravated robbery case because it constituted hearsay since the relevancy turned on the truthfulness or accuracy of the contents of the statement; defendant failed to preserve his argument that the transmission was admissible under Tex. R. Evid. 801(e)(1)(C) because it was not raised before the trial court. Johnson v. State, 2003 Tex. App. LEXIS 10949 (Tex. App. Houston 1st Dist. May 13 2003).

962. In a products-liability case that involved a vehicular accident, the appellate court was not persuaded that it was an error to admit the videotaped testimony of a witness to the accident that stated a tire blew up given that the testimony was not offered to prove the truth of the matter asserted: that the tire blew up. Volkswagen of Am., Inc. v. Ramirez, 79 S.W.3d 113, 2002 Tex. App. LEXIS 3358 (Tex. App. Corpus Christi 2002), *rev'd on other grounds*, 159 S.W.3d 897, 2004 Tex. LEXIS 1429 (Tex. 2004).

963. Several factors relevant to determine whether hearsay statements by a five-year-old child witness in a child sexual abuse case were reliable were the spontaneity and consistent repetition of the statement, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and the lack of a motive to fabricate; hearsay is an out-of-court assertion offered in evidence to prove the truth of the matter asserted and as a general rule is inadmissible under Tex. R. Evid. 801(d) and Tex. R. Evid. 802 because an oath, personal appearance at trial and cross-examination are conventional indicia of reliability of testimony. Smith v. State, 88 S.W.3d 652, 2002 Tex.

App. LEXIS 2473 (Tex. App. Tyler 2002), *cert. denied*, 537 U.S. 1206, 123 S. Ct. 1283, 154 L. Ed. 2d 1051, 2003 U.S. LEXIS 1631 (2003).

964. Appellant did not properly preserve a bolstering issue, but did properly preserve the issues of a violation of Tex. R. Evid. 701 and hearsay for review, but the court did not reach the issues because evidence that appellant was in the area on the night of the murders came in through many witnesses without objection. Boyd v. State, 2001 Tex. App. LEXIS 8661 (Tex. App. Tyler Aug. 22 2001).

965. Hearsay cannot be made the basis of summary judgment. Koehler v. Sears, Roebuck & Co., 2001 Tex. App. LEXIS 3701 (Tex. App. Dallas June 6 2001).

966. Detective's testimony was not hearsay because his testimony concerning the police department's prior investigations for the "same type of offense" was not offered to establish that defendant had been investigated for or committed other instances of indecent exposure. Rather, the testimony was offered to explain the course of his investigation and how defendant came to be a suspect, which was an acceptable, non-hearsay purpose for admitting an out-of-court statement. Denmon v. State, 2014 Tex. App. LEXIS 2180, 2014 WL 857671 (Tex. App. Austin Feb. 27 2014).

967. Although a murder victim's written statement that was made by four months before her death and that described a physical altercation with defendant was erroneously admitted because it was objectionable hearsay, the error was harmless because there was substantial evidence of defendant's guilt, exclusive of the written statement, because reference to the statement was relatively limited, and because many of the facts mentioned in the statement were properly in the record through other testimony. Barrett v. State, 2014 Tex. App. LEXIS 2251, 2014 WL 792123 (Tex. App. Texarkana Feb. 27 2014).

Evidence : Hearsay : Rule Components : Declarants

968. Trial court did not err during a sexually violent predator commitment proceeding in admitting testimony from the offender and the State's expert regarding the details of the offender's prior murder conviction because the offender personally testified as to the details of the conviction and the actions he took after the murder, which was not hearsay, and the State's expert testified to many of the same details that the offender related to the jury. Moreover, the trial court provided the jury with a limiting instruction, which it was presumed the jury followed. In re Martinez, 2013 Tex. App. LEXIS 13512, 2013 WL 5874583 (Tex. App. Beaumont Oct. 31 2013).

969. Trial court did not err by permitting the expert to testify about the results of the computer analysis of the car fingerprint because the information was not hearsay, as the computer was not a declarant. Davis v. State, 2013 Tex. App. LEXIS 7868 (Tex. App. Dallas June 26 2013).

970. Detective's statement "I learned where the vehicle wrecked" did not constitute hearsay because the statement was not made by one "other than the declarant" as required under Tex. R. Evid. 801(d). Lightner v. State, 2013 Tex. App. LEXIS 5365 (Tex. App. Dallas Apr. 30 2013).

971. At defendant's trial for theft of property, the trial court was permitted to admit a computer generated printout from a store register into evidence; because no person added anything to the record, there was no declarant and the computer printout was not hearsay for purposes of Tex. R. Evid. 801(d). Therefore, the State was not required to lay a predicate to admit the document as a business record under Tex. R. Evid. 803(6). Haskins v. State, 2010 Tex. App. LEXIS 4769, 2010 WL 2524797 (Tex. App. Dallas June 24 2010).

972. Trial court did not err in excluding a witness's testimony because the witness was not the declarant; defendant failed to establish the proper predicate for impeachment and attempted to characterize the testimony as evidence of identification for purposes of Tex. R. Evid. 801, but the court was not persuaded. Chapman v. State, 2007 Tex. App. LEXIS 3184 (Tex. App. Waco Apr. 25 2007).

Evidence : Hearsay : Rule Components : Nonverbal Conduct

973. Where defendant was convicted of the aggravated sexual assault of his thirteen-year-old niece, the trial court erred by admitting the therapist's testimony that the child told her that family members were pressuring her and her mother to drop the charges; the State offered the therapist's statements to show how the child reacted to perceived pressures; the same testimony was admitted through other witnesses without objection. Arguelles v. State, 2007 Tex. App. LEXIS 602 (Tex. App. Dallas Jan. 29 2007).

974. In defendant's trial for aggravated sexual assault of a child, although defendant claimed that witnesses' testimony violated the hearsay prohibition under Tex. R. Evid. 801 by referring to the child's nonverbal conduct that was intended as a substitute for verbal expression, defendant did not hypothesize, nor was the court able to imagine, what verbal expression the child's glum affect and shift in demeanor were intended as a substitute for. Gauna v. State, 2006 Tex. App. LEXIS 11128 (Tex. App. Austin Dec. 29 2006).

Evidence : Hearsay : Rule Components : Statements

975. At defendant's trial for multiple sexual offenses involving child victims, the trial court did not err in overruling defense counsel's objection to the testimony of an alleged improper outcry witness because there was no hearsay statement as the witness did not testify about any statements made by the children. Perez v. State, 2014 Tex. App. LEXIS 640, 2014 WL 1260989 (Tex. App. Corpus Christi Jan. 23 2014).

976. At defendant's trial for multiple sexual offenses involving child victims, the trial court did not err in overruling defense counsel's objection to the testimony of an alleged improper outcry witness because there was no hearsay statement as the witness did not testify about any statements made by the children. Perez v. State, 2014 Tex. App. LEXIS 640, 2014 WL 1260989 (Tex. App. Corpus Christi Jan. 23 2014).

977. Because a silent videotape of an informant's drug buy from defendant was not intended as a substitute for verbal expression, Tex. R. Evid. 801(a)(2), it was not a statement and was not testimonial; therefore, admission of the tape did not violate the Confrontation Clause, U.S. Const. amend. IV. Watson v. State, 421 S.W.3d 186, 2013 Tex. App. LEXIS 14603, 2013 WL 6244135 (Tex. App. San Antonio Dec. 4 2013).

978. On appeal of defendant's conviction for sexual assault, he failed to prove his trial counsel was ineffective for failing to object to inadmissible hearsay testimony during trial. Testimony from witnesses about the alleged rape and the fact that victim had been diagnosed with a behavior disorder were offered to illustrate the victim's mental capacity, not to prove the truth of the matter asserted; neither witness mentioned an out-of-court statement. Dunn v. State, 2013 Tex. App. LEXIS 8711 (Tex. App. Houston 14th Dist. July 16 2013).

979. Detective's statement "I learned where the vehicle wrecked" did not constitute hearsay because the statement was not made by one "other than the declarant" as required under Tex. R. Evid. 801(d). Lightner v. State, 2013 Tex. App. LEXIS 5365 (Tex. App. Dallas Apr. 30 2013).

980. At defendant's trial for retaliation, the trial court did not err in excluding the testimony of his step-daughter because it contained defendant's hearsay statements under Tex. R. Evid. 801(d) explaining why did not appear in court. The State's hearsay objection was properly sustained. Austin v. State, 2013 Tex. App. LEXIS 1234, 2013 WL

490000 (Tex. App. Waco Feb. 7 2013).

981. Under Tex. R. Evid. 801(d) and hearsay purposes, a photograph was not an out-of-court statement. Herrera v. State, 367 S.W.3d 762, 2012 Tex. App. LEXIS 2940, 2012 WL 1297553 (Tex. App. Houston 14th Dist. Apr. 17 2012).

982. Lender's alleged statements that full payment of a note would result in full release of the lien were not hearsay because they were not offered for the truth of the matter asserted. Comiskey v. FH Partners, LLC, 373 S.W.3d 620, 2012 Tex. App. LEXIS 2876 (Tex. App. Houston 14th Dist. Apr. 12 2012).

983. There was no showing that appellant's out-of-court statements were necessary to correct a false or incorrect impression, plus appellant did not testify, and if the trial court had admitted his statements, there would have been no chance to cross-examine appellant on his statements; thus, to admit the statements would have permitted any defendant to place his version of the facts before the jury through hearsay statements without being subject to cross-examination, and the trial court did not abuse its discretion in excluding appellant's self-serving statements. Greene v. State, 2011 Tex. App. LEXIS 2792, 2011 WL 1403167 (Tex. App. Amarillo Apr. 13 2011).

984. Trial court did not err by admitting investigator's statements into evidence during sentencing because none of the statements constituted hearsay: (1) in the first, the investigator was not offering his statement of the official prison data compilation of 78 serious staff assaults for the truth of the matter asserted; (2) in the second, the investigator did not disclose any out-of-court statement when he testified concerning why assaults on inmates were not reported; and (3) in the third, there was no statement, as the investigator was merely recounting an event of an inmate who was beaten and starved to death. Coble v. State, 330 S.W.3d 253, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. 2010).

985. In an equipment supplier's breach of contract action against an electrical subcontractor, the court did not err in admitting testimony from the supplier's vice president about a change-order request and an agreed modification to a training requirement in the contract; the testimony was not hearsay under Tex. R. Evid. 801(d) because it contained no out-of-court statements. Austin Traffic Signal Constr. Co., L.P. v. Transdyn Controls, Inc., 2010 Tex. App. LEXIS 7059, 2010 WL 3370292 (Tex. App. Austin Aug. 24 2010).

986. Defendant's conviction for engaging in organized criminal activity, with the two predicate offenses being aggravated sexual assault of a child, was improper because the trial court clearly abused its discretion in overruling defendant's repeated hearsay objections, Tex. R. Evid. 801(e)(1)(B), (d). In so doing, those witnesses were permitted to repeat the children's allegations as facts, fill the gap left by the failure of the children's outcry witness, and describe the sordid details of the alleged child sex ring as if they were personally aware of it. Kelly v. State, 321 S.W.3d 583, 2010 Tex. App. LEXIS 4506 (Tex. App. Houston 14th Dist. June 17 2010).

987. In defendant's trial for possession of four grams or more but less than 200 grams of methamphetamine in violation of Tex. Health & Safety Code § 481.115, defendant's rights under the Confrontation Clause were not violated by the admission of a chemist's testimony and related exhibits related to the laboratory results obtained by a nontestifying chemist; Crawford did not apply to the baggies of controlled substances admitted as exhibits because they were not "statements" under Tex. R. Evid. 801(a). Camacho v. State, 2009 Tex. App. LEXIS 5975, 2009 WL 2356885 (Tex. App. Fort Worth July 30 2009).

988. It was not clear that an officer was testifying about an out-of-court statement made by an informant at one point and thus the trial court did not abuse its discretion in overruling the objection. Patterson v. State, 2009 Tex. App. LEXIS 3196 (Tex. App. Texarkana May 12 2009).

989. Witness's statement to defendant and his wife was a crude exclamation or insult that did not assert any matter and thus it was not hearsay under Tex. R. Evid. 801(d) and the trial court erred by excluding it as such; the trial court did allow testimony that the witness slammed the door in the faces of defendant and his wife and thus the court was unable to say that the trial court's erroneous exclusion of the expletive effectively prevented defendant from presenting his defense. Svitak v. State, 2009 Tex. App. LEXIS 796, 2009 WL 279462 (Tex. App. Fort Worth Feb. 5 2009).

990. During the punishment phase of defendant's trial for aggravated sexual assault of a child, defendant stipulated to eight prior convictions, which included a felony conviction for endangering a child, and the State did not err in calling a police officer to testify regarding the circumstances of that offense, which initially was investigated and charged as an aggravated sexual assault of a child, where the officer's statement was not hearsay because he identified the charge that he personally filed and the persons that he arranged for the prior child victim to meet; although the officer's testimony about the prior child victim's precise age was based on hearsay and thus erroneously admitted, there was a fair assurance that the admission of the single piece of hearsay testimony was not harmful error because defendant stipulated to his conviction for endangering a child, and evidence of that prior conviction was properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07, and as an exception under Tex. R. Evid. 803 to the hearsay rule, and because the record as a whole included: (1) defendant's guilty plea to endangering a child; (2) the detailed evidence of the complainant's sexual abuse itself; (3) child pornography found on defendant's family computer; (4) the fact that the State did not emphasize the erroneously admitted evidence and concentrated on the "heinousness" of the offense; (5) defendant's cunning and violent character; (6) the effect of the abuse on the complainant for the rest of her life; and (7) defendant's eight prior convictions and numerous disciplinary infractions. Hunt v. State, 2008 Tex. App. LEXIS 2273 (Tex. App. Houston 14th Dist. Apr. 1 2008).

991. Trial court did not err in excluding a witness's testimony because the witness was not the declarant; defendant failed to establish the proper predicate for impeachment and attempted to characterize the testimony as evidence of identification for purposes of Tex. R. Evid. 801, but the court was not persuaded. Chapman v. State, 2007 Tex. App. LEXIS 3184 (Tex. App. Waco Apr. 25 2007).

992. In a trial for aggravated assault with a deadly weapon under, the trial court did not err by excluding the hearsay recitals in an arrest warrant affidavit and complaint indicating the complainant had previously committed an assault on the defendant; defendant was not prevented from confronting the complainant; he was permitted to cross-examine the complainant concerning his previous conviction for aggravated assault. Bradshaw v. State, 2006 Tex. App. LEXIS 5891 (Tex. App. Houston 1st Dist. July 6 2006).

993. Witness told the jury that a man told the witness that appellant was trying to get the man to say that he committed the crime, and this was clearly hearsay; the witness did not relay that part of the man's admission that was inculpatory of the man, that he killed one victim, and thus the trial court abused its discretion in admitting the statement pursuant to Tex. R. Evid. 803(24). Boyd v. State, 2001 Tex. App. LEXIS 8661 (Tex. App. Tyler Aug. 22 2001).

994. In considering a Confrontation Clause analysis, error in admitting a hearsay statement under Tex. R. Evid. 803(24) was harmless under Tex. R. App. P. 44.2(a); the witness did not say that a man claimed that appellant killed two victims, the witness's testimony about the man's statement was not emphasized, and in light of other testimony and evidence of appellant's guilt of capital murder, the error was harmless. Boyd v. State, 2001 Tex. App. LEXIS 8661 (Tex. App. Tyler Aug. 22 2001).

Evidence : Hearsay : Rule Components : Truth of Matter Asserted

995. In defendant's trial for aggravated assault of an officer, his hearsay objection to statements made by a store clerk to a dispatcher and then by the dispatcher to the officer regarding the presence of a robbery suspect at the

store was rejected, because the statements were offered not to prove the truth of the matter, that defendant had committed a robbery, but to explain why the officer stopped defendant and the circumstances of the assault. Kindred v. State, 2014 Tex. App. LEXIS 8107, 2014 WL 3732941 (Tex. App. Austin July 25 2014).

996. Trial court erred when it admitted testimony about the removal of a blanket over defendant's hearsay objection, as the statement was clearly offered to prove the truth of the matter asserted: that defendant had disposed of the blanket. Kinsey v. State, 2014 Tex. App. LEXIS 5551 (Tex. App. Eastland May 22 2014).

997. Court properly admitted testimony about information relayed to a police officer by a 911 dispatcher because the officer's testimony was not offered to prove that a bus driver had been attacked. Rather, the statement was admitted to explain how the officer came to investigate the offense, which was an acceptable, non-hearsay purpose for admitting an out-of-court statement. Walls v. State, 2014 Tex. App. LEXIS 3159, 2014 WL 1208017 (Tex. App. Austin Mar. 20 2014).

998. Defense counsel was not ineffective for failing to object to testimony from a detective and a bank employee about the victim's identification of the check as forged because the testimony was not hearsay, as it was offered to explain the bank's procedures and how defendant became a suspect. Pearce v. State, 2014 Tex. App. LEXIS 549, 2014 WL 942687 (Tex. App. Waco Jan. 16 2014).

999. Trial court could have found that the father's statement was not offered for its truth, for hearsay purposes, as the testimony followed a narrow line of inquiry showing how the alleged abuse came to be investigated years after it occurred, and the prosecutor argued the testimony was offered to show the father's reaction to the complainant's statement. Manderscheid v. State, 2013 Tex. App. LEXIS 14768, 2013 WL 6405470 (Tex. App. Houston 14th Dist. Dec. 5 2013).

1000. Statements by three witnesses that defendant was outside yelling something about killing a dog were not hearsay because they were offered to show what was said to show how one witness was awakened in the middle of the night and why he was looking outside rather than for the truth of the matter stated therein. Alcala v. State, 476 S.W.3d 1, 2013 Tex. App. LEXIS 13924, 2013 WL 6053837 (Tex. App. Corpus Christi Nov. 14 2013).

1001. Court did not abuse its discretion in overruling defendant's hearsay objection, because the detective's statements were not offered to prove the truth of the matter asserted, but simply as statements made during defendant's interviews in an effort to ascertain the true cause of the child's injuries. Fincher v. State, 2013 Tex. App. LEXIS 11991, 2013 WL 5429928 (Tex. App. San Antonio Sept. 25 2013).

1002. Defendant's conviction for driving while intoxicated was proper because the trial court did not abuse its discretion in admitting an audio recording of the motorist's 911 call. It was not outside the zone of reasonable disagreement for the district court to conclude that the relevant statements on the call were not inadmissible as hearsay, either because the statements on the call were not offered to prove the truth of the matter asserted, or because the statements fell under one of the recognized exceptions to the hearsay rule. Condarco v. State, 2013 Tex. App. LEXIS 10741 (Tex. App. Austin Aug. 27 2013).

1003. Trial court did not err by allowing into evidence a statement by the first accomplice in which the second accomplice told the first accomplice to pick up the gun and hide it because it was not hearsay, as it explained why the first accomplice arrived at defendant's house and took possession of the weapon used in the shooting. Robertson v. State, 2013 Tex. App. LEXIS 9554 (Tex. App. Tyler July 31 2013).

1004. Trial court did not err by allowing into evidence a statement by an accomplice that he found the gun in defendant's bedroom because the statement was not hearsay, nor was defendant's statement to a detective that he possessed the gun for approximately 10 minutes and accidently shot himself while trying to dislodge a bullet. Robertson v. State, 2013 Tex. App. LEXIS 9554 (Tex. App. Tyler July 31 2013).

1005. On appeal of defendant's conviction for sexual assault, he failed to prove his trial counsel was ineffective for failing to object to inadmissible hearsay testimony during trial. Testimony from witnesses about the alleged rape and the fact that victim had been diagnosed with a behavior disorder were offered to illustrate the victim's mental capacity, not to prove the truth of the matter asserted; neither witness mentioned an out-of-court statement. Dunn v. State, 2013 Tex. App. LEXIS 8711 (Tex. App. Houston 14th Dist. July 16 2013).

1006. Newspaper articles that are offered to prove the truth of what the article is reporting are inadmissible hearsay. Tex. R. Evid. 801(d). Walker v. Hitchcock Indep. Sch. Dist., 2013 Tex. App. LEXIS 8746 (Tex. App. Houston 1st Dist. July 16 2013).

1007. Documents provided to insurers regarding asbestos claims, offered to show that the insurers had notice of the claims, were not hearsay because they were not offered for the truth of the matter asserted Certain Underwriters at Lloyd's v. Chi. Bridge & Iron Co., 406 S.W.3d 326, 2013 Tex. App. LEXIS 7856, 2013 WL 3270615 (Tex. App. Beaumont June 27 2013).

1008. Trial court could have reasonably found that the sergeant's statement that a confidential informant told him that the persons of interest were armed had a purpose other than the truth of the matter stated because it explained the aggressive behavior the officers exhibited at the scene. Even if the statement was hearsay, it was cumulative of other evidence that defendant and his accomplices had firearms with them in the hotel room. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

1009. Trial court did not abuse its discretion in prohibiting a witness from testifying about what was said during her phone conversations with appellant and another person, as what was said constituted hearsay under Tex. R. Evid. 801(d) and appellant did not offer an explanation that the statements qualified as an exception to the hearsay rule. Carrion v. State, 2013 Tex. App. LEXIS 5673 (Tex. App. Eastland May 9 2013).

1010. Because the State's Exhibits 55-60 contained impermissible hearsay, the trial court abused its discretion by overruling defendant's objection to the exhibits; however, the error was harmless, Tex. R. App. P. 44.2(b), because the record showed there was substantial evidence to prove defendant matched the description of the robbery suspect independent of the hearsay evidence. Davis v. State, 2013 Tex. App. LEXIS 5357 (Tex. App. Dallas Apr. 30 2013).

1011. Detective's testimony that a black male had robbed the complainants with a black and silver handgun and that fingerprints were taken from the scene was not inadmissible hearsay because it was not offered for the truth of the matter asserted but rather was offered to explain how the detective began his investigation and why defendant became a suspect. Lightner v. State, 2013 Tex. App. LEXIS 5365 (Tex. App. Dallas Apr. 30 2013).

1012. Trial court did not abuse its discretion by permitting the officer to testify that the truck driver did not know defendant's last name because the testimony was not offered for the truth of the matter asserted but only to show why the officer was suspicious and asked for consent to search the vehicle. Dominguez v. State, 474 S.W.3d 688, 2013 Tex. App. LEXIS 4875, 2013 WL 1748810 (Tex. App. Eastland Apr. 18 2013).

1013. Trial court did not err by excluding a defense witness's testimony as it related to defendant's neighbor's involvement both with illegal drugs and narcotics agents because it was properly excluded as hearsay, as defendant offered the neighbor's statement to prove the truth of the matter asserted, namely that the neighbor gave defendant to the narcotics agents. Ivie v. State, 407 S.W.3d 305, 2013 Tex. App. LEXIS 4876 (Tex. App. Eastland Apr. 18 2013).

1014. In a divorce, a wife's testimony from a prescription information sheet regarding the husband's prescriptions was inadmissible hearsay because (1) the wife did not prepare the sheet, and (2) the information in the sheet was offered for the truth of the matter asserted, which was the reasons one would take the medication. Howell v. Howell, 2013 Tex. App. LEXIS 1991, 2013 WL 784542 (Tex. App. Corpus Christi Feb. 28 2013).

1015. Defendant failed to prove that counsel was deficient for failing to object to a detective's hearsay statements because the detective did not testify as an outcry witness but rather detailed her investigation of the sexual assault and provided an explanation of the events and circumstances leading to defendant's arrest; because the statements were not offered to prove the truth of the matter asserted, they were not hearsay. Aranda v. State, 2013 Tex. App. LEXIS 1882 (Tex. App. Austin Feb. 28 2013).

1016. Defendant's convictions for aggravated kidnapping and aggravated sexual assault of a child were proper because statements were admissible as non-hearsay, Tex. R. Evid. 801(d). The victim's indication that she was okay was admissible pursuant to Tex. R. Evid. 803(3) as it was a statement of her then existing mental, emotional, or physical condition; the sheriff's indication that everything was okay constituted a present sense impression and was admissible under Rule 803(1); the victim's statement that "he is trying to get in the bathroom" could have been admitted either as a present sense impression under Rule 803(1) or an excited utterance under Rule 803(2); the trial court did not abuse it discretion in allowing the officer to testify that he heard a male voice saying, "Open the door" because that statement could have been admitted either as an admission by a party opponent or as a statement merely showing what was said rather than proving the truth of the matter asserted, Tex. R. Evid. 801(e)(2). Billings v. State, 399 S.W.3d 581, 2013 Tex. App. LEXIS 1423, 2013 WL 607699 (Tex. App. Eastland Feb. 14 2013).

1017. Financial history should have been excluded from evidence in light of the company's hearsay objection; no testimony was offered, either live or by affidavit, that could have proved the "financial history" was not hearsay, was a business record, or otherwise satisfied an exception to the hearsay rule. Shamrock Foods Co. v. Munn & Assocs., Ltd., 392 S.W.3d 839, 2013 Tex. App. LEXIS 244, 2013 WL 150810 (Tex. App. Texarkana Jan. 15 2013).

1018. Even though the trial court erred by excluding from evidence videos of interviews with children using improper interview techniques on the ground that they were inadmissible hearsay, the error was harmless because defendant did not identify for the trial court areas on the recordings that were of particular importance or relevance and his expert witness was able to testify without reservation about what he observed on the videos and the jury saw examples of many of the techniques he said were improper. Pittman v. State, 2012 Tex. App. LEXIS 9057 (Tex. App. Tyler Oct. 31 2012).

1019. Court did not abuse its discretion in overruling hearsay objections to the officer's statements made during defendant's videotaped interview, because the officer's statements during the interview were not offered to prove the truth of the matter asserted, and were relevant to show what was said to bring about certain responses from defendant that led officers to believe that defendant had not been truthful in his prior statements to police; the officer's statements were admitted as part of defendant's recorded interview with police and served to establish the context of the statement defendant made to police. Humphrey v. State, 2012 Tex. App. LEXIS 8315, 2012 WL 4739925 (Tex. App. Houston 1st Dist. Oct. 4 2012).

1020. Trial court did not abuse its discretion by sustaining the State's hearsay objection to a tape recording between defendant and another person because that person did not testify and defendant announced his intent in introducing the recording was to prove that he did not commit the crime of burglary of a habitation. Pardee v. State, 2012 Tex. App. LEXIS 6823, 2012 WL 3516485 (Tex. App. Texarkana Aug. 16 2012).

1021. Sergeant's testimony was not hearsay under Tex. R. Evid. 801, as the statement was not offered for the truth because what the sergeant was told was not true; even if the testimony was hearsay, it was harmless under Tex. R. App. P. 44.2(b), given that the same testimony was elicited in other testimony to which there was no objection, and appellant's substantial rights were not affected. Dempsey v. State, 2012 Tex. App. LEXIS 6871, 2012 WL 3525653 (Tex. App. Corpus Christi Aug. 16 2012).

1022. Trial court did not err by excluding evidence of the father's psychological evaluation, which included an evaluation of his predilection to pedophilia, because since the father's stated reason to admit the evidence could be accomplished by permitting the mother to testify concerning actions she took to investigate allegations of child abuse against the father in 2003, the trial court was within its discretion to find that there was no other purpose for which the evaluation could have been offered than for the truth of its contents. In addition, the trial court was within its discretion to decide that the evaluation itself would have been cumulative of the mother's testimony and that admitting it would have needlessly confused the jury. In the Interest of W.B.W., 2012 Tex. App. LEXIS 5562, 2012 WL 2856067 (Tex. App. Eastland July 12 2012).

1023. Lender's alleged statements that full payment of a note would result in full release of the lien were not hearsay because they were not offered for the truth of the matter asserted. Comiskey v. FH Partners, LLC, 373 S.W.3d 620, 2012 Tex. App. LEXIS 2876 (Tex. App. Houston 14th Dist. Apr. 12 2012).

1024. In a trial for abuse of official capacity by a deputy sheriff, testimony that a judge provided a phone number that defendant gave to a State witness was not hearsay under Tex. R. Evid. 801(d) because the testifying witness did not give the judge's statement or offer the contents of the statement--the phone number and the name of the person to whom it belonged--for the truth of the matter asserted. Hernandez v. State, 2012 Tex. App. LEXIS 2894, 2012 WL 1255202 (Tex. App. Corpus Christi Apr. 12 2012).

1025. Witness had no personal knowledge about the value of wheels and repeated only what an automobile dealer told him, such that the witness's testimony was hearsay under Tex. R. Evid. 801(d), and this was inadmissible unless an exception to the rule applied. Calixto v. State, 2012 Tex. App. LEXIS 2643, 2012 WL 1138726 (Tex. App. Dallas Apr. 4 2012).

1026. Appellant claimed the purpose for which the State offered the evidence was not a purpose discussed in the rules; however, the exceptions to the hearsay rules are not dependent on the reason why a party wants to offer the hearsay, and the only relevant inquiry concerning the purpose of hearsay is whether the out-of-court statement is being offered for the truth of the matter asserted. Why the proponent wishes to admit the evidence, beyond offering it for the truth of the matter asserted, is immaterial, and how the hearsay evidence supports the proponent's trial theory or fits into the proponent's trial strategy does not affect its admissibility under an exception under the rules. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

1027. Confrontation Clause did not require the admission of multi-level hearsay to impeach the complainant and her mother in defendant's trial for continuous sexual abuse of a child. The unnamed declarant's statement that someone made child-molestation allegations against defendant was inadmissible hearsay under Tex. R. Evid. 801, 802, because it was an out-of-court-statement offered for the truth of the matter asserted -- to show that someone made child-abuse allegations against defendant to child protective services. Shafer v. State, 2012 Tex. App. LEXIS

1902, 2012 WL 745422 (Tex. App. Fort Worth Mar. 8 2012).

1028. In defendant's criminal prosecution for bribery, the trial court did not abuse its discretion by admitting a letter into evidence because the letter was offered for a nonhearsay purpose to show that defendant knew the author and not to prove the truth of the matter asserted under Tex. R. Evid. 801(d). Watts v. State, 2012 Tex. App. LEXIS 1044, 2012 WL 403859 (Tex. App. Beaumont Feb. 8 2012).

1029. Even had appellant limited his request to the parts of his statements he claimed the trial court should have admitted, self-serving declarations were generally considered to be inadmissible hearsay when offered into evidence by a defendant, and parts of the recorded statements appellant argued the trial court did not admit were properly excluded as hearsay, as each part appellant claimed was improperly excluded under Tex. R. Evid. 803(3) was a statement of memory or belief offered to prove the fact remembered or believed. Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

1030. Whether a statement that defendant's daughter testified that her aunt made regarding her lack of surprise as to defendant's conduct constituted hearsay was within the zone of reasonable disagreement, and therefore, a trial court did not abuse its discretion in admitting the testimony during defendant's trial for sexual assault of a child and for indecency with a child by exposure. The testimony of defendant's daughter tended to show that the State was indeed seeking to show her state of mind and why she failed to report the incident earlier, and the prosecution neither pressed the issue nor mentioned the testimony in its closing arguments. Grant v. State, 2011 Tex. App. LEXIS 6606, 2011 WL 3652548 (Tex. App. Corpus Christi Aug. 18 2011).

1031. Statement was not hearsay because it was not offered to show a witness was telling the truth about where suspects had gone, but only to show the officers' actions and why they went to where appellant and others were apprehended; any error was harmless under Tex. R. App. P. 44.2(b) because the challenged testimony was cumulative of other testimony admitted without objection. Briscoe v. State, 2011 Tex. App. LEXIS 4632, 2011 WL 2420367 (Tex. App. Dallas June 17 2011).

1032. Officer's statement was not hearsay because he merely recounted the particulars of his investigation and how appellant became a suspect, and any error was harmless because the testimony in question was cumulative of other testimony. Briscoe v. State, 2011 Tex. App. LEXIS 4632, 2011 WL 2420367 (Tex. App. Dallas June 17 2011).

1033. Trial court did not abuse its discretion by overruling appellant's hearsay objection under Tex. R. Evid. 801 because the statement was not hearsay; the trial court could have found that a witness's statement was offered to show what was said to her and what she did, in addition to the circumstances that led to appellant's arrest, plus any error was harmless under Tex. R. App. P. 44.2(b) because the challenged testimony was cumulative of other testimony admitted without objection. Briscoe v. State, 2011 Tex. App. LEXIS 4632, 2011 WL 2420367 (Tex. App. Dallas June 17 2011).

1034. Statement was not hearsay because it was an officer's explanation regarding the origin of his investigation and how appellant became a suspect, plus the question that prompted his response was not designed to bring about hearsay testimony; any error was harmless under Tex. R. App. P. 44.2(b) because the challenged testimony was cumulative of other testimony admitted without objection. Briscoe v. State, 2011 Tex. App. LEXIS 4632, 2011 WL 2420367 (Tex. App. Dallas June 17 2011).

1035. State's questions were not designed to elicit hearsay testimony, but allowed the investigators to explain the process of the investigation and how appellant was a suspect, such that the trial court did not err in overruling appellant's hearsay objection. Bible v. State, 2011 Tex. App. LEXIS 3737, 2011 WL 1902021 (Tex. App. Waco May

11 2011).

1036. Under Tex. R. Evid. 801(d), the complainant's testimony that she was offered money to drop the charges against defendant and to sign an affidavit of non-prosecution was relevant as evidence of defendant's consciousness of his guilt and was not offered for the truth of the matter asserted; the trial court did not err in admitting it. Johnson v. State, 425 S.W.3d 344, 2011 Tex. App. LEXIS 3430 (Tex. App. Houston 1st Dist. May 5 2011).

1037. Most of an officer's statements were not offered for the truth of the matter asserted, and thus they were not hearsay under Tex. R. Evid. 801(d). Calderon v. State, 2011 Tex. App. LEXIS 3352, 2011 WL 1734068 (Tex. App. El Paso May 4 2011).

1038. Trial court did not abuse its discretion when it overruled defendant's hearsay objections because the statements at issue were not hearsay; the statements were offered to explain their effect on the detective and were not offered for the purpose of proving that the men did not witness the stabbings. Fernandez v. State, 2011 Tex. App. LEXIS 2912, 2011 WL 1467820 (Tex. App. Dallas Apr. 19 2011).

1039. At defendant's robbery trial, a detective was questioned about information he obtained in the course of his investigation; when he began to divulge what co-defendant told him, defendant raised a hearsay objection. The detective's testimony was hearsay within the meaning of Tex. R. Evid. 801(d) because it was offered for the truth of the matter asserted: that defendant was with co-defendant before, during, and after the robbery and they used the crime's proceeds to buy drugs. Sanders v. State, 2011 Tex. App. LEXIS 1568, 2011 WL 742646 (Tex. App. Texarkana Mar. 3 2011).

1040. Trial court did not violate defendant's Sixth Amendment right to confrontation in a community supervision revocation proceeding by admitting documentary evidence that defendant and the passenger of his truck were listed in police gang unit reports as self-admitted gang members. The challenged evidence was not testimonial hearsay under Tex. R. Evid. 801(e)(2)(A), because it was not offered for the truth of the matter asserted -- that defendant was a gang member -- but rather for the fact that he was listed in a report as having claimed gang membership. Cantu v. State, 339 S.W.3d 688, 2011 Tex. App. LEXIS 854 (Tex. App. Fort Worth Feb. 3 2011).

1041. State's questions to the investigators were not designed to elicit hearsay testimony; instead the questions allowed the investigators to comment on their investigations and how defendant became a suspect, and the trial court did not abuse its discretion in overruling defendant's hearsay objections. Lopez v. State, 2010 Tex. App. LEXIS 10251, 2010 WL 5541704 (Tex. App. Corpus Christi Dec. 30 2010).

1042. Text messages received by appellant were relevant evidence of his ability to follow community supervision conditions and terms, if granted, including those under Tex. Code Crim. Proc. Ann. art. 42.12, § 11(a)(1)-(2), (14), and this evidence was also proper to aid the jury in determining the appropriate length of his sentence, for purposes of Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1); the trial court could have reasonably found that the State introduced the text messages not for the truth of the matter asserted, but to impeach the credibility of character witnesses to test their knowledge of appellant, and no abuse of discretion was found. Barrientos v. State, 2010 Tex. App. LEXIS 8879, 2010 WL 4395423 (Tex. App. Houston 1st Dist. Nov. 4 2010).

1043. Court did not consider the State's closing arguments when determining whether the State offered text messages for the truth of the matter asserted. Barrientos v. State, 2010 Tex. App. LEXIS 8879, 2010 WL 4395423 (Tex. App. Houston 1st Dist. Nov. 4 2010).

1044. Even if text messages had constituted inadmissible hearsay and the trial court erred in permitting the questioning, the error was harmless under Tex. R. App. P. 44.2(b); the jury assessed punishment at five years and a fine for appellant, for purposes of Tex. Penal Code Ann. §§ 29.02(b), 12.33, and given the testimony supporting the guilty verdict, the admission of the text messages could not have caused more than a slight influence on the punishment decision. Barrientos v. State, 2010 Tex. App. LEXIS 8879, 2010 WL 4395423 (Tex. App. Houston 1st Dist. Nov. 4 2010).

1045. Because the wife had the burden to prove that they represented to others that they were married, this was not a situation covered by the exception allowing a news report to show the surrounding circumstances of the article's subject matter, and the trial court abused its discretion in admitting the two obituaries referring to the ward and wife as married; however, the admission of the obituaries was not calculated to cause and probably did not cause the rendition of an improper judgment because if that evidence was excluded, there remained sufficient evidence to support the trial court's determination that an informal marriage existed between the wife and ward. Barbee v. Barbee, 2010 Tex. App. LEXIS 8386, 2010 WL 4132766 (Tex. App. Tyler Oct. 20 2010), no pet.

1046. Trial court did not err by admitting investigator's statements into evidence during sentencing because none of the statements constituted hearsay: (1) in the first, the investigator was not offering his statement of the official prison data compilation of 78 serious staff assaults for the truth of the matter asserted; (2) in the second, the investigator did not disclose any out-of-court statement when he testified concerning why assaults on inmates were not reported; and (3) in the third, there was no statement, as the investigator was merely recounting an event of an inmate who was beaten and starved to death. Coble v. State, 330 S.W.3d 253, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. 2010).

1047. In a drug trial, there was no error under Tex. R. Evid. 801 in admitting an unauthenticated journal found at defendant's residence because the initials and other entries in the ledger were not admitted to show the persons whose initials were listed actually owed the amount of money listed or purchased the quantities of drugs listed; rather, they were admitted to show that this "drug ledger" was a tool of the drug dealing trade, and thus was circumstantial evidence that drug trafficking was occurring on the premises. Woolverton v. State, 324 S.W.3d 794, 2010 Tex. App. LEXIS 7510 (Tex. App. Texarkana Sept. 14 2010).

1048. Trial court did not abuse its discretion in excluding two letters as hearsay; the bank relied on the contents to support its argument, and thus the letters were offered to prove the truth of the matters asserted. First-citizens Bank & Trust Co. v. Am. Constructors, Inc., 2010 Tex. App. LEXIS 3887, 2010 WL 2010802 (Tex. App. Austin May 21 2010).

1049. For purposes of Tex. R. Evid. 801(d), the complained-of testimony established how defendant became a suspect, and thus it was not hearsay. Nickerson v. State, 312 S.W.3d 250, 2010 Tex. App. LEXIS 3288 (Tex. App. Houston 14th Dist. May 4 2010).

1050. Court could assume without deciding that defendant was correct that a videotape was not admissible as a prior consistent statement or prior inconsistent statement, for purposes of Tex. R. Evid. 613(a), 801(e)(1)(B), even though he failed to raise the latter objection at trial and raised the former with insufficient specificity because the videotape was still admissible (1) to rebut the suggestion that the police fed the witness his answers to their questions, and (2) to show that the witness was not parroting what the police told him; defendant did not object or seek a limiting instruction under Tex. R. Evid. 105(a), such that the jury was free to consider the tape's contents for any purposes, plus the videotape was admissible to clarify what the witness actually said, for purposes of Tex. R. Evid. 107. Franks v. State, 2010 Tex. App. LEXIS 3224, 2010 WL 1730032 (Tex. App. Austin Apr. 28 2010).

1051. Victim's testimony that she was afraid because she saw robbers with a gun and that they told her to move was not hearsay under Tex. R. Evid. 801(d) because the robbers' statements were not offered to prove the truth of the matter asserted, but their effect on the victim. Colvin v. State, 2010 Tex. App. LEXIS 1827, 2010 WL 917852 (Tex. App. Houston 14th Dist. Mar. 16 2010).

1052. Warrants were admitted without the supporting affidavits and the hearsay statements of the affiant and the State did not use any information contained in the warrants for the truth of the matter asserted; thus, there was no likelihood that the jury's verdict was adversely affected by any error caused by the admission of the warrants, for purposes of Tex. R. App. P. 44.2(b). Lowery v. State, 2010 Tex. App. LEXIS 1230, 2010 WL 610915 (Tex. App. Dallas Feb. 23 2010).

1053. Trial court could have reasonably found that a witness's testimony did not lead to any inescapable conclusions that another witness was testifying through him, and the testimony with respect to another witness showed how the investigation linked defendant to the crime; thus, the testimony in question was not admitted to prove the content of either witness's testimony or its truth, but rather to explain how defendant became a suspect, and thus the testimony was not inadmissible hearsay. Lowery v. State, 2010 Tex. App. LEXIS 1230, 2010 WL 610915 (Tex. App. Dallas Feb. 23 2010).

1054. Officer's testimony that he heard a general broadcast to look out for a specific white car was offered to support the officer's reasonable suspicion and decision to investigate further; in this context, the testimony was not hearsay. Lara v. State, 2010 Tex. App. LEXIS 1114, 2010 WL 547488 (Tex. App. Houston 1st Dist. Feb. 18 2010).

1055. For hearsay purposes under Tex. R. Evid. 801(d), a sergeant's testimony was not offered to prove the truth of the matter asserted, but to explain how defendant became a suspect, and thus the court overruled defendant's hearsay challenge. Stafford v. State, 2010 Tex. App. LEXIS 475, 2010 WL 318231 (Tex. App. Houston 14th Dist. Jan. 28 2010).

1056. In a negligence suit, the trial court properly sustained Tex. R. Evid. 801(d) hearsay objections to testimony from a police officer and to e-mails written in anticipation of litigation; the officer's testimony was not admissible under the Tex. R. Evid. 803(3) state of mind hearsay exception because the Tex. R. Evid. 103(a)(2) offer of proof did not make clear when the declarant spoke with the officer, and the e-mails also were not spontaneous statements and did not qualify as business records under Rule 803(6). Estate of Ronnie Wren v. Bastinelli, 2010 Tex. App. LEXIS 330 (Tex. App. Texarkana Jan. 20 2010).

1057. Both parts of a statement were hearsay under Tex. R. Evid. 801(d) because they were offered to prove the truth of the matter asserted, namely, that the victim had ended her romantic relationship with defendant and he had made a threat against he because the relationship had ended; thus, the trial court abused its discretion by overruling defendant's hearsay objection. Woods v. State, 2009 Tex. App. LEXIS 8749 (Tex. App. El Paso Nov. 12 2009).

1058. Gonzalez v. State does not stand for the proposition that the forfeiture-by-wrongdoing doctrine is an exception to the hearsay rule; it applies to an objection based on a Confrontation Clause violation. Woods v. State, 2009 Tex. App. LEXIS 8749 (Tex. App. El Paso Nov. 12 2009).

1059. In defendant's aggravated robbery case, the court properly allowed an officer's testimony because it was not offered to show that defendant "burglarized a woman's apartment." The testimony established the investigation that linked defendant to the apartment complex where the complainant's vehicle was found, and eventually, the investigation led to defendant being a suspect in the instant case. Martinez v. State, 2009 Tex. App. LEXIS 8627,

2009 WL 3734154 (Tex. App. Houston 14th Dist. Nov. 10 2009).

1060. Documents that were not offered to prove the truth of the matter asserted were not hearsay pursuant to Tex. R. Evid. 801 in an action by a business purchaser against an owner of the purchased business who allegedly engaged in improper conduct that harmed the business.

1061. Any error by the court in considering an officer's testimony concerning statements made to him by a witness was harmless because, assuming that the trial court considered the complained-of testimony for the truth of the matter asserted, there was overwhelming evidence of defendant's guilt that was properly introduced. Three eyewitnesses identified defendant as the gunman, and a vehicle matching the description of the vehicle driven by the gunman was found in close proximity of defendant's residence. In re E.S., 2009 Tex. App. LEXIS 6690, 2009 WL 2623352 (Tex. App. Corpus Christi Aug. 26 2009).

1062. Court properly allowed a police officer to testify because the testimony explained how defendant became a suspect in the case and the status of the investigation; therefore, the officer's testimony was not inadmissible hearsay. Moreover, given that the officer responded to the victim's emergency call within fifteen minutes of the incident and that he observed the victim to be "very upset, nervous, and shaking," it was clear that the victim was still dominated by the emotions, fear, and excitement attendant to the incident. Nolen v. State, 2009 Tex. App. LEXIS 6648 (Tex. App. Corpus Christi Aug. 25 2009).

1063. In defendant's capital murder case, the trial court did not err by overruling his objections to statements made by a detective in the video-taped interview wherein the detective challenged defendant's version of the events because the statements were not hearsay because they were offered solely to show their effect on defendant's demeanor, thus permitting the jury to evaluate his credibility. Additionally, because the complained-of statements were not offered for the truth of the matter asserted, the Confrontation Clause did not bar admission of the statements. Padilla v. State, 2009 Tex. App. LEXIS 6552, 2009 WL 5247434 (Tex. App. Corpus Christi Aug. 20 2009), *aff'd,*326 S.W.3d 195, 2010 Tex. Crim. App. LEXIS 1239 (Tex. Crim. App. 2010).

1064. Detective's testimony regarding her investigation, when taken in context, could lead to inescapable conclusions as to the substance of defendant's out-of-court statement, such that the testimony was inadmissible as hearsay under Tex. R. Evid. 801(d). Galvez v. State, 2009 Tex. App. LEXIS 6300, 2009 WL 2476600 (Tex. App. Waco Aug. 12 2009).

1065. Officer's testimony that informants told him defendant was dealing drugs was not hearsay under Tex. R. Evid. 801(d) because it was offered to explain why the investigation was initiated and why it focused on defendant. Gillett v. State, 2009 Tex. App. LEXIS 5830 (Tex. App. Corpus Christi July 30 2009).

1066. Defendant objected to the victim's testimony concerning a book on the grounds of leading, and after he made his hearsay objection, the State rephrased its questions and no objections were raised, and when the exhibit was offered, defendant objected on the grounds of duplicity and relevancy, such that defendant failed to preserve error under Tex. R. App. P. 33.1 on claims that the testimony was hearsay and irrelevant; moreover, the victim's statements were not offered to prove the truth of the matter asserted, but were offered to show his state of mind and basis for his actions, such that the statements were not hearsay and were relevant. Miller v. State, 2009 Tex. App. LEXIS 4157, 2009 WL 1653070 (Tex. App. Eastland June 11 2009).

1067. Statements by officers were not offered to prove the truth of the matters asserted. The officers' statements were offered either to provide context for defendant's statements or to show the effect of the officers' statements on defendant, and accordingly, the trial court did not abuse its discretion by overruling defendant's hearsay objection.

Hernandez v. State, 2009 Tex. App. LEXIS 3333, 2009 WL 1331649 (Tex. App. Houston 1st Dist. May 14 2009).

1068. Witness's statement that another person had said defendant had a gun outside a house was not hearsay under Tex. R. Evid. 801(d) because the statement was not offered to prove that defendant had a gun, but to explain why defendant was not allowed entry into the house. Therefore, the statement was properly admitted. Phillips v. State, 2009 Tex. App. LEXIS 2150, 2009 WL 824755 (Tex. App. Dallas Mar. 31 2009).

1069. State Bar complaint against an attorney was not admitted to prove an operative fact; the trial court limited the admission of the complaint as evidence that the complaint was used to launch the State Bar's investigation against the attorney. Because the complaint was not admitted to prove the allegations made therein by the attorney's client, it was not hearsay. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 1694 (Tex. App. Houston 14th Dist. Mar. 12 2009).

1070. Witness's statement was hearsay under Tex. R. Evid. 801(d) because it was offered at least in part to prove the truth of the matter asserted, and defendant's statement was also hearsay because it was offered to prove defendant's belief as to why something happened, such that the trial court did not abuse its discretion by excluding the statements as hearsay. Svitak v. State, 2009 Tex. App. LEXIS 796, 2009 WL 279462 (Tex. App. Fort Worth Feb. 5 2009).

1071. Witness's statement to defendant and his wife was a crude exclamation or insult that did not assert any matter and thus it was not hearsay under Tex. R. Evid. 801(d) and the trial court erred by excluding it as such; the trial court did allow testimony that the witness slammed the door in the faces of defendant and his wife and thus the court was unable to say that the trial court's erroneous exclusion of the expletive effectively prevented defendant from presenting his defense. Svitak v. State, 2009 Tex. App. LEXIS 796, 2009 WL 279462 (Tex. App. Fort Worth Feb. 5 2009).

1072. State bar complaint was properly introduced into evidence during a disciplinary matter for several reasons; it did not constitute hearsay because it was merely introduced to show that it was used to launch an investigation. Moreover, to the extent that the lawyer argued that a signature on the complaint was inadmissible as fraudulent, that matter was not preserved for appellate review since no such objection was raised before a trial court. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 351 (Tex. App. Houston 14th Dist. Jan. 20 2009).

1073. In a case involving the revocation of deferred adjudication community supervision where the State sought to introduce a recipe for cooking methamphetamine, a hearsay objection was meritless because the State did not offer the recipe to prove that one was able to manufacture methamphetamine by following the steps but, presumably, to show that defendant deserved a greater punishment for possessing something that purported to be a methamphetamine recipe. Therefore, the recipe was not offered in evidence to prove the truth of the matter asserted, and it was not hearsay. Leitao v. State, 2009 Tex. App. LEXIS 325, 2009 WL 112768 (Tex. App. Fort Worth Jan. 15 2009).

1074. In an assault against a public servant case, a deputy's statement as to the reasons he put defendant into a patrol car was not hearsay under Tex. R. Evid. 801(d) because it was not offered to prove that defendant was a suspect in an assault involving another victim. The evidence was not offered to prove the truth of the matter asserted. Reaves v. State, 2008 Tex. App. LEXIS 6866 (Tex. App. Corpus Christi Aug. 28 2008).

1075. Court properly admitted an officer's testimony to explain how defendant became a suspect in the investigation and to establish the course of events and circumstances leading to defendant's arrest because this was harmless error because the same information was admitted without objection through other witnesses. Flores

v. State, 2008 Tex. App. LEXIS 6491 (Tex. App. Corpus Christi Aug. 25, 2008).

1076. Because a statement was offered as proof of a representation on which parties claiming an easement by estoppel had relied, the making of the statement was an operative fact and was not offered to prove the truth of the matter stated, but simply that the statement was made; thus, the testimony was not hearsay. Allen v. Allen, 280 S.W.3d 366, 2008 Tex. App. LEXIS 6527 (Tex. App. Amarillo 2008).

1077. In a driving while intoxicated case, there was no error in admitting the 911 recording because the 911 recording was not offered to prove the truth of the matter asserted--namely, that defendant was intoxicated--but to explain the reason why the officer was dispatched to the subdivision and one of the reasons why the officer suspected that defendant was intoxicated. Davis v. State, 2008 Tex. App. LEXIS 6459 (Tex. App. Austin Aug. 20, 2008).

1078. Trial court did not abuse its discretion in allowing eyewitnesses to recall the names of the pill bottles found in defendant's car because the statements did not constitute hearsay under Tex. R. Evid. 801(d); defendant was not charged with possession or consumption of any of the pills found and the statements were not offered for the truth, but provided context as to why medical personnel reacted as they did, given that defendant argued at her driving while intoxicated trial that she was improperly denied medical assistance. Bailey v. State, 2008 Tex. App. LEXIS 5137 (Tex. App. Waco July 9 2008).

1079. Court agreed that testimony was not hearsay under Tex. R. Evid. 801 because it was not offered to prove the truth of the matter asserted; rather, it was offered to show why an officer knew to look for a car with damage, and thus the trial court did not abuse its discretion when it overruled defendant's hearsay objection to the officer's testimony regarding how he knew to look for a damaged vehicle. Ramirez v. State, 2008 Tex. App. LEXIS 3523 (Tex. App. Houston 1st Dist. May 15 2008).

1080. In a sexual assault of a child case, counsel was not ineffective for failing to request a determination of the proper outcry witness because, given that counsel could have concluded three witnesses all qualified as outcry witnesses and that a detective was not giving outcry testimony, there was no need to request a determination of the outcry witness; the detective's testimony was admissible because his testimony as to what the aunt said was offered to impeach the aunt and not for the truth of the matter asserted. Byars v. State, 2008 Tex. App. LEXIS 3363 (Tex. App. Houston 14th Dist. May 8 2008).

1081. In defendant's drug case, the court did not err by admitting a videotape of a witness's interrogation by police because it was introduced to "rebut the witness's claims that the police threatened and coerced her into falsely stating that defendant was at the parking lot in order to conduct the drug deal;" the videotape was not offered for the truth of the matter asserted. Kennedy v. State, 2008 Tex. App. LEXIS 3424 (Tex. App. Fort Worth May 8 2008).

1082. In defendant's trial under Tex. Penal Code Ann. § 22.021, the record did not lead the court to the conclusion that certain testimony was offered to prove the truth of a witness's statements to another under Tex. R. Evid. 801, and it appeared that the State offered the testimony for the purpose of showing the effect that learning of the statement had on another; the elicited testimony described only how the victim's mother came to be concerned for her child's welfare while in the care of defendant, and the trial court could have found that the testimony would not have proven the substance of the statement in question, and thus the trial court did not abuse its discretion when it permitted the disputed testimony. Marine v. State, 2008 Tex. App. LEXIS 3161 (Tex. App. Houston 1st Dist. May 1 2008).

1083. In defendant's attempted indecency with a child case, the court erred in admitting hearsay evidence of the girl's age during the State's direct examination of the store's loss-prevention investigator because the investigator's

statement that the mother told him the child was born in December, 1996 was hearsay because it was offered for the truth of the matter that the child was under seventeen years old. Rivera-Reyes v. State, 252 S.W.3d 781, 2008 Tex. App. LEXIS 2988 (Tex. App. Houston 14th Dist. 2008).

1084. Affiant's statement was hearsay under Tex. R. Evid. 801 because the statement in question was offered to prove the fact in question. Winn v. Spectrum Primary Care, Inc., 2008 Tex. App. LEXIS 3094 (Tex. App. Fort Worth Apr. 24 2008).

1085. Trial court did not err in admitting a letter the district attorney issued to defendant before her arrest because: (1) the letter was not hearsay under Tex. R. Evid. 801, as it was admitted to show that defendant had notice that her activities might have been illegal, rather than to prove that the letter's contents were true; (2) defendant failed to request a limiting instruction, and therefore she could not complain on appeal about the letter's admission for all purposes; and (3) defendant's due process rights were not violated, as the State did not expressly represent the letter as a correct statement of the law until its closing argument, after the trial court had instructed the jury as to the applicable law. Pardue v. State, 252 S.W.3d 690, 2008 Tex. App. LEXIS 2421 (Tex. App. Texarkana 2008).

1086. In defendant's sexual assault of a child case, the court properly allowed testimony from witnesses regarding their actions following the victim reporting the abuse to them because the State did not offer the statements to prove their contents; rather, the State offered them to show what the recipients did after hearing the information and to explain the course of events that followed; the jury was instructed accordingly. Dillon v. State, 2007 Tex. App. LEXIS 9339 (Tex. App. Tyler Nov. 30 2007).

1087. In a case of fraudulent use of identifying information with intent to harm and defraud another, a credit application was not hearsay under Tex. R. Evid. 801 because it was not offered to prove the truth of the statements within the application but, rather, to show that an application in the victim's name was made. Rezaie v. State, 259 S.W.3d 811, 2007 Tex. App. LEXIS 9368 (Tex. App. Houston 1st Dist. 2007).

1088. Challenged statements were not hearsay under Tex. R. Evid. 801 because they were not presented to prove the truth of the matter asserted, but were instead elicited to prove defendant's answers to the questions. Chuber v. State, 2007 Tex. App. LEXIS 9227 (Tex. App. San Antonio Nov. 28 2007).

1089. Police officer testified about an anonymous informant for the purpose of showing how the investigation became focused on defendant; his testimony also explained how he acted in response to information he received after speaking with an unknown person at a club where defendant's fellow gang members were known to frequent, but his testimony did not relate historical aspects of the case or contain specific hearsay statements; the trial court could have reasonably concluded that the officer's testimony did not lead to any inescapable conclusions as to the substance of his conversation at the nightclub; thus, the officer's testimony was not admitted to prove the content of an informant's testimony or its truth, but rather to explain how defendant became a suspect, which was not inadmissible hearsay. Rivera v. State, 2007 Tex. App. LEXIS 6508 (Tex. App. Dallas Aug. 10 2007).

1090. Sales receipt admitted in the case showed how defendant's sister, and thus defendant, were linked to the use of the victim's credit card and was not to prove the truth of the matter asserted for purposes of Tex. R. Evid. 801, and thus the trial court did not err in admitting the receipt in defendant's aggravated robbery trial. Kimble v. State, 2007 Tex. App. LEXIS 5092 (Tex. App. Dallas June 29 2007).

1091. Trial court did not err in admitting a document entitled, "Application for Protective Order," to which defendant timely objected on hearsay grounds under Tex. R. Evid. 801; the document contained statements that defendant had engaged in conduct constituting family violence, but the State claimed that the document was not offered for the truth of the matter, but for a permissible purpose, and even though the purpose of the offer was not stated to the

trial judge, the court had to affirm, given this ground of admissibility. Sapp v. State, 2007 Tex. App. LEXIS 4790 (Tex. App. Houston 14th Dist. June 21 2007).

1092. Record did not indicate that the State sought to invoke Tex. Code Crim. Proc. Ann. art. 38.072 to admit the child victim's statements through his mother's testimony and defendant was correct that the trial court erred in permitting the mother to testify as to what the child generally told her about the abuse, as the testimony was offered to prove the truth of the matter, the severity of defendant's conduct, which amounted to inadmissible hearsay under Tex. R. Evid. 801, and absent the invocation of Tex. Code Crim. Proc. Ann. art. 38.072, the trial court erred in overruling defendant's objection; however, the error was harmless under Tex. R. App. P. 44.2(b) because the facts to which the mother testified were included in the same facts that defendant introduced through her own testimony and through other testimony of the mother without objection, and the court was unable to say that the erroneous admission of the mother's testimony had a substantial effect in determining defendant's punishment for injury to a child in violation of Tex. Penal Code Ann. § 22.04(a). Toliver v. State, 2007 Tex. App. LEXIS 4059 (Tex. App. Houston 1st Dist. May 24 2007).

1093. In defendant's trial for injury to a child under Tex. Penal Code Ann. § 22.04(a), the child's mother's testimony concerning out-of-court statements by hospital personnel that were offered to prove the truth of the matter asserted constituted inadmissible hearsay under Tex. R. Evid. 801, but even if defendant's counsel's performance was deficient for failing to object, defendant did not show that there was a reasonable probability that, but for the error, the outcome of the trial would have been different; defendant testified to the injuries she caused the child, the same testimony admitted through the mother, and thus it was harmless error admitting the mother's testimony in this regard. Toliver v. State, 2007 Tex. App. LEXIS 4059 (Tex. App. Houston 1st Dist. May 24 2007).

1094. Given defendant's reason to admit the evidence, a videotaped statement of the child victim, to show demeanor and character, the trial court would have been within its discretion to exclude the evidence because the videotape would have been cumulative of the victim's trial testimony, for purposes of Tex. R. Evid. 403, and because the court found that the trial court did not abuse its discretion in excluding the evidence on non-hearsay grounds, the court did not need to analyze whether the evidence fell within an exception to the hearsay rule under Tex. R. Evid. 803(1), for purposes of Tex. R. App. P. 47.1; the court noted that had the tape been offered to show the truth of the matters asserted, it would have been hearsay under Tex. R. Evid. 801(d). Shanta v. State, 2007 Tex. App. LEXIS 2887 (Tex. App. Houston 1st Dist. Apr. 12 2007).

1095. In a domestic violence case, because threatening e-mails sent by defendant to the victim were not offered to prove the truth of the matter asserted, they were not hearsay under Tex. R. Evid. 801; moreover, an out-of-court statement made by a party and offered against him at trial is not hearsay. Ashford v. State, 2007 Tex. App. LEXIS 946 (Tex. App. Eastland Feb. 8 2007).

1096. In a trial for defendant's murder of his 81-year-old neighbor, there was no hearsay error under Tex. R. Evid. 801(d) in the admission of testimony that the complainant attempted to obtain food for defendant from an assistance organization where the complainant worked; the witness's statement that defendant needed to fill out paperwork was not offered for the truth of the matter asserted -- how one would obtain food from the organization -- but rather to show that defendant killed a woman who was trying to help him. Peterson v. State, 2006 Tex. App. LEXIS 10431 (Tex. App. Houston 14th Dist. Dec. 7 2006).

1097. Trial court properly admitted an officer's testimony regarding what was written on the back of a business card because the officer's testimony was not offered for the purpose of proving that the phone numbers on the back of the card were the numbers of two certain individuals; instead, the officer's testimony was offered only to show that appellant had a business card containing the information in his possession and, therefore, was not hearsay. Rodriguez v. State, 2006 Tex. App. LEXIS 9916 (Tex. App. Houston 14th Dist. Nov. 16 2006).

1098. In defendant's criminal street gang case, evidence of an interview with the gang's leader was properly admitted because the prosecution's argument focused on the implications and inferences drawn from the leader giving an interview to an openly racist radio program, and therefore, it was not admitted for the truth of the matters asserted therein. Chaddock v. State, 203 S.W.3d 916, 2006 Tex. App. LEXIS 8861 (Tex. App. Dallas 2006).

1099. Trial court did not err by admitting a document created by Pontiac showing the GTO's serial number and a note from the seller to the buyer stating the GTO was no longer for sale because the documents were not admitted for the truth of the matter asserted but to show the ongoing series of communications and faxes between the buyer and the seller concerning the buyer's purchase of the GTO. Marten v. Silva, 200 S.W.3d 297, 2006 Tex. App. LEXIS 7260 (Tex. App. Dallas 2006).

1100. Court properly admitted statements made by officers when interviewing defendant because the statements were not offered to prove the truth of the matter asserted; the statements were questions that an officer asked defendant, and they were admitted in order to give context to defendant's replies; it would have been difficult to redact them in their entirety and have defendant's statements still make sense to the jury. Kirk v. State, 199 S.W.3d 467, 2006 Tex. App. LEXIS 6060 (Tex. App. Fort Worth 2006).

1101. In a criminal trial for aggravated robbery, the trial court overruled defendant's hearsay objection to the officer's testimony that a woman sitting in the car driven from the crime scene provided police with defendant's name; the testimony was not offered for the truth of the matter asserted, but rather, to inform the jury how defendant became a suspect. Hall v. State, 2006 Tex. App. LEXIS 5193 (Tex. App. Houston 1st Dist. June 15 2006).

1102. In a case dealing with possession of a controlled substance, over 400 grams of cocaine, with intent to deliver that was found in defendant's truck, there was evidence offered through a videotape of the incident in which defendant responded to a question by an officer by stating that the truck was his; defendant affirmatively stated he had no objection to the admission of that videotape; accordingly, proof of ownership of the truck was adequately shown; thus, pursuant to Tex. R. Evid. 801, the erroneous admission of hearsay testimony regarding proof of ownership of the truck was harmless. Barnes v. State, 2006 Tex. App. LEXIS 4328 (Tex. App. Texarkana May 19 2006).

1103. Because certain testimony was not solicited to prove the truth of the matter asserted, it was not hearsay under Tex. R. Evid. 801 and the trial court did not err in permitting an officer to testify as to why the assistance of immigration services was sought in locating defendant. Ramirez v. State, 2006 Tex. App. LEXIS 3375 (Tex. App. Fort Worth Apr. 27 2006).

1104. By the employee's own admission, the initial injury occurred on March 1, 2000, when the employee immediately knew of the injury and its cause, which was sufficient to commence the accrual of the cause of action, for purposes of Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a), and thus, the trial court properly granted the employer summary judgment because the employee's action was not filed within two years as the statute required; regarding the employee's claim of suffering a separate injury in July 2000, the employee had not provided evidence of the factual details of that incident or the "repetitious trauma," and the employee's affidavit in this regard was conclusory and contained prohibited hearsay under Tex. R. Evid. 801 because the employee's claim that a medical provider advised the employee not to work was offered to prove the truth of the matter asserted. Espinoza v. Universal City Animal Hosp., Inc., 2006 Tex. App. LEXIS 3343 (Tex. App. San Antonio Apr. 26 2006).

1105. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive and the trial court had to admonish her during

her testimony for offering explanations rather than answers. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

1106. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

1107. Documents seized from the vehicle of defendant's mother pursuant to a search warrant were admissible because they were not offered to prove the truth of the matters asserted but to show that defendant had access to the vehicle in which defendant fled the crime scene. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

1108. Witness told the jury that a man told the witness that appellant was trying to get the man to say that he committed the crime, and this was clearly hearsay; the witness did not relay that part of the man's admission that was inculpatory of the man, that he killed one victim, and thus the trial court abused its discretion in admitting the statement pursuant to Tex. R. Evid. 803(24). Boyd v. State, 2001 Tex. App. LEXIS 8661 (Tex. App. Tyler Aug. 22 2001).

1109. In considering a Confrontation Clause analysis, error in admitting a hearsay statement under Tex. R. Evid. 803(24) was harmless under Tex. R. App. P. 44.2(a); the witness did not say that a man claimed that appellant killed two victims, the witness's testimony about the man's statement was not emphasized, and in light of other testimony and evidence of appellant's guilt of capital murder, the error was harmless. Boyd v. State, 2001 Tex. App. LEXIS 8661 (Tex. App. Tyler Aug. 22 2001).

Evidence : Judicial Admissions : Pleadings

1110. In an action for breach of contract arising from a licensing agreement, the trial court committed error by refusing to admit into evidence defendants' superseded pleading in which they admitted that manufacturing income was subject to the agreement. The Court of Appeals of Texas held that a superseded pleading from a party-opponent is not hearsay under Tex. R. Evid. 801(e)(2). Quick v. Plastic Solutions of Tex., Inc., 2008 Tex. App. LEXIS 9821 (Tex. App. El Paso June 27 2008).

Evidence : Procedural Considerations : Curative Admissibility

1111. At defendant's trial for three counts of aggravated sexual assault of a child and two counts of indecency with a child by contact, the trial court did not err by admitting the victim's hearsay statements into evidence under the rule of completeness. The State was allowed to question a detective about the victim's statements and the differences between the two police reports, because defense counsel opened the door by asking questions based on the discrepancies between the reports. Ramirez v. State, 2014 Tex. App. LEXIS 3955, 2014 WL 1410344 (Tex. App. Waco Apr. 10 2014).

1112. Defense counsel was not rendered ineffective by failing to object when the prosecutor elicited testimony showing that defendant had assaulted a murder victim because the hearsay evidence was admissible under the

rule of optional completeness, given that the portion of the statement admitted by the defense gave the false impression that defendant was not present when the victim was murdered. Salazar v. State, 2012 Tex. App. LEXIS 4983, 2012 WL 2357744 (Tex. App. Corpus Christi June 21 2012).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

1113. In a criminal trial for theft of property where defendant was charged with financial exploitation based on undue influence, the trial court did not err by admitting hearsay evidence of the Kelly bluebook value of a Ford Explorer that the victims purchased and signed over to defendant; the evidence was admissible under Tex. R. Evid. 803, the hearsay exception for published compilations. Jacks v. State, 2006 Tex. App. LEXIS 1968 (Tex. App. Tyler Mar. 15 2006).

1114. In a murder trial, the court improperly admitted draft affidavits relaying a history of domestic violence that were never signed, notarized, or introduced in any prior court proceeding; the admission of the hearsay evidence was harmless error under Tex. R. App. P. 44.2(b) because other similar evidence was before the jury, including prior applications for protective orders. Rogers v. State, 183 S.W.3d 853, 2005 Tex. App. LEXIS 10705 (Tex. App. Tyler 2005).

1115. Trial court did not err in admitting defendant's girlfiend's out-of-court statements where her threat to an eyewitness was offered to show the threat was made, not to prove any "matter asserted" therein. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22 2004).

1116. In a criminal prosecution for evading arrest in a vehicle, hearsay statements that the officer relied on as a basis for the arrest warrant were admissible as nonhearsay. The officer was permitted to testify that he overheard a cell phone caller ask "Did Little Mike get away, or did the police get him?" "Little Mike" was defendant's nickname. Powell v. State, 151 S.W.3d 646, 2004 Tex. App. LEXIS 9368 (Tex. App. Waco 2004), reversed by 189 S.W.3d 285, 2006 Tex. Crim. App. LEXIS 681 (Tex. Crim. App. 2006).

1117. In a criminal trial for aggravated assault, trial counsel did not err in failing to object to an investigating officer's testimony of a cohort's out-of-court statements regarding the incident where the same testimony was later received though the cohort's own testimony, a nonhearsay source. Mason v. State, 2004 Tex. App. LEXIS 6458 (Tex. App. Texarkana July 20 2004).

1118. Where defendant argued that the officer's testimony that the officer ran defendant's nickname in the computer led to the inescapable conclusion that the complainant had identified defendant as the assailant and was "backdoor hearsay," the testimony was offered not to "prove the truth of the matter asserted," (here, that defendant committed an aggravated assault), but rather to explain how defendant became a suspect and the testimony was not hearsay. Terry v. State, 2004 Tex. App. LEXIS 5899 (Tex. App. Houston 14th Dist. July 1 2004).

1119. Although defendant argued that the trial court erred in admitting hearsay testimony of a witness to the murder, the admission of a statement that was hearsay was non-constitutional error subject to a harm analysis under Tex. R. App. P. 44.2(b), and that the impact of the witness's hearsay testimony that defendant was angry with the victim regarding a transmission was relatively insignificant when considered in connection with the other evidence supporting defendant's guilt, and did not have a substantial and injurious effect on the jury's verdict. Alvarado v. State, 2004 Tex. App. LEXIS 5019 (Tex. App. Houston 1st Dist. June 3 2004).

1120. In a capital murder trial, the admission of a poem written to defendant by defendant's brother who assisted in the crime was hearsay and it was improperly admitted. However, the State provided ample evidence, including eyewitness testimony, establishing that defendant and defendant's brother shot and stabbed the victims; thus, the

erroneous admission of the poem did not have a substantial and injurious effect or influence in determining the jury's verdict and the error was harmless. Windland v. State, 2004 Tex. App. LEXIS 4709 (Tex. App. Dallas May 26 2004).

1121. In a criminal prosecution for possession of marihuana, defense counsel was not ineffective for failing to object to the admission of the hearsay statement made by defendant to his father that he was holding the marihuana for someone else, that defendant owed someone $1,000.00, and that he had to get the marihuana back from his father so he could return it to that person. Under Tex. R. Evid. 801(e)(2)(A), the statement was an admission against interest, a hearsay exception. Esser v. State, 2004 Tex. App. LEXIS 3764 (Tex. App. Texarkana Apr. 29 2004).

1122. Where a defendant listened to a witness's description of the murders and surrounding events without disputing them, and pointed out that the witness should have been there because he would have had some fund, he manifested his agreement with and adoption of the statements within the meaning of Tex. R. Evid. 801(e)(2)(B), and the witness's statements were admissible. Paredes v. State, 129 S.W.3d 530, 2004 Tex. Crim. App. LEXIS 1 (Tex. Crim. App. 2004).

1123. In defendant's criminal trial, testimony of arresting officer as to an out of court statement that defendant's car "had been possibly involved in a robbery three days earlier" was not hearsay under Tex. R. Evid. 801(d) where the testimony was not offered to prove the truth of the matter asserted; rather, it was offered to show probable cause for the detention of the defendant for traffic violations. Ellis v. State, 99 S.W.3d 783, 2003 Tex. App. LEXIS 1445 (Tex. App. Houston 1st Dist. 2003).

1124. Pursuant to Tex. R. Evid. 801 and 803(3), the statements made by a witness, that the victim told the witness that the defendant had been partying, tearing things up, and smoking pot in the victim's residence, amounted to the admission of inadmissible hearsay, and the trial court erred by admitting testimony regarding the events or existing conditions that were the cause of the victim's mental and emotional state. Skeen v. State, 96 S.W.3d 567, 2002 Tex. App. LEXIS 8181 (Tex. App. Texarkana 2002).

Evidence : Procedural Considerations : Limited Admissibility

1125. In a defamation action, a trial court did not err by admitting daily logs as business records for the limited purpose of whether a prudent investigation of complaints was conducted by an executive director of an independent living facility prior to banning a service provider; the trial court gave a limiting instruction to the jury, and the logs were relevant because the bore on the directors motivation and state of mine and a substantial truth defense. Collins v. Sunrise Senior Living Mgmt., 2012 Tex. App. LEXIS 2457, 2012 WL 1067953 (Tex. App. Houston 1st Dist. Mar. 29 2012).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

1126. At defendant's trial for retaliation, the trial court did not err in excluding the testimony of his step-daughter because it contained defendant's hearsay statements under Tex. R. Evid. 801(d) explaining why did not appear in court. The State's hearsay objection was properly sustained. Austin v. State, 2013 Tex. App. LEXIS 1234, 2013 WL 490000 (Tex. App. Waco Feb. 7 2013).

1127. In defendant's kidnapping trial, in which defendant was charged with kidnapping the victim on the orders of a higher-ranking gang member with whom the victim had ended a romantic relationship, evidence of statements made by the other gang member over the telephone ordering defendant to put the victim in the trunk of a car and other statements were admissible as co-conspirator statements under Tex. R. Evid. 801(e)(2)(E). Guffey v. State,

2012 Tex. App. LEXIS 3293, 2012 WL 1470185 (Tex. App. Eastland Apr. 26 2012).

1128. In a personal injury action in which appellee truck driver pleaded a claim for negligent hiring against appellant foreign corporation by alleging that it hired a Texas corporation to deliver products to Texas when appellant retained control over the Texas corporation and knew or should have known that the Texas corporation employed an incompetent driver, appellee had offered a carrier agreement to demonstrate the existence of a legal relationship between appellant and the Texas corporation, and because the carrier agreement appeared to be signed by the director of appellant, and appellant did not properly challenge the agreement's authenticity, the trial court did not err in overruling appellant's hearsay objection. Ltd. Logistics Servs. v. Villegas, 268 S.W.3d 141, 2008 Tex. App. LEXIS 6536 (Tex. App. Corpus Christi 2008).

1129. During defendant's criminal trial for aggravated sexual assault of a child, counsel was not ineffective for failing to object to evidence of hearsay statements by the victim. Bishop v. State, 2006 Tex. App. LEXIS 4874 (Tex. App. Waco June 7 2006).

Evidence : Procedural Considerations : Preliminary Questions : General Overview

1130. Horse owner was properly permitted to testify in rebuttal that a veterinarian who testified that the horse owner's filly did not die because of any actions taken by the horse farm owners, with whom the horse owner left his filly, had told the horse owner that the filly died because the horse farm owners failed to get the filly to the veterinary clinic sooner. The testimony pertained to the same subject matter as did the veterinarian's testimony and was directly contrary to the veterinarian's testimony. Therefore, the evidence was clearly admissible for the limited purpose of impeaching the veterinarian's earlier testimony, and the trial court properly admitted it over the horse farm owners' hearsay objection. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview

1131. Predicate for admission of a prior consistent statement is laid by the content, tone, and tenor of cross-examination, which either does or does not open the door to the admissibility of a prior consistent statement by an express or implied suggestion that the witness is fabricating testimony in some relevant respect; such an attack may not be immediately apparent from the specific wording of the questions asked, but may become obvious only during the attorney's final argument. Hammons v. State, 239 S.W.3d 798, 2007 Tex. Crim. App. LEXIS 1632 (Tex. Crim. App. 2007).

1132. Police officer testified about an anonymous informant for the purpose of showing how the investigation became focused on defendant; his testimony also explained how he acted in response to information he received after speaking with an unknown person at a club where defendant's fellow gang members were known to frequent, but his testimony did not relate historical aspects of the case or contain specific hearsay statements; the trial court could have reasonably concluded that the officer's testimony did not lead to any inescapable conclusions as to the substance of his conversation at the nightclub; thus, the officer's testimony was not admitted to prove the content of an informant's testimony or its truth, but rather to explain how defendant became a suspect, which was not inadmissible hearsay. Rivera v. State, 2007 Tex. App. LEXIS 6508 (Tex. App. Dallas Aug. 10 2007).

Evidence : Procedural Considerations : Rule Application & Interpretation

1133. Several factors relevant to determine whether hearsay statements by a five-year-old child witness in a child sexual abuse case were reliable were the spontaneity and consistent repetition of the statement, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and the lack of a motive to fabricate;

hearsay is an out-of-court assertion offered in evidence to prove the truth of the matter asserted and as a general rule is inadmissible under Tex. R. Evid. 801(d) and Tex. R. Evid. 802 because an oath, personal appearance at trial and cross-examination are conventional indicia of reliability of testimony. Smith v. State, 88 S.W.3d 652, 2002 Tex. App. LEXIS 2473 (Tex. App. Tyler 2002), *cert. denied*, 537 U.S. 1206, 123 S. Ct. 1283, 154 L. Ed. 2d 1051, 2003 U.S. LEXIS 1631 (2003).

Evidence : Procedural Considerations : Rulings on Evidence

1134. In defendant's murder trial, there was no error in the admission of testimony by a witness about statements defendant made in a telephone call because they were within the hearsay exemption for statements of a party-opponent. Van Exel v. State, 2014 Tex. App. LEXIS 8464 (Tex. App. Dallas Aug. 4 2014).

1135. Trial court did not err in allowing state troopers to testify, over defendant's hearsay objection, regarding information they had received from an anonymous tipster where the information was used at trial to show how and why defendant came to the attention of the troopers and, in that sense, was admissible to prove that the troopers detained defendant after they acquired specific information concerning a drug-smuggling operation involving a tractor-trailer whose description matched the appearance of defendant's tractor-trailer. Because defendant had challenged the conduct of the troopers on the grounds that they lacked reasonable suspicion for the traffic stop and probable cause for his arrest, the details of the out-of-court statements by the anonymous tipster were admissible to show the reasonableness of the troopers' conduct. Iglesias v. State, 2013 Tex. App. LEXIS 433 (Tex. App. Corpus Christi Jan. 17 2013).

1136. Whether a statement that defendant's daughter testified that her aunt made regarding her lack of surprise as to defendant's conduct constituted hearsay was within the zone of reasonable disagreement, and therefore, a trial court did not abuse its discretion in admitting the testimony during defendant's trial for sexual assault of a child and for indecency with a child by exposure. The testimony of defendant's daughter tended to show that the State was indeed seeking to show her state of mind and why she failed to report the incident earlier, and the prosecution neither pressed the issue nor mentioned the testimony in its closing arguments. Grant v. State, 2011 Tex. App. LEXIS 6606, 2011 WL 3652548 (Tex. App. Corpus Christi Aug. 18 2011).

1137. In a case in which a commercial tenant argued that the trial court erred in excluding a string of emails between its landlord's prior counsel and the tenant's counsel, dated prior to the filing of the underlying lawsuit, the emails were admissible because while the landlord's attorney's statement was in the nature of an opinion rather than a declaration of fact, as long as an agent's statement was made during the existence of the employment relationship and concerned a matter within the scope of that employment, it was admissible against the principal, even if the agent had no authority to speak for the principal, pursuant to Tex. R. Evid. 801(e)(2)(D). However, the exclusion of the email correspondence was harmless because the evidence was merely cumulative, and because the tenant did not reasonably show that the exclusion of the evidence probably caused the rendition of an improper judgment. Cleveland Reg'l Med. Ctr., L.P. v. Celtic Props., L.C., 323 S.W.3d 322, 2010 Tex. App. LEXIS 7942 (Tex. App. Beaumont Sept. 30 2010).

1138. Documents that were not offered to prove the truth of the matter asserted were not hearsay pursuant to Tex. R. Evid. 801 in an action by a business purchaser against an owner of the purchased business who allegedly engaged in improper conduct that harmed the business.

1139. Assuming that allowance of a mother's accusations toward defendant was improper hearsay, such allowance was not reversible error because the same facts were shown by unchallenged testimony of defendant's admissions to the accusations; under Tex. R. App. P. 44.2(b), nonconstitutional error that did not affect substantial rights was disregarded. Tucker v. State, 2009 Tex. App. LEXIS 7009, 2009 WL 2767304 (Tex. App. Tyler Sept. 2

2009).

1140. In a criminal trial for aggravated robbery, the trial court overruled defendant's hearsay objection to the officer's testimony that a woman sitting in the car driven from the crime scene provided police with defendant's name; the testimony was not offered for the truth of the matter asserted, but rather, to inform the jury how defendant became a suspect. Hall v. State, 2006 Tex. App. LEXIS 5193 (Tex. App. Houston 1st Dist. June 15 2006).

1141. Defendant waived any error in the trial court's denial of a mistrial in his aggravated robbery trial. Defendant did not request a curative instruction after the trial court sustained his objection to hearsay testimony by the complainant that his employee identified defendant in a photo lineup and stated that the guy probably came back over to shoot the complainant. Gonzalez v. State, 2005 Tex. App. LEXIS 2147 (Tex. App. San Antonio Mar. 23 2005).

1142. Even absent waiver, any error by a trial court in admitting double hearsay did not have a substantial and injurious effect or influence on the jury's verdict. The evidence before the jury included defendant's written confession, an eyewitness's identifications of defendant, and testimony that defendant gave the detectives a false alibi and hid when law enforcement wanted to question him about the murder. Mims v. State, 2004 Tex. App. LEXIS 4019 (Tex. App. Tyler Apr. 30 2004).

1143. Where summaries of records were admitted of sales records in an action by an agency seeking recovery for commissions, and where the personal knowledge of those documents was established, there was no abuse of discretion by the trial court in admitting the summary exhibit pursuant to Tex. R. Evid. 1006, as it was shown that the records were voluminous, were made available to the customers for inspection, and the underlying records were admissible as non-hearsay admissions of a party-opponent under Tex. R. Evid. 801(e)(2). C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 2004 Tex. App. LEXIS 808 (Tex. App. Houston 1st Dist. 2004).

Evidence : Procedural Considerations : Weight & Sufficiency

1144. Trial court did not err when it allowed a police officer to testify that defendant's girlfriend told the officer that defendant went by a certain name as his "street" name because the girlfiend herself testified that defendant went by that name and, further, the complainant and the other eyewitness both identified defendant and testified they knew him by his street name. Thus, the alleged hearsay was not the only evidence that defendant went by that street name. Butler v. State, 2004 Tex. App. LEXIS 10576 (Tex. App. Dallas Nov. 22 2004).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

1145. Trial court did not abuse its discretion in admitting statements that defendant made to a jailer where the evidence was admissible as an admission by a party-opponent, as it was offered to prove that defendant admitted guilt in the instant case-he was being held for murder and said he would have to limit himself to one murder every two years. The jailer's testimony clarified the circumstances surrounding the victim's shooting, directly contradicted defendant's theory of the case that his accomplices were wrongly accusing him of firing the gun so that they would receive a favorable deal in their own cases, and was not likely to impress the jury in some irrational but nevertheless indelible way. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

1146. Trial court did not abuse its discretion in admitting defendant's statement to a witness who had been in jail with him before the trial, that defendant was the "shooter," where the State did not offer the inmate's testimony as evidence of an extraneous offense separate and apart from the charged offense but, instead offered the evidence as proof that defendant fired the shots that killed the victim. The statement was an admission by a party-opponent, supported the allegation that defendant killed the victim, directly contradicted defendant's defensive theory that his

accomplices only named him as the shooter to get a reduced sentence, and was not likely to impress the jury in some irrational but nevertheless indelible way. Haynes v. State, 2013 Tex. App. LEXIS 7232 (Tex. App. Eastland June 13 2013).

1147. Trial court did not err by excluding evidence of the father's psychological evaluation, which included an evaluation of his predilection to pedophilia, because since the father's stated reason to admit the evidence could be accomplished by permitting the mother to testify concerning actions she took to investigate allegations of child abuse against the father in 2003, the trial court was within its discretion to find that there was no other purpose for which the evaluation could have been offered than for the truth of its contents. In addition, the trial court was within its discretion to decide that the evaluation itself would have been cumulative of the mother's testimony and that admitting it would have needlessly confused the jury. In the Interest of W.B.W., 2012 Tex. App. LEXIS 5562, 2012 WL 2856067 (Tex. App. Eastland July 12 2012).

1148. Trial court did not err by admitting into evidence statements defendant made in a letter concerning the murder because the statements were not hearsay under Tex. R. Evid. 801, as they were admissible as admissions of a party opponent. The statements were relevant because in the letter defendant did not claim, as he did at trial, that the shooting was accidental, and they were not inadmissible under Tex. R. Evid. 403, as the statements supported the State's contention that defendant intentionally shot the victim, it related to defendant's state of mind which was a central issue at trial, and the letter was brief and not cumulative of other evidence. Benitez v. State, 2011 Tex. App. LEXIS 9871, 2011 WL 6306643 (Tex. App. Houston 1st Dist. Dec. 15 2011).

1149. In a wrongful death and survival action stemming from a multi-fatality vehicular accident, it was reversible error to admit evidence of the illegal immigrant status of defendant driver. The observation that driver's statements were party admissions under Tex. R. Evid. 801(e)(2)(A) did not establish that they were more probative than prejudicial and did not explain why other witnesses were permitted to be questioned or why extrinsic evidence was admitted on the subject. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

1150. In a medical malpractice case, the probative value of statements from superseded pleadings regarding two nonsuited doctors was not outweighed by the danger of unfair prejudice because counsel, representing the parents of an injured child, first alluded to the doctor's party status, thus opening the door to rebuttal, and the statements, which were made by the parents, constituted admissions by party-opponents under Tex. R. Evid. 801, and were not hearsay. Bay Area Healthcare Group, Ltd. v. McShane, 239 S.W.3d 231, 2007 Tex. LEXIS 527, 50 Tex. Sup. Ct. J. 866 (Tex. 2007).

1151. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive and the trial court had to admonish her during her testimony for offering explanations rather than answers. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

1152. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v.

State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

1153. In a child sexual abuse case, the admission of the testimony of an investigator and a police officer regarding the complainant's prior statements was reversible error because any legitimate probative value under Tex. R. Evid. 607 was substantially outweighed by the prejudicial effect under Tex. R. Evid. 403; the State had ample notice that the complainant would recant, and conflicting evidence alone did not trigger Tex. R. Evid. 801(e)(1)(B). Klein v. State, 2006 Tex. App. LEXIS 950 (Tex. App. Fort Worth Feb. 2 2006), opinion withdrawn by, substituted opinion at, modified by 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

1154. Because defendant did not request notice of the State's intent to use evidence of crimes committed by third persons under Tex. R. Evid. 404(b), no notice was required of the intent to use evidence that a grandmother attempted to bribe a child to remain quiet about sexual abuse; moreover, the evidence was not hearsay under Tex. R. Evid. 801(d) because it was merely offered to show that the child maintained the allegations despite the bribe. Franco v. State, 2004 Tex. App. LEXIS 1655 (Tex. App. Dallas Feb. 19 2004).

1155. Detective's testimony was not hearsay because his testimony concerning the police department's prior investigations for the "same type of offense" was not offered to establish that defendant had been investigated for or committed other instances of indecent exposure. Rather, the testimony was offered to explain the course of his investigation and how defendant came to be a suspect, which was an acceptable, non-hearsay purpose for admitting an out-of-court statement. Denmon v. State, 2014 Tex. App. LEXIS 2180, 2014 WL 857671 (Tex. App. Austin Feb. 27 2014).

Evidence : Relevance : Relevant Evidence

1156. Messages retrieved from a murder victim's voicemail were not hearsay under Tex. R. Evid. 801 and were relevant under Tex. R. Evid. 401 because they were not offered to prove the truth of the matters asserted therein and they assisted the jury in establishing the time of the victim's death. White v. State, 2006 Tex. App. LEXIS 2224 (Tex. App. Houston 1st Dist. Mar. 23 2006).

1157. Trial court properly admitted defendant's statement that when he found the victim he was going to kill her because it was an admission by a party-opponent under Tex. R. Evid. 801(e)(2)(A) and was not offered for the purpose of proving action in conformity therewith on a particular occasion, but was offered to show defendant's intent and knowledge as provided in Tex. R. Evid. 404(b) because the State sought to show that defendant's statement conflicted with his defensive theory that the group members were merely going to beat up the victim and not kill her. Ponce-Duron v. State, 2004 Tex. App. LEXIS 10149 (Tex. App. Fort Worth Nov. 12 2004).

Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview

1158. Several factors relevant to determine whether hearsay statements by a five-year-old child witness in a child sexual abuse case were reliable were the spontaneity and consistent repetition of the statement, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and the lack of a motive to fabricate; hearsay is an out-of-court assertion offered in evidence to prove the truth of the matter asserted and as a general rule is inadmissible under Tex. R. Evid. 801(d) and Tex. R. Evid. 802 because an oath, personal appearance at trial and cross-examination are conventional indicia of reliability of testimony. Smith v. State, 88 S.W.3d 652, 2002 Tex. App. LEXIS 2473 (Tex. App. Tyler 2002), *cert. denied*, 537 U.S. 1206, 123 S. Ct. 1283, 154 L. Ed. 2d 1051, 2003 U.S. LEXIS 1631 (2003).

Evidence : Scientific Evidence : Autopsies

1159. There was no error when a medical examiner who was not present at an autopsy testified about photographs taken during the autopsy because the photographs were not an out-of-court statement under Tex. R. Evid. 801 and there was no question under Tex. R. Evid. 901(a) that they accurately depicted the appearance of the victim's body. Wood v. State, 299 S.W.3d 200, 2009 Tex. App. LEXIS 7882 (Tex. App. Austin Oct. 7 2009).

Evidence : Scientific Evidence : DNA

1160. In a murder trial, any hearsay error under Tex. R. Evid. 801 was harmless when a detective was permitted to testify as to DNA test results as a basis for eliminating other suspects because the expert who performed the DNA analyses later testified that the tests ruled out the other suspects as contributors to the DNA collected at the crime scene, the very same conclusion that was implicit in the detective's testimony. Russell v. State, 2008 Tex. App. LEXIS 1723 (Tex. App. Fort Worth Mar. 6 2008).

Evidence : Scientific Evidence : Sobriety Tests

1161. In a criminal trial arising from a collision, the other driver's out-of-court statements were admissible as excited utterance because they were made shortly after the collision while the driver was still in her wrecked vehicle and were made to her daughter, not to law enforcement officers. Pointe v. State, 371 S.W.3d 527, 2012 Tex. App. LEXIS 4295, 2012 WL 1948880 (Tex. App. Beaumont May 30 2012).

Evidence : Testimony : Credibility : General Overview

1162. Defendant was entitled to a new trial on two counts of aggravated sexual abuse of a child where the trial court reversibly erred by admitting the testimony of the officer and a child protective services investigator regarding the victim's prior statements because it was inadmissible impeachment evidence of the victim's trial testimony, during which she recanted her allegations against defendant; the error was not harmless because without the investigator's testimony, the State would not have proven penetration. Klein v. State, 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

1163. In a child sexual abuse case, the admission of the testimony of an investigator and a police officer regarding the complainant's prior statements was reversible error because any legitimate probative value under Tex. R. Evid. 607 was substantially outweighed by the prejudicial effect under Tex. R. Evid. 403; the State had ample notice that the complainant would recant, and conflicting evidence alone did not trigger Tex. R. Evid. 801(e)(1)(B). Klein v. State, 2006 Tex. App. LEXIS 950 (Tex. App. Fort Worth Feb. 2 2006), opinion withdrawn by, substituted opinion at, modified by 191 S.W.3d 766, 2006 Tex. App. LEXIS 2790 (Tex. App. Fort Worth 2006).

1164. Horse owner was properly permitted to testify in rebuttal that a veterinarian who testified that the horse owner's filly did not die because of any actions taken by the horse farm owners, with whom the horse owner left his filly, had told the horse owner that the filly died because the horse farm owners failed to get the filly to the veterinary clinic sooner. The testimony pertained to the same subject matter as did the veterinarian's testimony and was directly contrary to the veterinarian's testimony. Therefore, the evidence was clearly admissible for the limited purpose of impeaching the veterinarian's earlier testimony, and the trial court properly admitted it over the horse farm owners' hearsay objection. Gabriel v. Lovewell, 164 S.W.3d 835, 2005 Tex. App. LEXIS 4060 (Tex. App. Texarkana 2005).

Evidence : Testimony : Credibility : Impeachment : General Overview

1165. Defendant failed to preserve for appellate review his claim that the trial court abused its discretion by excluding the victim's diary because defense counsel failed to make any suggestion that the diary was admissible as impeachment evidence under Tex. R. Evid. 613, as a general assertion that the diary was not hearsay was insufficient to make the trial court aware of a Rule 613 argument. Fletcher v. State, 2012 Tex. App. LEXIS 5429, 2012 WL 2783298 (Tex. App. Texarkana July 10 2012).

Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility

1166. Trial court did not abuse its discretion by allowing the State to introduce testimony about defendant's criminal record during the guilt-innocence phase of his trial because the State was authorized under Tex. R. Evid. 806 to impeach defendant's hearsay testimony; the two witnesses' testimony was hearsay, as they were statements of defendant made out of court to prove that defendant had purchased the laptop from a friend. The Theus factors also weighed in favor of admission, as all of defendant's prior convictions but one involved crimes of moral turpitude or theft, defendant's otherwise remote convictions were followed by additional convictions, and had the jury believed the witnesses' hearsay statements it likely would have acquitted defendant. Schmidt v. State, 373 S.W.3d 856, 2012 Tex. App. LEXIS 5657, 2012 WL 2888213 (Tex. App. Amarillo July 16 2012).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

1167. In a murder case, a court properly allowed the State to impeach a witness with his prior inconsistent grand jury statement where he was shown a copy of his grand jury testimony and he acknowledged that he had previously testified that, during a telephone conversation, defendant told him that "they are here." The State used the brother's prior statements for the limited purpose of attacking his credibility because of his inconsistent statements, and not to prove the truth of the matter asserted. Bolton v. State, 2004 Tex. App. LEXIS 5584 (Tex. App. Houston 1st Dist. June 24 2004).

1168. Where defendant was convicted of intoxication manslaughter and intoxication assault, the trial court abused its discretion by allowing defendant's prior felony convictions to be introduced to impeach his credibility, pursuant to Tex. R. Evid. 609, where the convictions were improperly admitted as hearsay, pursuant to Tex. R. Evid. 806, when they were not in fact hearsay as defined by Tex. R. Evid. 801(d). Enriquez v. State, 56 S.W.3d 596, 2001 Tex. App. LEXIS 5450 (Tex. App. Corpus Christi 2001).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

1169. Trial court did not err by admitting the witness's testimony that defendant urged her to say that the victim assaulted her so that defendant could assert the affirmative defense of defense of a third person because the statements were made by defendant and offered against him. Thus, they constituted an admission of a party opponent and did not implicate the prior inconsistent statement rule. Stairhime v. State, 439 S.W.3d 499, 2014 Tex. App. LEXIS 7905 (Tex. App. Houston 1st Dist. July 22 2014).

1170. In a drug trial, counsel's failure to interview defendant's brother (an alternative possessor of the drugs) was not ineffective assistance, in part because the strategy was to prevent the jury from hearing evidence of defendant's oral confession; if the brother had testified inconsistently, the confession could have been admitted under Tex. Code Crim. Proc. Ann. art. 38.22, § 5, for impeachment purposes, even though it would not have been admissible under the prior-inconsistent-statement exception to the hearsay rule. Chavis v. State, 2012 Tex. App. LEXIS 9975 (Tex. App. Houston 14th Dist. Dec. 4 2012).

1171. Any error by the court in considering an officer's testimony concerning statements made to him by a witness was harmless because, assuming that the trial court considered the complained-of testimony for the truth of the matter asserted, there was overwhelming evidence of defendant's guilt that was properly introduced. Three

eyewitnesses identified defendant as the gunman, and a vehicle matching the description of the vehicle driven by the gunman was found in close proximity of defendant's residence. In re E.S., 2009 Tex. App. LEXIS 6690, 2009 WL 2623352 (Tex. App. Corpus Christi Aug. 26 2009).

1172. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive and the trial court had to admonish her during her testimony for offering explanations rather than answers. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

1173. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

Evidence : Testimony : Credibility : Rehabilitation

1174. Trial court did not abuse its discretion by allowing a friend of the victim to testify about journal entries allegedly written by the victim as prior consistent statements under Tex. R. Evid. 801(e)(1)(B) because the trial court reasonably could have found that defense counsel's cross-examination implicitly charged that the victim's direct examination testimony that defendant sexually assaulted her by forcing her to engage in oral sex was a recent fabrication, made during the trial, in light of her allegedly conflicting statement in a 2008 note. The trial court reasonably could have found that the victim's journal statements met the consistency requirements of Rule 801(e)(1)(B) because the journal statements concerned the exact same incidents of sexual abuse about which the victim testified at trial and the journal statements did not necessarily exclude acts of forcible contact and were generally consistent with the testimony at trial. Williams v. State, 2013 Tex. App. LEXIS 106, 2013 WL 84903 (Tex. App. Houston 14th Dist. Jan. 8 2013).

1175. Because defendant implied that his girlfriend was lying to secure a favorable plea bargain, her statement to her mother before the plea agreement was admissible as a prior consistent statement under Tex. R. Evid. 801(e)(1)(B); defendant raised an implied charge that his girlfriend fabricated her testimony and had a motive to fabricate her testimony as a result of the plea bargain, and her consistent statement made before she entered the plea agreement was admissible to rebut that charge. Hobday v. State, 2007 Tex. App. LEXIS 109 (Tex. App. San Antonio Jan. 10 2007).

1176. Defendant's cross-examination implied that the victim had been improperly influenced, which led to a fabrication of statements; the victim's statements to the investigator were made prior to an alleged improper influence, and thus the trial court did not err in allowing the statements to be admitted as prior consistent statements pursuant to Tex. R. Evid. 801(e). Rodarte v. State, 2006 Tex. App. LEXIS 6938 (Tex. App. El Paso Aug. 4 2006).

Evidence : Testimony : Experts : General Overview

1177. In a wrongful death case, a court properly excluded expert deposition testimony on hearsay grounds where the expert was not an employee of defendant pharmacy, and there was no evidence that an agency relationship

existed. When the family non-suited their claims against the doctor, the subject matter over which the expert was asked to give his opinion became moot; subsequently, he was not called at trial, and, therefore, the trial court excluded his testimony on hearsay grounds. McCluskey v. Randall's Food Mkts., Inc., 2004 Tex. App. LEXIS 9178 (Tex. App. Houston 14th Dist. Oct. 19 2004).

Evidence : Testimony : Experts : Criminal Trials

1178. In a murder trial where defendant claimed he acted in self-defense, the trial court did not err by excluding testimony from a psychologist regarding the victim's acts of violence; because the psychologist's knowledge of any acts committed by the victim came entirely from his review of the medical records, the psychologist's proffered testimony was hearsay for which no exception was offered under Tex. R. Evid. 801-804. Mason v. State, 2012 Tex. App. LEXIS 2314, 2012 WL 1058792 (Tex. App. Eastland Mar. 22 2012).

1179. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

1180. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Evidence : Testimony : Refreshing Recollection : Refreshing During Testimony

1181. In defendant's assault case, the court properly allowed an officer to testify about the incident because the officer did not say that his testimony was based on another officer's report, nor did he quote or read from that officer's report or testify to any conclusions made by the other officer; rather, the officer refreshed his memory about his personal observations by reviewing the other officer's report, then testified from his own memory of those observations. Thrower v. State, 2008 Tex. App. LEXIS 2590 (Tex. App. Dallas Apr. 10 2008).

Family Law : Child Custody : Awards : General Overview

1182. In a child custody proceeding, it was error to admit an e-mail written by the mother's boyfriend in which he purportedly discussed wanting to be with another man's wife; the e-mail was inadmissible hearsay because it was introduced to prove the truth of the assertion that the boyfriend was interested in the wives of other men. However, the admission did not cause reversible error because it was cumulative and was not controlling on the material issue. In re Marriage of Ivers, 2004 Tex. App. LEXIS 3800 (Tex. App. Texarkana Apr. 30 2004).

Family Law : Child Support : Obligations : Modification : General Overview

1183. In a child support modification case, the trial court did not err in admitting copies of bank statements from a father's concessions business bank account where he acknowledged at the modification hearing that he had produced the bank statements to the mother in response to discovery requests. Therefore, the bank statements

were not hearsay pursuant to Tex. R. Evid. 801(e)(2)(B) because they were admissible as admissions by a party opponent. In re A.J.J., 2005 Tex. App. LEXIS 3058 (Tex. App. Fort Worth Apr. 21 2005).

Family Law : Family Protection & Welfare : Cohabitants & Spouses : Abuse, Endangerment & Neglect

1184. In a trial for defendant's sexual assault of his wife, who recanted in her trial testimony, the trial court properly admitted statements that the victim made shortly after the assault under the excited utterance exception to the hearsay rule of Tex. R. Evid. 801; it was reasonable to find that the victim was still dominated by the emotions, excitement, fear, or pain of being sexually assaulted, hit, and threatened with death, over the course of several hours. Davis v. State, 2007 Tex. App. LEXIS 352 (Tex. App. Dallas Jan. 18 2007).

Family Law : Parental Duties & Rights : Termination of Rights : General Overview

1185. In a proceeding to terminate a father's parental rights, it was reversible error under Tex. R. Evid. 801 to admit hearsay statements relating to purported sexual abuse by the father of a different child, including written statements by two adults relating to the child's reports of sexual abuse, a child abuse protocol from a physical examination, and an arrest warrant with an affidavit containing reports of the purported assault. Those documents were not admissible under either the business records or public records exceptions of Tex. R. Evid. 803 because the Department of Family and Protective Services failed to lay a proper predicate. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

Governments : Legislation : Statutes of Limitations : Time Limitations

1186. Statement against interest exception to the hearsay rule should have applied to appellant's testimony about decedent's intent to give her a parcel of land because the evidence showed that decedent still owned the 1100 acres at the time appellant claimed the statement was made to her (and the evidence also showed that appellant had continuously possessed, occupied, and cultivated the plot and adjacent 10 acres), and although appellant's testimony of decedent's statement of a parol gift appeared self-serving as to appellant, it was also adverse to appellant because once appellant made her claim as a parol gift, as opposed to by adverse possession, the limitations period for anyone claiming adversely to her was extended. Conner v. Johnson, 2004 Tex. App. LEXIS 9633 (Tex. App. Fort Worth Oct. 28 2004).

Immigration Law : Duties & Rights of Aliens : Discrimination

1187. In a wrongful death and survival action stemming from a multi-fatality vehicular accident, it was reversible error to admit evidence of the illegal immigrant status of defendant driver. The observation that driver's statements were party admissions under Tex. R. Evid. 801(e)(2)(A) did not establish that they were more probative than prejudicial and did not explain why other witnesses were permitted to be questioned or why extrinsic evidence was admitted on the subject. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 2010 Tex. LEXIS 212, 53 Tex. Sup. Ct. J. 431 (Tex. 2010).

Insurance Law : Motor Vehicle Insurance : Coverage : Compulsory Coverage : Certificates of Insurance

1188. In a criminal trial for presenting a false insurance card, in violation of Tex. Penal Code Ann. § 37.10(a)(5), the statement of the insurance company's computer to officers regarding the validity of the policy was hearsay under Tex. R. Evid. 801(d). However, defendant waived any error by failing to object, as required by Tex. R. App. P. 33.1. Fuller v. State, 2009 Tex. App. LEXIS 6978 (Tex. App. Corpus Christi Aug. 31 2009).

Labor & Employment Law : Disability & Unemployment Insurance : Unemployment Compensation : Review

1189. On a trial de novo following a denial of unemployment benefits, there was no competent evidence on which to base a summary judgment upholding the decision that the employee was discharged for misconduct because the Texas Workforce Commission attached the entire record of its hearing to the motion. The record contained items that were irrelevant to de novo review, such as the Commission's findings, and even if the employee's testimony was admissible as the admission of a party-opponent, it did not support the judgment. Gardini v. Tex. Workforce Comm'n & Dell Prods., L.P., 2004 Tex. App. LEXIS 10029 (Tex. App. Austin Nov. 12 2004).

Labor & Employment Law : Discrimination : Disparate Treatment : Proof : Burdens of Proof

1190. In an employment discrimination case, the employee's summary judgment testimony about hearing an out-of-court statement by a human resources director was not competent evidence because it was hearsay. Rincones v. Whm Custom Servs., 2013 Tex. App. LEXIS 5448 (Tex. App. Corpus Christi May 2 2013).

Labor & Employment Law : Wage & Hour Laws : Statutes of Limitations

1191. Texas Workforce Commission had the authority to determine that the all of an employee's unpaid salary was due to be paid on September 25 based on the parties' agreement, Tex. Lab. Code Ann. § 61.013, thus placing the entire amount within its jurisdiction to award under Tex. Lab. Code Ann. § 61.051(c). A company representative's testimony that he agreed to the September 25 date was not hearsay because it was an admission by a party-opponent. Jmj Acquisitions Mgmt. v. Peterson, 407 S.W.3d 371, 2013 Tex. App. LEXIS 7340 (Tex. App. Dallas June 13 2013).

Legal Ethics : Sanctions : Disciplinary Proceedings : General Overview

1192. State Bar complaint against an attorney was not admitted to prove an operative fact; the trial court limited the admission of the complaint as evidence that the complaint was used to launch the State Bar's investigation against the attorney. Because the complaint was not admitted to prove the allegations made therein by the attorney's client, it was not hearsay. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 1694 (Tex. App. Houston 14th Dist. Mar. 12 2009).

Real Property Law : Adverse Possession : General Overview

1193. Statement against interest exception to the hearsay rule should have applied to appellant's testimony about decedent's intent to give her a parcel of land because the evidence showed that decedent still owned the 1100 acres at the time appellant claimed the statement was made to her (and the evidence also showed that appellant had continuously possessed, occupied, and cultivated the plot and adjacent 10 acres), and although appellant's testimony of decedent's statement of a parol gift appeared self-serving as to appellant, it was also adverse to appellant because once appellant made her claim as a parol gift, as opposed to by adverse possession, the limitations period for anyone claiming adversely to her was extended. Conner v. Johnson, 2004 Tex. App. LEXIS 9633 (Tex. App. Fort Worth Oct. 28 2004).

Torts : Business Torts : Fraud & Misrepresentation : Actual Fraud : Elements

1194. Regarding appellants' argument that two investors could not recover for fraud because they were unable to testify at trial, it was immaterial that a direct relationship did not exist between those two investors and appellants because privity was not required, and the third investor could properly testify to appellants' representations under Tex. R. Evid. 801. Matis v. Golden, 228 S.W.3d 301, 2007 Tex. App. LEXIS 3796 (Tex. App. Waco 2007).

Torts : Damages : Compensatory Damages : Medical Expenses

1195. In a personal injury suit, where appellee filed affidavits for the authentication of medical bills and appellant filed a chiropractor's controverting affidavit, the controverting affidavit and report were sufficient under Tex. Civ. Prac. & Rem. Code Ann. § 18.001(f) to controvert appellee's affidavit as to chiropractic expenses but appellant's chiropractor did not show that the chiropractor was qualified to controvert the reasonableness of the medical doctor's, radiologist's, or pharmacist's bills. Hong v. Bennett, 209 S.W.3d 795, 2006 Tex. App. LEXIS 10105 (Tex. App. Fort Worth 2006).

Tex. Evid. R. 802

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 802 The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

-- a statute;

-- these rules; or

-- other rules prescribed under statutory authority.

Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 40, *Hearsay*.

Case Notes

Civil Procedure : Jurisdiction : Personal Jurisdiction & In Rem Actions : In Personam Actions : General Overview
Civil Procedure : Discovery : Methods : Perpetuation of Testimony
Civil Procedure : Pretrial Judgments : Default : Default Judgments
Civil Procedure : Summary Judgment : Evidence
Civil Procedure : Summary Judgment : Supporting Materials : Affidavits
Civil Procedure : Remedies : Costs & Attorney Fees : Attorney Expenses & Fees : Statutory Awards
Civil Procedure : Remedies : Damages : General Overview
Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus
Civil Procedure : Appeals : General Overview
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Civil Procedure : Appeals : Standards of Review : Reversible Errors
Civil Procedure : Appeals : Standards of Review : Substantial Evidence : Sufficiency of Evidence

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Assistance of Counsel
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Contracts Law : Remedies : Compensatory Damages : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Penalties
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Hit & Run Accidents : Elements
Criminal Law & Procedure : Arrests : Probable Cause
Criminal Law & Procedure : Interrogation : Voluntariness
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Tests
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Motions for Mistrial
Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview
Criminal Law & Procedure : Sentencing : Presentence Reports
Criminal Law & Procedure : Sentencing : Restitution
Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Registration
Criminal Law & Procedure : Appeals : Reversible Errors : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Jury Instructions
Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Cumulative Errors
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview
Estate, Gift & Trust Law : Trusts : Modification & Termination
Evidence : General Overview
Evidence : Authentication : Chain of Custody
Evidence : Competency : Interpreters
Evidence : Documentary Evidence : General Overview
Evidence : Documentary Evidence : Completeness

Evidence : Hearsay : General Overview
Evidence : Hearsay : Exceptions : General Overview
Evidence : Hearsay : Exceptions : Business Records : General Overview
Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials
Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business
Evidence : Hearsay : Exceptions : Former Testimony of Unavailable Declarants
Evidence : Hearsay : Exceptions : Market Reports & Commercial Publications : General Overview
Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment
Evidence : Hearsay : Exceptions : Present Sense Impression : General Overview
Evidence : Hearsay : Exceptions : Present Sense Impression : Contemporaneous Statements
Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials
Evidence : Hearsay : Exceptions : Spontaneous Statements : General Overview
Evidence : Hearsay : Exceptions : Spontaneous Statements : Criminal Trials
Evidence : Hearsay : Exceptions : State of Mind : General Overview
Evidence : Hearsay : Exceptions : State of Mind : Proof of Later Acts
Evidence : Hearsay : Exceptions : Statements Against Interest
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Exemptions : General Overview
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Identifications
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements
Evidence : Hearsay : Exemptions : Statements by Coconspirators : Statements During Conspiracy
Evidence : Hearsay : Exemptions : Statements by Coconspirators : Statements Furthering Conspiracy
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Hearsay : Exemptions : Statements by Party Opponents : Authorized Statements
Evidence : Hearsay : Exemptions : Statements by Party Opponents : Extrajudicial Statements
Evidence : Hearsay : Hearsay Within Hearsay
Evidence : Hearsay : Rule Components
Evidence : Hearsay : Rule Components : General Overview
Evidence : Hearsay : Rule Components : Statements
Evidence : Hearsay : Rule Components : Truth of Matter Asserted
Evidence : Inferences & Presumptions : Inferences
Evidence : Judicial Notice
Evidence : Procedural Considerations : Curative Admissibility
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Limited Admissibility
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Procedural Considerations : Rule Application & Interpretation
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Relevance : General Overview
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview
Evidence : Scientific Evidence : DNA
Evidence : Scientific Evidence : Sobriety Tests
Evidence : Testimony : Credibility : Impeachment : Prior Conduct
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements
Evidence : Testimony : Examination : General Overview
Evidence : Testimony : Experts : Criminal Trials
Family Law : Child Custody : Awards : General Overview
Family Law : Family Protection & Welfare : Cohabitants & Spouses : Abuse, Endangerment & Neglect

Family Law : Marital Termination & Spousal Support : Dissolution & Divorce : Property Distribution
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Best Interests of Child
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure
Governments : Courts : Rule Application & Interpretation
Labor & Employment Law : Discrimination : Actionable Discrimination
Labor & Employment Law : Discrimination : Disparate Treatment : Proof : Burdens of Proof
Labor & Employment Law : Discrimination : Retaliation : Elements : Protected Activities
Torts : Damages : General Overview

LexisNexis (R) Notes

Civil Procedure : Jurisdiction : Personal Jurisdiction & In Rem Actions : In Personam Actions : General Overview

1. In a suit by a securities purchaser, the Texas courts did not have personal jurisdiction over companies that provided custodial accounts. The purchaser did not establish specific jurisdiction on an agency theory; although his financial advisor identified himself as an agent, that statement was admitted for the limited purpose of showing that it was made and was not evidence of agency. Equity Trust Co. v. Hebert, 2004 Tex. App. LEXIS 9800 (Tex. App. Beaumont Nov. 4 2004).

Civil Procedure : Discovery : Methods : Perpetuation of Testimony

2. Mandamus relief was conditionally granted where a former employee sought to take a presuit deposition under Tex. R. Civ. P. 202 because the record contained no evidence; neither the employee's verified pleadings nor a letter from his counsel was admitted. Even if they had been, pleadings were not competent evidence, and letter contained hearsay within hearsay. In re Contractor's Supplies, Inc., 2009 Tex. App. LEXIS 6396, 2009 WL 2488374 (Tex. App. Tyler Aug. 17 2009).

Civil Procedure : Pretrial Judgments : Default : Default Judgments

3. Nothing in Tex. R. Evid. 802 limits its application to contested hearings. The rule is not ambiguous and requires no explication. Texas Commerce Bank v. New, 3 S.W.3d 515, 1999 Tex. LEXIS 105, 42 Tex. Sup. Ct. J. 1175 (Tex. 1999).

4. In entering a default judgment in a bank's action against two salesman, wherein the bank alleged claims of fraud, breach of contract, conspiracy, and civil theft, the trial court committed no error in awarding unliquidated damages based on affidavits. Neither Tex. R. Civ. P. 243 nor Tex. R. Evid. 802 barred the trial court's reliance on the affidavits. Texas Commerce Bank v. New, 3 S.W.3d 515, 1999 Tex. LEXIS 105, 42 Tex. Sup. Ct. J. 1175 (Tex. 1999).

Civil Procedure : Summary Judgment : Evidence

5. In a spousal support enforcement case, a former husband was unable to raise the issues of hearsay and authentication to challenge summary judgment evidence because these complaints were not presented to the trial court, and no ruling was obtained. Eberstein v. Hunter, 260 S.W.3d 626, 2008 Tex. App. LEXIS 6596 (Tex. App. Dallas 2008).

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits

6. Where the heirs claimed title to a portion of Padre Island alleging that a deed conveying the property was fraudulent, an affidavit provided by an affiant who lacked personal knowledge and relied upon hearsay was not competent summary judgment evidence. The affiant's testimony about out-of-court sources carried no probative weight over a hearsay objection under Tex. R. Evid. 802. Kerlin v. Arias, 274 S.W.3d 666, 2008 Tex. LEXIS 992, 52 Tex. Sup. Ct. J. 103 (Tex. 2008).

Civil Procedure : Remedies : Costs & Attorney Fees : Attorney Expenses & Fees : Statutory Awards

7. In an open meetings dispute, a former employee was unable to challenge affidavits offered in support of an attorney's fee award based on hearsay because he never filed a controverting affidavit. Moreover, the affidavits were timely provided to the employee where they were given to him more than 30 days before the evidence was presented in the trial court. Rogers v. City of McAllen, 2008 Tex. App. LEXIS 6381 (Tex. App. Corpus Christi Aug. 21, 2008).

Civil Procedure : Remedies : Damages : General Overview

8. Although a creditor had not properly pleaded a claim upon which a suit on a sworn account could be based in a case against a debtor involving credit extensions to fund the purchase of goods or services at the point of purchase and for cash advances, the trial court erred in not granting a default judgment on liability because the creditor's allegations against the debtor were sufficient to allege a traditional suit for breach of contract; although the damages were not liquidated, the creditor submitted damages evidence in the form of a request for admissions that were deemed admitted and an affidavit of its attorney, which provided sufficient evidence to prove the creditor's damages because the trial court would have been able to ascertain the amount of damages from that evidence. Sherman Acquisition II LP v. Garcia, 229 S.W.3d 802, 2007 Tex. App. LEXIS 4793 (Tex. App. Waco 2007).

Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus

9. Mandamus relief was conditionally granted where a former employee sought to take a presuit deposition under Tex. R. Civ. P. 202 because the record contained no evidence; neither the employee's verified pleadings nor a letter from his counsel was admitted. Even if they had been, pleadings were not competent evidence, and letter contained hearsay within hearsay. In re Contractor's Supplies, Inc., 2009 Tex. App. LEXIS 6396, 2009 WL 2488374 (Tex. App. Tyler Aug. 17 2009).

Civil Procedure : Appeals : General Overview

10. In a termination of parental rights proceeding, the State introduced evidence of the father's anti-social behavior in the form of criminal convictions and the revocation of community supervision; on review of the order terminating the father's parental rights, Tex. R. Evid. 802 did not require the court of appeals of disregard records which contained hearsay admitted without objection. In re S.K.A., 236 S.W.3d 875, 2007 Tex. App. LEXIS 8202 (Tex. App. Texarkana 2007).

Civil Procedure : Appeals : Reviewability : Preservation for Review

11. Numerous appellate courts have expressly determined that hearsay is a defect of form, and thus waived if no objection is made in the trial court; while this analysis is ordinarily applied to hearsay statements made in affidavits, there is no reason to treat hearsay statements in depositions any differently. Vega v. Autozone West, Inc., 2013 Tex. App. LEXIS 6833 (Tex. App. San Antonio June 5 2013).

12. Hearsay objection to a tenant's summary judgment affidavit in a dispute over unpaid rent was waived by failure to raise the objection in the trial court. Rosales v. Williams, 2010 Tex. App. LEXIS 957 (Tex. App. Houston 1st Dist.

Feb. 11 2010).

13. In a child custody case, a father was unable to argue on appeal that allowing the testimony and a report from an amicus attorney violated Tex. Fam. Code Ann. § 107.007(a) and amounted to hearsay because he did not object at trial. Conn v. Rhodes, 2009 Tex. App. LEXIS 6587, 2009 WL 2579577 (Tex. App. Fort Worth Aug. 20 2009).

14. In a spousal support enforcement case, a former husband was unable to raise the issues of hearsay and authentication to challenge summary judgment evidence because these complaints were not presented to the trial court, and no ruling was obtained. Eberstein v. Hunter, 260 S.W.3d 626, 2008 Tex. App. LEXIS 6596 (Tex. App. Dallas 2008).

15. In a dispute between a hospital and a health maintenance organization regarding Medicaid coverage for a patient, the hospital waived a hearsay objection because it failed to obtain a ruling. Methodist Hosps. of Dallas v. Amerigroup Tex., Inc., 2007 Tex. App. LEXIS 3488 (Tex. App. Dallas May 7 2007).

16. With respect to an affidavit admitted at a trial involving a property boundary dispute, where appellants failed to present a hearsay objection at trial, the issue was waived on appeal pursuant to Tex. R. App. P. 33.1. Moreover, under Tex. R. Evid. 802, inadmissible evidence admitted without objection is not denied probative value merely because it is hearsay. Neal v. Machaud, 2006 Tex. App. LEXIS 10602 (Tex. App. San Antonio Dec. 13 2006).

17. In an appeal from a divorce judgment, the husband waived his arguments as to the exclusion of his evidence as hearsay where he cited no authority for an excluded statement, but merely argued that it was not presented for the truth of the matter asserted and listed Tex. R. Evid. 801, 802, and 803. Lorant v. Lorant, 2004 Tex. App. LEXIS 1641 (Tex. App. Dallas Feb. 19 2004).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

18. In a case where a father sought modification of a parent-child relationship, assuming that testimony from the mother amounted to inadmissible hearsay evidence, the appellate court was unable to say that it probably caused the rendition of an improper judgment. In re R.A.M., 2013 Tex. App. LEXIS 606, 2013 WL 257367 (Tex. App. Beaumont Jan. 24 2013).

19. In a termination of parental rights case, an alleged error relating to the admission of hearsay evidence was deemed harmless because evidence relating to the reasons for the removal of children were reiterated with greater specificity without objection by other witnesses, including the mother herself. The mother's brief did not specify the substance of the testimony that she found objectionable nor did it establish how that evidence probably caused the rendition of an improper judgment under Tex. R. App. P. 44.1. In the Interest of L.M., 2012 Tex. App. LEXIS 2720 (Tex. App. Waco Apr. 4 2012).

Civil Procedure : Appeals : Standards of Review : Reversible Errors

20. In a case involving insurance, a trial court's exclusion of two issues of a trade publication from evidence did not result in a reversible error because there was no evidence that the two issues had been read. Moreover, although the two insureds contended that the material was not offered for the truth of the matters asserted therein, it appeared that they offered these two issues to show that several broker parties should have known of the truth of statements made in this material, and should have had such knowledge at the time these issues were published; the hearsay rules could not have been avoided by this kind of circular reasoning. Envtl. Procedures, Inc. v. Guidry, 282 S.W.3d 602, 2009 Tex. App. LEXIS 670 (Tex. App. Houston 14th Dist. Feb. 3 2009), *appeal after remand and supplemental opinion at* 388 S.W.3d 845, 2013 Tex. App. LEXIS 957 (Tex. App.--Houston [14th Dist.] 2013).

Civil Procedure : Appeals : Standards of Review : Substantial Evidence : Sufficiency of Evidence

21. Trial court did not err by granting the ex-husband's motion to modify the parent-child relationship, because there was a material change in circumstances since the parties had been named joint managing conservators; the husband testified the police were called to the ex-wife's home, she voluntarily relinquished child custody to him, and they had been living with him. In reviewing the sufficiency of the evidence, the appellate court was permitted to consider hearsay admitted without objection. In the Interest of B.A.E., 2013 Tex. App. LEXIS 10002, 2013 WL 4041551 (Tex. App. Dallas Aug. 9 2013).

22. Evidence was legally sufficient to support the finding that the employee operated the vehicle at the time of the accident, because the claimant testified that the employee was the operator of the vehicle that collided with the car she and her father were traveling in, and appellants never objected to the claimant's identification of the employee as the operator of the vehicle on hearsay grounds or any other grounds. Wilson v. Martinez, 2011 Tex. App. LEXIS 5690, 2011 WL 3063354 (Tex. App. Houston 14th Dist. July 26 2011).

23. Because defendant oil and gas well operator failed to object to hearsay testimony at trial regarding plaintiff mineral interest owners' claim of underpayment of royalties, under Tex. R. Evid. 802, even if the evidence was hearsay, the appellate court could consider it in an evidentiary sufficiency review. Moore v. Jet Stream Invs., Ltd., 261 S.W.3d 412, 2008 Tex. App. LEXIS 6021, 168 Oil & Gas Rep. 661 (Tex. App. Texarkana 2008).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Assistance of Counsel

24. Defendant's claim that he was denied effective assistance of counsel in violation of U.S. Const. amend. VI and Tex. Const. art. I, § 10 solely because his attorney failed to object to certain testimony that was allegedly intended to elicit a hearsay statement, Tex. R. Crim. Evid. 801, 802, was without merit where the record was silent regarding counsel's trial strategy for not objecting immediately to the testimony and the court could not say that no reasonable counsel would not have objected to the testimony. As the record reflected that counsel filed pretrial motions, vigorously cross-examined witnesses, and objected to the admission of other evidence, defendant failed to prove by a preponderance of the evidence that, but for his counsel's failure to object to the particular testimony, a reasonable probability existed that a different outcome would have resulted. Payne v. State, 1998 Tex. App. LEXIS 2198 (Tex. App. Dallas Apr. 15 1998).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

25. Confrontation Clause did not require the admission of multi-level hearsay to impeach the complainant and her mother in defendant's trial for continuous sexual abuse of a child. The unnamed declarant's statement that someone made child-molestation allegations against defendant was inadmissible hearsay under Tex. R. Evid. 801, 802, because it was an out-of-court-statement offered for the truth of the matter asserted -- to show that someone made child-abuse allegations against defendant to child protective services. Shafer v. State, 2012 Tex. App. LEXIS 1902, 2012 WL 745422 (Tex. App. Fort Worth Mar. 8 2012).

26. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified; even if the State called the complainants to testify so that otherwise inadmissible prior inconsistent statements could be admitted, there was no harm committed. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

27. In a murder trial, there was no violation of the confrontation clause when the trial court admitted, as an excited utterance, evidence of a statement by the victim to his mother that defendant had just threatened to kill him. The statement was not testimonial. Hartless v. State, 2006 Tex. App. LEXIS 5066 (Tex. App. Tyler June 14 2006).

Contracts Law : Remedies : Compensatory Damages : General Overview

28. In entering a default judgment in a bank's action against two salesman, wherein the bank alleged claims of fraud, breach of contract, conspiracy, and civil theft, the trial court committed no error in awarding unliquidated damages based on affidavits. Neither Tex. R. Civ. P. 243 nor Tex. R. Evid. 802 barred the trial court's reliance on the affidavits. Texas Commerce Bank v. New, 3 S.W.3d 515, 1999 Tex. LEXIS 105, 42 Tex. Sup. Ct. J. 1175 (Tex. 1999).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : General Overview

29. In a drug trial, there was no error in excluding defendant's compendium of complaints against one of the officers involved in the investigation because the document was riddled with hearsay and hearsay upon hearsay. Oliver v. State, 2012 Tex. App. LEXIS 10588, 2012 WL 6634591 (Tex. App. Amarillo Dec. 20 2012).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Intent to Distribute : Elements

30. In a case dealing with possession of a controlled substance, over 400 grams of cocaine, with intent to deliver that was found in defendant's truck, there was evidence offered through a videotape of the incident in which defendant responded to a question by an officer by stating that the truck was his; defendant affirmatively stated he had no objection to the admission of that videotape; accordingly, proof of ownership of the truck was adequately shown; thus, pursuant to Tex. R. Evid. 802, the erroneous admission of hearsay testimony regarding proof of ownership of the truck was harmless. Barnes v. State, 2006 Tex. App. LEXIS 4328 (Tex. App. Texarkana May 19 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

31. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

32. In a trial for family assault, testimony concerning the complainant's statements was properly admitted as excited utterance; the complainant was visibly shaken and highly upset and her intoxication did not negate her state of excitement. Hudson v. State, 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

33. In a trial for assault on a family member, the complainant's statement to officers and an emergency medical technician was properly admitted under the excited utterance exception to the hearsay rule. The complainant's intoxication did not call into question whether her mind was dominated by a state of excitement; the three witnesses testified that she was visibly shaken and highly upset when they arrived within five minutes of receiving the assault call. Hudson v. State, 2005 Tex. App. LEXIS 7386 (Tex. App. Houston 14th Dist. Sept. 8 2005), opinion withdrawn by, substituted opinion at 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault

34. In a trial for assault involving family violence, the victim's nonverbal out-of-court statement (blinking to indicate "yes" in response to the question of whether defendant choked her) was properly admitted as an excited utterance because the officer observed that she was extremely frightened and she did not have sufficient time or composure to fabricate an answer. Miller v. State, 2013 Tex. App. LEXIS 7679 (Tex. App. Tyler June 25 2013).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Penalties

35. In the punishment phase of a domestic assault trial, any error was harmless from admitting a recording of conversations between a 911 operator and a hospital employee who was responding to the complainant's injuries because the complainant plainly testified at trial that defendant had hit her with a closed fist in her eye. Sanders v. State, 422 S.W.3d 809, 2014 Tex. App. LEXIS 1090, 2014 WL 325028 (Tex. App. Fort Worth Jan. 30 2014).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

36. There was no hearsay error in admitting an officer's testimony that the owner of the vehicle used in a robbery told the officer that he lent his car to defendant in exchange for illegal drugs because the testimony explained how defendant became a suspect. Green v. State, 2012 Tex. App. LEXIS 3611, 2012 WL 1606238 (Tex. App. Houston 14th Dist. May 8 2012).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview

37. Evidence was sufficient to support defendant's conviction of aggravated robbery under Tex. Penal Code Ann. §§ 29.02, 29.03 because a rational jury could believe a witness's hearsay statement under Tex. R. Evid. 802, admitted without objection, that defendant had implicated himself in the robbery and, accordingly, in light of the other evidence, could conclude that defendant committed the robbery. Betancourt v. State, 2013 Tex. App. LEXIS 874 (Tex. App. Tyler Jan. 31 2013).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

38. In defendant's murder case, a witness's statement that "spending time with defendant that night was going to be the worst mistake he ever made" was erroneously admitted because the statement was hearsay, and it contained a dramatic piece of information not communicated in the earlier testimony. Martin v. State, 151 S.W.3d 236, 2004 Tex. App. LEXIS 9437 (Tex. App. Texarkana 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

39. In a murder trial, testimony that the witness telephoned and finally contacted the victim on the day of the murder and that the victim simply gave an explanation for a delay (without more) was not hearsay and thus was

properly admitted. Russo v. State, 228 S.W.3d 779, 2007 Tex. App. LEXIS 4499 (Tex. App. Austin 2007).

40. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview

41. In a criminal trial for theft of property where defendant was charged with financial exploitation based on undue influence, the trial court did not err by admitting hearsay evidence of the Kelly bluebook value of a Ford Explorer that the victims purchased and signed over to defendant; the evidence was admissible under Tex. R. Evid. 803, the hearsay exception for published compilations. Jacks v. State, 2006 Tex. App. LEXIS 1968 (Tex. App. Tyler Mar. 15 2006).

42. In a sufficiency review of the evidence for a theft conviction, hearsay that was admitted without objection was probative of the fact that defendant did not leave merchandise in a dressing room. Thornton v. State, 2005 Tex. App. LEXIS 7332 (Tex. App. Houston 1st Dist. Aug. 31 2005).

43. In defendant's theft case, a court's error in excluding evidence that the declarant told defendant to move a trailer was harmless where defendant's sister testified that the employer told her defendant moved a trailer for a the declarant, and through the testimony of the two witnesses, the jury heard essentially the same evidence the trial court initially excluded: that the declarant hired defendant to move a trailer. Gibson v. State, 2004 Tex. App. LEXIS 3198 (Tex. App. Beaumont Apr. 7 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

44. In a sexual assault trial, the complainant's statement to police was properly admitted under the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2). The complainant had run into a store crying, shaking, and screaming that she had just been raped at gunpoint by two men in a van and needed help; the police were called within three to four minutes and arrived approximately five minutes later, when she was still under the influence of the trauma she just experienced and appeared to be in shock. Ascencio v. State, 2005 Tex. App. LEXIS 1449 (Tex. App. Houston 14th Dist. Feb. 24 2005).

45. In a trial for child sexual assault, the victim's medical records, containing her statement about prior incidents, were properly admitted. The evidence was probative of both the previous relationship between defendant and the victim and of defendant's state of mind; the evidence is not graphically prejudicial, providing no details of the purported prior incident. Perez v. State, 2004 Tex. App. LEXIS 11395 (Tex. App. Fort Worth Dec. 16 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements

46. In a trial for defendant's sexual assault of his wife, who recanted in her trial testimony, the trial court properly admitted statements that the victim made shortly after the assault under the excited utterance exception to the hearsay rule of Tex. R. Evid. 802; it was reasonable to find that the victim was still dominated by the emotions, excitement, fear, or pain of being sexually assaulted, hit, and threatened with death, over the course of several hours. Davis v. State, 2007 Tex. App. LEXIS 352 (Tex. App. Dallas Jan. 18 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

47. In a sexual assault trial, it did not violate the hearsay rule to admit the complainant's account of what happened, as told to a sexual assault nurse examiner, because the complainant's statements regarding the incident were necessary for purposes of medical diagnosis and treatment and thus came under the medical treatment exception. Williams v. State, 2014 Tex. App. LEXIS 2618, 2014 WL 895506 (Tex. App. Waco Mar. 6 2014).

48. In a trial for child sexual assault, testimony from a clinical social worker about the complainant's statements was inadmissible hearsay under Tex. R. Evid. 801(d), 802. The testimony was not admissible under the medical-diagnosis-and-treatment exception of Tex. R. Evid. 803(4) because the record did not show that the child-complainant understood that the statements identifying defendant as the perpetrator were for the purpose of medical diagnosis or treatment. Nasrollah Hanjani Alizadeh v. State, 2009 Tex. App. LEXIS 1423 (Tex. App. Houston 1st Dist. Feb. 26 2009).

49. In defendant's sexual assault on a child case, a court properly allowed outcry testimony from a psychotherapist who treated the victim because, although the witness's testimony concerning the victim's statement did not specify the manner or means of defendant's offenses, the victim's statement did clearly allege sexual abuse and clearly identified defendant as the abuser. Newton v. State, 2007 Tex. App. LEXIS 2477 (Tex. App. Waco Mar. 28 2007).

50. In a trial for indecency with a child, it was proper to exclude evidence of conduct by the complainant's mother, such as extramarital affairs and involvement in pornography and drug abuse; the reviewing court noted that much of the testimony probably also constituted objectionable speculation or hearsay, at least from the witnesses through whom defendant sought to introduce it. Jimenez v. State, 2006 Tex. App. LEXIS 6538 (Tex. App. Waco July 26 2006).

51. Although a trial court erred when it allowed a child's mother to testify that, shortly after a sexual assault was committed against the child, the child told her what happened during the offense, because the State did not qualify the statement as an outcry statement nor did it justify the admission of the statement as an exception to the hearsay rule, the error was waived when the same evidence was introduced at other points in the trial and defendant made no objection. Vargas v. State, 2006 Tex. App. LEXIS 4525 (Tex. App. Texarkana May 26 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements

52. In an intoxication manslaughter trial under Tex. Penal Code Ann. § 49.08, medical records that contained the notes of a substance abuse counselor regarding defendant's 40-year history of drinking six to eight beers a day were properly admitted as business records. Sullivan v. State, 248 S.W.3d 746, 2008 Tex. App. LEXIS 670 (Tex. App. Houston 1st Dist. 2008).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Hit & Run Accidents : Elements

53. In a trial for failing to stop and render assistance, a police report stating that defendant was the driver of the vehicle that struck the victim had probative value under Tex. R. Evid. 802 because it was admitted without objection. Camacho v. State, 2011 Tex. App. LEXIS 4740, 2011 WL 2474489 (Tex. App. Corpus Christi June 23 2011).

Criminal Law & Procedure : Arrests : Probable Cause

54. In a drug case, a trial court did not err by allowing a detective to testify as to what defendant had stated to another detective during a translation because hearsay testimony relating to the existence of probable cause was admissible if that issue was before the jury. Here, defendant argued lack of probable cause to the jury, focusing on the validity of a stop and arrest based on the detective's testimony; moreover, defendant raised probable cause in his opening statement, and it was the material issue in the case. Reyes v. State, 2009 Tex. App. LEXIS 4816, 2009 WL 1801033 (Tex. App. Dallas June 24 2009).

Criminal Law & Procedure : Interrogation : Voluntariness

55. Court affirmed defendant's capital murder conviction because his videotaped confession was properly admitted under Tex. Code Crim. Proc. Ann. art. 38.22 as it was voluntarily given and testimony concerning the inclusion of defendant's picture in a lineup was not improperly admitted hearsay as it was not offered for the truth of the matter asserted. Delao v. State, 2006 Tex. App. LEXIS 9995 (Tex. App. Waco Nov. 15 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

56. In community supervision revocation proceedings, counsel was not ineffective for failing to make a hearsay objection to testimony about information in defendant's community supervision file; even if the business records predicate under Tex. R. Evid. 803 was not established, the record did not affirmatively demonstrate that the State could not have established it. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

57. Defendant's counsel was not ineffective for failure to object to the extraneous offenses mentioned in the presentence report, because defendant's complaints were based on Tex. R. Evid 404(b) (extraneous evidence) and 802 (hearsay), and because the rules of evidence, including the rules pertaining to hearsay, did not apply to the contents of the presentence report. Champion v. State, 126 S.W.3d 686, 2004 Tex. App. LEXIS 964 (Tex. App. Amarillo 2004).

Criminal Law & Procedure : Counsel : Effective Assistance : Tests

58. Failure to object under Tex. R. Evid. 802 was not ineffective assistance of counsel because the witness's testimony did not constitute hearsay. Robinson v. State, 2007 Tex. App. LEXIS 9809 (Tex. App. Houston 1st Dist. Dec. 13 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

59. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

60. In a case involving child sexual assault, a statement given by the child's mother would have not been admissible as an outcry statement since the child had already told someone else over 18 about an alleged incident, and a videotaped interview of the victim three years later was also not admissible under Tex. Code Crim. Proc. Ann. art. 38.072; however, the failure to object to these hearsay items did not result in ineffective assistance of counsel because there was a reasonable trial strategy relating to the believability of the victim. Hankey v. State, 231 S.W.3d 54, 2007 Tex. App. LEXIS 4161 (Tex. App. Texarkana 2007).

61. Counsel was not rendered ineffective by a failure to pick up a file that contained an exculpatory affidavit because the affidavit was inadmissible hearsay under Tex. R. Evid. 801, 802. Coleman v. State, 188 S.W.3d 708, 2005 Tex. App. LEXIS 8143 (Tex. App. Tyler 2005).

62. In a sexual assault case, counsel was ineffective where he failed to object to hearsay testimony that did not qualify as outcry evidence and allowed defendant to testify, knowing that doing so would permit the State to introduce evidence of defendant's previous incriminating oral statement. Failing to object to the previous statement in any way, counsel allowed the testimony to come in as evidence of defendant's guilt, rather than as only impeachment evidence to his testimony. Glasgow v. State, 2005 Tex. App. LEXIS 2979 (Tex. App. Dallas Apr. 20 2005).

63. In the punishment phase of a trial for aggravated robbery, counsel was not rendered ineffective by the failure to object to hearsay testimony by a trial-court clerk. Given that defense counsel used the clerk's testimony, this was not one of those "rare cases" in which counsel's performance could be evaluated absent a record of his strategy. Curtis v. State, 2004 Tex. App. LEXIS 8543 (Tex. App. Houston 1st Dist. Sept. 23 2004).

64. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

65. Defendant's claim that he was denied effective assistance of counsel in violation of U.S. Const. amend. VI and Tex. Const. art. I, § 10 solely because his attorney failed to object to certain testimony that was allegedly intended to elicit a hearsay statement, Tex. R. Crim. Evid. 801, 802, was without merit where the record was silent regarding counsel's trial strategy for not objecting immediately to the testimony and the court could not say that no reasonable counsel would not have objected to the testimony. As the record reflected that counsel filed pretrial motions, vigorously cross-examined witnesses, and objected to the admission of other evidence, defendant failed to prove by a preponderance of the evidence that, but for his counsel's failure to object to the particular testimony, a reasonable probability existed that a different outcome would have resulted. Payne v. State, 1998 Tex. App. LEXIS 2198 (Tex. App. Dallas Apr. 15 1998).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

66. In an assault case, there was no reversible error based on hearsay, relevance, undue prejudice, improper opinion, and violations of the confrontation clause because the challenged evidence had come in during other portions of the trial without objection. Hecht v. State, 2009 Tex. App. LEXIS 521, 2009 WL 200979 (Tex. App. Dallas Jan. 29 2009).

67. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified; even if the State called the complainants to testify so that otherwise inadmissible prior inconsistent statements could be admitted, there was no harm committed. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

Criminal Law & Procedure : Trials : Motions for Mistrial

68. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview

69. In community supervision revocation proceedings, counsel was not ineffective for failing to make a hearsay objection to testimony about information in defendant's community supervision file; even if the business records predicate under Tex. R. Evid. 803 was not established, the record did not affirmatively demonstrate that the State could not have established it. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

Criminal Law & Procedure : Sentencing : Presentence Reports

70. Defendant's counsel was not ineffective for failure to object to the extraneous offenses mentioned in the presentence report, because defendant's complaints were based on Tex. R. Evid 404(b) (extraneous evidence) and 802 (hearsay), and because the rules of evidence, including the rules pertaining to hearsay, did not apply to the contents of the presentence report. Champion v. State, 126 S.W.3d 686, 2004 Tex. App. LEXIS 964 (Tex. App. Amarillo 2004).

Criminal Law & Procedure : Sentencing : Restitution

71. Following defendant's conviction for theft in a real estate scheme, defendant failed to object, as hearsay, to a presentence investigation report at sentencing; therefore, the report was a sufficient factual basis to support the trial court's restitution order. Nugent v. State, 2006 Tex. App. LEXIS 8827 (Tex. App. Houston 1st Dist. Oct. 12 2006).

Criminal Law & Procedure : Postconviction Proceedings : Motions for New Trial

72. In a trial for assault--family violence, any error under Tex. R. Evid. 404(b), 802 from an unredacted video containing a hearsay statement of an alleged prior extraneous offense could be cured by a new trial rather than dismissal. State v. Harbor, 425 S.W.3d 508, 2012 Tex. App. LEXIS 3033 (Tex. App. Houston 1st Dist. Apr. 19 2012).

73. New trial could not be granted based on the trial court's recollection of an informal postverdict chat with jurors. The court observed without deciding that an attempt to tender a trial judge's affidavit or testimony at a new trial hearing could result in the State raising any number of objections, including hearsay. State v. Krueger, 179 S.W.3d 663, 2005 Tex. App. LEXIS 8899 (Tex. App. Beaumont 2005).

74. New trial could not be granted based on the trial court's recollection of an informal postverdict chat with jurors. The jurors' assertions were not the kinds of "facts" that a court could judicially notice under Tex. R. Evid. 201. State v. Krueger, 179 S.W.3d 663, 2005 Tex. App. LEXIS 8899 (Tex. App. Beaumont 2005).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

75. In a case involving the civil commitment of a sexually violent predator, because a patient did not object or request an instruction to disregard with respect to his complaints on appeal about hearsay or undue prejudice in relation to expert testimony, the error was not preserved for appellate review. The patient argued that the testimony from one expert exceeded the scope of a limiting instruction, and that another expert's testimony about the effect of his offenses on the victims had no probative value regarding the diagnosis of the patient's mental condition and was not related to a prediction of future dangerousness. In re Bocanegra, 2013 Tex. App. LEXIS 844 (Tex. App. Beaumont Jan. 31 2013).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Registration

76. In a trial for failure to register as a sex offender, a witness's statement to police about where defendant was living could be used substantively because defendant did not object. Howard v. State, 2014 Tex. App. LEXIS 3051, 2014 WL 2619087 (Tex. App. Corpus Christi Mar. 20 2014).

Criminal Law & Procedure : Appeals : Reversible Errors : Evidence

77. Assuming that allowance of a mother's accusations toward defendant was improper hearsay, such allowance was not reversible error because the same facts were shown by unchallenged testimony of defendant's admissions to the accusations; under Tex. R. App. P. 44.2(b), nonconstitutional error that did not affect substantial rights was disregarded. Tucker v. State, 2009 Tex. App. LEXIS 7009, 2009 WL 2767304 (Tex. App. Tyler Sept. 2 2009).

78. In a drug case, the alleged admission of hearsay evidence from a police department chemist relating to her identification of the State's exhibit containing crack cocaine did not amount to a reversible error because the substance of the testimony came into evidence a number of times without any objection. Rutledge v. State, 2009 Tex. App. LEXIS 2448 (Tex. App. Austin Apr. 9 2009).

79. In an assault case, there was no reversible error based on hearsay, relevance, undue prejudice, improper opinion, and violations of the confrontation clause because the challenged evidence had come in during other portions of the trial without objection. Hecht v. State, 2009 Tex. App. LEXIS 521, 2009 WL 200979 (Tex. App. Dallas Jan. 29 2009).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

80. Defendant did not preserve for review his hearsay argument regarding statements by a seven-year-old complainant in a sexual assault case, which were admitted through the testimony of her mother, a forensic investigator, and a physician, because the only basis on which defendant objected at trial was that complainant was not competent to testify. Hunter v. State, 2006 Tex. App. LEXIS 1783 (Tex. App. Houston 1st Dist. Mar. 9 2006).

81. In a sufficiency review of the evidence for a theft conviction, hearsay that was admitted without objection was probative of the fact that defendant did not leave merchandise in a dressing room. Thornton v. State, 2005 Tex. App. LEXIS 7332 (Tex. App. Houston 1st Dist. Aug. 31 2005).

82. Evidence of a police transmission describing a robbery suspect was inadmissible in an aggravated robbery case because it constituted hearsay since the relevancy turned on the truthfulness or accuracy of the contents of the statement; defendant failed to preserve his argument that the transmission was admissible under Tex. R. Evid. 801(e)(1)(C) because it was not raised before the trial court. Johnson v. State, 2003 Tex. App. LEXIS 10949 (Tex. App. Houston 1st Dist. May 13 2003).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

83. Defendant failed to preserve for appellate review his claim that the trial court erred by overruling his objection to a portion of a detective's testimony regarding defendant's failure to immediately come to the hospital to attend to the child victim on the ground that it was inadmissible hearsay because defendant did not obtain a ruling from the trial court on his objection to the rephrased question. Even if he had preserved the error, the trial court's admission of the testimony was harmless because the detective offered substantially similar testimony at the beginning of the exchange that was not objected to and the detective's statements merely recounted the particulars of her investigation into the incident and how defendant became a suspect, which was admissible. Samora v. State, 2010 Tex. App. LEXIS 6759, 2010 WL 3279536 (Tex. App. Corpus Christi Aug. 19 2010).

84. Hearsay objection under Tex. R. Evid. 802 was inadequate under Tex. R. App. P. 33 and Tex. R. Evid. 103 where counsel asserted a reiteration of a previous objection but had not previously objected on hearsay grounds, where counsel failed to obtain a ruling, and where the evidence was admitted without objection elsewhere. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

85. In a murder trial, defendant failed to preserve hearsay error with regard to a statement that the complainant made to a witness because defendant permitted the contents of the complainant's statement to come in without objection and therefore failed to comply with Tex. R. App. P. 33.1 and Tex. R. Evid. 103. Gay v. State, 2007 Tex. App. LEXIS 8753 (Tex. App. Houston 1st Dist. Nov. 1 2007).

86. Defendant's failure to make specific objections waived, under Tex. R. App. P. 33.1 and Tex. R. Evid. 103, the issues of hearsay in a police officer's testimony concerning an unsafe lane change and the lack of closing arguments; to the extent defendant's general objection to the officer's testimony could be construed as a more general contention that a conviction could not be based on hearsay evidence, Tex. R. Evid. 802 allows consideration of inadmissible hearsay admitted without objection. James v. State, 2007 Tex. App. LEXIS 7608 (Tex. App. Waco Sept. 19 2007).

87. In a murder trial, a hearsay objection was waived because defendant failed to identify a specific statement in an exchange that was hearsay or show how it qualified as such. Mims v. State, 2007 Tex. App. LEXIS 5448 (Tex. App. Houston 1st Dist. July 12 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

88. In a case involving the civil commitment of a sexually violent predator, because a patient did not object or request an instruction to disregard with respect to his complaints on appeal about hearsay or undue prejudice in relation to expert testimony, the error was not preserved for appellate review. The patient argued that the testimony from one expert exceeded the scope of a limiting instruction, and that another expert's testimony about the effect of his offenses on the victims had no probative value regarding the diagnosis of the patient's mental condition and was not related to a prediction of future dangerousness. In re Bocanegra, 2013 Tex. App. LEXIS 844 (Tex. App. Beaumont Jan. 31 2013).

89. Issue of whether the nurse's testimony should have been excluded as hearsay was not preserved for review, because defendant withdrew his objection and never gave the trial court a chance to consider whether the nurse's testimony was hearsay. Arcos v. State, 2011 Tex. App. LEXIS 5134, 2011 WL 2652262 (Tex. App. Houston 1st Dist. July 7 2011).

90. Testimony from an officer that he was conducting surveillance on defendant's residence due to complaints about drug activity did not constitute hearsay because it was a general description of possible criminality; no objection was made to testimony relating to specific complaints, so that error was not preserved under Tex. R. App. P. 33.1. Lester v. State, 2008 Tex. App. LEXIS 6006 (Tex. App. Waco Aug. 6 2008).

91. In a case involving intoxication manslaughter, defendant did not preserve an error relating to a paramedic's testimony for appellate review because no hearsay objection was raised; moreover, a motion to suppress filed before the trial court was based on a violation of Miranda, and this was not the same issue raised on appeal. Wooten v. State, 267 S.W.3d 289, 2008 Tex. App. LEXIS 5497 (Tex. App. Houston 14th Dist. 2008).

92. Where a hearsay statement under Tex. R. Evid. 802 was admitted for impeachment under Tex. R. Evid. 613, the reviewing court did not address defendant's arguments that it was error under Tex. R. Evid. 403 to allow the State to impeach its own witness and that the error was compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds and did not request a limiting instruction. Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

93. Where a hearsay statement under Tex. R. Evid. 802 was admitted for impeachment under Tex. R. Evid. 613, it was not error under Tex. R. Evid. 403 to allow the State to impeach its own witness and the error was not compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds and did not request a limiting instruction. Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Jury Instructions

94. Where a hearsay statement under Tex. R. Evid. 802 was admitted for impeachment under Tex. R. Evid. 613, the reviewing court did not address defendant's arguments that it was error under Tex. R. Evid. 403 to allow the State to impeach its own witness and that the error was compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds and did not request a limiting instruction. Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

95. Where a hearsay statement under Tex. R. Evid. 802 was admitted for impeachment under Tex. R. Evid. 613, it was not error under Tex. R. Evid. 403 to allow the State to impeach its own witness and the error was not compounded by the court's failure to give a limiting instruction. Defendant did not object to the admission on Rule 403 grounds and did not request a limiting instruction. Galvan v. State, 2006 Tex. App. LEXIS 3197 (Tex. App. Austin Apr. 20 2006).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : General Overview

96. Victim's prior inconsistent statement about the assault was hearsay and contained hearsay within hearsay, but defendant's counsel never objected to it on either basis and any objection defendant had to the statement was waived under Tex. R. App. P. 33.1(a)(1); unobjected-to-hearsay has probative value as substantive evidence, and is considered in reviewing sufficiency challenges pursuant to Tex. R. Evid. 802. Rios v. State, 2003 Tex. App. LEXIS 1832 (Tex. App. Tyler Feb. 28 2003).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

97. Trial court did not abuse its discretion by admitting hearsay evidence because most of the challenged testimony was an explanation of how defendant became the suspect. The officer took the jury step-by-step through the investigation to explain how all of the piece of evidence fit together to make defendant the suspect in the murder. Lacaze v. State, 346 S.W.3d 113, 2011 Tex. App. LEXIS 5095 (Tex. App. Houston 14th Dist. July 7 2011).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

98. In a criminal prosecution for aggravated sexual assault of a child under the age of 14, the State was improperly allowed to present evidence through the outcry witness that her mother had suspected that defendant was molesting the child even before she had made any outcry. However, the error was harmless since it was unlikely that the single recounting of hearsay about a witness' "suspicion," especially when strongly and directly denied by the declarant herself, had more than a slight influence on the verdict. May v. State, 139 S.W.3d 93, 2004 Tex. App. LEXIS 5560 (Tex. App. Texarkana 2004).

99. In defendant's theft case, a court's error in excluding evidence that the declarant told defendant to move a trailer was harmless where defendant's sister testified that the employer told her defendant moved a trailer for a the declarant, and through the testimony of the two witnesses, the jury heard essentially the same evidence the trial court initially excluded: that the declarant hired defendant to move a trailer. Gibson v. State, 2004 Tex. App. LEXIS 3198 (Tex. App. Beaumont Apr. 7 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Cumulative Errors

100. Court did not abuse its discretion in admitting the redacted jailhouse recording into evidence, because defendant's own statements implicated his guilt, and the redacted statements were not offered for the truth of the matter asserted, but offered for the purpose of placing in evidence defendant's own statements against interest. Howard v. State, 2014 Tex. App. LEXIS 9208, 2014 WL 4100690 (Tex. App. El Paso Aug. 20 2014).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

101. In a prosecution of defendant for aggravated robbery, any error in the admission of testimony relating to how the police established another person had an alibi was rendered harmless when substantially the same evidence was admitted elsewhere without objection. Benitez v. Tex., 2014 Tex. App. LEXIS 7651 (Tex. App. Dallas July 15 2014).

102. Any error in admitting the officer's hearsay testimony was harmless because evidence of the additional fact that defendant had rented and occupied the house "for several weeks" did not move the jury from a state of non-persuasion to one of persuasion on the issue of knowing possession of marijuana. Guillen v. State, 2014 Tex. App. LEXIS 3739, 2014 WL 1387977 (Tex. App. Houston 1st Dist. Apr. 8 2014).

103. In the punishment phase of a domestic assault trial, any error was harmless from admitting a recording of conversations between a 911 operator and a hospital employee who was responding to the complainant's injuries because the complainant plainly testified at trial that defendant had hit her with a closed fist in her eye. Sanders v. State, 422 S.W.3d 809, 2014 Tex. App. LEXIS 1090, 2014 WL 325028 (Tex. App. Fort Worth Jan. 30 2014).

104. Defendant's conviction for possession of between 4 and 200 grams of cocaine with intent to deliver was appropriate because his failure to continue to object each time the allegedly inadmissible evidence was offered with regard to his W-2, he failed to preserve error. Moreover, even if the officer's testimony was improperly admitted as hearsay evidence, its admission did not harm defendant since the officer later testified without objection that the W-

2 bore the same information connecting defendant to the subject property. Anderson v. State, 2013 Tex. App. LEXIS 12822, 2013 WL 5657445 (Tex. App. Tyler Oct. 16 2013).

105. Trial court had the discretion to determine the sufficiency of the evidentiary predicate for the physical evidence submission form because the offense report served only to buttress the chain of custody of items of physical evidence used to establish the identity of the victims. Defendant did not contend the evidence was tampered with and the identity of one of the victims was corroborated by other evidence. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

106. Even if the trial court erred by admitting a jail book in sheet as a business record under Tex. R. Evid. 803(6), the error was harmless because no party emphasized the unexplained divergence of dates between the date defendant was arrested and the date he bonded out. Crutchfield v. State, 2013 Tex. App. LEXIS 1942 (Tex. App. Tyler Feb. 28 2013).

107. Any error in the admission of the testimony was harmless because the same or similar evidence was admitted at another point in the trial without objection. Nelson v. State, 405 S.W.3d 113, 2013 Tex. App. LEXIS 377, 2013 WL 174502 (Tex. App. Houston 1st Dist. Jan. 17 2013).

108. Even though the trial court erred by admitting the audio portions of the tape that recorded the arresting officer's statements about defendant's conditions and his narrative about what he found in defendant's vehicle, as they were spoken offense reports that were inadmissible hearsay and did not qualify as present sense impressions under Tex. R. Evid. 803(1), the error was harmless because both officers testified at trial as to everything the arresting officer mentioned in the audio tape. The arresting officer testified about defendant's agitated attitude and appearance, stating that he smelled like alcohol and his face was red; the officer also testified that he asked defendant to perform field sobriety tests at least twice and he found multiple empty beer and wine bottles in the vehicle. Eggert v. State, 395 S.W.3d 240, 2012 Tex. App. LEXIS 9190, 2012 WL 5416202 (Tex. App. San Antonio Nov. 7 2012).

109. Defendant's conviction for possession of a controlled substance, namely cocaine, with intent to deliver in an amount of 4 grams or more but less than 200 grams was proper because the evidence admitted without objection was substantially the same as the officers' statements regarding the confidential informant objected to by defendant and thus, any error in admitting the confidential informant's hearsay statements was harmless, Tex. R. Evid. 801(d), 802. Even if defendant had objected each time the alleged inadmissible evidence was offered, any error in admitting the evidence would be nonconstitutional error. Thompson v. State, 2012 Tex. App. LEXIS 6310, 2012 WL 3104272 (Tex. App. Tyler July 31 2012).

110. During sentencing in defendant's trial for aggravated robbery, the trial court's admission of hearsay statements under Tex. R. Evid. 802 from defendant's friend who said that defendant's daughter had told her that defendant sexually abused her was harmless error, because it was very similar to evidence admitted without objection through the daughter's testimony concerning the repeated instances of sexual abuse by defendant. Prieto v. State, 337 S.W.3d 918, 2011 Tex. App. LEXIS 2606 (Tex. App. Amarillo Apr. 7 2011).

111. Defendant failed to preserve for appellate review his claim that the trial court erred by overruling his objection to a portion of a detective's testimony regarding defendant's failure to immediately come to the hospital to attend to the child victim on the ground that it was inadmissible hearsay because defendant did not obtain a ruling from the trial court on his objection to the rephrased question. Even if he had preserved the error, the trial court's admission of the testimony was harmless because the detective offered substantially similar testimony at the beginning of the exchange that was not objected to and the detective's statements merely recounted the particulars of her investigation into the incident and how defendant became a suspect, which was admissible. Samora v. State, 2010

Tex. App. LEXIS 6759, 2010 WL 3279536 (Tex. App. Corpus Christi Aug. 19 2010).

112. In a murder case, although the trial court erred in admitting the victim's hearsay statement regarding her plans to withhold all financial support from defendant, the error was harmless. The State provided evidence of the stolen rifle as the murder weapon, the victim's negative feelings toward defendant, defendant's inconsistent alibi, and the perpetrator's knowledge of where valuables were located in the victim's home. Fischer v. State, 2009 Tex. App. LEXIS 4092 (Tex. App. San Antonio June 10 2009).

113. In defendant's aggravated robbery case, the complainant's statement, "I'm siding with what the emergency people told me" was hearsay. However, the error was harmless because defendant ran over the complainant's ankle, there was substantial evidence to prove that fact independent of the hearsay testimony; the complainant testified that she fell off the moving vehicle, lost consciousness, and awoke in the same area with a crushed ankle. Davidson v. State, 2008 Tex. App. LEXIS 5459 (Tex. App. Dallas July 24 2008).

114. In defendant's aggravated robbery case, even if it was error for the court to admit an officer's hearsay testimony regarding the details of the police dispatch, the error was harmless; the same substantive evidence was introduced through another officer's testimony without objection when she testified regarding the type of car defendant was driving and the circumstance surrounding her interview of the robbery complainants. Carson v. State, 2008 Tex. App. LEXIS 3091 (Tex. App. Fort Worth Apr. 24 2008).

115. During the punishment phase of defendant's trial for aggravated sexual assault of a child, defendant stipulated to eight prior convictions, which included a felony conviction for endangering a child, and the State did not err in calling a police officer to testify regarding the circumstances of that offense, which initially was investigated and charged as an aggravated sexual assault of a child, where the officer's statement was not hearsay because he identified the charge that he personally filed and the persons that he arranged for the prior child victim to meet; although the officer's testimony about the prior child victim's precise age was based on hearsay and thus erroneously admitted, there was a fair assurance that the admission of the single piece of hearsay testimony was not harmful error because defendant stipulated to his conviction for endangering a child, and evidence of that prior conviction was properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07, and as an exception under Tex. R. Evid. 803 to the hearsay rule, and because the record as a whole included: (1) defendant's guilty plea to endangering a child; (2) the detailed evidence of the complainant's sexual abuse itself; (3) child pornography found on defendant's family computer; (4) the fact that the State did not emphasize the erroneously admitted evidence and concentrated on the "heinousness" of the offense; (5) defendant's cunning and violent character; (6) the effect of the abuse on the complainant for the rest of her life; and (7) defendant's eight prior convictions and numerous disciplinary infractions. Hunt v. State, 2008 Tex. App. LEXIS 2273 (Tex. App. Houston 14th Dist. Apr. 1 2008).

116. In a murder trial, hearsay was improperly admitted when a detective was permitted to testify that a suspect was eliminated based on the detective's conversation with the suspect's romantic partner, for the sole purpose of proving that the suspect was somewhere other than the victim's home at the time of the killing; however, the error was harmless under Tex. R. App. P. 44 in light of the other evidence: defendant's DNA, fingerprint, and palm print were on a bloody fire extinguisher and on the coaxial cable with which the killer strangled the victim, and defendant did not dispute that none of the DNA or fingerprint evidence connected the other suspect to the crime scene. Russell v. State, 2008 Tex. App. LEXIS 1723 (Tex. App. Fort Worth Mar. 6 2008).

117. In a murder trial, any hearsay error under Tex. R. Evid. 802 was harmless when a detective was permitted to testify as to DNA test results as a basis for eliminating other suspects because the expert who performed the DNA analyses later testified that the tests ruled out the other suspects as contributors to the DNA collected at the crime scene, the very same conclusion that was implicit in the detective's testimony. Russell v. State, 2008 Tex. App. LEXIS 1723 (Tex. App. Fort Worth Mar. 6 2008).

118. Although defendant complained that a trial court committed reversible error in allowing a police officer to read his offense report during his testimony, which defendant claimed was hearsay in violation of Tex. R. Evid. 802, the record was unclear as to whether the officer was actually viewing his offense report, and, in any event, any error in admitting the testimony was harmless because the officer later testified without objection that there was an open container on the seat of defendant's vehicle, making the previous testimony cumulative. Goudeau v. State, 209 S.W.3d 713, 2006 Tex. App. LEXIS 9813 (Tex. App. Houston 14th Dist. 2006).

119. In a driving while intoxicated case, a court erred by admitting witnesses' hearsay statements under the present sense impression exception because the evidence did not establish how much time elapsed between when one witness observed the incident and when she prepared her statement, and the other witness's written statement, made five days after the incident, clearly fell outside any reasonable argument that she made it immediately after the incident; however, the error was harmless; both witnesses testified at trial that they saw defendant weaving across the roadway prior to her leaving the highway, and a videotape of field sobriety tests supported that defendant did not have the normal use of her mental or physical faculties. Dalton v. State, 2006 Tex. App. LEXIS 9189 (Tex. App. Beaumont Oct. 25 2006).

120. In an injury to a child case, the court erred by allowing testimony by the child's mother that her parents needed to tell her something important that the police said regarding defendant's involvement in the crime because it constituted double hearsay; however, the error was harmless because defendant was indicted for the crime, and the police themselves testified during trial that they believed defendant committed the crime and why. Lopez v. State, 200 S.W.3d 246, 2006 Tex. App. LEXIS 9199 (Tex. App. Houston 14th Dist. 2006).

121. Documents seized from the vehicle of defendant's mother pursuant to a search warrant were admissible because they were not offered to prove the truth of the matters asserted but to show that defendant had access to the vehicle in which defendant fled the crime scene. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview

122. In a sufficiency review of the evidence for a theft conviction, hearsay that was admitted without objection was probative of the fact that defendant did not leave merchandise in a dressing room. Thornton v. State, 2005 Tex. App. LEXIS 7332 (Tex. App. Houston 1st Dist. Aug. 31 2005).

Estate, Gift & Trust Law : Trusts : Modification & Termination

123. In a trustee's appeal of the probate court's order that terminated an irrevocable trust and ordered the assets delivered to the trustor, the trustee incorrectly argued that certain testimony in the probate court was inadmissible hearsay evidence that lacked any probative value even though it was admitted without objection; under Tex. R. Evid. 802, inadmissible hearsay admitted without objection would not be denied probative value merely because it was hearsay. Uzzell v. Roe, 2009 Tex. App. LEXIS 5239, 2009 WL 1981389 (Tex. App. Austin July 8 2009).

Evidence : General Overview

124. Trial court did not abuse its discretion in excluding a 12-year-old boy's translation of his deaf aunt's statement to him that she communicated through sign language as hearsay because defendant failed to establish the nephew's competency, proficiency, and reliability as a translator of sign language. Moland v. State, 2012 Tex. App. LEXIS 1062, 2012 WL 403885 (Tex. App. Houston 1st Dist. Feb. 9 2012).

Evidence : Authentication : Chain of Custody

125. Trial court had the discretion to determine the sufficiency of the evidentiary predicate for the physical evidence submission form because the offense report served only to buttress the chain of custody of items of physical evidence used to establish the identity of the victims. Defendant did not contend the evidence was tampered with and the identity of one of the victims was corroborated by other evidence. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

Evidence : Competency : Interpreters

126. If the proponent of an out-of-court translation of an out-of-court statement of a party can demonstrate to the satisfaction of the trial court that the party authorized the interpreter to speak for him on the particular occasion, or otherwise adopted the interpreter as his agent for purposes of translating the particular statement, then the out-of-court interpretation may properly be admitted under Tex. R. Evid. 801(d)(2)(C) or (D). If the trial court is not so satisfied, it should sustain a hearsay objection to the out-of-court translation, under Tex. R. Evid. 802. Saavedra v. State, 297 S.W.3d 342, 2009 Tex. Crim. App. LEXIS 1560 (Tex. Crim. App. 2009).

Evidence : Documentary Evidence : General Overview

127. In a case seeking to recover for damage to a wrecked vehicle, an argument that affidavits under Tex. Civ. Prac. & Rem. Code Ann. § 18.001 were incompetent due to the fact that they did not concern the cost and necessity of service was rejected because a driver failed to object; inadmissible hearsay admitted without objection was not denied probative value merely because it was hearsay. Therefore, the failure to meet the requirements of § 18.001 went to the admissibility of the affidavits, but not their competence. Adams v. State Farm Mut. Auto. Ins. Co., 264 S.W.3d 424, 2008 Tex. App. LEXIS 6486 (Tex. App. Dallas 2008).

Evidence : Documentary Evidence : Completeness

128. In a second trial for sexual abuse, it was error to admit the entirety of the complainant's testimony from the first trial even though the defense used part of the testimony for impeachment, because there was no showing that the entire prior testimony was either on the same subject or was necessary to correct a false or incorrect impression of the witness' testimony; the testimony was admissible because the complainant was not unavailable. Sneed v. State, 209 S.W.3d 782, 2006 Tex. App. LEXIS 10067 (Tex. App. Texarkana 2006).

Evidence : Hearsay : General Overview

129. Court properly excluded testimony because the proffered testimony centered on what the victim told the witness regarding a boy wanting to have sexual intercourse with her, and that constituted hearsay. Vega v. State, 2014 Tex. App. LEXIS 7948 (Tex. App. Corpus Christi July 24 2014).

130. In an eviction action, the apartment manager's testimony that the police department received a disturbance call was inadmissible hearsay; its admission was harmless because she had already testified, without objection, that law enforcement had been called to respond to the disturbance. This unobjected-to hearsay was probative evidence upon which the trial court was permitted to rely. Black v. Countryside Vill. Apts., 2013 Tex. App. LEXIS 14853, 2013 WL 6506303 (Tex. App. Houston 1st Dist. Dec. 10 2013).

131. Defendant's conviction for possession of between 4 and 200 grams of cocaine with intent to deliver was appropriate because his failure to continue to object each time the allegedly inadmissible evidence was offered with regard to his W-2, he failed to preserve error. Moreover, even if the officer's testimony was improperly admitted as hearsay evidence, its admission did not harm defendant since the officer later testified without objection that the W-2 bore the same information connecting defendant to the subject property. Anderson v. State, 2013 Tex. App.

LEXIS 12822, 2013 WL 5657445 (Tex. App. Tyler Oct. 16 2013).

132. Trial court did not err by granting the ex-husband's motion to modify the parent-child relationship, because there was a material change in circumstances since the parties had been named joint managing conservators; the husband testified the police were called to the ex-wife's home, she voluntarily relinquished child custody to him, and they had been living with him. In reviewing the sufficiency of the evidence, the appellate court was permitted to consider hearsay admitted without objection. In the Interest of B.A.E., 2013 Tex. App. LEXIS 10002, 2013 WL 4041551 (Tex. App. Dallas Aug. 9 2013).

133. Numerous appellate courts have expressly determined that hearsay is a defect of form, and thus waived if no objection is made in the trial court; while this analysis is ordinarily applied to hearsay statements made in affidavits, there is no reason to treat hearsay statements in depositions any differently. Vega v. Autozone West, Inc., 2013 Tex. App. LEXIS 6833 (Tex. App. San Antonio June 5 2013).

134. Evidence was sufficient to support defendant's conviction of aggravated robbery under Tex. Penal Code Ann. §§ 29.02, 29.03 because a rational jury could believe a witness's hearsay statement under Tex. R. Evid. 802, admitted without objection, that defendant had implicated himself in the robbery and, accordingly, in light of the other evidence, could conclude that defendant committed the robbery. Betancourt v. State, 2013 Tex. App. LEXIS 874 (Tex. App. Tyler Jan. 31 2013).

135. In a case where a father sought modification of a parent-child relationship, assuming that testimony from the mother amounted to inadmissible hearsay evidence, the appellate court was unable to say that it probably caused the rendition of an improper judgment. In re R.A.M., 2013 Tex. App. LEXIS 606, 2013 WL 257367 (Tex. App. Beaumont Jan. 24 2013).

136. Defendant's conviction for possession of a controlled substance, namely cocaine, with intent to deliver in an amount of 4 grams or more but less than 200 grams was proper because the evidence admitted without objection was substantially the same as the officers' statements regarding the confidential informant objected to by defendant and thus, any error in admitting the confidential informant's hearsay statements was harmless, Tex. R. Evid. 801(d), 802. Even if defendant had objected each time the alleged inadmissible evidence was offered, any error in admitting the evidence would be nonconstitutional error. Thompson v. State, 2012 Tex. App. LEXIS 6310, 2012 WL 3104272 (Tex. App. Tyler July 31 2012).

137. Evidence was legally sufficient to support the finding that the employee operated the vehicle at the time of the accident, because the claimant testified that the employee was the operator of the vehicle that collided with the car she and her father were traveling in, and appellants never objected to the claimant's identification of the employee as the operator of the vehicle on hearsay grounds or any other grounds. Wilson v. Martinez, 2011 Tex. App. LEXIS 5690, 2011 WL 3063354 (Tex. App. Houston 14th Dist. July 26 2011).

138. Even if the trial court erred by admitting therapy notes and records on the ground that they contained hearsay statements, the error was harmless because much of the evidence contained in the therapy notes was cumulative of the testimony already given by the father, the therapist, and an investigator for the Texas Department of Family and Protective Services, and even without the therapy notes, ample evidence existed to support the trial court's best-interest finding under Tex. Fam. Code Ann. § 161.001(2). The record showed that: (1) the therapist testified that all four children feared their mother; (2) the children did not want to return to their mother; (3) the children were doing well in their placements; and (4) evidence of the mother's past conduct supported the inference that she would be unable to meet her children's physical and emotional needs or provide a stable home environment were the children returned to her care. Rader v. Tex. Dep't of Family, 2011 Tex. App. LEXIS 4594, 2011 WL 2437679

(Tex. App. Austin June 15 2011).

139. During sentencing in defendant's trial for aggravated robbery, the trial court's admission of hearsay statements under Tex. R. Evid. 802 from defendant's friend who said that defendant's daughter had told her that defendant sexually abused her was harmless error, because it was very similar to evidence admitted without objection through the daughter's testimony concerning the repeated instances of sexual abuse by defendant. Prieto v. State, 337 S.W.3d 918, 2011 Tex. App. LEXIS 2606 (Tex. App. Amarillo Apr. 7 2011).

140. Court did not abuse its discretion by admitting the testimony of the boyfriend of one of the victims (subsequently her husband), because at the time the boyfriend testified the victim had already testified in detail as to defendant's alleged conduct and the role of the victim's mother, the boyfriend did not mention any individual in connection with the molestation, and the record did not establish the inescapable conclusion that the State's sole purpose in eliciting the boyfriend's testimony was to prove that the victim had told him that she had been molested by defendant. De La Garza v. State, 2011 Tex. App. LEXIS 1617, 2011 WL 768872 (Tex. App. Dallas Mar. 7 2011).

141. During grandparents' trial for the murder of one granddaughter and serious bodily injury to another granddaughter, defense counsel did not render ineffective assistance when certain hearsay statements were admitted without objection; all of the unobjected-to testimony was cumulative of other testimony given at trial. Ramirez v. State, 2010 Tex. App. LEXIS 7169 (Tex. App. Corpus Christi Aug. 31 2010).

142. In an aggravated sexual assault case, a court's decision to exclude evidence as hearsay was proper because the out of court statement made by defendant in the presence of the officers that the victim had lost her clothing in a game of cards did not possess the requisite level of reliability so as to remove it from the realm of contrivance and fabrication. The trial court could have reasonably concluded that, because the applicability of the excited utterance exception required it to first accept defendant's version of events as true, the statement was not sufficiently reliable to qualify as a hearsay exception. Langford v. State, 2010 Tex. App. LEXIS 567, 2010 WL 323081 (Tex. App. Austin Jan. 27 2010).

143. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

144. When defendant and a man were in the camper when the officers served the warrant, methamphetamine, manufacturing precursors, and drug manufacturing paraphernalia were in plain sight; in determining whether defendant possessed the contraband, Tex. R. Evid. 802 permitted the jury to consider the officer's hearsay statement that a confidential informant had spoken with defendant about manufacturing methamphetamine in the camper trailer. The evidence was sufficient evidence for the jury to determine that defendant had custody, control, or management over the contraband for purposes of Tex. Health & Safety Code Ann. § 1.07(39); the evidence was sufficient to support her conviction for possession of a controlled substance, methamphetamine in an amount less than one gram, in violation of Tex. Health & Safety Code Ann. § 481.115. Judd v. State, 2009 Tex. App. LEXIS

7400, 2009 WL 3019712 (Tex. App. Tyler Sept. 23 2009).

145. In a child custody case, a father was unable to argue on appeal that allowing the testimony and a report from an amicus attorney violated Tex. Fam. Code Ann. § 107.007(a) and amounted to hearsay because he did not object at trial. Conn v. Rhodes, 2009 Tex. App. LEXIS 6587, 2009 WL 2579577 (Tex. App. Fort Worth Aug. 20 2009).

146. In a trustee's appeal of the probate court's order that terminated an irrevocable trust and ordered the assets delivered to the trustor, the trustee incorrectly argued that certain testimony in the probate court was inadmissible hearsay evidence that lacked any probative value even though it was admitted without objection; under Tex. R. Evid. 802, inadmissible hearsay admitted without objection would not be denied probative value merely because it was hearsay. Uzzell v. Roe, 2009 Tex. App. LEXIS 5239, 2009 WL 1981389 (Tex. App. Austin July 8 2009).

147. In a drug case, a trial court did not err by allowing a detective to testify as to what defendant had stated to another detective during a translation because hearsay testimony relating to the existence of probable cause was admissible if that issue was before the jury. Here, defendant argued lack of probable cause to the jury, focusing on the validity of a stop and arrest based on the detective's testimony; moreover, defendant raised probable cause in his opening statement, and it was the material issue in the case. Reyes v. State, 2009 Tex. App. LEXIS 4816, 2009 WL 1801033 (Tex. App. Dallas June 24 2009).

148. In a drug case, the alleged admission of hearsay evidence from a police department chemist relating to her identification of the State's exhibit containing crack cocaine did not amount to a reversible error because the substance of the testimony came into evidence a number of times without any objection. Rutledge v. State, 2009 Tex. App. LEXIS 2448 (Tex. App. Austin Apr. 9 2009).

149. On review of the sufficiency of the evidence supporting defendant's conviction for aggravated sexual assault of a child and indecency with a child, the appellate court was permitted to consider hearsay testimony from a pediatrician who testified as to the complainant's statements of abuse. The testimony was admitted without objection and had probative value under Tex. R. Evid. 802. Moncada v. State, 2009 Tex. App. LEXIS 1697, 2009 WL 563990 (Tex. App. Austin Mar. 3 2009).

150. Defendant's conviction for the misdemeanor offense of assault on a family member was proper because, when a deputy responded to the victim's 911 call, he found the victim upset, crying, and in pain, with a large gash on his face; the victim, his mother, and his brother additionally all similarly described defendant's assault of the victim. And, unobjected-to hearsay statements, such as statements made to the deputy at the scene of the altercation, were not denied probative value merely because they were hearsay. Carter v. State, 2008 Tex. App. LEXIS 9399 (Tex. App. Houston 14th Dist. Dec. 18 2008).

151. Trial court did not err in excluding videotaped forensic interviews of the two children as hearsay, although the children could not answer some of defendant's counsel's questions, because the videotapes contained admissible statements along with clearly inadmissible statements, and defendant failed to segregate or identify the potentially admissible statements. The trial judge was not required to sort through the evidence to determine which statements were admissible. Hoang v. State, 2008 Tex. App. LEXIS 8771 (Tex. App. Dallas Nov. 24 2008).

152. In a case seeking to recover for damage to a wrecked vehicle, an argument that affidavits under Tex. Civ. Prac. & Rem. Code Ann. § 18.001 were incompetent due to the fact that they did not concern the cost and necessity of service was rejected because a driver failed to object; inadmissible hearsay admitted without objection was not denied probative value merely because it was hearsay. Therefore, the failure to meet the requirements of § 18.001 went to the admissibility of the affidavits, but not their competence. Adams v. State Farm Mut. Auto. Ins.

Co., 264 S.W.3d 424, 2008 Tex. App. LEXIS 6486 (Tex. App. Dallas 2008).

153. In an open meetings dispute, a former employee was unable to challenge affidavits offered in support of an attorney's fee award based on hearsay because he never filed a controverting affidavit. Moreover, the affidavits were timely provided to the employee where they were given to him more than 30 days before the evidence was presented in the trial court. Rogers v. City of McAllen, 2008 Tex. App. LEXIS 6381 (Tex. App. Corpus Christi Aug. 21, 2008).

154. Because defendant oil and gas well operator failed to object to hearsay testimony at trial regarding plaintiff mineral interest owners' claim of underpayment of royalties, under Tex. R. Evid. 802, even if the evidence was hearsay, the appellate court could consider it in an evidentiary sufficiency review. Moore v. Jet Stream Invs., Ltd., 261 S.W.3d 412, 2008 Tex. App. LEXIS 6021, 168 Oil & Gas Rep. 661 (Tex. App. Texarkana 2008).

155. In defendant's aggravated robbery case, the complainant's statement, "I'm siding with what the emergency people told me" was hearsay. However, the error was harmless because defendant ran over the complainant's ankle, there was substantial evidence to prove that fact independent of the hearsay testimony; the complainant testified that she fell off the moving vehicle, lost consciousness, and awoke in the same area with a crushed ankle. Davidson v. State, 2008 Tex. App. LEXIS 5459 (Tex. App. Dallas July 24 2008).

156. In a case involving intoxication manslaughter, defendant did not preserve an error relating to a paramedic's testimony for appellate review because no hearsay objection was raised; moreover, a motion to suppress filed before the trial court was based on a violation of Miranda, and this was not the same issue raised on appeal. Wooten v. State, 267 S.W.3d 289, 2008 Tex. App. LEXIS 5497 (Tex. App. Houston 14th Dist. 2008).

157. Evidence was factually sufficient to support a conviction under Tex. Penal Code Ann. § 49.04 for driving while intoxicated; although defendant presented witnesses who testified that she was not the driver, the evidence was conflicting, and a police officer's hearsay testimony was properly considered under Tex. R. Evid. 802 because defendant did not object. Richardson v. State, 2008 Tex. App. LEXIS 344 (Tex. App. Waco Jan. 16 2008).

158. Father's failure to object to videotaped statements of his children's deceased mother in child custody proceedings caused a waiver of any subsequent hearsay objection; pursuant to Tex. R. Evid. 802, hearsay admitted without objection would not be denied its probative value merely because it was hearsay. In re N.B.B., 2007 Tex. App. LEXIS 8639 (Tex. App. San Antonio Oct. 31 2007).

159. Father's failure to object to statements of a social worker in child custody proceedings caused a waiver of any subsequent hearsay objection; pursuant to Tex. R. Evid. 802, hearsay admitted without objection would not be denied its probative value merely because it was hearsay. In re N.B.B., 2007 Tex. App. LEXIS 8639 (Tex. App. San Antonio Oct. 31 2007).

160. In a termination of parental rights proceeding, the State introduced evidence of the father's anti-social behavior in the form of criminal convictions and the revocation of community supervision; on review of the order terminating the father's parental rights, Tex. R. Evid. 802 did not require the court of appeals of disregard records which contained hearsay admitted without objection. In re S.K.A., 236 S.W.3d 875, 2007 Tex. App. LEXIS 8202 (Tex. App. Texarkana 2007).

161. Defendant's failure to make specific objections waived, under Tex. R. App. P. 33.1 and Tex. R. Evid. 103, the issues of hearsay in a police officer's testimony concerning an unsafe lane change and the lack of closing arguments; to the extent defendant's general objection to the officer's testimony could be construed as a more

general contention that a conviction could not be based on hearsay evidence, Tex. R. Evid. 802 allows consideration of inadmissible hearsay admitted without objection. James v. State, 2007 Tex. App. LEXIS 7608 (Tex. App. Waco Sept. 19 2007).

162. In a murder trial, a hearsay objection was waived because defendant failed to identify a specific statement in an exchange that was hearsay or show how it qualified as such. Mims v. State, 2007 Tex. App. LEXIS 5448 (Tex. App. Houston 1st Dist. July 12 2007).

163. Although a creditor had not properly pleaded a claim upon which a suit on a sworn account could be based in a case against a debtor involving credit extensions to fund the purchase of goods or services at the point of purchase and for cash advances, the trial court erred in not granting a default judgment on liability because the creditor's allegations against the debtor were sufficient to allege a traditional suit for breach of contract; although the damages were not liquidated, the creditor submitted damages evidence in the form of a request for admissions that were deemed admitted and an affidavit of its attorney, which provided sufficient evidence to prove the creditor's damages because the trial court would have been able to ascertain the amount of damages from that evidence. Sherman Acquisition II LP v. Garcia, 229 S.W.3d 802, 2007 Tex. App. LEXIS 4793 (Tex. App. Waco 2007).

164. In a dispute between a hospital and a health maintenance organization regarding Medicaid coverage for a patient, the hospital waived a hearsay objection because it failed to obtain a ruling. Methodist Hosps. of Dallas v. Amerigroup Tex., Inc., 2007 Tex. App. LEXIS 3488 (Tex. App. Dallas May 7 2007).

165. With respect to an affidavit admitted at a trial involving a property boundary dispute, where appellants failed to present a hearsay objection at trial, the issue was waived on appeal pursuant to Tex. R. App. P. 33.1. Moreover, under Tex. R. Evid. 802, inadmissible evidence admitted without objection is not denied probative value merely because it is hearsay. Neal v. Machaud, 2006 Tex. App. LEXIS 10602 (Tex. App. San Antonio Dec. 13 2006).

166. Court affirmed defendant's capital murder conviction because his videotaped confession was properly admitted under Tex. Code Crim. Proc. Ann. art. 38.22 as it was voluntarily given and testimony concerning the inclusion of defendant's picture in a lineup was not improperly admitted hearsay as it was not offered for the truth of the matter asserted. Delao v. State, 2006 Tex. App. LEXIS 9995 (Tex. App. Waco Nov. 15 2006).

167. Because the ex-husband did not object to the ex-wife's trial inventory, pursuant to Tex. R. Evid. 802, the trial court could rely on the values of the property as contained in that inventory; in addition, the trial court could have relied on the testimony of the ex-wife that the fair market value of the residence was a little less than the tax-appraised value. McKamie v. McKamie, 2006 Tex. App. LEXIS 8726 (Tex. App. Houston 1st Dist. Oct. 5 2006).

168. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified; even if the State called the complainants to testify so that otherwise inadmissible prior inconsistent statements could be admitted, there was no harm committed. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

169. In a criminal trial for sexual assault, the court did not err by excluding hearsay statements of a physician admitted through a police officer who spoke to the physican after he attended to the rape victim; the testimony was hearsay not within an exception. Smith v. State, 2006 Tex. App. LEXIS 6325 (Tex. App. Texarkana July 21 2006).

170. Defendant's conviction for assault causing bodily injury to a family member was appropriate because a reasonable person could have concluded that the victim made the statement at issue to the officer upon his arrival

at the scene while under the excitement, fear, or pain of the event at the time she made the statement. Smith v. State, 2006 Tex. App. LEXIS 5173 (Tex. App. Fort Worth June 15 2006).

171. Nothing in Tex. R. Evid. 802 limits its application to contested hearings. The rule is not ambiguous and requires no explication. Texas Commerce Bank v. New, 3 S.W.3d 515, 1999 Tex. LEXIS 105, 42 Tex. Sup. Ct. J. 1175 (Tex. 1999).

Evidence : Hearsay : Exceptions : General Overview

172. At defendant's trial for three counts of aggravated sexual assault of a child and two counts of indecency with a child by contact, the trial court did not err by admitting the victim's hearsay statements into evidence under the rule of completeness. The State was allowed to question a detective about the victim's statements and the differences between the two police reports, because defense counsel opened the door by asking questions based on the discrepancies between the reports. Ramirez v. State, 2014 Tex. App. LEXIS 3955, 2014 WL 1410344 (Tex. App. Waco Apr. 10 2014).

173. In a criminal trial, defendant's testimony about the victim's statement that she was going to injure herself to support the assault charge and then hit herself in the face was not hearsay because it was offered to describe one person's observations about how another person acted. Corbin v. State, 2013 Tex. App. LEXIS 15300, 2013 WL 7083195 (Tex. App. Eastland Dec. 19 2013).

174. Trial court did not abuse its discretion by admitting hearsay evidence because most of the challenged testimony was an explanation of how defendant became the suspect. The officer took the jury step-by-step through the investigation to explain how all of the piece of evidence fit together to make defendant the suspect in the murder. Lacaze v. State, 346 S.W.3d 113, 2011 Tex. App. LEXIS 5095 (Tex. App. Houston 14th Dist. July 7 2011).

175. In defendant's trial for aggravated sexual assault of a child in violation of Tex. Penal Code Ann. § 22.021(a)(1)(B)(i), the trial court did not abuse its discretion in ruling that only the victim's statement to the forensic interviewer, and not to the victim's mother, described the alleged offense, and thus the trial court properly allowed the interviewer to testify as the outcry witness under Tex. Code Crim. Proc. Ann. art. 38.072, § 2 and for purposes of Tex. R. Evid. 802. Olivas v. State, 2008 Tex. App. LEXIS 18 (Tex. App. Waco Jan. 2 2008).

176. In defendant's burglary case, the court properly allowed an officer to testify that, as she could not come to a conclusion on the latent fingerprint, she asked other examiners to examine the print, because the trial court could have reasonably concluded that the testimony, when taken in context, did not lead to any inescapable conclusions as to the substance of the other examiner's conclusions about the print and was therefore, not hearsay; the only information imparted by the testimony was that others had examined the print and had reached a conclusion, and that their conclusions were the same. Smith v. State, 236 S.W.3d 282, 2007 Tex. App. LEXIS 2206 (Tex. App. Houston 1st Dist. 2007).

177. During defendant's criminal trial for two counts of aggravated sexual assault of a child, the investigating detective was permitted to testify as to hearsay evidence relating the child's grandmother's concern that another illicit sexual contact had occurred; the testimony was admissible as "the whole on the same subject" inquired into by the State and thus allowed by Tex. R. Evid. 107. Phillips v. State, 2006 Tex. App. LEXIS 9509 (Tex. App. Dallas Nov. 2 2006).

178. Defendant's claim that he was denied effective assistance of counsel in violation of U.S. Const. amend. VI and Tex. Const. art. I, § 10 solely because his attorney failed to object to certain testimony that was allegedly intended to elicit a hearsay statement, Tex. R. Crim. Evid. 801, 802, was without merit where the record was silent

regarding counsel's trial strategy for not objecting immediately to the testimony and the court could not say that no reasonable counsel would not have objected to the testimony. As the record reflected that counsel filed pretrial motions, vigorously cross-examined witnesses, and objected to the admission of other evidence, defendant failed to prove by a preponderance of the evidence that, but for his counsel's failure to object to the particular testimony, a reasonable probability existed that a different outcome would have resulted. Payne v. State, 1998 Tex. App. LEXIS 2198 (Tex. App. Dallas Apr. 15 1998).

Evidence : Hearsay : Exceptions : Business Records : General Overview

179. In a defamation action, a trial court did not err by admitting daily logs as business records for the limited purpose of whether a prudent investigation of complaints was conducted by an executive director of an independent living facility prior to banning a service provider; the trial court gave a limiting instruction to the jury, and the logs were relevant because the bore on the directors motivation and state of mine and a substantial truth defense. Collins v. Sunrise Senior Living Mgmt., 2012 Tex. App. LEXIS 2457, 2012 WL 1067953 (Tex. App. Houston 1st Dist. Mar. 29 2012).

180. In a creditor's suit to recover unpaid debt on a credit card account, the trial court erroneously excluded the billing statements and notices informing the debtor of changes in his credit card agreement where the creditor properly established the applicability of Tex. R. Evid. 803(6)'s business records hearsay exception because an employee of the company that provided administrative services for the creditor's credit card accounts testified that: (1) she had worked for the company for nearly seven years; (2) the company provided support for the creditor's credit card accounts; (3) her job responsibilities gave her the right to access the kind of information included in the monthly billing statements for the debtor's account; (4) she was the custodian of those records; (5) the statements in the debtor's billing statements were made at or near the time of the information recorded therein by a person with knowledge; and (6) the debtor's billing statements and other billing statements like it were made and kept in the regular course of the company's business. Moreover, the billing records could qualify for the business records hearsay exception even if they were business records of a third party to the lawsuit because the employee testified that the records were kept in the course of the company's business, that the company issued billing statements and provided collections and litigation support, and that she had no indication of any lack of trustworthiness in the way the documents were handled, generated, or kept. Citibank (s.D.), N.A. v. Tate, 2010 Tex. App. LEXIS 9959 (Tex. App. Houston 1st Dist. Dec. 16 2010).

181. In a criminal prosecution for sexual assault, the defendant's proffer of evidence about the victim's written medical report included no affidavit or live testimonial sponsorship from a records custodian; therefore, the medical records were hearsay, and the trial court properly excluded their admission. Smith v. State, 2006 Tex. App. LEXIS 6325 (Tex. App. Texarkana July 21 2006).

182. In community supervision revocation proceedings, counsel was not ineffective for failing to make a hearsay objection to testimony about information in defendant's community supervision file; even if the business records predicate under Tex. R. Evid. 803 was not established, the record did not affirmatively demonstrate that the State could not have established it. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

183. Even if the trial court erred by admitting a jail book in sheet as a business record under Tex. R. Evid. 803(6), the error was harmless because no party emphasized the unexplained divergence of dates between the date defendant was arrested and the date he bonded out. Crutchfield v. State, 2013 Tex. App. LEXIS 1942 (Tex. App. Tyler Feb. 28 2013).

Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business

184. In an intoxication manslaughter trial under Tex. Penal Code Ann. § 49.08, medical records that contained the notes of a substance abuse counselor regarding defendant's 40-year history of drinking six to eight beers a day were properly admitted as business records. Sullivan v. State, 248 S.W.3d 746, 2008 Tex. App. LEXIS 670 (Tex. App. Houston 1st Dist. 2008).

Evidence : Hearsay : Exceptions : Former Testimony of Unavailable Declarants

185. At defendant's trial for murder, the trial court did not err by admitting the prior testimony from an accomplice witness that constituted hearsay under Tex. R Evid. 802; he was unavailable under the meaning of Tex. R. Evid. 804 because he invoked his Fifth Amendment privilege against self-incrimination. Lockridge v. State, 2013 Tex. App. LEXIS 6147 (Tex. App. Texarkana May 17 2013).

186. In a second trial for sexual abuse, it was error to admit the entirety of the complainant's testimony from the first trial even though the defense used part of the testimony for impeachment, because there was no showing that the entire prior testimony was either on the same subject or was necessary to correct a false or incorrect impression of the witness' testimony; the testimony was admissible because the complainant was not unavailable. Sneed v. State, 209 S.W.3d 782, 2006 Tex. App. LEXIS 10067 (Tex. App. Texarkana 2006).

Evidence : Hearsay : Exceptions : Market Reports & Commercial Publications : General Overview

187. In a criminal trial for theft of property where defendant was charged with financial exploitation based on undue influence, the trial court did not err by admitting hearsay evidence of the Kelly bluebook value of a Ford Explorer that the victims purchased and signed over to defendant; the evidence was admissible under Tex. R. Evid. 803, the hearsay exception for published compilations. Jacks v. State, 2006 Tex. App. LEXIS 1968 (Tex. App. Tyler Mar. 15 2006).

Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment

188. In a sexual assault trial, it did not violate the hearsay rule to admit the complainant's account of what happened, as told to a sexual assault nurse examiner, because the complainant's statements regarding the incident were necessary for purposes of medical diagnosis and treatment and thus came under the medical treatment exception. Williams v. State, 2014 Tex. App. LEXIS 2618, 2014 WL 895506 (Tex. App. Waco Mar. 6 2014).

189. Defendant failed to show that the court erred in admitting the statements made to the nurse for purposes of medical diagnosis or treatment, because the qualifications of the person hearing the statements was not the important consideration, and the fact that the nurse could have been gathering information for a criminal prosecution did not lead to the conclusion that the statements were inadmissible. Beck v. State, 2013 Tex. App. LEXIS 13160, 2013 WL 5773573 (Tex. App. Tyler Oct. 23 2013).

190. In defendant's sexual abuse case, the victim's hearsay statements to a doctor were properly admitted because the doctor testified that she had specialized training in treating conditions related to sexual abuse, and that she always asked her patients for a thorough medical history prior to making any diagnosis. The doctor found that the victim had a "notch" on her hymen, which was a "suspicious" finding consistent with what the victim had told her about the abuse she suffered. Whitman v. State, 2012 Tex. App. LEXIS 936, 2012 WL 361740 (Tex. App. Corpus Christi Feb. 2 2012).

191. Defendant failed to carry his burden of establishing that a hearsay exception applied to make the clinical social worker's testimony admissible into evidence, because defendant did not establish that truth-telling was a vital

component of the social worker's treatment of the niece or that the niece was aware that being truthful was essential to her therapy. Harrington v. State, 2010 Tex. App. LEXIS 2138, 2010 WL 1137046 (Tex. App. Fort Worth Mar. 25 2010).

192. There was no err in allowing the jury to hear the testimony of the pediatric nurse who examined one of the child complainants, because defendant had not demonstrated that the trial court's implied ruling, that the nurse's examination was for the purpose of medical diagnosis or treatment, was so clearly wrong as to lie outside the zone within which reasonable people might disagree; the nurse testified that she performed a medical examination on the complainant, the nurse explained that her standard examination consisted of a head-to-toe physical, with special attention on the genital and anal area and testing for sexually transmitted diseases, and the nurse testified that if she found any injury, then she would prescribe a course of treatment. Lucero v. State, 2009 Tex. App. LEXIS 9908 (Tex. App. Houston 1st Dist. Dec. 31, 2009).

193. In a trial for child sexual assault, testimony from a clinical social worker about the complainant's statements was inadmissible hearsay under Tex. R. Evid. 801(d), 802. The testimony was not admissible under the medical-diagnosis-and-treatment exception of Tex. R. Evid. 803(4) because the record did not show that the child-complainant understood that the statements identifying defendant as the perpetrator were for the purpose of medical diagnosis or treatment. Nasrollah Hanjani Alizadeh v. State, 2009 Tex. App. LEXIS 1423 (Tex. App. Houston 1st Dist. Feb. 26 2009).

194. In a criminal prosecution for sexual assault, the defendant's proffer of evidence about the victim's written medical report included no affidavit or live testimonial sponsorship from a records custodian; therefore, the medical records were hearsay, and the trial court properly excluded their admission. Smith v. State, 2006 Tex. App. LEXIS 6325 (Tex. App. Texarkana July 21 2006).

Evidence : Hearsay : Exceptions : Present Sense Impression : General Overview

195. Even though the trial court erred by admitting the audio portions of the tape that recorded the arresting officer's statements about defendant's conditions and his narrative about what he found in defendant's vehicle, as they were spoken offense reports that were inadmissible hearsay and did not qualify as present sense impressions under Tex. R. Evid. 803(1), the error was harmless because both officers testified at trial as to everything the arresting officer mentioned in the audio tape. The arresting officer testified about defendant's agitated attitude and appearance, stating that he smelled like alcohol and his face was red; the officer also testified that he asked defendant to perform field sobriety tests at least twice and he found multiple empty beer and wine bottles in the vehicle. Eggert v. State, 395 S.W.3d 240, 2012 Tex. App. LEXIS 9190, 2012 WL 5416202 (Tex. App. San Antonio Nov. 7 2012).

Evidence : Hearsay : Exceptions : Present Sense Impression : Contemporaneous Statements

196. In a driving while intoxicated case, a court erred by admitting witnesses' hearsay statements under the present sense impression exception because the evidence did not establish how much time elapsed between when one witness observed the incident and when she prepared her statement, and the other witness's written statement, made five days after the incident, clearly fell outside any reasonable argument that she made it immediately after the incident; however, the error was harmless; both witnesses testified at trial that they saw defendant weaving across the roadway prior to her leaving the highway, and a videotape of field sobriety tests supported that defendant did not have the normal use of her mental or physical faculties. Dalton v. State, 2006 Tex. App. LEXIS 9189 (Tex. App. Beaumont Oct. 25 2006).

Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials

197. Prior written statement of a witness with memory loss was properly admitted as recorded recollection under Tex. R. Evid. Rule 803(5) because the witness sufficiently vouched for the accuracy of the statement through unobjected-to hearsay testimony that the witness told an officer that the statement was true at the time she wrote it. Under Tex. R. Evid. 802, hearsay not objected to had probative value. In re J.W., 2009 Tex. App. LEXIS 9830, 2009 WL 5155784 (Tex. App. Waco Dec. 30 2009).

Evidence : Hearsay : Exceptions : Spontaneous Statements : General Overview

198. In defendant's murder case, the court properly admitted the deaf victim's written statements under the excited utterance exception because the statements related to a startling event: she wrote that she was raped, hit, and threatened with a knife that evening, the deputy testified that the statements were made while the victim was scared and angry, and thus, it was reasonable for the trial court to infer that the victim was under the stress of excitement caused by the event or condition. Fuentes v. State, 2009 Tex. App. LEXIS 9779 (Tex. App. Houston 1st Dist. Dec. 3 2009).

199. Trial court did not abuse its discretion in admitting an officer testimony regarding the victim's statements because, given that the officer responded to the victim's emergency call within fifteen minutes of the incident and that he observed the victim to be "very upset, nervous, an shaking," it was clear that the victim was still dominated by the emotions, fear, and excitement attendant to the incident when she spoke to the officer. Nolen v. State, 2009 Tex. App. LEXIS 9054, 2009 WL 4051980 (Tex. App. Corpus Christi Nov. 24 2009).

200. In a failure to stop case, the court properly excluded testimony that defendant's husband told her that he had been involved in an accident because the traffic accident was not such a startling event that the husband was still dominated by the emotions, excitement, fear, or pain of the event or condition when the statement was made; the accident was not of a serious nature, the vehicle was still operable, the injuries were relatively minor, and the statements were made in response to a question and were untrue since the driver of the other car had not left the scene. Martinez v. State, 2007 Tex. App. LEXIS 927 (Tex. App. El Paso Feb. 8 2007).

201. Statements about sexual abuse by a complainant to a school counselor were improperly admitted under the excited utterance exception to the hearsay rule because the statements were made three years after the abuse by a 14-year-old complainant, after she had told her mother about the abuse. Neill v. State, 2006 Tex. App. LEXIS 8684 (Tex. App. Fort Worth Oct. 5 2006).

202. Court properly admitted a child's statements as excited utterances where the police officer testified that the child had appeared to be upset not only when he entered the room, but for some time afterward, as she continued to express fear and distress regarding the disappearance and, she believed, death of her mother. Lagunas v. State, 187 S.W.3d 503, 2005 Tex. App. LEXIS 6957 (Tex. App. Austin 2005).

Evidence : Hearsay : Exceptions : Spontaneous Statements : Criminal Trials

203. Police officer's testimony regarding the complainant's statements made shortly after the alleged assault occurred was properly admitted because the following circumstances supported application of the excited utterance hearsay exception: (1) the officer testified he arrived on the scene within six minutes of the 911 call; (2) the trial court reasonably could have concluded that no significant amount of time elapsed between the officer's arrival and his conversation with the complainant; (3) the officer described the complainant as being visibly shocked, dazed, and very upset and sad; and (4) the officer also observed that the complainant was bleeding from lacerations on his arm. Salinas v. State, 2013 Tex. App. LEXIS 14761, 2013 WL 6328863 (Tex. App. Houston 14th Dist. Dec. 5 2013).

204. In a trial for assault involving family violence, the victim's nonverbal out-of-court statement (blinking to indicate "yes" in response to the question of whether defendant choked her) was properly admitted as an excited utterance because the officer observed that she was extremely frightened and she did not have sufficient time or composure to fabricate an answer. Miller v. State, 2013 Tex. App. LEXIS 7679 (Tex. App. Tyler June 25 2013).

205. In a murder trial, there was no error under Tex. R. Evid. 801(d), 802, in admitting, as excited utterance under Tex. R. Evid. 803(2), testimony from a deceased witness's wife about his statements. It could not reasonably be disputed that the decedent's statement shortly after the murder related to a startling event, and the wife testified that the decedent was completely out of it, rambling, and really nervous and scared. Wells v. State, 319 S.W.3d 82, 2010 Tex. App. LEXIS 2595 (Tex. App. San Antonio Apr. 14 2010).

206. In an aggravated sexual assault case, a court's decision to exclude evidence as hearsay was proper because the out of court statement made by defendant in the presence of the officers that the victim had lost her clothing in a game of cards did not possess the requisite level of reliability so as to remove it from the realm of contrivance and fabrication. The trial court could have reasonably concluded that, because the applicability of the excited utterance exception required it to first accept defendant's version of events as true, the statement was not sufficiently reliable to qualify as a hearsay exception. Langford v. State, 2010 Tex. App. LEXIS 567, 2010 WL 323081 (Tex. App. Austin Jan. 27 2010).

207. In a domestic assault case, the court properly admitted the victim's statement as an excited utterance because the victim's answer to a standard form provided by the officer said she would feel danger after the officer left. Based on those facts, which indicated that the victim might still then have been dominated by emotions when making her statements, the trial judge's discretionary decision was not so clearly wrong as to lie outside that zone within which reasonable persons might disagree. James v. State, 2009 Tex. App. LEXIS 8494, 2009 WL 3643554 (Tex. App. Texarkana Nov. 5 2009).

208. Court properly allowed a police officer to testify because the testimony explained how defendant became a suspect in the case and the status of the investigation; therefore, the officer's testimony was not inadmissible hearsay. Moreover, given that the officer responded to the victim's emergency call within fifteen minutes of the incident and that he observed the victim to be "very upset, nervous, and shaking," it was clear that the victim was still dominated by the emotions, fear, and excitement attendant to the incident. Nolen v. State, 2009 Tex. App. LEXIS 6648 (Tex. App. Corpus Christi Aug. 25 2009).

209. In a murder trial, there was no hearsay error under Tex. R. Evid. 802 in admitting the victim's statement to a friend that the defendant was chasing the victim because the statement was properly admitted as an excited utterance under Tex. R. Evid. 803; the testimony showed that the victim was still dominated by the emotions of being chased and bumped by defendant when the victim arrived at the friend's home at 4 a.m., acting scared, weird, and paranoid. Mims v. State, 238 S.W.3d 867, 2007 Tex. App. LEXIS 8534 (Tex. App. Houston 1st Dist. 2007).

210. In a trial for aggravated assault on a public servant, there was no error in admitting the statement of a 911 caller whom officers called back because the statement was properly found to be an excited utterance under Tex. R. Evid. 803; at the time of the statement, defendant had not been apprehended, and an officer testified that the caller sounded upset. Jarrell v. State, 2007 Tex. App. LEXIS 6357 (Tex. App. Austin Aug. 10 2007).

211. In a sexual assault trial, there was no error under Tex. R. Evid. 802, in admitting the complainant's out-of-court statement to the police as an excited utterance under Tex. R. Evid. 803 because the officer stated that the complainant was very excited, very nervous, almost to the point where the complainant's nervousness made the officer nervous; further, the trial court could have reasonably concluded that the sexual assault occurred within the

past few hours, supporting the admission. Farmer v. State, 2007 Tex. App. LEXIS 6012 (Tex. App. Houston 14th Dist. July 31 2007).

212. In a sexual assault trial, there was no error in admitting the complainant's out-of-court statement to a relative as an excited utterance under Tex. R. Evid. 803; although the relative described the complainant's demeanor as absolutely flat and without emotion, the relative further explained that the complainant was beyond upset, just absolutely flat and in shock about what had just happened. Farmer v. State, 2007 Tex. App. LEXIS 6012 (Tex. App. Houston 14th Dist. July 31 2007).

213. Defendant's conviction for assault causing bodily injury to a family member was appropriate because a reasonable person could have concluded that the victim made the statement at issue to the officer upon his arrival at the scene while under the excitement, fear, or pain of the event at the time she made the statement. Smith v. State, 2006 Tex. App. LEXIS 5173 (Tex. App. Fort Worth June 15 2006).

214. In a murder trial, there was no violation of the confrontation clause when the trial court admitted, as an excited utterance, evidence of a statement by the victim to his mother that defendant had just threatened to kill him. The statement was not testimonial. Hartless v. State, 2006 Tex. App. LEXIS 5066 (Tex. App. Tyler June 14 2006).

215. In defendant's robbery case, a court properly admitted the complainant's hearsay testimony as an excited utterance where a neighbor testified that when the complainant came to his apartment, she was crying and still partially bound by the wire used by her attacker, and seemed "pretty upset." Considering the complainant's shaken and excited demeanor when she spoke with the neighbor, reasonable people could conclude that the complainant was dominated by the emotions of the event when speaking with him although 30 minutes had passed since the crime. Campos v. State, 186 S.W.3d 93, 2005 Tex. App. LEXIS 9814 (Tex. App. Houston 1st Dist. 2005).

216. In a trial for family assault, testimony concerning the complainant's statements was properly admitted as excited utterance; the complainant was visibly shaken and highly upset and her intoxication did not negate her state of excitement. Hudson v. State, 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

217. In a trial for assault on a family member, the complainant's statement to officers and an emergency medical technician was properly admitted under the excited utterance exception to the hearsay rule. The complainant's intoxication did not call into question whether her mind was dominated by a state of excitement; the three witnesses testified that she was visibly shaken and highly upset when they arrived within five minutes of receiving the assault call. Hudson v. State, 2005 Tex. App. LEXIS 7386 (Tex. App. Houston 14th Dist. Sept. 8 2005), opinion withdrawn by, substituted opinion at 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

218. Outcry statement by a child sexual assault victim did not quality as an excited utterance because the statement was made almost two years after the first assault. The court rejected the argument that the "startling event" was a revelation made to the victim just prior to the outcry by her father's girlfriend because the testimony indicated that the victim considered how and what to reveal about the assault several months before she made her outcry to her father's girlfriend. Smith v. State, 2005 Tex. App. LEXIS 3972 (Tex. App. San Antonio May 25 2005).

219. In a trial for unlawfully carrying a handgun, the trial court properly admitted an officer's testimony about a witness's statement that defendant approached the car she was occupying, demanded that it be moved, and partially removed a gun from his pocket. The statement was an excited utterance under Tex. R. Evid. 803(2), even though the record did not reflect how much time passed after the confrontation, because the officer testified that the witness was very upset and was crying. Spielman v. State, 2005 Tex. App. LEXIS 3854 (Tex. App. Houston 1st Dist. May 19 2005).

220. In an assault trial, the victim's statement to police, which she made when they responded to a 911 call from a third person, was properly admitted under the excited utterance exception, Tex. R. Evid. 803(2) to the hearsay rule, Tex. R. Evid. 801(d), 802. The victim was extremely agitated when officers arrived at the scene and was so upset that officers initially could not understand her. Bufkin v. State, 2005 Tex. App. LEXIS 2745 (Tex. App. Houston 14th Dist. Apr. 12 2005), opinion withdrawn by, substituted opinion at 179 S.W.3d 166, 2005 Tex. App. LEXIS 8750 (Tex. App. Houston 14th Dist. 2005).

221. In a sexual assault trial, the complainant's statement to police was properly admitted under the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2). The complainant had run into a store crying, shaking, and screaming that she had just been raped at gunpoint by two men in a van and needed help; the police were called within three to four minutes and arrived approximately five minutes later, when she was still under the influence of the trauma she just experienced and appeared to be in shock. Ascencio v. State, 2005 Tex. App. LEXIS 1449 (Tex. App. Houston 14th Dist. Feb. 24 2005).

222. Each case that involves a period of unconsciousness between the time of a startling event and a statement must be reviewed in light of the facts and circumstances of the case to determine whether the statement is admissible as an excited utterance. The declarant need not necessarily have been unconscious for the entire period between the startling event and the statement, so long as the record supports the reasonable conclusion that the declarant did not have a meaningful opportunity to reflect. Apolinar v. State, 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

223. In a trial for aggravated robbery, a statement made by the victim four days after the attack was properly admitted as an excited utterance because the victim was unconscious for part of the four days and, based on the circumstances, it was reasonable to conclude that he had no meaningful opportunity to reflect. The record supported findings that between the stabbing and his surgery, the victim was still in shock, that he was then unconscious until the time that he made the statement, and that at the time of the statement he was animated, angry, and excited. Apolinar v. State, 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

224. Excited utterance exception to the hearsay rule justified the admission of testimony that the declarant, a murder victim, had told the witness that he was afraid of the defendant; the trial court did not abuse its discretion in concluding that the victim was under the influence of a startling event. Headley v. State, 2004 Tex. App. LEXIS 5104 (Tex. App. Houston 1st Dist. June 10 2004).

Evidence : Hearsay : Exceptions : State of Mind : General Overview

225. In an aggravated assault case, defendant should have been allowed to testify that the victim threatened to file a "false" assault charge against her because the statement was not offered to prove the truth of the matter asserted; instead, it was offered to show that the victim had an intent to lie. Corbin v. State, 2013 Tex. App. LEXIS 15300, 2013 WL 7083195 (Tex. App. Eastland Dec. 19 2013).

226. In a murder case, although the trial court erred in admitting the victim's hearsay statement regarding her plans to withhold all financial support from defendant, the error was harmless. The State provided evidence of the stolen rifle as the murder weapon, the victim's negative feelings toward defendant, defendant's inconsistent alibi, and the perpetrator's knowledge of where valuables were located in the victim's home. Fischer v. State, 2009 Tex. App. LEXIS 4092 (Tex. App. San Antonio June 10 2009).

227. In a murder case, because the victim's statement that defendant "gave her the creeps" was permissible hearsay, and went to the nature of the relationship between the victim and defendant, the court did not err in

admitting the statement. Fischer v. State, 2009 Tex. App. LEXIS 4092 (Tex. App. San Antonio June 10 2009).

228. In defendant's trial for robbery and kidnapping, testimony about defendant's accomplice's statement was not hearsay because the testimony was elicited to show what effect the statement had on the victim's state of mind. Edwards v. State, 2008 Tex. App. LEXIS 2564 (Tex. App. Houston 1st Dist. Apr. 10 2008).

229. In the trial of an officer for lying in a warrant affidavit about the reliability of an informant, the trial court properly allowed testimony that the alleged informant was reluctant to deal with the subject of the warrant, while prohibiting more specific testimony that the informant was afraid because of the informant's belief that the subject had killed a man. The latter statement was properly excluded as hearsay under Tex. R. Evid. 801(d), 802 and did not fall within the exception of Tex. R. Evid. 803 because it was a statement of memory or belief offered to prove that the subject had killed a man. Delapaz v. State, 228 S.W.3d 183, 2007 Tex. App. LEXIS 2377 (Tex. App. Dallas 2007).

Evidence : Hearsay : Exceptions : State of Mind : Proof of Later Acts

230. In an aggravated assault case, the trial court erred by sustaining the hearsay objection to the victim's statement that "she was gonna call the law" because it evinced a state of mind concerning her future conduct and was admissible. Corbin v. State, 2013 Tex. App. LEXIS 15300, 2013 WL 7083195 (Tex. App. Eastland Dec. 19 2013).

Evidence : Hearsay : Exceptions : Statements Against Interest

231. Court did not abuse its discretion in admitting the redacted jailhouse recording into evidence, because defendant's own statements implicated his guilt, and the redacted statements were not offered for the truth of the matter asserted, but offered for the purpose of placing in evidence defendant's own statements against interest. Howard v. State, 2014 Tex. App. LEXIS 9208, 2014 WL 4100690 (Tex. App. El Paso Aug. 20 2014).

232. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

233. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

234. In defendant's robbery case, the court properly allowed testimony because the statement "It just didn't go as planned," inferentially tended to show that the coconspirator committed or attempted to commit the offense that was the subject of the conspiracy, i.e., to obtain some money, in Pampa, by some method. Davey Enriquez v. State, 2009 Tex. App. LEXIS 5183 (Tex. App. Amarillo July 7 2009).

235. Court properly admitted evidence as a statement against interest because defendant's question to the witness -- "how she would feel towards him if the police said that he had killed the two ladies" -- was self-

inculpatory, and the circumstances of the relationship between defendant and the witness tended to corroborate the trustworthiness of the statement. Juarez v. State, 2009 Tex. App. LEXIS 77, 2009 WL 41648 (Tex. App. Houston 1st Dist. Jan. 8 2009).

236. Accomplice's statement was properly admitted because the reliability of the statements to the officer was established through confirmation that the accomplice's backpack was in the trunk of defendant's car and that another participant was nearby in a stolen truck similar to the one the accomplice was driving. Johnson v. State, 2008 Tex. App. LEXIS 9455 (Tex. App. Beaumont Dec. 17 2008).

237. In a drug case, a court did not err by excluding an audiotape statement of a witness purportedly showing that he confessed to having exclusive possession of the cocaine because the witness's guilt was not inconsistent with defendant's because possession was not mutually exclusive, and the statement was given after being arrested and in the context of interrogation, at a time when motivation to curry favor with law enforcement existed. Minor v. State, 2005 Tex. App. LEXIS 5470 (Tex. App. Houston 1st Dist. July 14 2005).

238. In a murder trial, testimony was properly admitted by two witnesses regarding hearsay statements by friends of defendant concerning their plans to commit a robbery with him. The hearsay statements were against penal interest, even if they would not, at the time they were made, have subjected the declarants to liability for capital murder, because the declarants could have been liable for criminal conspiracy. Lafitte v. State, 2004 Tex. App. LEXIS 10247 (Tex. App. Austin Nov. 18 2004), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 1790 (Tex. App. Austin Mar. 10, 2005).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

239. In a case in which defendant was convicted of indecency with a child, among other offenses, the trial court did not abuse its discretion in admitting the outcry statements that the victim made to her foster mother after determining that the outcries were reliable because although the victim did not testify about the outcries, she did testify that defendant had touched her on her private part and therefore confirmed, in part, her statements in the outcries, and the foster mother's testimony and written reports indicated that the victim had made the outcries spontaneously and in her own terminology. Moreover, the trial court could have reasonably determined that a child of the victim's age would not have normally imagined things such as a parent's touching her private area or naked people kissing and touching each other, and the record did not disclose a motive that the victim would have had to fabricate the outcries. Woodruff v. State, 2012 Tex. App. LEXIS 6132, 2012 WL 3041114 (Tex. App. Fort Worth July 26 2012).

240. Issue of whether the nurse's testimony should have been excluded as hearsay was not preserved for review, because defendant withdrew his objection and never gave the trial court a chance to consider whether the nurse's testimony was hearsay. Arcos v. State, 2011 Tex. App. LEXIS 5134, 2011 WL 2652262 (Tex. App. Houston 1st Dist. July 7 2011).

241. Mother was the proper outcry witness, because the victim described the offense in a discernible manner to the mother before he talked with the sexual assault nurse examiner for the hospital, when the victim clearly communicated to his mother that defendant penetrated the anus of the victim; while the mother testified that the term "ding-a-ling" was not a term that she used and she did not know how the victim was familiar with that term, her actions immediately following the allegation indicated that she understood the victim was alleging a specific incident of sexual abuse. Alexander v. State, 2010 Tex. App. LEXIS 9753, 2010 WL 4983437 (Tex. App. Texarkana Dec. 9 2010).

242. Court did not abuse its discretion by permitting the investigator to testify as a second outcry witness, because the investigator's statement could be classified as an outcry witness statement and was admissible under Tex. Code Crim. Proc. Ann. art. 38.072, § 2(a), since the complainant's outcry regarding the additional instances of sexual abuse did not occur until the investigator's interview. Hernandez v. State, 2010 Tex. App. LEXIS 3491, 2010 WL 1854150 (Tex. App. Fort Worth May 6 2010).

243. In defendant's sexual assault case, it was error to have permitted a witness to testify concerning the child's statements because the State failed to offer proof that the witness was the proper outcry witness whose testimony was an exception to the hearsay rule. It was error to fail to conduct the hearing once the hearsay objection was raised. Rawls v. State, 2009 Tex. App. LEXIS 8054, 2009 WL 3321006 (Tex. App. Texarkana Oct. 16 2009).

244. In a case involving child sexual assault, a statement given by the child's mother would have not been admissible as an outcry statement since the child had already told someone else over 18 about an alleged incident, and a videotaped interview of the victim three years later was also not admissible under Tex. Code Crim. Proc. Ann. art. 38.072; however, the failure to object to these hearsay items did not result in ineffective assistance of counsel because there was a reasonable trial strategy relating to the believability of the victim. Hankey v. State, 231 S.W.3d 54, 2007 Tex. App. LEXIS 4161 (Tex. App. Texarkana 2007).

245. Defendant maintained that the trial court erred in admitting, during defendant's trial for aggravated sexual assault on a child, a videotape of the complainant's interview with a police officer; defendant argued that the videotape contained the complainant's outcry statement, which had to be relayed through testimony of a live witness; nevertheless, during a hearing, defendant did not mention the videotape, and he did not object at trial. Scott v. State, 222 S.W.3d 820, 2007 Tex. App. LEXIS 2848 (Tex. App. Houston 14th Dist. 2007).

246. In defendant's sexual assault on a child case, a court properly allowed outcry testimony from a psychotherapist who treated the victim because, although the witness's testimony concerning the victim's statement did not specify the manner or means of defendant's offenses, the victim's statement did clearly allege sexual abuse and clearly identified defendant as the abuser. Newton v. State, 2007 Tex. App. LEXIS 2477 (Tex. App. Waco Mar. 28 2007).

247. In a trial for child sexual assault, there was no error in admitting a statement about the offense that the complainant made to a friend's parent; although the statement was not outcry, it was also not hearsay under Tex. R. Evid. 802 because it was offered to show the circumstances under which the friend's parent called the police, not the truth of the matter asserted. Scott v. State, 2007 Tex. App. LEXIS 473 (Tex. App. Houston 14th Dist. Jan. 25 2007).

248. Statements about sexual abuse by a complainant to a school counselor were improperly admitted under the excited utterance exception to the hearsay rule because the statements were made three years after the abuse by a 14-year-old complainant, after she had told her mother about the abuse. Neill v. State, 2006 Tex. App. LEXIS 8684 (Tex. App. Fort Worth Oct. 5 2006).

249. Hearsay statement by a child-sexual-assault complainant to a forensic interviewer was properly admitted as outcry under Tex. Code Crim. Proc. Ann. art. 38.072, even though the complainant told other witnesses that defendant had taken off her clothes and climbed on top of her, because it was her statement to the forensic interviewer that described the penetration. Garza v. State, 2006 Tex. App. LEXIS 8308 (Tex. App. Austin Sept. 21 2006).

250. Defendant did not preserve for review his hearsay argument regarding statements by a seven-year-old complainant in a sexual assault case, which were admitted through the testimony of her mother, a forensic

investigator, and a physician, because the only basis on which defendant objected at trial was that complainant was not competent to testify. Hunter v. State, 2006 Tex. App. LEXIS 1783 (Tex. App. Houston 1st Dist. Mar. 9 2006).

251. Outcry statement by a child sexual assault victim did not quality as an excited utterance because the statement was made almost two years after the first assault. The court rejected the argument that the "startling event" was a revelation made to the victim just prior to the outcry by her father's girlfriend because the testimony indicated that the victim considered how and what to reveal about the assault several months before she made her outcry to her father's girlfriend. Smith v. State, 2005 Tex. App. LEXIS 3972 (Tex. App. San Antonio May 25 2005).

252. At a trial for child sexual assault, testimony from a second outcry witness was not admissible as a prior consistent statement of the victim because the State did not confine its presentation of the testimony to consistent reports of the incident. The State presented the testimony to prove the truth of the matter asserted by the victim, that she was exposed to defendant's penis, and to present details not included in other testimony. Moreno v. State, 2005 Tex. App. LEXIS 1834 (Tex. App. Austin Mar. 10 2005).

253. In a trial for defendant's sexual assault of his minor daughters, outcry testimony was properly admitted from two witnesses because the testimony contained information regarding specific instances of sexual contact and did not entirely overlap. Testimony from a third witness, an investigator, should not have been admitted because the statements were not specific; however, counsel's failure to object did not render his assistance ineffective. Everett v. State, 2005 Tex. App. LEXIS 795 (Tex. App. San Antonio Feb. 2 2005).

254. In a criminal prosecution for aggravated sexual assault of a child under the age of 14, the State was improperly allowed to present evidence through the outcry witness that her mother had suspected that defendant was molesting the child even before she had made any outcry. However, the error was harmless since it was unlikely that the single recounting of hearsay about a witness' "suspicion," especially when strongly and directly denied by the declarant herself, had more than a slight influence on the verdict. May v. State, 139 S.W.3d 93, 2004 Tex. App. LEXIS 5560 (Tex. App. Texarkana 2004).

255. At the time the prosecutor proffered the out-of-court statement, defendant objected only that the statutory predicate had not been fully satisfied in that the requisite showing of reliability was deficient; pursuant to Tex. R. Evid. 802, absent such showing, the statute could not operate to take the statement out of the pale of the general rule excluding hearsay. In short, defendant lodged a hearsay objection, not an objection to a violation of confrontation; the two were neither synonymous nor necessarily coextensive, and having ruled that the statutory predicate had been met, and that the hearsay objection was therefore not well taken, the trial court had no notice of any other ground for exclusion. Holland v. State, 802 S.W.2d 696, 1991 Tex. Crim. App. LEXIS 14 (Tex. Crim. App. 1991).

Evidence : Hearsay : Exemptions : General Overview

256. Testimony from an officer that he was conducting surveillance on defendant's residence due to complaints about drug activity did not constitute hearsay because it was a general description of possible criminality; no objection was made to testimony relating to specific complaints, so that error was not preserved under Tex. R. App. P. 33.1. Lester v. State, 2008 Tex. App. LEXIS 6006 (Tex. App. Waco Aug. 6 2008).

257. In defendant's burglary case, the court properly allowed an officer to testify that, as she could not come to a conclusion on the latent fingerprint, she asked other examiners to examine the print, because the trial court could have reasonably concluded that the testimony, when taken in context, did not lead to any inescapable conclusions as to the substance of the other examiner's conclusions about the print and was therefore, not hearsay; the only information imparted by the testimony was that others had examined the print and had reached a conclusion, and

that their conclusions were the same. Smith v. State, 236 S.W.3d 282, 2007 Tex. App. LEXIS 2206 (Tex. App. Houston 1st Dist. 2007).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : General Overview

258. At a trial for child sexual assault, testimony from a second outcry witness was not admissible as a prior consistent statement of the victim because the State did not confine its presentation of the testimony to consistent reports of the incident. The State presented the testimony to prove the truth of the matter asserted by the victim, that she was exposed to defendant's penis, and to present details not included in other testimony. Moreno v. State, 2005 Tex. App. LEXIS 1834 (Tex. App. Austin Mar. 10 2005).

259. Evidence of a police transmission describing a robbery suspect was inadmissible in an aggravated robbery case because it constituted hearsay since the relevancy turned on the truthfulness or accuracy of the contents of the statement; defendant failed to preserve his argument that the transmission was admissible under Tex. R. Evid. 801(e)(1)(C) because it was not raised before the trial court. Johnson v. State, 2003 Tex. App. LEXIS 10949 (Tex. App. Houston 1st Dist. May 13 2003).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Identifications

260. In a murder trial, no hearsay error occurred under Tex. R. Evid. 801, 802 when a detective testified to a witness's out-of-court identification, which was translated from Cambodian by the complainant's offspring. Because the witness testified at trial, the out-of-court identification was not hearsay in itself, and the interpreter served as a mere language conduit for the witness. Driver v. State, 2009 Tex. App. LEXIS 778, 2009 WL 276539 (Tex. App. Houston 1st Dist. Feb. 5 2009).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements

261. In a trial for child sexual assault in which the complainant's age at the time of the sexual incidents was at issue, it was error under Tex. R. Evid. 802 to admit the complainant's prior consistent statements about the time of the incidents; defendant was entitled to cross-examine the complainant as to who told her what dates to allege because the complainant herself blamed her lawyer for inconsistencies in her deposition testimony; cross-examination that tested the memory of a witness did not rise to the level of a charge of recent fabrication or improper influence or motive. Hammons v. State, 221 S.W.3d 720, 2007 Tex. App. LEXIS 663 (Tex. App. San Antonio 2007), *rev'd on other grounds*, 239 S.W.3d 798, 2007 Tex. Crim. App. LEXIS 1632 (Tex. Crim. App. 2007, no pet).

Evidence : Hearsay : Exemptions : Statements by Coconspirators : Statements During Conspiracy

262. In defendant's robbery case, the court properly allowed testimony because the statement "It just didn't go as planned," inferentially tended to show that the coconspirator committed or attempted to commit the offense that was the subject of the conspiracy, i.e., to obtain some money, in Pampa, by some method. Davey Enriquez v. State, 2009 Tex. App. LEXIS 5183 (Tex. App. Amarillo July 7 2009).

Evidence : Hearsay : Exemptions : Statements by Coconspirators : Statements Furthering Conspiracy

263. In defendant's aggravated robbery case, the court properly admitted a co-conspirator's statement because the officer's testimony about the statement "waste him, dog, waste him" and "shoot him, and get out of here," was not hearsay; the officer was attempting to arrest or detain the suspect while defendant was in a nearby car. The statement was not offered for the truth of the matter asserted but rather to provide the jury the context in which

defendant was eventually arrested. Clifton v. State, 2009 Tex. App. LEXIS 6533, 2009 WL 2567946 (Tex. App. Austin Aug. 20 2009).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

264. In defendant's murder trial, there was no error in the admission of testimony by a witness about statements defendant made in a telephone call because they were within the hearsay exemption for statements of a party-opponent. Van Exel v. State, 2014 Tex. App. LEXIS 8464 (Tex. App. Dallas Aug. 4 2014).

265. Testimony did not constitute hearsay under Tex. R. Evid. 802(2)(e) and thus the trial court did not err in overruling the objection. Lowery v. State, 2010 Tex. App. LEXIS 1230, 2010 WL 610915 (Tex. App. Dallas Feb. 23 2010).

266. Trial court did not abuse its discretion in admitting defendant's testimony regarding her examination under oath conducted to settle a civil claim for insurance proceeds in her criminal trial for arson, because the statements under oath were admissions by defendant; since defendant's examination under oath was not hearsay when offered against her, no hearsay exception was needed to admit the statements. Montgomery v. State, 2009 Tex. App. LEXIS 7223, 2009 WL 2933749 (Tex. App. Dallas Sept. 15 2009).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : Authorized Statements

267. Hearsay objection was irrelevant, because the witness's recorded testimony from the prior suit, the judgment from which the claimant sought to enforce in the instant action, was properly admitted under Tex. R. Evid. 801(e)(2)(D) as the admission of a party-opponent. Tryco Enters. v. Robinson, 390 S.W.3d 497, 2012 Tex. App. LEXIS 7810, 2012 WL 4021126 (Tex. App. Houston 1st Dist. Sept. 13 2012).

268. If the proponent of an out-of-court translation of an out-of-court statement of a party can demonstrate to the satisfaction of the trial court that the party authorized the interpreter to speak for him on the particular occasion, or otherwise adopted the interpreter as his agent for purposes of translating the particular statement, then the out-of-court interpretation may properly be admitted under Tex. R. Evid. 801(d)(2)(C) or (D). If the trial court is not so satisfied, it should sustain a hearsay objection to the out-of-court translation, under Tex. R. Evid. 802. Saavedra v. State, 297 S.W.3d 342, 2009 Tex. Crim. App. LEXIS 1560 (Tex. Crim. App. 2009).

269. Court did not err in overruling defendant's hearsay objections to statements admitted at trial because the interpreter-victim was apparently able to translate accurately because the fact that a witness complied with demands for his money, his wallet, putting his hands down, and getting out of the car demonstrated the reliability of the victim as a language conduit for defendant. Pitts v. State, 2008 Tex. App. LEXIS 2796 (Tex. App. Houston 1st Dist. Apr. 17 2008).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : Extrajudicial Statements

270. In a trial for possession of marihuana, the court should have admitted a codefendant's statement taking responsibility for some of the drugs under Tex. R. Evid 803; however, the error in excluding the statement was harmless because defendant was able to present a defense and to argue effectively that the drugs belonged to the codefendant and because the State consistently argued that both parties were guilty of the offense. Bradley v. State, 2006 Tex. App. LEXIS 4425 (Tex. App. Tyler May 24 2006).

Evidence : Hearsay : Hearsay Within Hearsay

271. In an injury to a child case, the court erred by allowing testimony by the child's mother that her parents needed to tell her something important that the police said regarding defendant's involvement in the crime because it constituted double hearsay; however, the error was harmless because defendant was indicted for the crime, and the police themselves testified during trial that they believed defendant committed the crime and why. Lopez v. State, 200 S.W.3d 246, 2006 Tex. App. LEXIS 9199 (Tex. App. Houston 14th Dist. 2006).

Evidence : Hearsay : Rule Components

272. Detective's testimony that his investigation centered on defendant after taking witness's statements was admissible to show how defendant became a suspect and was not inadmissible as backdoor hearsay. Peace v. State, 2005 Tex. App. LEXIS 7700 (Tex. App. Houston 14th Dist. Sept. 20 2005).

273. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

274. In a sexual assault case, counsel was ineffective where he failed to object to hearsay testimony that did not qualify as outcry evidence and allowed defendant to testify, knowing that doing so would permit the State to introduce evidence of defendant's previous incriminating oral statement. Failing to object to the previous statement in any way, counsel allowed the testimony to come in as evidence of defendant's guilt, rather than as only impeachment evidence to his testimony. Glasgow v. State, 2005 Tex. App. LEXIS 2979 (Tex. App. Dallas Apr. 20 2005).

275. In a burglary trial, the registration card from the motel where police found defendant was admissible, even if not properly offered as a business record, because it was not hearsay. Rather, it was introduced for the purpose of showing how the investigation proceeded. Rodriguez v. State, 2005 Tex. App. LEXIS 1164 (Tex. App. Amarillo Feb. 11 2005).

276. In an aggravated sexual assault of a child case, even if the victim's alleged statement itself was admissible, it was shrouded by additional layers of hearsay not falling under any exception. The tape consisted of an out-of-court statement by an anonymous caller reporting her daughter's out-of-court statement that the victim told her, in an out-of-court statement, that her father sexually assaulted her (rather than defendant). Because the tape contained layers of inadmissible hearsay, the trial court properly excluded it. Holmes v. State, 2004 Tex. App. LEXIS 10661 (Tex. App. Dallas Nov. 30 2004).

277. In defendant's murder case, a witness's statement that "spending time with defendant that night was going to be the worst mistake he ever made" was erroneously admitted because the statement was hearsay, and it contained a dramatic piece of information not communicated in the earlier testimony. Martin v. State, 151 S.W.3d 236, 2004 Tex. App. LEXIS 9437 (Tex. App. Texarkana 2004).

278. In a murder case, a court properly allowed the State to impeach a witness with his prior inconsistent grand jury statement where he was shown a copy of his grand jury testimony and he acknowledged that he had previously testified that, during a telephone conversation, defendant told him that "they are here." The State used the brother's prior statements for the limited purpose of attacking his credibility because of his inconsistent statements, and not to prove the truth of the matter asserted. Bolton v. State, 2004 Tex. App. LEXIS 5584 (Tex. App. Houston 1st Dist.

June 24 2004).

279. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

280. In defendant's theft case, a court's error in excluding evidence that the declarant told defendant to move a trailer was harmless where defendant's sister testified that the employer told her defendant moved a trailer for a the declarant, and through the testimony of the two witnesses, the jury heard essentially the same evidence the trial court initially excluded: that the declarant hired defendant to move a trailer. Gibson v. State, 2004 Tex. App. LEXIS 3198 (Tex. App. Beaumont Apr. 7 2004).

281. In an assault case, counsel was not ineffective for failing to object to an extraneous assault offense as being not relevant, unfairly prejudicial, and based on hearsay where the evidence was relevant because it tended to make it more probable that the victim's father was a credible witness; without the evidence, the jury was presented with the impression that he was being evasive and that he was racially biased against defendant. The probative value of the evidence was not outweighed by its prejudicial effect because the evidence presented a reason for the witness's feelings toward defendant, and the extraneous offense was not hearsay because it was not offered to prove that defendant had assaulted the victim in the past; rather, the evidence was admitted to prove that the victim's father disapproved of defendant because of his belief that defendant had assaulted the victim in the past. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

282. In a prosecution for unauthorized use of a motor vehicle, the trial court correctly sustained a hearsay objection regarding an offer by the vehicle's owner to drop all charges against defendant if he paid her restitution, as defense counsel was soliciting an answer which would have constituted a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Kirksey v. State, 132 S.W.3d 49, 2004 Tex. App. LEXIS 2448 (Tex. App. Beaumont 2004).

283. Victim's prior inconsistent statement about the assault was hearsay and contained hearsay within hearsay, but defendant's counsel never objected to it on either basis and any objection defendant had to the statement was waived under Tex. R. App. P. 33.1(a)(1); unobjected-to-hearsay has probative value as substantive evidence, and is considered in reviewing sufficiency challenges pursuant to Tex. R. Evid. 802. Rios v. State, 2003 Tex. App. LEXIS 1832 (Tex. App. Tyler Feb. 28 2003).

284. At the time the prosecutor proffered the out-of-court statement, defendant objected only that the statutory predicate had not been fully satisfied in that the requisite showing of reliability was deficient; pursuant to Tex. R. Evid. 802, absent such showing, the statute could not operate to take the statement out of the pale of the general rule excluding hearsay. In short, defendant lodged a hearsay objection, not an objection to a violation of confrontation; the two were neither synonymous nor necessarily coextensive, and having ruled that the statutory predicate had been met, and that the hearsay objection was therefore not well taken, the trial court had no notice of any other ground for exclusion. Holland v. State, 802 S.W.2d 696, 1991 Tex. Crim. App. LEXIS 14 (Tex. Crim. App. 1991).

Evidence : Hearsay : Rule Components : General Overview

285. Any error in admitting the officer's hearsay testimony was harmless because evidence of the additional fact that defendant had rented and occupied the house "for several weeks" did not move the jury from a state of non-persuasion to one of persuasion on the issue of knowing possession of marijuana. Guillen v. State, 2014 Tex. App. LEXIS 3739, 2014 WL 1387977 (Tex. App. Houston 1st Dist. Apr. 8 2014).

286. Any error in the admission of the child's mother's out-of-court hearsay statements regarding defendant's drug use, employment, and housing was harmless because evidence similar to the testimony was admitted at trial without objection and it was cumulative of other evidence. In the Interest of R.T.M., 2014 Tex. App. LEXIS 3683, 2014 WL 1357242 (Tex. App. Eastland Apr. 3 2014).

287. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

288. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

289. Defendant failed to show that the court erred in admitting the statements made to the nurse for purposes of medical diagnosis or treatment, because the qualifications of the person hearing the statements was not the important consideration, and the fact that the nurse could have been gathering information for a criminal prosecution did not lead to the conclusion that the statements were inadmissible. Beck v. State, 2013 Tex. App. LEXIS 13160, 2013 WL 5773573 (Tex. App. Tyler Oct. 23 2013).

290. Although appellant complained about appellee's testimony about her father's delivery of an eviction notice to appellant, the complaint was waived by appellant's failure to appear and challenge the hearsay testimony before the county court. Johnson v. Mohammed, 2013 Tex. App. LEXIS 5808 (Tex. App. Austin May 10 2013).

291. Testimony by indecency with a child victim's mother that the victim stated that she felt uncomfortable when she could feel defendant in the pool was inadmissible hearsay; the victim's statement described an emotion, but was not admissible as a then-existing state of mind. Linney v. State, 401 S.W.3d 764, 2013 Tex. App. LEXIS 5560 (Tex. App. Houston 14th Dist. May 7 2013).

292. Trial court did not err in allowing state troopers to testify, over defendant's hearsay objection, regarding information they had received from an anonymous tipster where the information was used at trial to show how and why defendant came to the attention of the troopers and, in that sense, was admissible to prove that the troopers detained defendant after they acquired specific information concerning a drug-smuggling operation involving a tractor-trailer whose description matched the appearance of defendant's tractor-trailer. Because defendant had challenged the conduct of the troopers on the grounds that they lacked reasonable suspicion for the traffic stop and probable cause for his arrest, the details of the out-of-court statements by the anonymous tipster were admissible to show the reasonableness of the troopers' conduct. Iglesias v. State, 2013 Tex. App. LEXIS 433 (Tex. App. Corpus Christi Jan. 17 2013).

293. Any error in the admission of the testimony was harmless because the same or similar evidence was admitted at another point in the trial without objection. Nelson v. State, 405 S.W.3d 113, 2013 Tex. App. LEXIS 377, 2013 WL 174502 (Tex. App. Houston 1st Dist. Jan. 17 2013).

294. Financial history should have been excluded from evidence in light of the company's hearsay objection; no testimony was offered, either live or by affidavit, that could have proved the "financial history" was not hearsay, was a business record, or otherwise satisfied an exception to the hearsay rule. Shamrock Foods Co. v. Munn & Assocs., Ltd., 392 S.W.3d 839, 2013 Tex. App. LEXIS 244, 2013 WL 150810 (Tex. App. Texarkana Jan. 15 2013).

295. In review of the commission's decision, the trial court's role was to consider evidence and hear testimony presented to show whether the commission's decision was supported by substantial evidence, but when the trial court sustained appellees' objection and excused the patrolman's witnesses, he did not make an offer of proof, call other witnesses, or try to admit any other evidence; on appeal, the patrolman complained that the trial court should not have considered the transcript, but after his initial objection, he did not object when the transcript was admitted, and he was the one who asked for admission, such that he waived any objection to the admission, including his objection that certain parts of the transcript were not translated, and the trial court had discretion to consider the transcript, for purposes of Tex. R. Evid. 802. Reyes v. City of Laredo, 2012 Tex. App. LEXIS 10361, 2012 WL 6553636 (Tex. App. San Antonio Dec. 14 2012).

296. Assuming that testimony contained inadmissible hearsay for purposes of Tex. R. Evid. 802, a father had to show that counsel's decision not to object was not based on sound trial strategy. Medellin v. Tex. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 8225, 2012 WL 4466511 (Tex. App. Austin Sept. 26 2012).

297. Counsel asked where a witness obtained his understanding of the facts to which he testified, and the witness stated what his grandmother told him; this was hearsay under Tex. R. Evid. 802 and properly excluded. In re Estate of Snow, 2012 Tex. App. LEXIS 7450 (Tex. App. Tyler Aug. 30 2012).

298. Statement about what someone else said was inadmissible hearsay. In re Estate of Snow, 2012 Tex. App. LEXIS 7450 (Tex. App. Tyler Aug. 30 2012).

299. Appellant did not dispute that the proffered evidence was hearsay, and it was his responsibility to specify the exception on which he relied, but he failed to cite one; even if the court found the evidence was admissible under Tex. R. Evid. 403, on which appellant focused, appellant did not address the hearsay issue, and thus the trial court did not abuse its discretion in excluding the testimony on inadmissible hearsay grounds. Quevedo v. State, 2012 Tex. App. LEXIS 6178, 2012 WL 3055470 (Tex. App. Dallas July 27 2012).

300. Court found that any error in admitting certain exhibits was harmless under the standard of Tex. R. App. P. 44.2(a); any error in admitting the exhibits over a hearsay objection did not require reversal of the judgment under Rule 44.2(b). Peluso v. State, 2012 Tex. App. LEXIS 5122, 2012 WL 2450818 (Tex. App. Beaumont June 27 2012).

301. Appellant did not obtain a ruling on his renewed objections when the State sought to question a witness on rebuttal, and no objection was made during that questioning, such that the issues raised regarding hearsay and the Confrontation Clause were not preserved as to that testimony; the court noted that under Tex. R. Evid. 802, inadmissible hearsay admitted without an objection was not denied value just given that it was hearsay. Thompson v. State, 2012 Tex. App. LEXIS 4597, 2012 WL 2106549 (Tex. App. Houston 1st Dist. June 7 2012).

302. Witness had no personal knowledge about the value of wheels and repeated only what an automobile dealer told him, such that the witness's testimony was hearsay under Tex. R. Evid. 801(d), and this was inadmissible

unless an exception to the rule applied. Calixto v. State, 2012 Tex. App. LEXIS 2643, 2012 WL 1138726 (Tex. App. Dallas Apr. 4 2012).

303. Allowing the prosecutor to testify about an email regarding another out-of-court statement allegedly made by a detective would have involved violations of the hearsay rules, including Tex. R. Evid. 801, 805, and appellant did not identify any exception, for purposes of Tex. R. Evid. 802; appellant did not show that the trial court erred in refusing to allow the prosecutor to testify about the email. Zavala v. State, 401 S.W.3d 171, 2011 Tex. App. LEXIS 8671, 2011 WL 5156843 (Tex. App. Houston 14th Dist. Nov. 1 2011).

304. While a trial court erred in admitting hearsay testimony by appellee's friend recounting appellant's statements to appellee, the error was harmless as the testimony was merely cumulative of other properly admitted evidence. Jasik v. Mauricio, 2011 Tex. App. LEXIS 7078, 2011 WL 3849473 (Tex. App. San Antonio Aug. 31 2011).

305. Because the evidence presented in a police report was admitted elsewhere during defendant's trial, without objection, even if it was hearsay error for the trial court to allow the State to read the entire police report, the error was harmless. Washmon v. State, 2010 Tex. App. LEXIS 3085 (Tex. App. Corpus Christi Apr. 29 2010).

306. Court agreed that seller waived any hearsay complaint with an affidavit by failing to object and obtain a ruling below. Sprayberry v. Siesta Mhc Income Ptnrs., L.P., 2010 Tex. App. LEXIS 2517, 2010 WL 1404598 (Tex. App. Austin Apr. 8 2010).

307. In a case in which a jury found that defendant juvenile engaged in delinquent conduct by committing the offenses of aggravated sexual assault and indecency with a child, the trial court did not err in excluding certain testimony of various witnesses and did not prevent defendant from fully presenting his defensive theory where: (1) the proffered testimony of the victim's mother as set forth in defendant's bill of exceptions was properly excluded as speculative pursuant to Tex. R. Evid. 602; (2) the victim's mother was not shown to be qualified as an expert to testify under Tex. R. Evid. 702; (3) at trial, defendant was allowed to question the victim and her sister regarding the meeting they allegedly had with their grandparents during the time period after the victim's outcry but prior to the Monday morning interview with a deputy; and (4) the only testimony excluded by the trial court during defense counsel's examination of the victim and her sister was testimony regarding statements made by their grandparents during the alleged meeting, which was properly excluded on hearsay grounds pursuant to Tex. R. Evid. 802. Although defendant's bill of exceptions set forth the testimony that he asserted that the victim would have offered regarding what she told her grandparents during the alleged meeting, defense counsel did not question the victim regarding what she told her grandparents during that meeting, and, additionally, defense counsel did not argue that the trial court improperly sustained the State's hearsay objections to statements of the grandparents. In re J.R.N., 2010 Tex. App. LEXIS 2280, 2009 WL 6312273 (Tex. App. Beaumont Apr. 1 2010).

308. Even if appellant adequately briefed her points, there was no abuse of discretion in the trial court's evidentiary rulings, for purposes of Tex. R. Evid. 402, 601, 802 and Tex. R. App. P. 44.1. Pool v. Diana, 2010 Tex. App. LEXIS 2208 (Tex. App. Austin Mar. 24 2010).

309. In defendant's online solicitation case, the trial court did not err by admitting the chat logs between defendant and the officer posing as a teenager because the investigation traced the IP address used by defendant to defendant's apartment, and defendant admitted he used to have the particular screen name at issue. The officer asked defendant if they could "safely assume" it was defendant on the chats with the "teenager," and defendant answered, "Yes, sir." Bailey v. State, 2009 Tex. App. LEXIS 9440, 2009 WL 4725348 (Tex. App. Dallas Dec. 11 2009), *cert. denied*, 131 S. Ct. 475, 178 L. Ed. 2d 301, 2010 U.S. LEXIS 7971 (U.S. 2010).

310. Although defendant objected to the evidence as hearsay, he did not obtain an express ruling on that objection under Tex. R. App. P. 33.1(a)(1)(A) and while the State conceded the objection was implicitly overruled, defendant did not cite authority supporting an argument that the trial court erred in overruling his objection; he merely argued that the evidence was insufficient because it was hearsay and the result was the same as if he had failed to object in the trial court, and because the admissibility of the evidence was not challenged on appeal, the evidence was before the court for all purposes under Tex. R. Evid. 802, in connection with defendant's challenge to a restitution order. Vasquez v. State, 2009 Tex. App. LEXIS 6117, 2009 WL 5915945 (Tex. App. Corpus Christi Aug. 6 2009).

311. Defendant did not object to a hearsay statement, for purposes of Tex. R. Evid. 801(a), 802; the jury was therefore permitted to consider this hearsay evidence for any purpose. Walker v. State, 291 S.W.3d 114, 2009 Tex. App. LEXIS 4863 (Tex. App. Texarkana June 23 2009).

312. Defendant complained that an officer's videotaped statement that two witnesses had implicated defendant as the shooter was inadmissible hearsay that was testimonial; the court noted that while the rules generally prohibited the admission of out of court statements offered to prove the truth of the matter asserted, a statement was not deemed hearsay if it involved identification of one perceived by the declarant, who later testified at trial and was available for cross-examination, under Tex. R. Evid. 801(e)(1)(C). York v. State, 2009 Tex. App. LEXIS 3827, 2009 WL 1493255 (Tex. App. Houston 1st Dist. May 28 2009).

313. Defendant lodged a proper and timely hearsay objection to a witness's testimony concerning a person's statement to him, for purposes of Tex. R. Evid. 802, and an analysis of the witness's testimony revealed that it contained two levels of hearsay, for analysis purposes under Tex. R. Evid. 805, with the first layer of hearsay concerning what defendant told the person about his involvement in the crime, which constituted a statement against penal interest under Tex. R. Evid. 803(24); because the second layer of hearsay, the person's statement that defendant admitted involvement in the crimes, would not subject the person to prosecution and did not satisfy Rule 803(24), the admission of the double hearsay was an abuse of discretion. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

314. Secret Service agent's testimony concerned what defendant told investigators was said by defendant, and this testimony was clearly hearsay within hearsay under Tex. R. Evid. 805, and the second layer of hearsay was not excluded from the hearsay rule by any exception, such as Tex. R. Evid. 803(24), because any statement by the witness about defendant's involvement in the crimes would not implicate the witness; defendant did not renew the hearsay objection he previously raised to another witness's substantially similar testimony, and because the substantively equivalent testimony to which he earlier objected was later admitted without objection, defendant did not preserve this issue for appellate review. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

315. Trial court impliedly sustained defendant's vague hearsay objection by ordering the State to rephrase the question and defendant's limiting instruction request went only to the issue of nonresponsiveness; the record did not support the view that the trial court was given an opportunity to address the issue being raised on appeal, that the trial court failed to instruct the jury to disregard. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

316. Defendant's conviction for arson of a habitation was appropriate because, applying the Woods factors to the victims' daughter's former boyfriend's unsworn statements in the presence of the prosecutor and investigator, defendant failed to show the boyfriend's statements were trustworthy. Additionally, another of the boyfriend's former girlfriend's sworn statement to the investigator noted that the boyfriend bragged to her about how he and defendant set fire to the home. Charles v. State, 2008 Tex. App. LEXIS 9368 (Tex. App. Houston 14th Dist. Dec. 18 2008).

317. Although defendant objected to testimony at one point during the witness's testimony, defendant failed to object to the testimony the first time it was raised at trial; under Tex. R. Evid. 802, the responsibility fell upon defendant and his counsel to object to the admission of the hearsay, and having failed to object, defendant had to be prepared to accept the consequences that hearsay could be considered by the trier of fact as probative evidence to be considered with other evidence admitted at trial. Lucas v. State, 2008 Tex. App. LEXIS 8976 (Tex. App. Dallas Dec. 3 2008).

318. Testimony in a murder trial did not constitute indirect hearsay in violation of Tex. R. Evid. 801 and Tex. R. Evid. 802 because at most, the jury might have deduced that the declarant told the investigators something that led them to acquire a warrant; the trial court could have reasonably determined that that inferential leap did not provide the requisite degree of certainty that the State's sole intent in pursuing the line of questioning was to convey the contents of the out-of-court statement. Vasquez v. State, 2008 Tex. App. LEXIS 2952 (Tex. App. Corpus Christi Apr. 24 2008).

319. In defendant's aggravated robbery case, even if it was error for the court to admit an officer's hearsay testimony regarding the details of the police dispatch, the error was harmless; the same substantive evidence was introduced through another officer's testimony without objection when she testified regarding the type of car defendant was driving and the circumstance surrounding her interview of the robbery complainants. Carson v. State, 2008 Tex. App. LEXIS 3091 (Tex. App. Fort Worth Apr. 24 2008).

320. In a credit cardholder's action against his credit card company for breach of contract, among other things, the trial judge did not abuse his discretion in admitting an unsworn letter from the company to the cardholder because the letter was not hearsay in its entirety, and the trial judge stated that he did not consider the hearsay portion of the letter in finding that the company did not offer the letter for the truth of the matter asserted therein, namely that the company contacted a merchant regarding charges that the merchant was making to the cardholder's account; rather, the letter was offered by the company to demonstrate that it responded in writing to the cardholder's inquiries concerning his account, and even assuming that the trial judge erred in admitting the letter, appellate review of the record revealed that the admission of the evidence did not cause an improper judgment and was not reversible error under Tex. R. App. P. 44. Elkins v. Capital One Bank, 2008 Tex. App. LEXIS 605 (Tex. App. Dallas Jan. 29 2008).

321. Because an affidavit consisted entirely of hearsay, the trial court did not abuse its discretion in excluding the affidavit. Corona v. Pilgrim's Pride Corp., 245 S.W.3d 75, 2008 Tex. App. LEXIS 492 (Tex. App. Texarkana 2008).

322. During defendant's trial for aggravated robbery, the trial court did not err in allowing the testimony of a police officer and a detective where their testimony was offered to establish the course of the detective's investigation and to show how defendant became the robbery suspect; thus, the testimony did not constitute backdoor hearsay. Hurd v. State, 2007 Tex. App. LEXIS 9363 (Tex. App. Houston 1st Dist. Nov. 29 2007).

323. Defendant claimed that the trial court's evidentiary rulings effectively prevented her from presenting her defense to capital murder, that the child victim's parents were the perpetrators of the crime, and the court analyzed the evidence to determine if the trial court's evidentiary rulings were clearly erroneous; the court found that (1) absent evidence that the children became involved in the physical disputes the parents previously had, the court was unable to hold that the trial court abused its discretion in excluding this evidence, and in any event, defendant did not raise her due process argument in this regard to the trial court, such that two related subpoints were not properly before the court, (2) certain excluded evidence did not add much, if anything, to the defense and did not prevent defendant from putting on a defense, such that defendant's due process rights were not violated, and (3) another witness statement was hearsay and did not meet any exceptions, and the exclusion of the statement in question did not prevent defendant from putting on a defense, and no indicia of reliability existed concerning the witness's statement, and defendant did not call this witness to testify. Stevens v. State, 234 S.W.3d 748, 2007 Tex.

App. LEXIS 6845 (Tex. App. Fort Worth 2007).

324. Ordinarily the statements made by the minor victim to two individuals would have been inadmissible as hearsay under Tex. R. Evid. 802, but outcry testimony admitted under Tex. Code Crim. Proc. Ann. art. 38.072 was admitted as an exception to the hearsay rule. Delane v. State, 2007 Tex. App. LEXIS 5928 (Tex. App. Corpus Christi July 26 2007).

325. In defendant's trial for assault under Tex. Penal Code Ann. § 22.01, although defendant claimed that the victim's statement to an officer was hearsay, the court noted that hearsay admitted without objection was not to be denied probative value merely because it was hearsay, pursuant to Tex. R. Evid. 802, and once the trier of fact weighed the probative value of the evidence, the court was not able to deny that evidence or ignore it in the court's review of sufficiency of the evidence. Jackson v. State, 2007 Tex. App. LEXIS 5846 (Tex. App. Waco July 25 2007).

326. In a termination of parental rights case, when a witness testified to the mother's history with the Texas Department of Family and Protective Services, the mother did not raise hearsay objections; she raised that objection only twice in reference to questions asked about allegations made in a referral, such that the mother did not preserve her complaint on appeal. Boyd v. Tex. Dep't of Family & Protective Servs., 2007 Tex. App. LEXIS 5696 (Tex. App. Austin July 20 2007).

327. Probation officers' reports were admitted under Tex. R. Evid. 803 without objection and the trial court could have properly considered the testimony and the reports when assessing a sentence, as well as considering live testimony, and thus the court rejected defendant's claim that he was denied effective assistance when the testimony was admitted, which defendant claimed contained hearsay. Torres v. State, 2007 Tex. App. LEXIS 5641 (Tex. App. Corpus Christi July 19 2007).

328. Evidence was sufficient to show that a rungu was a club and prohibited weapon for purposes of Tex. Penal Code Ann. § 46.01(1) and thus the court affirmed defendant's conviction under Tex. Penal Code Ann. § 46.02; the State presented testimony showing that the rungu was a throwing instrument used for hunting and killing and rendering animals unconscious, and from this, the trial court could have reasonably found that the rungu functioned as a weapon or club and was specially designed, made, or adapted for the purpose of inflicting serious injury. Warr v. State, 2007 Tex. App. LEXIS 5675 (Tex. App. Dallas July 19 2007).

329. Other than citing generally to case law concerning the standard for reviewing rulings on the admissibility of evidence and Tex. R. Evid. 602 and Tex. R. Evid. 802 concerning lack of personal knowledge and hearsay, defendant, for purposes of Tex. R. App. P. 38.1(h), provided no substantive legal analysis, argument, or authority to support his contention that the trial court erred in overruling his objections, and thus the point was inadequately briefed and presented nothing for review. Warr v. State, 2007 Tex. App. LEXIS 5675 (Tex. App. Dallas July 19 2007).

330. Trial court would not have committed error in overruling, for purposes of Tex. R. Evid. 802, an objection to the victim's statement to an officer on the basis of hearsay under Tex. R. Evid. 801(d); the trial court could have found that the victim was dominated by the emotions and fear of the event at the time she gave the statement and thus it was admissible as an excited utterance under Tex. R. Evid. 803(2), and defendant failed to show ineffective assistance of counsel under the Sixth Amendment. Smith v. State, 2007 Tex. App. LEXIS 5693 (Tex. App. Austin July 18 2007).

331. Witness's prior out of court statement to police, if offered to prove the truth of the matters asserted, likely constituted inadmissible hearsay, and thus the statements were subject to a limiting instruction under Tex. R. Evid. 105, and because counsel did not request the instruction at the first opportunity, the evidence was admitted for all

purposes; the record was undeveloped as to counsel's reasons for not requesting the instruction, no new trial motion was filed to create such a record, and thus defendant did not overcome the presumption of reasonable assistance; even if the court found counsel's performance was not within the range of professional assistance, defendant failed to show that there was a reasonable probability that the result of the proceeding would have been different had counsel sought to limit the use of the witness's statements sooner than in the jury charge, as this testimony was not the only evidence that could have defeated defendant's self-defense theory in the murder trial. Scott v. State, 2007 Tex. App. LEXIS 2896 (Tex. App. Houston 1st Dist. Apr. 12 2007).

332. Testimony was objected to as hearsay under Tex. R. Evid. 801 and the trial court properly sustained the objection, and as such, it was not considered in the court's analysis; the statement was one made out of court and was inadmissible for purposes of Tex. R. Evid. 802, and no hearsay exception applied to render the statement admissible. Mark III Sys. v. Sysco Corp., 2007 Tex. App. LEXIS 1339 (Tex. App. Houston 1st Dist. Feb. 22 2007).

333. Although defendant complained that a trial court committed reversible error in allowing a police officer to read his offense report during his testimony, which defendant claimed was hearsay in violation of Tex. R. Evid. 802, the record was unclear as to whether the officer was actually viewing his offense report, and, in any event, any error in admitting the testimony was harmless because the officer later testified without objection that there was an open container on the seat of defendant's vehicle, making the previous testimony cumulative. Goudeau v. State, 209 S.W.3d 713, 2006 Tex. App. LEXIS 9813 (Tex. App. Houston 14th Dist. 2006).

334. In a suit for fraud and negligent misrepresentation, the trial court did not abuse its discretion by excluding an investor's testimony about the details of alleged out-of-court conversations because such testimony reasonably could have been found to be hearsay and therefore inadmissible. Racciato v. Davies, 2006 Tex. App. LEXIS 6988 (Tex. App. Houston 14th Dist. Aug. 8 2006).

335. Defendant's conviction for assault causing bodily injury to a family member was appropriate because a reasonable person could have concluded that the victim made the statement at issue to the officer upon his arrival at the scene while under the excitement, fear, or pain of the event at the time she made the statement. Smith v. State, 2006 Tex. App. LEXIS 5173 (Tex. App. Fort Worth June 15 2006).

336. Appellant failed to appear and therefore to object to alleged hearsay evidence, which had to be objected to when admitted, for purposes of Tex. R. Evid. 802, and thus appellant was not able to raise that argument on appeal. Piper v. Edwards, 2006 Tex. App. LEXIS 1788 (Tex. App. Houston 14th Dist. Mar. 9 2006).

337. In a trial for murder and attempted murder, there was no error in the admission of documents found in a search of defendant's car, including hotel receipts, a church bulletin, and handwritten notes, because the trial court could have reasonably concluded that the documents were not offered for the truth of the matters asserted but to show the circumstances surrounding the investigation and leading to defendant's arrest. Yanez v. State, 187 S.W.3d 724, 2006 Tex. App. LEXIS 1289 (Tex. App. Corpus Christi 2006).

338. Where a detective's interview with the first robbery suspect led him to defendant, the State's questioning of the detective regarding the interview with the first suspect was not inadmissible backdoor hearsay because the testimony was offered to show how defendant became a suspect and it did not leave the jury with the inescapable conclusion that the first suspect was testifying through the detective; because there was no hearsay problem with the testimony, defendant's right to confrontation was not violated. McCreary v. State, 194 S.W.3d 517, 2006 Tex. App. LEXIS 1230 (Tex. App. Houston 1st Dist. 2006).

339. Although the homeowners asserted many complaints regarding a witness's testimony, including a hearsay complaint, no objections were made at trial, for purposes of Tex. R. App. P. 33, and furthermore, inadmissible

hearsay, admitted without objection, was not to be denied probative value just because it was hearsay, pursuant to Tex. R. Evid. 802. Moreno v. Towne Lake Garden Ass'n, 2005 Tex. App. LEXIS 10862 (Tex. App. San Antonio Dec. 14 2005).

340. Because a witness' testimony was not offered for the truth of the matter asserted, it did not constitute hearsay; even if the testimony was hearsay, because the testimony was cumulative, if there was error, it was harmless under Tex. R. App. P. 44.2(b), given that defendant did not demonstrate that the admission of the testimony affected defendant's substantial rights under Tex. R. App. P. 44.2(b) and Tex. R. Evid. 103(a). Alexander v. State, 2005 Tex. App. LEXIS 10298 (Tex. App. Beaumont Dec. 7, 2005).

341. Trial court did not err in excluding testimony of a witness concerning the victim's sexual activities; the testimony consisted of speculation that the victim and another engaged in some sort of sexual activity, the court questioned whether the evidence qualified as a specific instance of past sexual behavior as contemplated by Tex. R. Evid. 412, it was difficult to find that the evidence explained or rebutted the medical evidence, for purposes of Rule 412(b)(2)(A), and the prejudicial effect of the testimony outweighed the probative value such that the evidence constituted inadmissible hearsay. Kennedy v. State, 184 S.W.3d 309, 2005 Tex. App. LEXIS 10126 (Tex. App. Texarkana 2005).

342. Evidence from a witness that the victim said she had 33 sexual partners did not rebut or explain, for purposes of Tex. R. Evid. 412(b)(2)(A), the medical evidence, given that there was no evidence as to when the alleged encounters took place, and the excluded evidence constituted inadmissible hearsay; even if the trial court had been incorrect in its application of Rule 412, the court would have upheld the ruling on an alternative holding. Kennedy v. State, 184 S.W.3d 309, 2005 Tex. App. LEXIS 10126 (Tex. App. Texarkana 2005).

343. Trial court admitted the evidence conditionally under Tex. R. Evid. 104(b), and appellant did not renew a hearsay objection under Tex. R. Evid. 801and Tex. R. Evid. 802, and thus this issue was waived under Tex. R. App. P. 33.1(a). Watson v. Michael Haskins Photography, Inc., 2005 Tex. App. LEXIS 9838 (Tex. App. Waco Nov. 23 2005).

344. Although defendant claimed that the trial court erroneously admitted hearsay statements, the same statements were admitted without objection, and thus reversal was not required; the court noted that defendant misstated the effect of hearsay evidence admitted without objection under Tex. R. Evid. 802, and the court clarified that inadmissible hearsay admitted without objection was not to be denied probative value merely because it was hearsay. Lynn v. State, 2005 Tex. App. LEXIS 6623 (Tex. App. Dallas Aug. 18 2005).

345. Trial court acted within its discretion in admitting the wife's statement under the excited utterance exception to the hearsay rule because the officer noticed that the wife was visibly upset, shaking, trembling and crying, and that her cheek was red, and the trial court could have reasonably concluded that the wife was still under the emotion, excitement, fear, or pain of the alleged assault when she told the officer that defendant slapped her. Solorzano v. State, 2005 Tex. App. LEXIS 5694 (Tex. App. Austin July 21 2005).

346. Even if the court assumed that certain testimony was hearsay under Tex. R. Evid. 801(d), not subject to any exception pursuant to Tex. R. Evid. 802, any error in admitting such testimony was not harmful to have warranted reversal pursuant to Tex. R. App. P. 44.1(a); the testimony had no bearing on the jury's finding that neither the general contractor nor the business had a right to control the injury-causing activity and/or the defect-producing work on the premises. Collins v. J.E. Kingham Constr., 2005 Tex. App. LEXIS 5630 (Tex. App. Tyler July 20 2005).

347. Life care plans and affidavit testimony on past medical expenses was admissible because even assuming that the evidence was hearsay, the evidence was not objected to on this basis, and as such, it was admissible,

competent and sufficient to support summary judgment. Fortis Benefits v. Cantu, 170 S.W.3d 755, 2005 Tex. App. LEXIS 5539 (Tex. App. Waco 2005).

348. Under Tex. Code Crim. Proc. Ann. art. 38.072, the trial court admitted a witness's testimony regarding a child's abuse allegations as an exception to the hearsay rule under Tex. R. Evid. 802 because the child made the original outcry during the witness's interview. Patterson v. State, 2005 Tex. App. LEXIS 5260 (Tex. App. Austin July 8 2005).

349. Although a particular statement was hearsay, there was no objection thereto, and thus it could have been considered probative by the jury pursuant to Tex. R. Evid. 802. Soulas v. State, 2005 Tex. App. LEXIS 4618 (Tex. App. Corpus Christi June 16 2005).

350. Witness' proffered testimony was inadmissible testimony under Tex. R. Evid. 802 where the competitors obtained the witness' affidavit and arranged for him to testify by telephone at the hearing on the manufacturer's motion for preliminary injunction. The witness' affidavit did not fall under any exception to the hearsay rule, and his telephonic testimony was inadmissible because he had not been previously deposed and it would not have been visually recorded under Tex. Civ. Prac. & Rem. Code Ann. § 30.012. IAC, Ltd. v. Bell Helicopter Textron, Inc., 160 S.W.3d 191, 2005 Tex. App. LEXIS 1728 (Tex. App. Fort Worth 2005).

351. Rational trier of fact could have found beyond a reasonable doubt that defendant exercised care, custody, control, and management over the contraband and that defendant knew the substance possessed was contraband, and therefore, the evidence was legally sufficient to support defendant's conviction. The court found that (1) a police officer's testimony that a confidential informant said that defendant was selling narcotics was probative evidence of defendant's guilt of possession of crack cocaine, (2) although defendant could have objected to the out-of-court statements as hearsay under Tex. R. Evid. 802, defendant did not, nor did defendant request the trial court to limit consideration of the statements, (3) the out-of-court statements of the informant had sufficient probative value, in and of themselves, to establish an affirmative link between defendant and the cocaine found in defendant's home, (4) the contraband was both in plain view and recovered from a hidden location accessible only to one who exercised control over the house, and (5) given the manufacturing and packaging materials also found, this evidence sufficed to prove that defendant possessed the cocaine found in the closet and intended to distribute it. Poindexter v. State, 153 S.W.3d 402, 2005 Tex. Crim. App. LEXIS 3 (Tex. Crim. App. 2005).

352. Where a statement originally came in only as impeachment evidence but later was read without objection, the statement was substantive evidence of guilt under Tex. R. Evid. 802. Blanton v. State, 2004 Tex. Crim. App. LEXIS 2210 (Tex. Crim. App. June 30, 2004).

353. Defendant's counsel was not ineffective for failure to object to the extraneous offenses mentioned in the presentence report, because defendant's complaints were based on Tex. R. Evid 404(b) (extraneous evidence) and 802 (hearsay), and because the rules of evidence, including the rules pertaining to hearsay, did not apply to the contents of the presentence report. Champion v. State, 126 S.W.3d 686, 2004 Tex. App. LEXIS 964 (Tex. App. Amarillo 2004).

354. Although defendant contended that the trial court abused its discretion in granting the state's motion in limine excluding his mother's testimony about threats that defendant allegedly received on the phone from the victim, the state took the witness on voir dire and established that she did not hear any threats on the phone herself, but rather was informed of these threats by defendant, her son, such that any further testimony by the mother about the phone calls would have been based on inadmissible hearsay under Tex. R. Evid. 801(d) and 802; it was proper for the trial court to grant the state's motion in limine and exclude the mother's testimony about the alleged threats. Burgett v.

State, 2003 Tex. App. LEXIS 10212 (Tex. App. Fort Worth Dec. 4 2003).

355. Admission of a memorandum of agreement between a parent and Child Protective Services did not violate Tex. R. Evid. 802. The agreement was not admitted to prove the truth of its contents, but rather to prove that the agreement had been made and what its terms were. In re M.S., 115 S.W.3d 534, 2003 Tex. LEXIS 108, 46 Tex. Sup. Ct. J. 999 (Tex. 2003).

356. Evidence of a police transmission describing a robbery suspect was inadmissible in an aggravated robbery case because it constituted hearsay since the relevancy turned on the truthfulness or accuracy of the contents of the statement; defendant failed to preserve his argument that the transmission was admissible under Tex. R. Evid. 801(e)(1)(C) because it was not raised before the trial court. Johnson v. State, 2003 Tex. App. LEXIS 10949 (Tex. App. Houston 1st Dist. May 13 2003).

357. Several factors relevant to determine whether hearsay statements by a five-year-old child witness in a child sexual abuse case were reliable were the spontaneity and consistent repetition of the statement, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and the lack of a motive to fabricate; hearsay is an out-of-court assertion offered in evidence to prove the truth of the matter asserted and as a general rule is inadmissible under Tex. R. Evid. 801(d) and Tex. R. Evid. 802 because an oath, personal appearance at trial and cross-examination are conventional indicia of reliability of testimony. Smith v. State, 88 S.W.3d 652, 2002 Tex. App. LEXIS 2473 (Tex. App. Tyler 2002), *cert. denied*, 537 U.S. 1206, 123 S. Ct. 1283, 154 L. Ed. 2d 1051, 2003 U.S. LEXIS 1631 (2003).

358. Detective's testimony was not hearsay because his testimony concerning the police department's prior investigations for the "same type of offense" was not offered to establish that defendant had been investigated for or committed other instances of indecent exposure. Rather, the testimony was offered to explain the course of his investigation and how defendant came to be a suspect, which was an acceptable, non-hearsay purpose for admitting an out-of-court statement. Denmon v. State, 2014 Tex. App. LEXIS 2180, 2014 WL 857671 (Tex. App. Austin Feb. 27 2014).

Evidence : Hearsay : Rule Components : Statements

359. On appeal of defendant's conviction for sexual assault, he failed to prove his trial counsel was ineffective for failing to object to inadmissible hearsay testimony during trial. Testimony from witnesses about the alleged rape and the fact that victim had been diagnosed with a behavior disorder were offered to illustrate the victim's mental capacity, not to prove the truth of the matter asserted; neither witness mentioned an out-of-court statement. Dunn v. State, 2013 Tex. App. LEXIS 8711 (Tex. App. Houston 14th Dist. July 16 2013).

360. Where the heirs claimed title to a portion of Padre Island alleging that a deed conveying the property was fraudulent, an affidavit provided by an affiant who lacked personal knowledge and relied upon hearsay was not competent summary judgment evidence. The affiant's testimony about out-of-court sources carried no probative weight over a hearsay objection under Tex. R. Evid. 802. Kerlin v. Arias, 274 S.W.3d 666, 2008 Tex. LEXIS 992, 52 Tex. Sup. Ct. J. 103 (Tex. 2008).

361. During the punishment phase of defendant's trial for aggravated sexual assault of a child, defendant stipulated to eight prior convictions, which included a felony conviction for endangering a child, and the State did not err in calling a police officer to testify regarding the circumstances of that offense, which initially was investigated and charged as an aggravated sexual assault of a child, where the officer's statement was not hearsay because he identified the charge that he personally filed and the persons that he arranged for the prior child victim to meet; although the officer's testimony about the prior child victim's precise age was based on hearsay and thus

erroneously admitted, there was a fair assurance that the admission of the single piece of hearsay testimony was not harmful error because defendant stipulated to his conviction for endangering a child, and evidence of that prior conviction was properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07, and as an exception under Tex. R. Evid. 803 to the hearsay rule, and because the record as a whole included: (1) defendant's guilty plea to endangering a child; (2) the detailed evidence of the complainant's sexual abuse itself; (3) child pornography found on defendant's family computer; (4) the fact that the State did not emphasize the erroneously admitted evidence and concentrated on the "heinousness" of the offense; (5) defendant's cunning and violent character; (6) the effect of the abuse on the complainant for the rest of her life; and (7) defendant's eight prior convictions and numerous disciplinary infractions. Hunt v. State, 2008 Tex. App. LEXIS 2273 (Tex. App. Houston 14th Dist. Apr. 1 2008).

Evidence : Hearsay : Rule Components : Truth of Matter Asserted

362. Trial court erred when it admitted testimony about the removal of a blanket over defendant's hearsay objection, as the statement was clearly offered to prove the truth of the matter asserted: that defendant had disposed of the blanket. Kinsey v. State, 2014 Tex. App. LEXIS 5551 (Tex. App. Eastland May 22 2014).

363. On appeal of defendant's conviction for sexual assault, he failed to prove his trial counsel was ineffective for failing to object to inadmissible hearsay testimony during trial. Testimony from witnesses about the alleged rape and the fact that victim had been diagnosed with a behavior disorder were offered to illustrate the victim's mental capacity, not to prove the truth of the matter asserted; neither witness mentioned an out-of-court statement. Dunn v. State, 2013 Tex. App. LEXIS 8711 (Tex. App. Houston 14th Dist. July 16 2013).

364. Court did not abuse its discretion in overruling hearsay objections to the officer's statements made during defendant's videotaped interview, because the officer's statements during the interview were not offered to prove the truth of the matter asserted, and were relevant to show what was said to bring about certain responses from defendant that led officers to believe that defendant had not been truthful in his prior statements to police; the officer's statements were admitted as part of defendant's recorded interview with police and served to establish the context of the statement defendant made to police. Humphrey v. State, 2012 Tex. App. LEXIS 8315, 2012 WL 4739925 (Tex. App. Houston 1st Dist. Oct. 4 2012).

365. Confrontation Clause did not require the admission of multi-level hearsay to impeach the complainant and her mother in defendant's trial for continuous sexual abuse of a child. The unnamed declarant's statement that someone made child-molestation allegations against defendant was inadmissible hearsay under Tex. R. Evid. 801, 802, because it was an out-of-court-statement offered for the truth of the matter asserted -- to show that someone made child-abuse allegations against defendant to child protective services. Shafer v. State, 2012 Tex. App. LEXIS 1902, 2012 WL 745422 (Tex. App. Fort Worth Mar. 8 2012).

366. Whether a statement that defendant's daughter testified that her aunt made regarding her lack of surprise as to defendant's conduct constituted hearsay was within the zone of reasonable disagreement, and therefore, a trial court did not abuse its discretion in admitting the testimony during defendant's trial for sexual assault of a child and for indecency with a child by exposure. The testimony of defendant's daughter tended to show that the State was indeed seeking to show her state of mind and why she failed to report the incident earlier, and the prosecution neither pressed the issue nor mentioned the testimony in its closing arguments. Grant v. State, 2011 Tex. App. LEXIS 6606, 2011 WL 3652548 (Tex. App. Corpus Christi Aug. 18 2011).

367. Court properly allowed a police officer to testify because the testimony explained how defendant became a suspect in the case and the status of the investigation; therefore, the officer's testimony was not inadmissible hearsay. Moreover, given that the officer responded to the victim's emergency call within fifteen minutes of the incident and that he observed the victim to be "very upset, nervous, and shaking," it was clear that the victim was still dominated by the emotions, fear, and excitement attendant to the incident. Nolen v. State, 2009 Tex. App.

LEXIS 6648 (Tex. App. Corpus Christi Aug. 25 2009).

368. In a case involving insurance, a trial court's exclusion of two issues of a trade publication from evidence did not result in a reversible error because there was no evidence that the two issues had been read. Moreover, although the two insureds contended that the material was not offered for the truth of the matters asserted therein, it appeared that they offered these two issues to show that several broker parties should have known of the truth of statements made in this material, and should have had such knowledge at the time these issues were published; the hearsay rules could not have been avoided by this kind of circular reasoning. Envtl. Procedures, Inc. v. Guidry, 282 S.W.3d 602, 2009 Tex. App. LEXIS 670 (Tex. App. Houston 14th Dist. Feb. 3 2009), *appeal after remand and supplemental opinion at* 388 S.W.3d 845, 2013 Tex. App. LEXIS 957 (Tex. App.--Houston [14th Dist.] 2013).

369. In defendant's drug case, the court did not err by admitting a videotape of a witness's interrogation by police because it was introduced to "rebut the witness's claims that the police threatened and coerced her into falsely stating that defendant was at the parking lot in order to conduct the drug deal;" the videotape was not offered for the truth of the matter asserted. Kennedy v. State, 2008 Tex. App. LEXIS 3424 (Tex. App. Fort Worth May 8 2008).

370. In defendant's attempted indecency with a child case, the court erred in admitting hearsay evidence of the girl's age during the State's direct examination of the store's loss-prevention investigator because the investigator's statement that the mother told him the child was born in December, 1996 was hearsay because it was offered for the truth of the matter that the child was under seventeen years old. Rivera-Reyes v. State, 252 S.W.3d 781, 2008 Tex. App. LEXIS 2988 (Tex. App. Houston 14th Dist. 2008).

371. Record did not indicate that the State sought to invoke Tex. Code Crim. Proc. Ann. art. 38.072 to admit the child victim's statements through his mother's testimony and defendant was correct that the trial court erred in permitting the mother to testify as to what the child generally told her about the abuse, as the testimony was offered to prove the truth of the matter, the severity of defendant's conduct, which amounted to inadmissible hearsay under Tex. R. Evid. 802 and absent the invocation of Tex. Code Crim. Proc. Ann. art. 38.072, the trial court erred in overruling defendant's objection; however, the error was harmless under Tex. R. App. P. 44.2(b) because the facts to which the mother testified were included in the same facts that defendant introduced through her own testimony and through other testimony of the mother without objection, and the court was unable to say that the erroneous admission of the mother's testimony had a substantial effect in determining defendant's punishment for injury to a child in violation of Tex. Penal Code Ann. § 22.04(a). Toliver v. State, 2007 Tex. App. LEXIS 4059 (Tex. App. Houston 1st Dist. May 24 2007).

372. In defendant's trial for injury to a child under Tex. Penal Code Ann. § 22.04(a), the child's mother's testimony concerning out-of-court statements by hospital personnel that were offered to prove the truth of the matter asserted constituted inadmissible hearsay under Tex. R. Evid. 802, but even if defendant's counsel's performance was deficient for failing to object, defendant did not show that there was a reasonable probability that, but for the error, the outcome of the trial would have been different; defendant testified to the injuries she caused the child, the same testimony admitted through the mother, and thus it was harmless error admitting the mother's testimony in this regard. Toliver v. State, 2007 Tex. App. LEXIS 4059 (Tex. App. Houston 1st Dist. May 24 2007).

373. In a case dealing with possession of a controlled substance, over 400 grams of cocaine, with intent to deliver that was found in defendant's truck, there was evidence offered through a videotape of the incident in which defendant responded to a question by an officer by stating that the truck was his; defendant affirmatively stated he had no objection to the admission of that videotape; accordingly, proof of ownership of the truck was adequately shown; thus, pursuant to Tex. R. Evid. 802, the erroneous admission of hearsay testimony regarding proof of ownership of the truck was harmless. Barnes v. State, 2006 Tex. App. LEXIS 4328 (Tex. App. Texarkana May 19 2006).

374. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive and the trial court had to admonish her during her testimony for offering explanations rather than answers. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

375. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

376. Documents seized from the vehicle of defendant's mother pursuant to a search warrant were admissible because they were not offered to prove the truth of the matters asserted but to show that defendant had access to the vehicle in which defendant fled the crime scene. Yanez v. State, 199 S.W.3d 293, 2006 Tex. App. LEXIS 10540 (Tex. App. Corpus Christi 2006).

Evidence : Inferences & Presumptions : Inferences

377. In a trial for possession hydromorphone, no hearsay error resulted from admitting unsealed and opened vials of medicine because they were not admitted to identify the substance (the truth of the matter asserted) but rather to support an inference that defendant's possession was not a one-time mistake. Moore v. State, 2014 Tex. App. LEXIS 5823, 2014 WL 2521537 (Tex. App. Tyler May 30 2014).

Evidence : Judicial Notice

378. New trial could not be granted based on the trial court's recollection of an informal postverdict chat with jurors. The jurors' assertions were not the kinds of "facts" that a court could judicially notice under Tex. R. Evid. 201. State v. Krueger, 179 S.W.3d 663, 2005 Tex. App. LEXIS 8899 (Tex. App. Beaumont 2005).

Evidence : Procedural Considerations : Curative Admissibility

379. At defendant's trial for three counts of aggravated sexual assault of a child and two counts of indecency with a child by contact, the trial court did not err by admitting the victim's hearsay statements into evidence under the rule of completeness. The State was allowed to question a detective about the victim's statements and the differences between the two police reports, because defense counsel opened the door by asking questions based on the discrepancies between the reports. Ramirez v. State, 2014 Tex. App. LEXIS 3955, 2014 WL 1410344 (Tex. App. Waco Apr. 10 2014).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

380. In a criminal trial for theft of property where defendant was charged with financial exploitation based on undue influence, the trial court did not err by admitting hearsay evidence of the Kelly bluebook value of a Ford Explorer that the victims purchased and signed over to defendant; the evidence was admissible under Tex. R. Evid. 803, the hearsay exception for published compilations. Jacks v. State, 2006 Tex. App. LEXIS 1968 (Tex. App. Tyler

Mar. 15 2006).

381. In a trial for unlawfully carrying a handgun, the trial court properly admitted an officer's testimony about a witness's statement that defendant approached the car she was occupying, demanded that it be moved, and partially removed a gun from his pocket. The statement was an excited utterance under Tex. R. Evid. 803(2), even though the record did not reflect how much time passed after the confrontation, because the officer testified that the witness was very upset and was crying. Spielman v. State, 2005 Tex. App. LEXIS 3854 (Tex. App. Houston 1st Dist. May 19 2005).

Evidence : Procedural Considerations : Limited Admissibility

382. In a defamation action, a trial court did not err by admitting daily logs as business records for the limited purpose of whether a prudent investigation of complaints was conducted by an executive director of an independent living facility prior to banning a service provider; the trial court gave a limiting instruction to the jury, and the logs were relevant because the bore on the directors motivation and state of mine and a substantial truth defense. Collins v. Sunrise Senior Living Mgmt., 2012 Tex. App. LEXIS 2457, 2012 WL 1067953 (Tex. App. Houston 1st Dist. Mar. 29 2012).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

383. Victim's prior inconsistent statement about the assault was hearsay and contained hearsay within hearsay, but defendant's counsel never objected to it on either basis and any objection defendant had to the statement was waived under Tex. R. App. P. 33.1(a)(1); unobjected-to-hearsay has probative value as substantive evidence, and is considered in reviewing sufficiency challenges pursuant to Tex. R. Evid. 802. Rios v. State, 2003 Tex. App. LEXIS 1832 (Tex. App. Tyler Feb. 28 2003).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

384. Father's failure to object to videotaped statements of his children's deceased mother in child custody proceedings caused a waiver of any subsequent hearsay objection; pursuant to Tex. R. Evid. 802, hearsay admitted without objection would not be denied its probative value merely because it was hearsay. In re N.B.B., 2007 Tex. App. LEXIS 8639 (Tex. App. San Antonio Oct. 31 2007).

385. Father's failure to object to statements of a social worker in child custody proceedings caused a waiver of any subsequent hearsay objection; pursuant to Tex. R. Evid. 802, hearsay admitted without objection would not be denied its probative value merely because it was hearsay. In re N.B.B., 2007 Tex. App. LEXIS 8639 (Tex. App. San Antonio Oct. 31 2007).

Evidence : Procedural Considerations : Rule Application & Interpretation

386. Several factors relevant to determine whether hearsay statements by a five-year-old child witness in a child sexual abuse case were reliable were the spontaneity and consistent repetition of the statement, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and the lack of a motive to fabricate; hearsay is an out-of-court assertion offered in evidence to prove the truth of the matter asserted and as a general rule is inadmissible under Tex. R. Evid. 801(d) and Tex. R. Evid. 802 because an oath, personal appearance at trial and cross-examination are conventional indicia of reliability of testimony. Smith v. State, 88 S.W.3d 652, 2002 Tex. App. LEXIS 2473 (Tex. App. Tyler 2002), *cert. denied*, 537 U.S. 1206, 123 S. Ct. 1283, 154 L. Ed. 2d 1051, 2003 U.S. LEXIS 1631 (2003).

Evidence : Procedural Considerations : Rulings on Evidence

387. In defendant's murder trial, there was no error in the admission of testimony by a witness about statements defendant made in a telephone call because they were within the hearsay exemption for statements of a party-opponent. Van Exel v. State, 2014 Tex. App. LEXIS 8464 (Tex. App. Dallas Aug. 4 2014).

388. In an eviction action, the apartment manager's testimony that the police department received a disturbance call was inadmissible hearsay; its admission was harmless because she had already testified, without objection, that law enforcement had been called to respond to the disturbance. This unobjected-to hearsay was probative evidence upon which the trial court was permitted to rely. Black v. Countryside Vill. Apts., 2013 Tex. App. LEXIS 14853, 2013 WL 6506303 (Tex. App. Houston 1st Dist. Dec. 10 2013).

389. Trial court did not err in allowing state troopers to testify, over defendant's hearsay objection, regarding information they had received from an anonymous tipster where the information was used at trial to show how and why defendant came to the attention of the troopers and, in that sense, was admissible to prove that the troopers detained defendant after they acquired specific information concerning a drug-smuggling operation involving a tractor-trailer whose description matched the appearance of defendant's tractor-trailer. Because defendant had challenged the conduct of the troopers on the grounds that they lacked reasonable suspicion for the traffic stop and probable cause for his arrest, the details of the out-of-court statements by the anonymous tipster were admissible to show the reasonableness of the troopers' conduct. Iglesias v. State, 2013 Tex. App. LEXIS 433 (Tex. App. Corpus Christi Jan. 17 2013).

390. In a case in which defendant was convicted of indecency with a child, among other offenses, the trial court did not abuse its discretion in admitting the outcry statements that the victim made to her foster mother after determining that the outcries were reliable because although the victim did not testify about the outcries, she did testify that defendant had touched her on her private part and therefore confirmed, in part, her statements in the outcries, and the foster mother's testimony and written reports indicated that the victim had made the outcries spontaneously and in her own terminology. Moreover, the trial court could have reasonably determined that a child of the victim's age would not have normally imagined things such as a parent's touching her private area or naked people kissing and touching each other, and the record did not disclose a motive that the victim would have had to fabricate the outcries. Woodruff v. State, 2012 Tex. App. LEXIS 6132, 2012 WL 3041114 (Tex. App. Fort Worth July 26 2012).

391. Whether a statement that defendant's daughter testified that her aunt made regarding her lack of surprise as to defendant's conduct constituted hearsay was within the zone of reasonable disagreement, and therefore, a trial court did not abuse its discretion in admitting the testimony during defendant's trial for sexual assault of a child and for indecency with a child by exposure. The testimony of defendant's daughter tended to show that the State was indeed seeking to show her state of mind and why she failed to report the incident earlier, and the prosecution neither pressed the issue nor mentioned the testimony in its closing arguments. Grant v. State, 2011 Tex. App. LEXIS 6606, 2011 WL 3652548 (Tex. App. Corpus Christi Aug. 18 2011).

392. In a case in which a jury found that defendant juvenile engaged in delinquent conduct by committing the offenses of aggravated sexual assault and indecency with a child, the trial court did not err in excluding certain testimony of various witnesses and did not prevent defendant from fully presenting his defensive theory where: (1) the proffered testimony of the victim's mother as set forth in defendant's bill of exceptions was properly excluded as speculative pursuant to Tex. R. Evid. 602; (2) the victim's mother was not shown to be qualified as an expert to testify under Tex. R. Evid. 702; (3) at trial, defendant was allowed to question the victim and her sister regarding the meeting they allegedly had with their grandparents during the time period after the victim's outcry but prior to the Monday morning interview with a deputy; and (4) the only testimony excluded by the trial court during defense counsel's examination of the victim and her sister was testimony regarding statements made by their grandparents during the alleged meeting, which was properly excluded on hearsay grounds pursuant to Tex. R. Evid. 802.

Although defendant's bill of exceptions set forth the testimony that he asserted that the victim would have offered regarding what she told her grandparents during the alleged meeting, defense counsel did not question the victim regarding what she told her grandparents during that meeting, and, additionally, defense counsel did not argue that the trial court improperly sustained the State's hearsay objections to statements of the grandparents. In re J.R.N., 2010 Tex. App. LEXIS 2280, 2009 WL 6312273 (Tex. App. Beaumont Apr. 1 2010).

393. Assuming that allowance of a mother's accusations toward defendant was improper hearsay, such allowance was not reversible error because the same facts were shown by unchallenged testimony of defendant's admissions to the accusations; under Tex. R. App. P. 44.2(b), nonconstitutional error that did not affect substantial rights was disregarded. Tucker v. State, 2009 Tex. App. LEXIS 7009, 2009 WL 2767304 (Tex. App. Tyler Sept. 2 2009).

394. Trial court did not err in excluding videotaped forensic interviews of the two children as hearsay, although the children could not answer some of defendant's counsel's questions, because the videotapes contained admissible statements along with clearly inadmissible statements, and defendant failed to segregate or identify the potentially admissible statements. The trial judge was not required to sort through the evidence to determine which statements were admissible. Hoang v. State, 2008 Tex. App. LEXIS 8771 (Tex. App. Dallas Nov. 24 2008).

395. In a credit cardholder's action against his credit card company for breach of contract, among other things, the trial judge did not abuse his discretion in admitting an unsworn letter from the company to the cardholder because the letter was not hearsay in its entirety, and the trial judge stated that he did not consider the hearsay portion of the letter in finding that the company did not offer the letter for the truth of the matter asserted therein, namely that the company contacted a merchant regarding charges that the merchant was making to the cardholder's account; rather, the letter was offered by the company to demonstrate that it responded in writing to the cardholder's inquiries concerning his account, and even assuming that the trial judge erred in admitting the letter, appellate review of the record revealed that the admission of the evidence did not cause an improper judgment and was not reversible error under Tex. R. App. P. 44. Elkins v. Capital One Bank, 2008 Tex. App. LEXIS 605 (Tex. App. Dallas Jan. 29 2008).

Evidence : Procedural Considerations : Weight & Sufficiency

396. When defendant and a man were in the camper when the officers served the warrant, methamphetamine, manufacturing precursors, and drug manufacturing paraphernalia were in plain sight; in determining whether defendant possessed the contraband, Tex. R. Evid. 802 permitted the jury to consider the officer's hearsay statement that a confidential informant had spoken with defendant about manufacturing methamphetamine in the camper trailer. The evidence was sufficient evidence for the jury to determine that defendant had custody, control, or management over the contraband for purposes of Tex. Health & Safety Code Ann. § 1.07(39); the evidence was sufficient to support her conviction for possession of a controlled substance, methamphetamine in an amount less than one gram, in violation of Tex. Health & Safety Code Ann. § 481.115. Judd v. State, 2009 Tex. App. LEXIS 7400, 2009 WL 3019712 (Tex. App. Tyler Sept. 23 2009).

397. Evidence was factually sufficient to support a conviction under Tex. Penal Code Ann. § 49.04 for driving while intoxicated; although defendant presented witnesses who testified that she was not the driver, the evidence was conflicting, and a police officer's hearsay testimony was properly considered under Tex. R. Evid. 802 because defendant did not object. Richardson v. State, 2008 Tex. App. LEXIS 344 (Tex. App. Waco Jan. 16 2008).

Evidence : Relevance : General Overview

398. On review of the sufficiency of the evidence supporting defendant's conviction for aggravated sexual assault of a child and indecency with a child, the appellate court was permitted to consider hearsay testimony from a pediatrician who testified as to the complainant's statements of abuse. The testimony was admitted without

objection and had probative value under Tex. R. Evid. 802. Moncada v. State, 2009 Tex. App. LEXIS 1697, 2009 WL 563990 (Tex. App. Austin Mar. 3 2009).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

399. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive and the trial court had to admonish her during her testimony for offering explanations rather than answers. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

400. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

401. In a trial for child sexual assault, the victim's medical records, containing her statement about prior incidents, were properly admitted. The evidence was probative of both the previous relationship between defendant and the victim and of defendant's state of mind; the evidence is not graphically prejudicial, providing no details of the purported prior incident. Perez v. State, 2004 Tex. App. LEXIS 11395 (Tex. App. Fort Worth Dec. 16 2004).

402. Detective's testimony was not hearsay because his testimony concerning the police department's prior investigations for the "same type of offense" was not offered to establish that defendant had been investigated for or committed other instances of indecent exposure. Rather, the testimony was offered to explain the course of his investigation and how defendant came to be a suspect, which was an acceptable, non-hearsay purpose for admitting an out-of-court statement. Denmon v. State, 2014 Tex. App. LEXIS 2180, 2014 WL 857671 (Tex. App. Austin Feb. 27 2014).

Evidence : Relevance : Sex Offenses : Similar Crimes : General Overview

403. Several factors relevant to determine whether hearsay statements by a five-year-old child witness in a child sexual abuse case were reliable were the spontaneity and consistent repetition of the statement, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and the lack of a motive to fabricate; hearsay is an out-of-court assertion offered in evidence to prove the truth of the matter asserted and as a general rule is inadmissible under Tex. R. Evid. 801(d) and Tex. R. Evid. 802 because an oath, personal appearance at trial and cross-examination are conventional indicia of reliability of testimony. Smith v. State, 88 S.W.3d 652, 2002 Tex. App. LEXIS 2473 (Tex. App. Tyler 2002), *cert. denied*, 537 U.S. 1206, 123 S. Ct. 1283, 154 L. Ed. 2d 1051, 2003 U.S. LEXIS 1631 (2003).

Evidence : Scientific Evidence : DNA

404. In a murder trial, any hearsay error under Tex. R. Evid. 802 was harmless when a detective was permitted to testify as to DNA test results as a basis for eliminating other suspects because the expert who performed the DNA analyses later testified that the tests ruled out the other suspects as contributors to the DNA collected at the crime scene, the very same conclusion that was implicit in the detective's testimony. Russell v. State, 2008 Tex. App. LEXIS 1723 (Tex. App. Fort Worth Mar. 6 2008).

Evidence : Scientific Evidence : Sobriety Tests

405. In a criminal trial arising from a collision, the other driver's out-of-court statements were admissible as excited utterance because they were made shortly after the collision while the driver was still in her wrecked vehicle and were made to her daughter, not to law enforcement officers. Pointe v. State, 371 S.W.3d 527, 2012 Tex. App. LEXIS 4295, 2012 WL 1948880 (Tex. App. Beaumont May 30 2012).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

406. In a murder case, a court properly allowed the State to impeach a witness with his prior inconsistent grand jury statement where he was shown a copy of his grand jury testimony and he acknowledged that he had previously testified that, during a telephone conversation, defendant told him that "they are here." The State used the brother's prior statements for the limited purpose of attacking his credibility because of his inconsistent statements, and not to prove the truth of the matter asserted. Bolton v. State, 2004 Tex. App. LEXIS 5584 (Tex. App. Houston 1st Dist. June 24 2004).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

407. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive and the trial court had to admonish her during her testimony for offering explanations rather than answers. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

408. Trial court's decision to allow a sheriff's office investigator to testify to statements that an assault/domestic violence victim made to her as extrinsic evidence of the victim's prior inconsistent statements was not an abuse of discretion where the victim unequivocally admitted making statements to the investigator, but when confronted with her prior statements, her answers in large part were not responsive. The testimony of the investigator could have been admitted for the purpose of showing what the victim said rather than the truth of the matter stated, and defendant did not demonstrate that the testimony of the investigator was more probative than prejudicial. Sharp v. State, 2006 Tex. App. LEXIS 3216 (Tex. App. Amarillo Apr. 20 2006).

Evidence : Testimony : Examination : General Overview

409. Witness' proffered testimony was inadmissible testimony under Tex. R. Evid. 802 where the competitors obtained the witness' affidavit and arranged for him to testify by telephone at the hearing on the manufacturer's motion for preliminary injunction. The witness' affidavit did not fall under any exception to the hearsay rule, and his telephonic testimony was inadmissible because he had not been previously deposed and it would not have been visually recorded under Tex. Civ. Prac. & Rem. Code Ann. § 30.012. IAC, Ltd. v. Bell Helicopter Textron, Inc., 160 S.W.3d 191, 2005 Tex. App. LEXIS 1728 (Tex. App. Fort Worth 2005).

Evidence : Testimony : Experts : Criminal Trials

410. In a sexual abuse case, a court did not err by failing to declare a mistrial where an expert relied on the victim's mother's testimony in determining that defendant had a fetish, which was a factor that the expert considered in evaluating defendant's risk for reoffending; consequently, the expert could disclose such inadmissible hearsay. Although the expert's answer pertaining to defendant's engaging in that behavior with his wife was nonresponsive to the question posed by the prosecutor during direct examination, the error was harmless because the trial court properly sustained the hearsay objection and instructed the jury to disregard. Cooper v. State, 2005 Tex. App. LEXIS 5304 (Tex. App. Fort Worth July 7 2005).

411. In defendant's capital murder case, a court did not err by admitting a detective's hearsay over defendant's objection where the detective was a fingerprint expert who compared the latent print found on the cash box with defendant's prints and determined that the latent print matched defendant's right index finger. The witness explained the scientific methodology involved in fingerprint comparison and how he determined that the latent print matched defendant's print, and the judge intentionally referenced the witness's expert witness status in an effort to explain why he overruled the hearsay objection. Webber v. State, 2004 Tex. App. LEXIS 3440 (Tex. App. El Paso Apr. 15 2004).

Family Law : Child Custody : Awards : General Overview

412. In a child custody proceeding, it was error to admit an e-mail written by the mother's boyfriend in which he purportedly discussed wanting to be with another man's wife; the e-mail was inadmissible hearsay because it was introduced to prove the truth of the assertion that the boyfriend was interested in the wives of other men. However, the admission did not cause reversible error because it was cumulative and was not controlling on the material issue. In re Marriage of Ivers, 2004 Tex. App. LEXIS 3800 (Tex. App. Texarkana Apr. 30 2004).

Family Law : Family Protection & Welfare : Cohabitants & Spouses : Abuse, Endangerment & Neglect

413. In a trial for defendant's sexual assault of his wife, who recanted in her trial testimony, the trial court properly admitted statements that the victim made shortly after the assault under the excited utterance exception to the hearsay rule of Tex. R. Evid. 802; it was reasonable to find that the victim was still dominated by the emotions, excitement, fear, or pain of being sexually assaulted, hit, and threatened with death, over the course of several hours. Davis v. State, 2007 Tex. App. LEXIS 352 (Tex. App. Dallas Jan. 18 2007).

Family Law : Marital Termination & Spousal Support : Dissolution & Divorce : Property Distribution

414. Because the ex-husband did not object to the ex-wife's trial inventory, pursuant to Tex. R. Evid. 802, the trial court could rely on the values of the property as contained in that inventory; in addition, the trial court could have relied on the testimony of the ex-wife that the fair market value of the residence was a little less than the tax-appraised value. McKamie v. McKamie, 2006 Tex. App. LEXIS 8726 (Tex. App. Houston 1st Dist. Oct. 5 2006).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview

415. In a termination of parental rights case, an alleged error relating to the admission of hearsay evidence was deemed harmless because evidence relating to the reasons for the removal of children were reiterated with greater specificity without objection by other witnesses, including the mother herself. The mother's brief did not specify the substance of the testimony that she found objectionable nor did it establish how that evidence probably caused the rendition of an improper judgment under Tex. R. App. P. 44.1. In the Interest of L.M., 2012 Tex. App. LEXIS 2720 (Tex. App. Waco Apr. 4 2012).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Best Interests of Child

416. Even if the trial court erred by admitting therapy notes and records on the ground that they contained hearsay statements, the error was harmless because much of the evidence contained in the therapy notes was cumulative of the testimony already given by the father, the therapist, and an investigator for the Texas Department of Family and Protective Services, and even without the therapy notes, ample evidence existed to support the trial court's best-interest finding under Tex. Fam. Code Ann. § 161.001(2). The record showed that: (1) the therapist testified that all four children feared their mother; (2) the children did not want to return to their mother; (3) the children were doing well in their placements; and (4) evidence of the mother's past conduct supported the inference that she would be unable to meet her children's physical and emotional needs or provide a stable home environment were the children returned to her care. Rader v. Tex. Dep't of Family, 2011 Tex. App. LEXIS 4594, 2011 WL 2437679 (Tex. App. Austin June 15 2011).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

417. In a termination of parental rights case, a family service plan that had been filed with the court as required by Tex. Fam. Code Ann. § 263.101, was properly admitted as a public record. In the Interest of R.R., 2011 Tex. App. LEXIS 8394, 2011 WL 5026229 (Tex. App. Houston 1st Dist. Oct. 20 2011).

418. In a termination of parental rights case, medical records were properly admitted as business records under Tex. R. Evid. 802, 803(6) because the custodian affidavit complied with Tex. R. Evid. 902(10). In the Interest of R.R., 2011 Tex. App. LEXIS 8394, 2011 WL 5026229 (Tex. App. Houston 1st Dist. Oct. 20 2011).

Governments : Courts : Rule Application & Interpretation

419. Nothing in Tex. R. Evid. 802 limits its application to contested hearings. The rule is not ambiguous and requires no explication. Texas Commerce Bank v. New, 3 S.W.3d 515, 1999 Tex. LEXIS 105, 42 Tex. Sup. Ct. J. 1175 (Tex. 1999).

Labor & Employment Law : Discrimination : Actionable Discrimination

420. In an employment discrimination case, plaintiff could not aver to statements by a coworker who interpreted discussions between plant managers and a supervisor because, as recounted by plaintiff, the evidence was hearsay. Gonzalez v. Champion Techs., Inc., 384 S.W.3d 462, 2012 Tex. App. LEXIS 9379 (Tex. App. Houston 14th Dist. Nov. 13 2012).

Labor & Employment Law : Discrimination : Disparate Treatment : Proof : Burdens of Proof

421. In an employment discrimination case, the employee's summary judgment testimony about hearing an out-of-court statement by a human resources director was not competent evidence because it was hearsay. Rincones v. Whm Custom Servs., 2013 Tex. App. LEXIS 5448 (Tex. App. Corpus Christi May 2 2013).

Labor & Employment Law : Discrimination : Retaliation : Elements : Protected Activities

422. In an employment retaliation case, it was error to exclude as hearsay statements in the employee's summary judgment affidavit regarding his complaint to the plant manager about race-based harassment from coworkers because the value of the statements was not the truth of the matter but rather the fact that the employee made the complaint and thus engaged in a protected activity. Gonzalez v. Champion Techs., Inc., 384 S.W.3d 462, 2012 Tex. App. LEXIS 9379 (Tex. App. Houston 14th Dist. Nov. 13 2012).

Torts : Damages : General Overview

423. In entering a default judgment in a bank's action against two salesman, wherein the bank alleged claims of fraud, breach of contract, conspiracy, and civil theft, the trial court committed no error in awarding unliquidated damages based on affidavits. Neither Tex. R. Civ. P. 243 nor Tex. R. Evid. 802 barred the trial court's reliance on the affidavits. Texas Commerce Bank v. New, 3 S.W.3d 515, 1999 Tex. LEXIS 105, 42 Tex. Sup. Ct. J. 1175 (Tex. 1999).

Tex. Evid. R. 803

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 803 Exceptions to the Rule Against Hearsay -- Regardless of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) ***Present Sense Impression.***--A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) ***Excited Utterance.***--A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) ***Then-Existing Mental, Emotional, or Physical Condition.***--A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) ***Statement Made for Medical Diagnosis or Treatment.***--A statement that:

(A)is made for - and is reasonably pertinent to-medical diagnosis or treatment; and

(B)describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) ***Recorded Recollection.***--A record that:

(A)is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B)was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C)accurately reflects the witness's knowledge, unless the circumstances of the record's preparation cast doubt on its trustworthiness.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) ***Records of a Regularly Conducted Activity.***--A record of an act, event, condition, opinion, or diagnosis if:

(A)the record was made at or near the time by - or from information transmitted by - someone with knowledge;

(B)the record was kept in the course of a regularly conducted business activity;

(C)making the record was a regular practice of that activity;

(D)all these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10); and

(E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

"Business" as used in this paragraph includes every kind of regular organized activity whether conducted for profit or not.

(7) ***Absence of a Record of a Regularly Conducted Activity.***--Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent fails to show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) ***Public Records.***--A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by lawenforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent fails to demonstrate that the source of information or other circumstances indicate a lack of trustworthiness.

(9) ***Public Records of Vital Statistics.***--A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) ***Absence of a Public Record.***--Testimony - or a certification under Rule 902 - that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) ***Records of Religious Organizations Concerning Personal or Family History.***--A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) ***Certificates of Marriage, Baptism, and Similar Ceremonies.***--A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) ***Family Records.***--A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) ***Records of Documents That Affect an Interest in Property.***--The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) ***Statements in Documents That Affect an Interest in Property.***--A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose-unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) ***Statements in Ancient Documents.***--A statement in a document that is at least 20 years old and whose authenticity is established.

(17) ***Market Reports and Similar Commercial Publications.***--Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) ***Statements in Learned Treatises, Periodicals, or Pamphlets.***--A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on crossexamination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) ***Reputation Concerning Personal or Family History.***--A reputation among a person's family by blood, adoption, or marriage - or among a person's associates or in the community - concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) ***Reputation Concerning Boundaries or General History.***--A reputation in a community - arising before the controversy - concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) ***Reputation Concerning Character.***--A reputation among a person's associates or in the community concerning the person's character.

(22) ***Judgment of a Previous Conviction.***--Evidence of a final judgment of conviction if:

(A) it is offered in a civil case and:

(i) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(ii) the conviction was for a felony;

(iii) the evidence is admitted to prove any fact essential to the judgment; and

(iv) an appeal of the conviction is not pending; or

(B) it is offered in a criminal case and:

(i) the judgment was entered after a trial or a guilty or nolo contendere plea;

(ii) the conviction was for a criminal offense;

(iii) the evidence is admitted to prove any fact essential to the judgment;

(iv) when offered by the prosecutor for a purpose other than impeachment, the judgment was against the defendant; and

(v) an appeal of the conviction is not pending.

(23) ***Judgments Involving Personal, Family, or General History or a Boundary.***--A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A)was essential to the judgment; and

(B)could be proved by evidence of reputation.

(24) ***Statement Against Interest.***--A statement that:

(A)a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability or to make the declarant an object of hatred, ridicule, or disgrace; and

(B)is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 40, *Hearsay*.

See also *Texas Civil Trial Guide*, Unit 7, *Evidence: Affidavits*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Pre-March 1, 1998 comment [on paragraph (6)] This provision rejects the doctrine of *Loper v. Andrews*, 404 S.W.2d 300, 305 (Tex. 1966), which required that an entry of a medical opinion or diagnosis meet a test of "reasonable medical certainty."

Case Notes

Banking Law : Consumer Protection : Credit Card Agreements : General Overview
Civil Procedure : Summary Judgment : Evidence
Civil Procedure : Summary Judgment : Opposition : Supporting Materials
Civil Procedure : Summary Judgment : Standards : General Overview
Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Remedies : Costs & Attorney Fees : Attorney Expenses & Fees : Reasonable Fees
Civil Procedure : Appeals : Briefs
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Civil Procedure : Appeals : Standards of Review : Reversible Errors

Communications Law : Telephone Services : Wireless Services
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Contracts Law : Breach : Causes of Action : General Overview
Contracts Law : Formation : Capacity of Parties : Mental Capacity
Contracts Law : Remedies : Specific Performance
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale : Elements
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Endangerment : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Terrorism : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Violation of Protective Orders
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Elements
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Perjury : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Forgery : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements
Criminal Law & Procedure : Criminal Offenses : Weapons : Use : General Overview
Criminal Law & Procedure : Accessories : Aiding & Abetting
Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : General Overview
Criminal Law & Procedure : Eyewitness Identification : Photo Identifications
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Counsel : Effective Assistance : Pleas
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Tests
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Trials : Examination of Witnesses : Admission of Codefendant Statements
Criminal Law & Procedure : Trials : Examination of Witnesses : Child Witnesses
Criminal Law & Procedure : Trials : Examination of Witnesses : Videotaped Testimony
Criminal Law & Procedure : Trials : Motions for Mistrial
Criminal Law & Procedure : Witnesses : Presentation
Criminal Law & Procedure : Jury Instructions : General Overview
Criminal Law & Procedure : Jury Instructions : Curative Instructions
Criminal Law & Procedure : Jury Instructions : Limiting Instructions

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence
Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview
Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Proceedings
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Sentencing : Restitution
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments
Criminal Law & Procedure : Appeals : Reversible Errors : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Constitutional Errors
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Cumulative Errors
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview
Criminal Law & Procedure : Habeas Corpus : Appeals : Certificate of Appealability
Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Ineffective Assistance
Criminal Law & Procedure : Habeas Corpus : Review : Specific Claims : Evidentiary Errors
Criminal Law & Procedure : Habeas Corpus : Review : Standards of Review : Contrary & Unreasonable Standard
Environmental Law : Hazardous Wastes & Toxic Substances : Cleanup
Evidence : General Overview
Evidence : Authentication : General Overview
Evidence : Authentication : Self-Authentication
Evidence : Authentication : Chain of Custody
Evidence : Demonstrative Evidence : General Overview
Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Photographs
Evidence : Demonstrative Evidence : Recordings
Evidence : Documentary Evidence : Affidavits
Evidence : Hearsay : General Overview
Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence
Evidence : Hearsay : Exceptions : General Overview
Evidence : Hearsay : Exceptions : Ancient Documents
Evidence : Hearsay : Exceptions : Business Records : General Overview
Evidence : Hearsay : Exceptions : Business Records : Absence of Records
Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials
Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business
Evidence : Hearsay : Exceptions : Family Records & Statements
Evidence : Hearsay : Exceptions : Judgments : Prior Felony Convictions
Evidence : Hearsay : Exceptions : Learned Treatises : General Overview
Evidence : Hearsay : Exceptions : Market Reports & Commercial Publications : General Overview
Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment
Evidence : Hearsay : Exceptions : Present Sense Impression : General Overview
Evidence : Hearsay : Exceptions : Present Sense Impression : Contemporaneous Statements
Evidence : Hearsay : Exceptions : Present Sense Impression : Description of Events
Evidence : Hearsay : Exceptions : Public Records
Evidence : Hearsay : Exceptions : Public Records : General Overview
Evidence : Hearsay : Exceptions : Public Records : Absence of Records
Evidence : Hearsay : Exceptions : Public Records : Investigative Reports

Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports
Evidence : Hearsay : Exceptions : Recorded Recollection : General Overview
Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials
Evidence : Hearsay : Exceptions : Recorded Recollection : Recollection Refreshed
Evidence : Hearsay : Exceptions : Recorded Recollection : Requirements
Evidence : Hearsay : Exceptions : Records of Documents Affecting Property Interests
Evidence : Hearsay : Exceptions : Religious Records
Evidence : Hearsay : Exceptions : Reputation : General Overview
Evidence : Hearsay : Exceptions : Reputation : Boundaries
Evidence : Hearsay : Exceptions : Reputation : Character
Evidence : Hearsay : Exceptions : Residual Exceptions : General Overview
Evidence : Hearsay : Exceptions : Residual Exceptions : Confrontation Clause Requirements
Evidence : Hearsay : Exceptions : Spontaneous Statements : General Overview
Evidence : Hearsay : Exceptions : Spontaneous Statements : Criminal Trials
Evidence : Hearsay : Exceptions : Spontaneous Statements : Elements
Evidence : Hearsay : Exceptions : State of Mind : General Overview
Evidence : Hearsay : Exceptions : State of Mind : Proof of Earlier Acts
Evidence : Hearsay : Exceptions : State of Mind : Proof of Later Acts
Evidence : Hearsay : Exceptions : Statements Against Interest
Evidence : Hearsay : Exceptions : Statements of Child Abuse
Evidence : Hearsay : Exemptions : General Overview
Evidence : Hearsay : Exemptions : Confessions : General Overview
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements
Evidence : Hearsay : Exemptions : Statements by Coconspirators : General Overview
Evidence : Hearsay : Exemptions : Statements by Coconspirators : Statements During Conspiracy
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Hearsay : Exemptions : Statements by Party Opponents : Extrajudicial Statements
Evidence : Hearsay : Hearsay Within Hearsay
Evidence : Hearsay : Rule Components
Evidence : Hearsay : Rule Components : General Overview
Evidence : Hearsay : Rule Components : Declarants
Evidence : Hearsay : Rule Components : Nonverbal Conduct
Evidence : Hearsay : Rule Components : Statements
Evidence : Hearsay : Rule Components : Truth of Matter Asserted
Evidence : Hearsay : Unavailability : General Overview
Evidence : Inferences & Presumptions : Inferences
Evidence : Procedural Considerations : General Overview
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Objections & Offers of Proof : Objections
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Relevance : Sex Offenses : General Overview
Evidence : Scientific Evidence : Autopsies
Evidence : Scientific Evidence : Blood Alcohol
Evidence : Scientific Evidence : Daubert Standard
Evidence : Scientific Evidence : DNA
Evidence : Scientific Evidence : Sobriety Tests
Evidence : Scientific Evidence : Toxicology

Evidence : Testimony : Experts : General Overview
Evidence : Testimony : Experts : Admissibility
Evidence : Testimony : Experts : Criminal Trials
Evidence : Testimony : Lay Witnesses : Personal Knowledge
Family Law : Child Custody : Awards : General Overview
Family Law : Family Protection & Welfare : Cohabitants & Spouses : Abuse, Endangerment & Neglect
Family Law : Guardians : Appointment
Family Law : Parental Duties & Rights : Termination of Rights : General Overview
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure
Labor & Employment Law : Disability & Unemployment Insurance : Unemployment Compensation : Review
Labor & Employment Law : Discrimination : Gender & Sex Discrimination : Proof : General Overview
Military & Veterans Law : Military Justice : Evidence : Writings & Real Evidence
Real Property Law : Landlord & Tenant : Lease Agreements : Residential Leases
Transportation Law : Private Vehicles : Operator Licenses : General Overview
Transportation Law : Private Vehicles : Operator Licenses : Revocation & Suspension
Transportation Law : Private Vehicles : Vehicle Registration : General Overview

LexisNexis (R) Notes

Banking Law : Consumer Protection : Credit Card Agreements : General Overview

1. In a collections case brought by the purchaser of credit card debt, there was no error under Tex. R. Evid. 902(10), 803(6) in admitting business records of the original lender, based on affidavits stating that the affiants were the record custodian and media manager for the purchaser, that the records custodian was personally familiar with how the purchaser prepared and maintained its records, that both affiants had personal knowledge of the business record practices of an intermediate purchaser, and that both vouched for the accuracy of the records that were initially created by the lender. Nice v. Dodeka, L.L.C., 2010 Tex. App. LEXIS 8922, 2010 WL 4514174 (Tex. App. Beaumont Nov. 10 2010).

Civil Procedure : Summary Judgment : Evidence

2. In a credit card company's action for breach of contract for a cardholder's failure to pay his credit card debt, a custodian of records for the company properly authenticated the documents referenced in her summary judgment affidavit as "business records" and the affidavit contained sufficient factual support and was not, therefore, conclusory; the cardholder did not present any evidence to raise a fact issue as to whether the documents were properly authenticated business records, and he also failed to identify any statements in the affidavit that he contended were opinions or legal conclusions. Duran v. Citibank (South Dakota), N.A., 2008 Tex. App. LEXIS 2060 (Tex. App. Houston 1st Dist. Mar. 20 2008).

Civil Procedure : Summary Judgment : Opposition : Supporting Materials

3. In a debt collection case, a trial court did not err by striking an affidavit opposing summary judgment from a managing partner and in refusing to grant leave to amend the affidavit because there was no facts upon which the partner based his conclusion regarding the last payment made on a note, and there were no readily controvertible facts shown that were known to the partner; moreover, he did not identify the company where payments were made, how he knew that the records were kept in the ordinary course of business, or which company kept the records in the regular course of business. Because the conclusory nature of the affidavit constituted a defect in substance, no amendment was allowed. CA Partners v. Spears, 274 S.W.3d 51, 2008 Tex. App. LEXIS 6789 (Tex. App. Houston 14th Dist. 2008).

Civil Procedure : Summary Judgment : Standards : General Overview

4. Trial court erred in overruling the couple's objections to the travel club's summary judgment evidence and in granting summary judgment, as the sworn affidavit by the club's customer service manager, and a series of documents attached to another affidavit, were not admissible because of his lack of personal knowledge and because the documents constituted hearsay, where the manager stated that he based his assertion of the fact that there had been a refund to the couple upon information that he obtained from a third party and the documents did not satisfy the business records' exception of Tex. R. Evid. 803(6). Thus, the club failed to establish that the couple were not entitled to damages as a matter of law. Powell v. Vavro, McDonald, & Assocs., L.L.C., 136 S.W.3d 762, 2004 Tex. App. LEXIS 5260 (Tex. App. Dallas 2004).

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

5. In a fraud and negligence action, a client was not permitted to raise the issues of authenticity and hearsay on appeal from the grant of summary judgment based on the admission of an employment contract because the client did not obtain a ruling on the objections from the trial court. Yazdchi v. Am. Arbitration Ass'n, 2005 Tex. App. LEXIS 1320 (Tex. App. Houston 1st Dist. Feb. 17 2005).

6. In airport facility lessees' challenge to the city appraisal district's tax assessment on improvements the lessees constructed under their leases and subleases with the city, the trial court did not abuse its discretion in admitting certificates of occupancy stating that the city had accepted the facilities as the certificates and an affidavit referencing them as they were not hearsay, and even if they were, the certificates were admissible public records under Tex. R. Evid. 803(8) in that they memorialized the city's issuance of certificates of occupancy to the lessees of the facilities. Travis Cent. Appraisal Dist. v. Signature Flight Support Corp., 140 S.W.3d 833, 2004 Tex. App. LEXIS 5783 (Tex. App. Austin 2004).

7. Trial court erred in overruling the couple's objections to the travel club's summary judgment evidence and in granting summary judgment, as the sworn affidavit by the club's customer service manager, and a series of documents attached to another affidavit, were not admissible because of his lack of personal knowledge and because the documents constituted hearsay, where the manager stated that he based his assertion of the fact that there had been a refund to the couple upon information that he obtained from a third party and the documents did not satisfy the business records' exception of Tex. R. Evid. 803(6). Thus, the club failed to establish that the couple were not entitled to damages as a matter of law. Powell v. Vavro, McDonald, & Assocs., L.L.C., 136 S.W.3d 762, 2004 Tex. App. LEXIS 5260 (Tex. App. Dallas 2004).

Civil Procedure : Remedies : Costs & Attorney Fees : Attorney Expenses & Fees : Reasonable Fees

8. Trial court affirmatively stated that it had considered the factors set forth in Tex. Disciplinary R. Prof. Conduct 1.04(b), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A-1 (Tex. State Bar R. art. X, sec. 9) in awarding attorney's fees, and absent objection, counsel's unsworn testimony sufficiently established the amount of fees incurred. Thus, although the supporting affidavits were hearsay because they did not comply with the requirements of Tex. Civ. Prac. & Rem. Code Ann. § 18.001 and the invoices were hearsay because they were not properly authenticated as business records under Tex. R. Evid. 803(6), their admission was harmless error. Good v. Baker, 339 S.W.3d 260, 2011 Tex. App. LEXIS 2167 (Tex. App. Texarkana Mar. 25 2011).

Civil Procedure : Appeals : Briefs

9. In a case involving a repossession of a vehicle by a creditor, a debtor's claim that a trial court erred by failing to admit exhibits on hearsay grounds was inadequately briefed where the debtor did not explain whether the exhibits were not hearsay or whether they were hearsay, but nevertheless should have been admitted under some

exception to the hearsay rule. Flores v. James Wood Fin. Llc, 2013 Tex. App. LEXIS 7488 (Tex. App. Fort Worth June 20 2013).

Civil Procedure : Appeals : Reviewability : Preservation for Review

10. In an action seeking to recover on a credit card debt, a debtor failed to preserve an error relating to an alleged failure to satisfy the business records exception to the hearsay rule in summary judgment evidence because there was no ruling from the trial court on the objections, as required by Tex. R. App. P. 33.1(a)(2). McGrew v. Citibank N.A., 2009 Tex. App. LEXIS 4529, 2009 WL 1693473 (Tex. App. Waco June 17 2009).

11. Exhibit consisting of receipt books was properly admitted as a business record under Tex. R. Evid. 803(6), as the books were kept in the regular course of business and reflected the record of payments made and a witness testified to checking the receipts and accounting for monies received, and therefore there was a sufficient evidentiary basis for the admission. Thomas v. State, 226 S.W.3d 697, 2007 Tex. App. LEXIS 3878 (Tex. App. Corpus Christi 2007).

12. In an appeal from a divorce judgment, the husband waived his arguments as to the exclusion of his evidence as hearsay where he cited no authority for an excluded statement, but merely argued that it was not presented for the truth of the matter asserted and listed Tex. R. Evid. 801, 802, and 803. Lorant v. Lorant, 2004 Tex. App. LEXIS 1641 (Tex. App. Dallas Feb. 19 2004).

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

13. In an electrical supplier's collection action against a contractor and others, arising from unpaid items, the trial court did not abuse its discretion in excluding certain business invoices because there was wavering testimony and conflicting information, such that it deemed them untrustworthy. Border States Elec. Supply of Tex., Inc. v. Coast to Coast Elec., LLC, 2014 Tex. App. LEXIS 5681, 2014 WL 3953961 (Tex. App. Corpus Christi May 29 2014).

14. Trial court did not abuse its discretion by excluding expert-opinion evidence based on its finding that the evidence was not subject to the public record exception of the hearsay rule, because it had limited knowledge of the qualifications of the authors of the opinion testimony, and had limited knowledge of the reliability of such testimony. Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc., 434 S.W.3d 142, 2014 Tex. LEXIS 381, 57 Tex. Sup. Ct. J. 531, 43 Media L. Rep. (BNA) 1086 (Tex. May 9 2014).

15. Trial court did not err by admitting into evidence a California police report of domestic violence made by the mother against the father because it was admissible as a public record under Tex. R. Evid. 803(8). L.M. & Y.Y. v. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 5683, 2012 WL 2923132 (Tex. App. Houston 1st Dist. July 12 2012).

16. Trial court did not abuse its discretion by determining that Tex. R. Evid. 803(8) did not apply and excluding four documents from the Texas Natural Resource Conservation Commission regarding appellee's solid waste permit because at the time the documents were presented, the trial court had little or no information regarding the authors' qualifications to give the expert opinions set forth in the documents or regarding the reliability of the opinions. Waste Mgmt. of Tex., Inc. v. Texas Disposal Systems Landfill, 2012 Tex. App. LEXIS 4005, 2012 WL 1810215 (Tex. App. Austin May 18 2012).

17. Trial court did not abuse its discretion by admitting the contact log narrative of the Texas Department of Family and Protective Services' investigator as a business record under Tex. R. Evid. 803(8)(C) because it appeared to track the investigator's observations that were made during the investigation. In the Interest of B.G.M., 2011 Tex.

App. LEXIS 6040 (Tex. App. Texarkana Aug. 4 2011).

18. Because defendant filed a verified denial regarding an agreement and a credit application was for different work than was alleged to have been completed in the agreement, plaintiff did not establish that the circumstances indicated the trustworthiness of the documents; therefore, plaintiff did not demonstrate that the trial court abused its discretion by refusing to admit the agreement and credit application into evidence as business records under Tex. R. Evid. 803(6). Old Republic Ins. Co. v. Edwards, 2011 Tex. App. LEXIS 4933, 2011 WL 2623994 (Tex. App. Houston 1st Dist. June 30 2011).

19. Trial court did not abuse its discretion by sustaining a father's objections to admission of an "updated" record, as the objection from the father's attorney prevented the attorney general from authenticating the "updated" record without testifying under oath; when the trial judge sustained the father's objection to the "updated" record, the attorney general had to prove the authenticity of the document by some other means; however, the attorney general made no attempt to call any witnesses to testify at the hearing and the document was not self-authenticating because it was not under seal, a certified copy of a public record, or supported by a business records affidavit. In re K.R., 2007 Tex. App. LEXIS 5756 (Tex. App. Dallas July 23 2007).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

20. Trial court erred in admitting under Tex. R. Evid. 803(6) an investigative report prepared by a third party on behalf of an employer in response to a former employee's complaint of sexual harassment filed with the Texas Commission of Human Rights where it was prepared in an adversarial setting and was not the regular practice of the employer to make such a report because the report was prepared by an industrial relations counselor specially employed to answer the Commission's request and, therefore, lacked the high probability of trustworthiness that attached to records that were regularly kept and routinely relied on; however, the jury's verdict did not turn on the erroneous admission of the report because most of what was contained in the report was also elicited in the testimony of witnesses. Mackey v. U.P. Enters., 2005 Tex. App. LEXIS 6044 (Tex. App. Tyler July 29 2005).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

21. Even though the trial court abused its discretion by admitting two exhibits containing reports of hair follicle drug tests of appellants under the business records exception to the hearsay rule, as there was insufficient indicia of trustworthiness or reliability, the error was harmless because other evidence that two children and the mother's boyfriend tested positive for cocaine was admitted without objection, and termination of the mother's parental rights did not turn on the admission of the second and third sets of positive drug test results. In the Interest of S.S., 2012 Tex. App. LEXIS 9946, 2012 WL 5991391 (Tex. App. Tyler Nov. 30 2012).

22. Assuming that the trial court erred by admitting as evidence a mediator's report to the trial court in which the mediator indicated that the case had been settled on the ground that it was inadmissible hearsay, the error was harmless because there was other evidence that the parties had reached a settlement agreement, including testimony that the deletion of the parties' brother's name had been discussed early in the negotiations and that the deletion was pointed out to all parties before the conclusion of the mediation. Mcdonald v. Fox, 2012 Tex. App. LEXIS 9518, 2012 WL 5591795 (Tex. App. Corpus Christi Nov. 15 2012).

23. Even if the trial court erred in excluding any evidence that it ruled was not admissible under Tex. R. Evid. 803(8), the error was harmless under Tex. R. App. P. 44.1(a)(1) because the excluded investigative reports, which did not show any illegal activity more recent than that shown in admitted evidence, were cumulative. State v. Elite Med, L.L.C., 2011 Tex. App. LEXIS 6502, 2011 WL 3610414 (Tex. App. San Antonio Aug. 17 2011).

Civil Procedure : Appeals : Standards of Review : Reversible Errors

24. In a wrongful death and survival action stemming from a collision of a sport utility vehicle and a gravel truck, because the factual findings in a Department of Public Safety (DPS) accident report, as well as the opinions set forth in it, were all admitted into evidence via testimony and exhibits other than the accident report, any trial court error in excluding the opinion testimony of a DPS officer or the accident report pursuant to the hearsay exception set forth in Tex. R. Evid. 803(8)(B) did not cause the rendition of an improper judgment and therefore did not constitute reversible error under Tex. R. App. P. 44.1(a)(1). TXI Transp. Co. v. Hughes, 224 S.W.3d 870, 2007 Tex. App. LEXIS 4124 (Tex. App. Fort Worth 2007).

Communications Law : Telephone Services : Wireless Services

25. Where defendant was charged with murder, the trial court did not err by admitting defendant's cell phone records and testimony from the custodian of record under the business records exception to the hearsay rule. The phone records denoted defendant's whereabouts on the day of the murder. Wilson v. State, 195 S.W.3d 193, 2006 Tex. App. LEXIS 815 (Tex. App. San Antonio 2006).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

26. During the punishment phase of defendants murder trial, the trial court committed reversible error in admitting into evidence disciplinary records from the jail, probation department, and the Texas Youth Commission because the offense reports constituted hearsay and were not admissible under the business records exception. The admission of these records violated his right to confront the witnesses against him, because they contained several testimonial statements from witnesses who did not testify at trial. Smith v. State, 420 S.W.3d 207, 2013 Tex. App. LEXIS 15280, 2013 WL 6699495 (Tex. App. Houston 1st Dist. Dec. 19 2013).

27. In an animal cruelty case, forms from the Society for the Prevention of Cruelty to Animals (SPCA) were business records under Tex. R. Evid. 803(6), and their admission did not violate the Confrontation Clause because they were not testimonial but rather were compiled for diagnostic or medical treatment purposes. Holz v. State, 2010 Tex. App. LEXIS 2017, 2010 WL 1041068 (Tex. App. Texarkana Mar. 23 2010).

28. At the punishment stage of trial, a pen pack documenting a prior conviction was not categorically exempt from Confrontation Clause analysis, even if it was a business record under Tex. R. Evid. 803(6). However, the document was not testimonial because the objective circumstances indicated that it was not prepared for prosecutorial use. Grey v. State, 299 S.W.3d 902, 2009 Tex. App. LEXIS 8572 (Tex. App. Austin Nov. 4 2009).

29. Because a witness's statements that three men had attacked her son and then ran toward a house were nontestimonial in nature, the trial court did not err in admitting that evidence as an excited utterance. Rios v. State, 2009 Tex. App. LEXIS 3444, 2009 WL 1406249 (Tex. App. San Antonio May 20 2009).

30. District court denied a state inmate's petition under 28 U.S.C.S. § 2254, challenging his conviction and sentence for murder, because the inmate did not show he was denied effective assistance of counsel or that a state habeas court made findings that were contrary to clearly established federal law when it rejected the inmate's claims; although the inmate claimed that the trial court violated his Sixth Amendment right to confrontation when it admitted hearsay testimony, the district court found that the trial court properly admitted testimony under Tex. R. Evid. 803 as an excited utterance; even assuming arguendo that the trial court erred, the error was harmless in light of the other incriminating evidence the State introduced. Turnbow v. Quarterman, 2007 U.S. Dist. LEXIS 77098 (N.D. Tex. Oct. 17 2007).

31. Where petitioner state death row inmate argued trial counsel was ineffective for admitting into evidence at the penalty phase psychiatric reports which suggested the inmate was a future danger, each of those exhibits that trial counsel introduced satisfied an exception to the hearsay rule under Tex. R. Evid. 803 and thus met the requirements of the Confrontation Clause. Coble v. Quarterman, 496 F.3d 430, 2007 U.S. App. LEXIS 19327 (5th Cir. Tex. 2007).

32. Where petitioner state death row inmate argued trial counsel was ineffective for admitting into evidence at the penalty phase psychiatric reports which were 22 and 25 years old which suggested the inmate was a future danger, each of those exhibits that trial counsel introduced satisfied an exception to the hearsay rule under Tex. R. Evid. 803 and thus met the requirements of the Confrontation Clause. Coble v. Quarterman, 496 F.3d 430, 2007 U.S. App. LEXIS 19327 (5th Cir. Tex. 2007).

33. In a murder case, defendant's confrontation rights under the Sixth Amendment were not violated by the introduction of a friend's testimony that the victim came to his house in the middle of the night stating that defendant was chasing him and bumping his car; the statements were not hearsay either since an exception in Tex. R. Evid. 803 applied due to the fact that the victim was still dominated by the fear of the event at the time the statements were made. Mims v. State, 2007 Tex. App. LEXIS 5448 (Tex. App. Houston 1st Dist. July 12 2007).

34. Where defendant was tried for two counts of indecency with a child and two counts of aggravated sexual assault of a child by penetration, the trial court did not err by admitting testimony from the complainant's grandmother relating a statement the complainant made about defendant "tickling" her and pulling up her blouse; the complainant's statement met all the requirements of Tex. R. Evid. 803, as it was made while the complainant was in the grip of fear and without time for reflection; because the statement was not testimonial, the admission of the complainant's statement did not violate the Confrontation Clause even though defendant had no opportunity to cross-examine her. McCarty v. State, 227 S.W.3d 415, 2007 Tex. App. LEXIS 4604 (Tex. App. Texarkana 2007).

35. In federal habeas proceedings, a state prisoner did not make a substantial showing of the denial of his Sixth Amendment right to confrontation by the district court's admission of an accomplice's statement implicating the prisoner as the perpetrator of a murder as an excited utterance under Tex. R. Evid. 803 because the remarks were blurted out after the accomplice fled a routine traffic stop, was chased by police officers, and was apprehended while officers were inventorying weapons found in his vehicle. Rodriguez v. Quarterman, 2006 U.S. App. LEXIS 23173 (5th Cir. Tex. Sept. 11 2006).

36. Admission of an accomplice's statement and a prisoner's jail disciplinary records at trial did not violate the prisoner's Sixth and Fourteenth Amendment rights under Crawford because both pieces of evidence were admitted under the prevailing law at the time of the prisoner's trial. Rodriguez v. Quarterman, 2006 U.S. App. LEXIS 23173 (5th Cir. Tex. Sept. 11 2006).

37. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified; even if the State called the complainants to testify so that otherwise inadmissible prior inconsistent statements could be admitted, there was no harm committed. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

38. In a prosecution for driving while intoxicated, there was no error under the Confrontation Clause in permitting an officer to testify about the vehicle registration; the computer entry showing vehicle registration was akin to a public record under Tex. R. Evid. 803 and was thus non-testimonial under a Crawford analysis. Nieschwietz v. State, 2006 Tex. App. LEXIS 5255 (Tex. App. San Antonio June 21 2006).

39. In a murder trial, there was no violation of the confrontation clause when the trial court admitted, as an excited utterance under Tex. R. Evid. 803(2), evidence of a statement by the victim to his mother that defendant had just threatened to kill him. The statement was not testimonial. Hartless v. State, 2006 Tex. App. LEXIS 5066 (Tex. App. Tyler June 14 2006).

40. Although a domestic violence complainant's statements to a police officer near the scene of the offense were admissible under the excited utterances exception to the hearsay rule, Tex. R. Evid. 803(2), because she was crying, sobbing, and appeared hysterical at the time that she identified defendant and then, in a series of accusations against him, detailed blow by blow the assault made upon her, that did not mean that the statements were ipso facto nontestimonial hearsay outside the scope of the Confrontation Clause and admissible into evidence. Each case must be examined on its facts to determine if the evidence is testimonial and controlled by Crawford. Davis v. State, 169 S.W.3d 660, 2005 Tex. App. LEXIS 3773 (Tex. App. Austin 2005).

41. Merely because a declarant is excited, the statements made do not lose their character as testimonial statements subject to the Confrontation Clause. Davis v. State, 169 S.W.3d 660, 2005 Tex. App. LEXIS 3773 (Tex. App. Austin 2005).

42. Sixth Amendment was violated by the admission of a victim's statement, which was taken by police at the hospital, as excited utterance because the statement was "testimonial" as a matter of law; the error, however, was harmless. Because defendant did not brief his claims separately, the court assumed that defendant claimed no greater protection under the state constitution than that provided by the federal constitution. Wall v. State, 143 S.W.3d 846, 2004 Tex. App. LEXIS 7467 (Tex. App. Corpus Christi 2004), affirmed by 184 S.W.3d 730, 2006 Tex. Crim. App. LEXIS 16 (Tex. Crim. App. 2006).

Contracts Law : Breach : Causes of Action : General Overview

43. In a breach of contract case, a trial court erred by refusing to admit a creditor's business records into evidence because a witness testified that she was personally acquainted with the facts in an affidavit, that she was the custodian of the records, and that she was familiar with how they were prepared and maintained; it did not matter that the creditor, as the purchaser of the account, was not the original author of the documents. The records were trustworthy because creator of the documents had to keep careful records of credit card accounts, otherwise it could have faced civil or criminal penalties, and the error probably caused the rendition of an improper judgment since the creditor was preventing from presenting its case against a debtor. Dodeka, L.C.C. v. Campos, 377 S.W.3d 726, 2012 Tex. App. LEXIS 3435 (Tex. App. San Antonio May 2 2012).

Contracts Law : Formation : Capacity of Parties : Mental Capacity

44. Business records concerning a decedent and his health were admissible in a declaratory judgment action because evidence of the decedent's irrationality and dementia in the months preceding and following the signing of certain contracts naming his friend as the payable on death beneficiary was probative of the decedent's capacity to contract on the date at issue. In the Estate of Minton, 2014 Tex. App. LEXIS 1061, 2014 WL 354527 (Tex. App. Corpus Christi Jan. 30 2014).

Contracts Law : Remedies : Specific Performance

45. In a collection suit by a creditor that purchased the debt from a credit card company, it was proper to admit, as business records under Tex. R. Evid. 803(6), monthly statements from the credit card company and the credit card company's agreement with the debtor because the documents were shown to be incorporated by the creditor, accurate, and trustworthy. Simien v. Unifund Ccr Partners, 2010 Tex. App. LEXIS 2687, 2010 WL 1492267 (Tex. App. Houston 1st Dist. Apr. 15 2010).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Delivery, Distribution & Sale : Elements

46. In a trial for delivering a controlled substance to a minor, it was proper to admit as excited utterance testimony as to statements made by the minor's mother, who was described as frantic, that she thought her son had overdosed on methamphetamine. Garza v. State, 2011 Tex. App. LEXIS 6480 (Tex. App. Amarillo Aug. 15 2011).

47. In a trial for delivering a controlled substance to a minor, it was proper to admit, either as excited utterance or as a statement against interest, the testimony of an officer as to a statement made by the minor that he felt weird after smoking the methamphetamine. Garza v. State, 2011 Tex. App. LEXIS 6480 (Tex. App. Amarillo Aug. 15 2011).

48. Statement against interest regarding smoking methamphetamine was corroborated, as required by Tex. R. Evid 803(24), by medical evidence. Garza v. State, 2011 Tex. App. LEXIS 6480 (Tex. App. Amarillo Aug. 15 2011).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Manufacture : General Overview

49. In a possession of pseudoephedrine with intent to manufacture methamphetamine case, the labeling on the cold medicine bottles constituted hearsay because it was an extrajudicial assertion offered to prove the truth of the matter asserted that the tablets contained pseudoephedrine; however, the labels were generally relied upon by the public, which suggested that the cold medication labels were accurate and trustworthy; thus, pursuant to Tex. R. Evid. 803, the labels were admissible as an exception to the hearsay rule. Shaffer v. State, 184 S.W.3d 353, 2006 Tex. App. LEXIS 410 (Tex. App. Fort Worth 2006).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : General Overview

50. In a drug case, the trial court did not err in refusing to allow defendant's girlfriend to testify that another person had stated that the contraband belonged to him; the proffered evidence was not relevant, under Tex. R. Evid. 402, to whether defendant possessed a controlled substance with intent to deliver it, in violation of Tex. Health & Safety Code Ann. § 481.112(a), and defendant offered no independent facts corroborating the hearsay statement under Tex. R. Evid. 803(24). Menton v. State, 2005 Tex. App. LEXIS 7799 (Tex. App. Amarillo Sept. 22 2005).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

51. Evidence was sufficient to show that defendant committed the offense of aggravated assault by intentionally, knowingly, or recklessly causing either bodily injury or serious bodily injury to his wife by choking or strangling her with his hand, and that he used his hand as a deadly weapon during the commission of the offense; physician, in a prior trial, had testified as to the extent of the wife's injuries; the wife's statements to a paramedic at the time of the incident were admissible under Tex. R. Evid. 803(4), and the wife was still suffering from the residual effects of the injuries, which included a stroke. Wesber v. State, 2004 Tex. App. LEXIS 3376 (Tex. App. Eastland Apr. 15 2004).

52. In an assault case, counsel was not ineffective for failing to object to ineffective for failing to object to hearsay evidence regarding a telephone call where the statements made by the victim to her mother met the excited utterance exception to the hearsay rule because they were the result of a startling occurrence, being assaulted, the victim was still crying and visibly upset when officers arrived, and all of her statements were related to the circumstances of the occurrence. In addition, the statements made by the victim's mother to the victim's father also met the excited utterance exception to the hearsay rule because they were the result of a startling occurrence,

receiving a telephone call from her daughter that she was being assaulted, the evidence indicated that the mother was was crying, and upset as a result of receiving the telephone call, and her statements were related to the circumstances of the occurrence. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

53. In an assault case, counsel was not ineffective for failing to object to hearsay evidence regarding the victim's fear that defendant would retaliate against her or her family where the statement was offered to show that the victim was afraid, not that defendant would retaliate against her or her family; therefore, it was admissible under the state of mind exception to the hearsay rule. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

54. In a criminal trial for the offense of aggravated assault with a deadly weapon, the court was permitted to exclude evidence of a blood test suggesting the victim was intoxicated, and proof of fundamental trustworthiness, or indicia of reliability of the blood test result was missing under Tex. R. Evid. 803(6). Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : General Overview

55. In a trial for family assault, testimony concerning the complainant's statements was properly admitted as excited utterance; the complainant was visibly shaken and highly upset and her intoxication did not negate her state of excitement. Hudson v. State, 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

56. In a trial for assault on a family member, the complainant's statement to officers and an emergency medical technician was properly admitted under the excited utterance exception to the hearsay rule. The complainant's intoxication did not call into question whether her mind was dominated by a state of excitement; the three witnesses testified that she was visibly shaken and highly upset when they arrived within five minutes of receiving the assault call. Hudson v. State, 2005 Tex. App. LEXIS 7386 (Tex. App. Houston 14th Dist. Sept. 8 2005), opinion withdrawn by, substituted opinion at 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

57. Defendant's convictions of indecency with a child by contact and exposure pursuant to Tex. Penal Code Ann. § 21.11 were affirmed, even though two witness were erroneously permitted to testify as outcry witnesses under Tex. Code Crim. Proc. Ann. art. 38.072, and the counselor was erroneously allowed to testify under Tex. R. Evid. 803(4) regarding the victim's statements during counseling, and where the testimony did not affect defendant's substantial rights under Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b), as defendant admitted that he engaged in the conduct described in the victim's statements to the three witnesses. Jones v. State, 92 S.W.3d 619, 2002 Tex. App. LEXIS 8545 (Tex. App. Austin 2002).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault

58. In a trial for assault involving family violence, the victim's nonverbal out-of-court statement (blinking to indicate "yes" in response to the question of whether defendant choked her) was properly admitted as an excited utterance because the officer observed that she was extremely frightened and she did not have sufficient time or composure to fabricate an answer. Miller v. State, 2013 Tex. App. LEXIS 7679 (Tex. App. Tyler June 25 2013).

59. In an assault causing bodily injury to a family member case under Tex. Penal Code Ann. § 22.01 and Tex. Fam. Code Ann. § 71.005, the complainant's statements to two police officers were properly admitted as excited utterances under Tex. R. Evid. 803(2) because her statements were related to the startling event as she stated that

defendant was upset because he could not find his keys and struck her in the face and choked her around the neck; only a short amount of time elapsed between the assault and when the statements were made to the officers; and the complainant was still under the stress of excitement caused by the assault and dominated by the emotions, fear, and pain of the event as the first officer testified that when the complainant stepped out of the bathroom and made her statements she was clearly upset, shaken, and crying and the second officer testified that after the complainant came out of the bathroom, she appeared very upset, she was crying, her shirt was stretched out a little bit, and she had a swollen bottom lip... Shannon v. State, 2010 Tex. App. LEXIS 9011, 2010 WL 4523766 (Tex. App. Corpus Christi Nov. 10 2010).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Endangerment : General Overview

60. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, two exhibits containing the medical records of the child-victims fell within the hearsay exception for records of regularly conducted activity set forth in Tex. R. Evid. 803(6); however, it was error to admit the exhibits because they contained a second layer of hearsay statements of abuse made by the children, and it was not clear that the children made these statements for the purpose of proper diagnosis within the meaning of Tex. R. Evid. 803(4). Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

61. In a robbery trial, the state was properly permitted to read to the jury an audio-recorded statement defendant made in a telephone call to his wife while he was in jail because under Tex. R. Evid. 801(e)(2), defendant's statement was not hearsay and did not have to be against defendant's interest under Tex. R. Evid. 803(24). Robinson v. State, 2012 Tex. App. LEXIS 365, 2012 WL 130616 (Tex. App. Dallas Jan. 18 2012).

62. In defendant's aggravated robbery case, a witness's statement was properly admitted where it was sufficiently self-inculpatory to be reliable, and the statement was trustworthy because the declarant's guilt was not inconsistent with defendant's guilt. The evidence at trial indicated that two men committed the robbery, one who was the driver of a pick-up truck matching the description of defendant's truck, and defendant admitted being at the scene of the second robbery when he said in his statement that he stopped and the declarant got out of the truck with what appeared to be a shotgun. Davila v. State, 2004 Tex. App. LEXIS 4781 (Tex. App. Dallas May 27 2004).

63. In a case where defendant's cousin assisted him in the crime of aggravated robbery, the hearsay statement of the cousin confessing to the crime was admissible at defendant's trial as a statement against penal interest under Tex. R. Evid. 803(24). Lopez v. State, 2003 Tex. App. LEXIS 1962 (Tex. App. Dallas Mar. 6 2003).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : Armed Robbery : General Overview

64. At an aggravated robbery trial, the court did not abuse its discretion in excluding defendant's statements to a police officer because the statements, although admitting that defendant was trying to steal a van, sought to shift blame for a shooting to an accomplice and thus were not statements against penal interest under Tex. R. Evid. 803. Lynn v. State, 2007 Tex. App. LEXIS 9095 (Tex. App. Houston 1st Dist. Nov. 15 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Terrorism : General Overview

65. In a proceeding relating to defendant's threats to kill his ex-wife, the ex-wife's statement to police was properly admitted as an excited utterance under Tex. R. Evid. 803(2). Defendant's loading a shotgun and issuing threats was startling enough to produce a state of nervous excitement, and only 10 to 20 minutes elapsed between the

threats and the ex-wife's first statement, at which time she was scared, had been crying, and was shaking all over. Champion v. State, 2005 Tex. App. LEXIS 3733 (Tex. App. Texarkana May 17 2005).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Violation of Protective Orders

66. Where defendant was charged with assaulting the victim in violation of a protective order, the trial court properly admitted the victim's hearsay statements to the arresting officer that she had had problems with defendant in the past. The testimony was admissible as a spontaneous statement under Tex. R. Evid. 803(2). Polley v. State, 2004 Tex. App. LEXIS 11317 (Tex. App. Eastland Dec. 16 2004).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

67. In a murder trial, there was no hearsay error in admitting pawn shop tickets showing that defendant was in Houston on two of the days when an alibi witness testified that he was in New Orleans because the tickets were admissible under the business records exception to the hearsay rule, Tex. R. Evid. 803(6). Brumfield v. State, 2010 Tex. App. LEXIS 10137, 2010 WL 5187690 (Tex. App. Houston 1st Dist. Dec. 23 2010).

68. There was no error in the exclusion of a murder defendant's statement to a witness in which he conceded concealing the body but denied committing the murder; the statement did not qualify as a statement against penal interest under Tex. R. Evid. 803 because it absolved him of the greater offense of murder. Johnson v. State, 2006 Tex. App. LEXIS 5214 (Tex. App. Dallas June 19 2006).

69. In a murder trial, an out-of-court statement made by the victim that her relationship with the defendant, her ex-boyfriend, was over, was admissible under Tex. R. Evid. 803(3) as a statement showing future intent, and also her state of mind. Thrailkille v. State, 2002 Tex. App. LEXIS 8972 (Tex. App. Beaumont Dec. 18 2002).

70. In a murder trial, an out-of-court statement made by the victim, that she was afraid of the defendant taking her home, was admissible under Tex. R. Evid. 803(3) as a statement of her existing state of mind. Thrailkille v. State, 2002 Tex. App. LEXIS 8972 (Tex. App. Beaumont Dec. 18 2002).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : Capital Murder : General Overview

71. In a capital murder trial, it was proper to exclude testimony from an inmate that a witness said he had shot a man because there were insufficient corroborating circumstances indicating the trustworthiness of the statement, for purposes of the statement-against-interest exception to the hearsay rule. Mason v. State, 416 S.W.3d 720, 2013 Tex. App. LEXIS 13527, 2013 WL 5861492 (Tex. App. Houston 14th Dist. Oct. 31 2013).

72. Murder victim's statements concerning a plan and intent to meet a "man" on the following Saturday were properly admitted under Tex. R. Evid. 803. Russo v. State, 228 S.W.3d 779, 2007 Tex. App. LEXIS 4499 (Tex. App. Austin 2007).

73. Defendant's conviction of capital murder was affirmed because a 9-1-1 call was admissible under the excited utterance exception to the hearsay rule where the caller made the call less than five minutes after victims were shot inside her home. Johnson v. State, 2006 Tex. App. LEXIS 1897 (Tex. App. Fort Worth Mar. 9 2006).

74. In a murder trial, the trial court properly excluded, under Tex. R. Evid. 803(24), portions of an accomplice's written statement that were uncorroborated. Gonzales v. State, 2005 Tex. App. LEXIS 4532 (Tex. App. Amarillo June 14 2005).

Criminal Law & Procedure : Criminal Offenses : Inchoate Crimes : Conspiracy : General Overview

75. In a trial for conspiracy to commit murder, a witness was properly allowed to testify regarding a conversation that she had with a gang member about defendant's order to shoot an ex-member. The statement of the planned shooter was a statement against interest under Tex. R. Evid. 803(24) because, although reluctant, he was taking steps to carry out his orders; therefore, his statement tended to expose him to criminal charges for conspiracy to commit murder at a minimum. Maynard v. State, 166 S.W.3d 403, 2005 Tex. App. LEXIS 4003 (Tex. App. Austin 2005).

76. In a trial for conspiracy to commit murder, a witness was properly allowed to testify regarding a conversation that she had with a gang member about defendant's order to shoot an ex-member; corroboration was not required for accomplice testimony under Tex. Code Crim. Proc. Ann. art. 38.14 because the witness was not an accomplice as a matter of law, even though she knew of the plan and did not report it to the police, and the jury could have found that she was not an accomplice. The statement of the planned shooter could be used to corroborate the testimony of other coconspirators, and that testimony in turn provided sufficient evidence for the conviction under Tex. Penal Code Ann. § 15.02. Maynard v. State, 166 S.W.3d 403, 2005 Tex. App. LEXIS 4003 (Tex. App. Austin 2005).

77. Statements made by defendant's co-conspirators to a police officer were not so much against their own penal interests to reach the level of reliability as required by Tex. R. Evid. 803(24). Barnes v. State, 56 S.W.3d 221, 2001 Tex. App. LEXIS 4834 (Tex. App. Fort Worth 2001).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : General Overview

78. In an evading arrest or detention conviction under Tex. Penal Code Ann. § 38.04, a person other than defendant admitted to driving a car that first pulled over in response to an officer's overhead lights, then drove off, committed several traffic violations, and subsequently stopped a second time when the road was blocked by a second officer's cruiser; although his hearsay statement to defendant's great-grandmother sufficiently exposed him to criminal liability, his statement was not admissible as a statement against his penal interest under Tex. R. Evid. 803(24) because he had no relationship, familial or otherwise, with defendant's great-grandmother, his statement lacked spontaneity where it was purportedly made in response to a query from defendant's great-grandmother regarding his reluctance to testify at defendant's upcoming trial, and the trustworthiness of his statement was directly attacked or controverted by the two officers' testimonies. Rodriguez v. State, 2010 Tex. App. LEXIS 9105, 2010 WL 4628580 (Tex. App. Amarillo Nov. 16 2010).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Fleeing & Eluding : Elements

79. In a trial for evading arrest, counsel was not rendered ineffective by failing to object to the introduction an audio recording of testimony police radio transmissions from the night of the arrest, which was admitted under the business records exception to the hearsay rule, Tex. R. Evid. 803(6). Britt v. State, 2007 Tex. App. LEXIS 3148 (Tex. App. Houston 14th Dist. Apr. 26 2007).

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : Perjury : General Overview

80. Challenged juror's proffered testimony fell within the statement against interest hearsay exception, under Tex. R. Evid. 803, because (1) during voir dire, the juror indicated that he knew both parties and their children and that the father had been his high school basketball coach, but he denied that this would give him a bias in the case or that he would show favoritism toward the father; (2) these representations were fundamentally inconsistent with the

juror's alleged posttrial admission that he had decided how to vote before the start of trial and his alleged statement that he did not want to let his coach down; and (3) these discrepancies would have potentially subjected the juror to a perjury charge, under Tex. Penal Code Ann. § 37.02. Clark v. Clark, 2008 Tex. App. LEXIS 2010 (Tex. App. Eastland Mar. 20 2008).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Arson : General Overview

81. In a theft and arson prosecution, the arson report was properly admitted as a business record under Tex. R. Evid. 803(6) where a State witness testified that (1) he was the custodian of the records; (2) the report was prepared by an arson investigator near the time of the investigation; (3) the investigator spoke to the witnesses, police, and defendant about the fire; (4) investigators routinely make reports following their investigations; and (5) the investigator's employer kept the reports in the course of its regular business. Mboob v. State, 2004 Tex. App. LEXIS 1714 (Tex. App. Dallas Feb. 23, 2004).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary

82. In a burglary trial, a statement by a five year old declarant was properly admitted as an excited utterance under Tex. R. Evid. 803(2), despite a lapse of several days between the burglary and the statement, because the declarant was very upset after seeing an officer investigating a property, asked if a five-year-old child could go to jail, and confessed to being present at on the property when defendant entered into and damaged the property. In re D.A.A., 2009 Tex. App. LEXIS 6126, 2009 WL 2397333 (Tex. App. Corpus Christi Aug. 6 2009).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Forgery : General Overview

83. In a case where defendant was convicted of forgery of one of the victim's stolen checks, although 1 1/2 hours to 2 1/2 hours had passed since the intruders left and the victim's daughter spoke with the victim, the victim was upset, weeping, and traumatized by the events and was worried that the intruders would wipe out her account; thus, the daughter's testimony regarding the mother's statements that her checks were stolen were an excited utterance pursuant to Tex. R. Evid. 803(2) and the trial court did not abuse its discretion in admitting the hearsay statements under the excited utterance exception. Kendig v. State, 2003 Tex. App. LEXIS 10803 (Tex. App. Houston 14th Dist. Dec. 30 2003).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Larceny & Theft : General Overview

84. In a criminal trial for theft of property where defendant was charged with financial exploitation based on undue influence, the trial court did not err by admitting evidence of the Kelly bluebook value of a Ford Explorer that the victims purchased and signed over to defendant; the evidence was admissible under Tex. R. Evid. 803, the hearsay exception for published compilations. Jacks v. State, 2006 Tex. App. LEXIS 1968 (Tex. App. Tyler Mar. 15 2006).

85. In a motor vehicle theft case, a court properly admitted an accomplice's statement as a statement against interest where he was an employee of the car rental agency, he admitted that he knew defendant and had made arrangements with him to exchange the vehicles, and the accomplice's position as an employee of the car rental agency put him in a position to commit the crime and conceal it. The evidence presented sufficient corroborating circumstances to clearly indicate the trustworthiness of the statement. Roy v. State, 161 S.W.3d 30, 2004 Tex. App. LEXIS 6712 (Tex. App. Houston 14th Dist. 2004).

86. In defendant's theft case, a court's error in excluding evidence that the declarant told defendant to move a trailer was harmless where defendant's sister testified that the employer told her defendant moved a trailer for a the declarant, and through the testimony of the two witnesses, the jury heard essentially the same evidence the trial court initially excluded: that the declarant hired defendant to move a trailer. Gibson v. State, 2004 Tex. App. LEXIS

3198 (Tex. App. Beaumont Apr. 7 2004).

87. In a theft and arson prosecution, the arson report was properly admitted as a business record under Tex. R. Evid. 803(6) where a State witness testified that (1) he was the custodian of the records; (2) the report was prepared by an arson investigator near the time of the investigation; (3) the investigator spoke to the witnesses, police, and defendant about the fire; (4) investigators routinely make reports following their investigations; and (5) the investigator's employer kept the reports in the course of its regular business. Mboob v. State, 2004 Tex. App. LEXIS 1714 (Tex. App. Dallas Feb. 23, 2004).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

88. In a child sexual abuse case, a court properly admitted the hearsay of a nurse where the nurse asked the child victim if she understood why she was at the hospital, the child related that it was because defendant had touched her, and without any prompting by the nurse or leading questions, the child went on to provide details regarding the sexual abuse. Smith v. State, 2005 Tex. App. LEXIS 4203 (Tex. App. El Paso May 31 2005).

89. In a sexual assault trial, the complainant's statement to police was properly admitted under the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2). The complainant had run into a store crying, shaking, and screaming that she had just been raped at gunpoint by two men in a van and needed help; the police were called within three to four minutes and arrived approximately five minutes later, when she was still under the influence of the trauma she just experienced and appeared to be in shock. Ascencio v. State, 2005 Tex. App. LEXIS 1449 (Tex. App. Houston 14th Dist. Feb. 24 2005).

90. In an indecency with a child by sexual contact case, without anything to indicate that the victim understood the purpose of the forensic interview, and that the importance of being truthful was so the counselor could effectively assess or diagnose her, it was error for the trial court to admit the videotaped statements of the victim's interview under Tex. R. Evid. 803(4). Wright v. State, 154 S.W.3d 235, 2005 Tex. App. LEXIS 56 (Tex. App. Texarkana 2005).

91. In a sexual assault of a child case, a court properly allowed a sexual assault examiner to testify about statements made by the victim during a physical exam where the statements were statements made for the purpose of medical diagnosis and treatment. Barrera v. State, 2004 Tex. App. LEXIS 9621 (Tex. App. Fort Worth Oct. 28 2004).

92. In sexual assault case, complainant's hearsay statement to a hospital social worker was properly admitted and documented in the complainant's medical record where: (1) The complainant was aware that his mother had taken him to the hospital for a sexual assault examination; (2) for the purposes of a sexual assault examination, it was standard hospital procedure for a social worker to receive a history specifically regarding the abuse allegations; (3) the doctor expressly testified that the history obtained by the social worker was necessary for the diagnosis and treatment of the child; and (4) thus, the record demonstrated that the hospital social worker, participating as part of a team of medical personnel, obtained a history of the sexual abuse allegations in a critical early step necessary for the purposes of the diagnosis and treatment of a child admitted to undergo a sexual assault examination. French v. State, 2004 Tex. App. LEXIS 2924 (Tex. App. Houston 1st Dist. Apr. 1, 2004).

93. In defendant's sexual assault of a child case, a court did not err in admitting hearsay testimony of the complainant in violation of his rights of confrontation and cross-examination where the medical record evidence, including statements given by the complainant to her examining physician and documented in the medical record, was admissible under the exception for statements made for the purposes of diagnosis or treatment; the complainant knew that she was at the office for the purpose of diagnosis and treatment, and the record showed that

the examination results were used to diagnose and treat the complainant for a sexually transmitted disease. Joseph v. State, 2004 Tex. App. LEXIS 2945 (Tex. App. Houston 1st Dist. Apr. 1, 2004).

94. In a criminal appeal of defendant's conviction for aggravated sexual assault of a child, the appellate court would not consider defendant's argument that the trial court erred by allowing into evidence a medical report and testimony of a pediatrician who examined the victim. Defendant's argument that the evidence was not made for the purpose of medical diagnosis or treatment did not comport with his objection at trial; therefore, it was not preserved for review. Frueboes v. State, 2004 Tex. App. LEXIS 2848 (Tex. App. Texarkana Mar. 31 2004).

95. Sexual assault victim, who was 14 at the time, understood that he was seeing the county youth services director to get help for committing sexual assault and that his statements to the director were made for the purpose of medical treatment; thus, hearsay evidence of defendant's extraneous sexual assault offenses against the victim was admissible under Tex. R. Evid. 803(4) and defendant's conviction for sexual assault of a child was affirmed. Cannon v. State, 2004 Tex. App. LEXIS 1105 (Tex. App. Beaumont Feb. 4 2004).

96. Trial court did not err by allowing the state to present hearsay evidence in defendant's indecency with a child trial, consisting of a mother's testimony concerning what her daughter told her about an extraneous offense allegedly committed by defendant against her, where the evidence was admissible as an excited utterance under Tex. R. Evid. 803(2); the daughter told her mother about the incident immediately after a church member stood up in church and made statements about the allegations of child sexual abuse against defendant, the pastor, the daughter became very upset after hearing the statements in church, and remained upset and was crying as she told her mother what defendant had done to her, and the daughter's statements were made before there was time to contrive and misrepresent. Powell v. State, 2003 Tex. App. LEXIS 10851 (Tex. App. Tyler Dec. 31 2003).

97. Child's statements to a nurse and a therapist regarding sexual abuse were properly admitted as statements made for the purpose of medical diagnosis under Tex. R. Evid. 803(4). Wimer v. State, 2003 Tex. App. LEXIS 10262 (Tex. App. San Antonio Dec. 10 2003).

98. Where the victim did not disclose until she was 18 years of age that defendant fathered her son when she was 12 years of age, the victim's belated outcry statement did not qualify as an excited utterance under Tex. R. Evid. 803(2); while the original assault was undoubtedly shocking, the record did not reflect that defendant was still, six years later, dominated by the excited state produced by the attack. Harvey v. State, 123 S.W.3d 623, 2003 Tex. App. LEXIS 9837 (Tex. App. Texarkana 2003).

99. In a sexual assault of a child case, the mother's testimony, relating statements made by the 14-year-old victim and seeking to establish the truth of facts remembered regarding past events, was inadmissible under the state of mind exception to the hearsay rule, Tex. R. Evid. 803(3). Glover v. State, 102 S.W.3d 754, 2002 Tex. App. LEXIS 7797 (Tex. App. Texarkana 2002).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Adults : Elements

100. In a trial for defendant's sexual assault of his wife, who recanted in her trial testimony, the trial court properly admitted statements that the victim made shortly after the assault as excited utterances under Tex. R. Evid 803; it was reasonable to find that the victim was still dominated by the emotions, excitement, fear, or pain of being sexually assaulted, hit, and threatened with death, over the course of several hours. Davis v. State, 2007 Tex. App. LEXIS 352 (Tex. App. Dallas Jan. 18 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : General Overview

101. In a sexual assault trial, it did not violate the hearsay rule to admit the complainant's account of what happened, as told to a sexual assault nurse examiner, because the complainant's statements regarding the incident were necessary for purposes of medical diagnosis and treatment and thus came under the medical treatment exception. Williams v. State, 2014 Tex. App. LEXIS 2618, 2014 WL 895506 (Tex. App. Waco Mar. 6 2014).

102. In defendant's sexual assault of a child case, the court properly allowed testimony under the excited utterance exception because the victim told a witness that defendant told her to open her mouth and that was going to stick his penis in her mouth. Although a quarter of an hour passed, the victim was shaking and crying. Ervin v. State, 2013 Tex. App. LEXIS 8213 (Tex. App. Dallas July 3 2013).

103. In a trial for child sexual assault, no prejudice resulted from any error under Tex. R. Evid. 803(4) in admitting a nurse's testimony that the complainant identified defendant as her abuser during a sexual assault examination because the same evidence came in later through the testimony of a forensic interviewer. Starnes v. State, 2010 Tex. App. LEXIS 3715 (Tex. App. Dallas May 19 2010).

104. In a trial for indecency with a child by contact there was no error in admitting a videotape of the complainant's interview at a child advocacy center to refresh her memory, as permitted by Tex. R. Evid. 803(5). Although the complainant testified that no improper touching had occurred, she also responded that she did not know to several of the State's questions regarding the incident. Hernandez v. State, 2010 Tex. App. LEXIS 851, 2010 WL 391850 (Tex. App. Austin Feb. 5 2010).

105. In a sexual assault of a child case, the victim's mother's testimony regarding what the victim told her was admissible as an excited utterance because the time between when the grandmother witnessed the encounter and the victim made the declaration that defendant "put his private in her mouth" was 10 minutes and, throughout that period, the victim cried. Although the mother asked the victim what was wrong, the declaration was not the result of questioning and was a spontaneous declaration regarding the occurrence that caused the emotional state the victim was in at a time that the victim was still in that emotional state. In re A. W. B., 419 S.W.3d 351, 2010 Tex. App. LEXIS 747 (Tex. App. Amarillo Feb. 2 2010).

106. In a case in which defendant was convicted of aggravated sexual assault under Tex. Penal Code Ann. § 22.021 and indecency with a child under Tex. Penal Code Ann. § 21.11, although defendant complained of the trial court's overruling of his hearsay objection to the State's question of what the victim told a professional about defendant's conduct, the admission of the testimony during the direct examination of the forensic interviewer was not harmful because it did no more than reiterate facts admitted elsewhere and even included testimony supportive of the defense. Moreover, even assuming, without deciding, that it was inadmissible hearsay, the substance of the complained-of testimony of the forensic interviewer was admitted elsewhere without limitation or an objection preserved on appeal, and, thus, the error, if any, of the trial court in admitting the statement of the forensic interviewer did not affect a substantial right of defendant and had to be disregarded. Drake v. State, 2010 Tex. App. LEXIS 716, 2010 WL 348365 (Tex. App. Amarillo Jan. 31 2010).

107. In a case involving sexual abuse of a child, a trial court did not admit inadmissible hearsay from a sexual assault nurse examiner because statements made for the purpose of medical diagnosis or treatment constituted a hearsay exception under Tex. R. Evid. 803(4), and the child involved understood the need to be truthful. The child knew that she was reporting the crime, she made a decision to talk to her family, despite knowing that her father would have been angry, and she knew she was seeing the nurse for treatment. Little v. State, 2009 Tex. App. LEXIS 7091, 2009 WL 2882932 (Tex. App. San Antonio Sept. 9 2009).

108. In a case involving the sexual abuse of a child, a trial court did not abuse its discretion by admitting an exhibit offered by the State, which were records of the examinations performed by medical personnel following the child's outcry. The statements within the exhibit complied with Tex. R. Evid. 803(4) because the child told medical personnel that she was receiving treatment because defendant had forced her to perform oral sex, and she stated that defendant had told her not to tell about their sexual activities because he could have went to jail. Constance v. State, 2009 Tex. App. LEXIS 3627, 2009 WL 1477791 (Tex. App. San Antonio May 27 2009).

109. In a trial for child sexual assault, testimony from a clinical social worker about the complainant's statements was not admissible under the medical-diagnosis-and-treatment exception of Tex. R. Evid. 803(4) because the record did not show that the child-complainant understood that the statements identifying defendant as the perpetrator were for the purpose of medical diagnosis or treatment. Nasrollah Hanjani Alizadeh v. State, 2009 Tex. App. LEXIS 1423 (Tex. App. Houston 1st Dist. Feb. 26 2009).

110. In a case involving aggravated sexual abuse of a child, a nurse was properly allowed to testify regarding a victim's statements, which were contained in a medical report; under Tex. R. Evid. 803(4) it was necessary to take a history of the abuse in order to properly diagnose and treat the victim for infections or sexually transmitted diseases. The trial court did not admit the evidence under Tex. Code Crim. Proc. Ann. art. § 38.072, § 2(a). Uribes v. State, 2009 Tex. App. LEXIS 885, 2009 WL 330972 (Tex. App. San Antonio Feb. 11 2009).

111. In a sexual assault of a child case, a nurse's testimony was properly admitted because the object of the sexual assault exam was to ascertain whether the child had been sexually abused and to determine if further medical attention was needed, and statements describing acts of sexual abuse were pertinent to the victim's medical diagnosis and treatment. Johnson v. State, 2008 Tex. App. LEXIS 3713 (Tex. App. El Paso May 22 2008).

112. In a case of aggravated sexual assault of a child, a physician's testimony about hearsay statements made by the victim during a sexual assault examination that identified defendant as the offender and described the assault was admissible under Tex. R. Evid. 803 because the victim's statements were pertinent to medical diagnosis or treatment. Guzman v. State, 253 S.W.3d 306, 2008 Tex. App. LEXIS 1066 (Tex. App. Waco 2008).

113. Any error in admitting a sexual assault nurse examiner's testimony, over defendant's hearsay objection, about a study conducted by another person explaining why a child victim of a sexual assault would not show evidence of trauma to her private parts was harmless given the overwhelming evidence of defendant's guilt that was introduced at trial. Garza v. State, 2007 Tex. App. LEXIS 7194 (Tex. App. Corpus Christi Aug. 28 2007).

114. Medical records stated that the 10-year-old complainant was the victim of serial penetrative sexual acts by defendant (her father), and they had been occurring since she was a young girl; the medical records also included a progress report detailing the mother's version of the events leading up to defendant's arrest; because all the statements involved the causation and source of the complainant's injuries or statements by a parent for purposes of diagnosing or treating the complainant, they were admissible under Tex. R. Evid. 803; thus, the trial court properly admitted the medical records into evidence over defendant's hearsay objection. Davidson v. State, 2006 Tex. App. LEXIS 9178 (Tex. App. Dallas Oct. 25 2006).

115. In a child sexual abuse case, statements to a physician regarding alleged sexual acts between defendant and a minor victim were admissible because they were made for the purpose of medical diagnosis and treatment under Tex. R. Evid. 803. White v. State, 2006 Tex. App. LEXIS 4973 (Tex. App. Austin June 9 2006).

116. Although a trial court erred when it allowed a child's mother to testify that, shortly after a sexual assault was committed against the child, the child told her what happened during the offense, because the State did not qualify the statement as an outcry statement nor did it justify the admission of the statement as an exception to the hearsay

rule, the error was waived when the same evidence was introduced at other points in the trial and defendant made no objection. Vargas v. State, 2006 Tex. App. LEXIS 4525 (Tex. App. Texarkana May 26 2006).

117. In defendant's aggravated sexual assault trial, a doctor's testimony regarding statements made to her by one of the alleged child victims was properly admitted because there was sufficient evidence that the child understood the need to be truthful. Green v. State, 191 S.W.3d 888, 2006 Tex. App. LEXIS 3658 (Tex. App. Houston 14th Dist. 2006).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : Abuse of Children : Elements

118. In defendant's trial on a charge of aggravated sexual assault of a child under Tex. Penal Code Ann. § 22.021(a)(1)(B)(i) and (a)(2)(B), even if the trial court erred in admitting the victim's hearsay statements under the hearsay exception under Tex. R. Evid. 803(4), any such error was harmless because the victim herself testified without objection to the very statements contained in the objected-to medical record. Vanhoy v. State, 2011 Tex. App. LEXIS 6591, 2011 WL 3631316 (Tex. App. Corpus Christi Aug. 18 2011).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

119. Blood test results were properly admitted under Tex. R. Evid. 803(6) in appellant's prosecution for intoxication assault under Tex. Penal Code Ann. § 49.07 because the test was not done at law enforcement's request but as part of appellant's treatment at the hospital for a hip injury following an automobile collision. Desilets v. State, 2010 Tex. App. LEXIS 8097, 2010 WL 3910588 (Tex. App. Beaumont Oct. 6 2010).

120. In a prosecution under Tex. Penal Code Ann. § 49.04, a law enforcement officer's observations of defendant, dictated on videotape, were not admissible because they were the functional equivalent of a police or offense report under Tex. R. Evid. 803(8)(B). The contemporaneous recording did not render the observations admissible as present sense impression under R. 803(1). Fischer v. State, 207 S.W.3d 846, 2006 Tex. App. LEXIS 9432 (Tex. App. Houston 14th Dist. 2006).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

121. Under former 1 Tex. Admin. Code §/Aa159.23(c)(7), an officer's failure to swear an arrest report did not deprive it of the assurance of veracity or render it inadmissible; supported by Tex. R. Evid. 803(8), arrest reports were admissible without being sworn and the ALJ properly concluded that the report should be admitted. Tex. Dep't of Pub. Safety v. Caruana, 363 S.W.3d 558, 2012 Tex. LEXIS 265, 55 Tex. Sup. Ct. J. 479 (Tex. 2012).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements

122. In an intoxication manslaughter trial under Tex. Penal Code Ann. § 49.08, medical records that contained the notes of a substance abuse counselor regarding defendant's 40-year history of drinking six to eight beers a day were properly admitted as business records. Sullivan v. State, 248 S.W.3d 746, 2008 Tex. App. LEXIS 670 (Tex. App. Houston 1st Dist. 2008).

Criminal Law & Procedure : Criminal Offenses : Weapons : Use : General Overview

123. In a criminal trial for the offense of aggravated assault with a deadly weapon, the court was permitted to exclude evidence of a blood test suggesting the victim was intoxicated, and proof of fundamental trustworthiness, or

indicia of reliability of the blood test result was missing under Tex. R. Evid. 803(6). Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

Criminal Law & Procedure : Accessories : Aiding & Abetting

124. Trial court did not abuse its discretion by excluding a videotape in a capital murder trial because the understandable portions contained only statements not falling under any recognized exception to the hearsay rule; admitting presence at the scene was not necessarily against an accomplice's penal interest under Tex. R. Evid. 803(24), as mere presence at the scene of the offense, by itself, is insufficient to support criminal responsibility as a party. Frank v. State, 183 S.W.3d 63, 2005 Tex. App. LEXIS 10647 (Tex. App. Fort Worth 2005).

Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : General Overview

125. In a juvenile delinquency proceeding, the mother's testimony recounting the nine-year-old victim's outcry to her about the assault was admissible under the excited-utterance exception to the hearsay rule; the State was not required to comply with Tex. Fam. Code Ann. § 54.031. In re M.A.M., 2006 Tex. App. LEXIS 3826 (Tex. App. Texarkana May 5 2006).

Criminal Law & Procedure : Eyewitness Identification : Photo Identifications

126. Out-of-court identification of appellant was not admissible as a present sense impression under Tex. R. Evid. 803(1); however, the trial court's erroneous admission of the identification was harmless error because it did not affect appellant's substantial rights or the jury's verdict under Tex. R. App. P. 44.2(b). Ferguson v. State, 97 S.W.3d 293, 2003 Tex. App. LEXIS 148 (Tex. App. Houston 14th Dist. 2003).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

127. In a suppression hearing, the trial court properly denied defendant's hearsay objection under Tex. R. Evid. 801 and 803 because the rules of evidence did not apply. Diaz v. State, 2010 Tex. App. LEXIS 3203, 2010 WL 1714001 (Tex. App. Dallas Apr. 28 2010).

128. Court properly relied upon an officer's unsworn hearsay document at defendant's suppression hearing because, although it was better practice to produce the witness or attach the documentary evidence to an affidavit, Tex. Code Crim. Proc. Ann. art. 28.01, § 1(6) did not create a "best evidence" rule that mandated such a procedure in a motion to suppress hearing. The offense report included defendant's name, correct offense date, and specific information that coincided with the same basic information to which defendant testified at the hearing, and defendant did not argue that the offense report was, in any way, unauthentic, inaccurate, unreliable, or lacking in credibility. Ford v. State, 305 S.W.3d 530, 2009 Tex. Crim. App. LEXIS 1440 (Tex. Crim. App. 2009).

Criminal Law & Procedure : Counsel : Effective Assistance : Pleas

129. Trial court did not err in excluding testimony as to defendant's deceased husband's statements to two witnesses that he was the one that should have been arrested for obtaining drugs by a forged prescription rather than defendant, who did not know the prescription was forged, because defendant failed to show that his statements fell within the excited-utterance hearsay exception provided in Tex. R. Evid. 803(2). The husband made the statement to one witness weeks after defendant was arrested, therefore such a large amount of time had passed that the trial court did not err in implicitly finding that the statements resulted from reason or reflection and were made while the husband was no longer dominated by the emotions or excitement of learning about defendant's arrest. Ex Parte Buffington-Bennett, 2005 Tex. App. LEXIS 3158 (Tex. App. Houston 14th Dist. Apr. 28

2005), writ of certiorari denied by 126 S. Ct. 1656, 164 L. Ed. 2d 400, 2006 U.S. LEXIS 2752, 74 U.S.L.W. 3560 (U.S. 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

130. Defense counsel was not rendered ineffective by failing to object to the admission of a penitentiary packet because penitentiary packets were admissible as an exception to the hearsay rule if they were properly authenticated as public records, as provided by Tex. R. Evid. 803(8), 901(b)(7), 902(4). Henderson v. State, 2006 Tex. App. LEXIS 5911 (Tex. App. Tyler June 30 2006).

131. In community supervision revocation proceedings, counsel was not ineffective for failing to make a hearsay objection to testimony about information in defendant's community supervision file; even if the business records predicate under Tex. R. Evid. 803 was not established, the record did not affirmatively demonstrate that the State could not have established it. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Tests

132. Failure to object under Tex. R. Evid. 803 was not ineffective assistance of counsel because the witness's testimony did not constitute hearsay. Robinson v. State, 2007 Tex. App. LEXIS 9809 (Tex. App. Houston 1st Dist. Dec. 13 2007).

133. Trial counsel was not ineffective for failing to ask the trial court for a limiting instruction regarding the admission of an alleged assault victim's statements to officers because they were admissible as excited utterances under Tex. R. Evid. 803(2) where the victim called 911 and the victim was distraught when they arrived. Alli v. State, 2005 Tex. App. LEXIS 1463 (Tex. App. Houston 1st Dist. Feb. 24 2005).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

134. In a robbery case, trial counsel did not render ineffective assistance due to a failure to object to the testimony of officers about a victim's statement, which was made while he was still bleeding and was frantic, yelling, and frightened, because this would likely have been admitted as an excited utterance. Moreover, there was no prejudice where the officers' testimony added no new details to the victim's testimony at trial. Helmke v. State, 2013 Tex. App. LEXIS 12471, 2013 WL 5570474 (Tex. App. San Antonio Oct. 9 2013).

135. In a robbery case, trial counsel did not render ineffective assistance due to a failure to object to a property release form because this would have likely been admitted under the business records exception to the hearsay rule. Helmke v. State, 2013 Tex. App. LEXIS 12471, 2013 WL 5570474 (Tex. App. San Antonio Oct. 9 2013).

136. Trial counsel's performance was not deficient in not objecting on hearsay grounds to the Sexual Abuse Nurse Examiner's report because this rule provided legal grounds for admission of the report. Moreno v. State, 2013 Tex. App. LEXIS 9446 (Tex. App. San Antonio July 31 2013).

137. Assuming that it was hearsay when an officer testified that a trainee signaled to him that there was a gun in the passenger seat, counsel could have reasonably believed that the statement was admissible as a present sense impression under Tex. R. Evid. 803(1). Therefore, counsel was not ineffective in failing to object. Bacon v. State, 2010 Tex. App. LEXIS 6765, 2010 WL 3271288 (Tex. App. Austin Aug. 19 2010).

138. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

139. Defendant failed to overcome a presumption of reasonable professional assistance of counsel, even if there was a failure to preserve error since defense counsel did not continue to object each time the State asked questions that related to out-of-court statements by a sexual assault victim. Counsel was not questioned about his conduct, and it was possible that a new trial strategy had been formed based on the trial evidence; the victim's testimony had been impeached, her prior statements had been admitted into evidence over hearsay objections, and the jury had heard that defendant had threatened the victim. Henderson v. State, 2009 Tex. App. LEXIS 1000, 2008 WL 5622655 (Tex. App. Beaumont Feb. 11 2009).

140. In an assault case, defendant did not receive ineffective assistance of counsel because there was no reversible error relating to the exclusion of evidence, a victim's medical records could have been admissible under Tex. R. Evid. 803(6) and through the testimony of another witness, and counsel was not given an opportunity to explain his strategy as it related to the timing of a mistrial motion. Because the claims of ineffectiveness were all alleged errors of omission beyond the record, counsel's performance was not found deficient since defendant failed to show the conduct was so outrageous that no competent attorney would have engaged in it. Fillmore v. State, 2008 Tex. App. LEXIS 6573 (Tex. App. Amarillo Aug. 27, 2008).

141. There was no merit to defendant's claim that trial counsel was ineffective during defendant's trial for aggravated robbery, enhanced by three prior felony convictions, for failing to file a motion to suppress and/or objecting at trial to the admission of the business records of defendant's employer, along with an affidavit of the custodian of records of the employer that tracked verbatim Tex. R. Evid. 902, and even though the records were not physically attached to the affidavit in the clerk's record but were included in the record of exhibits, defendant was not harmed because his girlfriend testified before the jury that he was not at work on the date of the incident. Delgado v. State, 2008 Tex. App. LEXIS 2463 (Tex. App. Houston 1st Dist. Apr. 3 2008).

142. In an aggravated assault case, counsel was not ineffective for failing to proffer a hearsay objection to the victim's written statement and testimony by a nurse regarding the victim's description of the assault because the record showed that counsel did in fact object to hearsay; moreover, the statement reasonably could be viewed as an excited utterance under Tex. R. Evid. 803(2) because of the victim's emotional state, and because it was cumulative of the nurse's testimony, any error in failing to request a limiting instruction as to the nurse's testimony was harmless. Green v. State, 2007 Tex. App. LEXIS 2381 (Tex. App. Amarillo Mar. 28 2007).

143. Although defendant claimed error in trial counsel's failure during defendant's aggravated sexual assault trial to object to the testimony of a registered nurse and sexual assault nursing examiner relating to the content of her interview with the child complainant, because statements of a child relating to the offense which were made in the course of seeking medical diagnosis or treatment were exempted from the rule precluding hearsay statements, pursuant to Tex. R. Evid. 803, counsel's failure to object to admissible evidence did not constitute ineffective

representation under the Sixth Amendment. Todd v. State, 2007 Tex. App. LEXIS 389 (Tex. App. Texarkana Jan. 23 2007).

144. Inmate was not entitled to 28 U.S.C.S. § 2254 relief on his claim that his trial counsel was ineffective for failing to challenge the prosecution's evidence regarding the inmate's expulsion from middle school, because trial counsel reasonably believed that at least some evidence showing that the inmate had been expelled and possibly the reasons therefore was going to be admitted at trial, and counsel's decision to challenge that evidence on cross-examination was objectively reasonable. Gutierrez v. Dretke, 392 F. Supp. 2d 802, 2005 U.S. Dist. LEXIS 32496 (W.D. Tex. 2005).

145. Where defendant was charged with aggravated sexual assault of a child, his counsel was not ineffective for failing to object to the attending nurse's testimony and report, because the hearsay exception set forth in Tex. R. Evid. 803(4) applied. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

146. In a case of aggravated sexual assault of a child, counsel's failure to object to the admission of a forensic report was not ineffective assistance because an affidavit from the custodian of the hospital's records was sufficient for compliance with Tex. R. Evid. 803(6) and a statement made by the victim to a nurse was admissible under Rule 803(4). Lopez v. State, 2005 Tex. App. LEXIS 3596 (Tex. App. Eastland May 12 2005).

147. Defense counsel's failure to lodge a Confrontation Clause objection to a co-offender's out-of-court statements at the time defendant was tried was not outside the broad range of reasonable professional assistance because, at the time defendant was tried, the admission of hearsay did not violate the Confrontation Clause if the statement fell within a firmly rooted hearsay objection or if the statement contained such particularized guarantees of trustworthiness that adversarial testing would be expected to add little to its reliability. Defense counsel's hearsay objection had been overruled on the ground that the co-offender's statements were against his penal interest under Tex. R. Evid. 803(24). Beltran v. State, 2005 Tex. App. LEXIS 555 (Tex. App. Austin Jan. 27 2005).

148. In a sexual assault on a child case, counsel was not ineffective for failing to object to an expert's reliance on a medical report in forming his conclusion that the non-specific red bumps he found in the victim's genital area were caused by the Herpes Simplex Virus (HSV) where, regardless of whether the report was properly admitted as part of the State's exhibit, the expert could have properly testified to the basis for his diagnosis even though part of the data he relied on was hearsay; the report was also cumulative of all the other evidence at trial showing that the victim had been infected with HSV. Coker v. State, 2004 Tex. App. LEXIS 4799 (Tex. App. El Paso May 27 2004).

149. In a sexual assault on a child case, counsel was not ineffective for failing to object to the admission of defendant's medical records on the ground that the State failed to lay a proper foundation under Tex. R. Evid. 803 where he failed to show that the State would have been unable to establish the elements if counsel had objected. Further, other evidence established that defendant had been infected with herpes prior to the sexual assault. Coker v. State, 2004 Tex. App. LEXIS 4799 (Tex. App. El Paso May 27 2004).

150. In an assault case, counsel was not ineffective for failing to object to ineffective for failing to object to hearsay evidence regarding a telephone call where the statements made by the victim to her mother met the excited utterance exception to the hearsay rule because they were the result of a startling occurrence, being assaulted, the victim was still crying and visibly upset when officers arrived, and all of her statements were related to the circumstances of the occurrence. In addition, the statements made by the victim's mother to the victim's father also met the excited utterance exception to the hearsay rule because they were the result of a startling occurrence, receiving a telephone call from her daughter that she was being assaulted, the evidence indicated that the mother was was crying, and upset as a result of receiving the telephone call, and her statements were related to the circumstances of the occurrence. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar.

30 2004).

151. In an assault case, counsel was not ineffective for failing to object to hearsay evidence regarding the victim's fear that defendant would retaliate against her or her family where the statement was offered to show that the victim was afraid, not that defendant would retaliate against her or her family; therefore, it was admissible under the state of mind exception to the hearsay rule. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

152. Counsel was not required to object to a hearsay statement of the complainant admitted through the testimony of a police officer during a criminal trial for aggravated assault; the statement was more than likely an excited utterance admissible under Tex. R. Evid. 803(2). Mathis v. State, 2003 Tex. App. LEXIS 9987 (Tex. App. Dallas Nov. 24 2003).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

153. Co-arrestee's statements to his girlfriend, later his common-law wife, regarding a large amount of methamphetamine that went undiscovered by officers during a traffic stop were non-testimonial for purposes of the Confrontation Clause and were statements against penal interest and admissible under Tex. R. Evid. 803(24). Walker v. State, 406 S.W.3d 590, 2013 Tex. App. LEXIS 3046, 2013 WL 1154209 (Tex. App. Eastland Mar. 21 2013).

154. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified; even if the State called the complainants to testify so that otherwise inadmissible prior inconsistent statements could be admitted, there was no harm committed. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

155. In a capital murder trial, the Confrontation Clause was violated by the admission of excerpts from an accomplice's written confession, which was made in the course of six meetings with detectives; although the statement might have been admissible under Tex. R. Evid. 803, it was exactly the kind of testimonial statement prohibited under a Crawford analysis. Springsteen v. State, 2006 Tex. Crim. App. LEXIS 2340 (Tex. Crim. App. May 24 2006).

156. In a capital murder trial, there was no error in the admission of a witness's testimony that an accomplice confessed to her; the statement was a statement against penal interest under Tex. R. Evid. 803and did not violate the Confrontation Clause because it was a casual remark to an acquaintance. Springsteen v. State, 2006 Tex. Crim. App. LEXIS 2340 (Tex. Crim. App. May 24 2006).

157. Confrontation Clause was violated by the admission of an assault victim's out-of court statements made during a hospital interview by a deputy because a reasonable person in the victim's shoes would have had the capacity to make a testimonial statement and would have been aware that he was being interviewed as part of a criminal investigation; the statement's qualification as an excited utterance did not alter its testimonial nature. Wall v. State, 184 S.W.3d 730, 2006 Tex. Crim. App. LEXIS 16 (Tex. Crim. App. 2006).

158. Court of Criminal Appeals of Texas rejects any per se or categorical approach in determining whether excited utterances may or may not be classified as testimonial hearsay; the excited utterance inquiry focuses on whether the declarant was under the stress of a startling event, while the testimonial hearsay inquiry focuses on whether a reasonable declarant, similarly situated (that is, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of her statement. Wall v. State, 184 S.W.3d 730, 2006 Tex. Crim. App.

LEXIS 16 (Tex. Crim. App. 2006).

159. Trial court did not err in allowing an officer to testify regarding a witness's out-of-court statements where the statements qualified as excited utterances under Tex. R. Evid. 803(2) because they were made in relation to startling events while the witness was still dominated by the emotion caused by those events. Furthermore, even assuming that Crawford barred the admission of the statements, defendant was not harmed by the error because the statements were not important to the State's case for aggravated assault, as the lawfully admitted evidence presented by the State overwhelmingly established defendant's guilt. Arias v. State, 2005 Tex. App. LEXIS 4341 (Tex. App. San Antonio June 8 2005).

160. The Court of Appeals of Texas, Fourteenth District, Houston declines to join those courts that have established a bright-line rule that excited utterances can never be testimonial because the fact that a statement is an excited utterance as provided in Tex. R. Evid. 803(2) is only one factor that can be considered when determining whether the statement is testimonial for purposes of analyzing a Confrontation Clause claim. Texas courts have held that a declarant's state of excitement can last long after the initial crime and that excited utterances can be made both spontaneously and in response to questioning, therefore each situation should be analyzed individually. Spencer v. State, 162 S.W.3d 877, 2005 Tex. App. LEXIS 3162 (Tex. App. Houston 14th Dist. 2005).

161. Trial court did not abuse its discretion by finding the record of the results of a test of defendant's blood-alcohol level sufficiently reliable to be admissible under the business-record exception to the hearsay rule, Tex. R. Evid. 803(6), and not to have deprived him of his constitutional right to meaningful confrontation and cross-examination of witnesses against him, because the blood-alcohol test results were part of a group of records produced by the hospital pursuant to a subpoena, and the records were accompanied by the affidavit of the custodian of the hospital's records in which the custodian recited that he kept the records in the regular course of business and that the records were made in the regular course and scope of the hospital's business at or near the time of the event. Furthermore, the surgeon who treated defendant testified that, although he did not conduct or observe the blood draw, he and other doctors routinely relied on such procedures and records in treating patients, and there was no evidence that an unauthorized or unqualified person drew the blood or that the persons who drew or tested the blood did their jobs inappropriately. Blackwell v. State, 2005 Tex. App. LEXIS 1816 (Tex. App. Austin Mar. 10 2005).

162. Admission of a co-offender's out-of-court statements at defendant's capital murder trial, which were allowed on the ground that they were against the co-offender's penal interest pursuant to Tex. R. Evid. 803(24), did not violate the Sixth Amendment because the co-offender's statements describing his involvement in the murder were not made at a preliminary hearing, before a grand jury, at a former trial, or as the product of police interrogation, but, instead, were made to friends and fellow gang members at an informal gathering. Thus, the statements were not the product of an ex parte examination or testimonial hearsay. Beltran v. State, 2005 Tex. App. LEXIS 555 (Tex. App. Austin Jan. 27 2005).

163. Defense counsel's failure to lodge a Confrontation Clause objection to a co-offender's out-of-court statements at the time defendant was tried was not outside the broad range of reasonable professional assistance because, at the time defendant was tried, the admission of hearsay did not violate the Confrontation Clause if the statement fell within a firmly rooted hearsay objection or if the statement contained such particularized guarantees of trustworthiness that adversarial testing would be expected to add little to its reliability. Defense counsel's hearsay objection had been overruled on the ground that the co-offender's statements were against his penal interest under Tex. R. Evid. 803(24). Beltran v. State, 2005 Tex. App. LEXIS 555 (Tex. App. Austin Jan. 27 2005).

164. In a criminal prosecution for sexual assault, defendant failed to preserve his claim that his confrontation rights were violated by a police officer's testimony concerning statements made to him by the complainant where defendant did not make a timely and specific objection in the trial court once the State established that the

statements fell within the excited utterance exception to the hearsay rule. Crawford v. State, 2004 Tex. App. LEXIS 6472 (Tex. App. Dallas July 21 2004).

165. In a murder case, the trial court did not err in ruling that an article taken from an Internet medical journal was a treatise and, under Tex. Evid. R. 803(18), was not admissible as an exhibit; because cross-examination as to the article was permitted, there was no violation of the constitutional right of confrontation. Sanchez v. State, 2004 Tex. App. LEXIS 3783 (Tex. App. Corpus Christi Apr. 29 2004).

166. In defendant's sexual assault of a child case, a court did not err in admitting hearsay testimony of the complainant in violation of his rights of confrontation and cross-examination where the medical record evidence, including statements given by the complainant to her examining physician and documented in the medical record, was admissible under the exception for statements made for the purposes of diagnosis or treatment; the complainant knew that she was at the office for the purpose of diagnosis and treatment, and the record showed that the examination results were used to diagnose and treat the complainant for a sexually transmitted disease. Joseph v. State, 2004 Tex. App. LEXIS 2945 (Tex. App. Houston 1st Dist. Apr. 1, 2004).

167. Where an assault victim, defendant's common law wife, was still in the emotional grip of the assault when she made her statements to the responding officer, so that her out-of-court statements, in accordance with Tex. R. Evid. 803(2), fell under the excited utterance exception to the hearsay rule, but she did not testify, and there was no showing the victim was not available to testify, admission of her statements violated appellant's constitutional right of confrontation. Johnson v. State, 2000 Tex. App. LEXIS 6689 (Tex. App. Waco Oct. 4 2000), criticized by Hudson v. State, 2001 Tex. App. LEXIS 8270 (Tex. App. Houston 1st Dist. Dec. 13, 2001).

Criminal Law & Procedure : Trials : Examination of Witnesses : Admission of Codefendant Statements

168. Fact that defendant's spouse confessed to the unadjudicated offense of possession of marijuana did not make it any more or less probable that defendant was a party to the offense; thus, it was proper to exclude the spouse's admission. Moore v. State, 2014 Tex. App. LEXIS 5823, 2014 WL 2521537 (Tex. App. Tyler May 30 2014).

Criminal Law & Procedure : Trials : Examination of Witnesses : Child Witnesses

169. Admission of videotaped interview of a child was not proper because it was hearsay in that Tex. Code. Crim. Proc. art. 38.072 did not authorize the introduction of a videotape of an alleged "outcry," and the videotape did not fall under the medical diagnosis exception to the hearsay rule under Tex. R. Evid. 803(4) because the child was not aware that she was seeing the therapist for purposes of medical treatment in connection with the abuse by defendant. However, the error was harmless under Tex. R. App. P. 44.2(b) because the majority of the videotape was merely cumulative of the child's testimony at trial. Lewis v. State, 2004 Tex. App. LEXIS 10217 (Tex. App. Texarkana Nov. 16 2004).

Criminal Law & Procedure : Trials : Examination of Witnesses : Videotaped Testimony

170. Admission of videotaped interview of a child was not proper because it was hearsay in that Tex. Code. Crim. Proc. art. 38.072 did not authorize the introduction of a videotape of an alleged "outcry," and the videotape did not fall under the medical diagnosis exception to the hearsay rule under Tex. R. Evid. 803(4) because the child was not aware that she was seeing the therapist for purposes of medical treatment in connection with the abuse by defendant. However, the error was harmless under Tex. R. App. P. 44.2(b) because the majority of the videotape was merely cumulative of the child's testimony at trial. Lewis v. State, 2004 Tex. App. LEXIS 10217 (Tex. App. Texarkana Nov. 16 2004).

171. In a criminal trial for the offense of aggravated assault with a deadly weapon, the court was permitted to exclude a videotape of the scene where victim died while certain portions of the videotape contained testimony falling within the hearsay exception for excited utterances under Tex. R. Evid. 803(2), and other portions contained hearsay falling within no recognized exception. Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

Criminal Law & Procedure : Trials : Motions for Mistrial

172. In a case involving aggravated sexual assault, a motion for a mistrial based on hearsay testimony given by defendant's son was denied where an objection was sustained, and the jury was told to disregard the statement. Isenberger v. State, 2008 Tex. App. LEXIS 9224 (Tex. App. Houston 1st Dist. Dec. 11 2008).

Criminal Law & Procedure : Witnesses : Presentation

173. Tex. Code Crim. Proc. Ann. art. 38.075, requiring corroboration of inmate testimony, did not apply to statements defendant made to the inmates because the statements, even if they were statements against interest, were not confessions or admissions tending to connect him to a robbery, but were requests that the inmates say that an accomplice had committed the robbery alone. Phillips v. State, 436 S.W.3d 333, 2014 Tex. App. LEXIS 5316 (Tex. App. Waco May 15 2014).

174. In a murder trial, the trial court properly excluded, under Tex. R. Evid. 803(24), portions of an accomplice's written statement that were uncorroborated. Gonzales v. State, 2005 Tex. App. LEXIS 4532 (Tex. App. Amarillo June 14 2005).

175. In a trial for conspiracy to commit murder, a witness was properly allowed to testify regarding a conversation that she had with a gang member about defendant's order to shoot an ex-member; corroboration was not required for accomplice testimony under Tex. Code Crim. Proc. Ann. art. 38.14 because the witness was not an accomplice as a matter of law, even though she knew of the plan and did not report it to the police, and the jury could have found that she was not an accomplice. The statement of the planned shooter could be used to corroborate the testimony of other coconspirators, and that testimony in turn provided sufficient evidence for the conviction under Tex. Penal Code Ann. § 15.02. Maynard v. State, 166 S.W.3d 403, 2005 Tex. App. LEXIS 4003 (Tex. App. Austin 2005).

Criminal Law & Procedure : Jury Instructions : General Overview

176. Court did not err by instructing in a supplemental charge during the punishment phase that the jury could only consider the suicide note for the same limited purpose imposed during the guilt/innocence phase because the note was not reintroduced into evidence and the court was responding to a jury question. Kirchner v. State, 2014 Tex. App. LEXIS 5330 (Tex. App. El Paso May 16 2014).

Criminal Law & Procedure : Jury Instructions : Curative Instructions

177. In a case involving aggravated sexual assault, a motion for a mistrial based on hearsay testimony given by defendant's son was denied where an objection was sustained, and the jury was told to disregard the statement. Isenberger v. State, 2008 Tex. App. LEXIS 9224 (Tex. App. Houston 1st Dist. Dec. 11 2008).

Criminal Law & Procedure : Jury Instructions : Limiting Instructions

178. In a trial for unlawfully carrying a weapon, there was no reversible error in denying a request for a limiting instruction in the jury charge as to hearsay statements relating to whether defendant had a gun; if the trial court admitted the statements as excited utterances under Tex. R. Evid. 803, the statements were admissible for all purposes and were not subject to a limiting instruction. Cockrell v. State, 2006 Tex. App. LEXIS 8940 (Tex. App. San Antonio Oct. 18 2006).

Criminal Law & Procedure : Jury Instructions : Particular Instructions : Use of Particular Evidence

179. Tex. Code Crim. Proc. Ann. art. 38.075, requiring corroboration of inmate testimony, did not apply to statements defendant made to the inmates because the statements, even if they were statements against interest, were not confessions or admissions tending to connect him to a robbery, but were requests that the inmates say that an accomplice had committed the robbery alone. Phillips v. State, 436 S.W.3d 333, 2014 Tex. App. LEXIS 5316 (Tex. App. Waco May 15 2014).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview

180. At defendant's probation revocation hearing, the contents of his probation file were admissible as a business record under Tex. R. Evid. 803; although defendant's current probation officer did not have personal knowledge of all the entries in the probation file, he testified that defendant's former probation officer prepared the file and had personal knowledge of the facts recorded in the file. Canseco v. State, 199 S.W.3d 437, 2006 Tex. App. LEXIS 4664 (Tex. App. Houston 1st Dist. 2006).

181. In community supervision revocation proceedings, counsel was not ineffective for failing to make a hearsay objection to testimony about information in defendant's community supervision file; even if the business records predicate under Tex. R. Evid. 803 was not established, the record did not affirmatively demonstrate that the State could not have established it. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

182. At a probation revocation hearing, a witness who did not personally supervise defendant was properly allowed to testify from his probation file. A predicate was laid for the business records hearsay exception when the witness testified that probation officers kept notes when they met with probationers and entries were made in the probationer's record within 48 hours Jefferson v. State, 2004 Tex. App. LEXIS 11796 (Tex. App. Waco Dec. 29 2004).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Proceedings

183. In a proceeding to revoke defendant's community supervision for burglary of a habitation, the State offered an exhibit of defendant's community supervision records from Louisiana; the trial court overruled defendant's hearsay objection and admitted the exhibit as a business record and a government record under Tex. R. Evid. 803(8). Clay v. State, 361 S.W.3d 762, 2012 Tex. App. LEXIS 1255, 2012 WL 503513 (Tex. App. Fort Worth Feb. 16 2012).

184. Under the business record exception to the hearsay rule in Tex. R. Evid. 803(6), appellant's probation record was properly admitted for the trial court's consideration because, at the hearing on the motion to revoke, appellant's probation officer testified that the "chronos" in appellant's file, which contained the chronology of events set out in the records from the probation department, were recorded at or near the time of the occurrence or event that gave rise to them by a person with personal knowledge of the "chronos" events, and that the files were kept in the ordinary course of the probation department. Norman v. State, 2011 Tex. App. LEXIS 5391, 2011 WL 2732673 (Tex. App. Corpus Christi July 14 2011).

185. Even if the "chronos" in appellant's file, which contained the chronology of events set out in the records from the probation department, were not admissible under the business records exception to the hearsay rule in Tex. R. Evid. 803(6), the evidence of the six other violations of probation was sufficient to revoke appellant's probation. Norman v. State, 2011 Tex. App. LEXIS 5391, 2011 WL 2732673 (Tex. App. Corpus Christi July 14 2011).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

186. Two pen packets were properly authenticated and were not hearsay because they were accompanied by affidavits carrying the state seal and certifying that they were true and correct copies of original records maintained in the regular course of business; in addition, the packets contained defendant's fingerprint cards and other identifying information. Carr v. State, 2013 Tex. App. LEXIS 13396, 2013 WL 5873299 (Tex. App. El Paso Oct. 30 2013).

187. Complainant's diary excerpt was admitted during the punishment phase of the trial, when it was no longer in dispute that defendant had sexually abused the complainant; the statement was admissible under the "state of mind" exception to the hearsay rule, Tex. R. Evid. 803(3) as it was not offered to prove the fact remembered or believed, but as punishment evidence to show the complainant's state of mind while recovering from the abuse, and evidence of the physical pain and emotional turmoil defendant inflicted on the complainant. Spurgeon v. State, 2011 Tex. App. LEXIS 4843, 2011 WL 2520280 (Tex. App. Dallas June 27 2011).

188. In a murder case, a trial court did not err by admitting testimony regarding defendant's behavior at a Texas Youth Commission residential treatment facility because such evidence fell under the public records exception for hearsay under Tex. R. Evid. 803(8)(A); the State introduced the testimony from defendant's counselor regarding defendant's violent physical acts, gang activity, and intimidation. The objected-to portions of the testimony were merely sterile recitations of defendant's offenses of the type that had been held admissible at the punishment phase of trial. Bautista v. State, 2009 Tex. App. LEXIS 6806, 2009 WL 2622405 (Tex. App. Dallas Aug. 27 2009).

189. Where petitioner death row inmate argued ineffective assistance of counsel because counsel, during the penalty phase, sought and obtained admission of a psychiatric report on the inmate prepared by a doctor years earlier when the inmate was 15 years old, and that the report suggested the inmate was a future danger, the report was not hearsay admitted in violation of the Confrontation Clause of the Sixth Amendment because the report was admissible under Tex. R. Evid. 803(4), (6), (16), and further, the inmate's statements in the report as to his criminal activity did not violate the Fifth Amendment because the psychiatric consultation was not a custodial interrogation; the ineffective assistance of counsel claim failed. Coble v. Dretke, 417 F.3d 508, 2005 U.S. App. LEXIS 14438 (5th Cir. Tex. 2005), opinion withdrawn by, substituted opinion at 444 F.3d 345, 2006 U.S. App. LEXIS 7171 (5th Cir. Tex. 2006).

190. Trial court did not err during the punishment phase of defendant's aggravated sexual assault trial in finding that the statements of two of his alleged prior victims were admissible as excited utterances under Tex. R. Evid. 803(2), considering the apparent emotional state of the women when police officers encountered them. One officer testified that the first victim was upset and very emotional when he saw her and that she was still crying while she answered his questions, and the other officer described the second victim as being very upset, very emotionally distraught, and almost hysterical. Marc v. State, 166 S.W.3d 767, 2005 Tex. App. LEXIS 4228 (Tex. App. Fort Worth 2005).

191. In a criminal prosecution, the trial court did not err in admitting evidence of a prior conviction for purposes of enhancing punishment; because it was admitted pursuant to Tex. R. Evid. 803(8), the business records exception to the hearsay rule, rather than Tex. R. Evid. 803(22), the public document exception. If the trial judge's decision is correct on any theory of law applicable to the case, it will be sustained. Macias v. State, 2004 Tex. App. LEXIS

10996 (Tex. App. San Antonio Dec. 8 2004).

192. In the punishment phase of defendant's murder case, a court did not err by admitting medical records where a registered nurse testified that she treated defendant's boyfriend for a stab wound in 2000, she recognized the medical record, she was one of the registered nurses involved in the trauma, her handwriting was on the record, she had probably directed a co-worker to take notes, and she signed the bottom of the record. The nurse testified that the medical records were kept as part of the records of the hospital. Williams v. State, 176 S.W.3d 476, 2004 Tex. App. LEXIS 10561 (Tex. App. Houston 1st Dist. 2004).

Criminal Law & Procedure : Sentencing : Restitution

193. Trial court did not err in allowing a county investigator to testify about restitution records where he was a "qualified witness" pursuant to Tex. R. Evid. 803 because he showed his personal knowledge of the manner in which the records were created and maintained. Cooper v. State, 2006 Tex. App. LEXIS 1899 (Tex. App. Fort Worth Mar. 9 2006).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : Civil Commitments

194. Even if the trial court erred by admitting the December 2010 judgment under Tex. R. Evid. 803(22), other evidence showed that the patient had been convicted of indecency with a child by contact; thus, the order of civil commitment was proper as the patient had been convicted of more than one qualifying sexually violent offense under Tex. Health & Safety Code Ann. §§ 841.002(8)(A), 841.003(b). In re Commitment of Hernandez, 2011 Tex. App. LEXIS 9806, 2011 WL 6229575 (Tex. App. Beaumont Dec. 15 2011).

Criminal Law & Procedure : Appeals : Reversible Errors : General Overview

195. Where a trial court erroneously admitted statements that were not admissible under Tex. R. Evid. 803(2) as spontaneous statements, the State filed to comply with Tex. Code Crim. Proc. Ann. art. 38.072, which would have prevented introduction of statements of outcry witnesses; the admission of the hearsay evidence probably had an injurious influence on the jury's deliberation and therefore affected a substantial right of defendant, Tex. R. App. P. 44.2, such that reversal and remand for a new trial was warranted. Hughes v. State, 128 S.W.3d 247, 2003 Tex. App. LEXIS 6980 (Tex. App. Tyler 2003).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

196. In a drug case, the trial court did not err in allowing the arresting officer to testify about statements made by an undercover officer; although defendant made a hearsay objection before the testimony was given, defendant did not renew his objection when the hearsay statement exceeded the present-sense-impression exception of Tex. R. Evid. 803(1). Johnson v. State, 2005 Tex. App. LEXIS 4286 (Tex. App. Houston 1st Dist. June 2 2005).

197. Under Tex. R. App. P. 33.1(a), defendant failed to preserve his Tex. R. Evid. 803(24) complaint for review where he objected to a witness's testimony regarding statements made by defendant's alleged accomplice on relevance grounds but did not object on hearsay grounds. Coleman v. State, 2005 Tex. App. LEXIS 2855 (Tex. App. Houston 14th Dist. Apr. 14 2005).

198. In a domestic violence case, defendant's objection to the State's trial assertion that a 911 tape was admissible as a present sense impression under Tex. R. Evid. 803(1), on the ground that a sufficient predicate had not been made to show a present sense impression, without stating in what regard the predicate was deficient, was too general to preserve the issue for review under Tex. R. App. P. 33.1(a)(1)(A). Warfel v. State, 2005 Tex. App.

LEXIS 2922 (Tex. App. Amarillo Apr. 14 2005).

199. Admission of defendant's jail records in defendant's murder trial was proper under the business records exception to the hearsay rule because the records were not prepared for purposes of litigation and conviction, but they were instead part of a record routine for objective observation purposes. Kennedy v. State, 2005 Tex. App. LEXIS 897 (Tex. App. Fort Worth Feb. 3 2005), opinion withdrawn by 2005 Tex. App. LEXIS 10469 (Tex. App. Fort Worth Dec. 16, 2005).

200. In reviewing a conviction for child sexual assault, the court would not consider complaints about outcry testimony that defendant raised for the first time on appeal. Turner v. State, 2004 Tex. App. LEXIS 8384 (Tex. App. Fort Worth Sept. 16 2004).

201. In a criminal trial, where defendant claimed that the trial court erred in excluding a handwritten note allegedly written by an assistant district attorney, defendant failed to preserve his argument that the note was admissible as a statement against interest where defendant did not offer the note as evidence at trial. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

202. In a criminal appeal of defendant's conviction for aggravated sexual assault of a child, the appellate court would not consider defendant's argument that the trial court erred by allowing into evidence a medical report and testimony of a pediatrician who examined the victim. Defendant's argument that the evidence was not made for the purpose of medical diagnosis or treatment did not comport with his objection at trial; therefore, it was not preserved for review. Frueboes v. State, 2004 Tex. App. LEXIS 2848 (Tex. App. Texarkana Mar. 31 2004).

203. In a trial for indecency with a child under the age of 17 years, defendant objected, during a psychiatric witness's voir dire, to testimony regarding the complainant's statements about one incident; the separate objections under Tex. R. Evid. 403, 404(b), 602, 803(1) and 803(4), were overruled and appellant was not required to later repeat the individual objections before the jury. However, defendant argued on appeal that it was error to admit the hearsay statements for the purpose of medical diagnosis when the child did not have personal knowledge of the incident, in that the child was not sure whether he was touched by a penis or a finger; this argument appeared to be a unique blend of Tex. R. Evid. 602 and 803(4), which was not presented to the trial court with sufficient specificity to preserve the objection and which was also contrary to the law because defendant was not challenging the lack of personal knowledge by the witnesses. Ramirez v. State, 2004 Tex. App. LEXIS 1063 (Tex. App. Austin Feb. 5 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

204. Although defendant argued that the trial court erred when it admitted the hearsay testimony of a pediatrician because the victim's statements to the pediatrician were not made for the purpose of medical treatment but were instead made for the purpose of a criminal investigation, because defendant failed to object to any other portion of the pediatrician's testimony concerning what the victim told her, defendant did not preserve error. Gonzalez v. State, 2014 Tex. App. LEXIS 208, 2014 WL 97295 (Tex. App. Eastland Jan. 9 2014).

205. Defendant in an indecency with a child case did not preserve an argument that hearsay evidence was admissible under the medical diagnosis exception to the hearsay rule because he failed to argue in the trial court that a relevant hearsay exception applied. Peace v. State, 2012 Tex. App. LEXIS 10631, 2012 WL 6634691 (Tex. App. Dallas Dec. 21 2012).

206. At defendant's trial for theft, the trial court admitted an exhibit containing photocopies of credit receipts and purchase orders as business records under Tex. R. Evid. 803(6); defendant objected under the best evidence rule. Because defendant did not challenge the admission of the exhibit on the grounds that the testifying witness did not have knowledge of how the record was prepared, the error was not preserved for review. Thompson v. State, 2011 Tex. App. LEXIS 4019, 2011 WL 2112810 (Tex. App. Houston 1st Dist. May 26 2011).

207. During defendant's trial for sexual assault, the trial court admitted hearsay testimony from the complainant's friend as to details of her telephone conversation with the complainant as an excited utterance under Tex. R. Evid. 803(2); because defendant also explored the conversation and the complainant's emotional state during it on cross examination, defendant failed to preserve his hearsay objection for appellate review. Jennings v. State, 2010 Tex. App. LEXIS 10241, 2010 WL 5392684 (Tex. App. Amarillo Dec. 29 2010).

208. Defendant failed to preserve an argument relating to the admission of hearsay statements under the excited utterance exception of Tex. R. Evid. 803(2), even though defense counsel made a timely, specific hearsay objection to one question, because he did not object to other questions that elicited the same or similar responses and did not obtain a running objection or a court ruling outside the jury's presence, as required by Tex. R. App. P. 33.1(a). Peralta v. State, 338 S.W.3d 598, 2010 Tex. App. LEXIS 9436 (Tex. App. El Paso Nov. 30 2010).

209. Defendant preserved for appellate review his claim that the trial court erred by admitting the victim's counselor's hearsay testimony because at trial, defendant objected to the counselor's testimony on the ground that it would constitute hearsay; he asserted his objection in a timely manner and with sufficient specificity to make the trial court aware of his complaint. Taylor v. State, 263 S.W.3d 304, 2007 Tex. App. LEXIS 6198 (Tex. App. Houston 1st Dist. 2007).

210. On appeal of defendant's conviction for two counts of capital murder, he claimed that the trial court erred in allowing inadmissible hearsay accounts from his disciplinary records of uncharged prison misconduct; defendant contended the reports were inadmissible hearsay under Tex. R. Evid. 803(8)(B), as matters observed by "other law enforcement personnel. Because his trial objections did not comport with the specific claim he raised on appeal, defendant failed to preserve the error for review under Tex. R. App. P. 33.1. Robles v. State, 2006 Tex. Crim. App. LEXIS 2533 (Tex. Crim. App. Apr. 26 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

211. Defendant in a child sexual abuse case waived his objection to testimony by the child's school counselor on the grounds that she was not a licensed professional counselor as required by Tex. R. Evid. 803, because he did not raise his objection at trial. Madden v. State, 2008 Tex. App. LEXIS 2637 (Tex. App. Dallas Apr. 11 2008).

212. Trial court had not erroneously admitted the medical report prepared by the doctor who examined the child, a victim of sexual assault, because, as defendant argued, the State did not establish the proper predicate for the business records exception; defense counsel's objection "Just object to its entry, Your Honor. Don't feel like the proper foundation and predicate has been laid for its entry," did not inform the trial court of that deficiency. Weaver v. State, 2006 Tex. App. LEXIS 9996 (Tex. App. Waco Nov. 15 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

213. Murder defendant failed to preserve error under Tex. R. Evid. 803 regarding the exclusion of evidence that a third party had a murder plan because defendant failed to sponsor the evidence on that ground. Johnson v. State, 2006 Tex. App. LEXIS 5214 (Tex. App. Dallas June 19 2006).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

214. Trial court did not err by allowing an expert witness to testify to statements the victim made to him regarding the allegations against defendant because they were admissible under Tex. R. Evid. 803, as the victim made the statements to the expert for the purpose of the victim's medical diagnosis or treatment; defendant failed to point to hearsay statements that were allegedly made by other witnesses. Bailey v. State, 2007 Tex. App. LEXIS 208 (Tex. App. Fort Worth Jan. 11 2007).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

215. In a possession of pseudoephedrine with intent to manufacture methamphetamine case, the labeling on the cold medicine bottles constituted hearsay because it was an extrajudicial assertion offered to prove the truth of the matter asserted that the tablets contained pseudoephedrine; however, the labels were generally relied upon by the public, which suggested that the cold medication labels were accurate and trustworthy; thus, pursuant to Tex. R. Evid. 803, the labels were admissible as an exception to the hearsay rule. Shaffer v. State, 184 S.W.3d 353, 2006 Tex. App. LEXIS 410 (Tex. App. Fort Worth 2006).

216. Trial court did not abuse its discretion in permitting an officer to testify about a witness's statements because the record supported a finding that the witness, who was a friend of the victim, was still dominated by the emotions and fear of the event as the officer, who arrived only six to eleven minutes after being dispatched to the scene, testified that the victim was upset, excited, and nervous and was running around yelling that his friend had just been shot. Reyes v. State, 2004 Tex. App. LEXIS 4776 (Tex. App. Houston 14th Dist. May 27 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

217. Trial court did not abuse its discretion by admitting the testimony of the victim's counselor because the State met its burden to make the record reflect that truth-telling was a vital component of the victim's counseling and that he was aware that that was the case. In re H.L.A., 2014 Tex. App. LEXIS 3081 (Tex. App. Houston 1st Dist. Mar. 20 2014).

218. Trial court could have reasonably concluded that defendant failed to lay sufficient predicate to show that the victim's previous statement was admissible as a past recollection record because there was nothing in the record to indicate that she knew she was being recorded at the time she made the statement or that she subsequently verified the accuracy of her statement while she could still recall the relevant events. Mury v. State, 2013 Tex. App. LEXIS 12662, 2013 WL 5856337 (Tex. App. Austin Oct. 11 2013).

219. Trial court did not abuse its discretion by admitting testimony from the victim's widow as a present sense impression because the victim's statement during his telephone conversation with his wife were nonreflective and described the event he was perceiving. Dean v. State, 2013 Tex. App. LEXIS 11011 (Tex. App. Tyler Aug. 29 2013).

220. Trial court did not err by allowing a witness's prior statement to be read in the record as a recorded recollection because the witness testified that she could not recall significant details of what occurred due to the passage of time. Sanchez v. State, 2013 Tex. App. LEXIS 10155 (Tex. App. Austin Aug. 15 2013).

221. Trial court did not abuse its discretion by excluding a statement defendant made to his mother that he stabbed a guy who came after him with a stick because it was not an excited utterance under Tex. R. Evid. 803(2), as at least 15 to 20 minutes passed between the stabbing and the statement while defendant presumably walked back to his mother's house, sufficient time in which he could have formulated a story about why he stabbed the

victim. Blue v. State, 2012 Tex. App. LEXIS 7895, 2012 WL 4095988 (Tex. App. San Antonio Sept. 19 2012).

222. Trial court did not err by admitting an officer's testimony about the complainant's out-of-court statements under the excited utterance exception to the hearsay rule because shortly before the complainant made the statement he had been the victim of an armed robbery at gunpoint and, according to the testimony of two witnesses, this experience caused the complainant to be very excited; the statement was related to the circumstances of the occurrence preceding it as in the statement the complainant identified defendant as one of the robbers. Even if the trial court had erred by admitting the testimony the error would have been harmless because similar statements were also testified to by two other witnesses. Amador v. State, 376 S.W.3d 339, 2012 Tex. App. LEXIS 6811 (Tex. App. Houston 14th Dist. Aug. 16 2012).

223. Trial court did not err by admitting the video recording of the police officer's interview with the victim at the scene of the investigation under the excited utterance exception to hearsay because when the victim was speaking to the officer, she had to be calmed several times and the officer testified she was very upset and crying. Alanis v. State, 2012 Tex. App. LEXIS 5232, 2012 WL 2501026 (Tex. App. Tyler June 29 2012).

224. Trial court did not abuse its discretion by excluding a statement made by defendant to an officer at the time of his arrest following the foot chase, that he ran because he thought he had outstanding warrants or tickets, because given the circumstances under which the statement was made, the trial court reasonably could have found the excited utterance hearsay exception of Tex. R. Evid. 803(2) to be inapplicable. The trial court could have concluded that defendant knew he was being chased under the suspicion of exposing himself to young girls on a playground, giving him enough time to think about his story. Ingram v. State, 2012 Tex. App. LEXIS 260 (Tex. App. Dallas Jan. 12 2012).

225. Trial court did not abuse its discretion by admitting the testimony of the sexual assault nurse examiner regarding hearsay statements made by the victim under Tex. R. Evid. 803(4) because: (1) the 16-year-old victim was seen by the nurse in an emergency room setting less than 48 hours after the assaultive conduct ended; (2) there was nothing in the record to negate that the victim possessed the necessary awareness of the need to be truthful during the medical history portion of the exam; (3) the nurse specifically testified that obtaining the history from the victim was necessary for medical treatment; and (4) based on the victim's statements that she had been sexually abused over an extended period of time by more than one assailant and the abuse included penetration of the female sexual organ and anus, the nurse examined those areas of the victim's body. Johnson v. State, 2011 Tex. App. LEXIS 7151, 2011 WL 3848985 (Tex. App. El Paso Aug. 31 2011).

226. Trial court did not abuse its discretion by admitting the uncle's testimony under the excited utterance exception to the hearsay rule under Tex. R. Evid. 803(2) because, even though a day had elapsed between the assault and the victim's meeting her uncle, the uncle testified that in her initial telephone the victim was very upset, sobbing, and hysterical, and that when they met she was still upset and crying before telling him that defendant had inflicted her injuries. Walls v. State, 2011 Tex. App. LEXIS 7109, 2011 WL 3840992 (Tex. App. Tyler Aug. 31 2011).

227. Trial court did not err by admitting the victim's hearsay statement to a police officer as an excited utterance under Tex. R. Evid. 803(2) because a reasonable person could have concluded that she made her statement while still dominated by the emotion, fear, and pain of the startling event as only a short amount of time had elapsed between the event and the officer's arrival, where he found the victim visibly upset and that her body bore signs of injury. Stoltz v. State, 2011 Tex. App. LEXIS 5738, 2011 WL 3199337 (Tex. App. El Paso July 27 2011).

228. Trial court did not abuse its discretion by admitting an animal control officer's testimony concerning what the baby's father said to her after he was told that the baby had been bitten by a dog because it was properly admitted as an excited utterance under Tex. R. Evid. 803(2). The officer testified that the father was screaming and crying

and had collapsed on the floor shortly before making the statement. Nadal v. State, 348 S.W.3d 304, 2011 Tex. App. LEXIS 5104 (Tex. App. Houston 14th Dist. July 7 2011).

229. Trial court did not abuse its discretion by admitting a detective's testimony about the victim's statement because it was admissible as an excited utterance under Tex. R. Evid. 803(2), even though one hour had passed between the crime and the statement, as the detective described the victim as very visibly shaken, very upset, scared, excited, and crying. Dixon v. State, 358 S.W.3d 250, 2011 Tex. App. LEXIS 1745 (Tex. App. Houston 1st Dist. Mar. 10 2011).

230. Trial court did not abuse its discretion by admitting the victim's second 911 call as an excited utterance because the victim's voice was quivering and she sounded very upset, scared, and excited. Dixon v. State, 358 S.W.3d 250, 2011 Tex. App. LEXIS 1745 (Tex. App. Houston 1st Dist. Mar. 10 2011).

231. Trial court did not abuse its discretion by refusing to admit the victim's statement to her employer three days before the accident because her statement of "whatever" in response to termination for failing a drug test was not an admission of drug use and therefore the statement was not admissible as a statement against interest under Tex. R. Evid. 803(24). Somers v. State, 333 S.W.3d 747, 2010 Tex. App. LEXIS 9384 (Tex. App. Waco Nov. 24 2010).

232. Within minutes of yelling for help, the victim, who was still shaken up, recounted to a witness and company that defendant had hit him in the face when he became angry at the victim for not wanting to spend any more money on beer at a bar; a reasonable person could conclude that the victim made the statements about the bar attack while still dominated by the emotions, excitement, fear, or pain of the startling event that provoked the victim to flee his home only moments before; therefore, the trial court did not abuse its discretion by admitting the victim's statements into evidence under the excited utterance exception in Tex. R. Evid. 803. Bermudez v. State, 2007 Tex. App. LEXIS 7629 (Tex. App. El Paso Sept. 20 2007).

233. Operator for 911 testified that she received a call at about 1:30 in the morning from the victim's mother and there was a lot of yelling, some type of disturbance; the operator finally got the victim's mother to talk to her on the phone and she told the operator that the victim, her 15-year-old daughter, had accused defendant, her step-father, of touching her, that the victim was upset and ran out of the house, and then the victim's mother got off the phone to go find the victim outside; the operator's description of the 911 call showed that the victim's mother was still dominated by the emotions, excitement, fear, or pain of the event where defendant "groped" her daughter when she made the telephone call; thus, the trial court did not abuse its discretion by allowing the testimony into evidence as an excited utterance. Mestas v. State, 2007 Tex. App. LEXIS 6947 (Tex. App. Dallas Aug. 29 2007).

234. When defendant touched the 15-year-old victim for the second time, she screamed and went into her mother's bedroom; after the victim told her mother what had happened, her mother went into the living room screaming and yelling at defendant; thus, the mother's statements were made immediately after learning defendant had "groped" her 15-year-old daughter; because the mother was still dominated by the emotions, excitement, fear, or pain of the event when she made the statements, the trial court did not abuse its discretion by allowing the complained-of testimony into evidence as an excited utterance. Mestas v. State, 2007 Tex. App. LEXIS 6947 (Tex. App. Dallas Aug. 29 2007).

235. Trial court did not abuse its discretion by admitting into evidence the hearsay testimony of the victim's counselor under Tex. R. Evid. 803 because the victim specifically testified that she was receiving therapy for post-traumatic stress disorder and the record supported the inference that the victim understood that she needed to be truthful with the counselor to receive proper treatment and that the facts surrounding the victim's encounter with defendant were reasonably pertinent to the counselor's treatment of the victim for her issues concerning the

resolution of the sexual assault. Taylor v. State, 263 S.W.3d 304, 2007 Tex. App. LEXIS 6198 (Tex. App. Houston 1st Dist. 2007).

236. Trial court did not abuse its discretion by refusing to admit a police report into evidence because the portions defendant attempted to offer, transcribed statements made by a prospective informant, were not factual findings and therefore were outside the scope of Tex. R. Evid. 803; the statements were not shown to be otherwise exempt from the hearsay rule. Ramirez v. State, 2007 Tex. App. LEXIS 5825 (Tex. App. Houston 14th Dist. July 26 2007).

237. Trial court did not err by admitting a detective's testimony recounting statements the victim made to him shortly after the robbery under the excited utterance hearsay exception of Tex. R. Evid. 803(2) because an officer who spoke to the victim prior to the interview, stated that she was a little bit distraught and visibly shaken but had begun to calm down. The detective testified that he spoke with the victim 45 to 50 minutes after the robbery and she was still visibly shaken and upset, and looked like she had been crying. Young v. State, 2006 Tex. App. LEXIS 11371 (Tex. App. Houston 14th Dist. Dec. 21 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

238. In defendant's murder case, the court erred during the punishment phase by admitting evidence of defendant's jail record because it was a report of crimes and acts of misconduct reported to or observed by law enforcement personnel, and reflected law enforcement personnel's rulings regarding culpability and the punishment imposed by law enforcement personnel. Kennedy v. State, 193 S.W.3d 645, 2006 Tex. App. LEXIS 2517 (Tex. App. Fort Worth 2006).

239. Trial court did not err in allowing an officer to testify regarding a witness's out-of-court statements where the statements qualified as excited utterances under Tex. R. Evid. 803(2) because they were made in relation to startling events while the witness was still dominated by the emotion caused by those events. Furthermore, even assuming that Crawford barred the admission of the statements, defendant was not harmed by the error because the statements were not important to the State's case for aggravated assault, as the lawfully admitted evidence presented by the State overwhelmingly established defendant's guilt. Arias v. State, 2005 Tex. App. LEXIS 4341 (Tex. App. San Antonio June 8 2005).

240. Merely because a declarant is excited, the statements made do not lose their character as testimonial statements subject to the Confrontation Clause. Davis v. State, 169 S.W.3d 660, 2005 Tex. App. LEXIS 3773 (Tex. App. Austin 2005).

241. Although a court erred by admitting an officer's statement as an excited utterance because the victim's statements were not spontaneous, the error was harmless because the officer's testimony was cumulative of eyewitness testimony that implicated defendant in the assault. Oveal v. State, 2005 Tex. App. LEXIS 1837 (Tex. App. Houston 14th Dist. Mar. 10 2005), opinion withdrawn by, substituted opinion at 164 S.W.3d 735, 2005 Tex. App. LEXIS 3517 (Tex. App. Houston 14th Dist. 2005).

242. In an injury to a child case, while the trial court erred in admitting the gang intelligence form into evidence as it constituted matters observed by police officers and other law enforcement personnel and was therefore not admissible as an exception to the hearsay rule, the error was harmless as the same information was subsequently introduced, without objection, during an officer's testimony. Furthermore, any error was waived as no objection was made as to the officer testimony regarding defendant's involvement in a gunfight or an assault. Aranda v. State, 2004 Tex. App. LEXIS 10370 (Tex. App. Corpus Christi Nov. 18 2004).

243. Statements did not fall within the excited utterance hearsay exception because the speaker, although angry, was not dominated by emotions, and he made his statements in response to an officer's questions, not spontaneously. The admission did not affect defendant's substantial rights, however, because the evidence was cumulative and other evidence overwhelmingly supported the conviction for aggravated assault with a deadly weapon. Reyes v. State, 2004 Tex. App. LEXIS 9717 (Tex. App. Dallas Nov. 3 2004).

244. In defendant's theft case, a court's error in excluding evidence that the declarant told defendant to move a trailer was harmless where defendant's sister testified that the employer told her defendant moved a trailer for a the declarant, and through the testimony of the two witnesses, the jury heard essentially the same evidence the trial court initially excluded: that the declarant hired defendant to move a trailer. Gibson v. State, 2004 Tex. App. LEXIS 3198 (Tex. App. Beaumont Apr. 7 2004).

245. Where the victim did not disclose until she was 18 years of age that defendant fathered her son when she was 12 years of age, the victim's belated outcry statement did not qualify as an excited utterance under Tex. R. Evid. 803(2); while the original assault was undoubtedly shocking, the record did not reflect that defendant was still, six years later, dominated by the excited state produced by the attack. Harvey v. State, 123 S.W.3d 623, 2003 Tex. App. LEXIS 9837 (Tex. App. Texarkana 2003).

246. Out-of-court identification of appellant was not admissible as a present sense impression under Tex. R. Evid. 803(1); however, the trial court's erroneous admission of the identification was harmless error because it did not affect appellant's substantial rights or the jury's verdict under Tex. R. App. P. 44.2(b). Ferguson v. State, 97 S.W.3d 293, 2003 Tex. App. LEXIS 148 (Tex. App. Houston 14th Dist. 2003).

247. Officer's testimony that a codefendant would have cooperated but feared for his life was hearsay because the codefendant's mental state was evidenced by inference and therefore did not qualify as an exception to the hearsay rule under Tex. R. Evid. 803(3); but, because the statement was irrelevant to prove any fact or element of the charge against defendant, a trial court's admission of the hearsay testimony was harmless error pursuant to Tex. R. App. P. 44.2(b). Barnes v. State, 56 S.W.3d 221, 2001 Tex. App. LEXIS 4834 (Tex. App. Fort Worth 2001).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Constitutional Errors

248. Defendant lost any constitutional right to confront his mother in court when he killed her; the admission of the evidence that defendant argued should have been excluded did not contribute to his conviction or sentence and was otherwise harmless as the unchallenged evidence supporting the elements of the offense of capital murder was overwhelming. Samuelson v. State, 2014 Tex. App. LEXIS 9222, 2014 WL 4179440 (Tex. App. Austin Aug. 21 2014).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Cumulative Errors

249. Court did not abuse its discretion in admitting the redacted jailhouse recording into evidence, because defendant's own statements implicated his guilt, and the redacted statements were not offered for the truth of the matter asserted, but offered for the purpose of placing in evidence defendant's own statements against interest. Howard v. State, 2014 Tex. App. LEXIS 9208, 2014 WL 4100690 (Tex. App. El Paso Aug. 20 2014).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

250. In defendant's trial for theft from a store, although defendant objected to the admissibility under Tex. R. Evid. 803(6) of a receipt prepared by the store to show the value of the items, and the objection was overruled, a witness

subsequently testified without objection as to the value of the stolen property, rendering any error harmless. Mays v. State, 2014 Tex. App. LEXIS 7330, 2014 WL 3058462 (Tex. App. Dallas July 8 2014).

251. At defendant's trial for aggravated sexual assault of a child, the trial court did not commit reversible error by overruling his hearsay objection to testimony from an outcry witness who said that the victim told her defendant had raped her several years earlier. Even if the trial court erred in admitting the testimony as an excited utterance because it was made years after the first assault, the same facts were received elsewhere without objection. Washington v. State, 2014 Tex. App. LEXIS 933 (Tex. App. Austin Jan. 30 2014).

252. In a case involving indecency with a child, it was not necessary to determine if a trial court erred by allowing a victim's brother to testify about the event surrounding the victim's revelation where the State argued that Tex. R. Evid. 803(2) applied because the same evidence was admitted through the victim's testimony and her mother's testimony. The admission of inadmissible evidence was harmless error if other evidence that proved the same fact was properly admitted elsewhere. In re C. D., 2013 Tex. App. LEXIS 7591, 2013 WL 3203220 (Tex. App. Corpus Christi June 20 2013).

253. Trial court had the discretion to determine the sufficiency of the evidentiary predicate for the physical evidence submission form because the offense report served only to buttress the chain of custody of items of physical evidence used to establish the identity of the victims. Defendant did not contend the evidence was tampered with and the identity of one of the victims was corroborated by other evidence. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

254. Even if the trial court erred by admitting a jail book in sheet as a business record under Tex. R. Evid. 803(6), the error was harmless because no party emphasized the unexplained divergence of dates between the date defendant was arrested and the date he bonded out. Crutchfield v. State, 2013 Tex. App. LEXIS 1942 (Tex. App. Tyler Feb. 28 2013).

255. Victim's statements to her mother that she and defendant had engaged in sexual intercourse and oral sex on multiple occasions were not excited utterances under Tex. R. Evid. 803(2) because they were not made suddenly or immediately after the victim heard defendant refer to her as a liar and a whore, but rather were made after she spoke to her boyfriend who encouraged her to talk to her mother. Even though the trial court erred by admitting the statements as excited utterances, the error was harmless because the State introduced evidence from a nurse who examined the victim after she made the allegations and defendant did not object when the nurse testified about the history of the sexual relationship between the victim and defendant. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

256. Any error in the admission of the testimony was harmless because the same or similar evidence was admitted at another point in the trial without objection. Nelson v. State, 405 S.W.3d 113, 2013 Tex. App. LEXIS 377, 2013 WL 174502 (Tex. App. Houston 1st Dist. Jan. 17 2013).

257. Even though the trial court erred by admitting the audio portions of the tape that recorded the arresting officer's statements about defendant's conditions and his narrative about what he found in defendant's vehicle, as they were spoken offense reports that were inadmissible hearsay and did not qualify as present sense impressions under Tex. R. Evid. 803(1), the error was harmless because both officers testified at trial as to everything the arresting officer mentioned in the audio tape. The arresting officer testified about defendant's agitated attitude and appearance, stating that he smelled like alcohol and his face was red; the officer also testified that he asked defendant to perform field sobriety tests at least twice and he found multiple empty beer and wine bottles in the vehicle. Eggert v. State, 395 S.W.3d 240, 2012 Tex. App. LEXIS 9190, 2012 WL 5416202 (Tex. App. San Antonio

Nov. 7 2012).

258. Trial court abused its discretion by admitting the ATM receipt as the State did not lay a business records exception predicate, Tex. R. Evid. 803(6); however, the error was harmless, Tex. R. App. P. 44.2, in light of the other abundant evidence of defendant's guilt. Gatewood v. State, 2011 Tex. App. LEXIS 9302, 2011 WL 5903656 (Tex. App. Fort Worth Nov. 23 2011).

259. Even if it was error to admit, under Tex. R. Evid. 803(24), a codefendant's plea stipulation implicating defendant, the evidence was cumulative of the codefendant's testimony; therefore, defendant's substantial rights were not affected, as required for reversal under Tex. R. App. P. 44.2. Zuniga v. State, 2011 Tex. App. LEXIS 4579, 2011 WL 2435417 (Tex. App. Houston 1st Dist. June 16 2011).

260. Even assuming that a trial court abused its discretion by admitting alleged hearsay statements regarding defendant's prior relationship with the murder victim, the error did not affect defendant's substantial rights because: (1) the jury heard defendant testify to some of the same facts as the other witnesses, specifically that he and the victim fought, they argued over drugs, the victim filed charges against him, the victim sought a protective order against him, and he threw a rock at the victim; (2) defendant did not dispute that he had threatened the victim or been physically abusive in the past; (3) during closing argument, the State did not emphasize the prior instances of abuse, but focused on the events surrounding the victim's death; and (4) the record contained other evidence from which the jury could conclude that defendant committed the offense of murder. Sanders v. State, 2011 Tex. App. LEXIS 2535, 2011 WL 1304882 (Tex. App. Beaumont Apr. 6 2011).

261. In a trial for child sexual assault, any error under Tex. R. Evid. 803(4) in allowing a nurse examiner to testify to hearsay statements made by the complainant was harmless because the evidence was cumulative of testimony from the complainant and a forensic examiner that was admitted without objection. Duran v. State, 2010 Tex. App. LEXIS 9058, 2010 WL 4611769 (Tex. App. Dallas Nov. 16 2010).

262. In a trial for child sexual assault, no prejudice resulted from any error under Tex. R. Evid. 803(4) in admitting a nurse's testimony that the complainant identified defendant as her abuser during a sexual assault examination because the same evidence came in later through the testimony of a forensic interviewer. Starnes v. State, 2010 Tex. App. LEXIS 3715 (Tex. App. Dallas May 19 2010).

263. In a trial for driving while intoxicated (DWI), any hearsay error under Tex. R. Evid. 803 did not require reversal because the admission of a request by defendant's husband for the police to help in keeping defendant out of a DWI was harmless, given the extensive testimony tending to show that defendant had operated a motor vehicle while intoxicated. Snokhous v. State, 2010 Tex. App. LEXIS 3629, 2010 WL 1930088 (Tex. App. Austin May 14 2010).

264. In a prosecution of defendant for sexual assault of a child, even if the trial court erred in admitting into evidence during the punishment phase an order setting defendant's bail and imposing conditions pending trial and a motion to find defendant's bond insufficient, the error was harmless. Even if the documents themselves were inadmissible, a community supervision officer could testify as to their substance. Segler v. State, 2010 Tex. App. LEXIS 1727, 2010 WL 864396 (Tex. App. Eastland Mar. 11 2010).

265. Assuming that the fourth requirement of Tex. R. Evid. 803(5) had to be restrictively construed, it was error under Rule 803(5) to admit a witness's statement to police that he saw defendant pull a gun and that defendant had said he was going to kill the victim because the witness testified to the contrary at trial. However, the statement was useful for impeachment and partially admissible as a statement against interest. Spearman v. State, 307 S.W.3d

463, 2010 Tex. App. LEXIS 1026 (Tex. App. Beaumont Feb. 10 2010).

266. In a case in which defendant was convicted of aggravated sexual assault under Tex. Penal Code Ann. § 22.021 and indecency with a child under Tex. Penal Code Ann. § 21.11, although defendant complained of the trial court's overruling of his hearsay objection to the State's question of what the victim told a professional about defendant's conduct, the admission of the testimony during the direct examination of the forensic interviewer was not harmful because it did no more than reiterate facts admitted elsewhere and even included testimony supportive of the defense. Moreover, even assuming, without deciding, that it was inadmissible hearsay, the substance of the complained-of testimony of the forensic interviewer was admitted elsewhere without limitation or an objection preserved on appeal, and, thus, the error, if any, of the trial court in admitting the statement of the forensic interviewer did not affect a substantial right of defendant and had to be disregarded. Drake v. State, 2010 Tex. App. LEXIS 716, 2010 WL 348365 (Tex. App. Amarillo Jan. 31 2010).

267. In a sexual abuse case, error, if any, in allowing hearsay testimony regarding defendant's sexual assault of the child victim's younger sister was harmless because defendant did not challenge other testimony containing the same facts, but of a significantly more descriptive and incriminating nature. Vivid testimony specifically setting forth the nature of defendant's "touching" of the sister was not challenged. Murphy v. State, 2009 Tex. App. LEXIS 6226, 2009 WL 2450990 (Tex. App. Tyler Aug. 12 2009).

268. In a murder case, although the trial court erred in admitting the victim's hearsay statement regarding her plans to withhold all financial support from defendant, the error was harmless. The State provided evidence of the stolen rifle as the murder weapon, the victim's negative feelings toward defendant, defendant's inconsistent alibi, and the perpetrator's knowledge of where valuables were located in the victim's home. Fischer v. State, 2009 Tex. App. LEXIS 4092 (Tex. App. San Antonio June 10 2009).

269. In defendant's driving while intoxicated case, although the admission of the trooper's inventory report was error because the inventory report on defendant's pickup was done by the arresting officer, directly implicating Tex. R. Evid. 803(8)(B)'s concern with the adversarial nature of the process and was done at the scene by the arresting officer, the admission of that evidence was harmless. Whether defendant had beer in his pickup was not hotly contested and was proven by other properly admitted evidence. Russell v. State, 290 S.W.3d 387, 2009 Tex. App. LEXIS 3317 (Tex. App. Beaumont May 13 2009).

270. Trial court did not err in admitting jail disciplinary reports under the business records exception to the hearsay rule, Tex. R. Evid. 803(6), with the exception of reports that contained inadmissible testimonial statements. However, admission of the testimonial statements was harmless because although the reports were read aloud to the jury, they were never emphasized again by the State in any way. Smith v. State, 297 S.W.3d 260, 2009 Tex. Crim. App. LEXIS 527 (Tex. Crim. App. 2009).

271. In defendant's aggravated sexual assault of a child case, the trial court did not err when it overruled his objection and admitted into evidence the complete video recording of the child's forensic interview because defendant conceded that the accusations made by the child and specific details provided by her during the video recording of her forensic interview were consistent with her trial testimony. Even if the trial court erred when it admitted the video recording, the error was harmless because the same facts were proved by the child's properly admitted testimony. Estrada v. State, 2009 Tex. App. LEXIS 387, 2009 WL 144327 (Tex. App. Dallas Jan. 22 2009).

272. As to a hearsay objection in a sexual assault case, defendant only specifically stated his intended testimony for the first time on appeal; defendant apparently sought to introduce testimony to show a victim's state of mind as it related to consent. Therefore, there was no error in sustaining a hearsay objection raised by the State; even if the

trial court and the State had understood the specifics of the testimony that defendant intended to elicit, there was no harm shown because substantially similar testimony was later received into evidence. Zuniga v. State, 2008 Tex. App. LEXIS 6905 (Tex. App. San Antonio Sept. 10 2008).

273. In a trial for child sexual abuse, any error under Tex. R. Evid. 803(4) was harmless, within the meaning of Tex. R. App. P. 44.2(b), when the trial court admitted a photograph of an accusation that the complainant wrote on the chalkboard in a therapy session. The single out-of-court statement could not have had more than a slight effect on the jury's assessment of the complainant's credibility, given that the complainant testified in court explicitly describing the sexual assault. Consuelo v. State, 2008 Tex. App. LEXIS 6203 (Tex. App. Dallas Aug. 15 2008).

274. In defendant's theft case, although the State failed to lay a proper predicate for admission of receipts under the business records exception because there was no evidence that the information contained in the exhibits came from a "person with knowledge" of that information, the error was harmless. The exhibits showed that a computer and a cash register, respectively, were charged to the theft victim, and that evidence was cumulative of other testimony. Underwood v. State, 2008 Tex. App. LEXIS 5936 (Tex. App. Dallas Aug. 7 2008).

275. During the punishment phase of defendant's trial for aggravated sexual assault of a child, defendant stipulated to eight prior convictions, which included a felony conviction for endangering a child, and the State did not err in calling a police officer to testify regarding the circumstances of that offense, which initially was investigated and charged as an aggravated sexual assault of a child, where the officer's statement was not hearsay because he identified the charge that he personally filed and the persons that he arranged for the prior child victim to meet; although the officer's testimony about the prior child victim's precise age was based on hearsay and thus erroneously admitted, there was a fair assurance that the admission of the single piece of hearsay testimony was not harmful error because defendant stipulated to his conviction for endangering a child, and evidence of that prior conviction was properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07, and as an exception under Tex. R. Evid. 803 to the hearsay rule, and because the record as a whole included: (1) defendant's guilty plea to endangering a child; (2) the detailed evidence of the complainant's sexual abuse itself; (3) child pornography found on defendant's family computer; (4) the fact that the State did not emphasize the erroneously admitted evidence and concentrated on the "heinousness" of the offense; (5) defendant's cunning and violent character; (6) the effect of the abuse on the complainant for the rest of her life; and (7) defendant's eight prior convictions and numerous disciplinary infractions. Hunt v. State, 2008 Tex. App. LEXIS 2273 (Tex. App. Houston 14th Dist. Apr. 1 2008).

276. Even if the trial court erred by admitting an officer's testimony that witnesses had told him that the assailant was wearing a tan jacket, the error was harmless because its admission had no effect on the jury's verdict. Two witnesses knew defendant prior to witnessing his struggle with the victim, one witness gave an officer directions to defendant's home, and although two officers noticed a tan jacket on the hood of a car in the driveway of defendant's home, another officer found defendant inside a shed in the back of the house. Matez v. State, 2007 Tex. App. LEXIS 4418 (Tex. App. Corpus Christi June 7 2007).

277. In defendant's burglary case, a court erred by allowing one officer to testify that a finger print, in his opinion, belonged to defendant because the testimony necessarily revealed the substance of the third officer's conclusion, namely that in his opinion, the print belonged to defendant; under Tex. R. Evid. 803, that was hearsay; however, the error was harmless because the testimony was cumulative of other testimony regarding the conclusion. Smith v. State, 236 S.W.3d 282, 2007 Tex. App. LEXIS 2206 (Tex. App. Houston 1st Dist. 2007).

278. In a trial for driving while intoxicated, there was no error in the admission as a present-sense impression under Tex. R. Evid. 803 of a statement that defendant had been drinking all day; the contemporaneous event was an argument between defendant and the declarant that concluded moments before the declarant, seeking to explain defendant's behavior, made the statement; further, any error in the admission was harmless under Tex. R. App. P. 44 because there was other evidence in the record to establish defendant's intoxication. Brdecka v. State,

2007 Tex. App. LEXIS 2072 (Tex. App. Austin Mar. 13 2007).

279. Although defendant claimed that a trial court erred in admitting statements that he made to his therapist because such statements were not made for purposes of medical diagnosis or treatment as contemplated by Tex. R. Evid. 803, even assuming that the trial court erred in admitting the statements, any error was harmless under Tex. R. App. P. 44.2(b) because the child sexual assault complainant provided explicit detailed testimony about the sexual assaults; further, there was properly admitted evidence that the complainant told his school counselor about the assaults. Romero v. State, 2006 Tex. App. LEXIS 9835 (Tex. App. Dallas Nov. 14 2006).

280. Even if the trial court abused its discretion in admitting the medical records of the sexual assault of the 10-year-old complainant under Tex. R. Evid. 803, any error would be harmless under Tex. R. App. P. 44.2 because the medical records established the same facts that the jury had already heard during complainant's testimony and a videotape of her interview with a detective. Davidson v. State, 2006 Tex. App. LEXIS 9178 (Tex. App. Dallas Oct. 25 2006).

281. In a driving while intoxicated case, a court erred by admitting witnesses' hearsay statements under the present sense impression exception because the evidence did not establish how much time elapsed between when one witness observed the incident and when she prepared her statement, and the other witness's written statement, made five days after the incident, clearly fell outside any reasonable argument that she made it immediately after the incident; however, the error was harmless; both witnesses testified at trial that they saw defendant weaving across the roadway prior to her leaving the highway, and a videotape of field sobriety tests supported that defendant did not have the normal use of her mental or physical faculties. Dalton v. State, 2006 Tex. App. LEXIS 9189 (Tex. App. Beaumont Oct. 25 2006).

282. Appellate court did not need to address whether a trial court abused its discretion in admitting a child sexual assault complainant's hearsay statements to her counselor through the medical records exception to the hearsay rule when, even if it did, any error was harmless because: (1) the complainant testified to the same facts that were the subject of her hearsay statements to the counselor; (2) there were eight witnesses other than the counselor who testified to some extent about the complainant's allegations; (3) the counselor was the second-to-last witness to testify for the State, and the hearsay statements that the counselor testified to were merely cumulative of the testimony that the jury had already heard; (4) the vast majority of the counselor's testimony was not hearsay; and (5) the State did not mention the counselor in its opening statement and only briefly mentioned the counselor's testimony in its closing argument, which suggested that his testimony was not an integral part of the State's case. Graham v. State, 2006 Tex. App. LEXIS 8063 (Tex. App. Austin Sept. 8 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview

283. Evidence was sufficient to show that defendant committed the offense of aggravated assault by intentionally, knowingly, or recklessly causing either bodily injury or serious bodily injury to his wife by choking or strangling her with his hand, and that he used his hand as a deadly weapon during the commission of the offense; physician, in a prior trial, had testified as to the extent of the wife's injuries; the wife's statements to a paramedic at the time of the incident were admissible under Tex. R. Evid. 803(4), and the wife was still suffering from the residual effects of the injuries, which included a stroke. Wesber v. State, 2004 Tex. App. LEXIS 3376 (Tex. App. Eastland Apr. 15 2004).

Criminal Law & Procedure : Habeas Corpus : Appeals : Certificate of Appealability

284. Trial court properly admitted a statement by a witness to police that defendant had shot a motorist; the statement was an exited utterance under Rule 803(2) of the Texas Rules of Criminal Evidence, and counsel was not ineffective under the Sixth Amendment for not opposing its admission. Rodriguez v. Quarterman, 204 Fed.

Appx. 489, 2006 U.S. App. LEXIS 28253 (5th Cir. Tex. 2006).

285. In federal habeas proceedings, a state prisoner did not make a substantial showing of the denial of his Sixth Amendment right to confrontation by the district court's admission of an accomplice's statement implicating the prisoner as the perpetrator of a murder as an excited utterance under Tex. R. Evid. 803 because the remarks were blurted out after the accomplice fled a routine traffic stop, was chased by police officers, and was apprehended while officers were inventorying weapons found in his vehicle. Rodriguez v. Quarterman, 2006 U.S. App. LEXIS 23173 (5th Cir. Tex. Sept. 11 2006).

286. Admission of an accomplice's statement and a prisoner's jail disciplinary records at trial did not violate the prisoner's Sixth and Fourteenth Amendment rights under Crawford because both pieces of evidence were admitted under the prevailing law at the time of the prisoner's trial. Rodriguez v. Quarterman, 2006 U.S. App. LEXIS 23173 (5th Cir. Tex. Sept. 11 2006).

Criminal Law & Procedure : Habeas Corpus : Cognizable Issues : Ineffective Assistance

287. Jail disciplinary records fell under the business record exception to the bar on hearsay statements under Rule 803(6) of the Texas Rules of Criminal Evidence. Rodriguez v. Quarterman, 204 Fed. Appx. 489, 2006 U.S. App. LEXIS 28253 (5th Cir. Tex. 2006).

Criminal Law & Procedure : Habeas Corpus : Review : Specific Claims : Evidentiary Errors

288. State inmate convicted of raping a woman at knifepoint was not entitled to habeas relief under 28 U.S.C.S. § 2254. A police officer's testimony about what the victim told him the day after the rape was admissible as an excited utterance under Tex. R. Evid. 803(2) because the victim was still very upset, crying, and traumatized at the time. Martin v. Thaler, 2009 U.S. Dist. LEXIS 103733 (W.D. Tex. Nov. 5 2009).

289. State inmate convicted of raping a woman at knifepoint was not entitled to habeas relief under 28 U.S.C.S. § 2254. A nurse's testimony about what the rape victim told her about the assault was admissible under Tex. R. Evid. 803(4) because the victim made the statements for the purpose of medical diagnosis or treatment. Martin v. Thaler, 2009 U.S. Dist. LEXIS 103733 (W.D. Tex. Nov. 5 2009).

Criminal Law & Procedure : Habeas Corpus : Review : Standards of Review : Contrary & Unreasonable Standard

290. District court denied a state inmate's petition under 28 U.S.C.S. § 2254, challenging his conviction and sentence for murder, because the inmate did not show he was denied effective assistance of counsel or that a state habeas court made findings that were contrary to clearly established federal law when it rejected the inmate's claims; although the inmate claimed that the trial court violated his Sixth Amendment right to confrontation when it admitted hearsay testimony, the district court found that the trial court properly admitted testimony under Tex. R. Evid. 803 as an excited utterance; even assuming arguendo that the trial court erred, the error was harmless in light of the other incriminating evidence the State introduced. Turnbow v. Quarterman, 2007 U.S. Dist. LEXIS 77098 (N.D. Tex. Oct. 17 2007).

Environmental Law : Hazardous Wastes & Toxic Substances : Cleanup

291. In the State's suit to recover costs incurred under Tex. Nat. Res. Code Ann. § 91.113(f) in cleaning up a company's abandoned salt water disposal facility, the trial court did not err by admitting the State's documentary evidence showing the amounts spent by the Railroad Commission to clean up the site as the documents were not

summaries prepared for trial, but documents prepared by and filed with the Commission reporting and compiling the amounts paid. Martin v. State, 2007 Tex. App. LEXIS 6167 (Tex. App. Austin Aug. 3 2007).

Evidence : General Overview

292. Trial court did not abuse its discretion in excluding a 12-year-old boy's translation of his deaf aunt's statement to him that she communicated through sign language as hearsay because defendant failed to establish the nephew's competency, proficiency, and reliability as a translator of sign language. Moland v. State, 2012 Tex. App. LEXIS 1062, 2012 WL 403885 (Tex. App. Houston 1st Dist. Feb. 9 2012).

Evidence : Authentication : General Overview

293. In defendant's theft case, a court properly admitted deposit slips from bank and credit card records under Tex. R. Evid. 803 because the records were authenticated with an affidavit executed by the custodian of records for each institution and properly admitted; Rule 803(6) clearly permitted the testimony of the custodian of records to be offered by affidavit. Garza v. State, 2012 Tex. App. LEXIS 7430, 2012 WL 6042579 (Tex. App. Corpus Christi Aug. 28 2012).

294. Summary judgment in favor of the customer was proper, because the bank failed to create a genuine issue of material fact as to whether a contract existed or whether the customer authorized the charges to the credit card account, when the bank's only summary judgment evidence was inadmissible; since the bank's affidavit neither named the affiant in the body of the affidavit or the jurat, and the affiant's signature was completely illegible, the bank's affidavit did not substantially comply with Tex. R. Evid. 902(10) and was insufficient to establish the business records exception to the hearsay rule under Tex. R. Evid. 803(6). Fia Card Services, N.A. v. Frausto, 2011 Tex. App. LEXIS 9924, 2011 WL 6260653 (Tex. App. Amarillo Dec. 15 2011).

295. Court did not abuse its discretion in failing to exclude the bank witness's affidavit and attachments, because the witness's testimony adequately demonstrated the basis for her personal knowledge of the manner in which the bank kept its records and the other facts to which she testified; Texas Rules of Evidence did not require that the qualified witness who provided the predicate for the admission of business records be their creator or have personal knowledge of the contents of the record, when the witness was required only to have personal knowledge of the manner in which the records were kept. Damron v. Citibank (s.D.) N.A., 2010 Tex. App. LEXIS 7054, 2010 WL 3377777 (Tex. App. Austin Aug. 25 2010).

296. In defendant's murder case, a court properly admitted evidence of the victim's handwritten letters because it was admissible as relating to the victim's state of mind, and the State authenticated the letters through the victim's daughter, who recognized the handwriting on the letters as being that of her mother. Stafford v. State, 248 S.W.3d 400, 2008 Tex. App. LEXIS 1280 (Tex. App. Beaumont 2008).

297. In the slaughterhouses' appeal of the trial court's issuance of a permanent injunction and award of expenses to the State, pursuant to Tex. Health & Safety Code Ann. § 433.099, the appellate court rejected the slaughterhouses' claim that the trial court erred by admitting the State's exhibits, which included handwritten compilation of expenses incurred by the State, because a Department of State Health Services representative testified that the exhibits were a record regularly kept in the course of business, that he was a custodian of the record, that it was the regular practice of the Department to keep such records, and that the records were made at or near the time of the occurrence by a person with knowledge or by a person furnished with such knowledge; therefore the State laid the necessary predicate for admission of the exhibits as properly authenticated business records. Qaddura v. State, 2006 Tex. App. LEXIS 9209 (Tex. App. Fort Worth Oct. 26 2006).

298. In a domestic violence case, the trial court did not err by admitting a 911 tape of a call from the victim as a business record; a 911 tape is admissible as a business record if properly authenticated, and the custodian testified that the tape was made in the ordinary course of business at the time of the event recorded. Warfel v. State, 2005 Tex. App. LEXIS 2922 (Tex. App. Amarillo Apr. 14 2005).

299. In a child sexual assault case, the admission of defendant's medical records under Tex. R. Evid. 803(6) was proper because the records were properly authenticated by their custodian in accordance with Tex. R. Evid. 902(10) as having been made and kept in the course of a regularly conducted business activity. Eslora v. State, 2005 Tex. App. LEXIS 2564 (Tex. App. San Antonio Apr. 6 2005).

300. In a defamation action, the Texas Rules of Evidence did not specify that the certification on the employee and the employer's exhibits contain an accurate date, and there was nothing in the record to indicate that the incorrect date stamp was the result of a fraudulent act; thus, it was not an abuse of discretion for the trial court to admit the exhibits under the public documents exception to the hearsay rule. Adi v. Prudential Prop. & Cas. Ins. Co., 2004 Tex. App. LEXIS 5937 (Tex. App. Houston 1st Dist. July 1 2004), writ of certiorari denied by 126 S. Ct. 565, 163 L. Ed. 2d 475, 2005 U.S. LEXIS 7988, 74 U.S.L.W. 3273 (U.S. 2005).

Evidence : Authentication : Self-Authentication

301. Probate court did not abuse its discretion in admitting the 1993 tax return into evidence because the certified public accountant's affidavit met the requirements of Tex. R. Evid. 803(6) and the affidavit and tax return were timely filed pursuant to Tex. R. Evid. 902(10). In the affidavit, the accountant affirmed that he was the custodian of records, that the 12 pages consisted of the 1993 1040 U.S. Individual Income Tax Return and the decedent's W-2, that the 12 pages were kept by him in the regular course of business, and that the records were made at or near the time or reasonably soon thereafter, and that the records were the original or exact duplicates of the original. Valdez v. Hollenbeck, 410 S.W.3d 1, 2013 Tex. App. LEXIS 4998 (Tex. App. San Antonio Apr. 24 2013).

302. Trial court did not abuse its discretion in admitting the mortgage company's evidence where the agent's affidavit complied with Tex. R. Evid. 902(10) by averring to facts that satisfied Tex. R. Evid. 803(6); the agent averred that she was providing the records as the custodian, that she had personal knowledge of the information contained in the records, that the records were made in the regular course of business, and that it was the regular practice of the business to keep such records. Khalilnia v. Fed. Home Loan Mortg. Corp., 2013 Tex. App. LEXIS 2991, 2013 WL 1183311 (Tex. App. Houston 1st Dist. Mar. 21 2013).

303. Insurance company documents were presented as business records pursuant to Tex. R. Evid. 803(6) and the cell phone documents were presented pursuant to Tex. R. Evid. 902 with the accompanying affidavit; because the documents were produced in the normal and regular course of business of the entity that kept the records, defendant was not denied his right of confrontation. Lozoya v. State, 2013 Tex. App. LEXIS 1973, 2013 WL 708489 (Tex. App. Amarillo Feb. 27 2013).

304. In a bank's forcible-detainer case against a property occupant, the bank's claim to a superior right to possess the property was not based on a business-records affidavit containing inadmissible hearsay where the affiant averred that she was both an employee and a custodian of records of the bank's law firm and that she had actual or constructive care, custody, and control of the attached records relating to the bank's forcible-detainer proceeding against the occupant, and where she stated that the records were made in the regular course of the law firm's business by someone with personal knowledge and that it was the regular course of business to keep such records. Kaldis v. U.S. Bank Nat'l Ass'n, 2012 Tex. App. LEXIS 6609, 2012 WL 3229135 (Tex. App. Houston 14th Dist. Aug. 9 2012).

305. There was no error under Tex. R. Evid. 803(10), 902 in excluding a letter from the United States Department of Transportation showing that defendant had never held an airplane pilot's certificate because the document was a copy of a letter that, though written on letterhead, was not under seal or certified. Teczar v. State, 2011 Tex. App. LEXIS 2919, 2011 WL 1743756 (Tex. App. Eastland Apr. 15 2011).

306. In a personal injury case, the court properly excluded appellant's "business records" because they were repetitive and likely to confuse the jury, it was cumulative of other evidence, and appellant's handwritten notes and figures were abstract, indecipherable, were confusing, and were unlikely to help the jury with the calculation of appellant's lost earnings. Griffin v. Carson, 2009 Tex. App. LEXIS 3843, 2009 WL 1493467 (Tex. App. Houston 1st Dist. May 28 2009).

307. Counsel was not ineffective for failing to object to the admission of the judgment for defendant's conviction of boating while intoxicated because the supervisor's testimony that the judgment bore a seal purporting to be that of the county district clerk would have satisfied the requirements of Tex. R. Evid. 902. In addition, as evidence of a finalized judgment of conviction, counsel could not have brought forth a sustainable objection based on hearsay. Reese v. State, 273 S.W.3d 344, 2008 Tex. App. LEXIS 8518 (Tex. App. Texarkana 2008).

308. In a case involving unpaid credit card debt, business records showing a debtor's liability were properly admitted under Tex. R. Evid. 803(6) because an authenticating affiant did not have to be a custodian of records to qualify under Tex. R. Evid. 902(10); therefore, a designated agent was able to satisfy this standard. Moreover, the agent's affidavit tracked the model language of a self-authenticating affidavit, the affidavit was not conclusory, and an objection regarding personal knowledge was not raised at trial. McElroy v. Unifund CCR Partners, 2008 Tex. App. LEXIS 7170 (Tex. App. Houston 14th Dist. Aug. 26, 2008).

309. Documents could not be admitted as public records under Tex. R. Evid. 803(8) in a receivership proceeding without certification pursuant to Tex. R. Evid. 902(4) or extrinsic evidence of authenticity under Tex. R. Evid. 901(a), (b)(7). Benefield v. State ex rel. Alvin Cmty. Health Endeavor, Inc., 266 S.W.3d 25, 2008 Tex. App. LEXIS 6152 (Tex. App. Houston 1st Dist. 2008).

310. In a breach of contract action, the summary judgment evidence offered by a creditor was admissible; a record of the monthly payments qualified under Tex. R. Evid. 803(6) as a business record, and the affidavit of the creditor's employee substantially complied with Tex. R. Evid. 902(10)(b). Capers v. Citibank (South Dakota), N.A., 2006 Tex. App. LEXIS 9175 (Tex. App. Dallas Oct. 25 2006).

311. Where a drilling company sued an operating company to collect for services in attempting re-entry of an abandoned oil and gas well, as the custodian of records and the president of the drilling company, the president was qualified to testify regarding the invoice and the daily time sheets without an affidavit complying with Tex. R. Evid. 902(10); moreover, those exhibits were admissible under Tex. R. Evid. 803(6), the business records exception, and the trial court did not abuse its discretion in admitting the invoice or the daily time sheets into evidence. Integras Operating, L.L.C. v. Re-Entry People, Inc., 2004 Tex. App. LEXIS 2461 (Tex. App. Eastland Mar. 18 2004).

312. Assault victim's medical records were admissible as business records under Tex. R. Evid. 803(6) because the affidavit of the custodian of hospital records stated that the records were kept in the regular course of the hospital's business, that the hospital was the custodian's employer, that the victim's medical records were made by a hospital employee with knowledge of the events, and that the employee made the records at or near the time of the event. Thus, the affidavit satisfied both Rule 803(6) and Tex. R. Evid. 902(10)(b), including the notice provision of Rule 902(10). Reyes v. State, 48 S.W.3d 917, 2001 Tex. App. LEXIS 3983 (Tex. App. Fort Worth 2001).

Evidence : Authentication : Chain of Custody

313. Trial court had the discretion to determine the sufficiency of the evidentiary predicate for the physical evidence submission form because the offense report served only to buttress the chain of custody of items of physical evidence used to establish the identity of the victims. Defendant did not contend the evidence was tampered with and the identity of one of the victims was corroborated by other evidence. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

314. Information contained on chain-of-evidence forms involved routine information that did not involve any subjective interpretation or analysis by the police personnel and were properly admitted on that basis. Ash v. State, 2006 Tex. App. LEXIS 1315 (Tex. App. El Paso Feb. 16 2006).

Evidence : Demonstrative Evidence : General Overview

315. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court did not err in refusing to admit the complainant's handwritten statement as impeachment evidence since defendant claimed the document was admissible because it contained statements against interest; however, he did not make this complaint at trial, so the appellate court would not consider it on review. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

Evidence : Demonstrative Evidence : Admissibility

316. As initially offered by the State, a chart regarding intoxication was demonstrative evidence used as a visual aid and the information regarding defendant was entered onto the chart as the officer testified and so was not an out of court statement offered to prove the truth of the matter asserted. The chart was therefore not inadmissible simply because it contained the same information used in the inadmissible police report. Baker v. State, 177 S.W.3d 113, 2005 Tex. App. LEXIS 662 (Tex. App. Houston 1st Dist. 2005).

317. In a criminal trial for the offense of aggravated assault with a deadly weapon, the court was permitted to exclude a videotape of the scene where victim died while certain portions of the videotape contained testimony falling within the hearsay exception for excited utterances under Tex. R. Evid. 803(2), and other portions contained hearsay falling within no recognized exception. Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

Evidence : Demonstrative Evidence : Photographs

318. Trial court did not abuse its discretion in admitting autopsy photographs because the photographs were admissible under Tex. R. Evid. 803(6) as part of the business record of the autopsy report as the assistant medical examiner, who was the custodian of the office's records, testified that autopsy reports were made at or near the time that the autopsy was conducted by the medical examiner who conducted the autopsy; the records were kept in the regular course of the office's business; and he recognized the three photographs offered by the State as photographs from the murder victim's autopsy Delacerda v. State, 425 S.W.3d 367, 2011 Tex. App. LEXIS 5558 (Tex. App. Houston 1st Dist. July 21 2011).

Evidence : Demonstrative Evidence : Recordings

319. Recorded admissions that defendant made in phone calls from jail were properly identified under Tex. R. Evid. 901 because in addition to the information provided by the recordings, a ranger testified that the exhibits were of recorded jailhouse conversations obtained from jail personnel and identified most of the voices on the recordings;

the jury also heard defendant's live testimony. Capps v. State, 244 S.W.3d 520, 2007 Tex. App. LEXIS 9602 (Tex. App. Fort Worth 2007), (Tex. App. -- Fort Worth, pet. ref'd).

Evidence : Documentary Evidence : Affidavits

320. Employee's letter accompanying cell tower records was sufficient to authenticate the records, even if it did not meet the requirements of an affidavit, because it met the requirements of an unsworn declaration; the letter contained all of the declarations required to establish that the records were prepared through regularly conducted activities and was signed under penalty of perjury. Dominguez v. State, 441 S.W.3d 652, 2014 Tex. App. LEXIS 6190, 2014 WL 2582975 (Tex. App. Houston 1st Dist. June 10 2014).

321. In a forcible detainer action, a business records affidavit that authenticated the notice to vacate was not inadmissible hearsay under Tex. R. Evid. 801(d) because it substantially complied with the requirements of Tex. R. Evid. 803(6), 902(10), although it did not precisely track the language of Rule 902(10). Although the affidavit was prepared by a third party, the foreclosure purchaser's law firm, the trial court could have concluded that the purchaser reasonably relied on the accuracy of the records in the ordinary course of its business and that they were trustworthy. Baty v. Morequity, Inc., 2012 Tex. App. LEXIS 9876 (Tex. App. Houston 1st Dist. Nov. 29 2012).

322. In a will contest, the trial court erred by granting summary judgment on the issue of testamentary capacity because testimony from witnesses that decedent was not in a state of mind to conduct financial affairs when he signed his will was sufficient to show the existence of a material fact issue with respect to testamentary capacity. The appellate court did not consider the medical records attached to the motions for summary judgment, because they were not proven up with a medical record's affidavit in accordance with Tex. R. Evid. 803(6). In re Estate of O'Neil, 2012 Tex. App. LEXIS 7376, 2012 WL 3776490 (Tex. App. San Antonio Aug. 31 2012).

323. In a breach of contract action brought by appellee, the assignee of a credit card company, against an account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent sufficiently showed that appellee incorporated the credit card company's records and kept them in the regular course of its business. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

324. In a breach of contract action brought by appellee, the assignee of a credit card company, against appellant account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent showed that the agent had personal knowledge of appellant's file, that she was appellee's designated agent for those records, and that appellant's account remained unpaid in the amount stated in the affidavit. Thus, the evidence demonstrated that appellee reasonably relied upon the accuracy of the contents of the documents that it received from the credit card company. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

Evidence : Hearsay : General Overview

325. Assuming that the trial court erred by admitting as evidence a mediator's report to the trial court in which the mediator indicated that the case had been settled on the ground that it was inadmissible hearsay, the error was harmless because there was other evidence that the parties had reached a settlement agreement, including testimony that the deletion of the parties' brother's name had been discussed early in the negotiations and that the deletion was pointed out to all parties before the conclusion of the mediation. Mcdonald v. Fox, 2012 Tex. App. LEXIS 9518, 2012 WL 5591795 (Tex. App. Corpus Christi Nov. 15 2012).

326. In an aggravated sexual assault case, a court's decision to exclude evidence as hearsay was proper because the out of court statement made by defendant in the presence of the officers that the victim had lost her clothing in a game of cards did not possess the requisite level of reliability so as to remove it from the realm of contrivance and fabrication. The trial court could have reasonably concluded that, because the applicability of the excited utterance exception required it to first accept defendant's version of events as true, the statement was not sufficiently reliable to qualify as a hearsay exception. Langford v. State, 2010 Tex. App. LEXIS 567, 2010 WL 323081 (Tex. App. Austin Jan. 27 2010).

327. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

328. In a sexual abuse case, error, if any, in allowing hearsay testimony regarding defendant's sexual assault of the child victim's younger sister was harmless because defendant did not challenge other testimony containing the same facts, but of a significantly more descriptive and incriminating nature. Vivid testimony specifically setting forth the nature of defendant's "touching" of the sister was not challenged. Murphy v. State, 2009 Tex. App. LEXIS 6226, 2009 WL 2450990 (Tex. App. Tyler Aug. 12 2009).

329. In defendant's driving while intoxicated case, although the admission of the trooper's inventory report was error because the inventory report on defendant's pickup was done by the arresting officer, directly implicating Tex. R. Evid. 803(8)(B)'s concern with the adversarial nature of the process and was done at the scene by the arresting officer, the admission of that evidence was harmless. Whether defendant had beer in his pickup was not hotly contested and was proven by other properly admitted evidence. Russell v. State, 290 S.W.3d 387, 2009 Tex. App. LEXIS 3317 (Tex. App. Beaumont May 13 2009).

330. In defendant's aggravated sexual assault of a child case, the trial court did not err when it overruled his objection and admitted into evidence the complete video recording of the child's forensic interview because defendant conceded that the accusations made by the child and specific details provided by her during the video recording of her forensic interview were consistent with her trial testimony. Even if the trial court erred when it admitted the video recording, the error was harmless because the same facts were proved by the child's properly admitted testimony. Estrada v. State, 2009 Tex. App. LEXIS 387, 2009 WL 144327 (Tex. App. Dallas Jan. 22 2009).

331. Any error in admitting a sexual assault nurse examiner's testimony, over defendant's hearsay objection, about a study conducted by another person explaining why a child victim of a sexual assault would not show evidence of trauma to her private parts was harmless given the overwhelming evidence of defendant's guilt that was introduced at trial. Garza v. State, 2007 Tex. App. LEXIS 7194 (Tex. App. Corpus Christi Aug. 28 2007).

332. Defendant preserved for appellate review his claim that the trial court erred by admitting the victim's counselor's hearsay testimony because at trial, defendant objected to the counselor's testimony on the ground that

it would constitute hearsay; he asserted his objection in a timely manner and with sufficient specificity to make the trial court aware of his complaint. Taylor v. State, 263 S.W.3d 304, 2007 Tex. App. LEXIS 6198 (Tex. App. Houston 1st Dist. 2007).

333. Even if the trial court erred by admitting an officer's testimony that witnesses had told him that the assailant was wearing a tan jacket, the error was harmless because its admission had no effect on the jury's verdict. Two witnesses knew defendant prior to witnessing his struggle with the victim, one witness gave an officer directions to defendant's home, and although two officers noticed a tan jacket on the hood of a car in the driveway of defendant's home, another officer found defendant inside a shed in the back of the house. Matez v. State, 2007 Tex. App. LEXIS 4418 (Tex. App. Corpus Christi June 7 2007).

334. Trial court properly excluded a deposition because it had been taken in another lawsuit and, although appellant's opinion at the time would have been within the exception to the hearsay rule provided by Tex. R. Evid. 803(3), the deposition's contents were inadmissible hearsay because the statements contained within it pertained to the other party's statements and state of mind rather than to appellant's. Trantham v. Isaacks, 218 S.W.3d 750, 2007 Tex. App. LEXIS 501 (Tex. App. Fort Worth 2007), *cert. denied*, 552 U.S. 892, 128 S. Ct. 340, 169 L. Ed. 2d 155, 2007 U.S. LEXIS 10018 (2007).

335. Officer testified as to statements of defendant's wife and stepdaughter, the complainants, made in an alleged family violence situation; however, the admission of the hearsay statements did not violate the Confrontation Clause because both complainants testified; even if the State called the complainants to testify so that otherwise inadmissible prior inconsistent statements could be admitted, there was no harm committed. Villarreal v. State, 2006 Tex. App. LEXIS 6304 (Tex. App. Austin July 21 2006).

336. Defendant's conviction for assault causing bodily injury to a family member was appropriate because a reasonable person could have concluded that the victim made the statement at issue to the officer upon his arrival at the scene while under the excitement, fear, or pain of the event at the time she made the statement. Smith v. State, 2006 Tex. App. LEXIS 5173 (Tex. App. Fort Worth June 15 2006).

337. Merely because a declarant is excited, the statements made do not lose their character as testimonial statements subject to the Confrontation Clause. Davis v. State, 169 S.W.3d 660, 2005 Tex. App. LEXIS 3773 (Tex. App. Austin 2005).

338. In a fraud and negligence action, a client was not permitted to raise the issues of authenticity and hearsay on appeal from the grant of summary judgment based on the admission of an employment contract because the client did not obtain a ruling on the objections from the trial court. Yazdchi v. Am. Arbitration Ass'n, 2005 Tex. App. LEXIS 1320 (Tex. App. Houston 1st Dist. Feb. 17 2005).

Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence

339. In defendant's motion for a new trial, the court properly excluded four letters written by a witness who testified at trial because the letters did not tend to expose the witness to criminal liability, and even if they did, there was no corroborating evidence to clearly indicate the trustworthiness of the statement. In both letters, the witness expresses his anger at defendant, but the witness did not say, however, that he lied when he testified for the State. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

Evidence : Hearsay : Exceptions : General Overview

340. In a criminal trial, defendant's testimony about the victim's statement that she was going to injure herself to support the assault charge and then hit herself in the face was not hearsay because it was offered to describe one person's observations about how another person acted. Corbin v. State, 2013 Tex. App. LEXIS 15300, 2013 WL 7083195 (Tex. App. Eastland Dec. 19 2013).

341. In a case involving a repossession of a vehicle by a creditor, a debtor's claim that a trial court erred by failing to admit exhibits on hearsay grounds was inadequately briefed where the debtor did not explain whether the exhibits were not hearsay or whether they were hearsay, but nevertheless should have been admitted under some exception to the hearsay rule. Flores v. James Wood Fin. Llc, 2013 Tex. App. LEXIS 7488 (Tex. App. Fort Worth June 20 2013).

342. Any error in the admission of the testimony was harmless because the same or similar evidence was admitted at another point in the trial without objection. Nelson v. State, 405 S.W.3d 113, 2013 Tex. App. LEXIS 377, 2013 WL 174502 (Tex. App. Houston 1st Dist. Jan. 17 2013).

343. Documents that comply with the specified categories of Tex. R. Evid. 803 are admissible without regard to whether the declarant is available to testify. Infante v. State, 404 S.W.3d 656, 2012 Tex. App. LEXIS 10800, 2012 WL 6754834 (Tex. App. Houston 1st Dist. Dec. 28 2012).

344. Witness had no personal knowledge about the value of wheels and repeated only what an automobile dealer told him, such that the witness's testimony was hearsay under Tex. R. Evid. 801(d), and this was inadmissible unless an exception to the rule applied. Calixto v. State, 2012 Tex. App. LEXIS 2643, 2012 WL 1138726 (Tex. App. Dallas Apr. 4 2012).

345. Appellant argued that the trial court erred in admitting an exhibit of a recorded conversation between appellant and his wife, but prior to the State's offer of the exhibit, the jury heard testimony that appellant gave authorization for the murder and that appellant's wife told a witness to relay a message in this regard, all without objection by appellant; whether or not the evidence was admissible as an exception to the hearsay rule was irrelevant and error in the admission of evidence was harmless as the same evidence was admitted without objection. Gonzales v. State, 2011 Tex. App. LEXIS 9231, 2011 WL 5843686 (Tex. App. Corpus Christi Nov. 22 2011).

346. Because the trial court admitted a pen packet without requesting that the State provide a basis for its admissibility, the State was not required to voice an exception to the hearsay rule. Price v. State, 2011 Tex. App. LEXIS 2020, 2011 WL 946978 (Tex. App. Fort Worth Mar. 17 2011).

347. Court recognized that one resident testified that an insurance representative informed him that the fire was caused by the homeowner's cigarette, but the court did not consider this testimony to create more than a scintilla of evidence as to this issue because the homeowners objected to the testimony as hearsay and the residents did not allege any applicable hearsay exception, plus the insurance documents provided no support for the representative's alleged statement, and the residents' own expert testified that a claims adjuster was not qualified to determine the cause of a fire. Hemenas v. Caston, 2010 Tex. App. LEXIS 1023, 2010 WL 521116 (Tex. App. Austin Feb. 11 2010).

348. Defendant made several objections to the contents of a written statement, but he did not object that the State had failed to lay the proper predicate under Tex. R. Evid. 803(5), such that the argument was waived under Tex. R. App. P. 33.1(a)(1). Woods v. State, 2009 Tex. App. LEXIS 8749 (Tex. App. El Paso Nov. 12 2009).

349. Court did not address the hearsay objection under Tex. R. Evid. 801 as to certain exhibits because they were not relevant under Tex. R. Evid. 401 to the resolution of the issues before the court, even if they fell under a hearsay exception; another exhibit contained an affidavit from an attorney in another case and contained the same information found in that case and had no bearing on the issues before the court. Southtex 66 Pipeline Co. v. Spoor, 238 S.W.3d 538, 2007 Tex. App. LEXIS 8352, 168 Oil & Gas Rep. 68 (Tex. App. Houston 14th Dist. 2007).

350. Defendant claimed that the trial court's evidentiary rulings effectively prevented her from presenting her defense to capital murder, that the child victim's parents were the perpetrators of the crime, and the court analyzed the evidence to determine if the trial court's evidentiary rulings were clearly erroneous; the court found that (1) absent evidence that the children became involved in the physical disputes the parents previously had, the court was unable to hold that the trial court abused its discretion in excluding this evidence, and in any event, defendant did not raise her due process argument in this regard to the trial court, such that two related subpoints were not properly before the court, (2) certain excluded evidence did not add much, if anything, to the defense and did not prevent defendant from putting on a defense, such that defendant's due process rights were not violated, and (3) another witness statement was hearsay and did not meet any exceptions, and the exclusion of the statement in question did not prevent defendant from putting on a defense, and no indicia of reliability existed concerning the witness's statement, and defendant did not call this witness to testify. Stevens v. State, 234 S.W.3d 748, 2007 Tex. App. LEXIS 6845 (Tex. App. Fort Worth 2007).

351. Testimony was objected to as hearsay under Tex. R. Evid. 801 and the trial court properly sustained the objection, and as such, it was not considered in the court's analysis; the statement was one made out of court and was inadmissible for purposes of Tex. R. Evid. 802, and no hearsay exception applied to render the statement admissible. Mark III Sys. v. Sysco Corp., 2007 Tex. App. LEXIS 1339 (Tex. App. Houston 1st Dist. Feb. 22 2007).

352. Defendant's arguments under Tex. R. Evid. 803 were inadequately briefed under Tex. R. App. P. 38.1(h) and defendant waived appellate review of the issue. Dixon v. State, 2006 Tex. App. LEXIS 7953 (Tex. App. Houston 14th Dist. Sept. 5 2006).

353. In a murder case, testimony regarding statements made by defendant's accomplice satisfied the statement against interest exception to the hearsay rule under Tex. R. Evid. 803(24) because there was independent corroborative evidence, which included autopsy evidence, testimony from other witnesses, and defendant's own statements. Williams v. State, 2005 Tex. App. LEXIS 5351 (Tex. App. Houston 14th Dist. July 12 2005).

354. In a drug case, the trial court did not err in allowing the arresting officer to testify about statements made by an undercover officer; although defendant made a hearsay objection before the testimony was given, defendant did not renew his objection when the hearsay statement exceeded the present-sense-impression exception of Tex. R. Evid. 803(1). Johnson v. State, 2005 Tex. App. LEXIS 4286 (Tex. App. Houston 1st Dist. June 2 2005).

355. In a murder case, because the trial court did not rule on whether statements as to which a witness had asserted the self-incrimination privilege were incriminating, they were not admissible under Tex. R. Evid. 803(24) through an investigator's testimony as statements against interest. Boler v. State, 177 S.W.3d 366, 2005 Tex. App. LEXIS 2719 (Tex. App. Houston 1st Dist. 2005).

356. In a murder case, the trial court did not err in ruling that an article taken from an Internet medical journal was a treatise and, under Tex. Evid. R. 803(18), was not admissible as an exhibit; because cross-examination as to the article was permitted, there was no violation of the constitutional right of confrontation. Sanchez v. State, 2004 Tex. App. LEXIS 3783 (Tex. App. Corpus Christi Apr. 29 2004).

Evidence : Hearsay : Exceptions : Ancient Documents

357. Where petitioner state death row inmate argued trial counsel was ineffective for admitting into evidence at the penalty phase psychiatric reports which were 22 and 25 years old which suggested the inmate was a future danger, each of those exhibits that trial counsel introduced satisfied an exception to the hearsay rule under Tex. R. Evid. 803 and thus met the requirements of the Confrontation Clause. Coble v. Quarterman, 496 F.3d 430, 2007 U.S. App. LEXIS 19327 (5th Cir. Tex. 2007).

358. Appellees offered a certified copy of the deed recorded for over 60 years, the record supported appellees' ancient documents theory of admissibility under Tex. R. Evid. 803(16), and the descendants pointed to nothing suspicious in the deed's appearance; the court noted that the justification for the exception was in part indicia of trustworthiness, and fair appearance and proper location were sufficient to justify admissibility of an ancient document, and the rules require no further showing of trustworthiness. Walton v. Watchtower Bible & Tract Soc'y of Pa., 2007 Tex. App. LEXIS 180 (Tex. App. Waco Jan. 10 2007).

359. Where petitioner death row inmate argued ineffective assistance of counsel because counsel, during the penalty phase, sought and obtained admission of a psychiatric report on the inmate prepared by a doctor years earlier when the inmate was 15 years old, and that the report suggested the inmate was a future danger, the report was not hearsay admitted in violation of the Confrontation Clause of the Sixth Amendment because the report was admissible under Tex. R. Evid. 803(4), (6), (16), and further, the inmate's statements in the report as to his criminal activity did not violate the Fifth Amendment because the psychiatric consultation was not a custodial interrogation; the ineffective assistance of counsel claim failed. Coble v. Dretke, 417 F.3d 508, 2005 U.S. App. LEXIS 14438 (5th Cir. Tex. 2005), opinion withdrawn by, substituted opinion at 444 F.3d 345, 2006 U.S. App. LEXIS 7171 (5th Cir. Tex. 2006).

Evidence : Hearsay : Exceptions : Business Records : General Overview

360. In an electrical supplier's collection action against a contractor and others, arising from unpaid items, the trial court did not abuse its discretion in excluding certain business invoices because there was wavering testimony and conflicting information, such that it deemed them untrustworthy. Border States Elec. Supply of Tex., Inc. v. Coast to Coast Elec., LLC, 2014 Tex. App. LEXIS 5681, 2014 WL 3953961 (Tex. App. Corpus Christi May 29 2014).

361. Trustworthiness of the document is not a consideration when determining whether a document has been properly authenticated; instead, it is a consideration when trying to admit a business record under the business-records exception to the hearsay rule, and authenticity of a document and admissibility of that document under an exception to the hearsay rule are separate inquiries, and the companies in this case did not claim the documents were inadmissible hearsay. H2o Solutions, Ltd. v. Pm Realty Group, Lp, 438 S.W.3d 606, 2014 Tex. App. LEXIS 1665, 2014 WL 576262 (Tex. App. Houston 1st Dist. Feb. 13 2014).

362. Defendant's conviction for conspiracy to manufacture methamphetamine in a quantity between one and four grams was appropriate because there was no error in admitting the report of defendant's pseudoephedrine purchases. The affidavit said that such employee or representative had knowledge of the events, acts, conditions, or results depicted in the records and that the events chronicled in the records occurred at or near the time the records were made; The affidavit was therefore sufficient and was evidence of matters contained in the records. Burris v. State, 2014 Tex. App. LEXIS 1513, 2014 WL 576209 (Tex. App. Texarkana Feb. 12 2014).

363. Trial court did not err in admitting original loan documents as a mortgagee's records under the business record exception to the hearsay rule, Tex. R. Evid. 803(6), because the mortgagee presented evidence that satisfied the three-factor test for the admission of business records. Roper v. Citimortgage, Inc., 2013 Tex. App.

LEXIS 14518, 2013 WL 6465637 (Tex. App. Austin Nov. 27 2013).

364. There was no abuse of discretion if the trial court found that an exhibit was not hearsay under the business record exception, as the data for the report was entered at or near the time each transaction occurred, the record was kept in the regular course of business, and the borrower, who relied on the exhibit as a record of his transactions, testified regarding the details of his business. Bank of Am., N.A. v. Barth, 2013 Tex. App. LEXIS 12871, 2013 WL 5676024 (Tex. App. Corpus Christi Oct. 17 2013).

365. During defendant's trial for aggravated sexual assault of her two-year-old daughter, the court did not err in admitting medical records relating to the victim's hospital visit for an examination because such records were admissible under the business record exception to the hearsay rule, Tex. R. Evid. 803(6). Mitchell v. State, 2013 Tex. App. LEXIS 8806 (Tex. App. Dallas July 16 2013).

366. During petitioner's trial for forging the will of a deceased client, testimony by the client's sister was inadmissible hearsay by implication; by testifying that casino records, which were inadmissible without meeting the strictures of Tex. R. Evid. 803(6), confirmed her recollection that she and her brother were gambling on a particular weekend, she implicitly testified to the contents of the records. Ex Parte Skelton, 2013 Tex. App. LEXIS 8368, 2013 WL 3455583 (Tex. App. San Antonio July 10 2013).

367. Although the liaison officer did not have personal knowledge of all entries in appellant's community supervision file, she maintained custody of the file as a normal course of her business activities, and the entries were made by people with knowledge of the events described, at or near the time of the events, and thus the State laid the proper predicate for admission of the file as a business record under Tex. R. Evid. 803(6). Mena v. State, 2013 Tex. App. LEXIS 7634 (Tex. App. Houston 14th Dist. June 25 2013).

368. In a prosecution of defendant for failure to comply with sex offender registration requirements, the trial court did not err by overruling defendant's hearsay objection to the admission of a halfway house's logs and a letter a case-management supervisor sent to the police department informing it that defendant had left the halfway house. Both the logs and the letter were admissible under the business records exception. Ostrander v. State, 2013 Tex. App. LEXIS 7618 (Tex. App. Fort Worth June 20 2013).

369. Competitor and employee did not explain how business records were based on illegal or improper accounting methods or why such would have rendered them inadmissible, and thus the trial court did not abuse its discretion by overruling the objection. Hht Ltd. v. Nationwide Recovery Sys., 2013 Tex. App. LEXIS 6717 (Tex. App. Dallas May 31 2013).

370. Exhibit should not have been excluded on the basis of the hearsay objection, because the business records affidavit made by the custodian of records precisely tracked the requirements in Tex. R. Evid. 902(10). Cabot Oil & Gas Corp. v. Healey, L.P., 2013 Tex. App. LEXIS 3934 (Tex. App. Tyler Mar. 28 2013).

371. Trial court did not err in admitting breathalyzer maintenance records during defendant's trial for DWI because they were admissible under Tex. R. Evid. 803(6) as business records; they fell under the category of documents prepared in the regular course of equipment maintenance. Boutang v. State, 402 S.W.3d 782, 2013 Tex. App. LEXIS 1851 (Tex. App. San Antonio Feb. 27 2013).

372. Challenged portions of certain affidavits referred to the sale of the debtor's account to the company, which was a fact that was absent from the remaining unchallenged records; without that nexus, the statements were not admissible because they were independent evidence used to establish account ownership, which was a material

fact to the issues being tried, and thus the court's holding that these affidavits did not fall under the business record exception was not inconsistent with the court's holding in other case law. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

373. Business record affidavit had 21 pages of documents attached, including certain affidavits, and although they were notarized and therefore self-authenticating, they could still be inadmissible if they were hearsay. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

374. Affidavit was offered as a business record, but it was prepared for the purpose of litigation, and the court adhered to the established rule and held that the document was not admissible under the business records exception. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

375. Circumstances indicated that either the date on an affidavit was wrong, or another affidavit concerned a different account than the debtor's, and whichever was true, the circumstances surrounding the latter affidavit did not indicate trustworthiness, and it did not fall within the business records exception. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

376. Without the challenged paragraphs, there would have been insufficient evidence to prove the assignment of the debtor's account to the company and therefore insufficient evidence upon which a judgment could have been rendered in the company's favor; the affidavits in question did not fall under the business records exception, and thus the judgment turned on improperly admitted evidence, to which a hearsay objection should have been sustained, and the court reversed. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

377. Dates of affidavits in this case were highly relevant and indicated untrusthworthiness, and thus the affidavits did not fall under the business records exception and the court's holding in another case was not inconsistent with this case. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

378. In case law, the court held that a doctor's letter submitted to an attorney during litigation was not a routine entry in the patient's medical history and was inadmissible under the business record exception, but this was not relevant to the issue in this case, where a witness who was at trial also submitted a document that detailed when she worked in corroboration of her testimony. Ryland Enter. v. Weatherspoon, 2012 Tex. App. LEXIS 10794, 2012 WL 6754966 (Tex. App. Houston 1st Dist. Dec. 28 2012).

379. Even assuming witness testimony as to the radio's serial number was hearsay, the serial number was documented in other evidence that was admitted at trial, including business records containing the number, and although the witness did not personally obtain the number, his testimony connected the records to the radio through his personal knowledge of and involvement in the investigation; in the absence of a challenge to the sufficiency of the business records affidavit, the court could not find that the trial court abused its discretion in admitting the business records that contained the serial number over appellant's hearsay objection. Infante v. State, 404 S.W.3d 656, 2012 Tex. App. LEXIS 10800, 2012 WL 6754834 (Tex. App. Houston 1st Dist. Dec. 28 2012).

380. Although appellant objected that a witness lacked personal knowledge of the serial number of a radio, Tex. R. Evid. 803(6) did not require that the one authenticating the record be the creator thereof or have personal knowledge, and the affiant swore to such knowledge and this was not contested. Infante v. State, 404 S.W.3d 656,

2012 Tex. App. LEXIS 10800, 2012 WL 6754834 (Tex. App. Houston 1st Dist. Dec. 28 2012).

381. As the trial court did not abuse its discretion in admitting business records containing a radio's serial number, testimony as to that number was duplicative of evidence that was properly admitted, and even assuming the testimony was inadmissible hearsay, any error did not harm appellant; as there was no harm, the court could not reverse the judgment on this basis even if the testimony was inadmissible hearsay. Infante v. State, 404 S.W.3d 656, 2012 Tex. App. LEXIS 10800, 2012 WL 6754834 (Tex. App. Houston 1st Dist. Dec. 28 2012).

382. Even though the trial court abused its discretion by admitting two exhibits containing reports of hair follicle drug tests of appellants under the business records exception to the hearsay rule, as there was insufficient indicia of trustworthiness or reliability, the error was harmless because other evidence that two children and the mother's boyfriend tested positive for cocaine was admitted without objection, and termination of the mother's parental rights did not turn on the admission of the second and third sets of positive drug test results. In the Interest of S.S., 2012 Tex. App. LEXIS 9946, 2012 WL 5991391 (Tex. App. Tyler Nov. 30 2012).

383. In defendant's theft case, a court properly admitted deposit slips from bank and credit card records under Tex. R. Evid. 803 because the records were authenticated with an affidavit executed by the custodian of records for each institution and properly admitted; Rule 803(6) clearly permitted the testimony of the custodian of records to be offered by affidavit. Garza v. State, 2012 Tex. App. LEXIS 7430, 2012 WL 6042579 (Tex. App. Corpus Christi Aug. 28 2012).

384. In a bank's forcible-detainer case against a property occupant, the bank's claim to a superior right to possess the property was not based on a business-records affidavit containing inadmissible hearsay where the affiant averred that she was both an employee and a custodian of records of the bank's law firm and that she had actual or constructive care, custody, and control of the attached records relating to the bank's forcible-detainer proceeding against the occupant, and where she stated that the records were made in the regular course of the law firm's business by someone with personal knowledge and that it was the regular course of business to keep such records. Kaldis v. U.S. Bank Nat'l Ass'n, 2012 Tex. App. LEXIS 6609, 2012 WL 3229135 (Tex. App. Houston 14th Dist. Aug. 9 2012).

385. Trial court did not abuse its discretion in determining that the letter from the physician was not admissible under the business records exception, Tex. R. Evid. 803(6), as it contained opinions from her physician on whether the spinal conditions were compensable injuries. Hazelip v. Am. Cas. Co., 2012 Tex. App. LEXIS 5142, 2012 WL 2453716 (Tex. App. Houston 1st Dist. June 28 2012).

386. From the testimony of a community supervision officer, the chronology of events in the probation department records were proven up to be those of regularly conducted activity and thus fell under Tex. R. Evid. 803(6), an exception to the hearsay rule. Bluntzer v. State, 2012 Tex. App. LEXIS 4455, 2012 WL 2005677 (Tex. App. Amarillo June 5 2012).

387. By probation department records admitted under Tex. R. Evid. 803(6), the State offered evidence of appellant's failure to abide by various conditions of his community supervision; even if the trial court erred in admitting the chronology of events, the State proved certain condition violations via certain testimony and other records, and proof of only one violation was sufficient, such that the court affirmed the revocation of appellant's community supervision. Bluntzer v. State, 2012 Tex. App. LEXIS 4455, 2012 WL 2005677 (Tex. App. Amarillo June 5 2012).

388. In a breach of contract case, a trial court erred by refusing to admit a creditor's business records into evidence because a witness testified that she was personally acquainted with the facts in an affidavit, that she was

the custodian of the records, and that she was familiar with how they were prepared and maintained; it did not matter that the creditor, as the purchaser of the account, was not the original author of the documents. The records were trustworthy because creator of the documents had to keep careful records of credit card accounts, otherwise it could have faced civil or criminal penalties, and the error probably caused the rendition of an improper judgment since the creditor was preventing from presenting its case against a debtor. Dodeka, L.C.C. v. Campos, 377 S.W.3d 726, 2012 Tex. App. LEXIS 3435 (Tex. App. San Antonio May 2 2012).

389. Court addressed the admissibility of a business records affidavit first, instead of considering a standing issue the court would ordinarily consider first, given that the issues in the case turned on the admissibility of the affidavit because it established a debt-holder's assignee's standing and provided sufficient evidence to support the verdict in the assignee's favor. Ainsworth v. Cach, Llc, 2012 Tex. App. LEXIS 2798 (Tex. App. Houston 14th Dist. Apr. 10 2012).

390. Debtor relied on case law for the claim that documents under the business records exception came in fully proven, but that case did not deal with credit card debt, and under Tex. Bus. & Com. Code Ann. § 26.02(a)(2)(A), a credit card agreement did not need to be in writing or signed; although the debtor denied applying for the account or making payments thereon, his credibility was an issue for the trier of fact. Ainsworth v. Cach, Llc, 2012 Tex. App. LEXIS 2798 (Tex. App. Houston 14th Dist. Apr. 10 2012).

391. Debt holder's assignee provided a business records affidavit under Tex. R. Evid. 803(6), which established that the assignee had standing to sue as the creditor assigned its ownership interest in the debt to the assignee; thus, the assignee was entitled to bring suit. Ainsworth v. Cach, Llc, 2012 Tex. App. LEXIS 2798 (Tex. App. Houston 14th Dist. Apr. 10 2012).

392. Properly admitted business-records affidavit provided legally sufficient evidence that supported the verdict in the debt holder's assignee's favor in this credit card case, as the affidavit showed that the debtor incurred a credit card debt that he failed to pay and the debt was acquired by the assignee; the assignee's credibility was an issue of fact. Ainsworth v. Cach, Llc, 2012 Tex. App. LEXIS 2798 (Tex. App. Houston 14th Dist. Apr. 10 2012).

393. Court had held that several exceptions could be relied upon to allow proof of the value of stolen property, including the business-records exception, the exception for records of documents affecting an interest in property, and the exception for market reports and such, and thus the trial court did not abuse its discretion in permitting a witness's testimony in this regard over appellant's hearsay objection; in the alternative, any error was harmless because (1) appellant's community supervision was conditioned on him not committing any offense, (2) although it was alleged that appellant committed theft of property worth at least $ 1,500, proof of a lesser included offense would have sufficed to render judgment adjudicating his guilt, (3) theft of property valued at less than $ 50 was a lesser-included offense of theft of property of a higher amount, and (4) even if there was no properly admitted evidence of the value of the wheels and tires, the court could presume they had some value because the witness had not replaced them for months after the theft. Calixto v. State, 2012 Tex. App. LEXIS 2643, 2012 WL 1138726 (Tex. App. Dallas Apr. 4 2012).

394. Court did not abuse its discretion in determining that the letter from one of the claimant's doctors was not admissible under the business records exception to the hearsay rule under Tex. R. Evid. 803(6), because the letter was drafted for the insurer in an attempt to influence its determination of whether the spinal conditions at issue were compensable injuries. Hazelip v. Am. Cas. Co. of Reading, Pa, 2012 Tex. App. LEXIS 2109, 2012 WL 952120 (Tex. App. Houston 1st Dist. Mar. 15 2012).

395. In a breach of contract action brought by appellee, the assignee of a credit card company, against appellant account holder, the trial court did not err in admitting appellee's business records affidavit and business records

where the affidavit of appellee's designated agent showed that the agent had personal knowledge of appellant's file, that she was appellee's designated agent for those records, and that appellant's account remained unpaid in the amount stated in the affidavit. Thus, the evidence demonstrated that appellee reasonably relied upon the accuracy of the contents of the documents that it received from the credit card company. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

396. Appellant did not challenge the admission of medical records as business records, he did not obtain a ruling on his initial objection, and before a witness testified that he was the custodian, appellant objected, without getting a ruling, that it was not shown the witness was the custodian, for purposes of Tex. R. App. P. 33.1. Bone v. State, 2012 Tex. App. LEXIS 1450, 2012 WL 592927 (Tex. App. Corpus Christi Feb. 23 2012).

397. Appellant based her objection at trial upon an exhibit's alleged hearsay status because of the exhibit's purported failure to qualify as a business record, but she did not object on constitutional grounds, and an objection concerning hearsay rules did not preserve an argument concerning one's right of confrontation; because appellant failed to urge an objection regarding her right of confrontation under U.S. Const. amend. VI, XIV at trial, she forfeited her issue on appeal, under Tex. R. App. P. 33.1(a). Buckner v. State, 2012 Tex. App. LEXIS 1258, 2012 WL 503522 (Tex. App. Fort Worth Feb. 16 2012).

398. Appellant claimed that his medical records were admissible under Tex. R. Evid. 803(4), (6), but this was not presented at trial as a ground for overruling the State's hearsay objection under Tex. R. Evid. 801(d), and although the records were included in the bill of exceptions, such was not made on the predicate for admission under either hearsay exception appellant raised for the first time on appeal; even if the court assumed that the trial court understood the bill of exceptions to be a proffer of admission, the records did not establish that appellant suffered from a medical condition that was relevant to his prosecution for driving while intoxicated, the patient history did not show that he had a condition that mimicked the symptoms of intoxication, and no other potential relevance for the records was shown, such that exclusion of the records did not affect a substantial right under Tex. R. App. P. 44.2(b). Bradley v. State, 2012 Tex. App. LEXIS 410, 2012 WL 150969 (Tex. App. Beaumont Jan. 18 2012).

399. Showing that a summary was shown to be a business record under Tex. R. Evid. 803(6) is not necessary under Tex. R. Evid. 1006; the rule merely requires the contents of voluminous writings to be otherwise admissible. Leander v. Fin & Feather Club, 2012 Tex. App. LEXIS 178, 2012 WL 75815 (Tex. App. Texarkana Jan. 11 2012).

400. Witness's testimony proved that the underlying documents were otherwise admissible under Tex. R. Evid. 1006, and his testimony showed that the records were made when the fines in question were incurred; while the testimony did not specifically track the language of the statute, the overall context, that the records were generated at a regular intervals and at or near the time the fines were incurred, and that the witness was a co-custodian of the records and knew the summary to be a true representation of the records, was sufficient to establish the admissibility of the records. Leander v. Fin & Feather Club, 2012 Tex. App. LEXIS 178, 2012 WL 75815 (Tex. App. Texarkana Jan. 11 2012).

401. Trial court erred in sustaining an objection to business records, and thus the company was prevented from presenting its case against a debtor, which probably caused the rendition of an improper judgment under Tex. R. App. P. 44.1(a)(1). Dodeka v. Campos, 2011 Tex. App. LEXIS 10003 (Tex. App. San Antonio Dec. 21 2011).

402. Witness's affidavit showed that a company incorporated a business's records into the company's regular business use, and the company reasonably relied on the accuracy of the documents in order to determine the existence and value of the debt in question, for purposes of Tex. R. Evid. 803(6). Dodeka v. Campos, 2011 Tex. App. LEXIS 10003 (Tex. App. San Antonio Dec. 21 2011).

403. Although a debtor claimed that business records were untrustworthy, the court noted that the creator of the documents, the creditor, could have faced penalties for inaccurate records, for purposes of Tex. Fin. Code Ann. §§ 392.304(a)(8), 392.402, and the court found those circumstances gave supported to the company's claim that the creditor's documents were trustworthy. Dodeka v. Campos, 2011 Tex. App. LEXIS 10003 (Tex. App. San Antonio Dec. 21 2011).

404. Summary judgment in favor of the customer was proper, because the bank failed to create a genuine issue of material fact as to whether a contract existed or whether the customer authorized the charges to the credit card account, when the bank's only summary judgment evidence was inadmissible; since the bank's affidavit neither named the affiant in the body of the affidavit or the jurat, and the affiant's signature was completely illegible, the bank's affidavit did not substantially comply with Tex. R. Evid. 902(10) and was insufficient to establish the business records exception to the hearsay rule under Tex. R. Evid. 803(6). Fia Card Services, N.A. v. Frausto, 2011 Tex. App. LEXIS 9924, 2011 WL 6260653 (Tex. App. Amarillo Dec. 15 2011).

405. In a drunk driving case, the trial court did not abuse its discretion by finding a hospital's record of defendant's blood-alcohol test results to be sufficiently reliable to be admissible under the business-records exception to the hearsay rule. The hospital's records and accompanying affidavit complied with the relevant provisions of the business-record exception. Rodarte v. State, 2011 Tex. App. LEXIS 9096, 2011 WL 5569494 (Tex. App. El Paso Nov. 16 2011).

406. Record did not show any references to where the workers may have laid a proper predicate to show that the proffered document fit under a hearsay exception, such as a business record, Tex. R. Evid. 803(8). Belmarez v. Formosa Plastics Corp., 2011 Tex. App. LEXIS 7945, 2011 WL 4696750 (Tex. App. Corpus Christi Sept. 30 2011).

407. Court properly admitted a lender's business records affidavit because the opening paragraph of the affidavit specifically stated that the affiant had "personal knowledge of the facts contained in this Affidavit and that they are true and correct"; as such, the affidavit demonstrated on its face that the affiant had the requisite knowledge. The attached records included copies of the notices, documentation that the notices were mailed, and documentation that they posted via certified mail. Puentes v. Fannie Mae, 350 S.W.3d 732, 2011 Tex. App. LEXIS 7168 (Tex. App. El Paso Aug. 31 2011).

408. In a daughter's action claiming undue influence, nurse reports regarding the decedent's interaction with her husband were admissible because they were supported by an affidavit complying with Tex. R. Evid. 902(10); they were admissible as business records under Tex. R. Evid 803(4), (6) regarding the decedent's medical treatment. In the Estate of Ward, 2011 Tex. App. LEXIS 6811, 2011 WL 3720829 (Tex. App. Waco Aug. 24 2011).

409. Parties claimed that documents became business records when they were sent to their attorney's office, making them an exception to the hearsay rule, but this appeared to be an unusually liberal interpretation of the evidence rules; if this interpretation was used, every otherwise inadmissible document would be deemed admissible based on the fact that it was received in an attorney's office and the attorney, as the custodian, provided an accompanying affidavit. Husain v. Petrucciani, 2011 Tex. App. LEXIS 6180, 2011 WL 3449497 (Tex. App. Houston 14th Dist. Aug. 9 2011).

410. Under the business record exception to the hearsay rule in Tex. R. Evid. 803(6), appellant's probation record was properly admitted for the trial court's consideration because, at the hearing on the motion to revoke, appellant's probation officer testified that the "chronos" in appellant's file, which contained the chronology of events set out in the records from the probation department, were recorded at or near the time of the occurrence or event that gave rise to them by a person with personal knowledge of the "chronos" events, and that the files were kept in the ordinary course of the probation department. Norman v. State, 2011 Tex. App. LEXIS 5391, 2011 WL 2732673

(Tex. App. Corpus Christi July 14 2011).

411. Even if the "chronos" in appellant's file, which contained the chronology of events set out in the records from the probation department, were not admissible under the business records exception to the hearsay rule in Tex. R. Evid. 803(6), the evidence of the six other violations of probation was sufficient to revoke appellant's probation. Norman v. State, 2011 Tex. App. LEXIS 5391, 2011 WL 2732673 (Tex. App. Corpus Christi July 14 2011).

412. Court erred during defendant's trial for theft in allowing documents from a federal administrative proceeding into evidence under Tex. R. Evid. 803(6) because the testimony of a local witness from the United States Department of Agriculture did not establish that the particular records were made in the ordinary course of business, that they were made at or near the time of the event they recorded, and that they were made by a person with knowledge who was acting in the regular course of business. Johnson v. State, 2011 Tex. App. LEXIS 5430, 2011 WL 3328687 (Tex. App. Tyler July 13 2011).

413. Objections that an affidavit failed to comply with the business records exception to the hearsay rule likewise must be preserved in the trial court via an objection and a ruling on the objection by the trial court; thus, the only alleged defect in the magazine's president's affidavit that was preserved for the appellate court's review was whether the affidavit was conclusory. Law Office of David E. Williams, Ii, P.C. v. Fort Worth Tex. Magazine Venture, Lp, 2011 Tex. App. LEXIS 5157, 2011 WL 2651865 (Tex. App. Fort Worth July 7 2011).

414. Because defendant filed a verified denial regarding an agreement and a credit application was for different work than was alleged to have been completed in the agreement, plaintiff did not establish that the circumstances indicated the trustworthiness of the documents; therefore, plaintiff did not demonstrate that the trial court abused its discretion by refusing to admit the agreement and credit application into evidence as business records under Tex. R. Evid. 803(6). Old Republic Ins. Co. v. Edwards, 2011 Tex. App. LEXIS 4933, 2011 WL 2623994 (Tex. App. Houston 1st Dist. June 30 2011).

415. In a breach of contract action, a trial court did not err in considering an assignment by a predecessor to a leasing company and a business records affidavit by the predecessor's president; because the affidavit met the requirements of Tex. R. Evid. 902(10), the assignment was admissible under the hearsay exception in Tex. R. Evid. 803(6). Game Sys. v. Forbes Hutton Leasing, Inc., 2011 Tex. App. LEXIS 4098, 2011 WL 2119672 (Tex. App. Fort Worth May 26 2011).

416. Assuming business records objections were raised, the court found nothing indicating that appellant obtained a ruling on them; any complaints regarding the admission of summary judgment evidence would not be preserved for review under Tex. R. App. P. 33.1(a)(2), but the court noted in any event that a witness could have personal knowledge to testify regarding the record keeping practices of a one other than his employer. Ekpe v. Cach, Llc, 2011 Tex. App. LEXIS 2080, 2011 WL 1005379 (Tex. App. Austin Mar. 16 2011).

417. Senior toxicologist identified her initials on the samples of appellant's blood and testified that she received the blood in a sealed vial, performed tests on the blood, and generated a toxicology report; this testimony served as a predicate for admission of the toxicology report under Tex. R. Evid. 803(6) and thus the trial court did not abuse its discretion by admitting the report. Burchfield v. State, 2011 Tex. App. LEXIS 122, 2011 WL 56049 (Tex. App. Fort Worth Jan. 6 2011).

418. In a creditor's suit to recover unpaid debt on a credit card account, the trial court erroneously excluded the billing statements and notices informing the debtor of changes in his credit card agreement where the creditor properly established the applicability of Tex. R. Evid. 803(6)'s business records hearsay exception because an employee of the company that provided administrative services for the creditor's credit card accounts testified that:

(1) she had worked for the company for nearly seven years; (2) the company provided support for the creditor's credit card accounts; (3) her job responsibilities gave her the right to access the kind of information included in the monthly billing statements for the debtor's account; (4) she was the custodian of those records; (5) the statements in the debtor's billing statements were made at or near the time of the information recorded therein by a person with knowledge; and (6) the debtor's billing statements and other billing statements like it were made and kept in the regular course of the company's business. Moreover, the billing records could qualify for the business records hearsay exception even if they were business records of a third party to the lawsuit because the employee testified that the records were kept in the course of the company's business, that the company issued billing statements and provided collections and litigation support, and that she had no indication of any lack of trustworthiness in the way the documents were handled, generated, or kept. Citibank (s.D.), N.A. v. Tate, 2010 Tex. App. LEXIS 9959 (Tex. App. Houston 1st Dist. Dec. 16 2010).

419. Third-party records contained in a creditor's trial exhibit were admissible, even though they were not created by the creditor, given that (1) the affiant stated that the records were kept by the creditor in the regular course of business and that the affiant was the custodian and had personal knowledge of the records, such that the creditor incorporated the third-party documents, (2) the affiant relied on the accuracy of the documents to establish the existence and value of a debt, and (3) the trustworthiness of the documents was supported by the fact that the creditor's predecessors had to keep careful records or their business would suffer, plus inaccurate records could result in civil or criminal penalties. Wood v. Pharia L.L.C., 2010 Tex. App. LEXIS 9819, 2010 WL 5060621 (Tex. App. Houston 1st Dist. Dec. 9 2010).

420. Because a creditor's trial exhibit satisfied the requirements for the admission of third-party business records and because the challenged affidavits satisfied the requirements of Tex. R. Evid. 902(10), the trial court did not abuse its discretion in overruling hearsay objections. Wood v. Pharia L.L.C., 2010 Tex. App. LEXIS 9819, 2010 WL 5060621 (Tex. App. Houston 1st Dist. Dec. 9 2010).

421. Affidavits were not conclusory because they substantially complied with Tex. R. Evid. 902(10), and as such could properly serve to authenticate business records. Wood v. Pharia L.L.C., 2010 Tex. App. LEXIS 9819, 2010 WL 5060621 (Tex. App. Houston 1st Dist. Dec. 9 2010).

422. Affidavits were offered as predicates for the introduction of business records; they were not offered to prove the content of any writing or to contradict, vary, or add to the terms of any agreement, and the affidavits did not violate the parol evidence or best evidence rules, including under Tex. R. Evid. 1002. Wood v. Pharia L.L.C., 2010 Tex. App. LEXIS 9819, 2010 WL 5060621 (Tex. App. Houston 1st Dist. Dec. 9 2010).

423. Records were never admitted into evidence, and therefore Tex. R. Evid. 803(6) was not applicable. In the Interest of S.R., 2010 Tex. App. LEXIS 9681, 2010 WL 4983484 (Tex. App. Waco Dec. 8 2010).

424. Doctor provided testimony proving up the victim's medical records as business records in accord with Tex. R. Evid. 803(6), and to the extent that the issue of the medical records' admissibility had been preserved, the court found no error in their admission. Cozzens v. State, 2010 Tex. App. LEXIS 9336, 2010 WL 4813686 (Tex. App. Texarkana Nov. 24 2010).

425. Court did not abuse its discretion in failing to exclude the bank witness's affidavit and attachments, because the witness's testimony adequately demonstrated the basis for her personal knowledge of the manner in which the bank kept its records and the other facts to which she testified; Texas Rules of Evidence did not require that the qualified witness who provided the predicate for the admission of business records be their creator or have personal knowledge of the contents of the record, when the witness was required only to have personal knowledge of the manner in which the records were kept. Damron v. Citibank (s.D.) N.A., 2010 Tex. App. LEXIS 7054, 2010 WL

3377777 (Tex. App. Austin Aug. 25 2010).

426. For purposes of Tex. R. Evid. 803(6), the affiant stated that the documents received from the original lender were kept by the creditor in the regular course of business and that the affiant reviewed the file, was the designated agent for the file, and had personal knowledge of the records concerning the debtor, and thus the affidavit sufficiently showed that the creditor incorporated the original lender's records. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

427. Because business records were properly admitted, the court overruled a debtor's challenge to certain conclusions of law made by the trial court. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

428. Because the business records affidavit was admissible, the court did not need to address a conditional challenge. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

429. Cases do not hold that verification of accuracy is the sole means of admitting third-party documents under the business records exception; case law requires reliance on the accuracy of the document, which is a slightly different standard than proof that someone actually verified the accuracy of document, and although the second business's confirmation of the accuracy of the first business's records is one way to determine the records are admissible, another way is to show that the second business reasonably relied on the accuracy of the first business's records as part of the three-step test articulated in case law. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

430. Affidavit failed to state that the affiant confirmed the accuracy of the records, but that is not required under case law; a creditor presented evidence that it reasonably relied on the accuracy of the debtor's account with the original lender. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

431. Given that the original lender had to keep careful records of the debtor's credit card debt, for purposes of Tex. Fin. Code Ann. §§ 392.304(a)(8), 392.405, and the Fair Debt Collection Practices Act, this provided an indication, for business record purposes, of the trustworthiness of the lender's documents, which were given to the current creditor. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

432. Affidavit did not lack trustworthiness because it was made by the original lender; to the extent the affiant's credibility was attacked, the trier of fact was the judge of such credibility. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

433. Although a debtor claimed the affiant was not qualified to testify about the original lender's documents, personal knowledge of the record-keeping practices of the original lender was not required under case law. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

434. To the extent the opinions in *Martinez v. Midland Credit Mgmt., Inc.*, 250 S.W.3d 481, 485 (Tex. App.--El Paso 2008, no pet.), and *Powell v. Vavro, McDonald, & Assocs., L.L.C.*, 136 S.W.3d 762, 765 (Tex. App.--Dallas 2004, no pet.), conflict with the prior opinions of the court and federal precedent concerning Tex. R. Evid. 803(6), the court declines to follow them. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex.

App. Houston 1st Dist. July 15 2010).

435. Unlike case law, the affidavit in this case included more than the basic predicate of Tex. R. Evid. 803(6), as the affiant expressly referenced the documents attached to the affidavit, and included facts discussing the contents, such that the decision in case law was consistent with the court's holding here. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

436. Creditor presented evidence to the trial court that met the three factors of case law regarding third party documents, and the trial court properly admitted the original lender's records as the creditor's records under Tex. R. Evid. 803(6). Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

437. Trial court did not abuse its discretion in excluding the affiant's deposition concerning a different case because that deposition did not pertain to the original lender, for relevance purposes, and the debtor never challenged the trustworthiness of the lender's documents. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

438. Trial court erred in awarding summary judgment to a creditor, as the assignee of accounts, in its breach of contract action against a debtor for allegedly failing to pay debt acquired with a credit card because an affidavit from an authorized agent of the creditor did not satisfy the requirements of Tex. R. Evid. 803(6) and the trial court erred by admitting it; the agent did not state that the agent had personal knowledge of, or was qualified to testify, regarding the assignor's record keeping practices. Abrego v. Harvest Credit Mgmt. Vii, Llc, 2010 Tex. App. LEXIS 3117, 2010 WL 1718953 (Tex. App. Corpus Christi Apr. 29 2010).

439. Because debtors did not object to a custodian's affidavit, they could not challenge her personal knowledge on appeal as the issue was waived, plus the mere fact that the custodian was employed by another business did not preclude her testimony, for purposes of Tex. R. Evid. 803(6). Athey v. Mortg. Elec. Registration Sys., 314 S.W.3d 161, 2010 Tex. App. LEXIS 2980 (Tex. App. Eastland Apr. 22 2010).

440. Records showing the hours when defendant was at work were admissible under the hearsay exception in Tex. R. Evid. 803(6) for records of regularly conducted activity; although they contained some inaccuracies, the trial court as the finder of fact reasonably could have found them to be largely correct. Sanchez v. State, 2009 Tex. App. LEXIS 9858, 2009 WL 5149961 (Tex. App. Austin Dec. 29 2009).

441. Creditor's employee's affidavit followed the form the example affidavit provided by Tex. R. Evid. 902(10), which was sufficient to support the admission of the documents; the issuing lender's documents became the creditor's primary record of the transaction and the documents were properly admitted as business records of the creditor under Tex. R. Evid. 803(6). Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist. Dec. 10 2009).

442. Having held that the trial court's admission of the business records affidavit was proper, the court overruled a debtor's challenges to findings of fact that were expressly conditioned on the exclusion of the business records, as well as the related conclusions of law. Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist. Dec. 10 2009).

443. Creditor employee was qualified to testify to the accuracy of the business record documents, given that he stated that he had personal knowledge of the record, which he said were originals or exact duplicates of the records for the debtor's account. Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist.

Dec. 10 2009).

444. Creditor's employee stated that it was in the regular course of business of the creditor for an employee to make the record, which language mirrored precisely the language approved for submitting business records affidavits under Tex. R. Evid. 902(10); because the affidavit accurately represented where the documents came from, it did not indicate a lack of trustworthiness, and the trial court did not err in admitting the business records affidavit or the documents verified by the affidavit. Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist. Dec. 10 2009).

445. Trial court did not abuse its discretion in excluding the a creditor's employee's deposition concerning a different case because that deposition did not pertain to the lender and the debtor never challenged the trustworthiness of the lender's business record documents. Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist. Dec. 10 2009).

446. Report from a crime laboratory was not admissible under either Tex. R. Evid. 803(6) or (8), but any error in the trial court's admission of the report was harmless under Tex. R. App. P. 44.2(b) because the value of the report was cumulative; the same evidence found in the report, that the substance was cocaine, was also admitted through other testimony without objection. Miles v. State, 2009 Tex. App. LEXIS 9756, 2009 WL 4358959 (Tex. App. Houston 1st Dist. Dec. 3 2009).

447. Trial court erred in admitting the complained-of documents, because there was no indication that the business knew of the events recorded on the third-party documents, when the witness testified about the telemarketing application, he stated that the information was inputted by someone at the company, although he had no personal information about how the information was inputted or how the information was obtained, and the same observation could be made about the account statements and the cardholder agreement. Riddle v. Unifund Ccr Patrns, 298 S.W.3d 780, 2009 Tex. App. LEXIS 7805 (Tex. App. El Paso Oct. 7 2009).

448. In an action seeking to recover on a credit card debt, a debtor failed to preserve an error relating to an alleged failure to satisfy the business records exception to the hearsay rule in summary judgment evidence because there was no ruling from the trial court on the objections, as required by Tex. R. App. P. 33.1(a)(2). McGrew v. Citibank N.A., 2009 Tex. App. LEXIS 4529, 2009 WL 1693473 (Tex. App. Waco June 17 2009).

449. In a personal injury case, the court properly excluded appellant's "business records" because they were repetitive and likely to confuse the jury, it was cumulative of other evidence, and appellant's handwritten notes and figures were abstract, indecipherable, were confusing, and were unlikely to help the jury with the calculation of appellant's lost earnings. Griffin v. Carson, 2009 Tex. App. LEXIS 3843, 2009 WL 1493467 (Tex. App. Houston 1st Dist. May 28 2009).

450. Exhibits, which were summaries of business records compiled by a painter and his secretary two days after an airplane owner filed suit for breach of contract for failure to paint an airplane, were properly admitted as business records under Tex. R. Evid. 803(6) based on the painter's foundation testimony. Cano v. Nino's Paint & Body Shop, 2009 Tex. App. LEXIS 2713, 2009 WL 1057622 (Tex. App. Houston 14th Dist. Apr. 16 2009).

451. Trial court properly admitted certain exhibits as self-authenticated business records, for purposes of Tex. R. Evid. 902(10)(a) and Tex. R. Evid. 803(6); the exhibits were trustworthy because the State established an adequate foundation and there was nothing that led the court to believe that the exhibits lacked authenticity or trustworthiness. Henderson v. State, 2009 Tex. App. LEXIS 677, 2009 WL 237473 (Tex. App. Houston 14th Dist. Feb. 3 2009).

452. Objections that an affidavit failed to meet the business records exception and did not satisfy Tex. R. Evid. 902(10) were objections to the form of the affidavit and had to be timely raised in the trial court to be raised on appeal. A.J. Morris, M.D., P.A. v. De Lage Landen Fin. Servs., 2009 Tex. App. LEXIS 457, 2009 WL 161065 (Tex. App. Fort Worth Jan. 22 2009).

453. In a case involving unpaid credit card debt, business records showing a debtor's liability were properly admitted under Tex. R. Evid. 803(6) because an authenticating affiant did not have to be a custodian of records to qualify under Tex. R. Evid. 902(10); therefore, a designated agent was able to satisfy this standard. Moreover, the agent's affidavit tracked the model language of a self-authenticating affidavit, the affidavit was not conclusory, and an objection regarding personal knowledge was not raised at trial. McElroy v. Unifund CCR Partners, 2008 Tex. App. LEXIS 7170 (Tex. App. Houston 14th Dist. Aug. 26, 2008).

454. In a debt collection case, a trial court did not err by striking an affidavit opposing summary judgment from a managing partner and in refusing to grant leave to amend the affidavit because there was no facts upon which the partner based his conclusion regarding the last payment made on a note, and there were no readily controvertible facts shown that were known to the partner; moreover, he did not identify the company where payments were made, how he knew that the records were kept in the ordinary course of business, or which company kept the records in the regular course of business. Because the conclusory nature of the affidavit constituted a defect in substance, no amendment was allowed. CA Partners v. Spears, 274 S.W.3d 51, 2008 Tex. App. LEXIS 6789 (Tex. App. Houston 14th Dist. 2008).

455. Affidavit stated that the affiant was one of the custodians of the records presented and the affidavit was substantially in the form set forth in Tex. R. Evid. 902, and thus the court rejected the claim that the affidavit did not comply with the requirements of Tex. R. Evid. 803. Wynne v. Citibank (South Dakota) N.A., 2008 Tex. App. LEXIS 3037 (Tex. App. Amarillo Apr. 25 2008).

456. Because defendant did not assert in the trial court that certain records constituted inadmissible character evidence, defendant forfeited that complaint under Tex. R. App. P. 33; furthermore, when making objections, defendant agreed that the records were business records, but appeared to argue that they contained double hearsay, but defendant failed to specify or identify the objectionable part of the exhibit, and thus the objections were insufficiently specific to have preserved the hearsay complaint defendant also made on appeal. Starn v. State, 2008 Tex. App. LEXIS 2402 (Tex. App. Fort Worth Apr. 3 2008).

457. Both the custodian of medical records and the witness who performed the test in question were qualified to testify to the authenticated records; because the test came into evidence through the witness's testimony without objection, any error in the admission of the exhibit was cured. Cline v. State, 2008 Tex. App. LEXIS 2242 (Tex. App. Austin Mar. 26 2008).

458. Trial court erred in awarding summary judgment to a creditor in its action against a debtor to recover on a credit card debt where the creditor's affidavit was defective because it was not based on personal knowledge and because it failed to meet the requirements of the hearsay exception contained in Tex. R. Evid. 803. Martinez v. Midland Credit Mgmt., 250 S.W.3d 481, 2008 Tex. App. LEXIS 1906 (Tex. App. El Paso 2008).

459. Although Tex. R. Evid. 803 does not require a predicate witness to be the record's creator or have personal knowledge of the content of the record, the witness must have personal knowledge of the manner in which the records were prepared; documents received from another entity are not admissible if the witness is not qualified to testify about the entity's record keeping. Martinez v. Midland Credit Mgmt., 250 S.W.3d 481, 2008 Tex. App. LEXIS 1906 (Tex. App. El Paso 2008).

460. In defendant's trial under Tex. Penal Code Ann. § 38.05, a deputy testified that he recognized teletypes as confirmation that there was a valid warrant pending for the felon's arrest and the deputy testified that the teletypes were true and correct copies and were kept in the regular course of business as a law enforcement officer, and this testimony supplied the predicate for admission of the teletypes under Tex. R. Evid. 803. LeClear v. State, 2007 Tex. App. LEXIS 8198 (Tex. App. Amarillo Oct. 16 2007).

461. Although a debtor argued that account statements were hearsay, the record custodian properly authenticated them under Tex. R. Evid. 902 as business records under Tex. R. Evid. 803 and the debtor presented no supporting argument that the statements lacked trustworthiness. Sikander Ghia v. Am. Express Travel Related Servs., 2007 Tex. App. LEXIS 8194 (Tex. App. Houston 14th Dist. Oct. 11 2007).

462. Company stipulated that a witness was qualified to establish that invoices were business records, and it was not necessary that the records' custodian possess actual knowledge of every entry on an invoice, and the only requirement was that the information used to create the invoice was transmitted by a person with knowledge, such that the trial court did not err in admitting a summary of the invoices under Tex. R. Evid. 803. Legacy Motors, LLC v. Bonham, 2007 Tex. App. LEXIS 7530 (Tex. App. Fort Worth Sept. 13 2007).

463. Although, for purposes of Tex. R. Evid. 1006, exhibits did summarize account activity, they were in and of themselves business records and therefore admissible as such under Tex. R. Evid. 803; therefore, the trial court did not abuse its discretion by not ordering the State to produce the underlying documentation that would have been required if the records were summaries under Tex. R. Evid. 1006. Forkert v. State, 2007 Tex. App. LEXIS 7586 (Tex. App. El Paso Sept. 13 2007).

464. Business record exception under Tex. R. Evid. 803 is an exception to the general rule prohibiting hearsay and Tex. R. Evid. 1006 is more properly viewed as an exception to the best evidence rule. Forkert v. State, 2007 Tex. App. LEXIS 7586 (Tex. App. El Paso Sept. 13 2007).

465. State properly authenticated exhibits and thus the trial court did not err in admitting the exhibits as business records under Tex. R. Evid. 803; although the custodian of the records admitted that she did not personally review the underlying documents, her testimony was sufficient to authenticate the exhibits as business records, as she said they were kept in the ordinary course of business and the entries were made at or near the time of the transaction by bank tellers with personal knowledge. Forkert v. State, 2007 Tex. App. LEXIS 7586 (Tex. App. El Paso Sept. 13 2007).

466. Without having to determine whether the business records exception to the hearsay rule predicate was even necessary, so long as the document itself was not offered into evidence, the court found that testimony served as a sufficient predicate for admission of the evidence regarding the chemist's test; while one chemist did test the cocaine in question, no report was offered into evidence and it was proper for him to base his opinion on another chemist's test results. Alexander v. State, 2007 Tex. App. LEXIS 6260 (Tex. App. Texarkana Aug. 9 2007).

467. Certified copy of a judgment and sentence relating to defendant's first assault conviction was properly admitted under Tex. R. Evid. 803 during defendant's trial for felony assault involving family violence because the evidence was an exception to the hearsay rule under either the business or public records exception. Williams v. State, 2007 Tex. App. LEXIS 2375 (Tex. App. Dallas Mar. 28 2007).

468. For purposes of Tex. R. Evid. 803, a witness who creates a written statement or who provides the information to its creator is certainly qualified to testify to the nature of the document and the circumstances of its preparation. Dixon v. State, 2007 Tex. App. LEXIS 2110 (Tex. App. Dallas Mar. 20 2007).

469. Trial court did not err in overruling defendant's objection to the admission of a police "money log" from defendant's arrest, as the form showed that the cataloging process described by a detective was what happened, and an unknown signature at the bottom of the form did not place the accuracy of the report by the seizing officers in question, nor did the signature affect the log's relevance, which tended to prove that defendant was involved in buying or selling amounts of contraband for purposes of defendant's trial for unlawful possession of cocaine with intent to distribute; Tex. R. Evid. 803 did not require a business record to be sponsored by its custodian, as defendant claimed. Dixon v. State, 2007 Tex. App. LEXIS 2110 (Tex. App. Dallas Mar. 20 2007).

470. Probate court properly excluded the exhibits offered by a decedent's surviving spouse and administratrix of his estate at the special appearance hearing of the decedent's Florida business associate because the exhibits were business records of a group of Texas entities owned by the business associate, and they were not authenticated by the administratrix merely by virtue of her role as administratrix of the decedent's estate. Allen v. Havens, 2007 Tex. App. LEXIS 2088 (Tex. App. Fort Worth Mar. 15 2007).

471. Particular exhibit was a series of purchase orders made by a construction company that documented its purchase of materials, and the fact that the documents were orders sent to a third party did not remove them from the scope of the business records exception under Tex. R. Evid. 803(6). Royce Homes, L.P. v. Espinosa, 2007 Tex. App. LEXIS 1029 (Tex. App. Houston 1st Dist. Feb. 8 2007).

472. Document was not rendered inadmissible per se as a business record solely because additional notations were later added to the document. Blackstock v. State, 2007 Tex. App. LEXIS 72 (Tex. App. Houston 14th Dist. Jan. 9 2007).

473. In the slaughterhouses' appeal of the trial court's issuance of a permanent injunction and award of expenses to the State, pursuant to Tex. Health & Safety Code Ann. § 433.099, the appellate court rejected the slaughterhouses' claim that the trial court erred by admitting the State's exhibits, which included handwritten compilation of expenses incurred by the State, because a Department of State Health Services representative testified that the exhibits were a record regularly kept in the course of business, that he was a custodian of the record, that it was the regular practice of the Department to keep such records, and that the records were made at or near the time of the occurrence by a person with knowledge or by a person furnished with such knowledge; therefore the State laid the necessary predicate for admission of the exhibits as properly authenticated business records. Qaddura v. State, 2006 Tex. App. LEXIS 9209 (Tex. App. Fort Worth Oct. 26 2006).

474. In a breach of contract action, the summary judgment evidence offered by a creditor was admissible; a record of the monthly payments qualified under Tex. R. Evid. 803(6) as a business record, and the affidavit of the creditor's employee substantially complied with Tex. R. Evid. 902(10)(b). Capers v. Citibank (South Dakota), N.A., 2006 Tex. App. LEXIS 9175 (Tex. App. Dallas Oct. 25 2006).

475. Admission of the State's exhibits, which included the traffic citation, the warrant of arrest signed by the judge of the municipal court and a deputy clerk's certificate of defendant's failure to appear at trial for his speeding citation, did not violate defendant's confrontation rights because the exhibits were forms used by the Houston courts that record the occurrence of an event, and defendant failed to offer and the appellate court could not find, any authority or reasoning to transform the documents into testimonial statements. Azeez v. State, 203 S.W.3d 456, 2006 Tex. App. LEXIS 7821 (Tex. App. Houston 14th Dist. 2006).

476. In a child sexual assault case, hospital records of the child's exam were properly admitted as business records because a witness testified that she was the legal custodian of the records in question, that the records were kept in the regular course of business, and that an employee of the hospital recorded the information at the

time of the sexual abuse exam. Dotie v. State, 2006 Tex. App. LEXIS 7200 (Tex. App. Dallas Aug. 16 2006).

477. In a murder case, an autopsy report was properly admitted as a public record and a business record because the report set forth matters observed pursuant to a duty imposed by law, including the location and the nature of the injuries; a doctor testified and was subject to cross-examination and he was also a signatory to the report. Terrazas v. State, 2006 Tex. App. LEXIS 6696 (Tex. App. Austin July 28 2006).

478. In a criminal prosecution for sexual assault, the defendant's proffer of evidence about the victim's written medical report included no affidavit or live testimonial sponsorship from a records custodian; therefore, the requirements of Tex. R. Evid. 803 were not met to allow admission of the records under the business records exception to the hearsay rule. Smith v. State, 2006 Tex. App. LEXIS 6325 (Tex. App. Texarkana July 21 2006).

479. While the trial court erred in admitting defendant's cell phone bill because it was not authenticated, the error was harmless under Tex. R. App. P. 44.1 because of the wealth of other evidence to convict defendant. Miller v. State, 208 S.W.3d 554, 2006 Tex. App. LEXIS 2791 (Tex. App. Austin 2006).

480. Trial court did not err by admitting an invoice of attorney fees, for purposes of an accountant's claim for fees under Tex. Civ. Prac. & Rem. Code Ann. § 38.001, because it fell under the exception of business records under Tex. R. Evid. 803; there was testimony from the attorney that (1) the spreadsheet was a printout of records prepared in the ordinary course of business, (2) the records included data entries the attorney gave to the administrative assistant, who entered them, (3) the attorney personally approved the entries, and (4) the attorney had personal knowledge about the time and records listed because they were the attorney's descriptions. Cox v. Wilkins, 2006 Tex. App. LEXIS 2598 (Tex. App. Austin Mar. 31 2006).

481. In community supervision revocation proceedings, counsel was not ineffective for failing to make a hearsay objection to testimony about information in defendant's community supervision file; even if the business records predicate under Tex. R. Evid. 803 was not established, the record did not affirmatively demonstrate that the State could not have established it. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

482. Trial court abused its discretion by admitting the results of a drug test into evidence under the business records exception because the actual results of the test were not included in the admitted medical records; instead, a notation of the results was included on a summary page, which did not state what was tested, who took the sample, when the sample was taken, or what laboratory conducted the testing. In re A.T., 2006 Tex. App. LEXIS 1882 (Tex. App. Fort Worth Mar. 9 2006).

483. In affirming the appointment of grandparents as managing conservators, the court found that the results of a drug test on the 11-month-old child were properly admitted under the business records exception to the hearsay rule; the results were trustworthy because they showed the doctor who ordered the test, the time and date that the test was collected and received, and that the test was "presumptive positive" for amphetamine. In re A.T., 2006 Tex. App. LEXIS 1882 (Tex. App. Fort Worth Mar. 9 2006).

484. In a proceeding to terminate a father's parental rights, it was reversible error under Tex. R. Evid. 801 to admit hearsay statements relating to purported sexual abuse by the father of a different child, including written statements by two adults relating to the child's reports of sexual abuse, a child abuse protocol from a physical examination, and an arrest warrant with an affidavit containing reports of the purported assault. Those documents were not admissible under either the business records or public records exceptions of Tex. R. Evid. 803 because the Department of Family and Protective Services failed to lay a proper predicate. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

485. No business record affidavit under Tex. R. Evid. 902(10)(a) was necessary because the witness laid the proper foundation for admission of the report as a business record during testimony, for purposes of Tex. R. Evid. 803(6). Benavides v. Cushman, Inc., 189 S.W.3d 875, 2006 Tex. App. LEXIS 716 (Tex. App. Houston 1st Dist. 2006).

486. In a breach of contract and fraudulent inducement case, a trial court properly refused to admit an exhibit because it was irrelevant to either claim; moreover, it did not fit within the business records exception to the hearsay rule. Case Corp. v. Hi-Class Bus. Sys. of Am., Inc., 184 S.W.3d 760, 2005 Tex. App. LEXIS 10549 (Tex. App. Dallas 2005).

487. Autopsy report set forth matters observed pursuant to a duty imposed by law, for purposes of the business records exception under Tex. R. Evid. 803; a doctor testified to the cause of death based on the doctor's opinion on the autopsy report, and it was not a statement given in response to police interrogatories, and for purposes of Tex. R. Evid. 803, it was considered a public record or business record, and business records were non-testimonial. Mitchell v. State, 191 S.W.3d 219, 2005 Tex. App. LEXIS 10830 (Tex. App. San Antonio 2005).

488. Trial court erred in admitting under Tex. R. Evid. 803(6) an investigative report prepared by a third party on behalf of an employer in response to a former employee's complaint of sexual harassment filed with the Texas Commission of Human Rights where it was prepared in an adversarial setting and was not the regular practice of the employer to make such a report because the report was prepared by an industrial relations counselor specially employed to answer the Commission's request and, therefore, lacked the high probability of trustworthiness that attached to records that were regularly kept and routinely relied on; however, the jury's verdict did not turn on the erroneous admission of the report because most of what was contained in the report was also elicited in the testimony of witnesses. Mackey v. U.P. Enters., 2005 Tex. App. LEXIS 6044 (Tex. App. Tyler July 29 2005).

489. Documents that a successor administrator of a decedent's estate used to establish the loss to the estate concerning the decedent's house, which occurred during the former administrator's administration, were not inadmissible hearsay in a breach of fiduciary duty action against the former administrator because the documents were business records under Tex. R. Evid. 803(6) that related to the mortgage on the house. A number of the documents concerning the house were duplicates of evidence duly admitted in related proceedings, and there was no evidence indicating that the documents were inadmissible hearsay in the related proceedings. Sierad v. Barnett, 164 S.W.3d 471, 2005 Tex. App. LEXIS 4161 (Tex. App. Dallas 2005).

490. Testimony of a trucking company's safety administrative coordinator was properly admitted because her purpose was to explain how global positioning systems (GPS) data, which another witness's testimony showed was reliable, became a business record of the trucking company. Furthermore, her testimony established her understanding of the many systems the company used to track its drivers and showed that the system of transmitting and receiving the GPS data was automatic. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

491. In a case of aggravated sexual assault of a child, counsel's failure to object to the admission of a forensic report was not ineffective assistance because an affidavit from the custodian of the hospital's records was sufficient for compliance with Tex. R. Evid. 803(6) and a statement made by the victim to a nurse was admissible under Rule 803(4). Lopez v. State, 2005 Tex. App. LEXIS 3596 (Tex. App. Eastland May 12 2005).

492. In a domestic violence case, the trial court did not err by admitting a 911 tape of a call from the victim as a business record; a 911 tape is admissible as a business record if properly authenticated, and the custodian testified that the tape was made in the ordinary course of business at the time of the event recorded. Warfel v. State, 2005

Tex. App. LEXIS 2922 (Tex. App. Amarillo Apr. 14 2005).

493. Trial court did not abuse its discretion by finding the record of the results of a test of defendant's blood-alcohol level sufficiently reliable to be admissible under the business-record exception to the hearsay rule, Tex. R. Evid. 803(6), and not to have deprived him of his constitutional right to meaningful confrontation and cross-examination of witnesses against him, because the blood-alcohol test results were part of a group of records produced by the hospital pursuant to a subpoena, and the records were accompanied by the affidavit of the custodian of the hospital's records in which the custodian recited that he kept the records in the regular course of business and that the records were made in the regular course and scope of the hospital's business at or near the time of the event. Furthermore, the surgeon who treated defendant testified that, although he did not conduct or observe the blood draw, he and other doctors routinely relied on such procedures and records in treating patients, and there was no evidence that an unauthorized or unqualified person drew the blood or that the persons who drew or tested the blood did their jobs inappropriately. Blackwell v. State, 2005 Tex. App. LEXIS 1816 (Tex. App. Austin Mar. 10 2005).

494. In a proceeding to terminate parental rights, the trial court did not err in admitting the entire Department of Family & Protective Services (DFPS) case file over the father's hearsay objection. DFPS laid the proper predicate for admission of the file as a business or public record. Rogers v. Dep't of Family & Protective Servs., 175 S.W.3d 370, 2005 Tex. App. LEXIS 1327 (Tex. App. Houston 1st Dist. 2005).

495. Trial court did not err in admitting a physician's reports under Tex. R. Evid. 803(6) because it was not contended that any of the objectionable documents contained entries that were not made by the physician, nor was it suggested that the reports were written solely in response to a request by the insurance carrier or that the evaluation would not have been done otherwise. State Office of Risk Mgmt. v. Escalante, 162 S.W.3d 619, 2005 Tex. App. LEXIS 1348 (Tex. App. El Paso 2005).

496. Trial court abused its discretion in admitting the medical records because they were inadmissible hearsay, when the State failed to show the two hospital documents were the business records of the medical facility, Tex. R. Evid. 803(6), however, the improperly admitted records had no substantial effect or influence on the jury's verdict, thus the admission of the records was harmless error, Tex. R. App. P. 44.2(b). The medical records at issue were either irrelevant or cumulative of other evidence admitted without objection. Carmouche v. State, 2004 Tex. App. LEXIS 11164 (Tex. App. Houston 14th Dist. Dec. 14 2004).

497. In a criminal prosecution, the trial court did not err in admitting evidence of a prior conviction for purposes of enhancing punishment; because it was admitted pursuant to Tex. R. Evid. 803(8), the business records exception to the hearsay rule, rather than Tex. R. Evid. 803(22), the public document exception. If the trial judge's decision is correct on any theory of law applicable to the case, it will be sustained. Macias v. State, 2004 Tex. App. LEXIS 10996 (Tex. App. San Antonio Dec. 8 2004).

498. Defendant's general hearsay objection did not preserve error, pursuant to Tex. R. App. P. 33.1(a), on the alleged violation of Tex. R. Evid. 902(10)(a) as to the asserted failure to comply with the 14-day requirement; even assuming the objection was sufficient to preserve error, the trial court did not err in overruling defendant's objection because the clerk's record contained copies of the hospital records together with a business records affidavit conforming to Tex. R. Evid. 803(6), 902(10)(a), and the records were file marked on one day and the trial was conducted 10 days later on defendant's charge of driving while intoxicated. Astalas v. State, 2004 Tex. App. LEXIS 9152 (Tex. App. Fort Worth Oct. 14 2004).

499. Defendant did not argue at trial or in the brief that a witness, though not a custodian of blood sample records, was not a qualified witness under Tex. R. Evid. 803(6), and thus, defendant did not show that the trial court erred in

allowing the witness to authenticate the transmittal form under Tex. R. Evid. 902(10)(a) in connection with defendant's driving while intoxicated trial. Astalas v. State, 2004 Tex. App. LEXIS 9152 (Tex. App. Fort Worth Oct. 14 2004).

500. In a termination of parental rights case, the trial court must determine the admissibility of drug test results as business records under Tex. R. Evid. 803(6) by clear and convincing evidence under Tex. Fam. Code Ann. § 101.007. In re K.C.P., 142 S.W.3d 574, 2004 Tex. App. LEXIS 7102 (Tex. App. Texarkana 2004).

501. Trial court abused its discretion in admitting drug test results into evidence as business records under Tex. R. Evid. 803(6); admitting drug tests in a termination of parental rights case with no information as to the qualifications of the person or equipment used, the method of administering the test, and whether the test was a standard one for the particular substance indicates a lack of trustworthiness of the tests. The error was harmless under Tex. R. App. P. 44.1(a)(1), however, because the mother admitted extensive drug test and acknowledged her long-term difficulties in avoiding the use of drugs. In re K.C.P., 142 S.W.3d 574, 2004 Tex. App. LEXIS 7102 (Tex. App. Texarkana 2004).

502. In a personal injury case, letters written by a doctor to plaintiff's attorney were inadmissible because they admittedly were generated to facilitate settlement of a legal claim. The difficulty of lay persons reading and understanding medical records was inherent in the records themselves, especially when no explanatory expert testimony was presented, and for those reasons, the two excluded letters did not qualify under the business records exception to the hearsay rule. Grove v. Overby, 2004 Tex. App. LEXIS 6822 (Tex. App. Austin July 29 2004).

503. Defendant's conviction for driving while intoxicated was proper where he did not show that the trial court committed any error in allowing the senior chemist to authenticate the transmittal form from the lab indicating defendant's blood alcohol level, and as such, he did not show that the trial court committed any error in allowing the chemist to authenticate the transmittal form under Tex. R. Evid. 902(10)(a), 803(6). Astalas v. State, 2004 Tex. App. LEXIS 6398 (Tex. App. Fort Worth July 15 2004), opinion withdrawn by, substituted opinion at, modified by 2004 Tex. App. LEXIS 9152 (Tex. App. Fort Worth Oct. 14, 2004).

504. Business records used in one business, created by a third party at their behest, may be admissible under Tex. R. Evid. 803(6) if: (1) the incorporating business relied upon the information transmitted in the records in the normal course of its business and (2) the circumstances otherwise indicated the trustworthiness of the document; the business incorporated the two letters that the insurer created into its business records and relied upon them, and the circumstances indicated their trustworthiness, such that the trial court did not abuse its discretion in admitting the letters. Bell v. State, 176 S.W.3d 90, 2004 Tex. App. LEXIS 5936 (Tex. App. Houston 1st Dist. 2004).

505. Trial court erred in overruling the couple's objections to the travel club's summary judgment evidence and in granting summary judgment, as the sworn affidavit by the club's customer service manager, and a series of documents attached to another affidavit, were not admissible because of his lack of personal knowledge and because the documents constituted hearsay, where the manager stated that he based his assertion of the fact that there had been a refund to the couple upon information that he obtained from a third party and the documents did not satisfy the business records' exception of Tex. R. Evid. 803(6). Thus, the club failed to establish that the couple were not entitled to damages as a matter of law. Powell v. Vavro, McDonald, & Assocs., L.L.C., 136 S.W.3d 762, 2004 Tex. App. LEXIS 5260 (Tex. App. Dallas 2004).

506. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, two exhibits containing the medical records of the child-victims fell within the hearsay exception for records of regularly conducted activity set forth in Tex. R. Evid. 803(6); however, it was error to admit the exhibits because they contained a second layer of hearsay statements of abuse made by the children, and it

was not clear that the children made these statements for the purpose of proper diagnosis within the meaning of Tex. R. Evid. 803(4). Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

507. Where a drilling company sued an operating company to collect for services in attempting re-entry of an abandoned oil and gas well, as the custodian of records and the president of the drilling company, the president was qualified to testify regarding the invoice and the daily time sheets without an affidavit complying with Tex. R. Evid. 902(10); moreover, those exhibits were admissible under Tex. R. Evid. 803(6), the business records exception, and the trial court did not abuse its discretion in admitting the invoice or the daily time sheets into evidence. Integras Operating, L.L.C. v. Re-Entry People, Inc., 2004 Tex. App. LEXIS 2461 (Tex. App. Eastland Mar. 18 2004).

508. In a theft and arson prosecution, the arson report was properly admitted as a business record under Tex. R. Evid. 803(6) where a State witness testified that (1) he was the custodian of the records; (2) the report was prepared by an arson investigator near the time of the investigation; (3) the investigator spoke to the witnesses, police, and defendant about the fire; (4) investigators routinely make reports following their investigations; and (5) the investigator's employer kept the reports in the course of its regular business. Mboob v. State, 2004 Tex. App. LEXIS 1714 (Tex. App. Dallas Feb. 23, 2004).

509. In revoking defendant's probation for violation of the condition of avoiding the use of narcotics or habit-forming drugs, the State established the predicate for admission of a urinalysis test as a business record exception, under Tex. R. Evid. 803(6). Adams v. State, 2004 Tex. App. LEXIS 1222 (Tex. App. Amarillo Feb. 9 2004).

510. Check paid to a moving company for moving a scanner for a business qualified as a business record under Tex. R. Evid. 803(6). Strahan v. Strahan, 2003 Tex. App. LEXIS 9844 (Tex. App. Houston 1st Dist. Nov. 20 2003).

511. Account statement attached to the affidavit of an employee of a promissory note assignee was improperly stricken by a trial court in a dispute over the note because the statement laid the proper foundation for each element of the business records exception of Tex. R. Evid. 803(6). Diversified Fin. Sys. v. Hill, O'Neal, Gilstrap & Goetz, P.C., 99 S.W.3d 349, 2003 Tex. App. LEXIS 1647 (Tex. App. Fort Worth 2003).

512. Medical records that included a defendant's blood test results were properly admitted as a business record exception to the hearsay rule under Tex. R. Evid. 803(6); the exception was applicable to criminal proceedings so long as the reliability of the information were established. Serrano v. State, 936 S.W.2d 387, 1996 Tex. App. LEXIS 5029 (Tex. App. Houston 14th Dist. 1996).

Evidence : Hearsay : Exceptions : Business Records : Absence of Records

513. In revocation of community supervision proceedings, while defendant conceded that his probation file was admissible as a business record under Tex. R. Evid. 803(6), defendant failed to object on the basis that the State never established the necessary predicate for admitting the negative evidence in the business record under Tex. R. Evid. 803(7). The trial court, therefore, could properly admit the entire proffer under Tex. R. Evid. 105(a). Ferris v. State, 2011 Tex. App. LEXIS 1232, 2011 WL 664016 (Tex. App. Houston 1st Dist. Feb. 17 2011).

Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

514. In defendant's trial for theft from a store, although defendant objected to the admissibility under Tex. R. Evid. 803(6) of a receipt prepared by the store to show the value of the items, and the objection was overruled, a witness subsequently testified without objection as to the value of the stolen property, rendering any error harmless. Mays v.

State, 2014 Tex. App. LEXIS 7330, 2014 WL 3058462 (Tex. App. Dallas July 8 2014).

515. During the punishment phase of defendants murder trial, the trial court committed reversible error in admitting into evidence disciplinary records from the jail, probation department, and the Texas Youth Commission because the offense reports constituted hearsay and were not admissible under the business records exception. The admission of these records violated his right to confront the witnesses against him, because they contained several testimonial statements from witnesses who did not testify at trial. Smith v. State, 420 S.W.3d 207, 2013 Tex. App. LEXIS 15280, 2013 WL 6699495 (Tex. App. Houston 1st Dist. Dec. 19 2013).

516. In a robbery case, trial counsel did not render ineffective assistance due to a failure to object to a property release form because this would have likely been admitted under the business records exception to the hearsay rule. Helmke v. State, 2013 Tex. App. LEXIS 12471, 2013 WL 5570474 (Tex. App. San Antonio Oct. 9 2013).

517. Even if the issue had been preserved, there was some evidence to support a conclusion that it was the regular course of business for the Midland Police Department to make the sex offender registration records and they were properly admitted. Morrison v. State, 2013 Tex. App. LEXIS 6527 (Tex. App. Eastland May 30 2013).

518. Trial court acted within its discretion during defendant's trial for aggravated assault with a deadly weapon in admitting the victim's medical records without expert testimony because Tex. R. Evid. 803(6) plainly authorized the admission of the medical records without any witness, and while the State might have offered expert testimony to explain the medical records to the jury, Tex. R. Evid. 702 did not require such testimony. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

519. Trial court's admission of an aggravated assault victim's medical records, without an opportunity for defendant to first question the records' author on voir dire, did not violate defendant's rights under Tex. R. Evid. 705(b) because the language of Rule 705 contained no inference or even a suggestion that its provisions overrode the admissibility of a physician's observations, diagnoses, or opinions properly admitted as a business record. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

520. Even if the trial court erred by admitting a jail book in sheet as a business record under Tex. R. Evid. 803(6), the error was harmless because no party emphasized the unexplained divergence of dates between the date defendant was arrested and the date he bonded out. Crutchfield v. State, 2013 Tex. App. LEXIS 1942 (Tex. App. Tyler Feb. 28 2013).

521. The State properly authenticated the booking sheet from a prior crime allegedly committed by defendant in the State of Washington as a business record under Tex. R. Evid. 902(10), and the records were not subject to exclusion because they contained hearsay, pursuant to Tex. R. Evid. 803(6). Wood v. State, 2012 Tex. App. LEXIS 3254, 2012 WL 1448333 (Tex. App. Beaumont Apr. 25 2012).

522. In a proceeding to revoke defendant's community supervision for burglary of a habitation, the State offered an exhibit of defendant's community supervision records from Louisiana; the trial court overruled defendant's hearsay objection and admitted the exhibit as a business record and a government record under Tex. R. Evid. 803(8). Clay v. State, 361 S.W.3d 762, 2012 Tex. App. LEXIS 1255, 2012 WL 503513 (Tex. App. Fort Worth Feb. 16 2012).

523. Trial court abused its discretion by admitting the ATM receipt as the State did not lay a business records exception predicate, Tex. R. Evid. 803(6); however, the error was harmless, Tex. R. App. P. 44.2, in light of the other abundant evidence of defendant's guilt. Gatewood v. State, 2011 Tex. App. LEXIS 9302, 2011 WL 5903656

(Tex. App. Fort Worth Nov. 23 2011).

524. Trial court did not abuse its discretion in admitting autopsy photographs because the photographs were admissible under Tex. R. Evid. 803(6) as part of the business record of the autopsy report as the assistant medical examiner, who was the custodian of the office's records, testified that autopsy reports were made at or near the time that the autopsy was conducted by the medical examiner who conducted the autopsy; the records were kept in the regular course of the office's business; and he recognized the three photographs offered by the State as photographs from the murder victim's autopsy Delacerda v. State, 425 S.W.3d 367, 2011 Tex. App. LEXIS 5558 (Tex. App. Houston 1st Dist. July 21 2011).

525. Trial court's decision to admit the bank's business records did not fall outside the zone of reasonable disagreement where the custodian of records testified that the records were kept in the regular course of business at the bank; there was no requirement that the testifying witness had to have created the records, or even that she had personal familiarity of the mode of preparation in the records. Olejnik v. State, 2011 Tex. App. LEXIS 4747, 2011 WL 2475503 (Tex. App. Corpus Christi June 23 2011).

526. At defendant's trial for theft, the trial court admitted an exhibit containing photocopies of credit receipts and purchase orders as business records under Tex. R. Evid. 803(6); defendant objected under the best evidence rule. Because defendant did not challenge the admission of the exhibit on the grounds that the testifying witness did not have knowledge of how the record was prepared, the error was not preserved for review. Thompson v. State, 2011 Tex. App. LEXIS 4019, 2011 WL 2112810 (Tex. App. Houston 1st Dist. May 26 2011).

527. Where defendant was charged with several counts of indecency with a child by contact under Tex. Penal Code Ann. § 21.11(a)(1), where he testified on direct examination that he had never improperly touched the alleged victims or any other child, where the prosecutor impeached defendant on cross-examination by introducing defendant's guilty plea to the offense of aggravated sexual assault of a child in which defendant admitted that he sexually penetrated a male child under the age of 14, and where defense counsel on redirect attempted to introduce the child's medical records to show that the child told health care providers that he had been assaulted by his father and not defendant, the trial court did not err under Tex. R. Evid. 803(6) in excluding the records because defense counsel tried to admit the records through the testimony of a disability advocate with the hospital who claimed familiarity with the records but who did not testify that the victim's statements were kept in the course of a regularly conducted business activity or that it was a regular practice to keep records of such statements. She was not the custodian of the records and did not make the records, and there was no evidence that the records at issue were business records. Salinas v. State, 2011 Tex. App. LEXIS 3644, 2011 WL 1938664 (Tex. App. Corpus Christi May 12 2011).

528. Blood test results were properly admitted under Tex. R. Evid. 803(6) in appellant's prosecution for intoxication assault under Tex. Penal Code Ann. § 49.07 because the test was not done at law enforcement's request but as part of appellant's treatment at the hospital for a hip injury following an automobile collision. Desilets v. State, 2010 Tex. App. LEXIS 8097, 2010 WL 3910588 (Tex. App. Beaumont Oct. 6 2010).

529. At defendant's trial for theft of property, the trial court was permitted to admit a computer generated printout from a store register into evidence; because no person added anything to the record, there was no declarant and the computer printout was not hearsay for purposes of Tex. R. Evid. 801(d). Therefore, the State was not required to lay a predicate to admit the document as a business record under Tex. R. Evid. 803(6). Haskins v. State, 2010 Tex. App. LEXIS 4769, 2010 WL 2524797 (Tex. App. Dallas June 24 2010).

530. In the punishment phase of defendant's aggravated sexual assault of a child case, the court properly admitted evidence of his prior sexual assault convictions because, although the records custodian admitted that she

did not have personal knowledge of the contents of defendant's record, and did not personally pull and copy the files, such testimony was unnecessary. The witness's testimony sufficiently satisfied the necessary predicate by showing she had personal knowledge of the manner by which the records were prepared, and there was nothing in the record to suggest the judgments were so untrustworthy as to justify exclusion. Herrera v. State, 2009 Tex. App. LEXIS 9690, 2009 WL 4981327 (Tex. App. San Antonio Dec. 23 2009).

531. In defendant's driving while intoxicated trial, hospital records met the business records exception under Tex. R. Evid. 803(6), given that (1) the record indicated that a nurse drew defendant's blood, (2) the record appeared to constitute the nurse's summary of all the procedures she performed, including the blood draw, and (3) the record contained the State's notice of intent to offer business records and an affidavit from the custodian of records, which was in substantially the same format as that listed in Tex. R. Evid. 902(10)(b). Patel v. State, 2009 Tex. App. LEXIS 3575, 2009 WL 1425219 (Tex. App. Fort Worth May 21 2009).

532. Because hospital records here were properly admitted under the business records exception to the hearsay rule, their admission did not violate defendant's confrontation rights. Patel v. State, 2009 Tex. App. LEXIS 3575, 2009 WL 1425219 (Tex. App. Fort Worth May 21 2009).

533. Trial court did not err in admitting jail disciplinary reports under the business records exception to the hearsay rule, Tex. R. Evid. 803(6), with the exception of reports that contained inadmissible testimonial statements. However, admission of the testimonial statements was harmless because although the reports were read aloud to the jury, they were never emphasized again by the State in any way. Smith v. State, 297 S.W.3d 260, 2009 Tex. Crim. App. LEXIS 527 (Tex. Crim. App. 2009).

534. Trial court did not abuse its discretion by admitting documents from defendant's sex offender records in Texas because the sheriff's deputy who laid the predicate for introduction of the documents as business records demonstrated she had personal knowledge of the mode of preparation of the documents, as: (1) the deputy testified that her agency confirmed that defendant was convicted of a sexual offense out of state by calling a probation officer who faxed the Ohio court papers to the sheriff's office; (2) sheriff's department personnel verified facts within the record with defendant, who signed many of the registration documents containing reference to the Ohio cause number; and (3) the deputy affirmed that this method was the usual practice of sheriff's department employees in confirming information of an offender and the records were kept in the regular course of business of her agency. Wagner v. State, 2009 Tex. App. LEXIS 2423 (Tex. App. Houston 14th Dist. Mar. 31 2009).

535. Tex. R. Evid. 803(6) does not require that the witness be the person who made the record; thus, the trial court did not abuse its discretion in admitting all the medical records contained in an exhibit pursuant to the business records exception. Hill v. State, 2009 Tex. App. LEXIS 1509, 2009 WL 578629 (Tex. App. Amarillo Mar. 6 2009).

536. Defendant objected to an exhibit on hearsay grounds and claimed on appeal that the evidence was not admissible under Tex. R. Evid. 803(4), but the State established the admissibility of the documents as a record of regularly conducted activity under Tex. R. Evid. 803(6), and the fact that defendant might have been correct about the applicability of the medical diagnosis exception was not conclusive of the issue; the trial court was correct in admitting the evidence as a record of regularly conducted activity and there was no abuse of discretion. Matthews v. State, 2008 Tex. App. LEXIS 8544 (Tex. App. Amarillo Nov. 13 2008).

537. In an assault case, defendant did not receive ineffective assistance of counsel because there was no reversible error relating to the exclusion of evidence, a victim's medical records could have been admissible under Tex. R. Evid. 803(6) and through the testimony of another witness, and counsel was not given an opportunity to explain his strategy as it related to the timing of a mistrial motion. Because the claims of ineffectiveness were all

alleged errors of omission beyond the record, counsel's performance was not found deficient since defendant failed to show the conduct was so outrageous that no competent attorney would have engaged in it. Fillmore v. State, 2008 Tex. App. LEXIS 6573 (Tex. App. Amarillo Aug. 27, 2008).

538. In defendant's theft case, although the State failed to lay a proper predicate for admission of receipts under the business records exception because there was no evidence that the information contained in the exhibits came from a "person with knowledge" of that information, the error was harmless. The exhibits showed that a computer and a cash register, respectively, were charged to the theft victim, and that evidence was cumulative of other testimony. Underwood v. State, 2008 Tex. App. LEXIS 5936 (Tex. App. Dallas Aug. 7 2008).

539. In defendant's aggravated robbery case, the juvenile court properly admitted a statement about the victim being "struck with a rock" that was contained in the medical records because the medical records satisfied the business records exception, the document was signed by the treating physician, and the medical records included an affidavit by the custodian of records for the hospital, who averred that she had personal knowledge of the manner in which the records were prepared. In re B. P. S., 2008 Tex. App. LEXIS 6028 (Tex. App. Austin Aug. 6 2008).

540. There was no merit to defendant's claim that trial counsel was ineffective during defendant's trial for aggravated robbery, enhanced by three prior felony convictions, for failing to file a motion to suppress and/or objecting at trial to the admission of the business records of defendant's employer, along with an affidavit of the custodian of records of the employer that tracked verbatim Tex. R. Evid. 902, and even though the records were not physically attached to the affidavit in the clerk's record but were included in the record of exhibits, defendant was not harmed because his girlfriend testified before the jury that he was not at work on the date of the incident. Delgado v. State, 2008 Tex. App. LEXIS 2463 (Tex. App. Houston 1st Dist. Apr. 3 2008).

541. Nurse testified that a nurse's records were kept in the regular course of business at the medical center, and that she was familiar with the records because she, as a representative of the medical center, made them; furthermore, she created them near the time of the event and had actual knowledge of the event; although she did not specifically say she was the custodian of records, she established that she was qualified to testify, and her testimony laid the proper predicate for admission of the medical records under the business records exception to the hearsay rule. Clark v. State, 2007 Tex. App. LEXIS 9452 (Tex. App. Dallas Dec. 4 2007).

542. In a theft case, the testimony of an authenticating witness established the proper predicate for admission of a purchase requisition form as a record of regularly conducted activity under Tex. R. Evid. 803 because the witness had personal knowledge of how such records were created, although he did not know exactly when the form was created. Baker v. State, 2007 Tex. App. LEXIS 7970 (Tex. App. Houston 1st Dist. Oct. 5 2007).

543. At defendant's trial for theft of a plasma television, the State was permitted to admit a purchasing requisition form showing the cost of replacing the television under the business records exception to the hearsay rule set forth in Tex. R. Evid. 803; the authenticating witness testified that he was the head of the security, he made the form in the regular course of business near the time of the events in question, such forms were created to inform the finance department of the price of a needed item, and he was authorized to keep and control such forms. Baker v. State, 2007 Tex. App. LEXIS 7886 (Tex. App. Houston 1st Dist. Oct. 4 2007).

544. Where petitioner state death row inmate argued trial counsel was ineffective for admitting into evidence at the penalty phase psychiatric reports which suggested the inmate was a future danger, each of those exhibits that trial counsel introduced satisfied an exception to the hearsay rule under Tex. R. Evid. 803 and thus met the requirements of the Confrontation Clause. Coble v. Quarterman, 496 F.3d 430, 2007 U.S. App. LEXIS 19327 (5th

Cir. Tex. 2007).

545. Probation officers' reports were admitted under Tex. R. Evid. 803 without objection and the trial court could have properly considered the testimony and the reports when assessing a sentence, as well as considering live testimony, and thus the court rejected defendant's claim that he was denied effective assistance when the testimony was admitted, which defendant claimed contained hearsay. Torres v. State, 2007 Tex. App. LEXIS 5641 (Tex. App. Corpus Christi July 19 2007).

546. Regarding defendant's federal Confrontation Clause argument, he failed, under Tex. R. App. P. 38.1(h), to explain how probation reports were more testimonial in a constitutional sense than they were business records under Tex. R. Evid. 803, and the court was unable to speculate on the matter and overruled defendant's ineffective assistance claim. Torres v. State, 2007 Tex. App. LEXIS 5641 (Tex. App. Corpus Christi July 19 2007).

547. 911 operator established the predicate for admission of an exhibit listing data entries made by the operator as a business record, and the victim's statements contained therein were admissible as excited utterances. Shepard v. State, 2007 Tex. App. LEXIS 3602 (Tex. App. Waco May 9 2007).

548. During defendant's murder trial, he was not permitted to introduce his jail records under Tex. R. Evid. 803; the height and weight identifiers on the jail records were provided by defendant at the time of booking; he had no business duty to report accurately. Benford v. State, 2007 Tex. App. LEXIS 2844 (Tex. App. Houston 14th Dist. Apr. 12 2007).

549. Trial court had not erroneously admitted the medical report prepared by the doctor who examined the child, a victim of sexual assault, because, as defendant argued, the State did not establish the proper predicate for the business records exception; defense counsel's objection "Just object to its entry, Your Honor. Don't feel like the proper foundation and predicate has been laid for its entry," did not inform the trial court of that deficiency. Weaver v. State, 2006 Tex. App. LEXIS 9996 (Tex. App. Waco Nov. 15 2006).

550. Jail disciplinary records fell under the business record exception to the bar on hearsay statements under Rule 803(6) of the Texas Rules of Criminal Evidence. Rodriguez v. Quarterman, 204 Fed. Appx. 489, 2006 U.S. App. LEXIS 28253 (5th Cir. Tex. 2006).

551. Admission of an accomplice's statement and a prisoner's jail disciplinary records at trial did not violate the prisoner's Sixth and Fourteenth Amendment rights under Crawford because both pieces of evidence were admitted under the prevailing law at the time of the prisoner's trial. Rodriguez v. Quarterman, 2006 U.S. App. LEXIS 23173 (5th Cir. Tex. Sept. 11 2006).

552. At defendant's probation revocation hearing, the contents of his probation file were admissible as a business record under Tex. R. Evid. 803; although defendant's current probation officer did not have personal knowledge of all the entries in the probation file, he testified that defendant's former probation officer prepared the file and had personal knowledge of the facts recorded in the file. Canseco v. State, 199 S.W.3d 437, 2006 Tex. App. LEXIS 4664 (Tex. App. Houston 1st Dist. 2006).

553. In a criminal trial for prostitution, a deputy was a "qualified witness" to testify as to defendant's sexually oriented business employee record under the business records exception to the hearsay rule; the document was created for the vice department's database. Melendez v. State, 194 S.W.3d 641, 2006 Tex. App. LEXIS 4250 (Tex. App. Houston 14th Dist. 2006).

554. On appeal of defendant's conviction for two counts of capital murder, he claimed that the trial court erred in allowing inadmissible hearsay accounts from his disciplinary records of uncharged prison misconduct; defendant contended the reports were inadmissible hearsay under Tex. R. Evid. 803(8)(B), as matters observed by "other law enforcement personnel. Because his trial objections did not comport with the specific claim he raised on appeal, defendant failed to preserve the error for review under Tex. R. App. P. 33.1. Robles v. State, 2006 Tex. Crim. App. LEXIS 2533 (Tex. Crim. App. Apr. 26 2006).

555. Information contained on chain-of-evidence forms involved routine information that did not involve any subjective interpretation or analysis by the police personnel and were properly admitted on that basis. Ash v. State, 2006 Tex. App. LEXIS 1315 (Tex. App. El Paso Feb. 16 2006).

556. Where defendant was charged with murder, the trial court did not err by admitting defendant's cell phone records and testimony from the custodian of record under the business records exception to the hearsay rule. The phone records denoted defendant's whereabouts on the day of the murder. Wilson v. State, 195 S.W.3d 193, 2006 Tex. App. LEXIS 815 (Tex. App. San Antonio 2006).

557. In a child sexual assault case, the admission of defendant's medical records under Tex. R. Evid. 803(6) was proper because the records were properly authenticated by their custodian in accordance with Tex. R. Evid. 902(10) as having been made and kept in the course of a regularly conducted business activity. Eslora v. State, 2005 Tex. App. LEXIS 2564 (Tex. App. San Antonio Apr. 6 2005).

558. In a murder trial, the victim's autopsy report was admissible under the public records exception to the hearsay rule. The forensic pathologist was not "other law enforcement personnel" under Tex. R. Evid. 803(8)(B), in that the record did not support that the autopsy report was other than an objective, routine, scientific determination of an unambiguous factual nature. Denoso v. State, 156 S.W.3d 166, 2005 Tex. App. LEXIS 878 (Tex. App. Corpus Christi 2005).

559. Motel owner testified that (1) he owned the motel; (2) the registration cards were kept in the regular course of business; and (3) the forms were filled out in part by the motel guest and in part by an employee of the motel; thus, his testimony supported the trial court's determination that the hotel registration form met the requirements of Tex. R. Evid. 803(6) and, therefore, were admissible under the business records exception to the hearsay rule. Raveiro v. State, 2005 Tex. App. LEXIS 218 (Tex. App. Houston 14th Dist. Jan. 13 2005).

560. At a probation revocation hearing, a witness who did not personally supervise defendant was properly allowed to testify from his probation file. A predicate was laid for the business records hearsay exception when the witness testified that probation officers kept notes when they met with probationers and entries were made in the probationer's record within 48 hours Jefferson v. State, 2004 Tex. App. LEXIS 11796 (Tex. App. Waco Dec. 29 2004).

561. In a driving while intoxicated case, a court did not err in admitting the record of defendant's truck registration because the registration was from a public agency charged with the duty of maintaining vehicle registration records. Pendley v. State, 2004 Tex. App. LEXIS 10526 (Tex. App. Fort Worth Nov. 24 2004).

562. In the punishment phase of defendant's murder case, a court did not err by admitting medical records where a registered nurse testified that she treated defendant's boyfriend for a stab wound in 2000, she recognized the medical record, she was one of the registered nurses involved in the trauma, her handwriting was on the record, she had probably directed a co-worker to take notes, and she signed the bottom of the record. The nurse testified that the medical records were kept as part of the records of the hospital. Williams v. State, 176 S.W.3d 476, 2004

Tex. App. LEXIS 10561 (Tex. App. Houston 1st Dist. 2004).

563. In an injury to a child case, while the trial court erred in admitting the gang intelligence form into evidence as it constituted matters observed by police officers and other law enforcement personnel and was therefore not admissible as an exception to the hearsay rule, the error was harmless as the same information was subsequently introduced, without objection, during an officer's testimony. Furthermore, any error was waived as no objection was made as to the officer testimony regarding defendant's involvement in a gunfight or an assault. Aranda v. State, 2004 Tex. App. LEXIS 10370 (Tex. App. Corpus Christi Nov. 18 2004).

564. Booking record from a prior felony conviction was properly admitted as a business record at the sentencing portion of a trial for aggravated robbery. The arresting officer was competent to sponsor the exhibit, even though he was not the records custodian, where he testified that he had been an officer for seven years and was familiar with the booking process. Martin v. State, 2004 Tex. App. LEXIS 8903 (Tex. App. Austin Oct. 7 2004).

565. Trial court did not err in admitting into evidence in defendant's trial for DWI medical records where defendant's objection was not specific enough to make the trial court aware; therefore, the error was not preserved. Jacobs v. State, 2004 Tex. App. LEXIS 4538 (Tex. App. Texarkana May 20 2004).

566. Trial court did not err in admitting into evidence in defendant's trial for DWI medical records where defendant's objection was not specific enough to make the trial court aware; therefore, the error was not preserved. Jacobs v. State, 2004 Tex. App. LEXIS 4538 (Tex. App. Texarkana May 20 2004).

567. Examining credit union account records did not establish that the records were of a regularly conducted activity or that it was the regular practice of the credit union to make such records. There was no presumption that the account records had any more reliability than other business records, such that the account records were immune from the foundational requirements of Tex. R. Evid. 803(6). West v. State, 124 S.W.3d 732, 2003 Tex. App. LEXIS 9451 (Tex. App. Houston 1st Dist. 2003).

568. Under Tex. R. Evid. 803(6), evidence of a videotaped interview of a child witness was properly excluded at defendant's trial for knowingly or intentionally causing bodily injury to her 14 month old daughter because the videotape was hearsay and did not fall under the business records exception to the hearsay rule since the witness did not have a business duty to make the statements. Cheek v. State, 119 S.W.3d 475, 2003 Tex. App. LEXIS 9301 (Tex. App. El Paso 2003).

569. Tex. R. Evid. 803 does not render inadmissible the certified copies of an accused's driving record complied by the Department of Public Safety as required by law. Ball v. State, 2002 Tex. App. LEXIS 6293 (Tex. App. Austin Aug. 30 2002).

570. In a defendant's trial on charges of theft of property valued at more than $ 20,000 from his employer, the trial court erred in admitting a letter containing out-of-court statements of a company employee claiming the property belonged to his company because the document, created solely in anticipation of prosecuting criminal charges against defendant, was offered as proof of the matter asserted and did not fall within the category of a business record for hearsay purposes. Hardy v. State, 71 S.W.3d 535, 2002 Tex. App. LEXIS 2149 (Tex. App. Amarillo 2002).

571. Assault victim's medical records were admissible as business records under Tex. R. Evid. 803(6) because the affidavit of the custodian of hospital records stated that the records were kept in the regular course of the hospital's business, that the hospital was the custodian's employer, that the victim's medical records were made by

a hospital employee with knowledge of the events, and that the employee made the records at or near the time of the event. Thus, the affidavit satisfied both Rule 803(6) and Tex. R. Evid. 902(10)(b), including the notice provision of Rule 902(10). Reyes v. State, 48 S.W.3d 917, 2001 Tex. App. LEXIS 3983 (Tex. App. Fort Worth 2001).

Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business

572. Trial court did not abuse its discretion in admitting business records over a debtor's "untrustworthiness" objection because the circumstances indicated the trustworthiness of the documents; although the last credit-card statement did contain conflicting information, it did not reflect a zero balance, and the prior statements in the business records were consistent and reflected the balance on the account at the end of each billing period Levy v. Cach, L.L.C., 2013 Tex. App. LEXIS 14586, 2013 WL 6237273 (Tex. App. Houston 14th Dist. Dec. 3 2013).

573. Even if the issue had been preserved, there was some evidence to support a conclusion that it was the regular course of business for the Midland Police Department to make the sex offender registration records and they were properly admitted. Morrison v. State, 2013 Tex. App. LEXIS 6527 (Tex. App. Eastland May 30 2013).

574. Appellant claimed that the credit card receipt should not have been admitted under Tex. R. Evid. 803(6) because the State failed to establish the document's trustworthiness, but the store's sales associate testified that he was the one who conducted the transaction and he testified that the receipt was made and kept in the regular course of business, and the store's regular practice was to make a record of each transaction and generate a receipt on the computer, and that he had personal knowledge of the transaction and acting in the regular course of business in generating the receipt; thus, the trial court could have found that the receipt was sufficiently trustworthy to fall within the business records exception. Haq v. State, 445 S.W.3d 330, 2013 Tex. App. LEXIS 5565 (Tex. App. Houston 1st Dist. May 7 2013).

575. Fact that the associate was not a store employee at the time of trial and that he was not the custodian of the records did not affect the admissibility of the credit card receipt, and he stated he would be able to determine if there had been changes made to the receipt, given that the company used a specific type of printer in order to print receipts; the trial court did not err in finding the receipt admissible. Haq v. State, 445 S.W.3d 330, 2013 Tex. App. LEXIS 5565 (Tex. App. Houston 1st Dist. May 7 2013).

576. Probate court did not abuse its discretion in admitting the 1993 tax return into evidence because the certified public accountant's affidavit met the requirements of Tex. R. Evid. 803(6) and the affidavit and tax return were timely filed pursuant to Tex. R. Evid. 902(10). In the affidavit, the accountant affirmed that he was the custodian of records, that the 12 pages consisted of the 1993 1040 U.S. Individual Income Tax Return and the decedent's W-2, that the 12 pages were kept by him in the regular course of business, and that the records were made at or near the time or reasonably soon thereafter, and that the records were the original or exact duplicates of the original. Valdez v. Hollenbeck, 410 S.W.3d 1, 2013 Tex. App. LEXIS 4998 (Tex. App. San Antonio Apr. 24 2013).

577. Exhibit which consisted of numerous payout calculations, as business records, should not have been excluded as summaries of business records compiled for trial purposes, because these payout calculations set forth drilling and completion costs as well as operating revenues and expenses. Cabot Oil & Gas Corp. v. Healey, L.P., 2013 Tex. App. LEXIS 3934 (Tex. App. Tyler Mar. 28 2013).

578. Trial court did not abuse its discretion in admitting the mortgage company's evidence where the agent's affidavit complied with Tex. R. Evid. 902(10) by averring to facts that satisfied Tex. R. Evid. 803(6); the agent averred that she was providing the records as the custodian, that she had personal knowledge of the information contained in the records, that the records were made in the regular course of business, and that it was the regular practice of the business to keep such records. Khalilnia v. Fed. Home Loan Mortg. Corp., 2013 Tex. App. LEXIS

2991, 2013 WL 1183311 (Tex. App. Houston 1st Dist. Mar. 21 2013).

579. Insurance company documents were presented as business records pursuant to Tex. R. Evid. 803(6) and the cell phone documents were presented pursuant to Tex. R. Evid. 902 with the accompanying affidavit; because the documents were produced in the normal and regular course of business of the entity that kept the records, defendant was not denied his right of confrontation. Lozoya v. State, 2013 Tex. App. LEXIS 1973, 2013 WL 708489 (Tex. App. Amarillo Feb. 27 2013).

580. Affidavit was dated in 2010 and asserted that an account was sold to a company in 2009, but a record of a sale made more than a year after a sale takes place is clearly not at or near the time of the event that it purports to record; the circumstances suggested that the affidavit was created in anticipation of litigation instead of in the course of regular business activity, which cast doubt on its trustworthiness, and as the circumstances of the affidavit did not reflect the conditions of the justifications behind the business record exception, the affidavit did not fall within the business records exception. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

581. In a forcible detainer action, a business records affidavit that authenticated the notice to vacate was not inadmissible hearsay under Tex. R. Evid. 801(d) because it substantially complied with the requirements of Tex. R. Evid. 803(6), 902(10), although it did not precisely track the language of Rule 902(10). Although the affidavit was prepared by a third party, the foreclosure purchaser's law firm, the trial court could have concluded that the purchaser reasonably relied on the accuracy of the records in the ordinary course of its business and that they were trustworthy. Baty v. Morequity, Inc., 2012 Tex. App. LEXIS 9876 (Tex. App. Houston 1st Dist. Nov. 29 2012).

582. Trial court did not err by admitting into evidence a conservatorship specialist's plan and progress report into evidence on the ground that it was inadmissible hearsay because the records were admissible under the business records exception to the hearsay rule, as the specialist testified that the permanency plan was made and kept in the regular course of her business, that the records were made near the time of the events recorded, and that the records were compiled by a person with knowledge who was acting in the regular course of business. In re A.L.W., 2012 Tex. App. LEXIS 9290 (Tex. App. Fort Worth Nov. 8 2012).

583. Business records of an attorney were admissible pursuant to Tex. R. Evid. 803(6) to support attorney's fees, and the trial court did not abuse its discretion in overruling the brother's objection and admitting the trustee's Exhibit 1 into evidence. Lesikar v. Moon, 2012 Tex. App. LEXIS 7311, 2012 WL 3776365 (Tex. App. Houston 14th Dist. Aug. 30 2012).

584. Business records affidavit met the criteria under Tex. R. Evid. 803(6), given that (1) the affiant stated she was the records custodian for the debt-holder's assignee, it was the assignee's regular practice to rely on documents the original creditor prepared, and the records were maintained by those with the duty to keep the record accurately, (2) one of the documents attached to the affidavit was an affidavit of sale, which was notarized and self-authenticating under Tex. R. Evid. 902(8), and the affidavit of sale stated that the creditor acquired the account and then sold it to the assignee, with a certain amount due, and (3) the creditor's failure to keep accurate records could result in penalties, for purposes of Tex. Fin. Code Ann. §§ 392.304(a)(8), 392.402, and the circumstances otherwise indicated the trustworthiness of the creditor's documents; the trial court did not abuse its discretion in admitting the records. Ainsworth v. Cach, Llc, 2012 Tex. App. LEXIS 2798 (Tex. App. Houston 14th Dist. Apr. 10 2012).

585. In a breach of contract action brought by appellee, the assignee of a credit card company, against an account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent sufficiently showed that appellee incorporated the credit card company's records and kept them in the regular course of its business. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App.

LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

586. Testimony of a custodian of records as to their preparation established the business records exception under Tex. R. Evid. 803(6) in a construction contract dispute, and his statement that the evidence accurately portrayed what the subcontractor claimed it portrayed met the authentication requirement of Tex. R. Evid. 901(a), regardless of whether he had personal knowledge of the information contained in the records. Concept Gen. Contr., Inc. v. Asbestos Maint. Servs., 346 S.W.3d 172, 2011 Tex. App. LEXIS 5475 (Tex. App. Amarillo July 18 2011).

587. In an action to collect a credit card debt, although the debtor pointed to discrepancies between the creditor's business records affidavit and other documents, the trial court did not abuse its discretion under Tex. R. Evid. 803(6) in determining that the circumstances did not indicate untrustworthiness and in admitting the records. Troung v. Dodeka, L.L.C., 2011 Tex. App. LEXIS 5213, 2011 WL 2693504 (Tex. App. Houston 14th Dist. July 12 2011).

588. Where defendant was charged with several counts of indecency with a child by contact under Tex. Penal Code Ann. § 21.11(a)(1), where he testified on direct examination that he had never improperly touched the alleged victims or any other child, where the prosecutor impeached defendant on cross-examination by introducing defendant's guilty plea to the offense of aggravated sexual assault of a child in which defendant admitted that he sexually penetrated a male child under the age of 14, and where defense counsel on redirect attempted to introduce the child's medical records to show that the child told health care providers that he had been assaulted by his father and not defendant, the trial court did not err under Tex. R. Evid. 803(6) in excluding the records because defense counsel tried to admit the records through the testimony of a disability advocate with the hospital who claimed familiarity with the records but who did not testify that the victim's statements were kept in the course of a regularly conducted business activity or that it was a regular practice to keep records of such statements. She was not the custodian of the records and did not make the records, and there was no evidence that the records at issue were business records. Salinas v. State, 2011 Tex. App. LEXIS 3644, 2011 WL 1938664 (Tex. App. Corpus Christi May 12 2011).

589. Trial court affirmatively stated that it had considered the factors set forth in Tex. Disciplinary R. Prof. Conduct 1.04(b), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A-1 (Tex. State Bar R. art. X, sec. 9) in awarding attorney's fees, and absent objection, counsel's unsworn testimony sufficiently established the amount of fees incurred. Thus, although the supporting affidavits were hearsay because they did not comply with the requirements of Tex. Civ. Prac. & Rem. Code Ann. § 18.001 and the invoices were hearsay because they were not properly authenticated as business records under Tex. R. Evid. 803(6), their admission was harmless error. Good v. Baker, 339 S.W.3d 260, 2011 Tex. App. LEXIS 2167 (Tex. App. Texarkana Mar. 25 2011).

590. In a suit to recover a credit-card debt, the debtor failed to preserve for review under Tex. R. App. P. 33.1(a)(2) his objections to an affidavit because he did not obtain a ruling; and in any event, the affidavit was sufficiently authenticated as a business record under Tex. R. Evid. 803(6), 902(10) by the affiant's testimony about her personal knowledge of account records. Singh v. Citibank (south Dakota), N.A., 2011 Tex. App. LEXIS 2161, 2011 WL 1103788 (Tex. App. Austin Mar. 24 2011).

591. Probation officer's chronological record of attempts to contact defendant was properly admitted as a business record under Tex. R. Evid. 803(6) because the officer testified that the record was a computer printout of notes that he entered into the computer in the ordinary course of his role as a probation officer. Ford v. State, 2011 Tex. App. LEXIS 2192, 2011 WL 1106731 (Tex. App. Corpus Christi Mar. 24 2011).

592. Under Tex. R. Evid. 901, the production of a decedent's medical records during discovery might have authenticated them but did not render them admissible in a will contest. The medical records were hearsay and inadmissible as business records under Tex. R. Evid. 801(d), 803(6) because no custodian established the

requirements of the exception. In the Estate of Vackar, 345 S.W.3d 588, 2011 Tex. App. LEXIS 1684 (Tex. App. San Antonio Mar. 9 2011).

593. In a forcible detainer suit brought by a lender that purchased the property at a foreclosure sale, a paralegal employed by an affiliated service provider of the lender's counsel was a qualified witness with personal knowledge under Tex. R. Evid. 602, 803(6), 902(10) of business records regarding the foreclosure proceedings. Rodriguez v. Citimortgage, Inc., 2011 Tex. App. LEXIS 171, 2011 WL 182122 (Tex. App. Austin Jan. 6 2011).

594. Pharmacy dispensed medication to a mother pursuant to the physician's directions and kept records of the prescriptions in the course of its regular business, plus a witness, the owner of the pharmacy, was the custodian of the records, such that the trial court did not err in admitting the business records under Tex. R. Evid. 803(6). In the Interest of S.R., 2010 Tex. App. LEXIS 9681, 2010 WL 4983484 (Tex. App. Waco Dec. 8 2010).

595. Affidavit demonstrated that the agent was the custodian of records for the law firm that represented the mortgagor at trial, and it tracked the requirements of Tex. R. Evid. 803(6); the homeowner did not challenge the trustworthiness of the business records covered by the affidavit, and the affidavit contained information upon which the trial court could have reasonable concluded that the agent was qualified to testify about the matters contained in the business record. Fleming v. Fannie Mae, 2010 Tex. App. LEXIS 9393, 2010 WL 4812983 (Tex. App. Fort Worth Nov. 24 2010).

596. In a negligence suit, the trial court properly sustained Tex. R. Evid. 801(d) hearsay objections to testimony from a police officer and to e-mails written in anticipation of litigation; the officer's testimony was not admissible under the Tex. R. Evid. 803(3) state of mind hearsay exception because the Tex. R. Evid. 103(a)(2) offer of proof did not make clear when the declarant spoke with the officer, and the e-mails also were not spontaneous statements and did not qualify as business records under Rule 803(6). Estate of Ronnie Wren v. Bastinelli, 2010 Tex. App. LEXIS 330 (Tex. App. Texarkana Jan. 20 2010).

597. In the punishment phase of defendant's aggravated sexual assault of a child case, the court properly admitted evidence of his prior sexual assault convictions because, although the records custodian admitted that she did not have personal knowledge of the contents of defendant's record, and did not personally pull and copy the files, such testimony was unnecessary. The witness's testimony sufficiently satisfied the necessary predicate by showing she had personal knowledge of the manner by which the records were prepared, and there was nothing in the record to suggest the judgments were so untrustworthy as to justify exclusion. Herrera v. State, 2009 Tex. App. LEXIS 9690, 2009 WL 4981327 (Tex. App. San Antonio Dec. 23 2009).

598. Trial court did not abuse its discretion by admitting documents from defendant's sex offender records in Texas because the sheriff's deputy who laid the predicate for introduction of the documents as business records demonstrated she had personal knowledge of the mode of preparation of the documents, as: (1) the deputy testified that her agency confirmed that defendant was convicted of a sexual offense out of state by calling a probation officer who faxed the Ohio court papers to the sheriff's office; (2) sheriff's department personnel verified facts within the record with defendant, who signed many of the registration documents containing reference to the Ohio cause number; and (3) the deputy affirmed that this method was the usual practice of sheriff's department employees in confirming information of an offender and the records were kept in the regular course of business of her agency. Wagner v. State, 2009 Tex. App. LEXIS 2423 (Tex. App. Houston 14th Dist. Mar. 31 2009).

599. In the State's action under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) that alleged that appellants, a husband and wife who operated a business assisting Spanish speaking individuals with immigration matters, had counseled consumers without legal authorization or qualification, appellants raised no valid complaints regarding the admissibility of the evidence and the trial court's rulings thereon where an exhibit

consisting of a summary of the more than 2,180 G-28 forms filed by the husband was itself a business record entitled to be treated as other business records, making Tex. R. Evid. 1006 inapplicable, and where the testimony of an intelligence research specialist with the Citizenship and Immigration Services Branch of the United States Department of Homeland Security established the necessary predicate required by Tex. R. Evid. 803(6) because the specialist testified that the exhibit was a business record made in the ordinary course of business at Citizenship and Immigration Services, made at or near the time his department received the G-28 forms, by a person with knowledge of the events being recorded; furthermore, the trial court did not err in refusing to allow a previous client of appellants who was testifying for the State to answer when asked if she obtained her residency status because any testimony going to the gravity of the harm done by engaging in the prohibited act was irrelevant and inadmissible. Avila v. State, 252 S.W.3d 632, 2008 Tex. App. LEXIS 2270 (Tex. App. Tyler 2008).

600. In a credit card company's action for breach of contract for a cardholder's failure to pay his credit card debt, a custodian of records for the company properly authenticated the documents referenced in her summary judgment affidavit as "business records" and the affidavit contained sufficient factual support and was not, therefore, conclusory; the cardholder did not present any evidence to raise a fact issue as to whether the documents were properly authenticated business records, and he also failed to identify any statements in the affidavit that he contended were opinions or legal conclusions. Duran v. Citibank (South Dakota), N.A., 2008 Tex. App. LEXIS 2060 (Tex. App. Houston 1st Dist. Mar. 20 2008).

601. In an intoxication manslaughter trial under Tex. Penal Code Ann. § 49.08, medical records that contained the notes of a substance abuse counselor regarding defendant's 40-year history of drinking six to eight beers a day were properly admitted as business records. Sullivan v. State, 248 S.W.3d 746, 2008 Tex. App. LEXIS 670 (Tex. App. Houston 1st Dist. 2008).

602. Nurse testified that a nurse's records were kept in the regular course of business at the medical center, and that she was familiar with the records because she, as a representative of the medical center, made them; furthermore, she created them near the time of the event and had actual knowledge of the event; although she did not specifically say she was the custodian of records, she established that she was qualified to testify, and her testimony laid the proper predicate for admission of the medical records under the business records exception to the hearsay rule. Clark v. State, 2007 Tex. App. LEXIS 9452 (Tex. App. Dallas Dec. 4 2007).

603. Jury's verdict finding that an individual was incapacitated was upheld because two physicians' reports were properly admitted under the business records exception of Tex. R. Evid. 803 since it was the regular course of business to make the reports and there was no question about trustworthiness. In re Parker, 2007 Tex. App. LEXIS 9428 (Tex. App. Fort Worth Nov. 29 2007).

604. During defendant's murder trial, he was not permitted to introduce his jail records under Tex. R. Evid. 803; the height and weight identifiers on the jail records were provided by defendant at the time of booking; he had no business duty to report accurately. Benford v. State, 2007 Tex. App. LEXIS 2844 (Tex. App. Houston 14th Dist. Apr. 12 2007).

Evidence : Hearsay : Exceptions : Family Records & Statements

605. Documents related to marriages, births, personal history, and relationships of church members and were regularly maintained by the church; the documents were excepted from the hearsay rule under Tex. R. Evid. 803(11) or Tex. R. Evid. 803(13) and the trial court did not abuse its discretion in admitting these documents. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

606. Appellant claimed the purpose for which the State offered the evidence was not a purpose discussed in the rules; however, the exceptions to the hearsay rules are not dependent on the reason why a party wants to offer the hearsay, and the only relevant inquiry concerning the purpose of hearsay is whether the out-of-court statement is being offered for the truth of the matter asserted. Why the proponent wishes to admit the evidence, beyond offering it for the truth of the matter asserted, is immaterial, and how the hearsay evidence supports the proponent's trial theory or fits into the proponent's trial strategy does not affect its admissibility under an exception under the rules. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

607. Trial court did not err in admitting the testimony of a descendant of the dominant estate's original owner, including events pre-dating the descendant's birth and the use of the purported easement. Under case law, such testimony was permissible under Tex. R. Evid. 803(19), (20), 804(b)(3). Perkins v. Krauter Family P'ship, 2004 Tex. App. LEXIS 8399 (Tex. App. San Antonio Sept. 22 2004).

Evidence : Hearsay : Exceptions : Judgments : Prior Felony Convictions

608. Even if the trial court erred by admitting the December 2010 judgment under Tex. R. Evid. 803(22), other evidence showed that the patient had been convicted of indecency with a child by contact; thus, the order of civil commitment was proper as the patient had been convicted of more than one qualifying sexually violent offense under Tex. Health & Safety Code Ann. §§ 841.002(8)(A), 841.003(b). In re Commitment of Hernandez, 2011 Tex. App. LEXIS 9806, 2011 WL 6229575 (Tex. App. Beaumont Dec. 15 2011).

609. Given that Tex. R. Evid. 803 created an exception to the hearsay rule for public records and reports and judgments of previous convictions, to the extent that defendant's complaint was that pen packets were hearsay, the trial court did not abuse its discretion by overruling the hearsay objection. Smith v. State, 2008 Tex. App. LEXIS 2849 (Tex. App. Fort Worth Apr. 17 2008).

Evidence : Hearsay : Exceptions : Learned Treatises : General Overview

610. In defendant's aggravated sexual assault of a child case, the court properly allowed expert testimony by a nurse concerning her finding no trauma to the child's genitals in her examination because she was qualified by her knowledge, skill, experience, training, and education as an expert witness in the field of child sexual abuse; she testified that she relied on a study in reaching her opinion, and therefore, the trial court did not abuse its discretion by allowing the nurse to testify about the results of the study. Archer v. State, 2007 Tex. App. LEXIS 6612 (Tex. App. Austin Aug. 17 2007).

611. During defendant's trial for recklessly causing serious bodily injury to a child with the use of a deadly weapon, the trial court did not err under Tex. R. Evid. 803 (18) in failing to admit a medical journal article that refuted the scientific theory upon which the State's medical experts relied, because defendant had the opportunity to cross-examine the State's medical experts on Shaken Baby Syndrome and the minority viewpoint contained in the article suggesting that injuries such as those sustained by the child could result from causes other than Shaken Baby Syndrome. Hernandez v. State, 2005 Tex. App. LEXIS 10659 (Tex. App. Fort Worth Dec. 22 2005).

612. In a murder case, the trial court did not err in ruling that an article taken from an Internet medical journal was a treatise and, under Tex. Evid. R. 803(18), was not admissible as an exhibit; because cross-examination as to the article was permitted, there was no violation of the constitutional right of confrontation. Sanchez v. State, 2004 Tex. App. LEXIS 3783 (Tex. App. Corpus Christi Apr. 29 2004).

Evidence : Hearsay : Exceptions : Market Reports & Commercial Publications : General Overview

613. Court had held that several exceptions could be relied upon to allow proof of the value of stolen property, including the business-records exception, the exception for records of documents affecting an interest in property, and the exception for market reports and such, and thus the trial court did not abuse its discretion in permitting a witness's testimony in this regard over appellant's hearsay objection; in the alternative, any error was harmless because (1) appellant's community supervision was conditioned on him not committing any offense, (2) although it was alleged that appellant committed theft of property worth at least $ 1,500, proof of a lesser included offense would have sufficed to render judgment adjudicating his guilt, (3) theft of property valued at less than $ 50 was a lesser-included offense of theft of property of a higher amount, and (4) even if there was no properly admitted evidence of the value of the wheels and tires, the court could presume they had some value because the witness had not replaced them for months after the theft. Calixto v. State, 2012 Tex. App. LEXIS 2643, 2012 WL 1138726 (Tex. App. Dallas Apr. 4 2012).

614. In a criminal trial for theft of property where defendant was charged with financial exploitation based on undue influence, the trial court did not err by admitting evidence of the Kelly bluebook value of a Ford Explorer that the victims purchased and signed over to defendant; the evidence was admissible under Tex. R. Evid. 803, the hearsay exception for published compilations. Jacks v. State, 2006 Tex. App. LEXIS 1968 (Tex. App. Tyler Mar. 15 2006).

615. In a possession of pseudoephedrine with intent to manufacture methamphetamine case, the labeling on the cold medicine bottles constituted hearsay because it was an extrajudicial assertion offered to prove the truth of the matter asserted that the tablets contained pseudoephedrine; however, the labels were generally relied upon by the public, which suggested that the cold medication labels were accurate and trustworthy; thus, pursuant to Tex. R. Evid. 803, the labels were admissible as an exception to the hearsay rule. Shaffer v. State, 184 S.W.3d 353, 2006 Tex. App. LEXIS 410 (Tex. App. Fort Worth 2006).

Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment

616. Given the record before the appellate court, and the general objection to all of the sexual assault nurse examiner's testimony, the appellate court could not say that there was no medical purpose to obtaining any of the history; because the investigative questions were intertwined with proper requests for medical history, the trial court did not abuse its discretion by allowing her testimony. Berman v. State, 2014 Tex. App. LEXIS 5523 (Tex. App. Fort Worth May 22 2014).

617. Trial court did not abuse its discretion by admitting the testimony of the victim's counselor because the State met its burden to make the record reflect that truth-telling was a vital component of the victim's counseling and that he was aware that that was the case. In re H.L.A., 2014 Tex. App. LEXIS 3081 (Tex. App. Houston 1st Dist. Mar. 20 2014).

618. In a sexual assault trial, it did not violate the hearsay rule to admit the complainant's account of what happened, as told to a sexual assault nurse examiner, because the complainant's statements regarding the incident were necessary for purposes of medical diagnosis and treatment and thus came under the medical treatment exception. Williams v. State, 2014 Tex. App. LEXIS 2618, 2014 WL 895506 (Tex. App. Waco Mar. 6 2014).

619. Court did not abuse its discretion by admitting the inculpatory statements, because they fell squarely within the hearsay exception for medical diagnosis or treatment, when there was a family relationship between the accuser and defendant, and the identity of the assailant was reasonably pertinent to diagnosis or treatment. Trevizo v. State, 2014 Tex. App. LEXIS 652, 2014 WL 260591 (Tex. App. El Paso Jan. 22 2014).

620. Court did not abuse its discretion by admitting the inculpatory statements, because they fell squarely within the hearsay exception for medical diagnosis or treatment, when there was a family relationship between the accuser and defendant, and the identity of the assailant was reasonably pertinent to diagnosis or treatment. Trevizo v. State, 2014 Tex. App. LEXIS 652, 2014 WL 260591 (Tex. App. El Paso Jan. 22 2014).

621. On appeal, defendant appeared to concede that the statement was made for purposes of medical treatment, but opined that it was inadmissible before there was no assurance that the victim understood the need to speak truthfully, and the issue did not comport with the objection made by counsel; even if the court assumed the issue had been properly preserved, the decision to admit the testimony of the sexual assault nurse examiner was not outside the zone of reasonable disagreement. Tuckness v. State, 2013 Tex. App. LEXIS 14333, 2013 WL 6255702 (Tex. App. Amarillo Nov. 21 2013).

622. Defendant failed to show that the court erred in admitting the statements made to the nurse, because the qualifications of the person hearing the statements was not the important consideration, and the fact that the nurse could have been gathering information for a criminal prosecution did not lead to the conclusion that the statements were inadmissible. Beck v. State, 2013 Tex. App. LEXIS 13160, 2013 WL 5773573 (Tex. App. Tyler Oct. 23 2013).

623. Testimony by a sexual assault nurse examiner and a clinical psychologist regarding the victim's statements were made to those witnesses for purposes of medical diagnosis and treatment, as they obtained a medical history and history of what happened from the victim in order to diagnose and treat the victim. Herrera v. State, 2013 Tex. App. LEXIS 11569 (Tex. App. El Paso Sept. 11 2013).

624. At defendant's trial for three counts of aggravated sexual assault of a child, the nurse who examined the victim after she made her outcry was permitted to testify about the victim's responses when asked why she was going to have the exam; it could be inferred that the victim knew it was important to tell the truth and that asking about the assaults was important to the child's medical diagnosis or treatment. Thomas v. State, 2013 Tex. App. LEXIS 10661 (Tex. App. Austin Aug. 23 2013).

625. Trial counsel's performance was not deficient in not objecting on hearsay grounds to the Sexual Abuse Nurse Examiner's report because this rule provided legal grounds for admission of the report. Moreno v. State, 2013 Tex. App. LEXIS 9446 (Tex. App. San Antonio July 31 2013).

626. Trial court did not allow a nurse to testify as an expert because she was not so designated, and this was irrelevant to an analysis under the rule, as the notion that a witness had to have medical qualifications had already been rejected; the fact that the nurse might have been gathering information for a criminal prosecution did not lead to the finding that the statements were not admissible, and appellant did not show error. Beck v. State, 2013 Tex. App. LEXIS 9536 (Tex. App. Tyler July 31 2013).

627. Defendant's contention that the SANE nurse examiner reading from her medical report was inadmissible hearsay on the ground that the nurse had not advised the complainant of the importance of telling the truth was rejected because the trial court did not abuse its discretion in inferring that the complainant had an implicit awareness her examination was dependent on the veracity of her statements, as the nurse explained the entire process to her before obtaining the history of what happened. Duckworth v. State, 2013 Tex. App. LEXIS 9062 (Tex. App. San Antonio July 24 2013).

628. At defendant's trial for multiple counts of injury to a child and aggravated sexual assault of a child, the State was permitted to present the testimony of a professional counselor under this rule indicating that the victim made an outcry to his foster mother before he discussed it with the counselor. Stewart v. State, 2013 Tex. App. LEXIS 8614

(Tex. App. Corpus Christi July 11 2013).

629. Where defendant was convicted of multiples counts of aggravated sexual assault, attempted aggravated sexual assault, and indecency with a child, the trial court did not err in admitting the testimony of the two sexual assault nurse examiners (SANE) because their testimony fell under an exception to the hearsay rule. Neither SANE nurse gave any opinion about the truthfulness of the alleged victims, and bolstering was not a cognizable objection. Trevino v. State, 2013 Tex. App. LEXIS 8618 (Tex. App. Corpus Christi July 11 2013).

630. In a prosecution of defendant for sexual assault of a child, the trial court did not err in admitting the testimony of a sexual assault nurse examiner, where a proper predicate was laid for the admission of the testimony. Lathan v. State, 2013 Tex. App. LEXIS 4779 (Tex. App. San Antonio Apr. 17 2013).

631. Defendant's conviction for an assault against his wife was appropriate, in part because a plausible inference could have been made that the medical records at issue were created simply for the purpose of medical diagnosis, Tex. R. Evid. 803(6). Perez v. State, 2013 Tex. App. LEXIS 1694, 2013 WL 655714 (Tex. App. Houston 14th Dist. Feb. 21 2013).

632. Defendant's convictions for aggravated sexual assault of a child and indecency with a child were proper because the trial court did not abuse its discretion by overruling defendant's hearsay objection to the victim's statement since the trial court could have reasonably concluded in light of the testimony and the setting for the examination that the victim was aware that her statements were for the purposes of medical diagnosis and treatment and was aware of the importance of being truthful, Tex. R. Evid. 803(4). Sosa v. State, 2012 Tex. App. LEXIS 9807 (Tex. App. Dallas Nov. 28 2012).

633. In a will contest, the trial court erred by granting summary judgment on the issue of testamentary capacity because testimony from witnesses that decedent was not in a state of mind to conduct financial affairs when he signed his will was sufficient to show the existence of a material fact issue with respect to testamentary capacity. The appellate court did not consider the medical records attached to the motions for summary judgment, because they were not proven up with a medical record's affidavit in accordance with Tex. R. Evid. 803(6). In re Estate of O'Neil, 2012 Tex. App. LEXIS 7376, 2012 WL 3776490 (Tex. App. San Antonio Aug. 31 2012).

634. In defendant's domestic violence case, the victim's statements to a doctor were properly admitted because the victim was at the emergency room complaining of "physical abuse and assault," and the doctor testified that in order to treat victims of assault in cases in which the victim might return to her assailant, he needed to know who caused the assault and how the assault occurred. Additionally, the doctor testified that the victim complained of pain in specific areas of her body, and the district court could have reasonably inferred that in order for the doctor to determine how to treat the pain in those areas, he needed to know what, specifically, had caused the pain. Garcia v. State, 2012 Tex. App. LEXIS 7543 (Tex. App. Austin Aug. 29 2012).

635. Statements defendant's granddaughter made to a licensed professional counselor that defendant played an active role in the day-to-day care of her grandchildren and was the disciplinarian for the grandchildren were admissible under the hearsay exception for statements made for purposes of medical diagnosis or treatment under Tex. R. Evid. 803(4) because the counselor needed to establish the family structure to address the granddaughter's therapeutic needs. Tijerina v. State, 2012 Tex. App. LEXIS 6872, 2012 WL 3525632 (Tex. App. Corpus Christi Aug. 16 2012).

636. Victim's out-of-court statements made to a therapist concerning appellant's conduct as the perpetrator of the crime were not inadmissible under Tex. R. Evid. 803(4) just because the therapist was not a psychiatrist or a member of the medical profession; the therapist had been seeing the victim in counseling for two years, and the

therapist had a developed a working diagnosis of post-traumatic stress disorder to pursue the treatment course for the victim. Ortiz v. State, 2012 Tex. App. LEXIS 2603, 2012 WL 1137909 (Tex. App. Houston 14th Dist. Apr. 3 2012).

637. Even if the court assumed that the trial court erred in admitting a therapist's testimony of certain incidents under Tex. R. Evid. 803(4), there was no harm from the admission of the testimony, given that the victim had already testified tot the same incidents including other ones, and the court could not find that the error, if any, influenced the jury in appellant's attempted indecency with a child case. Ortiz v. State, 2012 Tex. App. LEXIS 2603, 2012 WL 1137909 (Tex. App. Houston 14th Dist. Apr. 3 2012).

638. In defendant's sexual abuse case, the victim's hearsay statements to a doctor were properly admitted because the doctor testified that she had specialized training in treating conditions related to sexual abuse, and that she always asked her patients for a thorough medical history prior to making any diagnosis. The doctor found that the victim had a "notch" on her hymen, which was a "suspicious" finding consistent with what the victim had told her about the abuse she suffered. Whitman v. State, 2012 Tex. App. LEXIS 936, 2012 WL 361740 (Tex. App. Corpus Christi Feb. 2 2012).

639. Appellant claimed that his medical records were admissible under Tex. R. Evid. 803(4), (6), but this was not presented at trial as a ground for overruling the State's hearsay objection under Tex. R. Evid. 801(d), and although the records were included in the bill of exceptions, such was not made on the predicate for admission under either hearsay exception appellant raised for the first time on appeal; even if the court assumed that the trial court understood the bill of exceptions to be a proffer of admission, the records did not establish that appellant suffered from a medical condition that was relevant to his prosecution for driving while intoxicated, the patient history did not show that he had a condition that mimicked the symptoms of intoxication, and no other potential relevance for the records was shown, such that exclusion of the records did not affect a substantial right under Tex. R. App. P. 44.2(b). Bradley v. State, 2012 Tex. App. LEXIS 410, 2012 WL 150969 (Tex. App. Beaumont Jan. 18 2012).

640. During defendant's trial for continuous sexual abuse of a young child, the court did not err under Tex. R. Evid. 803(4) in admitting a summary of the victim's interview by an examining physician because although no affirmative showing was required, the evidence supported an inference that the victim understood the need for veracity; the victim was 13 years old at the time of the examination. Alvarado v. State, 2011 Tex. App. LEXIS 10062, 2011 WL 6808378 (Tex. App. Houston 14th Dist. Dec. 22 2011).

641. Texas Court of Criminal Appeals does not require a proponent of Tex. R. Evid. 803(4) statements to an examining physician to affirmatively demonstrate the declarant was aware of the need for veracity. Alvarado v. State, 2011 Tex. App. LEXIS 10062, 2011 WL 6808378 (Tex. App. Houston 14th Dist. Dec. 22 2011).

642. Trial court did not err in allowing an emergency medical technician who treated a murder victim at the scene to testify that when she asked the victim about one of his injuries, he replied, "he kicked me," because the medical diagnosis exception to the hearsay rule found in Tex. R. Evid. 803(4) applied to the victim's response to the question about how he became injured. Malone v. State, 2011 Tex. App. LEXIS 8602, 2011 WL 5118820 (Tex. App. Fort Worth Oct. 27 2011).

643. Trial court did not abuse its discretion by overruling defendant's objection and admitting the challenged hearsay as the sexual assault nurse examiner testified she explained the purpose of the examination to the complainant and believed the complainant understood what she was asking of her. Barshaw v. State, 2011 Tex. App. LEXIS 7400 (Tex. App. Austin Sept. 9 2011).

644. Trial court did not abuse its discretion by admitting the testimony of the sexual assault nurse examiner regarding hearsay statements made by the victim under Tex. R. Evid. 803(4) because: (1) the 16-year-old victim was seen by the nurse in an emergency room setting less than 48 hours after the assaultive conduct ended; (2) there was nothing in the record to negate that the victim possessed the necessary awareness of the need to be truthful during the medical history portion of the exam; (3) the nurse specifically testified that obtaining the history from the victim was necessary for medical treatment; and (4) based on the victim's statements that she had been sexually abused over an extended period of time by more than one assailant and the abuse included penetration of the female sexual organ and anus, the nurse examined those areas of the victim's body. Johnson v. State, 2011 Tex. App. LEXIS 7151, 2011 WL 3848985 (Tex. App. El Paso Aug. 31 2011).

645. In a daughter's action claiming undue influence, nurse reports regarding the decedent's interaction with her husband were admissible because they were supported by an affidavit complying with Tex. R. Evid. 902(10); they were admissible as business records under Tex. R. Evid 803(4), (6) regarding the decedent's medical treatment. In the Estate of Ward, 2011 Tex. App. LEXIS 6811, 2011 WL 3720829 (Tex. App. Waco Aug. 24 2011).

646. In defendant's trial on a charge of aggravated sexual assault of a child under Tex. Penal Code Ann. § 22.021(a)(1)(B)(i) and (a)(2)(B), even if the trial court erred in admitting the victim's hearsay statements under the hearsay exception under Tex. R. Evid. 803(4), any such error was harmless because the victim herself testified without objection to the very statements contained in the objected-to medical record. Vanhoy v. State, 2011 Tex. App. LEXIS 6591, 2011 WL 3631316 (Tex. App. Corpus Christi Aug. 18 2011).

647. Trial court did not err in admitting the transcription of the doctor's testimony into evidence as an expert witness may rely on records and information prepared by others in reaching his conclusions, Tex. R. Evid. 703, and medical and autopsy reports fell into an exception to the hearsay rule and were allowed into evidence without the preparing doctor appearing in court to explain them, Tex. R. Evid. 803(4), (8). Rodriguez v. Tex. Dep't of Family & Protective Servs., 2011 Tex. App. LEXIS 6131, 2011 WL 3435736 (Tex. App. Austin Aug. 4 2011).

648. In the penalty phase of a trial for intoxication manslaughter, there was no error under Tex. R. Evid. 803(4) in refusing to allow an expert witness to explain that a diagnosis of post-traumatic stress disorder was based, in part, on what defendant told him about his mental history, including what happened on the night of the accident. Bayas v. State, 2011 Tex. App. LEXIS 5306, 2011 WL 2714114 (Tex. App. El Paso July 13 2011).

649. During sentencing in defendant's trial for aggravated robbery, the trial court did not abuse its discretion by admitting hearsay testimony from a sexual assault nurse examiner who indicated that defendant's daughter had sustained multiple penetrating injuries that were consistent with her account of abuse. Statements made for purposes of medical diagnosis were excepted from hearsay under Tex. R. Evid. 803(4). Prieto v. State, 337 S.W.3d 918, 2011 Tex. App. LEXIS 2606 (Tex. App. Amarillo Apr. 7 2011).

650. Trial court did not abuse its discretion by admitting the doctor's testimony under Tex. R. Evid. 803(4); it was within the trial court's discretion to determine that the statements were made for the purpose of medical diagnosis or treatment and that proper treatment depended on the veracity of such statements. Vela v. State, 2011 Tex. App. LEXIS 2127, 2011 WL 1084795 (Tex. App. Eastland Mar. 24 2011).

651. During defendant's trial for aggravated sexual assault, the testimony of a physician and a psychotherapist regarding the victim's statements to them was admissible under Tex. R. Evid. 803(4) as an exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment. Anderson v. State, 2010 Tex. App. LEXIS 8487, 2010 WL 4140317 (Tex. App. Waco Oct. 20 2010).

652. Given that (1) the victim met with the sexual assault nurse alone, which isolated the victim from anyone who could influence her, and (2) the nurse testified that medical histories were relevant to medical diagnosis and treatment, the medical history was at a minimum reasonably pertinent to diagnosis or treatment, and thus admissible under Tex. R. Evid. 803(4). Satterlee v. State, 2010 Tex. App. LEXIS 6007, 2010 WL 2966967 (Tex. App. Corpus Christi July 29 2010).

653. Although no specific inquiry was made to determine whether the 12-year-old child victim appreciated the need to be truthful in her statements to a nurse, the record supported this, given that the nurse found the victim's conduct was consistent with descriptions provided by other similarly aged victims and the child's welfare was an incentive for her to be honest with the nurse; it was reasonable for the nurse to ask what happened to determine what tests she might have to run, it was relevant for the nurse to know who the perpetrator was to prevent the victim from returning to an abusive home, and the evidence supported a finding that the medical history taken by the nurse was given for the purpose of medical diagnosis and treatment and the testimony fell under Tex. R. Evid. 803(4) and was properly admitted. Satterlee v. State, 2010 Tex. App. LEXIS 6007, 2010 WL 2966967 (Tex. App. Corpus Christi July 29 2010).

654. Nurse's testimony was properly admitted because it related to a statement made for medical diagnosis or treatment under Tex. R.e Evid. 803(4) and thus counsel's failure to pursue the objection did not fall below an objective standard of reasonableness. Satterlee v. State, 2010 Tex. App. LEXIS 6007, 2010 WL 2966967 (Tex. App. Corpus Christi July 29 2010).

655. Court did not err during defendant's trial for aggravated sexual assault of his stepdaughter in admitting the eight-year-old victim's hearsay statements to a pediatrician who examined her because the court could have found that the statements, including those identifying defendant, were reasonably pertinent to diagnosis or treatment under Tex. R. Evid. 803(4). Hernandez v. State, 2010 Tex. App. LEXIS 5558, 2010 WL 2788875 (Tex. App. Austin July 13 2010).

656. Tex. R. Evid. 803(4) is premised on a patient's selfish motive in receiving appropriate medical treatment. Thus, the patient must have a motive consistent with obtaining medical care, knowing that proper diagnosis or treatment depends upon the veracity of his or her statements to the physician. Hernandez v. State, 2010 Tex. App. LEXIS 5558, 2010 WL 2788875 (Tex. App. Austin July 13 2010).

657. Testimony of emergency medical technician (EMT) regarding the statements made by defendant's wife indicating that defendant had assaulted her was admissible under Tex. R. Evid. 803(4) because the statements were made for the purpose of receiving medical treatment. The purpose of asking defendant's wife what happened to her was pertinent to determining a present course of treatment, as different medical treatments are necessary in to treat different conditions; the questions asked and responses received were unrelated to the investigation of defendant's crimes, and there were no formalities typical of a criminal investigatory review. Martinez v. State, 2010 Tex. App. LEXIS 4932, 2010 WL 2619647 (Tex. App. El Paso June 30 2010).

658. Defendant failed to carry his burden of establishing that a hearsay exception applied to make the clinical social worker's testimony admissible into evidence, because defendant did not establish that truth-telling was a vital component of the social worker's treatment of the niece or that the niece was aware that being truthful was essential to her therapy. Harrington v. State, 2010 Tex. App. LEXIS 2138, 2010 WL 1137046 (Tex. App. Fort Worth Mar. 25 2010).

659. There was no err in allowing the jury to hear the testimony of the pediatric nurse who examined one of the child complainants, because defendant had not demonstrated that the trial court's implied ruling, that the nurse's examination was for the purpose of medical diagnosis or treatment, was so clearly wrong as to lie outside the zone

within which reasonable people might disagree; the nurse testified that she performed a medical examination on the complainant, the nurse explained that her standard examination consisted of a head-to-toe physical, with special attention on the genital and anal area and testing for sexually transmitted diseases, and the nurse testified that if she found any injury, then she would prescribe a course of treatment. Lucero v. State, 2009 Tex. App. LEXIS 9908 (Tex. App. Houston 1st Dist. Dec. 31, 2009).

660. State inmate convicted of raping a woman at knifepoint was not entitled to habeas relief under 28 U.S.C.S. § 2254. A nurse's testimony about what the rape victim told her about the assault was admissible under Tex. R. Evid. 803(4) because the victim made the statements for the purpose of medical diagnosis or treatment. Martin v. Thaler, 2009 U.S. Dist. LEXIS 103733 (W.D. Tex. Nov. 5 2009).

661. In a case involving sexual abuse of a child, a trial court did not admit inadmissible hearsay from a sexual assault nurse examiner because statements made for the purpose of medical diagnosis or treatment constituted a hearsay exception under Tex. R. Evid. 803(4), and the child involved understood the need to be truthful. The child knew that she was reporting the crime, she made a decision to talk to her family, despite knowing that her father would have been angry, and she knew she was seeing the nurse for treatment. Little v. State, 2009 Tex. App. LEXIS 7091, 2009 WL 2882932 (Tex. App. San Antonio Sept. 9 2009).

662. Trial court did not err in redacting portions of defendant's medical records for the treatment of his hand that referenced his statements that the injuries had been sustained in a fight because defendant did not explicate why it was important for his treatment that the medical professionals know that he was cut in a fight, and he presented no evidence or argument at trial establishing that such information was important to his treatment. Mbugua v. State, 312 S.W.3d 657, 2009 Tex. App. LEXIS 6842 (Tex. App. Houston 1st Dist. Aug. 21 2009).

663. In defendant's trial for aggravated sexual assault of a child, the trial court did not err in allowing a sexual assault nurse examiner's testimony for the purposes of medical diagnosis and treatment under Tex. R. Evid. 803(4), given that (1) the nurse explained to the victim what the examination would entail and that she just wanted to make sure no one had hurt him, (2) the nurse explained that she gave that explanation to every child she examined, (3) the nurse elicited the information from the victim for treatment and diagnosis, and (4) in response to her question of knowing why he was there, he responded it was because defendant touched him inappropriately. Soliz v. State, 2009 Tex. App. LEXIS 6322, 2009 WL 2470500 (Tex. App. Eastland Aug. 13 2009).

664. Defendant's assertion that the trial court erred in admitting a sexual assault examination report into evidence because the report contained a narrative of the offense that constituted hearsay and did not fall under an exception to the hearsay rule was without merit. The report was created for purposes of medical diagnosis and treatment and therefore, it was properly admitted into evidence under Rule 803(4). Fuller v. State, 2009 Tex. App. LEXIS 5406 (Tex. App. San Antonio July 15 2009).

665. Medical report of a sexual assault nurse examiner was properly admitted in defendant's criminal trial because such report was admissible as a statement made for the purpose of medical diagnosis or treatment under Tex. R. Evid. 803(4) as the examiner testified that she initially took a history for diagnosis and treatment. Rivas v. State, 2009 Tex. App. LEXIS 5181, 2009 WL 1956383 (Tex. App. San Antonio July 8 2009).

666. In a case involving the sexual abuse of a child, a trial court did not abuse its discretion by admitting an exhibit offered by the State, which were records of the examinations performed by medical personnel following the child's outcry. The statements within the exhibit complied with Tex. R. Evid. 803(4) because the child told medical personnel that she was receiving treatment because defendant had forced her to perform oral sex, and she stated that defendant had told her not to tell about their sexual activities because he could have went to jail. Constance v.

State, 2009 Tex. App. LEXIS 3627, 2009 WL 1477791 (Tex. App. San Antonio May 27 2009).

667. Child abuse victim's statement to his doctor that he was being examined because his "dad did something bad" to him was admissible under Tex. R. Evid. 803(4) as a statement made for the purpose of medical diagnosis or treatment; treatment for sexual abuse included identifying and removing the abuser. Weeks v. State, 2009 Tex. App. LEXIS 3278, 2009 WL 1325461 (Tex. App. Houston 14th Dist. May 14 2009).

668. Inasmuch as the substance of a pediatric nurse practitioner's testimony related to statements made to her for purposes of medical diagnosis or treatment and describing medical history and inasmuch as such statements were not excluded by the hearsay rule, the trial court did not err or abuse its discretion by admitting those statements into evidence under Tex. R. Evid. 803(4). Reyes v. State, 2009 Tex. App. LEXIS 2976 (Tex. App. Eastland Apr. 30 2009).

669. In defendant's sexual assault trial, a sexual assault nurse examiner performed a head-to-toe assessment of the victim and also measured blood pressure, pulse, and respirations and documented those findings and the results of her assessment in the medical records, and thus although the nurse was engaged in the dual role of collecting evidence and providing medical service, she performed sufficient functions to bring her within the scope of Tex. R. Evid. 803(4); although Tex. Occ. Code Ann. § 301.002(2) provided that one who practiced professional nursing could not offer a medical diagnosis or prescribe therapeutic measures, Texas appellate courts had consistently affirmed that a nurse's testimony could satisfy the Tex. R. Evid. 803(4) exception. Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

670. In defendant's sexual assault trial, the same information on which defendant claimed error, a sexual assault nurse examiner's testimony regarding the victim's description of the assault, was admitted without objection on at least two other occasions and because the complained-of evidence was admitted elsewhere without objection, the court found no reversible error in the admission of the nurse's testimony under Tex. R. Evid. 803(4). Shackelford v. State, 2009 Tex. App. LEXIS 1441, 2009 WL 508478 (Tex. App. Houston 14th Dist. Mar. 3 2009).

671. In a trial for child sexual assault, testimony from a clinical social worker about the complainant's statements was not admissible under the medical-diagnosis-and-treatment exception of Tex. R. Evid. 803(4) because the record did not show that the child-complainant understood that the statements identifying defendant as the perpetrator were for the purpose of medical diagnosis or treatment. Nasrollah Hanjani Alizadeh v. State, 2009 Tex. App. LEXIS 1423 (Tex. App. Houston 1st Dist. Feb. 26 2009).

672. In a sexual assault of a child case, a therapist's testimony was properly admitted under Tex. R. Evid. 803(4) because the child knew she was being treated for depression and that statements made to the therapist during her therapy--including the identity of her abuser--were made in furtherance of that treatment. The identity of her father as her abuser was of critical importance in preventing further harm or abuse by preventing the child's return to her father's home or any visitation with him. Munoz v. State, 288 S.W.3d 55, 2009 Tex. App. LEXIS 1047 (Tex. App. Houston 1st Dist. Feb. 12 2009).

673. In a case involving aggravated sexual abuse of a child, a nurse was properly allowed to testify regarding a victim's statements, which were contained in a medical report; under Tex. R. Evid. 803(4) it was necessary to take a history of the abuse in order to properly diagnose and treat the victim for infections or sexually transmitted diseases. The trial court did not admit the evidence under Tex. Code Crim. Proc. Ann. art. § 38.072, § 2(a). Uribes v. State, 2009 Tex. App. LEXIS 885, 2009 WL 330972 (Tex. App. San Antonio Feb. 11 2009).

674. Trial court did not abuse its discretion in concluding that Tex. R. Evid. 803(4) applied to the victim's statements to a sexual assault nurse examiner, given that (1) although no witness specifically testified that the

victim understood the need to be truthful, the trial court could reasonably have concluded this, as the victim was responding to questions from the nurse, a health-care provider, about her condition and the incident, (2) there was no indication those statements were made in the presence of family members or law enforcement officers, (3) the victim's statements to the nurse were made while receiving medical care and were consistent with the physical evidence, (4) the statements guided the medical examination and assisted the nurse in knowing what to look for and what tests to conduct, and (5) the fact that the victim initially went to another hospital and received triage medical care before going for more thorough treatment tailored to the needs of sexual assault victims and provided within hours of the attack did not undermine the reliability of the victim's report or render the nurse's testimony inadmissible. West v. State, 2008 Tex. App. LEXIS 8599 (Tex. App. Austin Nov. 14 2008).

675. Defendant objected to an exhibit on hearsay grounds and claimed on appeal that the evidence was not admissible under Tex. R. Evid. 803(4), but the State established the admissibility of the documents as a record of regularly conducted activity under Tex. R. Evid. 803(6), and the fact that defendant might have been correct about the applicability of the medical diagnosis exception was not conclusive of the issue; the trial court was correct in admitting the evidence as a record of regularly conducted activity and there was no abuse of discretion. Matthews v. State, 2008 Tex. App. LEXIS 8544 (Tex. App. Amarillo Nov. 13 2008).

676. In a child sexual abuse case, trial court properly admitted a nurse's report under Tex. R. Evid. 803(4). Although defendant argued that, because of the nature of the complaints, it was apparent that the victim would be transferred to another facility and that the hospital to which the victim initially visited would have provided no medical care or diagnosis, the victim was not aware of a possible transfer at the time she made her statements to the nurse. Prater v. State, 2008 Tex. App. LEXIS 7099 (Tex. App. Texarkana Sept. 15, 2008).

677. In defendant's aggravated robbery case, the juvenile court properly admitted a statement about the victim being "struck with a rock" that was contained in the medical records because the medical records satisfied the business records exception, the document was signed by the treating physician, and the medical records included an affidavit by the custodian of records for the hospital, who averred that she had personal knowledge of the manner in which the records were prepared. In re B. P. S., 2008 Tex. App. LEXIS 6028 (Tex. App. Austin Aug. 6 2008).

678. In a sexual assault of a child case, a nurse's testimony was properly admitted because the object of the sexual assault exam was to ascertain whether the child had been sexually abused and to determine if further medical attention was needed, and statements describing acts of sexual abuse were pertinent to the victim's medical diagnosis and treatment. Johnson v. State, 2008 Tex. App. LEXIS 3713 (Tex. App. El Paso May 22 2008).

679. In a child sexual assault case, the trial court properly permitted the child's therapist to testify as to hearsay statements the child made during therapy because the therapist was a licensed marriage and family therapist, and the child's statements regarding the sexual acts and defendant's identity were for the purpose of and pertinent to the therapist's treatment and diagnosis of the child's post-traumatic stress disorder. Bargas v. State, 252 S.W.3d 876, 2008 Tex. App. LEXIS 3443 (Tex. App. Houston 14th Dist. 2008).

680. Child sexual abuse victim's statements to her school counselor were admissible under the medical diagnosis exception to the hearsay rule, Tex. R. Evid. 803, because the counselor had been working with the victim for over a year, sometimes using play therapy, to explore her apparent lifelessness after visiting defendant, her grandfather. Madden v. State, 2008 Tex. App. LEXIS 2637 (Tex. App. Dallas Apr. 11 2008).

681. Defendant was required under Tex. R. App. P. 33 to make an objection with sufficient specificity that the trial court could be aware of what defendant was complaining about, and because the initial hearsay objection was to the entirety of medical records, the objection was too general and insufficient and the court was unable to say that

the inadmissible material that formed the basis of the objection was apparent from the context, and thus error was not preserved; even assuming that the hearsay objection was sufficient to preserve error, the statements in question were made by medical personnel for the purpose of diagnosis and treatment under Tex. R. Evid. 803, although defendant complained of certain injuries, his actions were inconsistent with any desire for treatment, and that defendant was escorted to a police car following his return to the emergency room was consistent with admission of the evidence for diagnosis and treatment and defendant did not show that the probative value of the evidence was outweighed by its prejudicial nature. Cline v. State, 2008 Tex. App. LEXIS 2242 (Tex. App. Austin Mar. 26 2008).

682. Defendant's convictions for aggravated sexual assault of a child under 14 years of age were appropriate because his claim that a nurse's testimony did not fit under Tex. R. Evid. 803 was without merit since defendant failed to object to the relevant portions of the victim's testimony and the victim's testimony was substantially the same as what defendant currently complained about on appeal regarding the nurse's testimony; thus, defendant forfeited any error regarding the nurse's testimony. Pierson v. State, 2008 Tex. App. LEXIS 1934 (Tex. App. Fort Worth Mar. 13 2008).

683. In a case of aggravated sexual assault of a child, a physician's testimony about hearsay statements made by the victim during a sexual assault examination that identified defendant as the offender and described the assault was admissible under Tex. R. Evid. 803 because the victim's statements were pertinent to medical diagnosis or treatment. Guzman v. State, 253 S.W.3d 306, 2008 Tex. App. LEXIS 1066 (Tex. App. Waco 2008).

684. Even if out-of-court statements made by a child sexual abuse victim at a clinic were hearsay, they fell under the exception in Tex. R. Evid. 803 for symptoms or the inception or general character of the cause that related to treatment because the victim was diagnosed with post-traumatic stress disorder and depression while at the clinic. Gibson v. State, 2007 Tex. App. LEXIS 9396 (Tex. App. Austin Nov. 29 2007).

685. Statements the victim made to a nurse examiner were made for the purpose of medical diagnosis or treatment for purposes of Tex. R. Evid. 803; in giving a history to the nurse, the victim responded to questions and provided information such that the nurse was able to ensure that the victim received the proper care, and thus the victim's statements fell within the Rule and trial counsel was not ineffective for failing to object to the statements. Ezell v. State, 2007 Tex. App. LEXIS 7712 (Tex. App. San Antonio Sept. 26 2007).

686. Court found no evidence that the victim went to the counselor or made statements to her seeking medical diagnosis or treatment, and the counselor testified that the victim was not a patient; thus, the prosecutor's attempt to bring the statements within Tex. R. Evid. 803(4) by asking the counselor if she had a recommendation for treatment failed because the counselor's positive response did not show that the victim made the statements for the purpose of diagnosis or treatment, and the trial court erred by admitting the hearsay testimony of the counselor. Rodriguez v. State, 280 S.W.3d 288, 2007 Tex. App. LEXIS 7135 (Tex. App. Amarillo 2007).

687. For purposes of Tex. R. Evid. 803, the record was devoid of any evidence that defendant's young daughter understood why she was in therapy or that she needed to be truthful in her statements that her mother stomped on the child victim's stomach, and thus the trial court abused its discretion by admitting the daughter's hearsay statement as within the medical diagnosis exception; however, the error was harmless under Tex. R. App. P. 44 because the daughter herself testified to seeing defendant step on the child's stomach, and thus fair assurance existed that the less powerful, cumulative testimony of the other witness concerning this fact did not influence the jury or had but a slight effect. Stevens v. State, 234 S.W.3d 748, 2007 Tex. App. LEXIS 6845 (Tex. App. Fort Worth 2007).

688. Where petitioner state death row inmate argued trial counsel was ineffective for admitting into evidence at the penalty phase psychiatric reports which were between 19 and 25 years old which suggested the inmate was a future danger, each of the exhibits that trial counsel introduced satisfied the exception to the hearsay rule under Tex. R. Evid. 803 as statements made for purposes of medical diagnosis or treatment and thus met the requirements of the Confrontation Clause. Coble v. Quarterman, 496 F.3d 430, 2007 U.S. App. LEXIS 19327 (5th Cir. Tex. 2007).

689. Trial court properly admitted the testimony of a licensed professional counselor in defendant's trial for aggravated sexual assault and sexual assault, for purposes of Tex. R. Evid. 803(4); the counselor testified (1) to being licensed and having a master's degree in community counseling, and (2) that she had counseled the victim for four months regarding defendant's sexual abuse and that the victim understood the purpose of the counseling, despite her mental disability. Williams v. State, 2007 Tex. App. LEXIS 6251 (Tex. App. Tyler Aug. 8 2007).

690. Trial court did not abuse its discretion by admitting into evidence the hearsay testimony of the victim's counselor under Tex. R. Evid. 803 because the victim specifically testified that she was receiving therapy for post-traumatic stress disorder and the record supported the inference that the victim understood that she needed to be truthful with the counselor to receive proper treatment and that the facts surrounding the victim's encounter with defendant were reasonably pertinent to the counselor's treatment of the victim for her issues concerning the resolution of the sexual assault. Taylor v. State, 263 S.W.3d 304, 2007 Tex. App. LEXIS 6198 (Tex. App. Houston 1st Dist. 2007).

691. Trial court properly allowed a sexual assault nurse examiner to testify concerning statements the son made to her during her interview with him under Tex. R. Evid. 803(4) because her testimony pertained to statements taken during a medical examination as part of diagnosis and treatment; the nurse made the appropriate physical examinations based on her diagnosis and the son's allegations. Vesely v. State, 2007 Tex. App. LEXIS 5611 (Tex. App. Tyler July 18 2007).

692. In an aggravated sexual assault of a child case, defendant's objection to the testimony of the sexual assault nurse examiner was properly overruled since the medical records had previously been admitted into evidence as a hearsay exception under Tex. R. Evid. 803. Castillo v. State, 2007 Tex. App. LEXIS 4745 (Tex. App. San Antonio June 20 2007).

693. Under Tex. R. Evid. 803, there is no authority for the proposition that specific testimony regarding the need to be truthful is necessary; therefore, notes regarding a child's statements to a social worker and a nurse implicating her father in a sexual assault several days after a surgery to repair a life-threatening vaginal tear were properly admitted because the statements were in response to questions, they were not made around family members, and they were consistent with the physical evidence. Delapaz v. State, 229 S.W.3d 795, 2007 Tex. App. LEXIS 4614 (Tex. App. Eastland 2007).

694. In defendant's sexual assault trial, although defendant claimed that a witness's testimony about what the child victim said was inadmissible because the witness was not designated as an outcry witness, there were multiple grounds used to justify the admission of the evidence, including under Tex. R. Evid. 803; defendant did not deny that the rule encompassed statements, as in this case, by suspected victims of child abuse regarding the source of their injuries, defendant did not question that trial court's authority to use the Rule, and because defendant did not show why the Rule did not apply, defendant failed to show any abuse of discretion. Francis v. State, 2007 Tex. App. LEXIS 3938 (Tex. App. Amarillo May 22 2007).

695. Trial court did not abuse its discretion by overruling defendant's objection to the admission of a nurse's testimony regarding statements the child victim made to her because the nurse provided a detailed explanation of

her sexual assault questioning procedures, and explained why it was medically necessary to ask the victim questions about his sexual history to diagnose him for medical treatment; such questions from a medical examiner and answers from a sexual assault victim were hearsay statements that were admissible under Tex. R. Evid. 803. Mead v. State, 2007 Tex. App. LEXIS 3833 (Tex. App. Fort Worth May 17 2007).

696. Interview summary was not admissible under Tex. R. Evid. 803(4) given that nothing suggested the speaker made the statement in question for the purpose of diagnosing or treating defendant's mental condition. Austin v. State, 222 S.W.3d 801, 2007 Tex. App. LEXIS 2739 (Tex. App. Houston 14th Dist. 2007).

697. In defendant's aggravated sexual assault on a child case, the trial court properly found that a nurse's testimony was admissible because the purpose of the nurse's examination of the victim was to ascertain whether the victim had been sexually assaulted and whether he needed medical treatment; therefore, his statement describing the act of sexual assault was pertinent to his diagnosis and treatment. Morrison v. State, 2007 Tex. App. LEXIS 1529 (Tex. App. Fort Worth Mar. 1 2007).

698. Although the court questioned whether defendant's complaint on appeal comported with the objection lodged in the trial court, the court found that even if testimony was inadmissible and error under Tex. R. Evid. 803(4) as defendant claimed, the error was harmless under Tex. R. App. P. 44.2(b); although the testimony indicated that the child victim was referred to the witness for sexual abuse, nothing in the testimony suggested that the witness was able to confirm that, and the limited testimony did not have a significant impact in light of the other evidence offered in defendant's trial for aggravated sexual assault of a child. Alberty v. State, 2007 Tex. App. LEXIS 989 (Tex. App. Dallas Feb. 9 2007).

699. Where defendant was convicted of the aggravated sexual assault of his thirteen-year-old niece, the trial court erred by admitting the therapist's testimony that the child told her that family members were pressuring her and her mother to drop the charges; the State offered the therapist's statements to show how the child reacted to perceived pressures; the same testimony was admitted through other witnesses without objection. Arguelles v. State, 2007 Tex. App. LEXIS 602 (Tex. App. Dallas Jan. 29 2007).

700. Although defendant claimed error in trial counsel's failure during defendant's aggravated sexual assault trial to object to the testimony of a registered nurse and sexual assault nursing examiner relating to the content of her interview with the child complainant, because statements of a child relating to the offense which were made in the course of seeking medical diagnosis or treatment were exempted from the rule precluding hearsay statements, pursuant to Tex. R. Evid. 803, counsel's failure to object to admissible evidence did not constitute ineffective representation under the Sixth Amendment. Todd v. State, 2007 Tex. App. LEXIS 389 (Tex. App. Texarkana Jan. 23 2007).

701. Court did not need to consider whether the trial court erred in admitting, under Tex. R. Evid. 803, statements defendant's son made to a sexual assault nurse examiner (SANE) because even assuming there was error, the court was unable to conclude that it was harmful under Tex. R. App. P. 44.2; the son's testimony established the same facts that were in the SANE report, the jury had the opportunity to gauge the veracity of defendant's denial of event, the son's testimony was sufficient to obtain a conviction, for purposes of Tex. Code Crim. Proc. Ann. art. 38.07(a), and the court noted that the State did not emphasize the statements of which defendant complained. Bersosa v. State, 2007 Tex. App. LEXIS 370 (Tex. App. Dallas Jan. 22 2007).

702. Trial court did not err by allowing an expert witness to testify to statements the victim made to him regarding the allegations against defendant because they were admissible under Tex. R. Evid. 803, as the victim made the statements to the expert for the purpose of the victim's medical diagnosis or treatment; defendant failed to point to hearsay statements that were allegedly made by other witnesses. Bailey v. State, 2007 Tex. App. LEXIS 208 (Tex.

App. Fort Worth Jan. 11 2007).

703. Although defendant claimed that a trial court erred in admitting statements that he made to his therapist because such statements were not made for purposes of medical diagnosis or treatment as contemplated by Tex. R. Evid. 803, even assuming that the trial court erred in admitting the statements, any error was harmless under Tex. R. App. P. 44.2(b) because the child sexual assault complainant provided explicit detailed testimony about the sexual assaults; further, there was properly admitted evidence that the complainant told his school counselor about the assaults. Romero v. State, 2006 Tex. App. LEXIS 9835 (Tex. App. Dallas Nov. 14 2006).

704. Medical records stated that the 10-year-old complainant was the victim of serial penetrative sexual acts by defendant (her father), and they had been occurring since she was a young girl; the medical records also included a progress report detailing the mother's version of the events leading up to defendant's arrest; because all the statements involved the causation and source of the complainant's injuries or statements by a parent for purposes of diagnosing or treating the complainant, they were admissible under Tex. R. Evid. 803; thus, the trial court properly admitted the medical records into evidence over defendant's hearsay objection. Davidson v. State, 2006 Tex. App. LEXIS 9178 (Tex. App. Dallas Oct. 25 2006).

705. Even if the trial court abused its discretion in admitting the medical records of the sexual assault of the 10-year-old complainant under Tex. R. Evid. 803, any error would be harmless under Tex. R. App. P. 44.2 because the medical records established the same facts that the jury had already heard during complainant's testimony and a videotape of her interview with a detective. Davidson v. State, 2006 Tex. App. LEXIS 9178 (Tex. App. Dallas Oct. 25 2006).

706. Although defendant claimed that a trial court erred in admitting the child sexual assault complainant's hearsay statements to her counselor through the medical records exception to the hearsay rule, before permitting the counselor to testify, the trial court had held a hearing under rule of Tex. R. Evid. 104 at which the State elicited testimony concerning the counselor's treatment of the complainant; the counselor testified that his eliciting of facts concerning the complainant's sexual abuse was an important part of her diagnosis and treatment, he provided a treatment-related reason for the timing of her statements, and he also testified that an important part of his work was ensuring that the complainant made truthful statements, and similar testimony had been held in other cases to support admission of child sexual abuse victim statements. Graham v. State, 2006 Tex. App. LEXIS 8063 (Tex. App. Austin Sept. 8 2006).

707. Appellate court did not need to address whether a trial court abused its discretion in admitting a child sexual assault complainant's hearsay statements to her counselor through the medical records exception to the hearsay rule when, even if it did, any error was harmless because: (1) the complainant testified to the same facts that were the subject of her hearsay statements to the counselor; (2) there were eight witnesses other than the counselor who testified to some extent about the complainant's allegations; (3) the counselor was the second-to-last witness to testify for the State, and the hearsay statements that the counselor testified to were merely cumulative of the testimony that the jury had already heard; (4) the vast majority of the counselor's testimony was not hearsay; and (5) the State did not mention the counselor in its opening statement and only briefly mentioned the counselor's testimony in its closing argument, which suggested that his testimony was not an integral part of the State's case. Graham v. State, 2006 Tex. App. LEXIS 8063 (Tex. App. Austin Sept. 8 2006).

708. Trial court did not err in allowing a nurse to testify under the medical diagnosis exception to the hearsay rule about statements made to him by a two-year-old child during an examination for possible sexual assault where the nurse was performing sufficient functions to bring him within the scope of Tex. R. Evid. 803; the nurse testified that he was a sexual assault nurse examiner and that, prior to evaluating the child, he had performed over 500 sexual assault exams; he explained that the oral history taken during his exam was used for medical diagnosis and treatment as well as a guide for much of the physical examination that was performed, specifically testifying about

bruises on the child, one on her right back side and two on her right hip and thigh; and he testified that the child's vaginal area was very red and excoriated, which he attributed to poor hygiene and not sexual assault. McDonald v. State, 2006 Tex. App. LEXIS 7416 (Tex. App. San Antonio Aug. 23 2006).

709. As long as the other requirements were satisfied, the fact that the nurse was not a licensed physician had no bearing on his ability to testify in accordance with Tex. R. Evid. 803. McDonald v. State, 2006 Tex. App. LEXIS 7416 (Tex. App. San Antonio Aug. 23 2006).

710. Nurse's testimony regarding statements made to him by a two-year-old child during an examination for possible sexual assault complied with Tex. R. Evid. 803 and was not excluded by the hearsay rule because the nurse testified that he believed that the child was articulate when responding to questions, and because he further testified about the procedure used during the examinations and interview. McDonald v. State, 2006 Tex. App. LEXIS 7416 (Tex. App. San Antonio Aug. 23 2006).

711. In a child sexual assault case, although the State offered the child victim's medical records as evidence of the results of the sexual abuse exam, the victim's description of the abuse contained within the records fell under the exception to the hearsay rule that provided an exception for statements made for purposes of medical diagnosis or treatment and describing medical history. Dotie v. State, 2006 Tex. App. LEXIS 7200 (Tex. App. Dallas Aug. 16 2006).

712. In a prosecution of defendant juvenile for indecency with a child, the trial court properly allowed a sexual assault nurse examiner to testify regarding statements made by the victim during an examination of the victim. In re M.M.L., 241 S.W.3d 546, 2006 Tex. App. LEXIS 6783 (Tex. App. Amarillo 2006).

713. Because the victim was unconscious, the paramedic elicited information from the bystander, who witnessed the beating, in order to be able to treat the victim; thus, the court was unable to find that the trial court abused its discretion in allowing the paramedic to testify regarding the bystander's response, for purposes of Tex. R. Evid. 803. Richardson v. State, 2006 Tex. App. LEXIS 5098 (Tex. App. Corpus Christi June 15 2006).

714. Defendant failed to preserve error regarding an expert's testimony pursuant to Tex. R. App. P. 33, given that (1) defendant's objection to any of the expert's testimony was overly broad and untimely, and (2) defendant's objection on appeal differed substantially from that raised at trial, and thus any error was waived; even if the error was properly preserved, the testimony was admissible under Tex. R. Evid. 803(4), and defendant did not object or identify any out-of-court statement that was made for purposes other than medical diagnosis and treatment, and thus the trial court did not err in overruling defendant's hearsay objection. Estes v. State, 2006 Tex. App. LEXIS 5028 (Tex. App. Houston 14th Dist. June 13 2006).

715. In a child sexual abuse case, statements to a physician regarding alleged sexual acts between defendant and a minor victim were admissible because they were made for the purpose of medical diagnosis and treatment under Tex. R. Evid. 803. White v. State, 2006 Tex. App. LEXIS 4973 (Tex. App. Austin June 9 2006).

716. Court rejected defendant's claim of ineffective assistance of counsel; a sexual assault nurse examiner's testimony fell under Tex. R. Evid. 803(4), and therefore defendant did not overcome the presumption that counsel's not objecting to the examiner's testimony was sound strategy. Perez v. State, 2006 Tex. App. LEXIS 1763 (Tex. App. San Antonio Mar. 8 2006).

717. Court did not need to address whether a witness's testimony qualified as an exception to the hearsay rule under Tex. R. Evid. 803(4) because, even assuming it did and the trial court erred in overruling defendant's

objection, the record did not show that the error required reversal under Tex. R. App. P. 44.2; there was other evidence presented at trial that was substantially similar to the witness's testimony, and the court noted that the improper exclusion of evidence was rendered harmless when other properly admitted evidence proved the same fact. Cardenas v. State, 2006 Tex. App. LEXIS 1372 (Tex. App. Dallas Feb. 21 2006).

718. Trial court did not err in ruling that statements by the child victim to a doctor were admissible under Tex. R. Evid. 803(4), and although nothing suggested that the examination was conducted to remove the child from an abusive setting, the court found no distinction in the cases that would remove statements by a child from the effect of the rule; whether the statements were reasonably pertinent to the diagnosis or treatment of the victim was a question for the trial court prior to admitting the evidence, and the court found no abuse of discretion. Manzano v. State, 2006 Tex. App. LEXIS 1285 (Tex. App. Waco Feb. 15 2006).

719. Where defendant was charged with aggravated sexual assault of a child, his counsel was not ineffective for failing to object to the attending nurse's testimony and report, because the hearsay exception set forth in Tex. R. Evid. 803(4) applied. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

720. Court rejected defendant's claim of ineffective assistance of counsel; counsel's failure to raise a Confrontation Clause objection was not outside the range of reasonable assistance because the victim's hearsay statements were non-testimonial in nature, given that they were made during an informal setting to emergency personnel, and the statements fell under Tex. R. Evid. 803(2), (4), and thus bore particularized guarantees of trustworthiness. Ramos v. State, 2005 Tex. App. LEXIS 6466 (Tex. App. El Paso Aug. 11 2005).

721. In an aggravated sexual assault of a child case, defendant's counsel was not ineffective for failing to object to the child's therapist's testimony about what the child told her and the child's behavior and demeanor as this evidence fell within the Tex. R. Evid. 803(4) exception to the prohibition against hearsay. De La Cruz v. State, 2005 Tex. App. LEXIS 5850 (Tex. App. Houston 14th Dist. July 26 2005).

722. Where petitioner death row inmate argued ineffective assistance of counsel because counsel, during the penalty phase, sought and obtained admission of a psychiatric report on the inmate prepared by a doctor years earlier when the inmate was 15 years old, and that the report suggested the inmate was a future danger, the report was not hearsay admitted in violation of the Confrontation Clause of the Sixth Amendment because the report was admissible under Tex. R. Evid. 803(4), (6), (16), and further, the inmate's statements in the report as to his criminal activity did not violate the Fifth Amendment because the psychiatric consultation was not a custodial interrogation; the ineffective assistance of counsel claim failed. Coble v. Dretke, 417 F.3d 508, 2005 U.S. App. LEXIS 14438 (5th Cir. Tex. 2005), opinion withdrawn by, substituted opinion at 444 F.3d 345, 2006 U.S. App. LEXIS 7171 (5th Cir. Tex. 2006).

723. Physician's testimony about what a child victim said fell within the exception for medical diagnoses under Tex. R. Evid. 803(4). Patterson v. State, 2005 Tex. App. LEXIS 5260 (Tex. App. Austin July 8 2005).

724. In a child sexual abuse case, a court properly admitted the hearsay of a nurse where the nurse asked the child victim if she understood why she was at the hospital, the child related that it was because defendant had touched her, and without any prompting by the nurse or leading questions, the child went on to provide details regarding the sexual abuse. Smith v. State, 2005 Tex. App. LEXIS 4203 (Tex. App. El Paso May 31 2005).

725. In a case of aggravated sexual assault of a child, counsel's failure to object to the admission of a forensic report was not ineffective assistance because an affidavit from the custodian of the hospital's records was sufficient for compliance with Tex. R. Evid. 803(6) and a statement made by the victim to a nurse was admissible under Rule

803(4). Lopez v. State, 2005 Tex. App. LEXIS 3596 (Tex. App. Eastland May 12 2005).

726. Defendant's daughter was referred to a physician by Child Protective Services, and she was brought to her appointment by her maternal grandmother; defendant argued that because alleged abuse took place five years earlier, and the child had been removed from defendant's custody, there was no justification for the examination. Nevertheless, while the physician was clearly gathering evidence, there was a need for a medical examination, and the evidence supported a conclusion that the daughter understood the need to be truthful; therefore, there was no abuse of discretion in admitting the hearsay testimony under Tex. R. Evid. 803(4). Barnes v. State, 165 S.W.3d 75, 2005 Tex. App. LEXIS 2603 (Tex. App. Austin 2005).

727. In an indecency with a child by sexual contact case, without anything to indicate that the victim understood the purpose of the forensic interview, and that the importance of being truthful was so the counselor could effectively assess or diagnose her, it was error for the trial court to admit the videotaped statements of the victim's interview under Tex. R. Evid. 803(4). Wright v. State, 154 S.W.3d 235, 2005 Tex. App. LEXIS 56 (Tex. App. Texarkana 2005).

728. Because the State did not prove the source of defendant's name in the medical report, the trial court erred in admitting the doctor's testimony under Tex. R. Evid. 803(4), that the report named defendant as the perpetrator, however, the erroneous admission of the doctor's testimony was harmless, Tex. R. App. P. 44.2(b), because ample evidence existed that proved the same facts as the doctor's testimony. The victim testified that defendant sexually abused her from June of 1999 until September of 2002, the officer testified that defendant admitted to having sex with the victim when she went to his house to ask him questions about the sexual abuse allegations, and the jury had access to a signed confession defendant made after his arrest. Crody v. State, 2004 Tex. App. LEXIS 10559 (Tex. App. Houston 1st Dist. Nov. 24 2004).

729. In a sexual assault of a child case, a court properly allowed a sexual assault examiner to testify about statements made by the victim during a physical exam where the statements were statements made for the purpose of medical diagnosis and treatment. Barrera v. State, 2004 Tex. App. LEXIS 9621 (Tex. App. Fort Worth Oct. 28 2004).

730. Although the exception created by Tex. R. Evid. 803(4) is not limited to statements by patients, the person making the statement must have an interest in proper diagnosis or treatment. Parents normally possess this interest in the well-being of their children; however, courts are not willing to extend this "interest" to the statement of a child. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

731. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, two exhibits containing the medical records of the child-victims fell within the hearsay exception for records of regularly conducted activity set forth in Tex. R. Evid. 803(6); however, it was error to admit the exhibits because they contained a second layer of hearsay statements of abuse made by the children, and it was not clear that the children made these statements for the purpose of proper diagnosis within the meaning of Tex. R. Evid. 803(4). Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

732. For purposes of the hearsay exception set forth at Tex. R. Evid. 803(4), the person making the statement must have an interest in proper diagnosis or treatment, but there may be circumstances, especially in child sex abuse cases, in which the statement is motivated by improper reasons such as wanting to shift the blame or a personal dislike of the accused. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

733. In a sexual assault on a child case, counsel was not ineffective for failing to object to an expert's reliance on a medical report in forming his conclusion that the non-specific red bumps he found in the victim's genital area were

caused by the Herpes Simplex Virus (HSV) where, regardless of whether the report was properly admitted as part of the State's exhibit, the expert could have properly testified to the basis for his diagnosis even though part of the data he relied on was hearsay; the report was also cumulative of all the other evidence at trial showing that the victim had been infected with HSV. Coker v. State, 2004 Tex. App. LEXIS 4799 (Tex. App. El Paso May 27 2004).

734. In a sexual assault on a child case, counsel was not ineffective for failing to object to the admission of defendant's medical records on the ground that the State failed to lay a proper foundation under Tex. R. Evid. 803 where he failed to show that the State would have been unable to establish the elements if counsel had objected. Further, other evidence established that defendant had been infected with herpes prior to the sexual assault. Coker v. State, 2004 Tex. App. LEXIS 4799 (Tex. App. El Paso May 27 2004).

735. In sexual assault case, complainant's hearsay statement to a hospital social worker was properly admitted and documented in the complainant's medical record where: (1) The complainant was aware that his mother had taken him to the hospital for a sexual assault examination; (2) for the purposes of a sexual assault examination, it was standard hospital procedure for a social worker to receive a history specifically regarding the abuse allegations; (3) the doctor expressly testified that the history obtained by the social worker was necessary for the diagnosis and treatment of the child; and (4) thus, the record demonstrated that the hospital social worker, participating as part of a team of medical personnel, obtained a history of the sexual abuse allegations in a critical early step necessary for the purposes of the diagnosis and treatment of a child admitted to undergo a sexual assault examination. French v. State, 2004 Tex. App. LEXIS 2924 (Tex. App. Houston 1st Dist. Apr. 1, 2004).

736. In defendant's sexual assault of a child case, a court did not err in admitting hearsay testimony of the complainant in violation of his rights of confrontation and cross-examination where the medical record evidence, including statements given by the complainant to her examining physician and documented in the medical record, was admissible under the exception for statements made for the purposes of diagnosis or treatment; the complainant knew that she was at the office for the purpose of diagnosis and treatment, and the record showed that the examination results were used to diagnose and treat the complainant for a sexually transmitted disease. Joseph v. State, 2004 Tex. App. LEXIS 2945 (Tex. App. Houston 1st Dist. Apr. 1, 2004).

737. In a criminal appeal of defendant's conviction for aggravated sexual assault of a child, the appellate court would not consider defendant's argument that the trial court erred by allowing into evidence a medical report and testimony of a pediatrician who examined the victim. Defendant's argument that the evidence was not made for the purpose of medical diagnosis or treatment did not comport with his objection at trial; therefore, it was not preserved for review. Frueboes v. State, 2004 Tex. App. LEXIS 2848 (Tex. App. Texarkana Mar. 31 2004).

738. Court abused its discretion in admitting a therapist's testimony in trial for sexual abuse of a child because there was nothing about the context of the victim's statement that suggested that it possessed the guarantees of trustworthiness on which the medical diagnosis or treatment exception in Tex. R. Evid. 803(4) was founded. However, because the substance of the therapist's inadmissible testimony was admitted without objection through other witnesses, the error did not harm defendant's substantial rights. Naranjo v. State, 2004 Tex. App. LEXIS 2189 (Tex. App. Texarkana Mar. 9 2004).

739. Sexual assault victim, who was 14 at the time, understood that he was seeing the county youth services director to get help for committing sexual assault and that his statements to the director were made for the purpose of medical treatment; thus, hearsay evidence of defendant's extraneous sexual assault offenses against the victim was admissible under Tex. R. Evid. 803(4) and defendant's conviction for sexual assault of a child was affirmed. Cannon v. State, 2004 Tex. App. LEXIS 1105 (Tex. App. Beaumont Feb. 4 2004).

740. Child's statements to a nurse and a therapist regarding sexual abuse were properly admitted as statements made for the purpose of medical diagnosis under Tex. R. Evid. 803(4). Wimer v. State, 2003 Tex. App. LEXIS 10262 (Tex. App. San Antonio Dec. 10 2003).

741. Psychologist's testimony in child sexual abuse case that complainant's father had sexually assaulted her was admissible where the child's statement was made to the psychologist for the purpose of a medical diagnosis and fell under the exception contained in Tex. R. Evid. 803(4). Burns v. State, 122 S.W.3d 434, 2003 Tex. App. LEXIS 10193 (Tex. App. Houston 1st Dist. 2003).

742. Defendant's convictions of indecency with a child by contact and exposure pursuant to Tex. Penal Code Ann. § 21.11 were affirmed, even though two witness were erroneously permitted to testify as outcry witnesses under Tex. Code Crim. Proc. Ann. art. 38.072, and the counselor was erroneously allowed to testify under Tex. R. Evid. 803(4) regarding the victim's statements during counseling, and where the testimony did not affect defendant's substantial rights under Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b), as defendant admitted that he engaged in the conduct described in the victim's statements to the three witnesses. Jones v. State, 92 S.W.3d 619, 2002 Tex. App. LEXIS 8545 (Tex. App. Austin 2002).

743. Medical records containing alleged hearsay statements were from a nurse's examination of the victim and fell within the exception of Tex. R. Evid. 803(4) because the object of the exam was to ascertain whether the child had been sexually abused and to determine whether further medical attention was needed. Ponce v. State, 89 S.W.3d 110, 2002 Tex. App. LEXIS 6450 (Tex. App. Corpus Christi 2002).

744. Trial court did not err in admitting statements made by the victim's grandmother to the treating physician because the statements were necessary for a proper diagnosis; the statements fell within the hearsay exception under Tex. R. Evid. 803(4). Ware v. State, 62 S.W.3d 344, 2001 Tex. App. LEXIS 8094 (Tex. App. Fort Worth 2001).

745. Pursuant to Tex. R. Evid. 803(4), statements given to a nurse by a child victim of indecent assault as part of the general medical history did not constitute hearsay because such statements were reasonably pertinent to medical diagnosis or treatment. Gregory v. State, 56 S.W.3d 164, 2001 Tex. App. LEXIS 4519 (Tex. App. Houston 14th Dist. 2001), writ of certiorari denied by 538 U.S. 978, 123 S. Ct. 1787, 155 L. Ed. 2d 667, 2003 U.S. LEXIS 2967, 71 U.S.L.W. 3666 (2003).

Evidence : Hearsay : Exceptions : Present Sense Impression : General Overview

746. Statements by two witnesses to a third witness that defendant was outside yelling something about killing a dog were not inadmissible hearsay because the witnesses were describing what they were seeing at the time, and therefore they fell within the present sense impression exception to the hearsay rule. Alcala v. State, 476 S.W.3d 1, 2013 Tex. App. LEXIS 13924, 2013 WL 6053837 (Tex. App. Corpus Christi Nov. 14 2013).

747. At defendant's trial for aggravated robbery and injury to the elderly with the intent to cause serious bodily injury, his trial counsel was not ineffective for failing to object to the recording of the victim's 911 call as it fell within three separate hearsay exceptions. The 911 call was admissible as an excited utterance, a present sense impression, and as a statement regarding the victim's physical condition. Rincon v. State, 2013 Tex. App. LEXIS 11309 (Tex. App. Tyler Sept. 4 2013).

748. Defendant's convictions for aggravated kidnapping and aggravated sexual assault of a child were proper because statements were admissible as non-hearsay, Tex. R. Evid. 801(d). The victim's indication that she was okay was admissible pursuant to Tex. R. Evid. 803(3) as it was a statement of her then existing mental, emotional,

or physical condition; the sheriff's indication that everything was okay constituted a present sense impression and was admissible under Rule 803(1); the victim's statement that "he is trying to get in the bathroom" could have been admitted either as a present sense impression under Rule 803(1) or an excited utterance under Rule 803(2); the trial court did not abuse it discretion in allowing the officer to testify that he heard a male voice saying, "Open the door" because that statement could have been admitted either as an admission by a party opponent or as a statement merely showing what was said rather than proving the truth of the matter asserted, Tex. R. Evid. 801(e)(2). Billings v. State, 399 S.W.3d 581, 2013 Tex. App. LEXIS 1423, 2013 WL 607699 (Tex. App. Eastland Feb. 14 2013).

749. Even though the trial court erred by admitting the audio portions of the tape that recorded the arresting officer's statements about defendant's conditions and his narrative about what he found in defendant's vehicle, as they were spoken offense reports that were inadmissible hearsay and did not qualify as present sense impressions under Tex. R. Evid. 803(1), the error was harmless because both officers testified at trial as to everything the arresting officer mentioned in the audio tape. The arresting officer testified about defendant's agitated attitude and appearance, stating that he smelled like alcohol and his face was red; the officer also testified that he asked defendant to perform field sobriety tests at least twice and he found multiple empty beer and wine bottles in the vehicle. Eggert v. State, 395 S.W.3d 240, 2012 Tex. App. LEXIS 9190, 2012 WL 5416202 (Tex. App. San Antonio Nov. 7 2012).

750. Appellant did not present to the trial court his argument regarding the present sense impression exception to the hearsay rule, and thus the court could not reverse on this theory. Lewis v. State, 2012 Tex. App. LEXIS 100, 2012 WL 29326 (Tex. App. Corpus Christi Jan. 5 2012).

751. Court disagreed that statements were present sense impressions, given the time that elapsed between the events and the time when appellant made the statements. Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

752. Statements by a 911 caller reporting a drunk driver were not shown to be present sense impression under Tex. R. Evid. 803(1) because the observations were made with an eye toward future litigation or evidentiary use. Godinez v. State, 2011 Tex. App. LEXIS 5176, 2011 WL 2652129 (Tex. App. Fort Worth July 7 2011).

753. Officer's comments were made directly to appellant, in the officer's attempt to determine if appellant was going to be able to complete a field sobriety test; these were unreflective statements, which the present sense impression exception allowed. Calderon v. State, 2011 Tex. App. LEXIS 3352, 2011 WL 1734068 (Tex. App. El Paso May 4 2011).

754. Defendant's argument on appeal did not comport with his objection at trial, such that the claimed error based on the trial court's failure to issue a limiting instruction was waived under Tex. R. App. P. 33.1, Tex. R. Evid. 103(a); in any event, the complaint provided no basis for reversal because statements admitted as present sense impressions or excited utterances under Tex. R. Evid. 803(1), (2) were admissible for all purposes and were not subject to a limiting instruction. Green v. State, 2009 Tex. App. LEXIS 9300, 2009 WL 4575146 (Tex. App. Houston 14th Dist. Dec. 8 2009).

755. Officer's statements were not admissible as present sense impressions under Tex. R. Evid. 803(1) and thus the trial court erred in admitting portions of recordings with the officer's statements; however, the error was harmless under Tex. R. App. P. 44.2(b), given that (1) the officer testified to the substance of the inadmissible portion of the tapes prior to the admission of the tapes, without objection, (2) the informant testified as to the substance of that portion of the tapes also, and the testimony was subject to cross-examination and was admissible, and (3) the inadmissible portions of the tapes did not have a substantial and injurious effect or influence

on the jury's verdict. Rios v. State, 2009 Tex. App. LEXIS 8737, 2009 WL 3766341 (Tex. App. Waco Nov. 10 2009), mem. op.

756. Statement conveyed events as the witness perceived them, and thus the statement fell under the present sense impression exception to the hearsay rule under Tex. R. Evid. 803(1); the witness testified that the woman in question made the statement in response to the argument she was observing between defendant, another, and the victim, plus testimony tending to show that defendant was a suspect and explained the circumstances leading up to a murder was admissible, and thus the trial court did not err in admitting this statement over defendant's hearsay objection in his murder trial. Brown v. State, 2008 Tex. App. LEXIS 9063 (Tex. App. Houston 1st Dist. Dec. 4 2008).

757. Statement met none of the exceptions in Tex. R. Evid. 803(1), (2), (3), and while (1) an objection made mid-sentence also applied to the rest of the statement that was admitted after the objection, and (2) defendant also timely objected the second time the statement was made, because defendant did not object to the third mention of the statement, defendant did not preserve error. Dodson v. State, 268 S.W.3d 674, 2008 Tex. App. LEXIS 6442 (Tex. App. Fort Worth 2008).

758. Given that defendant argued that a witness's inconsistent statements to police were admissible to show state of mind, the court found that defendant preserved the argument that the statements were admissible under Tex. R. Evid. 803(1). Mooring v. State, 2007 Tex. App. LEXIS 3601 (Tex. App. Waco May 9 2007).

759. Given defendant's reason to admit the evidence, a videotaped statement of the child victim, to show demeanor and character, the trial court would have been within its discretion to exclude the evidence because the videotape would have been cumulative of the victim's trial testimony, for purposes of Tex. R. Evid. 403, and because the court found that the trial court did not abuse its discretion in excluding the evidence on non-hearsay grounds, the court did not need to analyze whether the evidence fell within an exception to the hearsay rule under Tex. R. Evid. 803(1), for purposes of Tex. R. App. P. 47.1; the court noted that had the tape been offered to show the truth of the matters asserted, it would have been hearsay under Tex. R. Evid. 801(d). Shanta v. State, 2007 Tex. App. LEXIS 2887 (Tex. App. Houston 1st Dist. Apr. 12 2007).

760. Counsel was not ineffective for not lodging certain hearsay objections; counsel could have concluded that a statement would have been admitted as an excited utterance or a present sense impression, and counsel could have found that the State could have obtained the same testimony by recalling a witness to clarify the statements, and furthermore, counsel was not ineffective for not objecting to another question, given that the State meant to ask the witness if, at the time of defendant's arrest, the witness identified defendant as the person the witness, not another, saw lighting the fire in question. Ortiz v. State, 2006 Tex. App. LEXIS 3893 (Tex. App. Houston 1st Dist. May 4 2006).

761. In a medical malpractice case, the trial court did not err in excluding, as hearsay under Tex. R. Evid. 801(d), a statement by a witness who would have testified that the doctor was afraid that he had done something wrong; the statement was offered in evidence to prove the truth of the matter asserted, and the present sense impression rule of Tex. R. Evid. 803(1) did not apply because there was no evidence of contemporaneity. Daniels v. Yancey, 175 S.W.3d 889, 2005 Tex. App. LEXIS 8789 (Tex. App. Texarkana 2005).

762. In a drug case, the trial court did not err in allowing the arresting officer to testify about statements made by an undercover officer; although defendant made a hearsay objection before the testimony was given, defendant did not renew his objection when the hearsay statement exceeded the present-sense-impression exception of Tex. R. Evid. 803(1). Johnson v. State, 2005 Tex. App. LEXIS 4286 (Tex. App. Houston 1st Dist. June 2 2005).

763. In a domestic violence case, defendant's objection to the State's trial assertion that a 911 tape was admissible as a present sense impression under Tex. R. Evid. 803(1), on the ground that a sufficient predicate had not been made to show a present sense impression, without stating in what regard the predicate was deficient, was too general to preserve the issue for review under Tex. R. App. P. 33.1(a)(1)(A). Warfel v. State, 2005 Tex. App. LEXIS 2922 (Tex. App. Amarillo Apr. 14 2005).

764. In a capital murder case, the trial court did not abuse its discretion by admitting a report of the murder on a 9-1-1 tape under the present sense impression exception to the hearsay rule, because the tape was made immediately after the witness perceived the event. After the witness saw defendant throw the body into the victim's truck and peel out of the parking lot, he called 9-1-1. Pack v. State, 2004 Tex. App. LEXIS 11129 (Tex. App. Fort Worth Dec. 9 2004).

765. In a criminal trial for aggravated assault, the investigating officer's testimony concerning the victim's statements at the scene identifying defendant as the man who attacked him the night before fell squarely into the present sense impression exception to the rule excluding hearsay. Mason v. State, 2004 Tex. App. LEXIS 6458 (Tex. App. Texarkana July 20 2004).

766. Murder victim's statements while crying that she had seen guns in a car outside was admissible as a present sense impression under Tex. R. Evid 803(1), and her statement that she was going to be killed by the people outside and her writing of those peoples' names on paper were admissible as excited utterances under Tex. R. Evid. 803(2). Cantu v. State, 2004 Tex. App. LEXIS 6049 (Tex. App. Corpus Christi July 8 2004).

767. In defendant's theft case, a court's error in excluding evidence that the declarant told defendant to move a trailer was harmless where defendant's sister testified that the employer told her defendant moved a trailer for a the declarant, and through the testimony of the two witnesses, the jury heard essentially the same evidence the trial court initially excluded: that the declarant hired defendant to move a trailer. Gibson v. State, 2004 Tex. App. LEXIS 3198 (Tex. App. Beaumont Apr. 7 2004).

768. Statement not connected to a contemporaneous observation is not a present sense impression under Tex. R. Evid. 803(1). Ferguson v. State, 97 S.W.3d 293, 2003 Tex. App. LEXIS 148 (Tex. App. Houston 14th Dist. 2003).

769. Out-of-court identification of appellant was not admissible as a present sense impression under Tex. R. Evid. 803(1); however, the trial court's erroneous admission of the identification was harmless error because it did not affect appellant's substantial rights or the jury's verdict under Tex. R. App. P. 44.2(b). Ferguson v. State, 97 S.W.3d 293, 2003 Tex. App. LEXIS 148 (Tex. App. Houston 14th Dist. 2003).

770. While a written statement made by a murder victim four months before her death that described a physical altercation with defendant qualified for admission under the code of criminal procedure, it was not admissible as a present sense impression because the statements it contained were recitations of events that occurred before the making of the statement and indicated the victim's fear of defendant only through inference. Barrett v. State, 2014 Tex. App. LEXIS 2251, 2014 WL 792123 (Tex. App. Texarkana Feb. 27 2014).

Evidence : Hearsay : Exceptions : Present Sense Impression : Contemporaneous Statements

771. In a burglary case, the trial court did not abuse its discretion when it refused to admit the videotape of defendant's interview with police because he failed to establish that a hearsay exception applied under Tex. R. Evid. 803; due to the time that elapsed between the alleged chase and the interview, the video was not an excited utterance and the unreflective nature required of a present sense impression was destroyed. The business record exception did not apply, because the source of the information indicated an absence of trustworthiness. Walker v.

State, 2012 Tex. App. LEXIS 9928 (Tex. App. Eastland Nov. 30 2012).

772. In a domestic violence case, a 911 recording was properly admitted as present sense impression under Tex. R. Evid. 803, even though the caller, defendant's son, stated that his father had beaten his mother and thus appeared to be describing a past event, because at least some statements in the recording appeared to be a contemporaneous statement about an event the caller was witnessing. The 911 recording included statements by the caller that his mother was "limping" and that she "needs" an ambulance. Reyes v. State, 314 S.W.3d 74, 2010 Tex. App. LEXIS 1837 (Tex. App. San Antonio Mar. 17 2010).

773. Witness made statements the following morning in response to questioning, and this did not satisfy Tex. R. Evid. 803(1)'s requirement that the statement have been made at the time the declarant was perceiving the event or immediately thereafter. Woods v. State, 2009 Tex. App. LEXIS 8749 (Tex. App. El Paso Nov. 12 2009).

774. Trial court did not abuse its discretion in striking a portion of the horse owner's affidavit and deposition where it contained hearsay statements allegedly made by an acquaintance to the police and those statements did not constitute a present sense impression under Tex. R. Evid. 803 because as there was no evidence indicating that the acquaintance's statement was contemporaneous with his alleged observation of the utility truck turning around in the horse owner's pasture. Thomas v. Centerpoint Energy, Inc., 2008 Tex. App. LEXIS 945 (Tex. App. Houston 1st Dist. Feb. 7 2008).

775. Murder victim's statement to a witness over the telephone that "This guy just left" could be inferred to be contemporaneous with the event it described and therefore could be admitted under Tex. R. Evid. 803. Russo v. State, 228 S.W.3d 779, 2007 Tex. App. LEXIS 4499 (Tex. App. Austin 2007).

776. Witness's statement, "that's defendant," was made while the witness watched the shooting and it described what the witness had just seen, such that it constituted a present sense impression under Tex. R. Evid. 803 and the trial court did not err in admitting it. Freeman v. State, 230 S.W.3d 392, 2007 Tex. App. LEXIS 3965 (Tex. App. Eastland 2007).

777. More than four hours elapsed between the time of the robbery and the time a witness was interviewed by a detective, and thus the trial court would not have abused its discretion in finding that the witness's statements were not sufficiently contemporaneous to have been admissible under the present-sense-impression exception to the hearsay rule under Tex. R. Evid. 803(1). Mooring v. State, 2007 Tex. App. LEXIS 3601 (Tex. App. Waco May 9 2007).

778. In a trial for driving while intoxicated, there was no error in the admission as a present-sense impression under Tex. R. Evid. 803 of a statement that defendant had been drinking all day; the contemporaneous event was an argument between defendant and the declarant that concluded moments before the declarant, seeking to explain defendant's behavior, made the statement; further, any error in the admission was harmless under Tex. R. App. P. 44 because there was other evidence in the record to establish defendant's intoxication. Brdecka v. State, 2007 Tex. App. LEXIS 2072 (Tex. App. Austin Mar. 13 2007).

779. In a driving while intoxicated case, a court erred by admitting witnesses' hearsay statements under the present sense impression exception because the evidence did not establish how much time elapsed between when one witness observed the incident and when she prepared her statement, and the other witness's written statement, made five days after the incident, clearly fell outside any reasonable argument that she made it immediately after the incident; however, the error was harmless; both witnesses testified at trial that they saw defendant weaving across the roadway prior to her leaving the highway, and a videotape of field sobriety tests supported that

defendant did not have the normal use of her mental or physical faculties. Dalton v. State, 2006 Tex. App. LEXIS 9189 (Tex. App. Beaumont Oct. 25 2006).

Evidence : Hearsay : Exceptions : Present Sense Impression : Description of Events

780. Trial court did not abuse its discretion by admitting testimony from the victim's widow as a present sense impression because the victim's statement during his telephone conversation with his wife were nonreflective and described the event he was perceiving. Dean v. State, 2013 Tex. App. LEXIS 11011 (Tex. App. Tyler Aug. 29 2013).

781. During defendant's trial for intoxication manslaughter, a witness was permitted to testify that he heard other truckers on his CB radio talking about how they had seen a person driving rapidly down the wrong side of the highway on the night in question; these were present sense impressions. Hackler v. State, 2006 Tex. App. LEXIS 4995 (Tex. App. Fort Worth June 8 2006).

Evidence : Hearsay : Exceptions : Public Records

782. A certified tax statement is a public record, even if it was prepared solely for the purpose of litigation. F-Star Socorro, L.P. v. City of El Paso, 281 S.W.3d 103, 2008 Tex. App. LEXIS 5008 (Tex. App. El Paso 2008).

Evidence : Hearsay : Exceptions : Public Records : General Overview

783. Even if the buyers had timely asserted that the second print-out of the county appraisal district's website was a public record, the excluded information was not trustworthy, and therefore did not qualify for admission under the public records exception to hearsay. Zhu v. Lam, 426 S.W.3d 333, 2014 Tex. App. LEXIS 2973, 2014 WL 1028485 (Tex. App. Houston 14th Dist. Mar. 18 2014).

784. Trial court did not abuse its discretion by excluding expert-opinion evidence based on its finding that the evidence was not subject to the public record exception of the hearsay rule, because it had limited knowledge of the qualifications of the authors of the opinion testimony, and had limited knowledge of the reliability of such testimony. Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc., 434 S.W.3d 142, 2014 Tex. LEXIS 381, 57 Tex. Sup. Ct. J. 531, 43 Media L. Rep. (BNA) 1086 (Tex. May 9 2014).

785. Naming of the Texas Department of Family and Protective Services as permanent managing conservator of the father's child was proper under Tex. Fam. Code Ann. § 264.754 and 162.102, art. III, § d because, although he argued that the trial court erred by admitting a copy of a home study request and result on his home in Michigan, but the appellate court stated that it was admissible under the public records exception contained in Tex. R. Evid. 803(8). In the Interest of S.W., 2012 Tex. App. LEXIS 6363, 2012 WL 3115749 (Tex. App. Fort Worth Aug. 2 2012).

786. Trial court did not abuse its discretion by determining that Tex. R. Evid. 803(8) did not apply and excluding four documents from the Texas Natural Resource Conservation Commission regarding appellee's solid waste permit because at the time the documents were presented, the trial court had little or no information regarding the authors' qualifications to give the expert opinions set forth in the documents or regarding the reliability of the opinions. Waste Mgmt. of Tex., Inc. v. Texas Disposal Systems Landfill, 2012 Tex. App. LEXIS 4005, 2012 WL 1810215 (Tex. App. Austin May 18 2012).

787. Court had previously held that a certified copy of a driving record was admissible under Tex. R. Evid. 803(8)(B), 902(4), and thus the trial court did not err in admitting appellant's certified driving record. Mclamore v.

State, 2012 Tex. App. LEXIS 2909 (Tex. App. Fort Worth Apr. 12 2012).

788. Even assuming that the hearsay exception for public records in Tex. R. Evid. 803(8)(B) did not apply and a trial court erred in admitting a toxicology report or a toxicologist's testimony over defendant's hearsay objection, any error was harmless because the State proved the impairment definition in Tex. Penal Code Ann. § 49.01(2). Derichsweiler v. State, 359 S.W.3d 342, 2012 Tex. App. LEXIS 465 (Tex. App. Fort Worth Jan. 19 2012).

789. During defendant's trial for aggravated sexual assault, aggravated kidnapping, and unlawful possession of a firearm, the court did not err in admitting a docket sheet from one of defendant's prior convictions; while the docket sheet was hearsay under Tex. R. Evid. 801(d), it was admissible under the public records exception in Tex. R. Evid. 803(8). Brown v. State, 2011 Tex. App. LEXIS 7319, 2011 WL 3915663 (Tex. App. Tyler Sept. 7 2011).

790. Trial court did not err in admitting the transcription of the doctor's testimony into evidence as an expert witness may rely on records and information prepared by others in reaching his conclusions, Tex. R. Evid. 703, and medical and autopsy reports fell into an exception to the hearsay rule and were allowed into evidence without the preparing doctor appearing in court to explain them, Tex. R. Evid. 803(4), (8). Rodriguez v. Tex. Dep't of Family & Protective Servs., 2011 Tex. App. LEXIS 6131, 2011 WL 3435736 (Tex. App. Austin Aug. 4 2011).

791. Trial court did not abuse its discretion by admitting an exhibit, a pen packet, over appellant's hearsay objection under Tex. R. Evid. 801(d); the pen packet relating to appellant's prior felony conviction fell within the exceptions of Tex. R. Evid. 803(8), (22), and nothing indicated that the documents lacked trustworthiness. Price v. State, 2011 Tex. App. LEXIS 2020, 2011 WL 946978 (Tex. App. Fort Worth Mar. 17 2011).

792. Report from a crime laboratory was not admissible under either Tex. R. Evid. 803(6) or (8), but any error in the trial court's admission of the report was harmless under Tex. R. App. P. 44.2(b) because the value of the report was cumulative; the same evidence found in the report, that the substance was cocaine, was also admitted through other testimony without objection. Miles v. State, 2009 Tex. App. LEXIS 9756, 2009 WL 4358959 (Tex. App. Houston 1st Dist. Dec. 3 2009).

793. In this termination case, a mother complained evidence that counsel did not object to harmed her, but the court disagreed because there was sufficient other evidence of cases concerning the mother's other children before the court under Tex. R. Evid. 803(8) and the effect of testimony the mother complained of was minimal. In the Interest of R.S., 2009 Tex. App. LEXIS 7632, 2009 WL 3191515 (Tex. App. Houston 14th Dist. Oct. 1 2009).

794. In a murder case, a trial court did not err by admitting testimony regarding defendant's behavior at a Texas Youth Commission residential treatment facility because such evidence fell under the public records exception for hearsay under Tex. R. Evid. 803(8)(A); the State introduced the testimony from defendant's counselor regarding defendant's violent physical acts, gang activity, and intimidation. The objected-to portions of the testimony were merely sterile recitations of defendant's offenses of the type that had been held admissible at the punishment phase of trial. Bautista v. State, 2009 Tex. App. LEXIS 6806, 2009 WL 2622405 (Tex. App. Dallas Aug. 27 2009).

795. Because defendant failed to respond to the State's relevance objection and because there was nothing in the record to show that a witness actually made any prior inconsistent statements, for purposes of Tex. R. Evid. 801(e)(1)(A), to which Scott's hearsay exceptions under Tex. R. Evid. 613(a), 803(8) would apply, the court could not say that the trial court abused its discretion by not allowing defendant to impeach the witness. Scott v. State, 2009 Tex. App. LEXIS 131, 2009 WL 51035 (Tex. App. Fort Worth Jan. 8 2009).

796. Defendant's conviction for arson of a habitation was appropriate because, in light of an investigator's status as a law enforcement official, the plain language of Tex. R. Evid. 801(d) and 803(8)(B), and defendant's failure to provide any argument on appeal refuting the trial court's classification of the statements offered from the DA packet as inadmissible hearsay under the rules, the appellate court was unable to say that the trial court abused its discretion in excluding those portions of the DA packet in which another individual was designated as a co-defendant. Charles v. State, 2008 Tex. App. LEXIS 9368 (Tex. App. Houston 14th Dist. Dec. 18 2008).

797. Documents could not be admitted as public records under Tex. R. Evid. 803(8) in a receivership proceeding without certification pursuant to Tex. R. Evid. 902(4) or extrinsic evidence of authenticity under Tex. R. Evid. 901(a), (b)(7). Benefield v. State ex rel. Alvin Cmty. Health Endeavor, Inc., 266 S.W.3d 25, 2008 Tex. App. LEXIS 6152 (Tex. App. Houston 1st Dist. 2008).

798. Given that Tex. R. Evid. 803 created an exception to the hearsay rule for public records and reports and judgments of previous convictions, to the extent that defendant's complaint was that pen packets were hearsay, the trial court did not abuse its discretion by overruling the hearsay objection. Smith v. State, 2008 Tex. App. LEXIS 2849 (Tex. App. Fort Worth Apr. 17 2008).

799. As a certified copy of a public record, the State's exhibit of defendant's driving record was well within Tex. R. Evid. 803 and its admission did not constitute inadmissible hearsay. Cline v. State, 2008 Tex. App. LEXIS 2242 (Tex. App. Austin Mar. 26 2008).

800. Court rejected defendant's claim of ineffective assistance of counsel related to counsel's failure to object to testimony offered during the punishment phase, given that (1) the challenged evidence, including defendant's juvenile and adult criminal records, were admissible under Tex. Code Crim. Proc. Ann. art. 37.07, § 3 and were properly admitted under Tex. R. Evid. 803 as public records, (2) defendant's reliance on certain case law regarding his confrontation argument was distinguishable, as that case dealt with incident and disciplinary reports, and defendant's case dealt with certified court documents of the criminal records, and (3) even if the court found that the exhibits violated Tex. Code Crim. Proc. Ann. art. 37.07 or were hearsay, counsel's reasons for his actions did not appear in the record, and because his conduct could have been part of a reasonable trial strategy, without more, the court had to defer to counsel's decisions not to object to the evidence and deny relief. Garza v. State, 2007 Tex. App. LEXIS 6301 (Tex. App. Corpus Christi Aug. 9 2007).

801. In the State's suit to recover costs incurred under Tex. Nat. Res. Code Ann. § 91.113(f) in cleaning up a company's abandoned salt water disposal facility, the trial court did not err by admitting the State's documentary evidence showing the amounts spent by the Railroad Commission to clean up the site as the documents were not summaries prepared for trial, but documents prepared by and filed with the Commission reporting and compiling the amounts paid. Martin v. State, 2007 Tex. App. LEXIS 6167 (Tex. App. Austin Aug. 3 2007).

802. Trial court did not abuse its discretion by sustaining a father's objections to admission of an "updated" record, as the objection from the father's attorney prevented the attorney general from authenticating the "updated" record without testifying under oath; when the trial judge sustained the father's objection to the "updated" record, the attorney general had to prove the authenticity of the document by some other means; however, the attorney general made no attempt to call any witnesses to testify at the hearing and the document was not self-authenticating because it was not under seal, a certified copy of a public record, or supported by a business records affidavit. In re K.R., 2007 Tex. App. LEXIS 5756 (Tex. App. Dallas July 23 2007).

803. Certified copy of a judgment and sentence relating to defendant's first assault conviction was properly admitted under Tex. R. Evid. 803 during defendant's trial for felony assault involving family violence because the evidence was an exception to the hearsay rule under either the business or public records exception. Williams v.

State, 2007 Tex. App. LEXIS 2375 (Tex. App. Dallas Mar. 28 2007).

804. To the extent that both Tex. R. Evid. 803(8) and case law mentioned that governmental records were subject to be excluded from the hearsay rule, the companies did not explain why or whether the exhibit in question, purportedly created by the government, met the rule requirements; there was no evidence authenticating the exhibit and relieving the companies of having to prove that it satisfied the rule. Stringer v. Red River Commodities, Inc., 2006 Tex. App. LEXIS 10617 (Tex. App. Amarillo Dec. 13 2006).

805. In a murder case, an autopsy report was properly admitted as a public record and a business record because the report set forth matters observed pursuant to a duty imposed by law, including the location and the nature of the injuries; a doctor testified and was subject to cross-examination and he was also a signatory to the report. Terrazas v. State, 2006 Tex. App. LEXIS 6696 (Tex. App. Austin July 28 2006).

806. In defendant's murder case, the court erred during the punishment phase by admitting evidence of defendant's jail record because it was a report of crimes and acts of misconduct reported to or observed by law enforcement personnel, and reflected law enforcement personnel's rulings regarding culpability and the punishment imposed by law enforcement personnel. Kennedy v. State, 193 S.W.3d 645, 2006 Tex. App. LEXIS 2517 (Tex. App. Fort Worth 2006).

807. It was not error to admit child service plan reviews generated by the state child protective services department, as mandated by law under Tex. Fam. Code Ann. § 263.105, which the mother challenged as lacking in trustworthiness; the plan reviews were reviewed by the trial court and were testified to by a caseworker; in the event there was error, it was not harmful and did not lead to the rendition of an improper judgment under Tex. R. App. P. 44.1(a). In re P.D.A., 2006 Tex. App. LEXIS 2179 (Tex. App. Eastland Mar. 23 2006).

808. In a proceeding to terminate a father's parental rights, it was reversible error under Tex. R. Evid. 801 to admit hearsay statements relating to purported sexual abuse by the father of a different child, including written statements by two adults relating to the child's reports of sexual abuse, a child abuse protocol from a physical examination, and an arrest warrant with an affidavit containing reports of the purported assault. Those documents were not admissible under either the business records or public records exceptions of Tex. R. Evid. 803 because the Department of Family and Protective Services failed to lay a proper predicate. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

809. Trial court did not err in admitting a letter from the Housing and Urban Development Department under Tex. R. Evid. 803(8) because (1) the letter was a report setting forth activities of the agency, and (2) the circumstances did not indicate a lack of trustworthiness, given that it was not shown that the letter was created for purposes of the litigation. 1001 McKinney Ltd. v. Credit Suisse First Boston Mortg. Capital, 192 S.W.3d 20, 2005 Tex. App. LEXIS 9742 (Tex. App. Houston 14th Dist. 2005).

810. Inmate was not entitled to 28 U.S.C.S. § 2254 relief on his claim that his trial counsel was ineffective for failing to challenge the prosecution's evidence regarding the inmate's expulsion from middle school, because trial counsel reasonably believed that at least some evidence showing that the inmate had been expelled and possibly the reasons therefore was going to be admitted at trial, and counsel's decision to challenge that evidence on cross-examination was objectively reasonable. Gutierrez v. Dretke, 392 F. Supp. 2d 802, 2005 U.S. Dist. LEXIS 32496 (W.D. Tex. 2005).

811. Although an officer's supplemental written refusal report was not filed within five days after the motorist's arrest, the officer's failure to comply with Tex. Transp. Code Ann. §724.032(c)'s time requirement did not render the supplemental report inadmissible, as such reports were admissible under Tex. R. Evid. 803(8), and the

administrative law judge's admission of the supplemental written refusal report was not an abuse of discretion. Tex. Dep't of Pub. Safety v. Perkins, 2004 Tex. App. LEXIS 10833 (Tex. App. Houston 1st Dist. Dec. 2 2004).

812. Trial court did not err in admitting police reports in a parental termination proceeding because the reports were admissible as a public record under Tex. R. Evid. 803(8) and the parents failed to meet their burden to show untrustworthiness. The parents failed to show resulting harm because the police reports were merely cumulative of the evidence already in the record as the result of the mother's admissions regarding her previous arrests and drug use during pregnancy. Corrales v. Dep't of Family & Protective Servs., 155 S.W.3d 478, 2004 Tex. App. LEXIS 10384 (Tex. App. El Paso 2004).

813. In a car owner's suit against another driver arising out of a car accident, the trial court did not err in admitting the police accident report as it was admissible under Tex. R. Evid. 803(8) as an exception to the hearsay rule, even though the trial court stated it was admitting the report under Tex. R. Evid. 803(6). Madrigal v. Soliz, 2004 Tex. App. LEXIS 7990 (Tex. App. Corpus Christi Aug. 31 2004).

814. Trial court improperly admitted a manufacturer's database of consumer complaints; even if a government agency report was admitted first under Tex. R. Evid. 803(8), it did not hold the door open for the database. While the report listed the numbers of reported acceleration incidents as background to indicate what and why it was investigating; the consumer offered the database to show that the cars were defective. Nissan Motor Co. v. Armstrong, 145 S.W.3d 131, 2004 Tex. LEXIS 737, 47 Tex. Sup. Ct. J. 955, CCH Prod. Liab. Rep. P17123 (Tex. 2004).

815. Court refused to consider a police report attached to defendant's brief in connection with defendant's appeal from a conviction under Tex. Health & Safety Code Ann. §§ 481.102(6) and 481.115(a) because the report was not part of the appellate record, and it constituted inadmissible hearsay under Tex. R. Evid. 803(8)(B). Cowan v. State, 2004 Tex. App. LEXIS 6968 (Tex. App. Tyler July 30 2004).

816. Trial court properly excluded an explanatory letter, which purported to provide the same explanation offered by a witness as to why the date listed in the records was not necessarily the date appellant's disability began where the letter did not fall within the specific categories of Tex. R. Evid. 803(8). Moore v. Mem'l Hermann Hosp. Sys., 140 S.W.3d 870, 2004 Tex. App. LEXIS 6067 (Tex. App. Houston 14th Dist. 2004).

817. In airport facility lessees' challenge to the city appraisal district's tax assessment on improvements the lessees constructed under their leases and subleases with the city, the trial court did not abuse its discretion in admitting certificates of occupancy stating that the city had accepted the facilities as the certificates and an affidavit referencing them as they were not hearsay, and even if they were, the certificates were admissible public records under Tex. R. Evid. 803(8) in that they memorialized the city's issuance of certificates of occupancy to the lessees of the facilities. Travis Cent. Appraisal Dist. v. Signature Flight Support Corp., 140 S.W.3d 833, 2004 Tex. App. LEXIS 5783 (Tex. App. Austin 2004).

818. In a defamation action, the Texas Rules of Evidence did not specify that the certification on the employee and the employer's exhibits contain an accurate date, and there was nothing in the record to indicate that the incorrect date stamp was the result of a fraudulent act; thus, it was not an abuse of discretion for the trial court to admit the exhibits under the public documents exception to the hearsay rule. Adi v. Prudential Prop. & Cas. Ins. Co., 2004 Tex. App. LEXIS 5937 (Tex. App. Houston 1st Dist. July 1 2004), writ of certiorari denied by 126 S. Ct. 565, 163 L. Ed. 2d 475, 2005 U.S. LEXIS 7988, 74 U.S.L.W. 3273 (U.S. 2005).

819. Although there was a hearsay exception for public records, this exception did not apply to matters observed by police officers and contained in their offense reports, Tex. R. Evid. 803(8)(B); even if the complainant's drug

addiction and acts of prostitution were relevant to defendant's defense, he was not entitled to prove these facts by introducing the contents of the officer's offense report. Ex parte Irving, 2004 Tex. App. LEXIS 2033 (Tex. App. Austin Mar. 4 2004).

820. In a driving while intoxicated case, the trial court erred in admitting the arresting officer's commentary from the audio portion of a videotape taken from his patrol car while following defendant as the commentary was hearsay; the observations were not made by the officer while testifying at trial, as they were offered to prove that the officer had probable cause to stop defendant, and where the officer's comments were matters observed by a police officer in a criminal case, they were excluded from the public records exception under Tex. R. Evid. 803(8)(B) for admission at trial. Thompson v. State, 2003 Tex. App. LEXIS 10088 (Tex. App. Tyler Nov. 26 2003).

821. In a driving while intoxicated case, the trial court erred in admitting the arresting officer's commentary from the audio portion of a videotape taken from his patrol car while following defendant as the commentary was hearsay; the observations were not made by the officer while testifying at trial, as they were offered to prove that the officer had probable cause to stop defendant, and where the officer's comments were matters observed by a police officer in a criminal case, they were excluded from the public records exception under Tex. R. Evid. 803(8)(B) for admission at trial. Thompson v. State, 2003 Tex. App. LEXIS 10088 (Tex. App. Tyler Nov. 26 2003).

822. In a driving while intoxicated case, the trial court erred in admitting the arresting officer's commentary from the audio portion of a videotape taken from his patrol car while following defendant as the commentary was hearsay; the observations were not made by the officer while testifying at trial, as they were offered to prove that the officer had probable cause to stop defendant, and where the officer's comments were matters observed by a police officer in a criminal case, they were excluded from the public records exception under Tex. R. Evid. 803(8)(B) for admission at trial. Thompson v. State, 2003 Tex. App. LEXIS 10088 (Tex. App. Tyler Nov. 26 2003).

823. In juvenile defendant's probation revocation hearing, although the State did not lay the proper predicate for admitting defendant's school disciplinary reports pursuant to Tex. R. Evid. 803(6), the records were admissible under the public records exception of Tex. R. Evid. 803(8) as they set forth matters observed pursuant to the teachers' duty imposed by Tex. Educ. Code Ann. § 37.001(b). In re B. J., 100 S.W.3d 448, 2003 Tex. App. LEXIS 237 (Tex. App. Texarkana 2003).

824. Affidavit of an arresting officer on form DIC-23, that contained observations and factual findings resulting from his investigation, was properly admitted under the public records exception in Tex. R. Evid. 803(8) in an administrative hearing on the suspension of a driver's license; after a person has been arrested and has refused to submit to a breath test, a peace officer is required to submit a written report to the Director of the Texas Department of Public Safety pursuant to Tex. Transp. Code Ann. § 724.032, and the report is admissible unless the officer fails to appear at a scheduled hearing after receipt of a timely subpoena. Tex. Dep't of Pub. Safety v. Struve, 79 S.W.3d 796, 2002 Tex. App. LEXIS 4433 (Tex. App. Corpus Christi 2002).

825. Peace officer's sworn report, which the officer signed under oath before a notary, properly admitted at an administrative driver's license revocation hearing under the public record exception to the hearsay rule, Tex. R. Evid. 803(8). Texas Dep't of Pub. Safety v. Cortinas, 996 S.W.2d 885, 1998 Tex. App. LEXIS 7791 (Tex. App. Houston 14th Dist. 1998).

Evidence : Hearsay : Exceptions : Public Records : Absence of Records

826. In an action by a second wife to establish her right to share in a decedent's estate, the trial court did not err in admitting certificates, signed and certified by the clerk or a deputy clerk of three counties, that no divorce had been

entered between the decedent and his first wife, pursuant to Tex. R. Evid. 803(10). In the Estate of Rice, 2013 Tex. App. LEXIS 7215 (Tex. App. Beaumont June 13 2013).

Evidence : Hearsay : Exceptions : Public Records : Investigative Reports

827. In determining that a proposed acquisition of a utility was in the public interest, the Texas Public Utility Commission properly struck as hearsay under Tex. R. Evid. 801(d) portions of proposed testimony that discussed withdrawn testimony, including statements by an expert witness who was hired by the Commission's staff. The withdrawn testimony did not constitute admissions by party-opponents under Rule 801(e)(2) because it did not come from opposing parties, nor was it admissible under the public-record exception of Tex. R. Evid. 803(8)(C) because it was not admitted into the record or prepared under the supervision of a public official. Nucor Steel -- Tex. v. PUC, 363 S.W.3d 871, 2012 Tex. App. LEXIS 2108, 2012 WL 895994 (Tex. App. Austin Mar. 15 2012).

828. Tex. R. Evid. 803(8) dictates that matters observed by police officers or other law enforcement personnel are subject to the hearsay rule. Brewer v. State, 2012 Tex. App. LEXIS 1519, 2012 WL 626275 (Tex. App. Texarkana Feb. 28 2012).

829. Letter under Tex. Gov't Code Ann. § 493.009 was a statement notifying the trial court that appellant failed the program and asked for a bench warrant, and the rest of the report was a summary of specified disruptive behavior; the first prong of the test fell in favor of finding that the letter was admissible, but less so as to attachments to the letter. Brewer v. State, 2012 Tex. App. LEXIS 1519, 2012 WL 626275 (Tex. App. Texarkana Feb. 28 2012).

830. Coordinator's letter was administrative and ministerial in nature, created by the coordinator under a duty imposed by law under Tex. Gov't Code Ann. § 493.009, and although the detailed attachments that explained the specific conduct of appellant were not necessarily created for facilitating a prosecution, those parts of the documents fell on the inadmissible side of the spectrum, for purposes of Tex. R. Evid. 803(8). Brewer v. State, 2012 Tex. App. LEXIS 1519, 2012 WL 626275 (Tex. App. Texarkana Feb. 28 2012).

831. Letter was prepared by an employee of the Texas Department of Criminal Justice, who worked as a release coordinator in a substance abuse program, and he had a duty to make the report to the judge who had placed appellant on community supervision if the facility found appellant was not complying with the rules, for purposes of Tex. Gov't Code Ann. § 493.009; the court concludes that a release coordinator for the Texas Department of Criminal Justice reporting a defendant's noncompliance with the facility's rules to a sentencing court for its further action is acting as "law enforcement personnel" as contemplated by the rule, Tex. R. Evid. 803(8). Brewer v. State, 2012 Tex. App. LEXIS 1519, 2012 WL 626275 (Tex. App. Texarkana Feb. 28 2012).

832. Under the unique circumstances and given the conflicting evidence presented concerning the existence or nonexistence of a written report and the opinions allegedly contained therein, which formed the basis for a motion to dismiss the indictment, the trial court's finding that the motion was not admissible under Tex. R. Evid. 803(8)(C) fell within the zone of reasonable disagreement. Lozano v. State, 359 S.W.3d 790, 2012 Tex. App. LEXIS 718 (Tex. App. Fort Worth Jan. 26 2012).

833. Even if the trial court erred in excluding any evidence that it ruled was not admissible under Tex. R. Evid. 803(8), the error was harmless under Tex. R. App. P. 44.1(a)(1) because the excluded investigative reports, which did not show any illegal activity more recent than that shown in admitted evidence, were cumulative. State v. Elite Med, L.L.C., 2011 Tex. App. LEXIS 6502, 2011 WL 3610414 (Tex. App. San Antonio Aug. 17 2011).

834. Trial court did not abuse its discretion by admitting the contact log narrative of the Texas Department of Family and Protective Services' investigator as a business record under Tex. R. Evid. 803(8)(C) because it

appeared to track the investigator's observations that were made during the investigation. In the Interest of B.G.M., 2011 Tex. App. LEXIS 6040 (Tex. App. Texarkana Aug. 4 2011).

835. In defendant's assault case, the court did not err in excluding the officer's entire report during the cross-examination of the officer because the report did not consist of "factual findings resulting from an investigation," or the officer's opinions or conclusions based on such findings. To the contrary, the report was a recitation of statements made by the victim in reporting the offense. Weiss v. State, 2009 Tex. App. LEXIS 9453, 2009 WL 4757379 (Tex. App. Fort Worth Dec. 10 2009).

836. A certified tax statement is a public record, even if it was prepared solely for the purpose of litigation. F-Star Socorro, L.P. v. City of El Paso, 281 S.W.3d 103, 2008 Tex. App. LEXIS 5008 (Tex. App. El Paso 2008).

837. Trial court did not abuse its discretion by refusing to admit a police report into evidence because the portions defendant attempted to offer, transcribed statements made by a prospective informant, were not factual findings and therefore were outside the scope of Tex. R. Evid. 803; the statements were not shown to be otherwise exempt from the hearsay rule. Ramirez v. State, 2007 Tex. App. LEXIS 5825 (Tex. App. Houston 14th Dist. July 26 2007).

838. Portions of an offense report contained factual findings resulting from an officer's investigation of one of the State's witnesses, and the factual findings were admissible even though the report in its entirety was not admissible; under Tex. R. Evid. 803, defendant could have properly offered those factual findings into evidence to show bias or motive, but defendant offered the entire report, including the part that was inadmissible, and because defendant did not limit the offer to the admissible portions of the report, the trial court did not err in excluding the entire report. August v. State, 2006 Tex. App. LEXIS 3829 (Tex. App. Fort Worth May 4 2006).

Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports

839. State conceded that the trial court violated Tex. R. Evid. 803(8)(B) in admitting the officer's police report, but defendant was not harmed under Tex. R. App. P. 44.2(b), given that the report revealed nothing other than defendant refused to give a breath sample, and this same evidence was elicited from the officer without objection. Eckiss v. State, 2013 Tex. App. LEXIS 7371 (Tex. App. Dallas June 11 2013).

840. Trial court did not err by admitting into evidence a California police report of domestic violence made by the mother against the father because it was admissible as a public record under Tex. R. Evid. 803(8). L.M. & Y.Y. v. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 5683, 2012 WL 2923132 (Tex. App. Houston 1st Dist. July 12 2012).

841. Under former 1 Tex. Admin. Code §/Aa159.23(c)(7), an officer's failure to swear an arrest report did not deprive it of the assurance of veracity or render it inadmissible; supported by Tex. R. Evid. 803(8), arrest reports were admissible without being sworn and the ALJ properly concluded that the report should be admitted. Tex. Dep't of Pub. Safety v. Caruana, 363 S.W.3d 558, 2012 Tex. LEXIS 265, 55 Tex. Sup. Ct. J. 479 (Tex. 2012).

842. Appellant objected to the entire letter under Tex. Gov't Code Ann. § 493.009, including attachments, but because the letter was partly admissible under Tex. R. Evid. 803(8), the trial court did not abuse its discretion by admitting the letter as evidence, which showed he did not meet the conditions imposed by the court for his community supervision. Brewer v. State, 2012 Tex. App. LEXIS 1519, 2012 WL 626275 (Tex. App. Texarkana Feb. 28 2012).

843. Court's finding that the trial court did not err under Tex. R. Evid. 803(8) in admitting an entire letter under Tex. Gov't Code Ann. § 493.009 negated appellant's claim that there was no support for the adjudication; the letter and attachments provided sufficient evidence that appellant violated his community supervision terms, plus there was testimony that appellant did not complete a treatment program, and the trial court did not err in revoking his community supervision. Brewer v. State, 2012 Tex. App. LEXIS 1519, 2012 WL 626275 (Tex. App. Texarkana Feb. 28 2012).

844. Defendant failed to show he received ineffective assistance of counsel, because the record was silent as to why defense counsel might have declined to object to admission of the offense report during the punishment hearing, and the failure to object to the offense report was not so outrageous that no competent attorney would have acceded to the trial court's ruling; it was possible that defense counsel knew or surmised that if he kept out the report, which included the victim's version of events, that the elderly victim herself would have been called to testify and given a potentially more impactful live version of events than the one contained in the report. Reyes v. State, 2011 Tex. App. LEXIS 8569, 2011 WL 5119007 (Tex. App. Houston 14th Dist. Oct. 27 2011).

845. Court did not abuse its discretion in admitting the officer's expert testimony that there was nothing the employee could have done to avoid colliding with the daughter's car after the daughter's car struck the third-party's tractor-trailer, because there was no analytical gap between the data the officer collected and relied on in his investigation and his opinion as to causation; police reports could be admissible as an exception to the hearsay rule under Tex. R. Evid. 803(8). Schultz v. Lester, 2011 Tex. App. LEXIS 5866, 2011 WL 3211271 (Tex. App. Dallas July 29 2011).

846. Suspension of a driver's license for refusal to submit to a breath test under Tex. Transp. Code Ann. § 724.035 was supported by substantial evidence because even if the officer's sworn report was inadmissible under Tex. R. Evid. 803(8) based on a lack of a signature, the admissible evidence demonstrated the four elements required to uphold the suspension; that evidence included the DIC-24 form, under Tex. Transp. Code Ann. § 724.032, which indicated refusal to submit to the breath test and was signed by the driver. Tex. Dep't of Pub. Safety v. Guajardo, 2010 Tex. App. LEXIS 6000, 2010 WL 2967224 (Tex. App. Corpus Christi July 29 2010).

847. Trial court did not err by excluding from evidence written witness statements attached to an officer's accident report because the statements were hearsay under Tex. R. Evid. 801(d) and they did not fall under the public records exception, as witness statements in an officer's file did not qualify. Sherbin v. Dean Word Co., 2010 Tex. App. LEXIS 5362, 2010 WL 2698761 (Tex. App. Austin July 9 2010).

848. For purposes of Tex. R. Evid. 803(8)(B), a presentence investigation report showed that defendant owed a certain amount due to his failure to pay child support, but the report failed to show the amount of child support owed before his indictment and instead showed an amount that was less than what the trial court ordered, such that the amount ordered was without adequate evidentiary support in relation to matters for which defendant had been adjudged criminally responsible, for purposes of Tex. Code Crim. Proc. Ann. art. 42.12, § 23(a); deducting the payments defendant made during his community supervision did not cure the insufficiency of the evidence. Jester v. State, 2010 Tex. App. LEXIS 341, 2010 WL 177792 (Tex. App. Tyler Jan. 20 2010).

849. In a subrogation action, a trial court did not err by admitting a police report into evidence under Tex. R. Evid. 803(8) because there was nothing to indicate that the report lacked trustworthiness. Moreover, because a large part of the report was admissible non-opinion evidence and a driver did not specifically object to the opinion statements, the trial court properly overruled an alleged driver's objection regarding expert opinion. Lawrence v. Geico Gen. Ins. Co., 2009 Tex. App. LEXIS 5082, 2009 WL 1886177 (Tex. App. Houston 1st Dist. July 2 2009).

850. In a personal injury case, the court did not err by admitting a redacted accident report because the investigator stated an opinion that appellee "failed to yield the right of way," and the trial court chose to exclude the investigator's narrative. Additionally, the record showed that appellee conceded at trial that she caused the collision. Griffin v. Carson, 2009 Tex. App. LEXIS 3843, 2009 WL 1493467 (Tex. App. Houston 1st Dist. May 28 2009).

851. Peace officer's sworn DIC-23 report stating that a driver refused an alcohol concentration test was admissible in license suspension proceedings as a public record under Tex. R. Evid. 803, and the failure to fill in a blank for the number of pages did not overcome the presumption of admissibility. Hooker v. Tex. Dep't of Pub. Safety, 2008 Tex. App. LEXIS 329 (Tex. App. Beaumont Jan. 17 2008).

852. Court did not err by admitting a drug analyst-supervisor to testify in the punishment phase of defendant's aggravated robbery case that the substances removed from the car that defendant was driving were marijuana and cocaine because the trial court implicitly found that the supervisor qualified as an expert, and therefore, the State had no burden to invoke an exception to the hearsay rule; the trial court properly admitted the expert testimony that the substances were cocaine and marijuana because it was not hearsay and was not required to be based on her personal knowledge. Moore v. State, 2007 Tex. App. LEXIS 6844 (Tex. App. Fort Worth Aug. 24 2007).

853. In a wrongful death and survival action stemming from a collision of a sport utility vehicle and a gravel truck, because the factual findings in a Department of Public Safety (DPS) accident report, as well as the opinions set forth in it, were all admitted into evidence via testimony and exhibits other than the accident report, any trial court error in excluding the opinion testimony of a DPS officer or the accident report pursuant to the hearsay exception set forth in Tex. R. Evid. 803(8)(B) did not cause the rendition of an improper judgment and therefore did not constitute reversible error under Tex. R. App. P. 44.1(a)(1). TXI Transp. Co. v. Hughes, 224 S.W.3d 870, 2007 Tex. App. LEXIS 4124 (Tex. App. Fort Worth 2007).

854. In defendant's burglary case, a court erred by allowing one officer to testify that a finger print, in his opinion, belonged to defendant because the testimony necessarily revealed the substance of the third officer's conclusion, namely that in his opinion, the print belonged to defendant; under Tex. R. Evid. 803, that was hearsay; however, the error was harmless because the testimony was cumulative of other testimony regarding the conclusion. Smith v. State, 236 S.W.3d 282, 2007 Tex. App. LEXIS 2206 (Tex. App. Houston 1st Dist. 2007).

855. In a prosecution under Tex. Penal Code Ann. § 49.04, a law enforcement officer's observations of defendant, dictated on videotape, were not admissible because they were the functional equivalent of a police or offense report under Tex. R. Evid. 803(8)(B). The contemporaneous recording did not render the observations admissible as present sense impression under R. 803(1). Fischer v. State, 207 S.W.3d 846, 2006 Tex. App. LEXIS 9432 (Tex. App. Houston 14th Dist. 2006).

856. Defense counsel was not rendered ineffective by failing to object to the admission of a penitentiary packet because penitentiary packets were admissible as an exception to the hearsay rule if they were properly authenticated as public records, as provided by Tex. R. Evid. 803(8), 901(b)(7), 902(4). Henderson v. State, 2006 Tex. App. LEXIS 5911 (Tex. App. Tyler June 30 2006).

857. In a prosecution for driving while intoxicated, there was no error under the Confrontation Clause in permitting an officer to testify about the vehicle registration; the computer entry showing vehicle registration was akin to a public record under Tex. R. Evid. 803 and was thus non-testimonial under a Crawford analysis. Nieschwietz v. State, 2006 Tex. App. LEXIS 5255 (Tex. App. San Antonio June 21 2006).

Evidence : Hearsay : Exceptions : Recorded Recollection : General Overview

858. At defendant's murder trial, the court did not abuse its discretion in publishing to the jury a witness' previous statement as a recorded recollection as his testimony indicated that he was not able to remember all of the details of the incident. Smith v. State, 420 S.W.3d 207, 2013 Tex. App. LEXIS 15280, 2013 WL 6699495 (Tex. App. Houston 1st Dist. Dec. 19 2013).

859. Nothing showed that the original statement was introduced into evidence, but the victim testified that the statement was the one she was asked to fill out and contained some of her handwriting, and it was dated a day after the incident, such that the trial court had the discretion to find that the statement was the original and that it was made at or near the time of the event. Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

860. State did not meet the predicate for admissibility as a recorded recollection because the victim did not vouch for the statement's accuracy and did not remember much of what was in the statement, plus parts were not in her handwriting, and thus a limiting instruction, advising the jury to consider the statement for testing the victim's credibility only for purposes of Tex. R. Evid. 613(a), should have been granted. Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

861. State had the burden to show that the statement was admissible under Tex. R. Evid. 803(5). Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

862. Appellant did not contest the third case law requirement for admissibility for purposes of Tex. R. Evid. 803(5) because the victim testified that her memory as set forth in the statement was not clear. Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

863. Second prong of the test for admissibility requires that the statement be an original memorandum made at or near the time of the event while the witness was able to clearly and accurately recall the event. Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials

864. Witness eventually regained her memory and testified as to her present recollection of the events, and thus the court found her prior statement was not admissible as a prior recorded recollection; testimony recollecting her conversation with defendant was substantive evidence of his guilt. Sashington v. State, 2014 Tex. App. LEXIS 2861, 2014 WL 1018005 (Tex. App. Austin Mar. 14 2014).

865. Trial court could have reasonably concluded that defendant failed to lay sufficient predicate to show that the victim's previous statement was admissible as a past recollection record because there was nothing in the record to indicate that she knew she was being recorded at the time she made the statement or that she subsequently verified the accuracy of her statement while she could still recall the relevant events. Mury v. State, 2013 Tex. App. LEXIS 12662, 2013 WL 5856337 (Tex. App. Austin Oct. 11 2013).

866. Prior written statement of a witness with memory loss was properly admitted as recorded recollection under Tex. R. Evid. Rule 803(5) because the witness sufficiently vouched for the accuracy of the statement through unobjected-to hearsay testimony that the witness told an officer that the statement was true at the time she wrote it. In re J.W., 2009 Tex. App. LEXIS 9830, 2009 WL 5155784 (Tex. App. Waco Dec. 30 2009).

867. Trial court overruled defendant's objection that the trial court erred in allowing an officer to read a police report to the jury on the ground that the report was hearsay, and the trial court granted a running objection;

however, defendant's complaint on appeal, that there was no proper predicate for the report, did not comport with the objections made at trial, and thus nothing was preserved for the court's review; the court noted that, under Tex. R. Evid. 803, if a witness's memory was not refreshed, a trustworthy document could be read to the jury under certain circumstances. Wilson v. State, 2006 Tex. App. LEXIS 2282 (Tex. App. Tyler Mar. 22 2006).

868. In an aggravated robbery case, although a foundation was lacking for admission of an accomplice's statement as a prior inconsistent statement under Tex. R. Evid. 613 or as an exception to the hearsay rule under this rule, its admission into evidence at trial did not constitute reversible error because a detective had already testified in detail regarding the contents of the statement. Romero v. State, 2004 Tex. App. LEXIS 2999 (Tex. App. Eastland Apr. 1 2004).

Evidence : Hearsay : Exceptions : Recorded Recollection : Recollection Refreshed

869. At defendant's murder trial, the court did not abuse its discretion in publishing to the jury a witness' previous statement as a recorded recollection as his testimony indicated that he was not able to remember all of the details of the incident. Smith v. State, 420 S.W.3d 207, 2013 Tex. App. LEXIS 15280, 2013 WL 6699495 (Tex. App. Houston 1st Dist. Dec. 19 2013).

Evidence : Hearsay : Exceptions : Recorded Recollection : Requirements

870. Trial court did not err by allowing a witness's prior statement to be read in the record as a recorded recollection because the witness testified that she could not recall significant details of what occurred due to the passage of time. Sanchez v. State, 2013 Tex. App. LEXIS 10155 (Tex. App. Austin Aug. 15 2013).

871. Defendant's aggravated robbery with a deadly weapon conviction was appropriate, in part because, even if it were to be assumed that the trial court erroneously admitted a statement since the State failed to lay a proper predicate under Tex. R. Evid. 803(5), there was no showing that the alleged erroneous evidentiary ruling rose to the level of denying fundamental constitutional rights. Hernandez v. State, 2012 Tex. App. LEXIS 9499, 2012 WL 5520422 (Tex. App. Dallas Nov. 15 2012).

872. At defendant's trial for engaging in organized criminal activity, the trial court erred by admitting an out-of-court statement made by an accomplice witness to police after he was arrested; although the statement included direct statements against interest and blame-sharing statements that were admissible under Tex. R. Evid. 803(24), it also included numerous blame-shifting statements that were not admissible. The statement was not admissible under Tex. R. Evid. 803(5) as recorded recollection, because the witness did not testify that he had firsthand knowledge of the events contained in his statement; nor did he vouch at trial for the accuracy of his statement. Batts v. State, 2012 Tex. App. LEXIS 5163, 2012 WL 2469546 (Tex. App. Eastland June 28 2012).

873. Assuming that the fourth requirement of Tex. R. Evid. 803(5) had to be restrictively construed, it was error under Rule 803(5) to admit a witness's statement to police that he saw defendant pull a gun and that defendant had said he was going to kill the victim because the witness testified to the contrary at trial. However, the statement was useful for impeachment and partially admissible as a statement against interest. Spearman v. State, 307 S.W.3d 463, 2010 Tex. App. LEXIS 1026 (Tex. App. Beaumont Feb. 10 2010).

874. In defendant's murder case, the trial court did not err in allowing a witness's recorded statement to be read to the jury because she stated that it was "hard for her to remember now" what happened in 1998 that caused her to be a witness in the case, the witness gave a statement to the police on the day the events occurred, the witness signed the statement, and she would not have signed it if it had not been true and correct. Therefore, the State proved the necessary predicate to satisfy the recorded recollection exception. Wilson v. State, 2009 Tex. App.

LEXIS 2954 (Tex. App. Corpus Christi Apr. 30 2009).

875. Although defendant argued that a written statement and grand jury testimony were admissible only under Tex. R. Evid. 613 and not under Tex. R. Evid. 803(5), the court disagreed; the witness had firsthand knowledge of the event, his statement was dated two weeks after the event, and the record supported a finding that the witness lacked a present recollection of the event at trial and his grand jury testimony was made close in time to the event, such that the trial court did not err in permitting the statement and grand jury testimony to be read into evidence under Rule 803(5), and because the statements were not offered for purposes of impeachment, the trial court did not err in failing to instruct the jury to consider the statements as such. Brown v. State, 333 S.W.3d 606, 2009 Tex. App. LEXIS 2936 (Tex. App. Dallas Apr. 30 2009).

Evidence : Hearsay : Exceptions : Records of Documents Affecting Property Interests

876. In a suit for forcible detainer filed by a mortgage company, the trial court abused its discretion by sustaining the occupant's hearsay within hearsay objection to the recitals in the trustee's deed, because the recitals were relevant to the purpose of the document and not excluded by the hearsay rule. Citimortgage, Inc. v. Sczepanik, 2013 Tex. App. LEXIS 14177 (Tex. App. Dallas Nov. 19 2013).

877. In an action for unlawful detainer following a foreclosure sale, the trial court did not abuse its discretion by admitting the trustee's deed into evidence. The hearsay recitals in the deed set forth the facts upon which the foreclosure sale was based and were germane to the deed's purpose; therefore, they were admissible under this rule. Mason v. Wells Fargo Bank, N.A., 2013 Tex. App. LEXIS 13682, 2013 WL 5948077 (Tex. App. Dallas Nov. 5 2013).

878. In defendant's burglary case, the court properly admitted records from a pawn shop because an officer testified that the exhibit was an electronic copy of the pawn ticket containing the information recorded by the pawn shop when the stolen equalizer was pawned. The record showed that the item was pawned by defendant. Gomez v. State, 2009 Tex. App. LEXIS 9526, 2009 WL 4831117 (Tex. App. El Paso Dec. 16 2009).

879. It was in connection with the correction of the acknowledgment in previous deeds, to reflect that the decedent had conveyed her entire interest in the property, that the deed made the statements of which descendants complained; they did not contend, for purposes of Tex. R. Evid. 803(15), that the dealings with the property since the deed was made had been inconsistent with the truth of the statement or the purport of the deed and the court did not see any such dealings in the record. Walton v. Watchtower Bible & Tract Soc'y of Pa., 2007 Tex. App. LEXIS 180 (Tex. App. Waco Jan. 10 2007).

880. Tenant should have timely sent a written notice of a lease extension by certified mail to the new landlord consistent with the literal terms of the lease amendment and the trial court did not err in not admitting two exhibits under the Tex. R. Evid. 803(15) hearsay exception because the new landlord had not treated the tenant's interpretation of its property interest consistently with the former landlord's interpretation in those exhibits. Tri-Steel Structures, Inc. v. Baptist Found., 166 S.W.3d 443, 2005 Tex. App. LEXIS 4115 (Tex. App. Fort Worth 2005).

Evidence : Hearsay : Exceptions : Religious Records

881. Documents admitted during defendant's trial for sexual assault of a child were admissible under Tex. R. Evid. 803(11) because they related to marriages, births, family relationships, personal history, and family history of Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) members; the documents were regularly maintained by the FLDS as part of the religious organization of the church. Jessop v. State, 368 S.W.3d 653, 2012

Tex. App. LEXIS 3176, 2012 WL 1402117 (Tex. App. Austin Apr. 19 2012).

882. Appellant characterized his fundamental church as an extreme sect, whose documents should not be included in the hearsay exemption under Tex. R. Evid. 803(11), but Rule 803(11) does not depend on the popularity or acceptance of the religious organization; hearsay evidence need only be consistent with the provisions of the exception to be admissible. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

883. Documents related to marriages, births, personal history, and relationships of church members and were regularly maintained by the church; the documents were excepted from the hearsay rule under Tex. R. Evid. 803(11) or Tex. R. Evid. 803(13) and the trial court did not abuse its discretion in admitting these documents. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

884. Appellant claimed the purpose for which the State offered the evidence was not a purpose discussed in the rules; however, the exceptions to the hearsay rules are not dependent on the reason why a party wants to offer the hearsay, and the only relevant inquiry concerning the purpose of hearsay is whether the out-of-court statement is being offered for the truth of the matter asserted. Why the proponent wishes to admit the evidence, beyond offering it for the truth of the matter asserted, is immaterial, and how the hearsay evidence supports the proponent's trial theory or fits into the proponent's trial strategy does not affect its admissibility under an exception under the rules. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

Evidence : Hearsay : Exceptions : Reputation : General Overview

885. Trial court improperly excluded a defense witness's testimony regarding the complainant's poor reputation for truthfulness, where the testimony was clearly admissible under Tex. R. Evid. 803(21). Siverand v. State, 89 S.W.3d 216, 2002 Tex. App. LEXIS 7258 (Tex. App. Corpus Christi 2002).

Evidence : Hearsay : Exceptions : Reputation : Boundaries

886. Testimony regarding the venue of the offense was admissible as an exception to the hearsay rule under Tex. R. Evid. 803(20). Mccuin v. State, 2011 Tex. App. LEXIS 5031, 2011 WL 2611234 (Tex. App. Fort Worth June 30 2011).

Evidence : Hearsay : Exceptions : Reputation : Character

887. Officer's opinion, based on the officer's conversations with other officers, that defendant did not have a reputation for being peaceful and law abiding, was admissible under the exception for general reputation in the community, and defendant opened the door to questions about his criminal record; although it was error for the officer to testify about specific prior bad acts that the officer had no knowledge of, the error was harmless. Panchol v. State, 2013 Tex. App. LEXIS 9192 (Tex. App. Fort Worth July 25 2013).

Evidence : Hearsay : Exceptions : Residual Exceptions : General Overview

888. Considering the lack of trustworthiness in the testimony of two individual's called by defendant concerning an individual they claimed had murdered the victim, defendant's signed confession, and the testimony's contradictions with the substantial amount of evidence showing defendant's guilt, the trial court did not abuse its discretion in not allowing the jury to hear the two witness' testimony under Tex. R. Evid. 803(24). Hall v. State, 2005 Tex. App. LEXIS 5730 (Tex. App. Dallas July 22 2005).

Evidence : Hearsay : Exceptions : Residual Exceptions : Confrontation Clause Requirements

889. Where petitioner state death row inmate argued trial counsel was ineffective for admitting into evidence at the penalty phase psychiatric reports which were between 19 and 25 years old which suggested the inmate was a future danger, each of the exhibits that trial counsel introduced satisfied the exception to the hearsay rule under Tex. R. Evid. 803 as statements made for purposes of medical diagnosis or treatment and thus met the requirements of the Confrontation Clause. Coble v. Quarterman, 496 F.3d 430, 2007 U.S. App. LEXIS 19327 (5th Cir. Tex. 2007).

Evidence : Hearsay : Exceptions : Spontaneous Statements : General Overview

890. In defendant's sexual assault of a child case, the court properly allowed testimony under the excited utterance exception because the victim told a witness that defendant told her to open her mouth and that was going to stick his penis in her mouth. Although a quarter of an hour passed, the victim was shaking and crying. Ervin v. State, 2013 Tex. App. LEXIS 8213 (Tex. App. Dallas July 3 2013).

891. Because there was no dispute concerning the inapplicability of the present sense impression exception, the court's inquiry was whether the excited utterance exception applied. Carrillo v. State, 2013 Tex. App. LEXIS 3968 (Tex. App. El Paso Mar. 27 2013).

892. Although the victim's statements were in response to officer questioning, there was sufficient evidence that the victim's statements were made while still dominated by the fear and pain of the event, given that only a short amount of time passed between the event and the arrival of officers, when one officer observed the victim visibly upset and showing signs of injury, and thus the statements fell within the excited utterance exception under Tex. R. Evid. 803(2), and the trial court did not err in admitting the statements. Carrillo v. State, 2013 Tex. App. LEXIS 3968 (Tex. App. El Paso Mar. 27 2013).

893. Defendant's convictions for aggravated kidnapping and aggravated sexual assault of a child were proper because statements were admissible as non-hearsay, Tex. R. Evid. 801(d). The victim's indication that she was okay was admissible pursuant to Tex. R. Evid. 803(3) as it was a statement of her then existing mental, emotional, or physical condition; the sheriff's indication that everything was okay constituted a present sense impression and was admissible under Rule 803(1); the victim's statement that "he is trying to get in the bathroom" could have been admitted either as a present sense impression under Rule 803(1) or an excited utterance under Rule 803(2); the trial court did not abuse it discretion in allowing the officer to testify that he heard a male voice saying, "Open the door" because that statement could have been admitted either as an admission by a party opponent or as a statement merely showing what was said rather than proving the truth of the matter asserted, Tex. R. Evid. 801(e)(2). Billings v. State, 399 S.W.3d 581, 2013 Tex. App. LEXIS 1423, 2013 WL 607699 (Tex. App. Eastland Feb. 14 2013).

894. In defendant's domestic violence case, the victim's statements to an officer were properly admitted as excited utterances because, when the officer started to ask the victim what had happened to her, "she began to cry" "to the point where she had tears running down her face and she was not able to speak." The victim "was having difficulty controlling her emotions about the event" and "was still under the stress of the incident when she was talking" to the officer. Garcia v. State, 2012 Tex. App. LEXIS 7543 (Tex. App. Austin Aug. 29 2012).

895. In defendant's aggravated assault case, the trial court did not abuse its discretion by allowing an officer to testify because according to the officer, the declarant was exhausted, scared, and visibly upset when she told the officer that, "defendant came in and the door was unlocked, and defendant and a friend came in and beat this guy up." Jarnagin v. State, 2010 Tex. App. LEXIS 10158, 2010 WL 5186782 (Tex. App. Houston 1st Dist. Dec. 23

2010).

896. During defendant's trial for injury to an elderly individual, defendant's grandfather, the trial court did not err in admitting an officer's recitation of statements made by the victim and a witness just minutes after the assault occurred; the statements were excited utterances under Tex. R. Evid. 803(2) because they were related to a startling event. Castro-valenzuela v. State, 2010 Tex. App. LEXIS 5942, 2010 WL 2949963 (Tex. App. El Paso July 28 2010).

897. In a sexual assault of a child case, the victim's mother's testimony regarding what the victim told her was admissible as an excited utterance because the time between when the grandmother witnessed the encounter and the victim made the declaration that defendant "put his private in her mouth" was 10 minutes and, throughout that period, the victim cried. Although the mother asked the victim what was wrong, the declaration was not the result of questioning and was a spontaneous declaration regarding the occurrence that caused the emotional state the victim was in at a time that the victim was still in that emotional state. In re A. W. B., 419 S.W.3d 351, 2010 Tex. App. LEXIS 747 (Tex. App. Amarillo Feb. 2 2010).

898. In defendant's aggravated sexual assault trial, irrespective of whether the victim's disclosure to her stepmother constituted an excited utterance or whether the stepmother was an outcry witness, the victim's mother also testified that the victim disclosed how defendant repeatedly raped her, plus a sexual assault nurse testified to what the victim told her about being assaulted; because other evidence involving the sexual assaults was admitted at trial, the stepmother's testimony was cumulative and thus error, if any, was harmless. Rosales v. State, 303 S.W.3d 917, 2010 Tex. App. LEXIS 313 (Tex. App. Amarillo Jan. 15 2010).

899. Defendant's argument on appeal did not comport with his objection at trial, such that the claimed error based on the trial court's failure to issue a limiting instruction was waived under Tex. R. App. P. 33.1, Tex. R. Evid. 103(a); in any event, the complaint provided no basis for reversal because statements admitted as present sense impressions or excited utterances under Tex. R. Evid. 803(1), (2) were admissible for all purposes and were not subject to a limiting instruction. Green v. State, 2009 Tex. App. LEXIS 9300, 2009 WL 4575146 (Tex. App. Houston 14th Dist. Dec. 8 2009).

900. In defendant's murder case, the court properly admitted the deaf victim's written statements under the excited utterance exception because the statements related to a startling event: she wrote that she was raped, hit, and threatened with a knife that evening, the deputy testified that the statements were made while the victim was scared and angry, and thus, it was reasonable for the trial court to infer that the victim was under the stress of excitement caused by the event or condition. Fuentes v. State, 2009 Tex. App. LEXIS 9779 (Tex. App. Houston 1st Dist. Dec. 3 2009).

901. Trial court did not abuse its discretion in admitting an officer testimony regarding the victim's statements because, given that the officer responded to the victim's emergency call within fifteen minutes of the incident and that he observed the victim to be "very upset, nervous, an shaking," it was clear that the victim was still dominated by the emotions, fear, and excitement attendant to the incident when she spoke to the officer. Nolen v. State, 2009 Tex. App. LEXIS 9054, 2009 WL 4051980 (Tex. App. Corpus Christi Nov. 24 2009).

902. In defendant's aggravated robbery case, the court properly admitted a co-conspirator's statement because the officer's testimony about the statement "waste him, dog, waste him" and "shoot him, and get out of here," because the startling event was the suspect's sudden confrontation with the police officer and his detention at gunpoint. The suspect was clearly under the stress of excitement caused by the startling circumstances. Clifton v. State, 2009 Tex. App. LEXIS 6533, 2009 WL 2567946 (Tex. App. Austin Aug. 20 2009).

903. In a murder case, the court properly allowed testimony under the excited utterance exception because the witnesses' testimony indicated that the victim was bloody, in severe pain, and pleading for help when he made the statements to them; although the victim made the statements in response to general questions about what had happened, there was nothing to indicate that the witnesses asked the questions for any reason other than personal concern. Sadler v. State, 2009 Tex. App. LEXIS 2962, 2009 WL 1163407 (Tex. App. Waco Apr. 29 2009).

904. Statement met none of the exceptions in Tex. R. Evid. 803(1), (2), (3), and while (1) an objection made mid-sentence also applied to the rest of the statement that was admitted after the objection, and (2) defendant also timely objected the second time the statement was made, because defendant did not object to the third mention of the statement, defendant did not preserve error. Dodson v. State, 268 S.W.3d 674, 2008 Tex. App. LEXIS 6442 (Tex. App. Fort Worth 2008).

905. Under Tex. R. Evid. 803, the event about which an excited utterance is made does not have to be the same event that caused a declarant's excitement. McCarty v. State, 257 S.W.3d 238, 2008 Tex. Crim. App. LEXIS 759 (Tex. Crim. App. 2008).

906. One may continue to rely on Tezeno v. State, 484 S.W.2d 374 (Tex. Crim. App. 1972), Sellers v. State, 588 S.W.2d 915 (Tex. Crim. App. 1979), Hunt v. State, 904 S.W.2d 813 (Tex. App.-- Fort Worth 1995, pet. ref'd), and Bondurant v. State, 956 S.W.2d 762 (Tex. App.-- Fort Worth 1997, pet. ref'd), concerning the treatment of the present excited-utterance exception. McCarty v. State, 257 S.W.3d 238, 2008 Tex. Crim. App. LEXIS 759 (Tex. Crim. App. 2008).

907. In defendant's murder case, the court properly excluded testimony of a witness regarding what the victim told the witness about altercations between the victim and defendant because the testimony concerning what the victim said to the witness at least two days after the event in question was not a present sense impression, there was no evidence in the record that the victim was "in the instant grip of violent emotion, excitement or pain" immediately before or during his recounting of the events, and the victim's statements were not self-inculpatory. Eisenman v. State, 2008 Tex. App. LEXIS 282 (Tex. App. Corpus Christi Jan. 10 2008).

908. In a failure to stop case, the court properly excluded testimony that defendant's husband told her that he had been involved in an accident because the traffic accident was not such a startling event that the husband was still dominated by the emotions, excitement, fear, or pain of the event or condition when the statement was made; the accident was not of a serious nature, the vehicle was still operable, the injuries were relatively minor, and the statements were made in response to a question and were untrue since the driver of the other car had not left the scene. Martinez v. State, 2007 Tex. App. LEXIS 927 (Tex. App. El Paso Feb. 8 2007).

909. Statements about sexual abuse by a complainant to a school counselor were improperly admitted under the excited utterance exception to the hearsay rule because the statements were made three years after the abuse by a 14-year-old complainant, after she had told her mother about the abuse. Neill v. State, 2006 Tex. App. LEXIS 8684 (Tex. App. Fort Worth Oct. 5 2006).

910. Counsel was not ineffective for not lodging certain hearsay objections; counsel could have concluded that a statement would have been admitted as an excited utterance or a present sense impression, and counsel could have found that the State could have obtained the same testimony by recalling a witness to clarify the statements, and furthermore, counsel was not ineffective for not objecting to another question, given that the State meant to ask the witness if, at the time of defendant's arrest, the witness identified defendant as the person the witness, not another, saw lighting the fire in question. Ortiz v. State, 2006 Tex. App. LEXIS 3893 (Tex. App. Houston 1st Dist. May 4 2006).

911. In a case of interference with an emergency telephone call, the statements made during the call, which were made for the purpose of reporting a crime in progress and were made while the declarant was still dominated by the emotions and fear of the event, qualified as an excited utterance. Neal v. State, 186 S.W.3d 690, 2006 Tex. App. LEXIS 1945 (Tex. App. Dallas 2006).

912. Statements by the child victim's younger sister were admissible as exceptions to the hearsay rule because they were excited utterances under Tex. R. Evid. 803(2), given that (1) the sister was emotionally distraught when she made the statements and she reacted spontaneously and immediately upon being told that the victim was at defendant's house and that the sister was to join them shortly, and (2) this was not an event she was likely to have told her mother about initially, having witnessed the sexual assault on the victim by defendant, and this was not an incident she could have fabricated on her own; even had the statements not been allowed, there was no harm for purposes of Tex. R. App. P. 44.2(b) because the substance of the sister's testimony as to what happened to the victim was presented to the jury through the victim and through pictures found at defendant's house. Lane v. State, 174 S.W.3d 376, 2005 Tex. App. LEXIS 7616 (Tex. App. Houston 14th Dist. 2005).

913. Court properly admitted a child's statements as excited utterances where the police officer testified that the child had appeared to be upset not only when he entered the room, but for some time afterward, as she continued to express fear and distress regarding the disappearance and, she believed, death of her mother. Lagunas v. State, 187 S.W.3d 503, 2005 Tex. App. LEXIS 6957 (Tex. App. Austin 2005).

914. Court rejected defendant's claim of ineffective assistance of counsel; counsel's failure to raise a Confrontation Clause objection was not outside the range of reasonable assistance because the victim's hearsay statements were non-testimonial in nature, given that they were made during an informal setting to emergency personnel, and the statements fell under Tex. R. Evid. 803(2), (4), and thus bore particularized guarantees of trustworthiness. Ramos v. State, 2005 Tex. App. LEXIS 6466 (Tex. App. El Paso Aug. 11 2005).

915. During defendant's trial for aggravated robbery, the trial court did not err in admitting under the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2), the complainant's out-of-court statement to the first officer on the scene that defendant tried to take his money where the complainant expressly testified that he was in a fair amount of pain at the time he made the statement to the officer, and paramedics were assessing his condition after he had been shot and hit on the head with a gun, which clearly established that he was still dominated by the pain of the shooting when he made the statement. In addition, the statement occurred only a short time after the shooting. Moore v. State, 2005 Tex. App. LEXIS 6273 (Tex. App. Houston 14th Dist. Aug. 4 2005).

916. Trial court acted within its discretion in admitting the wife's statement under the excited utterance exception to the hearsay rule because the officer noticed that the wife was visibly upset, shaking, trembling and, crying and that her cheek was red, and the trial court could have reasonably concluded that the wife was still under the emotion, excitement, fear, or pain of the alleged assault when she told the officer that defendant slapped her. Solorzano v. State, 2005 Tex. App. LEXIS 5694 (Tex. App. Austin July 21 2005).

917. Trial court did not err in overruling defendant's objection to testimony of a witness who said what an injured officer said on hearsay grounds under Tex. R. Evid. 801, nor did the trial court err in admitting the statement under Tex. R. Evid. 803(2); the statement was in response to a general question of what happened and the statement was made immediately after the officer was shot, and thus the officer was still dominated by the emotions of the event, for purposes of Rule 803(2), and furthermore, the officer's statement was consistent with defendant's plea of guilty to the charge that defendant shot the officer, in violation of Tex. Penal Code Ann. § 22.02(a), (b)(2). Jones v. State, 2005 Tex. App. LEXIS 5093 (Tex. App. Tyler June 30 2005).

918. Trial court did not err in allowing an officer to testify regarding a witness's out-of-court statements where the statements qualified as excited utterances under Tex. R. Evid. 803(2) because they were made in relation to startling events while the witness was still dominated by the emotion caused by those events. Furthermore, even assuming that Crawford barred the admission of the statements, defendant was not harmed by the error because the statements were not important to the State's case for aggravated assault, as the lawfully admitted evidence presented by the State overwhelmingly established defendant's guilt. Arias v. State, 2005 Tex. App. LEXIS 4341 (Tex. App. San Antonio June 8 2005).

919. Trial court did not err during the punishment phase of defendant's aggravated sexual assault trial in finding that the statements of two of his alleged prior victims were admissible as excited utterances under Tex. R. Evid. 803(2), considering the apparent emotional state of the women when police officers encountered them. One officer testified that the first victim was upset and very emotional when he saw her and that she was still crying while she answered his questions, and the other officer described the second victim as being very upset, very emotionally distraught, and almost hysterical. Marc v. State, 166 S.W.3d 767, 2005 Tex. App. LEXIS 4228 (Tex. App. Fort Worth 2005).

920. Although a domestic violence complainant's statements to a police officer near the scene of the offense were admissible under the excited utterances exception to the hearsay rule, Tex. R. Evid. 803(2), because she was crying, sobbing, and appeared hysterical at the time that she identified defendant and then, in a series of accusations against him, detailed blow by blow the assault made upon her, that did not mean that the statements were ipso facto nontestimonial hearsay outside the scope of the Confrontation Clause and admissible into evidence. Each case must be examined on its facts to determine if the evidence is testimonial and controlled by Crawford. Davis v. State, 169 S.W.3d 660, 2005 Tex. App. LEXIS 3773 (Tex. App. Austin 2005).

921. Victim's statements, made within 30 minutes of the incident, were clearly made while the victim was under the stress of the excitement of the victim's encounter with defendant, and thus the trial court did not err in admitting the victim's statement under Tex. R. Evid. 803(2). Smock v. State, 2005 Tex. App. LEXIS 3612 (Tex. App. Eastland May 12 2005).

922. Trial court did not err in excluding testimony as to defendant's deceased husband's statements to two witnesses that he was the one that should have been arrested for obtaining drugs by a forged prescription rather than defendant, who did not know the prescription was forged, because defendant failed to show that his statements fell within the excited-utterance hearsay exception provided in Tex. R. Evid. 803(2). The husband made the statement to one witness weeks after defendant was arrested, therefore such a large amount of time had passed that the trial court did not err in implicitly finding that the statements resulted from reason or reflection and were made while the husband was no longer dominated by the emotions or excitement of learning about defendant's arrest. Ex Parte Buffington-Bennett, 2005 Tex. App. LEXIS 3158 (Tex. App. Houston 14th Dist. Apr. 28 2005), writ of certiorari denied by 126 S. Ct. 1656, 164 L. Ed. 2d 400, 2006 U.S. LEXIS 2752, 74 U.S.L.W. 3560 (U.S. 2006).

923. The Court of Appeals of Texas, Fourteenth District, Houston declines to join those courts that have established a bright-line rule that excited utterances can never be testimonial because the fact that a statement is an excited utterance as provided in Tex. R. Evid. 803(2) is only one factor that can be considered when determining whether the statement is testimonial for purposes of analyzing a Confrontation Clause claim. Texas courts have held that a declarant's state of excitement can last long after the initial crime and that excited utterances can be made both spontaneously and in response to questioning, therefore each situation should be analyzed individually. Spencer v. State, 162 S.W.3d 877, 2005 Tex. App. LEXIS 3162 (Tex. App. Houston 14th Dist. 2005).

924. When trial court admitted defendant's daughter's statements to a police officer about defendant's alleged sexual assault, the statements were admitted in error under the excited utterance rule. Although the daughter was

visibly upset, the incident had allegedly taken place 5 years earlier; nevertheless, the error was harmless. Barnes v. State, 165 S.W.3d 75, 2005 Tex. App. LEXIS 2603 (Tex. App. Austin 2005).

925. Trial court did not err in admitting into evidence testimony from a robbery victim's supervisor with respect to a statement the victim made to her after the robbery because the statement was an excited utterance and, therefore, was admissible as an exception to the hearsay rule under Tex. R. Evid. 803(2). The supervisor said that on the day of the robbery, she received a phone call from the victim, that he appeared to be kind of nervous, and that he had told her that he had been threatened because defendant told him that if he called the police, defendant would kill him. Hayden v. State, 155 S.W.3d 640, 2005 Tex. App. LEXIS 243 (Tex. App. Eastland 2005).

926. In a products liability action arising from an auto accident, an unidentified witness' account of the accident, calmly given to a reporter after an opportunity for deliberation, was not an excited utterance under Tex. R. Evid. 803(2). Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 2004 Tex. LEXIS 1429, 48 Tex. Sup. Ct. J. 256, CCH Prod. Liab. Rep. P17242 (Tex. 2004).

927. Trial court did not err in permitting a police officer to testify over a hearsay objection regarding one victim's statements about the incident because the State established that the statements were admissible as excited utterances under Tex. R. Evid. 803(2). The victim was involved in the gunfight, wherein the other victim was shot in the head, and the victim gave the officer the statement within minutes of the event when the victim was hysterical, but even if the trial court erred in admitting the testimony, any error was harmless under Tex. R. App. P. 44.2(b) because both the victim and the officer testified to the same matter, and therefore defendant's substantial rights were not affected. Rivera v. State, 2004 Tex. App. LEXIS 11726 (Tex. App. San Antonio Dec. 30 2004).

928. Where defendant was charged with assaulting the victim in violation of a protective order, the trial court properly admitted the victim's hearsay statements to the arresting officer that she had had problems with defendant in the past. The testimony was admissible as a spontaneous statement under Tex. R. Evid. 803(2). Polley v. State, 2004 Tex. App. LEXIS 11317 (Tex. App. Eastland Dec. 16 2004).

929. One victim's statements to police concerning who committed the offense, the shooter's physical characteristics, and the shooter's place of residence, qualified as excited utterances under Tex. R. Evid. 803(2). The victims had been shot a short time before police arrived, and at the time the victim made the statements implicating defendant, the victim was visibly shaken by what had occurred, and it was reasonable to infer that a startling event had occurred and that the victim was still under the stress caused by the event when the victim made the statements, and the fact that some of the statements were in form of responses to questions did not make them inadmissible. Gonzalez v. State, 155 S.W.3d 603, 2004 Tex. App. LEXIS 11198 (Tex. App. San Antonio 2004), affirmed by 195 S.W.3d 114, 2006 Tex. Crim. App. LEXIS 1129 (Tex. Crim. App. 2006).

930. Trial court did not abuse its discretion in admitting, pursuant to Tex. R. Evid. 803(2), an officer's testimony concerning what the victim told the officer, in connection with defendant's trial for and conviction of burglary of a habitation with intent to commit aggravated assault. The court did not consider certain facts that were not in evidence at the time the officer testified, and given that the officer testified that the victim had physical injuries, was still in the ransacked apartment where the assault took place, and was somewhat stressed, upset, and had watery eyes, the trial court properly found the statements to be excited utterances. Oveal v. State, 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9 2004), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 1837 (Tex. App. Houston 14th Dist. Mar. 10, 2005).

931. Trial court did not err in admitting, pursuant to Tex. R. Evid. 803(2), a victim's aunt's testimony about what the victim told her, in connection with defendant's trial for and conviction of burglary of a habitation with intent to commit aggravated assault. Although the victim's statements were made one to two hours after the assault, the victim was

crying, looked scared, and it appeared that the victim was suffering under the stress caused by the event, and although the court did not consider facts that were not in evidence at the time the aunt testified, there was already evidence presented that the victim had visible injuries and the apartment where the assault took place was ransacked. Oveal v. State, 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9 2004), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 1837 (Tex. App. Houston 14th Dist. Mar. 10, 2005).

932. Defendant maintained the trial court erred in his trial for murder in excluding statements; defendant claimed that the statements were admissible under the excited utterance exception to the hearsay rule. Nevertheless, when the witness's statement was taken at the police department an hour after the incident, the witness was no longer excited. Palacios v. State, 2004 Tex. App. LEXIS 9912 (Tex. App. San Antonio Nov. 10 2004).

933. Trial court properly admitted statements made by defendant's girlfriend under Tex. R. Evid. 803(2) because a reasonable person could have concluded that the girlfriend made the statements while under stress, fear, or excitement from seeing her car wrecked, abandoned, and surrounded by police officers, knowing that she had lent the car to her boyfriend. Wilson v. State, 151 S.W.3d 694, 2004 Tex. App. LEXIS 9874 (Tex. App. Fort Worth 2004).

934. Trial court did not abuse its discretion in admitting a domestic violence victim's statements to police officers into evidence as an excited utterance under Tex. R. Evid. 803(2) after finding that the victim was still in the grip of emotion, excitement, fear, or pain caused by the assault. An officer testified that he arrived at the scene approximately two or three minutes after the dispatch and that the victim was extremely upset and was still crying. Carter v. State, 150 S.W.3d 230, 2004 Tex. App. LEXIS 9461 (Tex. App. Texarkana 2004).

935. In connection with defendant's trial for robbery and aggravated robbery, defendant did not challenge the trial court's ruling that testimony was admissible as a present sense impression under Tex. R. Evid. 803(1); the testimony was from a police officer, who spoke to the victims who explained that defendant carjacked them, and the officer stated that the officer first had to calm one of the victims down before the victim gave the officer any details, but that the victim was "stunned" at the time, and defendant did not demonstrate that the trial court abused its discretion by admitting the testimony under Rule 803(1). Hovey v. State, 2004 Tex. App. LEXIS 9014 (Tex. App. San Antonio Oct. 13 2004).

936. In connection with defendant's murder trial, the trial court did not abuse its discretion in finding that the victim's statement, that defendant said defendant felt like killing someone, was an excited utterance under Tex. R. Evid. 803(2); at the time the statement was made, the victim was still dominated by the emotions of the event involving defendant, and the victim repeated the threat to a police officer shortly after it was made, at a time when she was still scared. Peyravi v. State, 2004 Tex. App. LEXIS 7365 (Tex. App. Houston 14th Dist. Aug. 17 2004).

937. In a criminal prosecution for sexual assault, defendant failed to preserve his claim that his confrontation rights were violated by a police officer's testimony concerning statements made to him by the complainant where defendant did not make a timely and specific objection in the trial court once the State established that the statements fell within the excited utterance exception to the hearsay rule. Crawford v. State, 2004 Tex. App. LEXIS 6472 (Tex. App. Dallas July 21 2004).

938. Record supported the trial court's finding that an officer's testimony of hearing that defendant had attempted escape before was admissible in defendant's trial for escape under the excited utterance exception to the rule against hearsay where the officer was at the jail when other officers arrived with defendant an hour after the officer first saw defendant, and even though an hour had passed, nothing indicated any intervening events, and the officers' statements about the attempted escape were not made in response to any question. Gorman v. State, 2004 Tex. App. LEXIS 5494 (Tex. App. San Antonio June 23 2004).

939. Trial court could have reasonably concluded that the victim's statements to an officer that defendant threatened her with a pocketknife and forced her to perform oral sex on him were excited utterances, Tex. R. Evid. 803(2); the officer testified that when she arrived at the scene, she observed that the victim was very emotional and was visibly shaken, and in her opinion, the victim seemed to be under the stress of excitement caused by the sexual assault. Dudley v. State, 2004 Tex. App. LEXIS 2696 (Tex. App. Houston 1st Dist. Mar. 25 2004).

940. Defendant's argument that the statement made by his roommate to the responding officer was hearsay, was overruled because the roommate's statement that defendant was going to kill the victim, his ex-lover's current boyfriend, qualified as an excited utterance, Tex. R. Evid. 803(2), when the roommate was excited and the officer had to calm him down in order to understand him, and the roommate was clearly in the throes of what he perceived as an on-going murder. Delgado v. State, 2004 Tex. App. LEXIS 1899 (Tex. App. El Paso Feb. 25 2004).

941. Trial court did not err by allowing the state to present hearsay evidence in defendant's indecency with a child trial, consisting of a mother's testimony concerning what her daughter told her about an extraneous offense allegedly committed by defendant against her, where the evidence was admissible as an excited utterance under Tex. R. Evid. 803(2); the daughter told her mother about the incident immediately after a church member stood up in church and made statements about the allegations of child sexual abuse against defendant, the pastor, the daughter became very upset after hearing the statements in church, and remained upset and was crying as she told her mother what defendant had done to her, and the daughter's statements were made before there was time to contrive and misrepresent. Powell v. State, 2003 Tex. App. LEXIS 10851 (Tex. App. Tyler Dec. 31 2003).

942. Excited utterance exception has three requirements: (1) an exciting event must have occurred; (2) the statement must have been a spontaneous reaction to the event; and (3) the statement must relate to the event. The purpose of the relationship requirement is to ensure that the statement is truly spontaneous and not the result of reflection, which could inject such factors as self-interest, anger, or vindictiveness into the utterance; that purpose is not fulfilled if the statement is not related to the startling event. Apolinar v. State, 106 S.W.3d 407, 2003 Tex. App. LEXIS 4370 (Tex. App. Houston 1st Dist. 2003), *aff'd,* 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

943. Single most critical factor in evaluating an excited utterance as an exception to hearsay is whether the declarant made the statement while dominated by the emotion of the startling event or condition. While the time lapse between the startling event and the statement is not dispositive, it is the lack of opportunity to reflect or fabricate details that gives the exception its reliability; thus, the declarant's excitement must be continuous between the event itself and the making of the statement. Apolinar v. State, 106 S.W.3d 407, 2003 Tex. App. LEXIS 4370 (Tex. App. Houston 1st Dist. 2003), *aff'd,* 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

944. In evaluating an excited utterance as an exception to hearsay, while the declarant's excitement is ordinarily continuous between the event itself and the making of the statement, it is too strong to say that the excitement must always be continuous. Apolinar v. State, 106 S.W.3d 407, 2003 Tex. App. LEXIS 4370 (Tex. App. Houston 1st Dist. 2003), *aff'd,* 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

945. Statement of robbery victim, made four days after he was stabbed and robbed, was admissible as an excited utterance because the victim was in surgery, unconscious, heavily medicated, or incoherent for the intervening four days and made his excited utterance the very day that he awoke; the victim did not have the opportunity to fabricate his statement. Apolinar v. State, 106 S.W.3d 407, 2003 Tex. App. LEXIS 4370 (Tex. App. Houston 1st Dist. 2003), *aff'd,* 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

946. Question of whether or not utterances factually meet the requirements of Tex. R. Evid. 803(2) is within the discretion of the trial court. Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

947. The critical factor in determining when a statement is an excited utterance under Tex. R. Evid. 803(2) is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event. Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

948. Pursuant to the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2), the spontaneity of the statements cannot be measured by the expectations of the listener, as only the speaker's perspective is important in determining spontaneity. Glover v. State, 102 S.W.3d 754, 2002 Tex. App. LEXIS 7797 (Tex. App. Texarkana 2002).

949. In a sexual assault of a child case, the 14-year-old victim's statements to the victim's mother comprised a reflective, narrative account of past events and were made in response to direct, specific questions that were calculated to elicit the type of responses given, even though the contents of the responses were unanticipated, and thus, although the victim might have been upset when the victim made the statements, the statements did not fall within the excited-utterance exception to the hearsay rule, Tex. R. Evid. 803(2), since the appellate court could not say that the statements were spontaneous and unreflecting, or made without the opportunity to contrive or misrepresent. Glover v. State, 102 S.W.3d 754, 2002 Tex. App. LEXIS 7797 (Tex. App. Texarkana 2002).

950. Trial court did not err when it admitted the testimony of a codefendant's girlfriend, who related the codefendant's statements that defendant shot a victim because the codefendant made his statements while dominated by the emotion, fear, and pain that was a result of the shooting, and the girlfriend's testimony was admitted as an excited utterance under Tex. R. Evid. 803(2). Ricketts v. State, 89 S.W.3d 312, 2002 Tex. App. LEXIS 7838 (Tex. App. Fort Worth 2002).

951. Codefendant's spontaneous statements to his girlfriend that were made shortly after a shooting and that inculpated both the codefendant and defendant possessed an indicia of reliability and were properly admitted by the trial court as an excited utterance under Tex. R. Evid. 803(2). Ricketts v. State, 89 S.W.3d 312, 2002 Tex. App. LEXIS 7838 (Tex. App. Fort Worth 2002).

952. Undercover officer's testimony that after he purchased cocaine from defendant's partner and the arrest team entered the house and defendant's partner yelled "flush the dope" as she was running towards the back of the apartment, was admissible under Tex. R. Evid. 803 as an excited utterance because the statement was made as defendant's partner ran towards the back of the house in an attempt to destroy evidence before the arrest team could seize it, while she was under the stress and excitement caused by the approaching arrest team. Wilkerson v. State, 933 S.W.2d 276, 1996 Tex. App. LEXIS 4504 (Tex. App. Houston 1st Dist. 1996).

953. Passengers' statements were properly admitted because they were spontaneously uttered just after defendant had almost knocked the officer over with the vehicle; the passengers were still dominated by their emotions or fear when they apologized to the officer, and seeing a police officer get hit by a car mirror during a traffic stop could qualify as a startling event. Ford v. State, 2014 Tex. App. LEXIS 2379, 2014 WL 823409 (Tex. App. El Paso Feb. 28 2014).

Evidence : Hearsay : Exceptions : Spontaneous Statements : Criminal Trials

954. State used an investigator to sponsor statements and drawings made by the child to prove that defendant stomped on the child's brother, and these statements and drawings were unquestionably hearsay, but fell under the excited utterance exception because the statements and drawings were made by the child immediately or shortly

after being told his brother was dead and thus made out of impulse rather than through reason. Almaguer v. State, 2014 Tex. App. LEXIS 3842, 2014 WL 1415182 (Tex. App. Corpus Christi Apr. 10 2014).

955. Assuming arguendo that the excited utterance exception did not apply and statements and drawings were testimonial hearsay, any Confrontation Clause error was harmless, given defendant's admission to hitting the child and the doctor's testimony that the child died as a result of blunt force abdominal trauma, plus defendant's flight to Mexico could be taken as consciousness of guilt. Almaguer v. State, 2014 Tex. App. LEXIS 3842, 2014 WL 1415182 (Tex. App. Corpus Christi Apr. 10 2014).

956. At defendant's trial for aggravated sexual assault of a child, the trial court did not commit reversible error by overruling his hearsay objection to testimony from an outcry witness who said that the victim told her defendant had raped her several years earlier. Even if the trial court erred in admitting the testimony as an excited utterance because it was made years after the first assault, the same facts were received elsewhere without objection. Washington v. State, 2014 Tex. App. LEXIS 933 (Tex. App. Austin Jan. 30 2014).

957. At defendant's trial for stalking, the trial court did not abuse its discretion by admitting a recording of the 9-1-1 call made by the complainant because it satisfied the requirements of an excited utterance. The complainant tried to call 9-1-1 while defendant was in her home arguing with her and refusing to leave; she testified that she made the call under the excitement of the event that had just happened. Mcgee v. State, 2014 Tex. App. LEXIS 825, 2014 WL 261060 (Tex. App. Dallas Jan. 23 2014).

958. At defendant's trial for stalking, the trial court did not abuse its discretion by admitting a recording of the 9-1-1 call made by the complainant because it satisfied the requirements of an excited utterance. The complainant tried to call 9-1-1 while defendant was in her home arguing with her and refusing to leave; she testified that she made the call under the excitement of the event that had just happened. Mcgee v. State, 2014 Tex. App. LEXIS 825, 2014 WL 261060 (Tex. App. Dallas Jan. 23 2014).

959. Police officer's testimony regarding the complainant's statements made shortly after the alleged assault occurred was properly admitted because the following circumstances supported application of the excited utterance hearsay exception: (1) the officer testified he arrived on the scene within six minutes of the 911 call; (2) the trial court reasonably could have concluded that no significant amount of time elapsed between the officer's arrival and his conversation with the complainant; (3) the officer described the complainant as being visibly shocked, dazed, and very upset and sad; and (4) the officer also observed that the complainant was bleeding from lacerations on his arm. Salinas v. State, 2013 Tex. App. LEXIS 14761, 2013 WL 6328863 (Tex. App. Houston 14th Dist. Dec. 5 2013).

960. In a robbery case, trial counsel did not render ineffective assistance due to a failure to object to the testimony of officers about a victim's statement, which was made while he was still bleeding and was frantic, yelling, and frightened, because this would likely have been admitted as an excited utterance. Moreover, there was no prejudice where the officers' testimony added no new details to the victim's testimony at trial. Helmke v. State, 2013 Tex. App. LEXIS 12471, 2013 WL 5570474 (Tex. App. San Antonio Oct. 9 2013).

961. Victim's disclosure of the sexual assault to her cousin did not qualify as an excited utterance because the record did not support that the victim was still, three or four months later, dominated by the excited state produced by the attack. Nor did the record reflect that the mention of defendant's name was the type of startling or shocking event contemplated by the rule. Sandoval v. State, 409 S.W.3d 259, 2013 Tex. App. LEXIS 11657 (Tex. App. Austin Sept. 13 2013).

962. At defendant's trial for aggravated robbery and injury to the elderly with the intent to cause serious bodily injury, his trial counsel was not ineffective for failing to object to the recording of the victim's 911 call as it fell within

three separate hearsay exceptions. The 911 call was admissible as an excited utterance, a present sense impression, and as a statement regarding the victim's physical condition. Rincon v. State, 2013 Tex. App. LEXIS 11309 (Tex. App. Tyler Sept. 4 2013).

963. In a prosecution for aggravated kidnapping, an officer's testimony that the victim said she felt terrorized and feared she was going to be raped was admissible as an excited utterance, as it was made a few minutes after the incident and the officer testified that the victim was distraught and hysterical. Mason v. State, 2013 Tex. App. LEXIS 10853 (Tex. App. Austin Aug. 28 2013).

964. In a trial for assault involving family violence, the victim's nonverbal out-of-court statement (blinking to indicate "yes" in response to the question of whether defendant choked her) was properly admitted as an excited utterance because the officer observed that she was extremely frightened and she did not have sufficient time or composure to fabricate an answer. Miller v. State, 2013 Tex. App. LEXIS 7679 (Tex. App. Tyler June 25 2013).

965. In a case involving indecency with a child, it was not necessary to determine if a trial court erred by allowing a victim's brother to testify about the event surrounding the victim's revelation where the State argued that Tex. R. Evid. 803(2) applied because the same evidence was admitted through the victim's testimony and her mother's testimony. The admission of inadmissible evidence was harmless error if other evidence that proved the same fact was properly admitted elsewhere. In re C. D., 2013 Tex. App. LEXIS 7591, 2013 WL 3203220 (Tex. App. Corpus Christi June 20 2013).

966. Victim's statements to her mother that she and defendant had engaged in sexual intercourse and oral sex on multiple occasions were not excited utterances under Tex. R. Evid. 803(2) because they were not made suddenly or immediately after the victim heard defendant refer to her as a liar and a whore, but rather were made after she spoke to her boyfriend who encouraged her to talk to her mother. Even though the trial court erred by admitting the statements as excited utterances, the error was harmless because the State introduced evidence from a nurse who examined the victim after she made the allegations and defendant did not object when the nurse testified about the history of the sexual relationship between the victim and defendant. Seery v. State, 2013 Tex. App. LEXIS 1772, 2013 WL 683327 (Tex. App. Tyler Feb. 21 2013).

967. Trial court did not abuse its discretion in concluding the victim's statements were excited utterances, and the officer's testimony regarding those statements was admissible; given the victim's age, the event, and the short passage of time, it was not outside the zone of reasonable disagreement for the trial court to conclude that the victim's statements were based on impulse as opposed to reason and reflection. In re H.T.S., 2012 Tex. App. LEXIS 10772 (Tex. App. San Antonio Dec. 31 2012).

968. In a burglary case, the trial court did not abuse its discretion when it refused to admit the videotape of defendant's interview with police because he failed to establish that a hearsay exception applied under Tex. R. Evid. 803; due to the time that elapsed between the alleged chase and the interview, the video was not an excited utterance and the unreflective nature required of a present sense impression was destroyed. The business record exception did not apply, because the source of the information indicated an absence of trustworthiness. Walker v. State, 2012 Tex. App. LEXIS 9928 (Tex. App. Eastland Nov. 30 2012).

969. Trial court did not abuse its discretion by excluding a statement defendant made to his mother that he stabbed a guy who came after him with a stick because it was not an excited utterance under Tex. R. Evid. 803(2), as at least 15 to 20 minutes passed between the stabbing and the statement while defendant presumably walked back to his mother's house, sufficient time in which he could have formulated a story about why he stabbed the victim. Blue v. State, 2012 Tex. App. LEXIS 7895, 2012 WL 4095988 (Tex. App. San Antonio Sept. 19 2012).

970. Although defendant argued that his statement, "You bit me on my lip!" was an excited utterance that constituted some evidence of his claim that he acted in self-defense, the utterance did not constitute evidence that defendant's assault of the complainant was immediately necessary to protect defendant against the complainant's alleged use of force. Johnson v. State, 2012 Tex. App. LEXIS 6914, 2012 WL 3553502 (Tex. App. Dallas Aug. 20 2012).

971. Trial court did not err by admitting an officer's testimony about the complainant's out-of-court statements under the excited utterance exception to the hearsay rule because shortly before the complainant made the statement he had been the victim of an armed robbery at gunpoint and, according to the testimony of two witnesses, this experience caused the complainant to be very excited; the statement was related to the circumstances of the occurrence preceding it as in the statement the complainant identified defendant as one of the robbers. Even if the trial court had erred by admitting the testimony the error would have been harmless because similar statements were also testified to by two other witnesses. Amador v. State, 376 S.W.3d 339, 2012 Tex. App. LEXIS 6811 (Tex. App. Houston 14th Dist. Aug. 16 2012).

972. Trial court did not err by admitting the video recording of the police officer's interview with the victim at the scene of the investigation under the excited utterance exception to hearsay because when the victim was speaking to the officer, she had to be calmed several times and the officer testified she was very upset and crying. Alanis v. State, 2012 Tex. App. LEXIS 5232, 2012 WL 2501026 (Tex. App. Tyler June 29 2012).

973. Because the victim made the statement to the witness that she was trying to be forced to do something that she did not want to do after exerting considerable energy to free herself from defendant's trunk, running towards lights, and banging on the doors of three houses with her hands still tied, the witness's testimony was admissible as an excited utterance under Tex. R. Evid. 803(2). Mcwilliams v. State, 367 S.W.3d 817, 2012 Tex. App. LEXIS 3153, 2012 WL 1406463 (Tex. App. Houston 14th Dist. Apr. 24 2012).

974. Statements that a child sexual assault victim made to her grandmother qualified as an excited utterance because: (1) the child made the statements only a few seconds after she awoke from a nightmare; (2) she was two years old at the time; (3) her statements were not in response to a question, nor were they self-serving; and (4) she was not of sufficient age to consider whether her statements would later be used against defendant. Bellanger v. State, 2012 Tex. App. LEXIS 3109, 2012 WL 1379662 (Tex. App. Tyler Apr. 18 2012).

975. Trial court did not abuse its discretion by excluding a statement made by defendant to an officer at the time of his arrest following the foot chase, that he ran because he thought he had outstanding warrants or tickets, because given the circumstances under which the statement was made, the trial court reasonably could have found the excited utterance hearsay exception of Tex. R. Evid. 803(2) to be inapplicable. The trial court could have concluded that defendant knew he was being chased under the suspicion of exposing himself to young girls on a playground, giving him enough time to think about his story. Ingram v. State, 2012 Tex. App. LEXIS 260 (Tex. App. Dallas Jan. 12 2012).

976. Officer's testimony about what the complainants told him immediately after he arrived at the apartment was admissible under the excited utterance exception to the hearsay rule in Tex. R. Evid. 803(2) because the officer testified that the complainants were very scared, excited, anxious, and crying. Oliva v. State, 2011 Tex. App. LEXIS 8940, 2011 WL 5428965 (Tex. App. Houston 1st Dist. Nov. 10 2011).

977. Trial court did not abuse its discretion by admitting the uncle's testimony under the excited utterance exception to the hearsay rule under Tex. R. Evid. 803(2) because, even though a day had elapsed between the assault and the victim's meeting her uncle, the uncle testified that in her initial telephone the victim was very upset, sobbing, and hysterical, and that when they met she was still upset and crying before telling him that defendant had

inflicted her injuries. Walls v. State, 2011 Tex. App. LEXIS 7109, 2011 WL 3840992 (Tex. App. Tyler Aug. 31 2011).

978. Trial court did not err by admitting the victim's hearsay statement to a police officer as an excited utterance under Tex. R. Evid. 803(2) because a reasonable person could have concluded that she made her statement while still dominated by the emotion, fear, and pain of the startling event as only a short amount of time had elapsed between the event and the officer's arrival, where he found the victim visibly upset and that her body bore signs of injury. Stoltz v. State, 2011 Tex. App. LEXIS 5738, 2011 WL 3199337 (Tex. App. El Paso July 27 2011).

979. Trial court did not abuse its discretion by admitting an animal control officer's testimony concerning what the baby's father said to her after he was told that the baby had been bitten by a dog because it was properly admitted as an excited utterance under Tex. R. Evid. 803(2). The officer testified that the father was screaming and crying and had collapsed on the floor shortly before making the statement. Nadal v. State, 348 S.W.3d 304, 2011 Tex. App. LEXIS 5104 (Tex. App. Houston 14th Dist. July 7 2011).

980. In a criminal trial for indecency with a child, the interviewing officer's testimony as to the victim's hearsay statements was admissible as an excited utterance under Tex. R. Evid. 803(2) because the victim was still dominated by the emotions, excitement, fear or pain of the event when she spoke with police just minutes after her 911 call. Vasquez v. State, 2011 Tex. App. LEXIS 2875, 2011 WL 1458165 (Tex. App. Amarillo Apr. 15 2011).

981. Based on the officer's account of the circumstances surrounding the victim's statement, a reasonable person could have concluded that she made the statement while still dominated by the emotion, fear, and pain of the startling event; the trial court did not abuse its discretion permitting the police officer to testify about the victim's statement under the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2). Zuniga v. State, 2011 Tex. App. LEXIS 2266, 2011 WL 1157555 (Tex. App. El Paso Mar. 30 2011).

982. Trial court did not abuse its discretion by admitting a detective's testimony about the victim's statement because it was admissible as an excited utterance under Tex. R. Evid. 803(2), even though one hour had passed between the crime and the statement, as the detective described the victim as very visibly shaken, very upset, scared, excited, and crying. Dixon v. State, 358 S.W.3d 250, 2011 Tex. App. LEXIS 1745 (Tex. App. Houston 1st Dist. Mar. 10 2011).

983. Trial court did not abuse its discretion by admitting the victim's second 911 call as an excited utterance because the victim's voice was quivering and she sounded very upset, scared, and excited. Dixon v. State, 358 S.W.3d 250, 2011 Tex. App. LEXIS 1745 (Tex. App. Houston 1st Dist. Mar. 10 2011).

984. When police officers responded to a domestic disturbance call at the residence of defendant and his wife, she told the officers that defendant had repeatedly struck her with a cane and held a gun to her head during an argument. At defendant's trial for assault, he did not question the admissibility of his wife's statements to an officer on the night of the incident, which appear to have been excited utterances under Tex. R. Evid. 803(2) and nontestimonial under Crawford. Smith v. State, 2011 Tex. App. LEXIS 859, 2011 WL 350434 (Tex. App. Austin Feb. 2 2011).

985. Where defendant had come through a now deceased individual's house, with a gun, looking for the victim, her hearsay statements were admissible as excited utterances under Tex. R. Evid. 803(2) because she was upset and scared, her voice was high-pitched, she was crying, and she was still under the influence of the resulting emotions when she called the victim. Dohnal v. State, 2011 Tex. App. LEXIS 600, 2011 WL 319950 (Tex. App. Eastland Jan. 27 2011).

986. Victim was under the stress of excitement caused by the events, having been severely beaten and exposed to the environment; thus, his statement met the requirements of the excited utterance exception to the hearsay rule set forth in Tex. R. Evid. 803(2). Dollery v. State, 2011 Tex. App. LEXIS 352, 2011 WL 193493 (Tex. App. Beaumont Jan. 19 2011).

987. Witness's statements qualified as excited utterances under Tex. R. Evid. 803(2) because the evidence supported an inference that the officer quickly responded to an emergency; when the officer first met with the witness, she was crying, shaking, nervous, and too scared to speak with the officer; after the officer hugged the witness and brought her outside, she finally confided that there was a man in her house that she wanted out as he was scaring her and selling drugs out of her house; when the officer and the witness approached her house, she was scared and agreed to allow the officer to help her only after coaxing; and she kept repeating defendant's name. Cadoree v. State, 331 S.W.3d 514, 2011 Tex. App. LEXIS 146 (Tex. App. Houston 14th Dist. Jan. 11 2011).

988. During defendant's trial for sexual assault, the trial court admitted hearsay testimony from the complainant's friend as to details of her telephone conversation with the complainant as an excited utterance under Tex. R. Evid. 803(2); because defendant also explored the conversation and the complainant's emotional state during it on cross examination, defendant failed to preserve his hearsay objection for appellate review. Jennings v. State, 2010 Tex. App. LEXIS 10241, 2010 WL 5392684 (Tex. App. Amarillo Dec. 29 2010).

989. Trial court did not abuse its discretion by admitting into evidence statements the victim made to a police dispatcher as excited utterances under Tex. R. Evid. 803(2) because a prior threat to kill, combined with the knowledge that the threatening party had been recently released from custody, constituted an exciting event. Smith v. State, 2010 Tex. App. LEXIS 9419, 2010 WL 4878847 (Tex. App. Houston 14th Dist. Nov. 30 2010).

990. In an assault causing bodily injury to a family member case under Tex. Penal Code Ann. § 22.01 and Tex. Fam. Code Ann. § 71.005, the complainant's statements to two police officers were properly admitted as excited utterances under Tex. R. Evid. 803(2) because her statements were related to the startling event as she stated that defendant was upset because he could not find his keys and struck her in the face and choked her around the neck; only a short amount of time elapsed between the assault and when the statements were made to the officers; and the complainant was still under the stress of excitement caused by the assault and dominated by the emotions, fear, and pain of the event as the first officer testified that when the complainant stepped out of the bathroom and made her statements she was clearly upset, shaken, and crying and the second officer testified that after the complainant came out of the bathroom, she appeared very upset, she was crying, her shirt was stretched out a little bit, and she had a swollen bottom lip... Shannon v. State, 2010 Tex. App. LEXIS 9011, 2010 WL 4523766 (Tex. App. Corpus Christi Nov. 10 2010).

991. Although defendant complained that the admission of a complainant's statement to a witness was an improper admission of hearsay evidence, in light of the evidence regarding the condition of the complainant at the time (weak, scared, bleeding, seriously injured from two gunshots to the abdomen, being driven away against her will by her assailant who had abused and abducted her on other occasions and threatened to kill her), the complained-of evidence was admissible under the excited utterance exception to hearsay, Tex. R. Evid. 803(2). Douglas v. State, 2010 Tex. App. LEXIS 8659, 2010 WL 4264541 (Tex. App. Houston 1st Dist. Oct. 28 2010).

992. Trial court did not abuse its discretion by finding that the witness's sister's out-of-court statement was admissible as an excited utterance under Tex. R. Evid. 803(2) because the witness testified that: (1) she heard his sister banging on the kitchen window; (2) she saw her sister run through her bedroom and out the door; and (3) she saw defendant driving off just before her sister returned to tell her that defendant was peeping in her bedroom window. Coble v. State, 330 S.W.3d 253, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. 2010).

993. In a murder trial, there was no error in admitting, as excited utterance under Tex. R. Evid. 803(2), testimony from a deceased witness's wife about his statements. It could not reasonably be disputed that the decedent's statement shortly after the murder related to a startling event, and the wife testified that the decedent was completely out of it, rambling, and really nervous and scared. Wells v. State, 319 S.W.3d 82, 2010 Tex. App. LEXIS 2595 (Tex. App. San Antonio Apr. 14 2010).

994. In an aggravated sexual assault case, a court's decision to exclude evidence as hearsay was proper because the out of court statement made by defendant in the presence of the officers that the victim had lost her clothing in a game of cards did not possess the requisite level of reliability so as to remove it from the realm of contrivance and fabrication. The trial court could have reasonably concluded that, because the applicability of the excited utterance exception required it to first accept defendant's version of events as true, the statement was not sufficiently reliable to qualify as a hearsay exception. Langford v. State, 2010 Tex. App. LEXIS 567, 2010 WL 323081 (Tex. App. Austin Jan. 27 2010).

995. In a domestic assault case, the court properly admitted the victim's statement as an excited utterance because the victim's answer to a standard form provided by the officer said she would feel danger after the officer left. Based on those facts, which indicated that the victim might still then have been dominated by emotions when making her statements, the trial judge's discretionary decision was not so clearly wrong as to lie outside that zone within which reasonable persons might disagree. James v. State, 2009 Tex. App. LEXIS 8494, 2009 WL 3643554 (Tex. App. Texarkana Nov. 5 2009).

996. State inmate convicted of raping a woman at knifepoint was not entitled to habeas relief under 28 U.S.C.S. § 2254. A police officer's testimony about what the victim told him the day after the rape was admissible as an excited utterance under Tex. R. Evid. 803(2) because the victim was still very upset, crying, and traumatized at the time. Martin v. Thaler, 2009 U.S. Dist. LEXIS 103733 (W.D. Tex. Nov. 5 2009).

997. During defendant's criminal trial for multiple counts of aggravated sexual assault of a child and indecency with a child by contact, the trial court erred by admitting out of court statements that the complainant made to her physical education teacher; the statements were made a week after the police had received a referral from the complainant's school and after the complainant had discussed the events with her teacher, her counselor, representatives of child protective services, and medical personnel. The statements to the teacher were made about an upsetting series of events, but did not qualify as excited utterances as contemplated by Tex. R. Evid. 803(2). Madden v. State, 2009 Tex. App. LEXIS 7084, 2009 WL 2857269 (Tex. App. Fort Worth Sept. 3 2009).

998. Because a witness's statements that three men had attacked her son and then ran toward a house were nontestimonial in nature, the trial court did not err in admitting that evidence as an excited utterance. Rios v. State, 2009 Tex. App. LEXIS 3444, 2009 WL 1406249 (Tex. App. San Antonio May 20 2009).

999. In a murder case, the court properly allowed testimony under the excited utterance exception because the witnesses' testimony indicated that the victim was bloody, in severe pain, and pleading for help when he made the statements to them; although the victim made the statements in response to general questions about what had happened, there was nothing to indicate that the witnesses asked the questions for any reason other than personal concern. Sadler v. State, 2009 Tex. App. LEXIS 2962, 2009 WL 1163407 (Tex. App. Waco Apr. 29 2009).

1000. Trial court did not err by admitting the statement of the victim's injured girlfriend made to a police officer as excited utterances under Tex. R. Evid. 803(2) because she made the statement "he shot me" while she was bleeding from gunshot wounds at the crime scene. The shooting was a startling event or condition and the girlfriend was under the stress of excitement caused by the shooting. Clark v. State, 282 S.W.3d 924, 2009 Tex. App. LEXIS

2431 (Tex. App. Beaumont Apr. 1 2009).

1001. Trial court did not err in admitting hearsay testimony from a police officer during defendant's aggravated assault trial where the testimony was admissible under Tex. R. Evid. 803(2)'s excited-utterance hearsay exception because the evidence showed that the complainant (1) was still dominated by the emotions, excitement, fear, or pain of the event or condition when he made the objected-to statements to the police officer, and (2) the statements resulted from impulse rather than reason and reflection. The fact that the complainant's statements were in the form of responses to questions did not make them inadmissible to the hearsay exception. Ramirez v. State, 2009 Tex. App. LEXIS 368, 2009 WL 1567340 (Tex. App. Corpus Christi Jan. 22 2009).

1002. Trial court did not err by admitting a statement that defendant's mother gave to police over 3 hours after defendant shot and killed the mother's husband; this was an excited utterance under Tex. R. Evid. 803, even though the statement was given over 3 hours after the incident, since the mother was dominated by fear and other emotions at the time. Jeffery v. State, 2008 Tex. App. LEXIS 5406 (Tex. App. Dallas July 23 2008).

1003. Child sexual abuse victim's statements to her cousin after watching a television program involving a man being aggressive with a woman were admissible under the excited utterances exception to the hearsay rule, Tex. R. Evid. 803, because the victim was bawling and trembling after the show and, at age 7, did not have time or resources to fabricate her comments. Madden v. State, 2008 Tex. App. LEXIS 2637 (Tex. App. Dallas Apr. 11 2008).

1004. Trial court's decision during defendant's trial for indecency with a child by exposure to admit the testimony of the initial responding police officer did not fall outside the zone of reasonable disagreement or constitute an abuse of discretion where the statement came under the excited utterance hearsay exception of Tex. R. Evid. 803; just prior to the subject testimony, the officer said that the complainant,aa 10-year-old girl, was very upset and crying at the time that he interviewed her. Mathre v. State, 2008 Tex. App. LEXIS 1123 (Tex. App. Amarillo Feb. 14 2008).

1005. Trial court's decision during defendant's trial for indecency with a child by exposure to admit the testimony of the 10-year-old complainant's father did not fall outside the zone of reasonable disagreement or constitute an abuse of discretion where the statement came under the excited utterance hearsay exception of Tex. R. Evid. 803; according to the father, the complainant shook, her voice trembled, her face was red, she had an altered breathing pattern, she was crying, and she appeared generally traumatized when he spoke with her when he arrived at the place where the incident occurred after the incident. Mathre v. State, 2008 Tex. App. LEXIS 1123 (Tex. App. Amarillo Feb. 14 2008).

1006. Law enforcement officer's factual observations of a DWI suspect, contemporaneously dictated on his patrol-car videotape, are not admissible as a present sense impression exception to the hearsay rule under Tex. E. Evid. 803; an officer may testify in the courtroom to what he saw, did, heard, smelled, and felt at the scene, but he cannot substitute or augment his in-court testimony with an out-of-court oral narrative. Fischer v. State, 252 S.W.3d 375, 2008 Tex. Crim. App. LEXIS 5 (Tex. Crim. App. 2008).

1007. Appellate court's decision that the trooper's taped observations were not admissible as a present sense impression hearsay exception under Tex. R. Evid. 803 was affirmed because the evidence showed that the trooper calmly walked back and forth from his patrol car to defendant several times, and that he carefully and deliberately narrated the results of his DWI field tests and investigation; the trooper's statements were testimonial and reflective in nature, and they were the type of statements that were made for evidentiary use in a future criminal proceeding; therefore, they were not the sort of spontaneous, unreflective, contemporaneous present sense impression statements that qualified for admission. Fischer v. State, 252 S.W.3d 375, 2008 Tex. Crim. App. LEXIS 5 (Tex.

Crim. App. 2008).

1008. In a murder trial, there was no error in admitting, as excited utterances, out-of-court statements regarding defendant's alleged threats against the victim; the declarant was present when defendant shot the victim, was screaming hysterically when the testifying officer arrived, sobbed and cried while trying to tell the officer what had happened, and never completely calmed down during questioning at the scene. Kearse v. State, 2007 Tex. App. LEXIS 9828 (Tex. App. San Antonio Dec. 19 2007).

1009. Defendant's conviction for unlawful restraint was appropriate under Tex. R. Evid. 803 because the victim made the out-of-court statement to the police officer when she was still dominated by the emotions, excitement, fear, or pain of the attack; thus, the officer's testimony regarding what the victim said was admissible as an excited utterance. Cooper v. State, 2007 Tex. App. LEXIS 9536 (Tex. App. Houston 1st Dist. Dec. 6 2007).

1010. In a murder trial, there was no hearsay error in admitting the victim's statement to a friend that the defendant was chasing the victim because the statement was properly admitted as an excited utterance under Tex. R. Evid. 803; the testimony showed that the victim was still dominated by the emotions of being chased and bumped by defendant when the victim arrived at the friend's home at 4 a.m., acting scared, weird, and paranoid. Mims v. State, 238 S.W.3d 867, 2007 Tex. App. LEXIS 8534 (Tex. App. Houston 1st Dist. 2007).

1011. Witness's testimony of a conversation she had with the victim, defendant's wife, before the crime, when the victim was highly upset and crying, was admissible as an excited utterance under Tex. R. Evid. 803, plus defendant admitted that the statements were cumulative, and thus any error was harmless; because the statements related to the nature of the relationship between defendant and his wife, the statements were relevant and admissible under Tex. R. Evid. 404(b), and as they were not merely an attack on defendant's character, the trial court therefore did not err in overruling defendant's Tex. R. Evid. 403 objection. Garcia v. State, 246 S.W.3d 121, 2007 Tex. App. LEXIS 8051 (Tex. App. San Antonio 2007), *cert. denied*, 555 U.S. 949, 129 S. Ct. 404, 172 L. Ed. 2d 295, 2008 U.S. LEXIS 7457 (2008).

1012. In a murder case, testimony concerning defendant's statement that someone had tried to assault him was not admissible as an excited utterance under Tex. R. Evid. 803 because the witness testified that defendant did not appear to be scared, nervous, or excited. Hager v. State, 2007 Tex. App. LEXIS 8120 (Tex. App. Beaumont Oct. 10 2007).

1013. In a trial for aggravated assault on a public servant, there was no error in admitting the statement of a 911 caller whom officers called back because the statement was properly found to be an excited utterance under Tex. R. Evid. 803; at the time of the statement, defendant had not been apprehended, and an officer testified that the caller sounded upset. Jarrell v. State, 2007 Tex. App. LEXIS 6357 (Tex. App. Austin Aug. 10 2007).

1014. During defendant's trial for aggravated robbery with a deadly weapon, the trial court did not abuse its discretion under Tex. R. Evid. 803 in admitting a witness's statement regarding excited utterances made by the victim; the victim was described by the witness as crying hysterically, absolutely terrified, unable to breathe, and shaking hysterically immediately after the occurrence. Minos v. State, 2007 Tex. App. LEXIS 6394 (Tex. App. Fort Worth Aug. 9 2007).

1015. In a sexual assault trial, there was no error under Tex. R. Evid. 801, in admitting the complainant's out-of-court statement to the police as an excited utterance under Tex. R. Evid. 803 because the officer stated that the complainant was very excited, very nervous, almost to the point where the complainant's nervousness made the officer nervous; further, the trial court could have reasonably concluded that the sexual assault occurred within the past few hours, supporting the admission. Farmer v. State, 2007 Tex. App. LEXIS 6012 (Tex. App. Houston 14th

Dist. July 31 2007).

1016. In a sexual assault trial, there was no error in admitting the complainant's out-of-court statement to a relative as an excited utterance under Tex. R. Evid. 803; although the relative described the complainant's demeanor as absolutely flat and without emotion, the relative further explained that the complainant was beyond upset, just absolutely flat and in shock about what had just happened. Farmer v. State, 2007 Tex. App. LEXIS 6012 (Tex. App. Houston 14th Dist. July 31 2007).

1017. Where the police officer responded to a call about a disturbance, he spoke to the assault victim and noticed that she was very upset; the trial court did not abuse its discretion in admitting her statements to the officer under the excited utterance exception to the hearsay rule, Tex. R. Evid. 803; the victim was still dominated by the excitement of the event when she spoke with police. Victoria v. State, 2007 Tex. App. LEXIS 5853 (Tex. App. Beaumont July 25 2007).

1018. Trial court would not have committed error in overruling, for purposes of Tex. R. Evid. 802, an objection to the victim's statement to an officer on the basis of hearsay under Tex. R. Evid. 801(d); the trial court could have found that the victim was dominated by the emotions and fear of the event at the time she gave the statement and thus it was admissible as an excited utterance under Tex. R. Evid. 803(2), and defendant failed to show ineffective assistance of counsel under the Sixth Amendment. Smith v. State, 2007 Tex. App. LEXIS 5693 (Tex. App. Austin July 18 2007).

1019. In a murder case, defendant's confrontation rights under the Sixth Amendment were not violated by the introduction of a friend's testimony that the victim came to his house in the middle of the night stating that defendant was chasing him and bumping his car; the statements were not hearsay either since an exception in Tex. R. Evid. 803 applied due to the fact that the victim was still dominated by the fear of the event at the time the statements were made. Mims v. State, 2007 Tex. App. LEXIS 5448 (Tex. App. Houston 1st Dist. July 12 2007).

1020. Child's identification of defendant as the perpetrator of a rape was properly admitted into evidence as an excited utterance because the startling event was not the rape, which had occurred the day before the statement, but the fact that the victim's mother attacked defendant when he returned to the house the next day. Sanchez v. State, 2007 Tex. App. LEXIS 5277 (Tex. App. Houston 1st Dist. July 6 2007).

1021. Where defendant was tried for two counts of indecency with a child and two counts of aggravated sexual assault of a child by penetration, the trial court did not err by admitting testimony from the complainant's grandmother relating a statement the complainant made about defendant "tickling" her and pulling up her blouse; the complainant's statement met all the requirements of Tex. R. Evid. 803, as it was made while the complainant was in the grip of fear and without time for reflection; because the statement was not testimonial, the admission of the complainant's statement did not violate the Confrontation Clause even though defendant had no opportunity to cross-examine her. McCarty v. State, 227 S.W.3d 415, 2007 Tex. App. LEXIS 4604 (Tex. App. Texarkana 2007).

1022. In an aggravated assault case, the trial court did not abuse its discretion in finding the excited utterance hearsay exception of Tex. R. Evid. 803 applicable to a statement made by the victim to the investigating officer approximately 20 to 30 minutes after the incident, while the victim was visibly shaking, pacing, and obviously upset. Ollie v. State, 2007 Tex. App. LEXIS 2767 (Tex. App. Dallas Apr. 11 2007).

1023. In an aggravated assault case, counsel was not ineffective for failing to proffer a hearsay objection to the victim's written statement and testimony by a nurse regarding the victim's description of the assault because the record showed that counsel did in fact object to hearsay; moreover, the statement reasonably could be viewed as an excited utterance under Tex. R. Evid. 803(2) because of the victim's emotional state, and because it was

cumulative of the nurse's testimony, any error in failing to request a limiting instruction as to the nurse's testimony was harmless. Green v. State, 2007 Tex. App. LEXIS 2381 (Tex. App. Amarillo Mar. 28 2007).

1024. Domestic violence victim's statements to her mother, made when the victim was frightened and crying, were properly admitted under the excited utterance exception to the hearsay rule. Ashford v. State, 2007 Tex. App. LEXIS 946 (Tex. App. Eastland Feb. 8 2007).

1025. In a sexual abuse case, testimony from a victim's friend regarding the victim's act of telling her about the abuse was admissible as an excited utterance, even though the abuse had been going on for several years; the evidence showed that the victim made the statement to the friend one day after her brother thought he saw defendant watching the victim shower; the victim then felt as if she could tell someone about the abuse. Luna v. State, 2007 Tex. App. LEXIS 617 (Tex. App. Dallas Jan. 30 2007).

1026. Trial court did not err by admitting a detective's testimony recounting statements the victim made to him shortly after the robbery under the excited utterance hearsay exception of Tex. R. Evid. 803(2) because an officer who spoke to the victim prior to the interview, stated that she was a little bit distraught and visibly shaken but had begun to calm down. The detective testified that he spoke with the victim 45 to 50 minutes after the robbery and she was still visibly shaken and upset, and looked like she had been crying. Young v. State, 2006 Tex. App. LEXIS 11371 (Tex. App. Houston 14th Dist. Dec. 21 2006).

1027. In a murder trial, the trial court allowed a detective to testify that the victim's mother stated the defendant's name when she learned that her daughter had died from a stab wound; the statement was admissible under the excited utterance exception to the hearsay rule, because the victim's mother was in the midst of a very violent outburst and did not appreciate the fact that the officers were collecting evidence for a criminal prosecution. Cantu v. State, 2006 Tex. App. LEXIS 8738 (Tex. App. San Antonio Oct. 11 2006).

1028. In federal habeas proceedings, a state prisoner did not make a substantial showing of the denial of his Sixth Amendment right to confrontation by the district court's admission of an accomplice's statement implicating the prisoner as the perpetrator of a murder as an excited utterance under Tex. R. Evid. 803 because the remarks were blurted out after the accomplice fled a routine traffic stop, was chased by police officers, and was apprehended while officers were inventorying weapons found in his vehicle. Rodriguez v. Quarterman, 2006 U.S. App. LEXIS 23173 (5th Cir. Tex. Sept. 11 2006).

1029. Because defendant's wife testified, admitting making certain statements, and was given the opportunity to explain them, the admission of her out-of-court statements under Tex. R. Evid. 803(2) did not implicate defendant's right of confrontation under U.S. Const. amend. VI. Mitchell v. State, 2006 Tex. App. LEXIS 7584 (Tex. App. Tyler Aug. 25 2006).

1030. In a case in which a police officer and a victim services counselor for the police department testified, over defendant's hearsay objection, that the complainant said in Spanish that she had been assaulted by defendant, who she described as her boyfriend, in the apartment they shared, the trial court could reasonably find, pursuant to the excited utterance exception, Tex. R. Evid. 803(2), that the complainant's statements related to a startling event, namely an assault against her by defendant, and that she made her statements to the police while under the physical and emotional stress of excitement caused by the assault where the counselor testified that, in her opinion, the complainant's demeanor was "appropriate" for a woman who had been assaulted, and where defendant cited no evidence that the complainant had any selfish reason to accuse him of assaulting her, and the appellate court would not assume such a motivation on a silent record. Vargas v. State, 2006 Tex. App. LEXIS 7078 (Tex. App. Austin Aug. 11 2006).

1031. In a prosecution for assault on a household member and interfering with an emergency telephone call, the complainant's statements to an officer who was responding to a 911 were properly admitted as excited utterances under Tex. R. Evid. 803(2). The complainant was described as visibly shaken, excited, scared, recently injured, and bloody; only 10 to 15 minutes had elapsed from the time of the initial 911 call. Vinson v. State, 221 S.W.3d 256, 2006 Tex. App. LEXIS 7036 (Tex. App. Houston 1st Dist. 2006).

1032. Murder victim's statement identifying defendant as her attacker qualified as an excited utterance under Tex. R. Evid. 803(2) because the victim, who made the statement only moments after she was taken away from the scene of the attack, was still dominated by the emotion, excitement, horror, and pain of the event when she made the statement. Nethery v. State, 2006 Tex. App. LEXIS 6761 (Tex. App. Tyler July 31 2006).

1033. In a trial for driving while intoxicated, the trial court properly admitted a tape of the 911 call made by a witness; there was no error in the ruling that the statements were excited utterances under Tex. R. Evid. 803(2) because a custodian of 911 records for the sheriff's department testified that the witness sounded agitated during the call, and a deputy who saw the witness a few minutes later testified that the witness was very upset and spoke fast. Cook v. State, 199 S.W.3d 495, 2006 Tex. App. LEXIS 6431 (Tex. App. Houston 1st Dist. 2006).

1034. Defendant's conviction for assault causing bodily injury to a family member was appropriate because a reasonable person could have concluded that the victim made the statement at issue to the officer upon his arrival at the scene while under the excitement, fear, or pain of the event at the time she made the statement. Smith v. State, 2006 Tex. App. LEXIS 5173 (Tex. App. Fort Worth June 15 2006).

1035. In a murder trial, it was proper to exclude a statement by a deceased witness to police that the victim had a knife in his hand when defendant shot him. There was no evidence that if such a statement was made, it was made while the witness was under the stress of excitement caused by the event, as required for admission under Tex. R. Evid. 803(2). Hartless v. State, 2006 Tex. App. LEXIS 5066 (Tex. App. Tyler June 14 2006).

1036. In a murder trial, there was no violation of the confrontation clause when the trial court admitted, as an excited utterance under Tex. R. Evid. 803(2), evidence of a statement by the victim to his mother that defendant had just threatened to kill him. The statement was not testimonial. Hartless v. State, 2006 Tex. App. LEXIS 5066 (Tex. App. Tyler June 14 2006).

1037. Testimony in an aggravated assault trial that the victim stated that defendant had beaten her was properly admitted because the witness found the victim bloodied and upset; thus, the statement related to the startling event under Tex. R. Evid. 803. Fertic v. State, 2006 Tex. App. LEXIS 4685 (Tex. App. El Paso June 1 2006).

1038. In a juvenile delinquency proceeding, the mother's testimony recounting the nine-year-old victim's outcry to her about the assault was admissible under the excited-utterance exception to the hearsay rule; the State was not required to comply with Tex. Fam. Code Ann. § 54.031. In re M.A.M., 2006 Tex. App. LEXIS 3826 (Tex. App. Texarkana May 5 2006).

1039. Statements from the daughter of a murder victim made to her father just shortly after witnessing a murder were admissible under the excited utterance exception to the hearsay rule. Wilson v. State, 195 S.W.3d 193, 2006 Tex. App. LEXIS 815 (Tex. App. San Antonio 2006).

1040. Confrontation Clause was violated by the admission of an assault victim's out-of court statements made during a hospital interview by a deputy because a reasonable person in the victim's shoes would have had the capacity to make a testimonial statement and would have been aware that he was being interviewed as part of a

criminal investigation; the statement's qualification as an excited utterance did not alter its testimonial nature. Wall v. State, 184 S.W.3d 730, 2006 Tex. Crim. App. LEXIS 16 (Tex. Crim. App. 2006).

1041. Court of Criminal Appeals of Texas rejects any per se or categorical approach in determining whether excited utterances may or may not be classified as testimonial hearsay; the excited utterance inquiry focuses on whether the declarant was under the stress of a startling event, while the testimonial hearsay inquiry focuses on whether a reasonable declarant, similarly situated (that is, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of her statement. Wall v. State, 184 S.W.3d 730, 2006 Tex. Crim. App. LEXIS 16 (Tex. Crim. App. 2006).

1042. In defendant's robbery case, a court properly admitted the complainant's hearsay testimony as an excited utterance where a neighbor testified that when the complainant came to his apartment, she was crying and still partially bound by the wire used by her attacker, and seemed "pretty upset." Considering the complainant's shaken and excited demeanor when she spoke with the neighbor, reasonable people could conclude that the complainant was dominated by the emotions of the event when speaking with him although 30 minutes had passed since the crime. Campos v. State, 186 S.W.3d 93, 2005 Tex. App. LEXIS 9814 (Tex. App. Houston 1st Dist. 2005).

1043. In a trial for family assault, testimony concerning the complainant's statements was properly admitted as excited utterance; the complainant was visibly shaken and highly upset and her intoxication did not negate her state of excitement. Hudson v. State, 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

1044. In defendant's assault case, a court properly admitted the victim's hearsay testimony as an excited utterance where the witness testified that the victim was extremely agitated when officers arrived at the scene and she was so upset that officers initially could not understand her. The State's attorney repeatedly asked whether the alleged assault caused the victim's excited state and whether she was still under the stress of that exciting event when she was describing what occurred; only after the officer affirmatively answered those questions did the trial court allow the officer to testify about what the victim actually said. Bufkin v. State, 179 S.W.3d 166, 2005 Tex. App. LEXIS 8750 (Tex. App. Houston 14th Dist. 2005).

1045. In a trial for assault on a family member, the complainant's statement to officers and an emergency medical technician was properly admitted under the excited utterance exception to the hearsay rule. The complainant's intoxication did not call into question whether her mind was dominated by a state of excitement; the three witnesses testified that she was visibly shaken and highly upset when they arrived within five minutes of receiving the assault call. Hudson v. State, 2005 Tex. App. LEXIS 7386 (Tex. App. Houston 14th Dist. Sept. 8 2005), opinion withdrawn by, substituted opinion at 179 S.W.3d 731, 2005 Tex. App. LEXIS 9577 (Tex. App. Houston 14th Dist. 2005).

1046. During defendant's trial for aggravated robbery, the trial court did not err in admitting under the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2), the complainant's out-of-court statement to the first officer on the scene that defendant tried to take his money where the complainant expressly testified that he was in a fair amount of pain at the time he made the statement to the officer, and paramedics were assessing his condition after he had been shot and hit on the head with a gun, which clearly established that he was still dominated by the pain of the shooting when he made the statement. In addition, the statement occurred only a short time after the shooting. Moore v. State, 2005 Tex. App. LEXIS 6273 (Tex. App. Houston 14th Dist. Aug. 4 2005).

1047. Outcry statement by a child sexual assault victim did not quality as an excited utterance because the statement was made almost two years after the first assault. The court rejected the argument that the "startling event" was a revelation made to the victim just prior to the outcry by her father's girlfriend because the testimony indicated that the victim considered how and what to reveal about the assault several months before she made her

outcry to her father's girlfriend. Smith v. State, 2005 Tex. App. LEXIS 3972 (Tex. App. San Antonio May 25 2005).

1048. In a trial for unlawfully carrying a handgun, the trial court properly admitted an officer's testimony about a witness's statement that defendant approached the car she was occupying, demanded that it be moved, and partially removed a gun from his pocket. The statement was an excited utterance under Tex. R. Evid. 803(2), even though the record did not reflect how much time passed after the confrontation, because the officer testified that the witness was very upset and was crying. Spielman v. State, 2005 Tex. App. LEXIS 3854 (Tex. App. Houston 1st Dist. May 19 2005).

1049. In a proceeding relating to defendant's threats to kill his ex-wife, the ex-wife's statement to police was properly admitted as an excited utterance under Tex. R. Evid. 803(2). Defendant's loading a shotgun and issuing threats was startling enough to produce a state of nervous excitement, and only 10 to 20 minutes elapsed between the threats and the ex-wife's first statement, at which time she was scared, had been crying, and was shaking all over. Champion v. State, 2005 Tex. App. LEXIS 3733 (Tex. App. Texarkana May 17 2005).

1050. The Court of Appeals of Texas, Fourteenth District, Houston declines to join those courts that have established a bright-line rule that excited utterances can never be testimonial because the fact that a statement is an excited utterance as provided in Tex. R. Evid. 803(2) is only one factor that can be considered when determining whether the statement is testimonial for purposes of analyzing a Confrontation Clause claim. Texas courts have held that a declarant's state of excitement can last long after the initial crime and that excited utterances can be made both spontaneously and in response to questioning, therefore each situation should be analyzed individually. Spencer v. State, 162 S.W.3d 877, 2005 Tex. App. LEXIS 3162 (Tex. App. Houston 14th Dist. 2005).

1051. In an assault trial, the victim's statement to police, which she made when they responded to a 911 call from a third person, was properly admitted under the excited utterance exception, Tex. R. Evid. 803(2) to the hearsay rule, Tex. R. Evid. 801(d), 802. The victim was extremely agitated when officers arrived at the scene and was so upset that officers initially could not understand her. Bufkin v. State, 2005 Tex. App. LEXIS 2745 (Tex. App. Houston 14th Dist. Apr. 12 2005), opinion withdrawn by, substituted opinion at 179 S.W.3d 166, 2005 Tex. App. LEXIS 8750 (Tex. App. Houston 14th Dist. 2005).

1052. When trial court admitted defendant's daughter's statements to a police officer about defendant's alleged sexual assault, the statements were admitted in error under the excited utterance rule. Although the daughter was visibly upset, the incident had allegedly taken place 5 years earlier; nevertheless, the error was harmless. Barnes v. State, 165 S.W.3d 75, 2005 Tex. App. LEXIS 2603 (Tex. App. Austin 2005).

1053. Although a court erred by admitting an officer's statement as an excited utterance because the victim's statements were not spontaneous, the error was harmless because the officer's testimony was cumulative of eyewitness testimony that implicated defendant in the assault. Oveal v. State, 2005 Tex. App. LEXIS 1837 (Tex. App. Houston 14th Dist. Mar. 10 2005), opinion withdrawn by, substituted opinion at 164 S.W.3d 735, 2005 Tex. App. LEXIS 3517 (Tex. App. Houston 14th Dist. 2005).

1054. In an assault case, a court did not err by admitting the victim's statements to her aunt as excited utterances where the victim was lying on the couch crying, she looked scared, and she "seemed kind of out of it." The aunt further testified that the victim appeared to be suffering under the stress or excitement caused by the event, she had visible injuries, and the apartment was ransacked. Oveal v. State, 2005 Tex. App. LEXIS 1837 (Tex. App. Houston 14th Dist. Mar. 10 2005), opinion withdrawn by, substituted opinion at 164 S.W.3d 735, 2005 Tex. App. LEXIS 3517 (Tex. App. Houston 14th Dist. 2005).

1055. Trial court's admission of the testimony by a rape counselor about a prior victim of sexual assault was admissible as the prior victim was still extremely upset when she made the statements to the counselor. Reyna v. State, 2005 Tex. App. LEXIS 1663 (Tex. App. Amarillo Mar. 2 2005).

1056. In a sexual assault trial, the complainant's statement to police was properly admitted under the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2). The complainant had run into a store crying, shaking, and screaming that she had just been raped at gunpoint by two men in a van and needed help; the police were called within three to four minutes and arrived approximately five minutes later, when she was still under the influence of the trauma she just experienced and appeared to be in shock. Ascencio v. State, 2005 Tex. App. LEXIS 1449 (Tex. App. Houston 14th Dist. Feb. 24 2005).

1057. Trial counsel was not ineffective for failing to ask the trial court for a limiting instruction regarding the admission of an alleged assault victim's statements to officers because they were admissible as excited utterances under Tex. R. Evid. 803(2) where the victim called 911 and the victim was distraught when they arrived. Alli v. State, 2005 Tex. App. LEXIS 1463 (Tex. App. Houston 1st Dist. Feb. 24 2005).

1058. Each case that involves a period of unconsciousness between the time of a startling event and a statement must be reviewed in light of the facts and circumstances of the case to determine whether the statement is admissible as an excited utterance. The declarant need not necessarily have been unconscious for the entire period between the startling event and the statement, so long as the record supports the reasonable conclusion that the declarant did not have a meaningful opportunity to reflect. Apolinar v. State, 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

1059. In a trial for aggravated robbery, a statement made by the victim four days after the attack was properly admitted as an excited utterance because the victim was unconscious for part of the four days and, based on the circumstances, it was reasonable to conclude that he had no meaningful opportunity to reflect. The record supported findings that between the stabbing and his surgery, the victim was still in shock, that he was then unconscious until the time that he made the statement, and that at the time of the statement he was animated, angry, and excited. Apolinar v. State, 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

1060. In an assault case, statements made by defendant's girlfriend to a police officer at the scene and on videotape about an hour after an alleged assault were admissible as excited utterances because they met the element of spontaneity. Mumphrey v. State, 155 S.W.3d 651, 2005 Tex. App. LEXIS 370 (Tex. App. Texarkana 2005).

1061. In a murder trial, the trial court properly admitted, under the excited utterance exception, a hearsay statement that the declarant could not believe defendant had shot someone, even though the State did not establish the exact amount of time that elapsed between the shooting and the statement, because the approximate length of time was only a few hours. The statement itself supported a conclusion that the declarant witnessed the shooting. The startling occurrence could have been acquiring knowledge that defendant killed someone. Ross v. State, 154 S.W.3d 804, 2004 Tex. App. LEXIS 11407 (Tex. App. Houston 14th Dist. 2004).

1062. Trial court did not err in admitting an officer's statement that the victim had told him that defendant had helped others kidnap him. At the time the victim made the statement he had not yet received treatment for his three gunshot wounds and the officer believed the victim was going to die, and the statement was admissible as a statement relating to startling event made immediately thereafter. Jarrett v. State, 2004 Tex. App. LEXIS 10397 (Tex. App. Houston 1st Dist. Nov. 18 2004).

1063. Defendant maintained the trial court erred in his trial for murder in excluding statements; defendant claimed that the statements were admissible under the excited utterance exception to the hearsay rule. Nevertheless, when the witness's statement was taken at the police department an hour after the incident, the witness was no longer excited. Palacios v. State, 2004 Tex. App. LEXIS 9912 (Tex. App. San Antonio Nov. 10 2004).

1064. Statements did not fall within the excited utterance hearsay exception because the speaker, although angry, was not dominated by emotions, and he made his statements in response to an officer's questions, not spontaneously. The admission did not affect defendant's substantial rights, however, because the evidence was cumulative and other evidence overwhelmingly supported the conviction for aggravated assault with a deadly weapon. Reyes v. State, 2004 Tex. App. LEXIS 9717 (Tex. App. Dallas Nov. 3 2004).

1065. In a criminal prosecution for two counts of burglary of a habitation, the trial court did not err in refusing to admit an out-of-court statement of the complainant's wife as an excited utterance; there was no showing by defendant that the declarant's statement, if made, was made while she was excited or in the grip of a shocking event. Kesaria v. State, 148 S.W.3d 634, 2004 Tex. App. LEXIS 9396 (Tex. App. Houston 14th Dist. 2004), affirmed by 189 S.W.3d 279, 2006 Tex. Crim. App. LEXIS 680 (Tex. Crim. App. 2006).

1066. Even if testimony from the mother of a child victim was not within the outcry hearsay exception, it was admissible as excited utterance. McDonald v. State, 148 S.W.3d 598, 2004 Tex. App. LEXIS 8855 (Tex. App. Houston 14th Dist. 2004), *aff'd*, 179 S.W.3d 571, 2005 Tex. Crim. App. LEXIS 2010 (Tex. Crim. App. 2005). no pet.

1067. Sixth Amendment was violated by the admission of a victim's statement, which was taken by police at the hospital, as excited utterance because the statement was "testimonial" as a matter of law; the error, however, was harmless. Because defendant did not brief his claims separately, the court assumed that defendant claimed no greater protection under the state constitution than that provided by the federal constitution. Wall v. State, 143 S.W.3d 846, 2004 Tex. App. LEXIS 7467 (Tex. App. Corpus Christi 2004), affirmed by 184 S.W.3d 730, 2006 Tex. Crim. App. LEXIS 16 (Tex. Crim. App. 2006).

1068. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court properly admitted the complainant's "excited utterances" to her aunt and the investigating officer where both the officer and the aunt spoke to the complainant shortly after the assault, she had visible injuries, and she was scared. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

1069. Court should consider whether a statement is in response to a question when determining whether a hearsay statement qualifies as an excited utterance, but this factor is not dispositive as it is only one factor to be considered. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

1070. Murder victim's statements while crying that she had seen guns in a car outside was admissible as a present sense impression under Tex. R. Evid 803(1), and her statement that she was going to be killed by the people outside and her writing of those peoples' names on paper were admissible as excited utterances under Tex. R. Evid. 803(2). Cantu v. State, 2004 Tex. App. LEXIS 6049 (Tex. App. Corpus Christi July 8 2004).

1071. Defendant argued that the trial court erred in excluding an excited utterance under Tex. R. Evid. 803(2) where, during the direct examination of a witness's uncle, the uncle testified that when the witness returned to the party after the shooting, he was crying and hysterical, and stated that he had been robbed; even if a statement might qualify as an exception to the hearsay rule, the burden was on the proponent of the evidence to invoke the

exception and satisfy its requirements, and defendant failed to proffer the out-of-court statement as an exception to the hearsay rule and therefore did not meet his burden to establish the admissibility of the statement. Borner v. State, 2004 Tex. App. LEXIS 5220 (Tex. App. Dallas June 15 2004).

1072. Where arresting officer testified, over a hearsay objection, that the complainant told him that defendant entered her residence through a sliding glass door, the evidence was properly admitted as an excited utterance. The officer testified that the complainant, was "very, very nervous" and "very much shook up by the ordeal that went on that night," she was "crying profusely and trying to tell the officer what happened in between sobs"; she was very upset and very excited. Gamble v. State, 2004 Tex. App. LEXIS 5103 (Tex. App. Houston 1st Dist. June 10 2004).

1073. Excited utterance exception to the hearsay rule justified the admission of testimony that the declarant, a murder victim, had told the witness that he was afraid of the defendant; the trial court did not abuse its discretion in concluding that the victim was under the influence of a startling event. Headley v. State, 2004 Tex. App. LEXIS 5104 (Tex. App. Houston 1st Dist. June 10 2004).

1074. Trial court did not abuse its discretion in allowing a police officer to testify to remarks made by the complainant in a domestic assault case where the trial court admitted the testimony under the excited utterance exception; trial court could have reasonably determined the complainant was still dominated by the emotions, excitement, fear, or pain of the altercation when making the statements of which the officer testified. Eck v. State, 2004 Tex. App. LEXIS 4735 (Tex. App. Houston 1st Dist. May 27 2004).

1075. Trial court did not abuse its discretion in permitting an officer to testify about a witness's statements because the record supported a finding that the witness, who was a friend of the victim, was still dominated by the emotions and fear of the event as the officer, who arrived only six to eleven minutes after being dispatched to the scene, testified that the victim was upset, excited, and nervous and was running around yelling that his friend had just been shot. Reyes v. State, 2004 Tex. App. LEXIS 4776 (Tex. App. Houston 14th Dist. May 27 2004).

1076. Trial court properly convicted defendant of aggravated assault where the trial court correctly treated the interpreter as a language conduit who did not add an additional level of hearsay, and the victim's statements were excited utterances pursuant to Tex. R. Evid. 803(2). Cassidy v. State, 149 S.W.3d 712, 2004 Tex. App. LEXIS 4519 (Tex. App. Austin 2004), writ of certiorari denied by 544 U.S. 925, 125 S. Ct. 1648, 161 L. Ed. 2d 486, 2005 U.S. LEXIS 2531, 73 U.S.L.W. 3555 (2005), criticized by Wall v. State, 184 S.W.3d 730, 2006 Tex. Crim. App. LEXIS 16 (Tex. Crim. App. 2006), criticized by Wall v. State, 143 S.W.3d 846, 2004 Tex. App. LEXIS 7467 (Tex. App. Corpus Christi 2004).

1077. Trial court properly convicted defendant of aggravated assault where the trial court correctly treated the interpreter as a language conduit who did not add an additional level of hearsay, and the victim's statements were excited utterances pursuant to Tex. R. Evid. 803(2). Cassidy v. State, 149 S.W.3d 712, 2004 Tex. App. LEXIS 4519 (Tex. App. Austin 2004), writ of certiorari denied by 544 U.S. 925, 125 S. Ct. 1648, 161 L. Ed. 2d 486, 2005 U.S. LEXIS 2531, 73 U.S.L.W. 3555 (2005), criticized by Wall v. State, 184 S.W.3d 730, 2006 Tex. Crim. App. LEXIS 16 (Tex. Crim. App. 2006), criticized by Wall v. State, 143 S.W.3d 846, 2004 Tex. App. LEXIS 7467 (Tex. App. Corpus Christi 2004).

1078. In an assault case, counsel was not ineffective for failing to object to ineffective for failing to object to hearsay evidence regarding a telephone call where the statements made by the victim to her mother met the excited utterance exception to the hearsay rule because they were the result of a startling occurrence, being assaulted, the victim was still crying and visibly upset when officers arrived, and all of her statements were related to the circumstances of the occurrence. In addition, the statements made by the victim's mother to the victim's father also met the excited utterance exception to the hearsay rule because they were the result of a startling

occurrence, receiving a telephone call from her daughter that she was being assaulted, the evidence indicated that the mother was was crying, and upset as a result of receiving the telephone call, and her statements were related to the circumstances of the occurrence. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

1079. In the sentencing phase of a sexual assault trial, witness's testimony about a friend's statement that defendant had put his hand in her pants, was admissible as an excited utterance where the touching occurred the prior evening, the actions startled the declarant, and she was still dominated by the emotions. Mass v. State, 2004 Tex. App. LEXIS 2551 (Tex. App. San Antonio Mar. 24 2004).

1080. In the sentencing phase of a sexual assault trial, witness's testimony about a friend's statement that defendant had put his hand in her pants, was admissible as an excited utterance where the touching occurred the prior evening, the actions startled the declarant, and she was still dominated by the emotions. Mass v. State, 2004 Tex. App. LEXIS 2551 (Tex. App. San Antonio Mar. 24 2004).

1081. In a domestic abuse case, a wife's oral statement to police and a 911 call for help were properly admitted into evidence as excited utterances because the wife was upset, crying, and in pain when the statements were made, and a trial court was not required to make an independent finding of reliability before admitting the statements under Tex. R. Evid. 803(2). Dettmer v. State, 2004 Tex. App. LEXIS 389 (Tex. App. Dallas Jan. 15 2004).

1082. In a case where defendant was convicted of forgery of one of the victim's stolen checks, although 1 1/2 hours to 2 1/2 hours had passed since the intruders left and the victim's daughter spoke with the victim, the victim was upset, weeping, and traumatized by the events and was worried that the intruders would wipe out her account; thus, the daughter's testimony regarding the mother's statements that her checks were stolen were an excited utterance pursuant to Tex. R. Evid. 803(2) and the trial court did not abuse its discretion in admitting the hearsay statements under the excited utterance exception. Kendig v. State, 2003 Tex. App. LEXIS 10803 (Tex. App. Houston 14th Dist. Dec. 30 2003).

1083. Counsel was not required to object to a hearsay statement of the complainant admitted through the testimony of a police officer during a criminal trial for aggravated assault; the statement was more than likely an excited utterance admissible under Tex. R. Evid. 803(2). Mathis v. State, 2003 Tex. App. LEXIS 9987 (Tex. App. Dallas Nov. 24 2003).

1084. Where the victim did not disclose until she was 18 years of age that defendant fathered her son when she was 12 years of age, the victim's belated outcry statement did not qualify as an excited utterance under Tex. R. Evid. 803(2); while the original assault was undoubtedly shocking, the record did not reflect that defendant was still, six years later, dominated by the excited state produced by the attack. Harvey v. State, 123 S.W.3d 623, 2003 Tex. App. LEXIS 9837 (Tex. App. Texarkana 2003).

1085. Defendant's claim that the trial court committed reversible error by admitting into evidence the complainant's hearsay statements through an outcry witness was upheld as the statements in question were not admissible under Tex. R. Evid. 803(2) as an excited utterance where the interviews were conducted over a four to six hour period, some of the statements were in response to questions, the narration was inherently reflective, and it was impossible to conclude that the statements were made without opportunity for reflection or deliberation. Hughes v. State, 128 S.W.3d 247, 2003 Tex. App. LEXIS 6980 (Tex. App. Tyler 2003).

1086. Where a trial court erroneously admitted statements that were not admissible under Tex. R. Evid. 803(2) as spontaneous statements, the State filed to comply with Tex. Code Crim. Proc. Ann. art. 38.072, which would have

prevented introduction of statements of outcry witnesses; the admission of the hearsay evidence probably had an injurious influence on the jury's deliberation and therefore affected a substantial right of defendant, Tex. R. App. P. 44.2, such that reversal and remand for a new trial was warranted. Hughes v. State, 128 S.W.3d 247, 2003 Tex. App. LEXIS 6980 (Tex. App. Tyler 2003).

1087. Excited utterance exception has three requirements: (1) an exciting event must have occurred; (2) the statement must have been a spontaneous reaction to the event; and (3) the statement must relate to the event. The purpose of the relationship requirement is to ensure that the statement is truly spontaneous and not the result of reflection, which could inject such factors as self-interest, anger, or vindictiveness into the utterance; that purpose is not fulfilled if the statement is not related to the startling event. Apolinar v. State, 106 S.W.3d 407, 2003 Tex. App. LEXIS 4370 (Tex. App. Houston 1st Dist. 2003), *aff'd,* 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

1088. Single most critical factor in evaluating an excited utterance as an exception to hearsay is whether the declarant made the statement while dominated by the emotion of the startling event or condition. While the time lapse between the startling event and the statement is not dispositive, it is the lack of opportunity to reflect or fabricate details that gives the exception its reliability; thus, the declarant's excitement must be continuous between the event itself and the making of the statement. Apolinar v. State, 106 S.W.3d 407, 2003 Tex. App. LEXIS 4370 (Tex. App. Houston 1st Dist. 2003), *aff'd,* 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

1089. In evaluating an excited utterance as an exception to hearsay, while the declarant's excitement is ordinarily continuous between the event itself and the making of the statement, it is too strong to say that the excitement must always be continuous. Apolinar v. State, 106 S.W.3d 407, 2003 Tex. App. LEXIS 4370 (Tex. App. Houston 1st Dist. 2003), *aff'd,* 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

1090. Statement of robbery victim, made four days after he was stabbed and robbed, was admissible as an excited utterance because the victim was in surgery, unconscious, heavily medicated, or incoherent for the intervening four days and made his excited utterance the very day that he awoke; the victim did not have the opportunity to fabricate his statement. Apolinar v. State, 106 S.W.3d 407, 2003 Tex. App. LEXIS 4370 (Tex. App. Houston 1st Dist. 2003), *aff'd,* 155 S.W.3d 184, 2005 Tex. Crim. App. LEXIS 145 (Tex. Crim. App. 2005).

1091. Trial court did not abuse its discretion in allowing a family member to testify regarding a sister's statement that defendant assaulted her, despite the fact that the statement was made more than 20 hours after the event took place where the statement was an excited utterance under Tex. R. Evid. 803(2) because the sister was still under stress and had not been previously separated from defendant when the statement was made. Zuliani v. State, 97 S.W.3d 589, 2003 Tex. Crim. App. LEXIS 26 (Tex. Crim. App. 2003), criticized by Zuniga v. State, 2004 Tex. Crim. App. LEXIS 2014 (Tex. Crim. App. Apr. 21, 2004), criticized by Denman v. State, 193 S.W.3d 129, 2006 Tex. App. LEXIS 2003 (Tex. App. Houston 1st Dist. 2006).

1092. Question of whether or not utterances factually meet the requirements of Tex. R. Evid. 803(2) is within the discretion of the trial court. Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

1093. The critical factor in determining when a statement is an excited utterance under Tex. R. Evid. 803(2) is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event. Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

1094. Pursuant to the excited utterance exception to the hearsay rule, Tex. R. Evid. 803(2), the spontaneity of the statements cannot be measured by the expectations of the listener, as only the speaker's perspective is important

in determining spontaneity. Glover v. State, 102 S.W.3d 754, 2002 Tex. App. LEXIS 7797 (Tex. App. Texarkana 2002).

1095. In a sexual assault of a child case, the 14-year-old victim's statements to the victim's mother comprised a reflective, narrative account of past events and were made in response to direct, specific questions that were calculated to elicit the type of responses given, even though the contents of the responses were unanticipated, and thus, although the victim might have been upset when the victim made the statements, the statements did not fall within the excited-utterance exception to the hearsay rule, Tex. R. Evid. 803(2), since the appellate court could not say that the statements were spontaneous and unreflecting, or made without the opportunity to contrive or misrepresent. Glover v. State, 102 S.W.3d 754, 2002 Tex. App. LEXIS 7797 (Tex. App. Texarkana 2002).

1096. Where an assault victim, defendant's common law wife, was still in the emotional grip of the assault when she made her statements to the responding officer, so that her out-of-court statements, in accordance with Tex. R. Evid. 803(2), fell under the excited utterance exception to the hearsay rule, but she did not testify, and there was no showing the victim was not available to testify, admission of her statements violated appellant's constitutional right of confrontation. Johnson v. State, 2000 Tex. App. LEXIS 6689 (Tex. App. Waco Oct. 4 2000), criticized by Hudson v. State, 2001 Tex. App. LEXIS 8270 (Tex. App. Houston 1st Dist. Dec. 13, 2001).

1097. Husband's statement made 30 minutes after the assault occurred while he was under the stress or excitement of some startling event or condition was properly admitted as an excited utterance pursuant to Tex. R. Evid. 803(2) where the police officer testified that the husband was very upset and under the stress or excitement of the assault. Woods v. State, 2004 Tex. App. LEXIS 5196 (Tex. App. Dallas June 14 2004).

Evidence : Hearsay : Exceptions : Spontaneous Statements : Elements

1098. Defendant lost any constitutional right to confront his mother in court when he killed her; the admission of the evidence that defendant argued should have been excluded did not contribute to his conviction or sentence and was otherwise harmless as the unchallenged evidence supporting the elements of the offense of capital murder was overwhelming. Samuelson v. State, 2014 Tex. App. LEXIS 9222, 2014 WL 4179440 (Tex. App. Austin Aug. 21 2014).

1099. Prior to calling a detective, a witness heard defendant say that he had strangled a woman, after which he demonstrated how, and thus the record reasonably showed that the witness was still dominated by the emotions, fear, and excitement of the event when she spoke to the detective, for excited utterance purposes, and the trial court did not abuse its discretion by overruling defendant's hearsay objection. Owens v. State, 2014 Tex. App. LEXIS 6214, 2014 WL 2568483 (Tex. App. Dallas June 9 2014).

1100. Victim's disclosure of the sexual assault to her cousin did not qualify as an excited utterance because the record did not support that the victim was still, three or four months later, dominated by the excited state produced by the attack. Nor did the record reflect that the mention of defendant's name was the type of startling or shocking event contemplated by the rule. Sandoval v. State, 409 S.W.3d 259, 2013 Tex. App. LEXIS 11657 (Tex. App. Austin Sept. 13 2013).

1101. In a prosecution for aggravated kidnapping, an officer's testimony that the victim said she felt terrorized and feared she was going to be raped was admissible as an excited utterance, as it was made a few minutes after the incident and the officer testified that the victim was distraught and hysterical. Mason v. State, 2013 Tex. App. LEXIS 10853 (Tex. App. Austin Aug. 28 2013).

1102. Victim's statement that he just got stabbed was shortly after the attack, while he was still in the store's parking lot, and although it was a response to a witness's question, nothing suggested that it was a calculated response; the audio recording of the victim's 911 call corroborated his testimony that he was still dominated by the emotions of the stabbing when he made the statement, which qualified as an excited utterance. Law v. State, 2013 Tex. App. LEXIS 8753 (Tex. App. Houston 1st Dist. July 16 2013).

1103. Statement was not testimonial and instead it appeared to have been an excited utterance made to a co-worker; the statement explained why a witness seemed startled by whatever she had heard and why she appeared nervous and paced the room, and the trial court did not err in admitting the statement as an excited utterance. Skief v. State, 2013 Tex. App. LEXIS 6274 (Tex. App. Dallas May 21 2013).

1104. For excited utterance purposes under Tex. R. Evid. 803(2), although it was not clear how much time had elapsed, the statement took place while a search was in progress and while the witness was angry, yelling, and agitated, and thus the decision to admit the statement was not unreasonable. Edmondson v. State, 399 S.W.3d 607, 2013 Tex. App. LEXIS 3156, 2013 WL 1154210 (Tex. App. Eastland Mar. 21 2013).

1105. Object of a search was drugs, a witness was arrested for drug possession, and appellant had brought crack and Xanax to the witness's home the night before, such that it was reasonable for the trial court to find that the witness's statement related to either the search or the events of the previous night, for excited utterance purposes. Edmondson v. State, 399 S.W.3d 607, 2013 Tex. App. LEXIS 3156, 2013 WL 1154210 (Tex. App. Eastland Mar. 21 2013).

1106. Trial court could consider a detective's testimony that a witness was crying and hysterical, had a high-pitched voice, and was mumbling about appellant letting her take the fall, and this, combined with the witness's statement, supported a finding that a search at the witness's house for drugs and her arrest and transport in a raid van were events that were startling, and the court could not say that the trial court's decision to admit the statements as an excited utterance constituted an abuse of discretion. Edmondson v. State, 399 S.W.3d 607, 2013 Tex. App. LEXIS 3156, 2013 WL 1154210 (Tex. App. Eastland Mar. 21 2013).

1107. For purposes of Tex. R. Evid. 803(2), the record reasonably showed that the statement was made by the complainant shortly after she had been sexually assaulted and she was still dominated by the fear, emotions, and/or pain of the incident when she spoke, such that the trial court did not abuse its discretion in overruling appellant's hearsay objection. Herrera v. State, 2012 Tex. App. LEXIS 8411, 2012 WL 4748203 (Tex. App. Dallas Oct. 5 2012).

1108. Because the victim made the statement to the witness that she was trying to be forced to do something that she did not want to do after exerting considerable energy to free herself from defendant's trunk, running towards lights, and banging on the doors of three houses with her hands still tied, the witness's testimony was admissible as an excited utterance under Tex. R. Evid. 803(2). Mcwilliams v. State, 367 S.W.3d 817, 2012 Tex. App. LEXIS 3153, 2012 WL 1406463 (Tex. App. Houston 14th Dist. Apr. 24 2012).

1109. Appellant sought admission of a videotape, claiming his statements to a deputy were excited utterances for purposes of Tex. R. Evid. 803(2), but it was hard for the court to tell whether what was on the videotape was just appellant's normal speaking pattern or whether he was angry or excited, and evidence of an excited emotional state alone did not qualify a statement as an excited utterance. Dyke v. State, 2012 Tex. App. LEXIS 2181, 2012 WL 954625 (Tex. App. Texarkana Mar. 21 2012).

1110. Trial court did not err in excluding a videotape of appellant's statements as excited utterances; the court found that about less than 30 minutes elapsed between the shooting and the statements, appellant volunteered

many of his statements before he was questioned, and appellant's statements were self-serving, as the trial court could have found the statements as appellant's attempt to present officers with a self-defense argument. Dyke v. State, 2012 Tex. App. LEXIS 2181, 2012 WL 954625 (Tex. App. Texarkana Mar. 21 2012).

1111. Officer's testimony about what the complainants told him immediately after he arrived at the apartment was admissible under the excited utterance exception to the hearsay rule in Tex. R. Evid. 803(2) because the officer testified that the complainants were very scared, excited, anxious, and crying. Oliva v. State, 2011 Tex. App. LEXIS 8940, 2011 WL 5428965 (Tex. App. Houston 1st Dist. Nov. 10 2011).

1112. Witness's challenged testimony fell under the excited utterance exception under Tex. R. Evid. 803(2), given that (1) the victim called the witness immediately after the altercation with appellant, (2) the victim was still dominated by the fear and pain of the fight, as shown by her being upset and asking the witness to come get her, and (3) the record did not show decedent's statements were self-serving. Sanders v. State, 2011 Tex. App. LEXIS 3673, 2011 WL 1843508 (Tex. App. Dallas May 16 2011).

1113. Where defendant had come through a now deceased individual's house, with a gun, looking for the victim, her hearsay statements were admissible as excited utterances under Tex. R. Evid. 803(2) because she was upset and scared, her voice was high-pitched, she was crying, and she was still under the influence of the resulting emotions when she called the victim. Dohnal v. State, 2011 Tex. App. LEXIS 600, 2011 WL 319950 (Tex. App. Eastland Jan. 27 2011).

1114. Witness's statements qualified as excited utterances under Tex. R. Evid. 803(2) because the evidence supported an inference that the officer quickly responded to an emergency; when the officer first met with the witness, she was crying, shaking, nervous, and too scared to speak with the officer; after the officer hugged the witness and brought her outside, she finally confided that there was a man in her house that she wanted out as he was scaring her and selling drugs out of her house; when the officer and the witness approached her house, she was scared and agreed to allow the officer to help her only after coaxing; and she kept repeating defendant's name. Cadoree v. State, 331 S.W.3d 514, 2011 Tex. App. LEXIS 146 (Tex. App. Houston 14th Dist. Jan. 11 2011).

1115. Trial court did not abuse its discretion by finding that the witness's sister's out-of-court statement was admissible as an excited utterance under Tex. R. Evid. 803(2) because the witness testified that: (1) she heard his sister banging on the kitchen window; (2) she saw her sister run through her bedroom and out the door; and (3) she saw defendant driving off just before her sister returned to tell her that defendant was peeping in her bedroom window. Coble v. State, 330 S.W.3d 253, 2010 Tex. Crim. App. LEXIS 1297 (Tex. Crim. App. 2010).

1116. Trial court did not err by excluding from evidence written witness statements attached to an officer's accident report because the construction workers' statements were hearsay under Tex. R. Evid. 801(d) and they did not fall under the excited utterance exception, as the record did not indicate how much time elapsed between the accident and the statements or demonstrate the demeanor of the workers at the time of the statements. Sherbin v. Dean Word Co., 2010 Tex. App. LEXIS 5362, 2010 WL 2698761 (Tex. App. Austin July 9 2010).

1117. Trial court could have reasonably concluded that the victim's statement that she was scared, uttered to another while the victim was crying and defendant was mad and throwing a fit, was an excited utterance under Tex. R. Evid. 803(2) because defendant was acting angry and violent at the time of the declaration; the trial court could have also reasonably found that the victim's other statements showed that her state of mind was fearful of defendant, for purposes of Rule 803(3), and thus the trial court did not err in admitting these statements. Anderson v. State, 2010 Tex. App. LEXIS 3440, 2010 WL 1839945 (Tex. App. Houston 1st Dist. May 6 2010).

1118. For purposes of Tex. R. Evid. 803(2), an officer's response to an emergency call could be assumed to have been short, plus the victim was still bleeding from her injuries when she spoke to the officer, and this suggested that the victim's statement was still dominated by the excitement and emotions of the event despite the time lapse between the statement and the event. Cherry v. State, 2009 Tex. App. LEXIS 8787, 2009 WL 3805850 (Tex. App. Houston 1st Dist. Nov. 12 2009).

1119. At no point was the victim separated from defendant and an officer stated that the victim was crying and scared when she said defendant had assaulted her, such that the victim's demeanor was consistent with a person still under the stress of excitement of the event. Cherry v. State, 2009 Tex. App. LEXIS 8787, 2009 WL 3805850 (Tex. App. Houston 1st Dist. Nov. 12 2009).

1120. There was no indication that an officer was attempting to direct the victim's statement, for purposes of Tex. R. Evid. 803(2), which supported the admission of the statement as an excited utterance. Cherry v. State, 2009 Tex. App. LEXIS 8787, 2009 WL 3805850 (Tex. App. Houston 1st Dist. Nov. 12 2009).

1121. Victim's statement was not self-serving, given that she was in fear and not motivated by revenge, and given this and the other factors, the court could have found that the out of court statement was an excited utterance and unlikely fabricated. Cherry v. State, 2009 Tex. App. LEXIS 8787, 2009 WL 3805850 (Tex. App. Houston 1st Dist. Nov. 12 2009).

1122. In a burglary trial, a statement by a five year old declarant was properly admitted as an excited utterance under Tex. R. Evid. 803(2), despite a lapse of several days between the burglary and the statement, because the declarant was very upset after seeing an officer investigating a property, asked if a five-year-old child could go to jail, and confessed to being present at on the property when defendant entered into and damaged the property. In re D.A.A., 2009 Tex. App. LEXIS 6126, 2009 WL 2397333 (Tex. App. Corpus Christi Aug. 6 2009).

1123. Trial court did not err in admitting a witness's statements under Tex. R. Evid. 803(2), given that a reasonable trier of fact could have found that the witness's wife was still dominated by the excitement and fear caused by her abduction; the time lapse of 30 minutes between the abduction and the witness's conversation with his wife was not lengthy, and the witness did not indicate that he questioned his wife during their conversation, nor was there anything self-serving about her description of the crime. Newton v. State, 2009 Tex. App. LEXIS 5686, 2009 WL 2196118 (Tex. App. Dallas July 24 2009).

1124. Evidence showed that a frail, 80-year-old woman, who was recovering from heart surgery and needed help at all times, learned that someone had taken money out of her account and that her caretaker, defendant, could be the responsible party, such that the trial court did not abuse its discretion in admitting a bank employee's testimony about the woman's statements under Tex. R. Evid. 803(2); even if the trial court erred in overruling the hearsay objection, any such error was harmless under Tex. R. App. P. 44.2(b) because the statements were corroborated and also cumulative and the case against defendant for theft of an elderly individual and debit card abuse was very strong. Arriaga v. State, 2009 Tex. App. LEXIS 5408, 2009 WL 2045220 (Tex. App. San Antonio July 15 2009).

1125. Trial court heard testimony indicating that the victim was afraid of defendant and that he had threatened her and that she knew he would eventually kill her, and each time when the victim talked about the threats by defendant, she appeared upset, visible shaken, crying, and distressed, such that the victim was still dominated by the emotions, excitement, fear, or pain of the event of being threatened and the court did not abuse its discretion in admitting the statements as excited utterances under Tex. R. Evid. 803(2); even if the trial court erred in admitting the evidence, the error was harmless under Tex. R. App. P. 44.2(b), as there was testimony that the victim was fearful of defendant and a psychologist testified that the threats by defendant against the victim were part of their

relationship. Akeredolu v. State, 2009 Tex. App. LEXIS 4112, 2009 WL 1609372 (Tex. App. El Paso June 10 2009).

1126. Trial court did not act outside the zone of reasonable disagreement by overruling defendant's hearsay objection to an officer recitation of the victim's hearsay statement that defendant had gotten angry and pushed her into a wall and by admitting it as an excited utterance under Tex. R. Evid. 803(2); when the officer responded to the victim's 911 case, he found her clearly upset and it was a reasonable inference that 911 response time was fairly quick. Davis v. State, 268 S.W.3d 683, 2008 Tex. App. LEXIS 6566 (Tex. App. Fort Worth 2008).

1127. Although the trial court did not explicitly find that the statement was an excited utterance, as the trial court gave no basis for its overruling of defendant's objection, the court nevertheless upheld the trial court's ruling on an evidentiary matter if it was correct on any theory of law applicable to the case. Davis v. State, 268 S.W.3d 683, 2008 Tex. App. LEXIS 6566 (Tex. App. Fort Worth 2008).

1128. Trial court did not abuse its discretion in striking a portion of the horse owner's affidavit and deposition where it contained hearsay statements allegedly made by an acquaintance to the police and those statements did not constitute an excited utterance under Tex. R. Evid. 803 because the acquaintance was not a witness to the car accident that led to the negligence claim, and nothing in the record indicated that he was under stress or spoke with excitement when he made the statements. Thomas v. Centerpoint Energy, Inc., 2008 Tex. App. LEXIS 945 (Tex. App. Houston 1st Dist. Feb. 7 2008).

1129. Defendant's conviction for unlawful restraint was appropriate under Tex. R. Evid. 803 because the victim made the out-of-court statement to the police officer when she was still dominated by the emotions, excitement, fear, or pain of the attack; thus, the officer's testimony regarding what the victim said was admissible as an excited utterance. Cooper v. State, 2007 Tex. App. LEXIS 9536 (Tex. App. Houston 1st Dist. Dec. 6 2007).

1130. Trial court did not err in admitting into evidence a 9-1-1 tape in which a declarant was seeking police help after her boyfriend allegedly assaulted her because the declarant's statements constituted an excited utterance under Tex. R. Evid. 803; the statements were related to a startling event and were made at a point in time when the declarant was in an extremely excited emotional state as a direct result of the event. Dixon v. State, 244 S.W.3d 472, 2007 Tex. App. LEXIS 9292 (Tex. App. Houston 14th Dist. 2007).

1131. Within minutes of yelling for help, the victim, who was still shaken up, recounted to a witness and company that defendant had hit him in the face when he became angry at the victim for not wanting to spend any more money on beer at a bar; a reasonable person could conclude that the victim made the statements about the bar attack while still dominated by the emotions, excitement, fear, or pain of the startling event that provoked the victim to flee his home only moments before; therefore, the trial court did not abuse its discretion by admitting the victim's statements into evidence under the excited utterance exception in Tex. R. Evid. 803. Bermudez v. State, 2007 Tex. App. LEXIS 7629 (Tex. App. El Paso Sept. 20 2007).

1132. Trial court acted within its discretion in admitting the victim's statements to officers as excited utterances under Tex. R. Evid. 803(2), as the victim was frantic, scared, and recently injured and bleeding at the time of the statement, and although the record did not show the exact length of time that elapsed between the incident and the statements made, the statements were made before the victim was taken by ambulance to the hospital and while he was still at the scene. Tyler v. State, 2007 Tex. App. LEXIS 7348 (Tex. App. Houston 1st Dist. Aug. 31 2007).

1133. Operator for 911 testified that she received a call at about 1:30 in the morning from the victim's mother and there was a lot of yelling, some type of disturbance; the operator finally got the victim's mother to talk to her on the phone and she told the operator that the victim, her 15-year-old daughter, had accused defendant, her step-father, of touching her, that the victim was upset and ran out of the house, and then the victim's mother got off the phone to

go find the victim outside; the operator's description of the 911 call showed that the victim's mother was still dominated by the emotions, excitement, fear, or pain of the event where defendant "groped" her daughter when she made the telephone call; thus, the trial court did not abuse its discretion by allowing the testimony into evidence as an excited utterance. Mestas v. State, 2007 Tex. App. LEXIS 6947 (Tex. App. Dallas Aug. 29 2007).

1134. When defendant touched the 15-year-old victim for the second time, she screamed and went into her mother's bedroom; after the victim told her mother what had happened, her mother went into the living room screaming and yelling at defendant; thus, the mother's statements were made immediately after learning defendant had "groped" her 15-year-old daughter; because the mother was still dominated by the emotions, excitement, fear, or pain of the event when she made the statements, the trial court did not abuse its discretion by allowing the complained-of testimony into evidence as an excited utterance. Mestas v. State, 2007 Tex. App. LEXIS 6947 (Tex. App. Dallas Aug. 29 2007).

1135. Trial court would not have committed error in overruling, for purposes of Tex. R. Evid. 802, an objection to the victim's statement to an officer on the basis of hearsay under Tex. R. Evid. 801(d); the trial court could have found that the victim was dominated by the emotions and fear of the event at the time she gave the statement and thus it was admissible as an excited utterance under Tex. R. Evid. 803(2), and defendant failed to show ineffective assistance of counsel under the Sixth Amendment. Smith v. State, 2007 Tex. App. LEXIS 5693 (Tex. App. Austin July 18 2007).

1136. When an officer responded to the victim's second call against defendant, the father of her child, she was upset, crying, appeared frightened, and said defendant had been knocking on her door and threatened to kill her, and this type of evidence was routinely held admissible as an excited utterance, and the trial court's decision to admit this testimony did not present an issue of arguable merit. Shepard v. State, 2007 Tex. App. LEXIS 3602 (Tex. App. Waco May 9 2007).

1137. 911 operator established the predicate for admission of an exhibit listing data entries made by the operator as a business record, and the victim's statements contained therein were admissible as excited utterances. Shepard v. State, 2007 Tex. App. LEXIS 3602 (Tex. App. Waco May 9 2007).

1138. Given the evidence of defendant's wife's changing emotional condition and the lack of evidence showing that she was still dominated by the emotions or excitement of the criminal offense when she made the statements, the trial court's exclusion of the statements was proper and the court rejected defendant's claim that the statements were admissible under Tex. R. Evid. 803. Aleman v. State, 2007 Tex. App. LEXIS 365 (Tex. App. San Antonio Jan. 19 2007).

1139. Court rejected defendant's claim of ineffective assistance of counsel; the court assumed a strategic motive of counsel given the silent record, defendant failed to show that counsel's alleged failures to object were unreasonable and (1) it was reasonable for counsel to have found that certain evidence was admissible under Tex. R. Evid. 803(2), given that defendant's wife was extremely upset and nervous when talking to an officer about the incident, (2) counsel could have found that protective orders and testimony concerning defendant's wife's applying for the orders were not proof of extraneous offenses under Tex. R. Evid. 404(b), given that they were issued in response to the same conduct that defendant was on trial for, (3) counsel could have found that defendant's wife's father's testimony opened the door to cross-examination regarding defendant's character by referencing specific examples of defendant's conduct for purposes of Tex. R. Evid. 405, and (4) counsel might have believed that the wife's inconsistent statements were admissible to impeach her testimony under Tex. R. Evid. 613. Romero v. State, 2006 Tex. App. LEXIS 10723 (Tex. App. Austin Dec. 15 2006).

1140. Trial court properly admitted a statement by a witness to police that defendant had shot a motorist; the statement was an exited utterance under Rule 803(2) of the Texas Rules of Criminal Evidence, and counsel was not ineffective under the Sixth Amendment for not opposing its admission. Rodriguez v. Quarterman, 204 Fed. Appx. 489, 2006 U.S. App. LEXIS 28253 (5th Cir. Tex. 2006).

1141. Statements defendant's wife made to a 911 operator and an officer on the scene were properly admitted as excited utterances under Tex. R. Evid. 803(2); the wife's identification of defendant as the shooter was made immediately after the shooting at close range, and between the event and the statements, there was no time for reason or reflection. Mitchell v. State, 2006 Tex. App. LEXIS 7584 (Tex. App. Tyler Aug. 25 2006).

1142. Statements defendant's wife made to an investigator two hours after the shooting were admitted by the trial court under Tex. R. Evid. 803(2), and the court found no abuse of discretion; during the interview, the wife was still crying and it was not unreasonable to believe that she was still dominated by the emotions caused by the attack. Mitchell v. State, 2006 Tex. App. LEXIS 7584 (Tex. App. Tyler Aug. 25 2006).

1143. Statements made to a 911 operator by a burglary complainant were excited utterances under Tex. R. Evid. 803 because she was clearly dominated by the event as defendant was yelling threats at her and banging on the door; furthermore, the statements did not violate confrontation clause under Crawford because they were not testimonial and the complainant (declarant) was unavailable. Dunn v. State, 2006 Tex. App. LEXIS 7425 (Tex. App. Houston 14th Dist. Aug. 17 2006).

1144. Defendant's wife's statements were made when she was still dominated by her emotions and fear, for purposes of Tex. R. Evid. 803(2), and thus the trial court did not err in admitting the statements as excited utterances and the State's purpose in calling the witness was not solely to introduce into evidence otherwise inadmissible hearsay, for purposes of Tex. R. Evid. 607; the statements had been previously admitted. White v. State, 201 S.W.3d 233, 2006 Tex. App. LEXIS 7057 (Tex. App. Fort Worth 2006).

1145. Statements made by the victim, a 14-year-old girl, to her mother were excited utterances under Tex. R. Evid. 803; the statements were made approximately two and one-half hours after the alleged incident and in response to questioning, but given that she was crying hysterically when she spoke to her mother, the court found that the victim was still under the emotional and physical stress of the incident. Rodarte v. State, 2006 Tex. App. LEXIS 6938 (Tex. App. El Paso Aug. 4 2006).

1146. Concerning statements a victim made to a priest, they fell under the excited utterances exception under Tex. R. Evid. 803; although the statements were made six hours after the alleged incident, the victim had to be helped into the priest's house by her mother, the victim had a runny nose due to crying, the priest testified that the victim was distraught, and the court found no abuse of discretion. Rodarte v. State, 2006 Tex. App. LEXIS 6938 (Tex. App. El Paso Aug. 4 2006).

1147. Regarding an officer's testimony concerning what the victim said during their conversations, the statements were excited utterances under Tex. R. Evid. 803; the victim appeared to be disturbed and distraught and the victim's actions indicated that he was quite upset; even if the trial court erred, the error was harmless under Tex. R. App. P. 44.2(b) because the same evidence came in through the victim's testimony without objection. Alexander v. State, 2006 Tex. App. LEXIS 6950 (Tex. App. Houston 14th Dist. Aug. 1 2006).

1148. Trial court would have been justified in finding that a deputy's testimony regarding what the victim told the officer was not inadmissible hearsay because it fell under Tex. R. Evid. 803 as an excited utterance, given that at the time the victim gave the statement, the victim was upset and trembling. Rodriguez v. State, 2006 Tex. App.

LEXIS 6416 (Tex. App. Houston 1st Dist. July 20 2006).

1149. In defendant's trial for unlawfully restraining his girlfriend in violation of Tex. Penal Code Ann. § 20.02, the trial court did not abuse its discretion in determining that the girlfriend was still dominated by the emotions and fear of being held by defendant when she spoke to an officer, for purposes of Tex. R. Evid. 803, given that the officer described the girlfriend as upset, shaking, and crying when she recounted her story; while three hours had passed from the startling event and the statement, the court noted that time was not dispositive. Mazumder v. State, 2006 Tex. App. LEXIS 5235 (Tex. App. Dallas June 20 2006).

1150. In defendant's trial for unlawfully restraining his girlfriend in violation of Tex. Penal Code Ann. § 20.02, the trial court did not abuse its discretion in ruling that the girlfriend's statement to her daughter was an excited utterance under Tex. R. Evid. 803, given that (1) defendant held the girlfriend in her house for almost nine hours, (2) she then immediately went to her daughter's place of work, and (3) the daughter described her as upset and scared and when confronted, she told her daughter what had happened; clearly a startling event had occurred, the time frame between the release and the statement was less than one hour, and after only being asked two questions, the girlfriend recounted her experience, such that the record supported a finding that she was still dominated by the startling event when she recounted it to her daughter. Mazumder v. State, 2006 Tex. App. LEXIS 5235 (Tex. App. Dallas June 20 2006).

Evidence : Hearsay : Exceptions : State of Mind : General Overview

1151. During defendant's trial for aggravated assault with family violence, the court did not err in allowing an investigator to testify about a telephone conversation he had with the complainant while she was in the hospital because the complainant's statements that she was afraid of defendant were admissible under Tex. R. Evid. 803(3). Adams v. State, 2014 Tex. App. LEXIS 6515 (Tex. App. Dallas June 16 2014).

1152. In an aggravated assault case, defendant should have been allowed to testify that the victim threatened to file a "false" assault charge against her because the statement was not offered to prove the truth of the matter asserted; instead, it was offered to show that the victim had an intent to lie. Corbin v. State, 2013 Tex. App. LEXIS 15300, 2013 WL 7083195 (Tex. App. Eastland Dec. 19 2013).

1153. Daughter's statements in her affidavit signed two days after the night her mother came to pick her up were not statements of her then existing state of mind or spontaneous remarks made while a sensation was being experienced such that they were admissible; the affidavit containing the daughter's statements in a conservatorship proceeding nearly two years prior to her death were not relevant to the damages suffered by the father due to the loss of his daughter's companionship and society. In re Estate of Macdonald, 2013 Tex. App. LEXIS 10135, 2013 WL 4081419 (Tex. App. Dallas Aug. 13 2013).

1154. Trial court erred in an indecency with a child trial in admitting purported "outcry" testimony from the victim's mother because the victim's statement that she felt uncomfortable when she could feel defendant in the pool described an emotion, but it was not admissible as a then-existing state of mind under Tex. R. Evid. 803(3) because the victim did not make the statement while she was feeling uncomfortable. Linney v. State, 401 S.W.3d 764, 2013 Tex. App. LEXIS 5560 (Tex. App. Houston 14th Dist. May 7 2013).

1155. Defendant's convictions for aggravated kidnapping and aggravated sexual assault of a child were proper because statements were admissible as non-hearsay, Tex. R. Evid. 801(d). The victim's indication that she was okay was admissible pursuant to Tex. R. Evid. 803(3) as it was a statement of her then existing mental, emotional, or physical condition; the sheriff's indication that everything was okay constituted a present sense impression and was admissible under Rule 803(1); the victim's statement that "he is trying to get in the bathroom" could have been

admitted either as a present sense impression under Rule 803(1) or an excited utterance under Rule 803(2); the trial court did not abuse it discretion in allowing the officer to testify that he heard a male voice saying, "Open the door" because that statement could have been admitted either as an admission by a party opponent or as a statement merely showing what was said rather than proving the truth of the matter asserted, Tex. R. Evid. 801(e)(2). Billings v. State, 399 S.W.3d 581, 2013 Tex. App. LEXIS 1423, 2013 WL 607699 (Tex. App. Eastland Feb. 14 2013).

1156. Utterance could have been seen as indicative of the mother's state of mind in response to her frustration that arose from being told that police were interested in talking to appellant, her son; construing the declaration this way would have fallen within the zone of reasonable disagreement, and no limiting instruction was sought by appellant, such that the jury was free to use the evidence as it cared to. Williams v. State, 2013 Tex. App. LEXIS 695 (Tex. App. Amarillo Jan. 24 2013).

1157. Even had appellant limited his request to the parts of his statements he claimed the trial court should have admitted, self-serving declarations were generally considered to be inadmissible hearsay when offered into evidence by a defendant, and parts of the recorded statements appellant argued the trial court did not admit were properly excluded as hearsay, as each part appellant claimed was improperly excluded under Tex. R. Evid. 803(3) was a statement of memory or belief offered to prove the fact remembered or believed. Anderson v. State, 2011 Tex. App. LEXIS 10038, 2011 WL 6743297 (Tex. App. Beaumont Dec. 21 2011).

1158. Complainant's diary excerpt was admitted during the punishment phase of the trial, when it was no longer in dispute that defendant had sexually abused the complainant; the statement was admissible under the "state of mind" exception to the hearsay rule, Tex. R. Evid. 803(3) as it was not offered to prove the fact remembered or believed, but as punishment evidence to show the complainant's state of mind while recovering from the abuse, and evidence of the physical pain and emotional turmoil defendant inflicted on the complainant. Spurgeon v. State, 2011 Tex. App. LEXIS 4843, 2011 WL 2520280 (Tex. App. Dallas June 27 2011).

1159. In defendant's capital murder trial for the killing of his wife and son, his wife's statement that defendant did not want her to have contact with her parents and that she wished to divorce appellation were expressions of her state of mind at the time they were made and were admissible as an exception to the hearsay rule. Payne v. State, 2011 Tex. App. LEXIS 3270, 2011 WL 1662856 (Tex. App. Tyler Apr. 29 2011).

1160. In defendant's capital murder trial for the killing of his wife and son, his wife's statement begging her sister-in-law to avenge her death was not a statement of mind but a supposition that her husband would be responsible if she were killed. That kind of statement did not fit into the state of mind exception to the hearsay rule. Payne v. State, 2011 Tex. App. LEXIS 3270, 2011 WL 1662856 (Tex. App. Tyler Apr. 29 2011).

1161. Trial court did not err under Tex. R. Evid. 803(3) in permitting a mother to offer testimony concerning one child's opinion of the father, the child's viewpoint of the father's parenting skills, and the child's viewpoint of the father as a role model; the testimony was offered to show the child's state of mind while the father was caring for the child. Koenig v. Koenig, 2010 Tex. App. LEXIS 7423, 2010 WL 3518232 (Tex. App. Beaumont Sept. 9 2010).

1162. Trial court could have reasonably concluded that the victim's statement that she was scared, uttered to another while the victim was crying and defendant was mad and throwing a fit, was an excited utterance under Tex. R. Evid. 803(2) because defendant was acting angry and violent at the time of the declaration; the trial court could have also reasonably found that the victim's other statements showed that her state of mind was fearful of defendant, for purposes of Rule 803(3), and thus the trial court did not err in admitting these statements. Anderson v. State, 2010 Tex. App. LEXIS 3440, 2010 WL 1839945 (Tex. App. Houston 1st Dist. May 6 2010).

1163. Trial court's instruction was technically in error because it varied from the statutory language and expanded the scope of the language of Tex. Code Crim. Proc. Ann. art. 38.36 to include the complainant's state of mind, but defendant's proposed instruction would not have cured the error; because Article 38.36 allows evidence as to the previous relationship between appellant and the complainant and Tex. R. Evid. 803(3) allows evidence of the complainant's state of mind, there could be no harm to defendant's rights from the erroneous jury instruction. Anderson v. State, 2010 Tex. App. LEXIS 3440, 2010 WL 1839945 (Tex. App. Houston 1st Dist. May 6 2010).

1164. In defendant's capital murder case, the court properly allowed testimony regarding the victim's statement to the witness because it was not testimonial but, rather, a casual remark expressing her intent to go show her truck. The statement about being nervous was an indication of her state of mind, and was not admissible for the truth of the matter asserted but rather to show her intent. Fain v. State, 2009 Tex. App. LEXIS 6592, 2009 WL 2579580 (Tex. App. Fort Worth Aug. 20 2009).

1165. In defendant's trial for possession of four grams or more but less than 200 grams of methamphetamine in violation of Tex. Health & Safety Code § 481.115, the trial court properly admitted the recording of a telephone conversation between a confidential informant (CI) and the individual who purchased methamphetamine from defendant; the recording was properly admitted as to the purchaser-coconspirator under Tex. R. Evid. 801(e)(2)(E) and was properly admitted as to the CI under Tex. R. Evid. 803(3) as a statement of the CI's then existing plan to provide the purchaser with transportation to a meeting place with defendant. Camacho v. State, 2009 Tex. App. LEXIS 5975, 2009 WL 2356885 (Tex. App. Fort Worth July 30 2009).

1166. In a murder case, although the trial court erred in admitting the victim's hearsay statement regarding her plans to withhold all financial support from defendant, the error was harmless. The State provided evidence of the stolen rifle as the murder weapon, the victim's negative feelings toward defendant, defendant's inconsistent alibi, and the perpetrator's knowledge of where valuables were located in the victim's home. Fischer v. State, 2009 Tex. App. LEXIS 4092 (Tex. App. San Antonio June 10 2009).

1167. In a murder case, because the victim's statement that defendant "gave her the creeps" was permissible hearsay, and went to the nature of the relationship between the victim and defendant, the court did not err in admitting the statement. Fischer v. State, 2009 Tex. App. LEXIS 4092 (Tex. App. San Antonio June 10 2009).

1168. As to a hearsay objection in a sexual assault case, defendant only specifically stated his intended testimony for the first time on appeal; defendant apparently sought to introduce testimony to show a victim's state of mind as it related to consent. Therefore, there was no error in sustaining a hearsay objection raised by the State; even if the trial court and the State had understood the specifics of the testimony that defendant intended to elicit, there was no harm shown because substantially similar testimony was later received into evidence. Zuniga v. State, 2008 Tex. App. LEXIS 6905 (Tex. App. San Antonio Sept. 10 2008).

1169. In defendant's indecency with a child case, the court properly admitted testimony of a counselor regarding the victim's fears because the trial court could have reasonably concluded that the victim's statements to the counselor about her perceived fears were statements of her then existing emotional or mental state and were admissible as an exception to hearsay under rule. Fugate v. State, 2008 Tex. App. LEXIS 6266 (Tex. App. Dallas Aug. 18, 2008).

1170. In a will contest case, even though the decedent's siblings, who opposed admitting a photocopy of the decedent's will to probate, argued that the decedent's daughter's testimony regarding what the decedent told her was admissible under Tex. R. Evid. 803(3), the trial court did not err in finding the state of mind exception inapplicable. Although the excluded testimony may have been considered relevant to establish that the decedent had executed a new will naming his daughter as his sole beneficiary, because the siblings' position was that the

decedent had died intestate, its exclusion was not harmful to them. In re Estate of Turner, 265 S.W.3d 709, 2008 Tex. App. LEXIS 5937 (Tex. App. Eastland 2008).

1171. Victim's statement, what appeared to be goodbye messages to her loved ones and signed with her name and a blank for the year she died, was admissible under the state of mind exception under Tex. R. Evid. 803 in defendant's murder trial; it was undisputed that defendant killed the victim, his estranged wife, and the statement was not offered to prove the fact remembered or believed, but as punishment evidence to show the emotional pain and turmoil defendant inflicted on the victim over the course of her life. Edwards v. State, 2008 Tex. App. LEXIS 5403 (Tex. App. Dallas July 23 2008).

1172. Although defendant tried to introduce testimony under Tex. R. Evid. 803, defendant provided no substantive legal analysis, argument, or authority to support his contention, and thus the point was inadequately briefed and presented nothing for review. Guerrero v. State, 2008 Tex. App. LEXIS 1837 (Tex. App. Corpus Christi Mar. 13 2008).

1173. Defendant did not explain how letters fell within the state of mind exception, and because he failed to offer analysis or argument in support of his contention, the matter was inadequately briefed under Tex. R. App. P. 38. Guerrero v. State, 2008 Tex. App. LEXIS 1837 (Tex. App. Corpus Christi Mar. 13 2008).

1174. In defendant's murder case, a court properly admitted evidence of the victim's handwritten letters because it was admissible as relating to the victim's state of mind, and the State authenticated the letters through the victim's daughter, who recognized the handwriting on the letters as being that of her mother. Stafford v. State, 248 S.W.3d 400, 2008 Tex. App. LEXIS 1280 (Tex. App. Beaumont 2008).

1175. Statements made by the victim, defendant's wife, were admissible under Tex. R. Evid. 803 because they went to her state of mind, and although defendant claimed that statements that she was afraid of him were not relevant, it had previously been determined that the circumstances surrounding their relationship were relevant under Tex. Code Crim. Proc. Ann. art. 38.36(a), and thus the court held that the statements were relevant under Tex. R. Evid. 401; given that the jury had been told of the "dicey" relationship between defendant and his wife, the trial court did not believe there was going to be any confusion of the issues, and the court agreed and held that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury for purposes of Tex. R. Evid. 403. Garcia v. State, 246 S.W.3d 121, 2007 Tex. App. LEXIS 8051 (Tex. App. San Antonio 2007), *cert. denied*, 555 U.S. 949, 129 S. Ct. 404, 172 L. Ed. 2d 295, 2008 U.S. LEXIS 7457 (2008).

1176. In the trial of an officer for lying in a warrant affidavit about the reliability of an informant, the trial court properly allowed testimony that the alleged informant was reluctant to deal with the subject of the warrant, while prohibiting more specific testimony that the informant was afraid because of the informant's belief that the subject had killed a man. The latter statement was properly excluded as hearsay under Tex. R. Evid. 801(d), 802 and did not fall within the exception of Tex. R. Evid. 803 because it was a statement of memory or belief offered to prove that the subject had killed a man. Delapaz v. State, 228 S.W.3d 183, 2007 Tex. App. LEXIS 2377 (Tex. App. Dallas 2007).

1177. In defendant's capital murder trial under Tex. Penal Code Ann. § 19.03, a witness testified to overhearing a conversation that one victim did not want defendant coming back to her and her husband's house, and in response to defendant's hearsay objection, the trial court allowed the testimony under Tex. R. Evid. 803 as a statement of the victim's then-existing mental or emotional state, which was proper; even if the trial court erred, the alleged error in admitting the testimony, if any, was nonconstitutional and subject to harmless error analysis under Tex. R. App. P. 44 and the error was harmless, given the overwhelming evidence of defendant's guilt. Bryant v. State, 2007 Tex.

App. LEXIS 945 (Tex. App. Eastland Feb. 8 2007).

1178. Trial court properly excluded a deposition because it had been taken in another lawsuit and, although appellant's opinion at the time would have been within the exception to the hearsay rule provided by Tex. R. Evid. 803(3), the deposition's contents were inadmissible hearsay because the statements contained within it pertained to the other party's statements and state of mind rather than to appellant's. Trantham v. Isaacks, 218 S.W.3d 750, 2007 Tex. App. LEXIS 501 (Tex. App. Fort Worth 2007), *cert. denied*, 552 U.S. 892, 128 S. Ct. 340, 169 L. Ed. 2d 155, 2007 U.S. LEXIS 10018 (2007).

1179. Court properly denied the admission of defendant's statements, which he claimed were exculpatory, because, whether the statement was reflective of defendant's then existing mental state showing that he did not know that the true owners of the car were dead was an area where reasonable minds could differ; in such a situation, the trial court's determination of admissibility must prevail. Kirk v. State, 199 S.W.3d 467, 2006 Tex. App. LEXIS 6060 (Tex. App. Fort Worth 2006).

1180. In a husband's trial for the murder of his wife, the trial court properly admitted a tape-recorded phone message from the victim to her lawyer, in which she described defendant's threats, because the first two paragraphs described both the victim's state of mind and defendant's state of mind. Rogers v. State, 183 S.W.3d 853, 2005 Tex. App. LEXIS 10705 (Tex. App. Tyler 2005).

1181. In a murder trial, the court improperly admitted draft affidavits relaying a history of domestic violence that were never signed, notarized, or introduced in any prior court proceeding; all of the statements were either of memory or belief by the victim and thus did not fall within the state of mind exception to the hearsay rule under Tex. R. Evid 803(3). Rogers v. State, 183 S.W.3d 853, 2005 Tex. App. LEXIS 10705 (Tex. App. Tyler 2005).

1182. In a husband's trial for the murder of his wife, the trial court properly admitted a tape recorded phone message from the victim to the administrator of a retirement plan, in which the victim pleaded with the administrator to call defendant and explain to him that she would eventually become entitled to the money in her retirement plan; this statement was admissible under Tex. R. Evid. 803 because it showed both the victim's state of mind and defendant's state of mind, indicating that he was suspicious of the victim's motives regarding a divorce proceeding. Rogers v. State, 183 S.W.3d 853, 2005 Tex. App. LEXIS 10705 (Tex. App. Tyler 2005).

1183. Witness's testimony that the victim was scared was a statement of the victim's then-existing state of mind and was thus subject to the exception in Tex. R. Evid. 803(3). Martinez v. State, 186 S.W.3d 59, 2005 Tex. App. LEXIS 8678 (Tex. App. Houston 1st Dist. 2005).

1184. Complained-of hearsay statements to which the complainant's sister testified indicated the victim's state of mind at the time they were made and were, therefore, admissible under Tex. R. Evid. 803(3). Haley v. State, 2004 Tex. App. LEXIS 9569 (Tex. App. Houston 1st Dist. Oct. 28 2004).

1185. In a murder trial, it was proper to exclude testimony by a defense witness that, in case anything happened to him, the victim had pointed out a couple of guys that had beat him up two weeks prior where the statement fell into the realm of the victim's belief and therefore was not within the state-of-mind exception to the hearsay rule as the victim's state of mind was not at issue. Braziel v. State, 2004 Tex. App. LEXIS 6101 (Tex. App. El Paso July 8 2004).

1186. In a murder case, witnesses' testimony regarding statements the victim made that she thought defendant was going to hurt her were admissible hearsay as the statements showed the victim's fear and state of mind.

Gutierrez v. State, 2004 Tex. App. LEXIS 5555 (Tex. App. Amarillo June 23 2004).

1187. In an assault case, counsel was not ineffective for failing to object to hearsay evidence regarding the victim's fear that defendant would retaliate against her or her family where the statement was offered to show that the victim was afraid, not that defendant would retaliate against her or her family; therefore, it was admissible under the state of mind exception to the hearsay rule. Williams v. State, 2004 Tex. App. LEXIS 2775 (Tex. App. Houston 14th Dist. Mar. 30 2004).

1188. Tex. R. Evid. 803(3) states that a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition such as intent, plan, motive, design, mental feeling, pain, or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. Salazar v. State, 127 S.W.3d 355, 2004 Tex. App. LEXIS 1045 (Tex. App. Houston 14th Dist. 2004).

1189. Because, pursuant to Tex. R. Evid. 803(3), hearsay testimony regarding the declarant's emotion or mental feeling was admissible so long as it did not include a statement of memory or belief to prove the fact remembered or believed, each of the statements at issue concerned the declarant's then existing emotional condition or mental feeling. Thus, the hearsay testimony was admissible under Rule 803(3). Salazar v. State, 127 S.W.3d 355, 2004 Tex. App. LEXIS 1045 (Tex. App. Houston 14th Dist. 2004).

1190. Letter from one witness in a murder trial to another witness was properly excluded where it did not show the recipient's state of mind, and thus her incentive to lie; although it arguably demonstrated the writer's feelings for the witness, it contained no evidence of what the witness felt for or thought of the writer. Williams v. State, 2004 Tex. App. LEXIS 706 (Tex. App. Dallas Jan. 26 2004).

1191. In a murder trial, an out-of-court statement made by the victim that her relationship with the defendant, her ex-boyfriend, was over, was admissible under Tex. R. Evid. 803(3) as a statement showing future intent, and also her state of mind. Thrailkille v. State, 2002 Tex. App. LEXIS 8972 (Tex. App. Beaumont Dec. 18 2002).

1192. Tex. R. Evid. 803(3) excepts from the hearsay rule a statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will; however, the statement of the victim of a crime, related by another person, and expressing fear of the defendant, is admissible under Rule 803(3) as a statement of existing state of mind. Thrailkille v. State, 2002 Tex. App. LEXIS 8972 (Tex. App. Beaumont Dec. 18 2002).

1193. When related by another person, an out-of-court statement by the victim of a crime is admissible under Rule 803(3) as a statement of existing state of mind. Thrailkille v. State, 2002 Tex. App. LEXIS 8972 (Tex. App. Beaumont Dec. 18 2002).

1194. Under Rule 803(3) of the Rules of Evidence, statements of the intent of the declarant with regard to relationships are admissible as showing future intent, and also admissible to demonstrate state of mind. Thrailkille v. State, 2002 Tex. App. LEXIS 8972 (Tex. App. Beaumont Dec. 18 2002).

1195. In a murder trial, an out-of-court statement made by the victim, that she was afraid of the defendant taking her home, was admissible under Tex. R. Evid. 803(3) as a statement of her existing state of mind. Thrailkille v.

State, 2002 Tex. App. LEXIS 8972 (Tex. App. Beaumont Dec. 18 2002).

1196. Pursuant to Tex. R. Evid. 801 and 803(3), the statements made by a witness, that the victim told the witness that the defendant had been partying, tearing things up, and smoking pot in the victim's residence, amounted to the admission of inadmissible hearsay, and the trial court erred by admitting testimony regarding the events or existing conditions that were the cause of the victim's mental and emotional state. Skeen v. State, 96 S.W.3d 567, 2002 Tex. App. LEXIS 8181 (Tex. App. Texarkana 2002).

1197. In a sexual assault of a child case, the mother's testimony, relating statements made by the 14-year-old victim and seeking to establish the truth of facts remembered regarding past events, was inadmissible under the state of mind exception to the hearsay rule, Tex. R. Evid. 803(3). Glover v. State, 102 S.W.3d 754, 2002 Tex. App. LEXIS 7797 (Tex. App. Texarkana 2002).

1198. Officer's testimony that a codefendant would have cooperated but feared for his life was hearsay because the codefendant's mental state was evidenced by inference and therefore did not qualify as an exception to the hearsay rule under Tex. R. Evid. 803(3); but, because the statement was irrelevant to prove any fact or element of the charge against defendant, a trial court's admission of the hearsay testimony was harmless error pursuant to Tex. R. App. P. 44.2(b). Barnes v. State, 56 S.W.3d 221, 2001 Tex. App. LEXIS 4834 (Tex. App. Fort Worth 2001).

1199. Written statement by a homicide victim was not admissible evidence in defendant's murder trial as an exception to hearsay under Tex. R. Evid. 803(3) because the first two sentences of the statement, which disclosed the victim's fear that defendant, her husband, would murder her for insurance money, were simply out-of-court statements of events that had occurred, and the next sentence was an out-of-court exposition of the victim's belief. The statement demonstrated the victim's fear or state of mind, other than her recited "belief," only by inference. Barnum v. State, 7 S.W.3d 782, 1999 Tex. App. LEXIS 8907 (Tex. App. Amarillo 1999).

Evidence : Hearsay : Exceptions : State of Mind : Proof of Earlier Acts

1200. During defendant's trial for capital murder, even if the court erred under Tex. R. Evid. 803(3) in admitting testimony about a specific incident when defendant shoved defendant's mother, the victim, against a wall, the testimony was clearly insufficient to establish a claim of cumulative error that would justify reversal under Tex. R. App. P. 44.2(b). Logan v. State, 2010 Tex. App. LEXIS 3847, 2010 WL 2010921 (Tex. App. Amarillo May 20 2010).

1201. In a negligence suit, the trial court properly sustained Tex. R. Evid. 801(d) hearsay objections to testimony from a police officer and to e-mails written in anticipation of litigation; the officer's testimony was not admissible under the Tex. R. Evid. 803(3) state of mind hearsay exception because the Tex. R. Evid. 103(a)(2) offer of proof did not make clear when the declarant spoke with the officer, and the e-mails also were not spontaneous statements and did not qualify as business records under Rule 803(6). Estate of Ronnie Wren v. Bastinelli, 2010 Tex. App. LEXIS 330 (Tex. App. Texarkana Jan. 20 2010).

1202. In a murder case, testimony concerning defendant's statement that someone had tried to assault him was not admissible under the Tex. R. Evid. 803 state of mind exception to the hearsay rule because defense counsel's arguments indicated that he sought to introduce the evidence to prove that an unknown assailant could have killed the victim. Hager v. State, 2007 Tex. App. LEXIS 8120 (Tex. App. Beaumont Oct. 10 2007).

Evidence : Hearsay : Exceptions : State of Mind : Proof of Later Acts

1203. In an aggravated assault case, the trial court erred by sustaining the hearsay objection to the victim's statement that "she was gonna call the law" because it evinced a state of mind concerning her future conduct and

was admissible. Corbin v. State, 2013 Tex. App. LEXIS 15300, 2013 WL 7083195 (Tex. App. Eastland Dec. 19 2013).

Evidence : Hearsay : Exceptions : Statements Against Interest

1204. Court did not abuse its discretion in admitting the redacted jailhouse recording into evidence, because defendant's own statements implicated his guilt, and the redacted statements were not offered for the truth of the matter asserted, but offered for the purpose of placing in evidence defendant's own statements against interest. Howard v. State, 2014 Tex. App. LEXIS 9208, 2014 WL 4100690 (Tex. App. El Paso Aug. 20 2014).

1205. Court did not err by admitting the witness's testimony over the hearsay objection, because the statement to the witness that the declarant had just hit someone tended to subject the speaker to civil and criminal liability or to make the declarant an object of hatred, ridicule or disgrace, and the essential statement-that the declarant had hit someone-was corroborated by evidence that the witness was near the accident site. Roberts v. State, 2014 Tex. App. LEXIS 4927 (Tex. App. Austin May 8 2014).

1206. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

1207. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

1208. Although defendant claimed that her post-arrest statement was admissible as a statement against interest, the trial court did not abuse its discretion in refusing to admit it. Defendant's post-arrest statement sought to downplay her involvement in the solicitation of her husband's murder and to absolve her of criminal responsibility. Gelber v. State, 2014 Tex. App. LEXIS 257, 2014 WL 98802 (Tex. App. Waco Jan. 9 2014).

1209. Facts indicated that a witness's statement to his sister was trustworthy and therefore admissible under Tex. R. Evid. 803(2), and the trial court did not abuse its discretion in admitting the testimony. Whitney v. State, 2013 Tex. App. LEXIS 15059, 2013 WL 6570059 (Tex. App. Dallas Dec. 12 2013).

1210. Where defendant pled guilty to aggravated robbery with a deadly weapon, the trial court did not err in refusing to admit his co-conspirator's out-of-court statement in which he said that he was involved in the crime but that a third co-conspirator fired the shot that struck the victim; because the statement minimized his culpability in the seriousness of the offense and shifted the major blame to his co-conspirator, it was more of a blame-shifting statement than a blame-sharing statement. Perkins v. State, 2013 Tex. App. LEXIS 14372, 2013 WL 6459390 (Tex. App. Austin Nov. 26 2013).

1211. Co-arrestee's statements to his girlfriend, later his common-law wife, regarding a large amount of methamphetamine that went undiscovered by officers during a traffic stop were non-testimonial for purposes of the Confrontation Clause and were statements against penal interest and admissible under Tex. R. Evid. 803(24).

Walker v. State, 406 S.W.3d 590, 2013 Tex. App. LEXIS 3046, 2013 WL 1154209 (Tex. App. Eastland Mar. 21 2013).

1212. In an aggravated sexual assault of a child case, the trial court erred by refusing to admit testimony that the victim had recanted her claims. The appellate court held that the testimony was admissible as a statement against interest under Tex. R. Evid. 803(24); it was by definition not excluded by the hearsay rule. Korp v. State, 2012 Tex. App. LEXIS 9832, 2012 WL 5961662 (Tex. App. Texarkana Nov. 28 2012).

1213. At defendant's trial for engaging in organized criminal activity, the trial court erred by admitting an out-of-court statement made by an accomplice witness to police after he was arrested; although the statement included direct statements against interest and blame-sharing statements that were admissible under Tex. R. Evid. 803(24), it also included numerous blame-shifting statements that were not admissible. The statement was not admissible under Tex. R. Evid. 803(5) as recorded recollection, because the witness did not testify that he had firsthand knowledge of the events contained in his statement; nor did he vouch at trial for the accuracy of his statement. Batts v. State, 2012 Tex. App. LEXIS 5163, 2012 WL 2469546 (Tex. App. Eastland June 28 2012).

1214. While selling marihuana was certainly a criminal offense, it would not be outside the zone of reasonable disagreement for the district court to conclude that the inculpatory significance of admitting to a drug offense was minor in comparison to its significance as a means of absolving defendant of the burglary offense for which he was charged; the district court did not abuse its discretion in finding defendant's statements to be more self-serving than inculpatory and thus inadmissible. Valadez v. State, 2011 Tex. App. LEXIS 8653, 2011 WL 5138641 (Tex. App. Austin Oct. 26 2011).

1215. Declarant's statements were properly admitted as statements against interest because there were sufficient corroborating circumstances that clearly indicated the trustworthiness of the statements. The declarant made the statements in response to questions from his common law wife about his involvement in the robbery, the declarant's guilt was not inconsistent with defendants, and the testimony bore significant probative force and was valuable in proving the State's case in chief. Gonzalez v. State, 2011 Tex. App. LEXIS 7084, 2011 WL 3849393 (Tex. App. San Antonio Aug. 31 2011).

1216. Defendant's statements to the police were not admissible as statements against interest pursuant to Tex. R. Evid. 803(24) because they were not truly inculpatory statements; at the time defendant admitted acting alone, defendant was attempting to downplay any notion that defendant intentionally caused the victim's death, an element of capital murder. Estrada v. State, 352 S.W.3d 762, 2011 Tex. App. LEXIS 6739 (Tex. App. San Antonio Aug. 24 2011).

1217. Appellant claimed that the victim's testimony about what appellant had told her concerning a prior offense was inadmissible, but regardless of whether the victim's testimony qualified as a statement against interest under Tex. R. Evid. 803(24), the trial court would not have abused its discretion in admitting the evidence under Tex. R. Evid. 801(e)(2)(A) as an admission by a party opponent. Reyes v. State, 2011 Tex. App. LEXIS 4811, 2011 WL 2507002 (Tex. App. Austin June 24 2011).

1218. Co-conspirator's statement to a witness that he and appellant beat the victim equally exposed both to criminal responsibility, and the trustworthiness of the statement was corroborated by other testimony, such that the statement was admissible under Tex. R. Evid. 803(24) as a statement against interest. Orona v. State, 341 S.W.3d 452, 2011 Tex. App. LEXIS 1452 (Tex. App. Fort Worth Feb. 24 2011).

1219. Where witnesses testified that a pit bull attacked defendant at the scene of an aggravated robbery, the trial court did not abuse its discretion by excluding hearsay testimony that an unidentified third party admitted that he

shot a pit bull that day; the testimony did not qualify as a statement against penal interest under Tex. R. Evid. 803(24). The purported admission was not trustworthy, and it did not exculpate defendant. Ramos v. State, 2011 Tex. App. LEXIS 247, 2011 WL 166926 (Tex. App. Houston 14th Dist. Jan. 13 2011).

1220. Trial court did not abuse its discretion by refusing to admit the victim's statement to her employer three days before the accident because her statement of "whatever" in response to termination for failing a drug test was not an admission of drug use and therefore the statement was not admissible as a statement against interest under Tex. R. Evid. 803(24). Somers v. State, 333 S.W.3d 747, 2010 Tex. App. LEXIS 9384 (Tex. App. Waco Nov. 24 2010).

1221. In an evading arrest or detention conviction under Tex. Penal Code Ann. § 38.04, a person other than defendant admitted to driving a car that first pulled over in response to an officer's overhead lights, then drove off, committed several traffic violations, and subsequently stopped a second time when the road was blocked by a second officer's cruiser; although his hearsay statement to defendant's great-grandmother sufficiently exposed him to criminal liability, his statement was not admissible as a statement against his penal interest under Tex. R. Evid. 803(24) because he had no relationship, familial or otherwise, with defendant's great-grandmother, his statement lacked spontaneity where it was purportedly made in response to a query from defendant's great-grandmother regarding his reluctance to testify at defendant's upcoming trial, and the trustworthiness of his statement was directly attacked or controverted by the two officers' testimonies. Rodriguez v. State, 2010 Tex. App. LEXIS 9105, 2010 WL 4628580 (Tex. App. Amarillo Nov. 16 2010).

1222. Witness's statement that "I just did something good" was vague in that it could not have exposed the witness to criminal liability for the victim's death or any criminal act, and that the handgun in question had been burned tended to indicate that the witness used it for the commission of some crime, but appellant did not get an adverse ruling on the issue of whether the gun had been burned, for purposes of Tex. R. App. P. 33.1(a); the exclusion of the witness's statement, for purposes of Tex. R. Evid. 803(24), did not preclude appellant from presenting his defense that it was the witness who shot the victim. Ramirez v. State, 2010 Tex. App. LEXIS 4365 (Tex. App. Houston 1st Dist. June 10 2010).

1223. In defendant's aggravated sexual assault case, the court properly excluded defendant's hearsay statements because defendant's statements were less an attempt to inculpate himself than an attempt to shift the blame to the victim for agreeing to gamble her clothes and sexual favors for money. The inculpatory significance of the statements was minor in comparison to its significance as means of absolving defendant of the crime for which he was accused; accordingly, defendant's statements did not fall under the admission against interest exception to the hearsay rule. Langford v. State, 2010 Tex. App. LEXIS 567, 2010 WL 323081 (Tex. App. Austin Jan. 27 2010).

1224. In defendant's murder case, the trial court properly admitted a witness's testimony that defendant told her he had killed someone "in front of the bar" because the statement was an admission by a party; therefore, it was not hearsay. Additionally, defendant admitted to the trial court that the statement was a statement that exposed him to criminal liability and was probably a statement against interest. Walton v. State, 2009 Tex. App. LEXIS 8046, 2009 WL 3326759 (Tex. App. Eastland Oct. 15 2009), *cert. denied*, 131 S. Ct. 512, 178 L. Ed. 2d 379, 2010 U.S. LEXIS 8559 (U.S. 2010).

1225. Detective testified that a juvenile eventually admitted to acting as a lookout for defendant during a burglary, the juvenile's statement was supported by corroborating circumstances, including witnesses who saw defendant and the juvenile walk toward the victim's house and go behind the house, plus the victim testified that a flat screen television was taken from his house and someone saw defendant in possession of such a television shortly after the burglary; given this and the fact that the juvenile was present, available to testify, granted immunity, and represented by counsel, Crawford v. Washington was not applicable and the detective's testimony was not admitted in violation of Crawford and was properly admitted under Tex. R. Evid. 803(24). Carroll v. State, 2009 Tex. App.

LEXIS 7995, 2009 WL 3319894 (Tex. App. Waco Oct. 14 2009).

1226. There were no hearsay issues presented by this case that met Tex. R. Evid. 803(24)'s corroboration requirements. Cherry v. State, 2009 Tex. App. LEXIS 7755, 2009 WL 3153276 (Tex. App. Fort Worth Oct. 1 2009).

1227. Trial court did not abuse its discretion in ruling that defendant's girlfriend's hearsay testimony inadmissible under Tex. R. Evid. 803(24), given that (1) defendant did not demonstrate that the declarant's guilt was inconsistent with his guilt, (2) it was unclear from the declarant's statement to the girlfriend whether he was admitting to being the shooter, (3) although there was some evidence that supported a finding that the declarant's guilt was inconsistent with defendant's, there was evidence that the declarant subsequently recanted his admission and witnesses placed the declarant elsewhere at the time of the shooting, (4) the trial court could have questioned the declaration's spontaneity, (5) the relationship between the declarant and the girlfriend allowed conflicting inferences as to the trustworthiness of the statement, (6) the trial court was entitled to rely on the possibility that the declarant had a motive to lie in finding his statement untrustworthy, and (7) a witness's identification of defendant undermined the statement's reliability. Harrell v. State, 2009 Tex. App. LEXIS 7052, 2009 WL 5818564 (Tex. App. Houston 14th Dist. Sept. 1 2009).

1228. Defendant waived an argument regarding his right to present a defense because he had not first presented it to the trial court, for purposes of Tex. R. App. P. 33.1(a), but in any event the argument was without merit because neither Tex. R. Evid. 803(24) nor a case law standard used to determine the admissibility of statements offered under the rule fell into the category of rules proscribed in other case law. Harrell v. State, 2009 Tex. App. LEXIS 7052, 2009 WL 5818564 (Tex. App. Houston 14th Dist. Sept. 1 2009).

1229. Even if the court assumed the trial court erred in excluding defendant's girlfriend's testimony under Tex. R. Evid. 803(24), the error was harmless; despite the exclusion of the testimony, the defense was left with substantial corroborating evidence lending credibility to defendant's theory that the declarant was the shooter, plus the murder verdict was supported by evidence that defendant coerced the declarant into making his affidavit, defendant left his motel room shortly before the murder and returned shortly afterwards, his gun fired the bullet that killed the victim, and a witness identified defendant as the man leaving his yard just after the murder. Harrell v. State, 2009 Tex. App. LEXIS 7052, 2009 WL 5818564 (Tex. App. Houston 14th Dist. Sept. 1 2009).

1230. Error in excluding defendant's girlfriend's testimony under Tex. R. Evid. 803(24) would be non-constitutional in nature as it involved neither a state evidentiary rule that categorically and arbitrarily prohibiting defendant from offering relevant evidence vital to his defense nor the erroneous exclusion of vital, relevant evidence that effectively precluded defendant from presenting a defense. Harrell v. State, 2009 Tex. App. LEXIS 7052, 2009 WL 5818564 (Tex. App. Houston 14th Dist. Sept. 1 2009).

1231. For purposes of Tex. R. Evid. 803(24), the bulk of one witness's testimony was admissible as it recounted co-defendant's statements against his own penal interest; the inadmissible portions of the testimony concerned certain blame-shifting statements, those in which co-defendant attempted to portray defendant as the more culpable party. Walter v. State, 293 S.W.3d 886, 2009 Tex. App. LEXIS 6218 (Tex. App. Texarkana Aug. 11 2009).

1232. Inadmissible evidence under Tex. R. Evid. 803(24), that of three victims unsuccessfully begging for their lives, was not an easy one to forget and could suggest harm, but there was also a wealth of other emotionally charged evidence, including the tearful testimony of one widow and photographs depicting one young, pregnant victim cowering near a wall trying to seek refuge behind a desk, the probable impact of which the court could consider in determining whether the admission of the inadmissible testimony was harmful under Tex. R. App. P. 44.2(b); the emotional impact of the improperly admitted testimony was diminished to a degree when placed in the context of a trial filled with other highly emotionally charged evidence, and the harm from the probative value was

diminished by the probative value of the other, properly admitted, evidence of guilt. Walter v. State, 293 S.W.3d 886, 2009 Tex. App. LEXIS 6218 (Tex. App. Texarkana Aug. 11 2009).

1233. Although the State specifically referenced the three victims pleading for their lives, which was the subject of inadmissible testimony under Tex. R. Evid. 803(24), which would itself lend to a finding of harm under Tex. R. App. P. 44.2(b), it was important to place the erroneously admitted evidence in the context of other evidence presented at trial; the record provided the court with evidence that corroborated the testimony and defendant's role as the shooter and provided evidence that defendant participated in the robbery during which three victims were killed, and the law of parties under Tex. Penal Code Ann. § 7.02(b) would apply to make defendant liable for capital murder, no matter his specific role in the act; given that the record revealed much other evidence to support defendant's role as the shooter, including his own inculpatory statements, the court found that the error in admitting the inadmissible testimony did not have a substantial and injurious effect or influence in determining the jury's verdict. Walter v. State, 293 S.W.3d 886, 2009 Tex. App. LEXIS 6218 (Tex. App. Texarkana Aug. 11 2009).

1234. In defendant's robbery case, the court properly allowed testimony because the statement "It just didn't go as planned," inferentially tended to show that the coconspirator committed or attempted to commit the offense that was the subject of the conspiracy, i.e., to obtain some money, in Pampa, by some method. Davey Enriquez v. State, 2009 Tex. App. LEXIS 5183 (Tex. App. Amarillo July 7 2009).

1235. In an off-duty police officer's deadly conduct case the court did not err in excluding testimony about statements the complainant made on the night of the incident because the statements were not statements against the complainant's interest. There was no evidence that the complainant was himself evading a police officer, because it was another person who was driving at the time. Kacz v. State, 287 S.W.3d 497, 2009 Tex. App. LEXIS 4966 (Tex. App. Houston 14th Dist. June 23 2009).

1236. Burden to produce evidence that clearly indicated trustworthiness, for purposes of Tex. R. Evid. 803(24), was on the State, who sought to admit the statement. Chaney v. State, 2009 Tex. App. LEXIS 2799 (Tex. App. Houston 1st Dist. Apr. 23 2009).

1237. Declarant's statements to a witness tended to expose the declarant to criminal liability because he solicited the witness to commit a crime, for purposes of Tex. Penal Code Ann. § 15.03(a), and the trustworthiness of the statements was corroborated by other testimony; because the statements were admissible under Tex. R. Evid. 803(24), the trial court did not err in admitting the witness's testimony. Chaney v. State, 2009 Tex. App. LEXIS 2799 (Tex. App. Houston 1st Dist. Apr. 23 2009).

1238. For purposes of Tex. R. Evid. 803(24), the court did not apply the first two factors because the statement was not one by which defendant sought to escape culpability, but one on which the State relied. Chaney v. State, 2009 Tex. App. LEXIS 2799 (Tex. App. Houston 1st Dist. Apr. 23 2009).

1239. Declarant spontaneously made statements to his wife on the day of the murder and the timing, spontaneity, and relationship between the declarant and the party to whom the statement was made tended to establish the reliability of the statements, plus the State presented evidence of independent corroborative facts verifying the reliability of the declarant's statements, such that the trial court did not abuse its discretion in admitting the wife's testimony under Tex. R. Evid. 803(24). Chaney v. State, 2009 Tex. App. LEXIS 2799 (Tex. App. Houston 1st Dist. Apr. 23 2009).

1240. Defendant lodged a proper and timely hearsay objection to a witness's testimony concerning a person's statement to him, for purposes of Tex. R. Evid. 802, and an analysis of the witness's testimony revealed that it contained two levels of hearsay, for analysis purposes under Tex. R. Evid. 805, with the first layer of hearsay

concerning what defendant told the person about his involvement in the crime, which constituted a statement against penal interest under Tex. R. Evid. 803(24); because the second layer of hearsay, the person's statement that defendant admitted involvement in the crimes, would not subject the person to prosecution and did not satisfy Rule 803(24), the admission of the double hearsay was an abuse of discretion. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

1241. Secret Service agent's testimony concerned what defendant told investigators was said by defendant, and this testimony was clearly hearsay within hearsay under Tex. R. Evid. 805, and the second layer of hearsay was not excluded from the hearsay rule by any exception, such as Tex. R. Evid. 803(24), because any statement by the witness about defendant's involvement in the crimes would not implicate the witness; defendant did not renew the hearsay objection he previously raised to another witness's substantially similar testimony, and because the substantively equivalent testimony to which he earlier objected was later admitted without objection, defendant did not preserve this issue for appellate review. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

1242. In defendant's capital murder case, the court properly excluded evidence that defendant's accomplice stated that the shooting was an accident because a witness testified that the accomplice boasted to him that he "shot that fool" and that the victim got what he deserved. That testimony directly contradicted the theory that the shooting was an accident; the timing of the statement combined with contradictory testimony was not sufficiently convincing to clearly indicate its trustworthiness. Gonzalez v. State, 296 S.W.3d 620, 2009 Tex. App. LEXIS 1144 (Tex. App. El Paso Feb. 19 2009).

1243. Court properly admitted evidence as a statement against interest because defendant's question to the witness -- "how she would feel towards him if the police said that he had killed the two ladies" -- was self-inculpatory, and the circumstances of the relationship between defendant and the witness tended to corroborate the trustworthiness of the statement. Juarez v. State, 2009 Tex. App. LEXIS 77, 2009 WL 41648 (Tex. App. Houston 1st Dist. Jan. 8 2009).

1244. Defendant's conviction for arson of a habitation was appropriate because, applying the Woods factors to the victims' daughter's former boyfriend's unsworn statements in the presence of the prosecutor and investigator, defendant failed to show the boyfriend's statements were trustworthy, Tex. R. Evid. 803(24). Additionally, another of the boyfriend's former girlfriend's sworn statement to the investigator noted that the boyfriend bragged to her about how he and defendant set fire to the home. Charles v. State, 2008 Tex. App. LEXIS 9368 (Tex. App. Houston 14th Dist. Dec. 18 2008).

1245. Accomplice's statement was properly admitted because the reliability of the statements to the officer was established through confirmation that the accomplice's backpack was in the trunk of defendant's car and that another participant was nearby in a stolen truck similar to the one the accomplice was driving. Johnson v. State, 2008 Tex. App. LEXIS 9455 (Tex. App. Beaumont Dec. 17 2008).

1246. In defendant's motion for a new trial, the court properly excluded four letters written by a witness who testified at trial because the letters did not tend to expose the witness to criminal liability, and even if they did, there was no corroborating evidence to clearly indicate the trustworthiness of the statement. In both letters, the witness expresses his anger at defendant, but the witness did not say, however, that he lied when he testified for the State. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

1247. In reviewing the trustworthiness of a statement against interest to determine its admissibility under Tex. R. Evid. 803(24), court should consider a number of factors, including: (1) whether the guilt of the declarant is inconsistent with the guilt of the defendant, (2) whether the declarant was so situated that he or she might have

committed the crime, (3) the timing of the declaration, (4) the spontaneity of the declaration, (5) the relationship between the declarant and the party to whom the statement was made, and (6) the existence of independent corroborating facts. Tong v. State, 2008 Tex. App. LEXIS 5025 (Tex. App. Houston 1st Dist. July 3 2008).

1248. The first inquiry in determining admissibility under Tex. R. Evid. 803(24) is whether the statement tended to expose the declarant to criminal liability; the second inquiry is whether or not corroborating circumstances clearly indicated the trustworthiness of the statement. Tong v. State, 2008 Tex. App. LEXIS 5025 (Tex. App. Houston 1st Dist. July 3 2008).

1249. Juror's testimony was admissible under the statement against interest hearsay exception, under Tex. R. Evid. 803, because (1) during voir dire, the challenged juror indicated that he knew both parties and their children and that the father had been his high school basketball coach, but, the juror denied that this would give him a bias in the case or that he would show favoritism toward the father; (2) the representations during voir dire were fundamentally inconsistent with the juror's alleged posttrial admission that he had decided how to vote before the start of trial and his alleged statement that he did not want to let his coach down; and (3) the discrepancies would have potentially subjected the juror to a perjury charge. Clark v. Clark, 2008 Tex. App. LEXIS 3198 (Tex. App. Eastland May 1 2008).

1250. Finding against the appellant property owner in an action concerning access to land was appropriate, in part, because a statement that appellant referred to the disputed road as "your road" was admissible as a declaration against pecuniary interest under Tex. R. Evid. 803; not being offered to prove the truth of the matter stated, but simply that the statement was made, the appellee property owner's testimony was not hearsay. Allen v. Allen, 2008 Tex. App. LEXIS 2687 (Tex. App. Amarillo Apr. 15 2008).

1251. Witness's availability should not have been considered as a material factor in determining the admissibility of the witness's recorded statement, for purposes of Tex. R. Evid. 803. Watkins v. State, 2008 Tex. App. LEXIS 2539 (Tex. App. Beaumont Apr. 9 2008).

1252. Witness acknowledged in a recorded statement that he committed the theft, that he did not have the owner's authority to use the vehicle, and that he misled defendant in that regard, and thus the witness's statement exposed him to criminal liability, for analysis purposes under Tex. R. Evid. 803; the trial court could properly consider the witness's changing versions in finding whether his version of events in the recorded statement was credible, but the court ultimately found the evidence credible, given that (1) the witness was in a position to commit the crimes with which defendant had been tried, including theft and unauthorized use of a motor vehicle, (2) the witness's admissions were made at a time when they were relevant to then-existing charges, and (3) independent corroborative facts supported the credibility of the account, such that defendant met the burden of corroborating the witness's statement against interest and the corroborating circumstances indicated the trustworthiness of the statement. Watkins v. State, 2008 Tex. App. LEXIS 2539 (Tex. App. Beaumont Apr. 9 2008).

1253. Exclusion of a witness's testimony under Tex. R. Evid. 803 was not harmless under Tex. R. App. P. 44 because, for purposes of the offense of unauthorized use of a motor vehicle under Tex. Penal Code Ann. § 31.07, the witness's statement was relevant to the issue of defendant's state of mind and it was an issue on which the State had the burden of proof; because the witness's statement would have given credibility to defendant's otherwise self-serving testimony that he was misled by the witness about the source of the witness's permission to use the truck, the trial court's exclusion of the witness's statement was prejudicial, which necessitated reversal of defendant's conviction. Watkins v. State, 2008 Tex. App. LEXIS 2539 (Tex. App. Beaumont Apr. 9 2008).

1254. Challenged juror's proffered testimony fell within the statement against interest hearsay exception, under Tex. R. Evid. 803, because (1) during voir dire, the juror indicated that he knew both parties and their children and

that the father had been his high school basketball coach, but he denied that this would give him a bias in the case or that he would show favoritism toward the father; (2) these representations were fundamentally inconsistent with the juror's alleged posttrial admission that he had decided how to vote before the start of trial and his alleged statement that he did not want to let his coach down; and (3) these discrepancies would have potentially subjected the juror to a perjury charge, under Tex. Penal Code Ann. § 37.02. Clark v. Clark, 2008 Tex. App. LEXIS 2010 (Tex. App. Eastland Mar. 20 2008).

1255. Defendant failed to argue to the trial court on which of the categories of Tex. R. Evid. 803 that he relied on, plus he failed to argue any corroborating circumstances to the trial court; the mere declaration that testimony was a statement against interest did not satisfy the requirement that corroborating circumstances had to show trustworthiness and the court did not find any abuse of discretion in the trial court's exclusion of the evidence. Guerrero v. State, 2008 Tex. App. LEXIS 1837 (Tex. App. Corpus Christi Mar. 13 2008).

1256. In defendant's murder case, the court properly excluded testimony of a witness regarding what the victim told the witness about altercations between the victim and defendant because the testimony concerning what the victim said to the witness at least two days after the event in question was not a present sense impression, there was no evidence in the record that the victim was "in the instant grip of violent emotion, excitement or pain" immediately before or during his recounting of the events, and the victim's statements were not self-inculpatory. Eisenman v. State, 2008 Tex. App. LEXIS 282 (Tex. App. Corpus Christi Jan. 10 2008).

1257. Defendant's murder conviction was proper pursuant to Tex. R. Evid. 803 because his own recorded statements against interest offered in a criminal case were not hearsay. Capps v. State, 244 S.W.3d 520, 2007 Tex. App. LEXIS 9602 (Tex. App. Fort Worth 2007).

1258. In a trial for defendant's murder of his stepson, a statement by the mother that she hated kids was not a statement against interest under Tex. R. Evid. 803 because at the time she was nine months pregnant and could have claimed to hate children out of frustration and not because she actually harbored hate. Lewis v. State, 2007 Tex. App. LEXIS 9519 (Tex. App. Waco Dec. 5 2007).

1259. At an aggravated robbery trial, the court did not abuse its discretion in excluding defendant's statements to a police officer because the statements, although admitting that defendant was trying to steal a van, sought to shift blame for a shooting to an accomplice and thus were not statements against penal interest under Tex. R. Evid. 803. Lynn v. State, 2007 Tex. App. LEXIS 9095 (Tex. App. Houston 1st Dist. Nov. 15 2007).

1260. In a murder trial, there was no error in allowing into evidence recorded admissions that defendant made in phone calls from jail; a defendant's recorded statements against interest offered in a criminal case were not hearsay under Tex. R. Evid. 803. Capps v. State, 244 S.W.3d 520, 2007 Tex. App. LEXIS 9602 (Tex. App. Fort Worth 2007), (Tex. App. -- Fort Worth, pet. ref'd).

1261. In a drug case, a conversation between a constable and a caller on defendant's phone was properly admitted under Tex. R. Evid. 803(24); the conversation concerning drugs exposed the declarant to criminal liability because it showed that she was either a buyer or seller of drugs. Also, the required corroboration came from expert testimony that the amount of cocaine found on defendant was indicative of a seller, rather than a buyer. Allen v. State, 236 S.W.3d 818, 2007 Tex. App. LEXIS 6749 (Tex. App. Waco 2007).

1262. For purposes of Tex. R. Evid. 103, defendant waited until after the jury had decided guilt and punishment before making a bill of exception regarding the exclusion of evidence that defendant claimed on appeal was admissible under an exception to the hearsay rule under Tex. R. Evid. 803; defendant never argued this claim to the trial court and thus defendant failed to preserve this issue for review. Chapman v. State, 2007 Tex. App. LEXIS

3184 (Tex. App. Waco Apr. 25 2007).

1263. Sufficient corroborating circumstances allowed the trial court to reasonably determine that a declarant's statements, that both he and defendant participated in a shooting, were trustworthy and therefore admissible as statements against interest under Tex. R. Evid. 803; those circumstances included that the declarant made the statements a day or two after the offense and before police had developed any leads and that he made the statements spontaneously in the course of simple conversation while he and the testifying witness "hung out" at defendant's apartment. Gongora v. State, 214 S.W.3d 58, 2006 Tex. App. LEXIS 9789 (Tex. App. Fort Worth 2006).

1264. In defendant's criminal street gang case, evidence of an interview with the gang's leader was properly admitted because, even if the interview's importance lay in the truth of the matters asserted therein, the hearsay rule excepted statements against interest, and the interview contained "socially unacceptable language throughout." Chaddock v. State, 203 S.W.3d 916, 2006 Tex. App. LEXIS 8861 (Tex. App. Dallas 2006).

1265. There was no error in the exclusion of a murder defendant's statement to a witness in which he conceded concealing the body but denied committing the murder; the statement did not qualify as a statement against penal interest under Tex. R. Evid. 803 because it absolved him of the greater offense of murder. Johnson v. State, 2006 Tex. App. LEXIS 5214 (Tex. App. Dallas June 19 2006).

1266. Murder defendant failed to preserve error under Tex. R. Evid. 803 regarding the exclusion of evidence that a third party had a murder plan because defendant failed to sponsor the evidence on that ground. Johnson v. State, 2006 Tex. App. LEXIS 5214 (Tex. App. Dallas June 19 2006).

1267. In a capital murder trial, there was no error in the admission of a witness's testimony that an accomplice confessed to her; the statement was a statement against penal interest under Tex. R. Evid. 803and did not violate the Confrontation Clause because it was a casual remark to an acquaintance. Springsteen v. State, 2006 Tex. Crim. App. LEXIS 2340 (Tex. Crim. App. May 24 2006).

1268. Where defendant and his codefendant illegally entered a home and shot and killed two victims, defendant was charged with capital murder; at trial, a witness was permitted to give hearsay testimony about statements in which the co-defendant implicated himself and defendant in the murders. The testimony was admitted as statements against penal interest Tex. R. Evid. 803(24); the co-defendant's statements about the crime suggested trustworthiness, because the details could not have been learned from a newspaper or other outside source. Robles v. State, 2006 Tex. Crim. App. LEXIS 2533 (Tex. Crim. App. Apr. 26 2006).

1269. In a trial for evading arrest with a vehicle, a hearsay statement by the car's owner, identifying defendant as the driver, was properly admitted as a declaration against interest under Tex. R. Evid. 803 because it was related to a statement that she had lied to police about the issue and thus inculpated her for making a false report to police under Tex. Penal Code Ann. § 42.06(a)(1). Clay v. State, 2006 Tex. App. LEXIS 1808 (Tex. App. Tyler Mar. 8 2006).

1270. Trial court did not abuse its discretion by excluding a videotape in a capital murder trial because the understandable portions contained only statements not falling under any recognized exception to the hearsay rule; admitting presence at the scene was not necessarily against an accomplice's penal interest under Tex. R. Evid. 803(24), as mere presence at the scene of the offense, by itself, is insufficient to support criminal responsibility as a party. Frank v. State, 183 S.W.3d 63, 2005 Tex. App. LEXIS 10647 (Tex. App. Fort Worth 2005).

1271. Trial court did not err in excluding testimony of a witness that the victim encouraged friends to "get their stories straight"; the court found that the statement did not subject the victim to criminal liability for perjury under Tex. Penal Code Ann. § 37.02(a)(1), given that the statement was not made under oath, and thus Tex. R. Evid. 803(24) was not applicable. Kennedy v. State, 184 S.W.3d 309, 2005 Tex. App. LEXIS 10126 (Tex. App. Texarkana 2005).

1272. Court found no authority that would permit consideration of previously excluded testimony as qualifying corroborating circumstances under Tex. R. Evid. 803(24). Kennedy v. State, 184 S.W.3d 309, 2005 Tex. App. LEXIS 10126 (Tex. App. Texarkana 2005).

1273. Although the court acknowledged that it was to liberally construe an appellant's point of error to cover subsidiary questions that were fairly included, for purposes of Tex. R. App. P. 38.1(e), the court noted that the only reference in defendant's brief to any other aspects of Tex. R. Evid. 803(24) appeared in defendant's quote of the rule in its entirety, and defendant failed to cite any authority analyzing other aspects of the rule, such that the court limited its holding to the portion of the rule addressing the testimony in question as a statement against penal interest. Kennedy v. State, 184 S.W.3d 309, 2005 Tex. App. LEXIS 10126 (Tex. App. Texarkana 2005).

1274. In a drug case, the trial court did not err in refusing to allow defendant's girlfriend to testify that another person had stated that the contraband belonged to him; the proffered evidence was not relevant, under Tex. R. Evid. 402, to whether defendant possessed a controlled substance with intent to deliver it, in violation of Tex. Health & Safety Code Ann. § 481.112(a), and defendant offered no independent facts corroborating the hearsay statement under Tex. R. Evid. 803(24). Menton v. State, 2005 Tex. App. LEXIS 7799 (Tex. App. Amarillo Sept. 22 2005).

1275. In an individual's written statement, he stated that one of the reasons he gave the gun to defendant's wife was that he could not legally own a gun at the time; however, there was nothing in the record to suggest that the individual actually subjected himself to any criminal liability by making the statement or that he believed he would subject himself to criminal liability. Thus, the individual's hearsay statement was not admissible under the statement against penal interest exception to the hearsay rule, Tex. R. Evid. 803(24). Holland v. State, 2005 Tex. App. LEXIS 7230 (Tex. App. Fort Worth Aug. 31 2005).

1276. In a drug case, a court did not err by excluding an audiotape statement of a witness purportedly showing that he confessed to having exclusive possession of the cocaine because the witness's guilt was not inconsistent with defendant's because possession was not mutually exclusive, and the statement was given after being arrested and in the context of interrogation, at a time when motivation to curry favor with law enforcement existed. Minor v. State, 2005 Tex. App. LEXIS 5470 (Tex. App. Houston 1st Dist. July 14 2005).

1277. In a murder case, testimony regarding statements made by defendant's accomplice satisfied the statement against interest exception to the hearsay rule under Tex. R. Evid. 803(24) because there was independent corroborative evidence, which included autopsy evidence, testimony from other witnesses, and defendant's own statements. Williams v. State, 2005 Tex. App. LEXIS 5351 (Tex. App. Houston 14th Dist. July 12 2005).

1278. Testimony was properly admitted as a statement against interest under Tex. R. Evid. 803(24) where the witness testified that one of the persons involved in a capital murder case told him that he got guns by "pulling a lick" and they "went inside, took care of business" giving the witness the impression that the declarant had stolen the guns because the declarant was exposed to potention criminal liability and the witness's guilt for his role in storing the stolen property was not inconsistent with the declarant's role in the robbery and murder. Pena v. State, 2005 Tex. App. LEXIS 5110 (Tex. App. Houston 1st Dist. June 30 2005).

1279. In a trial for conspiracy to commit murder, a witness was properly allowed to testify regarding a conversation that she had with a gang member about defendant's order to shoot an ex-member. The statement of the planned shooter was a statement against interest under Tex. R. Evid. 803(24) because, although reluctant, he was taking steps to carry out his orders; therefore, his statement tended to expose him to criminal charges for conspiracy to commit murder at a minimum. Maynard v. State, 166 S.W.3d 403, 2005 Tex. App. LEXIS 4003 (Tex. App. Austin 2005).

1280. Under Tex. R. App. P. 33.1(a), defendant failed to preserve his Tex. R. Evid. 803(24) complaint for review where he objected to a witness's testimony regarding statements made by defendant's alleged accomplice on relevance grounds but did not object on hearsay grounds. Coleman v. State, 2005 Tex. App. LEXIS 2855 (Tex. App. Houston 14th Dist. Apr. 14 2005).

1281. In a murder case, because the trial court did not rule on whether statements as to which a witness had asserted the self-incrimination privilege were incriminating, they were not admissible under Tex. R. Evid. 803(24) through an investigator's testimony as statements against interest. Boler v. State, 177 S.W.3d 366, 2005 Tex. App. LEXIS 2719 (Tex. App. Houston 1st Dist. 2005).

1282. Court erred in excluding inculpatory hearsay statements made by a possible perpetrator of a murder for which defendant was convicted where the corroborating evidence, even in light of evidence tending to undermine the trustworthiness of the possible perpetrator's statements, was sufficiently convincing to indicate trustworthiness. The statements, if believed, could have created a reasonable doubt as to defendant's guilt. Eby v. State, 165 S.W.3d 723, 2005 Tex. App. LEXIS 2580 (Tex. App. San Antonio 2005).

1283. Court did not err by excluding the testimony of a witness concerning statements made to her by another person concerning the disappearance of the victim where the witness could not say whether the statements were made before the victim's body was found. If the statements were made after the body was found, then the declarant could have gotten his information from the media coverage of the event and that was not indicative of the statement being against his penal interest. Bednarek v. State, 2005 Tex. App. LEXIS 2221 (Tex. App. Dallas Mar. 24 2005).

1284. Testimony of two witnesses about two other persons' statements was admissible under Tex. R. Evid. 803(24) because (1) the persons could have been liable for a crime, and (2) the persons' statements were corroborated by evidence admitted at trial. Lafitte v. State, 2005 Tex. App. LEXIS 1790 (Tex. App. Austin Mar. 10 2005).

1285. Trial court did not err in excluding hearsay testimony in defendant's theft trial under Tex. Penal Code Ann. § 31.03(a); defendant failed to show that a statement was against penal interest within the meaning of Tex. R. Evid. 803(24), and no evidence corroborated the trustworthiness of the witness's purported statements. Biagas v. State, 177 S.W.3d 161, 2005 Tex. App. LEXIS 947 (Tex. App. Houston 1st Dist. 2005).

1286. Admission of a co-offender's out-of-court statements at defendant's capital murder trial, which were allowed on the ground that they were against the co-offender's penal interest pursuant to Tex. R. Evid. 803(24), did not violate the Sixth Amendment because the co-offender's statements describing his involvement in the murder were not made at a preliminary hearing, before a grand jury, at a former trial, or as the product of police interrogation, but, instead, were made to friends and fellow gang members at an informal gathering. Thus, the statements were not the product of an ex parte examination or testimonial hearsay. Beltran v. State, 2005 Tex. App. LEXIS 555 (Tex. App. Austin Jan. 27 2005).

1287. Defense counsel's failure to lodge a Confrontation Clause objection to a co-offender's out-of-court statements at the time defendant was tried was not outside the broad range of reasonable professional assistance

because, at the time defendant was tried, the admission of hearsay did not violate the Confrontation Clause if the statement fell within a firmly rooted hearsay objection or if the statement contained such particularized guarantees of trustworthiness that adversarial testing would be expected to add little to its reliability. Defense counsel's hearsay objection had been overruled on the ground that the co-offender's statements were against his penal interest under Tex. R. Evid. 803(24). Beltran v. State, 2005 Tex. App. LEXIS 555 (Tex. App. Austin Jan. 27 2005).

1288. Capital murder conviction and death penalty were affirmed where trial court: improperly limited defendant's voir dire of a witness when he was seeking to discover her views on whether she could fairly consider the mitigation special issue, but it did not have a substantial or injurious effect or influence in determining the jury's verdict, as defense counsel was able to ask the same question; did not abuse its discretion in preventing defendant from cross-examining a State's witness about his prison sentence and prospects for parole, as defendant's offer of proof did not establish a nexus between the witness's testimony and prison sentence; did not err in admitting the testimony of two witnesses about statements made to them by a co-defendant, under the "statement against interest" exception to the hearsay rule (Tex. R. Evid. 803(24)), as there were sufficient corroborating circumstances to indicate the trustworthiness of the co-defendant's statements; did not abuse its discretion by including paragraph 3 of the Geesa instruction in the jury charge at the guilt or innocence phase of the trial; and the Texas death-penalty statute was not unconstitutional. Woods v. State, 152 S.W.3d 105, 2004 Tex. Crim. App. LEXIS 2146 (Tex. Crim. App. 2004), writ of certiorari denied by 544 U.S. 1050, 125 S. Ct. 2295, 161 L. Ed. 2d 1092, 2005 U.S. LEXIS 4223, 73 U.S.L.W. 3685 (2005).

1289. In a murder trial, testimony was properly admitted by two witnesses regarding hearsay statements by friends of defendant concerning their plans to commit a robbery with him. The hearsay statements were against penal interest, even if they would not, at the time they were made, have subjected the declarants to liability for capital murder, because the declarants could have been liable for criminal conspiracy. Lafitte v. State, 2004 Tex. App. LEXIS 10247 (Tex. App. Austin Nov. 18 2004), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 1790 (Tex. App. Austin Mar. 10, 2005).

1290. Trial court properly excluded defendant's brother's testimony regarding the accomplice's admission to having killed the employees during the robbery because although it was admissible as a statement against interest under Tex. R. Evid. 803(24), defendant failed to offer any corroborating circumstances as required under Rule 803(24). Cooper v. State, 2004 Tex. App. LEXIS 9565 (Tex. App. Houston 1st Dist. Oct. 28 2004).

1291. Defendant's incriminating statements before and after a murder could have been admissible as statements against interest under Tex. R. Evid. 803(24); therefore, defendant's trial counsel was not ineffective for failing to object to the evidence, and his murder and aggravated assault convictions were upheld. Mendez v. State, 2004 Tex. App. LEXIS 7998 (Tex. App. Corpus Christi Aug. 31 2004).

1292. In a motor vehicle theft case, a court properly admitted an accomplice's statement as a statement against interest where he was an employee of the car rental agency, he admitted that he knew defendant and had made arrangements with him to exchange the vehicles, and the accomplice's position as an employee of the car rental agency put him in a position to commit the crime and conceal it. The evidence presented sufficient corroborating circumstances to clearly indicate the trustworthiness of the statement. Roy v. State, 161 S.W.3d 30, 2004 Tex. App. LEXIS 6712 (Tex. App. Houston 14th Dist. 2004).

1293. In a criminal trial, where defendant claimed that the trial court erred in excluding a handwritten note allegedly written by an assistant district attorney, defendant failed to preserve his argument that the note was admissible as a statement against interest where defendant did not offer the note as evidence at trial. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

1294. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court did not err in refusing to admit the complainant's handwritten statement as impeachment evidence since defendant claimed the document was admissible because it contained statements against interest; however, he did not make this complaint at trial, so the appellate court would not consider it on review. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

1295. In defendant's aggravated robbery case, a witness's statement was properly admitted where it was sufficiently self-inculpatory to be reliable, and the statement was trustworthy because the declarant's guilt was not inconsistent with defendant's guilt. The evidence at trial indicated that two men committed the robbery, one who was the driver of a pick-up truck matching the description of defendant's truck, and defendant admitted being at the scene of the second robbery when he said in his statement that he stopped and the declarant got out of the truck with what appeared to be a shotgun. Davila v. State, 2004 Tex. App. LEXIS 4781 (Tex. App. Dallas May 27 2004).

1296. Defendant's mother's statement did not satisfy the Bingham test for a statement against interest under Tex. R. Evid. 803(24), as the redacted statement ultimately used by the trial court did not expose her to any liability for the crime in question; the statement was not sufficiently against the mother's own penal interests so as to overcome Confrontation Clause concerns about the reliability of hearsay statements. In re U. G., 128 S.W.3d 797, 2004 Tex. App. LEXIS 1854 (Tex. App. Corpus Christi 2004).

1297. In a case where defendant's cousin assisted him in the crime of aggravated robbery, the hearsay statement of the cousin confessing to the crime was admissible at defendant's trial as a statement against penal interest under Tex. R. Evid. 803(24). Lopez v. State, 2003 Tex. App. LEXIS 1962 (Tex. App. Dallas Mar. 6 2003).

1298. Where defendant was a passenger in a vehicle she had rented when it was pulled over by a sheriff's deputy, a consensual search led to the seizure of illegal drugs and the arrest of defendant and the driver, defendant was charged with unlawful possession, which required proof of intentional or knowing possession of the drugs, defendant consistently denied knowledge of the drugs, and the State relied upon circumstantial evidence to establish knowledge where the driver's statement to law enforcement, in which she claimed responsibility for the situation and asserted that she "used" defendant to obtain the rental vehicle and that defendant knew nothing about the drugs, was a statement against penal interest supported by corroborating evidence indicating its trustworthiness, and should have been admitted under Tex. R. Evid. 803(24). James v. State, 102 S.W.3d 162, 2003 Tex. App. LEXIS 181 (Tex. App. Fort Worth 2003).

1299. Witness told the jury that a man told the witness that appellant was trying to get the man to say that he committed the crime, and this was clearly hearsay; the witness did not relay that part of the man's admission that was inculpatory of the man, that he killed one victim, and thus the trial court abused its discretion in admitting the statement pursuant to Tex. R. Evid. 803(24). Boyd v. State, 2001 Tex. App. LEXIS 8661 (Tex. App. Tyler Aug. 22 2001).

1300. In considering a Confrontation Clause analysis, error in admitting a hearsay statement under Tex. R. Evid. 803(24) was harmless under Tex. R. App. P. 44.2(a); the witness did not say that a man claimed that appellant killed two victims, the witness's testimony about the man's statement was not emphasized, and in light of other testimony and evidence of appellant's guilt of capital murder, the error was harmless. Boyd v. State, 2001 Tex. App. LEXIS 8661 (Tex. App. Tyler Aug. 22 2001).

1301. In defendant's trial for murder, the testimony of two witnesses about the statements defendant's accomplice made to the witnesses were admissible under Tex. R. Evid. 803(24), where the accomplice told the witnesses that the accomplice helped plan and carry out a kidnapping and murder, where the statements were made before either

the accomplice or defendant were even suspected of the murder, and where the statements were trustworthy and reliable because they tended to subject the accomplice to criminal liability. Graham v. State, 3 S.W.3d 272, 1999 Tex. App. LEXIS 7796 (Tex. App. Fort Worth 1999).

1302. The record revealed that the trial court admitted a brother's statements to three different acquaintances about the crime evidence as declarations against interest under Tex. R. Evid. 803 (24), not as co-conspirator statements; the State was careful to elicit accounts only of statements made by the brother referring to "we," which included both him and defendant; the State developed independent corroborative facts, which verified the statements made by the brother; and there was evidence, which demonstrated that the statements were trustworthy under Rule 803(24). Dewberry v. State, 4 S.W.3d 735, 1999 Tex. Crim. App. LEXIS 115 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1131, 120 S. Ct. 2008, 146 L. Ed. 2d 958, 2000 U.S. LEXIS 3459 (2000).

1303. Testimony of a witness who would have testified that while he was in prison with defendant and another individual, the other individual admitted to stealing the vehicle that defendant was charged with driving was not admissible under Tex. R. Evid. 803(24) as an exception to the hearsay rule because defendant presented no corroborating evidence of the statement's trustworthiness; thus, the testimony did not fall within the Rule 803(24) exception. O'Brien v. State, 1996 Tex. App. LEXIS 5471 (Tex. App. Houston 14th Dist. Dec. 12 1996).

Evidence : Hearsay : Exceptions : Statements of Child Abuse

1304. At defendant's trial for three counts of aggravated sexual assault of a child, the nurse who examined the victim after she made her outcry was permitted to testify about the victim's responses when asked why she was going to have the exam; it could be inferred that the victim knew it was important to tell the truth and that asking about the assaults was important to the child's medical diagnosis or treatment. Thomas v. State, 2013 Tex. App. LEXIS 10661 (Tex. App. Austin Aug. 23 2013).

1305. At defendant's trial for multiple counts of injury to a child and aggravated sexual assault of a child, the State was permitted to present the testimony of a professional counselor under this rule indicating that the victim made an outcry to his foster mother before he discussed it with the counselor. Stewart v. State, 2013 Tex. App. LEXIS 8614 (Tex. App. Corpus Christi July 11 2013).

1306. Child abuse victim's statement to his doctor that he was being examined because his "dad did something bad" to him was admissible under Tex. R. Evid. 803(4) as a statement made for the purpose of medical diagnosis or treatment; treatment for sexual abuse included identifying and removing the abuser. Weeks v. State, 2009 Tex. App. LEXIS 3278, 2009 WL 1325461 (Tex. App. Houston 14th Dist. May 14 2009).

1307. Trial court did not abuse its discretion by admitting a nurse's interpretation of the child victim's gesture as a statement of the child under Tex. R. Evid. 803(4) because in her testimony, the nurse explained that the challenged remark in the forensic report simply meant that she confirmed with the victim that she did not state to defendant that she was "wondering" what he was going to do. Emry v. State, 2009 Tex. App. LEXIS 2633, 2009 WL 1025725 (Tex. App. Houston 1st Dist. Apr. 16 2009).

1308. In a criminal prosecution for the sexual assault of a child, the trial court did not err in allowing the introduction of hearsay statements through the testimony of a nurse who examined the child during her initial hospital visit. Prater v. State, 2008 Tex. App. LEXIS 7096 (Tex. App. Texarkana Sept. 15 2008).

1309. In a criminal prosecution for the sexual assault of a child, the trial court did not err in allowing the introduction of hearsay statements through the testimony of a nurse who examined the child during her initial

hospital visit. Prater v. State, 2008 Tex. App. LEXIS 7100 (Tex. App. Texarkana Sept. 15 2008).

1310. In a criminal prosecution for the sexual assault of a child, the trial court did not err in allowing the introduction of hearsay statements through the testimony of a nurse who examined the child during her initial hospital visit. Prater v. State, 2008 Tex. App. LEXIS 7103 (Tex. App. Texarkana Sept. 15 2008).

1311. Child sexual abuse victim's statements to her school counselor were admissible under the medical diagnosis exception to the hearsay rule, Tex. R. Evid. 803, because the counselor had been working with the victim for over a year, sometimes using play therapy, to explore her apparent lifelessness after visiting defendant, her grandfather. Madden v. State, 2008 Tex. App. LEXIS 2637 (Tex. App. Dallas Apr. 11 2008).

1312. Child sexual abuse victim's statements to her cousin after watching a television program involving a man being aggressive with a woman were admissible under the excited utterances exception to the hearsay rule, Tex. R. Evid. 803, because the victim was bawling and trembling after the show and, at age 7, did not have time or resources to fabricate her comments. Madden v. State, 2008 Tex. App. LEXIS 2637 (Tex. App. Dallas Apr. 11 2008).

1313. Defendant in a child sexual abuse case waived his objection to testimony by the child's school counselor on the grounds that she was not a licensed professional counselor as required by Tex. R. Evid. 803, because he did not raise his objection at trial. Madden v. State, 2008 Tex. App. LEXIS 2637 (Tex. App. Dallas Apr. 11 2008).

1314. In a trial for aggravated sexual assault of a child, there was no error in admitting the victim's statements, through the testimony and report of a sexual assault nurse examiner, even though no witnesses specifically testified that the victim understood the need to be truthful; the victim was responding to questions from a health-care provider while receiving medical care at the hospital and the statements were made at a time when the nurse had little or no information about what had happened and were consistent with the physical evidence. Escobedo v. State, 2008 Tex. App. LEXIS 1427 (Tex. App. Dallas Feb. 28 2008).

1315. In a criminal prosecution for indecency with a child, the trial court did not err by allowing a sexual assault nurse examiner to testify about statements made by the victim during the sexual assault examination; the child's statements were excepted from the hearsay rule per Tex. R. Evid. 803(4). Sharp v. State, 210 S.W.3d 835, 2006 Tex. App. LEXIS 11033 (Tex. App. Amarillo 2006).

1316. Statements about sexual abuse by a complainant to a school counselor were improperly admitted under the excited utterance exception to the hearsay rule because the statements were made three years after the abuse by a 14-year-old complainant, after she had told her mother about the abuse. Neill v. State, 2006 Tex. App. LEXIS 8684 (Tex. App. Fort Worth Oct. 5 2006).

1317. In a juvenile delinquency proceeding, the mother's testimony recounting the nine-year-old victim's outcry to her about the assault was admissible under the excited-utterance exception to the hearsay rule; the State was not required to comply with Tex. Fam. Code Ann. § 54.031. In re M.A.M., 2006 Tex. App. LEXIS 3826 (Tex. App. Texarkana May 5 2006).

1318. Outcry statement by a child sexual assault victim did not quality as an excited utterance because the statement was made almost two years after the first assault. The court rejected the argument that the "startling event" was a revelation made to the victim just prior to the outcry by her father's girlfriend because the testimony indicated that the victim considered how and what to reveal about the assault several months before she made her

outcry to her father's girlfriend. Smith v. State, 2005 Tex. App. LEXIS 3972 (Tex. App. San Antonio May 25 2005).

1319. In a trial for defendant's sexual assault of his minor daughters, outcry testimony was properly admitted from two witnesses because the testimony contained information regarding specific instances of sexual contact and did not entirely overlap. In addition, testimony from a school nurse could also have been admissible for the purpose of medical diagnosis and treatment. Everett v. State, 2005 Tex. App. LEXIS 795 (Tex. App. San Antonio Feb. 2 2005).

1320. Although the exception created by Tex. R. Evid. 803(4) is not limited to statements by patients, the person making the statement must have an interest in proper diagnosis or treatment. Parents normally possess this interest in the well-being of their children; however, courts are not willing to extend this "interest" to the statement of a child. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

1321. For purposes of the hearsay exception set forth at Tex. R. Evid. 803(4), the person making the statement must have an interest in proper diagnosis or treatment, but there may be circumstances, especially in child sex abuse cases, in which the statement is motivated by improper reasons such as wanting to shift the blame or a personal dislike of the accused. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

1322. Any error in the admission of a social worker's testimony that a child to whom the social worker provided therapy stated that defendant had touched her inappropriately was cumulative of the social worker's properly admitted testimony on the same issue and thus did not affect defendant's substantial rights. Dunbar v. State, 2004 Tex. App. LEXIS 4139 (Tex. App. Fort Worth May 6 2004).

1323. In sexual assault case, complainant's hearsay statement to a hospital social worker was properly admitted and documented in the complainant's medical record where: (1) The complainant was aware that his mother had taken him to the hospital for a sexual assault examination; (2) for the purposes of a sexual assault examination, it was standard hospital procedure for a social worker to receive a history specifically regarding the abuse allegations; (3) the doctor expressly testified that the history obtained by the social worker was necessary for the diagnosis and treatment of the child; and (4) thus, the record demonstrated that the hospital social worker, participating as part of a team of medical personnel, obtained a history of the sexual abuse allegations in a critical early step necessary for the purposes of the diagnosis and treatment of a child admitted to undergo a sexual assault examination. French v. State, 2004 Tex. App. LEXIS 2924 (Tex. App. Houston 1st Dist. Apr. 1, 2004).

1324. Where a trial court erroneously admitted statements that were not admissible under Tex. R. Evid. 803(2) as spontaneous statements, the State filed to comply with Tex. Code Crim. Proc. Ann. art. 38.072, which would have prevented introduction of statements of outcry witnesses; the admission of the hearsay evidence probably had an injurious influence on the jury's deliberation and therefore affected a substantial right of defendant, Tex. R. App. P. 44.2, such that reversal and remand for a new trial was warranted. Hughes v. State, 128 S.W.3d 247, 2003 Tex. App. LEXIS 6980 (Tex. App. Tyler 2003).

1325. Defendant's convictions of indecency with a child by contact and exposure pursuant to Tex. Penal Code Ann. § 21.11 were affirmed, even though two witness were erroneously permitted to testify as outcry witnesses under Tex. Code Crim. Proc. Ann. art. 38.072, and the counselor was erroneously allowed to testify under Tex. R. Evid. 803(4) regarding the victim's statements during counseling, and where the testimony did not affect defendant's substantial rights under Tex. R. Evid. 103(a) and Tex. R. App. P. 44.2(b), as defendant admitted that he engaged in the conduct described in the victim's statements to the three witnesses. Jones v. State, 92 S.W.3d 619, 2002 Tex. App. LEXIS 8545 (Tex. App. Austin 2002).

Evidence : Hearsay : Exemptions : General Overview

1326. Counsel was not ineffective for failing to object to the admission of the judgment for defendant's conviction of boating while intoxicated because the supervisor's testimony that the judgment bore a seal purporting to be that of the county district clerk would have satisfied the requirements of Tex. R. Evid. 902. In addition, as evidence of a finalized judgment of conviction, counsel could not have brought forth a sustainable objection based on hearsay. Reese v. State, 273 S.W.3d 344, 2008 Tex. App. LEXIS 8518 (Tex. App. Texarkana 2008).

Evidence : Hearsay : Exemptions : Confessions : General Overview

1327. In a murder trial, the trial court properly excluded, under Tex. R. Evid. 803(24), portions of an accomplice's written statement that were uncorroborated. Gonzales v. State, 2005 Tex. App. LEXIS 4532 (Tex. App. Amarillo June 14 2005).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements

1328. Defendant's conviction for driving while intoxicated was proper because the trial court did not abuse its discretion in admitting an audio recording of the motorist's 911 call. It was not outside the zone of reasonable disagreement for the district court to conclude that the relevant statements on the call were not inadmissible as hearsay, either because the statements on the call were not offered to prove the truth of the matter asserted, or because the statements fell under one of the recognized exceptions to the hearsay rule. Condarco v. State, 2013 Tex. App. LEXIS 10741 (Tex. App. Austin Aug. 27 2013).

Evidence : Hearsay : Exemptions : Statements by Coconspirators : General Overview

1329. Where defendant pled guilty to aggravated robbery with a deadly weapon, the trial court did not err in refusing to admit his co-conspirator's out-of-court statement in which he said that he was involved in the crime but that a third co-conspirator fired the shot that struck the victim; because the statement minimized his culpability in the seriousness of the offense and shifted the major blame to his co-conspirator, it was more of a blame-shifting statement than a blame-sharing statement. Perkins v. State, 2013 Tex. App. LEXIS 14372, 2013 WL 6459390 (Tex. App. Austin Nov. 26 2013).

1330. In defendant's trial for possession of four grams or more but less than 200 grams of methamphetamine in violation of Tex. Health & Safety Code § 481.115, the trial court properly admitted the recording of a telephone conversation between a confidential informant (CI) and the individual who purchased methamphetamine from defendant; the recording was properly admitted as to the purchaser-coconspirator under Tex. R. Evid. 801(e)(2)(E) and was properly admitted as to the CI under Tex. R. Evid. 803(3) as a statement of the CI's then existing plan to provide the purchaser with transportation to a meeting place with defendant. Camacho v. State, 2009 Tex. App. LEXIS 5975, 2009 WL 2356885 (Tex. App. Fort Worth July 30 2009).

1331. Statements made by defendant's co-conspirators to a police officer were not so much against their own penal interests to reach the level of reliability as required by Tex. R. Evid. 803(24). Barnes v. State, 56 S.W.3d 221, 2001 Tex. App. LEXIS 4834 (Tex. App. Fort Worth 2001).

1332. In defendant's trial for murder, the testimony of two witnesses about the statements defendant's accomplice made to the witnesses were admissible under Tex. R. Evid. 803(24), where the accomplice told the witnesses that the accomplice helped plan and carry out a kidnapping and murder, where the statements were made before either the accomplice or defendant were even suspected of the murder, and where the statements were trustworthy and reliable because they tended to subject the accomplice to criminal liability. Graham v. State, 3 S.W.3d 272, 1999 Tex. App. LEXIS 7796 (Tex. App. Fort Worth 1999).

1333. The record revealed that the trial court admitted a brother's statements to three different acquaintances about the crime evidence as declarations against interest under Tex. R. Evid. 803 (24), not as co-conspirator statements; the State was careful to elicit accounts only of statements made by the brother referring to "we," which included both him and defendant; the State developed independent corroborative facts, which verified the statements made by the brother; and there was evidence, which demonstrated that the statements were trustworthy under Rule 803(24). Dewberry v. State, 4 S.W.3d 735, 1999 Tex. Crim. App. LEXIS 115 (Tex. Crim. App. 1999), *cert. denied*, 529 U.S. 1131, 120 S. Ct. 2008, 146 L. Ed. 2d 958, 2000 U.S. LEXIS 3459 (2000).

Evidence : Hearsay : Exemptions : Statements by Coconspirators : Statements During Conspiracy

1334. In defendant's robbery case, the court properly allowed testimony because the statement "It just didn't go as planned," inferentially tended to show that the coconspirator committed or attempted to commit the offense that was the subject of the conspiracy, i.e., to obtain some money, in Pampa, by some method. Davey Enriquez v. State, 2009 Tex. App. LEXIS 5183 (Tex. App. Amarillo July 7 2009).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

1335. In defendant's murder case, the trial court properly admitted a witness's testimony that defendant told her he had killed someone "in front of the bar" because the statement was an admission by a party; therefore, it was not hearsay. Additionally, defendant admitted to the trial court that the statement was a statement that exposed him to criminal liability and was probably a statement against interest. Walton v. State, 2009 Tex. App. LEXIS 8046, 2009 WL 3326759 (Tex. App. Eastland Oct. 15 2009), *cert. denied*, 131 S. Ct. 512, 178 L. Ed. 2d 379, 2010 U.S. LEXIS 8559 (U.S. 2010).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : Extrajudicial Statements

1336. In a trial for possession of marihuana, the court should have admitted a codefendant's statement taking responsibility for some of the drug under Tex. R. Evid 803; however, the error in excluding the statement was nonconstitutional and harmless because defendant was able to present a defense and to argue effectively that the drugs belonged to the codefendant and because the State consistently argued that both parties were guilty of the offense. Bradley v. State, 2006 Tex. App. LEXIS 4425 (Tex. App. Tyler May 24 2006).

Evidence : Hearsay : Hearsay Within Hearsay

1337. In defendant's capital murder case, the court did not abuse its discretion by excluding double hearsay testimony that an unknown person, maybe fitting a different person's description, used the murder weapon about two weeks before the offense. The witness never actually spoke to any of the declarants of the statements related to the shooting; he merely read the statements as reflected in a police report written by another officer. Marshall v. State, 210 S.W.3d 618, 2006 Tex. Crim. App. LEXIS 2444 (Tex. Crim. App. 2006).

1338. Texas Department of Public Safety trooper's report of his arrest of defendant on suspicion of operating a motor vehicle while intoxicated was admissible in an action to revoke defendant's driver's license for failure to submit to a breath test under an exception to the hearsay rule found at Tex. R. Evid. 803(8)(B) & (C); the exception applied because Tex. Transp. Code Ann. § 724.032(a)(4) imposed a duty on the trooper to submit a report detailing defendant's refusal to submit a breath specimen. Tex. Dep't of Pub. Safety v. Pruitt, 75 S.W.3d 634, 2002 Tex. App. LEXIS 2697 (Tex. App. San Antonio 2002).

Evidence : Hearsay : Rule Components

1339. In defendant's appeal from his conviction of capital murder, hearsay statement concerning the purchase of the murder weapon, which inculpated not only the declarant but defendant as well, was admissible pursuant to Tex. R. Evid. 803(24) because corroborating circumstances clearly indicated the trustworthiness of statement in that the statements were self-inculpatory, did not include non-self-inculpatory statements, and did not attempt to shift or spread blame, curry favor, avenge the declarant, or divert attention to another. Dewberry v. State, 979 S.W.2d 871, 1998 Tex. App. LEXIS 7622 (Tex. App. Beaumont 1998), *aff'd*, 4 S.W.3d 735, 1999 Tex. Crim. App. LEXIS 115 (Tex. Crim. App. 1999).

Evidence : Hearsay : Rule Components : General Overview

1340. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

1341. Trial court did not abused its discretion by permitting the hearsay statements of defendant's brother through the testimony of other witnesses as a statement against interest exception to hearsay because the brother's statements to his girlfriend and his friend's mother subjected him to criminal liability for the murder of his stepfather, implicated both himself and defendant equally in the murder, and the corroborating circumstances clearly indicated the trustworthiness of the brother's statements. Coleman v. State, 428 S.W.3d 151, 2014 Tex. App. LEXIS 760, 2014 WL 257879 (Tex. App. Houston 1st Dist. Jan. 23 2014).

1342. Exhibit should not have been excluded on the basis of the hearsay objection, because the business records affidavit made by the custodian of records precisely tracked the requirements in Tex. R. Evid. 902(10). Cabot Oil & Gas Corp. v. Healey, L.P., 2013 Tex. App. LEXIS 3934 (Tex. App. Tyler Mar. 28 2013).

1343. Defendant's conviction for assault causing bodily injury to a family member was appropriate because a reasonable person could have concluded that the victim made the statement at issue to the officer upon his arrival at the scene while under the excitement, fear, or pain of the event at the time she made the statement. Smith v. State, 2006 Tex. App. LEXIS 5173 (Tex. App. Fort Worth June 15 2006).

1344. In a medical malpractice case, the trial court did not err in excluding, as hearsay under Tex. R. Evid. 801(d), a statement by a witness who would have testified that the doctor was afraid that he had done something wrong; the statement was offered in evidence to prove the truth of the matter asserted, and the present sense impression rule of Tex. R. Evid. 803(1) did not apply because there was no evidence of contemporaneity. Daniels v. Yancey, 175 S.W.3d 889, 2005 Tex. App. LEXIS 8789 (Tex. App. Texarkana 2005).

1345. Documents that a successor administrator of a decedent's estate used to establish the loss to the estate concerning the decedent's house, which occurred during the former administrator's administration, were not inadmissible hearsay in a breach of fiduciary duty action against the former administrator because the documents were business records under Tex. R. Evid. 803(6) that related to the mortgage on the house. A number of the documents concerning the house were duplicates of evidence duly admitted in related proceedings, and there was no evidence indicating that the documents were inadmissible hearsay in the related proceedings. Sierad v. Barnett, 164 S.W.3d 471, 2005 Tex. App. LEXIS 4161 (Tex. App. Dallas 2005).

1346. In a products-liability case that involved a vehicular accident, the appellate court was not persuaded that it was an error to admit the videotaped testimony of a witness to the accident that stated a tire blew up given that the

witness' statement was videotaped immediately after the crash while emergency personnel were still trying to extricate the only live victim from a vehicle, and it was an exited utterance. Volkswagen of Am., Inc. v. Ramirez, 79 S.W.3d 113, 2002 Tex. App. LEXIS 3358 (Tex. App. Corpus Christi 2002), *rev'd on other grounds*, 159 S.W.3d 897, 2004 Tex. LEXIS 1429 (Tex. 2004).

1347. In defendant's appeal from his conviction of capital murder, hearsay statement concerning the purchase of the murder weapon, which inculpated not only the declarant but defendant as well, was admissible pursuant to Tex. R. Evid. 803(24) because corroborating circumstances clearly indicated the trustworthiness of statement in that the statements were self-inculpatory, did not include non-self-inculpatory statements, and did not attempt to shift or spread blame, curry favor, avenge the declarant, or divert attention to another. Dewberry v. State, 979 S.W.2d 871, 1998 Tex. App. LEXIS 7622 (Tex. App. Beaumont 1998), *aff'd*, 4 S.W.3d 735, 1999 Tex. Crim. App. LEXIS 115 (Tex. Crim. App. 1999).

Evidence : Hearsay : Rule Components : Declarants

1348. At defendant's trial for theft of property, the trial court was permitted to admit a computer generated printout from a store register into evidence; because no person added anything to the record, there was no declarant and the computer printout was not hearsay for purposes of Tex. R. Evid. 801(d). Therefore, the State was not required to lay a predicate to admit the document as a business record under Tex. R. Evid. 803(6). Haskins v. State, 2010 Tex. App. LEXIS 4769, 2010 WL 2524797 (Tex. App. Dallas June 24 2010).

Evidence : Hearsay : Rule Components : Nonverbal Conduct

1349. Where defendant was convicted of the aggravated sexual assault of his thirteen-year-old niece, the trial court erred by admitting the therapist's testimony that the child told her that family members were pressuring her and her mother to drop the charges; the State offered the therapist's statements to show how the child reacted to perceived pressures; the same testimony was admitted through other witnesses without objection. Arguelles v. State, 2007 Tex. App. LEXIS 602 (Tex. App. Dallas Jan. 29 2007).

Evidence : Hearsay : Rule Components : Statements

1350. During the punishment phase of defendant's trial for aggravated sexual assault of a child, defendant stipulated to eight prior convictions, which included a felony conviction for endangering a child, and the State did not err in calling a police officer to testify regarding the circumstances of that offense, which initially was investigated and charged as an aggravated sexual assault of a child, where the officer's statement was not hearsay because he identified the charge that he personally filed and the persons that he arranged for the prior child victim to meet; although the officer's testimony about the prior child victim's precise age was based on hearsay and thus erroneously admitted, there was a fair assurance that the admission of the single piece of hearsay testimony was not harmful error because defendant stipulated to his conviction for endangering a child, and evidence of that prior conviction was properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07, and as an exception under Tex. R. Evid. 803 to the hearsay rule, and because the record as a whole included: (1) defendant's guilty plea to endangering a child; (2) the detailed evidence of the complainant's sexual abuse itself; (3) child pornography found on defendant's family computer; (4) the fact that the State did not emphasize the erroneously admitted evidence and concentrated on the "heinousness" of the offense; (5) defendant's cunning and violent character; (6) the effect of the abuse on the complainant for the rest of her life; and (7) defendant's eight prior convictions and numerous disciplinary infractions. Hunt v. State, 2008 Tex. App. LEXIS 2273 (Tex. App. Houston 14th Dist. Apr. 1 2008).

Evidence : Hearsay : Rule Components : Truth of Matter Asserted

1351. Defendant's conviction for driving while intoxicated was proper because the trial court did not abuse its discretion in admitting an audio recording of the motorist's 911 call. It was not outside the zone of reasonable disagreement for the district court to conclude that the relevant statements on the call were not inadmissible as hearsay, either because the statements on the call were not offered to prove the truth of the matter asserted, or because the statements fell under one of the recognized exceptions to the hearsay rule. Condarco v. State, 2013 Tex. App. LEXIS 10741 (Tex. App. Austin Aug. 27 2013).

1352. Court properly allowed a police officer to testify because the testimony explained how defendant became a suspect in the case and the status of the investigation; therefore, the officer's testimony was not inadmissible hearsay. Moreover, given that the officer responded to the victim's emergency call within fifteen minutes of the incident and that he observed the victim to be "very upset, nervous, and shaking," it was clear that the victim was still dominated by the emotions, fear, and excitement attendant to the incident. Nolen v. State, 2009 Tex. App. LEXIS 6648 (Tex. App. Corpus Christi Aug. 25 2009).

Evidence : Hearsay : Unavailability : General Overview

1353. Admission of a co-offender's out-of-court statements at defendant's capital murder trial, which were allowed on the ground that they were against the co-offender's penal interest pursuant to Tex. R. Evid. 803(24), did not violate the Sixth Amendment because the co-offender's statements describing his involvement in the murder were not made at a preliminary hearing, before a grand jury, at a former trial, or as the product of police interrogation, but, instead, were made to friends and fellow gang members at an informal gathering. Thus, the statements were not the product of an ex parte examination or testimonial hearsay. Beltran v. State, 2005 Tex. App. LEXIS 555 (Tex. App. Austin Jan. 27 2005).

Evidence : Inferences & Presumptions : Inferences

1354. Because the rules of evidence allowed an expert to draw inferences from the underlying facts or data, Tex. Civ. Prac. & Rem. Code Ann. § 74.351 did not prohibit experts from making inferences based on medical history, and the absence of an entry in the records of a regularly conducted activity was admissible to show the nonoccurence of the matter, the nurse's inferences, and the fact that she drew some of them from what was not in the patient's medical records, did not render her expert report defective. Azle Manor, Inc. v. Vaden, 2008 Tex. App. LEXIS 8414 (Tex. App. Fort Worth Nov. 6, 2008).

Evidence : Procedural Considerations : General Overview

1355. In revocation of community supervision proceedings, while defendant conceded that his probation file was admissible as a business record under Tex. R. Evid. 803(6), defendant failed to object on the basis that the State never established the necessary predicate for admitting the negative evidence in the business record under Tex. R. Evid. 803(7). The trial court, therefore, could properly admit the entire proffer under Tex. R. Evid. 105(a). Ferris v. State, 2011 Tex. App. LEXIS 1232, 2011 WL 664016 (Tex. App. Houston 1st Dist. Feb. 17 2011).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

1356. In a criminal trial for theft of property where defendant was charged with financial exploitation based on undue influence, the trial court did not err by admitting evidence of the Kelly bluebook value of a Ford Explorer that the victims purchased and signed over to defendant; the evidence was admissible under Tex. R. Evid. 803, the hearsay exception for published compilations. Jacks v. State, 2006 Tex. App. LEXIS 1968 (Tex. App. Tyler Mar. 15 2006).

1357. Inmate was not entitled to 28 U.S.C.S. § 2254 relief on his claim that his trial counsel was ineffective for failing to challenge the prosecution's evidence regarding the inmate's expulsion from middle school, because trial counsel reasonably believed that at least some evidence showing that the inmate had been expelled and possibly the reasons therefore was going to be admitted at trial, and counsel's decision to challenge that evidence on cross-examination was objectively reasonable. Gutierrez v. Dretke, 392 F. Supp. 2d 802, 2005 U.S. Dist. LEXIS 32496 (W.D. Tex. 2005).

1358. In a trial for unlawfully carrying a handgun, the trial court properly admitted an officer's testimony about a witness's statement that defendant approached the car she was occupying, demanded that it be moved, and partially removed a gun from his pocket. The statement was an excited utterance under Tex. R. Evid. 803(2), even though the record did not reflect how much time passed after the confrontation, because the officer testified that the witness was very upset and was crying. Spielman v. State, 2005 Tex. App. LEXIS 3854 (Tex. App. Houston 1st Dist. May 19 2005).

1359. Where defendant was charged with assaulting the victim in violation of a protective order, the trial court properly admitted the victim's hearsay statements to the arresting officer that she had had problems with defendant in the past. The testimony was admissible as a spontaneous statement under Tex. R. Evid. 803(2). Polley v. State, 2004 Tex. App. LEXIS 11317 (Tex. App. Eastland Dec. 16 2004).

1360. In a criminal trial for aggravated assault, the investigating officer's testimony concerning the victim's statements at the scene identifying defendant as the man who attacked him the night before fell squarely into the present sense impression exception to the rule excluding hearsay. Mason v. State, 2004 Tex. App. LEXIS 6458 (Tex. App. Texarkana July 20 2004).

1361. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court properly admitted the complainant's "excited utterances" to her aunt and the investigating officer where both the officer and the aunt spoke to the complainant shortly after the assault, she had visible injuries, and she was scared. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

1362. Defendant argued that the trial court erred in excluding an excited utterance under Tex. R. Evid. 803(2) where, during the direct examination of a witness's uncle, the uncle testified that when the witness returned to the party after the shooting, he was crying and hysterical, and stated that he had been robbed; even if a statement might qualify as an exception to the hearsay rule, the burden was on the proponent of the evidence to invoke the exception and satisfy its requirements, and defendant failed to proffer the out-of-court statement as an exception to the hearsay rule and therefore did not meet his burden to establish the admissibility of the statement. Borner v. State, 2004 Tex. App. LEXIS 5220 (Tex. App. Dallas June 15 2004).

1363. Sexual assault victim, who was 14 at the time, understood that he was seeing the county youth services director to get help for committing sexual assault and that his statements to the director were made for the purpose of medical treatment; thus, hearsay evidence of defendant's extraneous sexual assault offenses against the victim was admissible under Tex. R. Evid. 803(4) and defendant's conviction for sexual assault of a child was affirmed. Cannon v. State, 2004 Tex. App. LEXIS 1105 (Tex. App. Beaumont Feb. 4 2004).

1364. Where defendant was a passenger in a vehicle she had rented when it was pulled over by a sheriff's deputy, a consensual search led to the seizure of illegal drugs and the arrest of defendant and the driver, defendant was charged with unlawful possession, which required proof of intentional or knowing possession of the drugs, defendant consistently denied knowledge of the drugs, and the State relied upon circumstantial evidence to establish knowledge where the driver's statement to law enforcement, in which she claimed responsibility for the

situation and asserted that she "used" defendant to obtain the rental vehicle and that defendant knew nothing about the drugs, was a statement against penal interest supported by corroborating evidence indicating its trustworthiness, and should have been admitted under Tex. R. Evid. 803(24). James v. State, 102 S.W.3d 162, 2003 Tex. App. LEXIS 181 (Tex. App. Fort Worth 2003).

1365. Question of whether or not utterances factually meet the requirements of Tex. R. Evid. 803(2) is within the discretion of the trial court. Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

1366. Pursuant to Tex. R. Evid. 801 and 803(3), the statements made by a witness, that the victim told the witness that the defendant had been partying, tearing things up, and smoking pot in the victim's residence, amounted to the admission of inadmissible hearsay, and the trial court erred by admitting testimony regarding the events or existing conditions that were the cause of the victim's mental and emotional state. Skeen v. State, 96 S.W.3d 567, 2002 Tex. App. LEXIS 8181 (Tex. App. Texarkana 2002).

1367. Where an assault victim, defendant's common law wife, was still in the emotional grip of the assault when she made her statements to the responding officer, so that her out-of-court statements, in accordance with Tex. R. Evid. 803(2), fell under the excited utterance exception to the hearsay rule, but she did not testify, and there was no showing the victim was not available to testify, admission of her statements violated appellant's constitutional right of confrontation. Johnson v. State, 2000 Tex. App. LEXIS 6689 (Tex. App. Waco Oct. 4 2000), criticized by Hudson v. State, 2001 Tex. App. LEXIS 8270 (Tex. App. Houston 1st Dist. Dec. 13, 2001).

1368. In defendant's appeal from his conviction of capital murder, hearsay statement concerning the purchase of the murder weapon, which inculpated not only the declarant but defendant as well, was admissible pursuant to Tex. R. Evid. 803(24) because corroborating circumstances clearly indicated the trustworthiness of statement in that the statements were self-inculpatory, did not include non-self-inculpatory statements, and did not attempt to shift or spread blame, curry favor, avenge the declarant, or divert attention to another. Dewberry v. State, 979 S.W.2d 871, 1998 Tex. App. LEXIS 7622 (Tex. App. Beaumont 1998), *aff'd*, 4 S.W.3d 735, 1999 Tex. Crim. App. LEXIS 115 (Tex. Crim. App. 1999).

1369. Medical records that included a defendant's blood test results were properly admitted as a business record exception to the hearsay rule under Tex. R. Evid. 803(6); the exception was applicable to criminal proceedings so long as the reliability of the information were established. Serrano v. State, 936 S.W.2d 387, 1996 Tex. App. LEXIS 5029 (Tex. App. Houston 14th Dist. 1996).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

1370. Where defendant was charged with aggravated sexual assault of a child, his counsel was not ineffective for failing to object to the attending nurse's testimony and report, because the hearsay exception set forth in Tex. R. Evid. 803(4) applied. Foxworth v. State, 2005 Tex. App. LEXIS 7728 (Tex. App. Waco Sept. 21 2005).

1371. Under Tex. R. App. P. 33.1(a), defendant failed to preserve his Tex. R. Evid. 803(24) complaint for review where he objected to a witness's testimony regarding statements made by defendant's alleged accomplice on relevance grounds but did not object on hearsay grounds. Coleman v. State, 2005 Tex. App. LEXIS 2855 (Tex. App. Houston 14th Dist. Apr. 14 2005).

1372. Admission of defendant's jail records in defendant's murder trial was proper under the business records exception to the hearsay rule because the records were not prepared for purposes of litigation and conviction, but they were instead part of a record routine for objective observation purposes. Kennedy v. State, 2005 Tex. App. LEXIS 897 (Tex. App. Fort Worth Feb. 3 2005), opinion withdrawn by 2005 Tex. App. LEXIS 10469 (Tex. App. Fort

Worth Dec. 16, 2005).

1373. Counsel was not required to object to a hearsay statement of the complainant admitted through the testimony of a police officer during a criminal trial for aggravated assault; the statement was more than likely an excited utterance admissible under Tex. R. Evid. 803(2). Mathis v. State, 2003 Tex. App. LEXIS 9987 (Tex. App. Dallas Nov. 24 2003).

Evidence : Procedural Considerations : Objections & Offers of Proof : Objections

1374. In a subrogation action, a trial court did not err by admitting a police report into evidence under Tex. R. Evid. 803(8) because there was nothing to indicate that the report lacked trustworthiness. Moreover, because a large part of the report was admissible non-opinion evidence and a driver did not specifically object to the opinion statements, the trial court properly overruled an alleged driver's objection regarding expert opinion. Lawrence v. Geico Gen. Ins. Co., 2009 Tex. App. LEXIS 5082, 2009 WL 1886177 (Tex. App. Houston 1st Dist. July 2 2009).

1375. Defendant failed to overcome a presumption of reasonable professional assistance of counsel, even if there was a failure to preserve error since defense counsel did not continue to object each time the State asked questions that related to out-of-court statements by a sexual assault victim. Counsel was not questioned about his conduct, and it was possible that a new trial strategy had been formed based on the trial evidence; the victim's testimony had been impeached, her prior statements had been admitted into evidence over hearsay objections, and the jury had heard that defendant had threatened the victim. Henderson v. State, 2009 Tex. App. LEXIS 1000, 2008 WL 5622655 (Tex. App. Beaumont Feb. 11 2009).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview

1376. Court properly relied upon an officer's unsworn hearsay document at defendant's suppression hearing because, although it was better practice to produce the witness or attach the documentary evidence to an affidavit, Tex. Code Crim. Proc. Ann. art. 28.01, § 1(6) did not create a "best evidence" rule that mandated such a procedure in a motion to suppress hearing. The offense report included defendant's name, correct offense date, and specific information that coincided with the same basic information to which defendant testified at the hearing, and defendant did not argue that the offense report was, in any way, unauthentic, inaccurate, unreliable, or lacking in credibility. Ford v. State, 305 S.W.3d 530, 2009 Tex. Crim. App. LEXIS 1440 (Tex. Crim. App. 2009).

1377. Although defendant claimed that a trial court erred in admitting the child sexual assault complainant's hearsay statements to her counselor through the medical records exception to the hearsay rule, before permitting the counselor to testify, the trial court had held a hearing under rule of Tex. R. Evid. 104 at which the State elicited testimony concerning the counselor's treatment of the complainant; the counselor testified that his eliciting of facts concerning the complainant's sexual abuse was an important part of her diagnosis and treatment, he provided a treatment-related reason for the timing of her statements, and he also testified that an important part of his work was ensuring that the complainant made truthful statements, and similar testimony had been held in other cases to support admission of child sexual abuse victim statements. Graham v. State, 2006 Tex. App. LEXIS 8063 (Tex. App. Austin Sept. 8 2006).

Evidence : Procedural Considerations : Rulings on Evidence

1378. Even assuming that a trial court abused its discretion by admitting alleged hearsay statements regarding defendant's prior relationship with the murder victim, the error did not affect defendant's substantial rights because: (1) the jury heard defendant testify to some of the same facts as the other witnesses, specifically that he and the victim fought, they argued over drugs, the victim filed charges against him, the victim sought a protective order

against him, and he threw a rock at the victim; (2) defendant did not dispute that he had threatened the victim or been physically abusive in the past; (3) during closing argument, the State did not emphasize the prior instances of abuse, but focused on the events surrounding the victim's death; and (4) the record contained other evidence from which the jury could conclude that defendant committed the offense of murder. Sanders v. State, 2011 Tex. App. LEXIS 2535, 2011 WL 1304882 (Tex. App. Beaumont Apr. 6 2011).

1379. Exhibits, which were summaries of business records compiled by a painter and his secretary two days after an airplane owner filed suit for breach of contract for failure to paint an airplane, were properly admitted as business records under Tex. R. Evid. 803(6) based on the painter's foundation testimony. Cano v. Nino's Paint & Body Shop, 2009 Tex. App. LEXIS 2713, 2009 WL 1057622 (Tex. App. Houston 14th Dist. Apr. 16 2009).

1380. Trial court did not err in admitting into evidence a 9-1-1 tape in which a declarant was seeking police help after her boyfriend allegedly assaulted her because the declarant's statements constituted an excited utterance under Tex. R. Evid. 803; the statements were related to a startling event and were made at a point in time when the declarant was in an extremely excited emotional state as a direct result of the event. Dixon v. State, 244 S.W.3d 472, 2007 Tex. App. LEXIS 9292 (Tex. App. Houston 14th Dist. 2007).

1381. Tenant should have timely sent a written notice of a lease extension by certified mail to the new landlord consistent with the literal terms of the lease amendment and the trial court did not err in not admitting two exhibits under the Tex. R. Evid. 803(15) hearsay exception because the new landlord had not treated the tenant's interpretation of its property interest consistently with the former landlord's interpretation in those exhibits. Tri-Steel Structures, Inc. v. Baptist Found., 166 S.W.3d 443, 2005 Tex. App. LEXIS 4115 (Tex. App. Fort Worth 2005).

1382. In a criminal prosecution, the trial court did not err in admitting evidence of a prior conviction for purposes of enhancing punishment; because it was admitted pursuant to Tex. R. Evid. 803(8), the business records exception to the hearsay rule, rather than Tex. R. Evid. 803(22), the public document exception. If the trial judge's decision is correct on any theory of law applicable to the case, it will be sustained. Macias v. State, 2004 Tex. App. LEXIS 10996 (Tex. App. San Antonio Dec. 8 2004).

1383. Any error in the admission of a social worker's testimony that a child to whom the social worker provided therapy stated that defendant had touched her inappropriately was cumulative of the social worker's properly admitted testimony on the same issue and thus did not affect defendant's substantial rights. Dunbar v. State, 2004 Tex. App. LEXIS 4139 (Tex. App. Fort Worth May 6 2004).

1384. Where a drilling company sued an operating company to collect for services in attempting re-entry of an abandoned oil and gas well, as the custodian of records and the president of the drilling company, the president was qualified to testify regarding the invoice and the daily time sheets without an affidavit complying with Tex. R. Evid. 902(10); moreover, those exhibits were admissible under Tex. R. Evid. 803(6), the business records exception, and the trial court did not abuse its discretion in admitting the invoice or the daily time sheets into evidence. Integras Operating, L.L.C. v. Re-Entry People, Inc., 2004 Tex. App. LEXIS 2461 (Tex. App. Eastland Mar. 18 2004).

1385. Account statement attached to the affidavit of an employee of a promissory note assignee was improperly stricken by a trial court in a dispute over the note because the statement laid the proper foundation for each element of the business records exception of Tex. R. Evid. 803(6). Diversified Fin. Sys. v. Hill, O'Neal, Gilstrap & Goetz, P.C., 99 S.W.3d 349, 2003 Tex. App. LEXIS 1647 (Tex. App. Fort Worth 2003).

1386. In a criminal trial for the offense of aggravated assault with a deadly weapon, the court was permitted to exclude a videotape of the scene where victim died while certain portions of the videotape contained testimony

falling within the hearsay exception for excited utterances under Tex. R. Evid. 803(2), and other portions contained hearsay falling within no recognized exception. Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

Evidence : Procedural Considerations : Weight & Sufficiency

1387. Evidence was sufficient to show that defendant committed the offense of aggravated assault by intentionally, knowingly, or recklessly causing either bodily injury or serious bodily injury to his wife by choking or strangling her with his hand, and that he used his hand as a deadly weapon during the commission of the offense; physician, in a prior trial, had testified as to the extent of the wife's injuries; the wife's statements to a paramedic at the time of the incident were admissible under Tex. R. Evid. 803(4), and the wife was still suffering from the residual effects of the injuries, which included a stroke. Wesber v. State, 2004 Tex. App. LEXIS 3376 (Tex. App. Eastland Apr. 15 2004).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

1388. Declarant's statements were properly admitted as statements against interest because there were sufficient corroborating circumstances that clearly indicated the trustworthiness of the statements. The declarant made the statements in response to questions from his common law wife about his involvement in the robbery, the declarant's guilt was not inconsistent with defendants, and the testimony bore significant probative force and was valuable in proving the State's case in chief. Gonzalez v. State, 2011 Tex. App. LEXIS 7084, 2011 WL 3849393 (Tex. App. San Antonio Aug. 31 2011).

1389. Trial court did not abuse its discretion in admitting the autopsy photographs because the complained-of exhibits were offered during the testimony of the medical examiner, the photographs did not reveal any damage caused by the autopsy and were used by the medical examiner during her testimony to explain the nature of the victim's wounds, the photographic exhibits illustrated and clarified the medical examiner's description of the injuries, including the force with which the injuries were inflicted, an issue addressing appellant's contention of self-defense, and although the photographs were in color and depicted pictures of the twenty-six sharp force injuries and stab wounds the victim suffered, they depicted nothing more than the reality of the brutal crime committed. Tran v. State, 2005 Tex. App. LEXIS 2942 (Tex. App. Dallas Apr. 18 2005).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

1390. The State properly authenticated the booking sheet from a prior crime allegedly committed by defendant in the State of Washington as a business record under Tex. R. Evid. 902(10), and the records were not subject to exclusion because they contained hearsay, pursuant to Tex. R. Evid. 803(6). Wood v. State, 2012 Tex. App. LEXIS 3254, 2012 WL 1448333 (Tex. App. Beaumont Apr. 25 2012).

Evidence : Relevance : Relevant Evidence

1391. Business records concerning a decedent and his health were admissible in a declaratory judgment action because evidence of the decedent's irrationality and dementia in the months preceding and following the signing of certain contracts naming his friend as the payable on death beneficiary was probative of the decedent's capacity to contract on the date at issue. In the Estate of Minton, 2014 Tex. App. LEXIS 1061, 2014 WL 354527 (Tex. App. Corpus Christi Jan. 30 2014).

1392. Daughter's statements in her affidavit signed two days after the night her mother came to pick her up were not statements of her then existing state of mind or spontaneous remarks made while a sensation was being experienced such that they were admissible; the affidavit containing the daughter's statements in a conservatorship

proceeding nearly two years prior to her death were not relevant to the damages suffered by the father due to the loss of his daughter's companionship and society. In re Estate of Macdonald, 2013 Tex. App. LEXIS 10135, 2013 WL 4081419 (Tex. App. Dallas Aug. 13 2013).

1393. In the State's action under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) that alleged that appellants, a husband and wife who operated a business assisting Spanish speaking individuals with immigration matters, had counseled consumers without legal authorization or qualification, appellants raised no valid complaints regarding the admissibility of the evidence and the trial court's rulings thereon where an exhibit consisting of a summary of the more than 2,180 G-28 forms filed by the husband was itself a business record entitled to be treated as other business records, making Tex. R. Evid. 1006 inapplicable, and where the testimony of an intelligence research specialist with the Citizenship and Immigration Services Branch of the United States Department of Homeland Security established the necessary predicate required by Tex. R. Evid. 803(6) because the specialist testified that the exhibit was a business record made in the ordinary course of business at Citizenship and Immigration Services, made at or near the time his department received the G-28 forms, by a person with knowledge of the events being recorded; furthermore, the trial court did not err in refusing to allow a previous client of appellants who was testifying for the State to answer when asked if she obtained her residency status because any testimony going to the gravity of the harm done by engaging in the prohibited act was irrelevant and inadmissible. Avila v. State, 252 S.W.3d 632, 2008 Tex. App. LEXIS 2270 (Tex. App. Tyler 2008).

1394. In a drug case, the trial court did not err in refusing to allow defendant's girlfriend to testify that another person had stated that the contraband belonged to him; the proffered evidence was not relevant, under Tex. R. Evid. 402, to whether defendant possessed a controlled substance with intent to deliver it, in violation of Tex. Health & Safety Code Ann. § 481.112(a), and defendant offered no independent facts corroborating the hearsay statement under Tex. R. Evid. 803(24). Menton v. State, 2005 Tex. App. LEXIS 7799 (Tex. App. Amarillo Sept. 22 2005).

1395. In a driving while intoxicated case, the trial court erred in admitting the arresting officer's commentary from the audio portion of a videotape taken from his patrol car while following defendant as the commentary was hearsay; the observations were not made by the officer while testifying at trial, as they were offered to prove that the officer had probable cause to stop defendant, and where the officer's comments were matters observed by a police officer in a criminal case, they were excluded from the public records exception under Tex. R. Evid. 803(8)(B) for admission at trial. Thompson v. State, 2003 Tex. App. LEXIS 10088 (Tex. App. Tyler Nov. 26 2003).

1396. In a driving while intoxicated case, the trial court erred in admitting the arresting officer's commentary from the audio portion of a videotape taken from his patrol car while following defendant as the commentary was hearsay; the observations were not made by the officer while testifying at trial, as they were offered to prove that the officer had probable cause to stop defendant, and where the officer's comments were matters observed by a police officer in a criminal case, they were excluded from the public records exception under Tex. R. Evid. 803(8)(B) for admission at trial. Thompson v. State, 2003 Tex. App. LEXIS 10088 (Tex. App. Tyler Nov. 26 2003).

Evidence : Relevance : Sex Offenses : General Overview

1397. In a child sexual assault case, the State was properly permitted under Tex. R. Evid. 803(4) to elicit testimony from the sexual assault nurse examiner about the complainant's report of sexual abuse for the purpose of a rape examination. The record showed that the complainant knew she was being seen by the nurse not only so she could be treated but also so her family could determine if she was lying about her allegations of sexual abuse, and she knew it was important for her to tell the truth. Bahle v. State, 2012 Tex. App. LEXIS 3141, 2012 WL 1382568 (Tex. App. Dallas Apr. 23 2012).

Evidence : Scientific Evidence : Autopsies

1398. In a murder trial, the victim's autopsy report was admissible under the public records exception to the hearsay rule. The forensic pathologist was not "other law enforcement personnel" under Tex. R. Evid. 803(8)(B), in that the record did not support that the autopsy report was other than an objective, routine, scientific determination of an unambiguous factual nature. Denoso v. State, 156 S.W.3d 166, 2005 Tex. App. LEXIS 878 (Tex. App. Corpus Christi 2005).

Evidence : Scientific Evidence : Blood Alcohol

1399. Trial court did not abuse its discretion by finding the record of the results of a test of defendant's blood-alcohol level sufficiently reliable to be admissible under the business-record exception to the hearsay rule, Tex. R. Evid. 803(6), and not to have deprived him of his constitutional right to meaningful confrontation and cross-examination of witnesses against him, because the blood-alcohol test results were part of a group of records produced by the hospital pursuant to a subpoena, and the records were accompanied by the affidavit of the custodian of the hospital's records in which the custodian recited that he kept the records in the regular course of business and that the records were made in the regular course and scope of the hospital's business at or near the time of the event. Furthermore, the surgeon who treated defendant testified that, although he did not conduct or observe the blood draw, he and other doctors routinely relied on such procedures and records in treating patients, and there was no evidence that an unauthorized or unqualified person drew the blood or that the persons who drew or tested the blood did their jobs inappropriately. Blackwell v. State, 2005 Tex. App. LEXIS 1816 (Tex. App. Austin Mar. 10 2005).

1400. In a criminal trial for the offense of aggravated assault with a deadly weapon, the court was permitted to exclude evidence of a blood test suggesting the victim was intoxicated, and proof of fundamental trustworthiness, or indicia of reliability of the blood test result was missing under Tex. R. Evid. 803(6). Blaylock v. State, 2003 Tex. App. LEXIS 140 (Tex. App. Tyler Jan. 8 2003).

Evidence : Scientific Evidence : Daubert Standard

1401. Testimony of a trucking company's safety administrative coordinator was properly admitted because her purpose was to explain how global positioning systems (GPS) data, which another witness's testimony showed was reliable, became a business record of the trucking company. Furthermore, her testimony established her understanding of the many systems the company used to track its drivers and showed that the system of transmitting and receiving the GPS data was automatic. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

Evidence : Scientific Evidence : DNA

1402. Under Tex. R. Evid. 803(18), defense counsel could have cross-examined a DNA analyst with relevant scientific literature regarding the desirability of retaining a portion of the DNA evidence for additional testing. The failure to do so was relevant to the analysis of an ineffective assistance of counsel claim. Ex Parte Napper, 322 S.W.3d 202, 2010 Tex. Crim. App. LEXIS 1209 (Tex. Crim. App. 2010).

Evidence : Scientific Evidence : Sobriety Tests

1403. In a criminal trial arising from a collision, the other driver's out-of-court statements were admissible as excited utterance because they were made shortly after the collision while the driver was still in her wrecked vehicle and were made to her daughter, not to law enforcement officers. Pointe v. State, 371 S.W.3d 527, 2012 Tex. App. LEXIS 4295, 2012 WL 1948880 (Tex. App. Beaumont May 30 2012).

1404. Affidavit of an arresting officer on form DIC-23, that contained observations and factual findings resulting from his investigation, was properly admitted under the public records exception in Tex. R. Evid. 803(8) in an administrative hearing on the suspension of a driver's license; after a person has been arrested and has refused to submit to a breath test, a peace officer is required to submit a written report to the Director of the Texas Department of Public Safety pursuant to Tex. Transp. Code Ann. § 724.032, and the report is admissible unless the officer fails to appear at a scheduled hearing after receipt of a timely subpoena. Tex. Dep't of Pub. Safety v. Struve, 79 S.W.3d 796, 2002 Tex. App. LEXIS 4433 (Tex. App. Corpus Christi 2002).

Evidence : Scientific Evidence : Toxicology

1405. Trial court abused its discretion by admitting the results of a drug test into evidence under the business records exception because the actual results of the test were not included in the admitted medical records; instead, a notation of the results was included on a summary page, which did not state what was tested, who took the sample, when the sample was taken, or what laboratory conducted the testing. In re A.T., 2006 Tex. App. LEXIS 1882 (Tex. App. Fort Worth Mar. 9 2006).

1406. In affirming the appointment of grandparents as managing conservators, the court found that the results of a drug test on the 11-month-old child were properly admitted under the business records exception to the hearsay rule; the results were trustworthy because they showed the doctor who ordered the test, the time and date that the test was collected and received, and that the test was "presumptive positive" for amphetamine. In re A.T., 2006 Tex. App. LEXIS 1882 (Tex. App. Fort Worth Mar. 9 2006).

Evidence : Testimony : Experts : General Overview

1407. In a personal injury case, the court did not err by admitting a redacted accident report because the investigator stated an opinion that appellee "failed to yield the right of way," and the trial court chose to exclude the investigator's narrative. Additionally, the record showed that appellee conceded at trial that she caused the collision. Griffin v. Carson, 2009 Tex. App. LEXIS 3843, 2009 WL 1493467 (Tex. App. Houston 1st Dist. May 28 2009).

1408. Because the rules of evidence allowed an expert to draw inferences from the underlying facts or data, Tex. Civ. Prac. & Rem. Code Ann. § 74.351 did not prohibit experts from making inferences based on medical history, and the absence of an entry in the records of a regularly conducted activity was admissible to show the nonoccurence of the matter, the nurse's inferences, and the fact that she drew some of them from what was not in the patient's medical records, did not render her expert report defective. Azle Manor, Inc. v. Vaden, 2008 Tex. App. LEXIS 8414 (Tex. App. Fort Worth Nov. 6, 2008).

1409. Testimony of a trucking company's safety administrative coordinator was properly admitted because her purpose was to explain how global positioning systems (GPS) data, which another witness's testimony showed was reliable, became a business record of the trucking company. Furthermore, her testimony established her understanding of the many systems the company used to track its drivers and showed that the system of transmitting and receiving the GPS data was automatic. Brown v. State, 163 S.W.3d 818, 2005 Tex. App. LEXIS 3949 (Tex. App. Dallas 2005).

Evidence : Testimony : Experts : Admissibility

1410. Court did not err by admitting a drug analyst-supervisor to testify in the punishment phase of defendant's aggravated robbery case that the substances removed from the car that defendant was driving were marijuana and cocaine because the trial court implicitly found that the supervisor qualified as an expert, and therefore, the State had no burden to invoke an exception to the hearsay rule; the trial court properly admitted the expert testimony that the substances were cocaine and marijuana because it was not hearsay and was not required to be based on her

personal knowledge. Moore v. State, 2007 Tex. App. LEXIS 6844 (Tex. App. Fort Worth Aug. 24 2007).

1411. In defendant's aggravated sexual assault of a child case, the court properly allowed expert testimony by a nurse concerning her finding no trauma to the child's genitals in her examination because she was qualified by her knowledge, skill, experience, training, and education as an expert witness in the field of child sexual abuse; she testified that she relied on a study in reaching her opinion, and therefore, the trial court did not abuse its discretion by allowing the nurse to testify about the results of the study. Archer v. State, 2007 Tex. App. LEXIS 6612 (Tex. App. Austin Aug. 17 2007).

Evidence : Testimony : Experts : Criminal Trials

1412. Trial court acted within its discretion during defendant's trial for aggravated assault with a deadly weapon in admitting the victim's medical records without expert testimony because Tex. R. Evid. 803(6) plainly authorized the admission of the medical records without any witness, and while the State might have offered expert testimony to explain the medical records to the jury, Tex. R. Evid. 702 did not require such testimony. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

1413. Trial court's admission of an aggravated assault victim's medical records, without an opportunity for defendant to first question the records' author on voir dire, did not violate defendant's rights under Tex. R. Evid. 705(b) because the language of Rule 705 contained no inference or even a suggestion that its provisions overrode the admissibility of a physician's observations, diagnoses, or opinions properly admitted as a business record. Brown v. State, 2013 Tex. App. LEXIS 2250, 2013 WL 857252 (Tex. App. Austin Mar. 7 2013).

1414. In a sexual assault on a child case, counsel was not ineffective for failing to object to an expert's reliance on a medical report in forming his conclusion that the non-specific red bumps he found in the victim's genital area were caused by the Herpes Simplex Virus (HSV) where, regardless of whether the report was properly admitted as part of the State's exhibit, the expert could have properly testified to the basis for his diagnosis even though part of the data he relied on was hearsay; the report was also cumulative of all the other evidence at trial showing that the victim had been infected with HSV. Coker v. State, 2004 Tex. App. LEXIS 4799 (Tex. App. El Paso May 27 2004).

1415. In a sexual assault on a child case, counsel was not ineffective for failing to object to the admission of defendant's medical records on the ground that the State failed to lay a proper foundation under Tex. R. Evid. 803 where he failed to show that the State would have been unable to establish the elements if counsel had objected. Further, other evidence established that defendant had been infected with herpes prior to the sexual assault. Coker v. State, 2004 Tex. App. LEXIS 4799 (Tex. App. El Paso May 27 2004).

Evidence : Testimony : Lay Witnesses : Personal Knowledge

1416. At defendant's probation revocation hearing, the contents of his probation file were admissible as a business record under Tex. R. Evid. 803; although defendant's current probation officer did not have personal knowledge of all the entries in the probation file, he testified that defendant's former probation officer prepared the file and had personal knowledge of the facts recorded in the file. Canseco v. State, 199 S.W.3d 437, 2006 Tex. App. LEXIS 4664 (Tex. App. Houston 1st Dist. 2006).

Family Law : Child Custody : Awards : General Overview

1417. In affirming the appointment of grandparents as managing conservators, the court found that the results of a drug test on the 11-month-old child were properly admitted under the business records exception to the hearsay rule; the results were trustworthy because they showed the doctor who ordered the test, the time and date that the

test was collected and received, and that the test was "presumptive positive" for amphetamine. In re A.T., 2006 Tex. App. LEXIS 1882 (Tex. App. Fort Worth Mar. 9 2006).

Family Law : Family Protection & Welfare : Cohabitants & Spouses : Abuse, Endangerment & Neglect

1418. In a trial for defendant's sexual assault of his wife, who recanted in her trial testimony, the trial court properly admitted statements that the victim made shortly after the assault as excited utterances under Tex. R. Evid 803; it was reasonable to find that the victim was still dominated by the emotions, excitement, fear, or pain of being sexually assaulted, hit, and threatened with death, over the course of several hours. Davis v. State, 2007 Tex. App. LEXIS 352 (Tex. App. Dallas Jan. 18 2007).

Family Law : Guardians : Appointment

1419. Jury's verdict finding that an individual was incapacitated was upheld because two physicians' reports were properly admitted under the business records exception of Tex. R. Evid. 803 since it was the regular course of business to make the reports and there was no question about trustworthiness. In re Parker, 2007 Tex. App. LEXIS 9428 (Tex. App. Fort Worth Nov. 29 2007).

Family Law : Parental Duties & Rights : Termination of Rights : General Overview

1420. In a proceeding to terminate a father's parental rights, it was reversible error under Tex. R. Evid. 801 to admit hearsay statements relating to purported sexual abuse by the father of a different child, including written statements by two adults relating to the child's reports of sexual abuse, a child abuse protocol from a physical examination, and an arrest warrant with an affidavit containing reports of the purported assault. Those documents were not admissible under either the business records or public records exceptions of Tex. R. Evid. 803 because the Department of Family and Protective Services failed to lay a proper predicate. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

1421. In a proceeding to terminate parental rights, the trial court did not err in admitting the entire Department of Family & Protective Services (DFPS) case file over the father's hearsay objection. DFPS laid the proper predicate for admission of the file as a business or public record. Rogers v. Dep't of Family & Protective Servs., 175 S.W.3d 370, 2005 Tex. App. LEXIS 1327 (Tex. App. Houston 1st Dist. 2005).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : General Overview

1422. In a termination of parental rights case, medical records relevant to the child's fall from stairs were generally admissible under Tex. R. Evid. 803(4), (6). In re K.L., 442 S.W.3d 396, 2012 Tex. App. LEXIS 4294 (Tex. App. Beaumont May 31 2012).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

1423. In a termination of parental rights case, a family service plan that had been filed with the court as required by Tex. Fam. Code Ann. § 263.101, was properly admitted as a public record. In the Interest of R.R., 2011 Tex. App. LEXIS 8394, 2011 WL 5026229 (Tex. App. Houston 1st Dist. Oct. 20 2011).

1424. In a termination of parental rights case, medical records were properly admitted as business records under Tex. R. Evid. 802, 803(6) because the custodian affidavit complied with Tex. R. Evid. 902(10). In the Interest of R.R., 2011 Tex. App. LEXIS 8394, 2011 WL 5026229 (Tex. App. Houston 1st Dist. Oct. 20 2011).

Labor & Employment Law : Disability & Unemployment Insurance : Unemployment Compensation : Review

1425. On a trial de novo following a denial of unemployment benefits, there was no competent evidence on which to base a summary judgment upholding the decision that the employee was discharged for misconduct because the Texas Workforce Commission attached the entire record of its hearing to the motion. The record contained items that were irrelevant to de novo review, such as the Commission's findings, and an affidavit from the custodian of records did not satisfy the requirement that admissible parts of the record be introduced independently. Gardini v. Tex. Workforce Comm'n & Dell Prods., L.P., 2004 Tex. App. LEXIS 10029 (Tex. App. Austin Nov. 12 2004).

Labor & Employment Law : Discrimination : Gender & Sex Discrimination : Proof : General Overview

1426. In a suit for gender-based employment discrimination, it was permissible under Tex. R. Evid. 803(8)(c) to admit a determination letter from the United States Equal Employment Opportunity Commission, which concluded that a violation of Title VII occurred. Tex. Hhs Comm'n v. Wolfe, 2010 Tex. App. LEXIS 5566, 2010 WL 2789777 (Tex. App. Austin July 14 2010).

Military & Veterans Law : Military Justice : Evidence : Writings & Real Evidence

1427. Probate court properly excluded the exhibits offered by a decedent's surviving spouse and administratrix of his estate at the special appearance hearing of the decedent's Florida business associate because the exhibits were business records of a group of Texas entities owned by the business associate, and they were not authenticated by the administratrix merely by virtue of her role as administratrix of the decedent's estate. Allen v. Havens, 2007 Tex. App. LEXIS 2088 (Tex. App. Fort Worth Mar. 15 2007).

Real Property Law : Landlord & Tenant : Lease Agreements : Residential Leases

1428. In an appeal from default judgment entered against a tenant in an eviction proceeding, a notice from an electric and gas company about leaking gas pipes, was, at best, mere hearsay, given the tenant's failure to properly authenticate the filing. Therefore, the reviewing court declined to consider the document as evidence that the home was not suitable for habitation. Raines v. Gomez, 2004 Tex. App. LEXIS 6924 (Tex. App. Texarkana July 30 2004), opinion withdrawn by, substituted opinion at 143 S.W.3d 867, 2004 Tex. App. LEXIS 7605 (Tex. App. Texarkana 2004).

Transportation Law : Private Vehicles : Operator Licenses : General Overview

1429. Peace officer's sworn DIC-23 report stating that a driver refused an alcohol concentration test was admissible in license suspension proceedings as a public record under Tex. R. Evid. 803, and the failure to fill in a blank for the number of pages did not overcome the presumption of admissibility. Hooker v. Tex. Dep't of Pub. Safety, 2008 Tex. App. LEXIS 329 (Tex. App. Beaumont Jan. 17 2008).

1430. Texas Department of Public Safety trooper's report of his arrest of defendant on suspicion of operating a motor vehicle while intoxicated was admissible in an action to revoke defendant's driver's license for failure to submit to a breath test under an exception to the hearsay rule found at Tex. R. Evid. 803(8)(B) & (C); the exception applied because Tex. Transp. Code Ann. § 724.032(a)(4) imposed a duty on the trooper to submit a report detailing defendant's refusal to submit a breath specimen. Tex. Dep't of Pub. Safety v. Pruitt, 75 S.W.3d 634, 2002 Tex. App. LEXIS 2697 (Tex. App. San Antonio 2002).

1431. Peace officer's sworn report, which the officer signed under oath before a notary, properly admitted at an administrative driver's license revocation hearing under the public record exception to the hearsay rule, Tex. R.

Evid. 803(8). Texas Dep't of Pub. Safety v. Cortinas, 996 S.W.2d 885, 1998 Tex. App. LEXIS 7791 (Tex. App. Houston 14th Dist. 1998).

Transportation Law : Private Vehicles : Operator Licenses : Revocation & Suspension

1432. Where the Texas Department of Public Safety appealed a trial court's judgment reversing an administrative law judge's (ALJ) decision to suspend a driver's license pursuant to Tex. Transp. Code Ann. § 724.035, a peace officer's report was admissible under the business records exception to the hearsay rule, Tex. R. Evid. 803(8)(C), even if the report was unsworn. The ALJ acted within his discretion in admitting the report and the administrative decision was supported by substantial evidence. Tex. Dep't of Pub. Safety v. Todd, 2014 Tex. App. LEXIS 6455, 2014 WL 2628139 (Tex. App. Dallas June 12 2014).

Transportation Law : Private Vehicles : Vehicle Registration : General Overview

1433. In a driving while intoxicated trial, an officer was properly allowed to testify regarding defendant's vehicle registration because vehicle registration records were from a public agency charged with the duty of maintaining said records and thus were admissible under Tex. R. Evid. 803. Blair v. State, 2008 Tex. App. LEXIS 561 (Tex. App. Dallas Jan. 25 2008).

Tex. Evid. R. 804

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 804 Exceptions to the Rule Against Hearsay -- When the Declarant is Unavailable as a Witness

(a) ***Criteria for Being Unavailable.***--A declarant is considered to be unavailable as a witness if the declarant:

(1)is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2)refuses to testify about the subject matter despite a court order to do so;

(3)testifies to not remembering the subject matter;

(4)cannot be present or testify at the trial or hearing because of death or a thenexisting infirmity, physical illness, or mental illness; or

(5)is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance or testimony.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) ***The Exceptions.***--The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) ***Former Testimony.***--Testimony that:

(A)when offered in a civil case:

(i)was given as a witness at a trial or hearing of the current or a different proceeding or in a deposition in a different proceeding; and

(ii)is now offered against a party and the party - or a person with similar interest - had an opportunity and similar motive to develop the testimony by direct, cross-, or redirect examination.

(B)when offered in a criminal case:

(i)was given as a witness at a trial or hearing of the current or a different proceeding; and

(ii)is now offered against a party who had an opportunity and similar motive to develop it by direct, cross-, or redirect examination; or

(iii)was taken in a deposition under - and is now offered in accordance with - chapter 39 of the Code of Criminal Procedure.

(2) ***Statement Under the Belief of Imminent Death.***--A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) ***Statement of Personal or Family History.***--A statement about:

(A)the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B)another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 40, *Hearsay*.

Pre-March 1, 1998 Comment A deposition in some circumstances may be admissible without regard to unavailability of the deponent. *See* Rule 801(e)(3), Texas Rules of Civil Evidence, and Texas Rules of Civil Procedure, Rule 207.

Case Notes

Civil Procedure : Discovery : Methods : Oral Depositions
Civil Procedure : Appeals : Briefs
Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Accessories : Aiding & Abetting
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Documentary Evidence : Completeness
Evidence : Hearsay : General Overview
Evidence : Hearsay : Exceptions : General Overview
Evidence : Hearsay : Exceptions : Dying Declarations : General Overview
Evidence : Hearsay : Exceptions : Dying Declarations : Belief of Imminent Death
Evidence : Hearsay : Exceptions : Family Records & Statements
Evidence : Hearsay : Exceptions : Former Testimony of Unavailable Declarants
Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment
Evidence : Hearsay : Exceptions : Present Sense Impression : General Overview
Evidence : Hearsay : Exceptions : Residual Exceptions : Confrontation Clause Requirements
Evidence : Hearsay : Exceptions : Statements Against Interest
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Hearsay : Unavailability : General Overview
Evidence : Hearsay : Unavailability : Absence of Declarants
Evidence : Hearsay : Unavailability : Inability to Testify : Death
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements
Governments : Legislation : Statutes of Limitations : Time Limitations
Real Property Law : Adverse Possession : General Overview
Torts : Intentional Torts : Conversion : General Overview

LexisNexis (R) Notes

Civil Procedure : Discovery : Methods : Oral Depositions

1. In a capital murder case, because defendant's civil deposition was not hearsay when offered against her, Tex. R. Evid. 804 was inapplicable and any noncompliance with the rule was irrelevant. Johnson v. State, 208 S.W.3d 478, 2006 Tex. App. LEXIS 2254 (Tex. App. Austin 2006).

Civil Procedure : Appeals : Briefs

2. In a case involving a repossession of a vehicle by a creditor, a debtor's claim that a trial court erred by failing to admit exhibits on hearsay grounds was inadequately briefed where the debtor did not explain whether the exhibits were not hearsay or whether they were hearsay, but nevertheless should have been admitted under some exception to the hearsay rule. Flores v. James Wood Fin. Llc, 2013 Tex. App. LEXIS 7488 (Tex. App. Fort Worth June 20 2013).

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

3. Witness testimony from a first murder trial was properly admitted under Tex. R. Evid. 804(b)(1) and did not violate U.S. Const. amend. VI because the State made a good-faith effort to obtain a witness for a second trial; an investigator had exhausted his contacts with the friends and family of the witness, and any further efforts could have reasonably been deemed futile by the trial court. Because the investigator was unable to determine where the witness was located, a writ of attachment would have been futile as well. Reed v. State, 312 S.W.3d 682, 2009 Tex. App. LEXIS 7472 (Tex. App. Houston 1st Dist. Sept. 24 2009).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

4. Defendant's conviction under Tex. Penal Code Ann. § 19.02(b) for murdering his roommate, on the theory that he participated as a party to murder pursuant to Tex. Penal Code Ann. § 7.02(a)(2), was supported by sufficient factual evidence because: (1) the victim's statement after he was shot in the neck, which qualified as a dying declaration under Tex. R. Evid. 804(b)(2), identifying a second man as the shooter and placing defendant in the victim's bedroom when the shooting occurred was corroborated by three detached witnesses; (2) the jury could have reasonably inferred from the evidence that defendant aided the second man in the commission of the offense by providing him the only available access to the victim at that time of the night; (3) the victim, who was afraid of defendant, had requested that defendant vacate the apartment within a week; and (4) according to the victim's dying declaration, the second man said that the shooting was payback because he was arrested at the crack house, and the crack house was closed down as a result. The jury was free to disbelieve defendant's statement to police and testimony that denied his involvement, to reconcile any discrepancies in the testimony before it, and to judge the credibility of the witnesses. Moya v. State, 2005 Tex. App. LEXIS 4577 (Tex. App. Corpus Christi June 16 2005).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

5. In a prosecution for indecency with a child by contact and aggravated sexual assault, the trial court did not err by admitting a social worker's testimony concerning the mother's and child's statements during an interview at the hospital under the Tex. R. Evid. 803(4) exception to the rule against hearsay as the social worker's role was similar to that of an intake nurse in assisting a doctor in conducting a medical examination. Sledge v. State, 2004 Tex. App. LEXIS 2247 (Tex. App. Austin Mar. 11 2004).

Criminal Law & Procedure : Accessories : Aiding & Abetting

6. Defendant's conviction under Tex. Penal Code Ann. § 19.02(b) for murdering his roommate, on the theory that he participated as a party to murder pursuant to Tex. Penal Code Ann. § 7.02(a)(2), was supported by sufficient factual evidence because: (1) the victim's statement after he was shot in the neck, which qualified as a dying declaration under Tex. R. Evid. 804(b)(2), identifying a second man as the shooter and placing defendant in the victim's bedroom when the shooting occurred was corroborated by three detached witnesses; (2) the jury could have reasonably inferred from the evidence that defendant aided the second man in the commission of the offense by providing him the only available access to the victim at that time of the night; (3) the victim, who was afraid of defendant, had requested that defendant vacate the apartment within a week; and (4) according to the victim's dying declaration, the second man said that the shooting was payback because he was arrested at the crack house, and the crack house was closed down as a result. The jury was free to disbelieve defendant's statement to police and testimony that denied his involvement, to reconcile any discrepancies in the testimony before it, and to judge the credibility of the witnesses. Moya v. State, 2005 Tex. App. LEXIS 4577 (Tex. App. Corpus Christi June 16 2005).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

7. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

8. In a murder case, counsel was not ineffective for failing to object to the victim's statement regarding who shot him because the victim expressed that he was scared of dying, a statement that clearly demonstrated that he thought his death was imminent, and was thus admissible as a dying declaration. Gomez v. State, 2007 Tex. App. LEXIS 4787 (Tex. App. Houston 14th Dist. June 21 2007).

Criminal Law & Procedure : Trials : Defendant's Rights : Right to Confrontation

9. In a capital murder case, appellant's confrontation rights were not violated by the admission of statements from his wife regarding injuries allegedly inflicted by appellant because they were admissible as dying declarations under

Tex. R. Evid. 804(b)(2); testimony about the severity of the wife's injuries was circumstantial evidence showing that she believed that her death was imminent, and her statements were directed at revealing the cause and circumstances of her impending death. Although she was mistaken about the age of her children, she was clear with regard to the circumstances causing her injuries, and she accurately provided her home address and that of her friend. Denson v. State, 2012 Tex. App. LEXIS 5971, 2012 WL 3025845 (Tex. App. San Antonio July 25 2012).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Failure to Object

10. In a case involving sentencing for a theft offense, because appellant did not object to a witness taking the stand where there was inadequate notice, the complaint was waived. Moreover, the witness was only called to read a victim's prior testimony, which was admissible due to his death under Tex. R. Evid. 804(a)(4). Kennedy v. State, 2012 Tex. App. LEXIS 6506, 2012 WL 3201924 (Tex. App. Tyler Aug. 8 2012).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : General Overview

11. Determining whether evidence comes in under Tex. R. Crim. Evid. 804(b)(1), which admits testimony based on the unavailability of the declarant, is a question for the trial court to resolve, reviewable on appeal only under an abuse of discretion standard. Caldwell v. State, 916 S.W.2d 674, 1996 Tex. App. LEXIS 561 (Tex. App. Texarkana 1996).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

12. In defendant's capital murder trial, the trial court did not err in excluding the former testimony of a witness from a co-defendant's trial because the requested excerpt of testimony contained both admissible and inadmissible evidence, and it was defendant's burden to segregate and specifically offer the portions that were admissible under Tex. R. Evid. 804(b)(1); further, any error was harmless because substantially similar testimony was admitted into evidence. Brown v. State, 2013 Tex. App. LEXIS 10655 (Tex. App. Houston 14th Dist. Aug. 22 2013).

Evidence : Documentary Evidence : Completeness

13. In a second trial for sexual abuse, it was error to admit the entirety of the complainant's testimony from the first trial even though the defense used part of the testimony for impeachment, because there was no showing that the entire prior testimony was either on the same subject or was necessary to correct a false or incorrect impression of the witness' testimony; the testimony was admissible because the complainant was not unavailable. Sneed v. State, 209 S.W.3d 782, 2006 Tex. App. LEXIS 10067 (Tex. App. Texarkana 2006).

Evidence : Hearsay : General Overview

14. In a case in which defendant was convicted of murder, defendant did not prove by a preponderance of the evidence that his trial counsel's representation was deficient where, although he claimed that trial counsel did not call witnesses who would have supported his contention that his cousin killed the victim, it could not be said that counsel was ineffective for failing to attempt to introduce evidence that was inadmissible because: (1) neither the witnesses nor the proffered testimony attacked the cousin's character for truthfulness or untruthfulness, nor did their testimony establish he had been convicted of a crime within the parameters of Tex. R. Evid. 609; and (2) as to testimony by defendant's grandmother and uncle about what the cousin's father told them, that evidence was clearly hearsay, and defendant did not demonstrate on the record any exception that would have permitted the admission of those statements. Moreover, defendant did not establish that, but for his counsel's failure to call the witnesses, there was a reasonable probability the result of the proceeding would have been different because there were three eyewitnesses to the murder, one of whom had no relationship to anyone other than the victim, and therefore no motive to lie, and his testimony was corroborated by the other two eyewitnesses. Aquino v. State, 2009 Tex. App. LEXIS 7391, 2009 WL 3030749 (Tex. App. San Antonio Sept. 23 2009).

Evidence : Hearsay : Exceptions : General Overview

15. In a case involving a repossession of a vehicle by a creditor, a debtor's claim that a trial court erred by failing to admit exhibits on hearsay grounds was inadequately briefed where the debtor did not explain whether the exhibits were not hearsay or whether they were hearsay, but nevertheless should have been admitted under some exception to the hearsay rule. Flores v. James Wood Fin. Llc, 2013 Tex. App. LEXIS 7488 (Tex. App. Fort Worth June 20 2013).

16. Statements of the victim's friend were not admissible under Tex. R. Evid. 804, because none of the exceptions in Tex. R. Evid. 804(b)(1)--(3) applied, and Tex. R. Evid. 804(a) was not a hearsay exception and only provided guidance as to who was an unavailable witness. Kresse v. State, 2010 Tex. App. LEXIS 3031, 2010 WL 1633383 (Tex. App. Fort Worth Apr. 22 2010).

Evidence : Hearsay : Exceptions : Dying Declarations : General Overview

17. In defendant's capital murder case, the contents of the 911 call the victim made after she was shot was properly admitted as a dying declaration because, when police and paramedics arrived at the location that the caller had given them, they found the victim in her bed, bleeding profusely from a gunshot wound to her head. Gardner v. State, 306 S.W.3d 274, 2009 Tex. Crim. App. LEXIS 1441 (Tex. Crim. App. 2009).

18. In defendant's murder case, a witness was properly allowed to testify to the victim's statements made at the hospital because it was undisputed that his injuries were severe and his prognosis was grim. Given the extent of the victim's injuries, the witness's impression that the victim knew there was a possibility he would die after being removed from the ventilator, and the giving of last rites, the trial court did not abuse its discretion by admitting the testimony under the dying declarations exception to the hearsay rule. Sadler v. State, 2009 Tex. App. LEXIS 2962, 2009 WL 1163407 (Tex. App. Waco Apr. 29 2009).

19. In a murder case, counsel was not ineffective for failing to object to the victim's statement regarding who shot him because the victim expressed that he was scared of dying, a statement that clearly demonstrated that he thought his death was imminent, and was thus admissible as a dying declaration. Gomez v. State, 2007 Tex. App. LEXIS 4787 (Tex. App. Houston 14th Dist. June 21 2007).

20. Admission of the stepfather's dying declaration that defendant stabbed him did not contribute to his conviction or punishment and was harmless error under Tex. R. App. P. 44.2, because the identity of the person who stabbed the stepfather was never an issue at trial. Carrillo v. State, 2007 Tex. App. LEXIS 1374 (Tex. App. Austin Feb. 23 2007).

21. In a juvenile defendant's murder case, the court erred in admitting a statement of the victim, a taxicab driver, under a hearsay exception because, although the victim was clearly unavailable at the time of trial, his statement to the dispatcher identifying the pick-up and drop-off locations did not fall within any of the exceptions listed in Tex. R. Evid. 804(b). In re E.C.D., 2007 Tex. App. LEXIS 1270 (Tex. App. San Antonio Feb. 21 2007).

22. Defendant's conviction under Tex. Penal Code Ann. § 19.02(b) for murdering his roommate, on the theory that he participated as a party to murder pursuant to Tex. Penal Code Ann. § 7.02(a)(2), was supported by sufficient factual evidence because: (1) the victim's statement after he was shot in the neck, which qualified as a dying declaration under Tex. R. Evid. 804(b)(2), identifying a second man as the shooter and placing defendant in the victim's bedroom when the shooting occurred was corroborated by three detached witnesses; (2) the jury could have reasonably inferred from the evidence that defendant aided the second man in the commission of the offense

by providing him the only available access to the victim at that time of the night; (3) the victim, who was afraid of defendant, had requested that defendant vacate the apartment within a week; and (4) according to the victim's dying declaration, the second man said that the shooting was payback because he was arrested at the crack house, and the crack house was closed down as a result. The jury was free to disbelieve defendant's statement to police and testimony that denied his involvement, to reconcile any discrepancies in the testimony before it, and to judge the credibility of the witnesses. Moya v. State, 2005 Tex. App. LEXIS 4577 (Tex. App. Corpus Christi June 16 2005).

Evidence : Hearsay : Exceptions : Dying Declarations : Belief of Imminent Death

23. In a murder trial, it was proper to admit an officer's testimony about the victim's statement to him because it was a dying declaration. A finding that the statement concerned the cause and circumstances of what the victim believed to be impending death was supported by evidence that she was bleeding profusely from stab wounds and said she was dying and that she had gone voluntarily with defendant but when she wanted to leave he refused to let her go and became angry and began to stab her. Valdez v. State, 2012 Tex. App. LEXIS 8686, 2012 WL 4928905 (Tex. App. El Paso Oct. 17 2012).

24. In a capital murder case, appellant's confrontation rights were not violated by the admission of statements from his wife regarding injuries allegedly inflicted by appellant because they were admissible as dying declarations under Tex. R. Evid. 804(b)(2); testimony about the severity of the wife's injuries was circumstantial evidence showing that she believed that her death was imminent, and her statements were directed at revealing the cause and circumstances of her impending death. Although she was mistaken about the age of her children, she was clear with regard to the circumstances causing her injuries, and she accurately provided her home address and that of her friend. Denson v. State, 2012 Tex. App. LEXIS 5971, 2012 WL 3025845 (Tex. App. San Antonio July 25 2012).

25. In defendant's murder case, a witness was properly allowed to testify to the victim's statements made at the hospital because it was undisputed that his injuries were severe and his prognosis was grim. Given the extent of the victim's injuries, the witness's impression that the victim knew there was a possibility he would die after being removed from the ventilator, and the giving of last rites, the trial court did not abuse its discretion by admitting the testimony under the dying declarations exception to the hearsay rule. Sadler v. State, 2009 Tex. App. LEXIS 2962, 2009 WL 1163407 (Tex. App. Waco Apr. 29 2009).

Evidence : Hearsay : Exceptions : Family Records & Statements

26. Trial court did not err in admitting the testimony of a descendant of the dominant estate's original owner, including events pre-dating the descendant's birth and the use of the purported easement. Under case law, such testimony was permissible under Tex. R. Evid. 803(19), (20), 804(b)(3). Perkins v. Krauter Family P'ship, 2004 Tex. App. LEXIS 8399 (Tex. App. San Antonio Sept. 22 2004).

Evidence : Hearsay : Exceptions : Former Testimony of Unavailable Declarants

27. Trial court's exclusion of the witness's testimony was not an abuse of its discretion because his unsworn statement was not testimony. The statement was neither notarized nor sworn to as part of a judicial proceeding and there was no examination to develop the assertions contained in the statement by direct, cross, or redirect examination. Lee v. State, 442 S.W.3d 569, 2014 Tex. App. LEXIS 8192 (Tex. App. San Antonio July 30 2014).

28. In defendant's capital murder trial, the trial court did not err in excluding the former testimony of a witness from a co-defendant's trial because the requested excerpt of testimony contained both admissible and inadmissible evidence, and it was defendant's burden to segregate and specifically offer the portions that were admissible under Tex. R. Evid. 804(b)(1); further, any error was harmless because substantially similar testimony was admitted into

evidence. Brown v. State, 2013 Tex. App. LEXIS 10655 (Tex. App. Houston 14th Dist. Aug. 22 2013).

29. At defendant's trial for murder, the trial court did not err by admitting the prior testimony from an accomplice witness; he was unavailable under the meaning of Tex. R. Evid. 804 because he invoked his Fifth Amendment privilege against self-incrimination. Lockridge v. State, 2013 Tex. App. LEXIS 6147 (Tex. App. Texarkana May 17 2013).

30. Trial court did not err in excluding the son's expert's prior testimony because he did not prove she was unavailable, Tex. R. Evid. 804(b)(1). Massey v. Allen Nat'l Prop., L.L.C., 2013 Tex. App. LEXIS 441, 2013 WL 173737 (Tex. App. Fort Worth Jan. 17 2013).

31. Admission of testimony from a prior hearing pertained to the introduction of the transcript from a prior hearing in which two witnesses testified who were not available to testify at trial; no authority would support reversal on this basis. In the Interest of H.L., 2012 Tex. App. LEXIS 5964, 2012 WL 3025912 (Tex. App. San Antonio July 25 2012).

32. Trial court did not abuse its discretion in denying defendant's request to present the prior sworn testimony of a witness under Tex. R. Evid. 804; without any evidence that defendant made any effort to locate the witness from August 2005 until November 2005, the date of trial, the trial court did not abuse its discretion in finding that defendant failed to show a goof faith effort to obtain the witness's presence at trial and that the witness was unavailable to testify at trial. Williams v. State, 2007 Tex. App. LEXIS 3444 (Tex. App. Houston 1st Dist. May 3 2007).

33. In a second trial for sexual abuse, it was error to admit the entirety of the complainant's testimony from the first trial even though the defense used part of the testimony for impeachment, because there was no showing that the entire prior testimony was either on the same subject or was necessary to correct a false or incorrect impression of the witness' testimony; the testimony was admissible because the complainant was not unavailable. Sneed v. State, 209 S.W.3d 782, 2006 Tex. App. LEXIS 10067 (Tex. App. Texarkana 2006).

34. Trial court did not err in admitting defendant's deposition testimony taken in a civil suit; because the deposition was not hearsay, no hearsay exception was needed, making Tex. R. Evid. 804(b)(1) and its reference to Tex. Code Crim. Proc. Ann. ch. 39 irrelevant. Ortega v. State, 2005 Tex. App. LEXIS 1941 (Tex. App. San Antonio Mar. 16 2005).

35. Borrower's former trial testimony was not hearsay, but was an admission by a party opponent under Tex. R. Evid. 801(e)(2); as such, the Texas Rules of Evidence did not require the trial court to have found the borrower unavailable under Tex. R. Evid. 804(b)(1) as a preliminary condition to admitting his testimony. Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc., 176 S.W.3d 307, 2004 Tex. App. LEXIS 7269 (Tex. App. Houston 1st Dist. 2004).

36. Reasonable minds could disagree as to whether defendant's trial counsel demonstrated a good-faith effort to secure a witness's attendance at his second trial by only contacting family members; therefore, the trial court did not abuse its discretion by denying defendant's request to declare the witness unavailable under Tex. R. Evid. 804(a)(5) for purposes of using the witness's prior testimony. Robinson v. State, 2014 Tex. App. LEXIS 1969, 2014 WL 700760 (Tex. App. Houston 1st Dist. Feb. 20 2014).

Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment

37. In a prosecution for indecency with a child by contact and aggravated sexual assault, the trial court did not err by admitting a social worker's testimony concerning the mother's and child's statements during an interview at the

hospital under the Tex. R. Evid. 803(4) exception to the rule against hearsay as the social worker's role was similar to that of an intake nurse in assisting a doctor in conducting a medical examination. Sledge v. State, 2004 Tex. App. LEXIS 2247 (Tex. App. Austin Mar. 11 2004).

Evidence : Hearsay : Exceptions : Present Sense Impression : General Overview

38. Written statement made by a murder victim four months before her death that described a physical altercation with defendant was not admissible as a statement of personal or family history because although the State pointed to the victim's statement describing her confrontation with defendant about his infidelities with another woman and claimed that amounted to a statement about the victim's marriage to defendant, there was no mention of the marital relationship in the victim's statement; moreover, parties did not need to be married in order to "cheat" on one another. Barrett v. State, 2014 Tex. App. LEXIS 2251, 2014 WL 792123 (Tex. App. Texarkana Feb. 27 2014).

Evidence : Hearsay : Exceptions : Residual Exceptions : Confrontation Clause Requirements

39. In an assault case, the Confrontation Clause was not implicated, despite the testimonial nature of a witness's written statement. Although the witness appeared in court, she did not remember anything that happened on the day of the assault, nor could the witness remember what she told a school security officer about the assault. In re M.H.V.-p., 341 S.W.3d 553, 2011 Tex. App. LEXIS 3348 (Tex. App. El Paso May 4 2011).

40. Although defendant, who was convicted of aggravated sexual assault of a child, asserted his constitutional right to confront witnesses was violated when the trial court allowed the State to read into evidence the testimony a witness gave at a pretrial hearing during which the witness testified about an outcry statement made to her, defendant's motive to cross-examine the witness at the pretrial hearing was similar to his stated motive for cross-examining her at trial. Therefore, defendant was not denied his constitutional right to confront a witness at trial. Sanchez v. State, 335 S.W.3d 256, 2010 Tex. App. LEXIS 8765 (Tex. App. San Antonio Nov. 3 2010).

Evidence : Hearsay : Exceptions : Statements Against Interest

41. Witness's comment about looking for defendant to retrieve a portion of the stolen money could have been deemed as against the witness's interests and not one that the declarant would have wanted others to hear; it was not said under oath or at any trial, but was volunteered to defendant's girlfriend, and nothing suggested that the information was part of a conversation involving an attempt to obtain evidence for use in a later prosecution, and thus the court did not find error in the decision to find the comment as non-testimonial for Confrontation Clause purposes. Boyd v. State, 2007 Tex. App. LEXIS 2787 (Tex. App. Amarillo Apr. 11 2007).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements

42. In defendant's sexual assault case, the trial court did not err in permitting the prosecutor to elicit testimony from a witness regarding prior consistent statements the victim made because defendant's wife testified that she believed the victim fabricated the sexual assault. The trial court could reasonably have concluded that the defense charged recent fabrication or improper motive, and that the prior statements were closer in time to the incident and made under circumstances and at a time where there was no "supposed motive to falsify." Weatherly v. State, 283 S.W.3d 481, 2009 Tex. App. LEXIS 2435 (Tex. App. Beaumont Apr. 1 2009).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

43. Trial court did not abuse its discretion in admitting defendant's testimony regarding her examination under oath conducted to settle a civil claim for insurance proceeds in her criminal trial for arson, because the statements under oath were admissions by defendant; since defendant's examination under oath was not hearsay when offered

against her, no hearsay exception was needed to admit the statements. Montgomery v. State, 2009 Tex. App. LEXIS 7223, 2009 WL 2933749 (Tex. App. Dallas Sept. 15 2009).

44. In a capital murder case, because defendant's civil deposition was not hearsay when offered against her, Tex. R. Evid. 804 was inapplicable and any noncompliance with the rule was irrelevant. Johnson v. State, 208 S.W.3d 478, 2006 Tex. App. LEXIS 2254 (Tex. App. Austin 2006).

Evidence : Hearsay : Unavailability : General Overview

45. In a juvenile defendant's murder case, the court erred in admitting a statement of the victim, a taxicab driver, under a hearsay exception because, although the victim was clearly unavailable at the time of trial, his statement to the dispatcher identifying the pick-up and drop-off locations did not fall within any of the exceptions listed in Tex. R. Evid. 804(b). In re E.C.D., 2007 Tex. App. LEXIS 1270 (Tex. App. San Antonio Feb. 21 2007).

46. Trial court did not err in admitting the testimony of a descendant of the dominant estate's original owner, including events pre-dating the descendant's birth and the use of the purported easement. Under case law, such testimony was permissible under Tex. R. Evid. 803(19), (20), 804(b)(3). Perkins v. Krauter Family P'ship, 2004 Tex. App. LEXIS 8399 (Tex. App. San Antonio Sept. 22 2004).

47. Trial court did not abuse its discretion when it did not admit a written statement from the daughter because the husband had not shown that he had made a good faith effort to procure the daughter's attendance at the hearing or to otherwise procure her sworn testimony. In re Marriage of Moon, 2004 Tex. App. LEXIS 3805 (Tex. App. Amarillo Apr. 29 2004).

Evidence : Hearsay : Unavailability : Absence of Declarants

48. Based on the testimony, the trial court could have found that the State made a good faith effort to locate and present a witness, and thus the trial court did not abuse its discretion in finding that the witness was unavailable. Wise v. State, 2013 Tex. App. LEXIS 8446 (Tex. App. Eastland July 11 2013).

49. Witness testimony from a first murder trial was properly admitted under Tex. R. Evid. 804(b)(1) and did not violate U.S. Const. amend. VI because the State made a good-faith effort to obtain a witness for a second trial; an investigator had exhausted his contacts with the friends and family of the witness, and any further efforts could have reasonably been deemed futile by the trial court. Because the investigator was unable to determine where the witness was located, a writ of attachment would have been futile as well. Reed v. State, 312 S.W.3d 682, 2009 Tex. App. LEXIS 7472 (Tex. App. Houston 1st Dist. Sept. 24 2009).

50. Since the objection for purposes of Tex. R. Evid. 804 was made outside the presence of the jury, a running objection was not necessary to preserve error, but it never hurts to secure a running objection. Loun v. State, 273 S.W.3d 406, 2008 Tex. App. LEXIS 8748 (Tex. App. Texarkana 2008).

51. Record did not contain any evidence that attempting compulsory process in this case under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings under Tex. Code Crim. Proc. Ann. art. 24.28 would have been futile; because there is no evidence of any good-faith efforts, the State failed to show it made good-faith efforts to secure a witness's presence and the trial court abused its discretion in admitting the prior recorded testimony. Loun v. State, 273 S.W.3d 406, 2008 Tex. App. LEXIS 8748 (Tex. App. Texarkana 2008).

52. Error raised, a violation of Tex. R. Evid. 804, was not constitutional and the violation, if any, of the Sixth Amendment was not raised as a separate issue; under Tex. R. App. P. 38.1, the court overruled this issue as multifarious or inadequately briefed. Loun v. State, 273 S.W.3d 406, 2008 Tex. App. LEXIS 8748 (Tex. App. Texarkana 2008).

53. Because a witness was the most favorable eyewitness for the State and the testimony that was improperly admitted under Tex. R. Evid. 804 formed an important part of the State's case, the court could not determined, for purposes of Tex. R. App. P. 44.2(b), that the inadmissible evidence did not have a substantial and injurious effect or influence on the jury, and thus the error resulted in some harm. Loun v. State, 273 S.W.3d 406, 2008 Tex. App. LEXIS 8748 (Tex. App. Texarkana 2008).

54. In civil trial for conversion of a decedent's funds, the trial court properly excluded testimony of a financial advisor of the decedent pursuant to Tex. R. Evid. 804 because the husband and wife, charged with conversion, failed to show that they had been unable to procure the testimony by process or other reasonable means in that they had not attempted to locate the advisor and merely asserted that the witness was beyond the court's subpoena power; this was insufficient to qualify the witness as unavailable. Estate of Glenn, 2006 Tex. App. LEXIS 10242 (Tex. App. Fort Worth Nov. 30 2006).

55. Texas R. Crim. Evid. 804, detailing the situations in which certain hearsay evidence may be admitted based on a witness's unavailability, mirrors the federal rule. Federal case law requires the government to demonstrate the unavailability of the witness. Caldwell v. State, 916 S.W.2d 674, 1996 Tex. App. LEXIS 561 (Tex. App. Texarkana 1996).

56. Determining whether evidence comes in under Tex. R. Crim. Evid. 804(b)(1), which admits testimony based on the unavailability of the declarant, is a question for the trial court to resolve, reviewable on appeal only under an abuse of discretion standard. Caldwell v. State, 916 S.W.2d 674, 1996 Tex. App. LEXIS 561 (Tex. App. Texarkana 1996).

57. Pursuant to Tex. R. Crim. Evid. 804(b)(1), testimony that a witness was elderly and recovering from surgery was sufficient to support a finding that the witness was unavailable to appear at appellant's trial; thus, the witness's former testimony was admissible at trial. Caldwell v. State, 916 S.W.2d 674, 1996 Tex. App. LEXIS 561 (Tex. App. Texarkana 1996).

58. Reasonable minds could disagree as to whether defendant's trial counsel demonstrated a good-faith effort to secure a witness's attendance at his second trial by only contacting family members; therefore, the trial court did not abuse its discretion by denying defendant's request to declare the witness unavailable under Tex. R. Evid. 804(a)(5) for purposes of using the witness's prior testimony. Robinson v. State, 2014 Tex. App. LEXIS 1969, 2014 WL 700760 (Tex. App. Houston 1st Dist. Feb. 20 2014).

Evidence : Hearsay : Unavailability : Inability to Testify : Death

59. In a case involving sentencing for a theft offense, because appellant did not object to a witness taking the stand where there was inadequate notice, the complaint was waived. Moreover, the witness was only called to read a victim's prior testimony, which was admissible due to his death under Tex. R. Evid. 804(a)(4). Kennedy v. State, 2012 Tex. App. LEXIS 6506, 2012 WL 3201924 (Tex. App. Tyler Aug. 8 2012).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

60. Determining whether evidence comes in under Tex. R. Crim. Evid. 804(b)(1), which admits testimony based on the unavailability of the declarant, is a question for the trial court to resolve, reviewable on appeal only under an abuse of discretion standard. Caldwell v. State, 916 S.W.2d 674, 1996 Tex. App. LEXIS 561 (Tex. App. Texarkana 1996).

Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview

61. In a second trial for child sexual assault, there was no error in admitting defendant's prior felony conviction for possession of marihuana because defendant invoked the right not to testify in the second trial, thus becoming unavailable under Tex. R. Evid. 804 and making testimony from the first trial admissible; in the former testimony, the trial court allowed the State to establish the prior conviction. Sirois v. State, 2008 Tex. App. LEXIS 3053 (Tex. App. Eastland Apr. 24 2008).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

62. Prior inconsistent statement for the purpose of impeaching the witness's previous testimony was not hearsay under Tex. R. Evid. 801(d). Williams v. State, 2009 Tex. App. LEXIS 9190, 2009 WL 4377196 (Tex. App. Tyler Dec. 2 2009).

Governments : Legislation : Statutes of Limitations : Time Limitations

63. Statement against interest exception to the hearsay rule should have applied to appellant's testimony about decedent's intent to give her a parcel of land because the evidence showed that decedent still owned the 1100 acres at the time appellant claimed the statement was made to her (and the evidence also showed that appellant had continuously possessed, occupied, and cultivated the plot and adjacent 10 acres), and although appellant's testimony of decedent's statement of a parol gift appeared self-serving as to appellant, it was also adverse to appellant because once appellant made her claim as a parol gift, as opposed to by adverse possession, the limitations period for anyone claiming adversely to her was extended. Conner v. Johnson, 2004 Tex. App. LEXIS 9633 (Tex. App. Fort Worth Oct. 28 2004).

Real Property Law : Adverse Possession : General Overview

64. Statement against interest exception to the hearsay rule should have applied to appellant's testimony about decedent's intent to give her a parcel of land because the evidence showed that decedent still owned the 1100 acres at the time appellant claimed the statement was made to her (and the evidence also showed that appellant had continuously possessed, occupied, and cultivated the plot and adjacent 10 acres), and although appellant's testimony of decedent's statement of a parol gift appeared self-serving as to appellant, it was also adverse to appellant because once appellant made her claim as a parol gift, as opposed to by adverse possession, the limitations period for anyone claiming adversely to her was extended. Conner v. Johnson, 2004 Tex. App. LEXIS 9633 (Tex. App. Fort Worth Oct. 28 2004).

Torts : Intentional Torts : Conversion : General Overview

65. In civil trial for conversion of a decedent's funds, the trial court properly excluded testimony of a financial advisor of the decedent pursuant to Tex. R. Evid. 804 because the husband and wife, charged with conversion, failed to show that they had been unable to procure the testimony by process or other reasonable means in that they had not attempted to locate the advisor and merely asserted that the witness was beyond the court's subpoena power; this was insufficient to qualify the witness as unavailable. Estate of Glenn, 2006 Tex. App. LEXIS 10242 (Tex. App. Fort Worth Nov. 30 2006).

End of Document

Tex. Evid. R. 805

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 805 Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 40, *Hearsay*.

Case Notes

Civil Procedure : Discovery : Methods : Perpetuation of Testimony
Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus
Civil Procedure : Appeals : Reviewability : Preservation for Review
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Endangerment : General Overview
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Demonstrative Evidence : General Overview
Evidence : Hearsay : Exceptions : Business Records : General Overview
Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment
Evidence : Hearsay : Exceptions : Public Records : General Overview
Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials
Evidence : Hearsay : Exceptions : Spontaneous Statements : Criminal Trials
Evidence : Hearsay : Hearsay Within Hearsay

Evidence : Hearsay : Rule Components
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements
Family Law : Parental Duties & Rights : Termination of Rights : General Overview

LexisNexis (R) Notes

Civil Procedure : Discovery : Methods : Perpetuation of Testimony

1. Mandamus relief was conditionally granted where a former employee sought to take a presuit deposition under Tex. R. Civ. P. 202 because the record contained no evidence; neither the employee's verified pleadings nor a letter from his counsel was admitted. Even if they had been, pleadings were not competent evidence, and letter contained hearsay within hearsay. In re Contractor's Supplies, Inc., 2009 Tex. App. LEXIS 6396, 2009 WL 2488374 (Tex. App. Tyler Aug. 17 2009).

Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus

2. Mandamus relief was conditionally granted where a former employee sought to take a presuit deposition under Tex. R. Civ. P. 202 because the record contained no evidence; neither the employee's verified pleadings nor a letter from his counsel was admitted. Even if they had been, pleadings were not competent evidence, and letter contained hearsay within hearsay. In re Contractor's Supplies, Inc., 2009 Tex. App. LEXIS 6396, 2009 WL 2488374 (Tex. App. Tyler Aug. 17 2009).

Civil Procedure : Appeals : Reviewability : Preservation for Review

3. Because the detective failed to address each document he objected to, identify which parts of the document contained hearsay and hearsay within hearsay, and explain why the documents were not admissible as a statement by a party opponent, his claim was rejected on appeal. Both at trial and on appeal, the detective made a blanket objection without identifying each part of each statement that contained hearsay with hearsay, and as such, his objection was not sufficiently specific to preserve error. Flores v. City of Liberty, 318 S.W.3d 551, 2010 Tex. App. LEXIS 6298 (Tex. App. Beaumont Aug. 5 2010).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Endangerment : General Overview

4. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, the trial court committed harmless error by admitting two exhibits containing the medical records of the child-victims as the statements of abuse contained within the exhibits were double hearsay not within any exception. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

5. In community supervision revocation proceedings, counsel was not ineffective for failing to object on the ground of hearsay within hearsay under Tex. R. Evid. 805 when a witness testified concerning reports made by another community supervision officer; there was not much hearsay within hearsay evidence, the record did not affirmatively demonstrate that the State could not have gotten this evidence in, and counsel effectively countered the evidence on cross-examination. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : General Overview

6. In community supervision revocation proceedings, counsel was not ineffective for failing to object on the ground of hearsay within hearsay under Tex. R. Evid. 805 when a witness testified concerning reports made by another community supervision officer; there was not much hearsay within hearsay evidence, the record did not affirmatively demonstrate that the State could not have gotten this evidence in, and counsel effectively countered the evidence on cross-examination. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

7. Admission of defendant's jail records in defendant's murder trial was proper under the business records exception to the hearsay rule because the records were not prepared for purposes of litigation and conviction, but were instead part of a record routine kept for objective observation purposes. Kennedy v. State, 2005 Tex. App. LEXIS 897 (Tex. App. Fort Worth Feb. 3 2005), opinion withdrawn by 2005 Tex. App. LEXIS 10469 (Tex. App. Fort Worth Dec. 16, 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

8. Defendant's hearsay objections to the admission of Child Protective Services records as whole were properly overruled because portions of the exhibits were admissible and defendant failed to request specific deletions of specific items in the exhibits. Moore v. State, 2013 Tex. App. LEXIS 11349 (Tex. App. Corpus Christi Sept. 5 2013).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

9. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, the trial court committed harmless error by admitting two exhibits containing the medical records of the child-victims as the statements of abuse contained within the exhibits were double hearsay not within any exception. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

10. In an injury to a child case, the court erred by allowing testimony by the child's mother that her parents needed to tell her something important that the police said regarding defendant's involvement in the crime because it constituted double hearsay; however, the error was harmless because defendant was indicted for the crime, and the police themselves testified during trial that they believed defendant committed the crime and why. Lopez v. State, 200 S.W.3d 246, 2006 Tex. App. LEXIS 9199 (Tex. App. Houston 14th Dist. 2006).

Evidence : Demonstrative Evidence : General Overview

11. If a document contains both inadmissible and admissible hearsay testimony, an appellant must specify in the trial court which portion of the document is admissible, and if he fails to do so, a trial court may properly exclude the entire document. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

12. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court did not err in refusing to admit the complainant's handwritten statement as impeachment evidence where the document was double hearsay not within any exception. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

Evidence : Hearsay : Exceptions : Business Records : General Overview

13. In a proceeding to terminate a father's parental rights, hearsay statements of two adults, repeating a child's accusation of sexual abuse by the father, could not be admitted as public or business records. Because the reviewing court found that the statements of the adults were inadmissible hearsay, it did not separately discuss the admissibility of the underlying statements of the child; the documents were inadmissible under Tex. R. Evid. 805 if either level was not admissible under an exception to the hearsay rule. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment

14. In defendant's aggravated robbery case, the juvenile court properly admitted a statement about the victim being "struck with a rock" that was contained in the medical records because the medical records satisfied the business records exception, the document was signed by the treating physician, and the medical records included an affidavit by the custodian of records for the hospital, who averred that she had personal knowledge of the manner in which the records were prepared. In re B. P. S., 2008 Tex. App. LEXIS 6028 (Tex. App. Austin Aug. 6 2008).

Evidence : Hearsay : Exceptions : Public Records : General Overview

15. In a proceeding to terminate a father's parental rights, hearsay statements of two adults, repeating a child's accusation of sexual abuse by the father, could not be admitted as public or business records. Because the reviewing court found that the statements of the adults were inadmissible hearsay, it did not separately discuss the admissibility of the underlying statements of the child; the documents were inadmissible under Tex. R. Evid. 805 if either level was not admissible under an exception to the hearsay rule. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

Evidence : Hearsay : Exceptions : Recorded Recollection : Criminal Trials

16. In an aggravated assault case, a trial court erred by allowing the admission of a statement because the State merely wanted to impeach a witness with otherwise inadmissible hearsay since it was shown that the State had learned that the witness did not remember making the statement, and the witness was not going to give favorable testimony for the State; moreover, the statement was not admissible as a past recorded recollection under Tex. R. Evid. 803(5) because the witness did not vouch for the accuracy of the statement. However, the error was harmless because evidence that defendant shot a victim was admitted through other sources. Aguilar v. State, 2008 Tex. App. LEXIS 8921 (Tex. App. Houston 14th Dist. Dec. 2 2008).

Evidence : Hearsay : Exceptions : Spontaneous Statements : Criminal Trials

17. In a murder trial, the trial court properly admitted, under the excited utterance exception, a hearsay statement that the declarant could not believe defendant had shot someone. Even if the declarant's knowledge came from a third person, the only out-of-court statement offered into evidence was the declarant's. The State did not have to show that the third party's statement fell within a hearsay exception. Ross v. State, 154 S.W.3d 804, 2004 Tex. App. LEXIS 11407 (Tex. App. Houston 14th Dist. 2004).

Evidence : Hearsay : Hearsay Within Hearsay

18. Defendant's hearsay objections to the admission of Child Protective Services records as whole were properly overruled because portions of the exhibits were admissible and defendant failed to request specific deletions of specific items in the exhibits. Moore v. State, 2013 Tex. App. LEXIS 11349 (Tex. App. Corpus Christi Sept. 5 2013).

19. Allowing the prosecutor to testify about an email regarding another out-of-court statement allegedly made by a detective would have involved violations of the hearsay rules, including Tex. R. Evid. 801, 805, and appellant did not identify any exception, for purposes of Tex. R. Evid. 802; appellant did not show that the trial court erred in refusing to allow the prosecutor to testify about the email. Zavala v. State, 401 S.W.3d 171, 2011 Tex. App. LEXIS 8671, 2011 WL 5156843 (Tex. App. Houston 14th Dist. Nov. 1 2011).

20. Because the detective failed to address each document he objected to, identify which parts of the document contained hearsay and hearsay within hearsay, and explain why the documents were not admissible as a statement by a party opponent, his claim was rejected on appeal. Both at trial and on appeal, the detective made a blanket objection without identifying each part of each statement that contained hearsay with hearsay, and as such, his objection was not sufficiently specific to preserve error. Flores v. City of Liberty, 318 S.W.3d 551, 2010 Tex. App. LEXIS 6298 (Tex. App. Beaumont Aug. 5 2010).

21. For purposes of Tex. R. Evid. 805, without knowing the identity of the declarant, the court could not say that the first part of a statement qualified as any exception to the hearsay rule; because not all levels of hearsay contained within the statement satisfied an exception to the hearsay rule, the trial court did not err in sustaining a hearsay objection to this statement. Montalvo v. County of Refugio, 2010 Tex. App. LEXIS 3120, 2010 WL 1731651 (Tex. App. Corpus Christi Apr. 29 2010).

22. First level of hearsay in a statement identified declarants as "other individuals," but no hearsay exception was offered that was applicable to them, such that the trial court did not err in sustaining a hearsay objection to this statement. Montalvo v. County of Refugio, 2010 Tex. App. LEXIS 3120, 2010 WL 1731651 (Tex. App. Corpus Christi Apr. 29 2010).

23. Defendant lodged a proper and timely hearsay objection to a witness's testimony concerning a person's statement to him, for purposes of Tex. R. Evid. 802, and an analysis of the witness's testimony revealed that it contained two levels of hearsay, for analysis purposes under Tex. R. Evid. 805, with the first layer of hearsay concerning what defendant told the person about his involvement in the crime, which constituted a statement against penal interest under Tex. R. Evid. 803(24); because the second layer of hearsay, the person's statement that defendant admitted involvement in the crimes, would not subject the person to prosecution and did not satisfy Rule 803(24), the admission of the double hearsay was an abuse of discretion. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

24. Secret Service agent's testimony concerned what defendant told investigators was said by defendant, and this testimony was clearly hearsay within hearsay under Tex. R. Evid. 805, and the second layer of hearsay was not excluded from the hearsay rule by any exception, such as Tex. R. Evid. 803(24), because any statement by the witness about defendant's involvement in the crimes would not implicate the witness; defendant did not renew the hearsay objection he previously raised to another witness's substantially similar testimony, and because the substantively equivalent testimony to which he earlier objected was later admitted without objection, defendant did not preserve this issue for appellate review. Bryant v. State, 282 S.W.3d 156, 2009 Tex. App. LEXIS 1737 (Tex. App. Texarkana Mar. 13 2009).

25. In defendant's aggravated robbery case, the juvenile court properly admitted a statement about the victim being "struck with a rock" that was contained in the medical records because the medical records satisfied the business records exception, the document was signed by the treating physician, and the medical records included an affidavit by the custodian of records for the hospital, who averred that she had personal knowledge of the manner in which the records were prepared. In re B. P. S., 2008 Tex. App. LEXIS 6028 (Tex. App. Austin Aug. 6 2008).

26. In a child sexual abuse case, defendant could not question the investigating officer about prior inconsistent statements that the victim allegedly had made to the officer who initially took her statement and to a caseworker; this multiple hearsay was not admissible under Tex. R. Evid. 805 because even if the victim's statements had been admissible under the prior inconsistent statement rule, which would have passed the first level of hearsay, defendant offered no explanation of how the contents of a report by the officer who initially took the victim's statement or the investigating officer's testimony based on that report fell within any hearsay exception. Segura v. State, 2008 Tex. App. LEXIS 1303 (Tex. App. Fort Worth Feb. 21 2008).

27. Defendant initially objected to a witness's statement as containing hearsay and as having been disavowed by the witness, and defendant then objected because the statement denied his constitutional rights, but neither objection preserved a double hearsay issue. Freeman v. State, 230 S.W.3d 392, 2007 Tex. App. LEXIS 3965 (Tex. App. Eastland 2007).

28. In an injury to a child case, the court erred by allowing testimony by the child's mother that her parents needed to tell her something important that the police said regarding defendant's involvement in the crime because it constituted double hearsay; however, the error was harmless because defendant was indicted for the crime, and the police themselves testified during trial that they believed defendant committed the crime and why. Lopez v. State, 200 S.W.3d 246, 2006 Tex. App. LEXIS 9199 (Tex. App. Houston 14th Dist. 2006).

29. In community supervision revocation proceedings, counsel was not ineffective for failing to object on the ground of hearsay within hearsay under Tex. R. Evid. 805 when a witness testified concerning reports made by another community supervision officer; there was not much hearsay within hearsay evidence, the record did not affirmatively demonstrate that the State could not have gotten this evidence in, and counsel effectively countered the evidence on cross-examination. Kennemur v. State, 2006 Tex. App. LEXIS 2226 (Tex. App. Waco Mar. 22 2006).

30. Because an investigator's notes were not helpful in determining the truth or falsity of any fact relevant to the lawsuit for purposes of Tex. R. Evid. 401, they were not relevant and not admissible; furthermore, the notes were inadmissible because they memorialized out-of-court observations of a third party's interview of the victim and were hearsay within hearsay under Tex. R. Evid. 805. Khoshayand v. State, 179 S.W.3d 779, 2005 Tex. App. LEXIS 10404 (Tex. App. Dallas 2005).

31. Oil well blowout report contained hearsay within hearsay under Tex. R. Evid. 805 because the author of the report did not contribute any information to the report, which was based on other records; the trial court did not abuse its discretion by excluding the hearsay within hearsay found in the report because the company did not prove an exception that would have rendered the hearsay admissible. Rebel Drilling Co., L.P. v. Nabors Drilling USA, Inc., 2004 Tex. App. LEXIS 8320 (Tex. App. Houston 14th Dist. Sept. 16 2004).

32. If a document contains both inadmissible and admissible hearsay testimony, an appellant must specify in the trial court which portion of the document is admissible, and if he fails to do so, a trial court may properly exclude the entire document. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

33. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court did not err in refusing to admit the complainant's handwritten statement as impeachment evidence where the document was double hearsay not within any exception. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

34. In a criminal prosecution for endangering a child arising from the sexual assault of defendant's two children by her live-in boyfriend, the trial court committed harmless error by admitting two exhibits containing the medical records of the child-victims as the statements of abuse contained within the exhibits were double hearsay not within any exception. Naivar v. State, 2004 Tex. App. LEXIS 4883 (Tex. App. Tyler May 28 2004).

35. Trial court properly sustained the State's objection to a defendant's attempt to cross-examine a police officer regarding a victim's statements that she dug her fingernails into her assailant as inadmissible hearsay where the statement was recorded in a medical record and constituted hearsay within hearsay under Tex. R. Evid. 805 because the officer had no first-hand knowledge of the victim's statements as recorded in the medical record. Rodgers v. State, 111 S.W.3d 236, 2003 Tex. App. LEXIS 5321 (Tex. App. Texarkana 2003).

Evidence : Hearsay : Rule Components

36. In a murder trial, the trial court properly admitted, under the excited utterance exception, a hearsay statement that the declarant could not believe defendant had shot someone. Even if the declarant's knowledge came from a third person, the only out-of-court statement offered into evidence was the declarant's. The State did not have to show that the third party's statement fell within a hearsay exception. Ross v. State, 154 S.W.3d 804, 2004 Tex. App. LEXIS 11407 (Tex. App. Houston 14th Dist. 2004).

37. In an aggravated sexual assault of a child case, even if the victim's alleged statement itself was admissible, it was shrouded by additional layers of hearsay not falling under any exception. The tape consisted of an out-of-court statement by an anonymous caller reporting her daughter's out-of-court statement that the victim told her, in an out-of-court statement, that her father sexually assaulted her (rather than defendant). Because the tape contained layers of inadmissible hearsay, the trial court properly excluded it. Holmes v. State, 2004 Tex. App. LEXIS 10661 (Tex. App. Dallas Nov. 30 2004).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

38. Admission of defendant's jail records in defendant's murder trial was proper under the business records exception to the hearsay rule because the records were not prepared for purposes of litigation and conviction, but were instead part of a record routine kept for objective observation purposes. Kennedy v. State, 2005 Tex. App. LEXIS 897 (Tex. App. Fort Worth Feb. 3 2005), opinion withdrawn by 2005 Tex. App. LEXIS 10469 (Tex. App. Fort Worth Dec. 16, 2005).

Evidence : Procedural Considerations : Rulings on Evidence

39. Trial court properly sustained the State's objection to a defendant's attempt to cross-examine a police officer regarding a victim's statements that she dug her fingernails into her assailant as inadmissible hearsay where the statement was recorded in a medical record and constituted hearsay within hearsay under Tex. R. Evid. 805 because the officer had no first-hand knowledge of the victim's statements as recorded in the medical record. Rodgers v. State, 111 S.W.3d 236, 2003 Tex. App. LEXIS 5321 (Tex. App. Texarkana 2003).

Evidence : Testimony : Credibility : Impeachment : Prior Inconsistent Statements

40. In an aggravated assault case, a trial court erred by allowing the admission of a statement because the State merely wanted to impeach a witness with otherwise inadmissible hearsay since it was shown that the State had learned that the witness did not remember making the statement, and the witness was not going to give favorable testimony for the State; moreover, the statement was not admissible as a past recorded recollection under Tex. R. Evid. 803(5) because the witness did not vouch for the accuracy of the statement. However, the error was harmless

because evidence that defendant shot a victim was admitted through other sources. Aguilar v. State, 2008 Tex. App. LEXIS 8921 (Tex. App. Houston 14th Dist. Dec. 2 2008).

Family Law : Parental Duties & Rights : Termination of Rights : General Overview

41. In a proceeding to terminate a father's parental rights, hearsay statements of two adults, repeating a child's accusation of sexual abuse by the father, could not be admitted as public or business records. Because the reviewing court found that the statements of the adults were inadmissible hearsay, it did not separately discuss the admissibility of the underlying statements of the child; the documents were inadmissible under Tex. R. Evid. 805 if either level was not admissible under an exception to the hearsay rule. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

Tex. Evid. R. 806

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 806 Attacking and Supporting the Declarant's Credibility

When a hearsay statement - or a statement described in Rule 801(e)(2)(C), (D), or (E), or, in a civil case, a statement described in Rule 801(e)(3) - has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's statement or conduct, offered to impeach the declarant, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 40, *Hearsay*.

Case Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Witnesses : Impeachment
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Hearsay : Credibility of Declarants : General Overview
Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence
Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

Evidence : Hearsay : Exceptions : Statements Against Interest
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements
Evidence : Hearsay : Hearsay Within Hearsay
Evidence : Hearsay : Rule Components
Evidence : Testimony : Credibility : General Overview
Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview
Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility
Evidence : Testimony : Credibility : Impeachment : Prior Conduct

LexisNexis (R) Notes

Constitutional Law : Bill of Rights : Fundamental Rights : Criminal Process : Right to Confrontation

1. In a murder trial, there was no violation of the Confrontation Clause when the State introduced an accomplice's out-of-court statement incriminating defendant because it was offered to impeach other out-of-court statements by the accomplice, introduced in the defense's case in chief, which tended to exonerate defendant; the introduction of the exonerating statements triggered Tex. R. Evid. 806; the State was then allowed to use Tex. R. Evid. 806, together with Tex. R. Evid. 613, to impeach the accomplice. Hernandez v. State, 219 S.W.3d 6, 2006 Tex. App. LEXIS 11300 (Tex. App. San Antonio 2006).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault

2. In a domestic violence case under Tex. Penal Code Ann. § 22.01, defendant should have been permitted to introduce testimony from a witness that the complainant said that the assault was an accident, in order to impeach the complainant's out-of-court accusations; however, the error in excluding that evidence was harmless under Tex. R. App. P. 44 because the excluded testimony was repetitious of the version of the incident testified to by defendant and defendant's parent, and it was inconsistent with the physical evidence. Sohail v. State, 264 S.W.3d 251, 2008 Tex. App. LEXIS 1236 (Tex. App. Houston 1st Dist. 2008).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Sexual Assault : General Overview

3. In a sexual assault case, a court properly allowed evidence of defendant's prior convictions to impeach his out-of-court statement that he was not responsible for the crime where, during the recross-examination of an officer, defense counsel elicited, without objection, defendant's out-of-court statement that he was not responsible for what he was being accused. By eliciting the statement during his cross-examination of a State's witness, defendant opened the door to the issue of his credibility. Flores v. State, 2004 Tex. App. LEXIS 7207 (Tex. App. Corpus Christi Aug. 12 2004).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

4. Counsel was not ineffective for asking a detective questions on cross-examination about what defendant told him about the ownership of the guns in defendant's house, which allowed the State to introduce defendant's prior murder conviction for impeachment as if defendant had been a witness under Tex. R. Evid. 806, because the presence of guns in the house was undeniable and never a contested issue; the only reasonable defense strategy and the one counsel pursued was to acknowledge the presence of the firearms in the house but to demonstrate the paucity of evidence that defendant owned or possessed them. Smith v. State, 2007 Tex. App. LEXIS 6023 (Tex. App. Tyler July 31 2007).

Criminal Law & Procedure : Witnesses : Impeachment

5. In a sexual assault case, a court properly allowed evidence of defendant's prior convictions to impeach his out-of-court statement that he was not responsible for the crime where, during the recross-examination of an officer, defense counsel elicited, without objection, defendant's out-of-court statement that he was not responsible for what he was being accused. By eliciting the statement during his cross-examination of a State's witness, defendant opened the door to the issue of his credibility. Flores v. State, 2004 Tex. App. LEXIS 7207 (Tex. App. Corpus Christi Aug. 12 2004).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

6. Although defendant argued the trial court abused its discretion by excluding evidence of prior convictions offered to impeach the statements of identification by a non-witness, defendant's complaint on appeal was waived. Defendant did not give the trial court an opportunity to consider admissibility under Tex. R. Evid. 806 by pointing out that rule. Hackett v. State, 2013 Tex. App. LEXIS 13576, 2013 WL 5889446 (Tex. App. Waco Oct. 31 2013).

7. Defendant failed to preserve for appellate review his claim that the trial court erred by prohibiting him from offering evidence of the complainant's criminal history to impeach her because defendant did not argue to the trial court that it was admissible under Tex. R. Evid. 806 or any other rule of evidence and never gave the trial court an opportunity to consider its admissibility. Hill v. State, 2012 Tex. App. LEXIS 2225, 2012 WL 983338 (Tex. App. Houston 1st Dist. Mar. 22 2012).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

8. During defendant's criminal trial for burglary of a building, he challenged the trial court's admission of hearsay impeachment evidence of his twenty prior convictions; the trial court determined the evidence was properly admitted under Tex. R. Evid. 806. Because defendant failed to object when the same evidence was admitted through the testimony of a police officer, the issue was waived for appellate review in accordance with Tex. R. App. P. 33.1. Greenlee v. State, 2008 Tex. App. LEXIS 9438 (Tex. App. Texarkana Dec. 19 2008).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

9. Trial court did not abuse its discretion by allowing the State to introduce testimony about defendant's criminal record during the guilt-innocence phase of his trial because the State was authorized under Tex. R. Evid. 806 to impeach defendant's hearsay testimony; the two witnesses' testimony was hearsay, as they were statements of defendant made out of court to prove that defendant had purchased the laptop from a friend. The Theus factors also weighed in favor of admission, as all of defendant's prior convictions but one involved crimes of moral turpitude or theft, defendant's otherwise remote convictions were followed by additional convictions, and had the jury believed the witnesses' hearsay statements it likely would have acquitted defendant. Schmidt v. State, 373 S.W.3d 856, 2012 Tex. App. LEXIS 5657, 2012 WL 2888213 (Tex. App. Amarillo July 16 2012).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

10. In a theft prosecution, the allegedly improper admission of a store invoice for a Rolex watch that had later-made notations on it regarding defendant's check being returned for insufficient funds was harmless. The State relied on bank records that showed that defendant's account had insufficient funds at the time he wrote the check and thereafter and did not rely on the invoice at all. Rodgers v. State, 2013 Tex. App. LEXIS 1741, 2013 WL 1614109 (Tex. App. Dallas Feb. 21 2013).

11. In defendant's drug case, assuming the trial court abused its discretion by allowing the State to ask a witness questions concerning whether defendant paid for the motel room and questions about defendant's prior convictions, any harm arising from the error was cured when defendant later testified that he paid for the motel room--the very

same conclusion implicit in the witness's testimony--and when evidence of defendant's convictions was admitted without objection during his testimony. Davis v. State, 2010 Tex. App. LEXIS 450 (Tex. App. Amarillo Jan. 26 2010).

12. In a domestic violence case under Tex. Penal Code Ann. § 22.01, defendant should have been permitted to introduce testimony from a witness that the complainant said that the assault was an accident, in order to impeach the complainant's out-of-court accusations; however, the error in excluding that evidence was harmless under Tex. R. App. P. 44 because the excluded testimony was repetitious of the version of the incident testified to by defendant and defendant's parent, and it was inconsistent with the physical evidence. Sohail v. State, 264 S.W.3d 251, 2008 Tex. App. LEXIS 1236 (Tex. App. Houston 1st Dist. 2008).

Evidence : Hearsay : Credibility of Declarants : General Overview

13. In a murder case, defendant was not entitled to impeach the victim's credibility regarding a statement allegedly made by the victim while arguing with defendant because the victim's purported statement was not offered for the truth of the matter asserted. McGowan v. State, 188 S.W.3d 239, 2006 Tex. App. LEXIS 878 (Tex. App. Waco 2006).

14. Trial court erred by refusing to allow defendant to attack his girlfriend's credibility under Tex. R. Evid. 806 after her out-of-court statements were admitted into evidence; however the error was harmless because defendant's offer of proof showed that his girlfriend later denied he pointed a knife at her; but it did not show she recanted her previous statement that defendant pointed the knife at her daughter, who was the complainant. Godfrey v. State, 2005 Tex. App. LEXIS 4050 (Tex. App. Houston 14th Dist. May 26 2005).

15. Because the victim was the declarant of hearing statements admitted through a family member and a police officer, defendant was entitled to impeach the victim's credibility as if the victim had given live testimony. Oveal v. State, 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9 2004), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 1837 (Tex. App. Houston 14th Dist. Mar. 10, 2005).

Evidence : Hearsay : Credibility of Declarants : Impeachment Evidence

16. State's ability to object to the admissibility of the victim's statement did not make the trial unfair, and even if the State had introduced the victim's statement, defendant would have been entitled to impeach the evidence, and thus he was not deprived of a fair trial because of the State's hearsay objection. Mares v. State, 2013 Tex. App. LEXIS 11983, 2013 WL 5433321 (Tex. App. Tyler Sept. 25 2013).

17. Even assuming that a witness's statements were hearsay, a trial court did not err in excluding another witness's immunity agreement to impeach the hearsay statements; the statements did not reach the "formal" level that would raise them to the level of "testimonial" statements, such that they would implicate the Confrontation Clause of the U.S. Constitution. Marmolejo v. State, 2013 Tex. App. LEXIS 5316 (Tex. App. El Paso Apr. 30 2013).

18. Defendant failed to preserve for appellate review his claim that the trial court erred by prohibiting him from offering evidence of the complainant's criminal history to impeach her because defendant did not argue to the trial court that it was admissible under Tex. R. Evid. 806 or any other rule of evidence and never gave the trial court an opportunity to consider its admissibility. Hill v. State, 2012 Tex. App. LEXIS 2225, 2012 WL 983338 (Tex. App. Houston 1st Dist. Mar. 22 2012).

19. Appellant's attempt to impeach a doctor's credibility was not covered under Tex. R. Evid. 806, and when applicable, the rule allowed the declarant's credibility to be challenged; the declarant's credibility was not an issue at trial, and a witness's testimony regarding information he received from the declarant was relevant only if the jury

found the declarant's statement was accurate and truthful, and because the declarant's statement was offered to prove the truth of the matter asserted, it was inadmissible and the trial court properly excluded it. Lozano v. State, 359 S.W.3d 790, 2012 Tex. App. LEXIS 718 (Tex. App. Fort Worth Jan. 26 2012).

20. Trial court did not abuse its discretion by admitting evidence that defendant had previously been convicted of failure to register as a sex offender under Tex. R. Evid. 609 and 806 during his trial on charges of sexual assault and aggravated sexual assault because: (1) the prior crime involved deception since defendant, by failing to register, concealed the address at which he resided; (2) one of the charged offenses occurred only five years after the past crime; (3) the admission of the prior conviction informed the jury that defendant had been determined to be a sex offender so there was some potential for the jury to perceive a pattern of past conduct; and (4) defendant's testimony and credibility were critical to his defense because no other witnesses could dispute the detective's account of his interview of defendant and the meaning of a drawing admitted into evidence. Theragood v. State, 2011 Tex. App. LEXIS 7141, 2011 WL 3848840 (Tex. App. El Paso Aug. 31 2011).

21. During defendant's criminal trial for burglary of a building, he challenged the trial court's admission of hearsay impeachment evidence of his twenty prior convictions; the trial court determined the evidence was properly admitted under Tex. R. Evid. 806. Because defendant failed to object when the same evidence was admitted through the testimony of a police officer, the issue was waived for appellate review in accordance with Tex. R. App. P. 33.1. Greenlee v. State, 2008 Tex. App. LEXIS 9438 (Tex. App. Texarkana Dec. 19 2008).

22. In defendant's motion for a new trial, the court properly excluded four letters written by a witness who testified at trial because the letters did not tend to expose the witness to criminal liability, and even if they did, there was no corroborating evidence to clearly indicate the trustworthiness of the statement. In both letters, the witness expresses his anger at defendant, but the witness did not say, however, that he lied when he testified for the State. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

23. In defendant's drug case, the court properly refused to allow him to impeach the informant with her prior criminal record because the only document defendant had was a printout that the officers had obtained when they ran a "background check" on the informant, and there was no evidence linking the first name in the printout to the informant whose statements were admitted at trial. Kuecker v. State, 2008 Tex. App. LEXIS 2778 (Tex. App. Houston 1st Dist. Apr. 17 2008).

24. Other than two short paragraphs complaining of counsel's actions in asking a question that permitted the State, under Tex. R. Evid. 806, to introduce defendant's prior convictions, defendant provided no legal argument or case law supporting his position, pursuant to Tex. R. App. P. 38.1(h), and thus the issue of ineffective assistance in this regard was waived; even if not waived, defendant's argument would have failed because it was sound trial strategy and defendant did not meet his burden of showing that counsel's actions deviated from prevailing norms. Wilborn v. State, 2007 Tex. App. LEXIS 6700 (Tex. App. Tyler Aug. 22 2007).

25. Because a witness's alleged hearsay statements were not admitted through another's testimony, the trial court did not abuse its discretion by denying defendant's request to introduce evidence to impeach the witness under Tex. R. Evid. 806. Francis v. State, 2007 Tex. App. LEXIS 2090 (Tex. App. Fort Worth Mar. 15 2007).

Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

26. In a theft prosecution, the allegedly improper admission of a store invoice for a Rolex watch that had later-made notations on it regarding defendant's check being returned for insufficient funds was harmless. The State relied on bank records that showed that defendant's account had insufficient funds at the time he wrote the check

and thereafter and did not rely on the invoice at all. Rodgers v. State, 2013 Tex. App. LEXIS 1741, 2013 WL 1614109 (Tex. App. Dallas Feb. 21 2013).

Evidence : Hearsay : Exceptions : Statements Against Interest

27. In defendant's motion for a new trial, the court properly excluded four letters written by a witness who testified at trial because the letters did not tend to expose the witness to criminal liability, and even if they did, there was no corroborating evidence to clearly indicate the trustworthiness of the statement. In both letters, the witness expresses his anger at defendant, but the witness did not say, however, that he lied when he testified for the State. Padron v. State, 2008 Tex. App. LEXIS 6175 (Tex. App. Corpus Christi Aug. 14 2008).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements

28. In defendant's sexual assault case, the trial court did not err in permitting the prosecutor to elicit testimony from a witness regarding prior consistent statements the victim made because defendant's wife testified that she believed the victim fabricated the sexual assault. The trial court could reasonably have concluded that the defense charged recent fabrication or improper motive, and that the prior statements were closer in time to the incident and made under circumstances and at a time where there was no "supposed motive to falsify." Weatherly v. State, 283 S.W.3d 481, 2009 Tex. App. LEXIS 2435 (Tex. App. Beaumont Apr. 1 2009).

Evidence : Hearsay : Hearsay Within Hearsay

29. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court did not err in refusing to admit the complainant's handwritten statement as impeachment evidence where the document was double hearsay not within any exception. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

Evidence : Hearsay : Rule Components

30. Where defendant was convicted of intoxication manslaughter and intoxication assault, the trial court abused its discretion by allowing defendant's prior felony convictions to be introduced to impeach his credibility, pursuant to Tex. R. Evid. 609, where the convictions were improperly admitted as hearsay, pursuant to Tex. R. Evid. 806, when they were not in fact hearsay as defined by Tex. R. Evid. 801(d). Enriquez v. State, 56 S.W.3d 596, 2001 Tex. App. LEXIS 5450 (Tex. App. Corpus Christi 2001).

Evidence : Testimony : Credibility : General Overview

31. In a criminal prosecution for burglary of a habitation with intent to commit aggravated assault, the trial court did not err in refusing to admit the complainant's handwritten statement as impeachment evidence where the document was double hearsay not within any exception. Oveal v. State, 2004 Tex. App. LEXIS 6148 (Tex. App. Houston 14th Dist. July 13 2004), opinion withdrawn by, substituted opinion at 2004 Tex. App. LEXIS 11050 (Tex. App. Houston 14th Dist. Dec. 9, 2004).

Evidence : Testimony : Credibility : Impeachment : Convictions : General Overview

32. In defendant's drug case, assuming the trial court abused its discretion by allowing the State to ask a witness questions concerning whether defendant paid for the motel room and questions about defendant's prior convictions, any harm arising from the error was cured when defendant later testified that he paid for the motel room--the very

same conclusion implicit in the witness's testimony--and when evidence of defendant's convictions was admitted without objection during his testimony. Davis v. State, 2010 Tex. App. LEXIS 450 (Tex. App. Amarillo Jan. 26 2010).

Evidence : Testimony : Credibility : Impeachment : Convictions : Admissibility

33. Trial court did not abuse its discretion by allowing the State to introduce testimony about defendant's criminal record during the guilt-innocence phase of his trial because the State was authorized under Tex. R. Evid. 806 to impeach defendant's hearsay testimony; the two witnesses' testimony was hearsay, as they were statements of defendant made out of court to prove that defendant had purchased the laptop from a friend. The Theus factors also weighed in favor of admission, as all of defendant's prior convictions but one involved crimes of moral turpitude or theft, defendant's otherwise remote convictions were followed by additional convictions, and had the jury believed the witnesses' hearsay statements it likely would have acquitted defendant. Schmidt v. State, 373 S.W.3d 856, 2012 Tex. App. LEXIS 5657, 2012 WL 2888213 (Tex. App. Amarillo July 16 2012).

34. Trial court did not abuse its discretion by admitting evidence that defendant had previously been convicted of failure to register as a sex offender under Tex. R. Evid. 609 and 806 during his trial on charges of sexual assault and aggravated sexual assault because: (1) the prior crime involved deception since defendant, by failing to register, concealed the address at which he resided; (2) one of the charged offenses occurred only five years after the past crime; (3) the admission of the prior conviction informed the jury that defendant had been determined to be a sex offender so there was some potential for the jury to perceive a pattern of past conduct; and (4) defendant's testimony and credibility were critical to his defense because no other witnesses could dispute the detective's account of his interview of defendant and the meaning of a drawing admitted into evidence. Theragood v. State, 2011 Tex. App. LEXIS 7141, 2011 WL 3848840 (Tex. App. El Paso Aug. 31 2011).

35. Counsel was not ineffective for asking a detective questions on cross-examination about what defendant told him about the ownership of the guns in defendant's house, which allowed the State to introduce defendant's prior murder conviction for impeachment as if defendant had been a witness under Tex. R. Evid. 806, because the presence of guns in the house was undeniable and never a contested issue; the only reasonable defense strategy and the one counsel pursued was to acknowledge the presence of the firearms in the house but to demonstrate the paucity of evidence that defendant owned or possessed them. Smith v. State, 2007 Tex. App. LEXIS 6023 (Tex. App. Tyler July 31 2007).

Evidence : Testimony : Credibility : Impeachment : Prior Conduct

36. Where defendant was convicted of intoxication manslaughter and intoxication assault, the trial court abused its discretion by allowing defendant's prior felony convictions to be introduced to impeach his credibility, pursuant to Tex. R. Evid. 609, where the convictions were improperly admitted as hearsay, pursuant to Tex. R. Evid. 806, when they were not in fact hearsay as defined by Tex. R. Evid. 801(d). Enriquez v. State, 56 S.W.3d 596, 2001 Tex. App. LEXIS 5450 (Tex. App. Corpus Christi 2001).

Tex. Evid. R. 901

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 901 Authenticating or Identifying Evidence

(a) ***In General.***--To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) ***Examples.***--The following are examples only-not a complete list-of evidence that satisfies the requirement:

(1) ***Testimony of a Witness with Knowledge.***--Testimony that an item is what it is claimed to be.

(2) ***Nonexpert Opinion About Handwriting.***--A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) ***Comparison by an Expert Witness or the Trier of Fact.***--A comparison by an expert witness or the trier of fact with a specimen that the court has found is genuine.

(4) ***Distinctive Characteristics and the Like.***--The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) ***Opinion About a Voice.***--An opinion identifying a person's voice - whether heard firsthand or through mechanical or electronic transmission or recording - based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) ***Evidence About a Telephone Conversation.***--For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A)a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B)a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) ***Evidence About Public Records.***--Evidence that:

(A)a document was recorded or filed in a public office as authorized by law; or

(B)a purported public record or statement is from the office where items of this kind are kept.

(8) ***Evidence About Ancient Documents or Data Compilations.***--For a document or data compilation, evidence that it:

(A)is in a condition that creates no suspicion about its authenticity;

(B)was in a place where, if authentic, it would likely be; and

(C)is at least 20 years old when offered.

(9) ***Evidence About a Process or System.***--Evidence describing a process or system and showing that it produces an accurate result.

(10) ***Methods Provided by a Statute or Rule.***--Any method of authentication or identification allowed by a statute or other rule prescribed under statutory authority.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 30, *Authentication*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Case Notes

Civil Procedure : Discovery : Methods : Admissions : General Overview
Civil Procedure : Summary Judgment : Evidence
Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Trials : Motions for Mistrial
Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials
Civil Procedure : Remedies : Costs & Attorney Fees : Attorney Expenses & Fees : Reasonable Fees
Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus
Civil Procedure : Appeals : Reviewability : Preservation for Review
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Computer & Internet Law : General Overview
Computer & Internet Law : Criminal Offenses : General Overview
Computer & Internet Law : Criminal Offenses : Sex Crimes
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview
Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : Elements
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Criminal Abortion : General Overview
Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview
Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary
Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Obscenity : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Vehicular Homicide : Elements
Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview
Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : Records
Criminal Law & Procedure : Search & Seizure : Electronic Eavesdropping : Warrantless Eavesdropping
Criminal Law & Procedure : Interrogation : Miranda Rights : Notice & Warning
Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims
Criminal Law & Procedure : Counsel : Effective Assistance : Appeals

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury : Weight of the Evidence
Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Proceedings
Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Standards
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History : Prior Felonies
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Waiver Triggers Generally
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview
Evidence : Authentication : General Overview
Evidence : Authentication : Self-Authentication
Evidence : Authentication : Chain of Custody
Evidence : Demonstrative Evidence
Evidence : Demonstrative Evidence : General Overview
Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Photographs
Evidence : Demonstrative Evidence : Recordings
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Documentary Evidence : General Overview
Evidence : Documentary Evidence : Best Evidence Rule
Evidence : Documentary Evidence : Writings : General Overview
Evidence : Documentary Evidence : Writings : Transcripts & Translations : General Overview
Evidence : Documentary Evidence : Writings : Transcripts & Translations : Translations
Evidence : Hearsay : Exceptions : Business Records : General Overview
Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials
Evidence : Hearsay : Exceptions : Judgments
Evidence : Hearsay : Exceptions : Public Records : General Overview
Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports
Evidence : Hearsay : Exceptions : State of Mind : General Overview
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Hearsay : Rule Components : General Overview
Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Procedural Considerations : Weight & Sufficiency
Evidence : Relevance : Confusion, Prejudice & Waste of Time
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Relevance : Relevant Evidence
Evidence : Scientific Evidence : Autopsies
Evidence : Scientific Evidence : Blood Alcohol
Evidence : Scientific Evidence : DNA
Evidence : Scientific Evidence : Fingerprints & Footprints

Evidence : Scientific Evidence : Handwriting
Evidence : Scientific Evidence : Voice Identification
Family Law : Guardians : General Overview
Workers' Compensation & SSDI : Administrative Proceedings : Evidence : General Overview

LexisNexis (R) Notes

Civil Procedure : Discovery : Methods : Admissions : General Overview

1. In an action alleging that the individual was the alter ego of three corporate entities, defendant was deemed to have admitted that he signed the letters and the asset purchase agreement that were attached to the request for admissions, and the trial court did not abuse its discretion in concluding that the deemed admissions sufficiently authenticated the letters and the asset purchase agreement. Carone v. Retamco Operating, Inc., 138 S.W.3d 1, 2004 Tex. App. LEXIS 2557 (Tex. App. San Antonio 2004).

2. In an action alleging that the individual was the alter ego of three corporate entities, defendant was deemed to have admitted that he signed the letters and the asset purchase agreement that were attached to the request for admissions, and the trial court did not abuse its discretion in concluding that the deemed admissions sufficiently authenticated the letters and the asset purchase agreement. . Carone v. Retamco Operating, Inc., 138 S.W.3d 1, 2004 Tex. App. LEXIS 2557 (Tex. App. San Antonio 2004).

Civil Procedure : Summary Judgment : Evidence

3. In a dispute over an oil and gas lease where a lessee was liable under the terms of the contract for compensatory royalties, a lessor did not produce sufficient evidence relating to damages because neither purported Texas Railroad Commission records nor a demand letter were authenticated; therefore, they were not summary judgment evidence. H&S Prod. v. Dorchester Minerals, LP, 2009 Tex. App. LEXIS 6386, 2009 WL 2478089 (Tex. App. Dallas Aug. 14 2009).

4. In a negligence case where a customer contended that he contracted food poisoning after eating undercooked chicken at a restaurant, medical records and a receipt were not considered summary judgment evidence because they were not properly authenticated under Tex. R. Evid. 901(a). The trial court was then required to grant a restaurant owner's motion for no-evidence summary judgment because the customer offered no evidence to support his position, and the record showed that the customer failed to respond to the motion after receiving proper service. Moody v. James, 2009 Tex. App. LEXIS 337, 2009 WL 127866 (Tex. App. Texarkana Jan. 21 2009).

5. In a spousal support enforcement case, a former husband was unable to raise the issues of hearsay and authentication to challenge summary judgment evidence because these complaints were not presented to the trial court, and no ruling was obtained. Eberstein v. Hunter, 260 S.W.3d 626, 2008 Tex. App. LEXIS 6596 (Tex. App. Dallas 2008).

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

6. Attaching the assignments to the summary judgment affidavits and describing the assignments therein was sufficient authentication or identification to show the documents were what the beneficial owners of the stock claimed they were as a condition precedent to admissibility; therefore, the trial court erred in holding that the beneficial owners' assignment and assumption agreements lacked authentication and it should have considered the assignment and assumption agreements as part of the summary judgment record. Caso-Bercht v. Striker Indus., 147 S.W.3d 460, 2004 Tex. App. LEXIS 4324 (Tex. App. Corpus Christi 2004).

7. Where the client sued the law firm and its attorneys for legal malpractice alleging breach of fiduciary duty, negligence, and gross negligence arising out of the sale of real estate and a foreclosure action, summary judgment was affirmed because: (1) the client's motion for continuance was properly denied because she was given sufficient notice of the hearing on the motion for summary judgment under the provisions of Tex. R. Civ. P. 166a(c), 4 and the certificate of service was prima facie evidence of service under Tex. R. Civ. P. 21, (2) the client's summary judgment evidence was properly excluded because even though the documents were authenticated, they could have been objected to on other grounds under Tex. R. Evid. 901(a) and the client failed to properly brief the issue on appeal under Tex. R. App. P. 38.1(h), (3) the exclusion of the client's expert testimony was proper because it was not an affidavit in that it contained no jurat under the provisions of Tex. Gov't Code Ann. § 312.011, and the expert was not licensed to practice law in Texas, and (4) the no evidence summary judgment was affirmed because without expert testimony, the client was unable to show a breach of duty which was an essential element of her cause of action. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

8. Where there is proper identification of a document under Tex. R. Evid. 901, that does not cure the defect of it being an unsworn statement under Tex. R. Civ. P. 166a(f) or hearsay per the hearsay rule. Koehler v. Sears, Roebuck & Co., 2001 Tex. App. LEXIS 3701 (Tex. App. Dallas June 6 2001).

Civil Procedure : Trials : Motions for Mistrial

9. Photographs were properly admitted during the termination of parental rights trial, and therefore the trial court did not err by denying the grandmother's motion for a mistrial, because the photographs showed nothing more than what was established by the testimony of the father and the grandmother, namely them leaving an apartment building with the child. In re A.L.W., 2012 Tex. App. LEXIS 9290 (Tex. App. Fort Worth Nov. 8 2012).

Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials

10. In a breach of contract case, a trial court did not err by refusing to grant a new trial based on newly discovered evidence; Tex. R. Evid. 901(b)(7) did not require the admission of the evidence since appellant offered no evidence about an Internal Revenue Service document other than his unsworn statement that he received the document in the mail, and it was not authenticated by either certification or any extrinsic evidence. Moreover, the trial court did not err by failing to take judicial notice of the document. Nixon v. GMAC Mortg. Corp., 2009 Tex. App. LEXIS 7350, 2009 WL 2973660 (Tex. App. Dallas Sept. 18 2009).

Civil Procedure : Remedies : Costs & Attorney Fees : Attorney Expenses & Fees : Reasonable Fees

11. In awarding attorney's fees, the trial court, in its discretion, could conclude that the attorney's testimony was sufficient to prove the bills were genuine under Tex. R. Evid. 901(a), (b)(1). Good v. Baker, 339 S.W.3d 260, 2011 Tex. App. LEXIS 2167 (Tex. App. Texarkana Mar. 25 2011).

Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus

12. Mandamus relief was not granted in a case where an amended motion to compel arbitration was denied because there was no competent evidence of an agreement to arbitrate a debt dispute. In re Universal Fins. Consulting Group, Inc., 2008 Tex. App. LEXIS 3723 (Tex. App. Houston 14th Dist. May 20 2008).

Civil Procedure : Appeals : Reviewability : Preservation for Review

13. In a products liability case, a retailer's argument that documents were not competent summary judgment evidence due to the fact that they were not properly authenticated was rejected because the retailer received notice of self-authentication under Tex. R. Civ. P. 193.7; moreover, a specificity argument was rejected because the

retailer failed to raise such the issue until a response was made to a reply brief. Merrell v. Wal-Mart Stores, Inc., 276 S.W.3d 117, 2009 Tex. App. LEXIS 414 (Tex. App. Texarkana Jan. 23 2009).

14. In a spousal support enforcement case, a former husband was unable to raise the issues of hearsay and authentication to challenge summary judgment evidence because these complaints were not presented to the trial court, and no ruling was obtained. Eberstein v. Hunter, 260 S.W.3d 626, 2008 Tex. App. LEXIS 6596 (Tex. App. Dallas 2008).

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

15. Trial court did not abuse its discretion by excluding several off-color cartoons and printouts of e-mail jokes that the employee claimed were put on her office desk to show the existence of a hostile work environment because she failed to authenticate the proffered exhibits as required by Tex. R. Evid. 901, as she did not identify whom the cartoons and e-mails were from but merely stated that her supervisors was the only other person who had access to her office. Martinez v. Aa Foundries, Inc., 2013 Tex. App. LEXIS 789 (Tex. App. San Antonio Jan. 30 2013).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

16. In a probate proceeding where the testator's wife contested the testator's daughter inventory of property, having determined that the second exhibit was sufficiently authenticated pursuant to Tex. R. Evid. 901 and the first exhibit was relevant to the determination of the declaratory judgment action pursuant to Tex. R. Evid. 401, the trial court ruled the exhibits were inadmissible was error; the excluded exhibits were controlling to a material issue in the case regarding whether the community property agreement between the wife and the testator was valid and enforceable, and the exclusion of the exhibits was harmful error under Tex. R. App. P. 44.1. Haugen v. Olson, 2003 Tex. App. LEXIS 10495 (Tex. App. Dallas Dec. 15 2003).

17. In a probate proceeding where the testator's wife contested the testator's daughter inventory of property, having determined that the second exhibit was sufficiently authenticated pursuant to Tex. R. Evid. 901 and the first exhibit was relevant to the determination of the declaratory judgment action pursuant to Tex. R. Evid. 401, the trial court ruled the exhibits were inadmissible was error; the excluded exhibits were controlling to a material issue in the case regarding whether the community property agreement between the wife and the testator was valid and enforceable, and the exclusion of the exhibits was harmful error under Tex. R. App. P. 44.1. Haugen v. Olson, 2003 Tex. App. LEXIS 10495 (Tex. App. Dallas Dec. 15 2003).

Computer & Internet Law : General Overview

18. Trial court did not err by admitting a chain of social network messages allegedly exchanged between defendant and complainant because in light of the witness testimony and circumstantial evidence, the State proffered sufficient evidence under Tex. R. Evid. 901 to authentic the messages. Two of the messages in the chain identified defendant as the sender, they were sent on the day of the assault, the sender expressed remorse, and the messages were printed from defendant's social network account. Laurentz v. State, 2013 Tex. App. LEXIS 12603, 2013 WL 5604740 (Tex. App. Houston 1st Dist. Oct. 10 2013).

19. Court properly admitted the contents of social networking web pages because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be -- web pages the contents of which defendant was responsible for. There were numerous photographs of defendant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring, and there was a reference to the victim's death and the music from his funeral. Tienda v. State, 358 S.W.3d 633, 2012 Tex. Crim. App. LEXIS 244 (Tex. Crim. App. 2012).

Computer & Internet Law : Criminal Offenses : General Overview

20. In a murder trial, social networking pages were properly authenticated under Tex. R. Evid. 901(a) because the holder of the account was identified with both defendant's name and a pseudonym, there were photographs of defendant on the pages, and there were references to the murder and defendant's arrest and electronic monitoring. Tienda v. State, 2010 Tex. App. LEXIS 10031 (Tex. App. Dallas Dec. 17 2010).

Computer & Internet Law : Criminal Offenses : Sex Crimes

21. In a case where defendant was convicted under Tex. Penal Code Ann. § 33.021(b), there was no ineffective assistance of counsel because a trial court would not have erred by admitting an exhibit showing pictures of scantily clad children that defendant was purportedly viewing at a library over a proper specific objection made by defense counsel; defense counsel had merely objected based on an improper predicate. It was evident from a librarian's testimony that the photographs were the product of a reliable system, pursuant to Tex. R. Evid. 901(b)(9), and the proof was sufficient to demonstrate that the challenged exhibit was what its proponent claimed it to be under Tex. R. Evid. 901(a). Brier v. State, 2009 Tex. App. LEXIS 3749, 2009 WL 998638 (Tex. App. Tyler Apr. 15 2009).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : General Overview

22. Chain of custody was adequately established under Tex. R. Evid. 901 for drug evidence because officers testified that items were seized from defendant's bedroom and bathroom, placed in sealed bags at the scene, mailed to a lab for testing, and returned. Evidence of a punctured baggie went to weight and did not prohibit admission of the evidence. Brown v. State, 2010 Tex. App. LEXIS 5432, 2010 WL 2772488 (Tex. App. San Antonio July 14 2010).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : General Overview

23. In a juvenile defendant's challenge to his adjudication as a delinquent upon a finding that he violated his community supervision conditions by possessing marijuana, the trial court did not err in admitting a State exhibit containing a tin canister and cigar with marijuana as the testimony of the officer regarding the marked bag in which he placed the evidence, and the testimony of the lab technician regarding his analysis of the contents of the marked bag and the sealing procedure, clearly showed the beginning and end of the chain of custody. In re J.M.A.B., 2006 Tex. App. LEXIS 10341 (Tex. App. Eastland Nov. 30 2006).

Criminal Law & Procedure : Criminal Offenses : Controlled Substances : Possession : Simple Possession : Elements

24. Court denied defendant's point of error that the State failed to establish the proper chain of custody for the drugs involved; an investigator testified that after a witness purchased the cocaine, she delivered it to him and he marked the envelope and mailed it to the laboratory, but he made a mistake in his labeling, the laboratory received the envelope and marked it with a unique identifier, and the identifying marks stayed with it during the laboratory processing and it was returned by the chemist to the investigator in open court. Alexander v. State, 2007 Tex. App. LEXIS 6260 (Tex. App. Texarkana Aug. 9 2007).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

25. At defendant's trial on unlawful possession of a firearm, enhanced by a conviction of assault against a family member, certified copies of the judgment and sentence of the convicting judge were self-authenticating and admissible as proof of his prior conviction; the defendant's confirmation through testimony that he was the person

convicted further established the orders' authenticity. Worley v. State, 2004 Tex. App. LEXIS 3271 (Tex. App. Houston 1st Dist. Apr. 8 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Robbery : General Overview

26. In a criminal trial for aggravated robbery under Tex. Penal Code Ann. § 29.03(a), the court did not err by overruling defendant's objection to the admission of a video recording of the robbery; the victim, an eyewitness, testified that the recording accurately represented the robbery; it was sufficiently authenticated for purposes of Tex. R. Evid. 901. Hawkins v. State, 2006 Tex. App. LEXIS 1104 (Tex. App. Waco Feb. 8 2006).

27. Evidence was sufficient to support defendant's aggravated robbery conviction under Tex. Penal Code Ann. §§ 29.02(a) and 29.03(a) where three witnesses unequivocally identified defendant as the masked and armed man in surveillance videotapes based on his actions and voice under Tex. R. Evid. 901(b)(5). Although defendant's alleged accomplice testified that defendant did not participate in the robbery, the State presented evidence that the accomplice told others that he and defendant had committed the robbery. Coleman v. State, 2005 Tex. App. LEXIS 2855 (Tex. App. Houston 14th Dist. Apr. 14 2005).

Criminal Law & Procedure : Criminal Offenses : Homicide : Criminal Abortion : General Overview

28. In the trial of a water supervisor for tampering with a governmental record, an employee's testimony was sufficient under Tex. R. Evid. 901 to authenticate a to-do list that defendant left for the employee, instructing the employee to deliver water samples and stating that the paper work was already filled out; the employee testified to thinking that the exhibit was a copy of the to-do list that defendant prepared and left. Daugherty v. State, 2008 Tex. App. LEXIS 726 (Tex. App. El Paso Jan. 31 2008).

Criminal Law & Procedure : Criminal Offenses : Homicide : Murder : General Overview

29. In a murder trial, it was proper to admit shoes that the victim's daughter gave to defendant, which had a tread pattern like a partial print at the scene, because a finding that the shoes were defendant's was supported by testimony that he had put his shoes in the trunk of a car the day after the murder, that the daughter found them there and stored them in a plastic back until the police picked them up, and that the bag in which they were presented at trial was the same bag. Dominguez v. State, 441 S.W.3d 652, 2014 Tex. App. LEXIS 6190, 2014 WL 2582975 (Tex. App. Houston 1st Dist. June 10 2014).

Criminal Law & Procedure : Criminal Offenses : Property Crimes : Burglary & Criminal Trespass : Burglary

30. In a burglary of a habitation case, defendant complained that counsel was ineffective for failing to object to photographs of the crime scene; however, the victim testified that each of the three photographs in question accurately represented the scene it was intended to portray; thus, defendant's complaint that the photographs were not authenticated under Tex. R. Evid. 901(a) was entirely without merit. Tarango v. State, 2007 Tex. App. LEXIS 2247 (Tex. App. El Paso Mar. 22 2007).

Criminal Law & Procedure : Criminal Offenses : Sex Crimes : Obscenity : General Overview

31. In an obscenity trial arising from an undercover investigation, defendant's email to an officer and an attached video were authenticated under the reply letter doctrine because the officer testified at trial that the e-mail and attached video were received from defendant in direct response to an e-mail sent by the officer to defendant inquiring whether defendant would send the officer the "horse movie" file; the e-mail was also authenticated under Tex. R. Evid. 901 because defendant was in the unique position of knowing that the officer's inquiry about the

"horse movie" concerned a bestiality video seen when the officers were at defendant's home. Varkonyi v. State, 276 S.W.3d 27, 2008 Tex. App. LEXIS 3353 (Tex. App. El Paso 2008).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : General Overview

32. In a case where defendant was found guilty of driving while intoxicated, the trial court did not err in admitting into evidence, over defendant's objection, the videotaped recording of his traffic stop because, although the officer inadvertently taped over a portion of defendant's stop, and the recording did not show all of the sobriety testing or the actual arrest, the officer, a witness with knowledge, testified that the parts of the traffic stop that were on the video were fairly and accurately depicted, which was sufficient testimony to authenticate the recording. Peratta v. State, 2014 Tex. App. LEXIS 8788, 2014 WL 4180807 (Tex. App. Dallas Aug. 11 2014).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

33. In a driving while intoxicated case, defendant's blood test results were properly admitted because both the blood vial and the blood box delivered to the State lab contained information identifying the blood as defendant's. That identifying information indicated that the blood sample that the technician thought was defendant was the sample marked by the officer as belonging to defendant. Meier v. State, 2009 Tex. App. LEXIS 2051, 2009 WL 765490 (Tex. App. Dallas Mar. 25 2009).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Vehicular Homicide : Elements

34. In a trial for intoxication manslaughter under Tex. Penal Code Ann. § 49.08, any error resulting from the admission of an analysis request form for blood testing was harmless in light of other evidence proving the chain of custody: the officer's testimony that he witnessed the nurse follow each of the statutory requirements for the blood draw. Mitchell v. State, 419 S.W.3d 655, 2013 Tex. App. LEXIS 14606, 2013 WL 6244137 (Tex. App. San Antonio Dec. 4 2013).

Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview

35. Chain of custody was not required for the admission of a handgun because initials engraved on the side of the gun made it easily identifiable, and the gun and the initials were resistant to change. Bailey v. State, 2006 Tex. App. LEXIS 1267 (Tex. App. Houston 14th Dist. Feb. 16 2006).

Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : Records

36. Judgments from defendant's earlier juvenile cases were properly admitted at a punishment hearing, even though they did not contain seals, as discussed in Tex. R. Evid. 902(1), (2), and (4), because they contained a certification showing that they were from the clerk's office in the county of the juvenile court and thus were properly authenticated under Tex. R. Evid. 901(b)(7). Hull v. State, 172 S.W.3d 186, 2005 Tex. App. LEXIS 6502 (Tex. App. Dallas 2005).

Criminal Law & Procedure : Search & Seizure : Electronic Eavesdropping : Warrantless Eavesdropping

37. Because an accomplice witness stated that he had previously listened to the recording of a phone call he made to his cousin, who then called defendant, and that he could identify all of the voices on the recording as himself, his cousin, and defendant, admission of a recording of the accomplice's call was proper. Phillips v. State, 436 S.W.3d 333, 2014 Tex. App. LEXIS 5316 (Tex. App. Waco May 15 2014).

Criminal Law & Procedure : Interrogation : Miranda Rights : Notice & Warning

38. Video recording of defendant's post-arrest statements regarding his use and purchase of methamphetamine was properly admitted under Tex. Code Crim. Proc. Ann. art. 38.22 and Tex. R. Evid. 901 because the officer was able to identify the voices and recount what was said, and the warning given to defendant and his statements were clearly audible. Parker v. State, 2013 Tex. App. LEXIS 6409, 2013 WL 2248254 (Tex. App. Fort Worth May 23 2013).

Criminal Law & Procedure : Discovery & Inspection : Brady Materials : Brady Claims

39. Defendant's challenge to the admission of recordings and transcripts of her statements on the ground that the tapes were never disclosed and contained discrepancies was rejected because: (1) even if the recordings were not disclosed, Brady did not apply because defendant knew she had made the statements; and (2) the record contained authenticating testimony that the recordings were what they were claimed to be. Mayfield v. State, 2010 Tex. App. LEXIS 6037 (Tex. App. Waco July 28 2010).

Criminal Law & Procedure : Counsel : Effective Assistance : Appeals

40. Even if an inmate's appellate counsel used an incorrect standard of review regarding the admission of a surveillance tape by citing a case that had been superseded by the adoption of Tex. R. Evid. 901, the inmate failed to show that he was prejudiced because there was no indication that he would have prevailed had the appellate counsel used the correct standard. Brown v. Quarterman, 2007 U.S. Dist. LEXIS 88445 (S.D. Tex. Nov. 30 2007).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

41. Defense counsel was not rendered ineffective by failing to object to the admission of a penitentiary packet because penitentiary packets were admissible as an exception to the hearsay rule if they were properly authenticated as public records, as provided by Tex. R. Evid. 803(8), 901(b)(7), 902(4). Henderson v. State, 2006 Tex. App. LEXIS 5911 (Tex. App. Tyler June 30 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

42. In a child pornography case, habeas relief was denied to an accused on the basis of ineffectiveness of trial counsel relating to a failure to object on the basis of chain of custody because problems in the chain of custody did not affect admissibility of evidence but, instead, affected the weight the fact-finder should give the evidence. This could have been pointed out and argued by the parties. Ex Parte Yusafi, 2009 Tex. App. LEXIS 6715, 2008 WL 6740798 (Tex. App. Beaumont Aug. 26 2009).

43. In a case where defendant was convicted under Tex. Penal Code Ann. § 33.021(b), there was no ineffective assistance of counsel because a trial court would not have erred by admitting an exhibit showing pictures of scantily clad children that defendant was purportedly viewing at a library over a proper specific objection made by defense counsel; defense counsel had merely objected based on an improper predicate. It was evident from a librarian's testimony that the photographs were the product of a reliable system, pursuant to Tex. R. Evid. 901(b)(9), and the proof was sufficient to demonstrate that the challenged exhibit was what its proponent claimed it to be under Tex. R. Evid. 901(a). Brier v. State, 2009 Tex. App. LEXIS 3749, 2009 WL 998638 (Tex. App. Tyler Apr. 15 2009).

44. In a trial for driving while intoxicated, it was not ineffective assistance when counsel failed to object to the lack of proper predicate for admission of the audio portion of a videotape because the trial court would not have abused its discretion by overruling an objection under Tex. R. Evid. 901, given that an officer testified that the exhibit was a copy of in-car videotape, that it was made on the day of a collision, and that it was accurate. Carey v. State, 2007

Tex. App. LEXIS 9052 (Tex. App. Texarkana Nov. 16 2007).

45. Defendant's trial counsel could not be found ineffective on the ground that the trial court did not admit into evidence photographs showing injuries to defendant's face and head because counsel laid a proper foundation and offered them into evidence. Defendant testified that the photographs were taken two days after he shot the victim in self-defense and that the photographs accurately depicted his appearance at that time. Romero v. State, 2004 Tex. App. LEXIS 10563 (Tex. App. Houston 1st Dist. Nov. 24 2004).

Criminal Law & Procedure : Juries & Jurors : Province of Court & Jury : Weight of the Evidence

46. In a murder trial, defendant's chain-of-evidence objections under Tex. R. Evid. 901 to the admission of DNA-sample buccal swabs from other potential suspects related to the weight of the evidence, not its admissibility; defendant argued that the State failed to prove the people from whom the analysts obtained the swabs were who they claimed to be, that those people might have lied about their identities, and that the tested DNA may have come from persons unrelated to the investigation. Russell v. State, 2008 Tex. App. LEXIS 1723 (Tex. App. Fort Worth Mar. 6 2008).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Proceedings

47. Trial court properly revoked defendant's community supervision following a hearing on the State's amended motion to revoke, which alleged that defendant violated his supervisory conditions by, among other things, committing the offense of harassment, because even though defendant contended that an exhibit, which was a copy of an on-line classified advertisement, was erroneously admitted at the hearing because it was not properly authenticated, defendant's identity as the person who placed the ad did not go to the authenticity of the exhibit. It was undisputed below that the exhibit was an authentic copy of an actual on-line classified advertisement, and whether defendant placed the ad did not go to the authenticity of the exhibit, but to his guilt of the harassment offense alleged in the motion to revoke. Musgrove v. State, 2009 Tex. App. LEXIS 8964, 2009 WL 3926289 (Tex. App. Austin Nov. 20 2009).

Criminal Law & Procedure : Sentencing : Alternatives : Probation : Revocation : Standards

48. Trial court properly revoked defendant's community supervision following a hearing on the State's amended motion to revoke, which alleged that defendant violated his supervisory conditions by, among other things, committing the offense of harassment, because even though defendant contended that an exhibit, which was a copy of an on-line classified advertisement, was erroneously admitted at the hearing because it was not properly authenticated, defendant's identity as the person who placed the ad did not go to the authenticity of the exhibit. It was undisputed below that the exhibit was an authentic copy of an actual on-line classified advertisement, and whether defendant placed the ad did not go to the authenticity of the exhibit, but to his guilt of the harassment offense alleged in the motion to revoke. Musgrove v. State, 2009 Tex. App. LEXIS 8964, 2009 WL 3926289 (Tex. App. Austin Nov. 20 2009).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History

49. Texas Department of Criminal Justice Institutional Division record chairman's certification of the pen packet constituted sufficient extrinsic evidence that the copies were authentic. B Reyes v. State, 2013 Tex. App. LEXIS 14267, 2013 WL 6178500 (Tex. App. Eastland Nov. 21 2013).

50. Where defendant was indicted as a habitual felony offender for the unlawful possession of a firearm by a felon, the indictment contained enhancement paragraphs alleging that defendant had prior felony convictions. The State proved his prior convictions by introducing as exhibits two pen packets that were certified by the custodian of

records from the Texas Department of Criminal Justice; the pen packets were self-authenticating for purposes of Tex. R. Evid. 901, 902. Harden v. State, 2009 Tex. App. LEXIS 1578, 2009 WL 539379 (Tex. App. Beaumont Mar. 4 2009).

51. At a punishment trial, sufficient evidence of identity established that defendant was the same person identified in a prior conviction alleged in the enhancement paragraphs; the proof included a pen packet from the prior offense, which was admissible under Tex. R. Evid. 901(b)(7) and containing defendant's name, height, weight, hair and eye color, complexion, and location of scars. Tomlinson v. State, 2006 Tex. App. LEXIS 5182 (Tex. App. Houston 1st Dist. June 15 2006).

52. Court did not err in overruling defendant objections to the State's admission of two pen packets to prove prior convictions during the punishment phase of trial because the pen packets were accompanied by signed affidavits with the State of Texas seal, certifying that the attached information related to defendant, the records were true and correct copies, and the documents were self-authenticating. Billington v. State, 2014 Tex. App. LEXIS 1845, 2014 WL 669555 (Tex. App. El Paso Feb. 19 2014).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History : Prior Felonies

53. In an aggravated robbery case, the certifications for two penitentiary packets were adequate for admission into evidence, although the name of the judge of the convicting court was omitted. Douglas v. State, 2005 Tex. App. LEXIS 6063 (Tex. App. San Antonio Aug. 3 2005).

54. Two prior juvenile adjudications were sufficiently linked to defendant and showed that he was the same person convicted; therefore, the trial court did not err by admitting certified copies of those adjudications at his sentencing hearing. Mackey v. State, 2005 Tex. App. LEXIS 1002 (Tex. App. San Antonio Feb. 9 2005).

55. At defendant's trial on unlawful possession of a firearm, enhanced by a conviction of assault against a family member, certified copies of the judgment and sentence of the convicting judge were self-authenticating and admissible as proof of his prior conviction; the defendant's confirmation through testimony that he was the person convicted further established the orders' authenticity. Worley v. State, 2004 Tex. App. LEXIS 3271 (Tex. App. Houston 1st Dist. Apr. 8 2004).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

56. Two pen packets were properly authenticated and were not hearsay because they were accompanied by affidavits carrying the state seal and certifying that they were true and correct copies of original records maintained in the regular course of business; in addition, the packets contained defendant's fingerprint cards and other identifying information. Carr v. State, 2013 Tex. App. LEXIS 13396, 2013 WL 5873299 (Tex. App. El Paso Oct. 30 2013).

57. At a community supervision revocation hearing, the trial court did not err in admitting a letter found tacked to defendant's next door neighbor's front door that warned defendant to stay away from her children; the letter was not barred by the Confrontation Clause because it was not testimonial, and the letter was properly authenticated under Tex. R. Evid. 901(a) by a police officer's testimony that he had recovered it from the house next door. Harber v. State, 2013 Tex. App. LEXIS 9548 (Tex. App. Tyler July 31 2013).

58. At a punishment trial, sufficient evidence of identity established that defendant was the same person identified in a prior conviction alleged in the enhancement paragraphs; the proof included a pen packet from the prior offense,

which was admissible under Tex. R. Evid. 901(b)(7) and containing defendant's name, height, weight, hair and eye color, complexion, and location of scars. Tomlinson v. State, 2006 Tex. App. LEXIS 5182 (Tex. App. Houston 1st Dist. June 15 2006).

59. In an aggravated robbery case, the certifications for two penitentiary packets were adequate for admission into evidence, although the name of the judge of the convicting court was omitted. Douglas v. State, 2005 Tex. App. LEXIS 6063 (Tex. App. San Antonio Aug. 3 2005).

60. There was no evidence supporting an enhanced punishment for driving while intoxicated under Tex. Penal Code Ann. §§ 49.04, 49.09 where nothing in the record supported the state's contention that a computer-generated case synopsis represented a judgment of conviction to prove a prior conviction. Blank v. State, 172 S.W.3d 673, 2005 Tex. App. LEXIS 10714 (Tex. App. San Antonio 2005).

61. Two prior juvenile adjudications were sufficiently linked to defendant and showed that he was the same person convicted; therefore, the trial court did not err by admitting certified copies of those adjudications at his sentencing hearing. Mackey v. State, 2005 Tex. App. LEXIS 1002 (Tex. App. San Antonio Feb. 9 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

62. In a trial for driving while intoxicated, defendant failed to preserve for review his argument that a videotape was admitted without the proper predicate under Tex. R. Evid. 901. His objection, that the State failed to lay the proper predicate "per Lucas," did not preserve error on a Rule 901 claim. Garcia v. State, 2005 Tex. App. LEXIS 6691 (Tex. App. Austin Aug. 18 2005).

63. Defendant failed to properly reserve his argument that admission of tape recordings of a controlled substance buy was improper because defendant's objection at trial was a mere predicate objection. Young v. State, 183 S.W.3d 699, 2005 Tex. App. LEXIS 6299 (Tex. App. Tyler 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

64. Defendant failed to preserve an authentication argument under Tex. R. Evid. 901 as to the admission of e-mails because defendant did not object to the e-mails on the authentication ground, as required by Tex. R. App. P. 33. Ussery v. State, 2008 Tex. App. LEXIS 741 (Tex. App. Austin Jan. 30 2008).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Requirements

65. Trial court did not err by admitting into evidence a bag containing a green leafy substance found in defendant's pocket at the hospital as marijuana, even though there was no evidence that it was in fact marijuana, because the State did not charge defendant with possession of marijuana and therefore did not have to prove that the substance was marijuana. Three witnesses referred without objection to the substance as marijuana, and defendant's complaint on appeal was not the same as his objection at trial. Blanchard v. State, 2013 Tex. App. LEXIS 5140 (Tex. App. Fort Worth Apr. 25 2013).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Admission of Evidence

66. On appeal of defendant's conviction for murder, he challenged whether the evidence regarding the DNA sample test results was insufficient; however, defendant failed to object at trial to the admissibility of the DNA test results, and therefore, he waived any error with respect to that evidence. Lane v. State, 2006 Tex. App. LEXIS 8912 (Tex. App. Houston 14th Dist. Oct. 17 2006).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Waiver Triggers Generally

67. In a case involving aggravated assault on a public servant, defendant waived the right to challenge the introduction of a homemade weapon into evidence because his counsel stated that there was "no objection" the second time that the State offered it into evidence; moreover, a chain of custody showing under Tex. R. Evid. 901(a) was not required because the weapon was unique, easily identifiable, and remained substantially unchanged since it was discovered in the area where the assaults took place. Even if such a showing was required under Tex. R. Evid. 901(a), testimony that identified the item and established the beginning and the end of the chain of custody was sufficient. Wingfield v. State, 2009 Tex. App. LEXIS 3744, 2009 WL 998679 (Tex. App. Tyler Apr. 15 2009).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

68. Trial court did not abuse its discretion by admitting a letter the State contended defendant wrote while in jail because the record revealed sufficient facts to support a determination that the letter was written by defendant, as defendant was in the jail in which the letter was found, the writer identified himself as defendant, the letter indicated defendant's jail cell as the return address, and the letter bore defendant's unique number assigned to identify him within the jail. Boldon v. State, 2013 Tex. App. LEXIS 12777, 2013 WL 5637031 (Tex. App. Houston 1st Dist. Oct. 15 2013).

69. Trial court did not abuse its discretion by admitting the drugs alleged seized from defendant's vehicle because the State presented sufficient evidence to support a finding that the first step in the chain of custody had been established as required by Tex. R. Evid. 901(a). The evidence established that the detective controlled the drugs until he placed them in the vault, and although during voir dire the detective acknowledged that he could not tell if the initials on the inside bag were his, the court could not conclude that that fact rendered the bag of drugs inadmissible absent a showing of tampering or alteration. Cedeno v. State, 2012 Tex. App. LEXIS 2716 (Tex. App. Corpus Christi Apr. 5 2012).

70. Trial court did not abuse its discretion by admitting the methamphetamine into evidence, even though there were some potential problems with the chain of custody, including the receiving officer's failure to place identifying marks on the evidence and the fact that the officer who transported the evidence to the crime lab did not testify, because testimony of the receiving officer, a sergeant, and a crime lab chemist supported the district court's finding that the suspected methamphetamine was what the State claimed it to be. In addition, there was no evidence of tampering or other fraud. Frasier v. State, 2010 Tex. App. LEXIS 6365 (Tex. App. Austin Aug. 5 2010).

71. In a possession of a controlled substance case, as the testimony of an informant who was on the recording established that the recording was what it claimed to be, resulting in a proper authentication, defendant failed to establish that the presence of a 10 to 15 minute gap in the recording, standing alone, destroyed authentication or precluded admission of the tape into evidence. As such, the trial court did not erroneously admit the tape recording into evidence. Malone v. State, 2008 Tex. App. LEXIS 7163 (Tex. App. Houston 14th Dist. Aug. 26, 2008).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : General Overview

72. Trial court did not abuse its discretion by admitting a State's exhibit, which was a list of stolen property and its value, where the property's owner had personal knowledge of the items listed on the document because he made a list and his wife copied the list. Furthermore, even assuming that the trial court erred in admitting the exhibit, the error, if any, was harmless because it could not be concluded that it contributed to defendant's conviction or punishment or affected his substantial rights. Hernandez v. State, 2005 Tex. App. LEXIS 5219 (Tex. App. Corpus Christi July 7 2005).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

73. Although in a theft case a trial court erred in admitting spreadsheets prepared by an absent accountant through a witness who was not familiar with them, contrary to Tex. R. Evid. 901, the error was harmless because the bank records underlying the spreadsheets were admitted without objection. Canion v. State, 2014 Tex. App. LEXIS 7284 (Tex. App. Corpus Christi July 3 2014).

74. Trial court had the discretion to determine the sufficiency of the evidentiary predicate for the physical evidence submission form because the offense report served only to buttress the chain of custody of items of physical evidence used to establish the identity of the victims. Defendant did not contend the evidence was tampered with and the identity of one of the victims was corroborated by other evidence. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

75. Even if it was error under Tex. R. Evid. 901 to admit photographs of a child victim through the testimony of a physician who did not have personal knowledge of the truth of what was portrayed, the error was harmless under Tex. R. App. P. 44.2(b) because other properly authenticated photographs were admitted containing similar depictions of the child when he was brought into the hospital; further, an investigator with Child Protective Services testified that she had seen the child on the night he was taken to the hospital and verified that at least seven of the photographs in question accurately portrayed the child that night based on her personal knowledge. Nash v. State, 2010 Tex. App. LEXIS 1916 (Tex. App. Waco Mar. 17 2010).

76. In a case in which defendant was convicted of aggravated kidnapping, even assuming that defendant was correct in asserting that documents purporting to be his Indian passport and an identification card issued by the Indian Aviation Authority were not properly authenticated and that the trial court abused its discretion in admitting them, defendant did not show, nor could a reviewing court find, any harm caused by their admission because it was uncontested that defendant was a citizen of India and that he worked at the international airport in Bombay. Therefore, the authenticity of the passport and identification card could not have substantially or injuriously impacted the jury when the uncontroverted testimony of the victim sought to prove the same fact. Shamsher Medih Chisti v. State, 2009 Tex. App. LEXIS 8941, 2009 WL 3931105 (Tex. App. Houston 1st Dist. Nov. 19 2009).

77. Surveillance video was properly authenticated because a witness testified, out of the jury's presence, that the video depicted "exactly" what he saw on the surveillance system on the night of the robbery. Additionally, any error was harmless because there was overwhelming evidence of defendant's guilt. Swinnie v. State, 2009 Tex. App. LEXIS 5352, 2009 WL 1981849 (Tex. App. Dallas July 10 2009).

78. In an aggravated assault case, any error in the authentication of the bullet was harmless because, although the records concerning the victim's treatment reflected a diagnosis of "GSW to head -- no injury," that entry did reflect that the victim sustained a gunshot wound, but it caused no significant injuries; moreover, records from the doctor who later removed the bullet were admitted at trial and confirmed that the removal procedure occurred. Jones v. State, 2008 Tex. App. LEXIS 877 (Tex. App. Houston 14th Dist. Feb. 7 2008).

79. Narcotics task force officer was not present during the drug deals contained on the tape, he did not testify as to any of the distinctive characteristics contained on the tape, and he did not identify any of the voices contained on the tape; he only testified that he placed a tape in a device capable of recording conversations, made a copy of the tape after the transaction was completed, made a copy of the tape noting defendant's name and the case number on it, and that the tape had not been changed or edited in any way; simply placing a tape in a tape recorder and later retrieving it was not enough to satisfy the requirements for authentication; thus, it was error for the trial court to admit the tape, but the error was harmless because substantively the same evidence was properly admitted via an

undercover officer's testimony who was present during the events. Roberson v. State, 2006 Tex. App. LEXIS 4282 (Tex. App. Houston 1st Dist. May 18 2006).

80. Although the tape was not properly authenticated, the evidence of an extraneous offense under Tex. R. Evid. 404 could not be said to have infringed on defendant's substantial rights because the evidence was before the jury via an undercover officer's unobjected-to testimony; therefore, admission of the extraneous offense evidence was harmless. Roberson v. State, 2006 Tex. App. LEXIS 4282 (Tex. App. Houston 1st Dist. May 18 2006).

Criminal Law & Procedure : Appeals : Standards of Review : Substantial Evidence : General Overview

81. Evidence was sufficient to support defendant's aggravated robbery conviction under Tex. Penal Code Ann. §§ 29.02(a) and 29.03(a) where three witnesses unequivocally identified defendant as the masked and armed man in surveillance videotapes based on his actions and voice under Tex. R. Evid. 901(b)(5). Although defendant's alleged accomplice testified that defendant did not participate in the robbery, the State presented evidence that the accomplice told others that he and defendant had committed the robbery. Coleman v. State, 2005 Tex. App. LEXIS 2855 (Tex. App. Houston 14th Dist. Apr. 14 2005).

Evidence : Authentication : General Overview

82. Heirship was not established in a trespass to try title action because a page of a document purporting to be a deed lacked the clerk's seal and signature, which meant the document was not properly certified and thus could not be self-authenticated, nor was there other evidence that could authenticate the document as what it purported to be. Heirs of Garcia v. Parr, 2014 Tex. App. LEXIS 8819 (Tex. App. San Antonio Aug. 13 2014).

83. In a case where defendant was found guilty of driving while intoxicated, the trial court did not err in admitting into evidence, over defendant's objection, the videotaped recording of his traffic stop because, although the officer inadvertently taped over a portion of defendant's stop, and the recording did not show all of the sobriety testing or the actual arrest, the officer, a witness with knowledge, testified that the parts of the traffic stop that were on the video were fairly and accurately depicted, which was sufficient testimony to authenticate the recording. Peratta v. State, 2014 Tex. App. LEXIS 8788, 2014 WL 4180807 (Tex. App. Dallas Aug. 11 2014).

84. Appellee's testimony that he printed off a page at a time when he had access to appellant's Facebook page was sufficient to satisfy the authentication requirement of Tex. R. Evid. 901, and the trial court did not abuse its discretion in determining that this testimony was sufficient to satisfy the authentication requirement. Walls v. Klein, 2014 Tex. App. LEXIS 7334 (Tex. App. San Antonio July 9 2014).

85. Telephone conversation was properly authenticated because the account was consistent with defendant's statements about his fabricated story, and the speaker had personal knowledge of the victim's family situation. Mendoza v. State, 2014 Tex. App. LEXIS 7198, 2014 WL 3045194 (Tex. App. Houston 1st Dist. July 3 2014).

86. Although in a theft case a trial court erred in admitting spreadsheets prepared by an absent accountant through a witness who was not familiar with them, contrary to Tex. R. Evid. 901, the error was harmless because the bank records underlying the spreadsheets were admitted without objection. Canion v. State, 2014 Tex. App. LEXIS 7284 (Tex. App. Corpus Christi July 3 2014).

87. During defendant's trial for sexual assault of his daughter, the court did not err in finding a condom and DNA analysis of it sufficiently authenticated and identified to satisfy the rule; there was no evidence of deliberate tampering with the evidence before, during, or after its collection, only speculation that defendant's DNA might have made its way onto or into the condom by some means of contamination. James v. State, 2014 Tex. App. LEXIS

6994 (Tex. App. Austin June 27 2014).

88. Surveillance video was properly authenticated because the store owner testified that he had multiple cameras monitoring his store, after the robbery, he watched the recording, and the owner said a copy of the video produced at trial showed the same events as the original. Ruff v. State, 2014 Tex. App. LEXIS 6839, 2014 WL 2917843 (Tex. App. Texarkana June 25 2014).

89. Victim's testimony sufficiently linked the messages in State's exhibit to defendant so as to justify submission to the jury for its ultimate determination of authenticity, because while the screen names alone would likely be insufficient to authenticate the instant messages in the State's exhibit, the victim's testimony was additional evidence that she both participated in the electronic conversation and prepared the compilation of messages that made up the exhibit. Adams v. State, 2014 Tex. App. LEXIS 6619, 2014 WL 2807978 (Tex. App. Dallas June 18 2014).

90. An officer's testimony that a videotape recording of a search of defendant's apartment reflected the scene the day of a search was sufficient to authenticate it, Tex. R. Evid. 901(a) although the officer was not the recorder. Alvarado v. State, 2014 Tex. App. LEXIS 6102 (Tex. App. Dallas June 4 2014).

91. Because an accomplice witness stated that he had previously listened to the recording of a phone call he made to his cousin, who then called defendant, and that he could identify all of the voices on the recording as himself, his cousin, and defendant, admission of a recording of the accomplice's call was proper. Phillips v. State, 436 S.W.3d 333, 2014 Tex. App. LEXIS 5316 (Tex. App. Waco May 15 2014).

92. Defendant had not established that copies of two different checks that were allegedly forged and presented by him at two different banks were inadmissible as duplicates because there was no evidence that would raise a question about whether the checks were what the State claimed them to be, and reasonable jurors thus could not disagree about whether the checks were the actual checks presented by defendant, as the State alleged. Moreover, the potentially unique probative value of the original checks went to the issues of whether the checks were the actual checks presented by defendant and whether the checks were forgeries, and defendant had admitted both of those facts. Duncan v. State, 2014 Tex. App. LEXIS 4678, 2014 WL 1788173 (Tex. App. Corpus Christi May 1 2014).

93. During defendant's trial for aggravated assault with a deadly weapon, the court did not err in admitting the metal propane tank brought to trial by the victim because her testimony properly authenticated and identified the tank/torch assembly as the weapon defendant used; her testimony was sufficient under Tex. R. Evid. 901(b)(1) to authenticate the exhibit. Barber v. State, 2014 Tex. App. LEXIS 4409, 2014 WL 1663322 (Tex. App. Texarkana Apr. 24 2014).

94. Surveillance video was properly authenticated under this rule where a detective testified that she viewed the surveillance tape at the store, downloaded the video to a thumb driver, and copied it to the DVD that was introduced into evidence. Mbata v. State, 2014 Tex. App. LEXIS 3241, 2014 WL 1285756 (Tex. App. Austin Mar. 26 2014).

95. Security footage was properly authenticated because a company manager testified that the bus's security cameras recorded footage from the bus as it occurred, the videos were transferred to her hard drive, and the hard drive was kept in a secure location. Furthermore, the witness stated that she reviewed the footage and verified that it "depicts what was going on on the bus during that person's shift during that period of time." Walls v. State, 2014 Tex. App. LEXIS 3159, 2014 WL 1208017 (Tex. App. Austin Mar. 20 2014).

96. In a forgery case, the trial court did not abuse its discretion when it admitted a photograph of defendant into evidence. The store employee who took the photograph testified that the picture was an accurate depiction of defendant when he returned to the store, and the fact that she did not witness defendant's commission of the offense did not affect her ability to authenticate the photograph. Resendez v. State, 2014 Tex. App. LEXIS 2587, 2014 WL 972297 (Tex. App. Eastland Mar. 6 2014).

97. Affidavit testimony was evidence that the exhibits were what the companies claimed them to be. H2o Solutions, Ltd. v. Pm Realty Group, Lp, 438 S.W.3d 606, 2014 Tex. App. LEXIS 1665, 2014 WL 576262 (Tex. App. Houston 1st Dist. Feb. 13 2014).

98. Trustworthiness of the document is not a consideration when determining whether a document has been properly authenticated; instead, it is a consideration when trying to admit a business record under the business-records exception to the hearsay rule, and authenticity of a document and admissibility of that document under an exception to the hearsay rule are separate inquiries, and the companies in this case did not claim the documents were inadmissible hearsay. H2o Solutions, Ltd. v. Pm Realty Group, Lp, 438 S.W.3d 606, 2014 Tex. App. LEXIS 1665, 2014 WL 576262 (Tex. App. Houston 1st Dist. Feb. 13 2014).

99. At defendant's trial for stalking, the trial court did not err in admitting the text messages that did not contain the sender's name even though the phone company records showed the cell phone was listed in another person's name. Because the complainant testified that it was the same number defendant used to contact her and it was the number she programmed into her phone as his contact number, the State satisfied its burden to authenticate the calls and text messages. Mcgee v. State, 2014 Tex. App. LEXIS 825, 2014 WL 261060 (Tex. App. Dallas Jan. 23 2014).

100. At defendant's trial for stalking, the trial court did not err in admitting the text messages that did not contain the sender's name even though the phone company records showed the cell phone was listed in another person's name. Because the complainant testified that it was the same number defendant used to contact her and it was the number she programmed into her phone as his contact number, the State satisfied its burden to authenticate the calls and text messages. Mcgee v. State, 2014 Tex. App. LEXIS 825, 2014 WL 261060 (Tex. App. Dallas Jan. 23 2014).

101. Because the only link between the email and the victim's mother was the email purporting on its face to have been sent from her email address, the trial court did not abuse its discretion in excluding the email from evidence. Chin v. State, 2013 Tex. App. LEXIS 15441, 2013 WL 6869905 (Tex. App. San Antonio Dec. 31 2013).

102. Silent videotape of an informant's cocaine buy from defendant was properly admitted under Tex. R. Evid. 901(a), although the informant did not testify, because the officers had personal knowledge of the video's contents and could corroborate it; Tex. Code Crim. Proc. Ann. art. 38.141, requiring corroboration of an accomplice's testimony, did not apply because the video was muted. Watson v. State, 421 S.W.3d 186, 2013 Tex. App. LEXIS 14603, 2013 WL 6244135 (Tex. App. San Antonio Dec. 4 2013).

103. Texas Department of Criminal Justice Institutional Division record chairman's certification of the pen packet constituted sufficient extrinsic evidence that the copies were authentic. B Reyes v. State, 2013 Tex. App. LEXIS 14267, 2013 WL 6178500 (Tex. App. Eastland Nov. 21 2013).

104. Combination of unique identifiers and the contents in line with defendant's comments to police was sufficient to support a finding that the jailhouse letter was what the proponent claimed, especially as defendant did not present evidence suggesting falsification or tampering. Barfield v. State, 416 S.W.3d 743, 2013 Tex. App. LEXIS

13493, 2013 WL 5861504 (Tex. App. Houston 14th Dist. Oct. 31 2013).

105. Admission of a surveillance video recording depicting the capital murder of a cab company employee was proper because the evidence was sufficient for the trial court to determine that the testimony concerning the recording was sufficient for a reasonable jury to determine that the recording was in fact an accurate video recording of the events that occurred that morning at the cab company; two witnesses familiar with the video surveillance system testified regarding the video evidence, and the cab driver who discovered the victim also testified about the recording. Turnbull v. State, 2013 Tex. App. LEXIS 13167 (Tex. App. Austin Oct. 24 2013).

106. Trial court did not abuse its discretion by admitting a letter the State contended defendant wrote while in jail because the record revealed sufficient facts to support a determination that the letter was written by defendant, as defendant was in the jail in which the letter was found, the writer identified himself as defendant, the letter indicated defendant's jail cell as the return address, and the letter bore defendant's unique number assigned to identify him within the jail. Boldon v. State, 2013 Tex. App. LEXIS 12777, 2013 WL 5637031 (Tex. App. Houston 1st Dist. Oct. 15 2013).

107. Trial court did not err by admitting a chain of social network messages allegedly exchanged between defendant and complainant because in light of the witness testimony and circumstantial evidence, the State proffered sufficient evidence under Tex. R. Evid. 901 to authentic the messages. Two of the messages in the chain identified defendant as the sender, they were sent on the day of the assault, the sender expressed remorse, and the messages were printed from defendant's social network account. Laurentz v. State, 2013 Tex. App. LEXIS 12603, 2013 WL 5604740 (Tex. App. Houston 1st Dist. Oct. 10 2013).

108. Admission of computer-enhanced photographs depicting the offense contained in a PowerPoint presentation introduced by the State was not error because the photographs were properly authenticated; a district attorney's office employee testified that he created the presentation using still frames taken from the police officer's dash-cam video, which was admitted without objection, and the officer testified that the photographs contained in the presentation accurately represented what he personally viewed the night of the incident. Hurst v. State, 2013 Tex. App. LEXIS 12376, 2013 WL 5526226 (Tex. App. Waco Oct. 3 2013).

109. Trial court did not abuse its discretion by admitting recordings of telephone calls made from jail; the State properly authenticated that the telephone calls were made by defendant because during the calls, the person who made the calls referred several times to the complaining witness in defendant's case, the mother of defendant's children, child support defendant owed, and defendant's lawyer. Raper v. State, 2013 Tex. App. LEXIS 12332, 2013 WL 5459911 (Tex. App. Dallas Sept. 30 2013).

110. At a community supervision revocation hearing, the trial court did not err in admitting a letter found tacked to defendant's next door neighbor's front door that warned defendant to stay away from her children; the letter was not barred by the Confrontation Clause because it was not testimonial, and the letter was properly authenticated under Tex. R. Evid. 901(a) by a police officer's testimony that he had recovered it from the house next door. Harber v. State, 2013 Tex. App. LEXIS 9548 (Tex. App. Tyler July 31 2013).

111. Given the testimony that a witness reviewed surveillance videos and produced a true copy of the video she viewed and it had not been tampered with or altered, the evidence was sufficient for the trial court to have found that the State presented facts sufficient to support a finding that the evidence was authentic. Williams v. State, 2013 Tex. App. LEXIS 9376 (Tex. App. Dallas July 29 2013).

112. Documents provided to insurers regarding asbestos claims were properly authenticated by the testimony of the insured's corporate counsel, who testified that he was responsible for informing the insurers and described how

the documents had been created. Certain Underwriters at Lloyd's v. Chi. Bridge & Iron Co., 406 S.W.3d 326, 2013 Tex. App. LEXIS 7856, 2013 WL 3270615 (Tex. App. Beaumont June 27 2013).

113. Trial court did not abuse its discretion by admitting a handgun into evidence because even if the trial court erred by admitting the handgun before the State laid a sufficient foundation to show that it was the one removed from defendant, the subsequent testimony of the jail pat-down officer that the handgun looked like the one he took from defendant provided an adequate foundation for the decision to admit the handgun. The testimony of the arresting officer and another officer, relating how each had gained possession of the handgun, were additional circumstances that, in light of the pat-down officer's testimony, allowed the jury to decide whether the handgun admitted into evidence was the handgun defendant had at the jail. Joseph v. State, 2013 Tex. App. LEXIS 7133 (Tex. App. Beaumont June 12 2013).

114. Pen packet had the appropriate certificate from the records manager and thus met the evidence rules, including Tex. R. Evid. 901(a), 902(4), for authentication and certification, and appellant did not dispute that the documents were true and correct copies, such that the trial court was within its discretion in admitting the pen packet into evidence. Smith v. State, 401 S.W.3d 915, 2013 Tex. App. LEXIS 6416 (Tex. App. Texarkana May 24 2013).

115. There was no abuse of discretion in admitting into evidence a photograph depicting a screen-shot of the text message received by the accomplice witness, because the similarity of defendant's verbal messages to the text message provided a sufficient link to support a reasonable determination that the evidence was authentic. Joseph v. State, 2013 Tex. App. LEXIS 6115 (Tex. App. Houston 14th Dist. May 16 2013).

116. Trial court did not err by admitting into evidence a bag containing a green leafy substance found in defendant's pocket at the hospital as marijuana, even though there was no evidence that it was in fact marijuana, because the State did not charge defendant with possession of marijuana and therefore did not have to prove that the substance was marijuana. Three witnesses referred without objection to the substance as marijuana, and defendant's complaint on appeal was not the same as his objection at trial. Blanchard v. State, 2013 Tex. App. LEXIS 5140 (Tex. App. Fort Worth Apr. 25 2013).

117. Trial court did not abuse it discretion when it authenticated and admitted the e-mails under Tex. R. Evid. 104 and 901 because the alleged victim's mother testified that about personally knowing defendant's e-mail address and the content of the e-mails referred to matters that only defendant and the alleged victim would know. Sennett v. State, 406 S.W.3d 661, 2013 Tex. App. LEXIS 5148 (Tex. App. Eastland Apr. 25 2013).

118. Evidence supported a finding that a prison letter was what it was claimed to be, as the letter had certain distinctive characteristics that linked it to appellant, such that it was within the zone of reasonable disagreement for the trial court to find that a juror could have found the letter was properly authenticated. Bundick v. State, 2013 Tex. App. LEXIS 4350 (Tex. App. Houston 14th Dist. Apr. 4 2013).

119. Defendant's conviction for capital murder was proper because the trial court did not err in admitting the audiotaped recordings of jail phone conversations between defendant and other parties under Tex. R. Evid. 901(a). The record showed that the victim's mother identified each exhibit as well as the voices on each exhibit and she explained how she knew each individual and how often she spoke with each one; her testimony was sufficient to support admission of the exhibits under Rule 901(b)(5). Duncan v. State, 2013 Tex. App. LEXIS 3169, 2013 WL 1258449 (Tex. App. Dallas Mar. 22 2013).

120. Governing rule for the authentication of evidence is now stated under Tex. R. Evid. 901. Goodwin v. State, 2013 Tex. App. LEXIS 2430, 2013 WL 980173 (Tex. App. Houston 14th Dist. Mar. 12 2013).

121. Clerk provided a sufficient foundation for admission of exhibits of surveillance, given that (1) the clerk testified that she had a chance to review the exhibits before trial, and (2) as an eyewitness to the crime, she recognized everything on the video, which was a fair and accurate description of events; although she could not testify about the capabilities of the recording device, her testimony supported a finding that the exhibits were what she claimed they were, for purposes of Tex. R. Evid. 901(b)(1), and the trial court did not err in admitting them into evidence. Goodwin v. State, 2013 Tex. App. LEXIS 2430, 2013 WL 980173 (Tex. App. Houston 14th Dist. Mar. 12 2013).

122. At the hearing on the motion to revoke defendant's community supervision, the trial court did not err in admitting two audio recordings of jail telephone calls into evidence because the jail phone technician confirmed that he downloaded the recordings of calls that were made by an inmate with defendant's name. The calls were authenticated by distinctive characteristics of the caller and the contents of the conversations under Tex. R. Evid. 901(h)(4). Malone v. State, 2013 Tex. App. LEXIS 1044, 2013 WL 427354 (Tex. App. Dallas Feb. 5 2013).

123. Trial court did not abuse its discretion by excluding several off-color cartoons and printouts of e-mail jokes that the employee claimed were put on her office desk to show the existence of a hostile work environment because she failed to authenticate the proffered exhibits as required by Tex. R. Evid. 901, as she did not identify whom the cartoons and e-mails were from but merely stated that her supervisors was the only other person who had access to her office. Martinez v. Aa Foundries, Inc., 2013 Tex. App. LEXIS 789 (Tex. App. San Antonio Jan. 30 2013).

124. Trial court did not err under Tex. R. Evid. 901(b)(1) in admitting a grocery store's surveillance video over defendant's objections during defendant's theft trial; a store manager agreed the recording was made simultaneously with the actions recorded on the video, the manager reviewed the contents of the copy prior to testifying, and it had not been tampered with. Randell v. State, 2013 Tex. App. LEXIS 742, 2013 WL 309001 (Tex. App. Amarillo Jan. 25 2013).

125. Fact that the reinsurer did not take advantage of the procedure in Tex. R. Evid. 902 was not determinative of whether the judgments were properly authenticated because the reinsurer could have properly authenticated the judgments in accordance with Tex. R. Evid. 901. N.H. Ins. Co. v. Magellan Reinsurance Co., 2013 Tex. App. LEXIS 194, 2013 WL 105654 (Tex. App. Fort Worth Jan. 10 2013).

126. Defendant's conviction for engaging in organized crime was proper because the nonaccomplice evidence placed defendant at or near the scene of the crime at or about the time of its commission under suspicious circumstances and because, although the forensic examiner testified that he did not know who actually sent or received the text messages, the circumstances were sufficient to allow a jury reasonably to find that defendant sent and received the messages, Tex. R. Evid. 901(a). Because intent to commit forgery could not be inferred, the prior conviction showing strikingly similar facts made the existence of a material fact, that was, whether defendant possessed forged checks with the intent to defraud or harm another, more probable. Franklin v. State, 2012 Tex. App. LEXIS 8513 (Tex. App. Dallas Oct. 10 2012).

127. In defendant's community supervision revocation proceeding, the trial court did not err in admitting an exhibit containing his letters that were intercepted by the mail clerk of the correctional facility. The letters were sufficiently authenticated under Tex. R. Evid. 901(b)(4), because the contents and substance of the letters established the correspondence was between defendant, his wife and minor children. Rivera v. State, 2012 Tex. App. LEXIS 8306, 2012 WL 4712902 (Tex. App. Beaumont Oct. 3 2012).

128. Record did not affirmatively show that potential objections to evidence would have been successful, or if so, would have resulted in the exclusion of the evidence; nothing indicated that the proper foundation could not have been provided if objected to, and nothing indicated that the trial court would have excluded the evidence as unduly prejudicial, and thus the father failed to show that had counsel objected, the evidence would have been excluded, and the court did not find counsel was deficient for failing to objection. Medellin v. Tex. Dep't of Family & Protective Servs., 2012 Tex. App. LEXIS 8225, 2012 WL 4466511 (Tex. App. Austin Sept. 26 2012).

129. For purposes of Tex. R. Evid. 901, the content of Facebook messages purported to be messages that were sent from an account with appellant's name to an account with the victim's name, and although this alone was insufficient to authenticate that appellant was the author of the messages, when combined with other evidence that was circumstantial, the record might support a finding that appellant authored and sent the messages, and thus the court examined whether the other evidence supported the ruling that admitted the Facebook messages. Campbell v. State, 382 S.W.3d 545, 2012 Tex. App. LEXIS 7684 (Tex. App. Austin Aug. 31 2012).

130. Facebook messages contained characteristics that tended to connect appellant as the author, given that (1) the speech pattern was consistent with appellant's speech as a native of Jamaica, (2) the messages referenced the potential charges, and at the time the messages were sent, few people would have known about this, (3) the messages referenced the incident and were sent only a few days after, and (4) circumstantial evidence tended to connect appellant to the messages, given that (a) appellant had a Facebook account and only he and the victim had access to his account, (b) the victim received messages that bore appellant's name, which suggested that only appellant or the victim could have authored the messages in question, plus (c) the victim said she could not access appellant's account and did not send the messages to herself, and while this did not conclusively establish that appellant was the author, the State was not required to rule out all possibilities; there was prima facie evidence such that a jury could have found that appellant authored the messages, and the trial court did not abuse its discretion in admitting the evidence. Campbell v. State, 382 S.W.3d 545, 2012 Tex. App. LEXIS 7684 (Tex. App. Austin Aug. 31 2012).

131. Because error in admitting evidence was nonconstitutional, in the case of admitting Facebook messages over an authentication objection, appellant had to show that the error affected his substantial rights under Tex. R. App. P. 44.2(b). Campbell v. State, 382 S.W.3d 545, 2012 Tex. App. LEXIS 7684 (Tex. App. Austin Aug. 31 2012).

132. Even if the trial court erred in admitting Facebook messages over appellant's authentication objection, the error was harmless because the case against appellant for aggravated assault with a deadly weapon under Tex. Penal Code Ann. § 22.02 was substantial; the testimony about the message was not elicited from an expert, aside from impeaching appellant, the State did not emphasize the messages, and they were also cumulative of other evidence, as appellant testified that he struck the victim, which was consistent with the Facebook messages that he should not have put his hands on the victim. Campbell v. State, 382 S.W.3d 545, 2012 Tex. App. LEXIS 7684 (Tex. App. Austin Aug. 31 2012).

133. In an aggravated robbery case, the trial court did not err by admitting a convenience store security videotape. The evidence was sufficient to support a finding that the videotape was what the State claimed it to be, and therefore the videotape was properly authenticated. Razo v. State, 2012 Tex. App. LEXIS 6625 (Tex. App. Fort Worth Aug. 9 2012).

134. Letters that defendant purportedly wrote to a district attorney and an assistant district attorney were properly authenticated under Tex. R. Evid. 901(a). A detective who interviewed defendant testified that the detective watched him initial and sign the warning form; the detective testified that the two letters appeared to be in the same handwriting as on the warning form. Woodall v. State, 376 S.W.3d 122, 2012 Tex. App. LEXIS 6245 (Tex. App. Texarkana July 31 2012).

135. Court properly found a recording authenticated because the officer watched and listened to the recording, he recognized the voices on the video, the video had not been altered, and the officer had heard defendant speak on numerous occasions and recognized defendant's voice on the recording, and he recognized his own voice. Johnson v. State, 2012 Tex. App. LEXIS 4400, 2012 WL 1992888 (Tex. App. Waco May 30 2012).

136. Trial court did not abuse its discretion by admitting into evidence letters purportedly written by defendant to the victim while he was in jail awaiting trial because the victim's testimony was sufficient to authenticate the letters under Tex. R. Evid. 901. The victim testified that she recognized defendant's handwriting on the letters, with the exception of one all of the letters began by referencing her name, some but not all were signed by defendant, and because defendant did not know her current address, he sent them to a mutual friend with instructions to give them to the victim. Piasecki v. State, 2012 Tex. App. LEXIS 3927, 2012 WL 1795136 (Tex. App. Beaumont May 16 2012).

137. For purposes of Tex. R. Evid. 901, the victim's statement was authenticated; the victim testified that she recognized the statement and that some parts were in her handwriting, plus the context and substance of the statement, along with the circumstances related to the relationship between appellant and the victim, were enough to authenticate the statement. Lund v. State, 366 S.W.3d 848, 2012 Tex. App. LEXIS 3406, 2012 WL 1503014 (Tex. App. Texarkana May 1 2012).

138. Officer testified to each requirement for admission of the CD of a motor vehicle recording, including that the copy accurately depicted the original recording contents, the voices were identifiable, and the conversation on the record was accurate; thus, the trial court did not err in admitting the exhibit. Parr v. State, 2012 Tex. App. LEXIS 3144, 2012 WL 1392614 (Tex. App. Amarillo Apr. 23 2012).

139. During defendant's trial for stalking, the court did not err under Tex. R. Evid. 901(b)(1) in admitting a text message from the victim's phone. Because the victim's son was better with technology, he saved the text on the phone; he testified the text was threatening, produced the victim's phone, and produced the text message for the attorneys to review. Montoya v. State, 2012 Tex. App. LEXIS 2568, 2012 WL 1059699 (Tex. App. Dallas Mar. 30 2012).

140. Given the substance and appearance of the documents and where they were located, in locked vaults at a temple and temple annex, and the testimony concerning the importance of the keeping these records, the trial court could have found that the State met its burden and a jury could have found that the documents were church and family records related to church members, such that there was no abuse of discretion by the trial court in admitting the documents, for authentication purposes under Tex. R. Evid. 901. Keate v. State, 2012 Tex. App. LEXIS 2117, 2012 WL 896200 (Tex. App. Austin Mar. 16 2012).

141. Trial court did not abuse its discretion by admitting a DVD of images taken from a security camera showing defendant on the stairwell of the apartment complex carrying the victim's backpacks into evidence because the maintenance supervisor's testimony was sufficient to authenticate the DVD under Tex. R. Evid. 901. The supervisor's testimony explained how the security cameras worked and that: (1) he removed the SD card from the camera, reviewed its contents with the victim, and copied four images onto a DVD, which he gave to the victim; (2) the victim gave the DVD to the police; (3) the supervisor testified that the camera was capable of making true and accurate recordings and that the DVD contained a true and accurate depiction of images taken by the camera; (4) he did not alter or change the images as he initially saw them from the SD card; and (5) he reviewed the DVD before trial and determined that it was a true and accurate depiction and recording of the four images he took from the SD card. The State's failure to establish the chain of custody did not render the DVD inadmissible as there was no evidence of tampering or fraud. Warren v. State, 2012 Tex. App. LEXIS 1544, 2012 WL 651642 (Tex. App. El Paso Feb. 29 2012).

142. Record had nothing to suggest that a predicate could not have been laid for a video by witness testimony, for purposes of Tex. R. Evid. 901(b)(1), plus the State presented testimony from a person who operating the surveillance system and compiled the video; appellant failed to show that the failure to object to the video amounted to deficient performance, plus counsel had a reasonable strategy to allow admission of the video. Darnell v. State, 2012 Tex. App. LEXIS 1512, 2012 WL 626318 (Tex. App. Houston 14th Dist. Feb. 28 2012).

143. Because appellant did not raise the authentication argument in the trial court, he did not preserve it for review. Kresse v. State, 2012 Tex. App. LEXIS 1419, 2012 WL 579446 (Tex. App. Fort Worth Feb. 23 2012).

144. Motorist did not properly authenticate a document, and thus the trial court did not err in denying the document into evidence. Carter v. Johnson, 2012 Tex. App. LEXIS 1239, 2012 WL 566089 (Tex. App. San Antonio Feb. 15 2012).

145. Court properly admitted the contents of social networking web pages because there was sufficient circumstantial evidence to support a finding that the exhibits were what they purported to be -- web pages the contents of which defendant was responsible for. There were numerous photographs of defendant with his unique arm, body, and neck tattoos, as well as his distinctive eyeglasses and earring, and there was a reference to the victim's death and the music from his funeral. Tienda v. State, 358 S.W.3d 633, 2012 Tex. Crim. App. LEXIS 244 (Tex. Crim. App. 2012).

146. While defense counsel did not object to 84 crime scene and other photographs, counsel was not ineffective for failing to object to admissible evidence; police officers' testimony as to all of the photographs was sufficient to authenticate them and establish the predicate for their admission into evidence. Gomez v. State, 2012 Tex. App. LEXIS 1013, 2012 WL 390970 (Tex. App. El Paso Feb. 8 2012).

147. In defendant's criminal prosecution for bribery, the trial court did not abuse its discretion by admitting a letter into evidence because it contained sufficient distinctive characteristics to support a finding that defendant was the intended recipient. The authentication requirement was met because the evidence supported a finding that the letter was what its proponent claimed it to be under Tex. R. Evid. 104(b), 901(a). Watts v. State, 2012 Tex. App. LEXIS 1044, 2012 WL 403859 (Tex. App. Beaumont Feb. 8 2012).

148. As appellant did not object to a document's authentication or secure a ruling on any such objection, appellant waived any complaints in this regard. Segal v. Bock, 2011 Tex. App. LEXIS 9868, 2011 WL 6306623 (Tex. App. Houston 1st Dist. Dec. 15 2011).

149. Court did not err during defendant's murder trial in admitting photographs of the area roadways, a bar, and the residence where the victim's body was found because although a testifying police officer did not take the photographs, the officer stated that they were fair and accurate representations of the scenes they depicted. Reyes v. State, 2011 Tex. App. LEXIS 9460, 2011 WL 6004333 (Tex. App. Waco Nov. 30 2011).

150. During defendant's trial for third-degree felony theft, the court did not err in admitting security videos of the theft into evidence because from the testimony of the store's loss prevention manager there was sufficient evidence from which the court could have found that the video had been authenticated. Harrison v. State, 2011 Tex. App. LEXIS 9133, 2011 WL 5589532 (Tex. App. Houston 14th Dist. Nov. 17 2011).

151. Under Tex. R. Evid. 901, the video taken from an officer's patrol car was properly authenticated by another officer, who was at the scene and who viewed the entire video, and stated that there were no additions, deletions, or changes to the video. Delgado v. State, 2011 Tex. App. LEXIS 7682, 2011 WL 4389956 (Tex. App. Waco Sept.

21 2011).

152. During defendant's trial for aggravated sexual assault and aggravated kidnapping, the court did not err in admitting a photograph showing the victim's face because the victim's testimony that it was a photograph of her face taken two or three days after the assault and that it was an accurate depiction of her face was sufficient to authenticate the photograph. Brown v. State, 2011 Tex. App. LEXIS 7319, 2011 WL 3915663 (Tex. App. Tyler Sept. 7 2011).

153. Appellant's brother acknowledged that the handwriting on a letter looked like appellant's and it contained appellant's signature; the brother's testimony was sufficient to authenticate the letter under Tex. R. Evid. 901(b)(2) Vallair v. State, 2011 Tex. App. LEXIS 7055, 2011 WL 3847418 (Tex. App. Beaumont Aug. 31 2011).

154. In defendant's stalking case, a reasonable fact finder could have found that the telephone number the victim attributed to defendant was his telephone number, and that defendant sent the electronic communications attributed to him by the State and depicted in the challenged exhibits. Accordingly, the challenged exhibits were relevant, and the trial court did not abuse its discretion by admitting them. Manuel v. State, 357 S.W.3d 66, 2011 Tex. App. LEXIS 7152 (Tex. App. Tyler Aug. 31 2011).

155. There was no abuse of discretion in admitting the CDs into evidence which contained excerpts from defendant's phone calls made from county jail, because inasmuch as the evidence was sufficient to show that the recordings were what the State represented them to be, there was no requirement for testimony from a representative of the company that operated the system for the county involved, and the court did not find any requirement that a particular witness know the name of the company that operated the system when the recordings were made. Chatman v. State, 2011 Tex. App. LEXIS 7217, 2011 WL 3860437 (Tex. App. Eastland Aug. 31 2011).

156. Regarding appellant's conviction of theft of property over $ 1,500 but less than $ 20,000 under Tex. Penal Code Ann. § 31.03(e)(4)(A) and his sentence under Tex. Penal Code Ann. § 12.42(a)(2), the State introduced two penitentiary packets concerning prior offenses that contained an affidavit certifying that the attached information related to appellant and the enclosed documents were self-authenticating under Tex. R. Evid. 901, 902, plus a fingerprint expert testified that appellant's fingerprints matched those in the packets; in light of case law holding that the criminal justice department's record clerk's certification of the packet constituted proper authentication, the court overruled appellant's issue. Brunner v. State, 2011 Tex. App. LEXIS 6781, 2011 WL 3717002 (Tex. App. El Paso Aug. 24 2011).

157. Trial court did not abuse its discretion in admitting a letter as properly authenticated under Tex. R. Evid. 901(b)(2), given that (1) the letter contained sufficient characteristics to support a finding that appellant wrote the letter, (2) while appellant's wife and daughter did not testify that they were familiar with appellant's handwriting, appellant and his wife were together for approximately 13 years, and (3) the letter included intimate details of appellant's childhood and relationship with his wife, as well as appellant's state of mind on the day of the crime. Delagarza v. State, 2011 Tex. App. LEXIS 6209, 2011 WL 3484797 (Tex. App. Dallas Aug. 10 2011).

158. Testimony of a custodian of records as to their preparation established the business records exception under Tex. R. Evid. 803(6) in a construction contract dispute, and his statement that the evidence accurately portrayed what the subcontractor claimed it portrayed met the authentication requirement of Tex. R. Evid. 901(a), regardless of whether he had personal knowledge of the information contained in the records. Concept Gen. Contr., Inc. v. Asbestos Maint. Servs., 346 S.W.3d 172, 2011 Tex. App. LEXIS 5475 (Tex. App. Amarillo July 18 2011).

159. Knife was properly authenticated and the trial court did not err by admitting it into evidence because the officer testified as to how he remembered finding the knife and testified to the characteristics of the knife that

ensured him he was looking at the same knife that he discovered in the parking lot of the club, including the distinct logo written on the side of the knife. Madrigal v. State, 347 S.W.3d 809, 2011 Tex. App. LEXIS 5144 (Tex. App. Corpus Christi July 7 2011).

160. Court did not err in finding that a tape recorder accurately recorded the investigator's conversation with defendant because, although a "popping noise" would occur, the court found that the tape recorder was capable of making an accurate recording, that the investigator was competent in making that recording, and that the recording was accurate and did not appear to have been altered. Martines v. State, 371 S.W.3d 232, 2011 Tex. App. LEXIS 4773, 2011 WL 2502839 (Tex. App. Houston 1st Dist. June 23 2011).

161. Although defendant, who was convicted of delivery of a controlled substance in a drug free zone, argued that the trial court erred in admitting a map because the map had not been properly authenticated under under Tex. R. Evid. 901, any error in admitting the map was harmless. Evidence that the drug transaction took place within 1,000 feet of an elementary school was admitted without objection on at least four other occasions. Carter v. State, 2011 Tex. App. LEXIS 4319, 2011 WL 2306113 (Tex. App. Tyler June 8 2011).

162. Reasonable juror would have found that a phone call recording was authenticated for purposes of Tex. R. Evid. 901, given that the conversation was authenticated by several witnesses, including the administrator of the inmate phone system and a detective who identified the voices, and the phone call was made to a number with a certain area code, which region included where both appellant and his wife originally lived; the trial court did not abuse its discretion in admitting this evidence. Williams v. State, 2011 Tex. App. LEXIS 3799, 2011 WL 1888258 (Tex. App. Dallas May 19 2011).

163. Trial court did not err during defendant's sentencing hearing in admitting into evidence a compact disc (CD) purportedly containing audio recordings of some telephone conversations defendant participated in while in jail because defendant's voice was adequately authenticated under Tex. R. Evid. 901(b); when played on a computer, the CD showed defendant's name and identification number. Lawrence v. State, 2011 Tex. App. LEXIS 2971, 2011 WL 1494035 (Tex. App. Dallas Apr. 20 2011).

164. Given that (1) a Texas Ranger identified a computer disc and stated that it contained the recording of a voicemail from appellant to the victim, (2) records from appellant cellular-phone provider tied the voicemail as originating from a call made from appellant's home phone, and (3) the message included a request that the recipient call appellant's home number, there was evidence authenticating the message for purposes of Tex. R. Evid. 901(b), and thus the trial court did not err in admitting the voicemail message. Goodrich v. State, 2011 Tex. App. LEXIS 2745, 2011 WL 1417026 (Tex. App. Beaumont Apr. 13 2011).

165. Each of the affidavits submitted by the county and the city showed that they were not conclusory but supported the affirmative defense of the statute of limitations, and each affidavit was based on the personal knowledge of the affiant, and those affidavits submitting records substantially complied with Tex. R. Evid. 902(10)(b) and properly authenticated the relevant business records, Tex. R. Evid. 901(10)(b). Rameses Sch., Inc. v. City of San Antonio, 2011 Tex. App. LEXIS 2552, 2011 WL 1312279 (Tex. App. Houston 14th Dist. Apr. 7 2011).

166. In awarding attorney's fees, the trial court, in its discretion, could conclude that the attorney's testimony was sufficient to prove the bills were genuine under Tex. R. Evid. 901(a), (b)(1). Good v. Baker, 339 S.W.3d 260, 2011 Tex. App. LEXIS 2167 (Tex. App. Texarkana Mar. 25 2011).

167. Under Tex. R. Evid. 901, the production of a decedent's medical records during discovery might have authenticated them but did not render them admissible in a will contest. The medical records were hearsay and inadmissible as business records under Tex. R. Evid. 801(d), 803(6) because no custodian established the

requirements of the exception. In the Estate of Vackar, 345 S.W.3d 588, 2011 Tex. App. LEXIS 1684 (Tex. App. San Antonio Mar. 9 2011).

168. State introduced photographs through a detective, who testified that the photographs accurately showed how the rooms and evidence looked to him when he entered the scene; although appellant objected because the detective who actually took the pictures did not testify, the trial court did not abuse its discretion in admitting the photographs under Tex. R. Evid. 901(b)(1). Griffin v. State, 2011 Tex. App. LEXIS 1594, 2011 WL 754349 (Tex. App. Fort Worth Mar. 3 2011).

169. Record had evidence supporting an implied finding by the trial court that the photographs at issue were of the mother's minor children and that they were properly authenticated, Tex. R. Evid. 901. In the Interest of P.G.F., 2011 Tex. App. LEXIS 1136, 2011 WL 950171 (Tex. App. Houston 1st Dist. Feb. 10 2011).

170. Trial court had sufficient evidence upon which to conclude that the mother was the subject in the photographs posted on the Internet and therefore, did not abuse its discretion by admitting them, because the mother could not complain on appeal that the trial court abused its discretion by not granting an objection it was not presented with or by not requiring additional authentication evidence to answer a challenge she did not raise. In re J.A.S., 2011 Tex. App. LEXIS 345 (Tex. App. Eastland Jan. 13 2011).

171. Any error in admitting evidence of a video of the collision between the train and vehicle was harmless, because even assuming the software overlay was not properly authenticated, there was evidence concerning the time, date, speed and location of the train that was admitted into evidence without objection. Henry v. Burlington Northern Santa Fe Corp., 2010 Tex. App. LEXIS 7557, 2010 WL 3582636 (Tex. App. Tyler Sept. 15 2010).

172. Trial court did not abuse its discretion by admitting a child protective service's investigator's testimony about a telephone call she heard on a speakerphone because it was properly authenticated under Tex. R. Evid. 901, as the investigator testified that the person on the phone identified herself as defendant's sister and continued to disclose information that was very specific to circumstances previously described by defendant and her sister. Mosley v. State, 2010 Tex. App. LEXIS 7344 (Tex. App. Houston 1st Dist. Aug. 31 2010).

173. Trial court did not err by admitting inculpatory statements made during a telephone conversation between an officer and a man purporting to be defendant because there was sufficient evidence supporting the finding that the person speaking to the officer was defendant, as: (1) the officer testified that the person identified himself as defendant; (2) the caller advised the officer that he still had the stolen property and that he would have his mother return it to the police department; (3) the next day defendant's mother met with the officer at the police department and returned some of the stolen property, along with a handwritten note purportedly signed by defendant in which he admitted to and apologized for stealing the property; (4) defendant's girlfriend met with the officer and provided information the further led the officer to believe that he had been speaking to defendant; and (5) there was no contrary evidence presented that the caller was anyone other than defendant. Castle v. State, 2010 Tex. App. LEXIS 7039, 2010 WL 3370057 (Tex. App. Austin Aug. 25 2010).

174. Trial court did not abuse its discretion in excluding a photograph because it was not supported by the testimony of any witness explaining who took it, when it was taken, and what the subject of the photograph was, for purposes of Tex. R. Evid. 901. Goad v. State, 2010 Tex. App. LEXIS 6349 (Tex. App. Austin Aug. 6 2010).

175. Defendant's challenge to the admission of recordings and transcripts of her statements on the ground that the tapes were never disclosed and contained discrepancies was rejected because: (1) even if the recordings were not disclosed, Brady did not apply because defendant knew she had made the statements; and (2) the record contained authenticating testimony that the recordings were what they were claimed to be. Mayfield v. State, 2010

Tex. App. LEXIS 6037 (Tex. App. Waco July 28 2010).

176. Letters purportedly written by defendant to another inmate in the jail were properly authenticated under Tex. R. Evid. 901(a). Defendant was in position to have the letters delivered by a trustee to the other inmate and the letters were signed with a name that multiple witnesses identified as defendant's street name, were written to a witness to the charged offense, referred to another witness in the case and said the second witness was not going to testify, indicated a knowledge of the facts of the case, mentioned defendant's cell location, and referred to defendant's next court date. Green v. State, 2010 Tex. App. LEXIS 5828, 2010 WL 2874146 (Tex. App. Houston 1st Dist. July 22 2010).

177. Defendant's conviction for indecency with a child by contact was proper because, given the lack of evidence that a tape was in fact what defendant claimed it to have been, the trial court acted within its discretion in determining that the recording's authenticity had not been sufficiently established to allow its admission into evidence, Tex. R. Evid. 901(a). Sosa v. State, 2010 Tex. App. LEXIS 4428, 2010 WL 2330304 (Tex. App. Austin June 10 2010).

178. For purposes of Tex. R. Evid. 901(a), the trial court's ruling, admitting into evidence the gun stolen during the crime, was not clearly wrong, given that (1) the victim testified that she was absolutely positive that the exhibit was the gun in question, (2) another victim testified that he recognized the exhibit as the gun in question and he identified it by the broken hammer on the back, as did the first victim, and (3) two police officers testified that, based on their training and experience, the broken hammer on the exhibit was a unique identifying characteristic on the gun. Traylor v. State, 2010 Tex. App. LEXIS 3611 (Tex. App. Beaumont May 12 2010).

179. Defendant argued that the trial court erred in admitting into evidence the gun stolen during the robbery, as there were no identifiable markings in the photograph of the gun, which was substituted in the trial record in place of the gun, or ownership papers indicating the gun admitted was the gun stolen during the robbery; an employee working on the night of the robbery testified that he recognized the exhibit as the revolver he always put in a money bag at night, and although he did not know the serial number of the gun, he recognized it because of the gun's broken hammer, and another employee testified that she recognized the revolver as the one she placed in the money bag on the night of the robbery and because of its broken hammer, and thus, for purposes of Tex. R. Evid. 901(a), the trial court's admissibility ruling was not clearly wrong. Traylor v. State, 2010 Tex. App. LEXIS 3655, 2010 WL 1930283 (Tex. App. Beaumont May 12 2010).

180. Although defendant questioned the complainant about how she was able to recognize his handwriting, he made no objection to the admission of the birthday card, and thus defendant failed to preserve error under Tex. R. App. P. 33.1 regarding his claim that the card was not properly authenticated. Sosa v. State, 2010 Tex. App. LEXIS 3328, 2010 WL 1790811 (Tex. App. Houston 14th Dist. May 6 2010).

181. Because defendant's former girlfriend had personal knowledge of the things depicted in the video, she could authenticate them, and she was not required to have been present when the video was made to be able to authenticate it, for purposes of Tex. R. Evid. 901(a), 902(b)(1), (5), and the trial court did not abuse its discretion in finding that the video was authenticated by the girlfriend. George v. State, 2010 Tex. App. LEXIS 2425, 2010 WL 1269676 (Tex. App. Waco Mar. 31 2010).

182. Argument about linking defendant to a prior conviction did not comport with the argument at trial, which concerned lack of authentication, such that defendant was procedurally barred from raising this issue for the first time on appeal under Tex. R. App. P. 33.1(a). Andrus v. State, 2010 Tex. App. LEXIS 1665, 2010 WL 797196 (Tex. App. Dallas Mar. 10 2010).

183. Court questioned whether defendant's complaint on appeal related to the authenticity of his handwriting on a letter comported with his objection at trial that another person was to authenticate the letter, but assuming error was preserved, there was no abuse of discretion in the admission of the letter; under Tex. Code Crim. Proc. Ann. art. 38.27, the authenticity of the letter could have been established by the jury's comparison of the signature on the letter with other unobjected-to exhibits containing defendant's signature. Dacus v. State, 2010 Tex. App. LEXIS 1072, 2010 WL 546691 (Tex. App. El Paso Feb. 17 2010).

184. Prior to defendant's objection, the prosecutor authenticated a letter through a detective's testimony, and when defendant objected and the trial court examined the signature on the letter with other documents, the trial court was merely concerned with properly applying the rules of evidence in regard to the admission of the letter under Tex. Code Crim. Proc. Ann. art. 38.27; even if the trial court's comment could be interpreted to show bias, because the comment was made outside the presence of the jury, there was no harmful error. Dacus v. State, 2010 Tex. App. LEXIS 1072, 2010 WL 546691 (Tex. App. El Paso Feb. 17 2010).

185. In defendant's online solicitation case, the trial court did not err by admitting the chat logs between defendant and the officer posing as a teenager because the officer testified that the chats he conducted while posing as the teenager appeared on his computer terminal during the chat and the chat logs contained the content of those chats. The investigation traced the IP address used by defendant to defendant's apartment. Bailey v. State, 2009 Tex. App. LEXIS 9440, 2009 WL 4725348 (Tex. App. Dallas Dec. 11 2009), *cert. denied*, 131 S. Ct. 475, 178 L. Ed. 2d 301, 2010 U.S. LEXIS 7971 (U.S. 2010).

186. In a fraud suit involving an alleged misrepresentation regarding the zoning of property, the buyer's summary judgment affidavit authenticated an attached document under Tex. R. Evid. 901(b)(1). Doye Baker, L.P. v. City of Robinson, 305 S.W.3d 783, 2009 Tex. App. LEXIS 9250 (Tex. App. Waco Dec. 2 2009).

187. In a case in which defendant was convicted of aggravated kidnapping, even assuming that defendant was correct in asserting that documents purporting to be his Indian passport and an identification card issued by the Indian Aviation Authority were not properly authenticated and that the trial court abused its discretion in admitting them, defendant did not show, nor could a reviewing court find, any harm caused by their admission because it was uncontested that defendant was a citizen of India and that he worked at the international airport in Bombay. Therefore, the authenticity of the passport and identification card could not have substantially or injuriously impacted the jury when the uncontroverted testimony of the victim sought to prove the same fact. Shamsher Medih Chisti v. State, 2009 Tex. App. LEXIS 8941, 2009 WL 3931105 (Tex. App. Houston 1st Dist. Nov. 19 2009).

188. Court did not believe that corroboration was required to establish authenticity of the tape pursuant to Tex. Code Crim. Proc. Ann. art. 38.141; defendant cited no authority for the proposition that for purposes of determining the authenticity of a recording for purposes of Tex. R. Evid. 901, corroboration of an informant was required, and defendant did not argue that the recording was not of his voice or that it was altered in any manner, such that the trial court did not err in admitting the audio recordings. Rios v. State, 2009 Tex. App. LEXIS 8737, 2009 WL 3766341 (Tex. App. Waco Nov. 10 2009), mem. op.

189. In defendant's capital murder case, the robe the victim was wearing was properly admitted at trial because a witness testified that the victim was wearing a red robe when the paramedics arrived, she had to cut it off to complete her original assessment, and she recognized the exhibit as being the "exact" same red robe because of: (1) the distinctive jagged marks she made around the front zipper with her trauma shears; and (2) the blood stains near the neck area. Gardner v. State, 306 S.W.3d 274, 2009 Tex. Crim. App. LEXIS 1441 (Tex. Crim. App. 2009).

190. Admission of surveillance video was proper because the officer outfitted the informant with a recording device and transmitter, the officer monitored an audio feed, and the officer later watched the video and interviewed the

informant; that evidence was sufficient to conclude that the video was what the State claimed it was. Sanford v. State, 2009 Tex. App. LEXIS 7592, 2009 WL 3161505 (Tex. App. Tyler Sept. 30 2009).

191. In a breach of contract case, a trial court did not err by refusing to grant a new trial based on newly discovered evidence; Tex. R. Evid. 901(b)(7) did not require the admission of the evidence since appellant offered no evidence about an Internal Revenue Service document other than his unsworn statement that he received the document in the mail, and it was not authenticated by either certification or any extrinsic evidence. Moreover, the trial court did not err by failing to take judicial notice of the document. Nixon v. GMAC Mortg. Corp., 2009 Tex. App. LEXIS 7350, 2009 WL 2973660 (Tex. App. Dallas Sept. 18 2009).

192. In defendant's murder case, the trial court did not abuse its discretion in excluding a letter from a witness because, at the conclusion of the witness's testimony, he was excused without any request that he be subject to recall, the witness could not be located when defendant offered the letter into evidence, and thus, the witness was no longer subject to cross-examination. Furthermore, the letter was not authenticated and there was no indication showing that the letter was written prior to the alleged improper influence by defendant's family and friends. Long v. State, 2009 Tex. App. LEXIS 6577, 2009 WL 2581286 (Tex. App. Eastland Aug. 20 2009).

193. In a dispute over an oil and gas lease where a lessee was liable under the terms of the contract for compensatory royalties, a lessor did not produce sufficient evidence relating to damages because neither purported Texas Railroad Commission records nor a demand letter were authenticated; therefore, they were not summary judgment evidence. H&S Prod. v. Dorchester Minerals, LP, 2009 Tex. App. LEXIS 6386, 2009 WL 2478089 (Tex. App. Dallas Aug. 14 2009).

194. Victim testified that photographs fairly and accurately reflected the injuries she sustained, and thus the photographs were properly authenticated. Wallace v. State, 2009 Tex. App. LEXIS 5794, 2009 WL 2265023 (Tex. App. San Antonio July 29 2009).

195. Surveillance video was properly authenticated because a witness testified, out of the jury's presence, that the video depicted "exactly" what he saw on the surveillance system on the night of the robbery. Additionally, any error was harmless because there was overwhelming evidence of defendant's guilt. Swinnie v. State, 2009 Tex. App. LEXIS 5352, 2009 WL 1981849 (Tex. App. Dallas July 10 2009).

196. Defendant objected to the admission of recordings only on the ground that the recordings were not accurate and complete, and in his motion for new trial, he contended that this trial objection was based on the doctrine of optional completeness under Tex. R. Evid. 107, but that was not a rule of exclusion; his objection at trial was too general to alert the trial court that he was actually objecting on the grounds that the recording equipment malfunctioned or that the recordings were manipulated and he did not argue in his new trial motion that he had a legitimate reason for not asserting these objections when the recordings were offered, such that the objections made for the first time in the new trial motion were not preserved for review under Tex. R. App. P. 33.1(a)(1). Even if the matter was preserved, a witness's testimony was sufficient to meet the requirement that the evidence be authenticated under Tex. R. Evid. 901, plus defendant's complaint that the recordings were not accurate went to the weight of the evidence only and not to its admissibility. Manis v. State, 2009 Tex. App. LEXIS 4909 (Tex. App. Dallas June 26 2009).

197. Trial court did not abuse its discretion in excluding a letter by a defense witness, given that (1) the witness was no longer subject to cross-examination under Tex. R. Evid. 801(e)(1)(B), as he had been excused without any request that he be subject to recall and he could not be located when the letter was offered, plus (2) the letter was not authenticated under Tex. R. Evid. 901, and there was no indication showing that the letter was written prior to the alleged improper influence by defendant's family and friends. Long v. State, 2009 Tex. App. LEXIS 4166, 2009

WL 1653056 (Tex. App. Eastland June 11 2009).

198. In order for a love poem to have been admissible, it had to be authenticated under Tex. R. Evid. 901(a), but it was not, and failure to authenticate a document rendered it inadmissible even if otherwise relevant and admissible; the trial court did not abuse its discretion in excluding the love poem because it was not relevant to punishment, for purposes of Tex. R. Evid. 401 and Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a), and the poem's impact on the jury could have been to imply that the victim deserved her fate. Akeredolu v. State, 2009 Tex. App. LEXIS 4112, 2009 WL 1609372 (Tex. App. El Paso June 10 2009).

199. Because a resident and his wife did not authenticate 911 reports, the trial court properly excluded the reports as incompetent summary-judgment evidence. Xiao Yu Zhong v. Sunblossom Gardens, LLC, 2009 Tex. App. LEXIS 3010, 2009 WL 1162213 (Tex. App. Houston 1st Dist. Apr. 30 2009).

200. In an aggregate theft over $ 200.000 or more case, while no handwriting expert verified the handwriting on the deposit slips, the handwriting on those slips was properly authenticated as defendant's long-time supervisor confirmed that the handwriting on the deposit slips belonged to defendant, and multiple witnesses testified that only defendant had access to the bank deposits. Keck v. State, 2009 Tex. App. LEXIS 2402, 2009 WL 3003257 (Tex. App. Houston 14th Dist. Apr. 2 2009).

201. Videotape was properly authenticated because a loss prevention officer described the intricacies of the store's recording system, he detailed how he was able to link the encoding on the receipts to the time and date, and he had personally copied the relevant recordings from the multiplex to the videotape. Thierry v. State, 288 S.W.3d 80, 2009 Tex. App. LEXIS 1043 (Tex. App. Houston 1st Dist. Feb. 12 2009).

202. In a negligence case where a customer contended that he contracted food poisoning after eating undercooked chicken at a restaurant, medical records and a receipt were not considered summary judgment evidence because they were not properly authenticated under Tex. R. Evid. 901(a). The trial court was then required to grant a restaurant owner's motion for no-evidence summary judgment because the customer offered no evidence to support his position, and the record showed that the customer failed to respond to the motion after receiving proper service. Moody v. James, 2009 Tex. App. LEXIS 337, 2009 WL 127866 (Tex. App. Texarkana Jan. 21 2009).

203. In a negligence suit filed against a fitness center when a member died after a workout, the trial did not err by allowing the fitness center to introduce a copy of decedent's membership contract that was retained by the gym in microfiche storage; testimony from a corporate representative and counsels' representations there would be no contest to the signature on the document were sufficient circumstances to establish the document's genuineness under Tex. R. Evid. 901(a). Sinegaure v. Bally Total Fitness Corp., 2008 Tex. App. LEXIS 9435 (Tex. App. Houston 1st Dist. Dec. 18 2008).

204. Witness need not have taken the photographs in question or observed them being taken in order to testify about them; the witness testified that the pictures accurately depicted the child's condition on the date that she saw him and this testimony met the requirements of Tex. R. Evid. 901 and the trial court did not err in admitting the photographs in the father's termination of rights proceeding. In re M.M.F., 2008 Tex. App. LEXIS 9486 (Tex. App. Fort Worth Dec. 18 2008).

205. Even if a variance existed between the cause number alleged in the enhancement count and that on the judgment, reversal would be required only if defendant could show prejudicial surprise, and there was no variance between the enhancement allegation and the copy of the judgment of conviction in one cause number, the proper judgment of the prior conviction on defendant was contained in the pen packet that was certified, and the court did

not believe it was incumbent on counsel to object to a matter that clearly appeared to be no more than a typographical error; even if defendant had objected to the typographical error and even if the trial court had sustained the objection, the State likely could have been granted an opportunity to obtain a correction of this clerical error and thus the court was unable to say that counsel's failure to object specifically to the authentication of the pen packet constituted ineffective assistance of counsel. Fox v. State, 2008 Tex. App. LEXIS 8527 (Tex. App. Texarkana Nov. 13 2008).

206. When the State sought to admit a pen packet, defense counsel objected to it as hearsay, but did not object to authentication; this was not an improper objection because if the record was actually not authenticated, then it would have been subject to a hearsay objection, but the court agreed that counsel should make a more specific objection to preserve the issue of authentication. Fox v. State, 2008 Tex. App. LEXIS 8527 (Tex. App. Texarkana Nov. 13 2008).

207. Letter written by defendant was properly authenticated by an officer because the officer identified the letter as having been written by defendant based on his familiarity with defendant's handwriting from other letters he had reviewed as part of his jailhouse duties and from defendant's name and unique "SO" number on the return address. Galbraith v. State, 2008 Tex. App. LEXIS 8433 (Tex. App. Fort Worth Nov. 6, 2008).

208. Documents could not be admitted as public records under Tex. R. Evid. 803(8) in a receivership proceeding without certification pursuant to Tex. R. Evid. 902(4) or extrinsic evidence of authenticity under Tex. R. Evid. 901(a), (b)(7). Benefield v. State ex rel. Alvin Cmty. Health Endeavor, Inc., 266 S.W.3d 25, 2008 Tex. App. LEXIS 6152 (Tex. App. Houston 1st Dist. 2008).

209. State did not produce any witness testimony identifying defendant as the person who presented the checks in question to a store, but the trial court could have compared the photograph and signature in the driver license pack to defendant and the signatures on the checks and reasonably concluded that defendant was the person who presented the checks, given that the trial court, as the trier of fact, was authorized to compare the signatures, for purposes of Tex. Code Crim. Proc. Ann. art. 38.27 and Tex. R. Evid. 901(a), (b)(3); given that the trial court could have found that the same person who signed the checks signed the driver's license, and in the absence of any contrary evidence that defendant's checks were stolen or someone else presented the checks, it was a reasonable inference that defendant presented the checks, for purposes of defendant's conviction of theft of $ 500 or more but less than $ 1,500, in violation of Tex. Penal Code Ann. § 31.03(a), (e)(3). Perez v. State, 2008 Tex. App. LEXIS 6092 (Tex. App. Dallas Aug. 13 2008).

210. Mandamus relief was not granted in a case where an amended motion to compel arbitration was denied because there was no competent evidence of an agreement to arbitrate a debt dispute. In re Universal Fins. Consulting Group, Inc., 2008 Tex. App. LEXIS 3723 (Tex. App. Houston 14th Dist. May 20 2008).

211. Defendant did not show that objectionable material remained due to counsel's lack of objection and the record showed that the proper predicate was laid for the authentication of cocaine in defendant's trial for delivery of a controlled substance in violation of Tex. Health & Safety Code Ann. § 481.112, such that had an objection been made, there was nothing to show that it would have been error to overrule it; furthermore, an isolated failure to object to improper evidence did not constitute ineffective assistance of counsel. Rodgers v. State, 2008 Tex. App. LEXIS 3182 (Tex. App. Corpus Christi May 1 2008).

212. To the extent that defendant argued that pen packets were not properly authenticated under Tex. R. Evid. 901, the court noted that the rule does not require a raised or colored seal, and it had been long rejected that a facsimile signature stamp on a pen packet rendered the attestation defective and the pen packet inadmissible.

Smith v. State, 2008 Tex. App. LEXIS 2849 (Tex. App. Fort Worth Apr. 17 2008).

213. Because defendant did not present a claim of improper authentication to the trial court in his motion to suppress, the court was unable to conclude that the trial court erred in denying defendant's motion on this basis because he failed to preserve error on this issue under Tex. R. App. P. 33. Green v. State, 2008 Tex. App. LEXIS 1193 (Tex. App. San Antonio Feb. 20 2008).

214. Defendant did object to the admission of audiotapes on the basis of authentication and while defendant did not directly state so in his brief, under Tex. R. App. P. 38, the court interpreted the arguments over lack of authenticity to contest the trial court's decision to admit the audiotapes, and because defendant's wife testified that the audiotapes contained recordings of her telephone conversations and identified the voices on the audiotapes, the trial court did not err in admitting the tapes. Green v. State, 2008 Tex. App. LEXIS 1193 (Tex. App. San Antonio Feb. 20 2008).

215. In defendant's murder case, a court properly admitted evidence of the victim's handwritten letters because it was admissible as relating to the victim's state of mind, and the State authenticated the letters through the victim's daughter, who recognized the handwriting on the letters as being that of her mother. Stafford v. State, 248 S.W.3d 400, 2008 Tex. App. LEXIS 1280 (Tex. App. Beaumont 2008).

216. In an aggravated assault case, any error in the authentication of the bullet was harmless because, although the records concerning the victim's treatment reflected a diagnosis of "GSW to head -- no injury," that entry did reflect that the victim sustained a gunshot wound, but it caused no significant injuries; moreover, records from the doctor who later removed the bullet were admitted at trial and confirmed that the removal procedure occurred. Jones v. State, 2008 Tex. App. LEXIS 877 (Tex. App. Houston 14th Dist. Feb. 7 2008).

217. Photographs were properly authenticated under Tex. R. Evid. 901 and deemed admissible evidence because it was not necessary that an authenticating witness have taken the photographs- -all that was required was testimony from a witness with personal knowledge that the photographs accurately depicted what they claimed to be. Kirwan v. City of Waco, 249 S.W.3d 544, 2008 Tex. App. LEXIS 152 (Tex. App. Waco 2008).

218. Defendant's murder conviction was proper pursuant to Tex. R. Evid. 901 because a ranger was permitted to testify as to the authenticity of the tape recordings at issue; iIn addition to the information provided by the recordings, the ranger testified that the exhibits were of defendant's recorded jailhouse conversations, and that he had obtained the exhibits from jail personnel and had reviewed them at that jail; he also identified most of the voices and testified that he had interviewed defendant before his confinement. Capps v. State, 244 S.W.3d 520, 2007 Tex. App. LEXIS 9602 (Tex. App. Fort Worth 2007).

219. Even if an inmate's appellate counsel used an incorrect standard of review regarding the admission of a surveillance tape by citing a case that had been superseded by the adoption of Tex. R. Evid. 901, the inmate failed to show that he was prejudiced because there was no indication that he would have prevailed had the appellate counsel used the correct standard. Brown v. Quarterman, 2007 U.S. Dist. LEXIS 88445 (S.D. Tex. Nov. 30 2007).

220. In a case of fraudulent use of identifying information with intent to harm and defraud another, an affidavit of a bank's custodian of records, who stated that he was responsible for the documents produced and that they were records kept in the regular course of business activity, was sufficient authentication under Tex. R. Evid. 901, in the absence of a specific objection, to support a finding that a credit application was a record kept by the bank. Rezaie v. State, 259 S.W.3d 811, 2007 Tex. App. LEXIS 9368 (Tex. App. Houston 1st Dist. 2007).

221. Trial court did not abuse its discretion by admitting a knife as the offense weapon in a robbery because: (1) direct testimony established that defendant returned to the robbery scene with the knife found in his possession; (2) at the scene, the robbery victim positively identified the knife as the weapon with which defendant threatened him; and (3) a police officer maintained custody of the knife until he tagged it and booked it into the evidence room, where it remained in an envelope until the morning of trial. Maranda v. State, 253 S.W.3d 762, 2007 Tex. App. LEXIS 9285 (Tex. App. Amarillo 2007).

222. Court was left to infer that a recording was made by jail personnel, and the court noted that authentication of an audio recording did not require proof of who made the recording or the details of how it was made. Mendoza v. State, 2007 Tex. App. LEXIS 7679 (Tex. App. Amarillo Sept. 24 2007).

223. Victim acknowledged that the recording in question sounded like her voice and she acknowledged being a party to the conversation, and the trial court heard the testimony and the recording and could properly consider similarities or differences between the victim's voice and those on the recording in making the trial court's ruling, for purposes of Tex. R. Evid. 901; the contents of the recording concerned defendant's prosecution and matters to which the victim testified, serving to further authenticate the recording, and the trial court could have found that the voices were the victim and defendant, and that the victim was uncertain as to one segment did not suggest an abuse of discretion on the trial court's part. Mendoza v. State, 2007 Tex. App. LEXIS 7679 (Tex. App. Amarillo Sept. 24 2007).

224. Trial court did not error when it admitted into evidence the audiotape of the undercover drug transaction recorded by the police, because the officer's testimony explaining how the audiotape was made and confirming that it was an audiotape of what occurred during the undercover sting operation satisfied the requirements of Tex. R. Evid. 901. Fresch v. State, 2007 Tex. App. LEXIS 6353 (Tex. App. Austin Aug. 6 2007).

225. Because defendant did not properly authenticate, under Tex. R. Evid. 901, certain grievance records, the trial court did not abuse its discretion in excluding the records. Holbert v. State, 2007 Tex. App. LEXIS 5803 (Tex. App. San Antonio July 25 2007).

226. In a medical disciplinary matter, the physician complained that the Texas State Board of Medical Examiners failed to introduce evidence meeting a seven-part predicate for the admission of recordings; however, an officer's testimony was susceptible to the interpretation that transcriptions of tapes were an accurate reflection of conversation that took place with the physician about killing one of the physician's former patients. Sanchez v. Tex. State Bd. of Med. Examiners, 229 S.W.3d 498, 2007 Tex. App. LEXIS 5077 (Tex. App. Austin 2007).

227. Upon summary judgment in a suit for wrongful termination, the trial court could not consider the employee's notarized responses to the employer's summary judgment motion and a transcript of a conversation with a supervisor; the transcript was not competent summary judgment proof, because it was never produced in discovery and never authenticated, as required by Tex. R. Evid. 901. Kosa v. Dallas Lite & Barricade, Inc., 228 S.W.3d 428, 2007 Tex. App. LEXIS 4561 (Tex. App. Dallas 2007).

228. In a case involving aggravated assault on a public servant and possession of a weapon in a penal institution, a videotape of an altercation between defendant and correctional officers was properly authenticated by the testimony of an officer who had taken the tape; the officer testified that he had viewed the tape, it was prepared on a recording device capable of making an accurate recording, he was trained to operate the recording device, the tape was an accurate copy of the recording that he took, it had not been altered, and the recording accurately and correctly depicted the scene that he recorded. Wilson v. State, 2007 Tex. App. LEXIS 4332 (Tex. App. Corpus Christi May 31 2007).

229. Recordings of telephone calls defendant made while in jail were properly authenticated under Tex. R. Evid. 901 because an officer identified State's exhibit 12 as the disc containing digital recordings of telephone calls defendant made, another witness demonstrated how the recording system authenticated the accuracy of a digitally recorded inmate telephone call, and the victim identified defendant's voice as one of the voices on the recordings; it was not necessary for the victim to identify both voices to establish that the digital recording was what the State claimed it to be. Banargent v. State, 228 S.W.3d 393, 2007 Tex. App. LEXIS 4365 (Tex. App. Houston 14th Dist. 2007).

230. Trial court did not abuse its discretion in admitting two pen packets during defendant's trial for armed robbery where an affidavit sufficiently authenticated the pen packets under Tex. R. Evid. 902. Eason v. State, 2007 Tex. App. LEXIS 2973 (Tex. App. Beaumont Apr. 18 2007).

231. In a burglary of a habitation case, defendant complained that counsel was ineffective for failing to object to photographs of the crime scene; however, the victim testified that each of the three photographs in question accurately represented the scene it was intended to portray; thus, defendant's complaint that the photographs were not authenticated under Tex. R. Evid. 901(a) was entirely without merit. Tarango v. State, 2007 Tex. App. LEXIS 2247 (Tex. App. El Paso Mar. 22 2007).

232. In defendant's trial under Tex. Penal Code Ann. § 22.041(c), the trial court did not err in admitting a videotape into evidence for purposes of Tex. R. Evid. 901, 1001(b), given that (1) testimony showed that a witness removed the videotape from a locked box and placed it in his desk, reviewed the videotape the day after the incident and before testifying, and the videotape was the same or similar to what was seen on the day after the incident, (2) the testimony described where the camera lens and locked box were located in the school bus and how they were activated, (3) other testimony established the chain of custody, (4) the videotape display indicated it was a videotape of the bus on a certain date and time, and (5) events the children described appeared on the videotape. Teeter v. State, 2007 Tex. App. LEXIS 1248 (Tex. App. Dallas Feb. 20 2007).

233. Employer was properly denied a new trial on its claim that the trial court erred by excluding a graph summarizing the amount of time the former employee and the allegedly harassing coworker worked together because the employer's sponsoring witness did not create the graph herself, did not know who did, and was not sure whether it was created before or after the trial began. Waffle House, Inc. v. Williams, 314 S.W.3d 1, 2007 Tex. App. LEXIS 843, 100 Fair Empl. Prac. Cas. (BNA) 451 (Tex. App. Fort Worth 2007).

234. On appeal from a drug conviction, defendant suggested no way in which the proof was inadequate to support a finding under Tex. R. Evid. 901 that the contraband was what its proponent claimed because his entire argument focused on the lack of a "chain of custody" affidavit; the affidavit was not required. Ingram v. State, 213 S.W.3d 515, 2007 Tex. App. LEXIS 86 (Tex. App. Texarkana 2007).

235. Testifying as a witness with knowledge that a matter was what it was claimed to be, defendant sufficiently authenticated a letter pursuant to Tex. R. Evid. 901. Horton v. State, 2006 Tex. App. LEXIS 10521 (Tex. App. Fort Worth Dec. 7 2006).

236. Trial court's decision to admit an exhibit over a lack of authentication objection was not an abuse of discretion; the trial court found that defendant's testimony of not writing the letters in question went to the weight of the evidence, not admissibility. Horton v. State, 2006 Tex. App. LEXIS 10521 (Tex. App. Fort Worth Dec. 7 2006).

237. In the slaughterhouses' appeal of the trial court's issuance of a permanent injunction and award of expenses to the State, pursuant to Tex. Health & Safety Code Ann. § 433.099, the appellate court rejected the slaughterhouses' claim that the trial court erred by admitting the State's exhibits, which included handwritten

compilation of expenses incurred by the State, because a Department of State Health Services representative testified that the exhibits were a record regularly kept in the course of business, that he was a custodian of the record, that it was the regular practice of the Department to keep such records, and that the records were made at or near the time of the occurrence by a person with knowledge or by a person furnished with such knowledge; therefore the State laid the necessary predicate for admission of the exhibits as properly authenticated business records. Qaddura v. State, 2006 Tex. App. LEXIS 9209 (Tex. App. Fort Worth Oct. 26 2006).

238. Complainant testified that she recognized the handwriting in the letter as that of defendant; she explained that she recognized defendant's handwriting because he wrote her a lot of letters; also, during the punishment phase, defendant admitted that he wrote the letters; accordingly, the trial court did not err in admitting one of the letters into evidence because it was properly authenticated. Parker v. State, 2006 Tex. App. LEXIS 8834 (Tex. App. Houston 1st Dist. Oct. 12 2006).

239. In a case charging burglary of a habitation, the State properly authenticated a crowbar, which was easily identifiable and resistant to change, by presenting testimony that the item was what the State said it was. Chavez v. State, 2006 Tex. App. LEXIS 7878 (Tex. App. El Paso Aug. 31 2006).

240. Admission of the State's exhibits, which included the traffic citation, the warrant of arrest signed by the judge of the municipal court and a deputy clerk's certificate of defendant's failure to appear at trial for his speeding citation, did not violate defendant's confrontation rights because the exhibits were forms used by the Houston courts that record the occurrence of an event, and defendant failed to offer and the appellate court could not find, any authority or reasoning to transform the documents into testimonial statements. Azeez v. State, 203 S.W.3d 456, 2006 Tex. App. LEXIS 7821 (Tex. App. Houston 14th Dist. 2006).

241. Trial court did not err in admitting the State's exhibits that consisted of a cardboard box spattered with defendant's DNA and pictures of that box into evidence over defendant's objection that the State could not prove a proper chain of custody of the exhibits where, although there were no photographs of the box at the scene of the crime and, at trial, the State conceded that it could not prove who removed the box from the scene of the crime, identification of the box by a police officer who saw it at the scene of the crime was sufficient authentication under Tex. R. Evid. 901 because the box had an unusual characteristic--a marking that appeared to be blood spatter. Hartsfield v. State, 200 S.W.3d 813, 2006 Tex. App. LEXIS 7432 (Tex. App. Texarkana 2006).

242. Although defendant objected to the admission of sheets on the ground that the chain of custody had not been properly proven, the court found nothing showing that defendant raised the issue of tampering, and because defendant's objection did not challenge the admissibility of the evidence, for purposes of Tex. R. Evid. 901, the error was overruled. Alexander v. State, 2006 Tex. App. LEXIS 6950 (Tex. App. Houston 14th Dist. Aug. 1 2006).

243. In the ex-husband's action against his brother-in law for conversion of gold coins, the trial court did not err in quashing the ex-husband's discovery attempts and granting protection for the brother-in-law's financial records based on the brother-in-law's submission of the two file stamped copies of orders from a prior divorce proceeding that were unauthenticated and not served on the ex-husband in the conversion action because the orders were stamped and certified and thus admissible under Tex. R. Evid. 901(b)(7); also a copy of a court order is not an affidavit and the service requirement of Tex. R. Civ. P. 193 does not apply. Calhoun v. Ying, 2006 Tex. App. LEXIS 6636 (Tex. App. Houston 1st Dist. July 27 2006).

244. Trial court did not abuse its discretion in overruling an insurer's lack-of-authentication objections to a workers' compensation benefits claimant's exhibits; the trial court could conclude that the distinctive characteristics and contents of the documents, taken in conjunction with the circumstances, were sufficient to prove the documents

were genuine. Am. Cas. Co. v. Hill, 194 S.W.3d 162, 2006 Tex. App. LEXIS 5009 (Tex. App. Dallas 2006).

245. Because there was no an objection to the general authenticity of an audio tape under Tex. R. Evid. 901, the complaint was waived under Tex. R. App. P. 33. Lingo-Perkins v. State, 2006 Tex. App. LEXIS 4877 (Tex. App. Tyler June 7 2006).

246. In defendant's capital murder trial, the trial court did not err in admitting into evidence an audio tape of defendant demanding money from the victim's father for the victim's safe return; for purposes of Tex. R. Evid. 901(b)(5), it was reasonable for the trial court to find that it was defendant's voice on the tape, given the witnesses who recognized defendant's voice, and defendant had admitted to being the caller, which was at least circumstantial evidence that it was defendant's voice on the tape. Lingo-Perkins v. State, 2006 Tex. App. LEXIS 4877 (Tex. App. Tyler June 7 2006).

247. Narcotics task force officer was not present during the drug deals contained on the tape, he did not testify as to any of the distinctive characteristics contained on the tape, and he did not identify any of the voices contained on the tape; he only testified that he placed a tape in a device capable of recording conversations, made a copy of the tape after the transaction was completed, made a copy of the tape noting defendant's name and the case number on it, and that the tape had not been changed or edited in any way; simply placing a tape in a tape recorder and later retrieving it was not enough to satisfy the requirements for authentication; thus, it was error for the trial court to admit the tape, but the error was harmless because substantively the same evidence was properly admitted via an undercover officer's testimony who was present during the events. Roberson v. State, 2006 Tex. App. LEXIS 4282 (Tex. App. Houston 1st Dist. May 18 2006).

248. Although the tape was not properly authenticated, the evidence of an extraneous offense under Tex. R. Evid. 404 could not be said to have infringed on defendant's substantial rights because the evidence was before the jury via an undercover officer's unobjected-to testimony; therefore, admission of the extraneous offense evidence was harmless. Roberson v. State, 2006 Tex. App. LEXIS 4282 (Tex. App. Houston 1st Dist. May 18 2006).

249. Trial court did not err in admitting 2 counterfeit $ 100 bills in defendant's trial on a charge of unlawfully passing a forged $ 100 bill because they were properly authenticated as required by Tex. R. Evid. 901, where the police officer at the scene had recorded the serial numbers of the 2 bills separately from other bills found on defendant or passed at the race track on the same day, and defendant made an indirect admission that the bill passed to the clerk was his; proof of the chain of custody was unnecessary where there was direct evidence at the trial that the same item was taken from the scene of the crime, and defendant failed to raise the issue of tampering at trial. Haddad v. State, 2006 Tex. App. LEXIS 4414 (Tex. App. Texarkana May 18 2006).

250. Tape recording made from a murder victim's voice mail was admissible because the deletions of the messages of the victim's best friend did not affect the reliability of the remaining messages on the tape; the best friend explained that she erased her own messages because she knew that the voice-mail would only hold 20 messages and she wanted to preserve space in the voice mail box. White v. State, 2006 Tex. App. LEXIS 2224 (Tex. App. Houston 1st Dist. Mar. 23 2006).

251. In defendant's capital murder case, a court properly admitted an anonymous letter regarding defendant, addressed to a reporter, where in addition to being found on defendant's computer, the letter contained numerous intimate details of defendant's life, confirmed by other evidence, that collectively supported an inference that she was the author; given those circumstances, it was a reasonable exercise of the trial court's discretion to conclude that the letter was written by defendant, and because the letter was shown to be written by defendant, it was not hearsay when offered against her. Johnson v. State, 208 S.W.3d 478, 2006 Tex. App. LEXIS 2254 (Tex. App.

Austin 2006).

252. In defendant's theft case, documents were properly authenticated where several of the documents contained defendant's handwriting, with which a witness testified he was familiar, and another was a forged statement from a bank purporting to show payments on a mortgage and the victim's attorney testified that he was present when it was found in the victim's office and that the exhibit had a transaction from a previous bank statement that had been cut and taped onto the present statement. Reuter v. State, 2006 Tex. App. LEXIS 1314 (Tex. App. Houston 1st Dist. Feb. 16 2006).

253. In a criminal trial for aggravated robbery under Tex. Penal Code Ann. § 29.03(a), the court did not err by overruling defendant's objection to the admission of a video recording of the robbery; the victim, an eyewitness, testified that the recording accurately represented the robbery; it was sufficiently authenticated for purposes of Tex. R. Evid. 901. Hawkins v. State, 2006 Tex. App. LEXIS 1104 (Tex. App. Waco Feb. 8 2006).

254. Although the officer who originally found or seized the cocaine at issue did not testify or otherwise authenticate the substance prior to its admission into evidence, the officer who bought the cocaine from defendant testified that he recognized the cocaine and that he forwarded the exhibits to the laboratory for analysis, and because no one objected to his testimony, it was admissible for all purposes. Cyphers v. State, 2005 Tex. App. LEXIS 10699 (Tex. App. Amarillo Dec. 30 2005).

255. X-ray evidence, which was printed from a computer program, was admissible in a termination of parental rights case because the evidence was sufficiently authenticated for purposes of Tex. R. Evid. 901(a) by the testimony of a radiologist who testified that the computer program could not significantly alter an image. In re J.P.B., 180 S.W.3d 570, 2005 Tex. LEXIS 912, 49 Tex. Sup. Ct. J. 208 (Tex. 2005).

256. Trial court did not abuse its discretion in admitting the DNA evidence obtained from the victim's fingernail scrapings, and for purposes of Tex. R. Evid. 901(b)(1), the testimony the State elicited was sufficient for the trial court to have found that the evidence was derived from the material recovered from the victim's fingernails and was what the State purported it to be; although there was no direct testimony from the doctor who performed the autopsy or the person who transmitted the evidence within the police department, other witnesses established the chain of custody of the scrapings from the scene, to the medical examiner's office, to the police department crime laboratory, and there was no evidence of tampering or that the scrapings were not properly collected. Martinez v. State, 186 S.W.3d 59, 2005 Tex. App. LEXIS 8678 (Tex. App. Houston 1st Dist. 2005).

257. Evidence supported the conclusion that the drugs in question were what they were claimed to be because (1) the officer who found the drugs explained how they were found, as well as how the officer packaged them in an envelope, dated it, and turned it in at the station, (2) the custodian of the evidence testified about drug task force policies on maintaining evidence in a locker, and (3) a representative of the crime laboratory testified to opening, examining, and repackaging the evidence and retaining it in the laboratory vault until the representative brought it to court; for chain of custody and authentication purposes under Tex. R. Evid. 901(a), there was no evidence of tampering. Meitler v. State, 2005 Tex. App. LEXIS 7519 (Tex. App. Texarkana Sept. 13 2005).

258. Chain of custody was properly established by testimony from a police officer and a criminalist, and the evidence established, for purposes of admissibility under Tex. R. Evid. 901(a), that the items found to contain methamphetamine were the items seized from defendants' residence. Stark v. State, 2005 Tex. App. LEXIS 6872 (Tex. App. Tyler Aug. 24 2005).

259. Trial court did not err in admitting evidence related to seized narcotics because a sufficient chain of custody was established, for purposes of Tex. R. Evid. 901(a), and although the better practice would have been for the

officer who found the narcotics or the deputy who deposited the narcotics in the evidence locker to testify as to the identifying marks placed on the evidence, a reasonable juror could have found that the evidence was sufficiently authenticated by the officer's testimony, particularly given the positive field test of the evidence; furthermore, there was no affirmative proof of tampering or alteration, and barring such a showing, the chain of custody was sufficiently proven. Ramirez v. State, 2005 Tex. App. LEXIS 6705 (Tex. App. El Paso Aug. 18 2005).

260. Case law provides a way for the State to prove conclusively the chain of custody; however, case law does not require the State to prove the chain in only one manner. Ramirez v. State, 2005 Tex. App. LEXIS 6705 (Tex. App. El Paso Aug. 18 2005).

261. In a trial for driving while intoxicated, defendant failed to preserve for review his argument that a videotape was admitted without the proper predicate under Tex. R. Evid. 901. His objection, that the State failed to lay the proper predicate "per Lucas," did not preserve error on a Rule 901 claim. Garcia v. State, 2005 Tex. App. LEXIS 6691 (Tex. App. Austin Aug. 18 2005).

262. Judgments from defendant's earlier juvenile cases were properly admitted at a punishment hearing, even though they did not contain seals, as discussed in Tex. R. Evid. 902(1), (2), and (4), because they contained a certification showing that they were from the clerk's office in the county of the juvenile court and thus were properly authenticated under Tex. R. Evid. 901(b)(7). Hull v. State, 172 S.W.3d 186, 2005 Tex. App. LEXIS 6502 (Tex. App. Dallas 2005).

263. Defendant failed to properly reserve his argument that admission of tape recordings of a controlled substance buy was improper because defendant's objection at trial was a mere predicate objection. Young v. State, 183 S.W.3d 699, 2005 Tex. App. LEXIS 6299 (Tex. App. Tyler 2005).

264. In an aggravated robbery case, the certifications for two penitentiary packets were adequate for admission into evidence, although the name of the judge of the convicting court was omitted. Douglas v. State, 2005 Tex. App. LEXIS 6063 (Tex. App. San Antonio Aug. 3 2005).

265. Court did not err in admitting a handwritten letter and poem that were allegedly written by defendant and mailed from his jail cell to the detective because it was not only the letter's and poem's contents that suggest defendant was the author; the document was also signed by defendant and the envelope listed his specific, personal identification information, such as his birth date and inmate number. Fields v. State, 2005 Tex. App. LEXIS 5494 (Tex. App. Austin July 14 2005).

266. Trial court did not abuse its discretion by admitting a State's exhibit, which was a list of stolen property and its value, where the property's owner had personal knowledge of the items listed on the document because he made a list and his wife copied the list. Furthermore, even assuming that the trial court erred in admitting the exhibit, the error, if any, was harmless because it could not be concluded that it contributed to defendant's conviction or punishment or affected his substantial rights. Hernandez v. State, 2005 Tex. App. LEXIS 5219 (Tex. App. Corpus Christi July 7 2005).

267. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of certified records of defendant's prior felony convictions which the State alleged for enhancement purposes because the trial could admit evidence of prior criminal convictions during the punishment phase of a trial pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Lopez v. State, 2005 Tex. App. LEXIS 4610 (Tex. App. Eastland June 16 2005).

268. Trial court did not abuse its discretion in admitting mortgage-related documents that were challenged by a surety on the ground that they were never authenticated under Tex. R. Evid. 901 because the circumstances concerning the origin and admission of each of the documents led to the conclusion that they were genuine. The surety's principal had testified that it was her signature on some of the documents and did not deny their accuracy. Sierad v. Barnett, 164 S.W.3d 471, 2005 Tex. App. LEXIS 4161 (Tex. App. Dallas 2005).

269. In defendant's trial for aggravated sexual assault, the court rejected defendant's claim that semen evidence was improperly admitted without the establishment of a proper chain of custody because he failed to present evidence of tampering or commingling. Tex. R. Evid. 901 only requires a showing that satisfies the trial judge that the item in question is what the State claims, and most questions concerning custody go to the weight rather than the admissibility of evidence. Ford v. State, 2005 Tex. App. LEXIS 3151 (Tex. App. Dallas Apr. 27 2005).

270. Complainant properly authenticated defendant's e-mail communications under Tex. R. Evid. 901(b)(1) and (b)(4) where she testified that she was familiar with defendant's e-mail address and that the content of the e-mails was similar to conversations she had had with defendant over the telephone. Shea v. State, 167 S.W.3d 98, 2005 Tex. App. LEXIS 3091 (Tex. App. Waco 2005).

271. Evidence was sufficient to support defendant's aggravated robbery conviction under Tex. Penal Code Ann. §§ 29.02(a) and 29.03(a) where three witnesses unequivocally identified defendant as the masked and armed man in surveillance videotapes based on his actions and voice under Tex. R. Evid. 901(b)(5). Although defendant's alleged accomplice testified that defendant did not participate in the robbery, the State presented evidence that the accomplice told others that he and defendant had committed the robbery. Coleman v. State, 2005 Tex. App. LEXIS 2855 (Tex. App. Houston 14th Dist. Apr. 14 2005).

272. In a domestic violence case, the trial court did not err by admitting a 911 tape of a call from the victim as a business record; a 911 tape is admissible as a business record if properly authenticated, and the custodian testified that the tape was made in the ordinary course of business at the time of the event recorded. Warfel v. State, 2005 Tex. App. LEXIS 2922 (Tex. App. Amarillo Apr. 14 2005).

273. Given that (1) a computer-generated case synopsis did not indicate whether defendant was actually convicted of a prior driving while intoxicated offense, (2) the requirements of Tex. R. Evid. 901(b)(7), 902(4) were not met, given that it was not shown that the synopsis was a writing authorized by law to be filed or was a copy of an official record, and (3) the State introduced no other evidence of the prior conviction, the evidence was insufficient to support defendant's conviction under Tex. Penal Code Ann. § 49.09(a) of driving while intoxicated, second offense. Blank v. State, 2005 Tex. App. LEXIS 2566 (Tex. App. San Antonio Apr. 6 2005), opinion withdrawn by, substituted opinion at 172 S.W.3d 673, 2005 Tex. App. LEXIS 10714 (Tex. App. San Antonio 2005).

274. Trial court did not abuse its discretion in finding that photographs were properly authenticated under Tex. R. Evid. 901 where the arresting officer testified that the vehicles in the photographs were similar to the patrol unit he was driving on the date of defendant's offense, felony evading arrest with a motor vehicle. The officer's testimony provided sufficient evidence to support a finding that the photographs were what the State claimed they were. Ball v. State, 2005 Tex. App. LEXIS 2575 (Tex. App. Waco Mar. 30 2005).

275. Trial court did not abuse its discretion in finding that a videotape was properly authenticated under Tex. R. Evid. 901 where the arresting officer testified that he had reviewed the videotape and that the tape was a true and accurate copy of the recording he had made at the time of defendant's offense, felony evading arrest with a motor vehicle. The officer had activated the patrol vehicle's on-board vehicle camera when he decided to effectuate the traffic stop. Ball v. State, 2005 Tex. App. LEXIS 2575 (Tex. App. Waco Mar. 30 2005).

276. Trial court erred by admitting certain photographs in violation of Tex. R. Evid. 404(b), 403, and 901 because although the photographs that were found in defendant's kitchen the day after the alleged sexual assault that showed the victim naked and unconscious were properly admitted as they were essential to understanding the circumstances of the assault and tended to confirm her testimony; other photographs that showed unidentified men sexually assaulting another woman, and that showed defendant's house mate having sexual intercourse, and defendant urinating against the wall giving a gang sign were improperly admitted. There was no evidence that defendant took the other photographs or knew of their existence and they suggested an improper basis upon which to convict defendant. Casey v. State, 160 S.W.3d 218, 2005 Tex. App. LEXIS 1807 (Tex. App. Austin 2005).

277. In a theft case, the trial court did not abuse its discretion in admitting photographs from a surveillance camera as they were sufficiently authenticated as to be reliable evidence: defendant did not attack the authenticity of the original videotape and raised no substantive concerns as to the authenticity of the photos, defendant did not assert that the photos had been tampered with or reflected anything other than what the original videotape showed, and an employee testified that he viewed the surveillance tape almost immediately after the burglary was discovered and that the photos were fair and accurate representations of what he saw on the videotape. Benford v. State, 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3 2005).

278. Testimony of an employee who viewed a security videotape immediately after a theft was sufficient authentication under Tex. R. Evid. 901(b)(1) of photographs made from the videotape. Benford v. State, 2005 Tex. App. LEXIS 463 (Tex. App. Austin Jan. 21 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3, 2005).

279. Defendant's taped statements were properly authenticated under Tex. R. Evid. 901 because the detective participating in the taped conversation testified he was the operator of the recording equipment, it was functioning properly, and that the recording accurately reflected the conversation; additionally, the tape statements were relevant because they contained defendant's version of the events. Thus, the trial court did not abuse its discretion in admitting the statements at his trial. Raveiro v. State, 2005 Tex. App. LEXIS 218 (Tex. App. Houston 14th Dist. Jan. 13 2005).

280. Absent evidence of tampering or commingling, theoretical breaches in the chain of custody did not affect the admissibility of evidence; defendant made no offer of evidence of tampering or commingling where he merely objected that the officer did not properly retrieve the evidence from the evidence locker and the State later entered into evidence the officer's property room receipt for the evidence. Prescott v. State, 2004 Tex. App. LEXIS 11787 (Tex. App. Waco Dec. 29 2004).

281. Defendant argued that a tape recording made of him by the complainant's mother was inadmissible because the testimony in support of its admission did not meet a seven-prong test; however, Tex. R. Evid. 901 provided that the requirement of authentication or identification as a condition precedent to admissibility was satisfied by evidence sufficient to support a finding that the matter in question was what its proponent claimed, and the complainant's mother that the tape was a tape of a telephone conversation she had with defendant. Justice v. State, 2004 Tex. App. LEXIS 11616 (Tex. App. El Paso Dec. 22 2004).

282. Defendant's objection went to the weight of the evidence rather than to its admissibility where defendant neither suggested tampering or alteration nor questioned that a Texas Ranger delivered and returned the boxes of evidence; the defendant's objection was that the chain of custody failed because the Ranger was unable to identify the items contained in the boxes he transported. Millican v. State, 2004 Tex. App. LEXIS 11617 (Tex. App. Tyler Dec. 22 2004).

283. Court rejected defendant's claim of ineffective assistance of counsel in connection with defendant's trial for aggravated sexual assault because (1) the court would not second-guess counsel's reasoning and trial strategy regarding testimony concerning other assaults, (2) counsel might have known that once an initial showing under Tex. R. Evid. 901 was made, any problems with the chain of custody of certain evidence would not have barred the admission of the evidence, and thus counsel's decision not to object to the evidence might have been valid trial strategy, (3) regarding sentencing, counsel might have been agreeing that imposition of a life sentence was mandatory, which was a correct statement of the law under Tex. Penal Code Ann. § 12.42(c)(2), and (4) as for the contention that counsel failed to put on mitigating evidence, the record did not show and defendant did not explain such evidence that counsel might have presented. Acuna v. State, 2004 Tex. App. LEXIS 10768 (Tex. App. Austin Dec. 2 2004).

284. To be considered as evidence of a final conviction, a penitentiary packet had to contain a judgment and sentence, properly certified, and, pursuant to Tex. R. Evid. 901, the evidence offered by the State lacked certification and a seal, Tex. R. Evid. 902, and was not self-authenticating. The State's admissible evidence linked defendant to the purported conviction, but failed to prove the conviction was valid and final. Banks v. State, 2004 Tex. App. LEXIS 10630 (Tex. App. Houston 14th Dist. Nov. 30 2004), opinion withdrawn by, substituted opinion at 158 S.W.3d 649, 2005 Tex. App. LEXIS 1838 (Tex. App. Houston 14th Dist. 2005).

285. Defendant's trial counsel could not be found ineffective on the ground that the trial court did not admit into evidence photographs showing injuries to defendant's face and head because counsel laid a proper foundation and offered them into evidence. Defendant testified that the photographs were taken two days after he shot the victim in self-defense and that the photographs accurately depicted his appearance at that time. Romero v. State, 2004 Tex. App. LEXIS 10563 (Tex. App. Houston 1st Dist. Nov. 24 2004).

286. Defendant did not claim tampering or commingling of evidence, and given that blood samples were sealed and marked, locked at police headquarters, taken to the crime laboratory, then taken to the medical examiner's office, and finally picked up by an officer just prior to trial, the trial court did not abuse its discretion in admitting the results of the blood test into evidence pursuant to Tex. R. Evid. 901 in connection with defendant's driving while intoxicated trial. Astalas v. State, 2004 Tex. App. LEXIS 9152 (Tex. App. Fort Worth Oct. 14 2004).

287. Evidence was legally sufficient to support defendant's conviction of the offense of possession with intent to deliver a controlled substance, namely cocaine in an amount over four grams and less than two hundred grams under Tex. Health & Safety Code Ann. § 481.112(d) because the State established the chain of custody of the cocaine as required under Tex. R. Evid. 901. Police officers testified that the substance seized from defendant by police officers was the same substance that the crime lab chemist tested and identified as cocaine and that the crime lab kept secured in a vault when they were not testing it. Roberson v. State, 2004 Tex. App. LEXIS 8781 (Tex. App. Houston 1st Dist. Sept. 30 2004).

288. Officer offered articulable facts and circumstances that justified a continued detention and broader investigation of defendant's vehicle, and the collective and undisputed testimony of the police officers and technicians established the proper chain of custody of the narcotics from its seizure at the crime scene to its appearance in the courtroom on the day of trial. Beach v. State, 2004 Tex. App. LEXIS 7243 (Tex. App. Corpus Christi Aug. 12 2004).

289. There is a paucity of case law applying Tex. R. Evid. 901 to e-mails, but one federal court, applying identical Fed. R. Evid. 901(a) and (b)(4), found that a district court had not abused its discretion in admitting e-mail evidence by applying Fed. R. Evid. 901(b)(4), utilizing characteristic evidence such as: (1) consistency with the e-mail address on another e-mail sent by the defendant; (2) the author's awareness through the e-mail of the details of defendant's conduct; (3) the e-mail's inclusion of similar requests that the defendant had made by phone during the time period; and (4) the e-mail's reference to the author by the defendant's nickname. Distinctive internal

characteristics have also served to authenticate documents in other contexts. Massimo v. State, 144 S.W.3d 210, 2004 Tex. App. LEXIS 7069 (Tex. App. Fort Worth 2004).

290. Trial court had sufficient evidence before it to determine that defendant wrote a letter that was introduced into evidence at sentencing to show a prior criminal record under Tex. Crim. Proc. Ann. art. 37.07, § 3(a)(1) and Tex. R. Evid. 901(a) where the letter contained the same identification number as defendant's penitentiary packet, referenced the same cause number, referenced the same date as the judgment against defendant, and stated that he had been convicted under this style and cause number. Patton v. State, 2004 Tex. App. LEXIS 7092 (Tex. App. Tyler Aug. 4 2004).

291. Copy of the email correspondence appellant claimed was from appellees to the trial court that appellees intended for the judgment to be final as to their counterclaims was not accompanied by an affidavit, nor was it authenticated; appellees did not concede that the copy of the email was accurate, nor did they concede that it was ever sent, nor did the copy appear to fall within the category of facts that may be judicially noticed, such that the appellate court could not consider it for purposes of determining whether appellees intended for the judgment to be final as to their counterclaims. Lindsey v. Kline, 2004 Tex. App. LEXIS 6941 (Tex. App. Fort Worth July 29 2004).

292. Defendant's conviction for driving while intoxicated was proper where defendant did not claim that there was any tampering or commingling of the evidence, and given the testimony that the blood samples were sealed and marked, locked up at police headquarters, taken to the crime lab, then taken to the medical examiner's office, and finally picked up by prior to trial, the court could not say that the trial court abused its discretion in admitting the results of the blood test into evidence. Astalas v. State, 2004 Tex. App. LEXIS 6398 (Tex. App. Fort Worth July 15 2004), opinion withdrawn by, substituted opinion at, modified by 2004 Tex. App. LEXIS 9152 (Tex. App. Fort Worth Oct. 14, 2004).

293. Error based on improper authentication of exhibits during a summary judgment hearing was not preserved for appellate review because an attorney had "no objection" when the evidence was admitted at a prior hearing. Kent v. Holmes, 139 S.W.3d 120, 2004 Tex. App. LEXIS 5844 (Tex. App. Texarkana 2004).

294. Where the evidence showed that an incriminating conversation took place on a jail telephone with defendant's girlfriend, the events described could have only been known by the perpetrator of a crime, as the caller described being shot by police, and since defendant was the only suspect shot by police during the relevant time period, the phone call was properly authenticated under Tex. R. Evid. 901. Patton v. State, 2004 Tex. App. LEXIS 5531 (Tex. App. Austin June 24 2004).

295. Trial court did not err in admitting drug evidence where even though the deputy did not place an identifying mark on the plastic bag itself, he did put identification upon the envelope in which the plastic bag was placed after field testing the substance, and that was sufficient to identify the evidence. Reber v. State, 2004 Tex. App. LEXIS 4808 (Tex. App. Amarillo May 26 2004).

296. Attaching the assignments to the summary judgment affidavits and describing the assignments therein was sufficient authentication or identification to show the documents were what the beneficial owners of the stock claimed they were as a condition precedent to admissibility; therefore, the trial court erred in holding that the beneficial owners' assignment and assumption agreements lacked authentication and it should have considered the assignment and assumption agreements as part of the summary judgment record. Caso-Bercht v. Striker Indus., 147 S.W.3d 460, 2004 Tex. App. LEXIS 4324 (Tex. App. Corpus Christi 2004).

297. At defendant's trial on unlawful possession of a firearm, enhanced by a conviction of assault against a family member, certified copies of the judgment and sentence of the convicting judge were self-authenticating and

admissible as proof of his prior conviction; the defendant's confirmation through testimony that he was the person convicted further established the orders' authenticity. Worley v. State, 2004 Tex. App. LEXIS 3271 (Tex. App. Houston 1st Dist. Apr. 8 2004).

298. Where a list which did not contain appellee's name and phone number as an emergency contact was admitted into evidence by the trial court, although it did not meet the authentication requirements of Tex. R. Evid. 901 because there was no evidence as to who prepared the list, the purpose for which it was prepared, or when it was prepared, it was erroneously admitted; the admission was harmful and probably caused an improper judgment pursuant to Tex. R. App. P. 44.1 because appellee's objection to appellant's application to be appointed guardian of the parties' incapacitated father was based on her claim that appellant excluded her, and the list was supportive of that claim. In re Henderson, 2004 Tex. App. LEXIS 3244 (Tex. App. Waco Apr. 7 2004).

299. In a probate proceeding where the testator's wife contested the testator's daughter inventory of property, the parties' arguments concerned the contents and effect of the community property agreement, not whether it was in fact a writing signed by both the testator and his wife, and the issue of authentication was uncontested; thus, the second exhibit was sufficiently authenticated under Tex. R. Evid. 901. Haugen v. Olson, 2003 Tex. App. LEXIS 10495 (Tex. App. Dallas Dec. 15 2003).

300. In a probate proceeding where the testator's wife contested the testator's daughter inventory of property, having determined that the second exhibit was sufficiently authenticated pursuant to Tex. R. Evid. 901 and the first exhibit was relevant to the determination of the declaratory judgment action pursuant to Tex. R. Evid. 401, the trial court ruled the exhibits were inadmissible was error; the excluded exhibits were controlling to a material issue in the case regarding whether the community property agreement between the wife and the testator was valid and enforceable, and the exclusion of the exhibits was harmful error under Tex. R. App. P. 44.1. Haugen v. Olson, 2003 Tex. App. LEXIS 10495 (Tex. App. Dallas Dec. 15 2003).

301. In a probate proceeding where the testator's wife contested the testator's daughter inventory of property, having determined that the second exhibit was sufficiently authenticated pursuant to Tex. R. Evid. 901 and the first exhibit was relevant to the determination of the declaratory judgment action pursuant to Tex. R. Evid. 401, the trial court ruled the exhibits were inadmissible was error; the excluded exhibits were controlling to a material issue in the case regarding whether the community property agreement between the wife and the testator was valid and enforceable, and the exclusion of the exhibits was harmful error under Tex. R. App. P. 44.1. Haugen v. Olson, 2003 Tex. App. LEXIS 10495 (Tex. App. Dallas Dec. 15 2003).

302. In a child sexual assault case involving abduction in a car, a videotape from a gas station was sufficiently authenticated under Tex. R. Evid. 901(a), (b)(1) by the testimony of a victim and an investigating officer that the videotape accurately depicted events at the gas station. Gilkey v. State, 2003 Tex. App. LEXIS 9964 (Tex. App. Dallas Nov. 21 2003).

303. Under Tex. R. Evid. 901, a trial court erred in admitting into evidence two uncertified copies of judgments of conviction against defendant because a parole officer was unable to authenticate the judgments, as the parole officer was not custodian of the records. Carlock v. State, 99 S.W.3d 288, 2003 Tex. App. LEXIS 1063 (Tex. App. Texarkana 2003).

304. Where the client sued the law firm and its attorneys for legal malpractice alleging breach of fiduciary duty, negligence, and gross negligence arising out of the sale of real estate and a foreclosure action, summary judgment was affirmed because: (1) the client's motion for continuance was properly denied because she was given sufficient notice of the hearing on the motion for summary judgment under the provisions of Tex. R. Civ. P. 166a(c), 4 and the certificate of service was prima facie evidence of service under Tex. R. Civ. P. 21, (2) the client's summary

judgment evidence was properly excluded because even though the documents were authenticated, they could have been objected to on other grounds under Tex. R. Evid. 901(a) and the client failed to properly brief the issue on appeal under Tex. R. App. P. 38.1(h), (3) the exclusion of the client's expert testimony was proper because it was not an affidavit in that it contained no jurat under the provisions of Tex. Gov't Code Ann. § 312.011, and the expert was not licensed to practice law in Texas, and (4) the no evidence summary judgment was affirmed because without expert testimony, the client was unable to show a breach of duty which was an essential element of her cause of action. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

305. Defendant argued that the trial court should not have admitted the marijuana seized from his trunk into evidence, where the evidence weighed less when it was returned to, and where the box containing the marijuana was sealed with tape that could not be identified; the defendant asserted that these two facts indicated that the evidence had been tampered with or altered, however, absent affirmative evidence of tampering, theoretical breaches do not affect admissibility. Chambers v. State, 2002 Tex. App. LEXIS 8466 (Tex. App. Tyler Nov. 27 2002).

306. Tape recording of a drug transaction which implicated defendant was properly authenticated under Tex. R. Crim. Evid. 901(a) through the testimony of the officer who wore the microphone and conducted the transaction with defendant. Brooks v. State, 921 S.W.2d 875, 1996 Tex. App. LEXIS 1656 (Tex. App. Houston 14th Dist. 1996), *aff'd*, 957 S.W.2d 30, 1997 Tex. Crim. App. LEXIS 94, 97:38 Tex. Crim. App. Op. Serv. 5 (Tex. Crim. App. 1997, no writ).

307. Trial court did not err in ruling that recordings of telephone calls made by defendant from jail were properly authenticated because a technical administrator with the contracting company that operated the inmate phone system testified that the recordings were linked to defendant's identification number; the detective who defendant called identified defendant's voice as one of the two voices on the calls. Escalona v. State, 2014 Tex. App. LEXIS 2008 (Tex. App. Dallas Feb. 20 2014).

Evidence : Authentication : Self-Authentication

308. Given the detail of the speaker's account of the events and the consistency of that account with defendant's fabricated story, the speaker's personal knowledge of the victim's family situation, and the speaker's self-identification as defendant, the trial court did not abuse its discretion in admitting the telephone conversation as properly authenticated evidence. Mendoza v. State, 2014 Tex. App. LEXIS 2817, 2014 WL 1004403 (Tex. App. Houston 1st Dist. Mar. 13 2014).

309. Translator who signed and certified a translated transcript of defendant's statement was not required to testify to the accuracy of the translation to authenticate the transcript under Tex. R. Evid. 901, because the exhibit contained a certificate of acknowledgment by a notary public, making it self-authenticating under Tex. R. Evid. 902(8). Zambrano v. State, 2014 Tex. App. LEXIS 1606, 2014 WL 1022386 (Tex. App. Dallas Feb. 12 2014).

310. Fact that the reinsurer did not take advantage of the procedure in Tex. R. Evid. 902 was not determinative of whether the judgments were properly authenticated because the reinsurer could have properly authenticated the judgments in accordance with Tex. R. Evid. 901. N.H. Ins. Co. v. Magellan Reinsurance Co., 2013 Tex. App. LEXIS 194, 2013 WL 105654 (Tex. App. Fort Worth Jan. 10 2013).

311. Court did not abuse its discretion in admitting the governor's warrant and the documents attached thereto into evidence, because the governor's warrant constituted a domestic public document under seal, and the State was not required to present extrinsic evidence of authenticity as a condition precedent to admissibility. Ex Parte Garcia,

2011 Tex. App. LEXIS 7908 (Tex. App. Corpus Christi Sept. 29 2011).

312. Each of the affidavits submitted by the county and the city showed that they were not conclusory but supported the affirmative defense of the statute of limitations, and each affidavit was based on the personal knowledge of the affiant, and those affidavits submitting records substantially complied with Tex. R. Evid. 902(10)(b) and properly authenticated the relevant business records, Tex. R. Evid. 901(10)(b). Rameses Sch., Inc. v. City of San Antonio, 2011 Tex. App. LEXIS 2552, 2011 WL 1312279 (Tex. App. Houston 14th Dist. Apr. 7 2011).

313. Despite defendant's assertions that a thumbprint was not taken, penitentiary packets were properly admitted into evidence during the punishment phase of an aggravated sexual assault trial; those packets were self-authenticated for purposes of Tex. R. Evid. 901 and Tex. R. Evid. 902, and the State called a crime scene technician, who had reviewed the packets and taken fingerprints from defendant. Therefore, the State established beyond a reasonable doubt that defendant was the same person that had been previously convicted of other crimes. Stewart v. State, 2009 Tex. App. LEXIS 6716, 2009 WL 2617647 (Tex. App. Beaumont Aug. 26 2009).

314. Where defendant was indicted as a habitual felony offender for the unlawful possession of a firearm by a felon, the indictment contained enhancement paragraphs alleging that defendant had prior felony convictions. The State proved his prior convictions by introducing as exhibits two pen packets that were certified by the custodian of records from the Texas Department of Criminal Justice; the pen packets were self-authenticating for purposes of Tex. R. Evid. 901, 902. Harden v. State, 2009 Tex. App. LEXIS 1578, 2009 WL 539379 (Tex. App. Beaumont Mar. 4 2009).

315. In a products liability case, a retailer's argument that documents were not competent summary judgment evidence due to the fact that they were not properly authenticated was rejected because the retailer received notice of self-authentication under Tex. R. Civ. P. 193.7; moreover, a specificity argument was rejected because the retailer failed to raise such the issue until a response was made to a reply brief. Merrell v. Wal-Mart Stores, Inc., 276 S.W.3d 117, 2009 Tex. App. LEXIS 414 (Tex. App. Texarkana Jan. 23 2009).

316. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of arrest records and certified copies of judgments and sentences because the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Also defendant failed to preserve his claim of error because he did not object to the admission of these evidentiary items on that basis as required by Tex. R. App. P. 33.1. Lopez v. State, 2005 Tex. App. LEXIS 4625 (Tex. App. Eastland June 16 2005).

317. Court did not err in overruling defendant objections to the State's admission of two pen packets to prove prior convictions during the punishment phase of trial because the pen packets were accompanied by signed affidavits with the State of Texas seal, certifying that the attached information related to defendant, the records were true and correct copies, and the documents were self-authenticating. Billington v. State, 2014 Tex. App. LEXIS 1845, 2014 WL 669555 (Tex. App. El Paso Feb. 19 2014).

Evidence : Authentication : Chain of Custody

318. Testimony of officers established the beginning of the chain of custody, and the transfer of defendant's blood sample from the lab directly to court and then the State's prosecutor established the end of the chain of custody; additionally, a lab employee testified the blood sample arrived at the lab sealed with tape and showed no indications that the condition of the sample was poor or that the sample had been tampered with prior to its arrival at the lab. Islas v. State, 2014 Tex. App. LEXIS 5171 (Tex. App. El Paso May 14 2014).

319. Court properly admitted defendant's sandals into evidence because the chain of custody was satisfied as the detective who retrieved the sandals from the jail explained that based on his knowledge of the jail's intake procedure, the sandals were taken from defendant by someone with the sheriff's office when he was booked. The sandals were also marked with a tag indicating that they belonged to defendant. Walls v. State, 2014 Tex. App. LEXIS 3159, 2014 WL 1208017 (Tex. App. Austin Mar. 20 2014).

320. In a trial for intoxication manslaughter under Tex. Penal Code Ann. § 49.08, any error resulting from the admission of an analysis request form for blood testing was harmless in light of other evidence proving the chain of custody: the officer's testimony that he witnessed the nurse follow each of the statutory requirements for the blood draw. Mitchell v. State, 419 S.W.3d 655, 2013 Tex. App. LEXIS 14606, 2013 WL 6244137 (Tex. App. San Antonio Dec. 4 2013).

321. By proving the beginning and end of the chain of custody through the testimony of a crime lab employee and a nurse, the State established the proper predicate for the DNA evidence, and thus the evidence was admissible. Haynes v. State, 2013 Tex. App. LEXIS 12243, 2013 WL 5503728 (Tex. App. Houston 14th Dist. Oct. 1 2013).

322. Trial court had the discretion to determine the sufficiency of the evidentiary predicate for the physical evidence submission form because the offense report served only to buttress the chain of custody of items of physical evidence used to establish the identity of the victims. Defendant did not contend the evidence was tampered with and the identity of one of the victims was corroborated by other evidence. Colvin v. State, 2013 Tex. App. LEXIS 7128 (Tex. App. Beaumont June 12 2013).

323. To the extent appellant claimed the State did not establish a chain of custody for a credit card receipt, the court had previously held that articles that were easily identifiable and substantially unchanged did not require the introduction of a chain of custody. Haq v. State, 445 S.W.3d 330, 2013 Tex. App. LEXIS 5565 (Tex. App. Houston 1st Dist. May 7 2013).

324. To the extent appellant claimed the trial court erred in admitting photo-arrays because they were inadmissible hearsay, were impermissibly suggestive, and did not contain a fair and accurate representation of appellant, he did not preserve these complaints for review because he failed to object in the trial court on these grounds. Haq v. State, 445 S.W.3d 330, 2013 Tex. App. LEXIS 5565 (Tex. App. Houston 1st Dist. May 7 2013).

325. Appellant did not cite authority for the claim that only the officer who either prepared the photo array or showed it to witnesses could properly authenticate it, and appellant also did not cite authority for the claim that testimony concerning how the array was generated was necessary to authenticate it; the State only needed to present evidence sufficient to support a finding that the arrays were what the State claimed them to be, for purposes of Tex. R. Evid. 901(a), and this could be accomplished by the testimony of witnesses who had knowledge that the exhibits were what the State claimed them to be. Haq v. State, 445 S.W.3d 330, 2013 Tex. App. LEXIS 5565 (Tex. App. Houston 1st Dist. May 7 2013).

326. Witnesses identified exhibits as the photo arrays showed to them, plus they identified their signatures next to the picture they picked, and this testimony was sufficient to satisfy the trial court that the exhibits were what the State claimed them to be. Haq v. State, 445 S.W.3d 330, 2013 Tex. App. LEXIS 5565 (Tex. App. Houston 1st Dist. May 7 2013).

327. Regarding appellant's conviction of possession of cocaine with intent to deliver, the evidence was sufficient to establish a proper chain of custody, given that (1) an officer identified an exhibit as a drug evidence bag, marked with his name and when the drugs were found, (2) the officer explained that he did not mark the bags of drugs, but recognized them as the bags he collected on the night in question, (3) a second officer said the first officer gave him

the drugs at the scene, and the second officer took the drugs to the jail and put the bags in the drug bag, sealed it, and put his initials and badge number on the bag, (4) another officer testified he helped the second officer heat seal the drugs into the drug bag, which also contained this officer's name and badge number, plus appellant's name, (5) there was testimony from a chemist the exhibit had a bar code label placed on it by the laboratory, which was the same number on the report, and the bags contained cocaine, and (6) another officer picked up the drugs and brought them to court. Simmons v. State, 2013 Tex. App. LEXIS 1799, 2013 WL 1614114 (Tex. App. Dallas Feb. 20 2013).

328. Notations and references to receipt of the blood, as well as the source of the sample, established the chain of custody for purposes of Tex. R. Evid. 901(a). Grimaldo v. State, 2012 Tex. App. LEXIS 9647, 2012 WL 5869603 (Tex. App. Fort Worth Nov. 21 2012).

329. Trial court did not abuse its discretion during defendant's capital murder trial in admitting a condom found at an extraneous murder and the DNA evidence obtained from that condom where the trial court could have reasonably believed that a reasonable jury could find that the condom had been authenticated and identified. Defendant made no allegations of alteration, tampering, or fraud, and the State presented sufficient evidence for the trial court to conclude that the matter in question was what the State claimed that it was. Mcgregor v. State, 394 S.W.3d 90, 2012 Tex. App. LEXIS 6552, 2012 WL 3244196 (Tex. App. Houston 1st Dist. Aug. 9 2012).

330. During defendant's trial for sexual assault of a child, a police investigator's testimony properly established the beginning and the end of the chain of custody under Tex. R. Evid. 901(a) with respect to defendant's blood sample. Hendershot v. State, 2012 Tex. App. LEXIS 6632 (Tex. App. Corpus Christi Aug. 9 2012).

331. Nothing supported any claim that evidence had been tampered with, and thus the trial court did not abuse its discretion in admitting the exhibits consisting of cocaine; the State established a chain of custody, as the record showed which officer seized the evidence and that each officer identified the evidence by use of a case number, plus the record showed who retrieved the evidence and took it for examination and the results of the examination, which was sufficient to identify the exhibits. Parr v. State, 2012 Tex. App. LEXIS 3144, 2012 WL 1392614 (Tex. App. Amarillo Apr. 23 2012).

332. Trial court did not abuse its discretion by admitting the drugs alleged seized from defendant's vehicle because the State presented sufficient evidence to support a finding that the first step in the chain of custody had been established as required by Tex. R. Evid. 901(a). The evidence established that the detective controlled the drugs until he placed them in the vault, and although during voir dire the detective acknowledged that he could not tell if the initials on the inside bag were his, the court could not conclude that that fact rendered the bag of drugs inadmissible absent a showing of tampering or alteration. Cedeno v. State, 2012 Tex. App. LEXIS 2716 (Tex. App. Corpus Christi Apr. 5 2012).

333. Trial court did not abuse its discretion in admitting blood evidence because the State, for purposes of Tex. R. Evid. 901(a), presented sufficient evidence to support an authentication finding, given that (1) a laboratory manager testified to the protocols in place for chain of custody for a blood sample, (2) the manager testified that a registered nurse drew the blood and a trained technologist tested the blood, and (3) the record contained no evidence of tampering. Bone v. State, 2012 Tex. App. LEXIS 1450, 2012 WL 592927 (Tex. App. Corpus Christi Feb. 23 2012).

334. Court did not err in admitting testimony on the results of DNA testing under Tex. R. Evid. 901(a) because a doctor testified that he collected samples from the victim, he submitted each sample in a standardized kit, and he identified the exhibits at trial; a biologist testified that each piece of evidence was labeled and sealed after testing. The biologist identified the sexual assault kit and the samples contained in the kit at trial and testified that the evidence had not been tampered with in any way. Sharp v. State, 2011 Tex. App. LEXIS 7208, 2011 WL 3850038

(Tex. App. Waco Aug. 31 2011).

335. Trial court acted within its discretion in determining that the IT workers did not tamper or change the contents of defendant's work hard drive in such a manner that the State failed to properly authenticate the images as coming from defendant's computer; the State presented sufficient evidence to support a finding that the matter in question was what its proponent claimed. Creech v. State, 2011 Tex. App. LEXIS 3340, 2011 WL 1663040 (Tex. App. Dallas May 4 2011).

336. Court did not improperly admit a pistol into evidence during defendant's trial for aggravated robbery because a detective established a predicate sufficient for it to be admitted at trial under Tex. R. Evid. 901(b)(1); the chain of custody began when the detective retrieved the pistol from the ground from where it had been lying, and not when an unknown trusty had spotted it. Pierson v. State, 2011 Tex. App. LEXIS 2356, 2011 WL 1204718 (Tex. App. Tyler Mar. 31 2011).

337. Detective testified as to the beginning and ending of the chain of custody of scales and the trial court did not err in admitting the evidence; even if the trial court abused its discretion, there was no harm because the scales were pertinent to the possession with intent to deliver offense, and the jury convicted appellant solely of the possession offense. Griffin v. State, 2011 Tex. App. LEXIS 1594, 2011 WL 754349 (Tex. App. Fort Worth Mar. 3 2011).

338. Trial court did not abuse its discretion by admitting the methamphetamine into evidence, even though there were some potential problems with the chain of custody, including the receiving officer's failure to place identifying marks on the evidence and the fact that the officer who transported the evidence to the crime lab did not testify, because testimony of the receiving officer, a sergeant, and a crime lab chemist supported the district court's finding that the suspected methamphetamine was what the State claimed it to be. In addition, there was no evidence of tampering or other fraud. Frasier v. State, 2010 Tex. App. LEXIS 6365 (Tex. App. Austin Aug. 5 2010).

339. Trial court did not err in admitting videotaped evidence of the robbery on the ground that the State failed to establish a proper predicate for its admission under Tex. R. Evid. 901 because the store's loss prevention investigator testified that: (1) he was the custodian of the surveillance tapes that were generated in the stores he supervised; (2) he arrived at the store approximately 20 minutes after the robbery; (3) he personally made several copies of the recording of the robbery; (4) he gave one copy to an unidentified police officer; and (5) the compact disk admitted into evidence was one of the discs he burned for the police on the day of the robbery. There was no evidence of tampering and alteration, and therefore the investigator was a witness with personal knowledge that the disk was what the State claimed it to be. Smith v. State, 2010 Tex. App. LEXIS 5388, 2010 WL 2723164 (Tex. App. Houston 1st Dist. July 8 2010).

340. Trial court could have rationally found the essential elements of possession of a controlled substance in an amount of at least four grams but less than 200 grams beyond a reasonable doubt, because no evidence was submitted suggesting that anything inappropriate or out of the ordinary happened to the evidence during the time gap in the chain of custody. Shinette v. State, 2009 Tex. App. LEXIS 9013, 2009 WL 3817878 (Tex. App. Houston 14th Dist. Nov. 17 2009).

341. In defendant's drug case, the evidence was sufficient to establish chain of custody because, although the officer did not mark the capsules at the time they were discovered, a proper chain of custody was established. Both officers identified the capsules as the same ones that were discovered during defendant's property inventory, the lab confirmed that the capsules were the same ones turned over to the officer, and defendant offered no evidence of tampering at trial. Mason v. State, 2009 Tex. App. LEXIS 6705, 2009 WL 2623363 (Tex. App. El Paso Aug. 26

2009).

342. In a child pornography case, habeas relief was denied to an accused on the basis of ineffectiveness of trial counsel relating to a failure to object on the basis of chain of custody because problems in the chain of custody did not affect admissibility of evidence but, instead, affected the weight the fact-finder should give the evidence. This could have been pointed out and argued by the parties. Ex Parte Yusafi, 2009 Tex. App. LEXIS 6715, 2008 WL 6740798 (Tex. App. Beaumont Aug. 26 2009).

343. Drugs' chain of custody was properly authenticated because at trial, the arresting officer identified the bags of marihuana visually and by means of his notations on the evidence tag as being the marihuana that he seized on the night in question and placed in the evidence locker. In the same manner, a witness identified the exhibits as the marihuana she transported to the lab for testing, and the technician identified the exhibits as the marihuana he tested at the lab. Dabbs v. State., 2009 Tex. App. LEXIS 3866, 2009 WL 1563563 (Tex. App. Austin June 2 2009).

344. In a case involving aggravated assault on a public servant, defendant waived the right to challenge the introduction of a homemade weapon into evidence because his counsel stated that there was "no objection" the second time that the State offered it into evidence; moreover, a chain of custody showing under Tex. R. Evid. 901(a) was not required because the weapon was unique, easily identifiable, and remained substantially unchanged since it was discovered in the area where the assaults took place. Even if such a showing was required under Tex. R. Evid. 901(a), testimony that identified the item and established the beginning and the end of the chain of custody was sufficient. Wingfield v. State, 2009 Tex. App. LEXIS 3744, 2009 WL 998679 (Tex. App. Tyler Apr. 15 2009).

345. In a driving while intoxicated case, defendant's blood test results were properly admitted because both the blood vial and the blood box delivered to the State lab contained information identifying the blood as defendant's. That identifying information indicated that the blood sample that the technician thought was defendant was the sample marked by the officer as belonging to defendant. Meier v. State, 2009 Tex. App. LEXIS 2051, 2009 WL 765490 (Tex. App. Dallas Mar. 25 2009).

346. In a trial for driving while intoxicated, the admission of defendant's medical blood draw was not improper, pursuant to Tex. R. Evid. 901, because the record contained no evidence suggesting that the blood drawn was tampered, confused, or comingled with that of another patient. Lindsey v. State, 2008 Tex. App. LEXIS 9797 (Tex. App. San Antonio Dec. 10 2008).

347. Although defendant claimed that the trial court committed error in overruling his objections to the admissibility of certain evidence, which objections were directed at the chain of custody, the court found no evidence to suggest that anyone had tampered with the evidence; defendant's claims went to the weight of the testimony and not to the admissibility and the court overruled this issue. Gallow v. State, 2008 Tex. App. LEXIS 6695 (Tex. App. Eastland Sept. 4, 2008).

348. In a felony driving while intoxicated case, a chain of custody argument under Tex. R. Evid. 901(a) was rejected because there was no evidence of tampering with a blood specimen; an officer observed a nurse draw the blood, and the nurse's signature on a form indicated that he did draw the blood. Also, the nurse's signature was on blood vials. Gasca v. State, 2008 Tex. App. LEXIS 6629 (Tex. App. Fort Worth Aug. 29, 2008).

349. There was sufficient evidence to demonstrate that the methamphetamine tested by the laboratory was the same substance seized by the police and admitted into evidence because: (1) an officer stated that the substances seized from the house were placed into evidence bag, which were heat sealed and labeled; (2) the laboratory analysts' supervisor testified about the standard procedure in the laboratory; and (3) each evidence bag admitted

into evidence had a lab number that corresponded to a lab report that was also admitted into evidence. Elizalde v. State, 2008 Tex. App. LEXIS 6588 (Tex. App. Dallas July 21, 2008).

350. In defendant's attempted arson case, a court erred in admitting a witness's testimony regarding tests she performed on liquid samples because no proof of chain of custody was offered; the liquid in the bottles was fungible and not capable of being identified through distinctive markings and no evidence or testimony was introduced connecting the samples the witness analyzed to the scene of the crime. Clemens v. State, 2008 Tex. App. LEXIS 3571 (Tex. App. Austin May 15 2008).

351. In defendant's aggravated robbery case, the court did not err in admitting a suitcase into evidence because a witness testified that although he did not know who put the items in the suitcase, he did know it was originally in the motel room where defendant temporarily lived. Marquez v. State, 2008 Tex. App. LEXIS 3467 (Tex. App. Dallas May 14 2008).

352. Where defendant was convicted of possession of methamphetamine seized from his personal effects during an inventory search at the jail, the State proved chain of custody based on the testimony of the arresting officer, the booking officer, and the officer who mailed the evidence to the crime lab and the chemist; the evidence substantiated the trial court's admission under Tex. R. Evid. 901; defendant made no showing of a possibility of commingling or tampering of the evidence. Martinez v. State, 2007 Tex. App. LEXIS 9830 (Tex. App. San Antonio Dec. 19 2007).

353. Chain of custody evidence as to defendant's possession of marijuana in jail was sufficient; jail employees testified about finding it, a sheriff's deputy testified that he received it, a property custodian testified that she took it out of the deputy's bag and sent it to the lab, and a forensic scientist testified that she analyzed and returned it. Hofman v. State, 2007 Tex. App. LEXIS 7283 (Tex. App. Fort Worth Aug. 31 2007).

354. Trial court did not err in overruling an offender's objection that a proper predicate was not laid for the admission of the crack cocaine from the sale alleged in count two of the indictment (delivery of a controlled substance in an amount of one gram or more but less than four grams), since the evidence had markings of corresponding laboratory identification numbers, and each bore the technician's initials and date, which indicated a proper chain of custody. Alexander v. State, 2007 Tex. App. LEXIS 5715 (Tex. App. Texarkana July 19 2007).

355. In a juvenile defendant's challenge to his adjudication as a delinquent upon a finding that he violated his community supervision conditions by possessing marijuana, the trial court did not err in admitting a State exhibit containing a tin canister and cigar with marijuana as the testimony of the officer regarding the marked bag in which he placed the evidence, and the testimony of the lab technician regarding his analysis of the contents of the marked bag and the sealing procedure, clearly showed the beginning and end of the chain of custody. In re J.M.A.B., 2006 Tex. App. LEXIS 10341 (Tex. App. Eastland Nov. 30 2006).

356. Trial court did not abuse its discretion in determining that the chain of custody was sufficient and by admitting the bullet into evidence where defendant's argument that because the bullet was in such good condition, someone must have replaced it was not supported by the record, and the trial court could have decided that a reasonable juror could find that the bullet was authenticated. Thomas v. State, 2006 Tex. App. LEXIS 5823 (Tex. App. Fort Worth July 6 2006).

357. Court properly admitted a State exhibit -- a bag containing thirteen bullets -- because there was no evidence of tampering, and thus defendant's complaint went to the weight, and not the admissibility of the evidence; an officer testified that he recognized the exhibit to be the live rounds in the exact same bag that he found when he

searched the vehicle. Renfro v. State, 2006 Tex. App. LEXIS 4553 (Tex. App. Fort Worth May 25 2006).

358. Trial court did not err in admitting 2 counterfeit $ 100 bills in defendant's trial on a charge of unlawfully passing a forged $ 100 bill because they were properly authenticated as required by Tex. R. Evid. 901, where the police officer at the scene had recorded the serial numbers of the 2 bills separately from other bills found on defendant or passed at the race track on the same day, and defendant made an indirect admission that the bill passed to the clerk was his; proof of the chain of custody was unnecessary where there was direct evidence at the trial that the same item was taken from the scene of the crime, and defendant failed to raise the issue of tampering at trial. Haddad v. State, 2006 Tex. App. LEXIS 4414 (Tex. App. Texarkana May 18 2006).

359. In a capital murder trial, the State was permitted to introduce evidence of DNA results from a specimen taken from defendant's truck; testimony from a detective, a lab technician, and a DNA analyst established the chain of custody. Thomas v. State, 2006 Tex. App. LEXIS 1986 (Tex. App. Waco Mar. 15 2006).

360. Chain of custody was not required for the admission of a handgun because initials engraved on the side of the gun made it easily identifiable, and the gun and the initials were resistant to change. Bailey v. State, 2006 Tex. App. LEXIS 1267 (Tex. App. Houston 14th Dist. Feb. 16 2006).

361. Chain of custody was properly established by testimony from a police officer and a criminalist, and the evidence established, for purposes of admissibility under Tex. R. Evid. 901(a), that the items found to contain methamphetamine were the items seized from defendants' residence. Stark v. State, 2005 Tex. App. LEXIS 6872 (Tex. App. Tyler Aug. 24 2005).

362. In a prisoner's capital murder trial, the State made out a prima facie case of authenticity under Fed. R. Evid. 901 and Tex. R. Evid. 901 for a hammer and knives where the record evidence established that the hammer was the one found at the scene and the victim's husband testified that the one knife missing from the set found in his home fit the description of the weapon that caused the stab wounds to the victim's body. Consequently, any possible break in the chain of custody went only to the weight the jury accorded the hammer and the knives. Shields v. Dretke, 122 Fed. Appx. 133, 2005 U.S. App. LEXIS 2910 (5th Cir. Tex. 2005), writ of certiorari denied by 126 S. Ct. 28, 162 L. Ed. 2d 928, 2005 U.S. LEXIS 5374, 74 U.S.L.W. 3129 (U.S. 2005).

363. Evidence was legally sufficient to support defendant's conviction of the offense of possession with intent to deliver a controlled substance, namely cocaine in an amount over four grams and less than two hundred grams under Tex. Health & Safety Code Ann. § 481.112(d) because the State established the chain of custody of the cocaine as required under Tex. R. Evid. 901. Police officers testified that the substance seized from defendant by police officers was the same substance that the crime lab chemist tested and identified as cocaine and that the crime lab kept secured in a vault when they were not testing it. Roberson v. State, 2004 Tex. App. LEXIS 8781 (Tex. App. Houston 1st Dist. Sept. 30 2004).

364. Officer offered articulable facts and circumstances that justified a continued detention and broader investigation of defendant's vehicle, and the collective and undisputed testimony of the police officers and technicians established the proper chain of custody of the narcotics from its seizure at the crime scene to its appearance in the courtroom on the day of trial. Beach v. State, 2004 Tex. App. LEXIS 7243 (Tex. App. Corpus Christi Aug. 12 2004).

365. In a criminal prosecution for murder, the trial court did not err by admitting a bandana into evidence that was found at the crime scene where the State called three police officer's to testify as to the bandana's chain of custody. Sandoval v. State, 2004 Tex. App. LEXIS 5722 (Tex. App. San Antonio June 30 2004).

366. State conclusively establishes the chain of custody if an officer testifies that he seized the item of physical evidence, tagged it, placed an identifying mark on it, placed it in evidence storage, and retrieved the item for trial. Sandoval v. State, 2004 Tex. App. LEXIS 5722 (Tex. App. San Antonio June 30 2004).

367. When the State sends the evidence to a laboratory for analysis, it must introduce testimony showing the laboratory handled the evidence the same way in order to conclusively establish the chain of custody. Sandoval v. State, 2004 Tex. App. LEXIS 5722 (Tex. App. San Antonio June 30 2004).

368. Once the State completes the chain of custody from the initial collection of the evidence to inside the laboratory, most questions concerning care and custody, including gaps and minor theoretical breaches, go to the weight of the evidence, not to its admissibility. Sandoval v. State, 2004 Tex. App. LEXIS 5722 (Tex. App. San Antonio June 30 2004).

369. Chain of custody for a bottle of methamphetamine was established because an officer testified that after securing the evidence, he transported it to the sheriff's office, where it was put in the evidence vault, and a forensic scientist testified that it was consistent for a lab technician to put certain types of substances into laboratory containers instead of the container in which it arrived. Kinder v. State, 2014 Tex. App. LEXIS 2352, 2014 WL 887357 (Tex. App. Eastland Feb. 28 2014).

Evidence : Demonstrative Evidence

370. In a criminal trial for aggravated robbery under Tex. Penal Code Ann. § 29.03(a), the court did not err by overruling defendant's objection to the admission of a video recording of the robbery; the victim, an eyewitness, testified that the recording accurately represented the robbery; it was sufficiently authenticated for purposes of Tex. R. Evid. 901. Hawkins v. State, 2006 Tex. App. LEXIS 1104 (Tex. App. Waco Feb. 8 2006).

Evidence : Demonstrative Evidence : General Overview

371. Admission of the 911 tape where defendant called to say that the child he was babysitting was not breathing was proper under Tex. R. Evid. 901(b)(4) because the State introduced a copy of the recording made through the testimony of the services supervisor who was in charge of the 911 records. She identified the dispatcher who received the 911 call as and the other voice on the tape identified by defendant's name and stated that he was watching the injured child, and gave the address of the apartment where the incident occurred. Batteas v. State, 2006 Tex. App. LEXIS 1333 (Tex. App. Fort Worth Feb. 16 2006).

Evidence : Demonstrative Evidence : Admissibility

372. In a theft case, the trial court did not abuse its discretion in admitting photographs from a surveillance camera as they were sufficiently authenticated as to be reliable evidence: defendant did not attack the authenticity of the original videotape and raised no substantive concerns as to the authenticity of the photos, defendant did not assert that the photos had been tampered with or reflected anything other than what the original videotape showed, and an employee testified that he viewed the surveillance tape almost immediately after the burglary was discovered and that the photos were fair and accurate representations of what he saw on the videotape. Benford v. State, 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3 2005).

Evidence : Demonstrative Evidence : Photographs

373. In a forgery case, the trial court did not abuse its discretion when it admitted a photograph of defendant into evidence. The store employee who took the photograph testified that the picture was an accurate depiction of

defendant when he returned to the store, and the fact that she did not witness defendant's commission of the offense did not affect her ability to authenticate the photograph. Resendez v. State, 2014 Tex. App. LEXIS 2587, 2014 WL 972297 (Tex. App. Eastland Mar. 6 2014).

374. Admission of computer-enhanced photographs depicting the offense contained in a PowerPoint presentation introduced by the State was not error because the photographs were properly authenticated; a district attorney's office employee testified that he created the presentation using still frames taken from the police officer's dash-cam video, which was admitted without objection, and the officer testified that the photographs contained in the presentation accurately represented what he personally viewed the night of the incident. Hurst v. State, 2013 Tex. App. LEXIS 12376, 2013 WL 5526226 (Tex. App. Waco Oct. 3 2013).

375. Photographs were properly admitted during the termination of parental rights trial, and therefore the trial court did not err by denying the grandmother's motion for a mistrial, because the photographs showed nothing more than what was established by the testimony of the father and the grandmother, namely them leaving an apartment building with the child. In re A.L.W., 2012 Tex. App. LEXIS 9290 (Tex. App. Fort Worth Nov. 8 2012).

376. During defendant's trial for aggravated sexual assault and aggravated kidnapping, the court did not err in admitting a photograph showing the victim's face because the victim's testimony that it was a photograph of her face taken two or three days after the assault and that it was an accurate depiction of her face was sufficient to authenticate the photograph. Brown v. State, 2011 Tex. App. LEXIS 7319, 2011 WL 3915663 (Tex. App. Tyler Sept. 7 2011).

377. Photograph was properly authenticated under Tex. R. Evid. 901(b)(1) because a witness testified on direct examination that the photographs accurately depicted the witness's grill with a hat and a shirt that he found on it on the night in question. Moore v. State, 2010 Tex. App. LEXIS 9234, 2010 WL 4677272 (Tex. App. Fort Worth Nov. 18 2010).

378. There was no error when a medical examiner who was not present at an autopsy testified about photographs taken during the autopsy because the photographs were not an out-of-court statement under Tex. R. Evid. 801 and there was no question under Tex. R. Evid. 901(a) that they accurately depicted the appearance of the victim's body. Wood v. State, 299 S.W.3d 200, 2009 Tex. App. LEXIS 7882 (Tex. App. Austin Oct. 7 2009).

379. Photographs were properly authenticated under Tex. R. Evid. 901 and deemed admissible evidence because it was not necessary that an authenticating witness have taken the photographs- -all that was required was testimony from a witness with personal knowledge that the photographs accurately depicted what they claimed to be. Kirwan v. City of Waco, 249 S.W.3d 544, 2008 Tex. App. LEXIS 152 (Tex. App. Waco 2008).

380. Court properly admitted photographs and documentary evidence found in the search of an alleged member of the Mexican Mafia because they were properly authenticated where the circumstances under which the evidence was obtained support a finding that they are authentic; they were found at the home of a gang member linked to defendant during a search conducted by the police pursuant to a warrant a week before the murder, the State presented evidence to show the circumstances under which the exhibits were obtained, that they had not been tampered with, and that they were connected to defendant. Hernandez v. State, 2006 Tex. App. LEXIS 722 (Tex. App. Austin Jan. 26 2006).

381. Trial court did not abuse its discretion in finding that photographs were properly authenticated under Tex. R. Evid. 901 where the arresting officer testified that the vehicles in the photographs were similar to the patrol unit he was driving on the date of defendant's offense, felony evading arrest with a motor vehicle. The officer's testimony provided sufficient evidence to support a finding that the photographs were what the State claimed they were. Ball

v. State, 2005 Tex. App. LEXIS 2575 (Tex. App. Waco Mar. 30 2005).

382. Trial court did not abuse its discretion in finding that a videotape was properly authenticated under Tex. R. Evid. 901 where the arresting officer testified that he had reviewed the videotape and that the tape was a true and accurate copy of the recording he had made at the time of defendant's offense, felony evading arrest with a motor vehicle. The officer had activated the patrol vehicle's on-board vehicle camera when he decided to effectuate the traffic stop. Ball v. State, 2005 Tex. App. LEXIS 2575 (Tex. App. Waco Mar. 30 2005).

383. Trial court erred by admitting certain photographs in violation of Tex. R. Evid. 404(b), 403, and 901 because although the photographs that were found in defendant's kitchen the day after the alleged sexual assault that showed the victim naked and unconscious were properly admitted as they were essential to understanding the circumstances of the assault and tended to confirm her testimony; other photographs that showed unidentified men sexually assaulting another woman, and that showed defendant's house mate having sexual intercourse, and defendant urinating against the wall giving a gang sign were improperly admitted. There was no evidence that defendant took the other photographs or knew of their existence and they suggested an improper basis upon which to convict defendant. Casey v. State, 160 S.W.3d 218, 2005 Tex. App. LEXIS 1807 (Tex. App. Austin 2005).

384. Where defendant challenged the admission of a videotape taken from a camera mounted in the arresting officer's patrol car of the events constituting the offense, the state offered the videotape during the arresting officer's testimony and, contrary to defendant's assertion, the officer testified he reviewed the tape and it showed exactly what happened on the day of the arrest; therefore it was admissible under Tex. R. Evid. 901(a) where it accurately represented the scene or event it purported to portray. Cooks v. State, 2004 Tex. App. LEXIS 228 (Tex. App. Dallas Jan. 9 2004).

Evidence : Demonstrative Evidence : Recordings

385. Video recording of defendant's post-arrest statements regarding his use and purchase of methamphetamine was properly admitted under Tex. Code Crim. Proc. Ann. art. 38.22 and Tex. R. Evid. 901 because the officer was able to identify the voices and recount what was said, and the warning given to defendant and his statements were clearly audible. Parker v. State, 2013 Tex. App. LEXIS 6409, 2013 WL 2248254 (Tex. App. Fort Worth May 23 2013).

386. At the hearing on the motion to revoke defendant's community supervision, the trial court did not err in admitting two audio recordings of jail telephone calls into evidence because the jail phone technician confirmed that he downloaded the recordings of calls that were made by an inmate with defendant's name. The calls were authenticated by distinctive characteristics of the caller and the contents of the conversations under Tex. R. Evid. 901(h)(4). Malone v. State, 2013 Tex. App. LEXIS 1044, 2013 WL 427354 (Tex. App. Dallas Feb. 5 2013).

387. Court properly found a recording authenticated because the officer watched and listened to the recording, he recognized the voices on the video, the video had not been altered, and the officer had heard defendant speak on numerous occasions and recognized defendant's voice on the recording, and he recognized his own voice. Johnson v. State, 2012 Tex. App. LEXIS 4400, 2012 WL 1992888 (Tex. App. Waco May 30 2012).

388. Court did not err in finding that a tape recorder accurately recorded the investigator's conversation with defendant because, although a "popping noise" would occur, the court found that the tape recorder was capable of making an accurate recording, that the investigator was competent in making that recording, and that the recording was accurate and did not appear to have been altered. Martines v. State, 371 S.W.3d 232, 2011 Tex. App. LEXIS 4773, 2011 WL 2502839 (Tex. App. Houston 1st Dist. June 23 2011).

389. Defendant's conviction for indecency with a child by contact was proper because, given the lack of evidence that a tape was in fact what defendant claimed it to have been, the trial court acted within its discretion in determining that the recording's authenticity had not been sufficiently established to allow its admission into evidence, Tex. R. Evid. 901(a). Sosa v. State, 2010 Tex. App. LEXIS 4428, 2010 WL 2330304 (Tex. App. Austin June 10 2010).

390. Recordings of defendant's telephone calls from jail were properly authenticated under Tex. R. Evid. 901, even though the sponsoring witness had no knowledge of defendant's voice, because the calls were subject to and passed voice-print recognition. White v. State, 2010 Tex. App. LEXIS 2723 (Tex. App. Dallas Apr. 1 2010).

391. In a possession of a controlled substance case, as the testimony of an informant who was on the recording established that the recording was what it claimed to be, resulting in a proper authentication, defendant failed to establish that the presence of a 10 to 15 minute gap in the recording, standing alone, destroyed authentication or precluded admission of the tape into evidence. As such, the trial court did not erroneously admit the tape recording into evidence. Malone v. State, 2008 Tex. App. LEXIS 7163 (Tex. App. Houston 14th Dist. Aug. 26, 2008).

392. In a murder trial, 911 recordings were properly admitted under Tex. R. Evid. 901 because the 911 dispatcher testified that, although the dispatcher neither made the recordings nor retained custody of the recordings, the two recordings were true and accurate representations of the calls the dispatcher received on the evening of the incident. Mendoza v. State, 2007 Tex. App. LEXIS 10011 (Tex. App. San Antonio Dec. 28 2007).

393. In a trial for aggravated assault on a public servant, there was no error in the admission of compilation exhibits in which the audio recording of defendant's conversation with a 911 operator was paired and played with videotapes of a pursuit taken from patrol cars; the exhibits were properly authenticated under Tex. R. Evid. 901 because the lead investigator assigned to the case testified to reviewing all the audiotapes and videotapes and to how the compilations were made. Jarrell v. State, 2007 Tex. App. LEXIS 6357 (Tex. App. Austin Aug. 10 2007).

394. Recordings of telephone calls defendant made while in jail were properly authenticated under Tex. R. Evid. 901 because an officer identified State's exhibit 12 as the disc containing digital recordings of telephone calls defendant made, another witness demonstrated how the recording system authenticated the accuracy of a digitally recorded inmate telephone call, and the victim identified defendant's voice as one of the voices on the recordings; it was not necessary for the victim to identify both voices to establish that the digital recording was what the State claimed it to be. Banargent v. State, 228 S.W.3d 393, 2007 Tex. App. LEXIS 4365 (Tex. App. Houston 14th Dist. 2007).

Evidence : Demonstrative Evidence : Visual Formats

395. Witness had sufficient knowledge to authenticate a video recording from a jail surveillance camera, even though he did see the event depicted of defendant's contact with an assault victim, because he personally witnessed the events depicted only seconds later and then appeared on the video himself. Standmire v. State, 475 S.W.3d 336, 2014 Tex. App. LEXIS 8672 (Tex. App. Waco Aug. 7 2014).

396. An officer's testimony that a videotape recording of a search of defendant's apartment reflected the scene the day of a search was sufficient to authenticate it, Tex. R. Evid. 901(a) although the officer was not the recorder. Alvarado v. State, 2014 Tex. App. LEXIS 6102 (Tex. App. Dallas June 4 2014).

397. Security footage was properly authenticated because a company manager testified that the bus's security cameras recorded footage from the bus as it occurred, the videos were transferred to her hard drive, and the hard drive was kept in a secure location. Furthermore, the witness stated that she reviewed the footage and verified that

it "depicts what was going on on the bus during that person's shift during that period of time." Walls v. State, 2014 Tex. App. LEXIS 3159, 2014 WL 1208017 (Tex. App. Austin Mar. 20 2014).

398. Silent videotape of an informant's cocaine buy from defendant was properly admitted under Tex. R. Evid. 901(a), although the informant did not testify, because the officers had personal knowledge of the video's contents and could corroborate it; Tex. Code Crim. Proc. Ann. art. 38.141, requiring corroboration of an accomplice's testimony, did not apply because the video was muted. Watson v. State, 421 S.W.3d 186, 2013 Tex. App. LEXIS 14603, 2013 WL 6244135 (Tex. App. San Antonio Dec. 4 2013).

399. Trial court did not abuse its discretion by admitting a DVD of images taken from a security camera showing defendant on the stairwell of the apartment complex carrying the victim's backpacks into evidence because the maintenance supervisor's testimony was sufficient to authenticate the DVD under Tex. R. Evid. 901. The supervisor's testimony explained how the security cameras worked and that: (1) he removed the SD card from the camera, reviewed its contents with the victim, and copied four images onto a DVD, which he gave to the victim; (2) the victim gave the DVD to the police; (3) the supervisor testified that the camera was capable of making true and accurate recordings and that the DVD contained a true and accurate depiction of images taken by the camera; (4) he did not alter or change the images as he initially saw them from the SD card; and (5) he reviewed the DVD before trial and determined that it was a true and accurate depiction and recording of the four images he took from the SD card. The State's failure to establish the chain of custody did not render the DVD inadmissible as there was no evidence of tampering or fraud. Warren v. State, 2012 Tex. App. LEXIS 1544, 2012 WL 651642 (Tex. App. El Paso Feb. 29 2012).

400. Under Tex. R. Evid. 901, the video taken from an officer's patrol car was properly authenticated by another officer, who was at the scene and who viewed the entire video, and stated that there were no additions, deletions, or changes to the video. Delgado v. State, 2011 Tex. App. LEXIS 7682, 2011 WL 4389956 (Tex. App. Waco Sept. 21 2011).

401. Admission of surveillance video was proper because the officer outfitted the informant with a recording device and transmitter, the officer monitored an audio feed, and the officer later watched the video and interviewed the informant; that evidence was sufficient to conclude that the video was what the State claimed it was. Sanford v. State, 2009 Tex. App. LEXIS 7592, 2009 WL 3161505 (Tex. App. Tyler Sept. 30 2009).

402. Authentication of video excerpts from a seized camera satisfied Tex. R. Evid. 901(a)(1), (5), (9) because a witness testified to the process of transferring the video files from the camera to a disc, that the disc accurately represented what was viewed on the camera when it was seized, and that the video had not been tampered with in any way. Also, the jury could have recognized defendant in the video. Mincey v. State, 2009 Tex. App. LEXIS 2825, 2009 WL 1058734 (Tex. App. Dallas Apr. 21 2009).

403. Videotape was properly authenticated because a loss prevention officer described the intricacies of the store's recording system, he detailed how he was able to link the encoding on the receipts to the time and date, and he had personally copied the relevant recordings from the multiplex to the videotape. Thierry v. State, 288 S.W.3d 80, 2009 Tex. App. LEXIS 1043 (Tex. App. Houston 1st Dist. Feb. 12 2009).

404. In defendant's murder case, the trial court did not abuse its discretion in admitting a videotape into evidence because a witness showed his knowledge of the operation of the apartment complex's cameras and his knowledge of what was recorded on the videotape; he was sufficiently able to show that the videotape offered into evidence was what the prosecution claimed it to be. Garcia v. State, 2008 Tex. App. LEXIS 5064 (Tex. App. Dallas July 8 2008).

405. In a trial for aggravated assault on a public servant, there was no error in the admission of compilation exhibits in which the audio recording of defendant's conversation with a 911 operator was paired and played with videotapes of a pursuit taken from patrol cars; the exhibits were properly authenticated under Tex. R. Evid. 901 because the lead investigator assigned to the case testified to reviewing all the audiotapes and videotapes and to how the compilations were made. Jarrell v. State, 2007 Tex. App. LEXIS 6357 (Tex. App. Austin Aug. 10 2007).

Evidence : Documentary Evidence : General Overview

406. In a child sexual assault case involving abduction in a car, a videotape from a gas station was sufficiently authenticated under Tex. R. Evid. 901(a), (b)(1) by the testimony of a victim and an investigating officer that the videotape accurately depicted events at the gas station. Gilkey v. State, 2003 Tex. App. LEXIS 9964 (Tex. App. Dallas Nov. 21 2003).

Evidence : Documentary Evidence : Best Evidence Rule

407. Defendant had not established that copies of two different checks that were allegedly forged and presented by him at two different banks were inadmissible as duplicates because there was no evidence that would raise a question about whether the checks were what the State claimed them to be, and reasonable jurors thus could not disagree about whether the checks were the actual checks presented by defendant, as the State alleged. Moreover, the potentially unique probative value of the original checks went to the issues of whether the checks were the actual checks presented by defendant and whether the checks were forgeries, and defendant had admitted both of those facts. Duncan v. State, 2014 Tex. App. LEXIS 4678, 2014 WL 1788173 (Tex. App. Corpus Christi May 1 2014).

408. Where defendant challenged the admission of a videotape taken from a camera mounted in the arresting officer's patrol car of the events constituting the offense, the state offered the videotape during the arresting officer's testimony and, contrary to defendant's assertion, the officer testified he reviewed the tape and it showed exactly what happened on the day of the arrest; therefore it was admissible under Tex. R. Evid. 901(a) where it accurately represented the scene or event it purported to portray. Cooks v. State, 2004 Tex. App. LEXIS 228 (Tex. App. Dallas Jan. 9 2004).

Evidence : Documentary Evidence : Writings : General Overview

409. Trial court did not abuse it discretion when it authenticated and admitted the e-mails under Tex. R. Evid. 104 and 901 because the alleged victim's mother testified that about personally knowing defendant's e-mail address and the content of the e-mails referred to matters that only defendant and the alleged victim would know. Sennett v. State, 406 S.W.3d 661, 2013 Tex. App. LEXIS 5148 (Tex. App. Eastland Apr. 25 2013).

410. In defendant's community supervision revocation proceeding, the trial court did not err in admitting an exhibit containing his letters that were intercepted by the mail clerk of the correctional facility. The letters were sufficiently authenticated under Tex. R. Evid. 901(b)(4), because the contents and substance of the letters established the correspondence was between defendant, his wife and minor children. Rivera v. State, 2012 Tex. App. LEXIS 8306, 2012 WL 4712902 (Tex. App. Beaumont Oct. 3 2012).

411. Trial court did not abuse its discretion by admitting into evidence letters purportedly written by defendant to the victim while he was in jail awaiting trial because the victim's testimony was sufficient to authenticate the letters under Tex. R. Evid. 901. The victim testified that she recognized defendant's handwriting on the letters, with the exception of one all of the letters began by referencing her name, some but not all were signed by defendant, and because defendant did not know her current address, he sent them to a mutual friend with instructions to give them

to the victim. Piasecki v. State, 2012 Tex. App. LEXIS 3927, 2012 WL 1795136 (Tex. App. Beaumont May 16 2012).

Evidence : Documentary Evidence : Writings : Transcripts & Translations : General Overview

412. Upon summary judgment in a suit for wrongful termination, the trial court could not consider the employee's notarized responses to the employer's summary judgment motion and a transcript of a conversation with a supervisor; the transcript was not competent summary judgment proof, because it was never produced in discovery and never authenticated, as required by Tex. R. Evid. 901. Kosa v. Dallas Lite & Barricade, Inc., 228 S.W.3d 428, 2007 Tex. App. LEXIS 4561 (Tex. App. Dallas 2007).

Evidence : Documentary Evidence : Writings : Transcripts & Translations : Translations

413. Translator who signed and certified a translated transcript of defendant's statement was not required to testify to the accuracy of the translation to authenticate the transcript under Tex. R. Evid. 901, because the exhibit contained a certificate of acknowledgment by a notary public, making it self-authenticating under Tex. R. Evid. 902(8). Zambrano v. State, 2014 Tex. App. LEXIS 1606, 2014 WL 1022386 (Tex. App. Dallas Feb. 12 2014).

Evidence : Hearsay : Exceptions : Business Records : General Overview

414. In a domestic violence case, the trial court did not err by admitting a 911 tape of a call from the victim as a business record; a 911 tape is admissible as a business record if properly authenticated, and the custodian testified that the tape was made in the ordinary course of business at the time of the event recorded. Warfel v. State, 2005 Tex. App. LEXIS 2922 (Tex. App. Amarillo Apr. 14 2005).

Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

415. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of arrest records and certified copies of judgments and sentences because the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Also defendant failed to preserve his claim of error because he did not object to the admission of these evidentiary items on that basis as required by Tex. R. App. P. 33.1. Lopez v. State, 2005 Tex. App. LEXIS 4625 (Tex. App. Eastland June 16 2005).

Evidence : Hearsay : Exceptions : Judgments

416. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of certified records of defendant's prior felony convictions which the State alleged for enhancement purposes because the trial could admit evidence of prior criminal convictions during the punishment phase of a trial pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Lopez v. State, 2005 Tex. App. LEXIS 4610 (Tex. App. Eastland June 16 2005).

Evidence : Hearsay : Exceptions : Public Records : General Overview

417. Documents could not be admitted as public records under Tex. R. Evid. 803(8) in a receivership proceeding without certification pursuant to Tex. R. Evid. 902(4) or extrinsic evidence of authenticity under Tex. R. Evid. 901(a), (b)(7). Benefield v. State ex rel. Alvin Cmty. Health Endeavor, Inc., 266 S.W.3d 25, 2008 Tex. App. LEXIS 6152 (Tex. App. Houston 1st Dist. 2008).

418. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of arrest records and certified copies of judgments and sentences because the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Also defendant failed to preserve his claim of error because he did not object to the admission of these evidentiary items on that basis as required by Tex. R. App. P. 33.1. Lopez v. State, 2005 Tex. App. LEXIS 4625 (Tex. App. Eastland June 16 2005).

419. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of certified records of defendant's prior felony convictions which the State alleged for enhancement purposes because the trial could admit evidence of prior criminal convictions during the punishment phase of a trial pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Lopez v. State, 2005 Tex. App. LEXIS 4610 (Tex. App. Eastland June 16 2005).

Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports

420. Defense counsel was not rendered ineffective by failing to object to the admission of a penitentiary packet because penitentiary packets were admissible as an exception to the hearsay rule if they were properly authenticated as public records, as provided by Tex. R. Evid. 803(8), 901(b)(7), 902(4). Henderson v. State, 2006 Tex. App. LEXIS 5911 (Tex. App. Tyler June 30 2006).

Evidence : Hearsay : Exceptions : State of Mind : General Overview

421. In defendant's murder case, a court properly admitted evidence of the victim's handwritten letters because it was admissible as relating to the victim's state of mind, and the State authenticated the letters through the victim's daughter, who recognized the handwriting on the letters as being that of her mother. Stafford v. State, 248 S.W.3d 400, 2008 Tex. App. LEXIS 1280 (Tex. App. Beaumont 2008).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements

422. In defendant's murder case, the trial court did not abuse its discretion in excluding a letter from a witness because, at the conclusion of the witness's testimony, he was excused without any request that he be subject to recall, the witness could not be located when defendant offered the letter into evidence, and thus, the witness was no longer subject to cross-examination. Furthermore, the letter was not authenticated and there was no indication showing that the letter was written prior to the alleged improper influence by defendant's family and friends. Long v. State, 2009 Tex. App. LEXIS 6577, 2009 WL 2581286 (Tex. App. Eastland Aug. 20 2009).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

423. In defendant's capital murder case, a court properly admitted an anonymous letter regarding defendant, addressed to a reporter, where in addition to being found on defendant's computer, the letter contained numerous intimate details of defendant's life, confirmed by other evidence, that collectively supported an inference that she was the author; given those circumstances, it was a reasonable exercise of the trial court's discretion to conclude that the letter was written by defendant, and because the letter was shown to be written by defendant, it was not hearsay when offered against her. Johnson v. State, 208 S.W.3d 478, 2006 Tex. App. LEXIS 2254 (Tex. App. Austin 2006).

Evidence : Hearsay : Rule Components : General Overview

424. Because appellant did not obtain a ruling on hearsay, authentication, and Tex. R. Civ. P. 194 objections, which were objections to the form of evidence, they could not be considered on appeal. Petro-Hunt, L.L.C. v. Wapiti Energy, L.L.C., 2012 Tex. App. LEXIS 1860, 2012 WL 761144 (Tex. App. Houston 1st Dist. Mar. 8 2012).

425. Where there is proper identification of a document under Tex. R. Evid. 901, that does not cure the defect of it being an unsworn statement under Tex. R. Civ. P. 166a(f) or hearsay per the hearsay rule. Koehler v. Sears, Roebuck & Co., 2001 Tex. App. LEXIS 3701 (Tex. App. Dallas June 6 2001).

Evidence : Procedural Considerations : Exclusion & Preservation by Prosecutor

426. Defendant failed to properly reserve his argument that admission of tape recordings of a controlled substance buy was improper because defendant's objection at trial was a mere predicate objection. Young v. State, 183 S.W.3d 699, 2005 Tex. App. LEXIS 6299 (Tex. App. Tyler 2005).

427. Trial court did not abuse its discretion by admitting a State's exhibit, which was a list of stolen property and its value, where the property's owner had personal knowledge of the items listed on the document because he made a list and his wife copied the list. Furthermore, even assuming that the trial court erred in admitting the exhibit, the error, if any, was harmless because it could not be concluded that it contributed to defendant's conviction or punishment or affected his substantial rights. Hernandez v. State, 2005 Tex. App. LEXIS 5219 (Tex. App. Corpus Christi July 7 2005).

428. Testimony of an employee who viewed a security videotape immediately after a theft was sufficient authentication under Tex. R. Evid. 901(b)(1) of photographs made from the videotape. Benford v. State, 2005 Tex. App. LEXIS 463 (Tex. App. Austin Jan. 21 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3, 2005).

429. Defendant's taped statements were properly authenticated under Tex. R. Evid. 901 because the detective participating in the taped conversation testified he was the operator of the recording equipment, it was functioning properly, and that the recording accurately reflected the conversation; additionally, the tape statements were relevant because they contained defendant's version of the events. Thus, the trial court did not abuse its discretion in admitting the statements at his trial. Raveiro v. State, 2005 Tex. App. LEXIS 218 (Tex. App. Houston 14th Dist. Jan. 13 2005).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

430. Error based on improper authentication of exhibits during a summary judgment hearing was not preserved for appellate review because an attorney had "no objection" when the evidence was admitted at a prior hearing. Kent v. Holmes, 139 S.W.3d 120, 2004 Tex. App. LEXIS 5844 (Tex. App. Texarkana 2004).

Evidence : Procedural Considerations : Preliminary Questions : Admissibility of Evidence : General Overview

431. In defendant's criminal prosecution for bribery, the trial court did not abuse its discretion by admitting a letter into evidence because it contained sufficient distinctive characteristics to support a finding that defendant was the intended recipient. The authentication requirement was met because the evidence supported a finding that the letter was what its proponent claimed it to be under Tex. R. Evid. 104(b), 901(a). Watts v. State, 2012 Tex. App. LEXIS 1044, 2012 WL 403859 (Tex. App. Beaumont Feb. 8 2012).

432. In defendant's trial for capital murder, a trial court did not err in admitting evidence; there was sufficient evidence to support the jury's finding that defendant wrote a letter and an envelope that was sent from the jail and returned to defendant for insufficient postage; the documents had sufficient internal characteristics to authenticate the evidence. Druery v. State, 225 S.W.3d 491, 2007 Tex. Crim. App. LEXIS 392 (Tex. Crim. App. 2007), *cert. denied*, 132 S. Ct. 1550, 182 L. Ed. 2d 180, 2012 U.S. LEXIS 1267 (U.S. 2012).

Evidence : Procedural Considerations : Rulings on Evidence

433. Trial court did not abuse its discretion during defendant's capital murder trial in admitting a condom found at an extraneous murder and the DNA evidence obtained from that condom where the trial court could have reasonably believed that a reasonable jury could find that the condom had been authenticated and identified. Defendant made no allegations of alteration, tampering, or fraud, and the State presented sufficient evidence for the trial court to conclude that the matter in question was what the State claimed that it was. Mcgregor v. State, 394 S.W.3d 90, 2012 Tex. App. LEXIS 6552, 2012 WL 3244196 (Tex. App. Houston 1st Dist. Aug. 9 2012).

434. Where a list which did not contain appellee's name and phone number as an emergency contact was admitted into evidence by the trial court, although it did not meet the authentication requirements of Tex. R. Evid. 901 because there was no evidence as to who prepared the list, the purpose for which it was prepared, or when it was prepared, it was erroneously admitted; the admission was harmful and probably caused an improper judgment pursuant to Tex. R. App. P. 44.1 because appellee's objection to appellant's application to be appointed guardian of the parties' incapacitated father was based on her claim that appellant excluded her, and the list was supportive of that claim. In re Henderson, 2004 Tex. App. LEXIS 3244 (Tex. App. Waco Apr. 7 2004).

Evidence : Procedural Considerations : Weight & Sufficiency

435. Admission of a surveillance video recording depicting the capital murder of a cab company employee was proper because the evidence was sufficient for the trial court to determine that the testimony concerning the recording was sufficient for a reasonable jury to determine that the recording was in fact an accurate video recording of the events that occurred that morning at the cab company; two witnesses familiar with the video surveillance system testified regarding the video evidence, and the cab driver who discovered the victim also testified about the recording. Turnbull v. State, 2013 Tex. App. LEXIS 13167 (Tex. App. Austin Oct. 24 2013).

436. Defendant's conviction for engaging in organized crime was proper because the nonaccomplice evidence placed defendant at or near the scene of the crime at or about the time of its commission under suspicious circumstances and because, although the forensic examiner testified that he did not know who actually sent or received the text messages, the circumstances were sufficient to allow a jury reasonably to find that defendant sent and received the messages, Tex. R. Evid. 901(a). Because intent to commit forgery could not be inferred, the prior conviction showing strikingly similar facts made the existence of a material fact, that was, whether defendant possessed forged checks with the intent to defraud or harm another, more probable. Franklin v. State, 2012 Tex. App. LEXIS 8513 (Tex. App. Dallas Oct. 10 2012).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

437. Defendant's motion to suppress the DNA evidence was properly denied because there was sufficient authentication evidence through the victim's sexual assault kit's markings and witness testimony showing that the kit was what it purported to be, and there was no affirmative evidence that the victim's samples were commingled, altered, or tampered with prior to their submission for DNA testing in April 2003. Dossett v. State, 216 S.W.3d 7, 2006 Tex. App. LEXIS 7428 (Tex. App. San Antonio 2006).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

438. Although the tape was not properly authenticated, the evidence of an extraneous offense under Tex. R. Evid. 404 could not be said to have infringed on defendant's substantial rights because the evidence was before the jury via an undercover officer's unobjected-to testimony; therefore, admission of the extraneous offense evidence was harmless. Roberson v. State, 2006 Tex. App. LEXIS 4282 (Tex. App. Houston 1st Dist. May 18 2006).

439. Trial court erred by admitting certain photographs in violation of Tex. R. Evid. 404(b), 403, and 901 because although the photographs that were found in defendant's kitchen the day after the alleged sexual assault that showed the victim naked and unconscious were properly admitted as they were essential to understanding the circumstances of the assault and tended to confirm her testimony; other photographs that showed unidentified men sexually assaulting another woman, and that showed defendant's house mate having sexual intercourse, and defendant urinating against the wall giving a gang sign were improperly admitted. There was no evidence that defendant took the other photographs or knew of their existence and they suggested an improper basis upon which to convict defendant. Casey v. State, 160 S.W.3d 218, 2005 Tex. App. LEXIS 1807 (Tex. App. Austin 2005).

Evidence : Relevance : Relevant Evidence

440. In defendant's stalking case, a reasonable fact finder could have found that the telephone number the victim attributed to defendant was his telephone number, and that defendant sent the electronic communications attributed to him by the State and depicted in the challenged exhibits. Accordingly, the challenged exhibits were relevant, and the trial court did not abuse its discretion by admitting them. Manuel v. State, 357 S.W.3d 66, 2011 Tex. App. LEXIS 7152 (Tex. App. Tyler Aug. 31 2011).

441. Defendant's taped statements were properly authenticated under Tex. R. Evid. 901 because the detective participating in the taped conversation testified he was the operator of the recording equipment, it was functioning properly, and that the recording accurately reflected the conversation; additionally, the tape statements were relevant because they contained defendant's version of the events. Thus, the trial court did not abuse its discretion in admitting the statements at his trial. Raveiro v. State, 2005 Tex. App. LEXIS 218 (Tex. App. Houston 14th Dist. Jan. 13 2005).

442. In a probate proceeding where the testator's wife contested the testator's daughter inventory of property, having determined that the second exhibit was sufficiently authenticated pursuant to Tex. R. Evid. 901 and the first exhibit was relevant to the determination of the declaratory judgment action pursuant to Tex. R. Evid. 401, the trial court ruled the exhibits were inadmissible was error; the excluded exhibits were controlling to a material issue in the case regarding whether the community property agreement between the wife and the testator was valid and enforceable, and the exclusion of the exhibits was harmful error under Tex. R. App. P. 44.1. Haugen v. Olson, 2003 Tex. App. LEXIS 10495 (Tex. App. Dallas Dec. 15 2003).

443. In a probate proceeding where the testator's wife contested the testator's daughter inventory of property, having determined that the second exhibit was sufficiently authenticated pursuant to Tex. R. Evid. 901 and the first exhibit was relevant to the determination of the declaratory judgment action pursuant to Tex. R. Evid. 401, the trial court ruled the exhibits were inadmissible was error; the excluded exhibits were controlling to a material issue in the case regarding whether the community property agreement between the wife and the testator was valid and enforceable, and the exclusion of the exhibits was harmful error under Tex. R. App. P. 44.1. Haugen v. Olson, 2003 Tex. App. LEXIS 10495 (Tex. App. Dallas Dec. 15 2003).

444. Where the client sued the law firm and its attorneys for legal malpractice alleging breach of fiduciary duty, negligence, and gross negligence arising out of the sale of real estate and a foreclosure action, summary judgment was affirmed because: (1) the client's motion for continuance was properly denied because she was given sufficient

notice of the hearing on the motion for summary judgment under the provisions of Tex. R. Civ. P. 166a(c), 4 and the certificate of service was prima facie evidence of service under Tex. R. Civ. P. 21, (2) the client's summary judgment evidence was properly excluded because even though the documents were authenticated, they could have been objected to on other grounds under Tex. R. Evid. 901(a) and the client failed to properly brief the issue on appeal under Tex. R. App. P. 38.1(h), (3) the exclusion of the client's expert testimony was proper because it was not an affidavit in that it contained no jurat under the provisions of Tex. Gov't Code Ann. § 312.011, and the expert was not licensed to practice law in Texas, and (4) the no evidence summary judgment was affirmed because without expert testimony, the client was unable to show a breach of duty which was an essential element of her cause of action. Ramsey v. Reagan, 2003 Tex. App. LEXIS 276 (Tex. App. Austin Jan. 16 2003).

Evidence : Scientific Evidence : Autopsies

445. There was no error when a medical examiner who was not present at an autopsy testified about photographs taken during the autopsy because the photographs were not an out-of-court statement under Tex. R. Evid. 801 and there was no question under Tex. R. Evid. 901(a) that they accurately depicted the appearance of the victim's body. Wood v. State, 299 S.W.3d 200, 2009 Tex. App. LEXIS 7882 (Tex. App. Austin Oct. 7 2009).

Evidence : Scientific Evidence : Blood Alcohol

446. Testimony of officers established the beginning of the chain of custody, and the transfer of defendant's blood sample from the lab directly to court and then the State's prosecutor established the end of the chain of custody; additionally, a lab employee testified the blood sample arrived at the lab sealed with tape and showed no indications that the condition of the sample was poor or that the sample had been tampered with prior to its arrival at the lab. Islas v. State, 2014 Tex. App. LEXIS 5171 (Tex. App. El Paso May 14 2014).

447. In a felony driving while intoxicated case, a chain of custody argument under Tex. R. Evid. 901(a) was rejected because there was no evidence of tampering with a blood specimen; an officer observed a nurse draw the blood, and the nurse's signature on a form indicated that he did draw the blood. Also, the nurse's signature was on blood vials. Gasca v. State, 2008 Tex. App. LEXIS 6629 (Tex. App. Fort Worth Aug. 29, 2008).

Evidence : Scientific Evidence : DNA

448. Court did not err in admitting testimony on the results of DNA testing under Tex. R. Evid. 901(a) because a doctor testified that he collected samples from the victim, he submitted each sample in a standardized kit, and he identified the exhibits at trial; a biologist testified that each piece of evidence was labeled and sealed after testing. The biologist identified the sexual assault kit and the samples contained in the kit at trial and testified that the evidence had not been tampered with in any way. Sharp v. State, 2011 Tex. App. LEXIS 7208, 2011 WL 3850038 (Tex. App. Waco Aug. 31 2011).

449. In a trial for child sexual assault, the trial court did not abuse its discretion in determining that a reasonable juror could find that swabs used for DNA testing were properly authenticated under Tex. R. Evid. 901 because there was no affirmative evidence to substantiate a claim for tampering or commingling of the swabs, and the State substantiated the beginning and the end of the chain of custody for the swabs. Williams v. State, 2008 Tex. App. LEXIS 3095 (Tex. App. Fort Worth Apr. 24 2008).

450. In a murder trial, defendant's chain-of-evidence objections under Tex. R. Evid. 901 to the admission of DNA-sample buccal swabs from other potential suspects related to the weight of the evidence, not its admissibility; defendant argued that the State failed to prove the people from whom the analysts obtained the swabs were who they claimed to be, that those people might have lied about their identities, and that the tested DNA may have come from persons unrelated to the investigation. Russell v. State, 2008 Tex. App. LEXIS 1723 (Tex. App. Fort Worth

Mar. 6 2008).

451. On appeal of defendant's conviction for murder, he challenged whether the evidence regarding the DNA sample test results was insufficient; however, defendant failed to object at trial to the admissibility of the DNA test results, and therefore, he waived any error with respect to that evidence. Lane v. State, 2006 Tex. App. LEXIS 8912 (Tex. App. Houston 14th Dist. Oct. 17 2006).

452. Defendant's motion to suppress the DNA evidence was properly denied because there was sufficient authentication evidence through the victim's sexual assault kit's markings and witness testimony showing that the kit was what it purported to be, and there was no affirmative evidence that the victim's samples were commingled, altered, or tampered with prior to their submission for DNA testing in April 2003. Dossett v. State, 216 S.W.3d 7, 2006 Tex. App. LEXIS 7428 (Tex. App. San Antonio 2006).

453. In a capital murder trial, the State was permitted to introduce evidence of DNA results from a specimen taken from defendant's truck; testimony from a detective, a lab technician, and a DNA analyst established the chain of custody. Thomas v. State, 2006 Tex. App. LEXIS 1986 (Tex. App. Waco Mar. 15 2006).

Evidence : Scientific Evidence : Fingerprints & Footprints

454. Despite defendant's assertions that a thumbprint was not taken, penitentiary packets were properly admitted into evidence during the punishment phase of an aggravated sexual assault trial; those packets were self-authenticated for purposes of Tex. R. Evid. 901 and Tex. R. Evid. 902, and the State called a crime scene technician, who had reviewed the packets and taken fingerprints from defendant. Therefore, the State established beyond a reasonable doubt that defendant was the same person that had been previously convicted of other crimes. Stewart v. State, 2009 Tex. App. LEXIS 6716, 2009 WL 2617647 (Tex. App. Beaumont Aug. 26 2009).

Evidence : Scientific Evidence : Handwriting

455. In an aggregate theft over $ 200.000 or more case, while no handwriting expert verified the handwriting on the deposit slips, the handwriting on those slips was properly authenticated as defendant's long-time supervisor confirmed that the handwriting on the deposit slips belonged to defendant, and multiple witnesses testified that only defendant had access to the bank deposits. Keck v. State, 2009 Tex. App. LEXIS 2402, 2009 WL 3003257 (Tex. App. Houston 14th Dist. Apr. 2 2009).

456. Letter written by defendant was properly authenticated by an officer because the officer identified the letter as having been written by defendant based on his familiarity with defendant's handwriting from other letters he had reviewed as part of his jailhouse duties and from defendant's name and unique "SO" number on the return address. Galbraith v. State, 2008 Tex. App. LEXIS 8433 (Tex. App. Fort Worth Nov. 6, 2008).

Evidence : Scientific Evidence : Voice Identification

457. Evidence was sufficient to authenticate a telephone call under Tex. R. Evid. 901 as coming from defendant's sister because the witness testified that the person on the phone identified herself with the sister's name and disclosed information that was very specific to circumstances described by the sister and defendant. Mosley v. State, 355 S.W.3d 59, 2010 Tex. App. LEXIS 10278 (Tex. App. Houston 1st Dist. Dec. 30 2010).

Family Law : Guardians : General Overview

458. Where a list which did not contain appellee's name and phone number as an emergency contact was admitted into evidence by the trial court, although it did not meet the authentication requirements of Tex. R. Evid. 901 because there was no evidence as to who prepared the list, the purpose for which it was prepared, or when it was prepared, it was erroneously admitted; the admission was harmful and probably caused an improper judgment pursuant to Tex. R. App. P. 44.1 because appellee's objection to appellant's application to be appointed guardian of the parties' incapacitated father was based on her claim that appellant excluded her, and the list was supportive of that claim. In re Henderson, 2004 Tex. App. LEXIS 3244 (Tex. App. Waco Apr. 7 2004).

Workers' Compensation & SSDI : Administrative Proceedings : Evidence : General Overview

459. Trial court did not abuse its discretion in overruling an insurer's lack-of-authentication objections to a workers' compensation benefits claimant's exhibits; the trial court could conclude that the distinctive characteristics and contents of the documents, taken in conjunction with the circumstances, were sufficient to prove the documents were genuine. Am. Cas. Co. v. Hill, 194 S.W.3d 162, 2006 Tex. App. LEXIS 5009 (Tex. App. Dallas 2006).

Tex. Evid. R. 902

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 902 Evidence That is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) ***Domestic Public Documents That are Sealed and Signed.***--A document that bears:

(A)a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B)a signature purporting to be an execution or attestation.

(2) ***Domestic Public Documents That are Not Sealed But Are Signed and Certified.***--A document that bears no seal if:

(A)it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B)another public officer who has a seal and official duties within that same entity certifies under seal - or its equivalent - that the signer has the official capacity and that the signature is genuine.

(3) ***Foreign Public Documents.***--A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so.

(A) ***In General.***--The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester - or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States.

(B) ***If Parties Have Reasonable Opportunity to Investigate.***--If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(i)order that it be treated as presumptively authentic without final certification; or

(ii)allow it to be evidenced by an attested summary with or without final certification.

(C) ***If a Treaty Abolishes or Displaces the Final Certification Requirement.***--If the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces the final certification requirement, the record and attestation must be certified under the terms of the treaty or convention.

(4) ***Certified Copies of Public Records.***--A copy of an official record - or a copy of a document that was recorded or filed in a public office as authorized by law - if the copy is certified as correct by:

(A)the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed under statutory authority.

(5) ***Official Publications.***--A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) ***Newspapers and Periodicals.***--Printed material purporting to be a newspaper or periodical.

(7) ***Trade Inscriptions and the Like.***--An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) ***Acknowledged Documents.***--A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) ***Commercial Paper and Related Documents.***--Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) ***Business Records Accompanied by Affidavit.***--The original or a copy of a record that meets the requirements of Rule 803(6) or (7), if the record is accompanied by an affidavit that complies with subparagraph (B) of this rule and any other requirements of law, and the record and affidavit are served in accordance with subparagraph (A). For good cause shown, the court may order that a business record be treated as presumptively authentic even if the proponent fails to comply with subparagraph (A).

(A) ***Service Requirement.***--The proponent of a record must serve the record and the accompanying affidavit on each other party to the case at least 14 days before trial. The record and affidavit may be served by any method permitted by Rule of Civil Procedure 21a.

(B) ***Form of Affidavit.***--An affidavit is sufficient if it includes the following language, but this form is not exclusive. The proponent may use an unsworn declaration made under penalty of perjury in place of an affidavit.

1. I am the custodian of records [*or* I am an employee or owner] of and am familiar with the manner in which its records are created and maintained by virtue of my duties and responsibilities.

2. Attached are pages of records. These are the original records or exact duplicates of original records.

3. The records were made at or near the time of each act, event, condition, opinion, or diagnosis set forth. [*or* It is the regular practice of to make this type of record at or near the time of each act, event, condition, opinion, or diagnosis set forth in the record.]

4. The records were made by, or from information transmitted by, persons with knowledge of the matters set forth. [*or* It is the regular practice of for this type of record to be made by, or from information transmitted by, persons with knowledge of the matters set forth in them.]

5. The records were kept in the course of regularly conducted business activity. [*or* It is the regular practice of to keep this type of record in the course of regularly conducted business activity.]

6. It is the regular practice of the business activity to make the records.

(11) ***Presumptions Under a Statute or Rule.***--A signature, document, or anything else that a statute or rule prescribed under statutory authority declares to be presumptively or prima facie genuine or authentic.

History

EDITOR'S NOTE. --

Texas Supreme Court Misc. Docket No. 13-9022 provides: "Rule of Civil Procedure 91a and Rule of Evidence 902(10)(c) apply to all cases, including those pending on March 1, 2013."

2013 amendment, by G.O. 13-9022, added (10)(c)

2014 amendment, rewrote the introductory paragraph and (10).

Comment to 2013 change by G.O. 13-9022 Rule 902(10)(c) is added to provide a form affidavit for proof of medical expenses. The affidavit is intended to comport with Section 41.0105 of the Civil Practice and Remedies Code, which allows evidence of only those medical expenses that have been paid or will be paid, after any required credits or adjustments. *See Haygood v. Escabedo*, 356 S.W.3d 390 (Tex. 2011). The records attached to the affidavit must also meet the admissibility standard of *Haygood*, 356 S.W.3d at 399--400 ("[O]nly evidence of recoverable medical expenses is admissible at trial.").

(Comment amended by Texas Supreme Court, Misc. Docket No. 13-9043, effective March 26, 2013.)

Comment to 2014 change by G.O. 14-9174 and G.O. 14-003 At the direction of the Legislature, the requirement that records be filed with the court before trial has been removed. *See* Act of May 17, 2013, 83rd Leg., R.S., ch. 560, § 3, 2013 Tex. Gen. Laws 1509, 1510 (SB 679). The word "affidavit" in this rule includes an unsworn declaration made under penalty of perjury. *Tex. Civ. Prac. & Rem. Code* § 132.001. The reference to "any other requirements of law" incorporates the requirements of Sections 18.001 and 18.002 of the Civil Practice and Remedies Code for affidavits offered as prima facie proof of the cost or necessity of services or medical expenses. The form medical expenses affidavit that was added to this rule in 2013 has been removed as unnecessary. It can now be found in Section 18.002(b-1) of the Civil Practice and Remedies Code.

Comment to 2014 Change At the direction of the Legislature, the requirement that records be filed with the court before trial has been removed. *See* Act of May 17, 2013, 83rd Leg., R.S., ch. 560, § 3, 2013 Tex. Gen. Laws 1509, 1510 (SB 679). The word "affidavit" in this rule includes an unsworn declaration made under penalty of perjury. Tex. Civ. Prac. & Rem. Code § 132.001. The reference to "any other requirements of law" incorporates the requirements of Sections 18.001 and 18.002 of the Civil Practice and Remedies Code for affidavits offered as prima facie proof of the cost or necessity of services or medical expenses. The form medical expenses affidavit that was added to this rule in 2013 has been removed as unnecessary. It can now be found in Section 18.002(b-1) of the Civil Practice and Remedies Code.

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 30, *Authentication*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Pre-March 1, 1998 Comment Subdivision (10) is based on portions of the affidavit authentication provisions of TEX. REV. CIV. STAT. ANN. art. 3737e. The most general and comprehensive language from those provisions was chosen. It is intended that this method of authentication shall be available for any kind of regularly kept record that satisfies the requirements of Rule 803(6) and (7), including X-rays, hospital records, or any other kind of regularly kept medical record.

Annotations

Case Notes

Administrative Law : Agency Adjudication : Hearings : Evidence : General Overview
Banking Law : Consumer Protection : Credit Card Agreements : General Overview
Civil Procedure : Summary Judgment : Evidence
Civil Procedure : Summary Judgment : Supporting Materials : General Overview
Civil Procedure : Summary Judgment : Supporting Materials : Affidavits
Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials
Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus

Civil Procedure : Appeals : Records on Appeal
Civil Procedure : Appeals : Standards of Review : Abuse of Discretion
Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule
Contracts Law : Remedies : Specific Performance
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview
Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Elements
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence
Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements
Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : Records
Criminal Law & Procedure : Search & Seizure : Search Warrants : General Overview
Criminal Law & Procedure : Bail : Forfeitures
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing
Criminal Law & Procedure : Counsel : Effective Assistance : Trials
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : General Overview
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History : Prior Felonies
Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History
Criminal Law & Procedure : Sentencing : Imposition : Evidence
Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview
Criminal Law & Procedure : Appeals : Reviewability : Waiver : Waiver Triggers Generally
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Authentication : General Overview
Evidence : Authentication : Self-Authentication
Evidence : Authentication : Chain of Custody
Evidence : Documentary Evidence : Affidavits
Evidence : Documentary Evidence : Writings : General Overview
Evidence : Hearsay : Exceptions : Business Records : General Overview
Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials
Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business
Evidence : Hearsay : Exceptions : Judgments
Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment
Evidence : Hearsay : Exceptions : Public Records : General Overview
Evidence : Hearsay : Exceptions : Public Records : Absence of Records
Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports
Evidence : Hearsay : Exemptions : General Overview
Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements
Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview
Evidence : Procedural Considerations : Rule Application & Interpretation
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : Prior Acts, Crimes & Wrongs
Evidence : Scientific Evidence : Blood Alcohol
Evidence : Scientific Evidence : Fingerprints & Footprints
Evidence : Scientific Evidence : Toxicology
Family Law : Child Custody : Awards : General Overview
Family Law : Marital Termination & Spousal Support : Spousal Support : Obligations : Temporary Support
Family Law : Parental Duties & Rights : Termination of Rights : General Overview
Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

Governments : Courts : Court Records
Military & Veterans Law : Military Justice : Evidence : Writings & Real Evidence
Real Property Law : Financing : Mortgages & Other Security Instruments : Foreclosures
Transportation Law : Bridges & Roads : Turnpikes
Transportation Law : Private Vehicles : Operator Licenses : General Overview

LexisNexis (R) Notes

Administrative Law : Agency Adjudication : Hearings : Evidence : General Overview

1. In a case in which a trial court found in favor of a county that sought to recover from a vehicle owner unpaid tolls due to the county toll road authority, there was no merit in the owner's claim that the judgment entered by the trial court was not supported by the evidence because the county offered, and the trial court properly admitted into evidence, a certified copy of the county's administrative order finding the owner liable, a certified copy of the affidavit and certificate of service, and the toll road authority's records detailing the owner's toll violations and the fee associated with the violations. The county also presented evidence indicating that the owner had been properly served notice of the administrative hearing. Edmiston v. Harris County, 2012 Tex. App. LEXIS 7045, 2012 WL 3612436 (Tex. App. Houston 14th Dist. Aug. 23 2012).

Banking Law : Consumer Protection : Credit Card Agreements : General Overview

2. In a collections case brought by the purchaser of credit card debt, there was no error under Tex. R. Evid. 902(10), 803(6) in admitting business records of the original lender, based on affidavits stating that the affiants were the record custodian and media manager for the purchaser, that the records custodian was personally familiar with how the purchaser prepared and maintained its records, that both affiants had personal knowledge of the business record practices of an intermediate purchaser, and that both vouched for the accuracy of the records that were initially created by the lender. Nice v. Dodeka, L.L.C., 2010 Tex. App. LEXIS 8922, 2010 WL 4514174 (Tex. App. Beaumont Nov. 10 2010).

Civil Procedure : Summary Judgment : Evidence

3. In an action seeking to recover unpaid credit card debt, a debtor's argument that an affidavit submitted by a creditor from a litigation analyst was conclusory was rejected because the affidavit was based on her personal knowledge in her role as a records custodian for the creditor, and the affidavit substantially complied with Tex. R. Evid. 902(10)(b). Therefore, the affidavit was proper summary judgment evidence. McFarland v. Citibank, N.A., 293 S.W.3d 759, 2009 Tex. App. LEXIS 4530 (Tex. App. Waco June 17 2009).

4. In a credit card company's action for breach of contract for a cardholder's failure to pay his credit card debt, a custodian of records for the company properly authenticated the documents referenced in her summary judgment affidavit as "business records" and the affidavit contained sufficient factual support and was not, therefore, conclusory; the cardholder did not present any evidence to raise a fact issue as to whether the documents were properly authenticated business records, and he also failed to identify any statements in the affidavit that he contended were opinions or legal conclusions. Duran v. Citibank (South Dakota), N.A., 2008 Tex. App. LEXIS 2060 (Tex. App. Houston 1st Dist. Mar. 20 2008).

Civil Procedure : Summary Judgment : Supporting Materials : General Overview

5. In a fraud and negligence action, a client was not permitted to raise the issues of authenticity and hearsay on appeal from the grant of summary judgment based on the admission of an employment contract because the client did not obtain a ruling on the objections from the trial court. Yazdchi v. Am. Arbitration Ass'n, 2005 Tex. App. LEXIS

1320 (Tex. App. Houston 1st Dist. Feb. 17 2005).

6. Accompanied by an affidavit complying with Tex. R. Evid. R. 902(10), the appellant subpoenaed records from the police department and business records of regularly conducted activity that were not excluded by the hearsay rule, Tex. R. Evid. 803(6); thus, the trial court abused its discretion in excluding such records from the summary judgment evidence. Spradlin v. State, 100 S.W.3d 372, 2002 Tex. App. LEXIS 8874 (Tex. App. Houston 1st Dist. 2002).

7. Accompanied by an affidavit complying with Tex. R. Evid. R. 902(10), the appellant subpoenaed records from the police department and business records of regularly conducted activity that were not excluded by the hearsay rule, Tex. R. Evid. 803(6); thus, the trial court abused its discretion in excluding such records from the summary judgment evidence. Spradlin v. State, 100 S.W.3d 372, 2002 Tex. App. LEXIS 8874 (Tex. App. Houston 1st Dist. 2002).

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits

8. In an action seeking to recover unpaid credit card debt, a debtor's argument that an affidavit submitted by a creditor from a litigation analyst was conclusory was rejected because the affidavit was based on her personal knowledge in her role as a records custodian for the creditor, and the affidavit substantially complied with Tex. R. Evid. 902(10)(b). Therefore, the affidavit was proper summary judgment evidence. McFarland v. Citibank, N.A., 293 S.W.3d 759, 2009 Tex. App. LEXIS 4530 (Tex. App. Waco June 17 2009).

Civil Procedure : Judgments : Relief From Judgment : Motions for New Trials

9. In a breach of contract case, a trial court did not err by refusing to grant a new trial based on newly discovered evidence; Tex. R. Evid. 901(b)(7) did not require the admission of the evidence since appellant offered no evidence about an Internal Revenue Service document other than his unsworn statement that he received the document in the mail, and it was not authenticated by either certification or any extrinsic evidence. Moreover, the trial court did not err by failing to take judicial notice of the document. Nixon v. GMAC Mortg. Corp., 2009 Tex. App. LEXIS 7350, 2009 WL 2973660 (Tex. App. Dallas Sept. 18 2009).

Civil Procedure : Remedies : Writs : Common Law Writs : Mandamus

10. Mandamus relief was denied to a common law husband who was found in contempt for failing to pay temporary support under Tex. Fam. Code Ann. § 6.502(a)(2) because there was no deprivation of due process based on an alleged failure to allow the husband to present evidence of his inability to pay; the husband was allowed to testify as to the effects of a bankruptcy order, even though the trial court erroneously excluded such under Tex. R. Evid. 902(4). Moreover, his son was permitted to testify, there was no showing that the husband had ever requested a modification of a joint receivership or a bankruptcy court's order in order to allow for the payment of the temporary support, and property held by the husband's claimed "current" wife could have been used to pay the temporary support. In re Small, 2009 Tex. App. LEXIS 3798 (Tex. App. Houston 14th Dist. Feb. 26 2009).

Civil Procedure : Appeals : Records on Appeal

11. In a divorce proceeding, it was not an abuse of discretion to allow the withdrawal from the record of one of the children's passports seven days before the judgment became final; the husband did not inform the appellate court whether there was a proper motion to substitute a duplicate original, either orally or in writing, or whether the action was sua sponte by the trial court. Thomas v. Robert, 2007 Tex. App. LEXIS 1149 (Tex. App. Corpus Christi Feb. 15 2007).

Civil Procedure : Appeals : Standards of Review : Abuse of Discretion

12. Trial court did not abuse its discretion by sustaining a father's objections to admission of an "updated" record, as the objection from the father's attorney prevented the attorney general from authenticating the "updated" record without testifying under oath; when the trial judge sustained the father's objection to the "updated" record, the attorney general had to prove the authenticity of the document by some other means; however, the attorney general made no attempt to call any witnesses to testify at the hearing and the document was not self-authenticating because it was not under seal, a certified copy of a public record, or supported by a business records affidavit. In re K.R., 2007 Tex. App. LEXIS 5756 (Tex. App. Dallas July 23 2007).

Civil Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Harmless Error Rule

13. Even though the trial court abused its discretion by admitting two exhibits containing reports of hair follicle drug tests of appellants under the business records exception to the hearsay rule, as there was insufficient indicia of trustworthiness or reliability, the error was harmless because other evidence that two children and the mother's boyfriend tested positive for cocaine was admitted without objection, and termination of the mother's parental rights did not turn on the admission of the second and third sets of positive drug test results. In the Interest of S.S., 2012 Tex. App. LEXIS 9946, 2012 WL 5991391 (Tex. App. Tyler Nov. 30 2012).

Contracts Law : Remedies : Specific Performance

14. In a collection suit by a creditor that purchased the debt from a credit card company, it was proper to admit, as business records, monthly statements from the credit card company, in part because the documents were shown to be incorporated by the creditor; an employee of the creditor provided an affidavit under Tex. R. Evid. 902(10), stating the documents received from the credit card company were kept by the creditor in the regular course of its business as permanent records of the company. Simien v. Unifund Ccr Partners, 2010 Tex. App. LEXIS 2687, 2010 WL 1492267 (Tex. App. Houston 1st Dist. Apr. 15 2010).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Assault & Battery : General Overview

15. At defendant's trial on unlawful possession of a firearm, enhanced by a conviction of assault against a family member, certified copies of the judgment and sentence of the convicting judge were self-authenticating and admissible as proof of his prior conviction; the defendant's confirmation through testimony that he was the person convicted further established the orders' authenticity. Worley v. State, 2004 Tex. App. LEXIS 3271 (Tex. App. Houston 1st Dist. Apr. 8 2004).

Criminal Law & Procedure : Criminal Offenses : Crimes Against Persons : Domestic Offenses : Domestic Assault : Elements

16. In a family violence assault case under Tex. Penal Code Ann. § 22.01(b)(2)(A), the evidence was legally insufficient to support a jury's finding that defendant previously was convicted of an assault involving family violence, although there were some discrepancies in the documents. Burks v. State, 2013 Tex. App. LEXIS 6340 (Tex. App. Tyler May 22 2013).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence

17. Trial court properly admitted defendant's blood test results included in his hospital records following the crash; the State established the beginning and end of a proper chain of custody because a nurse testified that she drew defendant's blood that day pursuant to the treating physician's orders and a custodian of records established under Tex. R. Evid. 902(10) that the records were made at the time of the event, by a person with knowledge, and that

they were kept in the regular course of business by the hospital. Gallagher v. State, 2013 Tex. App. LEXIS 5125, 2013 WL 1800198 (Tex. App. Corpus Christi Apr. 25 2013).

Criminal Law & Procedure : Criminal Offenses : Vehicular Crimes : Driving Under the Influence : Elements

18. In a driving while intoxicated case, there was no error in refusing, under Tex. R. Evid. 902, to admit the records of a speech therapist and a medical doctor because the business records did not contain a certificate of service and the clerk's record did not contain any other document showing service of the documents on the State, which the prosecutor stated she had not seen. Wasserloos v. State, 2010 Tex. App. LEXIS 3144, 2010 WL 1711753 (Tex. App. Beaumont Apr. 28 2010).

Criminal Law & Procedure : Juvenile Offenders : Juvenile Proceedings : Records

19. Judgments from defendant's earlier juvenile cases were properly admitted at a punishment hearing, even though they did not contain seals, as discussed in Tex. R. Evid. 902(1), (2), and (4), because they contained a certification showing that they were from the clerk's office in the county of the juvenile court and thus were properly authenticated under Tex. R. Evid. 901(b)(7). Hull v. State, 172 S.W.3d 186, 2005 Tex. App. LEXIS 6502 (Tex. App. Dallas 2005).

20. Juvenile court order granting probation was properly self-authenticated under Tex. R. Evid. 902(1) and could be admitted at the punishment hearing for a subsequent crime because the order contained the seal of the county court and the signature of the juvenile court clerk. Hull v. State, 172 S.W.3d 186, 2005 Tex. App. LEXIS 6502 (Tex. App. Dallas 2005).

Criminal Law & Procedure : Search & Seizure : Search Warrants : General Overview

21. Defendant's challenge to the denial of her motion to suppress was rejected because the trial court did not abuse its discretion by admitting a certified copy of the search warrant and affidavit under Tex. R. Evid. 902(4). Mayfield v. State, 2010 Tex. App. LEXIS 6037 (Tex. App. Waco July 28 2010).

Criminal Law & Procedure : Bail : Forfeitures

22. In a forfeiture hearing, because the certified copy of the bail bond was a self-authenticated public record, no further authentication was required; additionally, the surety's hearsay objection failed because a public record fell under the hearsay exception. Thus, the trial court did not err in admitting the bail bond into evidence as a public record. Williams v. State, 2005 Tex. App. LEXIS 6363 (Tex. App. Corpus Christi Aug. 11 2005).

23. Trial court did not err in admitting a certified copy of a bail bond into evidence as a public record. Pursuant to Tex. R. Evid. 1005, a copy of a public record, such as a bail bond, was admissible in place of an original where the copy is certified in accordance with Tex. R. Evid. 902. Williams v. State, 2005 Tex. App. LEXIS 6377 (Tex. App. Corpus Christi Aug. 11 2005).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

24. Defendant's challenge to the denial of her motion to suppress was rejected because the trial court did not abuse its discretion by admitting a certified copy of the search warrant and affidavit under Tex. R. Evid. 902(4). Mayfield v. State, 2010 Tex. App. LEXIS 6037 (Tex. App. Waco July 28 2010).

25. At the hearing on defendant's motion to suppress intoxilyzer results, the State was permitted to offer into evidence unsworn police reports detailing defendant's arrest for driving while intoxicated. The rules of evidence do not apply in suppression hearings. Caballero v. State, 2005 Tex. App. LEXIS 1865 (Tex. App. El Paso Mar. 10 2005).

Criminal Law & Procedure : Counsel : Effective Assistance : Sentencing

26. Defense counsel was not rendered ineffective by failing to object to the admission of a penitentiary packet because penitentiary packets were admissible as an exception to the hearsay rule if they were properly authenticated as public records, as provided by Tex. R. Evid. 803(8), 901(b)(7), 902(4). Henderson v. State, 2006 Tex. App. LEXIS 5911 (Tex. App. Tyler June 30 2006).

Criminal Law & Procedure : Counsel : Effective Assistance : Trials

27. Trial counsel was not ineffective as the record was silent as to why trial counsel did not file any pretrial motions and the State was entitled to allege all of defendant's prior convictions; any failure to object to documents admitted as evidence of defendant's prior convictions was not ineffective assistance because the documents at issue were either properly admitted under Tex. R. Evid. 902(4) or clearly harmless. Bartee v. State, 2011 Tex. App. LEXIS 2843 (Tex. App. Fort Worth Apr. 14 2011).

28. There was no merit to defendant's claim that trial counsel was ineffective during defendant's trial for aggravated robbery, enhanced by three prior felony convictions, for failing to file a motion to suppress and/or objecting at trial to the admission of the business records of defendant's employer, along with an affidavit of the custodian of records of the employer that tracked verbatim Tex. R. Evid. 902, and even though the records were not physically attached to the affidavit in the clerk's record but were included in the record of exhibits, defendant was not harmed because his girlfriend testified before the jury that he was not at work on the date of the incident. Delgado v. State, 2008 Tex. App. LEXIS 2463 (Tex. App. Houston 1st Dist. Apr. 3 2008).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : General Overview

29. Where the state offered proof as to a defendant's prior convictions alleged by certified copies of the judgment and sentence in each case under Tex. R. Evid. 902, and offered the testimony of a fingerprint expert who testified that the defendant's known fingerprints were identical to the fingerprints on the certified copies of the judgment and sentences, the prior convictions alleged for enhancement of punishment purposes were properly proved. Ball v. State, 2002 Tex. App. LEXIS 6293 (Tex. App. Austin Aug. 30 2002).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History

30. Court properly admitted records from the Williamson County Clerk's Office with regard to defendant's prior convictions for assault, theft, and unlawful use of a criminal instrument because they were certified court records. Hooper v. State, 2009 Tex. App. LEXIS 7880, 2009 WL 3230842 (Tex. App. Austin Oct. 9 2009).

31. Where defendant was indicted as a habitual felony offender for the unlawful possession of a firearm by a felon, the indictment contained enhancement paragraphs alleging that defendant had prior felony convictions. The State proved his prior convictions by introducing as exhibits two pen packets that were certified by the custodian of records from the Texas Department of Criminal Justice; the pen packets were self-authenticating for purposes of Tex. R. Evid. 901, 902. Harden v. State, 2009 Tex. App. LEXIS 1578, 2009 WL 539379 (Tex. App. Beaumont Mar. 4 2009).

32. Although a North Carolina penitentiary packet lacked certified documentation from the sentencing court, it was properly authenticated and contained sufficient evidence of a final conviction of the enhancement offense; hence, it was admissible as the functional equivalent of a properly certified judgment and sentence. Martin v. State, 227 S.W.3d 335, 2007 Tex. App. LEXIS 3445 (Tex. App. Houston 1st Dist. 2007).

33. Where defendant was convicted for indecency with a child, the State was permitted to admit his pen packet into evidence during the punishment phase of trial; the pen packet was self-authenticated via certification as to its accuracy by the custodian; Tex. R. Evid. 902(4) has no notice requirement. Sharp v. State, 210 S.W.3d 835, 2006 Tex. App. LEXIS 11033 (Tex. App. Amarillo 2006).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History

34. True and correct extract copy of Louisiana court minutes regarding defendant's Louisiana conviction was attested to by the deputy clerk of court in Iberia Parish and included details regarding the court, parish, case number, date, defendant's name, defendant's birth date, defendant's plea of guilty to sexual battery, and defendant's sentence to five years at hard labor. Such extract clearly was admissible under Tex. R. Evid. 902 to prove the prior conviction. Castle v. State, 402 S.W.3d 895, 2013 Tex. App. LEXIS 6883 (Tex. App. Houston 14th Dist. June 6 2013).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History : Prior Felonies

35. Court properly admitted defendant's out of state pen packet as proof of defendant's prior felony where the court minutes, the statement of suspensive appeal, and the warrant of commitment appeared to have originally been executed under official seal, and the attestations in the documents that defendant had been found guilty of a felony offense, he had been sentenced to twenty-one years, and he had not appealed the judgment and sentence, were sufficient to establish his prior felony conviction. White v. State, 2005 Tex. App. LEXIS 7226 (Tex. App. Fort Worth Aug. 31 2005).

36. At defendant's trial on unlawful possession of a firearm, enhanced by a conviction of assault against a family member, certified copies of the judgment and sentence of the convicting judge were self-authenticating and admissible as proof of his prior conviction; the defendant's confirmation through testimony that he was the person convicted further established the orders' authenticity. Worley v. State, 2004 Tex. App. LEXIS 3271 (Tex. App. Houston 1st Dist. Apr. 8 2004).

37. Where the state offered proof as to a defendant's prior convictions alleged by certified copies of the judgment and sentence in each case under Tex. R. Evid. 902, and offered the testimony of a fingerprint expert who testified that the defendant's known fingerprints were identical to the fingerprints on the certified copies of the judgment and sentences, the prior convictions alleged for enhancement of punishment purposes were properly proved. Ball v. State, 2002 Tex. App. LEXIS 6293 (Tex. App. Austin Aug. 30 2002).

Criminal Law & Procedure : Sentencing : Guidelines : Adjustments & Enhancements : Criminal History

38. Packet of papers relating to defendant's prior conviction was properly certified pursuant to Tex. R. Evid. 902(4) where each page had a stamp purporting to be the seal of the county clerk and attesting the page to be a true and correct copy of the original filed in the clerk's office and one page of the packet bore an attestation signed and dated by a deputy clerk from that office. McCray v. State, 2004 Tex. App. LEXIS 1166 (Tex. App. Waco Feb. 4 2004).

Criminal Law & Procedure : Sentencing : Imposition : Evidence

39. Trial court did not err in admitting certain juvenile court judgments where the judgments were generally admissible under Tex. R. Evid. 902(4) because they consisted of certified copies of public records, certified as correct by their custodian, and, therefore, self-authenticating, and where there was ample evidence that defendant was the person named in the judgments because the prior convictions were linked to defendant via (1) his name, (2) his birth date, (3) his mother's name, and (4) his signature, which appeared on his two written statements, the authenticity of which had not been contested. While the jury was not specifically requested to compare the signatures on the written statements with those appearing on the prior convictions, the jury was free to do so in order to assist in the determination of whether or not defendant was indeed the same individual listed in the prior convictions. Benton v. State, 336 S.W.3d 355, 2011 Tex. App. LEXIS 845 (Tex. App. Texarkana Feb. 4 2011).

40. Affidavits attached to two exhibits (including a pen pack and defendant's jail records) included a certification by their custodian that the documents were true and correct copies of the original records on file in the office and maintained in the regular course of business within the Bureau of Classification and Records of the Texas Department of Criminal Justice -- Correctional Institutions Division and the Tarrant County Sheriff's Department; thus, the affidavits sufficiently authenticated those exhibits under Tex. R. Evid. 902(4). Because Tex. R. Evid. 902(4) did not contain a notice requirement, the exhibits were properly admitted into evidence during the punishment phase of the trial even though defendant had no notice of the exhibits. Garza v. State, 2007 Tex. App. LEXIS 7194 (Tex. App. Corpus Christi Aug. 28 2007).

41. Where defendant was charged with driving while intoxicated, during the punishment phase the State was permitted to offer a computer-generated printout of his prior conviction record from Dallas County, Texas; the county record was self-authenticating under Tex. R. Evid. 902. Flowers v. State, 220 S.W.3d 919, 2007 Tex. Crim. App. LEXIS 428 (Tex. Crim. App. 2007).

42. Court properly admitted defendant's out of state pen packet as proof of defendant's prior felony where the court minutes, the statement of suspensive appeal, and the warrant of commitment appeared to have originally been executed under official seal, and the attestations in the documents that defendant had been found guilty of a felony offense, he had been sentenced to twenty-one years, and he had not appealed the judgment and sentence, were sufficient to establish his prior felony conviction. White v. State, 2005 Tex. App. LEXIS 7226 (Tex. App. Fort Worth Aug. 31 2005).

43. There was no evidence supporting an enhanced punishment for driving while intoxicated under Tex. Penal Code Ann. §§ 49.04, 49.09 where nothing in the record supported a contention that a computer-generated case synopsis represented a judgment of conviction to prove a prior conviction. Blank v. State, 172 S.W.3d 673, 2005 Tex. App. LEXIS 10714 (Tex. App. San Antonio 2005).

44. In the punishment phase of defendant's murder case, a court did not err by in admitting medical records where a registered nurse testified that she treated defendant's boyfriend for a stab wound in 2000, she recognized the medical record, she was one of the registered nurses involved in the trauma, her handwriting was on the record, she had probably directed a co-worker to take notes, and she signed the bottom of the record. The nurse testified that the medical records were kept as part of the records of the hospital. Williams v. State, 176 S.W.3d 476, 2004 Tex. App. LEXIS 10561 (Tex. App. Houston 1st Dist. 2004).

Criminal Law & Procedure : Postconviction Proceedings : Sex Offenders : General Overview

45. Defendant was improperly convicted of failing to register as a sex offender under Tex. Code Crim. Proc. Ann. art. 62.10 because the State did not authenticate an Illinois penitentiary packet, as required by Tex. R. Evid. 902, and thus did not prove that defendant had been convicted of an offense that required him to register as a sex

offender. The improper admission affected defendant's substantial rights and required reversal because proof of a prior conviction for a reportable offense was an essential element of failing to register, and the penitentiary packet was the only evidence the State relied upon to prove that element. Banks v. State, 158 S.W.3d 649, 2005 Tex. App. LEXIS 1838 (Tex. App. Houston 14th Dist. 2005).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : General Overview

46. By not objecting, defendant failed to preserve error regarding his complaint that the prosecutor engaged in misconduct when he represented to the trial court that a business record affidavit serving as the predicate for admission of a 911 call tape had been on file with the court for 14 days. Bailey v. State, 2006 Tex. App. LEXIS 1267 (Tex. App. Houston 14th Dist. Feb. 16 2006).

Criminal Law & Procedure : Appeals : Reviewability : Waiver : Waiver Triggers Generally

47. Even though a pen packet from New Mexico was properly admitted under Tex. R. Evid. 902 because no seal was required, defendant waived any objection relating to admissibility when he took the stand and testified about his own convictions; an exception did not apply because defendant was not trying to deny or rebut the evidence. Williams v. State, 2008 Tex. App. LEXIS 2241 (Tex. App. Austin Mar. 28 2008).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

48. district court did not abuse its discretion by admitting into evidence the victim's medical records Even though Tex. R. Evid. 902 was not complied with because: (1) although the clerk's office refused to keep the records, the State attempted to file the records well before the rule's deadline; (2) the State informed defendant that the documents were in the district attorney's office and defense counsel reviewed the documents there before trial; (3) when the district court was informed, it gave defendant permission to take the documents home to review before they were admitted into evidence; and (4) defendant made no allegation that the documents had been altered. Even if the district court erred by admitting the records, it was harmless because the same information contained in the medical records was related to the jury without objection through other exhibits and witnesses' testimony. Davis v. State, 2012 Tex. App. LEXIS 7074, 2012 WL 3601168 (Tex. App. Austin Aug. 16 2012).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

49. In an aggravated sexual assault case, an error in admitting improperly authenticated evidence of defendant's juvenile criminal history was harmless because the grandmother found the child on the bed, bleeding and unconscious, with defendant asleep on the floor with his belt unbuckled, zipper down, and the front of his pants wet. Blood on defendant's pants belonged to the child, and DNA on a diaper discovered the next day in the same bedroom belonged to both the child and defendant. Rangel v. State, 2009 Tex. App. LEXIS 1555, 2009 WL 540780 (Tex. App. Waco Mar. 4 2009).

Evidence : Authentication : General Overview

50. Exhibit should not have been excluded on the basis of the hearsay objection, because the business records affidavit made by the custodian of records precisely tracked the requirements in Tex. R. Evid. 902(10). Cabot Oil & Gas Corp. v. Healey, L.P., 2013 Tex. App. LEXIS 3934 (Tex. App. Tyler Mar. 28 2013).

51. Because appellant did not show that records were or could have been properly authenticated, the trial court did not err in excluding them. Mathis v. State, 397 S.W.3d 332, 2013 Tex. App. LEXIS 4110, 2013 WL 1313775 (Tex. App. Dallas Mar. 28 2013).

52. Fact that the reinsurer did not take advantage of the procedure in Tex. R. Evid. 902 was not determinative of whether the judgments were properly authenticated because the reinsurer could have properly authenticated the judgments in accordance with Tex. R. Evid. 901. N.H. Ins. Co. v. Magellan Reinsurance Co., 2013 Tex. App. LEXIS 194, 2013 WL 105654 (Tex. App. Fort Worth Jan. 10 2013).

53. In a forcible detainer action, a business records affidavit that authenticated the notice to vacate was not inadmissible hearsay under Tex. R. Evid. 801(d) because it substantially complied with the requirements of Tex. R. Evid. 803(6), 902(10), although it did not precisely track the language of Rule 902(10). Although the affidavit was prepared by a third party, the foreclosure purchaser's law firm, the trial court could have concluded that the purchaser reasonably relied on the accuracy of the records in the ordinary course of its business and that they were trustworthy. Baty v. Morequity, Inc., 2012 Tex. App. LEXIS 9876 (Tex. App. Houston 1st Dist. Nov. 29 2012).

54. Relator failed to provide a record sufficient to establish his right to mandamus relief under Tex. R. App. P. 52.7(a) to obtain additional jail-time credit, because a computer printout suggested a detainer was placed on relator by the sheriff's office for the charged offense; however, the length of time the detainer was placed on relator was not clear. The copy of the computer printout included in the record did not appear to be a certified copy as required by Tex. R. Evid. 902(4). In re Garza, 2012 Tex. App. LEXIS 1307 (Tex. App. Houston 1st Dist. Feb. 15 2012).

55. Summary judgment in favor of the customer was proper, because the bank failed to create a genuine issue of material fact as to whether a contract existed or whether the customer authorized the charges to the credit card account, when the bank's only summary judgment evidence was inadmissible; since the bank's affidavit neither named the affiant in the body of the affidavit or the jurat, and the affiant's signature was completely illegible, the bank's affidavit did not substantially comply with Tex. R. Evid. 902(10) and was insufficient to establish the business records exception to the hearsay rule under Tex. R. Evid. 803(6). Fia Card Services, N.A. v. Frausto, 2011 Tex. App. LEXIS 9924, 2011 WL 6260653 (Tex. App. Amarillo Dec. 15 2011).

56. Defendant's objection to a certified copy of a prior federal judgment convicting him of two felonies as unauthenticated had no merit because the Texas Rules of Evidence allowed the trial court to admit a certified copy of a public record as properly authenticated.. Rowell v. State, 2011 Tex. App. LEXIS 6596, 2011 WL 3612297 (Tex. App. Houston 1st Dist. Aug. 18 2011).

57. Admission of inadequately authenticated cell phone records under Tex. R. Evid. 902(10) was error, but the error was harmless under Tex. R. App. P. 44.2(b); although the State's case might have been less persuasive without the records, other properly admitted evidence linking appellant to the cell phone numbers tended to negate the likelihood that the jury's guilty verdict relied in any significant way on the records. Bible v. State, 2011 Tex. App. LEXIS 3737, 2011 WL 1902021 (Tex. App. Waco May 11 2011).

58. Each of the affidavits submitted by the county and the city showed that they were not conclusory but supported the affirmative defense of the statute of limitations, and each affidavit was based on the personal knowledge of the affiant, and those affidavits submitting records substantially complied with Tex. R. Evid. 902(10)(b) and properly authenticated the relevant business records, Tex. R. Evid. 901(10)(b). Rameses Sch., Inc. v. City of San Antonio, 2011 Tex. App. LEXIS 2552, 2011 WL 1312279 (Tex. App. Houston 14th Dist. Apr. 7 2011).

59. In a suit to recover a credit-card debt, the debtor failed to preserve for review under Tex. R. App. P. 33.1(a)(2) his objections to an affidavit because he did not obtain a ruling; and in any event, the affidavit was sufficiently authenticated as a business record under Tex. R. Evid. 803(6), 902(10) by the affiant's testimony about her personal knowledge of account records. Singh v. Citibank (south Dakota), N.A., 2011 Tex. App. LEXIS 2161, 2011 WL 1103788 (Tex. App. Austin Mar. 24 2011).

60. Affidavits substantially comported with the form provided by Tex. R. Evid. 902(10)(b), and both were accompanied by business records; because the affidavits complied with Rule 902(10), the trial court did not abuse its discretion by admitting them. Wood v. Pharia L.L.C., 2010 Tex. App. LEXIS 9819, 2010 WL 5060621 (Tex. App. Houston 1st Dist. Dec. 9 2010).

61. Because a creditor's trial exhibit satisfied the requirements for the admission of third-party business records and because the challenged affidavits satisfied the requirements of Tex. R. Evid. 902(10), the trial court did not abuse its discretion in overruling hearsay objections. Wood v. Pharia L.L.C., 2010 Tex. App. LEXIS 9819, 2010 WL 5060621 (Tex. App. Houston 1st Dist. Dec. 9 2010).

62. Affidavits were not conclusory because they substantially complied with Tex. R. Evid. 902(10), and as such could properly serve to authenticate business records. Wood v. Pharia L.L.C., 2010 Tex. App. LEXIS 9819, 2010 WL 5060621 (Tex. App. Houston 1st Dist. Dec. 9 2010).

63. Court did not abuse its discretion in failing to exclude the bank witness's affidavit and attachments, because the witness's testimony adequately demonstrated the basis for her personal knowledge of the manner in which the bank kept its records and the other facts to which she testified; Texas Rules of Evidence did not require that the qualified witness who provided the predicate for the admission of business records be their creator or have personal knowledge of the contents of the record, when the witness was required only to have personal knowledge of the manner in which the records were kept. Damron v. Citibank (s.D.) N.A., 2010 Tex. App. LEXIS 7054, 2010 WL 3377777 (Tex. App. Austin Aug. 25 2010).

64. Because defendant's former girlfriend had personal knowledge of the things depicted in the video, she could authenticate them, and she was not required to have been present when the video was made to be able to authenticate it, for purposes of Tex. R. Evid. 901(a), 902(b)(1), (5), and the trial court did not abuse its discretion in finding that the video was authenticated by the girlfriend. George v. State, 2010 Tex. App. LEXIS 2425, 2010 WL 1269676 (Tex. App. Waco Mar. 31 2010).

65. Court properly admitted records from the Williamson County Clerk's Office with regard to defendant's prior convictions for assault, theft, and unlawful use of a criminal instrument because they were certified court records. Hooper v. State, 2009 Tex. App. LEXIS 7880, 2009 WL 3230842 (Tex. App. Austin Oct. 9 2009).

66. Trial court erred in admitting the complained-of documents, because there was no indication that the business knew of the events recorded on the third-party documents, when the witness testified about the telemarketing application, he stated that the information was inputted by someone at the company, although he had no personal information about how the information was inputted or how the information was obtained, and the same observation could be made about the account statements and the cardholder agreement. Riddle v. Unifund Ccr Patrns, 298 S.W.3d 780, 2009 Tex. App. LEXIS 7805 (Tex. App. El Paso Oct. 7 2009).

67. In a breach of contract case, a trial court did not err by refusing to grant a new trial based on newly discovered evidence; Tex. R. Evid. 901(b)(7) did not require the admission of the evidence since appellant offered no evidence about an Internal Revenue Service document other than his unsworn statement that he received the document in the mail, and it was not authenticated by either certification or any extrinsic evidence. Moreover, the trial court did not err by failing to take judicial notice of the document. Nixon v. GMAC Mortg. Corp., 2009 Tex. App. LEXIS 7350, 2009 WL 2973660 (Tex. App. Dallas Sept. 18 2009).

68. In defendant's driving while intoxicated trial, hospital records met the business records exception under Tex. R. Evid. 803(6), given that (1) the record indicated that a nurse drew defendant's blood, (2) the record appeared to constitute the nurse's summary of all the procedures she performed, including the blood draw, and (3) the record

contained the State's notice of intent to offer business records and an affidavit from the custodian of records, which was in substantially the same format as that listed in Tex. R. Evid. 902(10)(b). Patel v. State, 2009 Tex. App. LEXIS 3575, 2009 WL 1425219 (Tex. App. Fort Worth May 21 2009).

69. In an aggravated sexual assault case, an error in admitting improperly authenticated evidence of defendant's juvenile criminal history was harmless because the grandmother found the child on the bed, bleeding and unconscious, with defendant asleep on the floor with his belt unbuckled, zipper down, and the front of his pants wet. Blood on defendant's pants belonged to the child, and DNA on a diaper discovered the next day in the same bedroom belonged to both the child and defendant. Rangel v. State, 2009 Tex. App. LEXIS 1555, 2009 WL 540780 (Tex. App. Waco Mar. 4 2009).

70. Objections that an affidavit failed to meet the business records exception and did not satisfy Tex. R. Evid. 902(10) were objections to the form of the affidavit and had to be timely raised in the trial court to be raised on appeal. A.J. Morris, M.D., P.A. v. De Lage Landen Fin. Servs., 2009 Tex. App. LEXIS 457, 2009 WL 161065 (Tex. App. Fort Worth Jan. 22 2009).

71. In defendant's aggravated robbery case, the juvenile court properly admitted a statement about the victim being "struck with a rock" that was contained in the medical records because the medical records satisfied the business records exception, the document was signed by the treating physician, and the medical records included an affidavit by the custodian of records for the hospital, who averred that she had personal knowledge of the manner in which the records were prepared. In re B. P. S., 2008 Tex. App. LEXIS 6028 (Tex. App. Austin Aug. 6 2008).

72. Regarding an exhibit that contained a judicial record log and drop cards, a sheriff's office records and identification section employee testified that he knew what the exhibit was, that he was the custodian of the records of the drop cards, and that the fingerprints thereon matched defendant; the employee's testimony, along with the trial court's examination of the contents of the exhibit and the implicit determination that the document was what the State claimed it to be, satisfied the authentication requirement for purposes of Tex. R. Evid. 901. Martinez v. State, 2008 Tex. App. LEXIS 3115 (Tex. App. El Paso Apr. 30 2008).

73. Both the custodian of medical records and the witness who performed the test in question were qualified to testify to the authenticated records; because the test came into evidence through the witness's testimony without objection, any error in the admission of the exhibit was cured. Cline v. State, 2008 Tex. App. LEXIS 2242 (Tex. App. Austin Mar. 26 2008).

74. In a credit card company's action for breach of contract for a cardholder's failure to pay his credit card debt, a custodian of records for the company properly authenticated the documents referenced in her summary judgment affidavit as "business records" and the affidavit contained sufficient factual support and was not, therefore, conclusory; the cardholder did not present any evidence to raise a fact issue as to whether the documents were properly authenticated business records, and he also failed to identify any statements in the affidavit that he contended were opinions or legal conclusions. Duran v. Citibank (South Dakota), N.A., 2008 Tex. App. LEXIS 2060 (Tex. App. Houston 1st Dist. Mar. 20 2008).

75. Creditor's record custodian authenticated certain documents as business records under Tex. R. Evid. 902, and thus the court rejected the challenge to the custodian's affidavit for summary judgment purposes. Sikander Ghia v. Am. Express Travel Related Servs., 2007 Tex. App. LEXIS 8194 (Tex. App. Houston 14th Dist. Oct. 11 2007).

76. Although a debtor argued that account statements were hearsay, the record custodian properly authenticated them under Tex. R. Evid. 902 as business records under Tex. R. Evid. 803 and the debtor presented no supporting

argument that the statements lacked trustworthiness. Sikander Ghia v. Am. Express Travel Related Servs., 2007 Tex. App. LEXIS 8194 (Tex. App. Houston 14th Dist. Oct. 11 2007).

77. Order awarding summary judgment to a mortgagee in its action against mortgagors to foreclose a lien on property was upheld where an affidavit from the mortgagee's custodian of records about the default was sufficient summary judgment evidence; the custodian, in the affidavit, was not required to recite the exact words that appeared in Tex. R. Evid. 902. Kyle v. Countrywide Home Loans, Inc., 232 S.W.3d 355, 2007 Tex. App. LEXIS 6667 (Tex. App. Dallas 2007).

78. Judgments from defendant's earlier juvenile cases were properly admitted at a punishment hearing, even though they did not contain seals, as discussed in Tex. R. Evid. 902(1), (2), and (4), because they contained a certification showing that they were from the clerk's office in the county of the juvenile court and thus were properly authenticated under Tex. R. Evid. 901(b)(7). Hull v. State, 172 S.W.3d 186, 2005 Tex. App. LEXIS 6502 (Tex. App. Dallas 2005).

79. Juvenile court order granting probation was properly self-authenticated under Tex. R. Evid. 902(1) and could be admitted at the punishment hearing for a subsequent crime because the order contained the seal of the county court and the signature of the juvenile court clerk. Hull v. State, 172 S.W.3d 186, 2005 Tex. App. LEXIS 6502 (Tex. App. Dallas 2005).

80. Trial court did not err in admitting a certified copy of a bail bond into evidence as a public record. Pursuant to Tex. R. Evid. 1005, a copy of a public record, such as a bail bond, was admissible in place of an original where the copy is certified in accordance with Tex. R. Evid. 902. Williams v. State, 2005 Tex. App. LEXIS 6377 (Tex. App. Corpus Christi Aug. 11 2005).

81. In a child sexual assault case, the admission of defendant's medical records under Tex. R. Evid. 803(6) was proper because the records were properly authenticated by their custodian in accordance with Tex. R. Evid. 902(10) as having been made and kept in the course of a regularly conducted business activity. Eslora v. State, 2005 Tex. App. LEXIS 2564 (Tex. App. San Antonio Apr. 6 2005).

82. At the hearing on defendant's motion to suppress intoxilyzer results, the State was permitted to offer into evidence unsworn police reports detailing defendant's arrest for driving while intoxicated. The rules of evidence do not apply in suppression hearings. Caballero v. State, 2005 Tex. App. LEXIS 1865 (Tex. App. El Paso Mar. 10 2005).

83. Defendant was improperly convicted of failing to register as a sex offender under Tex. Code Crim. Proc. Ann. art. 62.10 because the State did not authenticate an Illinois penitentiary packet, as required by Tex. R. Evid. 902, and thus did not prove that defendant had been convicted of an offense that required him to register as a sex offender. The improper admission affected defendant's substantial rights and required reversal because proof of a prior conviction for a reportable offense was an essential element of failing to register, and the penitentiary packet was the only evidence the State relied upon to prove that element. Banks v. State, 158 S.W.3d 649, 2005 Tex. App. LEXIS 1838 (Tex. App. Houston 14th Dist. 2005).

84. In a fraud and negligence action, a client was not permitted to raise the issues of authenticity and hearsay on appeal from the grant of summary judgment based on the admission of an employment contract because the client did not obtain a ruling on the objections from the trial court. Yazdchi v. Am. Arbitration Ass'n, 2005 Tex. App. LEXIS 1320 (Tex. App. Houston 1st Dist. Feb. 17 2005).

85. In a domestic assault case in which defendant was found to be a habitual offender, the judgment and docket sheets from a prior assault offense were properly admitted because they contained the proper embossed seal pursuant to Tex. R. Evid. 902(1). Stanley v. State, 2004 Tex. App. LEXIS 10917 (Tex. App. Fort Worth Dec. 2 2004).

86. In the punishment phase of defendant's murder case, a court did not err by in admitting medical records where a registered nurse testified that she treated defendant's boyfriend for a stab wound in 2000, she recognized the medical record, she was one of the registered nurses involved in the trauma, her handwriting was on the record, she had probably directed a co-worker to take notes, and she signed the bottom of the record. The nurse testified that the medical records were kept as part of the records of the hospital. Williams v. State, 176 S.W.3d 476, 2004 Tex. App. LEXIS 10561 (Tex. App. Houston 1st Dist. 2004).

87. At defendant's trial on unlawful possession of a firearm, enhanced by a conviction of assault against a family member, certified copies of the judgment and sentence of the convicting judge were self-authenticating and admissible as proof of his prior conviction; the defendant's confirmation through testimony that he was the person convicted further established the orders' authenticity. Worley v. State, 2004 Tex. App. LEXIS 3271 (Tex. App. Houston 1st Dist. Apr. 8 2004).

Evidence : Authentication : Self-Authentication

88. True and correct extract copy of Louisiana court minutes regarding defendant's Louisiana conviction was attested to by the deputy clerk of court in Iberia Parish and included details regarding the court, parish, case number, date, defendant's name, defendant's birth date, defendant's plea of guilty to sexual battery, and defendant's sentence to five years at hard labor. Such extract clearly was admissible under Tex. R. Evid. 902 to prove the prior conviction. Castle v. State, 402 S.W.3d 895, 2013 Tex. App. LEXIS 6883 (Tex. App. Houston 14th Dist. June 6 2013).

89. Pen packet had the appropriate certificate from the records manager and thus met the evidence rules, including Tex. R. Evid. 901(a), 902(4), for authentication and certification, and appellant did not dispute that the documents were true and correct copies, such that the trial court was within its discretion in admitting the pen packet into evidence. Smith v. State, 401 S.W.3d 915, 2013 Tex. App. LEXIS 6416 (Tex. App. Texarkana May 24 2013).

90. Revocation of community supervision was proper, because the copy of the Oklahoma charging document was admissible under Tex. R. Evid. 902(4), when the copy bore facsimile information, as well as a seal and certification as a true copy of a record maintained by the clerk; the Oklahoma pen packet contained a photograph, permitting the trial court to compare the visage depicted with the petitioner's in open court. Ford v. State, 2013 Tex. App. LEXIS 6028 (Tex. App. Amarillo May 15 2013).

91. Probate court did not abuse its discretion in admitting the 1993 tax return into evidence because the certified public accountant's affidavit met the requirements of Tex. R. Evid. 803(6) and the affidavit and tax return were timely filed pursuant to Tex. R. Evid. 902(10). In the affidavit, the accountant affirmed that he was the custodian of records, that the 12 pages consisted of the 1993 1040 U.S. Individual Income Tax Return and the decedent's W-2, that the 12 pages were kept by him in the regular course of business, and that the records were made at or near the time or reasonably soon thereafter, and that the records were the original or exact duplicates of the original. Valdez v. Hollenbeck, 410 S.W.3d 1, 2013 Tex. App. LEXIS 4998 (Tex. App. San Antonio Apr. 24 2013).

92. Trial court did not abuse its discretion by admitting jail records into evidence they were certified copies of public records and therefore they were self-authenticating under Tex. R. Evid. 902(4). Capps v. State, 2013 Tex.

App. LEXIS 4438 (Tex. App. Dallas Apr. 5 2013).

93. Trial court did not abuse its discretion in admitting the mortgage company's evidence where the agent's affidavit complied with Tex. R. Evid. 902(10) by averring to facts that satisfied Tex. R. Evid. 803(6); the agent averred that she was providing the records as the custodian, that she had personal knowledge of the information contained in the records, that the records were made in the regular course of business, and that it was the regular practice of the business to keep such records. Khalilnia v. Fed. Home Loan Mortg. Corp., 2013 Tex. App. LEXIS 2991, 2013 WL 1183311 (Tex. App. Houston 1st Dist. Mar. 21 2013).

94. Insurance company documents were presented as business records pursuant to Tex. R. Evid. 803(6) and the cell phone documents were presented pursuant to Tex. R. Evid. 902 with the accompanying affidavit; because the documents were produced in the normal and regular course of business of the entity that kept the records, defendant was not denied his right of confrontation. Lozoya v. State, 2013 Tex. App. LEXIS 1973, 2013 WL 708489 (Tex. App. Amarillo Feb. 27 2013).

95. Business record affidavit had 21 pages of documents attached, including certain affidavits, and although they were notarized and therefore self-authenticating, they could still be inadmissible if they were hearsay. Ortega v. Cach, Llc, 396 S.W.3d 622, 2013 Tex. App. LEXIS 830, 2013 WL 326317 (Tex. App. Houston 14th Dist. Jan. 29 2013).

96. Authenticity of a copy of a bail bond admitted into evidence was shown both because it was a certified copy of an official record and because the deputy district clerk compared it to the bond contained within the clerk's file while testifying. The copy of the bond was therefore admissible under Tex. R. Evid. 902(4) and Tex. R. Evid. 1005. Guiles v. State, 2013 Tex. App. LEXIS 675, 2013 WL 257368 (Tex. App. Fort Worth Jan. 24 2013).

97. Fact that the reinsurer did not take advantage of the procedure in Tex. R. Evid. 902 was not determinative of whether the judgments were properly authenticated because the reinsurer could have properly authenticated the judgments in accordance with Tex. R. Evid. 901. N.H. Ins. Co. v. Magellan Reinsurance Co., 2013 Tex. App. LEXIS 194, 2013 WL 105654 (Tex. App. Fort Worth Jan. 10 2013).

98. Borrower's assertion that the Notice of Substitute Trustee Sale was not self-authenticating under Tex. R. Evid. 902 was not preserved for review because the borrower did not object in the trial court. Givens v. Midland Mortg. Co., 393 S.W.3d 876, 2012 Tex. App. LEXIS 10096, 2012 WL 6042534 (Tex. App. Dallas Dec. 5 2012).

99. district court did not abuse its discretion by admitting into evidence the victim's medical records Even though Tex. R. Evid. 902 was not complied with because: (1) although the clerk's office refused to keep the records, the State attempted to file the records well before the rule's deadline; (2) the State informed defendant that the documents were in the district attorney's office and defense counsel reviewed the documents there before trial; (3) when the district court was informed, it gave defendant permission to take the documents home to review before they were admitted into evidence; and (4) defendant made no allegation that the documents had been altered. Even if the district court erred by admitting the records, it was harmless because the same information contained in the medical records was related to the jury without objection through other exhibits and witnesses' testimony. Davis v. State, 2012 Tex. App. LEXIS 7074, 2012 WL 3601168 (Tex. App. Austin Aug. 16 2012).

100. In a bank's forcible-detainer case against a property occupant, the bank's claim to a superior right to possess the property was not based on a business-records affidavit containing inadmissible hearsay where the affiant averred that she was both an employee and a custodian of records of the bank's law firm and that she had actual or constructive care, custody, and control of the attached records relating to the bank's forcible-detainer proceeding against the occupant, and where she stated that the records were made in the regular course of the law firm's

business by someone with personal knowledge and that it was the regular course of business to keep such records. Kaldis v. U.S. Bank Nat'l Ass'n, 2012 Tex. App. LEXIS 6609, 2012 WL 3229135 (Tex. App. Houston 14th Dist. Aug. 9 2012).

101. Each of the public documents admitted was certified by the county clerk's office and bore the office's seal, for purposes of Tex. R. Evid. 902(1), and because they were properly admitted under Rule 902(4), the trial court did not err in overruling appellant's objection. Rodgers v. State, 2012 Tex. App. LEXIS 5975, 2012 WL 3025878 (Tex. App. San Antonio July 25 2012).

102. Court overruled appellant's authentication issue under Tex. R. Evid. 902, given that (1) he did not argue that the Pennsylvania criminal records could not be self-authenticated, (2) he did not claim that he was not the person named in those records, and (3) the documents were grouped via cause numbers, and the beginning page for the cases admitted under each cause number was stamped certified, although each page of the exhibits was not stamped certified; the court found no abuse of discretion. Peluso v. State, 2012 Tex. App. LEXIS 5122, 2012 WL 2450818 (Tex. App. Beaumont June 27 2012).

103. Under Tex. Bus. & Com. Code Ann. §§ 3.103, 3.104, a check was a negotiable instrument and was self-authenticating; it was not material that the check was a copy and that did not affect its admissibility because the original was not available. Ethridge v. State, 2012 Tex. App. LEXIS 3110, 2012 WL 1379648 (Tex. App. Tyler Apr. 18 2012).

104. Court had previously held that a certified copy of a driving record was admissible under Tex. R. Evid. 803(8)(B), 902(4), and thus the trial court did not err in admitting appellant's certified driving record. Mclamore v. State, 2012 Tex. App. LEXIS 2909 (Tex. App. Fort Worth Apr. 12 2012).

105. Business records affidavit met the criteria under Tex. R. Evid. 803(6), given that (1) the affiant stated she was the records custodian for the debt-holder's assignee, it was the assignee's regular practice to rely on documents the original creditor prepared, and the records were maintained by those with the duty to keep the record accurately, (2) one of the documents attached to the affidavit was an affidavit of sale, which was notarized and self-authenticating under Tex. R. Evid. 902(8), and the affidavit of sale stated that the creditor acquired the account and then sold it to the assignee, with a certain amount due, and (3) the creditor's failure to keep accurate records could result in penalties, for purposes of Tex. Fin. Code Ann. §§ 392.304(a)(8), 392.402, and the circumstances otherwise indicated the trustworthiness of the creditor's documents; the trial court did not abuse its discretion in admitting the records. Ainsworth v. Cach, Llc, 2012 Tex. App. LEXIS 2798 (Tex. App. Houston 14th Dist. Apr. 10 2012).

106. Trial judge did not abuse his discretion by concluding that the customer had not made a sufficient showing of authenticity under Tex. R. Evid. 902(5); it was not clear on the face of the document that it was purportedly issued by a public authority. Kishor v. Txu Energy Retail Co., Llc, 2011 Tex. App. LEXIS 9147 (Tex. App. Dallas Nov. 17 2011).

107. Nothing in the worker's Social Security disability finding document indicated that the worker was cross-examined at his disability hearing as required by Tex. R. Evid. 801(e)(1)(B); it was not clear whether the disability finding was the worker's "statement" as it was a document issued by a federal agency and not the worker himself, and because the document was not certified, its authenticity was at issue, Tex. R. Evid. 902(4). Belmarez v. Formosa Plastics Corp., 2011 Tex. App. LEXIS 7945, 2011 WL 4696750 (Tex. App. Corpus Christi Sept. 30 2011).

108. Court did not abuse its discretion in admitting the governor's warrant and the documents attached thereto into evidence, because the governor's warrant constituted a domestic public document under seal, and the State was not required to present extrinsic evidence of authenticity as a condition precedent to admissibility. Ex Parte Garcia,

2011 Tex. App. LEXIS 7908 (Tex. App. Corpus Christi Sept. 29 2011).

109. During defendant's trial for aggravated sexual assault, aggravated kidnapping, and unlawful possession of a firearm, the court did not err in admitting a docket sheet from one of defendant's prior convictions; the docket sheet was certified by a seal under Tex. R. Evid. 902(1), (4). Brown v. State, 2011 Tex. App. LEXIS 7319, 2011 WL 3915663 (Tex. App. Tyler Sept. 7 2011).

110. Regarding appellant's conviction of theft of property over $ 1,500 but less than $ 20,000 under Tex. Penal Code Ann. § 31.03(e)(4)(A) and his sentence under Tex. Penal Code Ann. § 12.42(a)(2), the State introduced two penitentiary packets concerning prior offenses that contained an affidavit certifying that the attached information related to appellant and the enclosed documents were self-authenticating under Tex. R. Evid. 901, 902, plus a fingerprint expert testified that appellant's fingerprints matched those in the packets; in light of case law holding that the criminal justice department's record clerk's certification of the packet constituted proper authentication, the court overruled appellant's issue. Brunner v. State, 2011 Tex. App. LEXIS 6781, 2011 WL 3717002 (Tex. App. El Paso Aug. 24 2011).

111. In a daughter's action claiming undue influence, nurse reports regarding the decedent's interaction with her husband were admissible because they were supported by an affidavit complying with Tex. R. Evid. 902(10); they were admissible as business records under Tex. R. Evid 803(4), (6) regarding the decedent's medical treatment. In the Estate of Ward, 2011 Tex. App. LEXIS 6811, 2011 WL 3720829 (Tex. App. Waco Aug. 24 2011).

112. Documents were not properly authenticated under Tex. R. Evid. 902(4), (10) because the documents were not certified copies or accompanied by an affidavit made by the records' custodian. Husain v. Petrucciani, 2011 Tex. App. LEXIS 6180, 2011 WL 3449497 (Tex. App. Houston 14th Dist. Aug. 9 2011).

113. Given that plaintiff filed a business record affidavit in the incorrect case, and the affidavit and attached documents were not made a part of the record in the underlying case until after the final judgment was signed, and given that plaintiff did not dispute defense counsel's representation to the court that defendant had not otherwise been provided several of the attached documents in discovery, under Tex. R. Evid. 902(10), the trial court did not abuse its discretion by refusing to allow plaintiff to introduce the business records affidavit and attached records. Old Republic Ins. Co. v. Edwards, 2011 Tex. App. LEXIS 4933, 2011 WL 2623994 (Tex. App. Houston 1st Dist. June 30 2011).

114. In a breach of contract action, a trial court did not err in considering an assignment by a predecessor to a leasing company and a business records affidavit by the predecessor's president; because the affidavit met the requirements of Tex. R. Evid. 902(10), the assignment was admissible under the hearsay exception in Tex. R. Evid. 803(6). Game Sys. v. Forbes Hutton Leasing, Inc., 2011 Tex. App. LEXIS 4098, 2011 WL 2119672 (Tex. App. Fort Worth May 26 2011).

115. Trial counsel was not ineffective as the record was silent as to why trial counsel did not file any pretrial motions and the State was entitled to allege all of defendant's prior convictions; any failure to object to documents admitted as evidence of defendant's prior convictions was not ineffective assistance because the documents at issue were either properly admitted under Tex. R. Evid. 902(4) or clearly harmless. Bartee v. State, 2011 Tex. App. LEXIS 2843 (Tex. App. Fort Worth Apr. 14 2011).

116. Each of the affidavits submitted by the county and the city showed that they were not conclusory but supported the affirmative defense of the statute of limitations, and each affidavit was based on the personal knowledge of the affiant, and those affidavits submitting records substantially complied with Tex. R. Evid. 902(10)(b) and properly authenticated the relevant business records, Tex. R. Evid. 901(10)(b). Rameses Sch., Inc.

v. City of San Antonio, 2011 Tex. App. LEXIS 2552, 2011 WL 1312279 (Tex. App. Houston 14th Dist. Apr. 7 2011).

117. State's exhibit, a pen packet relating to appellant's prior felony conviction, contained an affidavit of the custodian of the records, such that the exhibit was self-authenticating under Tex. R. Evid. 902(1), (4). Price v. State, 2011 Tex. App. LEXIS 2020, 2011 WL 946978 (Tex. App. Fort Worth Mar. 17 2011).

118. Security instrument contained a stamp demonstrating it was filed in county property records, and thus, it was self-authenticated under Tex. R. Evid. 902(4). Meachum v. Jp Morgan Chase Bank, N.A., 2011 Tex. App. LEXIS 1016, 2011 WL 477885 (Tex. App. Dallas Feb. 11 2011).

119. Trial court did not err in admitting certain juvenile court judgments where the judgments were generally admissible under Tex. R. Evid. 902(4) because they consisted of certified copies of public records, certified as correct by their custodian, and, therefore, self-authenticating, and where there was ample evidence that defendant was the person named in the judgments because the prior convictions were linked to defendant via (1) his name, (2) his birth date, (3) his mother's name, and (4) his signature, which appeared on his two written statements, the authenticity of which had not been contested. While the jury was not specifically requested to compare the signatures on the written statements with those appearing on the prior convictions, the jury was free to do so in order to assist in the determination of whether or not defendant was indeed the same individual listed in the prior convictions. Benton v. State, 336 S.W.3d 355, 2011 Tex. App. LEXIS 845 (Tex. App. Texarkana Feb. 4 2011).

120. In a forcible detainer suit brought by a lender that purchased the property at a foreclosure sale, a paralegal employed by an affiliated service provider of the lender's counsel was a qualified witness with personal knowledge under Tex. R. Evid. 602, 803(6), 902(10) of business records regarding the foreclosure proceedings. Rodriguez v. Citimortgage, Inc., 2011 Tex. App. LEXIS 171, 2011 WL 182122 (Tex. App. Austin Jan. 6 2011).

121. In a breach of contract action against appellants by the assignee of a construction loan, the construction loan, mortgage note, and guaranty agreement were admissible because they were notarized and, therefore, self-authenticating under Tex. R. Evid. 902(8). Rockwall Commons Assocs. v. Mrc Mortg. Grantor Trust I, 331 S.W.3d 500, 2010 Tex. App. LEXIS 10234 (Tex. App. El Paso Dec. 29 2010).

122. For purposes of Tex. R. Evid. 803(6), the affiant stated that the documents received from the original lender were kept by the creditor in the regular course of business and that the affiant reviewed the file, was the designated agent for the file, and had personal knowledge of the records concerning the debtor, and thus the affidavit sufficiently showed that the creditor incorporated the original lender's records. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

123. Affidavit failed to state that the affiant confirmed the accuracy of the records, but that is not required under case law; a creditor presented evidence that it reasonably relied on the accuracy of the debtor's account with the original lender. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

124. Affidavit did not lack trustworthiness because it was made by the original lender; to the extent the affiant's credibility was attacked, the trier of fact was the judge of such credibility. Simien v. Unifund CCR Ptnrs, 321 S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

125. Unlike case law, the affidavit in this case included more than the basic predicate of Tex. R. Evid. 803(6), as the affiant expressly referenced the documents attached to the affidavit, and included facts discussing the contents, such that the decision in case law was consistent with the court's holding here. Simien v. Unifund CCR Ptnrs, 321

S.W.3d 235, 2010 Tex. App. LEXIS 5585 (Tex. App. Houston 1st Dist. July 15 2010).

126. Having held that the trial court's admission of the business records affidavit was proper, the court overruled a debtor's challenges to findings of fact that were expressly conditioned on the exclusion of the business records, as well as the related conclusions of law. Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist. Dec. 10 2009).

127. Because a business records affidavit was admissible, the court did not need to address a conditional challenge. Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist. Dec. 10 2009).

128. Creditor's employee's affidavit followed the form the example affidavit provided by Tex. R. Evid. 902(10), which was sufficient to support the admission of the documents; the issuing lender's documents became the creditor's primary record of the transaction and the documents were properly admitted as business records of the creditor under Tex. R. Evid. 803(6). Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist. Dec. 10 2009).

129. Creditor's employee stated that it was in the regular course of business of the creditor for an employee to make the record, which language mirrored precisely the language approved for submitting business records affidavits under Tex. R. Evid. 902(10); because the affidavit accurately represented where the documents came from, it did not indicate a lack of trustworthiness, and the trial court did not err in admitting the business records affidavit or the documents verified by the affidavit. Simien v. Unifund Ccr Ptnrs, 2009 Tex. App. LEXIS 9411 (Tex. App. Houston 1st Dist. Dec. 10 2009).

130. Despite defendant's assertions that a thumbprint was not taken, penitentiary packets were properly admitted into evidence during the punishment phase of an aggravated sexual assault trial; those packets were self-authenticated for purposes of Tex. R. Evid. 901 and Tex. R. Evid. 902, and the State called a crime scene technician, who had reviewed the packets and taken fingerprints from defendant. Therefore, the State established beyond a reasonable doubt that defendant was the same person that had been previously convicted of other crimes. Stewart v. State, 2009 Tex. App. LEXIS 6716, 2009 WL 2617647 (Tex. App. Beaumont Aug. 26 2009).

131. In a personal injury case, the court properly excluded appellant's "business records" because they were repetitive and likely to confuse the jury, it was cumulative of other evidence, and appellant's handwritten notes and figures were abstract, indecipherable, were confusing, and were unlikely to help the jury with the calculation of appellant's lost earnings. Griffin v. Carson, 2009 Tex. App. LEXIS 3843, 2009 WL 1493467 (Tex. App. Houston 1st Dist. May 28 2009).

132. Resident and his wife contended that 911 records were competent summary judgment proof under case law and Tex. R. Evid. 902, but they did not state that the records obtained were true and correct copies of original documents; furthermore, the Texas Rules of Evidence and summary-judgment practice treat public records differently from private records and though Tex. R. Evid. 1003 and 1004(d) recognize that a "duplicate" of the original is admissible to the same extent as the original when the original of a document is not available, Tex. R. Evid. 1003 does not apply when, as here, its authenticity is questioned. Xiao Yu Zhong v. Sunblossom Gardens, LLC, 2009 Tex. App. LEXIS 3010, 2009 WL 1162213 (Tex. App. Houston 1st Dist. Apr. 30 2009).

133. Resident and his wife offered nothing in support of the 911 records to satisfy the requirements of self-authentication established by Tex. R. Evid. 902; without the required certification by a records custodian or other person authorized to certify them, the 911 records had no probative value and were incompetent summary-judgment evidence properly excluded as hearsay. Xiao Yu Zhong v. Sunblossom Gardens, LLC, 2009 Tex. App.

LEXIS 3010, 2009 WL 1162213 (Tex. App. Houston 1st Dist. Apr. 30 2009).

134. Where defendant was indicted as a habitual felony offender for the unlawful possession of a firearm by a felon, the indictment contained enhancement paragraphs alleging that defendant had prior felony convictions. The State proved his prior convictions by introducing as exhibits two pen packets that were certified by the custodian of records from the Texas Department of Criminal Justice; the pen packets were self-authenticating for purposes of Tex. R. Evid. 901, 902. Harden v. State, 2009 Tex. App. LEXIS 1578, 2009 WL 539379 (Tex. App. Beaumont Mar. 4 2009).

135. There is no requirement in Tex. R. Evid. 902(10)(a) that the affidavit must be dated the same as the letter accompanying the corresponding business records. Henderson v. State, 2009 Tex. App. LEXIS 677, 2009 WL 237473 (Tex. App. Houston 14th Dist. Feb. 3 2009).

136. Trial court properly admitted certain exhibits as self-authenticated business records, for purposes of Tex. R. Evid. 902(10)(a) and Tex. R. Evid. 803(6); the exhibits were trustworthy because the State established an adequate foundation and there was nothing that led the court to believe that the exhibits lacked authenticity or trustworthiness. Henderson v. State, 2009 Tex. App. LEXIS 677, 2009 WL 237473 (Tex. App. Houston 14th Dist. Feb. 3 2009).

137. Counsel was not ineffective for failing to object to the admission of the judgment for defendant's conviction of boating while intoxicated because the supervisor's testimony that the judgment bore a seal purporting to be that of the county district clerk would have satisfied the requirements of Tex. R. Evid. 902. In addition, as evidence of a finalized judgment of conviction, counsel could not have brought forth a sustainable objection based on hearsay. Reese v. State, 273 S.W.3d 344, 2008 Tex. App. LEXIS 8518 (Tex. App. Texarkana 2008).

138. In a case involving unpaid credit card debt, business records showing a debtor's liability were properly admitted under Tex. R. Evid. 803(6) because an authenticating affiant did not have to be a custodian of records to qualify under Tex. R. Evid. 902(10); therefore, a designated agent was able to satisfy this standard. Moreover, the agent's affidavit tracked the model language of a self-authenticating affidavit, the affidavit was not conclusory, and an objection regarding personal knowledge was not raised at trial. McElroy v. Unifund CCR Partners, 2008 Tex. App. LEXIS 7170 (Tex. App. Houston 14th Dist. Aug. 26, 2008).

139. Documents could not be admitted as public records under Tex. R. Evid. 803(8) in a receivership proceeding without certification pursuant to Tex. R. Evid. 902(4) or extrinsic evidence of authenticity under Tex. R. Evid. 901(a), (b)(7). Benefield v. State ex rel. Alvin Cmty. Health Endeavor, Inc., 266 S.W.3d 25, 2008 Tex. App. LEXIS 6152 (Tex. App. Houston 1st Dist. 2008).

140. One exhibit was offered to prove a second driving while intoxicated conviction necessary for enhancement and the State called a sheriff's office records and identification section employee to identify the judgment, who stated that the copy was stamped and certified by the county clerk's office; the court requested the original exhibits to be sent to the court and because the court found that the document did contain a certification from the county clerk's office on the back of each page, the document was self-authenticating under Tex. R. Evid. 902 and the exhibit was properly admitted into evidence. Martinez v. State, 2008 Tex. App. LEXIS 3115 (Tex. App. El Paso Apr. 30 2008).

141. Affidavit stated that the affiant was one of the custodians of the records presented and the affidavit was substantially in the form set forth in Tex. R. Evid. 902, and thus the court rejected the claim that the affidavit did not comply with the requirements of Tex. R. Evid. 803. Wynne v. Citibank (South Dakota) N.A., 2008 Tex. App. LEXIS

3037 (Tex. App. Amarillo Apr. 25 2008).

142. There was no merit to defendant's claim that trial counsel was ineffective during defendant's trial for aggravated robbery, enhanced by three prior felony convictions, for failing to file a motion to suppress and/or objecting at trial to the admission of the business records of defendant's employer, along with an affidavit of the custodian of records of the employer that tracked verbatim Tex. R. Evid. 902, and even though the records were not physically attached to the affidavit in the clerk's record but were included in the record of exhibits, defendant was not harmed because his girlfriend testified before the jury that he was not at work on the date of the incident. Delgado v. State, 2008 Tex. App. LEXIS 2463 (Tex. App. Houston 1st Dist. Apr. 3 2008).

143. Even though a pen packet from New Mexico was properly admitted under Tex. R. Evid. 902 because no seal was required, defendant waived any objection relating to admissibility when he took the stand and testified about his own convictions; an exception did not apply because defendant was not trying to deny or rebut the evidence. Williams v. State, 2008 Tex. App. LEXIS 2241 (Tex. App. Austin Mar. 28 2008).

144. Documents certified by the Texas Department of Public Safety complied with Tex. R. Evid. 902 and therefore, under Tex. R. Evid. 902, required no extrinsic evidence of authenticity in license suspension proceedings. Hooker v. Tex. Dep't of Pub. Safety, 2008 Tex. App. LEXIS 329 (Tex. App. Beaumont Jan. 17 2008).

145. Affidavits attached to two exhibits (including a pen pack and defendant's jail records) included a certification by their custodian that the documents were true and correct copies of the original records on file in the office and maintained in the regular course of business within the Bureau of Classification and Records of the Texas Department of Criminal Justice -- Correctional Institutions Division and the Tarrant County Sheriff's Department; thus, the affidavits sufficiently authenticated those exhibits under Tex. R. Evid. 902(4). Because Tex. R. Evid. 902(4) did not contain a notice requirement, the exhibits were properly admitted into evidence during the punishment phase of the trial even though defendant had no notice of the exhibits. Garza v. State, 2007 Tex. App. LEXIS 7194 (Tex. App. Corpus Christi Aug. 28 2007).

146. Trial court did not abuse its discretion by sustaining a father's objections to admission of an "updated" record, as the objection from the father's attorney prevented the attorney general from authenticating the "updated" record without testifying under oath; when the trial judge sustained the father's objection to the "updated" record, the attorney general had to prove the authenticity of the document by some other means; however, the attorney general made no attempt to call any witnesses to testify at the hearing and the document was not self-authenticating because it was not under seal, a certified copy of a public record, or supported by a business records affidavit. In re K.R., 2007 Tex. App. LEXIS 5756 (Tex. App. Dallas July 23 2007).

147. Although a North Carolina penitentiary packet lacked certified documentation from the sentencing court, it was properly authenticated and contained sufficient evidence of a final conviction of the enhancement offense; hence, it was admissible as the functional equivalent of a properly certified judgment and sentence. Martin v. State, 227 S.W.3d 335, 2007 Tex. App. LEXIS 3445 (Tex. App. Houston 1st Dist. 2007).

148. Where defendant was charged with driving while intoxicated, during the punishment phase the State was permitted to offer a computer-generated printout of his prior conviction record from Dallas County, Texas; the county record was self-authenticating under Tex. R. Evid. 902. Flowers v. State, 220 S.W.3d 919, 2007 Tex. Crim. App. LEXIS 428 (Tex. Crim. App. 2007).

149. Trial court did not abuse its discretion in admitting two pen packets during defendant's trial for armed robbery where an affidavit sufficiently authenticated the pen packets under Tex. R. Evid. 902. Eason v. State, 2007 Tex.

App. LEXIS 2973 (Tex. App. Beaumont Apr. 18 2007).

150. Pen packets may be authenticated under Tex. R. Evid. 902 via a certification by their custodian that the contents are correct copies of the originals. Eason v. State, 2007 Tex. App. LEXIS 2973 (Tex. App. Beaumont Apr. 18 2007).

151. In a divorce proceeding, it was not an abuse of discretion to allow the withdrawal from the record of one of the children's passports seven days before the judgment became final; the husband did not inform the appellate court whether there was a proper motion to substitute a duplicate original, either orally or in writing, or whether the action was sua sponte by the trial court. Thomas v. Robert, 2007 Tex. App. LEXIS 1149 (Tex. App. Corpus Christi Feb. 15 2007).

152. Where defendant was convicted for indecency with a child, the State was permitted to admit his pen packet into evidence during the punishment phase of trial; the pen packet was self-authenticated via certification as to its accuracy by the custodian; Tex. R. Evid. 902(4) has no notice requirement. Sharp v. State, 210 S.W.3d 835, 2006 Tex. App. LEXIS 11033 (Tex. App. Amarillo 2006).

153. Admission of a Mississippi "pen packet" at the punishment stage of appellant's trial was not in error, where a raised--uncolored--seal was on the original exhibit, and the requirements of Tex. R. Evid. 902(4) were adequately met. Smith v. State, 2006 Tex. App. LEXIS 9782 (Tex. App. Texarkana Nov. 10 2006).

154. In a breach of contract action, the summary judgment evidence offered by a creditor was admissible; a record of the monthly payments qualified under Tex. R. Evid. 803(6) as a business record, and the affidavit of the creditor's employee substantially complied with Tex. R. Evid. 902(10)(b). Capers v. Citibank (South Dakota), N.A., 2006 Tex. App. LEXIS 9175 (Tex. App. Dallas Oct. 25 2006).

155. Admission of the State's exhibits, which included the traffic citation, the warrant of arrest signed by the judge of the municipal court and a deputy clerk's certificate of defendant's failure to appear at trial for his speeding citation, did not violate defendant's confrontation rights because the exhibits were forms used by the Houston courts that record the occurrence of an event, and defendant failed to offer and the appellate court could not find, any authority or reasoning to transform the documents into testimonial statements. Azeez v. State, 203 S.W.3d 456, 2006 Tex. App. LEXIS 7821 (Tex. App. Houston 14th Dist. 2006).

156. Computer printout showing a prior driving while intoxicated (DWI) conviction contained sufficient information and indicia of reliability to have constituted the functional equivalent of a judgment and sentence, and the trial court did not err in admitting the printout, which was properly authenticated by the clerk pursuant to Tex. R. Evid. 902, into evidence in defendant's trial for DWI, enhanced by the prior conviction; the printout stated defendant's name, the offense charged, the date of commission, the verdict of guilty and the sentence given, and the specifics of the amount of time served, and the trial court could have concluded from the "comments" section of the printout that defendant received a time credit on the sentence for pre-sentence confinement, pursuant to Tex. Code Crim. Proc. Ann. art. 42.03, § 2(a). Flowers v. State, 2006 Tex. App. LEXIS 4352 (Tex. App. Fort Worth May 18 2006).

157. Although defendants argued that a power of attorney was forged, it was acknowledged by a notary public, and defendants did not submit evidence to rebut the recitations in the certificates, for purposes of Tex. R. Evid. 902(8), and because a fact issue as to the validity of the power of attorney was not raised, the trial court's sole duty was to construe a deed and determine if it conveyed a wife's interest, which it did, and the trial court could have granted summary judgment in this regard, for purposes of plaintiffs' declaratory judgment action under Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a). Ruiz v. Stewart Mineral Corp., 202 S.W.3d 242, 2006 Tex. App. LEXIS 3547,

168 Oil & Gas Rep. 224 (Tex. App. Tyler 2006).

158. No business record affidavit under Tex. R. Evid. 902(10)(a) was necessary because the witness laid the proper foundation for admission of the report as a business record during testimony, for purposes of Tex. R. Evid. 803(6). Benavides v. Cushman, Inc., 189 S.W.3d 875, 2006 Tex. App. LEXIS 716 (Tex. App. Houston 1st Dist. 2006).

159. Court properly admitted defendant's out of state pen packet as proof of defendant's prior felony where the court minutes, the statement of suspensive appeal, and the warrant of commitment appeared to have originally been executed under official seal, and the attestations in the documents that defendant had been found guilty of a felony offense, he had been sentenced to twenty-one years, and he had not appealed the judgment and sentence, were sufficient to establish his prior felony conviction. White v. State, 2005 Tex. App. LEXIS 7226 (Tex. App. Fort Worth Aug. 31 2005).

160. In a forfeiture hearing, because the certified copy of the bail bond was a self-authenticated public record, no further authentication was required; additionally, the surety's hearsay objection failed because a public record fell under the hearsay exception. Thus, the trial court did not err in admitting the bail bond into evidence as a public record. Williams v. State, 2005 Tex. App. LEXIS 6363 (Tex. App. Corpus Christi Aug. 11 2005).

161. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of arrest records and certified copies of judgments and sentences because the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Also defendant failed to preserve his claim of error because he did not object to the admission of these evidentiary items on that basis as required by Tex. R. App. P. 33.1. Lopez v. State, 2005 Tex. App. LEXIS 4625 (Tex. App. Eastland June 16 2005).

162. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of certified records of defendant's prior felony convictions which the State alleged for enhancement purposes because the trial could admit evidence of prior criminal convictions during the punishment phase of a trial pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Lopez v. State, 2005 Tex. App. LEXIS 4610 (Tex. App. Eastland June 16 2005).

163. Where each of defendant's penitentiary packets contained an affidavit by the Chairman of Classification and Records for the Texas Department of Criminal Justice-Operational Division in which he certified under the seal of the department that the information contained in the packets included true and correct copies of the original records on file in his office and maintained in the regular course of business; therefore, the packets were sufficiently authenticated in accordance with Tex. R. Evid. 902. Aurich v. State, 2005 Tex. App. LEXIS 4391 (Tex. App. Fort Worth June 9 2005).

164. Borrower, who brought suit against a lender to prevent foreclosure, argued that documents lender introduced into evidence were not properly authenticated; however, Tex. R. Evid. 902 allowed for self-authentication of the substitute trustee's deed, affidavit of mortgage, and deed of trust. Murphy v. Countrywide Home Loans, Inc., 199 S.W.3d 441, 2006 Tex. App. LEXIS 4958 (Tex. App. Houston 1st Dist. 2006).

165. Given that (1) a computer-generated case synopsis did not indicate whether defendant was actually convicted of a prior driving while intoxicated offense, (2) the requirements of Tex. R. Evid. 901(b)(7), 902(4) were not met, given that it was not shown that the synopsis was a writing authorized by law to be filed or was a copy of an official record, and (3) the State introduced no other evidence of the prior conviction, the evidence was

insufficient to support defendant's conviction under Tex. Penal Code Ann. § 49.09(a) of driving while intoxicated, second offense. Blank v. State, 2005 Tex. App. LEXIS 2566 (Tex. App. San Antonio Apr. 6 2005), opinion withdrawn by, substituted opinion at 172 S.W.3d 673, 2005 Tex. App. LEXIS 10714 (Tex. App. San Antonio 2005).

166. In an action brought to recover delinquent real property taxes, the trial court erred in admitting tax statements into evidence; because the tax statements did not bear a seal or contain a certification under seal from a public officer, the tax statements were not self-authenticating as certified public records under Tex. R. Evid. 902(4). Al-Nayem Int'l Trading, Inc. v. Irving Indep. Sch. Dist., 159 S.W.3d 762, 2005 Tex. App. LEXIS 1919 (Tex. App. Dallas 2005).

167. Because there was no affidavit that documents were true and correct copies of the originals, pursuant to Tex. R. Evid. 902, the documents were not proper summary judgment evidence under Tex. R. Civ. P. 166a. Gillespie v. Wells Fargo Bank Minn., N.A., 2004 Tex. App. LEXIS 11719 (Tex. App. Houston 1st Dist. Dec. 23 2004).

168. To be considered as evidence of a final conviction, a penitentiary packet had to contain a judgment and sentence, properly certified, and, pursuant to Tex. R. Evid. 901, the evidence offered by the State lacked certification and a seal, Tex. R. Evid. 902, and was not self-authenticating. The State's admissible evidence linked defendant to the purported conviction, but failed to prove the conviction was valid and final. Banks v. State, 2004 Tex. App. LEXIS 10630 (Tex. App. Houston 14th Dist. Nov. 30 2004), opinion withdrawn by, substituted opinion at 158 S.W.3d 649, 2005 Tex. App. LEXIS 1838 (Tex. App. Houston 14th Dist. 2005).

169. Court declined to find that the method for computing time in a criminal case should have been that under Tex. R. Civ. P. 4. Tex. R. Evid. 902(10) makes no reference to Tex. R. Civ. P. 4 and because the Texas Rules of Evidence are not statutes, Rule 4, by its express terms, has no applicability to them. Landrum v. State, 153 S.W.3d 635, 2004 Tex. App. LEXIS 9711 (Tex. App. Amarillo 2004).

170. Because Tex. R. Evid. 902(10) did not require defendant to do anything in response to the State's filing of certain records, Tex. R. Civ. P. 4 had no application to the question of whether the State met its burden of proof for the admission of the records. The records were filed for purposes of Tex. R. Evid. 902(10) when they and their affidavits were presented on April 7, 2004, and day 14 was April 20, 2004, and thus the records were filed at least 14 days prior to the commencement of defendant's trial for theft on April 21, 2004 as required. Landrum v. State, 153 S.W.3d 635, 2004 Tex. App. LEXIS 9711 (Tex. App. Amarillo 2004).

171. School district's tax statements were not self-authenticating as certified public records under Tex. R. Evid. 902(4) because the tax statements did not bear a seal or contain a certification under seal from a public officer. Al-Nayem Int'l Trading, Inc. v. Irving Indep. Sch. Dist., 2004 Tex. App. LEXIS 9676 (Tex. App. Dallas Nov. 1 2004), superseded by, opinion withdrawn by 159 S.W.3d 762, 2005 Tex. App. LEXIS 1919 (Tex. App. Dallas 2005).

172. City's tax statements were not under seal and did not contain a certification under seal, as required for self-authentication under Tex. R. Evid. 902(4). Because the trial court sustained the taxpayer's objection that he was not given timely notice of the statements and the accompanying business records affidavit as required by Rule 902(10), the trial court erred in admitting the statements into evidence. Al-Nayem Int'l Trading, Inc. v. Irving Indep. Sch. Dist., 2004 Tex. App. LEXIS 9676 (Tex. App. Dallas Nov. 1 2004), superseded by, opinion withdrawn by 159 S.W.3d 762, 2005 Tex. App. LEXIS 1919 (Tex. App. Dallas 2005).

173. Defendant did not argue at trial or in the brief that a witness, though not a custodian of blood sample records, was not a qualified witness under Tex. R. Evid. 803(6), and thus, defendant did not show that the trial court erred in allowing the witness to authenticate the transmittal form under Tex. R. Evid. 902(10)(a) in connection with defendant's driving while intoxicated trial. Astalas v. State, 2004 Tex. App. LEXIS 9152 (Tex. App. Fort Worth Oct.

14 2004).

174. Defendant's general hearsay objection did not preserve error, pursuant to Tex. R. App. P. 33.1(a), on the alleged violation of Tex. R. Evid. 902(10)(a) as to the asserted failure to comply with the 14-day requirement; even assuming the objection was sufficient to preserve error, the trial court did not err in overruling defendant's objection because the clerk's record contained copies of the hospital records together with a business records affidavit conforming to Tex. R. Evid. 803(6), 902(10)(a), and the records were file marked on one day and the trial was conducted 10 days later on defendant's charge of driving while intoxicated. Astalas v. State, 2004 Tex. App. LEXIS 9152 (Tex. App. Fort Worth Oct. 14 2004).

175. Copy of the email correspondence appellant claimed was from appellees to the trial court that appellees intended for the judgment to be final as to their counterclaims was not accompanied by an affidavit, nor was it authenticated; appellees did not concede that the copy of the email was accurate, nor did they concede that it was ever sent, nor did the copy appear to fall within the category of facts that may be judicially noticed, such that the appellate court could not consider it for purposes of determining whether appellees intended for the judgment to be final as to their counterclaims. Lindsey v. Kline, 2004 Tex. App. LEXIS 6941 (Tex. App. Fort Worth July 29 2004).

176. Where a bail bond was certified in accordance with Tex. R. Evid. 902, the bond was self-authenticating and the trial court did not err in admitting it into evidence under Tex. R. Evid. 1005. Williams v. State, 2004 Tex. App. LEXIS 6619 (Tex. App. Corpus Christi July 22 2004).

177. Defendant's conviction for driving while intoxicated was proper where he did not show that the trial court committed any error in allowing the senior chemist to authenticate the transmittal form from the lab indicating defendant's blood alcohol level, and as such, he did not show that the trial court committed any error in allowing the chemist to authenticate the transmittal form under Tex. R. Evid. 902(10)(a), 803(6). Astalas v. State, 2004 Tex. App. LEXIS 6398 (Tex. App. Fort Worth July 15 2004), opinion withdrawn by, substituted opinion at, modified by 2004 Tex. App. LEXIS 9152 (Tex. App. Fort Worth Oct. 14, 2004).

178. In a defamation action, the Texas Rules of Evidence did not specify that the certification on the employee and the employer's exhibits contain an accurate date, and there was nothing in the record to indicate that the incorrect date stamp was the result of a fraudulent act; thus, it was not an abuse of discretion for the trial court to admit the exhibits under the public documents exception to the hearsay rule. Adi v. Prudential Prop. & Cas. Ins. Co., 2004 Tex. App. LEXIS 5937 (Tex. App. Houston 1st Dist. July 1 2004), writ of certiorari denied by 126 S. Ct. 565, 163 L. Ed. 2d 475, 2005 U.S. LEXIS 7988, 74 U.S.L.W. 3273 (U.S. 2005).

179. Where a drilling company sued an operating company to collect for services in attempting re-entry of an abandoned oil and gas well, as the custodian of records and the president of the drilling company, the president was qualified to testify regarding the invoice and the daily time sheets without an affidavit complying with Tex. R. Evid. 902(10); moreover, those exhibits were admissible under Tex. R. Evid. 803(6), the business records exception, and the trial court did not abuse its discretion in admitting the invoice or the daily time sheets into evidence. Integras Operating, L.L.C. v. Re-Entry People, Inc., 2004 Tex. App. LEXIS 2461 (Tex. App. Eastland Mar. 18 2004).

180. Assault victim's medical records were admissible as business records under Tex. R. Evid. 803(6) because the affidavit of the custodian of hospital records stated that the records were kept in the regular course of the hospital's business, that the hospital was the custodian's employer, that the victim's medical records were made by a hospital employee with knowledge of the events, and that the employee made the records at or near the time of the event. Thus, the affidavit satisfied both Rule 803(6) and Tex. R. Evid. 902(10)(b), including the notice provision of Rule 902(10). Reyes v. State, 48 S.W.3d 917, 2001 Tex. App. LEXIS 3983 (Tex. App. Fort Worth 2001).

Evidence : Authentication : Chain of Custody

181. Trial court properly admitted defendant's blood test results included in his hospital records following the crash; the State established the beginning and end of a proper chain of custody because a nurse testified that she drew defendant's blood that day pursuant to the treating physician's orders and a custodian of records established under Tex. R. Evid. 902(10) that the records were made at the time of the event, by a person with knowledge, and that they were kept in the regular course of business by the hospital. Gallagher v. State, 2013 Tex. App. LEXIS 5125, 2013 WL 1800198 (Tex. App. Corpus Christi Apr. 25 2013).

Evidence : Documentary Evidence : Affidavits

182. In a forcible detainer action, a business records affidavit that authenticated the notice to vacate was not inadmissible hearsay under Tex. R. Evid. 801(d) because it substantially complied with the requirements of Tex. R. Evid. 803(6), 902(10), although it did not precisely track the language of Rule 902(10). Although the affidavit was prepared by a third party, the foreclosure purchaser's law firm, the trial court could have concluded that the purchaser reasonably relied on the accuracy of the records in the ordinary course of its business and that they were trustworthy. Baty v. Morequity, Inc., 2012 Tex. App. LEXIS 9876 (Tex. App. Houston 1st Dist. Nov. 29 2012).

183. In a breach of contract action brought by appellee, the assignee of a credit card company, against an account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent sufficiently showed that appellee incorporated the credit card company's records and kept them in the regular course of its business. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

184. In a breach of contract action brought by appellee, the assignee of a credit card company, against appellant account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent showed that the agent had personal knowledge of appellant's file, that she was appellee's designated agent for those records, and that appellant's account remained unpaid in the amount stated in the affidavit. Thus, the evidence demonstrated that appellee reasonably relied upon the accuracy of the contents of the documents that it received from the credit card company. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

185. In a breach of contract action brought by appellee, the assignee of a credit card company, against appellant account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent showed that the agent had personal knowledge of appellant's file, that she was appellee's designated agent for those records, and that appellant's account remained unpaid in the amount stated in the affidavit. Thus, the evidence demonstrated that appellee reasonably relied upon the accuracy of the contents of the documents that it received from the credit card company. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

Evidence : Documentary Evidence : Writings : General Overview

186. Authenticity of a copy of a bail bond admitted into evidence was shown both because it was a certified copy of an official record and because the deputy district clerk compared it to the bond contained within the clerk's file while testifying. The copy of the bond was therefore admissible under Tex. R. Evid. 902(4) and Tex. R. Evid. 1005. Guiles v. State, 2013 Tex. App. LEXIS 675, 2013 WL 257368 (Tex. App. Fort Worth Jan. 24 2013).

187. Granting a lessor leave to file an untimely business records affidavit under Tex. R. Evid. 902(10) did not prejudice the lessee; Tex. R. Civ. P. 5 generally gives trial courts discretion to enlarge time periods, and any error in admitting the version of the lease agreement introduced by the lessor was harmless under Tex. R. App. P. 44.1(a)(1) because the trial court was well situated to resolve evidentiary conflicts. Kahn v. Imperial Airport, L.P., 308 S.W.3d 432, 2010 Tex. App. LEXIS 1830 (Tex. App. Dallas Mar. 16 2010).

Evidence : Hearsay : Exceptions : Business Records : General Overview

188. Even though the trial court abused its discretion by admitting two exhibits containing reports of hair follicle drug tests of appellants under the business records exception to the hearsay rule, as there was insufficient indicia of trustworthiness or reliability, the error was harmless because other evidence that two children and the mother's boyfriend tested positive for cocaine was admitted without objection, and termination of the mother's parental rights did not turn on the admission of the second and third sets of positive drug test results. In the Interest of S.S., 2012 Tex. App. LEXIS 9946, 2012 WL 5991391 (Tex. App. Tyler Nov. 30 2012).

189. In a bank's forcible-detainer case against a property occupant, the bank's claim to a superior right to possess the property was not based on a business-records affidavit containing inadmissible hearsay where the affiant averred that she was both an employee and a custodian of records of the bank's law firm and that she had actual or constructive care, custody, and control of the attached records relating to the bank's forcible-detainer proceeding against the occupant, and where she stated that the records were made in the regular course of the law firm's business by someone with personal knowledge and that it was the regular course of business to keep such records. Kaldis v. U.S. Bank Nat'l Ass'n, 2012 Tex. App. LEXIS 6609, 2012 WL 3229135 (Tex. App. Houston 14th Dist. Aug. 9 2012).

190. In a breach of contract action brought by appellee, the assignee of a credit card company, against appellant account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent showed that the agent had personal knowledge of appellant's file, that she was appellee's designated agent for those records, and that appellant's account remained unpaid in the amount stated in the affidavit. Thus, the evidence demonstrated that appellee reasonably relied upon the accuracy of the contents of the documents that it received from the credit card company. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

191. In a breach of contract action brought by appellee, the assignee of a credit card company, against appellant account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent showed that the agent had personal knowledge of appellant's file, that she was appellee's designated agent for those records, and that appellant's account remained unpaid in the amount stated in the affidavit. Thus, the evidence demonstrated that appellee reasonably relied upon the accuracy of the contents of the documents that it received from the credit card company. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

192. Summary judgment in favor of the customer was proper, because the bank failed to create a genuine issue of material fact as to whether a contract existed or whether the customer authorized the charges to the credit card account, when the bank's only summary judgment evidence was inadmissible; since the bank's affidavit neither named the affiant in the body of the affidavit or the jurat, and the affiant's signature was completely illegible, the bank's affidavit did not substantially comply with Tex. R. Evid. 902(10) and was insufficient to establish the business records exception to the hearsay rule under Tex. R. Evid. 803(6). Fia Card Services, N.A. v. Frausto, 2011 Tex. App. LEXIS 9924, 2011 WL 6260653 (Tex. App. Amarillo Dec. 15 2011).

193. Given that plaintiff filed a business record affidavit in the incorrect case, and the affidavit and attached documents were not made a part of the record in the underlying case until after the final judgment was signed, and

given that plaintiff did not dispute defense counsel's representation to the court that defendant had not otherwise been provided several of the attached documents in discovery, under Tex. R. Evid. 902(10), the trial court did not abuse its discretion by refusing to allow plaintiff to introduce the business records affidavit and attached records. Old Republic Ins. Co. v. Edwards, 2011 Tex. App. LEXIS 4933, 2011 WL 2623994 (Tex. App. Houston 1st Dist. June 30 2011).

194. Court did not abuse its discretion in failing to exclude the bank witness's affidavit and attachments, because the witness's testimony adequately demonstrated the basis for her personal knowledge of the manner in which the bank kept its records and the other facts to which she testified; Texas Rules of Evidence did not require that the qualified witness who provided the predicate for the admission of business records be their creator or have personal knowledge of the contents of the record, when the witness was required only to have personal knowledge of the manner in which the records were kept. Damron v. Citibank (s.D.) N.A., 2010 Tex. App. LEXIS 7054, 2010 WL 3377777 (Tex. App. Austin Aug. 25 2010).

195. In a personal injury case, the court properly excluded appellant's "business records" because they were repetitive and likely to confuse the jury, it was cumulative of other evidence, and appellant's handwritten notes and figures were abstract, indecipherable, were confusing, and were unlikely to help the jury with the calculation of appellant's lost earnings. Griffin v. Carson, 2009 Tex. App. LEXIS 3843, 2009 WL 1493467 (Tex. App. Houston 1st Dist. May 28 2009).

196. Trial court's exclusion of an affidavit as inadmissible hearsay was proper where it could not serve as an authentication to business records pursuant to Tex. R. Evid. 902(10) because it had not been on file for the requisite fourteen days before the subsequent trial; the affidavit had been signed only five days prior to the subsequent trial. Benchmark Ins. Co. v. Sullivan, 2009 Tex. App. LEXIS 2947, 2009 WL 1153385 (Tex. App. Tyler Apr. 30 2009).

197. In a case involving unpaid credit card debt, business records showing a debtor's liability were properly admitted under Tex. R. Evid. 803(6) because an authenticating affiant did not have to be a custodian of records to qualify under Tex. R. Evid. 902(10); therefore, a designated agent was able to satisfy this standard. Moreover, the agent's affidavit tracked the model language of a self-authenticating affidavit, the affidavit was not conclusory, and an objection regarding personal knowledge was not raised at trial. McElroy v. Unifund CCR Partners, 2008 Tex. App. LEXIS 7170 (Tex. App. Houston 14th Dist. Aug. 26, 2008).

198. Order awarding summary judgment to a mortgagee in its action against mortgagors to foreclose a lien on property was upheld where an affidavit from the mortgagee's custodian of records about the default was sufficient summary judgment evidence; the custodian, in the affidavit, was not required to recite the exact words that appeared in Tex. R. Evid. 902. Kyle v. Countrywide Home Loans, Inc., 232 S.W.3d 355, 2007 Tex. App. LEXIS 6667 (Tex. App. Dallas 2007).

199. Probate court properly excluded the exhibits offered by a decedent's surviving spouse and administratrix of his estate at the special appearance hearing of the decedent's Florida business associate because the exhibits were business records of a group of Texas entities owned by the business associate, and they were not authenticated by the administratrix merely by virtue of her role as administratrix of the decedent's estate. Allen v. Havens, 2007 Tex. App. LEXIS 2088 (Tex. App. Fort Worth Mar. 15 2007).

200. In a breach of contract action, the summary judgment evidence offered by a creditor was admissible; a record of the monthly payments qualified under Tex. R. Evid. 803(6) as a business record, and the affidavit of the creditor's employee substantially complied with Tex. R. Evid. 902(10)(b). Capers v. Citibank (South Dakota), N.A., 2006 Tex.

App. LEXIS 9175 (Tex. App. Dallas Oct. 25 2006).

201. While the trial court erred in admitting defendant's cell phone bill because it was not authenticated, the error was harmless under Tex. R. App. P. 44.1 because of the wealth of other evidence to convict defendant. Miller v. State, 208 S.W.3d 554, 2006 Tex. App. LEXIS 2791 (Tex. App. Austin 2006).

202. In affirming the appointment of grandparents as a child's managing conservators, the court found that the results of a drug test on the 11-month-old child were properly admitted under the business records exception to the hearsay rule; the affidavit of the custodian of records was substantially the same as the sample form provided in Tex. R. Evid. 902(10)(b). In re A.T., 2006 Tex. App. LEXIS 1882 (Tex. App. Fort Worth Mar. 9 2006).

203. In a dispute over a home equity loan, business records relating to the payment history of a borrower were admissible into evidence under Tex. R. Evid. 902(10)(b) because there was no requirement that the witness have personal knowledge of the facts contained therein. Greene v. Deutsche Bank Nat'l Trust Co., 2005 Tex. App. LEXIS 4130 (Tex. App. Houston 1st Dist. May 26 2005).

204. Court declined to find that the method for computing time in a criminal case should have been that under Tex. R. Civ. P. 4. Tex. R. Evid. 902(10) makes no reference to Tex. R. Civ. P. 4 and because the Texas Rules of Evidence are not statutes, Rule 4, by its express terms, has no applicability to them. Landrum v. State, 153 S.W.3d 635, 2004 Tex. App. LEXIS 9711 (Tex. App. Amarillo 2004).

205. Because Tex. R. Evid. 902(10) did not require defendant to do anything in response to the State's filing of certain records, Tex. R. Civ. P. 4 had no application to the question of whether the State met its burden of proof for the admission of the records. The records were filed for purposes of Tex. R. Evid. 902(10) when they and their affidavits were presented on April 7, 2004, and day 14 was April 20, 2004, and thus the records were filed at least 14 days prior to the commencement of defendant's trial for theft on April 21, 2004 as required. Landrum v. State, 153 S.W.3d 635, 2004 Tex. App. LEXIS 9711 (Tex. App. Amarillo 2004).

206. School district's tax statements were properly authenticated as a business record under affidavit pursuant to Tex. R. Evid. 902(10). Although there was nothing in the record to indicate the tax statements and record were filed with the court clerk 14 days before trial or that the taxpayer received prompt notice of the filing, the taxpayer did not complain about these matters on appeal. Al-Nayem Int'l Trading, Inc. v. Irving Indep. Sch. Dist., 2004 Tex. App. LEXIS 9676 (Tex. App. Dallas Nov. 1 2004), superseded by, opinion withdrawn by 159 S.W.3d 762, 2005 Tex. App. LEXIS 1919 (Tex. App. Dallas 2005).

207. City's tax statements were not under seal and did not contain a certification under seal, as required for self-authentication under Tex. R. Evid. 902(4). Because the trial court sustained the taxpayer's objection that he was not given timely notice of the statements and the accompanying business records affidavit as required by Rule 902(10), the trial court erred in admitting the statements into evidence. Al-Nayem Int'l Trading, Inc. v. Irving Indep. Sch. Dist., 2004 Tex. App. LEXIS 9676 (Tex. App. Dallas Nov. 1 2004), superseded by, opinion withdrawn by 159 S.W.3d 762, 2005 Tex. App. LEXIS 1919 (Tex. App. Dallas 2005).

208. Debtor's argument that the trial court erred in failing to sustain his objections to the business records affidavit attached to the motion for summary judgment was overruled because once the bank purchased the predecessor bank's accounts, it took possession of the former's business records and it was not necessary that loan account records be verified by the custodian of the original holder's records, and in all other respects, the business records affidavit substantially comported with Tex. R. Evid. 902(10). Block v. Providian Nat'l Bank, 2004 Tex. App. LEXIS 6141 (Tex. App. Dallas July 12 2004).

209. Where a drilling company sued an operating company to collect for services in attempting re-entry of an abandoned oil and gas well, as the custodian of records and the president of the drilling company, the president was qualified to testify regarding the invoice and the daily time sheets without an affidavit complying with Tex. R. Evid. 902(10); moreover, those exhibits were admissible under Tex. R. Evid. 803(6), the business records exception, and the trial court did not abuse its discretion in admitting the invoice or the daily time sheets into evidence. Integras Operating, L.L.C. v. Re-Entry People, Inc., 2004 Tex. App. LEXIS 2461 (Tex. App. Eastland Mar. 18 2004).

210. Court rejected appellants' contention that statements in affidavits, which were submitted in support of summary judgment motions under Tex. R. Civ. P. 166a, constituted improper legal conclusions; case law did not stand for the proposition the statements that affiants had personal knowledge of the facts were improper, and the state supreme court had recommended, under Tex. R. Evid. 902(10)(b), that certain affidavits commence with the language appellants challenged. Choctaw Props., L.L.C. v. Aledo I.S.D., 127 S.W.3d 235, 2003 Tex. App. LEXIS 10659 (Tex. App. Waco 2003).

Evidence : Hearsay : Exceptions : Business Records : Admissibility in Criminal Trials

211. The State properly authenticated the booking sheet from a prior crime allegedly committed by defendant in the State of Washington as a business record under Tex. R. Evid. 902(10), and the records were not subject to exclusion because they contained hearsay, pursuant to Tex. R. Evid. 803(6). Wood v. State, 2012 Tex. App. LEXIS 3254, 2012 WL 1448333 (Tex. App. Beaumont Apr. 25 2012).

212. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of arrest records and certified copies of judgments and sentences because the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Also defendant failed to preserve his claim of error because he did not object to the admission of these evidentiary items on that basis as required by Tex. R. App. P. 33.1. Lopez v. State, 2005 Tex. App. LEXIS 4625 (Tex. App. Eastland June 16 2005).

213. In a child sexual assault case, the admission of defendant's medical records under Tex. R. Evid. 803(6) was proper because the records were properly authenticated by their custodian in accordance with Tex. R. Evid. 902(10) as having been made and kept in the course of a regularly conducted business activity. Eslora v. State, 2005 Tex. App. LEXIS 2564 (Tex. App. San Antonio Apr. 6 2005).

214. Assault victim's medical records were admissible as business records under Tex. R. Evid. 803(6) because the affidavit of the custodian of hospital records stated that the records were kept in the regular course of the hospital's business, that the hospital was the custodian's employer, that the victim's medical records were made by a hospital employee with knowledge of the events, and that the employee made the records at or near the time of the event. Thus, the affidavit satisfied both Rule 803(6) and Tex. R. Evid. 902(10)(b), including the notice provision of Rule 902(10). Reyes v. State, 48 S.W.3d 917, 2001 Tex. App. LEXIS 3983 (Tex. App. Fort Worth 2001).

Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business

215. Probate court did not abuse its discretion in admitting the 1993 tax return into evidence because the certified public accountant's affidavit met the requirements of Tex. R. Evid. 803(6) and the affidavit and tax return were timely filed pursuant to Tex. R. Evid. 902(10). In the affidavit, the accountant affirmed that he was the custodian of records, that the 12 pages consisted of the 1993 1040 U.S. Individual Income Tax Return and the decedent's W-2, that the 12 pages were kept by him in the regular course of business, and that the records were made at or near the time or reasonably soon thereafter, and that the records were the original or exact duplicates of the original. Valdez

v. Hollenbeck, 410 S.W.3d 1, 2013 Tex. App. LEXIS 4998 (Tex. App. San Antonio Apr. 24 2013).

216. Trial court did not abuse its discretion in admitting the mortgage company's evidence where the agent's affidavit complied with Tex. R. Evid. 902(10) by averring to facts that satisfied Tex. R. Evid. 803(6); the agent averred that she was providing the records as the custodian, that she had personal knowledge of the information contained in the records, that the records were made in the regular course of business, and that it was the regular practice of the business to keep such records. Khalilnia v. Fed. Home Loan Mortg. Corp., 2013 Tex. App. LEXIS 2991, 2013 WL 1183311 (Tex. App. Houston 1st Dist. Mar. 21 2013).

217. Insurance company documents were presented as business records pursuant to Tex. R. Evid. 803(6) and the cell phone documents were presented pursuant to Tex. R. Evid. 902 with the accompanying affidavit; because the documents were produced in the normal and regular course of business of the entity that kept the records, defendant was not denied his right of confrontation. Lozoya v. State, 2013 Tex. App. LEXIS 1973, 2013 WL 708489 (Tex. App. Amarillo Feb. 27 2013).

218. In a breach of contract action brought by appellee, the assignee of a credit card company, against an account holder, the trial court did not err in admitting appellee's business records affidavit and business records where the affidavit of appellee's designated agent sufficiently showed that appellee incorporated the credit card company's records and kept them in the regular course of its business. Smith v. Federated Fin. Corp. of Am., 2012 Tex. App. LEXIS 1593, 2012 WL 682258 (Tex. App. Houston 1st Dist. Mar. 1 2012).

Evidence : Hearsay : Exceptions : Judgments

219. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of certified records of defendant's prior felony convictions which the State alleged for enhancement purposes because the trial could admit evidence of prior criminal convictions during the punishment phase of a trial pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Lopez v. State, 2005 Tex. App. LEXIS 4610 (Tex. App. Eastland June 16 2005).

Evidence : Hearsay : Exceptions : Medical Diagnosis & Treatment

220. In defendant's aggravated robbery case, the juvenile court properly admitted a statement about the victim being "struck with a rock" that was contained in the medical records because the medical records satisfied the business records exception, the document was signed by the treating physician, and the medical records included an affidavit by the custodian of records for the hospital, who averred that she had personal knowledge of the manner in which the records were prepared. In re B. P. S., 2008 Tex. App. LEXIS 6028 (Tex. App. Austin Aug. 6 2008).

221. Defendant's medical records, with which he intended to expalin his poor performance on field sobriety tests, were properly excluded because he did not provide the State with the medical records 14 days prior to trial, in accordance with Tex. R. Evid. 902(10)(a). Werdlow v. State, 2005 Tex. App. LEXIS 6788 (Tex. App. Corpus Christi Aug. 22 2005).

Evidence : Hearsay : Exceptions : Public Records : General Overview

222. Documents could not be admitted as public records under Tex. R. Evid. 803(8) in a receivership proceeding without certification pursuant to Tex. R. Evid. 902(4) or extrinsic evidence of authenticity under Tex. R. Evid. 901(a), (b)(7). Benefield v. State ex rel. Alvin Cmty. Health Endeavor, Inc., 266 S.W.3d 25, 2008 Tex. App. LEXIS 6152

(Tex. App. Houston 1st Dist. 2008).

223. In a proceeding to terminate a father's parental rights, hearsay statements relating to purported sexual abuse by the father could not be admitted as public records because the Department of Family and Protective Services failed to lay a proper predicate. None of the documents at issue was under seal or certified for purposes of Tex. R. Evid. 902. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

224. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of arrest records and certified copies of judgments and sentences because the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Also defendant failed to preserve his claim of error because he did not object to the admission of these evidentiary items on that basis as required by Tex. R. App. P. 33.1. Lopez v. State, 2005 Tex. App. LEXIS 4625 (Tex. App. Eastland June 16 2005).

225. Trial court did not err in admitting State's exhibits during the penalty phase that consisted of certified records of defendant's prior felony convictions which the State alleged for enhancement purposes because the trial could admit evidence of prior criminal convictions during the punishment phase of a trial pursuant to Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) and the certified copies of a judgment and sentence were admissible without additional testimony as self-authenticated public records under Tex. R. Evid. 901(b)(7) and 902(1) and (4). Lopez v. State, 2005 Tex. App. LEXIS 4610 (Tex. App. Eastland June 16 2005).

226. In a defamation action, the Texas Rules of Evidence did not specify that the certification on the employee and the employer's exhibits contain an accurate date, and there was nothing in the record to indicate that the incorrect date stamp was the result of a fraudulent act; thus, it was not an abuse of discretion for the trial court to admit the exhibits under the public documents exception to the hearsay rule. Adi v. Prudential Prop. & Cas. Ins. Co., 2004 Tex. App. LEXIS 5937 (Tex. App. Houston 1st Dist. July 1 2004), writ of certiorari denied by 126 S. Ct. 565, 163 L. Ed. 2d 475, 2005 U.S. LEXIS 7988, 74 U.S.L.W. 3273 (U.S. 2005).

227. Where a statutory warning was properly certified as a public record under Tex. R. Evid. 902(4) by the custodian of records for the Texas Department of Public Safety, it was properly admitted at an administrative driver's license revocation hearing over the driver's authentication objection. Texas Dep't of Pub. Safety v. Cortinas, 996 S.W.2d 885, 1998 Tex. App. LEXIS 7791 (Tex. App. Houston 14th Dist. 1998).

Evidence : Hearsay : Exceptions : Public Records : Absence of Records

228. There was no error under Tex. R. Evid. 803(10), 902 in excluding a letter from the United States Department of Transportation showing that defendant had never held an airplane pilot's certificate because the document was a copy of a letter that, though written on letterhead, was not under seal or certified. Teczar v. State, 2011 Tex. App. LEXIS 2919, 2011 WL 1743756 (Tex. App. Eastland Apr. 15 2011).

Evidence : Hearsay : Exceptions : Public Records : Law Enforcement Reports

229. Defense counsel was not rendered ineffective by failing to object to the admission of a penitentiary packet because penitentiary packets were admissible as an exception to the hearsay rule if they were properly authenticated as public records, as provided by Tex. R. Evid. 803(8), 901(b)(7), 902(4). Henderson v. State, 2006 Tex. App. LEXIS 5911 (Tex. App. Tyler June 30 2006).

Evidence : Hearsay : Exemptions : General Overview

230. Counsel was not ineffective for failing to object to the admission of the judgment for defendant's conviction of boating while intoxicated because the supervisor's testimony that the judgment bore a seal purporting to be that of the county district clerk would have satisfied the requirements of Tex. R. Evid. 902. In addition, as evidence of a finalized judgment of conviction, counsel could not have brought forth a sustainable objection based on hearsay. Reese v. State, 273 S.W.3d 344, 2008 Tex. App. LEXIS 8518 (Tex. App. Texarkana 2008).

Evidence : Hearsay : Exemptions : Prior Statements by Witnesses : Consistent Statements

231. Nothing in the worker's Social Security disability finding document indicated that the worker was cross-examined at his disability hearing as required by Tex. R. Evid. 801(e)(1)(B); it was not clear whether the disability finding was the worker's "statement" as it was a document issued by a federal agency and not the worker himself, and because the document was not certified, its authenticity was at issue, Tex. R. Evid. 902(4). Belmarez v. Formosa Plastics Corp., 2011 Tex. App. LEXIS 7945, 2011 WL 4696750 (Tex. App. Corpus Christi Sept. 30 2011).

Evidence : Procedural Considerations : Objections & Offers of Proof : General Overview

232. Where a statutory warning was properly certified as a public record under Tex. R. Evid. 902(4) by the custodian of records for the Texas Department of Public Safety, it was properly admitted at an administrative driver's license revocation hearing over the driver's authentication objection. Texas Dep't of Pub. Safety v. Cortinas, 996 S.W.2d 885, 1998 Tex. App. LEXIS 7791 (Tex. App. Houston 14th Dist. 1998).

Evidence : Procedural Considerations : Rule Application & Interpretation

233. At the hearing on defendant's motion to suppress intoxilyzer results, the State was permitted to offer into evidence unsworn police reports detailing defendant's arrest for driving while intoxicated. The rules of evidence do not apply in suppression hearings. Caballero v. State, 2005 Tex. App. LEXIS 1865 (Tex. App. El Paso Mar. 10 2005).

Evidence : Procedural Considerations : Rulings on Evidence

234. Granting a lessor leave to file an untimely business records affidavit under Tex. R. Evid. 902(10) did not prejudice the lessee; Tex. R. Civ. P. 5 generally gives trial courts discretion to enlarge time periods, and any error in admitting the version of the lease agreement introduced by the lessor was harmless under Tex. R. App. P. 44.1(a)(1) because the trial court was well situated to resolve evidentiary conflicts. Kahn v. Imperial Airport, L.P., 308 S.W.3d 432, 2010 Tex. App. LEXIS 1830 (Tex. App. Dallas Mar. 16 2010).

235. Where a drilling company sued an operating company to collect for services in attempting re-entry of an abandoned oil and gas well, as the custodian of records and the president of the drilling company, the president was qualified to testify regarding the invoice and the daily time sheets without an affidavit complying with Tex. R. Evid. 902(10); moreover, those exhibits were admissible under Tex. R. Evid. 803(6), the business records exception, and the trial court did not abuse its discretion in admitting the invoice or the daily time sheets into evidence. Integras Operating, L.L.C. v. Re-Entry People, Inc., 2004 Tex. App. LEXIS 2461 (Tex. App. Eastland Mar. 18 2004).

Evidence : Relevance : Prior Acts, Crimes & Wrongs

236. In a family violence assault case under Tex. Penal Code Ann. § 22.01(b)(2)(A), the evidence was legally insufficient to support a jury's finding that defendant previously was convicted of an assault involving family violence, although there were some discrepancies in the documents. Burks v. State, 2013 Tex. App. LEXIS 6340

(Tex. App. Tyler May 22 2013).

237. The State properly authenticated the booking sheet from a prior crime allegedly committed by defendant in the State of Washington as a business record under Tex. R. Evid. 902(10), and the records were not subject to exclusion because they contained hearsay, pursuant to Tex. R. Evid. 803(6). Wood v. State, 2012 Tex. App. LEXIS 3254, 2012 WL 1448333 (Tex. App. Beaumont Apr. 25 2012).

Evidence : Scientific Evidence : Blood Alcohol

238. In a personal injury suit stemming from a collision between a motorist and a bicyclist, evidence of the bicyclist's intoxication was rebuttably presumed to be admissible because the bicyclist's vigilance, judgment, and reactions were at issue; no expert evidence was required as to causation; assessing the reliability of scientific methods was not a precondition to the admission of factual evidence of alcohol consumption, business records showing blood-alcohol levels, or non-expert opinions regarding intoxication. Ticknor v. Doolan, 2006 Tex. App. LEXIS 6717 (Tex. App. Houston 14th Dist. July 27 2006).

Evidence : Scientific Evidence : Fingerprints & Footprints

239. Despite defendant's assertions that a thumbprint was not taken, penitentiary packets were properly admitted into evidence during the punishment phase of an aggravated sexual assault trial; those packets were self-authenticated for purposes of Tex. R. Evid. 901 and Tex. R. Evid. 902, and the State called a crime scene technician, who had reviewed the packets and taken fingerprints from defendant. Therefore, the State established beyond a reasonable doubt that defendant was the same person that had been previously convicted of other crimes. Stewart v. State, 2009 Tex. App. LEXIS 6716, 2009 WL 2617647 (Tex. App. Beaumont Aug. 26 2009).

Evidence : Scientific Evidence : Toxicology

240. In affirming the appointment of grandparents as a child's managing conservators, the court found that the results of a drug test on the 11-month-old child were properly admitted under the business records exception to the hearsay rule; the affidavit of the custodian of records was substantially the same as the sample form provided in Tex. R. Evid. 902(10)(b). In re A.T., 2006 Tex. App. LEXIS 1882 (Tex. App. Fort Worth Mar. 9 2006).

Family Law : Child Custody : Awards : General Overview

241. In affirming the appointment of grandparents as a child's managing conservators, the court found that the results of a drug test on the 11-month-old child were properly admitted under the business records exception to the hearsay rule; the affidavit of the custodian of records was substantially the same as the sample form provided in Tex. R. Evid. 902(10)(b). In re A.T., 2006 Tex. App. LEXIS 1882 (Tex. App. Fort Worth Mar. 9 2006).

Family Law : Marital Termination & Spousal Support : Spousal Support : Obligations : Temporary Support

242. Mandamus relief was denied to a common law husband who was found in contempt for failing to pay temporary support under Tex. Fam. Code Ann. § 6.502(a)(2) because there was no deprivation of due process based on an alleged failure to allow the husband to present evidence of his inability to pay; the husband was allowed to testify as to the effects of a bankruptcy order, even though the trial court erroneously excluded such under Tex. R. Evid. 902(4). Moreover, his son was permitted to testify, there was no showing that the husband had ever requested a modification of a joint receivership or a bankruptcy court's order in order to allow for the payment of the temporary support, and property held by the husband's claimed "current" wife could have been used to pay the temporary support. In re Small, 2009 Tex. App. LEXIS 3798 (Tex. App. Houston 14th Dist. Feb. 26 2009).

Family Law : Parental Duties & Rights : Termination of Rights : General Overview

243. In a proceeding to terminate a father's parental rights, hearsay statements relating to purported sexual abuse by the father could not be admitted as public records because the Department of Family and Protective Services failed to lay a proper predicate. None of the documents at issue was under seal or certified for purposes of Tex. R. Evid. 902. In re E.A.K., 192 S.W.3d 133, 2006 Tex. App. LEXIS 1562 (Tex. App. Houston 14th Dist. 2006).

Family Law : Parental Duties & Rights : Termination of Rights : Involuntary Termination : Procedure

244. In a termination of parental rights case, medical records were properly admitted as business records under Tex. R. Evid. 802, 803(6) because the custodian affidavit complied with Tex. R. Evid. 902(10). In the Interest of R.R., 2011 Tex. App. LEXIS 8394, 2011 WL 5026229 (Tex. App. Houston 1st Dist. Oct. 20 2011).

Governments : Courts : Court Records

245. Relator failed to provide a record sufficient to establish his right to mandamus relief under Tex. R. App. P. 52.7(a) to obtain additional jail-time credit, because a computer printout suggested a detainer was placed on relator by the sheriff's office for the charged offense; however, the length of time the detainer was placed on relator was not clear. The copy of the computer printout included in the record did not appear to be a certified copy as required by Tex. R. Evid. 902(4). In re Garza, 2012 Tex. App. LEXIS 1307 (Tex. App. Houston 1st Dist. Feb. 15 2012).

Military & Veterans Law : Military Justice : Evidence : Writings & Real Evidence

246. Probate court properly excluded the exhibits offered by a decedent's surviving spouse and administratrix of his estate at the special appearance hearing of the decedent's Florida business associate because the exhibits were business records of a group of Texas entities owned by the business associate, and they were not authenticated by the administratrix merely by virtue of her role as administratrix of the decedent's estate. Allen v. Havens, 2007 Tex. App. LEXIS 2088 (Tex. App. Fort Worth Mar. 15 2007).

Real Property Law : Financing : Mortgages & Other Security Instruments : Foreclosures

247. Borrower's assertion that the Notice of Substitute Trustee Sale was not self-authenticating under Tex. R. Evid. 902 was not preserved for review because the borrower did not object in the trial court. Givens v. Midland Mortg. Co., 393 S.W.3d 876, 2012 Tex. App. LEXIS 10096, 2012 WL 6042534 (Tex. App. Dallas Dec. 5 2012).

Transportation Law : Bridges & Roads : Turnpikes

248. In a case in which a trial court found in favor of a county that sought to recover from a vehicle owner unpaid tolls due to the county toll road authority, there was no merit in the owner's claim that the judgment entered by the trial court was not supported by the evidence because the county offered, and the trial court properly admitted into evidence, a certified copy of the county's administrative order finding the owner liable, a certified copy of the affidavit and certificate of service, and the toll road authority's records detailing the owner's toll violations and the fee associated with the violations. The county also presented evidence indicating that the owner had been properly served notice of the administrative hearing. Edmiston v. Harris County, 2012 Tex. App. LEXIS 7045, 2012 WL 3612436 (Tex. App. Houston 14th Dist. Aug. 23 2012).

Transportation Law : Private Vehicles : Operator Licenses : General Overview

249. Documents certified by the Texas Department of Public Safety complied with Tex. R. Evid. 902 and therefore, under Tex. R. Evid. 902, required no extrinsic evidence of authenticity in license suspension proceedings. Hooker v.

Tex. Dep't of Pub. Safety, 2008 Tex. App. LEXIS 329 (Tex. App. Beaumont Jan. 17 2008).

250. Court would not invalidate a police officer's sworn and notarized report solely based on a partially illegible notary stamp where there was no evidence negating the intent of the officer in making the affidavit. Tex. Dep't of Pub. Safety v. Rajachar, 2006 Tex. App. LEXIS 1582 (Tex. App. San Antonio Mar. 1 2006).

251. Where a statutory warning was properly certified as a public record under Tex. R. Evid. 902(4) by the custodian of records for the Texas Department of Public Safety, it was properly admitted at an administrative driver's license revocation hearing over the driver's authentication objection. Texas Dep't of Pub. Safety v. Cortinas, 996 S.W.2d 885, 1998 Tex. App. LEXIS 7791 (Tex. App. Houston 14th Dist. 1998).

Tex. Evid. R. 903

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS RULES OF EVIDENCE > ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 903 Subscribing Witness's Testimony

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 30, *Authentication*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Tex. Evid. R. 1001

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 1001 Definitions That Apply to This Article

In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout - or other output readable by sight - if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 31, *Best Evidence Rule*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Case Notes

Criminal Law & Procedure : Arrests : Probable Cause
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Evidence : Authentication : General Overview
Evidence : Demonstrative Evidence : General Overview
Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Photographs
Evidence : Demonstrative Evidence : Recordings

Evidence : Demonstrative Evidence : Visual Formats
Evidence : Documentary Evidence : Best Evidence Rule
Evidence : Relevance : Confusion, Prejudice & Waste of Time

LexisNexis (R) Notes

Criminal Law & Procedure : Arrests : Probable Cause

1. Videotape of a driver's performance on field sobriety tests can be sufficient evidence to support probable cause to proceed with an arrest for driving while intoxicated. The reviewing court assumed that such a video, which was published in the trial court as permitted by Tex. R. Evid. 401, 1001, supported a probable cause finding where defendant failed to include the video in the record and the trial court did not file findings of fact. Amador v. State, 187 S.W.3d 543, 2006 Tex. App. LEXIS 2090 (Tex. App. Beaumont 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

2. Objection that evidence was "unsubstantiated" was insufficient to preserve a complaint that copies of an e-mail and allegedly obscene video were inadmissible under Tex. R. Evid. 1001. Varkonyi v. State, 276 S.W.3d 27, 2008 Tex. App. LEXIS 3353 (Tex. App. El Paso 2008).

Evidence : Authentication : General Overview

3. In a theft case, the trial court did not abuse its discretion in admitting photographs from a surveillance camera's videotape as they were sufficiently authenticated as to be reliable evidence: defendant did not attack the authenticity of the original videotape and raised no substantive concerns as to the authenticity of the photos, defendant did not assert that the photos had been tampered with or reflected anything other than what the original videotape showed, and an employee testified that he viewed the surveillance tape almost immediately after the burglary was discovered and that the photos were fair and accurate representations of what he saw on the videotape. Benford v. State, 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3 2005).

Evidence : Demonstrative Evidence : General Overview

4. Trial court did not err in failing to exclude a videotape of defendant's arrest because it was not overly prejudicial under Tex. R. Evid. 403; the videotape, which was treated as a photograph for evidentiary purposes under Tex. R. Evid. 1001(2), was helpful to the jury, and the court noted that the officer testified without objection to a similar course of events contained in the videotape. Hartis v. State, 2005 Tex. App. LEXIS 7079 (Tex. App. Houston 14th Dist. Aug. 30 2005), opinion withdrawn by, substituted opinion at 183 S.W.3d 793, 2005 Tex. App. LEXIS 10330 (Tex. App. Houston 14th Dist. 2005).

5. Admission of a videotape depicting the outside of a murder victim's business, the disarray in the reception area, the blood on the walls, and the placement of the victim lying face-down on the floor was proper under Tex. R. Evid. 1001(a); the video merely presented a three-dimensional perspective of the evidence that was already before the jury. Williams v. State, 82 S.W.3d 557, 2002 Tex. App. LEXIS 3413 (Tex. App. San Antonio 2002).

Evidence : Demonstrative Evidence : Admissibility

6. In a theft case, the trial court did not abuse its discretion in admitting photographs from a surveillance camera's videotape as they were sufficiently authenticated as to be reliable evidence: defendant did not attack the authenticity of the original videotape and raised no substantive concerns as to the authenticity of the photos, defendant did not assert that the photos had been tampered with or reflected anything other than what the original

videotape showed, and an employee testified that he viewed the surveillance tape almost immediately after the burglary was discovered and that the photos were fair and accurate representations of what he saw on the videotape. Benford v. State, 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3 2005).

7. Admission of a videotape depicting the outside of a murder victim's business, the disarray in the reception area, the blood on the walls, and the placement of the victim lying face-down on the floor was proper under Tex. R. Evid. 1001(a); the video merely presented a three-dimensional perspective of the evidence that was already before the jury. Williams v. State, 82 S.W.3d 557, 2002 Tex. App. LEXIS 3413 (Tex. App. San Antonio 2002).

Evidence : Demonstrative Evidence : Photographs

8. Although defendant argued that a portion of a videotape was not relevant, defendant's brief, for purposes of Tex. R. App. P. 38.1(h), did not frame the contention as an issue nor did it present supported record citations and authorities, and thus the question was not properly before the court; even if the issue was raised, the evidence of defendant's demeanor and speech in defendant's case for driving while intoxicated would have been relevant, as in a trial for driving while intoxicated, evidence could include relevant photographs or videotapes. Lovington v. State, 2007 Tex. App. LEXIS 7816 (Tex. App. Amarillo Sept. 28 2007).

9. Videotape of a driver's performance on field sobriety tests can be sufficient evidence to support probable cause to proceed with an arrest for driving while intoxicated. The reviewing court assumed that such a video, which was published in the trial court as permitted by Tex. R. Evid. 401, 1001, supported a probable cause finding where defendant failed to include the video in the record and the trial court did not file findings of fact. Amador v. State, 187 S.W.3d 543, 2006 Tex. App. LEXIS 2090 (Tex. App. Beaumont 2006).

Evidence : Demonstrative Evidence : Recordings

10. Although defendant argued that a portion of a videotape was not relevant, defendant's brief, for purposes of Tex. R. App. P. 38.1(h), did not frame the contention as an issue nor did it present supported record citations and authorities, and thus the question was not properly before the court; even if the issue was raised, the evidence of defendant's demeanor and speech in defendant's case for driving while intoxicated would have been relevant, as in a trial for driving while intoxicated, evidence could include relevant photographs or videotapes. Lovington v. State, 2007 Tex. App. LEXIS 7816 (Tex. App. Amarillo Sept. 28 2007).

11. In defendant's trial under Tex. Penal Code Ann. § 22.041(c), the trial court did not err in admitting a videotape into evidence for purposes of Tex. R. Evid. 901, 1001(b), given that (1) testimony showed that a witness removed the videotape from a locked box and placed it in his desk, reviewed the videotape the day after the incident and before testifying, and the videotape was the same or similar to what was seen on the day after the incident, (2) the testimony described where the camera lens and locked box were located in the school bus and how they were activated, (3) other testimony established the chain of custody, (4) the videotape display indicated it was a videotape of the bus on a certain date and time, and (5) events the children described appeared on the videotape. Teeter v. State, 2007 Tex. App. LEXIS 1248 (Tex. App. Dallas Feb. 20 2007).

Evidence : Demonstrative Evidence : Visual Formats

12. Defendant's conviction for recklessly causing serious bodily injury to a child was appropriate because the trial court did not abuse its discretion in admitting into evidence a video recording of the infant while he was in the hospital. The video had probative value because it demonstrated the seriousness of the infant's brain injury and the trial court could have reasonably concluded that the video aided the jury's understanding of the mother's testimony regarding the long-term effects of the injury as it showed the infant's diminished ability to see or speak; further, the

recording depicted nothing more emotional or graphic than the photographs. Holte v. State, 2013 Tex. App. LEXIS 12207, 2013 WL 5498134 (Tex. App. Houston 1st Dist. Oct. 1 2013).

Evidence : Documentary Evidence : Best Evidence Rule

13. Debtor argued that a copy of a contract was not admissible because it was not a duplicate as required by Tex. R. Evid. 1003, but Tex. R. Evid. 1001(d) defined duplicate as a counterpart produced by means that accurately reproduced the original; even though the copy was partially cut off, most of the contract were readily discernible and the copy accurately reproduced enough of the original contract that one could not reasonably doubt it was a true copy of the original. Wyatt v. Capital One Auto Fin., 2010 Tex. App. LEXIS 563, 71 U.C.C. Rep. Serv. 2d (CBC) 8 (Tex. App. Austin Jan. 29 2010).

14. In a theft case, the admission into evidence of photographs made from a security videotape was permissible under Tex. R. Evid. 1001, 1002, 1003. Benford v. State, 2005 Tex. App. LEXIS 463 (Tex. App. Austin Jan. 21 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3, 2005).

Evidence : Relevance : Confusion, Prejudice & Waste of Time

15. Defendant's conviction for recklessly causing serious bodily injury to a child was appropriate because the trial court did not abuse its discretion in admitting into evidence a video recording of the infant while he was in the hospital. The video had probative value because it demonstrated the seriousness of the infant's brain injury and the trial court could have reasonably concluded that the video aided the jury's understanding of the mother's testimony regarding the long-term effects of the injury as it showed the infant's diminished ability to see or speak; further, the recording depicted nothing more emotional or graphic than the photographs. Holte v. State, 2013 Tex. App. LEXIS 12207, 2013 WL 5498134 (Tex. App. Houston 1st Dist. Oct. 1 2013).

16. In a trial for aggravated assault, there was no error under Tex. R. Evid. 403, 1001(a) in admitting a crime scene videotape that showed the bodies of two murdered individuals who were not the victims of the charged offense. The video gave the jury a three dimensional perspective in understanding the chaotic sequence of events on the night in question. Dotson v. State, 2011 Tex. App. LEXIS 5255, 2011 WL 2714058 (Tex. App. San Antonio July 13 2011).

Tex. Evid. R. 1002

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 1002 Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or other law provides otherwise.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 31, *Best Evidence Rule*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Case Notes

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits
Civil Procedure : Appeals : Briefs
Contracts Law : Defenses : Public Policy Violations
Contracts Law : Formation : Capacity of Parties : Mental Capacity
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Evidence : Authentication : General Overview
Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Photographs
Evidence : Documentary Evidence : General Overview
Evidence : Documentary Evidence : Best Evidence Rule
Family Law : Marital Duties & Rights : Property Rights : Premarital Agreements : General Overview
Legal Ethics : Sanctions : Disciplinary Proceedings : Hearings

LexisNexis (R) Notes

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits

1. In borrowers' suit to contest a bank's right to foreclose on their home, the borrowers' motion to strike the bank's summary judgment evidence was properly denied because the best evidence rule did not apply to the transfer of assets from a predecessor to the loan servicer, because the bank was not attempting to prove the contents of a document; in light of the inferences that could be drawn from the conflicting testimony regarding whether a notice letter was sent, it was not an abuse of discretion to determine that the exhibit was admissible. Trimm v. U.S. Bank, N.A., 2014 Tex. App. LEXIS 7880 (Tex. App. Fort Worth July 17 2014).

Civil Procedure : Appeals : Briefs

2. While the record on appeal contained a release from one oil and gas company in which that company surrenders all interest in one tract of land, but neither plaintiff mineral interest owners nor defendant well operator directed the court to where the record contained evidence of how the oil and gas company obtained its interest under the lease, to the extent the best evidence rule would require the introduction of the writing proving that interest, the operator waived any error by failing to object in the trial court under Tex. R. App. P. 33.1, Tex. R. Evid. 1002. Moore v. Jet Stream Invs., Ltd., 261 S.W.3d 412, 2008 Tex. App. LEXIS 6021, 168 Oil & Gas Rep. 661 (Tex. App. Texarkana 2008).

Contracts Law : Defenses : Public Policy Violations

3. In an action in which a homebuilder sued a real estate developer for breach of contract, there was no merit to the homebuilder's claim that a provision that terminated the contract if the homebuilder recorded the contract of public record was void as a matter of public policy on the ground that the homebuilder would not have an adequate remedy under Texas law if it were contractually prevented from filing a lawsuit, and recording the contract in relation to that lawsuit, in order to enforce its right of specific performance; nothing in the Texas Rules of Evidence, specifically Tex. R. Evid. 1002, required the public recording of documents like the homebuilder had done when it filed the contract in the county deed records without the developer's permission in violation of the contractual provision, and, furthermore, the homebuilder could have maintained the confidentiality of the contract without publicly filing the contract and still sought remedy in court by either seeking an in camera inspection of the contract or having the trial court place the contract under seal. Classic Century, Inc. v. Deer Creek Estates, Inc., 2008 Tex. App. LEXIS 6248 (Tex. App. Fort Worth Aug. 14 2008).

Contracts Law : Formation : Capacity of Parties : Mental Capacity

4. Reference by beneficiaries' attorney to a decedent's medical records while questioning the decedent's friend that certain records indicated the decedent was mentally incompetent did not violate the best evidence rule because the attorney referenced the materials to impeach the friend on his testimony that the decedent was mentally competent, not to provide further evidence of the records' content; the decedent had named the friend as the "payable on death" beneficiary under certain contracts. In the Estate of Minton, 2014 Tex. App. LEXIS 1061, 2014 WL 354527 (Tex. App. Corpus Christi Jan. 30 2014).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

5. Because defendant did not object to the admission of letters he wrote to the victim while in jail on the basis of the best evidence rule when the letters were admitted at trial, he failed to preserve the issue for review. Piasecki v. State, 2012 Tex. App. LEXIS 3927, 2012 WL 1795136 (Tex. App. Beaumont May 16 2012).

6. Objection that evidence was "unsubstantiated" was insufficient to preserve a complaint that copies of an e-mail and allegedly obscene video were inadmissible under Tex. R. Evid. 1002. Varkonyi v. State, 276 S.W.3d 27, 2008 Tex. App. LEXIS 3353 (Tex. App. El Paso 2008).

Evidence : Authentication : General Overview

7. In a theft case, the trial court did not abuse its discretion in admitting photographs from a surveillance camera's videotape as they were sufficiently authenticated as to be reliable evidence: defendant did not attack the authenticity of the original videotape and raised no substantive concerns as to the authenticity of the photos, defendant did not assert that the photos had been tampered with or reflected anything other than what the original videotape showed, and an employee testified that he viewed the surveillance tape almost immediately after the burglary was discovered and that the photos were fair and accurate representations of what he saw on the videotape. Benford v. State, 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3 2005).

Evidence : Demonstrative Evidence : Admissibility

8. In a theft case, the trial court did not abuse its discretion in admitting photographs from a surveillance camera's videotape as they were sufficiently authenticated as to be reliable evidence: defendant did not attack the authenticity of the original videotape and raised no substantive concerns as to the authenticity of the photos, defendant did not assert that the photos had been tampered with or reflected anything other than what the original videotape showed, and an employee testified that he viewed the surveillance tape almost immediately after the burglary was discovered and that the photos were fair and accurate representations of what he saw on the videotape. Benford v. State, 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3 2005).

Evidence : Demonstrative Evidence : Photographs

9. Best evidence rule did not apply where the complained-of photographs were not tendered for admission into evidence in lieu of a police officer's dash-cam video; the photographs merely supplemented, but did not alter, the substance of the dash-cam video. Hurst v. State, 2013 Tex. App. LEXIS 12376, 2013 WL 5526226 (Tex. App. Waco Oct. 3 2013).

Evidence : Documentary Evidence : General Overview

10. In a harassment case, the trial court did not abuse its discretion in admitting, pursuant to Tex. R. Evid. 1003, a copy of a document over defendant's Tex. R. Evid. 1002 objection because defendant did not raise a question of authenticity. Chehade v. State, 2005 Tex. App. LEXIS 1962 (Tex. App. Dallas Mar. 16 2005).

Evidence : Documentary Evidence : Best Evidence Rule

11. In borrowers' suit to contest a bank's right to foreclose on their home, the borrowers' motion to strike the bank's summary judgment evidence was properly denied because the best evidence rule did not apply to the transfer of assets from a predecessor to the loan servicer, because the bank was not attempting to prove the contents of a document; in light of the inferences that could be drawn from the conflicting testimony regarding whether a notice letter was sent, it was not an abuse of discretion to determine that the exhibit was admissible. Trimm v. U.S. Bank, N.A., 2014 Tex. App. LEXIS 7880 (Tex. App. Fort Worth July 17 2014).

12. Court did not abuse its discretion by admitting the photographs, because the duplicate was a photograph, and nothing suggested that the photograph was an inaccurate duplicate of the original. Trotty v. State, 2014 Tex. App. LEXIS 6159 (Tex. App. Fort Worth June 5 2014).

13. Evidence in the form of an affidavit and verified petition to the effect that a written notice to vacate and demand for possession was delivered by the lender to the borrowers on a certain date by U.S. mail was not within the best

evidence rule and could be given without producing the document because the evidence was not used to prove the contents of the writing. Cantu v. Zar-Mat Props., 2014 Tex. App. LEXIS 4928, 2014 WL 1879276 (Tex. App. Corpus Christi May 8 2014).

14. Reference by beneficiaries' attorney to a decedent's medical records while questioning the decedent's friend that certain records indicated the decedent was mentally incompetent did not violate the best evidence rule because the attorney referenced the materials to impeach the friend on his testimony that the decedent was mentally competent, not to provide further evidence of the records' content; the decedent had named the friend as the "payable on death" beneficiary under certain contracts. In the Estate of Minton, 2014 Tex. App. LEXIS 1061, 2014 WL 354527 (Tex. App. Corpus Christi Jan. 30 2014).

15. Best evidence rule did not apply where the complained-of photographs were not tendered for admission into evidence in lieu of a police officer's dash-cam video; the photographs merely supplemented, but did not alter, the substance of the dash-cam video. Hurst v. State, 2013 Tex. App. LEXIS 12376, 2013 WL 5526226 (Tex. App. Waco Oct. 3 2013).

16. Appellant did not complain about the authenticity of the original recording, he complained that the evidence was nothing more than an altered copy of the original, but he did not allege the parts that were not accurate, and the trial court admitted a copy on hard drive of the backup files, and the admission of the video was not error. Williams v. State, 2013 Tex. App. LEXIS 9376 (Tex. App. Dallas July 29 2013).

17. In a divorce, it was not error to allow a wife to read a text message the wife received from the husband into the record because (1) the wife argued that no document of the message was obtainable, and the husband's response was not substantiated, and (2) the text message was not closely related to a controlling issue, so the message was exempt from the best evidence rule. Howell v. Howell, 2013 Tex. App. LEXIS 1991, 2013 WL 784542 (Tex. App. Corpus Christi Feb. 28 2013).

18. Witness's testimony concerning what he observed of the events as they took place, as shown on a closed-circuit television, was not testimony the depended upon or was regarding a videotape recording; therefore, the court was not persuaded by the claim that the trial court should have granted a motion to suppress pursuant to Tex. R. Evid. 1002. Cox v. State, 2012 Tex. App. LEXIS 5380, 2012 WL 2692189 (Tex. App. Dallas July 9 2012).

19. Because defendant did not object to the admission of letters he wrote to the victim while in jail on the basis of the best evidence rule when the letters were admitted at trial, he failed to preserve the issue for review. Piasecki v. State, 2012 Tex. App. LEXIS 3927, 2012 WL 1795136 (Tex. App. Beaumont May 16 2012).

20. There was no an objection on the grounds of best evidence, nor an objection that such testimony violated the parol evidence rule, and thus waiver occurred. Leander v. Fin & Feather Club, 2012 Tex. App. LEXIS 178, 2012 WL 75815 (Tex. App. Texarkana Jan. 11 2012).

21. Duplicate copy of a child victim's letter to Santa could properly have been admitted to the same extent as an original under Tex. R. Evid. 1002, 1003, because the authenticity of the original was not questioned. Cantu v. State, 2011 Tex. App. LEXIS 6658, 2011 WL 3667450 (Tex. App. Corpus Christi Aug. 22 2011).

22. In a real estate commission dispute, the trial court did not err in overruling a Tex. R. Evid. 1002 best evidence objection and finding a copy admissible under Tex. R. Evid. 1003 because authenticity was not disputed; rather, the clients contended that the document was not the parties' final agreement. Moreover, the copy was admissible under Tex. R. Evid. 1004 either as a replacement for a lost document or as a document in the possession of the objecting

party. PMS Hospitality, Inc. v. OM Realty Fin. Co., 2011 Tex. App. LEXIS 630, 2011 WL 258694 (Tex. App. Dallas Jan. 28 2011).

23. Affidavits were offered as predicates for the introduction of business records; they were not offered to prove the content of any writing or to contradict, vary, or add to the terms of any agreement, and the affidavits did not violate the parol evidence or best evidence rules, including under Tex. R. Evid. 1002. Wood v. Pharia L.L.C., 2010 Tex. App. LEXIS 9819, 2010 WL 5060621 (Tex. App. Houston 1st Dist. Dec. 9 2010).

24. Trial court did not enter contradictory ruling by sustaining the objections to the affidavits on grounds that they were conclusory and certified or sworn copies of documents to which the affidavits refer were not attached to the affidavits, because whether affidavits attempted to establish the contents of a document and whether they contained conclusory statements were distinct issues. Hill v. Crowson, 2009 Tex. App. LEXIS 8924, 2009 WL 3858065 (Tex. App. Waco Nov. 18 2009).

25. In a dissolution of marriage case, the trial court properly admitted evidence to establish the contents of a premarital agreement because, in its findings of fact and conclusion of law, the court found that the original was lost and the loss was not the result of any action by the wife, the proponent of the agreement. Jurek v. Couch-Jurek, 296 S.W.3d 864, 2009 Tex. App. LEXIS 7421 (Tex. App. El Paso Sept. 23 2009).

26. State Bar investigator's testimony that the original tape recording of an attorney's disciplinary hearing had been purged reflected that the original recordings were lost or destroyed within the meaning of Tex. R. Evid. 1004, and there was no evidence that the original recording was lost or destroyed in bad faith. Accordingly, the trial court did not abuse its discretion in admitting the written transcripts of the hearings despite the attorney's best evidence objection under Tex. R. Evid. 1002. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 1694 (Tex. App. Houston 14th Dist. Mar. 12 2009).

27. In a disciplinary matter, a trial court did not err by admitting a written transcript of a state bar hearing, rather than admitting an audio recording, because the original recording was lost or destroyed under Tex. R. Evid. 1004. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 351 (Tex. App. Houston 14th Dist. Jan. 20 2009).

28. In an action in which a homebuilder sued a real estate developer for breach of contract, there was no merit to the homebuilder's claim that a provision that terminated the contract if the homebuilder recorded the contract of public record was void as a matter of public policy on the ground that the homebuilder would not have an adequate remedy under Texas law if it were contractually prevented from filing a lawsuit, and recording the contract in relation to that lawsuit, in order to enforce its right of specific performance; nothing in the Texas Rules of Evidence, specifically Tex. R. Evid. 1002, required the public recording of documents like the homebuilder had done when it filed the contract in the county deed records without the developer's permission in violation of the contractual provision, and, furthermore, the homebuilder could have maintained the confidentiality of the contract without publicly filing the contract and still sought remedy in court by either seeking an in camera inspection of the contract or having the trial court place the contract under seal. Classic Century, Inc. v. Deer Creek Estates, Inc., 2008 Tex. App. LEXIS 6248 (Tex. App. Fort Worth Aug. 14 2008).

29. While the record on appeal contained a release from one oil and gas company in which that company surrenders all interest in one tract of land, but neither plaintiff mineral interest owners nor defendant well operator directed the court to where the record contained evidence of how the oil and gas company obtained its interest under the lease, to the extent the best evidence rule would require the introduction of the writing proving that interest, the operator waived any error by failing to object in the trial court under Tex. R. App. P. 33.1, Tex. R. Evid. 1002. Moore v. Jet Stream Invs., Ltd., 261 S.W.3d 412, 2008 Tex. App. LEXIS 6021, 168 Oil & Gas Rep. 661 (Tex.

App. Texarkana 2008).

30. Trial court acted within its discretion in finding that the original weapons were unavailable because they had corroded and degraded and replicas were thus necessary to show the jury the state of the guns at the time of the offense; the original weapons were admissible and relevant under Tex. R. Evid. 401 to a material issue because the jury was charged with finding whether defendant committed aggravated assault using or exhibiting a deadly weapon, and by admitting the gun as demonstrative evidence, the trial court allowed the jury to see examples of the weapons used during the offenses; the demonstrative weapons were the same models as the original ones, had no inflammatory attributes, and the trial court properly advised the jury on this issue, and defendant's reliance on the Best Evidence Rule was misguided because it applies only to writings or documents and the rule did not apply to weapons. Bang v. State, 2007 Tex. App. LEXIS 7680 (Tex. App. Houston 14th Dist. Sept. 25 2007).

31. Business record exception under Tex. R. Evid. 803 is an exception to the general rule prohibiting hearsay and Tex. R. Evid. 1006 is more properly viewed as an exception to the best evidence rule. Forkert v. State, 2007 Tex. App. LEXIS 7586 (Tex. App. El Paso Sept. 13 2007).

32. Trial court did not abuse its discretion by overruling objections to evidence submitted by a developer where the best evidence rule had been satisfied because the plats for the overall property in question were already in evidence; thus, the complained of statements were not hearsay because they were based on information already in evidence. DeSoto Wildwood Dev., Inc. v. City of Lewisville, 184 S.W.3d 814, 2006 Tex. App. LEXIS 413 (Tex. App. Fort Worth 2006).

33. In a dispute regarding impact fees, the trial court did not abuse its discretion by overruling an evidentiary objection to affidavit testimony; because neither party was attempting to prove the contents of a deed or deeds, the best evidence rule did not apply. Desoto Wildwood Dev., Inc. v. City of Lewisville, 2005 Tex. App. LEXIS 8913 (Tex. App. Fort Worth Oct. 27 2005), opinion withdrawn by, substituted opinion at 184 S.W.3d 814, 2006 Tex. App. LEXIS 413 (Tex. App. Fort Worth 2006).

34. In a harassment case, the trial court did not abuse its discretion in admitting, pursuant to Tex. R. Evid. 1003, a copy of a document over defendant's Tex. R. Evid. 1002 objection because defendant did not raise a question of authenticity. Chehade v. State, 2005 Tex. App. LEXIS 1962 (Tex. App. Dallas Mar. 16 2005).

35. In a theft case, the admission into evidence of photographs made from a security videotape was permissible under Tex. R. Evid. 1001, 1002, 1003. Benford v. State, 2005 Tex. App. LEXIS 463 (Tex. App. Austin Jan. 21 2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3, 2005).

36. In a theft case where defendant attempted to switch price tags with a different item, photographs of the stolen item were properly admitted as they were not admitted to prove the contents of a writing; thus, the trial court did not abuse its discretion by finding that the best evidence rule did not apply. Martin v. State, 2004 Tex. App. LEXIS 9095 (Tex. App. Waco Oct. 13 2004).

37. Pursuant to Tex. R. Evid. 1002 and 1004(a), because some certificates of deposit were unavailable since the bank had destroyed them after they had been cashed, an "exemplar" CD was admitted. A bank employee testified and authenticated that document. Phillips v. Ivy, 2004 Tex. App. LEXIS 7539 (Tex. App. Waco Aug. 18 2004).

38. Handwritten annotations on a promissory note, which indicated the dates on which additional loans were made and was admitted into evidence, did not add to the terms of the note because, under the note, 20 percent interest was being charged and the ex-boyfriend testified that he loaned the additional amounts interest-free to the ex-

girlfriend. Pena v. Hilliard, 2002 Tex. App. LEXIS 7186 (Tex. App. San Antonio Oct. 9 2002).

39. Even if a trial court erred in admitting a promissory note that had handwritten annotations on it that indicated the dates on which additional loans were made, any error was harmless as the ex-girlfriend testified that she signed the promissory note and was indebted to the ex-boyfriend for the amount evidenced by the note. Pena v. Hilliard, 2002 Tex. App. LEXIS 7186 (Tex. App. San Antonio Oct. 9 2002).

Family Law : Marital Duties & Rights : Property Rights : Premarital Agreements : General Overview

40. In a dissolution of marriage case, the trial court properly admitted evidence to establish the contents of a premarital agreement because, in its findings of fact and conclusion of law, the court found that the original was lost and the loss was not the result of any action by the wife, the proponent of the agreement. Jurek v. Couch-Jurek, 296 S.W.3d 864, 2009 Tex. App. LEXIS 7421 (Tex. App. El Paso Sept. 23 2009).

Legal Ethics : Sanctions : Disciplinary Proceedings : Hearings

41. State Bar investigator's testimony that the original tape recording of an attorney's disciplinary hearing had been purged reflected that the original recordings were lost or destroyed within the meaning of Tex. R. Evid. 1004, and there was no evidence that the original recording was lost or destroyed in bad faith. Accordingly, the trial court did not abuse its discretion in admitting the written transcripts of the hearings despite the attorney's best evidence objection under Tex. R. Evid. 1002. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 1694 (Tex. App. Houston 14th Dist. Mar. 12 2009).

42. In a disciplinary matter, a trial court did not err by admitting a written transcript of a state bar hearing, rather than admitting an audio recording, because the original recording was lost or destroyed under Tex. R. Evid. 1004. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 351 (Tex. App. Houston 14th Dist. Jan. 20 2009).

Tex. Evid. R. 1003

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 1003 Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 31, *Best Evidence Rule*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Case Notes

Banking Law : Consumer Protection : Credit Card Agreements : General Overview
Civil Procedure : Summary Judgment : Supporting Materials : Affidavits
Civil Procedure : Appeals : Records on Appeal
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence
Evidence : Authentication : General Overview
Evidence : Demonstrative Evidence : Admissibility
Evidence : Demonstrative Evidence : Photographs
Evidence : Demonstrative Evidence : Visual Formats
Evidence : Documentary Evidence : General Overview
Evidence : Documentary Evidence : Best Evidence Rule
Tax Law : State & Local Taxes : Real Property Tax : Collection : Tax Liens

LexisNexis (R) Notes

Banking Law : Consumer Protection : Credit Card Agreements : General Overview

1. In a collections case brought by the purchaser of credit card debt, it was proper under Tex. R. Evid. 1003 to admit copies of the documents used to accomplish the sale of the debtor's account from the lender to an intermediary purchaser, and then to plaintiff purchaser. The debtor did not question the authenticity of the documents reflecting the sale of his account. Nice v. Dodeka, L.L.C., 2010 Tex. App. LEXIS 8922, 2010 WL 4514174 (Tex. App. Beaumont Nov. 10 2010).

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits

2. In borrowers' suit to contest a bank's right to foreclose on their home, the borrowers' motion to strike the bank's summary judgment evidence was properly denied because the best evidence rule did not apply to the transfer of assets from a predecessor to the loan servicer, because the bank was not attempting to prove the contents of a document; in light of the inferences that could be drawn from the conflicting testimony regarding whether a notice letter was sent, it was not an abuse of discretion to determine that the exhibit was admissible. Trimm v. U.S. Bank, N.A., 2014 Tex. App. LEXIS 7880 (Tex. App. Fort Worth July 17 2014).

Civil Procedure : Appeals : Records on Appeal

3. In a divorce proceeding, it was not an abuse of discretion to allow the withdrawal from the record of one of the children's passports seven days before the judgment became final; the husband did not inform the appellate court whether there was a proper motion to substitute a duplicate original, either orally or in writing, or whether the action was sua sponte by the trial court. Thomas v. Robert, 2007 Tex. App. LEXIS 1149 (Tex. App. Corpus Christi Feb. 15 2007).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

4. Because defendant did not object to the admission of letters he wrote to the victim while in jail on the basis of the best evidence rule when the letters were admitted at trial, he failed to preserve the issue for review. Piasecki v. State, 2012 Tex. App. LEXIS 3927, 2012 WL 1795136 (Tex. App. Beaumont May 16 2012).

Criminal Law & Procedure : Appeals : Standards of Review : Abuse of Discretion : Evidence

5. Trial court did not abuse its discretion by admitting into evidence a duplicate recording of the meeting rather than the original because the captain testified that the CD was an exact duplicate of the minicassette, defendant never questioned the authenticity of the original recording at trial, and defense counsel conceded that she never compared the original to the CD even though the original was made available to her. Milton v. State, 2011 Tex. App. LEXIS 7592, 2011 WL 4361482 (Tex. App. Houston 14th Dist. Sept. 20 2011).

Evidence : Authentication : General Overview

6. Defendant had not established that copies of two different checks that were allegedly forged and presented by him at two different banks were inadmissible as duplicates because there was no evidence that would raise a question about whether the checks were what the State claimed them to be, and reasonable jurors thus could not disagree about whether the checks were the actual checks presented by defendant, as the State alleged. Moreover, the potentially unique probative value of the original checks went to the issues of whether the checks were the actual checks presented by defendant and whether the checks were forgeries, and defendant had admitted both of those facts. Duncan v. State, 2014 Tex. App. LEXIS 4678, 2014 WL 1788173 (Tex. App. Corpus Christi May 1 2014).

7. In a theft case, the trial court did not abuse its discretion in admitting photographs from a surveillance camera's videotape as they were sufficiently authenticated as to be reliable evidence: defendant did not attack the authenticity of the original videotape and raised no substantive concerns as to the authenticity of the photos, defendant did not assert that the photos had been tampered with or reflected anything other than what the original videotape showed, and an employee testified that he viewed the surveillance tape almost immediately after the burglary was discovered and that the photos were fair and accurate representations of what he saw on the videotape. Benford v. State, 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3 2005).

Evidence : Demonstrative Evidence : Admissibility

8. In a theft case, the trial court did not abuse its discretion in admitting photographs from a surveillance camera's videotape as they were sufficiently authenticated as to be reliable evidence: defendant did not attack the authenticity of the original videotape and raised no substantive concerns as to the authenticity of the photos, defendant did not assert that the photos had been tampered with or reflected anything other than what the original videotape showed, and an employee testified that he viewed the surveillance tape almost immediately after the burglary was discovered and that the photos were fair and accurate representations of what he saw on the videotape. Benford v. State, 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3 2005).

Evidence : Demonstrative Evidence : Photographs

9. Best evidence rule did not apply where the complained-of photographs were not tendered for admission into evidence in lieu of a police officer's dash-cam video; the photographs merely supplemented, but did not alter, the substance of the dash-cam video. Hurst v. State, 2013 Tex. App. LEXIS 12376, 2013 WL 5526226 (Tex. App. Waco Oct. 3 2013).

Evidence : Demonstrative Evidence : Visual Formats

10. In a theft trial, there was no error in admitting a videotape put together by a store's loss prevention officer from numerous surveillance cameras. Tex. R. Evid. 1003 did not apply to the argument that the video was edited. Massey v. State, 2011 Tex. App. LEXIS 5284, 2011 WL 2698608 (Tex. App. Dallas July 13 2011).

Evidence : Documentary Evidence : General Overview

11. In a harassment case, the trial court did not abuse its discretion in admitting, pursuant to Tex. R. Evid. 1003, a copy of a document over defendant's Tex. R. Evid. 1002 objection because defendant did not raise a question of authenticity. Chehade v. State, 2005 Tex. App. LEXIS 1962 (Tex. App. Dallas Mar. 16 2005).

Evidence : Documentary Evidence : Best Evidence Rule

12. In borrowers' suit to contest a bank's right to foreclose on their home, the borrowers' motion to strike the bank's summary judgment evidence was properly denied because the best evidence rule did not apply to the transfer of assets from a predecessor to the loan servicer, because the bank was not attempting to prove the contents of a document; in light of the inferences that could be drawn from the conflicting testimony regarding whether a notice letter was sent, it was not an abuse of discretion to determine that the exhibit was admissible. Trimm v. U.S. Bank, N.A., 2014 Tex. App. LEXIS 7880 (Tex. App. Fort Worth July 17 2014).

13. Court did not abuse its discretion by admitting the photographs, because the duplicate was a photograph, and nothing suggested that the photograph was an inaccurate duplicate of the original. Trotty v. State, 2014 Tex. App. LEXIS 6159 (Tex. App. Fort Worth June 5 2014).

14. Defendant had not established that copies of two different checks that were allegedly forged and presented by him at two different banks were inadmissible as duplicates because there was no evidence that would raise a question about whether the checks were what the State claimed them to be, and reasonable jurors thus could not disagree about whether the checks were the actual checks presented by defendant, as the State alleged. Moreover, the potentially unique probative value of the original checks went to the issues of whether the checks were the actual checks presented by defendant and whether the checks were forgeries, and defendant had admitted both of those facts. Duncan v. State, 2014 Tex. App. LEXIS 4678, 2014 WL 1788173 (Tex. App. Corpus Christi May 1 2014).

15. Best evidence rule did not apply where the complained-of photographs were not tendered for admission into evidence in lieu of a police officer's dash-cam video; the photographs merely supplemented, but did not alter, the substance of the dash-cam video. Hurst v. State, 2013 Tex. App. LEXIS 12376, 2013 WL 5526226 (Tex. App. Waco Oct. 3 2013).

16. Appellant did not complain about the authenticity of the original recording, he complained that the evidence was nothing more than an altered copy of the original, but he did not allege the parts that were not accurate, and the trial court admitted a copy on hard drive of the backup files, and the admission of the video was not error. Williams v. State, 2013 Tex. App. LEXIS 9376 (Tex. App. Dallas July 29 2013).

17. Because defendant did not object to the admission of letters he wrote to the victim while in jail on the basis of the best evidence rule when the letters were admitted at trial, he failed to preserve the issue for review. Piasecki v. State, 2012 Tex. App. LEXIS 3927, 2012 WL 1795136 (Tex. App. Beaumont May 16 2012).

18. Trial court did not abuse its discretion by admitting into evidence a duplicate recording of the meeting rather than the original because the captain testified that the CD was an exact duplicate of the minicassette, defendant never questioned the authenticity of the original recording at trial, and defense counsel conceded that she never compared the original to the CD even though the original was made available to her. Milton v. State, 2011 Tex. App. LEXIS 7592, 2011 WL 4361482 (Tex. App. Houston 14th Dist. Sept. 20 2011).

19. Lender's tax liens were enforceable because verified copies were recorded in lieu of originals. Genesis Tax Loan Servs. v. Kothmann, 339 S.W.3d 104, 2011 Tex. LEXIS 359, 54 Tex. Sup. Ct. J. 988 (Tex. 2011).

20. In a real estate commission dispute, the trial court did not err in overruling a Tex. R. Evid. 1002 best evidence objection and finding a copy admissible under Tex. R. Evid. 1003 because authenticity was not disputed; rather, the clients contended that the document was not the parties' final agreement. Moreover, the copy was admissible under Tex. R. Evid. 1004 either as a replacement for a lost document or as a document in the possession of the objecting party. PMS Hospitality, Inc. v. OM Realty Fin. Co., 2011 Tex. App. LEXIS 630, 2011 WL 258694 (Tex. App. Dallas Jan. 28 2011).

21. Debtor argued that a copy of a contract was not admissible because it was not a duplicate as required by Tex. R. Evid. 1003, but Tex. R. Evid. 1001(d) defined duplicate as a counterpart produced by means that accurately reproduced the original; even though the copy was partially cut off, most of the contract was readily discernible and the copy accurately reproduced enough of the original contract that one could not reasonably doubt it was a true copy of the original. Wyatt v. Capital One Auto Fin., 2010 Tex. App. LEXIS 563, 71 U.C.C. Rep. Serv. 2d (CBC) 8 (Tex. App. Austin Jan. 29 2010).

22. Because defendant did not question the authenticity of the original currency, the duplicate copies of the currency offered in evidence were admissible under Tex. R. Evid. 1003. Rios v. State, 2009 Tex. App. LEXIS 8737,

2009 WL 3766341 (Tex. App. Waco Nov. 10 2009), mem. op.

23. Trial court did not abuse its discretion by admitting video recordings as duplicates of the original, for purposes of Tex. R. Evid. 1003. Henley v. State, 2009 Tex. App. LEXIS 3653, 2009 WL 1464247 (Tex. App. Dallas May 27 2009).

24. Resident and his wife contended that 911 records were competent summary judgment proof under case law and Tex. R. Evid. 902, but they did not state that the records obtained were true and correct copies of original documents; furthermore, the Texas Rules of Evidence and summary-judgment practice treat public records differently from private records and though Tex. R. Evid. 1003 and 1004(d) recognize that a "duplicate" of the original is admissible to the same extent as the original when the original of a document is not available, Tex. R. Evid. 1003 does not apply when, as here, its authenticity is questioned. Xiao Yu Zhong v. Sunblossom Gardens, LLC, 2009 Tex. App. LEXIS 3010, 2009 WL 1162213 (Tex. App. Houston 1st Dist. Apr. 30 2009).

25. Owner contended that the trial court erred in refusing to admit the owner's version of the contract that was properly authenticated and admsisible under Tex. R. Evid. 1003, 1004, however, the contractor objected and the parties agreed that the contract contained the terms relevant to the challenged rulings on appeal; even if the trial court erred in excluding the owner's version of the contract, the owner failed to show that the exclusion probably caused the rendition of an improper judgment under Tex. R. App. P. 44.1(a). Stonehill-PRM WC I, L.P. v. Chasco Constructors, Ltd., L.L.P., 2009 Tex. App. LEXIS 1019, 2009 WL 349136 (Tex. App. Austin Feb. 11 2009).

26. Appellate court overruled the owner's assertion that the trial court erred in admitting the lease because it failed to comply with the statute of frauds, because the owner did not raise any question on the authenticity of the duplicate of the original lease or why admission of a duplicate would be unfair, and the description of the leased premises was sufficient to satisfy the statute of frauds. Woodmark Austin Ltd. P'ship v. Coinamatic, Inc., 2007 Tex. App. LEXIS 9672 (Tex. App. Amarillo Dec. 11 2007).

27. Trial court acted within its discretion in finding that the original weapons were unavailable because they had corroded and degraded and replicas were thus necessary to show the jury the state of the guns at the time of the offense; the original weapons were admissible and relevant under Tex. R. Evid. 401 to a material issue because the jury was charged with finding whether defendant committed aggravated assault using or exhibiting a deadly weapon, and by admitting the gun as demonstrative evidence, the trial court allowed the jury to see examples of the weapons used during the offenses; the demonstrative weapons were the same models as the original ones, had no inflammatory attributes, and the trial court properly advised the jury on this issue, and defendant's reliance on the Best Evidence Rule was misguided because it applies only to writings or documents and the rule did not apply to weapons. Bang v. State, 2007 Tex. App. LEXIS 7680 (Tex. App. Houston 14th Dist. Sept. 25 2007).

28. In a divorce proceeding, it was not an abuse of discretion to allow the withdrawal from the record of one of the children's passports seven days before the judgment became final; the husband did not inform the appellate court whether there was a proper motion to substitute a duplicate original, either orally or in writing, or whether the action was sua sponte by the trial court. Thomas v. Robert, 2007 Tex. App. LEXIS 1149 (Tex. App. Corpus Christi Feb. 15 2007).

29. In a harassment case, the trial court did not abuse its discretion in admitting, pursuant to Tex. R. Evid. 1003, a copy of a document over defendant's Tex. R. Evid. 1002 objection because defendant did not raise a question of authenticity. Chehade v. State, 2005 Tex. App. LEXIS 1962 (Tex. App. Dallas Mar. 16 2005).

30. In a theft case, the admission into evidence of photographs made from a security videotape was permissible under Tex. R. Evid. 1001, 1002, 1003. Benford v. State, 2005 Tex. App. LEXIS 463 (Tex. App. Austin Jan. 21

2005), opinion withdrawn by, substituted opinion at 2005 Tex. App. LEXIS 840 (Tex. App. Austin Feb. 3, 2005).

31. Lender's evidence was sufficient to support summary judgment as the loan documents attached were true and correct copies of the records pertaining to the debtor's accounts. Dennis v. Scil Tex., Inc., 2014 Tex. App. LEXIS 1948, 2014 WL 700783 (Tex. App. Houston 1st Dist. Feb. 20 2014).

Tax Law : State & Local Taxes : Real Property Tax : Collection : Tax Liens

32. Lender's tax liens were enforceable because verified copies were recorded in lieu of originals. Genesis Tax Loan Servs. v. Kothmann, 339 S.W.3d 104, 2011 Tex. LEXIS 359, 54 Tex. Sup. Ct. J. 988 (Tex. 2011).

Tex. Evid. R. 1004

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 1004 Admissibility of Other Evidence of Content

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) an original is not located in Texas;

(d) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(e) the writing, recording, or photograph is not closely related to a controlling issue.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 31, *Best Evidence Rule*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Case Notes

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits
Civil Procedure : Appeals : Reviewability : Preservation for Review
Criminal Law & Procedure : Search & Seizure : Search Warrants : Probable Cause : General Overview
Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence
Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence
Evidence : Documentary Evidence : Best Evidence Rule
Family Law : Marital Duties & Rights : Property Rights : Premarital Agreements : General Overview
Legal Ethics : Sanctions : Disciplinary Proceedings : Hearings

LexisNexis (R) Notes

Civil Procedure : Summary Judgment : Supporting Materials : Affidavits

1. In borrowers' suit to contest a bank's right to foreclose on their home, the borrowers' motion to strike the bank's summary judgment evidence was properly denied because the best evidence rule did not apply to the transfer of assets from a predecessor to the loan servicer, because the bank was not attempting to prove the contents of a document; in light of the inferences that could be drawn from the conflicting testimony regarding whether a notice letter was sent, it was not an abuse of discretion to determine that the exhibit was admissible. Trimm v. U.S. Bank, N.A., 2014 Tex. App. LEXIS 7880 (Tex. App. Fort Worth July 17 2014).

Civil Procedure : Appeals : Reviewability : Preservation for Review

2. In a dissolution of marriage case, the husband did not preserve his objection to the admission of a premarital agreement because, at trial, the husband specifically referred the court to Tex. R. Evid.1004(e), not Rule 1004(a). The trial objections based on relevance, "controlling matters," and on Rule 1004(e) were different from the argument raised on appeal, and therefore, the issue was waived. Jurek v. Couch-Jurek, 296 S.W.3d 864, 2009 Tex. App. LEXIS 7421 (Tex. App. El Paso Sept. 23 2009).

Criminal Law & Procedure : Search & Seizure : Search Warrants : Probable Cause : General Overview

3. Based upon the four-corners test, probable cause existed for the issuance of a search warrant for defendant's residence where, based upon a narcotics officer's affidavit, the trial court could have reasonably concluded that methamphetamine and other items used in its manufacture would be found at the suspected place; the officer's testimony that he had sworn to the affidavit before a magistrate and that he and the magistrate had signed it, and that, other than his missing signatures, the affidavit introduced into evidence was identical to the original, supported the admission of the documents into evidence pursuant to Tex. R. Evid.1004, and evidence obtained in good faith pursuant to a search warrant was admissible under Tex. Code Crim. Proc. Ann. art. 38.23(b) even if the officer had failed to sign the affidavit. McCormick v. State, 2006 Tex. App. LEXIS 1619 (Tex. App. Eastland Mar. 1 2006).

Criminal Law & Procedure : Pretrial Motions & Procedures : Suppression of Evidence

4. Based upon the four-corners test, probable cause existed for the issuance of a search warrant for defendant's residence where, based upon a narcotics officer's affidavit, the trial court could have reasonably concluded that methamphetamine and other items used in its manufacture would be found at the suspected place; the officer's testimony that he had sworn to the affidavit before a magistrate and that he and the magistrate had signed it, and that, other than his missing signatures, the affidavit introduced into evidence was identical to the original, supported the admission of the documents into evidence pursuant to Tex. R. Evid.1004, and evidence obtained in good faith pursuant to a search warrant was admissible under Tex. Code Crim. Proc. Ann. art. 38.23(b) even if the officer had failed to sign the affidavit. McCormick v. State, 2006 Tex. App. LEXIS 1619 (Tex. App. Eastland Mar. 1 2006).

Criminal Law & Procedure : Appeals : Reviewability : Preservation for Review : Evidence

5. Because defendant did not object to the admission of letters he wrote to the victim while in jail on the basis of the best evidence rule when the letters were admitted at trial, he failed to preserve the issue for review. Piasecki v. State, 2012 Tex. App. LEXIS 3927, 2012 WL 1795136 (Tex. App. Beaumont May 16 2012).

Evidence : Documentary Evidence : Best Evidence Rule

6. In borrowers' suit to contest a bank's right to foreclose on their home, the borrowers' motion to strike the bank's summary judgment evidence was properly denied because the best evidence rule did not apply to the transfer of assets from a predecessor to the loan servicer, because the bank was not attempting to prove the contents of a document; in light of the inferences that could be drawn from the conflicting testimony regarding whether a notice letter was sent, it was not an abuse of discretion to determine that the exhibit was admissible. Trimm v. U.S. Bank, N.A., 2014 Tex. App. LEXIS 7880 (Tex. App. Fort Worth July 17 2014).

7. Copies of two different checks that were allegedly forged and presented by defendant at two different banks were admissible because the State established that the original checks had been lost or destroyed, and defendant never asserted or attempted to prove that the State, as the proponent of the evidence, lost or destroyed the original checks in bad faith; therefore, defendant had not established that the copies were inadmissible as "other evidence" of the original checks. Duncan v. State, 2014 Tex. App. LEXIS 4678, 2014 WL 1788173 (Tex. App. Corpus Christi May 1 2014).

8. Trial court did not abuse its discretion by admitting the decedent's 1993 income tax return into evidence because the certified public accountant's affidavit affirmed that the copy of the tax return was an exact duplicate of the original return which had been submitted to the Internal Revenue Service. Valdez v. Hollenbeck, 410 S.W.3d 1, 2013 Tex. App. LEXIS 4998 (Tex. App. San Antonio Apr. 24 2013).

9. Defendant's convictions for aggravated kidnapping and aggravated sexual assault of a child were proper because the admission of an edited interview was appropriate. Nothing in the appellate record in indicated that the original recording was destroyed by the State, that it was destroyed in bad faith, or that its contents would have been favorable to defendant. Billings v. State, 399 S.W.3d 581, 2013 Tex. App. LEXIS 1423, 2013 WL 607699 (Tex. App. Eastland Feb. 14 2013).

10. Because defendant did not object to the admission of letters he wrote to the victim while in jail on the basis of the best evidence rule when the letters were admitted at trial, he failed to preserve the issue for review. Piasecki v. State, 2012 Tex. App. LEXIS 3927, 2012 WL 1795136 (Tex. App. Beaumont May 16 2012).

11. In a real estate commission dispute, the trial court did not err in overruling a Tex. R. Evid. 1002 best evidence objection and finding a copy admissible under Tex. R. Evid. 1003 because authenticity was not disputed; rather, the clients contended that the document was not the parties' final agreement. Moreover, the copy was admissible under Tex. R. Evid. 1004 either as a replacement for a lost document or as a document in the possession of the objecting party. PMS Hospitality, Inc. v. OM Realty Fin. Co., 2011 Tex. App. LEXIS 630, 2011 WL 258694 (Tex. App. Dallas Jan. 28 2011).

12. In a dissolution of marriage case, the husband did not preserve his objection to the admission of a premarital agreement because, at trial, the husband specifically referred the court to Tex. R. Evid.1004(e), not Rule 1004(a). The trial objections based on relevance, "controlling matters," and on Rule 1004(e) were different from the argument raised on appeal, and therefore, the issue was waived. Jurek v. Couch-Jurek, 296 S.W.3d 864, 2009 Tex. App. LEXIS 7421 (Tex. App. El Paso Sept. 23 2009).

13. In a dissolution of marriage case, the trial court properly admitted evidence to establish the contents of a premarital agreement because, in its findings of fact and conclusion of law, the court found that the original was lost and the loss was not the result of any action by the wife, the proponent of the agreement. Jurek v. Couch-Jurek, 296 S.W.3d 864, 2009 Tex. App. LEXIS 7421 (Tex. App. El Paso Sept. 23 2009).

14. Resident and his wife contended that 911 records were competent summary judgment proof under case law and Tex. R. Evid. 902, but they did not state that the records obtained were true and correct copies of original

documents; furthermore, the Texas Rules of Evidence and summary-judgment practice treat public records differently from private records and though Tex. R. Evid. 1003 and 1004(d) recognize that a "duplicate" of the original is admissible to the same extent as the original when the original of a document is not available, Tex. R. Evid. 1003 does not apply when, as here, its authenticity is questioned. Xiao Yu Zhong v. Sunblossom Gardens, LLC, 2009 Tex. App. LEXIS 3010, 2009 WL 1162213 (Tex. App. Houston 1st Dist. Apr. 30 2009).

15. No sponsoring witness vouched for the authenticity of records, for purposes of Tex. R. Evid. 1005. Xiao Yu Zhong v. Sunblossom Gardens, LLC, 2009 Tex. App. LEXIS 3010, 2009 WL 1162213 (Tex. App. Houston 1st Dist. Apr. 30 2009).

16. State Bar investigator's testimony that the original tape recording of an attorney's disciplinary hearing had been purged reflected that the original recordings were lost or destroyed within the meaning of Tex. R. Evid. 1004, and there was no evidence that the original recording was lost or destroyed in bad faith. Accordingly, the trial court did not abuse its discretion in admitting the written transcripts of the hearings despite the attorney's best evidence objection under Tex. R. Evid. 1002. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 1694 (Tex. App. Houston 14th Dist. Mar. 12 2009).

17. Owner contended that the trial court erred in refusing to admit the owner's version of the contract that was properly authenticated and admsisible under Tex. R. Evid. 1003, 1004, however, the contractor objected and the parties agreed that the contract contained the terms relevant to the challenged rulings on appeal; even if the trial court erred in excluding the owner's version of the contract, the owner failed to show that the exclusion probably caused the rendition of an improper judgment under Tex. R. App. P. 44.1(a). Stonehill-PRM WC I, L.P. v. Chasco Constructors, Ltd., L.L.P., 2009 Tex. App. LEXIS 1019, 2009 WL 349136 (Tex. App. Austin Feb. 11 2009).

18. In a disciplinary matter, a trial court did not err by admitting a written transcript of a state bar hearing, rather than admitting an audio recording, because the original recording was lost or destroyed under Tex. R. Evid. 1004. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 351 (Tex. App. Houston 14th Dist. Jan. 20 2009).

19. Where the heirs claimed title to a portion of Padre Island alleging that a deed conveying the property was fraudulent, the trustee defending the suit provided a copy of a translated deed showing that the conveyance was valid; the statements in the translated deed were competent to prove the facts stated therein. The heirs did not challenge the authenticity of the copy from the county deed records, and the best evidence rule did not apply to originals located outside Texas under Tex. R. Evid. 1004(c). Kerlin v. Arias, 274 S.W.3d 666, 2008 Tex. LEXIS 992, 52 Tex. Sup. Ct. J. 103 (Tex. 2008).

20. Based upon the four-corners test, probable cause existed for the issuance of a search warrant for defendant's residence where, based upon a narcotics officer's affidavit, the trial court could have reasonably concluded that methamphetamine and other items used in its manufacture would be found at the suspected place; the officer's testimony that he had sworn to the affidavit before a magistrate and that he and the magistrate had signed it, and that, other than his missing signatures, the affidavit introduced into evidence was identical to the original, supported the admission of the documents into evidence pursuant to Tex. R. Evid.1004, and evidence obtained in good faith pursuant to a search warrant was admissible under Tex. Code Crim. Proc. Ann. art. 38.23(b) even if the officer had failed to sign the affidavit. McCormick v. State, 2006 Tex. App. LEXIS 1619 (Tex. App. Eastland Mar. 1 2006).

21. No evidence summary judgment rendered in favor of the estate administrator was reversed and remanded because the claimant's affidavit provided more than a scintilla of evidence that the trust agreement was lost, thus "other evidence" was admissible to prove the contents of the trust agreement, and the evidence raised a genuine issue of material fact on the question of whether the claimant was the beneficiary of the purported trust agreement,

and whether the object of the purported trust was to provide for the claimant's welfare; a few days after the decedent's death, the claimant observed the trust document on the kitchen counter in the decedent's home, and the claimant stated in her affidavit that the trust document indicated that certain real property and personal property, described in schedules A and B, were held in trust for the claimant's benefit. In re Estate of Berger, 174 S.W.3d 845, 2005 Tex. App. LEXIS 6987 (Tex. App. Waco 2005).

22. Pursuant to Tex. R. Evid. 1002 and 1004(a), because some certificates of deposit were unavailable since the bank had destroyed them after they had been cashed, an "exemplar" CD was admitted. A bank employee testified and authenticated that document. Phillips v. Ivy, 2004 Tex. App. LEXIS 7539 (Tex. App. Waco Aug. 18 2004).

Family Law : Marital Duties & Rights : Property Rights : Premarital Agreements : General Overview

23. In a dissolution of marriage case, the trial court properly admitted evidence to establish the contents of a premarital agreement because, in its findings of fact and conclusion of law, the court found that the original was lost and the loss was not the result of any action by the wife, the proponent of the agreement. Jurek v. Couch-Jurek, 296 S.W.3d 864, 2009 Tex. App. LEXIS 7421 (Tex. App. El Paso Sept. 23 2009).

Legal Ethics : Sanctions : Disciplinary Proceedings : Hearings

24. State Bar investigator's testimony that the original tape recording of an attorney's disciplinary hearing had been purged reflected that the original recordings were lost or destroyed within the meaning of Tex. R. Evid. 1004, and there was no evidence that the original recording was lost or destroyed in bad faith. Accordingly, the trial court did not abuse its discretion in admitting the written transcripts of the hearings despite the attorney's best evidence objection under Tex. R. Evid. 1002. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 1694 (Tex. App. Houston 14th Dist. Mar. 12 2009).

25. In a disciplinary matter, a trial court did not err by admitting a written transcript of a state bar hearing, rather than admitting an audio recording, because the original recording was lost or destroyed under Tex. R. Evid. 1004. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 351 (Tex. App. Houston 14th Dist. Jan. 20 2009).

Tex. Evid. R. 1005

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 1005 Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record - or of a document that was recorded or filed in a public office as authorized by law - if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 31, *Best Evidence Rule*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Case Notes

Civil Procedure : Summary Judgment : Standards : General Overview
Criminal Law & Procedure : Bail : Forfeitures
Evidence : Authentication : General Overview
Evidence : Authentication : Self-Authentication
Evidence : Documentary Evidence : Best Evidence Rule
Evidence : Documentary Evidence : Writings : General Overview
Evidence : Hearsay : Exceptions : Public Records : General Overview
Evidence : Procedural Considerations : Rulings on Evidence

LexisNexis (R) Notes

Civil Procedure : Summary Judgment : Standards : General Overview

1. Because the trespass-to-try-title rules did not require the joinder of every person claiming ownership in the property; there was no error in the trial court's entering a final summary judgment for the 1/6 interest in the property in the absence of other co-tenants. The motion for summary judgments was properly based on certified public records on file at the time of the hearing.. Beeler v. Fuqua, 2004 Tex. App. LEXIS 7747 (Tex. App. Beaumont Aug. 26 2004).

Criminal Law & Procedure : Bail : Forfeitures

2. In a forfeiture hearing, because the certified copy of the bail bond was a self-authenticated public record, no further authentication was required; additionally, the surety's hearsay objection failed because a public record fell under the hearsay exception. Thus, the trial court did not err in admitting the bail bond into evidence as a public record. Williams v. State, 2005 Tex. App. LEXIS 6363 (Tex. App. Corpus Christi Aug. 11 2005).

3. Trial court did not err in admitting a certified copy of a bail bond into evidence as a public record. Pursuant to Tex. R. Evid. 1005, a copy of a public record, such as a bail bond, was admissible in place of an original where the copy is certified in accordance with Tex. R. Evid. 902. Williams v. State, 2005 Tex. App. LEXIS 6377 (Tex. App. Corpus Christi Aug. 11 2005).

Evidence : Authentication : General Overview

4. Trial court properly refused to take judicial notice under Tex. R. Evid. 201 of public record documents that were not certified and were for informational purposes only, given that Tex. R. Evid. 1005 provided that the contents of official public records could be proven by a certified copy. Verizon California, Inc. v. Douglas, 2006 Tex. App. LEXIS 1622 (Tex. App. Houston 1st Dist. Mar. 2, 2006).

5. Trial court did not err in admitting a certified copy of a bail bond into evidence as a public record. Pursuant to Tex. R. Evid. 1005, a copy of a public record, such as a bail bond, was admissible in place of an original where the copy is certified in accordance with Tex. R. Evid. 902. Williams v. State, 2005 Tex. App. LEXIS 6377 (Tex. App. Corpus Christi Aug. 11 2005).

Evidence : Authentication : Self-Authentication

6. Authenticity of a copy of a bail bond admitted into evidence was shown both because it was a certified copy of an official record and because the deputy district clerk compared it to the bond contained within the clerk's file while testifying. The copy of the bond was therefore admissible under Tex. R. Evid. 902(4) and Tex. R. Evid. 1005. Guiles v. State, 2013 Tex. App. LEXIS 675, 2013 WL 257368 (Tex. App. Fort Worth Jan. 24 2013).

7. In a case in which defendant was convicted of burglary of a building under Tex. Penal Code Ann. § 30.02(a)(1), the trial court did not abuse its discretion by admitting four exhibits, pen packets, because the exhibits were certified as required by Tex. Code Crim. Proc. Ann. art. 42.09, § 8(b) and were therefore self-authenticated. Further, Tex. R. Evid. 1005 allowed the contents of public records to be proved by certified copies. Lambert v. State, 2010 Tex. App. LEXIS 1785, 2010 WL 851416 (Tex. App. Fort Worth Mar. 11 2010).

8. In a forfeiture hearing, because the certified copy of the bail bond was a self-authenticated public record, no further authentication was required; additionally, the surety's hearsay objection failed because a public record fell under the hearsay exception. Thus, the trial court did not err in admitting the bail bond into evidence as a public record. Williams v. State, 2005 Tex. App. LEXIS 6363 (Tex. App. Corpus Christi Aug. 11 2005).

9. Where a bail bond was certified in accordance with Tex. R. Evid. 902, the bond was self-authenticating and the trial court did not err in admitting it into evidence under Tex. R. Evid. 1005. Williams v. State, 2004 Tex. App. LEXIS 6619 (Tex. App. Corpus Christi July 22 2004).

Evidence : Documentary Evidence : Best Evidence Rule

10. Trial court did not abuse its discretion by admitting the decedent's 1993 income tax return into evidence because the certified public accountant's affidavit affirmed that the copy of the tax return was an exact duplicate of the original return which had been submitted to the Internal Revenue Service. Valdez v. Hollenbeck, 410 S.W.3d 1, 2013 Tex. App. LEXIS 4998 (Tex. App. San Antonio Apr. 24 2013).

Evidence : Documentary Evidence : Writings : General Overview

11. Authenticity of a copy of a bail bond admitted into evidence was shown both because it was a certified copy of an official record and because the deputy district clerk compared it to the bond contained within the clerk's file while testifying. The copy of the bond was therefore admissible under Tex. R. Evid. 902(4) and Tex. R. Evid. 1005. Guiles v. State, 2013 Tex. App. LEXIS 675, 2013 WL 257368 (Tex. App. Fort Worth Jan. 24 2013).

Evidence : Hearsay : Exceptions : Public Records : General Overview

12. Because the trespass-to-try-title rules did not require the joinder of every person claiming ownership in the property; there was no error in the trial court's entering a final summary judgment for the 1/6 interest in the property in the absence of other co-tenants. The motion for summary judgments was properly based on certified public records on file at the time of the hearing.. Beeler v. Fuqua, 2004 Tex. App. LEXIS 7747 (Tex. App. Beaumont Aug. 26 2004).

Evidence : Procedural Considerations : Rulings on Evidence

13. In a case in which defendant was convicted of burglary of a building under Tex. Penal Code Ann. § 30.02(a)(1), the trial court did not abuse its discretion by admitting four exhibits, pen packets, because the exhibits were certified as required by Tex. Code Crim. Proc. Ann. art. 42.09, § 8(b) and were therefore self-authenticated. Further, Tex. R. Evid. 1005 allowed the contents of public records to be proved by certified copies. Lambert v. State, 2010 Tex. App. LEXIS 1785, 2010 WL 851416 (Tex. App. Fort Worth Mar. 11 2010).

Tex. Evid. R. 1006

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 1006 Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 31, *Best Evidence Rule*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Case Notes

Evidence : Documentary Evidence : Best Evidence Rule
Evidence : Documentary Evidence : Writings : Summaries
Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business
Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview
Evidence : Procedural Considerations : Rulings on Evidence
Evidence : Relevance : Relevant Evidence
Family Law : Child Support : Obligations : Enforcement : General Overview
Family Law : Child Support : Obligations : Modification : General Overview
Family Law : Marital Termination & Spousal Support : Dissolution & Divorce : Property Distribution

LexisNexis (R) Notes

Evidence : Documentary Evidence : Best Evidence Rule

1. Duplicate copy of a child victim's letter to Santa could properly have been admitted to the same extent as an original under Tex. R. Evid. 1002, 1003, because the authenticity of the original was not questioned. Cantu v. State, 2011 Tex. App. LEXIS 6658, 2011 WL 3667450 (Tex. App. Corpus Christi Aug. 22 2011).

Evidence : Documentary Evidence : Writings : Summaries

2. Defendant's conviction for continuous sexual assault of a child under the age of 14 was appropriate even though the trial court erred in admitting a chart stating a timeline of the sexual assault incidents testified to by the complainant because the error was harmless. The jury heard testimony from the complainant regarding the incidents of abuse summarized on the chart and defendant did not argue that the chart was inaccurate or misleading. Castillo v. State, 2014 Tex. App. LEXIS 200, 2014 WL 61035 (Tex. App. Dallas Jan. 8 2014).

3. In an action involving a dispute over a fee-splitting agreement between two lawyers, the trial court did not abuse its discretion by admitting the Summary of Damages into evidence. The appellee attorney did not complain that the underlying data was not admissible or had not been produced in discovery and he even examined the appellant attorney about it and read a portion of the Summary of Damages in trial before appellant offered it as evidence. Shaw v. Lemon, 427 S.W.3d 536, 2014 Tex. App. LEXIS 3585, 2014 WL 1407727 (Tex. App. Dallas Apr. 2 2014).

4. Exhibit which consisted of numerous payout calculations, as business records, should not have been excluded as summaries of business records compiled for trial purposes, because these payout calculations set forth drilling and completion costs as well as operating revenues and expenses. Cabot Oil & Gas Corp. v. Healey, L.P., 2013 Tex. App. LEXIS 3934 (Tex. App. Tyler Mar. 28 2013).

5. Showing that a summary was shown to be a business record under Tex. R. Evid. 803(6) is not necessary under Tex. R. Evid. 1006; the rule merely requires the contents of voluminous writings to be otherwise admissible. Leander v. Fin & Feather Club, 2012 Tex. App. LEXIS 178, 2012 WL 75815 (Tex. App. Texarkana Jan. 11 2012).

6. Witness's testimony proved that the underlying documents were otherwise admissible under Tex. R. Evid. 1006, and his testimony showed that the records were made when the fines in question were incurred; while the testimony did not specifically track the language of the statute, the overall context, that the records were generated at a regular intervals and at or near the time the fines were incurred, and that the witness was a co-custodian of the records and knew the summary to be a true representation of the records, was sufficient to establish the admissibility of the records. Leander v. Fin & Feather Club, 2012 Tex. App. LEXIS 178, 2012 WL 75815 (Tex. App. Texarkana Jan. 11 2012).

7. Because a witness served as trustee before the damage summary was created, he was familiar with the amounts, and he testified that he reviewed the summary and it was an accurate representation, and if believed, this was sufficient to establish the accuracy of the summary. Leander v. Fin & Feather Club, 2012 Tex. App. LEXIS 178, 2012 WL 75815 (Tex. App. Texarkana Jan. 11 2012).

8. Even though the trial court did not order the documents to be produced, a witness testified that all of the minutes of the meetings were there, and there was nothing to contradict this statement; because all aspects for admission of the summary were complied with under Tex. R. Evid. 1006, the trial court did not err in admitting the exhibit. Leander v. Fin & Feather Club, 2012 Tex. App. LEXIS 178, 2012 WL 75815 (Tex. App. Texarkana Jan. 11 2012).

9. Although the rule does not require that the person who prepared a written summary, chart, or other exhibit must testify, in most cases it would be difficult to authenticate such a summary without calling as a witness the person responsible for its preparation. Leander v. Fin & Feather Club, 2012 Tex. App. LEXIS 178, 2012 WL 75815 (Tex.

App. Texarkana Jan. 11 2012).

10. Trial court did not abuse its discretion in admitting Petitioner's Exhibit 1 as the record included actual bills and payments in addition to the summaries and the weight and credibility to give evidence was at the discretion of the trial court. Montes v. Filley, 359 S.W.3d 260, 2011 Tex. App. LEXIS 7142 (Tex. App. El Paso Aug. 31 2011).

11. During defendant's trial for capital murder, the court erred in admitting a chart prepared by the prosecutors into evidence because no witness testified before the jury that the exhibit accurately reflected the times indicated on the various video recordings that were in evidence. Estrada v. State, 352 S.W.3d 762, 2011 Tex. App. LEXIS 6739 (Tex. App. San Antonio Aug. 24 2011).

12. In light of case law, any error under Tex. R. Evid. 1006 in the admission of the chart of defendant's prior convictions was harmless, given that the chart identified the offense, date, date of conviction, and sentence, defendant admitted committing the offenses listed on the chart, and documents were introduced that allowed the jury to evaluate the accuracy of the chart; defendant was not harmed. Melvin v. State, 2010 Tex. App. LEXIS 2973, 2010 WL 1611072 (Tex. App. Waco Apr. 21 2010).

13. Although, for purposes of Tex. R. Evid. 1006, exhibits did summarize account activity, they were in and of themselves business records and therefore admissible as such under Tex. R. Evid. 803; therefore, the trial court did not abuse its discretion by not ordering the State to produce the underlying documentation that would have been required if the records were summaries under Tex. R. Evid. 1006. Forkert v. State, 2007 Tex. App. LEXIS 7586 (Tex. App. El Paso Sept. 13 2007).

14. Business record exception under Tex. R. Evid. 803 is an exception to the general rule prohibiting hearsay and Tex. R. Evid. 1006 is more properly viewed as an exception to the best evidence rule. Forkert v. State, 2007 Tex. App. LEXIS 7586 (Tex. App. El Paso Sept. 13 2007).

15. In defendant's capital murder case, the billing records for eleven cell phone numbers were properly admitted where the identification of the various telephone numbers with a particular person in the spreadsheets was not merely the State's interpretation of the billing records; instead, there was evidence linking each telephone number to the person identified, and although the supporting evidence was outside the summarized telephone records, that did not render the spreadsheets inadmissible under Tex. R. Evid. 1006. Johnson v. State, 208 S.W.3d 478, 2006 Tex. App. LEXIS 2254 (Tex. App. Austin 2006).

16. Exhibit showing the costs of improvement to divorcing parties' house over a six-year-period, which included payments for the garage construction for which receipts were kept, was not wrongly admitted based on the ex-husband's claim that it did not comply with the requirements of Tex. R. Evid. 1006 because Rule 1006 did not require that the underlying documents be admitted, only that they be admissible. The ex-husband did not argue to the trial court that the invoices for the garage were not admissible. Moroch v. Collins, 174 S.W.3d 849, 2005 Tex. App. LEXIS 7359 (Tex. App. Dallas 2005).

17. In a child support modification case, the trial court did not err in admitting a summary of a father's bank deposits for his concessions business account and a table of child support calculations based on the family code's child support guidelines because the contents of voluminous, admissible writings could be presented in the form of a chart, summary, or calculation pursuant to Tex. R. Evid. 1006. In re A.J.J., 2005 Tex. App. LEXIS 3058 (Tex. App. Fort Worth Apr. 21 2005).

18. Where summaries of records were admitted of sales records in an action by an agency seeking recovery for commissions, and where the personal knowledge of those documents was established, there was no abuse of discretion by the trial court in admitting the summary exhibit pursuant to Tex. R. Evid. 1006, as it was shown that the records were voluminous, were made available to the customers for inspection, and the underlying records were admissible as non-hearsay admissions of a party-opponent under Tex. R. Evid. 801(e)(2). C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 2004 Tex. App. LEXIS 808 (Tex. App. Houston 1st Dist. 2004).

19. Tex. R. Evid. 1006 imposes three requirements for the admissibility of summaries of records that cannot conveniently be examined in court, as follows: the underlying records are (1) voluminous; (2) have been made available to the opponent for inspection; and (3) the underlying records are admissible. C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 2004 Tex. App. LEXIS 808 (Tex. App. Houston 1st Dist. 2004).

Evidence : Hearsay : Exceptions : Business Records : Normal Course of Business

20. In the State's action under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) that alleged that appellants, a husband and wife who operated a business assisting Spanish speaking individuals with immigration matters, had counseled consumers without legal authorization or qualification, appellants raised no valid complaints regarding the admissibility of the evidence and the trial court's rulings thereon where an exhibit consisting of a summary of the more than 2,180 G-28 forms filed by the husband was itself a business record entitled to be treated as other business records, making Tex. R. Evid. 1006 inapplicable, and where the testimony of an intelligence research specialist with the Citizenship and Immigration Services Branch of the United States Department of Homeland Security established the necessary predicate required by Tex. R. Evid. 803(6) because the specialist testified that the exhibit was a business record made in the ordinary course of business at Citizenship and Immigration Services, made at or near the time his department received the G-28 forms, by a person with knowledge of the events being recorded; furthermore, the trial court did not err in refusing to allow a previous client of appellants who was testifying for the State to answer when asked if she obtained her residency status because any testimony going to the gravity of the harm done by engaging in the prohibited act was irrelevant and inadmissible. Avila v. State, 252 S.W.3d 632, 2008 Tex. App. LEXIS 2270 (Tex. App. Tyler 2008).

Evidence : Hearsay : Exemptions : Statements by Party Opponents : General Overview

21. Where summaries of records were admitted of sales records in an action by an agency seeking recovery for commissions, and where the personal knowledge of those documents was established, there was no abuse of discretion by the trial court in admitting the summary exhibit pursuant to Tex. R. Evid. 1006, as it was shown that the records were voluminous, were made available to the customers for inspection, and the underlying records were admissible as non-hearsay admissions of a party-opponent under Tex. R. Evid. 801(e)(2). C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 2004 Tex. App. LEXIS 808 (Tex. App. Houston 1st Dist. 2004).

Evidence : Procedural Considerations : Rulings on Evidence

22. Where summaries of records were admitted of sales records in an action by an agency seeking recovery for commissions, and where the personal knowledge of those documents was established, there was no abuse of discretion by the trial court in admitting the summary exhibit pursuant to Tex. R. Evid. 1006, as it was shown that the records were voluminous, were made available to the customers for inspection, and the underlying records were admissible as non-hearsay admissions of a party-opponent under Tex. R. Evid. 801(e)(2). C.M. Asfahl Agency v. Tensor, Inc., 135 S.W.3d 768, 2004 Tex. App. LEXIS 808 (Tex. App. Houston 1st Dist. 2004).

Evidence : Relevance : Relevant Evidence

23. In the State's action under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) that alleged that appellants, a husband and wife who operated a business assisting Spanish speaking individuals with immigration matters, had counseled consumers without legal authorization or qualification, appellants raised no valid complaints regarding the admissibility of the evidence and the trial court's rulings thereon where an exhibit consisting of a summary of the more than 2,180 G-28 forms filed by the husband was itself a business record entitled to be treated as other business records, making Tex. R. Evid. 1006 inapplicable, and where the testimony of an intelligence research specialist with the Citizenship and Immigration Services Branch of the United States Department of Homeland Security established the necessary predicate required by Tex. R. Evid. 803(6) because the specialist testified that the exhibit was a business record made in the ordinary course of business at Citizenship and Immigration Services, made at or near the time his department received the G-28 forms, by a person with knowledge of the events being recorded; furthermore, the trial court did not err in refusing to allow a previous client of appellants who was testifying for the State to answer when asked if she obtained her residency status because any testimony going to the gravity of the harm done by engaging in the prohibited act was irrelevant and inadmissible. Avila v. State, 252 S.W.3d 632, 2008 Tex. App. LEXIS 2270 (Tex. App. Tyler 2008).

Family Law : Child Support : Obligations : Enforcement : General Overview

24. In a child-support determination, the mother failed to object, and thus waived appellate argument under Tex. R. App. P. 33.1, with regard to the admissibility under Tex. R. Evid. 1006 of summaries that the father provided to accompany his testimony regarding expenses. In re M.P.M., 161 S.W.3d 650, 2005 Tex. App. LEXIS 1418 (Tex. App. San Antonio 2005).

Family Law : Child Support : Obligations : Modification : General Overview

25. In a child support modification case, the trial court did not err in admitting a summary of a father's bank deposits for his concessions business account and a table of child support calculations based on the family code's child support guidelines because the contents of voluminous, admissible writings could be presented in the form of a chart, summary, or calculation pursuant to Tex. R. Evid. 1006. In re A.J.J., 2005 Tex. App. LEXIS 3058 (Tex. App. Fort Worth Apr. 21 2005).

Family Law : Marital Termination & Spousal Support : Dissolution & Divorce : Property Distribution

26. Exhibit showing the costs of improvement to divorcing parties' house over a six-year-period, which included payments for the garage construction for which receipts were kept, was not wrongly admitted based on the ex-husband's claim that it did not comply with the requirements of Tex. R. Evid. 1006 because Rule 1006 did not require that the underlying documents be admitted, only that they be admissible. The ex-husband did not argue to the trial court that the invoices for the garage were not admissible. Moroch v. Collins, 174 S.W.3d 849, 2005 Tex. App. LEXIS 7359 (Tex. App. Dallas 2005).

Tex. Evid. R. 1007

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

Rule 1007 Testimony or Statement of a Party to Prove Content

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 31, *Best Evidence Rule*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

Tex. Evid. R. 1008

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS RULES OF EVIDENCE > ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1008 Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines - in accordance with Rule 104(b) - any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

Annotations

Commentary

COMMENT

PUBLICATION REFERENCES. --See *Texas Civil Trial Guide*, Unit 31, *Best Evidence Rule*; *Texas Litigation Guide*, Ch. 120A, *Presentation of Proof*.

End of Document

Tex. Evid. R. 1009

THIS DOCUMENT IS CURRENT THROUGH August 16, 2020

TX - Texas Local, State & Federal Court Rules > STATE RULES > TEXAS RULES OF EVIDENCE > ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1009 Translating a Foreign Language Document

(a) ***Submitting a Translation.***--A translation of a foreign language document is admissible if, at least 45 days before trial, the proponent serves on all parties:

(1)the translation and the underlying foreign language document; and

(2)a qualified translator's affidavit or unsworn declaration that sets forth the translator's qualifications and certifies that the translation is accurate.

(b) ***Objection.***--When objecting to a translation's accuracy, a party should specifically indicate its inaccuracies and offer an accurate translation. A party must serve the objection on all parties at least 15 days before trial.

(c) ***Effect of Failing to Object or Submit a Conflicting Translation.***--If the underlying foreign language document is otherwise admissible, the court must admit - and may not allow a party to attack the accuracy of - a translation submitted under subdivision (a) unless the party has:

(1)submitted a conflicting translation under subdivision (a); or

(2)objected to the translation under subdivision (b).

(d) ***Effect of Objecting or Submitting a Conflicting Translation.***--If conflicting translations are submitted under subdivision (a) or an objection is made under subdivision (b), the court must determine whether there is a genuine issue about the accuracy of a material part of the translation. If so, the trier of fact must resolve the issue.

(e) ***Qualified Translator May Testify.***--Except for subdivision (c), this rule does not preclude a party from offering the testimony of a qualified translator to translate a foreign language document.

(f) ***Time Limits.***--On a party's motion and for good cause, the court may alter this rule's time limits.

(g) ***Court-Appointed Translator.***--If necessary, the court may appoint a qualified translator. The reasonable value of the translator's services must be taxed as court costs.

Annotations

Commentary

COMMENT

Comment to 1998 change This is a new rule.

Case Notes

Civil Procedure : Appeals : Reviewability : Preservation for Review
Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence
Evidence : Competency : Interpreters
Evidence : Demonstrative Evidence : Recordings
Evidence : Documentary Evidence : Writings : Transcripts & Translations : Translations
Legal Ethics : Sanctions : Disciplinary Proceedings : Hearings

LexisNexis (R) Notes

Civil Procedure : Appeals : Reviewability : Preservation for Review

1. In a disciplinary matter, an alleged error under Tex. R. Evid. 1009 was not preserved for appellate review because a trial court sustained an objection to an English translation of a Spanish complaint filed by a client, but a lawyer failed to make an objection to the original document. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 351 (Tex. App. Houston 14th Dist. Jan. 20 2009).

Criminal Law & Procedure : Appeals : Standards of Review : Harmless & Invited Errors : Evidence

2. Invited error doctrine estopped defendant from complaining on appeal about any perceived error concerning the admission of an audio recording of a Spanish translation of his statement, specifically, that it was not translated by a certified interpreter and that the record contained no affidavit setting out the qualifications of the interpreter and certifying that the translation was fair and accurate. Mijares v. State, 2013 Tex. App. LEXIS 7122 (Tex. App. Houston 1st Dist. June 11 2013).

Evidence : Competency : Interpreters

3. Because the trial court reasonably could have determined that the officer had sufficient skill in translating Spanish and possessed adequate interpreting skills for the particular situation such that she could render an accurate English translation of the recording of her conversation with defendant, the trial court did not abuse its discretion in implicitly determining that the officer was qualified to translate the recording and in admitting the recording. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

4. Because the trial court reasonably could have determined that the officer had sufficient skill in translating Spanish and possessed adequate interpreting skills for the particular situation such that she could render an accurate English translation of the recording of her conversation with defendant, the trial court did not abuse its discretion in implicitly determining that the officer was qualified to translate the recording and in admitting the recording. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

5. Defendant's videotaped confession conducted in Spanish, and a transcribed English translation, were properly admitted because the requirements of Tex. Code Crim. Proc. Ann. art. 38.30 and Tex. R. Evid. 1009 were met: there was an identified, official translator with qualifications listed in a sworn affidavit; there was nothing in the

record to indicate that she was not available to testify; defendant did not object to her qualifications; and an oath was administered. Peralta v. State, 338 S.W.3d 598, 2010 Tex. App. LEXIS 9436 (Tex. App. El Paso Nov. 30 2010).

6. Proponent of a recording in Spanish may rely on Tex. Code Crim. Proc. Ann. art. 38.30 and require that the interpreter be sworn, testify to his or her credentials, and certify that the translation is fair and accurate; alternatively, the proponent may comply with Tex. R. Evid. 1009(a). In that event, the proponent establishes admissibility if no objection is timely filed; in the event of conflicting translations served under Rule 1009(a) or if objections to another party's translation are served under Rule 1009(b), the trial court shall determine whether there is a genuine issue as to the accuracy of a material part of the translation to be resolved by the trial court; although not required by subsection (a), better practices dictate that the supporting affidavit should (1) establish the translator's identity; (2) itemize his or her credentials in sufficient detail; (3) identify the document or recording being translated; (4) demonstrate that the translator has been administered an oath; and (5) certify that the translation is fair and accurate; the court also recommended a limiting instruction. Peralta v. State, 338 S.W.3d 598, 2010 Tex. App. LEXIS 9436 (Tex. App. El Paso Nov. 30 2010).

Evidence : Demonstrative Evidence : Recordings

7. Fact that the State did not submit a written translation and affidavit of a qualified translator to defendant 45 days before trial did not preclude admission of a recording between defendant and the undercover officer posing as a prostitute because this rule did not require the contemporaneous admission of a written transcript of the exhibit being translated through live testimony of the officer. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

8. Because no written English transcription of the audio recording was offered translating the Spanish on the recording between defendant and the officer into English, no affidavit from a qualified translator as to the authenticity of the translation was required. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

9. Because the trial court reasonably could have determined that the officer had sufficient skill in translating Spanish and possessed adequate interpreting skills for the particular situation such that she could render an accurate English translation of the recording of her conversation with defendant, the trial court did not abuse its discretion in implicitly determining that the officer was qualified to translate the recording and in admitting the recording. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

10. Fact that the State did not submit a written translation and affidavit of a qualified translator to defendant 45 days before trial did not preclude admission of a recording between defendant and the undercover officer posing as a prostitute because this rule did not require the contemporaneous admission of a written transcript of the exhibit being translated through live testimony of the officer. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

11. Because no written English transcription of the audio recording was offered translating the Spanish on the recording between defendant and the officer into English, no affidavit from a qualified translator as to the authenticity of the translation was required. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

12. Because the trial court reasonably could have determined that the officer had sufficient skill in translating Spanish and possessed adequate interpreting skills for the particular situation such that she could render an

accurate English translation of the recording of her conversation with defendant, the trial court did not abuse its discretion in implicitly determining that the officer was qualified to translate the recording and in admitting the recording. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

Evidence : Documentary Evidence : Writings : Transcripts & Translations : Translations

13. Fact that the State did not submit a written translation and affidavit of a qualified translator to defendant 45 days before trial did not preclude admission of a recording between defendant and the undercover officer posing as a prostitute because this rule did not require the contemporaneous admission of a written transcript of the exhibit being translated through live testimony of the officer. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

14. Because no written English transcription of the audio recording was offered translating the Spanish on the recording between defendant and the officer into English, no affidavit from a qualified translator as to the authenticity of the translation was required. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

15. Fact that the State did not submit a written translation and affidavit of a qualified translator to defendant 45 days before trial did not preclude admission of a recording between defendant and the undercover officer posing as a prostitute because this rule did not require the contemporaneous admission of a written transcript of the exhibit being translated through live testimony of the officer. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

16. Because no written English transcription of the audio recording was offered translating the Spanish on the recording between defendant and the officer into English, no affidavit from a qualified translator as to the authenticity of the translation was required. Castrejon v. State, 428 S.W.3d 179, 2014 Tex. App. LEXIS 772, 2014 WL 258757 (Tex. App. Houston 1st Dist. Jan. 23 2014).

17. In a divorce, an argument that it was error to admit a translation of a 911 call without providing the translation to opposing counsel 45 days before trial was waived because (1) counsel did not object at trial, and (2) nothing showed this violated the opposing party's fundamental rights. Howell v. Howell, 2013 Tex. App. LEXIS 1991, 2013 WL 784542 (Tex. App. Corpus Christi Feb. 28 2013).

18. Former president claimed that a translation of a letter was not admissible because the member did not comply with Tex. R. Evid. 1009, but there was no objection to the evidence nor was there a ruling by the trial court in excluding the evidence; any defects in the form of translation were waived. Hung Tan Phan v. An Dinh Le, 426 S.W.3d 786, 2012 Tex. App. LEXIS 7693 (Tex. App. Houston 1st Dist. Aug. 30 2012).

19. Tex. R. Evid. 1009 concerns when a translated document must be admitted into trial and whether the accuracy of the translation can be submitted to the factfinder; it is not, then, a rule concerning the substance of the translated document. Hung Tan Phan v. An Dinh Le, 426 S.W.3d 786, 2012 Tex. App. LEXIS 7693 (Tex. App. Houston 1st Dist. Aug. 30 2012).

20. Termination of the father's parental rights was proper because his argument that the initial return violated Tex. R. Evid. 1009(a) was without merit. Rule 1009 was a rule of evidence and he cited no cases in which R. 1009 required the translation of foreign returns of service into English, or that such a translation could not be done in an amended return while the trial court still had plenary power. In re Dc, 2012 Tex. App. LEXIS 1638, 2012 WL 682289

(Tex. App. Houston 1st Dist. Mar. 1 2012).

21. Where an interpreter translated a letter's contents to English and no translation was admitted into evidence, Tex. R. Evid. 1009(a) did not apply. Cantu v. State, 2011 Tex. App. LEXIS 6658, 2011 WL 3667450 (Tex. App. Corpus Christi Aug. 22 2011).

22. Trial court properly admitted a Spanish-speaking client's complaint filed with the State Bar in Spanish and excluded an English translation of the document based on the attorney's objection. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 1694 (Tex. App. Houston 14th Dist. Mar. 12 2009).

23. In a disciplinary matter, an alleged error under Tex. R. Evid. 1009 was not preserved for appellate review because a trial court sustained an objection to an English translation of a Spanish complaint filed by a client, but a lawyer failed to make an objection to the original document. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 351 (Tex. App. Houston 14th Dist. Jan. 20 2009).

Legal Ethics : Sanctions : Disciplinary Proceedings : Hearings

24. Trial court properly admitted a Spanish-speaking client's complaint filed with the State Bar in Spanish and excluded an English translation of the document based on the attorney's objection. Onwuteaka v. Comm'n for Lawyer Discipline, 2009 Tex. App. LEXIS 1694 (Tex. App. Houston 14th Dist. Mar. 12 2009).

End of Document